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

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DONALD AND BONNIE POLLARD,
et al.

Plaintiffs,

Case No. 3:23-CV-135-wmc

v.

JOHN JOHNSON, SR.,
et al.

Defendants.

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**Defendants' Brief in Opposition to**
**Plaintiffs' Amended Motion for a Preliminary Injunction**

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## Introduction

The Plaintiffs' *Amended Motion for a Preliminary Injunction* seeks relief this Court is unable to grant against the Defendants, and it seeks relief for a problem that doesn't currently exist: the four roads at issue in the Motion, Annie Sunn Lane, Center Sugarbush Lane, East Ross Allen Lake Lane, and Elsie Lake Lane (the "Roadways") are currently available for the Plaintiffs' use to access their properties. The Plaintiffs are unable to meet the heavy burden required of them under the standards governing preliminary injunctions because they are unlikely to win on the merits of any of the claims brought, they have failed to show any irreparable harms they may suffer without a grant of injunctive relief, the balance of equities does not tip in the favor of allowing continued trespass over Indian lands, and an injunction allowing such continued trespass is not in the public interest.

## Background

The Defendants are elected members of the Tribal Council of the Lac du Flambeau Band of Lake Superior Chippewa Indians (the "Tribe"). Am. Compl. ¶¶ 35-45; Constitution and Bylaws of the Lac du Flambeau Band of Lake Superior Chippewa Indians of Wisconsin ("LDF Const."), art. III, § 1, *available at* https://www.ldftribe.com/uploads/files/Court-Ordinances/BYLAWS.pdf. The Tribal Council consists of twelve individuals elected by tribal members who collectively serve as the Tribe's governing body. LDF Const. art. III, § 2. The Tribal Council has the power to "regulate the use and disposition of tribal property to protect and preserve the tribal property, . . . [and] to protect the health, security, and general welfare of the Tribe." LDF Const., art. VI, § 1(a). The Tribe "is a self-governing, federally recognized Indian nation that exercises sovereign authority over its members and its territory." *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Zeuske,* 145 F. Supp. 2d 969, 971 (W.D. Wis. 2000).

The Tribe maintains a government-to-government relationship with the United States. *See* Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 88 Fed. Reg. 2112, 2113 (Jan. 12, 2023).

The Lac du Flambeau Indian Reservation ("Reservation") was established in 1854 by the second Treaty of La Pointe, whereby the United States set aside land in northern Wisconsin to create a permanent homeland for the Tribe. *See* Treaty with the Chippewa, 10 Stat. 1109, art. II (Sept. 30, 1854; Proclamation Jan. 10, 1855). In the interceding centuries, parcels of land within the exterior boundaries of the Reservation passed into non-Indian hands, creating a patchwork of ownership status on the Reservation. *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Evers*, 46 F.4th 552, 560 (7th Cir. 2022). Despite this, from the time of the Reservation's creation, the Tribe has continued to exercise governmental jurisdiction over the entirety of lands within the Reservation. LDF Const., art. I, § 1 ("The territory of the Lac du Flambeau Band of Lake Superior Chippewa Indians of Wisconsin shall be all the land and water within the original confines of the Lac du Flambeau Reservation as defined pursuant to the Treaty dated September 30, 1854 (10 Stat. 1109), and to such other lands and waters that have been added or may hereafter be added thereto under law of the United States, except as otherwise provided by Federal law[.]"); LDF Const., art. I, § 2 ("The jurisdiction of the Lac du Flambeau Band of Lake Superior Chippewa Indians of Wisconsin shall extend to all the land and water areas within the territory of the Band [.]"); *see also Lac Courte Oreilles*, 46 F.4th at 564; *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991) ("Indian tribes. . . exercise inherent sovereign authority over their members and territories."); *Solem v. Bartlett*, 465 U.S. 463, 470 (1984).

Due to the allotment provision added to the 1854 Treaty, landholdings on the Reservation resemble a "checkerboard" of tribal trust lands, Indian allottee trust lands, tribal fee, and private landowner fee lands. *See Treaty with the Chippewa,* 10 Stat. 1109, art. III; *Lac Courte Oreilles*, 46 F.4th at 560. As a result of allotment, 31,739 acres of the Reservation's 86,600 total acres are held in trust by the United States for the benefit of the Tribe, and 12,666 acres are held in trust by the United States for the benefit of individual Indian allottees. J. Peterson Aff. (Apr. 6, 2023) ¶ 2. The Indian Reorganization Act of 1934 (the "IRA") ended the federal policy of allotment and ushered in protections for tribal and individual Indian land holdings. 25 U.S.C. § 5103. The IRA further provided authority for the federal government to acquire lands "in the name of the United States of America in trust for the tribe or individual Indian for which acquired." 25 U.S.C. § 5105. The IRA's implementing regulations provide this definition of "trust land" or "land in trust status" as "land the title to which is held in trust by the United States for an individual Indian or a tribe." 25 C.F.R. § 151.2(d); *see also* 25 U.S.C. § 2201(4)(i); LDF Const., art. VII, § 2. Due to the history of allotment, lands held in trust for the benefit of the Tribe, individual Indians, as well as lands owned in fee simple by the tribe, tribal members, and non-Indians are scattered throughout the entire Reservation, with pockets of each isolated from other. G. Thompson Aff. (Apr. 7, 2023), ¶ 7; J. Peterson Aff. ¶¶ 4, 7. As such, it is not uncommon for roads, snowmobile/all-terrain vehicle trails, utility lines, old railroad beds to traverse both trust and fee lands on the Reservation. *See* Dkts. 26-1 – 26-4.

Plaintiffs are occasional or permanent residents of the Reservation who own fee simple land. Am. Compl. ¶¶ 10-33. Access to Plaintiffs' properties is possible through multiple routes, including by air, water, and land. G. Thompson Aff. ¶ 11. To travel over land, Plaintiffs have historically used the Roadways to access their properties. Am. Compl. ¶¶ 46-68. The Roadways

sit on and cross tribal trust land within the Reservation. J. Peterson Aff. ¶ 7. As depicted in the maps of definite location attached to Plaintiffs' Amended Complaint, the portions of the Roadways that cross trust lands are labeled with "BIA Tract Numbers." Dkts. 26-1 – 26-4. Any individual, not otherwise an owner of the land, who wishes to cross lands held in trust by the United States, is required to obtain a right-of-way access easement in order to do so. *See generally* 25 C.F.R. Part 169; 25 C.F.R. § 169.4. Thus, past and current property owners, including Plaintiffs, seeking to use the Roadways to access their properties are required to obtain easements through Part 169 in order to do so.

