UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Oneida Tribe of Indians of Wisconsin,

Plaintiff,

v.

Village of Hobart, Wisconsin,

Defendant.

Civil File No. 06-C-1302

Hon. William C. Griesbach

PLAINTIFF'S BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

The Oneida Tribe of Indians of Wisconsin ("the Tribe") brings this action for declaratory and injunctive relief in response to the defendant Village of Hobart's ("Village" or "Defendant") unlawful enforcement of state and Village laws against the Tribe's land within its Reservation. The Village has taken the extraordinary step of issuing an order purporting to condemn the Tribe's Reservation land for the purpose of extending O'Hare Boulevard through and over Tribal land, and has collected assessments pursuant to such order, without obtaining Tribal or congressional consent. The Village has also threatened condemnation proceedings to impose sewer and water extensions through the Tribe's Forest Road Property on the Reservation, again without obtaining Tribal or congressional consent. The Village has taken these actions even though it has conceded that the Reservation has never been disestablished or diminished, and that the fee lands within the Reservation constitute "Indian country" within the meaning of 18 U.S.C. § 1151.

Fundamental principles of federal Indian common law prohibit a state or local government from regulating an Indian tribe or its property within its reservation, absent express congressional consent or extraordinary circumstances involving vital state interests. Here, the

Village's actions against the Tribe not only transgress this basic common-law rule of federal Indian law, but also flatly violate the plain language of two unambiguous federal statutes that specifically govern the disposition of the type of tribal land at issue here.[1] First, Section 16 of the Indian Reorganization Act, 48 Stat. 984 (1934), codified at 25 U.S.C. § 476(e), prohibits the Village from condemning the Tribe's Reservation fee property without the Tribe's consent. Because the undisputed facts demonstrate that the Tribe has not consented to the Village's condemnation of the Tribe's Reservation property, the Court should grant summary judgment in favor of the Tribe with respect to Count I of the Complaint. Second, the Village's purported condemnation of the Tribe's land is precluded under the Indian Nonintercourse Act, 25 U.S.C. § 177, because Congress has not authorized the condemnation. As a result, the Court should also grant summary judgment to the Tribe with respect to Count IV of the Complaint. Finally, because federal law precludes condemnation of the Tribe's property, the Village cannot impose the special assessments that are at issue to pay for the O'Hare Boulevard extension, both as a logical consequence of the federal preclusion and for the additional reason that such assessments result in unjust enrichment of the Village. For these reasons, the Court should also grant summary judgment in favor of the Tribe with respect to Count VI of the Complaint and order the Village to return the special assessments paid by the Tribe, with interest from the dates of payment. A ruling in favor of the Tribe on this motion will dispose of the entire case.[2]

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1 Accordingly, the Tribe's arguments in this brief rest on straightforward federal statutory preclusion of state action rather than the so-called "balancing test" that is applied in some situations to test whether state regulation within Indian country is permissible.

2 Although the Tribe believes that it would prevail with respect to the remaining counts of the Complaint, it has not sought summary judgment with respect to those counts at this time because additional factual development is necessary.

STATEMENT OF UNDISPUTED FACTS

JURISDICTION AND VENUE

The Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1362 and 1367(a). Answer ¶ 2; Proposed Finding of Fact ¶ 1 (hereinafter "Prop. F."). Venue is proper in this District pursuant to 28 U.S.C. § 1391(b) because Defendant is located in the District, the events giving rise to the claims occurred within the District, and the property that is the subject of the action is situated in the District. Answer ¶ 3; Prop. F. ¶ 1.

PARTIES

Plaintiff Oneida Tribe of Indians of Wisconsin is a federally-recognized Indian tribe organized under the Indian Reorganization Act of 1934, 48 Stat. 984 (1934), codified at 25 U.S.C. § 461 et seq. (the "IRA"). Affidavit of Kathy Hughes at ¶ 2 (hereinafter "Hughes Aff."); Prop. F. ¶ 2. Defendant Village of Hobart is an incorporated municipality in the State of Wisconsin located in Brown County. Answer ¶ 5; Prop. F. ¶ 3. The Village was created by the Wisconsin Legislature in 1903 as a town government and remained so until becoming a Village on May 13, 2002. Answer ¶ 18; Prop. F. ¶ 3.

FACTS

The Tribe's Reservation was established by the Treaty with the Oneida, Feb. 3, 1838, 7 Stat. 566. Answer ¶ 7; Prop. F. ¶ 4. The Tribe's Reservation consists of approximately 64,000 acres in Brown and Outagamie Counties in Wisconsin. Hughes Aff. at ¶ 3; Prop. F. ¶ 4. The Oneida Reservation is located west of the city of Green Bay and west of the Fox River. The Reservation straddles the boundary of Brown and Outagamie Counties and includes all of the

Village of Hobart and the Town of Oneida and portions of the City of Green Bay, the Villages of Ashwaubenon and Howard, and the Town of Pittsfield. Id.

The Village has admitted that the Oneida Indian Reservation has not been disestablished or diminished. The Village also has admitted that fee land within the Oneida Reservation boundaries is "Indian country" within the meaning of 18 U.S.C. § 1151. Affidavit of Amy Hertel (hereinafter "Hertel Aff."), Exhs. B & C; Prop. F. ¶ 5.

Pursuant to Section 16 of the IRA, 25 U.S.C. § 476, the Tribe adopted its Constitution and By-Laws. The Secretary of the Interior approved the Tribe's Constitution and By-Laws on December 21, 1936. Article IV, Section 1(c) of the Oneida Constitution provides that the Tribe's government has the power "[t]o veto any sale, disposition, lease or encumbrance of tribal lands, interests in lands, or other tribal assets of the tribe." Hughes Aff. ¶ 3; Hughes Aff., Exh. A; Prop. F. ¶¶ 6-7.

