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 REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

INTRODUCTION

In its initial motion papers, the Oneida Tribe of Indians of Wisconsin ("Tribe") showed that the efforts of defendant Village of Hobart ("Village" or "Defendant") to condemn portions of the Tribe's O'Hare Boulevard and Forest Road Properties violated the express language of two unambiguous federal statutes. First, the Village's condemnation actions violate Section 16 of the Indian Reorganization Act, 48 Stat. 984 (1934) (the "IRA"), codified at 25 U.S.C. § 476(e). Section 16 grants a tribe organized under the IRA, such as the Tribe, the right to prevent the sale, disposition, lease, or encumbrance of tribal lands without tribal consent, which consent has not been given here. Second, the Village's actions violate the Indian Nonintercourse Act, 25 U.S.C. § 177 (the "INA"), which requires the consent of Congress for any "purchase, grant, lease or other conveyance" of Indian tribal lands, which consent again has not been given here. Because these federal statutes expressly prohibit the Village's condemnation efforts, the Village also cannot impose the special assessments it has levied to pay for the O'Hare Boulevard extension.

Try as they might, neither the Village nor Amici provide any convincing argument or authority showing that Section 16 or the INA do not apply to the Tribe's lands. Most of the

Village's brief contends that the General Allotment Act and the other relevant allotment statutes subject former allotments patented in fee to state and local jurisdiction. Despite the Village's repeated assertions, it is painfully clear that neither the language of the allotment statutes cited by the Village, nor any Supreme Court interpretations of such statutes, subject former allotments patented in fee to state and local jurisdiction. It is also painfully clear that nothing in the allotment statutes overrides the express prohibitions of Section 16 or the INA. The Village's remaining contentions, as shown below, are either plainly erroneous or irrelevant. Amici, in turn, go to astonishing lengths to imply that a plethora of cases support their crabbed readings of Section 16 and the INA. As further shown below, however, the vast bulk of these cases are either irrelevant or discredited, and very many stand for precisely the opposite principle of that contended by Amici.

The Village's brief also argues in favor of its own motion for summary judgment, relying heavily on the Supreme Court's decision in City of Sherrill v. Oneida Indian Nation of New York, 544 U.S. 197 (2005). Much of Amici's brief also focuses heavily on this decision. The Tribe will respond to the Village's summary judgment motion (and Amici's arguments) in its separate response brief, which shows that the Sherrill holding has absolutely no relevance to this case, and that contentions to the contrary by the Village and Amici profoundly misrepresent the most basic principles of federal Indian law.

ARGUMENT

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

Section 16 of the IRA vests in an IRA tribe such as the Tribe an unequivocal and unqualified right "to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets" without the consent of tribe. 25 U.S.C. § 476(e). By its plain

language, Section 16 precludes the condemnation of any land owned by an IRA tribe without its consent, and Congress and the Interior Department expressly acknowledged this in the 1948 Condemnation Act (codified at 25 U.S.C. § 324) and its legislative history. Pl. Br. 8.[1] Neither the language nor the legislative history nor the congressional intention behind the IRA give any grounds for excluding fee-simple parcels or former allotments from the Section 16 veto power. Because the Tribe has not consented to the Village's proposed condemnation of Tribal land, the purported condemnation is plainly invalid under the IRA.

Neither the Village nor Amici present any authorities that would disturb this conclusion. First, none of the allotment statutes cited by the Village subjects fee-patented former allotments to state regulation. When a fee patent was issued to an allottee pursuant to Section 5 or 6 of the General Allotment Act of 1887, 24 Stat. 388 (the "GAA"), the Burke Act, 34 Stat. 182 (1906), or the statute patenting certain allotments within the Wisconsin Oneida reservation, 34 Stat. 325, 380-81 (1906) (the "Oneida Act"), the statute simply removed restrictions on the title that the GAA itself had imposed.[2] After removal of the federal restrictions imposed on the former allotment, the GAA provided that state laws of inheritance and partition law would apply to the fee parcel, but otherwise says nothing about the future regulatory treatment of the allotment. Though Congress at one time intended that the process of fee-patenting reservation land would lead to the dismantling of Indian reservations, this intention was rendered defunct by the IRA, which halted the issuance of further allotments and fee patents and restored unallotted lands to

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[1] "Pl. Br." refers to the Tribe's opening brief, "Def. Br." refers to the Village's opening brief, and "Amici Br." refers to the brief of Amici Curiae.

