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

UNITED STATES OF AMERICA,

Plaintiff and
Counter Defendant,

Case No. 3:23-cv-00355-wmc

v.

TOWN OF LAC DU FLAMBEAU,

Defendant and
Counter Claimant,

and

GORDON ANDERSON et al.,

Intervenor Defendants and
Intervenor Counter Claimants.

UNITED STATES OF AMERICA'S COMBINED REPLY BRIEF IN OPPOSITION TO TOWN OF LAC DU FLAMBEAU'S AND GORDON ANDERSON ET AL.'S RESPONSE BRIEFS IN OPPOSITION TO THE UNITED STATES' MOTION FOR PARTIAL SUMMARY JUDGMENT AND FOR SUMMARY JUDGMENT ON THE TOWN'S AND ANDERSON'S COUNTERCLAIMS AND AFFIRMATIVE DEFENSES

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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 Reply Brief in Opposition to the Response Briefs (Dkts. 150, 156) filed by Defendant Town of Lac du Flambeau ("Town") and Intervenor Defendants Gordon Anderson et al. (the "Homeowners"). [1] This Combined Reply Brief is filed concurrently with the United States' Replies to the Town's and Homeowners' Responses to the United States' Statement of Proposed Findings of Fact; the United States' Response to the Town's Additional Statement of Proposed Findings of Fact; the Supplemental Declaration of Kenneth Roy in Support of the United States' Combined Reply Brief ("Roy Suppl. Decl."); the Supplemental Declaration of Dena Ness in Support of the United States' Combined Reply Brief ("Ness Suppl. Decl."); the Declaration of Melissa O'Connor in Support of the United States' Combined Reply Brief ("O'Connor Decl."); and the Declaration of Leroy Gishi in Support of the United States' Combined Reply Brief ("Gishi Decl.").

[1] The United States limits its arguments to only those issues raised by the Town and Homeowners in their Response Briefs that the United States has not fully addressed previously. Accordingly, the United States does not address the following issues:

- that the United States' sovereign immunity bars the Town's Fourth Counterclaim and that claim nevertheless fails as a matter of law, *see* Dkt. 138 at 80-81;
- that the Town's Temporary Access Permits from the Lac du Flambeau Band of Lake Superior Chippewa Indians ("Band") do not constitute a consent defense to the Town's trespass, *see* Dkt. 138 at 38 n.9; Dkt. 151 at 53 n.15;
- that the United States' entitlement to money damages for the Town's trespass is not time-barred, *see* Dkt. 151 at 51-55; and
- that the Town must remove the Roads and restore the underlying lands to their natural condition, or that the United States may undertake the work itself at the Town's expense, *see* Dkt. 138 at 39-48; Dkt. 151 at 55-57.

ARGUMENT

I. THE UNITED STATES IS ENTITLED TO SUMMARY JUDGMENT ON ITS TRESPASS AND EJECTMENT CLAIMS BECAUSE THE EXPIRED GRANTS OF EASMENT FOR RIGHT-OF-WAY FOR THE ROADS WERE NOT THE PRODUCT OF ERROR OR MISTAKE

For the first time in this action, the Town and Homeowners argue that the Bureau of Indian Affairs ("BIA") mistakenly included 50-year terms in the First Annie Sunn Lane ROW (Dkt. 61-1), the Center Sugarbush Lane ROW (Dkt. 61-3), the East Ross Allen Lake Lane ROW (Dkt. 61-4), and the Elsie Lake Lane ROW (Dkt. 61-5), and erroneously interpreted the Second Annie Sunn Lane ROW (Dkt. 61-2) to be limited to a 50-year term as well. *See* Town's Resp. at 21-35; Homeowners' Resp. at 8-13. The United States previously explained in its Opening and Combined Response Briefs why the plain language of those ROW grants and the relevant regulatory provisions compel a finding that the Town has committed a continuing trespass on the Band's and the Allottees' trust and restricted-fee lands and incorporates those arguments by reference. Dkt. 138 at 25-38; Dkt. 151 at 9-13. The United States will briefly address here the Town's and Homeowners' new claims of mistake on the part of the BIA.

