

**IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
GREEN BAY DIVISION**

Oneida Nation,

Plaintiff

v.

Case No. 16-CV-1217

Village of Hobart, Wisconsin,

Defendant.

**MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFF’S MOTION FOR PRELIMINARY INJUNCTION**

In yet another challenge to the governmental authority of the Oneida Nation (“Nation”),¹ Hobart now purports to regulate the conduct of special events conducted *by* the Nation and *on* the Nation’s trust lands through application of its own Special Event Permit Ordinance. Specifically, Hobart threatens to take action against the Nation and its officials in the conduct of the Nation’s annual Big Apple Fest scheduled for September 17, unless the Nation complies with Hobart’s ordinance. Without intercession by this Court, the Nation will be unable to conduct the event, as it has done for the six preceding years, without harassment by Hobart and its officials. Because of the strong likelihood, indeed, near certainty, of success on the merits in this action to preclude application of the ordinance, the Nation seeks preliminary relief so that it can peaceably proceed with the September 17 event.

¹ The Nation was formerly known as the Oneida Tribe of Indians of Wisconsin. 81 Fed. Reg. No. 86, at 26829, May 4, 2016.

Background

The Nation's Big Apple Fest

For the last six years, the Nation has conducted an annual Big Apple Fest. This is a family oriented community event, that is free of charge to the public, and that is conducted on two sites of trust land within the Nation's Reservation: principally the Cultural Heritage Site located predominantly in the City of Green Bay and secondarily the Nation's Apple Orchard located in Hobart.² Affidavit of Richard Figueroa ("Figueroa Affidavit"), ¶¶ 8 & 9, and trust deeds attached thereto. Activities at the Cultural Heritage Site include a farmer's market, a petting zoo, a hay ride, art programs for children, display of historic Oneida log homes, an apple pie contest, and fifteen (15) food vendors. *Id.*, ¶11. Activities at the Nation's Apple Orchard include a second hay ride and the sale of chili by one of the Oneida veterans organizations. The two sites are non-contiguous, both on Highway 54, with transportation between the two sites provided by the Nation for the event. *Id.*, ¶9.

As in past years, all the activities at 2016 Big Apple Fest are regulated by the Nation in accordance with Nation law. *Id.*, ¶10. The Nation's Special Events Coordinator, a tribal employee, is responsible for the conduct of the event. *Id.*, ¶4. All food vendors must comply with the Nation's Food Service Code and are inspected and licensed by the Nation. *Id.*, ¶11. Activities involving animals, such as the hay ride and petting zoo, are regulated under the Nation's Domestic

² There are outer portions of the Nation's Apple Orchard that are fee lands and are not used in the Big Apple Fest. In addition, there is parking lot on tribal fee land, the Ridge View Plaza, that is used to accommodate overflow parking for the event. However, the fee lands at the Orchard are not used in the Big Apple Fest and the fee land at the plaza is used only incidentally, not to conduct event activities. Figueroa Affidavit, ¶8. As a result, the Nation's motion for preliminary injunction address the Nation's trust lands only.

Animals Ordinance. *Id.* All electrical connections and sanitation facilities are inspected for compliance with tribal law by the Oneida Utilities Department. *Id.* In addition, there will be twelve security officers at the 2016 events and three members of the Oneida Police Department. *Id.*, ¶17. Nursing staff employed by the Nation will also be present, who will staff a first aid station. *Id.*, ¶12.

Traffic along Highway 54 between the two trust sites will be rerouted between the hours of 10 a.m. to 5 p.m. on the day of the event. This is a state highway and the Nation has obtained a closure permit from the Wisconsin Department of Transportation. *Id.*, ¶17. During those hours, traffic will be diverted to County Highway GE and the Nation has obtained permission from Brown County to do so. *Id.*

The Nation holds a general liability policy that applies to all activities of the Nation. King Affidavit, ¶7. In addition, the Nation requires vendors, including food vendors and the vendor that provides a tent for activities at the Cultural Heritage Site to maintain liability insurance for their activities. Figueroa Affidavit, ¶11.

The Hobart ordinance

Adopted on March 1, 2016,³ the ordinance is intended to:

promote the general health, safety, and welfare of the Village by establishing rules and a permit process in order to hold a special event on any property within the Village so as 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.

