LAC DU FLAMBEAU BAND OF LAKE SUPERIOR CHIPPEWA INDIANS

TRIBAL COURT

Lac du Flambeau Band of Lake Superior Chippewa Indians,

Plaintiff

Court File No. 23-CV-109

vs.

Howard Bros., Inc.; Terri Howard, Registered Agent of Howard Bros., Inc.; Greg Howard, President of Howard Bros., Inc.; Kyle Howard, Vice President of Howard Bros., Inc.; Kent Howard, Plumber of Howard Bros., Inc.; Keith Hoffman, Project Manager of Howard Bros., Inc.; Arbor Vitae Septic Service; and John Does,

Defendants.

Opinion and Order after Oral Argument

The Court hereby **DENIES** the Defendants' Motion to Dismiss and **DENIES** the Plaintiff's Motion for a Temporary Restraining Order and Preliminary Injunction.

Introduction

According to allegations in the complaint, which the Court accepts as true for the purpose of deciding the Motion to Dismiss, Howard Bros., Inc. ("Howard Bros.") is a nonmember-owned company that owns fee land within the reservation boundaries of the Lac du Flambeau Band of Lake Superior Chippewa Indians. These

parcels are known as Plummer 6 and Plummer 7. These parcels are contiguous to lands owned and held in trust by the United States for the benefit for the, Plaintiff, the Lac du Flambeau Band of Lake Superior Chippewa Indians ("Tribe"). The Tribe alleges that Howard Bros. are engaged in the business of the land application of septage, or human waste, which involves the spreading of waste on land for absorption into the soil. The Tribe further alleges that Howard Bros. sought to engage in the land application of septage on Plummer 6 and Plummer 7 by seeking approval to do so from the State of Wisconsin. The Tribe claims that Howard Bros. has actually engaged in the land application of septage on the parcels.

The trust lands controlled by the Tribe are used by tribal members for subsistence and recreational purposes. For example, the site known as LDF 341 is a historic campground for tribal members. LDF 330 is believed to be the location of a historic dance ring with a short berm foundation. The Tribe alleges that Howard Bros.' actions on fee land will cause pollution, contamination, and damage to the land, water, wildlife, and natural resources of the reservation and the related cultural and subsistence practices of the Tribe and its members. The Tribe finally alleges that Howard Bros. have not complied with applicable tribal laws by, for example, seeking to obtain tribal approval for their activities.

On June 3, 2023, the Tribe brought a claim in this Court seeking a judgment that Howard Bros. is in violation of several tribal codes and injunctive relief. On July 3, 2023, the Tribe moved for injunctive relief. On August 7, 2023, Howard Bros. moved to dismiss. On August 24, 2023, the Tribe filed an amended motion for injunctive relief. On September 15, 2023, Howard Bros. again moved to dismiss and filed an opposition to the Tribe's amended request for injunctive relief. On October 5, 2023, the Tribe responded. On October 17, 2023, Howard Bros. filed a reply. On May 24, 2024, the judge originally assigned this matter issued a notice of recusal. On June 21, 2024, the undersigned accepted this case. On July 26, 2024, this Court heard oral arguments in this matter.

Legal Background

This Court possesses jurisdiction over all cases arising on the Tribe's territory in which the Tribe is a party. *See* LAC DU FLAMBEAU BAND OF LAKE SUPERIOR CHIPPEWA INDIANS CONST. art. X, § 3; *id.* art. I, §§ 1-2. The Court possesses the power to issue all remedies in law and equity. *See id.* art. X, § 4(a).

This Court must apply the laws of the Tribe first, that is, the Constitution, tribal codes and ordinances, and customs and traditions of the Tribe. *See* TRIBAL CODE OF THE LAC DU FLAMBEAU BAND OF LAKE SUPERIOR CHIPPEWA INDIANS § 80.306(1). If tribal laws do not address an issue, the Court may then apply the laws of another tribe or the federal government as persuasive authority. *See* § 80.306(2). If tribal or federal laws do not address an issue, the Court may then apply laws of any state as persuasive authority. *See* § 80.306(3).

