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

DONALD POLLARD, et al.,

Plaintiffs,

v. Case No. 23-cv-135-wmc

JOHN JOHNSON, et al.,

Defendants.

AMICUS BRIEF OF THE UNITED STATES

INTRODUCTION

The United States holds title to the land at issue in this suit in trust for the Lac du Flambeau Band of Lake Superior Chippewa Indians (the Band) and 76 individual Indian landowners (the Allottees). Both the Band and Allottees are "under the guardianship of the United States and entitled to its aid and protection." *United States v. Minnesota*, 270 U.S. 181, 193-94 (1926). Accordingly, the United States submits this Amicus Brief in support of the Band's Motion to Dismiss, Dkt. 37. *See* 28 U.S.C. § 517 (authorizing the Department of Justice to appear in district court "to attend to the interests of the United States").

In the United States' view, the Court lacks subject-matter jurisdiction because Plaintiffs have failed to identify a cause of action authorizing their claim under the Declaratory Judgment Act, which seeks to enforce the tribal provisions of the Federal-

Aid Highway Act. Plaintiffs also lack Article III standing with respect to that claim because the declaration they seek would not fully redress the underlying controversy—whether Plaintiffs have a legal right to use the roads. Without the federal Declaratory Judgment Act claim, the Court should not exercise supplemental jurisdiction over Plaintiffs' claims for private nuisance, public nuisance, and an implied easement, which are based on state law. The Court also lacks jurisdiction over these pendent claims because they are the functional equivalent of a quiet-title action. The Quiet Title Act provides the exclusive means by which to challenge the United States' title to real property, and Congress expressly stated in the Act that the sovereign immunity waiver in that statute "does not apply to trust or restricted Indian lands." 28 U.S.C. § 2409a(a).

The Amended Complaint also suffers from other legal defects. The gist of Plaintiffs' action, which seeks prospective relief only, is that the Band must keep the roads open to the public because the Band chose to list the roads on the National Tribal Transportation Facilities Inventory (the Inventory). Dkt. 26, Am. Compl. ¶¶ 77-82. But the Bureau of Indian Affairs has since removed the roads from the Inventory, thereby eliminating Plaintiffs' purported right to use the roads and providing a basis to dismiss Counts I-III pursuant to Fed. R. Civ. P. 12(b)(6). The Court could also dismiss the case under Fed. R. Civ. P. 12(b)(7) and 19(b) because the United States is a necessary party that cannot be joined because it has not waived sovereign immunity.

BACKGROUND

I. INTERESTS OF THE UNITED STATES

As a party to the 1854 Treaty with the Chippewa, 10 Stat. 1109, and as the holder of the title to lands held for the benefit of the Band and its members, the United States has a governmental interest in protecting that title. It also has an interest in safeguarding the Band's and the Allottees' use and enjoyment of that land from claims and trespasses by third parties. Further, the United States has a substantial interest in preserving its sovereign immunity under the Quiet Title Act and Congress' prerogatives under its Indian-affairs and property-clause powers.

II. STATUTES AND REGULATIONS

The underlying controversy here is whether Plaintiffs have a legal right to use the sections of road at issue, which are situated on trust land. Resolving that controversy requires the Court to consider at least two sources of law: (1) the Indian Right-of-Way Act, 25 U.S.C. §§ 323-328, and the regulations found at 25 C.F.R. Part 169 (ROW Act); and (2) the Tribal Transportation Program (TTP), which includes the Inventory. Because Plaintiffs address only the latter, and do not explain the effect (if any) of the TTP on the ROW Act, it makes sense to begin with an overview of these statutory and regulatory schemes.

The ROW Act and the TTP must be interpreted against the backdrop of the Indian Trade and Intercourse Act, 25 U.S.C. § 177, which provides that tribal lands—and interests in those lands—can be validly conveyed only pursuant to congressional authorization. *Oneida Indian Nation of N.Y. v. Cty. of Oneida* (*Oneida I*), 414 U.S. 661, 667-

