No. 21-1817

In the United States Court of Appeals for the Seventh Circuit

LAC COURTE OREILLES BAND OF LAKE SUPERIOR CHIPPEWA INDIANS OF WISCONSIN, et al.,

Plaintiffs-Appellants,

v.

TONY EVERS, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Wisconsin, No. 18-cv-00992-jdp
The Honorable James D. Peterson, Judge Presiding.

REPLY BRIEF OF PLAINTIFFS-APPELLANTS LAC COURTE OREILLES BAND OF LAKE SUPERIOR CHIPPEWA INDIANS, *et al*.

Vanya S. Hogen
Hogen Adams PLLC
1935 W. County Road B2, Suite 460
St. Paul, Minnesota 55113
Ph: 651-842-9100

Counsel for Plaintiffs-Appellants

Table of Contents

Table of Authorities

Cases

Other Authorities

Regulations

Treaties

Introduction

The State,[1] stuck with the District Court decisions that (1) the Tribes possess a treaty right to be free from state taxation on their Reservations and (2) Congress never abrogated that right, is forced to defend the District Court's ruling that individual transfers of Reservation land from tribal members to non-Indians somehow made Reservation Fee Lands[2] taxable. Without congressional abrogation of the treaty right, however, the Tribes and their members retain it. Even if they didn't have a treaty right to be free from the State's property tax, however, the Tribes and their members are not subject to the tax under federal common law governing taxation of tribes and tribal members in Indian country, because Congress did not authorize the State to impose the tax on them.

Response to State's Statement of the Case

The State acknowledges in its Response Brief that "[t]he Tribes submitted a substantial amount of background facts, including expert testimony, pertaining to their own history, the negotiation of the 1854 treaty, and the State's taxation of Indian land." Dkt. 36, Resp. Br. at 10; *see, e.g.*, Dkt. 26-1 at A-1 to A-73 (PFOF ¶¶ 1-253), A-74 to A-102 (Supp. PFOF ¶¶ 322-388); Dkt. 26-1 at A-102 to Dkt. 26-2 at A-203 (Bowes Rep.); Dkt. 26-

[1] Although certain municipal defendants joined the State Defendants' brief, references here are to "the State."

[2] This term encompasses property owned in fee simple by the Tribes and Tribal citizens within the exterior boundaries of their 1854 Treaty-created reservations.

2 at A-204 to A-306 (Treuer Rep.); Dkt. 26-2 at A-307 to A-336 (Sullivan Rep.); Dkt. 26-2 at A-337 to A-400 (Bowes R. Rep.); Dkt. 26-3 at A-401 to A-447 (Treuer R. Rep.). The State also admits that "[t]he State Defendants did not dispute those facts." Dkt. 36, Resp. Br. at 10.

Indeed, the State offered very little factual support for its position in the District Court. It refused to respond to most of the Tribes' discovery requests, claiming that no modern facts were relevant.[3] For historical evidence, the State's only affirmative expert witness, Dr. Jay Brigham, was not an expert in American Indian history and did not study the 1854 Treaty or its historical context. As a result, the District Court granted the Tribes' motion to exclude nearly all of Dr. Brigham's expert report and opinions. Dkt. 21, Decision at SA-8 to SA-9; *see* Dist. Ct. Dkt. 114 (Tribes' *Daubert* Mot. re Dr. Brigham). The State offered one rebuttal expert witness, Dr. Anthony Gulig, who agreed with the Tribes' expert witnesses on many key matters. The only contrary opinions Dr. Gulig offered were not supported by evidence, were contradicted by his prior writings and testimony, and were already found unpersuasive in related litigation. *See e.g.*, Dkt. 26-3 at A-548 (Gulig Dep. 139:7-19) (admitting that he relied on no "petitions, letters or other documents" to support his opinion that the Lake Superior Ojibwa "understood that individual land ownership requires the payment of taxes"); *Keweenaw Bay Indian Cmty.*

[3] The Tribes moved to compel discovery from the State, but the District Court denied the motion, *see* Dist. Ct. Dkt. 233.

v. Naftaly, 370 F. Supp. 2d 620, 627 n.5 (W.D. Mich. 2005), *aff'd* 452 F.3d 514 (6th Cir. 2006) (criticizing Dr. Gulig's view on the same issue).

Despite this, the State's Brief contains several pages of "facts" that are purportedly offered to the court as "background" material. Dkt. 36, Resp. Br. at 3-9. The State cites court decisions involving parties other than the Tribes and various hornbooks and treatises. The Tribes properly objected to this "background" material in the proceedings before the District Court, Dist. Ct. Dkt. 216 (Tribes' Resp. to State Defs.' PFOF), because such evidence is not admissible at trial. *See, e.g.*, *Gustovich v. AT&T Commc'ns, Inc.*, 972 F.2d 845, 849 (7th Cir. 1992) (per curiam) (holding that "[w]hen acting on a motion for summary judgment the judge considers only evidence that would be admissible at trial"). Additionally, much of this general information is contradicted by the treaty-specific materials submitted by the Tribes. *Compare* Dkt. 36, Resp. Br. at 4 (claiming that "[t]hrough treaties, tribes generally . . . acknowledged a degree of dependence upon the United States and a corresponding diminution of tribal sovereignty with regard to relationships with non-Indians"), *with* Dkt. 26-1 at A-48 (Dkt. PFOF ¶ 168(b)) & Dkt. 26-3at A-591 (Nichols, *Statement Made by the Indians*, at ¶ 13.3).[4] As a result, this Court should disregard the State's statements of background facts.

