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

Oneida Nation,

Plaintiff,

v. Case No. 16-CV-1217

Village of Hobart, Wisconsin,

Defendant.

PLAINTIFF'S MEMORANDUM OF LAW
IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Plaintiff Oneida Nation ("Nation") filed this action seeking declaratory and injunctive relief prohibiting the Village of Hobart ("Village") from attempting to impose its Special Event Permit Ordinance, Ch. 250, Village of Hobart Municipal Code ("Ordinance") upon the Nation. The Nation moves for summary judgment and files this Memorandum of Law in support of its motion. For the reasons set out herein, there is no genuine dispute on any material facts and, under governing legal principles, the Nation is entitled to judgment that the Village lacks authority to regulate the Nation through its Ordinance.

STATEMENT OF FACTS

On September 2, 2016, counsel for the Village wrote the Nation's special event coordinator, a tribal employee, regarding the conduct of the Nation's 2016 Big Apple Fest, scheduled to take place on September 17 on the Nation's Reservation. He advised that, unless the Nation applied for a permit for the event on or before September 9, the Nation and its responsible officials would be prosecuted by the Village for violation of the Ordinance. ECF No.

1, ¶ 18. On September 9, the Nation filed this action seeking a declaration that the Village lacks authority to impose its Ordinance upon the Nation. ECF. No. 1. At the same time, the Nation sought a preliminary injunction against the Village's threatened prosecution, supported by affidavits. ECF Nos. 2, 3 & 4. The Village agreed not to interfere with or disrupt the event, and the Court denied the motion for a preliminary injunction. Statement of Proposed Material Facts, ¶ 12.

The Big Apple Fest occurred as scheduled on eleven (11) trust parcels and three (3) fee parcels, all within the Reservation.[1] *Id.* On September 21, and in the Village's first attempt to enforce the Ordinance against the Nation, the Village Chief of Police issued a citation against the Nation for violation of the Ordinance, and the Nation subsequently filed an amended complaint principally to add allegations regarding these events. Statement of Proposed Material Facts, ¶ 18. On October 3, the Village filed its answer, affirmative defenses, and counterclaims to the amended complaint. ECF No. 12. The Village admitted the essential facts giving rise to the dispute, asserted authority to impose its Ordinance on the Nation, questioned the Nation's federal status and Reservation, and counterclaimed for money damages in the amount of the fine appearing in its citation. *Id*., ¶¶ 18, 20, and Second Cause of Action.

The Ordinance at the center of this controversy was first adopted by the Village on June 3, 2014. In its original form, the Ordinance established "rules and a permit process in order to hold a special event on public property within the Village." Ch. 250, Village of Hobart

[1] Specifically, the activities largely took place at the Nation's Apple Orchard and the Cultural Heritage Site, both of which are held in trust. Some parking for the event and a portion of the apple-picking took place on the Nation's fee land. All the activities, including those on fee land, took place on the Nation's Reservation. Statement of Proposed Material Facts, ¶¶ 15, 16.

Municipal Code. It applied to "all persons and groups within the Village" and regulated three classes of events: those involving 200 or more people (denominated class I); those open to the public but of interest only to certain segments of the community (denominated class II); and those involving only a small number of people whether or not open to the public (denominated class III.) *Id.,* § 250-12. The Ordinance required permits for such events and imposed conditions for the conduct of the event. *Id.,* § 250-7. Thus, the Ordinance purported to regulate all events that occurred on public land.

On March 1, 2016, the Village replaced the original Ordinance with a significantly expanded one.[2] The current Ordinance applies to all persons, defined for the first time to include any "governmental entity," and to any event conducted by persons "occurring on public or private property." Ch. 250, Village of Hobart Municipal Code, § 250-5 Definitions. The current Ordinance carries forward the three classes of events, but defines them with more specificity: class I are those involving 200 or more persons; class II are those involving 50-200 persons; and class III are those involving approximately 50 persons, even if the event is closed to the public and does not involve any street closures. *Id.,* § 250-12. The substantive provisions regarding permit provisions and penalties for violation of the Ordinance are carried forward. *Id.,*§§ 250-7, 250-9.

Notably, the Ordinance does not take into account laws or regulations that any "governmental entity" might impose on its own conduct of special events. Rather, the Ordinance contemplates the displacement of any such laws or regulations in favor of Village authority to

[2] The legislative history of the Ordinance and its present terms appear on the Village's website at www.hobart-wi.org.

impose conditions for the conduct of special events. In the case of the Nation, there is a substantial body of tribal law under which the Nation conducts special events, including the emergency management and homeland security law, vendor licensing ordinance, food service code, waste disposal and recycling ordinances, safety law, and regulation of domestic animals ordinance. Statement of Proposed Material Facts, ¶ 13. By its attempted imposition of the Ordinance upon the Nation, the Village would completely displace the Nation's law, substituting Village regulation for that of the Nation with respect to the Nation's on-reservation activity.

As demonstrated below, the Village lacks authority as a matter of law to regulate the Nation and, thereby, infringe on the Nation's ability to govern itself in Indian country. The Nation is a federally recognized Indian tribe, entitled to invoke the immunity from state and local law that such tribes enjoy in Indian country. Part I, below. The Nation's Reservation constitutes Indian country, having been set aside by Congress as a reservation and having never been diminished by Congress. Part II, below. As a recognized tribe located in Indian country, the Nation and its activity on its own Reservation are immune from regulation by the Village. Part III, below. As a result, the Nation is entitled to judgment as a matter of law that the Village cannot impose its Ordinance on the Nation.

