UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WISCONSIN

RED CLIFF BAND OF LAKE SUPERIOR CHIPPEWA INDIANS,

Plaintiff,

v.

BAYFIELD COUNTY, WISCONSIN,

Defendant.

Case No. 18-CV-828

PLAINTIFF'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Plaintiff Red Cliff Band of Lake Superior Chippewa Indians (the "Tribe" or "Band") commenced this action for declaratory and injunctive relief to protect its sovereignty in the face of efforts by Defendant Bayfield County (the "County") to enforce zoning regulations on Tribal members within the boundaries of the Reservation. In response to the Tribe's motion for summary judgment, the County maintains that the motion should be denied for failure to comply with this Court's summary judgment procedures and because, according to the County, the County has the legal authority to enact land use regulations over all lands held in fee simple ownership within the boundaries of the Reservation.

The Court should reject the County's invitation to elevate form over substance and deny the motion for summary judgment merely because the Tribe did not file proposed findings of fact according the Court's procedures. The dispute at issue in this matter is primarily, if not exclusively, legal, not factual. In any event, the Tribe would respectfully request that Court to consider the 32 paragraphs set forth in the August 15, 2019 affidavit of Wade Max Williams [Dkt. # 12] as the Tribe's proposed findings of fact. If the Court declines to do so, and finds it

necessary for the Tribe to file proposed findings of fact before deciding this motion, the Tribe seeks leave to file proposed findings of fact on this motion.

With respect to the substance of this dispute, the County has failed to address, much less rebut, the arguments, based on controlling principles of federal Indian law, advanced by the Tribe in its principal brief. In its Opposition Brief, the County essentially argues that these controlling principles are superseded by the U.S. Supreme Court's decision in City of *Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 125 S.Ct. 1478 (2005). The *Sherrill* decision was based on equitable considerations arising from extraordinary circumstances irrelevant to this case. Rather, the "deeply rooted" "policy of leaving Indians free from state jurisdiction and control," *McClanahan v. State Tax Comm'n of Arizona*, 411 U.S. 164, 168, 93 S. Ct. 1257, 1260 (1973), neither rescinded nor annulled, controls the outcome of this case and bars the County from dictating to tribal members the activities they may conduct on their own property on their own Reservation.

ARGUMENT

I. THE FACT PLAINTIFF DID NOT FILE PROPOSED FINDINGS OF FACT SHOULD NOT RESULT IN A DENIAL OF THE MOTION FOR SUMMARY JUDGMENT

In the typical case, summary judgment involves a ferreting out of disputes of material fact in order to determine whether judgment as a matter of law is appropriate. Thus, the Seventh Circuit has referred to it as the "put up or shut up" moment of a lawsuit, *Everroad v. Scott Truck Systems, Inc.*, 604 F.3d 471, 476 (7th Cir. 2010), as factual matter set forth by the moving party must be disputed, or the party opposing the motion must seek the protections afforded by Rule 56(d) if it lacks sufficient facts to respond. What sets this case apart from the typical case is the nature of the dispute, which is legal in nature as it seeks relief based on established principles of

federal Indian law. The core fact that precipitated this litigation is not disputed; the County has asserted the right to subject Tribal members owning land in fee simple to its zoning ordinance.

Rule 56 explicitly contemplates the submission of affidavits or declarations put into the record as a basis to advance factual positions. Fed. R. Civ. P. 56(c)(1)(A). The Affidavit of Wade Max Williams was intended to satisfy this requirement. Counsel acknowledges that the failure to file a document containing proposed findings of fact is a departure from this Court's procedures as stated in the Preliminary Pretrial Packet. Counsel can only take small consolation in the observance of this Court that such an oversight is "a mistake even experienced lawyers have been known to make when first filing." *Davis v. Gee*, 2015 WL 7588506 *2, Case No. 14-cv-617 (W.D. Wis. Nov. 25, 2015) (Conley, J.).[1] It is worth recalling that the Federal Rules of Civil Procedure "should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1. *See also Foman v. Davis*, 371 U.S. 178, 181-82, 83 S.Ct. 227 (1962) ("It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities.")

