UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

ONEIDA TRIBE OF INDIANS OF WISCONSIN,

Plaintiff,

v. Civil File No. 06-C-1302

VILLAGE OF HOBART, WISCONSIN,

Defendant.

VILLAGE OF HOBART'S COMBINED BRIEF IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT AND RESPONSE BRIEF IN OPPOSITION TO THE TRIBE'S MOTION FOR SUMMARY JUDGMENT

The Defendant, Village of Hobart (Village), by its attorneys, Anderson & Kent, S.C., hereby submits the within combined brief in support of its motion for summary judgment and response brief in opposition to the Tribe's motion for summary judgment.

INTRODUCTION

For nearly 100 years, the majority of land within the Village of Hobart (Village) has been owned in fee by non-Indians and subject to state and local laws, including regulation and taxation. Recently, the Oneida Tribe of Indians of Wisconsin (Tribe) has begun to repurchase massive amounts of land within the Village and assert that such purchases remove the land from state and local laws merely because the land is within the original Oneida Reservation established by treaty in 1838. This change in land ownership is dramatically demonstrated in the sequence of maps attached as Appendices to this brief.

The specific facts that gave rise to this action involve two separate parcels of land:

the O'Hare Boulevard parcels in the southeast corner of the Village, and the Forest Road parcels in the north central part of the Village. While important in their own right, the underlying dispute transcends the specifics of these two properties.

The fundamental question before the Court is a legal question: does tribal reservation land allotted to individual Indians and sold in fee to third parties nearly a hundred years ago reacquire sovereign status merely by tribal repurchase? The Village maintains that under federal law the answer to this question is no. Congress made it unmistakably clear through the Allotment Acts that once tribal land was allotted and sold in fee simple, all restrictions on taxation, encumbrance and alienation were removed. As a result, such land is subject to state and local taxation and regulation. This remains so, even if a tribe repurchases allotted land within the boundaries of an Indian reservation.

Under federal law, the only way to remove such land from state and local regulation and taxation is to place the land into trust under the provisions of 25 U.S.C. § 465 and the associated regulations under 25 C.F.R. Part 151. This is precisely the holding of the United States Supreme Court in *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 221 (2005), "[the trust process] provides the proper avenue . . . to reestablish sovereign authority over territory." Until that happens, tribal fee land is subject to local regulation.

The Tribe would like to end run the trust process. They want to convert federal laws designed to protect tribal lands from the historic predatory practices of others (such as the Indian Nonintercourse Act), into laws granting the Tribe unfettered discretion to remove newly acquired lands from the jurisdiction of local governments. One need only look at the maps in the Appendix to see the fundamental problems the Village would

have if it lost jurisdiction over all newly acquired tribal fee lands without any trust process review. The Tribe's sweeping assertion that, "Village laws or ordinances or Wisconsin statutes or common law . . . [are] invalid as to the Tribe and the land within its Reservation" is simply not supported by federal law and must be rejected. Summary judgment should be granted to the Village.

FACTS

There are two sets of facts which are relevant in this case, the material portions of which are undisputed. The first set of facts relates to the history of land holdings under federal law and the exercise of jurisdiction within the Oneida Reservation. The second set of facts is less critical and relates to the specific parcels that provide the concrete illustrations of the jurisdictional dispute that is before the Court.

I. THE HISTORY OF THE ONEIDA RESERVATION AND THE VILLAGE OF HOBART.

The facts in this case arise in the context of evolving federal Indian law. In *Worcester v. Georgia*, 31 U.S. 515 (1832), Justice Marshall articulated a framework that guides federal Indian law to today. While tribes possess certain aspects of sovereignty, such sovereignty is subject to regulation by the United States Congress. *See id.* at 561. Over the years, Congressional policy has not been consistent in its treatment of Indian nations. Most commentators recognize at least three critical eras of federal Indian law policy: (1) the treaty era: 1789-1871; (2) the allotment and assimilation era: 1871-1934; and (3) the reorganization era: 1934 to present.[1] The history of the land and jurisdiction within the Oneida Reservation and the Village of Hobart follows this evolution.

[1] *See* American Indian Law Deskbook, Conference of Western Attorneys General, University Press of Colorado 1993 at 1-27; and Cohen's Handbook of Federal Indian Law, Matthew Bender (2005 Ed.) at 10.

A. The Oneida Treaty Of 1838.

The Oneida Indians were one of the Six Iroquois Indian Nations in New York.[2] By the early 1800s, there was increasing pressure from the state of New York to move the Oneida west. In 1822-23, a small group of Oneidas known as the First Christian Party settled around the Fox River near Green Bay on land held by the Menomonee Indians.[3] A second group of Oneidas known as the Orchard Party settled in this area in 1830.[4] In 1831 and 1832, the Oneidas were parties to treaties with the Menomonees to obtain cessions of land from the Menomonees.[5]

In 1838, the Oneida ceded their claims under the Menomonee Treaties in exchange for a reservation area that consisted of 100 acres for each of the adult Oneida Indians residing in the vicinity of Green Bay. *See* 7 Stat. 566. This Treaty provided in part as follows:

> ARTICLE 1.
>
> The First Christian and Orchard parties of Indians cede to the United States all their title and interest in the land set apart for them in the 1st article of the treaty with the Menomonies of February 8th, 1831, and the 2d article of the treaty with the same tribe of October 27th, 1832.
>
> ARTICLE 2.
>
> From the foregoing cession there shall be reserved to the said Indians to be held as other Indian lands are held a tract of land containing one hundred (100) acres, for each individual, and the lines of which shall be so run as to include all their settlements and improvements in the vicinity of Green Bay.

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[2] *See* J. Campisi and L. Hauptman, The Oneida Experience: Two Perspectives, Syracuse Press 1988 at 65 ("Campisi") and L. Hauptman and L Mc Lester III, The Oneida Indian Journey: From New York to Wisconsin 1784-1860, University of Wisconsin Press 1999; Village Proposed Findings of Fact ¶4 ("Village Prop.F").
[3] Campisi at 67; Village Prop.F.¶5.
[4] *Id.*
[5] Treaty with the Menominees February 8, 1831, 7 Stat. 342; Treaty with the Menominees October 27, 1832, 7 Stat. 405; Village Prop.F. ¶6.

The Oneida population at that time was 654 resulting in a reservation area of approximately 65,400 acres.[6] A map of the reservation area is attached as Appendix A.

B. The Allotment Era: 1871-1934.

The Treaty period came to an end in 1871 when Congress decided to govern Indian affairs through Congressional enactment. *See*, 25 USC §71. In 1887, Congress enacted the General Allotment Act, 25 U.S.C. § 331, 24 Stat. 388, also known as the Dawes Act. This Act marked a major shift in federal Indian policy. The purpose of the Dawes Act was the eventual assimilation of the United States Indian population into the general population and the gradual elimination of Indian reservations.[7]

Pursuant to the Dawes Act, the President was authorized to select Indian reservations for the allotment of land in severalty to the Indians residing on those reservations. The Act further provided that the United States would hold all allotments in trust for 25 years and at the conclusion of the trust period, an allottee would receive a patent in fee simple. Section 5 of the Dawes Act provided in part as follows:

> SEC. 5. That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and **that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever**: (Emphasis added).

The allotment process began on the Oneida Reservation in 1889.[8] By 1891, the final schedule of allotments was made and no surplus land remained.[9]

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[6] Campisi at 69, 83; Village Prop.F. ¶8.
[7] Campisi at 83-84; *Yakima v. Confederated Tribes*, 502 U.S. 251, 253-54 (1992).
[8] Campisi at 85 (citing the Annual Report of the Commissioner of Indian Affairs 1889); Village Prop.F. ¶10.

In 1906, the United States amended Section 6 of the Dawes Act by the Burke Act, 25 U.S.C. § 349, 34 Stat. 182. This Act authorized the Secretary of the Interior to immediately issue fee simple patents to competent Indian Allottees. The Burke Act also provided that once the trust period expired, all restrictions on sale, encumbrance and taxation were removed. The Burke Act provided in part:

> That the Secretary of the Interior may, in his discretion, and he is hereby authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be **issued to such allottee a patent in fee simple**, **and thereafter all restrictions as to sale, encumbrance, or taxation of said land shall be removed** and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent: (Emphasis added).

As part of the same 59th Congressional Session in 1906, Congress enacted a specific provision authorizing issuance of fee patents to allotted lands in the Oneida Reservation (hereinafter "Oneida Provisions") 34 Stat. 325 ch. 3504. This enactment again noted that upon the issuance of a patent, all restrictions as to the sale, taxation and alienation of the lands would be removed. This section provided as follows:

> That the Secretary of the Interior be and he is hereby authorized in his discretion to issue a patent in fee to any Indian of the Oneida Reservation in Wisconsin for the land heretofore allotted him, **and the issuance of such patent shall operate as a removal of all restrictions as to the sale, taxation and alienation of the lands so patented**. (Emphasis added).

Concurrent with the federal allotment process, the Wisconsin Legislature created two new towns within the Oneida reservation on May 20, 1903, the Town of Hobart and the Town of Oneida. 1903 Wis. Laws ch. 339. The Town of Hobart's first recorded meeting was in April 1908.[10] The geographical area subject to the Town of Hobart's jurisdiction was defined as "all that part of the territory embraced within Oneida reservation situated in Brown county." *Id.* Approximately 26,600 acres or 40% of the

[9] *Id.* (citing the Annual Report of the Commissioner of Indian Affairs 1891); Village Prop.F. ¶10.
[10] Helfenberger Aff. ¶6, Ex. B (Minutes of April 1908); Village Prop.F. ¶13.

reservation area was in the Town of Hobart, and the balance was in the Town of Oneida in Outagamie County.[11] (Over subsequent years approximately 5000 acres of Hobart has been annexed into the neighboring municipalities of Green Bay, Ashwaubenon and Howard.)[12]

The end of the 25-year trust period for allotments expired in 1917 and according to the tribal website, "the vast majority of the allotments had already passed out of Oneida Indian hands to non-Indians by that time."[13] By the mid-1920s, only a few hundred acres of the Oneida Reservation remained in Indian hands.[14]

C. Reorganization: 1934 to Present.

In 1934, Congress changed direction in federal policy towards Indian tribes again when it passed the Indian Reorganization Act of 1934 (IRA), 25 U.S.C. §§ 450 *et seq.* The purpose of the IRA was to stop the loss of Indian lands through the allotment process and re-establish tribal governments and land holdings. Among other things, the IRA terminated the further allotment of reservation lands, extended unexpired trust periods on allotted lands and provided that the Secretary of the Interior could acquire lands to be placed into trust status in which case they would be exempt from state and local taxation.

However, Congress made no attempt to impose restrictions on land sold to non-Indians under the Dawes Act years.[15] Those provisions read in part as follows:

> **Sec. 1**. That hereafter no land of any Indian reservation, created or set apart by treaty or agreement with the Indians, Act of Congress, Executive order, purchase, or otherwise, shall be allotted in severalty to any Indian.

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[11] *See* tribal website, http://land.oneidanation.org/maps/. The general tribal site is www.Oneidanation.org; Village Prop.F. ¶15.
[12] *Id; see also* Helfenberger Aff. ¶4; Village Prop.F. ¶15.
[13] Helfenberger Aff. ¶27, Ex. L (http://land.oneidanation.org/history/; Village Prop.F. ¶16).
[14] Campisi at 85; Village Prop.F. ¶17.
[15] *Yakima*, 502 U.S. at 225.

> **Sec. 3.** The Secretary of the Interior, if he shall find it to be in the public interest, is hereby authorized to restore to tribal ownership the remaining surplus lands of any Indian reservation heretofore opened, or authorized to be opened, to sale, or any other form of disposal by Presidential proclamation, or by any of the public land laws of the United States; Provided, however, **That valid rights or claims of any persons to any lands so withdrawn existing on the date of the withdrawal shall not be affected by this Act**: …
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> **Sec. 5.** The Secretary of the Interior is hereby authorized, in his discretion, to acquire through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments whether the allottee be living or deceased, for the purpose of providing lands for Indians.… Title to any lands or rights acquired pursuant to this Act shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, **and such lands or rights shall be exempt from State and local taxation**. (Emphasis added).

