No. 09-1946

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ROBERT C. GENSCHOW, SR.,
Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

BRIEF FOR APPELLEE UNITED STATES OF AMERICA

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STATEMENT REGARDING ORAL ARGUMENT

The Government requests oral argument to respond to any issues raised by Defendant in his oral argument, and to answer any questions that the Court may have.

ISSUES PRESENTED

I. Did the district court err by denying Defendant's motion to dismiss the indictment?

II. Did the district court abuse its discretion by determining that Defendant did not demonstrate acceptance of responsibility under the guidelines where Defendant denied specific intent to commit the offense?

III. Did the district court abuse its discretion by ordering restitution based on the cost of restoring tribal trust land used for hunting and gathering to its condition prior to the time Defendant clear-cut and began construction on the land?

STATEMENT OF THE CASE

On April 22, 2008, a grand jury for the Western District of Michigan returned a federal indictment charging Defendant-Appellant Robert C. Genschow, Sr. (hereinafter "Defendant") with unlawfully cutting and injuring trees, in violation of 18 U.S.C. § 1853; and theft from a tribal organization, in violation of 18 U.S.C. § 1163. (R.1: Indictment.)

On August 25, 2008, Defendant filed a motion to dismiss the indictment for lack of jurisdiction. (R.20: Motion to Dismiss; R.21: Brief in Support.) The government filed a response, and the district court heard the motion on November 3, 2008. (R.25: Government's Response.) On November 14, 2008, the district court issued an order and opinion denying Defendant's motion to dismiss. (R.29: Opinion; R.30: Order.)

Defendant filed an interlocutory appeal challenging the district court's order denying his motion to dismiss. (R.51: Notice of Appeal (Interlocutory).) This Court dismissed the appeal for lack of jurisdiction on January 23, 2009. (R. 52: Order of USCA.)

Following a two-day bench trial, the district court found Defendant guilty of both charges on March 24, 2009. (R.69: Verdict; R.72: Trial Transcript ("TR") at 178, 186.) On July 6, 2009, the court sentenced Defendant to ten months'

imprisonment and ordered him to pay $47,200 in restitution. (R.77: Judgment; R.83: Sentencing Transcript ("STR") at 54.)

Defendant filed a timely notice of appeal on July 15, 2009. (R.79: Notice of Appeal.)

STATEMENT OF THE FACTS

The Keweenaw Bay Indian Community ("KBIC") is a federally recognized tribe with reservation and trust lands located throughout several counties in Michigan's Upper Peninsula. (Dale Goodreau, TR at 13; Susan LaFernier, TR at 47, 52-53.) The tribe's holdings include a tract of unpopulated land in Ontonagon County used for hunting and fishing, commonly known as the Ontonagon Reservation. (Dale Dakota, TR at 4; Lafernier, TR at 53; Jason Ayres, TR at 86; R.32: Exhibit A, 10/2/07 LaFernier Ltr.) In late September of 2007, a concerned KBIC member contacted tribal authorities to alert them that construction was taking place on the Ontonagon Reservation. (Goodreau, TR at 16; Ayres, TR at 90.)

On September 25, 2007, Officer Dale Goodreau of the KBIC police department traveled to the Ontonagon Reservation and saw that approximately five acres of trees had been clear-cut, and the topsoil stripped away. (Goodreau, TR at 14.) Stakes had been placed in the ground, suggesting that someone planned to build on the site. (Goodreau, TR at 16.) Officer Goodreau alerted KBIC's realty officer and Tribal President to the trespass, who in turn informed the Bureau of Indian Affairs ("BIA"). (Goodreau, TR at 16-17.) Goodreau returned to the area every day over the next three days. (Goodreau, TR at 17-18.)

On returning to the property, Officer Goodreau encountered two loggers, and learned that Defendant had employed a logging company to cut timber on the land. (Goodreau, TR at 17.) Officer Goodreau later encountered Defendant at the clearing, accompanied by more workers. (Goodreau, TR at 18.) Officer Goodreau asked Defendant, whom he had known for several years as a fellow KBIC member, what he was building. (Goodreau, TR at 19-20.) Defendant responded that he was building a tribal office for his tribe as well as personal living quarters. (Goodreau, TR at 19.) When asked what tribe he was referring to, Defendant replied the Ontonagon Band, and claimed that he was working with Carl Levin to get the tribe federally recognized. (Goodreau, TR at 19.) Officer Goodreau instructed Defendant to leave the property by order of the BIA and KBIC tribal council, and, with KBIC tribal council's permission, installed a locked gate at the entrance. (Goodreau, TR at 20.)

KBIC's current vice-president and then-President, Susan LaFernier, wrote to the BIA informing it that the tribe had not authorized any cutting of timber on the Ontonagon Reservation, and requesting that the agency investigate the incident. (LaFernier, TR at 59; R.32: Exhibit A.) BIA Criminal Investigator Levi Carrick interviewed Defendant on October 3, 2009. (Levi Carrick, TR at 93.) Defendant admitted that he had hired a logging company to cut timber and to clear-cut several

acres on the Ontonagon Reservation, where he planned to build a tribal center and living quarters for himself. (Carrick, TR at 93-94.) He claimed he had authority to do so as "Chief Lonewolf," tribal chief of the Ontonagon Band, with ultimate authority over the land. (Carrick, TR at 94-95, 97.) Defendant contended that although he was an enrolled member of KBIC, he was working on getting his tribe federally recognized, and he planned to disenroll in KBIC once the Ontonagon Band gained recognition. (Carrick, TR at 96-97.) Defendant claimed to have spoken about his plans with some KBIC council members, but admitted he did not "out and out" ask permission from KBIC to cut timber on the Ontonagon Reservation. (Carrick, TR at 94-95.) Defendant further claimed that he had a letter from a former KBIC tribal chairman which stated that the Ontonagon Band is a separate entity from KBIC, but he was holding the letter for another day when he needed it. (Carrick, TR at 95.) Defendant told Officer Carrick that he wanted his day in court. (Carrick, TR at 101.)

Defendant was indicted for unlawfully cutting and damaging trees on lands belonging to an Indian tribe, and theft of tribal property. (R.1: Indictment.) Specifically, the indictment charged that "in Ontonagon County, in the Western District of Michigan, Northern Division, that is, at W1/2, NW 1/4 of Sec. 26, T53N, R38W, also known as the Ontonagon Reservation, Ontonagon, Michigan,

which lands are held in trust by the United States for the Keweenaw Bay Indian Community," Defendant caused "trees growing, standing, or being upon an Indian reservation, or lands belonging to or occupied by the Keweenaw Bay Indian Community under the authority of the United States" to be unlawfully cut. (R.1: Indictment at 1.) The indictment further alleged in Count Two that Defendant "did embezzle, steal, knowingly convert to his own use or the use of another, and willfully misapplied property of an Indian tribe" when he hired a logging company to remove logs from "the lands known as the Ontonagon Reservation, which are held in trust by the United States for the use and occupancy of the Keweenaw Bay Indian Community, which agreement was not authorized or approved by the tribal government." (R.1: Indictment at 2.)

Defendant moved to dismiss the indictment as defective on the ground that the lands at issue were not part of the KBIC reservation, but belonged instead to the successors of the Ontonagon Band, and that this alleged deficiency in the indictment deprived the district court of jurisdiction over the case. (R.20: Motion to Dismiss.)

History of the Ontonagon Reservation and Parcel at Issue

In 1854, the United States entered into a treaty with the Chippewa Indians. (R.45: Exhibit N, Treaty with the Chippewa, 1854, 10 Stat. 1109.) Under the

treaty, the Lake Superior Chippewa Indians ceded certain lands in exchange for lands held apart by the federal government for three separate and distinct bands of Lake Superior Chippewas: the L'Anse, Vieux Desert, and Ontonagon Bands. (R.45: Exh. N, Treaty with the Chippewa, 1854, 10 Stat. 1109, Art. 2, 1st, 6th.) One year later, the Ontonagon Reserve was created by executive order. (R.50: Exhibit S, Executive Order Establishing Ontonagon Reservation.)