Hobart Municipal Code, Ch. 250, §250-2. The ordinance requires applications for permits to

³ Legislative history of the ordinance appears on the Hobart website, accessed on September 8, 2016, at: www.hobart-wi.org.

conduct three classes of events, ranging in size from events with as few as fifty (50) participants to those with two hundred (200) or more participants. *Id.*, §250-12. Hobart purports to regulate these events through conditions imposed in the required permit on traffic control, licensing of vendors that provide services at events, inspection for purpose of fire protection, sanitation, clean-up, and other specifics regarding the conduct of the event. *Id.*, §§250-6, 205-7.

Any person, vendor, or organization which violates the ordinance is subject to forfeiture for each claimed violation in an amount ranging from \$20 to \$10,000 for each. In default of payment, every person, vendor or organization is subject to imprisonment for a term up to ninety (90) days for each violation. *Id.*, §250-9; Ch. 1-3.

The present dispute

In past years, the Nation has worked with Hobart officials in the conduct of the Big Apple Fest. Personnel from the Hobart Police Department have assisted in security and in the management of traffic. Figueroa Affidavit, ¶¶14, 15 & 16. Last year, Hobart informally advised Nation officials that the Nation was obliged to apply to Hobart for a special event permit for the event. By letter dated September 3, 2015, the Nation's Chairwoman advised the Hobart that the Nation would not apply for a Hobart permit, inasmuch as Hobart lacks the authority to regulate tribal activities on trust land or the Reservation. King Affidavit, ¶8. The 2015 Big Apple Fest took place with no further objection from Hobart. Figueroa Affidavit, ¶16.

On August 18, 2016, the Nation's Special Events Coordinator was notified via email by the Hobart Chief of Police that the Nation was obliged to apply to Hobart for a special event permit to conduct the 2016 Big Apple Fest. Figueroa Affidavit, ¶18. On September 2, 2016, counsel representing Hobart wrote the Nation's Special Events Coordinator that the Nation must

obtain a special event permit from Hobart for the Big Apple Fest. Counsel for Hobart further advised that, in the event such application is not submitted on or before “**4:00PM, September 9, 2016**, the Village will have no choice but to enforce the penalty provisions set forth in the ordinance....You and the Oneida Tribe, along with all responsible officials, will be cited pursuant to §1-3 of the Village Code, and will be subject to forfeitures of up to \$10,000.00 for each violation, plus the cost of prosecution, as well as other potential penalties.” *Id.* (emphasis in original). Hobart has failed to articulate any legal basis for or rationale authorizing the imposition of its special event ordinance on the Nation, its officials, and its trust land, in any of its communications with the Nation. *Id.*

The present lawsuit resulted. In this action, the Nation seeks declaratory relief that Hobart lacks authority to impose its special event permit ordinance on the Nation, its officials, or the Nation’s trust lands and activity thereon. Further, the Nation seeks a permanent injunction against the Village and officials claiming authority thereunder to enforce the special event permit ordinance from any action to impose the ordinance or enforce it against the Nation and its officials. In its motion for preliminary injunction, the Nation seeks an injunction against Hobart efforts to impose its ordinance upon the Nation and its official in the conduct of the 2016 Big Apple Fest.

Argument

The standard governing preliminary relief is well established in this Court and the Seventh Circuit. Under that standard, there are two phases to the Court’s analysis. Most importantly in that analysis, though, a sliding scale is applied to compare the likelihood of success on the merits as against the relative equities of and harm to the parties with regard to

preliminary relief. Even though the circumstances here show the presence of all considerations necessary for preliminary relief, the overwhelming prospects for success on the merits alone justifies the preliminary relief sought by the Nation.

I. The standard governing preliminary relief in the Seventh Circuit requires the Court to conduct a two-phased analysis, with particular attention to the likelihood of success on the merits.