The Tribe has alleged violations of several tribal codes. First, the Tribe alleges violations of the Solid Waste Management Code, specifically § 24.103(6), which governs household sewage. Section 24.103(6) requires tribal approval for "[l]andspreading of household sewage." Next, the Tribe alleges a violation of the Protection and Management of Archaeological, Historical, and Cultural Properties and Cultural Resources law, specifically § 66.401, which requires a Permit to Proceed from the Tribal Historic Preservation Officer before beginning any "undertaking on land within the reservation." Finally, the Tribe alleges that Howard Bros. violated Chapter 21 of the Code, which is the conservation code that governs nonmember activity. Specifically, the Tribe alleges that Howard Bros.' activities impact endangered species under § 21.701 and constitute littering under § 21.702.

Discussion

The Court first addresses the motion to dismiss, then the Tribe's motion for injunctive relief.

I. This Court Possesses Jurisdiction over the Tribe's Claims against Howard Bros.

Howard Bros. moves to dismiss the Tribe's complaint on numerous grounds, primarily that federal law forbids this Court from exercising jurisdiction over nonmembers engaged in septage spreading on fee lands within the reservation. "In ruling on a motion to dismiss, all well-pleaded facts are accepted as true, and all reasonable inferences are drawn in favor of the plaintiff." *Mitchell v. Pequette*, 2008 WL 8567012 at *2 (Leech Lake Band of Ojibwe Trial Ct. May 9, 2008).[1] The Court

[1] As the tribal code does not provide for a standard of reviewing motions to dismiss, the Court invokes the law of tribal and federal courts to set a standard for this case under § 80.306(2).

begins, however, with the question of whether the Tribe has alleged jurisdictional facts sufficient to demonstrate this Court's jurisdiction over the claims at all.

A. The Tribe Has Alleged Facts that, If Proven, Would Establish Jurisdiction in this Court.

As an initial matter, tribal constitutional and statutory law compels this Court to assume jurisdiction over this subject matter and over the defendants. We begin with the text of the tribal constitution, which declares that the territorial jurisdiction of the Tribe encompasses the lands of the reservation:

> The jurisdiction of the Lac du Flambeau Band of Lake Superior Chippewa Indians of Wisconsin shall extend to all the land and water areas within the territory of the Band, and further, for the purpose of exercising and regulating the exercise of rights to hunt, fish, trap, gather wild rice and other usual rights of occupancy, such jurisdiction shall extend to all lands and waters described in treaties to which the Band was a party, which treaties provide for such rights.

LAC DU FLAMBEAU BAND OF LAKE SUPERIOR CHIPPEWA INDIANS CONST. art. I, § 2. The tribal constitution also grants to the Tribe's governing council the power to govern the reservation and its lands and resources "subject to any limitations imposed by the statutes or the Constitution of the United States. . . ." *Id.* art. VI, § 1. In short, the Tribe's constitution commands this Court to assume jurisdiction over the lands and resources of the reservation subject to any limitations imposed by the federal constitution or other statutes. The tribal code does as well. *See* TRIBAL CODE OF THE LAC DU FLAMBEAU BAND OF LAKE SUPERIOR CHIPPEWA INDIANS § 80.102.

The tribal constitution and the tribal judicial code make explicitly clear that this Court must assume jurisdiction over this matter. The Tribe alleges sufficient jurisdictional facts that compel this result. First, the Tribe alleges that the fee land at issue is located within the reservation boundaries. The tribal constitution declares that all lands within the reservation, regardless of the status of the owner, are under the jurisdiction of the Tribe. *See* CONST. art. I, § 2. Second, the Tribe plausibly alleges that the activity of spreading septage on those lands impacts the land and resources of the fee lands owned by Howard Bros. and on tribally controlled trust lands contiguous to the fee lands. *See id.*

The Tribe invokes four code provisions, alleging that Howard Bros. is in violation of each of them. The Tribe first alleges violation of the Solid Waste Management Code, specifically § 24.103(6). That section provides:

> Household sewage must be managed in accordance with recommendations of the Tribal Water & Sewer Department. Landspreading of household sewage shall be conducted in strict accordance with 40 CFR 503, and, shall be conducted only after prior approval by the Tribal Natural Resources Department, Land Management Department, Historic Preservation Department, and in accordance with this Chapter, final approval by the Tribal Council.

