

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

DONALD AND BONNIE POLLARD,
et al.

Plaintiffs,

Case No. 3:23-CV-135

v.

JOHN JOHNSON, SR.,
et al.

Defendants.

Defendants' Reply Brief in Support of Motion to Dismiss Plaintiffs' Amended Complaint

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Introduction

The Plaintiffs' response brief, for all its pages, fails to do the one thing it must – identify why this Court has jurisdiction over the claims as they are plead. The Plaintiffs' multiple attempts to amend their complaint again through these filings, both in claims and sought relief, cannot fix the jurisdictional defects and legal issues present. Because each of the Defendants is subject to sovereign immunity and the United States and the Tribe remain necessary parties, this Court should dismiss the Plaintiffs' Amended Complaint with prejudice.

Argument

I. The Roadways have been removed from the NTTFI, and the Plaintiffs have not established a cause of action, even if they could show an existing federal question.

The Plaintiffs argue that the removal of the Roadways from the NTTFI is not effective or final because they have appealed that removal, and therefore, despite the Roadways no longer being listed on the most-current published version of the NTTFI, the Court has subject matter jurisdiction over this case. Notwithstanding the Plaintiffs' footnote 11, a review of the regulations referenced by the Plaintiffs reveals that they very likely lack the ability to challenge the removal decision.¹ The regulation governing updates to the NTTFI includes only a very narrow path of administrative review for Indian tribes who wish to appeal “the rejection of submitted data on a new or existing facility included in the NTTFI,” and details how it must do so: “by filing a written notice of appeal to the Director, Bureau of Indian Affairs, with a copy to the BIA Regional Director,” but provides no rights of appeal to any other third-party entity, such as the Plaintiffs. 25 C.F.R. § 170.444(c). Because this section identifies a specific administrative

¹ The Court may also choose to reject this argument because it is yet another attempt at amending their complaint – now as a request to issue injunctive relief as “contingent on the Roadways remaining on the NTTFI,” or that is “in effect until the APA issue is resolved.” Dkt. 55 at 10 n.1, 15. Like the *ultra vires* issues explored *infra* at Part II, the Court should reject the Plaintiffs' attempt to amend their Amended Complaint to add to their allegations and change their requested relief in this manner.

appeal procedure, the restriction in 25 C.F.R. § 2.3(b) is triggered: “This part does not apply if any other regulation or Federal statute provides a different administrative appeal procedure applicable to a specific type of decision,” and bars the Plaintiffs from obtaining the relief they request under 25 C.F.R. Part 2. This reading of the statute is in line with the overall scheme of the Tribal Transportation Program, designed to enable Indian tribes to “meet the needs of their communities” in an “exercise of Indian Tribes’ self-determination and self-governance.” 25 C.F.R. § 170.2(c)-(d). Interpreting 25 C.F.R. § 170.444(c) as allowing the filed appeal from the homeowners would not be construing those regulations either “in favor of the Tribes” or “to implement the Federal policy of self-determination and self-governance.” 25 C.F.R. § 170.2(i), (h). This reading also comports with the express language in the Federal Highway Act and the Tribal Transportation Program that the maintenance of the NTTFI itself serves only to identify those transportation facilities that “are eligible for assistance under the tribal transportation program,” 23 U.S.C. § 202(b)(1)(A), and not meant as a federal pronouncement on land access or title.

This Court need not determine whether the decision to remove the Roadways from the NTTFI is effective immediately, however, because the Plaintiffs have failed – in either their Supplemental Jurisdictional filing or their Response to the Motion to Dismiss – to identify how the Court has jurisdiction to provide them with the relief they seek. With no express or implied cause of action in the Federal Highway Act, the Plaintiffs attempt to distinguish their case from that of *Grable & Sons*, but fail to identify how the Court can grant them relief under their state law nuisance claims without first finding that they have any right to access and use the Roadways, a finding that necessarily implicates the interests (and sovereign immunity) of the