In the 1960s, under the requirements of the then-existing right-of-way regulations, easements were granted for the Roadways. J. Peterson Aff. ¶ 10. The easement for Annie Sunn Lane was granted on April 28, 1964; the easement for Center Sugarbush Lane was granted on July 28, 1964; the easement for East Ross Allen Lake Lane was granted on March 17, 1964; and the easement for Elsie Lake Lane was granted on October 23, 1961. *Id*. These right-of-way easements were not perpetually, however, and each had an expiration date of 50-years later. J. Peterson Aff. ¶ 11.

These Roadways were at one time listed on the National Tribal Transportation Facility Inventory ("NTTFI"), which enabled them to be eligible to receive federal funding under the Tribal Transportation Program ("TTP"). G. Thompson Aff. ¶ 14; *see* 23 U.S.C. § 202; 25 C.F.R. § 170.442. Although listed, the Tribe never expended any federal funding on the maintenance of the Roadways. G. Thompson Aff. ¶¶ 17-18; J. Allen Aff. ¶¶ 27-28, Ex. G. Due to this, the Tribe requested the Roadways be removed from the NTTFI. J. Allen Aff. ¶¶ 20-22, Ex. E. On March 30, 2023, the Bureau of Indian Affairs ("BIA") issued a letter to the Tribe's President confirming that because no federal funds had been expended on the Roadways in the last decade, the

Roadways were removed from the NTTFI with immediate effect. J. Allen Aff. ¶¶ 32-33, Exhibit I. A search of the Midwest Regional NTTFI Report confirms that the Roadways are no longer identified. *Compare* Indian Reservation Roads Program – Official Indian Reservation Road inventory, Apr. 6, 2023, U.S. Dep't of the Interior, Bureau of Indian Affairs (last accessed Apr. 10, 2023), https://itims.bia.gov/invreports/Midwest.pdf, at 126–28, *with* Dkt. 12-12 at 10–12.

During the course of the valid right-of-way easements for the Roadways, the Tribe entered into an Acknowledgement of Public Authority ("APAR") agreement with the Town of Lac du Flambeau, delegating responsibility to the Town to maintain and adequately repair the Roadways as necessary. J. Allen Aff. ¶¶ 7-9, Ex. A. The APAR did not convey any legal interest or ownership of the Roadways to the Town. *Id.* The Town "affirmatively decided to opt out of negotiating and entering a new APAR with the Tribe and the BIA" in 2008, and the Tribe then formally rescinded the APAR in 2017 after determining that the Town had used the original APAR improperly to claim legal interest in Tribal roads on the Reservation. *Id.*

In 2013 and 2014, the United States, through the BIA, issued notices to the affected landowners that the granted easements would be expiring, or had already expired, and new easements would need to be granted in order for legal access across the Roadways to continue. J. Peterson Aff. ¶¶ 12-19, Exs. A-D. The easement for Annie Sunn Lane expired on April 27, 2014; the easement for Center Sugarbush Lane expired on July 27, 2014; the easement for East Ross Allen Lake Lane expired on March 16, 2014; and the easement for Elsie Lake Lane expired on October 22, 2011. J. Peterson Aff. ¶¶ 11-19, Exs. A-D. The letters from the BIA instructed the homeowners on the steps they would need to take to maintain lawful access to their properties via the Roadways. In the intervening decade, no application for a renewed right-of-way was

completed, and there are no valid rights-of-way for public access across the lands underlying the Roadways. *Id*.; J. Allen Aff. ¶¶ 27-28, Ex. G.

After almost a decade of perpetual trespass across trust lands, the Tribal Council took action to stop continued access via the Roadways where there was no right-of-way easement. J. Allen Aff. ¶¶ 10-12, Ex. B. On January 20, 2023, the Tribal Council sent letters to the Plaintiffs for whom they had physical addresses, explaining the Tribe's intent to "limit access to Annie Sunn Lane, Center Sugarbush Lane, East Ross Allen Lake Lane, and Elsie Lake Lane . . . includ[ing] . . . physical barriers." J. Allen Aff. ¶¶ 13-14, Ex. C. These letters were also sent to the attorneys representing the title insurance companies who insured several of the Plaintiffs. A. Adams Aff. ¶¶ 6-7. In an effort to ensure that all affected individuals – and not just the landowners – would have notice of its intent to prevent further trespass, the Tribal Police Department also made efforts to personally serve each residence that would be affected by the Tribe's actions. T. Bill Aff. ¶¶ 7-9.

On January 31, 2023, the Tribe's Road Department, in conjunction with its Land Management Department, placed barriers across the Roadways to prevent continued trespass across trust lands. G. Thompson Aff. ¶¶ 19-20; J. Peterson Aff. ¶ 28. The barriers consist of two cement blocks placed on the edges of each Roadway, with enough room between for vehicles to pass. G. Thompson Aff. ¶ 21. The barriers were then connected with a locked chain to ensure no unauthorized vehicle traffic trespass could occur. G. Thompson Aff. ¶¶ 19-21; T. Bill Aff. ¶¶ 30-31; Dkt. 12-10. The Tribe's Road Department worked with the Tribe's Land Management Department to ensure that the barriers were only placed on the portions of the Roadway crossing lands held in trust by the United States for the benefit of the Tribe. J. Peterson Aff. ¶¶ 27-28; G. Thompson Aff. ¶ 19.

To provide for the health, safety, and welfare of the residents of the Reservation, the Tribe developed a plan, called the LDF Internal Emergency Service Aid in Action (the "Service Plan"), to ensure emergency access and critical services would not be interrupted to the affected residents. T. Bill Aff. ¶¶ 10-11. The Service Plan tasked the Tribal Police Department with making sure every Tribal officer had access to keys to the locks on the chains of the barriers, and always carried those keys with them. T. Bill Aff. ¶ 12. The Tribal Police offered keys to the locks on the chains of the barriers to the Town of Lac du Flambeau's Emergency Medical Services team (ambulance), and those keys were accepted. T. Bill Aff. ¶ 13. The Tribal Police also offered keys to the locks on the chains of the barriers to the Town of Lac du Flambeau's Fire and Rescue Department, but those keys were not taken as offered. *Id.* The Tribal Police made sure that every Tribal officer had tools with them at all times to quickly defrost any frozen locks, and even to cut the chains if necessary to ensure there would not be a delayed response in case of emergencies. T. Bill Aff. ¶ 14.

In accords with the Service Plan, tribal employees worked to ensure that necessary services, including the regular delivery of groceries, medications, gas, propane, and firewood, as well as trash hauling could be offered to homeowners living on the Roadways who requested such services. T. Bill Aff. ¶¶ 18-21, 23. This also included allowing contractors access to the homes to perform necessary maintenance, such as fixing appliances, repairing roofs, and trimming trees, when requested. T. Bill Aff. ¶ 22. The Tribal Police Department also arranged for regular mail delivery. T. Bill Aff. ¶ 24. Not wanting to interrupt any medical care, the Tribal Police Department regularly removed the chains from the barriers to allow residents to use their own vehicles to attend medical appointments. T. Bill Aff. ¶ 25.

