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 SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Dated this 19th day of July, 2018.

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Introduction

Plaintiff Oneida Nation ("Nation")[1] filed this action against Defendant Village of Hobart, Wisconsin ("Village") seeking declaratory and injunctive relief against the Village's attempt to regulate the Nation through imposition of the Village's Special Events Permit Ordinance, Ch. 250, Village of Hobart Municipal Code ("Ordinance"). (*See* Stipulated Statement of Material Facts ("Stip."), Ex. 1.) The Nation moves for summary judgment on all claims, defenses, and counterclaims and files this Memorandum of Law in support of its motion.[2] For the reasons stated herein and based upon the supporting declarations, Proposed Facts and Stipulated Facts, the Nation demonstrates that there is no genuine dispute on any material fact and that, under the governing legal principles, the Nation is entitled to declaratory judgment that the Village lacks authority to regulate the Nation through its Ordinance.

The present controversy arises out of the Nation's conduct of its 2016 Big Apple Fest. Specifically, the Village demanded that the Nation apply for and conduct its event in accordance with permit conditions authorized by the Village's Ordinance. The Nation declined to do so and the Village issued a citation to the Nation for its failure to apply for a permit under the Ordinance, purporting to impose a $5,000 penalty upon the Nation. The significance of this case, though, extends far beyond the conduct of a single event.

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[1] In the Bureau of Indian Affairs' list entitled *Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs*, the Nation appears under the name "Oneida Nation (previously listed as the Oneida Tribe of Indians of Wisconsin." 83 Fed. Reg. 4235, 4238 (Jan. 30, 2018); (*see also* Pl. Oneida Nation's Statement of Proposed Undisputed Material Facts ("Material Facts") ¶ 1).

[2] The Nation's motion is further supported by the declarations identified in the motion. It should be noted that the Jacquart Declaration ("Jacquart Dec.") includes, among other exhibits, expert reports submitted by and deposition transcripts of Dr. Frederick E. Hoxie and Dr. R. David Edmunds. In accordance with this Court's order of June 1, 2018, these reports and transcripts constitute those experts' affidavits for purposes of this motion. (*See* Text Only Order, Jun. 1, 2018, ECF No. 83.)

As it has done in other contexts, the Village uses the present dispute to launch a broad attack on the status of the Nation and its territory.[3] The Village alleges that: the Nation is not a federally recognized Indian tribe; the Oneida Reservation was not created as a commonly held reservation; the Reservation does not continue to exist (if originally created as such); the Indian Reorganization Act ("IRA") does not apply to the Nation or its Reservation; and Congress in any event lacks authority to remove land from state jurisdiction by authorizing land-into-trust under the IRA. (Def.'s Answer & Affirmative Defenses to Pl.'s Am. Compl. ("Answer to Am. Compl.") ¶¶ 6-9 & Affirmative Defenses Nos. 2, 4, 24-25, ECF No. 12.)

These issues go to the heart of the Nation's ability to engage in genuine self-governance and provide for the long-term welfare of its people. The existence of the Oneida Reservation is essential to the Nation's ability to maintain its government and tribal community. A reservation, or Indian country, generally defines the geographic reach of Indian laws and customs, and thereby provides a physical space within which the Nation's culture and government are protected. *See generally Cohen's Handbook of Federal Indian Law* § 3.04[1] (2012 ed.). Similarly, the Nation's eligibility for benefits authorized in the IRA, including the land-into-trust administrative process, is key to the Nation's future well-being. As the Supreme Court has said, "[t]he overriding purpose of that particular Act [IRA] was to establish machinery whereby Indian

[3] In numerous administrative appeals, the Village denies the continued vitality of the Oneida Reservation and claims that the Nation is not eligible for land-into-trust under the Indian Reorganization Act ("IRA"), as construed in *Carcieri v. Salazar*, 555 U.S. 379 (2009). *See Vill. of Hobart v. Midwest Reg'l Dir.*, 57 IBIA 4 (2013) (consolidated docket numbers 10-091, 10-092, 11-045, 10-107, 10-131 and 11-002); *Vill. of Hobart v. Midwest Reg'l Dir.*, 53 IBIA 221 (2011) (docket number 11-083), reconsideration denied at 54 IBIA 18 (2011); *Vill. of Hobart v. Midwest Reg'l Dir.*, 53 IBIA 269 (2011) (docket number 11-058); and *Vill. of Hobart v. Bureau of Indian Affairs, Great Lakes Agency*, (parcels HB-1462 and HB-1463, *pending* before the Midwest Regional Office). The United States processed the trust acquisitions at issue in all these cases as on-reservation acquisitions under the governing regulations, 25 CFR Part 151, and the IBIA has held that the Nation is eligible for land-into-trust under *Carcieri*. 57 IBIA 4.

tribes would be able to assume a greater degree of self-government, both politically and economically." *Morton v. Mancari*, 417 U.S. 535, 542 (1974). Thus, the Village's claims, made here and elsewhere, constitute a fundamental challenge to the Nation's future as a self-governing native community.

By contrast, the continued existence of the Nation's Reservation and the Nation's access to the IRA pose little threat to the Village. The existence of the Nation's Reservation has no impact on the Village's ability to govern its citizens and affairs throughout the Village. Local governments and tribal governments can and do peacefully co-exist in Indian country, each in its own juridical sphere.[4] *Oneida Tribe of Indians of Wis. v. Vill. of Hobart*, 732 F.3d 837, 839 (7th Cir. 2013) (overlapping sovereignty in same territory is "a familiar feature of American government" and a pattern "common in Indian country . . ."). Further, the Nation's eligibility for IRA benefits, including the land-into-trust process, allows for consideration of any claimed interests of the Village. The Nation can acquire trust land under the IRA only by purchasing it as it becomes available on the open market and then completing a lengthy administrative process in which the Village can (and regularly does) participate. Thus, the stakes here are enormous,

[4] The Supreme Court has long upheld state criminal authority over non-Indians in Indian country, while at the same time sharply curtailing tribal authority over crimes by non-Indians in Indian country. *See United States v. McBratney*, 104 U.S. 621 (1881) (state criminal authority extends over non-Indians on reservations); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) (absence of tribal authority over non-Indian criminal activity on reservations). Similarly, there is no barrier to state and local civil authority over non-Indians in Indian country, unless those non-Indians are engaged in conduct involving the tribe or tribal members and the exercise of state jurisdiction has either been pre-empted under federal law or would infringe on the right of a tribe on its reservation to be governed by its own laws. *Williams v. Lee*, 358 U.S. 217 (1959). Further, Congress has granted the State of Wisconsin criminal and civil adjudicatory jurisdiction over Indians on reservations in Wisconsin in Public Law 280 (Pub. L. 83-280, Act of Aug. 15, 1953, codified at 18 U.S.C. § 1162, 28 U.S.C. § 1360, and 25 U.S.C. §§ 1321-1326). The only authority at question in this case is state and local regulatory control over the Nation within its own Reservation, an authority to which the Congress has not consented, in Public Law 280 or otherwise. *See Bryan v. Itasca Cty., Minn.*, 426 U.S. 373 (1976).

perhaps existential, for the Nation, but not for the Village. Because of the paramount significance of these tribal and federal interests, a special rule of federal pre-emption applies in Indian country to generally prohibit state regulatory authority over tribes in Indian country. *McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164, 168 (1973) ("policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history"); *United States v. Kagama*, 118 U.S. 375, 384 ("They [Indian tribes] owe no allegiance to the states, and receive from them no protection.").

This special rule of federal pre-emption and related corollary rules inform or determine the issues in this matter. Those doctrines compel the conclusion that the Nation is immune from Village regulatory authority and the Village cannot prevail on its defenses or counterclaims as a matter of law. The absence of any disputed, material facts on the Nation's claims and the Village's defenses and counterclaims entitles the Nation to summary judgment on all these issues as a matter of law. S*ee* Part I, below.

In Part II, below, the Nation establishes that the Treaty of 1838 by its plain terms created the Oneida Reservation as a tract of commonly held land for the Nation. Congress, the Supreme Court, and the Executive Branch have since 1838 consistently confirmed this plain reading of the Treaty. Were there any doubt about the matter, that doubt should be resolved in favor of the Nation under the rules of treaty construction requiring that treaties be interpreted liberally in favor of the Indians. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196, 200 (1999).

In Part III, below, the Nation demonstrates conclusively that the IRA applies to the Nation and the Oneida Reservation. There is no dispute that the Department of the Interior

("Department") conducted an accept-or-reject election under the IRA on the Oneida Reservation and that the Nation voted to accept the IRA. The Department views this event as conclusive proof of a tribe's status as under federal jurisdiction and eligible for benefits of the IRA as construed by the Supreme Court in *Carcieri*. Further, the Nation immediately organized under a constitution under the IRA, a step permitted by the Department only for tribes located on a reservation. Under long-standing practice of the Department, the IRA applies to the Nation and its Reservation as a matter of law.

In Part IV, below, the Nation establishes that, as a matter of law, the Village cannot demonstrate either diminishment or disestablishment of the Oneida Reservation, regardless of the particulars of treatment of the Reservation over time. In this context, the special rule of federal pre-emption dictates that, once created, a reservation continues to exist unless and until diminished or disestablished by Congress. *Nebraska v. Parker*, 136 S. Ct. 1072, 577 U.S. __ (2016); *Solem v. Bartlett*, 465 U.S. 463 (1984). Further, allotment of a reservation under the General Allotment Act ("GAA"), Act of February 8, 1887 (24 Stat. 388, ch. 119, 25 U.S.C. § 331, et seq.), commonly known as the Dawes Act, does not by itself alter reservation boundaries. *Mattz v. Arnett*, 412 U.S. 481 (1973); *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351 (1962). Because there is no act of Congress that diminishes or disestablishes the Oneida Reservation, the Village's claims regarding diminishment or disestablishment of the Oneida Reservation must fail.

In Part V, below, the Nation establishes that the exceptional-circumstances standard that allows state regulation of tribes in Indian country under limited circumstances is simply not available to the Village here. *See California v. Cabazon Band of Mission Indians*, 480 U.S. 202

(1987). In *Cabazon*, the Supreme Court indicated that the bar for establishing exceptional circumstances must be high, in light of the traditional immunity of tribes from regulation by states when in Indian country. *Id.* at 207. Cases after *Cabazon* explicitly rejected state public health and safety claims as a justification for imposing state jurisdiction over Indian tribes. These are the same exceptional circumstances claimed by the Village and the Village, as a result, necessarily fails as a matter of law to meet the exceptional-circumstances standard.

In Part VI, below, the Nation demonstrates that there is no legal basis for the Village's first counterclaim that the Secretary of the Interior lacks authority under the IRA to remove lands from state jurisdiction through the land-into-trust process. (*See* Answer to Am. Compl., ECF No. 12.) The Village is unclear about the legal basis for this claimed defense. In other contexts, the Village has claimed the Tenth Amendment to the Constitution, the Enclaves Clause, and the supposed limitation of the Indian Commerce Clause to mercantile matters as the bases for this challenge to the IRA. Every single court to consider these arguments has rejected them.

In Part VII, below, the Nation demonstrates that its sovereign immunity from suit forecloses the Village's counterclaim against the Nation for the monetary penalty the Village purported to impose against the Nation for its refusal to apply for a permit under the Ordinance. (*See* Answer to Am. Compl. at Second Cause of Action, ECF No. 12.) The Nation's immunity is inviolate, both within and off the Oneida Reservation. *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 572 U.S. ___ (2014); *Okla. Tax Comm'n v. Citizen Band of Potawatomi Tribe of Okla.*, 498 U.S. 505 (1991). Because there has been no waiver of the Nation's immunity, the Village's counterclaim is barred.

For these reasons as more fully discussed below, the Nation is entitled to judgment on its

claims and the Village's counterclaims and defenses as a matter of law.

Statement of the Case

The Nation is a federally recognized Indian tribe in occupation of the Oneida Reservation, set aside as a permanent home for the Nation in the Treaty of 1838. (Pl. Oneida Nation's Statement of Proposed Undisputed Material Facts ("Material Facts") ¶¶ 1, 8.) Since 1936, the Nation has been organized under an IRA Constitution, based upon the Secretary of the Interior's determination that the Nation was under federal jurisdiction and in occupation of a reservation in 1934. (Material Facts ¶¶ 40, 44-49.) The Village is a municipality organized under Wisconsin law and is located wholly within the exterior boundaries of the tract reserved for the Nation in the Treaty of 1838. (Material Facts ¶ 2.)

Since 2009, the Nation has conducted an annual event known as the Big Apple Fest. (Material Facts ¶ 52.) It is a free event that is open to the public with the principal purpose of educating the public about the Nation's history. (*Id.*) This cultural event includes family based activities, such as apple picking, an apple pie contest, food and produce vendors, and various activities for children such as face painting and hay rides. (Material Facts ¶ 53.) It also features Oneida culture with activities such as pottery and corn husk doll making, basket weaving, and tours of historic Oneida homes. (*Id.*) These activities are regulated by the Nation in accordance with its laws. (Material Facts ¶¶ 55-56.)