The Tribe established that the purpose of the code is to "ensure that efficient, nuisance free, and environmentally sound waste management procedures are practiced on the Lac du Flambeau Reservation." § 24.101(1). The code further states that it applies to "the activities of tribal members and non-members within the exterior boundaries of the reservation including tribal and non-tribal facilities, operations and businesses." The code defines "household sewage" as

> the liquid or solid material removed from a septic tank, sewage lagoon, holding tank, cesspool, portable toilet, type III marine sanitation device, sewage treatment facility or other treatment works that receive domestic sewage. This does not include liquid or solid material removed from a septic tank, cesspool, or similar treatment works that receives either commercial wastewater or industrial wastewater and does not include grease removed from grease trap at a restaurant.

§ 24.102(10) (citing 40 CFR Part 503). The Tribe's allegations that Howard Bros. is engaged in the business of spreading human waste on land within the exterior boundaries of the reservation is adequate to establish this Court's jurisdiction over that claim.

The Tribe next alleges violations of the Conservation Code – Nonmembers, specifically §§ 21.701 and 21.702. Section 21.701 prohibits the "taking, possession, molesting, or transportation whatsoever of bald eagle, osprey, elk, fisher, golden eagle, marten, moose, timber wolf, or any species determined to be rare or endangered by U.S. Conservation . . . Service and listed in the current edition of 'Rare and Endangered Fish and Wildlife of the United States.'" Section 21.702 provides, "No weeds, sod, brush, cans, bottles, machinery, garbage, trash, waste, or rubbish shall be thrown, left, or deposited on any road, highway, logging trail or path

within the Lac du Flambeau Reservation." The Tribes does not appear to allege any facts that would demonstrate a violation of § 21.701; the Tribe alleges impacts on game, but does not show how those impacts constitute "taking, possession, molesting, or transportation" of the game. The Tribe does allege that Howard Bros. activities have caused garbage such as toiletries and feminine waste products to be left on roads within the reservation, activity that could violate § 21.702.

Finally, the Tribe alleges of § 66.401 of the Protection and Management of Archaeological, Historical, and Cultural Properties and Cultural Resources, which provides, "Prior to beginning any undertaking on land within the reservation, all individuals shall have a signed Permit to Proceed from the Tribal Historic Preservation Officer." The purpose of the code is "to engage in a comprehensive program of historic preservation to promote the protection and conservation of such archaeological, historical and cultural properties and resources located within the exterior boundaries of the Lac du Flambeau Indian Reservation. . . ." The Tribe alleges that Howard Bros. has not obtained a permit for its on-reservation activities. The Tribe also alleges that Howard Bros.' activities have affected important cultural sites, including a historic campground and a historic dance ring. The Tribe alleges that all lands within the reservation are important to the Tribe's cultural practices. These allegations, if proven, would show a violation of § 66.401.

In sum, the Tribe has alleged facts that compel the Court to assume jurisdiction over most of the claims in the complaint.

B. No Federal Constitutional Provision or Statute Precludes This Court's Jurisdiction over Howard Bros.

The Court must next reject Howard Bros.' federal law defenses. While the question is close, federal constitutional and statutory law does not forbid this Court from assuming jurisdiction over this matter.

Federal law may be applicable as persuasive authority in this Court where tribal law alone is insufficient to resolve a matter. Section 80.306(2) of the tribal judicial code provides, "If an issue arises that is not addressed by this Code or any other duly enacted tribal law, or any custom or tradition of the Tribe, then the Court may apply the statutes, regulations, or case law of any tribe or the federal government." The tribal constitution recognizes that tribal authority over nonmembers is "subject to any limitations imposed by the statutes or the

Constitution of the United States. . . ." LAC DU FLAMBEAU BAND OF LAKE SUPERIOR CHIPPEWA INDIANS CONST. art. VI, § 1. The Court therefore addresses the federal law defenses raised by Howard Bros., emphasizing federal constitutional or statutory restrictions on tribal powers as required by Article VI, § 1 of the tribal constitution.

1. There are No Federal Constitutional Principles Denying Tribal Jurisdiction in this Matter.

The Court finds no federal constitutional principles in conflict with tribal jurisdiction over Howard Bros. Howard Bros. offers no analysis to show how tribal jurisdiction violates the federal constitution. Instead, Howard Bros. relies on the precedents of the United States Supreme Court, primarily *Montana v. United States*, 450 U.S. 544 (1981), and its progeny, to oppose tribal jurisdiction. *Montana* established as a matter of federal common law that a tribal nation generally does not possess civil jurisdiction over nonmember activities on fee lands within a reservation. *Id.* at 565. The *Montana* Court noted two exceptions to that general rule, where: (1) a nonmember consents to tribal jurisdiction, or (2) nonmember conduct threatens the political integrity, economic security, or health and welfare of a tribe or its citizens. *Id.* at 565-66. In *Montana*, the Supreme Court held that the Crow Tribe could not enforce its fish and game conservation laws against nonmembers on fee lands.