Portions of the reserve were subsequently allotted to members of the Ontonagon Band, including the parcel of land at issue in this case: the W1/2 of the NW 1/4 of Section 26, Township 53 North, Range 38 West, which was patented to one Antoine Jocco (also known as Menogezhich or Me no ge zhick) in 1875. (R.39: Exhibit H, Deed.) On March 15, 1912, however, Mr. Jocco relinquished the allotment because he had received another allotment of land within the Bad River Reservation in Wisconsin. (R.40: Exhibit I, Affid. of Antoine Jocco.) The Secretary of the Interior accepted Mr. Jocco's relinquishment, and ordered his allotment cancelled on July 12, 1912. (R.39: Exhibit H, Deed; R.41: Exhibit J, Title Status Report.)

In 1935, the L'Anse, Lac Vieux Desert, and Ontonagon Bands of Chippewa Indians entered into discussions with the Department of the Interior regarding their intent to officially organize and be recognized as a single tribe, KBIC, pursuant to

Section 16 of Indian Reorganization Act of 1934 ("IRA"), 25 U.S.C. § 476. (R.29: Opinion at 2.) In correspondence dated December 2, 1935, from Peru Farver, a DOI Field Agent, to J. C. Cavill, Chairman of the KBIC Constitution Committee, Mr. Farver observed that the Ontonagon Band was included in the proposed KBIC "because the Ontonagon Reservation no longer exists":

> There are only a few scattered pieces of Indian land left within the confines of the original reservation, and it is understood only one Indian family resides there. Most of the Ontonagon band now being located at L'Anse, and affiliated with the L'Anse people.

(R.35: Exhibit D, 12/2/1935 Farver Ltr.) Mr. Farver also noted that "[i]t is satisfactory with the L'Anse Indians that the Ontonagon Band be included in their organization which appears to be a happy solution for this band." (Id.)

On December 9, 1935, Government Field Clerk E.J. Warren sent a letter to Cavill describing the status of the Ontonagon Reservation as follows:

> [W]hile the Ontonagon Reservation has always been spoken of and designated as a separate reservation the fact is the only thing that ever really took place on the Ontonagon reservation was the allotting of land in severalty to certain Indians – those living on the territory. No village or reservation was ever established at that point in recent years. Most of the lands were sold, and today only a few of the original allotments, inherited land, are still intact and unsold. No Indians now reside upon the Ontonagon Reservation and only one or two reside in that section of the country.

(R.36: Exhibit E, 12/9/1935 Warren Ltr., Incorporated into 12/23/1935 Westwood Memo.)

On June 15, 1936, William Zimmerman, Assistant Commissioner of Indian Affairs, sent a letter advising Cavill that Article I of the draft KBIC Constitution, describing KBIC's proposed territorial jurisdiction, should omit the words "and to any restricted land remaining on the Ont[o]nagon Reservation" because "it appears that all of the Indians of the Ont[o]nagon Band actually live on the L'Anse Reservation." (R.37: Exhibit F, 6/15/36 Zimmerman Ltr. ¶ 2.)

> While there are a number of members of the Ont[o]nagon Band who have allotments on the Ont[o]nagon Reservation it is not believed that the tribe could legally exercise jurisdiction over such land. Where several tribes are organizing to form one tribal body it is provided by the Reorganization Act that such tribes must reside on one reservation. The allotted lands of the Ont[o]nagon Indians could be made subject to the jurisdiction of the Keweenaw Bay Indian Community if the individual owners, with the consent of the Secretary of the Interior, were to convey them to the Keweenaw Bay Indian Community in accordance with the provisions of section 4 of the Indian Reorganization Act. . . . The omission of reference to the restricted land remaining on the Ont[o]nagon Reservation should not be interpreted as preventing the Community from subsequently acquiring jurisdiction over such land.

(Id. ¶ 2.) Zimmerman also indicated that the word "Ontonagon" should be omitted from Article VII section 1 because "the community has jurisdiction only over the lands included within the L'Anse Reservation." (Id. ¶ 15.)

The Constitution of the KBIC was adopted in December 1936. (R.34: Exhibit C: KBIC Const.) The preamble to the Constitution provides in part:

> We, the L'Anse, Lac Vieux Desert and Ontonagon Bands of Chippewa Indians residing within the original confines of the L'Anse Reservation,

> . . . . do ordain and establish this Constitution and By-laws for our community which shall be known as the Keweenaw Bay Indian Community.

(Id., Preamble.) Article I of the KBIC Constitution provides that "[t]he territorial jurisdiction of this Constitution shall embrace the land within the original boundary lines of the L'Anse Reservation . . . and any and all future additions of land acquired within or without said boundary line by the Secretary of the Interior or by the Tribe . . . ." (Id., art. I.) Article II provides that the membership of the KBIC consists of "[t]he bona fide enrolled members of the L'Anse, Lac Vieux Desert and Ontonagon Bands of Chippewa Indians as shown on any of the allotment rolls of the L'Anse, Lac Vieux Desert, and Ontonagon Reservations, and their descendants who were residing within the limits of the L'Anse Reservation of June 1, 1934." (Id., art. II, § 1(a).) Article VII provides that tribal lands include "[t]he unalloted lands of the Community and all lands which may hereafter be acquired by the Community or by the United States in trust for the Community shall be held as tribal lands . . . ." (Id., art. VII,§ 2.)

In 1971, the Acting Area director of the Great Lakes Region of the Bureau of Indian Affairs ("BIA"), sent a memorandum to the Superintendent of the Great Lakes Agency regarding the status of tribal land on the Ontonagon Reservation that had reverted to tribal ownership after allotments were cancelled. (R.48: Exhbit Q,

6/22/1971 Memo.) The Acting Area Director opined that it appeared to him that the 160 acres of tribal land remaining in trust on the Ontonagon Reservation "is not a part of or within the jurisdiction of the Keweenaw Bay Community. It is in effect an unorganized tribe but independent from all other existing groups." (Id.) However, he requested input from the Superintendent on the issue and requested verification of the title status of this property from the Titles and Records Section. (Id.)

On July 21, 1971, the Titles and Records Section of the BIA issued a Title Status Report indicating that the Property was held under the jurisdiction of the BIA in trust for the Ontonagon Band of Chippewa Indians. (R.41: Exhbit J, Title Status Report.) Although the Title Status Report indicates tribal ownership in the name of the Ontonagon Band, it assigns the Property a Reservation Code of 476, which is the tribal code for "Ontonagon, Keweenaw Bay." (R.42: Exhibit K, Code of Tribes and Land Units.)

In 1975, heirs of an Ontonagon Band member who claimed an interest in his allotment on the Ontonagon Reservation, sought information from the BIA on how to organize the Ontonagon Band of Chippewa Indians. (R.43: Exhibit L, 12/5/75 Chosa Tilden Ltr.) The BIA responded that "[t]he only Ontonagon Band of which we are aware is organized together with the L'Anse and Lac Vieux Desert Bands to

make up the Keweenaw Bay Indian Community." (R.44: Exhibit M, 1/9/76 Pennington Ltr.)

On January 28, 1992, DOI Field Solicitor Mark Anderson issued an opinion concluding that the public domain allotments within the Ontonagon reservation were not subject to the jurisdiction of the KBIC because the KBIC Constitution limits the exercise of tribal power to the L'Anse reservation boundaries and any and all future additions of land acquired by the Secretary of the Interior or the tribe. (R.47: Exhibit P, 1/28/92 Anderson Ltr.) According to Field Soliciter Anderson, the land at issue was not acquired after the adoption of the KBIC constitution. (Id.)

