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 REPLY BRIEF IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT AND RESPONSE TO THE TRIBAL AMICI'S BRIEF

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

INTRODUCTION

This case presents significant legal issues that have substantial policy ramifications for defining the proper jurisdictional boundaries of tribal and local governments over tribal fee land. The Village maintains that when Congress authorized the allotment of tribal reservation lands and removed all restrictions on taxation and alienation of such lands, it meant what it said. Given that framework, subsequent reacquisition of such lands by tribal government purchases does not alter that jurisdictional framework unless the Tribe successfully completes the federal process for placing such lands back into trust. The Village's position is supported by recent Supreme Court precedent in *Yakima*, *Cass County* and *Sherrill*.

The Tribe counters that this framework is overruled by the Indian Reorganization Act, the same act that created the trust process; and by the Indian Non-Intercourse Act that was enacted long before the Allotment Acts and merely required the kind of Congressional authorization that the Allotment Acts provided.

These legal questions arise in the highly charged context of control over land. Within Native American traditions, there is a strong tribal connection to the land even when that land may not have been their original ancestral home. At the same time, within the Anglo-American legal system, private ownership of land has been highly valued and protected. Thus, it is not surprising that the landholders – the Tribe and the individual amici – have strong feelings about these issues. However, resolution of the important legal issues in this case is surely not aided by *ad hominum*-like attacks such as the Tribe's charge that, "the Village has a history of fostering an anti-tribal agenda (s*ee* Tribe's Proposed Finding of Fact No. 28); a charge both irrelevant and untrue.

This reply will focus on the facts and legal questions necessary for resolution of the case. For the reasons set forth herein and in the Village's initial brief, summary judgment should be granted to the Village.

FACTS

The legal issues in this case turn on a few basic undisputed facts concerning the allotment and ownership of land within the original reservation. First, there is no dispute that in 1892 "nearly the entire Oneida Reservation was allotted to tribal members;" that these lands were thereafter converted to fee simple status; and that by 1917 "the vast majority of allotments had already passed out of Oneida Indian's hands to non-Indians."[1] According to the Tribe, only 591

[1] *See* Tribe's Proposed Finding of Fact No. 8; and Village Proposed Finding of Fact No. 16 to which the Tribe agrees.

acres of the original 65,400 acres were never patented in fee, less than 1% of the original reservation.[2] Whether the residual amount of the original 65,400-acre reservation was reduced to a few hundred acres by 1922 as one published source states,[3] or whether a few thousand acres remained as of 1934 as the Tribe now contends, in either case the vast majority of the land in the Village was lost to non-Indian ownership long ago.

Second, there is no dispute that the O'Hare Boulevard and Forest Road Properties at issue in this case were among those lands allotted to tribal members and granted fee patents in the late 1800s and early 1900s, and that those lands were thereafter sold to third parties.[4] There is no dispute that these lands have not been held by the Tribe since the time of allotment until they were recently reacquired by the Tribe between 2000 and 2006.[5]

Third, there is no dispute about the dramatic increase in tribal land purchases in recent years as illustrated in the maps attached to the Village's initial brief. The impacts to the ability of the Village to develop infrastructure in such a checkerboard area and the need for a resolution of the jurisdictional questions this poses are self-evident.[6]

---

[2] *See* Tribe Proposed Finding of Fact No. 13 to which the Village agrees.

[3] The Tribe claims that the source quoted by the Village on this point was mistaken. Tribe Resp. Br. at 7. The statement quoted by the Village is from a published article by Alinda Locklear, a tribal attorney, who argued the Oneida Land Claims cases in the Supreme Court. *See* A. Locklear, "The Allotment of the Oneida Reservation and Its Legal Ramifications" J. Campisi and L. Hauptman, *The Oneida Experience: Two Perspectives,* Syracuse Univ Press 1988, at *x*. and 85. The *Campisi* book was cited affirmatively by the U.S. Supreme Court in *Sherrill,* 544 U.S. at 205.

[4] *See* Webster Aff., Ex. E, summarizing the dates of the original patents and the first transfer from the original patents for the O'Hare and Forest Road Properties, to which the Village agrees. *See* Woodward Supp. Aff. ¶3. Although the Tribe complains about certain details in the title work, those are addressed in the Supplemental Affidavit of Bill Woodward, and none of these details change the basic facts.

[5] *See* Village Proposed Findings of Fact Nos. 39 and 60, to which the Tribe agrees.

[6] Although there may be a small amount of *member* fee land that could not be accounted for in this map given the limits of title records, it is not relevant to the jurisdictional issues associated with *tribal* fee lands and *trust* lands that are at issue in this case.

Finally, although the Tribe asserts that "the Village is the aggressor in seeking to force a condemnation of the Tribe's Reservation property,"[7] it was the Tribe who chose to purchase land directly in the path of O'Hare Boulevard. The Tribe admits to closing on the O'Hare Boulevard Property the same day that the Village had publicly noticed a meeting to lay the road in June 2001.[8] The Village did not set out to condemn tribal land, the Village set out to authorize the construction of O'Hare Boulevard as the main thoroughfare through the Southeast Industrial Park.[9] This park was the subject of many years of planning and significant Village expenditures.[10]

Once the Tribe made known its purchase and its objection to the placement of O'Hare Boulevard, the Village voluntarily chose not to proceed with building the road,[11] and it filed a declaratory judgment in state court to resolve the jurisdictional dispute. When the Tribe resisted that effort and ultimately sought to change venue to this Court, the Village did not oppose that effort. There is no dispute that the result of the Tribe's purchase is that the planned tax base for the Village has not occurred.[12]

In light of these facts, one might reasonably ask who the "aggressor" is here, but that is not the question before the Court. The question is whether the legal effect of such purchases is to deprive the Village of all jurisdiction over such land. This question is important not only for

---

[7] Tribe Resp. Br. at 27.