670 (1974). The ROW Act provides such an authorization as to ROWs, allowing the Secretary of the Interior to grant ROWs across trust and restricted lands of both tribes and individual Indians. *Id.* § 324; *see also Cohen's Handbook of Federal Indian Law* § 15.09[4] at 1063 (Nell Jessup Newton ed., 2012) (*Cohen's Handbook*). With respect to tribal trust land, the ROW Act contains two fundamental requirements for the granting of ROWs. First, "[n]o grant of a right-of-way . . . shall be made without the consent of the proper tribal officials." 25 U.S.C. § 324. Second, "[n]o grant of a right-of-way shall be made without the payment of such compensation as the Secretary of the Interior shall determine to be just." *Id.* § 325. The regulations also provide that grants of ROWs shall be for a term of years, which in most circumstances is not to exceed 50 years. 25 C.F.R. § 169.18. To renew a ROW, an applicant must apply for renewal before the ROW expires. *Id.* § 169.19. Absent compliance with the ROW Act, "the user of a right-of-way over Indian lands obtains no interest in those lands and may be held to be a trespasser." *Cohen's Handbook* at 1064.

The TTP is jointly administered by the Secretary of the Department of Transportation and the Secretary of the Interior. 23 U.S.C. § 202(a)(6). The program allows tribes to direct funds from the Department of Transportation toward planning, construction, improvement, and maintenance of roads and bridges on the Inventory. *See* 23 U.S.C. § 101 (definitions and declaration of policy for the surface transportation authorization and Federal-aid highways program for states); 23 U.S.C. §§ 201-202 (declaration of policy that federal lands and tribal transportation facilities are to be "treated under uniform policies similar to the policies that apply to Federal-aid highways" at Chapter 1 of Title 23 and authorization for the TTP); 25 C.F.R. Part 170 (TTP). The Inventory identifies the public authority responsible for maintaining each road as the "owner," but the purpose of the Inventory "is limited to establishing eligibility for assistance using TTP funds." *Rights-of-Way Indian Handbook* 52 IAM 9-H at 4.[1] Inventory data "should not be used for determining real property ownership, nor whether a ROW is needed or if it exists." *Id.*

The ROW Act and the TTP operate in separate spheres. Although roads listed on the Inventory are public in nature, the party responsible for a road situated on trust land must still maintain its legal right to place or keep the road on the land. Those rights, which transfer a term-limited interest in land, are governed by the ROW Act. Without a valid right-of-way, the public nature of the road for purposes of the TTP provides no right to use the road. *See Rights-of-Way Indian Handbook* at 3 ("While the ROW regulations do not affect a Tribe's ability to dedicate Tribal land for certain uses, including transportation, the grant of an interest to use trust or restricted fee land to third parties for such uses does require a ROW.").

[1] https://www.bia.gov/sites/default/files/dup/assets/public/raca/handbook/pdf/52%20IAM%209-H%20ROW%20HB%20_FINAL_signed_w.footer_Jan%202022_minor%20corrections_508.pdf, last visited April 10, 2023.

ARGUMENT

I. THE COURT LACKS SUBJECT MATTER JURISDICTION OVER PLAINTIFFS' SUIT

A. Plaintiffs' Declaratory Judgment Claim Fails for Lack of a Cause of Action.

"[A] plaintiff faced with a 12(b)(1) motion to dismiss bears the burden of establishing that the jurisdictional requirements have been met." *Ctr. for Dermatology & Skin Cancer, Ltd. v. Burwell*, 770 F.3d 586, 588–89 (7th Cir. 2014). Where, as here, a plaintiff relies on 28 U.S.C. § 1331 as a basis for subject matter jurisdiction, "it is not enough for a plaintiff to merely call upon a constitutional provision, a federal statute, or a principle of federal common law in the complaint." *E. Cent. Illinois Pipe Trades Health & Welfare Fund v. Prather Plumbing & Heating, Inc.* (*E. Cent. Illinois*), 3 F.4th 954, 958 (7th Cir. 2021). The plaintiff must identify a cause of action, of which there are two types: (1) an express cause of action conferred by federal statute, such as 42 U.S.C. § 1983; and (2) an implied cause of action, such as an action against federal officials under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). *See E. Cent. Illinois*, 3 F.4th at 958-59. The Declaratory Judgment Act, which is "procedural only," *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950) (further citation omitted), and "presupposes the existence of a judicially remediable right," *Schilling v. Rogers*, 363 U.S. 666, 677 (1960), does not provide a cause of action. *See Reiter v. Illinois Nat. Cas. Co.*, 213 F.2d 946, 949 (7th Cir. 1954) (explaining that the Declaratory Judgment Act did not "create new causes of action"). Consistent with these principles, the Court gave Plaintiffs the opportunity "to explain under what authority, and what cause of action, this court could enter an injunction, beyond citing to a federal regulation and the Declaratory Judgment Act." Dkt. 21, March 8, 2023, Text Order.

