IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

ONEIDA TRIBE OF INDIANS OF WISCONSIN, Plaintiff, v. VILLAGE OF HOBART, WISCONSIN, Defendant.	Civil File No. 06-C-1302

BRIEF OF *AMICI CURIAE*

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IN SUPPORT OF THE DEFENDANT VILLAGE OF HOBART'S MOTION FOR SUMMARY JUDGMENT

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Table of Contents

Page

Table of Authorities

Page(s)

Federal Cases:

State Cases:

Treaties, Statutes, Legislative History, and Regulations:

Secondary Sources:

INTEREST OF THE *AMICI CURIAE*

> [T]he [Oneida Indian Nation of New York] cannot unilaterally revive its ancient sovereignty … through open-market purchases from current titleholders. … A checkerboard of alternating state and tribal jurisdiction in New York State—created unilaterally at [the tribe's] behest—would "seriously burden the administration of state and local governments" and would adversely affect landowners neighboring the tribal patches.
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> *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197, 203, 219-20 (2005) (citation omitted).

The proposed *amici curiae* are "landowners neighboring the tribal patches" implicated by this litigation.[1] They are property owners, taxpayers, and voting citizens of the Village of Hobart, Wisconsin. *See* the accompanying Motion for Leave to File. The Oneida Tribe of Indians of Wisconsin is attempting to achieve *precisely* what the Supreme Court held in *City of Sherrill* that the Oneida Indian Nation of New York may not do—"unilaterally" take back sovereignty, jurisdiction, and regulatory authority over individual parcels of land simply by buying them on the open market.

Like the Wisconsin Oneida, the proposed *amici curiae* have deep roots in the Green Bay area. They have acquired "justifiable expectations" not only with respect to the sanctity of their titles and use rights, but with respect to the stability of sovereignty, jurisdiction, and regulatory authority in their community as well. *Hagen v. Utah*, 510 U.S. 399, 421 (1994); *see also*

[1] The *amici* understand that the Tribe has repurchased and now holds over 10,000 acres in fee status inside the boundaries of its original 1838 reservation. This Court's resolution with respect to the "O'Hare Boulevard parcels" and the "Forest Road parcels" will presumably set the governing precedent for all of these other fee lands as well, along with additional fee lands purchased by the Tribe on the open market in the future.

Sherrill, 544 U.S. at 202-03, 214-20.[2] A federal court's principal challenge in cases like this is to give fair weight to the interests of *all* affected stakeholders who view the contested area as their "home." As Senior District Judge Neil McCurn emphasized in his pathmarking opinion on tribal claims against private landowners—an opinion quoted at length and embraced by the Supreme Court in *Sherrill*—the "real task at hand" for a federal court is to determine "how, in the 21st century, to reconcile the Indians' interest in their homelands with those of current landowners who, understandably, also view the claim area as *their* 'homeland.'" *Oneida Indian Nation of New York State v. County of Oneida*, 199 F.R.D. 61, 93 (N.D.N.Y. 2000) (emphasis added); *see Sherrill*, 544 U.S. at 210-11, 213-14. The proposed *amici* ask to be heard with respect to their interests in their "homeland."

The Tribe reports that it "has been aggressively reacquiring land with the goal of owning 51 percent of the Reservation by 2020," and of "purchas[ing] and recover[ing] … all original reservation lands" after that.[3] Although the Tribe is free to pursue this goal, the governing

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[2] *See generally Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 433 (1989) (Stevens, J., concurring) (a community has the right to "define[] its essential character," whether "driven by a concern for health and safety, esthetics, or other public values," and to "ensure[] that neighboring uses of land are not mutually – or more often unilaterally – destructive"); *id.* at 458 (Blackmun, J., dissenting) (the "ability to engage in the systematic and coordinated utilization of land … may indeed be *the most essential function performed by local government*'") (emphasis added, internal quotation omitted); *Leo Sheep Co. v. United States*, 440 U.S. 668, 687 (1979) ("This Court has traditionally recognized the special need for certainty and predictability where land titles are concerned, and we are unwilling to upset settled expectations ….."); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 604-05 (1977) ("The longstanding assumption of jurisdiction by the State over an area that is over 90% non-Indian, both in population and in land use, not only demonstrates the parties' understanding of the meaning of the Act, but has created justifiable expectations which should not be upset by so strained a reading of the Acts of Congress as petitioner urges.").

[3] "History of Homelands," on the Official Website of the Sovereign Oneida Nation of Wisconsin, www.oneidanation.org; Jennifer Hill-Kelley, *Restoring the Reservation, Sustaining Oneida*, Natural Resource & Environment 21, 22 (American Bar Ass'n, Winter 2007).

precedents do not allow it to do so through the tactic of undermining state and local governments by cherry picking whatever lands it wishes—including lands within the corridors of planned public roads, sewer and water systems, and other necessary public developments—and then unilaterally purporting to declare those lands off-limits to state and local control. Allowing tribes to change the sovereign status of an individual parcel of land in this way

> would have far-reaching effects on the eminent domain authority of states and all other political subdivisions. Indian tribes would effectively acquire veto power over any public works project attempted by any state or local government merely by purchasing a small tract of land within the project. … If the State is automatically stripped of its authority to acquire property for public use whenever a tribe purchases a small tract of land within the project, all public works projects will be subject to uncertainty.

Cass County Joint Water Res. Dist. v. 1.43 Acres of Land, 2002 ND 83, ¶¶ 24-25, 643 N.W.2d 685, 694-95 (2002). These sorts of unilateral moves by one government to undermine another government are obviously not the way to achieve a fair and equitable "reconciliation" of the legitimate reliance-based expectations of *all* affected stakeholders who call the Green Bay area their "homeland." *Oneida Indian Nation*, 199 F.R.D. at 93.[4]

Allowing the Tribe to redraw jurisdictional boundaries on its own would harm the *amici* in other ways. For example, recognizing tribal sovereignty in "scattered checkerboard fashion over a territory otherwise under state jurisdiction" will "obviously" result in "many practical and legal conflicts between state and federal jurisdiction with regard to conduct and parties having mobility over the checkerboard territory." *DeCoteau v. Dist. County Court for the Tenth Jud.*

[4] The Tribe tries to distinguish the North Dakota Supreme Court's decision in *Cass County* by observing that that case dealt with a tribe's attempted exercise of sovereignty over land purchased far away from its reservation and traditional aboriginal area. (Tr. Br. at 21 n.7.) True enough, but the principle is much broader. *City of Sherrill* and other recent cases demonstrate that the principle also applies to former tribal lands *within* a tribe's reservation that are repurchased by the tribe on the open market. *See* pp. 7-16 below.