[8] Webster Aff. ¶16, even though the first offer to purchase was submitted earlier in 2001.

[9] The Tribe agrees that O'Hare Boulevard is the main east-west thoroughfare through the site. Village Proposed Finding of Fact No. 43.

[10] The Tribe claims that planning of the industrial park began in 1995 not 1974. This is addressed in Helfenberger Supp. Aff. at ¶10. However, whether the Village's plans for the Industrial Park began in 1974 or 1995, there is no dispute that planning for the Industrial Park was the subject of numerous public meetings well before the Tribe's purchases of land in 2000 and 2001. Similarly, the Tribe claims that the Village only spent $3.4 million rather than $5.0 million on the Park before the 2001 Tribal purchase. This is addressed in Helfenberger Supp. Aff. ¶12 but either number demonstrates substantial public commitment to this area by the Village.

[11] Village Proposed Finding of Fact No. 52 to which the Tribe agrees.

[12] Village Proposed Finding of Fact No. 48 to which the Tribe agrees.

these parcels but for other parcels the Tribe is likely to purchase in the future. For the reasons set forth below, such purchases should not alter the jurisdiction of tribal and local governments over such land.[13]

LAW AND ARGUMENT

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

A. The Tribe's Response Ignores The Allotment Acts.

The Village predicated its primary jurisdictional argument on three Congressional enactments – the Dawes Act (aka the General Allotment Act), the Burke Act and the Oneida Allotment Provisions (collectively referred to herein as the Allotment Acts). Village Br. at 18-31. The language of those Acts provide that, upon the expiration of the applicable trust periods, **all** restrictions on sale, taxation, encumbrance and alienation of allotted land were removed. The legislative history and subsequent interpretation by the Supreme Court have reaffirmed the continuing validity of the Allotment Act provisions as a basis for state and local jurisdiction over alienated fee lands.

The Tribe's response is telling – it virtually ignores the Allotment Acts. Instead of directly addressing the Allotment Acts, the Tribe's Response Brief is almost entirely devoted to *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005), and contains no refutation of the Allotment Act analysis outside of the *Sherrill* context. While *Sherrill* is supportive of the Village's position as set forth below, *Sherrill* is not an Allotment Act case. Thus, even if the Tribe's misplaced attempt to distinguish *Sherrill* had merit, that argument has no bearing on the continuing validity of the Allotment Act provisions. The only other response to the Allotment

[13] The Tribe also disputes details about the Village's statements regarding tribal demographics and governmental services between the Tribe and Village. Since those issues are only relevant in the context of the *Sherrill* decision, they will be addressed in that section.

Acts is the Tribe's reference to its Reply Brief arguments on the Indian Reorganization Act and the Indian Non-Intercourse Act. Those arguments are addressed elsewhere.

B. The Tribe's "Indian Country" Argument Is Irrelevant To The Allotment Acts.

To the extent that the Tribe addresses the Allotment Acts as part of its *Sherrill* analysis, it does so through an elaborate but irrelevant argument. The Tribe begins by asserting that one of the rationales cited by the court in *Sherrill* for rejecting the Tribe's assertion of jurisdiction over recently repurchased land, is that the longstanding exercise of jurisdiction by the State over an area that is predominantly non-Indian in population and land use can create justifiable expectations of continued jurisdiction. So far so good; this is one of several rationales cited by the court. *See Sherrill*, 544 U.S. at 215.

Where the Tribe veers off track is by claiming that the Village cannot have justifiable expectations of jurisdiction over tribal fee lands because its reservation is Indian Country and the reservation was not disestablished. Tribe Resp. Br. at 20. The Tribe then claims that, because the Allotment Acts do not affect the "Indian Country" status of the reservation, the Allotment Acts do not provide a basis for the exercise of jurisdiction over those lands by the Village.

The fundamental problem with the Tribe's argument is that the Indian County designation is irrelevant to jurisdiction over tribal fee lands. The Indian Country Act, codified at 18 U.S.C. § 1151, defines the term "Indian Country," for purposes of the criminal code for Indians. It has also been used in some contexts to define the extent of tribal jurisdiction over Indians and non-Indians in the context of certain civil actions.[14] These are questions of personal jurisdiction.

[14] *See DeCoteau v. District County Court*, 420 U.S. 425, 427 n.2 (1975). Although tribal jurisdiction over its own members is considerable pursuant to Public Law 280, states such as Wisconsin may retain criminal jurisdiction, 18 U.S.C. § 1162(a), and certain civil jurisdiction, 28 U.S.C. § 1360(a), over tribal members.

However, the question in this case involves state and local jurisdiction over alienated **land**, not questions of personal jurisdiction. The specific issues before the Court involve taxation of land through special assessments and the condemnation of land through state statutory procedures.[15] It is precisely in such areas where the effect of the Allotment Act is controlling.

