UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

ONEIDA NATION,

Plaintiff,

v. Case No. 16-CV-1217

VILLAGE OF HOBART, WISCONSIN,

Defendant.

PLAINTIFF ONEIDA NATION'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Dated this 5th day of September, 2018.

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Introduction

The Village argues for summary judgment by avoidance: it attempts to preclude consideration of its diminishment/disestablishment defense based on a wrongly decided case to which the Nation was not a party; it denies that the well-established three-part framework governing claims of diminishment/disestablishment of a reservation applies to its claims; and it reverses course and now denies that it carries the burden of proof on exceptional circumstances to justify local regulation of the Nation in Indian country. The Village is wrong on all counts. It does not and cannot establish that the Oneida Reservation has been disestablished or diminished or that it has authority to regulate the Nation on the Oneida Reservation. The Village's motion for summary judgment should be denied for the reasons stated herein.

I. There is no binding or authoritative ruling that the Oneida Reservation has been abolished.

The Village's first objection to the modern-day existence of the Oneida Reservation, and the resulting immunity of the Nation from Village regulation therein, is the supposed preclusive effect of prior court rulings. The Village relies primarily on *Stevens, et al. v. Cnty. of Brown* (E.D. Wis., Nov. 3, 1933, Unpublished Decision and Order) and secondarily on *United States v. Hall*, 171 F. 214 (E.D. Wis. 1909), for the proposition that the Reservation has been held to have been disestablished; further, the Village claims that *Stevens* is binding upon and cannot be relitigated by the Nation. Defendant's Memorandum of Law in Support of Defendant's Motion for Summary Judgement ("Defendant's Memorandum"), at 14 - 18, 29. Neither case provides the refuge that the Village seeks. *Stevens* is not binding upon the Nation and, in any event, was wrongly decided and is not persuasive authority. *Hall* was quickly rendered unreliable when the authority upon which it relied was explicitly overruled. As a result, the Village cannot avoid

addressing the merits of its affirmative defense that the Oneida Reservation has been disestablished or diminished.

A. The wrongly decided Stevens case is not binding upon the Nation.

Stevens was a tax case, not a case about the Nation's immunity from local regulation. It was filed by individual allottees on the Oneida Reservation "for the purpose of recovering taxes which had been levied and assessed on their lands..." which they held under fee patents.[1] ECF No. 89-45 at 2. Defendants were the Counties of Brown and Outagamie and the townships of Hobart and Oneida. The Nation was not a party.

The defendants moved to dismiss the Oneidas' complaint, claiming among other grounds that the Treaty of 1838 and the Reservation created in the Treaty were "discontinued" when the Reservation was allotted. *Id.* at 3. In its order on the motion to dismiss, the court determined that the passage and application of the Dawes Act, or General Allotment Act ("GAA"), to the Oneida Reservation "resulted in a discontinuance of the reservation..." *Id.* at 4. The court reached this conclusion regarding the GAA without analysis of or any reference to the Supreme Court's clearly contrary construction of the GAA in *United States v. Celestine*, 215 U.S. 278, 287 (1909) ("The act of 1887 [the GAA], which confers citizenship, clearly, does not emancipate the Indians from all control, or abolish the reservations.") Thus, the *Stevens* court's construction of the GAA was wrong at the time judgment was rendered.

Nonetheless, the Village claims that *Stevens* has preclusive effect to bar this Court from considering the current status of the Oneida Reservation. There are four, necessary elements of

[1] As a result, the plaintiff class in *Stevens* did not consist of all Oneida tribal members as the Village suggests. Defendant's Memorandum at 17 ("*Stevens* was a class action brought on behalf of all Oneida..."). It is undisputable that there were Oneida allottees at the time who held trust allotments. *See* Executive Orders, Nation's Statement of Proposed Facts, ¶¶ 30, 34 and 38. The *Stevens* class of plaintiffs excluded these Oneida allottees.

issue preclusion for a party to make defensive use of a prior judgment.[2] The most important of these is typically listed as the last, i.e., that the party against whom the judgment is invoked (here, the Nation) was fully represented in the earlier suit. *See Chicago Truck Drivers*, 125 F.3d at 530.

1. As a non-party, the Nation is not bound by *Stevens.*

This is the most important of the four elements because it is based upon due process considerations. "It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." *Hansberry v. Lee*, 311 U.S. 32, 40 (1940). Due process prohibits estopping parties who have never had a chance to present their evidence and arguments on a claim. *Blonder-Tongue Laboratories, Inc. v. University of Ill. Foundation*, 402 U.S. 313, 328 (1971) (discussing defensive use of an earlier judgment to preclude a claim made by the plaintiff). Where the first suit was a class action, due process permits preclusive effect against members of the class. *Taylor v. Sturgell*, 553 U.S. 880, 881 (2008). Outside the class context, though, it is not enough that there is an identity of interests or some kind of relationship between the party to the earlier judgment and a non-party. *Id*. Referred to as "virtual representation," courts have denied preclusive effect to an earlier judgment under such circumstances. *Id*. at 883; *Perry v. Globe Auto Recycling, Inc.*, 227 F. 3d 950, 953 (7th Cir. 2000) (every litigant is entitled to his own day in court in the absence of real representation of the non-party by a party); *Highway J Citizens Group v. United States Dept. of Transp*., 656 F.

[2] The Village acknowledges that the four elements are: 1) the issue in the later action must be the same as that in the earlier action; 2) the issue was actually litigated in the earlier action; 3) the determination in the earlier action was essential to the judgment there; and 4) the party against whom the preclusive effect is invoked was fully represented in the earlier suit. *See* Defendant's Memorandum at 15 (citing *Chicago Truck Drivers v. Century Motor Freight*, 125 F.3d 526, 530 (7th Cir. 1997)).

Supp. 2d 868, 882 (E.D. Wis. 2009) (there must be a relationship giving rise to a fiduciary duty by the party in the earlier suit to bind a non-party in later suit).

In *Stevens*, there was a plaintiff class consisting of those Oneida tribal members who held fee patents; thus, the class consisted of less than all Oneida tribal members and the Nation was obviously not a member of that class.[3] ECF No. 89-45 at 2. As a result, the Village here argues for an even lesser relationship than the "virtual representation" rejected by the Supreme Court and Seventh Circuit. Indeed, the Village fails to explain or identify any representative relationship between the class of Oneida plaintiffs in *Stevens* and the Nation.[4] Defendant's Memorandum, at 17. Under the Village's reasoning, the Nation would be bound by any judgment involving a class of Oneida tribal members, including classes of less than all tribal members – clearly an absurd result that would violate due process. For this reason alone, *Stevens* does not preclude the Nation from litigating the current status of the Oneida Reservation or relieve the Village of its burden to prove disestablishment or diminishment. The Village also fails to establish the three remaining elements of the doctrine.[5]

2. The elements of non-mutual collateral estoppel are missing.

Because the Nation was not a party to Stevens, issue preclusion is not available here.

[3] Even if the plaintiff class consisted of all Oneida tribal members, the judgment would not be binding upon the Nation itself. As a general proposition, individual litigation does not preclude relitigation by a government since private interests necessarily vary from those of the government. *Kerr-McGee Chem. Corp. v. Hartigan*, 816 F.2d 1177, 1180-81 (7th Cir. 1987).

[4] In *Perry*, the Seventh Circuit indicated that the absence of a litigant in the first suit ends the inquiry, "unless the facts show a strong reason why the first litigant was, in effect, a real representative (not a virtual one) of the second." *Perry*, 227 F. 3d at 955. The Village would bar the Nation from litigating the status of the Reservation because *Stevens* was publicized and one of the plaintiffs was a "tribal leader." Defendant's Memorandum, n. 7. This is far below the strong showing of actual representation required in the Seventh Circuit.

[5] *Firishchak v. Holder*, 636 F.3d 306 (7th Cir. 2011), cited by the Village on this point, provides no assistance. Defendant's Memorandum, at 18. In that case, there was literal identity between the parties, with the only question being whether that party had a full and fair opportunity to litigate the issue in the earlier suit. *Id.* at 308-09.

Perry, 227 F.3d at 953. Neither is non-mutual collateral estoppel, where a non-party can be precluded from relitigating an issue. The Seventh Circuit applies the same four factors to determine non-mutual collateral estoppel as it does issue preclusion. *Prymer v. Ogden*, 29 F.3d 1208, 1212 (7th Cir. 1994). The absence of a representative relationship between the Stevens plaintiffs and the Nation is also fatal to non-mutual collateral estoppel. The remaining three elements, of either issue preclusion or non-collateral estoppel, are also absent.

First, there is no identity of issues between *Stevens* and this case. This is an exacting criterion that requires precise identity between the issue in the current case and the issue decided in the prior case. *Crot v. Byrne*, 957 F.2d 394, 397 (7th Cir. 1992); *see also Parklane Hosier Co.*, 439 U.S. 322, 326 (1979); *American Nat. Band & Trust v. Regional Trans. Auth.*, 125 F.3d 420, 430 (7th Cir. 1997) (applying Illinois law.). In *Stevens*, the question was whether individual Oneida allottees were liable for the payment of local property taxes upon the issuance of fee patents for their allotments. ECF No. 89-45 at 2; (the purpose of the action was the recovery of taxes paid upon the lands of tribal members). The answer to this question is found in the text of the GAA itself, which directed that upon the issuance of fee patents, allottees "shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside." Act of Feb. 8, 1887, 24 Stat. 388, § 6; *Goudy v. Meath*, 203 U.S. 146, 149 (1906) (the state tax laws were among those to which allottees were subjected upon the issuance of fee patents.)[6] The question here is the Nation's inherent authority to adopt and be governed by its own laws on the Oneida Reservation in the conduct of special events, a matter not before the

[6] Because of *Goudy*, the Nation does not challenge the result in *Stevens* that fee patents held by tribal members were taxable, only the unnecessary holding that the Reservation was discontinued. As a result, there is no concern about the finality of judgments affecting property rights arising from the Court's refusal to follow *Stevens. See* Defendant's Memorandum at 17.

court in *Stevens* and upon which the court made no comment. Arguably, the *Stevens* court's comment about the "discontinuance" of the Reservation made in the context of state tax liability is dictum that this Court can disregard.[7] In any event, the required identity of issues is missing.

Second, and as a consequence of the difference between the issues, the Nation's immunity from local regulatory authority was not litigated in *Stevens*. Certainly, the court litigated the tax liability of the allottees, but the court made no comment upon the power of self-government held by the Nation, an absent party to that suit. ECF No. 89-45 at 2-5. The *Stevens* court unnecessarily construed the GAA to have legal consequences unrelated to the tax immunity of the individual allottees, but that comment hardly constitutes a litigation of those unrelated issues. *Id.*

Third, whether the Oneida Reservation continued to exist was not essential to the judgment on the tax liability of Oneida allottees. As noted above, there was an immediate and direct answer to this issue on the face of the GAA, as the Supreme Court had construed it years earlier. There was no need for the court to venture further afield and express its view on broader and different issues.[8]

B. The court has discretion whether to apply the doctrine of collateral estoppel, even where all necessary elements are present.

The doctrine of collateral estoppel is an equitable one and the court has "broad discretion to determine when it should be applied," even where the elements of the doctrine are present.

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[7] Dictum is a statement in an opinion that could have been deleted without seriously impairing the holding of the case and, as such, is not authoritative. *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 379 (1994) ("It is to the holdings of our cases, rather than their dicta, that we must attend..."); *United States v. Crawley*, 837 F.2d 291, 292 (7th Cir. 1988).

[8] The Village suggests that, because the parties framed the issue broadly, it was necessary for the court to address the broader issue. The Village cites no authority for the proposition that the parties determine the scope of the judgment by framing the issues in a particular way.

Parklane Hosiery, 439 U.S. at 331. In fact, in the case that the Village relies upon most heavily, the court declined to apply the doctrine; notwithstanding the presence of all four elements of the doctrine, the court held that its application under the circumstances would have been unfair. *Chicago Truck Drivers*, 125 F.3d at 530-32 (citing *Parklane Hosiery Co.*, 439 U.S. at 330-31); *see also* Defendant's Memorandum, at 2, 15. For the same reasons identified by the court in *Chicago Truck Drivers*, this Court should decline to apply the doctrine, regardless of the presence of the four elements.