[4] For example, while the federal government adopted a broad allotment policy in the late nineteenth century that was designed to, as the State notes, "hasten the demise of the entire reservation system," the allotment provision in the 1854 Treaty was not included by federal officials for this purpose. Dkt.26-2 at A223 & A-277 to A-278 (Treuer Rep.) ("For the Ojibwe, the allotments were explained to them as strengthening their

Argument[5]

The 1854 Treaty of La Pointe precludes state taxation of all Reservation Fee Lands. It is uncontroverted that the Tribes' main purpose in negotiating the 1854 Treaty was to secure permanent homes for their members, from which they would never be forced to remove. Dkt. 36, Resp. Br. at 8 (citing cases); Dkt. 26-1 at A-23 to A–24, A-33 to A-34, A-43 (PFOF ¶¶ 84-87, 118, 151); Dkt. 26-3 at A-522 (Gulig Dep. 36:12-17, 133:17-134:8). Federal officials assured them that the Treaty did just that, through both oral promises, Dkt. 26-1 at A-142 (Bowes Rep.); Dkt. 26-2 at A-251 (Treuer Rep.); Dkt. 26-2 at A-328 (Sullivan Rep.), and explicit Treaty language. Dkt. 22-4at A-865 and A-867 (1854 Treaty of La Pointe), arts. II and XI, 10 Stat. 1109 (Sept. 30, 1854)). Yet if state taxes were applicable to Indian-owned reservation lands, and those taxes were not paid,

---

permanency, because the patents provided would be 'strong papers' that would prevent anyone from taking their lands.")

[5] Without timely filing a notice of appeal, certain municipal Defendants filed a brief in which they assert no error of the District Court but state that they "take no formal position in this appeal" and are merely "caught in the middle of this dispute." Dkt. 33, Br. at 2, 5. But this brief, which is merely a condensed version of their respective motions to dismiss, is of no moment. The District Court denied their motions, Dkt. 21, Decision at SA-6 to SA-8, and they did not appeal. Consequently, they are precluded from revisiting this issue. *Jennings v. Stephens*, 574 U.S. 271, 276 (2015) ("[A]n appellee who does not cross-appeal may not attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary.") (quotation omitted).

They further claim that "the Tribes have never alleged that the Towns and their assessors refused to follow or flaunted the law." Dkt. 33, Br. at 4. In fact, the Tribes alleged that all the named Defendants violated the 1854 Treaty and federal common law regarding state taxation on Indian reservations. Dist. Ct. Dkt. 1 at ¶¶ 150, 151, 154, 156, 159, 162, 168, 175, 179.

reservation lands would be forfeited, forcing tribal members to remove therefrom. Consequently, state taxation of Indian-owned fee lands directly conflicts with the core benefit the Tribes negotiated for and received from the 1854 Treaty and cannot stand.[6] The District Court admitted this, holding that "the tax immunity of the tribes' reservation land . . . was a negotiated part of the 1854 treaty.

Treaty rights can be unilaterally abrogated, but only with explicit congressional action. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998). The District Court did not find any statute abrogating the Tribes' treaty right, and the State does argue statutory abrogation before this Court. Dkt. 36, Resp. Br. at 14, 19. Instead of finding abrogation, the District Court concluded that while the Treaty precluded state taxation of Indian-owned reservation land, the scope of that treaty right was limited to situations where the Tribe or Tribal members had continuously held the property from 1854 to the present. If one non-Indian appeared in the chain of title to the property—no matter how they obtained that title—the District Court held that the land was taxable, noting that it was "a stretch" to believe that the Tribes would have thought otherwise, but without citing any record evidence for the Court's beliefs about Indian understanding. Dkt. 21, Decision at SA-22.

[6] Federal negotiations knew how to explicitly authorize state taxation in Indian treaties when they wanted to. *See e.g.*, Treaty with the Wyandot, art. 4, 10 Stat. 1159 (Jan. 31 1855).

The State defends this decision. While the Supreme Court has long held that the scope of a treaty right is determined by the understanding of the tribal signatories at the time the treaty was negotiated—a necessarily fact-bound question—the State asserts that facts are irrelevant here. Dkt. 36, Resp. Br. at 19-20. It points to cases such as *Montana v. United States*, 450 U.S. 544 (1981), and *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408 (1989), claiming they stand for the proposition that, as a matter of law, a treaty cannot preserve tribal rights to be free of state real-estate taxation if that land that was at one time owned non-Indians. Dkt. 36, Resp. Br. at 21, 22. But even a cursory glance at *Montana* and *Brendale*, cases about tribal jurisdiction over non-Indians, not the authority of state governments over tribal members, shows their irrelevance here.

