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 BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR CONTEMPT

I. INTRODUCTION

The Oneida Tribe of Indians of Wisconsin's (Tribe) motion for contempt seeks to use its lack of candor with Brown County (County), the Village of Hobart (Village) and this Court, to confer trust status on land it knows the United States (U.S.) does not recognize as being in trust. The Tribe seeks to circumvent the proper mechanism for placing land in trust under the Indian Reorganization Act (IRA), and circumvent the U.S.'s long standing refusal to agree with the Tribe's theory that the 20 railroad parcels are in trust. The Tribe attempts to "create" trust land by claiming a stipulation (Stipulation) entered into for the purpose of summary judgment, can achieve such a result because its other attempts to do so have failed.

The Tribe's motion primarily involves 20 former railroad parcels of land, to which the Village has assessed a storm water fee because they are not in trust.[1] While the Village concedes it believed the Tribe's representation that these 20 parcels were deemed as being in trust by the U.S., at the time of the filings referenced in the Tribe's motion, the Village later discovered that the federal government does not list these parcels as trust land and has consistently refused to recognize the Tribe's claim the railroad parcels are in trust. A fact the Tribe has still not disclosed to this Court.

The Village is not bound by this Stipulation and its consequences as advanced by the Tribe, for several reasons, any one of which compels a denial of the Tribe's motion for contempt: (1) the Stipulation specifically qualified its limited use for the purpose of seeking summary judgment on the real issue before the Court; (2) the Court's reference to the Stipulation's mention of 148 parcels being in trust does not alter the Court's only real decision—that storm water charges may not be assessed on lands held in trust—and, thus, is merely dicta; (3) parties to a lawsuit cannot stipulate to facts that are not true; (4) the parties cannot purport to agree to a legal conclusion such as whether certain land is in trust or not; (5) the Stipulation was arrived at under false pretenses; (6) the parties cannot usurp the power of congress, as delegated to the Secretary of Interior, and "create" trust land where none truly exists; and (7) enforcement of the

[1] The Tribe's brief references 42 parcels in dispute. After learning in 2013 that the U.S. does not recognize the 20 railroad parcels as being in trust, the Village thinking there may be other such parcels, had a title search completed at the Brown County Register of Deeds Office for all land purportedly listed by the County as in trust. In addition to the railroad parcels, the Village found 22 other parcels the County listed as in trust but for which the County records, like the railroad parcels, showed no evidence of U.S. approval or acknowledgement of that trust status. The Village then asked the Tribe for evidence of at least some level of U.S. approval or acknowledgement and was given some documentation for nearly all of these parcels. The Village also submitted a FOIA request for documents evidencing what the U.S. has designated as trust land within the entire Village. The U.S. failed to respond to this July 9, 2014 request until May 21, 2015 after the Village filed its lawsuit seeking an order compelling a response. These 6,537 pages have not been fully reviewed at this time. However, given the Tribe's provision of some sort of U.S. knowledge (regardless of whether the parcels are properly in trust) it is not contemplated that the Village will not seek storm water charges for these parcels. Thus, this brief focuses on the 20 parcels containing the abandoned railroad.

Stipulation would result in manifest injustice not only to the Village but to many other property owners who are both literally and figuratively on the wrong side of the tracks.

II. STATEMENT OF FACTS

This statement of facts, as supplemented in the argument section of this brief, illustrates (1) the railroad parcels are referenced as being in trust only at the Brown County Register of Deeds Office and only because of a document unilaterally drafted and recorded by the Tribe; (2) the U.S. was unaware of this document's creation and original recording; (3) the U.S. does not recognize the railroad parcels as in trust; (4) the extent to which the Tribe has been completely unsuccessful in its many attempts over many years to have the U.S. recognize the subject parcels as trust land; (5) that when the Tribe represented to this Court, the County, and the Village that the subject parcels were unequivocally in trust, it had full knowledge that the U.S. did not recognize them as such; and (6) how the Village's discovery of the federal government's refusal to recognize these parcels as trust lands, occurred through Freedom of Information Act ("FOIA") requests made after the creation of the Stipulation and other filings cited in the Tribe's brief.

A. The Property.

On March 3, 1871, Congress passed "[a]n Act granting the right-of-way to the Green Bay and Lake Pepin Railway Company for its road across the Oneida Reservation in the State of Wisconsin. 16 Stat. 588 (March 3, 1871). Many years later a successor railroad company ceased operations on this line.

On October 18, 2007, without the knowledge of the Village, the Tribe recorded a document it called an "Affidavit of Easement Cancellation" with the County, which instructed the County to change the title of the railroad parcels from Fox Valley and Western Ltd. (the successor in interest to the Green Bay and Lake Pepin Railway Company) to being owned by

"United States of America in Trust for the Oneida Tribe of Indians of Wisconsin." (Kowalkowski Aff., ¶ 9, Ex. 21.) Immediately prior to this date, and the railroads abandonment of its interest, the property was in the name of the railroad with no reference to tribal or U.S. ownership. (Kowalkowski Aff., ¶ 8, Ex. 20.)

In its May 2, 2014 Answer to the Village's FOIA litigation, Case No. 14-CV-00201-WCG, the U.S. responded to the Village's allegation that the Tribe filed the Affidavit with Brown County on October 18, 2007. The U.S. answered by saying it was "without information sufficient to form a belief as to the truth of the allegations," and then denied the same. (Kowalkowski Aff., ¶ 5, Ex. 18.) In that same Answer, the U.S. stated that the "Department of the Interior has not issued any decision accepting the parcels into trust for the benefit of the Tribe." (Id.) The subject parcels are designated as in trust only at the Brown County Register of Deeds Office and only as a result of the Tribe's own self-serving Affidavit of Easement Cancellation.

The Tribe, therefore, took the step to change the title to these parcels by itself, without the knowledge, permission, or imprimatur of the federal government or the Village. It is the County's listing of trust parcels was then used by the Tribe to create its list of 148 parcels it claimed to be in trust.

B. <u>The Tribe's assertions in this lawsuit of "in trust" status for the railroad parcels.</u>

On February 19, 2010, the Tribe filed this action, 10-CV-00137-WCG. [Dkt. # 1.] In paragraph 8 of the Complaint, the Tribe boldly states that "as of this date, approximately 1,420 acres located within the Village are held in trust by the United States for the Tribe. These trust lands and the immunity of these trust lands from the Village's storm water management utility 'fees' are the subject of this litigation." [Dkt. # 1, p. 3.]