Unilateral mistake is an affirmative defense. *Trans-Western Petroleum, Inc. v. United States Gypsum Co.*, 830 F.3d 1171, 1175 (10th Cir. 2016); *Lange v. Andrus*, 1 Wis. 2d 13, 16-17, 83 N.W.2d 140, 141-42 (1957); *see also* Homeowners' Resp. at 11 ("the BIA . . . mistakenly inserted 50-year time limits on the face of the documentation for the Rights of Way . . . ."); Town's Resp. at 32 ("one single BIA employee's unilateral insertion of a 50-year term" in the ROW grants "was simply wrong"). The defense is thus "'subject to

all pleading requirements of the Federal Rules of Civil Procedure.'" *Vanhuss v. Kohn Law Firm S.C.*, 127 F. Supp. 3d 980, 983 (W.D. Wis. 2015) (quoting *Heller Fin., Inc. v. Midwhey Powder Co.*, 883 F.2d 1286, 1294 (7th Cir. 1989)); *see* Fed. R. Civ. P. 8(c). Moreover, the pleading requirement is heightened: "Alleging mistake requires a party to state the circumstances constituting the mistake 'with particularity.'" *Vanhuss* 127 F. Supp. 3d at 983-84 (quoting Fed. R. Civ. P. 9(b)). And Rule 9(b) requires a defendant "to plead the 'who, what, when, where, and how' of the alleged mistake." *Id.* at 984 (quoting *DiLeo v. Ernst & Young*, 901 F.2d 624, 627 (7th Cir. 1990)). The Town's and Homeowners' claims of BIA mistake in the granting of the ROWs is an affirmative defense that neither party timely pleaded in this case. Having failed to properly raise their claims of mistake, the Court should disregard the Town's and Homeowners' arguments.

As a matter of substance, those arguments are without any force in any event. First, to rely on correspondence between the BIA Superintendent who signed the ROWs and the applicants during the application process, rather than the plain language of the grant documents themselves, as the Town and Homeowners would have the Court do, is contrary to law.[2] *See* Dkt. 151 at 10. Second, the Town and Homeowners rely on a misreading of the applicable regulation to support their mistake defense. Both of them focus solely on the fact that the version of 25 C.F.R. § 161.19 in force at the time all five ROWs were granted provided that "Rights-of-way for . . . public highways . . . shall be

[2] The Town similarly seeks to rely on BIA Title Status Reports and Tract History Reports to argue that the ROW grants were perpetual, to the exclusion of the relevant grant documents. *See* Town's Resp. at 25 n.10 & 31 n.13. But those documents do not displace the grants themselves either. *See* Suppl. Decl. of Dena Ness ¶¶ 12-15.

without limitation as to term of years." But this reading ignores the regulation's second sentence, which provided in part that "[r]ights-of-way for all other purposes shall be for a period not to exceed 50 years[.]"[3] As the United States has amply demonstrated, the BIA properly interpreted § 161.19 to limit the grant of ROWs for public highways to governmental entities. *See* Dkt. 139 ¶¶ 19-20 & Dkt. 139-16 (US_0034626), Dkt. 139-17 (US_0034632); Dkt. 151 at 11-13. Grants to non-governmental entities, like the developers here, could per se not be for "public highways," but rather were for private roads, which were covered by the second sentence—"[r]ights-of-way for all other purposes"—of § 161.19. Because the Town and Homeowners never reconcile the developers' status as private entities with the full text of the regulation, their defense to the United States' trespass claim against the Town necessarily fails.[4]

II. THE TENTH AMENDMENT DOES NOT SHIELD THE TOWN FROM TRESPASS LIABILITY

The United States previously addressed the Town's Tenth Amendment arguments in the United States' Opening Brief and incorporates those arguments by reference here. Dkt. 138 at 89-90. In its Response Brief, the Town puts a slightly different

[3] The United States is not seeking deference to the BIA's interpretation of § 161.19, making *Kisor v. Wilkie*, 588 U.S. 558 (2019), and particularly *Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024), which dealt with statutory interpretation, irrelevant here. *See* Homeowners' Resp. at 11. Neither of those cases stands for the proposition that the Homeowners advocate, which is effectively that the Court allow the Town and Homeowners to rewrite the grants to their satisfaction.