The State also claims that for the Tribes to succeed, they need to argue that "*all* land on [their] reservation – including land owned by non-Indians—must be non-taxable." Dkt. 36, Resp. Br. at 23. In other words, by conceding that the Treaty rights don't protect non-Indians holding title in fee simple, the Tribes have supposedly admitted that if those lands are reacquired by the Tribes or their members, they remain taxable. That is simply not the case. As the Tribes have repeatedly pointed out, the Tribes retain those Treaty rights and can assert them over Reservation Fee Lands.

Even if the 1854 Treaty did not preclude State taxation here (which it does), federal common law would. While states can often tax non-Indians in Indian country,

congressional authorization is required before any state tax may be applied to a tribe, its members, or their property, within Indian country. The State cites no cases to the contrary. Relying on *Cass County, Minnesota v. Leech Lake Band of Chippewa Indians,* 524 U.S. 103 (1998), the State admits that there, the land at issue was made alienable by an act of Congress, Dkt. 36, Resp. Br. at 15, but claims that the "Supreme Court did not say, however, that its holding was limited to those facts," *id.* That is simply wrong. For decades, the U.S. Supreme Court has repeatedly stated that that only Congress can authorize state taxation of Indian-owned property, and that this is a *per se* or categorical rule. It has never required a tribe or tribal member to prove that the property was always held by Indians, and in fact, the Court's decisions explicitly acknowledge prior non-Indian ownership. *See, e.g., Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 457-58 (1995).

I. The 1854 Treaty sets out a right that precludes taxation of Indian-owned land within the Tribes' reservations, regardless of the chain of title for those lands.

A. The historical record is essential to the Tribal understanding of the 1854 Treaty.

The State claims that by reflecting on the historical context of the 1854 Treaty and the record evidence regarding the Tribes' contemporary understanding of the 1854 Treaty, "the Tribes[] attempt to transform the question of law in this appeal into a factual question." Dkt. 36, Resp. Br. at 19. In response, it argues that "[w]hile the meaning of the 1854 Treaty and the mechanism by which the Tribes' reservations were allotted in

the past may be historical matters of fact, the taxability of reacquired reservation land here is a question of law that is not controlled by the Tribes' factual evidence." *Id.* at 19-20. This argument misses the entire premise of the Tribes' claim, which is that the Tribes understood the 1854 Treaty protection from involuntary removal and promise of a permanent home—including the preclusion of state taxation—to be *permanent*. For this point, the historical record is not only relevant, it's essential.

Courts "interpret Indian treaties to give effect to the terms *as the Indians themselves* would have understood them," *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999) (emphasis added), and "as justice and reason demand," *United States v. Winans*, 198 U.S. 371, 380 (1905) (quotation omitted). To gain the Indian understanding of a treaty, "courts must focus upon the historical context in which it was written and signed." *Washington State Dep't of Licensing v. Cougar Den, Inc.*, 139 S. Ct. 1000, 1012 (2019). They must "look beyond the written words to the larger context that frames the Treaty, including 'the history of the treaty, the negotiations, and the practical construction adopted by the parties.'" *Mille Lacs*, 526 U.S. at 196 (quoting *Choctaw Nation v. United States*, 318 U.S. 423, 432 (1943)). Here, the Tribes presented the District Court with substantial evidence that they were bargaining for and believed that they had attained *permanent* homes and protection from future involuntary removal through Article II of the 1854 Treaty, which set aside reservations for the Tribes, and XI of the

1854 Treaty, which provided that "the Indians shall not be required to remove from the homes hereby set apart for them." Dkt. 224 at A-865 and A-867.

It is uncontested that leading up to the 1854 Treaty negotiations, the Tribes lived in constant fear of forcible removal from their ancestral lands. And they had already been deceived in the 1842 Treaty negotiations. To induce them to sign the 1842 Treaty, federal negotiator Robert Stuart led them to believe that the federal government did not need their lands for settlement and that they could remain there for 50 or 100 years so long as they were peaceable. Dkt. 26-1 at A-21 (PFOF ¶ 79). But removal pressure began almost immediately afterward. *Id.* at A-22 (PFOF ¶ 80). And just eight years later, President Zachary Taylor issued an Executive Order directing the Tribes to remove to Minnesota, and purporting to cancel their rights to hunt, fish, and gather in the ceded territory. *Id.* at A-25 (PFOF ¶ 90). Representatives of the Tribes travelled to Washington, D.C. twice in a five-year period to petition the President for lands in their traditional homelands, where their ancestors were buried. *Id.* at A-23 to A-24, A-27, A-35 (PFOF ¶¶ 84-87, 99, 121). But despite their efforts, the federal government continued to press for their removal, and hundreds of their members died as a direct result. *Id.* at A-25 to A-27 (PFOF ¶¶ 91-96).

With this historical context, Indian Agent Henry Gilbert, the lead negotiator for the 1854 Treaty, reported to Commissioner of Indian Affairs George Manypenny that "the points most strenuously insisted upon" by the Tribes were "first the privilege of

remaining in the country where they reside" and second "the appropriation of land for their future homes." *Id.* at A-40 (PFOF ¶ 137). "Without yielding these two points," he told Commissioner Manypenny, "it was idle for us to talk about a treaty." *Id.* Benjamin Armstrong, who was present and claimed to serve as an informal interpreter during the 1854 Treaty negotiations, recalled that the Tribes were unwilling to "forsake their old burying grounds" and had resolved before formal negotiations commenced that no one should sign any treaty that did not provide them reservations in their current village locations. *Id.* at A-38 (PFOF ¶ 133).

