UNITED STATES DISTRICT COURT

FOR THE

WESTERN DISTRICT OF MICHIGAN

GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS, Plaintiff, v. LEELANAU INDIANS, INC. and LEELANAU COUNTY, Defendants.	)	CASE NO. G 83-834 Hon. Richard A. Enslen

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR DECLARATORY JUDGMENT

DATED: April 15, 1987

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EXHIBIT A

Introduction

This Court incorporated the following findings of fact into the January 30, 1985 Opinion and Order:

> 3. Representatives of the historic Grand Traverse bands were signatories to the Treaty of Washington, executed March 28, 1836 (7 Stat. 491), and to the Treaty of Detroit, executed July 31, 1855 (11 Stat. 621).
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> 4. In exchange for ceding their aboriginal ownership of territory which now comprises approximately two-thirds of the State of Michigan, reservations of land were set aside for the various Ottawa and Chippewa bands which were signatories to the Treaties of 1836 and 1855.
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> 5. (a.) Article Second of the Treaty of 1836 set aside lands for the Grand Traverse bands described as "twenty thousand acres to be located on the north shores of Grand Traverse Bay."
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> (b.) Article I, clause Fifth of the Treaty of 1855 reserved: "For the bands who usually assemble for payment at Grand Traverse, townships 29, 30 and 31 north, range 11 west, and townships 29, 30 and 31 north, range 12 west, and the east half of township 29 north, range 9 west."
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> (c.) The preceding description includes the Indian community trust lands currently owned by Leelanau County which are the subject matter of this controversy.
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> 6. (a.) The subject-matter Indian community trust lands were acquired by Leelanau County from the State of Michigan by deeds dated June 21, 1944 and March 17, 1970.
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> (b.) Leelanau County holds fee title to the approximately 147.4 acres described in these two deeds subject to the restriction that they be used solely for Indian community purposes.

By Stipulation of Dismissal filed October 1, 1984, Leelanau County stipulated that it would "quit claim its interest in the above-described leased lands to the United States of America to be held in trust for whichever party...is determined by this Court as being the beneficiary entity of the trust created by LEELANAU COUNTY's acquisition of said lands." (Emphasis added.) By quit claim deed executed December 10, 1985, Leelanau County conveyed the subject-matter Indian community trust lands to "the United States of America in trust for the Grand Traverse Band of Ottawa and Chippewa Indians."

Contravening these commitments regarding federal trust status, on March 17, 1987 the Leelanau County Board of Commissioners officially determined

to oppose federal trust status[1] for portion(s)[2] of the lands deeded in 1985. The County's opposition has been transmitted to representatives of the Departments of Interior and Housing and Urban Development (H.U.D.) as well as Hon. Guy Vander Jagt, M.C.; see Exhibits 4-7 attached to Deegan deposition (April 2, 1987). Moreover, on April 7, 1987, the County filed a separate lawsuit against Plaintiff Tribe and the Secretary of H.U.D., challenging the Tribe's construction of a house located on a 23-acre parcel included within the Indian community trust lands which are the res of this litigation.[3] [Given this Court's retention of jurisdiction over the subject-matter lands in File No. G 83-834, query whether it is appropriate for the County to challenge in File No. G 87-321 the Tribe's actions upon the Indian community lands? Cf. Penn General Casualty Co. v. Pennsylvania, 294 U.S. 189, 195 (1935).]

Additionally, County officials have instructed the Cherryland Rural Electric Cooperative Association not to hook up power to the construction site,[4] harming the Tribe in several respects and directly infringing the Tribe's right to govern matters pertaining to its trust lands.[5] Adding insult to injury, the County's assertion of zoning authority would essentially render useless one-half of the 147.4-acre tribal land base: the 23-acre parcel and a 50-acre

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1 See Craker deposition, pp. 27-28 & 32 (and Ex. 6, at pp. 11-12), and Deegan deposition, pp. 11-12 (and Ex. 8). [Depositions upon oral examination were taken April 2, 1987 of three County officials: Commissioner Kathleen Craker, Prosecuting Attorney Joseph Deegan and Planning Director Victoria McDonnell; the originals (with exhibits) are being submitted to this Court together with Plaintiff's Motion for Order of Contempt and Motion for Declaratory Judgment.]

2 County officials are not sure exactly which lands are included, but they agree that they now oppose trust status for the 23-acre parcel where the Tribe currently is constructing a house. See Craker deposition, pp. 27-28 & 104; and Deegan deposition, pp. 13-15 (April 2, 1987).