Pursuant to the IRA, the Oneida IRA Charter was approved in 1936.[16] However, by this time, most of the tribal land and tribal population along with political control of the Oneida area had been lost.[17] The land holdings of the Tribe and tribal members that had dwindled to a few hundred acres, less than 0.1% of the original reservation. Tribal land holdings remained a small percentage of the land within the Village of Hobart throughout most of the 1900s. Village assessment records from 1950 show 755.5 acres of trust land and no tribal fee lands within Hobart; approximately 3.1% of Hobart's total area at the time.[18] As recently as 1990, trust land and tribal fee land in Hobart was 1,367.3 acres or 6.5% of its total area.[19]

As tribal members lost their land to non-Indians, the population of the reservation area became predominantly non-Indian. In 1887, before allotment took effect, there were 1,732 tribal members living on the reservation.[20] Shortly thereafter, the 1890 United

[16] Hughes Aff. ¶3; Village Prop.F. ¶18.
[17] Campisi at 78.
[18] Helfenberger Aff. ¶5; Smith Aff. ¶4, Ex. A; Village Prop.F. ¶19.
[19] Helfenberger Aff. ¶5; Smith Aff. ¶4, Ex. B; Village Prop.F. ¶20.
[20] Campisi at 77 (citing the Annual Report of the Commissioner of Indian Affairs 1887); Village Prop.F. ¶21.

States Census data for shows a total reservation population of 1,646, of which 723 were in Brown County, in what would become the Town of Hobart.[21] While census data by ethnicity for Hobart is not readily available for much of the 1900s, recent census data summarized below continues to show the effects of the Tribe's loss of land on population.[22]

United States Census Data for Hobart

Year	Native American	All Other	Total	Percent Native American
1980*	579	4401	4980	11.6%
2000	848	4165	5013	16.9%

* Census tract includes Town of Lawrence.

In recent years, the Tribe has begun what it has characterized as an aggressive land acquisition program to repurchase the original reservation area. Its interim goal is to reacquire 51% of the reservation by 2020.[23] The Tribe has specifically sought to slow down development in the Village and has noted that "strategic purchases in Hobart are essential to making this strategy succeed."[24] In fact, Village assessment records show that these land acquisition efforts have been dramatic. Land ownership patterns are summarized on the table below and shown on the maps. Appendices 3-5.[25]

[21] Smith Aff. ¶5; 1890 Census Data is available at http://www2.census.gov/prod2/decennial/documents/33405927v1ch07.pdf; Village Prop.F. ¶22.
[22] Smith Aff. ¶5, Ex. D; Village Prop.F. ¶23.
[23] Helfenberger Aff. ¶27, Ex. L (*see* tribal website at http://land.oneidanation.org/history/); Village Prop.F. ¶24. *See also* J. Hill-Kelley, "Restoring the Reservation, Sustaining Oneida," 22 Natural Resources & Environment 21, (ABA Winter 2007).
[24] Helfenberger Aff. ¶27, Ex. L. (*see* tribal website at http://land.oneidanation.org/maps/hobart.html); Village Prop.F. ¶25.
[25] Smith Aff. ¶4, Exs. A, B, and C; Village Prop.F. ¶26.

Tribal Land Holdings In Hobart (In acres)

Year	Trust Land	Tribal Fee Land	Total Land in Hobart	Percentage of Trust and Tribal Land
1950	755.5	0.0	24,370.7	3.1%
1990	734.9	632.4	21,250	6.5%
2007	1033.87	5770.1	21,195	32.1%

D. History Of The Village Of Hobart 1903 to Present.

The history of the Village of Hobart, spans the last two eras of federal Indian law. As noted above, the Town of Hobart was created by the Wisconsin Legislature on May 20, 1903, during the height of the allotment era. It now continues to operate in a post-allotment era environment. Hobart became a Village on May 13, 2002.

Under Wisconsin law, towns are general purpose local governments with taxing authority that operate in unincorporated areas of the state that derive their powers from the state statutes. Such powers include those, but are not limited to those in Wis. Stat. chs. 60 and 66. Its enabling legislation, 1903 Wis. Laws ch. 339 specifically created Hobart, "with all the rights, powers and privileges conferred upon and granted to other towns."

From its initial town meeting on April 30, 1908 until today, the Town functioned continuously as a local government. At its initial meeting, the Town employed staff including a clerk and a tax assessor, elected a constable and justice of the peace.[26] One of the Town's central functions was the dedication, laying out and maintenance of town roads and bridges. As early as April 1910, the Town authorized the maintaining of

[26] Helfenberger Aff. ¶6, Ex. B (Minutes from April 30, 1908); Village Prop.F. ¶29.

highways and appropriation of the sum of $1,106 for building a bridge across Duck Creek.[27] Road development and maintenance continues to be a central function of the Village.[28]

In addition to roads, the Town provided for certain basic public services common to town governments. It provided for "poor relief" on a regular basis until such functions were assumed by county and state agencies,[29] it provided for a Board of Health and hired a Town Physician,[30] and it provided fire protection services.[31] Post World War II development saw increasing development pressures and the Town developed its own zoning ordinance in 1954. Comprehensive amendments to the zoning ordinances and other ordinances have been periodically undertaken.[32] From the 1970s forward, land use and zoning matters were on most town and village agendas and remain so today.[33]

Today, the Village continues to exercise its jurisdiction and provides a range of services throughout its territory. Specific examples of services provided pursuant to its jurisdiction to its residents are as follows:[34]

- The Village maintains a functioning government that meets regularly consisting of an elected board in addition to committees and commissions. The Village employs 16 paid staff.

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[27] Helfenberger Aff. ¶6, Ex. B; Village Prop.F. ¶30.
[28] Helfenberger Aff. ¶6, Ex. B (Subsequent Town meetings regularly included agenda items relating to roads and bridges including, where necessary, condemnation. *See*, *e.g.,* Minutes from, April 1, 1913, June 18, 1922; and November 24, 1939. By the 1980s, roads for new areas were often dedicated as part of local zoning, plat or subdivision approvals rather than by condemnation, *see*, *e.g.,* Minutes September 11, 1989, but condemnation was also used where necessary. S*ee*, *e.g.*, Minutes April 12, 1993. Road development and maintenance continues to be a regular agenda item. *See*, *e.g.,* Minutes July 19, 2007.); Village Prop.F. ¶¶30-31.
[29] Helfenberger Aff. ¶6, Ex. B (s*ee*, *e.g.*, Minutes from, January 23, 1923; May 6, 1935; and April 11, 1949); Village Prop.F. ¶32.
[30] Helfenberger Aff. ¶6, Ex. B (s*ee*, Minutes May 5, 1931, December 18, 1934); Village Prop.F. ¶33.
[31] *Id.* (*See e.g.* Minutes May 3, 1948).
[32] Helfenberger Aff. ¶6, Ex. B (s*ee*, *e.g.,* Minutes September 8, 1975; June 10, 1991; and May 21, 2002); Village Prop.F. ¶34.
[33] Helfenberger Aff. ¶6, Ex. B (*see*, *e.g.,* Minutes July 10, 2007); Village Prop.F. ¶35.
[34] Helfenberger Aff. ¶7; Village Prop.F. ¶36.

- The Village's 2007 Budget was $2,416,854.51.
- The Village has a comprehensive code of ordinances for the Village enforced through its municipal court.
- The Village owns and maintains approximately 81 miles of roads throughout the Village.
- The Village has a Utility District that includes sewer services to significant portions of the Village. Currently the Village contracts to provide refuse and recycling pick up services for its residents throughout the Village.
- The Village maintains approximately 33 miles of water mains that provides water service to approximately 977 households in the Village.
- The Village has approximately 46 acres of park land.
- The Village maintains a volunteer fire department and has a full time police force which currently consists of 4 full time equivalent employees.

The Village has raised funds through taxation on all non-exempt lands including tribal fee lands. The Tribe has conceded that it pays property taxes on fee lands and Village records show that it has historically paid property taxes on such lands.[35]

II. FACTS ASSOCIATED WITH O'HARE BOULEVARD AND FOREST ROAD.

Disputes relating to Village jurisdiction over tribal fee land has arisen out of two specific and separate situations. Both of these parcels involve lands that were allotted, sold in fee to non-Indians in the early 1900s and were only recently reacquired by the Tribe.[36] A map showing the location of those parcels in the Village is attached as Appendix 2. Detailed maps of those areas are attached to the Tribe's Complaint. The material facts are not in dispute.

[35] Kocken Aff. ¶¶ 3-5, Ex. B; Village Prop.F. ¶37; *see also* http://land.oneidanation.org/faq/faq.shtml.
[36] Woodward Aff. ¶¶4-5; Hughes Aff. ¶7; Village Prop.F. ¶38.

A. O'Hare Boulevard And The Southeast Industrial Park.

The Southeast Industrial Park parcels involve lands that were allotted to individual Oneida Indians who received patents from the United States between 1892 and 1915.[37] These lands were subsequently sold in fee to third parties between 1907 and 1922.[38] Those lands were reacquired by the Tribe in 2000 and 2001.[39] Until 2000, none of the O'Hare Boulevard parcels were held by the United States in trust or held by the Oneida Tribe of Indians. Woodward Aff. ¶5.

The Southeast Industrial Park was the subject of long-term land use planning dating back to 1974 when Hobart identified land in the southeast portion of its community as suitable for industrial park purposes.[40] Actions to implement that plan began in earnest in 1995.[41] To encourage commercial development of this area, from 1997 to 1999, Hobart authorized the expenditure of approximately $5.0 million to provide sewer, water, gas, roads and other improvements into this area eventually comprising approximately 490 acres.[42]

As part of this development, the Village authorized the construction of an extension of O' Hare Boulevard to serve as the main east-west thoroughfare through the Southeast Industrial Park site. The Village authorized bonds for this project on May 15, 2001 which were issued on or about June 1, 2001.[43] On June 5, 2001, pursuant to the provisions in Wis. Stat. ch. 80, Hobart provided a notice of public hearing for the purpose

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[37] Woodward Aff. ¶4; Village Prop.F. ¶38.
[38] *Id.*
[39] Woodward Aff. ¶¶4-5; Hughes Aff. ¶7; Village Prop.F. ¶38.
[40] Helfenberger Aff. ¶9, Ex. D (Excerpt from 1974 land use plan); Village Prop.F. ¶40.
[41] Helfenberger Aff. ¶10, Ex. E; Village Prop.F. ¶41.
[42] Helfenberger Aff. ¶11, Ex. F (summary chart of contracts); Village Prop.F. ¶42.
[43] Helfenberger Aff. ¶12, Ex. G; Village Prop.F. ¶44.

of condemning land and making special assessments for this roadway.[44] The Board met on June 26, 2001 and adopted an order laying out a town highway, awarding damages for the right-of-way acquisition and establishing a resolution for the levying of special assessments.[45]

While this area was being developed, the Tribe began buying up parcels within the Industrial Park. In 2000, the Tribe purchased approximately 98.4 acres.[46] On June 26, 2001, literally hours before the announced Board meeting to approve the special assessments for O'Hare Boulevard, the Tribe purchased 273.5 acres of land in the Southeast Industrial Park.[47] This purchase involved the lands over which O'Hare Boulevard was scheduled to be laid.[48] Together, these purchases resulted in the Tribe's acquisition of 371.9 acres of the 490-acre industrial park – more than 75% of the total area.[49]

The Village sent special assessments and an award of damages to the owners of land including the Tribe by certified mail.[50] The Village followed up with the Tribe in July 2002, and in response, on August 1, 2002, Loretta R. Webster, Land Management Attorney, wrote a letter that stated in part: "The process you followed for land owned by a private citizen, WI. Stats. § 80.05, does not apply to land owned by a tribal government."[51] The Tribe also objected to any placement of any special assessments on

[44] Helfenberger Aff. ¶13, Ex. H (Minutes June 8, 2001); Village Prop.F. ¶45.
[45] *Id.*
[46] Hughes Aff. ¶7; Village Prop.F. ¶47.
[47] Helfenberger Aff. ¶14; Hughes Aff ¶7; Village Prop.F. ¶46.
[48] Helfenberger Aff. ¶14; Village Prop.F. ¶46.
[49] Helfenberger Aff. ¶14; Hughes Aff. ¶7; Village Prop.F. ¶47.
[50] Helfenberger Aff. ¶15, Ex. J; Village Prop.F. ¶49.
[51] Hughes Aff. ¶9, Ex. C ; Helfenberger Aff. ¶15, Ex. J; Village Prop.F. ¶49.

the land but still made payments for the years 2001 to 2005 totaling $1,021,318.42.[52] The Tribe has made and continues to make property tax payments on these parcels.[53]

Given the impasse on Village authority for O'Hare Boulevard raised by the Tribe, on January 20, 2003, the Village filed a declaratory judgment proceeding in state court to resolve the jurisdictional dispute.[54] After the Tribe's motion to dismiss was denied, the suit was stayed for a time for settlement.[55] Settlement was not successful and as the matter was about to be scheduled, the Tribe initiated this action.[56]

While this jurisdictional dispute has been pending, the Village has voluntarily refrained from initiating construction on the disputed land to avoid exacerbating jurisdictional tensions and incurring additional costs. As a result, to date, the only expenses incurred on the project have been principal and interest payments on the bond issues.[57] The Village has made assessments, but has held the collected funds in a restricted account that appears on the Village's financial statement each year.[58] The Tribe has not appealed the assessments under Wis. Stat. § 66.0703(12) nor has it filed a notice of claim for reimbursement of its O'Hare assessment under Wis. Stat. § 893.80.[59]

As of September 1, 2007, of the 371.9 acres purchased by the Tribe, only three small parcels totaling 7.45 acres have been developed. As a result, there has been limited development of tax base for the Village.[60] Thus, the acquisition of the O'Hare Boulevard properties by the Tribe has thwarted the laying of O'Hare Boulevard, has prevented the

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[52] Kocken Aff. ¶3; Hughes Aff. ¶15; Village Prop.F. ¶54.
[53] Kocken Aff. ¶4; Village Prop.F. ¶55.
[54] Helfenberger Aff. ¶16; Village Prop.F. ¶50.
[55] Helfenberger Aff. ¶16; Village Prop.F. ¶51.
[56] *Id.*
[57] Helfenberger Aff. ¶17; Village Prop.F. ¶52.
[58] Helfenberger Aff ¶18; Village Prop.F. ¶53.
[59] Helfenberger Aff. ¶21, Village Prop.F. ¶58.
[60] Helfenberger Aff. ¶19; Village Prop.F. ¶48.

development of commercial and industrial uses by taxpaying entities and has resulted in unused infrastructure.[61]

The jurisdictional questions relating to the O'Hare Boulevard property are whether the Village can use state condemnation procedures for laying out a road way on tribal fee land and whether it can charge special assessments for improvements to that land.

