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.

DEFENDANT'S BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Defendant, Village of Hobart, Wisconsin (the "Village"), respectfully submits this brief in opposition to the Motion for Summary Judgment filed by Plaintiff Oneida Nation (the "Nation"). As set forth below, and as set forth in the Village's own motion for summary judgment,[1] the Court should deny the Nation's motion and grant the Village summary judgment because (1) the Oneida Reservation[2] has at least been diminished such that activities associated with the 2016 Big Apple Fest occurred on land owned in fee by the Nation and public roads not contained within an Indian reservation, and (2) even if an approximately 65,400-acre reservation still exists, the Village can apply its Special Event Ordinance to the Nation with respect to the 2016 Big Apple Fest. In addition, the Nation's motion for summary judgment on the issue of the creation of the Oneida Reservation should be denied because, as set forth below, there is at least a fact issue as to whether the Treaty of 1838 was intended to create a reservation held in common or was intended to provide individuals with separate 100-acre tracts. This Court should also deny the Nation's motion for summary judgment on the issues of its eligibility under the IRA and the Village's constitutional challenges to the IRA because the Court need not address those issues to decide this case. Finally, this Court should deny the Nation's motion for summary judgment on the Village's counterclaim against the Nation for the monetary penalty that the Nation would need to pay if the Special Event Ordinance applies to the 2016 Big Apple Fest.

---

[1] At times in this brief, the Village will refer to the Village's Memorandum of Law In Support of the Village's Motion for Summary Judgment (ECF No. 94) (hereinafter referred to as "Village MSJ Br.", as well as to the Village's Statement of Proposed Undisputed Material Facts In Support of the Village's Motion for Summary Judgment (ECF No. 91) (hereinafter referred to as "DSUMF") and the July 19, 2018 Declaration of Frank Kowalkowski In Support of the Village's Motion for Summary Judgment (ECF No. 89) (hereinafter referred to as "July 19 Kowalkowski Decl."). References to the Village's Additional Proposed Undisputed Material Facts In Opposition to the Nation's Motion for Summary Judgment, filed contemporaneously herewith, will be to "Village's Proposed Facts In Opposition."

[2] For purposes of this motion, the Village will refer to the approximately 65,400-acre set aside under the Treaty of 1838 as the "Oneida Reservation."

INTRODUCTION

As the Village explains in its own motion for summary judgment, this case represents the culmination of an ongoing effort by the Nation to rewrite the history of the Oneida Reservation and to assert sovereignty over lands that have been under state and local jurisdiction for over a century. The record is overwhelming, however, that an approximately 65,400-acre reservation defined by the boundaries established by the Treaty of 1838 no longer exists. A judge on this court expressly held as much in 1933 and, even if this Court addresses the question anew, the record evidence supports only one reasonable conclusion: that the Oneida Reservation was at the very least diminished to the extent the vast majority of the area within the 1838 boundaries of the Oneida Reservation passed out of Indian ownership in the early twentieth century. The Oneida Reservation, as defined by its 1838 boundaries, no longer exists.

In Part I, below, the Village responds to the Nation's request for summary judgment on the issue of whether the Treaty of 1838 created the Oneida Reservation as a tract of land commonly held by the Nation. There is significant record evidence that the Oneida Indians contemporaneously understood the Treaty of 1838 as granting each individual Oneida Indian a 100-acre tract, rather than granting the Nation as a whole a commonly held reservation. Because there is at the least a fact dispute on this question, on which the Nation acknowledges it bears the burden of proof, the Nation's request for summary judgment should be denied.

In Part II, below, the Village responds to the Nation's request for summary judgment on the question of whether, if an approximately 65,400-acre reservation did exist, that reservation has been disestablished and/or diminished. This Court should deny the Nation's motion. The Nation's arguments are inconsistent with the indisputable facts and apply a legal standard that is inconsistent with Supreme Court precedent. Moreover, the Nation misconstrues the Village's

legal theory and the holdings of the Supreme Court and other courts, and makes arguments this Court has already rejected. Rather, the Village respectfully requests that this Court grant summary judgment to the Village on the question of whether a reservation defined by the boundaries of the Treaty of 1838 still exists—it does not—for the reasons set forth below and in the Village's own motion for summary judgment.

In Part III, below, the Village responds to the Nation's argument that the Nation is entitled to summary judgment on the affirmative defense of whether exceptional circumstances justify application of the Special Event Ordinance to the Nation within Indian country. As an initial matter, this Court need only reach this issue if it determines that an approximately 65,400-acre reservation continues to exist. Moreover, for reasons explained below and in the Village's own motion, it is the Village's position that the "exceptional circumstances" test does not apply to this case and that application of the Special Event Ordinance to the 2016 Big Apple Fest is justified under the "balancing test" and a number of the legal principles recognized by the Supreme Court. Even if the Village must show "exceptional circumstances," however, it has done so.

In Part IV, below, the Village explains why this Court need not reach the Nation's arguments regarding its eligibility under the IRA and the IRA's constitutionality. This issue is irrelevant because 2016 Big Apple Fest activities occurred on fee land and/or public roads.

Finally, in Part V, below, the Village responds to the Nation's claim that it is immune from the Village's counterclaim for the monetary penalty that can be imposed under the Special Event Ordinance. Here, whether sovereign immunity bars the Village's monetary claim may depend on whether the Village has alternative ways of enforcing the Special Event Ordinance and/or whether the immovable property exception to sovereign immunity applies.

ARGUMENT

I. The Treaty of 1838 Was Not Intended to Create a Reservation Held In Common.

The Nation seeks summary judgment on the question of whether the Treaty of 1838 created what the Nation describes as a "classic Indian reservation . . . one held in common by the Nation." It is the Village's position that the Court need not resolve this question to resolve this case. Even if the Nation is correct as to the status of the area set aside by the Treaty of 1838—that it was a single reservation held in common by the Nation—the Village respectfully submits that the reservation has since been, at a minimum, diminished such that land on which 2016 Big Apple Fest activities occurred was not Indian country under 18 U.S.C. § 1151. *See* Village MSJ Br. at 14-44; *infra* at 8-37.

To the extent the Court does address this issue, however, it is the Village's position that there is at least a fact issue as to whether the original intent of the Treaty of 1838 was to provide individual 100-acre tracts for the Oneida Indians, as opposed to an approximately 65,400-acre reservation to be held in common. The Village's interpretation of the Treaty of 1838 is consistent with the plain language of the Treaty, as well as available extrinsic evidence of the Nation's understanding of the Treaty and justifies denial of the Nation's motion. Further, the Village believes the original intent of the Treaty of 1838 is relevant to assessing the history of the Oneida after allotment under the Dawes Act, including the question of whether the Oneida Reservation has been diminished and/or disestablished.

A. The Treaty of 1838 Created Individual 100-Acre Tracts for the Oneida Indians.

The Nation asserts the "plain language of the Treaty of 1838 created" a reservation held in common and that "[t]here is no ambiguity or doubt requiring resort to canons of construction." Nation Br. at 21. Incredibly, the Nation's assertions with respect to the "plain language" of the

Treaty are largely based—not on the language of the Treaty—but on various forms of extrinsic evidence that are not relevant to the fundamental question, which is how the Nation understood the terms of the Treaty of 1838 at the time the Treaty was enacted. *See Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999) ("[W]e interpret Indian treaties to give effect to the terms as the Indians themselves would have understood them.").

For example, the Nation primarily relies on "administrative statements" by the United States occurring decades after the Treaty of 1838, but such evidence is irrelevant to the question of how the Nation understood the terms of the Treaty at the time of its enactment. Nation Br. at 18-21. Similarly, while the Nation does note that the survey and field notes that occurred after the Treaty of 1838 show a single tract, and cites a single 1839 letter from Commissioner of Indian Affairs Hartley Crawford, neither of those documents are relevant to *the Nation's* understanding of the Treaty. The Nation also attempts to interpret the Treaty of 1838 in light of what it contends is the interpretation of other treaties between the United States and other tribes, but there are serious flaws with doing so.[3] It is well-established that the "argument that similar

[3] For example, the Nation relies on cases interpreting the term "as other Indian lands are held" in an 1854 treaty with the Menominee to claim that the Treaty of 1838 created "a classic Indian reservation held in common." Nation Br. at 17. Not only is the Nation's reliance on a different treaty involving different parties irrelevant, the cases it cites do not support its argument. In *Menominee Tribe of Indians v. United States*, 388 F.2d 998 (Ct. Cl. 1967), the term "to be held as Indians lands are held" was merely found to grant the Menominee "an unqualified right to hunt and fish on the reservation in their own way free from all outside regulation or control." *Id.* at 1002. Similarly, in *State v. Sanapaw*, 21 Wis. 2d 377, 124 N.W.2d 41 (1963), the Court only determined that the Menominee "enjoyed the same exclusive hunting rights free from the restrictions of the state's game laws over the ceded lands, which comprised the Menominee Indian Reservation…" *Id.* at 383. Neither case establishes that the term "to be held as other Indian lands are held" as used in the Treaty of 1838 must be interpreted to mean a communal reservation. Further, the Nation fails to recognize that *Sanpaw* was overturned by *Menominee Tribe of Indians v. U.S.*, 391 U.S. 404, 88 S. Ct. 1705 (1963), where the Supreme Court noted that "the words 'to be held as Indian lands are held' sum up in a single phrase the familiar provisions of earlier treaties which recognized hunting and fishing as normal incidents of Indian life." *Id.* at 406 n.2.

language in two Treaties involving different parties has precisely the same meaning reveals a fundamental misunderstanding of basic principles of treaty construction." *Mille Lacs Band of Chippewa Indians*, 526 U.S. at 202.

In contrast to the Nation's arguments, the Village's position is based on the plain language of the text of the Treaty and contemporaneous evidence that *the Oneida* understood the Treaty to reserve individual 100-acre tracts. Article 2 of the Treaty of 1838 provides:

> From the foregoing cession 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, and the lines of which shall be so run as to include all their settlements and improvements in the vicinity of Green Bay.

Ex. 13 to July 19, 2018 Declaration of Paul R. Jacquart, ECF No. 92-13. By its plain terms, this provision provides for the reservation of individual 100-acre tracts: "a tract of land containing one hundred (100) acres, for each individual." Were there any doubt on this point, Article 3 of the Treaty expressly refers to "the *tracts* reserved in the 2d article." When Articles 2 and 3 are read together, there is only one plausible interpretation of Article 2—the Village's.

Moreover, the margin notes to Article 2 of the Treaty of 1838 provide "*Reservations* to be made from said cession," (emphasis added), thereby indicating that Article 2 was intended to reserve separate 100-acre tracts. *Cf. Motorola, Inc. v. United States*, 729 F.2d 765, 771 (Fed. Cir. 1984) ("Although margin notes are generally not used in interpreting statutes, they may be referred to as indicating the intention of Congress."). The Village's expert, Dr. Emily Greenwald, further explains in her report, "historical documents including petitions, correspondence, and an unratified treaty from the period immediately following the ratification of the February 1838 treaty indicate that the tribe and U.S. officials believed that it had created individually rather than collectively held land." Ex. 154 to July 19 Kowalkowski Decl. at 7, ECF No. 89-154. Correspondence from tribal members and the Commissioner of Indian Affairs in 1838 refer to

100-acre tracts of land as being reserved for "each individual," Village's Proposed Facts In Opposition at ¶¶ 3-5. As Dr. Greenwald explains, after completion of the Treaty of 1838, Oneida leaders almost immediately began petitioning the federal government to exchange their individual 100-acre parcels for larger 320-acre parcels west of the Mississippi. These petitions resulted in the negotiation and execution of a new treaty that would have allowed for individual Oneida to voluntarily determine whether to exchange their individual 100-acre parcels for larger parcels outside of Wisconsin. Village's Proposed Facts In Opposition at ¶¶ 3-10. Although the new treaty was never ratified, this documentary evidence shows that both the United States and the Oneida understood the Treaty of 1838 as granting separate 100-acre tracts to each individual Oneida Indian. In contrast to this evidence, the Nation does not cite a single piece of evidence that would illustrate how the Oneida understood the Treaty of 1838 when it was executed.[4]

Finally, the Nation's reliance on *United States v. Cook*, 86 U.S. 591 (1873) is misguided. In that case, the Supreme Court made no "explicit" holding concerning commonality of the land occupied by the Oneida. Rather, the Court in *Cook* found that "[t]he Indians having only a right of occupancy in the lands, the presumption is against their authority to cut and sell the timber." *Id.* at 594. The Court also noted:

> The timber taken off by the Indians in such clearing may be sold by them. But to justify any cutting of the timber, except for use upon the premises, as timber or its product, it must be done in good faith for the improvement of the land. The improvement must be the principal thing, and the cutting of the timber the incident only. Any cutting beyond this would be waste and unauthorized.