[4] Nothing in the applicable regulations operated to make the ROWs permanent upon each of their assignments to the Town. The Town could have approached the BIA at any time after those assignments to seek to remove the term limits, but never did. Nor, of course, did the Town ever seek renewal of the ROWs prior to their various expiration dates, when it also would have been appropriate to broach that subject with the BIA.

gloss on those arguments, contending that "the USA's attempt to seek ejectment from the portions of the Roads that traverse lands held by the USA in trust or restricted-fee status" violates the Town's rights under the Tenth Amendment because the United States' efforts to enforce federal law on the trust and restricted-fee land under its jurisdiction prevents the Town from accessing fee land within its own jurisdiction and fulfilling certain municipal obligations to its citizens under state law. Town's Resp. at 78. *See generally id.* at 78-81. As it has done throughout this litigation, the Town ignores relevant federal law—this time, the Supremacy and Indian Commerce Clauses of the United States Constitution—to make its point, and, as a result, the Town's argument fails as a matter of law.

When the United States adopted the Constitution, "Indian relations became the exclusive province of federal law." *Cnty. of Oneida v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 234 (1985) ("*Oneida II*"). Consistent with this exclusive control, the Indian Commerce Clause empowers Congress "to regulate Commerce . . . with the Indian Tribes." U. S. Const., art. I, § 8, cl. 3. The Supreme Court has consistently interpreted the clause broadly. *See*, *e.g.*, *Cotton Petroleum Corp.*, 490 U.S. 163, 192 (1989) ("[T]he central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs."); *accord Haaland v. Brackeen*, 599 U.S. 255 (2023) (Congress had authority under Article I to enact the Indian Child Welfare Act ("ICWA")).

The Tenth Amendment provides that "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States

respectively, or to the people." U. S. Const., amend. X. "The powers delegated to the federal government and those reserved to the states by the Tenth Amendment are mutually exclusive." *Carcieri v. Kempthorne,* 497 F.3d 15, 39 (1st Cir. 2007) (en banc), *rev'd on other grounds,* 555 U.S. 379 (2009); *see also New York v. United States*, 505 U.S. 144, 156 (1992) ("If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States . . . ."). Therefore, so long as Congress acted within its powers under the Indian Commerce Clause in passing the ROW Act, the United States' enforcement of the Act's requirements on trust and restricted-fee land cannot offend the Tenth Amendment.

Congress acted within its authority when it passed the ROW Act in 1948, and neither the Town nor the Homeowners has argued otherwise. Among other things, the Act's legislative history makes clear that its purpose was "to satisfy the need for simplification and uniformity in the administration of Indian law." S. Rep. No. 80-823, at 1036 (1948), *as reprinted in* 1948 U.S.C.C.A.N. 1033, 1036. In holding that Congress did not exceed its authority in passing ICWA, and that ICWA does not violate the Tenth Amendment, the Supreme Court stated:

> This argument runs headlong into the Constitution. The Supremacy Clause provides that "the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." Art. VI, cl. 2. Thus, when Congress enacts a valid statute pursuant to its Article I powers, "state law is naturally preempted to the extent of any conflict with a federal statute." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372, 120 S.Ct. 2288, 147 L.Ed.2d 352 (2000). End of story.

Brackeen, 599 U.S. at 287. For these same reasons, the Indian Commerce Clause and the Supremacy Clause should also put to rest the Town's argument here.

III. *CITY OF SHERRILL* AND EQUITABLE PRINCIPLES DO NOT APPLY TO THE ISSUE OF THE TOWN'S LIABILITY FOR TRESPASS

The Town and Homeowners continue to assert equitable-defense arguments in response to the United States' trespass and ejectment claims against them. *See* Town's Resp. at 38-52, 73-78; Homeowners' Resp. at 37-38. The United States has previously explained that such defenses do not apply to the United States acting in its sovereign capacity to protect federal title to trust and restricted-fee land, and incorporates those arguments by reference. Dkt. 138 at 42-48, 81-88; Dkt. 151 at 51-57. The United States will briefly address, however, the Town's invocation of *City of Sherrill, N.Y. v. Oneida Indian Nation of N.Y.*, 544 U.S. 197 (2005) ("*Sherrill*") and *Cayuga Indian Nation of N.Y. v. Pataki*, 413 F.3d 266 (2d Cir. 2005) ("*Cayuga*"), in support of its argument (the Homeowners do not cite or rely upon either case).