On July 2, 2004, in response to an inquiry as to who had authority to approve a lease on the Ontonagon Reservation, DOI Field Solicitor Priscilla A. Wilfahrt noted that the title status report indicated that title is held by the United States in trust for the Ontonagon Band, but that the Ontonagon Band was not named on the list of recognized tribes. (R.33: Exhibit B, 7/2/04 Wilfahrt Ltr., citing 68 Fed. Reg. 68180 (December 5, 2003).) Acknowledging that she had no explanation for why the report indicated the property was held in trust for the Ontonagon Band when it was no longer in existence, Ms. Wilfahrt wrote:

> Denomination of title in this fashion created the legal anomaly that the United States purported to hold land in trust for a nonexistent entity, with

> the equally anomalous result that no one could use or benefit from the trust. To avoid such a ridiculous result it is reasonable to assume that the successor in interest to the Ontonagon Band was the intended beneficiary of the trust.

(Id. at 2, n. 1.)

Ms. Wilfahrt concluded that because the Ontonagon Band of Indians voted to organize with the L'Anse Chippewa Indians to form the Keweenaw Bay Indian Community, "the property held for the Ontonagon Band, since it no longer exists, should be deemed to be held by the Keweenaw Bay Indian Community." (Id. at 1.) Ms. Wilfahrt added that the January 28, 1992, opinion from the Solicitor's office did not bar KBIC from exercising control over the property because

> [T]he Keweenaw Bay Indian Community acting in a proprietary capacity could execute a lease for this property whether or not it may exercise regulatory jurisdiction over the property. As the successor in interest to the property of the Ontonagon Band [the KBIC] has the rights of any property owner to manage and control the use of its property. These rights are independent of its regulatory authority as a sovereign entity.

(Id.)

On May 28, 2008, BIA Realty Officer Esther M. Thompson issued a certification regarding the Property, stating:

> Said parcel was initially held in the name of the Ontonagon Band of Chippewa Indians pursuant to the Treaty with the Chippewa, 1854. Parcel was allotted to Me No ge zhick (aka: Antoine Jocco) via restricted fee patent, dated July 19, 1875. Said allotment was cancelled July 12, 1912 due to the allottee receiving a second allotment in Wisconsin. Ownership of the allotment then reverted to the "Ontonagon Band"

> which is now under the jurisdiction of the Keweenaw Bay Indian Community per Field Solicitor's Opinion dated July 2, 2004.

(R.46: Exhibit O, 5/28/08 Certification.)

Denial of Defendant's Motion to Dismiss the Indictment

In support of his motion to dismiss the indictment, Defendant conceded there was "no question" that the land at issue was held in trust by the government for an Indian community. (R.82: Transcript of Motion Hrg. "MTR" at 13.) Defendant claimed the indictment was nevertheless defective because it alleged that the property at issue was held in trust for KBIC when, according to Defendant, it belongs to the present-day Ontonagon Band, which is made up of the descendants of the members of the Ontonagon Band of Chippewa Indians who did not vote to merge into KBIC. (R.20: Motion.) Defendant further contended that this alleged defect deprived the district court of jurisdiction over the matter, requiring dismissal. (R.20: Motion at 8.) The parties submitted a joint appendix consisting of nineteen historical documents relating to the property, including those described above.

After reviewing the documents and hearing oral argument, the court denied Defendant's motion. (R.30: Order.) The court explained in a written opinion that even if, under their constitution, KBIC lacked regulatory jurisdiction over the Ontonagon property, there was "no dispute that the federal government retains the

fee title to reservation lands and that it holds the property in trust for the benefit of the tribe." (R.29: Opinion at 10.) Because the statutes Defendant was charged with violating "recognize and reflect the government's fiduciary duty to protect trust lands and resources," and apply to "any Indian reservation, or lands belonging to or occupied by any tribe of Indians under the authority of the United States" (18 U.S.C. § 1853), and property belonging to "any Indian tribal organization" (18 U.S.C. § 1163), the court found that there was no dispute that the government had jurisdiction to prosecute the crimes. (Id. at 10.)

The court also rejected Defendant's claim that the indictment was defective because the property did not belong to KBIC, but to him, as a descendant of a member of the Ontonagon Band who did not vote to become a KBIC member, and as chief of the present day Ontonagon Band. (Id. at 10-11.) The court found the historical evidence to establish that as of 1935, only one or two families resided on the Ontonagon Reservation, and most of the Ontonagon Band lived on the L'Anse reservation and were affiliated with the L'Anse tribe. (Id. at 11.) Recognizing that tribal property interests belong to the tribe as a community or political body rather than to individual members, the court held that when the majority of the Ontonagon Band voted to merge into KBIC, the government's fiduciary duty to protect the Ontonagon Reservation stayed with the political body of the Ontonagon

Band, and "the tribal property interests of the Ontonagon Band became the property interests of the KBIC as successors in interest to the Ontonagon Band." (Id. at 11-12.)

The court acknowledged that while some members of the Ontonagon Band did not vote to consolidate, neither those members nor their descendants had ever obtained federal recognition as a separate tribal entity. (Id. at 11.) Because "acknowledgment of tribal existence by the Department is a prerequisite to the protection, services, and benefits of the Federal government available to Indian tribes by virtue of their status as tribes," and because the government has not recognized any group other than the KBIC as the present day Ontonagon Band, the court concluded that records indicating that the property is held in trust for the "Ontonagon Band" must be understood to mean that the government holds the property in trust for KBIC. (Id. at 12-13.)

The Trial

On March 23, 2009, Defendant waived his right to be tried by a jury and elected a bench trial. (TR at 4.) At trial, the government presented evidence establishing that Defendant hired a logging and construction company to cut timber and strip topsoil on lands held in trust for KBIC without seeking or obtaining permission from KBIC, or following BIA regulations. The government also

demonstrated that Defendant was an enrolled and registered voting member of KBIC, who collected annual benefits and emergency assistance from the tribe. (Misegan, TR at 76-77.) Every year between 1998 and 2005, Defendant had campaigned, though unsuccessfully, for election to the KBIC tribal council. (Diana Chaudier, TR at 84.) Several fellow KBIC members testified that, although they had known Defendant for years, they had never heard him refer to himself as "Lonewolf" or "Chief Lonewolf" until after the clear-cutting incident. (Goodreau, TR at 20; Dakota, TR at 42; LaFernier, TR at 61; Misegan, TR at 77, 78.) [1]

Defendant testified. He admitted to cutting the timber, but claimed that he had authority to do so because, according to his research, including the 1971 BIA memorandum and 1992 DOI opinion letter, the property at issue belonged to the Ontonagon Band of Chippewa Indians, of whom he was chief. (Robert Genschow, TR at 134-36.) Defendant testified that he was a descendant of several members of

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[1] Dale Goodreau of the KBIC police department, who knew Defendant for five to seven years, never heard him called Lonewolf until after the incident. (Goodreau, TR at 20.) Defendant's cousin, Dale Dakota, first heard Defendant call himself Chief Lonewolf while bowling with Defendant after the incident. (Dakota, TR at 42.) Susan LaFernier, KBIC Vice-President and former President, had never heard Defendant call himself Lonewolf, or heard of another tribe calling themselves the Ontonagon Band. (LaFernier, TR at 61.) Jennifer Misegan, KBIC enrollment director, never heard Defendant call himself "Chief Lonewolf." (Misegan, TR at 77.) He first told her his Indian name was "Lonewolf" at the tribe's licensing office after the cutting was discovered. (Misegan, TR at 77.)

the original Ontonagon Band of Chippewa Indians who had not voted to merge into KBIC in 1936. (Genschow, TR at 105-06.) He contended that thereafter, descendants of members of the band who refused to reorganize under the IRA continued to exist as an independent tribe. (Genschow, TR at 122,126-130.) According to Defendant, he was selected to be their next tribal chief as a baby, and officially appointed successor to the chieftainship at the age of 13. (Genschow, TR at 128.)

