UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

The White Earth Band of Chippewa Indians, on its own behalf and its wholly-owned enterprise, the Shooting Star Casino,

Plaintiffs,

v.

Mahnomen County, Minnesota; Frank Thompson, Mahnomen County Auditor; Leslie Finseth, Mahnomen County Assessor; Brenda Lundon, Mahnomen County Treasurer; Wally Eid, Mahnomen County Commissioner; Jerry Dahl, Mahnomen County Commissioner; John Peterick, Mahnomen County Commissioner; Karen Ahman, Mahnomen County Commissioner; Charlie Pazdernik, Mahnomen County Commissioner,

Defendants.

Court File No. 07-3962 MJD/RLE

DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF ITS CROSS-MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Within an Indian reservation, Indian land held in fee is taxable unless Congress has clearly manifested an intent to preclude those lands from property taxes. The Band claims that the White Earth Reservation Land Settlement Act, Pub. L. 99-264, Act of Mar. 24, 1986, 100 Stat. 61 ("WELSA") and the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 *et seq.* (2006) ("IGRA") evidence that intent. But by their express terms neither WELSA nor IGRA manifest clearly any intent to prevent taxation of fee-owned lands. The plain language of those statutes simply does not address the question of taxing

fee-owned lands. Because neither WELSA nor IGRA clearly manifest an intent to exempt Indian fee-owned land from taxation, the Band's claim for tax exemption and a refund of previously paid taxes fails as a matter of law. Likewise, equitable doctrines preclude the Band's refund claim. Accordingly, the County is entitled to summary judgment as to those claims.

BACKGROUND

A. The Parties

Defendant Mahnomen County, Minnesota, ("County") is responsible for providing services to all County residents, including law enforcement, court services, roads, other infrastructure and welfare, and other necessary social services to County residents. Affidavit of Frank Thompson dated December 1, 2008 at ¶ 6. The County is also tasked with assessing and collecting real-property taxes from County residents, including the Band. *See* Defendants' Jurisdictional and Abstention Brief at 3-9 (describing Minnesota's comprehensive property tax scheme).

The White Earth Band of Chippewa has approximately 20,000 enrolled members, of whom approximately 25% live on the White Earth Reservation.[1] (Affidavit of Jeanette Larson, Ex. 1 ("Larson Aff.")) The White Earth Reservation was created through an 1867 treaty that provided for a reservation initially comprising 36 townships in northwestern Minnesota. Treaty with the Chippewa Indians, March 19, 1867. (Larson Aff. Ex. 2) The exterior boundaries of that reservation encompass all of what is now

[1] Census data for 2000 show 5,190 people resided in the County, and approximately 29 percent claim Native American ancestry. (Larson Aff. Ex. 23)

Mahnomen County, plus parts of Becker and Clearwater Counties. Subsequently, pursuant to the Nelson Act, four townships in Clearwater County were removed from the reservation. *White Earth Band of Chippewa Indians v. Alexander*, 518 F. Supp. 527, 534 (D. Minn. 1981).

B. The Casino Property

In 1991, the Band purchased by warranty deed three parcels of land on which a casino and various hotel, conference, restaurant and retail facilities were built ("the so-called Casino Property"). (Compl. ¶8) The Band claims that they purchased the Casino Property with funds acquired under Section 12 of WELSA; the County disputes the Band's claim that WELSA funds were used to purchase Casino Property. (Answer ¶7)[2]

The purchase and the financing history of the Casino Property, including the construction of the casino and other improvements, is not clear-cut as the Band purports. *See* Brief of Band at 4. The County's forensic accountant analyzed the information the Band provided to the Bureau of Indian Affairs ("BIA") about WELSA funds, finding that the BIA's conclusion about WELSA funds was unsupported because: (1) interest earnings from other, non-WELSA funds were used to purchase the Casino Properties; (2) the account from which the WELSA funds were allegedly paid had a previous balance from an unknown source of funds; (3) WELSA interest earnings may have been used to

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[2] The BIA, in adopting a decision by the Office of Indian Gaming Management, concluded that WELSA funds were used to purchase the Casino Properties. *See Minnesota v. Acting Midwest Reg'l Dir., BIA*, 47 IBIA 122, 123-24 (2008) (Larson Aff. Ex. 3). The County has appealed that determination. *Mahnomen County v. BIA*, Civ. No. 08-CV-05180 (Larson Aff. Ex. 4).

eliminate a general fund deficit, making the funds unavailable to purchase the Casino Properties and (4) documents the Band submitted did not support the agency's determination. This report completely undercut the Band's claim that WELSA funds were used.[3] (Larson Aff. Ex. 5)

Moreover, it is beyond peradventure that the various improvements – the casino itself, an RV park, a hotel and conference center – were financed by borrowed money. For example, in April 1992, the Band gave the First National Bank of Aitkin a mortgage on that land to secure a $5.5 million dollar real estate construction and term note. (*Id*. Ex. 6) Then in March 1994, the Band remortgaged the land – together with improvements – to secure a $10 million loan. (*Id*. Exs. 8 and 9) Another mortgage was given in favor of First American Bank, N.A. in October 1997, (*Id*. Ex. 10), to secure a $6 million real

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[3] Whether WELSA funds were used to purchase the Casino Property remains an issue in this litigation because, according to the IBIA, whether WELSA funds were used to purchase the property is a prerequisite to the Secretary's acceptance of the Casino Property into trust. 47 IBIA at 127. (Larson Aff. Ex. 3)

Moreover, the process by which the WELSA-fund determination was made was not adversarial. The discretionary application process only permitted the County to address three narrow issues, and the source of funds used to purchase the property was not one of them. 25 C.F.R. § 151.10. At that time, whether WELSA funds were used was not even an issue. The Band then changed course, arguing that because the property was purchased with WELSA funds, acquisition was mandatory. After the Band asserted that the acquisition into trust was mandatory, the County was wholly excised from the application process. *Id*.

Thus, the Band was able to submit, unchallenged, information about WELSA into the record. No actual, adversarial litigation of the WELSA-funds issue occurred before the BIA. *Healtheast Bethesda Lutheran Hosp. v. Shalala,* 164 F.3d 415, 419 (8th Cir. 2002) (adversarial proceeding required for collateral estoppel). As a matter of due process, the County should have been permitted to inquire and challenge the Band's claims about whether it used WELSA funds to purchase the Casino Property in this litigation.

estate note. Bremer Bank took a second mortgage on the Casino Property in June 1999 to secure a term note of $1.1 million due by November 1, 2002. (*Id*. Ex. 11) Finally, National City Bank took a chattel mortgage on the gaming and other improvements to secure two series of revenue bonds totaling $31,025,000. (*Id*. Ex. 12)

Significantly, the mortgages the Band gave provided its lenders with the right to foreclose and sell the Casino property in the event of a default:

> foreclose the Mortgage by action or advertisement upon written notice to the Mortgagor, and the Mortgagor hereby authorizes the Mortgagor to do so, power being herein expressly granted to sell the Mortgaged Property at public auction without any prior hearing thereof and to convey to the same to the purchaser in fee simple ….

(*E.g., id*. Ex. 6, Article III Remedies, § 3.01(1)). In short, if the Band defaulted, the lender could sell the land at a public sale and convey fee title to the buyer – no mention is made of any restriction on the lender's right to do so. Nothing. Even the 2000 Chattel Mortgage authorized the right to sell the improvements pursuant to the provisions of the UCC. (*Id*. Ex. 12, Article 2 Default § 2.2).

C. The Band's Fee-to-Trust Application

On April 2, 1995, in the midst of the Band's repeated financings and mortgaging the Casino Property, the Band petitioned the BIA to place that property into trust through the discretionary administrative process under 25 C.F.R. § 151.10. (Compl. ¶11) (Larson Aff. Ex. 13 at 1549, 1553-54) (cover letters discussing the Band's application).[4] Those

[4] In October 2006 the Mahnomen County Attorney requested from the BIA a copy of the original fee-to-trust application, but the BIA could not locate it, nor has the Band produced the application in response to the County's discovery.

parcels, identified in the application by their legal descriptions, correspond to two parcels on which the Band constructed the Shooting Star Casino and other related buildings.