The impact of the Allotment Acts on state and local jurisdiction over **land** was explained at length by the court in *Yakima v. Confederated Tribes*, 502 U.S. 251, 263-64 (1992):

> But (and now we come to the misperception concerning the structure of the General Allotment Act) *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, but by §5 that the Court found of central significance. . . . Thus, when §5 rendered the allotted lands alienable and encumberable, it also rendered them subject to assessment and forced sale for taxes.
>
> The Burke Act proviso, enacted in 1906, made this implication explicit and its nature more clear. . . Although such a fee patent would not subject the Indian owner to *plenary* state jurisdiction, fee ownership would free the land of "all restrictions as to sale, encumbrance or taxation." (Emphasis in original)

The Tribe clings to the same misperception that was expressly rejected in *Yakima*. The Allotment Acts are not about personal jurisdiction but *in rem* jurisdiction. This same *in rem* analysis was subsequently reaffirmed in *Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103 (1998). *Cass County* and *Yakima* were both Allotment Act cases and both involved lands that were Indian Country. *Yakima*, 502 U.S. at 256 and *Cass County*, 524 U.S. at 106. Yet, that designation was not an impediment to upholding *in rem* jurisdiction.

Although the Tribe makes a passing reference to *in rem* jurisdiction, it misperceives its scope. The Tribe asserts that *Yakima* "narrowly construed" and "strictly limited" *in rem* jurisdiction to state taxing authority. Tribe Resp. Br. at 23. Not so:

[15] The Tribe makes no response to the Village's argument that the special assessments are a form of property tax. In addition, the Tribe does not dispute that the procedures used by the Village to lay out O'Hare Boulevard were consistent with the state statutory requirements. *See* Village Proposed Findings of Fact Nos. 43-45, and 49, none of which the Tribe disputes. The Tribe simply disputes that the state procedures apply to them.

> While the Burke Act proviso **does not purport to describe the entire range of *in rem* jurisdiction** States may exercise with respect to fee-patented reservation land, we think it does describe the entire range of jurisdiction to tax. And that description is "taxation of . . . land"(emphasis added)

Yakima, 502 U.S. at 268. The Court concluded that the state had *in rem* jurisdiction to tax allotted fee land but it did not have personal jurisdiction to tax a tribal member on the proceeds of selling land. What *Yakima* did was to distinguish jurisdiction over land from jurisdiction over the owner; it did **not** limit *in rem* jurisdiction to taxation.

In fact, it is well established that *in rem* jurisdiction not only applies to taxation, it also applies to condemnation actions. *See, e.g., Cass County Joint Water Resource Dist. v. 1.43 Acres of Land*, 2002 N.D. 83, 643 N.W.2d 685, 688-689; and *United States, v. Petty Motor Co.*, 327 U.S. 372, 376 (1946). Taxation and condemnation are the two specific actions of the Village at issue in this case. Whether *in rem* jurisdiction extends to other state and local actions such as zoning presents a separate issue that this Court need not reach.[16]

The Tribe's Indian Country argument also leads the Tribe to the erroneous conclusion that tribal "acquisition [of land] simply removes an impediment – non-Indian ownership – that held the tribe's existing jurisdiction towards the parcel in abeyance." Tribe Resp. Br. at 24-25. This claim has been consistently rejected. In *Cass County*, the court rejected this theory in the context of the Allotment Acts:

> The Band essentially argues that, although its tax immunity lay dormant during the period when eight parcels were held by non-Indians, its reacquisition of the lands in fee rendered them nontaxable once again. We reject this contention.

[16] However, the Court should note that in *Sherrill*, the court observed that removing local zoning from tribal fee land would be inconsistent with its decision upholding local taxation: "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." *Sherrill*, 544 U.S. at 220. Even the sole dissenter agreed with this proposition. *Id.* at 226, n.6. Only the pre-*Sherrill* case of *Gobin v. Snohomish County*, 304 F.3d 909 (9th Cir. 2002) reached a contrary conclusion that zoning was not an alienation of the land and burdens the use of the land rather than the land itself.

Cass County, 524 U.S. at 113-14. A similar contention was rejected by the court in *Sherrill:*

> OIN and the United States argue that because the court in *Oneida II* recognized the Oneida's aboriginal title to their ancient reservation land and because the Tribe now acquired the specific parcels involved in this suit in the open market, it has united fee and aboriginal title and may now assert sovereign dominion over the parcels. . . . We now reject the unification theory of the OIN and the United States . . . .

Sherrill, 544 U.S. at 213-14. Tribal reacquisition of fee land does not result in the resurrection of dormant tribal jurisdiction and simultaneously extinguish state and local jurisdiction over the land.

Finally, although the Tribe attempts to suggest that the Indian Country designation is a major distinction between this case and *Sherrill*, the "Indian Country – disestablishment" argument was as irrelevant there as it is here. In *Sherrill*, the court noted that the Court of Appeals decision specifically ruled that the parcels **did** qualify as Indian Country, *Sherrill*, 544 U.S. at 212. The Supreme Court determined that it was not necessary to determine whether the reservation was disestablished and Indian Country status was lost to reach its decision.[17] If the designation of Indian Country was not dispositive in *Sherrill* where the land had passed out of tribal ownership in violation of federal law, it certainly has no weight where the land passed out of tribal ownership in accordance with federal laws like the Allotment Acts, which were designed to allow local taxation and alienation of the land.

While the Tribe would like the Court to ignore the Allotment Acts, it can only do so if it ignores the "unmistakably clear" intent of Congress "making the [allotted] lands freely alienable and withdrawing them from federal protection." *Cass County*, 524 U.S. at 110-11. That being the case, an unmistakably clear Congressional act is required to reimpose restrictions on such lands:

[17] "We need not decide today whether, contrary to the Second Circuit's determination, the 1838 Treaty of Buffalo Creek disestablished the Oneida's Reservation. . . ." *Sherrill*, 544 U.S. at 215, n. 9.

> [Once] Congress has demonstrated (as it has here) a clear intent to subject the land to taxation by making it alienable, Congress must make an unmistakably clear statement in order to render it nontaxable. . . . The subsequent repurchase of reservation land by a tribe does not manifest any congressional intent to reassume federal protection of that land. . . . (Internal citations omitted.)