Frustrating this Court's assessment of the *Montana* general rule is that the Supreme Court did not point to a single federal constitutional provision or principle divesting or restricting tribal authority over nonmembers. The Supreme Court has stated that tribal authority lies "outside the basic structure of the Constitution. . . [and t]he Bill of Rights does not apply to Indian tribes." *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316, 337 (2008). That reality, taken alone, would suggest there is no federal constitutional bar to tribal jurisdiction. Apparently, the implication one *could* draw from this circumstance, as one federal judge recently commented, is that "without any constitutional backstop, tribal suits are almost exclusively tried before tribe-member judges and all-tribe-member juries. . . . All this is foreign to those accustomed to the protections of state and federal courts and may well deprive nonmembers of their constitutional rights." *Lexington Ins. Co. v. Smith*, 117 F.4th 1106, 1115 (9th Cir. 2024) (Bumetay, J., dissenting from denial of rehearing en banc). Exactly how nonmember constitutional rights are violated merely because a tribal member is a judge is unclear. These conclusory

statements from the federal judiciary offer little guidance to the Court in the absence of an allegation that a specific federal constitutional right has been violated.

For purposes of locating a federal constitutional bar to tribal jurisdiction here, *Montana* and its progeny do no work.

2. There are No Federal Statutory Rights Denying Tribal Jurisdiction in this Matter.

Howard Bros. does not point to any specific or group of federal statutory rights that tribal jurisdiction would implicate. The Tribe's powers are governed by the Indian Civil Rights Act (ICRA), a federal statute that requires tribes to guarantee rights equivalent to federal constitutional rights, such as equal protection, due process, and right to just compensation for governmental takings. *See* 25 U.S.C. § 1302(a)(5), (8). Absent an allegation of a statutory violation alleged by Howard Bros., the Court finds that ICRA's statutory rights are sufficient to preserve nonmember rights.

3. Even Assuming *Montana* is Relevant, the Tribe Has Made a Showing Sufficient to Satisfy an Exception to the General Rule.

The tribal constitution does not allow mere federal common law to restrict the powers of the Tribe, but the tribal choice of law statute does allow the Court to consider the common law precedents of the federal judiciary. The Court is skeptical that tribal constitutional law allows federal common law decisions to restrict tribal powers. As the Court has previously noted, the tribal constitution allows only federal constitutional or statutory provisions to restrict tribal powers. *See* LAC DU FLAMBEAU BAND OF LAKE SUPERIOR CHIPPEWA INDIANS CONST. art. VI, § 1. There is, however, the Tribe's choice of law provision that allows this Court to import federal law as persuasive authority where an issue arises not addressed by tribal laws. *See* § 80.306(2). The Court, therefore, dutifully addresses the *Montana* general rule.

As noted earlier, the *Montana* general rule is that tribal nations may not regulate or adjudicate nonmembers. *See Montana*, 450 U.S. at 565. However, there are two exceptions. The first exception, usually called the consensual relations exception, allows for tribal jurisdiction where a nonmember consents. *See id.* The second exception allows for unconsented tribal jurisdiction where nonmember

actions threaten a tribe's political integrity, economic security, or the health and welfare of the tribe's members. *See id.* at 566. We address each in turn.

Howard Bros. argues that the first exception to the *Montana* general rule limiting tribal jurisdiction is not satisfied because it has not consented to tribal jurisdiction. The Court agrees. The leading precedents on this point are *Strate v. A-1 Contractors. Inc.*, 520 U.S. 438 (1997), and *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316 (2008). The *Strate* Court held that the tribal court could not assume jurisdiction over a tort claim brought against a nonmember where the nonmember's business on the reservation had no nexus to the accident of which the plaintiff complained. The nonmember company had business on the tribe's lands, necessitating travel on state-maintained highways on the reservation. While traveling those roads, the nonmember had been involved in a traffic accident with another nonmember on nonmember-controlled lands. The *Strate* Court found no contractual relationship between the nonmembers and rejected tribal jurisdiction. The *Plains Commerce* Court held that the tribal court could not assume jurisdiction over a dispute between a member and a nonmember where the contract at issue did not expressly provide for tribal court jurisdiction. There, a member ranching family sued their bank, a nonmember-owned business, for breach of contract and race discrimination in tribal court. The *Plains Commerce* Court further rejected the claim that the nonmember bank's invocation of tribal court jurisdiction in earlier matters constituted consent to tribal court jurisdiction in the later matter.