The Band has pursued trust status to avoid paying taxes, not for any altruistic purpose. In a letter to the BIA Area Director on April 20, 1995, the Band referenced its then-pending 1996 property tax payments and the need to avoid making them: "I write this letter because there is some need for some speed in this matter. The present taxes on the Casino are over a half of a million dollars. The taxes for 1995 will be almost $900,000.00. The taxes for 1996 will be over $1 million dollars. . . . Therefore it is important, before the million dollar taxes begin to attach, that we move this property from fee to Trust . . . ." (Larson Aff. Ex. 13 at 1558-59) The Band's statement is also an admission that the Casino Properties were owned in fee – not trust – since 1991.

The Band admits that, during a time of "governmental crisis, the trust application "was not aggressively pursued." (Compl. ¶12.) This governmental crisis was self-inflicted and concerned a criminal investigation that ultimately lead to the conviction of then-tribal chairman Darrell "Chip" Wadena. *See U.S. v. Wadena*, 151 F.3d 831 (8th Cir. 1998) This "governmental crisis" did not prevent the Band from building out the casino project or repeatedly engaging in sophisticated financial transactions involving the casino, which went on during this "crisis."

By 2002, the Band once again pursued the Section 151 trust application. (Compl. ¶14.) But before the BIA would accept any property into trust, the Band was required to

resolve all liens and encumbrances.[5] (Larson Aff. Ex. 14); *See* 25 C.F.R. § 151.13 (the applicant must notify the Secretary of any "liens, encumbrances, or infirmities" and prohibiting the Secretary from taking any land in trust if title is "unmarketable"). Because of the Band's actions, the Casino Property could not have been taken into trust until these liens were cleared.

In 2006, eleven years after the Band applied to have the property taken into trust, and only after the numerous mortgages were satisfied, the BIA informed the Band that, at the Band's insistence, it would treat the acquisition as a "mandatory" acquisition under 25 C.F.R. § 151.10. (Larson Aff. Ex. 15) The Band's 2002 request was contrary to its 1995 application and the discretionary process that both the Band and the BIA followed for years. This change corresponds with the Band's hiring of new attorneys. The BIA based this decision on a determination that WELSA funds were used to purchase the casino property. (*Id.*; Ex. 3 at 124.) Through the Governor, the State of Minnesota appealed this decision to the Interior Board of Indian Appeals ("IBIA"). On July 3, 2008, the IBIA affirmed the Notice of Decision. (Larson Aff. Ex. 3.)[6] The IBIA concluded that the acquisition process was not discretionary; rather, that the process was mandatory under Section 18 of WELSA.

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[5] The Band claims that the casino properties should have been held in trust from the dates of their purchase, in April and June of 1991. The Band's claim is inconsistent with its action in granting mortgages to numerous lenders, because if the land is held in trust, then it never should have been able to give any lender a mortgage.

[6] The July 3, 2008 decision is the subject of the County's APA challenge, *Mahnomen County v. BIA*, No. 08-CV-01580 (Larson Aff. Ex. 4), and the property has apparently not yet been accepted into trust.

D. The History of Taxation on the Band's Property

The County assessed and taxed the Casino Property starting in 1991, and continues to assess and collect taxes on the Casino Property, even though the Band has now refused to remit payment to the County. The Band paid the property taxes each year from 1991 through 2005. Occasionally the Band claimed to pay the taxes under protest, other times saying nothing about paying under protest. Attached to the Lundon Affidavit as Exhibit 1 are copies of tax statements and attached to the Larson Affidavit as Exhibit 16 are copies of cancelled checks remitted to the County from the Band. Information about protested payments is summarized below and demonstrates how inconsistent the Band was in claiming taxes were being paid under protest:

Year	Parcel No.	Paid Under Protest?	Annual Amount Paid (tax, interest, penalties, and fees)
1993	13.011.2400	no	$13,216.00
	18.011.0102	no	$50,954.00
	18.011.0110	no	$8,761.96
1994	13.011.2400	no	$100,892.00
	18.011.0102	no	$383,452.00
	18.011.0110	no	$36,792.00
1995	13.011.2400	yes	$326,784.00
	18.011.0102	yes	$498,424.00
	18.011.0110	1st half – no, 2nd half – yes	$38,362.00
1996	13.011.2400	1st half – no, 2nd half – yes	$326,694.00
	18.011.0102	1st half – no, 2nd half – yes	$499,058.00
	18.011.0110	1st half – yes, 2nd half – no	$33,316.00
1997	13.011.2400	1st half – no, 2nd half – yes	$338,996.00
	18.011.0102	1st half – no, 2nd half – yes	$516,872.00
	18.011.0110	yes	$34,504.00
1998	13.011.2400	yes	$262,496.00
	18.011.0102	yes	$461,360.00
	18.011.0110	1st half – yes, 2nd half – no	$32,076.00
1999	13.011.2400	no	$186,596.00
	18.011.0102	no	$413,606.00

Year	Parcel No.	Paid Under Protest?	Annual Amount Paid (tax, interest, penalties, and fees)
	18.011.0110	no	$22,266.00
2000	13.011.2400	2nd half – yes	$171,036.00
	18.011.0102	2nd half – yes	$384,936.00
	18.011.0110	2nd half – yes	$20,612.00
2001	18.011.0102	1st half – yes	$366,932.00
	18.011.0110	1st half – yes	$18,950.00
	18.011.2400	1st half – yes	$199,798.00
2002	18.011.0102	no	$326,680.30
	18.011.0110	no	$12,580.96
	18.011.2400	no	$411,214.46
2003	18.011.0102	no	$356,694.00
	18.011.0110	no	$12,544.00
	18.011.2400	no	$567,992.00
2004	18.011.0102	2nd half – yes	$352,832.00
	18.011.0110	2nd half – yes	$12,708.00
	18.011.2400	2nd half – yes	$521,202.00
2005	18.011.0102	1st half – yes	$320,692.00
	18.011.0110	1st half – yes	$13,884.00
	18.011.2400	1st half – yes	$495,594.00

The total amount of taxes paid from 1993 to 2005 was $9,767,224.80.[7]

E. The Tax-Delinquency Proceedings

On February 2, 2007, the Mahnomen County Auditor notified the Band it was delinquent in 2006 real estate taxes on the Casino Property in an amount totaling $970,541.71. (Larson Aff. Ex. 17.) This included $837,330.00 in claimed taxes owed; $117,226.20 in penalties; and $15,910.51 in interest; and $75.00 in fees. (*Id.*) The notices informed the Band that the Casino Property would be included in a list of properties that were delinquent on real estate taxes for 2006.

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[7] Despite diligent search the County can find no records for 1991 and 1992, Lundon Aff. at ¶ 8, nor has the Band produced anything for those years.

On February 26, 2007, the Band petitioned the Mahnomen County District Court claiming that it is exempt from paying state property taxes for 2006 and requested an order that would require a refund of all property taxes the Band paid on the Casino Property. (*Id*. Ex. 18) The Band refused to pay property taxes for 2006, and the County issued a delinquency notice to the Band. (*Id*. Ex. 20) Currently, the Band owes $1,145,557.43 in delinquent taxes, penalties, and interest for 2006. (Lundon Aff. ¶14) In September 2007 the Band voluntarily dismissed its petition, then venued in Minnesota Tax Court.

The Band has also refused to remit payment for taxes, penalties, interest, and other fees for the years 2007 and 2008. For 2007, the delinquent taxes on the Casino Property total $793,688.00, the penalties are $111,116.32, and interest is $90,480.44. (*Id*. ¶15) For 2008, the delinquent taxes on the Casino Property total $770,836.00 and penalty is $92,500.32; no interest has accrued. (*Id*. ¶16)

F. The Band's Federal Case

The Band filed this action, seeking to enjoin the state forfeiture action; a declaratory judgment that the Casino Property is not subject to property taxes under either IGRA or WELSA; and disgorgement and repayment of all taxes paid on this property by the Band to the County and other parties.

The Band claims that because WELSA funds were used to purchase the land, trust acquisition under WELSA is mandatory, so that the Casino Property was effectively taken into trust upon purchase. (Compl. ¶¶10-16) The Band's second argument is that section 2710(d)(4) of IGRA preempts the County from imposing property taxes on the

Casino Property. The Band claims a refund of all property taxes paid on grounds of unjust enrichment. (Compl. ¶11)

ARGUMENT

The central issue is whether the plain language of WELSA and IGRA "clearly manifests" a congressional intent to exempt the Casino Property from the property taxes. Supreme Court precedent going back over a century establishes that land owned in fee – as here – is taxable. *E.g.*, *Goudy v. Meath,* 203 U.S. 146, 149 (1906). WELSA and IGRA do not clearly manifest such an exemption. To avoid the obvious conclusion its land is taxable, the Band presents four roundabout arguments that have nothing to do with the plain language of WELSA.

