

**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 AMENDED ANSWER AND AFFIRMATIVE DEFENSES TO
PLAINTIFF’S AMENDED COMPLAINT**

NOW COMES the Defendant, Village of Hobart, Wisconsin (“the Village”), by and through its attorneys, von Briesen & Roper, s.c., and as and for its Amended Answer to the Complaint, states as follows:

NATURE OF THE ACTION

1. Answering paragraph 1, admits the Complaint asserts a claim for declaratory and injunctive relief; denies the Oneida Nation (“the Nation”) is entitled to such relief; denies the event subject to the Village’s Special Events Ordinance was occurring only on trust land, or the Nation’s reservation; and, further, lacks knowledge and information sufficient to form a belief as to the truth of the remaining allegations and, therefore, denies the same.

2. Answering paragraph 2, admits that this Court has jurisdiction over this action; and lacks knowledge and information sufficient to form a belief as to the truth of the remaining allegations and, therefore, denies the same.

VENUE

3. Answering paragraph 3, admits venue is proper in this District but denies the events giving rise to the claims occurred only on trust land and the reservation.

PARTIES

4. Answering paragraph 4, denies that the Nation is a successor-in-interest to the Oneida Nation; admits that the Nation's principal offices are located at N7210 Seminary Road, Oneida, Wisconsin; and lacks knowledge and information sufficient to form a belief as to the truth of the remaining allegations and, therefore, denies the same.

5. Answering paragraph 5, admits.

ALLEGATIONS COMMON TO ALL CLAIMS

6. Answering paragraph 6, admits that on February 3, 1838, the United States of America executed the treaty referenced; affirmatively states that the treaty speaks for itself; denies any allegations inconsistent with the express language of that treaty; and lacks knowledge and information sufficient to form a belief as to the truth of the remaining allegations and, therefore, denies the same.

7. Answering paragraph 7, admits that on June 18, 1934, Congress enacted the Indian Reorganization Act ("IRA"); affirmatively states that the IRA speaks for itself; denies any allegations inconsistent with the express language of the IRA; admits that the Nation has from time-to-time applied to have land placed into trust for their benefit, but denies this was properly done in accordance with the IRA and governing regulations; and denies the Nation is eligible to use the IRA as a means to place land into trust.

8. Answering paragraph 8, admits that the identified parcels are purportedly held in trust for the Nation; denies the property was properly placed into trust; denies the parcels are

within a true reservation; denies that the parcels and related activities are immune from the Village's Special Events Ordinance; and denies the Nation's Big Apple Fest is limited to these parcels.

9. Answering paragraph 9, admits that the identified parcels are purportedly held in trust for the Nation; denies the property was properly placed into trust; denies that the parcels and related activities are immune from the Village's Special Events Ordinance; and denies the Nation's Big Apple Fest is limited to these parcels.

10. Answering paragraph 10, admits that in 2015 the Village advised employees of the Nation that it was obligated to abide by the Village's ordinances to ensure the Big Apple Fest was conducted in a manner that protected the health, safety, and welfare of all Village residents, as well as those attending the event; admits that Chairwoman Danforth indicated that the Nation would not obtain a permit because the Fest occurred on trust land; and, affirmatively states that the Village was required to take numerous steps to ensure the safety of both the residents of the Village, as well as those attending the event and using neighboring roads, because needed safety measures were not being taken by the Nation.

11. Answering paragraph 11, admits that the Village adopted a special event permit ordinance; affirmatively states that the ordinance speaks for itself and that the ordinance refers to the general penalty provisions of the Village ordinances; and affirmatively states that the penalty provision speaks for itself and denies any allegation inconsistent therewith.

12. Answering paragraph 12, admits that the Nation announced the occurrence of the Big Apple Fest for September 17, 2016 but denies that the Nation's Big Apple Fest occurred only on trust land within the reservation.

13. Answering paragraph 13, denies knowledge or information sufficient to form a belief as to the truth of the allegations contained therein and therefore, denies the same.

14. Answering paragraph 14, denies that the 2016 Big Apple Fest is subject only to the control and supervision of the Nation; and denies knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained therein and therefore, denies the same.

15. Answering paragraph 15, denies that all activities are governed by the laws of the Nation given that state, county, and Village interests are also concerned; denies knowledge relative to permitting or insurance coverage obtained by the Nation, in that, the Nation failed to provide information of this type to the Village.

16. Answering paragraph 16, denies knowledge or information sufficient to form a belief as to the truth of the allegations contained therein because the National refused to provide this type of information, which the special event permitting process was designed to cover, and, therefore, denies the same.

