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 U.S. DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN, NO. 18-CV-992-JDP, THE HONORABLE JAMES D. PETERSON, PRESIDING

JOINT RESPONSE BRIEF OF STATE DEFENDANTS-APPELLEES TONY EVERS AND PETER BARCA AND MUNICIPAL DEFENDANTS-APPELLEES JENNIE SANDERS MARTEN, PAUL CARLSON, AND THE TOWNS OF RUSSELL, SHERMAN, LAC DU FLAMBEAU AND BOULDER JUNCTION[1]

[1] This brief was prepared by the State Defendants-Appellees. The named Municipal Defendants-Appellees join this brief in accordance with the Court's order of May 10, 2021. (7th Cir. Dkt. 3.) The remaining Municipal Defendants-Appellees have separately filed their own brief. (7th Cir. Dkt. 33.) The parties have consulted and determined that the present brief is not redundant of that brief.

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 21-1817

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Jennie Sanders Martin and Town of Russell

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:
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Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

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Defendants-Appellees.

CIRCUIT COURT RULE 26.1 DISCLOSURE STATEMENT FOR DEFENDANTS-APPELLEES TOWN OF SHERMAN AND PAUL CARLSON, ASSESSOR FOR TOWN OF SHERMAN

The undersigned, counsel for Defendants-Appellees, Town of Sherman and Paul Carlson, Assessor for Town of Sherman, furnishes the following list in compliance with Circuit Court Rule 26.1:

1. Defendants-Appellees are Town of Sherman and Paul Carlson, Assessor for Town of Sherman.
2. The name and address of the law firm representing the above listed parties is Schellgell Law Office, located at 2694 W County J, P.O. Box

558, Mercer, Wisconsin 54547. Counsel of record for the above listed parties is Frederick J. Schellgell.

3. The above listed parties are not corporations or amicus parties.

Dated this 27th day of August 2021.

By: /s/ Frederick J. Schellgell

No. 21-1817

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

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Defendants-Appellees.

CIRCUIT COURT RULE 26.1 DISCLOSURE STATEMENT FOR DEFENDANTS-APPELLEES TOWN OF LAC DU FLAMBEAU, TOWN OF BOULDER JUNCTION, AND PAUL CARLSON, ASSESSOR FOR TOWNS OF LAC DU FLAMBEAU AND BOULDER JUNCTION

The undersigned, counsel for Defendants-Appellees, Town of Lac du Flambeau, Town of Boulder Junction, and Paul Carlson, Assessor for Towns of Lac du Flambeau and Boulder Junction, furnishes the following list in compliance with Circuit Court Rule 26.1:

1. Defendants-Appellees are Town of Lac du Flambeau, Town of Boulder Junction, and Paul Carlson, Assessor for Towns of Lac du Flambeau and Boulder Junction.

2. The name and address of the law firm representing the above listed parties is Harrold, Scrobell & Danner, located at 315 Oneida Street, P.O. Box 1148, Minocqua, Wisconsin 54548. Counsel of record for the above listed parties is Gregory J. Harrold, .
3. The above listed parties are not corporations or amicus parties.

Dated this 27th day of August 2021.

By: /s/ Gregory J. Harrold

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JURISDICTIONAL STATEMENT

The Plaintiffs-Appellants' jurisdictional statement is complete and correct.

INTRODUCTION

This appeal presents a single question of law: Can the State of Wisconsin and its political subdivisions apply state property tax to land located within any of four Indian reservations in northern Wisconsin, where that land is currently owned in unrestricted fee title by either the tribe occupying the reservation or a tribal member, but has been previously owned by non-Indians and was taxable while in non-Indian ownership?[2]

The tribes inhabiting those four reservations contend that because Congress has not enacted legislation authorizing state taxation of any reservation land currently owned by the resident tribe or a tribal member—including land previously alienated to non-Indians—such taxation is precluded both by a treaty between themselves and the United States and by principles of federal Indian law. The district court agreed with the Tribes in part and disagreed in part, holding that Indian-owned land on their reservations is not taxable so long as it has never been alienated to non-Indians, but is taxable once it passes to non-Indians, and remains taxable even if it subsequently

[2] The land at issue will be referred to herein as "reacquired reservation land."

returns to Indian ownership. The Tribes now appeal from the portion of the district court decision holding that such reacquired reservation land is taxable.

The district court decision regarding the taxability of reacquired reservation land was correct and should be affirmed. Under established principles of Indian law—and independent of congressional action—reservation land becomes taxable when it is alienated to non-Indians and thereby ceases to be set aside for exclusive Indian use and occupation. Once such alienation has removed any previous legal obstacle to state taxation, the land thereafter remains taxable, even if reacquired by the tribe or a tribal member, unless the land is conveyed into trust by the United States on behalf of the current Indian landowner.

ISSUES PRESENTED

1. Does the 1854 Treaty between the United States and the Lake Superior Chippewa Indians preclude state taxation of reacquired reservation land?

   The district court answered no.

   This Court should answer no.

2. Is state taxation of reacquired reservation land precluded by common-law principles of federal Indian law that prohibit state taxation of Indian-owned property in Indian country absent clear congressional authorization?

   The district court answered no.

   This Court should answer no.