First, the Band argues that because WELSA is self-executing and automatically places the land in trust, the property cannot be taxed. This argument has nothing to do with the plain language of WELSA or whether that language expresses an intent to preclude property taxes. Second, the Band urges the Court to examine WELSA's legislative history and purpose, but not the statute's plain language. But the Band does not demonstrate that WELSA is ambiguous and hence irrelevant, and selectively interprets the legislative history to segue to its third argument, which addresses the language of the statute with conclusory statements and an inapposite claim that the lands were at least placed in "restricted fee" status, even though the Band has always treated

the land as restricted.[8] Strangely enough, even for its "plain language" argument, the Band barely cites to the actual language of WELSA to explain why WELSA clearly manifests an intent to preclude taxes. Finally, the Band asserts that because the Casino Properties cannot be forfeited, they cannot be taxed. Here, the Band's argument is a red-herring. Whether land may be forfeited is not the issue; whether it may be taxed is. The Band's various arguments should be rejected and summary judgment granted to the County.[9]

I. APPLICABLE STANDARDS OF REVIEW

A. Summary Judgment For Either Party

Summary judgment shall be granted where "there is no genuine issue as to any material fact, and the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). On a summary judgment motion, facts are viewed in a light most favorable to the non-moving party, but the non-movant must present admissible evidence sufficient

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[8] 25 C.F.R. § 151.2 defines "restricted land" and "land in restricted status" as "land the title to which is held by an individual Indian or a tribe and which can only be alienated or encumbered by the owner with the approval of the Secretary because of limitations contained in the conveyance instrument."

The Band never contended until October 31, 2008, that WELSA created "restricted land" and it certainly never informed its lenders that prior approval of the encumbrance was required before they could take a security interest in the Casino Property.

Nothing in WELSA that expressly creates restrictions on the alienation or encumbrance of properties owned in fee by the Band. Nor is there anything in any of the conveyance instruments that "pursuant to Federal law" imposes any restrictions or requires approval of alienation or encumbrance by the Secretary. Indeed, the Band mortgaged the Casino Property four times from 1992 until 2005 without seeking approval by the secretary.

[9] Although the Band does not move on IGRA grounds, because IGRA provides no basis for a tax exemption, the County addresses that statute in this brief.

to show that there is a genuine fact issue for trial. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). Summary judgment is particularly appropriate if the disputes are "primarily legal rather than factual." *Crain v. Board of Police Comm'rs of Metro. Police Dept. of City of St. Louis*, 920 F.2d 1402, 1406 (8th Cir. 1990).

Summary judgment may be granted for a non-movant, even without a cross-motion, where both parties expect the dispute to be decided in a summary fashion, certainly the case here. *Johnson v. Bismarck Pub. Sch. Dist.*, 949 F.2d 1000, 1005 (8th Cir. 1991). Hence, if the facts are undisputed, and the County is entitled to judgment as a matter of law, this Court may grant summary judgment in favor of the County, even though the County has not filed a cross-motion for summary judgment. *Burlington N. R. Co. v. Omaha Pub. Power Dist.*, 888 F.2d 1228, 1231 (8th Cir. 1989); *Jeffers v. Tucker*, 839 F. Supp. 612, 616 (E.D. Ark. 1993) ("[T]he Court has the authority to grant summary judgment against the movant even when the non-movant has not made a cross-motion for summary judgment.").

B. Canons Of Statutory Construction

Analysis of a statute begins with its plain language: "[A] court's primary objective is to ascertain the intent of the legislature by looking at the language of the statute itself and giving it its plain, ordinary and commonly understood meaning." *In re M & S Grading, Inc.*, 457 F.3d 898, 901 (8th Cir. 2006). Absent a clearly expressed intent to the contrary, the language of the statute is conclusive; congressional intent is otherwise not a proper subject for review. *U.S. v. McAllister*, 225 F.3d 982, 986 (8th Cir. 2000).

The Band resorts to canons of construction in Indian law of questionable applicability to argue that its construction of section 18 of WELSA must prevail. But this principle does not attain here, for the Supreme Court has stated that once land is freely alienable the land is presumed taxable. To reverse that presumption, Congress must make its intent "manifestly clear." Here, there is no defensible interpretation of either WELSA or IGRA that meets that standard. *Cf. South Carolina v. Catawba Indian Tribe, Inc.* 476 U.S. 498, 506 (1986) (canon inapplicable where no ambiguity exists).

II. SUPREME COURT PRECEDENT ESTABLISHES A PRESUMPTION OF TAXABILITY OF THE CASINO PROPERTY BECAUSE THE BAND OWNS IT IN FEE

In 1906, the Supreme Court established a bright-line rule for taxing reservation property: if Congress has made the land freely alienable, it is taxable. *Goudy v. Meath,* 203 U.S. 146 (1906), involved the right of Washington to tax lands formerly reserved to the Puyallup that had been allotted in severalty to tribal members. After restraints on alienability expired, the authority of Pierce County to levy a property tax on that land was affirmed:

> Among the laws to which the plaintiff as a citizen became subject were those in respect to taxation. His property, unless exempt, became subject to taxation in the same manner as property belonging to other citizens, and the rule of exemption for him must be the same as for other citizens, that is, that no exemption exists by implication, *but must be clearly manifested*. No exemption is clearly shown by the legislation in respect to these Indian lands.

Id. at 149 (emphasis added). As discussed below, the Supreme Court has twice reaffirmed the principle upheld in *Goudy*.

1. The Bright-Line Rule Enunciated In *Goudy* Is Reaffirmed By *County of Yakima*

The Yakima Tribe contested the authority of Yakima County to impose property taxes and taxes on the sale of land held in fee by the Tribe or the Tribe members. *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation,* 502 U.S. 251 (1992). The Court examined the General Allotment Act of 1887 and the Burke Act in concluding that Congress had not manifested a clear intent to revoke the taxability of fee lands that had once been allotted under the General Allotment Act. 502 U.S. at 254. In 1906 Congress enacted the Burke Act proviso that on expiration of the twenty-five years provided in the General Allotment Act, "all restrictions as to sale, encumbrance, or taxation of said land shall be removed . . . ." *Id.* Both the Yakima Tribe and the United States conceded that the Burke Act proviso authorized taxation, but the Yakima Tribe argued that the 1954 Indian Reorganization Act impliedly repealed the proviso, relying on *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976).

In light of the policies underlying the Indian Reorganization Act*, Moe* held that the General Allotment Act did not authorize states to exercise plenary jurisdiction over Indians residing on fee lands within a reservation. 425 U.S. at 478-79. But in *Yakima* the Court noted that "it is a cardinal rule … that repeals by implication are not favored," *i.e.,* there is a presumption against such an argument. 502 U.S. at 262. In short, *Yakima* recognized that *Moe* simply prevented states from exercising personal jurisdiction over Indians based on the land that the Indian owned. *Id.* (internal quotation omitted). Because *Moe* never addressed the Burke Act proviso, that case never addressed property

taxes. *Id.* at 263. Hence, the rule of law from *Goudy* applied: if Congress made the land alienable, it is taxable, absent a clear manifestation to the contrary. *Id.*

2. *Cass County v. Leech Lake Band of Chippewa Indians*

In 1993, one year after *Yakima* made clear the limits of *Moe*, Cass County, Minnesota began once again assessing property taxes on reservation land owned by the Leech Lake Band of Chippewa. *Cass County v. Leech Lake Band of Chippewa*, 524 U.S. 103, 109 (1998). Two years later the Leech Lake Band sought a declaratory judgment that Cass County could not tax the property. *Id.* The district court held that Cass County could assess taxes on the Leech Lake Tribe, but the court of appeals reversed. The Supreme Court agreed with Cass County, relying on *Yakima* and *Goudy* for the proposition that Congress unmistakably manifested its intention to permit taxation of tribe-owned lands under the General Allotment Act and Burke Act proviso, and nothing had clearly manifested an intent to remove the ability to tax. *Id.* at 112. In fact, the Court made it clear in *Cass County* that to override the authority of the Burke Act proviso, "Congress would have to 'clearly manifest' such a contrary purpose in order to counteract the consequence of taxability that ordinarily flows from alienability." *Id.* (citing *Goudy*, 203 U.S. at 149).