The Tribe requests that the Court construe those factual propositions contained in the 32 numbered paragraphs of the Affidavit of Wade Max Williams as the Tribe's proposed findings of fact in support of its motion. (Dkt. # 12.) In the alternative, if the Court is not so inclined, the Tribe requests leave to file proposed findings of fact that based upon this affidavit and the publications subject to judicial notice cited within it. In either case, the Tribe acknowledges that the County may wish to respond, but does not think such response will alter the fundamental nature of the dispute before the Court.

[1] A true and correct copy of this unreported decision is attached as **Exhibit 1**.

Whatever the Court decides concerning the sufficiency of form of the factual information the Tribe submitted in support of the motion, the Tribe maintains that at its core this dispute is a legal one in which the Tribe seeks declaratory and injunctive relief to address one simple and undisputed fact: the County is seeking to subject lands owned by members of the Tribe situated on the Tribe's Reservation to the County's zoning regulations. The Tribe disputes none of the County's proposed findings of fact. (Dkt. # 17.) Under these circumstances, the Court should decline the County's invitation to deny the Tribe's motion on the basis of a procedural misstep alone. To do so would elevate form over substance in a way that ignores the essential character of this dispute submitted to the Court for its resolution, and only result in further delay and expense.

II. THE TRIBE IS ENTITLED TO JUDGMENT AS A MATTER OF LAW

A. The Defendant Has Failed to Rebut the Controlling Authorities Relied Upon By the Tribe

In its Principal Brief, the Tribe explained why, pursuant to fundamental Indian law principles and leading U.S. Supreme Court decisions, the County may not regulate Red Cliff members' activities on their own property on their own Reservation. *See, e.g.*, *McClanahan v. State Tax Comm'n of Arizona*, 411 U.S. 164, 93 S. Ct. 1257, 36 L. Ed. 2d 129 (1973)(forbidding state taxation of tribal members on Reservation lands based on the "deeply rooted" "policy of leaving Indians free from state jurisdiction and control"); *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 473–75, 96 S. Ct. 1634, 48 L. Ed. 2d 96 (1976)(rejecting the argument that tribal members residing on allotted fee lands within their reservation were subject to state licensing fees and personal property taxes,); *Williams v. Lee,* 358 U.S. 217, 220, 79 S.Ct. 269, 271, 3 L.Ed.2d 251 (1959) (observing that "Congress has also acted consistently upon the assumption that the States have no power to regulate the affairs of

Indians on a reservation" and affirming that "absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them"); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145, 100 S. Ct. 2578 (1980)("When on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest"); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 214-15, 107 S. Ct. 1083, 94 L. Ed. 2d 244 (1987)(affirming that the exercise of state authority over "on-reservation activities of tribal members," while not categorically prohibited, is permitted only in "exceptional circumstances.")

In addition, the Tribe discussed *Gobin v. Snohomish County*, 304 F.3d 909, 918 (9th Cir. 2002), *cert. denied*, 538 U.S. 908 (2003), the sole federal appellate court decision that addresses the exact issue before this Court. We demonstrated how the Ninth Circuit in that case, although erroneously adopting a pro-county standard of review, had thoroughly addressed and disposed of the same arguments that the County raises in this case.

In its Response Brief, the County does not bother to meaningfully address the Tribe's arguments or distinguish the authorities cited. Instead, the County offers legal arguments based on unwarranted extrapolations from unrelated cases and policy arguments that ignore reality and boil down to the proposition that, if anyone is to be inconvenienced by inconsistent land use regulations on the Red Cliff Reservation, it must be the Indian people for whom the reservation was established and in no event the small number of non-Indian residents. These weak arguments do not remotely overcome the Indian law fundamentals that Indians in Indian country are not subject to state control and that states may not infringe the right of tribal self-government.

B. The Principles of *Sherrill* Derive from Equitable Considerations Unique to that Case

The County admits, as it must, that the Court in *Sherrill,* 544 U.S. 197 (2005) did not address the issue of zoning authority but nonetheless attempts to found its argument on "principles" from that decision. Before we examine how its principles relate to this case, it is important to put the *Sherrill* case in its unique context.

