The Prairie Band and the *Sherrill* Decision

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The *DeKalb County Taxpayers Against the Casino* is writing to address the issue as to whether the Prairie Band of the Potawatomi may conduct gaming on the property outside the town of Shabbona, Illinois that they purchased in 2006.

The tribe apparently claims that the land was once a reservation, granted to Chief Shab-eh-nay and his band, and therefore still is a reservation as it was never disestablished by Congress, and therefore they have full sovereign authority over it.

While the *DeKalb County Taxpayers Against the Casino* (DCTAC) argues against such reservation status in a separate document, we also wish to raise a second issue. *Even if* the land was and remains a reservation, we argue that the Supreme Court decision *Town of Sherrill v Oneida Indian Nation* strongly suggests that in this case as well the Potawatomi simply cannot reassert sovereignty over former reservation land that was repurchased on the open market. In the *Sherrill* case, the Oneida Indian Nation was required to put their newly repurchased former reservation land through the fee-into-trust process in order to regain sovereignty; we claim here that the relevant circumstances of that case appear to apply to the present situation as well.

The *Sherrill* decision states (bullets added) "*Given*

1. *the longstanding, distinctly non-Indian character of the area and its inhabitants,*
2. *the regulatory authority constantly exercised by New York State and its counties and towns, and*
3. *the Oneidas' long delay in seeking judicial relief against parties other than the United States,*

we hold that the Tribe cannot unilaterally revive its ancient sovereignty, in whole or in part, over the parcels at issue. The Oneidas long ago relinquished the reins of government and cannot regain them through open-market purchases from current titleholders" [p 2, slip opinion]. Later, the decision states

4. "*If OIN may unilaterally reassert sovereign control and remove these parcels from the local tax rolls, little would prevent the Tribe from initiating a new generation of litigation to free the parcels from local zoning or other regulatory controls that protect all landowners in the area*" [p 20, slip opinion],

with the unambiguous corollary that protecting all landowners is an important desideratum. We argue in the sequel that these four points of the *Sherrill* decision apply to the present case involving the Potawatomi as well: the area of the present Village of Shabbona — indeed the entire area of DeKalb County — is almost entirely non-Indian, has been governed by the Village or by DeKalb County since 1850, the Potawatomi have never sought relief in the courts for the loss of Shab-eh-nay's land, and local zoning is well-established and ought not lightly be set aside.

Furthermore, we are unable to identify any substantive circumstances serving to distinguish the situation of the Oneida from that of the Potawatomi that appear relevant to

the logic of the *Sherrill* decision: while the Oneida sold their land in violation of the Intercourse Act and Shab-eh-nay's was lost through abandonment proceedings, this distinction plays no role in the reasoning of the decision. Therefore, we reach the ineluctable conclusion that the same remedy ordered in *Sherrill* — application of the 25 U.S.C. §465 fee-into-trust process — must apply to the Potawatomi as well.

Finally, we note that, while the Indian Gaming Regulatory Act states, in 25 U.S.C. §2703, that Indian Lands include "all lands within the limits of any Indian reservation", and 18 U.S.C. §1151 makes a similar definition of "Indian Country", it is clear from established Department of the Interior rules, from *Sherrill v Oneida*, and from other regulations that operation of a gaming facility requires sovereign authority and not just fee-simple ownership of reservation land; that is, for gaming purposes the term "Indian lands" also presumes sovereignty. Without establishing sovereign authority over the land in question, Illinois state laws would forbid the operation of a gaming facility without state licensure.

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Applicability of *Sherrill* to the Shab-eh-nay case

1. According to data at census.gov from the 2000 census, DeKalb County is 0.2% Native American, and the town of Shabbona is 0.1% Native American (that is, one person). Such percentages have been typical for a very long time. The region certainly qualifies as having a "longstanding, distinctly non-Indian character." This distinctly non-Indian character was, in fact, in place by 1850. There were no Potawatomi settlements after that time, let alone Potawatomi governmental presence. Any later Native Americans in the area were incidental inhabitants with absolutely no official status relating to tribal settlements or to the land parcel in question.

The Lynch report lists the federal patents on the land granted to white settlers. When the Prairie Band purchased the land in 2006, the seller was not Native American.