[4] The Nation invokes the canon of construction that Indian treaties must be interpreted liberally in favor of the Indians, but that canon has no application when "plain language . . . viewed in historical context and given a fair appraisal clearly runs counter to a tribe's later claims." *Oregon Dep't of Fish and Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 774 (1985) (internal quotation marks and citation omitted).

Id. at 593. At issue in *Cook* was the cutting of timber for no reason other than its sale. The Court concluded that timber could only be sold by tribal members when the timber was cut for the purpose of improving the land. The claim by the Nation that the Supreme Court conclusively decided that "a tract of land containing one hundred (100) acres for each individual" means a reservation held in common goes beyond the actual holding of the Court.

B. The History of the Treaty of 1838 Informs the Village's Diminishment/Disestablishment Argument.

The Nation claims that the subsequent application of the Dawes Act to the area set aside in the Treaty of 1838 effectively treats that area as having been held in common prior to the Dawes Act, but the original intent of the Treaty of 1838 is nevertheless relevant here, as it is reflective of the unique history of the Nation. Unlike many tribes, the Nation already had a long history of involvement with white settlers by the 1830s and by that time members of the Nation were already expressing an interest in living by farming and becoming United States citizens. Village's Proposed Facts In Opposition at ¶¶ 1-2. Notably, this was at a time when "the prevailing view was that tribal affiliation was inconsistent with the acquisition of United States citizenship." *Wisconsin v. Stockbridge-Munsee Cmty.*, 366 F. Supp. 2d 698, 762 (E.D. Wis. 2004). That members of the Nation in the 1830s were already expressing an interest in relinquishing their tribal affiliation, and believed they had agreed to a treaty providing for individual tracts of land, provides additional context for understanding how both the United States and members of the Nation would view the impact of the subsequent allotment of the Oneida Reservation.

II. The 1838 Boundaries of the Oneida Reservation No Longer Exist.

As explained more fully in the Village's own motion for summary judgment, the Oneida Reservation—as defined by its 1838 boundaries—no longer exists and the fee land and roads on

which 2016 Big Apple Fest activities occurred are not "Indian country" under 18 U.S.C. § 1151(a). Village MSJ Br. at 14-44. The Nation seeks the opposite judgment in its own motion, arguing the Oneida Reservation is an "extant reservation" and thus "constitutes Indian country under § 1151(a)." Nation Br. at 42. Specifically, the Nation claims the Village's "affirmative defense that the Oneida Reservation was either diminished or disestablished fails as a matter of law" and the Nation is thus "immune from Village regulation within the reservation." *Id.* at 33.

As an initial matter, the Nation should be precluded from continuing to assert the existence of the Oneida Reservation. In 1933, in *Stevens, et al. v. County of Brown, et al.*, a judge on this court specifically addressed the questions of whether the Oneida Reservation had ceased to exist and whether as a result the Oneida were subject to state law. DSUMF ¶¶ 40-41; Ex. 45 to July 19 Kowalkowski Decl., ECF No. 89-45. In a lawsuit brought on behalf of the Oneida Tribe against the Village's predecessor and other local governments, the court held that it was "plain[]" the Oneida Reservation had been discontinued and that therefore the Oneida were subject to state law. *Id.* For the reasons more fully explained in the Village's own motion for summary judgment, Village MSJ Br. at 14-18, the court's decision in *Stevens* is entitled to preclusive effect on the issue of the status of the Oneida Reservation. Therefore, this Court must reject the Nation's assertion that the Oneida Reservation remains "extant" and hold that the Oneida Reservation no longer exists. *See Chi. Truck Drivers, Helpers, and Warehouse Union (Indep.) Pension Fund v. Century Motor Freight, Inc.*, 125 F.3d 526, 530 (7th Cir. 1997) (holding that a court "should honor the first actual decision of a matter that has been actually litigated" (internal quotation marks and citation omitted)).

Regardless of whether this Court grants issue-preclusive effect to the decision in *Stevens*, this Court should still deny the Nation's motion for summary judgment with respect to the status

of the Oneida Reservation. As the Village's own motion explains, the boundaries established by the 1838 Treaty ceased to exist, and the Nation's position that there remains an extant reservation defined by those boundaries must be rejected. Village MSJ Br. at 18-44. At a minimum, the Oneida Reservation was greatly diminished such that the only reservation land remaining was the small amount of acreage that had not passed out of Indian-ownership by the time Congress passed the IRA in 1934. Even the Nation itself, decades after allotment of the reservation, acknowledged that "[t]he reservation ceased to exist" and the Oneida Nation had "no reservation." DSUMF ¶ 121, ECF No. 91; Ex. 134 to July 19 Kowalkowski Decl., ECF No. 89-134.

Not only are the Nation's arguments in its motion inconsistent with these indisputable facts, but the Nation commits a number of legal and factual errors. As set forth in more detail below, the Nation applies a legal standard that is inconsistent with Supreme Court precedent, misconstrues the Village's legal theory and the holdings of the Supreme Court and other courts, and makes arguments this Court has already rejected. The Nation's request for summary judgment on the Village's affirmative defense of disestablishment or diminishment should be denied, for the reasons set forth below and in the Village's own motion for summary judgment.

A. The Nation Proposes a Legal Standard Inconsistent With Both Supreme Court Precedent and History.

The Nation takes the position that only "an express and plain act of Congress" can alter the boundaries of an Indian reservation and, comparing the Oneida Reservation to cases in which the Supreme Court addressed the question of whether a surplus lands act had diminished or disestablished a reservation, argues that "[t]here is no similar explicit act or surplus lands act regarding the Oneida Reservation that might even arguably support a congressional intent to diminish or disestablish it." Nation Br. at 34, 36. The Nation's argument suffers from at least two

fundamental flaws: (1) it distorts the framework the Supreme Court has applied in diminishment and disestablishment cases and thereby ignores the context of the late nineteenth and early twentieth centuries and how that context is relevant to the question of the existence of the Oneida Reservation; and (2) it presumes that the *Solem* framework alone should control this case.

1. **The Nation distorts the *Solem* framework.**

First, although the Nation superficially recounts the three-factor *Solem* framework, it distorts that framework by repeatedly suggesting that diminishment or disestablishment of a reservation cannot occur without "an express and plain act of Congress" that includes certain "[s]tatutory hallmarks." The Nation's suggestion conflicts with the law. The Supreme Court in *Solem v. Bartlett* did explain that Congress must "clearly evince *an intent* to change boundaries before diminishment will be found" and that "[t]he most probative evidence of congressional intent is the statutory language used to open the Indian lands." 465 U.S. 463, 470 (1984) (emphasis added). But, the Supreme Court has never held that "express and plain" statutory language containing certain "statutory hallmarks" is required to find diminishment or disestablishment.

On the contrary, the Supreme Court has been clear that no "particular form of words" is necessary to alter a reservation's boundaries and has expressly rejected a "clear-statement rule." *Hagen v. Utah*, 510 U.S. 399, 411 (1994). "*Even in the absence of a clear expression of congressional purpose in the text of a surplus land Act*, unequivocal evidence derived from the surrounding circumstances may support the conclusion that a reservation has been diminished." *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 351 (1998) (emphasis added). The Supreme Court has "been willing to infer that Congress shared the understanding that its action would diminish the reservation, *notwithstanding the presence of statutory language that would otherwise suggest reservation boundaries remained unchanged*." *Solem*, 465 U.S. at 471

(emphasis added). Numerous courts have found reservations to be diminished or disestablished despite the absence of the "hallmark language" that the Nation claims is necessary here. *Wisconsin v. Stockbridge-Munsee Cmty.*, 554 F.3d 657, 664 (7th Cir. 2009) (finding disestablishment even though "[t]he 1906 Act . . . included none of the hallmark language suggesting that Congress intended to disestablish the reservation"); *see also Osage Nation v. Irby*, 597 F.3d 1117, 1124 (10th Cir. 2010) (reservation disestablished even though "neither the Osage Allotment Act nor the Oklahoma Enabling Act contain express termination language"); *Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010 (8th Cir. 1999) (reservation diminished to the extent allotted lands for which fee patents were issued were sold to non-Indians).

Further contrary to the Nation's suggestion that this Court should limit its analysis to the text of the congressional acts at issue, the *Solem* framework itself contemplates a much broader inquiry that includes (1) the circumstances surrounding the passage of the congressional acts and (2) events subsequent to the passage of the act, including the subsequent treatment of the reservation by the federal government and subsequent demographic history.[5] 465 U.S. at 471-72. The Supreme Court has even acknowledged that "*de facto*, if not *de jure*, diminishment may have occurred" when "non-Indian settlers flooded into the opened portion of a reservation and the area has long since lost its Indian character." *Id.* at 471; *see also id.* 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."). In sum, the analysis the Supreme Court has employed in

[5] Although the Supreme Court in *Nebraska v. Parker* wrote that it had "never relied solely on this third consideration to find diminishment," 136 S. Ct. 1072, 1081 (2016), it did not foreclose reliance on that factor.

evaluating whether reservations have been disestablished or diminished is not as simple as the Nation makes it seem.

The Supreme Court has rejected a singular focus on whether there is an "express and plain act of Congress" because doing so would ignore relevant historical context that informs the disestablishment/diminishment analysis. In *South Dakota v. Yankton Sioux Tribe*, for example, the Supreme Court explained:

> Our inquiry is informed by the understanding that, at the turn of this century, Congress did not view the distinction between acquiring Indian property and assuming jurisdiction over Indian territory as a critical one, in part because "[t]he notion that reservation status of Indian lands might not be coextensive with tribal ownership was unfamiliar," *Solem*, 465 U.S., at 468, 104 S.Ct., at 1164, and in part because Congress then assumed that the reservation system would fade over time. "Given this expectation, Congress naturally failed to be meticulous in clarifying whether a particular piece of legislation formally sliced a certain parcel of land off one reservation." *Ibid.*; *see also Hagen*, 510 U.S. 399, 426, 114 S.Ct. 958, 973, 127 L.Ed.2d 252 (1994). (Blackmun, J., dissenting) ("As a result of the patina history has placed on the allotment Acts, the Court is presented with questions that their architects could not have foreseen").

522 U.S. at 343-44. The Seventh Circuit further explained this historical context in *Stockbridge-Munsee Community*:

> Congress was not always clear about its intentions for the boundaries of a reservation, primarily because at the turn of the last century, when many allotment acts were passed, it was operating under a different set of assumptions than it does now. Today, a reservation can encompass land that is not owned by Indians, 18 U.S.C. § 1151(a), but back then, the "notion that reservation status of Indian lands might not be coextensive with tribal ownership was unfamiliar . . . ." *Solem*, 465 U.S. at 468, 104 S. Ct. 1161. What's more, Congress believed that all reservations would soon fade away—the idea behind the allotment acts was that ownership of property would prepare Indians for citizenship in the United States, which, down the road, would make reservations obsolete. *Id.* Given these background assumptions, Congress would have felt little need to explicitly address a reservation's boundaries. We cannot, of course, extrapolate a clear intent to diminish a reservation from these generic assumptions. *Id.* at 468-69, 104 S. Ct. 1161. But given this backdrop, we also cannot expect Congress to have employed a set of magic words to signal its intention to shrink a reservation. Absent such clear language, courts look to events surrounding the passage of the act that "unequivocally reveal a widely held, contemporaneous understanding that the

> affected reservation would shrink as a result of the proposed legislation," *id.* at 471, 104 S. Ct. 1161, and, "to a lesser extent," events that occur after the passage of the act, *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 344, 118 S. Ct. 789, 139 L.Ed.2d 773 (1998).

554 F.3d at 662.[6] As these cases acknowledge, during the time periods relevant to this case Congress did not always speak clearly regarding its intentions with respect to the reservation status of Indian lands, and it is not appropriate to expect Congress to employ "a set of magic words to signal its intention to shrink a reservation." *Stockbridge-Munsee Cmty.*, 554 F.3d at 662. Yet, that appears to be the Nation's position. As the Nation's request for summary judgment is based on a legal framework at odds with established case-law—the alleged need for an "explicit" congressional act—it should be denied.[7] Further, although the Nation relies on an opinion from the Wisconsin Attorney General in 1981 that the Oneida Reservation had not been diminished or disestablished, the opinion is so far removed from the events that led to the

---

[6] The Eighth Circuit made similar observation in *Gaffey*, another case that supports the Village's position in this litigation:

> Lands to which the Indians did not have any property rights were never considered Indian country. The notion of a reservation as a piece of land, all of which is Indian country regardless of who owns it, would have thus been quite foreign. Congress in the late nineteenth century was operating on the assumption that reservations would soon cease to exist . . . and on the belief that allotting lands, and purchasing those left unalloted, were steps in the process of eventually dismantling the reservation system. . . . 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.