3 See Findings of Fact Re: Count I, ¶¶5(c) & 6(a) at p. 3 (January 30, 1985).

4 See Affidavit of Harry Galbraith (Exhibit C), pp. 3-5.

5 See Affidavits of Joseph C. Raphael and Harry Galbraith (Exhibits A and C).

parcel are both zoned "governmental," which prohibits any uses for residential or economic development purposes; see McDonnell deposition, pp. 41-51 & 106.[6]

The sad fact is that while the subject-matter Indian community trust lands formerly held in trust by Leelanau County are of vital importance today as the primary land base of the Grand Traverse Band, they are but a miniscule portion of the 87,000 acres originally "reserved" for the members of the historic Grand Traverse band(s) in Article I, clause Fifth of the Treaty of 1855. See Vol. I, Petition, Appendix p. 13a; and Vol. II, Federal Documents, Anthropological Report, p. 3; see also Findings of Fact Re: Count I, ¶7 at p. 3 (January 30, 1985). The federal government's setting aside the six and one-half townships therein described for Plaintiff's ancestors was partial consideration for the Indians' relinquishment in the Treaty of 1836 of their aboriginal ownership of approximately two-thirds of the present State of Michigan. See Findings of Fact Re: Count I, ¶¶3-7 at pp. 2-3 (January 30, 1985).

Tragically for the Michigan Ottawa and Chippewa bands, federal policy during this period was dictated by assimilationists who wished "to civilize the Indians and drive them into the mainstream of American society." Cohen's Handbook of Federal Indian Law at 139 (1982 edition). In accord with this policy,

> allotments were used as a method of terminating tribal existence. Allottees surrendered their interests in the tribal estate and became citizens subject to state and federal jurisdiction. During the 1850's this break-up of tribal lands and tribal existence assumed a standard pattern.

Id., at 130 (footnotes omitted).

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6 Leelanau County's Resolution 87-9 concludes by "demanding that the B.I.A. and H.U.D. respect and preserve the Leelanau County Master Plan and Zoning Ordinance with respect to the noncontiguous parcels of land." County officials admit that this master plan contains no provisions for the Indian community at Peshawbestown (or for elderly or low-income housing). See Craker deposition, pp. 107-09; and McDonnell deposition, pp. 107 & 115 (April 2, 1987). [Res. 87-9 is attached as Ex. 8 to Deegan deposition.]

In addition to the then prevailing federal policy,[7] the official B.I.A. records document malfeasance/negligence by federal officials which further contributed to the break-up of the 1855 treaty lands "reserved" for the Grand Traverse Band. See Vol. II, Federal Documents, Historical Report pp. 3-5 and Anthropological Report pp. 3-4. But the most significant factor contributing to the erosion of the "Leelanau Reserve" was the fact that the Indian allotments were subjected to state property taxation. Thousands of acres were forfeited for failure to pay property taxes,[8] notwithstanding the understanding of the Indian signatories to the Treaty of 1855 that no such taxes would apply.[9]

If the United States (and State of Michigan) had upheld obligations owed the historic Grand Traverse bands under the Treaties of 1836 and 1855, there probably would not be a Leelanau County today. The six and one-half townships reserved for the Grand Traverse bands in Article I, clause Fifth of the Treaty of 1855 comprise much of the present-day County. Vol. II, Federal Documents, Recommendation and Evidence Summary p. 2. By the 1930s all of these lands had been lost to the Indian allottees and their descendants, and it was understood by a few public officials that something must be done to assist the Ottawa and Chippewa descendants of the historic Grand Traverse bands. In contrast to Leelanau County's present officials, a half century ago the Leelanau County Prosecuting Attorney actively sought assistance so that the Indian community could preserve its tribal status. The ethnohistorical

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7 "Present federal policy appears to be returning to a focus upon strengthening tribal self-government,..." Bryan v. Itasca County, Minnesota, 426 U.S. 373, 388, 96 S.Ct. 2102, 2111 fn.14 (1976). See Section II.C., infra at pages 12-15.

8 Preliminary research already has identified approximately 7,000 acres within present-day Leelanau County improperly taken from Indian allottees, including 5,890.28 acres lost in tax sales by 1880. Presumably this total will increase significantly once post-1880 research is completed.

9 The issue remains whether the Tribe has any claim(s) regarding these lands. See 28 U.S.C. §2415 and 48 Fed.Reg. 13876 [Tribe F60474] (March 31, 1983); see also Findings of Fact Re: Count I, ¶7 at p. 3 (January 30, 1985).

report[10] cites a letter written in 1937 by Emelia Schaub, Leelanau County Prosecuting Attorney, to Eleanor Roosevelt seeking assistance for the Grand Traverse Band in response to the failure of the B.I.A. to permit the Tribe to organize under the Indian Reorganization Act. See generally, Vol. II, Federal Documents: Recommendation and Evidence Summary p. 3, and History Report pp. 7-9. If it hadn't been for the compassion of Ms. Schaub, perhaps the subject-matter trust lands would not exist today:

> The county concentrated on the Peshawbestown area, which may reflect the fact that the largest number of remaining, if defaulted, lands were there, as well as the largest population. There is correspondence as early as 1938 from Emelia Chaub (sic, Schaub), Leelanau County Prosecuting Attorney, on behalf of the Indians. She sought information on a charter for them under the IRA. Several individuals credited a man named Mike Raphael with an important role in getting the county to take the land. Raphael worked with Emelia Chaub (sic) on this,...

