IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
GREEN BAY DIVISION

Oneida Nation,

Plaintiff,

v.

Case No. 16-CV-1217

Village of Hobart, Wisconsin,

Defendant.

RESPONSE BRIEF TO ONEIDA NATION'S
MOTION TO CLARIFY BURDEN OF PROOF

Pursuant to this Court's Order of September 26, 2017, Defendant, Village of Hobart (the "Village"), hereby submits the following Brief in response to Plaintiff, Oneida Nation's (the "Nation") Motion to Clarify Each Party's Respective Burden of Proof (ECF. No. 59).

In its Motion to Clarify, the Nation moved this Court for an order specifying the following allocation of the burden of proof:

> (1) In its opening expert reports due October 31, and, generally, the Nation carries the burden of proof on the creation of the Oneida Reservation in the Treaty of 1838, 7 Stat. 566, and the applicability of the Indian Reorganization Act ["IRA"], 25 U.S.C. § 5123, in 1934 to the Nation and its Reservation in opening expert reports due October 31, and otherwise, except for the Nation's actual title to the trust parcels at issue;
>
> (2) In its opening expert reports due October 31, and, generally, Defendant, Hobart carries the burden of proof that the Oneida Reservation has been diminished or disestablished by an act of Congress or otherwise, any claim that the Nation does not hold trust or fee title to the parcels at issue, and other affirmative defenses it has or may raise in pleadings, specifically including any claimed exceptional circumstances that would allegedly justify the exercise of its jurisdiction over the Nation on the Reservation, notwithstanding the absence of express congressional authorization to do so;

> (3) In responsive expert reports due November 30, the Nation and Hobart may respond to opening expert reports and on December 31, the Nation and Hobart may exchange rebuttal reports, consistent with the above-allocated burden of proof.

The Village agrees with the Nation's assessment of its burden of proof to the extent that it must be the Nation's burden to prove "the creation of the Oneida Reservation in the Treaty of 1838, 7 Stat. 566, and the applicability of the Indian Reorganization Act ["IRA"], 25 U.S.C. § 5123, in 1934 to the Nation and its Reservation.…" However, the Village does not agree that the Nation's burden of proof ends there.

I. It is the Nation's Burden to Prove that the Parcels Involved in the Big Apple Fest are Actually Held in Trust.

A. Given that it is the Nation that is seeking a declaratory judgment that state-based jurisdiction does not apply because of the manner in which certain land is titled, consequently, it is the Nation's burden to establish the nature of that title.

As the Nation has already conceded, it has the clear burden to prove that the Treaty of 1838, 7 Stat. 566, created a reservation and entitles the Nation to exercise treaty rights. *United States v. State of Washington*, 641 F.2d 1368, 1374 (9th Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982). As such, it is the Nation that must also establish that the parcels involved in the Big Apple Fest ("Fest") are actually held in trust. As the Nation interprets things "the Hobart theory is that the Secretary of the Interior lacked authority to place trust parcels into trust for the Nation because the Nation was either *not on a reservation or not otherwise under federal jurisdiction* in 1934." (ECF. No. 60, p. 10.) The existence of a reservation (conceded as being the Nation's burden) and if the Nation was under federal jurisdiction in 1934 pursuant to an operative treaty (a prerequisite of being eligible to place land in trust) are the very things a tribe must establish as part of the fee-to-trust process. Before land may be placed in trust for a tribe, the tribe must prove to the BIA that it is eligible for such a transfer. 25 CFR 151.10(a). Given it is a tribe's

burden to prove eligibility to place land in trust, it follows that it is also the tribe's burden to show that land is currently in trust. This is especially true if a tribe is attempting to use ownership status of land as a way to avoid state based jurisdiction.

B. 25 U.S.C. § 194 does not apply to this case.

The Nation relies on 25 U.S.C. § 194 for its argument that it is the Village's burden to disprove the Nation's trust title to parcels used in the Fest. However, 25 U.S.C. § 194 is not applicable to this case. It reads as follows:

> In all trials about the right of property in which an Indian may be a party on one side and a white person on the other, the burden shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership.