STATEMENT OF THE CASE

I. Legal and historical background.

The courts of the United States have long recognized that Indians, as the original inhabitants of American territory, had a legally protectible property interest in the lands they inhabited prior to European contact. *See Johnson v. M'Intosh*, 21 U.S. 543, 574 (1823). This interest, often described as original or aboriginal Indian title, is based not on any formal conveyance or legal title, but on a history of "actual, exclusive, and continuous use and occupancy" of the land by the Indians. *Sac & Fox Tribe of Okla. v. United States*, 383 F.2d 991, 997–98 (Ct. Cl. 1967). The Supreme Court early characterized the respective property interests of tribes and the United States as a split title, with the United States holding what was described as the "ultimate title," "absolute title," or "fee," and tribes holding a right of occupancy and possession of the land. *See Johnson*, 21 U.S. at 585, 587–88, 592; *see also* Francis Paul Prucha, *The Great Father* 60 (1984) [hereinafter *Great Father*] (aboriginal title involved an exclusive right of occupancy but not ultimate ownership), (Dkt. 151-3:16). The split title between the United States and the tribes resembles a trust relationship in which the fee title to trust property is held by a trustee for the use and benefit of a beneficiary. *See Cohen's Handbook of Federal Indian Law* 998, 1050–51, 1053, 1104 (Nell Jessup Newton et al. eds., 12th ed. 2012) [hereinafter *Cohen's Handbook*], (Dkt. 151-4:15, 17–18, 20, 31).

As the United States expanded westward, the federal government typically acquired full title to Indian lands by entering into treaties with the Indian tribes in which a tribe would cede its rights in aboriginal territory to the United States, and the United States would reserve a smaller tract of land for the tribe's exclusive use and occupation. *See* Francis Paul Prucha, *American Indian Treaties* 226 (1994) [hereinafter *American Indian Treaties*], (Dkt. 151-2:13). Through treaties, tribes generally preserved autonomy in internal tribal matters, but acknowledged a degree of dependence upon the United States and a corresponding diminution of tribal sovereignty with regard to relationships with non-Indians and other external matters. *See id.* 5–6, 66 (Dkt. 151-2:3–4, 10); *Great Father, supra,* at 58, (Dkt. 151-3:14); *Montana v. United States*, 450 U.S. 544, 564–65 (1981).

In the first half of the 19th century, federal Indian policy focused on removing tribes from the eastern half of the country and relocating them on western lands, out of the advancing path of non-Indian settlement. *Yankton Sioux Tribe v. Podhrasky*, 606 F.3d 994, 998–99 (8th Cir. 2010); *Great Father, supra,* at 315–18, (Dkt. 151-3:30–33). Federal policy at that time generally supported the right of Indian nations to maintain communal, tribal land holdings and the social and political institutions associated with them. *See Cohen's Handbook*, *supra,* at 1072, 1074, (Dkt. 151-4:26–28).

By the 1850s, however, federal policy had shifted from removal to concentration of Indians on fixed reservations. *Podhrasky*, 606 F.3d at 998–99. The reservation policy was intended to separate Indians and non-Indians so as to prevent or ease immediate conflicts between the two groups, and to provide a secure environment in which federal programs for the Indians could be carried out. *See American Indian Treaties*, 235–36, (Dkt. 151-2:14 [sic][3]); *Great Father, supra,* at 135, 315–18, (Dkt. 151-3:22, 30–33).

As the reservation policy developed in the early 1850s, federal officials began to encourage the Indians to change from a nomadic, hunting and gathering way of life to a more settled existence based on agriculture and domestic and mechanical arts. *Great Father, supra,* at 30–31, 119, 139, 317, (Dkt. 151-3:10–11, 19, 26, 32). They adapted the reservation system to promoting individual land ownership by parceling out tribal land in farm-sized plots to individual Indians. *See Cohen's Handbook*, *supra,* at 1072, 1074, (Dkt. 151-4:26, 28). This distribution to individual Indians of property rights to specific parcels of reservation land is referred to as allotment in severalty—a legal term of art. *See Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010, 1015–16 (8th Cir. 1999) (*citing Affiliated Ute Citizens v. United States*, 406 U.S. 128, 142 (1972)).

[3] It appears that page 236 of the referenced text was inadvertently omitted from the docketed exhibit.

When a reservation is allotted, the rights of use and occupancy of reservation lands previously held in common by the tribe are converted into a legal title for each allotted parcel. *See Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 106 (1998); *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 253–54 (1992); *Hagen v. Utah*, 510 U.S. 399, 402 (1994). Title to the allotted parcels either is owned by the United States in trust for the individual Indian allottee ("trust allotment") or owned in fee by the allottee, subject to a restriction on alienation of the land ("restricted allotment"). *See Cohen's Handbook*, *supra,* at 1071, (Dkt. 151-4:25). Trust allotments and restricted allotments receive equivalent legal treatment for jurisdictional purposes and are generally treated similarly by the Department of the Interior. *See id.*; *United States v. Ramsey*, 271 U.S. 467, 471 (1926); 25 C.F.R. §§ 179.1–179.5; 43 C.F.R. § 4.201.

Numerous treaties executed in the 1850s included clauses that authorized the President to allot reservation land in specified amounts for occupation and use by individual Indians and their families. *See American Indian Treaties, supra,* at 11, (Dkt. 151-2:6); *Cohen's Handbook*, *supra,* at 1072, (Dkt. 151-4:26);

(Dkt. 94:34 (Gulig Rep.)).[4] The present case involves one such treaty: the Treaty with the Chippewa at La Pointe, Sept. 30, 1854, 10 Stat. 1109 [1854 Treaty], between the United States and the Chippewa Indians of Lake Superior and the Mississippi.

