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.

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases ***Page(s)***

Statutes

Rules

Other Authorities

Defendant, Village of Hobart, Wisconsin (the "Village"), respectfully submits this brief in support of its Motion for Summary Judgment filed contemporaneously herewith. The Village seeks summary judgment in its favor on the Nation's claims for relief because there are no material issues of disputed fact and the Village is entitled to judgment as a matter of law.

INTRODUCTION

The Village should be awarded summary judgment because activities associated with the 2016 Big Apple Fest occurred on land owned in fee by the Plaintiff Oneida Nation ("the Nation") and public roads not contained within an Indian reservation. Although the land at issue is contained within the approximately 65,400-acre area set aside for the Oneida by an 1838 treaty (the "Oneida Reservation" or the "Reservation"),[1] the boundaries established by the 1838 Treaty ceased to exist over a century ago and there is no present 65,400 acre Oneida Reservation. The federal government, scholars, and even the Nation itself recognized this indisputable fact at least until the 1970s. This case represents the culmination of a decades-long attempt by the Nation, buoyed by the Nation's economic success under the Indian Gaming Regulatory Act ("IGRA"), to rewrite this history and to reassert the Nation's sovereignty over lands that have been under state and local jurisdiction for over a century. While the Nation may wish that the history of the Oneida Reservation was different—and the Village does not dispute that the guiding philosophy

[1] The Nation has the burden of proving the creation of a reservation by the 1838 Treaty. For purposes of this motion, the Village will refer to the 65,400 acres set aside under the 1838 Treaty as the "Oneida Reservation" or the "Reservation" because the Village is entitled to summary judgment even if the 1838 Treaty created a reservation. The Village notes, however, that there is a fact dispute as to whether the 1838 Treaty was intended to create a 65,400-acre reservation as opposed individual 100 acre tracts for the Oneida, which the Village may address in response to any motion for summary judgment filed by the Nation. Ex. 154 to July 19, 2018 Declaration of Frank Kowalkowski ("Kowalkowski Decl.") at p. 6. ("[H]istorical documents including petitions, correspondence, and an unratified treaty from the period immediately following the ratification of the February 1838 treat indicate that the tribe and U.S. officials believed that it had created individually rather than collectively held land.")

behind the allotment policies that led to the termination of the boundaries of the Oneida Reservation has since been repudiated—"we cannot remake history." *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 357 (1998). Here, history and the law require that this Court conclude the Oneida Reservation, as defined by its 1838 boundaries, no longer exists, for three independent reasons.

First, in 1933 a judge of this court held in *Stevens v. County of Brown*, in a lawsuit brought on behalf of the Oneida Tribe against the Village's predecessor, the Township of Hobart (and other local governments), that it was "plain[]" the Oneida Reservation had been discontinued and that therefore the Oneida were subject to state law. At heart, this case—and this motion—is about whether the Nation can ignore that decision and claim that a 65,400-acre Oneida Reservation still exists notwithstanding the decision of a federal district judge on this court that it does not. The Village respectfully submits the law is clear that principles of issue preclusion preclude the Nation from making such a claim. A court "should honor the first actual decision of a matter that has been actually litigated." *Chi. Truck Drivers, Helpers, and Warehouse Union (Indep.) Pension Fund v. Century Motor Freight, Inc.*, 125 F.3d 526, 530 (7th Cir. 1997) (internal quotation marks and citation omitted). This principle is especially strong when, as here, adjudications of property rights or status are at issue. 18 Fed. Prac. & Proc. Juris. § 4416 (3d ed.). In such cases, "issue preclusion is the essential means for protecting the most fundamental purposes of achieving finality by adjudication." *Id.*

Here, the Nation seeks to revisit a decision that settled whether the Oneida Reservation, as defined by its 1838 boundaries, was terminated by Congress. While the Nation may consider the prior resolution of that question wrong or unfair, it nevertheless must be respected as the conclusive determination of the status of the Oneida Reservation. *Firishchak v. Holder*, 636 F.3d

305, 312 (7th Cir. 2011). This Court should preclude the Nation from relitigating that status and hold the 1838 boundaries of the Oneida Reservation no longer exist.

Second, even if this Court determines that it is appropriate to consider anew the issue of the status of the Oneida Reservation, this Court should hold that the Oneida Reservation was diminished to the extent that fee patents were issued for allotted lands and those lands were subsequently sold to non-Indians. Such sales represented the final step in the allotment process under the Dawes Act, which was designed to gradually dismantle the reservation system, and such lands would not have been viewed as "reservation" lands in the early twentieth century. *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994, 1009 (8th Cir. 2010) (noting Congress's "expectation that allotments would lose their reservation status as they passed out of Indian ownership and into white hands."). Here, the vast majority of the area within the 1838 boundaries of the Oneida Reservation—potentially more than 95% of the 65,400 acres—passed out of Indian ownership in the early twentieth century and should not be treated by this Court as part of a reservation. *Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010 (8th Cir. 1999) (reservation diminished to the extent lands allotted under Dawes Act for which fee patents were issued were sold to non-Indians).

Third, this Court should alternatively conclude that in 1906 Congress expressly indicated its intent to terminate the Oneida Reservation by passing legislation specifically authorizing the Secretary of the Interior to grant patents in fee simple to Oneida Indians in advance of the expiration of the trust periods on their allotments. The Nation's own experts have conceded that the Congressmen who enacted this legislation "wanted as many fee patents issued as quickly as possible," held views consistent with those "who wanted to destroy the reservation and get the tribe out of Wisconsin," and intended for non-Indians to gain access to the Oneida's land.

(DSUMF ¶¶ 25-26.)[2] There can be no doubt that Congress intended that allotments for which fee patents were issued would no longer be considered part of a reservation under federal protection.

That this was Congress's intent is confirmed by the federal government's treatment of the area throughout most of the twentieth century. Federal officials across decades and administrations, from the local Indian agents who dealt with the Oneida Indians to the Secretary of the Interior, all acknowledged that the Oneida Reservation as defined by its 1838 boundaries no longer existed and that the land for which fee patents had been issued (which comprised over 98% of the area within those boundaries) was no longer within the jurisdiction of the federal government. By the early 1930s most Oneida Indians did not even live within the 1838 boundaries of the Oneida Reservation. Even after federal Indian policy changed in the 1930s, federal officials continued to acknowledge that there was no 65,400-acre reservation but instead worked with the Oneida to rebuild their land base. That a 65,400-acre Oneida Reservation did not exist was acknowledged by scholars, and even the Nation itself, at least through the 1970s. This Court should conclude that the 1838 boundaries of the Oneida Reservation ceased to exist to the extent fee patents were issued for allotments within those boundaries.

Finally, even if this Court concludes a 65,400-acre Oneida Reservation exists, the Village is entitled to summary judgment. The Special Event Ordinance (the "Ordinance") is a land-use ordinance that focuses on a particular piece of property and application of the ordinance to fee land is justified under this Court's reasoning in *Oneida Tribe of Indians of Wisconsin v. Village of Hobart, Wis.*, 542 F. Supp. 2d 908 (E.D. Wis. 2008) (*Oneida I*). Alternatively, the Special Event Ordinance is a land-use ordinance that serves the same purposes as other types of land-use regulations, including zoning regulations, and can be applied to Nation-owned fee land pursuant

[2] References to DSUMF are to Defendant's Statement of Proposed Undisputed Material Facts filed contemporaneously herewith.

to the Supreme Court's reasoning in *City of Sherrill, N.Y. v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005), as well as Justice Stevens's controlling opinion in *Brendale v. Confederated Tribes and Bands of Yakima Nation*, 492 U.S. 408 (1989). The Village also should be allowed to apply the Ordinance to the extent an event by the Nation results in the closure of public roads within the Village. Finally, the Village's interests in applying its Ordinance to the 2016 Big Apple Fest far outweigh any federal or tribal interests at issue, and the Nation has not identified any actual conflicts that would preclude the Nation from both enforcing its own ordinances and complying with the Village's ordinance.

In sum, this Court should hold that the Oneida Reservation, as defined by its 1838 boundaries, no longer exists and therefore fee land on which 2016 Big Apple Fest activities occurred is not part of a reservation and does not meet the definition of "Indian country" in 18 U.S.C. § 1151. The Nation's first and second claims for relief then necessarily fail and the Village is entitled to summary judgment. And, even if the 2016 Big Apple Fest occurred within Indian country, this Court should grant summary judgment to the Village because the Village's indisputably strong policy interests justify applying the Ordinance to the 2016 Big Apple Fest.

QUESTIONS PRESENTED

1. Whether the Oneida Reservation, as defined by the 65,400-acre area set aside in the 1838 Treaty, was terminated, such that land owned by the Nation in fee simple and roads on which 2016 Big Apple Fest activities occurred are not part of a reservation and thus not Indian country under 18 U.S.C. § 1151.

2. Whether, if the 2016 Big Apple Fest occurred within Indian country, the Village may nevertheless apply its Special Event Ordinance with respect to the 2016 Big Apple Fest.

BACKGROUND

I. FACTUAL BACKGROUND

A. The Allotment of the Oneida Reservation

1. The Oneida Reservation.

On February 3, 1838, the United States entered into a treaty with the First Christian and Orchard Parties of the Oneida in which the United States "reserved to the said Indians to be held as other Indian lands are held a tract of land containing one hundred (100) acres, for each individual . . . ." (Joint Stipulated Statement of Material Facts ("JSSMF") ¶ 3 (the "1838 Treaty").) At the time of the 1838 Treaty, there were 654 Oneida, resulting in an area of approximately 65,400 acres being set aside. (DSUMF ¶ 1.)

2. The federal government's allotment policy and the Dawes Act.

As this Court is aware, "[f]ederal policy toward Indians dramatically changed in the late 19th century . . . when Congress terminated the process of treaty-making with individual tribes . . . and moved to a policy of allotment and assimilation." *Oneida Tribe of Indians of Wisconsin v. Village of Hobart, Wis.*, 542 F. Supp. 2d 908, 911 (E.D. Wis. 2008) (*Oneida I*). On February 8, 1887, Congress enacted the General Allotment Act, commonly known as the Dawes Act. 24 Stat. 388. (JSSMF ¶ 5.) The purpose of the Dawes Act, and the allotment policy, was "the eventual assimilation of the United States Indian population into the general population and the gradual elimination of Indian reservations." *Oneida I*, 542 F. Supp. 2d at 911.[3]

Under the Dawes Act, the President was authorized to select Indian reservations for the allotment of land in severalty to the Indians residing on those reservations. (DSUMF ¶ 2; *see also* Ex. 2 to Kowalkowski Decl.) When reservation land was allotted under the Dawes Act,

[3] *See also Podhradsky*, 606 F.3d at 999 ("The allotment policy in general and the Dawes Act in particular were intended to hasten the demise of the reservation system and to encourage Indian assimilation into the white system of private property ownership.").

Section 5 of the Act directed the Secretary of the Interior to issue patents in the name of the allottees to be held in trust by the United States for a period of twenty-five years "for the sole use and benefit of the Indian to whom such allotment shall have been made." (DSUMF ¶ 2.) At the conclusion of the twenty-five year trust period, the United States would then convey the land to the Indian allottee in fee simple. Section 6 of the Act provided "[t]hat upon completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside." (*Id.*)

3. The allotment of the Oneida Reservation.

Approximately one year after passage of the Dawes Act, Oneida leaders unanimously requested application of the Dawes Act to the Oneida. (DSUMF ¶ 4.) President Harrison subsequently approved the allotment of the Oneida Reservation and, with the exception of small amounts of land set aside for schools and the satisfaction of future allotment claims, the Oneida Reservation was allotted and at least 1500 trust patents were issued to individual Oneida Indians on June 13, 1892. (DSUMF ¶¶ 5-6.) There was no surplus lands act enacted by Congress with respect to the Reservation. (DSUMF ¶ 7.)

After the allotment of the Oneida Reservation, the federal government considered the Oneida to be citizens of the United States and the State of Wisconsin and subject to state civil and criminal laws. (DSUMF ¶¶ 9-10.) The federal government's position was consistent with the United States Supreme Court's decision in *In re Heff*, which in 1905 interpreted Section 6 of the Dawes Act to provide that an Indian who received a trust allotment became a citizen of the United States and subject to the state civil and criminal laws at the time of the allotment, and not at the expiration of the 25-year trust period. *In re Heff*, 197 U.S. 488 (1905).