Defendant testified that by the 1970's, the band consisted of roughly 100 members. (Genschow, TR at 130.) They began the process of becoming a recognized tribe by drafting a proposed constitution. (Genschow, TR at 130.) It was not until 1997, however, that a proposed constitution was finally approved by all living tribal members. (Genschow, TR at 130, 132.) By that time, Defendant testified, many members had died, and many more have died since then. (Genschow, TR at 132.) Defense counsel introduced a document titled "Constitution of the Ontonagon Band of Chippewa Indians," which, Defendant testified, was signed by two members of the Ontonagon Band: himself and Mike Chosa. (Genschow, TR at 131, 133.)

When asked on cross-examination why only Defendant's signature appeared on the document (Chosa's name had been added in printed characters), Defendant

responded that the document was only a copy; that the original constitution had been lost in a fire, along with records of the vote to approve the constitution. (Genschow, TR at 148.) Defendant named several people who had helped him draft the constitution, however they were all dead, and none of the drafts had been retained. (Genschow, TR at 132, 147-48.) Although Defendant had lost track of some members who had moved away and could still be alive, as far as he knew, he was currently the sole surviving member of the Ontonagon Band. (Genschow, TR at 148.) Defendant did not produce any other individual claiming to be an Ontonagon Band member to testify on his behalf or on behalf of the continued existence of the Ontonagon Band.

On rendering its verdict, the court found that Defendant had admitted to cutting trees on the Ontonagon Reservation without the permission of KBIC, and that the government had established that the lands were held in trust for the benefit of KBIC. (TR at 177-78.) Accordingly, the court found Defendant guilty of unlawfully cutting timber on lands held in trust for an Indian tribe, as charged in Count 1. (TR at 178.) As to the theft of tribal property charge – which, unlike Count 1, contains a specific intent element – the district court found that Defendant's testimony in support of his defense of good faith "stretche[d] credulity." (TR at 180-81.) In the court's opinion, Defendant had arrived at the

conclusion that he had authority to cut timber on KBIC lands by selecting information he chose to believe and completely ignoring evidence to the contrary. (TR at 181.) Defendant's testimony established that he was clearly aware of the BIA's federal recognition process because he had attempted to gain federal recognition. (TR at 182-83.) Nevertheless, on failing to obtain federal recognition, Defendant proceeded to operate "outside of the law that he knew and should have known to be the law." (TR at 182-83.)

The court also found Defendant's account of the continued existence of the Ontonagon Band and his status as tribal chief to be "puzzling." (TR at 183.) The Court noted that while Defendant claimed the Ontonagon Band had once consisted of approximately 100 members, Defendant was now "virtually the only living member." (TR at 184.) Further, Defendant presented no evidence to support his claim that the purported tribe spent 20 years developing a constitution, other than the assertion that all of the paperwork had been lost in a fire. (TR at 184.) The court also observed that Defendant's claim to be chief for life, and largely unaccountable to tribal members, ran contrary to BIA requirements and the law – a fact Defendant was familiar with, having long participated in the KBIC tribal government. (TR at 184-185.) The court also found it telling that Defendant's acts were undertaken in his own name and served his self interest. (TR at 185.)

Because Defendant had "ignored the obvious in exchange for the world in which he's not accountable to anyone," the court concluded that Defendant's actions did not evidence a good faith belief in his right to use the property. (TR at 185.) Thus, the court found beyond a reasonable doubt that Defendant had the specific intent to take property of another, being KBIC, and that Defendant was guilty of theft of tribal property as charged in Count 2. (TR at 185-86.)

Sentencing

Prior to sentencing, the President of KBIC's tribal council, Warren C. Swartz, Jr., submitted a victim-impact statement to the United States Probation Office on behalf of the tribe. (See Addendum: 7/1/09 Swartz Ltr.) The letter was provided to the district court in advance of sentencing. (STR at 35.) In the letter, Mr. Swartz explained that the Chippewa (or Ojibwe) Indians had originally arrived in the area of Lake Superior in the 1500s where they were "fishers, hunters, and gatherers of maple sugar, wild rice, and berries and lived because of the resources the natural world had to offer." (See Addendum.) To the Ojibwe, "land was a gift of the Great Spirit" which was provided for all to use, but that no individual had the right to control. (Id.) Mr. Swartz wrote:

> Our homeland is precious to the Keweenaw Bay Indian Community today because of these same beliefs and because our ancestors sought to keep control over our homeland and ultimately obtained the L'Anse Reservation and kept rights in the ceded territories pursuant to the

> Treaties of 1842 and 1854. Throughout the years, our members have preserved and protected our land and waters for the next seven generations as is our custom and tradition.

(Id.) By clear-cutting timber on the Ontonagon Reservation for personal gain, Mr. Swartz further explained, Defendant had not just violated the law, but also "victimized all the members of the Keweenaw Bay Indian Community, destroyed our resources, and offended our traditions." (Id.)

Defendant also provided a written statement to the probation department. It began: "I, Robert Genschow, do hereby accept responsibility for my actions." (Presentence Investigation Report ("PSR") ¶ 27.) Defendant stated that he believed he had authority to clear land on the Ontonagon Reservation as chief of the Ontonagon Band, and further claimed:

> [H]ad I even thought that the KBIC Constitution of 1936 had the authority to take or give away our Tribal Lands and effectively eliminate the Ontonagon Band of Lake Superior Chippewa Indians (as was eventually concluded by the BIA and has now been determined by this Court), I would have certainly first consulted with the BIA to find out who had appropriate jurisdiction over the Tribal Lands on the Ontonagon Reservation and then only acted in accordance with the law.

(PSR ¶ 27.) Defendant apologized for the trouble and difficulties he had caused.

A presentence investigation report was prepared. The presentence investigator recommended against granting Defendant a two-level reduction for acceptance of responsibility pursuant to USSG Section 3E1.1, which is generally

reserved for Defendants who plead guilty. (PSR ¶ 37.) The presentence report also recommended that the court order Defendant to pay $47,200 in restitution based on the findings of a Department of Interior appraisal and damage estimate. (PSR ¶ 94.) Defendant objected to both recommendations. (PSR Addendum, Objections.)

The court addressed Defendant's objections at sentencing. As to Defendant's argument in favor of a reduction for acceptance of responsibility, the court found that Defendant had demonstrated a "total and willful blindness" with regard to the status of the Ontonagon tribe and its combination with two other tribes to become KBIC, the fact of which he was well aware. (STR at 7.) Despite this, Defendant adopted the name "Lonewolf," and the court noted his testimony at trial that he was "somehow appointed chieftain" as a young boy and that the Ontonagons had always had chiefs. (STR at 7.) The court also found that the notion of good faith "breaks down completely" when considering that Defendant did not enter into the timber cutting contract on behalf of the Ontonagon Band, but under his own name, with the profits sent to his own bank account. (STR at 7-8.) Adding that Defendant had still not backed away from his position, the court further observed that Defendant knew to contact the BIA as the agency with authority to determine the legitimacy of his claim, but Defendant proceeded on his

own to build a residence for himself instead. (STR at 8.) The court concluded that although Defendant had since recognized that he had acted in error and demonstrated regret, that was not the kind of acceptance contemplated by the guidelines, and the reduction was denied. (STR at 8.)

On the issue of restitution, the government called Valerie Greene, Regional Supervisory Appraiser for the Midwest Region of the Department of Interior's Office of the Special Trustee for American Indians, to testify regarding a damage assessment report prepared by her office. (STR at 9-10.) The report indicated that the property's highest and best use was recreational with concurrent timber growth, and that it had an estimated market value of $82,400 before damages. (STR at 12, 18.) Based on information provided by the BIA forestry office, the report estimated $21,100 in damages, which consisted of approximately $11,000 worth of timber removed – the remainder being the cost of grading, shaping, erosion control, and replanting the cleared area. (STR at 13-14.) That number, however, did not account for the cost of repairing the perimeter, where a large amount of soil, unmarketable trees, and brush had been bulldozed into a pile approximately two-to-five feet high surrounding the cleared area. (STR at 14-15.) The DOI report estimated an additional cost of $26,100 necessary to repair the damage to the perimeter, for a total damage calculation of $47,200. (STR at 16-17.)

