UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
GREEN BAY DIVISION

LEGEND LAKE PROPERTY OWNERS ASSOCIATION, INC.,

Plaintiff,

Case No. 2023CV480

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, et al.,

Defendants.

PLAINTIFF LEGEND LAKE PROPERTY OWNERS ASSOCIATION, INC.'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Plaintiff, Legend Lake Property Owners Association, Inc. (the "Association") submits this Response in Opposition to the Defendants', United States Department of the Interior ("DOI"); Deb Haaland, in her official capacity as United States Secretary of the Interior; Bureau of Indian Affairs ("BIA"); Tammie Poitra, in her official capacity as the Midwest Regional Director Bureau of Indian Affairs; Acting Midwest Regional Director Bureau of Indian Affairs; and Interior Board of Indian Appeals ("IBIA") (collectively the "Federal Defendants"), Motion to Dismiss (the "Motion") (Dkt. 15) and states as follows:

INTRODUCTION

The Federal Defendants' Motion must be denied. Similar to the IBIA's decision that is the subject of this action under the Administrative Procedures Act ("APA"), 5 U.S.C. §§ 701, *et seq.*, the Federal Defendants in their Motion completely ignore the controlling, plain language text of the Menominee Restoration Act, Pub. L. No. 93-197, 87 Stat. 770 (1973) (the "MRA").

Importantly, the MRA provides that mandatory conditions survive and apply when land is accepted into trust under the MRA. The language that the Federal Defendants ignore requires that:

> ". . . *Such property* [accepted into trust] *shall be subject to all valid existing rights including, but not limited to, liens, outstanding taxes (local, state, and federal), mortgages, and any other obligations.* The land transferred to the Secretary pursuant to this subsection *shall be subject to foreclosure or sale pursuant to the terms of any valid existing obligation in accordance with the laws of the State of Wisconsin. . . . .*"

MRA § 6(c) (emphasis added). Furthermore, the MRA also states: "Except as specifically provided in this Act, *nothing contained in this Act, shall alter any property rights or obligations, any contractual rights or obligations,* including existing fishing rights, or any obligations for taxes already levied." MRA § 3(d) (emphasis added).

Despite this plain (and mandatory) language, the Federal Defendants contend that the IBIA did not violate the APA when it determined that the Association's Restrictive Covenants were unenforceable on the Properties the BIA accepted into trust. Because the IBIA declared the Association's Restrictive Covenants are unenforceable, the Association has standing to pursue its APA claim against the Federal Defendants. Moreover, the Association has stated a plausible claim for relief that the Federal Defendants violated the APA because the MRA, by its plain language, requires the survival of the Restrictive Covenants when the Properties are accepted into trust. The Association has stated a plausible claim that the Restrictive Covenants are not preempted in their entirety and it was a violation of the APA to declare otherwise. Accordingly, the Court should deny the Federal Defendants' Motion to Dismiss.

FACTUAL BACKGROUND

A. The Legend Lake Property Owners Association.

The Legend Lake area, located in Menominee County, Wisconsin, was initially developed in the late 1960s. (Compl. ¶ 13.) The Association was created in 1972 through the filing of articles

of incorporation with the State of Wisconsin and the Menominee County Register of Deeds. (*Id.* ¶ 14.) Per the articles, the Association's period of existence was deemed perpetual and membership was deemed mandatory for all record owners. (*Id.* ¶ 15.) Membership in the Association was declared appurtenant to, and inseparable from, lot ownership. (*Id.* ¶ 16.) Since its inception, the principle purpose of the Association has been the collective and efficient management, maintenance, preservation, and operation of properties within Legend Lake, which are carried out by the Association's bylaws. (*Id.* ¶ 17.)

B. The Restrictive Covenants.

On June 13, 2009, the Association, via an amendment to its bylaws, adopted restrictive covenants, as "covenants, conditions and restrictions running with the land as to any plot of land designated as a 'lot' or 'out lot' as set forth on the plat of Legend Lake, and any additions or amendments there to." (*Id.* ¶ 18; *see also* Dkt. 1-1, Ex. A to Compl. (the "Restrictive Covenants").) The Restrictive Covenants were recorded with the Menominee County Register of Deeds on June 18, 2009, as Document No. 29803. (*Id.* ¶ 19.) The Restrictive Covenants were intended to preserve the tax base of Menominee County as well as increase the property values of Legend Lake properties by ensuring compliance with state and local governance and with the membership responsibilities of the Association. (*Id.*)

All Legend Lake properties subject to the Restrictive Covenants could only be "held, sold, or conveyed in accordance with th[e] Restrictive Covenants." (*Id.* ¶ 20.) The Restrictive Covenants were "binding upon all parties acquiring or holding any right, title or interest in [the Properties] (or any part thereof), their heirs, personal representatives, successors or assigns." (*Id.*)

Article 1 of the Restrictive Covenants contain the following restrictions:

> B. Without the express written consent of the Association, which to be effective must be duly voted upon and approved by the Association's membership by amendment to the bylaws, 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.