In this case, there is no written contract on record between the Tribe and Howard Bros. involving septage on Plummer 6 and Plummer 7. The Tribe points to a long history of contractual relations with Howard Bros. involving tribal expenditures of $9 million over the years on septage, presumably spread elsewhere. *See* Exh. A to Stone Affidavit. However, the Tribe presents no contractual language suggesting that Howard Bros' has consented to tribal regulatory or adjudicatory jurisdiction. In the absence of that type of contractual language, a federal court likely would find no consensual relationship that allows for tribal jurisdiction. The *Plains Commerce* Court held that a nonmember did not consent to tribal court jurisdiction simply through prior commercial dealings. *Plains Commerce*, 554 U.S. at 338. That is the case here. The Court finds nothing in the record adequate to show contractual consent to tribal jurisdiction.

Howard Bros.' alleged impacts on tribal interests, on the other hand, are sufficient to fulfill the second *Montana* exception, at least for purposes of this motion to dismiss. There is a small universe of federal cases that tend to favor tribal jurisdiction over nonmember activities similar to Howard Bros.' business operations. The Tribe points to *Rincon Mushroom Corp. of America v. Mazzetti*, 2024 WL 3066049 (9th Cir. Jun. 20, 2024) (unpublished), and *St. Isadore Farm LLC v. Coeur d'Alene Tribe of Indians*, 2013 WL 4782140 (D. Idaho Sept. 5, 2013). The *Rincon Mushroom* case involved a nonmember company's activities that "posed a significant wildfire risk to the Tribe's nearby casino" and threatened the tribe's "pristine water table." *Rincon Mushroom*, 2024 WL 3066049, at *1. The court also noted that the local county would not regulate the nonmember activities. *Id.* at *2. The Ninth Circuit affirmed tribal jurisdiction over the nonmember. The *St. Isadore Farm* case involved nonmember septage activities. *St. Isadore Farm*, 2013 WL 4782140, at *5. There, the tribe offered evidence to show that the nonmember septage activities posed threats to the tribe's surface and groundwater, air quality, heavy metal pollution, contamination of game animals, and exposure of humans to toxic substances. *Id.* Procedurally, that case involved whether the nonmember must exhaust tribal remedies before seeking federal court relief, which requires a showing of mere plausibility of tribal jurisdiction, a much lower standard than that required to show actual tribal jurisdiction under *Montana*. This case factually is more similar to the *St. Isadore Farm* case than to the *Rincon Mushroom* case, though it matters little given than both cases support tribal jurisdiction. It would be mere guesswork by this Court to determine whether a federal court would actually find in favor of tribal jurisdiction over nonmember septage activities. For purposes of this motion to dismiss, it is sufficient to note that the Court sees no federal case that would affirmatively bar tribal jurisdiction over nonmember septage spreading on reservation lands.

Howard Bros. relies on *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989), in response. In *Brendale*, the Supreme Court held without a majority opinion that the Yakama Nation could enforce its zoning laws on nonmember activities on nonmember-owned fee lands within a portion of the reservation that was considered to be "closed" but not on portion of the reservation considered to be "opened." Loosely speaking, the *Brendale* Court declared the largely unallotted portion of the reservation (occupied primarily by tribal members) to be closed and the heavily allotted portion (occupied by a mix of members and nonmembers) to be open. In its reply in support of the motion to

dismiss, Howard Bros. asserts that Plummer 6 and 7 are not "islands of fee land surrounded by undeveloped natural land closed off the public," invoking the parlance of the *Brendale* decision. That may be true, but the *Brendale* matter did not involve septage with the potential to travel from one parcel to another, nor did the *Brendale* Court have the benefit of comparing those facts to a larger universe of more recent *Montana* 2-type cases that are more deferential to tribal jurisdiction. Still more, there is no majority opinion in *Brendale* that would compel a given result in any factual situation.