[2] See GAA § 5 (fee patent would be "discharged of said trust and free of all charge or incumbrance whatsoever"); GAA § 6 (after issuance of fee patent, "all restrictions as to sale, incumbrance, or taxation of said land shall be removed. . . ."); Oneida Act (issuance of patents "shall operate as a removal of all restrictions as to sale, incumbrance, or taxation of the lands so patented").

tribes. Subsequently, the 1948 Indian Country Act, 18 U.S.C. § 1151 provides, and federal judicial decisions have expressly held that fee-patented parcels within an Indian reservation retain their reservation status and remain Indian country subject to the primary jurisdiction of the federal government and the tribe. See Seymour v. Superintendent of Wash. State Penitentiary, 368 U.S. 351, 358 (1962) (fee-patented land owned by non-Indian within reservation constitutes Indian country); Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation, 425 U.S. 463, 478 (1976) (holding that the GAA fee-patenting process did not "diminish" Indian reservation for civil and criminal jurisdictional purposes); Alaska v. Native Village of Venetie Tribal Gov't, 522 U.S. 520, 527 n.1 (1998) ("Generally speaking, primary jurisdiction over land that is Indian country rests with the federal government and the Indian tribe inhabiting it, and not with the States."). The future treatment of the fee-patented parcel, therefore, would be governed by state law and such *other* federal Indian laws that might apply to the parcel or its subsequent owners.

Despite the Village's contentions, neither County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation, 502 U.S. 251 (1992), nor Cass County, Minnesota v. Leech Lake Band of Chippewa Indians, 524 U.S. 103 (1998), hold that the GAA subjected fee parcels within an Indian reservation to perpetual state jurisdiction. The Yakima court refused to hold that Section 6 of the GAA as amended (i.e., the Burke Act) granted *any* state jurisdiction over fee-patented parcels beyond the "taxation of . . . land," and struck down a state tax triggered by the transfer of such land. 502 U.S. at 268-69. The Court in Cass County, moreover, stated that if "Congress has demonstrated . . . a clear intent to subject [Indian reservation] land to taxation by making it alienable," Congress can also change that result through another "unmistakably clear statement." 524 U.S. at 114. Section 16 of the IRA, passed in 1934 *after* the GAA, shows such

an unmistakably clear intent to prevent the transfer of property owned by an IRA tribe without the consent of the tribe. Accordingly, Section 16 plainly prohibits the Village from exercising its eminent domain powers over the parcels at issue without the consent of the Tribe.

Second, contrary to the Village's assertion, Section 3 of the Act of March 3, 1901, 31 Stat. 1058, codified at 25 U.S.C. § 357 (the "1901 Act"), simply does not apply to tribally-owned lands. This statute provides that "[l]ands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee." By its terms, the provision applies only to "allotments," not to former allotments. "Allotment is a term of art in Indian law" which means "a selection of specific land awarded to an *individual* allottee from a common holding." Affiliated Ute Citizens v. United States, 406 U.S. 128, 142 (1972) (emphasis added). Accordingly, the 1901 Act applies only to land owned by individual Indians, not to land owned by tribes. Indeed, the Department of Interior has directly held that the 1901 Act has no application to tribal lands. Condemnation of Lands Allotted in Severalty to Indians, 49 Land Dec. 396, 1923 WL 2231 (1923) (discussing the 1901 Act and holding that "[a]s to the tribal lands involved, I find no act of Congress subjecting lands of this character to the operation of State statutes relating to condemnation"). The federal courts have agreed. Nebraska Public Power Dist. v. 100.95 Acres of Land, 719 F.2d 956, 961-62 (8th Cir. 1983) (holding that former allotments deeded to tribe by individual Indians was tribal land, no longer constituted "allotted land," and fell outside the scope of the 1901 Act); Yellowfish v. City of Stillwater, 691 F.2d 926, 929 (10th Cir. 1982) (noting that the 1901 Act applied to allotted land rather than tribal land), cert. denied, 461 U.S. 927 (1983).

