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

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UNITED STATES OF AMERICA,

Plaintiff and
Counter Defendant,

Case No. 3:23-cv-355-wmc

v.

TOWN OF LAC DU FLAMBEAU,

Defendant and
Counter Claimant,

and

GORDON ANDERSON et al.,

Intervenor Defendants and
Intervenor Counter Claimants.

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**UNITED STATES OF AMERICA'S COMBINED RESPONSE BRIEF IN OPPOSITION TO THE TOWN OF LAC DU FLAMBEAU'S AND GORDON ANDERSON ET AL.'S MOTIONS FOR SUMMARY JUDGMENT**

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## INTRODUCTION

Pursuant to Fed. R. Civ. P. 56, the Court's *Summary Judgment Procedures*, and the dispositive-motion briefing schedule set in this case, *see* Dkt. 124, Plaintiff United States of America hereby submits its Combined Response Brief in Opposition to Defendant Town of Lac du Flambeau's ("Town") and Intervenor Defendants Gordon Anderson et al.'s (the "Homeowners") Motions for Summary Judgment ("Combined Resp. Br."). This Combined Response Brief, along with the United States' Responses to the Town's and the Homeowners' Proposed Findings of Fact in support of their respective Motions for Summary Judgment, the United States' Statement of Additional Proposed Findings of Fact to Support Its Combined Response Brief, and the Supplemental Declaration of Hillary Hoffman in Support of the United States' Combined Response Brief in Opposition to the Town's and the Homeowners' Motions for Summary Judgment ("Hoffman Suppl. Decl."), all filed concurrently herewith, specifically addresses the arguments raised in the Town's and Homeowners' Briefs in Support of Their Motions for Summary Judgment. *See* Dkts. 126, 143.

## ARGUMENT

### I. THE TOWN CANNOT REWRITE THE TERMS OF THE ROW GRANTS TO AVOID ITS TRESPASS

The Parties agree that the BIA granted the First Annie Sunn Lane ROW, the Center Sugarbush Lane ROW, the East Ross Allen Lake Lane ROW, and the Elsie Lake Lane ROW for fifty-year terms. *See* Dkt. 137 at 11-12, ¶¶ 35-39; Dkt. 146 at 7, ¶ 39, at 10,

¶ 58, at 11, ¶ 69, and at 12, ¶ 73; Dkt. 127 at 12-13, ¶ 37, at 14, ¶ 46, at 15, ¶ 49, and at 16, ¶ 53. Despite the clear and unambiguous terms of those grants, the Town insists that:

> The language placed in four of the approvals by the Superintendent of the BIA cannot have effect because that insertion is in direct contradiction to the controlling regulation pursuant to which the grants were approved when the ROWs are for public roads and must be permanent. Historical evidence also shows that the access for these public roads was to be permanent when approved.

Dkt. 143 at 14. The Town's position defies logic. For that position to hold, one must ignore the plain terms of the grants, the text of the applicable regulations in force at the time of the grants, and the BIA's contemporary and subsequent interpretations of the grants.

The United States has trod most of this ground in its Opening Brief, *see* Dkt. 138 at 33-37, and incorporates those arguments here. That said, we address the key points raised in the Town's argument. First, the Town's desire to ignore the plain text of the four grants of easement, clearly and expressly limiting the term of each ROW to fifty years, violates

> the general principle announced in many cases in this court, that grants for the sovereign should receive a strict construction -- a construction which shall support the claim of the government rather than that of the individual. Nothing passes by implication, and unless the language of the grant be clear and explicit as to the property conveyed, that construction will be adopted which favors the sovereign rather than the grantee.

*N. Pac. Ry. Co. v. Soderberg*, 188 U.S. 526, 534 (1903). Given the clarity of the four ROW grants, they must be interpreted as written. Indeed, the Town was well aware of the limited duration of the grants when, in 2014, it informed residents of some of the Roads of the impending expiration of some of the ROWs. Dkt. 137 at 14, ¶¶ 48-49.

Second, the principle of construction in favor of the sovereign controls the grant for the Second Annie Sunn Lane ROW as well, which was silent as to term. Nothing on the face of the Second Annie Sunn Lane ROW supports the Town's reading of that grant. Nor do the applicable regulations. Those regulations were adopted in 1957 pursuant to the ROW Act, 25 U.S.C. § 328, and remained in effect, as amended in 1960, until the BIA issued a new version of 25 C.F.R. Part 161 in December 1968. *See* Hoffman Decl. (Dkt. 139 at 4, ¶ 15 & Att. L (Dkt. 139-12); *see also* Hoffman Suppl. Decl. ¶ 4 & Att. A (25 Fed. Reg. 7,979 (Aug. 18, 1960)) (amendment to 25 C.F.R. § 161.19); *id.* ¶ 5 & Att. B (33 Fed. Reg. 19,803–19,810 (Dec. 27, 1968)) (comprehensive revision to 25 C.F.R. Part 161). The BIA approved the Second Annie Sunn Lane ROW on February 19, 1968, pursuant to the 1957 version of 25 C.F.R. Part 161, as amended in August 1960. Dkt. 137 at 11, ¶ 36.

The specific regulation governing the "Tenure of approved right-of-way grants" in effect at the time of the grant in February 1968[1] stated in relevant part:

> Rights-of-way for railroads, telephone lines, telegraph lines, public highways, and water control projects including but not limited to dams, reservoirs, flowage easements, ditches and canals shall be without limitation as to term of years. Rights-of-way for all other purposes shall be for a period not to exceed 50 years, as fixed by the Superintendent and stated in the grant, and shall be subject to renewal for a like term upon compliance with the applicable regulations.

[1] Contrary to the Town's view, *see* Dkt. 143 at 15, the United States asserts that the above-quoted version of 25 C.F.R. § 161.19 was in force for the entire period between October 23, 1961, and February 19, 1968, during which the BIA approved the five ROWs for the Roads.

25 C.F.R. § 161.19 (1960). Although the BIA did not state the 50-year term in the grant, as explained in the United States' Opening Brief, § 161.19 limited the term of right-of-way grants for roads to private, non-governmental entities like Mr. Niske and Northwoods to no more than fifty years. *See* Dkt. 138 at 34-35. This was true because "all grants for public road purposes should be made to governmental entities qualified and willing to maintain them. Private individuals and corporations should only receive private grants of easement for the limited term specified in 25 C.F.R. 161." Hoffman Decl., Dkt. 139 at 5, ¶ 19 & Att. P (BIA Memorandum dated Feb. 23, 1968) (US_0034626).

The BIA has consistently treated the grant as limited to a term of 50 years. *See id.* ¶ 20 & Att. Q (BIA Letter to Richard Caspari dated Sept. 16, 1977) (US_0034632) ("Right-of-way was granted to Northwoods Land Office, Inc. on February 19, 1968 and was assigned to the Town of Lac du Flambeau on September 22, 1971. Right-of-way is for a 50-year tenure."). That interpretation is entitled to deference. *See*, *e.g.*, *United States v. Grand River Dam Auth.*, 363 U.S. 229, 235 (1960) ("all federal grants are construed in favor of the Government lest they be enlarged to include more than what was expressly included"). If the BIA intended this grant to be without limitation as to term, as the Town and Homeowners claim, the BIA would have said so in the grant (which the BIA did not). That was precisely the case with the perpetual easement granted for the third segment of Annie Sunn Lane, for which the United States did not bring claims against the Town in this action. *See* Dkt. 137 at 6, ¶ 18. The grant for that easement explicitly provides that it "is without limitation as to tenure, so long as said easement shall be actually used for the purpose above specified." *See* Dkt. 139 ¶ 9 & Att. F; Dkt. 139-6 at

295-96 (Att. 16) (Grant of Easement for Right-of-Way No. 432 1673) (US_0064620 – US_0064621). Absent express language making the grant "perpetual" or "without limitation as to tenure," the BIA's longstanding interpretation of the Second Annie Sunn Lane ROW should prevail.[2]

## II. THE HOMEOWNERS HAVE NEITHER IMPLIED EASEMENTS NOR EASEMENTS BY NECESSITY TO USE ANY OF THE ROADS

The Homeowners argue that the Court should declare that they have implied easements and easements by necessity over the Roads. Dkt. 126 at 19, 25. The Homeowners cite to no Treaty language or congressional act that provides a clear statement indicating that the Homeowners have such rights, because no such statement exists. Further, none of the eight land patents from which the Homeowners' properties indisputably derive contain clear statements from which easements over the trust and restricted-fee lands underlying the Roads may be implied. The Homeowners sidestep the plain text of the land patents and the lack of intent in the Treaty by seeking to apply common-law elements of easements by necessity to the Indian trust and restricted-fee lands. Dkt. 126 at 25-26. However, again, when it comes to easements through Indian lands, the pertinent inquiry is always whether the Federal Government intended to grant such easements in a clear statement to that effect. Here, not only is there no clear

[2] The canons of construction applicable in Indian law also shift the balance toward the BIA's application and interpretation of 25 C.F.R. § 161.19 in this instance. The canons require the construction of both statutes and federal regulations liberally in favor of Indians and Tribes and resolution of ambiguities in their favor. *See Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985) (statutes); *HRI, Inc. v. E.P.A.*, 198 F.3d 1224, 1245 (10th Cir. 2000) (regulations).

statement indicating the existence of any implied easements and easements by necessity over the Roads, but Congress made clear that it is the ROW Act that is the exclusive means by which the Homeowners and Town can acquire use-and-access rights over the Roads. The Homeowners' implied-easement and easement-by-necessity arguments fall short of the mark and should therefore be rejected.