The *Sherrill* decision was grounded in equitable considerations unique to the New York land claims cases that arose in the 1970s and 1980s. The Oneida Tribe had sold its 300,000-acre reservation in the State of New York in a series of transactions in the late 18th and early 19th centuries and resettled in Wisconsin. A small, landless remnant that had remained in New York reconstituted themselves as a separate tribe in the 20th century and, together with the Wisconsin Oneidas, brought a claim for recovery of the old Oneida reservation within Madison and Oneida counties, New York. The tribes argued that 18th and 19th century land sales to New York had not been approved by the federal government, as required under the Indian Non-Intercourse Act, and were, therefore, invalid. At the same time, the New York Oneidas, in recent decades, had acquired, on the open market in fee simple, lands within its land claim area, including within the City of Sherrill, and contested the City's right to impose property taxes on the ground that Congress had never authorized the sale of the lands in the first place. Oneida members represented 1% of the population in the land claim area and 0.5% in the City.[2] The Supreme Court rejected the Oneidas' claim, *not* on the ground that Indians residing on fee lands are subject to state jurisdiction but on the ground that, under the unique circumstances of the case, especially the Tribe's absence for two centuries, its small percentage of the population and the

[2] The demographic and historical facts are amply described in the Court's opinion.

"justifiable expectations" of non-Indian neighbors, equitable considerations barred the "disruptive" relief sought:

> OIN seeks declaratory and injunctive relief recognizing its present and future sovereign immunity from local taxation on parcels of land the Tribe purchased in the open market, properties that had been subject to state and local taxation for generations. We now reject the unification theory of OIN and the United States and hold that "standards of federal Indian law and federal equity practice" preclude the Tribe from rekindling embers of sovereignty that long ago grew cold.
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> This Court has observed in the different, but related, context of the diminishment of an Indian reservation that "[t]he longstanding assumption of jurisdiction by the State over an area that is over 90% non-Indian, both in population and in land use," may create "justifiable expectations." *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 604-605, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977); [citations omitted]. Similar justifiable expectations, grounded in two centuries of New York's exercise of regulatory jurisdiction, until recently uncontested by OIN, merit heavy weight here.
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> The wrongs of which OIN complains in this action occurred during the early years of the Republic. For the past two centuries, New York and its county and municipal units have continuously governed the territory. The Oneidas did not seek to regain possession of their aboriginal lands by court decree until the 1970's. *See, supra*, at 1487, n. 4. And not until the 1990's did OIN acquire the properties in question and assert its unification theory to ground its demand for exemption of the parcels from local taxation. 337 F.3d, at 144. This long lapse of time, during which the Oneidas did not seek to revive their sovereign control through equitable relief in court, and the attendant dramatic changes in the character of the properties, preclude OIN from gaining the disruptive remedy it now seeks.
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> There is no dispute that it has been two centuries since the Oneidas last exercised regulatory control over the properties here or held them free from local taxation. Parcel-by-parcel revival of their sovereign status, given the extraordinary passage of time, would dishonor "the historic wisdom in the value of repose." *Oneida II*, 470 U.S., at 262, 105 S.Ct. 1245 (STEVENS, J., dissenting in part).

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> [T]he distance from 1805 to the present day, the Oneidas' long delay in seeking equitable relief against New York or its local units, and developments in the city of Sherrill spanning several generations, evoke the doctrines of laches, acquiescence, and impossibility, and render inequitable the piecemeal shift in governance this suit seeks unilaterally to initiate.

544 U.S. at 214, 216, 218-219, 221.

The *Sherrill* Court speculated that Oneida assertion of zoning authority over newly-acquired fee lands might have "disruptive practical consequences," such as "burden the administration of state and local governments," and "adversely affect landowner neighboring the tribal patches." 544 U.S. at 219-20. The feared disruption did not, however, flow from the mere fact of tribal jurisdiction but precisely from the demographic and historical factors cited by the Court, viz. the Tribe's 200 year absence and less than 1% representation in the population.

