

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

WHITE SAND LAKE ASSOCIATION INC.,
PHEIFER BROTHERS CONSTRUCTION COMPANY, INC.,
CLARK ALBERT, RAY FRIGO, AMBER WINTER,
DENISE ODELL, CONNIE WINTER, MIKE RUMMEL,
LOUISE WALSH, and MARY LOU FISHER,

Plaintiffs,

Case No. 3:26-cv-00615

v.

JOHN D. JOHNSON, SR., in his official capacity as President of the Lac du Flambeau Band of Lake Superior Chippewa Indians, THE TRIBAL COURT OF THE LAC DU FLAMBEAU BAND OF LAKE SUPERIOR CHIPPEWA INDIANS, THE HONORABLE MATTHEW FLETCHER, in his official capacity as Pro Tem Judge of the Tribal Court of the Lac du Flambeau Band of Lake Superior Chippewa Indians, and MELINDA YOUNG, in her official capacity as Director of the Tribal Natural Resource Department of the Lac du Flambeau Band of Lake Superior Chippewa Indians.

PLAINTIFFS' BRIEF IN SUPPORT OF THEIR MOTION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

This case presents a straightforward question of federal law: whether the Lac du Flambeau Band of Lake Superior Chippewa Indians (the “Band”) may exercise regulatory and adjudicatory jurisdiction over nonmember citizens acting on nonmember fee land and navigable waters within the State of Wisconsin. Over forty years of settled federal precedent answers that question with an unequivocal “no.”

Plaintiffs are the White Sand Lake Association, Inc. (the “Association”), several of its individual members, and a construction company—all nonmembers who reside on or near White Sand Lake, a 1,229-acre navigable lake located within the exterior boundaries of the Band’s Reservation. The Association constructed a boat launch on privately owned, nonmember fee land belonging to one of its members, after obtaining all required permits from Vilas County, consulting the U.S. Army Corps

of Engineers (which confirmed no federal permit was needed), and receiving confirmation from both the Wisconsin DNR and the EPA that no additional approvals were necessary. In short, Plaintiffs' conduct fully complies with every applicable local, state, and federal law.

Despite this, the Band issued citations to Plaintiffs, sued them in Tribal Court for alleged violations of the Tribal Code, and obtained a preliminary injunction from the Tribal Court barring Plaintiffs from using their own boat launch to access the Lake. The Tribal Court's presiding judge—Professor Matthew Fletcher, selected by the Band specifically for this case—reached this result by expressly rejecting the controlling precedents of *Montana v. United States*, 450 U.S. 544 (1981), and *Wisconsin v. Baker*, 524 F. Supp. 726 (W.D. Wis. 1981), *aff'd*, 698 F.2d 1323 (7th Cir. 1983). Judge Fletcher has published scholarship calling for tribal courts to “actively and strategically resist” the U.S. Supreme Court on tribal jurisdiction, and he has put that theory into practice in this case and others.

This Court recently confronted a materially identical dispute between the State of Wisconsin and the same Band. In *State of Wisconsin v. John D. Johnson, Sr., et al.*, No. 3:26-cv-00401-wmc (W.D. Wis. filed Apr. 29, 2026), this Court granted the State's motion for a temporary restraining order on May 1, 2026, recognizing that *Baker* controls and that the Band lacks jurisdiction to regulate nonmember conduct on Wisconsin's navigable waters. On June 17, 2026, this Court granted the State's motion for a preliminary injunction again recognizing that *Baker* and *Montana* control, and finding that the Band submitted “little to no evidence” that nonmember conduct would “result in catastrophic consequences,” and that the balance of equities all weigh “heavily in favor of the State and the public.” Plaintiffs' case presents even stronger grounds for relief: Plaintiffs are nonmembers acting on nonmember fee land and attempting to access Wisconsin's navigable waters, placing the Band's jurisdictional assertion at its absolute weakest point under the *Montana* framework.

Plaintiffs respectfully request that this Court issue a temporary restraining order and preliminary injunction (1) halting the current proceedings against Plaintiffs in Tribal Court; (2) vacating the

Tribal citations; and (3) enjoining Defendants from enforcing any Tribal regulations against Plaintiffs with respect to their boat launch and access to White Sand Lake.

FACTUAL BACKGROUND

I. The Parties and the Property

Plaintiff White Sand Lake Association, Inc. is a Wisconsin corporation whose members are homeowners and individuals committed to protecting the Lake and its recreational and ecological resources. The individual Plaintiffs are all nonmembers of the Band who reside in homes on or near White Sand Lake. Plaintiff Mary Lou Fisher owns the privately held, nonmember fee-simple property on which the Association's boat launch was constructed. Plaintiff Clark Albert is the Association's President. Plaintiff Pheifer Brothers Construction Company, Inc. was hired to construct the launch. (Dkt. 0001 ("Compl.") ¶¶ 2, 8-9, 16, 54.)

White Sand Lake is a 1,229-acre natural lake located within the exterior boundaries of the Band's Reservation in Lac du Flambeau, Wisconsin. The Reservation was created by the Treaty with the Chippewa, Sep. 30, 1854, 10 Stat. 1109 (the "1854 Treaty"). Ms. Fisher's property exists within the outer boundaries of the Reservation but is privately owned, nonmember fee land. (Compl. ¶ 2.)

Defendants are officials of the Band, sued solely in their official capacities: President John D. Johnson, Sr.; Natural Resources Director Melinda Young; the Tribal Court of the Lac du Flambeau Band; and the Honorable Matthew Fletcher, the Pro Tem Tribal Court Judge presiding over the Band's case against Plaintiffs. (Compl. ¶¶ 17-21.)