188 F.3d at 1022.

[7] For this reason, the Nation's argument that its experts "exhaustively examined the historical record" and did not find an explicit act is, ultimately, irrelevant. Nation Br. at 36. Regardless, this is a legal question that ultimately resides with the Court, not the parties' experts. *Roundy's Inc. v. N.L.R.B.*, 674 F.3d 638, 648 (7th Cir. 2012) ("Rules 702 and 704 prohibit experts from offering opinions about legal issues that will determine the outcome of a case." (internal quotation marks omitted)); *Good Shepherd Manor Foundation, Inc. v. City of Momence*, 323 F.3d 557, 564 (7th Cir. 2003) ("[E]xpert testimony as to legal conclusions that will determine the outcome of the case is inadmissible.")

termination of the 1838 boundaries that it sheds little light on the issue.[8] *See Osage Nation*, 597 F.3d at 1126.

2. The *Solem* framework does not strictly control the issue of the disestablishment/diminishment of the Oneida Reservation.

Moreover, as the Village explains in its own motion, the *Solem* factors exist to provide a framework for analyzing surplus land acts, and the applicability of those factors outside the context of surplus land acts is an issue that is currently before the Supreme Court.[9] Village MSJ Br. at 18-20. Indeed, the Nation's motion illustrates why the Supreme Court's precedent from the surplus land act context is a poor fit for this case. The Nation lists several "statutory hallmarks of a congressional intent to alter reservation boundaries," Nation Br. at 34, but none of the examples it provides would make any sense in the allotment context.

For example, the Nation notes the absence of language of cession in this case. But, cession and allotment were two alternative ways of eliminating a tribal land base. As explained in a recent filing with the Supreme Court: "Words of cession and purchase in surplus land acts show diminishment, but such words were unnecessary . . . where Congress used allotment to achieve the same result as cession, *i.e.*, elimination of tribal territory." Br. for Petitioner, *Carpenter v. Murphy*, No. 17-1107, at 48; *see also* Br. for United States, Carpenter v. Murphy, No. 17-1107, at 24 (noting that language of cession to the United States would be inapposite

---

[8] Notably, the 1981 Wisconsin Attorney General opinion omits any discussion of *Stevens, et al. v. The County of Brown*, in which a judge on the U.S. District Court for the Eastern District of Wisconsin held that the Oneida Reservation had been discontinued.

[9] *See* Br. for Petitioner, *Carpenter v. Murphy*, No. 17-1107 (July 23, 2018), at 46-49, available at https://www.supremecourt.gov/DocketPDF/17/17-1107/55210/20180723232225994_17-1107ts.pdf; Br. for the U.S. as Amicus Curiae Supporting Petitioner, *Carpenter v. Murphy*, No. 17-1107 (July 2018), at 6-7, available at https://www.supremecourt.gov/DocketPDF/17/17-1107/55946/20180730184937862_17-1107tsacUnitedStates.pdf.

when land was distributed to tribal members). Simply put, it would make no sense to use language of cession when referring to allotted lands.

Similarly, one would not expect to see language expressly restoring land to the public domain in an allotment act, as opposed to a surplus land act. "The public domain was the land owned by the Government, mostly in the West, that was available for sale, entry, and settlement under the homestead laws, or other disposition under the general body of land laws." *Hagen*, 510 U.S. at 412 (internal quotation marks omitted). Allotment did not transfer land into government ownership, so a reference to the "public domain" would be out of place in an allotment act. Allotment did, however, create a process for individual Indians to ultimately take ownership of the land, and the granting of a fee patent for an allotted parcel of land would accomplish the same goal as restoring land to the public domain: opening those lands for sale or settlement by non-Indians and the extinguishing of the land's prior use as a reservation. *Id.*

Finally, the Nation notes the absence of any provisions providing for payment of a sum certain to the Oneida for their reservation lands, but, again, such a provision would be out of place in an allotment act. Congress had no need to make a lump sum payment to the Oneida because the "lands were conveyed through allotment to their own members rather than to the federal government." Br. for Petitioner, *Carpenter v. Murphy*, No. 17-1107, at 49; *see also* Br. for United States, Carpenter v. Murphy, No. 17-1107, at 25. That said, it must be noted that when federal officials sold the site of the Oneida Boarding School in 1924, the federal government effectively made a lump sum payment to the Oneida by distributing the proceeds of the sale to the Oneida on a per capita basis. DSUMF at ¶ 64; Ex. 79 to July 19 Kowalkowski Decl., ECF No. 89-79.

Moreover, the end result of the allotment process—the sale of allotted lands to non-Indians—accomplished the same objective as the payment of a sum certain to an Indian tribe: the surrendering of a tribal property interest in exchange for compensation. When Oneida Indians received their fee simple patents for their allotments, and subsequently sold those parcels, there was no longer any tribal ownership interest in those lands and compensation had been provided. The process was complete.

B. The Passage of Allotted and Fee-Patented Lands Out of Indian Ownership Diminished the Oneida Reservation.

Not only does the Nation distort the applicable legal standard, but the Nation's motion also sets up a strawman by mischaracterizing the Village's legal position so the Nation can claim the Village's position is precluded by Supreme Court precedent. The Nation claims, for example, that "[t]he Village relies solely on the allotment of the Oneida Reservation as the basis of its disestablishment/diminishment defense," Nation Br. at 34, and that "[t]he Supreme Court has been clear that allotment of a reservation under the GAA does *not* disestablish or abolish reservations," *id.* at 37. As explained in the Village's own motion, however, the Village does not claim that the mere act of allotment under the Dawes Act disestablished the Oneida Reservation, and the Village acknowledges that the initial allotment of the Oneida Reservation (i.e., the issuance of trust patents for parcels of land to individual Oneida Indians) did not alter the reservation status of the parcels at issue. Village MSJ Br. at 22.

Rather, it is the Village's position that the initial act of allotment was the first step in a multi-step process that Congress intended and expected would result in the breakdown of reservation boundaries. Once the trust period on an allotment expired, or was otherwise terminated, a fee patent would be issued. By that point, whether under the Dawes Act as originally enacted, or as amended by the Burke Act, the allottee and the fee-patented parcel

would become subject to state law and the federal government relinquished jurisdiction. This Court need not even reach the issue of whether issuance of a fee patent to an Indian allottee diminished the Oneida Reservation in order to resolve this case, however. Even if the issuance of a fee patent did not terminate the reservation status of the parcel at issue, the final step in the allotment process—the transfer of the fee-patented land to a non-Indian—would do so. This conclusion—that land within the Oneida Reservation lost its reservation status, thereby diminishing the reservation, as it passed out of Indian ownership—finds ample support both in the history of the Dawes Act and in the case law.

1. **The Intent of the Dawes Act.**

First, there should be no dispute that the ultimate goal of the Dawes Act was the breakup of Indian reservations. Again, this would be a gradual process; it would not occur at the moment of allotment but would occur gradually as fee simple patents were issued and land passed out of Indian ownership. The Supreme Court and other courts have repeatedly recognized this aspect of the allotment era, and the Dawes Act in particular. *See, e.g.*, *Upper Skagit Indian Tribe v. Lundgren*, 138 S. Ct. 1649, 1652 (2018) ("The General Allotment Act represented part of Congress's late Nineteenth Century Indian policy: to extinguish tribal sovereignty, erase reservation boundaries, and force the assimilation of Indians into the society at large." (internal quotation marks omitted)); *Montana v. United States*, 450 U.S. 544, 559 n.9 (1981) ("The policy of the Acts was . . . the gradual extinction of Indian reservations and Indian titles." (internal quotation marks omitted)); *Stockbridge-Munsee Cmty.*, 554 F.3d at 665 (fee simple patents "paved the way for non-Indians to own every parcel within the original reservation and ensured that the reservation could be immediately extinguished"); *Hackford v. Babbitt*, 14 F.3d 1457, 1459 (10th Cir. 1994) ("The Indian General Allotment Act allowed the breakup of Indian reservations into individual homesteads on which, Congress expected, the Indians would farm

and become self-sufficient. The ultimate purpose of the Indian General Allotment Act was to abrogate the Indian tribal organization, to abolish the reservation system and to place the Indians on an equal footing with other citizens of the country." (internal quotation marks and brackets omitted)). The Nation's argument that the Dawes Act "was not intended to alter reservation boundaries, either in its terms or consequences" is simply not consistent with this well-established case law.[10] And, regardless, the Village does not rely only on allotment under the Dawes Act, but also the existence of subsequent acts of Congress indicating intent to at least diminish the Oneida Reservation, as well as the contemporaneous understanding of those statutes and the subsequent treatment of the area.

2. **The Village's position is supported by case law.**

The Village's position also finds support in recent case law. Contrary to the Nation's suggestion that the Village is taking a position in this litigation that "no federal court has been prepared to endorse," Nation Br. at 42, the Village is simply asking that this Court apply the same rule applied by the U.S. Court of Appeals for the Eighth Circuit in *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994, and *Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010.

---

[10] The Nation asserts that one of its experts, Dr. Hoxie, "thoroughly examined the [Dawes Act] in his reports for the Nation and concluded that the Act was not intended to alter reservation boundaries, either in its terms or consequences." Nation Br. at 39. Although Dr. Hoxie's opinion may be correct as to the initial act of allotment under the Dawes Act—i.e., the issuance of a trust patent—Dr. Hoxie's suggestion that the Act was not intended ultimately to alter reservation boundaries is at odds with the case law described above, as well as the legislative history of the Act. *Cf. K-TEC, Inc. v. Vita-Mix Corp.*, 696 F.3d 1364, 1374 (Fed. Cir. 2012) (expert report does not create dispute "when no reasonable juror reviewing the evidence could reach such a conclusion"). The legislative history of the Act is described in the Supreme Court's opinion in *Montana v. United States*, 450 U.S. 544, 559 n.9 (1981) and the Dec. 15, 2017 report of the Village's expert, Dr. Emily Greenwald. Ex. 154 to July 19 Kowalkowski Decl., ECF No. 89-154. Further, the Nation's attempts to boost the credibility of Dr. Hoxie are plainly inappropriate at the summary judgment stage. *Planned Parenthood of Indiana and Kentucky, Inc. v. Commissioner, Indiana Dept. of Health*, 64 F. Supp. 3d 1235, 1252 (S.D. Ind. 2014) ("[I]t is inappropriate for the Court to make credibility and reliability determinations regarding competing expert opinions on summary judgment.").

In those cases, the Eighth Circuit addressed the reservation status of allotted land within the original boundaries of the Yankton Sioux Reservation. Acting under the authority of the Dawes Act and 1891 amendments to that act, the federal government allotted to tribal members approximately 262,300 acres of the approximately 430,405 acre Yankton Sioux Reservation. *Podhradsky*, 606 F.3d at 999; *Gaffey*, 188 F.3d at 1016. After the passage of the Burke Act in 1906 "tribal allotments began passing into white hands well before the expiration of the original twenty five year trust period set by the Dawes Act." *Podhradsky*, 606 F.3d at 1000. As a result "[b]y 1930, tribal members held only 43,358 acres of land out of the more than 262,300 acres originally carved into Indian allotments." *Id.* And, just as happened with the Oneida Reservation, subsequent executive orders extended the trust period on certain parcels remaining in trust until the 1934 passage of the IRA, which "indefinitely extended the trust periods for outstanding allotments." *Id.* at 1001.

As a result of this history, in *Gaffey* and *Podhradsky* the Eighth Circuit confronted three different categories of allotments: (1) "lands allotted to members of the Tribe which have been continuously held in trust for the benefit of the Tribe or its members"; (2) "allotted lands later transferred in fee to individual Indians and which have never passed out of Indian ownership"; and (3) "lands originally allotted to tribal members but later transferred in fee to non Indians and never reacquired in trust," *Podhradsky*, 606 F.3d at 1001. Read together, *Gaffey* and *Podhradsky* held that allotments made to tribal members that were continuously held in trust remained part of the Yankton Sioux Reservation. *Podhradsky*, 606 F.3d at 1007-1010. The Eighth Circuit held, however, that those lands originally allotted to tribal members that were later transferred in fee to non-Indians "had ceased to be part of the reservation." *Id.* at 1003; *Gaffey*, 188 F.3d at 1030. The court ultimately declined to address the question of the reservation status of allotted lands that

transferred in fee to individual Indians but never passed out of Indian ownership. *Podhradsky*, 606 F.3d at 1015.

