IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
GREEN BAY DIVISION

LEGEND LAKE PROPERTY OWNERS ASSOCIATION, INC.,

Plaintiff,

v. Case No. 1:23-cv-00480

UNITED STATES DEPARTMENT OF THE INTERIOR. et al.,

Defendants.

FEDERAL DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

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Plaintiff, the Legend Lake Property Owner's Association ("LLPOA" or "Plaintiff"), brings this Administrative Procedure Act ("APA") challenge to the Department of the Interior's ("DOI") decision to acquire land in trust for the Menominee Indian Tribe, claiming that DOI acted arbitrarily and capriciously. DOI, however, adhered to Congress's explicit statutory directive to accept land into trust for the benefit of the Menominee Indian Tribe. Federal Defendants respectfully move to dismiss this action under Federal Rule of Civil Procedure 12(b)(1), because Plaintiff's failure to meet its burden of establishing standing deprives the Court of subject matter jurisdiction, and under Rule 12(b)(6) for failure to state a claim.

INTRODUCTION

This case implicates significant federal interests in restoring land to federal trust status on the Menominee Reservation, as Congress intended and explicitly directed in passing the Menominee Restoration Act, Pub. L. No. 93-197, 87 Stat. 770 (1973). A key feature of the Menominee Restoration Act is its "mandatory acquisition" provisions, which state that DOI "shall" accept land in trust for the benefit of the Tribe, eliminating agency discretion and reliance on other generally applicable laws and regulations governing trust land acquisitions. In doing so, Congress precluded DOI or the courts from considering of the impacts of trust acquisition on county tax rolls. In fact, freeing these lands from local taxation was one of Congress's driving forces in passing this federal legislation. These lands had long-been tax exempt until federal termination era of the 1950s, when federal title was terminated and the lands became subject to local taxation. Congress intended the Restoration Act to bring a vast majority of land within the Menominee Reservation—including, specifically, land within the "Legend Lake" development area on the Reservation—back into federal trust status and free from local taxation.

In an apparent effort to frustrate the land-into-trust process on the Menominee Reservation—and in direct conflict with federal law, namely the mandatory acquisition and tax provisions of the Menominee Restoration Act—Plaintiff enacted restrictive covenants prohibiting landowners on the Reservation from making such transfers. The restrictive covenants purport to prohibit any transfer that would remove property from the county's tax rolls, including attempts to place land into trust. The restrictive covenants seek to go even further, purporting to render DOI's compliance with its statutory mandate "null and void."

Specifically, Plaintiff challenges DOI's acceptance of 40 parcels of land into trust, totaling approximately 21.53 acres, pursuant the mandatory acquisition provisions of the Menominee Restoration Act. DOI was statutorily required to take this action once two conditions were met: (1) the land must be located within Menominee County; and (2) the land must be transferred to the Secretary by a Menominee tribal member. Pub. L. No. 93-197, § 6(c), 87 Stat. at 773. Plaintiff concedes that both conditions have been satisfied.

Plaintiff's Complaint should be dismissed for lack of jurisdiction and for failure to state a claim. First, Plaintiff lacks standing to challenge DOI's trust acquisitions because it has not pled an actual or imminent injury fairly traceable to DOI's actions. Although Plaintiff alleges that it anticipates reduced property values at some future date because of DOI's actions, those unsupported and speculative allegations fall short of the actual or imminent injury required for Plaintiff to demonstrate standing. Moreover, even if Plaintiff were injured by these trust acquisitions, its injury would arise as a direct result of Congressional action through the Menominee Restoration Act, which mandates such acquisitions, rather than any independent discretionary action by DOI.

Second, even if Plaintiff could establish standing, its Complaint fails to state a claim because, as a matter of law, DOI's adherence to a congressional mandate, that DOI "shall" place these lands in trust, cannot as a matter of law or logic be considered arbitrary and capricious. DOI's action in this case was statutorily required, provided that two conditions were satisfied, which Plaintiff concedes has occurred. Plaintiff has not pled, and cannot show, that DOI has acted arbitrarily or capriciously by complying with a statutory directive.

Third and finally, Plaintiff's Complaint fails to state a claim because Plaintiff's restrictive covenants are preempted by federal law. These covenants conflict with Congress's mandate to place parcels in trust for the Tribe, and purportedly attempt to compel DOI to deny the land into trust applications, contrary to the statutory command in the Menominee Restoration Act. Enforcement of the restrictive covenants would also frustrate the objectives of Congress, which were to restore the trust status of most of the lands within the Menominee Reservation. For these and the reasons set forth below, Federal Defendants respectfully request that the Court dismiss this suit in its entirety.