Cass County, 524 U.S. at 114. In our case, there has been no explicit (or even implicit) Congressional action to return these parcels to protected status. The Village was acting within its authority to impose restrictions on such lands.

II. THE TRIBE MISCHARACTERIZES THE *SHERRILL* DECISION AND ITS RELEVANCE TO THE ISSUES BEFORE THE COURT

A. The Village's Position Is Supported By But Not Dependent On *Sherrill.*

The Tribe spends its entire response brief on *Sherrill* on the mistaken assertion that the Village's case rises or falls on *Sherrill*.[18] It does not. The Village's position is merely that *Sherrill* is instructive and supports the Village's position on all of the key issues before the Court, and that it provides an independent basis to uphold the Villages' position.

Sherrill is consistent with the Village's position on the Allotment Acts that a tribe cannot "unilaterally revive its ancient sovereignty, in whole or in part" merely by "open-market purchases from current title holders." *Sherrill*, 544 US at 203. *Sherrill* is also consistent with the Village's position on the Indian Reorganization Act (IRA) that the IRA trust process in § 465 "provides the proper avenue . . . to reestablish sovereign authority over territory." *Id*. at 221.[19] Finally, *Sherrill* is consistent with the Village's position that the existence of the Indian Non-Intercourse Act (INA) is not determinative of tribal control over reacquired fee land. *Sherrill* acknowledges the INA, s*ee id*. at 204 and n.2, but does not find the need to discuss it in reaching its decision.

---

[18] The Tribe attempts to create this false impression by continually tying the Village's brief and the individual amicus together. In fact, the Village's 60-page initial brief spent less than 6 pages on the *Sherrill* discussion.

[19] The Tribe complains that the Village is using "loaded language" by referring to the reestablishment of tribal jurisdiction. Tribe Resp. Br. at 24. The Village was quoting directly from language used by the Supreme Court.

Sherrill is significant and powerful because it confirms the limitations on tribal jurisdiction over fee lands even in the **absence** of specific Congressional action like the Allotment Acts. At the same time, if *Sherrill* did not exist, the Village's position would remain the same. All of the Village's arguments under the Allotment Acts and all of the prior Supreme Court decisions, including in *Yakima*, and *Cass County*, remain in full force and effect.

B. The Material Facts In *Sherrill* Parallel Those In This Case.

The Tribe next argues that the facts in *Sherrill* are distinguishable from those in this case. To some extent that is true in every Indian law case, but that does not prevent the use of such cases as precedent when the material facts are comparable. The various distinctions offered by the Tribe are factually wrong and do not materially affect the applicability of *Sherrill* to this case.

"Long Dormant Claim" Argument. The Tribe's primary argument is that *Sherrill* involved a "long dormant claim" by the New York Oneida and that, in our case, "the Tribe's present claim ripened only after it acquired the parcels at issue and the Village threatened to condemn the parcels" in 2001. Tribe Resp. Br. at 18. This is a mischaracterization of both *Sherrill* and our case:

- In *Sherrill*, the court stated, "This case concerns properties in the city of Sherrill, New York, purchased by the Oneida Indian Nation of New York (OIN) in 1997 and 1998." *Sherrill*, 544 U.S. at 202. Our case involved properties purchased by the Tribe in 2000-2001 and 2006. There is no material difference in these facts.

- In *Sherrill*, "The city of Sherrill initiated eviction proceedings in state court [for unpaid property taxes] and OIN sued Sherrill in federal court." *Sherrill*, 544 U.S. at 211. In our case, the Village attempted to condemn and specially assess lands, and when the Tribe objected, the Village brought an declaratory judgment action in state court and the Tribe sued in federal court. There is no material difference in these facts.

- In *Sherrill*, "The separate parcels of land in question . . . were last possessed by the Oneidas as a tribal entity in 1805." *Sherrill*, 544 U.S. at 202. In our case, the

> separate parcels of land in question were last possessed by the Oneidas as a tribal entity in 1892 prior to allotment and were subsequently sold to third parties.[20] Even the Tribe does not argue that the difference between 1805 and 1892 is material.

The Tribe also asserts that this is the first time the Village used its condemnation power. This is as irrelevant here as it was in *Sherrill*. *Sherrill* did not focus on when the specific eviction action became ripe, or even whether this was the first time the city brought an eviction action. The focus of the decision was that OIN had only recently "acquire[d] the properties in question and assert its unification theory." *Sherrill*, 544 U.S. at 216. That is exactly the situation here. It was not until this case that the Tribe asserted it was immune from local jurisdiction over fee lands. The Village had historically exercised a variety of zoning and land use regulations on Tribal property to which the Village did not object,[21] and even to this day, the Tribe continues to pay property taxes on tribal fee lands.[22] Moreover, although this may have been the first time the Village had to use condemnation procedures for laying a road on tribal land, but the Village has been laying and maintaining roads since at least 1910.[23]

Population Data. For purposes of drawing comparisons between our case and *Sherrill*, the Village acknowledged that "the tribal land and population percentages are slightly larger in Wisconsin than in New York," Village Br. at 34, but even so, "the vast majority of the land and population within the Village was non-Indian in character for the bulk of the 20th Century." *Id*. The Tribe takes great offense at this claim and takes the Village to task for its "erroneous and misleading" presentation of population data. Oberly Aff. ¶3. The Tribe's characterization of the

---

[20] This is true for the reservation as a whole (Tribe Proposed Finding of Fact No. 8) and for the O'Hare and Forest Road Properties at issue here (Webster Aff. Ex. E).