The Tribe owns real property in fee simple within its Reservation boundaries (hereinafter the "Tribe's Reservation Fee Property"). Hughes Aff. ¶ 5; Prop. F. ¶ 8. The Tribe has established a Standard Operating Procedure entitled "Granting Easements," which provides a detailed protocol for obtaining Tribal approval of easements over, under, or across Tribally-owned land. Hughes Aff. at ¶ 6; Prop. F. ¶ 9. The Village has admitted that it has made no effort to comply with the Tribe's approval procedures. Hertel Aff., Exh. D; Prop. F. ¶ 9.

In 1984, the Village designated approximately 490 acres of land in the southeast portion of the Village for an industrial park. Answer ¶ 19; Prop. F. ¶ 10. In 2000, the Tribe purchased approximately 98.4 acres of property located in the area designated by the Village for the industrial park. On June 26, 2001, the Tribe purchased an additional 273.5 acres of property, resulting in Tribal ownership of approximately 372 acres located in the area designated by the

Village for the industrial park (the "Tribe's O'Hare Boulevard Property"). Answer ¶ 20; Prop. F. ¶ 11. Shortly after the Tribe's 2001 purchase, the Village of Hobart passed a resolution purporting to extend O'Hare Boulevard through the Tribe's property and to install sewer, water, curb and gutter, street lines, and electric lines along the road extension (the "O'Hare Boulevard Project"). Hughes Aff. ¶ 8, Exh. B; Prop. F. ¶ 12.

The Village has admitted that prior to the purported condemnation of the Tribe's O'Hare Boulevard Property, the Village had never issued any condemnation orders regarding property owned by the Tribe within the Reservation boundaries. Hertel Aff., Exh. E; Prop. F. ¶ 13. The Village did not seek or obtain the Tribe's approval for the O'Hare Boulevard Project. Hughes Aff. ¶ 9; Prop. F. ¶ 14. The Tribe informed the Village of its objection in a letter from the Tribe's former Land Management Attorney, Loretta Webster, to the Village dated August 1, 2002. Id.; Hughes Aff., Exh. C.; Prop. F. ¶ 14.

The Village has collected $1,021,318.42 from the Tribe in special assessments for the O'Hare Boulevard Project since 2001. Hertel Aff., Exh. F; Prop. F. ¶ 15. The Village has admitted that it has not commenced construction of the O'Hare Boulevard Project and that it has not made any disbursements for development or construction activities. Hertel Aff., Exhs. G & H; Prop. F. ¶ 16.

On November 3, 2006, the Tribe purchased 17.4 acres of property in the northern portion of the Village, as well as a right of first refusal and a conservation easement on adjacent property (the "Tribe's Forest Road Property"). Hughes Aff. ¶ 10; Prop. F. ¶ 17. The Tribe notified the Village that it does not intend to develop the property as planned by the previous owner. Hughes Aff. at ¶ 11; Prop. F. ¶ 18. The Tribe has not approved any infrastructure projects on its Forest Road Property. Id. The Village intends to initiate condemnation proceedings in order to install

utility corridors, including sewer and water, through the Tribe's Forest Road Property. Answer ¶¶ 38-39; Prop. F. ¶ 19. The Village has not undertaken any improvements to the Tribe's Forest Road Property. Hughes Aff. ¶ 13; Prop. F. ¶ 20.

STANDARD FOR SUMMARY JUDGMENT

Summary judgment should be entered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); see also Doe v. Cunningham, 30 F.3d 879, 882 (7th Cir. 1994). The Supreme Court has emphasized that trial courts should look favorably upon motions for summary judgment to accomplish the just, speedy, and inexpensive resolution of civil litigation. Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986). At the summary judgment stage, facts must be viewed in the light most favorable to the nonmoving party only if there is a "genuine" dispute as to those facts. Scott v. Harris, 127 S.Ct. 1769, 1776 (2007) (citing Fed. R. Civ. P. 56(c)). "When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts . . . . Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" Id. (citing Matsushita Elec. Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986)).

ARGUMENT

I. SECTION 16 OF THE INDIAN REORGANIZATION ACT PRECLUDES THE VILLAGE FROM CONDEMNING THE TRIBE'S RESERVATION FEE PROPERTY WITHOUT THE TRIBE'S CONSENT.

Pursuant to the Indian Reorganization Act, an IRA tribe such as the Oneida Tribe must consent to any disposition of tribal assets, including dispositions resulting from condemnation.

Because the Tribe has not consented to the Village's proposed condemnation of Tribal land, the condemnation is invalid under the IRA.

The IRA was enacted by Congress to reverse the massive loss of Indian lands during the preceding three decades and to reinvigorate tribal self-government and tribal self-sufficiency. To achieve these objectives, Section 16 of the IRA granted to an Indian tribe "the right to organize for its common welfare" and adopt a constitution and bylaws by majority vote of the adult tribal members or adult Indians residing on the reservation. Pursuant to the IRA, each tribe that organized itself under an IRA constitution was expressly vested with certain enumerated "rights and powers." One of the enumerated Section 16 rights, now codified at 25 U.S.C. § 476(e), provides that an IRA constitution adopted by a tribe "shall also vest in such tribe or its tribal council the following rights and powers: . . . to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without consent of the tribe . . . ." In accordance with this language, the Tribe adopted an IRA Constitution and By-Laws which provide that the Tribe's government, subject to limitations imposed by the statutes or the Constitution of the United States, shall exercise the power "[t]o veto any sale, disposition, lease or encumbrance of tribal lands, interests in lands, or other tribal assets of the tribe." Exhibit A to the Hughes Aff., Oneida Const., Art. IV, § 1(c).