To facilitate meaningful negotiations on the expired rights-of-way and the past-trespass actions, as well as forward-looking solutions, on March 10, 2023, the Tribal Council passed a resolution to approve Temporary Access Permits for the Roadways. J. Allen Aff. ¶¶ 23-25, Ex. F. Following the payment of a modest sum, the Permits allowed homeowners access to their properties via the Roadways. J. Allen Aff. ¶ 26. On March 13, 2023, the chains were removed from the barriers, and vehicle traffic can proceed in a usual manner on the Roadways. *Id*.

**Legal Standard**

To obtain a preliminary injunction from the Court, the Plaintiffs must show: 1) their "claim has some likelihood of success on the merits," and "not merely a better than negligible chance," *Mays v. Dart*, 974 F.3d 810, 822 (7th Cir. 2020) (internal citations and quotations omitted); 2) that they are "likely to suffer irreparable harm in the absence of preliminary relief," *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008); and that 3) "legal remedies are inadequate," *Cook Cty, Il. v. Wolf*, 962 F.3d 208, 221 (7th Cir. 2020). Only if the Plaintiffs have made that showing should the Court then "balance[] the harms to the moving party, other parties, and the public." *Eli Lily & Co. v. Arla Foods, Inc.*, 893 F.3d 375, 381 (7th Cir. 2018).

Contrary to the Plaintiffs' assertions that this Court need not separately address whether they have an adequate remedy at law first, the facts of this case and availability of specific remedies should point this Court to require the Plaintiffs to show a likelihood of success on the merits, a likelihood of irreparable harm, and that legal remedies are inadequate before it considers a balancing of harms. *See Cook Cty, Il.*, 962 F.3d at 221, 233. The Plaintiffs are asking this Court to issue a mandatory preliminary injunction, one "requiring an affirmative act by the defendant[s]." *Graham v. Medical Mut. of Ohio*, 130 F.3d 293, 295 (7th Cir. 1997). Because the

Court would be ordering the Defendants to affirmatively engage in an action (removing the barriers) which would allow further trespass on private lands, the relief requested should be "cautiously viewed and sparingly issued." *Mays*, 974 F.3d at 818 (quoting *Graham*, 130 F.3d at 295).

Furthermore, unlike the standard governing the Defendants' contemporaneously filed motion to dismiss, here, "[i]n assessing the merits" the Court does not need to "accept [the Plaintiffs'] allegations as true," does not need to "give [them] the benefit of all reasonable inferences," and does not give them "the benefit of conflicting evidence." *Doe v. Univ. of S. Ind.*, 43 F.4th 784, 791 (7th Cir. 2022). Instead, the Court is free to "approach the record from a neutral and objective viewpoint, assessing the merits as [it thinks] they are likely to be decided." *Id.* at 792.

## Argument

### I. The Plaintiffs cannot succeed on the merits of their claims.

The Defendants' contemporaneously filed Motion to Dismiss identifies the many procedural and jurisdictional barriers in place barring Plaintiffs receiving the relief they seek, including sovereign immunity, federal question subject-matter jurisdiction issues, and failure to join appropriate parties to the case. Even if this Court were to look past each of these issues, the Plaintiffs cannot succeed on the merits of their claims, and this Court should deny the preliminary injunctive relief sought in Dkt. 27.

#### a. The Plaintiffs cannot succeed on the merits of their declaratory judgment claim because the Roadways are not public roads and the relevant right-of-way grants have expired.

Count I of the Plaintiffs' Amended Complaint seeks relief for a non-existent violation of federal law, while ignoring the reality of the legal title and access issues of the Roadways. The

Roadways cross lands owned in trust by the United States for the benefit of the Tribe, and the Plaintiffs do not have any valid right-of-way easements to cross those lands. The Plaintiffs cannot succeed on the merits of their declaratory judgment claim, and this Court should deny the Plaintiffs' requested preliminary injunctive relief.

**i. The Roadways at issue lie atop trust lands, and Plaintiffs' rights-of-way grants to traverse those lands have expired.**

Plaintiffs cannot succeed on the merits of their declaratory judgment claim because their claim ignores and otherwise fails to reckon with the fact that the Roadways are built upon tribal trust land, and they do not have a valid right-of-way to traverse that land. The federal government defines "Indian country" to include "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, *and, including rights-of-way running through the reservation*." 18 U.S.C. § 1151(a) (emphasis added). Federal regulations define a "right-of-way" as "an easement or a legal right to go over or across tribal land . . . for a specific purpose." 25 C.F.R. § 169.2. An "easement" is defined as "an interest, consisting of the right to use or control, for a specific limited purpose, land owned by another person…while title remains vested in the landowner." *Id.* Individuals seeking to cross Indian land are required under federal law to obtain an approved right-of-way "before crossing Indian land." 25 C.F.R. § 169.4. An approved right-of-way over tribal land can only be obtained from the federal government with the consent of the tribe. *Id.* Any unauthorized use of tribal land due to an expired right-of-way is considered a trespass. 25 C.F.R. §§ 169.2, 169.410. Federal law specifically recognizes a tribe's authority to evict trespassers and recover possession of Indian lands through "any available remedies under applicable law, including applicable tribal law." 25 C.F.R. § 169.413.

The Roadways cross lands held in trust for the Tribe and its members by the United States government. J. Peterson Aff. ¶ 7; 25 U.S.C. §§ 5105, 5108. Any landowner seeking ingress or egress rights over the Roadways must therefore obtain a valid right-of-way, consented to by the Tribe and approved by the federal government. 25 C.F.R. § 169.4. No such rights-of-way over the Roadways currently exist. The BIA previously approved rights-of-way on the Roadways in 1961 and 1964. *Id.* at ¶ 10. These were approved for a period of 50 years. *Id.* at ¶¶ 10-11. The BIA provided notice to the affected landowners prior to the expiration of the easements. *Id.* at ¶¶ 13-19, Ex. A-D. By 2014, all of the easements had expired. J. Allen Aff. ¶ 28, Ex. G. None of the landowners submitted complete applications for new rights-of-way, and no agreement was ever received between the Tribe and the applications to grant new rights-of-way over the Roadways. *Id.*

The rights-of-way over the Roadways expired a decade ago. J. Peterson Aff. ¶ 11. Without valid rights-of-way, any unauthorized use of the Roadways by Plaintiffs amounts to trespass. 25 C.F.R. §§ 169.2, 169.4, 169.413. Plaintiffs' Amended Complaint completely omits and fails to reckon with their own violations of federal law that led to the Tribe placing barriers on the Roadways to prevent further trespass.