The *Sherrill* decision was the third and final time—following *Oneida I and II*—that the Supreme Court addressed the Oneida Indian Nation's ("OIN") historic land claims in the State of New York. The United States was not a party in *Sherrill*, and the Court did not address any claims of the United States, much less overturn the controlling federal precedent that prohibits consideration of equitable defenses that the United States relies on here. *See* Dkt. 138 at 82-85. In *Sherrill,* the Court concluded that the OIN could not invoke its sovereign tax immunity with regard to alienated tribal land that it reacquired on the open market without placing the land in trust. *Sherrill*, 544 U.S. at 216-

17. The Supreme Court determined that the passage of time, the delay by the OIN in asserting its sovereign rights, and the justifiable expectations of the local governments and non-Indian landowners in the area precluded the OIN from asserting its tax immunity on the reacquired fee lands. *Id.* at 216-17. In *Cayuga*, the Cayuga Indian Nation ("Nation") filed suit against the State of New York, claiming that a flaw in the original transfer of its reservation over 200 years ago violated federal law and therefore entitled the tribe to possession of the land. 413 F.3d at 268-69. The Second Circuit held that the Nation's claim was barred based on *Sherrill*. *Id.* at 278.

There are two principal reasons why *Sherrill* and *Cayuga* do not apply to the United States' claims in this case. First, *Sherrill* and *Cayuga* are not applicable because the cases did not involve claims by the United States or lands held in trust by the United States. In fact, the Supreme Court stated in *Sherrill* that OIN could have exerted sovereign authority over it reacquired lands, making them exempt from state taxation, by seeking trust status for the lands. 544 U.S. at 220-21. Here, in contrast, the United States brings suit in its sovereign capacity to protect federal title to land held in trust for the Band, which the Band has owned since entering into the Treaty with the Chippewa, 10 Stat. 1109 (Sept. 30, 1854) ("1854 Treaty").[5] *See Bad River Band of Lake Superior Tribe of*

[5] The Town makes the entirely unsubstantiated claims that "[t]he parcels held in trust for the Band relevant to this case do not hold that title pursuant to the 1854 treaty" and "[n]o portion of the lands that the Roads traverse have had uninterrupted trust status since 1854." Town's Resp. at 16 n.4. This is true, the Town contends, again without citation or evidence, because the Band "reacquired partial trust ownership" after the lands were alienated through allotment. *Id.* Together, these "facts" allegedly foreclose the United States from arguing that the trust lands "are not subject to the general intent of the allotment era treaties and Congressional acts." *Id.* None of the Town's claims are based on admissible evidence—

Chippewa Indians of the Bad River Reservation v. Enbridge Energy Co., Inc., No. 19-cv-602-wmc, 2023 WL 4043961, at *19 (W.D. Wis. June 16, 2023) ("*Bad River Band II*") ("[A]lthough equitable concerns may displace tribal sovereignty in extraordinary situations, such as where the Tribe is asserting rights over land from which it was displaced hundreds of years ago, as in [*Sherrill* and *Cayuga*], this case does not present such extraordinary circumstances."); *Bad River Band of Lake Superior Tribe of Bad River Reservation v. Enbridge Energy Co., Inc.*, 626 F. Supp. 3d 1030, 1053 (W.D. Wis. 2022) ("*Bad River Band I*") (trespass claim involving an expired easement is "not remotely analogous to the circumstances in *Cayuga* or *Sherrill*"); *see also Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water District*, No. EDCV 13-883 JGB (SPx), 2016 WL 2621301, at *3-4 (C.D. Cal. Feb. 23, 2016) (rejecting *Sherrill* and *Cayuga* as inapplicable to suits brought by the United States to protect Indian trust resources). Nor can *Sherrill* or *Cayuga* overcome the operation of a federal statute like the ROW Act. *See Oklahoma v. Dep't of the Interior*, 577 F. Supp. 3d 1266, 1274-76 (W.D. Okla. 2021) (holding that Oklahoma could not rely on *Sherrill*, *Cayuga*, or equitable principles generally to avoid the plain terms of the Surface Mining Control and Reclamation Act).

