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.

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

Colette Routel
Mitchell Hamline School of Law
875 Summit Avenue
St. Paul, MN 55105
(651) 290-6327

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

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 21-1817

Short Caption: Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisc., et al., v. Tony Evers, et al.

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n/a

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

n/a

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

n/a

Attorney's Signature: /s/ Colette Routel Date: July 2, 2021

Attorney's Printed Name: Colette Routel

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

Address: Mitchell Hamline School of Law
875 Summit Ave, St Paul, MN 55105

Phone Number: 651-290-6327 Fax Number: n/a

E-Mail Address: colette.routel@mitchellhamline.edu

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n/a

Attorney's Signature: /s/ Peter Rademacher Date: June 2, 2021

Attorney's Printed Name: Peter J. Rademacher

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

Address: Hogen Adams PLLC, 1935 County Road B2 West, Suite 460, St. Paul, Minnesota 55113

Phone Number: 651-842-9100 Fax Number: 651-842-9101

E-Mail Address: prademacher@hogenadams.com

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Attorney's Signature: /s/ Vanya S. Hogen Date: June 2, 2021

Attorney's Printed Name: Vanya S. Hogen

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

Address: Hogen Adams PLLC, 1935 County Road B2 West, Suite 460, St. Paul, Minnesota 55113

Phone Number: 651-842-9100 Fax Number: 651-842-9101

E-Mail Address: vhogen@hogenadams.com

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Attorney's Signature: /s/ Leah K. Jurss Date: June 2, 2021

Attorney's Printed Name: Leah K. Jurss

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Address: Hogen Adams PLLC, 1935 County Road B2 West, Suite 460, St. Paul, Minnesota 55113

Phone Number: 651-842-9100 Fax Number: 651-842-9101

E-Mail Address: ljurss@hogenadams.com

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Attorney's Signature: /s/ Amy E. Kania Date: June 2, 2021

Attorney's Printed Name: Amy E. Kania

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

Address: Hogen Adams PLLC, 1935 County Road B2 West, Suite 460, St. Paul, Minnesota 55113

Phone Number: 651-842-9100 Fax Number: 651-842-9101

E-Mail Address: Akania@hogenadams.com

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Attorney's Signature: /s/ Andrew Adams III Date: June 2, 2021

Attorney's Printed Name: Andrew Adams III

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

Address: Hogen Adams PLLC, 1935 County Road B2 West, Suite 460, St. Paul, Minnesota 55113

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E-Mail Address: aadams@hogenadams.com

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Table of Contents

Table of Authorities

Cases

Constitutions, Treaties and Statutes

Other Authorities

Jurisdictional Statement

Plaintiffs-Appellants Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin, Lac du Flambeau Band of Lake Superior Chippewa Indians, Red Cliff Band of Lake Superior Chippewa Indians of Wisconsin, and Bad River Band of Lake Superior Chippewa Indians (the "Tribes"), are sovereign, federally recognized Indian tribes. Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs, 86 Fed. Reg. 7,554 (Jan. 29, 2021). In November 2018, they filed this lawsuit in the U.S. District Court for the Western District of Wisconsin, challenging the assessment, collection, and enforcement of taxes by the Defendants-Appellees (collectively, the "State") upon property owned in fee simple by the Tribes and Tribal citizens within the exterior boundaries of their treaty-created reservations (the "Reservation Fee Lands"). Dkt. 1, Complaint ¶ 1. The Complaint alleges that applying this state tax violates, among other things: (1) the 1854 Treaty of La Pointe, 10 Stat. 1109 ("1854 Treaty"), which provided reservations as permanent homes for the Tribes and guaranteed that they would never be removed therefrom; and (2) federal common law, which precludes state taxation of land owned by Indian tribes and tribal members within Indian reservations absent unmistakably clear congressional authorization. The District Court possessed subject-matter jurisdiction over this case under 29 U.S.C. § 1331 (general federal-question jurisdiction) and 28 U.S.C. § 1362 (federal-question cases brought by Indian tribes).

The District Court, the Honorable James D. Peterson presiding, issued its order and entered the final judgment in this case on April 9, 2021. Dkt. 245 & 246. The U.S. Court of Appeals for the Seventh Circuit possesses jurisdiction over the direct appeal of that final judgment, as the Tribes filed a timely Notice of Appeal on May 7, 2021. Dkt. 247; 28 U.S.C. § 1291.

Statement of the Issues

1. Indian treaties are interpreted using special canons of treaty construction. Rather than looking simply to the plain meaning of the text, Indian treaties must be interpreted the way they were originally understood by the tribal signatories, liberally in favor of preserving Indian rights, and with all ambiguities resolved in the tribes' favor. In 1854, the Tribes entered into a treaty with the United States whereby they ceded millions of acres of mineral-rich land in exchange for reservations located within their traditional homelands. The tribal signatories were promised that these reservations would be their "permanent homes," from which they would never be removed, and that non-Indians could enter and stay on the reservation only with the permission of the Tribe. Real-estate taxation was neither mentioned in the treaty nor explained to the Tribal signatories. Did the District Court err in concluding that the State could apply a tax on Reservation Fee Lands, and remove the Indian owner (foreclose) for failure to pay the taxes, just because those lands were once held – at any time after 1854 – by a non-Indian?

Most apposite cases, statutes, and other authorities:

- 1854 Treaty of La Pointe, 10 Stat. 1109.
- *Washington State Dep't of Licensing v. Cougar Den, Inc.*, 139 S. Ct. 1000 (2019).
- *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999).

2. Indian tribes are inherent sovereigns. State law generally does not apply to tribal members within Indian country unless Congress, which has plenary power over Indian affairs, says otherwise. For this reason, the legal incidence of a state tax cannot fall on a tribe or its members within Indian country without clear Congressional authorization for that tax. The Supreme Court has found such authorization in statutes like the General Allotment Act of 1887, 24 Stat. 388 (as amended by the Burke Act of 1906, 34 Stat. 182), which specifically mention taxation, as well as in statutes where Congress has authorized the sale of reservation lands to non-Indians. The General Allotment Act, however, did not apply to the Tribes' reservations, and Congress did not pass legislation authorizing taxation or alienability of the Tribes' reservation lands. Instead, under to the terms of the 1854 Treaty, the President made *ad hoc* decisions approving the sale and inheritance of some reservation lands to Indians and non-Indians, while the State illegally taxed and foreclosed on other reservation lands. Was the District Court correct in holding that the State can tax Reservation Fee Lands today, simply because they were once held by non-Indians, even if Congress never authorized this tax?

Most apposite cases and authorities:

- *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020).
- *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450 (1995).
- *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992).
- *Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103 (1998).

Statement of the Case

I. The 1854 Treaty and the Guarantee of a Permanent Homeland.

In September 1854, the Lake Superior Ojibwe ceded seven million acres of mineral-rich land in northeastern Minnesota to the United States. 1854 Treaty, art. I, 10 Stat. 1109; *Keweenaw Bay Indian Community v. Naftaly*, 452 F.3d 514, 525 (6th Cir. 2006); A-35 (Dkt. 173, PFOF ¶ 121), A-135 & A-140 (Bowes Rep. Dkt. 85, at 32, 37). In exchange, they received only nominal monetary compensation: somewhere between three and seven cents per acre. 1854 Treaty, art. IV (providing just $100,000 in money annuities distributed over a 20-year period, in addition to the payment of trader debts and funds used to purchase specified goods). This was far less money than the Lake Superior Ojibwe had demanded when asked to sell the same territory just five years earlier. A-235 to A-237 (Treuer Rep. Dkt. 83, at 28-30) (noting that during failed treaty discussions in 1847, the Ojibwe refused to cede the same land for less than $1 million). But in 1854, the Ojibwe were not negotiating for money. They sought "strong paper" to secure "permanent homes" within their ancestral territory, from which they could never be removed.

The guarantee of permanent homes was of immense importance to the Lake Superior Ojibwe. In two prior treaties, the Indians had unwittingly ceded all their land in Wisconsin to the United States, believing they were only selling the ability to cut pine timber and extract copper and other minerals. Treaty of St. Peters, 7 Stat. 536 (July 29, 1837); Treaty with the Chippewa, 7 Stat. 591 (Oct. 4, 1842); A-16 to A-17, A-20 (Dkt. 173, PFOF ¶¶ 62-64, 76); A-529 to A-530 (Gulig Dep. Dkt. 187, at 61-67); A-597 to A-600 (White, *The Myth of the "Forgotten" Treaty*, Dkt. 189-7, at 40-47); A-581 & A-583 (*Statement Made by the Indians*, Dkt. 189-4, at 15, 17). The Lake Superior Ojibwe believed the words of federal treaty commissioner Robert Stuart, who assured them during treaty negotiations in 1842 that the federal government did not want their land, which was ill-suited to agriculture. A-20 (Dkt. 173, PFOF ¶ 76); A-229 (Treuer Rep. Dkt. 83, at 22). Indeed, Stuart told the Ojibwe that they could continue their traditional hunting, fishing, and gathering throughout their aboriginal territory, for 50 to 100 years or more, unless they committed depredations on whites. A-21 to A-22 (Dkt. 173, PFOF ¶ 79); A-230 (Treuer Rep. Dkt. 83, at 23). Yet the text of the 1842 Treaty – which the Indians could not read – contained no such assurances. Instead, Article II stated that the Indians retained such rights only "until [they were] required to remove by the President of the United States." 1842 Treaty, 7 Stat. 591.

Contrary to Stuart's promises, not long after signing the 1842 Treaty, federal officials began their efforts to remove the Lake Superior Ojibwe to lands in the Minnesota

Territory. A-22 (Dkt. 173, PFOF ¶¶ 80-81); A-124 to A-125 (Bowes Rep. Dkt. 85, at 21-22). But officials underestimated Ojibwe ties to their homeland. The Lake Superior Ojibwe were inextricably linked to the land they believed the Creator had led them to, and they refused to leave the graves of their ancestors. A-23, A-31 (Dkt. 173, PFOF ¶ 84, 108).

In 1848-49, a small group of Lake Superior Ojibwe traveled to Washington, D.C., to meet with President Polk and advocate for their permanent settlement on lands where they currently maintained their villages. A-22 to A-24 (Dkt. 173, PFOF ¶¶ 82-88). They submitted petitions to the Congress and the President, which sought a "permanent home" for each of their bands, "covering the graves of our fathers, our sugar orchards, and our rice lakes and rivers." A-23 (Dkt. 173, PFOF ¶ 84); A-237 to A-238 (Treuer Rep. Dkt. 83, at 30-31). The Lake Superior Ojibwe delegation could not read or write in English, however, and these petitions were presumably written by a non-Indian who accompanied them on their journey. A-23 & A-24 (Dkt. 173, PFOF ¶¶ 83, 87). To ensure that their message was properly conveyed to the President, the chiefs also submitted a series of symbolic pictographs, illustrating that they were united in their purpose to obtain permanent homes in their traditional territory. A-24 (Dkt. 173, PFOF ¶¶ 87-88); A-239 (Treuer Rep. Dkt. 83, at 32) (reproducing color pictograph); A-645 to A-655 (Schoolcraft description); A-536 (Gulig Dep. Dkt. 187, at 90-91).

While this Ojibwe delegation appeared to have been well-received, a change in Presidential administrations occurred shortly thereafter, and removal was once again a

federal priority. A-25 (Dkt. 173, PFOF ¶¶ 89-90); A-240 (Treuer Rep. Dkt. 83, at 33). On February 6, 1850, President Zachary Taylor issued an executive order purporting to cancel the hunting, fishing, and gathering rights reserved by the 1837 and 1842 Treaties and directing the removal of the Ojibwe from Wisconsin to Minnesota. A-603 (Executive Order). Then, federal officials unilaterally (and in violation of promises made during prior treaty negotiations) changed the location of annuity payments to Sandy Lake, Minnesota. They hoped that by delaying the distribution of the payments until the waterways had frozen, they would prevent the return of tribal members to their winter villages. Instead, hundreds of tribal members died of starvation, disease, and cold, in a disaster that the State's expert acknowledges was on the same scale as the Cherokee Trail of Tears. A-25 to A-27 (Dkt. 173, PFOF ¶¶ 91-96); A-604 (Clifton, *Wisconsin Death March*, at 1); *Minnesota v. Mille Lacs Band*, 526 U.S. 172, 177-81 (1999) (recounting the history of the 1850 Executive Order and the Sandy Lake disaster); A-539 (Gulig Dep. Dkt. 187, at 101). Yet despite the ensuing public outcry, removal efforts continued. The local Indian agent even requested a U.S. cavalry detachment to assist in the removal process. A-27 (Dkt. 173, PFOF ¶ 97); A-243 to A-244 (Treuer Rep. Dkt. 83, at 36-37).

