Pollard v. Johnson, 2023 WL 5221533 (W.D. Wisc., August 15, 2023), amended opinion and order issued September 26, 2023, 2023 WL 6276403.

- **Holding**: The federal court lacked subject matter jurisdiction to hear case brought by non-Indian homeowners arising from Tribal Council's decision to bar four roads used to access plaintiffs' homes within the Lac de Flambeau Reservation after expiration of 50-year easements.
- **Summary**: In the 1960s, the Bureau of Indian Affairs granted 50-year, right-of-way easements across lands held in trust for the Lac de Flambeau Tribe to various individuals for four roads that provided access to non-Indian parcels within the Lac de Flambeau Reservation. The grants were made under the Indian Right-of-Way Act, 25 U.S.C. §§ 323–28. These easements were later assigned to the Town of Lac du Flambeau. The easements all expired between 2011 and 2018, and were not renewed. In January 2023, the Lac de Flambeau Tribal Council informed the homeowners and the Town that any future use of the road would be considered a trespass, and erected barriers across the roads (though it later relented and granted the Town a temporary permit allowing access).

  The homeowners filed a lawsuit against the individual Tribal Council members, alleging that the Council's barriers violated the Federal-Aid Highway Act, 23 U.S.C. § 101 *et seq.* and the Tribal Transportation Program, 23 U.S.C. §§ 201–202; additionally, they asserted state-law claims of public and private nuisance and implied easement. After plaintiffs filed their lawsuit, the Tribe asked the BIA to remove the four roads from the federal Tribal Transportation Program's National Tribal Transportation Facilities Inventory (NTTFI). BIA did so.

  The Tribe moved to dismiss, with the U.S. supporting it as amicus. The court determined that it lacked subject matter jurisdiction over the dispute, holding that it did not "arise under" federal law because nothing in the Federal-Aid Highway Act created or implied a cause of action or any means of federal judicial enforcement of the program. In short, "[n]othing in the Act suggests that the program is intended to promote or protect access rights of the public or individual citizens who want to traverse Indian lands." Likewise, plaintiffs could not rely on the Declaratory Judgment Act as an independent source of federal jurisdiction, because plaintiffs, given the lack of causes of action in the Federal-Aid Highway Act, did not identify a "predicate right of action" to support their request for declaratory relief.

  The court, distinguishing *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 314 (2005), also concluded that plaintiffs' state law claims did not sufficiently implicate federal issues so as to form a basis for federal court jurisdiction, because "they do not necessarily require resolution of any substantial federal issue," even if "defendants will no doubt invoke the Indian Right-of-Way Act, tribal sovereignty or other federal Indian law as a defense to plaintiffs' nuisance claims," because "defenses invoking federal law do not transform a state-law claim into a federal case." The court rejected the argument that resolution of the nuisance claim would require the court to resolve federal issues relating to the defendants' alleged violation of the Federal-Aid Highway Act and Tribal Transportation Program, because the plaintiffs cited no legal authority suggesting that failure to keep a road public under the Federal-Aid Highway

Act would constitute a public or private nuisance. Consequently, the court granted the defendant's motion to dismiss for lack of subject matter jurisdiction, and denied as moot the plaintiffs' motion for preliminary injunction. .

- **Relevant (2023) Deskbook Sections**: 3:14, 6:2 nn.9, 14