**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 RESPONSE BRIEF IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

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## INTRODUCTION

The premise of this case is simple: the Oneida Tribe of Indians of Wisconsin (the "Tribe") seeks to hold its own property within its own Reservation peacefully and without the threat of involuntary seizure by the Village of Hobart (the "Village"). The United States created the Reservation by treaty with the Tribe in 1838 to serve as a permanent homeland for those Oneidas who traveled over 900 miles from their New York aboriginal homeland to settle in eastern Wisconsin. The Tribe has shown in its motion papers that Section 16 of the Indian Reorganization Act ("IRA"), 25 U.S.C. § 476, and the Indian Nonintercourse Act, 25 U.S.C. § 177 (the "INA"), directly, plainly, unambiguously, and absolutely prohibit the Village's condemnation action against the Tribe's property. The Village and Amici have failed to show that the Tribe's property here falls outside of the protections of these long-standing and straightforward federal statutes.

The Village's own summary judgment motion, supported by Amici, urges this Court to grant summary judgment in favor of the Village on each of the Tribe's counts. The arguments of the Village and Amici largely rest on two fundamental errors. First, the Village and Amici mistakenly contend that the Supreme Court's holding in City of Sherrill v. Oneida Indian Nation of New York, 544 U.S. 197 (2005), controls the outcome of this case. Nothing could be further from the truth. The holding in Sherrill essentially stripped a New York tribe of its ordinary immunity from state property taxation within its reservation on the grounds that the tribe had delayed asserting its jurisdictional rights within the reservation for 200 years. The Court held that the tribe's inaction on its "long-dormant" jurisdictional claim rendered it inequitable to enforce the claim. Here, the Tribe's claim to immunity from the Village's eminent domain powers does not rest on any long-dormant claim. Rather, the Tribe's claim ripened only when

the Village first threatened condemnation proceedings against the Tribe's property in 2001 and then again in 2006. Accordingly, Sherrill has no relevance to this case.

Second, the Village and Amici fundamentally misrepresent the jurisdictional result of patenting in fee former allotments on the Tribe's Reservation, claiming that these fee simple parcels became "fully subject to state and local law," Def. Br. 29, and "subject to state and local sovereignty, jurisdiction, and regulatory authority," Amici Br. 15. These claims grossly misrepresent the jurisdictional status of fee simple parcels within Indian reservations that, like the Reservation, were subjected to the General Allotment Act, 24 Stat. 388 (1887), and other federal allotment statutes and treaties ("Allotted Reservations"), and that contain patches of non-Indian-owned land parcels scattered among tribal and tribal member land holdings.[1] As further shown below, these fee parcels remain part of the Indian reservation, constitute Indian country for federal law purposes, and, when owned by a tribe or tribal member, are subject only to state property tax jurisdiction – and not state condemnation or other jurisdiction - in the absence of express congressional provision to the contrary.

Because the Sherrill does not apply to this case, and because the tribally-owned fee parcels within the Reservation constitute Indian country, the Village's threatened condemnation of such land must be rejected.

## FACTS

This case can and should be decided in the Tribe's favor based on the law alone. The factual matters described below are included largely to provide background for the Court and to

[1] Checkerboard ownership patterns, like that found in the Oneida Reservation, are the norm within the 127 Allotted Reservations in the United States. One hundred (100) of these reservations were allotted by federal statute and 27 were allotted by federal treaty, including five other reservations in Wisconsin. See http://www.indianlandtenure.org/ILTFallotment/specinfo/specinfo.htm (last visited Nov. 28, 2007); Affidavit of Benjamin Lindblad at ¶¶ 2-3.

refute many of the irrelevant, but inflammatory and prejudicial, "facts" alleged by the Village and the Amici.[2]

The Tribe's Deep Roots on the Reservation

The Tribe and its members have deep roots on their 65,400-acre Reservation in Wisconsin. The Wisconsin Oneidas removed from New York to the Reservation area in the 1820s as a result of pressure from the federal and state governments and the Ogden Land Company.[3] They were granted their Reservation by the United States pursuant to a solemn treaty promise made in 1838, 10 years before Wisconsin even achieved statehood. Affidavit of James W. Oberly ("Oberly Aff.") at ¶ 59. As set forth in the personal and family histories included in the affidavits of Vice Chairwoman Kathy Hughes, Loretta Metoxen, Carol Cornelius, and Rebecca Webster, many living members of the Tribe have lived on the Reservation their entire lives and are descendants of generations of other Oneida Indians who resided on the Reservation during their lifetimes from 1838 through the present time. Id.; Affidavit of Vice Chairwoman Kathy Hughes ("Hughes Aff.") at ¶¶ 24-27[4]; Affidavit of Loretta Metoxen ("Metoxen Aff.") at

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[2] Even if the Court were to deny the Tribe's motion and somehow find City of Sherrill apposite, the evidence presented by the Tribe demonstrates that the Village is not entitled to summary judgment.

[3] See generally Laurence M. Hauptman and L. Gordon McLester, The Oneida Indian Journey: From New York to Wisconsin, 1784-1860, at 62, 64, 134,35 (1999).

[4] Vice Chairwoman Hughes's personal family history embodies the long-standing connection many Oneidas have with the Reservation. Vice Chairwoman Hughes was born and raised on the Reservation, to Oneida parents who were both born and raised on the Reservation. Hughes Aff. at ¶¶ 24-25. Both her maternal and paternal grandparents, all Oneida, were also born and raised and lived their entire lives on the Reservation. Id. at ¶¶ 26-27. Vice Chairwoman Hughes has been connected to the Reservation at least since 1884 through her direct ancestral heritage going back two generations. Id. Pl. Prop. F. No. 2

In their Motion for Leave to File an Amicus Curiae Brief, Amici have asked to be heard by the Court with respect to their interests in what they characterize as their "homeland" in the Village of Hobart, (p. 8), but the earliest year Hobart settlement date provided for any of the

¶¶ 2-8; Affidavit of Carol Cornelius ("Cornelius Aff.") at ¶¶ 59-61; Affidavit of Rebecca Webster ("Webster Aff.") at ¶¶ 2-8; see also Affidavit of John Breuninger ("Breuninger Aff.") at ¶ 3. Plaintiff's Proposed Finding of Fact (hereinafter "Pl. Prop. F.") No. 1.

The Tribe's Continuous Exercise of Self-Government and Jurisdiction on the Reservation

Throughout the entire history of the Oneida people, and for much longer than the Village has existed, the Tribe has had a functioning system of government. Cornelius Aff. at ¶ 3. Though the form of government has changed over time, often in response to historical events and outside influences, the Oneida people have always governed themselves and their members. Id. at ¶¶ 3-29; Metoxen Aff. at ¶¶ 15-34. Issues pertaining to governing the Tribe's land, and disputes with other governments over the Tribe's land, have been part of the Tribe's self-governance since the Tribe arrived in Wisconsin, as evidenced by, among other actions, the Tribe's participation in discussion of federal allotment proposals in the late 19th Century, the Tribe's formation of a Land Committee in 1941 and the Tribe's adoption of a number of formal laws pertaining to land use by 1966. See, e.g., Cornelius Aff. at ¶¶ 13, 19-22, 24-25; Metoxen Aff. at ¶¶ 10-11, 16-20, 24, 27-28, 29-31, 34. Pl. Prop. F. No. 4.

From and after the adoption of its IRA Constitution and By-Laws in 1936, the Tribe has governed itself and its members continuously through its General Tribal Council and, since an amendment of its Constitution and By-Laws in 1967, through its Business Committee acting pursuant to delegated authority. Hughes Aff. at ¶¶ 2-5; Metoxen Aff. at ¶ 31. The Tribe has

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Amici was 1967. (p. 4). The five other Amici for whom settlement dates were provided arrived in Hobart in 1971, 1974, 1983, and 1998. Id. Amici clearly reflect the modern face of the non-Indian population of Hobart – for the most part, they are part of the group that migrated there largely beginning in the 1970s, to live in suburban homes and perform nonagricultural jobs. Cf. Oberly Aff. ¶¶ 8, 16. Pl. Prop. F. No. 3.

adopted the Oneida Code of Laws in order to govern itself and affairs within its Reservation, which are publicly available at <http://onloc.oneidanation.org/laws/lawListing.shtml>. Pl. Prop. F. No. 5.