First, the issue did not receive "the kind of analysis needed to decide such an important issue," including no discussion of conflicting case law. *Id.* at 530. Similarly, the court in *Stevens* did not undertake any significant analysis of the reservation disestablishment issue and failed to address directly contrary Supreme Court authority such as *Celestine.*

Second, an issue should not be precluded if it is an issue of law. *Id.* at 531-32. To do so would prevent the court from performing its function of developing the law. *Pharmaceutical Care Management Ass'n v. District of Columbia*, 522 F.3d 443, 446 (D.C. Cir. 2008). This is particularly the case where preclusion would freeze a rule of law in an area of substantial public interest. *Id*. This concern is heightened when there has been a change in the legal context of the legal issue in question. *Id*. at 447 (agency has proposed a rule that, if adopted, might have affected the legal analysis in the first case); *United States Postal Service v. American Postal Workers Union*, 553 F.3d 686, 696 (D.C. Cir. 2009) (doctrine generally inappropriate where issue is one of law and there has been a change in the legal context). The *Stevens* court based its conclusion on a legal issue of statutory construction, i.e., that the GAA necessarily abolished reservations. ECF No. 89-45 at 4. It did so without even acknowledging a binding Supreme Court decision to the contrary. But even were it possible for the court to overlook *Celestine*,

there is no question that the entire legal context of the disestablishment issue has developed significantly since 1933 and that the current rule of law flatly rejects the *Stevens* court's construction of the GAA. *Nebraska v. Parker*, 136 S. Ct. 1072, 577 U.S. ___ (2016); *Solem v. Bartlett*, 465 U.S. 463 (1984); *Mattz v. Arnette*, 412 U.S. 481 (1973); *Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351 (1962). It would be inequitable, then, to give *Stevens* preclusive effect here.

Finally, it would be fundamentally unfair to bind the Nation to the *Stevens* court's erroneous and analytically thin construction of the GAA. Were this Court to do so, it would mean that the GAA has a different construction for the Nation than for any of the other hundreds of tribes whose reservations were allotted under the GAA, as properly construed in accordance with Supreme Court authority. No doctrine of equity should countenance this result, particularly where the Nation itself was not a party. *Chicago Truck Drivers*, 125 F.3d at 532.

C. *Hall* is neither authoritative nor persuasive.

Even though the Village cites *Hall* in its preclusion argument, it makes no argument that the case is binding upon the Nation or has any preclusive effect here; it does not for the good reason that neither the Nation nor the Village was not a party to this criminal prosecution for violation of federal law regulating the introduction of liquor into Indian country. Act of Jan. 30, 1897, 29 Stat. 506; *see also Perry*, 227 F.3d at 953. Instead, the Village relies upon *Hall* for the proposition that Oneidas had been released from federal supervision, and claims that *Hall's* passing reference to the "former reservation" constitutes a part of post-enactment history of the Oneida provision to the 1906 appropriations act ("the 1906 Oneida provision"). Defendant's Memorandum, at 29 (s*ee* discussion below regarding the 1906 act). For four reasons, *Hall* is no more authoritative on the 1906 act than it is binding upon the parties here.

First, the *Hall* court does not mention, much less rely upon, the 1906 Oneida provision. Had it been understood at the time to have abolished the Reservation, presumably a judge writing three years later would have made note of it. Because he did not, his opinion cannot be taken as an indication of the meaning of the 1906 Oneida provision.[9]

Second, the authority that *Hall* did rely upon has been repudiated. The *Hall* court reasoned that Oneida allottees had been subjected to state law in the GAA, that the Oneidas lost their status as federal wards as a result, and that the state consequently had sole authority to regulate liquor sales to the Oneidas. 171 F. at 215-16. The court relied primarily upon *In re Heff*, 197 U.S. 488 (1905), in reaching this conclusion. In relative short order, though, the Supreme Court overruled this decision in *United States v. Nice*, 241 U.S. 591, 601 (1916) ("...we are constrained to hold that the decision in [*In re Heff*] is not well grounded, and it is accordingly overruled.") The *Hall* court relied secondarily upon *State of Wisconsin v. Doxtator*, 47 Wis. 278, 2 N.W. 439 (1879), for the same rationale. This decision was also overruled in *State v. Rufus*, 205 Wis. 317, 237 N.W. 67 (1931). As a result, *Hall* is no longer authoritative.

Third, the *Hall* court did not purport to determine the status of the Oneida Reservation. It merely made a passing reference to the "former reservation" in the course of its decision on federal authority to criminally prosecute an Oneida allottee. 171 F. at 218. This meets the classic definition of dictum. *United States v. Crawley*, 837 F.2d at 292 ("We have defined dictum as 'a statement in a judicial opinion that could have been deleted without seriously impairing the

[9] This is not a situation like that considered by the Supreme Court in *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977) (acts of Congress in 1904, 1907 and 1911) and the Seventh Circuit in *Wisconsin v. Stockbridge-Munsee Community*, 554 F.3d 657 (7th Cir. 2009) (acts of Congress in 1871, 1893, and 1906), where the courts considered the cumulative effect of multiple acts of Congress. Here, the Village argues that a single act of Congress in 1906 had the dramatic effect of abolishing the Oneida Reservation. Since *Hall* fails to even reference the 1906 Oneida provision, it cannot be taken as authority construing that act.

analytical foundations of the holding..."). Because it is dictum, the comment is not authoritative and this Court is free to reject it. *Id.*

Fourth, the rationale of *Hall* has been explicitly rejected by the Supreme Court. As the Nation has already established, the Court has construed the GAA to neither release individual allottees from federal supervision nor abolish Indian reservations. Nation's Memorandum of Law in Support of Motion for Summary Judgment ("Nation's Memorandum"), at 37-39. As a result, *Hall* is not persuasive.

At this point in the litigation, it would be manifestly unjust to preclude the Nation from addressing the merits of the Village's affirmative defense of alleged diminishment or disestablishment of the Nation's Reservation. *Stevens* and *Hall* have been long known to the Village and typically cited by the Village as part of the historic evidence in support of its' affirmative defense; they featured prominently in the Village's demand for extensive and expensive discovery in this matter. ECF No. 31 at 11 (Defendant's Memorandum in Support of Motion to Allow Time for Discovery Under Rule 56(d); ECF No. 36 at 5-6 (Defendant's Memorandum of Law in Opposition to Plaintiff's Motion for Protective Order). Now, having obtained and completed that discovery, the Village proposes to foreclose this Court's consideration of the Village's diminishment/disestablishment defense. This gamesmanship should not be countenanced. The Nation is entitled to its day in court on this important issue.

II. The Supreme Court has rejected the Village's theory of diminishment/disestablishment based upon allotment, and the 1906 Oneida provision relied upon by the Village had no effect on the Oneida Reservation boundaries.

Analysis of the Village's diminishment/disestablishment defense must begin with the important historical fact that there is no surplus land act applicable to the Oneida Reservation.

The parties and their experts all agree upon this fact.[10] This fact is important because every case holding that a reservation was diminished or disestablished reached this conclusion based upon a surplus land act or a series of similar acts. Nation's Memorandum at 36. The Village nevertheless attempts to construct an alternative theory of diminishment/disestablishment that is based solely upon allotment of the Reservation and its inevitable consequences. ("It's my opinion that the Dawes Act, its amendments and the 1906 Appropriations Act, while they did not contain the explicit language...still reflect Congress's intent for reservations, and the Oneida Reservation in particular, to be allotted, fee-patented and cease to exist." (Second Jacquart Dec., Ex. 7, Greenwald Dep. at 157.)[11]

The Village builds its alternative theory by distorting some cases and ignoring others that construe the GAA. As a result, the Village's analysis of the GAA is wrong as a matter of law. *See* Part A, below. Further, the Village identifies only one other statutory provision as the basis for alleged diminishment/disestablishment of the Reservation – the 1906 Oneida provision. But this was a minor provision, one that did not significantly alter or displace the GAA as governing authority for the allotment of the Reservation, and one that lacked any indicia of congressional

[10] *See* ECF No. 91 at 5, Defendant's Statement of Proposed Facts, ¶ 7; Plaintiff's Memorandum of Law, at 36; Jacquart Dec., ¶ 3(ex. 2, Nov. 15, 2017 Hoxie Report at 87); Jacquart Dec., ¶ 6 (Ex. 5, Nov. 15, 2017 Edmunds Report at 27).

[11] The Village denies that its theory depends upon allotment alone. According to the Village, its theory depends upon allotment followed by the issuance of fee patents to allottees and the sale of those allotments to non-Indians. Defendant's Memorandum at 22. But these are all features of allotment under the GAA, requiring no further act of Congress to accomplish. Further, reservations held by the Supreme Court to have survived allotment and opening under a surplus land act experienced the same, predictable dynamics of allotment as the Nation. *See, e.g., Smith v. Parker,* 996 F. Supp. 2d 815, 827-28 (D. Neb.), *aff'd Nebraska v. Parker,* 136 S. Ct. 1072, 577 U.S.____(2016) (no disestablishment of Omaha Reservation even though no trust land remained in the opened area by 1919 and tribal members were less than 2% of the population of the opened area since early twentieth century). As a result, there is no principle that distinguishes the allotment experience at the Oneida Reservation (and the Village's theory of diminishment/disestablishment based thereon) from hundreds of other reservations allotted under the GAA.

intent to alter the Reservation boundaries. *See* Part B, below. Because there is no statutory text upon which to base a finding that the Reservation boundaries have been altered, the Court need go no further with the inquiry. *Parker*, 136 S. Ct. at 1081.

A. None of the cases cited by the Village indicates that allotment and its consequences can alone diminish or disestablish the Oneida Reservation

The Village insists that when allotted land "passed out of Indian ownership and was owned in fee by non-Indians, it ceased to be a part of a reservation." Defendant's Memorandum at 18. The Village relies primarily upon two cases arising out of the allotment and opening of the Yankton Sioux Reservation as support for this proposition. *Id.*, at 18-19 (citing *Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010 (8th Cir. 1999); *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994 (8th Cir. 2010)). Nothing in those cases or the Yankton experience supports the Village's conclusion. To the contrary, the alteration of Yankton Reservation boundaries resulted from clear congressional intent expressed in a surplus land act, not the allotment of the reservation.

The history of the Yankton Sioux Reservation was considered at length by the Supreme Court in *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998). It was created by treaty in 1858, allotted under the GAA, and the remaining or surplus land was ceded by the tribe to the United States in 1892. *Id.* at 334-40. The cession agreement contained classic language ceding all the tribe's interest and required payment of a sum certain. The Supreme Court based its determination that the reservation had been diminished squarely upon these terms of the cession agreement, not allotment:

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

Id. at 344. The Court went on to note that there were countervailing features in the cession agreement and that the parcel in question was among those ceded in the agreement. As a result, the Court declined to determine whether the cession agreement disestablished the reservation altogether, holding only that the reservation was diminished by the land ceded. *Id.* at 358.

Because the Supreme Court left the disestablishment issue open, the Eighth Circuit considered the status of unceded land on the Yankton Reservation in *Gaffey* and *Podhrasky.* The *Gaffey* court noted that 85% of the Yankton Reservation had passed out of trust status, most being held in fee by non-Indians. 188 F.3d at 1016. Nonetheless, the *Gaffey* court also based its holding squarely on the cession agreement: "The heart of the matter involves whether Congress intended to disestablish the Yankton Sioux Reservation when on August 15, 1894 it finally ratified the 1892 agreement..." *Id*. at 1018 (citing *Solem*, 465 U.S. at 470). In its analysis, the *Gaffey* court noted that Congress may have expected in the late nineteenth century that Indians would be assimilated and reservations go away, but the court declined "to extrapolate from general legislative assumptions and expectations of the late nineteenth century to find in each surplus land act a specific congressional purpose..." to disestablish the reservation.[12] *Id*. at 1024. Similarly, the *Podhrasky* court explicitly declined to find that the reservation had been disestablished by allotment. 606 F.3d at 1007. Citing the Supreme Court's decisions in *Solem*, *Seymour*, and *Celestine*, among others, and the statutory definition of Indian country, the

[12] The Village distorts the analysis in *Gaffey* when it cites it for the general proposition that "[o]nce allotted land passed out of Indian ownership and was owned in fee by non-Indians, it ceased to be part of a reservation." Defendant's Memorandum at 18. The court did hold that allotments which passed into non-Indian ownership diminished the Yankton Reservation. But the court made plain that this was a function of the cession agreement, not allotment alone: "When viewed in its [the cession agreement's] full historical context, however, it is clear that the parties did not intend for the tribe to retain control over allotted lands which passed out of trust status and into non Indian hands." 188 F.3d at 1030. There is nothing in *Gaffey* suggesting that the court would have reached the same conclusion, based on changes in title or otherwise, in the absence of the cession agreement.

Podhrasky court held that title did not determine reservation status. *Id*. at 1007-10 ("Section 1151 (a) thus separates the concept of jurisdiction from the concept of ownership").[13]

These Supreme Court decisions, which the Village ignores, directly reject the Village's theory of diminishment/disestablishment from application of the GAA and the resulting loss of Indian title. Defendant's Memorandum at 20 ("the driving purpose behind the federal government's allotment policy.... was the dissolution of the reservation system."). In *Solem,* the Court discussed Congress' assumptions regarding the ultimate demise of reservations after allotment but, as the *Gaffey* court indicated, declined to find this expectation alone as sufficient to disestablish reservations. *Solem*, 465 U.S. at 469-70. Thus, "[o]nce a block of land is set aside for an Indian Reservation and no matter what happens to title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise." *Id*. at 470. In *Seymour*, the Court rejected the Village's specific theory, that is, that reservation status lapses upon the conveyance of title to non-Indians. The *Seymour* Court noted the superficial appeal of the argument but concluded that Congress foreclosed this result with the enactment of the Indian country statute, 18 U.S.C. § 1151(a). 368 U.S. at 357-58. And in *Celestine,* the Court held that all of the consequences of the GAA combined – allotment and citizenship – did not abolish reservations. 215 U.S. at 285. As the Nation has already demonstrated, these and other Supreme Court cases establish the doctrinal errors in the Village's theory that allotment of the reservation, and its consequences, diminished the Oneida Reservation. Nation's Memorandum at 37-39. The Village's failure to distinguish (and, in most cases, even acknowledge) these binding Supreme Court cases is fatal to its diminishment/disestablishment theory.