Section 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. The right is formulated as a power to "prevent" the disposition of tribal property, indicating that it applies to dispositions at the instance of parties other than the IRA tribe. Congress expressly recognized that the language of Section 476(e) prevented the non-consensual condemnation of IRA tribal land when it passed a statute in 1948 to establish a general procedure for the Secretary of the

Interior to grant rights-of-way across Indian land. Act of Feb. 5, 1948, 62 Stat. 17 (codified as amended at 25 U.S.C. §§ 323-328) (the "1948 Act"). Section 2 of the 1948 Act provides that "[n]o grant of a right-of-way over and across any lands belonging to a tribe organized under the Act of June 18, 1934 [i.e., the IRA] . . . shall be made without the consent of the proper tribal officials." 25 U.S.C. § 324. The Senate Committee Report on the 1948 Act indicates that the Department of the Interior, which drafted the Act to consolidate and simplify the Secretary's powers to condemn Indian land, added Section 2 for the purpose of "preserv[ing] the powers of those Indian tribes organized under the Indian Reorganization Act of June 18, 1934 (48 Stat. 984) . . . with reference to the disposition of tribal land." S. Rep. No. 80-823 at 4 (1948) (quoting letter from Oscar L. Chapman, Under Secretary of the Interior). Accordingly, both Congress and the Interior Department confirmed by the 1948 Act that the Section 476(e) veto power precluded the condemnation of land owned by an IRA tribe absent tribal consent.

By its plain language, moreover, the Section 476(e) veto power applies to dispositions of all tribal land and assets, including tribal land held in fee simple. Section 476(e) empowers an IRA tribe to veto the disposition of "lands," "interests in land," and "assets." On its face, this language encompasses any tribal interest in real or personal property, regardless of the nature of the title by which the property is held. The breadth of Section 476(e) is confirmed by early administrative interpretations by the Interior Department. In 1936, the Solicitor General stated that: "a tribe organized under section 16 [of the IRA] may veto the grant [of a right-of-way on tribal lands] under the *broad power* given it by that section 'to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe . . .'" (emphasis added). 1 Opinions of the Solicitor of the Department of the Interior 1917-1974 668-69 (Sol. Op., Sept. 2, 1936), available at <http://thorpe.ou.edu/sol_opinions/

p651-675.html> (visited Aug. 7, 2007). Felix S. Cohen, the likely author of Section 476(e), prepared a long memorandum in 1934 on the drafting of tribal constitutions under the IRA, in which he stated that Section 476(e):

> is broad enough to cover all use of tribal lands, including the issuance of grazing permits, fishing and hunting permits, agricultural and mining leases, permits for prospecting, grants of rights of way, and assignments of tribal land to individual Indians. It also includes all use of tribal moneys, whether used for administrative purposes, for the making of reimbursable loans, for per capita payments, or otherwise.

Felix S. Cohen, On the Drafting of Tribal Constitutions 57 (2007) (emphasis added).

The legislative history of the IRA confirms that Section 476(e) applies to all tribal lands and assets. A central purpose of the IRA was "[t]o stop the alienation, through action by the Government or the Indian, of such lands, belonging to ward Indians, as are needed for the present and future support of these Indians." S. Rep. No. 73-1080 (1934). The hearings on the IRA abundantly reveal that Indian-owned fee simple lands were the lands most vulnerable to alienation from Indian ownership. See, e.g., To Grant to Indians Living Under Federal Tutelage the Freedom to Organize for Purposes of Local Self-Government and Economic Enterprise: Hearings on S. 2755 and S. 3645 Before the Senate Comm. on Indian Affairs, 73d Cong. 60-61, 117, 132-34, 148-50, 175, 213, 220 (1934). The hearings and debates on the IRA clearly indicate that Congress intended the Section 476(e) veto power to apply to all tribal lands and assets, preventing similar land losses in the future. Id. at 247 (statement by Chairman Wheeler) (veto power applies to "tribal lands"); Readjustment of Indian Affairs: Hearings on H.R. 7902 Before the House Comm. on Indian Affairs, 73d Cong. 195(1934) (statement of Commissioner of Indian Affairs John Collier) (veto power applies to "tribal assets"); 78 Cong. Rec. 11731 (1934) (statement of Representative Howard) (veto power applies to "tribal lands or assets"). The House Hearings indicate that the Section 476(e) veto power was included "at the suggestion

from numerous Indians." Hearings on H.R. 7902 at 195. The legislative history of the IRA does not give the slightest indication that Congress intended to exclude tribally-owned fee simple lands, the type of lands most vulnerable to alienation from Indian control and most in need of protection by the IRA, from the protections of the Section 476(e) veto power.

Finally, the only court that has addressed the scope of the Section 476(e) veto has held that it applies to fee simple lands held by an IRA tribe against a state attempt to foreclose upon the lands. In re 1981, 1982, 1984 and 1985 Delinquent Property Taxes Owed to the City of Nome, Alaska, 780 P.2d 363 (Alaska 1989). The Alaska Supreme Court rejected the contention that the veto power was limited to attempted dispositions of tribal property by the Department of Interior, a limitation inconsistent with the broad language of Section 476(e). Examining Section 476(e) in light of the IRA purpose of rebuilding the tribal land base, the court held that "[w]hile Congress may have had before it the specific problem of appropriation of Indian assets by the Secretary of the Interior, the broad terms in which it legislated indicate that it intended to protect Indian assets from other, similar threats as well." Delinquent Taxes, 780 P.2d at 367.

In this case, the Tribe has adopted a constitution and bylaws under Section 16 of the IRA and has been recognized by the Secretary of the Interior as an IRA tribe. Exhibit A to the Hughes Aff. The Tribe has not consented to the Village's attempt to condemn the Tribe's Reservation Fee Property. Hughes Aff at ¶¶ 9, 11. Accordingly, Section 476(e) prohibits the Village from condemning the Tribe's Reservation Fee Property. The Court should grant summary judgment in favor of the Tribe with respect to Count I of the Complaint.

II. THE INDIAN NONINTERCOURSE ACT PRECLUDES THE VILLAGE FROM CONDEMNING THE TRIBE'S RESERVATION FEE PROPERTY WITHOUT CONGRESS' CONSENT.