(*Id.* ¶ 21.)

C. Guy F. Keshena and the Tribe's Purchase of Properties and Request for Secretary of Interior to Acquire Properties into Trust.

Sometime after 2017, Guy F. Keshena acquired title to 40 parcels within the Legend Lake development (the "Properties"). (*Id.* ¶ 22.) Pursuant to a Tribal authorization, Mr. Keshena took

title to those Properties as "Guy F. Keshena, a single person for and on behalf of the Menominee Indian Tribe of Wisconsin." (*Id.* ¶ 24.) Mr. Keshena, having knowledge of the Restrictive Covenants, took title to the Properties after the Restrictive Covenants were duly recorded with the Menominee County Register of Deeds for the express purpose of further conveyance of the Properties to the United States of America in trust for the Menominee Indian Tribe of Wisconsin (the "Tribe"). (*Id.* ¶ 25.) Notwithstanding the Restrictive Covenants, the Tribe requested that the Secretary of the DOI accept the Properties into trust pursuant to the MRA. (*Id.* ¶ 26.) Shortly thereafter, in June and August 2018, the BIA issued determinations accepting the Properties into trust in accordance with the MRA and pursuant to 25 C.F.R. Part 151. (*Id.* ¶¶ 27-28; *see also* Dkt. 1-2, Ex. B to Compl.)

D. The Association's State Court Action and Pending Appeal.

After the Tribe requested the Properties be accepted to into trust, the Association filed a declaratory judgment action against Mr. Keshena and the Tribe on October 25, 2018 seeking a declaratory judgment from the Menominee County Circuit Court, State of Wisconsin that (1) the Restrictive Covenants are valid and legally enforceable; (2) the Restrictive Covenants apply and are of force and effect concerning the Properties; and (3) any purported transfer of the Properties in violation of the Restrictive Covenants shall be null and void. (*See* Menominee County Circuit Court, Case No. 2018-CV-007.) After the Association filed its complaint, Mr. Keshena and the Tribe moved to dismiss the complaint for lack of personal and subject matter jurisdiction, pursuant to Wis. Stat. §§ 802.06(2)(a)(2), 802.06(2)(a)3), for failure to join an indispensable party, pursuant to Wis. Stat. §§ 802.06(2)(a)(7), 803.03, and for failure to state a claim, pursuant to Wis. Stat. § 802.06(2)(a)(6). (Doc. 16, Case No. 2018-CV-007.) After briefing and oral argument on Mr. Keshena and the Tribe's motion to dismiss, the circuit court, the Honorable James R. Habeck,

presiding, on March 25, 2019 denied the motion to dismiss. (Doc. 25, Case No. 2018-CV-007.) After Judge Habeck denied Mr. Keshena and the Tribe's motion to dismiss, the parties filed cross-motions for summary judgment. (Docs. 66, 70, Case No. 2018-CV-007.) However, on the same day that Mr. Keshena and the Tribe filed their response to the Association's motion for summary judgment, they also filed a motion for reconsideration of Judge Habeck's order denying their motion to dismiss. (Doc. 140, Case No. 2018-CV-007.)

After oral argument on the motion for reconsideration, the circuit court, the Honorable Katherine Sloma, presiding, granted the motion and subsequently dismissed the case on its merits, with prejudice. (Doc. 163, Case No. 2018-CV-007.) In her order for judgment and judgment of dismissal, Judge Sloma came to a completely different conclusion than Judge Habeck, indicating, without citation to any authority, that "new case law has addressed issues of preemption and tribal sovereignty." (*Id.*) Judge Sloma first held that "the Menominee Restoration Act preempts the Restrictive Covenant . . . ." (*Id.*) Next, and despite already having ruled *on the merits* on preemption, Judge Sloma also concluded that the court did not have jurisdiction to hear the case because the *in rem* exception to sovereign immunity was not applicable and that tribal sovereign immunity had not been waived. (*Id.*)

After the circuit court entered final judgment, on May 25, 2022, the Association filed an appeal with District III of the Wisconsin Court of Appeals, *see Legend Lake Property Owners Association, Inc. v. Guy Keshena, et al.*, Appeal No. 2022AP937 (the "State Court Appeal"). Briefing was completed on December 20, 2022.

E. The IBIA's Decision Holding the Restrictive Covenants Unenforceable.

While the circuit court action was pending, on December 11, 2018, the Association filed a notice of appeal with the IBIA seeking review of the Midwest Regional Director's determinations

to accept the Properties into trust. (Compl. ¶¶ 29-30.) Despite the Association's request for a stay of any decision from the IBIA and objection to the BIA's motion for expedited consideration based on concurrent State court litigation concerning the enforceability of the Restrictive Covenants, on March 24, 2023, the IBIA issued its decision, 68 IBIA 285 (2023) (the "Decision") (Dkt. 1-3, Ex. C to Compl.), and affirmed the determinations of the Midwest Regional Director. (*Id.* ¶ 31.) However, the IBIA also declared the Association's Restrictive Covenants unenforceable. *E.g.*, 68 IBIA 285, at 295 ("Because the Covenants directly interfere with the terms and objectives of Federal law, any state law upon which they rely upon to prevent these trust acquisitions is preempted and the Covenants are unenforceable against the United States"); at 296 ("Because the Covenants interfere with and are contrary to Federal law, they (and the state law on which they rely, if any) are preempted and rendered unenforceable against BIA.").