[13] The *Podhrasky* court rejected the state's attempt to avoid the 1948 statute by limiting the inquiry to Congress' intent as of 1894. "The determinative question is simply whether they [the parcels] are now 'reservation' within the meaning of § 1151(a)." 606 F.3d at 1010.

The Village does cite one Supreme Court case in support of its theory, but that case is irrelevant to the inquiry here. The Village quotes extensively from *Montana v. United States*, 440 U.S. 147 (1979), regarding the legislative history and purpose of allotment acts, including the GAA. Defendant's Memorandum at 22-23. The question presented in that case, though, was the tribe's claimed authority to regulate on-reservation hunting and fishing of non-members on non-members' fee-titled lands, not alteration of reservation boundaries. *Id.* at 547.[14] The existence of the Crow Reservation was admitted, notwithstanding the allotment of the reservation and the fee title ownership of parcels by non-Indians therein. The principal issues were the tribe's claim to ownership of the Big Horn River bed and its inherent authority to regulate non-Indian activity on the reservation. *Id.* at 551-57. These issues are governed by authority distinct from those cases governing alleged disestablishment of reservations. The Court referenced the intent of the GAA in a footnote (quoted in full by the Village), but the quote, *as it explicitly states*, has to do with inherent tribal authority over non-members, not intent to diminish or disestablish a reservation by allotment or otherwise. *See* Defendant's Memorandum at 21. None of this supports the Village's theory of change in reservation boundaries by change in title.

In the end, the Village fails to distinguish the substantial body of authority that directly contradicts its theory that allotment under the GAA, and the resulting changes in title, without more, can diminish or disestablish the Oneida Reservation. Indeed, the Supreme Court has directly held to the contrary. Thus, the Village must identify a specific act of Congress other than the GAA that, construed in accordance with the standard set out in *Nebraska v. Parker* and *Solem*, evidences an intent to alter the Oneida Reservation boundaries.

[14] This Court has already noted that the issue in this case is different from that in cases where a tribe asserts regulatory authority over non-Indians. ECF No. 46 at 13.

B. The 1906 Oneida provision contained none of the necessary indicia of congressional intent to diminish or abolish the Oneida Reservation, as confirmed by contemporaneous statements of federal officials.

The Village makes its diminishment/disestablishment stand on a provision that appeared in the 1906 appropriations act. Act of June 21, 1906, 34 Stat. 325, 380-181; Defendant's Memorandum at 23-44.[15] This provision must be construed under the *Solem/Parker* standard. It was a minor provision that acknowledged the Oneida Reservation on its face and that lacked any of the indicia of congressional intent to diminish or disestablish required by the Supreme Court. Further, evidence contemporary with the 1906 provision regarding the Oneida Reservation confirms its continuing existence. Based on these factors and without reference to "subsequent treatment," the Court can and should conclude that the 1906 Oneida provision falls far below the *Solem/Parker* standard. *Parker*, 136 S. Ct. at 1079; *Solem*, 465 U.S. at 471.

1. The 1906 Oneida provision must be construed under the framework set out in *Solem* and *Parker*.

The Village disputes the applicability of the *Solem* standard of statutory construction, confirmed in *Parker*, because there is no surplus land act here. Defendant's Memorandum at 18-20. But the Village is wrong.

The Oneida Reservation was created by the Treaty of 1838. Nation's Memorandum at 13-23. Any modification of the Reservation boundaries would constitute a modification or abrogation of the Treaty. The rules of construction on the modification or abrogation of Indian

[15] At places, the Village suggests that there were multiple acts regarding the Oneida Reservation that allowed the Secretary to issue fee simple patents to allottees before the expiration of the trust period, all of which operated to diminish the Reservation. *See* Defendant's Memorandum at 23-24 ("several acts allowing the secretary of the interior to issue fee-simple patents to allottees..."). But the Oneida provision in the 1906 appropriation act is the only one analyzed by the Village under the *Solem/Parker* standard. *Id.* at 24-29. As a result, that is the only act addressed herein. The Nation reserves the right to respond, in the event the Village purports to find diminishment of the Reservation in the terms of any other specific act of Congress.

treaties are essentially the same as those applied in the diminishment/disestablishment cases: only Congress can modify a ratified Indian treaty and Congress must express its intent to do so plainly and unambiguously. *See* Nation's Memorandum at 33. As a result, whether analyzed under the line of Supreme Court cases governing abrogation of Indian treaties or that governing alteration of reservation boundaries, the same rules of construction apply. *Compare Solem* and *Parker, with United States v. Santa Fe Pac. R. R. Co.*, 314 U.S. 339, 354 (1941).

Further, the only court to consider the issue has determined that the *Solem/Parker* framework applies to construe any act of Congress alleged to have altered reservation boundaries, not just surplus land acts. In *United States v. Jackson*, the Eighth Circuit considered the effect of a 1905 act that authorized the sale of reservation land to a railroad; the court held that the *Solem* standard governed the alleged diminishment of the reservation as a result of the act and declined to find the necessary congressional intent. 697 F.3d 670, 675 (8th Cir. 2012); *see also United States v. Wounded Knee*, 596 F.2d 790, 793-94 (8th Cir. 1979) (diminishment standard applied to construe a 1962 act of Congress taking reservation land for a dam).

It is also unlikely that the *Solem/Parker* standard will be altered or restricted (at least as it applied outside Indian Territory (modern-day Oklahoma) in the matter pending in the Supreme Court and now captioned *Carpenter v. Murphy*, No. 11-1107, *cert. granted* May 21, 2018. *See* Defendant's Memorandum at n. 10. That case involves the continuing Indian country status of the Creek Reservation, which was explicitly exempted from the GAA along with other reservations in Indian Territory. 24 Stat. 388, § 8. The petitioner argues that those were never reservations in the first place, that they were subjected to a special series of congressional acts in anticipation of the admission of Oklahoma into the Union that stripped them of any such status, and that ordinary allotment did not take place there. (*See* Second Jacquart Dec., Ex. 11, Brief of

Petitioner, *Carpenter v. Murphy*, No. 17-1107 at 23-32 (U.S. S. Ct. Jul. 23, 2018)). For those reasons, petitioner maintains that the *Solem/Parker* standard does not apply. *Id.* at 46-49. Similarly, the United States as *amicus* in support of the petitioner relies upon the unique history of Indian Territory in Oklahoma and argues that the *Solem/Parker* standard supports disestablishment under the circumstances. (Second Jacquart Dec. at Ex. 12, Brief for the United States, *Carpenter v. Murphy*, No. 17-1107 at 6-22 (U.S. S. Ct. Jul. 30, 2018)). Neither petitioner nor the U.S. requests a modification of the *Solem/Parker* standard. (*See generally* Second Jacquart Dec. at Exs. 11 and 12). Nothing in the outcome of this case will likely provide this Court any guidance.

As a result, the familiar three-part framework of *Solem* and *Parker* applies to determine whether the 1906 Oneida provision diminished or disestablished the Reservation: first, the court inquires whether the act reflected the required, clear congressional intent to diminish or disestablish the reservation (*Parker*, 136 S. Ct. at 1079 (citing *Solem*, 465 U.S. at 470 and *Hagen v. Utah*, 510 U.S. 399, 411 (1994)); second, the court examines the history surrounding passage of the act for unequivocal, contemporaneous evidence of a congressional intent to diminish or disestablish a reservation (*Parker*, 136 S.Ct. at 1079 (citing *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 351 (1998)); and third, subsequent demographic history and United States' treatment of the area may be of some evidentiary value in determining Congress' intent. *Parker*, 136 S.Ct. at 1081 (citing *Solem*, 465 U.S. at 472). This inquiry shows the 1906 Oneida provision to be only a minor adjustment of the GAA as applied to the Oneida Reservation, not a marked departure from Congress' intent in the GAA to leave reservations intact.

2. The statutory context of the 1906 Oneida provision indicates that it was a minor adjustment of the implementation of the GAA on the Oneida Reservation.

The Oneida provision must be understood in the context in the entire 1906 appropriations act. It was a single provision in an act that ran fifty-eight pages in length. ECF No. 89-28. It was also one of roughly a dozen similar provisions that adjusted the application of the GAA on particular reservations, such as White Earth, Omaha, and others. *Id.* These provisions varied in precise language, sometimes directing the issuance of fee patents to named allottees and other times granting the Secretary authority to issue fee patents to classes of allottees (e.g., "restrictions as to sale...held by adult mixed-blood Indians, are hereby removed..." on the White Earth Reservation).[16] Neither was the 1906 appropriations act unique in this regard. The previous year, for example, Congress similarly adjusted the implementation of allotment on nearly a dozen specific reservations. *See* Act of Mar. 3, 1905, 33 Stat. 1048. Again, the particulars varied. But all the provisions had one thing in common: they were adjustments by Congress of the particulars on the implementation of allotment at specified reservations.

In this respect, these provisions (including the Oneida provision) differed significantly from the Stockbridge-Munsee sections in the 1906 appropriations act. The Stockbridge-Munsee sections were neither brief nor minor; they were separately sub-titled (unlike the other minor provisions), detailed, and ran nearly two pages in length. More importantly, the Stockbridge-Munsee sections were *not* an adjustment of the GAA as applied to that reservation. Instead, the

[16] The disestablishment question regarding the White Earth Reservation has been litigated and the court concluded that the opening of the reservation did not disestablish it. *See State v. Clark*, 282 NW2d 902, 907 (Minn. 1979) (citing *Leech Lake Band of Chippewa Indians v. Herbst*, 334 F. Supp. 1001, 1005 (D. Minn. 1971) for the proposition that the passing of land titles did not determine reservation disestablishment). The state argued that disestablishment resulted from an 1889 act that allotted the reservation on terms similar to the GAA and opened up surplus land for settlement; no mention was made of the 1906 provision.

Stockbridge-Munsee sections adopted a wholly different allotment scheme that applied to that reservation only, one that differed from the GAA in material ways, including the mandatory and immediate issuance of fee patents to all tribal members. These sections "set[] the 1906 act apart from most allotment acts," including the GAA. *Wisconsin v. Stockbridge-Munsee Community*, 554 F.3d 657, 664 (7th Cir. 2009).

Thus, these provisions, including the Oneida provision, were more akin to the Burke Act, an amendment to the GAA enacted just the month before the Oneida provision. 34 Stat. 182; *see also Bordeaux v. Hunt*, 621 F. Supp. 637, 644 (D. S.D. 1985) (Oneida provision and others had same purpose as the Burke Act). This act made two changes to the GAA. First, it provided that allottees acquired citizenship rights upon the issuance of fee patents (rather than upon issuance of the trust patents, as in the original Dawes Act). *See* Act of Feb. 8, 1887, 24 Stat. 388, § 6. Second, it provided that the Secretary may, in his discretion, issue fee patents before the expiration of the trust period upon a determination that "any Indian allottee is competent..." 34 Stat. at 183. Other than the nationwide application of the Burke Act (excepting only Indian Territory, or modern-day Oklahoma) and the application of the Oneida provision to a single reservation, there was only one difference between the Burke Act and the Oneida provision: the former authorized the early issuance of fee patents to "competent Indians" while the Oneida provision authorized the early issuance of fee patents "to any Indian of the Oneida Reservation in Wisconsin..." The Burke Act has never been construed to abolish reservations and the Oneida provision should not be either.[17]

[17] The Village's expert Dr. Greenwald claims that the 1906 Oneida provision is broader than the Burke Act because the former provided that "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." (Second Jacquart Dec., Ex. 1, 11/15/17 Greenwald Report at 17.) But this is wrong. The Burke Act contained equivalent language: "and

While it is not material to the statutory construction issue, it is noteworthy that the Burke Act was far more effective on the Oneida Reservation than was the Oneida provision. The Nation's expert Dr. Edmunds examined the record of Oneida allottees' loss of title after 1906 and determined that the "vast majority" of fee patents issued on the Oneida Reservation were issued under the Burke Act, not the Oneida provision of the 1906 appropriations act. Exh. 5, Jacquart Dec. at 37; Exh. 6, Jacquart Dec. at 6-7. The Village's expert Dr. Greenwald also observed that hundreds of patents were issued to Oneidas under the Burke Act, while other patents did not identify the authorizing act. (Second Jacquart Dec., Ex. 1, Emily Greenwald, Ph.D., *History of the Oneida Land Base, 1889-1936* (Nov. 15, 2017) ("11/15/17 Greenwald Report") at 18-19.) One would think that, had the 1906 Oneida provision so altered allotment on the Reservation that it diminished its boundaries (an affect the GAA did not have), it would have been noted in the patents issued on the Reservation. Instead, its impact on the ground at Oneida matched the minimal import of the statutory text.

