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, L.P. *Defendants*	Case No. 3:19-cv-00602-wmc Judge William M. Conley Magistrate Judge Stephen L. Crocker
ENBRIDGE ENERGY COMPANY, INC., and ENBRIDGE ENERGY, L.P. *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*	

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

INTRODUCTION

The Bad River Band of the Lake Superior Tribe of Chippewa Indians of the Bad River Reservation ("Band") has denied Enbridge Energy Company's ("Enbridge") applications for certifications of its proposed projects at the location known as the Bad River meander. In denying

these certification requests, the Band applied and enforced regulations duly promulgated under tribal law and the federal Clean Water Act. Over the course of nearly two years, a significant proportion of the thousands of documents the Band produced in discovery relate to its evaluation of the project applications. The Band provided witnesses for three depositions regarding the bases for the denials, and recently produced an expert report detailing the significant infirmities in Enbridge's applications. Enbridge now seeks to go beyond this voluminous record to depose the Band's legislators, apparently to inquire into their motivations for denying Enbridge's projects.

Enbridge's motion should be denied for two main reasons. First, this Court has stated in no uncertain terms that the "imputed or actual motives" of the Band in taking various actions, as opposed to the actions themselves, are not relevant to this dispute. Dkt. 144 at 2. The Band's decisions are to be evaluated on their merits, with expert testimony as to the dangers posed by Line 5 and the potential virtues or risks associated with Enbridge's proposed projects playing an important role. Discovery into the motivations behind Tribal Council's votes to deny the project proposals is therefore entirely irrelevant and disproportionate to the needs of this case.

Second, not only is the information sought through deposition irrelevant and disproportional, it is also privileged. The Band's certification denials were accomplished through deliberation and votes during Tribal Council meetings. They are quintessentially legislative acts protected by the legislative privilege. The letters notifying the federal government and Enbridge of the Band's decision on the applications, which Enbridge claims effectuated a waiver of the privilege, reflect the final decision of a legislature, not the mental processes of individual legislators in reaching that decision, and provide no springboard for prying into the latter. For these reasons, Enbridge's arguments fail and legislative privilege must be upheld.

BACKGROUND

Enbridge seeks to depose Council Members for the purported purpose of gathering additional information regarding the Band's denial of its applications to armor the banks of the Bad River and to drill under the river ("applications" or "project proposals"). To conduct the projects on the Reservation, Enbridge must obtain water quality certifications pursuant to the Band's authority under Section 401 of the Clean Water Act ("CWA"), implemented through its Water Quality Certification and Water Quality Review Code ("Bad River Tribal Code" or "BRTC Chapter 324").[1]

A. The Regulatory Process Governing the Band's Evaluation of Enbridge's Applications

The Band's Water Resources Program ("WRP"), a subdivision of the Mashkiiziibii Natural Resources Department ("MNRD"), has primary responsibility for evaluating applications for Tribal Water Quality Certifications under CWA §§ 401(a)(1), (2). Upon receipt of a complete application for a federal license or permit, the WRP conducts a technical review of the application

[1] Section 518(e) of the CWA authorizes the United States Environmental Protection Agency ("EPA") to treat a tribe in the same manner as a state ("TAS") for certain CWA programs, including Sections 303 (water quality standards) and 401 (water quality certifications). EPA regulations establish a process by which it determines whether to approve a tribal application for TAS and authorize the tribe to administer Sections 303 and 401 of the CWA. *See* 56 Fed. Reg. 64876 (Dec. 12, 1991) as amended by 59 Fed. Reg. 13814 (March 23, 1994) (codified at 40 C.F.R. Part 131). The Acting Regional Director of the EPA authorized the Band to administer a water quality standards program under Section 303 of the CWA on June 26, 2009. Declaration of Philip H. Tinker in Support of Plaintiff's Memorandum in Opposition to Enbridge's Motion to Overrule Bad River Band Tribal Council Members' Assertion of Legislative Privilege ("Tinker Decl."), ¶3, Exhibit 1.