Still, the Lake Superior Ojibwe refused to remove. In 1851, the chiefs petitioned the President once again, asking to remain in their homeland. A-27 to A-28 (Dkt. 173, PFOF ¶ 99); A-656 to A-657 (Dkt. 189-57, Sept. 1, 1851 Petition). Then, in 1852, another delegation of Lake Superior Ojibwe, including Chief Buffalo, traveled to Washington,

D.C. to advocate for the abandonment of the government's removal policy and their permanent settlement within their homeland. They secured a meeting with President Millard Fillmore and provided additional petitions to the Secretary of the Interior and the Commissioner of Indian Affairs. A-28 to A-30 (Dkt. 173, PFOF ¶¶ 100-104); A-658 to A-666 (June 1852 Petitions); A-246 to A-248 (Treuer Rep. Dkt. 83, at 39-41); A-773 to A-779 (Armstrong, *Early Life*, at 25-31). Yet when they returned home from Washington, D.C., Chief Buffalo was informed by Minnesota Governor Alexander Ramsey that it was still the intention of the United States to remove them from their lands. A-30 (Dkt. 173, PFOF ¶ 105); A-804 (Aug. 10, 1852 Letter from Ramsey to Chief Buffalo). Over the next two years, the Lake Superior Ojibwe were not provided their treaty-guaranteed annuity payments, because they refused to travel to Minnesota to receive them, lest the payments become another opportunity for the federal government to trick them into removal. A-30 (Dkt. 173, PFOF ¶ 106); A-248 (Treuer Rep. Dkt. 83, at 41).

Another change in Presidential administrations, however, brought about a dramatic shift in federal policy. In 1853, President Pierce, a Democrat, was elected to replace Millard Fillmore, a Whig. Pierce appointed George Manypenny as Commissioner of Indian Affairs. Manypenny became the architect of the federal government's new reservation policy, and he assigned a new Indian agent – Henry Gilbert – to work with the Lake Superior Ojibwe. A-31 to A-33 (Dkt. 173, PFOF ¶¶ 109-115); A-132 to A-134 (Bowes Rep. Dkt. 85, at 29-31). The United States wanted access to valuable mineral-rich

land in northeastern Minnesota that the Ojibwe had previously been reluctant to cede. A-35 (Dkt. 173, PFOF ¶¶ 121-122); A- 235 to A-237 (Treuer Rep. Dkt. 83, at 28-30). Federal officials knew that the Ojibwe would insist on receiving reservations in Wisconsin and the Upper Peninsula of Michigan, as well as promises that they would never be removed from this land. In 1853, Gilbert delivered their treaty annuities to them at La Pointe, and reported to Commissioner Manypenny that the Lake Superior Ojibwe "will sooner submit to extermination than to comply [with removal efforts]." Gilbert knew that in any subsequent land cession, the Ojibwe would "insist" on permanent lands in their homeland. A-34 (Dkt. 173, PFOF ¶ 119); A-668 to A-674 (Dkt. 190-12, Gilbert to Manypenny, Dec. 10, 1853).

It was against this backdrop that the 1854 Treaty was negotiated. The United States wanted access to valuable land in northeastern Minnesota that the Ojibwe had previously been reluctant to cede. The Ojibwe insisted on receiving reservations and promises that they would never be removed from this land. Manypenny instructed federal negotiators to provide the Indians with a "permanent home" and to "accede to their wishes" on the number and location of their reservations, while trying to consolidate the Indians in as few locations as possible. A-36 (Dkt. 173, PFOF ¶ 126); A-136 to A-138 (Bowes Rep. Dkt. 85, at 33-35).

In 1854, then, when the United States approached the Lake Superior Ojibwe to ask them to cede even more land, the tribal negotiators demanded and received firm

promises. While no official treaty journal was kept of the negotiations, A- 37 (Dkt. 173, PFOF ¶ 131), just ten years later, in 1864, a document written in Ojibwe and translated into English describes the promises that federal officials made to the tribal signatories when the 1854 Treaty was negotiated:

> 12.2. Then again came the word of our Great Father calling his children together through [Indian Agent Henry] Gilbert, asking us for the North Shore Country.
> . . .
> 12.4. 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.
> . . .
> 13.3. There is also a White Man living on our Reservation. Manypenny told us also in regard to him, as long as you are satisfied for him to stay he might, but the moment you wish him to go he would go.

A-589 & A-591 (Nichols, *Statement Made by the Indians*, at 23, 25). These promises were recorded in the text of the treaty. Article II of the 1854 Treaty set aside four sizeable reservations in Wisconsin for the Lake Superior Ojibwe that lived there: Red Cliff, Bad River, Lac du Flambeau, and Lac Courte Oreilles. Article XI of the 1854 Treaty promised that "the Indians shall not be required to remove from the homes hereby set apart for them." When read *in pari materia*, Articles II and XI of the 1854 Treaty plainly forbid Wisconsin's taxation of Reservation Fee Lands, which could result in involuntary forfeiture and tax sale proceedings. *Naftaly*, 452 F.3d at 524-26 (concluding that the same 1854 Treaty forbid taxing fee land within the Keweenaw Bay Indian Community's Reservation, which is located in the Upper Peninsula of Michigan).

The 1854 Treaty also contained a provision that authorized the President to allot reservation lands to individual Tribal citizens in the future:

> The United States will define the boundaries of the reserved tracts, whenever it may be necessary, by actual survey, and the President may, from time to time, at his discretion, cause the whole to be surveyed, and may assign to each head of a family or single person over twenty-one years of age, eighty acres of land for his or their separate use; and he may, at his discretion, as fast as the occupants become capable of transacting their own affairs, issue patents therefor to such occupants, with such restrictions of the power of alienation as he may see fit to impose. And he may also, at his discretion, make rules and regulations, respecting the disposition of the lands in case of the death of the head of a family, or single person occupying the same, or in case of its abandonment by them.

1854 Treaty, art. III. There is no indication that this article was explained to the Tribal signatories to the 1854 Treaty. It is not referred to or discussed in: (1) the description of negotiations that Henry Gilbert sent to Commissioner Manypenny, A-696 to A-707 (Dkt. 190-19, Henry Gilbert to George Manypenny, Oct. 17, 1854); (2) the 1864 *Statement Made by the Indians*, A-557 to A-593; (3) Benjamin Armstrong's recollection of treaty negotiations, published in 1890, A-747 to A-803 (Armstrong, *Early Life Among the Indians*); or (4) the notes of George Johnston, who was one of the interpreters during the 1854 Treaty negotiations. A-43 (Dkt. 173, PFOF ¶ 149); A-811 to A-826 (George Johnston Journal); A-545 to A-547 (Gulig Dep. Dkt. 187, at 126-35).

Neither the Tribes nor their citizens owned any land in fee simple when the 1854 Treaty was negotiated, and there is no indication that they understood the implications of private property ownership. A-549 (Gulig Dep. Dkt. 187, at 141). There is also no

indication that they understood the concept of taxation, or that any of their lands had ever been taxed prior to negotiation of the 1854 Treaty. A-548 (Gulig Dep. Dkt. 187, at 139-140). At the time of the 1854 Treaty, no more than perhaps a few members of the signatory Tribes could read or write in English. A-43 (Dkt. 173, PFOF ¶ 154). It would defy common sense to allow Article III to be interpreted in a manner that would eviscerate the protections the Ojibwe negotiated for: permanent homelands from which they could never be removed, so long as there was even one Indian left.

II. Allotment Under the 1854 Treaty.

The Lake Superior Ojibwe lived on their reservations for more than two decades before any attempt to allot their lands occurred. Ultimately, because of the United States' failure to fulfill certain treaty promises, it was the Indians themselves who called for allotment under Article III of the 1854 Treaty. A-157 to A-158 (Bowes Rep. Dkt. 85, at 54-55).

The Tribes had been promised that they would have absolute dominion and control over their reservations. A-78 (Dkt. 173, PFOF ¶ 333). But in 1873, the Supreme Court decided *United States v. Cook*, 86 U.S. 591 (1873), which held that timber located on lands occupied by an Indian tribe could not be cut and sold. The Court held that the timber was part of the realty, and since title to the land was technically held by the United States (in trust for the tribe), the timber could only be sold by the United States, not by the tribe. A-154 (Bowes Rep. Dkt. 85, at 51); A-292 (Treuer Rep. Dkt. 83, at 85). In 1876,

the Commissioner of Indian Affairs concluded that in accordance with *Cook*, "where the land is held in common such disposition of the timber is unauthorized by law," while conversely, "allottees have the right to dispose of the wood or timber on their respective allotments." A-80 (Dkt. 173, PFOF ¶ 337).

The timing of *Cook* was just as important as its holding. Before *Cook*, timber was cut from the Tribes' reservations in Wisconsin because revenues from timber production were necessary to sustain the Indians. A-79 (Dkt. 173, PFOF ¶ 335). But beginning in 1873, *Cook* prevented Tribal members from harvesting timber on their reservations. This happened around the same time that annuity payments under the 1842 and 1854 Treaties ceased. A-154 & A-156 (Bowes Rep. Dkt. 85, at 51, 53) (noting that annuity payments ceased under the 1842 and 1854 Treaties in 1869 and 1874, respectively). Federal officials had already begun ordering Tribal members to stay within reservation boundaries, which prevented them from making a subsistence living off the land and infringed on their treaty rights to hunt, fish, and gather outside of the reservation. A-81 (Dkt. 208, Supp. PFOF ¶ 343); A-292 to A-293 (Treuer Rep. Dkt. 83, at 85-86). Destitution resulted. A-81 to A-82 (Dkt. 208, Supp. PFOF ¶ 344); A-154 (Bowes Rep. Dkt. 85, at 51). As a result of starvation conditions, several of the Tribes began to request that the land be allotted to individual Tribal members, which would enable the timber to finally be cut and sold, allowing the Tribe to subsist off those revenues.

Allotments were made under the 1854 Treaty in 80-acre parcels to heads of household and single persons over 21 years old. Tribal members received a fee-simple deed to the property that explicitly stated the parcel of land was allotted under the 1854 treaty. A-976 (Dkt. 191-21, Patent, Red Cliff Reservation); A-977 (Dkt. 191-22, Patent, Lac Courte Oreilles Reservation). The deed contained a restriction that prevented its alienation without the permission of the President of the United States: "[allottee] and his heirs shall not sell, lease, or in any manner alienate, said Tract without the consent of the President of the United States." *E.g.*, A-977 (Dkt. 191-22, Patent, Lac Courte Oreilles Reservation). Thus, these lands were held in what is known as "restricted fee" status. To be transferred through inheritance, sale, or gift, the President of the United States himself needed to approve the transaction. Federal officials adopted regulations governing such transfers in 1877, and special forms were created to be used by federal officials when such land sales were requested. A-980 (1877 regulations); A-418 to A-421 (Treuer Reb. Rep. Dkt. 96, at 15-18).

III. Inapplicability of the General Allotment Act and the Burke Act.

In 1887, Congress passed the General Allotment Act, 24 Stat. 388 ("GAA"). The GAA authorized the President, "whenever in his opinion any reservation or any part thereof . . . is advantageous for agricultural and grazing purposes . . . to allot the lands in said reservation in severalty to any Indian located thereon." A-887 (GAA § 5). Allotments under the GAA were structured differently from 1854 Treaty allotments. They were

initially to be made in 160-acre increments (vs. 80-acre Treaty allotments). *Id.* The deeds explicitly stated that they were made under the GAA, and that the United States "does and will hold the land thus allotted . . . for the period of twenty-five years, in trust for the sale, use and benefit of the said [Indian] . . . and that at the expiration of said period the United States will convey the same by patent to said Indians, or his heirs, as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever." A-981 (Dkt. 210-47, sample GAA deed). Unlike with the 1854 Treaty allotments, the President was not involved in decisions to alienate GAA allotments. Land was automatically alienable when the trust period expired, and the President could not authorize the alienability of allotments held in trust.