B. The Issuance of Fee Patents to Oneida Allottees and the Creation of the Village.

1. The Burke Act.

In the early 1900s, Congress passed a number of measures authorizing the issuance of fee patents to Indian allottees before expiration of the 25-year trust period under the Dawes Act. (DSUMF ¶¶ 11, 12, 24.) One such act was the Burke Act, which was enacted on May 8, 1906 and amended the Dawes Act to authorize the secretary of the interior, "in his discretion," to issue patents in fee simple to Indian allottees the secretary determined were "competent." (DSUMF ¶ 12.) The Burke Act also addressed the Supreme Court's decision in *In re Heff*, by amending Section 6 of the Dawes Act so Indian allottees would not be subject to state civil and criminal jurisdiction until patents were issued in fee. (DSUMF ¶ 14.) The changes were not intended to affect the status of Indians, like the Oneida, who had already received allotments. (*Id.*)

2. The 1906 Oneida Provision.

Several weeks after passage of the Burke Act, on June 21, 1906, Congress passed an annual appropriations act for the Indian Department. (DSUMF ¶ 24.) The 1906 appropriations act included a provision that specifically authorized the Secretary of the Interior to issue fee patents to "to any Indian of the Oneida Reservation in Wisconsin for the lands heretofore allotted him, and the issuance of such patent shall operate as a removal of all restrictions as to the sale, taxation, and alienation of the lands so patented." (DSUMF ¶ 23; Ex. 28 to Kowalkowski Decl., (the "1906 Oneida Provision").) Congress enacted the 1906 Oneida Provision after the Oneida repeatedly petitioned their congressman, E.S. Minor, as well as other federal officials for legislation giving the Oneida fee simple title to their lands. (DSUMF ¶¶ 17-21.) A delegation of Oneida Indians traveled to Washington D.C. to meet with the Commissioner of Indian Affairs regarding their request and ultimately "asked that some legislation be enacted authorizing the

issuance of patents in fee in the discretion of the Secretary of the Interior and on the application of any Indian." (DSUMF ¶¶ 22-23.) The 1906 Oneida Provision was drafted in response to these requests. The Oneida were supported in their efforts by Congressman Minor, who was "an advocate of fee patenting" who "express[ed] support for the idea of eliminating the Oneida's land base." (DSUMF ¶¶ 22-25.)

3. The creation of the Village.

In 1903, the Wisconsin state legislature created the towns of Hobart and Oneida "from the territory now embraced within the Oneida Reservation in said counties," and the town of Hobart was subsequently recreated and organized in 1908 from "[a]ll that portion of the Oneida reservation, situated in Brown County, Wisconsin, except such as is located in sections Thirty&Two (32) and Thirty-Three (33), Township Twenty-Five (25) North; Range Nineteen (19) East." (DSUMF ¶¶ 37-38.) Initially, Oneida Indians controlled the governments of the towns of Hobart and Oneida. (DSUMF ¶ 39.) As a result of Congress's actions allowing for fee patents to be issued to the Oneida, the composition of the towns quickly changed. (*Id.*) By 1909, the Secretary of the Interior had issued fee patents for approximately 30,000 acres of the area set aside in the Treaty of 1838 and there was a "land rush" of white settlers. (DSUMF ¶¶ 29, 39.) As a result, the Oneidas living within the Oneida Reservation lost control of the town governments and were outnumbered by the new white residents. (DSUMF ¶ 39.)

4. The 1917 competency commissions and end of the trust period.

By 1917, the year in which the 25-year trust period for the Oneida allotments was to expire, only 106 Oneida allotments remained in trust and over 50,000 acres of the 65,400-acre area set aside under the 1838 Treaty had been alienated from Indian ownership. (DSUMF ¶¶ 30, 33.) In 1917, President Wilson signed an executive order extending the trust period of all remaining trust allotments on the area set aside in the Treaty of 1838, except for those of twenty-

three named allottees. (DSUMF ¶ 33.) Thereafter, the competency commission held meetings with the Oneida. (DSUMF ¶ 34.) The commissioners subsequently issued a report recommending that the trust period be extended on eighteen allotments, but that fee patents be issued for all others. (DSUMF ¶ 34.) On May 4, 1918, President Wilson signed another executive order extending the trust period for nine years for thirty-five named Oneida allottees. (DSUMF ¶ 35.) On March 1, 1927, President Calvin Coolidge would sign another executive order extending the trust period for twenty-one of the thirty-five named Oneida allottees. (DSUMF ¶ 36.) By the early 1930s, the Oneidas owned less than 90 acres of tribal lands and only several hundred acres of individual allotments in trust out of the approximately 65,400 acres within the original boundaries of the Oneida Reservation. (DSUMF ¶ 98.)

C. Status of the Oneida Reservation and *Stevens v. Brown*.

1. Federal treatment of fee-patented lands from 1909 to 1934.

The issuance of fee simple patents to the Oneida resulted in fee-patented land becoming subject to state and local taxation. (DSUMF ¶¶ 12, 23, 44, 50.) And, the Oneida who resided upon such land were subject to state and local jurisdiction. (DSUMF ¶¶ 44, 50.) Correspondence from federal officials from 1909 through the enactment of the IRA in 1934 repeatedly acknowledged that the federal government had no control or jurisdiction over the Oneida allotments for which fee patents had been issued. (DSUMF ¶¶ 44-51, 54-62, 66-71, 75-90.) Such lands comprised the vast majority of the area of the Oneida Reservation, and as a result federal officials at all levels, from the local Indian agents with responsibility for the Oneida to various Commissioners of Indian Affairs, considered the Oneida Reservation, as defined by its 1838 boundaries, to no longer exist. These facts are discussed in more detail *infra* at pages 31-37.

2. *Stevens, et al. v. County of Brown, et al.*

In the 1930s a number of Oneida Indians, "acting for themselves as well as for and on behalf of the members of the Oneida Tribe of Indians in the State of Wisconsin," sued Brown and Outagamie Counties, as well as the townships of Hobart and Oneida, seeking recovery of property taxes collected from tribal members and arguing that the townships had been illegally created. (DSUMF ¶ 40.) Judge Geiger of the U.S. District Court for the Eastern District of Wisconsin ultimately dismissed the case and in doing so accepted the argument made by the defendants that "the Oneida Reservation was lawfully discontinued, the allotments made thereunder superseding the Indian Treaty." (DSUMF ¶ 41.) Because the Oneida Reservation had been discontinued, Judge Geiger concluded that the Oneida were required to pursue remedies under state law and that the time for doing so had expired. (*Id.*) These facts are discussed in more detail *infra* at pages 14-18.

3. The IRA and the status of the Oneida Reservation through the 1970s.

In 1934, Congress "drastically changed federal policy toward Indian tribes when it turned away from allotment and assimilation through the passage of the Indian Reorganization Act (IRA), 25 U.S.C. §§ 450 *et seq.*," the purpose of which was "to stop the loss of Indian lands through the allotment process and re-establish tribal governments and holdings." *Oneida I*, 542 F. Supp. 2d at 912. Even after this change in policy, however, the federal government continued to consider the Oneida Reservation, as defined by its 1838 boundaries, to no longer exist. For example, John Collier, the Commissioner of Indian Affairs and leading advocate for the change in policy brought about the IRA, recognized that the Oneida were "not in any real way under Federal jurisdiction" and "ought to be brought into *new land* as an organized community." (DSUMF ¶ 88.) (emphasis added). And, a 1935 Annual Statistical Report for the Oneida Indians expressly states that there was "No Reservation" and "[t]his is not a Reservation, the Indians live

in scattered communities all over the state." (DSUMF ¶ 101.) The federal government subsequently worked with the Oneida to purchase a "small reservation" within the boundaries of the "former Oneida Indian Reservation," and continued to refer to the "original Oneida Reservation," the "original reservation," and "the former reservation." (DSUMF ¶ 104.) At least through the 1970s, documents from within the Bureau of Indian Affairs indicate the reservation for the Oneida was far smaller than 65,400 acres. (*See* DSUMF ¶ 125.) These facts are discussed in more detail *infra* at pages 38-40.

The Oneida themselves similarly recognized that a 65,400-acre reservation no longer existed, at least into the 1970s. Economic development plans prepared in the 1960s and 1970s variously note that "[t]he reservation had ceased to exist" and refer to "the original reservation" and "the former reservation." (DSUMF ¶¶ 119, 124.) And, in the 1970s, the Oneida Tribe of Indians of Wisconsin, Inc. (i.e., the Nation) published the book History of the Oneida Indians which expressly states "*[t]he reservation ceased to exist*" and that by the 1920s there was "no reservation." (DSUMF ¶ 121 (emphasis added).) Various scholars, including some relied on by the Nation's experts here, have similarly recognized that the Oneida no longer have a 65,400-acre reservation. (*See* DSUMF ¶¶ 114, 116, 122.)

D. IGRA and the Nation's Land Acquisition Policy.

"[A]fter the passage of the Indian Gaming Regulatory Act in 1988, the Tribe's economic standing in northeast Wisconsin . . . increased dramatically." *Oneida I*, 542 F. Supp. 2d at 913. The Nation now has a multi-million dollar gaming business the revenue from which drives an annual land acquisition budget of $9 to $12 million, and it is the Nation's goal to reacquire and place in trust all land within the 1838 boundaries of the Oneida Reservation. (DSUMF ¶¶ 128, 141.) Between 1988 and 2010, the amount of tribally owned land within the 1838 boundaries of the Oneida Reservation increased from 5.9% to 35.9%. (DSUMF ¶ 129.)

E. The 2016 Big Apple Fest

The 2016 Big Apple Fest took place on September 17, 2016. (JSSMF ¶ 19.) It was a public event that was open to, and advertised to, non-tribal members, and was attended by over eight thousand attendees. (DSUMF ¶¶ 138, 140.) Event activities occurred on both land owned in fee and land owned in trust by the Nation, and the Nation also used public roads (which were barricaded at its direction) to shuttle participants for the event. (DSUMF ¶¶ 134-137, 143-144.) Non-tribal vendors engaged in commercial activity at the event, and the Nation also used non-tribal vendors to assist in conducting the event. (DSUMF ¶¶ 135, 139, 143.) Although the Nation applied to the Wisconsin Department of Transportation and Brown County for a permit to close Highway 54 for the event, it did not submit any application for a permit to the Village. (JSSMF ¶¶ 20, 23; DSUMF ¶¶ 142.) The Village subsequently cited the Nation for failing to obtain a permit for the event under the Village's Special Event Ordinance. (JSSMF ¶ 23.)

LEGAL STANDARD

Summary judgment is required when "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. P. 56(a). The mere existence of some factual dispute does not defeat a summary judgment motion; "the requirement is that there be no genuine issue of material fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (emphasis deleted). For a dispute to be genuine, the evidence must be such that a "reasonable jury could return a verdict for the nonmoving party." *Id.* For the fact to be material, it must relate to a disputed matter that "might affect the outcome of the suit." *Id.* "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial." *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (internal quotations omitted); *see also K-TEC, Inc. v. Vita-Mix Corp.*, 696

F.3d 1364, 1374 (Fed. Cir. 2012) (expert report does not create dispute "when no reasonable juror reviewing the evidence could reach such a conclusion").

ARGUMENT

II. THE ORDINANCE CAN BE APPLIED TO THE NATION BECAUSE ACTIVITIES ASSOCIATED WITH THE 2016 BIG APPLE FEST OCCURRED OUTSIDE "INDIAN COUNTRY."

It is undisputed that 2016 Big Apple Fest activities occurred on land within the Village that is not owned in trust, including land the Nation owns in fee-simple and a public road maintained by the Village. (DSUMF ¶¶ 134-137, 144.) Here, for such land to be considered "Indian country," it must be located "within the limits of any Indian reservation." 18 U.S.C. § 1151(a). By the time Congress passed the IRA in 1934, however, the Oneida Reservation, as defined by its 1838 reservation boundaries, had ceased to exist. Whether this Court treats this case as one of disestablishment (concluding there was no longer a reservation for the Oneida by the passage of the IRA)[4] or one of diminishment (concluding that a reservation remained for the Oneida comprised of the small amounts of tribally owned land and allotments still in trust),[5] the result here is the same. Fee lands and public roads on which activities associated with the 2016 Big Apple Fest occurred are not Indian country under 18 U.S.C. § 1151(a).

A. The Nation is Precluded from Relitigating the Status of the Oneida Reservation.

In 1933, in *Stevens, et al. v. The County of Brown, et al.* (hereafter *Stevens*) a judge on this court determined the Oneida Reservation ceased to exist as a result of Congressional action.

[4] Reservations have been held disestablished even when some land remained in trust, however. *Osage Nation v. Irby*, 597 F.3d 1117, 1127-28 (10th Cir. 2010) (reservation disestablished by 1906 Act even though some parts of reservation remain in trust status).

[5] *See Gaffey*, 188 F.3d at 1030 and *Podhradsky*, 606 F.3d at 1003, 1007-1010 (together holding that reservation was diminished to the extent allotted lands for which fee patents were issued were sold to non-Indians but that allotments that remained in trust were still part of reservation).

(DSUMF ¶¶ 40-41; Ex. 45 to Kowalkowski Decl.) Indeed, the *Stevens* decision was actually the second case to reach that conclusion; in *United States v. Hall*, 171 F. 214 (E.D. Wis. 1909), the court recognized that the Oneida Reservation was a "former[]" reservation. *Hall*, 171 F. at 218.

This Court "should honor the first actual decision of a matter that has been actually litigated." *Chi. Truck Drivers, Helpers, and Warehouse Union (Indep.) Pension Fund*, 125 F.3d at 530 (internal quotation marks and citations omitted). "[O]nce an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." *Montana v. United States*, 440 U.S. 147, 153 (1979). Here, all four elements of issue preclusion are present with respect to the decision in *Stevens*,[6] and the Nation should be estopped from relitigating the question of the status of the Oneida Reservation.