EPA's decision approving TAS authority for the Band was premised on the recognition that "[a]ctivities regulated under the water quality standards program can, if not properly managed, threaten water quality regardless of whether they are carried out by tribal members or nonmembers" and on tribes' "inherent sovereign authority either to exclude nonmembers from tribal/trust land or, as a lesser included power, to condition entry for the purpose of conducting such activities on consent to proper regulatory control." *Id.* at 12. EPA approved the Band's TAS authority after careful review of the waters and water dependent activities the Band sought to protect (*e.g.* water supply, aquatic life, recreation, wild rice, cultural, ceremonial uses) in the face of activity on the Reservation (much of it engaged in by non-members) including "[a]griculture, Residential discharges, forestry, Illegal dumping and Salvage Yards, Sand/Gravel Mining and Energy Resources/Pipelines[.]". *Id.* EPA determined that the Band had the capability to administer an effective water quality standards program consistent with the CWA and applicable regulations. *Id.* at 13. The Band carries out its CWA authority under BRTC, Chapter 324. *Id.* ¶4, Exhibit 2.

and the applicant's responses to comments "to evaluate whether the proposed activity will cause or contribute to a violation of the Tribe's Water Quality Standards[.]". Tinker Decl. ¶ 4, Exhibit 2, § 324.7(d). Based on the WRP's recommendation to the Director of the MNRD, the Director renders her own recommendation to the Tribal Council whether to grant the certification, grant the certification with conditions to ensure regulatory compliance, or deny the certification. *Id.* § 324.7(e).

The Tribal Council then reviews the MNRD Director's recommendation and may issue or deny a Tribal Water Quality Certification "to any applicant for a federal permit or license for discharges that originate or will originate within the Reservation[.]". *Id.* § 324.4(b). The Band must deliver the certification decision to the United States Environmental Protection Agency, the federal permitting or licensing agency, and the applicant, or risk waving its certification authority. *Id.* § 324.7(f). *See* 40 C.F.R. §121.9(a)(2) (certification is waived upon "[t]he certifying authority's failure or refusal to act on a certification request").

B. The Legislative Process Tribal Council Followed to Deny the Applications

Enbridge's motion identifies two Tribal Council decisions denying its project proposals: a proposal to install a new section of pipeline underneath the Bad River via horizontal directional drilling (HDD), and a proposal to install riprap along the banks of the Bad River at the meander in an effort to prevent the river from encroaching upon and rupturing the pipeline. Enbridge Br. at 9. Enbridge's HDD project was placed on the Tribal Council's agenda for a meeting on November 17, 2020. Tinker Decl. ¶5, Exhibit 3. At that meeting, the Tribal Council reviewed MNRD's evaluation of the application, which provided a detailed analysis of adverse impacts from the project, including the potential for numerous types of discharges into the Bad River and surrounding wetlands, as well as other impacts to water, wetlands, wildlife, and tribal members' exercise of their treaty rights. Tinker Decl. ¶6, Exhibit 4 and ¶ 7 Exhibit 5 at 6, 8, 16. MNRD

therefore found the project to be ineligible for permitting under the Band's Antidegradation Policy of the Water Quality Standards. Tinker Decl. ¶7, Exhibit 5 at 20-30 and ¶8, Exhibit 6. After hearing MNRD's recommendations and reviewing relevant project materials, the Tribal Council concluded that "there was not reasonable assurance that the activities associated with Enbridge's proposed Project were consistent with relevant water quality considerations" and denied the proposal. Enbridge Br., Ex. K at 3; Tinker Decl. ¶¶ 9,10, Exhibits 7, 8.

To consummate its decision, the Tribal Council passed Resolution Nos. 11-17-20-428 and 11-17-20-427 which were certified by Secretary McFee. Tinker Decl. ¶¶ 9,10, Exhibits 7, 8. Chairman Wiggin's then sent a letter to the Army Corps of Engineers ("Army Corps") as required by BRTC § 324.7(f), which summarized the legal authority under which Tribal Council reviews and approves certifications under Section 401 of the CWA and BRTC § 324, the basis for the Band's denial, and the process for the applicant to reapply for a 401 certification. Enbridge Br., Ex. K at 4.

