UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

DONALD AND BONNIE POLLARD,
et al.

Plaintiffs,

v.

Case No. 3:23-cv-135

JOHN JOHNSON, SR.,
et al.

Defendants.

PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT

Plaintiffs, by and through their attorneys, Reinhart Boerner Van Deuren s.c., submit this Brief in opposition to Defendants' motion to dismiss Plaintiffs' amended complaint and in response to the Amicus Brief filed by the United States of America.

Unless otherwise specified, references in this Brief to Plaintiffs' "claims" only contemplates Plaintiffs' Count I (violation of Federal-Aid Highway Act and Tribal Transportation Program ("TTP") seeking declaratory and prospective injunctive relief), Count II (anticipated private nuisance), and Count III (anticipated public nuisance). Plaintiffs respectfully request the Court dismiss without prejudice Plaintiffs' implied easement claim (Count IV).

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INTRODUCTION

I. The Court Has Subject Matter Jurisdiction in the Form of a Federal Question and Thus Should Exercise Supplemental Jurisdiction over Plaintiffs' Nuisance Claims; Sovereign Immunity Does Not Apply to the Individual Defendants; and the Tribe and United States Are Not Necessary Parties to this Case.

All of Defendants' arguments to persuade the Court to dismiss Plaintiffs' claims are flawed. First, Defendants are incorrect that there is no longer a federal question because the Tribe purportedly removed the Roadways from the National Tribal Transportation Facility Inventory ("NTTFI") list after the filing of this lawsuit. The Roadways are still "listed" on the NTTFI pursuant to federal administrative law and regulations governing the effectiveness or finality of Bureau of Indian Affairs' decisions or actions. Thus, there is still squarely a federal question involving interpretation of the Federal-Aid Highway Act, the Tribal Transportation Program ("TTP"), and the implementing regulations as applied to Defendants' actions of barricading the Roadways that must be open to the public under the plain language of federal law, and such federal issue is intertwined with Plaintiffs' state-law anticipated nuisance claims that Plaintiffs' right to relief necessarily depends on resolution of these questions, making the federal issue not only substantial, but also integral to Plaintiffs' right to relief.

Second, because there is a federal question providing the Court with subject matter jurisdiction as described above and in Plaintiffs' prior filings, the Court should exercise supplemental jurisdiction over Plaintiffs' anticipated nuisance claims under 28 U.S.C § 1367.

Third, sovereign immunity does not bar Plaintiffs' claims, because the individual Defendants lacked delegated power or authority from the Tribal Council to barricade the Roadways (and to maintain the barricades for the 6-week span they prevented use of the Roadways). Defendants admit that they met as Tribal Council to pass a resolution to "ratify" their acts of closing the Roadways on March 28, 2023 (eight weeks after the individual Defendants

closed the Roadways). Therefore, the individual Defendants acted *ultra vires* and sovereign immunity does not apply. Plus, even if the Tribal Council had purported to delegate such power or authority to the individual Defendants (which it did not do), Defendants' conduct is an ongoing violation of federal law and thus the Defendants are not immune from suit for that reason too.

Fourth, neither the Tribe nor the United States is a necessary party to this case. Both Defendants and the United States conflate and confuse two separate and independent legal issues—with one issue (the one in this case) relating to *Defendants' conduct under the Federal-Aid Highway Act and TTP and the affirmative relief sought by Plaintiffs based on the Federal-Aid Highway Act and TTP*, and the other issue (one that is, at best, on this case's periphery) relating to *alleged trespass by non-Tribe members under the ROW Act and Defendants' and the United States' potential (but not currently sought) affirmative relief for alleged violations of the ROW Act*. *See* Defs.' Brief in Support of Motion to Dismiss ("Defs.' Brief"), ECF No. 38, at 19.[1] The former legal issue (Defendants' actions under the Federal-Aid Highway Act and TTP) is the only one that the Court needs to decide for Plaintiffs to get the narrow but full relief sought based on the Federal-Aid Highway Act and TTP. Defendants' actions under one statutory and regulatory scheme is the main issue *in this suit with respect to Plaintiffs' legal rights under that one scheme*. Any legal issue for which the Tribe and the United States might seek affirmative relief based on alleged violations of a separate and independent scheme—regardless of the possibility that the Town or residents of the Roadways could use a different law (the Federal-Aid Highway Act and TTP) in a defensive posture in that distinguishable litigation relating to other parties' claimed legal rights—

[1] "The Plaintiffs' requested relief includes the allowance of non-tribal access over Indian lands." *Id.* But that misstates Plaintiffs' Prayer for Relief, as Plaintiffs do not seek any decision or declaration on issues relating to alleged trespass under the ROW Act; instead, Plaintiffs seek the enjoinment of the individual Defendants from barricading the Roadways under a different federal scheme, the Federal-Aid Highway Act and TTP. If the Court were to enjoin the Defendants from barricading the Roadways again based on the Federal-Aid Highway Act and TTP, the Court's order could be contingent on the Roadways remaining on the NTTFI or could be in effect until any administrative proceeding and Administrative Procedure Act litigation relating to the Roadways remaining on the NTTFI is fully resolved.

is a conceptually and practically different legal issue than what is at the heart of this case. The United States and Defendants implicitly argue that because they might assert claims under federal scheme X (ROW Act) against the Town of Lac du Flambeau, Plaintiffs cannot proceed with Plaintiffs' claims based on federal scheme Y (the Federal-Aid Highway Act and TTP) due to joinder issues relating to the government's and Defendants' potential claims under federal scheme X, and Plaintiffs must wait to raise issues under federal scheme Y until Plaintiffs wish to use federal scheme Y in a defensive posture in a separate case dealing with other parties' claimed rights under federal scheme X. It is a misleading and incorrect argument.

The United States, consistent with Defendants' erroneous shaping of the central legal issue in this case, states: "[T]he underlying controversy here is whether Plaintiffs have a legal right to use the sections of road at issue." United States Amicus Brief at 3. This is a miscomprehension of *this suit and what Plaintiffs seek* and need to access their homes. Although the United States and Defendants might wish that that is the underlying controversy in this case, it simply is not. The United States' assertion would be correct that "the underlying controversy . . . is whether Plaintiffs have a legal right to use" the Roadways *in the context of an affirmative defense in a suit brought by the United States and Defendants seeking their own relief under the ROW Act*. *See id*. But the underlying controversy in Plaintiffs' suit, and independent of the ROW Act, is whether the individual Defendants can lawfully barricade roads which are public and must remain open and available for public use under the Federal-Aid Highway Act and TTP, regardless of others' alleged trespass in claimed violation of a separate federal scheme. The legal issue of any alleged trespassing supposedly in violation of the ROW Act is not dispositive of and is independent of the legal issue of Defendants' conduct, insofar as Plaintiffs' right to relief, that clearly violates the plain language of separate federal law. Indeed, the United States contradicts itself by saying that

"the ROW Act and the TTP operate in separate spheres" but then constantly implanting an erroneous critical assumption throughout its Amicus Brief that the issue of Plaintiffs' conduct under the ROW Act is somehow dispositive of or directly connected to the issue of Defendants' conduct under the Federal-Aid Highway Act and TTP.

Defendants are apparently trying to raise the ROW Act in defense to Plaintiffs' claims but that argument fails because *even if* trespass existed under 25 C.F.R., Part 169, Subpart F (Plaintiffs assert that it did not and does not), "[t]he Indian landowners may pursue any available remedies under applicable law, including applicable tribal law." 25 CFR § 169.413 (emphasis added). The Federal-Aid Highway Act and TTP are "applicable law." By necessary extension, section 170.114(a) of 25 C.F.R. is "applicable law." Thus, the Defendants taking actions that prohibit "Tribal transportation facilities listed in the approved NTTFI [from being] open and available for public use," when such roads "must be open and available for public use" (25 C.F.R. § 170.114(a)), plainly violates applicable law and therefore is *not* an "available remedy under applicable law" to Indian landowners to address any alleged violation of 25 C.F.R., Part 169, Subpart F.[2]

Indeed, Defendants appear to know this legal reality as shown by the Tribe surreptitiously seeking to remove the Roadways from the NTTFI, during the pendency of this litigation, in a post-hoc fashion, after Plaintiffs filed their original complaint. *See* ECF No. 43-5, Ex. E (Resolution No. 69(23), dated (and passed on) March 10, 2023—10 days after Plaintiffs filed their original complaint—stating "the Tribal Council believes it is in the best interests of the Tribe to immediately remove the Four Roads from its entries on the National Tribal Transportation Facility

[2] Also, applicable federal law trumps any applicable tribal law. *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians,* 471 U.S. 845, 851 (1985) ("[T]he power of the Federal Government over the Indian tribes is plenary."); *Escondido Mut. Water Co. v. La Jolla, Rincon, San Pasqual, Pauma, & Pala Bands of Mission Indians*, 466 U.S. 765, 787 n.30 (1984) ("[I]t is clear that all aspects of Indian sovereignty are subject to defeasance by Congress.").

Inventory" and "approv[ing] and authoriz[ing] the immediate removal of the Four Roads from the Tribe's entries on the Tribal Transportation Facility Inventory"); & ECF No. 43-9, Ex. I (March 30, 2023 BIA letter to Defendant Johnson showing that the BIA received on March 15, 2023 the Tribe's request to remove the Roadways from the NTTFI).

Moreover, the incorrect notion that the Tribe and United States are necessary parties to this case directly relates to Defendants and the United States trying to erroneously put title to the land on which the Roadways lie at issue; but who has the title to the land is not at issue by Plaintiffs' claims.[3] Specifically, insofar as Plaintiffs' affirmatively sought relief and legal issues raised by Plaintiffs' claim based on the Federal-Aid Highway Act and TTP as applied to Defendants' actions of barricading the public roads and requiring permits to use roads that must remain open and available for the public under federal law, land title is not at issue, as Plaintiffs' claims do not challenge the United States' title to the land held in trust for the Tribe. *Cf. Robinson v. United States*, 586 F.3d 683, 688 (9th Cir. 2009) ("[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 [Quiet Title Act].").

Plaintiffs' actions under (in the words of the United States) a "separate" statutory scheme are not the issue here that might otherwise raise land title issues. *See* United States Amicus Brief at 5. Defendants and the United States attempt to improperly reframe the actual underlying controversy in this case and the narrow declaratory and injunctive relief Plaintiffs seek solely based on Defendants' actions under the Federal-Aid Highway Act and TTP and to improperly reframe the case to one relating to affirmative claims that they would prefer to put at issue in this case but

[3] Plaintiffs are no longer seeking any property interest in the land on which the Roadways lie, as shown by Plaintiffs' request for the Court to dismiss without prejudice the implied easement claim (Count IV).

have not done so regarding alleged trespass under the ROW Act. They inappropriately conflate and confuse two "separate" federal schemes in a faulty attempt to broaden the case beyond what Plaintiffs' need or seek as full relief from the Court. *See* United States Amicus Brief at 5.

The United States tries to transform Plaintiffs' claims under the Federal-Aid Highway Act and TTP to instead be litigation based on the ROW Act. But the ROW Act presents an independent and separate case. The United States recognizes the separate affirmative legal issues by indicating that it may file its own litigation seeking to vindicate rights it claims on behalf of the Tribe under the ROW Act. *See* United States Amicus Brief at 11 ("The Department of Justice is currently considering whether to file a trespass action against the Town."). While the Town could raise the Federal-Aid Highway Act and TTP in defense to such new litigation if it arises, Plaintiffs are not the Town and are not in a defensive posture seeking to use the Federal-Aid Highway Act and TTP in that manner in response to others' trying to vindicate their claimed rights under the ROW Act.