Howard Bros. also employs *Brendale* to make a policy argument, asserting that the Tribe's assertion of authority over reservation fee land would create a kind of jurisdictional chaos that the United States Supreme Court feared would occur in land use matters. *See Brendale*, 492 U.S. at 430 (White, J.). However, no opinion in *Brendale* garnered a majority; the opinion quoted by Howard Bros. favoring county zoning authority was undercut by the opinion from Justice Blackmun favoring tribal zoning authority for virtually the same reasons articulated by Justice White. *See Brendale*, 492 U.S. at 460 (Blackmun, J.). Jurisdictional confusion certainly is not preferable, but confusion is endemic to Indian country, leading rational actors resolve the confusion with intergovernmental cooperation and agreement. *See* Rebecca M. Webster, *Tribal and Local Governments: Jurisdictional Challenges within Shared Spaces*, 89 WISC. LAW, Jan. 2016, at 22, 27 ("Focusing on cooperative efforts seems to be a better use of resources than litigation and a more realistic route than waiting for Congressional action."). Regardless, Howard Bros. offers no evidence-backed argument why state regulation of septage on reservation fee lands is preferable to tribal jurisdiction.

In the absence of a compelling argument under the federal judiciary's precedents, which tend to favor tribal jurisdiction in matters like this, the Court must defer to the tribe's constitutional and statutory mandates.

4. There are No Federal Statutory Restrictions on Tribal Jurisdiction in this Matter.

Howard Bros. does invoke a federal statute, the Clean Water Act, hoping to show that tribal jurisdiction is foreclosed. Howard Bros. argues that septage and regulation of septage is governed by 33 U.S.C. § 1345. Howard Bros. then points out that septage regulation is not one of the powers that can be delegated by the federal government to tribal nations under the Treatment-As-State program. *See* 33

U.S.C. § 1377(e). Howard Bros. concludes that if an Indian tribe cannot be treated as a state for the purpose of regulating sepatage, then the Tribe here cannot regulate septage at all. Howard Bros.' conclusion is erroneous.

The Clean Water Act provisions do not forbid inherent tribal jurisdiction over septage on reservation fee lands. Section 1345 statute "requires an [Environmental Protection Agency] permit specifically for the disposal of sewage sludge when such disposal results in pollutants from the sludge entering the navigable waters. . . ." *Pacific Legal Foundation v. Quarles*, 440 F. Supp. 316, 319 (C.D. Cal. 1977). That provision "was not intended to be the primary source of regulation of sludge but was intended as a cautionary measure to provide additional protection against dangers to navigable waters caused by disposal methods unregulated by Section 301—careless land disposal and deep ocean dumping of sludge from vessels." *Id.* at 324. State and local laws and ordinances regulating septage are not preempted by § 1345 unless they are less protective of navigable waters than federal law. *See Welch v. Board of Supervisors of Rappahannock County, Va.*, 888 F. Supp. 753, 756-68 (W.D. Va. 1995). All § 1345 does is establish a federal minimum of protection of navigable waterways caused by unregulated or loosely regulated septage. The fact that septage regulation is not a part of the Treatment-As-State program says nothing about inherent tribal sovereignty. If Congress wished to limit or eliminate tribal powers, the United States Supreme Court imposes an obligation on Congress to make its intent to do so express or clear. *E.g.*, *South Dakota v. Bourland*, 508 U.S. 679, 687-88 (1993) (holding that by exercising the power of eminent domain over tribal lands for a dam project, Congress eliminated tribal powers to exclude nonmembers from those lands). The Clean Water Act does not divest the Tribe of the power to regulate septage on nonmember owned fee land within the reservation. If anything, all these federal statutes do is leave open the question. Inherent tribal powers remain extant.

In sum, the Tribe's constitution and choice of law provisions require this Court to assess federal law for the purpose of determining whether there are federal constitutional or statutory limits to septage regulation. The Court finds no federal constitutional limits. ICRA ensures federal statutory rights for nonmembers. Howard Bros. makes no argument that tribal jurisdiction violates its federal constitutional or statutory rights. The Court also rejects Howard Bros.' claim that the Clean Water Act, which is silent as to the scope of tribal powers in this context, impliedly restricts tribal powers. The Court must deny the motion to dismiss.

II. The Tribe is Not Entitled to Injunctive Relief on this Record.

The Court at this time declines to enjoin Howard Bros. from spreading septage on its lands within the reservation boundaries.