In 1906, congress amended the GAA by passing the Burke Act, 34 Stat. 182. A-894 to A-895 (Burke Act). The Burke Act authorized the Secretary of the Interior to issue patents in fee to persons who held allotted land under the GAA, before the 25-year trust period had expired, if they were deemed "competent and capable of managing [their own] affairs." A-895 (Burke Act, § 6). Importantly, the Burke Act explicitly stated that once an allottee received a patent in fee simple, "thereafter all restrictions as to sale, incumbrance, *or taxation* of said land shall be removed." *Id.* (emphasis added).

Once the GAA was passed in 1887, federal officials considered whether allotments on the Tribes' reservations should proceed under the 1854 Treaty (*i.e.*, restricted-fee, 80-acres, Presidential approval for transfer) or under the GAA (*i.e.,* trust patents for 25

years, then freely alienable in fee simple and taxable, 160-acres). They decided that allotments on the Tribes' reservations could only proceed under the 1854 Treaty. A-897 (Dkt. 191-7, Mar. 12, 1894, Secretary of the Interior to Commissioner of Indian Affairs). There were at least two distinct reasons for this. First, the Tribes' reservations were not considered to be suitable for agriculture, which was one of the prerequisites for allotment under the GAA. A-898 to A-900 (Dkt. 191-7, Jan. 15, 1894, Secretary of the Interior to President); A-902 to A-906 (Dkt. 191-7, Assistant Attorney General Opinion Letter). Second, the GAA conflicted with the terms of the 1854 Treaty, yet the GAA did not contain any language abrogating those treaty rights. A-956 to A-964 (Dkt. 191-8, Sept. 23, 1889, Opinion of Assistant Attorney General Shields). Thus, even in the nineteenth-century federal officials understood that treaty rights should not be considered repealed by implication. Historical correspondence and patents issued to Tribal members on these reservations confirm that neither the GAA nor the Burke Act were applied to the Tribes' reservation lands. A-260 to A-272 (Treuer Rep. Dkt. 83, at 53-65); A-169 to A-173 (Bowes Rep. Dkt. 85, at 66-70, 73-74); A-971 to A-975 (Dkt. 191-27, Aug. 2, 1909 Letter from Assistant Secretary to Commissioner of Indian Affairs); A-976 (Dkt. 191-21, sample 1854 Treaty patent); A-977 (Dkt. 191-22, sample 1854 Treaty patent)

Congress knew of and agreed with the executive branch's decision to allot the Tribes' reservation under the 1854 Treaty rather than the GAA. In fact, Congress passed several specific, targeted statutes that sought to clarify the 1854 Treaty's allotment

process. A-872 (Act of Feb. 11, 1901, 31 Stat. 766); A-873 (Act of Feb. 3, 1903, 32 Stat. 795); A-877 (Act of Mar. 2, 1907, 34 Stat. 1217); A-884 (Act of Apr. 12, 1924, 43 Stat. 92); A-67 to A-71 (Dkt. 173, PFOF ¶¶ 219-241). Of note, these statutes almost universally required the consent of the Tribe to become applicable, or were specifically requested by the Tribes.

IV. Relevant Procedural History.

The Tribes filed this action in response to the State's attempts to impose state real-property taxes on lands within their reservation boundaries that are held in fee simple by the Tribes or their citizens (again, the "Reservation Fee Lands"). In their Complaint, the Tribes argued that the 1854 Treaty precludes state taxation of these lands. While Congress has the authority to abrogate an Indian treaty, it must do so in unmistakably clear terms. No such statute has abrogated the Tribes' treaty rights here, and therefore, the State cannot impose the tax. Alternatively, the Tribes argued that even if the 1854 Treaty did not preclude taxation of Reservation Fee Lands, the U.S. Supreme Court has held that the legal incidence of a state tax cannot fall on a tribe or its citizens within Indian country unless it has been explicitly authorized by Congress. Because neither the GAA nor the Burke Act applied to the Tribes' reservations, there was no statute authorizing the taxation in this case.

The Tribes and State Defendants Tony Evers and Peter Barca filed cross-motions for summary judgment. Dkt. 156 (Tribes' Motion); Dkt. 149 (State's Motion). The Tribes'

motion was supported by extensive historical evidence, including the expert witness reports submitted by Dr. Anton Treuer (historian and linguist), Dr. John Bowes (historian), and Dr. Michael Sullivan (linguist). The Tribes' proposed findings of fact were not disputed by the State. A-1 to A-73 (Dkt. 173, PFOF excerpts); A-74 to A-101 (Dkt. 208, Supp. PFOF excerpts). The State did not dispute any of these historical facts. District Court Op. at 3; Dkt. 203. On April 9, 2021, the District Court, the Honorable James D. Peterson presiding, issued its Decision and Order (the "Decision") on the parties' motions, Dkt. 245, and entered its judgment. Dkt. 246. The Decision granted the Tribes' motion for summary judgment in part and denied its motion in part.

V. Rulings Presented for Review.

In the Decision, the District Court determined that the "[t]axation of Ojibwe reservation land is inconsistent with the permanency promised in the 1854 treaty." Decision at 13 (Dkt. 345). As a negotiated part of the treaty, this treaty-guaranteed right would have to be abrogated by Congress using language of "pointed clarity," *id.* at 14, and that clarity did not exist in the GAA, the Burke Act, or any other federal statute. *Id.* at 18. As a result, the treaty right precluding state taxation remained. The District Court went on to find, however, that this right no longer existed if, at some point after 1854, the reservation land had passed into non-Indian hands. "[T]he act of selling that property surrenders that permanent right." *Id.* at 22. Additionally, the District Court concluded that once the property had passed into non-Indian hands and was freely

alienable, if it was later reacquired by the Tribes or their citizens, it remained taxable by the State. Thus, the District Court declared that the State may not impose state property taxes on Indian-owned reservation property unless that property has previously been in non-Indian ownership. *Id.* at 24.

Summary of the Argument

The Lake Superior Ojibwe ceded millions of acres of land in an 1854 Treaty with the United States in exchange for the guarantee that they would never again face the threat of removal from their homes. They were promised "permanent homes," and the treaty explicitly stated that they would never be removed therefrom. It is not surprising then, that the U.S. Court of Appeals for the Sixth Circuit long ago held that this same treaty precluded the State of Michigan from taxing reservation lands held in fee simple by another signatory tribe.

The District Court's decision is in conflict with that Sixth Circuit decision. It held that the State of Wisconsin could impose its real property taxes on fee lands held by the Tribes and their citizens so long as the chain of title included at least one non-Indian owner. This decision must be reversed because it is contrary to well established principals of treaty interpretation, as well as the rules governing state taxation of Indian-owned property. Since the treaty does not mention taxation, and neither taxation nor the impact of the sale of reservation lands to non-Indians was explained to the Tribes during negotiations, the original Indian understanding of the treaty does not

comport with the District Court's decision. And regardless, states cannot tax Indians within Indian country unless Congress has explicitly authorized the tax. No authorizing federal statute exists here.

Standard of Review

This Court reviews cross-motions for summary judgment *de novo*. *Woodring v. Jackson Cty.*, 986 F.3d 979, 984 (7th Cir. 2021); *Metro. Life Ins. Co. v. Johnson*, 297 F.3d 558, 561 (7th Cir. 2002); *Ozlowski v. Henderson*, 237 F.3d 837, 839 (7th Cir. 2000). On cross-motions for summary judgment, the relevant facts are undisputed by the parties and the issues turn only on questions of law. *Patriotic Veterans, Inc., v. State of Indiana*, 736 F.3d 1041, 1045 (7th Cir. 2013). Here, in fact, the State didn't dispute *any* of the proposed findings of fact offered by the Tribes. Dkt. 203; Decision at 3. All inferences should be made "in the light most favorable to the nonmoving party on each motion." *Wis. Alumni Research Found. v. Xenon Pharm., Inc.*, 591 F.3d 876, 882 (7th Cir. 2010). As applied here, the standard of review thus requires that all inferences be drawn in favor of the Tribes on that portion of the District Court's judgment that upheld the State's authority to tax Indian-owned reservation fee lands that have, at any time since 1854, been in non-Indian ownership.

Argument

I. The 1854 Treaty Precludes Taxation of Reservation Land Held by the Tribes or its Members.

The District Court acknowledges that "[t]he critical concern for the Ojibwe in treaty negotiations was to secure permanent homes on reservation land to preclude any future removal." Decision at 4. The District Court also admits that "[t]axation of Ojibwe reservation land is inconsistent with the permanency promised in the 1854 treaty." *Id.* at 13. Thus, it concluded that "the tax immunity of the tribes' reservation land was not merely a matter of congressional silence, but a negotiated part of the 1854 treaty," and "congressional intent to rescind treaty-granted tax immunity would have to be expressed with particular pointed clarity." *Id.* at 14.

This is certainly true. Under the U.S. Constitution, Indian treaties "shall be the supreme Law of the Land." U.S. Const. art. VI, cl. 2. While Congress may unilaterally abrogate a treaty right, *U.S. v. Dion*, 476 U.S. 734, 738-40 (1986), the Supreme Court has consistently held that it must clearly express its intent to do so. *Mille Lacs*, 526 U.S. at 202; *Menominee Tribe v. U.S.*, 391 U.S. 404, 413 (1968). Express language is preferred, *Dion*, 476 U.S. at 739, and arguably, following the Supreme Court's recent decision in *McGirt v. Oklahoma*, it may be required. 140 S. Ct. 2452, 2482 (2020) (noting that "[i]f Congress wishes to withdraw its promises, it must say so"). At a minimum, however, there must be "clear evidence that Congress actually considered the conflict between its

intended action on the one hand and Indian treaty rights on the other and chose to resolve that conflict by abrogating the treaty." *Dion*, 476 U.S. at 739-40.

Congress has not abrogated the Tribes' rights under the 1854 Treaty. While the State argued that the GAA, as amended by the Burke Act, abrogated any right to be free from state real-property taxation, the District Court disagreed and found those statutes inapplicable. Since no cross-appeal was filed, that argument is no longer a live one. *Lewert v. P.F. Chang's China Bistro, Inc.*, 819 F.3d 963, 970 (7th Cir. 2016) (noting that "an 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"). Yet the District Court ultimately concluded that the Tribes only retained a right to hold their reservation lands without paying state taxes if they had never before been in non-Indian ownership. The District Court erred in defining the scope of the treaty right, because it failed to appropriately apply the Indian canons of treaty construction, and did not base its decision on record evidence.

A. The District Court Failed to Interpret the Treaty Based on the Original Indian Understanding.

When interpreting treaties, courts must begin with the text. *Water Splash, Inc. v. Menon,* 137 S. Ct. 1504, 1508 (2017). But since a treaty is a contract between nations rather than an ordinary legislative act, the U.S. Supreme Court also considers the context of a treaty's negotiation and adoption to ensure its interpretation is consistent with the shared expectations of the contracting parties. *Olympic Airways v. Husain*, 540

U.S. 644, 650 (2004). Particularly where the parties to a treaty did not share a common language or legal heritage, the Court looks to the treaty's negotiating history to supplement its textual analysis. *Air France v. Saks*, 470 U.S. 392, 400 (1985).

This approach is used when interpreting treaties between the United States and Indian tribes, but it is expanded by special canons of construction. The first and most important canon requires courts to interpret Indian treaties as the tribal negotiators would have understood them. *Mille Lacs Band*, 526 U.S. at 196; *Washington State Dep't of Licensing v. Cougar Den*, 139 S. Ct. 1000, 1016 (2019) (Gorsuch, J., concurring) (noting that the court is "charged with adopting the interpretation most consistent with the treaty's original meaning" and that it must "give effect to the terms as the Indians themselves would have understood them"). Like the analysis for treaty interpretation in general, this requires the court to "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.'" *Id*. (quoting *Choctaw Nation v. United States*, 318 U.S. 423, 432 (1943)). But unique to Indian treaty interpretation is the special focus on one side's understanding: the tribal negotiators.

The Supreme Court has created this special approach to Indian treaty interpretation, in part, because treaties were written and negotiated in English, even though few if any tribal members understood that language. The language barrier forced tribes to rely on interpreters provided by the United States. *Jones v. Meehan*, 175 U.S. 1, 10-11 (1899);

Worcester v. Georgia, 31 U.S. 515, 551 (1832). These interpreters often had their own conflicting agendas, as well as difficulties in translating a treaty's terms into tribal languages. Kristen A. Carpenter, *Interpretive Sovereignty: A Research Agenda*, 33 Am. Indian L. Rev. 111, 115-16 & n.24 (2008-09) (noting that certain concepts, such as fee patents or the sale of land, may not have been capable of being translated into Native languages); *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 676, 667 n.10 (1979) (noting translation difficulties given the limited vocabulary of the trade jargon being used). As a result, it is the United States who should bear the burden of establishing that the terms of the treaty and their technical effects were adequately explained to the tribes. *Choctaw Nation v. United States*, 119 U.S. 1, 28 ("How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction"); *United States v. Shoshone Tribe*, 304 U.S. 111, 116 (1938) (noting that treaties "are not to be interpreted narrowly, as sometimes may be writings expressed in words of art employed by conveyancers, but are to be construed in the sense in which naturally the Indians would understand them.").