Third, contrary to the claims of the Village and Amici, Section 16 does not conflict in any manner with 25 U.S.C. § 465. Section 16 simply provides an IRA tribe with a veto power over the disposition of its tribal land and assets in order to protect Indian tribes against the dissipation of Indian property like that which had devastated Indian reservations during the GAA allotment era. Section 16 does *not* extend a tribe's general jurisdiction or regulatory authority,[3] and despite the Amici's straw man argument, the Tribe has never claimed that Section 16 establishes "tribal sovereignty, jurisdiction, and regulatory authority" over such property. Amici Br. 24. Section 16 simply precludes the operation of state and local jurisdiction, such as eminent domain authority, that is incompatible with its express terms.

Section 465, in contrast, has two very different purposes. First, Section 465 authorizes the *acquisition* of lands, water rights and surface rights for Indian tribes and tribal members. Section 465, which originally appeared as Section 5 of the IRA, was enacted primarily "*for the purpose of providing land for Indians*," and it applies not only to Indian tribes but also to *Indian individuals*. The Congress that enacted Section 465 appropriated $2 million to fund such acquisitions and anticipated that the Secretary of the Interior would acquire such lands directly from sellers to provide to Indians. IRA § 5. Second, unlike Section 16, Section 465 specifies that the newly acquired lands would be taken in the name of the United States in trust for the Indian tribe or Indian individual and that the lands "shall be exempt from State and local taxation." The primary objective of this provision was clearly to prevent losses of the newly acquired lands by means of tax sales of the type that had recently devastated federal Indian

[3] An Indian tribe's *general* jurisdictional authority over its property depends not on Section 16 but rather on whether such property is located within Indian country and, if so, whether a state or local government's interest in regulating such property outweighs the federal and tribal interests in avoiding such regulation. See, e.g., White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 144-45 (1980).

reservations. Aside from this express tax immunity, nothing in the language or legislative history Section 465 indicates that Congress intended Section 465 to be a general means of establishing tribal "jurisdiction" or "sovereignty." S. Rep. No. 73-1080 (1934) (failing to mention any jurisdictional ramifications of IRA § 5); H.R. Rep. No. 1804 (1934) (same).[4]

Contrary to Amici's strange assertion, moreover, the Supreme Court in Hynes v. Grimes Packing Co., 337 U.S. 86 (1949), did *not* hold that Section 16 applied only to tribal property placed into trust pursuant to Section 465 (Section 5 of the IRA). The Hynes Court discussed an early draft version of Section 465 to illustrate the type of property titles protected by Section 16. It focused on language which did *not* appear in the final bill that authorized the Secretary of the Interior, after acquiring land in trust for a tribe, to *then transfer title to the property directly "to such community under the conditions set forth in this Act*." 337 U.S. at 108. The Court suggested that Section 16 was intended to apply only to tribal property that, like property described in the italicized language, was *not* trust property, but was property that the tribe had the right "to control absolutely." Hynes, 337 U.S. at 107. Accordingly, the Hynes Court surmised that Section 16 applied only to lands held absolutely by the tribe *vis a vis* the United States, such as lands held by "a title equal to fee simple," 337 U.S. at 103-04, and not the type of temporary rights at issue before the Hynes Court.[5] 337 U.S. at 116. The Court's statement in