The Tribe couches its Rule 19 argument on the idea that the Roadways are within the Reservation and that relief granted to Plaintiffs would "as a practical matter" impede the Tribe's interest in its beneficial interest in the United States's land that it holds in trust for the Tribe. Defs.' Brief at 18–19. But this is a headscratcher, because the Tribal Council did not authorize or delegate power to the individual Defendants in the first place to construct the barricades or authorize the barricades to remain in place when the barricades were physically preventing use of the Roadways. *See infra* § ii. The Tribe played no authoritative part in constructing or maintaining the Roadways. *See infra* § ii. Thus, the same individuals who constructed the barricades without Tribal Council authorization or delegated power to do so can be enjoined from again barricading the Roadways in the future without any "practical" impact on the Tribe's interest in its land, as the Tribe has not claimed any "practical" impact on their interest in its land when the Defendants, in an *ultra vires*

manner, barricaded the Roadways, and such prospective injunctive relief by the Court can be shaped flexibly, including being contingent on the Roadways remaining on the NTTFI or otherwise being public roads or being effective during the pendency of any BIA appeal proceeding and potential Administrative Procedure Act litigation.[4]

Moreover, the Tribe's interest in its land is again related to the separate and independent legal issue of alleged trespass under the ROW Act, which is distinguished from the issues presented by Plaintiffs' claims.

Also, ironically, the individual Defendants' *ultra vires* acts that violate the Federal-Aid Highway Act and TTP implicate the Tribe's land interest only to the degree that the Tribe has a potential claim against the individual Defendants who hold positions on the Tribe's governing body but who acted on January 31, 2023 through March 13, 2023 unlawfully by barricading roads on which the land held in trust for the Tribe sits without the individual Defendants having received the delegation of power or authority from the Tribe via the Tribal Council to do so pursuant to the Tribe's own constitution and bylaws.

II. A Mere Handful of Misleading and Incorrect Assertions in Defendants' Motion to Dismiss Filings Show Plaintiffs' Amended Complaint Succeeds in Stating Claims Upon Which Relief Can be Granted and, Indeed, Show Plaintiffs' Claims Have Merit

Two assertions in Defendant Jamie Ann Marie Allen's Affidavit, plus an absurd (and incorrect) assertion in Defendant George Thompson's Affidavit, and a clear misunderstanding of federal regulations governing Bureau of Indian Affairs' ("BIA") decisions and actions show that: (1) the Court has subject matter jurisdiction in the form of a federal question; and (2) at least three of the Defendants in their individual capacities took non-voting actions that they lacked the

[4] *See Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 336 (1999) ("Since our earliest cases, we have valued the adaptable character of federal equitable power."); *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944) ("The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mold each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it.").

delegated power or authority (from the Tribe via the Tribal Council) to take at the time of their actions, and Defendants' current temporary access permits regime is an ongoing violation of federal law giving rise to the application of the *Ex parte Young* doctrine here.[5]

In light of the above-mentioned realities, no additional parties, like the Tribe or the United States, need to be joined, and with the Court having subject matter jurisdiction in the form of a federal question, Plaintiffs' anticipated nuisance claims should not be dismissed, as the Court should exercise supplemental jurisdiction over Plaintiffs' state law claims.

First assertion in Defendant Allen's Affidavit: Defendant Allen says that "Motion 5-23 . . . was the Tribal Council's decision to place barriers on the [R]oadways on January 31, 2023." Allen Aff., ECF No. 43 ¶¶ 10-12. This assertion is misleading and disingenuous. Defendant Allen's own Exhibit B says that Motion 5-23, which appears to have been a verbal vote and passed on January 17, 2023, was simply approving the decision "to send [a] letter to homeowners, Town of LDF and Title companies and inform them of trespassing." ECF No. 43-2. Exhibit B, by its own plain language, is not whatsoever a "Tribal Council[] decision to place barriers on the [R]oadways on January 31, 2023," *see* Allen Aff., ECF No. 43 ¶ 11. Defendant Allen is merely attempting to confuse two separate decisions—one that actually was made by the Tribal Council (sending the letter) and one that was not made by the Tribal Council (barricading the Roadways)—to erroneously cloak Defendants under the doctrine of sovereign immunity.[6]

[5] Defendants admit that under their access permits regime, the Roadways are not open to the public and not available for public use; thus, clearly showing Defendants' ongoing violation of the Federal-Aid Highway Act and TTP. Defs.' Response to Pls.' Proposed Findings of Fact, ECF No. 42, Defs.' Response to ¶ 10 ("Undisputed" that "the Roadways may be used only by the 'homeowners on [the Roadways],' and Resolution No. 67(23) states that the Temporary Access Permits (purportedly) 'grant each homeowner on [the Roadways] the ability to lawfully access their property for the duration of the Temporary Access Permit[s].' (Am. Compl. ¶ 4.)").

[6] Notably, Exhibit B to Defendant Allen's Affidavit does not actually include the "Tribal Secretary Minutes of the January 17, 2023 Special Tribal Council Meeting," which could shed more light on what Motion 5-23 actually is by giving full context or what the Tribal Council members were actually casting votes on via Motion 5-23. Exhibit B

In turn, the letter referenced in Exhibit B is Exhibit C to Allen's Affidavit, which represents a letter, dated January 19, 2023, sent to various recipients. This letter says "commencing on January 31, 2023, **the Tribe reserves the right to limit access** to [the Roadways]…. This right to limit access **may include**, but is not limited to, … **physical barriers**." ECF No. 43-3 at 1 (emphasis added); *compare id.*, *with* Allen Aff., ECF 43 ¶ 13 (misrepresenting that the letter "explain[s] … the Tribe's intent 'to limit access to [the Roadways] … includ[ing] … physical barriers.'" and completely omitting that the letter actually says the Tribe "reserves the right to limit access,"). Again, even by extension via Exhibit C and taking into account the letter's language, Exhibit B is not at all a "Tribal Council[] decision to place barriers on the [R]oadways on January 31, 2023," *see* Allen Aff., ECF No. 43 ¶ 11, and Exhibit C does not even reflect a decision by the Tribal Council to actually barricade the Roadways on January 31, 2023, prior to the individual Defendants constructing the barricades on that day and maintaining them for six weeks.

Second assertion in Defendant Allen's Affidavit: Resolution No. 100(23) proves the individual Defendants acted outside the delegated powers of Tribal Council when they barricaded the roads on January 31, 2023. On March 28, 2023—two months after the barricades were erected—Tribal Council passed Resolution No. 100(23), which "**ratified and reaffirmed Motion 5-23** and all ***prior actions*** taken by Tribal Council ***and/or*** **Tribal Employees** to restrict access to the [Roadways]." Allen Aff., ECF No. 43 ¶¶ 29-31 (emphasis added).[7] Clearly, in preparation for

shows that its terse substance is from "an excerpt taken from the Tribal Secretary Minutes of the January 17, 2023 Special Tribal Council Meeting." ECF No. 43-2.

[7] Exhibit H appears to mislead what Exhibits B and C actually said and effectuated. *See* Allen Aff., ECF No. 43-8, at 2 ("[O]n January 17, 2023, the Tribal Council approved and adopted Motion 5-23 (attached) authorizing President Johnson to send letters to the landowners alerting them of restricted access on January 31, 2023 and directing tribal staff to deny access on said date."). Exhibit B does not "direct tribal staff to deny access on said date," but rather approved the sending of a letter in which Defendant Johnson says the Tribe "reserves the right to limit access" to the Roadways and one such claimed reserved right "may include . . . physical barriers." ECF No. 43-3 at 1. Authorizing the sending of a letter that reserves the right to take an action is not the same thing as authorizing that action. At the

their Motion to Dismiss, the Defendants passed Resolution No. 100(23) in an attempt to retroactively give authority for individuals' actions that had already occurred without the delegated power in the form of a resolution or ordinance as the Tribe's own constitution and bylaws require. Yet, Defendants fail to cite to anything in the Tribe's constitution or bylaws that allows Tribal Council members to retroactively delegate power or give authority to previously unauthorized non-voting acts of tribal members, regardless of whether the individual actors are officers. And even if the Tribe's constitution or bylaws purport to retroactively authorize previously unauthorized non-voting actions, Supreme Court precedent holds as actionable tribal officials' ongoing violations of federal law—such as requiring permits to use roads that must remain open and available for public use—supersedes any tribal law attempting to skirt Supreme Court precedent. *See Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 281 (1997) ("An allegation of an ongoing violation of federal law where the requested relief is prospective is ordinarily sufficient to invoke the *Young* fiction" such that the officer of a sovereign is not immune from suit).

Absurd (and incorrect) assertions in Defendant Thompson's Affidavit: Defendants' complete lack of empathy for Plaintiffs who were barricading from their homes for six weeks is reflected in the absurd statements in Defendant Thompson's Affidavit. He asserts that "some of the Plaintiffs' homes can be directly accessed via lakes that abut their properties," and "all of the Plaintiffs' homes can be accessed via the airspace above their properties." Thompson Aff., ECF No. 44 ¶ 11. It is simply preposterous for Defendants to suggest that Plaintiffs' own or have access to helicopters and airplanes and infrastructure to take off and land to access their homes. Moreover, the size of East Ross Allen Lake and the restriction on gasoline engines preclude float plane or

very least, the motion to dismiss stage is not the proper place to resolve this apparent evidentiary issue that goes to the heart of whether Defendants acted, or are acting, *ultra vires* by barricading the Roadways and issuing temporary access permits to use federally funded public roads.

helicopter use. *See* Town of Lac du Flambeau, Ordinance 93-1B, Boating Ordinance, § V (2009), http://www.tn.lacduflambeau.wi.gov (last visited April 26, 2023); Ross Allen Lake, Lac Du Flambeau, WI, *Google Maps*, https://www.google.com/maps/place/Ross+Allen+Lake (last visited April 25, 2023); Ross Allen Lake, *Wis. Dep't of Nat. Res.*, https://dnr.wi.gov/lakes/lakepages (last visited April 25, 2023) (lake is 62 acres with a maximum depth of 24 feet). Additionally, there is no public boat launch on Ross Allen Lake, so unless the lake is safely solidly frozen over, the lake does not provide "direct[] access[]" to homes on the lake as Defendant Thompson claims. *See* Boat Access and Shorefishing, *Wis. Dep't of Nat. Res.*, https://dnrmaps.wi.gov (last visited April 26, 2023) (interactive map maintained by WDNR that identifies public boat access sites across Wisconsin; no public boat access site for Ross Allen Lake indicated on the map).

Defendants' misunderstanding of federal regulations governing Bureau of Indian Affairs' decisions and actions: Defendants devote four pages to the faulty argument that, because the Roadways are not listed on the NTTFI anymore, there is no federal question. Defs.' Brief at § 1, pp. 4–8. However, as discussed in Plaintiffs' Reply Brief in support of their amended motion for a preliminary injunction (ECF No. 54) and further below (§ I.A), Defendants' argument's erroneous premise destroys its conclusion. The erroneous premise—that the Roadways have been de-"listed" from the NTTFI—appears to derive from Defendants' (and the United States') failure to look to the Code of Federal Regulations governing BIA decisions and actions, specifically, the lack of immediate effectiveness and finality of such decisions and actions, including during the administrative appeal process. *Compare* 25 C.F.R. § 2.6, *and* 43 C.F.R. § 4.314, *with* Amicus Brief of the United States, ECF No. 53, at 2 ("[T]he [BIA] 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)."), *and id.* at § II.A ("Plaintiffs' suit is

based on an allegation that the roads are listed on the Inventory—an allegation that no longer has 'facial plausibility.' The Bureau of Indian Affairs has since removed the roads from the Inventory. 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." (internal citations omitted)), *and* Defs.' Brief at 6 (claiming that "a simple check of the public record is all that is needed for the Court" to find that it no longer has subject matter jurisdiction but neglecting to also check the Code of Federal Regulations regarding effectiveness and finality of BIA decisions or actions).[8]

BACKGROUND

On January 17, 2023, Motion No. 5-23 was passed by the Tribal Council. Allen Aff., Ex. B, ECF No. 43-2. It appears to have been a verbal vote. *See id.* According to a January 20, 2023 update from Recording Secretary/Tribal Operations Clerk Suzanne Burgess to Attorney Adams, Motion No. 5-23 was the Tribal Council's authorization "to send [a] letter to homeowners, Town of LDF and Title companies and inform them of trespassing." *Id.* This update to Attorney Adams is from "an excerpt taken from the Tribal Secretary Minutes of the January 17, 2023 Special Tribal Council Meeting," but the Minutes themselves are not attached to Defendant Allen's Affidavit.