First, "the issue sought to be precluded is the same as an issue in the prior litigation." *Adams v. City of Indianapolis*, 742 F.3d 720, 736 (7th Cir. 2014). This case presents the same issue that was addressed in *Stevens*: whether Congress acted to terminate the Oneida Reservation. The issue was squarely presented in that case, as the defendants (including the Town of Hobart) moved to dismiss on the ground "[t]hat the Oneida Reservation was lawfully discontinued, the allotments made thereunder superseding the Indian treaty." (DSUMF ¶ 41.)

Nor can there be any dispute that the issue was "actually litigated in the prior litigation." *Adams*, 742 F.3d at 736. The court in *Stevens* specifically addressed the question of whether the "third ground" raised by defendants—that "the Oneida Reservation was lawfully

[6] "Issue preclusion has the following elements: (1) the issue sought to be precluded is the same as an issue in the prior litigation; (2) the issue must have been actually litigated in the prior litigation; (3) the determination of the issue must have been essential to the final judgment; and (4) the party against whom estoppel is invoked must have been fully represented in the prior action." *Adams v. City of Indianapolis*, 742 F.3d 720, 736 (7th Cir. 2014).

discontinued"—was "well assigned." (DSUMF ¶ 41; Ex. 45 to Kowalkowski Decl.) It discussed the Supreme Court's holding in *Lone Wolf v. Hitchock*, 187 U.S. 553 (1903)—that Congress has the power to unilaterally diminish a reservation—and concluded:

> While Indian tribes may have been parties to treaties, the plenary authority of Congress over the tribal relations of the Indians is deemed political, and its exercise, notwithstanding treaties, must be recognized by the courts for the reasons indicated in the Hitchcock case. Therefore, there is no escape from the proposition that the Government, in passing and applying the Dawes Act, conceived itself in duty bound to carry out its provisions in the interest of the tribe and its members. Plainly, this resulted in a discontinuance of the reservation, and a recognition of the power of the state to incorporate the lands in the towns in question.

(DSUMF ¶ 41.) In sum, the court specifically analyzed the question of whether Congress had terminated the Oneida Reservation and concluded that it had. The court then went on to dismiss the case, a final judgment on the merits. (DSUMF ¶ 41; *cf. Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394, 399 n.3 (1981) (dismissal for failure to state a claim is decision on the merits entitled to preclusive effect).

Third, the status of the Oneida Reservation was "essential to the final judgment" in *Stevens*. *Adams*, 742 F.3d at 736. The court dismissed the plaintiffs' claim because it was "bound by the state statute governing procedure and also limitation." (DSUMF ¶ 41; Ex. 45 to Kowalkowski Decl.) This holding depended on the court's determination the reservation had been discontinued, as acknowledged by the court: "Therefore, *when the Hitchcock and other cases referred to are accepted as definitely supporting the third ground assigned*—[that the reservation had been discontinued]—it seems to me to follow that the plaintiffs, in seeking to recover taxes, are bound by the state statute governing procedure and also limitation." (*Id.*) (emphasis added). In sum, the court held that, because the reservation had been discontinued, state law applied and the plaintiffs had not used the appropriate remedies under state law to seek recovery of taxes or to challenge the legality of the organization of local governments.

Fourth, the Nation was "fully represented" in the prior case. *Adams*, 742 F.3d at 736. The plaintiffs were individual Oneida suing "for themselves *as well as for and on behalf of the members of the Oneida Tribe of Indians in the State of Wisconsin*." ((DSUMF ¶ 40.) As the court acknowledged: "[t]he complainants commenced this action as a class, or rather as members and representatives of the Oneida Tribe of Indians in the State of Wisconsin." (DSUMF ¶ 41; Ex. 45 to Kowalkowski Decl.) The case was a class action brought on behalf of all Oneida and accordingly should be given preclusive effect here. *Cf. Hansberry v. Lee*, 311 U.S. 32, 41 (1940) ("[T]he judgment in a 'class' or 'representative' suit, to which some members of the class are parties, may bind members of the class or those represented who were not made parties to it.").[7]

Not only are all the elements of issue preclusion present here, this is precisely the type of case in which issue preclusion should be at its strongest. Adjudications of property status—like the status of the land within the 1838 boundaries of the Oneida Reservation—are "designed to reach directly into the future and to bind it." 18 Fed. Prac. & Proc. Juris. § 4416 (3d ed.). In such cases, "issue preclusion is the essential means for protecting the most fundamental purposes of achieving finality by adjudication." *Id.* That purpose is strikingly relevant here, where the Nation's assertions regarding the status of the Oneida Reservation are a clear attempt to relitigate the merits of a decision with which the Nation disagrees. As the Seventh Circuit has observed:

[7] *See also Taylor v. Sturgell*, 553 U.S. 880, 894 (2008) ("[A] nonparty may be bound by a judgment because she was adequately represented by someone with the same interests who was a party to the suit. Representative suits with preclusive effect on nonparties include properly conducted class actions[.]" (internal quotation marks, citations, and brackets omitted)). There should be no dispute that the interests of the plaintiffs in the prior case were aligned with the Nation's interests here on the issue of the existence of the Oneida Reservation, that the plaintiffs understood themselves to be acting in a representative capacity (such status is reflected in the case caption and the court's recitation of the plaintiffs' allegations), and that there was notice of the suit. *Taylor*, 553 U.S. at 900-01. The suit was publicized and at least one of the plaintiffs was a tribal leader. (DSUMF ¶ 40.)

> The possibility that a prior action could result in the wrong outcome is a reason, as a matter of first principles, why one may not want courts to recognize the doctrine at all. Yet, whenever principles compete with one another—fairness versus finality, certainty versus economy—there are no right answers, only better ones. Courts recognize and apply collateral estoppel; [a party's] efforts to relitigate the merits of [the prior] case is precisely what the doctrine prevents.

Firishchak v. Holder, 636 F.3d 305, 312 (7th Cir. 2011) (citation omitted). This Court should preclude the Nation from relitigating that status and hold that the Oneida Reservation, as defined by its 1838 boundaries, no longer exists.

B. The Passage of Fee-Patented Oneida Lands Out of Oneida Ownership Diminished the Oneida Reservation.

Even if this Court allows the Nation to relitigate the status of the Oneida Reservation, this Court should conclude the Oneida Reservation was diminished at least to the extent fee-patented allotments within the Reservation passed out of Indian ownership. Once allotted land passed out of Indian ownership and was owned in fee by non-Indians, it ceased to be part of a reservation. *See Gaffey*, 188 F.3d at 1030. Here, the undisputed facts show that by 1934 potentially over 95 percent of the area of the Oneida Reservation had been alienated from Indian ownership, including land the Nation has subsequently repurchased in fee and used to conduct the 2016 Big Apple Fest. (DSUMF ¶¶ 95, 98, 146.) Those lands are no longer part of a reservation.

1. The three-factor *Solem* framework does not strictly control this issue.

The Nation will likely take the position that the passage of allotted lands out of Indian ownership cannot diminish a reservation without Congressional legislation expressly stating as much and that the three-factor framework established by the Supreme Court in *Solem v. Bartlett*, 465 U.S. 463, 470 (1984), controls whether the Oneida Reservation has been diminished or disestablished.[8] *Solem* did not address the question presented here, however, which is the status

[8] The *Solem* framework provides factors (the *Solem* factors) to guide the analysis of whether a reservation has been disestablished or diminished: (1) "the operative language of the act that

of allotted lands for which fee patents were issued and which subsequently passed out of Indian ownership. Rather, the Supreme Court developed and has applied the *Solem* factors only in cases involving the opening of reservations to non-Indian settlement of surplus lands remaining after the reservation was allotted, i.e. surplus lands act cases. The *Solem* factors exist to provide a framework for distinguishing those surplus lands acts that "simply offered non-Indians the opportunity to purchase land within established reservation boundaries" from those that "freed that land of its reservation status" so that the State "acquired primary jurisdiction over [the] unalloted opened lands[.]" *Yankton Sioux Tribe*, 522 U.S. at 343.[9]

No such distinguishing is necessary when assessing the status of the allotted Oneida lands that were fee-patented and passed out of Indian ownership, however, as such lands lacked any indicia of reservation status. They were owned by non-Indians at a time when "[l]ands to which the Indians did not have property rights were never considered Indian country" and "[t]he notion of a reservation as a piece of land, all of which is Indian country regardless of who owns it, would have thus been quite foreign." *Gaffey*, 188 F.3d at 1022; *see also Stockbridge-Munsee Cmty.*, 554 F.3d 657, 662 (7th Cir. 2009) ("[B]ack then, the 'notion that reservation status of

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purportedly shrinks a reservation," *Stockbridge-Munsee Cmty.*, 554 F.3d at 662; (2) "events surrounding the passage of the act that 'unequivocally reveal a widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation,'" *Id.* (quoting *Solem*, 465 U.S. at 471); and (3) events subsequent to the passage of the act, including "the subsequent demographic history of open lands . . . as well as the United States' treatment of the affected areas[.]" *Nebraska v. Parker*, 136 S. Ct. 1072, 1081 (2016) (internals citations and quotations omitted).

[9] As the United States has recently explained in an amicus filing to the Supreme Court, "the Court's cases provide 'a fairly clean analytical structure for distinguishing those surplus land Acts that diminished reservations from those Acts that simply offered non-Indians the opportunity to purchase land within established reservation boundaries." *See* Brief for the United States as Amicus Curiae, No. 17-1107, (U.S. March 2018), at 5, *available at* https://www.supremecourt.gov/DocketPDF/17/17-1107/38438/20180309192355230_17-1107%20Royal%20v.%20Murphy.pdf. As the United States further proclaimed, "the critical inquiry is not whether the statutory language included the 'hallmarks' found in prior cases, but rather whether Congress intended to disestablish the … territory…." *Id.* at 6.

Indian lands might not be coextensive with tribal ownership was unfamiliar . . . ." (quoting *Solem*, 465 U.S. at 468)). And there can be no dispute that the federal government disclaimed any jurisdiction over such lands and that states acquired primary jurisdiction over them. *See infra* at 31-40. Simply put, the concerns that informed the *Solem* framework are not present when assessing allotted lands that passed into non-Indian ownership.[10]

2. Congress intended land allotted under the Dawes Act to lose its reservation status when it passed out of Indian ownership.

Moreover, the *Solem* factors are not rigid absolutes that must all be met in order to find diminishment or disestablishment. As the Supreme Court has repeatedly reaffirmed, the "touchstone to determine whether a given statute diminished or retained reservation boundaries is congressional purpose." *Yankton Sioux Tribe*, 522 U.S. at 343; *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 588 n.4 (1977) ("The focus of our inquiry is congressional intent."). Thus, although the Court may identify "factors from which intent is inferred," such factors do not replace the fundamental inquiry: "to inquire whether a congressional determination to terminate is expressed on the face of the Act or (is) clear from the surrounding circumstances and legislative history." *Rosebud Sioux Tribe* ,430 U.S. at 588 n.4 (internal quotations omitted).

Here, the driving purpose behind the federal government's allotment policy in the late-nineteenth and early-twentieth centuries was the dissolution of the reservation system. Congress

[10] The Village notes that the applicability of the *Solem* factors outside the context of a surplus land act may be decided by the Supreme Court in the case of *Royal v. Murphy*. On May 21, 2018, the Supreme Court granted a petition for a writ of certiorari to hear that case, which raises the question of whether the 1866 territorial boundaries of the Creek Nation within the former Indian Territory of eastern Oklahoma constitute an "Indian reservation." In its petition for a writ of certiorari, the petitioner argued that *Solem* involved surplus land acts and thus should not apply. Petition for a Writ of Certiorari, *Murphy v. Warden*, No. 17-1107, at 30-31, *available at* https://www.supremecourt.gov/DocketPDF/17/17-1107/34619/20180206172951133_17-__PetitionForAWritOfCertiorari.pdf. This is thus now an issue of first impression pending in front of the United States Supreme Court.

had an "expectation that allotments would lose their reservation status as they passed out of Indian ownership and into white hands." *Podhradsky*, 606 F.3d at 1009 (8th Cir. 2010). During the allotment era Congress was "operating on the assumption that reservations would soon cease to exist" and that allotting reservation lands was a step "in the process of eventually dismantling the reservation system." *Gaffey*, 188 F.3d at 1022. In *Montana v. United States*, the Supreme Court discussed the legislative history of certain allotment acts, including the Dawes Act, and concluded that "[i]t defies common sense to suppose that Congress would intend that non-Indians purchasing allotted lands would become subject to tribal jurisdiction when an avowed purpose of the allotment policy was the ultimate destruction of tribal government." *Montana*, 450 U.S. at 559 n.9 (1981). As the Supreme Court explained:

> The Secretary of the Interior and the Commissioner of Indian Affairs repeatedly emphasized that the allotment policy was designed to eventually eliminate tribal relations. *See, e. g.*, Secretary of the Interior Ann.Rep., vol. 1, pp. 25–28 (1885); Secretary of the Interior Ann.Rep., vol. 1, p. 4 (1886); Commissioner of Indian Affairs Ann.Rep., vol. 1, pp. IV–X (1887); Secretary of the Interior Ann.Rep., vol. 1, pp. XXIX–XXXII (1888); Commissioner of Indian Affairs Ann.Rep. 3–4 (1889); Commissioner of Indian Affairs Ann.Rep. VI, XXXIX (1890); Commissioner of Indian Affairs Ann.Rep., vol. 1, pp. 3–9, 26 (1891); Commissioner of Indian Affairs Ann.Rep. 5 (1892); Secretary of the Interior Ann.Rep., vol. 1, p. IV (1894). And throughout the congressional debates on the subject of allotment, it was assumed that the "civilization" of the Indian population was to be accomplished, in part, by the dissolution of tribal relations. *See, e. g.*, 11 Cong.Rec. 779 (Sen. Vest), 782 (Sen. Coke), 783–784 (Sen. Saunders), 875 (Sens. Morgan and Hoar), 881 (Sen. Brown), 905 (Sen. Butler), 939 (Sen. Teller), 1003 (Sen. Morgan), 1028 (Sen. Hoar), 1064, 1065 (Sen. Plumb), 1067 (Sen. Williams) (1881).
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> There is simply no suggestion in the legislative history that Congress intended that the non-Indians who would settle upon alienated allotted lands would be subject to tribal regulatory authority. Indeed, throughout the congressional debates, allotment of Indian land was consistently equated with the dissolution of tribal affairs and jurisdiction. *See, e. g., id.*, at Cong.Rec. 785 (Sen. Morgan), 875 (Sen. Hoar), 876 (Sen. Morgan), 878 (Sens. Hoar and Coke), 881 (Sen. Brown), 908 (Sen. Call), 939 (Sen. Teller), 1028 (Sen. Hoar), 1067 (Sens. Edmunds and Williams).