[21] *See* Helfenberger Supp. Aff. ¶9.

[22] Tribe Proposed Finding of Fact 21.

[23] *See* Village Proposed Finding of Fact 30 and 31.

Village's position is incorrect and overblown.[24]

Surprisingly, given the harsh criticism directed at the Village, Oberly chooses to ignore the published pre-allotment population data from the 1890 Census in his analysis. The 1890 Census shows a population of 723 Oneida members in Hobart.[25] If that data was added to that shown at Oberly Aff. ¶6, the following conclusions can be drawn:[26]

- Tribal population dropped each year from 1890 to 1930 with the exception of a slight increase between 1900 and 1910.
- Tribal population did not reach 1890 levels again until 1990
- From 1890 to 1930, non-tribal population increased and was the majority by 1930.
- Since 1930, the percentage of non-tribal population has grown from 64.1% to 83.4% in 1990.

While it remains true that there is a larger Oneida tribal population in Hobart than there was in *Sherrill*, it also remains true that, in both cases, the tribal population and land holdings are distinct minorities. The differences in population between the cases hardly warrant disregarding the *Sherrill* decision.

Extent of Tribal and Local Government. Finally, the Tribe asserts that whereas the state and local governments exercised continuous jurisdiction and control within the New York reservation, here the Tribe has exercised "continuous jurisdiction and control with respect to its

[24] The Tribe claims that "it is false that there is no census data by ethnicity for Hobart for much of the 1900s." Oberly Aff. ¶19. What the Village actually said is that such data is "not readily available." Village Br. at 9. The Village with its limited resources reviewed published census data. Similarly, the Tribe contends that "the Village is making up an assertion about population change," and that most of the tribal population had not been lost. Oberly Aff. ¶18. The Village actually set out the demographic data in several tables and concluded that "the population of the reservation area became *predominantly* non-Indian," which remains correct. Village Br. at 8. The Village stated that, with the loss of land and population, it lost *political control* of the area, which is also correct and exactly the point made by the source cited by the Village. *See* J. Campisi and L. Hauptman, *The Oneida Experience: Two Perspectives*, Syracuse Press, 1988, at 78 ("With the loss of land the political control of the Oneida area also slipped away…").

[25] Village Br. at 8.

[26] A table showing the census data from 1890 to 2000 is incorporated in Smith Supp. Aff. ¶4.

own property." Tribe Resp. Br. at 26. This again overstates the factual differences in the cases.

First, the extent to which the Tribe has had a "functioning system of government" and has "always governed themselves and their members," (Tribe Resp. Br. at 4), has been disputed by published sources.[27] The Tribe's own submissions show that until the Tribe organized under the IRA in 1936, its members participated through the Town government.[28] Certainly, today the Tribe has considerable resources and is able to offer more services than in the past. Conversely, while the New York Oneida do not appear to be an IRA tribe, they had enough of an organization to participate in lawsuits going back at least to 1951 and they have various commercial operations today.[29] Thus, both in *Sherrill* and in our case, there was some tribal government of varying capacity over the years.

Second, the extent to which the Tribe has operated as an organization and regulated the affairs of its members on its land does not in any way disprove the exercise of state and local jurisdiction. The Tribe does not dispute that Hobart functioned as a local government.[30] Nor can there be any reasonable dispute that the Village continues to provide municipal services.[31] Thus, in *Sherrill* and in our case, there was a functioning local government. In *Sherrill*, the court observed, "There is no dispute that it has been two centuries since the Oneida's **last exercised regulatory control over the properties here**." *Sherrill*, 544 U.S. at 218. Here, there is no dispute that the Village, not the Tribe, has exercised regulatory control over the O'Hare and

---

[27] *See, e.g.* Arlinda Locklear, "The Allotment of the Oneida Reservation and Its Legal Ramifications" in Campisi, p. 85 ("Tribal culture is dependent upon a commonly used land base. Thus, the erosion of the land base had the expected debilitating effect on tribal government."); and R. Horsman, *Campisi* at 78 ("Ultimately, external power prevailed, and dreams of a small separate Oneida community, Indian controlled but with many of the external values of the white society by which it was surround, was lost, . . . With the loss of land the political control of the Oneida area also slipped away, and not until 1934 could the tribe again begin to control its own destiny.").

[28] Tribe Proposed Finding of Fact No. 17 and Village's response to same.

[29] *Sherrill*, 544 U.S. at 207 and 211.

[30] Tribe's response to Village Proposed Findings of Fact No. 29.

[31] Village Proposed Findings of Fact Nos. 29-36; Helfenberger Supp. Aff. ¶¶1-7.

Forest Road Properties at least until their recent repurchase. That is comparable to the situation in *Sherrill*.

In conclusion, the claim that *Sherrill* is inapposite to this case cannot be supported. Indeed, its near unanimous holding that tribes may not unilaterally reassert sovereignty over lands by mere repurchase is even more compelling in our case than in New York because the Oneida's New York land was lost in violation of federal law whereas, in Wisconsin, it occurred pursuant to the federal Allotment Acts.

III. SECTION 16 OF THE INDIAN REORGANIZATION ACT DOES NOT DEPRIVE LOCAL GOVERNMENTS OF JURISDICTION OVER REACQUIRED FEE LANDS.

The Tribal Amici filed a brief in support of the Tribe's claim that once the Tribe reacquires fee lands, Section 16 of the IRA allows a tribe to end-run the trust process in Section 5 of the IRA and obtain immunity from all state and local jurisdiction. The Tribal Amici attempt to present legislative history and other statutory arguments in support of this claim but cannot reconcile its interpretation with the overall structure of the IRA, relevant case law and other elements of the Acts' legislative history.