The Indian Nonintercourse Act, 25 U.S.C. § 177 (the "INA"), precludes the Village from condemning the Tribe's Reservation Fee Property without the consent of Congress. Because

Congress has not authorized the condemnations at issue, summary judgment also is appropriate based on Count IV of the Complaint.

Beginning in 1790, shortly after the ratification of the United States Constitution, Congress enacted a series of laws broadly controlling trade between Indians and non-Indians and the disposition of Indian lands. The INA is one of those laws. As originally enacted, the INA provided in pertinent part:

> That no sale of lands made by any Indians, or any nation or tribe of Indians within the United States, shall be valid to any person or persons, or to any state, whether having the right of preemption to such lands or not, unless the same be made and duly executed at some public treaty, held under the authority of the United States.

Act of July 22, 1790, ch. 33, § 4, 1 Stat. 137.

As commentators have explained, the INA "was enacted after more than 150 years of conflict between the colonies and the crown, and later the states and the federal government, over control of Indian affairs." Robert N. Clinton & Margaret Tobey Hotopp, Judicial Enforcement of the Federal Restraints on Alienation of Indian Land: The Origins of the Eastern Land Claims, 31 Maine L. Rev. 17, 18 (1979) (hereinafter cited as "Clinton Art."). Under the Articles of Confederation, authority in the field of Indian affairs had been delegated to both the states and the federal government, a "compromise [that] proved to be a major source of conflict." Id. at 25.[3] James Madison proposed to the Constitutional Convention of 1787 that Congress be

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[3] Article IX of the Articles of Confederation provided:

> The United States in Congress assembled shall . . . have the sole and exclusive right and power of . . . regulating the trade and managing all affairs with the Indians, not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated.

Clinton Art. at 23 (citing 9 Jour. of the Cont. Cong. 919 (1777)).

granted broad power "to regulate affairs with the Indians, as well within as without the limits of the United States." Id. at 28 (citing J. Madison, Journal of the Federal Convention 190 (E. Scott ed. 1898)). Consistent with Madison's proposal, the Convention ultimately adopted the Indian Commerce Clause, which granted Congress broad authority "to regulate Commerce . . . with the Indian Tribes," U.S. Const. art. I, § 8, cl. 3, and eliminated the constraints of the Articles of Confederation.[4] After ratification of the Constitution, "the first Congress acted quickly to impose unequivocal and universally applicable statutory restraints on alienation of Indian land" in the INA. Clinton Art. at 29. Shortly after its passage, President Washington explained the purpose of the INA to the Seneca Indians:

> I must inform you that these evils arose before the present Government of the United States was established, when the separate States, and individuals under their authority, undertook to treat with the Indian tribes respecting the sale of their lands. But the case is now entirely altered; the General Government, only, has the power to treat with the Indian nations, and any treaty formed, and held without its authority, will not be binding.
>
> Here, then, is the security for the remainder of your lands. No State, nor person, can purchase your lands, unless at some public treaty, held under the authority of the United States. The General Government will never consent to your being defrauded, but it will protect you in all your just rights.

Id. at 37 (quoting from I American State Papers: Indian Affairs 142 (W. Lowrie & M. St. Clair Clarke eds. 1832)).

Congress amended and reenacted the INA five times after 1790. See Act of March 1, 1793, ch. 19, § 8, 1 Stat. 329; Act of May 19, 1796, ch. 30, § 12, 1 Stat. 469; Act of March 3, 1799, ch. 46, § 12, 1 Stat. 743; Act of March 30, 1802, ch. 13, § 12, 2 Stat. 139; Act of June 30,

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[4] See also James Madison, The Federalist No. 42 ("The regulation of commerce with the Indian tribes is very properly unfettered from two limitations in the articles of Confederation, which render the provision obscure and contradictory."), quoted in Clinton Art. at 29 (citing The Federalist 284 (J. Cooke ed. 1961).

1834, ch. 161, § 12, 4 Stat. 729., reenacted as Rev. Stat. § 2116 (1875 ed.) (adopting the INA in its current form). As currently in effect, the INA is more expansive than the provision enacted in 1790, except that it no longer protects lands owned by individual Indians:

> No purchase, grant, lease or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.

25 U.S.C. § 177 (emphasis added).

The INA has been described as "perhaps the most significant congressional enactment regarding Indian lands." United States ex rel. Santa Ana Pueblo v. University of New Mexico, 731 F.2d 703, 706 (10th Cir.), cert. denied, 469 U.S. 853 (1984); see also H.R. Rep. No. 96-1353, 15 (1980) ("One of the most important federal protections is the restriction against alienation of Indian lands without federal consent.") (referring to the INA in discussing the Maine Indian Claims Settlement Act). The Supreme Court has explained that "[t]he obvious purpose of [the INA] is to prevent unfair, improvident or improper disposition by Indians of lands owned or possessed by them to other parties, except the United States, without the consent of Congress . . . ." Federal Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 119 (1960).

It is black letter law that a statute must be construed in accordance with its plain language. Lamie v. U.S. Trustee, 540 U.S. 526, 534 (2004) ("It is well established that 'when the statute's language is plain, the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms.'") (citing and quoting Hartford Underwriters Ins. Co. v. Union Planters Bank, N. A., 530 U.S. 1, 6 (2000)); United States v. Miscellaneous Firearms, Explosives, Destructive Devices & Ammunition, 376 F.3d 709, 712 (7th Cir. 2004) ("The cardinal rule of statutory interpretation is that courts 'must first look to the language of the statute and assume that its plain meaning accurately expresses the

legislative purpose.'"), cert. denied, 544 U.S. 1019 (2005). The INA applies broadly to any "purchase, grant, lease or other conveyance of lands, or any title or claim thereto, from any Indian nation or tribe of Indians . . . ." 25 U.S.C. § 177. By its plain terms, the INA does not distinguish between lands held in fee by a tribe and lands held in trust for the tribe by the United States, and does not distinguish among lands based on how or when a tribe acquired the lands. By its clear language, therefore, the INA applies to any conveyance of the Tribe's Reservation Fee Lands or of any title or claim thereto.

