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' REPLY
IN SUPPORT OF MOTION TO DISMISS

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INTRODUCTION

Plaintiff, the Legend Lake Property Owners Association ("LLPOA" or "Plaintiff"), originally challenged three decisions by the Bureau of Indian Affairs ("BIA") to accept approximately 21.53 acres of land (the "Properties") in trust for the benefit of the Menominee Tribe, pursuant to the Menominee Restoration Act, Pub. L. No. 93-197, 87 Stat. 770 (1973). The sole issue identified in Plaintiff's notice of appeal to the Interior Board of Indian Appeals (the "IBIA") was that Plaintiff's restrictive covenants *prohibited* the trust acquisitions which should therefore be declared "null and void." Dkt. 1 at ¶ 30; Plaintiff's Notice of Appeal to IBIA, referenced at Dkt. 1, at ¶¶ 29-30, and attached hereto as Exhibit A, at 6-7. The IBIA affirmed the BIA's trust acquisitions and this Administrative Procedure Act ("APA") challenge followed.

Plaintiff appears to have shifted arguments, no longer contesting the BIA decisions to place the Properties in trust. In sharp contrast to its appeal and its Complaint, Plaintiff never once argues in its current opposition brief that its restrictive covenants *prohibit* the BIA from accepting the Properties in trust. Instead, while failing to challenge the validity of the trust acquisitions, Plaintiff seeks a determination regarding whether its other restrictive covenants survived the transfer. That issue was not addressed (and was not required to be addressed) by the BIA's decisions by the IBIA appeal, and this Court should decline to address it as the functional equivalent of a title determination, beyond the scope of the APA's waiver of sovereign immunity in this case.

Moreover, Plaintiff's opposition brief fails to show how any of its claimed injuries are actual, immediate, or caused by the BIA decisions or the IBIA, rather than mandated by the Menominee Restoration Act. In addition, Plaintiff's opposition brief (like its Complaint) fails to show how BIA's adherence to a congressional mandate—that BIA "shall" place the Properties in

trust—can be considered arbitrary and capricious. Again, Plaintiff attempts to sidestep the issue, arguing that the BIA and the IBIA should have addressed not only the relevant issue before them (whether any restrictive covenants prohibited the trust acquisitions) but also what amounts to an advisory opinion about which, if any, of Plaintiff's additional restrictive covenants remain in effect. But as to the trust acquisitions themselves, Plaintiff concedes that accepting the Properties in trust was statutorily required and has not pled, and cannot show, that the BIA acted arbitrarily or capriciously by complying with its statutory directive.

Finally, even if this issue were appropriately before this Court, Plaintiff's opposition brief fails to demonstrate how its restrictive covenants are not in conflict with, and therefore preempted by, the Menominee Restoration Act. Specifically, Plaintiff's restrictive covenants purport to prevent the trust acquisitions (prohibiting any transfer that removes the Properties from County taxation or from state and local municipal jurisdiction, and declaring BIA's actions in this case "null and void") whereas the Menominee Restoration Act mandates that BIA accept the Properties in trust for the Tribe and stating that the Properties "shall be exempt from all local, State, and Federal taxation." Plaintiff's restrictive covenants, by design, conflict with the text, purposes, and intended effects of the Menominee Restoration Act and are therefore preempted.

ARGUMENT

I. Plaintiff has failed to demonstrate its standing to challenge the trust acquisitions.

The absence of an actual or imminent injury fairly traceable to the United States results not from the United States' characterization of Plaintiff's claims but from Plaintiff's own failure to plead such an injury. According to Plaintiff's allegations, the principal purpose of the LLPOA is the collective and efficient management, maintenance, preservation, and operation of properties within the Legend Lake development. Dkt. 1 at ¶ 17. Plaintiff fails to describe with

sufficient particularity an injury to these purposes or how these purposes are thwarted by placing the Properties in trust.