Second, the Second Circuit in *Cayuga* ignored the "rights-remedies distinction" that was central to the Supreme Court's analysis in *Sherrill*. *Sherrill* concerned *only* the

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and could not be—because they are false. The Band owns a one-hundred percent interest in both Tract No. 432 T 2047, underlying a segment of Annie Sunn Lane, *see* Dkt. 160 ¶ 19.b, and Tract No. 432 T 2056, underlying a segment of East Ross Allen Lake Lane, *see id.* ¶ 27. And based on the relevant BIA records, the United States has held the entirety of those tracts in trust for the Band without interruption since the time of the 1854 Treaty. *See* Decl. of Melissa O'Connor ¶ 4 & Exs. A and B.

remedies available to the OIN, not the rights it had sought to vindicate over the long course of litigation. The Supreme Court explicitly recognized this distinction. *Sherrill*, 544 U.S. at 213 ("The substantive questions whether the plaintiff has any right or the defendant has any duty, and if so what it is, are very different questions from the remedial questions whether this remedy or that is preferred, and what the measure of the remedy is.") (cleaned up); *see also Cayuga*, 413 F.3d at 289 ("[T]he *City of Sherrill* court addresses laches in the context of the specific equitable relief sought in that case. Further, it repeatedly notes the difference between a right and a remedy.") (Hall, J., dissenting in part and concurring in part). The same logic should apply here. The United States seeks at summary judgment only to establish the Town's liability for trespass and ejectment. *See* Dkt. 136 at 1-2; Dkt. 138 at 16. As it did in *Bad River Band I* and *II*, the Court thus should find *Sherrill* and *Cayuga* to be inapposite.

IV. THE UNITED STATES IS ENTITLED TO SUMMARY JUDGMENT ON THE TOWN'S AND HOMEOWNERS' IMPLIED-EASEMENT AND EASEMENT-BY-NECESSITY COUNTERCLAIMS BECAUSE THEY HAVE NOT ESTABLISHED THE REQUISITE INTENT ON THE PART OF THE FEDERAL GOVERNMENT

A. The Town And Homeowners Cannot Show The Requisite Intent.

The Town and Homeowners agree that the pertinent inquiry when it comes to easements over Indian lands is the intent of the Federal Government. Homeowners' Resp. at 27-28; Town's Resp. at 16. Federal intent is the guidepost, and only a clear statement of the Federal Government's intent can grant use and access rights to Indian trust and restricted-fee land. *E.g.*, *Leo Sheep Co. v. United States*, 440 U.S. 668, 681-82 (1979) ("pertinent inquiry" is intent); *Fitzgerald v. United States*, 932 F. Supp. 1195, 1203

(D. Ariz. 1996) (an implied easement can exist if Congress "intended to grant an easement"). While the Town and Homeowners acknowledge that intent is the touchstone for their implied-easement and easement-by-necessity arguments, they fail to show where in any of the legal instruments relevant to this case the Federal Government gave a clear statement of their purported perpetual use and access rights to the Band's and the Allottees' lands. That is because no such clear statement exists.

Neither the 1854 Treaty, the relevant land patents granted by the President of the United States, nor any applicable act of Congress gives a clear statement sufficient to establish the implied rights the Town and Homeowners advocate for here. *See* Dkt. 151 at 24-26 (discussing relevant land patents). The Homeowners speak of "clear Treaty and congressional intent" and implied easements "as a result of the Treaty and Congressional acts," Homeowners' Resp. at 28-29, but never show where the Treaty or any applicable Congressional act clearly imply such rights over *these* Indian lands. The Town accuses the United States of taking a "myopic" approach to the Treaty, Town's Resp. at 20, but the Town entirely fails to engage with the text and history of the Treaty in its analysis. Both the Town and Homeowners promise they can prove intent, but they never deliver.