On January 20, 2023, according to Defendant Allen's Affidavit, Jessie Peterson "placed a copy of the letters identified in Exhibit C [to Allen's Affidavit] in the U.S. Mail." ECF No. 43 ¶ 14. Exhibit C is a letter dated January 19, 2023, that seems to be the letter referenced in Exhibit B

[8] Even if the BIA decision to remove or action of "de-listing" the Roadways from the NTTFI becomes final and effective before the Court rules on the merits of the case, the Court can stay the case pending the outcome of Plaintiffs' potential Administrative Procedure Act litigation challenging the BIA's utter lack of any due process to interested parties and completely standardless process by which the BIA fails to take into account all affected or interested parties' interests when deciding whether to approve a tribe's request to remove roads from the NTTFI listing. *See* 5 U.S.C. § 706; *Leyva v. Certified Grocers of California Ltd.*, 593 F.2d 857, 863–64 (9th Cir. 1979) (citing *Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.*, 342 U.S. 180 (1952)).

to Allen's Affidavit. ECF No. 43-3 at 1; ECF No. 43 ¶¶ 10-14. This letter is from Defendant Johnson to various recipients. The substance of the letter is its middle paragraph, which states:

> Unfortunately, significant progress has not been made to bring this issue to a resolution that is mutually beneficial for all parties. Due to this, the Tribe considers your right-of-way to have expired nearly ten years ago and your use of said right-of-way since expiration is and will be considered trespassing under 25 C.F.R. §169.410. Additionally, commencing on January 31, 2023, the Tribe *reserves the right to limit access* to Annie Sunn Lane, Center Sugarbush Lane, East Ross Allen Lake Lane, and Elsie Lake Lane as the rightful owner of lands those roads traverse. *This right to limit access may include*, but is not limited to, posting of signs, road checkpoints, and/or *physical barriers*.

ECF No. 43-3 at 1 (emphasis added).

Despite what Exhibits B and C say on their face, Defendant Allen misleadingly states that Motion No. 5-23 "provided notice that the Tribe would be placing physical barriers on the roads as soon as January 31, 2023," and that the vote on Motion No. 5-23 "was the Tribal Council's decision to place barriers on the [R]oadways on January 31, 2023." ECF No. 43 ¶¶ 10-11.

Further showing that Exhibits B and C do not show any decision by the Tribal Council to actually barricade the Roadways, on January 27, 2023 (10 days after the January 17, 2023 letter), according to Defendant Allen and without providing any supporting documents, "the Tribal Council directed that the Tribal Police Department notify all homeowners and individuals that may be affected by the placement of the barriers directly via physical service." ECF No. 43 ¶ 15.

According to Thomas Bill, Chief of Police of the tribal police department, "*On January 27, 2023,* the Tribal Council directed me to visit each of the residences that would be affected by the barriers, ***should they be placed***, and deliver letters to the homeowners notifying them of the impending closures. I was provided the letters to deliver by Jessie Peterson, Lac du Flambeau Tribal Lands Management Department." ECF No. 45 ¶ 7 (emphasis added). Neither Peterson nor Bill nor Allen attach a copy of the letter or clarify what the letter actually says.

Oddly, three whole days after January 27, 2023, on January 30, 2023, *one day before the Defendants ended up barricading the Roadways*, Bill and Jacob Bryner say that they "went to the residences affected on [the Roadways] and hand delivered the letters." ECF No. 45 ¶ 8. Bill says that on January 30, 2023, *one day before the Defendants ended up barricading the Roadways*, Bill and Bryner "met with approximately 10 individuals in person, and where we could not make direct contact with the individuals living in the residences affected, left the letters where they would be most obvious to the residents, such as in front doors or garage door jambs." *Id.* ¶ 9.

On January 31, 2023, the individual Defendants participated in, oversaw, or directed the construction of barricades on the Roadways. Am. Compl., ECF No. 26 ¶¶ 2, 34, 35, 41, 92.[9]

On February 2, 2023, *after the barricades had been constructed and while they remained in place on the Roadways*, the Tribal Council passed Resolution No. 30(23), sending a letter and the Resolution itself to Superintendent, Great Lakes Agency, BIA, Diane Baker. ECF No. 43 ¶¶ 16-19. The letter and Resolution "formally request[s] that the BIA 'take action to recover possession, including eviction, on behalf of the Indian landowners and pursue any additional remedies available under applicable law.' *See* 25 C.F.R. § 169.413." ECF No. 43-4, Ex. D at 1.

On March 10, 2023, *10 days after Plaintiffs filed their original complaint*, the Tribal Council passed with a majority vote Resolution No. 69(23). ECF No. 43 ¶ 20. Resolution No. 69(23) states that "the Tribal Council believes it is in the best interests of the Tribe to

[9] "As averred in detail below, on January 31, 2023, the Defendants barricaded and, thereby, closed the Roadways, which, under the Federal-Aid Highway Act of 1956, 23 U.S.C. §101 et seq. (the 'Federal-Aid Highway Act'), as amended; and its Tribal Transportation Program, 23 U.S.C. §§ 201–202 (the 'Tribal Transportation Program'), and implementing regulations at 25 C.F.R. Part 170 (the 'federal Tribal Transportation Program implementing regulations'), must be open and remain open to the public…. Upon information and belief, Mr. Johnson was personally present during the erection of the barricades and supervised the same. … Upon information and belief, Mr. Thompson assisted in physically placing the barricades…. Upon information and belief, Mr. [Lyle Thomas] Chapman assisted in physically placing the barricades…. [O]n January 31, 2023, Defendants placed barricades across the Roadways, or otherwise caused those barricades to be placed across the Roadways, thereby closing the Roadways and restricting or completely preventing the Plaintiffs' ability to get to and from their respective properties."

immediately remove the Four Roads from its entries on the National Tribal Transportation Facility Inventory" and "approv[ing] and authoriz[ing] the immediate removal of the Four Roads from the Tribe's entries on the Tribal Transportation Facility Inventory"). ECF No. 43-5, Ex. E.

Also on March 10, 2023, the Tribal Council passed Resolution No. 67(23), which represents Defendants' ongoing violation of federal law making them subject to application of *Ex parte Young*. Resolution No. 67(23) purports to establish a revocable temporary access permits regime for Plaintiffs to use the Roadways and denies the public the ability to use the Roadways. According to the Defendants' Resolution No. 67(23), the Temporary Access Permits are conditioned on satisfactory performance by the Town and other stipulations set out in Resolution No. 67(23). The first of three potential terms of the Temporary Access Permits was 30 days, which expired on April 12, 2023. Resolution 67(23) allows a maximum of two, 30-day renewals. Even if renewed twice, and assuming Defendants do not revoke them sooner and assuming there is no lapse in renewing, the Temporary Access Permits will expire on June 13, 2023.

Upon the Town paying for the temporary access permits on March 13, 2023 (ECF No. 43 ¶ 26), Resolution No. 67(23) directed the Tribe's Land Management Department to approve the "temporary removal of the chain blocking access to the [Roadways], but not the existing cement barricades." ECF No. 43-6 at 2. In turn, Defendant Thompson says that pursuant to Resolution No. 67(23), he instructed Tribal Roads Department employees to remove the chains from the barr[icades] on the Roadways," which they did on March 13, 2023. ECF No. 44 ¶¶ 28-29.

The requirement for temporary access permits remains in place and ongoing. *See* ECF No. 67(23) at 2–6 ("[T]his Tribal Council, in Special Session assembled, hereby authorizes the LDF Land Management Department to re-issue the Temporary Access Permits two additional

times, for a total maximum period of 90 days of temporary access."; showing access permits first issued on March 13, 2023).[10]

On March 15, 2023, *15 days after Plaintiffs filed their original complaint*, the BIA received a copy of Resolution No. 69(23) (the resolution seeking the Roadways' removal from the NTTFI). ECF No. 43-9, Ex. I (March 30, 2023 BIA letter to Defendant Johnson stating that the BIA received the Tribe's request to remove the Roadways from the NTTFI on March 15, 2023).

On March 28, 2023, ***almost two months after the barricades were erected***, the Tribal Council passed by a majority vote Resolution No. 100(23), which "**ratified and reaffirmed Motion 5-23 and all prior actions taken by Tribal Council and/or Tribal Employees to restrict access to the [Roadways]**." ECF No. 43 ¶¶ 29-31 (emphasis added).

ARGUMENT

I. The Court has Subject Matter Jurisdiction Over the Lawsuit because the Roadways remain listed on the NTTFI and Plaintiffs' right to relief necessarily depends on resolution of a substantial question of federal law.

A. Defendants are incorrect that there is no federal question because, they erroneously claim, the Roadways have been removed from the NTTFI list.

Defendants incorrectly claim that "because the Roadways are not listed on the NTTFI, any alleged applicability of the Federal-Aid Highway Act, the Tribal Transportation Program, and its implementing regulations are immaterial," and therefore, "there is no federal question for the Court to decide in Count I of the Plaintiffs' Complaint, as required by 28 U.S.C. § 1331." Defs.' Brief

[10] The Tribal Council members (the Defendants) lack the authority to enact this Resolution and implement its measures that are ongoing, including the access permits regime, subjecting them as individual Defendants to this suit, because "when a plaintiff sues a[n] official alleging a violation of federal law, the federal court may award an injunction that governs the official's future conduct, but not one that awards retroactive monetary relief. Under the theory of *Young*, such a suit would not be one against the [sovereign] since the federal-law allegation would strip the . . . officer of his official authority." *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 102–03 (1984) (citing *Edelman v. Jordan*, 415 U.S. 651, 666–67 (1974)); *Ex parte Young*, 209 U.S. 123 (1908).

at 4. On that basis, Defendants claim the Court lacks subject matter jurisdiction over Count I and thus should dismiss it under Fed. R. Civ. P. 12(b)(1). *Id.*

"When ruling on a motion to dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1), the district court must accept as true all well-pleaded factual allegations[] and draw reasonable inferences in favor of the plaintiff." *Ezekiel v. Michel*, 66 F.3d 894, 897 (7th Cir. 1995). The court may "look beyond the jurisdictional allegations of the complaint and view whatever evidence has been submitted on the issue to determine whether in fact subject matter jurisdiction exists." *Id.*

Defendants go on at length claiming that the Roadways are no longer listed on the NTTFI and "simple check[s]" on the internet can, according to Defendants, confirm that. *See* Defs.' Brief at 4-8. But, as the *Ezekiel* court made clear, the Court may view Plaintiffs' Reply Brief in Support of Plaintiffs' Amended Moton for a Preliminary Injunction, ECF No. 54, and Plaintiffs' Supplemental Jurisdictional Statement, ECF No. 25, to determine whether in fact subject matter jurisdiction exists. As laid out in the reply brief in support of Plaintiffs' amended motion for a preliminary injunction, "[a] simple check of the public record" is not all that is needed for the Court to determine whether the Roadways are, as a matter of administrative law, still "listed" on the NTTFI. The Court must look to the Code of Federal Regulations governing BIA decisions and actions and the effectiveness and finality thereof, particularly the lack of finality and effectiveness during the administrative appeal process. A dive into the federal regulations takes a reviewer to C.F.R. Title 25, Chapter I, Subpart A, Part 2 and/or C.F.R. Title 43, Subtitle A, Part 4, Subpart D. A thorough review of these regulations shows that the BIA decision to remove or action of removing the Roadways from the NTTFI is not effective or final.

