UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

ONEIDA NATION,

Plaintiff,

v. Case No. 16-C-1217

VILLAGE OF HOBART, WISCONSIN,

Defendant.

MEMORANDUM OF LAW IN SUPPORT OF ONEIDA NATION MOTION TO CLARIFY BURDEN OF PROOF

Introduction

Plaintiff Oneida Nation ["Nation"] filed this action on September 9, 2016, to prevent disruption by Defendant Village of Hobart ["Hobart"] and its agents of the Nation's seventh annual Big Apple Fest scheduled to take place on September 17, 2016. The Nation seeks declaratory and other relief regarding Hobart's claimed authority to regulate the Nation and its activities, conducted on the Nation's trust and fee lands located on the Oneida Reservation, under the guise of Hobart's Special Events Permit Ordinance.

Following protracted proceedings on whether and upon what terms to permit discovery in the matter, the Court ordered that discovery take place before consideration of dispositive motions, with discovery to close by August 28, 2017. ECF No. 46. The parties made good-faith efforts to comply with the discovery deadline but were unable to do so. As a result, the

parties jointly proposed an amendment to the scheduling order that would set out all discovery deadlines, including the exchange of expert reports.

The parties were unable to agree upon the need for and an articulation of each party's burden of proof in expert reports as part of the proposal. As a result, the proposed amendment provided that the parties shall file any motions seeking clarification on the parties' respective burdens of proof no later than August 31. The Court so ordered the jointly proposed schedule. ECF No. 58.

By its motion to clarify the burden of proof, the Nation seeks an order allocating the burden of proof on issues here, in particular those to be addressed in expert reports, as follows:

> (1) in its opening expert reports due October 31 and generally, the Nation carries the burden of proof on the creation of the Oneida Reservation in the Treaty of 1838, 7 Stat. 566, and the applicability of the Indian Reorganization Act ["IRA"], 25 U.S.C. § 5123, in 1934 to the Nation and its Reservation, except for the Nation's actual title to the trust parcels at issue;
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> (2) in its opening expert reports due October 31 and generally, Hobart carries the burden of proof that the Oneida Reservation has been diminished or disestablished by an act of Congress or otherwise, any claim that the Nation does not hold trust or fee title to the parcels at issue, and other affirmative defenses it has or may raise in pleadings, specifically including any claimed exceptional circumstances that would allegedly justify the exercise of its jurisdiction over the Nation on the Reservation, notwithstanding the absence of express congressional authorization to do so;
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> (3) in responsive expert reports due November 30, the Nation and Hobart may respond to opening expert reports and on December 31, the Nation and Hobart may exchange rebuttal reports, consistent with the above allocated burden of proof.

Argument

An explicit allocation of the burden of proof between the parties is necessary to avoid surprise in the exchange of expert reports and to ensure an orderly and full presentation of disputed issues. The allocation proposed by the Nation is drawn from the claims, defenses, and

counterclaims made by the parties in their pleadings in this matter and is consistent with the burden generally borne by parties asserting claims and defenses in civil litigation.

Further, the burden of proof allocation proposed by the Nation is dictated by the governing substantive law. The Supreme Court has made plain that the party claiming the diminishment or disestablishment of an Indian reservation bears the burden of proving such. Similarly, the Supreme Court has indicated that, where a local government claims authority to regulate an Indian tribe or tribal Indians on a reservation in the absence of express consent of Congress, the local government must prove "exceptional circumstances" to justify such jurisdiction. This authority requires that Hobart bear the burden of proof on these events or circumstances, to the extent that Hobart alleges the same. For these reasons, the Nation urges the Court to adopt the burden of proof allocation proposed in its motion to clarify.

I. An explicit allocation of the burden of proof is necessary to avoid surprise.

The parties agree that expert reports are appropriate in this matter, given the necessity for compiling and assessing historical records dating from the early nineteenth century. *See* Fed. R. Evid. 702.[1] Further, as the parties proposed and this Court ordered, the parties will have an opportunity to respond to each other's expert reports and perhaps exchange rebuttal reports as well. The historical period and scope of records to be examined by the experts in these reports is extensive. Indeed, the one expert identified thus far by Hobart has already advised the Court that there are multiple historical issues extending over a long period of time with potentially relevant documents to be found in multiple repositories. ECF No. 38, Declaration of Emily Greenwald in

[1] The Nation does not waive any challenges to the qualifications of any of Hobart's particular experts or to the reliability of those experts' methodology by its agreement that expert reports are appropriate in this matter or by its reference to Dr. Greenwald.