QUESTION PRESENTED

In the Menominee Restoration Act, Congress mandated that DOI place certain parcels of land into trust for the Menominee Indian Tribe—without the exercise of discretion—provided that two conditions are satisfied. Here, Plaintiff concedes that the two prerequisite conditions have been satisfied. Nevertheless, Plaintiff claims that its restrictive covenants override Congress's mandate to place parcels in trust for the Tribe and compel DOI to deny the land into trust applications, contrary to the statutory command in the Menominee Restoration Act.

The questions presented are (1) whether Plaintiff has standing to challenge the trust acquisitions at issue; and (2) whether Plaintiff has adequately pled that DOI acted arbitrarily and

capriciously by taking a statutorily required action, i.e., following Congress's statutory command to place the parcels into trust for the Tribe.

FACTUAL BACKGROUND

I. The establishment of the Menominee Reservation and the Termination Act.

The Menominee Reservation was established within the Tribe's aboriginal homeland by a series of treaties, the last of which was the Treaty of Wolf River of 1854. *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 405 (1968). Federal policy shifted several times in the 100 years that followed, with the federal termination era taking hold in the 1950s, at which time Congress generally sought to end federal obligations with some tribes. In 1953, Congress instructed the Secretary of the Interior to recommend legislation for the withdrawal of federal supervision over certain American Indian tribes, including the Menominee Tribe. H.R. Con. Res. 108, 83d Cong., 1st Sess., 67 Stat. B132 (1953). In 1954, Congress passed the Menominee Termination Act, 68 Stat. 250 (1954), *as amended*, 70 Stat. 549 (1956), 72 Stat. 290 (1958), 74 Stat. 867 (1960), 25 U.S.C. §§ 891-902 (repealed).

The procedure established in the Menominee Termination Act occurred over the next several years, becoming fully effective at midnight on April 30, 1961. *Menominee*, 391 U.S. at 408; *Tomow v. Menominee Enterprises, Inc.*, 208 N.W.2d 824, 826 (Wis. 1973). By that time, Congress had officially ended all federal obligations to the Menominee Tribe and removed the federal trust status of tribal lands. Courts have explained that the Termination Act "caused the federal government to cede to the State of Wisconsin 'its power of supervision over the tribe and reservation lands.'" *United States v. Long*, 324 F.3d 475, 481 (7th Cir. 2003) (quoting *Menominee*, 391 U.S. at 412).

II. Tax burdens leading to the Legend Lake development.

In terminating the federal trust relationship with the Menominee Tribe, Congress provided for the creation of a tribal corporation, Menominee Enterprises, Inc. ("MEI"), to accept title to the Tribe's land previously held in trust by the United States, and to manage and operate all the business and property transferred to it by the United States pursuant to the Termination Act. *See Long*, 324 F.3d at 481. The County began taxing the MEI-managed tribal lands for the first time ever, and the company, substantially burdened by these new taxes, struggled financially. Menominee Restoration Act, Hearings Before the Subcomm. on Indian Affairs of the H. Comm. on Interior and Insular Affairs, 93rd Cong. 93-20 (1973), *available at* 73 CIS H 44132 [hereinafter *Hearings*] (statement of Ada Deer) at 33. Individual Menominee tribal members also struggled financially because of the newly imposed taxes. *Id.* at 33-35.

During the hearings leading up to the Restoration Act, property taxes were described as "the most crushing obligation" and "one of the greatest problems" for MEI following the Termination Act. *Id.* at 42; *see also Hearings* at 87 (statement of Ted Boyd). MEI's tax obligations became so overwhelming that the entity was forced to sell large portions of the Tribe's homelands for cash. *Hearings* at 38 (statement of Ada Deer); *Id.* at 241, 243 (statement of John Kyl, Asst. Sec. of the Interior) (describing the "serious financial other problems [that] plagued the Menominees since termination" and how the Tribe and its institutions were now "threatened by insolvency and the loss of their land base."); 118 Cong. Rec. H3391 (daily ed. Apr. 20, 1972) (statement of Hon. David Ross Obey) ("The Menominee land became subject to taxation and the only way the Menominees could meet that new tax burden was to begin to sell their land.").

MEI's growing tax obligations, and the resulting forced land sale of tribal lands, eventually led to the "Legend Lake" development project. MEI undertook this development through a joint venture, selling lots to buyers, including many non-Menominees. *Tomow*, 60 Wis. 2d at 10-11. The Legend Lake development generated a long history of litigation regarding reservation land sales, taxation, and other issues. *See, e.g.*, *Tomow* (tribal members challenging the validity of land sales leading to the development of Legend Lake); *Van Camp v. Menominee Enters., Inc.*, 228 N.W.2d 664 (Wis. 1975) (class action by Legend Lake property owners who purchased former lands previously held in trust by the United States for the Menominee Tribe regarding hunting and fishing privileges within the Legend Lake area).

III. The Menominee Restoration Act.

Congress passed the Menominee Restoration Act to repeal the Termination Act and its prior termination policies toward the Tribe. The Restoration Act provided for the full restoration of the Tribe's status as a federally recognized Tribe, as well for the full restoration of federal services. Pub. L. No. 93-197, 87 Stat. 770.

