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 REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

The Nation builds its opposition on a fiction: that the Supreme Court has rejected the Village's theory of disestablishment or diminishment in this case. It then uses that fiction to make a number of claims, including that the decision in *Stevens, et al. v. County of Brown* was wrongly decided, that allotment under the Dawes Act cannot diminish or disestablish reservations, and that this Court should ignore any evidence that is a "consequence" of allotment under the Dawes Act (including overwhelming evidence that the vast majority of allotments on the Oneida Reservation passed out of trust and Indian ownership and were treated as part of the state). The Nation is wrong on the law. None of the Supreme Court cases on which the Nation relies foreclose the Village's positions here. Indeed, contrary to the Nation's claims, whether reservation boundaries can be diminished when allotted lands pass into non-Indian ownership is an "important pending question." *Cohen's Handbook of Federal Indian Law* § 3.04[3] (2017).

This Court need not answer that question, however, as the issue of the Oneida Reservation's status has already been decided. Although the Nation strives mightily to avoid the preclusive effects of the decision in *Stevens*, there can be no real dispute that decision is binding on the Nation, which has cast itself as the continuation of the Oneida Tribe of Indians of Wisconsin. The Nation's claim that it is not bound by a judgment in a case brought by tribal leaders on behalf of the Oneida Tribe of Indians is not credible.

Even if this Court reassesses the status of the Oneida Reservation, the reservation should be held at least diminished to the extent allotments passed out of Indian ownership in the early twentieth century. The Village's position is supported by case law, *Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010 (1999), as well as the Dawes Act, the 1906 Oneida Provision, and a statute authorizing transfer of land on the reservation to a local government. The Nation's response is to wrongly claim that the Supreme Court has held otherwise and to ask this Court to

retroactively apply a statute passed in 1948 when assessing the intent of Congress in the late-nineteenth and early-twentieth centuries. The Nation's argument has been made, and rejected, before. *Wisconsin v. Stockbridge-Munsee Cmty.*, 366 F. Supp. 2d 698, 750, 769 (E.D. Wis. 2004). This Court should reject it as well.

Because the Oneida Reservation was at minimum diminished by the passage of allotments out of Indian ownership, any fee land falling within that category is no longer part of a reservation and thus is not Indian country under 18 U.S.C. § 1151. It is undisputed that activities associated with the 2016 Big Apple Fest occurred on such land. The Village is thus entitled to a judgment that its Special Event Ordinance can be applied with respect to that event. And, even if diminishment has not occurred, the Village should still be able to apply its ordinance due to its interest in regulating land-use and the use of public roads within its borders.

ARGUMENT[1]

I. This Court Should Preclude Relitigation of the Status of the Oneida Reservation.

The Nation should be precluded from asserting the existence of the Oneida Reservation, as defined by its 1838 boundaries, as a result of the decision in *Stevens, et al. v. County of Brown, et al.* Village MSJ Br. at 14-18.[2] The Nation makes several arguments why issue preclusion should not apply here, all of which should be rejected.

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[1] In its Memorandum of Law In Opposition to the Village's Motion (ECF No. 104) and its response to the Village's proposed statements of fact (ECF No. 106), the Nation argues the Village exceeded the number of facts allowed under Civil L.R. 56(b)(1). The Village respectfully submits that its proposed statement of facts complied with the rule, which provides that each statement "shall consist of short numbered paragraphs." In the event the Court disagrees, however, the Village requests either that the Court increase the number of facts allowed, given the extensive record in this case and the fact that the Court has already significantly increased the page limits for the parties. Regardless, this Court can rule on the Village's motion through reference to the extensive materials in the record under Fed. R. Civ. P. 56(c)(3) or (f).

[2] References to prior filings in this matter are as follows: "Village MSJ Br." refers to the Memorandum of Law In Support of Defendant's Motion for Summary Judgment (ECF No. 94);

A. *Stevens* Was Not Wrongly Decided.

The Nation discounts the *Stevens* decision by claiming it was "clearly contrary" to the Supreme Court's holding in *United States v. Celestine*, 215 U.S. 278 (1909). Nation Opp. Br. at 2. The Nation misreads *Celestine*. Village Opp. Br. at 22-24. *Celestine* did not involve an Indian tribe that had received allotments under the Dawes Act. Instead, the tribe at issue received allotments under the terms of a treaty, which imposed certain restrictions on alienation of the allotments, and the question was whether application of the Dawes Act's citizenship provision disestablished the reservation.[3] As *Celestine* did not involve allotments under the Dawes Act—and the decision indicated the Supreme Court might have reached a different decision had it been addressing allotments issued under the Dawes Act—the Nation is wrong when it asserts that the decision in *Celestine* was "clearly contrary" to the *Stevens* decision.

B. The Village Has Satisfied All the Elements of Issue Preclusion.[4]

In its opposition, the Nation asserts the Village has failed to establish the necessary elements of issue preclusion with respect to the question of the continued existence of the Oneida Reservation (as defined by its 1838 boundaries). As set forth below, however, the court in

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"Village Opp. Br." refers to the Village's Brief In Opposition to the Nation's Motion for Summary Judgment (ECF No. 102); and "Nation Opp. Br." refers to the Nation's Memorandum of Law In Opposition to the Village's Motion for Summary Judgment (ECF No. 104). "DSUMF Resp." refers to the Nation's response to the Village's proposed statements of undisputed fact (ECF No. 106).

[3] The allotments in *Celestine* were not subject to "all of the consequences" of the Dawes Act; the allotments were not subject to the Dawes Act's grant of state criminal and civil jurisdiction over allotments made under the terms of the Dawes Act. 215 U.S. at 289; *see also id.* at 291.

[4] The elements of the doctrine are: (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. Nation Opp. Br. at 3 n.2; *see also Adams v. City of Indianapolis*, 742 F.3d 720, 736 (7th Cir. 2014).

Stevens addressed whether the Oneida Reservation had been discontinued by Congress—the exact issue in this case—and determined that it had. And, that decision is binding on the Nation.

1. The issue is the same as an issue in the prior litigation.

First, there is no merit to the Nation's claim that there is no identity of issues between *Stevens* and this case. The Nation seems to suggest that, for issue preclusion to apply, the same cause of action or subject matter must be at issue here as was at issue in *Stevens*—i.e., that this case must also involve a challenge to the payment of local property taxes. Nation Opp. Br. at 5. But that is not correct. "Issue preclusion . . . bars successive litigation of *an issue of fact or law* actually litigated and resolved in a valid court determination essential to the prior judgment, *even if the issue recurs in the context of a different claim*." *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008) (internal citations and quotation marks omitted) (emphasis added).