Vol. II, Federal Documents: Anthropological Report p. 11.

All of this is lost upon today's County officials, who steadfastly refuse to accept the reality of tribal self-government (which ironically their predecessors were instrumental in preserving by securing the reservation lands). They have conjured up excuses to rationalize their recalcitrance, but the bottom line is that their actions amount to a breach of the County's stipulations contained in the Stipulation of Dismissal filed October 1, 1984 (and therefore are contemptuous of this Court's orders entered October 29, 1984, and January 30, 1985). Leelanau County's assertion of zoning authority over any portions of the subject-matter Indian community trust lands simply cannot be sustained given this Court's findings and conclusions incorporated into the January 30, 1985 Opinion and Order.

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10 "Ethnohistorical Report on the Grand Traverse Ottawas," by Dr. Richard White, (then of) Michigan State University History Department (1978).

I.

LEELANAU COUNTY IS ESTOPPED FROM DENYING THAT FEDERAL TRUST STATUS SHOULD PERTAIN TO THE SUBJECT-MATTER LANDS AND THAT THE INDIAN TRIBE IS ENTITLED TO GOVERN ZONING/LAND USE DECISIONS

A. Equitable Estoppel/Estoppel In Pais

It has been understood since 1978 "that federal trust status would be sought for these county-owned Indian community trust lands once federal acknowledgment of Plaintiff Tribe became effective." Findings of Fact Re: Count I, ¶16(a) at p. 5 (January 30, 1985). This understanding was formally set forth in the Stipulation of Dismissal filed October 1, 1984 (¶3 at p. 2):

> 3. That LEELANAU COUNTY hereby agrees and stipulates that it will quit claim its interest in the above-described leased lands to the United States of America to be held in trust for whichever party (GRAND TRAVERSE BAND or LEELANAU INDIANS, INC.) is determined by this Court as being the beneficiary entity of the trust created by LEELANAU COUNTY's acquisition of said lands. (Emphasis added.)

On December 10, 1985, Leelanau County executed a quit claim deed for these lands to the "United States of America in trust for the Grand Traverse Band of Ottawa and Chippewa Indians." When Leelanau County promised in 1984 to convey the subject-matter "lands to the United States of America to be held in trust" for the Indian tribe, it was clear that County zoning authority would not pertain to federal trust lands. 25 C.F.R. §1.4; see also Santa Rosa Band of Indians v. Kings County, 532 F.2d 655, 664-67 (9th Cir. 1975).

Nonetheless, Leelanau County now officially opposes federal trust status for portion(s) of these lands.[11] But Leelanau County's position taken March 17, 1987 is inconsistent with its earlier actions in this litigation

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[11] This opposition threatens approximately $2½ million committed by the U.S. Department of Housing and Urban Development for elderly and single-family residences to be located partially upon the subject-matter lands, see Affidavits of Joseph C. Raphael and Barry Burtt (Exhibits A and B).

and is at odds with this Court's January 30, 1985 ruling. Since the County's October 1, 1984 stipulation confirmed that federal trust status would ensue, Leelanau County is "estopped to deny the reality of the state of things which they have made appear to exist, and upon which others have been led to rely." Casey v. Galli, 94 U.S. 673, 24 L.Ed. 168 (1877). See Apponi v. Sunshine Biscuits, Inc., 652 F.2d 643, 649-50 (6th Cir. 1981); and Oxley v. Ralston Purina Company, 349 F.2d 328, 335 (6th Cir. 1965).

> Equitable estoppel, or estoppel in pais, is a term applied usually to a situation where, because of something which he has done or omitted to do, a party is denied the right to plead or prove an otherwise important fact.

28 Am.Jur.2d §27, p. 627 (1966). See United States v. Georgia-Pacific Company, 421 F.2d 92, 95-97 (9th Cir. 1970). Thus, Leelanau County is estopped from denying that federal trust status should pertain to all of the lands described in the deed it executed on December 10, 1985 to the United States in trust for the Grand Traverse Band. Cf. Conclusions of Law Re: Count I, ¶6 at p. 3 (January 30, 1985).

Moreover, it is noteworthy that:

> the rule is generally well settled in the modern law that the title to land or real property may pass by an equitable estoppel, which is effectual to take the title to land from one person and vest it in another where justice requires that such action be done.