As to the restrictive covenants, Plaintiff identifies only two purposes: (1) "to preserve the tax base of Menominee County;" and (2) to "increase the property values of Legend Lake properties." Dkt. 18 at 3; Dkt. 1 at ¶ 19. Plaintiff's Complaint falls short of pleading sufficient injury to these as well. First, the "injury" caused by the loss of tax revenues to Menominee County, or any "injury" to municipal jurisdiction, is not an injury suffered by Plaintiff, as described in detail by the IBIA opinion. *See* Dkt. 1-3 at 8. Second, the "injury" to property values—as alleged in the Complaint—is too vague and speculative to support Plaintiff's standing for the reasons described in the United States' opening brief. Dkt. 15 at 13-14; *see also Stop the Casino 101 Coal. v. Salazar*, Case No. 08-cv-02846, 2009 WL 1066299, at *5 (N.D. Cal. Apr. 21, 2009) (dismissing challenge to a mandatory land-into-trust acquisition and holding that 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); *Neighbors of Casino San Pablo v. Salazar*, 773 F. Supp. 2d 141, 150 (D.D.C. 2011) (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).

In response, Plaintiff ignores the land-into-trust cases cited by the United States and relies instead on cases outside the land-into-trust context in which diminution in property value (along with other alleged injuries) were deemed sufficient for standing purposes. Dkt. 18 at 9-10 (citing *Jorman v. Veterans Admin. of U.S.*, 500 F. Supp. 460, 463-64 (N.D. Ill. 1980) and *Cornell Vill. Tower Condo. v. Dep't of Hous. & Urb. Dev.*, 750 F. Supp. 909, 918 (N.D. Ill. 1990)).[1] But the

[1] Plaintiff also cites *Freedom from Religion Found., Inc. v. Shulman*, 961 F. Supp. 2d 947 (W.D.

point is not whether diminution in property value can ever form the basis of an injury; the issue is whether alleged injuries to property values are concrete and particularized, or whether—as with Plaintiff's Complaint—the allegations are merely speculative, conjectural, or hypothetical.

The cases cited by Plaintiff help distinguish the present case. For example, this case is unlike *Jorman*, where plaintiffs alleged a "massive racial resegregation caused, in part, by the manner in which the VA administers its home loan program . . . ." 500 F. Supp. at 464. This case is also unlike *Cornell Village Tower Condominium*, where plaintiffs challenged the construction of a 21-story apartment building in plaintiffs' neighborhood. 750 F. Supp. 909. In contrast to those cases, there are no allegations here about how the underlying agency action—accepting the Properties into trust pursuant to the Menominee Restoration Act—has affected or will affect property values beyond the Complaint's unexplained, conclusory, and speculative statements.[2]

Plaintiff's reliance on *Baylake Bank v. TCGC, LLC*, Case No. 08-C-608, 2008 WL 4525009, at *6 (E.D. Wis. Oct. 1, 2008), to defend the speculative nature of its purported injuries is misplaced. First, the *Baylake* analysis dealt with ripeness, not standing. Second, the restrictive covenant holder in *Baylake* was the Village of Hobart, the municipality that stood to lose tax revenues and municipal jurisdiction upon enforcement of the covenants, which is not the case with Plaintiff here, which sustains no injury by the loss of tax revenues. Third, unlike the present case, a decision about the restrictive covenants in *Baylake* was described as having an immediate

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Wis. 2013), to say that an inability to enforce its bylaws constitutes an injury in fact. Dkt. 18 at 10. But that case has nothing do with the proposition at issue here and in no way supports it.

[2] Plaintiff argues that "the present impact of a future though uncertain harm may establish injury in fact for standing purposes." Dkt. 18 at 10-11 (citing *Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Norton*, 422 F.3d 490, 498 (7th Cir. 2005)). This does not help Plaintiff, who fails to allege any present impact or injury to it. Plaintiff's Complaint contains no allegations about how property values have been or will be affected by the trust acquisitions beyond its conclusory and speculative statements.

impact on the parties, with reference to specific financial injury:

> That is, the dispute is a real and present one because this Court's decision on preemption would impact the current bankruptcy plan for disposing of the golf course. According to the Debtor's plan, the intent is to sell the property to the Tribe for $12,000,000 if the Village's interests are extinguished, but in the event the covenant is not extinguished the price the Oneida would be willing to pay would drop below $10,000,000 and the property could go to auction.