These cases support the Village's position that the Oneida Reservation has been diminished at least to the extent that lands allotted to tribal members were transferred in fee to non-Indians. Indeed, just as in *Gaffey* and *Podhradsky*, the Oneida Reservation was allotted under the Dawes Act and Congress passed subsequent acts that did not "suggest[] that any party anticipated that the Tribe would exercise jurisdiction over non Indians who purchased land after it lost its trust status."[11] *Gaffey*, 188 F.3d 1028. For example, Congress passed the 1906 Oneida Provision discussed below, as well as an act authorizing the conveyance of school land within the area set aside by the 1838 Treaty to "the public school authorities of district numbered one of the town of Oneida, Wisconsin, for district school purposes." Ex. 67 to July 19, 2018 Kowalkowski Decl. at 992, ECF No. 89-67. That Congress was conveying land to *another government*—the town public school authorities—to be used as a school for all residents, both non-Indian and Indian, is surely an indication that "as more white settlers came on to the opened lands, increased state involvement on their behalf was expected, and the jurisdiction of the State was expected to increase over time." *Gaffey*, 188 F.3d at 1028. And, of course, that is in fact what happened. *See generally* Village MSJ Br. at 29-44.

[11] The specific act at issue in *Gaffey* and *Podhradsky* was an 1894 Act that the Supreme Court held had ceded part of the Yankton Sioux Reservation. The case was remanded to address the status of nonceded lands within the original boundaries of the reservation. The 1894 Act did not expressly address the reservation status of those lands, but simply contained provisions that "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," such as a provision providing for reserving land for common schools. *Gaffey*, 188 F.3d at 1028. Here, too, there was no doubt that allottees who received full title were subject to the civil and criminal laws of the State, and Congress passed at least one additional act that clearly reflects such an assumption—the act authorizing the sale of land to the public school authorities for the establishment of a public school that would be attended by both "whites and Indians." Ex. 67 to July 19, 2018 Kowalkowski Decl. at 992, ECF No. 89-67.

3. The Supreme Court cases cited by the Nation do not foreclose the Village's position.

Finally, the Nation cites several Supreme Court cases that it claims "indicat[e] that the [Dawes Act] and its inevitable consequences – loss of title to parcels within the reservation and citizenship of the Indians – do not disestablish or diminish Indian reservations." Nation Br. at 39. The Nation reads too much into these cases, however, as none of them addressed the question posed here: whether allotted parcels of land on the Oneida Reservation lost their reservation status once a fee patent was issued and the parcel was transferred to a non-Indian prior to 1948.

For example, the Nation repeatedly cites the Supreme Court's decision in *Mattz v. Arnett*, 412 U.S. 481 (1973). As relevant here, that case stands only for the proposition that the initial act of allotting lands under the Dawes Act did not terminate a reservation, as the allotted lands retained their reservation status prior to the expiration of the trust period. *Podhradsky*, 606 F.3d at 1008. The holding in *Mattz*—that allotted lands retain their reservation status so long as they remain in trust—is consistent with and does not foreclose the Village's position: that allotted lands on the Oneida Reservation lost their reservation status once fee patents were issued and the lands passed out of Indian ownership. *Id.* at 1009 ("*Gaffey II* recounted Congress's original expectation that allotments would lose their reservation status as they passed out of Indian ownership and into white hands. 188 F.3d at 1028. That original concept was not inconsistent with the maintenance of reservation status for the allotted lands so long as they were held in trust.").

The Nation also cites *United States v. Celestine*, 215 U.S. 278 (1909), which the Nation claims held that neither allotment of the reservation, nor allotment combined with the conferral of citizenship on the allottees, had the effect of revoking the reservation. The Nation's discussion of *Celestine* omits several relevant details from that case that render it inapposite here, however.

For example, the land at issue in *Celestine* was not allotted under the Dawes Act, but was instead allotted under the terms of a treaty with the Indian tribe at issue. 215 U.S. at 285-86. Under those treaty terms, allotments were issued to members of the tribe, but the allotments remained subject to "conditions against alienation or leasing, exemption from levy, sale or forfeiture," and were "not to be disturbed by the state without the consent of Congress." *Id.* at 286. Under these circumstances, the Court held that "[a]lthough the defendant had received a patent for the land within that reservation, and although the murdered woman was the owner of another tract within such limits, also patented, both tracts remained within the reservation until Congress excluded them therefrom." *Id.* at 284.

The Supreme Court specifically explained that "[t]he conditions of the treaty with the Omahas, made reference a part of the treaty with the Tulalip Indians, providing for only a conditional alienation of the lands, make it clear that the special jurisdiction of the United States has not been taken away." *Id.* at 287. In effect, the Court held that the issuance of what amounted to a restricted patent—because it remained subject to conditions against alienation, was exempt from levy, sale, or forfeiture, and could not be disturbed by the state without Congress's consent—did not terminate a reservation. As noted above, however, the Village acknowledges that the Supreme Court has held that the mere act of allotment does not terminate the reservation status of land so long as it remains in trust.

That the land at issue in *Celestine* had not been allotted under the Dawes Act is also relevant because such land was not subject to the Dawes Act's grant of state criminal and civil jurisdiction over allottees. Indeed, the Supreme Court in *Celestine* specifically drew a distinction between the language in § 6 of the Dawes Act that granted state criminal and civil jurisdiction over allottees (which the Supreme Court held applied only to allotments made under the Dawes

Act) and the language in § 6 of the Dawes Act that conferred citizenship on allottees (which the Supreme Court held applied to allotments made under Dawes Act as well as to allotments made "under any law or treaty"). 215 U.S. at 288-89. In other words, the Indian at issue in *Celestine* was subject to the Dawes Act's citizenship provision, but not the provision in § 6 subjecting an allottee to state civil and criminal jurisdiction. It was in this context that the Supreme Court held that allotment, combined with citizenship, did not result in a loss of reservation status. That the Supreme Court in *Celestine* went so far out of its way to explain that certain provisions in the Dawes Act did not apply in that case—for example, it explained that "[t]here is not in this case in terms a subjection of the individual Indian to the laws, both civil and criminal, of the state; no grant to him of the benefit of those laws; no denial of the personal jurisdiction of the United States"—indicates that the Court's holding likely would have been different had it been addressing allotments issued under the Dawes Act. *Id.* at 291. Regardless, this distinction is another reason why *Celestine* has little to say regarding the question at issue in this case.[12]

Finally, the Nation cites *Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351 (1962), for the proposition that "the loss of title to individual parcels within the Reservation after allotment neither disestablishes nor diminishes the Reservation." Nation Br. at 38. The Nation reads too much into *Seymour*, however, as that case simply stands for the proposition that *after* Congress enacted § 1151(a) in 1948, the passage of fee lands out of Indian ownership would not affect their reservation status or status as "Indian country." It is well

[12] The Ninth Circuit's decision in *Eells v. Ross*, 64 F. 417 (1894), which the Supreme Court cited in *Celestine*, similarly did not involve allotments under the Dawes Act, the effect of the Dawes Act's grant of state jurisdiction over allottees under the Dawes Act, or the effect of a subsequent transfer of an allotment under the Dawes Act to a non-Indian. Rather, in *Eells*, as in *Celestine*, allotments were issued under the terms of a treaty and contained similar restrictions on alienation, forfeiture, and the like. And, as in *Celestine*, the question in *Eells* was whether the allotment under the earlier treaty, combined with the subsequent grant of citizenship under the Dawes Act's citizenship provision, revoked the reservation.

established that § 1151(a) represented a change in the federal government's treatment of this question. As the Eighth Circuit explained in *Podhradsky*:

> Prior to the passage of § 1151, land had generally ceased to be Indian country when Indian title was extinguished. *See, e.g.*, *Clairmont v. United States*, 225 U.S. 551, 558, 32 S. Ct. 787, 56 L.Ed. 1201 (1912). Section 1151(a) 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. *See Seymour*, 368 U.S. at 357-58, 82 S. Ct. 424 (concluding that under § 1151(a) reservation status applies even when land is purchased by a non Indian); *see also Solem*, 465 U.S. at 468, 104 S. Ct. 1161 ("Only in 1948 did Congress uncouple reservation status from Indian ownership . . . .").

606 F.3d at 1007; *cf. Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408, 424 (1989) (White, J.) (noting that *Seymour* and *Mattz* concluded "merely that allotment is consistent with continued reservation status"); *Hydro Resources, Inc. v. U.S. E.P.A.*, 608 F.3d 1131, 1157 (10th Cir. 2010) ("In *Seymour*, the Court simply observed the obvious: subsection (a), by its express terms, includes within the definition of Indian country *all* lands within the congressionally prescribed boundaries of a reservation, including private fee lands.") Importantly, the rule established by § 1151(a) was not retroactive—it did not recreate the reservation status of lands that had already lost that status.[13] Thus, just as the Eighth Circuit

[13] The Nation suggests that the Supreme Court in *Seymour* applied § 1151 even though "the enactment of § 1151 occurred well after the events claimed to have diminished the reservation in question." Nation Br. at 38 n.29. On the contrary, there is no indication in the decision when the parcel at issue passed out of Indian ownership. Further, the Nation cites *Parker* and *Solem* for the proposition that the Supreme Court "has consistently looked to § 1151 to determine the effect of earlier acts of Congress on reservation boundaries," *id.*, but that is a clear misstatement of the analyses employed by the Supreme Court and other courts. In those cases, as in this one, the question was whether particular parcels of land were part of a "reservation" and thus fell within the coverage of § 1151. The Supreme Court did not, however, rely on § 1151 to answer that question. It instead conducted a diminishment analysis that looked to the intent of the Congress that passed the acts alleged to have disestablished/diminished the reservation. Indeed, the district court in *Wisconsin v. Stockbridge-Munsee Community* addressed and rejected the very position that the Nation suggests here. 366 F. Supp. 2d 698, 769 (E.D. Wis. 2004) (rejecting the argument that § 1151 "somehow restored the original reservation boundaries" and noting that "the change in the definition of 'Indian country' in 1948 did not and could not alter the 'common understandings' of Congress at the time it passed the Act of 1871 and the Act of 1906").

recognized in *Podhradsky*—which was well aware of the *Seymour* decision—this Court should conclude that allotted lands on the Oneida Reservation for which fee simple patents were issued and which were subsequently sold to non-Indians prior to 1948 ceased to be reservation lands.[14]

C. The 1906 Oneida Provision Indicated Congress's Intent to Terminate the 1838 Boundaries of the Oneida Reservation.

As the Village explains in its own motion for summary judgment, in 1906 Congress included a provision in a 1906 Appropriations Act that provides evidence of Congress's intent to break down the 1838 boundaries of the Reservation by accelerating the passage of allotted lands on the Reservation out of trust status and into fee-simple ownership. Village MSJ Br. at 23-44. That provision, which Congress enacted in response to multiple petitions from Oneida Indians for such legislation, provides:

> That the Secretary of the Interior be, and he is hereby, authorized, in his discretion, to issue a patent in fee to any Indian of the Oneida Reservation in Wisconsin for the lands heretofore allotted him, and the issuance of such patent shall operate as a removal of all restrictions as to the sale, taxation, and alienation of the lands so patented.

DSUMF ¶ 24; Ex. 28 to July 19 Kowalkowski Decl. at VH-GRE000318, -75.

It is the Village's position that, although it does not contain the types of "hallmark language" that the Supreme Court has identified in the context of surplus lands acts, the 1906 Oneida Provision does indicate Congress's intent to terminate the 1838 boundaries of the Oneida Reservation by specifically authorizing the Secretary of the Interior to issue fee patents to Oneida Indians in advance of the expiration of the Dawes Act's 25-year trust period. The only reason Congress would have included such a provision is "[b]ecause the reservation could only be

[14] The last Supreme Court case cited by the Nation, *Tiger v. Western Inv. Co.*, 221 U.S. 286 (1911) is of little, if any, relevance here. That case dealt with the question of whether a restriction on alienation in a specific congressional act—that conveyances be approved by the Secretary of the Interior—applied to the transfer at issue. The Supreme Court concluded it did and that imposing such a restriction was constitutional despite the fact that the Indian was a citizen.

abolished if the tribal members held their allotments in fee simple." *Stockbridge-Munsee Cmty.*, 554 F.3d at 664. There can be no reasonable dispute that accelerating the issuance of fee simple patents would "pave[] the way" for non-Indians to own those parcels, resulting in a loss of reservation status. *Id.* at 665.