25 U.S.C. § 194.

Per its terms, this code section applies when there is a dispute over the ownership of a parcel of real estate and that dispute involves an Indian as a party on one side and a white person on the other side. In that type of a dispute, the burden of showing who actually owns the real estate rests with the white person after the Indian establishes the fact that he or she previously possessed or owned the land. In this case, however, the Village is not claiming any type of possession or ownership of the land. This case is about whether a state-based government can assert its ordinances on real estate, either owned in trust for a Native American tribe or owned directly in fee by that tribe. This will not be a trial about the ownership rights of property. This case is about the ability to assert state based jurisdiction over certain parcels of land because of how it is owned.

Additionally, even 25 U.S.C. § 194 applied to a case regarding jurisdiction, rather than title, which it does not, it does not apply to a state-based government such as the Village. The United States Supreme Court held as follows:

> It nevertheless does not follow that the "white persons" to whom will be shifted the burden of proof in title litigation with Indians also include the sovereign States of the Union. "[I]n common usage, the term 'person' does not include the sovereign, [and] statutes employing the phrase are ordinarily construed to exclude it."

Wilson v. Omaha Indian Tribe, 422 U.S. 653, 667 (1979)(citing *United States v. Cooper Corp.*, 312 U.S. 600, 604, 61 S. Ct. 742, 743, 85 L.Ed. 1071 (1941)).

> But in terms of the purpose of the provision—that of preventing and providing remedies against non-Indian squatters on Indian lands—it is doubtful that Congress anticipated such threats from the States themselves or intended to handicap the States so as to offset the likelihood of unfair advantage. Indeed, the 1834 Act, which included § 22, the provision identical to the present § 194, was "intended to apply to the whole Indian country, as defined in the first section." H.R.Rep. No. 474, 23d Cong. 1st Sess., 10 (1834). Section 1 defined Indian country as being "all that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana, or the territory of Arkansas, and, also, that part of the United States east of the Mississippi River, and not within any state to which the Indian title has not been extinguished…." 4 Stat. 729 Although this definition was discarded in the Revised Statutes, see Rev. Stat. § 5596, it is apparent that in adopting § 22 Congress had in mind only disputes arising in Indian country, disputes that would *not arise in* or involve any of the States.[1]

Id. (emphasis added).

The Supreme Court concluded as follows:

> By its terms, § 194 applies to the private petitioners but not to petitioner State of Iowa.

Id.

The Village is located "in" one of the states. The parcels involved are not within what was true Indian country west of the Mississippi. Congress did not create this Act in anticipation of attacks from the states themselves, as the Supreme Court has made clear. A state and its political subdivisions simply do not occupy land as a non-Indian squatter might.

[1] The Supreme Court's notation that this code section was designed to apply to "*title litigation*" and that "the purpose of the provision—that of *preventing and providing remedies against non-Indian squatters* on Indian lands," also confirm it is not applicable to this case, in which the Village is not claiming title nor is it a squatter on the land, as more fully argued above.

In contrast to the Supreme Court's clear precedent, the Nation relies on the district court decision in *Cayuga Indian Nation* for the proposition that the burden of proof requirements which extend to "white persons" under 25 U.S.C. § 194 also applies to municipalities. However, the court in *Cayuga Indian Nation* relied upon the district court decision in *Oneida Indian Nation of New York v. City of Sherrill, New York*, 145 F. Supp. 2d 226 (N.D.N.Y. 2001). Both the district court and Second Circuit decisions in *City of Sherrill* (337 F.3d 139 (2nd Cir. 2003)) were subsequently reversed and remanded by the United States Supreme Court. *See City of Sherrill, N.Y. v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005). Thereby, calling into doubt the validity of the district's court's decision in *Cayuga Indian Nation* that the burden of proof standard found in 25 U.S.C. § 194 also applies to municipalities. If anything, the district court's decision in *Cayuga Indian Nation* only muddies the water as to the application of 25 U.S.C. § 194 to municipalities, rather than provide some semblance of clarity.

Even if the district court's decision in *City of Sherrill* had not been overturned, the *Cayuga Indian Nation* district court's decision interpreting the district court's decision in *City of Sherrill* is flawed. In *City of Sherrill*, the district court's entire opinion relative to § 194 reads as follows:

> In keeping with the strong policy of the federal government to protect Indian lands, once an Indian tribe makes out a *prima facie* case of prior possession or title to the property in dispute, the burden of proof rests upon the non-Indian to demonstrate otherwise.