The event takes place on tribal trust and fee parcels within the boundaries of the tract set aside by the Treaty of 1838. (*See* Stip. ¶¶ 9-16.) Specifically, it is held on the Nation's Cultural Heritage Grounds, a parcel held in trust by the United States for the Nation since 2006, and the Nation's Apple Orchard, portions of which have been held in trust by the United States for the

Nation since 1995 and another portion of which is owned in fee by the Nation. (Stip. ¶¶ 9-16; Material Facts ¶ 53.) Parking for the event takes place on the Cultural Heritage Grounds and the Ridge View Plaza parking lot (a fee parcel owned by the Nation), with shuttles provided by the Nation to transport people to and from the event activities and parking areas. (Stip. ¶ 12; Material Facts ¶ 54.)

On March 1, 2016, the Village adopted its amended Ordinance, which regulates the conduct of special events through the issuance of permits with conditions. (*See* Stip., Ex. 1, Ordinance.) The Ordinance applies broadly to "any person," defined as including any "governmental entity," who conducts "[a]ny temporary event or activity occurring on public or private property that interferes with or differs from the normal and ordinary use of the property . . ." (*Id.* at §§ 250-4, 250-5.) The Ordinance mandates that any person conducting such an event apply for a permit from the Village. (*Id.* at §§ 250-5, 250-6.) It requires the permit applicant to follow a wide range of possible conditions that may be imposed, including: liability insurance coverage; indemnification of the Village; payment for any Village services, including security; the payment of a cleaning/damage deposit; the acquisition of business licenses by vendors; the provision of a representative tasked with insuring compliance with Village guidelines, standards, and county and state health requirements; and the inspection of tentage and payment for any fire inspections. (*Id.* at § 250-7.) Finally, the Village "reserves the right to shut down" an event deemed in its judgment to be a fire or other safety hazard or that is otherwise not in compliance with Village ordinances or permit conditions. *Id.*

The Nation scheduled its 2016 Big Apple Fest for September 17 and on September 2, 2016, counsel for the Village wrote to the Nation's employee charged with coordinating the

event to demand that the Nation apply for a permit under the Ordinance by September 9. (Stip. ¶ 18, Ex. 2, Letter.) Counsel further advised that, in the event the Nation failed to apply for a permit under the Ordinance, the Village would proceed against the Nation and the Nation's officials and employees under the Ordinance's penalty provision. *Id.* The Nation declined to apply for a permit; it held its 2016 Big Apple Fest as scheduled, in accordance with its own laws, regulation and security, without incident. (Stip. ¶ 20; Material Facts ¶¶ 55-56, 58-60, 62.) On September 21, the Village issued Citation 7F80F51TJS against the Nation for its alleged violation of the Ordinance, purporting to impose a $5,000.00 fine against the Nation.[5] (Stip. ¶ 23, Ex. 4, Citation.)

The Nation filed this action on September 9, 2016, in response to the Village Counsel's letter, and filed its First Amended Complaint on September 28, following the issuance of the Citation. (See Compl. for Declaratory & Injunctive Relief ("Compl."), ECF No. 1; First Am. Compl. for Declaratory & Injunctive Relief ("Am. Compl."), ECF No. 10.) The Nation makes two claims for relief: first, that the application of the Village's Ordinance against the Nation within Indian country is pre-empted by comprehensive and pervasive federal regulation of the Nation and its Reservation; second, that the imposition of the Village's Ordinance upon the Nation constitutes an impermissible infringement upon the Nation's inherent powers of self-government in general and its authority to manage and regulate its lands and Reservation in particular. The Nation alleges the Treaty Clause, Indian Commerce Clause, and Supremacy

[5] The Citation directed the Nation to appear before Hobart/Lawrence Municipal Court on November 10, 2016. The parties agreed to stay these proceedings, pending the outcome of this suit. The Village issued a second citation for the Nation's refusal to obtain a permit for the 2017 Big Apple Fest (held last September), and the parties also agreed to stay proceedings on this citation, pending the outcome of this litigation.

Clause of the United States Constitution, the Treaty of 1838, 7 Stat. 566, the IRA, and the federal common law as the bases for its claims. (Compl. ¶¶ 2, 6 and 7, First Claim for Relief (Federal pre-emption), Second Claim for Relief (Infringement of tribal self-government), ECF No. 1; Am. Compl., ECF No. 10.)

In its answer, the Village denies the Nation's allegations in support of the claims for relief. (Answer to Am. Compl., ECF No. 12.) The Village also asserts affirmative defenses, including: that the Secretary of the Interior lacks authority to remove lands from state jurisdiction; that the IRA does not preclude state and local jurisdiction; that the Nation was not under federal jurisdiction in 1934 and, hence, not covered by the IRA; and a general denial of the Nation's claims framed as an affirmative defense. (*Id.* at Affirmative Defenses.) In addition, the Village asserts two counterclaims against the Nation: first, the Village seeks declaratory judgment that the Secretary of the Interior lacks authority to remove land from state jurisdiction and, in any event, the Village's interest in the health, safety and welfare of Village residents outweighs any interests of the Nation; and second, the Village demands payment of the $5,000 fine imposed in its citation served upon the Nation for violation of the Village Ordinance. (*Id.* at Countercl.)

In response to a motion for summary judgment filed by the Nation on December 16, 2016, the Village insisted upon the need for wide-ranging discovery on all issues in this matter. (*See* Pl.'s Mot. for Protective Order, ECF No. 21; Pl.'s Mot. for Summ. J., Dec. 2, 2016, ECF No. 24; Def.'s Mot. to Allow Time for Disc. Under Rule 56(d), ECF No. 34.) In response to these motions, the Court allowed discovery but narrowed the Village's affirmative defenses and discovery in one significant respect: the Court held that the Village's challenge to the Nation's

status as a federally recognized tribe is barred by the statute of limitations. (Dec. & Order at 6, Apr. 19, 2017, ECF No. 46.) The parties engaged in substantial discovery on all other issues, including the exchange of thousands of pages of documents, the production of reports by four experts in total, and the deposition of expert witnesses and numerous fact witnesses. Discovery in the matter closed on April 13, 2018. (Text Only Order, Mar. 5, 2018, ECF No 79.)

During discovery and in response to the Nation's Motion to Clarify the Burden of Proof, (ECF No. 59), the Court entered its Decision and Order on Burden of Proof. (Oct. 23, 2017, ECF No. 66.) There, the Court identified the Indian country statute, 18 U.S.C. § 1151, as determinative of the jurisdictional conflict here, as well as the governing Supreme Court authority:

> In this case, by contrast [to *Oneida Tribe of Wis. v. Vill. of Hobart*, 542 F. Supp. 2d 90 (E.D. Wis. 2008)], the Village seeks to regulate the conduct of the Nation and its members within the boundaries of the Nation's Reservation. Unless the Village is able to show that the Nation's Reservation has been diminished by Congress, *Cabazon* and not *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992), or *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005), provides the rules governing the determination of the case.

(*Id.* at 5.) Accordingly, the Court identified the issues and allocated the burden of proof as follows: the Nation carries the burden of proof on the creation of the Oneida Reservation in the Treaty of 1838 and the application of the IRA to the Nation and its Reservation; the Village carries the burden of proof that the Oneida Reservation has been diminished or disestablished and its affirmative defenses, including specifically alleged exceptional circumstances that the Village claims justify the exercise of Village regulatory authority over the Nation on the Reservation, notwithstanding the absence of authority from Congress to do so. (*Id.* at 7.)

On June 1, 2018, the Court amended the scheduling order in this matter, setting July 19,

2018, as the due date for dispositive motions by the parties. (Order, ECF No. 83.) The Nation's motion for summary judgment is timely made.

Argument

I. Summary Judgment Standard

"A motion for summary judgment should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Oneida Tribe of Indians of Wis. v. Vill. of Hobart*, 891 F. Supp. 2d 1058, 1063 (E.D. Wis. 2012). "'Material' means that the factual dispute must be outcome-determinative under law." *Id.* "Where a claim has no legal basis, there can be no genuine issue of *material* fact and the movant, by definition, is entitled to judgment as a matter of law." *Saunders-El v. Rohde*, 778 F.3d 556, 559 (7th Cir. 2015) (emphasis in original). As the moving party, the Nation must demonstrate the absence of any such genuine dispute on a material fact. *Scaife v. Cook Cnty.*, 446 F.3d 735, 739 (7th Cir. 2006).

Once the Nation makes this demonstration, the Village must set forth specific facts showing there is a genuine issue for trial. *Lindemann v. Mobil Oil Corp.*, 141 F.3d 290, 294 (7th Cir. 1998). Mere assertion of an alleged factual dispute is insufficient. *Salvadori v. Franklin School Dist.*, 293 F.3d 989, 996 (7th Cir. 2002). And the alleged factual dispute must be outcome-determinative to avoid summary judgment. *Contreras v. City of Chi.*, 119 F.3d 1286, 1291 (7th Cir. 1997); *Oneida Tribe of Indians of Wis. v. Vill. of Hobart*, 542 F. Supp. 2d 908, 913 (E.D. Wis. 2008). There are no material facts in dispute under the governing legal standard here and the Nation is entitled to judgment as a matter of law.

II. The Treaty of 1838 created the Oneida Reservation to be held in common by the Nation.

The Oneida Reservation was created out of territory ceded by the Menominee Tribe to the United States. (*See* Material Facts ¶¶ 3-7.) The terms of the Menominee treaties leading up to the creation of the Oneida Reservation and the terms of the 1838 Treaty itself plainly reflect an intent by all parties to create a classic Indian reservation, that is, one held in common by the Nation. *See* A, below. Congress, the Supreme Court, and the Executive Branch have all consistently construed the 1838 Treaty as having created the Oneida Reservation held in common by the Nation. *See* B, below. Were there any doubt about the construction of the Treaty, that doubt should be resolved in favor of the Nation to conclude that the Treaty created a Reservation for the Nation. *See* C, below.

A. The Menominee treaties leading up to the Treaty of 1838 and the terms of the Treaty itself reflect an intent to create a reservation to be held in common by the Nation.

In 1831, and in contemplation of the removal of the Oneida and other tribes from New York, the United States treated with the Menominee Tribe to acquire a 500,000-acre tract for the relocation of the New York tribes. (Material Facts ¶¶ 3-5 (citing Dec. of Paul R. Jacquart in Supp. of Pl. Oneida Nation's Mot. for Summ. J. ("Jacquart Dec.") ¶ 11, Ex. 10, Treaty of Feb. 8, 1831, 7 Stat. 342).) The 1831 treaty reflected this intent on its face: Article First provided that the Menominee cede a portion of its territory to the United States that "may be *set apart as a home* to the several tribes of the New York Indians . . . " (Material Facts ¶ 3.) Further, the 1831 treaty specified a formula for the division of the tract among the New York tribes. The President was empowered to divide the ceded tract among the various emigrating New York tribes "so as not to assign to any tribe a greater number of acres than may be equal to one hundred for each

soul actually settled upon the lands . . .” (*Id.*) To further emphasize the point that the parties contemplated the creation of permanent reservations to be held in common by the New York tribes, the article ended with, “It is distinctly understood, that the lands hereby ceded to the United States for the New York Indians, are to be held by those tribes, under such tenure as the Menomonee Indians now hold their lands, subject to such regulations and alteration of tenure as Congress and the President of the United States shall, from time to time, think proper to adopt.” (Material Facts ¶ 4.)

The Menominee treaty was revised twice to adjust the particulars regarding the relocation of the New York tribes to the ceded tract. On February 17, 1831, the treaty was amended to authorize the President to extend the time by which the New York tribes were to relocate to the ceded Menominee tract and to apportion the ceded tract among the New York tribes on terms he deemed “equitable and just.” (Material Facts ¶ 6.) When it ratified the February 17 treaty, the Senate imposed additional conditions, which required yet another negotiation with the Menominees. *See* Note, 11 Kapp. 324-325. On October 27, 1832, the United States concluded this third treaty, which adjusted the boundaries of the tract for the New York tribes and expressly provided that the terms of the February 8, 1831, Menominee treaty, as amended, were otherwise confirmed. (Material Facts ¶ 7.)

On February 8, 1838, the Nation[6] treated with the United States to cede its interest “in the

[6] The tribal parties to the Treaty are identified as the First Christian and Orchard Parties of the Oneida. These parties are the same political entity now recognized by the United States as the Oneida Nation and as a successor-in-interest to the Oneida signatory to the 1794 Treaty of Canandaigua, 7 Stat. 44 (providing for, among other things, the payment of annuities to the tribal signatories). In 1851, Congress enacted a statute authorizing payment of annuity shortages to the First Christian and Orchard Parties of Oneidas in Wisconsin, clearly identifying those parties as the political entity in occupation of the Oneida Reservation. Act of Feb. 27, 1851 9 Stat. 586. The legislative history of this act is also explicit that

land set apart for them in the 1st article of the treaty with the Menomonies of February 8th, 1831 . . .” (Material Facts ¶ 8 (quoting Jacquart Dec. ¶ 14, Ex. 13, 7 Stat. 566 at Art. 1).) The Treaty further “reserved to the said Indians to be held as other Indians lands are held a tract of land containing one hundred (100) acres, for each individual . . .” from the foregoing cession. (Material Facts ¶ 8.) The Treaty also obliged the United States to survey the reserved tract as soon as practicable. (Material Facts ¶ 9.) The survey was completed in December of 1838 and showed a single tract as constituting the “Oneida Reservation” set aside by the 1838 Treaty. (Material Facts ¶ 10.) These terms plainly created a reservation to be held in common by the Nation for four reasons.