The equitable circumstances that underpin the *Sherrill* decision are not relevant to the Red Cliff Reservation. Unlike the New York Oneidas, the Red Cliff Band has occupied its Reservation without interruption before, during and after the establishment of Reservation. There has been no "long lapse of time" — or any lapse of time at all. Unlike the Oneidas' long-abandoned reservation, the Red Cliff reservation is not, and has never been, 99% occupied by non-Indians. On the contrary, tribal members represent 87% of the Reservation population. Unlike the putative "expectations" of non-Indian residents of Madison County, New York, any expectations by non-Indian Bayfield County residents that the Tribe would not exercise jurisdiction over its own citizens on its own continuously occupied Reservation would be entirely *unjustified*.

The Court in *Sherrill* did *not* revisit its rejection, in *Moe*, of the argument that "the General Allotment Act itself establishes [State] jurisdiction as to those Indians living on 'fee

patented' lands," 425 U.S. at 478, nor did the Court overrule its holding in *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989)[3] that, under certain circumstances, non-Indians residing on reservation fee lands are subject to *tribal* zoning regulations. The extrapolation, from the *Sherrill* decision, of a general rule applicable to all tribally owned fee lands, untethered from its equitable foundation of the decision, fails entirely.[4]

C. The Equitable Considerations Discussed in *Sherrill* Favor the Tribe

We have identified the controlling authorities in our principal brief and at Section A, above. To the extent that *Sherrill's* principles bear on this case at all, they support a judgment for the Tribe. The County quotes the Court's dictum, twice, that "[a] checkerboard of alternating state and tribal jurisdiction in New York State-- created unilaterally at OIN's behest-- would "seriously burde[n] the administration of state and local governments" and would adversely affect landowners neighboring the tribal patches." (Def.'s Br. at 7, 8-9; Dkt. # 16.) But the preceding sentence, which the County omits, provides the relevant context: "The city of *Sherrill* and Oneida County are today overwhelmingly populated by non-Indians." 544 U.S. at 219. The Red Cliff Reservation, by contrast, is overwhelmingly populated by *Red Cliff tribal*

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[3] Citing *Brendale* and *Plains Commerce Bank v. Long Family Land & Cattle Co*., 554 U.S. 316 (2008), the County argues that the rule of *Montana v. United States*, 450 U.S. 544 (1981) has been extended to "zoning decisions involving reservation land held in fee simple by non-tribal members." (Br. at 11; Dkt. # 16.). This is an overstatement. The *Brendale* holding recognizes that there may be circumstances in which tribal regulations of non-Indian owned land is permissible, which contradicts a fortiori the County's position that tribes have no authority to regulate lands owned by themselves and their members.

[4] In *Oneida Tribe of Wisconsin v. Village of Hobart*, 542 F. Supp.2d 908 (E.D. Wis., 2008), a case cited by the County (Br. at 10-11; Dkt. # 16), Judge Griesbach held that the Village of Hobart could condemn lands owned by the Oneida Tribe within the Oneida reservation, citing 25 U.S.C. § 357, which explicitly authorizes state condemnation of allotted lands held *in trust* and a Supreme Court declaration that "condemnation proceedings are in rem." 542 F. Supp. 2d at 923, 926. In dicta, Judge Griesbach remarked that "[t]he Court's more recent decision in *Sherrill* also calls into question the Ninth Circuit's holding in *Gobin*" essentially citing the "disruption" factors we address above. We respectfully disagree. As explained above, *Sherrill* leaves undisturbed the Court's longstanding jurisprudence, including the *McClanahan*, *Moe* and *Bracker* decisions, that protect Indians in Indian country from state regulation.

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members. The County's attempted regulation of small patches within the Reservation would "seriously burden the administration of [Tribal] government" and adversely affect the overwhelming majority of Reservation residents subject to Tribal law.