In the Seventh Circuit, courts conduct a two-phased analysis to determine a moving party's entitlement to preliminary relief. The first phase, or threshold inquiry, requires examination of irreparable injury to the moving party in the absence of preliminary relief, whether legal remedies would be adequate for the moving party in the absence of preliminary relief, and whether there is some likelihood of success on the merits. *Girl Scouts of Manitou Council, Inc. v. Girl Scout of the USA*, 549 F.3d 1079, 1086 (7th Cir. 2008); *Romper Room Inc. v. Winmark Corp.*, 60 F.Supp.3d 993, 995 (E.D. Wis. 2014). If the moving party fails on any of these three considerations, the motion must be denied. *Id.*

The second phase, or balancing phase, requires the court to balance the relative harm to the moving and non-moving parties, whether the motion is denied or granted. The public interest is also a relevant consideration in the balancing phase. *D.U. v. Rhoades*, No. 15-1243 (7th Cir. Jun 3, 2016), at 13; *Girl Scouts of Manitou Council, Inc.*, 549 F.3d at 1086; *Romper Room Inc.*, 60 F.Supp.3d at 996 (public interest is the "wild card"). In balancing the relative equities, the court uses a sliding scale: the more likely that the moving party will ultimately prevail on the merits, the less important alleged irreparable harm to the non-moving party becomes. *Turnell v. Centimark Corp.*, 796 F.3d 656, 662 (7th Cir. 2015); *Abbott Laboratories v. Mead Johnson & Co.*, 971 F.2d 6, 16 (7th Cir. 1992); *Romper Room Inc.*, 60 F.3d at 996.

The circumstances here easily support the need for preliminary relief, with the strong prospects for ultimate success on the merits overshadowing all other considerations.

II. The Nation easily meets the threshold phase of the standard for entitlement to preliminary relief.

First, the Nation will suffer irreparable injury unless this Court awards preliminary relief. The Nation's ability to conduct the 2016l Big Apple Fest depends upon an injunction against Hobart's unauthorized attempts to regulate the Nation, its officials, and its trust lands through the imposition of its special event permit ordinance. Hobart has directly threatened the Nation and its officials with substantial fines and possible imprisonment, if the Nation proceeds with 2016 Big Apple Fest. In the face of this threat, the Nation has two alternatives: either subject itself to the illegal attempts to regulate the Nation and its officials or face possible confrontation and certain disruption resulting from enforcement proceedings by Hobart against the Nation and its officials. The injury could not be more direct, immediate, or irreparable. For all practical purposes, the Nation's ability to conduct an event without interference or disruption, an event that the Nation has conducted successfully for years, is directly at risk in the absence of preliminary relief before September 17.

Second, there is no legal remedy that could make the Nation whole, in the event preliminary relief is denied and the Nation is unable to conduct Big Apple Fest without interference or disruption. The event is not a money-making enterprise for the Nation, one for which money damages could compensate the Nation if the event is spoiled or disrupted. The loss in that event is an injury to the Nation's sovereign authority over its officials and trust land and an injury to the community-building that the Big Apple Fest represents. Because of the nature of

these losses, it is not possible to calculate a damage award that might make the Nation whole.

Romper Room Inc., 60 F.Supp.3d at 996.

Third, the Nation is almost certain to prevail on the merits in this action. Hobart altogether lacks authority to regulate the activities of the Nation. *McClanahan v. Arizona Taxa Commission*, 411 U.S. 164, 181 (1973) (the state is “totally lacking in jurisdiction” over the Navajo people and its lands, absent an authorizing act of Congress). Even where Congress has authorized civil and criminal jurisdiction in Indian country, such statutes do not authorize state and local civil regulatory authority over tribes. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 210 (1987); *Bryan v. Itasca County*, 426 U.S. 373, 385 (1976). Further, because the Hobart ordinance purports to regulate activity on land - in this case, trust land - Hobart’s ordinance is pre-empted by federal law. *Segundo v. City of Rancho Mirage*, 813 F.2d 1387, 1393 (9th Cir. 1987) (municipality lacks authority to impose its rent control ordinance on trust land); *Santa Rose Band of Indians v. Kings County*, 532 F.2d 655, 658 (9th Cir. 1975) (municipality lacks authority to impose its zoning ordinance on trust land.) Finally, the Nation holds sovereign immunity and is not subject to enforcement proceedings by Hobart. This is a bedrock principle of federal Indian law and has been repeatedly and recently upheld by the Supreme Court. *Michigan v. Bay Mills Indian Community*, 572 U.S. ___, 134 S. Ct. 2024 (2014); *C & L Enters. v. Citizen Band of Potawatomi Indian Tribe*, 532 US. 411 (2001); *Kiowa Tribe v. Mfg. Tech., Inc.*, 523 U.S. 751 (1998). This immunity extends to tribal officials acting within the scope of their authority, as well as tribal employees. *Fletcher v. United States*, 116 F.3d 1315, 1324 (10th Cir.