2. The issue was actually litigated.

Second, the Nation argues that "the actually litigated" requirement is not satisfied because, according to the Nation, the Nation's immunity from local regulatory authority was not litigated in *Stevens*. Like the Nation's attempt to claim a different issue was involved in *Stevens*, this is another attempt at misdirection. The Nation's immunity from local regulatory authority is a separate issue from whether the Oneida Reservation as defined by its 1838 boundaries ceased to exist. It is the latter issue that was decided in *Stevens* and which the Village submits is entitled to preclusive effect here. Again, the question for this Court is whether the issue of the Oneida Reservation's continued existence was actually litigated and decided in the *Stevens* case.

Plainly, it was. In response to the complaint in *Stevens*, the local government defendants (including the Town of Hobart) expressly raised the issue of the Oneida Reservation's continued existence and moved to dismiss on a number of grounds, including that passage of the Dawes

Act and allotment of the Oneida Reservation had superseded the terms of the Treaty of 1838.[5] The court recognized that the discontinuance of the Oneida Reservation was one of the grounds on which the motion to dismiss was based, specifically addressed that argument, and concluded the federal government's passage and application of the Dawes Act "[p]lainly . . . resulted in a discontinuance of the reservation." Ex. 45 to July 19 Kowalkowski Decl. (ECF No. 89-45).[6]

3. The determination was essential to the judgment in *Stevens*.

The Nation also claims the issue of the Oneida Reservation's continued existence "was not essential to the judgment on the tax liability of Oneida allottees" in *Stevens* because, according to the Nation, the Supreme Court interpreted the Dawes Act to allow for local taxation of fee patents in *Goudy v. Meath*, 203 U.S. 146 (1906). The Nation suggests the *Stevens* court only had to apply *Goudy* to resolve the case, but the Nation wrongly presumes *Stevens* was only about whether local governments could tax fee patents issued under the terms of the Dawes Act. Not only did the plaintiffs challenge the taxes on their land, the plaintiffs also challenged the legality of the *allotment* of the Oneida Reservation. *See, e.g.*, Ex. 49 to July 19 Kowalkowski Decl. at ¶¶ 15-16 (ECF No. 89-49). The plaintiffs in *Stevens* specifically sought an order "that the said pretended allotment of the lands included in said Reservation be vacated and adjudged to be null and void." *Id.* at page 7. Applying *Goudy* would not have resolved that dispute.

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[5] *See, e.g.*, Ex. 52 to July 19 Kowalkowski Decl. at ¶ 2 (ECF No. 89-52) (alleging "that the so-called Oneida Reservation has for many years . . . ceased to exist"); Ex. 53 to July 19 Kowalkowski Decl. (ECF No. 89-53) (moving to dismiss on ground "[t]hat as a matter of law, the act of February 8th, 1887, and the executive order of the President of the United States dated May 21st, 1889, superseded the terms of the treaty . . . .").

[6] A prior case, *United States v. Hall*, 171 F. 214 (E.D. Wis. 1909) had also described the Oneida Reservation as a former reservation. The Nation argues that *Hall* was not binding on it, that its holding was overturned by a subsequent case, and that reference to the "former reservation" was dicta. Regardless, *Hall* still represents a contemporaneous recognition of the Oneida Reservation's loss of reservation status.

Further, the Nation is effectively arguing that the issue of the Oneida Reservation's existence was "not essential" to the judgment in *Stevens* because narrower grounds (an application of *Goudy*) existed for rejecting the plaintiffs' claims. Even if that is true—and, it is not—the conclusions in *Stevens* are still entitled to preclusive effect. The existence of narrower grounds on which a decision could have rested does not prevent a court from granting preclusive effect to the resolution of the broader issue. *See Gambino v. Koonce*, 757 F.3d 604 (7th Cir. 2014) (issue preclusion under Illinois law even though prior judgment could have been granted on lesser grounds). The relevant question is whether the issue "formed the basis of the [prior] court's decision," *Gambino*, 757 F.3d at 610.[7] That standard is met here, as the conclusion in *Stevens* that the Oneida Reservation had been discontinued formed the basis of the court's reasoning. The court concluded that, because the Oneida Reservation had been discontinued, the plaintiffs were bound to follow state law regarding the procedure for seeking recovery of taxes and challenging the legality of the organization of local governments. Indeed, the *Stevens* court expressly stated that its resolution of the case "follow[ed]" from its conclusion that the Oneida Reservation had been discontinued. Ex. 45 to July 19 Kowalkowski Decl. (ECF No. 89-45).

4. The Nation is bound by the result in *Stevens*.

Finally, the Nation argues that it was not a party to the *Stevens* case and therefore is not bound by that decision. This argument should be rejected. Although the Nation's current government was not organized until the late 1930s, the Nation effectively has taken the position that it is the successor in interest to the Oneida Tribe of Indians of Wisconsin and seeks the

[7] *See also Hoult v. Hoult*, 157 F.3d 29, 32 (1st Cir. 1998) ("[A] finding is 'necessary' if it was central to the route that led the factfinder to the judgment reached, even if the result could have been achieved by a different, shorter and more efficient route." (internal quotation marks and citation omitted)); *Courtney v. La Salle Univ.*, 124 F.3d 499, 504 (3d Cir. 1997) (rejecting "the notion that an issue is not essential if, under some hypothetical resolution of the dispute, the issue could have been avoided" (internal quotation marks and citation omitted)).

benefit of legal agreements executed prior to the formation of the current government—for example, the Treaty of 1838. *See, e.g.* Am. Compl. ¶¶ 2, 4, 6 (ECF No. 10). The lawsuit in *Stevens* was signed on behalf of the Oneida Tribe of Indians by William Skenandore, a leader of the Tribe,[8] who was "authorized and empowered to act for and on behalf of the Oneida Tribe of Indians of the State of Wisconsin." Ex. 49 to July 19 Kowalkowski Decl at ¶1 (ECF No. 89-49). The Nation cannot have it both ways—taking advantage of its connection to the Oneida Tribe of Indians when it is beneficial and distinguishing itself from the Tribe when it is not.

Even if this Court disagrees that *Stevens* was brought on behalf of a then-existing tribal government to which the Nation is a successor in interest, there is a separate reason why the Nation should be bound by the judgment. Even the Nation acknowledges the *Stevens* case was a class action brought, at a minimum, on behalf of Oneida Indians who had received fee patents[9] and that due process permits preclusive effect against a class. Nation Opp. Br. at 3. At a minimum, *Stevens* made a determination that land subject to those fee patents was no longer part of a reservation, and preclusion applies to "preceding and succeeding owners of property." *Taylor*, 553 U.S. at 894. To the extent the Nation now seeks to assert that such land is reservation land, the Nation is bound to the *Stevens* judgment as a succeeding owner of the property at issue.

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[8] DSUMF Resp. ¶40. The Nation's own experts repeatedly pointed to William Skenandore's status as "tribal chairman," "chairman of the Oneida Indians," and "chief" in the late 1920s and early 1930s to support the claim that the Nation maintained a tribal government during this time period. *See, e.g.* ECF No. 92-2 at 129-133; ECF No. 92-5 at 72-76; Exs. 1-4 to Sept. 28, 2018 Declaration of Frank Kowalkowski ("Sept. 28 Kowalkowski Decl.").