II. The Association's Efforts to Address Eurasian Watermilfoil and Construction of the Boat Launch

Prior to 2023, Association members accessed White Sand Lake primarily through a Band-owned public boat launch. That boat launch was the only public launch on the Lake. In 2023, the Band claimed that Eurasian watermilfoil, an aquatic plant designated as an aquatic invasive species ("AIS") by WDNR, had infested the Lake and attributed its spread to motorboat traffic. The Band

responded by closing its boat launch on August 9, 2023, declaring “The Tribe will post if or when the landing might reopen.” Other private launches on the Lake either refused access or charged exorbitant fees—up to \$100 per craft. (Compl. ¶¶ 51–53.) None of the landings on the lake would provide assurances or guarantees of future access.

The Association therefore decided to construct its own boat launch on Ms. Fisher’s private shoreline property. The Association obtained a permit from Vilas County in accordance with Chapter 30 of the Wisconsin Statutes governing navigable waters, harbors, and navigation. The Association also consulted with the U.S. Army Corps of Engineers, which confirmed no federal approval was necessary; the Wisconsin DNR, which confirmed no state permits were required; and the U.S. Environmental Protection Agency, which similarly confirmed no EPA approval was needed. (Compl. ¶¶ 55–58.)

After the Association applied for the County permit, the Band sent a letter asserting that Tribal approval was also required. Because the Band lacks jurisdiction over the Plaintiffs, their land, and Wisconsin’s navigable waterways, and because the Association received guidance from both an environmental engineering firm and outside legal counsel assuring the Association that the proposed landing would not harm the environment and that the Band’s approval was not required, the Association did not seek Tribal approval. The boat launch was completed by June 2025. (Compl. ¶¶ 55-58, 61.) And, to address the concern for Eurasian watermilfoil and other AIS, the Association implemented a requirement at its launch that all boats and trailers be inspected and washed by an Association member to ensure all ballast tanks and live wells are drained of water and boats and trailers are cleaned and free of any AIS prior to launch to prevent the further spread of AIS. The Association also closely monitors ingress and egress from the boat launch as the launch is only accessible through a monitored and locked gate. (Dkt. 0001.001 (“WSLA Decl.”) ¶ 9.)

The Association has a long history of protecting White Sand Lake, including efforts targeting

Eurasian watermilfoil. For example, the Association had for years administered WDNR's "Clean Boats Clean Waters" program on the Lake, through which Association volunteers inspected boats and trailers for Eurasian watermilfoil to prevent further proliferation, and educated boaters about the AIS's risks to the Lake. (WSLA Decl. ¶ 18.) Moreover, for many years, the Association received WDNR money to pay interns to monitor the landing. For no apparent reason, in the spring of 2023, the Band prohibited the paid interns or Association volunteers with the Clean Boats, Clean Waters program from monitoring the Tribal landing. There is no evidence that Eurasian watermilfoil was in the Lake while monitoring was permitted at the Tribal Landing. The first evidence of Eurasian watermilfoil in the Lake was noted in August of 2023, after a summer of unmonitored boat launches. To date, a vast majority of the Eurasian watermilfoil infestation is in the bay immediately off the Tribal Landing.

Once the Eurasian watermilfoil was discovered in August of 2023, Association members dedicated hundreds of volunteer hours working to mitigate and remediate watermilfoil spread. (WSLA Decl. ¶ 19.) In September of 2023, the Association began the application for the AIS Early Detection and Response Program for the removal of Eurasian watermilfoil from the lake. In 2024, WDNR awarded the Association a \$25,000.00 grant (along with over \$9,000 in matching funds from the Association) which, on multiple occasions, the Association offered as assistance to the Band. The Band rejected the Association's offers.

III. The Band's Enforcement Actions and Tribal Court Proceedings

On May 15, 2025, while the launch was still under construction, the Band issued citations to Ms. Fisher, Mr. Albert, and Pheifer Brothers Construction Company, Inc. for alleged violations of the Tribal Natural Resources Code, claiming that Plaintiffs had cleared vegetation from the launch's proposed path on Ms. Fisher's private property. (Compl. ¶¶ 59-60.) Specifically, the citations allege Ms. Fisher, Mr. Albert and Pheifer Bros. Construction "did unreasonably waste, destroy, or impair wild plants while harvesting said plants on shore of White Sand Lake." (*Id.*) Each citation lists a penalty of

up to \$5,000.00. (*Id.*)

On June 10, 2025, the Band filed a civil action in Tribal Court against Plaintiffs, alleging violations of various provisions of the Tribal Code¹ and seeking a permanent injunction barring Plaintiffs' use of the boat launch. Plaintiffs moved to dismiss on jurisdictional grounds. The Band filed an Amended Complaint,² and Plaintiffs again moved to dismiss. (Compl. ¶¶ 62-64.)

IV. Judge Fletcher's Rejection of Controlling Federal Law

Tribal law prohibited the Chief Judge, the Honorable Garold Smith, from hearing civil cases to which the Band is a party. In his place, the Band specifically selected Professor Matthew Fletcher to preside. (Compl. ¶¶ 65-66.)

Professor Fletcher is a law professor at the University of Michigan. He has published a law review article in the *University of Colorado Law Review* titled "Resisting Federal Courts on Tribal Jurisdiction," which succinctly articulates his call to action:

It is time for Indian tribes to actively and strategically resist the [U.S.] Supreme Court in the context of tribal court civil jurisdiction over nonmembers.

He explicitly calls for tribal courts to reject the entire *Montana* framework, the common law cause of action allowing nonmembers to access federal courts to decide matters of jurisdiction and instead look only to tribal law to determine jurisdiction.