Shortly following execution of the 1854 Treaty, the Tribes sent a bilingual petition known as the *Statement Made by the Indians* to Washington, D.C. describing their shared recollections of how the 1854 Treaty terms were explained to them by Agent Gilbert during the negotiations and of how Commissioner Manypenny reassured them of the 1854 Treaty's meaning during delivery of the annuities in 1855. An important passage explains the Tribes' shared understanding of what they were told about the permanence they received:

> You shall reserve the lands you are inhabiting, there you shall live as long as there is one Indian left. Then you will never be removed from your reservation, nor never ordered to leave it.
>
> For the sake of your Graves, you was not willing to remove when your Great Father ordered you through Watrous, which was for all the Indians.

> Next Summer you will receive the patents for your lands, which will be the establishment of the permanent occupation of your Reservations, which you will never be order[ed] to leave.
>
> The only reason in my compliance with the request of my Great Father although he is owing me on former sales, is the promise of the privilege of living on my Reservation for ever.
>
> As long as there is one Indian living, that he be allowed to own the lands. This is all that induces me to let my Great Father have the lands across the Lake.

Id. at A-38 & A-48 (PFOF ¶¶ 134, 168). The Tribes also noted that when discussing Article XIII of the 1854 Treaty, Agent Gilbert "again told us, there is no transaction of your Great Father but what will be made public, and there is no one that can invalidate our transactions, even our Great Father cannot destroy the effects of our Contract." *Id.* at A-48 (PFOF ¶ 168). This reassured the Tribes that the 1854 Treaty was permanent and established permanent promises to them. The District Court agreed, Dkt. 21, Decision at SA-13 to SA-14, and the State does not argue otherwise, Dkt. 36, Resp. Br. at 20.

The District Court concluded that it is "a stretch," that "the tribes would have had no idea that allowing non-Indians to live on their reservations would compromise the permanency that they had negotiated in the treaty." Dkt. 21, Decision at SA-22. In other words, it concluded that the Tribes did not understand that the 1854 Treaty would continue to provide a permanent home and protect them from involuntary removal

even after certain parcels were acquired by non-Indians. There are multiple problems with this conclusion.

First, the District Court cited no record or legal authority for this conclusion, and its decision conflicts with both.[7] The historical record strongly demonstrates the contrary. The Tribes were adamantly negotiating for *permanent* homes just years after the federal government had begun removal efforts that the Tribes were told would not happen after the 1842 Treaty. In response, federal negotiators and Commissioner Manypenny himself reassured the Tribes over, and over, and over, that they were receiving truly permanent homes that they would have "the privilege of living on . . . for ever." Dkt. 26-1, A-38 to A-39, A-48 to A-49, A-51 (PFOF ¶¶134, 168, 176). The Tribes were told that as long as just one of their citizens remained, he should be allowed to own the lands. *Id.* at A-49 (PFOF ¶ 168). The Tribes were even told by Agent Gilbert that no one, *not even the President*, could undo the promises they obtained through the 1854 Treaty, which all agree included a promise of a permanent home and protection from future removal—including protection from state taxation. *Id.* This evidence shows that the Tribes did not negotiate for, nor did they understand that they received, the District Court's ironic notion of permanence that could be so easily undone by individual members. They

[7] As a legal matter, Indian treaties must be liberally interpreted in favor of the Indians. *Oneida Cnty., N.Y. v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985). The District Court's restrictive interpretation of the 1854 Treaty without any basis in the record cannot be reconciled with this canon of Indian treaty construction.

negotiated for and believed that they received truly permanent homes that were theirs forever.

Against this record support for the Tribes' claim, the State presented no contrary evidence. Thus, the Tribes demonstrated that there is no genuine issue of material fact that the 1854 Treaty included a right to permanent homes on which they would be protected from future removal—including a preclusion from state taxation—that would remain forever, regardless of whether parcels of that land might be acquired by non-Indians from time to time.

The fact that non-Indians later acquired parcels in the Tribes' Reservations cannot be viewed as destroying the promises made to the Tribes. During the 1854 Treaty negotiations, the Tribes understood that they had the ability to determine whether whites and "mixed-bloods" lived within their midst then and in the future. Dkt. 26-1 at A-48 to A-50 (PFOF ¶¶ 168, 172). As Commissioner Manypenny told the Tribes regarding the "White Man" living on their lands: "[A]s long as you are satisfied for him to stay he might, but the moment you wish him to go he would go." *Id.* at A-48 (PFOF ¶ 168). There is nothing in the record to suggest that the Tribes would have understood that allowing non-Indians and "mixed-bloods" to live among them would compromise the federal government's central promises to the Tribes—the point most strenuously insisted upon by the Tribes. Reconciling the Tribes' understanding that the 1854 Treaty provided them permanent homes and protection from future removal while allowing

them to decide whether non-Indians and "mixed-bloods" could live among them in a manner "as justice and reason demand," *Winans*, 198 U.S. at 380, cannot lead to the conclusion drawn by the District Court and the State.