### A. The Pertinent Inquiry For These Reservation Lands Is The Intent Of The Federal Government.

In arguing that they have easements by necessity, the Homeowners allege that three elements at common law must be applied to determine if such easements exist, and that there is "no element of the conveyor's intent for an easement by necessity." Dkt. 126 at 25-26. In making that argument, the Homeowners treat the dispute here as one between private parties holding land in fee. This reflects a fundamental misunderstanding of the proper analysis for the lands at issue in this case. The land here is trust and restricted-fee land to which the United States holds title or restrictions against alienation and encumbrance. Further, the land patents from which the Homeowners' lands derive were made pursuant to Article 3 of the 1854 Treaty, an agreement made between the members of the Lake Superior Ojibwe Bands and the President of the United States. *See Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Evers* ("*Lac Corte Oreilles Band*"), 46 F.4th 552, 565 (7th Cir. 2022) ("A treaty is in its nature a contract between . . . nations, not a legislative act[.] . . . Accordingly, lands allotted under the 1854 Treaty became freely alienable by mutual assent of the contracting parties—the Ojibwe tribes and the President of the United States—without

Congress's input one way or the other."). In such a case, it is not common-law elements that govern. Rather, it is the intent of the Federal Government—the President, in the case of Indian treaties, and Congress, in the case of statutes—that governs whether easements over tribal trust lands (and federal lands generally) may be implied. *See Leo Sheep Co. v. United States*, 440 U.S. 668, 681-82 (1979) ("pertinent inquiry" is intent).

Multiple uncontroverted legal principles form the backdrop to the rule that it is only through a clear statement of intent from Congress or the President that Indian trust and restricted-fee lands, and interests in those lands, may be divested from Tribes, individual Indians, or the United States. The first principle is Congress's plenary power over Indian affairs. *See, e.g., Haaland v. Brackeen*, 599 U.S. 255, 272-73 (2023) (citing cases). Congress has used that authority to tightly regulate the sale and alienation of Indian lands since the Founding Era. *See* Dkt. 138 at 50-53 (laying out the history of Indian Nonintercourse Act). That tight regulation continues today, via 25 U.S.C. § 177, in which Congress has expressly stated that "[n]o purchase, grant, lease, or other conveyance of lands or of any title or claim thereto, from any Indian nation or tribe of Indians shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution." Thus, a clear statement of intent by the Federal Government is required to alienate any interest in Indian lands; in the absence of such a statement, no interests in trust or restricted-fee land can be implied.

The second principle supporting the rule that no interest in Indian lands may be implied without a clear statement of the President or Congress arises from the fundamental purpose and nature of Indian trust and restricted-fee lands, which is "to

protect the land from unauthorized alienation." *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1272 (9th Cir. 1991). A Tribe's inherent sovereign authority often "centers on the land held by the tribe and on tribal members within the reservation." *Plains Com. Bank v. Long Fam. Land & Cattle Co.*, 554 U.S. 316, 327 (2008). The Federal Government continues to hold "bare" legal title to trust lands "to increase the likelihood that Indian territory will remain Indian territory" and to "preserve tribal sovereignty" by preserving the land base. *Oneida Tribe of Indians of Wis. v. Vill. of Hobart*, 732 F.3d 837, 838-39, 842 (7th Cir. 2013). In short, that a Tribe's land serves as an "instrumentality of that [Tribal] government" requires a clear statement before any divestiture or diminishment of tribal real-property rights. *See United States v. 7,405.3 Acres of Land*, 97 F.2d 417, 422 (4th Cir. 1938).

Finally, "land grants are construed favorably to the Government," and "nothing passes except what is conveyed in clear language" in the granting document. *United States v. Union Pac. R.R. Co.*, 353 U.S. 112, 116 (1957). If there are any doubts as to what has been conveyed by the Government through the granting document, those doubts are "resolved for the Government, not against it." *Id.* This last principle is buttressed by the rule that the Federal Government cannot lose its property—including property that it holds bare legal title to, like Indian trust and restricted-fee lands—or interests in those properties through implication. *United States v. Town of Lac du Flambeau*, No. 23-cv-355-wmc, 2024 WL 4297671, at *11 (W.D. Wis. Sept 26, 2024).

The Supreme Court has confirmed that, where the Federal Government issues a land grant, the question of what interests pass in that grant is answered by the intent of the

Federal Government. *Leo Sheep Co.*, 440 U.S. at 681 (when Congress grants a land patent, "[t]he pertinent inquiry . . . is the intent of Congress when it granted the land"). In *Leo Sheep*, private owners of land which had been granted a patent by Congress brought a Quiet Title action against the United States, alleging that the United States was unlawfully entering their property by constructing a road on the private property. The Federal Government did not claim any express reservation of easement, but instead argued that it had an implicit reservation of the asserted easement. *Id* at 680. The Court described the doctrine of easement by necessity as being "of little significance," in part because the relevant inquiry was not common-law principles, but rather the intent of Congress. *Id.* at 682 ("we are unwilling to imply rights-of-way, with the substantial impact that such implication would have on property rights granted over 100 years ago, in the absence of a stronger case for their implication than the Government makes here").

In this case, the United States, acting through the President under the authority of Article 3 of the 1854 Treaty, granted the patents for the land that eventually became the Homeowners' properties. But however the Homeowners package their easement claims—whether as implied easements or easements by necessity—they cannot avoid, as part of the burden they carry at summary judgment, the requirement that any judicial declaration of easements in the Band's and the Allottees' lands be based on a clear statement of the intent of the Federal Government to grant the Homeowners such rights. As further described below, there is no such clear statement of intent to be found.

### B. *Brendale* And The Other Cases On Which The Homeowners Rely Do Not Support A Finding Of Intent Here.

Most of the Homeowners' easement arguments rest on a gross misreading of *Brendale v. Confederated Tribes & Bands of Yakima Nation*, 492 U.S. 408 (1989). *See* Dkt. 126 at 19-25. The Homeowners make it seem that the Supreme Court squarely held in that case that Congress, through the General Allotment Act (also known as the Dawes Act), implied common-law easements over all Indian lands when necessary to ensure access to fee property, free of any regulation and the payment of any consideration. But the issue of access easements over trust and restricted-fee lands *was not* even before the Court in *Brendale*, in which the Court only granted certiorari on the question of the Yakima Indian Nation's authority "to zone fee lands owned by nonmembers of the Tribe located within the boundaries of the Yakima Reservation." *Brendale,* 492 U.S. at 414; *see id.* at 419-421 (discussing the case's procedural history). Any statements the Supreme Court made in dicta regarding fee-property access rights across trust and restricted-fee land within Indian reservations are not only just that—dicta—but they are irrelevant to the issue presented here for another reason. In *Brendale*, the Court was analyzing Congress's intent under the General Allotment Act, not the President's intent under the 1854 Treaty, pursuant to which allotment on the Reservation occurred. Thus, *Brendale*, *Confederated Salish & Kootenai Tribes v. Namen*, 380 F. Supp. 452 (D. Mont. 1974), *aff'd per curiam*, 534 F.2d 1376 (9th Cir. 1976), *Brendale v. Olney*, No. C-78-145 (E.D. Wash. Mar. 3, 1981) (Mem. Decision and Judgment) (copy provided at Dkt. 91-3), and *Evans v. Shoshone-Bannock Land Use Pol'y Comm'n*, 736 F.3d 1298 (9th Cir. 2013)—all of which

concerned Congress's intent in the General Allotment Act or other allotment statutes specific to Indian reservations other than the Lac du Flambeau Reservation—offer the Homeowners no help.

As stated above, the sole question before the Court in *Brendale* was whether the Yakima Indian Nation had the authority to "zone fee lands owned by nonmembers of the Tribe located within the boundaries of the Yakima Reservation." 492 U.S. at 414. The Court held, by a six-to-three margin, that *Montana v. United States*, 450 U.S. 544 (1981), did not authorize the Nation to zone nonmembers' land within an area of the Tribe's reservation open to the general public. *Brendale*, 492 U.S. at 428-31 (White, J.), 445-47 (Stevens, J.). The Court also held that *Montana* did permit the Yakima Nation to zone fee land in an area of the reservation closed to the general public. *Id.* at 438-45 (Stevens, J.). None of the opinions garnered a majority, and thus the holdings of the decision should be interpreted "on the narrowest grounds." *Marks v. United States*, 430 U.S. 188, 193 (1977).

The Homeowners rest most of their implied-easement argument on a couple of select quotes from Justice Stevens' opinion. Dkt. 126 at 20-23. The first sentence provides: "A statute that authorizes the sale of a parcel of land in a reservation must implicitly grant the purchaser access to that property." 492 U.S. at 437; *see* Dkt. 126 at 20-22. The second full sentence states: "In my opinion, just as Congress could not possibly have intended in enacting the Dawes Act that tribes would maintain the power to exclude bona fide purchasers of reservation land from that property, it could not have intended that tribes would lose control over the character of their reservations

upon the sale of a few, relatively small parcels of land." 492 U.S. at 441; *see* Dkt. 126 at 20-21. Along with being dicta, these statements are irrelevant to this trespass case for two reasons.

First, Justice Stevens' statements are best understood when placed in the proper legal context of the precise issue before the Supreme Court. That legal context is the Tribe's power to exclude from its trust and restricted-fee land, not the question of implied easements on allotted land. "The Yakima Nation contends that this power to exclude provides the source for its authority over the land at issue here."492 U.S. at 422. Justice Stevens' was trying to convince a majority of the Court—which he did—that the Yakima Nation retained enough of its sovereign authority over the fee lands within the "closed" portion of the Yakima Reservation to assert its zoning authority over those fee lands. This trespass case, on the other hand, is not about the Band's power to exclude non-Indians from non-Indian fee lands or to regulate those non-Indians on non-Indian fee lands within the Reservation. *See generally* Dkt. 1 & 61. Instead, this trespass case is about the Town and Homeowners' conduct on *tribal trust and restricted-fee lands*. This case does not implicate the legal principle of a Tribe's right to exclude, and that alone renders Brendale *unhelpful,* let alone binding.