The Tribe continued to assert the subject parcels were "in trust," throughout the remainder of the case. As the Tribe concedes, it was the Tribe who on September 14, 2011, prepared the initial draft of the Stipulation referencing the 148 parcels (which number includes the railroad parcels). (Dkt. # 83, p. 2; Dkt. # 84, ¶ 5.) It was also the Tribe that created and attached a spreadsheet of 148 trust parcels in a later version of the Stipulation. [Id.][2] Additionally, on January 23, 2012, the Tribe filed its Memorandum of Law in Support of Motion for Summary Judgment, stating "the subject trust lands include *148 parcels…that are held in trust by the United States* for the Tribe and located in Hobart; *all these parcels were held in trust* at the time Hobart adopted its ordinance in 2007." [Dkt. # 48, p. 7.] (emp. added). These statements were made to the Court at the exact same time the Tribe had complete and total knowledge of the fact the federal government did not agree with its "theory" that the 20 railroad parcels were in trust.

These inaccurate statements were then followed by a misdirect. Rather than arguing an alternative theory as to how these lands became trust land in its brief in support of summary judgment, the Tribe cites only to the Indian Reorganization Act ("IRA"), which necessarily requires land to be placed "in trust" through a specific fee to trust application process, pursuant to rules set forth in 25 C.F.R. § 151. The Tribe stated:

> There is no federal statute authorizing taxation of the subject trust lands. To the contrary, Congress explicitly preserved the traditionally meaning of trust lands from state taxation when it enacted the IRA. The Act authorizes the Secretary of the Interior to acquire land for Indians and provide that such lands "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*." 25 U.S.C. §465 (italics applied). This plain language of the IRA

[2] In Attorney Webster's Affidavit filed in support of the Tribe's Motion for Contempt, she states "based upon my examination of county and tribal records, I prepared a spreadsheet listing 148 parcels held in trust. [Dkt. # 84, ¶ 4.] It should also be noted Attorney Webster is the same tribal attorney who drafted and recorded the Affidavit of Easement Cancellation with the County.

> concludes the matter – Hobart cannot tax the subject trust lands or the Tribe's beneficial ownership of those lands (citation omitted).

[Dkt. # 48, pp. 13-14.] The Tribe argued the plain language of the IRA provided the source for the Tribe's defense to not pay storm water assessments.[3] Despite the Tribe's focus on the IRA, the Village has since learned the federal government has not taken the parcels back into trust via the IRA, after they were allotted to individual tribal members.

C. <u>The 2013 and 204 FOIA revelations show the subject parcels were not "in trust," as advertised by the Tribe.</u>

The Tribe, throughout this case, alleged that the subject parcels were "in trust" and strongly suggested if not outright stated, the IRA was the means by which the land came into trust. However, when the Village submitted FOIA requests in 2013 and 2014, the documents and responses resulting therefrom revealed the subject parcels are not in trust and perhaps more significantly, that the Tribe was fully aware that the federal government had consistently refused to agree with numerous requests spanning many years to recognize these parcels as trust land.

1. <u>Before the lawsuit.</u>

On August 13, 2001, the Tribe sent a correspondence to a BIA Superintendent asking for an opinion if the soon to be abandoned railroad right-of-way was in trust. (Kowalkowski Aff., ¶ 38, Ex. 45.) On July 19, 2005, the Tribe sent another letter to the United States trying to claim that the railroad parcels are held "in trust." (Kowalkowski Aff., ¶ 38, Ex. 45.)

On May 29, 2008, the Tribe wrote to the United States Department of Interior Solicitor's Office, stating: "On Thursday April 24, 2008 we met at the Department of Interior's office in

[3] It appears the Court, like the Village, believed the railroad parcels were properly in trust via the IRA as implemented by 25 C.F.R. § 151. Therefore, on page 4 of this Court's September 5, 2012 Order it stated "[f]ollowing the passage of the IRA, and particularly since the dramatic increase in revenue achieved after the enactment of the Indian Gaming Regulatory Act in 1988, the Tribe has been reacquiring land…some of which has been taken back into trust…by the Secretary of Interior." [Dkt. #68.] The Court also stated: "[a]lthough this immunity from taxation was lost as to Indian lands that were conveyed by patent…during the allotment period, it was restored to these lands later acquired and taken in trust by the government under the Indian Reorganization Act (IRA) of 1934." [Id. at p. 9.]

Washington, D.C., to discuss the trust status of the former railroad right-of-way transversing the Oneida Reservation." (Kowalkowski Aff., ¶ 40, Ex. 47.) The letter goes on to state that the Solicitor requested additional information, and the May 29, 2008 letter provided some of that additional information. (Id.)

A year later, on May 13, 2009, counsel for the Tribe sent a Memorandum to Maria Wiseman of the DOI arguing that the railroad parcels are held "in trust," specifically stating that "[t]he Oneida Tribe originally sought, and still seeks, confirmation that the land…approved for a railroad easement and right-of-way in 1870 and 1871, respectively, remains titled to the United States of America for the beneficial use of the Tribe." (Kowalkowski Aff., ¶ 12, Ex. 22.) The Tribe received no such confirmation in response to any of these requests, but still filed this lawsuit, in which it represented the railroad parcels as absolutely being in trust.

2. <u>During the lawsuit.</u>

These requests continued throughout the lawsuit. A month after filing this lawsuit, on March 10, 2010, the Tribe wrote to DOI, referencing a February 3, 2010 meeting where the parties met to discuss: (1) an agreement on the documents to be deemed useable; (2) a consensus on the documents to use moving forward and (3) a discussion regarding Congress' intent with the railroad right-of-way. (Kowalkowski Aff., ¶ 14, Ex. 24.) As to the third issue, the Tribe noted that "in comparing the Tribe's findings and the DOI's findings concerning the Boardman Surveys and the Lamb and Kelsey Allotment Books, the Tribe agrees with the DOI's findings. However, the Tribe's findings and the DOI's findings concerning the Lamb and Kelsy Allotment Books are inconsistent. The differences are laid out in the attached chart." (Id.) The Tribe also changed tactics and stated the 2003 Oberly Report it previously relied on to advance its position the railroad parcels were in trust, is "unusable… due to the number of errors… in its contents…."

(Id.) The Tribe provided additional information and then stated as follows: "The Tribe will allow the DOI an opportunity to review its [chart] contents before discussing its impact of the status of the land at issue." (Kowalkowski Aff., Ex. 24.)

On July 21, 2010, an email was sent to the Solicitor's Office stating the following: "Daguana, the meeting request involves the Oneida Nation of Wisconsin's request for a final decision on the railroad right-of-way land issue. We have previously met on this issue almost seven weeks and Pilar requested additional time to do some additional research…." (Kowalkowski Aff., ¶ 43, Ex. 50.)