Id.[11] Congress's goal of dismantling reservations and its belief that allotting lands was part of that process, combined with its understanding that reservation status was coextensive with Indian ownership, makes clear that Congress intended to diminish the Oneida Reservation as lands passed out of Indian ownership. There should be no doubt that the Congress that passed the Dawes Act intended that the sale of allotments on the Oneida Reservation to non-Indians would terminate the reservation status of those allotments.

To be clear, the Village is not requesting that this Court find diminishment simply because the Oneida Reservation was allotted under the Dawes Act. Such a conclusion would conflict with Supreme Court precedent that clearly recognizes that "allotting land to Indians is consistent with continued reservation status." *Stockbridge Munsee Cmty.*, 554 F.3d at 664. The Village does not dispute that after the allotment of the Reservation each individual allotment was still held in trust by the United States on behalf of each individual allottee and that the reservation status of an allotment remained unchanged so long as the allotment was held in trust. *See Podhradsky*, 606 F.3d at 1009 ("Congress's original expectation that allotments would lose their reservation status as they passed out of Indian ownership and into white hands . . . was not inconsistent with the maintenance of reservation status for the allotted lands *so long as they were held in trust*." (emphasis added)). But, the act of allotment was just the first step in a multi-step process designed to eliminate reservations. The next step would be the issuance of a fee patent to the individual allottee. Even if that step did not diminish reservations, the final step—the sale of the land to a non-Indian—would do so and accomplish Congress's goal of reducing the size of

[11] The Village has provided the Secretary of the Interior and Commissioner of Indian Affairs reports, as well as the legislative history, referenced by the Supreme Court in *Montana* as Exs. 181-205 to the Kowalkowski Decl. In addition, the December 15, 2017 Report of Emily Greenwald provides an extensive discussion of the Congressional intent behind the Dawes Act at pages 13-24. Ex. 154 to Kowalkowski Decl. Documents referenced in that section of her report are Exs. 209-238 to Kowalkowski Decl.

the reservation. Such transferred lands were subject to state and local jurisdiction and, at that time, a loss of reservation status was the necessary consequence of a change in land tenure.

In short, the Village here is asking this Court to do nothing more than apply the same principle applied by the United States Court of Appeals for the Eighth Circuit in *Gaffey*. In that case, the Eighth Circuit addressed a situation in which approximately three-fifths of the Yankton Sioux Reservation had been allotted under the Dawes Act and amendments to that act. As here, the vast majority of those allotted parcels lost their trust status, either through the issuance of patents under the Burke Act or the expiration of the applicable trust period, and the bulk of them subsequently came to be owned in fee by non-Indians. *Gaffey*, 188 F.3d at 1016 ("At least eighty five percent of the land allotted on the Yankton Sioux Reservation eventually passed out of trust status; most of this land was sold in fee to non Indians."). In assessing the status of those lands, the court acknowledged the understanding that lands owned by non-Indians would not have been considered a reservation and concluded that the reservation was "diminished by the loss of those lands originally allotted to tribal members which have passed out of Indian hands." *Id.* at 1030. This Court should reach the same conclusion as to the Oneida Reservation and hold, at a minimum, that the Reservation was diminished to the extent land allotted to Indians passed out of restricted status and was subsequently sold to non-Indians.

C. Congress Indicated Its Intent to Terminate the 1838 Boundaries of the Oneida Reservation In a 1906 Act.

Even if this Court concludes that the passage of allotted lands out of Indian ownership does not alone diminish a reservation, an application of the *Solem* framework conclusively demonstrates that the Oneida Reservation, as defined by its 1838 boundaries, no longer exists. As set forth in more detail below, Congress evidenced its intent to break down the 1838 boundaries of the Reservation through the passage of several acts allowing the secretary of the

interior to issue fee-simple patents to allottees before the 25-year trust period expired, including a provision in a 1906 Appropriations Act specifically targeting the Oneida Reservation. And, from the early- to mid-twentieth century, federal officials at all levels of government and across different administrations consistently understood federal protection as extending only to the Nation's tribal lands or lands held in trust. The Nation itself acknowledged that the "reservation ceased to exist" at least until the 1970s.

1. The operative language of the 1906 Appropriations Act evidences Congressional intent to alter the boundaries of the Oneida Reservation.

"The most probative evidence of intent is the operative language of the act that purportedly shrinks a reservation." *Stockbridge-Munsee Cmty.*, 554 F.3d at 662. Here, Congress indicated its intent to alter the boundaries of the Oneida Reservation when it included in the 1906 Appropriations Act the following language:

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

(DSUMF ¶ 23.)

The Nation will almost certainly take the position that the text of 1906 Appropriations Act lacks certain "hallmarks of diminishment" that the Nation will claim are necessary in order for Congress to alter the boundaries of a reservation. But there is no merit to this claim, especially here, for at least two reasons.

First, the Supreme Court has recognized that no "particular form of words" is necessary to alter a reservation's boundaries. *Hagen v. Utah*, 510 U.S. 399, 411 (1994). "Even in the absence of a clear expression of congressional purpose in the text of a surplus land Act, unequivocal evidence derived from the surrounding circumstances may support the conclusion

that a reservation has been diminished." *Yankton Sioux Tribe*, 522 U.S. at 351. Indeed, various courts of appeal, including the Seventh Circuit, have upheld findings of disestablishment or diminishment even in the absence of "hallmark language suggesting that Congress intended to disestablish the reservation." *Stockbridge-Munsee Cmty.*, 554 F.3d at 664 (finding disestablishment even though "[t]he 1906 Act . . . included none of the hallmark language suggesting that Congress intended to disestablish the reservation."); *see also Osage Nation v. Irby*, 597 F.3d 1117, 1124 (10th Cir. 2010) (reservation disestablished even though "neither the Osage Allotment Act nor the Oklahoma Enabling Act contain express termination language"); *Gaffey*, 188 F.3d 1010 (8th Cir. 1999) (reservation diminished to the extent allotted lands for which fee patents were issued were sold to non-Indians). In *Stockbridge-Munsee Community*, for example, the Seventh Circuit noted that "Congress believed that all reservations would soon fade away—the idea behind the allotment acts was that ownership of property would prepare Indians for citizenship in the United States, which down the road would make reservations obsolete[,]" and concluded that given this backdrop "we also cannot expect Congress to have employed a set of magic words to signal its intention to shrink a reservation." 554 F.3d at 662.

Indeed, imposing a blanket requirement that an early twentieth-century Congress use "express termination" or "hallmark" language would be unrealistic given the historical context in which that Congress existed. The Congress that passed the 1906 Appropriations Act was operating on a different set of assumptions about the requirements for land to be classified as reservation land. In the early twentieth-century "[l]ands to which the Indians did not have property rights were never considered Indian country" and "[t]he notion of a reservation as a piece of land, all of which is Indian country regardless of who owns it, would have thus been quite foreign." *Gaffey*, 188 F.3d at 1022; *see also Stockbridge-Munsee Cmty.*, 554 F.3d at 662

("[T]he 'notion that reservation status of Indian lands might not be coextensive with tribal ownership was unfamiliar . . . ." (quoting *Solem*, 465 U.S. at 468)). As a result, the Congress that passed the 1906 Appropriations Act here "would have felt little need to explicitly address a reservation's boundaries[,]" because the expectation was that allotment of the land would result in the disestablishment of the reservation. *Stockbridge-Munsee Cmty.*, 554 F.3d at 662.[12]

Second, by authorizing the Secretary of the Interior to issue fee patents to Oneida Indians in advance of the expiration of the 25-year trust period created by the Dawes Act, Congress was acting to hasten the end of the reservation. As the Seventh Circuit has recognized, abolishing reservations is the reason Congress sought to issue fee simple patents to Indians. The court explained in *Stockbridge-Munsee Community*:

> The intent to extinguish what remained of the reservation is born out by the act's provision for allotments in fee simple. This provision sets the 1906 Act apart from most allotment acts, like the 1871 Act, which restricted the Indian owners from selling their land or required that it be held in trust by the United States. Why include this peculiar provision? Because the reservation could only be abolished if the tribal members held their allotments in fee simple.

554 F.3d at 664 (internal citations omitted). Here, unlike the Stockbridge-Munsee, the Oneida Reservation had already been allotted, so there was no need to issue allotments in fee simple, just a need to convert the allotments held in trust to fee-simple parcels. And, in 1906, it was understood the Oneida Indians were already citizens and subject to state and local law. (DSUMF ¶¶ 9-10, 14.) The only difference at that time between the Oneida Indians and non-Indians was

[12] *See also Solem*, 465 U.S. at 468 ("Consistent with prevailing wisdom, members of Congress voting on the surplus land acts believed to a man that within a short time-within a generation at most-the Indian tribes would enter traditional American society and the reservation system would cease to exist. Given this expectation, Congress naturally failed to be meticulous in clarifying whether a particular piece of legislation formally sliced a certain parcel of land off one reservation."); *Gaffey*, 188 F.3d at 1022 ("The 1894 Congress would have felt little pressure to specify how far a given act went toward diminishing a reservation and would have had no reason to distinguish between reservation land and other types of Indian country.").

that the Oneida Indians could not sell their individual trust allotments. By authorizing the Secretary of the Interior to convert the already-issued allotments to fee simple patents at his discretion, Congress intended to extinguish those parts of the reservation that the Secretary determined should receive fee simple patents.

2. The history surrounding the passage of the fee patenting acts.

The circumstances surrounding the 1906 Appropriations Act also reflect a clear congressional intent and understanding by the Oneida that the reservation would be diminished as fee patents were issued to individual Oneida. The 1906 Appropriations Act "was passed at a time where the United States sought dissolution of Indian reservations[.]" *Osage Nation*, 597 F.3d at 1124. Further, the Oneida-specific language at issue was enacted by Congress after the Oneida repeatedly petitioned the federal government for legislation granting the Oneida fee simple title to their land that would allow them to dispose of their allotments. (DSUMF ¶¶ 16-21.) Indeed, an Oneida delegation traveled to Washington D.C. to specifically request "that some legislation be enacted authorizing the issuance of patents in fee in the discretion of the Secretary of the Interior and on the application of any Indian." (DSUMF ¶¶ 22-24.) This request resulted in Congress authorizing the Secretary of the Interior "to issue a patent in fee to any Indian of the Oneida Reservation in Wisconsin for the lands heretofore allotted him."[13] (DSUMF ¶ 24.)

Granting the Oneida fee simple titles would "pave[] the way" for non-Indians to own those parcels, thereby breaking up the reservation's boundaries. *Stockbridge-Munsee Cmty.*, 554 F.3d at 664-65. Indeed, one of the Nation's experts acknowledged that the Oneida who petitioned for the legislation were supported in their efforts by their congressman, Congressman

[13] The legislative history for the act also indicates Congress's intent at this time of eliminating its prior practice of granting fee patents to Indians on an individual basis. Ex. 153 to Kowalkowski Decl. at p. 18. Both the 1906 Oneida Provision and the Burke Act accomplished that goal.