Additionally, to the extent that Justice Stevens discusses congressional intent in allotting the Yakima Reservation, *Brendale*, 492 U.S. at 441 (Stevens, J.), that discussion is not relevant to this case. The Yakima Reservation was subject to allotment under the General Allotment Act. *Id.* at 436. The Lac du Flambeau Reservation, on the other hand, was not subject to that Act but was allotted pursuant to the 1854 Treaty, as confirmed

by a 1903 congressional act. *See Lac Courte Oreilles Band*, 46 F.4th at 565 ("[I]t was the 1854 Treaty—not the General Allotment Act or any other act of Congress—that governed allotment of the lands here."). The Homeowners' land therefore did not "become alienable at Congress's behest." *See Lac Courte Oreilles Band*, 46 F.4th at 565. "[L]ands allotted under the 1854 Treaty became freely alienable by mutual assent of the contracting parties—the Ojibwe tribes and the President of the United States—without Congress's input one way or the other." Congressional intent generally, and Congress's intent specifically in passing the General Allotment Act, is therefore irrelevant to the question whether the Homeowners possess implied easements in the trust and restricted-fee lands on which the Roads are located. To the contrary, since the Reservation was allotted under the authority of the 1854 Treaty and patents were later issued by the President to the individual allottees, the relevant intent in determining if the Homeowners and Town have implied easements is the intent of the President. Thus, not only does *Brendale* not address the legal issues presented here, but that case does not analyze or in any way opine on the legal pertinent authorities. The intent of the President, as expressed both in the Treaty and in the land patents, is the appropriate reference point.

As for the other cases the Homeowners cite to support their implied-easement arguments, those cases either lack any reasoned analysis of the implied-easement and easement-by-necessity issue or reach their holdings through the application of well-established exceptions to the clear-statement-of-intent rule. In *Brendale v. Olney*, No. C-78-145 (E.D. Wash. Mar. 3, 1981) (copy provided at Dkt. 91-3), the district court held that

an individual had "an implied easement appurtenant over those BIA roads on the Yakima Reservation which are reasonably necessary for access to his lands." Slip. Op. at 7. In reaching that decision, the court did not consider the implications of implying an easement over trust land, but rather simply "believe[d] that common law easement principles are applicable in deciding the merits of the case." *Id.* at 5. The court's analysis is thus suspect, and the case deserves no attention as persuasive authority.

*Evans*, 736 F.3d 1298, is another tribal zoning-authority case, in which the Shoshone-Bannock Tribes sought to impose its land-use requirements upon the construction of a home by a non-Indian on fee land within the Fort Hall Indian Reservation. 736 F.3d at 1300. The court cited to Justice Stevens' opinion in *Brendale* for the proposition that "the transfer of tribal land to nonmembers 'must implicitly grant the purchasers access to the property.'" *Id.* at 1304 n.6 (quoting *Brendale*, 492 U.S. at 437). In short, *Evans* contains no analysis at all of the easement issues the Homeowners raise.

*Lyon v. Gila River Indian Cmty,* 626 F.3d 1059 (9th Cir. 2010), acknowledges the general rule that "Courts normally construe federal land grants narrowly, under a longstanding 'rule that unless the language in a land grant is clear and explicit, the grant will be construed to favor the [granting] government so that nothing passes by implication,'" 626 F.3d at 1072, but nevertheless found an implied easement across what are now Gila River Indian Reservation lands under an "exception to this general rule where the land grant at issue was made pursuant to 'legislation of Congress designed to aid the common schools of the states;' in such cases, the grants are 'to be construed liberally rather than restrictively.'" *Id.* The court only found the exception applied

because, "when the federal government granted Section 16 to Arizona, *the lands surrounding Section 16 were not Indian lands*. *Id.* at 1073 (emphasis added). Those lands were only added to the Gila Reservation after the federal school-lands patent had issued to Arizona. *Id. Lyons* is thus both factually and analytically distinguishable from the instant dispute.[3]

*Namen*, 380 F. Supp. 452, is also misplaced. The issue in that case "concerned . . . the intent of Congress with respect to riparian rights in providing for the allotment and sale of lands fronting on a navigable lake." *Id.* at 463. The court concluded "that Congress must have intended that the fee patents . . . would include the customary riparian rights of access and wharfage." *Id.* at 466. In reaching its conclusion, the court relied on *Potomac Steamboat Co. v. Upper Potomac Steamboat Co.*, 109 U.S. 672 (1884). That case makes clear that the nature of riparian-property ownership includes the right to access the navigable part of a river or lake, and the right to landing and wharfage, from the property. 109 U.S. at 682; *see also Namen*, 380 F. Supp. at 461-62 (discussing *Potomac Steamboat Co.*). In other words, the *Namen* court did not imply an easement, but rather recognized express rights that are simply part of riparian-property ownership. *Namen* thus has no practical precedential value for the easement issues currently before the Court.

In sum, there is no binding or persuasive authority supporting the Homeowners' position that they have implied easements or easements by necessity over the segments

[3] For the same reasons, so too is *Utah v. Andrus*, 486 F. Supp. 995, 1002 (D. Utah 1979), on which the *Lyons* court relied in reaching its holding. *See* Dkt. 126 at 22.

of the Roads crossing the Band's and the Allottees' lands. The relevant land patents further undercut the Homeowners' case.

### C. The Relevant Land Patents Neither Granted Easements Nor Implied Any Intent To Do So.

Nowhere in their arguments for implied easements and easements by necessity do the Homeowners address the actual text of the eight land patents from which their current ownership of their properties derives.[4] *See* Dkt. 126 at 19-32. If easements by implication or necessity were created in the lands the Homeowners now own, they must have arisen when the lands were allotted and removed from the common ownership of the Band.[5] But the text of the patents does not give any of the grantees an express easement across the Band's and the Allottees' trust and restricted-fee land. And, moreover, the patents lack any suggestion—much less contain a clear statement—of presidential intent from which an access easement might be implied.

The text of each of the patents, dating from 1895, 1899, 1905, and 1938, is identical. The first paragraph of each consists of a "whereas" clause that describes the process by which the land was selected for allotment, gives a legal description of the

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[4] The Homeowners and the United States agree that all of the properties within the boundaries of the Reservation currently owned by the Homeowners derive from the eight land patents described in ¶ 8 of the Declaration of Kenneth Roy (Dkt. 140) and reproduced at Dkts. 140-4 through 140-11. *See also* Dkt. 127 at 2, ¶ 5; Dkt. 128 at 1-2, ¶¶ 2-3 & Exs. 1 (Dkt. 128-1) and 2 (Dkt. 128-2); Dkt. 131 at 2-3, ¶¶ 5-6 & Exs. 1 (Dkt. 131-1) and 3 (Dkt. 131-3); Dkt. 133 at 2-3, ¶¶ 5-6 & Ex. 1 (Dkt. 133-1); Dkt. 134 at 3-5, ¶¶ 5-6 & Exs. 1 (Dkt. 134-1), 3 (Dkt. 134-3, and 5 (Dkt. 134-5).

[5] This is true because the lands over which the Homeowners argue they possess access rights have continuously been owned since that time by the United States in trust for the Band or owned by the Allottees in restricted-fee status, with the United States holding restrictions against alienation and encumbrance in those allotted lands.

land, identifies the allottee-grantee, and invokes the legal authority of Article 3 of the 1854 Treaty. The granting language is found in the second paragraph. That paragraph in each of the patents states:

> Now, Know Ye, That the United States of America, in consideration of the premises, and in conformity with the said Treaty, the ORDER and RETURN, with SCHEDULE aforesaid, HAVE GIVEN AND GRANTED, and by these presents DO GIVE AND GRANT, unto the said [name of allottee] and to [his or her] heirs, the said Tract above described; but with the stipulation that said [name of allottee] and [his or her] heirs shall not sell, lease, or in any manner alienate, said Tract without the consent of the President of the United States; TO HAVE AND TO HOLD the same, together with all the rights, privileges, immunities, and appurtenances, of whatsoever nature thereunto belonging, unto the said [name of allottee] and to [his or her] heirs forever, provided, as aforesaid, that [name of allottee] and [his or her] heirs shall not sell, lease, or in any manner alienate, said Tract without the consent of the President of the United States.

*E.g.*, Roy SJ Decl. (Dkt. 140), ¶ 8.G & Ex. J (Dkt. 140-10). Nothing in the granting language speaks of access to the land. Nor can such intent be gleaned from any presidential intent, underlying the land grants, in the 1854 Treaty. In fact, the opposite is true: The United States agreed in the Treaty "to set apart and withhold from sale" the respective Lake Superior Ojibwe Bands' reservations, and further promised that "the Indians shall not be required to remove from the homes hereby set apart for them." Treaty with the Chippewa, 10 Stat. 1109, Arts. 2 & 11 (Sept. 30, 1854). That promise of a permanent homeland on the lands the Lake Superior Bands reserved in the Treaty makes it unlikely—particularly against the backdrop of the Indian canons of construction and the construction-in-favor-of-the-sovereign principle—that the President intended to imply easements on the reserved lands comprising the Band's homeland.

In sum, neither the land patents themselves nor the 1854 Treaty evince any intent to recognize implied easements in the trust and restricted-fee lands on which segments of the Roads are located. Absent such intent, the Homeowners cannot meet their burden and their claims for easements by implication or necessity should be denied.

**D. The Town And Homeowners Cannot Ignore The ROW Act.**

The Homeowners summarily dismiss the ROW Act as inapplicable to their purported access rights to Indian lands. Dkt. 126 at 38. The Town pushes its discussion of the ROW Act to a footnote, asserting that the Act is "irrelevant" for the purposes of determining the Town's use-and-access rights to the Roads. Dkt. 143 at 21 n.7. The Town and Homeowners skim over the fact that the ROWs were granted under the ROW Act, and that the Town chose to let those rights-of-way expire without renewing them. But Congress's intent in passing the ROW Act must be relevant here and cannot simply be ignored as an inconvenience.

In the ROW Act, Congress set forth a program by which entities can acquire access on, over, and across Indian lands through a specific application process. This process requires obtaining the consent of the Tribe and/or individual Indian landowners. 25 U.S.C. § 324. In this way, Congress has recognized the extent of tribal authority over its lands by making tribal consent a statutory requirement to an encumbrance on tribal land. *See Bad River Band of Lake Superior Tribe of Bad River Reservation v. Enbridge Energy Co., Inc.*, 626 F. Supp. 3d 1030, 1047 & n.6 (W.D. Wis. 2022). Moreover, Congress fashioned the ROW Act such that it is the Tribe and individual allottees that determine the price for use-and-access rights to their lands. 25

U.S.C. § 325. Neither the Federal government nor the courts have authority under the ROW Act to usurp that decision-making power and force Tribes or individual landowners to accept compensation the Tribes or individual landowners deem inadequate. Congress's enactment of the ROW Act and the other "statutes governing acquisition of rights of way over Indian lands" "constitute a compressive scheme which completely covers the subject of rights of way" that admits of no exceptions. *Plains Elec. Generation & Transmission Corp., Inc.*, 542 F.2d 1375, 1380 (10th Cir. 1976).