B. The Forest Road Property.

The Forest Road Property consists of two groups of parcels formerly owned by Tom Juza. The southern portion of the Forest Road Property, Tax Parcel HB-555 was the subject of efforts by Juza to develop a subdivision known as Fern Gully. The northern portion of the Forest Road Property[62] borders on the State Highway 29-32 corridor. These properties are lands that were allotted to individual Oneida Indians who received patents from the United States in 1908.[63] These lands were subsequently sold to third parties between 1910 and 1911.[64] These lands were reacquired by the Tribe in 2006, and until that time were not held by the United States in trust or held by the Oneida Tribe of Indians.[65]

The Village met with Mr. Juza over a period of years to discuss plat approval and developer's agreement for Fern Gully. The Village Planning and Zoning Committee approved the final plat subject to a developer's agreement on August 25, 2004. As part of the developer's agreement discussions for Fern Gully, various options were evaluated

[61] Helfenberger Aff. ¶19.
[62] This section consists of Tax Parcel Nos. HB-550; HB-550-1; HB-550-2; HB-550-3; and HB-551; Village Prop.F. ¶58.
[63] Woodward Aff. ¶7; Village Prop.F. ¶59.
[64] *Id.*
[65] Woodward Aff. ¶8; Hughes Aff. ¶10; Village Prop.F. ¶59.

particularly related to the provision of sewer and water services to the Fern Gully lots from the adjacent subdivision.[66]

On November 3, 2006, the Tribe purchased 17.4 acres of the Forest Road Property and obtained a conservation easement on the balance of the Forest Road Properties.[67] The Tribe subsequently advised the Village that the Tribe does not intend to develop the property nor has it approved any infrastructure on the property.[68]

As can be seen from the map in Appendix 2, the Tribe's acquisition of the Forest Road Property included a northern leg that extended to the Highway 29-32 corridor and a leg running along the entire south boundary of the HB-555. This acquisition precludes the extension of any sewer and water mains through this area. It also precludes the placement of a frontage road along the corridor.[69] As a result, the Village Board voted to authorize the initiation of condemnation proceedings for a parcel of land south of the Highway 29-32 right-of-way for the placement of a frontage road and the utility services.[70]

Thus the jurisdictional questions relating to the Forest Road Property is whether the Village can use state condemnation procedures for obtaining utility corridors and roadways on tribal fee land.

STANDARD FOR SUMMARY JUDGMENT

The rules establishing the granting of summary judgment are well established. A court must grant summary judgment when there is no genuine issue of material fact and a party is entitled to a judgment as a matter of law. Fed.R.Civ.P. 56(c); *see also Schindler*

[66] Helfenberger Aff ¶24.
[67] Hughes Aff. ¶10; Village Prop.F. ¶63.
[68] Hughes Aff. ¶11; Village Prop.F. ¶64.
[69] Helfenberger Aff ¶25.
[70] Helfenberger Aff. ¶26 (s*ee* Minutes 11/14/06); Village Prop.F. ¶65.

v. Seiler, 474 F.3d 1008, 1010 (7th Cir. 2007). "The primary purpose of [Fed.R.Civ.P. 56(c)] is to avoid unnecessary trials when there is no genuine issue in dispute." *Jakubiec v. Cities Service Co.,* 844 F.2d 470, 471 (7th Cir. 1988) (citing *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 250, 106 S.Ct. 2505, 2511 (1986)).

"As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S. Ct. 2505 (1986).

LAW AND ARGUMENT

I. THE VILLAGE HAS AUTHORITY OVER TRIBAL FEE LANDS PURSUANT TO THE ALLOTMENT ACT PROVISIONS.

A. The Express Language And Intent Of The Allotment Act Provision Removes Federal Protection And Tribal Jurisdiction Over Allotted Fee Lands.

It is well established that "[Tribal] sovereignty . . . is subject to plenary federal control and definition." *Three Affiliated Tribes of Fort Berthold Reservation v. Wold*, 476 U.S. 877, 891, (1986). This plenary federal control is exercised through Congress. *See* U.S. Const. Art. I § 8; *Cotton Petroleum Corp v. New Mexico*, 490 U.S. 163, 192 (1989).

Pursuant to its Constitutional authority, during the allotment era, Congress enacted several provisions allotting trial lands and removing federal protection on those lands. Therefore, this case begins as a matter of statutory construction. As with any question of statutory interpretation, the place to start is with the statutory language itself. *Watt v. Alaska*, 451 U.S. 259 265 (1981). Although statutes applicable in Indian law

cases are to be liberally construed in favor of the Indians,[71] this rule "does not permit reliance on ambiguities that do not exist; nor does it permit disregard of the clearly expressed intent of Congress." *South Carolina v. Catawba Indian Tribe*, 476 U.S. 498, 506 (1986). In its summary judgment motion, even the Tribe agrees that a Congressional enactment involving Indian affairs "must be construed in accordance with its plain language," *See* Tribe Summary Judgment Br. at 13, citing *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004).

The primary statutory language relevant to this case comes from three Congressional enactments – the Dawes Act, the Burke Act and the Oneida Provisions (collectively referred to herein as the Allotment Acts). The relevant text of these acts is as follows:

> SEC. 5. [That] at the expiration of said [trust] period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, **discharged of said trust and free of all charge or incumbrance whatsoever** (Emphasis added).

Section 5 of the Burke Act.

> That the Secretary of the Interior may … cause to be issued to such allottee a patent in fee simple and thereafter **all restrictions as to sale, encumbrance, or taxation of said land shall be removed**. (Emphasis Added).

Section 6 of the Burke Act. If there were any questions about the applicability of those provisions to the Wisconsin Oneida Reservation or the extent of the alienation of allotted lands, such questions were resolved by 34 Stat. 125, which explicitly stated:

> That the Secretary of the Interior be and he is hereby authorized in his discretion to issue a patent in fee to any Indian of the **Oneida Reservation in Wisconsin** for the land heretofore allotted him, and the issuance of **such patent shall operate as a removal of all restrictions as to the sale, taxation and alienation of the lands so patented.** (Emphasis Added).

In all three cases, the Congressional language is unmistakably clear in its intent. Upon

[71] *See County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985).

the expiration of the applicable trust periods, **all** restrictions on sale, taxation, encumbrance and alienation of allotted land are removed.

While the statutory language is clear and speaks for itself, the Congressional intent behind that language is equally clear. The purpose of the Dawes Act was to extinguish federal protection of tribal lands and tribal jurisdiction. In *Montana v. United States*, 450 U.S. 544, 559, n.9 (1981), the Supreme Court set forth an extensive summary of the history of Allotment Acts noting that the goal of this policy was "the eventual assimilation of the Indian population . . . and the gradual extinction of Indian reservations and Indian titles." (citations omitted). After a thorough review of the Congressional debates, the Court concluded "throughout the congressional debates, allotment of Indian land was consistently equated with the dissolution of tribal affairs and jurisdiction." *Id.*

This has been consistently reiterated in subsequent Supreme Court opinions. *See Yakima v. Confederated Tribes*, 502 U.S. 251, 254 (1992) ("The objectives of allotment were simple and clear-cut: to extinguish tribal sovereignty, erase reservation boundaries, and force the assimilation of Indians into the society at large."); *Brendale v. Confederated Yakima Indian Nation*, 492 U.S. 408, 423 (1989) ("an avowed purpose of the allotment policy was the ultimate destruction of tribal government."); *Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 106 (1998) ("The new 'allotment' policy removed significant portions of reservation land from tribal ownership and federal protection. . ."); and *Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649, 650 n.1 (1976) ("The objects of this policy were to end tribal land ownership and to substitute private ownership. . . .").

One can certainly debate the wisdom of the allotment policy, but one cannot fairly debate Congressional intent. Congress clearly intended that allotted tribal land be removed from federal protection and be treated like any other privately owned fee land. That intent is manifest in the Congressional enactments allowing unrestricted alienation of allotted lands.

There is no dispute that the O'Hare Boulevard and Forest Road parcels at issue in this case were allotted to tribal members, and that patents from the United States to individuals identified as "Oneida Indian" were issued between 1892 and 1908. Those parcels were sold to third parties between 1907 and 1922.[72] Those parcels were only recently reacquired by the Tribe.[73] The only question is a pure legal question: does the express removal of restrictions on sale, taxation, encumbrance and alienation under the Allotment Acts allow the Village to tax, condemn and otherwise regulate such parcels in the same manner as other fee land within the Village? Given the clear language of these Acts, the answer must be in the affirmative.

B. The Allotment Acts Remove Restraints On Property Tax And Assessment.

The Burke Act and the Oneida Provisions expressly remove restrictions on taxation of allotted land. All three of the Allotment Acts remove all restrictions on encumbrance and alienation of the land. These provisions have been held to be sufficient to allow the imposition of property tax on tribal fee land.

In *Yakima*, the Supreme Court reviewed the ability of the County of Yakima to impose property tax on allotted parcels within a reservation that were held by the Tribe in

[72] Woodward Aff. ¶4; Village Prop.F. ¶38.
[73] Woodward Aff. ¶4-5; Village Prop.F. ¶38.

fee. The court began its discussion by reference to the clear language of the Burke Act proviso:

> [We] agree with the Court of Appeals that, by specifically mentioning immunity from land taxation "as one of the restrictions that would be removed upon conveyance in fee," Congress in the Burke Act proviso "**mainifest[ed] a clear intention to permit the state to tax "such Indian lands.**" (Emphasis added.)

502 U.S. at 259. The court noted that the same result was inherent under the Dawes Act. Relying on its prior analysis in *Goudy v. Meath*, 203 U.S. 146 (1906), the Yakima court stated:

> *Goudy* did not rest exclusively or even primarily on the §6 grant of personal jurisdiction over allottees to sustain the land taxes at issue. Instead, it was the alienability of the allotted lands – a consequence produced in the present case not by §6 of the General Allotment Act, by §5 that the Court found of central significance. . . . **Thus when §5 rendered the allotted lands alienable and enumerable, it also rendered them subject to assessment and forced sale for taxes.** The Burke Act proviso, enacted in 1906, made this implication §5 explicit and its nature more clear. (Emphasis added).

502 U.S. at 263-64.

The same result was reached in *Cass County*. The U.S. Supreme Court again discussed whether state and local governments may impose ad valorem property taxes on reservation land that was made alienable by Congress, sold to non-Indians, and later repurchased by the tribe. In determining that taxation was allowed, the court returned to the language of the Allotment Acts.

> We have determined that Congress has manifested such an intent [to authorize taxation] when it has authorized reservation lands to be allotted in fee to individual Indians, **thus making the lands freely alienable and withdrawing them from federal protection**. This was the case in Yakima *and Goudy v. Meath*, 203 US 146 (1906) . . .
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> ***
>
> When Congress makes Indian reservation land freely alienable, it manifests an unmistakably clear intent to render such land subject to state and local taxation. **The repurchase of such land by an Indian tribe does not cause the land to reassume tax-exempt status.** (Emphasis added.)

