UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

The White Earth Band of Chippewa Indians,
on its own behalf and its wholly-owned enterprise,
the Shooting Star Casino,

Plaintiffs,

vs.

County of Mahnomen County, et al.,

Defendants. Civ. No. 07-3962 (MJD/RLE)

PLAINTIFFS' REPLY MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' RULE 56 SUMMARY JUDGMENT MOTION

I. Introduction

The central issue in question for Plaintiffs' Rule 56 summary judgment motion in connection with Counts II, III & IV of the First Amended Complaint[1] is whether by operation of federal law the **application of Section 18 of WELSA** precludes state property taxation of the Casino Property. This is **NOT** an Indian Reorganization Act ("IRA") Section 465 case. This is a crucial difference that Defendants either chose to not recognize or simply don't appreciate. This leads Defendants to submit a responsive

[1] Plaintiffs have not moved for summary judgment in connection with their Indian Gaming Regulatory Act claim (Count I) and unjust enrichment claim (Count V). Neither have Defendants timely made any motion on these counts. Accordingly, there is no motion for summary judgment on these counts before the court to consider and therefore Plaintiffs will not address any argument made by Defendants in connection with these counts until such time as there is a proper and timely motion made on same.

memorandum that contains monumental misunderstandings of WELSA specifically, and federal Indian law generally: (1) that WELSA is not a statue intended for the benefit of Indians and so the Indian law canons of construction do not apply; (2) that the requirements of 25 U.S.C. §465 and its related 25 CFR Part 151 regulations govern this WELSA action; (3) that Congress could not use its "plenary and exclusive authority" to address the historic circumstances of the significant loss of the White Earth Band's land base[2] by adopting Section 18 making the Casino Property "deemed reserved" for "all purposes" since the date in 1991 the lands were acquired with WELSA funds (apparently under the theory that a wrong once perpetuated must be forever endured).

II. Argument

1. WELSA is an Indian settlement act enacted for the benefit of the White Earth Band, and therefore is to be "construed liberally in favor" of Plaintiffs under the Indian law canons of construction.

Defendants' begin their Argument section with a reference to a statutory construction "rule" which they later spend several pages describing, while ignoring the federal Indian law nature of this action. Defendants essentially argue that congressional intent and a specialized inquiry based on the history of WELSA is unnecessary because the meaning of Section 18 is clear on its face. While Plaintiffs agree with Defendants that the language used by Congress in Section 18 is clear and unambiguous, the parties do

[2] Because of the pernicious effects of the Nelson Act and the Clapp Amendments, "most reservation land was transferred to private parties," as Defendants so very politely and benignly state was the nature of the Band's land base decimation. See Defendants' Memorandum in Opposition at pp. 26-27.

differ as to what Section 18 means upon its application to the Casino Property for state taxation purposes.

But because this matter is a federal Indian law case, it is subject, as described more fully below, to a discrete set of canons of construction and particular standards of interpretation. A determination whether federal law preempts state taxation in an Indian law context requires "a particularized inquiry into the nature of the state, federal and tribal interests at stake … to determine whether, in the specific context, the exercise of state authority would violate federal law." White Mountain Apache Tribe v Bracker, 448 U.S. 136, 145 (1980).

> Each [Indian settlement] act must be analyzed individually, its effect depending on the language used and the circumstances of its passage. The statutory language provides the most probative evidence of congressional intent. Also relevant are the legislative history of the act and its historical context, including events surrounding the statute's passage which shed light on the contemporaneous understanding of it.