The Town and Homeowners must follow the requirements of federal law to obtain a right to use and access the trust and restricted-fee lands underlying the Roads. *See Davilla v. Enable Midstream Partners L.P.*, 913 F. 3d 959, 967 (10th Cir. 2019) ("When it comes to maintaining a pipeline over Indian allotted land, however, Congress has dictated the prerequisites of a right to enter by statute. Enable thus has no legal right to keep a structure on the Allottee's land . . . ."). While the Town and Homeowners may disagree with the autonomy Tribes and individual Indian landowners are given in the ROW Act to control the use of their land,[6] the Town and Homeowners cannot end-run the Act by arguing that they have easements by implication or necessity or access rights under a federal regulation that offers no such rights. Such an outcome would undermine the comprehensive statutory program enacted by Congress to cover this

[6] The Homeowners lament the Band's refusal to consent to renewed rights-of-way and urge the court to "order the USA, on behalf of the Tribe, to accept market value" for rights-of-way, Dkt. 126 at 37, but there is simply no requirement under the ROW Act that a Tribe accept a certain value for access to their trust and restricted-fee lands.

topic. Neither the Town nor the Homeowners should be permitted to evade the clearly stated dictates of federal law.

## III. THE TOWN ALSO HAS NEITHER IMPLIED EASEMENTS NOR EASEMENTS BY NECESSITY IN THE ROADS

The Town does not possess implied easements of any type or easements by necessity in the Roads for all of the reasons stated in the previous section. The Town posits two additional reasons why it is entitled to a declaration from this Court establishing such use rights in the segments of the Roads located on the trust and restricted-fee land. Neither reason satisfies the Town's burden here to establish such rights in the Band's, the Allottees', and the United States' real property.

### A. Whatever Legal Obligations The Town May Have Under State Law, They Do Not Excuse The Town From Compliance With The ROW Act.

The Town argues that the Homeowners have implied rights to use the segments of the Roads located on trust and restricted-fee land and, "[b]ecause the Homeowners have such rights, the Town, which provides road maintenance and other critical emergency services to the Homeowners, must also have such rights to access the properties (and residents) that the Roads service." Dkt. 143 at 17. In other words, the Town points to its legal obligations under Wisconsin state law "to provide critical services to all its residents," *id.*, to justify its use of the Roads notwithstanding its failure to renew the expired ROWs.

The Town cites no case law, federal or state, entitling it to ignore the requirements of the ROW Act and continue to use the segments of the Roads at issue

here without valid legal tenure.[7] Indeed, the sole basis of the Town's assertion of the implied rights it now claims by necessity is that it should be entitled to access, use and maintain the Roads "in the same manner it has for over 60 years." *Id.* at 19. But the Town neglects to acknowledge that it possessed valid legal rights under the ROW Act to access, use, and maintain the segments of the Roads located on trust and restricted-fee land for most of that time. And the Town further fails to acknowledge the fact that it did not apply for renewals of those ROWs for the Roads when the Town needed renewed ROWs to continue to legally access and use the Band's and the Allottees' lands to maintain those segments of the Roads as part of the Town's road system.[8] *See* Dkt. 137 ¶¶ 48-51.

The Town admits that it has failed to comply with the requirements of the ROW Act and that its continuing use of the segments of the Roads at issue constitutes a trespass. Dkt. 137 ¶¶ 48-52. The Town now asks the Court to excuse its malfeasance by declaring that the Town has easements by necessity. The Court should not defer to the Town's request.

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[7] The Town cites cases to suggest that its right to exercise its police power and the constitutional freedom to travel support its request for easements by necessity. Dkt. 143 at 18-19. Nothing in any of the cited cases helps the Town meets its burden.

[8] The Town further claims that litigation by some of the Homeowners against the Town in state court justify its request for easements by necessity. *See* Dkt. 143 at 18 and n.6. Those state-court suits seek redress against the Town—properly in the United States' view—for the Town's failure to maintain the legal right to use the segments of the Roads crossing trust and restricted-fee land as part of the Town's road system, not because "the USA initiat[ed] this lawsuit." *Id.*

### B. The Town's Prior Use And Maintenance Of The Roads Does Not Excuse Its Failure To Comply With The ROW Act.

The Town also claims implied rights to use the segments of the Roads crossing the Band's and the Allottees' lands by virtue of its "prior use and maintenance of the Roads." Dkt. 143 at 19 ("The Town has utilized, operated, and maintained the Roads for decades in an open and obvious manner, such that access was plainly intended to be permanent."). This argument fails for two reasons. First, as explained in section I, *supra*, the ROWs the Town held for the segments of the Roads were not perpetual, and thus were not "plainly intended to be permanent." The Town acquired the ROWs "*already knowing* the right[s]-of-way would eventually expire." *Davilla*, 913 F.3d at 970. In that light, the Town's post hoc justifications for failing to renew the ROWs are disingenuous.

Second, as explained in the United States' Opening Brief, Indian trust and restricted-fee land cannot be lost through adverse possession or claims of prescriptive rights. *See* Dkt. 138 at 82-85. For this reason, the Town's "prior use and maintenance of the Roads . . . in an open and obvious manner" cannot help the Town evade the consequences of its failure to comply with the ROW Act.[9] *See Cnty. of Oneida v. Oneida Indian Nation* ("*Oneida II*"), 470 U.S. 226, 240 n.13 (1985); *United States v. California*, 332 U.S. 19, 39-40 (1947); *United States v. Schwartz*, 460 F.2d 1365, 1371 (7th Cir. 1972).

[9] Of course, the Town again fails to mention here that its "prior use and maintenance of the Roads" was accomplished legally pursuant to the ROWs until they expired by their terms in 2011, 2014, and 2018.

## IV. THE PERMITS GRANTED PURSUANT TO THE 1933 UNEMPLOYMENT RELIEF ACT DID NOT GRANT THE HOMEOWNERS EXPRESS EASEMENTS

The Homeowners offer a puzzling argument that stitches language of the 1854 Treaty together with the 1933 Unemployment Relief Act ("URA") in an effort to convince the Court that they "may" have express rights of way through the trust and restricted-fee lands at issue here. Dkt. 126 at 32-38. First, the Homeowners argue that the 1854 Treaty between the Band and the United States created "mandatory" rights-of-way for the Homeowners because the Roads are "necessary" to access their respective properties. Dkt. 126 at 33-34. Then, the Homeowners leap forward some eighty years to the 1933 URA, arguing that when the Band and some Indian allottees granted limited use-and-access rights to the United States for the purpose of carrying out public works projects, the compensation given to the Band and allottees for those permissions "satisf[ied] any potential requirement for compensation under Article 3 of the 1854 Treaty[.]" *Id.* at 37. The Homeowners' superficial analysis of the 1854 Treaty and the URA, along with other secondary documents, merely combines sentences and phrases that they deem favorable from various historical documents in an effort to come up with cognizable legal rights where, in fact, none exist. The 1930s grants to the United States pursuant to the URA were for a limited purpose and duration, and offered no rights to the Homeowners. Further, the 1854 Treaty did not authorize the conversion of trust and restricted-fee land into public use, and the permissions given to the United States in the 1930s in no way satisfy the compensation requirements under the 1854

Treaty. The Homeowners' Argument III must be rejected for all those reasons and as further detailed below.

### A. The Permits Gave Finite Access Rights Only To The United States And Only For A Limited Purpose.

As explained in the United States' Opening Brief, Dkt. 138 at 74-75, the Unemployment Relief Act, Pub. L. No. 73-5, 48 Stat. 22 (1933), was a New Deal Era law passed "for the purpose of relieving the acute condition of widespread distress and unemployment . . . and in order to provide for the restoration of the country's depleted natural resources and the advancement of an orderly program of useful public works." Pub. L. No. 73-5, 48 Stat. 22. That is, the URA aimed to ease unemployment by providing jobs in "timber production, the prevention of forest fires, floods and soil erosion, plant pest and disease control, the construction, maintenance, or repair of paths, trails, and fire-lanes in the national parks and national forests, and such other work . . . ." *Id.* On May 12, 1933, President Roosevelt issued Executive Order 6131, which set aside funds to be "available for accomplishment of the purposes specified in the act of March 31, 1933, on tribal lands or other lands within Indian reservations." Funds were thus made available to ease unemployment through the completion of public works projects contemplated by the URA in Indian country. On June 28, 1937, Congress named the work group responsible for completing the public works under the URA the Civilian Conservation Corp and confirmed that the type of projects to be done under that Act and the 1933 URA could be done on private property, "but only for the purpose of doing thereon such kind of cooperative work as are or may be provided by

Acts of Congress, including the prevention of forest fires, forest tree pests and disease, soil erosion, and floods." Act of June 28, 1937, ch. 383, § 3, 50 Stat. 319. By its own terms, Congress enacted the URA to employ the unemployed and restore the country's natural resources. The URA did not purport to grant public rights-of-way through reservations or Indian trust or restricted-fee lands. Instead, the United States had to receive permission from the Band and individual allottees to carry out the public works projects on their respective lands. Dkt. 129-11 (Suppl. Decl. B. Hubing, Ex. K) (letter from Commissioner Collier discussing need to obtain necessary rights-of-way from allottees to carry out public works projects).