Following a very similar process, on December 7, 2021, Tribal Council denied Enbridge's application to armor the banks of the Bad River meander with riprap. Tinker Decl. ¶10, Exhibit 8; Enbridge Br., Ex. J at 3. Noting that this project was "substantially similar" to a proposed meander banks riprap project, which the Tribal Council had denied less than one year earlier on February 3, 2021, the Tribal Council denied Enbridge's renewed project proposal because it failed to address the fundamental concerns underlying its denial of the previous project. Enbridge Br., Ex. J at 2. Those concerns included the project's potential impacts to water resources; concerns for the project design, construction techniques, and management practices; as well as compliance with tribal water quality standards. *Id.* at 3. The Tribal Council memorialized its decision through Resolution No. 12-07-21-600, which was certified by Secretary McFee. Tinker Decl. ¶11, Exhibit

9. On December 10, 2021, the Band sent a letter, signed by Chairman Wiggins, notifying the Army Corps of the certification denial. Enbridge Br., Ex. J.

C. The Present Dispute

The instant motion is a sequel to the motion to compel that this Court heard on May 14, 2021. In that motion, Enbridge sought to compel information regarding the Band's administration of its wastewater treatment facility "to show that the denials of the Mitigation Projects are pretextual, not based on legitimate water quality concerns." Dkt. 89 at 1, 4. The Court permitted discovery on certain of Enbridge's requests, but significantly narrowed their scope. In no uncertain terms, the Court instructed Enbridge that it would not be allowed to test the motivations underlying the Band's decisions, stating that:

> You can document what efforts you've made to try to get access to do the things you say you need to do. You can document what the Bad River Band has done in response. *But what possible difference does their motive make to my resolving the disputes between the parties? … I'm going to be hearing from expert witnesses as to what they believe the environmental impacts are and could be, as well as the structural soundness of the line* … [I]t's insulting to come in here … to suggest that somehow you're going to be able to impugn the credibility of individual members of the Bad River Band … I am no more concerned as to whether the Band could prove that your current motions are hypocritical and pretextual harassment … *As far as the … Band's motivation for not wanting a pipeline to breach the Bad River, I really don't see the relevance of that. The only question is whether or not there's a reason to be concerned*.

Dkt. 147 at 7-8, 15 (emphasis added).

The Band has already collected and produced volumes upon volumes of documents revealing "what the Bad River Band has done in response" to Enbridge's remediation proposals, describing in painstaking detail the MNRD's technical and regulatory review of those proposals and the Tribal Council's public debate and decision on them. Counsel for the Band have spent a cumulative total of 39 days on site identifying and collecting materials in response to Enbridge's discovery requests, which included not only electronic documents but in excess of 45 banker's

boxes of notes and other hard-copy materials amounting to 78,688 pages. Tinker Decl. ¶2. Counsel for the Band then spent approximately 3,000 hours reviewing those materials, ultimately producing 33,500 documents comprising 200,584 pages over the course of this litigation. *Id.* Based on a thorough search of documents in the Band's document review platform, of the documents produced by the Band in this litigation, 4,994 unique documents comprising 53,635 pages relate to the Band's review of Enbridge's project proposals. *Id.*

The documents relating to Enbridge's project proposals include: (1) internal MNRD meeting agendas; (2) internal drafts of MNRD project review feedback forms summarizing staff members' technical comments on the project proposals; (3) spreadsheets for evaluating the project proposals based on criteria under the Band's Antidegradation Policy and Wetland and Watercourse Ordination Policy; (4) drafts of letters to the Army Corps pertaining to the Band's permitting decisions, including redlined edits; (5) community responses submitted during the Band's public comment period; (6) Tribal Council meeting minutes; (7) "Council packets" delivered by MNRD to Tribal Council summarizing each proposal, MNRD's recommendation, and the basis for that recommendation; and (8) audio and video recordings of Tribal Council meetings. *Id.*