Application of the INA to the Tribe's Reservation Fee Lands fully accords with the interpretation of the INA by the Executive Branch and the federal courts. Beginning at least as early as the mid-19th century, the Executive Branch interpreted the INA broadly to apply to lands acquired by a tribe in fee, as well as aboriginal lands. In 1857, addressing a tribe's ability to sell fee lands acquired from the United States, the Attorney General held:

> [The INA] will cover the present case, and will protect the Christian Indians against any sale made by them to a private person. I cannot think that it applies merely to those Indian tribes who hold their lands by the original Indian title. The words are broad enough to include a tribe holding lands by patent from the United States, and the purpose of the statute manifestly requires it to receive that construction.

9 Op. Atty. Gen. 24 (May 14, 1857) (also noting that the INA "makes *every* purchase, grant, lease, or other conveyance from a nation or tribe of Indians, altogether void, unless it be made by a treaty, pursuant to the Constitution") (emphasis added). In 1885, the Attorney General held that the INA precluded the Department of the Interior from authorizing a tribe to lease its reservation lands in the absence of any subsequent act of Congress granting such authority to the Department. The Attorney General explained:

> [The INA] is very general and comprehensive. Its operation does not depend upon the nature or extent of the title to the land which the tribe or nation may hold. Whether such title be a fee simple, or

> a right of occupancy merely, is not material; in either case the statute applies.

18 Op. Atty. Gen. 235 (July 21, 1885).

Every federal appellate court decision construing the INA has interpreted it broadly, in accordance with its language, with the lone exception of a split panel of the Ninth Circuit. In applying the INA, these courts have not distinguished between lands held in fee or trust, have not distinguished among lands based on how or when a tribe acquired them, and have held that the INA is effective against states as well as private parties. See United States v. Candelaria, 271 U.S. 432, 437, 441-42 (1926) (fee lands granted to Pueblo Indians by Spain); Tonkawa Tribe of Oklahoma v. Richards, 75 F.3d 1039, 1045 (5th Cir. 1996) ("a tribe's interest in land whether that interest is based on aboriginal right, purchase, or transfer from a state"); Mohegan Tribe v. Connecticut, 638 F.2d 612, 621 (2d Cir. 1981) ("all Indian lands [throughout the United States]"), cert. denied, 452 U.S. 968 (1981); Tuscarora Indian Nation v. Federal Power Commission, 265 F.2d 338, 339 (D.C. Cir. 1958) (fee lands acquired by purchase) ("It makes no difference how title to the land may have been acquired by the tribe."), rev'd on other grounds, 362 U.S. 99 (1960); Tuscarora Nation of Indians v. Power Authority of the State of New York, 257 F.2d 885 (2d Cir.) (fee lands acquired by purchase), cert. denied, 358 U.S. 841 (1958), vacated as moot sub nom. McMorran v. Tuscarora Nation of Indians, 362 U.S. 608 (1960); Alonzo v. United States, 249 F.2d 189, 195 (10th Cir. 1957) (fee lands acquired by purchase) ("[T]he word 'lands' is in nowise limited by any express or implied language in the Act."), cert. denied, 355 U.S. 940 (1958); United States v. 7,405.3 Acres of Land, 97 F.2d 417 (4th Cir. 1938) (trust lands originally obtained by grant from State of North Carolina); see also Oneida Indian Nation v. Oneida County, 432 F. Supp. 2d 285, 289 (N.D.N.Y. 2006) (fee lands acquired by purchase), appeals docketed, No. 06-5168 (2d Cir. Nov. 8, 2006), No. 06-5515 (2d Cir. Dec. 4,

2006); Oneida Indian Nation v. Madison County, 401 F. Supp. 2d 219, 227-28 (N.D.N.Y. 2005) (fee lands acquired by purchase), appeals docketed, No. 01-9363 (2d Cir. Nov. 21, 2001), No.05-6408 (2d Cir. Nov. 28, 2005); Jicarilla Apache Tribe v. Board of County Comm'rs of Rio Arriba County, 883 P.2d 136 (N.M. 1994) (fee lands acquired by purchase).

Three decisions, the two Oneida Indian Nation cases and the Second Circuit Tuscarora case, are particularly relevant here. In these cases, the courts invalidated attempts by states or their political subdivisions to forcibly acquire tribal lands by state law tax foreclosure and condemnation proceedings. The two Oneida Indian Nation cases were decided on remand from the Supreme Court from its decision in Oneida Indian Nation v. City of Sherrill, 544 U.S. 197 (2005), with which the two cases had been consolidated. The Court held in City of Sherrill that the Nation, under the factual circumstances at issue, was foreclosed by equitable doctrines from obtaining the remedy of tax immunity for lands ceded to New York in the early 19th century in violation of the INA and reacquired in fee nearly 200 years later. In the two Oneida Indian Nation cases, the district court held on remand that the county's seizure of the Nation's fee lands by foreclosure of property tax liens was prohibited by the INA. Oneida Indian Nation v. Oneida County, 432 F. Supp. 2d at 289; Oneida Indian Nation v. Madison County, 401 F. Supp. 2d at 227-28. As the court explained in Oneida Indian Nation v. Madison County:

> The Nonintercourse Act, in plain language, prohibits the conveyance of lands from any Indian nation. The foreclosure sought by the County would be a conveyance of lands from the Nation. Accordingly, the foreclosure is prohibited by the Nonintercourse Act.
>
> Similarly, the finding that the land is taxable does not mean that it is subject to foreclosure. Implicit permission to foreclose as read into the Sherrill decision by the County is simply insufficient to authorize such a drastic remedy.
>
> Just as the Nation is precluded from its chosen remedy – tax immunity, so is the County precluded from its chosen remedy –

> foreclosure. The former preclusion is derived from "standards of federal Indian law and federal equity practice" that "evoke the doctrines of laches, acquiescence, and impossibility." [City of Sherrill, 125 S. Ct.] at 1489-90, 1494. The latter preclusion is derived from a federal statute, the meaning of which is clear and unambiguous. See 25 U.S.C. § 177.
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> The seizing of land owned by a sovereign nation strikes directly at the very heart of that nation's sovereignty. In the face of Federal and State laws and the solemn treaty obligations of the United States, permitting the seizure of lands from a sovereign nation should require, at the very least, a specific Act of Congress.