In the 1930s, the Band and some Indian allottees owning land in the Reservation did give permission to the United States to enter certain tracts of the Band's and Indian allottees' lands for the limited purpose of completing URA work projects. Permission was given through documents uniformly titled "Permission Of The Allottee Or Owner To Place Improvements On And Across His (Their) Land for the Performance of Useful Public Works For the Relief of Unemployment Pursuant to Executive Order of May 12, 1933." Decl. of Dena Ness (Dkt. 141) ¶ 15 & Ex. E (Dkt. 141-5). These permission documents—also called "CCC documents"—"grant[ed] *to the United States* right of ways on and across said allotments and tracts of land on the said Reservation for the opening and establishing of necessary roadways, trails, and all other uses needed in carrying out the purposes of Executive Order of May 12, 1933, issued pursuant to the [URA]." *Id.* (emphasis added). The CCC documents expressly gave use-and-access rights *only* to the United States—not to future individual non-Indian homeowners, not

to the Town, and not to the public. The purpose of the rights-of-way granted by the CCC documents was clear: they were for the purpose of carrying out the Executive Order of May 12, 1933, and the URA, which in turn were for the purpose of limiting unemployment through public work projects. Pub. L. No. 73-5, 48 Stat. 22. The CCC documents say nothing about public-road access or permanent easements, as the Homeowners argue they do, because that was plainly not their purpose.

Records from that time period confirm the limited purpose of the access grants. One such document—a letter from a Department of the Interior Superintendent to a landowner within the Reservation, dated July 15, 1935—explained that the public work to take place on the individual's land under the "Emergency Relief Work" was "to clean up the dead and down timber and brush along the right of ways of the present roads systems of the reservations," as such debris "naturally creates a fire hazard and menace." Hoffman Suppl. Decl. ¶ 6 & Ex. C (US_0033380). A report titled "Report on Proposed Work Camps on Reservations of Lac Du Flambeau Indian Agency, Lac Du Flambeau Wisconsin Under Emergency Conservation Act of March 31, 1933," dated June 13, 1933, similarly described the work to be done on the Reservation as "cleaning up the fire hazard on the various areas, and the clean up along the woods." *Id.* ¶ 7 & Ex. D (US_0044888-89). One CCC document spoke of the potential to build stock water reservoirs on the Indian lands, Dkt. 129-8 (Suppl. Decl. B. Hubing Ex. H, at US_0031679), while some maps that accompanied the CCC documents referenced "trail construction" and "roadside cleanup work," *id.* at US_0033142. These discrete projects done for the stated purpose of reducing unemployment and restoring the Reservation's

natural resources are far afield from the permission to, and construction of, roads through Indian trust and restricted-fee lands for public use in perpetuity. The URA and CCC documents did not authorize such projects.

Indeed, the CCC-Indian Division Handbook, Section II, at 5658, specifically stated that: "No money consideration may be paid for these easements. The [Act of June 28, 1937] does not provide for the purchase of land and payment for such easements would constitute an interest in land." Hoffman Suppl. Decl. ¶ 8 & Ex. E (US_0044882). The URA did not authorize the United States to acquire interests in Indian lands, and the CCC documents that the United States needed to enter into to gain use-and-access rights to those Indian lands were for the sole purpose of carrying out public works projects. Reading the URA and CCC documents to authorize the construction of public roads has no support in the law or the evidence, and that reading would also be inconsistent with 25 U.S.C. § 311, enacted in 1901, which provided the Secretary of the Interior with the exclusive authority to establish public highways through Indian lands "upon compliance with such requirements as he may deem necessary." 25 U.S.C. § 311. There is no indication that Congress intended the URA to be an alternative to 25 U.S.C. § 311 by which public highways could be granted on Indian lands. Nor could it be reasonably argued that the CCC documents acted to authorize the public throughways—and offer compensation for them—in lieu of 25 U.S.C. § 311.

The purpose of the URA and the CCC documents was clear and limited: the grants were for the purpose of carrying out public works projects, not for the purpose of building public throughways, and it was only the United States that was granted those

limited access rights. Even as to the limited-purpose rights-of-way-granted to the United States to ease unemployment, the United States never transferred or assigned those temporary interests to the Town or Homeowners, and the Homeowners do not allege or prove as much.

Finally, the limited purpose for which the United States was granted the rights-of-way through the CCC documents expired before the Roads were even constructed. Dkt. 137, ¶¶ 20, 24, 28, 32. The Great Depression ended, and so too did the need for the public-works projects contemplated by the URA. Congress terminated the funding for the labor force responsible for the public-work projects in June of 1942. *See* Labor-Federal Security Appropriations Act, Pub. L. No. 77-647, 56 Stat. 562, 569 (1943) (liquidation of the Civilian Conservation Corps); *see also* Labor-Federal Security Appropriations Act, Pub. L. No. 78-135, 57 Stat. 498 (1944). The URA was repealed in 1966. Act of Sept. 16, 1966, Pub. L. No. 89-554 § 8(c), 80 Stat. 378, 648. With the end of the URA and the public works program came the end of the need for the access grants to Indian lands, which were given for the purpose of carrying out those public works. The CCC documents therefore never did, and cannot now, offer any use-and-access rights to the Homeowners or the Town.

The Homeowners fail to grapple with the plain text and purpose of the URA, the Executive Order of May 12, 1933, and the CCC documents. *See* Dkt. 126 at 35-36. Lacking any textual support, the Homeowners rely on secondary sources to support their position that they have perpetual rights-of-way over the Roads through the URA and CCC documents. The Homeowners argue that the rights given by the CCC

documents are "permanent," citing to secondary sources that are bereft of any legal reasoning or analysis. *See* Dkt 126 at 36, Suppl. Decl. B. Hubing ¶¶ 13-14 & Exs. L (two-sentence letter) & M (documents lacking legal analysis). All the while, Homeowners ignore the historic documents—including documents they cite to in their brief—that clearly speak to the limited purpose of the rights-of-way. *See* Dkt. 129-8 (Suppl. Decl. B. Hubing, Ex. H) (CCC documents specifically referencing limited purpose of grants); Dkt. 129-11 (Suppl. Decl. B. Hubing, Ex. K) (memorandum from Commissioner Collier discussing the limited purpose of the work projects). Aside from the limited purposes of these rights-of-way, the Homeowners fail to explain how the rights granted to the United States were ever assigned or transferred to the Homeowners, because they were not.

The Homeowners cherry-pick portions they deem helpful from their Exhibit N, a 1979 memorandum from Department of the Interior Field Solicitor Nitzschke, but disregard the portions of that memorandum that do not suit their needs. They use that source for the proposition that the CCC document grants were "permanent" since the United States cannot abandon its property interests without an Act of Congress. Dkt. 126 at 36 (citing Suppl. Decl. B. Hubing ¶ 15 & Ex. N). While that memorandum does lay out the general principle that the United States cannot abandon its property interests without an act of Congress, it also opines that "where the easement, as in the instant case, is more or less temporary in nature, the requirement that there can be no abandonment in the absence of an Act of Congress does not apply." Dkt. 129-14 at US_0034064). That aside, what the Nitzschke memorandum does not opine on, and

what the Homeowners never address, is that the grants given to the United States pursuant to the CCC documents were never transferred to the Homeowners or the Town. The secondary sources cited by the Homeowners offer the Homeowners no help in supporting their suspect URA arguments.

Simply put, the CCC documents gave use-and-access rights to the United States, not the Homeowners, and ninety years later, the purpose of those easements has expired.[10] While the Homeowners argue they "may" have rights pursuant to the CCC documents, Dkt. 126 at 32, they in fact have no rights under those grants.

### B. The Permits Did Not Satisfy The Compensation Requirements For "Necessary Roads, Highways, And Railroads" Under The 1854 Treaty.

Failing to find any support in the URA and CCC documents for the express easements the Homeowners allege they "may" have for the Roads, the Homeowners reach for a truly perplexing argument. The Homeowners argue that the 1854 Treaty between the Band and United States mandated the existence of the Roads, Dkt. 126 at 33-35, and that the limited rights-of-way granted to the United States eighty years later pursuant to the URA provided requisite compensation to the Band and individual Indian landowners for the Roads. Dkt. 126 at 32-38. But the 1854 Treaty did not

[10] Beyond the fact that none of the Roads existed in 1942, the last year Congress appropriated funds for the URA through the United States Department of Commerce (Commerce) to carry out the program, federal transportation law further lays bare the fallacy of the Homeowners' argument. *See* Dkt. 137 ¶¶ 20 (Annie Sunn Lane), 24 (Center Sugarbush Lane), 28 (East Ross Allen Lake Lane), and 32 (Elsie Lake Lane). If the URA easements exist to this day, then the United States, through Commerce as the administrator of the URA, would be the public authority, or "owner" of the Roads, not the Town or even the BIA.

authorize the conversion of tribal trust land into perpetual public throughways, and the CCC documents—which gave the United States limited use-and-access rights to the lands—did not compensate the Band and individual owners for Roads built decades after the CCC document grants. Homeowners' arguments prove, to say the least, a bridge too far.

The 1854 Treaty does not create "mandatory" rights-of-way for the Roads, as Homeowners allege. Dkt. 126 at 34. Article 3 of the 1854 Treaty states in part that: "All necessary roads, highways, and railroads, the lines of which may run through any of the reserved tracts, shall have the right of way through the same, compensation being made therefore as in other cases." At the time the Treaty was ratified, there was no unified right-of-way statute for Indian country. *Neb. Pub. Power Dist. v. 100.95 Acres of Land*, 719 F.2d 956, 958 (8th Cir. 1983). Instead, consistent with the principle that there are no implied easements in Indian country absent a clear statement from the Federal Government, *see* United States' Opening Br., Dkt. 138 at 48-54, such interests in Indian lands were granted through specific acts of Congress, or by the President of the United States. *Neb. Pub. Power Dist.*, 719 F.2d at 948 (prior to the ROW Act, rights-of-way through Indian lands were granted through an "amalgam of special purpose access statutes dating back as far as 1875"). Thus, at the time the Treaty was entered (and still today), it was Congress that needed to approve rights-of-way through Indian country and the corresponding compensation for those rights-of-way. That is how "compensation was [being] made" when the Treaty was signed. An 1888 congressional act dealing with a right-of-way through the Reservation proves a helpful example.