524 U.S. at 110-111, 115.

In light of the express language in the Allotment Acts and the Supreme Court holdings, there cannot be any serious contention that tribal fee land is exempt from Village property tax. Indeed, the Tribe has paid and continues to pay property tax on its tribal fee land including the O'Hare Boulevard parcel.[74]

In this case, the tax charges at issue arise from a special assessment. Under Wisconsin law, a special assessment, like a general property tax, is a charge against real property. The difference between special assessments and general property taxes under Wisconsin law is straightforward. A special assessment is imposed to pay for a public improvement which benefits specific property. *See generally*, *In re Installation of Storm Sewers*, 79 Wis. 2d 279, 287, 255 N.W.2d 521 (1977); Wis. Stat. § 66.60. Therefore, such charges do not need to be uniformly applied to all residents. General property taxes, on the other hand, are typically imposed on a uniform ad valorem basis, i.e. as a percent of the property's value.

However, both special assessments and general property taxes are charges on the property that are not dependent on the use of the property or actions of the owner. (Compare, *Yakima* in which the court held that an excise tax on the sale of the property by the owner was not a tax on the land itself." *Yakima*, 502 U.S. 268 at 268.) In the Village, special assessments are included with the general property tax levy on property tax bills sent by parcel number.[75] In fact, they are designated as "Special Taxes" on the county tax collection receipts.[76] Furthermore, special assessments like general property

[74] Kocken Aff. ¶¶3-5, Exs. A and B; Village Prop.F. ¶37. The Forest Road parcels have not been owned by the Tribe long enough to clearly show property tax payment.
[75] Kocken Aff. ¶2.
[76] *Id.*

taxes are liens on the property itself which can lead to forced sale. *See* Wis. Stat. § 66.0703(13).[77]

Thus, it is not surprising that in determining whether tribal land is subject to tax, the Supreme Court has considered taxes associated with improvements to land the same as taxes on the land itself. In *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), the court evaluated the scope of the tax exemption applicable to trust land under 25 U.S.C. § 465. At issue was whether personal property permanently attached to the realty–ski lifts–was exempt from tax. The court held the "use of permanent improvements upon land is so intrinsically connected with the use of the land itself that an explicit position relieving the latter of state tax burdens must be construed to encompass an exemption for the former." *Id.* at 158. The converse is equally true. If property is taxable, then permanent improvements on the land are also taxable. Roads and utilities are no less a permanent improvement to the land than a ski lift.

"Once Congress has demonstrated . . . a clear intent to subject land to taxation by making it alienable, Congress must make an unmistakably clear statement in order to render it nontaxable." *Cass County*, 524 U.S. at 114. Mere repurchase by the Tribe does not reinstitute federal protection from such taxation. *Id.* The Village has an absolute right under the Allotment Acts to impose special assessments against allotted lands sold in fee even if they have been reacquired by the Tribe.

B. The Allotment Era Statutes Also Remove Restraints On Condemnation And Acquisition Of Right-Of-Way.

1. Removal Of Restrictions Under The Allotment Acts.

[77] This section provides in part, "Every special assessment levied under this section is a lien on the property against which it is levied. . . ."

The Dawes Act and the Burke Act expressly remove all restraints on encumbrances of allotted fee land. The Oneida Provisions, if anything, are even broader and expressly remove all restraints on "alienation" of such land. This language is sufficient for the Village to condemn allotted fee land for rights-of-way and other public purposes.

The *Yakima* and *Cass County* courts rested on the rationale that the Allotment Acts made the lands freely alienable "withdrawing them from federal protection." *Cass County*, 524 U.S. at 111; *see also*, *Yakima*, 502 U.S. at 263. As a result, such land is subject to involuntary forfeiture. In *Goudy*, the court held that when the Indian lands were allotted and made alienable, all restrictions upon alienation, **both voluntary and involuntary**, ceased. *See Goudy,* 203 U.S. at 149-150. Similarly, in *Yakima*, the court acknowledged the possibility of a "forced sale for taxes." *Yakima*, 502 U.S. at 263.

Such a result is consistent with a long line of Supreme Court cases that have held that the removal of restrictions on alienation results in land being treated like other fee land. In *South Carolina v. Catawba Indian Tribe*, 476 U.S. 498, 508 (1986), the Supreme Court noted, that "When Congress removes restraints on alienation by Indians, state laws are fully applicable to subsequent claims." *Accord: Larkin v. Paugh*, 276 U.S. 431, 439 (1928) ("With the issue of the patent, the title not only passed from the United States but the prior trust and the incidental restriction on alienation were terminated . . . thereafter all questions pertaining to the title were subject to the examination and determination by the [state] courts); and *Dickson v. Luck Land Company*, 242 U.S. 371, 375 (1917) ("With those restrictions entirely removed and the fee simple patent issued, it would seem that the situation was one in which all questions pertaining to the disposal of the lands

naturally would fall within the scope and operation of the laws of the State."). *See also Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 676 (1974) ("Once patent issues, the incidents of ownership are for the most part matters of local property law to be vindicated in local courts.")

In addition to the language on alienation, the Allotment Acts also remove any restrictions on encumbrances. Under basic property law in Wisconsin as elsewhere, a right-of-way easement is an encumbrance. *First American Title Ins. Co. v. Dahlmann*, 2006 WI 65, ¶15, 291 Wis. 2d 156.[78] Thus, the imposition of an encumbrance such as a right-of-way is also expressly authorized by the Allotment Acts.

Given the alienability of the land under the Allotment Acts, allotted land can be alienated, whether voluntarily or involuntarily. As such, allotted fee land is subject to condemnation to effectuate utility easements and roadways such as those at issue in O'Hare and the Forest Road properties.[79]

2. Removal Of Restrictions Under 25 U.S.C. § 357.

In addition to the Allotment Acts noted above, there is a further statute enacted during the allotment era that specifically addresses the question of condemnation on allotted lands. 25 U.S.C. § 357 provides as follows:

Sec. 357: Condemnation of lands under laws of States.

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[78] *See also Taxman v. McMahan*, 21 Wis. 2d 215, 219, 124 N.W.2d 68 (1963) ("Easements generally constitute encumbrances within the meaning of a covenant against encumbrances." 4 Tiffany Real Property (3d ed.), p. 135, sec. 1004).

[79] Only *Gobin v. Snohomish County*, 304 F.3d 909 (9th Cir. 2002) takes a narrower construction of the term alienation and encumbrance under the Allotment Acts in the context of the imposition of county zoning regulations. The court concluded that because zoning was not an alienation of the land and burdens the use of the land rather than the land itself, it is analogous to the excise tax in *Yakima* rather than the property tax. 304 F.3d at 916-17. That analysis is both incorrect and inapplicable here. Among other things, a right-of-way easement clearly burdens the land as a matter of title not regulation. *See George v. Oswald*, 273 Wis. 380, 385, 78 N.W.2d 763 (1956) ("[zoning] restrictions are entirely different than the restrictions created by deed or contract.").

> **Lands 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. (Emphasis added.)

This section was enacted as 31 Stat. 1084, March 3, 1901, ch. 832 §3 and was recently described by the court in *Southern California Edison Co. v. Rice*, 685 F.2d 354, 356 (9th Cir. 1982) as follows:

> With respect to condemnation actions by state authorities, Congress explicitly afforded no special protection to allotted lands beyond that which land owner in fee already received under the state laws of eminent domain. *See* 25 U.S.C. §357. Thus consistent with the assimilation policy, Congress placed Indian allottees in the same position as any other private landowner *vis-à-vis* condemnation actions, with the interest of the United States implicated only to the extent of assuring a fair payment for the property taken and a responsible disposition of the proceeds.

Courts have described this section as "clear, plain and unambiguous." *Nicodemus v. Washington Power Company*, 264 F.2d 614, 617 (9th Cir. 1959). *See also Nebraska Public Power v. 100.95 Acres of Land*, 719 F.2d 956, 961 (8th Cir. 1983).

This section remains valid law today notwithstanding subsequent Congressional enactments addressing rights of way on trust lands that the Tribe cites in its summary judgment motion. In *Nebraska Public Power,* the question on appeal was whether "Section 357 has been implicitly repealed in part by the more recently enacted Indian Right of Way Act of 1948, 25 U.S.C. §§ 323-28." 719 F.2d at 958. The Eighth Circuit reviewed the legislative history, intent and language of the acts and concluded, "subsequent congressional action affirms the continued vitality of section 357." *Id.* at 959. Thus, the 1948 Act did not repeal § 357. Other courts have agreed. *Nicodemus*, 264 F.2d at 618; *Southern California Edison*, 685 F.2d at 357; and *U.S. v. 10.69 Acres of Land*, 425 F.2d 317, 319 (9th Cir. 1970).

Many of the cases interpreting this section have involved situations in which the

Indian allotments remained subject to some trust restriction. In such cases, the United States has an interest in the action and as a result, it must be made a party and the action must proceed in federal court. *See Minnesota v. United States*, 305 U.S. 382 (1939) (involved allotted lands in which the trust periods were extended). That is not the case here. All of the allotment periods have expired and the lands are fully alienable.

Under the plain language of 25 U.S.C. § 357, the allotted fee land "may be condemned for any public purpose" under the terms of state law. That is what the Village did here under Wis. Stat. ch. 80. Thus, in addition to the Allotment Acts, Congress has also expressly authorized condemnation under a separate allotment era provision that is fully applicable here.

C. Congress Provided For Protection Of Tribal Interests Through The Trust Process.

The Allotment era legislation created problems that resulted in the passage of the Indian Reorganization Act (IRA) in 1934. The IRA brought the allotment era policies to an end, but it did so on a prospective basis. Nothing in the IRA restores rights to lands that had already been allotted and sold. The Supreme Court emphasized this fundamental point in *Yakima*:

> The policy of allotment came to an abrupt end in 1934 with passage of the Indian Reorganization Act. . . . Except by authorizing reacquisition of allotted lands in trust, however, Congress made no attempt to undo the dramatic effects of the allotment years on the ownership of former Indian allottees to alienate or encumber their fee-patented lands nor impaired the rights of those non-Indians who had acquitted title to over two-thirds of the Indian lands allotted under the Dawes Act.

502 U.S. at 255-56. Thus, the court concluded, that "while putting an end to further allotment of reservation land, . . .[Congress] chose not to return allotted land to pre-General Allotment Act status, leaving it fully alienable by the allottees, their heirs and

assigns." *Id.* at 264. Other decisions are fully in accord with this view. *See Brendale*, 492 U.S. at 423 ("[the IRA] did not restore to the Indians the exclusive use of those lands that had already passed to non-Indians"); and *Cass County*, 524 U.S. at 108 (the IRA "did not repeal allotment statutes.").

This conclusion stems directly from the statutory language of the IRA. The IRA contains the following proviso at 25 U.S.C. § 463(a), "Provided, however, that valid rights or claims of any persons to an lands so withdrawn existing on the date of the withdrawal shall not be affected by this Act." Instead of reestablishing control over lands that had been allotted and sold, the IRA set out a number of prospective remedies. It terminated further allotment (Section 1), it extended the trust periods for any allotted land not sold (Section 2), it allowed the United States to restore surplus land (Section 3), and it created a mechanism to acquire land and place the land into trust status (Section 5, codified as amended at 25 U.S.C. § 465). Once land is placed into trust status, such land is taken in the name of the United States and is "exempt from state and local taxation." 25 U.S.C. § 465.

It is precisely the presence of this remedy that confirms alienated land is fully subject to state and local law absent trust status. For this reason, the court in *Cass County* rejected the argument that merely repurchasing land was sufficient to provide immunity from taxation:

> Holding that tax-exempt status automatically attaches when a tribe acquires reservation land would render unnecessary § 465 of the Indian Reorganization Act, which gives the Secretary of the Interior authority to place land in trust, held for the Indians' benefit and tax exempt, and which respondent has used to restore federal trust status to seven of the eight parcels at issue.

Cass County, 524 U.S. at 105.

More recently in *Sherrill*, the Supreme Court made the same point: Section 465 is

the mechanism tribes have to protect land from local tax and regulation. At the same time, *Sherrill* also points out that the Bureau of Indian Affairs ("BIA") regulations in 25 C.F.R. § 151.10 that govern the trust process, require consideration of the interests of local governments and the jurisdictional problems which may arise from the acquisition by a tribe.

> **The regulations implementing § 465 are sensitive to the complex interjurisdictional concerns that arise when a tribe seeks to regain sovereign control over territory**. Before approving an acquisition, the Secretary must consider, among other things, the tribe's need for additional land; "[t]he purposes for which the land will be used"; "the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls"; and "[j]urisdictional problems and potential conflicts of land use which may arise. 25 CFR § 151.10(f) (2004). Section 465 provides the proper avenue for OIN to reestablish sovereign authority over territory . . . ." (Emphasis added.)