ARGUMENT

I. Summary Judgment Standard

"Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole..." *Celotex Corp. v. Catrett,* 477 U.S. 317, 327 (1986). It serves the salutary purposes of conserving the parties' and the court's resources by identifying those claims for speedy disposition where "there is no

genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. Proc. 56(a); *Deere & Co. v. Ohio Gear,* 462 F.3d 701, 706 (7th Cir. 2006). As the moving party, the Nation must demonstrate the absence of a genuine issue of material fact. *Celotex Corp.; Scaife v. Cook Co.,* 446 F.3d 735, 739 (7th Cir. 2006).

Once the moving party makes this demonstration, the nonmoving party must set forth specific facts showing that there is a genuine issue for trial. *Scaife*. The mere existence of some alleged factual dispute will not defeat the motion; there must be a genuine dispute as to a material fact. *Scott v. Harris,* 550 U.S. 327 (2007). And the alleged material dispute of fact must be outcome determinative to avoid summary judgment. *Contreras v. City of Chicago,* 119 F.3d 1286, 1891 (7th Cir. 1997); *Oneida Tribe of Indians of Wisconsin v. Village of Hobart,* 542 F. Supp.2d 908, 913 (E.D. Wis. 1997). Further, the Rule provides that the nonmoving party may seek a continuance on the motion if that party can establish by affidavit that it needs discovery to identify facts essential to justify its opposition to the motion. Fed. R. Civ. Proc.56(d); *Deere & Co.,* 462 F.3d at 706 (discussing Rule 56(f), which was carried forward without substantial change in 2010 amendments to the rule as subsection d, *see Advisory Committee Notes.*)

Because there are no material facts in dispute between the parties here, this matter can and should be resolved on summary judgment.[3] For the reasons stated below, that judgment should be entered in favor of the Nation.

[3] The Nation moves separately for a protective order against the discovery request recently made by the Village because the discovery sought is not germane and the request is unduly burdensome.

II. The political branches of government have indisputably determined that the Nation is a federally recognized Indian tribe and that political judgment is binding upon this Court.

Congress and the Department of the Interior have consistently recognized the Nation as an Indian tribe, entitled to the immunities and privileges as such. Government-to-government relations between the Nation and the United States are reflected in treaties, statutes, and administrative actions. This determination by the political branches of government is binding upon this Court.[4]

A. Since at least 1784, and continuing to the present day, the Congress and the Department of the Interior have consistently recognized the Nation as an Indian tribe.

The Nation appears on every list published by the Bureau of Indian Affairs ("BIA") of federally recognized Indian tribes. The first such list was published in 1979 as part of the BIA's federal recognition process established by regulations. 43 Fed. Reg. 39361, Sept. 5, 1978, codified at 25 CFR Part 54. The regulations set up a process for the recognition of tribes and expressly exempted tribes that were already recognized from the scope of the regulations. 25 CFR § 54.3. The regulations also committed the BIA to the publication of an initial list of tribes that were already recognized, and as a result, beyond the scope of the administrative process

[4] The Nation addresses this issue only because the Village suggests that it may challenge that status in this action: "The Nation *purports to be* a federally recognized Indian tribe..." ECF No. 12, ¶ (emphasis added.) It is noteworthy that despite multiple actions involving these same parties, all of which depended upon the Nation's status as federally recognized, the Village has never before challenged the Nation's status. *See Oneida Tribe of Indians of Wisconsin v. Village of Hobart,* 542 F. Supp.2d 908 (E.D. Wis. 2008) (cited hereafter as *Oneida I*); *Oneida Tribe of Indians of Wisconsin v. Hobart (Oneida II),* 891 F. Supp.2d 1058 (E.D. Wis.), *aff'd* 732 F.3d 837 (7th Cir. 2013). Further, the Nation notes that the United States is an indispensable party in any direct challenge to the Nation's status as a federally recognized tribe. The Nation reserves the right to move to strike or otherwise object due to the absence of the United States, in the event the Village makes a direct challenge to the Nation's status.

established by the regulations. *Id.,* § 54.6(b). The Nation appears on this initial list published in 1979. 44 Fed. Reg. No. 26, at 7235. The Nation appears on the most recently published list. 81 Fed. Reg. No. 86 (May 4, 2016), at 26829 ("Oneida Nation (previously listed as the Oneida Tribe of Indians of Wisconsin")). And the Nation appears on every list published between 1979 and 2016. Statement of Proposed Material Facts, ¶ 3. The inclusion of the Nation on these lists is conclusive of Nation's status as a federally recognized Indian tribe. *Cherokee Nation of Oklahoma v. Babbitt,* 117 F.3d 1489, 1499 (D.C. Cir. 1997)[5]; *Ingrassia v. Chicken Ranch Bingo & Casino,* 676 F. Supp.2d 953, 957 (E.D. CA 2009).