Enbridge has also explored the bases for the Band's denial of its applications through three depositions. MNRD Director Tillison represented the Band at a deposition taken under Rule 30(b)(6). *Id.* ¶12. Enbridge explored the topic of the Band's denial of project proposals at the meander thoroughly at that deposition. Tinker Decl. ¶12, Exhibit 10. Enbridge also deposed former MNRD Water Resource Specialist, Melis Arik, and former MNRD Wetlands Specialist, Shea Schachameyer, regarding their evaluation of Enbridge's applications under the Tribe's regulations. *Id*. ¶19. Enbridge has also noticed the deposition of Director Tillison in her capacity as Director of the MNRD and recently served additional interrogatories and requests for admission

regarding the Band's denial of Enbridge's certification applications. Tinker Decl. ⁋13, Exhibit 11 and ⁋20. Enbridge accordingly has been given access to copious documentary and testamentary evidence concerning the MNRD's independent fact gathering, solicitation and incorporation of public comments, technical and regulatory analysis, and internal development of recommendations for the Tribal Council, as well as the Tribal Council's public deliberation and decision-making on Enbridge's applications. *Id.* ⁋⁋ 14-18, Exhibits 12-16.

ARGUMENT

In its attempt to uncover Tribal Council's motivations regarding the denial of its applications, Enbridge attempts to sidestep the Court's instructions setting clear parameters regarding relevance in this case, mischaracterizes the scope of legislative privilege claimed by the Band, and misconstrues the long-settled rules governing when and how legislators may waive legislative privilege. Enbridge's efforts fail to justify its intrusion into Council Members' legislative decision-making. Consequently, its motion should be denied.

A. Enbridge's Quest for Irrelevant Information Does Not Warrant Disproportional Discovery in This Case.

Enbridge seeks the Court's permission to depose Tribal Council Members regarding their individual intentions and motivations underlying Tribal Council's denial of Enbridge's project applications. But the Court's admonitions in its May 14, 2021 Order with respect to the wastewater treatment plant discovery fully apply here as well. Dkts. 144 and 147. Contrary to Enbridge's arguments, the pendency of this litigation does not require the Band to rubber stamp Enbridge's proposed projects. Because the meander is located in an ecologically sensitive area, the Band, through the MNRD, is responsible for ensuring that any disruptive activity at the meander complies with applicable tribal Clean Water Act regulations and does not do more harm than good. Denial of a poorly designed project—which after thorough analysis by the MNRD is determined to be

flawed because it will not accomplish its intended purpose, will have numerous adverse impacts on the land and freshwater resources, or both—is not a refusal to cooperate. Such a denial is a formal policy determination by the Tribal Council to adhere to tribal and federal law, to follow the recommendations of the Band's technical advisors, and to avoid making a bad situation worse.

Enbridge's attempt to interrogate the motivations of individual Council Members regarding their decision-making asks this Court to displace the Band's authority under federal and Tribal law to delegate to its elected representatives the power to review and authorize or deny projects affecting tribal waters. But this Court has already dismissed the relevance of motivation-based discovery, Dkts. 144 and 147, making clear that the Tribal Council's actions are to be evaluated on their merits and in light of the Band's sovereign prerogatives to safeguard Reservation resources and the health, safety and welfare of its citizens.