The District Court acknowledged that it was required to "consider the historical context of the treaty." Decision at 9. But rather than interpret the Treaty in accordance with its original Indian understanding, the court claimed that it was "particularly skeptical of attempts to ascribe specific knowledge or intent to the Indians who

negotiated the 1854 treaty." *Id.* The court claimed that "[w]e have a great deal of evidence about the United States' objectives because it policies were expressed and recorded, but evidence from the Indian side is relatively sparse." *Id.* Actually, there is robust evidence of the Indian understanding of the 1854 Treaty. This understanding can be readily seen in the writings of both Indians and non-Indians alike.

For many years leading up to the 1854 Treaty, federal officials attempted to remove the Tribes to a location west of the Mississippi River. The Tribes refused, and consistently asserted their desire to receive a permanent homeland from which they could never be removed:

- In 1848, several representatives of the Lake Superior Ojibwe traveled to Washington D.C. and submitted written and pictorial petitions to Congress and the President seeking lands "covering the graves of our fathers, our sugar orchards, and our rice lakes and rivers," which were to be "the permanent home of our people." A-23 (Dkt. 173, PFOF ¶¶ 84, 87); A-237 to A-239 (Treuer Rep. Dkt. 83, at 30-32); A-645 to A-655 (Schoolcraft description of symbolic pictographs).
- In 1851, after President Taylor issued an order directing the removal of the Lake Superior Ojibwe to western lands, the chiefs of various bands once again petitioned the President seeking the ability to stay in their homeland. They insisted that they had not agreed to remove westward during the 1842 Treaty

negotiations and stated simply: "[w]e love our old homes, and we know you love your home. Now have pity on us." A-656 to A-657 (Dkt. 189-57, Sept. 1, 1851 Petition).

- In 1852, a small delegation of Lake Superior Ojibwe traveled to Washington, D.C. They once again advocated for an end to the removal policy, indicating that they had never agreed to remove in the 1842 Treaty, and that they had not harmed any whites with their presence. A-658 to A-666 (June 1852 Petitions); A-246 to A-248 (Treuer Rep. Dkt. 83, at 39-41). This delegation is notable in that it included Chief Buffalo, one of the signatories to the 1854 Treaty, as well as Benjamin Armstrong and George Johnston, both of whom served as interpreters during the 1854 Treaty negotiations. A-29 (Dkt. 173, PFOF ¶¶ 100-104).
- In an 1853 petition, the Lake Superior Ojibwe once again asked to be guaranteed "permanent settlements . . . which shall be our own & may not be overflowed by the multitudes who come from your cities and towns to dwell in the forests." A-33 to A-34 (Dkt. 173, PFOF ¶ 114).

Federal agents understood the wishes of the Lake Superior Ojibwe, and they repeated those wishes in their own writings. In 1853, Indian Agent Henry Gilbert wrote, after meeting with the Lake Superior Ojibwe to deliver their annuities, that the threat of removal was "the great terror of their lives," and that they "will sooner submit to

extermination than to comply with it." A-34 (Dkt. 173, PFOF ¶ 119); A-668 to A-674 (Dkt. 190-12, Gilbert to Manypenny, Dec. 10, 1853). Likewise, Commissioner of Indian Affairs George Manypenny acknowledged in his 1854 annual report to Congress that the Lake Superior Ojibwe were "very unwilling to relinquish their present residences," and if the United States was to obtain their remaining mineral-rich lands, they would have to "permit them all to remain" on permanent reservations within their homelands. A-35 (Dkt. 173, PFOF ¶ 123).

There is also ample evidence of the discussions that occurred during the 1854 Treaty negotiations. Benjamin Armstrong, who served as an informal interpreter during the negotiations wrote of "the Indians' unwillingness to give up and forsake their old burying grounds," and noted that they had insisted that they receive permanent homes before ceding any land to the United States. A-38 (Dkt. 173, PFOF ¶ 133). Henry Gilbert wrote to Commissioner Manypenny and described the negotiations by stating:

> We found that the points most strenuously insisted upon by them were first the privilege of remaining in the country where they reside and next the appropriation of land for their future homes. Without yielding these two points, it was idle for us to talk about a treaty. We therefore agreed to the selection of lands for them in territory heretofore ceded.

A-830 (Gilbert Oct. 17, 1854 Letter). And in the *Statement Made by the Indians*, a document written in English and Ojibwe and forwarded to federal officials in Washington, D.C. in 1864, the Lake Superior Ojibwe noted that they were promised that their reservations would be their permanent homes, were "you shall live as long as

there is one Indian left," and where "you will never be removed from your reservation, nor never ordered to leave it." A-589 & A-591 (Nichols, *Statement Made by the Indians*, at 23, 25).

The ample and uncontroverted evidence of the Indian understanding of the 1854 Treaty indicates that the Lake Superior Ojibwe explicitly negotiated for permanent reservations from which they would never be forced to remove. Allowing taxation of their lands – and removal of them for failure to pay taxes – would eviscerate this core treaty promise.

B. The District Court's Conclusion that the Tribes' Treaty Rights Would be Severed if Non-Indians Ever Possessed the Land, is Not Supported by Record Evidence.

While the District Court acknowledged the Tribes' right to tax immunity was a "negotiated part of the 1854 treaty," Decision at 14, it claimed that this right was terminated if the land ever passed into non-Indian hands. As discussed above, treaty abrogation requires clear Congressional action. *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2482 (2020). No such language is pointed to here in any federal statute. Instead, the District Court appears to have narrowly construed the scope of the treaty right. The court wrote that it is "a stretch," to argue that the Indian signatories "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," Decision at 22, and that "[a]n Indian purchaser

who follows a non-Indian owner cannot really clam entitlement to the permanency granted in the 1854 treaty." *Id.*

But the State did not point to any record evidence showing that the Indian treaty negotiators *would* have understood that non-Indian ownership would result in taxation of Reservation Fee Lands. In fact, there is no evidence that:

- Federal negotiators explained the allotment provision of the 1854 Treaty;
- Tribal signatories understood the concept of taxation of land;
- Tribal signatories understood that their reservation lands could ever be subject to state taxation;
- Tribal signatories understood that the failure to pay taxes would result in losing their land; or
- Tribal signatories understood that allowing non-Indians to reside on their reservations could result in the loss of treaty rights.

The only evidence that does exist on these subjects establishes that the converse is true. Commissioner Manypenny told the Tribes that, with respect to a white man living on their reservations: "as long as you are satisfied for him to stay he might, but the moment you wish him to go he would go." A-591. There is no indication that Manypenny informed the Tribes that the presence of non-Indians on their reservations would nullify their hard-fought treaty right. When a Lake Superior Chief asked Commissioner Manypenny to "[a]ssure us, if thou canst, that this piece of land,

reserved for us, will really always be left to us," "and that you will never ask this land from us." A-47 (Dkt. 173, PFOF ¶ 166). Commissioner Manypenny gave those assurances, noting that "[n]ext Summer you will receive 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," and "[a]s long as there is one Indian living . . . he [will] be allowed to own the lands." A-48 (Dkt. 173, PFOF ¶ 168).

The long-standing canons applied by the Supreme Court to Indian treaties require that treaty provisions be liberally interpreted in favor of the Indians. As early as 1832, in *Worcester v. Georgia*, the Court instructed that, if the context of a treaty suggests its language can be extended beyond its "plain import," then the language must be interpreted with that broader understanding. 31 U.S. at 582. This rule is derived from the unique trust relationship between the United States and the Indians. *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985). Additionally, ambiguities should be "resolved from the standpoint of the Indians," *Winters v. United States*, 207 U.S. 564, 576 (1908). Since the Indians were never told that the mere sale or inheritance of reservation lands by non-Indians would compromise their rights to permanency and non-removal, those actions should not restrict their rights. The District Court's decision should be reversed.

II. In the Alternative, the State may not tax Reservation Fee Lands because Congress has not Authorized such Taxation.

The U.S. Supreme Court has adopted a categorial rule that precludes states from levying a tax on an Indian tribe, tribal member, or their property within Indian country, unless Congress has authorized the tax. *Oklahoma Tax Comm'n v. Chickasaw* Nation, 515 U.S. 450, 459 (1995); *Cohen's Handbook of Federal Indian Law* §8.03[1][c], at 700 (Nell Jessup Newton ed. 2012). Congress will only be found to have authorized a tax if it has made its intention to do so in "unmistakably clear" language. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 765 (1985). This test stands in sharp contrast to a state's ability to tax non-Indians within Indian country, which is presumed, unless preempted by federal law or precluded by the balance of federal, state, and tribal interests. *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980).

The bar for "unmistakably clear" authorization to tax is a high one. *See, e.g.*, *Bryan v. Itasca County*, 426 U.S. 373, 392-93 (1976) (holding that Public Law 280 did not authorize states to impose personal property taxes on mobile homes within reservation boundaries); *Blackfeet Tribe*, 471 U.S. at 763-64, 768 (holding that Indian royalty interests from mineral production on reservation lands were not taxable by the state where the lease was issued under the 1938 Act that contained no authorization to tax, even though an earlier 1924 Act contained an explicit taxation provision). For example, a federal statute that authorized state sales tax on gasoline sold on "military or other

reservations" has been held insufficient to authorize the taxation of such sales by tribal members within Indian reservations. The word "reservation" did not necessarily include Indian reservations, and was therefore too ambiguous to provide the required "unmistakably clear" Congressional authorization. *Coeur D'Alene Tribe v. Hammond*, 384 F.3d 674, 688 (9th Cir. 2004); *Pourier v. S.D. Dep't of Revenue*, 658 N.W.2d 395 (S.D. 2003), *opinion vacated in part*, 674 N.W.2d 213 (2004) (vacating statute-of-limitations portion of earlier opinion).

There is no federal statute that generally authorizes state taxation of Indian-owned fee-simply property. On many occasions, Congress passed legislation that authorized the taxation of property on specific reservations under specific circumstances.[1] In

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[1] *See, e.g.*, Act of June 1, 1872, 17 Stat. 213, 214 (authorizing the "partition" of a Miami Indian reservation and providing that "the same shall be subject to taxation as other property under the laws of the State of Indiana on and after [January 1, 1881]"); Act of July 1, 1902, 32 Stat. 636, 640 (allotting the Kansas or Kaw tribe's reservation in the Territory of Oklahoma and stating that the Secretary of the Interior could issue a certificate to any adult tribal member authorizing him to sell his allotted land, "*Provided*, That upon the issuance of said certificate, the lands of such member, both homestead and surplus, shall become subject to taxation"); Act of March 8, 1906, 34 Stat. 55, 56 (authorizing the allotment of lands on the "Columbia and Colville reservations" and expressly stating that "[a]ll allotted land alienated under the provisions of the Act shall thereupon be subject to taxation under the laws of the State of Washington"); Act of June 21, 1906, 34 Stat. 325, 353 (stating that "all restrictions as to sale, incumbrance, or taxation for allotments within the White Earth Reservation in the State of Minnesota, now or hereafter held by adult mixed-blood Indians, are hereby removed"); Act of June 21, 1906, 34 Stat. 325, 381 (authorizing the Secretary of the Interior to "issue a patent in fee to any Indian of the Oneida Reservation in Wisconsin for the lands heretofore allotted him, and the issuance of such patent shall operate as a removal of all

addition to reservation-specific statutes, Congress enacted general statutes such as the General Allotment Act of 1887, 24 Stat. 388 (Feb. 8, 1887), as amended by the Burke Act of 1906, 34 Stat. 182. The GAA authorized the President to allot reservations which, "in his opinion," were "advantageous for agricultural and grazing purposes." GAA, §1, 24 Stat. at 388. While such allotments were initially held in trust by the United States for the benefit of the individual tribal member, and thus, untaxable, when fee simple patents were issued upon the expiration of a 25-year trust period or an earlier declaration of "competency," those lands were expressly made taxable by the states. Section 6 of the Burke Act plainly provided that when a fee patent was issued under the statute, "all restrictions as to sale, incumbrance, or taxation of said land shall be removed."