Defendant called professional appraiser Michelle Swanson as an expert witness. (STR at 22.) Ms. Swanson, who had been asked to perform a fair market appraisal, likewise determined the highest and best use of the property to be recreational. (STR at 24-25.) Based on comparisons to undeveloped properties in the area, she estimated that the property had a current fair market value of $70,000. (STR at 25.) Ms. Swanson concluded that the cleared area and access road, a private road approximately 10 to 15 miles long, had increased the value of the property because a typical purchaser would likely want a road and perhaps to build on the land. (STR at 26-27.) Ms. Swanson acknowledged, however, that legal access to the parcel would be very important to determining the value of the property. (STR at 30.) Because she had not been aware of any legal restrictions on access to the property, her appraisal did not take into account the cost of obtaining legal access to the property, nor had it estimated the property's value as a landlocked parcel. (STR at 30-31.)

The court found that although the defense expert had prepared an excellent appraisal of the property based on the usual use of such land in Michigan's Upper Peninsula, "that's not what we're talking about here specifically. What we're talking about here is land owned by the government held in trust for the tribe." (STR at 43.) The court found that an "upheaval of the property to say the least"

had occurred. (STR at 44.) The court emphasized the value of pristine lands to tribes who use it to hunt, fish, or meditate traditionally, as opposed to persons who would prefer to build a cabin and run four-wheelers through. (STR at 43, 46.) Recalling the testimony of James Pollard, the logger who sold the timber cut from the property for a total of $33,000, the court concluded that the value of the timber trespass was at least $33,000. (STR at 45.) With regard to restoring the property to its owner, however, the court reasoned that the best that could be done was to arrive at a reasonable estimate of the cost of "putting the land back where it was before this unlawful act took place." (STR at 46.) Concluding that the government's estimate was reasonable under the circumstances, the court ordered restitution in the amount of $47,200. (STR at 46.)

Defendant timely appealed. (R.79: Notice of Appeal.)

SUMMARY OF ARGUMENT

The Court should affirm Defendant's conviction and sentence because each of his arguments on appeal is without merit. First, the district court correctly denied Defendant's motion to dismiss the indictment. After an extensive review of historical documents, the district court correctly determined that the land at issue is held in trust for KBIC, and that, at a minimum, KBIC has proprietary authority over the land as successor in interest to the former Ontonagon Band of Chippewa Indians. The court's conclusion is in keeping with BIA records and the law governing tribal property, and does not conflict with KBIC's constitution. By contrast, Defendant's claim that he, as tribal chieftain and sole known survivor of an unrecognized tribe, possessed legal authority to clear-cut the Ontonagon Reservation is not only factually unsupported, it is legally untenable.

Second, Defendant did not establish by a preponderance of the evidence that he was entitled to a reduction in offense level for acceptance of responsibility under Section 3E1.1. Such reductions are generally reserved for defendants who plead guilty, except in rare situations where a defendant proceeds to trial to preserve an issue unrelated to factual guilt. This Court has held that a reduction for acceptance of responsibility is inappropriate where, as here, a defendant denies criminal intent at trial. Thus, the district court's conclusion that Defendant failed

to accept responsibility within the meaning of the guidelines was not clearly erroneous.

Third, the district court did not abuse its discretion by basing its restitution order on the cost of restoring the damaged property to its former state. Where, as here, a defendant has damaged real property which is unique, not fungible, and is reasonably prized by its owners beyond its commercial or monetary value, courts have found that the only way to "return" the affected property within the meaning of the Mandatory Victims Restitution Act (MVRA) is to award the cost of returning or repairing the land to its former state. Further, contrary to Defendant's contention, courts need not default to a fair market value approach when calculating restitution. That restriction, which is no longer in effect, applied to calculations of loss for purposes of setting a defendant's base offense level, not restitution orders. The district court's restitution order was conservative under the circumstances, and was not an abuse of discretion.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY DENIED DEFENDANT'S MOTION TO DISMISS THE INDICTMENT.

A. Standard of Review.

Where the district court's decision to deny a motion to dismiss an indictment is based upon factual findings, this Court reviews for clear error. United States v. Grenier, 513 F.3d 632 (6th Cir. 2008). When questions of law predominate, this Court reviews the district court's determination de novo. Id. at 635-36.

B. The District Court Correctly Held that the Land at Issue Is Held in Trust for KBIC.

Defendant was charged with violating 18 U.S.C. §§ 1853 and 1163. To demonstrate a violation of 18 U.S.C. § 1853, the government must prove:

> 1. That the defendant did wantonly injure or destroy trees; and
>
> 2. That the injury or destruction occurred upon an Indian reservation, or lands belonging to or occupied by any tribe of Indians under the Authority of the United States.

See United States v. Johnson, 162 F. App'x 526, 529 (6th Cir. 2006). To establish a violation of 18 U.S.C. § 1163, the government must prove:

> 1. That the defendant did embezzle, steal, knowingly convert to his own use or the use of another; and willfully misapply;

2. Moneys, goods, assets, or other property;

3. Belonging to any Indian tribe or Indian tribal organization; and

4. With a value that exceeded $1,000.

See United States v. Markiewicz, 978 F.2d 786, 800 (2nd Cir. 1992).

The indictment alleges in Count One, that Defendant "did unlawfully cut [. . .] and wantonly injured and destroyed [. . .] trees growing, standing, or being upon and Indian reservation, or lands belonging to or occupied by the Keweenaw Bay Indian Community under the authority of the United States." (R.1: Indictment at 1.) In Count Two, the indictment alleges that Defendant "did embezzle, steal, knowingly convert to his own use or the use of another, and willfully misapply property of an Indian tribe, with the value exceeding $1000." (R.1: Indictment at 2.) The indictment further describes the stolen property as logs and stumpage moneys on lands "held in trust by the United States for the use and occupancy of the Keweenaw Bay Indian Community." (R.1: Indictment at 2.)

Defendant appeals the denial of his motion to dismiss the indictment, contending, incorrectly, that the indictment was defective for stating that the alleged crimes took place on lands held in trust for KBIC. The district court's determination, made after a full hearing and an extensive review of relevant historical documents and law, that the lands at issue are held in trust by the federal

government for the use and benefit of KBIC, was manifestly correct. As an initial matter, the BIA has certified that the parcel at issue is held in trust for the benefit of KBIC. (R.46: Exh. O, 5/28/08 Certification.) Additionally, the most recent 1971 Title Status Report attributes a Tribal Code of 476 to the land, which stands for the combined "Ontonagon, Keweenaw Bay" tribe. Because the Ontonagon Band legally merged itself into KBIC and is no longer federally recognized as a separate political entity, the district court correctly concluded that the title report must be read to indicate that the lands are held in trust for KBIC, and that at a minimum, KBIC has proprietary authority over the Ontonagon Reservation.

Further, the district court's conclusion that property on the former Ontonagon Reservation is now held in trust for the benefit of KBIC was not only correct, it is mandated by settled principles of tribal property ownership. As the court acknowledged in its opinion denying Defendant's motion to dismiss, tribal property is a form of ownership in common. United States v. Jim, 409 U.S. 80, 81 (1972). Absent contrary federal legislation vesting individual rights of ownership in tribal members, tribal property interests belong to the tribal community; an individual tribal member has no individual alienable or inheritable interest in the communal holding. Sizemore v. Brady, 235 U.S. 441, 446-47 (1914). Put another way, the lands of a tribe belong to the tribe as a political body. Eastern Band of the

Cherokee Indians v. United States, 117 U.S. 288, 308 (1886). Likewise, tribal funds are the property of the tribe as an entity rather than of the individual members. Chippewa Indians v. United States, 307 U.S. 1, 5 (1939). An individual tribal member can control the manner in which the tribe chooses to use its property only to the extent that the member participates in the governmental process of the tribe. See Delaware Tribal Business Committee v. Weeks, 430 U.S. 73 (1977); Eastern Band of the Cherokee Indians v. United States, 117 U.S. 309-312.