Not only is Congress's intent evident from the text of the 1906 Oneida Provision, it is also supported by the circumstances surrounding the passage of the provision. At the time, the Oneida Indians were already considered citizens and subject to state and local civil and criminal law. The only thing distinguishing the Oneida Indians holding allotments from non-Indian citizens was the fact that trust restrictions on the allotments precluded the Oneida from conveying their land. Village MSJ Br. at 28-29. The 1906 Oneida Provision allowed for the removal of those restrictions at the discretion of the Secretary of the Interior, thereby allowing for the gradual disappearance of the Oneida Reservation as fee patents were issued for allotments and those lands transferred to non-Indians. Indeed, the Nation's own experts have acknowledged that the intent behind the 1906 Oneida Provision was to have "as many fee patents issued as quickly as possible" and to allow non-Indians to gain access to the Nation's land, and was consistent with "interests who wanted to destroy the reservation and get the tribe out of Wisconsin." DSUMF ¶¶ 25-26. And, after passage of the 1906 Oneida Provision the Oneida Reservation was treated as disestablished, or at least diminished. Village MSJ Br. at 29-44.

Perhaps anticipating the Village's arguments, the Nation takes the position in its motion that it is entitled to summary judgment on this question because the 1906 Oneida Provision references the "Oneida Reservation" and "does *not* contain any of the hallmark statutory language evidencing a congressional intent to disestablish or diminish Oneida reservation boundaries." Nation Br. at 40. According to the Nation, "[t]he inquiry necessarily ends there and

the 1906 Oneida provision is simply insufficient on its face to alter the Oneida Reservation boundaries." *Id.* at 41. In effect, the Nation takes the position that this Court need not look beyond the language of the 1906 Oneida provision to conclude that the Oneida Reservation has not been diminished. The Nation's argument is overly simplistic, however, and is inconsistent with both Supreme Court case law and this Court's orders.

1. **The Nation's position conflicts with Supreme Court precedent.**

First, as discussed in more detail above, the Supreme Court does not require a "particular form of words" to alter a reservation's boundaries. *Hagen*, 510 U.S. at 411. Even assuming that the *Solem* framework applies in the context of allotment—which it should not, for reasons discussed above *supra* at 15-17—numerous courts applying this framework have found reservations to be diminished or disestablished despite the absence of the "hallmark language" that the Nation claims is necessary here. *See supra* at 11-12 (recounting caselaw). Contrary to the Nation's attempt to limit this Court's analysis to the text of the 1906 Oneida Provision, the Supreme Court has held that "[e]ven in the absence of a clear expression of congressional purpose in the text of a surplus land Act, unequivocal evidence derived from the surrounding circumstances may support the conclusion that a reservation has been diminished." *Yankton Sioux Tribe*, 522 U.S. at 351. Simply put, the Nation's suggestion that it is entitled to summary judgment because the text of the 1906 Oneida Provision does not contain "hallmark statutory language" has no basis in law.

2. **This Court has already rejected the Nation's argument.**

Moreover, this Court has already rejected the Nation's claim that this Court "can clearly construe the Act as failing to demonstrate a clear congressional intent to diminish the reservation." April 19, 2017 Decision and Order, ECF No. 46, at 9. The Nation's argument is merely a rehash of the argument it already made to this Court in opposition to the Village's Rule

56(d) motion early in this litigation. Plaintiff's Memorandum In Opposition to Defendant's Rule 56(d) Motion, ECF No. 39, at 15-16. As this Court observed then, "the 1906 Act is not as straightforward as the Nation suggests." April 19, 2017 Decision and Order, ECF No. 46, at 9. Indeed, this Court—consistent with the Seventh Circuit's observation in *Stockbridge-Munsee Community* that allotting reservation lands to Indians in fee simple indicates Congressional intent to terminate the reservation status of the land—properly acknowledged that the text of the 1906 Oneida Provision "suggests that the original reservation may have been diminished and its boundaries may not be the same as those of the current reservation." *Id.* at 10. In short, this Court has already rejected the Nation's argument that this case should start and stop at an analysis of the text of the 1906 Oneida Provision.

3. **The Nation's attempts to distinguish the Seventh Circuit's decision in *Stockbridge-Munsee Community* are baseless.**

The Nation also attempts to draw distinctions between this case and the Seventh Circuit's decision in *Stockbridge-Munsee Cmty.* In that case, the Seventh Circuit addressed the impact of the same 1906 Appropriations Act containing the 1906 Oneida Provision on the Stockbridge-Munsee Reservation. Specifically, the Seventh Circuit held that a separate provision in that 1906 Act (the "Stockbridge-Munsee Provision") disestablished the Stockbridge-Munsee Reservation. As set forth below, the Nation's attempts to distinguish the Seventh Circuit's decision in *Stockbridge-Munsee Cmty.* are either counterfactual or irrelevant.

For example, the Nation remarkably asserts that the 1906 Oneida Provision is "markedly different" from the 1906 Stockbridge-Munsee Provision because the 1906 Oneida Provision does not contain "hallmark statutory language." Nation Br. at 41. Yet, the 1906 Stockbridge-Munsee Provision did not contain any such language either, a fact the Nation concedes in the very next

sentence when it acknowledges that the 1906 Stockbridge-Munsee Provision "did not include classic disestablishment terms." *Id.*

Second, the Nation claims the court in *Stockbridge-Munsee Cmty.* "carried forward" a baseline intent to disestablish the Stockbridge-Munsee reservation that the Seventh Circuit found in an earlier 1871 act. This is simply not true. In *Stockbridge-Munsee Cmty.* the Seventh Circuit did address the impact of an 1871 act and determined that the 1871 Act *diminished* the Stockbridge-Munsee Tribe's 1856 reservation and created a "new, smaller, 'permanent reservation.'" 554 F.3d at 663. The land at issue in the 1906 Stockbridge-Munsee Provision was part of the "new, smaller, 'permanent reservation'" created by the 1871 act, however, and there is absolutely no indication that the court "carried forward" the intent behind the 1871 Act when assessing the 1906 Stockbridge-Munsee Provision. Rather, the Court reviewed the text of the 1906 provision, the circumstances surrounding its passage, and the treatment of the land at issue in the aftermath of the act to conclude that the 1906 provision extinguished what remained of the reservation. 554 F.3d at 664-65.

Third, the Nation notes that the 1906 Stockbridge-Munsee Provision "was not the 'run-of-the-mill allotment act'" because it "required the Secretary to immediately issue fee patents for all the remaining tribal lands, a provision which 'set the act apart from most allotment acts.'" Nation Br. at 41. This alleged distinction ignores the fact that the 1906 Oneida Provision also was not a "run-of-the-mill" provision—one of the Nation's experts referred to the provision as "remarkable." *See* Ex. 9 to July 19 Jacquart Decl., ECF No. 92-9, at pages 108-109 (deposition of R. David Edmunds). And the 1906 Oneida Provision also sets the Oneida apart from other Indian tribes that had received allotments under the Dawes Act. Whereas other tribes allotted under the Dawes Act were subject to the provisions of that act and its amendments, Congress

specifically singled out the Oneida for special legislation. Another of the Nation's experts acknowledged that Congress did so because Congress was not satisfied with the Dawes Act (as amended by the Burke Act) and "wanted as many fee patents issued as quickly as possible."[15] DSUMF ¶ 25.

Finally, the Nation notes that after 1906 the Department of the Interior treated the Stockbridge-Munsee Reservation as if it had been abolished. But, the Department treated the Oneida Reservation, at least those portions of the reservation that no longer remained in trust, similarly. As the Village explains in its own motion, after 1906 federal officials in the Office of Indian Affairs repeatedly referred to the area as a "former reservation" subject to state jurisdiction. The vast majority of the land on the Oneida Reservation became subject to state taxes, and the Department of the Interior refused to intervene in alcohol-related problems on land no longer held in trust or as tribal land.[16] *See, e.g.*, Village MSJ Br. at 29-44. And, a judge on this court held that the Oneida Reservation had been discontinued. The only real difference between the Stockbridge-Munsee Reservation and the Oneida Reservation is that there remained a small number of trust allotments and some unallotted tribal land, together comprising less than 2 percent of the area within the 1838 boundaries, on the Oneida Reservation. At most, this

---

[15] Of course, in 1906 Congress could not allot the Oneida Reservation to members of the Oneida Nation in fee simple, as it did with the Stockbridge-Munsee Reservation, because the Oneida Reservation *had already been allotted.* What Congress could do, however, was pass legislation that would accelerate the issuance of fee simple patents for the already-allotted lands. Although the Village acknowledges that Congress did not immediately issue fee simple patents for all of the already-issued allotments on the Oneida Reservation, this is a difference of degree not kind. While Congress may not have intended to immediately *disestablish* the entire reservation, Congress would have expected that the reservation would be gradually diminished as the Secretary of the Interior issued fee patents using the "remarkable" authority granted to him by Congress.

[16] In fact, federal officials repeatedly drew parallels between the situation of the Stockbridge-Munsee and the situation of the Oneida. *See, e.g.*, DSUMF ¶¶ 57-58, 60, 63, 65, 70; Exs. 72, 73, 78, 80, 85, 164 to July 19 Kowalkowski Decl.

distinction means this is a case of diminishment, rather than disestablishment. Regardless, the 1838 boundaries of the Oneida Reservation no longer exist and the fee land on which 2016 Big Apple Fest activities occurred is not part of a reservation.

D. Approval of the Nation's Constitution Under the IRA Does Not Mean the Oneida Reservation Was Not Diminished.

The Nation also appears to take the position that the adoption of the Nation's Constitution under the IRA shows that the Department of the Interior "determined that the Oneida Reservation existed in 1934." Nation Br. at 32. The Nation argues, for example, that section 16 of the IRA requires the existence of a reservation for a tribe to organize under an IRA constitution and that because the Nation did so the Nation therefore must have had a reservation. However, although the text of section 16 of the IRA requires the existence of a "reservation" in order for a tribe to adopt a constitution and bylaws, the text lacks any requirement as to the size of a reservation. *See* 48 Stat. 984, 987. This is because the size of a reservation under section 16 is irrelevant for a tribe seeking to become eligible and reorganize under the IRA as of 1934. Accordingly, a reservation could have been diminished but still exist for purposes of the IRA. (*See* DSUMF ¶ 98, ECF No. 91; Exs. 1, 111 to July 19 Kowalkowski Decl., ECF No. 89-1; 89-111.) Indeed, the evidence is overwhelming, and recounted in more detail in the Village's own motion for summary judgment, that federal officials—to the extent they believed a reservation continued to exist—believed that the reservation was comprised of those parcels of land remaining in tribal or restricted status and, possibly, those parcels still owned in fee by members of the Nation. Nation Br. at 31-40. None of the evidence the Nation cites establishes that the federal government understood the Oneida Reservation, as defined by its 1838 boundaries, to still exist.

For example, the Nation relies on the Assistant Commissioner of Indian Affair's recommendation of revising the constitution's language referring to the jurisdiction "within the original reservation boundaries, 'as defined in the Treaty of February 8, 1838,'" because the 1838 treaty was already a diminution of the original reservation established by the 1832 treaty. *See* Nation's Br. at 30; Ex. 64 to July 19 Jacquart Decl., ECF No. 92-64. The revised and subsequently approved language that was recommended instead referred to the "jurisdiction of the [Nation] . . . within the present confines of the [Reservation]." *Id.* The "present confines," however meant the confines as of 1936, which had already been diminished drastically to the extent that the reservation had practically "ceased to exist." *See* DSUMF ¶ 124, ECF No. 91; Ex. 137 to July 19 Kowalkowski Decl., ECF No. 89-137. It is clear that the word "present confines" meant at the time of the IRA, not 98 years prior in 1838 or something else. The inescapable conclusion is that at the time the Nation's constitution was passed the "present confines" were much less than the approximately 65,400 acres that comprised the area set aside in the Treaty of 1838.

Further, although the Nation cites an excerpt from the Basic Memorandum on Drafting Tribal Constitutions that it claims shows the Department had a policy that allotment did not affect reservation boundaries, Nation Br. at 29, the quoted language merely suggests that a tribe could exercise jurisdiction over fee patented lands within the original boundaries of the reservation that were owned by Indians. This is not inconsistent with the Village's position that land lost reservation status as it passed out of Indian ownership, and at the time the Basic Memorandum was prepared reservation status was coextensive with Indian ownership. *See supra* at 13-14. And, again, the Nation ultimately did not designate the original boundary of its

reservation in defining the territory over which the Nation would have jurisdiction, but instead referred to the "present confines" of the reservation.