Id. at *5; *see also id.* at *1 ("The restrictive covenant thus stands as a roadblock to the Debtor's ability to realize the highest price from the sale of the golf course."). By contrast, Plaintiff's case does not involve the relevant municipality and there is no affected bankruptcy plan, no immediate effect on any of the parties, and no real, immediate, or specific financial injury.[3]

As to causation, Plaintiff concedes that BIA was required by Congress to take the underlying administrative action in this case. That is, faced with the decision between granting or denying the trust application, BIA was required by the Menominee Restoration Act to accept the Properties in trust. As described in the United States' opening brief, Congress, not BIA, mandated that these lands go into trust for the benefit of the Menominee Tribe. Rather than address this issue head-on, Plaintiff seeks to insert discretion into BIA's determination by manufacturing an additional requirement within BIA's decision, alleging that BIA had a choice between placing the Properties in trust *with* the restrictive covenants or placing the Properties in trust *without* the restrictive covenants, and alleging Plaintiff's injuries were caused by BIA placing the Properties in trust "without the Restrictive Covenants." Dkt. 18 at 11-12. Again, this mischaracterizes the BIA's decisions, which were limited simply to whether to place the

[3] Plaintiff's argument that the IBIA suggested that the LLPOA has standing (Dkt. 18 at 11 n.2) is belied by the IBIA opinion, which says (1) "Appellant's standing to challenge the Decisions is unclear"; (2) "[Plaintiff] does not explicitly state how its legally protected interests were adversely affected . . ."; and (3) "[n]othing [in Plaintiff's brief] articulates how the Decisions have caused harm to [Plaintiff]." 68 IBIA at 290-91.

Properties in trust. *See* Public Notices to Acquire Land Into Trust, Dkt. 1-2. Plaintiff has failed to allege an actual or imminent injury fairly traceable to agency action based upon those decisions.[4]

II. Plaintiff no longer appears to dispute BIA's trust acquisitions.

Plaintiff originally challenged three decisions by the BIA to accept the Properties, totaling approximately 21.53 acres of land, in trust for the benefit of the Menominee Tribe, pursuant to the Menominee Restoration Act. The sole issue identified in Plaintiff's notice of appeal to the IBIA was whether Plaintiff's restrictive covenants prohibited the trust acquisition. *See* Dkt. 1 at ¶ 30 ("The notice of appeal, among other things, argued that the acceptance of the Properties into trust would violate the Restrictive Covenants . . . ."); Dkt. 1-3 at 3 (LLPOA contends that its covenants "prohibit transfers of properties if the transaction would remove the property from the County tax rolls or from state and local municipal jurisdiction"); *see also* Plaintiff's Notice of Appeal to IBIA, attached hereto as Exhibit A, at 6 (arguing that "[t]he placement of [the Properties] in federal trust for and on behalf of the Tribe would violate the Restrictive Covenants" and that BIA's trust acquisitions should therefore be declared "null and void."); *id.* at 7 (asking that the trust acquisitions "be voided based upon the conditions and limitations contained in the Restrictive Covenants"). The United States' opening brief showed why BIA's adherence to Congress's statutory directive in the Menominee Restoration Act cannot be considered arbitrary and capricious, and why Plaintiff's restrictive covenants—which purport

[4] Plaintiff also fails to meet its burden of establishing redressability. Beyond deciding whether to accept the Properties in trust—which necessarily included a decision that certain restrictive covenants do not prohibit the trust acquisition—the BIA and the IBIA are under no duty to produce an advisory opinion about which, if any, other restrictive covenants might survive the trust acquisition. As a result, the remand requested by Plaintiff would not (1) change the BIA's decision about whether to accept the Properties in trust; (2) take the Properties out of trust; or (3) require BIA or the IBIA to opine on the continued existence of any restrictive covenants that were not relevant to the underlying administrative decision.

to prohibit the trust acquisition, and declare BIA's decisions "null and void"—cannot override that statutory mandate. Dkt. 15 at 15-23.