Unable to find support in the legal documents that govern the questions presented in this case, the Town and Homeowners continue to rely on the General Allotment Act (also the "Dawes Act") and general principles about Congress's past intent to assimilate Tribes to prove their alleged implied access rights over the Band's and Allottees' land. Homeowners' Resp. at 15-22, 25, 32 (also relying on *Brendale*, which

makes statements in dicta about the Dawes Act); Town's Resp. at 12-14. The crux of the Town's and Homeowners' argument is that, since Congress intended in the late 1800s and early 1900s through the Dawes Act to "integrate the tribal members with non-tribal members" through allotment, Homeowners' Resp. at 32, Congress must have also intended to grant the Town and Homeowners perpetual rights-of-way through the trust and restricted-fee land at issue here. But the Town and Homeowners cite to no authority stating that the general assimilation policy created implied easements over trust and restricted-fee land, and all parties here agree that the Dawes Act was not the authority for allotment on the Lac du Flambeau Reservation. Dkt. 149 ¶¶ 5-6; Dkt. 160 ¶¶ 5-6. Thus, the Dawes Act offers no help to the Town and Homeowners.[6]

B. The Town And Homeowners Fail To Meet Their Burden.

It is the Town's and Homeowners' burden to prove that they have implied easements or easements by necessity. The Town and Homeowners attempt to reduce their burden by arguing that they only seek "narrow easement rights" and not "title" to

[6] The Town's related effort to introduce case law regarding the diminishment and disestablishment of Indian reservations into this dispute is simply misleading. Relying on such cases, the Town argues that since it was Congress's "policy to terminate reservations through allotment," Congress must have intended to give implied easements to the Town and Homeowners to traverse the Band's and the Allottees' land. Town's Resp. at 16-17. The Town is not only wrong on that general principle of law—allotment does not terminate reservations, *McGirt v. Oklahoma*, 591 U.S. 894, 906-07 (2020); *Oneida Nation v. Vill. of Hobart*, 968 F.3d 664, 676 (7th Cir. 2020)—but also fails to account for the 1854 Treaty, which authorized the allotment of the Lac du Flambeau Reservation to members of the Band, but says nothing about further alienation of the allotments. This Court should swiftly reject the notion that the Dawes Act, which is inapplicable to the Reservation, or general principles of diminishment, disestablishment, and assimilation, acted to create perpetual easements for the Town and Homeowners.

the underlying Indian lands. Homeowners' Resp. at 19-20, 26; Town's Resp. at 16, 19, 20 n.7.[7] But an easement is "an interest in real property." *Buckeye Pipe Line Co. v. Keating*, 229 F.2d 795, 798 (7th Cir. 1956); *see also Ronkowski*, 911 F.3d at 890 ("An easement is an interest that encumbers the land of another."). The existence of an easement—a real-property right—restricts the owner of the land that the easement burdens such that they "may not interfere" with the easement-holders rights. *Buckeye Pipeline*, 229 F.2d at 798. Thus, when an easement-holder's rights to the easement are interfered with, "there has been a taking of property from the owner of the easement just as much as if an adverse party had taken real estate which another owned in fee." *Id.* The Indian Nonintercourse Act ("INA") prohibits the "purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto" of Indian lands without approval by the Federal Government, 25 U.S.C. § 177, and applies to any and all interests in those lands. *Chemehuevi Indian Tribe v. Jewell*, 767 F.3d 900, 906 (9th Cir. 2014); *contra* Town's Resp. at 19 (arguing the INA only prohibits the "sale" of Indian lands). The Town and Homeowners cannot avoid the long history of federal control over Indian lands and Indian land conveyances because they are "merely" seeking easements. A clear statement of intent by the Federal

[7] The Town and Homeowners mistakenly attempt to shift the burden to the United States to prove the *absence* of implied easements. Homeowners' Resp. at 25-26 ("The USA does not, and cannot, cite to a treaty, statute or any authority evidencing that Congress intended to restrict access."); Town's Resp. at 15, 18. But it is their burden to prove that an implied easement *does* exist, *e.g.*, *Ronkowski v. United States*, 911 F.3d 887, 890 (7th Cir. 2018) (party arguing existence of easement by necessity must prove their case), and the Town and Homeowners have failed to do so.