Plaintiffs' Supplemental Jurisdictional Statement fails to identify a viable cause of action. Dkt. 25. Instead, Plaintiffs argue that it is not necessary to identify a cause of action because their "right to relief necessarily depends on resolution of a substantial question of federal law." *Id.* at 3 (quoting *Empire Healthchoice Assur., Inc. v. McVeigh*, 547 U.S. 677, 689–90 (2006)) (internal quotation marks and further citation omitted). While Plaintiffs are correct that a "slim category" of cases may proceed in federal court without a federal cause of action, *Empire Healthchoice*, 547 U.S. at 701, this case does not involve those "rare circumstance[s]." *E. Cent. Illinois*, 3 F.4th at 959.

The seminal case on this topic is *Grable & Sons Metal Prod., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308 (2005), a quiet title action invoking state law but involving real estate purchased at a federal tax sale. The case turned on whether the Internal Revenue Service had given the taxpayer whose property was seized the notice required by a federal statute. *Id.* at 314-315. The Court explained that the case belonged in federal court, to which it had been removed from Michigan state court, because of the United States' own interests in satisfying its claims through tax sales and because state title cases that raise federal tax issues are rare. *Id.* It held that federal question jurisdiction exists if "a *state-law claim* necessarily raise[s] a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities." *Id.* at 314 (emphasis added).

This case does not fit within the *Grable* exception because Plaintiffs have not pleaded a "state-law claim"—or at least not a valid one—that necessarily raises a federal law issue. *Id.* Count I of the Complaint is not a state-law claim, as it is based on the federal Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, and a federal regulation, 25 C.F.R. § 170.114(a). Dkt. 26, Am. Compl. ¶¶ 152-53, 156. With respect to the remaining state law claims, the United States has not waived its immunity to nuisance claims or claims for implied easements—addressed in more detail in the next section—which must be brought under the federal Quiet Title Act. Those pendent claims therefore fail as a matter of law.

Nor, as Plaintiffs assert, does *Ex parte Young*, 209 U.S. 123 (1908), authorize their suit. *See* Am. Compl. ¶ 8. "*Ex parte Young* provides a path around sovereign immunity [only] *if* the plaintiff already has a cause of action from somewhere else." *Michigan Corr. Org. v. Michigan Dep't of Corr.*, 774 F.3d 895, 905 (6th Cir. 2014) (citing *Ind. Prot. & Advocacy Servs. v. Ind. Family & Soc. Servs. Admin.*, 603 F.3d 365, 392-93 (7th Cir. 2010) (en banc) (Easterbrook, J., dissenting on other grounds). Further, the Supreme Court has held that *Ex parte Young* does not authorize suits that are "the functional equivalent of a quiet title action" against a state. *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 281 (1997); *accord Pavlock v. Holcomb*, 35 F.4th 581, 591 (7th Cir. 2022) (dicta). That same principle has been found to apply to tribes. *See, e.g., Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1271-72 (9th Cir. 1991).

Plaintiffs also emphasize the federal nature of the TTP and Indian law in general, but those federal issues, even if the roads still appeared on the Inventory, are not an adequate substitute for a cause of action. *See* Dkt. 25 at 2 ("the Tribe long ago availed itself of a federal statutory scheme by which the Tribe conceded the Roadways' status as 'public roads' in exchange for receiving federal funds"). Neither the statutes authorizing the TTP nor the Part 170 regulations governing the Inventory contain an express cause of action, or suggest that one could be implied. Finally, none of Plaintiffs' claims is based on a cause of action arising under federal common law, making inapposite Plaintiffs' general assertions in the Supplemental Jurisdictional Statement about "Indian law issues," the foundational "tribal exhaustion" case, *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985), and that case's progeny. *See* Dkt. 25 at 3-6 and nn.4 & 5.