28 Am.Jur.2d, supra, §81 at 723 (footnotes omitted). Michigan law has long applied the doctrine of equitable estoppel (or estoppel in pais) to effectuate the transfer of an interest in real estate. Dickerson v. Colgrove, 100 U.S. 578, 580-82, 25 L.Ed. 618 (1879). If title to real estate may be transferred pursuant to this equitable doctrine, then surely equitable estoppel also may be applied to bar Leelanau County from denying that the Grand Traverse Band is entitled to exercise governmental control over zoning and land use issues pertinent to the lands formerly held in trust by the County.

B. Federal Trust Status Is Necessary To Fully Exercise Sovereignty

This Court's January 30, 1985 ruling concluded that "the failure to effectuate federal trust status for the subject-matter Indian community trust lands has...(b) interfered with the Plaintiff Tribe's exercise of its sovereignty as an Indian tribe;..." Conclusions of Law Re: Count I, ¶8 at p. 4. For more than 150 years the Supreme Court has recognized that Indian tribes possess attributes of sovereignty over their members and territory. Worcester v. Georgia, 6 Pet. 515, 557, 8 L.Ed. 483 (1832); see United States v. Mazurie, 419 U.S. 544, 557, 95 S.Ct. 710, 717-18 (1975).

Notwithstanding an Indian tribe's inherent sovereign powers (see Section II.A., infra at pages 9-11), in some situations official federal trust/reservation status is a prerequisite for the exercise of tribal rights and privileges. For example, 25 U.S.C. §1911(a) confers exclusive tribal court jurisdiction "over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe" (emphasis added).[12] See also City of Sault Ste. Marie v. Andrus, 458 F.Supp. 465, at 472-73 (D.C. D.C. 1978). Additionally, general tribal court jurisdiction over members residing upon tribal lands requires federal trust/reservation status, and as the Supreme Court stated in Santa Clara Pueblo v. Martinez, 436 U.S. 49, 65, 98 S.Ct. 1670, 1680-81 (1978): "Tribal Courts have repeatedly been recognized as appropriate forums for the adjudication of disputes affecting important personal and property interests of both Indians and non-Indians" (footnote omitted).[13] But without federal trust/reservation status, Plaintiff continues to be deprived of its inherent sovereign power to adjudicate disputes involving its members residing upon the Indian community trust lands.

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12 Cf. Wisconsin Potowatomies of the Hannahville Indian Community v. Houston, 393 F.Supp. 719, at 730 (W.D. Mich. 1973).

13 See also Cohen's Handbook of Federal Indian Law, p. 257 (1982 edition).

II.

THE GRAND TRAVERSE BAND RETAINS INHERENT SELF-GOVERNMENT RIGHT TO DETERMINE ZONING AND LAND USE ISSUES ARISING UPON TRIBAL TRUST/RESERVATION LANDS

A. Tribal Self-Government Powers Exist Independent of I.R.A. Constitutions

The Indian Reorganization Act[14] does not create an Indian tribe's self-government powers. As the Supreme Court observed in United States v. Wheeler, 435 U.S. 313, 328, 98 S.Ct. 1078, 1088 (1978): "That Congress has in certain ways regulated the manner and extent of tribal power of self-government does not mean that Congress is the source of that power." Further, the Court concluded that tribal authority "is attributable in no way to any delegation to them of federal authority." Id., 435 U.S. at 328, 98 S.Ct. at 1089 (footnote omitted). See also Tribal Self-Government and the Indian Reorganization Act of 1934, 70 Michigan Law Review 955 (1972).

> Perhaps the most basic principle of all Indian law, supported by a host of decisions, is that those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather "inherent powers of a limited sovereignty which has never been extinguished." The Supreme Court has held that "Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status." This principle guides determinations of the scope of tribal authority. The tribes began their relationship with the federal government with the sovereign powers of independent nations. Upon coming under the authority of the United States, a condition acknowledged in treaties and agreements between tribes and the federal government, certain limitations upon the external powers of tribal self-government necessarily followed. But the United States from the beginning permitted, then protected, the tribes in their continued internal government. In so doing, the United States applied a general principle of international law to the particular situation of the Indians. The established tradi-

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14 25 U.S.C. §§461, et seq.

> tion of tribal independence within a tribe's territory has survived the admission of new states, citizenship of the Indians, and other changes in American life. Today that tradition of tribal sovereignty furnishes the backdrop against which all federal Indian laws are to be read.

Cohen's Handbook of Federal Indian Law at pp. 231-32 (1982 edition) (footnotes omitted). See United States v. Michigan, 471 F.Supp. 192, 272 (W.D. Mich. 1979).

For more than three hundred years our legal system has consistently recognized Indian tribes as "distinct, independent political communities," Worcester v. Georgia, 31 U.S. (6 Pet.) 515, at 559 (1832), which "exercise powers of self-government, not by virtue of any delegation of powers, but rather by reason of their original tribal sovereignty." Cohen's, supra, at p. 232 (footnote omitted). "Once considered a political body by the United States, a tribe retains its sovereignty until Congress acts to divest that sovereignty." Cohen's, id., at p. 231 (footnote omitted). See United States v. Michigan, supra, 471 F.Supp. at 262 and 272.