A key feature of the Restoration Act is its "mandatory acquisition" provisions, requiring that the Secretary of the Interior "shall" accept certain lands in trust for the benefit of the Tribe, provided that two conditions are met: (1) the land is located within Menominee County; and (2) the land is transferred to the Secretary by a Menominee tribal member. Pub. L. No. 93-197, § 6(c), 87 Stat. at 773 ("The Secretary shall accept the real property (excluding real property not located in or adjacent to the territory constituting, on the effective date of this Act, the county of Menominee, Wisconsin) of members of the Menominee Tribe, but only if transferred to him by the Menominee owner or owners."). If those two criteria are met, the statute mandates the trust acquisition, leaving DOI no discretion to deny the acquisition request. The Restoration Act also

provided that all lands transferred pursuant to the mandatory acquisition provisions "shall be exempt from all local, State, and Federal taxation." *Id.*

Alleviating tax burdens was one of the driving forces behind the legislation. As described above, the legislative history includes testimony about the burden of local taxation on the Menominee Reservation throughout the termination era, particularly property taxes. Congress, in enacting the Restoration Act, alleviated those burdens by providing a process to return land in trust and exclude it from local tax rolls. *Hearings* at 10 (statement of Hon. Harold V. Froehlich); *id.* at 14 (statement of Hon. David R. Obey); *id.* at 276 (statement of Hon. Patrick J. Lucey, Governor, State of Wisconsin) ("It will remove the crippling property tax burden . . . and return jointly-owned Menominee land to a federal trust.").

Tribal members made known their desire to re-acquire land, including within the Legend Lake area, to place it back into trust status for protection, and to remove the tax burdens that had encumbered the land during termination. *Id.* at 41 (statement of Ada Deer); *id.* at 42 (statement of Mr. Wilber); *id.* at 68-69 (statement of Francis Leon) (describing the need to "lower our taxes right now on the lakes of the Menominees").

Congress intended, through the Restoration Act, that the "vast majority" of lands within Menominee County would be returned to federal trust status and removed from the local tax rolls. Representative Froehlich—a key sponsor of the legislation, and a non-Indian owner of property at Legend Lake—expressed this clearly, stating that the Menominee Restoration would result in "**the vast majority of land in Menominee County [being] stricken from the property tax rolls of local government.**" *Hearings* at 10 (statement of Hon. Harold V. Froehlich) (emphasis added); *id.* at 68-69 (statement of Francis Leon) (describing Rep. Froehlich's Legend Lake property ownership).

Elsewhere, Representative Froehlich described that "[o]ne of the major objectives" of the Restoration Act was to place Menominee lands "in tax-free trust." *Hearings* at 251 (statement of Hon. Harold V. Froehlich). "When this happens," he said, "**the great bulk of taxable lands within the county will be removed from the tax rolls of the county** . . . ." *Id.* (emphasis added); *see also id.* at 252 (describing the time, after the Restoration Act, when "the great bulk of the land is removed from the tax rolls of local government"). Congress contemplated that the remaining tax base of the county would include only a "small amount of Menominee owned land that has not been placed in trust and property owned by non-Menominees, few of whom are residents of the county." *Id.* at 252 (emphasis added); *id.* at 258 ("after restoration occurs we will have a situation where we have a county in Wisconsin that will have most of its property tax-exempt"). It was equally important to Congress that "each individual Menominee has the opportunity to transfer the land that he owns in fee simple into trust, making it exempt." *Id.*; *see also id.* at 270 ("individual Menominees are anxious to transfer their lands to trust so they can get out of this tax burden").

IV. LLPOA's restrictive covenants.

The present litigation involves a challenge to DOI's acquisition of land within Legend Lake development in trust for the Tribe pursuant to the Menominee Restoration Act. In 2009, in what appears to be an effort to frustrate the land-into-trust transfers between Menominee tribal members and the United States—and in direct conflict with the mandatory acquisition provisions of the Menominee Restoration Act—Plaintiff, a local property owners association located within the Legend Lake development, put in place restrictive covenants prohibiting such transfers. The restrictive covenants provide in relevant part:

> B. Without the express written consent of the Association . . . no owner of any interest in the Subject Real Estate (or any part thereof) shall transfer any interest

in the Subject Real Estate to any individual, entity (whether corporation, limited liability company, limited partnership, limited liability partnership, general partnership or otherwise), organization, or sovereign or dependent sovereign nation, or during the period of ownership take any action, the result of which could or would:

(1) remove or eliminate the Subject Real Estate (or any part thereof) from the tax rolls of Menominee County, Wisconsin,

(2) diminish or eliminate the payment of real estate taxes duly levied or assessed against the Subject Real Estate (or any part thereof),

(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.