For example, in Eastern Band, the Supreme Court held that the descendants of members of the Eastern Band, who chose not to join the rest of their tribe in moving Westward to merge with another Cherokee tribe, had no interest in the tribal property of the merged tribe because "[a]ll public property of a nation is supposed to be held for the common benefit of its people; their individual interest is not separable from that of the nation." Id. at 308. The Court emphasized that since seceding from the Cherokee tribe, the Eastern Band had developed no separate political organization. Id. at 309. Neither had it become a federally recognized tribe. Id. Rather, the union was merely a social or business one. Id. As such, the Court considered the Band members to be individual citizens of the state in which they resided, with no seceding interest in the tribal property of the

Cherokee Nation, unless and until they were readmitted to the tribe and complied with its Constitution. Id. at 311.

Similarly, Delaware Tribal Business Committee v. Weeks, 430 U.S. 73 (1977), involved the rights of the descendants of tribal members who seceded from a larger tribe. Under an 1866 treaty, the Kansas Delawares, a subset of the Delaware Indians, elected to become United States citizens and receive individual parcels of land on the condition that they dissolve their relationship with the greater Delaware Tribe and share only proportionately in tribal assets "then held in trust by the United States." Id. at 78. Nearly a century later, Congress passed an Act approving payments to redress a breach by the United States of a 1854 treaty with the greater Delaware Indians. Id. at 79. Descendants of the Kansas Delawares, however, were excluded from the distribution. Id. at 80. They brought suit claiming that they were entitled to a just proportion of the payments. Id. at 82. The Supreme Court upheld the Act, holding that, as individuals, not members of a federally recognized tribe, descendants of the Kansas Delawares had no vested rights in the tribal property. Id. at 85.

Given the fundamental principles of tribal ownership illustrated in the cases above, it is clear that before the Ontonagon Band joined KBIC, the band's property interest in the Ontonagon Reservation belonged to the tribe as a community rather

than to the individual members. Accordingly, when the majority of the Ontonagon Band voted to merge into KBIC, its property interests in the Ontonagon Reservation remained with the Ontonagon political body as it merged into KBIC. Defendant's contention to the contrary—that when the political body of the Ontonagon Band merged with KBIC, its property interests fell to a minority of abstainers with no independent recognition as a tribe—is legally untenable, and was properly rejected by the district court. Thus, the district court correctly concluded that KBIC became successor to the property interests of the Ontonagon Band.

The fact that the Ontonagon Band was recognized by the Executive Branch in the 1854 Treaty with the Chippewa does not alter this result. As the district court correctly observed, Executive recognition of the sovereignty of a particular tribe, without more, does not speak to the status of the tribal group today. United Tribe of Shawnee Indians v. United States, 253 F.3d 543, 548 (10th Cir. 2001); see also Burt Lake Band of Ottowa and Chippewa Indians v. Norton, 217 F. Supp.2d 76, 79 (D.D.C. Aug. 26, 2002) ("historical recognition by the Executive Branch does not allow a defendant to bypass BIA, even if the recognition occurred in a treaty."). Rather, BIA regulations establish the procedure for obtaining federal acknowledgment and recognition of Indian groups as Indian tribes. 25 C.F.R. §

83.1-13 (2008). Therefore, even though the Ontonagon Band was named in an 1854 Treaty, because the Band subsequently merged into KBIC and the government has not since recognized the group as a tribe independent of KBIC, Defendant has no seceding interest in the property of the former Ontonagon Band. See Eastern Band, 117 U.S. at 311.

Moreover, even if the Ontonagon Reservation does not qualify as territorial or tribal lands under the KBIC Constitution, Defendant has not identified any authority to support the proposition that KBIC may not own property unless it is described in its Constitution. As Department of Interior Field Solicitor Priscilla Wilfahrt concluded in her 2004 opinion letter, the rights of KBIC to act in a proprietary capacity over its lands are independent of its regulatory authority as a sovereign entity. Thus, the district court correctly concluded that, whether or not KBIC may exercise regulatory jurisdiction over the Ontonagon Reservation under its Constitution, the tribe has the right of any property owner to manage and control the use of its real property as successor in interest.

Not only is Defendant's legal challenge to the indictment untenable, his factual claim that the property belongs to the Ontonagon Band, of which he is chief, lacks support at best. Defendant had a full opportunity to prove his claim at the hearing on the motion to dismiss. Other than his own bare assertions, however,

Defendant presented no evidence demonstrating the Ontonagon Band's continued existence apart from KBIC after 1936, and nothing to support his claim of being tribal chieftain.

Subsequently, Defendant was afforded another opportunity to substantiate his claim in support of his defense of good faith at trial. There, however, the only evidence Defendant introduced to support his claim that the Ontonagon Band continued to consider themselves an autonomous tribal group working for 20 years to develop a constitution, was a copy of a document, allegedly approved by all living members of the group in 1997, but signed by Defendant alone. According to Defendant, the original had been destroyed in a fire; likewise, no Constitutional drafts, meeting minutes, or voting records had been maintained. While the group purportedly consisted of approximately 100 members in the 1970's, all fellow members Defendant could name had since died, and Defendant remains the sole surviving member of the tribal group as far as he knows.

Further, Defendant presented no evidence to support the notion that he was selected to be the next lifetime tribal chieftain of the Ontonagon Band as a baby, and appointed "Chief Lonewolf" at 13 years old. Tellingly, none of Defendant's fellow KBIC members called to testify at trial, including his cousin, had ever heard Defendant referred to as Lonewolf prior to the incident. Neither had Susan

LaFernier, Vice President and former President of KBIC, ever heard of another tribal group who considered themselves to be Ontonagons. In sum, the district court did not clearly err by discrediting Defendant's self-serving claim, which was entirely unsubstantiated at the time of the motion to dismiss, and subsequently discredited.

Because BIA records indicate that the parcel at issue is held in trust for KBIC, because that conclusion is mandated by basic principles of tribal property ownership and does not conflict with KBIC's constitution, and because Defendant's claim to the contrary is unsupported, the district court correctly determined that the indictment was not defective for alleging that Defendant cut trees and stole property on lands held in trust for KBIC. Accordingly, the district court's denial of Defendant's motion to dismiss the indictment should be upheld.

II. THE DISTRICT COURT'S DETERMINATION THAT DEFENDANT FAILED TO DEMONSTRATE ACCEPTANCE OF RESPONSIBILITY WAS NOT CLEARLY ERRONEOUS.

A. Standard of Review.

As this Court has recognized, "[t]he sentencing judge is in a unique position to evaluate a defendant's acceptance of responsibility. For this reason, the determination of the sentencing judge is entitled to great deference on review." United States v. Angel, 355 F.3d 462, 476 (6th Cir. 2004) (quoting USSG § 3E1.1, cmt. (n. 5).). Thus, the district court's determination regarding acceptance of responsibility must be sustained unless clearly erroneous. Id.

B. The District Court's Determination That Defendant Did Not Merit A Reduction in Sentence for Acceptance of Responsibility Was Not Clearly Erroneous.

Section 3E1.1(a) of the sentencing guidelines provides: "If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by 2 levels." The application notes to Section 3E1.1 provide that "[t]his adjustment is not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse." USSG § 3E1.1, cmt. (n. 2). The note recognizes that there may be exceptions to this rule in "rare situations," such as "where a defendant goes to trial to assert and preserve issues

that do not relate to factual guilt," for example, to make a constitutional challenge to a statute or a challenge to the applicability of a statute to his conduct. Id. Even in such rare situations, however, "a determination that a defendant has accepted responsibility will be based primarily upon pre-trial statements and conduct," as opposed to post-conviction statements of remorse. United States v. Williams, 940 F.2d 176, 181 (6th Cir. 1991) (quoting USSG § 3E1.1, cmt. (n. 2)). Further, the defendant bears the burden of showing by a preponderance of the evidence that he or she has accepted responsibility for the crime committed. Id.