The 1854 Treaty followed earlier treaties in 1837 and 1842, in which the Chippewa had conveyed to the United States their aboriginal title to large amounts of territory in eastern Minnesota, northern Wisconsin, and Upper Michigan. *See Great Father, supra,* at 261, (Dkt. 151-3:29); *American Indian Treaties, supra,* at 197, (Dkt. 151-2:12); (Dkt. 94:27–29 (Gulig Rep.)); *Keweenaw Bay Indian Cmty. v. Naftaly* ("*Keweenaw II*"), 370 F. Supp. 2d 620,

[4] In the decades following the Civil War, federal policy makers increasingly sought to assimilate Indians into non-Indian society, and the allotment policy was broadened into a general policy that aimed not only to transform tribal members into individual property owners, but also to thereby hasten the demise of the entire reservation system, and to weaken and ultimately extinguish collective tribal existence. *See Great Father, supra,* at 631, 643–44, 656, 658, (Dkt. 151-3:34, 36–37, 41, 43); *American Indian Treaties, supra,* at 334, (Dkt. 151–2:21); *Solem v. Bartlett*, 465 U.S. 463, 466–67 (1984); *County of Yakima*, 502 U.S. at 253–54; *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 335 (1998); *Podhrasky,* 606 F.3d at 999. That policy culminated in federal legislation that authorized the President to allot any reservation that contained land advantageous for agricultural or grazing purposes, with the allotted lands to be held in trust by the United States for a time, during which the lands could not be alienated or encumbered without federal approval. *See* General Allotment Act, 24 Stat. 388 (Feb. 8, 1887), 25 U.S.C. §§ 331 et seq.. After the expiration or termination of the trust period, the allottee received fee title and the allotted land became freely alienable and subject to encumbrance and taxation. *Id.*; Burke Act, 24 Stat. 390 (May 8, 1906), 25 U.S.C. § 349; *see also County of Yakima*, 502 U.S. at 263–64; *Great Father, supra,* at 668, (Dkt. 151-3:53). The district court in the present case held that the reservation lands at issue here were not subject to that federal legislation, and those statutes are not part of the State Defendants' arguments in this appeal. They are referenced here as background to help the Court understand the history of this litigation.

622 (W.D. Mich. 2005), *aff'd,* 452 F.3d 514 (6th Cir. 2006); *Keweenaw Bay Indian Cmty. v. Michigan* ("*Keweenaw I*") 784 F. Supp. 418 421 (W.D. Mich. 1991). Those treaties did not expressly protect the Chippewa against federal removal to the west and, in the 1840s and early 1850s, the Chippewa became increasingly concerned with obtaining for themselves permanent reservations within their traditional lands. *See Keweenaw I*, 784 F. Supp. at 421; *Keweenaw II*, 370 F. Supp. 2d at 622; Edmund Jefferson Danziger, Jr., *The Chippewas of Lake Superior* 86 (1979), (Dkt. 151-1:8); *see also* (Dkt. 94:60 (Gulig Rep.)); (Dkt. 245:4). Accordingly, in the 1854 Treaty, the Chippewa ceded additional land in Minnesota, and the United States agreed to set apart specified tracts of land as reservations for the use of various Chippewa bands, including the reservations at issue in this case. *See* 1854 Treaty, *supra,* at art. I–II. It was further provided that "the Indians shall not be required to remove from the homes hereby set apart for them." *Id.* at art. XI.

Article III of the 1854 Treaty authorized the allotment of the created reservations. The President was given the powers to assign allotments to individual Indians, to issue patents for those allotments to the allottees, to include in those patents restrictions on the alienation of the allotments, and to remove such restrictions. 1854 Treaty, *supra,* at art. III; *see also Keweenaw Bay Indian Cmty. v. Naftaly* ("*Keweenaw III*"), 452 F.3d 514, 520 (6th Cir.

2006); (Dkt. 245:4). The text of the 1854 Treaty was silent regarding the taxability of reservation lands, including allotments. (*See* Dkt. 245:4.)

The four reservations at issue here were allotted through federal executive actions at various times between 1854 and 1924. (Dkt. 148, Ex. A:5 (Brigham Rep.); 245:5.) In addition, by 1934, significant amounts of allotted land on all four of the reservations had been alienated, ranging from 10,739 acres at Red Cliff to 55,408 acres at Bad River. (Dkt. 148, Ex. A:7 (Brigham Rep.).) By 1976, a portion of those alienated lands had been reacquired into trust by the federal government, ranging from 677 acres at Lac Courte Oreilles to 5,407 acres at Red Cliff. (Dkt. 148, Ex. A:9 (Brigham Rep.).) The issue in this appeal is the taxability of formerly alienated reservation land that is currently owned in fee simple by the resident tribe or tribal members, but that has not been taken into trust by the United States.

II. Procedural history.

This action was filed on November 30, 2018, by four bands of Lake Superior Chippewa Indians (the "Tribes") with reservations in northern Wisconsin.[5] (Dkt. 1.) The defendants were Wisconsin's Governor and Secretary of Revenue

[5] The plaintiff bands are: the Lac Courte Oreilles Band, the Lac du Flambeau Band, the Red Cliff Band, and the Bad River Band. (Dkt. 1 ¶¶ 3–6.)

(the "State Defendants") and a group of Wisconsin towns and their tax assessors (the "Municipal Defendants"). (Dkt. 1 ¶¶ 7–26.)

The Tribes sought declaratory and injunctive relief regarding the State's authority to impose ad valorem real property taxes on land within their reservations that is owned in fee simple either by the tribe occupying that reservation or by one or more of its members. (Dkt. 1 ¶¶ 1–2.) They advanced three claims, asserting that state taxation of the land is prohibited by (1) the 1854 Treaty (Dkt. 1 ¶¶ 161–66); (2) common-law principles of federal Indian law that generally prohibit state taxation of Indian property in Indian country absent clear congressional authorization (Dkt. 1 ¶¶ 167–73); and (3) the Indian Nonintercourse Act, 25 U.S.C. § 177, a federal statute that, according to the Tribes, prohibits the alienation or taxation of tribally-owned lands (Dkt. 1 ¶¶ 174–77).