The Tribe's Population on the Reservation

Even during the periods of greatest challenge and hardship for the Oneidas, there was always a sizable Oneida population on the Reservation. In 1892, when the Reservation was allotted, 1,520 Oneidas received trust allotment parcels. Oberly Aff. at ¶ 21. In 1930, 442 Oneidas lived in the Town of Hobart and 705 Oneidas lived in the Town of Oneida for a total Reservation population of 1,147. Id. at ¶ 36. The Oneida population on the Reservation grew during the 1930s to 603 in the Town of Hobart and 894 in the Town of Oneida, for a total population of 1,497 in 1940. Id. at ¶¶ 6-8. The Village would have the Court believe that "by [1936], most of the . . . tribal population . . . had been lost" (p.8), but this is clearly false. The Oneidas maintained a vibrant and visible presence on the Reservation from their arrival at Duck Creek forward, worshiping in the Episcopal and Methodist churches, attending federal, religious and district schools, meeting in councils, hunting, fishing and gathering, speaking the Oneida language and performing a wide variety of traditional ceremonies. Cornelius Aff. at ¶¶ 30-58; Metoxen Aff. at ¶¶ 9, 12-14. The U.S. census data shows a constant, and since 1970, growing presence of Oneidas on the Reservation, as well as a white population that has grown the most since the 1970 census.[5] Oberly Aff. at ¶ 4, Table A. The Oneida presence on the Reservation has not only been growing, but it has been a highly visible presence to others living on the

[5] The Village states incorrectly (p. 9) that "census data by ethnicity is not readily available for much of the 1990s." Only for 1950 is there no such census data. Oberly Aff. at ¶ 19. Pl. Prop. No. 7

Reservation or in the surrounding areas. See, e.g., Cornelius Aff. at ¶¶ 30-58; Oberly Aff. at ¶¶ 4-20, 50-53, 59; Metoxen Aff. at ¶¶ 12-14. Pl. Prop. F. No. 6.

Allotments on the Reservation

Nearly the entire Oneida Reservation was allotted to tribal members on June 13, 1892. Oberly Aff. at ¶ 21. No surplus lands existed on the Reservation following the allotment process. Most of the allotted parcels were eventually converted to fee simple status pursuant to the General Allotment Act and related federal statutes, and most of the fee simple land eventually fell out of Indian ownership**,** at least for some period of time. Pl. Prop. F. No. 8.

There were four basic ways in which allottees or their heirs lost their land in this period. First, starting in 1902, the U.S. School Superintendent for the Oneida Indian School (who functioned as the Indian Agent for the Oneida Reservation) received authority from the Secretary of Interior and Commissioner of Indian Affairs, pursuant to a new Act of Congress, the Act of May 27, 1902, ch. 888, § 7, 32 Stat. 245, to convert the trust allotments of deceased tribal members to fee simple status and sell the properties for the benefit of the estates of the deceased members. Second, pursuant to congressional legislation enacted in 1906, some Oneida Indians sold their parcels, or portions of their parcels, for cash in the Brown County and Outagamie County land markets. Third, some Oneida Indians mortgaged their property and then were unable to repay their loans and lost their land to their creditors. Fourth, some Oneida Indians did not pay their property taxes and had their parcels, or portions of their parcels, first declared delinquent and then forfeited by town governments. Oberly Aff. at ¶ 23. Pl. Prop. F. No. 9.

It is possible to estimate the land loss that occurred by particular dates. In 1913, Oneida allottees continued to own 11,312 acres of land within the Town of Hobart, some of it in trust and some of it in fee. Oberly Aff. at ¶ 30. In 1917, when the 25-year trust period for the

allotments was set to expire, 146 of the original allottees still held their land in trust. Id. at ¶¶ 31-32. The United States extended the trust period for 35 of these allottees, whose allotments comprised approximately 1,100 acres. The trust period initially was extended for these allottees through 1927, then was extended indefinitely. Id. at ¶¶ 32-34. By 1920, the Secretary of the Interior had approved the patenting in fee of 228 allotments to heirs of deceased allottees and the subsequent sales of such fee parcels, covering 10,894 acres, or approximately 16.7%, of the Reservation. Id. at ¶ 25. Pl. Prop. F. No. 10.

The Village states on page seven of its Brief and in paragraph 17 of its Proposed Findings of Fact that "[b]y the mid-1920s, only a few hundred acres of the Oneida Reservation remained in Indian hands."[6] In fact, Oneida Indians owned several *thousand* acres of fee land on the Reservation in the mid-1920s. Oberly Aff. at ¶ 35. Pl. Prop. F. No. 11.

There are at least 591 acres of land on the Reservation which have never been patented in fee and have always been held as either restricted treaty land or individual or tribal trust land. Affidavit of Rebecca Webster ("Webster Aff.") ¶¶ 22-26, Exhs. F-I. The total amount of trust land at any given point in time has been greater than 591 acres, because as certain parcels left trust status over time, other parcels were being taken into trust status, and the 591 acres only accounts for the land which has never been patented and which has always remained in restricted or trust status. Id. at ¶ 22. Pl. Prop. F. No. 13.

Beginning Efforts to Rebuild the Tribe's Land Base

[6] The Village cites J. Campisi and L. Hauptman, The Oneida Experience: Two Perspectives (Syr. U. Press 1988), at 85, as authority for this statement. Campisi and Hauptman are the editors of the work cited, not the authors. The citation is actually to a chapter in that volume by Arlinda Locklear entitled "The Allotment of the Oneida Reservation and Its Legal Ramifications," found at pages 83 to 93 of that volume. The Village's statement is supported by the Locklear article, but Locklear was mistaken on that point. Oberly Aff. at ¶ 35. Pl. Prop. F. No. 12.

The Tribe, with assistance from the federal government, began efforts to rebuild its land base within the Reservation nearly immediately following the enactment of the IRA. In the mid-1930s, the Office of Indian Affairs ("OIA") estimated that 300 Oneida Indian families each would need 40 acres of land to become self-sufficient and acquired options to purchase 12,000 acres at $50 per acre, or $600,000. Because Congress had only appropriated $2 million for all of Indian country for land purchases pursuant to Section 5, however, the OIA eventually was able to acquire only approximately 1,000 to 2,000 acres of Reservation land for Oneida Indians with these funds. That was insufficient to establish 300 families on 40-acre farms, but it was enough to begin to rebuild the tribal land base. Oberly Aff. at ¶ 41 and Table F. Pl. Prop. F. No. 14.

In 1941, according to the Tribe's Division of Land Management, 1,694 acres of Reservation land were in trust for the Tribe or in the form of options to purchase lands for the Tribe under the IRA, 713 acres were in trust for tribal members, and 2,308 acres were owned by tribal members in fee. These three categories of Indian land made up about 7% of the total Reservation. Oberly Aff. at ¶ 40. Pl. Prop. F. No. 15.

Establishment of Town Governments on the Reservation

The federal government was the instigator of the creation of both the Town of Hobart and the Town of Oneida on the Reservation, to facilitate the building of roads and land sales on the Reservation that were then viewed to be beneficial to the Oneida. Oberly Aff. at ¶ 46. The Village was named for John Henry Hobart (1775-1830), the third Episcopal Bishop for New York who supported missions to the Oneida Indians. See <http://www.hobart-wi.org/pages/2LocationHistory.htm> (last visited Nov. 30, 2007) (Bishop Hobart "helped relocate many of the Oneida Indians from New York State");

<http://en.wikipedia.org/wiki/John_Henry_Hobart> (last visited Nov. 30, 2007). Pl. Prop. F. No. 16.

