IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

BAD RIVER BAND OF THE LAKE SUPERIOR TRIBE OF CHIPPEWA INDIANS OF THE BAD RIVER RESERVATION, *Plaintiff*, v. ENBRIDGE ENERGY COMPANY, INC., and ENBRIDGE ENERGY, LP, *Defendants*.	Case No. 3:19-cv-00602 Judge William M. Conley Magistrate Judge Stephen Crocker
ENBRIDGE ENERGY, LP, *Counter-Plaintiff,* v. BAD RIVER BAND OF THE LAKE SUPERIOR TRIBE OF CHIPPEWA INDIANS OF THE BAD RIVER RESERVATION and NAOMI TILLISON, in her official capacity, *Counter-Defendants.*	

ENBRIDGE'S MOTION TO OVERRULE BAD RIVER BAND TRIBAL COUNCIL MEMBERS' ASSERTION OF LEGISLATIVE PRIVILEGE

Enbridge Energy Company, Inc. and Enbridge Energy, Limited Partnership ("Enbridge") hereby move for this Court to overrule the Bad River Band of the Lake Superior Tribe of Chippewa Indians of the Bad River Reservation's (the "Band's") objections, and the objections of its individual Tribal Council members, premised on the legislative privilege, which are preventing Enbridge from taking depositions of several key witnesses.

INTRODUCTION

The Band alleges that Enbridge's Line 5 pipeline constitutes a public nuisance and an existential threat. Enbridge has proposed several projects that would abate the alleged nuisance. The Band's Tribal Council (the "Council"), purportedly acting pursuant to the federal Clean Water Act, has denied each of these proposals on the professed grounds that the projects would somehow degrade tribal waters. But the Band refuses to permit Enbridge to ask the Council members (the "Members") questions on the circumstances, bases, and reasoning for these denials, and other information relevant to whether those denials were reasonable. The Band, and the Members, contend that the Members are shielded by a legislative privilege.

There is no dispute that this information is relevant. The Court has already determined that the Band's refusals are relevant to the Band's nuisance claims and Enbridge's defenses that, among other things, the Band is unreasonably interfering with Enbridge's attempts to abate the alleged nuisance. *See* ECF No. 144 at 2 ("[A]ctual *instances* . . . of the plaintiff refusing to cooperate with defendant in remediation measures to insure or increase the integrity of Line 5 . . . ARE relevant to this dispute . . . .") (emphasis in original).[1] Relatedly, the reasonableness or unreasonableness of the Band's refusals are relevant to whether the Band, not Enbridge, is liable for any public nuisance that were to occur. *See, e.g.,* ECF No. 77 (Enbridge Answer to Second Am. Compl., Eighteenth Affirmative Defenses) at 46; Wis. Stat. § 895.045 (2021) (plaintiff may not recover if its contributory negligence exceeds the alleged negligence of the defendant).

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[1] *See Michigan v. U.S. Army Corps of Eng'rs*, 758 F.3d 892, 900 (7th Cir. 2014) ("*Asian Carp II*") (finding no nuisance where plaintiffs did "not plausibly allege that the Corps cannot or will not respond to more urgent threats if and when they arise" and "[t]o the contrary, the allegations tend[ed] to show that the Corps [were] taking its stewardship over the CAWS and the carp problem seriously"); *Tioga Pub. Sch. Dist. No. 15 of Williams Cty., State of N.D. v. United States Gypsum Co.*, 984 F.2d 915, 920 (8th Cir. 1993) ("[L]iability for damage caused by a nuisance turns on whether the defendant is in control of the instrumentality alleged to constitute a nuisance, since without control a defendant cannot abate the nuisance."); *Johnson v. 3M*, No. 4:20-cv-8-AT, 2021 WL 4745421, at * 59 (N.D. Ga. Sept. 20, 2021) ("[I]n the case of a continuing nuisance, to be liable, the defendant must at least have a 'legal right' to terminate the cause of the injury.").