Even were the Court able to look behind this administrative determination, it would find consistent congressional, administrative, and court recognition of the Nation since the earliest days of relations between the United States and Indian tribes. In 1784 and 1794, the United States negotiated and the Congress ratified the Treaty of Fort Stanwix and the Treaty of Canandaigua, 7 Stat. 15 and 7 Stat. 44, with the Six Nations, including the Oneida Nation.[6] The

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[5] The court of appeals acknowledged the general rule that appearance of the list of recognized tribes is conclusive of the matter. But in that case, plaintiff had filed a timely Administrative Procedure Act ("APA") challenge to an administrative decision to add Delaware Nation to the list. As a result, the court had jurisdiction over the challenge and the court concluded that Congress had already taken the opposite position, i.e., that the Delaware Nation should not be recognized as a distinct Indian tribe. *Cherokee Nation*, 117 F.3d at 1499. Even if the United States could be made a party to this action, any challenge to the Nation's appearance on the lists described above is obviously untimely, i.e., beyond the governing six-year statute of limitations governing APA actions. Moreover, the Department of the Interior's view regarding the Nation reflects the consistently held view of Congress, unlike that in the *Cherokee Nation* case.

[6] The United States also negotiated the 1789 Treaty of Fort Harmar with the Six Nations, including the Oneida Nation. 7 Stat. 33, Jan. 9, 1789. While the record show no formal ratification of this treaty by the Senate, it is generally considered a binding federal treaty. *See* II Kapp.; C. Royce, *Indian Land Cessions in the United States* (GPO 1899), at 652; *Oneida County v. Oneida Indian Nation,* 470 U.S. 226, 231 (1985); *Oneida Indian Nation v. County of Oneida,*

United States expressly confirmed the Nation's status as a successor to the Oneida Nation recognized in these early treaties in the context of the Oneida land claim litigation. There, a BIA official made an affidavit declaring:

> It is the position of the Department of the Interior that the historic Oneida Nation was one of the Indian tribes which entered into and signed the Treaty of Fort Stanwix dated October 22, 1764 (sic), 7 Stat. 15; the Treaty of Fort Harmar dated January 9, 1769 (sic), 7 Stat. 33, and the Treaty with the Six Nations ("Treaty of Canandaigua"), dated November 11, 1794, 7 Stat. 44.
> The Secretary of the Interior recognizes the Oneida Nation of New York and the Oneida Tribe of Wisconsin as successors-in-interest to the historic Oneida Nation signatories of those treaties.

Affidavit of Sharon Blackwell, *Oneida Indian Nation v. State of New York,* 74-CV-187 (N.D.N.Y.), Statement of Proposed Material Facts, ¶ 4. For this and other reasons, the Supreme Court and other courts in the protracted Oneida land claim litigation concluded that the Nation is a successor-in-interest to the Oneida Nation recognized in the 1784, 1789, and 1794 treaties. *Id.; Oneida Indian Nation v. County of Oneida,* 434 F. Supp. 527, 538, *aff'd Oneida County v. Oneida Indian Nation,* 470 U.S. 226, 230; *Oneida Nation v. State of New York,* 199 F.R.D. 61, 69-70 (N.D.N.Y. 2000).

The 1794 Treaty of Canandaigua is the most significant of these federal treaties since it evidences the continuity of the relationship between the Nation and the United States. In Article VI of this treaty, the United States committed to an annuity payment in perpetuity to the Six Nations. On two occasions since 1794, the Nation complained about the United States' failure to make the required payments. In 1851, the Nation complained that it had not received its proportionate share of the annuity payment. Congress agreed and appropriated funds for

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414 U.S. 661 n.3 (1974).

"arrearages due the first Christian and Orchard parties of the Oneida Indians in Wisconsin, under the treaty of seventeen hundred and nine-six [1794]." Act of Feb. 27, 1851, 9 Stat. 574, 586.[7] In 1950, the Nation (along with other Six Nations successors), complained about later failure by the United States to make the required payments. *Six Nations v. United States,* Docket 84, Ind. Cl. Comm. Judgment was entered in favor of the Nation and other tribal plaintiffs in this action, 23 Ind. Cl. Comm. 376, 395. Under the distribution plan devised by the Department of the Interior, the Nation received 42% of the payment, based upon the relative populations of the plaintiff tribal signatories to the treaty. 42 Fed. Reg. 21665, April 28 1977. These acts and decisions by Congress, the Indian Claims Commission, and the Department of the Interior confirm the United States' continuing recognition of the Nation.

This record establishes beyond any doubt that the Nation has been since the founding of the Republic and is now a federally recognized Indian tribe, that the Nation is a successor-in-interest to federal treaties that recognized the Oneida Nation since 1784, and that the Nation has consistently maintained this relationship with the United States. There is no conclusion possible other than that the United States recognizes the Nation as an Indian tribe as a matter of law through treaty, statute, and administrative practice.

B. The determination by the political branches of government to recognize the Nation is binding upon this Court.

Largely because of the unique and historic nature of dealings between Congress and Indians tribes (as illustrated by the relations summarized above), the Supreme Court has been

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[7] Of course, the 1838 treaty with the First Christian and Orchard Parties of Oneidas also reflects federal recognition of the Nation. And the 1851 act and its legislative history demonstrate that the signatories to the 1838 treaty are the same Oneidas recognized by the United States as successors to the Treaty of Canandaigua. *See* discussion below.

very clear that federal courts must defer to the judgment of the political branches of government on the recognition of Indian tribes. In 1865, the Court stated the rule as follows:

> In reference to all matters of this kind, it is the rule of this Court to follow the action of the executive and other political departments of the government, whose more special duty it is to determine such affairs. If by them those Indians are recognized as a tribe, this Court must do the same.