Although the Wisconsin legislature enacted enabling legislation for the towns in 1903, the towns were not actually organized until 1908, when each held organizational meetings for the election of town offices. Oberly Aff. at ¶ 49; see also <http://www.hobart-wi.org/pages/2LocationHistory.htm> (last visited on Nov. 30, 2007) (noting that Hobart will be celebrating its centennial in 2008). Town governments provided the Oneida Indians one vehicle for the Tribe's exercise of self-government from 1908 until the enactment of the IRA. In the early days of the Town of Hobart's and the Town of Oneida's government, Oneida Indians dominated the elected and appointed positions. Id. at ¶ 50 and Table G. Oneida Indians served as Chairman of the Town Board from 1908 to 1928. Id. at ¶ 51. The Town Board was made up only of Oneida Indians from 1908 to 1914, and Oneida Indians constituted a majority of the Town Board from 1915 to 1924 and in 1927. Id. at ¶ 53. The Oneidas remained a significant presence in town government until the Tribe began efforts to organize as an IRA tribe shortly after the enactment of the IRA in 1934. Id. at ¶ 50. Pl. Prop. F. No. 17.

Initially, the Town of Hobart comprised 26,600 acres, or approximately 39.8%, of the 65,400-acre Reservation. As a result of subsequent annexations by the City of Green Bay and the Villages of Ashwaubenon and Howard, the current Village of Hobart comprises 21,195 acres, or approximately 32.1%, of the Reservation. See Village's Proposed Finding of Fact No. 26. Pl. Prop. F. No. 18.

Comparison of the Village's and the Tribe's Governmental Operations

The Tribe funds and operates numerous tribal government departments and programs providing essential governmental services for members of the Tribe, residents and visitors.

Hughes Aff. at ¶ 7; Breuninger Aff. at ¶¶ 11-15. The Tribe raises revenues to fund its government operations and programs primarily from its own enterprises. Hughes Aff. at ¶ 8. The federal government also provides significant grants and contract payments to the Tribe each year in furtherance of federal Indian laws and policy goals. Id. Pl. Prop. F. No. 19.

The Tribe's annual revenues, budget, and employees far exceed those of the Village of Hobart. The Village's total budget in 2007 was $2,416,854.51 and the Village had 16 employees. Village's Proposed Finding No. 36. In comparison, the Tribe's FY 2008 budget is $527,390,086.00 and the Tribe has approximately 3,000 employees, with approximately half employed in the Tribe's gaming division and the other half employed in non-gaming and governmental departments. Hughes Aff. at ¶ 9. Attached as Exhibit A to this brief is a table comparing the Village's governmental operations highlighted in its motion with those of the Tribe. Pl. Prop. F. No. 20.

The Tribe makes substantial contributions to the Village's tax base and overall budget. From 2000 to 2006, the Tribe paid $3,264,447.95 in real estate taxes for tribal fee land located within the Village. Webster Aff. at ¶ 31. In addition, the Tribe has made payments to the Village of $491,694 pursuant to a Service Agreement with the Village dated November 16, 2004, to compensate the Village for services which the Village provides to tribal trust property. Id. at ¶ 33. Pl. Prop. F. No. 21.

The Tribe's Land-into-Trust Applications for the O'Hare Boulevard and Forest Road Properties

On May 10, 2006, the Oneida Business Committee passed a resolution seeking the placement of the Tribe's O'Hare Boulevard Property into trust status pursuant to 25 U.S.C. § 465 and 25 C.F.R. Part 151. Webster Aff. at ¶ 29. The application is currently pending with the

BIA. Id.[7] On November 21, 2007, the Oneida Business Committee passed a resolution seeking placement of the Tribe's Forest Road Property into trust status. Id. at ¶ 30. The Tribe is in the process of assembling the application for forwarding to the BIA. Id. Pl. Prop. F. No. 22.

Tribe's Government-to-Government Relations with the Village and with Other Governments

The Tribe exercises its powers of self-governance and sovereignty over the Reservation by entering into government-to-government agreements with federal, state and local governments to resolve issues involving overlapping jurisdiction. Hughes Aff. at ¶ 10. Dating back to at least the early 1980s, the Tribe has entered into numerous intergovernmental agreements with the United States government through the Department of Interior and the Department of Health and Human Services, with the State of Wisconsin, with Brown and Outagamie Counties, and with the municipal governments of Hobart, Oneida, Ashwaubenon, Green Bay, DePere, Bear Creek, Black Creek, Hortonville, Seymour and Shiocton. Id. at ¶¶ 11-20. Disputes that arise under these intergovernmental agreements are generally resolved through government-to-government channels rather than litigation. Id. at ¶¶ 21-22. The Tribe maintains good government-to-government relations with all of these governments, except the Village of Hobart. Id. at ¶¶ 11-19, 21. Pl. Prop. F. No. 24.

One of the intergovernmental agreements entered into by the Tribe is the Service Agreement with the Village of Hobart described above. Hughes Aff. at ¶ 20; Webster Aff. at ¶ 33, Exh. J. In exchange for the Tribe's payments pursuant to the Service Agreement, the Village agreed not to object to fee-to-trust applications submitted by the Tribe to the Bureau of

[7] In the past, the length of time for the placement of land into trust has varied greatly depending on the current BIA administration and on the title and environmental issues that may arise with respect to particular parcels. Webster Aff. at ¶ 28. Currently, it takes approximately two years from the date of the Tribe's initial trust application until the United States takes title to the property. Id. Pl. Prop. F. No. 23.

Indian Affairs for certain properties, including properties owned by the Tribe prior to November 16, 2004. In this regard, the Service Agreement provides: "The Village will not oppose the Oneida Nation's attempt to place fee land into trust if the parcel meets any of the following conditions; (1) the parcel is land which the Oneida Nation owns in fee simple as of the date of this Agreement; . . ." Webster Aff. at ¶ 33, Exh. J. Pl. Prop. F. No. 25.

Despite its agreement not to object to fee-to-trust applications for parcels owned by the Tribe prior to November 16, 2004, the Village has objected to such fee-to-trust applications. Webster Aff. at ¶ 34. After the effective date of the Service Agreement, the Tribe submitted fee-to-trust applications for properties purchased by the Tribe on March 23, 1995, August 30, 1999, and April 30, 2001. Id., Exhs. K-M. On October 10, 2007, the Tribe received a courtesy copy of a letter, dated October 6, 2007, from the Village to the Bureau of Indian Affairs, in which the Village objected to these fee-to-trust applications. Id. at ¶ 34, Exh. N.[8] Pl. Prop. F. No. 26.

The Village appears to be the only government that has ever attempted to condemn Tribal land within the Reservation. Hughes Aff. at ¶ 23. The Wisconsin Department of Transportation, by contrast, has requested easements from the Tribe, rather than imposing state law condemnation procedures. Webster Aff. at ¶¶ 10-13, Exhs. A-D. Pl. Prop. F. No. 27.

The Village has a history of fostering an anti-tribal agenda, and it appears that at least a majority of the current Village Board members believe that tribal governments should be abolished. A recent example pertains to the Native Hawaiian Government Reorganization Act of 2007 (H.R. 505, S. 310), which would, among other things, provide a process for the reorganization and federal recognition of a single Native Hawaiian governing entity. Webster

[8] It is ironic that the Village advises the Court in this case that the proper way for the Tribe to protect its land from condemnation is to place it into trust, when the Village is at the same time taking steps to prevent the Tribe from doing so – in direct violation of its own Agreement with the Tribe.

Aff. at ¶ 35. In a letter to Congressman Steve Kagen, Senator Herb Kohl, and Senator Russ Feingold dated September 11, 2007, the members of the Village Board objected to passage of this Act. Id. at ¶ 36, Exh. O. In the letter, the Village board members stated:

> The continued creation of separate tribal governing bodies - bodies that are sovereign and exempt from the laws that are applicable to the rest of the country - is contrary to the whole concept of being one united nation.

Id., Exh. O. Pl. Prop. F. No. 28.

Also recently, the Village hosted Elaine Willman, Chairperson of the so-called "Citizens Equal Rights Alliance" ("CERA"). CERA's mission statement is as follows: "Federal Indian Policy is unaccountable, destructive, racist and unconstitutional. It is therefore CERA's mission to ensure the equal protection of the law as guaranteed to all citizens by the Constitution of the United States of America." Webster Aff. at ¶ 38. In September 2007, a Village newsletter stated that

> Hobart will be hosting a forum for author Elaine Willman to speak on the following subjects: Homeland Security and the 2010 Census, as they both relate to Hobart and the borders we share with the Oneida Tribe. Ms. Willman is author of the book, Going to Pieces: The Dismantling of the United States of America.