First, the language of the Menominee treaties and the Treaty of 1838 make plain that the parties intended to create a permanent home for the Oneidas. The Menominee treaties expressly stated that the purpose of the cession, out of which the Oneida Reservation was created, was “for the benefit of the New York tribes” and “to be set apart as a home” for those tribes. (Material Facts ¶¶ 3-5 (quoting Jacquart Dec. ¶ 11, Ex. 10, 7 Stat. 342).) Further, as expressly required in the 1831 Menominee treaty, the Oneida tract was to be held, like the Menominee Reservation, “as other Indian lands are held.” (Material Facts ¶ 8.) This is a classic formulation employed to create a reservation held in trust by the United States for the named tribe. *Cohen’s Handbook of Federal Indian Law* § 15.04[3][a]. Moreover, the very word “reservation” was used later in the 1831 Menominee treaty to describe the tract set apart therein for the Menominee. (Material Facts ¶ 5.) Because the treaty required the same tenure for tracts set aside for the New York tribes,

Oneidas who emigrated to Wisconsin were recognized as the same Oneidas who had signed earlier federal treaties. *See* House Rep. No. 13, 31st Cong., 2d Sess., Jan. 29, 1851.

the parties contemplated that those tracts would be reservations as well. (*Id.*) Thus, the Treaty of 1838 created the Oneida Reservation, even in the absence of the term reservation in the Treaty itself. *Minnesota v. Hitchcock*, 185 U.S. 373, 390 (1902) ("It is enough that from has been done there results a certain defined tract appropriated to certain purposes"); *see also Oneida Tribe*, 542 F. Supp. 2d at 923 (Village's concession that the Reservation constitutes Indian country "appears quite reasonable" in light of governing Supreme Court authority).

Second, the Supreme Court explicitly held in *United States v. Cook*, 86 U.S. 591 (1873) that the Oneida Reservation was one held in common by the Nation.[7] (*See* Material Facts ¶ 13.) There, the Court considered whether individual tribal members could remove timber from the Oneida Reservation for their own individual benefit. Because the tenure of the Reservation was Indian title held for the common benefit of the Nation, the Court held that individual tribal members could not do so. *Cook*, 86 U.S. at 594. Further, every court since to consider the rights of the Nation has assumed the creation of a commonly held Reservation under the Treaty of 1838 and the continuing existence of the Reservation. *See Oneida Tribe of Indians of Wis. v. Vill. of Hobart*, 891 F. Supp. 2d 1058, 1060 (Nation "in possession of the Oneida Reservation, set aside by treaty in 1838"), *aff'd* 732 F.3d 837, 838 ("The village itself is an enclave in the tribe's reservation"); *Vill. of Hobart v. Brown Cnty.*, 801 N.W.2d 348, 2011 WI App 114, ¶ 3 (the Nation "occupies a reservation encompassing approximately 65,400 acres in Brown and Outagamie Counties"); and *Vill. of Hobart v. Oneida Tribe of Indians of Wis.*, 736 N.W.2d 896,

[7]Given the Supreme Court's holding in *Cook* and the plain terms of the Treaty of the 1838, there is no need to resort to extrinsic evidence to construe the Treaty. It is noteworthy, though, that one of the Nation's experts, Dr. Hoxie, thoroughly examined the entire historical record and concluded that the Treaty of 1838 created the Oneida Reservation held in common by the Nation. (Jacquart Dec. ¶ 3, Ex. 2, Nov. 15, 2017 Hoxie Report at 40-50; *id.* at ¶ 5, Ex. 4, Jan. 15, 2018 Hoxie Report at 5-14.)

2007 WI App 180.

Third, courts have construed the key term of the Treaty of 1838, i.e., land held "as other Indian lands are held," also used in a later Menominee treaty, to mean a commonly-held reservation. In the Treaty of May 12, 1854, 10 Stat. 1064, the Menominee reserved a tract as "a home, to be held as Indian lands are held" located on the Wolf River in Wisconsin. *Id.,* Article 2. The term was held to have created a classic reservation with an unqualified right to hunt and fish by the tribe free of state regulation. *Menominee Tribe of Indians v. United States,* 388 F.2d 998, 1002 (Ct. Cl. 1967); *State v. Sanapaw*, 21 Wis. 2d 377, 380-82, 124 N.W.2d 41, 44 (1963). Later, the Supreme Court held that this term created a reservation, with a right to hunt and fish that survived termination of the Menominee Tribe in 1954. *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 406 (1968). The Oneida Treaty of 1838, by use of the same term, obviously accomplished the same thing, that is, the creation of a classic Indian reservation held in common.

Fourth, the reference in the Treaty of 1838 to one hundred acres per individual as the measure of the Reservation just as obviously meant a measure of overall size, not the creation of individual allotments. This formulation first appeared in the 1831 Menominee treaty as a method for apportioning the ceded tract among the various New York tribes, while at the same time making clear that those tracts were to constitute permanent reservations for those tribes. (*See* Material Facts ¶ 3.; 7 Stat. 342, Article First.) The 1831 Menominee treaty contained no reference to allotment of those tribal tracts. (*See* Material Facts ¶¶ 3-5 (citing 7 Stat. 342).) When the United States created the Oneida Reservation in 1838, it employed the same methodology previously agreed to in the Menominee treaty to determine the size of a permanent, commonly-

held reservation for the Oneidas. (*Id.*) And like the 1831 Menominee treaty, the Treaty of 1838 contained no reference to individual Oneida allotments. (*Id.*)

B. An Act of Congress and a hundred years of practice by the Executive Branch confirm that the Treaty of 1838 created a Reservation held in common by the Oneidas.

The commonsense reading of the Treaty of 1838 as creating a Reservation held in common by the Nation is confirmed by a specific act of Congress. In 1871, Congress enacted a statute authorizing a railroad to construct a line across the Oneida Reservation. (Material Facts ¶ 12.) The act was entitled, "Right of way across the *Oneida Reservation* granted to the Green Bay and Lake Pepin Railroad Company" and authorized the railroad company "to build and maintain its railway across the *Oneida Reservation*, in the State of Wisconsin" subject to "the conditions of an agreement made by the chiefs and headmen of the Oneida tribe of Indians . . ." (*Id.* (emphasis added).) Congress clearly understood the Reservation to be a classic one, held in common and governed by the Nation. This clear determination by Congress, confirmed by the Supreme Court in *United States v. Cook*, above, is obviously binding upon this Court.

Given this clear view by Congress and the Supreme Court, it is unsurprising that the Executive Branch has consistently adhered to the view that the Oneida Reservation was created as a classic Indian reservation, held in common by the Nation. Federal treatment of the Reservation as such continued after allotment, notwithstanding the alteration in land tenure from common land to land held in severalty by tribal members.[8] The following chronology of administrative statements of this reality is representative:

• As required by the Treaty of 1838, the United States undertook to survey the

[8] As discussed below, the Reservation retained its jurisdictional status after allotment since the change in land tenure does not abolish a reservation.

tract set aside for the Nation. John Suydam completed this survey in December 1838. The survey and field notes show a single tract as constituting the "Oneida Reservation" or "Oneida Reserve," not individual allotments. (Material Facts ¶¶ 9-10.)

• On February 7, 1839, Commissioner of Indian Affairs Hartley Crawford wrote to Secretary of War J.R. Poinsett regarding the execution of the 1838 Treaty. He reported that a census of tribal members had been done to determine the "aggregate amount of land" set aside in the Treaty and that Suydam had been employed to "survey a plat showing the entire reservation at 65,400 acres . . ." He concluded, "At first blush, it would seem that we covenanted to survey the several tracts, but upon consideration I am satisfied it is not so - The whole duty appears to have been discharged with ability and fidelity and this office is informed by the superintendent of Wisconsin agreeably and satisfactorily to the Oneidas." (Material Facts ¶ 11.)

• Because the Reservation was held in common, allotment of the Reservation required formal action by the Department under the GAA. On September 16, 1887, Commissioner of Indian Affairs Atkins recommended to the Secretary of the Interior that "the President be asked to authorize allotments in severalty to be made to the Indians on the Oneida Reservation, in Wisconsin, under the Act of February 8, 1887 (24 Stat. 388) . . ." (Material Facts ¶ 14.)

• In his 1887 recommendation to the Secretary of the Interior, Commissioner Atkins observed that the Oneida Reservation was created by the Treaty of February 3, 1838, and consisted of 65,430 acres. Commissioner Atkins also explained that the 100 acres per soul formulation in the Treaty was intended only to establish the overall size of the Reservation: "The provision in the treaty, reserving 100 acres for each individual was not regarded as authorizing allotments in severalty but as authorizing the measure of the quantity of land to be reserved for the band in common." (Material Facts ¶¶ 15-16.)

• In 1891 and following allotment of the Reservation, the Commissioner of Indian Affairs described the Reservation as in existence, notwithstanding allotment: "Oneida Reservation, situated between the counties of Brown and Outagamie, about 40 or 50 miles in a southeasterly direction from this office, contains a little less than three townships, 65,540 acres, allotted in severalty by Special Agent Lamb, which allotment was completed a little more than a year ago." (emphasis in original). (Material Facts ¶ 20.)

• In 1900, the Bureau of Indian Affairs agent at Oneida School "took charge" of "the reservation" from the Green Bay Agency. In his first report to the Commissioner of Indian Affairs, the Oneida School Agent described the Reservation as follows: "The Oneida Reservation contains 65,440 acres, all allotted, a large part still in forest from which the best timber has been removed."

(Material Facts ¶¶ 24-25.)

• The 1900 Annual Report of the Commissioner of Indian Affairs included a "Schedule showing the names of Indian reservations, agencies, etc." This schedule explicitly identified the Treaty of 1838 as creating the Oneida Reservation. Under Wisconsin, the schedule included a listing for Oneida and under the category "Date of treaty, law, or other authority establishing reserve," stated: "Treaty of Feb. 8, 1838, vol. 7, p. 566. 65,402.13 acres allotted to 1501 Indians. Remainder, 84.08 acres, reserved for school purposes." (Material Facts ¶ 26.)

• In 1909, Bureau of Indian Affairs Agent Charles Davis was appointed to investigate the organization of towns under state law on "the Oneida Reservation." Davis questioned whether "the State could go ahead and organize municipal territory included in an Indian reservation where no formal opening of surplus lands or obliteration of reservation lines had ever taken place . . ." and concluded that the State could do so. (Material Facts ¶ 28.)

• There were three executive orders extending the trust period for specified allotments on the Oneida Reservation in 1917, 1918, and 1927. Two of these orders explicitly referred to the action as applicable to the "Oneida Reservation." (Material Facts ¶¶ 30, 34, 38.)

• In 1919, federal supervision over the Oneida Reservation was transferred from the Oneida School Agency to the Keshena Agency. That year, the Annual Report of the Commissioner of Indian Affairs included "Table 5. Area of Indian lands June 30, 1919." Under "State and Reservation," Table 5 listed Wisconsin, Oneida. The entry for Oneida stated: "Number of allotments 1,541. Area in acres: Allotted 65,466; Unallotted . . .; Total 65,466." (Material Facts ¶¶ 35-36; Jacquart Dec. ¶ 7, Ex. 6, Jan. 15, 2018 Edmunds Report at 56.)

• In the 1920 Annual Report of the Commissioner of Indian Affairs, there was a Table 7, titled "General Data for each Indian reservation to June 30, 1920." Under the "Name of reservation and tribe" column for Wisconsin, the following entry appeared for Oneida "(Under Keshena School.) Tribe: Oneida; Area (unallotted) 151; Treaties, laws, or other authorities relating to reserve: Treaty of Feb. 3, 1838, vol. 1, p. 566. 65,428.13 acres allotted to 1,502 Indians; remainder, 84.08 acres, reserved for school purposes. 6 double allotments canceled containing 151 acres (see 5013-1912). Trust period on 35 allotments extended 19 years; Executive order, May 24, 1918." (Material Facts ¶ 37.)

• For the 1927 Annual Report of the Commissioner of Indian Affairs, reservation acreage figures were compiled. The Oneida figures showed: "Oneida Reservation. Acreage…65,617.77. Allotments…65,541.77. Reserved…76…Total land area 65,617.77." (Material Facts ¶ 39.)

• Approving the Nation's adoption of a Constitution under the IRA in 1936, the Department determined that the Treaty of 1838 established the Oneida Reservation, in which the Nation remained in occupation. *See* discussion below, III.