¹ The Band asserted that Plaintiffs violated LDF Tribal Code §§ 21.701-709 (the Nonmember Conservation Code) by "unreasonably wasting, injuring, destroying, or impairing any wild plant, animal, or fish while engaging in the harvest of said species"; LDF Tribal Code §§ 23.301-23.906 (the Shoreline Protection Code) by building the boat launch which allegedly "has the potential to impair water quality by spreading Eurasian water-milfoil infestation to other areas of the lake"; and LDF Tribal Code § 66.110(26) (the Cultural Protection Code) by building the boat launch because it allegedly is a "project, activity, or program...that may have potential to affect a historic property, burial site, human remains, sacred site or traditional property".

² The Tribe's Amended Complaint asserted two new violations of LDF law: the Boating Safety Ordinance, LDF Tribal Code § 27.508, which provides that the Tribe may "seek to obtain an injunction...against any person subject to this ordinance who undertakes activities that have the potential to obstruct a stream, impair water quality, disturb or impair fish reproduction, or create a hazard to public health," and the Water Quality Standard Code, LDF § 28.100-28.112, which provides that "existing ambient water quality may not be lowered as a result of an action attributable to human activities."

And to be absolutely clear, Professor Fletcher is not advocating for persuasively attempting to alter the current state of the law; rather he is calling for a radical rejection of the rule of law:

But a second and more important step is to resist the federal judiciary's assertion of jurisdiction to determine tribal court jurisdiction, a step which might include tribal court efforts to assert civil jurisdiction over nonmembers, perhaps even in the face of a federal order to halt.

(Compl. ¶ 70.)

True to his published theory, Judge Fletcher has already put these views into practice. In a prior case involving the same Band, *Lac du Flambeau Band v. Howard Bros. Inc.*, No. 23-CV-109 (LDF Band of Lake Superior Chippewa Indians Tribal Ct. Oct. 28, 2024), Judge Fletcher rejected *Montana* and its progeny, elevated Tribal law over federal common law, and relegated the *Montana* framework to mere “persuasive authority” on par with the laws of another tribe. (Compl. ¶¶ 71-72.)

In Plaintiffs’ case, Judge Fletcher applied the same approach. He held that the Tribal Court’s jurisdictional authority “derives from tribal law, not federal law,” relegated federal law to “persuasive authority:”

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).

(Dkt. 0001.002 (“Olson Decl.”), Ex. D (Tribal Court Order) at 3.)

In doing so, Judge Fletcher rejected the controlling rule of *Montana* as “inapposite,” and similarly dismissed *Baker*—the decision this Court has recently relied upon in granting the State of Wisconsin’s TRO and preliminary injunction motion in a highly analogous case. *See* W.D. Wis. Case No. 26-cv-401-wmc. Judge Fletcher denied Plaintiffs’ motion to dismiss and granted the Band’s motion for a preliminary injunction, barring Plaintiffs from using their own boat launch on their own private fee-owned property to access a navigable Wisconsin lake. (Compl. ¶¶ 72-76.)

V. The Ongoing Harm to Plaintiffs

As a result of the Tribal Court’s preliminary injunction, Association members cannot use their boat launch to access White Sand Lake. They face another season of paying exorbitant fees—up to \$100 per launch and retrieval—at other private launches, or foregoing lake access altogether. The Band’s enforcement actions fit a broader pattern of targeted conduct against the Association and its members, including the Band’s refusal of DNR-funded assistance for Eurasian watermilfoil remediation because the funds were part of a state program, even as other boat launches on the Lake continue to operate. (Compl. ¶¶ 77-78.)

LEGAL STANDARD

The legal standard for a temporary restraining order and a preliminary injunction is the same. *Democratic Nat’l Comm. v. Bostelmann*, 447 F. Supp. 3d 757, 765 (W.D. Wis. 2020). The moving party must show “(1) that he will suffer irreparable harm absent preliminary injunctive relief during the pendency of his action; (2) inadequate remedies at law exist; and (3) he has a reasonable likelihood of success on the merits.” *Id.* (quoting *Whitaker by Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1044 (7th Cir. 2017)).

If the moving party makes this showing, the Court then “engage[s] in a balancing analysis, to determine whether the balance of harm favors the moving party or whether the harm to other parties or the public sufficiently outweighs the movant’s interests.” *Id.* (quoting *Whitaker*, 858 F.3d at 1044). This involves “a ‘sliding scale’ approach: the more likely the plaintiff is to win on the merits, the less the balance of harms needs to weigh in his favor, and vice versa.” *Mays v. Dart*, 974 F.3d 810, 818 (7th Cir. 2020).

ARGUMENT

I. Plaintiffs are likely to succeed on the merits.

The dispositive issues in this case turn on the Band’s tripartite lack of jurisdiction: the Band lacks jurisdiction over Plaintiffs themselves as nonmembers, over Plaintiffs’ activities on nonmember fee land, and over Wisconsin’s navigable waterways. The Band’s lack of jurisdiction is confirmed by decades of precedent from the United States Supreme Court, the Seventh Circuit, and this Court; lauded Wisconsin constitutional guarantees and common law; and internal tribal law. And, courts exempt cases like this – where Tribal jurisdiction is so clearly wanting – from the general rules requiring exhaustion in tribal courts before proceeding in federal Court. Plaintiffs have a high likelihood of success of showing both that exhaustion before the Tribal Court is not required, and that they are entitled to the declaratory and injunctive relief they seek.

A. The Band plainly lacks jurisdiction.

1. *Baker* Controls: The Band lacks jurisdiction over Plaintiffs’ use of navigable waters like White Sand Lake.

