No. 19-1981

In the United States Court of Appeals for the Seventh Circuit

ONEIDA NATION,

Plaintiff-Appellant,

v.

VILLAGE OF HOBART, WISCONSIN,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Wisconsin, No. 1:16-cv-01217-WCG.
The Honorable **William C. Griesbach**, Judge Presiding.

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT ONEIDA NATION

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 19-1981

Short Caption: Oneida Nation v. Village of Hobart, WI

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Oneida Nation

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(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

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Attorney's Signature: /s/James R. Bittorf Date: June 7, 2019

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Attorney's Signature: /s/Kelly M. McAndrews Date: June 9, 2019

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Attorney's Signature: /s/Paul R. Jacquart Date: May 30, 2019

Attorney's Printed Name: Paul R. Jacquart

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Attorney's Signature: /s/Jessica C. Mederson Date:

Attorney's Printed Name: Jessica C. Mederson

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Attorney's Signature: /s/Vanya S. Hogen Date: May 31, 2019

Attorney's Printed Name: Vanya S. Hogen

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Attorney's Signature: /s/William A. Szotkowski Date: May 31, 2019

Attorney's Printed Name: William A. Szotkowski

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes & Other Authorities:

JURISDICTIONAL STATEMENT

The United States District Court for the Eastern District of Wisconsin had subject-matter jurisdiction over this case under 28 U.S.C. §§ 1331 and 1362. Plaintiff-Appellant Oneida Nation ("Nation") is a federally recognized Indian tribe. Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs, 84 Fed. Reg. 1200, 1202 (Feb. 1, 2019). Defendant-Appellee Village of Hobart ("Village") is an incorporated municipality in Brown County, Wisconsin. The dispute arises under the Constitution, laws, and treaties of the United States, including but not limited to Art. I, § 8, cl. 3, Art. II, § 2, cl. 2, and Art. VI of the United States Constitution; the Treaty with the Oneida, 7 Stat. 566 (1838) (the "1838 Treaty"); the Indian Reorganization Act, 25 U.S.C. §§ 5123, *et seq.* (the "IRA"); and federal common law. All events giving rise to the dispute occurred within the exterior boundaries of the Oneida Reservation ("Reservation"), as established by the 1838 Treaty and within the Eastern District of Wisconsin.

The district court (the Honorable William C. Griesbach presiding) entered final judgment on April 26, 2019. (Dkt. 137). [A-40]. The Nation noticed its appeal to this Court on May 22, 2019 (Dkt. 138). This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Did the General Allotment Act of 1887, 24 Stat. 388 (commonly known as the Dawes Act and as amended by the Burke Act of 1906, 34 Stat. 182), a statute of general applicability to Indian tribes, authorize or direct the diminishment of reservations by, and to the extent of, the issuance of fee patents to allotted tribal members or the transfer of fee title to non-Indians?

2. Were the boundaries of the Reservation set aside in the 1838 Treaty diminished by issuance of fee patents to tribal members (following a period in trust) or the transfer of fee title to non-Indians, thereby subjecting the Nation to Village regulation of an event held by the Nation on its fee lands?

3. Is the Indian country statute, 18 U.S.C. § 1151(a), which provides that all land within reservations constitutes Indian country "notwithstanding the issuance of any patent," applicable to reservations with patents issued before enactment of the statute in 1948?

STATEMENT OF THE CASE

1. Creation of the Oneida Reservation

The Nation and the United States signed the 1838 Treaty following the departure of the Nation's ancestors from New York and protracted negotiations with the Menominee Tribe over a new homeland for the Oneida and other New York tribes. (Dkt. 93 at ¶¶ 3-8). The 1838 Treaty reserved a tract of approximately 65,400 acres as the Nation's Reservation and ceded to the United States the remainder of a much larger territory that

had been acquired for the New York tribes. *Id*. at ¶¶ 3-11. The contemporaneous federal survey of the 1838 Treaty showed a single tract and this tract has since been viewed by the United States as a reservation held in common by the Nation. *Id*. at ¶¶ 10-13. The Reservation was later allotted by the United States to tribal members under the Dawes Act. *Id*. at ¶¶ 14-19.

2. The Dawes Act

In 1887, Congress enacted the Dawes Act to authorize the allotment of the "various reservations" to tribal members. 24 Stat. 388 (Act of Feb. 8, 1887). It authorized the President in his discretion to allot any Indian reservation to members of the tribe, to issue patents for the allotments to be held in trust by the United States for a period of 25 years, and to purchase unallotted portions of the reservations upon terms to be ratified by Congress. *Id.* at §§ 1 and 5. It also made Indian allottees citizens and subject to state law upon the issuance of trust patents. *Id.* at § 6. It made no reference to reservation boundaries or to any particular reservation.

In 1906, Congress amended the Dawes Act. 34 Stat. 182 (Act of May 8, 1906) ("Burke Act"). The Burke Act made Indian allottees citizens and subject to state law upon the expiration of the trust period on their allotments rather than upon issuance of a trust patent, as originally provided in the Dawes Act. It also authorized the Secretary of the Interior ("Secretary"), in his discretion, to issue fee patents to Indian allottees before the

expiration of the 25-year trust period under specified circumstances. *Id.* It made no reference to reservation boundaries or to any particular reservation.

As contemplated in the Dawes Act, Congress enacted tribe-specific legislation from time to time to direct or approve the purchase of reservation land that remained following allotment upon specified terms. These so-called surplus land Acts resulted in a spate of jurisdictional disputes; some of these surplus land Acts have been construed to disestablish reservations or diminish reservation boundaries and others have been construed to leave reservation boundaries intact. *Solem v. Bartlett*, 465 U.S. 463, 467- 69 (1984).

3. Allotment of the Oneida Reservation

In 1889, President Harrison approved allotment of the Oneida Reservation under the Dawes Act and tribal members received trust patents to most of the Reservation in 1892.[1] (Dkt. 93 at ¶¶ 18, 21). In 1906, Congress adjusted implementation of the Dawes Act on the Reservation in an Oneida-specific provision (the "1906 Oneida provision") included in an appropriations act (the "1906 Appropriations Act"). 34 Stat. 325 (Act of June 21, 1906). The 1906 Oneida provision authorized the Secretary, in his discretion, to issue fee patents to named Oneida allottees. *Id.* at 380. It also authorized the Secretary,

[1] Approximately 80 acres on the Reservation were reserved from allotment for use as a tribal boarding and day school. In addition, small amounts of unallotted land were reserved for possible future allotment. (Dkt. 93 at ¶¶ 22, 23).

in his discretion, to issue fee patents "to any Indian of the Oneida Reservation in Wisconsin" before the expiration of the trust period. *Id.* at 381. It made no reference to Reservation boundaries.

The issuance of trust patents on the Oneida Reservation, the expiration of the trust period for many allotments, and the early issuance of fee patents for other allotments under the Burke Act and other allotment acts had the same consequences as elsewhere, *i.e.*, the rapid loss of title by the allottees and, in many instances, conveyance of parcels in fee to non-Indians. (Dkt. 93 at ¶ 27).[2] Not all trust periods for allotments on the Reservation expired, however. In 1917, as the expiration of the trust period for Oneida allotments approached, President Wilson signed an executive order extending the trust period for all remaining Oneida allotments for one year, with the exception of 23 named Oneida allottees. *Id*. at ¶ 30. In 1918, President Wilson signed a second executive order extending the trust period for 35 named allottees "on the Oneida Reservation in Wisconsin" for nine years. *Id*. at ¶ 34. Finally, in 1927, President Coolidge signed an executive order extending the trust period for 21 "allotments made to Indians of the Oneida Reservation in Wisconsin" for ten years. *Id.* at ¶ 38.

There is no surplus land Act applicable to the Oneida Reservation.

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[2] One of the Nation's historian-experts examined the record of Oneida allottees' loss of title after 1906 and determined that the "vast majority" of fee patents issued early on the Reservation were issued under authority of the Burke Act, not the 1906 Oneida provision. (Dkt. 92-6 at p.6).

4. The Indian Reorganization Act

In 1934, Congress enacted the IRA, which halted the allotment of tribal lands and permanently extended the trust period on all remaining trust patents. 48 Stat. 984 (Act of June 18, 1934), §§ 1 and 2. The IRA also authorized any "tribe, or tribes, residing on the same reservation" to organize under a constitution. *Id.* at § 16. In 1936, the Secretary approved an IRA constitution for the Nation. (Dkt. 93 at ¶ 50). The Constitution extended (and does to this day) the Nation's jurisdiction to the "Oneida Reservation." *Id*. The Secretary explicitly premised his approval of the Constitution upon a finding that the Nation was in occupation of the Reservation created in the 1838 Treaty, which was a necessary pre-condition for adoption of a constitution under the IRA as construed by the Solicitor at the time.[3] *Id.*

***5.* The Big Apple Fest dispute**

In 2016, the Village amended its Special Event Permit Ordinance ("Ordinance"), which regulates the conduct of special events by "any person," to define person to include any "governmental entity." (Dkt. 86-1, at §§ 250-4, 250-5). The Ordinance mandates that any person conducting such an event apply for a permit that may impose

[3] The record contains the full administrative consideration of the Nation's eligibility to organize under the IRA, including: the Department's explicit determination that the Nation was in occupation of a reservation; and the Department's view that the reservation boundaries established by the 1838 Treaty remained intact. (*See* Dkt. 93 at ¶¶ 41-50). The district court ignored this record altogether.

a wide range of conditions, including, *e.g.*, use of and payment for Village personnel for services such as security. The Ordinance also reserves for the Village "the right to shut down a special event that is in progress," if the Village deems it to be a safety hazard or "there is a violation of Village ordinances, state statutes or the terms of the applicant's permit," thereby effectively imposing all Village ordinances and state law upon permit holders. *Id.* at § 250-7(I). On September 2, 2016, counsel for the Village advised the Nation that it must obtain a Village permit to conduct its ninth annual Big Apple Fest ("Fest") scheduled to take place on September 17, 2016. (Dkt. 86 at ¶ 18).

The Nation declined to apply for a Village permit and instead conducted the Fest, as it had in past years, in accordance with the Nation's own long-standing laws, including: Oneida Vendor Licensing, Oneida Food Service Code, On-Site Waste Disposal Ordinance, Recycling and Waste Disposal Code, Oneida Safety Law, Sanitation Code, and Oneida Tribal Regulation of Domestic Animals Ordinance. (Dkt. 93 at ¶ 55). The Fest was a free, one-day event open to the public and intended to educate the public about the Nation's history and culture. *Id.* at ¶ 52. It consisted of pottery, corn-husk-doll, and basket-weaving demonstrations; tours of historic Oneida homes; apple-picking; a petting zoo; children's games and face-painting; hay rides; food and produce vendors; and other family-oriented activities. *Id.* at ¶ 53.

The Fest activities took place largely on land held in trust by the United States for the Nation and completely within the 1838 Treaty boundaries. (Dkt. 86 at ¶¶ 9-16).

Parking for the Fest activities and some apple-picking occurred on parcels of fee land owned by the Nation, located within the Village. (Dkt. 90 at ¶¶ 11, 12 and 16). Altogether, Fest activities occurred on 11 trust parcels and three fee parcels; seven of the trust parcels and the three fee parcels are located within the Village. The other four trust parcels are located within the City of Green Bay, which has never sought to impose its ordinance regulating special events on the Nation.

The Fest generated significant pedestrian traffic along and across state and county roads. In anticipation of this foot traffic, the Nation applied for and received from the Wisconsin Department of Transportation and Brown County Public Works Director a permit to temporarily close vehicular traffic along a designated route. (Dkt. 90-3). Personnel from the Oneida Police Department and the Village's Police Department monitored the temporary road closure. (Dkt. 90 at ¶¶ 21 and 22).[4] The Nation coordinated closely with Village officials in the conduct of the Fest, in particular with regard to the temporary road closure. (Dkt. 88 at ¶¶ 18-20).

[4] The record establishes that the Nation maintains a police force with 19 full-time officers who are trained under and deputized to enforce state and county laws on the Reservation. (Dkt. 93 at ¶ 61). The Nation also has a Security Department responsible for security at tribal facilities and events. There were eleven Oneida security officers and six Oneida police officers on duty for the 2016 Big Apple Fest. (Dkt. 88 at ¶ 17; Dkt. 93 at ¶ 60).

On September 21, the Village issued Citation 7F80F51TJS to the Nation for its alleged violation of the Ordinance in conducting the 2016 Fest without a permit from the Village. The Village purported to impose a $5,000 fine against the Nation. (Dkt. 90-4).

6. Relevant Procedural History

The Nation filed this action in response to the Village's demand that it comply with the Ordinance and filed its first amended complaint following issuance of the Citation. (Dkt. 10). The Nation sought declaratory and injunctive relief for its two claims: first, that the imposition of the Village's Ordinance upon the Nation in Indian country is pre-empted by federal law; and second, that the imposition of the Village's Ordinance upon the Nation constitutes an impermissible infringement upon the Nation's inherent powers of self-government in general and its authority to manage and regulate its lands and Reservation in particular. *Id.*

In its answer, the Village denied that the 1838 Treaty created a "true reservation," denied that the Nation was eligible to have land placed into trust under the IRA, and asserted affirmative defenses and counterclaims, including its claim that the Reservation no longer existed and its demand for payment of the $5,000 fine imposed in its citation. (Dkt. 12 at ¶ 8, Affirmative Defenses ¶ 4, and Counterclaims ¶ 24; *see also* Dkt. 99). The Village sought substantial discovery on a wide range of issues, including the Nation's continuing status as federally recognized, the alleged disestablishment or diminishment of the Reservation, and the circumstances surrounding the conduct of the

2016 Big Apple Fest. (Dkt. 31 and 34). The district court allowed discovery on alleged Reservation disestablishment or diminishment and the Fest but denied it on the Nation's continuing status as federally recognized.[5]

During discovery, the Nation moved to clarify the burden of proof on issues presented in the case. In its Decision and Order on the motion, the district court identified the Indian County statute, 18 U.S.C. § 1151(a), as determinative of the contours of the Nation's and Village's respective authority within the Reservation. (Dkt. 66 at p. 3-4). [A-43-44]. Further, the court identified the governing Supreme Court authority as *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) (local and state governments lack authority to regulate tribes in Indian country in the absence of exceptional circumstances), unless the Village could demonstrate that the Nation's Reservation has been disestablished or diminished by Congress. (Dkt. 66 at p. 6). [A-46]. Accordingly, the court identified the issues and allocated the burden of proof as follows: the Nation carried the burden of proof on the creation of the Oneida Reservation by the 1838 Treaty and the applicability of the IRA to the Nation and its Reservation; the Village carried the burden of proof on its claim that the Oneida Reservation has been disestablished or diminished and its affirmative defense that, if the Reservation boundaries remained intact, exceptional circumstances justified

[5] The district court determined that the Village's challenge to the Nation's status is a non-justiciable, political one that is also barred by the applicable statute of limitations. (Dkt. 46).

imposing the Village's Ordinance upon the Nation on the Reservation. (Dkt. 66.) [A-44-45].

The Nation and the Village moved for summary judgment on their respective claims and defenses. (Dkt. 84 and 85). On March 29, 2019, the District Court issued its Decision and Order (the "Decision") on the parties' motions, (Dkt. 130) [A-1], and on April 26, 2019, entered its judgment (Dkt. 137) [A-40]. The judgment denied the Nation's claims for declaratory and injunctive relief that the Nation's Big Apple Fest was not subject to the Village's Special Event Ordinance, granted in part the Village's motion, and dismissed the Village's counterclaim for the $5,000 fine. The judgment stayed enforcement of the Ordinance against the Nation pending a final determination of this appeal. *Id.*

7. Rulings Presented for Review

In the Decision, the district court determined that: the Nation carried its burden of proof that the 1838 Treaty created a reservation held in common by the Nation and that the IRA is applicable to the Nation; and the Village failed to carry its burden of proof that the Reservation had been disestablished but had demonstrated that the Reservation had been diminished "as a result of the issuance of fee patents to tribal members who then conveyed their interests to non-tribal members." (Dkt. 130 at pp. 22-23). [A-22-23]. The district court identified two triggering events for the supposed diminishment of the Reservation, events which occurred at different times:

> Once the fee patents were issued, the federal government no longer retained control of the land, as the land was converted into fee simple and owned by the individual tribal member. At that point, the intent unequivocally expressed by Congress in its enactment of the allotment acts was realized *and either then or with the further conveyance of the land to non-Indians, the original reservation was diminished.*

(Dkt. 140 at p. 23). [A-23 (emphasis added)].[6]

As a result, the district court erroneously concluded that the Nation was subject to the Village's Ordinance "[t]o the extent the Nation's special event was held on property not held in trust by the United States," leaving the Nation free of Village regulation on its 14,078.612 acres of trust land which the district court found constitutes "the current size and location of the Oneida Reservation." (Dkt. 130 at pp. 39 and 36). [A-39 and A-36].[7] The district court deemed this result to be necessary to avoid the incorrectly presumed "breathtaking" implications from an issue not before it, *i.e.,* that the Nation could exercise primary jurisdiction over the activity of non-Indians on non-Indian fee

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[6] Because of these alternative triggering events, the Decision produces even more severe and impracticable checkerboarding on the Reservation than that rejected by the Supreme Court in *Seymour v. Superintendent of Washington State Penitentiary,* 368 U.S. 351, 358 (1962).

[7] The Village has not cross-appealed the judgment that its Ordinance applies only to the Nation's activities on fee land, based on claimed exceptional circumstances or otherwise. As a result, the Village has waived any claim that exceptional circumstances justify departure from the usual rules of federal pre-emption that prohibit local government regulation of tribes on reservations and preclude the imposition of the Village's Ordinance upon the Nation on an undiminished Reservation. *See California v. Cabazon Band of Mission Indians*, 480 U.S. at 221-22. (Dkt. 130 at pp. 38-39). [A-38-39].

land on the Reservation. (Dkt. 130 at p. 37). [A-37]. The court avoided these hypothetical and erroneous implications by holding that the Reservation had been diminished.[8]

SUMMARY OF THE ARGUMENT

The Supreme Court applies a well-established three-part test to determine whether a reservation has been disestablished or diminished: first, only Congress can alter reservation boundaries; second, an act of Congress or its surrounding circumstances must reflect an unequivocal intent to alter reservation boundaries; and third, if such an act exists, courts can examine the subsequent treatment of the reservation to confirm Congress's intent to alter reservation boundaries. Supreme Court jurisprudence applying this test is clear that general expectations surrounding the allotment policy embodied in the Dawes Act and related acts are an insufficient basis for finding a congressional intent to alter reservation boundaries.