**ii. Nothing in the federal regulations requires a road with an expired right-of-way to be open to the public.**

In their pleadings, Plaintiffs ignore the reality of the expired rights-of-way and instead argue that unrelated federal regulations have incidentally stripped the Tribe of their legal interest in their own lands. Dkt. 28 at 25-28. This argument ignores federal law that establishes the permanency of a Tribe's authority over trust land, regardless of countervailing interest or regulations. For example, federal law recognizes that, when dealing with rights-of-way over Indian land, "in all cases, title to the land remans vested in the landowner." 25 C.F.R. §§ 169.2,

169.10. Such rights-of-way are subject to applicable federal and tribal law, and not subject to state law, or the law of a political subdivision. 25 C.F.R. § 169.9. Additionally, even a valid, unexpired right-of-way over tribal land

> does not diminish to any extent:
> (a) The Indian tribe's jurisdiction over the land subject to, and any person or activity within, the right-of-way;
> (b) The power of the Indian tribe to tax the land, any improvements on the land, or any person or activity within, the right-of-way;
> (c) The Indian tribe's authority to enforce tribal law of general or particular application on the land subject to and within the right-of-way, as if there were no grant of right-of-way;
> (d) The Indian tribe's inherent sovereign power to exercise civil jurisdiction over non-members on Indian land; or
> (e) The character of the land subject to the right-of-way as Indian country under 18 U.S.C. § 1151.

25 C.F.R. § 169.10.

Ignoring the Tribe's legal interest in the lands on which the Roadways sit, Plaintiffs argue that, despite their expired easements, the Roadways are public roads due to the Tribe's participation in the TTP and must be kept open. Dkt. 28 at 25-28. The NTTFI is part of the TTP, and lists transportation facilities within or providing access to tribal lands that are eligible for assistance under the TTP. 25 U.S.C. § 202. Plaintiffs argue that because the implementing regulations state that roads on the NTTFI must be kept open to the public, except under a limited set of circumstances, *see* 23 U.S.C. §§ 101(a)(22), (23), (33), the Defendants have somehow violated federal law through their placement of the barriers, Dkt. 28 at 25-28.

Plaintiffs' argument implies that the Tribe's participation in the TTP has somehow eliminated both the Tribe's legal interest in their land, and the legal requirements for individuals seeking to cross tribal land. Even if the Roadways were still listed on the NTTFI, which they are not, *see infra* Subsection I(a)(iii), the Plaintiffs' argument is incorrect. The BIA has been careful to distinguish the designation of "public authority" and "public roads" under the TTP from legal

interest in roads and the existence or necessity of easements over those roads. In 2022, the BIA issued the following formal guidance regarding easements over Indian lands that are listed on the NTTFI:

> Transportation and other officials generally use the term "owner" or "road owner" when referencing the public authority that is responsible for operating and maintaining a particular road or transportation facility. While the NTTFI identifies an owner that is responsible for maintaining each listed road or transportation facility, its purpose is limited to establishing eligibility for assistance using TTP funds. NTTFI data should not be used for determining real property ownership, nor whether a ROW is needed or if it exists…Accordingly, the TTP regulations defer to 25 CFR 169 to determine whether a ROW is needed for a construction project (25 CFR 170.460). If a ROW is needed, the TTP regulations require that it be in place before commencement of construction activities (25 CFR 170.460).

Bureau of Indian Affairs, Rights-of-Way on Indian Lands Handbook, 52 IAM 9-H, at 4 (Jan. 10, 2022), *available at* https://www.bia.gov/policy-forms/handbooks.

This distinction was further confirmed by recent correspondence sent from Assistant Secretary of Indian Affairs Bryan Newland to multiple public officials in Wisconsin concerned with the dispute underlying this case. In a March 23, 2023 letter, Assistant Secretary Newland explained that the "presence of a road on the NTTFI means it is 'eligible for assistance' (e.g., use of TTP funds), but it does not mean that any TTP funds have ever been, or will ever be, expended on that road." J. Allen Aff. ¶ 28, Ex. G. The letter further stated that "where any non-Tribal road crosses Tribal lands it must have a right-of-way that under Federal law requires Tribal consent." *Id.*

Plaintiffs' argument that participation in the TTP completely alters the Tribe's legal ownership and authority over their land is based on the use of the label "public roads." Dkt. 28 at 25-28. But the label of "public roads" under the TTP cannot alter the Tribe's legal interest in its land, especially considering the explicit BIA guidance to the contrary.

**iii. The Roadways were never required to be listed on the NTTFI and have been taken off the inventory.**

In contrast to Plaintiffs' allegations, the Tribe's decision to list the Roadways on the NTTFI had no practical effect, given the lack of federal funding expended on the Roadways at issue, and was recently formally revoked, completely negating Plaintiffs' already unsound claim. The Tribe has authority to list roads on the NTTFI, and the Roadways were, at one time, listed on the NTTFI. 25 CFR § 170.5; G. Thompson Aff. ¶ 14. Listing a road on the NTTFI means that it is *eligible* for use of TTP funds but does not mean that any TTP funds will ever be expended on that road. 23 U.S.C. § 202(b)(1)(A).

On March 10, 2023, the Tribe passed a resolution, approving and authorizing the "immediate removal of the Four Roads from the Tribe's entries on the Tribal Transportation Facility Inventory." J. Allen Aff. ¶¶ 20-22, Ex. E. This resolution was transmitted to the BIA. *Id.* at ¶ 20. On March 30, 2023, the BIA issued a letter to the Tribe's President confirming that the BIA received the Tribe's resolution on March 15, 2023. *Id.* at ¶¶ 32-33, Ex. I. The letter confirms that the Tribe has not expended *any* TTP funds on the Roadways, and they are thus removed with immediate effect from the NTTFI. *Id.* at ¶ 33, Ex. I. The BIA's decision to process the Tribe's request and respect the Tribe's authority to remove the Roadways from the NTTFI is consistent with the history of the Tribe's involvement in the TTP overall. The presence of the Roadways on the NTTFI has been inconsequential for years, a mere placeholder in the event the Tribe chose to seek large amounts of TTP funds or enter into additional agreements for the Roadways' maintenance. *See* 23 U.S.C. § 202(b)(1)(A); J. Allen Aff. ¶ 28, Ex. G.

The Tribe's removal of the Roadways from the NTTFI demonstrates with certainty that the Roadways are not, and cannot, be labeled as "public" under the federal regulations governing the TTP.

**iv. The Roadways are not otherwise public roads.**

When the Roadways were listed on the NTTFI, the Town was listed as the public authority responsible for operating or maintaining the Roadways. J. Allen Aff. ¶ 9, Ex. A. This action was consistent with federal regulations that require a named "public authority" responsible for maintaining the roads. 25 C.F.R. § 170.5. Plaintiffs appear to allege that the Town is therefore the "owner" of the entire portion Roadways, even those portions that cross over trust lands. *See* Am. Compl. at ¶ 88. The Plaintiffs reference the Tribe's 2007 Acknowledgement of Public Authority ("APAR") with the Town in 2007 as support for this proposition. *See id.*; Dkt. 28 at 27-28.