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[4] Though the Supreme Court in City of Sherrill v. Oneida Indian Nation of New York, 544 U.S. 197 (2005), held that Section 465 constitutes "the proper avenue" for "reestablishing sovereign authority" over former tribal land, the land before the Court had last been held by the New York tribe 200 years ago, and had been free from tribal and federal jurisdiction and subject to state and local jurisdiction throughout the 200-year period. As further explained in the Tribe's response brief, fee parcels within an undiminished Allotted Reservation like the Tribe's remain within a tribe's jurisdiction and constitute Indian country. Accordingly, the tribe's authority does not need to be "reestablished" with respect to such parcels.

[5] The Hynes Court stated that the "absolute" nature of the tribe's title must be "specific[ally] recogni[zed]" because it was analyzing statutes to determine the nature of the tribal rights

Hynes regarding Section 16 is essentially dicta because it upheld the tribal reservation against encroachment by non-Indians on the basis of a *different* 1936 statute authorizing the Secretary of the Interior to protect the Indians usufructuary rights. 337 U.S. at 108-10. Nevertheless, to the extent the Hynes dicta has any authority here, it confirms that Section 16 applies to tribal property held under "absolute" title like the fee lands at issue here – *precisely the opposite* of Amici's contention.

The Village's remaining objections to the plain language of Section 16 are meritless.[6] The Village's heavy reliance on 25 U.S.C. § 463(a) is completely misplaced. This provision provides that the "valid rights or claims of any persons to any lands so withdrawn [from trust protection] *existing on the date of the withdrawal* shall not be affected by this Act." The provision merely preserves the property rights of the *original fee-patent holders* of lands within Indian reservations, most of whom are dead, and says nothing about the treatment of such fee-patented reservation land in the hands of subsequent owners or when affected by other federal statutes. Contrary to the Village's assertion, moreover, the Tribe has never argued that the IRA returned allotted reservation land "to its pre-allotment status." Def. Br. 39. The Tribe has

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before it. It is undisputable that fee simple rights to land are inherently absolute and need no such specific recognition.

[6] Amici also contends that Section 16 "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." Amici Br. 23. This contention is absurd. The plain language of Section 16 "vests" in the tribe or tribal council a "right" and "power" to prevent the disposition of tribal lands and assets without the consent of the tribe. All the authorities cited in the Tribe's opening brief on pages 7 through 10, including the 1948 Condemnation Act, describe the Section 16 veto power as a substantive right. The description of Section 16 in the hearings on the IRA makes it perfectly clear the Section provided a substantive right: "at the suggestion from numerous Indians, a new section has been drawn *specifically prohibiting* the disposition of any community or tribal assets without the consent of the tribe or community." Readjustment of Indian Affairs: Hearings on H.R. 7902 Before the House Comm. on Indian Affairs, 73d Cong. 195 (1934) (emphasis added).]

simply claimed that the broad and unambiguous veto power granted to IRA tribes under Section 16 applies with respect to *any* of its property, including fee-patented parcels within its reservation. Finally, the Village's claim that the regulations under the 1948 Condemnation Act "confirm that tribal authority is confined to tribal trust lands. . ." is groundless. Def. Br. 40. The 1948 Statute established streamlined procedures for condemning restricted Indian land in which the United States has an interest in the title. As the Tribe carefully showed in its opening brief, both the 1948 Statute and its legislative history confirm that Section 16 established an independent and additional tribal consent requirement that must be satisfied in order to condemn the lands of an IRA tribe.