Plaintiff's opposition brief, in sharp contrast to its appeal, fails to argue that its restrictive covenants *prohibit* the BIA from accepting the Properties in trust. Instead, Plaintiff argues that the IBIA erred in addressing the very issue Plaintiff put before it—whether the restrictive covenants barred the BIA from acquiring the Properties in trust. Plaintiff now appears to argue that this Court should issue what would amount to an advisory opinion about whether certain restrictive covenants survived the transfer. But as to the trust acquisition itself, Plaintiff has apparently abandoned the sole issue that it appealed, admitted that the two conditions in the Menominee Restoration Act are satisfied (Dkt. 1-3 at 10), conceded to the IBIA that trust transfers are mandatory (*id.*), and apparently no longer claims that its covenants *prohibit* the trust acquisition. The Court should dismiss Plaintiff's Complaint on those grounds alone.

III. Federal law conflicts with and preempts Plaintiff's restrictive covenants that purport to bar the trust acquisitions.

Plaintiff attempts to save its restrictive covenants by pivoting away from the argument that they *prohibit* the trust acquisitions, and arguing instead that the covenants remain fully in effect after the Properties are transferred into trust. This argument is contrary to the text of the covenants. The covenants purport to bar "any application to have the [Properties] placed into federal trust pursuant to the Indian Reorganization Act." Dkt. 1-1 at 4. The covenants also purport to bar any transfer of land to a "sovereign or dependent sovereign nation" that "could or would" remove the property from County tax rolls, zoning authority, or general municipal jurisdiction, or the general municipal jurisdiction of the State of Wisconsin. *Id.* And the covenants assert that "[a]ny purported transfer of any interest" in the Properties "in violation of these restrictions shall be null and void." *Id.*

Make no mistake: Plaintiff's restrictive covenants—if valid and enforceable against BIA—would prevent BIA from taking the Properties into trust and declare the trust acquisitions "null and void." Indeed, Plaintiff appears to have enacted the covenants for the very purpose of preventing the BIA from fulfilling its statutory duty under the Menominee Restoration Act and cannot credibly claim now that there is no conflict. Plaintiff fails to demonstrate how BIA erred by complying with the statutory mandate of transferring the Properties into federal trust status, which includes an express directive that the Properties be removed from the county tax rolls and be exempted from all local, State, and Federal taxation. That mandate is in direct conflict with restrictive covenant provisions aimed to ensure that the Properties *cannot* be transferred into trust, and *cannot* be transferred in any other way that removes them from the county tax rolls, diminishes or eliminates the payment of taxes, or removes them from other state or county zoning authority and other jurisdiction.

Plaintiff's new argument—that the Properties could be transferred into trust so long as these covenants remain in place—conflicts with the statute and lacks a basis in the text of the covenants. For these and the other reasons described in the United States' opening brief, the covenants purporting to prohibit the trust acquisitions are preempted, are unenforceable against the BIA, and cannot override Congress's directive that BIA accept the Properties in trust.

Plaintiff's additional arguments against preemption also lack a basis in law. First, Plaintiff argues that the Menominee Restoration Act contains more than the two prerequisites to a mandatory trust acquisition and that the United States failed to account for these additional requirements. Not so. The Act requires BIA to accept land into trust upon the occurrence of only two conditions: (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. But Plaintiff claims two additional conditions based on the effect of the passage of the Act (Section 3(d) of the Act) and the effect of the trust acquisition (Section 6(c) of the Act). The Act, however, does not provide or even imply that these serve as prerequisites to any trust acquisition.