After the IBIA issued its Decision, on May 2, 2023, Mr. Keshena and the Tribe filed a Motion to Dismiss the State Court Appeal on the grounds that the case was moot, and further claiming the Restrictive Covenants were now completely unenforceable because the IBIA upheld the BIA's decision to accept the Properties into trust. (*See* Motion to Dismiss Appeal, Appeal No. 2022-AP937.) Specifically, they claimed "[t]he IBIA ruling holds that federal law – *i.e.*, the Menominee Restoration Act – and its mechanisms for restoring the Tribe's ancestral homeland – *i.e.*, by registered Tribal members transferring the land to the United States, which accepts the Tribal Property into trust for the Tribe – serves to invalidate any private agreements such as the restrictive covenants at issue *sub judice* (the "Covenants") . . . . As the IBIA explained, the Covenants are unenforceable against the United States." (*Id.* at 3.) On June 2, 2023, the Wisconsin Court of Appeals denied Mr. Keshena and the Tribe's Motion to Dismiss the State Court Appeal

because of the current action before this Court. (Order Denying Motion to Dismiss Appeal, Appeal No. 2022AP937.)

LEGAL STANDARDS

I. F.R.C.P. 12(b)(1) – Article III Standing Requirements.

To satisfy a showing of standing for purposes of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1), three elements must be alleged: (1) injury in fact; (2) causation; and (3) redressability. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-62 (1992). An organization has standing to sue in its own right based on its institutional interests. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378–79 (1982). Additionally, associational standing allows an organization to sue on behalf of its members "even without a showing of injury to the association itself." *United Food & Com. Workers Union Local 751 v. Brown Grp., Inc.*, 517 U.S. 544, 552 (1996). "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Norton*, 422 F.3d 490, 495 (7th Cir. 2005).

II. F.R.C.P. 12(b)(6) – Plausibility Pleading Standard.

To defeat a motion to dismiss, the plaintiff must have alleged facts sufficient to "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). This "plausibility" pleading standard means that a plaintiff's well-pleaded factual allegations must allow "the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Even claims that are improbable should not be dismissed at the pleading stage. *Twombly*, 550 U.S. at 556. "[M]otions to dismiss based on preemption are only granted if 'the allegations of the complaint itself set forth everything necessary to satisfy the affirmative defense.'" *Sharenow v. Drake Oak Brook Resort LLC*, 614 F.

Supp. 3d 623, 630 (N.D. Ill. 2022) (quoting *Chi. Bldg. Design, P.C. v. Mongolian House, Inc.*, 770 F.3d 610, 614 (7th Cir. 2014)).

ARGUMENT

I. The Association Has Standing to Pursue Its APA Claim Against the Federal Defendants.

The Federal Defendants' standing argument, which is limited to two paragraphs in its Motion, contends the Association has not pled an actual or imminent injury fairly traceable to the DOI's actions. (Dkt. 18 at 28.) While largely undeveloped, the argument identifies two positions: (1) the Association's allegations related to reduced property values is not an actual and imminent injury, and (2) that, Congress, not the DOI, established the requirement that the Properties must be accepted into trust, and therefore, the injury to the Association is not traceable to the DOI. (Dkt. 15 at 18-19.)

The Federal Defendants' arguments fail for two reasons: (1) the Federal Defendants omit any discussion of what the Association actually plead in its Complaint, in addition to the reduced property values; and (2) the injuries the Association pled are a direct result of the IBIA's Decision. The Association's Complaint satisfies all three elements of standing.[1]

A. The Association was injured when the IBIA declared the Restrictive Covenants unenforceable.

As an initial matter, the Association's allegation that its members will suffer reduced property values is sufficient to confer standing and satisfies the injury in fact element. *See e.g.*, *Jorman v. Veterans Admin. of U.S.*, 500 F. Supp. 460, 463-64 (N.D. Ill. 1980) (holding "Plaintiffs

[1] Even if the Association's allegations in its Complaint are not sufficient to allege standing, dismissal for lack of standing can only be without prejudice, *see Am. Bottom Conservancy v. U.S. Army Corps of Eng'rs*, 650 F.3d 652, 660 (7th Cir. 2011) (where a district court dismisses a suit for lack of standing, "it [has] no jurisdiction [and] therefore [can] only dismiss without prejudice"), and the Association would request leave to file an amended complaint if necessary.

have satisfied the first criterion by asserting their own particular interests . . . and, in not having the property values of their homes diminished."); *Cornell Vill. Tower Condo. v. Dep't of HUD*, 750 F. Supp. 909, 918 (N.D. Ill. 1990) (reasoning the allegations, including the loss and diminution of property value, is sufficient to confer Article III standing). Contrary to the Federal Defendants' argument, the diminution in property values does constitute an injury in fact.