That the internal motivations and political considerations that govern Tribal Council's decision-making processes are irrelevant in this case (and are privileged, *see infra* Section B) does not mean that Enbridge has been deprived of the information it requires to interrogate the bases for the Band's denial of its applications. Enbridge does not claim and cannot credibly argue that it lacks for information in this regard. As discussed above, the reasons for the Band's rejection of Enbridge's applications have already been detailed in 4,994 unique documents comprising 53,635 pages, as well as in depositions of the Band, and MNRD employees. Both parties, moreover, have produced expert reports on the subject, with the Band's experts thoroughly addressing the infirmities in Enbridge's proposals. Tinker Decl. ¶21. Enbridge is not remotely lacking information regarding the "circumstances, bases, and reasoning for these denials, and other information relevant to whether those denials were reasonable." Enbridge Br. at 2. Additional

depositions of Tribal Council on the topic of the denials would far exceed the needs of the case. *See* Fed. R. Civ. P 26(b)(1).[2]

Furthermore, given the Court's admonishment that it will not interrogate "the … Band's motivation for not wanting a pipeline to breach the Bad River," but will instead rely on expert testimony regarding the threat posed by the pipeline and the merits of Enbridge's project applications, Dkt. 147 at 15, deposing the Council Members would "serve no useful purpose," but would instead have a significant chilling effect on their ability to continue carrying out their duties to the Tribe. *Stagman v. Ryan*, 176 F.3d 986, 994 (7th Cir. 1999) (finding that "depositions of public officials create unique concerns"). There is no reason to subject Tribal Council to the burden of depositions in order to scrutinize their political and policy-based decisions. *Dibble v. Quinn*, 793 F.3d 803, 813 (7th Cir. 2015) ("it is 'not consonant with our scheme of government for a court to inquire into the motives of legislators'") (quoting *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951)). For these reasons alone, Enbridge's motion should be denied.

B. The Legislative Privilege Applies to Tribal Council's Legislative Activities Related to Enbridge's Applications.

1. The Band Does Not Claim Privilege Over Tribal Council's Communications in a "Social Setting".

Before explaining why the legislative privilege guards against Enbridge's intrusive discovery, the Band must first dispense with a non-issue. Contrary to Enbridge's assertions, the Band has never taken the position that the legislative privilege applies to communications of Council Members in "social settings". *See* Enbridge Br. at 2-5. Enbridge admits that the Band does not claim legislative privilege in this context (Enbridge Br. at 4), but does not explain why it

[2] Given the voluminous productions and extensive deposition testimony already provided on these topics, Enbridge's argument for a limitation of evidence at trial based on the Council Members' assertion of legislative privilege can scarcely be credited. *See* Enbridge Br. at n.5.

nevertheless raises the issue in its motion, even after the Band provided Enbridge with a detailed listing of topics over which the Band is and is not asserting privilege. Enbridge Br., Ex. H at 3 ("Enbridge believes that statements made by Tribal Council members to individual Enbridge employees, including statements made in a social setting, are not entitled to any legislative privilege. *The Band and the witnesses agree*.") (emphasis added). It is unfortunate that Enbridge sees fit to waste this Court's time with efforts to distract from or color the issues actually in play.

2. The Rules Governing Application of the Legislative Privilege

The Band opposes Enbridge's deposition of Council Members because, as elected officials, the legislative privilege shields them from testifying about their legislative activity on behalf of the Band. The foundational principles of legislative privilege firmly support its application in this instance. In order to "protect the integrity of the legislative process by insuring the independence of individual legislators," *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 502 (1975), the Constitution's Speech or Debate Clause grants to legislators an absolute immunity from civil or criminal liability stemming from acts undertaken in performance of their legislative duties. A corollary of legislative immunity, the legislative privilege, protects lawmakers from compulsory legal process, including discovery, depositions, or trial testimony, relating to acts undertaken in their official capacities. *In re Hubbard*, 803 F.3d 1298, 1310 (11th Cir. 2015) ("The legislative privilege 'protects against inquiry into acts that occur in the regular course of the legislative process and *into the motivation for those acts*.") (emphasis in original); *see also E.E.O.C. v. Washington Suburban Sanitary Comm'n*, 631 F.3d 174, 180 (4th Cir. 2011) (describing immunity and privilege as "parallel concept[s.]").