B. Plaintiffs Lack Article III Standing Because Their Suit Would Not Completely Resolve the Controversy.

In addition to the cause-of-action problem, Plaintiffs' suit suffers from another jurisdictional defect: lack of Article III standing. As the Supreme Court has explained, the Declaratory Judgment Act cannot be used "to litigate a single issue in a dispute that must await another lawsuit for complete resolution." *Calderon v. Ashmus*, 523 U.S. 740, 748 (1998) (holding that plaintiff's class action complaint seeking a declaration on a legal issue that would impact future habeas proceedings did not present a case or controversy under Article III); *see also MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 n.7 (2007) (a "litigant may not use a declaratory-judgment action to obtain piecemeal adjudication of defenses that *would not finally and conclusively resolve* the underlying controversy").

The underlying controversy here is whether Plaintiffs have a legal right to use the sections of road at issue. Plaintiffs' suit cannot conclusively resolve that dispute. Plaintiffs seek "a declaration that the Roadways are public and must be kept open to the public pursuant to" the TTP and the Part 170 regulations. Dkt. 26, Am. Compl. at 41. But such a declaration would not address whether the roads have valid legal tenure under the Non-Intercourse Act and the ROW Act, or whether there is a trespass. Nor would that decision bind the United States, which is not a party to this suit and, as explained below, cannot be joined. *See Drummond v. United States*, 324 U.S. 316 (1945) (United States not bound by prior decision in litigation involving Indian lands where the United States was not a party in its own right, did not initiate the litigation or control or direct the case, and was not "the laboring oar" in presenting the defense of the tribe). The same goes for a declaration that Plaintiffs "have implied easements to use the Roadways in their present location to access their respective properties or homes and for related purposes." Dkt. 26, Am. Compl. at 42. Stated in terms of the "coercive action" test, *see Medtronic, Inc. v. Mirowski Family Ventures, LLC*, 571 U.S. 191, 197 (2014), Plaintiffs' suit is not the opposite of a federal common-law trespass action over which the Court would have jurisdiction. *See* Dkt. 25 at 2, n.1. Rather, Plaintiffs' suit seeks to litigate only one potential defense to such an action.

These issues need to be resolved, if at all, in a trespass action by the United States (or the Tribe) against the Town, which holds the expired ROWs for the roads at issue in this case. The Department of Justice is currently considering whether to file a trespass action against the Town. Such an action would allow all stakeholders to seek to intervene and litigate the full panoply of their claims and defenses. The United States would assert its own governmental and real-property interests and the interests of the Band under federal common law and the ROW Act. The Band, should it so choose, could intervene and assert its rights independently. The Town could assert its own defenses. And Plaintiffs could seek to intervene to litigate the issues raised in this suit without any jurisdictional impediments. To be clear, the United States supports a negotiated resolution among the Band, the Town, and other stakeholders that would compensate the Band for past trespasses and, if the Band consents, grant the Town permission to use the roads going forward. But if a negotiated resolution is not possible, a suit by the United States—not Plaintiffs' declaratory-judgment action—would provide a suitable legal mechanism to resolve this dispute.

C. If the Court Dismisses the Declaratory Judgment Act Claim, It Should Decline to Exercise Supplemental Jurisdiction Over the Remaining Claims.

District courts are vested with supplemental jurisdiction over state law claims if they are "so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367(a). A district court may decline to exercise supplemental jurisdiction if it "has dismissed all claims over which it has original jurisdiction."

§ 1367(c)(3). Although the district court has discretion on this matter, "the presumption is that the court will relinquish federal jurisdiction over any supplemental state-law claims." *Al's Serv. Ctr. v. BP Prods. N. Am., Inc.*, 599 F.3d 720, 727 (7th Cir. 2010). That presumption may be overcome if: (1) the statute of limitations has run on the pendent claim; (2) substantial judicial resources have already been spent and sending the case to another court would duplicate efforts; or (3) "it is absolutely clear how the pendent claims can be decided." *Sharp Elecs. Corp. v. Metro. Life Ins. Co.*, 578 F.3d 505, 514–15 (7th Cir. 2009).

Plaintiffs' claims for private nuisance, public nuisance, and an implied easement are based on state law. *See* Dkt. 25 at 1 (referencing a single "federal claim" and "pendent state law claims"); Dkt. 28 at 6, 28, 35, 37 (referencing "Wisconsin law"). If the Court dismisses the Declaratory Judgment Act claim, it should decline to exercise supplemental jurisdiction over the pendent claims. Because Plaintiffs' suit seeks prospective relief only, there is no statute-of-limitations issue. The lawsuit is in its early stages, so that if Plaintiffs had to refile in a different court, that would not duplicate significant judicial resources. And while, in the United States' view, it is "clear" that the state law claims should be dismissed, this factor is outweighed by the other two.