The District Court's decision also seems to presume that all alienation of Reservation parcels occurred through voluntary sale. *See* Dkt. 21, Decision at SA-22. But the Tribes presented evidence that many parcels were transferred to non-Indians in far different ways. For instance, some parcels were transferred through inheritance from members to their non-Indian spouses. Dkt. 26-1at A-99 (Supp. PFOF ¶ 378). And some parcels were taken through tax foreclosures by local governments. *Id.* at A-98 (Supp. PFOF ¶¶ 374-75). Even if voluntary sales could amount to relinquishment of treaty rights (they can't), it seems particularly hard to square relinquishment of treaty rights with involuntary transfers. *But cf.* Dkt. 21, Decision at SA-22 ("[T]ransfer to non-Indian ownership permanently severs the tie between the land and the treaty.").

Whether the District Court viewed the transfers as voluntary or if it knew that many were not, only express, intentional congressional action—not mere transfer of title—can sever a treaty right. "[O]nly Congress can alter the terms of an Indian treaty . . . ." *Yankton Sioux Tribe*, 522 U.S. at 343; *see also United States v. Dion*, 476 U.S. 734, 738-39 (1986). And "[i]f Congress wishes to withdraw its promises, it must say so." *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2482 (2020). Here, the District Court concluded—and the State concedes—that Congress has never abrogated the Tribes' 1854 Treaty rights. Dkt. 21,

Decision at SA-20; Dkt. 36, Resp. Br. at 21. Not only was there no congressional action to abrogate the *Tribes'* treaty right to a permanent homeland, but under the District Court's approach, individual tribal members can apparently relinquish *tribal* treaty rights. It is the Tribes themselves that are the parties to the 1854 Treaty. Particularly considering federal reassurances that not even the President could undo the Tribes' treaty rights, it would be absurd to conclude that individual members could do so by transferring various parcels—sometimes voluntarily, sometimes not—to non-Indians.

B. *Montana*, *Brendale*, and *Cass County* have no relevance to the Tribes' claim under the 1854 Treaty.

To advance its overarching position, the State relies on *Montana*, 450 U.S. 544, *Brendale*, 492 U.S. 408, and *Cass County*, 524 U.S. 103. It contends that these cases stand for the proposition that the "status of reservation land [changed] when it [was] alienated to a non-Indian." Dkt. 36, Resp. Br. at 21.[8] But these cases provide no traction against the Tribes' claim under the 1854 Treaty.

Montana and *Brendale* are about whether *tribes* can exercise civil regulatory jurisdiction over *non-Indians* on *non-Indian-owned* fee lands. *Montana*, 450 U.S. at 559; *Brendale*, 492 U.S. at 421-28. And *Cass County* is about how tribal- or member-owned parcels can become exempt from state taxation only after Congress has expressly

[8] In passing, the State argues that "absent . . . preemption [by federal statute or treaty], states have authority to tax property anywhere within the state, including within a reservation." Dkt. 36, Resp. Br. at 23. As discussed in Section II, this is wrong.

authorized state taxation over them. *Cass Cnty.*, 524 U.S. at 114. Each case involved lands that were either not part of the relevant tribe's reservation, *Montana*, 540 U.S. at 554, currently owned by non-Indians, *Montana, Brendale*, or were allotted through the General Allotment Act and related legislation, *Brendale*, 492 at 422; *Montana*, 540 U.S. at 559; *Cass Cnty.*, 425 U.S. at 108. None of them address the scope of treaty rights, the central issue before this Court, on the Tribes' claim that the 1854 Treaty precludes state taxation of Reservation Fee Lands, regardless of whether those parcels were once owned by non-Indians.

C. The 1854 Treaty does not extend rights to nonmembers.

The State claims that if only Congress can abrogate the Tribes' treaty right that precludes state taxation of tribal- and member-owned parcels within their reservations, then "it would necessarily follow that *all* land on those reservations—including land owned by non-Indians—must be non-taxable." Dkt. 36, Resp. Br. at 23. And since the Tribes acknowledge that Reservation parcels are subject to state taxation while they are held by nonmembers, the State makes the enormous leap that "such a transfer itself supersedes the . . . 1854 Treaty." *Id.* at 25. Every aspect of this argument, beginning with the premise on which it relies, is wrong.

As previously discussed, the Tribes negotiated for and understood that they obtained permanent homes protected from state taxation for themselves. Nothing in the 1854 Treaty or the historical record suggests that the Tribes were negotiating for or

understood that they obtained the same rights for nonmembers, and the State does not cite anything in the record to support such a view. So regardless of whether Congress abrogated the 1854 Treaty rights—which all parties agree it has not—non-Indians do not share in those rights.

II. Even absent the rights preserved by the 1854 Treaty, the State cannot tax the lands at issue because Congress never authorized such taxes.