[9] The Nation suggests the plaintiff class did not consist of all Oneida tribal members because, according to the Nation, the case only dealt with payment of property taxes and the class thus included only those Indians who held fee patents. As discussed above, the plaintiffs also challenged the legality of the allotment of the Oneida Reservation, an issue in which all Oneida Indians would have had an interest. It is the Village's position that the plaintiff class in *Stevens* thus included all Oneida tribal members. Ultimately, however, whether there was some small subset of tribal members not included in the class (those who still held trust patents in 1933) should not allow the Nation to escape the preclusive effects of the judgment in *Stevens*.

Finally, there is no dispute the class in *Stevens* at least included the vast majority of Oneida Indians who received allotments; by 1933 there were only twenty-one out of over 1500 allotments still in trust. *See* DSUMF Resp. ¶¶ 6, 36. Under these circumstances, the Nation—which was formed by the "people of the Oneida Tribe of Indians of Wisconsin . . . in order to reestablish our tribal organization" in 1936[10]—should be bound by the judgment because the Nation is in privity with the members of the Tribe who were bound by the *Stevens* decision.

Privity exists if a person is "so identified in interest with a party to former litigation that he represents precisely the same legal right in respect to the subject matter involved." *Jefferson School of Social Science v. Subversive Activities Control Board*, 331 F.2d 76, 83 (D.C. Cir. 1963).[11] With respect to the status of the Oneida Reservation, the Nation has identified no difference in interest between it and its members. Indeed, it is difficult to see how the Nation's interests on this question could differ from the plaintiffs' interests in *Stevens*. This Court should conclude privity exists between the Nation and the tribal members subject to the judgment in *Stevens*. *Cf. Yankton Sioux Tribe v. United States Department of Health and Human Services*, 533 F.3d 634, 641 (8th Cir. 2008) (individual tribal member's claim precluded because similar suit had previously been filed by the Yankton Sioux Tribe "on its own behalf and on behalf of its individual members"); *Apache Survival Coalition v. United States*, 21 F.3d 895, 907 (9th Cir. 1994) (holding a coalition of tribal members and a tribe should be treated as a single entity).[12]

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[10] Ex. 52 to July 19 Jacquart Decl. (ECF No. 92-52).

[11] In *Jefferson School of Social Science* a school was in privity with the Communist Party when the school was "substantially dominated, directed and controlled by the Communist Party and . . . operates primarily to achieve objectives of the Party." 331 F.2d at 83. Here, there can be no reasonable dispute that the Nation is controlled by and represents the interests of its members, and at the time of formation of the Nation's government in 1936 the vast majority of its members had been represented in *Stevens* and would be bound by the judgment in that case.

[12] The Nation suggests that individual litigation by its members does not preclude relitigation by the Nation "since private interests necessarily vary from those of the government," but fails to

C. The Nation's Request for an Exercise of Discretion Is Unwarranted.

The Nation also claims that even if all elements of issue preclusion are satisfied, the Court should exercise discretion and not apply the doctrine here. The Nation relies on *Parklane Hosiery Company, Inc. v. Shore*, 439 U.S. 322 (1979) for the proposition that a court has "broad discretion" as to whether to apply issue preclusion, but the Seventh Circuit has explained the Supreme Court made that statement when "discussing the use of collateral estoppel by a nonparty to the original proceeding against the defendant in that proceeding" – i.e., nonmutual offensive collateral estoppel. *Kairys v. I.N.S.*, 981 F.2d 937, 940 (7th Cir. 1992). The current case does not involve such a use of the doctrine. And, the Seventh Circuit has explained that although there are some principles that limit the scope of issue preclusion, those principles do not make the doctrine "discretionary." *Kairys*, 981 F.2d at 940; *see also United States v. Egan Marine Corp.*, 843 F.3d 674, 678 (7th Cir. 2016) (noting cases "reject[ing] judicial efforts to treat rules of preclusion as dispensable whenever judges prefer another outcome"). Also, the Nation provides insufficient reasons in support of its request.

First, the Nation claims the issue of the Oneida Reservation's existence did not receive sufficient analysis, and faults the *Stevens* court's alleged failure to discuss "conflicting case law" or "to address directly contrary Supreme Court authority such as *Celestine*," Nation Opp. Br. at 7. As discussed above, *Celestine* was not "directly contrary" authority. And, absent special circumstances not present here, a court ordinarily will not assess the fairness of the prior proceedings. *Cf. Avitia v. Metropolitan Club of Chicago, Inc.*, 924 F.2d 689, 691 (7th Cir. 1991).

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explain how its interests as to the existence of the Oneida Reservation differ from those of its members. Indian tribes also have not been treated as ordinary governments in this context. *Cf. Apache Survival Coalition*, 21 F.3d at 907 (comparing an Indian tribe to an "association").

Second, the Nation suggests an issue should not be precluded if it is an issue of law. Nation Opp. Br. at 7-8. It is true that issue preclusion may not have the same force when the issue involved is a "pure question[] of law, unmixed with any common elements of fact." *Chicago Truck Drivers, Helpers and Warehouse Union (Independent) Pension Fund v. Century Motor Freight, Inc.*, 125 F.3d 526, 531 (7th Cir. 1997) (quoting Wright, Miller & Cooper § 4425, at 245). But, that is not the case here. The issue of whether the Oneida Reservation has been diminished or disestablished is, ultimately, a legal question, but the answer to that question turns on the application of a legal standard to the specific facts and circumstances surrounding the Oneida Reservation. This is not an "abstract" ruling of law or a "purely legal" question, but instead represents the mixing of a question of law with common elements of fact.

Third, the Nation suggests there has been a change in the legal environment since *Stevens*. Although subsequent Supreme Court cases have identified examples of factors for courts to consider when conducting the analysis, the relevant question for disestablishment or diminishment remains the same today as it was when *Stevens* was decided: did Congress diminish or disestablish the reservation. *See, e.g.*, Village MSJ Br. at 20. That question has guided the analysis since *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903), in which the Supreme Court held Congress could diminish reservations unilaterally and on which *Stevens* relied. *See also Celestine*, 215 U.S. at 285 (land remains reservation until separated therefrom by Congress).

Finally, the Nation argues it would be "fundamentally unfair" to bind it to what it calls an "erroneous" and "analytically thin" decision. But, such concerns do not justify refusing to apply issue preclusion. "The general rule is that issue preclusion applies to an issue framed in an earlier action even though little or no evidence at all was introduced, or though an inept effort in the first litigation can be substantially improved in a later action." 18 Charles Alan Wright et al.,

Fed. Prac. & Proc. Juris. § 4419 at n.11 (3d ed.). And, issue preclusion applies even if it is possible the prior action resulted in the wrong outcome. *Id.* at § 4426 ("The premise of preclusion itself is that justice is better served in most cases by perpetuating a possibly mistaken decision than by permitting relitigation."); *see also Firishchak v. Holder*, 636 F.3d 305, 312 (7th Cir. 2011).