The 2007 APAR did delegate responsibility to the Town to maintain and adequately repair the Roadways as necessary. B. Hubing Decl. ¶ 24, Ex. M. However, and notwithstanding the erroneous language placed in the 2007 APAR, the Tribe has always recognized that the APAR did not do anything to change the legal ownership status of the parcels beneath the Roadways, including the requirement that a valid right-of-way easement exist before crossing. J. Allen Aff. ¶ 9, Ex. A. The Town "affirmatively decided to opt out of negotiating and entering a new APAR with the Tribe and the BIA" in 2008. *Id.* The Tribe then formally rescinded the APAR in 2017. J. Allen Aff. ¶ 8. The rescinding resolution recognizes that the Town had been attempting to use the APAR "to argue its legal interest and ownership of Tribal roads on the Lac du Flambeau Reservation." J. Allen Aff. ¶ 9, Ex. A at 2.

Maintenance of the Roadways under a long-rescinding inter-governmental agreement does nothing to change the legal reality that the Plaintiffs avoid in their Amended Complaint and request for preliminary injunctive relief. There is no valid right-of-way easement across any of

the Roadways for the Plaintiffs. J. Peterson Aff. ¶¶ 11-19, Exhibits A-D. Without a perpetual right-of-way, at minimum, the Roadways cannot be considered public roads.

**b. The Plaintiffs cannot succeed on the merits of their anticipated nuisance claims because there is no subject matter jurisdiction for the state law-based claims, they conflict with federal and tribal interests, and fail to meet state law standards.**

**i. This Court lacks jurisdiction to even consider Plaintiffs' state law-based nuisance claims.**

Plaintiffs cannot succeed on the merits of their anticipated nuisance claims because the Court lacks federal question jurisdiction to hear this case, and thus any alleged supplemental jurisdiction is improper. Federal question jurisdiction asserted under 28 U.S.C. § 1331 is appropriate only where the complaint "establishes either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on the resolution of a substantial question of federal law." *Franchise Tax Bd. of Cali. v. Const. Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 27-28 (1983). When a party's claim gives rise to federal court jurisdiction, the federal court *may* exercise supplemental jurisdiction over additional state law claims that form part of the same case or controversy. 28 U.S.C. § 1367(a); *Siler v. Louisville & Nashville R.R. Co.,* 213 U.S. 175, 191 (1909). But this type of supplemental jurisdiction does not exist if a plaintiff's federal claim is insubstantial or patently without merit. *Hagans v. Lavine,* 415 U.S. 528, 537-38 (1974). Thus, "[w]hen all federal claims in a suit in federal court are dismissed before trial, the presumption is that the court will relinquish federal jurisdiction over any supplemental state-law claims." *Al's Serv. Ctr. v. BP Prod. N. Am., Inc.,* 599 F.3d 720, 727 (7th Cir. 2010).

Here, Plaintiffs entire basis for purported federal question jurisdiction is Defendants' alleged violation of federal law, namely the TTP and corresponding regulations. As described

above, that claim is entirely meritless due to the expired easements, the Tribe's ownership of the land, and the removal of the Roadways from the NTTFI. Because their federal claim is meritless, the Court should not exercise supplemental jurisdiction over additional state law-based claims. Thus, Plaintiffs cannot succeed on the merits of their nuisance claims because those claims are not properly before this Court.

**ii. Plaintiffs' state law-based nuisance claims infringe on the Tribe's authority and are preempted by federal law.**

Even if this Court could exercise supplemental jurisdiction over Plaintiffs' nuisance claims, Plaintiffs still could not succeed on the merits because their nuisance claims infringe on the Tribe's authority and are preempted by federal law. Legal precedent recognizes that "Indian tribes generally are not subject to the laws of the state wherein their territory resides." *Aasen-Robles v. Lac Courte Oreilles Band of Lake Superior Chippewa Indians*, 671 N.W.2d 709, 715 n.7 (Wis. Ct. App. 2003). Two barriers to state jurisdiction on Indian lands apply: infringement and preemption. *See McClanahan v. Ariz. State Tax Comm'n,* 411 U.S. 164, 168-69 (1973); *St. Germaine v. Chapman,* 505 N.W.2d 450, 451 (Wis. Ct. App. 1993).

Under the infringement test, state authority must not unlawfully infringe "on the right of reservation Indians to make their own laws and be ruled by them." *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 142-43 (1980). The Wisconsin Supreme Court has cautioned against such unlawful intrusions. *Teague v. Bad River Band of Lake Superior Tribe of Chippewa Indians,* 665 N.W.2d 899, 908 (Wis. 2003). In their pleadings, Plaintiffs vaguely allege that Defendants have violated "federal Indian common law restricting the extent to which tribal officials can attempt to regulate non-members and attempt to exclude non-members from using

public roads." Dkt. 28 at 35. Plaintiffs do not further explain this allegation or provide authority for the implication that the Tribe lacks authority to regulate activity on tribal trust land.

In contrast to the Plaintiffs' allegations, the Supreme Court has held that "[n]onmembers who lawfully enter tribal lands remain subject to the tribe's power to exclude them." *Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130, 144-45 (1982). The federal regulations governing rights-of-way across Indian lands recognize this authority, including the ability for the tribe to evict trespassers and recover possession of Indian land through "any available remedies under applicable law, including applicable tribal law." 25 C.F.R. § 169.413. The Tribe has exercised that authority here, by requiring easements for nonmember passage over tribal land, and by acting to restrict Plaintiffs trespass over tribal land when those easements were long expired. J. Peterson Aff. ¶ 11; Exhibits A-D, G. Thompson Aff. ¶ 30. Thus, any application of state nuisance law to the Tribe's actions would infringe upon the already recognized principals of tribal sovereignty, and the Tribe's rights to make and be governed by their own laws.

Beyond infringing upon tribal sovereignty, Plaintiffs' nuisance claims as plead in Counts II and III are preempted by the federal scheme governing trespass on Indian lands. *See* 25 C.F.R. Part 169. When considering the application of state law to Indian tribes in general, state jurisdiction is pre-empted by the operation of federal law if it "interferes with or is incompatible with federal and tribal interest reflected in federal law, unless state interests at stake are sufficient to justify the assertion of state authority." *New Mexico v. Mescalero Apache Tribe,* 462 U.S. 324, 334 (1983). Here, the federal and tribal interests overwhelmingly outweigh any countervailing state interest.