Effective May 27, 1980, the Grand Traverse Band was acknowledged by the United States as an Indian tribe having a government-to-government relationship with the United States. 45 Fed.Reg. 18321 (March 25, 1980) (contained in Vol. I, Federal Documents). This federal action recognized the Grand Traverse Band as a political body with all retained rights of its sovereign status. Therefore this acknowledgment of the Tribe's status is the relevant date for determining the governmental powers retained by the Grand Traverse Band, rather than some date in the future when the Tribal Council is elected subsequent to the Secretary's approval of the Constitution as prescribed in 25 U.S.C. §476. "It is, of course, not essential that a tribe or any group of people have a written constitution before they can govern themselves." Tribal Self-Government and the Indian Reorganization Act of 1934, supra, 70 Mich.L.Rev. at 970. As stated in Cohen's Handbook of Federal Indian Law, supra at

pp. 247-48 (footnotes omitted):

> Many tribes have chosen to adopt constitutions under provisions of the Indian Reorganization Act. While the exercise of powers under these constitutions was expressly sanctioned by Congress, the tribes adopting them continue to exercise their unextinguished powers of sovereignty and not statutorily delegated powers.

B. This Court Has Previously Confirmed Plaintiff's Governmental Powers

In the words of the three County officials who authored the March 13, 1987 "Report to County Board Regarding Trip to Washington March 9-11, 1987":[15]

> --(at page 2, meeting with B.I.A.) "Lastly, discussion was had with regard to the fact that the Band is in litigation with the BIA over the membership issue and, accordingly, its constitution has not been finalized or voted on by the membership."
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> --(at page 3, meeting with Congressman Vander Jagt) "He expressed concern that H.U.D. would commit funds prematurely before trust status was established, and perhaps before the Band's governmental structure was properly completed."
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> --(at page 3, meeting with H.U.D.) "We again raised the land status issue and the question as to whether or not the Grand Traverse Band has actually completed setting up its government, including adoption of its constitution."
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> --(at page 3) "The following morning, March 11, we contacted Congressman Vander Jagt's office and advised him of the results of our meeting with Mr. Combs. We suggested that he and the Congressman could help by closely following H.U.D.'s review of whether the Grand Traverse Band's government has been finally and properly established and whether or not its housing authority is truly a legal entity and can make proper application for H.U.D. funds. We also suggested he and the Congressman could assist by urging the Bureau of Indian Affairs not to accept any noncontiguous parcels into trust or at least to restrict them, if accepted, in such a way as to protect county zoning and planning."

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15 This report is attached as an exhibit to the County's Motion for Protective Order Barring Taking of Noticed Depositions, etc., filed March 25, 1987.

Leelanau County has introduced a "red herring" by maintaining that the lack of an approved constitution (see 25 U.S.C. §476) prevents the Grand Traverse Band from exercising governmental powers. Not only is this argument insulting to the Tribe, but it also ignores previous rulings by this Court in three separate litigations:

(1.) Grand Traverse Band of Ottawa and Chippewa Indians v. Leelanau Indians, Inc. and Leelanau County (File No. G 83-834): Note especially Conclusions of Law Re: Count I, ¶3 at p. 2 and ¶9 at pp. 4-5 (January 30, 1985).

(2.) United States, et al. v. Michigan, et al. (File No. M 26-73), e.g.:

(a.) October 26, 1979 Order permitting Grand Traverse Band to intervene as a party-plaintiff;
(b.) April 11, 1984 Opinion and Order, footnote 1 at page 4; and
(c.) July 15, 1986 Opinion and Order and Declaratory Order.

(3.) Leelanau Indians, Inc. and Grand Traverse Band of Ottawa and Chippewa Indians v. U.S. Department of Housing and Urban Development (File No. G 80-526), 502 F.Supp. 741 (W.D. Mich. 1980).

In particular, the latter decision exemplifies the frustration tribal leaders feel in 1987 in response to Leelanau County's contentions that B.I.A. approval of trust status and H.U.D. funding of Indian housing are not appropriate, due to unresolved issues re: the Grand Traverse Band's Constitution and membership. In 1980 this Court confirmed the existence of Plaintiff Tribe's governmental powers in enjoining H.U.D.'s termination of a grant funding rehabilitation of housing on the county-owned Indian community trust lands, see 502 F.Supp. at 743. It is plainly insulting for the County to maintain seven years later that the Tribe lacks governmental authority to secure H.U.D. funding for construction of elderly and single-family housing.

