



LEGAL ISSUES  
RELATING TO COUNTY GOVERNMENT

# The Impact on Wisconsin Counties

## LAC COURTE OREILLES BAND OF LAKE SUPERIOR CHIPPEWA INDIANS OF WIS. V. EVERS

*by Andy Phillips and Jake Apostolu, Attorneys, Attolles Law, s.c.*

Wisconsin is home to 11 federally recognized Native American nations and tribal communities.<sup>1</sup> Native American tribes are considered “separate sovereigns pre-existing the Constitution” that exercise inherent sovereign authority over their members and territories.<sup>2</sup> The tribes may assess property taxes on land owned by members to fund tribal governments. By contrast, states may not assess property taxes on Native American lands unless (a) a tribe cedes jurisdiction of the land; or (b) Congress acts to specifically permit it.<sup>3</sup> Tribal sovereignty disputes have produced an intricate relationship between the tribes, the U.S. government, and states containing Native American reservations.

This intricacy was recently on display before the Seventh Circuit Court of Appeals in the 2022 case of *Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin v. Evers*. In the case, the Seventh Circuit considered questions on tax immunity and sovereignty of the Ojibwe tribe.<sup>4</sup> This article delves into the key facts, the legal issues at hand, the Seventh Circuit’s holding, and the broader implications for Wisconsin counties impacted by the ruling.

### ► Background

The U.S. Constitution vests the federal government with exclusive authority over relations with Native American tribes.<sup>5</sup> Treaties between the federal government and the tribes are one manner of exercising such authority. Relevant to the *Lac Courte Oreilles Band* case, an 1854 treaty between the Ojibwe tribe and the U.S. government ceded four tracts of land in northern Wisconsin to the Ojibwe in exchange for certain land in Minnesota.<sup>6</sup> The treaty (which remains in effect today) designated the reservation lands as the “permanent home” of the Ojibwe, emphasizing that the tribe would not be compelled to relocate and affirming the tribe’s bargained-for tax immunity.<sup>7</sup> Over time, many of the tribal lands within the reservation boundaries designated under the 1854 Treaty were sold by past tribal owners to non-Native Americans in a “fee simple” transaction and eventually sold back to tribal owners.<sup>8</sup> Once the land changed hands from tax-exempt tribal members to taxable non-tribal members, the state of Wisconsin assessed property taxes on such lands. The disagreement giving rise to the case occurred when the state continued to assess taxes on such lands after they

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Under the prior precedent holding that the act of selling reservation property to a non-Native American surrenders the parcel's tax immunity for all time,<sup>9</sup> the state posited that Ojibwe tribal members who own such reacquired parcels owe state property taxes, even though Ojibwe owners of parcels never owned by non-Native Americans remained tax immune.<sup>10</sup> Affected tribal members objected and filed suit for declaratory and injunctive relief to invalidate the state's assessment.

#### ► **Legal issue, holding and reasoning**

The central legal issue in the Lac Courte Oreilles Band case involved whether the one-time fact of sale to a non-Native American renders treaty-granted reservation land taxable against present and future tribal owners so as to extinguish its tax immunity. The Seventh Circuit held that, irrespective of a sale to non-Native Americans, the state of Wisconsin lacked the authority to tax tribal lands held by a member of the tribe (without regard to when or from whom the tribal member acquired the property) without explicit direction from Congress.<sup>11</sup>

This ruling reinforced the principle that tribes possess sovereign authority unless expressly restricted by Congress.<sup>12</sup> The court's decision rested on a categorical presumption that a tax on Native Americans on designated tribal land is presumptively invalid unless Congress has authorized it in "unmistakably clear" terms.<sup>13</sup> This categorical approach, first established by the Supreme Court, stipulates that states cannot tax reservation lands unless (a) the tribe cedes jurisdiction to the state;<sup>14</sup> or (b) Congress explicitly authorizes the tax.<sup>15</sup>

Because all parties agreed that neither of the above exceptions applied, the state advanced a third argument based upon the 1998 Supreme Court's decision in *Cass*

*County v. Leech Lake Band of Chippewa Indians*. That case concerned eight parcels of Ojibwe land in Minnesota that Congress sold directly to non-Native American owners under provisions of the Nelson Act of 1889.<sup>16</sup> Over time, Ojibwe tribal members bought all the land back and claimed property tax exemption.<sup>17</sup> There, the court held the lands taxable under the proposition that when Congress makes reservation lands freely alienable, it is 'unmistakably clear' that Congress intends that land to be taxable by state and local governments.<sup>18</sup>