Plaintiffs will not regurgitate ECF No. 54 but will note that the BIA still has not cured its defective notice to Plaintiffs of the BIA decision to remove the Roadways from the NTTFI, keeping in mind that Plaintiffs are undoubtedly "persons who may be adversely affected" by the BIA decision to remove the Roadways from the NTTFI and have the right to appeal under Part 2. *See* ECF No. 54 at 2 n.1.[11]

Because of the lack of proper notice of the BIA decision to remove the Roadways from the NTTFI under 25 C.F.R. § 2.7, including whom to appeal to, Plaintiffs are left guessing—based on reviewing multiple complex and interrelated regulatory schemes governing appeal processes and procedures regarding BIA decisions or action—which entity or official is the proper recipient of Plaintiffs' appeal, be it a BIA official under 25 C.F.R. Part 2 or the Interior Board of Indian Appeals under 43 C.F.R. Part 4. Nonetheless, out of an abundance of caution, Plaintiffs filed another notice of appeal two weeks ago, but this time filing the appeal with the Interior Board of Indian Appeals. Like 25 C.F.R. § 2.6, 43 C.F.R. § 4.314 provides that BIA decisions are not effective or final during an appeal proceeding at the Board unless the BIA decision or action being appealed has been made effective by the Board pending a decision on appeal. 43 C.F.R. § 4.314(a). As such, the Roadways remain "listed" on the NTTFI, despite Defendants' assertions to the contrary, and therefore the Roadways are required to remain open and available for public use under the Federal-Aid Highway Act, TTP, and the implementing regulations.

[11] Any argument that Plaintiffs have no appeal right of the BIA decision to remove the Roadways from the NTTFI because 25 C.F.R. § 2.3(b) dictates that 25 C.F.R. § 170.444(c) governs how *tribes* shall appeal BIA *rejections* of NTTFI update requests (and thus tribes have no appeal rights under Part 2's procedures relating to the specific decision of BIA rejecting a tribe's request to update the NTTFI) is an incorrect argument. Such an argument completely misinterprets both 25 C.F.R. §§ 2.3(b) and 170.444(c) and the interplay between those two subsections as those subsections and their interplay relate to adversely affected non-Indians' rights, under 25 C.F.R. Part 2, to appeal a BIA decision to accept a tribe's NTTFI update request removing roads from the inventory that are federally public roads, which encompasses use of the roads as the sole means of ingress to and egress from non-Indians' homes.

B. Plaintiffs' right to relief necessarily depends on resolution of a substantial question of federal law such that the case arises under federal law within the meaning of 28 U.S.C. § 1331.

The United States incorrectly argues that Plaintiffs "merely call upon" the Federal-Aid Highway Act, TTP, and implementing regulations, and fail to invoke federal question jurisdiction because Plaintiffs' case is unlike the interplay of state and federal law issues in *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308 (2005). The United States then suggests that (what the United States refers to as) "the *Grable* exception" is a hard and fast rule and argues that Plaintiffs' case does not fit within (what the United States suggests is basically) a bright-line exception because Plaintiffs have not pleaded a "valid" state-law claim that necessarily raises a federal law issue. *See* United States Amicus Brief at 7–9.

As an initial matter, the United States ignores the broader principle set forth in *Grable*, which is that the determination of whether a case "arises under" federal law is ultimately a determination of federalism principles that is case-specific and not dispositive on whether a substantive cause of action under federal statute has been expressly pleaded. 545 U.S. 308, 313–314. The *Grable* Court made clear that an issue "will ultimately qualify for a federal forum only if federal jurisdiction is consistent with congressional judgment about the sound division of labor between state and federal courts governing the application of § 1331. Thus, [*Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Trust for Southern Cal.*, 463 U.S. 1 (1983)] explained that the appropriateness of a federal forum to hear an embedded issue could be evaluated only after considering the 'welter of issues regarding the interrelation of federal and state authority and the proper management of the federal judicial system.'" *Id.* Such ultimate considerations "have kept [the Supreme Court] from stating a 'single, precise, all-embracing' test for jurisdiction over federal issues embedded in state-law claims between nondiverse parties." *Id.* at 314. The United States cuts against this broader principle in *Grable* by arguing that Plaintiffs' case does not invoke federal

question jurisdiction because it is unlike the facts and issues in the *Grable* case itself, i.e., the so-called "*Grable* exception." United States Amicus Brief at 7–8.

The United States correctly acknowledges that an express or implied cause of action under federal statute is not necessary for the invocation of federal question jurisdiction. United States Amicus Brief at 7. But the United States jumps from that correct principle to the misguided suggestion that Plaintiffs' case does not fit in a "slim category" of cases that may proceed in federal court without a federal cause of action because Plaintiffs' case is unlike the circumstances in *Grable* which the Supreme Court found there to boil down to a state title case that raised federal tax issues. *See* United States Amicus Brief at 7–8.

Regardless, here, Plaintiffs' anticipated nuisance claims necessarily depend[] on resolution of a substantial question of federal law. *Empire Healthchoice Assur., Inc. v. McVeigh*, 547 U.S. 677, 689–90 (2006). That substantial question of federal law is whether the individual Defendants, acting in an *ultra vires* manner and thus not shielded by sovereign immunity (described above and below), can barricade the Roadways and issue permits for use of the Roadways, thereby rendering them no longer "open and available for public use" as required by the TTP and the Federal-Aid Highway Act. Notably, this issue does not go to the defensive aspect of this case but rather is invoked immediately on the merits and stands at the core of Plaintiffs' claims. The question of whether the Defendants violate federal law by barricading the Roadways and requiring temporary access permits for use of the Roadways is inherently intertwined with Plaintiffs' anticipated nuisance claims, because the anticipated nuisance claims likely will succeed in the event that the Court were to hold that Defendants violate federal law by barricading the Roadways and requiring temporary permits for use of the Roadways, showing Plaintiffs' right to relief necessarily depends on the Federal-Aid Highway Act and TTP issue and rendering such federal issue not only

substantial, but also integral to Plaintiffs' right to relief under the law. *See Franchise Tax Bd.*, 463 U.S. at 27–28. Moreover, to the extent that Defendants and the United States claim that interplay between the ROW Act and Federal-Aid Highway Act/TTP directly impact the merits of Plaintiffs' anticipated nuisance claims, then the claims necessarily depend on resolution of (yet another) substantial question of federal law involving any interplay between two complex federal schemes and how such interplay impacts Plaintiffs' state-law anticipated nuisance claims.

II. Sovereign immunity does not bar Plaintiffs' claims, because: (a) the individual Defendants acted without delegated power or authority from the Tribal Council to barricade the Roadways and ensure they remained in place for 6 weeks; and (b) even if the Tribal Council had attempted to delegate such power to the Defendants, Defendants' conduct, including their temporary access permit regime for use of the Roadways, is an ongoing violation of federal law. For those two independent reasons, the Defendants acted *ultra vires* and sovereign immunity does not apply.

The Seventh Circuit has held that the question of sovereign immunity is not jurisdictional and thus not technically analyzed under Federal Rule of Civil Procedure 12(b)(1) but instead under Rule 12(b)(6). *Meyers v. Oneida Tribe of Indians of Wis.*, 836 F.3d 818, 820 (7th Cir. 2016).

"Dismissal for failure to state a claim under Rule 12(b)(6) is proper when the allegations in a complaint, however true, could not raise a claim of entitlement to relief." *Virnich v. Vorwald*, 664 F.3d 206, 212 (7th Cir. 2011) (internal quotation marks omitted) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 558 (2007)). Plaintiffs' amended complaint must contain allegations that "state a claim to relief that is plausible on its face" to avoid dismissal under Rule 12(b)(6). *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 1940 (2009)). "Factual allegations must be enough to raise a right to relief above the speculative level," i.e., the complaint must have "allegations plausibly suggesting" entitlement to relief. *Id.* (quoting *Twombly*, 550 U.S. at 555, 557). Facial plausibility requires that plaintiffs plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S.

at 678. The Court must construe all of Plaintiffs' factual allegations as true and must draw all reasonable inferences in their favor. *Id.* at 681.

On the issue of sovereign immunity, Defendants mainly argue that because each of the named Defendants are tribal officers, the Defendants are covered by tribal sovereign immunity. Defs.' Brief at 8-9. Defendants try to argue that they acted in the scope of their official positions as Tribal Council members by analogizing to inapposite cases where courts found that only the voting actions of the defendants as tribal council members were actually at issue, *see* Defs.' Brief at 10-11, and Defendants alternatively argue that even if they did not act with authority or delegated power from the Tribal Council, the relief sought by Plaintiffs can only be granted against the Tribe and not against the individual Defendants. *See id.* at 11-13. Also, Defendants argue that "because [Plaintiffs] have failed to plead any ownership interest in the Roadways," Plaintiffs fail to state claims upon which relief can be granted. *Id.* at 9. These several arguments all fail.

A. Plaintiffs' Amended Complaint states claims upon which relief can be granted because Plaintiffs allege facts showing and reasonably inferring the individual Defendants barricaded the Roadways without receiving delegated power or authorization from the Tribal Council to barricade the Roadways and to leave the barricades in place for six weeks and thus the individual Defendants acted *ultra vires* such that sovereign immunity does not apply.

While the general starting point is that tribes have sovereign immunity from suit, *see Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978), merely because an individual holds an official tribal council position does not necessarily shield them under the doctrine of sovereign immunity. *Id.* at 59 ("As an officer of the Pueblo, petitioner Lucario Padilla is not protected by the tribe's immunity from suit."). A tribe's sovereign immunity, if not abrogated by Congress or waived by the tribe, only extends to tribe members who hold tribal officer positions when the tribal officers or officials act with authority or delegated power from the tribe. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689–90 (1949). In other words, tribal officials are not necessarily

immune from suit, because when tribal officials act beyond their authority or without authority, they lose entitlement to sovereign immunity, and prospective relief can be issued against them by a court. *Santa Clara Pueblo*, 436 U.S. at 59; *Ex Parte Young*, 209 U.S. 123 (1908); *see Puyallup Tribe, Inc. v. Wash. Dep't of Game*, 433 U.S. 165, 171–72 (1977); *N. States Power Co. v. Prairie Island Mdewakanton Sioux Indian Cmty.*, 991 F.2d 458, 460 (8th Cir. 1993) ("*Ex parte Young* applies to the sovereign immunity of Indian tribes . . . ."); *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1154 (10th Cir. 2011) (same).

In *Larson*, the Supreme Court rejected attempts to invoke sovereign immunity where individuals, including officers of a sovereign, act while "lack[ing] . . . delegated power." *Larson*, 337 U.S. at 689–90. This is because such actions mean "[t]he officer is not doing the business which the sovereign has empowered him to do." *Id.* at 689. In such instances, the officers' "actions are ultra vires his authority and therefore may be made the object of specific relief." *Id.* at 689. That is precisely the case here. For Defendants to have acted with authority means they must have had authority from Tribal Council to barricade the Roadways pursuant to the Tribe's constitution and bylaws in order to be shielded by the doctrine of sovereign immunity. However, the individual Defendants erected the barricades and maintained them for six weeks with no delegation of power or authority from the Tribe via Tribal Council to close the Roadways. Thus, Defendants acted *ultra vires* their positions as tribal council members and thus are not shielded by sovereign immunity from this suit seeking prospective relief to enjoin them from re-barricading the Roadways.