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restrictions as to the sale, taxation, and alienation of the lands so patented"); Act of March 3, 1909, 35 Stat. 751, 752 (authorizing the alienation of Quapaw lands and providing that the Secretary of the Interior was "authorized to issue a patent in fee simple to the purchaser or purchasers of said lands, and all restrictions as to the sale, incumbrance, and taxation of said land shall thereupon be removed"); Act of May 6, 1910, 36 Stat. 348 (authorizing the taxation of certain lands allotted to members of the Omaha Tribe of Nebraska, but also providing that such taxes be released and discharged if they remained unpaid for a period of one year and the Indian allottee did not have any trust funds held for his or her benefit by the federal government to pay such taxes); Act of June 4, 1924, 43 Stat. 376, 381 ("[A]ll lands, and other property, of the [Eastern Band of Cherokee], or the members thereof, except funds held in trust by the United States, may be taxed by the State of North Carolina[.]").

Not surprisingly, the U.S. Supreme Court concluded that the GAA (as amended by the Burke Act), provided "unmistakably clear" Congressional intent to authorize state taxation of lands allotted and patented in fee under those statutes. *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 259 (1992). But neither the General Allotment Act nor the Burke Act applied to the Tribes' reservations. On multiple occasions, federal officials – including the President of the United States – concluded that the Tribes' reservations were not "advantageous for agricultural and grazing purposes," and thus, they could not be allotted under the GAA. Instead, the Tribes' reservations were allotted under Article III of the 1854 Treaty.

While the State argued otherwise below, the District Court agreed with the Tribes on this point. The District Court noted that "[t]he text of the General Allotment Act does not provide much support for the state's position," since it provided the President with discretion to allot reservations according to its terms; it did not mandate that result. Decision at 14. Additionally, the historical record demonstrates that the Tribes' reservations were not allotted under the GAA, and in fact, Congress passed a series of statutes specifically directing that allotments be provided to Tribal members under the terms of the 1854 Treaty rather than the General Allotment Act. *Id.* at 15-17. Thus, the District Court was "not persuaded that any . . . statutes cited by the state establish that the General Allotment Act applies to all allotments made after 1887." *Id.* at 18.

The State did not file a cross-appeal, and therefore, they cannot make any argument before this Court that either increases their own rights or diminishes the Tribes' rights. *Lewert*, 819 F.3d at 970; *EEOC v. Chicago Club*, 86 F.3d 1423 (7th Cir. 1996); *Morley Co. v. Maryland Casualty Co.*, 300 U.S. 185 (1937). As a result, the State cannot continue to claim that the GAA, the Burke Act, or any other federal statute authorizes the taxation of Reservation Fee Lands, because in doing so, they would be seeking to alter the relief provided to the Tribes by the District Court's order. The District Court concluded:

> The state has not shown that Congress has expressed, with unmistakable clarity, the intent to tax land that was allotted under the 1854 treaty. Even if tax immunity was not negotiated as an implicit term of the 1854 treaty, Congress remained silent on taxation of the plaintiff tribes' reservations even after the 1887 General Allotment Act because it did not invoke the General Allotment Act with respect to allotment on the tribes' reservations. And the state has certainly not shown that Congress intended to repudiate any tax immunity that was granted to the tribes in the 1854 treaty, which would require an even more pointed expression of congressional intent. Accordingly, the court holds that Indian-owned real property in the tribes' reservations is not taxable by the state or its municipalities – so long as that land has remained in Indian ownership since allotment.

Decision at 20; *see also id.* at 24-25 (noting in its order that generally, the "defendants may not impose state property taxes on Indian-owned reservation property").

Instead, this Court's review of the District Court's decision is limited to its conclusion that Reservation Fee Lands are taxable by the State, if at any point since allotment, that property was held by non-Indians. This decision is in error.

The District Court concluded that the State could tax reservation lands currently held in fee simple by the Tribes or their citizens, if at any point since their allotment

under the 1854 Treaty, those lands were held by non-Indians. In doing so, the District Court purported to rely on the U.S. Supreme Court's decision in *Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103 (1998). That decision, however, does not support the District Court's judgment.

Cass County centered on the taxability of fee-simple land that had recently been reacquired by the Leech Lake Band within the boundaries of its reservation. The Leech Lake Reservation was set aside by an 1855 treaty between the Band and the United States. *Id.* at 106. But unlike in the present case, the Leech Lake Reservation was allotted under a Congressional statute, rather than a treaty. In 1889, Congress passed the Nelson Act, 25 Stat. 642 (1889), which provided that the Leech Lake Reservation should be allotted "in conformity with the [General Allotment Act]." § 3, 25 Stat. at 643. Congress passed the Nelson Act, a Minnesota-specific statute, because Section 5 of the GAA Act provided that after reservations were allotted to tribal members according to the terms of the GAA, if there were "surplus" lands remaining, the Secretary of the Interior could negotiate with the tribe to purchase those lands. But any such negotiated agreement was not valid until ratified by Congress through legislation. GAA, § 5, at A-888. The Nelson Act, then, is Congressional ratification of a negotiated agreement between the Leech Lake Band and the United States, which resulted in the sale of reservation lands to non-Indians.

The U.S. Court of Appeals for the Eighth Circuit had easily held, using existing precedent, that land allotted to individual tribal members under the Nelson Act (and by reference, the General Allotment Act) was taxable by the state of Minnesota, since those statutes expressly authorize state taxation, and the Supreme Court had already held as much in *County of Yakima*. The real question in *Cass County*, however, was whether surplus lands that had been sold directly to non-Indians under the Nelson Act, were taxable today, if they were reacquired by the Leech Lake Band or its citizens. There was no express taxation language regarding these lands in the Nelson Act, and as a result, the Eighth Circuit said no. *Leech Lake Band of Chippewa Indians v. Cass County*, 108 F.3d 820 (8th Cir. 1997). But the U.S. Supreme Court reversed.

The Supreme Court began its analysis in *Cass County* on familiar grounds. It noted that "[w]e have consistently declined to find that Congress has authorized [state] taxation [of Indian-owned property] unless it has made its intention to do so unmistakably clear." *Cass County*, 524 U.S. at 110. The Court concluded, however, that Congress did not have to use the magic word – "taxation" – in order to make its intent clear. Rather, "when Congress makes reservation lands freely alienable, it is 'unmistakably clear' that Congress intends that land to be taxable by state and local governments, unless a contrary intent is 'clearly manifested.'" *Id.* at 113. Key to the Court's analysis, however, was that *Congress* had passed the Nelson Act, a *federal statute*

that sold the land in question to non-Indians. The Court repeated the key ingredient here – Congressional action – again and again:

> The Band essentially argues that, although its tax immunity lay dormant during the period when the eight parcels were held by non-Indians, its reacquisition of the lands in fee rendered them nontaxable once again. We reject this contention. As explained, once *Congress* has demonstrated (as it has here) a clear intent to subject the land to taxation by making it alienable, *Congress* must make an unmistakably clear statement in order to make it nontaxable.

Id. at 113-14 (emphasis added). Thus, *Cass County* still required *Congress* to demonstrate "unmistakably clear" intent to authorize state taxation of Indian-owned property.

Allotments on the Tribes' reservations were issued under the 1854 Treaty and alienated under the terms of the 1854 Treaty. Article III of the Treaty provided that the President may place "such restrictions of the power of alienation as he may see fit to impose." 10 Stat. 649. Each of the patents issued under Article III of the Treaty stated that the allottee "shall not sell, lease, or in any manner alienate, said Tract without the consent of the President of the United States." *E.g.*, A-270 (Treuer Rep., Dkt. 83 at 63 (Figure 22, displaying patent issued to Bi dwi wa ashi – Lac du Flambeau Reservation)). Consequently, if an allottee sought to alienate his allotment, his request (which was typically first presented to the Indian Agent in charge of his tribe's reservation), was forwarded to the President. The President, after considering many factors in his discretion, including the value of the land, the "competency" of the allottee, and the location of the allottee's residence, could then approve or deny the request to alienate

the land. A-414 to A-421 (Treuer R. Rep., Dkt. 96 at 11-18). As a result, the mere possession of a non-Indian owner in the chain of title is not evidence that Reservation Fee Lands are now taxable. Land was routinely alienated to Indians and non-Indians alike through Presidential, *not* Congressional action.

The District Court readily admits this, but claims the distinction does not matter:

> There is a distinction between the private parcels at issue in *Cass County* and the private parcels at issue in this case. In *Cass County*, it was an act of Congress that initially made the parcels freely alienable. Here, the initial alienability was the result of the 1854 Treaty of La Pointe. . . . 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.

District Court Op. at 22. But it *does* matter. As noted above, states are generally permitted to tax non-Indians when they use or purchase goods or property. *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980). It is a rare case where such a tax is preempted by federal law. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980). On the other hand, states are *never* permitted to tax tribes or their citizens within Indian country unless *Congress* has clearly authorized the tax. This is because Congress has "plenary and exclusive" power over Indian affairs, not the President or other executive branch officials. *See, e.g., United States v. Lara*, 541 U.S. 193, 194, 200 (2004); *see also Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903) (holding "Plenary authority over the tribal relations of the Indians has been exercised by Congress from the

beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government.").

The Supreme Court has never required tribes or tribal members to, for example, prove that the motor vehicle, gasoline, cigarette, or real property they are purchasing or using has always been in the hands of Indians. Tax immunity is determined based on the owner, not to the property itself. Because Congress did not authorize the State of Wisconsin to tax Reservation Fee Lands, the District Court's decision must be reversed.

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 2nd day of July, 2021

Respectfully submitted,

/s/ Colette Routel

Colette Routel
Director, Indian Law Litigation Clinic
Mitchell Hamline School of Law
875 Summit Avenue
St. Paul, MN 55105
Ph: (651) 290-6327
Email: colette.routel@mitchellhamline.edu

Counsel for all Plaintiffs

Vanya S. Hogen
Andrew Adams III
Peter J. Rademacher
Leah K. Jurss
Hogen Adams PLLC
1935 W. County Road B2, 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

Counsel for all Plaintiffs

Kekek Jason Stark
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: Kekek.Jason.Stark@lco-nsn.gov
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

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

Certificate of Compliance

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Dated: July 2, 2021

/s/ Colette Routel
Colette Routel

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/ Colette Routel
Colette Routel

Certificate of Service

I hereby certify that on July 2, 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/ Colette Routel
Colette Routel

Appendix

Table of Contents to the Appendix

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

LAC COURTE OREILLES BAND OF LAKE SUPERIOR CHIPPEWA INDIANS OF WISCONSIN, LAC DU FLAMBEAU BAND OF LAKE SUPERIOR CHIPPEWA INDIANS OF THE LAC DU FLAMBEAU RESERVATION OF WISCONSIN, RED CLIFF BAND OF LAKE SUPERIOR CHIPPEWA INDIANS OF WISCONSIN, and BAD RIVER BAND OF LAKE SUPERIOR TRIBE OF CHIPPEWA INDIANS OF THE BAD RIVER RESERVATION, WISCONSIN,

Plaintiffs,

v.

TONY EVERS, PETER BARCA, TOWN OF BASS LAKE, TOWN OF HAYWARD, TOWN OF LAC DU FLAMBEAU, TOWN OF SANBORN, TOWN OF RUSSELL, TOWN OF ASHLAND, TOWN OF WHITE RIVER, TOWN OF GINGLES, TOWN OF BOULDER JUNCTION, TOWN OF MERCER, TOWN OF SHERMAN, SCOTT ZILLMER, WILLIAM MIETZINGER, MICHAEL SCHNAUTZ, CLAUDE RIGLEMON, ASSOCIATED APPRAISAL CONSULTANTS, INC., PAUL CARLSON, and JENNIE MARTEN,

Defendants.

OPINION and ORDER

18-cv-992-jdp

The plaintiffs are four Ojibwe tribes with reservations in northern Wisconsin. Those reservations were established by the 1854 Treaty of La Pointe, which included a provision, common in treaties of the era, by which the President of the United States could allot parcels of reservation land to private ownership by individual Indians. Whether Wisconsin and its municipalities may tax those allotted parcels is the central issue in this case.