The discussion of taxability in *Cass County* extended beyond the simple question of whether the land was taxable – clearly it was under *Goudy* and *Yakima* – to the issue raised by the Band in this case, which is how Indian-owned land, once taxable, becomes non-taxable. The Court resolved that issue by stating that it becomes non-taxable when Congress manifested a clear intent to make it non-taxable. *Cass County*, 524 U.S. at

113–14. In *Cass County*, the Leech Lake Band's land became non-taxable not when the tribe acquired the land (because it was still alienable by the tribe at that time) but only after the BIA formally accepted the property into trust under the Indian Reorganization Act, 25 U.S.C. § 465. *Id.* Had the land been taxable upon acquisition by the tribe, section 465 would be unnecessary. *Id.* at 115. *Cass County* thus reaffirms that when Congress makes Indian-owned land freely alienable, it manifests its intent to subject that land to local property taxes "unless and until they were restored to federal trust protection under Section 465." *Id.* at 118. Nothing in WELSA or IGRA alters this conclusion.

III. WELSA DOES NOT "CLEARLY MANIFEST" AN INTENT TO PRECLUDE THE COUNTY FROM ASSESSING AND COLLECTING PROPERTY TAXES FROM THE BAND

Congress enacted WELSA for one purpose: to quiet title to lands within the White Earth Reservation that had been previously acquired, sold, or inherited. The Band claims WELSA extinguishes Minnesota's power to tax the Casino Properties, but WELSA has no bearing on the assessment and collection of state-authorized property taxes. The text of WELSA does not contain an explicit, or even implicit, exemption for lawfully imposed property taxes.[10]

The Band erroneously relies on unsupported conjecture about "self-executing" provisions and bits and scraps of legislative history to escape the plain language of the statute. Here, the correct analysis must start with the plain language of the statute, and

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[10] Obviously, this issue is relevant only if WELSA Section 12 funds were used to purchase the land on which the casino sits, something the County contests.

only if it is ambiguous, should the Court consider WELSA's legislative history. The plain language of WELSA does not exempt the Band from property taxes; likewise the legislative history, even if it was relevant, does not support the Band either.

A. The County May Tax Land Acquired By The Band, Even If The Band Used WELSA Funds To Purchase The Land

"When Congress makes reservation lands freely alienable, it is 'unmistakably clear' that Congress intends that land to be taxable by state and local government unless a contrary intent is 'clearly manifested.'" *Cass County,* 524 U.S. at 113 (quoting *Yakima*, 502 U.S. at 263). In the Nelson Act and the Clapp Amendment Congress removed federal protection from reservation land and made it fully alienable and taxable. *Cass County*, 524 U.S. at 113. The subsequent purchase of reservation land by the Band likewise does not manifest any congressional intent to re-establish federal protection of that land or to oust state taxing authority – particularly when Congress previously *explicitly* relinquished such protection. *Id*. at 114.

The lands at issue became freely alienable under the Nelson Act and related acts and, therefore, subject to taxation. Indeed, the County has lawfully assessed and collected property taxes from the Band using the procedures enacted by the Minnesota Legislature under Minn. Stat. Ch. 273. The Band's decision to purchase former reservation land does not automatically render the lands nontaxable; WELSA likewise does not provide that lands acquired with WELSA funds are tax exempt. The Band claims that Section 18 created an unprecedented procedure – one that is both automatic

and mandatory – for placing reservation lands into trust, a claim that does not stand up to meaningful statutory analysis.

Section 18 of WELSA provides:

> Any lands acquired by the White Earth Band within the exterior boundaries of the White Earth Reservation with funds referred to in section 12, or by the Secretary pursuant to section 17, shall be held in trust by the United States. Such lands shall be deemed to have been reserved from the date of the establishment of said reservation and to be part of the trust land of the White Earth Band for all purposes.

The language of Section 18 shows that there is no clear manifestation to remove the power of the County to assess and collect taxes from the Band, as authorized by the Nelson Act and recognized in *Yakima* and *Cass County*. Because the land becomes nontaxable only when taken into trust, the exemption that the Band needs is not in the plain language of the statute. To reach its contrary conclusion, the Band claims Section 18 creates an automatic and mandatory trust for lands purchased with WELSA funds. To support this claim, the Band misconstrues the phrase "such lands" in Section 18 to apply more broadly than the rules of grammar will allow.

1. The Plain Language Of WELSA Section 18 Does Not Support The Band's Interpretation

"Words and phrases contained in statutes are to be given their plain, ordinary meaning and are to be construed according to the rules of grammar and common usage." 1A Norman J. Singer and J.D. Shambie Singer, SUTHERLAND STATUTORY CONSTRUCTION, §21:6 (6th ed. 2000); *see, e.g., Miller's Apple Valley Chevrolet Olds-Geo, Inc. v. Goodwin*, 177 F.3d 232 (4th Cir. 1999) (rules of grammar, ordinary meaning, and context should be considered in statutory construction).

In interpreting a statute, a court may consider rules which emphasize "the text, dictionary meanings, and rules of grammar, are at least equally as relevant to determine what meaning the statute conveys to members of the public, since others as well as the legislators can be presumed to rely on conventional language usage in forming their understanding of what a statutory text means." 2A SUTHERLAND, § 45:13 (citing *U.S. v. Monjaras-Castaneda*, 190 F.3d 326 (5th Cir. 1999); *U.S. v. Workinger*, 90 F.3d 1409, (9th Cir. 1996)).

As a matter of plain English, WELSA section 18 provides only that the lands that are deemed "reserved" from the date of the establishment of the reservation are lands held in trust by the United States. This is, of course, an application of the "last-antecedent rule," which states that, as a matter of statutory construction, references and qualifying words and phrases, where no contrary intention appears, "refer solely to the last antecedent." 2A SUTHERLAND, § 47:33. The last antecedent is "the last word, phrase, or clause that can be made an antecedent without impairing the meaning of the sentence." *Id.* While merely an aid "to discovery of intent or meaning," the last-antecedent rule is applied to construe a proviso to apply to the provision or clause immediately preceding it. *Id; see Fed. Labor Relations Auth. v. U.S. Dep't of Justice*, 137 F.3d 683 (2d Cir. 1998) ("referent is closest preceding noun, for purposes of statutory intergradation").

In this case, the Band has erroneously concluded that "such lands" in the second sentence of Section 18 refers to "any lands acquired by the White Earth Band" and, therefore, all lands acquired by Section 12 funds have been trust land since the

establishment of the reservation. This reflects a grammatically incorrect view of the sentence structure of Section 18 and plainly ignores the last-antecedent rule. The last-antecedent rule means that in Section 18, "such lands" refers to the immediately preceding noun, in this case, lands held in trust by the United States. "Such lands" does not refer to any other part of the preceding sentence and should not be construed to refer to "any lands acquired by the White Earth Band." *See Mandina v. U.S.*, 472 F.2d 1110, 1113 (8th Cir. 1973) (applying last antecedent rule to interpret 18 U.S.C. § 922(a)(1)).

When the word "such" is involved, the application of the last-antecedent rule is particularly appropriate, and it has been applied to the particular instance that occurs here – the combination of "such" preceding a noun. In this instance, "such" is assumed to refer to a particular antecedent noun and any dependent adjective or adjectival clauses modifying that noun, but not to any other part of the preceding clause or sentence. 3A SUTHERLAND, § 71:1; *see Gen. Elec. Co. v. Bucyrus-Erie Co.*, 550 F. Supp. 1037, 1042 n.7 (D.C.N.Y. 1982) ("Such" means the aforementioned and "when 'such' precedes a noun it is assumed to refer to a particular antecedent noun and any dependent adjective or adjectival clauses modifying that noun, but not to any other part of the preceding clause or sentence"); *see generally Tippins Inc. v. USX Corp.*, 37 F.3d 87, 93 (3d Cir. 1994) ("a modifier's reference is to the closest noun," citing SUTHERLAND).