This Court’s decision in *Baker* is squarely on point and dispositive. In *Baker*, the Lac Courte Oreilles Band—another party to the same 1854 Treaty—enacted a tribal code that “purport[ed] to restrict fishing and hunting in all waters within the Band’s reservation.” *Baker II*, 698 F.2d at 1326. This Court held that “the State of Wisconsin enjoys exclusive sovereignty over the navigable waters lying within the outer boundary of the [band’s] reservation . . . with respect to the use of those waters by non-members of the . . . Chippewa tribe,” and that the band and its officials “lack power to regulate the use of those waters by such nonmembers.” *Baker I*, 524 F. Supp. at 733.

The Seventh Circuit affirmed, holding that “the 1854 Treaty did not convey to the Band sovereignty over navigable waters within its reservation and that exclusive sovereignty over them is in the State.” *Baker II*, 698 F.2d at 1335. The court emphasized that “[t]here are weighty reasons for presuming that the 1854 treaty did not confer upon the Band exclusive hunting and fishing rights in navigable Wisconsin lakes.” *Id.* at 1333.

Baker applies directly here. The Lac du Flambeau Band is a party to the same 1854 Treaty as

the Lac Courte Oreilles Band in *Baker*. White Sand Lake is a navigable lake within the exterior boundaries of the Reservation. The Band's claims against Plaintiffs rest on alleged violations of Tribal Codes governing conduct on or effecting navigable waters—precisely the kind of regulation that *Baker* holds the Band has no power to enforce against nonmembers.

Indeed, the Band has justified its enforcement actions against Plaintiffs as an exercise of Tribal regulation of White Sand Lake, citing the need to control motorboat traffic and the spread of Eurasian watermilfoil. But these justifications only confirm that the Band is attempting to regulate nonmember activity on navigable waters—the very assertion of authority that *Baker* categorically rejects.

This Court has already applied *Baker* in precisely this context. In *State of Wisconsin v. John D. Johnson, Sr., et al.*, No. 3:26-cv-00401-wmc, this Court granted the State's TRO motion on May 1, 2026, and the State's motion for a preliminary injunction on June 17, 2026, relying on *Baker* to enjoin the Band from regulating nonmember fishing on navigable waters within the Reservation; including White Sand Lake. The logic applies with equal—indeed, greater—force here, where the Band is not only purporting to regulate use of the Lake but also seeking to prevent Plaintiffs from even *accessing* the Lake from their own private fee simple property.

2. The Band's jurisdictional assertion directly conflicts with Plaintiffs' riparian rights and the State's broad sovereignty.

Baker's clear holding that the authority to regulate nonmembers' access to and use of navigable waters resides exclusively with the State and not with the Band is enough to resolve this case. But, the specific rights and State interests implicated by the Band's actions confirm it lacks jurisdiction here.

First, the Band has explicitly sought to prohibit Plaintiffs from accessing White Sand Lake from their own private property. This restricts Plaintiffs' riparian rights, which Wisconsin law has long recognized and protected. *Sea View Estates Beach Club, Inc. v. State Dep't of Nat. Res.*, 223 Wis. 2d 138, 157, 588 N.W.2d 667 (Ct. App. 1998); *see also R.W. Docks & Slips v. State*, 2001 WI 73, ¶ 21, 244 Wis. 2d 497, 628 N.W.2d 781; *State v. Bleck*, 114 Wis. 2d 454, 466, 338 N.W.2d 492 (1983); *Stoesser v. Shore*

Drive P'ship, 172 Wis. 2d 660, 666 n.2, 494 N.W.2d 204 (1993). These rights entitle Plaintiffs to reasonable access to the water from shoreline land, and includes the right to construct facilities and structures – such as a boat launch – necessary to aid that access. *Sea View Estates Beach Club, Inc.*, 223 Wis. 2d at 157; *see also R.W. Docks & Slips*, 244 Wis. 2d 497, ¶ 21; *Bleck*, 114 Wis. 2d at 466; *Stoesser*, 172 Wis. 2d at 666 n.2. The Band's regulatory and enforcement actions taken against Plaintiffs violate these lauded rights.

The Band's actions have also impinged and conflicted with the State's stewardship of the public trust doctrine. Enshrined in Wisconsin's constitution and established in its common law, this doctrine requires the State to ensure that navigable waters are “common highways and forever free” for public use, without taxation or restriction. Wis. Const. art. IX, § 1; *see also Rock-Koshkonong Lake Dis. v. State Dep't of Nat. Res.*, 2013 WI 74, ¶ 87, 350 Wis. 2d 45, 833 N.W.2d 800. The doctrine broadly encompasses not only navigation but also recreational activities such as boating, swimming, fishing, and hunting, as well as the preservation of scenic beauty. *Rock-Koshkonong Lake Dis.*, 350 Wis. 2d 45, ¶ 72; *see also Wisconsin's Env't Decade, Inc. v. Dep't of Nat. Res.*, 85 Wis. 2d 518, 526, 271 N.W.2d 69 (1978); *Movrich v. Lobermeier*, 2018 WI 9, ¶ 27, 379 Wis. 2d 269, 905 N.W.2d 807. It further requires the State to “protect and preserve” navigable waters for public purposes. *Rock-Koshkonong Lake Dis.*, 350 Wis. 2d 45, ¶ 87; *see also Wisconsin's Env't Decade, Inc.*, 85 Wis. 2d at 526; *Movrich*, 379 Wis. 2d 269, ¶ 27.