Despite this precedent, the court in the *Lac Courte Oreilles Band* decision found the comparison unavailing to the facts of the case before it, reasoning that Congress had not rendered the *Lac Courte Oreilles Band's* land freely alienable by allotting it to non-tribal members as it had through the Nelson Act of 1889 in the *Cass County* decision. Instead, the 1854 Treaty was, according to the court, an act of the president — not Congress — that promised the Ojibwe a permanent home on the bargained-for tracts of reservation land. As such, the court held that when tribal land is "freely alienable not because of an act of Congress, but because of the act of the President as empowered by [a] treaty," it remains tax-immune because "Congress simply has not spoken as to whether that land should be taxable."<sup>19</sup> In further reasoning, the court in the *Lac Courte Oreilles Band* decision analogized that if a church sells its property to a secular entity, the land becomes taxable.<sup>20</sup> However, if the church reacquires the space and resumes religious activities, the tax exemption is reinstated.<sup>21</sup> This analogy underscores the idea that tribal lands, like religious spaces, are afforded special status and tax immunity when owned by tribal members in the absence of clear congressional direction.

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Eventually, the state will need to work with the counties and other local governments on a long-term solution that preserves tribal sovereignty in upholding the terms of the 1854 Treaty **while also recognizing the costs associated with county and local governments' provision of vital services to residents living within the reservation boundaries.**

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### ► What this means for Wisconsin counties

The court's decision in the Lac Courte Oreilles Band case reaffirms the importance of tribal sovereignty and the need for a thorough review of the historical record related to properties within reservation boundaries before making a determination on taxability. Counties impacted by the ruling (Ashland, Bayfield, Sawyer, Iron and Vilas) unfortunately find themselves unable to collect property taxes on parcels located within reservation boundaries. In Ashland and Bayfield counties, in particular, this is a significant financial issue. Thankfully, the Legislature and governor addressed the financial burden on impacted counties in the 2023-25 state budget, but this temporary solution will indeed be short-lived. Eventually, the state will need to work with the counties and other local governments on a long-term solution that preserves tribal sovereignty in upholding the terms of the 1854 Treaty while also recognizing the costs associated with county and local governments' provision of vital services to residents living within the reservation boundaries.

More broadly, it is important to recognize the scope of the court's Lac Courte Oreilles Band decision. It does not apply to other tribes and tribal lands. As the court recognized and based upon long-standing precedent, the decision surrounding taxability of any parcel within reservation boundaries will depend upon the language of particular treaties and congressional action. That said, the analysis undertaken in the Lac Courte Oreilles Band decision is instructive in terms of how courts will analyze the issues in reaching a decision.

If you have any questions surrounding the decision, its impact on counties or matters involving property taxation with respect to tribal lands, please let the WCA know or reach out to the authors. ■

*Attolles Law, s.c. works on behalf of Wisconsin counties, school districts and other public entities across the state of Wisconsin. Its president & CEO, Andy Phillips, has served as outside general counsel for the Wisconsin Counties Association for nearly 20 years.*

1. American Indian Studies — "Tribal Nations of Wisconsin," WI Dept. of Public Instruction (last visited Dec. 5, 2023), available at [bit.ly/3GwaBgQ](https://bit.ly/3GwaBgQ).
2. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978); Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505, 509, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991).
3. See County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation, 502 U.S. 251, 257, 112 S.Ct. 683, 116 L.Ed.2d 687 (1992).
4. The federal government has traditionally used the term "Chippewa," an anglicized derivative of Ojibwe, but the Lac Courte Oreilles Band case uses the original name, as do the tribes in their briefing, so we will do the same here.
5. U.S. Const. art. 1, § 8, cl. 1.
6. Lac Courte Oreilles Band, 46 F.4th 552, 561.
7. Id. at 555.
8. Id. at 555.
9. Id.
10. Id.
11. Lac Courte Oreilles Band, 46 F.4th 552, 564.
12. See Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 788 (2014) (recognizing that "[u]nless and until Congress acts, the tribes retain their historic sovereign authority").
13. Blackfeet Tribe, 471 U.S. at 765.
14. This question gets increasingly murky in the area of "implied cession." Here, the parties agreed that no cession was committed by the Ojibwe tribe, so a detailed discussion of implied cession is not warranted here.
15. Yakima, 502 U.S. at 263, 112.
16. Id. at 108, 118 S.Ct. 1904.
17. Id.
18. [Quoting Yakima, 502 U.S. at 263, 112 S.Ct. 683].
19. See Keweenaw Bay Indian Cmty. v. Naftaly, 452 F.3d 514, 533 (6th Cir. 2006).
20. Lac Courte Oreilles Band, 46 F.4th 552, 570.
21. Id.