Congress granted a right-of-way through the Reservation to the Milwaukee, Lake Short, and Western Railway Company. Act of June 4, 1888, ch. 345, 25 Stat. 169 ("1888 Act"). Congress granted that right-of-way with the "Indians having consented by Treaty to a reservation by the United States of the power to grant right of way through said reservation." *Id.* § 1. The 1888 Act described the physical parameters of the right-of-way and made it the "duty of the Secretary of the Interior to fix the amount of compensation to be paid" for the right-of-way and for the "damages sustained by them by reason of the construction of said road." *Id*. at §§ 1-2. The Secretary was required to get the "consent of the Indians on said reservation as to the amount of said compensation" in a manner "satisfactory to the President of the United States." *Id.* at § 2. The right-of-way was thus granted by an act of Congress, and Congress delegated authority in the 1888 Act to the Secretary of the Interior to ensure the railroad paid adequate compensation.

Pursuant to the language of the Treaty, and as evidenced by subsequent acts of Congress and supported by the principle that easements in Indian country are not implied, rights-of-way across the Reservation lands were to be approved by Congress. The Homeowners forget that the 1854 Treaty is a treaty between the Band and the United States, where the United States solemnly promised the Band a permanent homeland that could not be divested from it absent an act of Congress. *Lac Courte Oreilles Band*, 46 F.4th at 560 (citing 1854 Treaty at § 11). The Homeowners' arguments also fail to acknowledge that the whole purpose of trust and restricted-fee land is to protect that land from unauthorized alienation, *Imperial Granite Co.*, 940 F.2d at 1272 , and that a Tribe's treaty language should be liberally and favorably construed for the

Tribe, not construed to give rights to third-parties in the face of the Tribe's property rights and the solemn promise of permanency made by the United States. *Oneida Tribe of Indians of Wis. v. Wisconsin*, 951 F.2d 757, 763 (7th Cir. 1991).

Under the Homeowners' reading of the Treaty, the Treaty acts as a self-executing grant of any rights-of-way for third-parties on tribal trust or restricted-fee lands that are deemed to be "necessary," without an act of Congress, approval by Interior, or consent from the Tribe or individual Indian landowner. The Homeowners do not grapple with the question of who makes the determination of "necessary." Nor do they explain how the Band's Treaty language could be read to authorize the conversion of the Band's permanent homeland to public rights-of-way. Acceptance of the Homeowners' arguments would make the Band's trust and restricted-fee land less protected than even fee lands not held in trust, by freely authorizing the use and access of Indian lands wherever "necessary." The Homeowners' argument that the Treaty mandates the permanent existence of ROWs for the Roads cannot be squared with the text of the Treaty, the purpose of the Treaty, congressional acts that post-date the treaty, or the very purpose of trust and restricted-fee lands. The argument therefore must be rejected.[11]

The Homeowners try to make ends meet by arguing that while the Treaty authorized the "mandatory" rights-of-way for the Roads, the compensation received by the Band and individual allottees in exchange for granting the United States access to

[11] Any ambiguity in the Band's Treaty should be resolved in the Band's favor, not the Homeowners'. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 200 (1999).

their lands in the 1930s is sufficient for "any potential requirement for compensation under Article 3 of the 1854 Treaty." Dkt. 126 at 37. Aside from the fact that the Treaty did not give the public carte blanche to use tribal trust and restricted-fee lands as any member of the public deemed "necessary," there is simply no support for the Homeowners' argument that benefits received by the Band and individual Indian landowners in the 1930s under the CCC documents were compensation for perpetual and public rights-of-way through their trust and restricted-fee lands. As explained above, the URA was not enacted for the purpose of constructing permanent roads through Indian lands, and nor did it grant rights-of-ways for such purpose. Further, the CCC documents stated that "the consideration for the grants herein made being the performance of such work and the benefits to accrue therefrom to the said Reservation and lands." Decl. of Dena Ness (Dkt. 141) ¶ 15 & Ex. E (Dkt. 141-5). Thus, in exchange for granting the United States access to perform public-works projects on their lands, the Band and the individual landowners received the benefit of those completed public works projects. Where, for example, the public work project was to clear debris to help prevent forest fires, the landowner received the benefit of having that debris cleared and the reduced risk of forest fire on their property. Or, if a stock water reservoir was "constructed on" the Indian lands as a URA project, the owner of that land received the benefit of having that reservoir on their land for their use. Dkt. 129-8 (Suppl. Decl. B. Hubing) ¶ 9 & Ex. H (US_0031679). Sometimes it was the tribal members themselves doing the public works projects within the Reservation. *Id.* ¶ 12 & Ex. K (Dkt. 129-11) (letter from Commissioner Collier, discussing the work "thus performed by the

Indians" pursuant to the URA, such works which are "for the benefit of the Indians in that it will protect, conserve, and enhance the value of the property of the particular Reservation where such work is performed").

Under the URA, therefore, the Band and individual allottees granted limited access to the United States to conduct public works, and as compensation the landowners received the benefits of those public works on those lands and employment through the URA program. Nothing about the URA program, nor anything in any of the documents cited by the Homeowners, supports the argument that the CCC documents provided compensation for perpetual public throughways through their trust and restricted-fee lands. Instead, the Band and landowners received the specific benefit—commensurate with the specific purpose of the URA—of having the projects done on their properties, and receiving potential employment through the URA projects.

Finally, and as discussed above, by the time the URA was enacted and the CCC documents were entered into, there was a statute, 25 U.S.C. § 311, that provided the Secretary of the Interior with the exclusive authority to establish public highways through Indian lands "upon compliance with such requirements as he may deem necessary." There is no indication in the URA or the CCC documents that the Secretary of the Interior, acting pursuant to authority granted in § 311, intended to create public and perpetual rights-of-way through the URA work projects or had the authority from Congress to do so. In fact, evidence shows that it was manifestly not Congress's intent

to acquire such interests in Indian property under the URA. Hoffman Suppl. Decl. ¶ 8 & Ex. E.

Homeowners' argument that they "may" have express easements pursuant to the CCC documents is unsupported by law and fact, and flies in the face of the Band's treaty rights and the promise of permanence the United States made to the Band in the Treaty. The Homeowners' argument can and should therefore be soundly rejected.[12]

## V. THE FEDERAL-AID HIGHWAY ACT AND THE TTP GRANT THE TOWN NO RIGHT TO USE THE ROADS

The Town argues that, by virtue of the listing in National Tribal Transportation Facility Inventory ("Inventory") of the segments of the Roads crossing the Band's and the Allottees' trust and restricted-fee lands, the Roads were and continue to be open and available for public access. Dkt. 143 at 21-24. But nothing in the Federal-Aid Highway Act ("Highway Act"), the Tribal Transportation Program ("TTP"), or the TTP's implementing regulations grant substantive rights to the Town, Homeowners, or the public to use those Indian lands. Rather, as the United States argued in its Opening Brief (and incorporates by reference those arguments here), *see* Dkt. 138 at 20-24, 66-73,

[12] Remarkably, the Homeowners argue that the Court should "order the USA, on behalf of the Tribe, to accept market value" compensation for the Homeowners' rights-of-way over the Band's and the Allottees' trust and restricted-fee lands. Dkt. 126 at 37 n.23. For all of the reasons stated above, the 1854 Treaty does not require the trust and restricted-fee lands on the Reservation to be open to third-party use and access, and the Treaty certainly does not require the Band to accept "market value" for their trust and restricted-fee lands. *See* 25 U.S.C. § 324; 25 C.F.R. § 169.107. Moreover, forcing the Band and the Allottees to accept market value for rights-of-way across their lands—lands that are traceable to the Band's aboriginal territory, that the Band specifically reserved in the Treaty, and that are not fungible—would entirely disregard the clear intent of Congress in the ROW Act that Tribes set the price for easements on their own lands, not the United States, the BIA, or the courts. *See* 25 U.S.C. § 325; 25 C.F.R. §§ 169.110 & 169.112.

the TTP is a funding program, with the sole beneficiaries of that program being Tribes. The TTP does not create property rights in or grant the public access rights to trust or restricted-fee land. Nor does the Town's status as "public authority" for the Roads give it any cognizable access rights to the Roads. Instead, it is the ROW Act that gave the Town and the public use-and-access rights to the Roads, and those rights expired. The TTP does not and cannot provide the Town a way around its failure to secure a right-of-way under the ROW Act.

The Town hangs its hat on 25 C.F.R. § 170.114(a) for its argument that the TTP grants it substantive access rights. Dkt. 143 at 22-24. But that regulation offers no help to the Town. Section 170.114(a) states, in part, that: "All Tribal transportation facilities listed in the approved NTTFI must be open and available for public use as required by 23 U.S.C. § 101(a)(31)." The regulation merely recognizes that the Federal appropriations underwriting the TTP are spent for public—*i.e.*, not private—purposes, and that the Federal Government must receive a reasonable return on its investment when TTP funds are spent on Tribal transportation infrastructure. *See* 23 U.S.C. § 101(a) (defining all roads and other transportation facilities as "public," not granting substantive rights in such roads and facilities). That is, roads constructed with funds authorized by the TTP must be maintained by a Tribe or other public authority until the Federal Government has received a reasonable return on its investment.

Moreover, the language of 25 C.F.R. § 170.114(a)—an agency regulation—cannot overcome the plain intent of Congress that the ROW Act be the sole means by which the Town and Homeowners can acquire use-and-access rights of this nature to the Roads.

In arguing that § 170.114(a) gives it use-and-access rights to the Roads, the Town never explains where *Congress* in the Highway Act or TTP made those Acts the sources—coextensively with the ROW Act or otherwise—of legal rights in Indian lands. Indeed, there is no congressional intent in the Highway Act or TTP to grant substantive rights to use Indian lands under the statutory scheme. *Pollard v. Johnson*, 694 F. Supp. 3d 1080, 1086 (W.D. Wis. 2023). And holding that a TTP regulation offers a means by which the Town and other non-Indian entities can gain use-and-access rights to Indian lands would directly contravene the detailed program that Congress enacted in the ROW Act. For example, under the ROW Act, a right-of-way applicant must get Tribal and/or Indian allottee consent to receive such a right-of-way grant. 25 U.S.C. § 324. If the TTP acts as a self-executing right-of-way for public use and access over trust and restricted-fee lands, then the ROW Act's consent requirement is completely undermined. Such a conclusion would allow the Town, and any public authority operating and maintaining roads on Indian lands, to simply ignore its responsibility for obtaining a valid ROW for those lands. The better reading is the most straightforward: The ROW Act offers the path for acquiring use-and-access rights of this nature trust and restricted-fee land, while the TTP provides a Tribe with a pathway to receive federal funds for transportation facilities of the Tribe's choice. *See* United States' Opening Br. at 69-72 (TTP did not repeal the ROW Act). That reading comports with the plain text and purpose of both the ROW Act and the Highway Act and the TTP.