Today, legislative immunity applies at the federal, state, tribal and local level. *Bogan v. Scott-Harris*, 523 U.S. 44, 44 (1998) ("Regardless of the level of government, the exercise of legislative discretion should not be inhibited by judicial interference[.]"); *Reeder v. Madigan*, 780

F.3d 799, 802 (7th Cir. 2015) (explaining that the privilege applies to "[l]egislators at the state, regional, and municipal levels" of government); *Tohono O'odham Nation v. Ducey*, No. CV-15-01135-PHX-DGC, 2016 WL 3402391, at *4, *7 (D. Ariz. June 21, 2016) (applying legislative privilege to tribal legislators and denying their deposition where defendant sought to inquire about issues related to the Nation's intent to build a casino on newly purchased property discussed during a closed session of Tribal Council).

The legislative privilege has "long been held to extend" to all "actions that constitute 'legitimate legislative activity.'" *Reeder*, 780 F.3d at 802 (quoting *Tenney*, 341 U.S. at 376). Thus, the privilege extends to any "integral steps in the legislative process" (*Bogan*, 523 U.S. at 45), including, but not limited to investigations, fact gathering, and consultations with advisors. *See Hutchinson v. Proxmire*, 579 F.2d 1027, 1031–32 (7th Cir. 1978), *rev'd on other grounds*, 443 U.S. 111 (1979) (no dispute that the "investigative actions by defendants in gathering information on public spending from administrative agencies … was within the legislative sphere").

Once it is determined that a legislator's actions are within the sphere of legislative activity, the privilege attaches. The only exceptions apply in federal criminal prosecutions or in cases "where important federal interests are at stake", such as constitutional challenges to redistricting plans. *United States v. Gillock*, 445 U.S. 360, 373 (1980); *see also Whitford v. Gill*, 331 F.R.D. 375, 378 (W.D. Wisc. 2019) (legislative privilege can be overcome in cases which "implicate important structural concerns about the legitimacy of the … government"). These narrow exceptions do not apply in the case of a "private [party seeking] to vindicate private rights." *Whitford*, 331 F.R.D. at 378 (quoting *Tenney*, 341 U.S. at 377).

3. Tribal Council's Deliberation, Votes, and Other Actions on Enbridge's Applications Was Legislative.

Although the application of the legislative privilege turns on the nature of the actions in question, specifically whether or not those actions were legislative in character, Enbridge has not identified the specific actions related to the denial of its applications that it seeks to interrogate. If it did, Enbridge would be compelled to concede that the Tribal Council's involvement in the denial decisions, described below, fall squarely within the "legitimate legislative sphere." *Eastland*, 421 U.S. at 503.

The Band's seven-member Tribal Council is the deliberative body that is elected to govern and make policy decisions on behalf of the Bad River Band and its members. Amended Constitution and Bylaws of the Bad River Band of the Lake Superior Tribe of Chippewa Indians of the State of Wisconsin, Art. III, Sec. 1, (http://www.badriver-nsn.gov/constitution-and-bylaws/). Its members consider, deliberate, and vote on hundreds of policy issues each year in order to shape the direction of the Band. The Tribal Council's consideration of and decision-making surrounding each application fully comported with the Band's constitutionally established procedures for promulgating Tribal law through the legislative process.

The Tribal Council's rigorous decision-making process on Enbridge's applications is flatly inconsistent with Enbridge's characterization of its decisions as ones "made on an ad hoc basis[.]". Enbridge Br. at 8. To the contrary, the Council's denials of Enbridge's applications for § 401 certification for HDD and installing riprap on the banks of the meander, described in the Background Facts, *supra*, are classic examples of legislative activity following formal legislative procedures. To reiterate, Council Members' actions took place "in the sphere of legitimate legislative activity" (duly constituted Tribal Council meetings), consisted of "formally legislative" actions (review of the application materials, review of MNRD's technical evaluation and

recommendation, deliberation, and voting), and enforced constitutional and statutory procedures (the BRTC Ch. 342 and Anti-degradation Policy of the Water Quality Standards, among other applicable federal law and regulations and tribal regulations). *Bagley*, 646 F.3d at 385, 392-93. Tinker Decl. ⁋⁋ 4-11, Exhibits 2-9. Consequently, legislative privilege firmly attaches to the actions of the tribal legislators Enbridge seeks to depose.