The State Defendants answered the Tribes' complaint on February 1, 2019. (Dkt. 50.) The Tribes submitted a substantial amount of background facts, including expert testimony, pertaining to their own history, the negotiation of the 1854 treaty, and the State's taxation of Indian land. (*See* Dkt. 157–68, 174–91.) The State Defendants did not dispute those facts. (Dkt. 245:3.)

On December 2, 2019, the Tribes and the State Defendants filed cross-motions for summary judgment on the Tribes' claims that state taxation is barred by the 1854 Treaty and by common-law principles of federal Indian law.

(Dkt. 148–155; 156–191.) The State Defendants also moved for summary judgment on the Tribes' claim that state taxation is barred by the Indian Nonintercourse Act. (Dkt. 153:23, 39–43.)

On the Tribes' first two claims, the State Defendants argued that the General Allotment Act and related federal legislation had authorized states to tax unrestricted reservation fee land that was initially allotted after that Act went into effect in 1887. (Dkt. 153:22.) The State Defendants also argued that the State may tax reacquired reservation land—*i.e.* unrestricted Indian-owned fee land that has previously been owned in fee simple by non-Indians—because such land becomes taxable when it is alienated to non-Indians and remains taxable if subsequently reconveyed into Indian ownership, unless it is taken into trust by the United States. (Dkt. 153:22–23.)

On the Tribes' third claim, the State Defendants argued that the Nonintercourse Act's restriction on alienation of tribally owned land does not apply to land that has been rendered alienable either pursuant to the terms of a treaty or by an act of Congress—which would include the land at issue here under either side's view of the case. (Dkt. 153:23.)

On April 9, 2021, the district court issued a decision granting in part and denying in part each of the cross motions for summary judgment. (Dkt. 245.)[6]

On the Tribes' first two claims, the district court granted summary judgment in favor of the Tribes with regard to reservation fee land that is currently owned by Indians and that has never passed into non-Indian ownership. The court found that the promise of permanent reservations in the 1854 Treaty precluded state taxation and the concomitant state power to enforce tax obligations by such methods as liens, foreclosures, and evictions. (Dkt. 245:13.) The court found no evidence that Congress intended the General Allotment Act to roll back the protection against state taxation provided by the 1854 Treaty. (Dkt. 245:14–15.) The court additionally concluded that the Tribes' reservations were allotted pursuant to the 1854 Treaty, not pursuant to the General Allotment Act. (Dkt. 245:2, 15.) Accordingly, the district court followed the reasoning of *Keweenaw III*,[7] and held that reservation fee land that is currently owned by Indians and that has never passed into non-Indian ownership is not taxable. (Dkt. 245:2, 20.)

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[6] The district court also denied motions for judgment on the pleadings filed by the Municipal Defendants and resolved several discovery related motions. (Dkt. 245:6–10.) Those rulings are not at issue here.

[7] In that decision, the Sixth Circuit construed the 1854 Treaty as applied to a tribe in Michigan and held that the State could not tax reservation land owned in fee simple by the tribe or its members. *See Keweenaw III*, 452 F.3d at 525–27. The decision did not specifically address the taxability of reacquired reservation land, which is the question at issue in the present appeal.

With regard to reacquired reservation land, however, the district court granted summary judgment on the first two claims in favor of the State Defendants. The court held that, under *Cass County,* 524 U.S. 103 (1998), reacquired reservation land is taxable unless it has been placed into trust by the United States. (Dkt. 245:2, 21–22.) The court rejected the Tribes' argument that the holding of *Cass County* only applies to reservation land that was rendered alienable by an act of Congress, rather than by executive action pursuant to a treaty. The court noted that the Tribes themselves admitted that reservation land is taxable by the State when it is owned in fee by non-Indians. The court reasoned that the property owner at that point holds title not pursuant to any treaty rights, but rather pursuant to the state's ordinary real estate laws. (Dkt. 245:22.) And *Cass County* expressly rejected the argument that the tax immunity of reservation land could lie dormant while the land was owned by non-Indians and then be re-awakened if the land is subsequently transferred back into Indian ownership. (Dkt. 245:21–22 (*citing Cass County*, 524 U.S. at 113–14).)

The district court also rejected the Tribes' argument that state taxation is precluded by the Indians' authority under the 1854 Treaty to decide whether non-Indians would be allowed to live on their reservations. The court reasoned that any right to exclude non-Indians is necessarily relinquished when fee ownership of reservation land is transferred to a non-Indian. The court

accordingly concluded that Indian rights under the Treaty are not compromised when reservation land is taxed after it has been transferred in fee to a non-Indian, even if the land has subsequently passed back into Indian ownership. (Dkt. 245:22.)

On the Tribes' third claim under the Nonintercourse Act, the district court granted summary judgment to the State Defendants. (Dkt. 245:22–24.)

On May 7, 2021, the Tribes filed a notice of appeal. (Dkt. 249.) In their appellate brief, they have challenged the portion of the district court decision that granted summary judgment to the State Defendants regarding reacquired reservation lands. (7th Cir. Dkt. 21:2–4.) The Tribes have not challenged the district court's rejection of their third claim under the Nonintercourse Act. Neither the State Defendants nor the Municipal Defendants has appealed any part of the district court's decision.

SUMMARY OF THE ARGUMENT

The Tribes contend that both the 1854 Treaty and common-law principles of federal Indian law preclude state taxation of reacquired reservation land on their reservations because Congress has not authorized such taxation. Their arguments fail because reservation land becomes taxable when it is actually alienated to non-Indians, independent of any actions of Congress.