First, the Supreme Court has repeatedly recognized that state law does not apply to tribal lands in the absence of congressional action. *See, e.g., California v. Cabazon Band of Mission*

*Indians,* 408 U.S. 202, 207 (1987). No such congressional action exists in the context of state nuisance laws. For states subject to Public Law 280, such as Wisconsin, the Supreme Court has clarified that while Public Law 280 grants a state authority to enforce its criminal laws on Indian reservations, it may not enforce its civil laws there. *Id.* at 207-08. Only those state civil laws intended to prohibit certain conduct, rather than regulate it, may be enforced under Public Law 280. *Id.* at 209. While it appears this Court has not specifically considered the application of state nuisance law to tribal trust lands, other federal courts have analyzed this issue and held that state nuisance law is "part of a larger scheme of land-use regulation and planning" and therefore "falls into the category of civil/regulatory laws that may not be enforced on Indian lands." *United States v. Duro,* EDCV 07-1309 SGL, 2009 WL 10669404 at *15 (C.D. Cali. April 1, 2009).

Second, a vast and exhaustive body of federal law governing tribal trust land, tribal authority, and easements over Indian land reveals the strong, preemptive federal interests at play. *See Alabama v. PCI Gaming Authority,* 15 F.Supp.3d 1161, 1171-72 (M.D. Ala. 2014) (holding that state-law nuisance claims seeking to enjoin allegedly illegal gaming conduct on Indian lands were completely preempted by the Indian Gaming Regulatory Act because "the state-law claim comfortably falls within the preemptive reach of IGRA"). The federal government demonstrated interest in the Tribe's authority over its land by establishing the Reservation as a permanent homeland for the Tribe and by taking tribal land into trust for the benefit of the Tribe. *See* Treaty with the Chippewa, 10 Stat. 1109, art. 11 (Sept. 30, 1854; Proclamation Jan. 10, 1855). Through implementation of federal regulations governing easements over Indian land, the federal government has demonstrated its strong interest in supporting "tribal self-determination and self-governance by acknowledging and incorporating tribal law and policies in processing a request for a right-of-way across tribal lands and defer to the maximum extent possible to Indian

landowner decisions regarding their Indian land." 25 C.F.R. § 169.1(a). The regulations recognize that access to Indian lands, without a valid easement, constitutes a trespass that may be enforced by either the United States or the applicable Indian tribe. *See* 25 C.F.R. § 169.413. Beyond federal interests, controlling and conditioning land use is a central tenant of tribal sovereignty, one of which the Tribe regularly employs. *See Merrion,* 455 U.S. at 144-45; LDF Const. art. VI, § 1(a); Lac du Flambeau Tribal Code, § 62.105 (the Tribe's Land Use Ordinance).

The Plaintiffs are unlikely to win on the merits of their Counts II and III, because the application of Wisconsin state nuisance law to the conduct at issue in the case would both infringe upon the sovereign interests of the Tribe, and is preempted by a controlling area of federal law.

**iii. Plaintiffs have not established the elements of an anticipated private or public nuisance claim.**

Assuming *arguendo* the Court analyzes the merits of the Plaintiffs' state law nuisance claims after finding subject-matter jurisdiction and discarding the doctrine bars of infringement and preemption, the Plaintiffs claims would fail.

First, a claim for public nuisance under Wisconsin law requires the establishment of a public right. *Bostco LLC v. Milwaukee Metro. Sewerage Dist*., 835 N.W.2d 160, 171 (Wis. 2013). A public nuisance is a condition or activity which substantially or unduly interferes with the use of a public place or with the activities of an entire community. *Physicians Plus Ins. Corp. v. Midwest Mut. Ins. Co.,* 646 N.W.2d 77, 788 (Wis. 2002). Thus, a public nuisance involves the impingement of public rights, defined as rights that are common to all members of the public. *Bostco,* 835 N.W.2d at 171. No common, public right exists here. Even when the Roadways were listed on the NTTFI, their presence on the NTTFI did not change the nature of the underlying trust land or the Tribe's sovereign authority to determine land use thereon. Bureau of

Indian Affairs, Rights-of-Way on Indian Lands Handbook, 52 IAM 9-H, at 4; *Merrion*, 455 U.S. at 144-45 (discussing a tribe's sovereign authority to control land use). Even when the APAR was in place, designation of the Town as a public authority over the Roadways merely designated responsibility to the Town to maintain and adequately repair the Roadways as necessary. B. Hubing Decl. ¶ 24, Ex. M. Now, with the Roadways removed from the NTTFI and the APAR rescinded, any argument that the Roadways are somehow public has been completely negated. J. Allen Aff. ¶ 33, Ex. I; J. Allen Aff. ¶ 9, Ex. A. Plaintiffs have no common, public right to use the Roadways, which sit on trust land regulated and controlled by the Tribe and the federal government. *See Merion,* 455 U.S. at 144-45 (discussing the sovereign power of Indian tribes to exclude nonmembers from trust land and place conditions on nonmember use of trust land); 25 C.F.R. Part 169. Because the Plaintiffs cannot show a public right to access a Roadway crossing trust lands that require right-of-way easements, they cannot win on the merits of their public nuisance claim.

Second, Plaintiffs cannot succeed on the merits of their private nuisance claim because a nuisance cannot be recognized solely on the basis of a lack of legal access, where there is no valid ingress and egress rights for the access complained of. A private nuisance is a condition that harms or interferes with an interest in the private use and enjoyment of land. *Bostco,* 835 N.W.2d at 171. The Plaintiffs cannot succeed on the merits of their private nuisance claim because they have – just as in Count I – failed to reconcile their arguments with the fact that they do not have a valid right-of-way to cross Indian trust lands. The Plaintiffs have not cited to any caselaw that would allow a state law private nuisance claim to succeed where the party claiming the nuisance does not have a right of ingress or egress on the land that the alleged nuisance lies. The cases cited by the Plaintiffs that come close only discuss streets and highways that are

otherwise already open to the public. *See* Dkt. 28 at 32-33. That, as discussed in Section I(a), *supra*, is not the case here. *See, e.g., Hunter v. McDonald*, 254 N.W. 2d 282 (Wis. 1977) (case discussing the nuisance aspect of disturbing a right of way, where the right-of-way easement was valid). Because Plaintiffs have not demonstrated a right to cross the land on which they claim private nuisance, they have failed to establish a private interest as required by Wisconsin law, and their private nuisance claim must fail.

Even if the Court were to consider the merits of the Plaintiffs' nuisance claims, they must fail, and the Plaintiffs' request for preliminary injunctive relief should be denied.