Support of Defendant's Memorandum of Law in Opposition to Plaintiff's Motion for Protective Order. As result, there will be multiple historical reports covering an extensive historical period and numerous historical documents.

Parties are entitled to a fair opportunity to prepare such reports, particularly responsive reports. *Tribble v. Evangelides,* 670 F.3d 753, 760 (7th Cir. 2012); *Musser v. Gentiva Health Services,* 356 F.3d 751, 758 (7th Cir. 2004). The schedule for the exchange of expert reports here is relatively tight, given the extent and complexity of historical issues to be addressed in opening reports. An explicit allocation of the burden of proof is necessary to give the parties notice of the general subject of opening reports so that they have a meaningful opportunity to prepare responsive reports.

Further, it is possible that a party may not exchange an opening report in the absence of an explicit allocation of the burden of proof, preferring instead to minimize exposure of its position by filing only responsive reports. In that event, the opposing party would be effectively denied the opportunity to prepare a responsive report. For example, if Hobart declines to exchange an opening report on its allegations regarding the disestablishment of the Reservation, it could file a report in the guise of responding the Nation's experts and raise theories and claimed historical support for alleged disestablishment as yet unknown to the Nation. In that event, the Nation would have no opportunity at all to exchange a responsive report. Instead, the Nation would be obliged to squeeze a round peg into a square hole by using the rebuttal report period to respond to arguments made by Hobart. Rebuttal reports are obviously intended to rehabilitate arguments made in opening reports, not to respond for the first time to defenses or counterclaims made by the opposing party. Such gamesmanship is inimical to the basic purpose

of setting a schedule for the exchange of expert reports and a disservice to this Court's ability to assess the parties' allegations.

At this stage in this litigation, the parties are aware of their theories of the claims and defenses, as well as the historical record believed to support those theories. It is necessary that the parties disclose those general theories as they relate to their expert reports in order that the opposing party will have a meaningful opportunity to respond to those reports.

II. The allocation of burden of proof proposed by the Nation is dictated by the parties' pleadings.

The Nation's proposed allocation of the burden of proof is neither surprising nor unfair. To the contrary, the proposed allocation set out in the Nation's Motion to Clarify is essentially drawn from and dictated by the claims and defenses made by the parties in their pleadings.

In its first amended complaint, the Nation alleges that it occupies a Reservation created by treaty with the United States in 1838. ECF No. 10, ¶ 6. Further, the Nation alleges that the IRA applies to the Reservation. *Id.,* ¶¶ 7, 8, 9. These allegations are made as part of the Nation's claims for relief that the imposition of Hobart's Special Events Permit Ordinance upon the Nation and its activities on the Reservation and its trust lands are pre-empted by federal common law and statutes, including the IRA, and violate the Nation's inherent right to govern the Reservation. *Id.,* ¶¶ 22-24, 26-31. In addition, these historical events are included in the Nation's Statement of Proposed Material Facts made in support of its Motion for Summary Judgment and feature prominently in Plaintiff's Memorandum of Law in Support of Motion for Summary Judgment. ECF No. 26, ¶¶ 5-8; 15, 16; ECF No. 25, pp. 12-24.[2] These historical

[2] The Nation argued in support of its motion for summary judgment that these historical events - the creation of the Reservation and the United States' application of the IRA to the Reservation -

events are central to the Nation's claims, and now that discovery has been ordered the Nation appropriately bears the burden of proof on these historical events (subject to the presumption regarding title to its trust and fee lands discussed below) in expert reports and otherwise.

Similarly, Hobart has asserted affirmative defenses that are dependent upon alleged historical facts upon which it obviously bears the burden of proof. Among its designated affirmative defenses and counterclaims, Hobart alleges that the 2016 Big Apple Fest did not occur within an existing reservation and that the Nation's trust title is not valid under the IRA. ECF No. 12, Affirmative Defense, ¶ 4, Counterclaim, ¶¶ 24, 25; *see also* ECF No. 31, pp. 10-12, Hobart Memorandum in Support of Motion to Allow Time for Discovery Under Rule 56 (d) (claiming that the 1838 treaty did not create a reservation, that the reservation has been diminished or disestablished, and specifically asserting a 1906 appropriation act of Congress as disestablishing the Reservation). Hobart further alleges in its first counterclaim that its interest in protecting the health, safety, and welfare of participants justifies its regulation of the Nation, even if the Big Apple Fest did take place on an extant Reservation. ECF No. 12, First Cause of Action, ¶ 26.[3] These allegations are affirmative defenses or are central to counterclaims made by

have been authoritatively established by courts and the United States and are not, therefore, susceptible to dispute by the parties. The Nation expressly reserves those arguments for possible renewal in a motion for summary judgment, depending upon the outcome of discovery.

