

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN**

ONEIDA NATION,

Plaintiff,

v.

Case No. 16-C-1217

VILLAGE OF HOBART, WISCONSIN,

Defendant.

**PLAINTIFF ONEIDA NATION CIVIL L.R. 7(h) EXPEDITED, NON-DISPOSITIVE
MOTION TO FORECLOSE FURTHER OPENING EXPERT REPORT(S)**

Plaintiff Oneida Nation (“Nation”) moves for an order to foreclose the filing by Defendant Village of Hobart (“Hobart”) of opening expert report(s) after the due date set by the Court, in accordance with FRCP 26(a)(2)(D) (party must make expert disclosures “at the time and in the sequence that the court orders.”) and Civil L.R. 7(h) (Expedited Non-Dispositive Motion). In further support of its motion, the Nation states as follows:

1. By its own admission and order of this Court, Hobart bears the burden of proof upon the claimed disestablishment of the Oneida Reservation. ECF No. 62, at 9 (“Admittedly, it is likely the Village’s burden to prove any allegation that the Oneida Reservation has been diminished or disestablished.”) By order of the Court, reports on which the parties bear the burden of proof were due November 15, 2017. ECF No. 66.

2. On November 15, the Nation offered two expert reports by Drs. Hoxie and Edmunds,

totaling 287 pages and supported by more than 700 documents addressing the issues upon which the Nation carries the burden of proof, *i.e.*, the creation of the Oneida Reservation in the Treaty of 1838, 7 Stat. 566, and the application of the Indian Reorganization Act to the Nation and its Reservation. Locklear Declaration, ¶ 2.

3. Also on November 15, Hobart offered an expert report by Dr. Greenwald, which report is 38 pages in length and cites approximately 120 historical documents. The Greenwald report addresses the alleged diminishment of the Oneida Reservation only and explicitly states that she is “still investigating whether the reservation was fully disestablished...” Locklear Declaration, ¶ 3.

4. Because of the Nation’s need to prepare responsive reports and to ascertain Hobart’s intentions regarding the disestablishment issue, counsel for the Nation wrote counsel for Hobart on November 21, 2017, to inquire whether Hobart intends to offer an additional expert report(s) on disestablishment; the letter was sent via email and first class mail. Locklear Declaration, ¶ 4. Counsel requested a response within three business days, or by close of business on Friday, November 24. As of this date, Hobart has not responded. *Id.*, ¶ 5.

5. The Nation raised this precise concern in its motion to clarify the burden of proof. Given the need to respond to Hobart’s opening report and the relatively brief time within which to do so (December 15), the Nation sought certainty regarding issues to be addressed in opening reports, particularly on the important disestablishment issue. ECF No. 59, p. 4. It appears now that Hobart intends to do exactly what the Nation feared (and the Court’s order was intended to avoid), *i.e.*, offer expert opinion(s) on alleged disestablishment of the Oneida Reservation out of time, thereby denying the Nation an opportunity to respond. Hobart cannot be allowed to

manipulate the schedule in such a manner and to the extreme prejudice of the Nation.

6. Hobart suffers no prejudice from the Nation's proposed order to foreclose further expert report(s) on disestablishment. Hobart admitted its obligation on the issue, the Court ordered the due date, and Hobart sought no relief from that order. As a result, Hobart has knowingly waived any further expert opinions on the disestablishment issue. Hobart's opportunity for such closed with its exchange of Dr. Greenwald's report offering no opinion thereon.

For these reasons and upon the further support of the Declaration of Arlinda Locklear, the Nation respectfully moves this Court for an expedited order foreclosing Hobart from offering any expert opinion or report on alleged disestablishment of the Oneida Reservation.

Dated this 29th day of November, 2017.

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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN**

ONEIDA NATION,

Plaintiff,

v.

Case No. 16-C-1217

VILLAGE OF HOBART, WISCONSIN,

Defendant.