The County's pretended concerns over the purported administrative burdens associated with a patchwork zoning scheme are ironic. The Reservation is *already* subject to patchwork zoning, caused by non-Indians' intrusion into the Reservation as a result of the since-repudiated Allotment Policy.[5] The occasional difference in regulatory outcomes, already an unavoidable fact of life for the Tribe and the County, will continue regardless of the Court's decision in this case.

The Tribe and its citizens, who occupy 74% of the Reservation, have far more to complain of than does the County. (Williams Aff. ¶14; Dkt. # 12.) The County does not dispute that its jurisdiction over tribally-owned lands terminates upon acquisition by the United States in trust, an event that has occurred with respect to some 1850 acres in recent years, with no known (much less "incredible") disruption.[6] (Br. at 7; Dkt. # 16.) The Tribe and its members already occupy 74% of non-federally-owned portion of the Reservation and their share of the Reservation is likely to *increase* in future years as the Tribe recovers more of the properties lost through allotment. (Williams Aff. ¶14; Dkt. # 12.) The Tribe itself is immune from County enforcement actions relative to Reservation lands that it owns in fee, *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 134 S.Ct. 2024 (2014), which means that, as a practical matter, this case concerns which government will regulate land use on the 511 acres of land owned in

[5] This occurred as a result of the federal government's allotment policy. The Tribe places no blame on these residents and considers them valued neighbors.

[6] When the IRA was enacted in 1934, it not only ended alienation of tribal lands, it also provided a mechanism for tribes to restore lands to trust status. *See* IRA, Section 5, 25 U.S.C. § 5108.

fee by Red Cliff tribal members.[7] The Tribe, not the County, is the principal victim of "patchwork zoning." The "comprehensive zoning" whose benefits the County claims would be lost if the Court rules in the Tribe's favor, Br. at 1, 2, 3, 6, 9, 11, 12, is fictitious. A ruling in the County's favor in this case would only exacerbate the problem.

If the County finds it irksome that the Tribe would regulate lands adjoining non-Indian owned lands regulated by the County, the Court may well imagine how much more irksome it is to the Tribe to endure the same inconvenience with respect to lands *within its own reservation*. Any "disruption" caused by the Tribe's regulation of itself and its own members is petty compared with the grievous insult to its sovereignty that the Tribe would suffer from the imposition of County authority over the Tribe on its own Reservation.

The County complains that if this Court were to grant Plaintiff's requested relief, "every time a parcel of land within the Reservation is sold, governments would have to determine whether the new owner is or is not a Tribal member, and the zoning requirements for a particular parcel could change every time a parcel of land changes hands." (Id. at 9-10.) The County's argument collapses on contact with reality. The premise, that the County is incapable of determining ownership of a parcel of property after a change in ownership, is obviously false. Every real estate transaction, including the transfer of property from one owner to another, is recorded by the Bayfield County Register of Deeds and the County uses the information for a variety of purposes. The County can obtain confirmation of tribal member status from the Tribe

[7] Tribal members can apply to the Secretary of the Interior to have their property taken into trust pursuant to Section 5 of the Indian Reorganization Act, 25 U.S.C. § 5108. By doing so, however, they subject themselves to BIA approval requirements if they wish to lease, 25 U.S.C. § 415, encumber, 25 U.S.C. § 81 or sell, 25 U.S.C. § 177, their property. A trial member should not have to subject himself or herself to government tutelage as the price of residing on his or her own reservation, under his or her own Tribe's laws. *Moe* and the other authorities we have cited confirm the absence of such a requirement under federal law.

upon request, just as the County requires documentation of tax exempt status when a non-taxable entity acquires real property and claims a tax exemption.[8] Alternatively, the County need do nothing at all. It can instead simply require that any person seeking to avoid county zoning regulations produce a tribal identification card. Law enforcement officers routinely require tribal identification from members exercising hunting and fishing rights without enduring "administrative burdens."[9] The purported inconvenience associated with confirming the member status of the Tribe members is illusory.