C. This Restriction on Transfer of Paragraph 1 shall apply to the transfer of an interest in an entity that is an owner of the Subject Real Estate if, as a result of the transfer, any of items (1)-(5) above could or would occur. This restriction shall, among other things, expressly apply to any application to have the Subject Real Estate (or any part thereof) placed into federal trust pursuant to the Indian Reorganization Act.

D. Any owner of an interest in the Subject Real Estate (or any part thereof) shall at all times comply with any and all municipal and Association laws, rules, regulations and obligations as set forth in the foregoing restrictions, to include, without limitation, the property tax collection laws set forth in Chapters 74 and 75 of the Wisconsin Statutes. The Subject Real Estate remains subject to said municipal and Association laws, rules, regulations and obligations, in rem, notwithstanding a transfer to an owner not otherwise subject to them.

E. Any purported transfer of any interest in the Subject Real Estate (or any part thereof) in violation of these restrictions shall be null and void.

LLPOA claims that its restrictive covenants are intended to maintain the property values of Legend Lake properties and to preserve the tax base of Menominee County, Wisconsin. Compl. (Dkt. 1) at 4, ¶ 19.

As previously described, the Legend Lake development has generated a long history of litigation regarding reservation land sales, taxation, and other issues. But there is an additional point of contention: in enacting its restrictive covenants, LLPOA excluded Menominees from voting and participating in the decision making. For purposes of voting and quorum, the LLPOA bylaws exclude the Menominee Tribe and all tribal trust lands within the Legend Lake development, a practice upheld in a separate action brought by non-Indian landowners (which did not include the United States, the Tribe, or tribal members as parties). *Legend Lake Property Owners Association, Inc. v. Lemay*, 710 N.W.2d 725 (Wis. Ct. App. 2006).

V. Administrative litigation before the Interior Board of Indian Appeals ("IBIA").

Plaintiff alleges that Guy F. Keshena, a Menominee tribal member and the title owner to 40 parcels of land within the Legend Lake development, within Menominee County, requested that DOI accept his parcels into trust for the benefit of the Tribe pursuant to the Menominee Restoration Act. Compl. (Dkt. 1) at 5-6, ¶¶ 22-26. DOI accepted the parcels into trust in 2018. *Id.* at 6, ¶¶ 27-28. Plaintiff filed a notice of appeal with the IBIA, which issued its decision in March 2023, holding that DOI did not err in accepting the parcels into trust because it was compelled to do so pursuant to the Menominee Restoration Act. *Id.* at 6-7, ¶¶ 29-32.

VI. Wisconsin State Court Litigation.

Plaintiff filed a separate action against Mr. Keshena and the Tribe in Wisconsin state court (Dkt. 1 at 8, ¶ 43), seeking a declaration that its restrictive covenants are valid and legally enforceable, and that the transfer of the Keshena properties into trust should be declared "null

and void." The Wisconsin state circuit court held (1) that the Menominee Restoration Act preempts Plaintiff's restrictive covenants and (2) that the covenants are not enforceable to prevent restoration of land to the United States in trust for the Menominee Tribe where that land is within the area addressed by the Menominee Restoration Act. DOI is not a party to that litigation, which is now pending in the Wisconsin Court of Appeals.

STANDARD OF REVIEW

I. Subject matter jurisdiction.

Subject matter jurisdiction is a threshold issue, which should be addressed prior to any consideration of the merits. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 88-89 (1998). Federal courts presumptively lack jurisdiction "unless the contrary appears affirmatively from the record." *Renne v. Geary*, 501 U.S. 312, 316 (1991) (quotation omitted). Furthermore, because "[f]ederal courts are courts of limited jurisdiction . . . [i]t is to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests on the party asserting jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (citations omitted). Therefore, to survive a motion to dismiss pursuant to Rule 12(b)(1), a plaintiff bears the burden of establishing that the court has subject matter jurisdiction over its claim. *Apex Digital, Inc. v. Sears, Roebuck & Co.*, 572 F.3d 440, 443 (7th Cir. 2009). In ruling on a jurisdictional challenge under Rule 12(b)(1), the "court may properly look beyond the jurisdictional allegations of the complaint and view whatever evidence has been submitted on the issue to determine whether in fact subject matter jurisdiction exists." *Id.* at 444 (internal quotation marks and citation omitted).

II. Failure to state a claim.

"A Rule 12(b)(6) motion tests the sufficiency of the complaint to state a claim upon which relief may be granted. *Coal. to Save the Menominee River Inc. v. EPA*, 423 F. Supp. 3d 560, 565 (E.D. Wis. 2019). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw [a] reasonable inference that the defendant is liable for the misconduct alleged." *Id*. (citing *Twombly*, 550 U.S. at 556).