Nevertheless, the Band—on behalf of its Members—has informed Enbridge that the Members will not answer questions about these subjects on the basis of legislative privilege.[2] They initially refused to discuss any action, decision, or mental impression made at Council meetings relating to the denials of Enbridge's proposed projects, including if the Members subsequently discussed the denials with non-Tribal Council members, such as Enbridge personnel, in social circumstances, outside of official legislative sessions.[3] **Exhibit D** (*Letter to D. Feinberg*, Sept. 14, 2020); **Exhibit E** (*Letter to P. Tinker*, Oct. 28, 2021) at 6-7 (IV.4-6); **Exhibit F** (*Letter to P. Tinker*, Nov. 19, 2021) at 4-5; **Exhibit G** (*Letter to D. Feinberg*, Dec. 3, 2021) at 20. The Members also still contend that *administrative* decisions made by the Tribal Council, such as denying Enbridge's project proposals, fall within the protections of the legislative privilege. *See* **Exhibit E** at 6 (IV.2); **Exhibit F** at 4-5; **Exhibit G** at 20; **Exhibit H** at 2. Lastly, the Members deny that they have waived the legislative privilege, even though the Members have described in detail to third parties the purported bases for the Band's denials and have produced these materials as part of their discovery obligations. **Exhibit E** at 6 (IV.3); **Exhibit F** at 4-5; **Exhibit G** at 20; **Exhibit H** at 2-3.

The Members are incorrect. First – and it appears the Band/the Members now agree – actions taken and communications made outside of the legitimate legislative sphere – including conversations in a social setting with non-legislators about internal deliberations – are not shielded

[2] In August and September 2021, Enbridge noticed to take the depositions of Members who, Enbridge believes, have relevant information pertaining to the Band's reasoning and bases for the denials. *See* **Exhibit A** (Sept. 14, 2021 Notice of Deposition to Council Chairman Mike Wiggins, Jr.), **Exhibit B** (Sept. 14, 2021 Notice of Deposition to Councilmember Dylan Jennings), **Exhibit C** (Aug. 26, 2021 Notice of Deposition to Councilmember Jay McFee).

[3] Counsel for the Band has recently informed Enbridge that "The Band and the witnesses will not assert legislative privilege over … statements made by or to interested parties and stakeholders relating to matters before the Tribal Council, including statements by or to Enbridge employees or legal counsel relating to proposals for Line 5 related projects on the Reservation." See "Kanji and Katzen Draft Proposed Stipulation Regarding Legislative Privilege" at pages 1-2, attached hereto as **Exhibit H**. Please note that Enbridge does not agree with many aspects of this proposed stipulation but cites it here merely to describe the nature of the dispute.

by the legislative privilege. Second, no privilege applies to the permitting functions of the Tribal Council – which are the functions at issue here – because these ad hoc decisions are administrative, not legislative, in nature. Third, even if the legislative privilege could apply to the Band's denials of Enbridge's proposed projects, which it does not, the Band has waived the privilege numerous times and in multiple instances. For example, Members circulated to non-Council Members – including Enbridge – insight into their internal deliberations and decisions. Other Members disclosed details of these internal deliberations in a social setting with non-Council Members.

Moreover, the Members have waived any privilege by putting their decision-making at issue in the litigation, arguing that the Council was only fairly enforcing the Clean Water Act and is therefore not arbitrarily refusing to cooperate with Enbridge on remediation projects. By putting that decision-making at issue, and then refusing to permit further discovery by invoking the legislative privilege, the Members are using the legislative privilege as a sword-and-shield. The Band cannot disclose what it likes and hide what it does not.

The parties have met and conferred, but the Band maintains its position. The Band's refusal to permit these lines of questioning of the Members affects numerous upcoming depositions. Therefore, Enbridge seeks a ruling on this issue now for efficiency and judicial economy.

ARGUMENT

The legislative privilege protects against inquiry into acts that occur "in the sphere of legitimate legislative activity." *In re Hubbard*, 803 F.3d 1298, 1308, 1310 (11th Cir. 2015). This includes, for example, "(1) core legislative acts such as introducing, debating, and voting on legislation; (2) activities that could not give rise to liability without inquiry into legislative acts

and the motives behind them; and (3) activities essential to facilitating or preventing core legislative process." *Biblia Abierta v. Banks*, 129 F.3d 899, 902 (7th Cir. 1997).