The parties agree that reservation property allotted before 1887 is not taxable. The State of Wisconsin contends that any property allotted after 1887 is taxable by virtue of the federal General Allotment Act, enacted that year. And all agree that reservation property allotted under the General Allotment Act is taxable, as the Supreme Court held in *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251 (1992). But the tribes contend that the General Allotment Act does not apply to property on their reservations. Instead, the tribes say that even after 1887 reservation land was allotted pursuant to the 1854 treaty, under which Indian-owned land on the plaintiffs' four reservations is not taxable. The material facts are undisputed, and the case turns primarily on the interpretation and legal effect of the General Allotment Act.

Congress has the authority to repudiate an Indian treaty, and it has the authority to tax Indian-owned reservation property. But to do either, it must express its intent in unmistakably clear terms. The historical record shows that land in the tribes' reservations was allotted pursuant to the 1854 treaty, and the General Allotment Act does not express Congress's intent to usurp rights granted to the tribes under the 1854 treaty, and certainly not in unmistakably clear terms. The court concludes that, generally, Indian-owned property on the plaintiff tribes' reservation is not taxable, following the reasoning of *Keweenaw Bay Indian Community v. Naftaly*, 452 F.3d 514 (6th Cir. 2006), which also addresses taxation of property allotted under the 1854 Treaty of La Pointe. But any property that has been transferred to non-Indian ownership is now taxable, even if it has subsequently returned to Indian ownership. That result is required under *Cass County, Minnesota v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103 (1998), which held that Indian tax immunity does not lie dormant during periods of non-Indian ownership only to be revived when the property returns to Indian ownership.

The four plaintiff tribes seek declaratory and injunctive relief from officers of the State of Wisconsin: Wisconsin Governor Tony Evers and Wisconsin Department of Revenue Secretary Peter Barca. The tribes also seek relief from several Wisconsin townships, and their assessors, who are imposing the disputed taxes.[1] This is a civil matter, brought by federally recognized Indian tribes, arising under the laws and treaties of the United States. Accordingly, the court has subject-matter jurisdiction under 28 U.S.C. §§ 1331 and 1362.

Many motions are before the court, but the main ones are the cross-motions for summary judgment filed by the state, Dkt. 149, and the tribes, Dkt. 156. This opinion begins with brief background, addresses the preliminary motions, and then turns to the main motions for summary judgment.

BACKGROUND

The tribes have submitted a substantial set of background facts pertaining to the history of the tribes, the negotiation of the 1854 treaty, and the state's taxation of Indian land. The state disputes none of these facts. Dkt. 224. It's an important part of Wisconsin history, but few of the facts are material to the issues before the court, so a succinct summary suffices.

As part of a broader campaign to facilitate settlement and westward expansion, the United States negotiated with the Ojibwe (also referred to as the Chippewa) to secure rights to territory near the Great Lakes historically occupied by the Ojibwe, particularly including mining rights in those areas. The negotiations produced a series of treaties, culminating in the

[1] Individual tribe members have filed 41 lawsuits against the Town of Sanborn regarding its past taxation of reservation fee lands, Case Nos. 18-cv-612–623 and 18-cv-625–53 (W.D. Wis.). Those cases have been stayed pending resolution of this case. Once this case, including any appeal, is resolved, the court will lift the stays in those cases.

1854 Treaty of LaPointe. Dkt. 1-3. Under the 1854 treaty, groups of Ojibwe, predecessors of the current plaintiff tribes, ceded more than seven million acres in northeastern Minnesota in exchange for permanent reservations and other compensation. The critical concern for the Ojibwe in the treaty negotiations was to secure permanent homes on reservation land to preclude any future removal. Article 11 of the treaty provided that "the Indians shall not be required to remove from the homes hereby set apart for them."

Article 3 of the treaty addressed allotment, the process by which tribe-owned reservation land could be transferred to ownership by an individual Indian. Under the 1854 treaty, the President of the United States could, at his discretion, allot eighty-acre tracts to individual tribal members with whatever restrictions on alienation that the President determined to impose. The treaty did not expressly address taxation.

As a general matter, allotment was part of the United States' assimilationist policy toward the Indians, by which the federal government intended to encourage Indians to become farmers on their own privately owned land, thereby diminishing the influence and authority of the tribes. Although allotment had been provided for in treaties negotiated with tribes, a generally applicable allotment process was established as a matter of federal statutory law in 1887 with the General Allotment Act, also referred to as the Dawes Act. The General Allotment Act provided, in pertinent part:

> [I]n all cases where any tribe or band of Indians has been, or shall hereafter be, located upon any reservation created for their use, either by treaty stipulation or by virtue of an act of Congress or executive order setting apart the same for their use, the President of the United States be, and he hereby is, authorized, whenever in his opinion any reservation or any part thereof of such Indians is advantageous for agricultural and grazing purposes, to . . . allot the lands in said reservation in severalty to any Indian located thereon . . . .

General Allotment Act, ch. 119, 24 Stat. 388 (1887). Real property on the Ojibwe reservations was allotted to private ownership both before and after enactment of the General Allotment Act on February 8, 1887, a decisive date in the state's tax policy.

The Wisconsin Department of Revenue provides guidance to Wisconsin municipalities concerning taxation, although the municipalities actually impose and collect the property tax. The Department's most recent guidance on the taxation of reservation property is a May 2008 letter to officials in the several northern Wisconsin counties where the plaintiff tribes' reservations are. Dkt. 168-40. The basic advice is that Indian-owned land allotted before 1887 is not taxable; land allotted after that date is. As the advice letter puts it:

> State and local governments may not impose property tax on reservation lands that are owned in fee simple by Native American tribes or tribal members and that were allotted by the 1854 Treaty of La Pointe before February 8, 1887. The lands allotted by the 1854 Treaty include acreage that is within the reservation boundaries of the Lac du Flambeau, Bad River, Lac Courte Oreilles, and Red Cliff. Other tribes did not participate in the 1854 Treaty.
>
> . . .
>
> It is important to note that the 1854 Treaty is tribal and land specific. . . .
>
> . . .
>
> The Attorney General has stated that state and local governments may impose property tax on fee simple reservation land owned by a tribal member or tribe IF the land was allotted pursuant to the General Allotment Act of 1887 after February 8, 1887. Land that was allotted by the Treaty of 1854 before February 8, 1887, is tax exempt.

Dkt. 168-40. The Department was equivocal about land that was allotted under the treaty, sold to a non-tribal member, then purchased by a tribe or tribal member. The letter advises

that such property "would likely be taxable" and recommends that local authorities consult with their attorneys to determine the tax status of property repurchased by Indians. *Id.*, at ¶ 9.

The municipal defendants have followed this guidance and taxed Indian-owned reservation land; the tribes have paid the tax under protest.

PRELIMINARY MOTIONS

A. Motions to dismiss by the municipal defendants

The municipal defendants have filed motions to dismiss the tribes' claims against them under Federal Rule of Civil Procedure 12(b)(6). Dkt. 116; Dkt. 125; Dkt. 128; Dkt. 132; Dkt. 133; Dkt. 145. Several municipal defendants press the same arguments in a motion for summary judgment. Dkt. 192.

Some of the motions to dismiss may be untimely (because some defendants had already answered the complaint without asserting failure to state a claim), but the court can treat an untimely motion to dismiss as a motion for judgment on the pleadings under Rule 12(c). *See Saunders-El v. Rohde*, 778 F.3d 556, 559 (7th Cir. 2015).

Taken together, the motions by municipal defendants raise three arguments why the tribes' claims against them should be dismissed. First, their main argument is that dismissal is required because the municipalities simply follow state guidance in assessing taxes and because any judgment on the state defendants would bind them. But local officials responsible for implementing challenged laws are often named as defendants in lawsuits. *See, e.g., Nordlinger v. Hahn*, 505 U.S. 1 (1992) (county tax assessor named as defendant in suit challenging state formula for assessing property values for property tax purposes); *see also* 74 Am. Jur. 2d Taxpayers' Actions § 67 ("[P]ublic officers whose acts are sought to be enjoined or corrected

are proper and usually necessary and indispensable parties defendant."). So even if the municipal defendants are not necessary parties, they may be permissively joined under Rule 20.

Second, the municipal defendants argue that they are not properly joined as permissive defendants under Rule 20 because the tribes' claims against them are based on individual tax decisions, and the factual disparities among these decisions do not support permissive joinder. But the tribes haven't alleged vastly disparate violations of the same law; they allege consistent conduct among the municipal defendants, through a series of similar and related transactions directed at individual taxpayers. Common questions of law apply to all defendants in this case, and the municipal defendants are properly joined as permissive defendants under Rule 20.

Third, the municipal defendants object that the tribes did not name as defendants all the towns and assessors who would be subject to the court's ruling. The tribes have entered agreements with some municipalities that Indian-owned reservation land will not be taxed, and those municipalities have not been named as defendants. The municipal defendants do not explain why Rule 19, which governs joinder of required parties, would require the tribes to sue towns and assessors who are not engaging in the challenged conduct.

The court will deny the municipal defendants' motions to dismiss and the motion for summary judgment asserting the same arguments.

B. Plaintiff tribes' motion to dismiss the Town of Mercer

The tribes have filed a motion under Federal Rule of Civil Procedure 41(a) to dismiss defendants Town of Mercer and its assessor Paul Carlson because no reservation property lies within the Town of Mercer. Dkt. 128. The tribes seek dismissal without prejudice. The Town of Mercer and Carlson agree that dismissal is appropriate, but they ask that it be with prejudice.

Rule 41(a) can be used only to dismiss the entire action; the appropriate vehicle to remove individual claims or parties is an amended pleading under Rule 15(a). *See Taylor v. Brown*, 787 F. 3d 851, 857–58 (7th Cir. 2015). So the court will construe the tribes' motion as one to amend their complaint by striking the claims against the Town of Mercer and Carlson, and the court will grant the motion. The court will dismiss these claims without prejudice because the parties agree that the Town of Mercer has no reservation property to tax. Thus, the court lacks jurisdiction because there is no "live case or controversy" with the Town of Mercer for the court to decide. *Burke v. Barnes*, 479 U.S. 361, 363 (1987). When a federal court lacks subject-matter jurisdiction over a claim, it must dismiss that claim without prejudice. *MAO-MSO Recovery II, LLC v. State Farm Mut. Auto. Ins. Co.*, 935 F.3d 573, 581 (7th Cir. 2019).

C. Plaintiff tribes' evidentiary motions

The core historical facts, and the material facts of the state's tax policies and practices, are undisputed. The state didn't dispute any of the facts proposed by the plaintiff tribes. Dkt. 224. But the tribes object to parts of the state's description of the history of the 1854 treaty and federal Indian policy, and they make several motions asking the court to disregard some of the state's evidence.

The tribes move in limine to exclude the expert testimony of Dr. Jay L. Brigham, the state's historical expert. Dkt. 114. Brigham is a Ph.D. historian who now works primarily as an expert witness. Brigham does not have any special expertise in American Indian history, and he has not studied the 1854 treaty or its historical context. The state says that it offers Brigham for the limited purpose of assembling and presenting some historical data about land ownership on the reservations of the plaintiff tribes, and it says that "Dr. Brigham has not offered an

opinion on the ultimate issue of the taxability of unrestricted Indian-owned fee lands which, in any event, is a question of law on which expert testimony is unnecessary." Dkt. 155, at 10. The assembly of the land ownership information is within Brigham's expertise, so the court will admit section IV of Brigham's report. Dkt. 82, at 5–10. The data show that land on the tribes' reservations was allocated both before and after 1887. The court will grant the tribes' motion with respect to the rest of Brigham's report.

The tribes move in limine to exclude two of the opinions offered by Dr. Anthony Gulig, the state's rebuttal expert on the history of the 1854 treaty. Dkt. 217. The challenged opinions concern what the Ojibwe understood about certain topics related to property ownership and taxation during the negotiation of the treaty. The court must consider the historical context of the treaty. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999). But the court is generally skeptical of experts offering opinions on essentially legal issues—in this case, the meaning of the treaty and the legal effect of the General Allotment Act—so it approaches both sides' historical experts with caution. The tribes' brief in support of their motion to limit Gulig's opinions reads more like a further rebuttal report or a closing argument than a proper *Daubert* motion. The tribes offer some good reasons why a trier of fact might reject Gulig's opinions, but the court is not persuaded that his opinions are inadmissible.