Legal conclusions and "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements do not suffice" to state a cause of action and must be disregarded. *Id.* (citing *Twombly*. 550 U.S. at 555). Similarly, "[a] pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.' Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Id*. (quoting *Twombly*, 550 U.S. at 555, 557). In evaluating a Rule 12(b)(6) motion, the court may consider not only the facts alleged in the complaint, but also facts or documents referred to or incorporated into the complaint which are central to Plaintiff's claim, *Burke v. 401 N. Wabash Venture, LLC*, 714 F.3d 501, 505 (7th Cir. 2013), and matters of which the Court may take judicial notice, *Fosnight v. Jones*, 41 F.4th 916, 922 (7th Cir. 2022).

ARGUMENT

I. Plaintiff lacks standing to challenge the trust acquisitions under the Menominee Restoration Act.

A plaintiff bears the burden of proof to establish federal jurisdiction. *Lujan v. Defs. of Wildlife,* 504 U.S. 555, 561 (1992). This burden includes establishing constitutional or Article III standing to maintain suit. *Id.* To meet the Article III standing requirements, a Plaintiff must establish three elements. *Id*. at 560. First, Plaintiff must show that it has suffered an "injury in fact" that is "concrete and particularized" and actual or imminent, not "conjectural" or "hypothetical." *Id.* (citations omitted). Plaintiff's injury must be "certainly impending" and cannot rely "on a highly attenuated chain of possibilities." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409, 410 (2013). Second, the Plaintiff's injuries must be "fairly . . . trace[able]" to the challenged action. *Lujan*, 504 U.S. at 560-61 (citations omitted). That is, the injury cannot be "th[e] result [of] the independent action of some third party not before the court." *Id.* Third, Plaintiff must show it is likely, as opposed to merely speculative, that the injury will be addressed by a favorable decision of the Court. *Id*.

Plaintiff lacks standing to challenge DOI's trust acquisitions because it has not pled an actual or imminent injury fairly traceable to DOI's actions. Plaintiff alleges that it anticipates reduced property values at some future date because of the trust acquisitions. Compl. (Dkt. 1) at 9, ¶ 45.[1] That unsupported and speculative allegation falls short of the actual or imminent injury required for Plaintiff to demonstrate standing. *See, e.g.*, *Stop the Casino 101 Coal. v. Salazar*, Case No. 08-cv-02846, 2009 WL 1066299, at *5 (N.D. Cal. Apr. 21, 2009) (granting Rule

[1] Plaintiff's standing is further attenuated by the fact that this alleged financial injury, should it ever occur, would be borne not by the Plaintiff but by individual property owners who are not parties to this suit.

12(b)(1) motion to dismiss plaintiffs' challenge to a mandatory land-into-trust acquisition; plaintiffs' alleged loss of protections of state law and diminution in property value did not constitute injury in fact for standing purposes), *aff'd,* 384 F. App'x 546 (9th Cir. 2010); *see also Neighbors of Casino San Pablo v. Salazar*, 773 F. Supp. 2d 141, 150 (D.D.C.) (plaintiffs alleging diminution in property value, among other alleged injuries, lacked standing to challenge congressionally mandated acquisition of land into trust), *aff'd,* 442 F. App'x 579 (D.C. Cir. 2011); *see also Padou v. D.C. Alcoholic Beverage Control Bd.*, 70 A.3d 208, 212 (D.C. 2013) ("Because [plaintiff] is alleging that real property values will decrease in the future, he has not established that he suffered any actual harm. Further, [plaintiff's] allegations concerning real property values fall short of establishing that he will suffer any imminent harm.").

Moreover, even if Plaintiff had alleged a cognizable injury due to the trust acquisitions, this injury would arise as a direct result of Congressional action through the Menominee Restoration Act, which mandates such acquisitions. "The causation or traceability element of standing requires that 'there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court.'" *Chesapeake Climate Action Network v. Exp.-Import Bank of the U.S.*, 78 F. Supp. 3d 208, 224 (D.D.C. 2015) (quoting *Lujan*, 504 U.S. at 560). Here, Congress, not DOI, established the requirement that these lands go into trust for the benefit of the Menominee Tribe.[2]

[2] To the extent Plaintiff is challenging the Menominee Restoration Act itself, that action is barred by the applicable six-year statute of limitations in 28 U.S.C. § 2401(a).

