

Oneida Tribal Judicial System

Onayote ʔ a-ka Tsiʔ Shakotiyaʔ Tolé hte

TRIAL COURT

**Daniel and Judy Hawk,
Petitioners,**

Docket #: 10-TC-219

v.

Date: March 30, 2011

**Village of Hobart,
Respondent**

DECISION ON RESPONDENT'S MOTION TO DISMISS

This case has come before the Oneida Tribal Judicial System, Trial Court. Judicial Officers, Mary Adams, Jean M. Webster, and Leland Wigg-Ninham, presiding.

I Background

This case arises out of Petitioners' claim that Respondent is unlawfully taxing Holy Apostles Cemetery. Petitioners' claim state law precludes the taxation of the cemetery.¹ Because Petitioners' claims rest on state law, we decline to exercise jurisdiction.

The procedural background of this case is straightforward and uneventful. On December 22, 2010 Petitioners, Daniel and Judy Hawk, filed a complaint against, Respondent, Village of Hobart, questioning the validity of Respondent's levy and collection of real estate taxes on the Holy Apostles Cemetery located on the Oneida Tribe of Indians of Wisconsin Reservation.

¹ We note at the pre-trial conference that Respondent asserted, and Petitioners did not deny, that the cemetery portion of the Holy Apostles Church lands has been carved out from the assessment and the tax levy correspondingly lowered. Whether this is true or not we cannot say as this case did not reach fact finding; however, if true, it suggests Petitioners' requested relief, exclusion of the cemetery from taxes, is already in place.

On January 20, 2011 Respondent filed an Answer and Affirmative Defenses, a Notice of Motion and Motion to Dismiss for Lack of Personal and Subject Matter Jurisdiction, and its Brief in Support of Motion to Dismiss and Affidavit in Support of Motion to Dismiss.

On January 25, 2011 Petitioner filed a Perfected Filing of Complaint and Motion to Deny Dismissal.

A Pre-trial hearing was held on February 1, 2011. Respondent stated the parcel of real estate is titled in the name of Episcopal Diocese of Fond du Lac. Michael Denor, as the Assessor for the Village of Hobart and other municipalities located within Brown County, made a determination that the majority of the parcel was subject to real estate taxes. Petitioners claim that no part of the parcel was subject to real estate taxes because it is exempt under state law as a cemetery. Respondent points out, although it is true that a portion of the property is used as a cemetery, the vast majority of the parcel is not. Respondent states Michael Denor only assessed taxes on the portion of property not currently used as a cemetery. The annual tax totals \$489.60.

Petitioners claim the Holy Apostle Cemetery is exempt from paying taxes because they are exempt by various sections of Wisconsin law including Wis. Stat. §70.11(13) and Wis. Ch. 157. Petitioners argue that under Wis. Stat. §70.11(13) if a property was previously exempt (which Petitioner alleges Holy Apostle was) then if its use and occupancy do not change, it continues to be tax exempt.

II Issue

Whether the Oneida Tribal Judicial System has jurisdiction over a claim to enforce state statutes governing the taxability of a cemetery located on the Reservation on non-trust, non-Indian lands.

III Analysis

Before turning to the merits, some background. The Oneida Tribe of Indians of Wisconsin is a federally recognized Indian tribe, 74 Fed. Reg. 40218 (August 11, 2009).

The Tribe's ancestral homelands are in New York. A large portion of the membership of the Tribe came to Wisconsin in the early 19th century. The Tribe established its current reservation by virtue of a treaty with the United States in 1838. It is the only treaty between a Wisconsin tribe and the United States entered into prior to Wisconsin becoming a state in 1848. The Reservation boundaries encompass approximately 65,000 acres including portions of Brown and Outagamie Counties.

The Oneida Tribe existed before the formation of the United States. The Tribe's sovereignty is inherent; its source is from within and not granted by any outside source including the federal government. The Oneida tribal government provides many services to tribal members and community residents: police, fire, social work, courts, roads and economic support, to name just a few. More recently, the Tribe established its own IV-D child support agency.

The Oneida Tribe enjoys government-to-government relationships with all other Indian tribes in the state, the federal government, the State of Wisconsin, and the surrounding counties, towns and villages. The Oneida Tribal Judicial System also works cooperatively with the surrounding state courts to ensure justice for all individuals seeking assistance of the tribal and state courts. For example, the Tribe, State and Brown County worked together to transfer tribal member child support cases from state to tribal court under Wis. Stat. §801.54.

Turning to the merits, Respondent argues this action should be dismissed because the Oneida Tribal Judicial System does not have subject matter or personal jurisdiction. As far as subject matter jurisdiction, Respondent recites the relevant federal cases which limit tribal court jurisdiction over non-Indians. Respondent notes that the land at issue is not trust land and that Respondent is of non-Indian character. Respondent argues at great length that the Oneida Nation Reservation has been diminished and therefore the Holy Apostles Cemetery is not even on the Oneida Reservation. We disagree, but disposition of that issue is not necessary for purposes of ruling on Respondent's motion. To be clear, we are not ruling on Respondent's diminishment and disestablishment arguments.

Petitioners address Respondent's points in their second filing but essentially repeat Petitioners' arguments that the alleged taxation is in violation of state law.

The Court's decision to dismiss this case is based on our lack of subject matter jurisdiction, but not on the grounds offered by Respondent Village of Hobart. The Court is dismissing this case because we do not see any issue of Oneida law before us. Petitioners' claim is based on state law. As a general rule, the Oneida Tribal Judicial System does not apply or enforce state law. In the few instances we can find where the issue has been addressed by the OTJS, we refused in both cases to apply state law. See *Harms v. Clucky*, 03-AC-029 (4/28/2004); *Hawk v. Wisconsin Office of Commissioner of Insurance*, 03-TC-0332 (11/10/2003).

Furthermore, Petitioners are not arguing the state statutes are inapplicable to the parcel in question or that they conflict with any Oneida law. Rather they are asking us to interpret, apply and enforce a state statute. We are unwilling to interpret and apply state statutes. There is no support for it and doing so may have unforeseen consequences.

We decline to rule out that the Oneida Tribal Judicial System may have subject matter jurisdiction over this parcel for certain claims brought in the future consistent with Oneida law and federal law, if applicable.

The Court's ruling today is a narrow one. We need not rule on the Village of Hobart's other arguments about subject matter jurisdiction, personal jurisdiction or the size of the Oneida Reservation. We simply hold that we do not have jurisdiction to hear a claim to enforce Wisconsin state statutes governing the taxation of a cemetery.

IV Decision

The Court dismisses Petitioner's claim because the Oneida Nation does not have jurisdiction to hear a claim to enforce Wisconsin state statutes governing the taxation of the Episcopal Diocese of Fond du Lac cemetery located within the Oneida Nation.