II. The Oneida Reservation Has At Minimum Been Diminished.

The Village is also entitled to summary judgment because the undisputed evidence establishes, at a minimum, the Oneida Reservation was diminished to the extent allotted land passed out of Indian ownership in the early twentieth century.[13] Prior to 1948, allotted land that passed out of Indian ownership was not considered reservation land. Congress also indicated its intent to at least diminish the Oneida Reservation by enacting the 1906 Oneida Provision. And, the subsequent history of the Oneida Reservation fully supports the Village's claim.

A. A Surplus Land Act Is Not Necessary.

As an initial matter, the Nation wrongly suggests that because there is no surplus land act with respect to the Oneida Nation, the Village's claim must fail. Indeed, the Nation goes so far as to claim that "every case holding that a reservation was diminished or disestablished reached this conclusion based upon a surplus land act or a series of similar acts." Nation Opp. Br. at 11. This claim simply is not true. There are several examples of cases finding disestablishment or diminishment based on the allotment of a reservation. In *Wisconsin v. Stockbridge-Munsee Cmty.*, the Seventh Circuit concluded that a reservation was disestablished by an allotment act

[13] It is undisputed that some 2016 Big Apple Fest activities occurred on fee land at HB-1391-1 and HB-1396-15, which was transferred to third parties prior to 1934. DSUMF Resp. ¶146 (no dispute HB-1391-1 and HB-1396-15 transferred to third parties prior to 1934); Pl.'s Answer and Affirmative Defenses to Counterclaims at ¶7 (ECF No. 111) (admitting use of HB-1391-1 and HB-1396-15 for 2016 Big Apple Fest).

that "included none of the hallmark language suggesting that Congress intended to disestablish the reservation."[14] 554 F.3d 657, 664 (2009). In *Osage Nation v. Irby*, the Tenth Circuit held a reservation was disestablished by an allotment act that "allotted the entire reservation to members of the tribe with no surplus lands allotted for non-Indian settlement," even though the act did not contain "express termination language." 597 F.3d 1117, 1123-24 (2010). And, while there was an 1894 Act that ceded part of the Yankton Sioux Reservation, the Eighth Circuit's decisions in *Gaffey* and *Yankton Sioux Tribe v. Podhradsky* addressed the status of the *nonceded* lands that had been allotted on that reservation and held that the reservation was diminished by the loss of allotted lands that had passed out of Indian hands. *Gaffey*, 188 F.3d at 1028; *Podhradsky*, 606 F.3d 994, 1003 (2010).

Indeed, if anything, the absence of a surplus land act here shows why the Nation is wrong to rely so heavily on the absence of "hallmark statutory language" from the 1906 Oneida Provision. As the Village explains elsewhere, the types of "hallmark statutory language" that the Supreme Court has identified to date occurred in the context of cases assessing surplus land acts and only make sense in that context. Contrary to the Nation's suggestion that does not mean a surplus land act is necessary to disestablish or diminish a reservation; rather it shows why reliance on the absence of "hallmark statutory language" is irrelevant. Village Opp. Br. at 15-17 (language of cession, language restoring land to the public domain, and language providing for payment of a sum certain do not make sense in context of allotment); *see also Osage Nation*, 597

[14] The Nation has tried to portray the decision in *Stockbridge-Munsee Cmty.* as a function of an earlier 1871 Act that diminished the reservation. As the Village explains elsewhere, however, a fair reading of the Seventh Circuit's opinion makes clear its decision that the reservation was subsequently disestablished was based on the text of the 1906 allotment provision, the circumstances surrounding its passage, and the treatment of the land at issue in the aftermath of allotment. Village Opp. Br. at 30.

F.3d at 1123-24 ("As the [Allotment] Act did not open any land for settlement by non-Osage, there is no sum-certain or any other payment arrangement in the Act.").

B. The Village's Position Is Consistent With *Gaffey* and *Podhradsky*.

In this case the Village seeks an application of the same rule applied by the Eighth Circuit in *Podhradsky* and *Gaffey*: allotments which passed out of Indian hands and into non-Indian ownership ceased to be part of the reservation. Village MSJ Br. at 18-23; Village Opp. Br. at 17-21. The Nation attempts to discount these cases by claiming they "resulted from clear congressional intent expressed in a surplus land act" and that the Supreme Court has rejected the Village's theory. Neither of the Nation's arguments has merit. Indeed, a treatise relied on by the Nation calls the issue raised in this case "[a]n important pending question." *Cohen's Handbook of Federal Indian Law* § 3.04[3] (2017) ("An important pending question is whether reservation boundaries can be diminished when allotted lands pass into non-Indian ownership.").[15]

1. *Gaffey* and *Podhradsky* addressed the status of the nonceded lands on the Yankton Sioux Reservation.

First, the Nation argues there was a cession agreement for the Yankton Sioux Reservation that "contained classic language ceding all the tribe's interest and required payment of a sum certain." Nation Opp. Br. at 12. The allotments at issue in *Gaffey* and *Podhradsky* were part of the *nonceded* lands on the reservation, however. And, although the *Gaffey* court referenced the cession agreement when it held the reservation was diminished to the extent allotments were

[15] The treatise takes the position that such lands should not lose reservation status, but it does so by taking issue with the Supreme Court's observation in *Solem v. Bartlett* that reservation status was coextensive with tribal ownership at the turn of the century. The Supreme Court's pronouncement on this issue has been applied by lower courts, however, including the Seventh Circuit's decision in *Stockbridge Munsee Cmty.* and the Eighth Circuit's decision in *Gaffey*. The Nation makes no attempt to argue the Supreme Court's observation in *Solem* was incorrect, but instead tries to retroactively apply the "uncoupling" of reservation status from Indian ownership that occurred when Congress enacted § 1151 in 1948.

conveyed to non-Indians, the cession agreement actually said very little about the status of the nonceded lands.[16] *See* Ex. 5 to Sept. 28, 2018 Kowalkowski Decl. at 314-19 (copy of Yankton Sioux cession agreement). Nevertheless, the court found diminishment after observing that "nothing in its text or the circumstances surrounding its passage suggests that any party anticipated that the Tribe would exercise jurisdiction over non Indians who purchased land after it lost its trust status." 188 F.3d at 1028. And, citing Section 6 of the Dawes Act, the court noted that some articles of the cession agreement "reflect the parties' assumption that an allottee who received full title at the end of the trust period would become subject to the civil and criminal laws of the State or territory in which he resided." *Id.*

Those same circumstances are present here. Nothing in the text or circumstances surrounding the passage of the 1906 Oneida Provision suggests that any party anticipated the Nation exercising jurisdiction over non-Indians who purchased land on the Oneida Reservation after it lost trust status (and there is no evidence the Nation did so). And, there is no dispute that Indians who received allotments on the Oneida Reservation became subject to state civil and criminal law at the end of the trust period.[17] Moreover, as the Village has explained elsewhere, not only is the 1906 Oneida Provision relevant here, but Congress also passed at least one other act reflecting an assumption that allotments on the Oneida Reservation would become subject to state law. Specifically, Congress passed an act authorizing the conveyance of land to *another*

[16] The court explained that "[t]he primary purpose of the 1892 agreement, which was ratified by the 1894 Act, was to cede the unallotted surplus lands on the Yankton Sioux Reservation to the United States" and rejected the state's claim that the cession agreement *disestablished* the entire reservation. 188 F.3d at 1023, 1028.