II. As a matter of law, DOI's adherence to Congress's statutory directive cannot be considered arbitrary and capricious.

Even if Plaintiff can establish standing, its Complaint must be dismissed for failure to state a claim because, as a matter of law, DOI's adherence to Congress's statutory directive cannot be considered arbitrary and capricious. *See Artichoke Joe's California Grand Casino v. Norton*, 278 F. Supp. 2d 1174, 1187 (E.D. Cal. 2003) (plaintiff was unlikely to succeed on the merits of its challenge where DOI was "under a specific Congressional mandate to take the land into trust"); *Pontarelli v. U.S. Dep't of the Treasury*, 285 F.3d 216, 222 (3d Cir. 2002) ("complying with a congressional mandate surely is not" arbitrary and capricious); *McHugh v. Rubin*, 220 F.3d 53, 61 (2d Cir. 2000) ("decision to comply with a congressional directive cannot be said to meet [the APA's arbitrary and capricious] standard"); *Turner v. Phillips*, Case No. 3:08-cv-133, 2009 WL 692195, at *4 (N.D. W. Va. Jan. 12, 2009) ("fidelity to Congress's mandate . . . is neither arbitrary nor capricious, but rather was manifestly correct"); *Funches v. United States*, Case No. 91-cv-5719, 1992 WL 80507, at *4 (N.D. Ill. Apr. 9, 1992) ("decision . . . based upon a clear congressional mandate—the express language of the statutory provisions . . . cannot . . . be characterized as an arbitrary and capricious act").

Here, the "mandatory acquisition" provisions of the Menominee Restoration Act required DOI to acquire the land at issue in trust for the Tribe—the very agency action challenged in this lawsuit. Congress's unequivocal use of the term "shall" in the statute dooms Plaintiff's challenge. *See Churchill Cnty. v. United States*, 199 F. Supp. 2d 1031, 1034 (D. Nev. 2001) ("Shall is a mandatory term, indicating the lack of discretion on the part of the Secretary. . . . Therefore, once the requirements of [the statute] were met, the Secretary was required to accept the land into trust for the tribe."); *Neighbors of Casino San Pablo v. Salazar*, 773 F. Supp. 2d at 150 (plaintiff "fail[ed] to state a claim under Rule 12(b)(6)" because Congress "mandated that

the Secretary take [the property] into trust"); *Tohono O'odham Nation v. City of Glendale*, Case No. 11-cv-279, 2011 WL 2650205, at *8 (D. Ariz. June 30, 2011) (Congress's use of the word "shall" makes the "[s]tatute . . . mandatory, unlike other statutes authorizing acquisition of Indian trust lands."), *aff'd* 804 F.3d 1292 (9th Cir. 2015).

DOI's action was statutorily mandated, where two conditions were satisfied: (1) the land is located within Menominee County; and (2) the land is transferred to the Secretary by a Menominee tribal member. Plaintiff concedes that these two prerequisite conditions have been satisfied. Compl. (Dkt. 1) at ¶¶ 6, 13, 19, 24-26; Dkt. 1-3 at 2-3, 5, 9. Therefore, Plaintiff has not pled, and cannot show, that DOI has acted arbitrarily or capriciously by complying with its statutory directive.

Plaintiff argues that, even if DOI were required to accept the parcels in trust for the benefit of the Menominee Tribe, its restrictive covenants—including their preservation of country tax levies—should be considered "other obligations" within the meaning of the Menominee Restoration Act. This argument also fails as a matter of law. First, the express statutory text contradicts Plaintiff's argument, stating that all lands transferred pursuant to the mandatory acquisition provisions "shall be exempt from all local, State, and Federal taxation." 87 Stat. at 773. Second, even if Congress had not provided such a clear and explicit answer, any ambiguity in the term "other obligations" should be resolved in favor of DOI's interpretation and for the benefit of the Tribe. *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005) (federal courts must accept the implementing agency's reasonable construction of a statute); *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 269 (1992) ("'[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.'") (quoting *Montana v. Blackfeet*

Tribe of Indians, 471 U.S. 759, 766 (1985)); *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985) ("[I]t is well established that treaties should be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." (citations omitted)).

III. Federal law conflicts with and preempts Plaintiff's restrictive covenants.

Plaintiff's restrictive covenants also conflict with the text, purposes, and intended effects of the Menominee Restoration Act and are therefore preempted by federal law. Federal preemption is based upon the Supremacy Clause of the United States Constitution. *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 152 (1982); U.S. CONST. art. VI, cl. 2 (federal law "shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding"). Congress can, of course, expressly command preemption by statute (express preemption). *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 299 (1988). But even absent explicit preemption language in a statute's text, Congress may implicitly preempt state law to the extent that it is an obstacle to the accomplishment and execution of congressional purposes and objectives (conflict preemption). *Fid. Fed. Sav. & Loan*, 458 U.S. at 152-53. Under conflict preemption principles, "[e]ven where Congress has not completely displaced state regulation in a specific area, state law is nullified to the extent that it actually conflicts with federal law." *Id.* Such a conflict arises when (1) "compliance with both federal and state regulations is a physical impossibility" or (2) "when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id*. (quoting *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963) and *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