D. The Doctrine of Sovereign Immunity Bars Plaintiffs' Claims for Implied Easement, Public Nuisance, and Private Nuisance.

"The basic rule of federal sovereign immunity is that the United States cannot be sued at all without the consent of Congress." *Block v. North Dakota ex rel. Bd. of Univ. and School Lands*, 461 U.S. 273, 287 (1983). The Quiet Title Act, 28 U.S.C. §§ 1346(f) and 2409a, "provide[s] the exclusive means by which adverse claimants [can] challenge the United States' title to real property." *Block*, 461 U.S. at 286 (footnote omitted). The term "adverse claimants" refers to plaintiffs who "assert a claim to property antagonistic to the Federal Government's." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 219-20 (2012).

Plaintiffs' claim for an implied easement (Count IV), by which they seek to establish easements over both "Indian land and non-Indian land within the exterior boundaries of the Lac du Flambeau Reservation," Dkt. 26, Am. Compl. ¶ 71, is antagonistic to the United States' underlying title to trust land, as well as its governmental interest in protecting tribal rights and resources. An easement is, of course, an interest in real property. *Buckeye Pipe Line Co. v. Keating*, 229 F.2d 795, 798 (7th Cir. 1956). The Quiet Title Act, therefore, applies to Count IV.

The limited waiver of sovereign immunity in the Quiet Title Act provides that "[t]he United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights." 28 U.S.C. § 2409a(a). The waiver, however, "does not apply to trust or restricted Indian lands." *Id.* As a practical matter, this exclusion operates "to retain the United States' immunity from suit by third parties challenging the United States' title to land held in trust for Indians." *United States v. Mottaz*, 476 U.S. 834, 842 (1986).

Because the United States holds title to the land over which Plaintiffs seek to establish easements, Plaintiffs could only establish an easement through a suit under the Quiet Title Act against the United States.[2] *See Kinscherff v. United* States, 586 F.2d 159, 161 (10th Cir. 1978) (concluding, with respect to plaintiff's claim of "an interest by virtue of an implied easement of necessity," that "[e]asements are real property interests subject to quiet title actions"); *Schilling v. Wis. Dep't. of Nat. Res.*, 298 F. Supp. 2d 800 (W.D. Wis. 2003) (same, with respect to a claim for a prescriptive easement). That suit would fail, however, because the United States has not waived sovereign immunity with respect "to trust or restricted Indian lands." 28 U.S.C. § 2409a(a).[3]

By similar logic, the doctrine of sovereign immunity bars Plaintiffs' anticipated-private-nuisance and anticipated-public-nuisance claims (Counts II and III). In essence, Plaintiffs seek through those claims to obtain a property interest in land the United States holds in trust for the Band and the Allottees—that right being a public or private right to use the roads—and to bar the Band from excluding others from lands to which the Band holds the beneficial interest. If allowed to proceed, Plaintiffs' suit would subvert Congress' limited waiver of sovereign immunity in the Quiet Title Act.

Because they seek to establish an interest in trust land, Plaintiffs' nuisance and easement claims also conflict with the Non-Intercourse Act, which bars the transfer of

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[2] If, however, the United States puts title at issue in an affirmative suit, *see, supra,* at 10-11, this jurisdictional bar would not prevent the Plaintiffs from raising all their claims in that action.

[3] *Robinson v. United States*, 586 F.3d 683 (9th Cir. 2009) is not to the contrary. There, plaintiffs sought relief in tort regarding damage to a road across trust land in which they held an undisputed easement interest. 586 F.3d at 684. The Ninth Circuit found that "a suit that does not challenge title but instead concerns the use of land as to which title is not disputed can sound in tort or contract and not come within the scope of the QTA." *Id.* at 688. The court ultimately concluded that "the Robinsons' suit properly sound[ed] in tort, as alleged," and remanded for the district court to "consider whether jurisdiction over this claim lies under the [Federal Tort Claims Act]." *Id.* Here, in contrast, Plaintiffs seek to establish a valid interest in and legal right to use the roads at issue, despite the expiration of the ROWS.

tribal interests in land without congressional approval. 25 U.S.C. § 177. In the ROW Act, Congress provided a mechanism for the Bureau of Indian Affairs to approve ROWs across trust and restricted lands. Plaintiffs cannot use state law or common law to bypass Congress' statutory mandate. *See Oneida Cty., N.Y. v. Oneida Indian Nation of N.Y.* (*Oneida II*), 470 U.S. 226, 229, 240-44 (1985) (applying a state statute of limitations to bar Nation's "suit for damages for the occupation and use of tribal land allegedly conveyed unlawfully" would violate Congress' will).