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

The plain language of the INA, as well as its nearly unanimous interpretation by all branches of the federal government, encompasses any Indian tribal lands, including lands held by a tribe in fee simple. The United States Attorney General has twice expressly held that the INA applies to tribal land without regard to "the nature or extent of the title to land," and specifically that it applies to lands held in "fee simple" title. 9 Op. Att'y. Gen. 24 (1857); 18 Op. Att'y. Gen. 235 (1885). Not only has every federal appellate court but one held that the INA applies to fee-patented lands, but Congress has repeatedly and consistently confirmed this interpretation by passing multiple statutes that authorize the sale of tribal fee lands. Because the INA applies to all dispositions of Indian tribal land, it clearly prevents any attempt to condemn the Tribe's lands absent a congressional statute permitting it.

A formal regulation of the Bureau of Indian Affairs (the "BIA") confirms the overwhelming consensus that the INA applies to tribal fee simple lands. The regulations governing the "Issuance of Patents in Fee, Certificates of Competency, Removal of Restrictions,

and Sale of Indian Lands," include the following provision: "Lands held in trust by the United States for an Indian tribe, lands owned by a tribe with Federal restrictions against alienation *and any other land owned by an Indian tribe* may only be conveyed where specific statutory authority exists and then only with the approval of the Secretary unless the Act of Congress authorized sale provides that approval is unnecessary. (See 25 U.S.C. 177)." 25 C.F.R. § 152.22 (emphasis added) (the "BIA Regulation"). The BIA Regulation construes the term "lands" in the INA to include "any . . . land" owned by an Indian tribe, regardless of the title by which it is held. The Notice of Proposed Rule Making which added the regulation gave no indication that it departed in any way from prior administrative interpretations of Section 177, 37 F.R. 8384 (April 26, 1972), and the publication of the final regulations did not indicate that the regulation stirred any controversy, 38 F.R. 10080 (April 24, 1973). The regulation plainly prohibits the condemnation of tribal fee simple land absent an act of Congress authorizing such a disposition.

In Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984), the Supreme Court established a two-step judicial analysis for reviewing an agency's interpretation of a statute that it administers. First, the court must determine "whether Congress has directly spoken to the precise question at issue." Id. If so and the intent of Congress is clear, then the court and the agency "must give effect to the unambiguously expressed intent of Congress." Id. Second, if "the statute is silent or ambiguous with respect to the specific issue," then the court must consider "whether the agency's [interpretation] is based on a permissible construction of the statute." Id. at 843. An interpretation is permissible and must be upheld if it is a "reasonable interpretation" of the statutory provision. Id. at 844; see also NLRB v. United Food & Commercial Workers Union, Local 23, 484 U.S. 112, 123 (1987) (an administrative interpretation is permissible "if it is rational and consistent with the statute"); Local 15, Int'l

Bhd. of Electrical Workers, AFL-CIO v. NLRB, 429 F.3d 651, 655 (7th Cir. 2005) (same), cert. denied, 127 S.Ct. 42 (2006). The court must "accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation." National Cable & Telecommunications Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980 (2005).

Here, the Court should hold under step one of the Chevron test that the INA applies to tribal fee simple lands because Congress indicated its "unambiguously expressed intent" that the INA restricts the transfer of "*any* claim or title" to "lands" from an Indian tribe. If the Court determines that the INA is ambiguous with respect to fee simple reservation lands – and it should not -- the Court should nevertheless uphold the BIA Regulation under step two of the Chevron test because the regulation is clearly a permissible interpretation of the INA. Congress has delegated to the President, and through him to the Secretary of the Interior and the Commissioner of Indian Affairs, the authority to "prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs, and for the settlement of the accounts of Indian affairs." 25 U.S.C. § 9; see also 5 U.S.C. § 301 (regulatory authority of head of executive department); 25 U.S.C § 2 (regulatory authority of the Commissioner of Indian Affairs). The regulation at issue is a reasonable interpretation of the broad language of the INA. The regulation is also consistent with the broad purpose of the INA to exercise federal oversight over the disposition of Indian tribal land. Because the regulation is reasonable, it is a permissible interpretation and must be upheld. Accordingly, the Court should hold that the Village's attempt to condemn the Tribe's lands violates the INA.