E. The Nation Overstates the Impact of the Village's Position.

The Nation also devotes a significant portion of its brief to warning against the impact of a decision in the Village's favor. The Nation claims, for example, that "[t]he existence of the Oneida Reservation is essential to the Nation's ability to maintain its government and tribal community" and that the stakes here are "perhaps existential" for the Nation. Nation Br. at 2, 4. The Nation further claims that "the Village's theory of disestablishment or diminishment proves too much"[17] and that "there is no principled basis . . . for distinguishing Oneida from all the other reservations that were allotted," thereby suggesting that adopting the Village's position in this litigation would call into question the reservation status of tens of millions of acres of land across the United States. Nation Br. at 41-42. This Court should ignore those claims, which severely overstate the impact that a decision in the Village's favor on the status of the Oneida Reservation would have on the Nation.

First, there is no merit to the Nation's claim that no principled basis exists for distinguishing the Oneida Reservation from other reservations that were subject to allotment. Each case involving a question of diminishment or disestablishment ultimately turns on its own set of circumstances, and this case presents a number of unique and distinguishing circumstances, including but not limited to:

- The unique history of the Nation and the original intent of the Treaty of 1838, *see supra* at 4-8;

[17] It must be noted that, although the Nation claims that the Village's theory of disestablishment or diminishment "proves too much," under the Nation's theory of this case, 100% of the land on a reservation could be allotted, fee patents could be issued for all allotments, and the entire reservation sold to non-Indians, and—according to the Nation—the reservation would still exist until Congress took some express act to disestablish the reservation.

- The 1906 Oneida Provision, which the Nation's experts have called "remarkable," intended to have "as many fee patents issued as quickly as possible" and to allow non-Indians to gain access to the Nation's land, and consistent with "interests who wanted to destroy the reservation and get the tribe out of Wisconsin," *see supra* at 27, 30, 31;

- The statute authorizing the sale of land to public school authorities for use as a school for Indians and non-Indians, which reflected an assumption that as more white settlers came on to the opened lands, increased state involvement on their behalf was expected, and the jurisdiction of the State was expected to increase over time, *see supra* at 21;

- The rapidity of the land tenure and demographic changes on the Oneida Reservation in the early part of the twentieth century, Village MSJ Br. at 29-31;

- The existence of a federal court decision expressly holding that the Oneida Reservation had been discontinued, DSUMF ¶ 40, which was described at the time as "unique in that it is the only case of its kind that has ever been brought by a tribe of Indians on the theory that the Indian reservation had not been legally discontinued," Ex. 48 to July 19 Kowalkowski Decl., ECF No. 89-48;

- The fact that the Oneida were understood to be an "extreme example" of land loss as a result of the federal government's allotment policies, DSUMF ¶ 95;

- The treatment of the affected areas by the federal government for decades after allotment, Village MSJ Br. 31-40; and

- The Nation's own acknowledgment until at least the 1970's that the reservation had ceased to exist, Village MSJ Br. 41-43.

This is not an exhaustive list, but it serves to show that any claim that there is no distinguishing principle here is baseless.

Second, contrary to the Nation's claims, a finding that the Oneida Reservation has been disestablished or diminished would in no way impact the Nation's ability to maintain its government and tribal community. For example, the Nation does not explain how such a finding would prevent the Nation from maintaining a tribal government. Nor does the Nation suggest that such a finding would in any way impact the millions of dollars of gaming revenue the Nation receives annually. DSUMF ¶ 41. Nor would such a finding prevent the Nation from continuing to purchase land on the open market and to seek to place that land into trust under the

IRA.[18] Indeed, the Supreme Court has recognized that the IRA provides a mechanism for Indian tribes to rebuild their land base, and the Nation has achieved great success under that Act to date. There are over 14,000 acres currently held in trust for the Nation's benefit that would remain so regardless of how this Court resolves the question of the disestablishment or diminishment of the Oneida Reservation. Village's Proposed Facts In Opposition at ¶ 12. Simply put, the Nation's claims of an "existential" threat to its existence based on the Village's disestablishment/diminishment claim are greatly exaggerated.

By contrast, a finding that the boundaries established by the 1838 Treaty continue to define the area of the Oneida Reservation would upset the settled expectations of the non-Indian residents of Hobart and would create significant jurisdictional uncertainties for the Village, its residents, and the Nation going forward. For example, although this case involves the Village's Special Event Ordinance, if it is determined that all Indian-owned fee land within the 1838 boundaries is part of a reservation the Nation would almost certainly take the position that such land is free from other forms of state and local regulation, such as the Village's zoning ordinances. Moreover, such a finding could result in the Nation taking steps to regulate non-Indians within the 1838 Treaty boundaries on a multitude of issues ranging from taxation to health and safety. Indeed, although it is a general rule that an Indian tribe has no authority to regulate the use of fee land owned by non-Indians within the boundaries of a reservation, there are exceptions to this rule. *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316, 328-29 (2008). For example, "[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Id.* at 329

[18] The Nation itself asserts that "Reservation status is not necessary for the Secretary to place land into trust." Nation Br. at 24 n.10.

(quoting *Montana*, 450 U.S. at 565). And, "a tribe may exercise 'civil authority over the conduct of non-Indians on fee lands within the reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.'" *Id.* at 329-30 (quoting *Montana*, 450 U.S. at 566). These exceptions have been the subject of numerous cases throughout the country. It is not unreasonable to expect that—if this Court finds a 65,400-acre reservation continues to exist—the Village and the Nation will soon find themselves mired in litigation surrounding the applicability of these exceptions to attempts by the Nation to regulate the non-Indians who comprise the vast majority of the residents of the Village. DSUMF ¶ 127.

III. Even If a Reservation Defined by the Area Set Aside In the Treaty of 1838 Remains, the Village May Apply the Special Event Ordinance to the Nation.[19]

A. The Nation Misstates the Law Governing State Regulatory Authority Over Tribes.

The Nation claims there is a "general rule that state authority over tribal activity on a reservation is prohibited, even if the tribal activity involves non-Indians," Nation Br. at 43, but

[19] The Nation contends that if the reservation was not diminished or disestablished, the property at issue in this case, falls within the definition of Indian country found at 18 U.S.C. § 1151. The argument continues that if the property meets that definition, the Village may not assert its special event ordinance. It must be noted, however, that the definition is found only in the criminal code and there is nothing within its text to even remotely suggest it would have any application whatsoever to civil matters. It is true that there is some Supreme Court precedent suggesting it may have applicability to civil matters but there is no Supreme Court case in which that issue is expressly analyzed. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 208 n. 5 (1987) (citing in support of the proposition that Indian country may apply to civil matters, only *DeCoteau v. District County Court*, 420 U.S. 425, 427, n. 2 (1975)); *DeCoteau v. District County Court*, 420 U.S. 425 (in which the parties agreed that the criminal definition of Indian country applied resulting in the court providing no analysis on the issue); *Oklahoma Tax Com'n v. Sac and Fox Nation*, 508 U.S. 114 (1993) (concluding the state could not tax in Indian country but providing no analysis or explanation as to why that definition would apply in the civil context, and in which the tribe based its argument, not on 18 U.S.C. § 1151 but upon the fact the tax was being applied against a tribal member living on a reservation and whose income was derived from reservation sources). Consequently, it is the Village's position that application of 18 U.S.C. § 1151 is inappropriate in this case.

the Nation is again misstating the law. "State sovereignty does not end at a reservation's border." *Nevada v. Hicks*, 533 U.S. 353, 361 (2001). The Supreme Court long ago departed from the view that the laws of a State cannot be applied within reservation boundaries and "there is no rigid rule by which to resolve the question whether a particular state law may be applied to an Indian reservation or to tribal members." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 141-42 (1980).

It is true that "[w]hen on-reservation conduct involving only Indians is at issue, state law is generally inapplicable," *Bracker*, 448 U.S. at 144. Even in that scenario, however, a state may assert jurisdiction in "exceptional circumstances." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215 (1987). Moreover, when a case involves state regulation of Indians "in the context of their dealings with non-Indians," a court must employ a balancing test that analyzes the state, federal, and tribal interests at issue. *Cabazon*, 480 U.S. at 216. Far from a categorical rule of preemption, the balancing tests requires a "particularized inquiry" that depends on the "specific context" of each case. *Bracker*, 448 U.S. at 145. The Nation's claim that there is a "general rule" prohibiting state authority over tribal activity on a reservation "even if the tribal activity involves non-Indians" is, simply, not true.[20]

B. The "Balancing Test," Rather than the "Exceptional Circumstances" Test, Applies Here and Supports the Village.

As the Village explained in its own motion for summary judgment, the "exceptional circumstances" test should not apply because, with respect to the Big Apple Fest, the Special

[20] Although the Nation suggests that the balancing test only applies when a state is attempting to regulate non-Indian activity on a reservation and does not apply when a state is attempting to regulate an Indian tribe, Nation Br. at 43 n.33, the Supreme Court in *Cabazon* employed the balancing test to evaluate a state's attempt to regulate an Indian tribe directly in the context of its dealings with non-Indians. The balancing test applies, even when the regulation falls on a tribal entity directly, if the regulation applies to the Indian tribe's dealings with non-Indians.

Event Ordinance regulates the Nation in the context of its dealings with non-Indians. The Big Apple Fest is a public event that is marketed to, and presumably attended by, Indians and non-Indians alike. Village MSJ Br. at 50-51. The event provides a venue for non-Indian vendors to sell to the public at-large, and the Nation contracts with non-Indian companies to assist in putting on the event. DSUMF ¶¶ 135, 139, 143. As explained in the Village's motion, this Court should employ a balancing test, on which the Nation would bear the burden of proof. Village MSJ Br. at 51-52.[21] And, that balancing test weighs in favor of allowing the Village to apply its Special Event Ordinance to the 2016 Big Apple Fest.

For example, this is not a case where the Village is seeking to regulate tribal conduct that is subject to comprehensive supervision and regulation by the federal government—the Nation identifies no federal statute or regulation applicable to the conduct of the 2016 Big Apple Fest. And, the Nation has identified no inherent conflicts between the Special Event Ordinance and the Nation's own laws, instead just generally asserting that the conditions the Village might place on a permit "may" differ substantially from the Nation's own laws and complaining that it might have to add the Village as an additional insured on its insurance policy. Nation Br. at 44. It does not explain how doing so would conflict with or displace the Nation's laws, however. Further, the Nation's complaint that the Village might require it to reimburse the Village for the services of Village police is premature. Had the Nation gone through the process of applying for a permit, and had the Village imposed such a condition on the Nation, the Nation might have a point. But having refused to go through that process, and unable to identify any areas where there is conflict

[21] As the Village explains in its own brief, this Court has held that the Village bears the burden of showing that exceptional circumstances exist here, but allowed for the Village to raise the issue on summary judgment. Village MSJ Br. at 46.

between the Nation's own laws and the Village's conditions for a permit, the Nation's claim should be rejected.

In this respect, Justice White's opinion (joined by three other justices) in *Brendale* is instructive. Although this opinion did not attain a majority, it provides a way forward:

> The Tribe in this case, as it should have, first appeared in the county zoning proceedings, but its submission should have been, not that the county was without zoning authority over fee land within the reservation, but that its tribal interests were imperiled. The federal courts had jurisdiction to entertain the Tribe's suit for declaratory and injunctive relief, but given that the county has jurisdiction to zone fee lands on the reservation and would be enjoinable only if it failed to respect the rights of the Tribe under federal law, the proper course for the District Court in the Brendale phase of this case would have been to stay its hand until the zoning proceedings had been completed. At that time, a judgment could be made as to whether the uses that were actually authorized on Brendale's property imperiled the political integrity, the economic security, or the health or welfare of the Tribe. If due regard is given to the Tribe's protectible interest at all stages of the proceedings, we have every confidence that the nightmarish consequences predicted by Justice BLACKMUN, post, at 3024, will be avoided.

492 U.S. at 431 (White, J.). Here, too, the Nation should have applied for a permit from the Village. If the Village imposed conditions on the Nation's conduct of the Big Apple Fest that the Nation believed did not respect its rights under federal law, then a more considered judgment could be made as to whether the Nation's rights were threatened. Having refused to participate in the process, however, the Nation cannot plausibly claim that its rights are threatened because it cannot identify with certainty the conditions it would have had to meet. At bottom, the Nation's real complaint is that it would have to apply to the Village for a permit in the first place, but that clearly is not a threat to the Nation's sovereignty as the Nation applied for a permit from the state and county governments without complaint.

C. The Village's Application of the Special Event Ordinance Is Justified Under Other Principles Recognized by the Supreme Court.

Moreover, several other principles recognized by the Supreme Court and/or this Court support the Village's application of the Special Event Ordinance.