This Court has held that a defendant who expresses regret for the results of criminal conduct without admitting criminal intent does not accept responsibility within the meaning of the Sentencing Guidelines. United States v. Williams, 940 F.2d at 183 (citing United States v. Sloman, 909 F.2d 176, 182 (6th Cir. 1990)). For example, in Williams, this Court found a reduction inappropriate where the defense consisted of a denial of criminal conduct, and the sole evidence of acceptance of responsibility was a post-conviction letter to the sentencing judge expressing remorse but maintaining that the defendant was unaware of her co-defendant's criminal activities. Williams, 940 F.2d at 183.

Similarly, in Sloman the defendant expressed his regret for what had happened, but never admitted any fraudulent intent, and continuously maintained

that he acted innocently. Sloman, 909 F.2d at 182. Having refused to admit criminal intent, this Court held that the defendant "did not accept responsibility within the meaning of the guidelines." Id.

Other circuits have similarly held that a defendant who denies having the requisite intent is contesting a factual element of the offense, and is thereby acting in a manner inconsistent with acceptance of responsibility. See United States v. Roy, 375 F.3d 21, 25 (1st Cir. 2004) (upholding denial of § 3E1.1 adjustment based on defendant's continued insistence that he acted without the requisite intent); see also United States v. Baucom, 486 F.3d 822, 830 (4th Cir. 2007) (holding that the district court clearly erred in granting a § 3E1.1 adjustment because the defendants did not proceed to trial solely to preserve their constitutional challenge to the validity of the tax code, but also contested the element of willfulness) (vacated on other grounds, Davis v. United States, ___ U.S. ___, 128 S. Ct. 870 (2008)); United States v. Saffo, 227 F.3d 1260, 1272 (10th Cir. 2000) (where challenge to criminal intent element was not made in good faith, defendant could not demonstrate acceptance of responsibility); United States v. Reed, 114 F.3d 1053, 1058 (10th Cir. 1997) (assertion of good faith defense "demonstrated that [defendant] did not accept responsibility for his conduct").

Here, Defendant denied intent from start to finish. From the moment he was caught at the site throughout trial and at sentencing, Defendant steadfastly refused to admit that he even knew he was breaking the law at the time of the offense. Although Defendant contends that he "explicitly recognized and acknowledged that, in retrospect, his earlier conduct was wrongful" in a post-conviction letter to the PSR investigator, that is the precise type of post-conviction statement of remorse this Court found unconvincing in Williams. Further, even in that statement, while purportedly accepting responsibility, Defendant maintained he had no inkling his actions were illegal at the time of the offense. Defendant admitted only that he turned out to be incorrect, he never admitted intent, thus he could not establish that he was entitled to a reduction for acceptance of responsibility. Williams, 940 F.2d at 183.

Defendant cites United States v. Jeter, 191 F.3d 637 (6th Cir. 1999), overruled on other grounds in United States v. Webb, 335 F.3d 534 (6th Cir. 2003), for the proposition that district courts may not deny acceptance of responsibility based on the fact that the defendant committed the crime and the facts of the crime. In Jeter, this Court found that it was error to deny acceptance of responsibility to a defendant who had pled guilty and provided cooperation based on the fact that he continued to commit crimes after he was initially indicted by state authorities, but

before he was federally indicted. Id. at 639. This Court reasoned that a defendant should be on notice that the federal government has an interest in his or her affairs before 3E1.1 comes into play, and that denial of acceptance points based on pre-indictment conduct "could deter defendants from pleading guilty and encourage them to take their cases to trial, a position contrary to the underlying purpose of reducing unnecessary trails and conserving resources." Id. at 639-40.

Here, obviously, Defendant never pled guilty. Thus, unlike the defendant in Jeter, he had the burden of establishing that his was one of those rare situations where a defendant may demonstrate acceptance despite proceeding to trial, which he failed to do. Further, the court did not focus inappropriately on offense conduct. In evaluating whether Defendant had demonstrated acceptance of responsibility, the court clearly contemplated events leading up to the offense in the context of Defendant's subsequent good faith defense. Those facts showed that although Defendant may have honestly believed that he *should* have had the legal authority to build a house for himself on the Ontonagon Reservation, he could not have believed he had actual authority to do so at the time.

For instance, the court found that Defendant's continued claim that he was acting in good faith on behalf of the Ontonagon Band as a tribe "breaks down completely" when considering the fact that Defendant entered into the timber

cutting contract in his own name and kept the profits for himself. In light of Defendant's actions up to and including the crime, his subsequent insistence that he acted in good faith demonstrated quite the opposite of acceptance of responsibility – it showed bad faith. The district court's determination that Defendant failed to demonstrate acceptance of responsibility was not clearly erroneous.

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY ORDERING RESTITUTION BASED ON THE COST OF RESTORING THE PROPERTY.

A. Standard of Review.

This court reviews the amount of restitution ordered for abuse of discretion. United States v. Gale, 468 F.3d 929, 941 (6th Cir. 2006) (citing United States v. Johnson, 440 F.3d 832, 849 (6th Cir. 2006)).

B. The District Court's Restoration Order Was Not an Abuse of Discretion Because the Property at Issue Is Unique, Its Value Is Not Commercial, and Courts Are Not Constrained to Fair Market Value Estimations of Loss.

The Mandatory Victims Restitution Act (MVRA) requires imposition of restitution for certain categories of offenses, including "offense[s] against property." 18 U.S.C. § 3663A(a)(1). In cases involving "damage to or loss or destruction of property of a victim of the offense," and in circumstances where mere return of the property to the owner or owners is "inadequate," the defendant shall "pay an amount equal to" "the greater of-(I) the value of the property on the date of the damage, loss, or destruction; or (II) the value of the property on the date of sentencing, less ... the value (as of the date the property is returned) of any part of the property that is returned." 18 U.S.C. § 3663A(b)(1)(B)(i)-(ii).

Courts have recognized the difficulty of calculating "value" under the MVRA where, as here, a defendant has damaged real property. See United States

v. Barton, 366 F.3d 1160, 1167 (10th Cir. 2004); United States v. Shugart, 176 F.3d 1373, 1375 (11th Cir. 1999). In Shugart, the defendant burned a century-old church to the ground and was ordered to pay restitution in an amount based on the cost of rebuilding the church using modern construction methods. Id. The defendant appealed, contending that § 3663A restricts restitution orders to actual cash or fair market value. Id. The Eleventh Circuit upheld the restitution order, holding that the term "value" as used in Section 3663A "contemplates a restitution order based on replacement cost where actual cash value is unavailable or unreliable." Id.

While acknowledging that fair market value will often be an accurate measure of the value of property, the Shugart court found that replacement cost may be a better measure of value where an item is unique, or because there is not a broad and active market for it. Id. Noting that the church was not a fungible commodity, but was valued by its members precisely because of its location, design, and the memories it evoked, the court concluded that the only way to approach returning the victims what they had before the fire was to afford them the cost of rebuilding a church comparable in size and design on the same lot where the original church stood. Id.

Similarly, several circuits have approved restitution calculations based on the cost of clean-up, repair, or replanting in cases involving damage to real property. See United States v. Barton, 366 F.3d at 1167 (approving proposed restitution calculation based on the monies spent by the Forest Service to revegetate the forest and prevent erosion); United States v. Quillen, 335 F.3d 219, 226 (3d Cir. 2003) (holding "clean-up or repair costs may be ordered under the MVRA, provided the defendant is not required to compensate the victim twice for the same loss"); United States v. Quarrell, 310 F.3d 664, 678-81 (10th Cir. 2002) (affirming restitution in an amount equal to costs of restoring and repairing archaeological site in national forest); United States v. Overholt, 307 F.3d 1231, 1254 (10th Cir. 2002) (affirming, under plain error standard of review, a restitution order under the MVRA that required defendants to pay the Coast Guard's cost of cleaning up defendants' pollution of navigable waters); United States v. Sharp, 927 F.2d 170, 174 (4th Cir. 1991) (affirming, in case arising under similar provision of the Victim Witness Protection Act (VWPA), restitution order that included the costs of repairing the property damaged by defendants).