Second, contrary to Plaintiff's argument, neither Section 3(d) nor Section 6(c) of the Menominee Restoration Act affect the preemption analysis. Section 3(d) states: **"[e]xcept 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." 87 Stat. at 770-71(emphasis added). The so-called right upon which Plaintiff relies, however, directly conflicts with the Act: the operative text of the Act specifically mandates that BIA "shall" place certain parcels of land into trust for the Menominee Indian Tribe—without the exercise of discretion—and states that all lands transferred pursuant to the mandatory acquisition provisions "shall be exempt from all local, State, and Federal taxation." *Id.* at 773. Furthermore, the legislative history of Section 3 makes clear that the section "**protects and preserves any valid existing right or obligation which may have vested** in any person, Indian or non-Indian, **during the years between termination and restoration**." H.R. Rep. No. 93-572, 93d Cong., 1st Sess. at 4 (Oct. 11, 1973) (emphasis added). It does not apply to Plaintiff's restrictive covenants passed many years after the Restoration Act with the goal of thwarting the Act.

Plaintiff's Section 6(c) argument fares no better. That section provides, among other things, that the trust acquisition shall be subject to "all valid and existing rights." Plaintiff claims that its restrictive covenants fall within the meaning of the phrase so that they remain fully in effect after the Properties are transferred into trust. As described above, this argument is contrary

to the text of the covenants: BIA cannot comply with both its statutory mandate and Plaintiff's restrictive covenants. This is especially true for the tax and jurisdictional covenants that directly conflict with the text, purposes, and intended effects of the Menominee Restoration Act. Indeed, Section 6(c) distinguishes between "outstanding taxes," which are specifically included within the meaning of "valid and existing rights," on the one hand, and all other "local, state, and federal taxation" from which the transferred Properties must be exempt, on the other hand. And Section 6(c) does not purport to make any exceptions against the exercise of federal and tribal jurisdiction that flows from acquisition by the United States of title to fee land in trust. To the contrary, the Act specifies that the land shall be part of the Tribe's reservation.

Finally, Plaintiff argues that the Menominee Restoration Act is unique in that it refers to existing property rights and obligations. Dkt. 18 at 18-19. Not so. For example, in *Churchill Cnty. v. United States*, cited in the United States' opening brief, the Court held that a mandatory trust acquisition statute—using the phrase "shall"—required the Secretary of Interior to accept land into trust once all statutory requirements were met. 199 F. Supp. 2d 1031, 1034 (D. Nev. 2001). The applicable trust land provisions in the statute in that case remained "[s]ubject to . . . all existing property rights or interest." Pub. L. 101-618 § 210(b)(1), 104 Stat. 3289, 3321 (Nov. 16, 1990). To the extent this distinction is relevant, as alleged, it is not limited to Menominee.

IV. Plaintiff's other arguments about its restrictive covenants are beyond the APA's limited waiver of sovereign immunity and are barred by the Quiet Title Act.

Plaintiff's current lawsuit appears to abandon its challenge to the trust acquisition—the underlying final agency action at issue—seeking instead an advisory opinion that its other restrictive covenants remain viable. Any such covenants were not relevant to the BIA's decision or the IBIA appeal. And neither the BIA nor the IBIA addressed that issue, nor was it required to be addressed. As a result, this Court should decline to address it as beyond the scope of the

APA's waiver of sovereign immunity in this case.

The clearest articulation of Plaintiff's argument is as follows:

> [S]hould 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."

Dkt. 18 at 19. Plaintiff's argument is wrong for at least two reasons. First, a separate advisory opinion about the enforceability of restrictive covenants that were not relevant to the trust acquisitions, and which were never addressed (nor required to be addressed) by the BIA or the IBIA, is not part of the underlying administrative decisions and is therefore beyond the scope of the APA's limited waiver of sovereign immunity in this case, which is tied to final agency action (here, the decision to acquire the land in trust).

As described in Section V.A. below, the BIA and the IBIA necessarily had to decide whether Plaintiff's restrictive covenants *prohibited* the trust acquisition. They correctly decided that the restrictive covenants were preempted and not enforceable; that they could not override the statutory mandate in Menominee Restoration Act; and that they did not prevent BIA from taking the Properties into trust. Any other restrictive covenants were not relevant to this determination. Indeed, that is the entire reason why Plaintiff has pursued a separate state court action about the enforceability of its restrictive covenants.