In addition to alleging the harm of reduced property values within the Association, the Complaint also alleges other grounds for an injury in fact. The Association points to the provision in the Restrictive Covenants requiring compliance with any and all Association laws, rules, regulations, and obligations, including the obligation to pay all dues and assessments properly levied by the Association. (Compl. ¶ 21.) The Complaint also alleges that as a result of the IBIA's Decision the Association and its members will "be prevented from enforcing the terms of the Restrictive Covenants as contractual agreements, and render [the Association] a paper tiger, or ultimately meaningless, because non-trust property owners . . . would be left without mutual owner protections." (Compl. ¶ 45.) Since the IBIA declared the Restrictive Covenants unenforceable, the Association now has no ability to enforce the Association laws, rules, regulations, and obligations, thus demonstrating it has suffered an actual, imminent injury in fact. *See, e.g.*, *Freedom from Religion Foundation, Inc. v. Shulman*, 961 F. Supp. 2d 947, 950-51 (W.D. Wis. 2013) (holding organization established standing from IRS policy relating to nonenforcement policy). Because the Association's Restrictive Covenants are no longer deemed to be applicable to the Properties, "it is easy to conceive of facts consistent with the complaint" showing that the Association and its members' property values are harmed now as a result of the inability to govern and enforce the Restrictive Covenants on the Properties, even if the effect on future value is

uncertain. *See Norton*, 422 F.3d at 498-99 (reasoning "the present impact of a future though uncertain harm may establish injury in fact for standing purposes.")

Likewise, similar to this Court's reasoning in *Baylake Bank v. TCGC, LLC*, No. 08-C-608, 2008 WL 4525009, at *6 (E.D. Wis. Oct. 1, 2008) on a question of ripeness, "[e]ven though the ultimate application of the restrictive covenant at issue might be contingent" on some future event "the existence of a restrictive covenant affects the transferability of the land *now* and looms large over" the present action. Here, the Association's ability to continue to apply the Restrictive Covenants to the Properties and enforce any part of them has now been eliminated by the IBIA's declaration that the Restrictive Covenants are unenforceable.[2] The Association has been directly harmed by the Federal Defendants' actions.

B. The Association's injury is traceable to the Federal Defendants.

The Association pled the injury was "fairly traceable" to the challenged action. As a result of the IBIA's decision that the Restrictive Covenants are unenforceable, the Association no longer has authority to manage, maintain, preserve, and operate the Properties, pertinent to the Association's bylaws. (Compl. ¶ 17.)

Contrary to the Federal Defendants' contention, it was not Congress who decided to accept the Properties into trust without the Restrictive Covenants, it was the Federal Defendants. While Congress enacted the MRA, it did so with explicit conditions listed in the MRA, such as the preservation of preexisting property and contractual rights, like the Restrictive Covenants. In other words, the Association is not challenging the Act of the Congress, but is instead challenging the erroneous application of Congress's Act (the MRA) by the Federal Defendants. The Federal

[2] Even the IBIA suggests that the Association has standing to enforce its legally protected interests in the Restrictive Covenants, 68 IBIA 290, thus demonstrating there is an injury if the Restrictive Covenants are deemed not to survive once the Properties are taken into trust.

Defendants' decisions, which were attached to and incorporated within the Complaint, to disregard the MRA's plain language and accept the Properties into trust without the Restrictive Covenants is directly traceable to the actions of the Federal Defendants.

C. A favorable decision by this Court will address the Association's injury.

The third element of standing, redressability, is also met.[3] The Association requested the IBIA's Decision be vacated and/or remanded under the APA. (*See generally* Compl. Prayer for Relief.) "For standing purposes, all that matters is that the court has the raw power to grant relief that would redress the plaintiff's injury." *Shulman*, 961 F. Supp. 2d at 953. Section 702 of the APA states "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. In the scope of its review, this Court may "compel agency action unlawfully withheld" and, among other authorities, "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706. Because the Court has the power to vacate and remand the IBIA's Decision on the grounds that the Federal Defendants violated the APA when the IBIA declared the Restrictive Covenants unenforceable and the DOI accepted the Properties into trust without the Restrictive Covenants attached, the Association's injury is redressable. If the Court declares that the IBIA agency action of holding the Restrictive Covenants unenforceable, once the decision was made to place the Properties into trust, was not in accordance with the MRA (the law), then the Association's injury will have been addressed.

[3] The Federal Defendants do not question this third element in their Motion to Dismiss.

II. The Association Stated a Plausible Claim Based On the IBIA's Arbitrary Decision to Accept the Properties Into Trust Without the Restrictive Covenants.