In short, the Executive Branch, including the President and the agency vested with authority to administer federal Indian affairs, has consistently identified the Oneida Reservation as subject to federal supervision[9] and regularly acknowledged that the Reservation was created by the Treaty of 1838 with explicit reference to acreage figures showing, with slight variations, the Reservation to include the full tract surveyed in 1838, and continuing to exist after the change in land tenure caused by allotment. The federal record is voluminous and overwhelmingly indicates that the plain language of the Treaty of 1838 created the Oneida Reservation, held in common by the Nation up until allotment in 1891, with continuing federal and tribal jurisdictional authority up to the present day and including approximately 65,400 acres.

C. The rules of construction applicable to Indian treaties require a construction favorable to the Nation.

The literal terms of the Treaty of 1838 created the Oneida Reservation, a reality that Congress, the Supreme Court, and the Executive Branch have all acknowledged. There is no ambiguity or doubt requiring resort to canons of construction. *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506 (1986). If there were ambiguity, it should be resolved in favor of the Nation, resulting in the same construction of the Treaty.

[9] The Nation and its Reservation have been consistently under the jurisdiction of an agency of the Bureau of Indian Affairs since the Nation's relocation to Wisconsin. Originally under the jurisdiction of the Green Bay Agency, it was transferred to Keshena in 1874, then to the Oneida Boarding School Agency in 1900, back to Keshena in 1919, to Tomah Indian Agency in 1932, finally to the Great Lakes Agency in 1949. (*See* Jacquart Dec. ¶ 6, Ex. 5, Nov. 15, 2017 Edmunds Report at 28, 56, and 136.)

Time and again, the Supreme Court has ruled that Indian treaties must be liberally construed with any ambiguities resolved in the favor of Indians. Most recently, the Court applied this rule to interpret an Indian treaty as reserving the tribe's hunting and fishing rights. *Mille Lacs Band*, 526 U.S. at 200; *see also Cnty. of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985) ("[I]t is well established that treaties should be construed liberally in favor of the Indians . . . with ambiguous provisions interpreted for their benefit[.]") (citations omitted); *McClanahan*, 411 U.S. at 173 (any "doubtful expressions in [treaties] are to be resolved in favor of the [Indians]"); *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 ("any doubtful expressions in [treaties] should be resolved in the Indians' favor"); *Choctaw Nation v. United States*, 318 U.S. 423, 431-432 (1943) ("treaties are construed more liberally than private agreements . . . . Especially is this true in interpreting treaties and agreements with the Indians"); *Choate v. Trapp*, 224 U.S. 665, 675 (1912) ("in the Government's dealings with the Indians . . . [the] construction [of treaties] is liberal").

The Court's analysis in *Mille Lacs Band* is particularly instructive. There, one issue was whether an 1855 treaty, in the face of silence on the subject, extinguished the tribe's usufructuary rights that had been reserved in an 1837 treaty. The silence of the treaty on the issue created an ambiguity so the Court looked to the history of the treaty, the negotiations, and the practical construction of the treaty adopted by the parties. *Mille Lacs* Band, 526 U.S. at 196. The Court applied the rule requiring liberal construction of Indian treaties and concluded that the tribe's usufructuary rights survived the 1855 treaty because those rights had not been expressly extinguished. *Id.* at 200. Here, the Treaty of 1838 is hardly silent. All interpretative indications - its terms, its history, Supreme Court construction, and consistent interpretation by the Executive Branch - support the Reservation construction of the Treaty of 1838. If silence alone supports a

liberal construction in favor of the tribe, the volumes spoken by the Treaty of 1838 and its circumstances are all the more compelling.

At this point in relations between the Nation and the United States, it is simply not credible to deny that the Treaty of 1838 created a Reservation, with tenure in common for the Nation. The Treaty identified the 100-per-soul methodology of allocating land among New York tribes because the Menominee treaties explicitly required that allocation. The Congress, the Supreme Court, and the President have confirmed the understanding that the Treaty created a Reservation held in common by the Nation, and the Department has administered its duties regarding the Nation ever since 1838 on this reading of the Treaty. Finally, the allotment of the Reservation, upon which the Village bases its entire theory of diminishment/disestablishment, depends upon this uniformly held view that the Treaty of 1838 created a Reservation held in common by the Nation. Had the Reservation been allotted at the time of its creation, allotment under the GAA would have been unnecessary. The time has come to put the Village's alternative and completely ahistorical construction of the Treaty of 1838 to rest.

III. The Nation and its Reservation are within the pre-emptive reach of the IRA as a matter of law.

As discussed in more detail below, federal statutes and regulations broadly pre-empt state regulatory authority over tribes in Indian country. *Williams v. Lee*, 358 U.S. 217 (1959). "Congress has also acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation," including in the IRA. *Id*. at 220. As a result, the IRA is a major feature of the extensive federal policy and statutory scheme that reflect Congress' intent to wholly occupy the field to the exclusion of states. *White Mountain Apache Tribe v. Bracker*, 426 U.S. 136, 142 n.10 (1980); *Santa Rosa Band of Indians v. Kings Cnty.*, 532

F.2d 655, 658 (9th Cir. 1975). The Nation and its Reservation are covered by the IRA and, therefore, fall within the protective scope of the pre-emptive federal policy embodied therein.[10]

A. The Department of the Interior has conclusively determined that the IRA applies to the Nation.

When enacted in June 1934, the IRA defined Indians who were eligible for services under the Act in section 19, codified at 25 U.S.C. § 5129.[11] That provision defined Indian to include three groups: 1) persons of Indian descent who are members of recognized tribes "now under Federal jurisdiction";[12] 2) descendants of such persons who were, on June 1, 1934, residing within the boundaries of an Indian reservation; and 3) persons of one-half or more Indian blood. The IRA also authorized "any reservation" to opt out of coverage of the Act if "a majority of the adult Indians, voting at a special election duly called by the Secretary of the Interior, shall vote against its application." 25 U.S.C. § 5125. These two provisions together resulted in 258 elections conducted by the Secretary for tribes to determine whether to accept the IRA. Theodore Haas, *Ten Years of Tribal Government under the IRA* 3 (1947) (attached as Ex. 69 to the Jacquart Dec.).

[10] In its First Cause of Action in its Counterclaim, the Village denies that the Nation is eligible for land-into-trust under the IRA and alleges that land could not be placed into trust for the Nation because the parcels are not within a reservation. (Answer to Am. Compl. ¶¶ 23-24, ECF No. 12.) The Village is plainly wrong on both counts, as discussed here. In addition, Reservation status is not necessary for the Secretary to place land into trust. 25 U.S.C. § 5108 ("The Secretary of the Interior is authorized . . . to acquire . . . any interest in lands . . . *within or without existing reservation* . . . for the purpose of providing land for Indians." (emphasis added)).

[11] This IRA provision was recently transferred from 25 U.S.C. § 479. *See* 25 U.S.C. § 5125, Historical and Statutory Notes. Much of the authority construing the provision cites to its former location.

[12] In *Carcieri*, the Supreme Court held that "now under Federal jurisdiction" referred to Indians under federal jurisdiction as of 1934. 555 U.S. at 381. This ruling resulted in a formal Solicitor's Opinion by the Department of the Interior, to adopt a standard for use in determining which tribes were under federal jurisdiction in 1934 and, hence, eligible for benefits under the IRA. M-37029, The Meaning of "Under Federal Jurisdiction" for Purposes of the Indian Reorganization Act (Mar. 12, 2014).

The Nation was among those tribes deemed to be under federal jurisdiction by the Department and for whom the Secretary conducted an election on acceptance of the IRA. The election was held on December 15, 1934, and the Nation voted 688 in favor of and 126 against acceptance of the IRA. (Material Facts ¶ 40.) The Village does not and cannot dispute that these events occurred. (Material Facts ¶ 40 (citing Jacquart Dec. ¶ 2, Ex. 1, Def.'s Suppl. Objs. & Resps. To Pl.'s First Set of Interrogs., Reqs. For Produc. of Docs., & Reqs. For Admiss. ("Def.'s Disc. Resps.") at 44 (Village "[a]dmits that the Secretary held an election for the Nation to accept or reject organization under the IRA . . " and Village "[a]dmits that the Nation's members voted to accept or reject organization under the IRA . . ")).)[13] Under administrative practice and precedent, these events alone are conclusive proof of the applicability of the IRA to the Nation.

In its formal opinion on the meaning of "under federal jurisdiction," the Solicitor's Office determined that the conduct of a secretarial election on acceptance of the IRA[14] obviates the need to examine a tribe's history prior to 1934. M-37029, at 20. As the Department explained:

> In order for the Secretary to conclude a reservation was eligible for a vote, a determination had to be made that the relevant Indians met the IRA's definition of "Indian" and were thus subject to the Act. Such an eligibility determination would include deciding the tribe was under federal jurisdiction, as well as an unmistakable assertion of that jurisdiction.

Id. at 21. The Department has applied this rule to the Nation and has, since the *Carcieri* decision,

[13] In both responses, the Village also goes on to deny sufficient knowledge of the Nation's entitlement to vote and whether the election was properly and timely held. But the Court can presume that the events were conducted properly in the absence of proof to the contrary. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415; *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14-15 (1926); *United States v. Aviles*, 623 F.2d 1192, 1198 (7th Cir. 1980) ("presumption of regularity attends official acts of public officers . . . .").

[14] The Solicitor's Office refers to these as Section 18 elections after the IRA section number that established the Secretary's obligation to conduct the elections. *See* 48 Stat. 984, 988.

made multiple decisions to take land into trust for the Nation, finding authority under the IRA to accept land into trust for the Nation based upon the conduct of the secretarial election for the Nation in 1934. *See* administrative appeals, footnote 3, above.[15] In one of the Village's challenges to these administrative decisions, the Interior Board of Indian Appeals[16] reviewed the Nation's eligibility under the IRA, undertook the same analysis, and reached the same conclusion as the Solicitor's Office. In the words of the IBIA:

> The legal predicate, and necessary determination by the Secretary prior to holding an IRA election for a particular tribe, was that the tribe was one to which the IRA applied . . . and to which its provisions were available, *unless and until* the tribe expressly *rejected* the IRA in the referendum. Thus, as interpreted at the time by the Solicitor, and recently by the Supreme Court, the purpose of the IRA referenda was not to bring existing tribes under Federal jurisdiction, but to afford *those tribes that were already under Federal jurisdiction* a right to opt out of the IRA, if they so chose.
>
> The Department's holding of the IRA election pursuant to 25 U.S.C. § 478 in 1934 for the Oneidas of Wisconsin necessarily was premised upon a determination by the Executive Branch that the [Indians were covered by the IRA].

Vill. of Hobart, 57 IBIA at 23 (emphasis in original); *see also New York v. Acting E. Reg'l Dir.*, 58 IBIA 323, 332 (2014); *Thurston Cnty., Neb. v. Great Plains Reg'l Dir.*, 56 IBIA 296, 306 n.12 (2013); and *Shawano Cnty., Wis. v. Acting Midwest Reg'l Dir.*, 53 IBIA 62, 71-72 (2011). Stated simply, the Secretary held a Section 18 election in 1934. Nothing more is required to

[15] Nothing in the Solicitor's Opinion requires the existence of a reservation for a tribe to be "under federal jurisdiction" and, hence, eligible for IRA benefits. *Cnty. of Amador v. U.S. Dep't of the Interior*, 872 F.3d 1012, 1026 (9th Cir. 2017). But the Department's later decision to approve a constitution for the Nation under the IRA *was* dependent upon the existence of a reservation. *See* below at § II.B.

[16] The Interior Board of Indian Appeals ("IBIA") is an administrative review body that exercises delegated authority of the Secretary to issue final decisions for the Department of the Interior in appeals involving Indian matters. 25 CFR § 2.4(e).

demonstrate applicability of the IRA. *Id.*

While the Village's administrative appeals of the Oneida land-into-trust decisions have yet to reach federal courts, other such appeals have reached federal courts. The Ninth and D.C. Circuit Courts of Appeal agreed with the IBIA and the Solicitor's Office that the conduct of a Section 18 election is conclusive proof of eligibility under the IRA. In *Cachil Dehe Band of Wintun Indians of Colusa Indian Cmty. v. Zinke*, 889 F.3d 584 (9th Cir. 2018), the plaintiff challenged the Bureau of Indian Affairs' decision to place land into trust for a tribe, including whether the tribe was covered by the IRA. The Ninth Circuit rejected the challenge, quoting the Bureau's decision favorably: "the calling of a Section 18 election on the Tribe's Reservation conclusively establishes that the Tribe was under federal jurisdiction." *Id.* at 595 (quotation omitted). Similarly, in *Stand Up for California! v. United States Department of the Interior*, 879 F.3d 1177, 1182 (D.C. Cir. 2018), the D.C. Circuit rejected challenges to the Secretary's authority to accept land into trust for a tribe, based upon the conduct of a Section 18 election for the tribe. *See also Cent. N.Y. Fair Bus. Ass'n v. Jewell*, 2015 WL 1400384 (N.D.N.Y. Mar. 26, 2015), *aff'd on related grounds, Upstate Citizens for Equality v. United States*, 841 F.3d 556 (2d Cir. 2016).