401 F. Supp. 2d at 228, 232. In Tuscarora, the Second Circuit concluded that in Public Law 85-159, enacted in 1957, Congress had appropriately authorized the Power Authority of the State of New York, a licensee of the Federal Power Commission, to condemn tribal fee property for the Niagara River Power Project. Although condemnation of the land in accordance with Public Law 85-159 would not have violated the INA, the court held that the condemnation at issue was improper because it occurred pursuant to a state law method that was not authorized in the federal statute. 257 F.2d at 894 (the federal statute authorized condemnation "in the State courts," not "in such [other] manner as may be prescribed by the legislature of the state in which the property is located"). Under the rationale for the court's decision in Tuscarora, it is clear that a condemnation of the tribe's fee property without congressional permission would have violated the INA.

In recent years, Congress has repeatedly confirmed that the INA applies to any conveyance of tribal lands, including fee lands. Congress has enacted numerous statutes to authorize conveyances of tribally owned fee lands in order to comply with the INA. In 1960, for example, Congress passed legislation to authorize the sale of lands held in fee simple by the Navajo Tribe:

> [L]and owned by the Navajo Tribe may be leased, sold, or otherwise disposed of by the sole authority of the Navajo Tribal Council, in any manner that similar land in the State in which such land is situated may be leased, sold, or otherwise disposed of by private landowners . . . .

Pub. L. No. 86-505, 74 Stat. 199 (1960), codified at 25 U.S.C. § 635(b). The legislation was prompted because in the years preceding 1960, the Navajo Tribe had acquired approximately 100,000 acres in fee simple, which it wished to dispose of in order to relieve its dire economic conditions. H.R. Rep. No. 86-1648 (1960), reprinted in 1960 U.S.C.C.A.N. 2352. The House Report recognized that under the INA, "it appears that no one can safely acquire these lands by purchase or otherwise without the consent of the United States." Id. at 2352–53. Similarly, in 1990, Congress empowered the Rumsey Indian Rancheria to sell a specific parcel of land it had acquired in fee simple. Pub. L. No. 101–630, §§ 102, 104 Stat. 4531 (1990). Section 101 of the statute expressly recognizes that the INA "prohibits the conveyance of any lands owned by Indian tribes without the consent of Congress." Also in 1990, Congress empowered the Eastern Band of Cherokee Indians to sell and transfer all of its interests in the business operating as Carolina Mirror Inc., including fee lands located in North Carolina and Texas outside its reservation. Pub. L. No. 101-379, § 11, 104 Stat. 473 (1990). Senator Helms explained the need for the legislation in floor debate:

> Mr. President, one of my many pleasures as a Senator from North Carolina is representing the Eastern Band of Cherokee Indians. As Senators know, the fine Cherokee people form one of the oldest and proudest communities on the North American continent.
>
> The Cherokees have long prospered in western North Carolina. Their varied activities contribute to the healthy business and tourist industries of my State. But on November 14, the Cherokees contacted me because an 1834 Federal law [i.e., the INA] stood in the way of their ability to conduct business for the benefit of the tribe.

> The Cherokees have owned the Carolina Mirror Co. in Wilkes County, NC, and in Harris County, TX, for a number of years. This year they began to negotiate the sale of this company. All of the financing and paperwork on the sale had been worked out before the Cherokees discovered that they could not sell off any of their land interests without prior approval of the Congress.

135 Cong. Rec. S15696-01, 1989 WL 189045 (Nov. 15, 1989). Congress has passed numerous other statutes authorizing conveyances of tribal fee lands. E.g., Pub. L. No. 102–497, § 4, 106 Stat. 3255 (1992) (authorizing the Mississippi Band of Choctaw Indians to "sell, convey, and warrant" a specific parcel of property held in fee simple, "without further approval of the United States"); Pub. L. No. 103-116, § 13, 107 Stat. 1136 (1993), codified at 25 U.S.C. § 941k (providing that the Catawba Tribe's "ownership and transfer of non-Reservation parcels shall not be subject to Federal law restrictions on alienation, including . . . the provisions of section 177 of this title [i.e., the INA]"); Pub. L. No. 106–568, § 301, 114 Stat. 2868 (2000) (providing that "without further approval, ratification, or authorization by the United States, the Coushatta Tribe of Louisiana, may lease, sell, convey, warrant, or otherwise transfer all or any part of the Tribe's interest in any real property that is not held in trust . . . ."); Pub. L. No. 107–331, § 701, 116 Stat. 2834 (2002) (authorizing the Seminole Tribe of Florida to "mortgage, lease, sell, convey, warrant, or otherwise transfer all or any part of any interest in any real property that . . . (1) was held by the Tribe on September 1, 2002; and (2) is not held in trust by the United States for the benefit of the Tribe"); Pub. L. No. 108–204, § 126, 118 Stat. 542 (2004) ("[w]ithout further authorization by the United States" the Shakopee Mdewakanton Sioux Community "may lease, sell, convey, warrant, or otherwise transfer all or any part of the interest of the Community in or to any real property that is not held in trust by the United States for the benefit of the Community"); see also Act of Sept. 13, 1950, Pub. L. No. 81-785, ch. 947, 64 Stat. 845 (1950), codified at 25 U.S.C. § 233 (in granting jurisdiction to New York state courts in civil actions

between Indians, statute provided that "nothing herein contained shall be construed as authorizing the alienation from any Indian nation, tribe, or band of Indians of any lands within any Reservation in the State of New York . . . ");[5] Pub. L. No. 96-420, § 5(g), 94 Stat. 1788 (1980), codified at 25 U.S.C. § 1724(g) (providing that "[t]he provisions of section 177 of this title shall not be applicable to . . . any . . . Indian, Indian nation, or tribe or band of Indians in the State of Maine"); S. 1286, 110th Cong. § 1 (2007) (pending legislation providing that the Coquille Tribe "may transfer, lease, encumber, or otherwise convey, without further authorization or approval, any land (including fee simple land) or interest in land owned by the Tribe").[6]