A. Section 16 Does Not Change The Jurisdiction Of Tribes Over Allotted Land.

The threshold problem with the Tribal Amici's argument is that the IRA was never intended to create the kind of jurisdictional impacts that it is now arguing. IRA Section 3 states 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." 25 U.S.C. § 463(a). John Collier, Commissioner of Indian Affairs, discussed this clause during the Congressional hearings and explained that,

"The bill does not disturb, but expressly safeguards and preserves, **every vested right** which has accrued through the workings of allotment." (emphasis added.)[32]

The Supreme Court has repeatedly underscored that the IRA did not give the tribes authority to undo the Allotment Acts:

> 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.

Yakima, 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. *See also Cass County*, 524 U.S. at 108 (the IRA "did not repeal allotment statutes."). The Tribal Amici do not address this settled law.

From the language of the IRA, the legislative history, and the relevant case law, it is clear that the IRA was not meant to affect any existing rights resulting from the Allotment Acts. This being the case, no section of the IRA, not even § 16, can be considered a basis of immunity from local jurisdiction over unrestricted lands.

B. The Tribe Amici's Section 16 Argument Is Contrary To Case Law And The Trust Process In Section 5 Of The IRA.

Section 16 of the IRA is designed to provide a mechanism to establish tribal governments and provide for their common welfare. Notwithstanding this limited overall purpose of Section 16, the Tribal Amici seize on a single clause in Section 16 and assert that this clause requires

[32] "The Purpose and Operation of the Wheeler-Howard Indian Rights Bill," Hearings on H.R. 7902, before the Committee on Indian Affairs, 73rd Congress, 2nd Session, at 19. Given that this clause was intended to apply "to every vested right," there is no basis for the claim that this proviso only attached to the allottee and not the heirs or transferees of the allottee, as the Tribe has argued. *See* Tribe Resp. Br. at 21.

tribal consent for any disposition encumbrance of tribal lands and tribal assets. Section 16 provides:

> **Sec. 16.** Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized by the Secretary of the Interior under such rules and regulations as he may prescribe. Such constitution and bylaws when ratified as aforesaid and approved by the Secretary of the Interior shall be revocable by an election open to the same voters and conducted in the same manner as hereinabove provided. Amendments to the constitution and bylaws may be ratified and approved by the Secretary in the same manner as the original constitution and bylaws.
>
> In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior; **to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe**; and to negotiate with the Federal, State, and local Governments. The Secretary of the Interior shall advise such tribe or its tribal council of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Bureau of the Budget and the Congress. (Emphasis added).

The problem with this argument is that it proves too much. If any disposition or encumbrance of tribal lands or tribal assets requires tribal consent, then even taxation of tribal fee lands would not be possible without tribal consent. Such a broad reading of Section 16 has been repeatedly rejected. In *Fort Mojave Tribe v. San Bernardino County*, 543 F.2d 1253, 1256 (9th Cir. 1976), the court directly rejected an attempt to use Section 16 as a shield against local taxation:

> The Indians' major argument is that their status as a self-governing tribe organized under the provisions of the Indian Reorganization Act precludes the imposition of this tax by the County of San Bernardino . . . The Indians argue that the imposition of a possessory interest tax on the lessee encumbers their reversionary interest in the land. Alternatively, they argue that the lease itself is an "other asset" of the tribe which is encumbered if subject to taxation. **We reject these arguments** as going beyond the expressed Congressional intent in enacting the Act to further the achievement of economic independence for the Indians and the establishment of effective systems of tribal self-government. . . .

In *Cass County*, 524 U.S. at 106, the Supreme Court upheld the imposition of taxes on

reacquired tribal fee land. Notably, the Leech Lake Band of Indians had a constitution developed pursuant to the IRA.[33] If Section 16 was the comprehensive power the Tribal Amici suggest, the court in *Cass County* would not have been able to uphold the local tax.

The same kind of analysis was used in *Hynes v. Grimes Packing Co.*, 337 U.S. 86 (1949). In *Hynes*, the question involved the validity of an Interior Department regulation giving exclusive fishing rights to an Alaskan tribe on reservation lands and water previously set aside for the tribe. The regulation was challenged by commercial fishing operations and overturned. One of the arguments made to uphold the regulation was that the tribe was an IRA tribe and any disposition affecting the reservation required tribal consent. Such a broad reading of Section 16 was rejected. *Hynes*, 337 U.S. at 107.

These cases are also supported by the consistent line of Supreme Court decisions holding that the process by which tribes can reestablish immunity from local jurisdiction is through the trust provisions of Section 5 of the IRA, codified at 25 USC §465. *See Cass County*, 524 U.S. at 105. "[Holding] that tax-exempt status automatically attaches when a tribe acquires reservation land would render unnecessary § 465 of the Indian Reorganization Act." Similarly, in *Sherrill*, the court stated, "Section 465 provides the proper avenue for OIN to reestablish sovereign authority over territory . . . ." (Emphasis added.) *Sherrill*, 544 U.S. at 221. If mere repurchase of land under Section 16 could result in such immunity, there would be no need for the trust process and all of the implementing regulations. The Tribal Amici's position on Section 16 would completely eviscerate the provisions of Section 5.