Finally, the Town's status as "public authority" for the Roads does not give it substantive use or access rights to the trust and restricted-fee land underlying the Roads

independent of the ROW Act. *See* Dkt. 143 at 27. The Town exaggerates what its status as "public authority" means under the TTP. The Inventory identifies the "public authority," also called the road "owner," that has the "authority to finance, build, operate, or maintain toll or toll-free facilities." 23 U.S.C. § 101(a)(22) (definition of "public authority"); *see also* 25 C.F.R. § 170.5 (same). That is, the public authority is the government entity responsible for upkeep of the transportation facility, regardless of legal ownership of the lands underlying the facility. Status as public authority does not establish real-property ownership in the transportation facility or the lands underlying the facility. Bureau of Indian Affairs, *Rights-of-Way on Indian Lands Handbook*, 52 IAM 9-H at 8 (Office of Trust Services Jan. 10, 2022). While the Roads were on the Inventory, the Town was the public authority responsible for operation and maintenance of the road segments at issue here. Dkt. 137 ¶ 45. However, that status as public authority confers no use or access rights to the Roads. Rather it was the easements—granted under the ROW Act and now expired—that allowed the Town, in its capacity as public authority, to enter upon the Band's and the Allottees' land and access the roads for, among other things, maintenance purposes. The Town never explains how its status as public authority gives it any property interest to use the trust and restricted-fee lands underlying the Roads independent of the ROW Act, which the Town simply waves away. *See* Dkt. 143 at 19 n.7 (the ROW "is irrelevant for purposes of determining the rights of access and use under the [Highway Act] and the TTP").

For all these reasons, and for all the reasons stated in the United States' Opening Brief, the TTP does not require the Roads to be open to the public in the absence of valid

grants of right-of-way across trust and restricted-fee land and the program gives no substantive use-and-access rights to the Town or Homeowners.

## VI. THE BIA PROPERLY REMOVED THE ROADS FROM THE INVENTORY AT THE BAND'S REQUEST

The Town argues that the BIA's "purported removal of the Roads from the Inventory was contrary to law, and therefore, the Roads are still open to the public." Dkt. 143 at 24.[13] The crux of the Town's argument is that the BIA "improperly" removed the Roads from the Inventory pursuant to 25 C.F.R. § 170.444, when the "correct" procedure for removal, according to the Town, is found at 25 C.F.R. § 170.114(c). The Town is mistaken. The BIA used the correct procedures, found at Section 170.444, to carry out the ministerial process of removing the Roads from the Inventory at the Band's request. Thus, as of March 24, 2023, the Roads have not been listed on the Inventory.

The regulation governing removal of a tribal facility from the Inventory is straightforward: for the Inventory to be updated, including removing the tribal facility from that list, a Tribe merely needs to submit the required documents to the BIA, to which the BIA must respond within 30 days. 25 C.F.R. § 170.444(b). The only consequence of removing a facility from the Inventory is that a Tribe can no longer expend TTP funds on the facility, and that consequence falls solely on the Tribe as the recipient of the federal funds. Thus, in accordance with the TTP's purpose of being a

[13] As noted above, even if the Roads were still listed on the Inventory, which they are not, the Town is still in trespass because the ROWs granted under the ROW Act have expired.

tribally-driven funding program, it is a Tribe's exclusive prerogative to have roads within or providing access to its lands listed and then subsequently removed from the Inventory. 23 U.S.C. § 202(b)(1)(B)(v-vi); 25 C.F.R. §§ 170.442-443 (listing) and 170.444 (updating to remove). The removal of a facility "owned" by another public authority from the Inventory has no effect on operation of the facility, if there are in fact valid use-rights for the facility. Instead, removal from the Inventory merely means the Tribe may no longer expend any TTP federal funds for the facility. Use-and-access rights to the facility, on the other hand, are governed by easements or agreements authorized by the Tribe under another statute or program, such as the ROW Act. Here, the Band submitted its request to have the Roads removed from the Inventory, thus eliminating the Band's option to expend federal funds for those roadways. The BIA followed the correct ministerial process for removing the Roads from the Inventory.

The Town argues that Section 170.444(b) is only to be used to "update" the Inventory, and thus the BIA got it wrong in using the procedure laid out therein to remove the Roads from the Inventory. Instead, the Town argues, the BIA should have complied with Section 170.114(c) to remove the Roads from the Inventory. Dkt. 143 at 27-28. That provision states:

> A Tribal transportation facility *owned by a Tribe or BIA may be permanently closed* only when the tribal government and the Secretary agree. Once agreement is reached, the BIA must remove the facility from the [Inventory] and it will be ineligible for expenditure of any TTP funds.

25 C.F.R. § 170.114(c) (emphasis added). The Town's error in arguing that 25 C.F.R.

§ 170.114(c) is the proper procedure by which to *remove* the Roads from the Inventory is twofold: first, the Town confuses "removal" from the Inventory with "closure" of a facility under the TTP; and second, the Town reads the ownership requirement out of the regulation. Here, the Band requested that the BIA update the Inventory to remove the Roads, and that is what the BIA did. The effect of that action is that the Band cannot, so long as the Roads do not appear in the Inventory, expend any TTP funds on the Roads. The removal action did not operate to *close* the Roads—that is, to bar entry upon them—for closure is what 25 C.F.R. § 170.114(c) governs. Put another way, the Town and Homeowners did not lose their use-and-access rights to the Roads because the Roads were removed from the Inventory, but rather because the Town's ROWs for the Roads expired.

On the other hand, permanent closure of a tribal transportation facility pursuant to § 170.114(c) may only occur if that facility is "owned" by a Tribe or the BIA—that is, the regulation only applies to tribal transportation facilities for which either a Tribe or the BIA is the "public authority," and only then "when the Tribal government and the Secretary agree." As discussed above, and as the Town acknowledges, the Town was the public authority—the "owner"—of the segments of the Roads located on the Band's and the Allottees' land, not the Band or the BIA. Thus, even putting aside the fact that the Band did not request that the BIA close the Roads, the BIA could not have permanently closed the Roads under § 170.114(c) at the request of the Band because the Town "owned" the segments of the Roads at issue. Indeed, the Town acknowledges that § 170.114(c) could not have applied here for that very reason. Dkt. 143 at 28 n.13. In

short, the BIA applied the proper regulation to fulfill its regulatory responsibilities under the TTP to remove the Roads from the Inventory, and the outcome of that process should not be disturbed.

## VII. IF THE COURT FINDS THE TOWN IN TRESPASS, THE UNITED STATES IS ENTITLED TO PROVE ITS DAMAGES

The Town makes a number of arguments asserting that the United States as a matter of law cannot obtain monetary damages or seek restoration of the Band's and the Allottees' lands if the Court were to find the Town in trespass and eject the Town from the trust and restricted-fee land. *See* Dkt. 143 at 33-35. We address each argument in turn.

### A. The Applicable Statute Of Limitations Does Not Bar The United States' Recovery Of Damages.

The United States agrees with the Town that actions brought by the United States on behalf of an Indian Tribe to recover monetary damages arising from trespass are limited by a six-year-and-ninety-day statute of limitations. *See* 28 U.S.C. § 2415(b); Dkt. 143 at 31-33. When, however, the illegal use and occupation is a "continuing trespass"—i.e., an illegal use or occupation of land that is repeated or ongoing[14]—the United States

[14] As the United States previously explained:

> The Town's trespass here is "continuing" because its use and occupation of the trust and restricted-fee lands underlying the Roads, and the permanent nature of the Roads themselves on those lands, constitutes a continued unauthorized invasion and use of the Band's, the Allottees', and the United States' real property. *See Davilla*, 913 F.3d at 971 n.8; *accord Ebert v. Vill. of Gresham*, 2020 WI App 76, ¶ 13, 394 Wis. 2d 840, 953 N.W.2d 106 (table) ("[A]n unprivileged remaining on another's land is a continuing trespass for so long as the defendant wrongfully remains.") (quoting *Munger v. Seehafer*, 2016 WI App 89, ¶ 38, 372 Wis. 2d 749, 890 N.W.2d 22).

may seek damages dating back six years and ninety days from the filing of its complaint. *See United States v. Hess*, 194 F.3d 1164, 1176–77 n.15 (10th Cir. 1999); *United States ex rel. Heirs of Gover v. Burlington Northern & S.F. Ry. Co.*, No. 11-CV-00024-GKF-TLW, 2013 WL 12526317, at *7 (N.D. Okla. May 22, 2013). Here, the Town admits accessing, occupying, and using the segments of the Roads crossing the Band's and the Allottees' lands both before and after each of the ROWs expired in 2011, 2014, and 2018. Dkt. 137 ¶¶ 46-47; Dkt. 146 ¶¶ 19-20, 23-25. Accordingly, if the Court finds the Town in trespass, the United States should be given an opportunity to prove its damages at trial going back 6 years and 90 days from May 31, 2023, the date on which the United States filed its Complaint. Dkt. 1.

