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GENERAL MEMORANDUM 22-016

Federal Appeals Court Rules Tribal Treaty Lands Reacquired From Non-Indians Are Immune From State Taxation

In *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Evers*, No. 21-1817, ___ F.4th ___ (7th Cir. 2022) (hereinafter Opinion), the Seventh Circuit Court of Appeals held that tribal landowners retained tax immunity under their treaty rights even after reacquiring fee land within reservation boundaries from non-Indians. Throughout its opinion, the court discussed a key fact distinguishing this case from others tribal tax cases where reacquired tribal lands were subject to state taxation: here the authorization to allot and remove restrictions on the alienability of tribal lands was provided by treaty terms and not by Congress. Courts have held congressionally approved allotments, such as those under the General Allotment Act, opened lands to state taxation by removing restrictions on the alienability of tribal lands. In this case, the participating tribes' treaty authorized the allotment of tribal lands. The court decided that even though the reacquired lands had previously been allotted and sold to non-Indians, the State of Wisconsin (State) had no authority to tax these Indian-owned parcels absent congressional approval or a concession of jurisdiction by the tribe—neither of which took place here.

This case arises from the State's attempt to assess property taxes on tribally-owned lands within four Ojibwe reservations. The Ojibwe tribes sued to prevent the State from assessing taxes against tribal landowners on the ground that the tax immunity provided under the 1854 Treaty of La Pointe (1854 Treaty) creating their reservations remains in effect today. The State argued that tax immunity ceased once the parcels had fallen out of tribal hands. The tribal members who owned parcels reacquired from non-Indians owe state property taxes, the State claimed.

The district court decided in favor of the State, holding that "Ojibwe-owned reservation property is tax free . . . so long as [it] has remained in Indian ownership since allotment" but the transfer of Ojibwe lands to "non-Indian ownership permanently severs the tie between the land and the treaty." Opinion at 18. The Seventh Circuit reversed.

The court began by citing to the general principle that treaties may not be impaired unless Congress provides otherwise. *Id.* at 6 (citing *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2462 (2020)). And, as the court noted, when Congress makes tribal lands freely alienable, Congress intends these lands to be taxable by states. *Id.* at 14. Here, the court reasoned that the parcels at issue did not become subject to state taxation because

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Congress did not make these lands freely alienable. *Id.* at 23. Rather, as the court noted, the lands allotted under the 1854 Treaty became freely alienable by the Ojibwe tribes' and the President's agreement alone. *Id.*

The court then cited to the principle that "[a] tax that falls on Indians on Indian land . . . is presumptively *invalid* unless Congress has authorized it in 'unmistakably clear' terms." *Id.* at 8 (emphasis original). The court emphasized that in "in the context of state taxation of tribal lands," federal courts have 'never wavered' from this presumption against state taxing authority." *Id.* And given that the claims here applied to tribal lands, the court held that the legal incidence fell on the tribal members, leaving the "State unable to justify its taxes." *Id.* at 28–29.

Moreover, the court reasoned that the 1854 Treaty's language uniquely protected the tribal landowners from state taxation because Congress never broke the treaty's promise to set aside "permanent homes" for tribal members. *Id.* at 29–30. The court reasoned that the promise of setting aside "permanent homes" typically includes an "assurance of immunity from state taxation[,]" which can only be abrogated by an act of Congress. *Id.* at 30–31. The court also reasoned that unlike the circumstances of the tribe in the *City of Sherrill v. Oneida Indian Nation of New York* case, "[n]othing in the record reflects anything close to the sort of out-and-out abandonment of a reservation that might lead [it] to conclude otherwise." *Id.* (citing 544 U.S. 197, 214–17 (2005)). In *City of Sherrill*, the Supreme Court held that equitable considerations barred the Oneida Indian Nation's (OIN's) tax immunity claim after OIN did not attempt to reassert its jurisdiction over tribal lands within New York state bounds—including its immunity from state taxation—for over two centuries. 544 U.S. at 218. Here, by contrast, the court observed that the Ojibwe tribes maintained a strong and active presence on their tribal lands. Opinion at 15. The court, thus, concluded that when paired with the historical record, the 1854 Treaty's language promises tax immunity even for reacquired lands. *Id.* at 33.

This case presents interesting tax immunity implications—and potentially other sovereignty interests—for tribes with treaties containing similar provisions. Please let us know if we may provide additional information.

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