It is also worth noting, however, that it was Plaintiff—not the IBIA—who originally delineated the restrictive covenant provisions that it believed conflicted with and barred the trust acquisitions:

> The placement of these lots in federal trust for and on behalf of the Tribe would violate the Restrictive Covenants by, among other things, removing or eliminating the parcels from the tax rolls of Menominee County Wisconsin, diminishing or eliminating the payment of real estate taxes duly levied or assessed against the parcels, ostensibly removing the parcels from the zoning authority and general

> municipal jurisdiction of Menominee County, Wisconsin and State of Wisconsin, and ostensibly removing the parcels from the obligations and/or restrictions imposed upon them by the duly adopted bylaws and resolutions of the Association. Any purported transfer of any interest in the parcels in violation of the Restrictive Covenants are [sic] null and void.

Plaintiff's Notice of Appeal to IBIA at 6. Plaintiff cannot now credibly claim that these do not conflict with and should survive the trust acquisition.

Second, to the extent Plaintiff seeks to litigate and enforce restrictive covenants outside the scope of the BIA's decision and the IBIA appeal, those claims are barred by the Quiet Title Act, 28 U.S.C. §§ 1346(f) and 2409a (the "QTA"). The QTA "provide[s] the exclusive means by which adverse claimants [can] challenge the United States' title to real property." *Block v. North Dakota*, 461 U.S. 273, 286 (1983) (footnote omitted). Although the QTA provides a limited waiver of sovereign immunity to adjudicate disputed title to real property in which the United States claims an interest, the waiver "does not apply to trust or restricted Indian lands." 28 U.S.C. § 2409. As a practical matter, this exclusion operates "to retain the United States' immunity from suit by third parties challenging the United States' title to land held in trust for Indians." *United States v. Mottaz*, 476 U.S. 834, 842 (1986). Because the United States holds title to the land over which Plaintiff now seeks to assert additional restrictive covenants, Plaintiff could proceed against the United States only through a suit under the QTA but cannot here because of the exception for "trust or restricted Indian lands."

V. Plaintiff's other arguments are without merit.

A. The IBIA had to address the enforceability of restrictive covenants that purported to preclude the trust acquisition and did not exceed its authority in doing so.

Plaintiff argues that "the IBIA should have made no holding as the Restrictive Covenants' enforceability." Dkt. 18 at 15. In so doing, Plaintiff mistakenly argues that "the

decision to accept the Properties into trust" is somehow different than "the declaration that the Restrictive Covenants are enforceable." *Id.* at 16. But as described above, these are not separate decisions about the covenants that purported to preclude trust acquisition. In considering the trust acquisition, the BIA and the IBIA necessarily had to decide whether Plaintiff's restrictive covenants purporting to prohibit the trust acquisition overrode the statutory directives of the Menominee Restoration Act (which required the trust acquisition). Indeed, it was Plaintiff who put in place these restrictive covenants, seeking to prevent lands from being taken into trust. And it was Plaintiff who put enforceability at issue, arguing that its restrictive covenants were enforceable, that they barred the trust acquisition, and that they rendered BIA's decisions "null and void." The BIA and the IBIA necessarily and correctly decided that issue by following Congress's mandate; Plaintiff cannot credibly claim that the IBIA erred in addressing this.

Plaintiff also mistakenly argues that the IBIA exceeded its authority in deciding whether to enforce the restrictive covenants purporting to prohibit the trust acquisitions. Plaintiff mischaracterizes this as a "constitutional question." But the scope of the IBIA's authority is clear: the IBIA "has full authority to review any legal issues raised in a trust acquisition case, except those challenging the *constitutionality of laws or regulations* . . . ." *South Dakota v. Acting Great Plains Regional Director*, 49 IBIA 129, 141, 2009 WL 1356400, at *9 (2009) (emphasis added). This case does not involve a determination of the constitutionality of a statute (like the Menominee Restoration Act) or any regulation. As described above, the BIA and the IBIA necessarily had to decide whether Plaintiff's restrictive covenants prohibited the trust acquisition mandated by the Menominee Restoration Act. The IBIA did not exceed its authority in deciding that the restrictive covenants were preempted, that the covenants could not override the statutory mandate, and that they did not prevent BIA from taking the Properties into trust.