[17] In fact, at the time the 1906 Oneida Provision was enacted, Indians who had received allotments on the Oneida Reservation were already subject to state criminal and civil law even if they held their allotments in trust as a result of the Supreme Court's decision in *In re Heff*. Village MSJ Br. at 28 n.14. The Nation claims that decision was overruled by *U.S. v. Nice*, 241 U.S. 591 (1916), but that is irrelevant to the question of Congress's intent in 1906.

government—"the public school authorities of district numbered one of the town of Oneida"—for use as a school for all residents (both Indian and non-Indian). Ex. 67 to July 19, 2018 Kowalkowski Decl. at 992 (ECF No. 89-67). Congress thereby indicated its understanding that the jurisdiction of the State would increase over time—the same type of Congressional intent the court relied on in *Gaffey*. 188 F.3d at 1028.

2. The Supreme Court has not rejected the Village's theory of diminishment/disestablishment.

Indeed, the Nation does not dispute that the state exercised jurisdiction over fee patented land on the Oneida Reservation, but instead argues that this cannot be treated as evidence of Congress's intent. Nation Opp. Br. at 32-33; *see, e.g.*, DSUMF Resp. ¶¶44-46, 49-50, 54, 55, 56, 57, 59, 61, 67, 71, 80. This is plainly wrong, as the Supreme Court and many other courts look to this kind of "jurisdictional history" when evaluating whether diminishment has occurred. Indeed, the Eighth Circuit relied on such evidence in *Gaffey* even though there—as here—the state's exercise of jurisdiction over allotted land that passed out of trust occurred as a function of the Dawes Act. 188 F.3d at 1029; *see also South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 357 (1998) ("The State's assumption of jurisdiction over the territory, almost immediately after the 1894 Act and continuing virtually unchallenged to the present day, further reinforces our holding."); *Hagen v. Utah*, 510 U.S. 399, 421 (1994) ("The State of Utah exercised jurisdiction over the opened lands from the time the reservation was opened . . . ."); *Stockbridge-Munsee Cmty.*, 554 F.3d at 665 ("The land became subject to state taxes, and the Department of the Interior refused to intervene in alcohol-related problems within the original reservation.").

The Nation's argument is based on a false premise. The Nation claims that the consequences of allotment under the Dawes Act are not evidence of diminishment or disestablishment because, according to the Nation, the Supreme Court has held that allotment

under the Dawes Act cannot abolish reservations. Nation Opp. Br. at 32-33. But there is no merit to the Nation's claim, and the Nation repeatedly misstates the holdings of the Supreme Court cases on which it primarily relies—*United States v. Celestine*, 215 U.S. 278 (1909), and *Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351 (1962).[18] For example, the Nation claims that *Celestine* "held that all of the consequences of the [Dawes Act] combined—allotment and citizenship—did not abolish reservations," Nation Opp. Br. at 14, yet as discussed *supra* at 3, *Celestine* did not involve allotments made under the Dawes Act. *Celestine* simply has nothing to say about the question before the court here.

The Nation further claims that in *Seymour* the Supreme Court "rejected the Village's specific theory, that is, that reservation status lapses upon the conveyance of title to non-Indians." Nation Opp. Br. at 14. The holding in *Seymour* depended, however, upon an application of 18 U.S.C. § 1151(a), which was passed in 1948 and "uncouple[d] reservation status from Indian ownership." *Solem v. Bartlett*, 465 U.S. 463, 468 (1984). Prior to the passage of § 1151(a), it was well-established that land lost its reservation status when it passed out of Indian ownership. *See Stockbridge-Munsee Cmty.*, 554 F.3d at 662; *Gaffey*, 188 F.3d at 1022. Thus, while the sale of allotted land on a reservation to a non-Indian *after* 1948 might not affect the reservation status of that land, *Seymour* does not foreclose a finding that allotments sold to non-Indians prior to 1948 ceased to be reservation land. *Cf. Podhradsky*, 606 F.3d at 1007 (8th Cir. 2010) (noting that "[p]rior to the passage of § 1151, land had generally ceased to be Indian country when Indian title was extinguished"). Contrary to the Nation's claims, the Supreme

[18] Indeed, the Nation's mistaken belief that the consequences of the Dawes Act are not evidence of the diminishment/disestablishment of a reservation informs much of the Nation's approach to this case. For example, the Nation disagrees with dozens of the Village's proposed statements of fact on the faulty basis that "the issuance of fee patents under the GAA and other acts implementing the GAA is not relevant to Reservation boundaries" or that "the title of individual parcels within the Reservation is not relevant to Reservation boundaries."

Court has never expressly addressed the question of whether allotments under the Dawes Act lost their reservation status when they passed out of Indian ownership. That is why this issue is "[a]n important pending question." *Cohen's Handbook of Federal Indian Law* § 3.04[3] (2017).

To the extent the Nation is arguing that passage of § 1151(a) is relevant to determining the reservation status of land that passed out of Indian ownership prior to 1948, the Nation is merely rehashing an argument that was made and rejected by the district court in *Wisconsin v. Stockbridge-Munsee Cmty.*, 366 F. Supp. 2d 698 (E.D. Wis. 2004). In that case, the Stockbridge-Munsee argued to the district court, just as the Nation does here, that the passage of § 1151(a) contradicted the theory that transfer of land title altered reservation status.[19] The State explained, however that "a subsequent Congress cannot alter the intent of a prior Congress and, even if it could, § 1151 did not alter the definition of 'reservation,' thereby somehow retroactively recreating a reservation that had disappeared long ago." 366 F. Supp. 2d at 750. The district court agreed with the State and rejected the Stockbridge-Munsee's argument "that the 1948 enactment of the definition of 'Indian country' somehow restored the original reservation boundaries." *Id.* at 769. Rather, the court explained that § 1151(a) simply "clarified the jurisdictional status of land within the boundaries of *existing* reservations by providing that even fee-patented lands within a reservation constitute 'Indian Country.'" *Id.* (emphasis added).