United States v. Holliday, 70 U.S. 407, 418 (1865). The Court has since described the rule as akin to the political question doctrine. *Baker v. Carr,* 369 U.S. 186, 215 (1962) ("This Court's deference to the political departments in determining whether Indians are recognized as a tribe, while it reflects familiar attributes of political questions, also has a unique element in that the relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist no where else..." (citations and internal quotation marks omitted); *United States v. Rickert,* 108 U.S. 432, 445 (1903) ("It is for the legislative branch of the Government to say when these Indians shall cease to be dependent and assume the responsibilities attaching to citizenship. That is a political question, which the courts may not determine.")[8] Indeed, the courts relied upon this rule of deference to the United States' recognition of the Nation in the Oneida land claim litigation. *Oneida Indian Nation v. County of Oneida,* 194 F.Supp.2d at 119; *see also Cayuga Indian Nation v. Cuomo,* 667 F.Supp. 938, 942-43 (N.D.N.Y. 1987) (applying the same rule of deference to the Cayuga Nation, also a Six Nations' signatory to the Treaty of Canandaigua.)

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[8] The Court has suggested only one limitation on courts' deference to the political branches on this issue. In *United States v. Sandoval,* 231 U.S. 28 (1913), the Court acknowledged the usual rule but observed that Congress could not arbitrarily recognize a group as an Indian tribe. *Id.,* at 46. However, no court has overturned congressional recognition on this basis. *Cohen Handbook of Federal Indian Law* (2012 ed.), § 3.02[4]. And there is certainly no basis for doing so in this case, where the United States has recognized the Nation consistently since 1784 and the Supreme Court has acknowledged the Nation's descent from the recognized, historic Oneida Nation.

The Seventh Circuit agrees that "the action of the federal government in recognizing or failing to recognize a tribe has traditionally been held to be a political one not subject to judicial review." *Miami Nation of Indians of Indiana v. United States Department of the Interior,* 255 F.3d 342, 347 (7th Cir. 2001). That particular case involved an APA challenge to an administrative decision declining to recognize a tribe under the acknowledgment regulations. For that reason, the court had authority to review the agency decision under the APA, and the court of appeals concluded that this circumstance took the political question doctrine out of play. *Id.,* at 349. Clearly, though, the Seventh Circuit has adopted the general rule that the political question doctrine shields administrative determinations on recognition of tribes outside the context of the APA.

Other lower federal courts also treat the federal recognition of Indian tribes as an issue upon which courts must generally defer to the political branches of government. *Kanawaiolaa v. Norton,* 386 F.3d 1271, 1276 (9th Cir. 2004) (action by federal government to recognize or failing to recognize a tribe "has traditionally been held to be a political one not subject to judicial review."); *Cherokee Nation of Oklahoma v. Babbitt,* 117 F.3d at 1496 ("Whether a group constitutes a 'tribe' is a matter ordinarily committed to the discretion of Congress and the Executive Branch, and courts will defer to their judgment."); *Western Shoshone Business Council v. Babbitt,* 1 F.3d 1052, 1056 (10th Cir. 1993) ("The judiciary has historically deferred to executive and legislative determinations of tribal recognition."); *Winnemem Wintu Tribe v. United States,* 725 F. Supp.2d 1119, 1132 (E.D. CA 2010); *Ingrassia,* 676 F. Supp.2d at 257.

The usual rule applies here, which requires this Court to defer to the clear and consistent judgment of both Congress and the Executive Branch that the Nation is a recognized Indian tribe.

This, together with the Nation's consistent appearance on the lists of federally recognized tribes, is conclusive on the issue. This Court cannot and need not consider the matter further. It is clear as a matter of law that the Nation is a federally recognized tribe entitled to invoke all the privileges and immunities of such status.

III. By its plain and unambiguous terms, the Treaty of 1838, 7 Stat. 566, set aside the Reservation for the Nation and the Reservation can only be disestablished or diminished by an act of Congress.

In 1831, the United States negotiated with the Menominee Tribe for a cession of a portion of its territory that "may be set apart as a home to the several tribes of the New York Indians..." Treaty of Feb. 8, 1831, 7 Stat. 342, Article First. The President was empowered to divide the ceded land 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..," such lands to be held by the New York tribes on the same terms as the Menominee held their lands. *Id.*[9] To emphasize the point, 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." *Id.* A few days thereafter, the 1831 treaty was modified to extend the three-year deadline by which the New York tribes may relocate to the ceded territory and to authorize the President to exceed the 100 acre per member limitation.

[9] The tract was "ceded to the United States, for the benefit of New York Indians..." *Id.,* Article First. And the treaty made clear that, to the extent that the New York tribes did not take up possession of the any portion of the tract, it reverted to the United States. *Id.* In other words, the ceded land became public lands, subject to the right of the New York tribes to take up possession. *See Humboldt County v. United States,* 684 F.2d 1276, 1281 (9th Cir. 1982).

Treaty of Feb. 17, 1831, 7 State 346. By the 1838 treaty with the emigrating Oneida, the Oneida ceded all their interest in the previously ceded Menominee territory, except that a tract containing one hundred acres, for each individual, "shall be reserve[d] to the said Indians to be held as other Indian lands are held..." *Id.,* Treaty of 1838, Art. 2. This reserved tract constitutes the Nation's Reservation as a matter of law. Part A, below.