B. The contractual nature of the restrictive covenants does not alter the preemption analysis or require BIA to deny the trust acquisitions.

Regardless of whether the covenants were enacted by contract, local ordinance, or state statutory law, they do not bind the United States and cannot override BIA's statutory mandate to place the Properties in trust. Plaintiff cites *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1454 (7th Cir. 1996), to argue that preemption analyses apply with less force to purely private transactions. But *ProCD* itself recognizes the limitations of its ruling saying: "we think it prudent to refrain from adopting a rule that anything with the label 'contract' is necessarily outside the preemption clause." *Id.*at 1455. And other federal courts have recognized that "*ProCD* does not stand for the proposition that preemption is unwarranted in all breach of contract cases." *Canal+ Image UK Ltd. v. Lutvak*, 773 F. Supp. 2d 419, 445 (S.D.N.Y. 2011).

Private agreements are given force and effect by state law because "[a] contract depends on a regime of common and statutory law for its effectiveness and enforcement." *Norfolk & W. Ry. Co. v. Am. Train Dispatchers Ass'n*, 499 U.S. 117, 129-30 (1991) (holding that certain contractual obligations regarding bargaining rights were preempted by federal statute). For this reason, a contract "has no legal force apart from the law that acknowledges its binding character." *Id.* Thus, federal law can and does preempt the enforcement of contracts and associated state law claims in certain circumstances. *See*, *e.g.*, *Canal+ Image*, 773 F. Supp. 2d at 446 (contract claim preempted by the Copyright Act); *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 582-84 (1981) (calculation of damages under state common law of contract preempted by the Natural Gas Act); *City of Lowell v. ENEL N. Am., Inc.*, 796 F. Supp. 2d 225, 229 (D. Mass. 2011) (contract preempted and unenforceable where it conflicted with federal statute and federal license requirements).

Moreover, restrictive covenants are not purely private contracts. *See Shelley v. Kramer*,

334 U.S. 1 (1948) (judicial enforcement of race-based restrictive covenants aimed at prohibiting protected groups from owning or occupying real property constituted state action). Here, the covenants were recorded with the State of Wisconsin and Plaintiff sought to enforce them through Wisconsin state law in Wisconsin state courts (per Plaintiff's pending state court action). In addition, these particular covenants constitute "transfer" restrictions on real property, which are unique from general contract law, and are typically accompanied by affirmative requirements that they be reasonable and consistent with public policy. Restatement (Third) of Property (Servitudes) § 3.1 (2000) (a servitude is not valid if "it is illegal or unconstitutional or violates public policy"); *see also Nebbia v. People of New York*, 291 U.S. 502, 527-28 (1934) ("The Constitution does not guarantee the unrestricted privilege to engage in a business or to conduct it as one pleases."); *Walthal v. Rusk*, 172 F.3d 481, 485 (7th Cir. 1999) ("state contract law cannot provide the basis of a decision if that law conflicts with federal law").[5]

CONCLUSION

For the foregoing reasons and those described in the United States' opening brief, 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.

[5] Moreover, this case does not involve an arms-length transaction in which the restriction was attached with knowledge of, meaningful involvement by, or agreement from the Tribe or tribal members. This case involves a blanket prohibition passed by a homeowner's association acting in quasi-regulatory capacity, applying its restriction broadly, including to parcels not owned by the association, for the purpose of thwarting federal law. *See, e.g.*, *Smith v. Clifton Sanitation Dist.*, 300 P.2d 548, 549-550 (Colo. 1956) (property owners association cannot create a restrictive covenant to prevent a governmental entity from carrying out its statutory duties).

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Respectfully submitted,

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