Dist., 420 U.S. 425, 430 n.3 (1975). This is particularly so where, as here, the layout of the checkerboard is left entirely to the discretion of the Tribe. It will be difficult if not impossible for local communities to function in the midst of the ensuing chaos and uncertainty.

SUMMARY OF THE ARGUMENT

I. The Supreme Court's decision in *City of Sherrill* is on point in all material respects. The Court held that, even assuming the New York Oneidas' reservation had never been "disestablished" or "diminished," the Oneida could not reacquire sovereignty, jurisdiction, and regulatory authority over former tribal lands inside reservation boundaries simply by repurchasing them on the open market. "'[S]tandards of federal Indian law and federal equity practice' preclude the Tribe from rekindling embers of sovereignty that long ago grew cold," unless it does so through the "land-into-trust" process established by 25 U.S.C. § 465. *Sherrill*, 544 U.S. at 214. A tribe may not "unilaterally" reacquire sovereignty over land simply by buying it from a willing seller. *Id.* at 202-03, 219-21.

A. This is an even more compelling case for rejecting tribal sovereignty than *Sherrill*. There, the Supreme Court assumed that the disputed lands had been taken from the tribe *in violation of federal law*, but the Court nevertheless held that the tribe now needed to go through the § 465 "land-into-trust" process. Here, it is clear that the disputed lands passed into non-Indian ownership and state sovereignty *in accordance with federal law*—specifically, the Indian General Allotment Act of 1887, the Burke Act of 1906, and a special 1906 Act aimed directly at the Wisconsin Oneida reservation. The language in those Acts (separately and in cumulative effect) made unmistakably clear that Congress intended the lands to be subject to state and local sovereignty, jurisdiction, and regulatory authority.

B. The Tribe's requested immunity from condemnation would create a much greater burden on state and local governments than the tribal tax immunity rejected in *Sherrill*. It is well established that a sovereign's power of eminent domain is so critical to its survival that it may even be exercised against other sovereigns that have purchased lands within its jurisdiction—precisely the case here. *See especially Georgia v. City of Chattanooga*, 264 U.S. 472, 480-82 (1924) ("Land acquired by one state in another state is held subject to the laws of the latter and to all the incidents of private ownership …. The power of the [sovereign] to condemn does not depend upon the consent or suability of the [other sovereign]."). Native American tribes are subject to the same limits on sovereignty that apply to States and foreign nations.

II. The Supreme Court has repeatedly held that the § 465 "land-into-trust" process provides "*the* proper avenue" for reestablishing tribal sovereignty over former tribal lands. *Sherrill*, 544 U.S. at 221 (emphasis added). Neither of the two statutes invoked by the Tribe exempts it from this Congressionally mandated process.

A. The overwhelming weight of modern authority holds that the Indian Nonintercourse Act does not apply to lands that a tribe recently purchased on the open market and holds in fee. A contrary reading would render the "land-into-trust" process superfluous. The cases cited by the Tribe are either distinguishable on their facts or were grounded on outdated and unacceptable notions about the supposed "incompetence" of tribal owners.

B. Section 16 of the Indian Reorganization Act, 25 U.S.C. § 476(e), does not create an alternative mechanism for reestablishing tribal sovereignty over repurchased lands, but merely makes clear that it is the "tribe or its tribal council" that shall exercise whatever land rights the tribe may hold pursuant to *other* laws. Here again, the Tribe's reading would render § 465 a nullity. The whole premise of § 465 is that, in order to reestablish the inalienability of former

tribal lands, it is necessary to go through the "land-into-trust" process prescribed by Congress. This process, which includes notice to and an opportunity to comment by all concerned governmental bodies in the area—federal, state, local, and tribal—results in a judicially reviewable decision by the Secretary of the Interior that is required to give careful consideration to the concerns of all affected stakeholders, including "[j]urisdictional problems," "potential conflicts of land use," "the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls," and "whether the Bureau of Indian Affairs is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status." 25 C.F.R. § 151.10(e)-(g) (2007).

The Tribe has offered no explanation why it would be futile or impracticable to use this available mechanism, as it has done in prior decades. Particularly in light of the century that has elapsed since these lands began to pass out of tribal ownership and sovereignty and the reliance interests of the many other stakeholders in the area, there is no good reason to recognize the Tribe's unilateral exercise of self-help remedies. If the Wisconsin Oneidas' sovereign landbase is to be rebuilt, it must be pursuant to the intergovernmental planning mechanisms created under § 465, not through unilateral declarations of sovereignty over checkerboard acquisitions that are cherry-picked off the open market in an effort to undermine the lawful functioning of other area governments.

ARGUMENT

I. The Tribe's Claims Are Barred Under The Supreme Court's Decision In *City Of Sherrill.*

The Tribe's motion papers virtually ignore the Supreme Court's landmark decision in *City of Sherrill*, and seek to limit its holding to the supposedly peculiar "factual circumstances at issue" in that case. (Tr. Br. 16.) As subsequent courts have emphasized, however, the *City of*

Sherrill decision has far-reaching application and "has dramatically altered the legal landscape."[5] *Sherrill* controls the outcome here.

A. *City Of Sherrill* Is On Point In All Material Respects.

At issue in *Sherrill* were lands within the boundaries of the New York Oneidas' reservation that had been "acknowledge[d]" by the United States in the Treaty of Canandaigua of November 11, 1794, 7 Stat. 44. Beginning in 1795, the State of New York had purchased many of these reservation lands directly from the New York Oneida in clear violation of the Nonintercourse Act (which requires federal approval of any conveyance of tribal trust lands) and over the strong objections of President George Washington's administration. *Sherrill*, 544 U.S. at 205. But the federal government eventually acquiesced, the illegal conveyances were allowed to stand, and the area was subject for generations to unquestioned state and local sovereignty, jurisdiction, and regulatory authority. *Id.* at 205-07, 213-20. In the 1990s, the New York Oneida began to reacquire these former tribal reservation lands in "open-market transactions" using their profits from casino gambling. *Id.* at 211. The Oneida refused to pay property taxes on these newly acquired lands, reasoning that the 1794 reservation had never been "diminished" or "disestablished"; that tribal "acquisition of fee title to discrete parcels of historic reservation land revived the Oneidas' ancient sovereignty piecemeal over each parcel"; and that "regulatory authority over [the Oneidas'] newly purchased properties no longer resides in" state or local governments. *Id.* at 202. That is *precisely* what the Wisconsin Oneida are claiming here.