Applying these principles to the Oneida Reservation decades ago, the State of Wisconsin determined that the Oneida Reservation boundaries remain intact. (*See* Dkt. 93 at ¶ 51) (1981 Attorney General Opinion that the Reservation has been neither

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[8] The district court also analyzed and rejected an affirmative defense and counterclaim asserted by the Village. It ruled that the Nation was not barred from defending against the alleged diminishment of the Reservation by the preclusive effect of *Stevens v. County of Brown* (E.D. Wis. Nov. 3, 1933) (unpublished decision) (Dkt. 89-45), a suit to which the Nation was not a party. (*See* Dkt. 130 at pp. 14-17). [A-14-17]. The district court also dismissed the Village's counterclaim for payment of the $5,000 fine based on the Nation's sovereign immunity from suit. The Village did not cross-appeal the judgment on either of these rulings and, as a result, those issues are not before this Court.

disestablished nor diminished). The State has since ordered its relations with the Nation on all manner of issues, including gaming, law enforcement, family relations, and the applicability of State taxes,[9] on the continued vitality of the Reservation boundaries. In addition, the Nation has environmental and service agreements with Brown and Outagamie Counties and other local governments, all premised upon the shared understanding that the 1838 Reservation boundaries remain intact. *See Oneida Tribe of Indians of Wisconsin v. Village of Hobart*, 732 F.3d 837, 841 (7th Cir. 2013) (noting cooperative service agreements with local governments).[10]

The Decision disrupts these long-standing government-to-government relations. Even in the absence of a specific act of Congress reflecting an intent to do so, the district court erroneously held that the Oneida Reservation has been diminished from the 1838 Treaty boundaries of 65,400 acres to just over 14,000 acres, thereby subjecting the Nation

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[9] *See* https://www.doa.wi.gov/Pages/AboutDOA/Oneida-Tribe-of-Indians-of-Wisconsin.aspx; Wisconsin Department of Revenue Publication 405, acknowledging that federal law pre-empts a wide range of state taxes on the Oneida and other reservations defined as "all land within the boundaries" of those reservations, https://www.revenue.wi.gov/DOR%20Publications/pb405.pdf; Wisconsin Department of Revenue Fact Sheet 2103-1, Native American Tribes Sales and Use Tax, identifying the Nation and its reservation, defined as all land within the boundaries of the Reservation, as eligible for an exemption from the State tax, https://www.revenue.wi.gov/DOR%20Publications/2013-1tribal-1.pdf; https://doa.wi.gov/Pages/AboutDOA/TribalCompactsAnd Amendments.aspx; Wisconsin Statutes, Children's Code, Ch.48.01; Wisconsin Statutes, Ch.165.90, County-Tribal Law Enforcement Program.

[10] *See* https://oneida-nsn.gov/government/intergovernmental-agreements/ identifying service agreements with Brown County, Outagamie County, Village of Ashwaubenon, and Town of Oneida and a water drainage agreement with the Outagamie County Drainage Board.

to the regulatory control of the Village. It did so by improperly inferring congressional intent to diminish the Reservation from expectations at the time of the Dawes Act — a construction of the Dawes Act that the Supreme Court has flatly rejected. It did so by disregarding Congress's codification of the common-law definition of reservations as including all land within their boundaries "notwithstanding the issuance of any patent." 18 U.S.C. §1151(a). Further, the district court did so based on a misplaced concern on an issue not before it — the erroneous belief that the Nation could, were the Reservation undiminished, exercise "primary jurisdiction over land largely populated by people who have no say in its governing body." (Dkt. 130). [A-37]. The Decision is rife with error.

First, the district court misread or ignored a substantial body of Supreme Court authority holding that a specific congressional intent is necessary to diminish an Indian reservation, that such intent cannot be found in the general expectations underlying the Dawes Act, and that the inevitable consequences of reservation allotment do not diminish or alter reservation boundaries. Further, the Supreme Court has formulated a rule governing the scope of tribal authority over non-Indians on fee lands within reservations that is premised upon the continuing reservation status of such fee lands. Yet, the district court held that the Oneida Reservation has been diminished, even in the admitted absence of specific statutory language indicating a congressional intent to do so. This occurred, the district court reasoned, either when patents were issued to

Oneida allottees following the trust period or when fee patents were conveyed by allottees to non-Indians. This diminishment analysis is wrong under governing Supreme Court authority.

Second, the district court mischaracterized cases addressing the status of the Yankton Reservation in South Dakota and the Stockbridge-Munsee Reservation in Wisconsin. Those cases are consistent with Supreme Court authority requiring specific congressional intent to alter reservation boundaries because they rely upon special acts applicable to those reservations which differed in terms and intent from the Dawes Act. The Oneida Reservation is not the subject of a surplus land Act, as was the Yankton Reservation, or a special and unique allotment act, as was the Stockbridge-Munsee Reservation. As a result, the district court was wrong that those cases support diminishment of the Oneida Reservation under the Dawes Act.

Third, the district court erroneously considered the subsequent treatment of the Reservation. The Supreme Court case law only allows courts to consider such evidence to corroborate a specific congressional intent to alter reservation boundaries. The Supreme Court has been clear that, in the absence of statutory language indicating an intent to disestablish or diminish reservation boundaries, evidence of subsequent treatment is insufficient as a matter of law to support a diminishment claim. Because the district court admitted the absence of such statutory language, it was inappropriate for the district court to examine the subsequent treatment of the Reservation in an effort

to bolster its diminishment finding. In any event, the district court's analysis of the subsequent treatment of the Reservation is so incomplete and one-sided that it is completely unreliable and does not corroborate the district court's diminishment finding.

Fourth, the district court wrongly failed to apply Congress's 1948 codification of the long-standing judicial definition of reservation under which all parcels within a reservation retain reservation status, "notwithstanding the issuance of any patent." 18 U.S.C. § 1151(a). The Supreme Court has applied this Indian country statute in all its disestablishment/diminishment cases without regard to whether the act claimed to alter reservation boundaries occurred before or after 1948. The district court's failure to apply the Indian country statute to the Oneida Reservation is reversible error.

The district court's diminishment holding has no precedence or coherence as a doctrinal matter, is unworkable on the ground as a practical matter, and has no limiting principle that restricts its pernicious effects to the Oneida Reservation among the dozens of reservations allotted under the Dawes Act. This Court should reverse and hold that the Oneida Reservation is undiminished, thus leaving the Nation free of Village regulation on the Reservation under the unchallenged and settled rules of federal pre-emption.

STANDARD OF REVIEW

This Court conducts *de novo* review of a district court's decision on cross-motions for summary judgment. *Metropolitan Life Ins. Co. v. Johnson*, 297 F.3d 558, 561 (7th Cir. 2002); *Ozlowski v. Henderson*, 237 F.3d 837, 839 (7th Cir. 2000). In such cases, the Court construes all inferences in the light most favorable to the party against whom the motion under consideration was reviewed. *Hess v. Reg-Ellen Machine Tool Corp.*, 423 F.3d 653, 658 (7th Cir. 2005). As applied here, the standard of review requires that all inferences be drawn in favor of the Nation on the district court's judgment in favor of the Village that the Oneida Reservation has been diminished.

Further, "[d]iminishment . . . will not be lightly inferred" under the Supreme Court's well-established framework that governs reservation disestablishment or diminishment. *Solem*, 465 U.S. at 470 (1985). The inquiry is governed by three principles:

> The first and governing principal is that only Congress can divest a reservation of its land and diminish it boundaries. Once a block of land is set aside for an Indian Reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise . . . The most probative evidence of congressional intent is the statutory language used to open the Indian lands . . . To a lesser extent, we have also looked to events that occurred after passage of a surplus land Act to decipher Congress's intentions . . . [finally] we look to subsequent demographic history of opened lands as one additional clue as to what Congress expected would happen once land on a particular reservation was opened to non-Indian settlers.

Id. at 470-472; *Nebraska v. Parker*, __ U.S. __, 136 S. Ct. 1072, 1078 (2016) (framework is "well settled"). Congress's general expectation at the time of the allotment policy that

reservations would be abolished at some point is insufficient evidence of intent to diminish; a specific congressional intent is required. *Solem*, 465 U.S. at 468-69 ("Although the Congresses that passed the surplus land Acts anticipated the imminent demise of the reservation and, in fact, passed the Acts partially to facilitate the process, we have never been willing to extrapolate from this expectation a specific congressional purpose of diminishing reservations with the passage of every surplus land Act.")

ARGUMENT

I. The district court ignored or misread Supreme Court authority that Indian reservations are not diminished by the Dawes Act or the inevitable consequences of allotment.

The 1838 Treaty-created Oneida Reservation remains intact unless Congress has acted to abrogate the Treaty by altering the Reservation's boundaries. The Supreme Court has repeatedly held, and very recently confirmed, that treaty-protected rights continue to exist unless repudiated by Congress. *Herrera v. Wyoming*, __ U.S. __, 139 S. Ct. 1686 (2019). The bar for assessing Congress's intent to do so is a high one. *Id*. at 1696. "There must be 'clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty.'" *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202-03 (1999) (quoting *United States v. Dion*, 476 U.S. 734, 740 (1986)).

The district court acknowledged the high evidentiary bar to establish abrogation of a treaty. (Dkt. 130 at p. 19). [A-19 ("The Nation correctly observes that '[b]ecause the Reservation was created by a treaty, only Congress can diminish or disestablish it.'")]. The district court also acknowledged that the Supreme Court's framework governing claims of reservation disestablishment or diminishment requires clear congressional intent and eschews "lightly inferred" alteration of reservation boundaries. *Id.* (citing *Solem*, 465 U.S. at 470 and *Nebraska v. Parker*, 136 S. Ct. at 1079). Nevertheless, the district court found diminishment of the Oneida Reservation despite the admitted absence of any statutory language indicating this result. *Id.* at 21 ("Notwithstanding the absence of such language, the intent of the allotment policy in general and the Dawes Act in particular is unmistakable."). (Dkt. 130 at p. 21). [A-21]. The Supreme Court has explicitly rejected the district court's construction of the Dawes Act and the diminishment of reservation boundaries as a result of allotment under the Dawes Act in its disestablishment/diminishment cases. Further, in its line of cases on the extent of tribal jurisdiction over non-Indians on reservations, the Supreme Court has plainly indicated that non-Indian fee lands acquired as a result of the allotment policy retain reservation status. The district court either ignored or misread all these cases.

A. The Dawes Act, as amended in the Burke Act, and the 1906 Oneida provision contained no provision indicating congressional intent to diminish the Reservation.

The Dawes Act set out the basic allotment policy. It authorized the President, in his discretion, to undertake three steps toward the break-up of reservations throughout Indian country (excepting Indian Territory or Oklahoma): first, tribal land was to be divided into allotments for individual tribal members; second, the individual tribal members were to receive patents to be held in trust by United States for 25 years (thereafter to be alienable); and third, remaining unallotted land on the reservations (or surplus land) was to be made available to non-Indians for settlement under terms to be ratified by Congress in surplus land Acts "with the purpose, in part, of promoting interaction between the races and of encouraging Indians to adopt white ways." *Mattz v. Arnett*, 412 U.S. 481, 498 (1973); *Solem*, 465 U.S. at 466-67; *see also* 24 Stat. 388 (Act of Feb. 8, 1887). Once all the land had been allotted and the trust patents had expired, the reservations could be abolished. *Mattz*, 412 U.S. at 496. But there was nothing in the Dawes Act that altered reservation boundaries. To the contrary, allotment was deemed consistent with continued reservation status. *Nebraska v. Parker*, 136 S. Ct. at 1079-80; *Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351, 356 (1962).

The Burke Act amended the Dawes Act to speed this process along. *See* 34 Stat. 182 (Act of May 8, 1906). It did so by authorizing the Secretary to issue fee patents to tribal members considered competent even before the expiration of the 25-year trust period.

Id.; *see also F. Cohen's Handbook of Federal Indian Law* (2012 ed.), § 16.03[2][b]. The amended Dawes Act was quite effective in this regard. By 1934, nearly two-thirds of the 38 million acres of allotted land had passed from Indian to non-Indian ownership. *Id*. at § 16.03[2][b].

The 1906 Oneida provision was merely a specific application of the Burke Act principles to the Oneida Reservation. First, it authorized the early issuance of fee patents to "any Indian of the Oneida Reservation of Wisconsin," while the Burke Act authorized the early issuance of fee patents to competent Indians. Second, it authorized the issuance of fee patents to named Oneida allottees. 34 Stat. 325, 381. Thus, the 1906 Oneida provision had the same purpose and effect as the Burke Act. *Bordeaux v. Hunt*, 621 F. Supp. 637, 644 (D. S.D. 1985) (Oneida provision and others had the same purpose as the Burke Act). In this regard, the 1906 Oneida provision was hardly unique. It was similar to literally dozens of such provisions applicable to specific reservations or to classes of allottees on those reservations. *See, e.g.*, the 1906 Appropriations Act (enacting specific adjustments to the implementation of the Dawes Act on 10 reservations in addition to Oneida)[11]; 33 Stat. 1048 (Act of Mar. 3, 1905) (also enacting nearly a dozen

[11] One of the other tribe-specific provisions adjusting the Dawes Act in the 1906 Appropriation Act applied to the White Earth Reservation. 34 Stat. at 353. Minnesota claimed that the White Earth Reservation had been disestablished based upon an 1889 surplus land Act. *See State v. Clark*, 282 N.W.2d 902, 907 (Minn. 1979) (citing *Leech Lake Band of Chippewa Indians v. Herbst*, 334 F. Supp. 1001, 1004 (D. Minn. 1971) for the proposition that the passing of land titles

adjustments to implementation of the Dawes Act on specified reservations).

Remarkably, the district court conceded the absence of statutory language indicating an intent to diminish the Oneida Reservation, even though there is no precedent finding diminishment in the absence of either a surplus land Act or a unique allotment act reflecting such an intent. It dismissed the significance of the absence of such language, though, because there is no surplus land act applicable to Oneida. (Dkt. 130 at p. 21). [A-21]. This claimed distinction between the surplus land Acts and the Dawes Act is illusory. The opening of surplus land to non-Indian settlement was expressly contemplated in the Dawes Act and was done in accordance with the terms of tribe-specific surplus land Acts; these acts were part and parcel of the allotment policy authorized by the Dawes Act. *See* 24 Stat. 388 at § 5. As such, there was a common purpose underlying allotment followed by the eventual issuance of fee patents on reservations and the opening of reservations under surplus land Acts. The Supreme Court has held that this common purpose, as reflected in the surplus land Acts, is insufficient alone to establish the required congressional intent to diminish a reservation. *Mattz v. Arnett*, 412 U.S. at 496. It necessarily follows that mere allotment of a reservation and its inevitable consequences are likewise insufficient evidence of a congressional intent to diminish a reservation. *Id.*

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did not determine reservation boundaries). Neither the state nor the court suggested that the 1906 White Earth provision altered reservation boundaries.

The district court's dismissal of the importance of specific language reflecting an intent to diminish a reservation is also counter-intuitive. Every reservation that was the subject of a surplus land Act had previously been allotted — hence, the existence of "surplus" land. Because the Supreme Court held that not all surplus land Acts diminished the affected reservations, those reservations could not have been diminished by the earlier issuance of fee patents to tribal members following the trust period or the transfer of fee title to non-Indians. *See Nebraska v. Parker*, 136 S. Ct. at 1079. Thus, it is simply nonsensical to suggest, as the Decision does, that the conveyance of parcels in fee title to non-Indians following some period of trusteeship is somehow more indicative of an intent to diminish a reservation than the immediate conveyance of fee title to non-Indians in a surplus land Act.

Undeterred by the absence of statutory language, the district court relied instead upon the "unmistakable" purpose of the Dawes Act "to hasten the demise of the reservation system and to encourage Indian assimilation into the white system of private property ownership" and the general belief at the time that "reservations would disappear, and individual Indians would be absorbed into the larger community of white settlers." (Dkt. 130 at 21). [A-21]. But the district court completely ignored the Supreme Court's explicit admonition that congressional intent to abolish or diminish a given reservation *cannot be found* in this general purpose and belief:

> Although the Congresses that passed the surplus land Acts anticipated the imminent demise of the reservation and, in fact, passed the Acts partially

> to facilitate the process, we have never been willing to extrapolate from this expectation a specific congressional purpose of diminishing reservations with the passage of every surplus land Act.

Solem, 465 U.S. at 468-69; *Nebraska v. Parker*, 136 S. Ct. at 1079. If this generalized expectation and belief were insufficient even when reflected in a tribe-specific surplus land act, they are also insufficient in the generally applicable Dawes Act. As a result, there is neither the requisite statutory language nor congressional intent to diminish the Reservation.

B. The Supreme Court has expressly repudiated the district court's holding that the inevitable effects of allotment resulted in diminishment.

As noted above, the district court is unclear whether the diminishment of the Reservation occurred when allottees received patents to their allotments or when allottees conveyed the fee patent to non-Indians, both of which were authorized under the Dawes Act and expedited under amendments to the Dawes Act. *Compare* Dkt. 130 at pp. 23-24 [A-23-24] *with* Dkt. 130 at pp. 26-31 [A-26-31].[12] The Supreme Court has

[12] The district court also cited *United States v. Pelican*, 232 U.S. 442 (1914), for the proposition that loss of Indian title as to an allotment resulted in the diminishment of a reservation. (Dkt. 130 at p. 23). [A-23]. But *Pelican* involved the definition of Indian country, not the definition of reservation. 232 U.S. at 449 (the question is whether this allotment is Indian country within the meaning of the federal criminal statute). The *Pelican* Court indicated that the Indian country status of a parcel lapsed upon the conveyance of fee title to the allottee, but it said nothing about the distinct question of whether the conveyance of fee title to the allottee altered reservation boundaries. *See* discussion, *infra*, on the distinction between the definition of "Indian country" and that of "reservation."

explicitly rejected both; neither conveyance of fee patents to allottees nor to non-Indians diminishes a reservation.