Even if the Tribes had no treaty-protected right to be free from taxation on the Reservation Fee Lands, the U.S. Supreme Court has repeatedly held that without *express congressional consent*, states cannot impose taxes on Indians in Indian country. Because tribes possess inherent sovereignty that predates the United States Constitution, "Indian tribes and individuals generally are exempt from state taxation within their own territory." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 764 (1985) (examining state taxes on royalties received by the Blackfeet Tribe under oil and gas leases). And while "Congress can authorize the imposition of state taxes on Indian tribes and individual Indians," it "has not done so often," and the Court will "find the Indians' exemption from state taxes lifted only when Congress has made its intention to do so unmistakably clear." *Id.* at 765. Thus, "the States may tax Indians only when Congress has manifested clearly its consent to such taxation." *Id.* at 766; *see also California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 214 n.17 (1987) ("In the special area of state taxation of Indian tribes and tribal members, we have adopted a *per se* rule.").

In a case a few years after *Blackfeet*, the Court described its "categorial" approach to state taxation of tribes and tribal members in Indian country:

> [W]hen a State attempts to levy a tax directly on an Indian tribe or its members inside Indian country, rather than on non-Indians, we have employed, instead of a balancing inquiry, "a more categorical approach: Absent cession of jurisdiction or other federal statutes permitting it,' we have held, *a State is without power to tax reservation lands and reservation Indians*." *County of Yakima v. Confederated Tribes and Bands of Yakima Nation*, 502 U.S. 251, 258 (1992))[] Taking this categorical approach, we have held unenforceable a number of state taxes whose legal incidence rested on a tribe or on tribal members inside Indian country. *See e.g., Bryan v. Itasca County*, 426 U.S. 373, [](1976 (tax on Indian-owned personal property situated in Indian country); *McClanahan*, 411 U.S. at 165–166 (tax on income earned on reservation by tribal members residing on reservation).

Chickasaw Nation, 515 U.S. at 458 (emphasis added, internal marks removed; *see also Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973) ("[I]n the special area of state taxation, absent cession of jurisdiction or other federal statutes permitting it, there has been no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation . . . .").

A. The "categorical approach" requiring express congressional intent to permit state taxation applies to the Reservation Fee Lands.

The State agrees that this "categorial approach" applies to "on-reservation property owned by the resident tribe or its members." Dkt. 36, Resp. Br. at 28. It contends, however, that "when unrestricted reservation land passes into non-Indian ownership, it ceases to be set aside by federal law for exclusive Indian use and occupation, and thereby becomes taxable, regardless of whether it was originally made alienable by a treaty or by Congress." *Id.* at 30. Therefore, it argues, "[t]he manner in which

reservation land was originally made alienable thus does not control its taxability after it has been actually alienated to a non-Indian owner." *Id.* Notably, however, the State cites no authority for this proposition. And indeed, there is none.

The land within the Tribes' Reservations, regardless of ownership status, is Indian country. 18 U.S.C. § 1151 ("[T]he term 'Indian country', as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation . . . .") *see also Oneida Nation v. Vill. of Hobart*, 968 F.3d 664, 689 (7th Cir. 2020) ("The Oneida Reservation defined by the 1838 Treaty remains intact, so the land within the boundaries of the Reservation is Indian country under 18 U.S.C. § 1151(a)."). Because all the land at issue in this case—the "reacquired reservation land," as the State terms it—is Indian country, it is subject to the Supreme Court's "categorial approach."

Under that "categorial approach," *Congress* must express "unmistakably clear" intent to authorize a state tax on Indians in their own Indian country. *Blackfeet*, 471 U.S. at 765.[9] The State again erroneously relies on *Cass County*, in which the Court held that

[9] Congress's intent to authorize a tax must be very specific. For example, in *Yakima*, where the Court found that the Burke Act proviso (the statute that applied in *Cass County* under which Congress expressed unmistakable intent to permit taxation of land allotted under the General Allotment Act once the trust period had expired) showed clear intent to permit real-property taxes on General Allotment Act allotments upon alienability, the Court also found that proviso did not provide clear intent to permit excise taxes on the *sale* of the land, even to non-Indians. 502 U.S. at 269. Furthermore,

"[w]hen *Congress* makes Indian reservation land freely alienable, it manifests an unmistakably clear intent to render such land subject to state and local taxation." 425 U.S. at 115 (emphasis added). The Tribes' Reservations, however, were allotted under the 1854 Treaty, and not under any federal statute. Dkt. 21, Decision at SA-20 ("[I]t *was not Congress* that authorized the allotment of the property in the plaintiff tribes' reservations . . . .") (emphasis added).[10] Allotments on the Tribes' Reservations were thus authorized by the President, not Congress. Dkt. 224-at A-866 (1854 Treaty, art. III). And the President—not Congress—also authorized the "disposition" of the lands once allotted. *Id; see also* Dkt. 21, Tr. Brief at 12-14. Thus, this case is not governed by *Cass County*.

The District Court agreed that "land allotted to Indian ownership under the 1854 treaty is not taxable, despite being freely alienable. But it's hard to see how that distinction matters once the property in question is transferred to non-Indian ownership, which all agree makes the property taxable by the state." Dkt. 21, Decision at SA-22. This distinction does matter for two important reasons, however. First, States can tax non-Indians in Indian country without explicit congressional intent. And

---

the Court remanded the issue of whether any of the lands at issue had been allotted under a statute other than the General Allotment Act and whether if so, it made a difference with respect to taxability. *Id.* at 270.