The Tribal Amici claim that Section 5 does not provide adequate protection because "the regulatory process can be time-consuming and can require significant effort on the part of tribal

[33] *See Leech Lake Band of Chippewa Ind. v. Cass County*, 108 F.3d 820, 823 (8th Cir. 1997) ("The Band is governed in part by a constitution adopted by the Minnesota Chippewa Tribes pursuant to the IRA." See Section(s) 476.)

governments." Tribal Amici Br. at 16. That may be true, but there is a reason that the process is time consuming. It is because Congress and the BIA have established a mechanism that "takes account of the interests of others with stakes in the area's governance and well being . . . The regulations implementing §465 are sensitive to the complex interjurisdictional concerns that arise when a tribe seeks to regain sovereign control over territory." *Sherrill*, 544 U.S. at 220-21. Short circuiting the trust process through a broad interpretation of Section 16 may very well be more expedient for tribes, but it is contrary to the express process Congress intended to protect the rights of local governments like the Village.

In contrast to these well established lines of cases from the Supreme Court and lower courts, the Tribal Amici provide no case authority for their proposition that Section 16 bars all transfers of tribally-owned land without tribal consent. Its reading of Section 16 is without support.

C. The Legislative History Of Section 16 Does Not Support The Broad Reading Of Section 16 Claimed By The Tribal Amici.

Lacking any other authority, the Tribal Amici attempt to construct an argument based on legislative history beginning with the overall purpose of the IRA. The Village does not dispute that the IRA was designed to prevent the further loss of Indian land through the allotment process and to enable tribes to reacquire lands lost through the allotment era process. The question is not whether the IRA had these goals but how the IRA accomplishes these goals. The goals of the IRA are accomplished through several provisions. The IRA 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); it limited the disposition of certain restricted land (Section 4); and it created a mechanism and funding to acquire land and place the land into trust status (Section 5).

By contrast, the legislative history of Section 16 indicates it was designed to pay a far more narrow purpose than suggested by the Tribal Amici. As noted above, first and foremost, Section 16 is a general provision providing for the establishment of tribal constitutions. To the extent Section 16 provided additional powers to tribes, it was to assist in redefining the roles between the federal government and tribes, not redefine state and local jurisdiction.

The purposes of Section 16 have been acknowledged by the courts:

> The purposes of IRA § 16 were twofold. First, the section was designed to encourage Indians to revitalize their self-government by establishing a basis for the adoption of tribal constitutions. *Fisher v. District Court*, 424 U.S. 382, 387, 96 S.Ct. 943, 946, 47 L.Ed.2d 106, 111 (1976); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152-52, 93 S.Ct. 1267, 1272-73, 36 L.Ed.2d 114, 120-21 (1973). Second, the section was one important element of an overall statutory scheme designed to put an end to piecemeal legislation authorizing sale of Indian lands and to allotment of tribal lands to individual members of a tribe. 78 Cong.Rec. 11123. See F. Cohen, Handbook of Federal Indian Law 516-17 (1982 ed.)

Escondido Mut. Water Co. v. F.E.R.C., 701 F.2d 826, 829-830 (9th Cir. 1983) (Anderson, J., concurring in part).

The legislative history focuses on the concern about the *federal* government unilaterally interfering with tribal assets. For example, the quote cited by the Tribal Amici from Indian Commissioner Collier expresses this concern: "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."[34] Collier's comments before the Senate and House Committees on Indian Affairs continue this theme: "The bill does not arrogate to the Indian Office or to the Interior Department added power. On the contrary, the bill divests these offices of much arbitrary power; makes them responsible to the

[34] Readjustment of Indian Affairs: Hearings on H.R. 7902 before the House Committee on Indian Affairs, 73d Cong., 2d Sess. 1989 (1934).

Indians whom they serve … and to Congress which has delegated to the Indian Office far too wide a discretion in the past."[35]

Read in its historical context, Section 16 was designed to protect tribes from intrusion by the federal government where it had an interest in the tribal lands. Thus, in *United States v. Anderson*, 625 F.2d 910, 916 (9th Cir. 1980), the court observed:

> However, even if § 16 were available to the Fort Peck Tribes, it would not promote Anderson's cause . . . The word "encumbrance," read in context and in *pari materia* with General Allotment Act § 5 . . . refers only to a tribe's power to prevent the unconsented encumbrance of its land interests by removing from its agents and members the legal authority to alienate or cloud, without official tribal consent, its equitable title to **its trust land**. (Internal citations omitted; emphasis added.)

It is also clear from the legislative history that efforts to redefine the jurisdiction of local governments over trial lands were rejected. Earlier versions of Section 16 attempted to create tribal immunity from state and local taxation. Those provisions were rejected in the final language. For example, the predecessor bills to the Wheeler-Howard Act, H.R. 7902 and S. 2755 (respectively 78 Cong. Rec. 2437 and 2440), expressly provided that, "Nothing in this Act shall be construed as rendering the property of any Indian community . . . subject to taxation by any State or subdivision thereof . . . ." [36] "These extensive provisions for tax immunity were discarded in the Wheeler-Howard Act, along with the accompanying provisions for more extensive governmental powers on the part of the chartered communities." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152, n.9 (1973) (referencing H.R. Rep. No. 1804, 73rd Congress, 2nd Session). *See also Anderson*, 625 F.2d at 915.

---

[35] Hearings on H.R. 7902, before the Committee on Indian Affairs 73rd Congress 2d Session at 20. See also, comments of Franklin D. Roosevelt, "The Wheeler-Howard bill embodies the basic and broad principals of the administration of a new standard of dealing between the Federal Government and its Indian wards." H.R. Rep. No. 1804, 73rd Congress, 2nd Session, at 8.

[36] Tit. I, § 11, Hearings on H.R. 7902, before the House Committee on Indian Affairs, 73d Cong., 2d Sess., at 5.