[3] While similar in language, this Hobart allegation is more than a denial of the Nation's claim that imposition of the Hobart ordinance would infringe the Nation's inherent powers of self-government on the Reservation. *See* ECF No. 10, ¶¶ 26-31. Absent express authorization by Congress or the presence of "exceptional circumstances," the Nation is immune from local and state regulation on the Reservation. *Cabazon v. California Band of Mission Indians,* 480 U.S. 202, 215 (1987); *see also 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."); *White Mountain Apache Tribe v. Bracker,* 480 U.S. 136, 142 (1980). Apparently, Hobart is invoking these "exceptional circumstances" to justify an exception to the usual rule precluding local regulation of tribes in

Hobart and, as such, Hobart bears the burden of proof upon these allegations. *Winforge, Inc. V. Coachmen Industries, Inc.,* 691 F.3d 856, 872 (7th Cir. 2012) (defendant bears burden of proof on matters in defense that do not controvert plaintiff's claims); *Brunswick Leasing Corp. v. Wisconsin Center, Ltd.,* 136 F.3d 521, 530 (7th Cir. 1998).

The allocation of the burden of proof proposed by the Nation tracks these claims and defenses made by the parties. Under the Nation's proposal, the Nation bears the burden of proof on its claims for relief, and Hobart bears the burden of proof on its affirmative defenses and counterclaims. As a result, the proposed burden of proof allocation follows the general rules regarding burden of proof in civil litigation.

III. The burden of proof allocation proposed by the Nation is required by the law governing certain disputes issues in this matter.

In this case, there is substantive governing law that must be examined in allocating the burden of proof. Specifically, there are three statutory or federal common law principles that mandate a particular allocation of the burden of proof here.

1. The governing standard places the burden of proving diminishment or disestablishment of a reservation upon the party alleging the same.

The Nation acknowledges that it bears the burden of proving that the Treaty of 1838, 7 Stat. 566, created the Oneida Reservation. Once established, though, "[o]nly Congress can divest a reservation of its land and diminish its boundaries, and its intent to do so must be clear." *Nebraska v. Parker,* 136 S. Ct. 1071, 1078, 576 U.S. __ (2016) (quoting *Solem v. Bartlett,* 463 U.S. 463, 467 (1984)) (internal quotations omitted). This rule applies "no matter what happens

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Indian country. But the presence of such "exceptional circumstances" requires a factual analysis with the burden of proof upon Hobart. *See* discussion below.

to the title of individual plots within the area [since] the entire block retains its reservation status until Congress explicitly indicates otherwise." *Id.* at 470. Further, diminishment or disestablishment will not be lightly inferred because doubtful expressions by Congress are resolved in favor of the Indians. *Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584, 586 (1977). As a result of these governing principles, "the Supreme Court has said courts must approach these issues with a 'presumption' that Congress did not intend to disestablish or diminish a reservation." *Murphy v. Royal,* Nos. 07-7068 & 15-7041, 2017 WL 3387877, *15 (10th Cir., Aug. 8, 2017).

As applied here, this authority indicates that the Reservation remains extant unless and until Hobart can establish a clear congressional intent to diminish or disestablish the Reservation. The burden of proof on this issue, whether from the 1906 appropriation act or otherwise, resides with Hobart and these matters should be addressed in Hobart's opening expert reports. *Murphy*, 2017 WL at*24 (noting that the Oklahoma Court of Criminal Appeals and the State had erroneously reversed the presumption against disestablishment)*; Cayuga Indian Nation of New York v. Village of Union Springs,* 317 F. Supp. 2d 128, 138 (NDNY 2004) (disestablishment is a defense the party claiming such must prove).

2. Hobart carries the burden of proving any exceptional circumstances in support of its claimed authority to regulate the Nation on its Reservation, notwithstanding the absence of any congressional authority therefor.

As noted above, Hobart alleges in support of a counterclaim here that its interest in protecting the health, safety, and welfare of its residents outweighs that of the Nation, even if the Big Apple Fest did take place on the intact Reservation. ECF No. 12, ¶ 26. Pleaded as a counterclaim, this allegation is more than a mere denial of the Nation's interest in regulating its

own territory. Instead, it appears to be an inartful attempt to invoke a narrow exception to the usual rule that state and local governments lack authority to regulate tribes and tribal members on reservations. *California,* 480 U.S. at 207. In *Cabazon,* the Supreme Court recognized that "in exceptional circumstances" a state may assert jurisdiction over the on-reservation activity of tribes and tribal members. *Id.* at 215 (citing *New Mexico v. Mescalero Apache Tribe,* 462 U.S. 324, 331-332 (1983)).