The Supreme Court rejected the New York Oneida's claims in an 8-1 decision (Stevens, J., dissenting). The Court assumed for the sake of decision that the 1794 reservation boundaries

[5] *Cayuga Indian Nation v. Pataki*, 413 F.3d 266, 273 (2d Cir. 2005), *cert. denied*, 126 S. Ct. 2022 (2006); *see also Shinnecock Indian Nation v. New York*, No. 05-CF-2887 (TCP), 2006 WL 3501099, at * 3 (E.D.N.Y. Nov. 28, 2006).

had never been "disestablished" or "diminished" (*see id.* at 215 n.9), but nevertheless concluded that "'standards of federal Indian law and federal equity practice' preclude the Tribe from rekindling embers of sovereignty that long ago grew cold." *Id.* at 214 (citation omitted). The Court summarized its decision as follows (*id.* at 202-03):

> Today, we decline to project redress for the Tribe into the present and future, thereby disrupting the governance of central New York's counties and towns. Generations have passed during which non-Indians have owned and developed the area that once composed the Tribe's historic reservation. … Given the longstanding, distinctly non-Indian character of the area and its inhabitants, the regulatory authority constantly exercised by New York State and its counties and towns, and the Oneidas' long delay in seeking judicial relief against parties other than the United States, we hold that the Tribe cannot unilaterally revive its ancient sovereignty, in whole or in part, over the parcels at issue. The Oneidas long ago relinquished the reins of government and cannot regain them through open-market purchases from current titleholders.

The Court in *Sherrill* relied on several principles of federal Indian law, two of which bear special emphasis in this case. *First*, the Court analogized to its reservation "diminishment" cases in emphasizing that "'[t]he longstanding assumption of jurisdiction by the State [in] an area that is over 90% non-Indian'" creates "'justifiable expectations'" on the part of non-Indians that "merit heavy weight." *Id.* at 215-16 (quoting *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 604-05 (1977)).[6]

Second, the Court relied heavily on the so-called "impossibility" or "impracticability" doctrine—the principle that, where Indian lands have been conveyed in violation of federal law, the conveyances have been allowed to stand for a long time, and the lands have passed into the

[6] *See also South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 357 (1998) (emphasizing "[t]he State's assumption of jurisdiction over the territory, almost immediately after the 1894 Act and continuing virtually unchallenged to the present day"); *Hagen*, 510 U.S. at 421 ("jurisdictional history" of the area had created "justifiable expectations" among non-Indians that deserved protection); *DeCoteau*, 420 U.S. at 442 ("state jurisdiction over the ceded (*i.e.*, unallotted) lands went virtually unquestioned [from the 1890s] until the 1960s").

hands of "innumerable innocent purchasers," the "restor[ation of] the Indians to their former rights" in the lands will be deemed a judicially "impossible" remedy. 544 U.S. at 219 (quoting *Yankton Sioux Tribe v. United States*, 272 U.S. 351, 357 (1926)); *see also Felix v. Patrick*, 145 U.S. 317, 335 (1892) ("it needs no argument to show that the consequences of setting [the conveyances] aside would be disastrous … and would result in the unsettlement of large numbers of titles upon which the owners have rested in assured security for nearly a generation"). The impossibility doctrine not only protects individual landowners from "the potential for displacement" from their lands, but protects the entire community from unilateral tribal actions that would result in social upheaval and "negative economic impact[s]," including the "'widespread disruption' to everyone residing in the general vicinity of the claim area due, in part, to interference with transportation systems[.]" *Oneida Indian Nation*, 199 F.R.D. at 92.[7]

The Supreme Court held in *Sherrill* that the "impossibility" doctrine applies not only to matters of land title and possession, but to issues of sovereignty, jurisdiction, and regulatory authority as well (544 U.S. at 219-20, citations omitted):

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[7] *Felix v. Patrick* involved lands that properly belonged to an Indian claimant but that had been conveyed to non-Indians in violation of federal law. Over the course of the next thirty years, the lands became part of the City of Omaha and were "now intersected by streets, subdivided into blocks and lots," and filled with "buildings of a permanent character." 145 U.S. at 334. *See generally United States v. Creek Nation*, 295 U.S. 103, 110 (1935) (lands that had been improperly allotted by the federal government could not be restored several decades later; proper remedy was payment of just compensation by United States to the tribe); *United States v. Minnesota*, 270 U.S. 181, 215 (1926) (where reservation lands had been illegally acquired by the State half a century or more earlier, "the United States is entitled to a decree canceling the patents for such as have not been sold by the State and charging her with the value of such as she has sold"—a recognition that illegally acquired lands that were long ago sold into private ownership are no longer subject to Indian title); *Confederated Salish & Kootenai Tribes v. United States*, 401 F.2d 785, 789 (Ct. Cl. 1968) (improper federal conveyances that had been allowed to stand for over 60 years "effected a taking of the plaintiffs' land. The Government would not be allowed to escape paying compensation for the property …. By the same token, the Indians cannot now claim that the lands have always remained theirs.").

> [T]he unilateral reestablishment of present and future Indian sovereign control, even over land purchased at the market price, would have disruptive practical consequences similar to those that led this Court in *Yankton Sioux* to initiate the impossibility doctrine. The city of Sherrill and Oneida County are today overwhelmingly populated by non-Indians. A checkerboard of alternating state and tribal jurisdiction in New York State—created unilaterally at [the Oneidas'] behest—would "seriously burde[n] the administration of state and local governments" and would adversely affect landowners neighboring the tribal patches. … If [the Oneida] may unilaterally reassert sovereign control and remove these parcels from the local tax rolls, little would prevent the Tribe from initiating a new generation of litigation to free the parcels from local zoning or other regulatory controls that protect all landowners in the area.

Contrary to the Tribe's arguments in this case, these broad holdings in *Sherrill* are in no way restricted to the supposedly narrow "factual circumstances at issue" in that case. (Tr. Br. 16.) Rather, they establish generally applicable principles for the resolution of tribal claims to sovereignty over former reservation lands repurchased on the open market—the root issue here. To be sure, the State of New York in *Sherrill* had exercised sovereignty over the lands in issue for about two centuries, whereas the State of Wisconsin in this case has exercised sovereignty over the lands in issue for about a century. *See* pp. 11-16 *below.* Many of the cases relied upon in *Sherrill*, however, involved situations in which States had exercised jurisdiction over an area for much less than a century, yet long enough to create "justifiable expectations" in the established divisions of sovereignty, jurisdiction, and regulatory authority.[8] The governing principle is that a tribe may not "unilaterally" reacquire sovereignty over a parcel of land simply by purchasing it. 544 U.S. at 202-03, 219-21. Here, as in *Sherrill*, "[t]he Oneidas long ago

[8] *Felix* involved a period of non-Indian ownership of about 30 years, *see* 145 U.S. at 334; *Yankton Sioux* involved a period of adverse possession of 35 years (1891-1926), *see* 272 U.S. at 357-58; *Creek Nation* involved a period of non-tribal ownership of about 44 years (1891-1935), *see* 295 U.S. at 107; and *United States v. Minnesota* involved patents that had been issued 55 years earlier, *see* 270 U.S. at 191.

relinquished the reins of government and cannot regain them through open-market purchases from current titleholders." *Id.* at 203.