Tribe and the United States.² See Dkt. 53 at 7-8; Dkt. 38 at 9-13; *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 314-15 (2005); see *Mich. Corr. Org. v. Mich. Dep't of Corr.*, 774 F.3d 895, 905-07 (6th Cir. 2014) (explaining that where neither the complained-of statute, nor the *Ex Parte Young* doctrine provided a private right of action, that meant no underlying lawsuit, no jurisdiction, and no availability of declaratory relief). The underlying controversy as alleged by the Plaintiffs, “whether the individual Defendants can lawfully barricade roads,” Dkt. 55 at 11, cannot rationally be separated in any way from a consideration of those “lawful” reasons the Defendants, as the elected Tribal Council for the Tribe, may have had to take their actions.

II. Under any of the Plaintiffs’ strained configurations of the facts in this case, the Defendants are entitled to sovereign immunity.

The Plaintiffs’ lengthy inclusion of facts that the Defendants filed in support of their opposition to the Plaintiffs’ Amended Motion for Preliminary Injunction does not rectify their jurisdictional issues, nor the fact that the Defendants have sovereign immunity from this lawsuit. The Defendants are each entitled to sovereign immunity from this lawsuit, because they acted wholly within their authority as elected leaders of the Tribe and the suit involves special sovereignty interests not sufficient to meet the *Ex Parte Young* legal fiction as plead.

In light of the evidence standards guiding motions to dismiss, the Defendants did not attach any affidavits to their motion, referencing only the Plaintiffs’ Amended Complaint and “information that is subject to proper judicial notice.” See *Geinosky v. City of Chicago*, 675 F.3d

² Beyond this issue, the Plaintiffs’ attempted withdrawal of their Count IV, coupled with the Tribe’s removal of the barriers in favor of Temporary Access Permits issued to the Town of Lac du Flambeau, see Dkt. 43-6, and *not* the individual homeowners, only increases the Plaintiffs’ Article III standing issues. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-562 (1992) (identifying the Article III standing requirements); *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 102-109 (1998) (exploring in detail the need for the relief requested to redress the injury alleged).

743, 745 n.1 (7th Cir. 2012). Despite this, the Plaintiffs expend nearly nine pages of their response brief to improperly assert new facts and evidence. *See* Dkt. 55 at 15–24. The Plaintiffs erroneously claim these assertions are found “in Defendants’ Motion to Dismiss Filings,” *id.* at 15, 32, when the referenced affidavits of Defendants Allen and Thompson, at Dkts. 43 and 44, were made a part of the case because of the Plaintiffs’ request for a preliminary injunction. *See Doe v. Univ. of S. Ind.*, 43 F.4th 784, 791-92 (7th Cir. 2022) (citing cases differentiating the Rule 12(b)(6) from the preliminary injunction analysis). While the Plaintiffs may be able to submit non-pleading materials in response to the Defendants’ motion to dismiss, *Thomas v. Guardsmark, Inc.*, 381 F.3d 701, 704 (7th Cir. 2004), the Seventh Circuit has instructed that any of these additional facts must be consistent with the complaint’s allegations and cannot amount to an amendment to their complaint or the assertion of a new claim, *Smith v. Dart*, 803 F.3d 304, 311 (7th Cir. 2015). The Plaintiffs have used these new facts to change their Amended Complaint’s allegations, and this Court should reject consideration of this evidence.

The Plaintiffs’ Amended Complaint attempts to defeat the Defendants’ sovereign immunity as elected officials of the Tribe through allegations that their actions are *ultra vires* because the placement of barriers over the Roadways, and subsequent Temporary Access Permit system are in violation of *federal* laws, including the Federal-Aid Highway Act and the Tribe’s “federal Indian law authority.” Am. Compl. at ¶¶ 6, 7, 148, 153. The Plaintiffs’ response brief attempts to fundamentally change their Amended Complaint’s allegations – now additionally alleging that the *ultra vires* actions are because of a violation of *tribal* laws, including the Tribe’s Constitution. *See* Dkt. 55 at 9, 31, 32, 39, 46. This additional *ultra vires* allegation is so wholly separate from that which was alleged in the Plaintiffs’ Amended Complaint that this Court should refuse to consider it. *See Smith*, 803 F.3d at 311, 311 n. 4.