Plaintiffs have expressly alleged that the individual Defendants participated in the action or decision to barricade the Roadways, which goes beyond merely voting during a tribal council meeting. *See* Am. Compl., ECF No. 26 ¶¶ 34-35, 41 (specifically alleging, with no discovery having yet occurred to gain insight into everyone who physically assisted with or oversaw the

construction of the barricades, that at least three individual Defendants—Johnson, Thompson, and Lyle Chapman—were physically present, supervised, or assisted with the construction of the barricades). Combine those express factual allegations with the crucial, newly learned allegations by Defendant Allen herself surrounding the lack of Tribal authority or delegation of power to the individual Defendants to construct the barricades, and it becomes immediately clear that Plaintiffs' claims well exceed the "plausibility" standard and thus the Court should not dismiss the amended complaint. *See Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498–99 (5th Cir. 2000) (finding that "various other circuits have specifically allowed that '[d]ocuments that a defendant attaches to a motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff's complaint and are central to her claim.'" (quoting *Venture Assocs. Corp. v. Zenith Data Sys. Corp.*, 987 F.2d 429, 431 (7th Cir. 1993)); "In so attaching, the defendant[s] merely assist[] the plaintiff[s] in establishing the basis of the suit[] and the court in making the elementary determination of whether a claim has been stated.").

Defendants' own filings have eliminated any doubt surrounding the lack of authority or delegated power from the Tribal Council and make clear that the individual Defendants responsible for erecting and maintaining the barricades did so without authorization or delegated power pursuant to the Tribe's own constitution and bylaws. *See* Art. VI, Constitution and Bylaws of the Lac du Flambeau Band of Lake Superior Chippewa Indians of Wisconsin, https://www.ldftribe.com/uploads/files/Court-Ordinances/BYLAWS.pdf (effective Sept. 9, 2005) (last visited April 25, 2023). Therefore, the individual Defendants acted *ultra vires* such that sovereign immunity is inapplicable to them.

Specifically, Defendant Allen says that "Motion 5-23 . . . was the Tribal Council's decision to place barriers on the [R]oadways on January 31, 2023." Allen Aff., ECF No. 43 ¶¶ 10-12.

However, the Tribe's constitution and bylaws dictate what constitutes official actions of the Tribe via the Tribal Council. *See* Constitution and Bylaws of the Lac du Flambeau Band of Lake Superior Chippewa Indians of Wisconsin, https://www.ldftribe.com/uploads/files/Court-Ordinances/BYLAWS.pdf (effective Sept. 9, 2005) (last visited April 25, 2023) (Article VI § 1(u): "resolutions or ordinances" effectuate the Tribal Council's, and thus the Tribe's, power). The Tribe's "Constitution and Bylaws" provide the "Powers and Duties of the Tribal Council" in Article VI. Nowhere in their governing rules is there any indication that a motion constitutes an official tribal council authorization or delegation of power. *See id.* Indeed, the word "motion" is not mentioned once in the entire constitution and bylaws document. Moreover, Article VI § 1(u) says that "resolutions or ordinances" effectuate the Tribal Council's, and thus the Tribe's, powers. Verbal motions, let alone ones that do not actually address the specific act of barricading the Roadways or maintaining the barricades but rather purport to authorize the issuing of a letter to inform of trespassing, are not, as a matter of the Tribe's own law, official authorizations or delegations of power from the Tribe, via the Tribal Council, to tribe members, including those who hold tribal council or executive positions. Additionally, Defendants do not point to anywhere in their constitution and bylaws that permits attempts to retroactively delegate power or authorize previously unauthorized non-voting acts of tribe members, regardless of whether the tribe members hold a position on the tribal council or an executive position.

Exhibit B to Defendant Allen's Affidavit states that Motion 5-23, which appears to have been a verbal vote and passed on January 17, 2023, was really just approving the decision "to send [a] letter to homeowners, Town of LDF and Title companies and inform them of trespassing." ECF No. 43-2. Exhibit B's own language is not at all a "Tribal Council[] decision to place barriers on the [R]oadways on January 31, 2023." *See* Allen Aff., ECF No. 43 ¶ 11. Defendants are attempting

to use Defendant Allen's Affidavit and this specific crucial admission by Defendant Allen to confuse two separate decisions—one that actually was made by the Tribal Council (sending the letter to inform of trespass) and one that was not made by the Tribal Council before the actions at issue were undertaken (barricading and maintaining the Roadways)—to mask their unauthorized acts behind the Tribe and sovereign immunity.

Also, the letter referenced in Exhibit B is Exhibit C to Allen's Affidavit. *See* Allen Aff., ECF No. 43 ¶ 13. Exhibit C is a letter from Defendant Johnson, dated January 19, 2023, that appears to have been sent to various recipients. ECF No. 43-3 at 1. This letter says that "commencing on January 31, 2023, **the Tribe reserves the right to limit access** to [the Roadways]. . . . This right to limit access **may include**, but is not limited to, . . . **physical barriers**." ECF No. 43-3 at 1 (emphasis added). Even by extension through Exhibit C and improperly taking into account this letter's language, Exhibit B is not at all a "Tribal Council[] decision to place barriers on the [R]oadways on January 31, 2023." *See* Allen Aff., ECF No. 43 ¶ 11. Plus, Exhibit C does not even reflect authority or delegation of power by the Tribal Council to the individual Defendants to actually barricade the Roadways on January 31, 2023, prior to the individual Defendants constructing the barricades on that day, or to maintain the barricades while they remained in place for around six weeks.

Defendants' lack of authority to barricade the Roadways on January 31, 2023 is bolstered by Thomas Bill's Affidavit. His affidavit shows that Exhibits B and C to Allen's Affidavit do not whatsoever show any decision by the Tribal Council to in fact barricade the Roadways on January 31, 2023, because Bill writes, "*On January 27, 2023,* the Tribal Council directed me to visit each of the residences that would be affected by the barriers, ***should they be placed***, and deliver letters to the homeowners notifying them of the impending closures. I was provided the

letters to deliver by Jessie Peterson, Lac du Flambeau Tribal Lands Management Department." ECF No. 45 ¶ 7 (emphasis added).

On March 28, 2023, 15 days after the barricades had been partially deconstructed, allowing traffic, the Tribal Council passed Resolution No. 100(23) by a majority vote. Allen Aff., ECF No. 43 ¶¶ 29–30. According to Defendant Allen, Resolution No. 100(23) "***ratified and reaffirmed Motion 5-23* and all *prior actions* taken by Tribal Council and/or Tribal Employees to restrict access to the [Roadways]**." Allen Aff., ECF No. 43 ¶¶ 29-31 (emphasis added). Clearly, after deconstructing the barricades, the individuals Defendants and other participants who constructed and maintained the barricades realized in March 2023 that they did not have the delegated power or authority from the Tribal Council to barricade the Roadways when they did on January 31, 2023. Resolution No. 100(23), which is Exhibit H to Allen's Affidavit (ECF No. 43-8), shows the individual Defendants, with the attempted post-hoc help of the Tribal Council, attempted to get retroactive authority or delegation of power for the individual Defendants' past actions that had already occurred without the delegated power or authority in the form of a resolution or ordinance as the Tribe's own constitution and bylaws require. Moreover, Defendants do not point to anywhere in their constitution and bylaws that permits attempts to retroactively delegate power or authorize previously unauthorized non-voting acts of tribe members, including tribe members who hold positions on the tribal council or executive positions. Even if the Tribe's constitution or bylaws purport to retroactively authorize previously unauthorized non-voting actions, Supreme Court precedent, which holds that tribal officials' ongoing violations of federal law—such as requiring permits to use roads that must remain open and available for public use under federal law—are actionable, supersedes any tribal attempt to skirt Supreme Court precedent. *See Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 281 (1997) ("An allegation of an ongoing violation

of federal law where the requested relief is prospective is ordinarily sufficient to invoke the *Young* fiction" such that the officer of a sovereign is not immune from suit).

Additionally, Exhibit H appears to obscure what Exhibits B and C actually say and what they purport to effectuate with respect to tribal authority. *See* Allen Aff., ECF No. 43-8, at 2 ("[O]n January 17, 2023, the Tribal Council approved and adopted Motion 5-23 (attached) authorizing President Johnson to send letters to the landowners alerting them of restricted access on January 31, 2023 *and directing tribal staff to deny access on said date*." (emphasis added)). Neither Exhibit B nor Exhibit C in any way "direct tribal staff to deny access on said date," but rather Exhibit B (ECF No. 43-2) approved the sending of a letter (Exhibit C, ECF No. 43-3) in which Defendant Johnson says the Tribe "reserves the right to limit access" to the Roadways and one such alleged reserved right "may include . . . physical barriers." ECF No. 43-3 at 1. Simply put, even if a motion constituted official tribal action or authorized tribal officials to act for the tribe, authorization to send a letter that reserves the right to take an action (barricading roads) is not the same thing as actually authorizing that action (barricading roads).

Defendants try to obfuscate the lack of delegated power or authorization from the Tribe via the Tribal Council and hang their hat on attempted retroactive authorization of past non-voting acts by attempting to analogize this case and their actions to other cases that are inapposite in part because all of those cases do not involve express allegations of a lack of tribal council delegations of power or authority when the tribal officials in those cases took actions beyond merely voting in their tribal council position and do not involve a tribal council trying to retroactively give authorization after past non-voting acts involving individual acts of constructing and maintaining barricades on federally public roads. For example, Defendants cite to *Miller v. Coyhis*, 877 F. Supp. 1262 (E.D. Wis. 1995), which involved four of seven tribal council members. *See* Defs.'

Brief at 10. There, "[a]ccording to the complaint and the arguments made by counsel in their respective briefs, the only action taken by the four tribal council members which gives rise to the plaintiff's claim . . . was to draft resolutions and vote as members of the Community's governing body." *Id.* at 1266. This is unlike what Plaintiffs here have expressly pleaded in their amended complaint relating to specific actions of at least three individual Defendants in their specific roles in constructing and maintaining the barricades, including their presence, supervision, oversight, and hands-on participation in the construction of the barricades and their maintenance for six weeks. *Compare* Am. Compl., ECF No. 26 ¶¶ 34, 35, 41,[12] *with Coyhis*, 877 F. Supp. at 1266 (noting that *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269 (9th Cir. 1991), was analogous to *Coyhis* because the complaint in *Imperial Granite*—unlike Plaintiffs' amended complaint—*"failed to allege individual actions by any of the tribal officials named as defendants*; the only action taken by those officials [in *Imperial Granite*] was to vote as members of the tribe's governing body." (emphasis added)). Plaintiffs' amended complaint well exceeds the plausibility pleading standard in the context of what is necessary to maintain a suit for prospective injunctive relief against tribe members for non-voting actions, including express allegations of personal participation in constructing and maintaining the barricades.

A second example is Defendants' misplaced, heavy reliance on *Imperial Granite* itself. First, as previously mentioned, the plaintiff in *Imperial Granite* failed to plead any "individual actions by any of the tribal officials named as defendants. . . . [T]he only action taken by those officials was to vote as members of the Band's governing body against permitting Imperial to use the road. Without more, it is difficult to view the suit against the officials as anything other than a

[12] "34. . . . Upon information and belief, Mr. Johnson was personally present during the erection of the barricades and supervised the same. 35. . . . Upon information and belief, Mr. Thompson assisted in physically placing the barricades. . . . 41. . . . Upon information and belief, Mr. [Lyle Thomas] Chapman assisted in physically placing the barricades."

suit against the Band. The votes individually have no legal effect; it is the official action of the Band, following the votes, that caused Imperial's alleged injury." 940 F.2d 1269, 1271.