B. This Is An Even More Compelling Case For Rejecting Tribal Sovereignty Than *Sherrill*, Which Involved Aboriginal Lands That Had Been Taken From The Oneida In *Violation* Of Federal Law. The Lands At Issue Here Passed Into Non-Indian Ownership And State Sovereignty *In Accordance With* Federal Law.

The Supreme Court in *Sherrill* acknowledged the New York Oneidas' deep roots in central New York State: they had lived in the area for over a millennium and were seeking to regain the "ancient sovereignty" they had once exercised over their "aboriginal homeland." 544 U.S. at 203; *see also id.* at 213, 215.[9] Notwithstanding these ancient tribal ties, the Court found that the "justifiable expectations" of more recent generations of Euro-American settlers outweighed the Oneidas' ancestral interests and required maintenance of existing divisions of sovereignty, jurisdiction, and regulatory authority—unless and until altered by the federal government through the "land-into-trust" process. *Id.* at 215-16, 220-21.

This case, on the other hand, does *not* involve a clash between "ancient," "aboriginal" land rights of a Native American tribe and the rights of Euro-Americans who arrived in the area centuries later. Instead, the Wisconsin Oneida and the Euro-Americans both began settling in Green Bay and the Fox River valley during the same generation—beginning in the 1820s and 1830s.[10] Without in any way denigrating the Wisconsin Oneidas' important treaty-protected

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[9] *See generally* Dean R. Snow, *The Iroquois* (1996); Barry M. Pritzker, *A Native American Encyclopedia: History, Culture, and Peoples*, at 443 (2000) (tracing Iroquois presence in New York back to "around 800" A.D.).

[10] *See especially* the series of essays by various authors in *The Oneida Indian Journey: From New York to Wisconsin, 1784-1860* (L. Hauptman & L. McLester eds., 1999); *see also* Robert E. Bieder, *Native American Communities in Wisconsin, 1600-1960: A Study of Tradition and Change*, at 128-29 (1995). A detailed legal history of the Oneida emigration to Wisconsin (which included two inter-tribal agreements in the early 1820s between the Menominees and the

(Footnote continued)

rights and their 186-year-old ties to Wisconsin, their interests in Wisconsin cannot possibly be given as much weight in the jurisdictional balance as the New York Oneidas' interests in their *aboriginal* homeland. The Wisconsin Oneida exercised sovereignty over the lands in issue for no more than about a century at most (1820s-1920s), compared with the Oneidas' sovereign control of central New York State for some 1,200 years.

Of even more importance, the Supreme Court in *Sherrill* rejected the New York Oneidas' claims of sovereignty over repurchased lands even though it assumed that those lands had been *illegally taken* from the tribe in violation of federal law. *See* 544 U.S. at 202, 208-09, 213-14; *see also County of Oneida v. Oneida Indian Nation of New York*, 470 U.S. 226, 233-40 (1985) (holding that New York's 1795 acquisition of Oneida reservation lands violated federal common law). If a tribe may not "unilaterally" reestablish its sovereignty over lands that were taken from it *in violation* of federal law, *a fortiorari*, a tribe may not "unilaterally" reestablish its sovereignty over lands that passed into non-Indian ownership and state sovereignty *in accordance with* federal law.

That is precisely what happened to the Oneida reservation in Wisconsin. Far from violating federal law, the Wisconsin Oneidas' losses of tribal ownership, sovereignty, and regulatory authority were the *natural and intended consequences* of federal law, especially the Indian General Allotment Act of 1887, 24 Stat. 388 (also known as the "Dawes Act").[11] Indeed,

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New York Indians which were approved by President James Monroe, followed by conflicting claims and multiple attempts at treaty resolution during the administrations of John Quincy Adams and Andrew Jackson) is set forth in the extended note appearing in *New York Indians v. United States*, 170 U.S. 1, 6-16 (1898).

[11] "The objectives of allotment were simple and clear cut: to extinguish tribal sovereignty, erase reservation boundaries, and force the assimilation of Indians into the society at large." *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 254 (1992). On the purposes and mechanics of allotment, *see generally* Francis Paul

(Footnote continued)

the federal government treated the Wisconsin Oneida reservation as something of a test case, began pushing for the allotment of that reservation shortly after the Civil War, and moved quickly to implement the 1887 Act on that reservation in order to serve as a model for other reservations. *See* James W. Oberly, *The Dawes Act and the Oneida Indian Reservation of Wisconsin*, in *The Oneida Indians in the Age of Allotment, 1860-1920*, at 187-90 (Laurence M. Hauptman & L. Gordon McLester III eds., 2007). President Benjamin Harrison directed that the Oneida reservation be allotted shortly after he took office in 1889, and, after three years of study and preparation, the entire reservation was formally allotted on June 13, 1892, when the Department of the Interior granted "trust patents" to 1,503 Oneida allottees. *See id.* at 190-92; Arlinda Locklear, *The Allotment of the Oneida Reservation and Its Legal Ramifications*, in *The Oneida Indian Experience: Two Perspectives*, at 85 (Jack Campisi & Laurence M. Hauptman eds., 1988).

The federal government did not stop there. Although the Oneida allottees were supposed to be the beneficiaries of a 25-year trust period (1892-1917), Congress enacted special legislation in 1906 providing for the immediate termination of trust status over many specified Wisconsin Oneida allotments. *See* Act of June 21, 1906, 34 Stat. 325, 380. This special Congressional legislation also authorized the Secretary of the Interior to terminate the trust over any remaining Oneida allotments, which Congress instructed "shall operate as a removal of all restrictions as to the sale, taxation, and alienation of the lands so patented." *Id.* at 381.[12]

Prucha, *The Great Father: The United States Government and the American Indians*, at 666-73 (1984); *Cohen's Handbook of Federal Indian Law*, § 1.04, at 77-80 (2005 ed.); Conference of Western Attorneys General, *American Indian Law Deskbook*, at 27-31 (3d ed. 2004).