Id. at ¶ 37, Exh. P. Contrary to the Village's representations, the forum hosted by the Village on September 19, 2007, did not focus on homeland security or the 2010 census. Instead, Ms. Willman advocated for the abolition of tribal governments, with specific reference to the Tribe. Id. at ¶ 39. Pl. Prop. F. No. 29.

## ARGUMENT

### I. THE SUPREME COURT'S DECISION IN SHERRILL DOES NOT AUTHORIZE THE VILLAGE TO CONDEMN THE TRIBE'S PROPERTY.

#### A. The Tribe's claim does not meet the threshold requirement for applying the equitable doctrines described in City of Sherrill.

The Village and Amici repeatedly claim that the Supreme Court's decision in City of Sherrill, New York v. Oneida Indian Nation of New York, 544 U.S. 197 (2005), is "on point in all material respects" and that "the material facts in this case parallel those in Sherrill and therefore require the same result." Amici Br. 7; Def. Br. 33. They are mistaken.

The Supreme Court in Sherrill held that the New York Oneida Tribe (the "New York Oneida") was barred from enforcing its traditional tribal immunity from state property taxation within its reservation by the equitable doctrines of laches, acquiescence and impossibility. The Village and Amici make laborious efforts to portray the legal claims and factual circumstances in Sherrill as being similar to those in the present case. Despite a combined 31 pages of discussion, however, the Village and Amici fail to show that the Tribe's claim satisfies the threshold requirement for application of the Sherrill equitable doctrines: the presence of a long-dormant claim which the claimant has neglected to vindicate. As the Sherrill Court made clear, it was the failure of the New York Oneida to pursue their jurisdictional rights within their reservation for nearly two hundred years after its illegal cession that barred the tribe from exercising its tax immunity, because such failure created justifiable expectations on the part of surrounding local governments and made relief impractical. Because the Tribe's claim to immunity from the Village's eminent domain authority in this case does not rest on any similar long-dormant legal claim, the Tribe is not subject to *any* of the equitable doctrines described in Sherrill.

In Sherrill, the New York Oneida sought to enjoin the City of Sherrill from imposing property taxes upon land parcels owned by the New York Oneida within the boundaries of its

300,000 acre Reservation (the "New York Reservation"). The New York Oneida ceded the New York Reservation to the State of New York by means of "25 treaties of cession concluded between 1795 and 1846." Sherrill, 544 U.S. at 207. In earlier land claims litigation, the Supreme Court had held that these treaties of cession violated the federal Indian Nonintercourse Act, 25 U.S.C. § 177 (the "INA"), and that the New York Oneida could bring an action for damages for the illegal cessions. See County of Oneida v. Oneida Indian Nation of N.Y., 470 U.S. 226 (1985). Because black-letter federal Indian law provides that only Congress can divest an Indian reservation of its reservation status, the New York Oneida argued that its 300,000 acre New York Reservation remained in existence as an Indian reservation for jurisdictional purposes. 544 U.S. at 212. Because Congress had never authorized the imposition of state or local taxes on Indian-owned lands within the Reservation, as required under federal law, the New York Oneida contended that the City of Sherrill had no jurisdiction to impose property taxes upon the tribally-owned parcels. 544 U.S. at 202.

The Supreme Court held that, regardless of the New York Oneida's substantive legal rights within the New York Reservation, the three equitable doctrines of laches, acquiescence and impossibility prevented it from vindicating such rights. Sherrill, 544 U.S. at 213-14. The fulcrum of the Court's holding was what it characterized as the New York Oneida's 200-year delay in seeking judicial relief for the illegal cessions of its New York Reservation. 544 U.S. at 221. The long delay between this "ancient wrongdoing" and the New York Oneida's suit, held the Court, evoked the equitable bar of laches, which requires a "long-dormant claim" that the claimant has failed to pursue, and "legitimate reliance" on the part of others resulting from the claimant's inaction. 544 U.S. at 217. Because of the New York Oneida's alleged inaction in seeking judicial relief, the Court found that state and local governments had exercised continuous

jurisdiction and control within the New York Reservation and thereby acquired a reliance interest in the status quo. 544 U.S. at 218-19. In addition, held the Court, the equitable doctrine of acquiescence barred the New York Oneida because, rather than diligently pursuing its ancient claim, it had long acquiesced to dominion over the area by another sovereign. 544 U.S. at 218. Finally, the Court held that the "impossibility doctrine" applied to the New York Oneida's tax claim because "the Oneida's long delay in seeking equitable relief against New York or its local units" for its claim permitted the development and growth of state and local jurisdiction, which would be seriously burdened if the Court permitted the Tribe to exercise its ordinary tribal jurisdiction within the New York Reservation. 544 U.S. at 219-20.

The 200-year dormancy of the New York Oneida's jurisdictional claim was the critical precondition for the Court's application of the three equitable doctrines. The Court repeatedly pointed to the "long lapse of time, during which the Oneidas did not seek to revive their sovereign control," and to the "Oneidas' failure to reclaim ancient prerogatives earlier," emphasizing that "it was not until lately that the Oneidas sought to regain ancient sovereignty over land converted from wilderness to become part of cities like Sherrill." 544 U.S. at 216, 217 n.11, 215. "The Tribe's inaction," held Justice Souter in his concurring option, is "central to the very claims of right made by the contending parties." 544 U.S. at 222. Because the precondition for invoking Sherrill is inaction on a long-dormant claim, all subsequent decisions applying Sherrill by necessity involve Indian claims that turn upon very old wrongs. See Cayuga Indian Nation v. Pataki, 413 F.3d 266 (2d Cir. 2005) (Indian land claim for land conveyed in 1795 and 1807), cert. denied, 126 S.Ct. 2021 (2006); State of N.Y. v. Shinnecock Indian Nation, No. 03-cv-3243, 2007 WL 3307089, slip op. at 87, 96 (E.D.N.Y. Oct. 30, 2007) (Indian lawsuit to build casino resting on tribal land claims dating to the 1670s and the early 1800s); Oneida Indian

Nation of N.Y. v. New York, 500 F. Supp. 2d 128 (N.D.N.Y. 2007) (Indian land claim for lands conveyed in the 1840s); Paiute-Shoshone Indians of the Bishop Community, No. 1:06-cv-00736, 2007 WL 521403 (E.D. Cal. Feb. 15, 2007) (Indian land claim for land conveyed in 1941); Shinnecock Indian Nation v. New York, No. 05-CV-2887 (TCP), 2006 WL 3501099 (E.D.N.Y. Nov. 28, 2006) (Indian land claim for land conveyed in 1859); Seneca-Cayuga Tribe of Okla. v. Town of Aurelius, 233 F.R.D. 278 (N.D.N.Y. 2006) (Indian property tax and zoning exemption claims resting upon land claims for land dating to 1795 and 1807) (see 2004 WL 1945359 at *5); Ottawa Tribe of Okla. v. Speck, 447 F. Supp. 2d 835 (N.D. Ohio 2006) (Indian hunting and fishing rights claim based on 1807 treaty); Cayuga Indian Nation of N.Y. v. Village of Union Springs, 390 F. Supp. 2d 203 (N.D.N.Y. 2005) (Indian zoning and land use exemption claim resting upon land claims dating to 1795) (see Cayuga Indian Nation of New York, 165 F. Supp. 2d 266, 357 (N.D.N.Y. 2001)); Shinnecock Indian Nation v. New York, 400 F. Supp. 2d 486, 494 (E.D.N.Y. 2005) (Indian lawsuit to build casino resting on tribal land claims that accrued in the 1850s).[9]

Amici's argument that the Sherrill holding applies even more compellingly to *legally* patented reservation land misconstrues the very basis of the decision. A violation of the claimant's rights, followed by culpable inaction with respect to an ancient claim, is the threshold requirement for invoking the Sherrill equitable doctrines. It is the claimant's "want of due diligence in failing to institute proceedings" to vindicate such violated rights that raises the equitable bar to enforcement of the claim. Townsend v. Vanderwerker, 160 U.S. 171, 187 (1895) (discussing laches). Moreover, the prejudice and "justifiable expectations" which Sherrill

[9] As the subject matter of these cases indicates, to the extent that the Sherrill decision has "dramatically altered the legal landscape," Cayuga, 413 F.3d at 273, it has done so only with respect to lawsuits resting on ancient claims, particularly lawsuits involving East Coast Indian Tribes who lost some or all of their aboriginal reservations at least 150 years ago.

and similar equity cases emphasize must arise out of the claimant's failure to diligently prosecute the claim. As the Supreme Court stated in a case cited by Sherrill, all of its laches decisions:

> proceed on the assumption that the party to whom laches is imputed has knowledge of his rights, and an ample opportunity to establish them in the proper forum; that *by reason of his delay* the adverse party has good reason to believe that the alleged rights are worthless, or have been abandoned; and that *because of the changing condition or relations during this period of delay* it would be an injustice to the latter to permit him to now assert them.