On December 2, 2010, the Tribe wrote to the Assistant Secretary-Indian Affairs and to the Office of Solicitor General, in which the Tribe stated:

> Considering the Tribe has been corresponding with and providing documentation to the BIA-DOI over the past five years, I anticipate that you have access to all the additional documents referenced within this letter. I hope you find this information useful and am optimistic that it will assist the DOI in determining that the former railroad right-of-way was not allotted to tribal members and, in fact, remains treaty reserved trust land.

(Kowalkowski Aff., ¶ 16, Ex. 26.) This letter confirms that, as of December 2, 2010, in the midst of this lawsuit, the Tribe was fully aware that the federal government was continuing to refuse to accept the Tribe's theory that subject parcels were "in trust."

In other words, immediately before and in the midst of this lawsuit, while filing its Complaint, its Stipulation, and its brief, all of which unequivocally state the parcels are in trust, the Tribe knew the U.S. did not agree.

3. <u>After the lawsuit.</u>

The Tribe's unsuccessful attempts did not end after this Court's decision of September 5, 2012. On April 3, 2014, the Tribe's counsel emailed several people at the Solicitor Office of the DOI stating the following:

> If you'll recall, the Oneida Tribe claims that an abandoned RR right-of-way across its reservation has reverted to the status of treaty trust land. The Tribe has announced plans to build a nature path on the right-of-way. That announcement prompted the attached letter from Rich Heidel, President of the Hobart Board of Trustees. It is certain that this issue, too, will end up in court – only question being who sues who. Also likely that Hobart will attempt to involve the U.S., given the recent FOIA request at Interior. The Oneida Business Committee will be meeting on this (and other Hobart matters) on April 18th. I expect to receive instructions from the Tribe then. I will keep you posted.

(Kowalkowski Aff., ¶ 17, Ex. 27.)

On April 15, 2014, the Tribe's counsel emailed a Solicitor at DOI, explaining that the Tribe has retained her with respect to the railroad claim and that "the Tribe expects to be in litigation with the Village of Hobart soon on this issue, either as plaintiff or defendant." (Kowalkowski Aff., ¶ 18, Ex. 28.) She also states that:

> [O]ne of the issues on the table for consideration by the business committee is the position of the United States on this issue. As you recall, a few years ago the Tribe had submitted a request to the Solicitor's office to confirm the trust status of the right-of-way, then agreed to back burner the request. I wonder whether there is any update on the U.S. position on the issue that I can report to the Business Committee."

(Id.)

The Solicitor responded: "As far as I know there is no U.S. position on this issue yet." (Kowalkowski Aff., ¶ 19, Ex. 28.) Tribe's counsel then responded to the Solicitor, stating:

> At this point, I doubt the Tribe will be making a litigation request to the U.S., mostly because of uncertainty about where the U.S. is on the issue. But we are concerned because the Village of Hobart has FOIAD all material relating to the right-of-way and is likely, we think, to try and drag the U.S. into any litigation.

(Id.)

On May 7, 2014, Tribal Counsel again emailed the Solicitor, stating: "Your nemesis bugging you again! Have your folks gotten back to you about a meeting on the Oneida railroad right-of-way?" (Kowalkowski Aff., ¶ 21, Ex. 29.)

The Tribe acknowledges in these emails that the federal government has not determined these lands are held "in trust," yet now claims within its motion for contempt that the subject parcels are undisputedly "trust lands." (Kowalkowski Aff., ¶ 3.) In reality, as of May 2, 2014, in response to the Village's FOIA requests, the U.S. had specifically stated that 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.)

Moreover, the Village submitted seven FOIA requests to several different agencies worded in several different ways, all designed to find any documents showing the U.S. agreed these parcels are in trust. The U.S. represented no such documents exist.[4]

D. <u>The Village has always denied all of the Tribe's purported trust parcels are properly in trust.</u>

On April 20, 2010, the Village filed an Answer to the Tribe's initial storm water Complaint in 10-CV-00137-WCG, specifically responding to paragraph 8:

> In answering paragraph 8, admits that United States holds land in trust for the Tribe; denies the property is properly placed into trust; lacks knowledge or information sufficient to form a belief as to the acreage held in trust; denies that the trust lands are immune from the Village's storm water management utility fees and; lacks knowledge or information sufficient to form a belief as to the remaining allegations contained therein and therefore denies the same.

[Dkt. # 4, p. 2.] The Village also filed affirmative defenses, including:

> 1. The property at issue is not properly held in trust because the Tribe was not under federal jurisdiction and the land was not within the present

[4] Kowalkowski Aff., ¶ 3. See also pp. 18-19 infra.

> boundaries of an Indian reservation when the IRA was enacted. These as well as other issues are the subject of the Village's April 16, 2010 appeal to the Board of Indian Appeals of a Bureau of Indian Affairs decision to accept into trust, the first 6 parcels of the Tribe's request to place 133 additional parcels into trust.
> . . .
> 9. The Tribe alleges that the property at issue was placed into trust via the Indian Reorganization Act of 1934 (IRA), 25 U.S.C. §465.
> 10. The Tribe was not federally recognized or under federal jurisdiction on June 18, 1934 and is therefore not eligible to use the IRA to obtain trust lands for real property it owns.

[Dkt. # 4, pp. 6 and 9.]

On July 12, 2010, the Village filed its Brief in Opposition to the Tribe's Motion to Dismiss Affirmative Defenses in 10-CV-00137-WCG. [Dkt. # 16.] The Village stated as follows in its brief:

> *For the purposes of this litigation* it is admitted the U.S. holds title to some form of trust for the Tribe with some level of corresponding restrictions.… However, the fact the Tribe was not a recognized tribe under federal jurisdiction in 1934, limits the benefits the Tribe receives from the U.S. taking title. In other words, the fact the U.S. holds title does not necessarily mean an ineligible tribe receives all the benefits of the IRA that an eligible tribe would enjoy. It is premature at this stage of the litigation to conclude that under no circumstances, issues relating to the legal status of the land could have no bearing on this case…. (emp. added.)

[Id at p. 4.]

On November 23, 2011, the Village filed an Amended Third-Party Complaint, alleging:

> 63. For decades prior to the land being taken into trust it was within the jurisdiction of the Town and now the Village of Hobart.

[Dkt. # 43, p. 13.]

E. <u>The Court's Judgment in this lawsuit.</u>

On September 5, 2012, the Court granted the Tribe's motion for Summary Judgment, and citing to the Stipulation, stated: "Today, the United States holds in trust for the Tribe 148 parcels

comprising of approximately 1,400 acres of land that are located within the boundaries of Hobart." [Dkt. # 68, p. 4.] In ruling that the storm water charges constitute a tax and therefore cannot be charged against trust parcels, the Court relied upon the language of the IRA:

> Although this immunity from taxation was lost as to Indian lands that were conveyed by patent to tribal members during the allotment period, it was restored to those lands later acquired and taken in trust by the government under the Indian Reorganization Act (IRA) of 1934. The IRA expressly provided that lands taken into trust for an Indian tribe would be "exempt from state and local taxation." 25 U.S.C. §465. (citations omitted).