First, the 1854 Treaty does not preclude state taxation of reacquired reservation land. Contrary to the Tribes' contentions, the taxability of such

land is a question of law that is not controlled by the factual evidence they submitted in the district court. Rather, under established legal principles, when reservation land passes into unrestricted fee ownership by non-Indians, it ceases to be set aside by federal law for exclusive Indian use and occupation. The resulting diminution of tribal authority over the alienated land surrenders any tax exemption previously attached to it and thereby removes any legal obstacle to state taxation. Reservation land alienated to non-Indians thus becomes taxable regardless of whether it was originally made alienable by an act of Congress or by executive action under a treaty.

Moreover, the Supreme Court held in *Cass County* that, once such alienation has removed any legal obstacle to state taxation, the land thereafter remains taxable, even if it is later reacquired by the tribe or a tribal member. Congress has provided a mechanism by which the land may be taken into trust by the United States, in which case the land again becomes nontaxable. But reacquired reservation land remains taxable unless it is placed in trust.

The Tribes try to factually distinguish *Cass County* on the ground that the land there—unlike the land here—was made alienable (and thus taxable) by an act of Congress. The Supreme Court did not say, however, that its holding was limited to those facts, and it is undisputed that reservation land that is actually alienated to non-Indians thereby becomes taxable, regardless of whether the land was originally made alienable by congressional legislation or

in some other way. The presence or absence of congressional action is thus legally immaterial. The holding of *Cass County* applies and the reacquired reservation land is taxable.

Second, for similar reasons, state taxation of reacquired reservation land is not precluded by common-law principles of federal Indian law that prohibit state taxation of Indian-owned property in Indian country absent clear congressional authorization. Once again, reservation land that passes into non-Indian fee ownership is no longer set aside by federal law for exclusive Indian use and occupation, and the land thus is taxable regardless of whether it was originally made alienable pursuant to a treaty or by Congress. Under *Cass County*, if such alienated land later returns to Indian ownership, it does not automatically regain its original immunity from state taxation, and *Cass County* is not distinguishable for the reasons previously noted.

In addition, if reacquired reservation land automatically became nontaxable, it would render partially superfluous the statutory mechanism Congress has established for protecting Indian-owned lands from state jurisdiction by placing them into trust. That mechanism requires federal officials to take into account the interests of both Indians and non-Indians with a stake in the jurisdictional issues. Those procedural protections should not be circumvented in the way suggested by the Tribes.

STANDARD OF REVIEW

A district court's grant of summary judgment is reviewed de novo. *Perez v. Illinois,* 488 F.3d 773, 776 (7th Cir. 2007). To grant summary judgment under Fed. R. Civ. P. 56, the court must conclude that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.

The initial burden is on the moving party to produce evidence demonstrating that there are no genuine disputes about any material facts and that judgment as a matter of law should be granted to the movant. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). "Material facts" are those that "might affect the outcome of the suit" under the applicable substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

Once the moving party has met its initial burden, the opposing party may not rest upon mere allegations or denials, but must go beyond the pleadings and set forth specific facts showing that there is a genuine issue for trial. *Id*; *Celotex Corp.*, 477 U.S. at 322 n.3. A dispute over "material fact" is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson,* 477 U.S. at 248. The mere existence of some alleged dispute between the parties concerning facts not material to a determinative issue will not defeat an otherwise properly supported motion for

summary judgment. *Id.* at 247–48; *Donald v. Polk County*, 836 F.2d 376, 379 (7th Cir. 1988).

ARGUMENT

The Tribes advance two legal theories for why the State is precluded from taxing reacquired reservation land. First, they argue that the 1854 Treaty gives reservation land an immunity from state taxation that can only be abrogated by congressional legislation. (7th Cir. Dkt. 21:41–50.) Second, they argue that taxation is precluded by common-law principles of federal Indian law that prohibit state taxation of Indian property in Indian country, absent clear congressional authorization. (7th Cir. Dkt. 21:51–60.) Although the Tribes present these legal theories separately, both turn on the same key factor: the presence or absence of congressional legislation authorizing state taxation. The Tribes' position boils down to a contention that the reacquired reservation land cannot be taxed because Congress has not enacted legislation authorizing its taxation.

The Tribes are mistaken. Under established principles of Indian law, the state may tax any unrestricted Indian-owned fee lands that were previously owned in fee simple by non-Indians, because—with or without congressional action—such lands become taxable when they are alienated to non-Indians and thereby cease to be set aside for exclusive Indian use and occupation. If the tribe or a tribal member later reacquires a taxable parcel, the land does not

regain its original restricted, non-taxable status unless the parcel is taken back into trust by the United States. The district court correctly so held, and this Court should affirm.

I. The 1854 Treaty does not preclude state taxation of reacquired reservation land.

A. This appeal involves questions of law that are not governed by the Tribes' factual evidence.

As a threshold matter, this Court should reject the Tribes' attempt to transform the question of law in this appeal into a factual issue. According to the Tribes, the taxability of reacquired reservation land is governed by factual considerations on which they submitted extensive evidence in the district court. Based in part on that evidence, the district court held (1) that the 1854 Treaty, as originally understood by the Indians, prohibited state taxation of reservation land; and (2) that the Tribes' reservations were allotted pursuant to that Treaty and were not subject to the General Allotment Act or other acts of Congress that authorized state taxation of some reservation lands. (Dkt. 245:13–15.) According to the Tribes, those holdings by the district court—from which the State Defendants have not appealed—compel an additional conclusion that the district court did not reach: that the 1854 Treaty precludes state taxation of reacquired reservation fee lands.

The Tribes are mistaken. While the meaning of the 1854 Treaty and the mechanism by which the Tribes' reservations were allotted in the past may be

historical matters of fact, the taxability of reacquired reservation land here is a question of law that is not controlled by the Tribes' factual evidence. (*See* Dkt. 245:10–11) As a matter of law, the 1854 Treaty does not prohibit state taxation of reservation land when the tribe no longer enjoys the treaty-recognized right of exclusive use and occupation. And as a matter of law, no act of Congress is necessary to authorize a state to tax such reservation land. Therefore, even if the facts on which the Tribes rely are accepted, the legal conclusion remains that reacquired reservation fee lands that have not been taken into trust are taxable.