[12] During the same legislative session, Congress enacted the Burke Act of 1906, 34 Stat. 182, 183, which gave the President authority to issue fee patents prior to the expiration of the trust period, and provided that the issuance of such a patent "shall" remove "all restrictions as to

(Footnote continued)

The 1906 Act resulted in an immediate, "dramatic turnover" of Oneida lands. As one historian has recently summarized (Oberly at 194, 196, paragraph breaks omitted):

> A preliminary answer points to three forms of land loss by the allottees of their fee simple parcels. First, some Oneida Indians took the opportunity to sell their parcels for cash in the Brown County and Outagamie County land markets. Second, some Oneida Indians mortgaged their property and then were unable to repay their loans and lost their land to their creditors. Third, some Oneida Indians failed to pay their property taxes and had their lands first declared delinquent and then forfeited to the town government. … [T]he preliminary work reported here suggests that there was a dramatic turnover of land on the Oneida Indian Reservation to non-Indian ownership in the first five years after Congress approved the conversion to fee simple ownership of allotments.

Nor did the federal government stop there. In 1917, a "Federal Competency Commission" investigated the Wisconsin Oneidas' remaining trust allotments, and recommended that the trust restrictions on nearly all parcels be allowed to expire as scheduled. *See* Laurence M. Hauptman, *The Wisconsin Oneidas and the Federal Competency Commission of 1917,* in *The Oneida Indians in the Age of Allotment, 1860-1920*, at 200-25 (Laurence M. Hauptman & L. Gordon McLester III eds., 2006). The result was that, by the 1920s, "only a few hundred acres of the Oneida Reservation remained in Indian hands." Locklear at 85.

The effects of allotment on the Wisconsin Oneida have been described by historians and tribal members as "wrenching" and "nightmarish," but the judicial decisions and historical accounts are unanimous in recognizing that these effects were fully authorized under then-prevailing federal law and were implemented *by the federal government*.[13] Congress specifically

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sale, incumbrance, or taxation of said land." This is virtually the identical language used in the Act of June 21, 1906, which focused on the Wisconsin Oneida reservation. The Supreme Court's construction of the Burke Act proviso in *County of Yakima*, 502 U.S. at 264, is authoritative with respect to the materially identical language in the special Oneida legislation.

[13] The U.S. Court of Claims found in 1905 that "[t]he reservation of the Oneida Indians in Wisconsin, except about 85 acres held for school purposes, has been allotted to said Indians under the provisions of the act of Congress of 1887 …, and said lands are now held in

(Footnote continued)

instructed in the Act of June 21, 1906 that the issuance of patents would "operate as a removal of all restrictions as to the sale, taxation, and alienation of the lands so patented." 34 Stat. at 381. This kind of language makes it "unmistakably clear" that Congress intended the patented lands to be subject to state and local sovereignty, jurisdiction, and regulatory authority. *See, e.g.*, *Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 112-13, 115 (1998); *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 263-64 (1992). And once Congress has made this transfer of sovereignty to state and local governments "unmistakably clear," Congress must also be "unmistakably clear" if it seeks to take that sovereignty away and transfer it back to the tribe. "The subsequent repurchase of reservation land by a tribe does not manifest any congressional intent to reassume federal protection of that land and to oust state taxing authority—particularly when Congress explicitly relinquished such protection many years before." *Cass County*, 524 U.S. at 114.

Thus, whether the disputed lands were originally transferred out of tribal ownership in *violation* of federal law (as in *Sherrill*) or in *accordance* with federal law (as in *Cass County*), the rule is the same: tribes may not unilaterally reacquire sovereignty over former lands simply by purchasing them on the open market. If anything, the equitable argument against unilateral

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accordance with the said act." *The New York Indians v. United States*, 40 Ct. Cl. 448, 471 (1905). Four years later, the U.S. District Court for the Eastern District of Wisconsin recognized "that a large fraction of the Oneida Reservation is now owned and occupied by white men who have obtained title through the heirs at law of deceased allottees[.]" *United States v. Hall*, 171 F. 214, 214 (E.D. Wis. 1909). *See also* Bieder at 164-65 ("The Oneida suffered wrenching change and more community disintegration from the allotment of their reservation …. By the 1920s little land remained in Oneida hands, and non-Oneida town and county government replaced tribal government."); Patty Loew, *Indian Nations of Wisconsin: Histories of Endurance and Renewal*, at 108 (2001) ("The results [of allotment], as elsewhere in Indian Country, were nightmarish. … By the 1930s, less than five percent of the original reservation remained in the hands of Oneida tribal members."); Nancy Oestreich Lurie, *Wisconsin Indians*, at 37 (rev. ed. 2002) ("allotment nearly wiped out the Oneida Reservation by the 1930s").

tribal action should apply with even greater force where, as here, the lands were *lawfully* placed under state and local sovereignty many generations ago. It would make no sense to give a tribe greater rights over lands that it *lawfully* lost than over lands that it *unlawfully* lost.

C. This Is Also A More Compelling Case Than *Sherrill* Because The Tribe's Requested Immunity From Condemnation Would Place A Much Greater Burden On State And Local Sovereignty Than The Tribal Tax Immunity Rejected In *Sherrill*.

As Justice Stevens emphasized in dissent, the narrow issue in *City of Sherrill* was whether a tribe was entitled to an immunity from local property taxes—the "least disruptive" of the potential consequences of continued tribal sovereignty. 544 U.S. at 226. The majority saw no ready distinction between a tax immunity and other incidents of tribal sovereignty such as land use, community planning, and public works. *Id.* at 202-03, 213-14, 219-20. Justice Stevens responded that he would allow *only* the "least disruptive" remedy of a tax immunity, and *agreed* with the rest of the Court that a tribe cannot unilaterally reacquire land-use and regulatory authority over repurchased lands (*id.* at 227 n.6, emphasis added):

> It is not necessary to engage in any speculation to recognize that the majority's fear of opening a Pandora's box of tribal powers is greatly exaggerated. Given the State's strong interest in zoning its land without exception for a small number of Indian-held properties arranged in checkerboard fashion, *the balance of interests obviously supports the retention of state jurisdiction in this sphere*.

This case involves one of the "obvious[]" core sovereign powers that Justice Stevens had in mind—the power of government to condemn lands within its jurisdiction (subject to payment of just compensation) where necessary to promote important public purposes.

> The power of eminent domain is an attribute of sovereignty, and inheres in every independent State. The taking of private property for public use upon just compensation is so often necessary for the proper performance of governmental functions that the power is deemed to be essential to the life of the State. It cannot be surrendered, and, if attempted to be contracted away, it may be resumed at will. It is superior to property rights ….

Georgia v. City of Chattanooga, 264 U.S. 472, 480 (1924) (citations omitted). *See also United States v. Carmack*, 329 U.S. 230, 236 (1946) ("The power of eminent domain is essential to a sovereign government. … Otherwise, the owner of the land, by refusing to sell it or by consenting to do so only at an unreasonably high price, is enabled to subordinate the [sovereign's] powers … to his personal will."); *United States v. 39.96 Acres of Land*, 754 F.2d 855, 858 (7th Cir. 1985) ("the power of eminent domain … is essential to a sovereign government").