However, even if the Court decides to consider the Plaintiffs' new *ultra vires* claims based on tribal law, both those and the claims based on federal laws must fail. The Tribe's Constitution explicitly gives the Tribal Council the authority to "regulate the use and disposition of tribal property . . . [and] to protect the health, security, and general welfare of the Tribe." Art. VI, § 1(a). This is the power exercised by the Tribal Council when it passed Motion 5-23 (Dkt. 43-2), Resolution 67(23) (Dkt. 43-6), and Resolution 100(23) (Dkt. 43-8). The Court should not accept the Plaintiffs' strained reading otherwise, that somehow the twelve individual Defendants acted without authority from the very body that those same twelve individuals compose, despite that the twelve individuals sued only took the complained-of actions in their official elected-leadership capacities.³ *Cf.* Dkt. 55 at 31. The Plaintiffs rely on *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949), to support their allegation that the individual Defendants acted outside their delegated authority because they did not, in the Plaintiffs' opinion, follow tribal law in the actions of Motion 5-23 (Dkt. 43-2), Resolution 67(23) (Dkt. 43-6), and Resolution 100(23) (Dkt. 43-8).⁴ But in *Larson*, the Supreme Court specifically held that the action complained of, that the named administrator inappropriately engaged in a sale of coal entrusted to his department, was "against the sovereign," and the administrator *was* entitled to sovereign immunity. 337 U.S. at 689. The quotes cited by the Plaintiffs in support of their arguments for *ultra vires* actions were no more than explanatory dicta about what might be the case in other situations, and specifically where the named defendant was an un-elected,

³ The Plaintiffs also attempt to bring in an *ultra vires* argument relating to the individual actions of Defendants Johnson, Thompson, and Chapman, but make no separate arguments with regards to why their actions were allegedly *ultra vires* beyond those they use for the rest of the Defendants (i.e., in the Amended Complaint that their actions violated federal law, and in the response briefing that they weren't acting with authority delegated to them). *See* Am. Compl. at ¶¶ 6, 7, 148, 153; Dkt. 55 at 9, 31, 32, 39, 46.

⁴ Many of the Plaintiffs' arguments on this point read more appropriately like those suited for the summary judgment stage, rather than at the motion to dismiss stage, where the Court's duty is only to review the complaint and determine if it "raises a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554 (2007).

appointed agency head. *See id.*; Dkt. 55 at 31. The Supreme Court went on to explain that – like the Plaintiffs’ claims – it is not enough to merely allege an “error in the exercise of that [delegated] power,” or that an official was acting “illegally” or “unauthorized” without also a specific allegation that the defendant official was “acting unconstitutionally or pursuant to an unconstitutional grant of power.” *Larson*, 337 U.S. at 690-91. Here, where there are no allegations in the Plaintiffs’ Amended Complaint about the Defendants acting in contravention to the Tribe’s Constitution, and where there is no tribal statute granting the Defendants a limited amount of power from some other authority, this Court should find their sovereign immunity as elected officials intact.

Stymied under their inappropriate tribal law *ultra vires* claims, the Plaintiffs also cannot get around the Defendants’ sovereign immunity through the use of the *Ex Parte Young* legal fiction in their claims that the Tribe’s Temporary Access Permit system violates federal law. The Plaintiffs cite *Idaho v. Coeur d’Alene Tribe of Idaho* for the proposition that what they’ve done – allege an ongoing violation of federal law and request prospective relief – is sufficient to invoke the *Ex Parte Young* legal fiction and void the Defendants’ sovereign immunity as tribal officials. Dkt. 55 at 40-41. But in *Coeur d’Alene Tribe*, the Supreme Court specifically rejected the opportunity to do just that, given the nature of the case, one that it described as the “functional equivalent of a quiet title action” that “implicates special sovereignty interests.” 521 U.S. 261, 281 (1997). The Plaintiffs’ Amended Complaint, both before and after their stated withdrawal of Count IV,⁵ can be described in exactly the same way, because the Plaintiffs’ requested relief