That said, the court is particularly skeptical of attempts to ascribe specific knowledge or intent to the Indians who negotiated the 1854 treaty. We have a great deal of evidence about the United States' objectives because its policies were expressed and recorded, but evidence from the Indian side is relatively sparse. The court's purpose in interpreting an Indian treaty is to derive the parties' intent, not to redress past injustices. Nevertheless, Indian treaties must be construed liberally in favor of the Indians. *Oneida Cty., N.Y. v. Oneida Indian Nation of*

N.Y. State, 470 U.S. 226, 247 (1985). Accordingly the court will not rely on Gulig's opinion that the Ojibwe understood that property tax was a necessary implication of the treaty's allotment provision. In any case, the state repeatedly disavows reliance on any disputed historical facts, acknowledging that the case turns primarily on legal issues. The tribes' motion to exclude Gulig's opinion is denied, although the challenged opinions are immaterial to the court's decision on the merits.

The tribes move to strike the portions of the state's summary judgment materials that rely on federal statutes that were not disclosed in response to the tribes' contention discovery. Dkt. 205; Dkt. 226. Contention interrogatories are an appropriate means of getting an opponent's commitment to its litigation positions to prevent sandbagging. A proper response to a contention interrogatory must fairly set out the party's basic positions on the issues; but it does not require exhaustive disclosure of every authority that the party might bring to bear in support of those positions. At summary judgment, both sides cited a vast tapestry of federal legislation and secondary sources in support of their interpretations of the 1854 treaty and the General Allotment Act. The state did not invoke any undisclosed federal statute as a separate new source of its taxation authority. The court sees no sandbagging by the state; the motions are denied.

ANALYSIS

Both the tribes and the state move for summary judgment on the question of whether Indian-owned property on the tribes' reservations is taxable. Summary judgment is appropriate if the moving party shows that the material facts are not in genuine dispute and the party is entitled to judgment as a matter of law. The usual standards apply to cross motions for

summary judgment: the court construes the facts and inferences arising from them in the light most favorable to the non-moving party. *Blow v. Bijora, Inc.*, 855 F.3d 793, 797 (7th Cir. 2017). The parties sharply dispute the conclusions that the court should draw from the long history they present, but the main issue in this case concerns the legal effect of the General Allotment Act, which is a matter of law appropriately resolved on summary judgment.

The tribes also move for summary judgment on the affirmative defenses pleaded by the municipal defendants. Neither the state nor the municipal defendants themselves have responded to this part of the tribes' motion, so that part will be granted as unopposed.

A. General rule for Indian-owned property allotted after 1887

States and municipalities have no power to tax reservation lands unless the tribe has ceded jurisdiction over the land or unless Congress has authorized taxation with "unmistakably clear" intent. *Cty. of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 258 (1992) (quoting *Montana v. Blackfeet Tribe*, 471 U.S. 759, 765 (1985)). The tribes have not ceded jurisdiction, so Indian-owned land on the tribes' reservations can be taxed only under unmistakably clear direction from Congress.

The parties agree on two basic points. First, reservation land allotted under the 1854 treaty before the 1887 enactment of the General Allotment Act is not taxable. Second, reservation land allotted under the authority of the General Allotment Act is taxable, as the Supreme Court held in *Yakima*. The core dispute is whether land allotted *after* enactment of the General Allotment Act is necessarily allotted under the authority of the General Allotment Act and is thus taxable, as the state Department of Revenue has instructed its municipalities for years.

1. Tax immunity of the tribes' land before 1887

The state concedes that land allotted under the 1854 treaty before 1887 is not taxable, consistent with its longstanding guidance to municipalities. But *why* that property is not taxable provides context for the court's analysis of the General Allotment Act, and the parties diverge on that point.

The state does not expressly say why land allotted before 1887 is not taxable. But the court infers that the state's view is that the 1854 treaty is entirely silent on taxation, and there was no congressional expression of intent to tax land on the plaintiff tribes' reservations until the 1887 General Allotment Act. So, for the state, that tax immunity is the result of thirty-three years of congressional silence.

The tribes, by contrast, contend that tax immunity was an implicit but important term of the treaty itself. Recall that the critical concern for the Ojibwe during the treaty negotiation was the establishment of reservations as permanent homes, from which they could not be removed. That concern was reflected in Article 11, which provided that "the Indians shall not be required to remove from the homes hereby set apart for them."

The state makes two counter-arguments, one historical, the other textual. The textual argument is that that Article 11 applies only to the reservations, not to property allocated to individual ownership, because of the use of the word "hereby." Dkt. 202, at 15. The treaty, the argument goes, only established the reservations; the allotments would come later. So the promise of non-removal only applies to what was established "hereby," which is to say by the treaty itself. But equating the term "homes" with the term "reservation" would be a peculiar reading of the term "homes." The term "homes" is used only once in the treaty, and nothing in the treaty suggests that it would be a synonym for "reservations." The treaty also established

entitlements to some individually owned tracts, Article 2, ¶ 6, and the allotment process itself was established by the treaty, so it's not a stretch to consider the to-be-allotted tracts as having been established by the treaty. The reservations themselves were not entirely established by the treaty; the boundaries of some of those were to be set later. Article 2, ¶¶ 3, 4. The court is not persuaded that "hereby" in Article 11 has the limiting effect that the state proposes.

The state's historical argument is based on Gulig's opinion that allotment was important to the tribes because private ownership would protect against non-Indian encroachment and prevent governmental removal. Dkt. 153, at 8. The court has already explained why it will not credit Gulig's specific opinion that, during the negotiation of the treaty, the tribal negotiators understood that private ownership would necessarily entail taxation. The state does not rely on that specific opinion in its briefs, and it makes no attempt to show that taxation of the allotted parcels was authorized by the treaty itself.

The broader context of the treaty supports the tribes' interpretation. Taxation of reservation land implies the government's ability to enforce the tax obligation, by liens, foreclosure, and eviction if necessary. As Chief Justice Marshall observed long ago, "[T]he power to tax involves the power to destroy," *McCulloch v. Maryland*, 17 U.S. 316, 431 (1819), which is one of the principles on which the Supreme Court has based its decisions on the taxability of Indian property. *See Yakima*, 502 U.S. at 257–58. Taxation of Ojibwe reservation land is inconsistent with the permanency promised in the 1854 treaty. This may not be expressly stated, but it is the most reasonable interpretation of the treaty, given the undisputed historical context and the "deeply rooted" principle that United States courts must read treaties and statutes liberally in favor of the Indians. *Oneida County*, 470 U.S. at 247. The Court of Appeals for the Sixth Circuit has endorsed this interpretation, holding that the grant of

permanent homes in the 1854 Treaty of La Pointe bars state taxation of Indian-owned land in the plaintiff tribes' reservations. *Keweenaw Bay Indian Cmty. v. Naftaly*, 452 F.3d 514, 527 (6th Cir. 2006).

The court concludes that before 1887, the tax immunity of the tribes' reservation land was not merely a matter of congressional silence, but a negotiated part of the 1854 treaty. And, as a negotiated part of the treaty, congressional intent to rescind treaty-granted tax immunity would have to be expressed with particularly pointed clarity.

2. The effect of the General Allotment Act on the tax status of the tribes' reservations

The state's main contention can be simply stated: the General Allotment Act applies throughout the United States to any allotment of reservation land occurring after its enactment on February 8, 1887 (subject only to a few explicit exceptions that are not applicable to the plaintiff tribes). It's not clear from the record how much of the plaintiff tribes' reservation property was allotted to individual ownership before 1887, but a substantial amount was allotted after, as Brigham's data and the individual land patents provided by the tribes show.

The text of the General Allotment Act does not provide much support for the state's position. The General Allotment Act is certainly "general" in the sense that it applies to any Indian reservation in the United States, whether created by treaty, act of Congress, or executive order, with only a few specified exceptions. The General Allotment Act gave the President of the United States the authority, without the consent of the tribes, to allot any part of a reservation to individual ownership that in his opinion was "advantageous for agricultural and grazing purposes." The General Allotment Act spelled out many details of the allotment process, including the manner of selecting the allotted parcels and the quantity to be allotted

to individual Indians, depending on family status. It provided that allotted land would be held in trust for 25 years, after which it would be conveyed to the recipient or his heirs "in fee, discharged of said trust and free of all charge or incumbrance whatsoever." And, after amendment by the 1906 Burke Act, the General Allotment Act provided that allocated parcels would be subject to taxation once the restrictions on alienation of the allotted parcel were lifted.

But the General Allotment Act does not state that it withdraws any rights granted by treaty. Congress has nearly complete authority in the area of tribal relations, including the authority to repudiate its own promises and ratified treaties. *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2462 (2020); *Herrera v. Wyoming*, 139 S. Ct. 1686, 1696 (2019). But it cannot do so by implication. "There must be 'clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty.'" *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 203 (1999) (citing *United States v. Dion*, 476 U.S. 734, 740 (1986)). The General Allotment Act does not show that Congress recognized any conflict with the treaty, nor does it express any clear intent to roll back treaty rights.

To the contrary, action by the federal government after 1887 shows that land on the plaintiff tribes' reservations continued to be allotted under the 1854 treaty, not under the General Allotment Act.

Shortly after the General Allotment Act's passage in 1887, President Grover Cleveland granted initial approval for the allotment of land on one of the plaintiff tribes, the Red Cliff Band, under the General Allotment Act. But by 1889, the federal government concluded that allotment of the tribes' land should take place under the 1854 treaty, not the General

Allotment Act, and it continued to allot the tribes' land under the treaty. When Cleveland was asked in 1894 to allot Red Cliff Band reservation land under the General Allotment Act, he refused to do so, stating that he believed that the land could not be allotted under the General Allotment Act. Dkt. 224, ¶¶ 200–11.

Congress also recognized that allotment under that 1854 treaty remained viable after the General Allotment Act. In 1901 and 1903, Congress passed legislation expanding the categories of tribal members who were eligible to receive allotments to include women and children on the Bad River, Lac Courte Oreille, and Lac du Flambeau Bands' reservations. Act of Feb. 11, 1901, ch. 350, 31 Stat. 766; Act of Feb. 3, 1903, ch. 399, 32 Stat. 795. Both acts expressly recognized that allotments on those reservations continued to be subject to the 1854 treaty. The 1901 act provided that "such allotments [were] to be subject in all respects, except as to the age and condition of the allottee, to the provisions of the third article of the treaty with the Chippewas of Lake Superior and the Mississippi, concluded September thirtieth, eighteen hundred and fifty-four." The 1903 act included similar language.

Congress also distinguished allotments made under the 1854 treaty from allotments made under the General Allotment Act. A 1914 act directed the Secretary of the Interior to compile a roll of Indians entitled to allotment on the Bad River Band reservation, and then to complete the allotments. The allotments were to be "made in conformity with the provisions of the treaty of September thirtieth, eighteen hundred and fifty-four . . . and subsequent Acts of Congress relating thereto." Act of Aug. 1, 1914, ch. 222, 38 Stat 582, 605. A 1924 act also directed the Secretary of the Interior to compile a roll of those entitled to allotment and to complete the allotments, this time on the Lac du Flambeau Band reservation. But these allotments were to be "in conformity with the provisions of the General Allotment Act of

February 8, 1887 . . . the trust patents to said allotments to contain the usual twenty-five year restriction clause as to alienation and taxation." Act of May 19, 1924, ch. 158, 43 Stat. 132. Neither party has identified any allotments that were issued under the 1924 act, but the 1924 act shows that Congress saw both the 1854 treaty and the General Allotment Act as available means of allotting property, and that in its legislation it specified which means it intended to use.

The patents granting allotments—both before and after 1887—stated that the allotment was "as contemplated by the Treaty concluded September 30, 1854 with the Chippewa Indians of Lake Superior." Dkt. 1-4 (May 16, 1878); Dkt. 199-22 (June 20, 1881); Dkt. 199-23 (June 24, 1905); Dkt. 199-24 (June 24, 1905); Dkt. 199-21 (June 29, 1905); Dkt. 199-25 (June 29, 1905); Dkt. 1-5 (October 29, 1914). There is no patent in the record that cites the General Allotment Act as the authority for the allotment.[2]

The state argues that other federal statutes show that Congress intended the General Allotment Act to apply generally to all allotments. The state's best example is a 1902 appropriations amendment that addressed allotments in several reservations in Washington, Nevada, and Utah. After these specific allotment provisions, the act provides:

> Insofar as not otherwise specially provided, all allotments in severalty to Indians, outside of the Indian Territory, shall be made in conformity to the provisions of the [General Allotment Act] and other general Acts amendatory thereof or supplemental thereto, and shall be subject to all the restrictions and carry all the privileges incident to allotments made under said Act and other general Acts amendatory thereof or supplemental thereto.