The Supreme Court first considered the effect of allotment under the Dawes Act on reservation boundaries in *United States v. Celestine*, 215 U.S. 278 (1909). This criminal case arose on the Tulalip Reservation, which had been allotted under an 1855 treaty. The defendant challenged federal jurisdiction because the situs of the crime was his allotment, for which he had received a fee patent. He claimed that the parcel was no longer part of the reservation and, hence, beyond federal jurisdiction. *Id.* at 285. The Court rejected this claimed result of allotment, relying upon authority construing the Dawes Act. *Id.* at 287 (citing *Eells v. Ross*, 64 F. 417, 420 (9th Cir. 1894) ("The act of 1887, which confers citizenship, clearly does not emancipate the Indians from all control, or abolish the reservations.")).[13] The Court did not indicate or imply that its holding was contingent upon continued ownership of the parcel by an Indian. Nonetheless, the district court purported to distinguish *Celestine* because the allotment at issue remained in the tribal member's possession. (Dkt. 130 at p. 23). [A-23].[14] This purported

[13] The Supreme Court also discussed the difference in meaning of the terms reservation and Indian country. *Celestine*, 215 U.S. at 285-86; *see also* discussion, *infra*.

[14] The purported distinction made by the district court thoroughly undermines its alternative argument that the Reservation was diminished with the issuance of fee patents to tribal members.

distinction was explicitly rejected by the Supreme Court in *Seymour*, 368 U.S. at 351, the Court's next major decision on the issue.

Seymour involved the Colville Reservation, which had been allotted under the Dawes Act and was the subject of a surplus land Act. After the Court concluded that the surplus land Act had not disestablished the reservation, the Court went on to consider the State's alternative theory. "The contention is that, even though the reservation was not dissolved completely by the Act permitting non-Indian settlers to come upon it, its limits would be diminished by the actual purchase of land within it by non-Indians because land owned in fee by non-Indians cannot be said to be reserved for Indians." *Id.* at 357. The Court rejected this proposition, instead reading *Celestine* to hold that allotment under the Dawes Act, including the eventual conveyance of former allotments to non-Indians, had no effect on reservation boundaries. *Id.* at 359.

The *Seymour* Court's reading of *Celestine* was hardly surprising. It read *Celestine* just as every lower court has, *i.e.*, that allotment under the Dawes Act, including the eventual conveyance of former allotments to non-Indians, had no effect on reservation boundaries. *See Beardslee v. United States*, 387 F.2d 280, 286 (8th Cir. 1967) ("Other courts almost uniformly have upheld federal jurisdiction or denied state jurisdiction, where the offense was committed by an Indian within the boundaries of a reservation but on particular land not owned by an Indian."); *United States v. Hilderbrand*, 190 F. Supp. 283, 287 (D. Kan. 1960) ("It seems to this Court that the phrase 'within the limits of any

Indian reservation' should be given the meaning accorded to it by the Supreme Court in *Celestine* . . . Although the Catholic Church may have taken title to this one acre plot of land, it still remained within the limits of the Lummi Reservation."), *aff'd per curiam* 287 F.2d 886 (10th Cir. 1961).

Similarly, lower courts after *Seymour* have read it to hold that allotment and conveyance of former allotments in fee patent, whether to a tribal member or a non-Indian, do not alone diminish a reservation. *See The City of New Town v. United States*, 454 F.2d 121, 125 (8th Cir. 1972) (citing *Celestine* and *Seymour* for the proposition that all tracts remain a part of the reservation, including those made available to non-Indians in fee);[15] *United States v. Erickson*, 478 F.2d 684, 688 (9th Cir. 1973) (citing *Seymour* for the proposition that placing title to reservation lands in the hands of non-Indians "does not, by itself, affect the exterior boundaries of the reservation."); *Ellis v. Page*, 351 F.2d 250, 252 (10th Cir. 1965) (since *Seymour*, the Tenth Circuit has consistently held "that the allotment of lands in severalty *or the conveyance of land to non-Indians*" does not disestablish or diminish reservations) (emphasis added); *State of Wisconsin v. Baker*, 464 F. Supp. 1377, 1382 (W.D. Wis. 1978) ("Courts have repeatedly held that lands which are

[15] Allotment of the Fort Berthold Reservation, considered in *New Town*, was mandated under a 1910 Act of Congress, but the 1910 Act provided that allotment was to be done in accordance with "existing law," *i.e.*, the Dawes Act. 36 Stat. 455, § 2 (Act of June 1, 1910).

privately held by non-Indians in fee simple can nevertheless be part of an Indian reservation.").

Most importantly, the Supreme Court has since consistently relied upon *Celestine* and *Seymour* for the proposition that the Dawes Act alone was not intended to alter reservation boundaries, either by allotment or the conveyance of former allotments to non-Indians in fee title. *See Nebraska v. Parker*, 136 S. Ct. at 1080 (statutory schemes that allow non-Indian settlers to own land on the reservation "do not diminish the reservation[] boundaries," citing *Seymour*); *Solem*, 465 U.S. at 470 (once Congress sets aside a block of land as a reservation, "and no matter what happens to the title of individual plots within the area," the entire block retains reservation status unless Congress indicates otherwise, citing *Celestine)*; *Mattz*, 412 U.S. at 496 (allotment provisions did not "differ materially from those of the General Allotment Act" which does not "alone, recite or even suggest that Congress intended thereby to terminate the Klamath River Reservation"); *see also Chemehuevi Indian Tribe v. McMahon*, __ F.3d __, 2019 WL 3886168 (9th Cir. 2019) (reservation boundaries are distinct from title since "'[o]ne inquiry does not necessarily have anything in common with the other, as title and reservation status are not congruent concepts in Indian law.'" (quoting *Navajo Tribe of Indians v. New Mexico*, 809 F.2d 1455, 1475 (10th Cir. 1987) and citing *Solem*).

Other Supreme Court cases construing specific surplus land Acts (not the Dawes Act itself) also cite *Seymour* or *Celestine* for the proposition that conveyance of title to non-

Indians alone did not disestablish or diminish a reservation. *See South Dakota v. Yankton Sioux Tribe,* 522 U.S. 329, 343 (1998); *Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584, 587 (1977); *DeCoteau v. District Cty. Court for the Tenth Judicial Dist.,* 420 U.S. 425, 427 (1975). The Supreme Court has repeatedly observed in these cases that the loss of Indian title resulting from every surplus land Act is insufficient to disestablish or diminish a reservation. *Nebraska v. Parker,* 136 S. Ct. at 1082, citing *South Dakota v. Yankton Sioux Tribe,* 522 U.S. at 356.

Inexplicably, the district court largely ignored this substantial body of Supreme Court authority. It acknowledged *Celestine* but attempted to distinguish it on grounds explicitly rejected by the Supreme Court in *Seymour* and lower courts. It failed to even acknowledge other Supreme Court authority, principally *Seymour*, notwithstanding the Nation's reliance on those cases in the briefing below.[16] The direct conflict with governing Supreme Court authority compels reversal of the judgment below.

C. The Supreme Court's jurisprudence on tribal authority over non-Indians on reservations also demonstrates the error of the district court's diminishment analysis.

At an early stage in this litigation, the district court acknowledged that the issue in this case is whether the Village can regulate the Nation on the Reservation, not whether the Nation can regulate the activity of non-Indians on the Reservation. (Dkt. 66 at pp. 4-

[16] *See* Dkt. 96 at pp. 37-40 (Nation's Memorandum of Law in Support of Motion for Summary Judgment).

5). Nonetheless, the district court purported to find authority for its diminishment analysis in the Supreme Court's leading case on the authority of tribes over non-Indians on reservations — *Montana v. United States*, 450 U.S. 544 (1981), from which the district court incorrectly inferred that the reservation was diminished to the extent of non-Indian fee title on the reservation. This reflects a profound misunderstanding of *Montana*. Contrary to the district court's understanding, *Montana* and its progeny are entirely consistent with the construction of the Dawes Act in *Celestine* and *Seymour* that the conveyance of title to non-Indians, without more, has no impact on reservation boundaries.

Montana concerned "the sources and scope of the power of an Indian tribe to regulate hunting and fishing by non-Indians *on lands within its reservation owned in fee simple by non-Indians*." *Id.* at 547 (emphasis added). The Crow Reservation at issue in *Montana* had been allotted under the Dawes Act and a 1920 Act that required further allotment and authorized the sale of unallotted lands.[17] The Court analyzed the tribe's treaty and inherent authority to govern the reservation. It observed that "Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations . . ." *Id.* at 565. But the Court concluded that such

[17] It should be noted that the 1920 Act directed that the "force and legal effect of the trust patents to be as is prescribed by the General Allotment Act of February 8, 1887." 41 Stat. 751, § 1 (Act of June 4, 1920). As a result, allotment of the Crow Reservation occurred under the Dawes Act.

authority was constrained and applied only in limited circumstances, *i.e.*, where consensual relations existed between the non-Indian and the tribe or the conduct of the non-Indian directly threatened the political integrity, economic security, or health or welfare of the tribe. *Id.* at 565-66. Stated otherwise, the loss of title to parcels through allotment did *not* have the effect of diminishing the reservation boundaries; had it done so, the tribe would have had no authority to govern activity on those parcels in the first instance. However, the loss of title to parcels *did* have the effect of limiting the tribe's civil jurisdiction over non-Indians on the reservation.[18] Thus, the district court's concern that the Nation would have "primary jurisdiction" over non-Indians on an undiminished Reservation reflects an incorrect reading of the law as well as a misapprehension of the basis of the holding in *Montana.*

Since *Montana*, the Court has acknowledged that fee lands on reservations remain a part of the reservations but that tribes' ability to regulate activities of non-Indians on non-Indian fee land is limited. In *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989), the Court considered whether the tribe had authority to apply its zoning ordinance to fee land on the reservation owned by non-Indians that

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[18] Indeed, the Court had already rejected the broad argument that the Dawes Act, and the conveyance of fee title as part of the allotment scheme, determined the reach of state authority for all jurisdictional purposes. *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation,* 425 U.S. 463, 478 (1976) (to construe the Dawes Act to eliminate tribal jurisdiction for all purposes would substantially diminish the reservation by allotment, a claim similar to that which the Court rejected in *Seymour*).

had been alienated as a result of the Dawes Act. The Court concluded that the tribe lacked jurisdiction to impose its zoning ordinance on those fee lands. *Id.* at 423, 425. Further, the Court distinguished its disestablishment/diminishment line of cases from the jurisdictional issue before it since those cases held that allotment is not inconsistent with continuing reservation status but did not address tribal jurisdiction over non-Indians on non-Indian fee lands. *Id.* at 424; *see also South Dakota v. Bourland*, 508 U.S. 679, 689 (1993) (tribe lacked authority to regulate hunting and fishing on fee land on the reservation even though reservation boundaries had not been altered). Plainly, the Supreme Court understood in these cases that allotment under the Dawes Act and the resulting acquisition of fee title by non-Indians did not alter the reservation boundaries — an understanding of the Act that directly contradicts that of the district court.

In the end, the district court's judgment cannot stand under the weight of contrary Supreme Court authority. The district court violated the Court's three-part test governing diminishment by finding diminishment even in the absence of the required congressional intent. The district court failed to distinguish, or in many instances even address, the substantial body of Supreme Court authority rejecting the proposition that allotment (and its inevitable consequences) resulted in diminishment of reservations. The district court misunderstood the Supreme Court jurisprudence governing tribal authority over non-Indians on non-Indian fee land on reservations, which is plainly premised upon the continuing existence of reservations notwithstanding the issuance of

fee patents under the Dawes Act to tribal members or the subsequent conveyance of fee title to non-Indians. The judgment below should be reversed based on the authority of these Supreme Court cases.

II. None of the cases relied upon by the district court support its diminishment analysis.

After largely ignoring Supreme Court authority to the contrary, the district court purported to find support for its construction of the Dawes Act in cases involving the Yankton Sioux Reservation in South Dakota and the Stockbridge-Munsee Reservation in Wisconsin. It was wrong as to both. In those cases, the courts relied upon tribe-specific statutes, not the Dawes Act, to find a change in reservation boundaries. As a result, nothing in those cases supports diminishment of the Oneida Reservation based upon allotment under the Dawes Act and later conveyance of allotments in fee.

A. Congressional intent to diminish the Yankton Reservation was found in a surplus land Act, not the Dawes Act.

The Supreme Court considered the history of the Yankton Sioux Reservation at length in *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998). The reservation was created by treaty in 1858, allotted under the Dawes Act, and the remaining or "surplus" land was ceded by the tribe under an 1894 surplus land Act. *Id.* at 334-40. The Yankton surplus land Act contained classic language ceding all the tribe's interest in exchange for payment of a sum certain. The Supreme Court concluded that the reservation had

been diminished based squarely upon the terms of the surplus land Act, not allotment or the Dawes Act:

> Indeed, we have held that when a surplus land Act contains both explicit language of cession evidencing "the present and total surrender of all tribal interests," and a provision for a fixed-sum payment, representing "an unconditional commitment from Congress to compensate the Indian tribe for its opened land," a "nearly conclusive," or "almost insurmountable," presumption of diminishment arises.

Id. at 334 (citations omitted). The Court went on to note that there were countervailing features in the Yankton surplus land Act and that the parcel before the Court had been ceded under that Act. As a result, the Court declined to determine whether the surplus land Act disestablished the Yankton Reservation altogether, holding only that the reservation was diminished by the land ceded in that Act. *Id.* at 358.

Because the Supreme Court left the disestablishment issue open, the Eighth Circuit considered the status of various classes of land not ceded in the surplus land Act in *Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010 (8th Cir. 1999) and *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994 (8th Cir. 2010). The Eighth Circuit also declined to find that the reservation had been disestablished but did hold that certain categories of allotted land lost reservation status upon conveyance to non-Indians. *Gaffey*, 188 F.3d at 1016, 1018; *Podhradsky*, 606 F.3d at 1007, 1012-1015. Like the Supreme Court, the Eighth Circuit made plain that the loss of reservation status under these circumstances was a function of the surplus land Act, not the Dawes Act:

> The text of the 1894 Act and evidence regarding the parties' contemporaneous understanding of it establish that the reservation was maintained, but do not define its precise boundaries. When viewed in its full historical context, however, it is clear that the parties did not intend for the tribe to retain control over allotted lands which passed out of trust status and into non-Indian hands.

Gaffey, 188 F.3d at 1030; *see also Podhradsky*, 606 F.3d at 1008-10 (allotment alone did not revoke reservation but congressional intent to diminish upon conveyance to non-Indians was present in surplus land Act). Almost immediately following the *Podhradsky* decision, the Eighth Circuit confirmed that the Yankton cases did, indeed, depend upon the particular surplus land Act under consideration there. *Yankton Sioux Tribe v. United States Army Corps of Engineers*, 606 F.3d 895, 899 (8th Cir. 2010) (*Podhradsky* held that Yankton Reservation was diminished "by reason of the 1894 Act as construed in *Gaffey*. . ."). Plainly, the Eighth Circuit would not have found further diminishment of the Yankton Reservation but for the Yankton surplus land Act.

The district court acknowledged the Eighth Circuit's reliance on the surplus land Act in the Yankton cases. (Dkt. 130 at pp. 27-29). [A-27-29]. But the court emphasized the assumption reflected in that Act that the reservation would be diminished upon the passage of title to former allotments to non-Indians and the expectation at the time that state jurisdiction would expand and federal/tribal jurisdiction shrink. It then found a similar assumption in the Dawes Act and concluded from the purportedly similar expectations that the Dawes Act likewise diminished the Oneida Reservation (even in the absence of an applicable surplus land Act). Through this sleight of hand, the district

court effectively read the surplus land Act out of the Yankton cases altogether. *Id.* at pp. 30-31.

Incredibly, the district court cited *Solem* as support for its diminishment ruling based upon general expectations at the time of the Dawes Act, notwithstanding the Supreme Court's explicit admonition in *Solem* that courts are not to extrapolate a specific congressional intent to diminish reservations from the assimilationist policy expectations at the time of the Dawes Act. *See Solem*, 465 U.S. at 469; *Nebraska v. Parker*, 136 S. Ct. at 1079, 1082. The district court thus justified its mistaken interpretation of the Yankton cases by ignoring the *Solem* admonition, finding diminishment of the Oneida Reservation untethered to any statutory language.

Under the district court's analysis, there is nothing to distinguish the Oneida Reservation from other reservations that were allotted under the Dawes Act and the millions of acres converted to non-Indian ownership as a consequence. Under the district court's analysis, the Supreme Court was wrong in *Solem* and *Parker* because those reservations would have been diminished by allotment and the passage of fee title

into the hands of non-Indians.[19] Under the district court's analysis, the Supreme Court was also wrong in *Montana* because the Crow Reservation would have been diminished by the transfer of fee title to non-Indians, necessarily eliminating all tribal authority. Nothing in the Yankton cases supports this stunning result.

B. This Court's holding that the Stockbridge-Munsee Reservation was disestablished was not based upon the Dawes Act or the conveyance of former allotments to non-Indians in fee.

The district court's reliance upon this Court's decision in *Wisconsin v. Stockbridge-Munsee Community*, 554 F.3d 657 (7th Cir. 2009), is equally misplaced. The particular history of that reservation is a long and tortured one. Congress enacted a series of statutes, beginning in 1871 and culminating in 1906, which attempted to resolve long-standing internal tribal disputes, adjust federal relations with the tribe, and in some instances indisputably diminish the reservation. *Id.* at 660-61. Ultimately, Congress intended that the 1906 Stockbridge-Munsee act operate "as a complete settlement of all obligations . . . due to said tribe . . . from whatever source the same may be accrued . . ." 34 Stat. 325 (Act of June 21, 1906). Further, the terms of the 1906 Stockbridge-Munsee act

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[19] The Cheyenne River Reservation (considered in *Solem*) and the Omaha Reservation (considered in *Parker*) had both been allotted under the Dawes Act. *See* 25 Stat. 888, § 11 (Act of March 3, 1889) (providing for allotment of the Cheyenne River Reservation) and 22 Stat. 341, § 7 (Act of Aug. 7, 1882) (providing for allotment of the Omaha Reservation). Under the district court's analysis of the allotment policy, both those reservations would have been diminished by allotment without regard to surplus land Acts at issue there. But the Supreme Court found that both reservations remained undiminished. *Solem*, 465 U.S. at 463; *Nebraska v. Parker*, 136 S. Ct. at 1076.

distinguished it "from most allotment acts." *Stockbridge*, 554 F.3d at 664. It required the immediate issuance of fee patents to all tribal members and mandated that all tribal members either accept the patents or "cash out" by accepting payment for their interest in tribal lands. Based on these unique statutory terms, this Court held that the 1906 Stockbridge-Munsee act disestablished the reservation. *Id.*

This Court emphasized the distinct terms of allotment under the Stockbridge-Munsee act, which differed sharply from the discretionary allotment with a 25-year trust period under the Dawes Act:

> The intent to extinguish what remained of the reservation [after diminishment in 1871] is born [sic] out by the act's provision for allotments in fee simple. This provision sets the 1906 Act apart from most allotment acts, like the 1871 Act, which restricted the Indian owners from selling their land or required that it be held in trust by the United States.