Government is required to alienate any interest in Indian lands, and the Town and Homeowners have failed to carry their burden to prove such intent.

Finally, the Town and Homeowners seem to allege that a finding of implied easement over the trust and restricted-fee land can work as a common-law remedy for their ongoing violations of a Tribe's or Allottee's property rights, citing to *Oneida II*. Town's Resp. at 19; Homeowners' Resp. at 21-22. That is, where the Town and Homeowners have been trespassing on the Band's and the Allottees' land, the "common-law remed[y]" they propose is a finding of implied easements in their favor. Homeowners' Resp.. at 22. In conceding a trespass in need of a remedy, the Town and Homeowners misconstrue *Oneida II*. There, the Supreme Court held that the OIN had a cause of action for a violation of its possessory rights that had occurred 175 years prior. 470 U.S. at 230. In 1795, the State of New York purported to purchase lands from the Oneidas in contravention of the INA, which prohibited the alienation of Indian lands without consent of the Federal Government. The OIN alleged that transaction was unlawful. The Supreme Court affirmed the State of New York's liability for the unlawful land conveyance. *Id.* at 232. In doing so, the Court held that the INA "did not establish a comprehensive remedial plan for dealing with violations of Indian property rights," and therefore the OIN's common-law claim for violation of their possessory rights was not preempted by the INA. *Id.* at 238-240. *Oneida II* does not stand for the proposition that the remedy for trespass over Indian lands is an implied easement.

The Town and Homeowners in effect ask the Court to imply easements to remedy the Town's trespass. But, in the ROW Act,[8] Congress has established the means by which to acquire use and access rights to Indian land. And through the Act, Congress has effectuated its intent to protect tribal sovereignty by giving Tribes and individual Indian landowners control over how their trust and restricted-fee land is used. 25 U.S.C. § 325. As the Supreme Court has explained, courts cannot "ignore a statutory promise" or the law "as written" to avoid certain outcomes. *McGirt,* 591 U.S. at 934; *Oneida II*, 470 U.S. at 253. The Town and Homeowners have failed to show that easements by implication or necessity exist, and their counterclaims therefore fail as a matter of law.

V. THE TOWN'S STATUS AS A "PUBLIC AUTHORITY" UNDER THE FEDERAL-AID HIGWAY ACT DOES NOT GIVE THE TOWN A PROPERTY INTEREST IN THE BAND'S AND ALLOTTEES' LANDS

The Town and Homeowners continue to argue that the Tribal Transportation Program, 23 U.S.C. §§ 201-202, and its implementing regulations in 25 C.F.R. Part 170 (together, the "TTP") gives them use and access rights to the trust and restricted-fee land at issue here by virtue of the Roads being listed on the National Tribal Transportation Facility Inventory ("Inventory"). Homeowners' Resp. at 35; Town's

[8] The Homeowners misconstrue the United States' arguments on the ROW Act. *See* Homeowners' Resp. at 15-16. The United States is not arguing that the ROW Act abrogated any implied rights that existed prior to its enactment. Rather, the United States asserts that the Town and Homeowners have no implied rights in the trust and restricted-fee lands that preexist the ROW Act, and that it was only through the ROW Act that the Town and Homeowners secured access to the Roads for the fifty-year terms. The Homeowners' extended discussion of *Nebraska Pub. Power Dist. v. 100.95 Acres of Land*, 719 F.2d 956, 958-59 (8th Cir. 1983), *see* Homeowners' Resp. at 16-17, is therefore of no moment.

Resp. at 52-62. For all of the reasons that the United States has previously argued and now incorporates here, neither the TTP nor the Town's status as "public authority" over the Roads pursuant to the Inventory give them use and access rights to the segments of the Roads crossing the Band's and the Allottees' land. Instead, it was the easements granted pursuant to the ROW Act that gave them that right, and those easements expired.

As the United States has argued, the TTP—an act of Congress—does not grant use and access rights to third parties. Nor do the TTP's implementing regulations. Dkt. 138 at 66-69. Instead, the ROW Act offers use and access rights to Tribal lands pursuant to specific procedures and requirements, while the TTP simply provides funding to Tribes for transportation facilities. The Town's prior status as "public authority" over the Roads does not change that analysis. As has been fully briefed, the Town's status as public authority pursuant to the Inventory offers the Town no property or liberty interests in the segments of the Roads located on trust or restricted-fee lands. Dkt. 138 at 68-69; Dkt. 151 at 46-47.