3. The 1906 Oneida provision contained no statutory indication of an intent to diminish or disestablish the Reservation.

The statutory hallmarks of an intent to alter reservation boundaries are well-known: a cession or similar language surrendering all tribal interest in the land, an unconditional commitment by Congress to immediately compensate the tribe with a certain sum, or restoration of land to the public domain. *Parker*, 136 S.Ct. at 1079. These are obviously missing from the 1906 Oneida provision. Neither is there any reference to alteration or abolition of Oneida Reservation boundaries. To the contrary, the only reference to the Reservation boundaries indicated that the boundaries remained intact: the Secretary of the Interior was authorized to

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thereafter [issuance of fee patent] all restrictions as to sale, incumbrance, or taxation of said land shall be removed..." 34 Stat. at 183.

issue fee patents to Oneida allottees on the "Oneida Reservation" before the expiration of the trust period. 34 Stat. at 381.

Significantly, the operative language of the provision did not indicate that Congress intended the demise of the Oneida Reservation. Unlike the Stockbridge-Munsee provisions, the Oneida provision did not mandate the issuance of fee patents to any Oneidas (other than the fifty-nine named allottees), thereby possibly indicating the termination of the Oneida Reservation. It merely authorized the Secretary "in his discretion" to issue such patents. *Id.* The Secretary could have declined to exercise the authority in many or all instances, leaving the condition of the Reservation precisely as it was before enactment of the Oneida provision, a result that belies any intent to diminish or abolish the Reservation.[18] *See Poverty Flats Land & Cattle Co. v. United States*, 788 F.2d 676, 678 (10th Cir. 1986) (complete discretion of Secretary eliminates any intended congressional result in that regard).

Moreover, there were relevant indicia of continuing reservation status at the time of the 1906 Oneida provision. Parcels within the Oneida Reservation that had been reserved for school purposes at the time of allotment remained in use as a school in 1906 and later.[19] ECF No. 93 at 6, Nation's Statement of Proposed Facts, ¶ 22. In addition, small parcels of land had been reserved for future allotments, and allotments continued to be made in 1906. *Id.* at 7, Nation's Statement of Proposed Facts, ¶ 23. The 1906 Oneida provision did not revoke these continuing

[18] This is not a fanciful observation. In fact, the Indian agent supervising the Oneida Reservation at the time made plain that he would exercise considerable discretion in determining whether to issue early fee patents on the Reservation, limiting such to Oneida allottees whom he deemed competent. Ex. 2 at 101-02, Jacquart Dec. (Hoxie Opening Report); Ex. 5, Jacquart Dec. at 37-38 (Edmunds Opening Report).

[19] The Department of the Interior continued to maintain the Oneida school on trust land on the Reservation until 1919. That year, the school was closed and agency responsibility for the Reservation (which had been exercised by the school superintendent) was transferred to the Keshena Agency. Nation's Statement of Proposed Facts, ¶ 35. That same year, the Annual Report for the Commissioner of Indian Affairs noted that the Oneida Reservation consisted of 65,466 acres, all allotted. Nation's Statement of Proposed Facts, ¶ 36.

uses of tribal trust land at Oneida, which indicates that Congress contemplated the continued existence of the Oneida Reservation. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. at 350 (land reserved for tribal uses indicated continuing existence of reservation); *Solem*, 465 U.S. at 474.[20]

The Village concedes that the statutory hallmarks of a congressional intent to diminish or disestablish a reservation are missing in the 1906 Oneida provision. Defendant's Memorandum at 24.[21] Instead, the Village insists that no "magic language" is required to alter reservation boundaries, citing four cases which found classic statutory hallmarks in the relevant acts. Defendant's Memorandum at 24-26. In *Hagen v. Utah*, the Court responded to a party's argument that disestablishment could be found only if both cession language and sum-certain payment terms were present. 510 U.S. at 411. The Court rejected this argument, indicating that such language was sufficient but not necessary, and found sufficient intent to disestablish from language restoring the ceded land to the public domain. *Id.* at 412. There is nothing in the Court's opinion indicating that disestablishment can be found untethered to any statutory language indicating such an intent. The *Gaffy* court, as discussed above, expressly relied upon classic language of cession to find diminishment. In *Osage Nation v. Irby*, 597 F.3d 1117 (10th Cir. 2010), the court relied upon the unique history of the tribes in Indian Territory to hold that there were no reservations in the state, based on a history of congressional statutes calculated to abolish those tribes altogether. *Id.* at 1124. And in *Stockbridge-Munsee*, the court found statutory

[20] For these and other reasons, it is emphatically not true that "the only difference at that time [1906] between the Oneida Indians and non-Indians was that the Oneida Indians could not sell their individual trust allotments." Defendant's Memorandum at 26-27. All individual Oneidas remained under BIA supervision regardless of whether they held trust patents, continued to receive annuity payments, remained eligible for the issuance of allotments on the Reservation, and all minor Oneidas were eligible to attend the Reservation school. Ex. 5, Jacquart Dec. at 33- 63 (Edmunds Opening Report).

[21] The Village's expert, Dr. Greenwald, conceded in her deposition that the 1906 Oneida provision contained no such language. (Second Jacquart Dec., Ex. 7, Greenwald Dep. at 65.)

text indicating an intent to disestablish in the treaty and acts of Congress leading up to and culminating in the 1906 Stockbridge sections, as well as in those sections themselves. 554 F.3d at 663.

Finally, and as a substitute for statutory language, the Village once again invokes the court's historical observation in *Gaffey* that Congress assumed in 1906 that Indian country followed Indian title and that reservations would eventually be terminated sometime after allotment. Defendant's Memorandum at 25-26. Once again, though, this historical observation is insufficient to support a finding of disestablishment: courts have not been prepared to extrapolate from this historical assumption that reservations were abolished. *Gaffey*, 188 F.3d 1010 at 1024 (citing *Solem*, 465 U.S. at 468-69).

4. Statements of federal officials contemporary with the 1906 Oneida provision indicate the continuing existence of the Oneida Reservation.

After examining the statutory language alleged to have altered reservation boundaries, courts look to events surrounding the passage of the act. *Parker*, 136 S.Ct. at 1079; *Solem*, 465 U.S. at 471 (events showing "widely-held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation" relevant). Such evidence must reflect a contemporary understanding of the act, not matters occurring subsequent to passage of the act, and it must be "unequivocal" to support a finding that Congress intended to diminish or disestablish a reservation. *Parker*, 136 S.Ct. at 1079; *Hagen*, 510 U.S. at 411.

Evidence contemporaneous with the 1906 Oneida provision confirms the continuing existence of the Oneida Reservation. The federal agent with jurisdiction over the Reservation that year reported on conditions at the "Oneida Reservation" in his annual report. Ex. 5, Jacquart Dec. at 31 (Edmunds Opening Report). That same year, he also reported to the Commissioner of Indian Affairs on the number of allottees "on the Oneida Reservation" who requested the

issuance of fee patents; there was no indication in this report that the issuance of those patents altered the boundaries of the Reservation, under the 1906 Oneida provision or otherwise. *Id.* at 32. And three years later, a special agent appointed to investigate the legality of the state law creating towns on the Oneida Reservation specifically indicated that there had been "no opening of surplus lands or obliteration of reservation lines..." ECF No. 93 at 8, Nation's Statement of Proposed Facts, ¶ 28.

The Village cites scattered indications in the legislative history of the 1906 Oneida provision that it was intended to facilitate the transfer of title out of Oneida hands and misconstrues these to indicate an intention to diminish the Reservation. Defendant's Memorandum at 27-28 and n. 14. Of course, this construction depends upon the false equivalence of title transfer and alteration of reservation boundaries argued by the Village. As courts have repeatedly indicated, no such equivalency exists. *Solem*, 465 U.S. at 470 (entire block retains reservation status, regardless of title changes in individual parcels, unless Congress alters reservation status); *Mattz v. Arnette*, 412 U.S. 481, 504 (1973) (change in title alone cannot be interpreted as termination because of 18 U.S.C. § 1151); *Seymour*, 368 U.S. at 357-58 (citing 18 U.S.C. § 1151); *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d at 1007 (18 U.S.C. § 1151 broke link between title and jurisdiction). For example, the Court has rejected floor statements describing an act as intended to "break up" a reservation as evidencing an intent to alter reservation boundaries. *Parker*, 136 S.Ct. at 1080. Further, as noted above, the Nation's experts also found that these transfers were done largely under authority of the Burke Act, not the 1906 Oneida provision, and there is no authority construing the Burke Act as having abolished reservations.

In the end, the Village fails to demonstrate that loss of Indian title to parcels within the

Oneida Reservation abolished its boundaries.[22] Indian title has continuously existed on the Reservation. Not all trust allotments on the Reservation either expired or were converted by the Secretary to fee patents. In 1917, the President issued an executive order extending the trust period on all remaining Oneida allotments for one year, except for twenty-three named Oneida allottees. ECF No. 93 at 9, Nation's Statement of Proposed Facts, ¶ 30. In 1918, the President issued a second executive order extending the trust period for thirty-five named Oneida allottees "on the Oneida Reservation" for nine years. *Id.* at 9-10, ¶ 34. In 1927, the President issued a third executive order extending the trust period for twenty-one identified "allotments made to Indians of the Oneida Reservation in Wisconsin" for ten years. *Id.* at 10-11, ¶ 38. All remaining Oneida allotments were extended indefinitely in 1934 when Congress enacted the IRA, the Nation voted to accept the IRA, and the Secretary of the Interior approved an IRA constitution for the Nation premised upon the existence of the Oneida Reservation. Nation's Memorandum at 23-33. Even under the Village's flawed disestablishment theory, then, disestablishment of the Oneida Reservation never occurred.

III. The subsequent history of the Oneida Reservation is not material and, in any event, weighs far more heavily in favor of continuing Reservation status.

The third part of the *Solem/Parker* framework for construing an act alleged to have altered reservation boundaries is subsequent demographic history and treatment of the area by the United States. *Parker*, 136 S.Ct. at 1081. But this inquiry is only relevant as an aid to reinforce construction of a statute; it is not necessary where, as here, there is no statute that

[22] The Village never commits to diminishment or disestablishment of the Reservation. But the Village fails to make its case for diminishment for the further reason that it does not establish that the parcels on which the Nation conducted the Big Apple Fest were lost to the Nation as a result of the 1906 Oneida provision. In the absence of such proof, the diminishment theory by gradual loss of title under that provision does not establish that the Big Apple Fest did not take place on the Reservation, even as theoretically diminished.

evidenced a congressional intent to alter the reservation boundaries. Even were that evidence material here, it overwhelmingly supports the continuing existence of the Reservation after allotment.

A. In this case, the history of subsequent demographics and United States' treatment of the Reservation is not material.

The Supreme Court has been clear that the subsequent history of a reservation claimed to have been diminished or disestablished is the least probative form of evidence. *Parker*, 136 S.Ct. at 1082; *South Dakota v. Yankton Sioux Tribe*, 522 U.S. at 356. Further, such evidence is relevant only to reinforce a finding of diminishment based upon statutory language. The Supreme Court's consideration of this form of evidence in *Parker* is particularly telling of the limited role of such evidence in the search for congressional intent regarding a reservation. There, the Court considered a surplus land act applicable to the Omaha Reservation that lacked any of the textual indications of an intent to diminish the reservation. *Parker*, 136 S.Ct. at 1079. Further, there was no unequivocal indication of such an intent in the legislative history of the act. *Id.* at 1080. As a result, any basis for diminishment would have come, if at all, only from this third form of evidence.

The State of Nebraska acknowledged the absence of statutory text indicating an intent to diminish the reservation. It relied instead upon the "doctrine of de facto diminishment," arising it argued from the third factor considered in *Solem* and the expectation of Congress at the time that reservations would go away (the same historical expectation invoked by the Village time and again). (Second Jacquart Dec., Ex. 8, Brief for Petitioners, *Nebraska v. Parker*, 136 S. Ct. 1072 (Nov. 16, 2015) (No. 14-1406) at 21-24.) The United States intervened in the action as a defendant and disputed the state's theory of de facto

diminishment. The United States asserted the governing principle as, "[a] reservation's borders do not depend on the title status of individual plots within it." (*Id.*, Ex. 9, Brief for the United States, *Nebraska v. Parker*, 136 S. Ct. 1072 (Dec. 16, 2015) (No. 14-1406) at 28.) The United States concluded that de facto diminishment does not exist as an independent doctrinal basis to establish diminishment of a reservation:

> This Court held more than a century ago that only Congress can diminish a reservation. (Citations omitted). Petitioner's plea that the Omaha Reservation has undergone "de facto" diminishment provides no basis for this Court to find diminishment de jure.

Id. at 54. The Supreme Court agreed. It held that evidence of subsequent demographic history and the United States' treatment "cannot overcome the statutory text, which is devoid of any language indicative of Congress' intent to diminish..." and that the "Court has never relied solely on this third consideration to find diminishment." *Parker*, 136 S.Ct. at 1081.