Minor, whom the Nation's expert described as "an advocate of fee patenting" who "express[ed] support for the idea of eliminating the Oneida's land base." (DSUMF ¶¶ 22, 25.) In fact, that same expert—again, the Nation's proposed expert—testified that the Oneida-specific language was inserted into the 1906 Appropriations Act by Congressman Minor and his allies because they were not satisfied with the Burke Act and "wanted as many fee patents issued as quickly as possible." (DSUMF ¶ 25.) The Nation's expert further testified that Congressman Minor's position was consistent with the position held by "interests who wanted to destroy the reservation and get the tribe out of Wisconsin" and that his position was "consistent with the position taken by those who sought to remove the tribe from Wisconsin." (*Id.*) This view was supported by another of the Nation's experts, who acknowledged that the Oneida-specific language was passed for the purpose of allowing non-Indians to gain access to the Oneida's land. (DSUMF ¶ 26.) In sum, even the Nation's own experts acknowledge that the Oneida-specific language in the 1906 Appropriations Act was enacted for the purpose of transferring land owned by Indians to non-Indians, which, as the Seventh Circuit has acknowledged, could not have been coextensive with reservation status. *Stockbridge-Munsee Cmty.*, 554 F.3d at 662.

Finally, it is notable that at the time this act was passed, Congress would have understood the Oneida to already be subject to state and local civil and criminal law as a result of the Supreme Court's decision in *In re Heff*, which interpreted Section 6 of the Dawes Act to provide that an Indian who received a trust allotment became a citizen of the United States and subject to the state civil and criminal laws at the time of the allotment, and not at the expiration of the 25-year trust period. *In re Heff*, 197 U.S. 488 (1905).[14] (DSUMF ¶¶ 9-10, 14.) By granting the

[14] The Burke Act was passed, in part, to overrule *In re Heff*, and includes a provision clarifying that Indians who received allotments would not become subject to section six's general grant of civil and criminal jurisdiction until patents were issued in fee. This change was not intended to

Secretary of the Interior the authority to issue fee patents to Oneida at his discretion, Congress paved the way for the removal of what it understood to be the last remaining restriction on the Oneida after allotment under the Dawes Act and opened the door for those allotted lands to pass out of Indian ownership. Although this process would not have been instantaneous, there can be no real dispute that Congress's intention was that the Oneida Reservation would gradually disappear as fee patents were issued to the Oneida.

3. Post-enactment history.

Subsequent events after passage of the 1906 Appropriations Act and other fee-patenting acts confirm that Congress intended to terminate the 1838 boundaries of the Oneida Reservation. As already discussed, in *Stevens* it was held that the Oneida Reservation had "[p]lainly" been discontinued. This conclusion was consistent with a prior decision from a different judge on this Court in 1909 that referred to "the territory formerly known as the Oneida reservation" and observed that the defendants, who were Oneida Indians, "being allottees, are citizens of the state of Wisconsin to all intents and purposes, receiving protection from the laws of the state, and being amenable thereto." *Hall*, 171 F. at 217-18. These court decisions show that, "[i]n the aftermath of the [1906] act, the reservation was treated, for the most part, as though it had been abolished." *Stockbridge-Munsee Cmty.*, 554 F.3d at 665. Not only did federal courts in the early twentieth century treat the Oneida Reservation as abolished, this conclusion is supported by the subsequent history of the Oneida Reservation and its treatment by the federal government.

a) Population demographics

First, there was a dramatic shift in the population demographics within the Oneida Reservation following passage of the 1906 Appropriations Act. *Cf. Osage Nation*, 597 F.3d at

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affect Indians to whom allotments had already been made (like the Oneida), however, as acknowledged by one of the Nation's experts. (DSUMF ¶ 14.)

1126 ("The Court has also explicitly focused on population demographics, noting that "[w]here non-Indian settlers flooded into the opened portion of a reservation and the area has long since lost its Indian character, we have acknowledged that *de facto*, if not *de jure*, diminishment may have occurred." (quoting *Solem*, 465 U.S. at 471)). This time period involved a "land rush by whites" and "Oneidas began to lose political control of both town governments, as they were now outnumbered by the new white residents." (DSUMF ¶ 39.) One of the Nation's experts described the three years after passage of the 1906 Act as a "rush of white settlers" and agreed that the influx of white settlers into the Oneida Reservation was "a rapid process." (*Id*.) By the early 1930s, many Oneida Indians had migrated away from the Oneida Reservation and fewer than half of the Oneidas lived at or within the immediate environment of the reservation. (DSUMF ¶¶ 69, 99.) According to a study prepared by the League of Women Voters in 1966, "1960 census figures for the Town of Oneida listed a total population of 2,520, including 786 Indians; for the town of Hobart, a total population of 2,343, with 552 Indians." (DSUMF ¶ 118.) Even today, the U.S. Census Bureau estimates that white residents make up approximately 80% of the population of the Village. (DSUMF ¶ 127.) These population demographics support a finding that the 1838 boundaries of the Oneida Reservation no longer exist.

b) Land Tenure

The shift in land tenure within the Oneida Reservation was even more extreme than the shift in population. Within approximately a decade after passage of the 1906 Appropriations Act, over 50,000 acres of the approximately 65,400 acres had been alienated from Indian ownership. (DSUMF ¶ 30.) By the passage of the IRA in 1934, the Oneida owned less than 90 acres of tribal lands and only a few hundred acres of allotments in trust; at least 95 percent of the reservation area was non-Indian owned. (DSUMF ¶¶ 95, 98.) Although some land was subsequently purchased and placed in trust for the Oneida in the late 1930s, even fifty years later, at the time

of the passage of IGRA in 1988, the Oneida owned a mere 5.9% of the total area within the 1838 boundaries of the Reservation. (DSUMF ¶ 129.) Even today "the area remains 'predominately populated by non-Indians with only a few surviving pockets of Indian allotments," thus signaling the diminishment of the reservation. *Yankton Sioux Tribe*, 522 U.S. at 356-57 (quoting *Solem*, 465 U.S. at 471 n.12); *see also Solem*, 465 U.S. at 471 n.12 ("When an area is predominately populated by non-Indians with only a few surviving pockets of Indian allotments, finding that the land remains Indian country seriously burdens the administration of State and local governments."). (DSUMF ¶¶ 127, 129.)

c) The federal government's treatment of affected areas through 1934.

The federal government's treatment of the land also supports a finding that the reservation's 1838 boundaries ceased to exist. For example, after enactment of the 1906 Appropriations Act and the rapid shift in land tenure on the Oneida Reservation, federal officials in the Office of Indian Affairs repeatedly referred to the area as a "former reservation" under state jurisdiction. *Cf. Osage Nation*, 597 F.3d at 1126. Such statements begin as early as 1909 and continue, practically unabated, through the enactment of the IRA in 1934. They are consistent across administrations, and come from different levels within the agency. They consistently show the federal government considered the Oneida Reservation, as defined by its 1838 boundaries, to no longer exist. The only lands under federal jurisdiction were the limited number of allotments still held in trust and small amounts of unallotted tribal land.

By contrast, land within the 1838 reservation boundaries held in fee by Indians or non-Indians was clearly subject to the jurisdiction of the state and local governments. For example, the fee-patented lands were subject to state and local taxes, (DSUMF ¶¶ 44-46, 49-50, 54, 56), state fish and game laws, (DSUMF ¶¶ 55, 78, 82), and state criminal jurisdiction. (DSUMF ¶ 9,

77.) The Oneida Indians were also subject to state marriage and divorce laws. (DSUMF ¶ 48.) Such "'jurisdictional history' . . . demonstrates a practical acknowledgment that the Reservation was diminished." *Osage Nation*, 597 F.3d at 1127 (quoting *Hagen*, 510 U.S. at 421).[15]

As early as 1909, the chief clerk of the Office of Indian Affairs informed an Oneida Indian "that when an Indian allottee receives a patent in fee simple, he thereafter enjoys all the privileges, and he must also assume all the responsibilities of a citizen of the United States; his land is subject to taxation, *and also subject to the jurisdiction of the town, county and state in which he resides*." (DSUMF ¶ 44; *see also* DSUMF ¶ 46.) That same year, a supervisor from the United States Indian Service informed "the Oneida Indians" that "the Government turns the land loose when it gives patents in fee." (DSUMF ¶ 45.) And, in 1911, the Annual Report for the Oneida Indian School observed that "[p]olitically, the reservation has ceased to exist, and all questions of law are referred to the state courts." (DSUMF ¶ 47.) The 1911 Annual Report went on to note that "[t]he federal laws appear to apply only to the introduction of liquors upon lands still held in trust." (DSUMF ¶ 47.)

The 1912 Annual Report for the Oneida School expressed similar views with respect to the control of liquor. It stated:

> The Federal officers now take practically no part in the suppression of the liquor traffic. The Oneidas are all allotted and citizens, and Federal laws apply only to lands still in trust. The State authorities hold that the Oneidas are citizens, and that the statute concerning the rule of liquor to Indians does not apply to them.

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[15] *See also Rosebud*, 430 U.S. at 603-04 ("Since state jurisdiction over the area within a reservation's boundaries is quite limited, the fact that neither Congress nor the Department of Indian Affairs has sought to exercise its authority over this area, or to challenge the State's exercise of authority is a factor entitled to weight as a part of the 'jurisdictional history.'") (internal citations omitted); *DeCoteau v. Dist. Cnty. Ct. for Tenth Judicial Dist.*, 420 U.S. 425, 442 (1975) ("The jurisdictional history subsequent to the 1891 Act is not wholly clear, but it appears that state jurisdiction over the ceded (i.e., unalloted) lands went virtually unquestioned until the 1960's.").

(DSUMF ¶ 48.) And letters from federal officials in 1915 again informed Oneida Indians that the Oneida were subject to state taxation once patents in fee were issued. (DSUMF ¶¶ 49-50.)

In 1919, the Commissioner of the Office of Indian Affairs, Cato Sells, wrote to the Secretary of the Interior regarding the Oneida:

> The Oneida Reservation in Wisconsin was created by treaty of February 3, 1838, and comprised a tract of land eight by twelve miles, containing approximately 65,400 acres. . . . Under an Act of Congress, the Oneidas have obtained fee simple patents, and at the present time all this land, except 151 acres reserved for school purposes, etc., has been allotted. . . . Public schools are now in operation, which are attended by both Indians and whites. All the Oneidas are citizens and have the privilege of attending public schools without other charge than their regular taxes. . . . Nearly all the Oneidas are property holders and pay taxes, and it is probable that the usual provision is made by the state or county for the care of orphans and destitute children.

(DSUMF ¶ 54.) The Office of Indian Affairs also closed the Oneida Boarding School and the Oneida Agency and transferred jurisdiction over remaining Oneida affairs—primarily, the payment of an annuity under a 1794 treaty—to the Keshena Agency. (DSUMF ¶¶ 53, 75, 85.)

Throughout the 1920s and early 1930s, federal officials at the Keshena Agency repeatedly acknowledged that the Oneida Reservation was a "former reservation" under state jurisdiction and that only the small number of allotments remaining in trust remained under federal supervision. For example, in 1920, the Superintendent of the Keshena Agency wrote to the Commissioner of Indian Affairs regarding fishing "on the Reservation":

> This I presume means the former Oneida Reservation. It is my understanding that the since the allotment of the Oneida Reservation the lines are broken down, reservation regulations no longer applying. The Oneidas are citizens and are subject to the fish and game laws of the State of Wisconsin and these laws undoubtedly apply to the lands embraced in the former Oneida Reservation as well as to other parts of the State.

(DSUMF ¶ 55.) In his 1921 annual report, the Superintendent of the Keshena Agency notes that "[a]ll of these [Oneida] allotees, or their heirs, but about thirty have received final patents *releasing them and their lands from all Federal supervision*." (DSUMF ¶ 57.) In 1922, the

Superintendent of the Keshena Agency wrote a letter to the Commissioner of Indian Affairs in which he observed:

> This land was all allotted many years ago and as your Office knows restrictions on practically all of it have expired and a good portion of the land has passed into the hands of purchasers. This reservation, or former reservation, is now much like any white community and I do not see how the Federal Government could prevent men hunting within its borders.

(DSUMF ¶ 62.) And, in 1926, the Superintendent of the Keshena Agency wrote to a member of the Oneida:

> I beg to advise that any treaty rights which you may have enjoyed relative to hunting and trapping on the Oneida reservation became obsolete for the reason that there is no more Oneida reservation. If you still hold your allotment in trust and have not been granted a patent in fee, any treaty rights which you may have enjoyed are undoubtedly still in effect on that particular allotment, but would have no effect on land for which a patent in fee has been granted – such land being wholly under the jurisdiction of the county and state in which it is located.

(DSUMF ¶ 68.) These are only four examples, but the record is replete with similar documents showing that the federal officials responsible for the Oneida believed the Oneida Reservation, as defined by its 1838 borders, no longer existed. (DSUMF ¶ 61) ("[T]his reservation, as you are aware, was long ago allotted and the Indians, with the exception of a very few incompetents, have received their patents in fee. In many cases the Indians have alienated their land and as I understand it the reservation lines have for a long time been broken down."); (*Id.*) ("They are all citizens and are the problems of the local authorities of the state in just as large a measure as are other citizens."); (DSUMF ¶ 65) (referring to "former Oneida reservation" or "former Oneida Indian Reservation" and observing "[t]hese Indians are solely under the jurisdiction of the state"); (DSUMF ¶ 69) (referring to the "former Oneida Indian reservation" and the "former reservation"); (DSUMF ¶ 70) (referring to Oneida reservation as "former reservation"); (DSUMF ¶ 74) (referring to "the old Oneida Reservation"); (DSUMF ¶ 80) ("Practically all the Oneidas are citizens and are therefore under state and county jurisdiction."); (DSUMF ¶ 84)

(relief efforts should be handled through local town chairmen because "the Oneidas are practically all citizens and no longer classified as wards"); (DSUMF ¶ 85) ("Practically all the Oneida Indians are no longer classified as wards of the Government.").