**c. The Plaintiffs cannot succeed on the merits of their implied easements claim because they have waived the argument; and because they have not filed suit against the appropriate parties to obtain such a remedy.**

The fourth and final claim that Plaintiffs raise in their Amended Complaint is for an implied easement within the Roadways to access their properties. Am. Compl. at ¶¶ 200-206. Although they bring this claim in their Amended Complaint, Plaintiffs fail to address or even mention the existence of the fourth claim in their Amended Motion for Preliminary Injunction. *See* Dkt. 28 at 22 (stating that "Plaintiffs have alleged three causes of action in the Amended Complaint: Declaratory Judgment (Count I); Anticipated Private Nuisance (Count II); and Anticipated Public Nuisance (Count III).").

By failing to argue their likelihood of success on the merits of their implied easement claim, Plaintiffs have failed to meet their burden of persuasion as the moving party and that argument should be deemed waived. *Courthouse News Service v. Brown,* 908 F.3d 1063, 1068 (7th Cir. 2018) (that "the moving party bears the burden of showing that a preliminary injunction is warranted."); *see also World Fuel Services, Inc. v. City of Chicago,* 20-cv-07836, 2021 WL 1533778 at *3 (N.D. Ill. April 19, 2021) (explaining that plaintiff who failed to argue crucial

element of preliminary injunction cannot later raise that argument in their reply brief). For the reasons explained in the Defendants' Brief in Support of Their Motion to Dismiss, which the Defendants incorporate here, Plaintiffs would be unable to succeed on the merits of their implied easement claim. *See Schilling v. Wisc. Dep't of Natural Res.*, 298 F. Supp. 2d 800, 802-03 (W.D. Wis. 2003) (holding that an easement over Indian lands could not be granted, because the United States holds title to such lands, and there is no waiver of sovereign immunity for Indian lands in the Quiet Title Act).

## II. The Plaintiffs have not established that they are likely to suffer irreparable harm, given the nearly six weeks that passed since the trespass barriers were set in place before the filing of this lawsuit, and the subsequent removal of the barriers.

To meet their burden of persuasion for preliminary injunctive relief, Plaintiffs must demonstrate that they are likely to suffer irreparable harm in the absence of preliminary injunction. This requires evidence of "a real and immediate threat of future injury by the defendant." *City of Los Angeles v. Lyons,* 461 U.S. 95, 107 n. 8 (1977). Plaintiffs have not established the likelihood of irreparable harm and are therefore not entitled to preliminary injunctive relief. Plaintiffs seeking preliminary injunction must show "[a] presently existing actual threat." *Michigan v. U.S. Army Corps of Engineers,* 667 F.3d 765, 788 (7th Cir. 2011). Plaintiffs allege injuries in this case based on the Roadway closures' causing "grave risk to public health, safety and welfare and irreparable harm to the Plaintiffs and others similarly suited." Am. Comp. ¶ 2. However, as recognized by Plaintiffs, the Roadways are no longer closed. Am. Compl. ¶ 140. With the Roadways open, there can be no "presently existing actual threat." *Michigan,* 667 F.3d at 788. Plaintiffs instead attempt to argue that irreparable harm *may occur* at some point *in the future* if the Tribe decides to place the chains back across the barriers. *See, e.g.* Dkt. 28 at 14-17. This chain of timing and necessary events is far from the standard

required to issue the Plaintiffs' sought relief. *See Orr v. Shicker,* 953 F.3d 490, 502 (7th Cir. 2020) ("Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy…").

The extended time that passed since the rights-of-way across the Indian lands expired, notice of that expiration, and time between the placement of the barriers and the filing of the initial Complaint further degrade Plaintiffs' arguments that they will suffer an immediate harm. The easements expired close to a decade ago. J. Peterson Aff. ¶¶ 12-10, Ex. A-D. When the Tribe finally took action and placed the barriers to prevent further trespass over the Roadways, Plaintiffs waited approximately six weeks before filing their request for an injunction. *See* Dkt. 1 (Plaintiffs initial Complaint filed February 28, 2023); Am. Compl. ¶ 92 (Plaintiffs' acknowledgment that the barriers were placed on January 31, 2023). The Plaintiffs' lack of urgency in ensuring they had valid easements to access their property, and in filing this lawsuit, suggest the "immediate threat" required for this Court to issue a preliminary injunction is fiction. *See Ty, Inc. v. Jones Group, Inc.,* 237 F.3d 891, 903 (7th Cir. 2001) (finding that delays in seeking preliminary injunction can raise questions about claims that a plaintiff will face irreparable harm absent injunctive relief.); *Ohio Art Co. v. Lewis Galoob Toys, Inc.,* 799 F.Supp. 870, 887 (N.D. Ill. 1992) (finding that irreparable harm is absent where plaintiff delays in seeking injunctive relief).

Plaintiffs also argue that a preliminary injunction is warranted because of the "anxiety and emotional stress from knowing that they may soon be once again barricaded from their home." Dkt. 28 at 43. But any harm Plaintiffs may have suffered due to the Roadways closures was mitigated by the Tribe's proactive steps to ensure that Plaintiffs' needs were met while the barriers were in place. *See, e.g. Right Field Rooftops, LLC v. Chicago Baseball Holdings, LLC,*

87 F.Supp.3d 874, 895 (N.D. Ill. 2015) (considering mitigation of harm to plaintiffs in denying request for preliminary injunction); *Cassell v. Snyders,* 458 F.Supp.3d 981, 1003 (N.D. Ill. 2020) (considering mitigation of harm by Defendants as diminishment of Plaintiffs' claimed irreparable harm). While the barriers were in place, Tribal police delivered groceries, medications, mail, propane, and other necessities to Plaintiffs at their request. T. Bill Aff. ¶ 20. Tribal police responded to calls from Plaintiffs and allowed them to exit and enter their properties as needed for medical appointments. *Id.* at ¶ 25. Tribal police also performed property checks and maintained communications with Plaintiffs as requested. *Id.* at ¶ 27. And, the Tribe's Police Department ensured that in emergencies, access would be available to Plaintiffs and their properties. *See id.* at ¶¶ 12-16 (providing keys to the locks on the chains to emergency management services, providing heaters to warm frozen locks, and ensuring tools to cut the locks were in service vehicles). All of these proactive measures from the Tribe severely decimate the Plaintiffs' claims of mental health stresses and future, hypothetical additional road closures.

Plaintiffs also complain of surveillance cameras, but stop short of arguing they constitute irreparable harm, and instead allege a vague fear of threats, intimidation, and retaliation. Dkt. 28 at 15. The Tribal Police Department placed a surveillance camera on East Ross Allen Lake Lane consistent with their responsibility to protect tribal property following receipt of threats against Tribal government officials, reports that people were threatening to interfere with tribal property by moving or damaging the barriers, and reports that people were, or were threatening to, trespass across Reservation lands. T. Bill Aff. ¶¶ 31-32. And, contrary to Plaintiffs' vague allegations, Defendants have not expressed any physical threats or intentions of harm against the Plaintiffs. G. Thompson Aff. ¶¶ 31-32; J. Allen Aff. ¶¶ 34-35. Plaintiffs are unable to substantiate their claims of irreparable harm due to surveillance or threats from Defendants.