⁵ Under the Federal Rules of Civil Procedure, the Plaintiffs should have moved under Rule 15(a) to properly dismiss a count of their Amended Complaint. *Taylor v. Brown*, 787 F.3d 851, 857 (7th Cir. 2015). Because of the procedure actually used (a request in an opposition brief), the Defendants are left uncertain in the drafting of this reply briefing whether it will be dismissed or not, and whether it will be dismissed with or without prejudice (the latter of which would leave the Defendants open to the threat of future litigation from the Plaintiffs on the claim). *See Weinberger v. Retail Credit Co.*, 498 F.2d 552, 554 n.4 (4th Cir. 1974).

requires the Court to (at minimum) issue orders delineating the right of access to the Roadways. Right to access to these Roadways—that cross lands owned by the United States, held in trust for the benefit of the Tribe, and are located within the Tribe’s treaty-bounded Reservation—is squarely within the powers reserved to the Defendants in their capacities as Tribal Council members exercising the powers of the Tribe. *See, e.g., Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 144-45 (1982) (detailing tribal powers over nonmembers on tribal lands); *United States v. Mazurie*, 419 U.S. 544, 556-57 (1975) (discussing aspects of tribal regulation over lands). Engaging in the line drawing encouraged by *Young* and its progeny, this Court should find, like the *Coeur d’Alene* court did, that the special sovereignty interests present in such a ruling on access to reservation roads “would be affected in a degree fully as intrusive as almost any conceivable retroactive levy upon funds in its Treasury,” and should “find the *Young* exception inapplicable.” 521 U.S. at 287.

The Plaintiffs’ final attempts to get around the Defendants’ sovereign immunity by distinguishing their challenge from the one present in *Imperial Granite Co. v. Pala Band of Mission Indians* are unavailing, especially in light of their abandonment of Count IV of their Amended Complaint. Here, just like in *Imperial Granite*, and notwithstanding the Plaintiffs’ strained attempts to create a question otherwise, “the Band clearly authorized the closure.” 940 F.2d 1269, 1271 (9th Cir. 1991). This authorization can be found in Motion 5-23 (Dkt. 43-2), Resolution 67(23) (Dkt. 43-6), and Resolution 100(23) (Dkt. 43-8), coupled with the fact that the Plaintiffs’ have not identified any evidence suggesting the Tribe has *not* authorized the closure, either in intention or procedure. The Plaintiffs’ allegations regarding the status of the Roadways on the NTTFI and the guidelines of the Federal Highway Act amount to no more than the mining company in *Imperial Granite* “alleg[ing] that the road was built with public funds.” 940 F.2d at

1272; Dkt. 55 at 39. And, should the Court dismiss the Plaintiffs' Count IV as they request, there is, like in *Imperial Granite*, a significant question of whether the Plaintiffs have alleged any right to use or legal interest in the Roadways sufficient to grant them standing to challenge the Defendants' actions. 940 F.2d at 1271; *see also Warth v. Seldin*, 422 U.S. 490, 508 (1975); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102-107 (1998) (noting relief that is only "vindication of the rule of law" is not sufficient for the redressability requirement). Under any reading of the Amended Complaint, and even the post-hoc allegations made in the Plaintiffs' response briefing, the Court must answer the question of "whether the sovereign is the real party in interest," affirmatively, and find that the Defendants are entitled to tribal sovereign immunity. *See Lewis v. Clarke*, 581 U.S. 155, 163 (2017) (finding "no reason to depart from the[] general rules in the context of tribal sovereign immunity" while holding that an action against an individual, to recover for personal actions would not "operate against the Tribe").

III. The Plaintiffs cannot separate the ROW Act and title issues from their lawsuit, even through dismissal of Count IV, making the United States and the Tribe required and indispensable parties.