It was not just the federal officials at the Keshena Agency who held this view. Throughout the 1920s Commissioner of Indian Affairs Charles Burke wrote a number of letters in which he expressed the view that the Oneida Reservation, as defined by its 1838 borders, was a thing of the past and that fee patented lands were under state jurisdiction. In 1922, Commissioner Burke wrote in response to complaints from two Oneida Indians:

> After issuance of fee patents to the allottees or their heirs, the lands are salable in the discretion of the Indian owners. For the Office to attempt to follow and pass upon all transactions entered into *subsequent to the removal of restrictions and closing of the Government's jurisdiction*, would be not only futile, but meddlesome and inimical to the business integrity of the Oneida Indians generally. . . .As to the land affairs of the fee patent Indians, their administration must be by the Indians themselves, or through the local courts.

(DSUMF ¶ 59.) Commissioner Burke expressed a similar view in a 1926 letter addressed to two Oneida Indians, informing them that "[t]he patented trusts now being under State jurisdiction, boundary controversies must be settled in the State courts" and that "[t]here are no lands remaining under the jurisdiction of the Federal Government except the few allotments continued under trust and the small area heretofore mentioned as having reverted to the status of tribal land." (DSUMF ¶ 66; *see also* DSUMF ¶ 67) ("Upon the issuance of patent the Government had no further control over the land, and it thereafter became subject to the laws of the state."). And, in 1927, a January 16, 1926 letter from Commissioner Burke was entered into the Congressional Record that similarly stated:

> The Oneidas have nearly all received fee patents and are citizens of Wisconsin. There are no lands remaining under the jurisdiction of the Federal Government except the few allotments continued under trust and the small area heretofore mentioned as having reverted to the status of tribal land.

(DSUMF ¶ 71.) Finally, in 1928, Commissioner Burke observed in a letter to the "Chairman, Oneida Indians": "[t]he Oneida Reservation was a small one and every available acre was consumed in the allotments. There remain only such tracts as constitute cancelled allotments. These have tribal status." (DSUMF ¶ 72.)

Other Commissioners of the Office of Indian Affairs also recognized the termination of the Oneida Reservation's 1838 boundaries and the limitation of federal jurisdiction to land held in trust or unallotted tribal land. In his 1929 Annual Report to the Secretary of the Interior, Commissioner of Indian Affairs C.J. Rhoads wrote that "[t]he Oneida have severed their relationship with the agency with the exception of annuity payments." (DSUMF ¶ 73.) In 1931, Commissioner Rhoads wrote a letter regarding the federal government's criminal jurisdiction that implicitly acknowledged that the Oneida Reservation was not a "present Indian Reservation." He wrote:

> To confer jurisdiction on the United States courts in criminal cases, the land on which the act was committed must be a present Indian reservation or an individual allotment carved out of a reservation and which is still held in trust or under restrictions against alienation without the consent of the Secretary of the Interior.
>
> ***
>
> In the case of the Oneida Indian Reservation specifically mentioned by you, there is very little tribal land left, and most of the individual allotments have passed from the control of the United States and are, therefore, subject to the unquestioned jurisdiction of the State. However, in the case of the small amount of tribal land remaining and the individual Indian allotments which are still held in trust, the Federal courts would have jurisdiction, subject to the above mentioned limitations and conditions.

(DSUMF ¶ 77.) And, in another letter from 1931, Commissioner Rhoads describes the breakdown in jurisdiction of game laws as follows:

> Generally speaking, the State game laws apply to the Indians except when exercising their hunting and fishing privileges on tribal Indian land within their reservation or, if allotted, within the limits of their own allotments still held in trust or under restricted patents.

> There are only a few small tracts of tribal Indian land within the limits of what was formerly the Oneida Indian Reservation. The ceded land to which the Indian title has been extinguished no longer belongs to the Indians, and as you have received a fee patent to your and land and the Oneida Indian Reservation has been broken up, you would have no special hunting or fishing privileges thereon because of the fact that you are an Indian. Under the circumstances you should comply with the state laws and regulations as to season, license, etc.

(DSUMF ¶ 78; see also DSUMF ¶ 79) ("The Government has now very little to do with the Oneida Indians."). Commissioner Rhoads provided an even fuller explanation of the federal government's view, as well as an acknowledgment of its practical implications, in a memorandum to the Secretary of the Interior regarding a proposal to reimburse the town of Oneida for expenses incurred in caring for indigent Oneida Indians. Commissioner Rhoads first defined the term "ward" as ordinarily including "an Indian who lives upon a Government reservation or who has restricted property held in trust" and continued:

> The tribal affairs of the Oneida Indians were practically wound up many years ago, with the exception of a small annuity under certain of the old treaties. There is no longer any reservation in the usual sense of the term, and the Indians have adopted the habits and customs of their white neighbors. Our records show that there are now only about six Oneidas who actually retain a wardship status. The others cannot be classed as wards of the Federal government and their status appears that of citizens of the United States and of the State and county in which they reside, and the responsibility for their care in case of destitution appears to be the same as that of any other citizen in that State or county and devolves not upon the Federal government but upon the local authorities and relief organizations, the same as it would in the case of white residents.

(DSUMF ¶ 75.) Others in the Office of Indian Affairs echoed Commissioner Rhoads's views in their own correspondence regarding the Oneida. (DSUMF ¶ 81) ("[I]t appears that most of the Oneida Indians are no longer under the direct supervision and control of the Federal Government. They received fee-simple title to their allotments and as citizens should look to the local county and township authorities for protection of their rights.").

d) The federal government's treatment of affected areas after 1934.

Even after the enactment of the IRA and the federal government's shift away from the allotment policy, federal officials continued to acknowledge that the 1838 boundaries of the Oneida Reservation had been eliminated, that the size of the reservation had been reduced, and that federal jurisdiction was limited only to land held in trust on behalf of the Nation. For example, throughout the 1930s and 1940s, the United States Department of Interior refused to intervene in alcohol-related problems with respect to lands within the boundaries of the original reservation that were no longer in trust status.[16] (*See* DSUMF ¶ 97.) Even John Collier, who became Commissioner of Indian Affairs in 1933 and has been described as "a fervent admirer of Indian culture and a fierce advocate of Indian rights" and "the original architect" of the IRA, *Wisconsin v. Stockbridge-Munsee Cmty.*, 366 F. Supp. 2d 698, 730 (E.D. Wis. 2004), repeatedly acknowledged the federal government's allotment policy had altered the borders of the Oneida Reservation. In a February 26, 1934 memorandum to the Secretary of the Interior, Commissioner Collier wrote: "[T]he Oneidas were allotted, and through fee patenting and other allotment procedures they lost all of their land. And they are living practically unprotected and not in any real way under Federal jurisdiction. They are one of the groups that ought to be brought into new land as an organized community." (DSUMF ¶ 88.) In a June 1934 letter, Commissioner Collier observed: "Practically all of th[e] allotted land has passed from government supervision through sale and the issuance of fee patents. For this reason, nothing could be gained through resurvey of the exterior boundary of the reservation lands." (DSUMF ¶ 91.) And, in a December 1934 letter

[16] *Cf. Stockbridge-Munsee Cmty.*, 554 F.3d at 665 ("In the aftermath of the act, the reservation was treated, for the most part, as though it had been abolished. The land became subject to state taxes, and the Department of the Interior refused to intervene in alcohol-related problems within the original reservation." (internal citations omitted)).

to an Oneida Indian, Commissioner Collier explained that "[t]he United States has fully discharged all of its treaty obligations to the Oneida Indians, except a small annual payment to be made perpetually" and that "[f]ee patents have been issued for most of the land, but a few allotments remain under governmental control and supervision." (DSUMF ¶ 92.)

Commissioner Collier's views were shared by the Secretary of the Interior. In late 1933, Secretary of the Interior Harold Ickes wrote to the Governor of Wisconsin regarding the federal government's role in caring for indigent Oneida Indians. The Secretary defined the term "ward" as including "an Indian who lives upon a government reservation and maintains a tribal relations" and further stated:

> The Oneida Indians under the jurisdiction of the Keshena Indian Agency, Keshena, Wisconsin, have been considered as non-wards, and their status that of citizens of the state and county in which they reside, and the responsibility for their care in cases of destitution that of the local authorities and relief organizations the same as in the case of white residents. We are, therefore, precluded from using any of the limited funds of the Indian Service for the relief of these people.

(DSUMF ¶ 87.) In a subsequent 1934 letter, Secretary Ickes acknowledged that fee-patented lands passed out of federal government jurisdiction, writing:

> In 1892 the usual 25-year trust patents were issued to approximately 1500 members of the Oneida Tribe, embracing about 70,000 acres. Through sales and issuance of fee patents to allottees and heirs, practically all of those allotted lands have passed from Government supervision. Only about 20 allotments or parts of allotments, containing between 500 and 600 acres, remain under trust.

(DSUMF ¶ 89.)

Officials within the Department of the Interior continued to express similar views for the next several decades. For example, reports prepared by officials in the Office of Indian Affairs throughout the 1930s continued to refer to the "original Oneida Reservation," the "original reservation," and "the former reservation," and further noted that after passage of the IRA "a small reservation was purchased" for the Oneida. (DSUMF ¶¶ 93, 102.) A 1935 Annual

Statistical Report for the Oneida Indians expressly states that there was "No Reservation" and "[t]his is not a Reservation, the Indians live in scattered communities all over the state." (DSUMF ¶ 101.) In 1941, Peru Farver, the Superintendent of the Tomah Indian Agency, wrote a letter to the Commissioner of Indian Affairs addressing a request by an Oneida Indian for funds for a boundary survey of the Oneida Reservation and stated:

> Of the original 65,607 acres composing the Oneida Reservation, only 748 acres involving 23 trust allotments remain. These are checker-boarded over two townships among privately owned land. There would appear to be no advantage in maintaining a designation of the boundary lines of the original reservation.

(DSUMF ¶ 105.) Maps prepared during this time period by both U.S. agencies and other entities that identify Indian reservations do not include the Oneida Reservation. (DSUMF ¶¶ 108-112.)

The federal government's recognition that a 65,400 acre reservation did not exist continued into the 1960s and 1970s. A 1961 document prepared by the Minneapolis Area Office of the U.S. Bureau of Indian Affairs describes the "Oneida Reservation" as containing "approximately 2,618 acres of land." (DSUMF ¶ 107; *see also* DSUMF ¶ 106.) In 1968, the U.S Bureau of Indian Affairs published a book titled Indians of the Great Lakes Area, which stated: "Originally a tract of more than 65,000 acres, the Oneida Reservation today consists of some 2,000 acres of tribal land in 26 scattered tracts. There are also more than 500 acres in individual allotments." (DSUMF ¶ 120.) In 1975, the U.S. Department of the Interior's Bureau of Indian Affairs prepared a report entitled "Statistical Data for Planning Oneida Reservation" that described the reservation: "The reservation was established by the Treaty of February 8, 1831 (7 Stat. 342) and the Treaty of February 3, 1838 (7 Stat. 566). The total acreage of this reservation is 2,581 acres–2,108 acres are tribally owned and 473 acres are allotted. By the treaty of 1838 the Oneidas were given 65,730 acres. By 1930 only a thousand acres remained. In 1934, through a series of land purchases, the acreage was increased to the present amount." (DSUMF ¶ 123.)

e) State treatment of the affected areas

The "longstanding assumption of jurisdiction" by state and local governments over parcels within the Oneida Reservation for which fee patents were issued is also inconsistent with continued reservation status. As discussed above, federal officials repeatedly recognized that state and local governments, not the federal government, had jurisdiction over lands for which fee patents had been issued. There is no evidence indicating that state and local governments did not exercise this jurisdiction or were prohibited from doing so; to the contrary, state officials expressly recognized their jurisdiction and the termination of the 1838 reservation boundaries. In 1931, the Attorney General of the State of Wisconsin wrote a letter addressing jurisdiction with respect to the Oneida:

> There is very little tribal land left, and most of the individual allotments have passed from the control of the United States and are therefore subject to the unquestioned jurisdiction of the state. However, in the case of the small amount of tribal land remaining and the individual Indian allotments which are still held in trust, the federal courts would have jurisdiction. . . . Most of the Oneidas have received a fee patent discharged of any trust. Many of them have sold their lands. The state has jurisdiction over those Indians that have a fee patent.