Finally, in their request for preliminary injunction, Plaintiffs ask the Court to direct Defendants "to preserve all documents and evidence related to this matter." Dkt. 28 at 56. Defendants have no intention of deleting documents or records related to this case, and have already taken the steps required to preserve information through the issuance of a "Litigation Hold Notice" letter, which has been reviewed and acknowledged by the twelve named Defendants, the Tribal Police Department, the Tribe's Lands Management Department, and the Tribe's Information Technology Department. A. Adams Aff. ¶¶ 8-9. Any risk of lost or eliminated documents and evidence has already been addressed and mitigated and no further Court order is necessary. *See DR Distributors, LLC v. 21 Century Smoking, Inc.,* 513 F.Supp.3d 839, 930 (N.D. Ill. 2021) ("The standard and recognized method to ensure clients have been adequately informed of their preservation duties is through a written litigation hold letter.")

In sum, Plaintiffs have failed to establish a likelihood of irreparable harm absent this Court's grant of a preliminary injunction. Much of Plaintiffs' requested relief is tied to conditions that no longer exist, or that may occur again at some unknown time in the future. The other harms alleged are either directly refuted by the actions of the Defendants and the Tribe, or no longer at issue. Failing to demonstrate irreparable harm, this Court should deny the request for preliminary injunctive relief.

## III. The Plaintiffs have other adequate remedies at law, including against other defendants, for their alleged harms.

Further discounting their claims of irreparable harm, Plaintiffs have numerous other legal remedies available to them for their alleged harms. In every case in which the plaintiff wants a preliminary injunction, "he must show that he has no adequate remedy at law." *Roland Machinery Co. v. Dresser Industries, Inc.,* 749 F.2d 380, 386 (7th Cir. 1984). This means that

Plaintiffs must demonstrate that any other remedy "would be seriously deficient as compared to the harm suffered." *Tay v. Dennison,* 457 F.Supp.3d 657, 686 (S.D. Ill. 2020). Contrary to Plaintiff's' assertion in their request for preliminary injunction, the requirements of "irreparable harm" and "no adequate remedy at law" only "merge" in cases where "the only remedy sought at trial is damages." *Roland,* 749 F.2d at 386. Plaintiffs seek declaratory and injunctive relief here and thus the requirement must be analyzed independently.

Plaintiffs have not met this requirement. Plaintiffs argue that they have no adequate remedies at law because Defendants would not be able to pay damages to Plaintiffs (an allegation with no citation to supporting evidence) and because of the "difficulty of quantifying the injury to the victim." Dkt. 28 at 50. This argument falls short of Plaintiffs' burden in this case, where any difficulty in quantifying the injury to Plaintiffs is more reasonably tied to the lack of harm and absence of injury overall. *See Cook Cty Republican Party v. Pritzker,* 487 F.Supp.3d 705, 715 (N.D. Ill. 2020) ("[I]n the absence of any showing of irreparable harm, Plaintiff has necessarily failed to show that it has no adequate remedy at law.") (internal quotations omitted)). As the Plaintiffs are not suffering any actual, direct, immediate harm at the hands of Defendants, other legal remedies would be far more appropriate to address their concerns. For instance, if Plaintiffs were somehow unaware that they needed valid easements to access their property, they are now so aware, and could pursue an action against their title insurance company for failing to inform them that access to their properties were not perpetually guaranteed. *See, e.g.*, *First Am. Title Ins. Co. v. Dahlmann*, 715 N.W. 2d 609 (Wis. 2006). Plaintiffs could also consider selling their properties and relocating to properties that do not require them to cross tribal land for ingress and egress. Finally, if the Plaintiffs believed the

Roadways were to remain forever open to the public under assurances made by the Town, they could take action against the Town for this misinformation. *See* Wis. Stat. § 893.80.

In the current case, the Plaintiffs have brought suit against the Defendants seeking the removal of barriers that were legally placed and have since been temporarily removed. The Defendants cannot provide the plaintiffs with any further equitable relief at this stage, and the Plaintiffs have other options to obtain relief from other parties, beyond the Defendants, requiring the denial of the Plaintiffs' Amended Motion for Preliminary Injunction.

## IV. The Defendants' property rights have been trampled upon for over a decade and allowing continued trespass does not serve the public or the parties' interests.

The Plaintiffs have not established any of the required initial three factors, so this Court does not need to engage in a balancing test to determine whether to grant the requested relief. *See, e.g.*, *Eli Lily.*, 893 F.3d at 381. Should the Court choose to weigh the interests of the parties at this stage, the balance of harms favors the Defendants not being ordered to allow continuing trespass over the lands of the Tribe.

Weighing of interests requires the Plaintiffs to show "the harm they would suffer without the injunction is greater than the harm that preliminary relief would inflict on the defendants." Dkt. 28 at 51 (citing *Michigan,* 667 F.3d at 787-88 (7th Cir. 2011)). Plaintiffs acknowledge that "[t]he more likely [the plaintiff] is to win, the less the balance of harms must weigh in his favor" Dkt. 28 at 51 (quoting *DM Trans, LLC v. Scott,* 38 F.4th 608, 622 (7th Cir. 2022)). As Part I, *supra*, reveals, Plaintiffs are unlikely to win on the merits of their case, given the removal of the Roadways from the NTTFI and the legal impediments to their other Counts. And, as described in Part II, *supra*, the Plaintiffs have failed to substantiate any immediate or future quantifiable harm.

Any alleged harm suffered by Plaintiffs is greatly outweighed by the decade-long, ongoing trespass by Plaintiffs over the Tribe's lands. It is well recognized that Indian tribes and their members "enjoy a unique historical and cultural connection to their land" and that there is perhaps no authority "more central to the economic security, or health or welfare of the tribe" than a tribe's authority to control land use. *Brendale v. Confederated Tribes and Bands of Yakima,* 109 S. Ct. 2994, 3022 (1989) (Blackmun, J., concurring). The importance of controlling land use is documented in the Tribe's Constitution which emphasizes the duty to "regulate the use and disposition of tribal property and preserve the tribal property…" LDF Const., art. VI, § 1(a). For the past decade, the Tribe's authority, and ability to protect and regulate their own land has been trampled upon by Plaintiffs' trespass. Granting a preliminary injunction here would further threaten the Tribe's ability to control land use, a central tenant of tribal sovereignty. No harm alleged by Plaintiffs can outweigh that which the Tribe has suffered and would continue to suffer if preliminary injunctive relief were granted here.

**Conclusion**

For all the foregoing reasons, Defendants respectfully request that the Court deny Plaintiffs' Amended Motion for Preliminary Injunction.

Dated: _April 10, 2023___

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