Yankton Sioux Tribe v. Gaffey et. al., 188 F.3d 1010, 1022-23 (8th Cir. 1999) (citations omitted)

In order to avoid the applicable Indian law canons of construction requiring Indian statutes be liberally interpreted in favor of Indians, Defendants incredibly assert that WELSA is not a land settlement act intended for the benefit of Indians. See Defendants'

Memorandum in Opposition at Docket 86, p. 30 ("WELSA was not passed for the Band's benefit"). Such a statement is profoundly incorrect to the point of giving offence.[3]

Ignoring the fact that the act at issue is actually entitled as the "White Earth Land Settlement Act" (emphasis added), Defendants claim that WESLA is simply a "quiet-title act" whose **only** purpose was to clear and settle certain title issues on the White Earth Reservation, presumably solely for the benefit of Mahnomen County and non-Indians. Defendants' claim in this regard is demonstrably incorrect. First, as noted by Defendants in passing in their Memorandum in Opposition, the purpose of WELSA was not only to remove clouds from the titles to certain lands but "for other purposes". See Introduction Clause of WELSA as quoted by Defendants on page 27. As the author of WELSA, Senator Boschwitz, stated in debate on the measure, one of the "other" purposes was "to provide compensation and other benefits to Indians as atonement for the policies that caused the land uncertainties." See Plaintiffs' Memorandum in Support of Summary Judgment Motion, Docket 54, at p. 9. Second, every Indian land settlement act and Indian treaty enacted by Congress has been about settling land title. Defendants' position apparently is that unless the congressional act or treaty in question *exclusively* benefits

[3] This is not the only time Defendants seize an opportunity offend. See Defendants' Memorandum in Opposition at p. 6 ("The Band has pursued trust status to avoid paying taxes, not for any altruistic purpose."). It is unclear what legal authority requires a party to act with altruistic purpose when asserting its legal rights under federal law. Moreover, what are Defendants implying Plaintiffs are doing with the funds not paid in property taxes to Defendants? Any funds not paid in property taxes by Plaintiffs are spent on Band governmental services in furtherance of its members' safety and welfare, just as was contemplated under WELSA.

Indians, it does not fall under the canons of construction applicable to statutes made "for the benefit of Indians." Last, the text of WELSA appears in the U.S.C. Title dedicated to Indians, Title 25, not the federal land title standards in Title 28.

Defendants go to great lengths to stress that even after provisions providing land and money to the Band were added to WELSA, the final language was not "endorsed' by the Band because the Band wanted even more land as part of the settlement. If this high standard is to be applied for determining whether a congressional act is for the benefit of Indians, then not a single act or treaty would be for the benefit of Indians. Our sad history shows that Indians and their lands have been diminished every time a treaty or act of Congress has defined and distinguished Indian lands from non-Indian.[4]

In sum, WELSA is subject to the Indian law canons of construction, and if there are two possible constructions as to the effect of Section 18, the section must be construed liberally in favor of the Band and to Plaintiffs' benefit.

2. Defendants' interpretation of WELSA § 18 is logically untenable.

In its discussion of the actual effect of WELSA, Defendants begin with a massive mischaracterization of Plaintiffs' position. "The Band's decision to purchase former reservation land does not automatically render the lands nontaxable; WELSA likewise

[4] The list of scholarly and popular literature describing the blatant land grabs of Indian lands by federal and state governments is far too long to be detailed here. However, if there is still question how "settling title" acts to the grave detriment of Indian tribes while being described and interpreted as acts for the "benefit" of Indian tribes, See Cohen's Handbook of Federal Indian Law, 2005 ed. (Lexis-Nexis) §§1.03–1.07 and §2 generally.

does not provide that lands acquired with WELSA funds are tax exempt." Defendants' Memorandum of Law, Docket 86, at 18 (emphasis added). This is a convenient mischaracterization that allows the Defendants to forward an outrageous interpretation WELSA Section 18, i.e. that the "deemed as" language refers to four townships that were formerly part of the Reservation. The Band does not contend that the use of WELSA funds could be used to convert former reservation lands into reservation trust lands.