Sherrill, 544 U.S. at 220-221.

To say that fee land is rendered sovereign simply by tribal repurchase would make the trust application process meaningless. Such a proposition is contrary to basic canons of statutory construction. *Hibbs v. Winn*, 542 U.S. 88, 89 (2004) ("[the] rule against superfluities instructs courts to interpret a statute to effectuate all its provisions so that no part is rendered superfluous."). It would also allow tribes to have the advantages of trust land status without the Congressionally required review process in 25 U.S.C. ¶465 and the implementing regulations at 25 C.F.R. § 151.10.

Apart from the detailed trust land acquisition process set forth in 25 C.F.R. Part 151, the basic policy of BIA on tribal trust lands is set forth in 25 C.F.R. § 1.4. That section provides that for **trust** land, "none of the laws, ordinances, codes, resolutions or other regulations of any state or political subdivision controlling the use or development of any real or personal property shall be applicable." This exemption does not apply to fee lands. Such an interpretation by a federal agency is entitled to deference. *Chevron*

U.S.A. v. Natural Resources Def. Council, 467 U.S. 837, 865 (1984). In this case, the Tribe's Complaint seeks the same broad exemption from all state and local regulation for all of its lands including its **fee** land, when BIA says such an exemption is only applicable to trust lands. Even BIA recognizes that the mechanism for protection of tribal lands is the trust process in 25 U.S.C. § 465, not tribal fiat.

II. THE VILLAGE HAS AUTHORITY OVER TRIBAL FEE LANDS PURSUANT TO *CITY OF SHERRILL.*

A. *Sherrill* Holds That Tribes Cannot Assert Sovereignty Over Fee Lands Outside The Trust Process For Lands That Passed To Non-Members Long Ago.

In *Sherrill*, the Supreme Court held that tribal sovereignty could not be reasserted on lands that had passed to non-Indians long ago even in the absence of Congressional authorization. The facts in *Sherrill* arose out of pre-allotment era facts in which most of the tribal reservation land was lost by 1805, in many cases by illegal actions of the New York government. *See County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985). In the late 1990s, the Oneida Indian Nation (OIN) began repurchasing lands that were part of its original reservation area. It then claimed it could remove the recently purchased properties from local regulation and exercise sovereignty over them. *See Sherrill*, 544 U.S. at 202-03.

In an 8-1 decision, the Supreme Court wholly rejected the Tribe's claims noting, "[We] hold that the Tribe cannot unilaterally revive its ancient sovereignty, in whole or in part, over the parcels at issue. The Oneidas long ago relinquished the reins of government and cannot regain them through open-market purchases from current titleholders." *Id.* The court made it clear that no aspect of the Tribe's claims of

sovereignty over the land survived and explained that the "embers of sovereignty . . . long ago grew cold." *Id.* at 214.

The court in *Sherrill* provided three interrelated rationales for its decision. First, it noted that for nearly 200 years, the disputed area had become predominantly non-Indian and was subject to the jurisdiction control of the state and local governments. Indian ownership of land in the area was 1.5% of the county's total area, and the Indian population was less than 1%. Municipal and county governments had continuously governed the territory since the 1800s, and the Tribe had not exercised regulatory control over the properties or asserted the exempt status until the 1990s. *Id.* at 199. The long lapse of time in asserting claims preclude the Tribe from the remedy it seeks based on the equitable doctrines of laches and acquiescence. *Sherrill* at 215.

Second, the court noted the disruptive effect and impracticability of parcel by parcel sovereignty.

> [Unilateral] reestablishment of present and future Indian sovereign control, even over land purchased at the market price, would have disruptive practical consequences. . . . A checkerboard of alternating state and tribal jurisdiction in New York State – created unilaterally at [the Tribe's] behest – would 'seriously burde[n] the administration of state and local governments' and would adversely affect landowners neighboring the tribal patches.

Id. at 219-220.

Finally, the court explained that the trust process, Title 25 U.S.C. § 465, is the appropriate mechanism for reviving sovereignty over lands re-acquired by tribal communities. *Id.* at 220. If a tribe were allowed to remove fee land from state and local regulation merely by repurchase, there would be disruptive practical consequences and the trust process would be nullified.

In summary, the *Sherrill* court reached the same conclusion as the courts

in *Yakima* and *Cass County*, but did so not based on the language of the Allotment Acts, but based on fundamental equitable doctrines. When tribal fee land passed into non-Indian ownership long ago, tribes should not be able to reassert jurisdiction merely by repurchasing the land. The appropriate mechanism for reviving ancient sovereignty is through the trust process.

B. The Undisputed Material Facts In This Case Parallel Those In *Sherrill* And Therefore Require The Same Result.

While the present case can be resolved based on the Allotment Acts' provisions alone, the same equitable considerations that were at issue in *Sherrill* are present in the current case. The primary factors in *Sherrill* turned on the historical character of the New York lands and the disruptive impact that the reassertion of sovereignty over fee lands would create for the City of Sherrill absent the trust process in Section 465. Those same factors are present with respect to the Village of Hobart.

1. Historical And Demographic Data.

Wisconsin was settled long after New York so its recorded history is shorter. The Oneidas, having been displaced from New York, were not native to Wisconsin, and did not arrive until the mid-1820s.[80] Their reservation originally carved out of the Menomonee territories, was reduced and redefined a few years later by the Treaty of 1838 to 65,400 acres.[81] As noted above, the Allotment Acts brought a catastrophic loss of control of the reservation land and a substantial influx of non-Indian population. By 1917, less than 100 years from original settlement, tribal land holdings were down to a few hundred acres – less than 0.1% of the original reservation area. Even as recently as

[80] Campisi at 67.
[81] 7 Stat. 566.

1990, the Tribe only owned 6.5% of the original reservation. Tribal population dropped with the loss of land base, and in 2000, was less than 17% of the Village population.[82]

Thus, in both Wisconsin and New York, there is no dispute that the Oneidas lost all but a few hundred acres of their land base. In Wisconsin, this occurred through the Allotment Act process less than 100 years after the Oneidas arrived in Wisconsin, and, for most of the 1900s, tribal land holdings remained at 7% or less of the reservation. By comparison, the Oneidas were native to the New York area until being illegally removed in the late 1700s and early 1800s. For approximately 200 years (1800 to 2000), tribal land holdings remained de minimis and are now 1.5%. In Wisconsin, local governments exercised jurisdiction within the reservation from the early 1900s and continue to do so today; while in New York, local jurisdictions began to exercise jurisdiction from the early 1800s.

While the time periods are compressed and the tribal land and population percentages are slightly larger in Wisconsin than in New York, clearly the vast majority of the land and population within the Village was non-Indian in character for the bulk of the 20th Century. Despite some differences from *Sherrill*, the underlying equitable and legal question remains the same. Can a tribe who lost control of all but a few hundred acres of its land for an extended time reassert jurisdiction merely by repurchase of that land? In *Sherrill*, the court concluded that a tribe could not do so based on equitable considerations. The same result should apply here. If anything, the equities are stronger in Wisconsin given the fact that non-Indians acquired the land lawfully through the Congressionally sanctioned allotment process rather than through illegal means as is the case in New York.

[82] Kocken Aff. ¶5, Ex. D.

2. Disruptive Impact Of Piecemeal Land Acquisition.

The *Sherrill* court rejected the unilateral assertion of tribal sovereignty over reacquired fee lands because such actions can "'seriously burde[n] the administration of state and local governments' and would adversely affect landowners neighboring the tribal patches." *Sherrill*, 544 U.S. at 219-220. These concerns are amply demonstrated by the facts in this case.

In the case of O'Hare Boulevard, the Tribe purchased more than 75% of the land in the Southeast Industrial Park including the last minute purchase of land on which O'Hare Boulevard was planned. The Village's land use plans were effectively thwarted and its investment in infrastructure largely unused. In the case of the Forest Road property, the Tribe's acquisition has imposed serious constraints on the ability of the Village to extend road and utility services to the northwest part of the Village.

As critical as these specific examples is the Tribe's aggressive overall land use acquisition policy that fully illustrates the concerns noted in *Sherrill*. As the maps of the Village from 1950, 1990 and 2007, attached as Appendices 3, 4 and 5, dramatically show, the Tribe is making good on its intent to acquire as much land in the Village as possible. For all of these lands, the Tribe seeks a declaration that "Village laws or ordinances or Wisconsin statutes or common law . . . [are] invalid as to the Tribe and the land within its Reservation." *See* Complaint at 31. At this time, the vast majority of the tribal land is tribal fee land. Such large scale acquisitions of land devoid of any local or state jurisdiction are likely to be far more disruptive to the Village and neighboring land owners than the limited amount of land at stake in *Sherrill*.

3. The Availability Of Trust Acquisition.

As the *Sherrill* court noted, there is a remedy for tribal concerns and that is the use of the trust land acquisition process in 25 U.S.C. § 465. That is no less true here. While the Village has concerns with the Trust process, the process does provide for some consideration of the impacts on the local tax base and "jurisdictional problems and potential conflicts of land use" that arise from tribal land acquisition. *See* 25 C.F.R. § 151.10. Given the potential for significant additional land acquisition, it is critical that any change in jurisdiction be accomplished in an orderly fashion subject to the review provided by law. The Tribe is no stranger to this process having placed substantial acres of land into trust over the past several years. *See* Appendices 3-5.

In short, all of the factors in *Sherrill* are present here. The primary difference between *Sherrill* and this case, is that, in Wisconsin, the Tribe lost the land through the federally sanctioned allotment process rather than through illegal means. It would be ironic to conclude that a tribe cannot reassert sovereignty over land lost to third parties by unlawful means but it can nevertheless assert sovereignty over land which passed out of tribal control under express Congressional authorization. There, as here, any change in jurisdiction should follow from the Trust process, not unilateral actions by the Tribe.

III. THE JURISDICTIONAL CLAIMS BY THE TRIBE DO NOT CHANGE THE RELATIONSHIP BETWEEN LOCAL LAW AND TRIBAL FEE LAND.

The Tribe's Complaint raises three basic jurisdictional claims in an attempt to thwart local jurisdiction: federal preemption (Claims 1 and 2), the Indian Nonintercourse Act (Claim 4), and Tribal Sovereignty and Sovereignty Infringement (Claims 3 and 5). The first two of these theories form the basis for the Tribe's Motion for Summary

Judgment. None of the jurisdictional claims overturn the right of local regulation already allowed by Congress. Summary judgment on all of the jurisdictional issues should be granted to the Village. The Tribe's remaining claims in its Complaint are largely derivative of its jurisdictional claims and will be addressed in the following section.

A. Federal Preemption.

The Tribe's first two claims in its Complaint are based on federal preemption. The first claim asserts preemption per se, based primarily on the Indian Reorganization Act ("IRA"). The Tribe's motion for summary judgment focuses specifically on 25 U.S.C. § 467(e) which it claims requires tribal consent to any land acquisition. The Tribe's second claim relies more generally on federal law that prohibits state or local regulations of an Indian tribe or its property within its reservation in absence express Congressional consent or compelling local interest. These claims are addressed in reverse order.

1. Federal Indian Law Does Not Preempt Local Jurisdiction.

Preemption under general "federal Indian law" is a non-issue here. "It is clear . . . that state laws may be applied to tribal Indians on their reservations if Congress has expressly so provided." *California v. Cabazon Band of Mission Indians* 480 U.S. 202, 207 (1987). *See also Narragansett Indian Tribe of Rhode Island v. Narragansett Elec. Co.,* 89 F.3d 908, 914-15 (1st Cir. 1996). Thus, if there is Congressional authorization, the general preemption analysis under federal Indian law comes to a close.[83] If not, then the courts will look to balance the relative interests of state against the intrusion into

[83] The Village concedes that reservation land is included as "Indian Country" under 25 U.S.C. § 1151. Whether that definition applies here is another question. More importantly, the fact that the land may be Indian country by itself proves nothing. It is simply a prerequisite to any analysis under the preemption test. If the land is not Indian country, there is no bar to the exercise of the states' jurisdiction. *Narragansett*, 89 F.3d at 915.

federal and tribal interests. *Cabazon*, 480 U.S. at 215-16.

As set forth in Section I above, Congress has expressly and repeatedly consented to taxation, encumbrance and alienation of land that was allotted under the Dawes Act, the Burke Act, and the Oneida Provisions. It has further consented to condemnation without tribal consent under 25 U.S.C. § 357. No further consent is required to allow the Village to make special assessments or condemn such land for rights-of-way.