17. Answering paragraph 17, admits.

18. Answering paragraph 18, admits that counsel for the Village sent a correspondence to the Nation on September 2, 2016, and affirmatively states that the correspondence speaks for itself and denies any allegations inconsistent with its express language.

19. Answering paragraph 19, admits that on September 17, 2016, the Big Apple Fest took place; and denies knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained therein and therefore, denies the same.

20. Answering paragraph 20, admits that the Village's chief of police issued a citation against the Nation for its failure to abide by the Village's Special Events Ordinance; and, affirmatively states, that the citation speaks for itself and denies any allegations inconsistent therewith.

FIRST CLAIM FOR RELIEF
(Federal Pre-emption)

21. Answering paragraph 21, the Village restates and incorporates as if stated in full herein all of the allegations contained in paragraphs 1 through 20.

22. Answering paragraph 22, the allegations contained therein call for legal conclusions for which no answer is required. To the extent an answer is required, denies that all state and local law and regulations are federally preempted on trust land or the reservation.

23. Answering paragraph 23, the allegations contained therein call for legal conclusions for which no answer is required. To the extent an answer is required, denies the allegations and, affirmatively states, that in *Nevada v. Hicks*, 533 U.S. 353 (2001), the court expressly stated that "state sovereignty does not end at a reservation's border."

24. Answering paragraph 24, the allegations contained therein call for legal conclusions for which no answer is required. To the extent an answer is required, denies the allegations.

SECOND CLAIM FOR RELIEF
(Infringement of tribal self-government)

25. Answering paragraph 25, the Village restates and incorporates as if stated in full herein all of the allegations contained in paragraphs 1 through 24.

26. Answering paragraph 26, the allegations contained therein call for legal conclusions for which no answer is required. To the extent an answer is required, denies the allegations.

27. Answering paragraph 27, the allegations contained therein call for legal conclusions for which no answer is required. To the extent an answer is required, denies the allegations.

28. Answering paragraph 28, the allegations contained therein call for legal conclusions for which no answer is required. To the extent an answer is required, denies the allegations.

29. Answering paragraph 29, the allegations contained therein call for legal conclusions for which no answer is required. To the extent an answer is required, denies the allegations.

30. Answering paragraph 30, the allegations contained therein call for legal conclusions for which no answer is required. To the extent an answer is required, denies the allegations contained therein; affirmatively states that the Nation's Big Apple Fest did not occur only on trust land; and, affirmatively states that the Nation, and its officials and employees, have no powers, inherent or otherwise, to act in violation of federal law and the United States Constitution.

31. Answering paragraph 31, the allegations contained therein call for legal conclusions for which no answer is required. To the extent an answer is required, denies that the Village's actions, to impose its Special Events Ordinance, violates the Nation's inherent power of self-government or is preempted by federal law; and, affirmatively states, that the Nation's Big Apple Fest did not occur only on trust land.

AFFIRMATIVE DEFENSES

1. The Village restates and incorporates as if stated in full herein all of the allegations contained in paragraphs 1 through 31.

2. The Secretary of Interior has no authority under any statute to remove lands from state jurisdiction. Once land has ceased to be territorial land by Congressional cession or act, and is under state jurisdiction, there is no federal authority to nullify state jurisdiction. Therefore, the Village has the authority to enforce its Special Events Ordinance for the entire Big Apple Fest event.

3. 25 U.S.C. § 465 states only that land taken into trust for a tribe “shall be exempt from state and local taxation” and contains no language removing the land from state and local jurisdiction.

4. For the portion of the Big Apple Fest that purportedly occurred on trust land, the property at issue is not properly held in trust because the Nation was not under federal jurisdiction in 1934, as required by the IRA, and the land was not within the present boundaries of an Indian reservation when the IRA was enacted.

5. The Nation’s 2016 Big Apple Fest did not occur only on tribal trust land and, therefore, the Village’s Special Events Ordinance is applicable, at the very least, to all activities occurring on fee land owned by the Nation, as well as for activities and disruptions occurring on roadways, rights-of-way, and neighboring properties.

6. The obligations created by the Village’s Special Events Ordinance are not preempted by federal law.

7. The obligations created by the Village’s Special Events Ordinance do not violate the Nation’s inherent powers of self-government.

8. The Oneida Reservation, as defined by its 1838 boundaries, does not exist and the Nation's argument regarding the Oneida Reservation's status must be dismissed on the grounds of issue preclusion because of the United States District Court for the Eastern District of Wisconsin's decisions in *United States v. Hall* (E.D. Wis. 1909) and *Stevens, et al. v. The County of Brown, et al.* (E.D. Wis. 1933).