1997); *Kizis v. Morse Diesel Int'l, Inc.*, 794 A.2d 498 (Conn. 2002).⁴ There is, then, no possible basis for Hobart to regulate the Nation, its officials, activity on trust land, or proceed against the Nation and its officials for alleged violation of the special event ordinance. Hobart and this Court are well familiar with these principles as they apply to shield the Nation and its trust lands from Hobart authority. *See Oneida Tribe of Wisconsin v. Village of Hobart*, 787 F.Supp.2d 882, aff'd 732 F.3d 837 (7th Cir. 2013). Those principles do not allow Hobart to regulate the Nation, the Nation's officials, or the Nation's trust lands for purposes of special events any more than they do for stormwater management.

III. The second phase, or balancing phase, of the preliminary relief inquiry strongly supports preliminary relief here.

As noted above, the balancing phase requires the court to balance the relative harm to the moving party in the event relief is denied against the relative harm to the non-moving party in the event relief is granted. *Abbott Laboratories*, 971 F.2d at 16. These factors are weighed on a sliding scale such that the greater the likelihood of success on the merits, the potential harm to the non-moving party becomes less important. *Romper Room Inc.*, 60 F.Supp.3d at 996; *Promatek Industries, Ltd. v. Equitrac Corp.*, 300 F.3d 808, 811 (7th Cir. 2002).

Because of the very strong likelihood of success on the merits by the Nation, potential harm to Hobart from preliminary relief is not a significant factor. Nonetheless, the imbalance in harm here is noteworthy. If the motion is denied, the Nation will be denied its sovereign right to govern activities on its trust land insofar as the 2016 Big Apple Fest is involved, a harm that is

⁴ There is no question that Hobart attempts to regulate the Nation, its officials, and employees in their official capacity and as acting within the scope of their authority as such. Hobart explicitly identifies the Nation and "all responsible officials" as subject to enforcement proceedings under its special permits order in the September 2 letter of Hobart's legal counsel.

not susceptible to compensation in damages. If the motion is granted, neither Hobart nor the public suffers any harm. Hobart itself made the judgment last year to forego insistence upon enforcement of its special events permit ordinance with no apparent harm. Furthermore, given the existence of tribal law to address all matters of public concern - health, safety, traffic regulation, insurance coverage - there is a guarantee of no harm to public interest. To the contrary, the public interest in the Big Apple Fest, evidenced by the high turnout at this annual event, weighs in favor of proceeding with the event without disruption by or interference from Hobart. Figueroa Affidavit, ¶14.

In sum, all relevant considerations demonstrate the need for and appropriateness of preliminary relief in this matter. The Nation will very likely prevail on the merits, will suffer irreparable harm if relief is denied, and cannot be made whole by remedies at law. By contrast, Hobart cannot demonstrate any harm resulting from preliminary relief, in the face of the Nation's demonstrated ability to regulate the event itself and manage all concerns identified by Hobart in its ordinance. It is unfortunate that Hobart has made application for preliminary relief necessary, but that is the reality. The Court should grant the motion based upon the supporting affidavits without the need for further evidentiary proceedings or delay. *Promatek Industries, Ltd.*, 300 F.3d at 814 (evidentiary hearing not necessary on a motion for preliminary injunction when there are no disputed issues of fact.)

Conclusion

For the reasons stated herein and in the supporting affidavits, the Nation asks the Court to enjoin Hobart and its officials from any attempts to enforce the Hobart special event permit against the Nation and its officials in relation to the upcoming September 17 Big Apple Fest.

Respectfully submitted this 9th day of September, 2016.

s/Arlinda F. Locklear
Attorney Arlinda F. Locklear
Bar No. 962845
Alocklearesq@verizon.net
4113 Jenifer Street, NW
Washington, D.C. 20015
(202) 237-0933

ONEIDA LAW OFFICE
By: James R. Bittorf, Deputy Chief Counsel
Wisconsin State Bar No. 1011794
Jbittorf@OneidaNation.org

Kelly M. McAndrews, Senior Staff Attorney
Wisconsin State Bar No. 1051633
KmcAndrews@OneidaNation.org
N7210 Seminary Road
Post Office Box 109
Oneida, WI 54155
(920) 869-4327