The court also held that "the change in definition of 'Indian country' in 1948 did not and could not alter the 'common understandings' of Congress at the time it passed the Act of 1871 and the Act of 1906." *Id.* In short, the court held that if the land at issue had lost its reservation status by the time § 1151 was enacted, § 1151 did not restore that status. And, in determining

[19] *Stockbridge-Munsee Cmty.*, 366 F. Supp. 2d at 746-47 (defendants argued that § 1151 contradicts plaintiffs' position that a fully-patented reservation cannot remain a reservation and claimed that transfer of title was not paramount).

whether land lost its reservation status, it was not Congress's intent in 1948 that mattered, but the intent of the Congress that passed the acts alleged to have altered the reservation boundaries. What matters here is not the intent of the Congress in 1948, but rather the intent of Congress in 1887 (when the Dawes Act was passed), 1906 (when Congress passed the Oneida Provision), and 1917 (when Congress passed an act authorizing the sale of school land to public school authorities). *Yankton Sioux* Tribe, 522 U.S. at 355 ("[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." (internal quotation marks and citation omitted)). As those Congresses expected allotments that passed out of Indian ownership would cease to be reservation land and would be under state jurisdiction—and, that understanding was reflected in Congressional enactments—this Court should apply the rule in *Gaffey* and hold the Oneida Reservation diminished to the extent allotted land passed out of Indian ownership.

C. The 1906 Oneida Provision Supports a Finding of Diminishment.

Not only is the Village's position supported by the Eighth Circuit's decisions in *Gaffey* and *Podhradsky*, but an application of the *Solem* framework[20] to the 1906 Oneida Provision further demonstrates that the Oneida Reservation has been, at a minimum, diminished. Although the Nation now seeks to minimize the 1906 Oneida Provision—calling it a "minor adjustment of the implementation of the [Dawes Act] on the Oneida Reservation" that is "akin to the Burke act," Nation Opp. Br. at 19-20—its experts sang a different tune. The Nation's experts described the 1906 Oneida Provision as a "remarkable" provision, passed by Congressmen who were not satisfied with the Burke Act. Ex. 9 to July 19 Jacquart Decl. at pp. 108-109 (ECF No. 92-9); DSUMF Resp. ¶ 25. The Nation's effort to now minimize the provision is simply not credible.

1. The language of the 1906 Oneida Provision supports diminishment.

[20] The Village maintains the *Solem* framework should not strictly control the issue. Village MSJ Br. at 18-20; Village Opp. Br. at 15-17.

When Congress enacted the 1906 Oneida Provision, it acted to hasten the end of the Oneida Reservation by making it easier to issue fee patents to Oneida Indians. *Stockbridge-Munsee Cmty.*, 554 F.3d at 664 ("The intent to extinguish what remained of the reservation is born out by the act's provision for allotments in fee simple."). As in its other filings, the Nation focuses on the absence of "statutory hallmarks" from the 1906 Oneida Provision, but that fact is neither relevant nor dispositive. As the Village has explained, the examples of statutory hallmarks provided by the Nation do not make sense in the allotment context. Village Opp. Br. at 15-17. And, there is no requirement that such statutory hallmarks exist in order for disestablishment or diminishment to have occurred. *Id.* at 11-15.

The Nation further notes that the 1906 Oneida Provision referred to the "Oneida Reservation," but there is nothing remarkable about such a reference. The 1906 Stockbridge-Munsee Provision, which disestablished the Stockbridge-Munsee Reservation, also referred to "the Stockbridge and Munsee Reservation." ECF No. 89-28 at VH-GRE000376. And, while the Nation claims that in 1906 there was still tribal land for future allotments and land reserved for school purposes, those facts are not inconsistent with the Village's position: that the Oneida Reservation continued to exist in 1906 but would gradually be diminished over time. Indeed, subsequent events—the sale of the Oneida Boarding School and Congress's authorization of the sale of another school site to local government authorities—fully support the conclusion that the Oneida Reservation subsequently was diminished.

Finally, the Nation suggests that because the 1906 Oneida Provision left the issuance of fee patents to the discretion of the Secretary of the Interior it did not indicate any intent to

diminish or abolish the reservation.[21] Granting the Secretary such discretion is indicative of Congress's intent to make it easier for fee patents to be issue on the Oneida Reservation than on other reservations, however, and by singling out the Oneida Reservation for such legislation Congress was acting to hasten the end of the Oneida Reservation in a way it was not for other reservations allotted under the Dawes Act.

2. The events surrounding the passage of the 1906 Oneida Provision support diminishment.

The Nation does not dispute that the legislative history of the 1906 Oneida Provision indicates it was intended to facilitate the transfer of land out of Indian hands, Nation Opp. Br. at 25, but instead argues the Village is relying on "the false equivalence of title transfer and alteration of reservation boundaries" that the Nation claims the courts have rejected. For the reasons already discussed, the Nation is simply wrong about the holdings of the cases on which it relies. And, the Nation's reliance on 18 U.S.C. § 1151 is simply misplaced. Section 1151 was passed in 1948, but Congress's actions in 1906 must be evaluated based on Congress's understanding of the relationship between Indian ownership and reservation status in 1906. In 1906, there *was* an equivalency between title transfer and alteration of reservation boundaries. To the extent the legislative history indicates intent to transfer land out of Indian hands—the Nation admits it does—the legislative history indicates intent to alter reservation boundaries.

Other than its attempt to get this Court to rely on a 1948 statute when assessing Congress's intent in 1906, the Nation cites little evidence to support its position. It notes there

[21] The Nation cites *Poverty Flats Land & Castle Co. v. United States*, 788 F.2d 676, 678 (10th Cir. 1986), claiming that granting discretion to the Secretary "belies any intent to diminish or abolish the Reservation," but that case did not involve the disestablishment or diminishment of an Indian reservation. It held that granting the Secretary of the Interior complete discretion on how to negotiate the scope of a reservation of minerals in a patent issued for ranch land belied any Congressional intent as to how to interpret the scope of the reservation. Here, it was the act of giving the Secretary complete discretion that signaled Congress's intent.

were references to the "Oneida Reservation" in 1906 reports, but such references are not inconsistent with the idea that the reservation would continue to exist but be diminished over time. Similarly, the Nation argues that the Village's *disestablishment* theory is "flawed" because not all trust allotments on the Oneida Reservation were converted to fee patents and the Secretary of the Interior approved an IRA constitution for the Nation premised upon the existence of a reservation. But, even if that is true, such facts are not inconsistent with the Village's *diminishment* theory—that an Oneida Reservation still existed at the time of the IRA, but it was diminished at least to the extent allotted land had passed out of Indian ownership. That trust allotments remained on the Oneida Reservation merely indicates some reservation land remained, not that all land within the 1838 boundaries remained part of the reservation.[22] *Cf. Podhradsky*, 606 F.3d at 1010 (allotments still held in trust remained reservation).

3. Subsequent History

Finally, the Village has explained in detail why the subsequent history of the Oneida Reservation in the twentieth century indicates Congress intended to at least diminish the reservation. Village MSJ Br. at 29-44. Federal officials across decades acknowledged that fee patented land—and certainly fee patented land that passed out of Indian ownership—was no longer subject to federal jurisdiction; for example, there is no real dispute that such land was subject to state taxes, state civil and criminal jurisdiction, and the federal government refused to intervene in alcohol-related issues on such land. *See, e.g.*, DSUMF Resp. ¶¶44-46, 49-50, 54, 55, 56, 57, 59, 61, 67, 71, 80, 97. *Cf. Stockbridge-Munsee Cmty.*, 554 F.3d at 665.