2. De Kalb County has had uninterrupted and indeed uncontested regulatory authority over the land in question.

> *Similar justifiable expectations, grounded in two centuries of New York's exercise of regulatory jurisdiction, until recently uncontested by OIN, merit heavy weight here.*[*Sherrill*, p 15, slip opinion]

Despite claims of the Prairie Band that they have held "unextinguished jurisdiction" over the "reservation", in fact their presence has been utterly absent for, now, almost 160 years. Formal *tribal* presence ended in 1837, 170 years ago.

3. After Shab-eh-nay returned to his former land in 1849 and found that it was now settled by others, there appears never to have been any court filing protesting the action.

Shab-eh-nay's descendants have filed complaints with the Department of the Interior in the years following his death, Shab-eh-nay himself had an attorney make inquiries. The original claims, however, were all flatly denied; multiple citations may be found in the Lynch Report [some are quoted below]. Past claims that were either denied or not pursued do not strengthen the Potawatomi case; in fact, these serve to establish that the Potawatomi were not ignorant of their alleged rights. The *Sherrill* decision states:

> *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* [p 16, slip opinion]

For 150 years there has been no notion in the community that the status of the land in question might still be contested, or that sovereign return of the tribe was a possibility. The tribe took no actions to keep their claim in the public eye. While the past occupancy by Shab-eh-nay was common knowledge, there was and is widespread belief that the Native American presence here had ended.

In 1853, after Shab-eh-nay's plight became well-known in Illinois, a letter was sent by two Illinois state attorneys to the Secretary of the Interior, asking for clarification. The query was referred to the Acting Commissioner of Indian Affairs, who answered that as Shab-eh-nay had only usufruct right to the land, "it was decided by this office ... that in as much as said land had been abandoned by the Indians for whom it had been reserved, that it was 'competent for the Commissioner of the General Land Office to dispose of the same as other public lands of the United States'" [Lynch report, p 42].

In 1854 Shab-eh-nay himself hired an attorney to make enquiry with the Secretary of the Interior; the answer received was substantially identical [Lynch report, p 71]

Over the years prior to the *Sherrill* decision, members of the Oneida Indian Nation also filed complaints with the Department of the Interior regarding what was felt to be the illegal nature of the land sales. These inquiries did not block the application of the doctrine of *laches* to that case, and past Potawatomi inquiries should similarly not block its application to the present case.

4. The *Sherrill* decision directly addresses only taxation. But there can be no doubt that exemption from taxation would be the least disruptive right that might be granted to the tribe, while authority to conduct gaming free from state and county zoning regulations would be among the most disruptive to the community.

> *If OIN may unilaterally reassert sovereign control and remove these parcels from the local tax rolls, little would prevent the Tribe from initiating a new generation of*

> *litigation to free the parcels from local zoning or other regulatory controls that protect all landowners in the area.* [p 20, slip opinion]

DeKalb has had a Unified Comprehensive Land Use Plan and long-established zoning regulations (dekalbcounty.org/Planning/planning_index.html). These rules are intended precisely to "protect all landowners in the area;" many of the DeKalb County rules have the explicit goal of preserving the rural character of existing rural areas. It is clear that the *Sherrill* decision placed great weight on such regulations.

5. Finally, the remedy ordered in *Sherrill* is a very proportionate approach, in light of the enormous impact that would be caused by a gaming facility exempt from state regulation. It can hardly be considered a substantial burden for the tribe.

> *Recognizing these practical concerns, Congress has provided a mechanism for the acquisition of lands for tribal communities that takes account of the interests of others with stakes in the area's governance and well being. Title 25 U.S.C. §465 authorizes the Secretary of the Interior to acquire land in trust for Indians.... The regulations implementing §465 are sensitive to the complex inter-jurisdictional concerns that arise when a tribe seeks to regain sovereign control over territory.* [p 20, slip opinion]

The land-into-trust process would merely allow local governmental units and citizens the right to input before sovereignty is restored to the tribe. This would allow, for example, careful consideration of the development impact on local communities and the environment. We believe that the appropriate interpretation of *Sherrill v Oneida* is that this remedy be considered the standard route to sovereignty over repurchased lands; there is nothing in the decision to suggest otherwise.