There is no precedent contrary to the Ninth and D.C. Circuits' decisions that the conduct of a secretarial election is conclusive proof of a tribe's eligibility under the IRA. Because the Village admits that the Secretary held such an election for the Nation, nothing more is required to establish the Nation's eligibility under the IRA. (Material Facts ¶ 40 (citing Jacquart Dec. ¶ 2, Ex. 1, Def.'s Disc. Resps. at 44).)

B. When it approved the Nation's IRA constitution, the Department determined that the Nation was in occupation of a reservation.

As originally enacted, section 16 of the IRA authorized "[a]ny tribe, or tribes, residing on the same reservation" to organize and "adopt an appropriate constitution and bylaws." 48 Stat. 984, 987.[17] By its literal terms, the provision required the existence of a reservation for a tribe to organize under an IRA constitution and the Department has consistently interpreted and applied the provision in accordance with its literal terms. In its earliest explication of the IRA, the Solicitor's Office identified four groups of Indian eligible to organize under section 16 and all four required the existence of a reservation.[18] M-27796, Nov. 7, 1934, I Sol. Op. 478, 479.

The Solicitor's Office has maintained this view, as expressed in multiple opinions. The most important of these for present purposes is M-27810, issued on December 13, 1934, because it was explicitly invoked as authority for approval of the Nation's IRA constitution. I Sol. Op. 484, 487. This opinion, entitled *Wheeler-Howard Act - Interpretation,* answered twelve statutory construction questions, each having to do with a particular IRA provision. Regarding section 16, the question of statutory construction was whether tribal members must reside on a reservation to vote on adoption of an IRA constitution, and the opinion indicated that a reservation was a pre-requisite:

> It is clear that the act contemplates two distinct and alternative types of tribal organization. In the first place, it authorizes the members of a tribe (or group of tribes located upon the same reservation) to organize as a tribe without regard to any requirements of residence. In the second place, this section authorizes the residents of a single reservation (who may be considered a tribe for purposes of this act, under section 19) to organize without regard to past tribal affiliation.

[17] This provision of the IRA has since been amended by Congress several times and is now codified at 25 U.S.C. § 5123.

[18] The four groups were: 1) a tribe with a partial interest in a single reservation; 2) a tribe with co-extensive rights within a single reservation; 3) Indians residing on a single reservation, regardless of tribal affiliation; and 4) a tribe with members scattered over two or more reservations in which they have rights.

M-27810 at 487. In other opinions, the Solicitor's Office made plain that a reservation was essential, denying the right to organize under the IRA to tribes that were not in occupation of a reservation. *See, e.g.*, I Sol. Op. 582, Nov. 12, 1935 (Ft. Bidwell not allowed to organize under the IRA because not in possession of land regarded by the Department to be a reservation); I Sol. Op. 724, Feb. 8, 1937 (St. Croix has no reservation and can only organize under the IRA if land is first taken into trust for it); I Sol. Op. 747, May 1, 1937 ("There is no possibility of approaching organization [under the IRA] for these Indians [Nahma and Beaver Indians] through their present land status as there are not existing reservations for these Indians."); M-35013, II Sol. Op. 1479, Dec. 9, 1947 ("For Indians to be able to organize under Section 16 of the Indian Reorganization Act of June 18, 1934 (48 Stat. 987, 25 U.S.C. § 476), they must constitute a 'tribe, or tribes, residing on the same reservation.'")

Further, by departmental policy, it made no difference whether the reservation had been allotted. In its Basic Memorandum on Drafting Tribal Constitutions, intended to provide tribes with guidance on drafting an IRA constitution, the Department addressed whether tribal jurisdiction under such constitutions was restricted to trust land only. In the Department's words:

> On allotted reservations, the question will arise: Shall the tribe exercise jurisdiction over fee patented lands within the original boundaries of the reservation, and shall it exercise jurisdiction over restricted allotments? No legal obstacle is seen to the exercise of tribal jurisdiction over such lands. That is to say, members of the tribe living on such lands will be subject to the same obligations towards the tribe and subject to the same jurisdiction on the part of the tribal courts as other members. Therefore, it would be proper for any tribe, if it so desires, to designate the original boundary of its reservation in defining the territory within which the tribal constitution and the laws passed under such constitution are to prevail.

(Material Facts ¶ 47.) This departmental policy is consistent with, if not mandated by, the rule

discussed below that allotment under the GAA, without more, has no affect on reservation boundaries.

The Department based its deliberations on the Nation's adoption of an IRA constitution upon this construction of the IRA and departmental policy. On December 7, 1935, the Bureau of Indian Affairs agent for Tomah Indian School, which had jurisdiction at the time over the Nation, submitted a draft IRA constitution prepared by the Oneida Constitution Committee for approval by the Commissioner of Indian Affairs. (Material Facts ¶ 41.) The Solicitor's Office criticized the draft constitution in two respects that were vital to the Nation's eligibility to organize under the IRA: first, the preamble referred to "'the Oneida Indians' without specifying whether those Indians constitute a recognized band or tribe;" and second, the proposed definition of territory referred to the "'original Oneida Reservation as defined in the treaty of February 8, 1838,' even though the 1838 treaty was not the original reservation in Wisconsin and represented a diminution of the reservation established by the treaty of October 27, 1832.[19] (Material Facts ¶ 42.) The Assistant Commissioner of Indian Affairs recommended two revisions to the draft to cure these defects: first, "[i]t is believed that in view of the fact that the Oneida Indians clearly are a recognized tribal group, the preamble should be changed by inserting the words 'tribe of' between the words 'Oneida' and 'Indians...'; and second, that to avoid confusion regarding the reservation, the constitution should simply refer to 'the present confines of the Oneida Reservation.'" (*See* Material Facts ¶ 43.) The Oneida Constitution Committee revised the draft

[19] This is a reference to the October 27, 1832, Menominee treaty discussed above in which 500,000 acres were set aside for the New York tribes. The 1838 Treaty ceded the Oneidas' interest in that tract, except for the reserved tract of 65,400 acres, thus representing the diminution of the Oneida Reservation referenced by the Assistant Solicitor.

constitution as recommended. (Material Facts ¶ 44.)

By letter dated April 23, 1936, Commissioner of Indian Affairs John Collier transmitted the proposed Oneida constitution to the Secretary of the Interior "for the purpose of enabling the members of the Oneida Indian Tribe of the Oneida Reservation in Wisconsin to vote on the adoption of a proposed Constitution and By-laws, pursuant to section 16 of the Indian Reorganization Act of June 18, 1934 (48 Stat. 984)." (Material Facts ¶¶ 45-46 (citing Jacquart Dec. ¶ 67, Ex. 66, Letter from the Commissioner of Indian Affairs to the Secretary of the Interior (Apr. 23, 1936).) In his letter transmitting the proposed Oneida constitution, the Commissioner addressed the necessary conditions for the Nation to organize under section 16 of the Act, as construed by the Solicitor's Office. Regarding a recognized tribal entity, the Commissioner highlighted the "history of tribal organization" of the Nation. Regarding the existence of the Oneida Reservation, the Commissioner observed the following:

> By the provisions of the treaty of February 3, 1838 (7 Stat. 566), the Oneida Indians ceded to the United States all their right, title and interest in the land set apart for them in the first article of the treaty with the Menominees of February 8, 1831 (7 Stat. 405). Out of the lands thus ceded there were reserved a 100-acre tract for each individual to be held as other Indian lands are held, etc. The Oneida Reservation has been subsequently recognized as such by Executive orders of May 19, 1917 and May 4, 1918, extending the trust periods on certain allotments made to Indians on the Oneida Reservation in Wisconsin.

(Material Facts ¶ 45.) In conclusion, the Commissioner recommended that the election on adoption of the constitution be held, expressly finding that the proposed constitution conformed to the Basic Memorandum on Drafting Tribal Constitutions and legal requirements set out in the October 25 and December 13, 1934, Solicitor's opinions discussed above. (Material Facts ¶ 46.)

The Secretary approved the conduct of a secretarial election and the election was held on November 14, 1936. (Material Facts ¶¶ 48-49.) The Nation voted to adopt the constitution by a

vote of 790 in favor and 16 against and the Secretary approved the Nation's constitution on December 21, 1936. (Material Facts ¶¶ 49-50.) The Village does not and cannot dispute these events. *See* (Material Facts ¶¶ 49-50 (citing Jacquart Dec. ¶ 2, Ex. 1, Def.'s Disc. Resps. at 44-46.) These undisputed events demonstrate that, in accordance with the requirements of the IRA as construed by the Solicitor's Office and departmental policy, the Department determined that the Oneida Reservation existed in 1934, that the Nation was entitled to and did organize under the IRA, and that the approved Constitution is the organic document under which the Nation governs the entire Oneida Reservation.

Finally, a point of contrast is worth noting. The Village often insists upon a false comparison between the Nation's history and that the Stockbridge-Munsee Indian Community ("Community"). (*See, e.g.*, Def.'s Mem. in Supp. of Mot. to Allow Time for Disc. Under Rule 56(d) at 12, ECF No. 31.) The very different treatment of the Nation and the Community regarding organization under the IRA highlights the Nation's continuing occupancy of its reservation. In contrast to the Nation's experience discussed above, the Department did not initially allow the Community to organize under an IRA constitution. Because the Community lacked a land base, it was not eligible to organize under the IRA. This occurred only after the Department placed land into trust for the Community and proclaimed that trust land to be an Indian reservation.[20] *Wisconsin v. Stockbridge-Munsee Cmty.*, 366 F. Supp. 2d 698, 732-33 (E.D. Wis. 2004), *aff'd* 554 F.3d 657 (7th Cir. 2009). These additional steps were not necessary for the Nation because the Department found that the Nation was in occupation of the Reservation set aside in the Treaty of 1838.

[20] Section 7 of the IRA, now codified at 25 U.S.C. § 5110, authorized the Secretary of the Interior to proclaim new Indian reservations as to lands acquired under the Act.

These undisputed events establish conclusively that the IRA applies to the Nation and the Oneida Reservation, that the Nation's trust land, upon which the 2016 Big Apple Fest was largely conducted, is properly held in trust for the Nation by the United States,[21] and that the Nation and the Reservation fall within the protective scope of the IRA.

IV. The Village's affirmative defense that the Oneida Reservation was either diminished or disestablished fails as a matter of law and the Nation is immune from Village regulation within the Reservation.

Because the Reservation was created by a treaty, only Congress can diminish or disestablish it. This is a function of the Supremacy Clause of the United States Constitution, which includes Indian treaties and preserves for Congress the sole authority to abrogate or modify an Indian treaty. *Antoine v. Washington*, 420 U.S. 194, 204 (1975); Art. VI, cl. 2, U.S Const. To do so, Congress must express its intent plainly and unambiguously, "in view of the avowed solicitude of the Federal Government for the welfare of its Indian wards." *United States v. Santa Fe Pac. R. R. Co.*, 314 U.S. 339, 354 (1941); *see also United States v. Celestine*, 215 U.S. 278, 285 (1909); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, 700 F.2d 341, 352 (7th Cir. 1983).

These general principles regarding Indian treaties are reflected in the analytical framework applied by the Supreme Court in the specific context of the termination of Indian country. Under that framework, only Congress can terminate Indian country, generally referred to as disestablishment or diminishment. As with Indian treaties in general, Congress' intent to do so will not be lightly implied; it must be plainly expressed. *See* A, below. Further, the Court has

[21] It should be noted that the Nation's trust land constitutes Indian country, even if not located within the boundaries of the Reservation. *Citizen Band of Potawatomi*, 498 U.S. at 511 (trust land is "'validly set apart,' and thus qualifies, as a reservation for tribal immunity purposes.")

held that allotment of a reservation under the GAA alone is insufficient to disestablish or diminish an Indian reservation. Because the Village relies solely on the allotment of the Oneida Reservation as the basis of its disestablishment/diminishment defense, the Village's defense is insufficient as a matter of law. *See* B, below. As a result, the Oneida Reservation remains Indian country, within which the Village lacks authority to regulate the Nation. *See* C, below.

A. It requires an express and plain act of Congress to disestablish or diminish an Indian reservation.

The Supreme Court recently and unanimously confirmed the analytical framework that applies to determine whether Congress has altered a reservation's boundaries. In *Parker*, the Court adhered to the standard it employed in *Solem v. Bartlett*, 465 U.S. 463 (1984), despite an invitation by the State of Nebraska to alter or relax the standard. 136 S. Ct. at 1076.

