

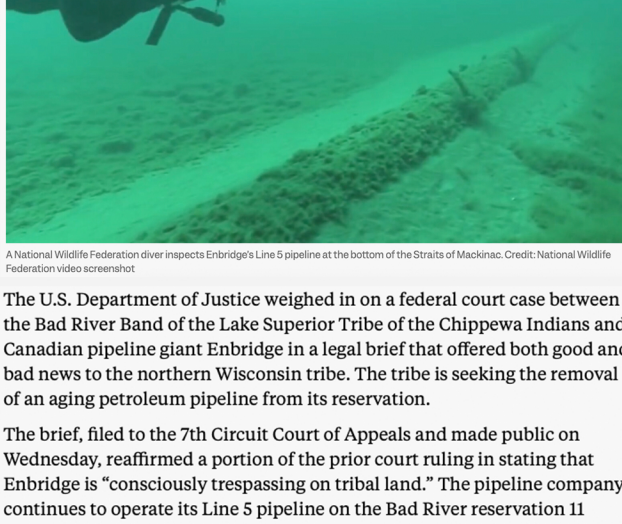
Inside Climate News

Justice & Health

Biden Administration Slams Enbridge for Ongoing Trespass on Bad River Reservation But Says Pipeline Treaty With Canada Must Be Honored

Court should increase “paltry” \$5 million payment for the Wisconsin tribe, but balancing tribal sovereignty and a binding international agreement is “not a simple matter,” DOJ says.

By Phil McKenna
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A National Wildlife Federation diver inspects Enbridge's Line 5 pipeline at the bottom of the Straits of Mackinac. Credit: National Wildlife Federation video screenshot

The U.S. Department of Justice weighed in on a federal court case between the Bad River Band of the Lake Superior Tribe of the Chippewa Indians and Canadian pipeline giant Enbridge in a legal brief that offered both good and bad news to the northern Wisconsin tribe. The tribe is seeking the removal of an aging petroleum pipeline from its reservation.

The brief, filed to the 7th Circuit Court of Appeals and made public on Wednesday, reaffirmed a portion of the prior court ruling in stating that Enbridge is “consciously trespassing on tribal land.” The pipeline company continues to operate its Line 5 pipeline on the Bad River reservation 11 years after portions of its 12-mile easement through the reservation expired.

However, the Department of Justice went further, criticizing the U.S. District Court for the Western District of Wisconsin, which made the initial ruling, for only awarding the tribe a “paltry amount that permits Enbridge to profit handsomely from its trespass.”

In June 2023, Judge William Conley awarded the tribe \$5.1 million in restitution for 10 years of past and ongoing trespass by Enbridge. Since 2013, the company netted more than \$1 billion in “ill-gotten gains” associated with Line 5, according to the DOJ.

The Department added that allowing Enbridge’s action to continue “sends a troublesome message to others who may want to trespass on Indian lands that they may retain a substantial amount of their profits that are appropriately attributable to the trespass.”

The Department recommended that the 7th Circuit Court of Appeals, which is now hearing the case, send it back to the District Court for reconsideration, including providing additional money for the tribe, though the department did not suggest a specific dollar amount.

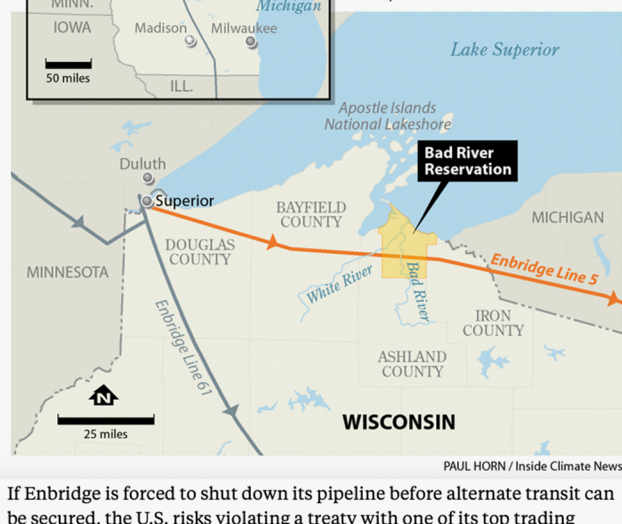
While the DOJ was unequivocal in its views on Enbridge’s trespass and the need for additional financial compensation for the tribe, the department noted that the fate of the 71-year-old pipeline on the reservation presented a thornier challenge.

At issue are two competing U.S. treaties, one with the tribe, the other with Canada.

The 1854 treaty between the United States and the Bad River Band, one of six bands of the Chippewa Nation, established their reservation. The treaty provides the tribe the power to “exclude or place conditions on Enbridge’s continued presence on tribal lands within the Reservation,” the department wrote in an unusually long, 70-page brief to the court.

However, the U.S.-Canada Pipeline Transit Treaty of 1977 ensures the uninterrupted transmission of hydrocarbons by pipeline between the two countries.

Judge Conley ruled in 2023 that Enbridge had three years to either reroute the pipeline or otherwise prepare for its shutdown. Enbridge is seeking state and federal permits for a reroute through wetlands that skirt the reservation’s boundary, a process that could take more than three years and has no guarantee of success.