Given the presence of the express authorization in the Allotment Acts, no "balancing" is necessary or appropriate. As the Supreme Court said in *Yakima*, "[either] Congress intended to preempt the state taxing authority or it did not. Balancing of interests is not the appropriate gauge for determining validity, since it is that very balancing which we have reserved to Congress." *Yakima,* 502 U.S. at 267 (citing *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134, 177 (1980) (opinion of REHNQUIST, J.)).

The Supreme Court again addressed the issue of balancing in the *Sherrill* case and explained that the trust process is specifically designed to weigh these interests. *See Sherrill*, 544 U.S. at 221. Recognizing the significant interests of the city and neighboring non-Indian landowners, the court also added that, "[if] OIN may unilaterally reassert sovereign control and remove these parcels from the local tax rolls, little would prevent the Tribe from initiating a new generation of litigation to free the parcels from local zoning or other regulatory controls that protect all landowners in the area." *Id.* at 220.[84] Any balancing of such interests is to take place in the trust process, not the courts.

[84] If the Court finds that express authorization is not granted, the Village preserves for trial the questions associated with the balancing of relative interests between the Tribe and the Village.

Given the express Congressional provisions present here, there is no need to conduct a balancing analysis.

2. IRA Section 16, 25 USC §467(e) Does Not Preempt Local Jurisdiction.

The Tribe asserts that Section 16 of the Indian Reorganization Act allows a tribe to unilaterally "veto" any Village attempt to condemn tribal land for utility corridors. Tribe Summary Judgment Br. at 7. The Tribe also cites the 1948 right-of-way Act, 25 U.S.C. §§ 323-328, as support for this argument. The Tribe's argument misconstrues the IRA and the 1948 Act in several significant respects.

First, the IRA, by its own terms, does not apply to land that was allotted and sold in fee under the Allotment Acts. The IRA contains the following proviso at 25 U.S.C. § 463(a), "Provided, however, that valid rights or claims of any persons to any lands so withdrawn existing on the date of the withdrawal shall not be affected by this Act." There is no dispute that most of the tribal lands in the Village, including the O'Hare and Forest Road Properties, were sold in fee and thus withdrawn from federal protection long before the IRA enactment in 1934.[85]

The IRA simply does not allow a tribe to reassert jurisdiction over lands which were withdrawn prior to the IRA. The courts in *Cass County* and *Yakima* were both clear in stating that IRA did not return such land to its pre-allotment status. *See Cass County*, 524 U.S. at 114; *Yakima,* 502 U.S. at 259-260. This conclusion is in line with the language of the Oneida's own Constitution which expressly states that the jurisdiction of the Oneida Tribe under the Constitution extends to all territory within the reservation or land later added to the reservation "except as otherwise provided by law." Oneida Constitution, Article I.

[85] Village Prop.F. ¶¶16-17.

Second, as noted above, the IRA establishes a separate process for the assertion of tribal "veto" authority over local regulation, and that is through the trust process in 25 U.S.C. § 465. This is clear from BIA regulations in 25 C.F.R. Part 151 and 25 C.F.R. § 1.4. As noted in *Cass County*, if a tribe may, by mere purchase of a piece of fee land, entirely withdraw it from any and all non-Indian jurisdiction, Section 465 would be rendered meaningless. *See also Sherrill*, 544 U.S. at 220-221. One section of the IRA should not be construed to render another section surplusage. *Hibbs v. Winn*, 542 U.S. at 89; *Env. Defense Ctr. v. EPA*, 344 F.3d 83, 844 (9th Cir. 2003).

Third, the regulations implementing the 1948 Act on which the Tribe relies confirm that tribal authority is confined to tribal trust lands not allotted fee lands. 25 C.F.R. § 169.1(d) defines "tribal land" as "land or any interest therein, title to which is held by the United States **in trust for a tribe** or title to which is held by any tribe subject to federal restrictions against alienation or encumbrance. . . ."[86] It was precisely for this reason that, in *Nebraska Public Power,* the court held that allotted fee land could be condemned, but once land was conveyed to the tribe and held in trust it could not be condemned. 719 F.2d at 961-62. The court specifically cited to the definition of tribal land in 25 C.F.R. § 169.1 in reaching its decision.

This same interpretation applies to the IRA provisions in 25 U.S.C § 467(e). The legislative history to this section shows that the purpose of Section 16 was to prevent the federal government from disposing of tribal trust lands without tribal consent. For example, John Collier, Commissioner of Indian Affairs, testified in hearings before the House Committee on Indian Affairs:

[86] The regulations involving encumbrances of tribal land similarly define "tribal lands" as those held in trust. 25 C.F.R. § 84.002.

> No disposition of any tribal or community lands or any interest therein or any right of use thereto shall be made without the consent of the tribe or community. In other words, under existing law, in any one case, the Secretary of the Interior can rent, lease, alienate tribal assets; under this new section that power would be taken away from him and would make all disposal subject to tribal consent.

Readjustment of Indian Affairs: Hearings on H.R. 7902 Before the House Committee on Indian Affairs, 73d Cong., 2d Sess. 1989 (1934). Such a concern of course would only apply to lands in which the United States had an interest, i.e. trust lands.

The Tribe attempts to support its position by citing one case from a divided state court in which an Alaskan tribe used federal funds to purchase fee land and then failed to pay property taxes. *See Matter of City of Nome, Alaska,* 780 P.2d 363 (Alaska 1989). When the city of Nome filed an action to foreclose, the court held that 25 U.S.C. § 476(e) barred the City from pursing its property tax claim. This case was not an Allotment Act case and it involved the acquisition of fee land through a specific federal grant program. More importantly, the basic holding of this case was overturned by the United States Supreme Court in *Yakima* and later in *Cass County*, when the court expressly held that tribal fee lands **were** subject to local taxation *Cass County*, 524 U.S. at 115. *See also Yakima*, 502 U.S. at 263-264.

Thus, the IRA provisions in 25 U.S.C. § 476(e) do not give the Tribe unilateral veto authority over the exercise of lawfully exercised state and local authority. Such authority is only available under 25 U.S.C. § 465 for trust lands.

3. Other Federal Acts Do Not Preempt Local Jurisdiction.

In its Complaint, the Tribe also references the Indian Self-Determination Act, 25 U.S.C. §§ 450 et seq., and the Tribal Self-Governance Act of 1994, 25 U.S.C. §§ 458aa et seq. The Tribe argues these Acts are also "intended to promote tribal self determination." (Complaint at 20). Maybe so, but such a policy does not overturn the ongoing legal

effect of state jurisdiction over allotted land. The Supreme Court in *Yakima* squarely rejected the argument that state jurisdiction was inconsistent with the "policies of self determination":

> [T]he Yakima Nation argues that state jurisdiction over reservation fee land is manifestly inconsistent with the policies of Indian self-determination and self-governance that lay behind the Indian Reorganization Act and subsequent congressional enactments. This seems to us a great exaggeration. . . . In any case, these policy objections do not belong in this forum. If the Yakima Nation believes that the objectives of the Indian Reorganization Act are too much obstructed by the [GAA], it must make that argument to Congress.

Id. at 265. While the Oneida may have a valid constitution under the IRA, it does not exclude state jurisdiction over tribal fee land alienated under the GAA.

B. The Indian Nonintercourse Act Is Not Applicable To Allotted Fee Lands.

The Tribe asserts that taxation and condemnation of tribal fee land by the Village is barred by the Indian Nonintercourse Act (INA) also known as the Indian Trade and Intercourse Act, 25 U.S.C. § 177. This assertion is not supported by the language of the Act, its history, or subsequent interpretation.

1. The INA Is Not Applicable To Land Alienated Under The Allotment Acts.

The INA was enacted during the "treaty era" of federal Indian policy. It was one of the first enactments of the United States Congress in 1790, 1 Stat. 137, and was amended several times, the last of which occurred in 1834, Act of June 30, 1834, ch 161, 4 Stat. 729. The language of the INA, codified as amended at 25 U.S.C. § 177, reflects its treaty era origins and provides in relevant part as follows:

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

Of course the treaty period came to an end in 1871. As noted above, the Allotment Acts expressly authorized the allotment and alienation of tribal lands without further "treaty or convention" after the expiration of trust periods. There is little question that the INA and the Allotment Acts represent two radically different approaches to the alienation of tribal lands which arose from two different eras of federal Indian policy. However, these two approaches are not irreconcilable. The INA was not repealed by the Allotment Acts and it remains on the books today. At the same time, the INA did not preclude Congress from alienating Indian lands through other enactments such as the Allotment Acts. Indeed, one can look at the Allotment Acts as the kind of express Congressional authorization the INA contemplated.

The question presented in this case is whether the INA applies to land that was allotted and sold pursuant to the Allotment Act process and years later repurchased by the Tribe. Several cases have reviewed this question and all have come to the conclusion that such an interpretation cannot be supported. These cases rest on three lines of analysis.

First, the INA put into statutory form the more general rule that "the extinguishment of Indian title required the consent of the United States." *See County of Oneida v. Oneida Indian Nation,* 470 U.S. 226, 240 (1985). Thus, one of the basic elements of a prima facie INA case is that, "the United States has never consented to the alienation of the tribal land." The court in *Golden Hill Paugussett Tribe of Indians v. Weicker*, 39 F.3d 51, 56 (2nd Cir. 1994) stated the test for an INA case as follows:

> To establish a *prima facie* case based on a violation of the Act [INA], a plaintiff must show that (1) it is an Indian tribe, (2) the land is tribal land, **(3) the United States has never consented to or approved the alienation of this tribal land**, and (4) the trust relationship between the United States and the tribe has not been terminated or abandoned. (Emphasis added.)

Accord: Delaware Nation v. Pennsylvania, 446 F.3d 410, 418 (3rd Cir. 2006); *Catawba Indian Tribe of S.C. v. S.C.*, 718 F.2d 1291, 1295 (4th Cir. 1983) (revs'd on different grounds); and *Seneca Nation of Indians v. New York*, 382 F.3d 245, 258 (2nd Cir. 2004).

In this case, consent to alienation **has** been given. As noted in Section I above, the United States clearly consented to alienation of Oneida tribal land when it explicitly removed all restraints on alienation and allotted the land to individual Oneida members in fee simple through the Dawes Act, Burke Act and Oneida Provisions. As a result, the consent to alienation required by the INA has been satisfied.

Having satisfied the INA requirement, a subsequent purchase of land by the Tribe does not reactivate the INA protections. *See Lummi Indian Tribe v. Whatcom County*, 5 F.3d 1355, 1359 (9th Cir. 1993). In *Lummi*, tribal land was allotted pursuant to the terms of the 1855 Treaty of Point Elliot. The parcel at issue was sold pursuant to an order removing restriction, and in 1970, the tribe purchased it from a non-Indian owner. The court explicitly held that once the restraints on alienation have been removed, the INA does not restrict the alienability of land repurchased by a tribe:

> No court has held that Indian land approved for alienation by the federal government and then reacquired by a tribe again becomes inalienable. To the contrary, courts have said that once Congress removes restraints on alienation of land, the protections of the Nonintercourse Act no longer apply. *See South Carolina v. Catawaba Indian Tribe, Inc.,* 476 U.S. 498, 505-06, 106 S. Ct. 2039, 2043-2044, 90 L.Ed. 2d 490 (1986) (Congressional act terminating federal services and statutory protections of Indians); *Larkin v. Paugh*, 276 U.S. 431, 433-34, 439, 48 S. Ct. 355, 366-367, 368, 72 L.Ed 640 (1928) (with the issuance of fee simple patent under Burke Act of 1906, 34 Stat. 182, "title not only passed from the United States but the prior trust and the incidental restriction against alienation were terminated"). Moreover, the statutory authorization for the sale of Indian land following proper government approval makes no mention of reimposing restrictions should a tribe reacquire the land. *See* 25 U.S.C. §372 (1988 & Supp. II 1990). Rather, the broad statutory language suggests that, once sold, the land becomes forever alienable.

Id.

Lummi has been followed by several courts. In *Anderson & Middleton Lumber Co. v. Quinault Indian Nation*, 130 Wash.2d 862, 877; 929 P.2d 379, 387-88 (Wash. 1996), the Washington Supreme Court held that land within the Quinault Indian Reservation became freely alienable under Indian General Allotment Act and "reacquisition of the land by the Nation does not change this result." In *Penobscot Indian Nation v. Key Bank of Maine*, 112 F.3d 538, 553 (1st Cir. 1997), the Maine Indian Claims Settlement Act disavowed further trust responsibility including that under the INA. The court rejected attempts to resurrect the INA and cited *Lummi* for the proposition that the Nonintercourse Act does not apply to land an Indian Tribe purchased in fee simple over which Congress previously terminated its trust obligation. *Id.* at 554. In *Bay Mills Indian Cmty. v. State of Michigan*, 244 Mich. App. 739, 748, 626 N.W.2d 169, 174 (Mich. Ct. App. 2001), the court held that the award of a fee patent to a non-Indian by the United States resulted in an alienation of the property and relinquished any trust relationship with respect to the land. Thus, "the state's transfer of the property at tax sale did not violate the [INA]." *Id.* Finally, in *Cass County Joint Water Res. Dist. v. 1.43 Acres of Land*, 2002 N.D. 83, ¶32, 643 N.W.2d 685, 697 (N.D. 2002), the tribe had acquired fee land that was not under any prior federal protection and the court concluded that "land does not become inalienable under the Nonintercourse Act merely because it is acquired by an Indian tribe."