[2] As the tribes note, a patent was issued to Michael Buffalo (Dkt. 199-145) pursuant to a special provision of the 1906 Indian Appropriations Act. That patent did not cite either the 1854 treaty or the General Allotment Act, apparently because the 1906 act provided the pertinent authority.

Act of June 19, 1902, Fifty-Seventh Congress, Sess. 1 Pub. Res. No. 31, 32 Stat. 744. But the court declines to interpret the statement in the 1902 act as broadly as the state urges. The 1902 act includes the exception language "Insofar as not otherwise specially provided." As discussed, after 1902, the President allotted reservation property expressly under the terms of the 1854 treaty. And Congress continued to acknowledge and modify the terms of the 1854 treaty's allotment process in statutes passed after 1902. These statutes and the presidential allotments specifically provided for allotments under the 1854 treaty, so those would be among the exceptions contemplated in the 1902 act. For similar reasons, the court is not persuaded that any of the other statutes cited by the state establish that the General Allotment Act applies to all allotments made after 1887.

The state defendants also contend that *United States v. Payne*, 264 U.S. 446 (1924), shows that all allotments made after the General Allotment Act's passage were made under the General Allotment Act, not under earlier treaties. *Payne* involved a member of the Quileute tribe who sought to compel the federal government to allot him a parcel of timbered land on a Washington reservation under the General Allotment Act. The Supreme Court held that the timbered portions of the reservation could be allotted under the General Allotment Act—despite the statute's restriction to agricultural and grazing land—because the treaty establishing the reservation allowed allotment of all reservation land, including timbered land. The Court determined that the General Allotment Act would control if there were a conflict between the General Allotment Act and the treaty's allotment provisions because the General Allotment Act was the later governmental act. But the Court explained that the General Allotment Act must be "harmonized with the letter and spirit of the treaty" because of the

presumption that Congress will not alter treaty rights without expressly stating its intention to do so. *Id.* at 448.

The reservation in *Payne* was already being allotted under the terms of the General Allotment Act. *See United States v. Mitchell*, 463 U.S. 206, 208 (1983) (describing the history of allotment of the reservation at issue in *Payne*). So the question in that case was whether the federal government could use the General Allotment Act to *deny* a tribal member an allotment of timbered land that was authorized under the treaty. Contrary to the state defendants' characterization of *Payne*, the Court did not hold that all timbered reservation land must be allotted under the General Allotment Act rather than under a treaty. Rather, the Court interpreted the General Allotment Act to preserve the tribe's treaty rights concerning allotment. The state here is attempting what was prohibited in *Payne*: to use the General Allotment Act to eliminate the tribes' treaty-based allotment rights by implication. *Payne* instructs that a construction of the General Allotment Act that would repeal treaty rights by implication "is to be avoided, if possible." *Payne*, 264 U.S. at 449. *Payne* does not support the state's position.

Ultimately, the state's best argument is based on the reasoning of *Yakima*, which is that Congress' unmistakably clear intent to allow state taxation is shown when Congress makes reservation land freely alienable. Some courts have accepted this straightforward logic and held that reservation land made freely alienable, through whatever means, is taxable. *See Lummi Indian Tribe v. Whatcom Cty., Wash.*, 5 F.3d 1355 (9th Cir. 1993), *as amended on denial of reh'g* (Dec. 23, 1993); *Thompson v. Cty. of Franklin*, 314 F.3d 79 (2d Cir. 2002).

But for two reasons the court will follow the approach of *Keweenaw Bay Indian Cmty. v. Naftaly*, 452 F.3d 514 (6th Cir. 2006), which held that the General Allotment Act did not abrogate the tax immunity of land allotted under the 1854 treaty. First, *Naftaly* addresses the

very treaty at issue in this case, the 1854 Treaty of LaPointe. As the state acknowledges in its guidance to municipalities, taxation is tribe- and treaty-specific. Second, *Naftaly* is the better-reasoned decision, with a careful and thorough discussion of the background to the 1854 treaty. As explained above, it was not Congress that authorized the allotment of the property in the plaintiff tribes' reservations; allotment in the Ojibwe reservations was negotiated between the tribes and the United States.

The state has not shown that Congress has expressed, with unmistakable clarity, the intent to tax land that was allotted under the 1854 treaty. Even if tax immunity was not negotiated as an implicit term of the 1854 treaty, Congress remained silent on taxation of the plaintiff tribes' reservations even after the 1887 General Allotment Act because it did not invoke the General Allotment Act with respect to allotment on the tribes' reservations. And the state has certainly not shown that Congress intended to repudiate any tax immunity that was granted to the tribes in the 1854 treaty, which would require an even more pointed expression of congressional intent. Accordingly, the court holds that Indian-owned real property in the tribes' reservations is not taxable by the state or its municipalities—so long as that land has remained in Indian ownership since allotment.

B. Exception for Indian-owned property repurchased from non-tribal owners

The parties agree that reservation property owned by non-Indians is taxable by the state. But the state contends that once reservation property goes to non-Indian ownership, that property is forever taxable, even if subsequently repurchased by a tribal owner. And, the state argues, for such Indian-repurchased property, it doesn't matter whether the allotment was originally made under the 1854 Treaty of La Pointe or under the General Allotment Act.

The state bases its argument on *Cass County, Minnesota v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103 (1998). The case involved 21 parcels of land that had been purchased by the Leech Band of Ojibwe in an effort to rebuild its reservation land base after it had been radically reduced by allotment to private ownership. Thirteen of the parcels had been allotted to ownership by individual Indians as provided under the General Allotment Act, made applicable to that reservation by the Nelson Act of 1889, ch. 24, 25 Stat. 642. Eight parcels were sold directly to non-Indians as allowed under the Nelson Act. The tribe contended that none of the 21 parcels could be taxed by Cass County, Minnesota. The Court of Appeals for the Eighth Circuit held that the parcels allotted under the General Allotment Act were taxable because Congress had expressly indicated its intent to tax those parcels in the 1906 Burke Act amendment to the General Allotment Act. But the parcels that had been sold to non-Indians would not be taxable because those parcels were not sold under the Burke Act, and the Nelson Act included no expression of intent to tax those parcels should they return to tribal ownership. *Leech Lake Band of Chippewa Indians v. Cass Cty., Minn.*, 108 F.3d 820 (8th Cir. 1997).

The Supreme Court held that all 21 parcels were taxable. The Court noted that the Burke Act expressly provided for taxation of those parcels allotted to Indians. But the Court concluded that the critical factor was free alienability: "When Congress makes Indian reservation land freely alienable, it manifests an unmistakably clear intent to render such land subject to state and local taxation." 524 U.S. at 115. Thus, the parcels sold to non-Indians were also taxable because Congress had made those parcels freely alienable, even though the act that allowed the sale said nothing about taxation.

There is a distinction between the private parcels at issue in *Cass County* and the private parcels at issue in this case. In *Cass County*, it was an act of Congress that initially made the

parcels freely alienable. Here, the initial alienability was the result of the 1854 Treaty of La Pointe. For reasons explained above, 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. At that point, the non-Indian owner of the property can claim no rights under the 1854 treaty; the owner then holds title by virtue of the state's ordinary real estate laws. In *Cass County*, the Court explicitly rejected the tribe's argument that "although its tax immunity lay dormant during the period when the eight parcels were held by non-Indians, its reacquisition of the lands in fee rendered them nontaxable once again." 524 U.S. at 113–14. Under *Cass County*, transfer to non-Indian ownership permanently severs the tie between the land and the treaty.

The plaintiff tribes don't have much of an argument on this point. They contend that 1854 treaty allowed the tribes "absolute dominion" over their reservations, including the authority to decide whether whites and "mixed-bloods" would be allowed to live on the reservation. Dkt. 215, at 13. So, the argument goes, 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. That's a stretch. Allowing non-Indians to live on the reservation does not compromise any Indian's permanent right to his or her property. But the act of selling that property surrenders that permanent right. And if the purchaser is a non-Indian, all agree that the property becomes taxable. An Indian purchaser who follows a non-Indian owner cannot really claim entitlement to the permanency granted in the 1854 treaty.

The tribes also argue that the Indian Trade and Intercourse Act of 1790 prohibits taxation of Indian-owned reservation property. That act contained a provision known as the

"Nonintercourse Act" prohibiting the transfer of title to land owned by a tribe or individual Indians except by a federally authorized treaty. The restriction on transfers from individual Indians was rescinded in 1834, but the prohibition on transfers of tribe-owned land endures. 25 U.S.C. § 177. It's hard to see how the current Nonintercourse Act would affect land that has been transferred to individual Indian ownership, and the tribes shift and limit their argument in their opposition brief. Dkt. 215, at 24–25. The tribes contend that, as a factual matter, some Indian-owned property has been taxed and then seized for non-payment of those taxes, a practice that would violate the Nonintercourse Act's bar on transferring title out of Indian ownership. But even if the historical taxation and seizure was wrongful, the tribes do not explain how that past wrong would affect the tax status of property that has now returned to private Indian ownership. The argument is stated in a scant couple of sentences, so the court deems it so underdeveloped that it is forfeited. *See Wine & Canvas Dev., LLC v. Muylle*, 868 F.3d 534, 538 (7th Cir. 2017).

Ultimately, it's hard to square the plaintiff tribes' position on Indian-repurchased property with the principle in *Cass County* that tax immunity does not lie dormant during periods of non-Indian ownership. The state is entitled to summary judgment that reservation land is taxable once it passes to non-Indian ownership, even if it subsequently returns to Indian ownership.

CONCLUSION

The court will grant both the state's and the tribes' motions for summary judgment in part. Indian-owned real property on the tribes' reservations is not taxable if it has been held in

Indian ownership since allotment; the property is taxable once it passes to non-Indian ownership, even if it subsequently returns to Indian ownership.

The court will enter judgment and close this case, but it will stay enforcement of the judgment for 30 days to give the parties the opportunity to appeal. The court will, if requested, grant a stay pending appeal for any portion of the judgment that is actually appealed.

ORDER

IT IS ORDERED that:

1. Defendants Town of Russell and Jennie Marten's motion to dismiss, Dkt. 116, is DENIED.

2. Defendants Town of Boulder Junction and Paul Carlson's motion to dismiss, Dkt. 132, is DENIED.

3. Defendants Town of Lac du Flambeau and Paul Carlson's motion to dismiss, Dkt. 133, is DENIED.

4. Defendants Town of Sherman and Paul Carlson's motion to dismiss, Dkt. 145, is DENIED.

5. Plaintiffs' motion to amend their complaint, Dkt. 128, is GRANTED. Plaintiffs' claims against defendants Town of Mercer and Paul Carlson in his role as Mercer's assessor are struck from plaintiffs' complaint, Dkt. 1, and dismissed without prejudice.

6. Plaintiffs' motion for summary judgment, Dkt. 156, is GRANTED in part and DENIED in part against all remaining defendants as provided in the opinion.

7. Plaintiffs' request for declaratory relief, Dkt. 1, is GRANTED in part and DENIED in part against all remaining defendants. It is DECLARED that those defendants may not impose state property taxes on Indian-owned reservation property, unless that property has previously been in non-Indian ownership.

8. Plaintiffs' request for a permanent injunction, Dkt. 1, is GRANTED in part and DENIED in part against all remaining defendants. All remaining defendants and their assigns, employees, and agents are enjoined from assessing, collecting, or

enforcing Wisconsin property taxes on Indian-owned reservation property, unless that property has previously been in non-Indian ownership.

9. Defendants Tony Evers and Peter Barca's motion for summary judgment, Dkt. 149, is GRANTED in part and DENIED in part as provided in the opinion.

10. Defendants Town of Bass Lake, Town of Hayward, Town of Sanborn, Town of Ashland, Town of White River, Town of Gingles, Scott Zillmer, William Metzinger, Michael Schnautz, Claude Riglemon, and Associated Appraisal Consultants, Inc.'s motion to dismiss, Dkt. 125, and motion for summary judgment, Dkt. 192, are DENIED.

11. Plaintiffs' motion in limine, Dkt. 114, is GRANTED in part and DENIED in part as provided in the opinion; plaintiffs' motion in limine Dkt. 217, and motions to strike, Dkt. 205 and Dkt. 226, are DENIED.

12. The clerk of court is directed to enter judgment as provided here and close this case.

13. The court will stay enforcement of the judgment for 30 days to allow the parties to appeal.

Entered April 9, 2021.

BY THE COURT:

/s/

_____
JAMES D. PETERSON
District Judge