The Village and Amici offer no convincing authority for excluding tribal fee simple lands from the scope of the INA. First, for the reasons stated above in connection with IRA Section

16, nothing in the Allotment Acts rendered Indian land permanently alienable. Though the Allotment Acts clearly authorized the initial allotment of tribal reservation lands to individual Indians, they have no application to former allotments after they have been patented in fee and do not govern the alienability of such parcels in the hands of an Indian tribe.

Second, the judicial decisions cited by the Village and the Amici do not offset the vast weight of federal decisions holding that the INA applies to fee lands. The Tribe cited eight cases that supported such a holding, including one decision by the United States Supreme Court, five decisions by four different courts of appeal (5th Cir., 2d Cir., D.C. Cir, 10th Cir.), and two decisions by federal district courts. Pl. Br. 15-17. The Village and especially Amici cite a welter of decisions, primarily for rhetorical effect and perhaps out of desperation, because most of the decisions lack either relevance or authority with respect to the scope of the INA. Three of the decisions make no holding whatsoever as to the application of the INA to the land at issue. See Delaware Nation v. Pennsylvania, 446 F.3d 410, 417-18 (3d Cir. 2006) (refusing to apply INA to land on grounds that owned by Indian individual rather than tribe); Buzzard v. Oklahoma Tax Comm'n, 992 F.2d 1073, 1077 (10th Cir. 1993) (refusing to resolve whether tribal charter or INA imposes restriction on alienation of tribal land in holding that the land does not constitute Indian country), cert. denied, 510 U.S. 994 (1993); Mashpee Tribe v. Watt, 542 F. Supp. 797, 806 (D. Mass. 1982) (holding that the INA does not apply to land owned by individual Indians), aff'd, 707 F.2d 23 (1st Cir. 1983), cert. denied, 464 U.S. 1020 (1983).[7] Two are federal district court decisions which the relevant circuit court reversed on appeal. See Leech Lake Band of Chippewa Indians v. Cass County, 908 F. Supp. 689 (D. Minn. 1995), rev'd, 108 F.3d 820 (8th

[7] The dicta in Mashpee Tribe that the INA "imposed restrictions only on the alienation of land held under aboriginal title," 542 F. Supp. at 803, is directly contrary to the BIA Regulation and to the two Attorneys General opinions cited herein, which expressly held that the INA applied to lands other than those held by original right of occupancy, i.e., aboriginal title.

Cir. 1997), rev'd, 524 U.S. 103 (1998); United States ex rel. Saginaw Chippewa Tribe v. Michigan, 882 F. Supp. 659 (E.D. Mich. 1995), rev'd, 106 F.3d 130 (6th Cir. 1997), vacated and remanded, 524 U.S. 923 (1998). One of the decisions dealt with an Indian tribe that Congress expressly exempted from the protection of the INA and addressed the application to the Indian lands at issue of a *different* restriction on alienation, 25 U.S.C. § 81. See Penobscot Indian Nation v. Key Bank of Maine, 112 F.3d 538, 553-54 (1st Cir. 1997) (dealing with land owned by a Maine Indian tribe with respect to which Congress at 25 U.S.C. § 1724(g) explicitly made the INA inapplicable). Despite the citation of questionable authorities by the Village and the Amici, only the Ninth Circuit's splintered panel holding in Lummi Indian Tribe v. Whatcom County, 5 F.3d 1355 (9th Cir. 1993), cert. denied, 512 U.S. 1228 (1994), supports their position. The central holding in Lummi – that the *status* of Indian reservation land as alienable renders the land taxable – is inconsistent with the Supreme Court's reasoning in the Cass County decision, which held that Indian reservation land is taxable only if made alienable *by a congressional act*.[8] As the Tribe showed in its opening brief, moreover, the two cases on which Lummi based its INA holding involved, on the one hand, an Indian tribe that Congress had stripped of its tribal status and expressly exempted from the protections of federal Indian statutes like the INA, and, on the