The Tribe is aware of only one federal case holding that the INA does not apply to fee lands purchased by a tribe. Lummi Indian Tribe v. Whatcom County, 5 F.3d 1355 (9th Cir. 1993), cert. denied, 512 U.S. 1228 (1994), a split panel decision, is non-binding, unpersuasive and should not be followed. The issue in Lummi was whether the county could tax the tribe's reservation fee lands that had been allotted to individual tribal members pursuant to the Treaty of Point Elliott, eventually sold by the allottees, then later reacquired by the tribe. In concluding that the INA did not apply to the lands at issue to restrict their alienability, the panel relied on two principal grounds, each of which is badly flawed. First, the panel stated that "courts have said that once Congress removes restraints on alienation of land, the protections of the

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5 As the Second Circuit in Tuscarora noted, "Congress . . . by the enactment of the express reservation concerning land interests of the Indian tribes in New York in [25 U.S.C.] § 233, . . . reaffirmed its paramount authority over Indian tribal lands." 257 F.2d at 891.

6 Before the United States ceased making treaties with Indian tribes in 1871, the United States approved dispositions of tribal lands by treaty in order to comply with the INA. See, e.g., Treaty with the Cherokee art. XVIII, 14 Stat. 799 (July 19, 1866) ("any lands owned by the Cherokee in the State of Arkansas and in States east of the Mississippi may be sold by the Cherokee Nation in such manner as their national council may prescribe . . . ."); Treaty with the New York Indians art. XIV, 7 Stat. 550 (Jan. 15, 1838) (authorizing the sale of a specific parcel of Tribal land); Treaty with the Seneca, 7 Stat. 70 (Jun. 30, 1802) (same).

Nonintercourse Act no longer apply," a proposition for which it cited South Carolina v. Catawba Indian Tribe, Inc., 476 U.S. 498, 505-06 (1986), and Larkin v. Paugh, 276 U.S. 433-34 (1928). Catawba involved a situation in which Congress had enacted a statute specifically providing that "all statutes of the United States that affect Indians because of their status as Indians shall be inapplicable to [the Catawba Indian Tribe and its members]," a circumstance not present in Lummi. Larkin involved land of an individual Indian; there was no issue in that case regarding the applicability of the INA. Second, the panel stated that "the broad statutory language" of 25 U.S.C. § 372 "suggests that, once sold, the land becomes forever alienable." That statute, however, sets forth rules regarding the alienability of land held by individual Indians, not lands held by Indian tribes. The panel failed to examine or even acknowledge the statutory text in its analysis, and it dismissed the relevance of cases cited by the tribe based on purported distinctions unsupported by the cases or the statute. It also bears noting that the Lummi panel's overall holding – that any alienable reservation land is subject to state property taxes – has been thoroughly discredited. See Keweenaw Bay Indian Community v. Naftaly, 452 F.3d 514, 531 & n.4 (6th Cir.), cert. denied, 127 S. Ct. 680 (2006), aff'g 370 F. Supp. 2d 620 (W.D. Mich. 2005).[7]

In sum, the Indian Nonintercourse Act precludes the Village from condemning the Tribe's Reservation Fee Property without the consent of Congress, which consent Congress has

[7] Since 1993, two state courts have followed the Lummi panel decision regarding the INA, repeating the panel's errors. Cass County Joint Water Resource District v. 1.43 Acres of Land, 643 N.W.2d 685 (N.D. 2002); Anderson & Middleton Lumber Co. v. Quinault Indian Nation, 929 P.2d 379 (Wash. 1996); see also Bay Mills Indian Community v. Michigan Court of Claims, 626 N.W.2d 169 (Mich. App.) (court cited Lummi in holding that land owned by state in trust for tribe's predecessors was not subject to INA), appeal denied, 661 N.W.2d 578 (Mich. 2001), cert. denied, 535 U.S. 930 (2002). It is notable, in addition, that the land at issue in 1.43 Acres of Land was located approximately 200 miles from the Turtle Mountain Chippewa Tribe's reservation. No federal court has followed Lummi. In Cass County, Minnesota v. Leech Lake Band of Chippewa Indians, 524 U.S. 103, 115 n.5 (1998), the Supreme Court declined to address a similar issue, concluding that it was not properly before the Court.

never given. This Court should grant summary judgment in favor of the Tribe with respect to Count IV.

III. THE SPECIAL ASSESSMENTS MUST BE RETURNED TO THE TRIBE, WITH INTEREST.

The Village must refund the Tribe's payment of special assessments for the O'Hare Boulevard Project for two reasons. First, because the plain language of Section 16 of the IRA and the INA preclude the Village from condemning the Tribe's Reservation Fee Property, the special assessments imposed by the Village to pay for the O'Hare Boulevard Project are a fortiorari invalid as a matter of federal law, and must be returned to the Tribe.

Second, the equitable doctrine of unjust enrichment requires the Village to return to the Tribe the special assessment payments it made for the O'Hare Boulevard Project. "A person who has been unjustly enriched at the expense of another is required to make restitution to the other." Restatement of Restitution § 1 (1937). Under the unjust enrichment doctrine, restitution is appropriate where "the person sought to be charged is in possession of money or property which in good conscience he should not retain, but should deliver to another." Matarese v. Moore-McCormack Lines, 158 F.2d 631, 634 (2d Cir. 1946).