**DECLARATION OF ARLINDA LOCKLEAR
IN SUPPORT OF ONEIDA NATION CIVIL L R 7(h) EXPEDITED, NON-DISPOSITIVE
MOTION TO FORECLOSE FURTHER EXPERT REPORT(S)**

Arlinda F. Locklear declares and states as follows:

1. I am counsel for Plaintiff Oneida Nation ("Nation") in this matter and make this declaration in support of the Nation's Motion to Foreclose Further Opening Expert Reports. I have personal knowledge of the facts stated herein.
2. In accordance with the schedule ordered by the Court, the Nation on November 15, 2017, offered two expert reports by Drs. Hoxie and Edmunds upon the creation of the Oneida Reservation in the Treaty of 1838, 7 Stat. 566, and the application of the Indian Reorganization Act to the Nation and its Reservation. The two reports total 287 pages in length and cite approximately 700 historical documents in support.
3. Also on November 15, the Village of Hobart ("Hobart") offered an expert report by Dr. Greenwald, which report is 38 pages in length and cites approximately 120 historical documents.

The Greenwald report addresses only the alleged diminishment of the Oneida Reservation. With regard to disestablishment, the Greenwald report explicitly notes that research on the subject remains on-going. Greenwald Report, at 2("I am still investigating this [disestablishment] issue."); 38 ("I am still investigating whether the reservation was fully disestablished..."). *See* Greenwald Excerpts, attached.

4. Because of the Nation's need to prepare a responsive report and to ascertain Hobart's intentions regarding alleged disestablishment of the Oneida Reservation, the undersigned wrote to Frank Kowalkowski, counsel for Hobart, on November 21. The letter was emailed that date to Mr. Kowalkowski and the original was mailed by US postage, prepaid, that date to Mr. Kowalkowski. *See* November 21, 2017, Letter, attached.

5. The undersigned's November 21 letter to Mr. Kowalkowski specifically inquired whether Hobart intended to offer any additional expert report(s) on alleged disestablishment of the Oneida Reservation and requested a response within three business days, or by close of business Friday, November 24. The undersigned has to date received no response to her letter.

6. Work on the Nation's responsive report to Dr. Greenwald, due December 15, 2017, is now underway. Without having received an expert opinion from Hobart on claimed disestablishment of the Oneida Reservation, the Nation is not able to prepare any responsive report.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 29th day of November, 2017.

/s/ Arlinda F. Locklear

History of the Oneida Land Base, 1889-1936

Submitted by:

Emily Greenwald, PhD

Emily Greenwald

Missoula, Montana
November 15, 2017



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ASSOCIATES, INC.

reservation actually did exist. Instead, I am assuming, hypothetically, that a reservation existed, solely for the purpose of addressing the question of diminishment or disestablishment.

Opinion

As I understand it, the court typically looks to surplus land acts to determine whether diminishment or disestablishment occurred. In the Oneida case, allotments took up the entire reservation, and thus Congress had no need or opportunity to pass a surplus land act. Most individual Oneidas received fee patents for their allotments between 1903 and 1918, when the trust period on all but a few of the allotments expired. By the 1930s, only a very small amount of land remained in trust.

It is my opinion that the operation of the 1887 Dawes Act and subsequent legislation, including the Indian Department appropriation act of June 20, 1906, effectively diminished or disestablished the Oneida reservation, if one existed. The 1906 act resulted from lobbying efforts of tribal members, who wanted fee simple patents to their allotments. In it, Congress authorized the secretary of the interior to grant fee patents to any Oneida allottee, specifying that "the issuance of such patent shall operate as a removal of all restrictions as to the sale, taxation, and alienation of the lands so patented."³ Virtually all of the land passed out of federal control and became subject to the jurisdiction of state and local government. The historical evidence indicates that the reservation was diminished. It is possible that the reservation was, in fact, disestablished. But the sources suggest that a nominal amount of land may have remained in trust. I am still investigating this issue.

Qualifications

I hold a PhD in American history from Yale University, received in 1994. In my course of study, I focused on the history of federal Indian policy, Native American history, U.S. environmental history, and the history of the American West. I was an assistant professor of History and Ethnic Studies at the University of Nebraska from 1995 to 2002, and I taught courses in American history, Native American history, environmental history, and the history of the American West.

In 2002, I joined HRA, a history and cultural resources management consulting firm based in Missoula, Montana. I am currently head of HRA's History Division, as well as a vice president and shareholder. I have served as a historical expert in a variety of cases involving Native American or environmental issues. My clients have included the United States, individual states, tribes, and private companies. My résumé is attached to this report as Appendix A.

