Bad River Band of the Lake Superior Tribe of Chippewa Indians of the Bad River Reservation v. Enbridge Energy Co., 2023 WL 4043961 (W.D. Wisc., June 16, 2023).

- **Holding**: Following expiration of right-of-way for oil pipeline over tribally-owned former allotment parcels, company was ordered to pay damages and to re-route pipeline around reservation within 3 years; pipeline's crossing of river meander also constituted public nuisance that required company to make preparations for an emergency purge of the pipeline if additional erosion occurred.
- **Summary**: Enbridge operated a 70-year old oil and gas pipeline, 12 miles of which traveled through the Bad River Reservation, including through 12 former allotment parcels owned by the Band, the rights-of-way for which had expired in 2013. The pipeline also traveled adjacent to a specific meander in Bad River subject to erosion that could expose the pipeline and cause a breach and oil spill that could result in significant damage to tribal watersheds. EPA had delegated to the Band the authority to administer federal and tribal water quality standards and certifications consistent with the Clean Water Act, and the Band had designated the Bad River as an "outstanding tribal resource water," which is the highest category of waters on the Reservation and subject to the most protection under the Band's "antidegradation policy" At trial, both parties' experts testified that exposure from bank erosion was likely to occur within three to five years.

  The Tribe brought an action in federal district court seeking damages for Enbridge's continued operation of the pipeline over the 12 allotments after the 2013 expiration of the rights-of-way, and injunctive relief to abate the public nuisance posed by the presence of the pipeline at its crossing of the meander where the greatest risk of pipe failure currently existed.

  Regarding the public nuisance claim, the court, after a bench trial, concluded that the pipeline, at its location near the meander, constituted a public nuisance because "if riverbank erosion continues at the meander, a substantial and unreasonable interference with a public right is imminent, if not certain to occur, at least if Enbridge fails to make prompt, extraordinary efforts to prevent a Line 5 rupture before a purge can be effectuated." To abate the nuisance, Enbridge was ordered to implement a robust monitoring and shutdown plan triggering purge preparations or a purge itself at specified flow thresholds that threatened a breach of the pipeline.

  Regarding the trespass claim, Enbridge was ordered to pay damages for past trespass, dating back to 2013—in doing so, the court rejected Enbridge's argument that the court should apply the state statute of limitations, which would have limited trespass damages to the last three years of trespass, based on *Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 241 (1985), which the court characterized as holding "that it would be 'inconsistent with federal policy' to apply a state limitations period to a federal common-law action brought by an Indian tribe to enforce property rights." Enbridge was also ordered to "disgorge [a portion of its] profits to the Band on a yearly basis until Line 5 is removed from the 12 allotment parcels," and to disgorge to the Band the ongoing cost-avoidance benefits that Enbridge received as a result of its "unjustly delaying the construction costs associated with a reroute and decommissioning of the pipeline on the Reservation."

In addition to damages for trespass, the court awarded injunctive relief, concluding that "the Band is ultimately entitled to permanent injunctive relief on its trespass claim under a fair reading of the current law applicable to its sovereign rights." Enbridge was ordered to complete a reroute of the pipeline around the reservation within three years, and to decommission and remove the pipeline through the 12 allotments. The three-year limit was made over Enbridge's objections that it would likely take 5 years for permitting and a turnkey bypass to be put in place.

- **Relevant (2023) Deskbook Sections**: 3:3, 3:8, 3:13, 3:14, 10:7
- **Comment**: Consider adding a new section to Chapter 10 to discuss common law remedies to environmental issues on reservations.