In summary judgment proceedings, facts must be outcome-determinative under the governing law to be material. *Contreras v. City of Chicago*, 119 F.3d 1286, 1291 (7th Cir. 1997); *Oneida Tribe of Indians of Wisconsin v. Vill. of Hobart*, 891 F. Supp.2d 1058, 1063 (E.D. Wis. 2012). Under *Parker*, the history of subsequent demographics and United States' treatment of the area, whatever it might be, cannot overcome the absence of statutory text indicating an intent to diminish a reservation. The Nation established above that there is no textual indication of a congressional intent to diminish the Oneida Reservation in the 1906 Oneida provision or unequivocal contemporaneous evidence to that effect. As a result, the subsequent history of the Oneida Reservation cannot affect the outcome of this case and, therefore, is not material. This Court need go no further to conclude that the Oneida Reservation remains intact.

B. The subsequent history of the Oneida Reservation overwhelmingly demonstrates the continued existence of the Reservation.

The record of subsequent history regarding the Oneida Reservation is a very large one. The Nation has been under the jurisdiction of an agency of the Bureau of Indians continuously before and after the 1906 Oneida provision. At the time of the act, the Nation was under the jurisdiction of the Oneida Boarding School superintendent. Ex. 5, Jacquart Dec. at 28 (Edmunds' opening report). In 1919, the Nation was transferred to the Keshena Indian Agency until 1932 when the Nation was transferred to the Tomah Agency. *Id.* at 56 and 136. In 1955, federal jurisdiction over the Nation was transferred to the Great Lakes Agency, where it remains today. (Second Jacquart Dec., Ex. 2, Douglas M. Kiel, Ph.D., *A History of the Oneida Reservation Boundaries, 1934-1984* (Dec. 15, 2017) at 24.) A large number of historical documents was generated by the continuous federal supervision over the Nation. Other records since 1906 include federal correspondence from the Bureau of Indian Affairs and other federal agencies, correspondence of local non-Indian leaders, local newspaper accounts, and correspondence from Oneida tribal members. Ex. 5, Jacquart Dec. at 92-103 (Edmunds opening report). Dr. Edmunds examined all these sources between 1919 and 1935, which consisted of hundreds of documents.[23] He describes this record as follows:

> Federal reports, correspondence by BIA officials, and excerpts from local newspapers are almost unanimous in describing the reservation as in existence through the closing of the boarding school in 1919. Census reports and statistical tables compiled by the BIA in the fifteen years following the closing of the boarding school and the transfer of federal jurisdiction over the Oneida

[23] This is consistent with the Village's view of the appropriate starting point as well. The Village begins its exposition of the subsequent history of the Reservation with demographic data from 1927 and statements of Bureau of Indian Affairs superintendents from 1920. Defendant's Memorandum at 30 and 33. The Village's expert Dr. Greenwald similarly began her review of subsequent history with 1920. (Second Jacquart Dec., Ex. 1, 11/15/17 Greenwald Report at 28.) Thus, there appears to be a consensus that the Reservation was uniformly deemed extant up to 1920. (*See also id.*, Ex. 7, Greenwald Dep. at 85.)

> Reservation to Keshena also include official recognition of the continued presence of the Oneida Reservation. After 1920 Indian agents at Keshena and some officials in Washington sometimes discounted the reservation's continued existence, but these bureaucrats regularly contradicted themselves (often in the same piece of correspondence) and repeatedly referred to the reservation as being extant. Both local newspapers and non-Indian citizens of the Green Bay region commonly referred to the reservation as still being in existence. In examining hundreds of references to the Oneida Reservation in the years following 1919, the author discovered that well over eighty per cent (a conservative estimate) of these citations attested to the continued presence of the Oneida Reservation. Less than twenty per cent of the documents referred to the reservation as being "former" or no longer in existence.

Ex. 5, Jacquart Dec. at 137 (Edmunds opening report). Federal activity in supervising its relationship with the Nation was undeniably reduced during this period, but this paralleled the experience of all tribes during the height of the allotment policy. Ex. 2, Jacquart Dec. at 82-89 (Hoxie Opening Report). The pre-eminent historian Paul Prucha summarized the period thusly: "In the first third of the twentieth century the Indians' estate was dissipated." *Id.* at 83. Nonetheless, federal supervision continued and, as Dr. Edmunds observes, overwhelmingly indicated the continuing existence of the Reservation.

The Village culled this extensive record for all documents that referred to the "former reservation" or used similar terms to describe the Oneida Reservation. The Village discusses roughly a dozen such documents. Defendant's Memorandum at 34-40. Clearly, even if accepted on their face, these documents at most indicate that the record is not uniform, that it is mixed, albeit as a group supportive of the continuing existence of the Reservation. Such a "mixed record" on this third factor under *Solem/Parker* is not entitled to weight, even where there is statutory text indicating an intent to diminish the Reservation. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. at 356.[24] This is so because, under such circumstances, "courts are bound

[24] Even the Village's expert admitted that there is a mixed record on the subsequent treatment of the

by our traditional solicitude for the Indian tribes to rule that diminishment did not take place." *Solem*, 465 U.S. at 472.

Further, the documents relied upon by the Village are either not probative of diminishment or do not reflect the consensus view of the United States in that particular year. These documents are examined below.

1. Demographic data

The Supreme Court described demographic data as the least compelling evidence of diminishment. *Parker*, 136 S.Ct. at 1082. The Court explained that every opening of a reservation "necessarily resulted in a surge of non-Indian settlement and degraded the 'Indian character' of the reservation, yet we have repeatedly stated that not every surplus land Act diminished the affected reservation." *Id*. (citing *South Dakota v. Yankton Sioux Tribe*, 522 U.S. at 356.) If anything, the influx of white settlers onto the Oneida Reservation was even less reflective of an intent to diminish the Reservation, given the absence of a surplus land act.

Further, there is nothing in any of the data indicating that this dynamic resulted from the 1906 Oneida provision, as opposed to the usual results of allotment and opening a reservation described by the Court in *Parker*. According to the data cited by the Village, this dynamic took hold in 1927, more than twenty years after the 1906 Oneida provision was enacted. This contrasts sharply with the history of the Osage Reservation, considered in *Osage Nation v. Irby* and relied upon by the Village. Defendant's Memorandum at 30-31. There was a profound and immediate shift in population at Osage that was obviously attributable to the opening of that reservation: within four years after the Osage act, the non-Indian population grew thirty percent,

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Oneida Reservation. (Second Jacquart Dec., Ex. 7, Greenwald Dep. at 123-24.) It would seem that nothing more needs to be considered, given the Supreme Court's refusal to give credence to a mixed record on subsequent history.

reducing the Indians to six percent of the population. *Osage Nation*, 597 F.3d at 1127; see also *South Dakota v. Yankton Sioux Tribe*, 522 U.S. at 356 (where tribal population "promptly and drastically declined" after the 1894 cession). By comparison, the data at Oneida showed only a small influx of non-Indian settlers in the years immediately following enactment of the 1906 Oneida provision.[25]

2. Change in land tenure

There is no dispute that Oneidas lost title to the majority of their allotments over time. But the Village fails to explain how this was attributable to the 1906 Oneida provision and should be taken as evidence of an intent in that act to diminish the Reservation. Defendant's Memorandum at 30-31. To the contrary, and as discussed above, this occurred primarily as a result of allotment and the Burke Act, not the 1906 Oneida provision. Further, courts have cautioned time and again that change in title alone cannot diminish a reservation. *Solem*, 465 U.S. at 470; *Mattz*, 412 U.S. at 504; *Yankton Sioux Tribe v. Gaffey*, 188 F.3d at 1018; *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d at 1005. No intent to diminish the Oneida Reservation can be found is this unfortunate reality of allotment.

3. United States' treatment before 1934

For this time period, the Village makes much of events authorized by the GAA itself. These include the taxability of fee patents held by allottees, the application of state civil and criminal laws to allottees, and the grant of citizenship to allottees. Defendant's Memorandum at 31-33; *see also* Defendant's Statement of Proposed Facts, ¶¶ 44, 45, 46, 49, 50, 54, 56, 57, 59,

[25] The 1910 Census Sheets for the Town of Hobart showed 710 Oneidas and 77 non-Indians living the Town of Hobart. Even by 1930, there was not the massive influx of white settlers suggested by the Village; the 1930 Census Sheets for the Town of Hobart showed 422 Oneidas and 663 non-Indians living in the Town of Hobart at the time. Nation's Response to Defendant's Statement of Proposed Facts, ¶ 39.

61, 67, 71 and 80.[26] The GAA and the Burke Act mandated these consequences, not the 1906 Oneida provision, *see* 24 Stat. 388, §§ 5 and 6, 34 Stat. 182, and the GAA did not abolish reservations. *Seymour*, 368 U.S. at 355-56. As a result, none of these consequences can be taken as either evidence of diminishment or evidence of Congress' intent in the 1906 Oneida provision.

The first actual document cited by the Village that contains arguable evidence of diminishment is dated 1920.[27] As indicated above, these should be construed in the context of the broader administrative record, of which they constitute a small minority of available records. The specific import and particular context of these documents are discussed below.

a. "former reservation"

The Village highlights five documents that refer to the Reservation as the former reservation. Defendant's Memorandum at 33-34. These are letters or reports dated 1920, 1922, 1925, 1927, and 1930, all written by three superintendents of the Keshena Agency (one agent penned three of the five).[28] But these three agents' views did not represent a consensus among

[26] As noted in the Nation's response to Defendant's Statement of Proposed Facts, the latter contains three to four times the permissible number of individual facts, many regarding events inevitably occurring as a result of allotment, such as citizenship, issuance of fee patents to allottees, and loss of Oneida title thereafter. The page limitation for this brief does not permit the Nation to discuss each of these separately, but the entire group can be dismissed as immaterial since allotment and its inevitable consequences are insufficient as a matter of law to disestablish or diminish the Reservation. Nation's Memorandum at 37-39.

[27] These dates are important. The Village claims that the 1906 Oneida provision is the act that diminished the Reservation. Yet, even the Village posits that this diminishment did not actually occur until around 1920. Dr. Greenwald is similarly uncertain. Her report offers no date but suggests that, by 1919, diminishment had occurred. (Second Jacquart Dec., Ex. 1, 11/15/17 Greenwald Report at 28.) At her deposition, Dr. Greenwald again declined to give an actual date as to when diminishment occurred but testified that the "process" of diminishment was completed in the 1920's. (*Id.*, Ex. 7, Greenwald Dep. 85.) Thus, the Village theory seems to be that diminishment did not actually take place in 1906 but became apparent only in retrospect when a sufficient percentage of title to land on the Reservation had been transferred to non-Indians, without ever specifying what that tipping point might be (necessarily less than 100% since there has always been trust land on the Oneida Reservation.) The uncertainty of this diminishment theory, based on a statute that lacks any evident intent to diminish, falls far below the clarity and unequivocal nature required by the Supreme Court under the *Solem/Parker* standard.

[28] As noted above, jurisdiction over the Oneida Reservation was transferred to the Keshena agent when

federal officials during this decade on the status of the Oneida Reservation. In 1920, the Commissioner of Indian Affairs included a statistical table in his annual report showing general data on each reservation. This table identified the Oneida Reservation, created under the Treaty of 1838, as consisting of 65,428.13 allotted acres, 84.08 unallotted acres, and 151 acres of cancelled allotments. ECF No. 93 at 10, Nation's Statement of Proposed Facts, ¶ 37. In 1923 and 1925, the chief clerk of the Bureau of Indian Affairs wrote that cancelled allotments were restored as tribal land on "the Oneida Reservation" and such land could be allotted to other members "on the Reservation." (Jacquart Dec., Ex. 5, R. David Edmunds, Ph.D., *The Oneida Indian Reservation in Wisconsin - Its Land, Its People, and its Governance, 1838-1938* (Nov. 15, 2017) at 65 and 66 (citing Second Jacquart Dec., Ex. 68 at ON-EDM01124 (n.138) and *id.*, Ex. 69 at ON-EDM01126 (n.139)).) Most importantly, the 1927 document cited by the Village included the President's Executive Order of 1927, which extended the trust period for twenty-one identified "allotments made to Indians of the Oneida Reservation in Wisconsin..." Nation's Statement of Proposed Facts, ¶ 38; *see also* Nation's Response to Defendant's Statement of Proposed Facts, ¶¶ 55, 58, 59, 60, 61, 62, 63, 65, 69, 70 and 71. The President's view surely outweighs that of the Keshena agent.[29]

b. "broken down lines," "old Oneida Reservation"

The Village relies upon two ambiguous references by Keshena agents in 1922 and 1930 to the "broken down lines" of the Oneida Reservation and the "old Oneida Reservation."

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the Oneida Boarding School was closed in 1919. The Keshena agent was located about fifty miles from the Oneida Reservation, was primarily responsible for the Menominee Reservation, and did not welcome the additional responsibilities that came with the Oneida Reservation. (First Jacquart Dec., Ex. 5, R. David Edmunds, Ph.D., *The Oneida Indian Reservation in Wisconsin – Its Land, Its People, and its Governance, 1838-1938* (Nov. 15, 2017) at 62.)