The Federal Defendants' contention that the DOI's adherence to a Congressional directive cannot be considered arbitrary and capricious, and therefore, the Association has not stated a claim is both misplaced and unfounded. The Federal Defendants misconstrue not only the allegations in the Association's Complaint as it relates to the IBIA's Decision, but also disregards the text of the MRA, itself. Despite the MRA's statutory directive that the Properties must be transferred into trust (which the Association conceded to the IBIA), the MRA also, however, explicitly mandates, among other relevant terms, that the transfer "shall be subject to . . . the terms of any *valid existing obligation* in accordance with the laws of the State of Wisconsin." MRA, § 6(c). The Federal Defendants' disregard of this clear directive is what the Association's APA claim is premised on.

Of importance, Sections 3(d) and 6(c) of the MRA provide:

> "Except as specifically provided in this Act, *nothing contained in this Act, shall alter any property rights or obligations, any contractual rights or obligations,* including existing fishing rights, or any obligations for taxes already levied."
>
> "The Secretary shall accept the real property (excluding any 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. *Such property shall be subject to all valid existing rights including, but not limited to, liens, outstanding taxes (local, state, and federal), mortgages, and any other obligations.* The land transferred to the Secretary pursuant to this subsection *shall be subject to foreclosure or sale pursuant to the terms of any valid existing obligation in accordance with the laws of the State of Wisconsin.* Subject to the conditions imposed by this subsection, the land transferred shall be taken in the name of the United States in trust for the Menominee Tribe of Wisconsin and shall be part of their Reservation. The transfer of assets authorized by this section shall be exempt from all local, state, and federal taxation. All assets transferred under this section shall, as of the date of the transfer, be exempt from all local, state, and federal taxation."

MRA §§ 3(d), 6(c) (emphasis added).

Contrary to the Federal Defendants' contention, the MRA contains more than two prerequisites to trust acquisition. While the Federal Defendants are correct that the MRA does mandate that the DOI accept the Properties into trust if (1) the land is located within Menominee

County, and (2) the land is transferred to the Secretary by a Menominee tribal member, the MRA also statutorily mandates other conditions, including: (3) the transfer be subject to "any property rights or obligations, [and] any contractual rights or obligations" and (4) the property transferred "*shall be subject to all valid existing rights including, but not limited to, liens, outstanding taxes (local, state, and federal), mortgages, and any other obligations.*" The use of the word "shall" appears in three separate places in the MRA with respect to existing obligations and rights, such as the Restrictive Covenants. Therefore, using the same rationale as the Federal Defendants use as purported support for their Motion, the use of the word "shall" with respect to property rights, contractual rights, and other obligations "dooms" the Federal Defendants' argument that only two conditions must be satisfied when the Properties are transferred into trust. The Federal Defendants' actions to accept the Properties into trust while also declaring the Restrictive Covenants were unenforceable was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law, therefore, constituting a violation of the APA. *See* 5 U.S.C. § 706.

The Federal Defendants cite several cases for the assertion that the DOI's adherence to Congress's statutory directive cannot be considered arbitrary and capricious (Dkt. at 20), but those cases do not stand for such a broad proposition, and, moreover, the cases are distinguishable from the facts and the legal authority in the present case. For instance, the Federal Defendants cite *Artichoke Joe's Cali. Grand Casino v. Norton*, 278 F. Supp. 2d 1174, 1187 (E.D. Cal. 2003), but in that case the challenge involved an act that did not contain the critical, statutory language in the MRA, namely, for example, that the property transferred "*shall be subject to all valid existing rights including, but not limited to, liens, outstanding taxes (local, state, and federal), mortgages, and any other obligations.*" MRA § 6(c). Likewise, *Pontarelli v. U.S. Dep't of the Treasury*, 285 F.3d 216, 222 (3d Cir. 2002) and *McHugh v. Rubin*, 220 F.3d 53, 61 (2d Cir. 2000) involved a

challenge to the ATF's alleged inaction to consider an individual's relief from firearms disabilities under federal law. The other cases cited by the Federal Defendants also provide no grounds for dismissal based on Congress's use of the word "shall," because those cases do nothing to advance the Federal Defendants' position with respect to the MRA's mandatory language. Instead, the general proposition in those cases with respect to the use of the word "shall" as a mandatory term indicating a lack of discretion on the part of the Secretary actually support the Association's position that the Restrictive Covenants "shall" survive trust acquisition.