Applying the last-antecedent rule to Section 18 provides a common sense interpretation of Section 18. By limiting "such lands" to mean lands taken into trust, the following provision of Section 18 makes sense. The reference that lands taken in trust shall be "deemed" reserved from the date of the establishment of the reservation

addresses the Nelson Act's partial disestablishment of the White Earth Reservation, whereby Nora, Minerva, Rice and one unorganized township in Clearwater County were removed from the reservation. *Alexander*, 518 F. Supp. at 534. Notably, the Band must believe so, for despite the explicit removal of those townships from the reservation, the Band's base map of its holdings includes those townships within the reservation boundaries. (Larson Aff. Ex. 24)[11] The "deemed" provision may also allow lands acquired after October 18, 1988, to be used for gaming without express approval of the governor. *See Artichoke Joe's Cal. Grand Casino v. Norton*, 278 F. Supp. 2d 1174, 1178 (E.D. Cal. 2003).

B. The Band's Argument Defies The Mandatory Fee-To-Trust Procedures Of 25 C.F.R. § 151.10

The Band also argues that WELSA is self-executing, *i.e.*, as soon as the Band purchases land with WELSA funds, Section 18 places it in trust for all purposes without additional administrative proceedings. Brief of Band at 10-14. Tellingly, the Band never acted as though WELSA was self-executing; rather, the Band repeatedly mortgaged the property and followed the discretionary trust acquisition procedures for years before concocting its current argument. Moreover, this self-executing argument is utterly impractical – the federal government cannot take title if there are other third party interests that would be affected.

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[11] An examination of that map also shows the Band does not denote the Casino Property as WELSA land.

The Band's position should be rejected. The only land that is reserved from the date of establishment of the reservation is land that the United States has formally accepted into trust. Land that has been acquired using Section 12 funds is not automatically deemed "reserved" as the Band argues; only land that has been taken into trust can be deemed "reserved" under Section 18. Section 18 lacks any procedure to take land into trust. Hence the Band's "self-executing" argument fails as matter of proper statutory construction.

The Band's "self-executing" is also inherently impractical. In effect the Band is saying that any land purchased with WELSA funds automatically vests title in the United States. If the Band bought contaminated property or a landfill for business purposes, those purchases and associated management obligations effectively become issues for the federal government. Conversely, if the Band purchases by quit claim deed, its self-executing argument precludes any recourse for third parties to assert an adverse claim, as the Quiet Title Act does not waive the federal government's sovereign immunity for Indian trust property. *See* 28 U.S.C. § 2409a(a). It would take an act of Congress to clear title.

Here, the dysfunctional interpretation the Band advocates is inconsistent with *Cass County* and federal regulations on trust acquisitions. In *Cass County* the Court rejected a similar argument because it "would render partially superfluous § 465 of the Indian Reorganization Act." 524 U.S. at 114. In section 465 Congress "explicitly set forth a procedure by which lands held by Indian tribes may become tax exempt." *Id.* The procedures created by Congress would be unnecessary if tax-exempt status

"automatically attaches when a tribe acquires reservation land." *Id*. The Court in *Cass County*, therefore concluded that, until restored to trust status under section 465, the Leech Lake Band's land was taxable. *Cass County*, 524 U.S. at 114.

Acquisition may only occur if authorized by Congress. 25 C.F.R. § 151.3. WELSA only provides authority to take land into trust on the occurrence of certain events. Certain prerequisites must be satisfied before acquisition can occur, however, regardless of whether an acquisition is deemed mandatory or discretionary. § 151.3(a)(1), (2). In other words, any acquisition or conveyance into trust must follow the procedures in Part 151, because WELSA is silent on acquisition procedures. Hence, the only way for the United States to obtain title to land purchased with WELSA funds is by the procedures set forth in Part 151 of the Code.

To commence the acquisition or conveyance process for land into trust, there must be a "written request to have lands taken into trust" 25 C.F.R. § 151.10. The written request is required regardless of whether an acquisition is discretionary or mandatory. *Id*. Before approving a request, the Secretary must first have title examined to ensure that liens or other infirmities are removed so title to the to-be-acquired land is marketable. 25 C.F.R. § 151.13. All of these steps were followed in this case, and the Band complied for years without objection. No deviation from these procedures is found in WELSA, and the Band's actions are further evidence the Band believed these procedures should be followed. It is too late for the Band to change course now. *New Hampshire v. Maine*, 532 U.S. 742, 755 (2001) (applying judicial estoppel against New Hampshire for advocating inconsistent or contradictory arguments).

The Band's position that Section 18 automatically places in trust any lands acquired by WELSA funds is inconsistent with the fee-to-trust procedure Congress provided for in Section 465, whether the acquisition is treated as discretionary or mandatory in Part 151. As the Supreme Court noted in *Cass County*, a court should avoid rendering Section 465 (or any other act) superfluous by creating alternative routes under which Indian lands are made tax exempt. 524 U.S. at 114-15. It is illogical to argue that Congress intended to bypass this statutorily authorized administrative scheme, without expressly saying so.[12] Hence, until, and unless, the Casino Property is restored to trust status, it is taxable. *See Cass County*, 524 U.S. at 115; *cf.* 2A SUTHERLAND, § 46:5 (court must consider the statute in connection with the "entire legislative scheme of which it is a part.").

The Court should give full effect to both WELSA Section 18 and Part 151. The only way to accomplish this is to hold, as the Supreme Court did in *Cass County*, that "the repurchase of such land by an Indian tribe does not cause the land to reassume tax-exempt status . . . *unless and until* they were restored to federal trust protection. 524 U.S. at 115 (emphasis added). In this case, the land in question has not been placed in trust, therefore, it is not exempt from taxation.

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[12] What is now 25 C.F.R. Part 151 was first adopted in 1980 as 25 C.F.R. Part 120a. *See* 45 Fed. Reg. 62034 (Sept. 18, 1980).

C. The History of Alienability and Taxability of Lands Within the White Earth Reservation Supports the County.

The Band erroneously relies on the legislative history of WELSA to support its argument that WELSA exempts the Band from the imposition of property taxes. Because the language of WELSA does not "clearly manifest" a tax exemption, the Band errs in considering the legislative history at all. Section 18 is not ambiguous, and it is only appropriate to consider legislative history if a statute is ambiguous. *Clark v. Dep't of Agric.*, 537 F.3d 934, 940 (8th Cir. 2008) (judicial inquiry ends if Congressional intent is clear from the statue's plain language). Here, the legislative history contradicts the Band's proffered construction of Section 18.

Courts that have looked at WELSA's history recognize it as a quiet-title act. For example, in *Manypenny v. U.S.*, 948 F.2d 1057 1060 (8th Cir. 1991), the Eighth Circuit reviewed the history leading up to WELSA. In 1889, the Nelson Act, 25 Stat. 642, applied the General Allotment Act of 1887 to the White Earth Reservation. *Id*. Under the Nelson Act, each full or mixed-blood allottee received a trust patent under which the United States would hold the land in trust for twenty-five years before conveying title in fee to the allottee. *Id.* During the trust period, the allotment was tax-exempt and could not be alienated or encumbered without approval of the federal government. *Id.* Approximately 5,000 allotments were issued under the Nelson Act. *Littlewolf v. Lujan*, 877 F.2d 1058, 1060 (D.C. Cir. 1989).

After the Clapp Amendment, which removed restrictions on the sale, encumbrance, and taxation of White Earth reservation land, most reservation land was

transferred to private parties. *Manypenny,* 948 F.2d at 1060-61 (citing Act of June 31, 1906, P.L. No. 258, 34 Stat. at 1034). The Department of Interior accordingly issued fee patents subjecting the land to property taxation and subjecting the property to state probate court jurisdiction. Legal challenges were made to these patents, and half a century later, the Minnesota Supreme Court held that Congress could not unilaterally end the trust state of the allotments given White Earth band members. *State v. Zay Zah*, 255 N.W.2d 580 (Minn. 1977).

In the 1980s, "more than 1700 White Earth allotments were listed" as Indian claims. *Manypenny,* 948 F.2d at 1061. Consequently, "more than 100,000 acres of land in Becker, Clearwater, and Mahnomen counties were clouded because of transfers that, for the most part, had occurred decades ago." *Id.*

It was the uncertainty the Clapp Amendment created that ultimately lead to the problem WELSA was designed to solve. Congress then passed WELSA "[t]o restore some order." *Id.* In fact, the express policy of WELSA is to address outstanding Indian land claims and to "settle unresolved legal uncertainties relating to these claims." WELSA § 2(6); *see also* S. Rep. No. 99-192, at 12 (1985) ("The purpose of [S.1396] is to settle unresolved claims relating to certain allotted Indian lands on the White Earth Reservation, to remove clouds from the titles to certain lands, and for other purposes."). Notably, Congress adopted WELSA "over the objections of the Minnesota Chippewa Tribe and the White Earth Reservation Business Council." *Manypenny,* 948 F.2d at 1062; *see also Littlewolf,* 877 F.2d at 1060-62 (providing additional background).