Once a reservation is established, only Congress can alter or abolish it. The Supreme Court has established a clear analytical framework for making this inquiry that looks to the text of the act alleged to alter the reservation, circumstances surrounding the passage of the act, and demographic history after the act that may reflect Congress' intent. In the case of the Nation, there is no act of Congress abolishing the Reservation and, therefore, no need to even inquire into other factors used to determine Congress' intent in the act. The Reservation, then, continues to exist as a matter of law. Part B, below.

A. The Reservation is Indian country as a matter of law.

Indian country is defined by federal statute to include, among other categories:

> all land within the limits of any Indian reservation under the jurisdiction of the United States Government, *notwithstanding the issuance of any patent, and including rights-of-way running through the reservation...*

18 U.S.C. § 1151(a) (emphasis added.)[10] In enacting this provision, Congress codified the Supreme Court's definition of Indian reservation in *Donnelly v. United States,* 228 U.S. 243

[10] This statutory definition appears in a criminal provision but the Supreme Court refers to this same statute to define the territorial reach of civil jurisdiction rules in Indian law, as well. *California v. Cabazon Band of Mission Indians,* 480 U.S. 202, 208 n. 5 (1987); *DeCoteau v. District County Court,* 420 U.S. 425, 427 n. 2 (1975); *see also Oklahoma Tax Commission v. Sac & Fox Nation,* 508 U.S. 114, 125 (1993) (Court asks only whether the land is Indian country to determine immunity from state law.)

(1913). *Cohen,* § 3.04[2][c][ii]. There, the Supreme Court rejected the proposition that a reservation, or Indian country, was limited to lands to which the Indians retained their original right of possession. The Court held that a tract of land lawfully set aside out of the public domain constituted an Indian reservation. *Id.,* at 269. The Court has also rejected the notion that formal action is necessary to set aside a reservation. "It is enough that from what has been done there results a certain defined tract appropriated to certain purposes." *Minnesota v. Hitchcock,* 185 U.S. 373, 390 (1902).

The 1838 treaty with the First Christian and Orchard Parties setting apart the Nation's Reservation far exceeds this minimal standard for the creation of an Indian reservation.[11] Both the 1831 Menominee treaty, which anticipated the creation of reservations for emigrating New York tribes, and the 1838 treaty itself, plainly stated that the land was "reserved," to be a homeland for the New York tribes, and "to be held as other Indian lands are held..." 7 Stat. 566, Art. 2. It could not be plainer that a definite tract was set aside for a certain purpose and expressly subjected to federal superintendence, thus unambiguously establishing an Indian reservation. *Alaska v. Native Village of Venetie Tribal Government,* 522 U.S. 520, 529 (1998); *Minnesota v. Hitchcock.* Indeed, as this Court has observed in earlier litigation between the present parties, the Village's concession there that the Reservation constituted Indian country "appears quite reasonable" in light of governing Supreme Court authority. *Oneida I,* 542 F.

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[11] There can be no doubt that the signatories to the 1838 treaty are one and the same political entity now recognized by the United States as the Nation and as the successor-in-interest to the 1794 Treaty of Canandaigua. Congress made this clear in the 1851 act that authorized payment for annuity shortages due the Nation. 9 Stat at 586. The legislative history of this act is even more explicit that Oneidas who emigrated to Wisconsin were recognized as the same Oneidas who had signed the earlier federal treaties. *See* House Rep. No. 13, 31st Cong., 2d Sess., Jan. 29, 1851.

Supp.2d at 923.

Use of the phrase "to be held as other Indian lands are held" in the 1838 treaty confirms this plain meaning. The same language was used by Congress in other treaties to create reservations. *See* Treaty with the Winnebago, Oct. 13, 1846, 9 Stat. 878, Art. 3; Treaty with the Menominee, Oct. 18, 1848, 9 Stat. 952, Art. 3; and Treaty with the Menominee, May 12, 1854, 10 Stat. 1064, Art. 2. The 1854 Menominee treaty was read by the Supreme Court to create a classic Indian reservation that included the right to hunt and fish on the reservation free of state regulation. *Menominee Tribe v. United States,* 391 U.S. 404, 406 (1968), *affirming* 388 F.2d 998, 1002 (Ct. Cl). Because the Nation is to hold its land under the same tenure as the Menominee, the 1838 treaty must have created a classic Reservation as well. Treaty of 1831, Article First, above.

The reference to one hundred acres per soul in the Oneida treaty just as plainly referred to a determination of the total acreage set aside, not the creation of a some undefined property interest in individual tribal members rather than the Nation.[12] As stated in the 1831 Menominee treaty, the tracts were to be aside for the tribes, but measured in extent by reference to the 100 acres per member standard. Treaty of 1831, Article first. These terms together - land set aside for the tribes, to be held as Indian lands are held, measured in extent by reference to tribal population - are ideally suited to the creation of a reservation, a land tenure that means tribal ownership, not individual member ownership. *See generally Cohen,* § 15.02.

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[12] When the 1838 treaty was implemented with a survey of its boundaries, the survey comprehended the entire tract, not individual parcels within for each tribal member. *State v. King,* 212 Wis. 2d 498, 502-503, 571 N.W.2d 680 (Wis. App. 1973). Again, this confirms the plain reading of the treaty as having created a classic reservation.