However, the legislative privilege has never been "treated [] as protecting all conduct relating to the legislative process." *United States v. Brewster*, 408 U.S. 501, 151-16 (1972). Rather the privilege is "limited to an act which was clearly a part of the legislative process . . . ." *Id.* Therefore, communications between non-legislators and outsiders to the legislative process do not retain their privileged status. *Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections*, No. 11-C-5065, 2011 WL 4837508, at *10 (N.D. Ill. Oct. 12, 2011).

Also, actions that are "administrative" in nature do not have the protection of legislative immunity or privilege, even if those actions are taken by a legislative body. *Bogley v. Blagojevich,* 646 F.3d 378 (7th Cir. 2011). And even if the legislative privilege would otherwise apply, the privilege is waived by either disclosing the contents of internal deliberations publicly or by attempting to use the privilege as both a sword and a shield. *Acantha LLC v. Depuy Orthopaedics Inc.*, No. 15-C-1257, 2017 WL 5186376, at *5 (E.D. Wis. Nov. 8, 2017).

I. The Legislative Privilege Does Not Shield Members from Questioning About Communications Outside the Legitimate Legislative Sphere.

The Band formerly took the position that the legislative privilege shields Members who have discussed the systematic denial of Enbridge's proposed projects with non-Tribal Council members, such as Enbridge personnel, in social settings outside of official legislative sessions. **Exhibit D** at 2-3 ("The privilege likewise applies to conversations and interactions that Secretary McFee may have had with… members of the general public, to the extent that those conversations or interactions relate to Secretary McFee's official duties. We will be instructing Secretary McFee

not to answer any questions falling into any of these categories."); *see also* **Exhibit E** at 6-7 (IV.4-6); **Exhibit F** at 4-5; **Exhibit G** at 20.

The Band appears to have reversed course. *See* **Exhibit H** at 3. However, in the event it has not, it is clear that the legislative privilege does not protect "all things in any way related to the legislative process." *Brewster*, 408 U.S. at 516. Rather, the legislative privilege only protects that which falls "in the sphere of legitimate legislative activity," *In re Hubbard*, 803 F.3d at 1308, 1310, in other words, acts that are "an integral part of the deliberative and communicative process." *Reeder v. Madigan*, 780 F.3d 799, 802 (7th Cir. 2015) (citing *Gravel v. United States*, 408 U.S. 606, 625 (1972)).

In contrast, the legitimate legislative sphere does not extend to conversations, like here, that took place in a social setting, even if such conversations revealed the Council's deliberations. Nor does the legitimate legislative sphere extend to conversations with individuals who are not Tribal Council Members, for example, Enbridge personnel or other outsiders. *Comm. for a Fair & Balanced Map*, 2011 WL 4837508, at *10; *see also Tavoulareas v. Piro*, 93 F.R.D. 11, 18 (D.D.C. 1981) (finding dissemination of information outside of Congress to reporters is outside the "legitimate legislative sphere" and therefore not privileged).

Accordingly, no privilege attaches to conversations such as these and Enbridge should be able to question the Members about them over the Band's objection.

II. Denials of Enbridge's Proposed Projects are Administrative in Nature and Therefore Not Protected by the Legislative Privilege.

The legislative privilege also does not extend to administrative or executive acts. *See Bogley,* 646 F.3d at 394–95 (drawing a distinction between legislative and administrative actions and noting that actions directed at an individual, as opposed to policy decisions, are administrative and do not have the protection of legislative privilege).

That the Band's Tribal Council is the body granting or denying project proposals does not make those decisions legislative. In fact, the Band, like most Indian Reorganization Act ("IRA") tribes, adopted and has retained for 87 years a model IRA constitution, which creates a unicameral governing body that possesses both executive and legislative powers. *See* 1 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 4.04(c)(i) (2019) ("The IRA model of tribal government lodged nearly all power in a tribal council, departing from the American system of separation of powers. Under these constitutions, tribal officers are most often agents of the tribal council, lacking independent control over bureaucracies or the power to veto legislative acts."). The Band itself recognizes this, as evidenced in its Application for Treatment as State submitted to the EPA: "Pursuant to the Bad River Constitution, all executive, legislative, and judicial functions are vested in the Tribal Council. *The Council has retained and exercises primary functions of the executive and legislative branch*." *See* **Exhibit I** (Bad River Band Application for Treatment as a State) at 30-31 (emphasis added).

