STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III
APPEAL NO: 2022AP937

LEGEND LAKE PROPERTY OWNERS ASSOCIATION, INC.,

Plaintiff-Appellant,

v.

GUY KESHENA and
THE MENOMINEE INDIAN TRIBE OF WISCONSIN,

Defendants-Respondents.

Appeal from the Circuit Court for Menominee County,
Case No. 2018-CV-0007
The Honorable Katherine Sloma, Presiding

PLAINTIFF-APPELLANT LEGEND LAKE PROPERTY OWNERS ASSOCIATION, INC.'S SUPPLEMENTAL BRIEF

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INTRODUCTION

On July 9, 2024, the Court issued an order directing supplemental briefing on three issues, including: (1) whether the Association seeks a determination that the transfer of the parcels into trust is void, or whether it seeks only a determination that certain non-transfer specific restrictive covenants are enforceable; (2) whether the answer to the foregoing inquiry alters the analyses for sovereign immunity and federal preemption; and (3) whether 28 U.S.C. § 1360 is applicable to the issues before the Court.

As further explained below, the Association does not seek a determination that the transfer of the parcels into trust is null and void as a result of the Restrictive Covenants. The Association does, however, seek a determination that the other rights and obligations in the Restrictive Covenants survive the transfer into trust and remain enforceable pursuant to the explicit language of the Menominee Restoration Act, 87 Stat. 770 (the "Act") and the Restrictive Covenants. Secondly, the answer to that question does not alter the analyses of the issues of sovereign immunity and federal preemption. And, finally, 28 U.S.C. § 1360 does not have any bearing on the issues in this matter.

ARGUMENT

I. THE RESTRICTIVE COVENANTS NON-TRANSFER RESTRICTIONS AND OBLIGATIONS REMAIN ENFORCEABLE.

The Association requests this Court decide whether the non-transfer specific portions of the Restrictive Covenants remain enforceable even though the parcels of land have now been placed into trust.[1]

In *Legend Lake Property Owners Association, Inc. v. United States Department of the Interior, et al.*, No. 23-C-480, 2024 WL 449287 (E.D. Wis. Feb. 6, 2024) (the "Decision"), Judge Griesbach left open this issue when concluding:

> The Association alternatively requests that, in the event the court finds that federal law preempts certain provisions of the restrictive covenants, the court should hold that the remainder of the restrictive covenants are not preempted and are thus valid and enforceable under the covenant's severability clause. *The enforceability of the Association's restrictive covenants that were not relevant to the trust acquisitions was never addressed by the BIA or IBIA. Because this argument was not addressed in the underlying final agency decision, the court will not decide it here.*

Decision at *6 (emphasis added).

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[1] The Association is not abandoning or conceding any of its arguments relating to the issue of enforceability of the transfer specific portion of the Restrictive Covenants. The transfer specific portion of the Restrictive Covenants were not directly addressed in this appeal, and have now since been decided by the United States District Court for the Eastern District of Wisconsin in *Legend Lake Property Owners Association, Inc. v. United States Department of the Interior, et al.*, No. 23-C-480, 2024 WL 449287 (E.D. Wis. Feb. 6, 2024) (Griesbach, J.). This Court does not need to consider whether those transfer specific portions of the Restrictive Covenants are enforceable.

Accordingly, the Association's appeal with regard to the enforceability of transfer versus non-transfer specific portions of the Restrictive Covenants is limited to the non-transfer specific portions.[2]

The non-transfer portions of the Restrictive Covenants, as identified below, are enforceable under the Act. Specifically, among the other non-transfer related terms in the Restrictive Covenants (R.1:12-18, App.012-018), the following prohibitions, rights and obligations remain enforceable, notwithstanding the transfer into trust:

> (3) remove the Subject Real Estate (or any part thereof) from the zoning authority and general municipal jurisdiction of Menominee County, Wisconsin,
>
> (4) remove the Subject Real Estate (or any part thereof) from the general municipal jurisdiction of the State of Wisconsin, to include administrative regulations duly adopted,
> and/or
>
> (5) remove the Subject Real Estate (or any part thereof) from the obligations and/or restrictions imposed on the Subject Real Estate (or any part thereof) by the duly adopted bylaws and resolutions of the Association, to include, without limitation, the obligation to pay all dues and assessments properly levied by the Association.