"The first and governing principle is that only Congress can divest a reservation of its land and diminish its boundaries." *Solem*, 465 U.S. at 470 (quoted with approval in *Parker*, 136 S. Ct. at 1078-79). As a result, in the absence of an act of Congress, the entire block of land set aside as a reservation retains that status "no matter what happens to the title of individual plots within the area." *Id.* Second, the text of the act of Congress, typically a surplus lands act,[22] is the most probative evidence of congressional intent. Statutory hallmarks of a congressional intent to alter reservation boundaries include explicit cession or similar language evidencing an intent to surrender all tribal interest in the area, an unconditional commitment by Congress to immediately

[22] As the Supreme Court explained in *Solem*, after allotment on many reservations, the unallotted lands were opened up for settlement by Congress in so-called surplus lands acts. 465 U.S. at 467. These acts resulted in a spate of jurisdictional disputes between state and tribal officials regarding the continuing vitality of the opened reservations. Typically, disestablishment cases require construction of a particular surplus lands act to determine Congress' intent regarding the affected reservation. The same analytical framework has been employed, though, to construe other acts of Congress alleged to have altered reservation boundaries. *United States v. Jackson*, 853 F.3d 436, 439 (8th Cir. 2017).

compensate the particular tribe for its ceded land, or a restoration of the area to the public domain. *Parker*, 136 S. Ct. at 1079. A widely held understanding contemporaneous with the act of Congress that the reservation boundaries would be altered may also be probative of congressional intent. *Solem*, 465 U.S. at 471.[23] Third, the subsequent demographic history of the opened area may be probative in determining Congress' intent in a surplus lands act. *Id.* at 470-471.

In *Parker*, the state emphasized the third factor, arguing at length that the Oneida Tribe was almost entirely absent from the area for more than 120 years. The state urged the Court to elevate this factor to an independent one sufficient in and of itself to support a finding of diminishment. 136 S. Ct. at 1081. The Court declined to do so. It indicated that such evidence is relevant only to reinforce a finding of diminishment or disestablishment based on statutory text but cannot overcome the absence of expressed congressional intent to diminish the reservation. *Id.* Similarly, the Court found the subsequent treatment of the area by Government officials to have "limited interpretive value." *Id.* at 1082. Like the demographic evidence, the "mixed record" of subsequent treatment of the disputed land, "as well as inconsistencies in maps and statements by Government officials," cannot overcome the absence of statutory text evidencing an intent to disestablish the reservation. *Id.*

Congress knows well how to express its intent to diminish or abolish a reservation. For example, in 1868, Congress provided that "the Smith River reservation is hereby discontinued,"

[23] The Court has relied upon such evidence only in *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977). Even there, though, the Court found a "baseline purpose of disestablishment" in earlier acts of Congress as the basis for interpreting later, more ambiguous acts of Congress as diminishing the reservation. *Id.* at 592.

Act of July 27, 1868, 15 Stat. 221, and in 1904, Congress provided that "the reservation lines of the said Ponca and Otoe and Missouria Indian reservations be, and the same are hereby, abolished." Act of April 21, 1904, 33 Stat. 218. Moreover, the Supreme Court has relied upon a surplus lands act, with terms that evidenced a surrender of all tribal interests or other text with similar intent, in every case in which the Court determined that a reservation had been disestablished or diminished. *See, e.g.*, *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998) [Act of Aug. 15, 1894, 28 Stat. 286]; *Hagen v. Utah*, 510 U.S. 399 (1994) [Act of May 27, 1902, 32 Stat. 263]; *Rosebud Sioux Tribe v. Kneip*, above [Act of Apr. 23, 1904, 33 Stat. 254-258; Act of Mar. 2, 1907, 34 Stat. 1230-1232; Act of May 30, 1910, 36 Stat. 448-452]; *DeCoteau v. Dist. County Court*, 430 U.S. 425 (1975) [Act of Mar. 3, 1892, 26 Stat. 1035]. There is no similar explicit act or surplus lands act regarding the Oneida Reservation that might even arguably support a congressional intent to diminish or disestablish it.[24] The Nation's experts exhaustively examined the historical record, found no such act, and concluded that the Reservation continues to exist. (Jacquart Dec. ¶ 3, Ex. 2, Nov. 15, 2017 Hoxie Report at 87; *id.* at ¶ 6, Ex. 5, Nov. 15, 2017 Edmunds Report at 27.)[25] The Wisconsin Attorney General undertook a similar review of the Oneida History and the governing legal standard discussed here, and reached the same conclusion: that Congress has not extinguished, diminished, or terminated the Oneida Reservation. (Material Facts ¶ 51.)

[24] As one Bureau of Indian Affairs agent observed in 1909, there was "no formal opening of surplus lands or obliteration of reservation lines" regarding the Oneida Reservation. (Material Facts ¶ 28.)
[25] Dr. Hoxie's historical analysis was relied upon by the Supreme Court in *Solem*. 465 U.S. at n.5. Dr. Edmunds was the expert for the Omaha Tribe in *Parker*. (Jacquart Dec. ¶ 6, Ex 5, Nov. 15, 2017 Edmunds Report at 1.)

B. Neither the GAA nor the 1906 Oneida act reflects a congressional intent to diminish or disestablish the Oneida Reservation.

In the absence of a surplus lands act or similar statute applicable to the Oneida Reservation, the Village asserts that the necessary congressional intent regarding the Reservation can be found in one of two statutes. First, the Village relies upon the GAA itself, citing one out-of-date and another repudiated case misconstruing the GAA (and allotment of the Reservation thereunder) to abolish the Oneida Reservation. (*See* Def.'s Mem. in Supp. of Mot. to Allow Time for Disc. Under Rule 56(d), ECF No. 31.)[26] Second, the Village relies upon a provision of the 1906 appropriation act that contains none of the hallmark statutory language indicating congressional intent to disestablish. (*Id.* at 12.) The Village is wrong about both statutes.

1. The GAA did not abolish reservations.

The Supreme Court has been clear that allotment of a reservation under the GAA does *not* disestablish or abolish reservations. In *Mattz*, the Court rejected the argument that the Klamath River Reservation was disestablished by allotment. 412 U.S. at 485. In that case, not only was the reservation allotted but it was opened for settlement by non-Indians, as well. Nonetheless, the Court held that the GAA (and by extension, the Klamath act which did not differ materially from the GAA), did not abolish the reservation. *Id.* at 497; *see also Seymour*, 368 U.S. at 357 (1962) (reservation not dissolved by allotment); *Celestine*, 215 U.S. at 285

[26] In its Memorandum in Support of Motion to Allow Time for Discovery under Rule 56(d), the Village cites *United States v. Hall*, 171 F. 214 (E.D. Wis. 1909), and *Stevens v. Cnty. of Brown*, (E.D. Wis. Nov. 3, 1933 Unpublished Decision and Order), for the proposition that the Oneida Reservation had been abolished by allotment. (ECF No. 31 at 11.) The statutory analysis of the GAA in both cases is obviously unreliable in the face of the directly contrary Supreme Court authority. In addition, the authority relied upon by the court in the *Hall* case has been explicitly overturned. *See United States v. Nice*, 241 U.S. 591, 609 (1916) and *State v. Rufus*, 205 Wis. 317, 237 N.W. 67 (1931) (repudiating prior rule that citizenship was inconsistent with continued wardship status.)

(reservation not revoked by allotment). In *Mattz*, the allotment of the reservation and the opening of the reservation for settlement by non-Indians did nothing more than open the way for non-Indians to own land on the reservation in a manner regarded as beneficial to the Government's wards. *Id.*[27]

In *Seymour*, the Court also addressed whether allotment diminished, if it did not disestablish, the reservation.[28] The Court rejected this alleged consequence of allotment, as well:

> The contention is that, even though the reservation was not dissolved completely by the Act permitting non-Indian settlers to come upon it, its limit would be diminished by the actual purchase of land within it by non-Indians because land owned in fee by non-Indians cannot be said to be reserved for Indians. . . . [T]he issue has since been squarely put to rest by congressional enactment of the currently prevailing definition of Indian country in § 1151 to include all land within the limits of any reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent . . .'

Id. at 357-358 (quotation omitted). In other words, the loss of title to individual parcels within the Reservation after allotment neither disestablishes nor diminishes the Reservation.[29]

In *Celestine*, the Court dealt with the combined effect of allotment and the grant of

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[27] By contrast, the Oneida Reservation was never opened for settlement. Instead, title was lost to parcels within the Oneida Reservation by the processes of allotment alone, i.e., by allotment to tribal members, the issuance of fee patents to allottees either before or at the expiration of the trust period, and sale of parcels by the original allottees (or heirs). (Material Facts ¶ 27.) The case for disestablishment by allotment and opening the reservation for non-Indian settlement at Klamath River, therefore, was even stronger than the Village's claim of disestablishment of the Oneida Reservation by allotment only.

[28] The Village puts its claim regarding the Oneida Reservation boundaries in the alternative, that is, that the Reservation was either disestablished or diminishment by allotment. (*See, e.g.*, Def.'s Mem in Supp. of Mot. To Allow Time for Disc. Under Rule 56(d) at 11-12, ECF No. 31; Def.'s Mem. Of Law in Opp. To Pl.'s Mot. For Protective Order 5, ECF No. 36.)

[29] As the Court noted, the enactment of § 1151 occurred well after the events claimed to have diminished the reservation in question there; nonetheless, the Indian country statute governed the dispute and precluded the construction of earlier events claimed to have diminished the reservation. Further, the Court has consistently looked to § 1151 to determine the effect of earlier acts of Congress on reservation boundaries. *See, e.g.*, *Parker*, 136 S. Ct. at 1078 (construing 1882 act, question is whether the reservation remains Indian country for purposes of liquor regulation); *Solem*, 455 U.S. at 465 (construing 1908 act, question is whether the open territory remained Indian country under § 1151).

citizenship to Indian allottees. After noting that the allotment of the reservation did not revoke it, the Court in went on to consider whether "allotment of the lands in severalty, and afterwards making the Indian citizens, necessarily had the effect to revoke the reservation." 215 U.S. at 285. The Court concluded that it did not, citing *Eells v. Ross*, 64 F. 417 (9th Cir. 1894), for the proposition that "[t]he act of 1887, which confers citizenship, clearly does not emancipate the Indians from all control, or abolish the reservations." *Id.* Two years later, the Court again cited *Eells* favorably when it held that citizenship does not affect federal jurisdiction over Indians. *See Tiger v. W. Inv. Co.*, 221 U.S. 286, 312-315 (1911). Thus, there is a substantial body of Supreme Court authority indicating that the GAA and its inevitable consequences - loss of title to parcels within the reservation and citizenship of the Indians - do not disestablish or diminish Indian reservations. Dr. Hoxie thoroughly examined the GAA in his reports for the Nation and concluded that the Act was not intended to alter reservation boundaries, either in its terms or consequences.[30] (Jacquart Dec. ¶ 3, Ex. 2, Nov. 15, 2017 Hoxie Report at 73-93; *id.* at ¶ 4, Ex. 3, Dec. 15, 2017 Hoxie Report at 11-15; *id.* at ¶ 5, Ex. 4, Jan. 15, 2018 Hoxie Report at 27-31.)

2. The 1906 Oneida provision did not abolish the reservation.

The Oneida provision in the 1906 appropriations act was nothing more than an adjustment of the allotment policy as applied to the Oneida Reservation and, like the GAA, evidences no congressional intent to diminish or disestablish the Oneida Reservation boundaries. Act of June 21, 1906, 34 Stat 325, 380-381.[31] It merely directed the early issuance of fee patents

[30] It should be noted that Dr. Hoxie is acknowledged as the author of one of the "major studies" of the GAA. *Cohen's Handbook of Federal Indian Law* § 1.04 n.3 (2012 ed.).

[31] The provisions reads in its entirety: "That the Secretary of the Interior be, and he is hereby, authorized, in his discretion, to issue fee-simple patents to the following parties for the lands heretofore allotted to them: [individual allottees omitted] and the issuance of said patents shall operate as a removal of all

to the named allottees (that is, before the termination of the twenty-five year trust period) and granted the Secretary discretionary authority to issue early fee patents to other allottees "of the Oneida Reservation."[32] *Id.* The provision may have had the effect of speeding the process of separating the allottees from their title, but did not otherwise alter the allotment scheme. (Jacquart Dec. ¶ 4, Ex. 3, Dec. 15, 2017 Hoxie Report at 98-101; *id.* at ¶ 6, Ex. 5, Nov. 15, 2017 Edmunds Report at 33-36; *id.* at ¶ 7, Ex. 6, Dec. 15, 2017 Edmunds Report at 6-7.) Because those tweaks do not change the fundamental allotment scheme of the GAA as identified by the Supreme Court in the cases discussed above, it cannot be construed differently from the GAA. Indeed, if anything the particulars of allotment at Oneida, even as altered in 1906, provide for an even more modest allotment scheme than those considered by the Supreme Court since there is no act opening up any lands to immediate settlement by non-Indians. *See generally Mattz*, 412 U.S. 481*; Seymour*, 368 U.S. 351; *Celestine*, 215 U.S. 278.

Moreover, the 1906 Oneida provision on its face explicitly acknowledges the "Oneida Reservation." And it does *not* contain any of the hallmark statutory language evidencing a congressional intent to disestablish or diminish Oneida reservation boundaries. *See Parker*, 136 S. Ct. at 1079. Significantly, the Village admits that the 1906 Oneida provision does *not* on its face alter or abolish the Reservation boundaries, does *not* contain language of cession, does *not* totally surrender tribal interests in any land, does *not* provide for payment by sum certain or

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

[32] Contrary to the Village's false claim, the provision plainly did *not* immediately turn all of the Nation's allotments in fee parcels, as was done in 1906 for the Community. (*See* Def.'s Mem. In Supp. of Mot. To Allow Time for Disc. Under Rule 56(d).)

otherwise for any tribal lands, and does *not* restore any lands to the public domain. (Material Facts ¶ 63 (citing Jacquart Dec. ¶ 2, Ex. 1, Def.'s Disc. Resps. at 39-47).) The inquiry necessarily ends there and the 1906 Oneida provision is simply insufficient on its face to alter the Oneida Reservation boundaries. *Parker*, 136 S. Ct. at 1081-82.

