*Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin v. Evers*, 533 F.Supp.3d 701 (W.D. Wis. 2021)

- **Holdings:** All allotments of on-reservation land, regardless of the date made, to members of four Ojibwe Indian tribes were issued pursuant to the 1854 Treaty of La Pointe, not the 1887 General Allotment Act, and were not taxable by the State. However, allotted land once conveyed to nonmembers became taxable and remained so upon reacquisition by the tribes or their members.
- **Summary:** Four Ojibwe Indian tribes have reservations in northern Wisconsin established under the 1854 Treaty of La Pointe. Article 11 of the Treaty provides that "the Indians shall not be required to remove from the homes hereby set apart for them." The Tribes sued various state officials challenging the imposition of taxes on lands that had been allotted and are now "Indian-owned." The state Defendants did not dispute the non-taxability of lands allotted prior to passage of the 1887 General Allotment Act that had never left tribal ownership but did contend that subsequent allotments were taxable. They also argued that any allotted land conveyed to nonmembers and later reacquired by a tribe or its members was taxable. On cross-motions for summary judgment, the district court rejected the state defendants' position with respect to the taxability of post-GAA allotments continued to be held in tribal ownership but concurred that reacquired lands were taxable. Prior to addressing the summary judgment motions, the court resolved several preliminary motions that will not be discussed.

  The first issue, and what the court described as the "core dispute," was "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." The Tribes contended 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"—as reflected in Article 11. The state Defendants responded principally with the textual argument that "Article 11 applies only to the reservations, not to property allocated to individual ownership, because of the use of the word 'hereby." The court declined to accept this restrictive interpretation of "hereby" because it would require equating "homes" with "reservations." In its view, "[t]he 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 court held more broadly that "[t]axation 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." The court thus concluded 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 that, given such immunity's treaty-based status, "congressional intent to rescind treaty-granted tax immunity would have to be expressed with particularly pointed clarity."

  Having established immunity from state taxation as a treaty right, the court then held that Congress had not abrogated such immunity. It deemed "the state's best argument ... based on the reasoning of [*County of Yakima v. Confederated Tribes & Bands of Yakima*

*Indian Nation*, 502 U.S. 258 (1992)], 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). The court nonetheless found contrary Sixth Circuit precedent more persuasive:

> 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.

Thus, "[e]ven 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." State Defendants, moreover, "certainly [have] 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."

The final question was whether "once reservation property goes to non-Indian ownership, that property is forever taxable, even if subsequently repurchased by a tribal owner." Here, the court determined that *Cass County, Minnesota v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103 (1998), controlled. There, the Supreme Court construed the 1906 Burke Act, 34 Stat. 182—which amended GAA § 6 (25 U.S.C. § 349) to read in part that "each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside"—to mean that "[w]hen Congress makes Indian reservation land freely alienable, it manifests an unmistakably clear intent to render such land subject to state and local taxation." The parcels at issue there, some of which had been allotted to tribal members and others sold to non-Indians but all of which had been later purchased by a tribe, were taxable "because Congress had made those parcels freely alienable, even though the act that allowed the sale said nothing about taxation." The district court reasoned:

> 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." ... Under *Cass County*, transfer to non-Indian ownership permanently severs the tie between the land and the treaty.

It added that while "[a]llowing non-Indians to live on the reservation does not compromise any Indian's permanent right to his or her property[,] ... 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."

- **Relevant (2020) Deskbook Section:** 11:6 nn.10, 13
- **Comment:** It will be interesting to see if the Tribes appeal and, if so, the Seventh Circuit's resolution of this rather complex litigation.