UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
GREEN BAY DIVISION

ONEIDA TRIBE OF INDIANS OF WISCONSIN,

Plaintiff,

v.

VILLAGE OF HOBART, WISCONSIN,

Case No. 10-CV-00137-WCG

Defendant/Third-Party Plaintiff

v.

UNITED STATES OF AMERICA, et al.,

Third-Party Defendants.

VILLAGE OF HOBART'S REPLY MEMORANDUM IN SUPPORT OF MOTION TO AMEND STIPULATION OR AMEND JUDGMENT OR ORDER UNDER FED. R. CIV. PROC. 60

The Oneida Tribe of Indians of Wisconsin's (Tribe) Memorandum in Opposition to the Village's Motion to Amend Stipulation or Judgment is very telling in what it does not contest. Specifically, the Tribe appears to now concede that: (1) it unilaterally invented the Affidavit of Easement Cancelation (Affidavit) stating the railroad parcels are in trust; (2) that it created and recorded the Affidavit with Brown County (County) with full knowledge of and only after the United States refused to agree with the Tribe's questionable claim in this regard; (3) that the United States, to this very day, does not recognize the railroad parcels as being in trust for the Tribe and; (4) that the Village of Hobart (Village) and the County had no knowledge that the United States did not draft, approve, acknowledge or in any way agree with what was stated in

the Affidavit or in any other manner accept or recognize the parcels as being held *in trust by the United States*, until after the Village received responses to its 2013 FOIA request.

In its opposition brief, the Tribe confuses the Village's knowledge of the existence of the Affidavit with the Village's belief in its veracity. The Village may have known about the Affidavit but it also, just like the County, believed the Tribe when it's stated within that Affidavit that the subject parcels are held *in trust by the United States.* What the Village did not know, and did not discover until FOIA responses were received, was that the federal government did not acquiesce to that Affidavit, and to this day does not considered these lands to be in trust by the United States. Prior to that discovery, the Village believed the federal government had authorized the placement of the land into trust via some mechanism, given the fact that the Affidavit expressly and unequivocally *states* those lands are in fact held *in trust by the United States*. Only the United States can create or recognize trust land. No Tribe has the unilateral authority to designate any land as being in trust and never has. Therefore, the fact the Village and County assumed the existence of something that absolutely must have existed (federal approval) does not create such approval and should not bind the Village and this Court to an erroneous stipulation and decision.

The Tribe argues that what it did is not misleading: "[t]hese documents say nothing about the United States' view of the matter." Tribe's Brief in Opp'n to Motion to Amend Judgment [Dkt. # 102] at 4. Surprisingly, this quote suggests that the Tribe's position is that it is perfectly acceptable to sign a sworn affidavit stating certain land is in trust and record that document when you, without question, know it contains statements the federal government has refused to agree with, and that is false when compared to the inventory of trust land the United States actually states it holds in trust. The Tribe is apparently arguing it is also acceptable to then use that

Affidavit in litigation as positive proof that those lands are, in fact, held *in trust by the United States*.

Stating that the subject parcels are held *in trust by the United States* does not make it so, especially when the "Department of the Interior has not issued any decision accepting the parcels into trust for the benefit of the Tribe" (Kowalkowski Aff. ¶ 6, Ex. 18); extensive federal responses to FOIA request seeking identification of *all* land the United States holds in trust for this Tribe identified many parcels, not one of which includes a railroad parcel (Kowalkowski Aff. ¶ 3); and despite well over a decade of repeated attempts by the Tribe to get the United States to agree with its trust theory, the United States has refused to do so.[1] (Kowalkowski Aff. ¶¶ 3 and 10) It is beyond dispute that the Tribe had full knowledge of all of these facts when it created the Affidavit and represented, first to the County, then to the Village, and then to this Court the land was undisputedly held in trust.

While the Tribe suggests knowledge of the existence of the Affidavit, by itself, is the key to showing the Village should have known better, that is a red herring—the real issue is whether the Tribe misled the Village, County and this Court into believing the subject parcels were actually held in trust by the United States, when they are not. The issue is whether it is acceptable to sign and file a sworn affidavit stating certain land is held *in trust by the United States,* in an attempt to avoid real estate taxes, storm water charges and state and local jurisdiction, when you know full well the United States does not identify those parcels as in trust.

The Tribe also argues that relief under Rule 60(d)(3) is available only under extraordinary circumstances. Tribe's Brief in Opp'n to Motion to Amend Judgment [Dkt. # 102] at 9-10. The Village will not repeat its arguments as to why the Rule 60 standards are met but

[1] Even the Tribe cannot come up with a more favorable spin on the United States refusal to agree with their trust theory other than calling it "inconclusive deliberations." Tribe's Brief in Opp'n to Motion to Amend Judgment [Dkt. # 102] at 8.

for one comment. It is hard to imagine a more extraordinary circumstance then allowing a Tribe, after the United States has refused to acknowledge or accept land as in trust, to then unilaterally "create" trust status by filing a document it invented with the local County, and thereafter in the context of litigation, have the judicial branch take over the role of creating trust land, by allowing that conduct and result, to stand.[2] The Tribe is requesting nothing less than having the judicial branch take over the role of the other branches of the federal government and create trust land, hence giving the Tribe the extraordinary benefit of avoiding all real estate taxes and all state and local jurisdiction, without due process.