First, the Village respectfully submits that the Special Event Ordinance implicates the Village's *in rem* jurisdiction over fee land within its borders to the extent the ordinance is a land-use ordinance that focuses on the use of a specific piece of property. The ordinance applies only to events or activities that "that interfere[] with or differ[] from the normal and ordinary use" of the property on which the event will occur. Ex. 1 to Joint Stipulated Statement of Material Facts, ECF No. 90. The required permit under the ordinance is tied to that specific piece of property and is valid "only . . . at the location specified." *Id.* These characteristics of the ordinance justify application of the ordinance under this Court's reasoning in *Oneida I*, as the ordinance is not exercising strictly *in personam* jurisdiction but also implicates the Village's "jurisdiction over the land." *Oneida Tribe of Indians of Wisconsin v. Village of Hobart, Wis.*, 542 F. Supp. 2d 908, 926 (E.D. Wis. 2008).

Second, the Special Event Ordinance is a land-use ordinance that protects the same state interests as other types of land-use regulations. Village MSJ Br. at 48. And, although the Supreme Court is yet to address this specific question, read together its cases indicate that local regulations that protect all landowners in an area may be applied to Indian-owned fee land within the open area of a reservation. In *Brendale v. Confederated Tribes and Bands of Yakima Nation*, for example, the Supreme Court addressed the question of whether an Indian tribe or a county government had the power to zone fee property owned by non-Indians on a reservation. The Supreme Court addressed this question in two different contexts: (1) a "closed" area of the reservation that was predominately forest land that had been closed to the general public for years and to which access was restricted, and (2) an "open" area of the reservation that was not restricted and that consisted of rangeland, agricultural land, and land used for residential and commercial development. There was no majority opinion in the case, as the justices divided

4:3:2 on how to resolve the question of the Indian tribe's authority. The Supreme Court later explained the opinions and holdings in *Brendale*:

> The Court held in *Brendale*, 6 to 3, that the Yakima Indian Nation lacked authority to zone nonmembers' land within an area of the Tribe's reservation open to the general public; almost half the land in the area was owned in fee by nonmembers. The Court also held, 5 to 4, that the Tribe retained authority to zone fee land in an area of the reservation closed to the general public. No opinion garnered a majority. Justice White, writing for four Members of the Court, concluded that, under *Montana*, the Tribe lacked authority to zone fee land in both the open and closed areas of the reservation. 492 U.S., at 422–432, 109 S.Ct., at 3003–3009. Justice STEVENS, writing for two Justices, concluded that the Tribe retained zoning authority over nonmember land only in the closed area. *Id.*, at 443–444, 109 S.Ct., at 3014–3015. Justice Blackmun, writing for three Justices, concluded that, under *Montana*'s second exception, the Tribe retained authority to zone fee land in both the open and the closed areas. *Id.*, at 456–459, 109 S.Ct., at 3021–3023.

Strate v. A-1 Contractors, 520 U.S. 438, 447 n.6 (1997). Justice Stevens's concurring opinion has been described as the controlling opinion from the case. *See, e.g.*, *Evans v. Shoshone-Bannock Land Use Policy Comm'n*, 736 F.3d 1298, 1303 (9th Cir. 2013).

In his opinion, Justice Stevens discussed the importance of zoning and other land use regulation to a community's ability to "define[] its essential character." 492 U.S. at 434. With respect to the closed area of the reservation, Justice Stevens explained that the Tribe had preserved and exercised "the power to define the essential character of that area" and that the Tribe therefore needed to have the authority to regulate owners of fee land in that area in order to prevent such individuals from undermining the Tribe's general plan to preserve the character of the area "without regard to an otherwise common scheme." *Id.* at 441. Justice Stevens reasoned that, notwithstanding the transfer of a small percentage of the land in the closed area to individuals who were not members of the Yakima Nation, the Yakima Nation retained "its legitimate interest in the preservation of the character of the reservation" and that "[t]he [Yakima Nation's] power to control the use of discrete, fee parcels of the land is simply incidental to its

power to preserve the character of what remains almost entirely a region reserved for the exclusive benefit of the Tribe." *Id.* at 442.

With respect to the open area of the reservation, however, Justice Stevens observed that the land at issue was "an integrated community that is not economically or culturally delimited by reservation boundaries," *id.* at 444, that the Yakima Nation lacked "power to define the essential character of the territory," *id.* at 441, and that the land "lost its character as an exclusive tribal resource, and has become, as a practical matter, an integrated portion of the county," *id.* at 447. Justice Stevens further noted the county's "substantial interest in regulating land use in the open area—and in particular in protecting the county's valuable agricultural land—and that the open area lacks a unique religious or spiritual significance to the members of the Yakima Nation." *Id.* at 446 (internal quotation marks omitted). Justice Stevens concluded that allowing nonmembers to use their land without regard to the approval of the tribal council "does not upset an otherwise coherent scheme of land use" and that the Yakima Nation "cannot complain that the nonmember seeks to bring a pig into the parlor, for, unlike the closed area, the [Yakima Nation] no longer possesses the power to determine the basic character of the area." *Id.* at 446.

Although *Brendale* dealt with the question of an Indian tribe's authority to enforce zoning regulations against non-Indians who owned fee land on a reservation, Justice Stevens's opinion is instructive here. It recognizes the importance of zoning and land use regulation to a community's ability to "define its essential character" and the need for a "common scheme" of such regulation. As a result, the question of which entity has authority to zone and enforce land-use regulations with respect to fee land on a reservation—an Indian tribe or a local government—necessarily must turn on whether the land is in an open or closed portion of the reservation, not on whether an Indian or a non-Indian owns the parcel at issue. As a result, land

owned in fee by Indians in an open area of a reservation must remain subject to local government zoning and land use regulation. Were it otherwise—if zoning and land use authority turned on ownership of the parcel at issue rather than the character of the area in which the land was located—neither the tribal government nor the local government would ever be able to enforce a common scheme of land-use regulation in the open portion of reservation. Here, there can be no real dispute that the fee land on which 2016 Big Apple Fest activities occurred is in an "open" part of the reservation and thus the Nation lacks the "power to define the essential character of the territory." Rather, the Village has a substantial interest in regulating land use on these lands, and the Special Event Ordinance furthers that interest.

City of Sherrill, N.Y. v. Oneida Indian Nation of New York, 544 U.S. 197 (2005), is also instructive on this point. In that case the Supreme Court rejected attempts by the Oneida Indian Nation of New York to avoid paying property taxes on historic reservation land it owned in fee. As relevant here, the Supreme Court observed:

> But the unilateral reestablishment of present and future Indian sovereign control, even over land purchased at the market price, would have disruptive practical consequences similar to those that led this Court in *Yankton Sioux* to initiate the impossibility doctrine. The city of Sherrill and Oneida County are today overwhelmingly populated by non-Indians. See *supra*, at 1488. A checkerboard of alternating state and tribal jurisdiction in New York State—created unilaterally at OIN's behest—would "seriously burde[n] the administration of state and local governments" and would adversely affect landowners neighboring the tribal patches. *Hagen*, 510 U.S., at 421, 114 S.Ct. 958 (quoting *Solem v. Bartlett*, 465 U.S. 463, 471–472, n. 12, 104 S.Ct. 1161, 79 L.Ed.2d 443 (1984)). If OIN may unilaterally reassert sovereign control and remove these parcels from the local tax rolls, little would prevent the Tribe from initiating a new generation of litigation to free the parcels from local zoning or other regulatory controls that protect all landowners in the area. *See Felix*, 145 U.S., at 335, 12 S.Ct. 862 ("decree prayed for in this case, if granted, would offer a distinct encouragement to ... similar claims"); *cf. Brendale v. Confederated Tribes and Bands of Yakima Nation*, 492 U.S. 408, 433–437, 109 S.Ct. 2994, 106 L.Ed.2d 343 (1989) (opinion of STEVENS, J.) (discussing tribal land-use controls); *post*, at 1497, n. 6 (STEVENS, J., dissenting) (noting that "the balance of interests" supports continued state zoning jurisdiction).

544 U.S. at 219-20. The Supreme Court further explained that there was an established mechanism for removing land from such local government taxation and regulation: the fee-to-trust mechanism in the IRA. As the Court explained:

> Recognizing these practical concerns, Congress has provided a mechanism for the acquisition of lands for tribal communities that takes account of the interests of others with stakes in the area's governance and wellbeing. Title 25 U.S.C. § 465 authorizes the Secretary of the Interior to acquire land in trust for Indians and provides that the land "shall be exempt from State and local taxation." *See Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 114–115, 118 S.Ct. 1904, 141 L.Ed.2d 90 (1998). The regulations implementing § 465 are sensitive to the complex interjurisdictional concerns that arise when a tribe seeks to regain sovereign control over territory. Before approving an acquisition, the Secretary must consider, among other things, the tribe's need for additional land; "[t]he purposes for which the land will be used"; "the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls"; and "[j]urisdictional problems and potential conflicts of land use which may arise." 25 CFR § 151.10(f) (2004).

Id. at 220-21. In short, the Supreme Court concluded that Indian tribes cannot unilaterally remove land from local tax rolls by purchasing it in fee, and implied that the result would be the same with respect to "local zoning or other regulatory controls that protect all landowners in the area." Rather, the mechanism for Indian tribes to remove such land from local regulation is the fee-to-trust mechanism established by Congress. Those same principles apply here. Land purchased by the Nation on the open market that has not been acquired in trust should remain subject to the Village's land-use controls, including the Special Event Ordinance.

Finally, regardless of whether the Special Event Ordinance can be applied to activities occurring on fee land owned by the Nation, 2016 Big Apple Fest activities occurred on public roads within the Village. The Nation does not exercise sovereign control over these roads and should be required to comply with Village ordinances, like the Special Event Ordinance, when it is engaging in conduct that impedes the ordinary flow of traffic within the Village. Were it

otherwise, the Nation would effectively be free to shut down Village roads at will without consulting with the Village. *See also* Village MSJ Br. at 49-50.

D. Application of the Special Event Ordinance to the Nation Satisfies the "Exceptional Circumstances" Test.

Even if the Village must satisfy the "exceptional circumstances" test, however, the Village's application of its Special Event Ordinance to the 2016 Big Apple Fest was justified. As discussed above and in the Village's own motion for summary judgment, the Special Event Ordinance, as applied to the Nation's 2016 Big Apple Fest, protects a number of strong interests that rise to the level of exceptional circumstances. For example, the Special Event Ordinance protects the Village's interest in uniformly applying land-use regulations within the Village to protect landowners in the Village from the potential adverse effects of large-scale events. And it protects the Village's interest in controlling the use of public roads within its borders in order to ensure that Village residents and/or emergency services are not unreasonably impacted by large-scale events conducted within the Village. Indeed, it cannot be the case that the Nation is free to close public roads maintained by the Village without seeking the consent of the Village. Yet that is exactly what the Nation has done, and will almost certainly continue to do in the future, absent a mechanism ensuring coordination between the Village and the Nation regarding the use of roads over which the Village exercises jurisdiction. The Special Event Ordinance provides that mechanism, at no real harm to the Nation's interests.

Further, none of the case law cited by the Nation precludes, or even weighs against, this Court finding that exceptional circumstances exist in this case. For example, although the Nation relies on the Supreme Court's decision in *Cabazon*, that case did not actually apply the exceptional circumstances test but rather the interest-balancing test from *Bracker*. The Supreme Court did so because that case, like this one, involved "a state burden on tribal Indians in the

context of their dealings with non-Indians." 480 U.S. at 216. Thus, instead of supporting the Nation's claim that exceptional circumstances do not exist here, *Cabazon* actually supports the Village's position that application of the Special Event Ordinance to the 2016 Big Apple Fest should be evaluated under the balancing test, rather than the exceptional circumstances test. And, as the Village explained in its own motion for summary judgment, the balancing test supports the Village's application of the Special Event Ordinance to the 2016 Big Apple Fest.

The Nation also, astoundingly, relies on the "exceptional circumstances" analysis conducted by the court in *Cayuga Indian Nation of N.Y. v. Village of Union Springs*, 317 F. Supp. 2d 128 (N.D.N.Y. 2004), despite the fact that the court later reversed its determination in that case after the Supreme Court issued its decision in *City of Sherrill*. *See Cayuga Indian Nation of N.Y. v. Village of Union Springs*, 390 F. Supp. 2d 203 (N.D.N.Y. 2005). The Nation does acknowledge that the injunction issued in *Cayuga I* was subsequently vacated, but nevertheless claims that the analysis in *Cayuga I* "remains instructive" and that the injunction was only vacated because the Supreme Court's ruling in *City of Sherrill* "called into question whether the usual pre-emptive force of Indian country status attached to fee title reacquired by the tribe in a reservation lost wholly to its possession." Nation Br. at 47 n.37.