B. Unrestricted reservation land is taxable from the time it passes into non-Indian ownership, regardless of whether it was originally made alienable by a treaty or by Congress.

The Tribes' primary argument is that the 1854 Treaty itself precludes state taxation of all reservation land owned by the resident tribe or a tribal member—including reacquired reservation land. (7th Cir. Dkt. 21:41–50.)

The district court held (and the State Defendants have not appealed) that the guarantee of a permanent homeland in the 1854 Treaty made reservation lands initially non-taxable by the State. (Dkt. 245:13.) That same Treaty guarantee of permanency, the Tribes argue, also gave the Indians authority to decide whether non-Indians would be allowed to live on their reservations. (*See* 7th Cir. Dkt. 21:48–50.) In addition, they contend that the Indian negotiators of the 1854 Treaty had no understanding that those treaty rights would be

diminished if reservation land later came to be owned by non-Indians. (*Id.*) Under these circumstances, according to the Tribes, their treaty rights could by diminished only by congressional abrogation—which has not occurred—and could not be diminished by the mere alienation of reservation land to non-Indians. (7th Cir. Dkt. 21:50.) And because the treaty rights thus have not been diminished by past alienation, the Tribes maintain that when previously alienated reservation land is reacquired from a non-Indian, it automatically regains the treaty-based tax immunity that it previously possessed.

The Supreme Court has recognized, however, that "treaty rights with respect to reservation lands must be read in light of the subsequent alienation of those lands." *Montana*, 450 U.S. at 561. To apply that principle here, one must specifically consider what happens to the legal status of reservation land when it is alienated to a non-Indian.

It is a fundamental principle of Indian law that the sovereignty of Indian tribes has been diminished by their relationship of dependence with the United States. *See Johnson,* 21 U.S. at 574. Through their incorporation into the United States in a dependent status, tribes have been implicitly divested of all sovereign rights inconsistent with that status, such that their retained sovereign powers extend only to the relations among the tribe and its people and generally do not extend to non-Indians. *Montana*, 450 U.S. at 563–65; *see also Duro v. Reina*, 495 U.S. 676, 685–86 (1990) (Tribes lack full territorial

sovereignty, but rather retain only those attributes of sovereignty "needed to control their own internal relations and to preserve their own unique customs and social order."), *superseded in other respects by statute,* 25 U.S.C. § 1301.

In *Montana* and in *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408 (1989), the Supreme Court applied these principles to allotment and alienation of reservation lands. The *Montana* Court concluded that alienation of land to non-Indians had reduced the quantity of reservation land over which the tribe enjoyed its treaty-recognized right to exclusive use and occupation, and thereby divested the tribe of territorial sovereignty over allotted lands that had been alienated to non-Indian owners. *See Montana*, 450 U.S. at 559 n.9. As the *Brendale* Court put it, once a non-Indian obtained title to reservation land, "that land was no longer off limits to him; the tribal authority to exclude was necessarily overcome by . . . an 'implici[t] grant' of access to the land." *Brendale*, 492 U.S. at 424 (citation omitted). A treaty, therefore, cannot be construed as preserving tribal authority over alienated reservation lands over which the tribe no longer has the right of exclusive use and occupation. *See Montana*, 450 U.S. at 559 n.9.

This diminution of tribal authority over alienated reservation land is necessarily a surrender of the tax exemption attached to the land prior to its alienation and thereby removes any legal obstacle to state taxation. States have broad authority to tax persons and property within their boundaries,

subject to any limitations imposed by federal law. *See M'Culloch v. Maryland*, 17 U.S. 316, 425–429 (1819). That authority can be preempted by federal statutes or by a treaty between the federal government and a tribe, but absent such preemption, states have authority to tax property anywhere within the state, including within a reservation. *See Cohen's Handbook*, *supra,* at 696, (Bellavia Decl. Ex. D); *see also Nevada v. Hicks*, 533 U.S. 353, 361–62 (2001) (holding that an Indian reservation is ordinarily considered part of the territory of the state in which the reservation is located, and state sovereignty does not end at a reservation's border). Accordingly, when reservation land comes into unrestricted fee ownership by non-Indians, the property is removed from federal protection, making it subject to state taxation. *See Cass County*, 524 U.S. at 113.

The Tribes, in contrast, fail to read their "treaty rights with respect to reservation lands . . . in light of the subsequent alienation of those lands," as *Montana* directs. 450 U.S. at 561. They contend that the 1854 Treaty itself precludes state taxation of their reservations unless Congress has authorized such taxation, and that Congress has provided no such authorization. (7th Cir. Dkt. 21:41–42.) But it would necessarily follow that *all* land on those reservations—including land owned by non-Indians—must be non-taxable. The tribes themselves, however, admit that states can tax reservation land

that is owned in fee simple by non-Indians.[8] (Dkt. 215:8–9 ("The Tribes are not arguing that non-Indian-owned land within reservation boundaries cannot be taxed by the State. It can."); 245:20.) That is an admission that reservation land that is alienated to non-Indians becomes taxable, without regard to that land's previous tax immunity under the 1854 Treaty, and without regard to whether Congress was involved in making the land alienable or otherwise authorizing state taxation.