[10] The State did not appeal the District Court's ruling on this point.

second, the lack of *congressional authorization* to tax tribes and tribal members when they reacquire Treaty-allotted lands is dispositive under federal common law.

B. State taxation of non-Indians in Indian country does not require congressional authorization.

Unlike with tribes or tribal members, States can tax non-Indians in Indian country without having express congressional authorization to permit the tax. "[U]nder our Indian tax immunity cases, the 'who' and the 'where' of the challenged tax have significant consequences. We have determined that '[t]he initial and frequently dispositive question in Indian tax cases . . . is *who* bears the legal incidence of [the] tax.'" *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 102 (2005) (assessing whether Kansas could tax fuel sold to off-reservation non-Indian distributors who deliver it to tribally owned gas station on the reservation) (quoting *Chickasaw Nation*, 515 U.S. at 458) (alterations in original). Where a non-Indian bears the legal incidence of a tax in Indian country, courts apply an interest-balancing test. *White Mt. Apache Tribe v. Bracker*, 448 U.S. 136, 144-145 (1980) (employing 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" where "a State asserts authority over the conduct of non-Indians engaging in activity on the reservation."). Broadly, unless the non-Indian can show that federal and tribal interests "outweigh the State's interest in raising revenue for required government services," the state can likely impose the tax, which is why the Tribes have conceded that the State may tax land on

their Reservations held in fee by non-Indians. *N. Border Pipeline Co. v. Montana*, 772 P.2d 829, 837 (Mont. 1989) (allowing state property tax on non-Indian company's right-of-way across trust land); *see also Calpine Const. Fin. Co. v. Ariz. Dep't of Rev.*, 211 P.3d 1228, 1232 (Ariz. Ct. App. 2009) ("In general, a state cannot tax property located on a reservation that is owned by an Indian tribe or an individual Indian . . . Property owned by a non-Indian, however, is taxable.")

Just because the State can tax Treaty-allotted lands within the Tribes' Reservations while they're in the hands of non-Indians, however, does not mean it can continue to tax the same lands after the Tribes or their members reacquire them. Mere sale from a non-Indian to a tribe or tribal member cannot substitute for congressional authorization.

C. Congress, not the President, must authorize state taxation of tribes and their members in Indian country.

When the "who" is tribes and tribal members and the "where" is their own Indian country, *Congress* must explicitly authorize the state tax because of its unique constitutional role in Indian affairs. "Congress has broad power to regulate tribal affairs under the Indian Commerce Clause, Art. 1, § 8, cl. 3." *Bracker*, 448 U.S. at 142. Indeed, "[t]he right of tribal self-government is ultimately dependent on and subject to the broad power of Congress." *Id.* That is, "Congress has 'plenary and exclusive authority' over Indian affairs." *Cohen's Handbook* § 5.02 [1] (2012 & Supp. 2019) (quoting *United States v. Lara*, 541 U.S. 192, 200 (2004)). The same is not true of the President, whose constitutional power regarding Indians was limited to making treaties. *Accord Lara*, 541

U.S. at 201 (distinguishing President's treaty-making authority in the Treaty Clause, art. II, § 2, cl. 2, from Congress's plenary power in the Indian Commerce Clause, art. I, § 8, cl. 3). And the House of Representatives is left out of the treaty-making process altogether. Const., art. II, § 2, cl. 3 (The President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur."). In fact, "[t]reating with Indian tribes ended in 1871 . . . because the House of Representatives thought treaty-making gave the Senate too much power over Indian policy." Erik M. Jensen, *Taxation and Doing Business Country in Indian Country*, 60 Me. L. Rev. 1, 27 (2008).

So it does matter that—as the District Court found—there is no *congressional* authorization to permit taxation of the Reservation Fee Lands here. Dkt. 21, Decision at SA-20. Congress has explicitly authorized property taxation on reservations in several instances, *see* Dkt. 21, Tr. Br. at 32 n.1, but not on the Tribes' Reservations. This is not *Cass County*, and that case can't hold the weight the State assigns it. Without explicit congressional authorization, the State cannot tax land held by the Tribes or their members on their own reservations because the legal incidence of the State's property tax falls squarely on them, a fact the State doesn't contest.

What does *not* matter here is if Treaty-allotted property was at one point held by a non-Indian. In the federal common-law tax cases, the tribes and Indians are often receiving title from non-Indians, and the Supreme Court has routinely disregarded this

consideration. In *Chickasaw Nation*, for example, the tribe received motor fuel from outside its Indian country and sold it at tribal convenience stores in Indian country, and the Court did not find this fact probative. 515 U.S. at 457-58. Rather, the Court focused on the fact that Oklahoma was imposing a tax, the legal incidence of which fell on a tribe in Indian country, which was not authorized by Congress. *Id.* at 458-459. *See also Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation,* 425 U.S. 463, 480-81 (1976). Likewise, it does not matter here whether the land was at one point owned by someone the State could tax—the important inquiry, given the absence of congressional authorization, is whether it is currently owned by someone the State can tax. The answer is no.