Here, Plaintiffs have pleaded specific actions, other than simply voting as tribal council members, by at least three individual Defendants. Those specific actions (i.e., personally participating in or personally being present to oversee the construction of the barricades) that irreparably harmed, continue to irreparably harm, and will likely further irreparably harm Plaintiffs caused, cause, and will cause Plaintiffs' injuries, unlike in *Imperial Granite.*

Second, the *Imperial Granite* court noted that "the Band clearly authorized the closure" of the road. Quite the opposite here, as has been discussed at length herein. *See supra* Intro. § II.

Third, there was no allegation that the road in *Imperial Granite* was a public road necessary for access to dozens of people's homes or that the road "must be open and available for public use" under federal law, including the Federal-Aid Highway Act, TTP, and implementing regulations. Simply put, the road in *Imperial Granite* did not invoke the Federal-Aid Highway Act and TTP like the Roadways here do. To the extent that Defendants are arguing that a "property right" is needed in roads to challenge *ultra vires* conduct occurring on and relating to such roads that violates the Federal-Aid Highway Act and TTP, *Imperial Granite* does not support that proposition. The *Imperial Granite* court only pointed out the need to allege facts showing a "property right" in order for the plaintiff there to maintain constitutional and civil rights claims relating to accessing plaintiff's quarry (i.e., "that the blocking of the road constitutes a 'taking' of its property in violation of the due process and equal protection clauses of the Constitution and the Indian Civil Rights Act, 25 U.S.C. § 1302(5) [ICRA Takings Clause] and (8) [ICRA Due Process and Equal Protection clause]").

Further, whereas the Court noted that "Imperial's complaint fails to allege facts giving it any property right in the road at all," *id.* at 1272–73,[13] here Plaintiffs' "right" to use the Roadways is not the issue; rather, at issue is Defendants' conduct of barricading the Roadways and requiring permits to use the Roadways that is unlawful based on the Federal-Aid Highway Act, TTP, and federal regulations. Indeed, the *Imperial* court noted that merely building the road with public funds "hardly differentiates it from any road on any Indian reservation," *Id.* at 1272, but here the Roadways are differentiated because they must remain open and available for public use under federal law. Defendants appear to impliedly recognize this differentiation by seeking to remove the Roadways from the NTTFI during this litigation in order to try to make the Roadways more similar to the road in *Imperial Granite*. But the Roadways remain listed on the NTTFI, *see supra* Arg. § I.A, and Plaintiffs are confident in their potential Administrative Procedure Act challenge, especially if the BIA does not (at the very least) procedurally reverse course.

Because the individual Defendants participated in or oversaw the construction and maintenance of the barricades on the Roadways without the Tribal Council giving them authority to do so, because it is far from clear that the Tribe authorized the barricading of the Roadways (*Cf. Imperial Granite*, 940 F.2d at 1272 n.5 (noting the "absence of any colorable claim that the tribe or its officials exceeded the scope of their" authority or power under federal law, and noting "Imperial has alleged no facts stating a colorable claim that the tribe's action in closing the road exceeded the tribe's powers under federal law"), and because the Tribe's own constitution and bylaws do not permit retroactive authorization of non-voting actions taken by tribe members, the individual Defendants acted *ultra vires* and are not shielded by sovereign immunity.

B. Plaintiffs' Amended Complaint states claims upon which relief can be granted because Plaintiffs allege facts showing and reasonably inferring that even if

[13] Notably, Defendants jump, without any explanation as to why, from the concept of needing a "property right" to needing an "ownership interest." *See* Defs.' Brief at 9.

the Tribal Council purported to delegate power or authorize the Defendants to barricade the Roadways, Defendants' conduct is an ongoing violation of federal law and therefore the Defendants cannot cloak themselves in the doctrine of sovereign immunity.

Even if the tribe via the tribal council had purported to authorize or delegate power to barricade the Roadways before (or while) the individual Defendants barricaded the Roadways and maintained the barricades for six weeks *before* the individual Defendants and co-participants personally constructed and maintained the barricades, sovereign immunity does not apply where tribe members' (including tribal council members') ongoing conduct violates federal law. *Alabama v. PCI Gaming Auth.*, 801 F.3d 1278 (11th Cir. 2015) ("We previously have extended the *Ex parte Young* doctrine to tribal officials. Although tribal officials are generally entitled to immunity for acts taken in their official capacity and within the scope of their authority, they are subject to suit under the doctrine of *Ex parte Young* when they act beyond their authority by violating a federal statute. Because Alabama alleges that the Individual Defendants are engaged in ongoing conduct that violates federal law, the Individual Defendants are not entitled to immunity." (emphasis added) (internal citation and quotation marks omitted) (citing *Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians*, 177 F.3d 1212, 1225 (11th Cir. 1999))); *see also Burlington N. & Santa Fe Ry. Co. v. Vaughn*, 509 F.3d 1085, 1092 (9th Cir. 2007) (explaining that the *Ex parte Young* doctrine "has been extended to tribal officials sued in their official capacity").

Here, Defendants' conduct of requiring temporary access permits for Plaintiffs to use the Roadways that are federally public roads is an ongoing violation of federal law causes Defendants to be unable to cloak themselves in sovereign immunity. *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 281 (1997) ("An allegation of an ongoing violation of federal law where the requested relief is prospective is ordinarily sufficient to invoke the *Young* fiction" such that the officer of a sovereign is not immune from suit). Plaintiffs' have expressly pleaded in their amended

complaint that the individual Defendants violated and continue to violate the Federal-Aid Highway Act, TTP, and implementing regulations, including pleading that Defendants' revocable temporary access permits regime for use of the federally public roads to access homes constitutes an ongoing violation of federal law.[14] *See* Am. Compl., ECF No. 26 ¶¶ 2–8, 34, 35, 41, 69-97. Consistent with numerous cases addressing invocation of the *Ex parte Young* doctrine and overcoming sovereign immunity defenses, Plaintiffs have (at the very least) plausibly pleaded that an ongoing temporary access permit regime for roads that are federally public roads and must remain open and available for public use is an ongoing violation of federal law. (Plus, Plaintiffs have shown that come June 2023, there is a very high likelihood that the Roadways will be barricaded again, which is a violation of federal law and additional grounds for the issuance of prospective injunctive relief against the individual Defendants.)

C. Plaintiffs' requested relief would not operate against the Tribe, and, regardless, *Ex parte Young* is "an important exception" to the 'real, substantial party in interest' principle.

Defendants' rely on a quote from *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 101–02 & n.11 (1984): "The general rule is that a suit is against the sovereign if 'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration,' or if the effect of the judgment would be 'to restrain the Government from acting, or to compel it to act." *Id.* n.11 (quoting *Dugan v. Rank*, 372 U.S. 609, 620 (1963)). Defendants use this quote to argue that because Plaintiffs' requested relief would restrain the Tribe from acting, the suit is against the sovereign. But this is incorrect because it entirely ignores the *Ex parte Young* exception that applies to the general rule and applies here.

[14] *Supra* note 5.

Defendants admit that under their ongoing access permits regime, the public is currently denied access to use the Roadways that "must be open and available for public use" under federal law; thus, clearly showing Defendants' ongoing violation of the Federal-Aid Highway Act and TTP. Defs.' Response to Pls.' Proposed Findings of Fact, ECF No. 42, Defs.' Response to ¶ 10 ("Undisputed" that "the Roadways may be used only by the 'homeowners on [the Roadways],' ….").

In quoting *Pennhurst*'s footnote 11, Defendants conveniently ignore the paragraph and two pages in *Pennhurst* that proceed the paragraph in which footnote 11 exists. After the *Pennhurst* Court noted the starting point that "[t]he Eleventh Amendment bars a suit against state officials when the state is the real, substantial party in interest" and "that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the [sovereign]," the Court stated that the *Ex parte Young* doctrine has been "recognized" by the Supreme Court as "an important exception" to the general rule. *Id.* at 101–02. The Court went on, writing, the *Ex parte Young* exception is a rule "permitting suits alleging conduct contrary to 'the supreme authority of the United States,'" and this rule (an exception to sovereign immunity) "has survived" since *Ex parte Young*. *Id.* at 102. The Court then invoked *Edelman v. Jordan*, 415 U.S. 651 (1974), describing *Edelman*'s holding and its significance: "[W]hen a plaintiff sues a[n] official alleging a violation of federal law, the federal court may award an injunction that governs the official's future conduct, but not one that awards retroactive monetary relief. Under the theory of *Young*, such a suit would not be one against the [sovereign] since the federal-law allegation would strip the . . . officer of his official authority." *Pennhurst*, 465 U.S. at 102–03 (citing *Edelman*, at 666–67). This perfectly describes Plaintiffs' suit against the individual Defendants and why, even if Defendants purported to act or are purportedly acting as officers of the Tribe such as in their

capacity relating to the issuance of access permits for use of the Roadways, the individual Defendants can be prospectively enjoined by this Court for an ongoing violation of federal law (and that relief can encompass other conduct that also violates federal law (i.e., barricading the Roadways) and thus additionally strips Defendants of any "tribal official" cloak). Plaintiffs have more than plausibly alleged that Defendants' conduct is an ongoing violation of federal law, making *Ex parte Young* squarely apply to Defendants.

Also, Defendants argue that "the relief sought requires action from the [Tribe] itself." Defs.' Brief at 11. This is untrue. Plaintiffs seek relief that, depending on when the Court were to issue injunctive relief, would require the opposite of action; it would enjoin Defendants (and/or the Tribe depending on the Court's findings on various sub-issues relating to sovereign immunity) from taking action (i.e., barricading the Roadways) and/or order them to stop taking action (i.e., requiring access permits and maintaining an access permits regime) that would not require further tribal resolutions because such a court order would void relevant tribal resolutions (e.g., Resolution No. 67(23) (ECF No. 43-6)).

Defendants also argue that the relief sought by Plaintiffs' claims "can only be accomplished through the voting actions of the individually named Defendants, comprising an official action of the Tribal Council, as the governing body of the Tribe." *Id.* at 12. Defendants posit that "Plaintiffs['] request that the barriers not be replaced can only be accomplished through the official actions of a voting block of the Tribal Council, not one or more individually named Defendants." *Id.* at 12-13. These statements are incorrect. Again, Plaintiffs seek relief that, depending on when the Court were to issue injunctive relief, would order Defendants (and/or the Tribe depending on the Court's findings on various sub-issues relating to sovereign immunity) to not do something. An order from the Court, for example, enjoining the issuance of permits would immediately render

Resolution No. 67(23) (ECF No. 43-6) void for violating federal law, and Defendants and the Tribe need not do anything immediately thereafter, be it in the form of voting or otherwise. An order from the Court, for example, ordering that the barricades not be reconstructed would require Defendants and the Tribe to do nothing except to abide by a court order to not take action that will not yet have occurred as contemplated by the court order. This same concept applies to the Defendants' misplaced arguments that a flexibly tailored injunction issued in time prior to future actions would somehow "interfer[e] with the public administration of the Tribe." There simply is no interference with the "public administration" of the Tribe if the Court ordered, on the basis of a violation of federal law, the cessation of or restraint from such federally unlawful (and thus sovereignly unauthorized) acts.

III. Neither the Tribe nor the United States is a necessary party to this case.

Both the Defendants and United States argue that the United States is a required party to this action under Federal Rule of Civil Procedure 19. Defendants additionally argue that the Tribe is also a required party under Rule 19. Defendants and the United States argue that the Complaint must be dismissed on this basis under Rule 12(b)(7).