If the Federal Defendants' position concerning the word "shall" is taken at face value and applied throughout the MRA, then the Federal Defendants should have accepted the Properties into trust with the Restrictive Covenants attached and the IBIA should have made no holding as to the Restrictive Covenants' enforceability. However, the IBIA in its Decision (and now the Federal Defendants in their Motion[4]) contradictorily argue that "the trust acquisition does not conflict with or diminish any *existing* obligation (e.g., prior tax debt, lien, or mortgage,) that might apply to any property" 68 IBIA 294-95, but also that the Restrictive Covenants in their entirety are unenforceable. 68 IBIA 295. The IBIA's discretionary decision to apply the word "shall" for one instance (trust acceptance), but disregard of the word "shall" in three other instances with respect

[4] The Federal Defendants argue any ambiguity in the term "other obligations" should be resolved in favor of the DOI's interpretation and for the benefit of the Tribe. (Dkt. 15 at 21.) The Federal Defendants' argument is contradictory. On one hand they suggest the Restrictive Covenants are unenforceable as "other obligations" due to certain conditions (e.g., taxes), and on the other hand, the Federal Defendants seem to suggest the Restrictive Covenants do not constitute "other obligations." While this argument is legally inconsistent and flawed, it also disregards the MRA's text. The Federal Defendants provide no legal support that the Restrictive Covenants do not constitute a property right or contractual right within the meaning of the MRA. And, any liberal construction in favor of the DOI and the Tribe's benefit cannot do away with the explicit language in the MRA, and therefore, the Restrictive Covenants. *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 432 (1943) ("But even Indian treaties cannot be re-written or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties.").

to the survival of the Restrictive Covenants was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.

The Association's claim does not just relate to the decision to accept the Properties into trust, but also the declaration that the Restrictive Covenants are unenforceable. Unless the Federal Defendants are now conceding that the Restrictive Covenants survive and attach to the Properties taken into trust, the IBIA erred and violated the APA when declaring the opposite.

III. The Association Stated a Plausible Claim Because the Plain Language of the MRA Expressly Permits the Restrictive Covenants and, Therefore, They Are Not Preempted.

The Federal Defendants' Motion based on preemption grounds also fails for both procedural and substantive reasons. As an initial matter, the IBIA exceeded its authority when deciding the preemption question, and second the MRA expressly allows the Restrictive Covenants. And, to the extent certain provisions of the Restrictive Covenants may conflict with the MRA's express language, such provisions are severable from the Restrictive Covenants.

A. The IBIA exceeded its authority when holding that the Restrictive Covenants were preempted by the IBIA.

The IBIA violated the APA when deciding the constitutional question of whether the Restrictive Covenants were preempted. 68 IBIA 292. The IBIA, as a federal agency, does not have the authority to decide constitutional questions. *Village of Hobart, Wisconsin v. Acting Mw. Reg'l Dir., BIA*, 57 IBIA 4, 18, 2013 WL 3054077, at *9. Preemption is inherently a constitutional question. *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 317–18 (1981) (making a preemption determination is "essentially a two-step process of first ascertaining the construction of the two statutes and then determining the constitutional question whether they are in conflict."); *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 605 (1991) (reasoning it is "axiomatic that "for the purposes of the Supremacy Clause, the constitutionality of local ordinances is

analyzed in the same way as that of statewide laws."). In its Decision, the IBIA violated the APA by deciding a constitutional question and determining under the Supremacy Clause that the MRA preempted the Restrictive Covenants. 68 IBIA 284, 292–93, 2023 WL 2783716, at *7.

B. The MRA does not preempt the Restrictive Covenants.

Even if the IBIA had authority to decide the preemption issue, the IBIA's holding was not in accordance with the law as the MRA does not preempt the Restrictive Covenants.

"[T]he purpose of Congress is the ultimate touchstone in every preemption case." *Wyeth v. Levine*, 555 U.S. 555, 565 (2009). Congress "expresses its intentions through statutory text," such that "the text of a law controls over purported legislative intentions unmoored from any statutory text." *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2496 (2022). In short, the text controls over all else, and courts are to presume that "the legislature says what it means and means what it says." *Id.*[5] Here, Congress has done just that in the Menominee Restoration Act.

Vitally, the MRA contains several important phrases that demonstrate the lack of preemption. First, the MRA states that "*nothing contained in this Act, shall alter any property rights or obligations, any contractual rights or obligations . . . .*" MRA § 3(d) (emphasis added). Additionally, the MRA states that "[s]uch property shall be *subject to all valid existing rights* including, but not limited to, liens, outstanding taxes (local, State and Federal)[,] mortgages, and *any other obligations*." MRA § 6(d) (emphasis added). The terms "property rights or obligations," "contractual rights or obligations," "valid existing rights" and "any other obligations" are certainly broad enough to, and do, encompass the Restrictive Covenants. Furthermore, the MRA expressly reserves that the transferred land may be subject to *foreclosure* or *sale pursuant to the terms of*

[5] The doctrine of preemption takes many forms: express, field, and conflict. Regardless of how one may attempt to frame preemption in this case (express or conflict), one thing is clear: the MRA does not preempt, under any form, the Restrictive Covenants.

existing obligations and in accordance with the of the State of Wisconsin. *Id.* Therefore, per this explicit language, the MRA cannot possibly preempt the Restrictive Covenants, because the MRA itself specifically dictates that the property, even after it is taken into trust, is subject to all valid, existing rights and obligations, which includes the possibility of claims for foreclosure and sale, in accordance with the laws of the State of Wisconsin. Plainly, the text demonstrates the Restrictive Covenants remain effective, and that is all this Court must examine. *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004) ("Thus, our inquiry begins with the statutory text, and ends there as well if the text is unambiguous.").