A sovereign's power of eminent domain is so important that it may even be exercised against other sovereigns that have purchased lands within its jurisdiction. The Supreme Court's decision in *Georgia v. City of Chattanooga* is squarely on point. There, the State of Georgia purchased eleven acres on the open market in adjoining Tennessee for use as a railroad yard in support of Georgia's state railway operations. Later, the City of Chattanooga sought to condemn Georgia's property for use in a road-building and redevelopment project, and Georgia brought an original action in the Supreme Court insisting that Chattanooga couldn't touch the property because of Georgia's sovereign immunity—the same argument the Tribe is making here. The Supreme Court unanimously rejected these claims:

> The power of Tennessee, or of Chattanooga as its grantee, to take land for a street, is not impaired by the fact that a sister state owns the land …. *Land acquired by one state in another state is held subject to the laws of the latter and to all the incidents of private ownership*. The proprietary right of the owning state does not restrict or modify the power of eminent domain of the state wherein the land is situated …. The sovereignty of Georgia was not extended into Tennessee. Its enterprise in Tennessee is a private undertaking. It occupies the same position there as does a private corporation authorized to own and operate a railroad, and, as to that property, it cannot claim sovereign privilege or immunity. *Undoubtedly Tennessee has power to open roads and streets across the railroad land owned by Georgia.* … [Georgia's] property [in Tennessee] is as liable to condemnation as that of others, and it has, and is limited to, the same remedies as are other owners of like property in Tennessee. *The power of the city to condemn does not depend upon the consent or suability of the owner.*

264 U.S. at 479-82 (citations and paragraph breaks omitted; emphasis added). *Georgia v. Chattanooga* remains blackletter law. *See* 11 McQuillin's Law of Municipal Corporations § 32.65 (3rd ed. 2007) ("A city may condemn lands within the state for street purposes though owned by another state."). As the Illinois Supreme Court emphasized a half-century ago, "[l]and acquired by one State in another is held subject to the laws of the latter and to all the incidents of private ownership." *People ex rel. Hoagland v. Streeper*, 12 Ill. 2d 204, 212, 145 N.E.2d 625, 629 (1957). "If it were otherwise," the court continued, "the acquisition of land in Illinois by another State would effect a separate island of sovereignty within our boundaries. Such possibility can find no support in the law or reason." *Id.* at 213, 145 N.E.2d at 630.[14]

Similar rules govern a foreign sovereign's ownership of real property within the United States: "when owning property here, a foreign state must follow the same rules as everyone else." *City of New York v. Permanent Mission of India to the UN*, 446 F.3d 365, 374 (2d Cir. 2006), *aff'd*, 127 S. Ct. 2352 (2007); *see also* Restatement (Second) of Foreign Relations Law § 68 cmt. d & Illustration 6 (1965) ("State A brings proceedings in eminent domain in its courts

[14] *See also Hall v. University of Nevada*, 8 Cal. 3d 522, 524, 503 P.2d 1363, 1364 (1972) (activities of a "sister state" engaged in activities within California "are subject to our laws with respect to those activities"); *State ex rel. Taggart v. Holcomb*, 85 Kan. 178, 184-85, 116 P. 251, 253 (1911) (waterworks plant owned by a Missouri city and located in Kansas was subject to regulation and taxation of its operations in Kansas, because a Missouri city "has no other or greater rights than a private corporation engaged in the same business. It is part of a sovereignty, it is true; but its powers cannot be exercised in Kansas. … When a state, or any of its municipalities, comes within the boundaries of another state, it does not carry with it any of the attributes of sovereignty, and is subject to the laws of such other state the same as any other proprietor."); *City of Cincinnati v. Commonwealth*, 292 Ky. 597, 600-06, 167 S.W.2d 709, 711-14 (1942) (railroad owned by an Ohio city and operating in Kentucky and Tennessee was subject to regulation and taxation in those States); *State v. City of Hudson*, 231 Minn. 127, 130-32, 42 N.W.2d 546, 548-49 (1950) (interstate toll bridge owned and operated by a Wisconsin city was subject to regulation and taxation by Minnesota to the extent of its operations inside Minnesota: "[A] state acquiring ownership of property in another state does not thereby project its sovereignty into the state where the property is situated. … Property of a municipality of another state located in the taxing state is not exempt from taxation ….").

to condemn real property owned by state B in A. B is not entitled to immunity from such a suit.").

The Supreme Court emphasized in *Sherrill* that cases construing the limits of *state* sovereignty "provide a helpful point of reference" in determining the scope of *tribal* sovereignty. 544 U.S. at 218. For example, because States are subject to the "acquiescence doctrine" in territorial disputes, so are tribes. *See id.* at 218-19. Likewise, because neither States nor foreign nations are allowed to create "separate islands of sovereignty" by purchasing land within another sovereign's jurisdiction, *People v. Streeper*, 12 Ill. 2d at 213, 45 N.E.2d at 630, neither may tribes. There is no reason why a Native American tribe should not be subject to the same limits on sovereignty that apply to States and foreign nations.

II. Section 5 Of The Indian Reorganization Act, 25 U.S.C. § 465, Provides The Exclusive Method For Reestablishing Tribal Sovereignty Over Newly Purchased Lands.

The Supreme Court has held twice in recent years that the "land-into-trust" process established by 25 U.S.C. § 465 provides "*the* proper avenue" for reestablishing tribal sovereignty over former trust lands, and that tribes may not unilaterally reestablish sovereignty simply by buying land on the open market. *See Sherrill*, 544 U.S. at 221 (emphasis added); *see also Cass County*, 524 U.S. at 114 ("It would render [§ 465] unnecessary, as far as exemption from taxation is concerned, if we held that tax-exempt status automatically attaches when a tribe acquires reservation land."). The Tribe nevertheless argues that two federal statutes render it exempt from these principles. Neither statute overcomes the Court's conclusion in *Sherrill* that § 465 establishes "*the* proper avenue" for seeking to reestablish tribal sovereignty.

A. The Indian Nonintercourse Act Does Not Override The "Land-Into-Trust" Provisions Of The Indian Reorganization Act.

The Tribe acknowledges that the Supreme Court "has never determined whether the Indian Nonintercourse Act … applies to land that has been rendered alienable by Congress and later reacquired by an Indian tribe." *Cass County*, 524 U.S. at 115 n. 5; *see also* Tr. Br. 21 n7. The Tribe also acknowledges that courts over the past century have divided on this issue, though it seeks to create the impression that the overwhelming weight of modern authority treats tribally repurchased lands as being subject to the Nonintercourse Act, with only a few isolated and distinguishable decisions going the other way. (*See* Tr. Br. at 15-16, 20-21 & n.7.)