C. County Jurisdiction Would Infringe Tribe's Right To Govern

According to the County's contention in File No. G 87-321, Plaintiff exercises no governmental powers over lands not accepted/approved into federal trust status. But the County's corresponding assertion of zoning jurisdiction

is at odds with the basic reason for setting aside these Indian community trust lands in the first place:

> Regulation and protection of reservation property are essential functions for a tribe. A primary purpose of creating reservations as enclaves where tribes retained sovereignty was to assure Indians sufficient control so that they could use their reservations to become economically self-sustaining. Thus, it is consistent with the purposes of the reservations for tribes to exercise legislative powers over the activities of all persons, Indian and non-Indian alike, when necessary to protect tribal interests in reservation land and other resources. Protection of a tribe's resources is an internal affair over which a tribe's legislative jurisdiction necessarily extends.

Cohen's Handbook of Federal Indian Law, supra at p. 250 (footnotes omitted). See also Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55-56, 98 S.Ct. 1670, 1675-76 (1978); United States v. Wheeler, 435 U.S. 313, 322-32, 98 S.Ct., 1078, 1085-91 (1978); and Williams v. Lee, 358 U.S. 217, 79 S.Ct. 269 (1959).

Leelanau County's argument boils down to the following syllogism:

--federal trust status divests state/local regulatory jurisdiction over tribal lands;
--the lands in question have not yet been accepted/approved into federal trust status;
--therefore county zoning must still be applicable.

This argument presumes that explicit federal preemption is the sole barrier against the assertion of state/local regulatory jurisdiction. However, the Supreme Court has recognized that there are

> two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members. First, the exercise of such authority may be pre-empted by federal law.*** Second, it may unlawfully infringe "on the right of reservation Indians to make their own laws and be ruled by them."
> ***The two barriers are independent because either, standing alone, can be a sufficient basis for holding state law inapplicable to activity undertaken on the reservation or by tribal members.

White Mountain Apache Tribe v. Bracker, supra, 448 U.S. at 142-43, 100 S.Ct. at 2583 (citations omitted and emphasis added).

No doubt the County's response will be that the "infringement test"[16] also is limited to situations involving federally-proclaimed reservations. But the record in this litigation supports the conclusion that the Indian community trust lands constituted a de facto reservation for decades prior to the deed being executed by Leelanau County on December 10, 1985. See Vol. II, Federal Documents: Recommendation and Evidence Summary p. 3; Anthropological Report pp. 11-12, and Historical Report pp. 8-9. See also Findings of Fact Re: Count I, paragraphs 5(c), 6(a), 8-10, and 15; and Conclusion of Law Re: Count I, paragraphs 4-5 (January 30, 1985).

Specific federal acknowledgment of an Indian tribe is not a sine qua non of the existence of tribal dependency. State v. Dana, 404 A.2d 551, at 553-64 (Maine Sup.Ct. 1979). And since tribal self-government powers also exist independent of specific federal delegation (see Section II.A., supra at pages 9-11), it follows that inherent self-government rights pertain to de facto Indian reservations acknowledged by state and county authorities. Cf. Sac and Fox Tribe of the Mississippi in Iowa v. Licklider, 576 F.2d 145, at 149-50 (8th Cir. 1978). Certainly now that the County has stipulated as to the trust-status nature of the subject-matter lands and deeded this de facto reservation to the United States in trust for the Tribe, it should be beyond dispute that the subject-matter lands constitute a "reservation" for

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16 The so-called infringement test is rooted in Williams v. Lee, 358 U.S. 217, 220, 79 S.Ct. 269, 271 (1959): "There can be no doubt that to allow the exercise of state jurisdiction here...would infringe on the right of the Indians to govern themselves."

purposes of applying the "infringement test."[17]

> Through the interweaving of thousands of statutes, treaties and court decisions, a complex relationship has developed interrelating the respective powers of Indian tribes, the federal government and the states. From the founding of this nation to the present, however, certain principles governing those relationships have held firm. One such principle is that Indian tribes retain all powers of self-government, sovereignty and aboriginal rights not explicitly taken from them by Congress.

United States v. Michigan, 471 F.Supp. 192, 261-62 (W.D. Mich. 1979). Note especially this Court's summary of federal case law confirming both the sovereign authority of tribes[18] to govern internal affairs as well as the principle that application of state law/regulation upon tribes is preempted in the absence of specific authority from Congress. Id., 471 F.Supp. at 272-74. See also McClanahan v. State Tax Commissioner of Arizona, 411 U.S. 164, 168-73, 93 S.Ct. 1257, 1260-73 (1973). Congress has not divested Plaintiff tribe of its governmental authority over tribal trust lands.

Thus, tribal sovereign powers currently pertain to the Indian community trust lands formerly held by Leelanau County in trust for the Grand Traverse Band of Ottawa and Chippewa Indians. Since Leelanau County's assertion of zoning jurisdiction clearly infringes on the Tribe's right to make its own laws and be governed by them, the Williams v. Lee doctrine operates as a barrier to County jurisdiction. White Mountain Apache Tribe v. Bracker, supra, 448 U.S. at 142-43, 100 S.Ct. at 2583. See also New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 329-44, 103 S.Ct. 2378, 2384-91 (1983).