In 1871, Congress confirmed this plain reading of the 1838 treaty when it granted a railway right-of-way across the Reservation. Act of March 3, 1871, 16 Stat. 588. The act was titled "Right of way across the *Oneida reservation* granted to the Green Bay and Lake Pepin Railroad Company." *Id.* (emphasis added.) It authorized the railroad company "to build and maintain its railway across the *Oneida Reservation*, in the State of Wisconsin..." *Id.* (emphasis added.) Congress obviously considered the tract set aside for the Nation in 1838 to constitute an Indian reservation.

Because of the plain language of the treaty, the Nation is entitled to a determination that the 1838 treaty created a Reservation as a matter of law. Resort to extrinsic evidence is unnecessary. There is a large body of administrative evidence that corroborates this reading of the 1838 treaty, though, including multiple annual reports of the Commissioner of Indian Affairs, surveys, and other material. In the event the Court determines that the treaty is ambiguous, the Nation is prepared to put the extensive administrative record into evidence.

B. It requires an act of Congress to disestablish or diminish an Indian reservation and there is no such act regarding the Oneida Reservation.

The Supreme Court recently confirmed the analytical framework to determine whether a reservation has been disestablished or diminished, thereby affecting the Indian country jurisdictional status of the affected territory, in *Nebraska v. Parker,* 136 S. Ct. 1072, 576 U.S. _ (2016). First and most importantly, "Only Congress can divest a reservation of its land and diminish its boundaries, and its intent to do so must be clear." 136 S. Ct. at 1078, *quoting in part Solem v. Bartlett,* 465 U.S. 465, 467 (1984) (internal quotes omitted.) This rule applies "no matter what happens to the title of individual plots within the area [since] the entire block retains

its reservation status until Congress explicitly indicates otherwise." *Solem.,* at 470.

To assess whether disestablishment or diminishment has occurred, the court examines the text of the act of Congress alleged to have that affect. *Nebraska*; *Solem*, at 467; *Hagen v. Utah,* 510 U.S. 399 (1994). In every instance where the Supreme Court has found disestablishment or diminishment, the Court based the finding upon a so-called surplus lands act that opened up the particular reservation to settlement by non-Indians with terms that provided for the cessation of federal supervision. As the Supreme Court put in it *Nebraska,* the act of Congress must contain language "evidenc[ing] the present and total surrender of all tribal interests" to support a construction of disestablishing or diminishing the reservation. *Nebraska,* at 1079; *see also South Dakota v. Yankton Sioux Tribe,* 522 U.S. 329 (1998) [Act of Aug. 15, 1894, 28 Stat. 286]; *Hagen v. Utah,* above [Act of May 27, 1902, 32 Stat. 263]; *Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584 (1977) [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. District County Court,* above [Act of Mar. 3, 1892, 26 Stat. 1035].

Only if the statutory text indicates a congressional intent to diminish or abolish the reservation, the demographic history of the area after the surplus lands act or other act of Congress allegedly altering the reservation boundaries can be considered in assessing Congress' intent. In *Nebraska,* the state suggested that this factor alone could result in diminishment of a reservation, particularly where the tribe's absence from the area for generations had resulted in justifiable expectations of diminishment on part of non-Indian settlers. *Id.,* at 1081-1082. But the Court rejected this contention because such factors "alone cannot diminish reservation boundaries." 136 S. Ct. at 1081. Stated otherwise, in the absence of an act evincing a

congressional intent to alter reservation boundaries, these factors are simply not germane to the inquiry of continued reservation status.

Allotment alone under the GAA does not alter reservation boundaries. As the Supreme Court has noted, allotment is completely consistent with continued reservation status. *Mattz v. Arnette,* 412 U.S. 481, 497 (1973); *Seymour v. Superintendent,* 368 U.S. 351, 357-58 (1962); *United States v. Celestine,* 215 U.S. 278, 285-88 (1909). Had there been any confusion on this point before, Congress made plain in 1948 when it enacted the current definition of Indian country that reservation status continues, notwithstanding the issuance of any fee patents therein. *Seymour.*

The Seventh Circuit applied these principles to determine whether an 1871 surplus land act, and a follow-up act in 1906, disestablished the Stockbridge-Munsee Reservation. *State of Wisconsin v. Stockbridge-Munsee Community,* 554 F.3d 667 (7th Cir. 2009). The 1871 act reduced the size of the tribe through the preparation of two rolls - one composed of those members who desired "to separate their relations with said tribe" and the other composed of those members who desired "to retain their tribal character and continue under the care and guardianship of the United States," all in contemplation of a new reservation. Act of Feb. 6, 1871, 16 Stat. 404, §§ 5 & 6. The act also directed the Secretary of the Interior to put up a block of tribal lands for sale to non-Indians at public auction, with eighteen contiguous sections to be reserved from the sale for the reduced tribe. *Id.,* § 2. Then, in 1906, as part of a lengthy appropriation bill, Congress decided that the land reserved in 1871 would be allotted among the remaining tribal members and made immediately alienable, with the intent of accomplishing "a full and complete settlement" of all the United States' obligations to the tribe. *Wisconsin v.*

Stockbridge-Munsee Community, 554 F.3d at 664. Applying the analytical framework required by the Supreme Court, the Seventh Circuit concluded that these acts together were not run-of-the mill allotment or surplus lands acts, but expressly contemplated the termination of United States' obligations to the tribe, the issuance of immediate patents in fee, and the disestablishment of the reservation. *Id.,* 664-665.