Id. at 664. But the district court ignored the sharp differences between allotment at Stockbridge-Munsee and at Oneida. At Stockbridge-Munsee, there was no period of trusteeship for the patents because of the unique terms of the Stockbridge act. At Oneida, there was a period of trusteeship for every allotment since the Reservation was allotted under the Dawes Act. As a result, there is nothing in *Stockbridge* that supports the district court's construction of the very different Dawes Act.

Further, this Court held that the Stockbridge-Munsee Reservation was disestablished immediately, not diminished over time. As the Court put it, Congress "extinguish[ed] what remained of the reservation when it passed the [Stockbridge] act."

Id. Again, this is very different from the district court's holding that the Oneida Reservation boundaries shrank over time either with the issuance of a patent to each allottee or the conveyance of fee title by an allottee to a non-Indian.

Finally, a member of the panel in *Stockbridge* wrote separately to emphasize the "unique historical context" of the 1906 Stockbridge-Munsee act. *Id*. at 665 (J. Ripple, concurring). He thought it important to "underline that today's decision [in *Stockbridge*] does not constitute a departure from the general rule that once Congress has established a reservation, its boundaries remained fixed unless Congress explicitly diminishes those boundaries or disestablishes the reservation." *Id.* Thus, like the Yankton cases, *Stockbridge* provides no support for the district court's construction of the Dawes Act and the effects of allotment.

III. The district court improperly relied upon cherry-picked excerpts from the historical record to support its diminishment finding.

The district court acknowledged that there is no surplus land Act applicable to the Oneida Reservation. (Dkt. 130 at p. 21). [A-21]. The district court also effectively acknowledged that the Dawes Act lacked any statutory indicia of an intent to diminish the Oneida Reservation. *Id.* The district court nevertheless purported to buttress its diminishment analysis by examining the subsequent treatment of the Reservation. This was error under the Supreme Court's three-part framework governing reservation diminishment claims.

The Supreme Court was quite clear in its most recent decision on the subject that subsequent treatment of an area is relevant only to reinforce a finding of diminishment based upon statutory language. *Nebraska v. Parker*, 136 S. Ct. at 1082; *see also Solem*, 465 at 472 ("When both an Act and its legislative history fail to provide substantial and compelling evidence of a congressional intention to diminish Indian lands, we are bound by our traditional solicitude for the Indian tribes to rule that diminishment did not take place and that the old reservation boundaries survived the opening."). The circumstances considered by the Court in *Parker* closely parallel those here and *Parker* thus compels the conclusion that the Reservation has not been diminished, without regard to the subsequent treatment of the area.

In *Parker,* the Court examined the text of a surplus land Act applicable to the Omaha Reservation and found that it "bore none of [the] hallmarks of diminishment." *Id.* The State of Nebraska conceded the absence of any statutory basis for diminishment of the reservation. *Smith v. Parker*, 996 F. Supp.2d 815, 836 (D. Neb. 2014), *aff'd* 774 F.3d 1166 (8th Cir. 2014). Instead, the State made its case for diminishment solely on the subsequent treatment of the reservation and demographics, which it referred to as *de facto* diminishment. *Id*. at 841-844; Brief for Petitioners, *Nebraska v. Parker*, 136 S. Ct. 1072 (2016) (No. 14-1406) (available at turtletalk.files.wordpress.com/2015/11/nebraska-opening-brief.pdf). The Supreme Court rejected the *de facto* diminishment theory and held that such evidence cannot overcome the absence of congressional intent to

diminish. *Nebraska v. Parker*, 136 S. Ct. at 1081. Since the district court here conceded the absence of statutory language indicating an intent to diminish the Oneida Reservation, evidence of subsequent treatment of the Reservation and demographics is likewise insufficient.

Even were the evidence of subsequent treatment and demographics probative here, the district court's analysis of that evidence is so limited and highly selective as to be wholly unreliable. Out of a voluminous historical record,[20] the court selected a handful of documents of doubtful significance, at best. For example, the district court inferred from state legislation in 1903 creating towns within the Oneida Reservation and a statement regarding state jurisdiction over fee patents on the Reservation[21] that the State of Wisconsin believed the Reservation to have been diminished. Yet, the district court ignored the State's considered view in 1981 that the Reservation continues to exist undiminished. (Dkt. 93 at ¶ 51). Similarly, the district court ignored multiple official reports of the Commissioner of Indian Affairs after allotment documenting the United

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[20] The historical record consists of thousands of pages of documents, eight reports by four historian-experts, and depositions of all four experts.

[21] The inferences drawn by the district court from these state actions are suspect. The 1903 state law explicitly acknowledged the Reservation. *See* Ch. 339, Wisconsin Laws of 1903 (May 20, 1903) creating towns by reference to "the territory now embraced within the Oneida Reservation." The 1931 state opinion regarding its jurisdiction over fee patents on the Reservation is a function of the explicit terms of the Dawes Act that allottees would be subject to state civil and criminal law upon the expiration of the trust period. Thus, the State opinion says nothing about Reservation boundaries. *See Solem*, 465 U.S. at 470; *Mattz*, 412 U.S. at 504; *Seymour*, 368 U.S. at 357-58.

States' view that the Oneida Reservation consisted of 65,400 acres, including allotted and fee patented lands.[22]

Most importantly, the district court disregarded the Department of the Interior's explicit determination following enactment of the IRA that the Nation was in occupation of the Reservation, as defined by reference to federal treaties, not allotment. Immediately after the Nation voted to accept the IRA, it proceeded to propose a draft constitution that described its jurisdiction as extending to the Oneida Reservation as defined in the 1838 Treaty. (Dkt. 93 at ¶¶ 40, 41). The Department reviewed the draft constitution and expressed concern that the reference to the 1838 Treaty was confusing, given that the 1838 boundaries represented a reduction in the Menominee territory that had been previously set aside for the Oneida and other New York tribes in earlier treaties. "In order to avoid confusion, it is suggested that the jurisdiction of the Tribe

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[22] *See, e.g.*, Dkt. 93 at ¶ 26 (1900 Annual Report of Commissioner of Indian Affairs, "Schedule showing the names of Indian reservations . . ." and listing the Reservation as "Treaty of Feb. 3, 1838, vol. 7, p. 566. 65,402.13 acres allotted to 1,501 Indians. Remainder, 84.08 acres, reserved for school purposes); ¶ 36 (1919 Annual Report of the Commissioner of Indian Affairs, Table 5, "State and Reservation," listing the Reservation as "Number of allotments 1,541. Area in acres: Allotted 65,466; Unallotted...; Total 65,466"; ¶ 37 (1920 Annual Report of the Commissioner of Indian Affairs, Table 7 "General Data for each Indian reservation to June 30, 1920" listing the Reservation as "Tribe: Oneida; area (unallotted) 151; Treaties, laws, or other authorities relating to reserve: Treaty of Feb. 3, 1838, vol. 7, p. 566. 65,428.13 acres allotted to 1,502 Indians; remainder, 84.08 acres, reserved for school purposes. 6 double allotments canceled containing 151 acres (see 5013-1912). Trust period on 35 allotments extended 19 years; Executive order, May 24, 1918); ¶ 39 (1927 Annual Report of the Commissioner of Indian Affairs, in compilation of reservation acreage figures, listing the Reservation as "Oneida Reservation. Acreage . . . 65,617.77. Allotments . . . 65,541.77. Reserved . . . 76 . . . Total land area 65,617.77.")

shall 'extend to the territory within the present confines of the Oneida Reservation', and that all references to the various treaties should be omitted." *Id.* at ¶ 43. The draft constitution was revised accordingly, adopted by the Nation at a secretarial election, and approved by the Secretary. *Id.* at ¶¶ 44, 45, 46, 49 and 50. The clear import of these administrative deliberations is that the Department understood the Reservation to extend to the full extent of the 1838 Treaty boundaries. *See id.* at ¶ 45 (Bureau of Indian Affairs letter recommending conduct of election on proposed constitution noting that the 1838 Treaty established the Oneida Reservation that had been further recognized by executive orders extending trust periods on certain allotments).[23]

Finally, the district court simply ignored the bulk of the historical record here, which supports the continuing existence of the Reservation. One of the Nation's experts surveyed the body of statements made between 1919 and 1935 regarding the Reservation, including the few references to the "former reservation" cited by the district court, and concluded that fewer than 20% of those documents referred to the Reservation as "former" or no longer in existence. (Dkt. 92-5 at p. 137). Even the

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[23] The Department reached the opposite conclusion on this issue regarding the Stockbridge-Munsee Reservation, another important point of distinction between *Stockbridge* and the present case. When Stockbridge-Munsee first sought to adopt an IRA constitution, the Department determined that the tribe was not eligible to do so because it lacked a land base. *Wisconsin v. Stockbridge-Munsee Cmty.*, 366 F. Supp. 2d 698, 732-33 (E.D. Wis. 2004), *aff'd*, 554 F.3d 657 (7th Cir. 2009). The Department approved an IRA constitution for Stockbridge-Munsee only after the Department had placed land into trust for the tribe and proclaimed that trust land to be a reservation. *Id.*

Village's own expert acknowledged that the record can fairly be described as "mixed." (Dkt. 105-7 at pp. 123-24). Such a "mixed record" is entitled to no weight, even in cases where there is statutory text indicating an intent to diminish a reservation. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. at 356.

Nothing in the district court's brief and selective summary of the subsequent treatment of the Reservation provides either an independent legal basis for diminishment of the Reservation or support for the court's erroneous construction of the Dawes Act.

IV. The district court should be reversed for its refusal to apply the Indian country statute to the inquiry.

In 1948, Congress enacted the current statutory definition of Indian country. By its terms, reservations constitute Indian country, "notwithstanding the issuance of any patent." 18 U.S.C. § 1151(a).[24] Further, the Supreme Court has been clear that the statute applies to determine the contours of federal and tribal jurisdiction in civil disputes, including claims of reservation disestablishment or diminishment, even though the

[24] 18 U.S.C. § 1151 reads in its entirety: "Except as otherwise provided in sections 1154 and 1156 of this title, the term 'Indian country', as used in this chapter, means (a) all land within the limits of any Indian reservation within the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same."

definition appears as part of federal criminal laws. *Oklahoma Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 125 (1993); *California v. Cabazon Band of Mission Indians*, 480 U.S. at n. 5; *DeCoteau v. District Cty. Court for the Tenth Judicial Dist.*, 420 U.S. 425, n. 2 (1975); *Mattz*, 412 U.S. at 483. Yet, the district court declined to apply the Indian country statute in its decision because it found that the Reservation had been diminished before enactment of the statute in 1948. The district court's refusal to do so is wrong for multiple reasons.

First, in a bizarre use of precedent, the district court relied upon *Solem* for the proposition that, because Congress first uncoupled Indian country status from title in 1948, the question here is whether the Reservation was diminished before 1948. (Dkt. 130 at p. 18). [A-18]. But the *Solem* Court explicitly applied the Indian country statute to the issue before it, even though alleged disestablishment occurred there, if at all, well before 1948, *i.e.*, as a result of a 1908 surplus land Act. 465 U.S. at 467 ("On the other hand, federal, state, and tribal authorities share jurisdiction over these lands if the relevant surplus land Act did not diminish the existing Indian reservation because the entire opened area is Indian country under 18 U.S.C. § 1151(a).").

Further, the Supreme Court has explicitly applied the Indian country statute in other disestablishment/diminishment cases where the event claimed to have changed reservation boundaries occurred long before 1948. *DeCoteau v. District Court*, 420 U.S. at 427 (question was whether the 1891 act terminated the Lake Traverse Reservation under

the Indian country statute); *Mattz*, 412 U.S. at 483 ("Our decision in this case turns on the resolution of the narrow question whether the Klamath River Indian Reservation in northern California was terminated by Act of Congress [in 1892] or whether it remains 'Indian country,' within the meaning of 18 U.S.C. § 1151(a)"); *Seymour*, 368 U.S. at 358 (Indian country statute applied to determine effect of 1906 surplus land Act). All these cases support the application of the Indian country statute regardless of when the alleged diminishment occurred.

Second, the district court misread *Clairmont v. United States*, 225 U.S. 551 (1912) to hold that reservation status was tied to Indian title before the adoption of the Indian country statute in 1948. (Dkt. 130 at p. 18). [A-18]. The question in *Clairmont* was whether the introduction of liquor onto a parcel of fee land on the Flathead Reservation violated an 1897 federal statute that applied to Indian country; the statute made no reference to reservations. *Id.* at 554, 557-58.[25] This is a crucial distinction, as the Supreme Court explained in *Celestine*. It noted that the term Indian country had been historically defined by reference to Indian title. *Celestine*, 215 U.S. at 285. Although this statutory definition of Indian country was repealed in 1874, courts continued to refer to it to define the term Indian country. *United States v. Le Bris*, 121 U.S. 278, 280 (1887); *Ex parte*

[25] As noted above, the Supreme Court indicated in *Moe* that the Flathead Reservation had not been diminished by the presence of fee lands within its boundaries. 425 U.S. at 478.

Kan-gi-shun-ca, 109 U.S. 556, 561 (1883). Not so with the definition of reservation, which had never been defined by reference to Indian title.

> But the word "reservation" has a different meaning, for while the body of land described in the section quoted as "Indian country" was a reservation, yet a reservation is not necessarily "Indian country." The word is used in the land law to describe any body of land, large or small, which Congress has reserved from sale for any purpose. It may be a military reservation, or an Indian reservation, or, indeed, one for any purpose for which Congress has authority to provide, and, when Congress has once established a reservation, all tracts included within it remain a part of the reservation until separated therefrom by Congress.

Celestine, 215 U.S. at 285.

Later, the Supreme Court adopted this as the "first and governing" principle in reservation disestablishment/diminishment cases: "Once a block of land is set aside for an Indian reservation, and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise." *Solem*, 465 U.S. at 470 (*citing Celestine*, 215 U.S. at 285); *Seymour*, 368 U.S. at 358; *Ute Indian Tribe v. State of Utah*, 521 F. Supp. 1072, 1081-83 (D. Utah 1981) (detailing distinction between historical definitions of reservation and Indian county). Rather than support the district court's analysis, *Clairmont* and similar cases demonstrate the court's error in failing to apply the historical definition of reservation.

Third, the 1948 Indian country statute codified this historical definition of reservation; it did not depart from it, thereby justifying a different rule regarding diminishment of reservations before and after 1948. The Supreme Court has explained

that Congress, in enacting the statute, adopted the existing common law rules that elucidated the various forms of Indian country, *i.e.*, patented land within reservation boundaries, rights-of-way, dependent Indian communities, and allotments with unextinguished Indian title. *Oklahoma Tax Comm'n*, 508 U.S. at 125 (Congress adopted decisions that Indian country included all lands set aside for residence of Indians under federal protection); 18 U.S.C. § 1151, Historical and Revision Notes.[26]

One of these cases was *Kills Plenty v. United States*, 133 F.2d 292 (8th Cir. 1943). The question there was whether the federal government had jurisdiction over a crime by an Indian on fee land within the boundaries of a reservation. The court concluded that the limits of a reservation included tracts to which Indian title had been extinguished. *Id.* at 294 (construing a statute providing for federal jurisdiction "within the limits of any Indian reservation"). By codifying this rule, Congress in 1948 simply adopted the definition of reservation used by the Supreme Court since its *Celestine* decision in 1909. *Beardslee*, 387 F.2d at 287-88.

There is no basis, then, for the district court's refusal to apply the Indian country statute in this case. The statute incorporated the long-standing definition of the term

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[26] The reviser's notes observed that the 1948 Indian country statute was intended in some respects to eliminate confusion arising from case law regarding federal criminal jurisdiction in Indian country, particularly where only non-Indians were involved. *See Draper v. United States*, 164 U.S. 240 (1896); *United States v. McBratney*, 104 U.S. 621 (1881). Congress resolved this confusion by adopting the broader definition of Indian country. *Ute Indian Tribe v. State of Utah*,

reservation, one that encompassed all land within the reservation, including fee land owned by non-Indians, unless Congress had acted to diminish that reservation's boundaries. *Solem*, 465 U.S. at 470; *Seymour*, 368 U.S. at 358; *Celestine*, 215 U.S. at 285. Under the plain terms of the 1948 Indian country statute and case law codified therein, the conveyance of tracts in the Oneida Reservation to non-Indians in fee patent did not diminish the Reservation or alter the usual rules of federal pre-emption which dictate that the Village lacks authority to regulate the Nation in its on-reservation activities. *California v. Cabazon Band of Mission Indians*, 480 U.S. at 221-22.

CONCLUSION

This is a simple case on the law. The outcome is governed by legal principles applied by the Supreme Court for over one hundred years: reservations once established by Congress can only be diminished by Congress; allotment of a reservation under the Dawes Act and the inevitable transfer of former allotments to non-Indians in fee, without more, do not diminish a reservation; and a reservation, under federal common law as codified in 18 U.S.C. § 1151(a), encompasses all land within its boundaries, unless Congress has specifically acted to abolish or diminish it. Under these legal principles, the Oneida Reservation continues to exist as set aside by the 1838 Treaty and, under the undisputed jurisdictional rules governing reservations, the

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521 F. Supp. at 1084. Nothing in the reviser's notes or the cases cited there indicated any historical confusion regarding the definition of reservation.

Village cannot regulate the Nation within the boundaries of the Reservation. This Court should accordingly reverse the district court and remand the case with direction to enter judgment in favor of the Nation. Otherwise, the longstanding government-to-government relations under which the Reservation has been governed will be cast asunder and every other reservation allotted under the Dawes Act will be placed in jeopardy.

Dated this 13th day of September 2019.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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Dated: September 13, 2019

/s/ Arlinda F. Locklear
Arlinda F. Locklear

Counsel for Plaintiff-Appellant
Oneida Nation

CIRCUIT RULE 30(d) STATEMENT

Pursuant to Circuit Rule 30(d), counsel certifies that all material required by Circuit Rule 30(a) and (b) are included in the Appendix.