[29] It should also be noted that the one Keshena agent responsible for at least three of these references to the "former" reservation also at times expressed a contrary review, i.e., that the Reservation continued to exist. Nation's Response to Defendant's Statement of Proposed Facts, ¶ 57.

Defendant's Memorandum at 34. The 1922 document is a letter written by the same Keshena agent who wrote three of the five documents discussed above so it adds little to the record regarding this agent's view. The 1930 reference to the "old Oneida Reservation" by a later agent is similar to a document considered by the Supreme Court in *South Dakota v. Yankton Sioux Tribe.* That document used the past tense to refer to the reservation; the adjective "old" used in the 1930 Oneida document also connoted something from the past. The Court easily dismissed the past tense reference as "not enough" to evidence an unequivocal intent to diminish the reservation. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. at 355-56. These ambiguous references to Oneida are similarly "not enough." *See also* Nation's Response to Defendant's Statement of Proposed Facts, ¶¶ 61 and 74.

c. The three Rhoads letters

Commissioner of Indian Affairs Rhoads wrote three letters, two in 1931 and the third in 1932, that merely suggested the Oneida Reservation no longer existed. The first indicated that it was not a "present reservation," the second said the Reservation had been "broken up," and the third said "there is no longer any reservation in the usual sense of the term..." Defendant's Memorandum at 36-37. Again, these documents are ambiguous; they contained no reference to termination of the Reservation, alteration of Reservation boundaries, or the 1906 Oneida provision. As such, they are similar to statements referring to a reservation as "thus diminished" or "reduced reservation," may have referred to just the loss of title, not the loss of reservation status, and are insufficient to meet the *Solem/Parker* standard. *Parker* at 1081 (references to reduced reservation insufficient); *Solem*, 136 S.Ct. at 475 (references to reservation thus diminished insufficient). In those same years, the annual report of the Commissioner of Indian Affairs included a census of Oneidas of the Oneida Reservation, under the jurisdiction of the

Keshena Agency. Nation's Response to Defendant's Statement of Proposed Facts, ¶ 75; (Second Jacquart Dec., Ex. 39, 1932 ARCIA at ON-EDM01244). And just one year before the 1931 letter, the Keshena agent wrote to the Commissioner regarding an application for an "allotment of land within the Oneida Reservation, Wisconsin." (Second Jacquart Dec., Ex. 70, Letter from Kenesha Indian Agency Superintendent to Commissioner of Indian Affairs (Feb. 26, 1930) at ON-EDM01309.) Once again, the three Rhoads letters do not represent a consensus view.[30]

In sum, the Village's pre-1934 documents that indicated a loss of reservation status are few in number, oftentimes ambiguous, and obviously outliers in a large administrative record. These cannot overcome the absence of statutory text indicating a congressional intent to diminish the Reservation.

4. Post 1934 documents[31]

The Village indicates its awareness of the significance of this watershed year by marking it as distinct period in Oneida history. Defendant's Memorandum at 38. But the Village fails to address the import of events that occurred on the Reservation after the enactment of the Indian Reorganization Act ("IRA") in this watershed year. The Nation has already demonstrated the significance of these events. The Department conducted an accept-or-reject election under the IRA on the Oneida Reservation in 1934, based on its determination that the Nation was already

[30] Neither was Commissioner Rhoads consistent in the implication that the Reservation boundaries had been altered. In at least one other letter in 1931, Rhoads wrote about the "Oneida Reservation" in a manner that indicated its continuing existence. Nation's Response to Defendant's Statement of Proposed Facts, ¶ 75.

[31] At an earlier stage in this litigation, the Village took the position that "the time period 1946-1984 is simply not relevant to this case." ECF No. 73 at 3. The Village's expert Dr. Greenwald also opined that the period after the IRA is not relevant. (Second Jacquart Dec., Ex. 3, Emily Greenwald, Ph.D., *Rebuttal Report* (Jan. 15, 2018) at 12 ("If the reservation was diminished or disestablished, it occurred in the 1910s and 1920s...").) The Village has obviously reconsidered its view and that of its expert, as well. Because Dr. Greenwald did not address the period, the Village here relies upon counsel's assessment of historical evidence from this period.

under federal jurisdiction at that time, and the Nation voted to accept the IRA. Nation's Memorandum at 24-27; *Vill. of Hobart v. Midwest Reg'l Dir.*, 57 IBIA 4 (2013). The Department also approved an IRA constitution for the Nation in 1936, based upon its determination that the Nation was in occupation of the Reservation. Nation's Memorandum at 28-32; *see Stockbridge-Munsee Community*, 366 F. Supp. 2d at 732-33, *aff'd* 544 F.3d 657 (7th Cir. 2009). These represented final agency actions by the Department on the Nation's status as under federal jurisdiction and on the existence of the Oneida Reservation, actions that were taken more than eighty years ago and upon which the course of relations between the Nation and the United States has ever since been conducted. *See* Second Jacquart Dec., Ex. 2 (Report of Douglas M. Kiel, Ph.D. "Kiel Report").

The Village did not challenge those federal actions at that time and should be barred from doing so now. As this Court has already determined, there is a six-year statute of limitations that applies to challenges to federal actions. ECF No. 46 at 6-7 (Village challenge to Nation's status as federally recognized time-barred). As a result, the federal determinations made in 1934 and 1936 are now binding upon the Village, rendering any discussion of post-1934 events unnecessary. Even were consideration of the Reservation's status after 1936 not time-barred, the Village presents a badly distorted view of the record for the period.

a. John Collier's view

The Village cites two Collier letters, and a third by the Secretary of the Interior, said to reflect Collier's view, suggesting that Collier believed the Reservation no longer existed. Defendant's Memorandum at 38-39. These letters reflect the much-reduced level of federal supervisory activity at Oneida (as elsewhere in Indian country at the time), but these letters did not say that the Reservation had been abolished or diminished. *See* Second Jacquart Dec. (Kiel

Report at 5). Another, the 1937 "Economic Survey of the Oneida Indian Reservation of Wisconsin," in its title and throughout the narrative, acknowledges the existence of the Reservation.[32] The Village ignores statements by others at the time indicating that the Reservation continued to exist. Assistant Commissioner of Indian Affairs Zimmerman, for example, wrote the Secretary of the Interior in 1937, recommending the approval of a corporate charter under the IRA for the "Oneida Tribe of Indians of the Oneida Reservation in Wisconsin..." (Second Jacquart Dec., Ex. 71, Letter from Assistant Commissioner William Zimmerman, Jr. to Secretary of the Interior (Apr. 7, 1937) at ON00009336.) Only one of the documents cited by the Village in this discussion actually referred to the former reservation, and this was done in passing without analysis. ECF No. 91 at 30, Defendant's Statement of Proposed Facts, ¶ 93.

Most importantly, the Village ignores Collier's definitive statement on the status of the Oneida Reservation at the time. This appeared in an April 23, 1936, letter recommending approval of an IRA constitution for the Nation. ECF No. 93 at 13, Nation's Statement of Proposed Facts, ¶ 45. In that letter, Collier noted the requirement of the Solicitor's Office and the Department's internal memorandum which required that a tribe be in occupation of a reservation

[32] Indeed, it is puzzling that the Village would cite this document. Not only does the title of the document acknowledge the Reservation, the text of the document repeatedly references the Reservation in a manner clearly indicating the full extent of the Reservation, not just the remaining allotments: the location of the "Oneida Reservation" at 1; population of the tribe "on this Reservation" at 11; the government employees who work "on this reservation" at 13; social organizations "on this reservation" at 15; Indian population "of the Oneida Reservation" at 18; houses "on the reservation" at 32; and social problems "on the Oneida Reservation" at 37. The only use of "original" in reference to the Reservation was the following: "The original area of the Reservation was composed of (1) 65,428.13l acres, but through the issuance of fee patents, certificates of competency, and Executive Orders, it was soon sold and as a result, today the Oneida Indians are practically landless." This use of "original" was clearly intended to refer to land title, not Reservation boundaries. Thus, this document directly contradicts the Village's claim of diminishment. Defendant's Statement of Proposed Facts, ¶ 102.

in order to organize under a IRA constitution; further, he concluded that the Nation was in occupation of a reservation and recommended that an election be conducted on the Nation's proposed IRA constitution on that basis. Nation's Memorandum at 28-32.

b. maps and reports

The Supreme Court views maps as an unreliable form of evidence, particularly where there are inconsistencies among various maps. *Parker* at 1082; *see also South Dakota v. Yankton Sioux Tribe*, 522 U.S. at 356 (mixed record reveals no consistent approach); *Solem*, 465 U.S. at 478-79 (administrative record rife with inconsistencies). That is the case with maps of the Oneida Reservation. For example, the Village identified one 1935 map of the Bureau of Indian Affairs that did not show the full extent of the Oneida Reservation; the Nation has identified two Bureau of Indian Affairs maps that show the full extent of the Reservation, one in 1932 and a second in 1944. (*Compare* Defendant's Statement of Proposed Facts, ¶ 110 and ON00011695[33] (attached as Ex. 62 to Second Jacquart Dec.) *with* Second Jacquart Dec., Ex. 42, Survey of Conditions of the Indians of the United States (1932) at ON-EDM01525.) All other federal statements cited by the Village from the 1960s and 1970s say nothing at all about diminishment of the Oneida Reservation. Instead, they reference only the acreage of land owned by the Nation or held in trust for it, clearly indicating that those are again statements of title issues only, not Reservation diminishment. Defendant's Memorandum at 40-41.

Further, as with other forms of evidence, the Village ignores contrary evidence during this period. For example, in 1941, the Bureau of Indian Affairs was asked about eligibility of

[33] The Village cites four other maps - one by the State of Wisconsin, a second by a private company, and two others from federal agencies other than the Bureau of Indian Affairs. Defendant's Memorandum at 40. But the Village does not explain how these maps are an authoritative statement of a federal view regarding the boundaries of the Oneida Reservation.

Oneida tribal members for hospitalization. The Bureau answered that all Indians residing on an Indian reservation were eligible and "that at Oneida the boundary lines of the original reservation, including the townships of Hobart and Oneida, were considered a reservation in determining eligibility..." (Second Jacquart Dec., Ex. 72, Tomah Indian Agency, Minutes of Staff Meeting (Dec. 11, 1941) at ON00009810**;** *see also id.*, Ex. 73, George Hendrix and Peter Walz, Report of Field Trip by George Hendrix and Peter Walz to the Oneida Reservation, October 1956, ON00011748-56 (indicating all Oneida children resident on the Reservation, including those not on trust land).) Clearly, the most that can be said is that the administrative record from the period is mixed.

c. view of the State of Wisconsin

Once again, the Village makes the unremarkable point that Indians who held fee patents were subject to the jurisdiction of the state. Defendant's Memorandum at 41. As discussed above, this was a function of the GAA itself and did not indicate diminishment of the Reservation since the GAA has never been construed to alter reservation boundaries. *Solem*, 465 U.S. at 470; *Mattz*, 412 U.S. at 504; *Seymour*, 368 U.S. at 357-58. And once again, the Village ignores actual evidence of the state's understanding regarding the Oneida Reservation. In 1981, the Wisconsin Department of Natural Resources sought guidance from the Wisconsin Attorney General on state jurisdiction to regulate Oneida on-reservation hunting and fishing. In response, the Attorney General observed that "Congress had not extinguished, diminished or terminated the [Oneida] reservation" and, as a result, the state lacked authority to regulate tribal members' hunting and fishing on the Reservation, except on fee lands where the landowner had withheld consent. Nation's Statement of Proposed Facts, ¶ 51. Again in 1984, the Wisconsin Attorney General's office did a detailed examination of the issue and concluded that "the reservation's

original 1838 boundaries remain intact." (Second Jacquart Dec., Ex. 38, Memorandum by Wisconsin Attorney General Bronson C. La Follette to Attorney Naomi Woloshin (May 31, 1984) at ON000333214.)

d. views of the Nation and other historians

The Village over reads a few ambiguous documents and ignores other to piece together an argument that the Nation and historians other than the parties' experts agree that the Reservation no longer exists. And once again, the linchpin to the argument is the false equivalence that the Village insists upon between Indian title to land within the Reservation boundaries and the continued vitality of the Reservation boundaries themselves. Defendant's Memorandum at 42-43. Thus, the Village purports to find evidence of diminishment from Oneida leadership statements acknowledging that "allotment policies had reduced the size of the Oneida Reservation." *Id.* at 42. It does the same with scholars' statements about the reservation having ceased to exist because of the loss of title, references to the few hundred acres left in the hands of Indian owners, and the reduction in the reservation. *Id.* These ambiguous statements appeared to lament the loss in title and did not identify any act of Congress, the 1906 Oneida provision or otherwise, that diminished the Reservation. As the Supreme Court has indicated, such statements are simply insufficient to accomplish a diminishment of Reservation boundaries. *Parker*, 136 S.Ct. at 1081; *Solem*, 465 U.S. at 470.