The Tribe now claims it never said "how" the railroad parcels ended up in trust. That is not entirely true. In its brief in support of its motion for summary judgment in the underlying case, it stated "*the [IRA] authorizes the Secretary of the Interior to acquire land for Indians* and proves that such lands shall be taken in the name of the Unites States in trust … and such land or rights shall be exempt from state and local taxation" [Dkt. #48, pg. 13-14] (emphasis added).

Whether the Tribe claims the parcels are in trust through the IRA or through some other means does not address the fundamental issue discovered only in 2013—that the federal government does not agree that these lands are held in trust by the federal government.[3] The true

[2] The Tribe argues the ruling is really very narrow in that it only involves storm water charges and the Village and adjacent land owners can and likely will litigate the true status of the land for other purposes. Tribe's Brief in Opp'n to Motion to Amend Judgment [Dkt. # 102] at16. Although this may have been the intention of the parties and the Court, clarification of that fact is needed as evidenced in the Tribes' motion for contempt. Its motion is based on the assumption the continued assertion of the storm water fees is inappropriate because the land is held in trust.

[3] The Village concedes it did not know the means, by which these lands were purportedly placed in trust by the United States, but it took the Tribe at its word, fairly assuming they were placed in trust by the United States in some way through the Indian Reorganization Act (IRA) or at least via some other similar approval process. After all, the IRA is the only statutory means to place lands in trust that have otherwise been fully allotted. Moreover, the Tribe consistently argued in summary judgment that all the parcels (including the subject parcels), are immune from taxation due to the IRA: (1) "This plain language of the IRA concludes the matter--Hobart cannot tax the subject trust lands or the Tribe's beneficial ownership of those lands." *Pl.'s Memo. of Law In Support of Mot. Sum. J.* [Dkt. # 48] at 14; (2) "The IRA has been construed to have precisely this pre-emptive effect as to civil regulatory authority of local government." *Id*. at 20; and (3) "Under authority of the IRA, the Secretary of the

question is whether the subject parcels are in trust or not. They are not, and will never be until the appropriate branch of the federal government agrees *it* holds them in trust. The Tribe should not be allowed to circumvent the Department of Interior's refusal to agree with its theory by simply creating and filing what is now known to be nothing more than a piece of paper invented by the Tribe.

The Tribe attempts to implicate the Village in the creation of the list of trust parcels that fraudulently included the railroad parcels. The tribe cites a communication in which the Tribe's counsel stated "[t]o simplify this, we began with your list of parcels for which Hobart billed the US for outstanding charges…." Tribe's Brief in Opp'n to Motion to Amend Judgment [Dkt. # 102] at 5. The Tribe then states the list of trust land it proposed in the original version of the stipulation created by the tribe was "drawn from the list you [the Village] provided the US in support of your demand letter." Tribe's Brief in Opp'n to Motion to Amend Judgment [Dkt. # 102] at 6. What the Tribe does not acknowledge is that this list, "compiled by Brown County" included the railroad parcels solely because of the Tribe's unilateral creation and filing of the Affidavit while having full knowledge the United States was not agreeing with what was stated in that document. In other words, the Tribe fails to go one more step back in its review of the creation of its stipulation to avoid disclosure of the fact the County's list never would have included the railroad parcels but for the Tribe's inappropriate creation and filing of the Affidavit with the County.

Finally, the Tribe's theory that the parcels are in trust is wrong. Why else would the United States have refused to agree with it. Moreover, the Tribe almost completely ignores the law confirming that the patents themselves control what land was allotted. As noted in the

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Interior adopted regulations . . . [and] section [25 CFR §] 1.4 prohibits the application of Hobart's ordinance to the subject trust lands." *Id*. at 29.

Village's earlier brief, the patents do not reference an exclusion for the railroad land. What the Tribe references is a single patent, for Claim 153, stating an underlying survey exempts the railroad right-of-way. First, the survey is not the patent. Second, "exclusive of the railroad right-of-way" is simply another way of saying "subject to" the railroad's rights. Given the purpose of the Dawes Act, the United States would never have preserved an unusable long narrow strip of reservation land at the time it was allotting out all of the rest of the reservation for the very purpose of disestablishing the entire reservation. Moreover, Claim 153 clearly includes the railroad right-of-way. One and a half years after the Claim 153 allotment, the land was deeded by the alottee to someone else. The deed signed by the grantor allotee describes the land to be transferred and stated it was "including above mentioned right-of-way." [Dkt. #90, 12 of 14]. That sale, immediately after the allotments, speaks volumes as to what was believed by all to be included in the original allotments. This contemporaneous understanding is also completely in line with the purpose of the Dawes Act, the Burke Act and the Oneida Special Provision, all of which were expressly designed to end the existence of the reservation. It is non-sensical to claim the federal government, in light of the policies of the day, wished to preserve a long narrow strip of a reservation.

CONCLUSION

All the Village is seeking is confirmation that the Judgment means what it says. Namely, that storm water charges are not owed on trust land and nothing more. Clarification or amendment is needed only to make it clear no determination has been made that the railroad parcels are among those trust parcels.

Dated this 27th day of July, 2015

Respectfully Submitted,
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