The Plaintiffs attempt to fix their required and indispensable party issues by requesting a voluntary dismissal of Count IV of their Amended Complaint, but even absent their seeking an express property interest in the lands underlying the Roadways, their claims necessarily involve a request that the Court determine the extent of access rights upon the Roadways. In their response brief, the Plaintiffs ask this Court to issue a ruling that *only* considers *one* federal law, without reference to any of the other obvious federal laws and regulations governing the Roadways. Dkt. 55 at 10, 11, 12, 14, 15, 49, 50, 58. But just as a court could not rule on a tenant seeking access to a rental property based on a lease, without also considering whether that lease had expired, or consider a breach of contract action without examining the duties owed by both parties under the

contract, this Court cannot look at the Federal Highway Act in a vacuum without also considering the ROW Act and its regulations, and both the Tribe and the United States remain required parties that cannot be joined because of their sovereign immunity.

Because a favorable outcome for the Plaintiffs would require the Court to ignore and otherwise undermine the abundance of legal authority reinforcing the Tribe's authority and interests over the Roadways, the Tribe is a required party under Rule 19(a)(1)(B). *See, e.g.*, 25 C.F.R. § 169.413 (allowing for the eviction of trespassers through "any available remedies"); *id.* § 169.10 (detailing that a right-of-way over Indian lands does not diminish a tribe's jurisdiction, authority to enforce tribal law, inherent sovereign power, or "[t]he character of the land subject to the right-of-way as Indian country"); Bureau of Indian Affairs, Rights-of-Way on Indian Lands Handbook, 52 IAM 9-H, at 4 (Jan. 10, 2022), *available at* <https://www.bia.gov/policy-forms/handbooks> (specifically highlighting that the Tribal Transportation Program and the NTTFI data invoked by the Plaintiffs "should not be used for determining real property ownership, nor whether a ROW is needed or if it exists"). The Tribe has both claimed an interest in the subject matter of the action, and identified that any decision made without the Tribe's participation in this case would fundamentally "as a practical matter impair or impede the [Tribe's] ability to protect the interest." Fed. R. Civ. P. 19(a)(1)(B); *see* Dkt. 38 at 23-24.

The Plaintiffs unconvincingly argue that the Tribe lacks (or has not appropriately claimed) a protectable interest in the subject of this litigation, Dkt. 55 at 47, all the while conflating the actions of the Tribe with those of the Defendants throughout their Amended Complaint and response briefing. *See* Dkt. 38 at 17; Dkt. 55 at 23, 43-44 (identifying Tribal Council Resolution No. 67(23) as a key component to their arguments for both *Ex Parte Young* jurisdiction and requesting this Court void it to obtain their prayed for relief). Contrary to the

Plaintiffs' insinuation, a party need not move to intervene in a case to be a necessary or indispensable party. *See, e.g., Burger King Corp. v. Am. Nat'l Bank & Trust Co.*, 119 F.R.D. 672, 679 (N.D. Ill. 1988); *Kafka v. Bellevue Corp.*, No. 90-C-6709, 1991 WL 159828, at *2 (N.D. Ill. Aug. 8, 1991); *Clorox Co. v. S.C. Johnson & Son, Inc.*, 627 F. Supp. 2d 954, 960 (E.D. Wis. 2009).

The Plaintiffs go on to argue that regardless of the Tribe's interest in the lands underlying the Roadways, the Court could somehow grant the Plaintiffs' requested relief without impeding that interest. Dkt. 55 at 48. But, as discussed above, any Court ruling in the Plaintiffs' favor will change the nature of the access rights to the Roadways – something that would, without the United States', and the Tribe's participation – impair or impede both of the sovereigns' abilities to protect their interests. The Plaintiffs assert that they are not now seeking “affirmative” or “access rights,” Dkt. 55 at 53, 55-56, but these statements are belied by the Plaintiffs' request in their Amended Complaint for “a declaration that the Roadways are public and must be kept open to the public,” Am. Compl. at 41. Granting this relief necessarily implicates access to, and even legal interests in, the Roadways. Any determination of the Plaintiffs' rights to access the Roadways would amount to an affirmative obligation (to allow access), forced upon both the Tribe and the United States in their absence, and would create the likely possibility of inconsistent obligations following separate litigation involving the expired rights-of-ways. *See Paiute-Shoshone Indians of Bishop Cmty. of Bishop Colony, Cal. v. City of Los Angeles*, 637 F.3d 993, 998 (9th Cir. 2011). For these reasons, the Tribe and the United States are parties that must be joined under Rule 19(a).