Oneida Indian Nation of New York v. City of Sherrill, New York, 145 F. Supp. 2d 226, 242, *citing Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 668-69 (1979)(citing 25 U.S.C. § 194).

The district court in *City of Sherrill* only vaguely even recognizes the fact that the Supreme Court decision in *Wilson*, and its application of § 194, was related to an actual dispute about the title or ownership of land. Moreover, the Supreme Court in *Wilson* made it abundantly clear that although § 194 applies to persons, and corporations those persons may create, it does

not apply to sovereign states or disputes that would "arise in" one of the states. *Wilson* at 668. The Village is an extension of the state of Wisconsin and, as such, § 194 does not apply to this case.

Furthermore, in *Wilson*, the United States Supreme Court held that Congress did not intend that states bear the burden set forth in 25 U.S.C. § 194. There is little to suggest that the Court's reasoning in *Wilson* would not also apply to the Village, which is a municipality or "political subdivision" of the state of Wisconsin. A political subdivision is generally considered to be an entity which has been authorized to exercise sovereign power, such as the power to tax, the power of eminent domain, and the police power. *Texas Learning Technology Group v. C.I.R.*, 958 F.2d 122 (5th Cir. 1992).

The concept of a municipality or political subdivision essentially taking the place of a state is evident throughout many areas of federal law. This is because "[m]unicipal corporations are mere instrumentalities of the State for the more convenient administration of local government." *Meriwether v. Garrett*, 102 U.S. 472 (1880).

For example, § 101(40) of the Bankruptcy Code states that a municipality "means political subdivision or public agency or *instrumentality of a State*." 11 U.S.C. § 101 (emphasis added). For purposes of the Fair Labor Standards Act ("FLSA"), both state *and* local governments are a "public agencies" and are both required to comply with applicable labor standards. 29 U.S.C. § 203(x).

Without question, the Village has been authorized to exercise some degree of sovereign powers, and is a political subdivision of the sovereign state of Wisconsin. It would make little sense if the burden of proof in this matter could so dramatically shift simply by substituting the state of Wisconsin for the Village as the defendant.

It is the Nation that is trying to avoid application of a state-based government ordinance, because the land is Indian country. To succeed on that claim, and obtain the declaratory judgment it is seeking, it must prove its starting premise that all of the land at issue is Indian country.

II. The Nation Carries the Burden of Proving All Activities Associated With the Big Apple Fest Took Place in Indian Country.

The Nation's original claim, found in its initial complaint, was that there is no application of "state and local law and regulations to recognized tribes and their *trust property* located within Indian Country…." (ECF. No. 1, p. 6) (emphasis added). The Nation then sought a preliminary injunction based on the premise the Fest was "conducted on two sites of *trust land*." (ECF. 5, p. 2) (emphasis added). In its Amended Complaint, the Nation significantly expanded this notion by claiming the state-based government's laws and regulations do not apply "to recognized tribes, their trust property, *and* their reservations *located within* Indian country…." (ECF. 10, p. 7) (emphasis added).

In addition to the Nation's shifting arguments, this Court has already noted that, "[t]he notion of Indian country is less than clear, however, especially whereas here the entire Village of Hobart is within the area the Nation identifies as Indian country." (ECF. No. 46.) It is this lack of clarity, as evidenced by the nation's very own pleadings, as to what constitutes Indian country, which requires the Nation to carry the burden of proof on whether any portion of the Fest occurred within Indian country. If the Village is saddled with that burden it will be left guessing as to how the Nation defines that term or what criteria it believes must be met to prove a certain parcel of land is Indian country. The Nation is the one asking to be excused from following the law in the Village, because the land the Fest occurred on may hold a certain status.

Consequently, it should be the one burdened with the obligation to show that status actually exists.