VI. THE TOWN AND HOMEOWNERS HAVE NOT ESTABLISHED THE EXISTENCE OF PERMANENT RIGHTS-OF-WAY FOR THE ROADS UNDER THE UNEMPLOYMENT RELIEF ACT

In arguing that they have easements pursuant to the 1933 Unemployment Relief Act, Pub. L. No. 73-5, 48 Stat. 22 (1933) (the "URA") and the access permits granted pursuant to the URA (the "CCC documents"), the Town again attempts to shift the burden to the United States to *disprove* the purported easements granted. Town's Resp. at 37 ("the USA provides no legal authority to suggest the public was not granted access

rights when the public work, e.g., a roadway, was performed"). It is not the United States' burden to disprove that such easements exist, but the Town's and Homeowners' burden to prove that they have such rights over the tribal trust and restricted-fee land at issue here, and they have failed to do so.[9]

The Town and Homeowners have failed to show where the Band and individual allottees gave permission through the URA and CCC documents for public throughways to be built on their lands and for rights-of-way to be granted in perpetuity to the Town, Homeowners, and the public. Homeowners' Resp. at 36; Town's Resp. at 35-38. The CCC documents specifically state that access was "grant[ed] to the United States" for the purpose of "carrying out the purposes of Executive Order of May 12, 1933, issued pursuant to the [URA]." Dkt. 141 at ¶ 15 & Ex. E (Dena Ness Decl.). The purpose of that Executive Order and the URA was limited to relieving unemployment through public works projects. *See* Dkt. 138 at 74-74 (explaining purpose and history of URA). The Town and Homeowners do not cite to any document illustrating that the United States granted or assigned its rights under the CCC documents to the Town or Homeowners.

Instead, the Town and Homeowners allege that, because the URA projects were "public work projects," the public must have rights to them almost 100 years later.

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[9] The Town and Homeowners have not demonstrated that any of the Roads even existed at the time the CCC documents were executed in the 1930s. With the possible exception of the north-south segment of Annie Sunn Lane, to which the Second Annie Sunn Lane ROW applied before its expiration in 2018, the United States has established that none of the other segments of the Roads crossing trust and restricted-fee land was constructed until after 1953. *See* Dkt. 137 ¶¶ 20, 24, 28, 32; *see also* Suppl. Decl. of Kenneth Roy, ¶¶ 2-13.

Town's Resp. at 37. Not only do the Town and Homeowners fail to show that roads were actually built pursuant to the URA and CCC documents, but the beneficiaries of the projects that were carried out under the URA and the CCC documents were the landowners—the Band and individual allottees—not the public.[10] The CCC documents clearly state 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." Dkt. 141 at ¶ 15 & Ex. E. Thus, to answer the Town's question of "what then becomes of the results of the work performed?[,]" Town's Resp. at 38, the CCC documents specifically state that those benefits were for the enjoyment of the landowner, not the public. *See also* Dkt. 151 at 42 (discussing compensation made under CCC documents).

Simply put, while the Town and Homeowners inject notions of public access and perpetual rights into the URA and CCC documents, there is no support for their arguments in the URA, the CCC documents, or the secondary sources relating to the URA and CCC documents. *See* Dkt. 138 at 76-79; Dkt. 151 at 34-35 (discussing secondary documents related to the URA and CCC documents). Because the Town and Homeowners have failed to meet their burden here, their arguments should be rejected.

[10] The Town fails to acknowledge the that the CCC documents gave permission to the United States to do public works projects on Indian lands owned by the Band and individual allottees, not on the "public domain." Town's Resp. at 38.

CONCLUSION

For all of the reasons stated above and in the United States' previous summary-judgement filings (Dkts. 136-141, 151-155), the Court should grant partial summary judgment in the United States' favor and deny the Town's and Homeowners' counterclaims and affirmative defenses.

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Respectfully submitted,

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