D. *City of Sherrill* has no application here.

In its response brief, the State contends for the first time that *City of Sherrill v. Oneida Indian Nation* is instructive here. Dkt. 36, Resp. Br. at 32. That case involved the Oneida Indian Nation in New York's attempt to enjoin the City of Sherrill from imposing property taxes on fee lands the Nation had purchased in 1997 and 1998 after last "possessing" them in 1805. 544 U.S. 197, 202 (2005). The decision was based not on the usual taxation-in-Indian-country rules, which weren't even cited, but rather on the unique history of the Oneidas' land claims and on laches and related equitable defenses because the Oneidas had been gone from the area for two centuries. *Id.* at 216-17. The State did not raise any *Sherrill*-type defenses below, and while some municipal

defendants did, the Tribe moved for summary judgment against them on those defenses and prevailed. Dkt. 21, Decision at SA-11.

In both *Sherrill* and *Cass County*, the Court noted that the tribes could apply to have land taken into trust under the Indian Reorganization Act to avoid state property taxes. *Sherrill*, 544 U.S. at 220-21; *Cass Cnty.*, 524 U.S. at 114. The availability of this option, and the fact that it would have been rendered "partially superfluous" if the tribes did not need to pursue it, weighed against the tribes in those cases. But the fact that the Tribes and their members could apply to have Reservation Fee Lands taken into trust does not negate the express-congressional-authorization rule to allow taxes on the lands, a rule that was met in *Cass County* and disregarded in *Sherrill* because of its unique facts.

In addition, having land taken into trust provides far more than tax exemption, e.g., "[t]rust status [] qualifies land for certain federal programs and services, and provides 'enhanced opportunities for housing, energy development, negotiated rights-of-way and leases, as well as greater protections for subsistence hunting and agriculture." Bethany C. Sullivan & Jennifer L. Turner, *Enough Is Enough: Ten Years of* Carcieri v. Salazar, 40 Pub. Land & Resources L. Rev. 37, 50 (2019) (quotation omitted). Because of this, the land-into-trust process can be expensive and time-consuming, often taking several years to complete. *Id.* at 47; *see generally* 25 C.F.R. Part 151 (2021) (federal fee-to-trust regulations). And having land held in trust restricts the beneficial owner's ability to dispose of it, 25 C.F.R. § 152.22. The Tribes and their members may well not wish to

go through the multi-step regulatory process to have their lands taken into trust for a variety of reasons, and the fact that they have not chosen to do so is no reason to subject them to state taxes without congressional consent.

Conclusion

This Court should reverse that portion of the District Court's decision that allows the State to impose a real-property tax on Indian-owned fee lands within the Tribes' reservation boundaries if those lands were, at one time, owned by a non-Indian party because Congress never authorized the State to do so.

Dated this 24th day of September, 2021

Respectfully submitted,

/s/ Vanya S. Hogen

Vanya S. Hogen
Andrew Adams III
Peter J. Rademacher
Leah K. Jurss
Amy Kania
Hogen Adams PLLC
1935 County Road B2 W. Suite 460
St. Paul, Minnesota 55113
Ph: (651) 842-9100
Fax: (651) 842-9101
Email: vhogen@hogenadams.com
aadams@hogenadams.com
prademacher@hogenadams.com
ljurss@hogenadams.com
akania@hogenadams.com

Counsel for all Plaintiffs

Erick Arnold
Howard Bichler
Bad River Band of Lake Superior Tribe of Chippewa Indians of the Bad River Reservation, Wisconsin
72662 Maple St.
Ashland, WI 54806
Po Box 39
Odanah, WI 54861
Phone: (715) 682-7101
Email: attorney@badriver-nsn.gov
hbichler@judicare.org

Counsel for Bad River Band of Lake Superior Tribe of Chippewa Indians of the Bad River Reservation, Wisconsin

Dyllan Linehan
Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin
13394 W. Trepania Road
Hayward, WI 54843
Phone: (715) 634-8934
Email: Dyllan.Linehan@lco-nsn.gov

Counsel for Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin

David Ujke
Red Cliff Band of Lake Superior Chippewa Indians of Wisconsin
88385 Pike Road
Bayfield, WI 54814
Phone: (715) 779-3725 ext. 30
Email: dujke@redcliff-nsn.gov

Counsel for Red Cliff Band of Lake Superior Chippewa Indians of Wisconsin

Certificate of Compliance

This document complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) and Circuit Rule 32, because this document contains 6,989 words, excluding the parts of the document exempted by Fed. R. App. P. 32(f).

This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 12-point Palatino Linotype style font.

Dated: September 24, 2021

/s/ Vanya S. Hogen
Vanya S. Hogen

Counsel for Plaintiff-Appellant,

Circuit Rule 30(d) Statement

Pursuant to Circuit Rule 30(d), counsel certifies that all material required by Circuit Rule 30(a) and (b) are included in the Appendix.

/s/ Vanya S. Hogen
Vanya S. Hogen

Certificate of Service

I hereby certify that on September 24, 2021, the Brief of Plaintiff-Appellant was filed with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Vanya S. Hogen
Vanya S. Hogen