The State has animated this doctrine by effectuating policy and regulatory schemes for navigable waterways that cover – and conflict with – both subjects the Band is attempting to regulate here. First, Wisconsin has enacted robust environmental policies to address the proliferation of invasive aquatic species generally, and Eurasian watermilfoil specifically. *See, e.g.*, Wis. Stat. § 23.22(2)(a) (“The [WI DNR] shall establish a statewide program to control invasive species in this state.”). *See also, e.g.*, Wis. Admin. Code NR § 40.05(2)(b)34 (naming Eurasian watermilfoil as a restricted species). It has also enacted a comprehensive regulatory scheme governing the construction, maintenance, and

operation of shoreline structures – such as wharves, piers, and boat launches – on private and public land intended to protect Wisconsin's reasonable access to waterways. *See generally* Wis. Stat. ch. 30, Navigable Waters, Harbors, and Navigation.

These broad and longstanding regulatory enactments, rooted in foundational State interests and constitutional mandates, make Tribal jurisdiction here all the more implausible. As the *Baker* court reasoned:

It is inconceivable that the exclusive power to regulate non-members' use of the navigable waters in the [band's] reservation might have resided in the State of Wisconsin in 1848, 1854, and 1876, but that at some time since, that exclusive power shifted to the [band] by virtue of changes in circumstances which caused the State's possession of that power to pose too severe a threat to the sovereignty of the [band].

Baker I at 524 F. Supp. at 735.

3. The *Montana* Framework independently bars Tribal jurisdiction over Plaintiffs and Activities Conducted on Nonmember Fee Land.

Even apart from *Baker*, the Band's jurisdictional assertions fail under the general framework of *Montana v. United States*, 450 U.S. 544 (1981), and its progeny.

It is Black Letter Law that “tribes do not, as a general matter, possess authority over non-Indians who come within their borders: “The inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.”” *Plains Com. Bank v. Long Fam. Land & Cattle Co.*, 554 U.S. 316, 328 (2008) (quoting *Montana*, 450 U.S. at 565). The presumption against tribal jurisdiction is “particularly strong when the nonmember's activity occurs on land owned in fee simple by non-Indians.” *Id.* (citing *Strate v. A-1 Contractors*, 520 U.S. 438, 446 (1997)).

Moreover, the Supreme Court has “made clear that once tribal land is converted into fee simple, the tribe loses plenary jurisdiction over it.” *Id.* “[W]hen the tribe or tribal members convey a parcel of fee land to non-Indians, the tribe loses any former right of absolute and exclusive use and occupation of the conveyed lands,” which “necessarily entails the loss of regulatory jurisdiction over the use of the land by others.” *Id.* at 328–29 (quoting *South Dakota v. Bourland*, 508 U.S. 679, 689 (1993)). “As

a general rule, then, ‘the tribe has no authority itself, by way of tribal ordinance or actions in the tribal courts, to regulate the use of fee land.’” *Id.* at 329 (quoting *Brendale v. Confederated Tribes and Bands of Yakima Nation*, 492 U.S. 408, 430 (1989)).

Here, Plaintiffs are all nonmembers, and the boat launch is constructed on nonmember fee land owned by Ms. Fisher. The presumption against tribal jurisdiction applies at maximum force. Neither *Montana* exception overcomes this presumption.

a. There is no consensual relationship under the first exception to Montana.

The first exception permits tribal regulation of nonmembers “who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.” *Montana*, 450 U.S. at 565. The Band has never claimed jurisdiction based on any consensual relationship, and none exists. Plaintiffs hold no tribal licenses, leases, or commercial agreements. This exception is inapplicable.

b. Plaintiffs’ conduct does not threaten the Band’s environmental integrity, political existence, or public health.

The “narrow, so-called second exception” permits tribal regulation of nonmembers when their conduct “threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.” *State of Wisconsin v. Johnson*, No. 26-cv-401-wmc, 2026 WL 1746659, at *3 (W.D. Wis. June 17, 2026) (citing *Montana*, 450 U.S. at 566). As this Court recently explained, this exception is to be narrowly construed: “the Supreme Court has held that for this exception to apply, the challenged conduct cannot merely injure a Tribe but must ‘imperil the subsistence’ of the tribal community such that ‘tribal power must be necessary to avert catastrophic consequences.’” *Id.* *4 (quoting *Plains Com. Bank*, 554 U.S. at 341). That is, any assertion of “tribal power must be necessary to avert catastrophic consequences.” *Id.*

The Band’s claims fall far short of this demanding threshold. The Band’s Amended Complaint

in Tribal Court alleges that the boat launch's construction required some vegetation clearing on Ms. Fisher's private land, and that use of the launch might contribute to the spread of Eurasian watermilfoil; might affect fish spawning; and might affect aquatic wildlife. But the Amended Complaint does not allege facts showing how these speculative effects imperil the Band's political sovereignty, economic security, or health and welfare. The Amended Complaint merely states that the boat launch "has the *potential* to impair water quality." (Olson Decl. Ex. A ("Am. Compl.") ¶ 56 (emphasis added).) Speculative potential impacts do not meet the "catastrophic consequences" standard.

The Band's own conduct confirms that it does not view Eurasian watermilfoil as a "catastrophic" risk. Eurasian watermilfoil is neither a new environmental concern in Wisconsin, nor is it one unique to White Sand Lake. As outlined above, both the Association and WDNR have maintained for years numerous programs and outreach efforts intended to curb and remediate Eurasian watermilfoil proliferation in this State. The Band has consistently rejected this assistance and refused to cooperate with the State and the Association. The Band cannot in one breath claim that Eurasian watermilfoil imperils its existence, while in the next reject offers of help to address it.

Moreover, numerous other public and private boat launches (roughly 28) remain in operation on White Sand Lake. (WSLA Decl. ¶ 8.) This includes the Band's launch, which it still operates for Members only. And, many of these launches – *including the Band's* – do not provide a requirement for boaters to inspect and rinse off AIS, including Eurasian watermilfoil. The Band has not sought to close these other launches, however. In other words, the Band's selective enforcement of its ban on nonmember boat launches has closed one of the few launches on the Lake that actually includes a means to mitigate the spread of Eurasian watermilfoil.