[22] At one point, the Nation appears to argue that the Village must prove that allotments passed out of Indian ownership as a result of the 1906 Oneida Provision specifically. There is no legal basis for this claim. The allotments in *Gaffey*, for example, did not pass out of Indian ownership as a result of the cession agreement in that case, but instead as a result of the natural operation of the Dawes Act on the Yankton Sioux Reservation.

The Nation asks this Court to ignore this and other subsequent history evidence, claiming that it is not material because "there is no textual indication of a congressional intent to diminish . . . or unequivocal contemporaneous evidence to that effect." Nation Opp. Br. at 28. As already discussed, however, the Nation is wrong when it argues there is no such evidence. And, even if the Nation was correct, contrary to the Nation's suggestion there is no categorical bar to considering subsequent history evidence even in the absence of other types of evidence.[23]

Both sides have submitted historical documents and other evidence on which they rely for purposes of summary judgment. The Village believes the Court should review that evidence, and that an assessment of both sides' evidence can lead to only one reasonable conclusion: the Oneida Reservation has at least been diminished. To assist the Court in its review of this record, however, the Village makes the following observations in response to the Nation's opposition:

First, the Nation argues that it has continually been under federal jurisdiction. Nation Opp. Br. at 29. This fact is disputed—for example, in 1934 the Commissioner of Indian Affiars wrote that the Oneidas were "living practically unprotected and not in any real way under Federal jurisdiction."[24] Even if true, however, that the Nation was still under federal jurisdiction says nothing about the status of the Oneida Reservation. During the period in question a tribe could receive certain benefits from the federal government without the existence of a reservation. *See Wisconsin v. Stockbridge-Munsee Cmty.*, 366 F. Supp. 2d 698, 725-26 (E.D. Wis. 2004) ("During this time period, the BIA did not require the presence of a reservation in order for it to assert jurisdiction over Indians and provide services to them."). And, although the Nation notes the federal government was responsible for paying members of the Nation an annuity, Nation

[23] Although the Supreme Court in *Nebraska v. Parker* wrote that it had "never relied solely on [subsequent history] to find diminishment," 136 S. Ct. 1072, 1081 (2016), it did not foreclose reliance on this factor and indeed consulted it even in the absence of the other two factors.

[24] Ex. 102 to July 19 Kowalkowski Decl. (ECF No. 89-102).

Opp. Br. at 23 n.20, the annuity was paid under a separate 1794 treaty and due regardless of whether a reservation existed. *See, e.g.* Ex. 9 to July 19 Jacquart Decl. at 25-26 (ECF No. 92-9).

Second, it is inappropriate for the Nation to rely on descriptions of the record by its experts if the underlying documents on which the expert relies have not been submitted as exhibits to either parties' summary judgment filings. For example, the Nation claims there is a "mixed record"[25] here by citing to the report of one of its proposed experts, Dr. Edmunds, and quoting Dr. Edmunds's conclusions from his review of "hundreds of documents." It is not clear that the Nation has placed all of the documents on which Dr. Edmunds relied for his report in the record,[26] however, and Dr. Edmunds's descriptions of such documents are inadmissible hearsay. This Court should reject any assertion that there is a "mixed record" based on the experts' characterizations of the documentary record, but should instead review the record itself.

Further, Dr. Edmunds has acknowledged that his methodology essentially involved reviewing documents and looking for references to the "Oneida Reservation" and treating such references as acknowledgements that the Oneida Reservation as defined by its 1838 boundaries continued to exist. ECF No. 92-9 at 156-157. For example, Dr. Edmunds testified he treated a reference to the "Oneida Reservation" in a 1930 statistical table as evidence of the Oneida Reservation's continued existence. *Id.* at 158-159; Ex. 6 to Sept. 28 Kowalkowski Decl. The

[25] The Nation claims that the Village's expert, Dr. Emily Greenwald testified there was a "mixed record" on subsequent history, but omits Dr. Greenwald's testimony that the historical record makes "a strong case that the reservation boundaries cease to exist." ECF No. 103-12 at p. 24.

[26] On July 20, 2018, counsel for the Nation submitted a letter to the Court requesting permission to file the materials cited by its expert witnesses outside of the ECF filing process. Ex. 7 to Sept. 28 Kowalkowski Decl. On July 24, 2018, counsel for the Village wrote to the Court requesting similar permission. ECF No. 97. In a subsequent call with the Clerk's office, counsel for the Village was informed that both requests would be denied and that all filings should occur on the ECF system. If the Nation has been allowed to submit all documents on which its experts relied via some other means, the Village requests the ability to do the same. Otherwise, this Court should evaluate only the evidence the parties have placed before it and should not rely on the Nation's experts' descriptions of documents that are not part of the record.

document included a reference to the "Stockbridge Reservation" as well, despite that reservation having been disestablished as of 1906. Dr. Edmunds admitted that under his methodology the reference to the Stockbridge Reservation was an acknowledgement by the federal government of the continued existence of that reservation, thus showing his methodology was not consistent with the approach to disestablishment taken by the Seventh Circuit in *Stockbridge Munsee Cmty*. Simply put, Dr. Edmunds made no attempt to distinguish between "considered jurisdictional statements" and mere references to a known location. *See* Dec. 15, 2017 Greenwald Report at 25-31 (Dkt. 89-154) (explaining "Edmunds gives equal weight to documents with very different levels of detail, claims contradictions in documents where they do not exist, and interprets documents as being in support of his argument that are, at best, ambiguous").

Indeed, in assessing the record this Court must draw distinctions between documents that provide a "considered jurisdictional statement" regarding the status of land on the Oneida Reservation and documents that use the terms "reservation" or the "Oneida Reservation" merely to refer to a known geographic area.[27] The Village respectfully submits that the documents it has identified discussing the status of land on the Oneida Reservation are precisely the type of considered statements that courts treat as evidence of diminishment or disestablishment. *Cf. Osage Nation*, 597 F.3d at 1126 ("After enactment, federal officials responsible for the Osage lands repeatedly referred to the area as a 'former reservation' under state jurisdiction."). The Nation, on the other hand, tries to muddy the waters by using an approach where it relies on any reference to the "reservation" or the "Oneida Reservation" as proof that the Oneida Reservation

[27] *Cf. Gaffey*, 188 F.3d at 1029 n.11 ("The use of the term 'Yankton Sioux Reservation' in such documents, without more, cannot be said to be a considered jurisdictional statement regarding the specific status of the remaining Indian lands."); *Osage Nation v. Oklahoma ex rel. Oklahoma Tax Commission*, 597 F. Supp. 2d 1250, 1259 (N.D. Okl. 2009) ("Although the Act mentions the 'Osage Indian Reservation,' as do some subsequent enactments, it plainly does so only to describe a known geographic area.").

continued to exist in an undiminished form or to claim the documents relied on by the Village are "ambiguous." *See, e.g.*, Nation Opp. Br. at 33-36. Again, statistical tables are a good example, as the Nation repeatedly relies on a mere reference to the Oneida Reservation in such tables, even when those tables also refer to a Stockbridge-Munsee Reservation years after that reservation was disestablished (thus showing the tables are not a reliable indicator of reservation status). *See, e.g.* Exs. 21-23, 35 to Sept. 5, 2018 Jacquart Decl. (ECF No. 105).