(DSUMF ¶ 76.) Again, this jurisdictional split—federal jurisdiction over tribal land and lands still held in trust and state and local jurisdiction over fee-patented land—supports the conclusion that the 1838 reservation boundaries no longer existed and that fee-patented land was no longer part of a reservation. Indeed, in 1966, the Wisconsin Governor's Commission on Human Rights published a *Handbook on Wisconsin Indians* that noted that as of that date there were only "2,592 acres comprising the Oneida reservation." (DSUMF ¶ 117.)

f) Understanding by the Nation and scholars

It was not only federal and state officials who acknowledged that the Oneida Reservation, as defined by its 1838 boundaries, no longer existed. There is significant documentary evidence demonstrating that in the decades immediately following passage of the IRA the Oneida

themselves recognized that the federal government's allotment policies had reduced the size of the Oneida Reservation. For example, in 1957, Oscar Archiquette, who had served as Chairman of the Oneida in 1934, (DSUMF ¶ 126), wrote a letter to Senator Alexander Wiley enclosing a copy of a report and a letter regarding the Oneida and stated: "the object of the report, and my letter is to bring some kind of Industry on the *former* Oneida reservation." (DSUMF ¶ 115.) In 1966, the Oneida Industrial Planning Committee, under the direction of the Oneida Tribal Council prepared a "Provisional Overall Economic Development Plan for the Oneida Indian Reservation" that described "The Oneida Reservation" as follows:

> Under the Indian Reorganization Act of 1934, the Oneida drew up a constitution and by-laws, approved by the Secretary of the Interior, and formed a tribal organization. The government purchased land in the area of *the original reservation*, and today there are 2,601.05 acres of Oneida lands scattered over *the former reservation*. Of these lands, 2,067.89 acres are tribally owned and 433.16 acres are allotted. Tribal affairs are now directed by a tribal council of four officers who are elected by the tribal membership living within the area of *the old reservation* from among the same population.

(DSUMF ¶ 119.)

Such acknowledgements by the Oneida continued into the 1970s. For example, in 1973, the Oneida Tribe of Indians of Wisconsin, Inc. (i.e., the Nation) published the book History of the Oneida Indians. The book states: "By the 1920's, all but a few hundred acres of the 650,000 [sic] was in white hands; the tribe itself held but 80 acres allocated for educational purposes. The reservation ceased to exist yet the tribe continued as a legal entity. . . . During the 1920's the Oneidas were in an anomalous state. The federal government limited its obligation to the annuity question. With no reservation, all other services usually provided by the BIA were assumed by the towns, counties and states." (DSUMF ¶ 121.) A 1977-79 Overall Economic Development Plan prepared by the Oneida Tribe of Indians expressed a similar view: "By the 1920's, all but a few hundred acres of the 65,000 were in white hands. The Tribe itself held but 85 acres allocated for education purposes, and this was eventually lost as well. The reservation

had ceased to exist, although the Tribe continued as a legal entity." (DSUMF ¶ 124.) Even today, a website maintained by the Nation states that "[b]y 1930 only a 1,000 acres of the reservation remained." (DSUMF ¶ 126.)

The reduction in the size of the Oneida Reservation is even recognized in scholarship prepared in consultation with the Oneida and relied on by the Nation's experts. For example, one scholar relied on by the Nation's experts, Jack Campisi, has repeatedly acknowledged that the federal government's allotment policies reduced the size of the Oneida Reservation. In his 1974 dissertation entitled "Ethnic Identity and Boundary Maintenance In Three Oneida Communities," Jack Campisi wrote that by 1930 "[t]he reservation ceased to exist" and that "[t]he passage of the Dawes Act rang the death knell to a separate nation and the reservation disappeared." (DSUMF ¶ 122.) The Handbook of North American Indians—another source on which the Nation's own experts rely—notes that "by the mid 1920s only a few hundred acres remained in the hands of Oneidas" and that "[i]n 1972 the Oneidas of Wisconsin occupied a checkerboard reservation of 2,200 acres interspersed among private White-owned property." (DSUMF ¶ 125.)

In the preface to A Nation Within a Nation: Voices of the Oneida in Wisconsin, published in 2010, the editors wrote that "[b]y 1934, the year of the Indian Reorganization Act, the Wisconsin Oneida reservation *had been reduced by more than sixty-five thousand acres*." (DSUMF ¶ 114) (emphasis added). The preface describes the book, which is the fourth volume of a series, as "the project [of] a joint effort of more than thirty years between the academic community and a Native American nation" in which "one of the editors and many of the authors are Wisconsin Oneidas." (*Id.*) Another book from the same series, The Oneida Indians in the Age of Allotment, 1860–1920, published in 2006, states that "[t]oday, more than sixteen thousand Oneidas occupy a reservation of more than *sixteen thousand* acres of tribal lands." (DSUMF

¶ 113.) The jacket cover for that book also states that after 1887 the Oneidas "faced an onslaught of pressures," including "federal legislation intended to abolish their reservation," and that "by 1920, the Oneidas' extensive Wisconsin reservation lands had virtually disappeared." (*Id.*)

g) Conclusion

In sum, there is an overwhelming evidentiary record in this case, not only that the 1906 Congress intended to extinguish the 1838 boundaries of the Oneida Reservation, but that for several decades thereafter federal and state officials, as well as the Oneida, recognized that the 1838 Oneida Reservation no longer existed and that fee-patented lands were not under federal jurisdiction. The record does indicate that a small amount of acreage, comprising less than 2% of the area within the 1838 boundaries, remained in trust or as tribal land when Congress passed the IRA in 1934, but that does not mean that the 1838 boundaries continued to exist such that the entire area remained reservation land. Whether this Court views the issue as one of diminishment or disestablishment,[17] the result remains the same—land within the 1838 Oneida Reservation boundaries that was not held in trust or as tribal land as of 1934 lost its reservation status.

III. THE VILLAGE IS ENTITLED TO SUMMARY JUDGMENT EVEN IF THE 2016 BIG APPLE FEST OCCURRED IN INDIAN COUNTRY

Even if the Oneida Reservation, as defined by its 1838 boundaries, still exists, such that the land on which the Big Apple Fest occurred is Indian country under 18 U.S.C. § 1151,[18] this

[17] *Compare Osage Nation*, 597 F.3d at 1127-28 (reservation disestablished by 1906 Act even though some parts of reservation remain in trust status) *with Gaffey*, 188 F.3d at 1028 (finding no disestablishment but concluding reservation was diminished).

[18] Apparently it is the Nation's position that if its reservation was not diminished or disestablished, then the land, subject to the Village's special events ordinance, would fall within the definition of Indian Country. 18 U.S.C. § 1151. To the extent that argument would have any merit, it must be based upon the presumption that Congress, in enacting 18 U.S.C. § 1151, had the authority to do so pursuant to one of the enumerated powers referenced in the United States Constitution. The United States Supreme Court, just two months ago, has highlighted the limitations of Congress in enacting legislation:

Court should nevertheless conclude that the Village may apply the Ordinance with respect to the Nation's 2016 Big Apple Fest. The Supreme Court has been clear that "the Indians' right to make their own laws and be governed by them does not exclude all state regulatory authority on the reservation" and that "[s]tate sovereignty does not end at a reservation's border." *Nevada v. Hicks*, 533 U.S. 353, 361 (2001). "[T]here is no rigid rule by which to resolve the question whether a particular state law may be applied to an Indian reservation or to tribal members." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980).[19] "'[E]ven on reservations, state laws may be applied unless such application would interfere with reservation self-government or would impair a right granted or reserved by federal law." *Rice v. Rehner*, 463 U.S. 713, 718 (1983) (quoting *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973)).

Here, the Nation has invoked the "two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members." *Bracker*, 448 U.S. at 142. It claims (1) that federal law preempts the application of the Ordinance with respect to the 2016

> The legislative powers granted to Congress are sizable, but they are not unlimited. The Constitution confers on Congress not plenary legislative power but only certain enumerated powers. Therefore, all other legislative power is reserved for the States, as the Tenth Amendment confirms. And conspicuously absent from the list of powers given to Congress is the power to issue direct orders to the governments of the States.

Murphy v. Nat'l Collegiate Athletic Ass'n, 584 U.S. ___, 138 S. Ct. 1461, 1476 (2018).

And just seven months ago, Justice Clarence Thomas stated, "neither the text nor the original understanding of the [Indian Commerce] Clause supports Congress' claim to such 'plenary' power," *Town of Vernon, N.Y. v. United* States, 583 U.S. _____ (slip op., at 2) (Nov. 27, 2017) (Thomas, J., dissenting) (citing *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 659, 133 S. Ct. 2552, 2567, 186 L. Ed. 2d 729 (2013)) (Thomas, J., concurring in judgment). These most recent pronouncements by the Supreme Court and one of its Justice's, call into question the constitutionality of 18 U.S.C. § 1151. It remains the Village's position that 18 U.S. C. § 1151 is unconstitutional.

[19] *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 214-15 (1987) (noting the Supreme Court has refused to adopt "an inflexible *per se* rule precluding state jurisdiction over tribes and tribal members in the absence of express congressional consent").

Big Apple Fest and (2) that application of the Ordinance would violate the Nation's inherent powers of self-government. As set forth below, neither of these claims has merit and the Village is thus entitled to summary judgment with respect to the claims for relief in the Nation's First Amended Complaint.

A. Burden of Proof and Applicable Legal Standard

In this Court's October 23, 2017 Decision and Order on Burden of Proof, this Court observed that "absent Congressional authorization, a State may only regulate the property or conduct of a tribe or tribal-member in Indian country in 'exceptional circumstances'" and that the Village has the burden of showing that such circumstances exist here. (ECF No. 66, p. 6.) The Court also concluded that "the trust status of the land used in the Big Apple Fest is not central to the Nation's claims." (*Id.* at 5.) In a follow-up order, however, the Court noted the Village was free to raise the issue on summary judgment if it believes the Court "erred in its description of the law in preliminarily determining burdens of proof of the respective parties." (ECF No. 68.) Respectfully, the Village submits that there are several aspects of this Court's description that merit further consideration, each of which is addressed in more detail below.

B. Big Apple Fest Activities Occurred on Fee Land and Aspects of the Special Event Ordinance Are In Rem.

First, although this Court commented in its prior order that "[u]nlike *Oneida I*, this is not a case where the Village is seeking to exercise *in rem* jurisdiction over land that is held in fee by the Nation," (ECF No. 66, p.4), the Village respectfully submits that this case does implicate this Court's decision in *Oneida I*. At its core, the Special Event Ordinance is a land-use ordinance that is focused on a particular piece of property. The required permit allows for a special event to occur at a specific location at a specific date and time. (JSSMF Ex. 1) ("The permit shall set forth the exact days on which and the exact location where such activities shall be carried on and shall

be valid only during the dates and times and at the location specified."). A special event is an "event or activity . . . that interferes with or differs from the normal and ordinary use of the property" and that "would require Village services beyond those normally provided." (*Id*.) These aspects of the ordinance, and the undisputed fact that Big Apple Fest activities occurred on land owned in fee, justify application of the ordinance under this Court's reasoning in *Oneida I*.

C. This Case Implicates the Supreme Court's Decision In *City of Sherrill*.

Second, this Court previously indicated that *Cabazon*, not *City of Sherrill*, provides the rules for governing the determination of this case. The Village respectfully submits that this case implicates the very same concerns that motivated the Supreme Court's decision in *City of Sherrill*. As this Court has observed, in that case the Supreme Court concluded that an Indian Tribe "could not restore its sovereignty over its reservation land through open-market purchases" and the Tribe's ability to place land into trust was the proper avenue to reestablish sovereignty over the land. *Oneida I*, 542 F. Supp. 2d at 926. As the Supreme Court explained:

> If OIN may unilaterally reassert sovereign control and remove these parcels from the local tax rolls, little would prevent it from initiating a new generation of litigation to free the parcels from local zoning or other regulatory controls that protect all landowners in the area.

544 U.S. at 220. Even the dissent in *City of Sherrill* recognized the significant local government interests at issue. In his dissent, Justice Stevens observed that "given the State's strong interest in zoning its land without exception for a small number of Indian-held properties arranged in checkerboard fashion, the balance of interests obviously supports the retention of state jurisdiction in this sphere." 544 U.S. at 226 n.6 (Stevens, J., dissenting). Courts have subsequently relied on *City of Sherrill* to reject attempts by tribes to claim immunity from state and local zoning laws and regulations. *See Cayuga Indian Nation of New York v. Vill. of Union Springs*, 390 F. Supp. 2d 203, 206 (N.D.N.Y. 2005) ("The Supreme Court's strong language in

City of Sherrill regarding the disruptive effect on the every day administration of state and local governments bars the Nation from asserting immunity from state and local zoning laws and regulations."); *see also Seneca-Cayuga Tribe of Oklahoma v. Town of Aurelius, N.Y.*, 233 F.R.D. 278 (N.D.N.Y. 2006).