[Dkt. # 68, p. 9.] The Court was never presented with an alternative theory upon which the land could be held "in trust."

The Court ultimately concluded:

> Accordingly, the Tribe's motion for summary judgment is **GRANTED**. The clerk is directed to enter judgment in favor of the Tribe declaring that the Tribe's trust land is immune from the Village's storm water management utility ordinance and that the Village lacks authority to impose charges under the ordinance on the Tribe's land directly or indirectly. The judgment shall also enjoin the Village from attempting to impose and collect "charges" under the ordinance from the Tribe or from foreclosing on the Tribe's lands.

[Dkt. # 68, p. 22.] The Judgment reflected the same: "the Oneida Tribe of Indians of Wisconsin's trust land is immune from the Village of Hobart, Wisconsin's Storm Water Management Utility Ordinance and that the Village lacks authority to impose charges under the Ordinance on the Tribe's land directly or indirectly." [Dkt. # 69, p. 1.] Notably, the Court made no judgment as to which parcels were the Tribe's "trust land."

III. STANDARD OF REVIEW

"In order to prevail on a contempt petition, the complaining party must demonstrate by clear and convincing evidence that the respondent has violated the express and unequivocal command of a court order." *D. Patrick, Inc. v. Ford Motor Co.*, 8 F.3d 455, 460 (7th Cir.1993).

"To hold a party in contempt, the district court must be able to point to a decree from the court which set[s] forth in specific detail an unequivocal command which the party in contempt violated." *Stotler and Co. v. Able*, 870 F.2d 1158, 1163 (7th Cir.1989) (internal quotations and citations omitted). "Due process may entitle the parties to discovery and an evidentiary hearing to the extent necessary to resolve relevant factual disputes. However, because the contempt proceeding is concerned solely with whether or not the respondent's conduct violates a prior court order, the parties cannot reasonably expect to litigate to the same extent that they might in a new and independent civil action." *D. Patrick, Inc.*, 8 F.3d at 459.

IV. ARGUMENT

The Tribe fails to meet the demanding standard of demonstrating "by clear and convincing evidence" that the Village "has violated the express and unequivocal command" of this Court's order. *D. Patrick, Inc.*, 8 F.3d at 460. The essence of the Court's express and unequivocal command—to not assert storm water charges on trust land—remains intact by allowing the Village to continue the application of storm water fees on land not in trust, including the subject railroad parcels. Additionally, the Stipulation cited by the Tribe was specifically qualified to be limited, and was entered into only to allow this Court to render a summary decision on the substantive issue—whether lands actually in trust may be assessed storm water charges. Importantly, the Tribe failed to disclose at the time of that Stipulation that the subject parcels purportedly "in trust," were not "in trust" in the eyes of the federal government. In fact, while the Tribe represented to the Court, the Village, and the Brown County Register of Deed's office that these parcels were "in trust," it neglected to even mention its ongoing dispute with the federal government and the federal government's refusal to recognize the subject parcels as trust land, *i.e.* the government did not, and still does not

recognize that these lands are "in trust." The decision of this Court only applies to parcels that are "in trust," [Dkt. # 68] ("The clerk is directed to enter judgment in favor of the Tribe declaring that the Tribe's trust land is immune from Village's Storm Water Management Utility Ordinance."), and no Stipulation or decision from this Court can place these parcels "in trust," without the processes statutorily-prescribed by the IRA. Because the Village has not violated an "express and unequivocal command" of this Court by assessing a tax on non-trust land, the Tribe fails to meet its burden.

A. <u>The Stipulation does not affect the decision of the Court.</u>

The Tribe overly ascribes significance to a single provision within a Stipulation that does not bear on the true substance of the Court decision. "Stipulations should be construed consistent with the apparent intention of the parties, the spirit of justice, and the furtherance of fair trials upon the merits, and should not be construed technically so as to defeat the purposes for which they were made." *Milwaukee & Suburban Transport Corp. v. Milwaukee County*, 82 Wis.2d 420, 263 N.W.2d 503 (1978). This Stipulation was entered into for the express purpose of allowing the Court to make legal findings on the issue of whether a municipality can impose "charges" on lands "in trust" for storm water management—not to identify what parcels are "in trust" that merit that protection. These are, thus, not admissions, but agreed upon facts for the specific purpose of allowing the Court to decide this real question.

The introductory portion of the Court's Order, that cites this Stipulation, does not rely upon its reference to the number of parcels in trust to render its decision. In fact, the Court's Judgment better describes the scope of the Court's decision:

> **IT IS HEREBY ORDERED AND ADJUDGED** that the Oneida Tribe of Indians of Wisconsin's trust land is immune from the Village of Hobart, Wisconsin's Storm Water Management Utility Ordinance and that the

> Village lacks authority to impose charges under the Ordinance on the Tribe's land directly or indirectly.
>
> **IT IS FURTHER ORDERED** that the Village of Hobart, Wisconsin is enjoined from attempting to impose and collect "charges" under the Ordinance from the Tribe or from foreclosing on the Tribe's lands.
>
> **IT IS FURTHER ORDERED** that the Village of Hobart, Wisconsin's claims against the United States are dismissed for lack of subject matter jurisdiction.

[Dkt. # 69, pp. 1-2.] The Judgment confirms this case is about the applicability of storm water charges to trust land, not the identity of trust land. As such, that provision within the Order that references the Stipulation should be considered dicta. The Seventh Circuit provides an excellent analysis of what is considered dicta:

> [S]tatement[s] in a judicial opinion that could have been deleted without seriously impairing the analytical foundations of the holding-that, being peripheral, may not have received the full and careful consideration of the court that uttered it." *Sarnoff v. American Home Products Corp.*, 798 F.2d 1075, 1084 (7th Cir.1986). "[D]ictum is a general argument or observation unnecessary to the decision. . . . The basic formula [for distinguishing holding from dictum] is to take account of facts treated by the judge as material and determine whether the contested opinion is based upon them." *Local 8599, United Steelworkers of America v. Board of Education*, 162 Cal.App.3d 823, 834, 209 Cal.Rptr. 16, 21 (1984). A dictum is "any statement made by a court for use in argument, illustration, analogy or suggestion. It is a remark, an aside, concerning some rule of law or legal proposition that is not necessarily essential to the decision and lacks the authority of adjudication." *Stover v. Stover*, 60 Md.App. 470, 476, 483 A.2d 783, 786 (1984). It is "a statement not addressed to the question before the court or necessary for its decision." *American Family Mutual Ins. Co. v. Shannon*, 120 Wis.2d 560, 565, 356 N.W.2d 175, 178 (1984). As often in dealing with complex terms, the definitions (those above, and others we could give) are somewhat inconsistent, somewhat vague, and somewhat circular.
>
> An alternative to definition is to ask what is at stake in the definition. What is at stake in distinguishing holding from dictum is that a dictum is not authoritative. It is the part of an opinion that a later court, even if it is an inferior court, is free to reject. So instead of asking what the word "dictum" means we can ask what reasons there are against a court's giving weight to a passage found in a previous opinion. There are many. One is that the passage was unnecessary to the outcome of the earlier case and