Likewise, the district court's restitution order based on the cost of restoring the Ontonagon Reservation was not an abuse of discretion. Like the church in Shugart, pristine Indian hunting and fishing grounds are unique, not fungible. As

Mr. Swartz, President of KBIC's tribal council explained, KBIC's land is precious to the tribe under its customs and traditions, and the tribe has protected and preserved that land for the benefit of all tribal members for seven generations. Susan LaFernier and Defendant also testified at trial that tribal lands are extremely important to tribes. Thus, contrary to Defendant's assertion, the district court had ample grounds on which to base its conclusion that the value of the land to the tribe was not captured by its value to a typical commercial developer or recreational user. Rather, the only way to approximate a return of the victims' property under the MVRA was to order restitution in the amount required to repair the damage done to the property. Further, the government's damage estimate was conservative considering, as the court did, that the value of the stolen timber alone was $33,000. The court's restitution order was appropriate under the circumstances, and was not an abuse of discretion.

Defendant's argument that, under United States v. Warshawsky, 20 F.3d 204, 212-14 (6th Cir. 1994) and cases citing to it, district courts must first determine restitution based upon a market value approach, and may only bypass that approach in certain circumstances, is unavailing. (See Def.'s Br. at 35.) Warshawsky involved the interpretation of a commentary note to Section 2B1.1 instructing district courts on determining loss for purposes of setting a defendant's

base offense level. The note provided that: "[o]rdinarily, when property is taken or destroyed the loss is the fair market value of the particular property at issue." Under the then-mandatory guideline scheme, this Court interpreted the commentary to require courts to default to a market value analysis when determining loss to a victim. Id.

Defendant's argument lacks merit. First, Warshawsky clearly applies to determinations of loss for purposes Section 2B1.1, not restitution orders. Second, to the extent the district court's loss calculation under Section 2B1.1 informed or influenced its restitution determination, the commentary note discussed in Warshawsky has since been stricken from the guidelines. USSG App C, Amend. 617 (eff. Nov. 1, 2001). Under the current guidelines, courts "need only make a reasonable estimation of the loss," "based on available information, taking into account, as appropriate and practicable under the circumstances," factors specifically including "the cost of repairs to damaged property" when calculating loss. USSG § 2B1.1, cmt. (n. 3). Thus, Warshawsky and subsequent cases relying on its outdated premise are both inapposite and unpersuasive.

CONCLUSION

For these reasons, the United States requests that Defendant's conviction be affirmed.

Respectfully submitted,

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Dated: February 5, 2010

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned certifies that this brief complies with the type-volume limitation and contains no more than 14,000 words as provided by FRAP 32(a)(7)(B). A word count was made using WordPerfect 12 and the brief contains 10,685 words.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee, No. 09-1946

v.

ROBERT C. GENSCHOW, SR.,

Defendant-Appellant.
_____/

CERTIFICATE OF SERVICE

I hereby certify that on February 5, 2010, the foregoing document was electronically filed. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. Parties may access this filing through the Court's system.

I further certify that a copy of the foregoing document was mailed on this date to the opposing party if he/she was not registered to receive the document by the Court's electronic filing system.

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DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

DESCRIPTION OF ENTRY	DATE	RECORD ENTRY NO.
Docket Sheet		NA
Presentence Report		NA
Indictment	4/22/08	1
Motion to Dismiss	8/25/08	20
Brief in Support	8/25/08	21
Response to Motion	10/14/08	25
Opinion	11/14/08	29
Order denying Motion to Dismiss	11/14/08	30
Exhibits A-F	11/18/08	32-37
Exhibits H-Q	11/18/08	39-48
Exhibit S	11/18/08	50
Notice of Appeal	11/26/08	51
Order of USCA	1/23/09	52
Verdict	03/24/09	69
Judgment	7/6/09	77
Notice of Appeal	7/15/09	79

DESCRIPTION OF PROCEEDING OR TESTIMONY	DATE	TRANSCRIPT PAGES AND VOLUME
Motion Hearing Transcript (R.82)	11/03/08	13
Sentencing Transcript (R.83)	07/06/09	7-10, 12-18, 22, 24-27, 30-31, 35, 43-46, 54

DESCRIPTION OF PROCEEDING OR TESTIMONY	DATE	TRANSCRIPT PAGES AND VOLUME
Trial Transcript (R.72)	3/23-24/09	Goodreau: 13-14, 16-20 Dakota: 4, 42 LaFernier: 47, 52-53, 59, 61 Misegan: 76-78 Chaudier: 84 Ayres: 86, 90 Carrick: 93-97, 101 Genschow: 122, 126-130, 132-36, 147-48 Court: 4, 177-78, 180-86

ADDENDUM

KEWEENAW BAY INDIAN COMMUNITY

Keweenaw Bay Tribal Center
16429 Beartown Road
Baraga, Michigan 49908
Phone (906) 353-6623
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July 1, 2009

U.S. Probation Office
ATTN: Rosa Alvarado-Hillary
101 Federal Building
110 Michigan Street, N.W.
Grand Rapids, MI 49503

Re: United States v. Robert Charles Genschow, Sr.
Docket No. 08-CR-00018

Please accept this letter as the Victim Impact Statement on behalf of the Keweenaw Bay Indian Community as the victim in the case of United States v. Robert Genschow, Sr.

In a tradition shared with the Ottawa and Potawatomi, the Ojibwe remember a time when they lived near an ocean…lived along the shores of a great salt sea to the east at the beginning of time. Sometime around 1400, the first Anishinabeg (the Original People), the Ojibwe (Chippewa), Odawa (Ottawa), and Bodewadmi (Potawatomi) bands, started to arrive on the east side of Lake Huron. By the 1500's the Ojibwe continued west to Lake Superior.

The Anishinabeg were fishers, hunters, and gatherers of maple sugar, wild rice, and berries and lived because of the resources the natural world had to offer. To the Ojibwe, land was a gift of the Great Spirit, a gift freely given for everyone to use but no person had a right to control such a gift. The land was used by all who needed it for hunting, gathering food, and growing crops.

Our homeland is precious to the Keweenaw Bay Indian Community today because of these same beliefs and because our ancestors sought to keep control over our homeland and ultimately obtained the L'Anse Reservation and kept rights in the ceded territories pursuant to

the Treaties of 1842 and 1854. Throughout the years, our members have preserved and protected our land and waters for the next seven generations as is our custom and tradition.

This traditional understanding and treatment of land is reflected in the modern Constitution and laws of the Keweenaw Bay Indian Community. Land owned by the Keweenaw Bay Indian Community is administered by the Tribal Council and the benefits received from that land, timber reserves for example, are for the benefit of all the members of the Keweenaw Bay Indian Community.

Mr. Genschow's actions of clear cutting timber on the Ontonagon reservation, for his own personal use, were taken without the permission of the Tribal Council. Mr. Genschow's actions were taken for private gain contrary to our tradition and laws. Mr. Genschow's actions have victimized all the members of the Keweenaw Bay Indian Community, destroyed our resources and offended our traditions.

The Keweenaw Bay Indian Community asks the Court to impose the sanctions requested by the United State's Attorney's Office for Mr. Genschow's destruction of those resources which resulted in the violations of federal law and the laws and traditions of the Keweenaw Bay Indian Community.

Sincerely,

Warren C. Swartz, Jr.
President

Cc: Jeff Davis, Asst. U.S. Attorney
Kathy Schuette, Victim Witness Unit