To the extent the Court may have doubts, legislative history confirms this intent. Although the Federal Defendants point to legislative history on the burden of taxation on the Menominee Reservation, the Federal Defendants neglect reference to an early draft that demonstrates Congress initially contemplated allowing the land to transfer free from all encumbrances. *See* 118 Cong. Rec. H 3390-93 (April 20, 1972). Then contained in Section 9, the MRA provided:

> The Secretary is hereby authorized, in his discretion, to acquire for inclusion in the Menominee Reservation through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without the Menominee Indian Reservation . . . The Secretary is further authorized to receive . . . voluntarily executed deeds to such land as the Tribe or person may own *in fee simple free from all encumbrances*.

Id. at 205 (emphasis added). Congress, however, flatly rejected this draft, instead enacting the language that expressly preserves any valid existing rights and obligations. Clearly, then, it was Congress' intent that obligations, such as restrictive covenants, shall continue to run with the land and remain enforceable.

Given the text, Congress could not have intended to preempt the Restrictive Covenants in their entirety. Unlike the cases cited by the Federal Defendants in their Motion, *e.g.*, *Tohono O'odham Nation v. City of Glendale*, No. CV-11-279-PHX-DGC, 2011 WL 2650205, at *9 (D.

Ariz. June 30, 2011), *aff'd* 804 F.3d 1292 (9th Cir. 2015), which rely upon mandatory statutory language regarding trust acquisition, the Menominee Restoration Act's plain language also includes other mandatory language that requires the survival of restrictions and encumbrances on the land being transferred into trust. And because "the purpose of Congress is the ultimate touchstone in every pre-emption case," this Court should conclude that the Restrictive Covenants are not preempted in their entirety as the IBIA concluded. *Wyeth,* 555 U.S. at 565 (2009) (discussing preemption doctrine).

The Federal Defendants solely focus their argument on the Properties being taken into trust and them being exempt from taxation. As preliminary matter, to the extent a prohibition against accepting the land into trust and continued taxation are preempted by the MRA, the Restrictive Covenants contain a valid severability clause. *See* Restrictive Covenants, Ex. A, Art. 3 ("If any provision or clause . . . is held to be invalid or inoperative by a court of competent jurisdiction, then such clause or provision shall be severed herefrom without affecting any other provision or clause of these Restrictive Covenants, the balance of which shall remain in full force and effect . . . ."). Therefore, should the Court agree that federal law preempts certain provisions of the Restrictive Covenants, like the restriction on transferring the land into trust, the Court should nonetheless hold that the remainder are not preempted, and therefore, are valid and enforceable pursuant to the severability clause. *E.g.*, *Dawson v. Goldammer*, 2006 WI App 158, ¶¶ 8-20, 295 Wis. 2d 728, 722 N.W.2d 106.

Tellingly, however, the Federal Defendants omit any discussion (or admission) that both the MRA and the Restrictive Covenants contain other express language regarding "existing rights" and "other obligations." The Federal Defendants do so for a reason – the MRA's language weakens their position – as the MRA specifically allows rights and obligations to run with the

land, even if the land is later transferred into trust. *See Friends of East Willits Valley v. Cnty. of Mendocino*, 101 Cal. App. 4th 191, 201 (2002) ("We hold that federal law does not void prior restrictions on land agreed to before the land passed into trust."). As discussed, the terms "valid existing rights" and "any other obligations" are certainly broad enough to, and do, encompass the Restrictive Covenants, a private agreement that was lawfully recorded on the Properties prior to the Properties being transferred to trust. *See Legend Lake Prop. Owners Ass'n, Inc. v. Lemay,* 2006 WI App 31, ¶ 4, 289 Wis. 2d 549, 710 N.W.2d 725 (holding the Association can create and expand property restrictions and continue to maintain itself as a perpetual organization). Courts are cautioned against use preemption principles to try to invalidate an enforceable private agreement. *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995); *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1454 (7th Cir. 1996). The Restrictive Covenants are expressly permitted under Sections 3(d) and 6(c) of the MRA, indicating that Congress did not intend for valid, existing obligations to be disregarded, but rather that those obligations survive. Relying on the plain text, this Court should deny the Federal Defendants' Motion and hold the Restrictive Covenants are not preempted.