/s/ Arlinda F. Locklear
Arlinda F. Locklear

CERTIFICATE OF SERVICE

I hereby certify that on September 13, 2019, the Brief of Plaintiff-Appellant was filed with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Arlinda F. Locklear
Arlinda F. Locklear

APPENDIX

TABLE OF CONTENTS TO APPENDIX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

ONEIDA NATION,

Plaintiff,

v. Case No. 16-C-1217

VILLAGE OF HOBART, WISCONSIN,

Defendant.

DECISION AND ORDER

This case represents another episode in the ongoing dispute between the Oneida Nation and the Village of Hobart over land use regulation and control. The Oneida Nation filed this action for declaratory and injunctive relief challenging the legal authority of the Village to enforce its Special Events Permit Ordinance, Chapter 250 of the Village Code, against the Nation, its officers, and its employees within the Village, which lies entirely within the 1838 boundaries of the Oneida Reservation. The action arises out of the Village's effort to enforce the Ordinance by requiring the Nation to obtain a permit for its annual Big Apple Fest. The Nation argues that as a federally recognized Indian tribe, it is immune from state and local regulations within its reservation and not subject to the Ordinance. The Village, on the other hand, challenges the Nation's claim that the boundaries of the original Oneida Reservation remain intact and contends that it is entitled to enforce the Ordinance to the extent necessary to protect the health, safety, and welfare of its residents and the public. This court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1362.

Presently before the court are the parties' cross-motions for summary judgment. The Nation moves for summary judgment, claiming that its reservation was created by its Treaty of February

3, 1838, with the United States and that the original Reservation boundaries remain intact. It thus follows, the Nation contends, that the Nation and its officials and employees are not subject to the Ordinance as a matter of law and the Village should be enjoined from attempting to enforce it against them. The Village filed a cross-motion for summary judgment in which it argues that the 1838 Treaty under which the Oneida received their land did not create a reservation. Even if the Treaty did create a reservation, the Village argues that a 1933 decision by this court held that the Oneida Reservation was disestablished and that the Nation is collaterally estopped from relitigating its status. Alternatively, the Village argues that, even aside from the 1933 decision, this court should find that the Oneida Reservation has been disestablished or, at a minimum, diminished. The United States filed a brief in support of the Nation as amicus curiae. The motions have been fully briefed and argued by the parties.

Having fully considered the arguments set forth, I conclude that the Treaty of 1838 created a reservation that has not been disestablished. But the Nation's reservation has been diminished such that the Village may enforce the Ordinance on those lands not held in trust by the United States for the benefit of the Nation. In addition, I conclude that the Nation's sovereign immunity forecloses the Village's counterclaim for monetary damages. Accordingly, and for the reasons set forth below, the Nation's motion will be only partially granted as to the Village's counterclaim for damages. The Village's motion for summary judgment dismissing the Nation's claims for declaratory and injunctive relief will be granted. Summary judgment on the Village's counterclaim for declaratory relief that the Ordinance may be enforced as to covered activities on fee land owned by the Nation, as well as activities on public roadways, rights-of-way, and neighboring properties is also granted.

BACKGROUND

A. The Present Dispute

The Nation is a federally-recognized Indian tribe and is listed in the Notice of the Indian Entities Recognized and Eligible to Receive Services from the United States Department of the Interior, Bureau of Indian Affairs. Joint Stipulated Statement of Material Fact (SSOMF) ¶ 1, ECF No. 86; Pl.'s Statement of Proposed Undisputed Material Facts (PSUMF) ¶ 1, ECF No. 93. The Village is an incorporated municipality in Brown County, Wisconsin and is located wholly within the boundaries of the area set aside for the Nation by the Treaty of February 3, 1838. SSOMF ¶ 2; PSUMF ¶ 2. According to U.S. Census Bureau population estimates, as of July 1, 2017, the total Village population was 8,896, of which "White alone" residents comprise 79.9% and "American Indian and Alaska Native alone" comprise 12.2%. Def.'s Statement of Proposed Undisputed Material Facts (DSUMF) ¶ 127, ECF No. 91.

The Nation has conducted an annual event known as the Big Apple Fest since 2009. PSUMF ¶ 52. The event is held on the Nation's Cultural Heritage Grounds and Apple Orchards and includes activities such as apple picking, an apple pie contest, an apple press demonstration, a petting zoo, children's games, face painting, cardboard cow painting, hay rides, horse demonstrations, pottery and corn husk doll making, basket weaving, Indian and non-Indian food and produce vendors, and tours of the preserved historic Oneida homes. *Id.* ¶ 53. The 2016 Apple Fest drew as many as 8,128 attendees to the event. DSUMF ¶ 140.

Richard Figueroa, the Nation's Special Events Coordinator in the Tourism Division, is responsible for planning the Big Apple Fest. Figueroa coordinates the event with the Oneida Compliance Division, the Oneida Risk Management Department, the Oneida Environmental Health

and Safety Division, Oneida Conservation, the Oneida Utilities Department, the Oneida Public Works Department, Oneida Security, and the Oneida Police Department to ensure compliance with the Nation's laws. PSUMF ¶ 56. The Nation conducts the Big Apple Fest in conformity with its laws, specifically the Emergency Management and Homeland Security Ordinance; the Oneida Safety Law; the Oneida Vendor Licensing Ordinance; the Oneida Food Service Code; the Nation's On-Site Waste Disposal Ordinance; the Recycling and Solid Waste Disposal Law; the Sanitation Ordinance; and Oneida Tribal Regulation of Domestic Animals Ordinance. *Id.* ¶ 55.

On March 1, 2016, the Village adopted amended Ordinance No. 03-2016, Special Events Permit Ordinance. *Id.* ¶ 17; Chapter 250, Village of Hobart Municipal Code, ECF No. 86-1. The Ordinance provides:

> No person shall conduct a special event within the Village of Hobart without first having obtained a rental and/or special event permit. A special event permit may be issued to any person that the Village Administrator or his/her designee find appropriate.

ECF No. 86-1 at 3. The Ordinance defines "person" as "[a]ny person, firm, partnership, association, corporation, company, governmental entity, or organization of any kind." *Id.*

On September 2, 2016, counsel for the Village informed the Nation that it needed to apply for a permit under the Ordinance or the Village would enforce the Ordinance's penalty provisions. SSOMF ¶ 18. Although it submitted an Application by Municipality for Permission to Detour State Trunk Highway Traffic to the Wisconsin Department of Transportation and Brown County Public Works Director, *id.* ¶ 20, the Nation declined to apply for a permit from the Village and, on September 9, 2016, filed a motion for a preliminary injunction seeking to enjoin the Village from requiring that the Nation's 2016 Big Apple Fest comply with the provisions of the Ordinance. The

court denied the Nation's motion on September 13, 2016, finding that the Nation did not demonstrate that it would suffer irreparable harm since the Village agreed it would not seek to prevent the event from going on. The Nation held the Big Apple Fest as planned on September 17, 2016. *Id.* ¶ 19.

Some activities associated with the 2016 Big Apple Fest occurred on non-trust land owned by the Nation in fee simple, including parking and apple picking. DSUMF ¶ 134. During the Apple Fest, security officers, six Oneida Nation police officers, and a registered nurse were on site. PSUMF ¶¶ 58, 60. Two officers of the Hobart-Lawrence Police Department attended the 2016 Big Apple Fest. SSOMF ¶ 22. The Nation contracted with a third-party vendor to place road closure barricades for the event at the intersection of North Overland Road and Riverside Drive and to block both lanes of traffic for the portion of North Overland Road between the North Overland Road/Highway 54 intersection. DSUMF ¶¶ 135–36.

On September 21, 2016, the Village's Chief of Police issued Citation No. 7R80F51TJS against the Nation for failing to act in accordance with the Ordinance. The Nation filed an amended complaint on September 28, 2016, asserting that it, its officials, and its employees are immune from the Ordinance in the conduct of special events on the Nation's trust land and Reservation and that the Village lacks the authority to enforce the Ordinance against the Nation, its officials, and its employees. It seeks to enjoin the Village's attempt to impose the Ordinance on the Nation, its officials, and its employees and to enforce the Ordinance through citation or municipal court proceedings. It also seeks to enjoin the Village from enforcing Citation No. 7R80F51TJS against the Nation.

While the present dispute between the parties arises out of these recent events, its resolution requires consideration of the Nation's history in Wisconsin and the various shifts in federal Indian policy in the United States over the last 150 years. For this reason, both parties sought a significant period of time for discovery and have submitted extensive documentation and briefing in support of their respective positions. Recognizing the importance of the issues raised to both parties, the court begins its analysis with a consideration of the history to which both appeal.

B. Historical Background

The Oneida Tribe of Indians was one of six Iroquois Nations living in the area that later became the State of New York. In the years following the Revolutionary War, encroachment by the new Americans on their ancestral lands, as well as other factors, gave rise to a plan for the Oneida to move west to the Wisconsin Territory. On February 8, 1831, the United States entered into a treaty with the Menominee Tribe, which was already located in the Wisconsin Territory, under which the Menominee agreed to cede a tract of land to be set apart as a home to the several tribes of the New York Indians, including the Oneida. The tract of land was to be apportioned among the New York tribes "so as not to assign any tribe a greater number of acres than may be equal to one hundred for each soul actually settled upon the lands." PSUMF ¶ 3 (quoting Treaty with the Menominee, 1931, signed Feb. 8, 1831, 7 Stat. 342, ECF No. 92-10 at 4). The Treaty stated that ceded lands "are to be held by those tribes, under such tenure as the Menomonee [sic] Indians now hold their lands, subject to such regulations and alteration of tenure, as Congress and the President of the United States shall, from time to time, think proper to adopt." *Id.* ¶ 4 (quoting Treaty with the Menominee, 1931, signed Feb. 8, 1831, 7 Stat. 342, ECF No. 92-10 at 4). The Treaty with the Menominee was amended on February 17, 1831, to extend the three-year deadline by which the

New York tribes were to relocate to the ceded Menominee lands. *Id.* ¶ 6. On October 27, 1832, the United States entered into a third treaty with the Menominee to amend the February 8, 1831 Treaty to alter the boundaries of the tract ceded to the United States for the benefit of the New York tribes. The October 27, 1832 treaty provided that the terms of the February 8, 1831 Treaty, as amended, were otherwise confirmed. *Id.* ¶ 7.

Then, on February 3, 1838, the Oneida entered into a treaty with the United States in which it ceded to the United States their title and interest in the 1831 Menominee cession in return for reserving "to the said Indians to be held as other Indian lands are held a tract of land containing one hundred (100) acres, for each individual, and the lines of which shall be so run as to include all their settlements and improvements in the vicinity of Green Bay." *Id.* ¶ 8 (quoting Treaty with the Oneida, 1838, signed Feb. 3, 1838, 7 Stat. 566, Arts. 1 and 2, ECF No. 92-13 at 3). The number of Oneida who had emigrated to the Duck Creek area totaled 654, resulting in a tract of land consisting of approximately 65,400 acres. DSUMF ¶ 1. The United States agreed to survey the reserved tracts as soon as practicable. PSUMF ¶ 9. In December 1838, John Suydam surveyed the tract of land set aside in the Treaty of 1838. *Id.* ¶ 10. The map he created of the survey, labeled "Oneida Reservation," consisted of land in what would later become parts of Brown and Outagamie Counties in the State of Wisconsin. ECF No. 92-14. Commissioner of Indian Affairs Crawford wrote to Secretary of War Poinsett on February 7, 1839, advising that the terms of the Treaty of 1838 had been carried out. PSUMF ¶ 11.

Federal Indian policy changed dramatically as the nation grew, and in the late 19th century, Congress terminated the treaty-making process with individual tribes, 25 U.S.C. § 71, and moved toward a policy of allotment and assimilation. In 1887, Congress enacted the General Allotment

Act, commonly referred to as the Dawes Act, 25 U.S.C. § 331, *et seq.*, the purpose of which was the eventual assimilation of tribal members into the general population and the elimination of Indian reservations through the allotment of the land in severalty to the Indians residing on those reservations. The allotted lands were to be held in trust by the United States for a period of at least 25 years, after which Indian allottees were to receive fee patents, which removed all restraints on alienation and allowed transfer of the land to non-Indians. *See* 25 U.S.C. § 348. Once allottees received their patents, they were to "have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside." Act of February 8, 1887, 24 Stat. 388 at 390. It was believed that, within a generation or two, "the tribes would dissolve, their reservations would disappear, and individual Indians would be absorbed into the larger community of white settlers." *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 335 (1998) (citing Hearings on H.R. 7902 before the House Committee on Indian Affairs, 73rd Cong., 2d Sess., 428 (1934)).

On September 16, 1887, Commissioner of Indian Affairs J.D.C. Atkins recommended to Secretary of the Interior John Noble that "the President be asked to authorize allotments in severalty to be made to the Indians on the Oneida Reservation, in Wisconsin, under the Act of February 8, 1887." PSUMF ¶ 14 (quoting ECF No. 92-17); DSUMF ¶ 5. The Secretary concurred and relayed the recommendation to President Benjamin Harrison in May 1889. PSUMF ¶ 17; DSUMF ¶ 5. The allotment of the Oneida Reservation to tribal members began in 1889. By 1891, with the exception of approximately eighty acres reserved for boarding school and day school purposes, as well as the small allotments of land for use in the satisfaction of additional claims to entitlement, a schedule containing 1,530 allotments with no surplus land remaining was submitted for approval. PSUMF ¶¶ 19, 22; DSUMF ¶ 6. In accordance with the provisions of the Dawes Act, trust patents dated

June 13, 1892, were issued to Oneida allottees, to remain in trust for twenty-five years. PSUMF ¶ 21; DSUMF ¶ 8.

After the individual tribal members, including members of the Oneida Tribe, received their allotments, but before the twenty-five-year trust period expired, they repeatedly petitioned the federal government for legislation granting the individual members fee simple title to their land. In response to such requests, Congress amended the Dawes Act through the Burke Act, 34 Stat. 182, 25 U.S.C. § 349, on May 8, 1906. The Burke Act gave the Secretary of the Interior the discretion to immediately issue fee patents to competent Indian allottees before the expiration of the twenty-five-year trust period required under the Dawes Act. Section 6 of the Burke Act provided that, upon issuance of the patent conveying the allotment in fee simple, "all restrictions as to sale, incumbrance, or taxation of said land [would] be removed." 25 U.S.C. § 349. During the same year, Congress passed an act making "appropriations for the current and contingent expenses of the Indian Department, for fulfilling treaty stipulations with various Indian tribes, and for other purposes." Act of June 21, 1906, 34 Stat. 325 ch. 3504. The June 21, 1906 Act included a provision authorizing the Secretary of the Interior to issue fee patents to fifty-six named Oneida allottees and, in the Secretary's discretion, "to issue a patent in fee to any Indian of the Oneida Reservation in Wisconsin for the lands heretofore allotted him." *Id.* The issuance of the patents would operate as a "removal of all restrictions as to the sale, taxation, and alienation of the lands so patented." *Id.*

In response to the allotment process, the Wisconsin state legislature in 1903 enacted legislation creating the towns of Hobart and Oneida in the area within the boundaries of the Oneida reservation in Brown County and Outagamie County. DSUMF ¶ 37. In 1908, the Brown County

Board of Supervisors vacated the town of Hobart as created in 1903 and reorganized the town from "all that portion of the Oneida reservation, situated in Brown County, Wisconsin." *Id.* ¶ 38 (quoting ECF No. 89-43).

Over the years that followed, Congress authorized the sale of trust patents held by non-competent allottees for their benefit, 34 Stat. 1015, at 1018, and authorized the issuance of fee patents to allotment purchasers, 35 Stat. 444, resulting in the issuance of fee patents for much of the allotted land. The twenty-five-year trust period for those allotments that remained in trust was set to expire on June 12, 1917. DSUMF ¶ 33. On March 24, 1917, a three-person competency commission recommended that fee patents be issued immediately to ten named Oneida allottees, that fee patents be issued to an additional twenty-two named Oneida allottees upon the expiration of the trust period on June 12, 1917, and that the trust period for all other allottees still holding allotments in trust on the area set aside in the Treaty of 1838 be extended. PSUMF ¶ 29; DSUMF ¶ 32. By 1917, over 50,000 acres of the 65,400-acre reservation fell out of Indian ownership. DSUMF ¶ 30. On May 4, 1918, President Woodrow Wilson signed an executive order extending the trust period by nine years for thirty-five named Oneida allottees. PSUMF ¶ 34; DSUMF ¶ 35. President Calvin Coolidge signed an executive order on March 1, 1927, extending the trust period for twenty-one named Oneida allottees. PSUMF ¶ 38; DSUMF ¶ 36. By the early 1930s, the Oneida Tribe owned less than 90 acres of the approximately 65,400 acres within the original boundaries of the area set aside in the 1838 treaty. DSUMF ¶ 98. Several hundred additional acres of individual allotments continued to be held in trust. *Id.* At least 95% of the land was no longer owned by Indians. *Id.* ¶ 95.

In 1934, Congress once again changed federal policy toward tribes through the passage of the Indian Reorganization Act (IRA), 25 U.S.C. § 450, *et seq.* The IRA put an end to the allotment process, 25 U.S.C. § 461; continued periods of trust upon Indian lands and restrictions on alienation indefinitely, 25 U.S.C. § 462; authorized the Secretary of the Interior to restore to tribal ownership the remaining surplus lands of any Indian reservation previously opened for public sale, acquire through purchase or otherwise any lands within or without existing reservations, and place them in trust for the purpose of providing land for Indians, 25 U.S.C. §§ 463, 465; and authorized tribes to adopt constitutions and by-laws, and organize their own governments under the supervision of the Secretary, 25 U.S.C. § 476. In 1936, less than two years after the enactment of the IRA, the Nation adopted its Constitution and Bylaws. PSUMF ¶ 49.