> An unjust enrichment claim requires proof of three elements: (1) a benefit that has been conferred upon the defendant by the plaintiff; (2) appreciation by the defendant of the benefit; and (3) acceptance and retention by the defendant of the benefit under circumstances such that it would be inequitable to retain the benefit without payment.

Associated Banc-Corp. v. John H. Harland Co., 2007 WL 128337 (E.D. Wis. 2007); see also Ulrich v. Zemke, 654 N.W.2d 458, 462 (Wis. App.) (same elements), review denied, 655 N.W.2d 128 (Wis. 2002).[8] Each of the elements of unjust enrichment is satisfied in the case of

[8] Federal common law incorporates the doctrine of unjust enrichment. See City Fed. Sav. & Loan Ass'n v. Crowley, 393 F. Supp. 644 (E.D. Wis. 1975) (holding that federal savings and loan association's claim of unjust enrichment against former officers and directors arises under federal common law). Both the federal and state common law doctrines of unjust enrichment are governed

the O'Hare Boulevard special assessments. The Tribe has conferred a benefit on the Village by paying $1,021,318.42 in special assessments, satisfying the first element of unjust enrichment. The Village admits that it has received the special assessments from the Tribe, establishing appreciation of the benefit. Finally, it would be inequitable for the Village to retain the benefit conferred by the Tribe, because the Village is prohibited by federal law from making any improvements to the Tribe's O'Hare Boulevard Property. See also Armour & Co. v. Scott, 480 F.2d 611, 612 (3d Cir. 1973) (restitution awarded from construction contractor for sums paid by owner which were not expended for construction of facility) (court stated that this was a "classic case" of unjust enrichment).[9]

The Court should order the Village to refund the special assessments with prejudgment interest calculated from the dates of payment at the prime rate with annual compounding. In the Seventh Circuit, prejudgment interest is "presumptively available to victims of federal law violations. Without it, compensation of the plaintiff is incomplete . . . ." Gorenstein Enters., Inc.

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by general principles of fairness and require proof of similar elements. See United States v. Applied Pharmacy Consultants, Inc., 182 F.3d 603, 606 (8th Cir. 1999) (holding that federal law should incorporate state common law into federal common law of unjust enrichment).

9 It should be noted that Wisconsin Statute Section 66.0703(11) also requires the Village to return these special assessments to the Tribe. Under Section 66.0703(11), the Village must refund to the property owner any special assessments paid in excess over cost:

> (11) *If the cost of the project is less than the special assessments levied,* the governing body, without notice or hearing, shall reduce each special assessment proportionately and *if any assessments or installments have been paid the excess over cost shall be* applied to reduce succeeding unpaid installments, if the property owner has elected to pay in installments, or *refunded to the property owner*.

Wis. Stat. § 66.0703 (2007) (emphasis added). The Village has conceded that no improvements have been made to the O'Hare Boulevard Property and that no disbursements have been made for the development or construction activities. See Exs. G, H to Hertel Aff. Accordingly, because the cost of the project is $0.00 and the special assessments collected total $1,021,318.42, see Ex. F to Hertel Aff., Section 66.0703(11) requires the Village to refund to the Tribe the full amount of the assessments paid.

v. Quality Care-USA, Inc., 874 F.2d 431, 436 (7th Cir. 1989); see also Rivera v. Benefit Trust Life Ins. Co., 921 F.2d 692, 696 (7th Cir. 1991) (presumptive entitlement to prejudgment interest reflects "[t]he growing recognition of the time value of money"). The Seventh Circuit has counseled, moreover, that district judges should use the prime rate for fixing prejudgment interest where there is no federal statutory rate for such interest. Gorenstein, 874 F.2d at 436; see also First Nat'l Bank of Chicago v. Standard Bank & Trust, 172 F.3d 472, 480 (7th Cir. 1999) ("Our practice has been to use the prime rate as the benchmark for prejudgment interest unless either there is a statutorily defined rate or the district court engages in 'refined rate-setting' directed at determining a more accurate market rate for interest."); Cement Div., Nat'l Gypsum Co. v. City of Milwaukee, 950 F. Supp. 904, 908-10 (E.D. Wis. 1996) (same), aff'd, 144 F.3d 1111 (7th Cir. 1998). Finally, "compound prejudgment interest is the norm in federal litigation." In re Oil Spill by the Amoco Cadiz Off the Coast of France on March 16, 1978, 954 F.2d 1279, 1332 (7th Cir. 1992) (per curiam). The case law in the Seventh Circuit reflects that annual compounding is appropriate. Id. at 1337; Nat'l Gypsum, 950 F. Supp. at 910-11.

This Court should grant summary judgment in favor of the Tribe with respect to Count VI and enter an order directing the Village to refund the special assessments paid by the Tribe for the O'Hare Boulevard Project, with interest calculated from the dates of payment at the prime rate with annual compounding.

CONCLUSION

For the foregoing reasons, the Tribe respectfully requests that this Court enter summary judgment for the Tribe with respect to Counts I, IV, and VI, and against the Village on its counterclaim, providing for the following relief:

- Declaring that the Village is precluded as a matter of federal law from condemning the Tribe's Reservation Fee Property, including the O'Hare

Boulevard Property and the Forest Road Property, without the consent of the Tribe or of the United States;

- Declaring that the Tribe is, by law, exempt from special assessments with respect to the O'Hare Boulevard Project;
- Enjoining the Village from taking any actions to condemn the Tribe's Reservation Fee Property or to collect further special assessments with respect to the O'Hare Boulevard Project; and
- Ordering the Village to refund all special assessments paid by the Tribe for the O'Hare Boulevard Project, with interest calculated from the dates of payment at the prime rate with annual compounding.

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Respectfully submitted,

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