(R.1:14, App.014.)

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[2] For similar reasons, the Association does not seek to enforce the provisions of the Restrictive Covenants related to future taxation of the parcels—given that the parcels are now held in trust. The Act provides that those parcels are, as of the date of transfer into trust, "exempt from all local, State, and Federal taxation." (Act, § 6(c), App.354.)

Furthermore, as provided in Section 1.D. of the Restrictive Covenants, the parcels of land remain subject to "municipal and Associations laws, rules, regulations and obligations, in rem, notwithstanding a transfer to an owner not otherwise subject to them." (*Id.*)

As explained in the Association's briefs filed as part of this appeal, the Association's legal position that the non-transfer specific portions of the Restrictive Covenants remain enforceable is supported by the plain and unambiguous language of the Act itself. The Act provides that any property accepted by the Secretary be "subject to all valid *existing rights* including, but not limited to, liens, outstanding taxes, (local, State, and Federal), mortgages, and *any other obligations*." (Act, § 6(c), App.354 (emphasis added).) The Act also provides for the enforcement of these obligations. (*See id.*) ("The land transferred to the Secretary pursuant to this subsection shall be subject to foreclosure or sale pursuant to the terms of any valid existing obligation in accordance with the laws of the State of Wisconsin."). Accordingly, the Restrictive Covenants remain valid and enforceable, even after the land is transferred into trust.

II. THE SOVEREIGN IMMUNITY AND PREEMPTION ANALYSES REMAIN UNCHANGED.

The Court has also requested that the parties answer how, if at all, the analyses for sovereign immunity and federal preemption change if only the non-transfer restrictive covenants are at issue. The analysis for each topic does not change at all: (1) Guy Keshena and the Menominee Indian Tribe of Wisconsin (collectively, the "Tribe") do not enjoy sovereign immunity[3] under the facts of this case and (2) the Restrictive Covenants are not preempted by federal law.

A. The Tribe Does Not Enjoy Sovereign Immunity.

The sovereign immunity analysis does not change even though the parcels have been transferred into trust. Indeed, the Tribe's claim to sovereign immunity is not based on the nature or character of the claims, but

3 The Court has not requested the parties address whether the United States' acquisition of title as a trustee on behalf of the Tribe changes the sovereign immunity analysis. To the extent that has relevance, the Association reserves the right to provide the Court with its position should the Court request supplemental briefing on that issue. In short, however, because the United States (1) took title to the parcels subject to the Restrictive Covenants; (2) the Restrictive Covenants expressly bind all assigns or successors (R.1:13, App.013); the Act expressly permits survival of the obligations following transfer (Act, § 6(c), App.354), and the Act expressly provides for judicial enforcement or such obligations after the land is placed into trust (*Id.*), any argument concerning alleged sovereign immunity of the United States also fails.

rather, the mere existence of the suit itself. (*See, e.g.*, Br. of Respondents at 12–13.)

To that end, the Association maintains that the Tribe does not enjoy sovereign immunity in this matter. As the Association has explained in its previous briefs to the Court, the Tribe does not have sovereign immunity for three separate reasons: (1) sovereign immunity is inapplicable to *in rem* proceedings; (2) the immoveable property exception to sovereign immunity applies to bar the defense; and (3) the Tribe waived any claim to sovereign immunity when it became subject to and agreed to the immunity waiver and exclusive forum provisions in the Restrictive Covenants.[4] The Association stands on its previous briefs with respect to these arguments.