A district court's analysis of a Rule 12(b)(7) motion proceeds in two steps. *See Askew v. Sheriff of Cook Cty., Ill.*, 568 F.3d 632, 635 (7th Cir. 2009). First, the court must determine whether a given party is a "required party" under Rule 19(a), and whether joinder of that party is feasible. *Id.* Rule 19(a)(1) defines who is a "required party." Under Rule 19, a party must be joined if the court "cannot accord complete relief among existing parties" in that party's absence, or if that party "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 impeded the person's ability to protect the interest; or (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest." Fed. R. Civ. P.

19(a)(1)(A)-(B). If a required party has not been joined, "the court must order that the person be made a party." Fed. R. Civ. P. 19(a)(2).

The second step of a court's analysis on a Rule 12(b)(7) motion is to determine whether, if such a "required party" cannot be joined, the case should proceed anyway—in other words, whether the party is indispensable. *Askew*, 568 F.3d at 635; *J.P. Morgan Chase Bank, N.A. v. McDonald*, 760 F.3d 646, 653 (7th Cir. 2014). The court need not proceed to this second step, however, if it determines that a party is not required to be joined under Rule 19(a). *See McDonald*, 760 F.3d at 653. Rule 19 also contemplates that if a required party cannot be joined, for whatever reason, "the court 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). Rule 19 provides several factors for the court to consider in making this determination, including:

> (1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;
>
> (2) the extent to which prejudice could be lessened or avoided by:
>
> (A) protective provisions in the judgment;
>
> (B) shaping the relief; or
>
> (C) other measures;
>
> (3) whether a judgment rendered in the person's absence would be adequate; and
>
> (4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

These factors "emphasi[ze] . . . practical measures that will allow either the entire suit or part of it to go forward." *Askew*, 568 F.3d at 635. The Seventh Circuit has explained that "[d]ismissal . . . is not the preferred outcome under the Rules." *Askew*, 568 F.3d at 634. "Courts are 'reluctant to

dismiss for failure to join where doing so deprives the plaintiff of his choice of federal forum.'" *Id.* (quoting *Davis Cos. v. Emerald Casino, Inc.*, 268 F.2d 477, 481 (7th Cir. 2001)). *See also Bourdieu v. Pacific Western Oil Co.*, 299 U.S. 65, 70 (1936) ("The rule is that if the merits of the cause may be determined without prejudice to the rights of necessary parties . . . it will be done; and a court of equity will strain hard to reach that result."). It is the moving party's burden to demonstrate that a party is both necessary and indispensable. *See CFI Wis., Inc. v. Hartford Fire Ins. Co.*, 230 F.R.D. 552, 554 (W.D. Wis. 2005).

The Defendants' and United States' arguments that the Complaint must be dismissed pursuant to Rules 12(b)(7) and 19 fail, because neither the Tribe nor United States is a required party in this action. Further, to the extent that the Tribe and/or the United States is a required party and cannot be joined, both the Defendants and the United States are incorrect that equity and good conscience demands the action be dismissed. To the contrary, equity and good conscience demand that the action proceed with the current parties even if the United States and/or Tribe are required parties that cannot be joined.

A. The Tribe is not a required party under Rule 19(a).

Defendants primarily claim that the Tribe is a required party under Rule 19(a)(1)(B), though they also assert in a footnote that the Tribe is also a required party under Rule 19(a)(1)(A). But the Tribe is wrong on both fronts.

The Defendants argue that the Tribe is a required party under Rule 19(a)(1)(A) because any relief ordered by the Court would require the Tribe itself engage—or refrain from engaging in—certain actions. Defs.' Brief at 18 n.5. Not so. As Plaintiffs have continuously pointed out, and Defendants' own filings confirm, the Defendants acted *ultra vires* in erecting the barricades and requiring access permits to use the Roadways. The Tribal Council may have attempted to authorize Defendants' unauthorized actions through post-hoc adoption of a resolution, but the actions at

issue in this case were taken by the individual named Defendants. And enjoining the issuance of permits would immediately render Resolution No. 67(23) (ECF No. 43-6) void for violating federal law such that neither Defendants nor the Tribe (Tribal Council) need do anything thereafter, be it voting or otherwise. The Court here can accord the complete relief sought by the Plaintiffs—declaratory judgment and injunctive relief against the named Defendants—without the Tribe's involvement, consistent with *Ex parte Young* and *Edelman*. Defendants attempt to analogize this case to *Askew* to argue that the Tribe is a required party under Rule 19(a)(1)(A); but in that case, Cook County was a required party to an action brought for *damages* against the County's Sheriff because, ultimately, any *damages* owed to the plaintiff would be paid by the County. 568 F.3d at 636. *Askew* is not analogous to nor does it control here, where Plaintiffs do not seek damages but merely injunctive relief for actions taken without authority or actions that exceed authority.

Defendants also argue that the Tribe is a required party under Rule 19(a)(1)(B). In support, Defendants assert that the Tribe "claims an interest relating to the subject of the action" and because disposing of the action without the Tribe's involvement would "as a practical matter impair or impede [its] ability to protect the interest." Defs.' Brief at 18. Defendants make surface-level arguments in support; they claim that because the Roadways at issue are within the Tribe's reservation, and because the Roadways are on lands held in trust by the United States for the benefit of the Tribe, that the Tribe necessarily has an "interest" in the subject of the action as that phrase is used in Rule 19. *Id*. at 19. Defendants cite two news articles rather than any caselaw precedent. *See id.* But the fact that the conflict and controversy between the Tribe and Town may operate one day in a separate, distinguishable case and inform the *why* of Defendants' actions, it does not necessarily follow that the Tribe has an "interest relating to the subject of the action" under Rule 19. An "interest" under Rule 19 must be a "significantly protectable interest." *Donaldson*

v. U.S., 400 U.S. 517, 531 (1971) (discussing Rule 24(a)(2), which provides for intervention as of right to a party which "claims an interest relating to the property or transaction that is the subject of the action . . . ."). *See also Lac du Flambeau Band of Lake Superior Chippewa Indians v. Norton*, 327 F.Supp.2d 995, 999–1000 (W.D. Wis. 2004) (explaining that "[t]he standards for granting leave to intervene as a party [under Rule 24] are essentially the same as the requirements for determining whether a party is to be joined if feasible set out in [Rule 19].").

Even assuming, *arguendo*, that the Tribe has an interest in the subject matter of the action, Defendants' conclusion that the Court cannot grant the relief sought by Plaintiffs without impeding the Tribe's interests does not necessarily follow. Importantly, Rule 19(a)(1)(B) requires *not only* that the party "claims an interest relating to the subject of the action," *but also* the party be situated such that "disposing of the action in the [party's] absence may: (i) as a practical matter impair or impede the person's ability to protect the interest; or (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest." Defendants assert that the relief sought by Plaintiffs would impair or impede the Tribe's ability to protect its interest over the land on which the Roadways sit. Defs.' Brief at 19. Defendants point only to paragraphs 200-206 of Plaintiffs' Amended Complaint to support this assertion, stating that because Plaintiffs' requested relief "includes the allowance of non-tribal access over Indian lands," Rule 19(a)(1)(B)'s standard is met. Defs.' Brief at 19. However, Plaintiffs request the Court to dismiss without prejudice their claim for an implied easement. Defendants' argument that the Tribe is a required party under Rule 19(a)(1)(B) therefore does not have a leg to stand on, as Plaintiffs do not seek any property interest in the land on which the Roadways lie.

B. The United States is not a required party under Rule 19(a).

The United States argues that it is an indispensable party that must be joined under Rule 19 because Plaintiffs' suit "seeks to establish title in lands to which the United States holds legal title,"

"challenges the United States' title to land," and because of the United States' interest in ensuring right-of-way grantees comply with the ROW Act. United States Amicus Brief, ECF No. 53 at 18. Similarly, Defendants argue that the United States is a required party because the United States is the "technical owner of the lands beneath which the barriers were placed." Defs.' Brief at 22. These arguments, however, conflate the legal questions actually at issue in Plaintiffs' case.

Both parties' arguments miss the mark and confuse two separate and independent legal questions. The first question, the one at issue in this case, is whether the named Defendants violated the Federal-Aid Highway Act and TTP by erecting the barricades on the Roadways and whether Plaintiffs can be afforded the relief sought on that basis. The second question, which is not at issue here but which the United States and Defendants continually interject, is whether non-tribal-member use of the Roadways constitutes trespass under the ROW Act and whether the ROW Act—independent of the Federal-Aid Highway Act and TTP as defenses—allows Defendants to prevent trespass. As the United States explained in its Amicus Brief, "the ROW Act and the TTP operate in separate spheres." United States Amicus Brief at 5. Despite this apparent understanding, Defendants and the United States argue that the United States is a required party under Rule 19 as the owner of legal title to the land on which the Roadways lie. But this question is irrelevant to the question at issue in Plaintiffs' affirmative suit for relief, which is whether the Roadways must remain open to the public under the Federal-Aid Highway Act and TTP such that Defendants' acts of barricading the Roadways and requiring access permits are unlawful.

Given that Plaintiffs request the Court to dismiss their implied easement claim, the United States' assertion that this suit "seeks to establish title in lands to which the United States holds legal title" is immaterial. Dismissal of the implied easement count also confirms that the United States' interest "in ensuring … that an easement is not granted outside of the limited circumstances

Congress allows" is no longer implicated in this case. *See* ECF No. 53 at 18. Nor is the United States' asserted interest "in ensuring that right-of-way grantees comply with the ROW Act" implicated here. This case revolves around the legality of *Defendants'* conduct in barricading the Roadways and requiring access permits to use federally funded public roads, despite the United States' and Defendants' conflation of that issue with the separate legal question of whether the Tribe or United States could obtain its own affirmative relief in a trespass action against the Town under the ROW Act.

Because the United States has not claimed an interest relating to the subject matter of the action, it is not a required party under Rule 19(a)(1)(B). The court's inquiry can stop there.

But if there is any question remaining on this issue, the Defendants' and Amici's argument that the United States is a required party also fails because disposing of this action without joining the United States would not impair or impede its ability to protect the interests it claims. *See* Fed. R. Civ. P. 19(a)(1)(B)(i)-(ii). The United States' title in the land on which the Roadways lie is not—assuming dismissal of the implied easement claim—at issue; it need not defend its property interests because they are not at risk.[15]

Additionally, there is no risk of exposing the parties to inconsistent obligations, as the United States claims. The United States asserts that there is a risk of inconsistent obligations because, even if Plaintiffs obtained a declaration requiring Defendants to refrain from barricading the Roadways (and perhaps requiring access permits), the United States would not be bound by that ruling and could seek to obtain its own ruling that use of the Roadways constitutes a trespass. ECF No. 53 at 19. But, even if the United States were to bring such a suit and even if it were

[15] To the extent that the United States seeks to present argument on the merits regarding the interests of outside litigants or society generally, its status as an amicus in this matter allows it to do just that. *See Prairie Rivers Network v. Dynegy Midwest Generation, LLC*, 976 F.3d 761, 763 (7th Cir. 2020).

successful, this would not risk imposing inconsistent *obligations* on Plaintiffs or Defendants. The phrase "inconsistent obligations" as it is used in Rule 19 is "not . . . the same as inconsistent adjudications or results. Inconsistent obligations occur when a party is *unable* to comply with one court's order without breaching another court's order regarding the same incident." *Delgado v. Plaza Las Americas, Inc.*, 139 F.3d 1, 3 (1st Cir. 1998) (emphasis added). *See also Scottsdale Ins. Co. v. Subscriptions Plus, Inc.*, 195 F.R.D. 640, 646 (W.D. Wis. 2000), *aff'd* 299 F.3d 618 (7th Cir. 2002) (Rule 19 "prevents inconsistent obligations, not inconsistent adjudications."); *Bad River Band of Lake Superior Tribe of Chippewa Indians of Bad River Reservation v. Enbridge Energy Co.*, 2021 WL 1425352 (W.D. Wis. Apr. 16, 2021) (finding that, even where multiple lawsuits might result in different damages awards, that did not show there was a "*substantial* risk of creating inconsistent *obligations*" to necessitate joinder under Rule 19) (emphases in original).