The Band's selective enforcement here underscores that Plaintiffs' boat launch does not genuinely imperil the Band's existence. *See Plains Com. Bank*, 554 U.S. at 341 (exception requires showing that "tribal power must be necessary to avert catastrophic consequences"). The State of Wisconsin's

complaint against the Band noted the same pretextual pattern: the Band's fishing restrictions apply only to nonmembers while Tribal members continue to fish unrestricted, demonstrating that any environmental concern is pretextual. *See State of Wisconsin v. Johnson*, No. 3:26-cv-00401-wmc (Apr. 29, 2026 Compl. ¶ 153). Additionally, the environmental regulatory spheres the Band purports to exercise are peculiarly the concern of the State of Wisconsin, as discussed above - not the Band. Plaintiffs complied with all of these regulatory requirements, and they are not within the Band's jurisdiction regardless.

4. Tribal jurisdiction conflicts with internal Tribal law.

Aside from the fact that Tribal jurisdiction over this matter conflicts with clear Seventh Circuit precedent in *Baker*, with the State's exclusive sovereignty over navigable waters and lauded riparian rights, and with settled law on inherent tribal sovereignty over nonmember conduct on nonmember fee land as explained in *Montana* and its lineage, the Band's own laws do not grant it jurisdiction over this dispute.

The Band's constitution and code establish Tribal regulatory and judicial jurisdiction. The Tribal constitution provides that Tribal jurisdiction "shall extend to all the land and water areas within the territory of the Band" and "to all lands and waters described in treaties to which the Band was a party, which treaties provide for usual rights of occupancy." LDF Tribal Const., art. I § 2. It defines the "territory of the Band" as those defined by the 1854 Treaty. *Id.*, art. I § 2. The Band based the claims it filed in Tribal Court against Plaintiffs on alleged violations of Chapters 21, 23, and 66 of the Tribal Code. Each of these Chapters only applies – by its express terms – to the lands defined by the 1854 Treaty. *See* LDF Tribal Code Ch. 21.101(2); Ch. 23.107, 23.108(4); Ch. 66.109, 66.110(15).

But, as explained in *Baker*, the 1854 treaty did not grant jurisdiction over the navigable waterways in the State of Wisconsin that are otherwise within the exterior borders of the Reservation. *Baker v. Wisconsin*, 524 F. Supp. 726 (W.D. Wis. 1981). This holding was affirmed by the Seventh Circuit, *see*

698 F.2d 1323 (7th Cir. 1983), and applied by this Court, *see State of Wisconsin v. Johnson et. al.*, W.D. Wis. No. 26-cv-401-wmc.³

Moreover, as the Supreme Court has made clear: “once tribal land is converted into fee simple, the tribe loses plenary jurisdiction over it.” *Plains Com. Bank*, 554 U.S. at 328-29 (emphasis added).

Therefore, by the Band’s own law, it lacks jurisdiction over the claims it is pressing in the Tribal Court because it does not have any claim to jurisdiction over the water, the people, or the land.

a. Tribal Exhaustion is not required under these circumstances.

Federal law recognizes a federal common law cause of action – under 28 U.S.C. § 1331 – to challenge tribal court jurisdiction. *Nat’l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 850 (1985). Courts generally require parties seeking to invoke this cause of action to first exhaust tribal court remedies. This is, however, only a prudential requirement, and federal courts allow nonmembers to sue in federal court to adjudicate tribal court jurisdictional issues in certain circumstances. *See Evans v. Shoshone-Bannock Land Use Policy Comm’n*, 736 F.3d 1298, 1302 (9th Cir. 2013).

Federal courts recognize multiple exceptions to the tribal exhaustion rule, three of which are implicated here, allowing immediate jurisdiction in this Court.⁴ First, tribal exhaustion is not required in cases where tribal court jurisdiction is “plainly lacking,” second, where tribal jurisdiction is patently violative of express jurisdictional prohibitions, and third, where requiring “exhaustion would be futile because of the lack of an adequate opportunity to challenge the tribal court’s jurisdiction.” *Id.* at 1302 (quoting *Elliot v. White Mt. Apache Tribal Ct.*, 566 F.3d 842, 847 (9th Cir. 2009)).

i. Tribal jurisdiction is plainly lacking because it has been expressly prohibited to the Band.

³ This Court explicitly noted that it is “nevertheless bound by the Seventh Circuit’s interpretation of the 1854 treaty in *Baker*, as well as its holding of that case. Perhaps the Band can persuade the Seventh Circuit to modify or overrule *Baker* on appeal, but this court has no such authority.” *Johnson*, 2026 WL 1746659, at *4.

⁴ Tribal-court exhaustion is also not required when an assertion of tribal court jurisdiction is “motivated by a desire to harass or is conducted in bad faith.” *Nevada v. Hicks*, 533 U.S. 353, 369 (2001) (quoting *Nat’l Farmers Union*, 471 U.S. at 856 n. 21). Plaintiffs do not waive their right to argue that this exception also applies.

To determine whether a tribal court plainly lacks jurisdiction, federal courts “analyze whether such jurisdiction is colorable or plausible.” *Id.* (quoting *Elliot*, 566 F.3d at 848). But, as detailed above, the Band lacks *any* legitimate claim of jurisdiction over this matter. Over forty years ago, *Baker* confirmed that the 1854 Treaty did not grant the Band the sovereignty necessary to regulate navigable waters in the ways they attempt here. And, because Tribal law limits jurisdiction to the lands and rights conveyed to the Band under the 1854 Treaty, the Band does not possess jurisdiction under its own Tribal constitution and ordinances. Moreover, the Band’s regulatory and enforcement efforts on White Sand Lake and against Plaintiffs specifically conflicts with the State’s exercise of its exclusive sovereignty over the waters, and Plaintiffs’ private rights in accessing them. Likewise, the *Montana* lineage of cases make it absolutely clear that the Tribe does not have jurisdiction over the Plaintiffs who are all nonmembers of the Tribe or over Ms. Fisher’s fee simple property. Moreover, the ostensible environmental harms the Band cite as objects of their regulatory efforts do not justify Tribal jurisdiction under *Montana*.