As noted above, the Special Event Ordinance is a land-use ordinance that serves the same purposes as other types of land-use regulations, including zoning regulations.[20] The stated purpose of requiring a permit for special events is "to address potential impacts on the general public of a special event, including without limitation noise, light, dust, traffic, parking, and other public health safety and welfare concerns" as well as "to promote the economic welfare and general prosperity of the community by safeguarding and preserving property values by addressing potential impacts of a special event." (JSSMF, Ex. 1.) The permitting process exists to prevent events that would, for example, "disrupt traffic within the Village beyond a reasonably practical solution," "create a likelihood of endangering the public," "interfere with access to emergency services," "cause undue hardship or excessive noise levels to adjacent business or residents," or "require the diversion of Village resources that would unreasonably affect the maintenance of regular Village service levels."[21] (*Id.*)

Accordingly, the Village respectfully suggests that *City of Sherrill*, as well as the Justice Stevens's controlling opinion in *Brendale v. Confederated Tribes and Bands of Yakima Nation*, 492 U.S. 408 (1989), control this case. In *Brendale*, Justice Stevens concluded that the Yakima Nation had the power to zone fee property (even fee property owned by non-Indians) in the

[20] *See, e.g.*, 3 Am. Law. Zoning § 18:68.40 (5th ed.) ("Special events such as weddings, festivals, and concerts are frequently addressed in municipal zoning and land use laws. These uses pose particular land use challenges due to their intermittent yet high-intensity character, and without sufficient regulation they can become nuisances to nearby properties due to noise, traffic, and other negative environmental impacts.").

[21] *Cf.* Wis. Stat. § 62.23(7)(c) (describing purposes of zoning).

closed portion of its reservation, but that it did not have such zoning power over fee property owned by non-Indians in the open portion of its reservation. 492 U.S. 408, 440-41 (1989). Essentially, Justice Stevens determined that whether a tribe or local government has zoning power over fee land depends on whether the land is in the closed or open portion of a reservation. *Id.* at 441-47. Here, the fee land at issue is not in a closed portion of a reservation; the Village thus has zoning authority over the land. The Village should similarly have the authority to enforce other Village land-use ordinances, such as the Special Event Ordinance, with respect to such land. Although this case involves the Village's Special Event Ordinance, there should be no doubt that a holding in the Nation's favor here will inevitably lead to the Nation's refusal to comply with other state and local land-use regulations, including the Village's zoning ordinances, thus seriously burdening the administration of the Village and removing the Village's ability to perform its most important function.[22]

D. This Case Involves the Nation Exercising Powers of Exclusion Over Land It Does Not Own.

Third, the Supreme Court has held that an Indian Tribe "cannot assert a landowner's right to occupy and exclude" on a public highway subject to the State's control. *Strate v. A-1 Contractors*, 520 U.S. 438, 455-56 (1997). A public highway over which a Tribe asserts no gatekeeping right is treated as "land alienated to non-Indians" when assessing jurisdictional disputes. *Id.* Here, at the Nation's direction barricades were placed not only on state Highway 54, but on a public road maintained by the Village. (DSUMF ¶¶ 135-136, 144.) Not only did the Nation barricade roads within the Village, it then used those roads as part of its transportation

[22] It is well-established that land use regulation is "the quintessential state activity," *FERC v. Mississippi*, 456 U.S. 742, 768 n.30 (1982), and that land-use restrictions "constitute some of the most important functions performed by local government." *Bryant Woods Inn, Inc. v. Howard Cnty., Md.*, 124 F.3d 597, 603 (4th Cir. 1997).

plan for shuttling attendees at the event. (DSUMF ¶ 143.) Although the Nation received a permit from the state to close Highway 54, that permit did not authorize any closure of N. Overland Rd. In fact, although the Nation represented to the Wisconsin Department of Transportation that it would work with the Village to close that road, in never sought formal permission of the Village by applying for a permit under the Special Event Ordinance. (DSUMF ¶ 130.)

Although some informal communication between the Hobart/Lawrence Police Department and the Oneida Nation Police Department ultimately occurred with respect to traffic control, as it was clear the event was going to proceed and the Hobart/Lawrence Police Department sought to ensure the safety of the event, absent the Special Event Ordinance there would be no formal mechanism requiring such coordination for the Nation's events in the future. The Nation could put on events that shut down Village roads without even informing the Village ahead of time or involving the Village in the planning process.[23] Such a situation would not only impact the ordinary flow of traffic within the Village, but could potentially hinder the provision of emergency services to Village residents. The Special Event Ordinance creates a procedure for ensuring that such a scenario does not occur by requiring the event sponsor to communicate with the Village and to show that the event will not disrupt traffic within the Village "beyond a reasonably practicable solution" or otherwise "interfere with access to emergency services." (JSSMF, Ex. 1.)

E. Application of the Ordinance Satisfies the Balancing Test

The Village believes the arguments set forth in Parts II.B, II.C, and II.D, show that *Cabazon* does not govern this case.[24] Even if it does, the Village is entitled to summary

[23] Indeed, the Nation has already indicated to the Hobart/Lawrence Police Department that the Nation does not need assistance putting on the event. (DSUMF ¶ 132-33.)

[24] *Cabazon* also involved regulation of activity occurring entirely on trust land, unlike here.

judgment. In *Cabazon* the Supreme Court did state that "in exceptional circumstances a State may assert jurisdiction over the on-reservation activities of tribal members."[25] 480 U.S. at 215. But this case, like *Cabazon*, "involves a state burden on tribal Indians in the context of their dealings with non-Indians." *Id.* at 216. The 2016 Big Apple Fest was a public event. It was advertised to non-Indians, and the Nation's Chairwoman described the event as "a great opportunity for everyone in our greater community to share our apple harvest" and as drawing "the market that we were looking to achieve for apple picking" in order "[t]o get rid of the apples before they spoil." (DSUMF ¶¶ 138, 140.) Apple-picking at the Nation's Apple Orchard was the activity that drew the most visitors to the event, (DSUMF ¶ 140), and the Nation generated thousands of dollars of revenue from those sales. (DSUMF ¶ 139.) Moreover, the 2016 Big Apple Fest provided a venue for non-tribal vendors to engage in commercial activity with the public, and the Nation itself engaged third-parties to assist in putting on the event. (DSUMF ¶¶ 135, 139, 143.)

Under these circumstances, the Court must perform a balancing test. "'State jurisdiction is pre-empted . . . if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority.'" *Cabazon*, 480 U.S. at 216 (quoting *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334-35 (1983)). "This inquiry is not dependent on mechanical or absolute conceptions of state or tribal sovereignty," but instead calls "for a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law." *Bracker*, 448 U.S. at

[25] Even if the Village must show "exceptional circumstances," the land- and road-use implications discussed above meet that threshold. *Cf. City of Sherrill*, 544 U.S. at 226 n.6 (Stevens, J., dissenting) (suggesting that State interest in zoning land represents an "exceptional circumstance").

145. Indeed, "[t]he State's interest in exercising its regulatory authority over the activity in question must be examined and given appropriate weight." *Ramah Navajo School Bd., Inc. v. Bureau of Revenue of N.M.*, 458 U.S. 832, 838 (1982).

Moreover, in conducting the balancing test called for by this case, the burden of proof should rest with the Nation. The Nation's claim that the Village should not be allowed to enforce the Special Event Ordinance is ultimately a claim of preemption, and the burden of proof rests with the party asserting preemption from state law. *See, e.g.*, *Energy Nuclear Vermont Yankee, LLC v. Shumlin*, 733 F.3d 393, 414 n.21 (2d Cir. 2013) ("As the party asserting preemption, Entergy carries the burden of proof."). As the Ninth Circuit held in *Yavapai-Prescott Indian Tribe v. Scott*, 117 F.3d 1107, 1112 (9th Cir. 1997), in conducting the balancing analysis "[t]he burden of proof was on the plaintiff Tribe."

The burden of proof should also rest with the Nation on its claim that the ordinance interferes with its right to self-government. The right to self-government informs and is related to the preemption analysis. *Rice v. Rehner*, 463 U.S. at 718-19. It does not alter the burden of proof. The party claiming a violation of its rights ordinarily bears the burden of proof. *Cf. Sow v. Fortville Police Dep't*, 636 F.3d 293, 300 (7th Cir. 2011) ("In a § 1983 case, the plaintiff bears the burden."). And, as the party the seeking declaratory and injunctive relief, the Nation should bear the burden of showing it is entitled to such relief.

1. The federal and tribal interests here are minimal.

First, the undisputed record shows the federal and tribal interests at issue here are insignificant. This is not a case where the Village is seeking to regulate tribal conduct that is subject to comprehensive supervision and regulation by the federal government.[26] The Nation

[26] *Cf. Cabazon*, 480 U.S. at 218 (noting "policies and actions, which demonstrate the Government's approval and active promotion of tribal bingo enterprises"); *Ramah Navajo*

has not identified a single federal statute or regulation establishing a federal regulatory scheme applicable to the 2016 Big Apple Fest that would preempt the Village from applying its Special Event Ordinance to the event. *Cf. Ward v. New York*, 291 F. Supp. 2d 188, 204 (W.D.N.Y. 2003) ("Plaintiffs failed to cite and this Court could not find any evidence of a federal policy favoring or promoting tribal control over the sale of cigarettes or confirming the power of tribes to regulate such sales."). The Nation must be able to point to a federal regulatory scheme involving the specific activity that the Village seeks to regulate; to date, it has not done so.

Nor would application of the Special Event Ordinance significantly impact the federal government's interest in "tribal self-sufficiency and economic development" or the Nation's economic interests. *Cabazon*, 480 U.S. at 216. Although the sale of apples is economic activity, there is no evidence that the 2016 Big Apple Fest provides "a major source of employment for tribal members" or provides "the Tribes' sole source of income." *Id.* at 205. In fact, the record evidence is overwhelmingly to the contrary. The Nation's Chairwoman at the time of the event described the revenues the Nation receives from the event as "very insignificant" compared to the Nation's "multi-million dollar" gaming business, the revenue from which drives an annual land acquisition budget of $9 to $12 million. (DSUMF ¶ 141.)

2. The Village's interests are significant.

In contrast to federal and tribal interests at issue here, the Village's interests are significant and justified application of the Special Event Ordinance to the 2016 Big Apple Fest. As noted above, the Special Event Ordinance, and in particular its application to the 2016 Big Apple Fest, protects two extremely significant Village interests: (1) the Village's interest in

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School Bd., Inc., 458 U.S. at 839 ("Federal regulation of the construction and financing of Indian education institutions is both comprehensive and pervasive."); *Bracker*, 448 U.S. at 145 ("[T]he Federal Government's regulation of the harvesting of Indian timber is comprehensive.").

regulating land use without creating exceptions for Oneida-owned properties arranged in checkerboard fashion; and (2) the Village's interest in ensuring coordination between the Village and the Nation regarding the use of roads over which the Village exercises jurisdiction. The Village also has a strong interest in ensuring the health, safety, and welfare of attendees at the event. At bottom, this case is about whether the Village's interest in regulating an event that the Nation markets to the public, that occurs within the Village and requires the closure of public roads, that provides a venue for non-tribal vendors, and that draws a number of attendees nearly equal to the Village's entire population outweighs the Nation's interest in an event that likely accounts for far less than one-tenth of one-percent of the Nation's annual revenues and does not implicate any areas of comprehensive federal regulation. The Village respectfully submits that the answer is self-evident.

3. Application of the Ordinance Does Not Impermissibly Infringe On the Nation's Inherent Powers of Self-Government.

Finally, there is no merit to the Nation's claim that compliance with the Special Event Ordinance will impermissibly infringe on the Nation's powers of self-government. Although the Nation has identified a number of tribal ordinances that it claims "would be impaired or supplanted" by application of the Special Event Ordinance to the 2016 Big Apple Fest, (Ex. 167 to Kowalkowski Decl.) to date it has not provided any explanation for why compliance with the Village's Special Event Ordinance would prevent the Nation from concurrently enforcing its own ordinances at the event. It has identified no inherent conflicts between the Nation's ordinances and the Special Event Ordinance.[27] Nor do the ordinances identified by the Nation address certain serious concerns that arise with the conduct of large-scale events, such as traffic

[27] For example, when asked during depositions how compliance with the Special Event Ordinance would prevent the Nation from enforcing its own ordinances, the Nation's witnesses could not answer the question. (DSUMF ¶ 148.)

control or the impact such events can have on neighboring properties, which are addressed by the Special Event Ordinance. The Nation has the burden of proving that federal law preempts application of the Special Event Ordinance to the 2016 Big Apple Fest. Based on the record to date, the Nation will be unable to meet that burden.

Indeed, the Nation's claim that obtaining a permit from the Village to conduct the 2016 Big Apple Fest impermissibly infringes on its right to self-government is irreconcilable with the fact that the Nation applied to both the State of Wisconsin and Brown County for a permit associated with the event. The Nation's Chairwoman at the time of the 2016 Big Apple Fest testified that she had no problem with the Nation applying for a permit from the State to close a state highway for one of the Nation's events, but that the "strained" relationship between the Village and the Nation would cause her concerns she had concerns about applying for a permit from the Village under similar circumstances. (DSUMF ¶ 142.) The Village is treated as a subdivision of the State, and the Nation should not get to pick and choose when compliance with state law infringes on its self-government based on the identity of the state entity at issue.

CONCLUSION

For the foregoing reasons, this Court should conclude that the 1838 boundaries of the Oneida Reservation no longer exist, either because those boundaries were diminished or because the reservation was disestablished. Regardless, fee land and public roads on which the 2016 Big Apple Fest was conducted were not part of a reservation and the Village is thus entitled to judgment on the Nation's claims. Even if the land was on a reservation, for the reasons set forth above the Village may apply its ordinance to the Nation.

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Respectfully submitted,

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