LEGAL STANDARD

Summary judgment is appropriate when the moving party shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). The fact that the parties filed cross-motions for summary judgment does not alter this standard. In evaluating each party's motion, the court must "construe all inferences in favor of the party against whom the motion under consideration is made." *Metro. Life Ins. Co. v. Johnson*, 297 F.3d 558, 561–62 (7th Cir. 2002) (quoting *Hendricks-Robinson v. Excel Corp.*, 154 F.3d 685, 692 (7th Cir. 1998)). The party opposing the motion for summary judgment must "submit evidentiary materials that set forth specific facts showing that there is a genuine issue for trial." *Siegel v. Shell Oil Co.*, 612 F.3d 932, 937 (7th Cir. 2010) (citations omitted). "The nonmoving party must do more than simply show that there is some metaphysical doubt as to the material facts." *Id.* Summary judgment is properly entered against a party "who fails to make a showing

sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial." *Austin v. Walgreen Co.*, 885 F.3d 1085, 1087–88 (7th Cir. 2018) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)).

ANALYSIS

A. The 1838 Treaty and the Creation of a Reservation

The court begins with the parties' dispute regarding the origin and creation of the Oneida Reservation. In 1831, the United States entered into a treaty with the Menominee Tribe to acquire a 500,000-acre tract of land to be set apart as a home to several New York tribes, including the Oneida Tribe of Indians. This tract of land was to be apportioned among the emigrating New York tribes "so as not to assign any tribe a greater number of acres than may be equal to one hundred for each soul actually settled upon the lands." ECF No. 92-10 at 4. The treaty indicated further that the ceded lands were to be held by the New York Indian tribes "under such tenure as the Menomonee [sic] Indians now hold their lands, subject to such regulations and alteration of tenure as Congress and the President of the United States shall, from time to time, think proper to adopt." *Id.* Although the treaty was amended twice to extend the three-year deadline by which the New York tribes were to relocate to the ceded lands and to alter the boundaries of the ceded tract of land, the original terms of the 1831 treaty were otherwise confirmed.

The United States entered into a treaty with the Oneida on February 3, 1838. The Oneida ceded to the United States its interest in the 1831 Menominee land set apart for them in return for reserving "to the said Indians to be held as other Indian lands are held a tract of land containing one hundred (100) acres, for each individual." ECF No. 92-13 at 3. The land was subsequently surveyed by the United States. The survey, labeled "Oneida Reservation," consisted of 65,400 acres of land. The Nation asserts that this treaty created a reservation held in common by the Tribe. The

Village maintains that the Treaty provides for the reservation of individual 100-acre tracts for each member, rather than one reservation held in common by the Tribe.

In determining whether a reservation has been created, courts "ask whether the area has been validly set apart for the use of the Indians as such, under the superintendence of the Government." *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 511 (1991) (citation omitted). When a party asserts that a treaty created a reservation, the "treaty is to be construed as the Indians would have understood it, as disclosed by the practices and customs of the Indians at the time the treaty was negotiated, and by the history of the treaty, the negotiations that preceded it, and the practical construction given the treaty by the parties." *United States v. Top Sky*, 547 F.2d 486, 487 (9th Cir. 1976) (internal citations omitted); *see also Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999) (noting that courts must look "beyond the written words to the larger context that frames the treaty, the negotiations, and the practical construction adopted by the parties").

Here, the history leading up to the Treaty of 1838 demonstrates that the United States, the Menominee, and the Oneida engaged in negotiations regarding the relocation of the Oneida from New York to the ceded Menominee territory. The Treaty of 1838 provides that "there shall be reserved to the said Indians to be held as other Indian lands are held a tract of land containing one hundred (100) acres, for each individual." ECF No. 92-13 at 3. The Village argues that the reference in the Treaty of 1838 to "a tract of land containing one hundred (100) acres for each individual" means that the Treaty allotted land to individual members of the tribe rather than creating a reservation held in common. Yet, a reading of the Treaty in its entirety and consideration of the surrounding circumstances indicates that the language simply conveys how the United States

would calculate the amount of land that would be apportioned to the Oneida Tribe from the 500,000 acres of ceded Menominee land set apart for the New York tribes. Indeed, the 1831 Menominee Treaty stated that the ceded land was to be apportioned among the tribes "so as not to assign any tribe a greater number of acres than may be equal to one hundred for each soul actually settled upon the lands" and that those tracts would be held "as the Menomonee [sic] Indians hold their lands," which the 1831 Menominee treaty described as a "reservation." ECF No. 92-10 at 4. Although it is true that certain individual members of the Oneida Tribe sought to trade their participation in the Oneida Reservation in favor of more land elsewhere, the principal tribal leaders intended to establish a permanent home for the Tribe in Wisconsin and ultimately entered into a treaty with the United States to do so. The United States' December 1838 survey labels a single tract of land, totaling 65,400 acres, as the Oneida Reservation. Both the United States and the Tribe agreed that the survey satisfactorily reflected the parties' understanding of the Treaty. In short, the language of the 1838 Treaty, the history of the Treaty, the negotiations that preceded it, and the practical construction given the Treaty by the parties compel the conclusion that the lands were ceded to the Oneida Tribe as a reservation and not as individual allotments to its members. For these reasons, the court holds that the Treaty of 1838 created the Oneida Reservation.

B. Current Boundaries of the Reservation

1. Issue Preclusion

The Village contends that, even if the Treaty of 1838 created a reservation, Congress disestablished, or at the very least, diminished, the Oneida Reservation by legislative act. In support of its disestablishment argument, the Village argues at the outset that the Nation is collaterally estopped from relitigating the status of the Oneida Reservation by virtue of the 1933 decision of this

court which held that the Reservation was discontinued and ceased to exist. *See Stevens v. County of Brown* (E.D. Wis. Nov. 3, 1933) (unpublished decision), ECF No. 89-45. The court's decision in *Stevens*, the Village contends, has preclusive effect in this case.

Collateral estoppel, or issue preclusion, prevents the relitigation of issues resolved in an earlier lawsuit. "Issue preclusion . . . bars successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment, even if the issue recurs in the context of a different claim." *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008) (internal quotation marks omitted). The doctrine "has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 (1979) (citation omitted). The prerequisites for applying the doctrine are satisfied when "(1) the issue sought to be precluded is the same as an issue in the prior litigation; (2) the issue must have been actually litigated in the prior litigation; (3) the determination of the issue must have been essential to the final judgment; and (4) the party against whom estoppel is invoked must have been fully represented in the prior action." *Adams v. City of Indianapolis*, 742 F.3d 720, 736 (7th Cir. 2014) (citation omitted).

The Nation maintains that it is not bound by the decision in *Stevens* because the Village has not satisfied the elements of issue preclusion. More specifically, the Nation asserts that it was not a party to the *Stevens* case and that there is no identity of issues between the issue in this case and the issue decided in *Stevens*. In *Stevens*, a plaintiff class consisting of Oneida tribal members and representatives brought an action against the counties of Brown and Outagamie as well as the townships of Hobart and Oneida to recover local property taxes that had been levied and assessed

on their lands as well as the lands of other Oneida tribal members. The plaintiffs also sought an injunction against any further assessment, levy, or collection of property taxes. The defendants moved to dismiss the case on four grounds: (1) the plaintiffs did not pursue the remedy outlined in Wis. Stat. § 74.73; (2) more than twenty years had elapsed since the creation of the towns without questioning their creation by a writ of certiorari or other appropriate proceeding as prescribed in the state statute; (3) the Oneida Reservation was lawfully discontinued; and (4) the doctrine of laches barred the plaintiffs from questioning the legality of the organization of the towns and their assumption of authority over the Oneida Reservation. ECF No. 89-45 at 3. The court concluded that, because the reservation had been discontinued through the implementation of the Dawes Act, the plaintiffs were bound by the state statute governing the procedure to recover taxes.

The Village asserts that, even though the Tribe was not a named party in the litigation, the complaint in that action indicates that the plaintiffs were duly authorized and empowered to act for and on behalf of the Oneida Tribe. But the fact that the lawsuit was brought by members of the Tribe, rather than the Tribe itself, suggests that the Tribe was not fully represented in *Stevens* and did not itself participate in the proceedings. Indeed, there is no evidence that the Tribe exercised a sufficient degree of control in *Stevens*. *See* 18A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE § 4451 (2017) ("Lesser measures of participation without control do not suffice.").

In addition, issue preclusion does not apply here because this case raises different factual and legal questions than those raised in *Stevens*. "Identity of the issue is established by showing that the same general legal rules govern both cases and that the facts of both cases are indistinguishable as measured by those rules." WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE § 4425. Again,

the question raised in *Stevens* was whether individual members of the Tribe were required to pay local property taxes upon the issuance of fee patents for their allotments. The underlying issue in this case is whether the Nation is subject to the regulations of a local municipality in the conduct of its special events. Although similar issues regarding the reservation's status were raised in *Stevens*, that action was not a comprehensive adjudication of the true status of the reservation. In addition, the issue of whether the Nation itself is immune from local regulatory authority was not litigated in *Stevens* to any extent. *See Bernstein v. Bankert*, 733 F.3d 190 (7th Cir. 2013) (holding issue preclusion did not apply because the issues involved facts that were not "identical in all material aspects"). Because this case presents different facts and legal foundation, issue preclusion does not apply. The court will therefore turn to the Village's alternative argument that, even apart from the 1933 decision in *Stevens*, the Oneida Reservation was disestablished or diminished.

2. Disestablishment or Diminishment

At its core, the dispute between the Village and the Nation is over whether all or only some of the original Oneida Reservation constitutes "Indian country." "Although the term 'Indian country' has been used in many senses, it is most usefully defined as country within which Indian laws and customs and federal laws relating to Indians are generally applicable." COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 3.04[1], at 183 (Nell, Jessup Newton ed. 2012). "Generally speaking, primary jurisdiction over land that is Indian country rests with the federal Government and the Indian tribe inhabiting it, not with the States." *Alaska v. Native Vill. of Venetie*, 522 U.S. 520, 527 n.1 (1998).

In 1948, Congress codified the definition of Indian country. That definition, which includes three different categories of land, reads as follows:

> Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151. Although located within the federal criminal code, "the Court has recognized that it generally applies as well to questions of civil jurisdiction." *DeCoteau v. Dist. Cty. Court for Tenth Judicial Dist.*, 420 U.S. 425, 427 n.2 (1975).

Prior to the enactment of § 1151, land within a reservation's boundaries was held to be no longer Indian country when Indian title was extinguished. *See, e.g.*, *Clairmont v. United States*, 225 U.S. 551 (1912) (vacating conviction for selling or giving intoxicating liquor to Indian on ground that railroad right-of-way, where offense occurred, had been conveyed in fee to railroad and thus was no longer Indian country). But § 1151 "abrogated this understanding of Indian country and, with respect to reservation lands, preserves federal and tribal jurisdiction even if such lands pass out of Indian ownership." *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994, 1007 (8th Cir. 2010) (citing *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 357–58 (1962)); *see also Solem v. Bartlett*, 465 U.S. 463, 468 (1984) ("Only in 1948 did Congress uncouple reservation status from Indian ownership, and statutorily define Indian country to include lands held in fee by non-Indians within reservation boundaries."). Thus, the question before the court is whether the Oneida Reservation was disestablished or diminished before § 1151 became effective.

"Although the terms 'diminished' and 'disestablished' have at times been used interchangeably," as the court explained in *Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010, 1017 (8th

Cir. 1999), "disestablishment generally refers to the relatively rare elimination of a reservation while diminishment commonly refers to the reduction in size of a reservation." The Nation correctly observes that "[b]ecause the Reservation was created by a treaty, only Congress can diminish or disestablish it." Pl.'s Br. in Supp. of Mot. for Summ. J., ECF No. 96, at 36. This follows from the Supremacy Clause of the United States Constitution, under which the Constitution, laws, and treaties of the United States are the supreme law of the land and control over the enactments of states and local governments. U.S. Const. art. VI.

Moreover, courts will not lightly conclude that an Indian reservation has been disestablished or diminished. *DeCoteau*, 420 U.S. at 444 ("This Court does not lightly conclude that an Indian reservation has been terminated."); *Solem*, 465 U.S. at 470 ("Diminishment, moreover, will not be lightly inferred."). The congressional intent to disestablish or diminish a reservation must be clear. This is because of the general rule that doubtful expressions are to be resolved in favor of the Indian tribes "who are the wards of the nation, dependent upon its protection and good faith." *McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164, 174 (1973) (quoting *Carpenter v. Shaw*, 280 U.S. 363, 367 (1930)). Accordingly, "[o]nce a block of land is set aside for an Indian Reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise." *Solem*, 465 U.S. at 470.

To determine whether an Indian reservation has been disestablished or diminished, the court must look first to the statutory text of the relevant statute, reasoning that it is "[t]he most probative evidence of congressional intent." *Id.* at 469; *see also Nebraska v. Parker*, 136 S. Ct. 1072, 1079 (2016) ("[W]e start with the statutory text, for '[t]he most probative evidence of diminishment is, of course, the statutory language used to open Indian lands.'" (citation omitted) (second alteration

in original)). Courts next examine the circumstances surrounding the passage of the act, "particularly the manner in which the transaction was negotiated with the tribes involved and the tenor of legislative reports presented to Congress." *Solem*, 465 U.S. at 471; *Parker*, 136 S. Ct. at 1079. Finally, courts "look to the subsequent treatment of the area in question and the pattern of settlement there." *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 351–52 (1998); *see also Parker*, 136 S. Ct. at 1079. "When both an act and its legislative history fail to provide substantial and compelling evidence of a congressional intention to diminish Indian lands, we are bound by our traditional solicitude for the Indian tribes to rule that diminishment did not take place and that the old reservation boundaries survived the opening." *Solem*, 465 U.S. at 472.

In cases where disestablishment or diminishment is alleged to have resulted from surplus land acts, such as *Solem* and *Parker*, the Court has observed that common "hallmarks of diminishment" include "'[e]xplicit reference to cession or other language evidencing the present and total surrender of all tribal interests' or 'an unconditional commitment from Congress to compensate the Indian tribe for its opened land.'" *Parker*, 136 S. Ct. at 1079 (quoting *Solem*, 465 U.S. at 470–71) (alteration in original). Examples of termination language contained in surplus land acts found to show congressional intent to diminish or disestablish include: "the Smith River reservation is hereby discontinued," *Mattz v. Arnett*, 412 U.S. 481, 505 n.22 (1973); "the reservation lines of the said Ponca and Otoe and Missouria Indian reservations . . . are hereby, abolished," *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 618 (1977); "the . . . Indians hereby cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest," *DeCoteau,* 420 U.S. at 455–56; and "[t]he said Indians belonging to the Shoshone or Wind River Reservation, Wyoming, for the consideration hereinafter named, do hereby cede, grant, and relinquish to the United States, all right,

title, and interest which they may have to all the lands embraced within the said reservation, except the lands within and bounded by the following lines," *Wyoming v. United States Envt'l Prot. Agency*, 875 F.3d 505, 518 (10th Cir. 2017).

But this case does not arise under a surplus land act. There was no surplus land act passed in connection with the Oneida Reservation because it was not contemplated that there would be surplus land remaining after the land within the Reservation was allotted to individual tribal members and fee patents finally issued. It would make no sense for an allotment act to contain the type of cession language that is found in surplus land acts or terms like "surrender, grant, or convey." Those terms have no place in the context of allotment. In the process of allotment, the tribes were not conveying surplus lands to the United States; instead, the United States was conveying its interest in the lands it had held in trust for the benefit of the tribes to the individual tribal members and terminating the restrictions that had previously applied to it. For the same reason, allotment acts would not contain language indicating that the Indian tribes would be compensated for the allotted lands. The land was not being conveyed to outsiders by the tribe, but instead divided among the tribal members free of all federal restrictions.

Notwithstanding the absence of such language, the intent of the allotment policy in general and the Dawes Act in particular is unmistakable. It was "to hasten the demise of the reservation system and to encourage Indian assimilation into the white system of private property ownership." *Podhradsky*, 606 F.3d at 999. As noted above, "[w]ithin a generation or two, it was thought, the tribes would dissolve, their reservations would disappear, and individual Indians would be absorbed into the larger community of white settlers." *Yankton Sioux Tribe*, 522 U.S. at 335. But even though complete assimilation of the Indians and the elimination of the reservation system was the

ultimate intent of the Dawes Act and related legislation, those acts did not themselves abolish the reservations. In fact, they assumed the reservations would continue at least until the trust patents were replaced with fee patents giving individual tribal members complete control over their own land. Before that process was complete, however, Congress changed its mind as reflected in the IRA of 1934.

The purpose of the IRA was to stop the loss of Indian lands through the allotment process and re-establish tribal governments and land holdings. COHEN, § 1.05, at 81–82. As noted above, among other steps taken to achieve these goals, the IRA terminated the further allotment of reservation lands, extended unexpired trust periods on allotted lands, and empowered the Secretary of the Interior to acquire lands to be placed into trust status and thus exempt from state and local taxation. 25 U.S.C. §§ 463, 465. The IRA also "permitted tribes to organize and adopt constitutions with a congressional sanction of self-government, and it permitted tribes to form business committees or business corporations." 25 U.S.C. § 476.

Within two years of the passage of the IRA, the Oneida Tribe adopted its Constitution and By-Laws, and the Oneida tribal government was formed. Since that time the Oneida Tribe, now known as the Oneida Nation, has remained in existence with a functioning tribal government. Although the precise number of acres may be in question, it is undisputed that at least some amount of land remained under tribal ownership or otherwise in trust status at the time the IRA was enacted, putting a complete stop to the further alienation of tribal lands. DSUMF ¶ 98. It thus follows that the Oneida Reservation has not been disestablished.

But while it has not been disestablished, the size of the Reservation has been significantly diminished as a result of the issuance of fee patents to tribal members who then conveyed their

interests to non-tribal members. This is because Congress's intent to diminish, if not disestablish, the Reservation, which was explicit in the Dawes Act, the Burke Act, and the Act of 1906, became effectuated with the issuance of fee patents to tribal members and the subsequent sale of the land to non-Indians. The intent to diminish was born out by Congress singling out the Oneida Reservation, in particular, and allowing the Secretary to quickly issue fee patents at his discretion.