WELSA Section 18 requires that lands under its jurisdiction are "within the exterior boundaries of the White Earth Reservation." The exterior boundaries were well established in 1985. The four townships were officially excluded from the current reservation four year earlier by White Earth v. Alexander 683 F.2d 1130 (8th Cir. 1982). The phrase "within the exterior boundaries of the White Earth Reservation" in the first sentence of § 18 categorically excludes the four townships from its jurisdiction. The second sentence can't enable such acquisitions, nor is any language necessary to prohibit them. Accordingly, the assertion at the completion of the Defendants specious invocation of "last antecedent" rule that the "deemed" provision of Section 18 somehow relates to former reservation lands is absurd on its face.

Further, the assertion of the Defendants that the modifying clause "acquired by the White Earth Band within the exterior boundaries of the White Earth Reservation with funds referred to in section 12, or by the Secretary pursuant to section 17," is not necessary to the meaning of the whole sentence is illogical. The meaning of the antecedent noun is lost without the adjectival clause. Defendants' assertion is

understandable under the circumstances as the clause is completely destructive of the Defendant's position. Congress specifically draws a distinction between lands purchased with section 12 funds and lands accepted by the Secretary under the exchange and state contribution of lands sections. See Plaintiffs' Memorandum, p. 13, Docket 54. The clear language of the controlling statute recognizes a distinction between settlement lands requiring Secretarial approval, and lands that immediately become trust (or at very least restricted from involuntary alienation), by operation of law.

3. Contrary to Defendants' assertion, the reasoning in the County of Yakima/Cass County court decisions, which apply to IRA Section 465 land acquisitions, does not apply to Plaintiffs' claim that WELSA Section 18 precludes state property taxation of the Casino Property.

Defendants claim that Plaintiffs' interpretation of the meaning of Section 18 is "inconsistent with Cass County and federal regulations on trust acquisitions". See Defendants' Memorandum in Opposition, Docket 86, at p. 23. In doing so, Defendants assert that Cass County stands for the "bright-line" rule that Indian owned land, once taxable, can only be made nontaxable by one method under federal law, i.e. "unless and until they were restored to federal trust protection under [IRA] Section 465." Id. at p.17. This is wrong as a matter of law. Hundreds of statutes before and after enactment of the IRA in 1934 limit taxing authority of states and their political subdivisions. See e.g, 25 U.S.C. §§ 501-1300.

Defendants' contention that Cass County absolutely precludes tax exempt status from ever "automatically attach[ing] when a tribe acquires reservation land" because it

would "render partially superfluous §465 of the Indian Reorganization Act" (and the related fee-to-trust procedures of the Part 151 regulations) plainly misses the all important point that Cass County (and County of Yakima) only dealt with a claim for "immediate trust status" under the general provisions of IRA. But while that was the path that the Leech Lake Band attempted to take, it is not the justification for the White Earth WELSA acquisitions. Claiming immediate trust or restricted status for the WELSA lands would be outside the Part 151 process, or somehow renders part of Section 465 nugatory, is completely off point and of no concern to the court in the context of this action.[5]

Plaintiffs wish to make it very clear that the Casino Property is not an IRA based acquisition. 25 U.S.C. §465 and 25CFR Part 151 are "a procedure," not the only procedure by which Indian lands become tax exempt. Any assertion that the only way land can be put in trust or restricted status is through Part 151 is just plain wrong. The

[5] The Defendants claim that because the Band commenced a § 465 acquisition, it could not exercise its rights under WELSA. Likewise, the County claims that because the Band paid past taxes, it must always pay taxes. This line of reasoning is similar to a bully who has beaten a victim without recourse for years, and then complains of great injury when the victim finally hits back.