The policy of leaving Indians free of state regulations is "deeply rooted" The exercise of state authority over the on-reservation activities of Indians is permitted only in "exceptional circumstances." *Cabazon*, 480 U.S. at 214-15. Far from "exceptional," the interests asserted by the County are trivial. They do not remotely justify violation of the federal Indian law mandate that bars the State from enforcing its writ against the Tribe and its members within the permanent homeland that the United States, by sacred treaty, has guaranteed the Tribe.

As we discuss in our principal brief, the Ninth Circuit in *Gobin*, 304 F.3d 909 (9th Cir. 2002) considered and dismissed all of the concerns that the County raises in this case. *Gobin* remains the sole appellate decision directly on point.

D. Other Authorities Cited by the County Do Not Support Its Argument

We have already explained how the *Sherrill* decision, to the extent it has any relevance, favors the Tribe's position. The County cites several additional authorities that rely on *Sherrill*. These cases are easily distinguishable.

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[8] Even off reservation, the enforceability of state and County hunting and fishing regulations turns on tribal membership, which county officials have routinely verified without undue "disruption."

[9] *Lac Courte Oreilles Band v. State of Wisconsin*, 668 F. Supp. 1233, 1242 (W.D. Wis. 1987); Wis. Stat. § 29.047(a)(d); See also, 2017 Act 227 "Tribal Identification Cards"

The County offers *Cayuga Indian Nation of New York v. Village of Union Springs*, 390 F. Supp.2d 203 (N.D.N.Y. 2005)(hereafter "*Cayuga*") and *Seneca-Cayuga Tribe of Oklahoma v. Town of Aurelius,* N.Y., 233 F.R.D. 278 (N.D.N.Y. 2006)(hereafter "*Seneca-Cayuga*") to counter the Ninth Circuit's decision in *Gobin* but these cases, New York land claims case like *Sherrill,* were based on similarly extraordinary considerations. The Cayuga Tribe had sold its entire 64,000 acre New York reservation to the State of New York, without federal approval and in violation of the Nonintercourse Act, in 1795 and 1807. The larger portion of the Tribe relocated to the Indian Territory (now Oklahoma) as the Seneca-Cayuga. The smaller remnant, the Cayuga Nation of New York, remained in New York *without a reservation*. Both branches of the Tribe initiated land claims based on the INA in 1980. The cases cited by the County involved small properties that the Seneca-Cayuga Tribe and New York Cayuga Tribe had purchased in fee simple in 2002 and 2003, respectively, within the 64,000-acre land claim area.

In *Cayuga*, the district court had initially granted the Tribe's motion for injunctive relief barring the Village from enforcing its zoning regulations. *Cayuga Indian Nation of New York v. Village of Union Springs*, 317 F. Supp.2d 128 (N.D.N.Y. 2004). While an appeal was pending, the Supreme Court decided *Sherrill*. The Second Circuit directed the District Court to reconsider its 2004 decision based on *Sherrill*. Citing Quoting from *Sherrill* and quoting Justice Stevens' recognition of "the State's strong interest in zoning its land without exception for a small number of Indian-held properties," the court vacated its earlier ruling and granted summary judgment to the Village.

In *Seneca-Cayuga*, the district court had previously held in abeyance the issue of the municipality's regulatory authority over the Tribe "pending a resolution of the remaining issues in relation thereto, to wit, whether the Property is Indian Country pursuant to 18 U.S.C.

§ 1151(a), and if so, whether 'exceptional circumstances' exist which would warrant the enforcement of state and local laws against the Tribe regarding its activities on the Property." *Seneca-Cayuga Tribe of Oklahoma v. Town of Aurelius*, N.Y., 2004 WL 1945359, p. 9 (N.D.N.Y. 2004). After *Sherrill* was handed down, the Court ruled against the Tribe, explicitly adopting Judge Hurd's rationale in *Cayuga Indian Nation of New York v. Village of Union Springs*, 390 F. Supp.2d 203 (N.D.N.Y. 2005)