Galliher v. Cadwell, 145 U.S. 368, 372 (1892) (emphasis added). Thus, an illegal violation of a claimant's right followed by neglect is the one absolutely essential requirement for invoking the other Sherrill equitable doctrines. The mere passage of time and history, with the ordinary changes in growth and development, can *never* by themselves provide sufficient grounds for depriving claimants of their legal rights. Accordingly, in the absence of a long-dormant claim, the population and demographics factors, the length of tribal ownership of the land, and similar factual factors cited by the Village and Amici are irrelevant as a matter of law to the question of whether the Sherrill equitable doctrines apply.

The Tribe's present claim ripened only after it acquired the parcels at issue and the Village threatened to condemn the parcels. The Tribe purchased the O'Hare Boulevard Property in 2000-2001, and the Village threatened to condemn a roadway and utility easements over the property shortly thereafter. On July 22, 2001, the Tribe formally objected to the proposed condemnation, and the Village brought a lawsuit against Tribal officials in state court in 2002. When the Tribe acquired the Forest Road property in 2006, the Village publicly stated that it intended to initiate condemnation proceedings for water and sewer easements in the same year. The Tribe filed this federal lawsuit in December 2006. The Tribe has therefore expeditiously pursued its remedy against the Village's condemnation action since the Village first attempted to condemn the properties. The Tribe's claim, moreover, does not rest on any earlier claim relating

to the status of its reservation, which the Village acknowledges has been neither terminated nor diminished,[10] or on any claim related to the fee-patenting of the parcels pursuant to the GAA, the Burke Act, or the Oneida Act. Because the Tribe's case does not involve culpable inaction on an ancient claim, the Sherrill equitable doctrines neither apply nor have any relevance to the Tribe's claims.

**B. Neither the Village nor Amici can have "justifiable expectations" that the Village's power of eminent domain extends to Tribally-owned property within the Reservation.**

Though the Tribe's claims do not satisfy even the threshold requirement for applying the Sherrill equitable doctrines, the Village and Amici invite the Court to nevertheless apply the Sherrill *result* with respect to the parcels at issue on grounds that to do otherwise would disturb "justifiable expectations" of Amici and the Village. Amici claims that the parcels have been made "subject to state and local sovereignty, jurisdiction, and regulatory authority," and that disallowing the Village's eminent domain authority over them would disturb "justifiable expectations" in the jurisdictional stability of the Reservation. Amici Br. 10. As an initial matter, it is difficult to see how Amici or the Village can have "justifiable expectations" regarding the Village's eminent domain authority when, as the Village admits, it has *never* before attempted to exercise this power against the Tribe's property. Hertel Aff., Ex. E, Docket No. 28-2 (Aug. 9, 2007). In any case, as a matter of law and of fact, neither the Village nor

[10] Hertel Aff., Ex. B, Docket No. 28-2 (Aug. 9, 2007). The Indian Court of Claims found that the Reservation has never been terminated or diminished. See Oneida Tribe of Indians of Wisconsin v. United States, 12 Ind. Cl. Comm. 1, 1 (Dec. 6, 1962) (finding that the Reservation created by the Oneida treaty, Feb. 3, 1838, 7 Stat. 566, "comprises approximately 65,000 acres"); State v. King, 571 N.W.2d 680, 685 (Wis. Ct. App. 1997) (holding that all the land within the boundaries of the Reservation established in 1838 has retained its status as an Indian reservation); Wis. Op. Att'y Gen. 24-82 (Mar. 10, 1982), 1982 WL 188319, at *1 (holding that it "is legally correct" that "all land within the boundaries of the . . . Oneida . . . .reservation" constitutes an Indian reservation).

Amici can possibly have justifiable expectations that the Village could exercise eminent domain power over Tribally-owned land within the Reservation.

**i) As a matter of law, the Village and Amici cannot have "justifiable expectations" that the Village's general regulatory jurisdiction applies to Tribal property within the Reservation.**

Amici persistently contend that former allotments like the parcels at issue passed into state "sovereignty, jurisdiction and regulatory authority" when patented in fee pursuant to the GAA. Amici Br. 1, 4, 7, 10, 11, 15. With two exceptions, Congress and the Supreme Court have held *precisely the contrary*. The Supreme Court has consistently held that former allotments patented in fee remain a part of the jurisdictional Indian reservation, *which is not diminished by the allotment and patenting process*.[11] Mattz v. Arnett, 412 U.S. 481, 497 (1973); Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation, 425 U.S. 463, 478 (1976) (squarely rejecting the argument that the GAA fee-patenting process "diminished" an Indian reservation for civil and criminal jurisdictional purposes). Pursuant to the Indian Country Act, 18 U.S.C. § 1151, moreover, Congress provided that fee parcels within an Indian reservation constitute "Indian country" for jurisdictional purposes, and the Supreme Court has held that such fee parcels remain Indian country even when owned by non-Indians. See Seymour v. Superintendent of Washington State Penitentiary, 368 U.S. 351, 358 (1962). The

[11] Because the Supreme Court has directly and repeatedly held that the patenting in fee of former allotments does *not* diminish an Indian reservation, Amici's heavy reliance upon reservation diminishment cases such as Hagen v. Utah, 510 U.S. 399 (1994), Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977), DeCoteau v. District County Court for the 10th Judicial Dist., 420 U.S. 425 (1975), with respect to jurisdictional issues, justified expectations, and checkerboard jurisdiction is utterly inappropriate. Amici Br. 1, 2 n.2, 3, 8 n.6. The observations of these diminishment decisions on these issues is irrelevant because the diminished area of these reservations, unlike the Tribe's Reservation, *no longer remained Indian country*. The Sherrill court could refer to the diminishment cases, however, because the "surplus land" acts at issue in diminishment cases is directly analogous to the "treaties of cession" that illegally transferred the New York Oneida Reservation.

Wisconsin State Attorney General has expressly acknowledged that fee simple parcels within an Indian reservation remain part of the jurisdictional reservation. See Wis. Op. Att'y Gen. 24-82 (Mar. 10, 1982), 1982 WL 188319, at *6 ("land owned in fee by the tribe or individual tribe members retains its reservation status if located within existing reservation boundaries. . . .").