All of these authorities show that the Band does not possess the jurisdiction it attempts to wield here. They also show that this jurisdiction has been expressly prohibited to the Band. The 1854 Treaty defined the Band’s sovereignty to exclude the ability to regulate navigable waters, a prohibition that was confirmed in *Baker* and is repeated in Tribal law. And, under *Montana*, the Band’s accession to the 1854 Treaty similarly forfeited its inherent sovereignty to regulate nonmember conduct on nonmember fee land within Reservation borders. Therefore, by entering the 1854 Treaty, the Band was prohibited the jurisdiction it now claims to invoke.

Tribal jurisdiction is plainly lacking.

ii. Tribal Exhaustion would also be futile.

Federal law does not require Plaintiffs to litigate their Tribal court case to conclusion because doing so would be futile, as that forum does not afford an adequate opportunity to vindicate their

jurisdictional arguments. Indeed, Judge Fletcher has on at least three occasions asserted or applied his novel theory of tribal jurisdiction, including in rejecting Plaintiffs' *Montana*- and *Baker*-based arguments once already in this case. Irrespective of the scholarly value of Professor Fletcher's work, his rulings based on that work as Tribal judge are directly contrary to settled and controlling federal law.⁵ Plaintiffs cannot reasonably expect to have this federal law applied in their case in Tribal Court at any point in the future. Indeed, discovery has not yet commenced, summary judgment is months away, and trial will not occur until sometime in 2027.

Tribal Court exhaustion is therefore not required here. The Band plainly lacks jurisdiction, in part because it has been expressly prohibited to the Band through multiple avenues. And, even so, Plaintiffs do not have an adequate opportunity to present these arguments before the Tribal Court. Plaintiffs may therefore proceed in this Court, now, before concluding litigation in the Tribal Court.

B. Plaintiffs are highly likely to succeed on the merits of their claims.

Plaintiffs' claims ask a single, simple question: does the Band possess jurisdiction to regulate their construction of a private boat launch on private, nonmember fee land? The answer to that question is a resounding "no." The 1854 Treaty, case law from this Court and the Seventh Circuit, longstanding U.S. Supreme Court precedent, and the Band's own laws confirm this. Plaintiffs seek a declaratory judgment from this Court further confirming that the Band does not have jurisdiction to regulate, enforce, and punish Plaintiffs for constructing their boat launch, and an injunction barring the Band from taking, maintaining or instituting any judicial, regulatory, or law enforcement proceedings that exceed this jurisdiction. Based on the authorities analyzed above, Plaintiffs are highly likely to succeed on obtaining this relief. Indeed, this Court just granted similar relief mere weeks ago in

⁵ Notably, moreover, the Band has also relied on Judge Fletcher's tribal court jurisdictional rulings in *Howard Bros.* and the instant case to defend against the State of Wisconsin's claims in *Johnson*. This further suggests that Judge Fletcher's theory is not unique to him as professor or judge, but instead would represent the Band's theory of jurisdiction if the tribal court case here is reassigned to another tribal judge or proceeds through the tribal appellate court process.

Wisconsin v. Johnson. All Plaintiffs ask is to apply the same law and logic to these analogous circumstances.

II. Plaintiffs will suffer irreparable harm absent preliminary injunctive relief.

Absent the immediate injunctive relief sought here, Plaintiffs will continue to suffer ongoing irreparable harm from the Band's unlawful exertion of jurisdiction.

First, the mere act of being forced to defend against unlawful tribal proceedings is itself an irreparable injury. The tribal exhaustion doctrine – and more precisely the exceptions to that doctrine – recognize that subjecting parties to tribal court proceedings where jurisdiction is clearly absent constitutes an immediate, irreparable injury. Where tribal jurisdiction is so clearly lacking, the burden of defending against unlawful proceedings is irreparable.

Second, Plaintiffs are being deprived of the use of their own property. The Tribal Court's preliminary injunction bars Plaintiffs from using their boat launch—a structure built on Ms. Fisher's private, nonmember, fee-simple property with all required permits. Plaintiffs are being prevented from exercising their riparian rights, which Wisconsin common law protects for property owners abutting navigable waterways. These rights include the right to reasonable use of the water for recreational purposes, the right to use the shoreline, and the right to construct piers or similar structures in aid of navigation. *See Sea View Estates*, 223 Wis. 2d at 157; *R.W. Docks*, 244 Wis. 2d 497, ¶ 21.

Third, the State's sovereignty is being invaded. Federal courts recognize that attempts to invade a State's sovereignty constitute irreparable harm. *Kansas v. United States*, 249 F.3d 1213, 1227–28 (10th Cir. 2001); *Akiachak Native Cmty. v. Jewell*, 995 F. Supp. 2d 7, 16–17 (D.D.C. 2014). The Band's attempt to exercise jurisdiction over nonmembers on navigable waters directly conflicts with the State's exclusive sovereignty as recognized in *Baker*. The Band's enforcement actions also conflict with the State's authority to regulate invasive species and public access to navigable waterways under the public trust doctrine. *See* Wis. Const. art. IX, § 1; *Rock-Koshkonong*, 350 Wis. 2d 45, ¶ 87.