The New York District Court decisions in *Cayuga* and *Seneca-Cayuga* do not help Bayfield County because (1) the Red Cliff Tribe has been the predominant presence on the Reservation, without interruption, from time immemorial, (2) there has been no "long lapse of time, during which the [Tribe] did not seek to revive their sovereign control," or "attendant dramatic changes in the character of the properties," 544 U.S. at 216, that preclude the Tribe's exercise of self-government on its own Reservation, (3) the Red Cliff Reservation is overwhelmingly owned by the Tribe and its members, with only a small number of non-Indian-held properties, (4) the character of the Reservation is already primarily subject to tribal law, which indisputable applies to the majority of the Reservation held in trust and (5) there has been no "longstanding assumption of jurisdiction by the State over an area that is over 90% non-Indian, both in population and in land use," sufficient to support "justifiable expectations." 544 U.S. at 215.

More significant for purposes of this case is the *Cayuga* decision reached by the Northern District of New York in 2004 *before* it was directed to reconsider in light of *Sherrill*. Relying on the Ninth Circuit's decision in *Gobin* and applying the "exceptional circumstances" test, the court held that the Village could not apply its zoning regulations to the Tribe:

> After careful consideration of the aforementioned factors, it is clear that the overriding federal goals of promoting tribal self

> sufficiency and economic development outweigh the interests set forth by defendants. Moreover, Congress knows how to legislate to allow such regulation, but has failed to do so. Therefore, because defendants have failed to meet their burden to show that exceptional circumstances exist to warrant enforcement of their regulations against the Nation or its members on the Property, and because the Property is Indian Country, the Nation's motion for summary judgment must be granted.

317 F. Supp.2d at 148.

Unless the Court is prepared to find that *Moe* and *Brendale* have been overruled by implication, the Ninth Circuit's decision in *Gobin* remains the leading case on the precise issue before the Court. *Gobin* is firmly grounded in the relevant legal principles, carefully reasoned and legally sound. Its analysis and conclusion are both deserving of adoption by this Court.

Finally, the County's reliance on Judge Griesbach's decision in *Oneida Tribe of Wisconsin v. Village of Hobart*, 542 F. Supp.2d 908 (E.D. Wis., 2008), is similarly misplaced. (Br. at 10-11; Dkt. # 16.) In holding that the Village of Hobart could condemn fee lands owned by the Oneida Tribe within the Oneida reservation, Judge Griesbach cited (i) 25 U.S.C. § 357, which explicitly authorizes state condemnation of allotted lands held in trust, (ii) the Burke Act, which provided that lands allotted under the General Allotment Act would be free of restrictions as to sale upon issuance of fee patents, and (iii) a Supreme Court declaration that "condemnation proceedings are *in rem*." 542 F. Supp. 2d at 923, 926. *Village of Hobart* is easily distinguishable. There is no zoning analog to 25 U.S.C. § 357, a relic of the repudiated allotment policy. The

Red Cliff Reservation was allotted under the 1854 Treaty, not the General Allotment Act.[10] A zoning enforcement action is not an *in rem* proceeding.[11]

CONCLUSION

For all of the foregoing reasons, the Tribe requests that the Court grant its motion for summary judgment and permanently enjoin the County from zoning or otherwise regulating lands owned by the Tribe or its members, whether in trust, restricted or fee status, within the boundaries of the Reservation established by the Treaty of 1854.

[10] The *Yakima* decision, upon which Judge Griesbach largely based his decision, was a property tax case that also involved lands allotted under the General Allotment Act. This case is not a property tax case and the Reservation was not, in any event, allotted under the General Allotment Act.

[11] In *dicta*, Judge Griesbach remarked that "[t]he Court's more recent decision in *Sherrill* also calls into question the Ninth Circuit's holding in *Gobin*" essentially citing the "disruption" factors we address above. We respectfully disagree. As explained above, *Sherrill* leaves undisturbed the Court's longstanding jurisprudence, including the *McClanahan*, *Moe* and *Bracker* decisions, that protect Indians in Indian country from state regulation. Sherrill undermines *Gobin* only if the only "disruption" that counts is disruption to non-Indians. No court has ever so held.

Dated this 26th day of September, 2019.

GODFREY & KAHN, S.C.

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