Just the opposite is true. Most of the Tribe's principal cases (*see* Tr. Br. at 15-16) are distinguishable because they either (a) involved special issues of Pueblo title, a unique hybrid of fee and trust title that does not carry over to other tribes; and/or (b) involved decisions from several generations ago grounded on outdated and unacceptable concepts about the supposed "incompetence" of Native American owners.[15] These cases cited by the Tribe have repeatedly been distinguished and criticized by modern federal decisions on precisely these grounds.[16] The

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[15] Cases in the former category include *United States v. Candelaria*, 271 U.S. 432 (1926), and *Alonzo v. United States,* 249 F.2d 189 (10th Cir. 1957). Cases in the latter category include *Alonzo* and *United States v. 7,405.3 Acres of Land*, 97 F.2d 417 (4th Cir. 1938). Many of the other decisions cited by the Tribe did not involve fee lands repurchased by a tribe and/or *rejected* the tribal Nonintercourse Act claims. *See, e.g., Tonkawa Tribe of Oklahoma v. Richards*, 75 F.3d 1039, 1045 (5th Cir. 1996); *Mohegan Tribe v. Connecticut*, 638 F.2d 612 (2d Cir. 1980).

[16] *See, e.g., Penobscot Indian Nation v. Key Bank*, 112 F.3d 538, 553 n.18 (1st Cir. 1997) (noting that *Candelaria* and similar Pueblo cases involved lands that, even though held in modified fee status under Spanish, Mexican, and then U.S. law, had never lost their inalienable character, and that *Alonzo* and *7,405.3 Acres of Land* suffered from a "paucity of analysis and outdated paternalism"); *Lummi Indian Tribe v. Whatcom County*, 5 F.3d 1355, 1358-59 (9th Cir. 1993) (distinguishing *Candelaria*, *Alonzo*, and *7,405.3 Acres of Land*, and adding that "no court has held that Indian land approved for alienation by the federal government and then reacquired by a tribe again becomes inalienable"); *Leech Lake Band of Chippewa Indians v. Cass County*,

(Footnote continued)

great weight of modern authority recognizes that lands repurchased by a tribe are not subject to the Nonintercourse Act unless and until they are restored to federal trust status under 25 U.S.C. § 465. Indeed, one of the elements of a Nonintercourse Act claim is that "the United States has never approved or consented to the alienation of the tribal land." *Catawba Indian Tribe v. South Carolina*, 718 F.2d 1291, 1295 (4th Cir. 1983) (collecting authorities), *rev'd on other grounds*, 476 U.S. 498 (1986); *see also Delaware Nation v. Pennsylvania*, 446 F.3d 410, 418 (3d Cir.), *cert. denied*, 127 S. Ct. 666 (2006). As many courts have emphasized, "[t]he logical consequence is that once Congress has approved the alienation of a certain piece of land, the protections of the Nonintercourse Act no longer apply." *Leech Lake Band of Chippewa Indians v. Cass County*, 908 F. Supp. 689, 696 (D. Minn. 1995).[17] Among both federal and state courts, this is the majority and by far the better reasoned line of authority.[18]

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908 F. Supp. 689, 695 (D. Minn. 1995) (distinguishing *Candelaria* and *Alonzo*, and criticizing *Alonzo* for its "outdated and unacceptable" rationale that Native Americans are incompetent to manage their own affairs) (*see* n.17 for subsequent history); *United States ex rel. Saginaw Chippewa Tribe v. Michigan*, 882 F. Supp. 659, 675 (1995) (distinguishing and criticizing *Alonzo* for its "regressive" reasoning) (*see* n.19 for subsequent history).

[17] The Eighth Circuit affirmed this decision with respect to most of the disputed parcels, but reversed as to some of the parcels that (in its opinion) had never been patented under the General Allotment Act or otherwise released from tax-exempt status. *See* 108 F.3d 820, 829 (8th Cir. 1997). The Supreme Court's *Cass County* decision reversed the Eighth Circuit's decision in part and held that *all* parcels at issue were subject to state and local taxation because the restraints against alienation had been lifted on all of these parcels and not reimposed through the tribe's unilateral reacquisition of title. *See* 524 U.S. at 110, 113-15.

[18] For federal authority, *see, e.g.*, *Penobscot Indian Nation*, 112 F.3d at 553 (*re* 25 U.S.C. § 81) (once Congress had terminated the trust status of particular lands, reimposing trust status on those lands when acquired by the tribe on the open market "would force the Secretary [of the Interior] to exercise a trust responsibility with respect to lands over which Congress specifically disavowed any further trust obligation"); *Lummi Indian Tribe*, 5 F.3d at 1359 ("parcels of [reservation] land approved for alienation by the federal government and then reacquired by the Tribe did not then become inalienable"); *Buzzard v. Okla. Tax Comm'n*, 992 F.2d 1073, 1077 (10th Cir. 1993) (if the Nonintercourse Act applied to recent tribal land purchases, a tribe "could remove land from state jurisdiction and force the federal government to

(Footnote continued)

A contrary reading of the Nonintercourse Act would render the "land-into-trust" process established by Congress in 25 U.S.C. § 465 completely superfluous:

> [I]f all land held by Indian tribes were automatically restricted by operation of the Nonintercourse Act, then the Tribe would not have to submit to the cumbersome and lengthy process … whereby Tribes may petition the Department of the Interior to place lands owned by them into trust. … If return to trust status were automatic via the Nonintercourse Act, a petitioning process to return land to trust status would be superfluous.

United States ex rel. Saginaw Chippewa Tribe v. Michigan, 882 F. Supp. 659, 676 (1995) (citation omitted).[19]

Amici acknowledge that the federal district judge who was overturned by the Supreme Court in *Sherrill* has held on remand that recently repurchased tribal lands are subject to the Nonintercourse Act, resulting in the odd result that local governments may tax such tribal lands

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exert jurisdiction over that land without either sovereign having any voice in the matter"); *Mashpee Tribe v. Watt*, 542 F. Supp. 797, 803 (D. Mass. 1982) (Nonintercourse Act does not restrict "the alienation of property acquired by Indians from non-Indians in settled sections of the country"), *aff'd*, 707 F.2d 23 (1st Cir. 1983). For additional cogent authority from state appellate courts, *see, e.g.*, *Bay Mills Indian Community v. State*, 244 Mich. App. 739, 745, 626 N.W.2d 169, 173 (2001) (upon the transfer of sovereignty over a parcel of land from tribe to state, "the land was removed from federal control and became subject to the state's taxing authority unless and until Congress manifested a contrary intent"); *Cass County Joint Water Res. Dist. v. 1.43 Acres of Land*, 2002 ND 83, ¶ 32, 643 N.W.2d 685, 697 (2002) ("[O]nce the federal government removes restraints on alienation of land, the land does not become inalienable under the Nonintercourse Act merely because it is acquired by an Indian tribe."); *Anderson & Middleton Lumber Co. v. Quinault Indian Nation*, 130 Wash. 2d 862, 929 P.2d 379, 388 (1996) ("[T]he protections of the [Nonintercourse] Act do not apply to lands made alienable and encumberable under a federally issued fee patent. Subsequent reacquisition of the land by an Indian tribe does not change this result because the land's alienable status is not altered.").