Contrary to the Nation's claims, however, it is clear that the injunction in *Cayuga I* was lifted upon reconsideration because of the Supreme Court's recognition in *City of Sherrill* that local governments have a strong interest in uniformly applying zoning and land-use laws and that this interest "bars the Nation from asserting immunity from state and local zoning laws and regulations." 390 F. Supp. 2d at 206. As the court in *Cayuga II* explained:

> The Nation's efforts to avoid dismissal in light of *City of Sherrill* are undermined by the Supreme Court's focus on the disruptive nature of exemption from taxation by local government. If avoidance of taxation is disruptive, avoidance of complying with local zoning and land use laws is no less disruptive. In fact, it is

> even more disruptive. The Supreme Court clearly expressed its concern about the disruptive effects of immunity from state and local zoning laws, even to the point of citing to this case as an example. *See City of Sherrill*, 125 S.Ct. at 1493 n.13. Even the lone dissenter, Justice John Paul Stevens, opined that local taxation was the "least disruptive to other sovereigns," and noted that "[g]iven the State's strong interest in zoning its land without exception for a small number of Indian-held properties arranged in checkerboard fashion, the balance of interests obviously supports the retention of state jurisdiction in this sphere." *Id.* at 1497 n. 6, 161 L.Ed.2d 386 (Stevens, J., dissenting) (citing *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215, 107 S.Ct. 1083, 94 L.Ed.2d 244 (1987)).
>
> The Nation is seeking relief that is even more disruptive than non payment of taxes. The Supreme Court's strong language in City of Sherrill regarding the disruptive effect on the every day administration of state and local governments bars the Nation from asserting immunity from state and local zoning laws and regulations.

Id. In short, the ultimate result in *Cayuga*, far from supporting the Nation's position in this case, actually supports the Village by illustrating that fee land owned by the Nation remains subject to local zoning and land-use laws and regulations. As the Special Event Ordinance is also a land-use regulation that protects similar interests, it too should apply to the Nation. As Justice Stevens implicitly recognized in his dissent in *City of Sherrill*, "the State's strong interest in zoning its land without exception for a small number of Indian-held properties arranged in checkerboard fashion" is an example of the exceptional circumstances in which a State may assert jurisdiction over the on-reservation activities of tribal members. 544 U.S. at 226 n.6 (citing *Cabazon*).

Next, the Nation relies on *In re Sonoma County Fire Chief's Application*, No. C 02-04873, 2005 WL 1005079, (N.D. Cal. April 29, 2005), an unpublished decision in which a Northern District of California judge held that exceptional circumstances did not justify the imposition of a county's health and safety regulations to a tribal casino that catered to non-tribal members. Notably, the court reached that decision by applying the Ninth Circuit's decision in *Gobin v. Snohomish County*, 304 F.3d 909 (9th Cir. 2002), in which the Ninth Circuit held that a county lacked land use jurisdiction, including the ability to apply county zoning, subdivision, and

building code regulations, over reservation land owned in fee by tribal members. As this Court has recognized, however, *City of Sherrill*—and in particular the Supreme Court's expression of concern over a Tribe's ability to free land parcels from local zoning or other regulatory controls that protect all landowners merely by purchasing land on the open market—"calls into question the Ninth Circuit's holding in *Gobin*." *Oneida I*, 542 F. Supp. 2d at 926.

Finally, the Nation cites the Minnesota Supreme Court's decision in *State v. Stone*, 572 N.W.2d 725 (1997) for the proposition that a state's interest in maintaining road safety is "insufficient to establish exceptional circumstances." That case addressed whether the state could enforce certain traffic and driving laws against tribal members within the boundaries of a reservation. The state laws at issue included: failure to provide motor vehicle insurance, no proof of insurance, driving with an expired registration, driving without a license, driving with an expired driver's license, speeding, driving with no seat belt, and failure to have a child in a child restraint seat. Although the court recognized that the state had an interest in maintaining safe roads and highways, it nevertheless concluded that the state had not established the extraordinary circumstances necessary to justify application of state law.

This case implicates far weightier state interests than were at issue in *Stone*, however. This case is not about whether a state government can apply its traffic regulations to tribal members traveling on public roads, thereby protecting the state interest in ensuring safe roadways. With respect to traffic regulations, compliance or non-compliance by tribal members has only an indirect effect on non-tribal members. The Village's interest at issue here, however, is its interest in *ensuring access to public roads*, for the public (including non-tribal members) as well as for emergency services. The Nation's conducting an event that results in road closures within the Village directly impacts non-tribal members, by interfering with their right to travel

on public roads, as well as the Village and other government entities, by potentially impacting the provision of emergency and other Village services that the Village is obligated to provide pursuant to Wis. Stat. § 61.65.[22] Applying the Special Event Ordinance to the Nation serves these interests by ensuring that the Nation's events do not unreasonably disrupt traffic within the Village beyond a reasonably practical solution or interfere with access to emergency services.

Moreover, requiring the Nation to coordinate with the Village and seek the Village's consent when it closes public roads within the Village does not impact any tribal regulatory interests. It is true that under certain circumstances an Indian tribe can have a "well-established tradition of tribal self-government" and "strong tribal regulatory interests" in the area of traffic regulation, thereby pre-empting attempts by a state government to charge and prosecute traffic offenses committed by tribal members within the confines of a reservation. *See, e.g., State v. Webster*, 114 Wis. 2d 418, 431-37, 338 N.W.2d 474, 481-83 (Wis. 1983) (holding that the State of Wisconsin does not have jurisdiction to charge and prosecute traffic offenses committed by member of Menominee Indian Tribe within the boundaries of the Menominee Reservation); *but see Vilas County v. Chapman*, 122 Wis.2d 211, 361 N.W.2d 211 (Wis. 1985) (holding that county had jurisdiction to enforce noncriminal traffic ordinance against tribal member for offense occurring on a public highway within reservation boundaries where the tribe "had no tradition of self-government in the area of traffic regulation" at the time of the offense). However, no such tradition of tribal self-government or tribal regulatory interest exists with respect to the control of access to public roads on the Oneida Reservation.

[22] Indeed, were an incident to occur in which the Nation's conduct of an event precluded the Village from providing these services, the Nation would almost certainly invoke its sovereign immunity to avoid any liability, thereby leaving the Village as the remaining potential defendant.

IV. This Court Need Not Reach the Question of the Nation's Eligibility to Place Land Into Trust Under the IRA.

The Nation devotes a significant portion of its brief to addressing an issue it calls "key to the Nation's future well-being": the Nation's eligibility to place land into trust under the IRA. It is true that the Village has challenged the Nation's eligibility under the IRA in administrative appeals from various BIA decisions placing land into trust for the benefit of the Nation. And, the Village acknowledges that, in its Answer and Affirmative Defenses to Plaintiff's Amended Complaint, the Village took the position that the Nation is not eligible to use the IRA to obtain trust status for real property it owns and that as a result the trust land on which the Nation claimed the 2016 Big Apple Fest occurred was not properly held in trust. As set forth below, however, the Village does not believe it is necessary for the Court to address this question.

Specifically, contrary to the Nation's allegations in its Amended Complaint—where the Nation suggested that the 2016 Big Apple Fest took place only on trust land[23]—it is now undisputed that activities associated with the 2016 Big Apple Fest were not confined to trust land. DSUMF ¶ 134. Therefore, if the Village is correct that the Oneida Reservation was disestablished and/or diminished such that the fee parcels on which 2016 Big Apple Fest activities occurred are no longer part of a reservation (and thus are not Indian country under § 1151(a)), then the Special Event Ordinance applies to the Nation. *See Michigan v. Bay Mills Cmty.*, 134 S. Ct. 2024, 2034 (2014) ("Unless federal law provides differently, Indians going beyond reservation boundaries are subject to any generally applicable state law." (internal quotation marks omitted)). The Village is thus entitled to judgment on the question of the

[23] *See* First Amended Complaint for Declaratory and Injunctive Relief at ¶¶8-9 (identifying only trust parcels as the Nation's Apple Orchard and Cultural Heritage Site); *id.* at ¶ 19 (alleging that the 2016 Big Apple Fest took place at the Nation's Apple Orchard and Cultural Heritage Site).

applicability of its Special Event Ordinance regardless of whether the trust parcels at issue were validly placed in trust under the IRA. Even if this Court concludes that the 1838 boundaries of the Oneida Reservation remain intact, the Village's application of the Special Event Ordinance to the 2016 Big Apple Fest is justified by the activities that occurred on fee land and/or public roads. Again, whether the trust parcels at issue were validly placed in trust is irrelevant to the resolution of this case. *Cf.* October 23, 2017 Decision and Order on Burden of Proof, ECF No. 66 at 5 ("It thus follows that the trust status of the land used in the Big Apple Fest is not central to the Nation's claims."). For these same reasons, the Village does not believe it is necessary for the Court to address the Village's various constitutional challenges to the IRA.[24]

V. The Nation's Sovereign Immunity Does Not Preclude the Village's Counterclaims.

The Village asserts two counterclaims against the Nation: (1) a declaration that the Village may enforce its SEO related to the Big Apple Fest event; and (2) a monetary judgment against the Nation for the amount referenced in the citation (ECF No. 12, pp. 12-13). The Nation claims in its heading to Section VII of its Brief that the Village's "Second" counterclaim is barred by the Nation's sovereign immunity. (Nation Br., p. 52.; ECF No. 96, p. 55.) In the body of the argument, however, it appears the Nation may be arguing both of the Village's counterclaims must be dismissed. *Id.*, pp. 55-57. The Nation is incorrect, in either case.

First, although it is not clear whether the Nation is actually asserting sovereign immunity with respect to the question of whether the Special Event Ordinance is applicable to the Nation, there should be no dispute that the Nation, by bringing this lawsuit on the question of the applicability of the Special Event Ordinance to the Big Apple Fest, has waived any sovereign

[24] To be clear, the Village does not purport to waive these arguments. If this Court determines that these issues are appropriate and necessary for resolution in this case, the Village requests leave to submit additional briefing on them.

immunity it might have with respect to that question. *See Oneida Nation of Indians of Wis. v. Village of Hobart*, 500 F. Supp. 2d 1143, 1149-50 (E.D. Wis. 2007). There should be no doubt this Court can reach and resolve any issues necessary to resolve that question, including whether the Oneida Reservation has been diminished and/or disestablished. A counterclaim seeking declaratory relief is not barred by sovereign immunity when the sovereign has initiated suit for declaratory relief. *Id.*

Second, the Village acknowledges that the Supreme Court has held tribal immunity may apply to claims against an Indian Tribe even arising from commercial activity outside Indian lands, and that at first blush that rule may apply to foreclose the Village's request for a monetary judgment here. *Bay Mills Indian Cmty.*, 134 S. Ct. at 2032. Nevertheless, the application of that rule can depend on the existence of other mechanisms for enforcing state law against an Indian tribe, for example by denying a license and then obtaining an injunction against tribal officials or employees for going forward absent a license. *Id.* at 2035. Here, it is not clear whether the Nation would agree such relief would be available to the Village were the Nation to proceed with an event absent a required permit. The Supreme Court has reserved the question of whether sovereign immunity applies if a plaintiff who has not chosen to deal with a tribe has no alternative way to obtain relief for off-reservation commercial conduct. *Id.* at 2036 n.8. Moreover, this case may implicate the immovable property exception to sovereign immunity, as it involves the Village's ability to control activities that occur on land the Nation purchased in the character of a private individual in the territory of another sovereign. *Cf. Upper Skagit Indian Tribe*, 138 S. Ct. at 1654. Finally, the Village seeks to preserve this issue in the event the Supreme Court revisits its tribal sovereign immunity jurisprudence. *cf. id.* at 1656 (Roberts, C.J, concurring).

CONCLUSION

For the foregoing reasons, the Village respectfully requests that this Court deny the Nation's motion for summary judgment.

Dated: September 5, 2018.
Respectfully submitted,

By: s/ Frank W. Kowalkowski
Frank W. Kowalkowski, SBN 1018119
von Briesen & Roper, s.c.
300 North Broadway, Suite 2B
Green Bay, WI 54303
920.713.7810
920.232.4899 – Facsimile
fkowalkowski@vonbriesen.com

Matthew J. Thome, SBN1113463
Christopher T. Koehnke, SBN 1076031
Derek J. Waterstreet, SBN 1090730
411 East Wisconsin Avenue, Suite 1000
Milwaukee, WI 53202
Thome Phone: (414) 287-1433
Thome Fax: (414) 238-6505
Koehnke Phone: (414) 287-1534
Koehnke Fax: (414) 238-6665
Waterstreet Phone: (414) 287-1519
Waterstreet Fax: (414) 238-6434
mthome@vonbriesen.com
ckoehnke@vonbreisen.com
dwaterstreet@vonbriesen.com

Counsel for Defendant, Village of Hobart