The second line of analysis concerning the applicability of the INA derives from the language and purpose of the INA itself. The INA is designed to protect against the conveyance of land "from any Indian nation or tribe of Indians." It was not intended to address conveyances of allotted fee land. The INA stemmed from a time period when

Indian land ownership was primarily tribal ownership based on aboriginal occupancy rights. *See Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 665 (1979) (citing, *Oneida Indian Nation*, 414 U.S. at 669-670). The concerns prompting the IRA have been variously expressed by the courts but center on the need to prevent tribal lands from being improperly acquired by non-Indian settlers. *Wilson,* 442 U.S. at 664; *Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 199 (1960).

When the INA was enacted, "Congress did not distinguish between Indian trust lands and Indian fee lands at this time presumably because it did not contemplate that Indian tribes could hold land in fee simple." *Penobscot Indian Nation v. Key Bank of Maine*, 112 F.3d 538, 549 (1st Cir. 1997). However, by allotting land to individual tribal members, the land was by definition no longer "tribal land." The INA has had no application to individually owned lands. As the court noted in *San Xavier Development Authority v. Charles*, 237 F.3d 1149, (9th Cir. 2001):

> By its terms, this prohibition [INA] only applies to tribal land, which is land held in common for the benefit of all members of a tribe. It does not apply to allotted land, which is land once held in common, but now owned by individual Indians, and held in trust by the federal government. *Compare* Felix S. Cohen, Handbook of Federal Indian Law 253 (1982) (tribal land) *with id* at 605-07 (allotted land). Every court which has addressed a claim brought under the Nonintercourse Act has discussed the Act in reference to tribal and not allotted land.

If the land lost its tribal character through the allotment process, the only question is whether contemporary acquisition or re-acquisition of land by tribes triggers INA protections. The courts that have considered this question have rejected such a claim. In *Mashpee Tribe v. Watt*, 542 F. Supp. 797, 803 (D. Mass. 1982), *judgment aff'd*, 707 F.2d 32 (1st Cir. 1983), the District Court of Massachusetts held:

> The major purpose of the Nonintercourse Act was to prevent Indian uprisings and preserve the peace along the frontier. *Mohegan,* 638 F.2d at 621. This was to be accomplished two ways. One was by "protect[ing] the rights of Indians to their

> properties", *Wilson v. Omaha Indian Tribes,* 442 U.S. 653, 99 S. Ct. 2529, 61 L. Ed. 2d 153 (1979), by acknowledging and guaranteeing the Indian tribes' right to occupy their aboriginal lands ("aboriginal title"). *See, Narragansett,* 418 F. Supp. at 803. The other was by preventing the Indians from "improvidently disposing of their lands" at fraudulently low prices. *Id., see generally,* Note, *supra,* 60 B.U.L.Rev. at 918-919. **This purpose would in no way be served by restricting the alienation of property acquired by Indians from non-Indians in settled sections of the country. It seems clear, therefore, that the Nonintercourse Acts imposed restrictions only on the alienation of land held under aboriginal title.** (Emphasis added.)

These same concerns were among the rationale that prompted the *Lummi* court to reject the claim that the acquisition of fee land by a tribe prompted INA protections. *Lummi,* 5 F.3d at 1358.

The third and final basis for rejecting the claim that the INA automatically applies to any re-acquired fee land is that such a claim is again contrary to the trust provisions of the IRA, 25 U.S.C. § 465. In *Lummi,* the court observed, "The federal government has provided a means whereby Indians may convey land in trust to the government and thus remove the land from state tax rolls. 25 U.S.C. § 465 (1988)." *Lummi*, 5 F.3d at 1359. Similarly, in *Cass County Joint Water Res. Dist*, the North Dakota court observed "interests in land held in trust may not be sold or otherwise alienated without an Act of Congress under the Nonintercourse Act." 643 N.W. 2d at 697. In short, it is the trust process that triggers or reactivates INA protections, not the unilateral acquisition of fee land by a tribe.

2. Sherrill Provides That The INA Is Not Applicable To Alienated Land.

Any remaining doubt about the applicability of the INA to alienated fee lands has been rendered academic by the Supreme Court's holding in *Sherrill*. In *Sherrill*, the Supreme Court rejected OIN's unification of fee and aboriginal title theory. *Sherrill*, 544 U.S. at 214. Thus, the Supreme Court eliminated the legal basis upon which the Tribe

arguably would have standing to invoke INA to protect its recently acquired fee title. With no legal mechanism to revive its ancient sovereignty – except by applying to the federal government to take the land into trust, the Tribe is left with unrestricted fee title. The restrictions against alienation that apply to a tribe's "original title to the soil," do not exist with respect to the Tribe's recently purchased properties.

If the court in *Sherrill* could find no reason to apply the INA to prohibit the taxation of tribal fee land when it lost its aboriginal character, the INA can hardly be held to apply here – to land that was not aboriginal in the first place and then allotted and sold pursuant to Congressional authorization.

3. The Tribe's Summary Judgment Arguments Regarding The INA Are Without Merit.

The Tribe's Motion for Summary Judgment attempts to breathe life into its INA claim but is unable to cite a single case in which a court has held that allotted land reacquired by a tribe is subject to INA protections. Instead, the Tribe tries to dismiss the cases cited by the Village and bolster its argument by lengthy citations to cases in which the INA is "interpreted broadly" which are largely irrelevant here.

The Tribe rests a significant part of its argument on three decisions that it asserts are "particularly relevant." Tribe Summary Judgment Br. at 16. The first two are remand cases from *Sherrill* both of which are now on appeal.[87] Once the Supreme Court in *Sherrill* rejected the "unification theory" and held that the INA did not bar taxation of such lands, it is difficult to see how the district courts on remand could nevertheless conclude that the INA bars collecting such taxes. That issue will no doubt be argued on appeal. However, even if those decisions hold up on appeal, those cases were pre-

[87] *Oneida Indian Nation v. Oneida County*, 432 F. Supp. 2d 285 (N.D.N.Y 2006) and *Oneida Indian Nation v. Madison County,* 501 F. Supp. 2d 219 (N.D.N.Y. 2005).

allotment era cases where there was no express federal authorization to the alienation of such lands. This case involves Allotment Act authorization.

The remaining case relied on by the Tribe, *Tuscarora Indian Nation v. Federal Power Commission*, 257 F.2d 885 (2nd Cir. 1958), is equally inapplicable. *Tuscarora* involved another displaced New York tribe. In 1804, through the offices of the United States War Department, the Tribe was able to purchase 4,329 acres of land in fee in New York which were then treated as a tax-exempt reservation. *Id.* at 887. Nearly 150 years later, the New York Power Authority sought to condemn the tribal lands for a power project. In applying the INA, the court distinguished the case from one involving allotted lands noting:

> There remains to be determined whether in delegating its power of condemnation to the Power Authority, Congress expressly or impliedly intended to authorize the taking of Indian Reservation or tribal lands (**as distinct from lands allotted to Indians in severalty, 25 U.S.C.A. §357**)… (Emphasis added.)

Id. at 893. The case before this Court, involves that very distinction – allotted lands and the use of condemnation under Section 357.

The Tribe also notes that in recent years Congress has continued to authorize the sale of Indian lands through special enactments. These Acts have merely done in recent years on a more limited basis what the Allotment Acts did years ago – authorize the conveyance of tribal lands. Nothing in these Acts suggests that once Congress authorizes conveyance, a subsequent repurchase by the Tribe would reinstate the INA protections.

Finally, being unable to find any cases directly on point that support its position, the Tribe attempts to dismiss the cases that are on point that support the Village, particularly *Lummi Indian Tribe v. Whatom County*, 5 F.3d 1355 (9th Cir. 1993). The Tribe criticizes the court in *Lummi* for relying on two Supreme Court cases. In one case,

Larkin v. Paugh et al., 276 U.S. 431, 439 (1928), the alienation of land belonged to an individual Indian, but that does not negate the fact that a fee simple patent to Indian allottees terminates the trust relationship and restrictions against alienation. In the other case, *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498 (1986), the court noted that the Catawba Act redefined the relationship between the federal government and the tribe, but the court also relied on *Larkin* and Allotment Act principles in concluding the INA did not bar the conveyance of land. *South Carolina*, 476 U.S. at 308. The U.S. Supreme Court cases remain valid.

The Tribe also attempts to down play *Lummi's* subsequent adoption by other courts, incorrectly noting that it was cited only by two state courts. It has in fact been affirmatively cited by three separate state courts and the Second Circuit Court of Appeals and is in accord with the numerous federal cases cited above. The Tribe asks this Court to ignore all of those cases in favor of its wholly unsupported claim that the INA trumps all of the subsequently enacted Allotment statutes, and the trust provisions of 25 U.S.C. § 465. There is no basis to do so.

In the case before us, the land at issue was allotted in severalty under the Allotment Acts to individual Indians and all restrictions on alienation were terminated. Congress has not acted to impose new restraints on the alienability of this land and outside of the trust process. Without clear Congressional intent to resume federal protection and control, the Nonintercourse Act cannot be used as a bar to alienation of the fee land at issue.

C. Sovereign Infringement And Sovereign Immunity.

The Tribe's third and fifth counts allege sovereign infringement and sovereign

immunity. The sovereign infringement claim asserts that the application of state and local laws infringes on the Tribe's rights of tribal self-government and violates their inherent sovereign right to make their own laws and be ruled by them. The sovereign immunity claim simply alleges that any effort by the Village to seize tribal property, assess tribal property, or bring suit to seize or assess tribal property is precluded by sovereign immunity.

The Tribe's assertion that it is a sovereign nation "enjoying all the rights and benefits of a sovereign" (Complaint ¶58) fails to recognize the fundamental limits of tribal sovereignty under federal law. "The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance." *United States v. Wheeler,* 435 U.S. 313, 323 (1978). As the *Wheeler* court has explained:

> Indian tribes are . . . no longer "possessed of the full attributes of sovereignty." Their incorporation within the territory of the United States, and their acceptance of its protection, necessarily divested them of some aspects of the sovereignty which they had previously exercised. By specific treaty provision they yielded up other sovereign powers; by statute, in the exercise of its plenary control, Congress has removed still others. (Internal citation omitted)

Id. For this reason, tribes are often referred to as "quasi-sovereign" entities. *See generally Morton v. Mancari*, 417 U.S. 535, 554, 94 S. Ct. 2474 (1974); *Fisher v. District Court*, 424 U.S. 382, 390 (1976); *United States v. Antelope*, 430 U.S. 641, 645 (1977); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208, 98 S. Ct. 1011 (1978); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 71, 98 S. Ct. 1670 (1978); *Three Affiliated Tribes v. Wold*, 476 U.S. 877, 890 (1986); *Rice v. Cayetano*, 528 U.S. 495, 518, 120 S. Ct. 1044 (2000).

As previously noted, "[Tribal] sovereignty . . . is subject to plenary federal control

and definition." *Three Affiliated Tribes*, 476 U.S. at 891. Here, Congress has exercised control over the lands at issue here through the Allotment Acts, the provisions of 25 U.S.C. § 357 and the trust provisions of 25 U.S.C. § 465. If those provisions apply, claims of tribal sovereign immunity are irrelevant.

Apart from those statutory provisions, the Tribe's claims of absolute sovereignty are based on the faulty assumption that tribal fee land re-acquires sovereign status merely by tribal repurchase. In *Sherrill*, the Supreme Court held that tribes cannot unilaterally revive ancient sovereignty, in whole or in part, over land simply by purchasing it on the open market. *See Sherrill*, 544 U.S. at 202-203.

Finally, it is important to keep in mind that the basic issues in this case are *in rem* in nature – i.e. they are attempts by the Village to exercise control over the land not tribal members. There is a distinction between *in rem* proceedings involving property held by tribes on the one hand, and *in personam* proceedings against tribes on the other hand. *Yakima* and other cases make it clear that any sovereignty possessed by a tribe *qua* tribe is irrelevant in an *in rem* proceeding. *See Yakima*, 502 U.S. at 265. *See also Cass County Joint Water Res. Dist.,* 643 N.W.2d 685 at 693 (N.D. 2002) (*in rem* eminent domain proceeding against land owned in fee by tribe is not barred by tribal sovereign immunity); *Anderson & Middleton Lumber Co.*, 130 Wash.2d at 876-877, 929 P.2d at 386-87 (Wash. 1996) ("Because our decision is based upon in rem jurisdiction, we need not further consider in personam jurisdiction, immunity and waiver").