Even a case cited by the Nation supports that logical conclusion. *Cayuga Indian Nation of New York v. Village of Union Springs,* 317 F. Supp. 2d 128, 142 (N.D.N.Y. 2004) ("the Nation has met *its burden* of establishing that the Property is Indian country.…") (emphasis added). Its entire legal argument (state-based laws never apply in Indian country) is linked to the status of the land. Consequently, it is the Nation's burden to establish any facts upon which its legal argument is based.[2]

III. It is the Nation's Burden to Prove how the Village's Ordinance Interferes with Its Right to Self-Governance.

Significant portions of the Nation's claims have to do with its right to self-governance and the applicability of the IRA to the Nation. (ECF. No. 25.) Any claim by the Nation that the Ordinance purports to impact its political integrity, economic security, or health and welfare are claims for which the Nation must bear the burden of proof.

It is the Nation, not the Village, which is in the best position to fully understand and demonstrate how it would be negatively impacted by complying with the Ordinance. It is for this reason that this Court ruled, "the Village is entitled to conduct and obtain discovery to determine the local, tribal and federal interests implicated by the Village's enforcement, or non-enforcement, of its Special Event Permit Ordinance on the Nation and its members' activities within Indian Country." (ECF. No. 46.)

Even if the Nation provides discovery regarding how it believes the Ordinance may impact its political integrity, economic security, or health and welfare, it must still be the

[2] The Village does not agree that even if all of the parcels at issue in this case are considered to be Indian country that the Village ordinances do not apply. That point will be argued in its summary judgment brief.

Nation's burden to actually prove the Ordinance in fact impacts its political integrity, economic security, or health and welfare.

IV. It Cannot be the Village's Burden to Prove that the Nation Does Not Hold Trust or Fee Title to the Parcels at Issue.

Admittedly, it is likely the Village's burden to prove any allegation that the Oneida Reservation has been diminished or disestablished or that exceptional circumstances exist that enables the Village to assert jurisdictional authority over the activities of tribal members occurring on trust land. However, it cannot be, as the Nation suggests, the Village's burden to prove that the Nation does not hold trust or fee title to the parcels at issue in this dispute.

Just as it is the Nation's burden to prove the existence of an Oneida Reservation, it must also be the Nation's burden to prove actual title to any parcels it alleges constitute the Oneida Reservation. It would make little logical sense for the Nation to have the burden of establishing the existence of the Oneida Reservation, but then rely on the Village to actually prove whether the parcels constituting the reservation are held in trust or fee. To avoid such a logical inconsistency, it must be the Nation's burden to not just prove the existence of a treaty creating the Oneida Reservation, but also the title status of the parcels within the Nation's claimed reservation. After all, it is they who are claiming the ordinances of a state-based government do not apply.

V. This Case Will Not Be Decided Solely on the Contents of the Parties' Expert Reports.

The Village agrees with the Nation insofar as this case involves large amounts of historical records and documents, dating as far back as the early nineteenth century. However, it will not be the contents of these expert reports alone on which this case will be decided. As is evident from the pleadings already filed in this matter, both the Nation and the Village intend to make compelling legal arguments *in addition to* proving factual allegations.

While it is true that "the distinction between fact and opinion is, at best, one of degree," *Beech Aircraft Corp. v. Rainey,* 488 U.S. 153, 168 (1988), the initial disclosures contained within an expert report cannot be the only evidence by which either party can meet their respective burden of proof. It is inappropriate for the Nation to suggest that the only manner in which the Village may be able to meet its burden of proof is based on what is contained in its expert report.

The Village cannot be prevented from presenting any evidence that is relevant to its claims and allowable under the Federal Rules of Evidence. In fact, the Village may present lay opinions, taking the form of firsthand sensory observations, but do not "provide specialized explanations or interpretations that an untrained layman could not make if perceiving the same acts or events." *United States v. Conn,* 297 F.3d 548, 554 (7th Cir. 2002).

It is true that the contents of expert reports are necessary to establish complex historical facts, however, it is not just the contents of these expert reports that will determine the outcome of this case.

CONCLUSION

For the reasons outlined above, the Village asks this Court to enter an order specifying that it must be the Nation's burden to prove the existence of the Oneida Reservation, that the parcels involved in the Fest are in fact held in trust for the Nation, that all activities associated with the Fest occurred in Indian country, and that application of the Village's Ordinance interferes with the Nation's right to self-governance.

Dated this 2nd day of October 2017.

von BRIESEN & ROPER, s.c.
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