> therefore perhaps not as fully considered as it would have been if it were essential to the outcome. A closely related reason is that the passage was not an integral part of the earlier opinion-it can be sloughed off without damaging the analytical structure of the opinion, and so it was a redundant part of that opinion and, again, may not have been fully considered. Still another reason is that the passage was not grounded in the facts of the case and the judges may therefore have lacked an adequate experiential basis for it; another, that the issue addressed in the passage was not presented as an issue, hence was not refined by the fires of adversary presentation. All these are reasons for thinking that a particular passage was not a fully measured judicial pronouncement, that it was not likely to be relied on by readers, and indeed that it may not have been part of the decision that resolved the case or controversy on which the court's jurisdiction depended (if a federal court).

Id., 837 F.2d 291, 292-93 (7th Cir. 1988). The Court determined a principle of law—land in trust is not subject to be storm water charges—and the identity of parcels to which this principle applies is irrelevant; that principle applies to all land in trust and, conversely, it does not apply to land not in trust. The amount and identity of parcels is not an "integral part of the earlier opinion . . . [and] can be sloughed off without damaging the analytical structure of the opinion;" the "passage was not grounded in the facts of the case;" and "the issue addressed in the passage was not presented as an issue, hence was not refined by the fires of adversary presentation." *Id*. Because the identity of parcels to which this principle applies is dicta, the provision of that Stipulation that identifies a number of parcels can be disregarded by the Court. In other words, if the Tribe's representation to the Court was that there were 128 parcels in trust, rather than 148, the Court's Order and final Judgment and the analytical structure that lead to them, would remain unchanged. Consequently, the Village should not be held in contempt. It is in compliance with the true decision of this Court.

B. <u>It would be "manifestly unjust" to apply the Stipulation and any portion of the Court's decision, referencing that Stipulation, given the Tribe's misrepresentations in that regard.</u>

At the time of the Stipulation, the Village was unaware of the federal government's refusal to agree with the Tribe's questionable assertions the land was in trust. (Kowalkowski Aff., ¶ 2.) The Brown County Register of Deeds showed the owner as the "USA in Trust for Oneida Tribe of Indians of Wisconsin," so the Village assumed they were legitimately in trust through the proper IRA process.[5] Only recently, through a FOIA request commenced in 2013, did the Village discover that was not true.

From August 23, 2013 through May 20, 2015, the Village submitted and received responses to seven FOIA requests, addressed to multiple federal agencies, all of which were designed to determine the U.S.'s position relative to whether the railroad parcels are in trust. (Kowalkowski Aff., ¶3.) These requests sought documents showing whether the railroad parcels in particular were in fact in trust, documents evidencing all land with the U.S. as designated as in trust (to then see if the railroad parcels were among them) and communications between the U.S. and Tribe relative to this issue. (Id.)

First, despite providing responses to seven separate FOIA requests, containing thousands of documents, the U.S. did not provide one document which indicates the railroad parcels are in trust as far as the U.S. is concerned. (Id.) Second, the documents that were produced show that for many years before and after this storm water suit, the Tribe has been totally unsuccessful in its attempts to get the U.S. to accept its "theory" that the railroad parcels are in trust.[6] (Kowalkowski Aff., ¶¶ 3 and 10.)

More specifically, the documents received included a May 13, 2009 correspondence (9 months before the Tribe commenced this action on February 19, 2010) from the Tribe's counsel, to DOI, stating "[t]he Oneida Tribe originally sought, and still seeks, confirmation that the land

[5] Subject to the Village's assertion that the Tribe was ineligible to utilize the IRA to acquire trust land.

[6] An August 13, 2001 correspondence from the Tribe, questioning the status of the railroad, even references a 1972 request from the Tribe. (Kowalkowski Aff., ¶ 38, Ex. 45.)

the Oneida Chiefs and United States Congress approved for a railroad easement and right-of-way also remains titled to the United States of America for the beneficial use of the Tribe." (Kowalkowski Aff., ¶ 12, Ex. 22.)

The documents received also included a March 10, 2010 correspondence (19 days after the Tribe filed its Complaint in this action) from the Tribe to DOI confirming a February 3, 2010 (16 days prior to the filing of this complaint) meeting concerning "Congress' intent with the railroad right-of-way;" that "the Tribe's findings and the DOI's findings concerning the Lamb and Kelsey Allotment Books are inconsistent;" and requesting further discussion on "the status of the land at issue." (Kowalkowski Aff., ¶ 14, Ex. 24.) The FOIA request also uncovered an April 2, 2010 email from the Tribe's counsel to DOI stating that "the Tribe desires a definitive determination of the reservation boundary issue …" (Kowalkowski Aff., ¶ 15, Ex. 25.)

The following more recent communications from the Tribe, confirming its knowledge of the U.S.'s unwillingness to give any credence to the Tribe's trust theory include the following:

4/3/14 Email from Tribe's counsel to DOI, in which she states "[i]f you recall, the Oneida Tribe claims that an abandoned railroad right-of-way…has reverted to the status of treaty trust land." (Kowalkowski Aff., ¶ 17, Ex. 27.)

4/15/14 Email from Tribe's counsel to DOI stating OTI retained her to help them with the railroad claim and that "the Tribe expects to be in litigation with the Village of Hobart soon on this issue, either as plaintiff or defendant." She also states that "one of the issues on the table for consideration by the business committee is the position of the United States on this issue. As you recall, a few years ago the Tribe had submitted a request to the Solicitor's office to confirm the trust status of the right-of-way, then agreed to back burner the request. I wonder whether there is any update on the U.S. position on the issue that I can report to the Business Committee." (Kowalkowski Aff., ¶ 18, Ex. 28.)

4/15/14 Email from DOI to Tribe's counsel stating "[a]s far as I know there is no U.S. position on this [railroad] issue yet." (Kowalkowski Aff., ¶ 19, Ex. 28.)