WHEREFORE, the Village of Hobart requests that the Court render judgment in its favor and grant the following relief:

A. Judgment against the Nation dismissing its claims and in favor of the Village declaring that the Nation's Big Apple Fest, is subject to the Village's Special Events Ordinance;

B. Judgment against the Nation enforcing the citation issued by the Village including a monetary judgment against the Nation in the amount of \$5,000 as referenced in the citation;

C. Award the Village costs, exclusive of attorney's fees, incurred in defending this action;

D. Award the Village costs, exclusive of attorney's fees, incurred in enforcing the citation; and

E. Award all other relief the Court deems appropriate.

COUNTERCLAIM
(Allegations Common to all Counterclaims)

PARTIES

1. The Village is an incorporated municipality in Brown County, Wisconsin, with a principal office located at 2990 South Pine Tree Road, Hobart, Wisconsin, 54155.

2. The Nation purports to be a federally recognized Indian tribe with principal government offices at N7210 Seminary Road, Oneida, Wisconsin, 54155.

VENUE AND JURISDICTION

3. The Village restates and incorporates as if stated in full herein all of the allegations contained in paragraphs 1 through 31 of its Answer; paragraphs 1 through 7 of its Affirmative Defenses; and paragraphs 1 through 2 of its Counterclaim.

4. Subject matter jurisdiction is based upon 28 U.S.C. § 1331 (controversy arising under a federal statute) and 28 U.S.C. § 2201(a) (action for a declaratory judgment). The Court further has authority to award injunctive relief under Rule 65 of the Federal Rules of Civil Procedure and 28 U.S.C. § 2202 (further necessary or proper relief based on a declaratory judgment).

5. Venue in this action is proper pursuant to 28 U.S.C. § 1391(b), and 28 U.S.C. § 1391(e) because the Village, the tribe and the land titled in the name of the United States are all located in this district, and a substantial part of the events or omissions giving rise to the claim occurred in this district.

ALLEGATIONS COMMON TO ALL COUNTS

6. The Village restates and incorporates as if stated in full herein all of the allegations contained in paragraphs 1 through 31 of its Answer; paragraphs 1 through 7 of its Affirmative Defenses; and paragraphs 1 through 5 of its Counterclaim.

7. The Nation's 2016 Big Apple Fest included activity on several fee parcels including, but not limited to, designated primary parking with signage on Parcel No. HB-1396-15; designated primary parking with signage for elderly and disabled on Parcel No. HB-1391-1; parking on Parcel No. HB-1356; apple picking on a significant portion of the Nation's orchard located on Parcel No. HB-1356, which included repeated and continuous shuttling of attendees, via tribally operated extended passenger golf carts, to and from Parcel No. HB-1356, as well as

vehicular traffic, vehicular parking, and pedestrian foot traffic, in and out of this area during the entire event; unauthorized closure by the Nation of a Village road without the consent of, or notice to, the Village; the closure of State Highway 54 in violation of the Wisconsin Department of Transportation's approval relative to such closure; blocking of the entrance to State Highway 54 at the intersection of State Highway 172 without authorization; upon information and belief, trespassing by attendees on parcel(s) not owned by the Nation nor held in trust for its benefit; and road closures impacting businesses and residents on property owned in fee, by persons or entities other than the Nation.

8. The Nation failed to adequately notify surrounding jurisdictions of the scope and nature of the event including anticipated road closures.

9. The Nation failed to properly notify Brown County Dispatch, as is normally done for events of this nature, of the existence of the event and the anticipated road closures.

10. The Nation's road closure relative to State Highway 54 was in contravention to the limited approval obtained from the Wisconsin Department of Transportation.

11. Only as a result of the Village's police chief's efforts relative to notifying other communities, issuing press releases to inform the public of road closures and safety concerns, contacting the Wisconsin Department of Transportation in 2015, and other measures, did traffic, parking and pedestrian safety concerns get significantly addressed.

12. The purpose of the special event application and permitting process is for the Village to gain an understanding of the scope of the proposed event so that health, safety and welfare concerns can be addressed by the Village and the sponsor of the event including, but not limited to, the type of information the Nation included within its Complaint, but failed to previously give to the Village, as part of the permitting process or otherwise.

13. The Nation was informed by the Village that it needed to abide by the Village's Special Events Ordinance, designed to ensure the health, safety, and welfare of all residents of the Village, as well as all individuals visiting the Village.

14. The Nation refused to abide by the Special Events Ordinance or give information relative to its handling of the event and the Village first obtained some of this information as part of the Nation's pleadings filed in federal court to commence this action.

15. The Nation, through its officials, indicated that it would not abide by the Special Events Ordinance because Big Apple Fest was conducted on trust land.