In short, having alleged that the roads at issue "cross over Indian land," Plaintiffs have pleaded themselves out of court. Dkt. 26, Am. Compl. ¶ 72. The Indian-lands exception to the Quiet Title Act's sovereign-immunity waiver deprives the Court of subject-matter jurisdiction with respect to Plaintiffs' easement and nuisance claims.[4]

II. THE COMPLAINT SHOULD BE DISMISSED BECAUSE PLAINTIFFS FAILED TO STATE A CLAIM

A. Plaintiffs Have Not Plausibly Alleged That the Roads Are on the Inventory.

With the exception of the implied-easement claim, Plaintiffs' suit is based on an allegation that the roads are listed on the Inventory—an allegation that no longer has "facial plausibility." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The Bureau of Indian Affairs has since removed the roads from the Inventory. Dkt. 38 at 7. Plaintiffs' claim that the Band must keep the roads open to the public because the roads are on the Inventory therefore fails as a matter of law.

[4] The Quiet Title Act also does not permit the issuance of a preliminary injunction "in any action brought under this section." 28 U.S.C. § 2409a(c).

B. Plaintiffs Have Not Stated a Claim for Private or Public Nuisance.

The typical nuisance involves a property owner using his property in a way that interferes with the use and enjoyment of another's property (private nuisance) or threatens or damages the public (public nuisance). Dobbs, Keeton, Owen, *Prosser and Keeton on Torts* 619, 643 (5th ed. 1984). Plaintiffs have not alleged that Defendants have taken, or are threatening to take, any action other than excluding others from the roads. That allegation is insufficient, as a matter of Wisconsin law, to support a nuisance claim.

Black letter law dictates that "one of the most essential sticks in the bundle of rights that are commonly characterized as property [is] the right to exclude others." *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979); *Jacque v. Steenberg Homes, Inc.*, 209 Wis. 2d 605, 618, 563 N.W.2d 154, 160 (1997) ("this court and the Supreme Court recognize the individual's legal right to exclude others from private property"). As a result, exclusion of the public from private property cannot serve as a basis for a public or private nuisance claim under Wisconsin law.[5] In *Jacque v. Steenberg Homes,* a company drove a bobcat over plaintiffs' snow-covered field to deliver a mobile home to one of its customers, even though plaintiffs (retired farmers) had refused the company permission to do so. Affirming the jury's award of $1 in nominal damages and $100,000 in punitive damages against the company, the Wisconsin Supreme Court explained that "both the individual and society have significant interests in deterring intentional trespass to land, regardless of the lack of measurable harm that results." *Jacque*, 209 Wis.

[5] That the Band is allegedly not using the property on which the roads are situated for business, trade, or education is irrelevant. *See* Dkt. 28 at 34 (arguing that Defendants "lack . . . utility" in their land).

2d at 617. It went on to explain that "[p]rivate landowners should feel confident that wrongdoers who trespass upon their land will be appropriately punished. When landowners have confidence in the legal system, they are less likely to resort to 'self-help' remedies." *Id.* at 620. In no uncertain terms, the court affirmed the right of landowners to tell an individual, "No, you cannot cross our land." *Id.* at 618.