4/15/14 Email from Tribe's counsel to DOI, stating:

> "[a]t this point, I doubt the Tribe will be making a litigation request to the U.S., mostly because of *uncertainty about where the U.S. is on the issue*. But we are concerned because the Village of Hobart has FOIAD all material relating to the right-of-way and is likely, we think, to try and drag the U.S. into any litigation." (Kowalkowski Aff., ¶ 20 Ex. 28.)

5/7/14 Email from Tribe's counsel to DOI Turner stating: "[y]our nemesis bugging you again! Have your folks gotten back to you about a meeting on the Oneida railroad right-of-way?" (Kowalkowski Aff., ¶ 21, Ex. 29.)

Consequently, the Tribe knew before, during and after the filing of this lawsuit, while drafting its Stipulation and the drafting its brief, all of which unequivocally state the railroad parcels are in fact in trust, that the U.S. did not agree. The Tribe should not be rewarded for misleading the County, Village, and this Court. Even in its current motion for contempt and supporting brief, the Tribe has still not disclosed the U.S.'s refusal to agree with the Tribe but instead still unbelievably claims it is absolutely undisputed these parcels are in trust.

In an apparent attempt to divert attention from its misrepresentations, the Tribe claims "these circumstances [questions about the land ownership] were clearly known to Hobart," by virtue of a prior 2006 lawsuit in which the Village sought a declaration as to the ownership of the 20 parcels. [Dkt. # 83, p. 5.] Although the Tribe may wish the parcels were in trust when that lawsuit was filed, it ignores the fact that the land, at that point in time, was titled in the name of the railroad according to Brown County. (Kowalkowski Aff., ¶ 8, Ex. 20.) The issue created by the erroneous Affidavit of Easement Cancellation arose after the 2006 lawsuit was over.

It would be unjust to reward the Tribe for hiding the fact the U.S. does not list these parcels in trust and is continuing to refuse to acknowledge the Tribe's claims to the contrary. This is especially true when the Village is doing nothing more than the U.S. is doing and

considering these parcels as owned in fee. Misrepresentation and gamesmanship employed against the Village and this Court and resulting in land being taken away from its true owners should not be rewarded. The Tribe's motion should be denied.

C. <u>The Stipulation does not contain dispositive admissions that the 20 parcels are actually parcels "in trust."</u>

On January 23, 2012, the parties filed the Stipulation of Facts, which states that "[t]he United States holds 148 parcels of land in trust for the Tribe located within the boundaries of Hobart; these parcels are referred to collectively herein as the subject trust lands." [Dkt. # 50.] However, the parties prefaced that joint stipulation by stating:

> [b]y their signature below, the plaintiff Oneida Tribe of Indians of Wisconsin and defendant Village of Hobart stipulate to the following factual matters as stated. *By doing so, the parties make no stipulation, admission or concession regarding legal implications or alleged consequences of the stated factual matters.*

[Dkt. # 50, p. 1.] (emp. added.) In short, the parties agreed this was a limited Stipulation in order to reach the real question of the lawsuit. Consistent with this intent, and preserving its objection to the trust status of any of the land, the Village also filed the "Village of Hobart's Statement of Additional Facts," in which it stated "the original 1838 reservation was allotted, so that no surplus lands were left;" "[t]he Tribe was not under federal jurisdiction in 1934, and therefore was not eligible to utilize the IRA;" and "[t]he Village had jurisdiction over the trust parcels for nearly a century prior to the Tribe applying to have them held in trust." [Dkt. # 62, p. 2.] Additionally, in its answer to the Tribe's Complaint, in which the Tribe asserted all of this land was "in trust," the Village expressly denied that allegation. [Dkt. # 4.]

Again, "[s]tipulations should be construed consistent with the apparent intention of the parties, the spirit of justice, and the furtherance of fair trials upon the merits, and should not be construed technically so as to defeat the purposes for which they were made." *Milwaukee &*

Suburban Transport Corp., 82 Wis.2d at 442. Because this Stipulation was entered into as a limited enterprise, to allow the Court to make legal findings on the larger issue of whether a municipality can impose "charges" on trust land for storm water management—not to identify what parcels were in trust that merit that protection—this Court should give effect to that intent and deny the motion for contempt.

D. <u>The Court is not bound by legal conclusions or false statements within the Stipulation.</u>

"The parties to a lawsuit are free to stipulate to factual matters. However, the parties may not stipulate to the legal conclusions to be reached by the court." *Saviano v. C.I.R.*, 765 F.2d 643, 645 (7th Cir. 1985). Whether these parcels are "in trust" is a legal conclusion. *See United States v. Jicarilla Apache Nation*, __U.S. __, 131 S.Ct. 2313, 2323 (2011) ("Though the relevant statutes denominate the relationship between the Government and the Indians a 'trust,' . . . that trust is defined and governed by statutes rather than the common law.") Just like in *Saviano*, where an agreement with the Commissioner did not bind the court as to the appropriate characterization of a transaction for tax purposes, *i.e.* a legal conclusion, here too, the Court is not bound by a Stipulation that purports to make a legal conclusion as to whether certain parcels of land are "in trust" under the IRA or otherwise.

Moreover, "parties may not create a case by stipulating to facts which do not really exist. A district court is entitled to disregard a stipulation if to accept it would be 'manifestly unjust or if the evidence contrary to the stipulation [is] substantial.'" *PPX Enters., Inc. v. Audiofidelity, Inc.*, 746 F.2d 120, 123 (2nd Cir. 1984); *see also Sinicropi v. Milone*, 915 F.2d 66, 68 (2nd Cir. 1990); *Loftin & Woodard, Inc. v. United States*, 577 F.2d 1206, 1232 (5th Cir. 1978) ("district court was entitled to disregard the stipulation if to accept it would have been manifestly

unjust or if the evidence contrary to the stipulation was substantial."); *Rutili v. O'Neill (In re O'Neill)*, 468 B.R. 308, 337 (Bankr. N.D. Ill. 2012).

Here, the evidence contrary to the Stipulation that the 20 railroad parcels are not in trust, is overwhelming. The railroad parcels were patented to the original allottees and are now owned by the successors in interest to those allottees. Section 5 of the Dawes Act says that after approval of the allotment:

> 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 charges or encumbrances whatsoever.

25 U.S.C. § 5.

In the year of its enactment, the Commissioner himself described the purpose and effect of the Dawes Act as follows:

> I fail to comprehend the full import of the allotment act if it was not the purpose of Congress which passed it and the Executive whose signature made it a law ultimately to dissolve all tribal relations and to place each adult Indian on the broad platform of American citizenship.