Because preemption stems from the "system of dual sovereignty between the States and the Federal Government," judicial analysis begins "with the basic assumption that Congress did

not intend to displace state law." *Gregory v. Ashcroft*, 501 U.S. 452, 457, 460 (1991); *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). Congressional intent is therefore the "touchstone" in every preemption case. *Fid. Fed. Sav. & Loan*, 458 U.S. at 153; *see also Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 95 (1983) ("In deciding whether a federal law pre-empts a state statute, our task is to ascertain Congress' intent in enacting the federal statute at issue."); *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) ("In determining whether a federal statute preempts state law, the purpose of Congress is the ultimate touchstone.") (quotations omitted). Preemption principles apply to real property law. *Fid. Fed. Sav. & Loan*, 458 U.S. at 153. The relative importance of the state law is not material, and cannot overcome preemption, when it conflicts with a valid federal law. *Id.*; *see also Brown v. Hotel & Rest. Emps. & Bartenders Int'l Union Loc. 54*, 468 U.S. 491, 503 (1984) ("[T]he relative importance to the State of its own law is not material . . . for the Framers of our Constitution provided that the federal law must prevail.") (citation and quotation marks omitted).

The Menominee Restoration Act obligates DOI to accept land in trust for the benefit of the Tribe, without the exercise of any discretion, and without reference to other generally applicable laws and regulations governing trust land acquisitions. Congress's use of the term "shall" in the Menominee Restoration Act is critical to this analysis. *See Tohono O'odham Nation v. City of Glendale*, Case No. CV-11-279-PHX-DGC, 2011 WL 2650205, at *9 (D. Ariz. June 30, 2011) (mandatory trust acquisition provision, stating that the Secretary "shall" place land in trust for a tribe if statutory conditions are satisfied, preempted state law attempt to prevent trust land transactions), *aff'd* 804 F.3d 1292 (9th Cir. 2015); *see also Barnett Bank of Marion Cty., N.A. v. Nelson*, 517 U.S. 25, 33 (1996) ("Congress would not want States to forbid, or to impair significantly, the exercise of a power that Congress explicitly granted."); *Brown*, 468

U.S. at 503 ("If the state law regulates conduct that is actually protected by federal law . . . pre-emption follows not as a matter of protecting primary jurisdiction, but as a matter of substantive right."); *Ignace v. Int'l; Playtex, Inc.*, Case No. 86-C-480-C, 1987 WL 93996, at *7 (W.D. Wis. Aug. 14, 1987) (state common law claims barred by federal preemption doctrine where Congress used the word "shall" to establish the controlling standard); *see also CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993) (in conflict preemption cases, "the plain wording of the [statute] . . . necessarily contains the best evidence of Congress's preemptive intent[]").

Congress mandated trust acquisition where two conditions are satisfied, thereby precluding any additional barriers, to converting Menominee tribal member land to federal trust status within the Menominee Reservation. If those two federal statutory conditions are met—as Plaintiff concedes they are—Congress mandated that the land be placed into trust status and removed from the local tax rolls as a matter of federal law.

Plaintiff in effect seek the that the Court rewrite the Restoration Act to include an additional condition, which is at odds with the Act. Plaintiff imposed its restrictive covenants to render the Restoration Act's mandatory acquisition provisions inapplicable. Both the text of the covenants, and the relief sought by Plaintiff, are in direct conflict with the Menominee Restoration Act. Where the Restoration Act expressly demands a particular outcome—i.e., that land transferred within Menominee County by a Menominee tribal member to the Secretary be converted to federal trust status and removed from the local tax rolls—the restrictive covenants, and Plaintiff's requested relief, would have DOI's congressionally mandated actions declared "null and void." Compl. Ex. A (Dkt. 1-1) at 4, Restrictive Covenant at ¶ E ("Any purported transfer of any interest in the Subject Real Estate (or any part thereof) in violation of these restrictions shall be null and void."). One cannot comply with both the Restoration Act and with

the enforcement of Plaintiff's restrictive covenants at the same time, and on that basis alone federal law preempts enforcement of the covenants. Upholding the enforceability of the restrictive covenants would purport to declare BIA's trust acquisition "null and void," and purport to limit BIA's authority and directives under the Restoration Act. The federal preemption doctrine forbids this result.

Plaintiff's covenants are also preempted, on additional conflict preemption grounds, because they stand "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Fid. Fed. Sav. & Loan*, 458 U.S. at 153 (quoting *Florida Lime & Avocado Growers*, 373 U.S. at 142-143). "What is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000). Applying the *Crosby* standard, in light of the Restoration Act's "purpose and intended effects," *id.*, it is clear that Congress sought to have individual tribal members re-acquire land, including within the Legend Lake area; to have the "vast majority" of reservation lands placed back into federal trust status; and to again remove the tax burdens that had encumbered the land during the termination era. Alleviating the burden of local taxation—especially property taxes—was one of the driving forces behind the Restoration Act. *See, e.g.*, *Hearings* at 10 (statement of Hon. Harold V. Froehlich); *id.* at 14 (statement of Hon. David R. Obey); *id.* at 276 (statement of Hon. Patrick J. Lucey, Governor, State of Wisconsin). This included lands within the Legend Lake area. *Id.* at 41 (statement of Ada Deer); *id.* at 42 (statement of Mr. Wilber); *id.* at 68-69 (statement of Francis Leon). And the "intended effects" of the Restoration Act were that the "vast majority" of lands within Menominee County would be returned to federal trust status and

removed from the local tax rolls. *Hearings* at 10 (statement of Hon. Harold V. Froehlich); *id.* at 251-52; *id.* at 258.