[19] The Sixth Circuit reversed this decision on other grounds, holding that the treaty under which the disputed lands had been allotted had not (unlike the General Allotment Act and the Burke Act) made them freely alienable and subject to state and local jurisdiction. *See* 106 F.3d 130, 133-35 (6th Cir. 1997). The Sixth Circuit's decision did not question the district court's decision with respect to lands allotted pursuant to the General Allotment Act and the Burke Act. In any event, the Sixth Circuit's decision was vacated and remanded for reconsideration in light of the Supreme Court's decision in *Cass County*. *See* 524 U.S. 923 (1998).

but may not do anything to enforce their tax laws through foreclosure or other remedies if tribes refuse to pay the taxes. *See Oneida Indian Nation of New York v. Madison County*, 401 F. Supp. 2d 219, 227-30 (N.D.N.Y. 2005); *Oneida Indian Nation v. Oneida County*, 432 F. Supp. 2d 285, 289 (N.D.N.Y. 2006). Those decisions are presently on appeal to the Second Circuit, and *amici* believe they should be overturned for all of the reasons noted in the decisions cited above. Even if the recent New York decisions were to be affirmed, however, the cases are readily distinguishable because the New York Oneida lands were never lawfully allotted and alienated out of tribal control, whereas the Wisconsin Oneida lands in issue here were. Where, as here, tribal land has been *lawfully* alienated and subjected to state and local sovereignty, the land remains freely alienable even if reacquired by the tribe in fee, absent "congressional intent to reassume federal protection of that land." *Cass County*, 524 U.S. at 114. No such intent has been manifested here.

B. Section 16 Of The IRA Does Not Provide An Alternative Mechanism To Section 5 For Restoring Tribal Sovereignty Over Former Reservation Lands.

The Tribe also argues that § 16 of the Indian Reorganization Act, 25 U.S.C. § 476(e), "plainly grants an IRA tribe such as the Oneida Tribe a veto power over any disposition of tribal assets, including dispositions resulting from condemnation." (Tr. Br. 7; *see id.* at 6-10.) Section 16 is not nearly as sweeping as the Tribe contends. It simply provides that a tribe may "organize" itself under the IRA and adopt a tribal constitution that, among other things, grants the "tribe or its tribal council" the "right[] and power[] … to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without consent of the tribe." 25 U.S.C. § 476(e). The short answer to the Tribe's argument is that this provision does not create *new* rights in tribal lands, but merely makes clear *who* shall exercise the tribe's rights in its lands created pursuant to *other* laws. The Supreme Court has specifically emphasized that

§ 16 of the IRA "would be effective *only where there has been specific recognition by the United States of Indian rights to control absolutely tribal lands.*" *Hynes v. Grimes Packing Co.*, 337 U.S. 86, 107 (1949) (emphasis added). The Court pointed to § 5 of the IRA—now codified as 25 U.S.C. § 465—as the mechanism by which such "specific recognition" could be sought and obtained. *See* 337 U.S. at 108.[20]

Indeed, the Tribe's interpretation of § 16 of the IRA would render the "land-into-trust" provisions of Section 5 of the IRA entirely superfluous—an outcome the Supreme Court rejected in *Cass County*, 524 U.S. at 114. *See also Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("cardinal principle of statutory construction" is "to give effect, if possible, to every clause and word of a statute") (citations and internal quotations omitted). The relevant legal and historical materials make clear that it was § 5 of the IRA, not § 16, that was the intended avenue for reestablishing tribal sovereignty, jurisdiction, and regulatory authority over former tribal lands.

> [Section 465] was quite important for those reservations that had a "checkerboard" appearance due to white acquisitions of reservation land. It afforded a tribe an opportunity to purchase the white properties and consolidate tribal holdings. The act authorized an appropriation of not more than two million dollars annually to assist in this program.

Vine Deloria Jr. & Clifford Lytle, *The Nations Within: The Past and Future of American Indian Sovereignty*, at 148 (1984). *See also* 78 Cong. Rec. 11730 (June 15, 1934) (remarks of Rep. Howard, a key sponsor of the IRA) (Section 465 would "go further and actually restore some of

[20] The Tribe relies heavily on a single, sharply divided Alaska Supreme Court decision which it acknowledges is the "only" decision to have adopted its construction of § 16 of the IRA. *See* Tr. Br. 10 (citing *In re 1981, 1982, 1984 & 1985 Delinquent Property Taxes Owed to the City of Nome*, 780 P.2d 363 (Alaska 1989)). That case misconstrued the Supreme Court's decision in *Hynes v. Grimes Packing*; it concluded without analysis that lands repurchased in fee were subject to "absolute[]" tribal control, and completely ignored the Supreme Court's requirement in *Hynes* that such control must have been "*specific[ally] recogni[zed]* by the United States." 337 U.S. at 107 (emphasis added). The federal government has given no such "specific recognition" here.

the lost lands to the Indians. … [M]any of the reservations are so riddled by alienation that their economic use for Indian grazing is impossible. This program … would permit progress toward the consolidation of badly checkerboarded Indian reservations, as well as provide additional agricultural land to supplement stock grazing or forestry operations.").[21]

This is in fact how § 465 has been used on the Wisconsin Oneida reservation since it was enacted in 1934. During this time, the federal government at the Tribe's request has placed some 2,200 acres back into trust status pursuant to § 465. *See* Loew at 109; Pritzker at 446. Those efforts would have been unnecessary if lands acquired by or on behalf of a tribe were automatically exempt from state and local sovereignty, jurisdiction, and regulatory authority.

CONCLUSION

For the reasons set forth above, the Village of Hobart's motion for summary judgment should be granted.

Dated this 27th day of September, 2007.

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[21] Representative Howard also observed during floor debate that, "[c]onsidering the magnitude of the losses of Indian land brought about by the past 50 years of incompetent Federal guardianship, the purchase program here proposed is indeed a very modest restitution; and it is moreover an investment that will many times repay itself …. Any lands acquired under this bill may be added to existing reservations." 78 Cong. Rec. 11730. *See also* H.R. Rep. No. 73-1804, at 6-7 (1934); S. Rep. No. 73-1081, at 6 (1934).