Pipeline Trespass

The U.S. Department of Justice said pipeline company Enbridge is “consciously trespassing” on land belonging to the Bad River Band of northern Wisconsin and should pay for its “ill-gotten gains.” However, removing the pipeline without violating a pipeline treaty with Canada is “not a simple matter” the Department said.

If Enbridge is forced to shut down its pipeline before alternate transit can be secured, the U.S. risks violating a treaty with one of its top trading partners and may be subject to “substantial monetary damages,” the DOJ noted.

“We are grateful the US urged the court not to let Enbridge profit from its unlawful trespass,” Chairman Robert Blanchard of the Bad River Band said in a prepared statement. “But we are disappointed that the US has not unequivocally called for an immediate end to Enbridge’s ongoing trespass, as justice and the law demand.”

Enbridge spokeswoman Juli Kellner said an immediate shutdown would negatively impact millions of people who depend on Line 5 for energy in both the U.S. and Canada.

“Enbridge continues to work diligently to find an equitable and amicable solution with the Bad River Band that recognizes the Band’s sovereignty and addresses their concerns while also allowing the continued delivery of vital energy that millions of people rely on every day throughout the Great Lakes region,” Kellner said. “Enbridge does not intend for operations to remain on the Bad River Reservation a moment longer than it takes to relocate the segment of Line 5 around the Reservation.”

“We appreciate that leaders in both Ottawa and Washington are engaged in the Treaty resolution process and recognize Line 5 is critical energy infrastructure,” Kellner added.

The Department of Justice noted in its brief that a court order allowing Enbridge to trespass perpetually would not be justifiable, but added that “devising the appropriate remedy for this trespass in this case is not a simple matter.”

“We’re hopeful that the Seventh Circuit will decide that a decade is more than enough to endure a trespass, and will order a quick end to Enbridge’s illegal activity,” Riyaz Kanji, an attorney who represents the Band in this case, said in a written statement.

Line 5 is a 645-mile pipeline from Superior, Wisconsin, to Sarnia, Ontario. The 30-inch diameter pipe transports up to 540,000 barrels per day of crude oil and natural gas liquids that originate further upstream in western Canada before flowing through Wisconsin and Michigan and then back into Canada in Ontario. The Bad River Band filed its lawsuit against Enbridge in 2019 after erosion from a severe flood reduced the banks of the Bad River to within 28 feet of the buried pipeline.

The tribe and its fight against Enbridge is gaining increasing media attention. *Bad River*, a documentary about the tribe and the pipeline, was released in theaters across the U.S. last month and will be available for streaming on Monday, April 22—Earth Day—on Comcast’s *Black Experience on Xfinity*.

Pat Parenteau, an emeritus professor at Vermont Law and Graduate School, characterized the Department of Justice’s long anticipated brief as “well done” and “labored” as it tried to balance two competing sovereign interests.

However, striking an appropriate balance, something the DOJ is now asking the District Court to do, will not be easy.

“I wouldn’t want to be this judge,” Parenteau said. “I, honest to God, don’t know how you balance all this out.”

The 1977 pipeline treaty with Canada, which Enbridge is seeking in its appeal of the District Court ruling, had rarely, if ever, been invoked in prior legal disputes and had been written off by some as a “Hail Mary” attempt by Enbridge. This week’s brief from the Biden Administration makes it clear that the pipeline treaty cannot be dismissed.

Parenteau noted that the pipeline treaty’s origin was largely driven by then-Sen. Ted Stevens (R-Alaska), who sought a pipeline that would deliver natural gas from Alaska to the lower 48 states. Stevens wanted to ensure that, if built, the flow of gas wouldn’t be interrupted by Canada, Parenteau said.

The treaty was signed in 1977, but the pipeline sought by Stevens was never built. Now, more than 40 years later, pipelines from Canada ship large volumes of crude oil, including diluted bitumen, or diluted tar sands oil, from Alberta across the border into the U.S.

“I don’t think, at the time Stevens was talking about getting gas from Alaska, anybody knew about the massive deposits of bitumen in Alberta, where this stuff is coming from,” Parenteau said.

In its brief, the DOJ also opposed a nuisance complaint raised by the tribe and granted in the District Court ruling. The complaint focused on the potential for imminent rupture of the pipeline due to erosion along the banks of the Bad River. The Department argued that the U.S. Department of Transportation’s Pipeline and Hazardous Materials Safety Administration displaces tribal authority in making such a determination and had deemed the pipeline safe.

The tribe strongly disagreed.

“Line 5 remains an urgent threat, not only to the Band’s fishing and gathering, but also to the health and welfare of our people and our neighbors,” Blanchard said. “We trust that the appeals court will not strip away the hard-fought protections that we have secured for the Bad River watershed and Lake Superior through this litigation.”



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Phil McKenna is a Boston-based reporter for Inside Climate News. Before joining ICN in 2016, he was a freelance writer covering energy and the environment for publications including The New York Times, Smithsonian, Audubon and WIRED. Uprising, a story he wrote about gas leaks under U.S. cities, won the AAAS Kavli Science Journalism Award and the 2014 NASW Science in Society Award. Phil has a master’s degree in science writing from the Massachusetts Institute of Technology and was an Environmental Journalism Fellow at Middlebury College.

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