Therefore, the question is whether the Band's permit denials here are legislative or executive/administrative in nature. *Dibble v. Quinn*, 793 F.3d 803, 813 (7th Cir. 2015) ("[w]hether an act is legislative turns on the nature of the act . . . ."). If those actions are legislative in nature, then a legislative privilege may potentially attach, if the privilege was not waived. If those decisions are executive/administrative in nature, then no privilege attaches. In determining whether an act is legislative in nature the Court should consider whether (1) it involves ad hoc decision making, or the formulation of policy; (2) it applies to a few individuals, or to the public

at large; (3) it is formally legislative in character; and (4) it bears the hallmark of traditional legislation. *Cmty. House, Inc. v. City of Boise*, 623 F.3d 945, 960 (9th Cir. 2010).[4]

The decision in *Skokomish Indian Tribe v. Forsman* is instructive. No. C16-5639 RBL, 2017 WL 1093294, at *5–6 (W.D. Wash. Mar. 23, 2017). There, the Skokomish Tribe sued Councilmembers and the Fisheries Director of the Suquamish Tribe alleging they violated the Skokomish's hunting rights by allowing tribal members to hunt in Skokomish territory. *Id.* at *1. The defendants claimed that legislative immunity precluded suit against Suquamish Tribal Councilmembers and Fisheries Director. *Id.* The Skokomish conceded that the Councilmembers' passing of the hunting rights ordinances were entitled to legislative immunity. *Id.* However, the Skokomish argued that the issuance of hunting licenses by the Fisheries Director was administrative and executive in nature, not legislative. *Id.*

The court agreed. Noting that the issuance of hunting licenses involved ad hoc decision making and applied to individuals, and the court found that these decisions were non-legislative in character and "d[id] not bear the hallmarks of traditional legislation." *Id.* at *6. Accordingly, the court held that legislative immunity did not apply or protect the Fisheries Director from suit. *Id.*

Here, the Tribal Council's denial of permits for Enbridge's proposed projects is similar to the Fisheries Director's granting or denying of hunting licenses in *Skokomish Indian Tribe v. Forsman*. Denying Enbridge's project proposals is a quintessential example of an administrative action. These decisions are made on an ad hoc basis, not as a formulation of policy. They relate solely to particular applications submitted by Enbridge. They also apply only to an individual company – Enbridge – not a class of companies or the public at large. Therefore, these decisions

[4] A similar test applies for whether legislative immunity applies, which is discussed in *Skokomish Indian Tribe v. Forsman*, No. C16-5639 RBL, 2017 WL 1093294 (W.D. Wash. Mar. 23, 2017), *supra.* Both center on whether an act is administrative, rather than legislative, in nature for the privilege or immunity to apply.

bear no "hallmarks of traditional legislation," *Cmty. House, Inc.*, 623 F.3d at 960, and are, instead, administrative acts.

Because the legislative privilege does not apply to administrative acts, the privilege does not apply to Members' denials of Enbridge's proposed projects. As such, the Court should overrule the Band's objections.

III. The Tribal Council Members Have Waived Their Privilege.

Like any other privilege, the legislative privilege may be waived. *Comm. for a Fair & Balanced Map*, 2011 WL 4837508, at *10. Here, even if the legislative privilege did at one point shield the Tribal Council Members – which it did not – the Members have since waived it.

A. Members Waived their Privilege by Sharing Information with Non-Tribal Council Members.

The legislative privilege is waived when a legislator publicly reveals documents or communications related to internal deliberations. *Favors v. Cuomo*, 285 F.R.D. 187, 212 (E.D.N.Y. 2012); *see also Gilby v. Hughs*, 471 F. Supp. 3d 763 (W.D. Tex. 2020) ("To the extent, however, that any legislator, legislative aid, or staff member had conversations or communications with any outsider (e.g. party representatives, non-legislators, or non-legislative staff), any privilege is waived as to the contents of those specific communications."); *NAACP v. E. Ramapo Central*, No. 17 Civ. 8943 (CS) (JCM), 2018 WL 11260468, at *6 (S.D.N.Y. Apr. 27, 2018) (finding legislative privilege is waived when communications were those between Board members and non-Board members "who are outsiders to the legislative process"); *Perez v. Perry*, No. SA-11-CV-360-OLG, 2014 WL 106927 (W.D. Tex. Jan. 8, 2014); *Comm. for a Fair & Balanced Map*, 2011 WL 4837508, at *10 ("Communications between Non-Parties and outsiders to the legislative process, however, do not [retain their privileged status]."). "Unlike a waiver of legislative immunity, the waiver of the [legislative] privilege need not be 'explicit and unequivocal' and may