B. Federal Law Does Not Preempt the Restrictive Covenants.

Likewise, the transfer of the parcels into trust, does not alter the federal preemption analysis previously briefed by the parties. As the Association has explained, the Act specifically states that even after the land is accepted into trust it "*shall* be subject to all valid existing rights including,

[4] The Association also made various arguments regarding Mr. Keshena's purported agency relationship with the Tribe, as well has his individual amenability to suit. The Association continues to maintain those arguments as well.

but not limited to, liens, outstanding taxes, (local, State, and Federal), mortgages, and any other obligations." ((emphasis added). Act, § 6(c), App.354.) The Act also provides for judicial enforcement of these obligations via "foreclosure or sale pursuant to the terms of any valid existing obligations in accordance with the laws of the State of Wisconsin." (*See id.*) Given the plain and unambiguous language of the Act, there is simply no way in which federal law could preempt the non-transfer related specific portions of the Restrictive Covenants. What exists here is federal law expressly confirming and preserving, rather than preempting, state law. Moreover, the Eastern District of Wisconsin's Decision did not address that issue within the context of the parcels being taken into trust. *See* Decision at *6. Therefore, the Association stands on its previous briefs with respect to this issue as well, and requests the Court hold that the Circuit Court erred when it decided that the Restrictive Covenants were preempted by federal law in their entirety. As discussed, the terms "valid existing rights" and "any other obligations" under the Act are certainly broad enough to, and do,

encompass the Restrictive Covenants. The Act's language specifies that the Restrictive Covenants are not federally preempted.[5]

III. 28 U.S.C. § 1360 HAS NO AFFECT ON THE ISSUES IN THIS MATTER.

Finally, the Court requested the parties provide briefing on the bearing of 28 U.S.C. § 1360. Section 1360 does not have any impact on the issues in this matter.

"Through what is commonly known as 'Public Law 280' . . . Congress provided to certain states broad jurisdiction over criminal offenses committed in Indian country . . . and limited jurisdiction over civil causes of action arising in Indian country." *K2 Am. Corp. v. Roland Oil & Gas, LLC*, 653 F.3d 1024, 1027–28 (9th Cir. 2011). That jurisdiction over civil causes of action arising in Indian country is codified at 28 U.S.C. § 1360:

> (a) Each of the States listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall

[5] The Tribe, in its response brief, only addressed its positions that the Restrictive Covenants sought to nullify the transfer of the parcels and retain taxation over the parcels. The Tribe's brief did *not* address the other terms in the Restrictive Covenants involving the Association's dues and bylaws or the continued application of zoning authority and municipal jurisdiction. The Tribe's silence on these Restrictive Covenants can only be construed as tacit agreement that those provisions survive under the terms of the Act.

> have the same force and effect within such Indian country as they have elsewhere within the State:
>
> . . .
>
> Wisconsin: All Indian country within the State.

28 U.S.C. § 1360(a). This provision is uncontroversial—it states that the courts of the State of Wisconsin have jurisdiction over civil causes of actions between Indians, or to which Indians are a party, that arise in any portion of Indian country located within the State. *See id.* That, at least in part, explains why the Wisconsin State Courts have authority to hear this case.

Section 1360(b) provides additional clarification:

> (b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

28 U.S.C. § 1360(b).

The United States Supreme Court has interpreted this provision as being nothing more than a "reaffirmation of the existing reservation Indian-Federal Government relationship in all respects save the conferral of state-court jurisdiction to adjudicate private civil causes of action involving Indians." *Bryan v. Itasca Cnty., Minnesota*, 426 U.S. 373, 391–92 (1976);

accord K2, 653 F.3d at 1028. Stated differently, Section 1360(b) can be read as prohibiting state courts from "applying state laws or enforcing judgments in ways that would effectively result in the 'alienation, encumbrance, or taxation' of trust property." *Bryan*, 426 U.S. at 391. That is not what is occurring here.