The Tribes are thus wrong when they insist that the analysis here is controlled exclusively by historical facts concerning the original Indian understanding of the 1854 Treaty. Contrary to their contention, when land on any of the Tribes' reservations is alienated to non-Indians, their original, treaty-recognized authority to exclude non-Indians from that land is

[8] All other parties below and the district court likewise accepted that reservation land owned by non-Indians is taxable. (Dkt. 245:20.) Similarly, in *County of Yakima*, both the plaintiff tribe and the United States as amicus acknowledged that states have the power to tax reservation fee lands owned by non-Indians, and the Supreme Court commented on that acknowledgment without criticism. *County of Yakima*, 502 U.S. at 265. The principle appears to be so uncontroversial that there is little published legal authority directly on point, but there is indirect supporting authority. *See, e.g.*, *Utah & Northern Ry. Co. v. Fisher*, 116 U.S. 28, 32–33 (1885) (upholding a property tax levied by the Territory of Utah on an easement owned by a railroad that ran through a tribal reservation); *Thomas v. Gay*, 169 U.S. 264, 273 (1898) (upholding personal property tax imposed by the Territory of Oklahoma on cattle that were grazing on reservation lands pursuant to a lease with the tribe); *Fort Mojave Tribe v. San Bernardino County*, 543 F.2d 1253, 1256–59 (9th Cir. 1976) (upholding tax on possessory leasehold interest in reservation property owned by nonmembers); *Pimalco, Inc. v. Maricopa County*, 937 P.2d 1198, 1203–06 (Ariz. Ct. App. Div. 1 1997) (state taxation of an interest in real property previously conveyed by tribe to non-Indians is not an illegal tax on Indian land).

necessarily overcome by an implicit grant of access. *See Brendale*, 492 U.S. at 424. The district court similarly reasoned that when reservation land has been alienated, title is thereafter held not pursuant to any treaty rights, but rather pursuant to the state's ordinary real estate laws, including state real property taxes. (Dkt. 245:22.) Accordingly, the district court correctly concluded that the Tribes' rights under the 1854 Treaty are not compromised when reservation land is taxed after it has been transferred in fee to a non-Indian. (Dkt. 245:22.) Contrary to the Tribes' assertions, such a transfer itself supersedes the tax immunity conferred by the 1854 Treaty.

What, then happens to the taxability of such alienated reservation land, if it is later reacquired by the tribe or a tribal member? This stage of the analysis is governed by the Supreme Court's holding in *Cass County*. The Court there held that, if taxable non-Indian-owned land within reservation boundaries is subsequently reacquired by the tribe or a tribal member, the land does not become non-taxable simply because it has been restored to Indian ownership. *Id.* at 113–14. The tribe in *Cass County*, like the Tribes here, argued that "its tax immunity lay dormant during the period when [the reservation lands in question] were held by non-Indians," and that the tribe's "reacquisition of the lands in fee rendered them nontaxable once again." *Id.* The Court, however, expressly rejected that contention. *Id.* at 114. In order to restore non-taxable

status to repurchased reservation fee lands, the Court said, the lands would have to be placed into trust pursuant to 25 U.S.C. § 465. *Id.* at 114–15.

The Tribes here argue that *Cass County* is factually distinguishable and does not control the taxability of the reacquired lands. In *Cass County*, the Tribes emphasize, congressional legislation had made the reservation lands alienable, and that legislation also authorized state taxation. Here, in contrast, the subject lands were allotted and rendered alienable not by Congress, but rather by executive actions taken pursuant to the 1854 Treaty. According to the Tribes, because those lands are currently Indian owned, and because Congress has not enacted legislation authorizing state taxation, *Cass County* does not apply and the 1854 Treaty precludes taxation. (*See* 7th Cir. Dkt. 21:56–59.)

It is true that the *Cass County* Court noted that Congress had "demonstrated . . . a clear intent to subject the land to taxation by making it alienable." *Cass County*, 524 U.S. at 114. That observation reflected the historical facts of that case, in which Congress had legislatively provided for the sale of the land to non-Indians. The *Cass County* Court, however, did not have occasion to decide whether that was the only circumstance in which reacquired reservation land would remain taxable. To the contrary, after holding that "the repurchase of reservation land by a tribe does not manifest any congressional intent to reassume federal protection of that land and to oust

state taxing authority," the Court immediately added, "particularly when Congress explicitly relinquished such protection many years before." *Id.* The use of the adverb "particularly" shows that the Court did not consider explicit congressional action to be the *only* circumstance in which repurchased reservation lands would be taxable. Such congressional action was one of the facts in that case, but the Court did not say that its holding was narrowly limited to those facts, nor did it foreclose that reservation land reacquired from non-Indians would remain taxable even if it had originally been made alienable by a treaty, rather than by Congress.

Most importantly, the Tribes' attempt to distinguish *Cass County* fails because it does not account for the undisputed fact that reservation land is taxable when it is owned in fee by non-Indians. As shown above, where reservation land has not only been made alien-*able*, but has actually been alien-*ated* to a non-Indian, the tribe's loss of the treaty-recognized right of exclusive use and occupation of the land itself supersedes any treaty-conferred tax immunity, without regard to whether Congress was involved in making the land alienable or otherwise authorizing state taxation. Because no act of Congress is necessary to make reservation land taxable where the land has actually been alienated to non-Indians, the factual distinction from *Cass County* on which the Tribes rely—*i.e.* presence or absence of Congressional action—is legally immaterial to the taxability issue.

In sum, if alienated reservation land is reacquired by the tribe or its members, the reasoning of *Cass County* applies and the land remains taxable unless it is taken back into trust by the United States. The district court thus correctly held that the 1854 Treaty does not preclude the State from taxing any Indian-owned fee lands that were previously owned by non-Indians and that are not in trust status.