As applied to the Oneida Reservation, these principles support only one conclusion - that the Reservation continues to exist as Indian country. The Reservation was allotted under the GAA, not an Oneida specific statute. *Oneida I,* 542 F. Supp.2d at 910. As a result, all allotments at Oneida were issued originally as trust patents. GAA, § 5. Eventually, allotment of the Oneida Reservation resulted in a checkboarded land ownership pattern on the Reservation. *Oneida II,* 732 F.3d at 838. Of course, allotment alone under the GAA does not alter reservation boundaries. *Mattz; Seymour; United States v. Celestine.* Neither is there a subsequent surplus lands act or other act of Congress even arguably altering the boundaries of the Oneida Reservation by the cessation of federal supervision over the Nation or the Reservation.[13] Because of the absence of any such act of Congress, no circumstances or facts relating to subsequent demographics or alleged justifiable expectations of non-Indian settlers after allotment are material to this legal conclusion. *Nebraska*. As a result, the Nation's Reservation remains Indian country, defined by statute to include any lands patented in fee, 18 U.S.C. § 1151(a), and

[13] There was an Oneida specific provision in the large appropriation bill discussed above that included the unique allotment provisions for the Stockbridge-Munsee Community. This Oneida provision merely authorized the Secretary to issue a fee patent to any Oneida allottee who had received a trust patent. 34 Stat. 325, 381. This provision did not void any trust patents, did not direct the issuance of any fee patents, did not anticipate removal of the Nation to another reservation, or otherwise contemplate the termination of United States' obligations to the Nation or the alteration of reservation boundaries.

within the Reservation the Nation is entitled to the full immunity from state law that applies to tribes in Indian country.

IV. As a recognized Indian tribe in occupation of Indian country, the Nation is not subject to regulation by state or local governments.[14]

On its face and as applied by the Village, the Ordinance purports to directly regulate the Nation and its activities within Indian country. The Village purports to supplant the Nation's own laws governing the Nation's conduct of events on its Reservation, thereby not only infringing upon but altogether displacing the Nation's right of self-government in that regard. The Supreme Court is quite clear that this result is not permissible in Indian country.

A. The Ordinance purports to regulate the Nation and its activities in Indian country.

By its terms, the Ordinance applies "to all persons within the Village..." *Id.,* § 250-4. No exceptions are made for the nature of the event, be it a public one or a family birthday party, and no exceptions are made for the identity of the participants, be they members of the Oneida Nation or non-members. The sole triggering factor is the conduct of a special event by any person. And by amendment to the Ordinance this year, person is defined to include any "governmental entity..," such as the Nation. *Id.,* § 250-5.

The Nation's conduct of events on the Reservation is governed by the Nation's own laws. These laws include the Nation's homeland security law, vendor licensing code, the food service code, sanitation code, and safety law, which together regulate all of the Nation's activities at the Big Apple Fest. ECF No. 4, Exhibits H, I, J, K, L, M, N & O. In addition, the Nation has law

[14] While the case law discussed herein refers largely to state authority, the Village exercises only authority granted to it under state law. *Oneida I,* 542 F.Supp.2d at 913. As a result, the Village's authority cannot exceed that of the State of Wisconsin.

enforcement and safety personnel operating under tribal law who provide services at events like the Big Apple Fest. ECF No. 3.[15] As a result, the Nation's own laws address the very issues claimed to be of concern to the Village. ECF No. 10, ¶¶ 12, 13 & 17.[16] Yet, by imposing the Ordinance upon the Nation, the Village would replace the Nation's own laws with the Village's permit conditions. As a result, if applied to the Nation, the Ordinance has the affect of setting aside the Nation's own laws governing its activity within the Reservation, or alternatively, imposing a monetary fine upon the Nation for non-compliance with the Ordinance.[17]

Whatever the Village may say regarding the intent or purpose of its Ordinance, the attempted imposition of the Ordinance constitutes a direct regulation of the Nation, one that displaces the Nation's own laws regarding its own conduct within Indian country. This the Village cannot do.

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[15] The Nation's law enforcement officers are trained and certified under state law and deputized to enforce state and county law on the Reservation, as well as tribal law. ECF No. 3, ¶¶ 5 & 6.

[16] The only issue not wholly governed by tribal law is the use of State Highway 54 and County Highway GE. As a result, the Nation sought and obtained a permit from the Wisconsin Department of Transportation for the temporary closure of State Highway 54 and a permit to reroute traffic onto County Highway GE from Brown County. ECF No. 4, Exhibit Q. Otherwise, all the Nation's activity regarding the Big Apple Fest were conducted under the Nation's laws. Even were there some issue regarding compliance with these permits (which has not been raised by either the state or county), the Village is not a party to those permits and is not in a position to raise any such issues.

[17] Of course, the Nation's immunity from suit by the Village in municipal court raises the distinct question of precisely how the Village would propose to enforce its ordinance. *Michigan v. Bay Mills Indian Community,* 572 U.S. __, 134 S. Ct. 2024 (2014); *C & L Enters. v. Citizen Band of Potawatomi Indian Tribe,* 523 U.S. 441 (2001); *Kiowa Tribe v. Mfg. Tech., Inc.,* 523 U.S. 751 (1998) Apart from that practical consideration, it is clear that the Village lacks authority to impose its Ordinance in the first instance.