In all these respects, the 1906 Oneida provision is markedly different from the 1906 provisions held by the Seventh Circuit to have disestablished the Stockbridge-Munsee Reservation. *See Wisconsin v. Stockbridge-Munsee Cmty.*, 554 F.3d 657 (7th Cir. 2009). Even though the 1906 Stockbridge provisions did not include classic disestablishment terms, the Seventh Circuit found a baseline intent to disestablish in an earlier act relating to the reservation, much like the Supreme Court did in *Rosebud Sioux Tribe*. The earlier act of 1871 had effectively abolished half of the reservation, and the court found this intent carried forward in the 1906 act as Congress intended to accomplish a "full and complete settlement of all obligations" of the United States under the treaty creating the reservation. *Stockbridge-Munsee*, 554 F.3d at 663. Further, the 1906 act was not the "run-of-the-mill allotment act." *Id.* In contrast to the GAA, the 1906 act required the Secretary to immediately issue fee patents for all the remaining tribal lands, a provision which "set the act apart from most allotment acts," including the GAA. *Id.* at 664; 34 Stat. at 382, Act of June 21, 1906. And after 1906, the Department treated the Stockbridge-Munsee Reservation as if it had been abolished, even up to the necessity of acquiring trust land for the tribe and issuing a reservation proclamation before allowing the tribe to organize under the IRA. *Stockbridge-Munsee*, 554 F.3d at 665; *see also Stockbridge*-Munsee, 366 F. Supp. 2d at 732.

In the end, the Village's theory of disestablishment or diminishment proves too much.

The GAA was applied to hundreds of tribes, including those considered by the Supreme Court in the cases discussed above. The allotment policy is credited with devastating tribes' land bases, reducing the total acreage owned by tribes from 138 million acres to 48 million acres by the time of the IRA. *Cohen's Handbook of Federal Indian Law,* § 1.04. But the allotment policy is not credited with abolishing all the reservations to which it applied and there is no principled basis exists for distinguishing Oneida from all the other reservations that were allotted. For very good reason, no federal court has been prepared to endorse that view. Allotment alone cannot abolish a reservation and the Nation is entitled to judgment as a matter of law on the Village's affirmative defense to the contrary.

C. Because the Nation conducted its 2016 Big Apple Fest in Indian country, the Village lacks authority to regulate the Nation under its Ordinance.

As an extant reservation, the Oneida Reservation constitutes Indian country under § 1151(a) and the Supreme Court has consistently adhered to the principle that states lack authority to regulate or tax Indians located in Indian country. The first case in the modern era is *Williams v. Lee*, 358 U.S. 217, in which the Court considered whether a state court could entertain an action against a tribal Indian for a claim arising on the reservation. Citing *Worcester v. Georgia*, 31 U.S. 515 (1832), the Court concluded that the state lacked such authority. 358 U.S. at 218-219. The Court deemed it immaterial that the plaintiff in the state action was non-Indian; the determinative principle was the state attempt to displace the tribe's authority over the reservation. *Id.* at 223.

In *Bracker*, the Court explained the modern-day doctrinal basis of tribal immunity in Indian country. The Court identified two independent, but related bases for it. First, state regulatory authority over tribes and their reservations was generally pre-empted by federal law,

which occupies the field of regulating relations with Indian tribes. *Bracker*, 448 U.S. at 142 (citing *Warren Trading Post v. Ariz. State Tax Comm'n*, 380 U.S. 685 (1965) and *McClanahan*, 411 U.S. 164). Second, states cannot infringe upon the right of reservation Indians to make and be governed by their own laws. *Id.* (citing *Williams*, 358 U.S. 217). These independent bases for states' lack of authority to regulate on-reservation tribal activity are related because tribes' right to make and be governed by their own laws is subject to Congress' broad authority. *Bracker*, 448 U.S. at 143. Taken together, these principles result in the general rule that state authority over tribal activity on a reservation is prohibited, even if the tribal activity involves non-Indians. *Id.* at 144.[33] The Supreme Court has since consistently adhered to the rule that on-reservation tribal activity is not subject to state regulatory authority. *Okla. Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 123 (1993) ("Indian nations . . . have long been distinct political communities, having territorial boundaries, within which their authority is exclusive" (quotation omitted)); *Cabazon Band*, 480 U.S. at 207 (Court has consistently recognized that tribes retain attributes of sovereignty over their members and their territory); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973) (tribes and their reservation land have historic immunity from state and local control); *Kennerly v. Dist. Court of the Ninth Judicial Dist. of Mont.*, 400 U.S. 423 (1971); *see also San Manuel Indian Bingo & Casino v. Nat'l Labor Relations Bd.*, 475 F.3d 1306, 1313 (D.C. Cir. 2007) (state laws do not apply to activities of tribal Indians on their reservations);

[33] While the Court in *Bracker* explained the principles regarding the boundaries between state regulatory authority and tribal self-government on reservations in general, the particular question in that case involved state authority over non-Indian activity on the reservation, which requires an inquiry into relative state, federal and tribal interests at stake. *Bracker*, 448 U.S. at 145. Here, the question is local authority to regulate the Nation itself on its Reservation, not non-Indians. As a result, this case is governed by principles discussed above, not the balancing-of-interests test applied in *Bracker*.

Santa Rosa Band of Indians v. Kings Cnty., 532 F.2d at 658 ("we have little doubt that Congress assumed and intended that states had no power to regulate the Indian use or governance of the reservation . . .").

The Village purports to do here precisely what this rule precludes, that is, regulate the Nation's activity on the Oneida Reservation. By its terms, the Village's Ordinance regulates "all persons within the Village" in the conduct of defined special events of whatever nature. (Stip., Ex. 1, Ordinance at § 250-4.) By amendment to the Ordinance in 2016, "person" is defined to include any "governmental entity," such as the Nation. (*Id.* at § 250-5.) Further, there are no limitations on the event conditions that might be imposed by the Village. Because those conditions may differ substantially from the Nation's own laws, the Ordinance would effectively displace Nation law.[34] The first condition on liability insurance is illustrative. The Ordinance requires a liability insurance policy naming the Village as an additional insured. (*Id.* at § 250-7 A.) The Nation has its own liability insurance, which is administered by the Nation's Risk Management Division. (Material Facts ¶ 64.) To comply with the Ordinance, the Nation would be obliged to add the Village as an additional insured to its policy. The provision of security is another clear example of conflict. The Nation has a well-trained and staffed Oneida Police

[34] The Nation conducts the Big Apple Fest under several and substantial Nation laws, including: Oneida Vendor Licensing; Oneida Food Service Code; On-Site Waste Disposal Ordinance; Recycling and Waste Disposal Code; Oneida Safety Law; Sanitation Code; and Oneida Tribal Regulation of Domestic Animals Ordinance. (Material Facts ¶ 55.) These laws are administered by divisions of Oneida tribal government, including: Oneida Compliance Division; Oneida Risk Management Department; Oneida Environmental Health and Safety Division; Oneida Conservation Department; Oneida Police Department; and the Oneida Tourism Division, which is responsible for coordinating activities of all these divisions of tribal government in the conduct of the Big Apple Fest. (*See* Material Facts ¶ 56.) Possible conditions that the Village might impose under the Ordinance conflict directly with all of these laws, with the possible exception of the Nation's Regulation of Domestic Animals Ordinance.

Department[35] and yet would be obliged under the Ordinance to pay for the services of Village police, "in the Village's reasonable discretion." (Stip., Ex. 1, Ordinance at § 250-7 C.) It is difficult to imagine a more intrusive interference with the Nation's ability to govern itself on the Reservation than the Village's Ordinance, an impermissible result under governing Supreme Court authority.

V. The Village's affirmative defense of claimed exceptional circumstances to justify imposition of its Ordinance upon the Nation within Indian country fails as a matter of law.

The Nation is immune from the Village's regulatory authority in Indian country unless the Village can prove the existence of "exceptional circumstances." *Cabazon Band*, 480 U.S. at 214-15. The Supreme Court has set a very high bar for claimed exceptional circumstances and the Village's stated interests are insufficient to meet that standard. As a result, the Nation is entitled to summary judgment on this affirmative defense.

A. There is a high bar for state regulatory authority over Indian tribes in Indian country.

In *Cabazon*, the Supreme Court considered whether state and county laws regulating gaming could be imposed upon gaming conducted by two federally recognized Indian tribes in Indian country. 480 U.S. at 205. The games at issue were a "major source of employment for tribal members, and the profits [were] the Tribes' sole source of income" and the games were "played predominantly by non-Indians coming onto the reservations." *Id.*

The Court began its analysis noting that it has "consistently recognized that Indian tribes retain 'attributes of sovereignty over both their members and their territory' . . . and that 'tribal

[35] The Oneida Police Department has nineteen officers, all of whom are certified as meeting state standards and are deputized by Brown County and the State of Wisconsin to enforce state law and county law on the Reservation. (Material Facts ¶ 61.)

sovereignty is dependent on, and subordinate to, only the Federal Government, not the States[.]'" *Id.* at 207 (quoting *United States v. Mazurie*, 419 U.S. 544 (1975) and *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980)). In keeping with these federal common law principles, the general rule is that state law does not apply to tribes in Indian country, unless Congress expressly so provides. *Id*. at 215.

The Court carved out a narrow exception to the general rule, holding that, "in exceptional circumstances a State may assert jurisdiction over the on-reservation activities of tribal members." *Id.* at 215 (quoting *New Mexico v. Mescalero Apache Tribe,* 462 U.S. 324, 331-32 (1983)). The state interests at stake must be sufficient to justify the assertion of state authority, in light of the "traditional notions of Indian sovereignty and the congressional goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development." *Id.* at 217. As for the existence of such circumstances in *Cabazon,* the Court acknowledged the state's "legitimate concern" in preventing organized crime but concluded that even this weighty concern was not "sufficient to escape the pre-emptive force of federal and tribal interests." *Id.* at 221.[36]

Because the threshold is high, there are few cases that apply the exceptional-circumstances test. Those cases have adhered to the high bar for the test set by the Supreme Court in *Cabazon.* In *Cayuga Indian Nation of New York v. Village of Union Springs*, 317 F.

[36] The Court noted that exceptional circumstances did exist in those cases where the Court held that states could require tribes to pre-collect cigarette taxes imposed on non-tribal members purchasing cigarettes on reservations. *Cabazon*, 480 U.S. at 216. In those cases, the Court declined to permit tribes to "market an exemption from state taxation to persons who would normally do their business elsewhere" when the tribes were "merely importing a product onto the reservations for immediate resale to non-Indians." *Id.* at 219 (citing *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 155 (1980) and *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976)).

Supp. 2d 128 (N.D. N.Y. 2004), the court considered whether the Village of Union Springs could apply its land-use regulations to fee land owned by the tribe and located within its historic reservation.[37] The Village of Union Springs argued multiple interests in an effort to establish exceptional circumstances: the regulations were necessary to "ensure the health and safety of their citizens"; the Village provided road maintenance and emergency service to the tribe's land; the tribe's land was located in close proximity to a local school; and the tribe's land would be "predominantly used by non-Indians."[38] *Id.* at 147-48. The court ruled that these interests were insufficient to meet the *Cabazon* exceptional-circumstances test:

> After careful consideration of the aforementioned factors, it is clear that the overriding federal goals of promoting tribal self-sufficiency and economic development outweigh the interest set forth by the defendants.

Id. Similarly, the court in *In re Sonoma Fire Chief's Application*, (Not Reported), 2005 WL 1005079, ruled that the county's interest in providing fire emergency services for an on-reservation tribal casino was insufficient as a matter of law to meet the exceptional circumstances test, even though the casino catered largely to nonmembers. *See also State v. Stone*, 572 N.W.2d 725, 728 (Minn. 1997) (state interest in maintaining road safety insufficient to establish exceptional circumstances).

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[37] The injunction issued in *Cayuga* was subsequently vacated because the Supreme Court's ruling in *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005), which called into question whether the usual pre-emptive force of Indian country status attached to fee title reacquired by the tribe in a reservation lost wholly to its possession. *Cayuga Indian Nation of N.Y. v. Vill. of Union Springs*, 390 F. Supp. 2d 203 (N.D.N.Y. 2005). Nonetheless, the district court's analysis of the exceptional-circumstances test remains instructive.

[38] In *Parker*, the Supreme Court noted that every reservation that was allotted and then opened to non-Indian settlement experienced "'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.'" 136 S. Ct. at 1082 (quoting *Yankton Sioux*, 522 U.S. at 356). Similarly, the influx of or proximity to non-Indians cannot be sufficient to create exceptional circumstances. Otherwise, the exception would overtake the general rule precluding state or local regulation of tribes in Indian country.