³ Act of June 21, 1906, 34 Stat. 325 at 381.

8. Conclusion

The history of the Oneida reservation (if one existed) differed from typical Indian reservations not only in the treaty language that provided for it but also in that almost the entire body of land was allotted under the terms of the Dawes Act. Through the operation of the Dawes Act, its amendments, and the 1906 Indian Department appropriation act, nearly all of the allotted land was fee patented and left federal jurisdiction. By the 1930s, federal officials and others were referring to the land area as the “former” reservation or the “original” reservation, recognizing that what existed previously was now gone, or “discontinued.”

Unlike typical Indian reservations, there was no surplus (unallotted) Oneida land for the government to purchase and open to non-Indian settlement. Nevertheless, the land was “opened” and acquired by non-Indians when it passed out of Oneida ownership through sales and tax forfeitures. Well-intentioned policymakers who supported the Dawes Act did not intend for Indians to become landless. But once the allotments were fee patented, whether or not they were subsequently sold or forfeited, they became subject to local and state laws. The federal government, local officials, and the Oneida Indians themselves recognized that the state and local governments had jurisdiction over the land.

The Dawes Act and the 1906 appropriation act operated exactly as Congress had intended, turning the Oneida tribal members into individual property owners and citizens. The transfer of fee patented land from federal to state jurisdiction, as intended by Congress, accomplished the erasure of the Oneida reservation boundaries. Based on my understanding of federal Indian policy and the Dawes Act, I do not believe Congress would have found it necessary to take any other steps to diminish or disestablish the Oneida reservation, if it existed. Congress would have understood that to have occurred through the fee patenting of nearly all of the land that had once been regarded as tribal land. Because no surplus land existed, Congress would not have taken further legislative steps to affirm that the reservation no longer existed.

It is my opinion that the Oneida reservation was diminished. I am still investigating whether the reservation was fully disestablished, as the sources contain conflicting information as to what or how much land may have remained in federal trust in 1934, when Congress passed the Indian Reorganization Act and reversed the allotment policy.

Arlinda F. Locklear, Esquire

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Via email and first class mail

Frank Kowalkowski
von Brieson & Roper, S.C.
300 North Broadway
Suite 2B
Green Bay, WI 54303

November 21, 2017

Re: Oneida Nation v. Village of Hobart, No. 16-cv-1217

Dear Mr. Kowalkowski:

On November 15, and in accordance with a court ordered schedule, the parties exchanged expert reports in the above captioned matter, including one from the Village of Hobart by Dr. Emily Greenwald titled "History of the Oneida Land Base, 1889-1936." In the introduction, Dr. Greenwald summarizes her opinion as follows:

The historical evidence indicates that the reservation was diminished. It is possible that the reservation was, in fact, disestablished. But the sources suggest that a nominal amount of land may have remained in trust. I am still investigating this issue.

Greenwald Report, p. 2. At the end of her report, Dr. Greenwald again states:

I am still investigating whether the reservation was fully disestablished, as the sources contain conflicting information as to what or how much land may have remained in federal trust in 1934, when Congress passed the Indian Reorganization Act and reversed the allotment policy.

Id., p. 38.

These statements indicate that Dr. Greenwald continues work on a possible second report regarding claimed disestablishment of the Oneida Reservation. However, as you know, Judge Griesbach ordered that "[t]he Village carries the burden of proof that the Oneida Reservation has been diminished or disestablished..." and parties carrying the burden of proof must exchange expert reports on those issues by November 15, 2017. ECF No. 66. An additional Greenwald report (or any other expert report) on claimed disestablishment of the Oneida Reservation at a later date, then, would plainly violate the Judge's order on the burden of proof.

Please confirm in writing within three business days from the date of this letter, i.e., close of business on November 24, that the Village of Hobart will not offer any further, initial expert opinion regarding the alleged disestablishment of the Oneida Reservation. Otherwise, we will have no choice but to seek appropriate relief from the Court.

Sincerely,

A handwritten signature in dark ink, appearing to read "Arlinda F. Locklear", written in a cursive style.

Arlinda F. Locklear