Congress held hearings on the proposed property settlements twice. *Unresolved Claims on the White Earth Indian Reservation: Hearing Before the Select Comm. on Indian Affairs*, 98th Cong. (Nov. 17, 1983) (hereinafter "1983 Hearing"); *White Earth Land Claims Settlement: Hearing before the Select Committee on Indian Affairs*, 99th Cong. (Sept. 11, 1985) (hereinafter "1985 Hearing"). The first hearing, held in 1983, addressed an early version of WELSA directed only at quieting title. 1983 Hearing at 2-12 (reprinting a copy of S. 885, 98th Cong. (1st Sess. 1983)). Opening statements by Senators Durenberger and Boschwitz were clear: the problem was that title on lands once allotted to members of the Band were unmarketable. *Id*. at 13 (Sen. Durenberger) and 15-16 (Sen. Boschwitz). Indians and non-Indians alike were hurt, since the cloud on titles prevented mortgaging, selling or even insuring affected lands until the title problem was resolved. *Id*. at 13. Sections 12 and 18 were not part of the legislation at this time. *See id*. at 2-12.[13]

The Band was not satisfied with the 1983 version and pressed for economic development funding. *Id*. at 61 (statement by then-Chairman Chip Wadena). By 1985, the Band's position shifted in favor of the legislation. *See* 1985 Hearing at 17-18 (statement of Attorney General Hubert H. Humphrey, III describing negotiations post-1983), 46-47 (reprinting White Earth Reservation Tribal Council Resolution No. 001-85-013). After it was able to negotiate the economic-development fund – now Section 12 –

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[13] The cited provisions of the WELSA legislative history are found at Larson Aff. Ex. 22.

and an additional 10,000 acres from the State of Minnesota, the Band was satisfied with the current draft of WELSA. *Id.* at 46-47. Later, however, the Band rescinded its approval, *id*. at 18, 108-113 (statement by Jerry Rawley hearing opposing S. 1396, 99th Cong. (1st Sess. 1985)), 231-232 (Minnesota Chippewa Tribal Executive Committee Resolution No. 94-85 withdrawing support for WELSA); 131 Cong. Rec. S17587 (Dec. 13, 1985) (statement of Sen. Boschwitz noting that the Band helped write WELSA and endorsed, then withdrew its endorsement), and it was the Band that informed Montana Senator Melcher (whom the Band quotes repeatedly) about its disapproval. 131 Cong. Rec. S17486 (Dec. 12, 1985) (letter of Jerry Rawley to Sen. Melcher confirming the Band's "total opposition" to S. 1396 and asking for support in its "strong opposition"). Senator Melcher's comments were driven by the Band and other interest groups who sent Senator Melcher numerous letters asking for his assistance. *See id*. While Senator Melcher offered amendments to WELSA, the Senate passed WELSA without them. 131 Cong. Rec. S17488 (rejecting Melcher Amendment No. 1414); 131 Cong. Rec. S17592-95 (passing S. 1396, and tabling the remaining Melcher Amendments Nos. 1415 and 1416).

Discussions during floor debates also evidence the Band's dissatisfaction with WELSA because the draft either did not provide any recompense to the Band, or because it provided too little. 1983 Hearing at 60-80; 1985 Hearing at 108-114, 160-167. Others questioned during the hearings whether the Band was entitled to any compensation at all, since the problem was with land titles held by individuals, and did not involve any land that was owned directly by the Band; had the quiet title actions been resolved through

litigation, rather than legislation, the Band would have received nothing since it had no valid claims. *See* 1985 Hearing at 3 (statement by Sen. Boschwitz: "And if litigated, [the Band] would receive nothing in this regard").

Section 18 was never addressed in hearings or floor debate; particularly notable is the absence of the BIA's position on Section 18. *See id*. at 94-99 (section-by-section critique of S. 1396 by the BIA's Minnesota Agency Superintendent). Moreover, with respect to the tax exemption, throughout the hearings no one ever discussed a tax exemption for WELSA-purchased lands. When taxes came up during the hearings, it was the Mahnomen County attorney that expressed concern over the effect that WELSA would have on the County if too much land was placed into trust. 1983 Hearing at 128-132; 1985 Hearing at 117-121. The County's tax base would be decimated. *See id*. Section 18 of WELSA was never amended to include any provision that "clearly manifested" an intent to preclude the imposition of property taxes that the Band held in fee.

While Band errs in relying on legislative history in the first place, that error is compounded by the Band's selective reliance on one dissenting Senator's comments during floor debates, because his comments were made at the Band's instance. WELSA was not passed for the Band's benefit, but to clear title to fee-owned land within the reservation.

D. The BIA Interpretation of WELSA Section 18 is Entitled to No Deference

The proceedings before BIA have included two major flip flops. The Band filed its application to take the Casino Property into trust in 1995 under the discretionary provisions of 25 C.F.R. § 151.10. It was not until 2002 – after the Band hire new counsel – that the Band advanced its present mandatory trust argument. The suggestion that the internal affairs of the Band excuses this reversal is unavailing. The Band presumably had counsel in 1994 or could have hired counsel.

The BIA agreed with the Band's initial approach as well, processing the application as a discretionary application and giving notice to interested stakeholders such as the State and the County. The agency, which has an ample number of attorneys versed with statutory interpretation, did not find Section 18 to be mandatory until years later, at the behest of the Band's new lawyers. It is settled that where an agency reverses course its views, those views are entitled to minimal, if any deference, especially where, as here, no justification is given for the reversal. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 and n.30 (1987). Of course, even less deference is owed because the agency is not advancing its interpretation, but only a party that stands to benefit from the agency's interpretation.

IV. IGRA DOES NOT "CLEARLY MANIFEST" AN EXEMPTION FROM PAYING VALID STATE-IMPOSED PROPERTY TAXES ON FEE-OWNED LANDS

In its complaint the Band alleges IGRA preempts the County from imposing property taxes. Tellingly, that argument is missing from its motion. IGRA is intended to

provide a comprehensive federal regulatory body of law on Indian gaming activities, not exemptions from property taxes. The legislative history of IGRA also confirms that IGRA provides a framework for gaming activities; it does not provide any exemption from property taxes imposed on fee-owned land.

Section 2702 declares IGRA's express policy. 25 U.S.C. § 2702. IGRA exists for three reasons: (1) to organize "gaming by Indian tribes to promote economic development, self-sufficiency, and strong tribal government;" (2) to regulate gaming and preclude organized crime, ensure that Tribes are the beneficiaries of gaming, and promote fair and honest operations; and (3) establish federal regulatory authority, promote federal standards for gaming, and establish a federal commission to oversee the implementation of IGRA. § 2702(1)-(3). Section 2702 provides no indication that IGRA regulates anything but gaming on Indian lands. *See id.*

A. Section 2710(d)(4) Does Not Preclude The County From Collecting And Assessing Property Taxes On The Casino Properties

The Band identifies 25 U.S.C. § 2710(d)(4) as the basis for its claim under IGRA, and claims that section preempts state tax law and prohibits the County from collecting property taxes for the Casino Property. Plaintiffs' Statement of the Case at 4, ¶10 (Docket No. 10, Jan. 23, 2008). Section 2710(d)(4) does not "clearly manifest" such an exemption; it states that IGRA cannot be read as authority for finding the power to tax gaming revenues, and courts have read IGRA consistent with that plain meaning. Section 2710(d)(4) does not precludes counties from assessing and collecting property taxes:

> Except for any assessments that may be agreed to under paragraph (3)(C)(iii) of this subdivision, nothing in this section shall be interpreted as conferring upon a State or any of its political subdivisions authority to impose any tax, fee, charge, or other assessment upon an Indian tribe or upon any other person or entity authorized by an Indian tribe to engage in a class III activity . . . ..