Accordingly, Amici's contention that the issuance of a patent for a former GAA allotment involves a "transfer of sovereignty to state and local governments" is nonsense.[12] Amici Br. 15. On the contrary, because the fee parcels constitute Indian country for jurisdictional purposes, the federal government and the Tribe exercise "primary jurisdiction" over them. Alaska v. Native Village of Venetie Tribal Gov't, 522 U.S. 520, 527 n.1 (1998). As Indian country, the fee parcels and the activity upon them are subject to federal and tribal criminal jurisdiction with respect to all crimes involving an Indian (unless Public Law 280 substitutes state for federal criminal jurisdiction within Indian country), are subject to federal and tribal liquor restrictions, and are subject to a vast array of federal and tribal civil laws provided that the parcels are owned by the Tribe or tribal members. See, e.g., 18 U.S.C. §§ 1151, 1152, 1153 (establishing federal criminal jurisdiction within Indian country); United States v. Mazurie, 419 U.S. 544 (1975) (holding that federal statute restricting introduction of liquor into Indian country, and tribal ordinance requiring liquor license, applied to non-Indians residing on fee-

[12] Section 6 of the GAA provided that upon the conveyance of a fee patent to an allottee, the allottee "shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside." By its terms, this provision applied only to state jurisdiction over the original allottee and *not* to the heirs or transferee of the allottee. Patents in Fee, 61 Interior Dec. 298, 302-03, 1954 WL 6443 (Feb. 15, 1954). Accordingly, it does not apply to any living person. See County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation, 502 U.S. 251, 272 (1992) (Blackman, J., dissenting) (describing the Section 6 provision as "an obsolete principal clause"). Moreover, the Yakima Court acknowledged that the provision has been superseded by "the many and complex intervening jurisdictional statutes dealing with States' civil and criminal jurisdiction over reservation Indians." 502 U.S. at 262 (quoting Moe, 425 U.S. at 478-79).

simple lands within reservation); Merrion v. Jicarilla Apache Indian Tribe, 455 U.S. 130, 139-42 (1982) (upholding Indian tribal power to impose taxes); Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408, 443 (1989) (opinion of Stevens, J., joined by O'Connor, J.) (concurrence in result by Blackman, Brennan and Marshall, Js.) (upholding power of Indian tribe to enforce tribal zoning ordinance against tribal and tribal member land within reservation and even against non-tribal member fee land where failure to enforce the zoning ordinance would negatively affect the general health and welfare of the tribe).

In sharp contrast to the claims of the Village and Amici, the Ninth Circuit has explicitly rejected the claim that Congress has authorized "plenary state in rem jurisdiction when it made Indian fee lands freely alienable," rejecting a county's attempt to enforce in rem land use regulations on tribal member-owned fee lands within an Indian reservation. Gobin v. Snohomish County, 304 F.3d 909, 914-15 (9th Cir. 2002), cert. denied, 538 U.S. 908. Citing the Gobin holding, the Department of the Interior Board of Indian Appeals held that a county lacked standing to challenge a tribe's land-into-trust application for reservation fee property to be developed into a marina. Skagit County, Wash. v. Northwest Regional Director, BIA, 43 Interior Board of Indian Appeals 62, 72-73, 80 (May 24, 2006), 2006 WL 1743213. Though the county argued that the Bureau of Indian Affairs failed to consider "[j]urisdictional problems and potential conflicts of land use which may arise" as required by 25 C.F.R. § 151.10(f) of the land-into-trust regulations, the Department held that taking the property into trust could not cause land use "jurisdictional problems" with the county because under Gobin the county had *no* regulatory jurisdiction over the fee property.

The Tribe's and federal government's continuing jurisdictional authority over such parcels is limited by just three main restrictions. First, in states to which Public Law 280 applies,

such as Wisconsin, Congress has granted to the state the criminal jurisdiction otherwise exercisable by the federal government within Indian country. Second, the fee-patenting process, by removing the prior federal restrictions upon alienation, permits the imposition of *in rem* state property taxes upon the parcels – at least until the parcel or its owner qualifies for a different federal statutory or treaty exemption. Cass County v. Leech Lake Band of Chippewa Indians, 524 U.S. 103, 112 (1998); Keweenaw Bay Indian Community v. Naftaly, 452 F.3d 514 (6th Cir. 2006) (holding that 1854 Treaty provision guaranteeing that "the Indians shall not be required to remove from the homes hereby set apart for them" precluded state from imposing property taxes upon fee simple parcels owned by Indians within reservation). The Supreme Court has narrowly construed this state taxing authority, strictly limiting it to taxation of land and distinguishing it from general jurisdiction over the parcel or its owner. County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation, 502 U.S. 251, 268 (1992) (refusing to recognize state *in rem* jurisdiction over fee-patented allotments beyond the "taxation of . . . land); Moe, 425 U.S. at 478-79. Third, tribal (though not federal) jurisdiction is generally held in partial abeyance over fee parcels when they are owned by non-Indians. The Supreme Court has held that a tribe generally may not regulate the land or conduct of non-Indians upon non-Indian fee-patented parcels within an Indian reservation See Montana v. United States, 450 U.S. 544, 563-64 (1981). This limitation is itself subject to two exceptions. An Indian tribe retains "inherent sovereign power" to "regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members through commercial dealing, contracts, leases, or other arrangements." Id. at 565. Tribes also retain inherent power "to exercise civil authority over the conduct of non-Indians on fee lands within [their] reservation

when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." Id. at 566.

Contrary to Amici's contentions, the issuance of fee patents pursuant to the GAA or other allotment statutes bears no resemblance to the transfers of reservation land at issue in Sherrill. The New York Oneida transferred their reservation land to the State of New York by means of 25 illegal but purportedly valid "treaties of cession" executed between 1795 and 1846. Sherrill, 544 U.S. at 207. A "treaty of cession" is an agreement to transfer land from one *government* to another *government*. 1 Bouvier's Law Dictionary and Concise Encyclopedia 448-49. Unlike an ordinary sale, a treaty of cession transfers *jurisdiction* as well as ownership from the seller to the purchaser: "[a]s soon as territory is transferred from one power to another the *sovereignty and jurisdiction of the former ceases, and that of the latter attaches*." 2 Charles Henry Butler, The Treaty-Making Power of the United States 190 (1902) (emphasis added). The government that receives the ceded land "acquires the right of governmental control, or of exercising sovereignty, over the ceded territory and the inhabitants thereof, and also title to the public property, government buildings and the public domain, or ungranted lands," subject to any reservations in the treaty. Id. at 154. In sharp contrast to an Allotted Reservation, such as the Tribe's Reservation, the reservation ceded under the New York Oneida treaties was expressly, if illegally, withdrawn from the jurisdiction of the Oneida and placed under the jurisdiction of New York.

Despite the loaded language chosen by the Village and Amici, an Indian tribe's acquisition of non-Indian-owned fee parcels within an Allotted Reservation does not "reestablish" the tribe's "sovereignty" over such land. Such acquisition simply removes an impediment – non-Indian ownership – that held the tribe's existing jurisdiction towards the

parcel in partial abeyance. Because the tribe can assert with respect to such acquired parcels "a landowner's right to occupy and exclude," its regulatory jurisdiction over such parcel is necessarily enhanced. Strate v. A-1 Contractors, 520 U.S. 438, 456 (1997); see also South Dakota v. Bourland, 508 U.S. 679, 691 n.11 (1993) ("Regulatory authority goes hand in hand with the power to exclude."). Without attempting to describe the extent of a tribe's regulatory jurisdiction over reacquired parcels, such authority clearly includes the right to enforce tribal zoning laws with respect to such land – a right which the Wisconsin State Attorney General has expressly acknowledged. Wis. Op. Att'y Gen. 61-82 (Oct. 19, 1982), 1982 WL 188357, at *1 (holding that an Indian tribe has exclusive jurisdiction to zone all Indian fee and trust land and concurrent zoning jurisdiction with local counties over non-Indian fee land "unless it is established that county zoning would infringe on tribal self-government"). With respect to the sole issue in question in this litigation – whether a tribe's acquisition of fee parcels within its reservation excludes operation of the Village's eminent domain authority – the answer is clear. Both Section 16 of the IRA and the INA explicitly prevent the divestiture of tribally owned land absent (1) tribal consent, or (2) an act of Congress.[13]

In short, federal statutes and common law have granted to the Village no general regulatory authority over fee-patented parcels within the Reservation, and they expressly prevent the Village from exercising its eminent domain power towards tribally-owned fee parcels. Because federal law plainly prohibits the Village from condemning the parcels at issue in this case, Amici and the Village cannot, as a matter of law, have "justifiable expectations" to the contrary.

[13] Neither the IRA nor the INA was at issue in Sherrill. The New York Oneida is not an IRA tribe, see Oberly Aff. at ¶ 57, so Section 16 of the IRA could not have applied. And the taxation question before the Sherrill Court did not involve a sale of property or otherwise implicate the INA. The Village's suggestion to the contrary (pp.47-48) makes no sense.