Enbridge's analogy to *Skokomish Indian Tribe v. Forsman* is inapposite. Enbridge Br. at 5-8. In that case, the Skokomish Tribe sued Suquamish Tribal Council Members and the Fisheries Director, who was alleged to have unlawfully licensed individual Suquamish tribal members to hunt in Skokomish Tribe's treaty territory. No. C16-5639 RBL, 2017 WL 1093294, at *5 (W.D. Wash. Mar. 23, 2017), *aff'd*, 738 F. App'x 406 (9th Cir. 2018). The court found that the Skokomish Tribe "*correctly conced[ed]*" that legislative immunity protected Suquamish Council Members for their actions in promulgating and enforcing the hunting regulations there in issue, but that the Fisheries Director was not entitled to legislative immunity because his authority to issue hunting licenses "involves ad hoc decision making, applied to individuals, that is non-legislative in character." *Id.* at 6 (emphasis added).

In contrast to *Skokomish*, the Band's elected legislators cast votes at Tribal Council meetings to deny Enbridge's applications because of their potential to degrade the environment on which tribal members rely to exercise their treaty rights. The Resolutions memorializing Tribal Council's decisions, agenda request and briefing materials demonstrate Tribal Council's decision-making process was anything but "ad hoc." Rather, Tribal Council's votes represent the culmination of a rigorous technical review by the MNRD to determine whether the applications conform to Band regulations promulgated under the Clean Water Act, and subsequently, the Tribal Council's review of MNRD's recommendations, public comment, and deliberation at Tribal

Council meetings. Tinker Decl., Exhibits 12-16. *Skokomish* fully supports the application of legislative privilege to the Tribal Council's decision-making in this case because its actions "bear the hallmarks of traditional legislation." 2017 WL 1093294 at *6.

Enbridge's argument that the Band's denial of applications to a single company renders Tribal Council's actions non-legislative finds no support in the law. Enbridge Br. at 8. To the contrary, cases in which courts apply legislative privilege to legislators' actions affecting a single or small group of individuals or entities abound. *See, e.g.*, *Bogan*, 523 U.S. at 45 (acts eliminating city department in which petitioner was sole employee, were "in form, quintessentially legislative."); *Reeder*, 780 F.3d at 806 (holding that two state legislators were entitled to legislative immunity for their denial of press credentials to plaintiff); *Biblia Abierta v. Banks*, 129 F.3d 899 (7th Cir. 1997) (upholding legislative immunity for two aldermen whose vote on city rezoning ordinances prevented nine churches from purchasing property in the ward). *Skokomish* provides no support for Enbridge's contention that the Tribal Council's decisions denying Enbridge's request to implement major infrastructure projects with potentially significant impacts on tribal natural resources utilized by the Tribal community at large were not legislative in nature.

C. The Legislative Privilege Has Never Been Waived.

Enbridge argues that Council Members or the Band have waived the legislative privilege as to *all* deliberations and discussions behind the denial of Enbridge's applications by (1) sharing information with non-Council Members, and (2) by producing copies of the Band's notices of denial to the Army Corps through discovery. Enbridge Br. at 8-9. These arguments—premised on the Band's two letters to the Army Corps (*see* Enbridge Br., Exs. J, K) are sorely misplaced.