The Nation argues that the Dawes Act and the Burke Act have never been construed to alter reservation boundaries. Indeed, the mere act of dividing the Reservation into individual allotments for each member, by itself, is insufficient to divest the land of its reservation status. *See United States v. Celestine*, 215 U.S. 278, 287 (1909) ("It is clear that the allotment alone could not [revoke the reservation]."). After all, the lands allotted to a tribe's members were set apart for the tribe and remained under the federal government's care and control. *United States v. Pelican*, 232 U.S. 442, 449 (1914) ("[W]e are unable to find ground for the conclusion that [Indian lands] became other than Indian country through the distribution into separate holdings, the Government retaining control."). But we are not talking here about allotment, by itself. Once the allotment trust period had run its course or was otherwise terminated, the Secretary, acting under the authority granted him by Congress, issued patents conveying the land in fee, free of all restrictions, to the individual tribal members. Once the fee patents were issued, the federal government no longer retained control of the land, as the land was converted into fee simple and owned by the individual tribal member. At that point, the intent unequivocally expressed by Congress in its enactment of the allotment acts was realized and either then or with the further conveyance of the land to non-Indians, the original reservation was diminished.

These facts distinguish this case from both *Celestine* and *Pelican*. In *Celestine*, the Indian defendant challenged his federal murder conviction on the ground that the United States district court lacked jurisdiction because the crime occurred on land within the exterior boundaries of the reservation, but which had been allotted to him and for which he had been granted a patent. 215 U.S. at 280. Notwithstanding the issuance of a patent, the Court held that the land remained part of the reservation because Congress had taken no steps to exclude the allotted land from the reservation. *Id.* at 284. Unlike this case, the patent issued to the defendant in *Celestine* contained "conditions against alienation or leasing, exemption from levy, sale, or forfeiture, not to be disturbed by the state without the consent of Congress . . . ." *Id.* at 286. And unlike this case, the defendant Indian had remained in possession of the property.

Similarly, in *Pelican*, the Indian defendant challenged his federal indictment for murder on the same ground, claiming that the crime occurred on another Indian's allotment and was therefore not within Indian country. 232 U.S. at 444. The district court agreed and sustained the defendant's demurrer. However, the Supreme Court reversed, holding that "[a]lthough the lands were allotted in severalty, they were to be held in trust by the United States for twenty-five years for the sole use and benefit of the allottee, or his heirs, and during this period were to be inalienable." *Id.* at 447. Explaining further, the Court stated, "[t]hat the lands, being so held, continued to be under the jurisdiction and control of Congress for all governmental purposes relating to the guardianship and protection of the Indians, is not open to controversy." *Id.* Again, unlike this case, no fee patent had been issued and the original tribal member remained in possession.

The conclusion that the issuance of fee patents and sale of the land following allotment diminished the reservation is also consistent with, if not compelled by, the Seventh Circuit's

decision in *Wisconsin v. Stockbridge-Munsee Community*, 554 F.3d 657 (7th Cir. 2009). In that case, the State of Wisconsin sued the Sockbridge-Munsee Tribe seeking an injunction enjoining the Tribe's gambling operation and a declaration of the current boundaries of the Tribe's reservation. The Tribe counterclaimed for a declaration that the golf course and supper club complex it had purchased was within the boundaries of the reservation created by its 1856 treaty with the United States such that it could operate slot machines at that location under a contract with the State of Wisconsin entered into pursuant to the Indian Gaming Regulatory Act, 25 U.S.C. § 2701, *et seq*. The golf course and supper club complex were located within the boundaries of the Tribe's original reservation, but it was in a section that had been sold to timber companies in 1871. 554 F.3d at 661. The unsold land within the reservation boundaries was later allotted to tribal members pursuant to a 1906 act of Congress, and eventually sold off. After passage of the IRA, the Department of the Interior had worked with the Tribe in the 1930s to reacquire parts of the land described in the 1856 treaty, rededicating the property as the Tribe's reservation. *Id.* Based on the previous history, however, the State argued that the 1856 reservation was diminished by the 1871 Act's sale of reservation land to timber companies, and then extinguished by the 1906 Act. The district court agreed, granting the State's motion for summary judgment, and the Seventh Circuit affirmed. Notwithstanding the absence of "the hallmark language" suggesting that Congress intended to disestablish or diminish the reservation in the 1906 Act, the court concluded that the circumstances surrounding it and the manner in which the reservation was treated in the aftermath of the Act made clear Congress's intent to extinguish the reservation:

> The intent to extinguish what remained of the reservation is born out by the act's provision for allotments in fee simple. This provision sets the 1906 Act apart from most allotment acts, like the 1871 Act, which restricted the Indian owners from

> selling their land or required that it be held in trust by the United States. 3 *Cohen's Handbook of Federal Indian Law* § 3.04.3; *see, e.g.*, Dawes Act, ch. 119, 24 Stat. 388, 389 (1887). Why include this peculiar provision? Because the reservation could only be abolished if the tribal members held their allotments in fee simple. *See Mattz*, 412 U.S. at 496 ("When all the lands had been allotted and the trust expired, the reservation could be abolished."). By 1910, all the land in the 1856 reservation was sold to non-Indians or allotted in fee simple, which meant that Congress paved the way for non-Indians to own every parcel within the original reservation and ensured that the reservation could be immediately extinguished.

Id. at 664–65. As for the manner in which the reservation was treated after the Act, the court noted that "the land became subject to state taxes, and the Department of the Interior refused to intervene in alcohol-related problems within the original reservation." *Id.* at 665. And when in the 1930s, the Department of Interior worked with the Tribe to reacquire parts of its 1856 reservation, it declared the newly reacquired land to be the Tribe's reservation. *Id.* Though "there were exceptions to this understanding," the court held, "the aberrational statements are not enough to overcome the clear record showing Congress's intent to extinguish the reservation and the otherwise consistent treatment of the reservation as disestablished." *Id.*

Strong support for the conclusion that the sale of fee patented land to non-Indians resulted in a diminishment of the reservation can also be found in the series of cases involving the Yankton Sioux Tribe of South Dakota. The dispute there initially arose out of an effort by the Yankton Sioux Tribe to regulate a landfill within the boundaries of its original reservation, over which the State of South Dakota claimed jurisdiction. The original boundaries of the Yankton Sioux Reservation were defined in an 1858 treaty between the United States and the Yankton Sioux Tribe to include approximately 430,000 acres of land in what is now Charles Mix County, South Dakota. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. at 334. Under the Dawes Act, about 167,325 acres of the reservation were allotted and patented, and then an additional 95,000 acres were allotted after the

passage of an Act of February 28, 1891. The allotments, which totaled approximately 262,300 acres, were not contiguous parcels and were interspersed with approximately 168,000 acres of unallotted surplus land. The 168,000 acres of unallotted lands were then ceded to the United States through an Act of August 15, 1894. *Id.* at 336–38. The landfill at the center of the dispute was located on non-Indian fee land within the ceded portion of the original reservation boundaries. *Id.* at 333. The Tribe and the federal government claimed that, because the site was located within the reservation's original 1858 boundaries, it remained part of the reservation and was therefore subject to federal environmental regulations. The State of South Dakota, on the other hand, argued that the 1894 divestiture of Indian property resulted in the disestablishment, or at least the diminishment, of the Tribe's reservation, such that the ceded lands no longer constituted "Indian country" under 18 U.S.C. § 1151(a) and thus the State had primary jurisdiction over the facility. *Id.* at 340–41.

Although the Tribe prevailed in the lower courts, the Supreme Court reversed. Finding that the plain language of the 1894 Act of Congress ratifying the agreement between the Tribe and the Yankton Indian Commission for the ceding of unalloted lands to the United States evinced a congressional intent to diminish the reservation, the Court concluded that the site for the facility was not within the reservation boundaries and thus the State had jurisdiction over it. *Id.* at 351. The Court limited the scope of its decision to the status of the ceded lands, however, and remanded the case for further proceedings. It explicitly avoided deciding whether Congress had disestablished the reservation altogether. *Id.* at 358.

On remand, the district court consolidated the case with an action brought by the Tribe to challenge state criminal jurisdiction over acts of tribal members on nonceded land within the original reservation boundaries. *Yankton Sioux Tribe v. Gaffey*, 188 F.3d at 1013. After an

evidentiary hearing, the district court held that the reservation had not been disestablished and still included all land within the original exterior boundaries that was not ceded to the United States by the 1894 Act. It then issued a permanent injunction enjoining state officials from exercising criminal jurisdiction over tribal members on "allotted or reserved lands." *Id.* On appeal, the Eighth Circuit Court of Appeals affirmed the district court's conclusion that the reservation had not been disestablished. But it reversed the court's conclusion that the original exterior boundaries of the reservation continued to have effect and that all nonceded lands remained as part of the reservation. *Id.* In so ruling, the court recognized at the outset that the 1894 Congress operated on a set of assumptions that conflicted with modern definitions of Indian country. It observed that "Indian lands were defined to include 'only those lands in which the Indians held some form of property interest: trust lands; individual allotments, and, to a more limited degree, opened lands that had not yet been claimed by non-Indians.'" *Id.* at 1022 (quoting *Solem*, 465 U.S. at 468). "Lands to which the Indians did not have any property rights were never considered Indian country," the court observed. *Id.* The court also acknowledged that because Congress in the late nineteenth century operated on the assumption that reservations would soon cease to exist, the "1894 Congress would have felt little pressure to specify how far a given act went toward diminishing a reservation and would have had no reason to distinguish between reservation land and other types of Indian country." *Id.* (citing *United States v. S. Pacific Transp. Co.*, 543 F.2d 676, 695 (9th Cir. 1976)). Though the court observed that this background informed the court's inquiry into whether Congress intended to eliminate the reservation through the 1894 Act, it noted that "courts have not been willing to extrapolate from general legislative assumptions and expectations of the late nineteenth century to find in each surplus land act a specific congressional purpose to remove all lands not

under Indian control from reservation status." *Id.* at 1024 (citing *Solem*, 465 U.S. at 468–69). After reviewing the record and the arguments of the parties, the court found that neither the text of the 1894 Act nor the evidence of the parties' contemporaneous understandings established a clear congressional intent to disestablish the Yankton Sioux Reservation. *Id.* at 1027.

The court did conclude, however, that the 1894 Act "intended to diminish the reservation by not only the ceded land, but also by the land which it foresaw would pass into the hands of the white settlers and homesteaders." *Id.* at 1028. The court explained that approximately three-fifths of the Yankton Sioux Reservation was allotted under the Dawes Act and the 1891 Act. Until the Indian allottees would receive their lands in fee and the trust period over them would end, they could not convey land to non-Indians. *Id.* The court noted that at least eighty-five percent of the allotted land eventually passed out of trust status and most of that land was sold in fee to non-Indians; by 1930, tribal members held only 43,358 acres of the 262,300 acres that had been originally allotted. *Id.* at 1016.

"The Act could not foresee all that would happen in the future with population movement, state development, and changing Indian policy," the court explained, "but it contained provisions showing concern for future interests of the Indians in common, as well as provisions recognizing that conditions were sure to change as white settlers moved in to the opened reservation with the expectation of state support." *Id.* at 1028. And "as more white settlers came on to the opened lands," the court explained, "increased state involvement on their behalf was expected, and the jurisdiction of the State was expected to increase over time." *Id.* In addition, "some articles of the Act reflect the parties' assumption that an allottee who received full title at the end of the trust period would become subject to the civil and criminal laws of the State or territory in which he

resided." *Id.* The court found that "nothing in its text or the circumstances surrounding its passage suggests that any party anticipated that the Tribe would exercise jurisdiction over non Indians who purchased land after it lost its trust status." *Id.* Though the court determined that the 1894 Act intended to diminish the reservation, it concluded that it could not define the precise limits of the remaining reservation and remanded the case to the district court with instructions to further develop the record and to determine what categories of land comprised the diminished reservation. *Id.* at 1030.

On remand, the district court found that four categories of trust lands remained part of the reservation and thus within the definition of Indian country: land which was reserved to the federal government in the 1894 Act and was subsequently returned to the Tribe, land which had been allotted to individual Indians and was still held in trust, land which was taken into trust under the IRA, and land which had been continuously owned in fee by individual Indians. *Yankton Sioux Tribe v. Podhradsky*, 529 F. Supp. 2d 1040, 1058 (D.S.D. 2007). Non-Indian fee lands, consisting of lands ceded to the United States or allotted to tribal members and transferred in fee to non-Indians and which had not been reacquired in trust, were excluded. Both sides appealed.

On this last appeal, the Eighth Circuit vacated the district court's holding that fee lands that had continuously remained in Indian ownership were still part of the reservation. In all other respects, the district court's decision was affirmed. 606 F.3d at 1015. In upholding the district court's determination that allotted lands that retained their trust status were still part of the Yankton Sioux Reservation, the Eighth Circuit observed that the "simple act of dividing the Yankton Sioux Reservation into individual allotments was insufficient to divest the allotted lands of their reservation status" and that there was "no indication in the historical record that either Congress or

the Tribe expressly intended to eliminate the reservation status of the Yankton allotted lands immediately upon allotment or upon the sale of the Tribe's surplus holdings." *Id.* at 1008. "It thus follows," the court concluded, that "the allotted lands held in trust retained the same reservation status they had enjoyed since the original 1858 Treaty." *Id.* at 1008–09. As for lands within the original boundaries of the reservation that were taken back into trust by the United States after the enactment of the IRA, the court noted that "[b]y taking former Yankton Sioux Reservation lands back into trust under the IRA, the Secretary effectively exercised his authority to consolidate the Tribe's land base by restoring reservation status to former pieces of a reservation in existence since 1858." *Id.* at 1012. With respect to fee lands continuously owned in fee by Indians, the court found no evidence in the record that any such land existed and therefore vacated the district court's conclusion that such lands would remain part of the reservation. *Id.* at 1015. That fee lands lawfully sold to non-Indians were no longer part of the reservation was virtually unquestioned.

I find this line of cases instructive for the issues before me here. Just as the Eighth Circuit concluded in *Gaffey* and *Podhradsky* that fee lands conveyed to non-Indians were no longer part of the Yankton Sioux Reservation, so also I conclude that the fee lands within the original boundaries of the Oneida Reservation that were sold to non-Indians, unless reacquired and placed into trust by the federal government, are no longer a part of that Reservation. The loss of that land has necessarily resulted in the diminishment of the Reservation from its original boundaries. Nothing in the text of the Dawes Act or the Act of 1906 suggest that Congress anticipated that the Nation would exercise jurisdiction over non-Indians who purchased land after it lost its trust status. Congress knew based on the Burke Act, which was enacted less than one month before the Act of 1906, that allottees who were issued fee patents would become subject to the civil and criminal laws

of the State or territory in which they resided. *See* 25 U.S.C. § 349 ("[A]t the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee . . . then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside."). It thus follows that as more non-Indian settlers purchased lands held in fee from Oneida members, increased involvement by the state on the settlers' behalf was expected, thereby increasing the State's jurisdiction over time. *See Montana v. United States*, 450 U.S. at 559 n.9 (1981) ("It defies common sense to suppose that Congress would intend that non-Indians purchasing allotted lands would become subject to tribal jurisdiction when an avowed purpose of the allotment policy was the ultimate destruction of tribal government."); *see also Solem*, 465 U.S. at 471 n.12 ("When an area is predominately populated by non-Indians with only a few surviving pockets of Indian allotments, finding that the land remains Indian country seriously burdens the administration of State and local governments."). By distributing reservation land through allotment and taking a definitive and considered step in allowing the Secretary to expedite the issuance of fee patents to Oneida members, Congress understood that the Nation would be divested of its authority once the allotment process was complete. In short, a reading of the Dawes Act and the Act of 1906 and an examination of the historical context in which they were enacted establish that Congress intended to diminish the Oneida Reservation by the land which it foresaw would become fee simple patents and would subsequently pass out of Indian ownership into the hands of white settlers. The issuance of fee patents and the subsequent transfer of fee title to those lands effectuated that intent.

The remaining evidence regarding the subsequent treatment of the land after the enactment of the Act of 1906 supports this conclusion. The parties have presented volumes of material

evidencing the subsequent treatment of the land after the passage of the Act of 1906. As noted above, to a lesser extent, courts should consider "Congress's own treatment of the affected areas, particularly in the years immediately following the opening," as well as "the manner in which the Bureau of Indian Affairs and local jurisdictional authorities dealt with unallotted open lands." *Solem*, 465 U.S. at 471. "[A]s one additional clue as to what Congress expected would happen," courts also "look to the subsequent demographic history of opened lands." *Id.* at 471–72. At the same time, it is not uncommon for the subsequent treatment evidence to be "so rife with contradictions and inconsistencies as to be of no help to either side." *Id.* at 478.

That appears to be the case here on the issue of disestablishment. For instance, the Village, on the one hand, asserts that certain federal officials in the Office of Indian Affairs as well as superintendents of the Keshena Agency repeatedly referred to the area as a former reservation and note that the Oneida lost almost all of their land. The Nation, on the other, asserts that these views did not represent a consensus among federal officials on the status of the Oneida Reservation and that the remaining documents are ambiguous on disestablishment. References to the "former reservation," for example, could simply mean the "original reservation," as opposed to the substantially diminished reservation that resulted from the sale of their allotments by tribal members and that continued to exist up until the passage of the IRA. Such language could also reflect the common assumption during the allotment era that reservations were in the process of becoming extinct. But as noted above, before that process was complete, Congress enacted the IRA and ended it. The Village's evidence of the aftermath of the 1906 Act does not overcome this undisputed fact, especially considering that subsequent treatment is the "least compelling evidence" in the court's diminishment analysis. *Parker*, 136 S. Ct. at 1082.

The subsequent treatment of the land in question does support the conclusion that the Oneida reservation was diminished, however. The numerous statements of federal officials referring to the "former reservation," even if ambiguous as to disestablishment, at least manifest the view that the original boundaries were no longer intact. Just as in *Stockbridge-Munsee*, "the land became subject to state taxes, and the Department of the Interior refused to intervene in alcohol-related problems within the original reservation." 554 F.3d at 665. In 1903, the Wisconsin legislature enacted legislation to create the towns of Hobart and Oneida "from the territory now embraced within the Oneida Reservation in said counties" and conferred upon them "all the rights, powers and privileges conferred upon and granted to other towns in the state of Wisconsin." DSUMF ¶ 37. Soon thereafter, each town formed its own government. This court's decision in *Stevens*, though not entitled to preclusive effect, also constitutes evidence of the manner in which the Reservation was viewed by federal officials prior to the enactment of the IRA and demonstrates that once fee patents were granted, local property taxes were assessed.