**ii) The Village and Amici cannot have "justifiable expectations" that the Village's regulatory jurisdiction applies to Tribal property within the Reservation because the factual circumstances present in Sherrill differ sharply from those present here.**

The Village and Amici also cannot have "justifiable expectations" with respect to the Village's purported condemnations of the Tribe's property, because the factual circumstances present in Sherrill differ sharply from those present here. The following principal material factual differences between Sherrill and the present case rule out any possibility of applying the equitable doctrines of laches, acquiescence and impossibility:

- Sherrill involved culpable inaction on an ancient land claim (544 U.S. at 216; 217 n.11; 215); there is no such inaction – or claim – at issue here.

- The reservation ceded under the New York Oneida treaties was expressly, if illegally, withdrawn from the jurisdiction of the Oneida and placed under the exclusive jurisdiction and jurisdiction and control of the State of New York (id.); here, the Tribe's Reservation has never been placed under the exclusive jurisdiction and control of the State of Wisconsin and its political subdivisions.

- State and local governments had exercised continuous jurisdiction and control within the New York reservation and thereby acquired a reliance interest in the status quo (544 U.S. at 218-19); here, the Tribe has exercised continuous jurisdiction and control with respect to its own property within the Reservation, with the narrow exception of property taxation (see supra pp. 4-5).

- State and local jurisdiction would have been seriously burdened in Sherrill if tax exemption had been permitted (544 U.S. at 219-20); here, neither the Village, nor any other state or local government authority, had ever before sought to exercise eminent domain authority over Tribal property within the Reservation (see supra p. 12). Indeed, the Village appears to be

basing its supposed long-term justified expectations on the holding of a very recent Supreme Court case applicable to land claims. There were no true justified expectations here, so there can be no disturbance of jurisdictional stability.

- The New York Oneida was the aggressor in seeking to remove property from local tax rolls; here, the Village is the aggressor in seeking to force a condemnation of the Tribe's Reservation property.

- The New York Oneida had largely disappeared from the tribe's "ancient" New York reservation; here, the Tribe and its members had a continuous and significant presence within the Reservation. Indeed, by the early 1990s, over two-thirds of the Oneida people resided in Wisconsin, fewer than one-third of the Oneida people were in Ontario, and fewer than 5% of the Oneida people remained in New York. See Barry M. Pritzker, A Native American Encyclopedia: History, Culture and Peoples 443 (2000)(as of the early 1990s there were 11,000 Oneida in Wisconsin, 4,600 in Ontario, and about 700 in New York.

### C. The impossibility doctrine has no application to jurisdictional issues within an Allotted Reservation like that of the Tribe.

Amici argues that the Tribe's jurisdiction over the fee parcels at issue here should be barred by the "Sherrill impossibility doctrine" because permitting tribal jurisdiction over fee parcels would cause "social upheaval," "negative economic impacts," and "widespread disruption" by creating a "checkerboard of alternating state and tribal jurisdiction." Amici Br. 9-10 (quoting Sherrill, 544 U.S. at 219, and Oneida Indian Nation, 199 F.R.D. at 92). Amici's arguments seriously misrepresent both the requirements for applying the Sherrill impossibility doctrine and the jurisdictional status of lands within an Allotted Reservation under governing federal law.

First, Sherrill and each of the decisions it relied upon require a long-dormant claim as a condition for applying the "impossibility" doctrine. 544 U.S. at 219-20.[14] Counsel for Amici admitted as much in his brief in Sherrill, describing the impossibility doctrine as "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 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." Brief of Amici Curiae Town of Lenox, Town of Stockbridge, and Town of Southampton at 18-19, 2004 WL 1835370, Sherrill, 544 U.S. 197 (2005) (No.03-855) (quoting Yankton Sioux). Each of the cases cited by Amici that applied an "impossibility" type doctrine, moreover, also involved one or more ancient and long-dormant claims.[15] Because the Tribe's lawsuit does not rest on a long dormant claim, the impossibility doctrine simply doesn't apply.

Second, contrary to Amici's suggestion, the Tribe's purchase of fee land within its Reservation does not *create* "checkerboard" jurisdiction within the Reservation. An Allotted Reservation like the Reservation is *already* subject to "checkerboard" or concurrent jurisdiction. Concurrent authority is the legacy, not of tribal land purchases, but of the allotment and fee patenting process itself, which "open[ed] the way for non-Indian settlers to own land on the

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[14] In describing and defining the "impossibility" doctrine, Sherrill relied on the following cases: (1) Yankton Sioux Tribe v. United States, 272 U.S. 351 (1926) (involving claim to land that accrued 30 years before lawsuit); (2) Oneida Indian Nation of N.Y. v. County of Oneida, 199 F.R.D. 61, 92 (N.D.N.Y. 2000) (involving claim to land that accrued nearly 200 years before lawsuit); and (3) Felix v. Patrick, 145 U.S. 317 (1892) (involving claim to land that accrued nearly 30 years before lawsuit).

[15] See Amici Br. 9 n.7, which cites United States v. Creek Nation, 295 U.S. 103 (1935) (20 year old claims); United States v. Minnesota, 270 U.S. 181 (1926) (50-year old claims); Confederated Salish & Kootenai Tribes v. United States, 401 F.2d 785 (Ct. Cl. 1968) (60-year old claims).

reservation in a manner which the federal government, acting as guardian and trustee for the Indians, regarded as beneficial to the developments of its wards." Seymour, 368 U.S. at 356. As noted above, within an Allotted Reservation, the state generally may only exercise jurisdiction over non-Indian land and activities, and property tax jurisdiction over fee simple parcels patented under a federal statute and not otherwise rendered immune by another federal statute or treaty. The Supreme Court has recognized that "checkerboard jurisdiction is not novel in Indian law," Washington v. Confederated Bands and Tribes of the Yakima Indian Nation, 439 U.S. 463, 502 (1979), and has expressly *required* concurrent jurisdiction with respect to certain powers. See, e.g., Yakima, 502 U.S. at 264-65 (state property tax authority); Montana, 450 U.S. at 563-67 (state jurisdiction over non-Indians within a reservation); see also Yakima, 502 U.S. at 265 (describing the Brendale plurality opinion as "affirming 'checkerboard' with respect to zoning power over reservation fee land"). Because concurrent jurisdiction is the federally sanctioned norm within Allotted Reservations, enforcement of this norm will hardly cause "social upheaval" or "widespread disruption."

Third, federal law – not the Tribe's say-so – enhances the Tribe's jurisdictional authority over fee parcels that it purchases within the Reservation. Jurisdiction over land within an Allotted Reservation inherently turns on the Indian or non-Indian status of the owner. See, e.g., Atkinson Trading Co., Inc. v. Shirley, 532 U.S. 645, 651-52 (2001) (tribal taxing jurisdiction depends on status of landowner within reservation as Indian or non-Indian). The Wisconsin Attorney General has repeatedly confirmed that the enforcement of state jurisdiction within Indian reservations is "affected by the status of the land tenure where enforcement is sought and the identity of the person or entity being regulated." Wis. Op. Att'y Gen. 17-83 (May 6, 1983), 1983 WL 180867, at *2 (state precluded from monitoring groundwater on Indian trust and fee

lands, but not on nonmember fee lands); Wis. Op. Att'y Gen. 61-82, 1982 WL 188357, at *1 (tribe has sole zoning jurisdiction over all Indian trust and fee lands within reservation and concurrent zoning jurisdiction with counties over nonmember lands). When a non-Indian owned fee parcel within the Reservation is sold to the Tribe or a tribal member, the Tribe's jurisdiction toward the parcel is necessarily enhanced and that of the Village decreases. But the contrary is also true: if a tribal member sells fee land within the Reservation to a non-Indian, the Tribe's jurisdiction towards the parcel declines and that of the Village increases. These shifts in regulatory jurisdiction occur automatically as a matter of federal law, not because the Tribe is attempting to "redraw jurisdictional boundaries." Moreover, contrary to Amici's black-and-white claims, neither tribal nor state jurisdiction within an Allotted Reservation is ever exclusive. Indeed, tribes can exercise jurisdiction over the land and conduct of *non*-Indians within the reservation when such conduct has a "direct effect on the political integrity, the economic security, or the health or welfare of the tribe." Montana, 450 U.S. at 566. Similarly, for example, the state retains jurisdiction over crimes solely involving non-Indians even if such crimes take place on tribal or tribal member land. Draper v. United States, 164 U.S. 240 (1896).