1887 Annual Report of the Commissioner of Indian Affairs. (Kowalkowski Aff., ¶ 32, Ex. 39.)

Approximately 20 years after the Dawes Act was enacted, a federal judge for the Eastern District of Wisconsin, when discussing the Dawes Act as it applied to this Tribe, described the effect of this law as follows:

> That the emancipation of the Indian from further federal control was the purpose of Congress is so plain from the language of the act of 1887 that no argument could make it plainer. . . . The jurisdiction has been distinctly renounced by the United States, and is now clearly vested in the states.

U.S. v. Hall, 171 F. 214, 218 (1909). (Kowalkowski Aff., ¶ 42, Ex. 49.)

The allotment process was advanced to its intended conclusion including the railroad parcels, for the Oneida Reservation. In the 1891 annual report of the Commissioner of Indian Affairs, the Commissioner reported as follows:

> The Oneida reservation, situated between the counties of Brown and Outagamie…contains less than three townships, ***65,540 acres allotted in severalty*** by Special Agent Lamb, which allotment was completed a little more than a year ago.
>
> Allotment trust patents are dated June 13, 1892. ***Oneida reservation fully allotted except for 85 acres held for future Indian allotments if/as needed***.
>
> 1891 Annual Report of the Commissioner of Indian Affairs. (Kowalkowski Aff., ¶ 33, Ex. 40.) (emp. added.)

In a report entitled "Some Observations on the Results of the Allotment System Among the Oneidas of Wisconsin," dated January 24, 1933, the following observation was made:

> ***[T]he entire reservation was allotted***, ***so that no surplus lands were left*** to create a tribal fund with its consequent pull away from individualization.
>
> (Kowalkowski Aff., ¶ 35, Ex. 42.) (emp. added.)

In 1933, the Eastern District again addressed the impact of the Dawes Act. In *Stevens v. County of Brown*, C.A. No. 307, E.D. Wis. 10, November 3, 1933, the Court held:

> ***[T]here is no escape from the proposition that the Government, in passing and applying the Dawes Act, but conceived itself in duty bound to carry out its provisions in the interest of the tribe and its members. Plainly, this resulted in a discontinuance of the reservation, and a recognition of the power of the state to incorporate the lands in the towns in question***. *Id.* (emp. added.)

(Kowalkowski Aff., ¶ 41, Ex. 48.)

As more fully explained in the Village's brief in support of its motion to amend the Stipulation and Order, the historic treatment of the railroad parcels track the above referenced allotment process perfectly. Individual tribal members were given patents. (Kowalkowski Aff.,

¶ 26, Exs. 30 - 33.) The patents contain nothing to even remotely suggest the railroad parcels were not included in what was patented. (Kowalkowski Aff., ¶ 26, Exs. 30 - 33.) The Indian claim numbers and lot numbers referenced in the patents include the railroad within their mapping. (Kowalkowski Aff., ¶ 27, Exs. 34 - 35.) None of these documents contain any language removing that part of the patent from the land actually transferred. Consequently, the railroad right-of-way was patented to individual tribal members, albeit subject to railroads right to use the right-of-way, and belongs to the original allottees' successors in interest.[7] The fact allottees themselves knew their patents included the railroad is confirmed by an allottee who sold a part of his land a year and a half later and expressly including the railroad right-of-way in the deed to the buyer. (Kowalkowski Aff., ¶ 30, Ex. 37.)

Consequently, the Village should not be held in contempt for viewing these parcels in the same way they are viewed by congress, the allottees, the federal court, numerous agencies of the DOI, the Solicitor's office and the successors in interest to the allottees. The congressional acts, the historical record and pre-existing federal court decisions leave no room for the Tribe's extremely tenuous argument that for some incomprehensible reason the U.S. wanted to preserve a long, narrow, unbuildable strip of trust land where the original reservation used to exist.

The inability of the Tribe and Village to stipulate to something that is not true is even more critical when the subject matter of the Stipulation is the status of trust land. Even if the Tribe and the Village had some reason to jointly request these parcels be designated as trust land, they simply could not accomplish that goal. Only the U.S. can make that determination. Preserving the U.S.'s ability to make such a determination is crucial. The motion for contempt must be denied because it is based on the false premise that the railroad parcels are actually in

[7] The Tribe may reference some surveys of this area, some of which contain a reference to the railroad and some of which do not. However, these surveys cannot be used to confuse the issue. As explained in the Village's brief in support of its motion to amend, the patents control.

trust. To base a contempt order on this false premise would run afoul of congressional acts, prior federal court decisions and the historical record.

E. <u>It would be "manifestly unjust" to in anyway apply the Stipulation and statement in the Order that the railroad parcels are in trust, because the Order has the serious potential of being used later against the U.S., the Village, the County, the State, as well as the local property owners who actually own that land.</u>

In reality, the railroad parcels were part of Indian claims and lots allotted to individual Tribal members pursuant to the Allotment Act of February 8, 1887 (24 Stat. 388). In fact, in a response to an inquiry from Brown County to the U.S. regarding ownership of the railroad parcels, the County was told by the U.S. "*the Bureau of Land Management transferred title to the property in question on June 13, 1892 under the Indian Allottment Act of February 8, 1887….*" (Kowalkowski Aff., ¶ 3, Ex. 12.) (emp. added.) Consequently, many individuals who access their homes and land, off County Highway J/Riverside and across the former railroad right-of-way, own these parcels in fee, as the successors in title to the original allottees. The County is just such an owner and its multi-million dollar golf course includes the former railroad right-of-way giving it direct access from County Highway J. That in part explains why since the construction of the golf course no U.S. or Tribal easement was ever recorded to access the golf course. (Kowalkowski Aff., ¶ 3, Ex. 7.) You do not need permission to construct a driveway over land you own. The same is true for the many other private property owners who continuously cross the old railroad line to get to their homes and other property.[8]

If the Court allows the Tribe to artificially create trust land via the Stipulation and as a result of the Court's dicta, the County and all other property owners who believe their land connects directly with County Highway J, would be at the mercy of the Tribe. Armed with what

[8] See Kowalkowski Aff., ¶ 27, Ex. 34, which is the County GIS map showing the property owners along the former railroad line. In addition to the Tribe which owns some of the parcels in fee, through open market parcels, other owners include the County and several individuals.

it is labeling a "decision," that these particular parcels are in trust, and further armed with sovereign immunity from being sued, and having the Indian exception to the Quiet Title Act, the Tribe could block or limit access to people's homes, businesses or other property and the property owners would have no recourse. Even the possibility of unfettered access to the properties would destroy their value. No title insurance company would insure over this potential lack of access. No bank would provide a loan secured by a mortgage on land that has questionable access.