Plaintiffs' nuisance claims would not only turn this principle on its head, but those claims would strip the Band of its right—arising from its beneficial ownership of the land and from its sovereign status—to exclude individuals from its land. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 141 (1982) ("a hallmark of Indian sovereignty is the power to exclude non-Indians from Indian lands"). As discussed above, this would violate both the ROW Act and the Non-Intercourse Act. Because Plaintiffs' nuisance claims are "incompatible" with this tribal interest, they are likewise preempted by federal law. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334 (1983).[6]

III. THE COMPLAINT SHOULD BE DISMISSED UNDER RULE 19 BECAUSE THE UNITED STATES IS AN INDISPENSABLE PARTY

Federal Rule of Civil Procedure 19(a)(1) requires joinder of a party if:

> (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
>
>> (i) as a practical matter impair or impede the person's ability to protect the interest; or

[6] Plaintiffs argue that courts "across the country for centuries" have recognized these types of nuisance claims, Dkt. 28 at 32, but Plaintiffs ignore the fact that the United States holds title to the lands in trust for the benefit of the Band and the Allottees. None of the cited cases involved Indian trust or restricted land. *See id.* at 32-33 (citing cases).

> (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

The United States is a necessary party because Plaintiffs' suit seeks to establish title in lands to which the United States holds legal title. *See Heckman v. United States*, 224 U.S. 413, 437 (1912) (the United States has "the right and duty . . . to enforce by all appropriate means the restrictions designed for the security of the Indians.").[7] As explained above, the Congressionally authorized mechanism for obtaining title to the United States' land is the Quiet Title Act. When proceeding under that statute, the proper defendant is the United States. 28 U.S.C. § 2409a. Although Plaintiffs are not proceeding under the Quiet Title Act (and could not do so because of the Indian-lands exception), that does not change the fact that this type of suit challenges the United States' title to land. *See Heckman*, 224 U.S. at 438 ("[a] transfer of the [Indian land] is not simply a violation of the proprietary rights of the Indian. It violates the governmental rights of the United States."). Further, the United States has a governmental and a property interest in ensuring that right-of-way grantees comply with the ROW Act and that an easement is not granted outside of the limited circumstances Congress allows.

Disposing of the action in the United States' absence would impair its ability to protect these interests. *See* Charles Wright & Arthur Miller, 7 *Fed. Prac. & Proc. Civ.*

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[7] *Compare Sokaogon Chippewa Cmty. v. State of Wis., Oneida Cnty.*, 879 F.2d 300, 304 (7th Cir. 1989) (holding that the United States was not indispensable to a tribe's action seeking to establish treaty rights such as hunting and fishing on a tract of land owned by Exxon, as the United States was no more than Exxon's predecessor in title); *Wisconsin v. Baker*, 464 F. Supp. 1377, 1383-85 (W.D. Wis. 1978) (holding that the United States was not indispensable to the state's action against a tribe where the United States did not hold title to the land in dispute and its interests would be affected "only indirectly").

§ 1617 (3d ed.) (April 2022 update) ("courts have found that the United States must be made a party to any action in which the relief sought would interfere with its obligation to protect this property against alienation or condemnation"). The United States cannot defend its property interests or fully participate in the litigation if it is not a party. *Compare Sokaogon Chippewa Cmty.*, 879 F.2d at 304 ("As for the U.S., it has declined to take any position on its indispensability, so it must not fear the consequences of a judgment in this suit."); *Baker*, 464 F. Supp. at 1383 ("No expression of the position of the United States has been made to the court.").

Allowing the case to proceed without the United States also carries the risk of exposing the parties to inconsistent obligations. For example, if Plaintiffs were to obtain a declaration in the present suit that 25 C.F.R. § 170.114(a) requires the Band to keep the roads open to the public, the United States would not be bound by the ruling. At the same time, the United States could obtain a ruling in its own litigation that the road constitutes a trespass on tribal land.[8]

Because the United States has not waived sovereign immunity with respect to Plaintiffs' suit, the Court cannot solve this problem by ordering joinder and it "must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed." Fed. R. Civ. P. 19(b). Here, equity requires dismissal. A judgment rendered in the United States' absence would resolve only one

[8] To the extent that Plaintiffs seek to challenge the validity of the removal of the roads from the Inventory in this case, that would in effect be a challenge to agency action to which the United States would be a necessary party, which could only be adjudicated, if at all, in the context of the Administrative Procedure Act.

potential piece of the ultimate controversy—an interpretation of the Inventory regulation. Obtaining this type of "advance ruling on an affirmative defense" provides an unfair litigation advantage and disrupts the usual course of federal litigation. *Calderon*, 523 U.S. at 747. And, as explained above, it would not resolve the controversy in any event.

CONCLUSION

For all the reasons stated above, the Court should grant Defendants' motion to dismiss.

Dated: April 10, 2023.

Respectfully submitted,

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