Most importantly, the Village ignores the documentary history of the Nation's insistence upon the existence of and its governance of the Oneida Reservation. In 1935, the Nation expressed it complete support for the IRA in a resolution originating from "the Oneida Tribe residing on the Oneida Reservation." (Second Jacquart Dec., Ex. 74, Oneida Indians Incorporated, Resolution of March 18, 1935, ON00026234.) In its IRA Constitution approved by

the Secretary in 1936, the Nation asserted its jurisdictional authority "to the territory within the present confines of the Oneida Reservation..." (*Id.*, Ex. 75, CONSTITUTION AND BY-LAWS FOR THE ONEIDA TRIBE OF INDIANS OF WISCONSIN (Approved Dec. 21, 1936) at ON- EDM01717.)[34] In 1940, the Nation authorized the issuance of a right-of-way on land "within the Oneida Indian Reservation." (*Id.*, Ex. 76, Oneida Tribe of Indians of Wisconsin, Executive Committee, Resolution of November 23, 1940 at ON00026238.) In 1941, the Nation's ordinance governing enrollment required residence upon the "Oneida Reservation." (*Id.*, Ex. 77, Oneida Tribe of Indians of Wisconsin, General Tribal Council, Ordinance No. IV - Membership (Feb. 6, 1942) at ON00026247.) In 1958, the Nation took steps to develop "industry on the reservation." (*See, e.g.*, *id.*, Ex. 78, Oneida Tribe of Indians of Wisconsin, Minutes of meeting held by Tribal Council (Executive Board) (May 21, 1958), ON00025358; *id.*, Ex. 79, Oneida Tribe of Indians of Wisconsin, Minutes of meeting held by Executive Council (Jun. 23, 1958), ON00025359; *id.*, Ex. 80, Oneida Indians Inc., Minutes of meeting held by Executive Committee (May 13, 1959), ON00025360.) By the 1980s, the Nation's regulation and control of the "Oneida Indian Reservation" had become routine and indisputable. (*See, e.g.*, *id.*, Ex. 81, Oneida Tribe of Indians of Wisconsin, Resolution # 3-22-88-B To Regulate the Conduct and Operation of all Lottery Games on the Oneida Indian Reservation (March 22, 1988) at ON00026669; *id.*, Ex. 82, Oneida Tribe of Indians of Wisconsin, Resolution # 6-10-88-C (Jun. 10, 1988) at ON00026674; *id.*, Ex. 83, Oneida Tribe of Indians of Wisconsin, Resolution # 04-21-99A, HUD Rural Housing and Economic Development Resolution (Apr. 21, 1999), ON00020072; *id.*, Ex. 84, Oneida Tribe of Indians of Wisconsin, Business Committee, Resolution 5-31-00-B, Authorization to Enter into

[34] As the Nation has already established, the present confines of the Reservation referred to the full extent of the boundaries of the Reservation as established in 1838. Nation's Memorandum at 28-32.

Indian Health Service Agreements for Sanitation Facilities (May 31, 2000) at ON00020111; *id.*, Ex. 85, Oneida Tribe of Indians of Wisconsin, BC Resolution 10-12-11-B, Rescinding and Replacing B Resolution #2-20-08-C Regarding Government-to-Government Relations with the Village of Hobart (Oct. 12, 2011) at ON00022793.) The Nation's regulatory control over the Reservation includes all facets of the organization and conduct of the Big Apple Fest. *See* discussion below.

This summary review of the administrative record confirms Dr. Edmunds' observation quoted above that the entire record reflects a dramatic disproportion of documents that support the continuing existence of the Oneida Reservation. Out of a record of thousands of documents, the Village identifies a few, scattered and mostly passing references to the former reservation and additional ambiguous references to the original reservation, acreage figures for land held in trust, and the like, without any direct reference to abolition or alteration of Reservation boundaries by Congress. *None* of these documents makes any reference at all to the 1906 Oneida provision. As a result, there is nothing in this record of subsequent treatment of the Reservation that can overcome the absence of statutory text indicating an intent by Congress to abolish or alter the Oneida Reservation. *Parker*, 136 S.Ct. at 1082. The Oneida Reservation remains intact and the Village lacks authority to regulate the conduct of the Nation therein through its Ordinance.

IV. The Village fails to carry its burden of proving exceptional circumstances to justify its attempt to regulate the Nation in Indian Country.

When the Nation sought an order clarifying the burden of proof on issues in this matter, it proposed among other things that the Village carries the burden of proof on any alleged "exceptional circumstances" in support of its claimed authority to regulate the Nation in Indian

country.[35] ECF No. 58. Eventually, the Village responded to the Nation's motion,[36] admitting that "it is likely the Village's burden to prove...that exceptional circumstances exist that enables [sic] the Village to assert jurisdictional authority over the activities of tribal members..." ECF No. 62, at 9. In its ruling on the Nation's motion, the Court determined that the Village does, indeed, carry the burden of proving such exceptional circumstances. ECF No. 66, at 4. Further, the Court determined that the exceptional circumstances inquiry is governed by *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), and not *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992), or *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005). *Id.* at 5.

Now, the Village seeks reconsideration of the Court's earlier order, arguing that the exceptional circumstances inquiry is governed by *City of Sherrill* and this Court's decision in *Oneida Tribe of Indians of Wisconsin v. Village of Hobart (Oneida I)*, 542 F. Supp. 2d 908. Defendant's Memorandum at 44-49. The Village does so without acknowledging the law of the case doctrine which generally precludes reconsideration of previous orders; it also grossly misrepresents the Ordinance at issue here. For these reasons, the Village's request that the Court revisit this issue should be denied. Further, the Village does not identify any exceptional circumstances that justify its regulation of the Nation in Indian country.

A. The Village fails to establish a basis for reconsideration of the Court's prior ruling under the law of the case doctrine.

[35] The Village correctly observes that the Nation defines Indian country by reference to 18 U.S.C. § 1151. This Court adopted this definition of Indian country as well. ECF No. 66, at ¶3. In a footnote, the Village asserts that it remains the Village's "position" that this statute is unconstitutional, but the Village makes no legal argument in support of this "position." Defendant's Memorandum, n. 18. As a result, the Nation makes no response herein but reserves the right to do so in the event the Village raises the issue in its opposition to the Nation's summary judgment motion.

[36] Initially, the Village declined to respond to the Nation's motion and only filed a response when ordered by the Court to do so. ECF No. 61.

The law of the case doctrine establishes a presumption that a court will not reopen matters already decided in earlier stages of litigation. *Chicago Joe's Tea Room, LLC v. Village of Broadview*, No. 16-1989 (7th Cir., June 29, 2018), at 6. The doctrine vests discretion in the court to do so, but courts generally do not unless the earlier decision was clearly erroneous or would work a manifest injustice. *Agostino v. Felton*, 521 U.S. 203, 236 (1997). The Seventh Circuit describes the threshold question as whether "compelling reason" exists to reconsider a previous ruling. *Santamarina v. Sears, Roebuck & Co.*, 466 F.3d 570, 572 (7th Cir. 2006); *Newsom v. Lopez*, No. 16-C-1084 (E.D. Wis., Feb. 26, 2018) (Griesbach, J.), citing *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988) (explaining that "[a] court has the power to revisit prior decisions of its own...although as a rule courts should be loathe to do so in the absence of extraordinary circumstances...").

While the Village seeks reconsideration of the Court's prior ruling, if offers no rationale under the law of the case doctrine as to why the Court should do so. It argues no extraordinary circumstance, no manifest injustice, or any change or clarification of the law that makes the court's earlier ruling clearly erroneous. *Santamarina*, 466 F.3d at 572. The Village did make an earlier motion for clarification of the Court's order on the burden of proof, which the Court denied. ECF No. 68 (the Village is free to raise the issue on summary judgment, in the event it believes the Court erred on the governing law in its order). But this does not relieve the Village of the obligation to at least address the law of the case doctrine, which counsels against reconsideration. For this reason, the Village's request for reconsideration is insufficient on its face.

Further, the Village's legal analysis on the governing standard is simply wrong as a matter of law. In this case, the Village attempts to regulate the Nation's on-reservation activity.

See discussion below. As such, it is governed by the rule in *Cabazon* and its progeny: state and local governments lack authority to regulate tribes in Indian country unless they can prove the existence of exceptional circumstances. *Cabazon*, 480 U.S. at 214-15; Nation's Memorandum at 45-48. The cases cited by the Village involve altogether different issues: *in rem* jurisdiction of local governments over tribal fee lands (*City of Sherrill*, 544 U.S. at 197[37]; *Oneida I*, 542 F.Supp.2d at 908); state regulatory authority over off-reservation activity of tribes (*Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973); tribal authority over the on-reservation activity of non-Indians (*Nevada v. Hicks*, 533 U.S. 353 (2001); *Strate v. A-1 Contractors*, 520 U.S. 438 (1997)[38], and *Brendale v. Confederated Tribes and Bands of Yakima Nation*, 492 U.S. 408 (1989)); and state authority over on-reservation activity of non-Indians (*Rice v. Rehner*, 463 U.S. 713 (1983) and *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980)).[39] The holdings of these cases clearly do not govern the Village's claimed authority to regulate the conduct of the

[37] It is noteworthy that the Village appeared as *amicus curiae* in the *Parker* case for the exclusive purpose of arguing that the *City of Sherrill* case should govern the inquiry of the continuing status of the Omaha Reservation, that is, the same argument it proposes here. (*See* Second Jacquart Dec., Ex. 10, Brief for Amicus Curiae Village of Hobart, Wisconsin and Pender Public Schools in Support of Petitioners, *Nebraska v. Parker*, 136 S. Ct. 1072 (Nov. 23, 2015) (No. 14-1406). As the outcome in *Parker* indicates, the Supreme Court was not persuaded. Instead of adopting *City of Sherrill* as the governing standard, the Court confirmed the applicability of the *Solem* framework. *Parker,* 136 S.Ct. at 1079. This Court should apply that framework as well.

[38] The Village also relies on *Strate* for the proposition that the Nation cannot exercise the power of exclusion over land it does not own by barricading Village roads during the Big Apple Fest. Defendant's Memorandum, at 49-50. But *Strate* does not so hold, any more than it holds that state or local governments can regulate the on-reservation activity of tribes. The Nation's temporary and partial closure of a road does not constitute a "landowner's right to occupy and exclude" that was considered in *Strate. Id.* at 456 (citing *South Dakota v. Bourland*, 508 U.S. 679, 689 (1993). The "landowner's right" in *Bourland* was the "right of absolute and exclusive use and occupation" of the land in question. *Bourland,* 508 U.S. at 689. A temporary road closure for a festival does not approach the level of control contemplated in *Strate* or *Bourland*.

[39] Even so, these cases often note the principle in *Cabazon* that does govern this case, that is: state law is generally inapplicable to on-reservation conduct of Indians, *Hicks*, 533 U.S. at 362; court is reluctant to infer state authority over Indians on reservations unless Congress has authorized it, *Rice*, 463 U.S. at 719-20; and "state law generally inapplicable to on-reservation conduct involving Indians..." *Bracker*, 448 U.S. at 144.

Nation on the Oneida Reservation.

B. Under its Ordinance, the Village claims personal Jurisdiction over the Nation, not *in rem* jurisdiction over the Nation's land.

The Village asserts that its Ordinance is a zoning regulation of the Nation's land, not a regulation of the Nation. "At its core, the Special Event Ordinance is a land-use ordinance...that serves the same purposes as other types of land-use regulations, including zoning regulations." Defendant's Memorandum at 46 and 48. The characterization of the Ordinance as a land-use or zoning regulation is obviously wrong and provides no basis for avoiding the *Cabazon* rule.

The Village's sleight of hand on this point is evident in its carefully edited quote from the Ordinance and its comparison citation to Wis. Stat. § 62.23(7), which describes the purposes of zoning laws. Defendant's Memorandum at 48 and n. 21. The Village does not acknowledge, however, that the Wisconsin statute also specifies the subjects that local governments may regulate under zoning ordinances. The subject of zoning ordinances under Wisconsin law is described as the power to:

> regulate and restrict by ordinance, subject to par. (hm), the height, number of stories and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts and other open spaces, subject to s. 66.10015(3) the density of population, and the location and use of buildings, structures and land for trade, industry, mining, residence or other purposes if there is no discrimination against temporary structures.

Wis. Stat. § 62.23(7)(am). Further, state law requires that zoning ordinances be enacted through a specified procedure that allows for public input, including input of adjacent governments, and that such ordinances authorize review of zoning decisions by a board of appeals. Wis. Stat. §§ 7(d) and 7(e).

The Village has a zoning ordinance that is found in chapter 295 of the Village of Hobart Municipal Code. It references Wis. Stat. § 62.23(7)(d) and (e), quoted above, as authorizing the

chapter,[40] covers the subjects authorized under state law, appears to comply with state law requirements on promulgation, and includes the required provisions for appeals. The Village's zoning ordinance is "intended to promote development of the community in accordance with the Official Village Comprehensive Plan..." *Id.*, § 295-4. And the zoning ordinance regulates land use in the Village: "The jurisdiction of this chapter shall include all lands and waters within the Village of Hobart." *Id.*, § 295-9.

