UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WISCONSIN

RED CLIFF BAND OF LAKE SUPERIOR
CHIPPEWA INDIANS,

Plaintiff,

v.

Case No. 18-cv-828

BAYFIELD COUNTY, WISCONSIN,

Defendant.

PLAINTIFF'S PROPOSED POST-HEARING BRIEF

INTRODUCTION

At the hearing on the Plaintiff's Motion for Summary Judgment held Thursday, November 21, 2019, the Court posed two questions that the parties did not address in their briefs: (1) whether the Red Cliff Reservation was allotted under the General Allotment Act of 1887, 24 Stat. 388, as partially repealed, amended and codified at 25 U.S.C. §§ 334-349 ("Dawes Act") and (2) whether, if the first question is answered affirmatively, the Court is required by the Supreme Court's decisions in *County of Yakima County v. Confederated Tribes and Bands of Yakima Indian Nation*, 502 U.S. 251, 112 S.Ct. 683 (1992) ("*Yakima*") and *Cass County v. Leech Lake Band*, 524 U.S. 103, 118 S.Ct. 1904 (1998) ("*Cass County*") to deny the Plaintiff's motion. For the reasons stated below, the Plaintiff believes that both of the questions posed by the Court must be answered in the negative.

I. THE RED CLIFF RESERVATION WAS ALLOTTED UNDER THE 1854 TREATY, NOT THE DAWES ACT

The record includes evidence that the Red Cliff Reservation was allotted under the 1854 Treaty, not the Dawes Act. Mr. Williams states at paragraphs 5, 7 and 8 of his Affidavit in support of summary judgment that: (1) the Tribe is a successor in interest to the La Pointe Treaty of 1854, 10 Stat. 1109, (2) the Tribe's reservation was "established and guaranteed to the Tribe by the La Pointe Treaty" and (3) "[d]uring the period 1877-1897, the Reservation was allotted to tribal members, who received patents, with the restriction that neither the patentee nor his or her heirs 'shall … sell, lease, or in any manner alienate said tract without the consent of the President of the United States." (Dkt. #12.) Obviously, any allotments made before the Dawes Act was enacted in 1887 could not have been made under that Act. Moreover, patents issued under Section 5 of the Dawes Act, 25 U.S.C. § 348, by contrast, include a declaration that the United States will hold the allotment in trust for 25 years and convey the allotment at the expiration of that period "free of all charge or incumbrance whatsoever." Subject to the Secretary's authority to extend the period of tutelage in individual cases, restrictions were lifted automatically under the Dawes Act, with no presidential involvement.[1]

Article 3 of the LaPointe Treaty provides for the allotment of the reservations created under the Treaty, including the Red Cliff reservation, to individual Indians in 80-acre parcels and authorizes the President to "issue patents therefor to such occupants, with such restrictions of the power of alienation as *he* may see fit to impose." The "Plaintiff's Memorandum of Law in Support of Motion for Summary Judgment" ("Plaintiff's Principal Brief"), p. 4, describes the

[1] The 1854 Treaty provided for 80-acre allotments rather than the standard 160-acre allotments provided for in the Dawes Act. The 1854 Treaty allotments were not limited to agricultural and grazing purposes, as were the Dawes Act allotments. 24 Stat. 388.

origin of the Reservation and explicitly cites the 1895 Joint Resolution of Congress that added 11,520 acres to the Reservation, 28 Stat. 970. The Joint Resolution provided that "said lands shall be allotted … in accordance with the provisions of said treaty," not in accordance with the Dawes Act.