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17 Alternatively, even if title technically has not yet passed to the United States, the County's 1984 stipulation and 1985 deed give rise to a constructive trust in favor of tribal self-government. Cf. Conclusions of Law Re: Count I ¶7 at pp. 3-4 (January 30, 1985).

18 See also Wisconsin Potowatomies of the Hannahville Indian Community v. Houston, 393 F.Supp. 719, 728-29 (W.D. Mich. 1973).

D. County Zoning Conflicts With Federal Housing/Sanitation Programs

The preceding section addresses the infringement test: one of the "two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members." White Mountain Apache Tribe v. Bracker, supra, 448 U.S. at 142, 100 S.Ct. at 2583. The second barrier, federal preemption, can result either from an explicit federal pronouncement[19] or implicitly as a result of comprehensive federal involvement: "We have thus rejected the proposition that in order to find a particular state law to have been preempted by operation of federal law, an express congressional statement to that effect is required." Id., 448 U.S. at 144, 100 S.Ct. at 2584 (citation and footnote omitted); see generally, id., 448 U.S. at 144-52, 100 S.Ct. at 2584-88.

An example of the distinction between explicit and implicit preemption was presented in the United States v. Michigan litigation (File No. M 26-73) during 1981, as a result of Interior Secretary Watt's decision to let the federal treaty-fishing regulations lapse. In response to the state's hastily-enacted regulations intended to fill the void, the tribes successfully argued to the Sixth Circuit that the state's authority to regulate treaty fishers was preempted even in the absence of federal regulations. The tribes' argument was premised upon the existence of extensive federal programs enabling "effective Indian tribal self-regulation," United States v. State of Michigan, 653 F.2d 277, 279 (6th Cir. 1981).[20]

Likewise, paramount federal policy supports the provision of elderly and low-income housing on Indian trust lands located in rural areas. The

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19 County zoning jurisdiction over lands formally accepted/approved into federal trust status is preempted by 25 C.F.R. §1.4, which confirms preexisting common law. Santa Rosa Band v. Kings County, 532 F.2d 655, 664-67 (9th Cir. 1975), cert denied, 429 U.S. 1038 (1977). See also United States v. County of Humboldt, 615 F.2d 1260 (9th Cir. 1980).

20 See also April 11, 1984 Opinion and Order, pp. 5-6 (File No. M 26-73).

Affidavit of Barry Burtt (Exhibit B) establishes that the housing planned upon the 23-acre parcel is the result of funding/assistance provided by the United States Departments of Housing and Urban Development, Health and Human Services (Indian Health Services) and Interior (Bureau of Indian Affairs). The County's planning director admits that the County zoning ordinance prohibits residential use upon the 23-acre parcel which is the situs of the dispute presently before this Court.[21] Thus, application of the County's ordinance would thwart Plaintiff Tribe's efforts to provide for the housing needs of its members.

III. Inconsistency with Federal statutes

> Finally, application of the ordinances in the circumstances presented here is inconsistent with the statutes authorizing the B.I.A. and I.H.S. to provide housing and sanitation aid to the plaintiffs. The H.I.P. was adopted pursuant to 25 U.S.C. §13 and funded by P.L. 92-369. The I.H.S. services are provided under 42 U.S.C. §2004a, using funds appropriated by P.L. 92-18. The purpose of both statutory programs is to upgrade the deplorable living conditions of many reservation Indians; funds are limited under both programs. Application of various local zoning and building ordinances rather than uniform Federal standards greatly enhances the difficulty of administering the Federal programs, adds expense to already tight budgets, and ultimately detracts from the programs' goals. The fees charged here by the County directly impede the receipt of the Federal services. The Zoning Ordinance, which subjects the Federally provided housing to the discretionary administrative approval of a County official, and to use for a two-year limit, threatens altogether to prevent plaintiffs' use of the housing, and at the very least impedes its provision and use. And the Building Code, which requires permits for the provision of the I.H.S. services, likewise hinders the performance of the duties authorized by §2004a. We are therefore clear that application of the County's ordiances here is "inconsistent" with the Federal statutes, and that, for this reason as well, the County is without jurisdiction to do so.

Santa Rosa Band v. Kings County, 532 F.2d 655, 668 (9th Cir. 1975).

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21 See McDonnell deposition, pp. 41-44 & 113 (April 2, 1987).

III.

DECLARATORY RELIEF ENABLES EXPEDIENT RESOLUTION OF ZONING CONTROVERSY

The Declaratory Judgment Act provides that "(f)urther necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment." 28 U.S.C. §2202. Even if Leelanau County had not been an "adverse party" in this litigation, declaratory relief is appropriate because this Court expressly retained "jurisdiction over this action until federal trust status is effectuated for the Indian community trust lands which are the subject matter of this controversy." January 30, 1985 Opinion and Order, p. 3.