Plaintiff admits that it passed its restrictive covenants for precisely the opposite purpose: to preserve the tax base of Menominee County, Compl. (Dkt. 1) at 4, ¶ 19, primarily through prohibiting individual Menominee tribal members from transferring their lands into trust to make it tax exempt. *Compare with Hearings* at 258 (statement of Hon. Harold V. Froehlich) ("each individual Menominee has the opportunity to transfer the land that he owns in fee simple into trust, making it exempt.").

Enforcing Plaintiff's restrictive covenants would stand as an obstacle to implementation of the Act because, "under the circumstances of [this] particular case," the effect of the restrictions is to thwart "the accomplishment and execution of the full purposes and objectives" of the Act. *Crosby*, 530 U.S. at 373 (quotation marks omitted). The restrictive covenants prohibit the very transfers the Restoration Act was designed to achieve.

This case is distinguishable from *Baylake Bank v. TCGC, LLC*, Case No. 08-cv-608, 2008 WL 4525009 (E.D. Wisc. 2008), in which this Court upheld a restrictive covenant against a preemption challenge involving a different statute and did not involve a mandatory trust acquisition statute like the Menominee Restoration Act. In *Baylake*, the Village of Hobart, a local government within the boundaries of the Oneida Nation Reservation, placed a restrictive covenant on golf course land it owned, preventing subsequent owners from transferring the land into trust without express written consent from the Village. This Court rejected the argument that the restriction was preempted by the land-into-trust provisions of the Indian Reorganization Act, 48 Stat. 984, codified as amended at 25 U.S.C. § 5101 et seq.

The United States was not a party in *Baylake*. And without conceding that the case was correctly decided, *Baylake* is nevertheless distinguishable because the preemption analysis involved the Indian Reorganization Act and its generally applicable land-into-trust regulations, pursuant to which tribes and tribal members do not have a statutory right to have land placed in trust. Such acquisitions are subject to DOI's discretion and rest upon a number of discretionary decisions, including potential information from consultation with state and local governments and the consideration of impacts to the community if the land is removed from the property tax rolls. *See* 25 C.F.R. § 151.10. Because of this, this court in *Baylake* found no conflict, holding that the restrictive covenants were in part consistent with a federal policy of considering the tax implications, and because DOI could deny the application, resulting in the same outcome as enforcing the Village's restrictive covenant.

Mandatory trust acquisition statutes, like the Restoration Act, however, are different. *Wyandotte Nation v. Salazar*, 939 F. Supp. 2d 1137, 1141 (D. Kan. 2013) ("When the acquisition statute is 'mandatory,' most of the regulatory factors applicable to discretionary acquisitions do not apply. For example, the notice and comment provisions requiring that the Department notify state and local governments of the fee-to-trust application are not applicable.") (footnote omitted); *White Earth Band of Chippewa Indians v. Cty. of Mahnomen, Minn.*, 605 F. Supp. 2d 1034, 1046-48 (D. Minn. 2009) (Congress's mandatory trust acquisition provisions, providing that certain land acquisitions "shall" be held in trust, are different from IRA procedures for discretionary acquisitions, are "self-executing or automatic," and "clearly manifested its intent to preclude *ad valoreum* taxation"); *Fallon Paiute-Shoshone Tribe v. City of Fallon*, 174 F. Supp. 2d 1088, 1093 (D. Nev. 2001) (mandatory trust acquisition provisions gave the tribe a federal statutory right to have its land held in trust).

So long as the two statutory conditions of the Menominee Restoration Act are satisfied, DOI lacks discretion and the Act mandates that the land be taken into trust. *Churchill Cnty.*, 199 F. Supp. 2d at 1034 ("Shall is a mandatory term, indicating the lack of discretion on the part of the Secretary. . . . Therefore, once the requirements of [the statute] were met, the Secretary was required to accept the land into trust for the tribe."). Congress did not permit, nor did it intend, any other barriers or conditions to a Menominee tribal member transferring his land into trust and removing it from the local tax rolls. Neither state law, nor a local property owners association, may impose additional conditions, like consent, nor prohibit the Secretary from taking land into trust all together.

CONCLUSION

For the foregoing reasons, Plaintiff's Complaint should be dismissed under Federal Rule of Civil Procedure 12(b)(1), because Plaintiffs' inability to prove standing deprives the Court of subject matter jurisdiction, and under Rule 12(b)(6) for failure to state a claim.

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Respectfully submitted,

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