The Ordinance at issue here is not the Village's zoning ordinance, but the distinct one regulating persons who conduct special events. It is located at chapter 250 of the Municipal Code, not chapter 295, does not regulate any of the subjects specified in the zoning ordinance, and makes no reference by incorporation or otherwise to any part of the Village's zoning ordinance. *See* ECF No. 86-1. Further, the Ordinance applies to persons, not land: "This chapter is intended to apply to all persons within the Village, and its provisions shall be administered by the Village Board, and/or other Village officials designated by the Village Board." *Id.*, § 250-4. Applicability; administration. Finally, it prohibits conduct of persons, that is, the conduct of defined special events in the absence of a permit. *Id.*, § 250-6 A. In contrast to the zoning ordinance, the Ordinance here does not purport to regulate any particular or manner of development of land.

Simply put, the Village claims exceptional circumstances to enforce a hypothetical ordinance against the Nation, not the Ordinance that is at issue here. The Ordinance actually at issue regulates conduct of persons (defined to include governments such as the Nation), not land. As a result, the Court correctly determined that the outcome here is determined by *Cabazon*, not

[40] This is the same provision cited by the Village in its argument that the Ordinance is a zoning ordinance. Defendant's Memorandum, at 48, n. 21. Plainly, the Village has a zoning ordinance but it is not the ordinance at issue here.

the line of *in rem* cases involving land relied upon by the Village.

C. The Village fails to identify exceptional circumstances justifying its regulatory authority over the Nation.

The Village observes that the situation here is much like that considered in *Cabazon.* Defendant's Memorandum at 51. The result here should be the same as that in *Cabazon*, that is, that the similar, claimed "exceptional circumstances" are insufficient to justify the Village's attempt to regulate the Nation's on-Reservation activity. 480 U.S. at 214-215. The Village attempts to avoid this result based upon a misapprehension of the standard governing exceptional circumstances and upon the most superficial analysis of its Ordinance. The Village's attempts are insufficient as a matter of law. Further, the facts on the ground regarding the actual conduct of the 2016 Big Apple Fest confirm the absence of any claimed exceptional circumstances.

1. The Village bears the burden of proving exceptional circumstances, as the Village has already conceded and this Court has already determined.

As noted above, the Village has already conceded that it carries the burden of proof on the existence of exceptional circumstances and the Court has already so ruled. ECF Nos. 62 at 9, 66 at 6, respectively. Yet, the Village now insists that the appropriate test here is the balancing test and the Nation carries the burden of proving that the Village should not be allowed to enforce its Ordinance. Defendant's Memorandum at 52. The Village reaches this conclusion by relying upon cases that are irrelevant and ignoring the special rule of federal pre-emption that applies in federal Indian law.

The general rule is that states and local governments lack authority to regulate the conduct of Indians and tribes in Indian country, absent consent of Congress. *Cohen's Handbook of Federal Indian Law* (2012 ed.), § 6.03[1][a]. *Cabazon* applies this rule but recognizes an

exception in the case of exceptional circumstances; it has been read to impose the burden of proving exceptional circumstances upon the state or local government asserting such authority. *Cayuga Indian Nation of New York v. Village of Union Springs*, 317 F. Supp.2d 128, 135 (N.D.N.Y. 2004) ("if initial determination is that Indian country exists, the burden of proving exceptional circumstances notwithstanding Indian country status rests with the municipality.").[41]

The cases cited by the Village are not to the contrary. Most particularly, the *Bracker* excerpt quoted by the Village on the balancing test is lifted out of the discussion of the different rule that governs state authority to regulate non-Indian activity on a reservation. Defendant's Memorandum at 51. This is apparent when the excerpt is placed in context, as follows:

> ...a more difficult question arises where, as here, a state asserts authority over the conduct of non-Indians engaging in activity on the reservation. In such cases, we have examined the language of the relevant federal treaties and statutes in terms of both the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence. This inquiry is not dependent on mechanical or absolute conceptions of state or tribal sovereignty, but has called for a particularized inquiry into the nature of the state, federal and tribal interests at stake...

Bracker, 448 U.S. at 145; *see also Ramah Navajo School Bd., Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832 (1982) (involving state authority tax a non-Indian company for activity on the reservation.) But that is not this case - this case involves attempted local regulation of the Nation itself, not non-Indians, and these cases are inapposite.[42]

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[41] As the Nation argued its motion to clarify the burden of proof, the Village carries the burden of proving exceptional circumstances for the additional reason that it is alleged as a counter-claim upon which defendants bear the burden of proof. ECF No. 60, citing *Winforge, Inc. v. Coachmen Industries, Inc.*, 691 F.3d 856, 872 (7th Cir. 2012) (defendant bears burden of proof of matters in defense that do no controvert plaintiff's claims); *see also* ECF No. 12, Village First Cause of Action.

[42] Neither is this a case involving minimal state regulation of tribes in an effort to collect a tax imposed by the state upon non-Indians. *See Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 151 (minimal burden in enforcing and collecting tax imposed on non-Indians) (1980); *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 483 (1976) (minimal burden in collecting otherwise valid state tax imposed on non- Indians). There is no potential or even hypothetical liability on

Similarly, the Village relies upon the wrong rule of federal pre-emption, citing cases that arise outside the context of federal Indian law. Defendant's Memorandum at 52. A different rule on the scope of federal pre-emption applies in Indian law. Because of the "unique historical origins of tribal sovereignty," federal statutes, specifically including the IRA, need not expressly pre-empt state authority to have that effect. *Bracker*, 448 U.S. at 143. Instead, when on-reservation conduct of Indians is involved, state law is generally inapplicable. *Id.* at 144; *see also Rice*, 463 U.S. at 719 (explicit pre-emption of state authority to regulate on-reservation activity of Indians not required). Thus, the Village cannot escape its obligation to demonstrate exceptional circumstances.

2. Imposition of the Ordinance upon the Nation would impair the Nation's right of self-governance in profound and multiple ways.

The question here is whether the Ordinance infringes upon the Nation's inherent right of self-government in Indian country and the determinative principle is whether the state or local regulation would displace the tribe's authority over the reservation. *Williams v. Lee*, 358 U.S. 217, 223 (1959); *see also* Nation's Memorandum at 42-44. The test is not, as the Village proposes, whether the Nation can somehow accommodate the local regulation by enforcing both its own laws and the Village's Ordinance in the conduct of the Big Apple Fest. *See* Defendant's Memorandum at 54-55. This is particularly the case since the Ordinance is a broad one, vesting the Village with authority to impose numerous and wide-ranging conditions including the possibility of closing down the event altogether if, in the Village's judgment, the event constitutes a hazard or is not in compliance with permit conditions. ECF No. 90-1 at 3, Ex. 1 at § 250-7, Stipulation of Facts. Thus, the Ordinance generally displaces the Nation's authority and,

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the part of the non-Indians in attendance at the Big Apple Fest. The *only* party that faces regulation or liability in this case is the Nation.

in its particulars, is sharply prejudicial to the Nation's right to govern itself on the Reservation. ECF No. 88 at 3-5; ECF No.'s 88-1 to 88-8, (Nation's laws and self-governance infringed upon by the Ordinance.)

First, the Ordinance threatens the Nation's sovereign immunity with its sweeping indemnification and defense clause which would require the Nation to incur legal liability and subject itself to suit in an enforceable writing. *Edward E. Gillen Co. v. United States*, 825 F.2d 1155, 1157 (7th Cir. 1987). The Nation's sovereign immunity to suit is "[a]mong the core aspects of sovereignty that tribes possess" and "a necessary corollary to Indian sovereignty and self-governance." *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024, 2030 (2014) (citation and quotation omitted). Were the Nation to apply for a permit under the Ordinance, the Nation would be obliged to enter into an agreement in which the Village would likely demand a waiver of the Nation's sovereign immunity from suit. ECF No. 90-1 at 3-4, § 250-7,(B).

Second, the Ordinance authorizes a permit condition that requires the applicant, at the Village's "reasonable discretion," to employ and pay the Hobart/Lawrence Policy Department for an event. *Id.* at 4, Ex. 1 at § 250-7(C),(D). Further, if the Village determines that security is required for an event, the Ordinance mandates that "the Hobart/Lawrence Police Department shall be utilized to provide the required security." *Id.* Were the Ordinance to apply, then, the Nation would not even have the option of using its own Oneida Police Department; it would be obliged to use Village police.

Third, all the other permit conditions are similarly mandatory. The application for a permit "shall be required to submit...a cleaning/damage deposit..." *Id.* at § 250-7(E). Any vendors who operate a revenue-generating business at an event "shall obtain and display any and all required Village permits..." *Id.* at (F). Any wiring required for an event "shall be installed by

a licensed electrician" and "inspected by the Village prior to being energized." *Id.* at (H). As a result, the Nation's own laws and services would be wholly supplanted, with the Nation obliged to pay for substitute services.[43]

Finally, the Ordinance authorizes the Village to "shut down a special event that is in progress" in the event "there is a violation of Village ordinances, state statutes or the terms of the applicant's permit." *Id.* at (I). As a result, the Ordinance not only compels the substitution of the Village's judgment on law and order and all other particulars regarding the conduct of an event, it also provides for the unilateral termination of an event in progress and incorporates compliance with all Village ordinances and all state statutes as a permit condition. In short, the Ordinance completely replaces tribal law with Village law and state law regarding how an event is conducted and whether the event is conducted to conclusion. And these are all Nation activities the Ordinance would regulate, not activity of those in attendance at the event, with only the Nation facing penalties for failure to comply with the Ordinance.

3. There are no exceptional circumstances justifying the Ordinance's sweeping interference with the Nation's right of self-government.

The Village makes no serious attempt to identify exceptional circumstances here. *See* Defendant's Memorandum at 54-55. It ignores the case law indicating that there is a high bar for such claims and that generalized claims of general health and welfare concerns are insufficient. Nation's Memorandum at 46-47. Its argument about particular circumstances essentially consists of a single sentence: "Nor do the ordinances identified by the Nation address certain serious concerns that arise in the conduct of large-scale events, such as traffic control or the impact such

[43] Given the mandatory nature of the permit conditions, the Village's suggestion that the Nation could simultaneously enforce its own laws in the conduct the Big Apple Fest is patently frivolous. *See* Defendant's Memorandum at 54.

events can have on neighboring properties, which are addressed by the Special Event Permit."[44] Defendant's Memorandum at 54-55.

The only specific circumstance cited by the Village justifying the need for its regulation is the alleged closure of Village roads by the Nation for the conduct of Big Apple Fest, without the Village's permission. Defendant's Memorandum at 50 and 54 (the "Village's interest in ensuring coordination between the Village and the Nation regarding the use of roads over which the Village exercises jurisdiction.") It is undisputed, though, that the Nation applied for and obtained a permit for the temporary closure of roads necessary for the conduct of the Apple Fest from the Wisconsin Department of Transportation and Brown County Highway Commissioner. ECF No. 86-3. The Nation submitted a detour map of the roads to be closed, as required by the permit application, and the map depicted portions of the Village road (N. Overland Road) that the Nation intended to close. ECF No. 89-144 at 2; ECF No. 89-145 at 2. Thus, the Nation had State and County approval for the necessary closures, including the Village road.[45]

Finally, the success of the 2016 Big Apple Fest itself, conducted by the Nation in accordance with tribal law, confirmed the absence of any legitimate concern regarding the public's health and welfare at the event. According to the OPD Chief of Police, it was a non-event from a law enforcement or public health point of view. ECF No. 87 at 3, (Van Boxtel Dec.,

[44] The Nation's ability to police "large-scale events" far exceeds that of the Village. The Oneida Police Department ("OPD") maintains full time law enforcement on the Oneida Reservation, that is, twenty-four hours a day and seven days a week. ECF No. 87 (Richard Van Boxtel Dec.) at ¶ 3. OPD employs nineteen police officers, all of whom are fully trained and certified under state law and deputized by Brown County. *Id.* at ¶¶ 4 and 5. By contrast, the Village employs ten police officers. (Second Jacquart Dec., Ex. 5, Bani Dep. at 16-17.)

[45] Moreover, the Village was aware that the closure request was made, and the Village Police Chief participated in planning meetings where the road closure was discussed. (Second Jacquart Dec., Ex. 5, Bani Dep. at 58:19-25, 59:3-23.) In addition, the Nation employed the barricade company suggested by the Village Police Chief Bani to ensure that the road closures were properly done. (*Id.* at 60:24-61:15, 90:7-16.)

¶ 11). There was a single incident report made following the event, which consisted of a collision between a golf cart and a car in a parking lot with only minor property damage. *Id.* And the Village fails to cite a single incidence at the event that warranted its claimed concern about public health, safety, or welfare. The Village plainly failed to meet its burden of proving exceptional circumstances to justify the imposition of its Ordinance upon the Nation.

Conclusion

For the foregoing reasons, the Nation respectfully requests that the Village of Hobart's motion for summary judgment be denied.

Dated this 5th day of September, 2018.

Respectfully submitted,

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