Other state and federal officials also viewed the Oneida Reservation as at least diminished. In 1919, the Office of Indian Affairs, the predecessor to the Bureau of Indian Affairs, closed the Oneida Agency and transferred jurisdiction over the Oneida to the Keshena Agency, located on the Menominee Reservation. *Id.* ¶ 53. In 1931, the Attorney General of the State of Wisconsin wrote a letter addressing jurisdiction with respect to the Oneida in which he stated:

> There is very little tribal land left, and most of the individual allotments have passed from the control of the United States and are therefore subject to the unquestioned jurisdiction of the state. However, in the case of the small amount of tribal land remaining and the individual allotments which are still held in trust, the federal courts would have jurisdiction . . . . Most of the Oneidas have received a fee patent discharged of any trust. Many of them have sold their lands. The state has jurisdiction over those Indians that have a fee patent.

Id. ¶ 76. On November 19, 1931, C.J. Rhoads, the Commissioner of Indian Affairs, wrote to a member of the Tribe concerning hunting and fishing rights:

> Generally speaking, the State game laws apply to the Indians except when exercising their hunting and fishing privileges on tribal Indian land within their reservation or, if allotted, within the limits of their own allotments still held in trust or under restricted patents.
>
> There are only a few small tracts of tribal Indian land within the limits of what was formerly the Oneida Indian Reservation. The ceded land to which the Indian title has been extinguished no longer belongs to the Indians, and as you have received a fee patent to your . . . land and the Oneida Indian Reservation has been broken up, you would have no special hunting or fishing privileges thereon because of the fact that you are an Indian. Under the circumstances you should comply with the state laws and regulations as to season, license, etc.

Id. ¶ 78.

This and other similar evidence cited by the Village supports the conclusion that in the aftermath of the 1906 Act and up until the enactment of the IRA, the Oneida Reservation was substantially diminished, though not completely disestablished. In 1975, the United States Department of the Interior's Bureau of Indian Affairs issued a report entitled "Statistical Data for Planning Oneida Reservation," which stated that "the total acreage of this reservation is 2,581 acres—2,108 acres are tribally owned and 473 acres are allotted." *Id.* ¶ 123. The report noted that "by 1930 only a thousand acres remained. In 1934, through a series of land purchases, the acreage was increased to the present amount." *Id.*

As the Village points out, and as this court noted in a previous case between the parties, in more recent years the Nation has made substantial purchases of land within the original reservation boundaries. *Id.* ¶¶ 128–29; *Oneida Tribe of Wis. v. Vill. of Hobart*, 542 F. Supp. 2d 908, 913 (E.D. Wis. 2008). But the Nation's purchase of property on the open market does not by itself increase

the size of its Reservation. *See City of Sherrill, N.Y. v. Oneida Nation of N.Y.*, 544 U.S. 197, 202–03 (2005) ("Given the longstanding, distinctly non-Indian character of the area and its inhabitants, the regulatory authority constantly exercised by New York State and its counties and towns, and 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."). As of December 28, 2017, however, 14,078.612 acres of the original Reservation are held in trust on behalf of the Nation. Def.'s Statement of Additional Proposed Undisputed Material Facts ¶ 12, ECF No. 100. The record is silent, however, as to how much of the total acreage held in trust is within the Village, but this acreage reflects the current size and location of the Oneida Reservation.

C. Enforcement of the Ordinance

It follows from the foregoing that the Village may enforce the Ordinance on those lands not held in trust by the United States for the benefit of the Nation. There is no dispute that the activities associated with the Big Apple Fest take place at least in part on land that is not part of the Oneida Reservation but instead is non-trust land owned by the Nation in fee simple. It is also undisputed that in order to conduct its festival, the Nation closes off, in whole or in part, streets and highways that are also not part of the current reservation. As the Village notes, the stated purpose of the Ordinance is "to address potential impacts on the general public of a special event, including without limitation noise, light, dust, traffic, parking, and other public health safety and welfare concerns," as well as "to promote the economic welfare and general prosperity of the community by safeguarding and preserving property values by addressing potential impacts of a special event."

Def.'s Mem. in Supp. of Mot. for Summ. J., ECF No. 94, at 48 (citing ECF No. 86-1, § 250-2). These are lawful purposes under the Village's police power, Wis. Stat. § 61.34 (2017–18), and the Nation does not contend that they are not. Nor does the Nation contend that compliance would create a hardship or that the Village would unreasonably deny it a permit. Instead, the Nation's sole argument is that it is immune and not subject to the Ordinance because it's special event occurs within the boundaries of its 1838 Reservation boundaries, the entirety of which it claims constitutes Indian country. For the reasons set forth above, the court concludes that it does not and instead holds that only those portions of the original Reservation held in trust by the United States for the benefit of the Nation, as well as any allotments still under trust patents, constitute Indian country.

In truth, the implications of the Nation's argument are quite breathtaking. If accepted, then not only are the Nation and its members immune from the regulatory measures of the Village, but also those of a substantial portion of the City of Green Bay, Brown and Outagamie Counties, and the State of Wisconsin. To hold in its favor would mean that the Nation has primary jurisdiction over land largely populated by people who have no say in its governing body. Because the Oneida Reservation has been diminished, however, and does not include land held in fee, the Nation's argument fails. The Nation is therefore not entitled to the relief it seeks, and the Village's motion for summary judgment will be granted.

D. The Nation's Sovereign Immunity

As a final matter, the Nation asserts that its sovereign immunity bars the Village's counterclaim for enforcement of the Ordinance against the Nation and the payment of the $5,000 fine issued through the citation. It is well established that Indian tribes possess immunity from suit traditionally enjoyed by sovereign powers. *See, e.g.*, *Okla. Tax Comm'n v. Citizen Band*

Potawatomi Indian Tribe, 498 U.S. 505, 509 (1991). In other words, tribes are protected from suits for monetary damages. *See Quinault Indian Nation v. Pearson for Estate of Comenout*, 868 F.3d 1093, 1096 (9th Cir. 2017). "[A]n Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived immunity." *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998). The Village acknowledges that the Supreme Court has held tribal immunity bars claims against an Indian Tribe arising from commercial activity outside Indian lands. *See Michigan v. Bay Mills Indian Cmty*, 572 U.S. 782 (2014). It nevertheless argues that the bar is not complete if an alternative mechanism is not available for the enforcement of its Ordinance. *See id.* at 795.

But as the Court suggested, the Village in this case may have other tools that it can use to enforce its laws on its own lands, for example, bringing a suit against tribal officers responsible for unlawful conduct. *Id.* As an extreme measure, the Village could presumably act to shut down the event if the Nation again sought to hold it without a permit, but there is no reason to believe that such an extreme measure will be necessary. The Nation brought this action to vindicate its sincerely held belief that it is not subject to the authority of the Village in the enforcement of the Ordinance. Should it not ultimately prevail, there is no reason to believe that the Nation will not comply with the Ordinance. In any event, the Nation is immune and the Village's counterclaim for monetary damages must be dismissed.

CONCLUSION

For the reasons set forth above, I conclude that the Treaty of 1838 created the Oneida Reservation. I also conclude that, while there is no evidence of congressional intent to disestablish the Reservation, Congress's intent to at least diminish the Reservation is manifest in the Dawes Act and the Act of 1906, and that intent was effectuated with the issuance of unrestricted fee patents for

the allotted land within the Reservation. To the extent the Nation's special event was held on property not held in trust by the United States, it is subject to the Ordinance. In addition, the Village's counterclaim for monetary damages is barred and must be dismissed. The Nation's motion for summary judgment (ECF No. 85) is therefore **GRANTED-IN-PART** and **DENIED-IN-PART** and the Village's motion for summary judgment (ECF No. 84) is accordingly **GRANTED**. The Clerk is directed to set the matter for a telephone conference to address the need for further proceedings as well as the form of the judgment to be entered.

SO ORDERED at Green Bay, Wisconsin this 28th day of March, 2019.

s/ William C. Griesbach
William C. Griesbach, Chief Judge
United States District Court

AO 450 (Rev. 5/85) Judgment in a Civil Case

United States District Court

EASTERN DISTRICT OF WISCONSIN

ONEIDA NATION,

Plaintiff,

JUDGMENT IN A CIVIL CASE

v. Case No. 16-C-1217

VILLAGE OF HOBART, WISCONSIN,

Defendant.

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict

☒ **Decision by Court.** This action came before the Court for consideration.

IT IS HEREBY ORDERED AND ADJUDGED that the Nation's claim for declaratory relief holding that the Nation's Big Apple Fest is not subject to the Village's Special Event Ordinance is denied. Its request for injunctive relief enjoining enforcement of the Village's Ordinance is likewise denied. The Village's counterclaim for the $5,000.00 forfeiture is dismissed. This case is DISMISSED with prejudice.

The stay of the enforcement of the Village's Ordinance against the Nation for its conduct of the Big Apple Fest, previously agreed upon by the parties, shall remain in effect until the time for appeal has expired or, if an appeal is taken, a final determination is rendered.

Approved: s/ William C. Griesbach
William C. Griesbach, Chief Judge
United States District Court

Dated: April 26, 2019

STEPHEN C. DRIES
Clerk of Court

s/ Terri Lynn Ficek
(By) Deputy Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

ONEIDA NATION,

Plaintiff,

v. Case No. 16-C-1217

VILLAGE OF HOBART, WISCONSIN,

Defendant.

DECISION AND ORDER ON BURDEN OF PROOF

Plaintiff Oneida Nation filed this action for declaratory and injunctive relief challenging the authority of the Village of Hobart to regulate the Nation and its officials with respect to activities occurring on the Nation's Reservation and on land held in trust for the Nation's benefit by the United States. More specifically, the Nation seeks a declaration that the Nation and its officials are not subject to the Village's Special Event Ordinance and an injunction enjoining the Village from enforcing the Ordinance against the Nation and its officials in their conduct of the Nation's annual Big Apple Fest. The Court has jurisdiction over the action under 28 U.S.C. § 1331 and 1362. The case is before the court on the Nation's motion to clarify the parties' burdens of proof in anticipation of their expert disclosures. The motion is now fully briefed and ready for decision. For the following reasons, the Nation's motion will be granted.

The Nation seeks an order specifying the following allocation of the parties' respective burdens of proof:

> 1. The Nation carries the burden of proof on the creation of the Oneida Reservation in the Treaty of 1838, 7 Stat. 566, and the applicability of the Indian Reorganization

> Act (IRA), 25 U.S.C. § 5123, in 1934 to the Nation and its Reservation, except for the Nation's actual title to the trust parcels at issue.
>
> 2. The Village carries the burden of proof that the Oneida Reservation has been diminished or disestablished by an act of Congress or otherwise, any claim that the Nation does not hold trust or fee title to the parcels at issue, and other affirmative defenses it has or may raise in pleadings, specifically including any claimed exceptional circumstances that would allegedly justify the exercise of its jurisdiction over the Nation on the Reservation, notwithstanding the absence of express congressional authorization to do so.

ECF No. 59 at 1.

The Village agrees that the Nation has the burden of proving the creation of the Oneida Reservation in the Treaty of 1838 and the applicability of the IRA in 1934 to the Nation and its Reservation. The Village also concedes that it bears the burden of proof on the alleged disestablishment of the Oneida Reservation and on the existence of any exceptional circumstances that would permit the Village to exercise jurisdiction over the Nation's Reservation conduct. ECF No. 62 at 9. The Village maintains, however, that it is the Nation's burden to prove that the parcels involved in the Big Apple Fest are actually held in trust.

Before going further, some clarification of terms and a brief history are in order. The Oneida Reservation refers to the tract of land consisting of approximately 65,400 acres in northeast Wisconsin that was set aside by the United States for the benefit of the Oneida Indians then residing in the vicinity of Green Bay pursuant to the February 3, 1838 treaty with the First Christian and Orchard Parties of the Oneida Indians, 7 Stat. 566. Title to the land within the Oneida Reservation, like title to all land within Indian Reservations, was originally held in trust for the benefit of the tribe by the United States. As a result of the allotment statutes enacted by Congress at the end of the 19th century and the beginning of the 20th century, patents for the vast majority of the land held in trust

by the United States for the benefit of the Oneida Indians were issued to tribal members and title to those lands over time was transferred to, or acquired by, non-Indians in fee simple. *See Oneida Tribe of Wis. v. Vill. of Hobart*, 542 F. Supp. 2d 908, 912 (E.D. Wis. 2008) (*Oneida I*). At around this same time, the State of Wisconsin created the town of Hobart which included that part of the Oneida Reservation located in Brown County. *Id.* With the enactment of the IRA in 1934, however, and perhaps more importantly, with the substantial improvement in the Nation's economic condition after the passage of the Indian Gaming Regulatory Act of 1988, the loss of land within the Reservation to non-Indian ownership ceased and, to some extent, appears to have been reversed with the purchase of additional land by the Nation and the transfer of title to some parcels to the United States in trust pursuant to the IRA, 25 U.S.C. § 465. *Id.* at 912 13. At the same time, the population of the Town of Hobart continued to grow, and in 2002 the Town incorporated to become the Village of Hobart.

As a result of these policy changes and historical developments, the Village, which is situated entirely within the original Reservation boundaries, is currently comprised of land, title to which is held by non-Indian parties or entities, members of the Oneida Nation, the Oneida Nation itself, and the United States for the benefit of the Nation. Notwithstanding the changes in ownership of the land within the Reservation, however, the entire Village is considered Indian country under federal law, unless the Village is able to establish that Congress diminished the original Oneida Reservation's boundaries. *Nebraska v. Parker*, 136 S. Ct. 1072, 1078 79 (2016). The term "Indian country" means:

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian

> communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151; *see also DeCouteau v. District Cnty. Court*, 420 U.S. 425, 427 n.2 (1975) (noting that "[w]hile § 1151 is concerned, on its face, only with criminal jurisdiction, the Court has recognized that it generally applies as well to questions of civil jurisdiction").

This principle is key to the Nation's case. "Generally speaking, primary jurisdiction over land that is Indian country rests with the Federal Government and the Indian tribe inhabiting it, and not with the States." *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 527 n.1 (1998). The Village, of course, is treated as a subdivision of the State for present purposes. "[S]tate laws may be applied to tribal Indians on their reservations if Congress has expressly so provided." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987). Otherwise, "a State may validly assert authority over the activities of nonmembers on a reservation, and . . . in exceptional circumstances a State may assert jurisdiction over the on-reservation activities of tribal members." *Id.* at 215 (quoting *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 331 32 (1983)).

Implicit in the Village's response to the Nation's motion is the assumption that the Village has unquestioned authority to enforce its ordinance within its boundaries on land that is not held in trust by the United States for the benefit of the Nation. As the foregoing discussion explains, however, that is not the law. Unlike *Oneida I*, this is not a case where the Village is seeking to exercise *in rem* jurisdiction over land that is held in fee by the Nation. *See Oneida I*, 542 F. Supp. 2d at 923 27. In this case, by contrast, the Village seeks to regulate the conduct of the Nation and its members within the boundaries of the Nation's Reservation. Unless the Village is able to show

that the Nation's Reservation has been diminished by Congress, *Cabazon* and not *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992), or *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005), provides the rules governing the determination of the case.

It thus follows that the trust status of the land used in the Big Apple Fest is not central to the Nation's claims. It may be relevant to the issue of whether diminishment has occurred, *see Nebraska v. Parker*, 136 S. Ct. at 1081 82, but as the Village concedes, the Village has the burden of proof on that issue. To the extent it is relevant, then, the Village would also have the burden of proof as to the trust status of the various parcels of land on which the festival was held. But it should not be a difficult burden to meet since it would appear to be simply a matter of record.

The Nation presumably knows which parcels are held in trust by the United States for its benefit and would have direct access to the documentation that would be needed to establish its claim that certain parcels are in fact held in trust for it by the United States. In particular, the Nation must know what land it acquired and then transferred to the United States for its benefit. Regulations promulgated by the Department of Interior describe the process by which Indian tribes may apply to have property taken into trust pursuant to the land to trust provisions of the IRA. *See* 25 C.F.R. Part 151.1; *see generally* Mary Jane Sheppard, *Taking Indian Land Into Trust*, 44 S.D. L. REV. 681 (1999) (describing the process by which Indian tribes may apply to have property taken into trust). If it has not already done so, the Village should be able to direct a set of discovery demands to either the Nation or the Department of Interior that would elicit the information and evidence it would need to meet its burden on the issue. A certification that a diligent search failed

to disclose a record of such a transfer would be sufficient to establish that no such transfer occurred. Fed. R. Evid. 803(10).

The Village also argues that the Nation must not only demonstrate which lands are held in trust but must also prove that all of the activities associated with the Big Apple Fest occurred in Indian country. But again, in light of the previous discussion, it is clear that all of the events occurred within Indian country, absent proof by the Village that the Nation's Reservation has been diminished. The entire Village is in Indian country as that term has been defined by Congress and the Supreme Court, and thus all of the activities the Village seeks to regulate occurred in Indian country absent proof of diminishment.

Finally, the Village asserts that the Nation has the burden to prove how the Village's Ordinance interferes with its right to self-governance. As noted above, absent Congressional authorization, a State may only regulate the property or conduct of a tribe or tribal-member in Indian county in "exceptional circumstances." *Cabazon*, 480 U.S. at 215. It is the Village's burden to show that such circumstances exist here. Of course, one would certainly expect the Nation to counter any evidence the Village offers of exceptional circumstances with evidence of how the regulation the Village seeks to enforce interferes with its right to self-governance, but the Nation has no burden to offer such evidence in the sense that the Village automatically prevails in the event the Nation fails to do so.

IT IS THEREFORE ORDERED that the Nation's motion to clarify (ECF No. 59) is **GRANTED**.

IT IS FURTHER ORDERED that the parties bear the following burdens of proof, whether such matters are the subject of expert reports or otherwise:

1. The Nation carries the burden of proof on the creation of the Oneida Reservation in the Treaty of 1838, 7 Stat. 566, and the applicability of the Indian Reorganization Act (IRA), 25 U.S.C. § 5123, in 1934 to the Nation and its Reservation.

2. The Village carries the burden of proof that the Oneida Reservation has been diminished or disestablished by an act of Congress or otherwise, and other affirmative defenses it has or may raise in pleadings, specifically including any claimed exceptional circumstances that would allegedly justify the exercise of its jurisdiction over the Nation on the Reservation, notwithstanding the absence of express congressional authorization to do so; and

3. This allocation of the burden of proof governs the exchange of opening expert reports due on November 15, 2017, and responsive and rebuttal reports due December 15, 2017 and January 15, 2018, respectively.

Dated at Green Bay, Wisconsin this 23rd day of October, 2017.

s/ William C. Griesbach
William C. Griesbach, Chief Judge
United States District Court