B. The Village's stated interests in imposing its Ordinance upon the Nation are insufficient to meet the exceptional circumstances test.

The Village's interests underlying its Ordinance are stated on the face of the Ordinance:

> § 250-2. Purpose and intent.
> The purpose and intent of this chapter is to protect the public interest and promote the general health, safety, and welfare of the Village by establishing rules and a permit process in order to hold a special event on any property within the Village so as to address potential impacts on the general public of a special event, including without limitation noise, light, dust, traffic, parking, and other public safety and welfare concerns. Further, the purpose and intent of this chapter is to promote the economic welfare and general prosperity of the community by safeguarding and preserving property values by addressing potential impacts of a special event

(Stip., Ex. 1, Ordinance.) These are the same or similar interests considered and held insufficient to meet the exceptional circumstances test in the cases discussed above. *Cabazon*, 480 U.S. at 220-21; *Cayuga*, 317 F. Supp. 2d at 146-148; *In re Sonoma County Fire Chief's Application*, 2005 WL 1005079 at *3; *Stone*, 572 N.W.2d at 732.

Moreover, to protect these claimed interests, the Ordinance employs a permitting system under which the Village can impose a broad range of permit conditions. As indicated above, the Nation regulates the conduct of the Big Apple Fest in all these respects, and more, under its own laws. (Material Facts ¶¶ 55-56.) Under *Cabazon* and the cases applying the exceptional circumstances exception, this is plainly a circumstance where local regulation of the Nation "would impermissibly infringe on tribal government." 480 U.S. at 222. The Nation is entitled to judgment that the Village fails to demonstrate exceptional circumstances as a matter of law.

VI. The Village's counterclaim that Congress lacks authority to foreclose state jurisdiction over the Nation and its lands under the IRA or otherwise is insufficient as a matter of law.

In its first counterclaim (and in its affirmative defenses), the Village alleges that Congress

lacks authority to enact federal statutes, including the IRA, to the extent those statutes purport to limit state authority over the Nation: "The Secretary of Interior has no authority under any statutes to remove lands from state jurisdiction. Once land has ceased to be territorial land by Congressional cession or act, and is under state jurisdiction, there is no federal authority to nullify state jurisdiction."[39] (Answer to Am. Compl., First Cause of Action, ¶ 25; Affirmative Defense 2, ECF No. 12.) While the Village's Answer does not specify the basis for this general claim, the Nation is well familiar with the arguments repeatedly asserted by the Village in its challenges to federal decisions to place land into trust for the Nation. *See* footnote 3, above. The usual litany asserted by the Village includes: the IRA violates the Tenth Amendment of the United States Constitution; trust lands create federal enclaves that require state consent; Congress can only regulate mercantile matters under the Indian Commerce Clause; and trust land deprives the state of a republican form of government. *See Vill. of Hobart*, 57 IBIA 4, 12 (IBIA did not address these issues as it lacks jurisdiction to entertain constitutional challenges to the IRA).

Of course, the Supreme Court has developed federal common law principles and construed the IRA and other federal statutes to have precisely the effect about which the Village complains. In addition, courts that have considered the Village's specific constitutional bases for avoiding this result have rejected every single one of them.

A. The IRA does not violate the Tenth Amendment.

The Tenth Amendment does no more than reserve to the people of the states those

[39] Of course, the Village simply overlooks the inconvenient historical fact that Wisconsin became a state in 1848, ten years after the Oneida Reservation was created. *See Wisconsin v. Lane*, 245 U.S. 427, 429 (1918).

"powers not delegated to the United States." U.S. Const. amend. X. Plenary authority over Indian affairs *was* expressly delegated to the Congress in the Indian Commerce Clause. U.S. Const. art. I, § 8, cl. 3. The cases so holding are legion in number. *See generally*, *Cohen's Handbook of Federal Indian Law*, § 5.01; *United States v. Lara*, 541 U.S. 193 (2004).

As a result of this express delegation, every court to consider the matter has rejected the proposition that the acquisition of land-in-trust under the IRA violates the Tenth Amendment. *Carcieri v. Kempthorne*, 497 F.3d 15, 39-40 (1st Cir. 2007), *rev'd on other grounds*, 555 U.S. 379; *Upstate Citizens for Equality, Inc., v. United States*, 2017 WL 5660979, *aff'd* 841 F.3d 556, 569 (2d Cir. 2016) (state sovereignty claims against IRA rejected without explicit reference to Tenth Amendment); *Gila River Indian Cmty. v. United States*, 697 F.3d 886, 899 (9th Cir. 2012) (Tenth Amendment argument asks court "to depart from every court decision that has previously addressed it"); *No Casino in Plymouth v. Jewell*, 136 F. Supp. 3d 1166, 1191 (E.D. Cal. 2015), *vacated on other grounds* 2017 WL 4480089 (9th Cir. 2017); *Cnty. of Charles Mix v. United States*, 799 F. Supp. 2d 1027, 1036-37 (D.S.D. 2011); *City of Roseville v. Norton*, 219 F. Supp. 2d 130, 154 (D.D.C. 2002).

B. Trust lands do not constitute federal enclaves requiring state consent.

While the Supreme Court has compared Indian country to federal enclaves in certain respects, the Supreme Court has never declared trust land or reservations to constitute federal enclaves requiring state consent. In *United States v. Antelope*, 430 U.S. 641 (1977), for example, the Court noted that Congress extended the same criminal statutes to Indian country that apply to federal enclaves and the Court went on to note the difference between Indian country and federal enclaves:

> But as our opinions have recognized that Indian reservations differ in certain respects from other federal enclaves, the statute has been construed as not encompassing crimes on the reservation by non-Indians against non-Indians.

Id. at 648, n.9. Similarly, other cases reference the extension to Indian country of criminal statutes that apply to federal enclaves but do not conclude therefrom that Indian country constitutes a federal enclave requiring state consent to its creation. *See United States v. Goodface*, 835 F.2d 1233, 1273, n.5 (8th Cir. 1987); *United States v. Marcyes*, 557 F.2d 1361 (9th Cir. 1977). As a result, any claim that the creation of Indian country requires federal consent as a federal enclave has been explicitly rejected. *Upstate Citizens for Equality*, 841 F.3d at 570; *Carcieri*, 497 F.3d at 40.

C. The Indian Commerce Clause is not limited to mercantile trade.

As noted above, there is a legion of cases holding that Congress has broad authority over Indian affairs under the Indian Commerce Clause, and that authority clearly extends well beyond mercantile trade. *Cohen's Handbook of Federal Indian Law* § 5.01. The only cases to directly address the issue have unsurprisingly held that "the Supreme Court majority has continued to adhere to the view that the Indian Commerce Clause vests Congress with plenary power over Indian tribes and this power is not delimited by state boundaries." *Upstate Citizens for Equality*, 841 F.3d at 568; *Gila River Indian Cmty.*, 697 F.3d at 899.

D. Trust land does not deprive the state of a republican form of government.

As noted above, the State of Wisconsin was admitted into the Union after, not before, the creation of the Oneida Reservation. Even were this not the case, the only courts to consider the issue have concluded that trust land does not deprive the state of a republican form of government. *Cnty. of Charles Mix*, 799 F. Supp. 2d at 1038 (trust land does not pose a realistic

risk of altering the form of government or method of functioning of local government); *City of Lincoln City v. U.S. Dep't of the Interior*, 229 F. Supp. 2d 1109, 1117 (D. Ore. 2002).

Broadly stated, these claims attempt to avoid Congress' clear and pre-emptive authority in Indian affairs and have been rejected in all their various forms. In *United States v. John*, 437 U.S. 634 (1978), the Court considered the status of land located in the State of Mississippi that was taken into trust for the Mississippi Band of Choctaw and proclaimed to be a reservation under the IRA, all events occurring nearly one hundred years after statehood. *Id.* at 639, 646. The State of Mississippi challenged the Indian country status of the land, essentially asserting the primacy of state law under the historical circumstances. The Court rejected all the state's arguments and confirmed the Secretary's authority under the IRA to take the land into trust, proclaim an Indian reservation, and thereby pre-empt what had been state criminal jurisdiction over the land. *Id.* at 654. There is no credible challenge to the Nation's Indian country in the face of this and other case law upholding Congress' and the Secretary's authority to oust state jurisdiction in favor of federal and tribal jurisdiction.[40]

VII. The Village's second counterclaim against the Nation is barred by the Nation's sovereign immunity.

The Village alleges a counterclaim against the Nation for violation of its Ordinance in general and for the payment of its $5,000.00 fine in particular. (Answer to Am. Compl., Second Cause of Action; Stip. ¶ 23, Ex. 4, Citation.) The Nation's sovereign immunity to suit is a

[40] It should be noted that this particular issue is moot in the event the Court determines that the Oneida Reservation remains intact. As the Court has already indicated, all land located within the boundaries of an Indian reservation constitute Indian country without regard to the title status of particular parcels. (Dec. & Order on Burden of Proof, Oct. 23, 2017, ECF No. 66.)

complete bar to this attempt to enforce compliance with its Ordinance.[41]

The Supreme Court is very clear that tribal 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.'" *Bay Mills Indian Cmty.*, 134 S. Ct. at 2030 (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58; *Three Affiliated Tribes of the Fort Bethold Reservation v. Wold Eng'g, P.C.*, 476 U.S. 877, 890 (1986); The Federalist No. 81 at 511 (A. Hamilton) (B. Wright ed. 1961) ("It is 'inherent in the nature of sovereignty not to be amenable' to suit without consent."")). The immunity applies to bar counterclaims against tribes in suits filed by tribes. *Citizen Band of Potawatomi*, 498 U.S. at 509; *Oneida Tribe of Indians of Wis. v. Vill. of Hobart*, 500 F. Supp. 2d 1143, 1148 (E.D. Wis. 2007) (holding the Village's counterclaim for monetary relief barred by sovereign immunity). It also applies to bar claims against tribes outside of Indian country. *Bay Mills Indian Cmty.*, 134 S. Ct. at 2031. As a result, tribal sovereign immunity bars Village attempts to enforce its Ordinance, even if exceptional circumstances existed to justify Village regulation of the Nation in Indian country and even if the Reservation no longer exists.

Tribal sovereign immunity can be waived, but the Nation has not done so with regard to the Ordinance. In the Nation's Sovereign Immunity Law, the Nation's law incorporates federal precedent into the law as "an inherent and indispensable aspect of Tribal Sovereignty . . .

[41] Other provisions of the Ordinance also contemplate the imposition of liability upon the Nation. For example, the Ordinance allows the Village to condition a permit upon an indemnification agreement, (Stip., Ex. 1, Ordinance at § 250-7 B), which, if imposed, could cause the Nation to incur legal liability and subject itself to suit. *Edward E. Gillen Co. v. United States*, 824 F.3d 1155, 1157 (7th Cir. 1987). Further, the Ordinance provides that any person who violates it is subject to a forfeiture as defined in § 1-3 of the Village Code. (Stip., Ex. 1, Ordinance at § 250-7 B.) In all these respects, the Ordinance purports to authorize direct, coercive action against the Nation resulting in liability, monetary damages and forfeitures.

afford[ing] necessary protection of Tribal resources, and necessary protection for Tribal officers, employees, and agents in both governmental and commercial settings." 1 Oneida Code of Laws ("O.C.") 112.1.[42] Further, it requires that any waiver of immunity be made by the Nation's government. 1 O.C. 112.4-112.6. There is no such waiver of the Nation's immunity with regard to the Village's Ordinance.

In short, whatever else the Village may assert as authority to impose its Ordinance upon the Nation, the Nation's sovereign immunity bars the Village's counterclaim for enforcement of its Ordinance against the Nation and payment of the $5,000 fine.

Conclusion

As the Supreme Court frequently cautions in cases such as these, it is important to remember what is at stake. This is not a case where the Nation seeks to regulate the Village or nonmembers. This is not a case where the Nation goes beyond the boundaries of Indian country in the assertion of economic might or to lay new claims. This is not a case where the health, safety, or welfare of the public, tribal or non-tribal, is in jeopardy. This is a case where the Village challenges the very existence of the Nation's Reservation and the Nation's ability to govern itself therein. Congress has not restricted this fundamental right of self-governance held by the Nation and the Village of Hobart lacks authority to do so itself.

For all the foregoing reasons, the Court should grant the Nation's motion for summary judgment and enter an order: (1) declaring that the Village lacks the authority to impose the Ordinance on the Nation, or otherwise regulate the Nation on its Reservation; (2) permanently enjoining the Village from any attempt or effort to impose the Ordinance on the Nation, its

[42] The Nation Code of Laws can be found at https://oneida-nsn.gov/government/register/laws/ (last visited Jul. 19, 2018).

officials, and its employees; and (3) dismissing all the Village's counterclaims and affirmative defenses with prejudice, including, but not limited to, its claims and defenses that the Nation's Reservation has been disestablished or diminished.

Dated this 19th day of July, 2018.

Respectfully submitted,

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