The plain language of Section 2710(d)(4) requires states to negotiate assessments for IGRA-regulated gaming activities, and include them in the tribal-state compact, which the Band and the State of Minnesota did. (Larson Aff. Ex. 21). The paradigm case addressing the plain language of Section 2710(d)(4) is *Cabazon Band of Mission Indians v. Wilson*, 37 F.3d 430, 435 (9th Cir. 1994). In that case, California imposed a license fee on money wagered at off-track racing facilities that the Cabazon Tribe operated. *Id.* at 432–35. The Ninth Circuit held that California could not impose a tax on gaming revenues under section 2710(d)(4), which this is precisely what Section 2710(d)(4) states. *Id*. Recognizing the limitation of the language in Section 2710(d)(4), the court then rejected the tribe's argument that section 2710(d)(4) prohibited the state from taxing proceeds of off-track racing activities. *Id.* at 437. "The Band's reasoning is flawed because it equates the failure to confer the authority to tax with a prohibition to tax. . . . Section (d)(4) is not on its face a prohibition of state taxation." *Id.*

Other courts have addressed Section 2710(d)(4), but none have concluded that Section 2710(d)(4) precludes taxation by a county for property held in fee. In *Dark-Eyes v. Comm'r of Revenue Servs*., 887 A.2d 848 (Conn. 2006), the plaintiff claimed that section 2710(d)(4) preempted Connecticut law and precluded the imposition of income taxes (not real property taxes) on individual tribe members. The Connecticut Supreme

Court rejected this argument based on two "fundamental principles set forth by the United States Supreme Court." *Id.* at 871-72. First, IGRA did not expressly preempt state income taxation even when the funds to be taxed were received by the reservation from gaming activity permitted by IGRA. *Id.* at 872. And second, "in the absence of any express provision indicating such an intent on the part of Congress, Supreme Court case law leads inexorably to the conclusion that the Gaming Act does not preclude the local taxing authority from imposing its income tax on the plaintiffs during the periods when they resided within the state but outside of Indian country." *Id.; see Idaho v. Shoshone-Bannock Tribes,* 465 F.3d 1095 (9th Cir. 2006) (section 2710(d)(4) addresses assessments on gaming revenues); *cf. Jefferson v. Comm'r of Revenue*, 631 N.W.2d 391, 396 (Minn. 2001) (construing section 2710(b)(3)(D)("section 2710(b)(3)(D) does not expressly preempt state taxation of income received by tribal members in the form of per capita payments from reservation gaming activity.").

The Tribe's argument that IGRA preempts state-imposed property taxes of fee-owned land misuses IGRA. In *Cabazon*, the Ninth Circuit concluded that IGRA preempted the state from collection because IGRA prohibited the direct taxation or assessment of gaming revenues. 37 F.3d at 433. But property taxes are different, and as noted in *Yakima*, "[l]iability for the ad valorem tax flows exclusively from ownership of realty on the date of assessment." 502 U.S. at 266; *see also Zay Zah*, 259 N.W.2d at 584 (noting that had the tribe member, Zay Zah, received a fee simple estate, the property would be subject to taxation, with the only exception to taxation of having the land held in trust by the federal government).

B. Legislative History Confirms That No Preemption Of Property Taxes Is Intended Because Of IGRA's Gaming Regulation

The principles in *Cabazon* and *Jefferson*, discussed above, are reflected in the legislative history of IGRA. IGRA was the product of several years of Congressional debate. S. Rep. No. 100-446 at 1, reprinted in 1988 U.S.C.C.A.N. 3701, 3071 (Larson Aff. Ex. 22). Only after several failed attempts to pass comprehensive gaming regulations was Congress able to enact IGRA. *Id.* at 3703. The ultimate congressional purpose to regulating Indian gaming is described in the Senate report: "[IGRA] provides for a system for joint regulation by tribes and the Federal government of class II gaming on Indian lands and a system for compacts between tribes and States for regulation of class III gaming." *Id.* at 3071.

The section-by-section analysis of section 2710(d)(4) echoes this very principle: section 2710(d)(4) does not confer authority to tax or assess Indian tribes. 1988 U.S.C.C.A.N. at 3088. Hence, state authority to tax Indian tribes must be derived from other sources, because IGRA will not suffice. If a state imposes taxes on an Indian tribe based on gaming activities, the assessments or taxes must be negotiated pursuant to subsection (d)(3)(A). Otherwise, the state must derive the power to tax from other congressional authority. In this case, the authority to assess a property tax on the Band land owned in fee derives from the General Allotment Act, the Nelson Act the Supreme Court's interpretation of that Act, and the Clapp Amendment. *See supra* at 14-17.

The text and legislative history of IGRA demonstrate that that statute is only intended to regulate Indian gaming on Indian lands. Considering the legislative history as

a backdrop, the plain text of section 2710(d)(4) demonstrates why the Band's contention that IGRA exempts it from paying property taxes is unpersuasive. Property taxes are an incidence of ownership of real property. *Yakima*, 502 U.S. at 266; *Zay Zah*, 259 N.W.2d at 584 (noting that had the tribe member, Zay Zah, received a fee simple estate, the property would be subject to taxation, unless the land were held in trust by the federal government). No court has ever held that property taxes fall within the scope of section 2710(d)(4).

V. THE DOCTRINES OF LACHES AND ESTOPPEL PRECLUDE THE BAND FROM CLAIMING A REFUND

The Band seeks a refund of all property taxes it has ever paid on the Casino Property, on the basis of the County's supposed unjust enrichment. This claim should be rejected as a matter of law. The Band's claim is simply a disguised tax refund claim. Its 15-year delay in seeking a refund and failure consistently to protest payment preclude it from asserting this claim. Any sense of unjustness also fails because the State afforded the Band a remedy. The justification the Band advances for its claim – the benefits its casino provides – cannot support a finding that the County, which used the proceeds for proper public purposes, many mandated by law, was unjustly enriched. In the end, the remedy the Band seeks is too harsh to be equitable.

Requests for tax relief are subject to equitable defenses. In *City of Sherill v. Oneida Indian Nation of New York*, 544 U.S. 197, 214 (2005), the Supreme Court addressed the Oneida Nation's request for relief from state and local taxes after it purchased parts of its original reservation from private landowners. The Court noted that

it had been nearly two centuries since the Oneida had exercised any sovereign control over the land. *Id*. at 214-15. In the interim, regulatory circumstances and land values had changed dramatically, making the Oneidas attempt to avoid state and local taxation extremely problematic. *Id*. at 218. Because the Oneidas had only recently purchased the land, and because they had not exercised jurisdiction over it for so long, the Court held that laches barred the Oneidas' claim and required them to use procedures Part 151 to return the land to trust status. *Id*. at 220.

Similar equitable considerations should prevail over the Band's claim for a ten-million dollar refund. The record fully supports the application of laches to bar the Band's claims. For years, the Band paid its property taxes. And even if it occasionally made payments under protest, the Band did nothing to seek relief from the allegedly unlawful taxation. Thus, the County and other taxing authorities prepared their annual budgets, relying on the revenue that would be collected from all the taxpayers – including the Band. The County was entitled to a presumption that its taxing authority could be exercised, particularly after that authority was confirmed so clearly in *Cass County*.

The Band's newly minted interpretation of WELSA cannot excuse its delay in seeking a refund, for such amounts to a claimed mistake of law. "A 'mistake of law' means a mistake as to the legal consequences of an assumed set of facts." RESTATEMENT (FIRST) OF RESTITUTION § 7 (1937). "It is correct as a general proposition to say that relief will not be granted against a mistake of law." *Conway v. Town of Grand Chute*, 162 Wis. 172, 174 (1916). Here, the Band's delayed construction of WELSA must be categorized as a mistake of law. *See New Jersey Hospital v. Fishman*, 661 A.2d 842, 849

(N.J. App. 1995) (payment of taxes under misinterpretation of statute is a mistake of law).

The Band waited 15 years before filing a petition under Minn. Stat. ch. 278, the correct means to challenge an allegedly unlawful tax. *Allright Parking Minnesota, Inc. v. County of Ramsey*, No. C2-01-4979, 2002 WL 549082, at *4 (Minn. Tax Ct. March 27, 2002). The Band was certainly aware that the Casino Property needed to be formally taken into trust *before* the tax exemption would attach. The Band admits, however, that despite the "need for speed" it did not "aggressively pursue" the trust application. (Compl. ¶ 12.) Here, assuming that the Band is even entitled to a refund, permitting the Band to reach back 17 years to assert its alleged rights under WELSA or IGRA would be unconscionable. The trust application was not final until nearly ten years after the Band's claim that it needed trust status to avoid taxes on the casino property. During this time the Band placed mortgages on its property that contractually required the Band to remain current on its property taxes. *E.g.*, Larson Aff. Ex. 12 (Art. 1.10). In other words, the Band had promised its lenders to remain current on its taxes. Moreover, the land could not be taken into trust until those mortgages were satisfied – the last of which was released in 2005. This is patently inconsistent conduct. Estoppel prevents a party from "taking unconscionable advantage of his own wrong by asserting his strict legal rights." *N. Petrochemical Co. v. U.S. Fire Ins. Co.*, 277 N.W.2d 408, 410 (Minn. 1979).