Fourth, Plaintiffs have no adequate remedy at law. This action is Plaintiffs' only practical means of obtaining relief from the Band's assertion of jurisdiction. The Tribal Court has already rejected their jurisdictional arguments under a legal framework that expressly disclaims the binding force of federal law. Money damages cannot compensate for the ongoing deprivation of property rights, the loss of lake access during the boating season, or the chilling effect of continued tribal prosecution.

III. The balance of equities favors Plaintiffs, and an injunction serves the public interest.

The balance of equities strongly favors Plaintiffs, particularly given their high likelihood of success on the merits. Under the sliding-scale approach, "the more likely the plaintiff is to win on the merits, the less the balance of harms needs to weigh in his favor." *Mays*, 974 F.3d at 818.

On Plaintiffs' side of the ledger, the harms are concrete and immediate: deprivation of property rights, loss of lake access, ongoing exposure to unlawful tribal proceedings—requiring an investment of time and money and adversely impacting the desirability and value of White Sand Lake property—and financial burdens from paying \$100 per launch at alternative sites. These harms are compounding daily as the boating season progresses. On the Band's side, an injunction would simply prevent the Band from exercising jurisdiction it does not possess under federal law. Defendants have no legitimate interest in exercising jurisdiction they do not possess. The Band's claimed interest in environmental protection is belied by its selective enforcement and its refusal to participate in state-funded watermilfoil remediation programs.

Importantly, this Court is not being asked to upend the status quo but rather to restore it. For decades, the State of Wisconsin has exercised exclusive sovereignty over navigable waters within the Reservation, and nonmembers have accessed these waters without tribal interference. The Band's recent assertion of jurisdiction represents a dramatic departure from the settled legal landscape that this Court and the Seventh Circuit established in *Baker*. An injunction would merely preserve the existing, lawful state of affairs while this case proceeds to a full resolution.

Moreover, the instant TRO and preliminary injunction Plaintiffs request only ask that the Band be required to pause its current enforcement and judicial proceedings while this case is decided. This is hardly a burden; the Band has not taken any action on the citations it issued to Plaintiffs for over six months, and the Tribal Court only recently resolved Plaintiffs' motions to dismiss and the Band's preliminary injunction request, and there are no imminent deadlines in that case; trial is not scheduled to begin until August 20, 2027 at the earliest. Ordering that case stayed while Plaintiffs litigate their claims in federal court does not impair the Band's interests in any way.

Against this, an injunction serves the public interest in several ways. First, an injunction protects Wisconsin residents' constitutional rights to access and enjoy navigable waterways. The public trust doctrine, enshrined in Wisconsin's constitution, ensures that navigable waters are "common highways and forever free" for public use. Wis. Const. art. IX, § 1. This doctrine encompasses not only navigation but also recreational activities such as boating, swimming, fishing, and hunting. *Rock-Koshkonong*, 350 Wis. 2d 45, ¶ 72.

Second, an injunction further prevents the jurisdictional confusion and potential for conflict that arises when a tribal government asserts regulatory authority that is directly contrary to federal law. As this Court recognized in granting the State's TRO and motion for a preliminary injunction in *State of Wisconsin v. Johnson*, overlapping and conflicting assertions of regulatory authority create uncertainty and risk of confrontation.

Third, an injunction enforces the well-established limits on tribal authority recognized by the Supreme Court, the Seventh Circuit, and this Court. The public interest is served by maintaining the legal framework that has governed state-tribal relations on navigable waters for over four decades. An injunction here further enforces the well-established limits on tribal authority recognized by the Supreme Court, the Seventh Circuit, and this Court. The public interest is served by maintaining the legal framework that has governed state-tribal relations on navigable waters for over four decades.

These interests are particularly salient given the assertion of tribal jurisdiction made in the Tribal Court here. Judge Fletcher’s open advocacy for tribal courts to “resist” the federal judiciary—and his implementation of that theory in binding rulings affecting nonmembers—threatens the rule of law and the supremacy of federal law in matters of tribal jurisdiction. Professor Fletcher’s view cannot be permitted to override the actual state of the law as articulated by the Supreme Court and the Seventh Circuit.

CONCLUSION

Based on the foregoing, Plaintiffs respectfully request the Court enter a temporary restraining order and preliminary injunction, pursuant to Fed. R. Civ. P. 65, as follows:

A. Preventing the Lac du Flambeau Band of Lake Superior Chippewa Indians, its officers, agents, employees, and all persons acting in concert or participation with them, from enforcing tribal ordinances against Plaintiffs’ construction, operation, or use of the private boat launch on White Sand Lake located on the shoreline property at 2977 County Highway H, Lac du Flambeau, Wisconsin 54538, pending final resolution of this action;

B. Ordering the case *Lac du Flambeau v. White Sand Lake Association, et al.*, Case No. 25-CV-034, stayed in its entirety until full and final resolution of this action;

C. Ordering that enforcement of any kind of the Tribal Court’s preliminary injunction issued on April 30, 2026, in the case *Lac du Flambeau v. White Sand Lake Association, et al.*, Case No. 25-CV-034 be stayed in its entirety until full and final resolution of this action;

D. Ordering that no enforcement action, judicial proceedings, or any other proceedings of any kind be taken with regard to the citations issued to Ms. Fisher, Mr. Albert, and Pheifer Bros. Construction, Inc. pending full and final resolution of this action;

E. Preserving the status quo by allowing Plaintiffs to continue construction, operation, and use of the boat launch in accordance with the Vilas County Zoning Permit obtained on April 28,

2025, and in compliance with all applicable state and local regulations; and

F. For such other relief as may be just and proper.

Dated this 7th day of July, 2026.

Respectfully submitted,

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