The Town argues that the United States cannot avail itself of the "exception" to 28 U.S.C. § 2415(b) because the Town's alleged trespass is not "continuing" in nature. *See* Dkt. 143 at 34 n.18. The Town relies on *Skokomish Indian Tribe v. United States*, 410 F.3d 506 (9th Cir. 2005) (en banc). There, the Ninth Circuit considered a state-law trespass claim regarding a federally-licensed hydroelectric project located upstream of the Skokomish Tribe's reservation. The court's ruling—that the alleged trespass did not constitute a "continuing" violation because the damage was not "reasonably abatable," 410 F.3d at 518—is distinguishable from the situation in the instant case in two key respects. First, the Tribe's claim did not arise from allegations the hydroelectric project that was the source of the alleged trespass was located on tribal land in violation of

United States' Opening Br. at 40 n.10.

federal law. *See id.* at 516-17. Second, the Tribe's trespass claim was based on Washington state law, and the court applied a state-law test requiring it to determine whether the damage was reasonably abatable. *Id.* at 518

Here, of course, federal common law applies. Under the federal common law of trespass on Indian land, a narrow interpretation of § 2415(b) is supported by the Indian canon of interpretation requiring that ambiguous statutes be interpreted to the benefit of tribes. *Blackfeet Tribe of Indians*, 471 U.S. at 766. Moreover, the principle underlying the Nonintercourse Act—that a transfer of an interest in land is invalid unless approved by Congress (or by a federal agency to which Congress has delegated authority)—should mandate a narrow interpretation of the limitation in § 2415(b), for a broad interpretation in effect would allow a trespasser like the Town to continue to benefit from its unlawful use of Tribal land to the disadvantage of Tribes and individual Indian landowners.

### B. The United States May Recover Monetary Damages For The Town's Trespass.

The Town argues that "the USA fails to plead or otherwise specifically describe any conduct of the Town that actually caused harm to anyone." Dkt. 143 at 31. For that reason, the Town contends that the United States is entitled to no monetary damages for the Town's trespass or, at most, nominal damages. *See id.* at 31-33.[15] The Town

[15] The Town also contends that the Band, through its temporary-access-permit regime, expressly authorized and consented to use of the Roads, and that consent limits the damages the United States may recover for the Town's trespass. The United States addressed in its Opening Brief why the temporary access permits do not constitute consent and insulate the Town from trespass liability. *See* Dkt. 138 at 38 n.9.

misunderstands both what constitutes a trespass under federal common law and the damages that flow from such a trespass.

As the United States explained in its Opening Brief:

> Trespass is the intentional use of the property of another without authorization and without privilege. W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 13 at 70 (5th ed. 1984). Any physical entry upon the surface of the land is a trespass . . . . The intent required is simply an intent to be on the land.

*United States v. Imperial Irr. Dist.*, 799 F. Supp. 1052, 1059 (S.D. Cal. 1992). *Accord Manor Enters., Inc. v. Vivid, Inc.*, 228 Wis. 382, 391, 596 N.W.2d 828, 832 (Ct. App. Wis. 1999). Put another way, it is the Town's use of the segments of the Roads located on the trust and restricted-fee land in the operation of the Town's road system without valid ROWs that constitutes the continuing trespass here. It is also the presence of the segments of the Roads themselves. *See Davilla*, 913 F.3d at 971 n.8; *see also* Restatement (Second) of Torts § 160 (Am. L. Inst. 1965) ("A trespass may be committed by the continued presence on the land of a structure, chattel, or other thing which the actor … has placed on the land … with the consent of the person then in possession of the land, if the actor fails to remove it after the consent has been effectively terminated."). In short, the Town did not have to physically damage the Band's and the Allottees' lands to be liable for trespass damages; it only had to be using and occupying those lands without valid legal tenure, as the Town admits it has been. Dkt. 137 ¶¶ 46-47; Dkt. 146 ¶¶ 19-20, 23-25.

And, if the Court finds the Town in trespass, the United States accordingly should be given an opportunity to prove its damages at trial.[16] *See* Dkt. 136 ¶ 6.

### C. The United States May Obtain An Order Requiring The Town To Remove The Segments Of The Roads In Trespass, Or Monetary Compensation In An Amount Equal To The Cost of Removal.

The Town finally argues that, as a matter of law, the United States is entitled to neither an order requiring the Town to remove the segments of the Roads crossing the Band's and the Allottees' land nor the costs of undertaking that removal itself if the United States prevails on its trespass and ejectment claims. *See* Dkt. 143 at 31-33. The Town bases its argument on the ROW Act's silence regarding such relief and Wisconsin case law supporting the unremarkable proposition that speculative damages are not recoverable. The Town fails to account for the federal common law in its argument, however.

In addition to the fair market rental value of the property, "[t]he United States "can . . . obtain a permanent injunction to remove 'the encroachment' in an action for trespass" and "is entitled to damages in the form of restitution and abatement costs . . . for ejectment." *United States v. Torlaw Realty, Inc.*, 483 F. Supp. 2d 967, 973-74 (C.D. Cal.

[16] Under the federal common law, a trespasser is liable for the fair market rental value of the property. *Hammond v. Cnty. of Madera*, 859 F.2d 797, 804 (9th Cir. 1988) ("reasonable rental value is the appropriate remedy for trespass"), *rev'd on other grounds, Wood v. Ostrander*, 851 F.2d 1212 (9th Cir. 1988); *Watson v. United States*, 263 F. 700, 702 (8th Cir. 1920) ("reasonable rental value"); *United States v. Osage Wind, LLC*, No. 4:14-cv-00704-JCG-JFJ, 2024 WL 5158188, at *17 (N.D. Okla. Dec. 18, 2024) ("fair rental value of the mineral estate occupied by Defendants is a reasonable and appropriate method for valuing damages caused by Defendants' trespass"); *Imperial Irr. Dist.*, 799 F. Supp. at 1066 ("proper measure of damages for trespass is the fair rental value of the property, assuming that the property is being put to its highest and best use").

2007) (providing damages for removing waste and cleaning up the trespass site), *aff'd*, 348 F. App'x 213 (9th Cir. 2009). Such damages include the reasonable costs of removing structures and restoring the land to its natural state. *See United States v. Brunskill*, 792 F. 2d 938, 940 & n.1 (9th Cir. 1986) (ordering trespasser to remove structures and restore the land to its natural state, or allowing the United States to do so and assess costs to defendant); *United States v. Osterlund*, 505 F. Supp. 165, 169 (D. Colo. 1981) (ordering trespasser to "remove all structures; improvements and personalty which he owns from plaintiff's lands"), *aff'd*, 671 F.2d 1267 (10th Cir. 1982); *United States v. McClure*, No. 04-CV-3047-LRS, 2006 WL 2818354, at *5-6 (E.D. Wash. Sept. 28, 2006) (same).

The Town asserts that the district court in *Bo Kang v. Sys. Cap. Real Prop. Corp.*, No. 18-cv-13617, 2019 WL 1923206 (E.D. Mich. Apr. 30, 2019), "soundly rejected a claim very similar to the one being raised here by the USA." Dkt. 143 at 38. *Bo Kang* was a diversity action in which the court applied Michigan law to the plaintiff's state-based claim "alleging that the nonuse of [a] sewer line impairs the value of his property." 2019 WL 1923206, at *1. The court held that the plaintiff failed to state a claim because, under Michigan law, "whether the easement is express or implied, abandoned or in use, an obligation to remove the sewer line does not exist as a matter of law." *Id.* at *4. *Bo Kang* is distinguishable and of no help to the Town. The United States did not own the real property at issue in that case, nor was the claim one for trespass and ejectment arising under the federal common law. *Bo Kang* thus has no value as persuasive authority.

The United States does not seek restitution and abatement damages as part of its Motion for Partial Summary Judgment. *See* Dkt. 136 ¶ 6. However, the United States

should be allowed to seek restoration damages following the issuance of any order ejecting the Town from the trust and restricted-fee land underlying the Roads if the Town, upon vacating the land, leaves it in a degraded state such that significant expenses would be required to restore it. If restoration is necessary, the United States, on behalf of the Band and the Allottees, is entitled to recover the reasonable costs of undertaking that task itself. *Brunskill*, 792 F. 2d at 940 & n.1; *Osterlund*, 671 F.2d at 1267 & n.2.

The Court thus should find that the United States is entitled to the reasonable costs of removing the Roads and restoring the land to its natural state if the Town leaves the trust and restricted-fee land underlying the Roads in a degraded condition upon ejectment and deny the Town's request for summary judgment on that issue. If the United States, after regaining possession of the trust and restricted-fee land for the Band and the Allottees, determines that restitution and abatement costs are needed, the Court should allow the United States to file an appropriate motion, with supporting declarations, to recover restitution and abatement costs. *See United States v. Ferguson*, No. CV 23-02286-MWF (Spx), 2024 WL 3540472, at *6 (C.D. Cal. Jun. 4, 2024) ("Plaintiff may file a motion to amend the final judgment to include the reasonable costs of removing structures and restoring the land to its natural state."). In that way, the United States would be required to quantify the required relief with specificity, allaying the Town's concerns about an award of potentially speculative damages.

## CONCLUSION

For all of the reasons stated above and in the United States' initial summary-judgment filings (Dkts. 136-141), the Court should grant summary judgment in the United States favor and deny the Town's and Homeowners' counterclaims and affirmative defenses.

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Respectfully submitted,

TIMOTHY M. O'SHEA, United States Attorney
Western District of Wisconsin

TODD KIM, Assistant Attorney General
Environment and Natural Resources Division

*/s/ Hillary K. Hoffman*
HILLARY K. HOFFMAN, Trial Attorney
Minnesota Bar No. 0402027
Tribal Resources Section
Environment and Natural Resources Division
United States Department of Justice
P.O. Box 7611, Ben Franklin Station
Washington, D.C. 20044
Tel.: (202) 598-3147
Fax: (202) 305-0275
Email: hillary.hoffman@usdoj.gov

*/s/ Samuel D. Gollis*
SAMUEL D. GOLLIS, Trial Attorney
Massachusetts BBO No. 561439
Tribal Resources Section
Environment and Natural Resources Division
United States Department of Justice
999 18th Street, South Terrace, Suite 370
Denver, CO 80202
Tel.: (303) 844-1351
Fax: (303) 844-1350
Email: samuel.gollis@usdoj.gov

*Attorneys for the United States of America*

OF COUNSEL:

KARA G. PFISTER, Senior Attorney
Office of the Solicitor – Northeast Region
United States Department of the Interior

ANDREW S. CAULUM, Senior Attorney
Office of the Solicitor – Division of Indian Affairs
United States Department of the Interior