The Defendants are correct that things changed when a new Band government was elected and, as Defendants allege, new lawyers were hired. They looked around and concluded the Band was being disserved by the BIA, the County, by the state, and by their own past government. They determined that they would not stand by and be disabused of their rights any longer. That is the kind of behavior that bullies fear whether they run a lunch counter in Montgomery, Alabama, or a county courthouse in Mahnomen, Minnesota. Just because injustices were endured in the past does not make them right today. The County had no right to benefit from lands provided to the Band in settlement from the very day those lands were bought. The Defendants have shown no authority that the Band has irrevocably waived or forgone its rights.

law is concisely stated in the July 3, 2008 Order Affirming Decision of the IBIA in State of Minnesota v. Acting Midwest Regional Director:

> "We conclude that where, as here, there is a specific statute that requires the trust acquisition of property upon the occurrence of specific events, the specific statute controls **in lieu of** the more general fee-to-trust acquisition statute **and its implementing regulations.**"

47 IBIA at 125 (emphasis added).

Defendants' principal defense in this action is that Congress at one time permitted state taxation of Indian owned fee lands within the White Earth reservation through enactment of the Nelson Act and the Clapp Amendments. But never once do Defendants address the Congress' plenary and exclusive authority over Indian Affairs. The exercise of this power is not limited by the IRA or its related regulations. Congress is free to act in the manner consistent with its trust relationship with Indian tribes, and to remedy the effects of any laws and policies that have damaged tribal governments and tribal lands. This is precisely what Congress did in WELSA: a remedial statute in "atonement" for devastation the allotment policy had on White Earth reservation land base. Congress used its constitutionally mandated powers to adopt Section 18 and remedy the unique circumstances "that is only applicable to this one reservation[6]" by crafting a "one-of-kind" statute that clearly and unequivocally states WELSA Section land automatically

[6] See Senator Andrews statement in the congressional record, Quigley Aff. Ex. No. 13 at p. 27.

and immediately reverts to its pre-1889 status as reservation land – which is not subject to taxation, regulation, foreclosure or seizure by the State or its political subdivisions.

4. Defendants ignore that Congress can use its "plenary and exclusive authority" to enact laws that affirmatively declare the "reserved" nature of the Indian lands and have not disputed that the Casino Property is not taxable under the Kansas Indians/New York Indians doctrine.

Moreover, Defendants never address the argument that whether the Casino Property is held in fee status, WELSA designation for the land constitutes a restriction on the ability of Defendants to foreclose or involuntarily alienate the property. Federal law makes clear that if the remedy of foreclosure is unavailable, the land is not taxable[7]. See Plaintiffs' Memorandum in Support Docket 54, at pp. 26-30.

Any discussion of past mortgages on the Casino Property misses this point. The fact that the former administration may have executed a document that was not enforceable by the secured party comes as no surprise. The fact that some instrument claims to create a legal right does not create such a right in fact.[8] Further, as determined in Keewenaw Bay, mere alienability does not equate to taxability. Rather, the Kansas

[7] Defendants' statement that "whether land may be forfeited is not the issue; whether it may be taxed is," see Defendants' Memorandum in Opposition at p. 12, ignores the Kansas Indians/New York Indians doctrine and raises the interesting question whether Defendants are now agreeing and representing that they never will resort to foreclosures and forfeiture in the event Plaintiffs continue to refuse the state property taxes claimed on the casino Property.

[8] The existence of these documents may go a long way toward explaining why the Wadena administration was initially slow to exercise all of its rights. The supposed availability of recourse to the land doubtlessly made financing easier, and it was that financing that Wadena ultimately was convicted of stealing. Because the former Band administration may have treated the property in some respects as fee, and ultimately as its personal property, does not make it so.

Indians/New York Indians doctrine means that Indian owned land is not taxable if it cannot be foreclosed upon by the taxing entity. As argued previously by Plaintiffs, and not disputed by Defendants in their response memorandum, WELSA could not, and should not, be interpreted to countenance lands acquired under the terms of its settlement to be seized for the benefit of Mahnomen County.

III. Conclusion

There are two issues before the Court: does Congress have the power to immediately restrict lands under Indian settlements; is WELSA § 18 such a restriction. The first question is indisputably yes. In support of its argument against the second question, the Defendants resort to a facially untenable and illogical reasoning. The only rational interpretation of the statute is that forwarded by Plaintiffs. Therefore, Plaintiffs are entitled to declaratory judgment and injunctive relief as requested under Counts II, III and IV of the First Amended Complaint.

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