Plaintiff is not requesting an injunction or other relief requiring in personam jurisdiction over Leelanau County. Instead, Plaintiff is requesting a declaration of its tribal rights with respect to the Indian community trust lands which are the res of this in rem action. For the following reasons stated in this Court's April 11, 1984 Opinion and Order (at pp. 14-15) in the United States v. Michigan litigation (File No. M 26-73), judicial power exists to consider the requested relief:

> A. Jurisdiction expressly retained;
> B. Inherent equitable power [United States v. Swift and Company, 286 U.S. 106 (1932); and United States v. United Shoe Machinery Corp., 391 U.S. 244 (1968)]; and
> C. Declaratory Judgment Act [Powell v. McCormack, 395 U.S. 486, 499 (1969); and Edward B. Marks M. Corp. v. Charles K. Harris M.P. Co., 255 F.2d 518, 522 (2nd Cir. 1958), cert. denied, 358 U.S. 831 (1958)].

The determination whether to grant declaratory relief depends upon the existence of an "actual controversy," 28 U.S.C. §2201; see generally 10A Wright, Miller & Kane, Federal Practice and Procedure §2757 (1983). As stated in the Notes of Advisory Committee On Rules (re: Rule 57, Fed.R.Civ.P.):

> The "controversy" must necessarily be "of a justiciable nature, thus excluding an advisory decree upon a hypothetical state of facts."*** The existence or non-existence of any right, duty, power, liability, privilege, disability, or immunity or of any fact upon which such legal relations depend, or of a status, may be declared. (Emphasis added and citation omitted.)

The issue involving zoning jurisdiction upon the Indian community trust lands presents an actual controversy which this Court could resolve expeditiously by issuing the declaratory relief requested in Plaintiff's motion. The Affidavit of Harry Galbraith (Exhibit C) establishes that Leelanau County is preventing electricity from being hooked up to the house constructed upon the 23-acre parcel in question; since that house basically is ready for occupancy, electricity is necessary not only so that it can be occupied (and rent paid to the Tribe's Housing Authority) but also so that insurance can be obtained (see Exhibit A). Additionally, the Affidavits of Joseph C. Raphael and Barry Burtt (Exhibits A & B) establish that Leelanau County's assertion of zoning jurisdiction conflicts with legitimate tribal governmental purposes as well as federal programs addressing housing and sanitation needs of Plaintiff's members. Finally, it has been more than two years since this Court concluded that Plaintiff is being harmed by the failure to achieve federal trust status, see Conclusions of Law Re: Count I, ¶8 at p. 4 (January 30, 1985); and for the reasons stated in this memorandum, it simply is not appropriate for Leelanau County to assert a position (e.g., zoning jurisdiction) inconsistent with Plaintiff's rights once federal trust status formally pertains.[22]

> The remedy made available by the Declaratory Judgment Act and Rule 57 is intended to minimize the danger of avoidable loss and the unnecessary accrual of damages....It permits actual controversies to be settled before they ripen into violations of law or a breach of contractual duty and it helps avoid multipli-

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22 See also Memorandum in Support of Motion for Order of Contempt, filed simultaneously with this pleading.

> city of actions by affording an adequate, expedient, and inexpensive means for declaring in one action the rights and obligations of litigants.

10A Wright, Miller and Kane, Federal Practice and Procedure §2751, at pp. 569-71 (1983) (footnotes omitted).

Conclusion

> The traditional notions of Indian sovereignty provide a crucial "backdrop,"***against which any assertion of State authority must be assessed. Moreover, both the tribes and the Federal Government are firmly committed to the goal of promoting tribal self-government, a goal embodied in numerous federal statutes.***In part as a necessary implication of this broad federal commitment, we have held that tribes have the power to manage the use of its territory and resources by both members and non-members,***to undertake and regulate economic activity within the reservation,***and to defray the cost of governmental services by levying taxes. ***Thus, when a tribe undertakes an enterprise under the authority of federal law, an assertion of State authority must be viewed against any interference with the successful accomplishment of the federal purpose.***(State authority precluded when it "stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.")

New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, , 103 S.Ct. 2378, 2386-87 (1983) (emphasis added, citations and footnotes omitted). See generally White Mountain Apache Tribe v. Bracker, supra, 448 U.S. at 143-52, 100 S.Ct. at 2583-88. In the matter sub judice, Leelanau County's assertion of zoning authority is just such an obstacle both to Plaintiff's self-government and also to successful accomplishment of the federal purposes inherent in the B.I.A., I.H.S. and H.U.D. programs administered by Plaintiff Tribe. Therefore Plaintiff respectfully requests this Court to grant the declaratory relief requested.

DATED: April 15, 1987

William Rastetter

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