occur either in the course of the litigation when a party testifies as to otherwise privileged matters, or when purportedly privileged communications are shared with outsiders." *Favors*, 285 F.R.D. at 211-12. Thus, to the extent any Member revealed internal deliberations to an outsider and outside the legitimate legislative sphere, the topics of those discussions are not protected by the legislative privilege.

Moreover, the Members waived any privilege when they disseminated reports and summaries of their internal deliberations to multiple third parties. After every denial of an Enbridge project, the Tribal Council Chairman, on behalf of himself and all of the Members, sent a letter to no less than ten individuals, including multiple individuals from the US Army Corps of Engineers, the EPA, Enbridge, and Barr Engineering Company, with multiple attachments, purporting to explain the reasons for the Council's denial. *See, e.g.*, **Exhibit J** (Denial Letter on December 10, 2021 addressed to Colonel Karl Jansen at US Army Corps of Engineers); **Exhibit K** (Denial Letter on December 22, 2020 addressed to Colonel Karl Jansen at US Army Corps of Engineers). No recipient was part of the Tribal Council or otherwise essential to its deliberative process.

Therefore, even if the Council's deliberations were protected by the legislative privilege—which they are not, because they are administrative and executive, rather than legislative—the Members waived any purported privilege when they disseminated these letters with summaries and reports of the Council's internal deliberations to outsiders.

B. Tribal Council Members Also Waived their Legislative Privilege by Using the Privilege as Both a Sword and a Shield.

It is well established that a party cannot use a purported privilege as both a sword and a shield. *See Kisting v. Westchester Fire Ins. Co.*, 290 F. Supp. 141, 149 (W.D. Wis. 1968); *see also Adams v. Ardcor*, 196 F.R.D. 339, 344 (E.D. Wis. 2000) ("Such a result is unacceptable because

it would allow the privilege holder to thwart the truth-seeking process by using the privilege as both a shield and a sword."). An attempt to do so waives any purported privilege. *Acantha LLC*, 2017 WL 5186376, at *5 ("[A] party waives attorney-client privilege when it relies on privileged communications to establish its claim or defense.").

This is precisely what the Members have done. The Members have taken the position that the self-serving letters they wrote to the U.S. Army Corps of Engineers, along with other documents—many of which they have produced during discovery—contain the bases and reasoning for their denials. But at the same time the Members have preemptively refused to answer any questions regarding these denials. Therefore, they have waived any privilege.

Enbridge is entitled to test (and contest) the reasons the Members have set forth about the denials. Enbridge is entitled to defend itself on the basis that the Band is intentionally thwarting its attempts to negate any nuisance and not even-handedly applying the Clean Water Act. The Members' preemptive assertions of privilege thwart Enbridge's defense and the jury's ability to hear the truth. The Members cannot have it both ways. They cannot take the position that the jury must accept their self-serving version of events without permitting any questioning of that version. As such, Enbridge asks that this Court find that the Members have waived any purported privilege as to these Council decisions.[5]

[5] Alternatively, if the Members will not answer questions under oath about the facts and circumstances of the denials, and if the Court were to permit their refusals to answer questions by not finding waiver, then Enbridge submits that the Court should at least find that none of the Band's self-serving evidence about the Council's reasoning for its denials may be admitted as evidence.

CONCLUSION

WHEREFORE, Enbridge respectfully requests the Court enter an Order:

A. Overruling the Band's objections to deposition testimony of Tribal Council Members premised on the legislative privilege and order that those depositions occur on mutually agreeable dates within the next 30 calendar days; and

B. Granting all other just and proper relief.

RULE 37(a)(1) CERTIFICATION

I certify that Enbridge's Counsel met and communicated with Counsel for the Band both through teleconference and email correspondence several times and attempted to obtain the sought-after testimony without court action. The Band did not consent.

Dated: January 26, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on January 26, 2022, I served the foregoing document on all counsel of record using the Court's ECF system.

/s/ *David L. Feinberg*
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