The factual showing the Tribe must make to justify injunctive relief is high. *See DeVerney v. Election Board*, 8 Am. Tribal Law 290, 291 (Little River Band of Ottawa Indians Tr. Ct. 2009). There are four factors the Court must consider in deciding whether to grant a motion for a preliminary injunction:

> The granting of preliminary injunctive relief requires a balancing of four different factors. The Court must first determine whether the Plaintiff has demonstrated a probability of succeeding on the merits of [its] claim. Second, if that is demonstrated, the Court must examine the potential harm to the Plaintiff should preliminary injunctive relief not be granted . . . . Third, that potential for harm must be balanced against the potential for harm to the Defendants should preliminary injunctive relief be granted. Lastly, the Court must examine the public interest in granting or denying preliminary injunctive relief.

LaRose v. Wilson, 2003 WL 26066795, at *5 (Leech Lake Band of Ojibwe Trial Ct. Jan. 21, 2003). "Each one of these factors must be proven. If one factor is not proven, the request for the injunction must fail." *Crampton v. Election Board*, 8 Am. Tribal Law 295, 296 (Little River Band of Ottawa Indians Tr. Ct. 2009).

The Tribe has failed to meet this difficult test. The first factor favors the Tribe. The Court has already determined that the Tribe may enforce its laws against Howard Bros. on Plummer 6 and 7. *Supra* Part I. It is undisputed that Howard Bros. has failed to comply with tribal laws by not seeking the permits required under tribal statutes. *E.g.*, Solid Waste Management Code, § 24.103(6) (requiring permission of tribal agencies to spread household sewage); Protection and Management of Archaeological, Historical, and Cultural Properties and Cultural Resources § 66.401 (requiring approval of the Tribal Historic Preservation Office). It is therefore likely that the Tribe will prevail on the question of whether Howard Bros. must seek tribal permits to continue its septage operations.

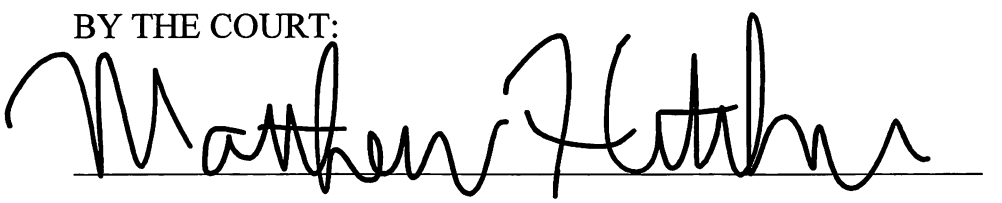
However, on this record, the Court cannot conclude that the Tribe is suffering irreparable harm from Howard Bros. failure to comply with tribal laws. The Tribe alleges in some detail that the spreading of septage is not environmentally sound, threatening water sources and game and plant species. Plaintiff's Amended Motion

for Preliminary Injunction at 8-9. The Tribe also alleges threats to important cultural sites. *Id.* at 10-11. The Tribe alleges that spreading septage on other lands has already caused significant harm to game and plants. *Id.* at 4-5. Even accepting these allegations as true, these harms are largely speculative and do not rise to the level needed to justify an injunction at this time. *See Holder v. Byrd*, 6 Okla. Trib. 349, 1997 WL 33477675, at *5 (Cherokee Nation Judicial App. Trib. 1997) ("An injunction is never granted based upon mere apprehension of injury, nor where the injury is nominal or speculative.").

The Court takes judicial notice that the State of Wisconsin has approved Howard Bros.' activities under state law. *See* Letter, State of Wisconsin, Dept. of Natural Resources, to Kyle Howard (dated Oct. 14, 2024). The Court assumes for the purposes of this motion that the State's laws are rational and that the State's approval is similarly rational. The State laws and the State's approval decision may deviate from the tribal regulatory regime, ultimately causing immediate and irreparable harm to the Tribe, but the Court cannot know at this time how far state laws deviate from tribal laws, if they do at all.

After all, neither the Tribe nor Howard Bros. has initiated the tribal regulatory apparatus. Consequently, the Court is not comfortable doing the work of the Tribe's regulatory bodies, which have not yet acted to enforce tribal laws. Perhaps the prudent move would be to remand this matter to the relevant tribal regulatory bodies for further factual development of the record. The Court will seek further argument from the parties on how to proceed, but for now, the motion for injunctive relief is denied.

BY THE COURT:



Honorable Matthew Fletcher, Lac du Flambeau Pro Tem Judge