Waiver of governmental privileges occurs through the voluntary disclosure of a significant portion of the information claimed to be privileged. *See* 26A Charles Alan Wright & Arthur R. Miller, Fed. Prac. & Proc. Evid. § 5692 (1st ed.) (collecting cases involving waiver in the context

of the Freedom of Information Act, deliberative process privilege, and legislative privilege). For example, in *United States v. Craig*, the Seventh Circuit found that a member of a state house of representatives indicted on corruption charges waived legislative privilege when he voluntarily sat for two interviews with postal inspectors during a grand jury investigation and declined to invoke the Fifth Amendment and the privilege, and answered all questions posed to him. 528 F.2d 773, 774, 781 (7th Cir. 1976), on reh'g, 537 F.2d 957 (7th Cir. 1976). Likewise, in *Trombetta v. Board of Educ., Proviso Township High School District 209*, defendant school board members waived the privilege by appearing at a deposition without objection and testified fully about the challenged termination, including the motives and reasons for their actions. No. 02C5895, 2004 WL 868265, at *5 (N.D. Ill. Apr. 22, 2004). Enbridge's waiver argument fails here because it does not, and cannot, identify instances of Tribal Council voluntarily disclosing the information over which the privilege is being asserted through depositions or otherwise. Thus, the privilege remains fully intact.

The Band's notification to the Army Corps of its final permit decision and the production of these notices through discovery certainly do not constitute a disclosure of privileged materials. These letters reflect the final product of the Council's legislative decision-making and are part of the Tribal Council's public record. They do not say a word about the internal motivations of individual Council Members, which is what Enbridge seeks to pry into here. Indeed, the Band was required to notify the Army Corps under BRTC § 324.7 or else risk waiving the Band's certification authority. *See* 40 C.F.R. 121.9(a)(2).

For the same reason, neither the inclusion of the MNRD's Technical Documents included in the notices to the Army Corps, nor the Band's production of other internal documents from MNRD summarizing its evaluation of Enbridge's applications are legislative in nature. These

documents do not divulge the type of sensitive, confidential, or internal deliberations of the Tribal Council that is protected by the legislative privilege. Rather, they provide the information that Enbridge should be interested in if it was concerned about the actual merits of the Band's decision-making, instead of endless conspiracy theories about the motivations behind those decisions. It would run counter to all notions of transparent governance if the Band, by describing the results of the legislative decision-making process to a federal agency with co-regulatory authority over the process in question, the applicant and other interested parties, and the public at large, through formal publication of a final decisional document, waived the legislative privilege.

Of the four other cases Enbridge cites in support of its argument that the privilege may not be use as a "sword and a shield", three cases do not even address governmental privileges. They involve entirely different considerations and are irrelevant. *See* Enbridge Br. at 9-10 (citing *Kisting v. Westchester Fire Ins. Co.*, 290 F. Supp. 141, 149 (W.D. Wis. 1968), aff'd, 416 F.2d 967 (7th Cir. 1969) (privilege against self-incrimination in insurance coverage case); *Adams v. Ardcor*, 196 F.R.D. 339 (E.D. Wis. 2000) (psychotherapist-patient privilege asserted in a personal injury suit); *Acantha LLC v. DePuy Orthopaedics Inc*, No. 15-C-1257, 2017 WL 5186376, at *5 (E.D. Wis. Nov. 8, 2017) (attorney-client privilege asserted in patent infringement suit)). *Committee for a Fair & Balanced Map v. Illinois State Board of Elections* ("*Committee for a Fair Map*") does involve legislative privilege, but it provides no comfort to Enbridge. Unlike Enbridge's purely private interests in the instant suit, *Committee for a Fair Map* involved heightened federal interests related to constitutional rights and redistricting—interests that have been held to diminish the protections ordinarily afforded by the legislative privilege. No. 11 C 5065, 2011 WL 4837508, at *1 (N.D. Ill. Oct. 12, 2011). *See Whitford*, 331 F.R.D. at 378 ("many courts, including two in the

Seventh Circuit, have concluded that gerrymandering claims raise sufficiently important federal interests to overcome legislative privilege").

In sum, the Band has fully complied with its discovery obligations while preserving the legislative privilege.

CONCLUSION

For the foregoing reasons, the Band respectfully requests that the Court deny Enbridge's motion.

Dated: February 9, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on February 9, 2022, a copy of the foregoing was filed through the Court's CM/ECF management system and electronically served on all counsel of record.

/s/ Riyaz A. Kanji
Riyaz A. Kanji