Further, under any commonsense analysis of the Rule 19(b) “equity and good conscience” factors, this Court should decline to rule on the Plaintiffs' requested relief without

the presence of the two sovereigns who hold ownership interests in the land underlying the Roadways. *See Republic of the Philippines v. Pimentel*, 553 U.S. 851, 867 (2008) (reviewing prior cases and summing that “where sovereign immunity is asserted, and the claims of the sovereign are not frivolous, dismissal of the action must be ordered where there is a potential for injury to the interests of the absent sovereign”). The Plaintiffs first argue that neither the United States nor the Tribe will be prejudiced if a judgment is rendered in their absence, because they are no longer claiming any property interest in the Roadways. Dkt. 55 at 55; Fed. R. Civ. P. 19(b)(1). But this ignores the critical and inseparable links between the Federal Highway Act and the ROW Act and its implementing regulations, discussed *supra*. Next, none of the Plaintiffs’ suggestions for a shaping of relief that could be provided by the Court address the fact that any relief granted will involve a determination of access to the Roadways, and many of the Plaintiffs’ suggestions involve the invalidation of Tribal Council resolutions. Dkt 55 at 43-45; Fed. R. Civ. P. 19(b)(2). Without the inclusion of the Tribe (the governing body adopting the complained-of and sought-to-be-invalidated motions and resolutions), the Plaintiffs fail to identify how any relief granted by the individual Defendants could be adequate. Dkt. 55 at 55; Fed. R. Civ. P. 19(b)(3). Finally, the Plaintiffs ignore the plain language of Rule 19(b)(4) through their arguments that other claims they might have are irrelevant. *See* Dkt. 55 at 56. While the Plaintiffs describe the underlying dispute as “whether the individual Defendants can lawfully barricade roads,” Dkt. 55 at 11, the actual alleged harms throughout the Amended Complaint revolve around access to the Roadways (and specifically, using the Roadways to access their properties), Am. Compl. at ¶¶ 46-70, 148, 171, 188, something that can be addressed through other avenues.

IV. This Court should not consider the state-court claims raised by the Plaintiffs.

If the Court finds it does not have federal subject matter jurisdiction over Count I of the Plaintiffs' Amended Complaint, it must dismiss the Plaintiffs' state law claims. *See Rivera v. Allstate Ins. Co.*, 913 F.3d 603, 618 (7th Cir. 2018). The Defendants will not raise new arguments on reply, but should the Court not dismiss Count I of the Plaintiffs' Amended Complaint, it can *sua sponte* consider the reasons listed in 28 U.S.C. § 1367(c) to decline supplemental jurisdiction over Counts II and III. *See, e.g., Schwartz v. System Software Assocs. Inc.*, 813 F. Supp. 1364, 1368 (N.D. Ill. 1993).

Conclusion

The Plaintiffs' Amended Complaint suffers from numerous jurisdictional defects and legal issues, each of which alone would be sufficient for this Court to dismiss the case. The Plaintiffs have failed to establish that this Court has subject matter jurisdiction, failed to show it can maintain the suit notwithstanding the Defendants' sovereign immunity, failed to join at least two necessary and indispensable parties, and failed to establish why the Court should exercise supplemental jurisdiction over the Plaintiffs' state law anticipated nuisance claims. For these reasons, the Defendants respectfully request that this Court grant their Motion to Dismiss and dismiss the Amended Complaint in its entirety.

Dated: May 18, 2023

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