II. State taxation of reacquired reservation land is not precluded by common-law principles of federal Indian law.

The Tribes' second argument is that state taxation of reacquired reservation land is precluded by common-law principles of federal Indian law that prohibit state taxation of Indian property in Indian country, absent clear congressional authorization. (7th Cir. Dkt. 21:51–60.) That argument fails because, for the reasons already shown, reservation land that is alienated to non-Indians becomes taxable independent of any congressional action.

The legal tests for determining the taxability of property located on a reservation vary, depending on who owns the property. *Compare, e.g., Bryan v. Itasca County*, 426 U.S. 373, 376 (1976) (Indian-owned personal property), *with Thomas v. Gay*, 169 U.S. 264 (1898) (non-Indian-owned personal property). For on-reservation property owned by the resident tribe or its members, the Supreme Court has adopted a categorical approach, under which state taxation is prohibited absent a cession of jurisdiction or federal statutory

authorization. *See California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215 n.17 (1987); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973). Congress may authorize state taxation, but its intent to do so must be made unmistakably clear. *Montana v. Blackfeet Tribe* 471 U.S. 759, 765 (1985). But that categorical presumption of non-taxability does not apply to on-reservation property owned by non-Indians. Instead, state taxation is barred only if the tax would impermissibly interfere with a federal regulatory scheme or with the attributes of internal sovereignty retained by Indian tribes. *See White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143–45 (1980); *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 459 (1995) ("[I]f the balance of federal, state, and tribal interests favors the State, and federal law is not to the contrary, the State may impose its levy.").

The Tribes here do not claim that any federal or tribal interests preclude state taxation of reservation land owned in fee by non-Indians—it is undisputed that such taxation is permissible. (*See* Dkt. 215:8–9; 245:20.) The parties disagree, however, over the legal standard that governs the taxability of land that is currently owned by a tribe or its members, but previously was owned by non-Indians. The Tribes argue that, because such land is currently Indian-owned, the categorical presumption above applies without regard to the land's previous ownership history, and the State therefore cannot tax such land without clear congressional authorization. (*See* 7th Cir. Dkt. 21:51–60.) The

State Defendants argue, in contrast, that unrestricted reservation land previously owned by a non-Indian is taxable even if that land has subsequently passed back into Indian ownership.

The State's position is correct. As shown above, when unrestricted reservation land passes into non-Indian ownership, it ceases to be set aside by federal law for exclusive Indian use and occupation, and thereby becomes taxable, regardless of whether it was originally made alienable by a treaty or by Congress. The manner in which reservation land was originally made alienable thus does not control its taxability after it has been actually alienated to a non-Indian owner. And if such taxable alienated land is later reacquired by the tribe or a member, it remains taxable unless it is placed back into trust status. *See Cass County*, 524 U.S. at 115 ("The . . . parcels at issue here were therefore taxable unless and until they were restored to federal trust protection under § 465.").

Unsurprisingly, the Tribes cite no authority directly supporting their contention that unrestricted reacquired reservation land cannot be taxed by the State. Instead, they again solely rely on a narrow reading of *Cass County*, limiting it to fact situations in which congressional legislation made the lands alienable, as opposed to executive action pursuant to a treaty. (*See* 7th Cir. Dkt. 21:56–58.) That attempt to factually distinguish *Cass County*, however,

fails for the reasons discussed above. Reframing the argument in terms of the common law does not change the result.

Further, the Tribes argument is flawed for an additional reason: it would circumvent the statutory mechanism for taking land into trust under 25 U.S.C. § 465. As the *Cass County* Court recognized, "if . . . tax-exempt status automatically attaches when a tribe reacquires reservation land," that "would render partially superfluous § 465 of the Indian Reorganization Act," which "grants the Secretary of the Interior authority to place land in trust," making the land "exempt from state and local taxation after assuming [trust] status." 524 U.S. at 114.

That reasoning applies equally here. Under the Tribes' theory, the taxable status of reservation land would flow simply from its location within reservation boundaries and the identity of the owner at the time of taxation, independent of any prior alienation. (*See* 7th Cir. Dkt. 21:60.) Like in *Cass County*, that would render the statutory trust procedure partially superfluous. A statute should not be construed in a way that would make any part of it superfluous, void, or insignificant. *Lamar, Archer & Cofrin, LLP v. Appling*, 138 S. Ct. 1752, 1761 (2018). Because the Tribes' position would lead to such a disfavored construction, it should be rejected.

Further, this is not a purely abstract concern, but rather would have practical consequences. The trust procedure is "sensitive to the complex

interjurisdictional concerns that arise when a tribe seeks to regain sovereign control over territory," and requires the Secretary of the Interior to consider a variety of factors that include "the tribe's need for additional land; '[t]he purposes for which the land will be used'; 'the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls'; and '[j]urisdictional problems and potential conflicts of land use which may arise.'" *City of Sherrill, N.Y. v. Oneida Indian Nation of New York,* 544 U.S. 197, 220–21 (2005) (*quoting* 25 CFR § 151.10(f) (2004)). However, the Tribes would have land be automatically removed from the property tax rolls whenever title was reacquired by the resident tribe or a tribal member, without any consideration of those jurisdictional concerns and the interests of all affected parties. For this pragmatic reason, too, the holding of *Cass County* should apply here.

CONCLUSION

The State Defendants and the joining Municipal Defendants respectfully ask this Court to affirm the judgment of the district court.

Dated this 27th day of August, 2021.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), typeface requirements of Fed. R. App. P. 32(a)(5), and type style requirements of Fed. R. App. P. 32(a)(6).

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Dated this 27th day of August, 2021.

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CERTIFICATE OF SERVICE

I certify that on August 27, 2021, I electronically filed the foregoing Joint Brief of Defendants-Appellees with the clerk of court using the CM/ECF system, which will accomplish electronic notice and service for all participants who are registered CM/ECF users.

Dated this 27th day of August, 2021.

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