IV. THE TRIBE'S REMAINING DERIVATIVE CLAIMS ARE WITHOUT MERIT AND SHOULD BE DISMISSED.

The Tribe's final five counts of its Complaint primarily relate to the Village's special assessment associated with the O'Hare Boulevard. The Tribe asserts that the levy

and collection of the assessment constitutes unjust enrichment and conversion, violates state and tribal law and warrants injunctive relief. These claims are primarily derivative claims of the Tribe's unsupported claim of sovereignty and jurisdiction and can be readily dismissed. The Village has proceeded lawfully under applicable state law; the Village has jurisdiction to levy the assessment and the Tribe has failed to comply with applicable state law which precludes further relief by the Tribe.

A. The Village Acted Lawfully And Appropriately In Levying And Collecting The Special Assessment For O'Hare Boulevard.

The basic chronology of the Village's actions in developing the Southeast Industrial park and O' Hare Boulevard have been set forth above.[88] There has been no dispute that in laying out the road, Hobart followed the procedures for laying out a town highway under then applicable notice, hearing, levy and damage award provisions of Wis. Stat. ch. 80.

There is also no dispute that mere hours before its meeting on June 26, 2001 the Tribe purchased the land on which O'Hare Boulevard was planned to be located and that the Tribe subsequently objected to the laying of the road and assessment. Given the Tribe's position on jurisdiction, the Village has voluntarily refrained from initiating construction and has attempted to resolve the jurisdictional issues through a state declaratory judgment action and settlement discussions.

To date, the only expenses incurred on the project have been principal and interest payments on the bond issues. The bonds were issued on June 1, 2001 before the Tribe's purchase of the O'Hare parcels. The Village has made assessments and the Tribe has paid the assessments (until this year) and the Village has placed the collected funds in a

[88] *See* Village Prop.F. ¶¶38-58 and discussion in the Fact Section above.

restricted account. No one is absconding with or misapplying the funds.

Having objected to the Village's jurisdiction to condemn the land and levy assessments, the Tribe now criticizes the Village for not building the road with assessments that the Tribe has paid. The Village would have been more than willing to commence the road as it noted in its July 2002 letter to the Tribe but for the Tribe's subsequent objection.[89]

Obviously, if it is determined as part of this proceeding that the Village does not have jurisdiction, or for some other reason that O'Hare Boulevard cannot constructed as planned, the Village will need to comply with state law, including Wis. Stat. §66.0703(11) and refund any surplus to the property owners including the Tribe. However, regard, there is no basis for prejudgment interest on an assessment refund under § 66.0703. If a refund is required, the Village will comply with state law.[90] Until that time, there is nothing unlawful or unreasonable with the course of action followed by the Village.

B. The Tribe's Special Assessment Claims Must be Dismissed.

1. Unjust Enrichment.

The Tribe's sixth claim alleges that the Village has been unjustly enriched by retaining the benefit of the assessments paid by the Tribe. Under Wisconsin law,

> [a]n unjust enrichment action requires proof of three elements: (1) a benefit conferred on the defendant by the plaintiff; (2) appreciation by the defendant of the benefit, and (3) acceptance and retention by the defendant of the benefit; or under circumstances such that it would be inequitable to retain the benefit without payment.

Staver v. Milwaukee County, 2006 WI App 33, ¶24. The standard applies under federal

[89] Helfenberger Aff. ¶15, Ex. J (July 2002 letter).
[90] Helfenberger Aff. ¶22.

common law. *See Prod. Process Cons. V. Wm. R. Hubbell Steel*, 988 F.2d 794, 797 (7th Cir. 1993).

The Tribe asserts that it is inequitable for the Village to retain the funds "because the Village is prohibited by federal law from making any improvements to the Tribe's O'Hare Boulevard Property." Tribe Summary Judgment Br. at 23. That, of course, is the central jurisdictional question in this case. For the reasons set forth above, until the land is placed into trust, the Village **does** have the right to make such improvements and impose charges for those improvements.

Furthermore, there is nothing inequitable, unjust or unreasonable about the actions of the Village. The Village acted in conformity with Wisconsin law. The Village fully intends to build the road or refund the assessments in accordance with state law once this jurisdictional issue is resolved.

2. Conversion.

The Tribe's seventh claim alleges that the assessments against the O'Hare Boulevard Property constitute acts wrongfully exerted over property belonging to the Tribe in denial of or inconsistent with the Tribe's rights.

'"The essence of conversion is the wrongful deprivation of one who has a right to the immediate possession of the object unlawfully held." *Horbach v. Kaczmarek*, 288 F.3d 969, 978 (7th Cir. 2002). "The plaintiff's right to the money must be absolute." *Id.* The same analysis applicable to unjust enrichment applies here. Because the Tribe cannot establish jurisdiction over the fee land at issue, they are unable to establish that the Village is acting unlawfully in its collection of assessments, nor can they establish an absolute right to the money. Therefore, without jurisdiction over the land, they cannot

support a claim for conversion.

3. Violation Of Tribal Law.

The Tribe's eighth claim alleges that the actions taken by the Village on tribal land without approval from the Tribe constitute violations of tribal law. The count explicitly requests a declaration that "any actions by the Village, on Tribal land, that have not been approved by the Tribe pursuant to its established Tribal laws and ordinances, are unlawful as a violation of Tribal law and would constitute an act in excess of the Village's authority under state law." Complaint at 27.

Whether the Village has complied with tribal law is wholly irrelevant if tribal law does not apply. For the reasons set forth above, tribal fee land is subject to the jurisdiction of the Village, not the Tribe. Tribal purchase alone does not alter jurisdiction. State law on taxation and condemnation is applicable to such lands regardless of tribal consent or compliance with tribal procedures. In short, this claim also rises or falls on the merits of the underlying jurisdictional claim and adds nothing by itself.

4. Wis. Stat. §§ 66.0703(1)(c) And 66.0703(11).

The Tribe's ninth claim alleges violations of Wis. Stat. §§ 66.0703(1)(c) and 66.0703(11). Wis. Stat. §§ 66.0703(1)(c) states that, "[i]f any property that is benefited is by law exempt from assessment, the assessment shall be computed and shall be paid by the city, town or village." The Tribe claims that they are exempt from assessment with respect to new road and infrastructure projects. Complaint at 72. Such an exemption only applies if their jurisdictional claim is correct.

As noted above, *Yakima* holds that a tax that creates a burden on property alone is

a "taxation of land," is explicitly allowed in the Allotment Acts and, is therefore, prima facie valid. *See Yakima*, 502 U.S. at 252. Additionally, any sovereignty possessed by a tribe *qua* tribe is irrelevant in an in rem proceeding. *See*, *e.g.*, *Cass County Joint Water Res. Dist.,* 643 N.W.2d 685, 693 (N.D. 2002).

The second part of this count alleges a violation of Wis. Stat. § 66.0703(11), which states:

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

The Tribe asserts that because the Village has not completed the assessed project, the cost of the project, thus far, is less than the amount assessed and the Tribe is entitled a refund. This is, at best, disingenuous because it is the Tribe that has kept the project from proceeding by its objection to the Village's jurisdiction. However, Wis. Stat. § 66.0703(11) cannot be applied at this time because, due to delay on the part of the Tribe, the final cost of the project has not been determined and therefore a refund cannot be calculated. When the project is complete or when the project is otherwise terminated and the resulting cost is lower than the assessments paid, the Village will provide refunds as required under state law. Again, this section does not allow for prejudgment interest.

C. The Tribe Is Not Entitled To Injunctive Or Monetary Relief.

In its tenth and final claim, the Tribe seeks a preliminary and permanent injunction alleging irreparable harm resulting from the violations enumerated in Claims 1-9. An injunction is of course not warranted if the Tribe is wrong on the law. This is truly a derivative claim that rises or falls on the strength of the prior claims.

The Tribe also seeks a refund of all of the assessments paid for the O'Hare Boulevard Project. As noted above, the Village will comply with its obligations under state law and, to the extent required, will refund funds not expended. However, the Tribe is not in a position to assert claims for any affirmative monetary relief against the Village much less prejudgment interest for two reasons.

First, the Tribe must avail itself of the appeal procedures under state law to obtain relief from a special assessment. *See*, *e.g.*, *Bialk v. City of Oak Creek*, 98 Wis. 2d 469, 297 N.W.2d 43 (Ct. App. 1980). Wis. Stat. § 66.0702(12) establishes a mandatory procedure for appeal of special assessments. The first requirement is that a notice of appeal be served on the municipality. Subsection (12)(a) provides in relevant part:

> (a) A person having an interest in a parcel of land affected by a determination of the governing body, under sub. (8) (c), (10) or (11), **may, within 90 days after the date of the notice or of the publication of the final resolution** under sub. (8) (d), appeal the determination to the circuit court of the county in which the property is located. The person appealing **shall serve a written notice of appeal upon the clerk** of the city, town or village . . . . (Emphasis added.)

The second requirement is that the assessment appealed from must be paid when due. § 66.0703(12)(f). Any failure to make a payment requires that the appeal be dismissed. *Id.* The statutes are unequivocal that this procedure is the exclusive remedy even if the improvement was not made according to the plans and specifications. Wis. Stat. § 66.0703(12)(e) provides:

> (e) **An appeal under this subsection is the sole remedy** of any person aggrieved by a determination of the governing body, whether or not the improvement was made according to the plans and specifications…

Here, there is no dispute that the Tribe has not filed a notice of appeal with the Village in accordance with this section.[91] There is also no dispute that, as to 2006, the

[91] Helfenberger Aff. ¶20.

Tribe has failed to make the required payment. Having failed to utilize its exclusive state remedy, the Tribe cannot obtain a remedy in this proceeding regarding the amount or timing of any refund, should one ultimately be required. Its claim should be dismissed.

Second, in the alternative, Wisconsin's notice of claim statute, Wis. Sta. § 893.80, requires that any person with a claim against a local unit of government comply with the statute. This requirement was summarized by the court in *Probst v. Winnebago County,* 208 Wis. 2d 280, 285, 560 N.W.2d 291 (Ct. App. 1997), as follows:

> Section 893.80, STATS., provides that an action cannot be brought or maintained against a governmental body unless two requirements are met: service upon the governmental unit of written notice of the circumstances of the claim, see § 893.80 (1)(a), and submission of a subsequent claim to the appropriate clerk, containing the claimant's address and an itemized statement of relief sought, see § 893.80 (1)(b). Upon receipt of the claim, the governmental body has 120 days in which to accept or disallow the claim. See id. (Footnote omitted).

No notice of claim or claim has been served on the Village.[92]

Courts in Wisconsin have applied this statute to other governmental units. *See generally*, *DNR v. City of Waukesha*, 184 Wis. 2d 178, 515 N.W.2d 888 (1994); and *City of Racine v. Waste Facility Siting Bd.*, 216 Wis. 2d 616, 575 N.W.2d 712 (1998). In the absence of compliance with those requirements, the claim should be dismissed. *See*, *e.g.*, *Probst*, 208 Wis. 2d at 288.

CONCLUSION

The historical facts are undisputed. The Tribe lost control of the land in its Reservation through the sale of tribal land authorized by the federal government in the Allotment Acts. The Tribe now has revenues to buy back large sections within the Reservation area and is doing just that. Both processes are lawful even if unpopular with

[92] Helfenberger Aff. ¶21.

the other. As with any geographic area where there are competing land claims, there are critical issues over control and governance.

The question in this case is whether those important jurisdictional issues will be resolved through the application of the Congressionally authorized trust process or whether the Tribe will be able to unilaterally resolve those issues by fiat. Both as a matter of law and policy, it is the trust process not tribal fiat that should govern. Until the trust process is complete, jurisdiction regarding taxation, regulation and condemnation remains with the Village. Accordingly, summary judgment should be granted to the Village on its Counterclaim and the Tribe's motion for summary judgment should be denied.

DATED this 10th day of September, 2007.

ANDERSON & KENT, S.C.

By: */s/ Paul G. Kent*

Paul G. Kent (#1002924)
Abigail C. S. Potts (#1060762)
1 North Pinckney Street, Suite 200
Madison, WI 53703
Telephone: 608-246-8500

Of Counsel:
HANAWAY ROSS LAW FIRM
William S. Woodward (#1008988)
345. S. Jefferson Street
Green Bay, WI 54301
Telephone: 920-432-3381

Attorneys for Defendant Village of Hobart