In its "Defendant's Response to Plaintiff's Proposed Findings of Fact," the County disputes none of the above-described averments by Mr. Williams, nor has the County disputed the Tribe's summary description of the 1895 Joint Resolution. For purposes of summary judgment, the County has conceded that the Red Cliff allotments were not subject to alienation automatically upon the expiration of 25 years, as provided under the Dawes Act, but by the consent of the President, as provided under the 1854 Treaty. This concession, together with the plain texts of the 1854 Treaty and the 1895 Resolution, support a finding that the allotment of the Red Cliff Reservation was allotted under the 1854 Treaty, not the Dawes Act.[2]

II. THE DAWES ACT DOES NOT AUTHORIZE STATES TO ZONE INDIAN-OWNED RESERVATION FEE LANDS

Even if the Red Cliff Reservation had been allotted under the Dawes Act, this would not authorize the state or its subdivisions to enforce its zoning regulations on tribal members. The Supreme Court's decisions in *Yakima* and *Cass County* held only that fee lands alienable under an act of Congress are subject to taxation, not that alienability authorizes states and their subdivisions to regulate Indians' *use* of their reservation lands.

The Supreme Court's decision in *Brendale v. Confederated Tribes and Bands of the Yakima Nation*, 492 U.S. 408, 109 S.Ct. 2994 (1989) ("*Brendale*") forecloses an interpretation of

[2] The allotment of the Red Cliff Reservation under the 1854 Treaty is a focus of a pending case, *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Evers*, No. 18-cv-992 (W.D. Wis. filed Nov. 30, 2018).

the Dawes Act as a license for states and their subdivisions to zone Indian-owned reservation fee lands. In *Brendale*, the Yakima reservation had been allotted under the Dawes Act. If removal of encumbrances pursuant to 25 U.S.C. §§ 348 or 349 meant that fee-patented lands are subject to state zoning authority, the Court would have been bound by Congress' mandate. Yet even the four dissenters relied on the *Montana* line of cases, not the Dawes Act, to support their position that a tribe could not zone non-members on reservation fee land. Five justices, including the two who provided the rule of decision, held that, under certain circumstances, a tribe has the authority to zone fee simple reservation land owned by *non-Indians*. It made no difference that the particular county zoning at issue involved the construction of permanent improvements on the land. It follows *a fortiori* that the Dawes Act does not prevent a tribe from exercising its right of self-government to zone reservation fee lands owned by *members*.[3] *None* of the nine justices believed that the Dawes Act compels this Court to find that Bayfield County zoning nullifies Red Cliff zoning of Red Cliff members' reservation fee lands.

The "incumbrance" intended by Sections 5 and 6 of the Dawes Act is best understood in the context of laws intended to prevent premature alienation of Indians lands,[4] including 25 U.S.C. § 81(b), which regulates certain encumbrances of Indian land. Regulations adopted to implement Section 81 define "encumber" to mean "to attach a claim, lien, charge, right of entry or liability to real property (referred to generally as encumbrances)" and explains that encumbrances may include "leasehold mortgages, easements, and other contracts or agreements

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[3] The Court did not address the right of a county to zone reservation fee lands owned by Yakima members but the Court's opinion notes that the Nation's zoning ordinance, by its terms, applied to such lands. Apparently, Yakima County did not contest tribal authority to zone fee simple lands owned by its members.

[4] Section 6 of the Dawes Act makes this concern explicit by clarifying, in the same sentence providing for the removal of restrictions upon issuance of a fee patent, that "said land shall not be liable for the satisfaction of any debt contracted prior to the issuance of such patent."

that by their terms could give to a third party exclusive or nearly exclusive proprietary control over tribal land." 25 C.F.R. § 84.002. Other authorities concur in characterizing encumbrances as individual legal rights rather than government regulations. According to Black's Law Dictionary (11th ed. 2019), an encumbrance is a "claim or liability that is attached to property or some other right and that may lessen its value, such as a lien or mortgage; any property right that is not an ownership interest." According to Wis. Stat. § 411.309(1)(b): "'Encumbrance' includes real estate mortgages and other liens on real estate and all other rights in real estate that are not ownership interests." These authorities do not support the inference that Congress, when it referred to the removal of "incumbrances" in the Dawes Act, intended to permit counties to override tribal land use laws and dictate to reservation Indians the allowable uses of their own lands. Nor do they distinguish between zoning regulations that involve permanent improvements and those that do not.

CONCLUSION

For the reasons set forth above, the Tribe believes that that the fundamental Indian law principles discussed in Plaintiff's Principal Brief control the outcome of this case.

Dated this 3rd day of December, 2019.

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