For the above reasons, Amici's reliance on Georgia v. City of Chattanooga, 264 U.S. 472 (1924), and other eminent domain cases involving states and foreign governments is completely misplaced. In sharp contrast to Georgia, which acquired commercial railroad property in Tennessee, the Tribe acquired the parcels at issue within its own jurisdictional Reservation. As noted above, the "rules" governing jurisdiction within the Reservation consist primarily of federal and tribal laws, and only secondarily of state laws. These rules automatically increase the Tribe's jurisdiction over reservation property that it acquires because it holds "a landowner's right to occupy and exclude" with respect to the parcel. See Strate, 520 U.S. at 456. Because the

Tribe obtained the parcels within the Reservation, moreover, the Tribe cannot, unlike Georgia, 264 U.S. at 482-83, be deemed to have consented to a judicial condemnation procedure in violation of its sovereign immunity. In any case, the Village's eminent domain power is plainly disabled with respect to the Tribe's property by Section 16 of the IRA and the Indian Nonintercourse Act.

## II. ALTERNATIVELY, THE APPLICABILITY OF THE EQUITABLE DOCTRINES OF LACHES, ACQUIESCENCE, AND IMPOSSIBILITY TURNS ON FACT ISSUES THAT WARRANT FURTHER DISCOVERY AND A TRIAL.

Even if City of Sherrill could possibly apply in this case – and as shown above, it cannot – the laches, acquiescence and impossibility doctrines at the heart of the Village's argument are fact-based equitable defenses that would necessitate a trial in any event.[16] The Seventh Circuit has held that "[l]aches is an equitable doctrine, 'not fixed by any unyielding measure, but *to be determined in each case under its factual situation . . . .*'" Advanced Hydraulics, Inc. v. Otis Elevator Co., 525 F.2d 477 (7th Cir. 1975) (emphasis added) (citing and quoting Boris v. Hamilton Mfg. Co., 253 F.2d 526, 529 (7th Cir. 1956)), cert. denied, 423 U.S. 869 (1975). The Seventh Circuit expressly avoids generalized inquiries into laches and estoppel and prefers a case-by-case inquiry: "While there is broad language in those cases which arguably could be applied in the estoppel context, *it is better to limit such decisions to the facts presented in each case*." Naxon Telesign Corp. v. Bunker Ramo Corp., 686 F.2d 1258, 1264 (7th Cir. 1982) (emphasis added) (citing and quoting Studiengesellschaft Kohle mbH v. Eastman Kodak Co., 616 F.2d 1315 (5th Cir. 1980)). "[L]aches and estoppel are equitable defenses, the

[16] A party does not, by moving for summary judgment, surrender its right to a trial if the court determines that the party is not entitled to judgment as a matter of law. Hunger v. Leininger, 15 F.3d 664, 669 (7th Cir. 1994). Even if both parties file cross-motions for summary judgment, a court must ascertain whether genuine issues of material fact exist to determine whether summary judgment is appropriate. Dawson v. County of Westchester, 373 F.3d 265, 272 (2d Cir. 2004).

appropriateness of which must be determined in each case under its particular factual situation." Id. The Eastern District of Wisconsin has adopted this fact-based inquiry, stating that "[p]recisely what constitutes an unreasonable or inexcusable delay for purposes of the laches doctrine varies with the facts and circumstances of each case." Knox v. Milwaukee County Bd. of Elections Comm'rs, 581 F.Supp. 399, 402-03 (E.D. Wis. 1984).

Several courts have declined to rule against tribes in the preliminary stages of litigation in cases involving long dormant claims impacted by the Sherrill decision. In these cases, the courts held that their assessment of the applicability of equitable defenses and appropriate remedies would require factual inquiries better suited for later stages of litigation. In New York v. Shinnecock Indian Nation, the Eastern District of New York denied the cross-motions for summary judgment, emphasizing the potential factual differences between Sherrill and the case at bar, including

> the extent of the impact of the "disruptive" claims, the nature of the Indians' present titles and possibly the length of the delay and the question of laches and appropriate remedies. *These are factual and legal determinations which may only be resolved at a trial*.

400 F.Supp.2d 486, 496 (E.D.N.Y. 2005) (internal footnotes omitted) (emphasis added); see also Paiute-Shoshone Indians, 2007 WL 521403 at *11 (favorably citing and quoting New York v. Shinnecock Indian Nation for the principle "that the question of whether a particular set of facts presents a 'disruptive' claim barred by Sherrill involves 'factual and legal determinations which may only be resolved at trial.'"); Ottawa Tribe of Okla., 447 F. Supp. 2d at 844-45 (N.D. Ohio 2006) (denying a motion to dismiss brought on the basis of laches in a hunting and fishing treaty rights case where the court concluded that the record not fully developed). In light of the factual nature of the defenses raised by the Village, the considerable factual issues presented by the Tribe and the Tribe's objections to the Village's Proposed Findings of Fact, see Plaintiff's Response to Defendant's Proposed Findings of Fact and Plaintiff's Proposed Findings of Fact

filed herewith, and the fact that only limited discovery and no exchange of expert reports have taken place to date, the Court should not grant summary judgment in favor of the Village.

## III. THE VILLAGE'S REMAINING ARGUMENTS WITH RESPECT TO SUMMARY JUDGMENT ARE WITHOUT MERIT.

Apart from its arguments based on Sherrill, the Village's seeks summary judgment dismissing the Tribe's Complaint largely on the basis of the three Allotment Acts (GAA, Burke Act and Oneida Provisions), as well as 25 U.S.C. § 357, and 25 U.S.C. § 465. None of these statutes permits the Village's condemnations of the Tribe's Reservation property or warrants dismissal of any of the Tribe's claims.

The Tribe has demonstrated in its Reply Brief filed herewith that the statutes relied on by the Village do nothing to alter the explicit prohibitions of the IRA and the INA against sales of Tribal land without the consent of the Tribe or Congress. Accordingly, summary judgment must be awarded to the Tribe on Counts I, IV, and VI of its Complaint.

The Tribe's remaining federal common law counts in its Complaint, relating to balancing of interests (Count II)[17] and sovereignty infringement (Counts III and V)[18] , which the Court need not even reach if it grants summary judgment to the Tribe, are not ripe for summary judgment in any case. While the Village correctly observes that the federal common law doctrines embodied in these claims can be overridden by congressional statutes, there is no basis to construe the statutes relied on by the Village to permit condemnation of Tribal property, as

[17] The issue presented by Count II is whether the Federal and Tribal interests against condemnation by the Village of the Tribe's Reservation property outweigh any legitimate interest of the Village in the condemnation.

[18] The issues presented by Counts III and V are whether condemnation by the Village of the Tribe's Reservation property infringes on the Tribe's right of tribal self-government, violates the Tribe's inherent sovereign right to make its own laws and be ruled by them, or violates the sovereign immunity enjoyed by the Tribe.

demonstrated in the Reply Brief. Resolution of the claims based on the federal common law doctrines will turn on issues that warrant further factual development and discovery and, potentially, a trial. Indeed, the Village concedes that if the statutes do not expressly authorize the condemnation of tribal property, then "the questions associated with the balancing of relative interests between the Tribe and the Village" will require a trial. Village Brief at 38 n.84. Similar balancing must occur in addressing the sovereignty infringement claims as well, also requiring a trial.

The Village's remaining arguments for summary judgment are all premised on establishing that state law governs the condemnation question. If federal law applies and precludes condemnation of the Tribe's Reservation land, however, whether under Counts I and IV which are the subject of the Tribe's summary judgment motion, or under Counts II, III, and V, which will require further factual development, discovery and, potentially, a trial, the Village's remaining arguments based on state law must fail. Accordingly, it would be premature for the Court to address those arguments at this stage of the case.

## CONCLUSION

For the reasons set forth above, this Court should deny the Village's motion for summary judgment.

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Respectfully submitted,

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