In addition to the Act's express language mandating that preemption does not apply here, in *Baylake Bank v. TCGC, LLC*, this Court encountered a similar issue, albeit under the Indian Reorganization Act ("IRA"), Pub. L. 73-383, 48 Stat. 984 (1934). There, this Court reviewed a restrictive covenant with the following language:

> *Restriction on Transfer*. Without the express written consent of the Village of Hobart, no owner of any interest in the Subject Real Estate ... shall transfer any interest in the Subject Real Estate to any individual, entity, ... organization, or sovereign nation, or during the period of ownership take any action the result of which would: (1) remove or eliminate the Subject Real Estate (or any part thereof) from the tax rolls of the Village of Hobart; (2) diminish or eliminate the payment of real estate taxes levied or assessed against the Subject Real Estate (or any part thereof) and / or (3) remove the Subject Real Estate (or any part thereof) from the zoning authority and / or jurisdiction of the Village of Hobart.

Baylake Bank, 2008 WL 4525009, at *1. This Court determined that the restrictive covenant – which had substantially identical language to the one in the present case – were not preempted by Federal Indian law under the IRA. *Id.* at *7-8.

In a well-reasoned decision, this Court noted that, while a typical preemption argument involves an assertion that a state law or regulation is preempted by federal law, the Bank was attempting to argue that a *private contract*, the restrictive covenant, was preempted by federal law. *Id.* at *7. This Court reasoned that "[s]uch an argument fits less snugly within the traditional considerations involved in the preemption doctrine, as the argument is not targeted at a specific law or claim apart from the state's general law of contracts or property (which would otherwise allow enforcement of the covenant)." *Id.* And "[a]lthough Congress possesses power to preempt even the enforcement of contracts about intellectual property . . . or railroads . . . courts usually read preemption clauses to leave private contracts unaffected." *See id.* (citing *Wolens*, 513 U.S. 219 (1995) and *Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996)).

Next, this Court noted that the IRA had "nothing whatsoever to say about how private entities go about creating property rights, even when those rights may have collateral effects on other parties who would otherwise be able to invoke the federal system." *Baylake Bank*, 2008 WL 4525009, at *8. And, just because "[t]he fact that the covenants might effectively decide the question before it may even be brought to the Secretary does not mean that their enforcement is inconsistent with the IRA and its regulations." *Id.* Ultimately, this Court held that "nothing in the IRA affect[ed] the ability of private entities to enter into a covenant that runs with the land, even though the covenant may adversely impact a given tribe's desire to purchase that land." *Id.* at *9.

Although the instant issue requires an analysis of the Menominee Restoration Act, *Baylake Bank* provides persuasive guidance for this case. As in *Baylake Bank*, the preemption challenge

here centers not around a state law or regulation, but around a private agreement: the Restrictive Covenants. The Federal Defendants do not contend that it is a state law or regulation that must be preempted, but a valid and agreed-upon restrictive covenant. The mere fact that the private agreement has taken center stage in the context of federal Indian law does not mean it is entitled to any less deference than if it were raised in a more common area of federal law. *Cf. Castro-Huerta*, 142 S. Ct. at 2494 ("State sovereignty does not end at a reservation's border."). As the Seventh Circuit has counseled, and as this Court adhered to, courts typically construe preemption principles to leave such private agreements unaffected. The MRA expressly permits the Restrictive Covenants at issue in this case and *Baylake Bank* provides helpful guidance.[6] Based on the language of the MRA and the language of the Restrictive Covenants the Association has stated a plausible claim for relief that the Federal Defendants violated the APA when declaring the Restrictive Covenants were preempted and unenforceable in their entirety.[7]

CONCLUSION

For the foregoing reasons, the Federal Defendants' Motion to Dismiss should be denied. The Association has standing and has stated a claim upon which relief can be granted.

[6] In responding to *Baylake Bank*, the Federal Defendants again note the distinction between the MRA's mandatory trust acquisition and the IRA's discretionary trust acquisition. (Dkt. 15 at 27.) But, again, the Federal Defendants fail to acknowledge that the MRA contains mandatory language as it relates to the survival of existing obligations and rights, such as the Restrictive Covenants. If the MRA provides no discretion as to trust acquisition of the land due to the word "shall," it also provides no discretion for the IBIA to declare the Restrictive Covenants as unenforceable.

[7] At this stage of responding to a Motion to Dismiss, the Association must only show it has pled a plausible claim for relief under the APA. Whether certain provisions in the Restrictive Covenants are preempted or not is a question to consider on the merits at another stage in the ligation, *i.e.*, summary judgment.

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VON BRIESEN & ROPER, S.C.

s/ Derek J. Waterstreet

Frank W. Kowalkowski, SBN 1018119
VON BRIESEN & ROPER, S.C.
300 N. Broadway, Suite 2B
Green Bay, Wisconsin 54303
T: (920) 713-7800
F: (920) 232-4897
frank.kowalkowski@vonbriesen.com

Derek J. Waterstreet, SBN 1090730
VON BRIESEN & ROPER, S.C.
411 E. Wisconsin Avenue, Suite 1000
Milwaukee, Wisconsin 53202
T: (414) 287-1519
F: (414) 238-6434
derek.waterstreet@vonbriesen.com

Attorneys for Plaintiff,
Legend Lake Property Owner's Association, Inc.