Additionally, there is a process under the Code of Federal Regulations implementing the IRA that ensures some measure of due process to prevent or mitigate manifest injustice. *See* 25 CFR 151.10. That due process allows notice, the ability to "provide written comments as to the acquisition's potential impacts on regulatory jurisdiction, real property taxes and special assessments," and requires consideration of many factors, including "[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," "[j]urisdictional problems and potential conflicts of land use which may arise," and "whether the Bureau of Indian Affairs is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status." *Id*. The Tribe seeks to dispatch these due process hurdles, the very ones they implied in their Complaint and brief were used to place all of the 148 parcels into trust. Granting the Tribe's motion for contempt would provide it with reason to try and broaden the Court's decision, that storm water charges may not be asserted against trust land, to eliminate all taxes, assessments and local jurisdiction on the railroad parcels. This would rob not only the Village, but the County and local school districts of desperately needed tax revenue. The lack of jurisdictional controls imposed by the State, County or Village could also result in unlimited and uncontrolled use of

the railroad line causing disruption and safety concerns for those who must (potentially now at the mercy of the Tribe) cross it every day.

F. <u>This Court cannot declare these parcels "in trust" without federal recognition under the IRA.</u>

As briefly touched upon above, the Tribe seeks to circumvent the statutorily-prescribed method for placing land "in trust" through the IRA and side step the U.S.'s refusal to recognize these parcels as in trust under any other theory, by attempting to place these 20 parcels in trust through judicial fiat and stipulation. In its motion for contempt, the Tribe states "[t]here is no question, then, that the parties agreed, and the Courts found, that all 148 parcels are trust lands subject to the litigation." [Dkt. # 83, p.4.] Not so. The only party statutorily-authorized to place lands in trust under the very detailed process of the IRA is the Secretary via power delegated from congress, and the executive branch does not agree that the parcels are in trust.

To be clear, the Tribe has never argued to the Court that this land is in trust by any other means other than the IRA. The Tribe asserted to the Court that these parcels "are held in trust by the United States for the Tribe." [Dkt. # 48.] In doing so, the Tribe represented that these parcels were held in trust as a result of the IRA, which prevented taxation thereon:

> There is no federal statute authorizing taxation of the subject trust lands. To the contrary, Congress explicitly preserved the traditionally meaning of trust lands from state taxation when it enacted the IRA. The Act authorizes the Secretary of the Interior to acquire land for Indians and provide that such lands "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*." 25 U.S.C. §465 (italics applied). 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 (citation omitted).

[Dkt. # 48, pp. 13-14.] It is the "plain language of the IRA that concludes the matter," according to the Tribe. And this is true, as the IRA provides the exemption from State and local taxation

when "[t]itle 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." 25 U.S.C. § 465. (emp. added.)

And the Court, presumably relying on the Tribe's assertion the parcels at issue were in trust "pursuant to this Act [the IRA]," premised its decision that "the United States holds in trust for the Tribe 148 parcels" (Decision and Order) on the presumption that these parcels were "in trust" via the IRA, not through the Tribe's unilateral actions prefacing its decision as follows:

> Following passage of the IRA, and particularly since the dramatic increase in revenue the Tribe achieved after the enactment of the Indian Gaming Regulatory Act in 1988, the Tribe has been reacquiring land within the original reservation, some of which has been taken back into trust for the benefit of the Tribe by the Secretary of Interior.

Decision and Order [Dkt. # 68, p. 4.] The Court contemplated, and the Village believed, these parcels were "in trust" as a result of proper IRA procedures. To the extent the Tribe may now suggest these parcels were in trust by some other means, that was not the Tribe's argument at the time of the Stipulation or Judgment, nor was it ever before the Court to make a decision on that matter. The Village would have argued against that point, noting that the subject parcels do not revert to trust land upon abandonment.[9]

The Tribe concludes "[i]t is also indisputable, then, that these parcels are trust lands and subject to the Court's Judgment," and "Hobart has indisputably violated the Judgment by its affirmative decision to persist in imposing those charges on 42 parcels of subject trust lands."

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[9] This Court would first be required to find these subject parcels are "in trust" to find the Village in contempt. Whether the subject parcels are "in trust" is a legal question that requires an analysis of the facts and property law. The Court made no such decision on this issue in its last judgment. And because there would be factual disputes as to the nature of those claims, discovery and an evidentiary hearing would be required to fully examine whether land can be "in trust" by the federal government and whether the land patents, which based on Indian claims and which do not exclude the railroad right-of-way, trump any claims of the Tribe to the contrary. See *D. Patrick, Inc.*, 8 F.3d at 459 ("Due process may entitle the parties to discovery and an evidentiary hearing to the extent necessary to resolve relevant factual disputes."). Therefore, to the extent the Court believes it must specifically rule on the trust status of these parcels to decide the Tribe's motion for contempt, the Village requests additional opportunity to brief that issue. Only a small sampling of the evidence and law confirming the parcels are not in trust are contained within this brief, due to page limitations.

[Dkt. # 83, p. 7.] Indisputable as it may seem to the Tribe, the Village does dispute it, and so does the federal government that has refused to agree with the Tribe's position for decades. As a result, until the proper IRA procedure is used to place the railroad parcels the Tribe currently owns in fee into trust, a process subject to due process, the Village has the same authority over these parcels as it has over every other fee parcel in the Village. The same is true for the other parcels not owned by the Tribe.

Additionally, the County and the many other owners of land both literally and figuratively on the wrong side of the tracks have their own property rights to protect as the true fee simple owners of these parcels as successors in title to the original allottees.[10] After facing decades of the BIA refusing to recognize these parcels as trust land, and after deciding not to try and use the IRA to place the portions of the railroad the Tribe does own in fee into trust, the Tribe cannot now use this lawsuit as a subterfuge for having these parcels treated as if they were "in trust."

CONCLUSION

As ridiculous as it sounds, the Tribe is asking this Court to punish the Village for treating parcels that are "not in trust" like parcels that are "not in trust." For all the above reasons, the Village respectfully requests that the Court deny the Tribe's motion for contempt and declare that the Village may properly assess storm water fees on parcels of land that are not held in trust.

[10] The United States' confirmation to the County that the "Bureau of Land Management *transferred title to the property* in question on June 13, 1892 under the Indian Allotment Act…" confirms these individuals, and the Tribe for the parcels it purchased on the open market along the railroad, all own them in fee. Given BLM transferred title to the railroad via the allotment process, the current owners are the successor in title to the original allottees. (Kowalkowski Aff., ¶3.) The last sentence in the quote from the BLM letter stating that title would *appear* to be under the jurisdiction of the Oneida Tribe is obviously based on the belief the Tribe purchased the parcels from the original allottee and is now the successor in title. That is true in some cases.

Dated this 2nd day of June, 2015

Respectfully Submitted,
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