

**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.

**CIVIL L.R. 7(H) EXPEDITED NON-DISPOSITIVE MOTION TO CLARIFY THE
COURT'S OCTOBER 23, 2017 DECISION AND ORDER ON BURDEN OF PROOF**

Pursuant to Rule (7)(b), FRCP, and L.R. 7(h), the Defendant, Village of Hobart, Wisconsin (the "Village"), moves the Court for an order clarifying its October 23, 2017 Decision and Order on Burden of Proof (ECF No. 66), as it is not clear to the Village whether a specific paragraph in this Order constitutes the "law of the case" that will bind the parties as they continue to litigate this matter on the merits.

By way of background, Plaintiff, Oneida Nation (the "Nation"), filed its Motion to Clarify Burden of Proof (ECF No. 59) on October 2, 2017, which was limited to the discrete matter of clarifying which party carries the burden of proof on three specific issues: (1) the creation of the Oneida Reservation in the Treaty of 1838 and the applicability of the Indian Reorganization Act of 1934, (2) various affirmative defenses raised by the Village, including the diminishment or disestablishment of the Oneida Reservation, the Nation's possession of trust or fee title to the parcels at issue, and the existence of any exceptional circumstances that would

justify the Village exercising jurisdiction over the Nation, and (3) applying these burdens of proof to the parties' respective disclosures of expert witness and rebuttal reports.

On October 23, 2017, the Court issued its Decision and Order on Burden of Proof (ECF No. 66) which expressly ordered the following:

1. 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.
2. The Village carries the burden of proof that the Oneida Reservation has been diminished or disestablished by an act of Congress or otherwise, 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; and
3. This allocation of the burden of proof governs the exchange of opening expert reports due on November 15, 2017, and responsive and rebuttal reports due on December 15, 2017 and January 15, 2018, respectively.

The body of the Order, however, also contained the following language: "The entire village is in Indian country as that term has been defined by Congress and the Supreme Court, and thus all of the activities the Village seeks to regulate occurred in Indian country absent proof of diminishment." (ECF No. 66, p. 6.) Moving forward, the Village anticipates the Nation may argue this language bars the Village from asserting the many defenses and counterclaims it has filed, in this case, other than the ones based on diminishment. Importantly, however, any such findings fall well outside the scope of Nation's Motion, as it did not request any declaration, finding, or ruling on these issues, and the Village did not have any corresponding opportunity to respond to any such request or argument. Instead, the Nation's Motion was limited to the narrow issue of clarifying the parties' respective burdens of proof as they continue to litigate this matter

further, and any order flowing from this Motion should be limited accordingly. Dispositive motions are due 30 days following the close of discovery on March 12, 2018, or 30 days following any extension to the close of the discovery date. (Amended Scheduling Order, ECF No. 58, ¶ 5.) The Village anticipates that further discovery before this deadline, including the above-discussed expert witness reports and extensive briefing and legal arguments, will have a significant impact on any analysis of all claims and defenses asserted in this case. As a result, any decision on those key issues should not be made until the parties have conducted that discovery and actually requested summary judgment on their respective claims and defenses.

Furthermore, the questions of whether the Village is entirely located in Indian country, whether the activities the Village seeks to regulate occurred in Indian country, and exactly what that means in terms of enforcing the precise ordinance involved in this case are the issues at the very heart of the parties' current lawsuit, and they should not be settled in the Court's discussion of a procedural motion clarifying the parties' respective burdens of proof. This is a particularly salient point given this Court's prior language in this lawsuit that the "notion of Indian country is less than clear, however, especially where as here the entire Village of Hobart is within the area the Nation identifies as Indian country." (Decision and Order, ECF No. 46, pp. 12–13.) *See also United States v. Lara*, 541 U.S. 193, 219, 124 S. Ct. 1628, 1644, 158 L. Ed. 2d 420 (2004) ("Federal Indian policy is, to say the least, schizophrenic. And this confusion continues to infuse federal Indian law and our cases.").

Therefore, the Village respectfully requests an order from the Court clarifying that its October 23, 2017 Decision and Order on Burden of Proof is limited to the three actual Orders found on the last page of the decision. (ECF No. 66, p. 7.) In the event the Court denies this Motion, the Village respectfully requests the issuance of a briefing schedule for a motion to

reconsider so the potentially dispositive language found in the body of the decision may be fully briefed to the Court.

Dated this 1st day of November 2017.

von BRIESEN & ROPER, s.c.

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