As with the disestablishment of a reservation, only Congress can authorize state or local regulation of tribes or tribal members on reservations and congressional intent to do so must be plainly expressed. *Cabazon,* 480 U.S. at 207. As a result, the local or state government claiming such exceptional circumstances bears the burden of proving the existence of those circumstances. *Gobin v. Snohomish County,* 304 F.3d 909, 917 (9th Cir. 2002); *Cayuga Indian Nation of New York v. Village of Union Springs,* 317 F. Supp.2d at 135 ("if initial determination is that Indian country exists, the burden of proving exceptional circumstances notwithstanding Indian country status rests with the municipality.") To the extent, then, that Hobart's counterclaim can be read to allege "exceptional circumstances," Hobart bears the burden of proving the existence of those circumstances.

The single expert witness that Hobart has identified thus far did not mention the exceptional circumstances issue in her listing of issues to be researched. It is not clear, then, whether Hobart intends to carry its burden of proof on this issue through expert witnesses or otherwise. If Hobart intends to do so through expert witnesses, it must do so in those experts' opening reports.

3. By federal statute, Hobart bears the burden of proving that the Nation does not hold trust title to the parcels used in the Big Apple Fest.

Hobart alleges that the trust parcels used by the Nation in the conduct of the Big Apple Fest are not proper trust lands. ECF No. 12, ¶¶ 23, 24. Apparently, the Hobart theory is that the Secretary of the Interior lacked authority to place trust parcels into trust for the Nation because the Nation was either not on a reservation or not otherwise under federal jurisdiction in 1934. *See* Declaration of Frank W. Kowalkowski in Support of Defendant's Memorandum in Support of Motion for Time for Discovery Under Rule 56 (d), ECF No. 32. Federal law places the burden of proving the facts in support of its claim that the Nation' trust title is faulty squarely on Hobart.[4]

In 1834, Congress included a provision in the Indian Trade and Intercourse Act titled "Tribal of right of property; burden of proof." R.S. § 2126. Now codified at 25 U.S.C. § 194, the provision explicitly imposes the burden of proof upon the "white person" who challenges an Indian's right to property, once the Indian makes "out a presumption of title in himself from the fact of previous possession or ownership." The burden of proof statute is available to Indian tribes as well as individual Indians, *Wilson v. Omaha Tribe,* 442 U.S. 653, 664-666 (1979), and is triggered once the tribe makes out a prima facie case of ownership. *Id.* at 669. Further, the "white persons" who must carry the burden of disproving Indian tribe extends to municipalities as well as non-Indian individuals. *Cayuga Indian Nation of New York v. Village of Union Springs,* 317 F. Supp. 2d at 134. Here, the Nation has made out a prima facie case of title with

[4] The Nation explicitly reserves its argument that Hobart's challenge to its title to the trust parcels is also barred by the applicable statute of limitations.

trust deeds showing such and filed in this proceeding.[5] As a result, to the extent that Hobart proposes to challenge the Nation's title to its trust land, it carries the burden of disproving the Nation's trust title to parcels used in the Big Apple Fest and must include the issue in opening expert reports, if it intends to rely upon expert witnesses to carry its burden.

Admittedly, the line dividing the Nation's burden of proof from Hobart's on issues arising under the IRA is a fine one. The IRA is a significant part of the Nation's claims inasmuch as it reflects Congress' judgment that tribes have powers of self-government over its territory and members. As a result, the Nation is prepared to establish the IRA's applicability to the Nation. Yet, Hobart goes beyond simply denying that the IRA, along with principles of federal common law, pre-empt state and local authority to regulate tribes and tribal members on reservations. Hobart also challenges the Nation's title to its trust land under the IRA. As to the latter, Hobart plainly bears the burden of proof under 25 U.S.C. § 194.

Conclusion

The time has come for the parties to be forthcoming with their theories of their claims and defenses, and historical and other facts in support thereof, in this litigation. Particularly as the deadlines approach for the exchange of expert reports, the parties must have notice of their respective burdens of proof, based upon their pleadings and governing substantive law. The Nation's proposed allocation of the burden of proof hues closely to both, and the Nation urges the Court to enter an order adopting its proposed allocation of the burden of proof for purposes

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[5] The Nation has provided copies of the trust deed to Hobart and requested that Hobart admit to the authenticity of these documents. At this point, it appears that the parties will resolve the authenticity of these deed between themselves, thereby establishing the Nation's prima facie trust ownership of the parcels.

of the opening expert reports and otherwise.

Dated this 31st day of August, 2017

Respectfully submitted,

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