B. The Supreme Court has repeatedly held that Indian tribes are not subject to state authority in Indian country.

The extensive body of Supreme Court cases on the subject has been described as follows: "Indian activity and property in Indian country are ordinarily immune from state taxes and regulations." *Cohen,* § 6.03[1][a].[18] The principle of tribal immunity from state legislative authority traces to *Worcester v. Georgia,* 6 Pet. 515, 561 (1832), where the Supreme Court concluded that, "The Cherokee Nation is...a distinct community, occupying its own territory...in which the laws of Georgia can have no force."

The Supreme Court has since consistently adhered to the principle that states lack authority to regulate or tax Indian tribes or tribal territory, generally denominated as Indian country. The first case in the modern era is *Williams v. Lee,* 358 U.S. 358 (1959), in which the Court considered whether a state had authority to entertain an action against a tribal Indian for a claim arising on the reservation. Citing *Worcester v. Georgia,* the Court concluded that the state lacked such authority. *Id.,* 218-219. In fact, Congress has legislated in Indian affairs on the assumption that states have no power to regulate the affairs of Indians on a reservation. *Id.,* 358 U.S. at 220. Further, it was immaterial that the plaintiff in the state suit was a non-Indian; the determinative principle was the state attempt to displace the authority of the Indian government over the reservation. *Id.,* at 223.

In *White Mountain Apache Tribe v. Bracker,* 480 U.S. 136 (1980), the Court explained the modern-day doctrinal basis of this principle. The Court identified two independent, but

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[18] This Court acknowledged this general principle in *Oneida I,* 542 F. Supp.2d at 926, but found that Congress had authorized *in rem* jurisdiction over fee land on the Reservation when it released the parcels from trust. There is no act of Congress authorizing the Village to exercise personal jurisdiction over the Nation, so the general principle is determinative here.

related, bases for it. First, state authority over tribes and their reservations was generally pre-empted by federal law, which occupied the field of regulating relations with Indian tribes. *Id.,* at 142, citing *Warren Trading Post v. Arizona State Tax Commission,* 380 U.S. 685 (1965), and *McClanahan v. Arizona Tax Comm'n,* 411 U.S. 164 (1973). Second, states cannot infringe upon the right of reservation Indians to make and be governed by their own laws. *Id.,* citing *Williams v. Lee*, above. These independent bases for denying state authority over tribal activity on reservations are related because tribes' right to make and be governed by their own laws is subject to Congress' authority to curtail tribal self-government. *White Mountain Apache Tribe v. Bracker,* at 143. Taken together, these result in the general rule that state authority over tribal activity on the reservation is prohibited, even if the Indian activity involves non-Indians. *Id.,* at 144.[19] The Supreme Court has repeatedly adhered to this result. *Oklahoma Tax Commission v. Sac & Fox Nation,* 508 U.S 114, 123 (1993) ("Indian nations have long been distinct Indian communities, having territorial boundaries, within which their authority is exclusive"); *California v. Cabazon Band of Mission Indians,* 480 U.S. 202, 207 (1987) (Court has consistently recognized that tribes retain attributes of sovereignty over both 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. District*

[19] In *White Mountain Apache,* the Supreme Court explained the basic principles regarding the boundaries between state regulatory authority and tribal self-government on reservations in general. *Id.,* at 144-44. But the particular question in that case involved state authority over non-Indian activity on the reservation, which requires an inquiry into the relative state, federal and tribal interests at stake. *Id.,* at 145. Here, the question is local authority to regulate the Nation on its Reservation, not non-Indians. So this case is governed by the general principles discussed in *White Mountain Apache*, not the balancing of interests test held applicable there.

Court, 400 U.S. 423 (1971); *see also San Manuel Indian Bingo & Casino v. NLRB,* 475 F.3d 1306, 1313 (D.C. Cir. 2007) (state laws do not apply to the activities of tribal Indians on their reservations); *Santa Rosa Band of Indians v. Kings County,* 532 F.2d 655, 658 (9th Cir. 1975) ("...we have little doubt that Congress assumed and intended that states had no power to regulate Indian use or governance of the reservation...")

In the end, the inquiry here has the same contours noted by the Supreme Court in *McClanahan*:

> We are not here dealing with Indians who have left or never inhabited reservations set aside for their exclusive use or who do not possess the usual accoutrements of tribal self-government. Nor are we concerned with exertions of state authority over non-Indians who undertake activity on Indian reservations. Nor, finally, is this a case where the state seeks to reach activity undertaken by reservation Indians on non-reservation lands.

411 U.S. at 168-69 (citations omitted.) The Ordinance in question here purports to regulate the Nation's activity taking place within the Reservation. In so doing, the Village would wholly supplant the Nation's own laws and deny altogether the Nation's right of self-government within Indian country with regard to matters addressed in the Ordinance. As the Supreme Court concluded in *McClanahan,* the state (and by extension, the Village) is precluded from doing so by this long-standing policy of leaving reservation Indians free of state regulation. *Id.,* 168.

CONCLUSION

This dispute is straightforward and is governed by simple, long-standing principles of federal Indian law. The Village purports to regulate the Nation in the conduct of activity on the Reservation and directly infringe upon the Nation's right of self-government. The Village has no authority to do this. No quibbling about particulars - the specifics by which the Nation and the United States established and conducted the government-to-government relations between them over time, the demographic results of the allotment of the Reservation, or the details of what activity occurred on which parcel of land - can avoid this legal conclusion. The Nation is entitled to summary judgment in its favor.

Respectfully submitted,

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