If Plaintiffs are successful here, they will have a declaration that the Roadways must remain open to the public such that Defendants cannot barricade the Roadways and cannot issue access permits for the Roadways to be used; such a result imposes no obligations on Defendants (apart from of course obligating them not to close the Roadways themselves, which they have no authority under federal law to do anyway). On the other hand, if Plaintiffs are defensively unsuccessful in a yet-to-be (and maybe never-to-be) filed trespass action (which would in fact likely name the Town as a defendant rather than the named Plaintiffs in this suit), they might have to refrain from actually using the Roadways. But that result would not impose an affirmative obligation on the Plaintiffs that would be inconsistent with any affirmative obligation imposed upon them in this case (because no such affirmative obligation will result here). Thus, there is no risk of inconsistent obligations which would warrant joinder under Rule 19.

Defendants cite three cases—notably none in this Circuit—which they claim support the proposition that federal courts "routinely" conclude that the United States is a required party where the action "involv[es] Indian lands and the United States[']' fiduciary duty to the respective Indian tribes and members . . . ." Defs.' Brief at 22. However, none of the cited cases should lead the Court to hold that the United States is a required party here.

In *Paiute-Shoshone Indians of Bishop Community of Bishop Colony, Cal. v. City of Los Angeles*, the Ninth Circuit concluded that the United States was a required party under Rule 19(a) because the district court could not award the relief sought by the plaintiff—to eject the City of Los Angeles from Bishop Tribal Land and restore possession of that land to the plaintiff—without the United States' involvement. 637 F.2d 993, 997 (9th Cir. 2011). In *Paiute-Shoshone*, the United States had in fact conveyed the Bishop Tribal Land at issue to the City; thus, the relief that the plaintiff ultimately sought would require the United States to cede title to the land at issue to the plaintiff or hold the land in trust for the plaintiff's benefit. *Id.* at 998. Thus, the relief sought involved the United States and it was therefore a required party under Rule 19. *Id.* Here, however, the Court need not rely on the United States to accord Plaintiffs the relief they seek. No affirmative action is required on the part of the United States to grant the requested relief.

The court in *Two Shields v. Wilkinson* also found that the United States was a required party, because the plaintiffs in that case sought damages from the United States for its alleged breach of fiduciary duty when the BIA approved certain leases for oil and gas mining rights. 790 F.3d 791, 792, 795 (8th Cir. 2015). Said another way, the plaintiffs needed to actually prove that the United States, acting through the BIA, had in fact "breached its fiduciary duty to ensure the leases at issue were in the best interest of the Indians." *Id.* at 797. It was clear to the Court that the United States would have an interest in such a determination, and that its ability to protect its

interest would be impaired or impeded by its absence. *Id.* To decide otherwise and determine that the United States was not a required party would allow "the question of whether the United States had acted illegally in approving the oil and gas leases for plaintiffs' allotments [to] . . . be tried behind its back." *Id.* at 795 (quotation omitted). Here, the conduct of Defendants, not the United States, is at issue. Thus, the Eight Circuit's reasoning and conclusion in *Two Shields* does not lead to the conclusion that the United States is a required party here.

The question at issue in *Minnesota v. United States* led to the Supreme Court concluding that the United States was a required party, but that question is miles apart from the question here. In *Minnesota*, the State sought to condemn nine parcels of land which were part of the Grand Portage Indian Reservation to establish a right-of-way for a highway. 305 U.S. 382 at 383. The United States was a required party in that instance because Minnesota sought affirmative rights over the land at issue, which land was owned by the United States and held in trust for the allottees. *Id.* at 386. *Minnesota* might provide good support for the Defendants' and United States' argument that the United States is a required party if Plaintiffs were maintaining their claim for an implied easement; but they are not. As it stands, Plaintiffs' prayer for relief does not require the United States provide Plaintiffs any affirmative rights over the land at issue; it would only demand that Defendants refrain from violating express federal law by barricading the Roadways and requiring access permits to use roads that must remain open and available for public use under federal law.

In sum, neither the Defendants nor United States have established that the United States is a required party to this action under Rule 19.

C. To the extent that the Tribe and/or United States are required parties that cannot be joined, equity and good conscience demand that this action proceed between the current Plaintiffs and Defendants.

Even if the Court determines that the Tribe and United States are required parties, and assuming *arguendo* that they cannot be joined based on sovereign immunity, that does not end the

inquiry. Under Rule 19(b), "[i]f a person who is required to be joined if feasible cannot be joined, the court muster determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed." The analysis under Rule 19(b) determines whether a party, even if "necessary," is indispensable, and provides the Court with discretion to balance the competing respective interests of the parties in making this determination. Rule 19(b) provides several factors for the court to consider in determining whether a party is indispensable, or if the action should instead proceed among the existing parties, including:

(1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;

(2) the extent to which prejudice could be lessened or avoided by:

(D) protective provisions in the judgment;

(E) shaping the relief; or

(F) other measures;

(3) whether a judgment rendered in the person's absence would be adequate; and

(4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

On balance, application of these factors here shows that, even if the Tribe and United States are *necessary* parties, they are not *indispensable*, and this action should proceed among the currently named Plaintiffs and Defendants.

As an initial matter, the United States only argues that dismissal is appropriate here because "[a] judgment rendered in [its] absence would resolve only one potential piece of the ultimate controversy—an interpretation of the Inventory regulation." (Dkt. No. 53 at 19-20.) The United States characterizes Plaintiffs' claims as mere affirmative defenses and claims that it would

provide an "unfair litigation advantage" to Plaintiffs if this Court were to rule on those claims. (Dkt. No. 53 and 20.) But the relief Plaintiffs seek in this case is to remedy *Defendants'* wrongdoing, not defend their own conduct. The United States does not explain how the factors laid out by Rule 19(b) make it indispensable such that dismissal is warranted here. Instead, the United States continues to conflate the affirmative legal question at issue here (the legality of *Defendants'* conduct) with a legal question that might arise in a hypothetical action for trespass brought by the Tribe or United States. This is insufficient to show that the United States is indispensable under Rule 19.

Further, Defendants' argument that the United States is indispensable relies entirely on the premise that the United States' ownership in the trust lands underlying the Roadways is relevant to this case; it is not, for all of the reasons previously discussed. The Court can accord Plaintiffs the relief they seek without prejudicing the United States, especially considering the Plaintiffs are no longer advancing their implied easement claim. And while it may be true that the United States cannot be bound by relief fashioned by the Court if it is not a party to this action, that also is irrelevant. Plaintiffs seek relief from the *Defendants'* wrongdoing, not the United States'. Plaintiffs do not seek any relief against the United States.

Defendants' arguments about why the Tribe is indispensable also miss the mark. The Defendants argue that the first Rule 19(b) factor weighs in favor of dismissal because "a judgment without the Tribe's presence would likely be unenforceable . . . since the named Defendants individually lack authority to provide the Plaintiffs any of their relief sought." (Dkt. No. 38 at 20.) The argument is facially flawed because the individual Defendants have every ability to restrain themselves personally from barricading the Roadways in violation of express federal law. Defendants also argue that the Tribe would be prejudiced if the Court were to grant relief in the

form of access rights over tribal land; but this argument is moot without Plaintiffs' claim for implied easement in play. Further, any such potential of prejudice is mitigated by the Court's ability to appropriately shape the relief, as recognized by the second factor of Rule 19(b). The Defendants claim that "there is no way for the Court to lessen or avoid the prejudice" to the Tribe because "[g]ranting any of the relief requested . . . would have an immediate impact on the ability of the Tribe to govern its land and exercise is sovereign authority over the Reservation." (Dkt. No. 38 at 21.) But it is not the relief requested that has this effect; the Federal-Aid Highway Act and TTP already have such an impact, and this Court would merely be upholding the intended effect of that statutory scheme.[16]

Defendants also argue that the fourth factor under Rule 19(b)—whether the Plaintiffs would have an adequate remedy if this action were dismissed for nonjoinder—weighs in favor of dismissal here. They suggest that Plaintiffs could seek redress from the title companies or from the Town. Again the Defendants attempt to deflect from the actual question at issue in this case, which is whether the *Defendants* can legally barricade the Roadways in violation of express federal law. Whether Plaintiffs *also* might have colorable claims against the title companies or the Town is not relevant. Neither the title companies nor the Town physically blocked the Plaintiffs' access to and from their homes in the dead of Wisconsin winter for over a month. And neither the title companies nor the Town are threatening to do so in the future. There is no other way to remedy the individual Defendants' conduct—and prevent them from committing the same or similar acts in the future—other than through this lawsuit.[17]

[16] Defendants do not give much treatment to the third Rule 19(b) factor, and only state that they "dispute whether the Court can even fashion any relief at all for the Plaintiffs as the case is currently plead." (Dkt. No. 38 at 21.)

[17] Perhaps Plaintiffs would be able to bring counterclaims in a trespass action brought by the United States, but no such action has been filed, and one may never be filed. Plaintiffs have no ability to force the United States to bring such an action, especially in the timeframe that Plaintiffs need, given the highly likely impending re-barricading of the Roadways.

Defendants and the United States have failed to meet their burden to show that they are necessary—let alone indispensable—parties. Defendants' motion to dismiss pursuant to Rules 19 and 12(b)(7) should be denied.

IV. With subject matter jurisdiction in the form of a federal question, the Court should exercise supplemental jurisdiction over Plaintiffs' state law anticipated nuisance claims.

The Defendants contend only that the Court should decline to exercise jurisdiction over the Plaintiffs' state law nuisance claims in the event that Plaintiffs' other federal claims are dismissed; they do not argue that the Court would lack supplemental jurisdiction over Plaintiffs' state law claims if Plaintiffs' federal claims are *not* dismissed, nor that the Court should decline to exercise supplemental jurisdiction for any of the other reasons laid out in section 1367(c).

For the reasons stated above, in Plaintiffs' Supplemental Jurisdictional Statement (Dkt. No. 25), and in Plaintiffs' Reply Brief in Support of Plaintiffs' Reply Brief in Support of Plaintiffs' Amended Motion for a Preliminary Injunction (Dkt. No. 54), the Court has federal question subject matter jurisdiction in this case under 28 U.S.C. § 1331. Because the Court has federal question jurisdiction in this matter, it also has supplemental jurisdiction over "all other claims that are so related to the claims in the action . . . that they form part of the same case or controversy . . . ." 28 U.S.C. § 1367(a). This includes Plaintiffs' nuisance claims, which arise from the exact same set of circumstances that give rise to the other causes of action alleged in this lawsuit.

CONCLUSION

As set forth above, the court has subject matter jurisdiction over Plaintiffs' suit, and on that basis the Court should exercise supplemental jurisdiction over Plaintiffs' anticipated nuisance claims. Sovereign immunity does not bar Plaintiffs' claims, because Defendants' conduct involving requiring access permits to use roads that must remain open and available for public use is an ongoing violation of federal law and the individual Defendants lacked delegated power or

authority from the Tribal Council to barricade the Roadways and maintain the barricades. And largely because title to the land on which the Roadways lie is no longer at issue in this case, and because Defendants and the United States improperly conflate and confuse Plaintiffs' right to affirmative relief based on the Federal-Aid Highway Act and TTP with potentially alleged tribal and United States' rights against the Town under the ROW Act, neither the Tribe nor the United States is a necessary party to this case. Accordingly, Plaintiffs respectfully request that this Court deny Defendants' motion to dismiss Plaintiffs' amended complaint and permit Plaintiffs to continue to pursue Counts I, II, and III in this case.

Dated this 8th day of May, 2023.

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