16. As a result of the Nation's refusal to abide by the Village's Special Events Ordinance, Chapter 250, the Nation was issued Citation No. 7R80F51TJS ("Citation") on September 21, 2016 in the amount of \$5,000, in accordance with that ordinance and the Village penalties for the violation of ordinances, as stated in §§ 1-3 of the Village Municipal Code.

17. The Village police chief and others, spent numerous hours in both 2015 and 2016, to the best of their ability and despite the Nation's refusal to abide by the Special Events Ordinance, ensuring the safety of the general public relative to the event including, but not limited to, instructing the Nation of their need to obtain permission from the Wisconsin Department of Transportation to block traffic on Highway 54; notifying other local policing authorities, property owners, and others, of the fact the event was occurring and that roads would be closed; issuing press releases as is a standard practice for such an event; notifying Brown County Dispatch of the event and road closures so it could better dispatch emergency vehicles, including fire and rescue, if needed; having a Village police officer stationed at the event to help ensure the safety of the public; and convincing the Nation to hire a qualified company to place traffic control barrels and blockades.

18. Without the Village's involvement, safety concerns would not have been adequately addressed by the Nation.

19. Even with the Village efforts, and because the Nation refused to abide by the Special Events Ordinance, significant safety concerns arose at the 2016 Big Apple Fest.

20. At the 2016 Big Apple Fest, there was a lack of coordination between the Nation's police officers relative to road closures and parking to such an extent that unauthorized road closures occurred only to later be abandoned; manned road closures were abandoned simply because the Nation's police officers shifts ended prior to the event ending; the Nation's police officers referring to the road closures, traffic concerns, and pedestrian safety as "a cluster," or "a mess," or "a disaster," and indicating that shuttle busses were going to hit pedestrians because of improper direction from the Nation's police officers; the Nation's police officers allowing cars to go through barricades into areas with significant pedestrian traffic; and disagreements and arguments occurring between the Nation's police officers, relative to vehicular and pedestrian safety.

FIRST CAUSE OF ACTION
(Declaratory Judgment)

21. The Village realleges and incorporates by reference paragraphs 1 through 20 of the Counterclaim.

22. The Nation alleges that the property at issue was placed into trust via the IRA.

23. The Nation was not federally recognized or under federal jurisdiction on June 18, 1934, and is, therefore, not eligible to use the IRA to obtain trust status for real property it owns.

24. Some or all of the property at issue was not within an existing reservation or within the present boundaries of a reservation at the time the IRA was enacted and the Nation was, therefore, not eligible to use the IRA to obtain trust status for real property it owns.

25. In the event it is determined that the property upon which the Nation's Big Apple Fest was held is in trust. The Secretary of Interior has no authority under any statute to remove lands from state jurisdiction. Once land has ceased to be territorial land by Congressional cession or act, and is under state jurisdiction, there is no federal authority to nullify state jurisdiction. Therefore, the Village has the authority to enforce its Special Events Ordinance for the entire Big Apple Fest event.

26. The Village's interest in protecting the health, safety, and welfare as everyone within the Village, via its Special Events Ordinance, outweighs the Nation's interest in refusing to abide by the Ordinance. The Nation is obligated to abide by the Ordinance just like any other resident of the Village, regardless of whether the property on which Big Apple Fest occurred, is found to be held in trust or fee or within a reservation.

27. The Nation's 2016 Big Apple Fest did not occur only on tribal trust land and, therefore, the Village's Special Events Ordinance is applicable, at the very least, to all activities occurring on fee land owned by the Nation, as well as for activities and disruptions occurring on roadways, rights-of-way, and neighboring properties.

SECOND CAUSE OF ACTION
(Money Judgment)

28. The Village realleges and incorporates by reference paragraphs 1 through 27 of the Counterclaim.

29. The Village was authorized to assert a monetary penalty against the Nation, pursuant to the Village's Special Events Ordinance, as a result of the Nation's refusal to abide by the Ordinance.

30. The Village has not received payment from the Nation for the penalty stated in the Citation.

31. The Village is entitled to a monetary judgment against the Nation in the amount referenced within the Citation, as well as all costs, exclusive of attorney's fees, incurred in prosecuting the Citation.

WHEREFORE, the Village of Hobart requests the following relief:

1. A declaration that the Village was entitled to impose its Special Events Ordinance on the Nation for the Nation's 2016 Big Apple Fest.

2. Judgment against the Nation for the amount owed pursuant to the Citation and for the costs, exclusive of attorney's fees, incurred in prosecuting the Citation.

3. Costs, exclusive of attorney's fees, of this action.

4. All other relief the Court deems appropriate.

Dated: September 5, 2018.

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