Thus the legislative history shows that Section 16 was never intended to give tribes a vehicle to redefine local jurisdiction outside of the trust process in Section 5. Section 16 has a tribal consent procedure to effectuate the new relationship between IRA tribes and the federal government where the federal government has an interest in tribal land. Nothing in Section 16 indicates that such a provision applies to unrestricted land in which the federal government has no interest.

D. The 1948 Right-Of-Way Act Does Not Support The Broad Interpretation Section 16 Claimed By The Tribal Amici.

Finally, the Tribal Amici attempt to bootstrap support for their Section 16 theory from the 1948 Right of Way Act. They claim that because the 1948 Act requires tribal consent for condemnation and also references the IRA, that the 1948 Act is proof that Section 16 precludes condemnation absent tribal consent. As noted above, the Section 16 provision only applies where the federal government has an interest in tribal land and the 1948 Act reinforces that interpretation.

The scope of 1948 Right-Of-Way Act is defined through the implementing regulations promulgated by the Department of the Interior, 25 C.F.R. § 169.1(d), which defines "Tribal Land" as restricted land:

> Tribal land means 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,** and includes such land reserved for Indian Bureau administrative purposes. The term also includes lands held by the United States in trust for an Indian corporation chartered under section 17 of the Act of June 18, 1934 (48 Stat. 988; 25 U.S.C. 477).

Additionally, case law discussing the 1948 Right Of Way Act confirms that the act only applies to land in which the federal government holds an interest. *See Fredericks v. Mandell,* 650 F.2d 144, 147 (8th Cir. 1981) ("Section 1 of the Act of February 5, 1948, 25 U.S.C. §323, authorizes the Secretary of the Interior to grant rights-of-way over Indian trust lands. The

accompanying statutory provisions, 25 U.S.C. ss. 324-328, and regulations, 25 C.F.R. ss. 161.1 et seq., make clear that the Secretary's approval is an indispensable requirement for obtaining a right-of-way **over trust lands**." (emphasis added)); and *Nebraska Public Power District v. 100.95 Acres of Land*, 540 F. Supp. 592, 598 (1982) ("In 1948 Congress enacted a comprehensive, general purpose right-of-way statute, 62 Stat. 17, 25 U.S.C.A. §§ 323-328, which empowers the Secretary to grant rights-of-way for all purposes over and across **trust lands**." (emphasis added) (rev'd in part, on different grounds, and aff'd in part, 719 F.2d 956 (8th Cir. 1983)).

In sum, the 1948 Right of Way Act does not require tribal consent for lands other than trust lands. Its reference to the tribal consent provisions of the IRA only serves to underscore the limits of Section 16. Section 16 does not undo the Allotment Acts nor the other provisions in the IRA.

IV. THE INDIAN NON-INTERCOURSE ACT (INA) DOES NOT REQUIRE MORE THAN THE AUTHORIZATION IN THE ALLOTMENT ACTS.

The Tribe's Response Brief references their reply arguments on the Indian Non-Intercourse Act. The Village's position on the INA has been fully briefed and the Village stands on the authorities at Village Br. pp. 42-52 and Individual Amici Br. at 20-23. To the extent the Tribe's Reply Brief raises new arguments, those can be addressed in oral argument.

V. THE TRIBE PROVIDES NO SUBSTANTIVE DEFENSE OF ITS REMAINING CLAIMS.

The Village moved for summary judgment on all of the Tribe's claims. The Tribe's IRA and INA arguments have been fully briefed. In addition, The Tribe's second, third and fifth counts allege sovereign infringement and sovereign immunity which the Village addressed in its initial brief at pages 36-42. The Tribe makes no argument in response other than a paragraph

reasserting it stands by its IRA and INA theories and if it is wrong, discovery is needed. Tribe Resp. Br. at 34.

The Tribe's final five counts of its Complaint primarily relate to the Village's special assessment associated with O'Hare Boulevard. The Village noted that these claims are derivative claims of the Tribe's unsupported claim of jurisdiction and can be readily dismissed. The Village also noted that because the Tribe has failed to comply with applicable state law, further relief by the Tribe is precluded. Again, the Tribe makes no response other than a cursory assertion that federal law precludes condemnation of land and if not, discovery is needed. *Id.*

The Tribe's response is a virtual default on these issues and confirms that all of the Tribe's remaining claims rise or fall on the merits of its IRA and INA claims. The Tribe's mere assertion that discovery is needed does not save these claims from summary judgment. As to the derivative state claims, the Tribe has already admitted that the Village has complied with applicable state procedures for laying roads[37] and that the Tribe has not followed state procedures for notice of claim and for assessment refund.[38] No further discovery is needed on those issues.

As to other the other claims, a party cannot resist summary judgment simply on an unsupported assertion that more facts are needed.

> Once a properly supported motion for summary judgment is made, the nonmoving party cannot resist the motion and withstand summary judgment by merely resting on its pleadings. Fed.R.Civ.P. 56(e) . . .Thus, to demonstrate a genuine issue of fact, the non-moving party must do more than raise some metaphysical doubt as to the material facts; the non-moving party must come forward with specific facts showing that there is a genuine issue for trial.

[37] *See* Village Proposed Findings of Fact Nos. 43-45, and 49, none of which the Tribe disputes.

[38] *See* Tribe's response to Village Proposed Findings of Fact Nos. 57 and 58.

Keri v. Board of Trustees of Purdue University, 458 F.3d 620, 628 (7th Cir. 2006). In the absence of specific facts showing a genuine issue for trial, summary judgment should be awarded to the Village.

CONCLUSION

The question in this case is whether 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 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 15th day of January, 2008.

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