Take the first sentence of the provision: "Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property . . . belonging to any Indian or any Indian tribe . . . that is held in trust by the United States." 28 U.S.C. § 1360(b). This clause does not state this Court cannot issue a ruling regarding the enforceability of the Restrictive Covenants, which applied to the lands prior to their acceptance into trust and which are preserved by the Act. Instead, when read in light of the United States Supreme Court's guidance that the provision simply "reaffirm[ed]" the existing relationship between the Federal Government and Indians, the first provision pronounces an unremarkable proposition: the mere grant of civil jurisdiction to state courts under the statute does not empower state courts to step into the shoes of the Federal Government with respect to Indian land. And, read in conjunction with the Supreme Court's instruction that § 1360(b) should be read as prohibiting the application of "state law" in ways

that would "result in the 'alienation, encumbrance, or taxation," of trust land, the import of this provision is clear: state courts cannot utilize state law, be it statutory or common, to place *new* encumbrances upon Indian land after it is placed in trust by the United States.

Importantly, the Association is not asking this Court to step into the shoes of the Federal Government with respect to dealings of Indian land, or utilize state law to create *new* encumbrances upon the Tribe's land that was accepted into trust. And, the Association is not requesting that the Court issue a ruling that would "result" in the encumbrance of the parcels—after all, the parcels have already been encumbered since 2009. Instead, the Association is simply asking whether the already-existing encumbrances are valid and enforceable under the explicit language of the Act. Accordingly, the first clause of § 1360(b) does not prohibit this Court from considering the enforceability of those Restrictive Covenants under the Act, which were already in place on the parcels prior to the parcels being transferred into trust.

The second clause of § 1360(b) also does not change the Court's analysis of the issues. That clause provides: "Nothing in this section . . . shall authorize regulation of the use of such property in a manner inconsistent with

any Federal treaty, agreement, or statute or with any regulation made pursuant thereto." 28 U.S.C. § 1360(b).

The Association is not asking the Court to declare any rights or obligations inconsistent with the Act. To the contrary, the Association is arguing that the survival of these Restrictive Covenants is wholly *consistent* with the Act, given that the language of the Act specifically provides for the survival of "all valid existing rights . . . and any other obligations." (Act, § 6(c), App.354.). Accordingly, by issuing a decision that the Circuit Court erred when considering whether the Restrictive Covenants were preempted, the Court would not run afoul of § 1360(b), and instead, would be upholding the Act as written by Congress. *See BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004) ("Thus, our inquiry begins with the statutory text, and ends there as well if the text is unambiguous."); *see also Friends of East Willits Valley v. Cnty. of Mendocino*, 101 Cal. App. 4th 191, 201 (2002) ("We hold that federal law does not void prior restrictions on land agreed to before the land passed into trust.") Certainly, § 1360(b) cannot be read so as to prevent state courts from upholding laws such as the Act, as written by Congress.

The third, and final, clause of Section 1360(b) is also inapplicable. It provides that "Nothing in this section . . . shall confer jurisdiction upon the State to adjudicate . . . the ownership or right to possession of such property or any interest therein." 28 U.S.C. § 1360(b). The Association's arguments in this matter do not seek the adjudication of the "ownership or right to possession" of the parcels. The Association never disputed the Tribe's ownership of the parcels. Rather, the Association sought in the Circuit Court a declaration as to whether the already-existing Restrictive Covenants, prior to the Tribe's acquisition of ownership, are valid and enforceable pursuant to the terms of the Act.

In sum, 28 U.S.C. § 1360 does not bear on the issues in this matter. Though § 1360(b) reaffirms the state of the law prior to the enactment of Public Law 280 by clarifying that it was not enlarging the powers of state courts to enable them to enact laws inconsistent with a Federal treaty, agreement, or statute, that Section does not prohibit the relief sought here. Again, what the Association is seeking is a declaratory judgment based on and totally consistent with the plain and unambiguous language of the Act. This Court's ability to construe and apply the Act which is specifically

designed to address the issue at hand, is not prohibited by the more general and yet still consistent language found in Section 1360(b).

CONCLUSION

For the foregoing reasons, in addition to the Association's previous briefs in this matter, the Association respectfully requests that this Court reverse the decision of the circuit court, vacate its judgment, and remand this case for further proceedings.

Respectfully submitted this 29th day of July, 2024.

Electronically Signed by Frank W. Kowalkowski

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