Moreover, despite the presence of an adequate state remedy in Chapter 278, the Band waited until the County notified it that its payments for taxable year 2006 were delinquent. The Band could have brought a Chapter 278 petition at any time prior to the

County's February 26, 2007 notice of delinquency. By that point, the County and other taxing authorities had already planned their budgets, submitted and certified the levy amounts to the tax assessor, and had budgeted for the revenue that would be collected from the Band to be distributed to the State, County, townships, city, and school district.

VI. THE VOLUNTARY PAYMENT DOCTRINE PRECLUDES RECOVERY

The voluntary payment doctrine places upon a party who wishes to challenge the validity of legality of a bill for payment the obligation to make the challenge either before voluntarily making payment, or at the time of voluntarily making payment. *See* 66 AM.JUR.2D, *Restitution and Implied Contracts* § 108 (2001) ("The rule is well settled that a person cannot recover money that he or she has voluntarily paid with full knowledge of all of the facts and without fraud, duress, or extortion in some form, and that no action will lie to recover the voluntary payment."); RESTATEMENT (FIRST) OF RESTITUTION § 112. The voluntary-payment doctrine "may seem counterintuitive," but it promotes the orderly conduct of taxing authorities' financial affairs and security and discourages litigation. *See Dallas County Cmty. Coll. Dist. v. Bolton* 185 S.W.3d 868, 876-77 (Tex. 2005); *Sullivan v. Bd. of Comm'rs of Oak Lawn Park Dist.*, 743 N.E.2d 1057, 106, (Ill. App. Ct. 2001) (to avoid the voluntary-payment doctrine, taxpayers may challenge taxes before or when they come due, and that process protects "the rights of the taxpayer" and ensures that "the government is not impaired by protracted delays in the collection of taxes necessary for the operation of governmental units"). The doctrine has long been recognized in the federal system. *E.g.*, *R.R. Co. v. Comm'rs*, 98 U.S. 541, 544 (1878)

(merely making a written protest at time of payment does not make payment involuntary).

The voluntary payment doctrine allows entities that receive payment for services to rely upon those funds and to use them unfettered in future activities. *See Heileman Brewing Co. v. City of La Crosse*, 312 N.W.2d 875, 880 (Wis. 1981). Forcing state and local municipalities to refund a taxpayer's taxes over 15 years after payment was made and long after the tax benefits have been enjoyed would injure municipalities. As the court aptly stated in *Heileman*:

> The requirement of resistance or involuntary payment of a tax is one of public policy; government has an interest in allocating its resources. It is desirable that government know when it contemplates spending public funds that those funds are either available or subject to loss through tax refund. The requirement that one who seeks repayment of illegally assessed taxes notify the governmental unit that he want them returned is not onerous. The inequity of paying illegally collected taxes is outweighed by the requirement that government know what amount of income it has available.

Id. at 880. *Id*. at 479-80; *accord Cmty. Federal Sav. & Loan Ass'n v. Dir. of Revenue*, 796 S.W.2d 883, 886 (Mo. 1990) (government entitled "to presume the constitutionality of its taxing statutes and to plan its budgets accordingly").

Here, the Band paid its taxes voluntarily for years, only sporadically noting that various payments were made under protest, but not others. *See supra* at 8-10; Lundon Aff. ¶¶ 4-6. There is marked absence that property taxes were involuntarily paid in 1993, 1994, parts of 1995-1998, 1999, parts of 2000-2001, in 2002-2003, and parts of 2004-2005. (*Id*.) Moreover, the Band did not seek a judicial resolution of this issue until 2006

– 15 years after they purchased the Casino Properties. In the absence of any record evidence that property taxes paid in those years were consistently paid under protest, the Band's refund claim should be denied.

VII. THE BAND HAS NO JUSTIFICATION TO CLAIM A TAX REFUND.

Unjust enrichment prevents a party from the wrongfully benefiting "from fraud, mistake or moral wrongdoing against" another. *Meyer v. Dygert*, 156 F. Supp. 2d 1081, 1089 (D. Minn. 2001) (citing *Fort Dodd P'ship v. Trooien,* 392 N.W.2d 46, 48-49 (Minn. Ct. App. 1986); *see also* RESTATEMENT (FIRST) OF RESTITUTION § 1 ("A person who has been unjustly enriched at the expense of another is required to make restitution to the other."). The Band must show that the County has "knowingly received or obtained something of value for which the [County] 'in equity and good conscience' should [re]pay." *ServiceMaster of St. Cloud v. GAB Bus. Servs., Inc.*, 544 N.W.2d 302, 306 (Minn. 1996); *see also Iowa Network Servs., Inc. v. Qwest Corp.*, 363 F.3d 683, 694 (8th Cir. 2004).

The Band has no factual basis for its claim that the County has been unjustly enriched. When asked to explain why the County had been unjustly enriched, Ronald Valiant, Band Executive Director and Rule 30(b)(6) witness for the Band said:

> Q. And do you believe it would be unjust for Mahnomen County to collect property taxes from the casino to use to pay for services that might go to Band members?
>
> A. Yes, I do.
>
> Q. And why is that?
>
> A. Because I feel that between the reservation RTC, our over 500 members, we spent almost 40 million or – yeah, 20

> million dollars in salaries, that's 40 million dollars of salaries going back into this county. There's a lot of taxes taken off that. It helps the people where there's health benefits. And I'm very familiar with our roads department, what we do for the roads, what our police force does, and I would match the County for what we provide for the County in that, too, so I do not believe that the taxes they're taking off the casino is just.
>
> Q. (BY MR. KNUDSON) Do you believe it's unjust to use some of the tax revenues from the casino to benefit Band members as part of providing county services to them?
>
> A. I believe the benefits coming off the casino outweigh that, yeah.

Larson Aff. Ex. 1 at 30-31. This concocted justification does not establish there were any benefits the County unjustly received. The Band's position is simply that the taxes were unfair because the County did not give the Band any offset for the economic benefits the casino provided, benefits Valiant could not identify or calculate. In any case, that is a claim many employers would make, but hardly qualifies as an unjust enrichment. *see Oklahoma Tax Comm'n v. United States*, 319 U.S. 598, 608-09 (1943) ("If some pay less, others must pay more.").

The harm to the County is now exponentially greater because of the nature of the Band's refund claim. It would be unconscionable to permit the Band to pursue an unjust enrichment claim against the County when it was the Band made no attempt to timely challenge the legality of the property taxes that the County assessed and collected under state law even though the Band had planned for ten years to avoid having the Casino Property taxed. The County used those revenues to provide essential governmental services to all County residents, including Band members and patrons of the Band's

casino. Many of these expenditures were mandated by law. Without those revenues services would have been cut back. Thompson Aff., ¶¶ 6-7. In no sense was the County unjustly enriched.

Simply put, the Band's own actions obviate its claim for unjust enrichment; the Band should be estopped from pursuing this claim against the County.

CONCLUSION

The Supreme Court requires that an exemption from paying property taxes be "clearly manifested" by Congress. WELSA and IGRA contain no language that "clearly manifests" Congressional intent to exempt the Band from paying property taxes on land that they still own in fee. The Band's arguments on WELSA cannot circumvent the bright-line rule, and the Band, therefore, cannot prevail on its claim for a declaration that WELSA exempts them from paying property taxes.

The Band fails to address IGRA, but there too, summary judgment in favor of the County is warranted because IGRA only addresses the regulation of Indian Gaming. The Band cannot point to any section of IGRA that "clearly manifests" an intent to prevent the County from assessing and collecting property taxes.

Finally, the Band's unjust enrichment claim must also be rejected. For fifteen years, the Band has completely neglected to seek a refund for the taxes it claims are unlawful; laches and estoppel prevent them from doing so now. The Band also voluntarily paid its property taxes so the voluntary-payment doctrine bars the Band's refund claim. And in any event, the Band has admitted that the County was not "unjustly" enriched because it assessed and collected property taxes from the Band.

As a matter of law, the Court should grant judgment for the County and dismiss the First Amended Complaint with prejudice.

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