[8] Petitioners in the Cass County case formulated the question before the Court as follows: "Under the decisions of this Court in County of Yakima v. Yakima Indian Nation, 520 U.S. 251 (1992), and Goudy v. Meath, 203 U.S. 146 (1906), is alienable land patented in fee by the federal government, and subsequently reacquired in fee by an Indian band, subject to state and local government taxation if it remains freely alienable, irrespective of the statute or treaty under which it was originally conveyed." Brief for the Petitioners at i, Cass County. The Court clearly declined this invitation to craft a bright-line rule that turned on the *status* of alienability and instead formulated a test that turned on *Congressional intent*. See also Brief of *Amici Curiae* States of Michigan *et al.* at 15, Cass County (contending that alienability means taxability); Brief of *Amici Curiae* the National Association of Counties *et al.* at 24-25, Cass County (same).

other hand, land held by an *individual Indian* rather than a tribe.[9] In any event, neither Lummi nor any of the other authorities cited by the Village or Amici can overcome the BIA's determination in the BIA Regulation that the INA applies to *all* Indian tribal land, regardless of title.

Finally, contrary to the contentions of the Village and Amici, application of the INA to tribal fee lands is in no way inconsistent with Section 465, the land into trust provision of the IRA. Like Section 16 of the IRA, the INA prevents the disposition of Indian tribal land unless such disposition satisfies the statutory requirements set forth in the INA. Like Section 16, the INA is not a jurisdictional statute; it simply precludes the exercise of jurisdiction over tribal property that is inconsistent with its express terms, such as eminent domain authority. It therefore does not conflict in any manner with the jurisdictional component of Section 465. Moreover, the BIA has expressly indicated that the INA provides protection against the disposition of tribal land that is independent of the Section 465 land-into-trust process. When the BIA first introduced the regulations governing the placing of land into trust under Section 465 in 1978, the Notice of Proposed Rulemaking included the following proposed provision at 25 C.F.R § 120a-4: "Section 2116 of the Revised Statutes (sec. 12 of the act of June 30, 1834; 4 Stat. 730; 25 U.S.C. 177) restricts the title to all "land" owned by a "tribe" regardless of how title may have been acquired, except where restrictions are, or have been, removed by Federal treaty or statute. *This has been interpreted to mean that even if a "tribe" acquires "land" in a fee status using nontrust funds, the "land" may not be conveyed, leased, or otherwise encumbered except pursuant to an act of Congress.*" Land Acquisitions, 43 Fed. Reg. 32,311, 32,313 (1978) (to be

[9] The two cases on which Lummi majority based its INA holding were South Carolina v. Catawba Indian Tribe, Inc., 476 U.S. 498, 505-06 (1986), and Larkin v. Paugh, 276 U.S. 433-34 (1928).

codified at 25 C.F.R. pt. 120a) (proposed July 26, 1978) (emphasis added). The introduction to the Notice explained that "Section 120a-4 provides that all lands owned by tribes are restricted by section 2116 of the Revised Statutes (25 U.S.C. 177) except where the restrictions have been specifically removed by some other statutes." 43 Fed. Reg. 32,312. The finalized regulations omitted the proposed Section 120a-4, but only because "it was not directly pertinent to acquisition of land in trust status" and "was the source of substantial confusion about the intent of these regulations." 45 Fed. Reg. 62,035. In short, the BIA clearly believes that the alienation restriction in the INA applies to all Indian tribal land and that the land-into-trust process of Section 465 simply affords a separate and additional layer of protection to such land.

CONCLUSION

For the reasons set forth above and in the Tribe's initial motion papers, this Court should enter summary judgment for the Tribe with respect to Counts I, IV and VI and provide the relief requested by the Tribe in its initial motion papers.

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Respectfully submitted,

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