Third, the Nation repeatedly assumes with no basis that a reference to the "reservation" or the "Oneida Reservation" in a document necessarily is a reference to the entire 65,400-acre area set aside in the Treaty of 1838, as opposed to a reference to a diminished reservation. To the contrary, that federal government officials, especially after implementation of the IRA for the Oneida, referred to an "Oneida Reservation" is consistent with the conclusion that a *diminished* reservation continued to exist. *Cf.* ECF No. 89-154 (noting that many documents cited by Edmunds used phrase "Oneida Reservation" to refer to small amount of tribally owned land).

Fourth, this Court should reject the Nation's attempt to discount the subsequent history of the Oneida Reservation by claiming there is no evidence the changes on the reservation occurred as a result of the 1906 Oneida Provision (as opposed to as a result of allotment under the Dawes Act). The Nation's attempt to require the Village to specifically tie its subsequent history evidence to the 1906 Oneida Provision has no basis in law. In *Gaffey*, the court relied on changes to the reservation that occurred as a result of allotment under the Dawes Act, and the passage of allotted lands out of trust status and Indian ownership, without requiring that those changes be specifically tied to any other statute. 188 F.3d at 1029.

Fifth, the demographic data provided by the Nation, far from showing a "small influx of non-Indian settlers," illustrates that after the 1906 Oneida Provision the non-Indian population in

Hobart increased by over 760% while the Indian population was almost halved. The population disparity is even greater today than it was in 1930. *Cf.* DSUMF Resp. ¶39 and ¶127. This is not a case in which the population of the disputed area is evenly divided between Indian and non-Indian residents. *Cf. Solem*, 465 U.S. at 480.

Sixth, the Nation does not dispute the massive changes in land tenure or that land that passed into fee status was taxable and subject to state civil and criminal laws. Nation Opp. Br. at 32. Instead, the Nation tries to write these facts off as a result of allotment and the Burke Act and not attributable to the 1906 Oneida Provision. As discussed above, that point is irrelevant. And, the Nation's statement that courts have held that change in title alone cannot diminish a reservation is irrelevant, to the extent those cases are applying § 1151. *See supra* at 17-18.

Seventh, that the federal government approved a constitution for the Nation does not mean the original reservation boundaries remained intact. The Nation's constitution limits its jurisdiction to the "present confines" of the reservation and those confines in 1936 would have been diminished, not the original reservation boundaries.[28] Village Opp. Br. at 32-34.

Eighth, much of the evidence on which the Nation relies, including state attorney general opinions from the 1980's, is too far removed temporally from the allotment of the reservation and the 1906 Act "to shed much light on 1906 Congressional intent." *Osage Nation*, 597 F.3d at 1126. The Nation's reliance on its recent attempts to expand its jurisdiction, for example, cannot be allowed to override the overwhelming evidence from the early part of the twentieth century.

[28] The Nation appears to claim the Village should be barred from challenging the status of the reservation after the IRA, but the federal government made no actual determination that a 65,400-acre reservation for the Nation existed at the time of the IRA's passage. What the federal government did do is require the Nation to amend its constitution to limit its jurisdiction to the "present confines" of the reservation.

III. THE VILLAGE CAN APPLY THE SPECIAL EVENT ORDINANCE TO THE BIG APPLE FEST EVEN IF THE EVENT WAS IN INDIAN COUNTRY.

A. This Court Should Balance the State, Federal, and Tribal Interests and the Nation Should Bear the Burden.

As the Village explained in its opening brief, application of its Special Event Ordinance to the Nation is appropriate even if the Oneida Reservation has not been diminished. For a number of reasons--including that this case implicates this Court's decision in *Oneida Tribe of Indians of Wis. v. Village of Hobart, Wis.*, 542 F. Supp. 2d 908 (E.D. Wis. 2008) and the Supreme Court's decisions in *City of Sherrill, N.Y. v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005), *Brendale v. Confederated Tribes and Bands of Yakima Nation*, 492 U.S. 408 (1989), and *Strate v. A-1 Contractors*, 520 U.S. 438 (1997)—it is the Village's position that the "exceptional circumstances" test should not apply here. Village MSJ Br. at 46-50. At most, the Village believes the "balancing test" should apply and the Nation should bear the burden as the plaintiff on that issue. *Cf. Yavapai-Prescott Indian Tribe v. Scott*, 117 F.3d 1107, 1112 (9th Cir. 1997) (burden is on plaintiff tribe).

The Nation claims that law of the case precludes this Court from revisiting this issue, but in this Court's November 2, 2017 order, this Court stated it had only "preliminarily determin[ed] the burdens of proof of the respective parties" and that the Village was "free to raise the issue when briefing the anticipated motion for summary judgment." ECF No. 68. A "preliminary" determination is not subject to the law of the case doctrine. *Cf. In re Olde Prairie Block Owner, LLC*, 460 B.R. 500, 507 (N.D. Ill. 2011) ("Because the oral findings were avowedly preliminary, they were not a 'ruling' for purposes of the law-of-the-case doctrine."). And, the Village respectfully submits it would be inequitable to apply the doctrine here, where the Court expressly invited the Village to brief the burden of proof issue on summary judgment.

B. Exceptional Circumstances Exist Due to the Land-Use Interests Protected by the Special Event Ordinance.

Ultimately, the Court need not even resolve this issue. Even if this Court determines an "exceptional circumstances" test should apply and the Village bears the burden on that question, the "exceptional circumstances" test still calls for a balancing of state, tribal, and federal interests. Dkt. 46 at 13 ("[T]he Supreme Court itself has applied the interest-balancing test to determine whether a State may assert jurisdiction over the on-reservation activities of tribal members in 'exceptional circumstances."). The Village has identified exceptional circumstances.

1. Land Use

First, the Special Event Ordinance protects the Village's interest in regulating land use within its borders, an interest that the Supreme Court would likely consider "exceptional." The Special Event Ordinance only applies to temporary events or activities "that interfere[] with or differ[] from the normal and ordinary use of the property or adjacent public or private property" and the purpose of the ordinance is "to address potential impacts on the general public" of such events, "including without limitation noise, light, dust, traffic, parking, and other public health safety and welfare concerns" and "to promote the economic welfare and general prosperity of the community by safeguarding and preserving property values by addressing potential impacts" of such events. As with other types of land use regulation, "the issue is ultimately one of whether the proposed land use is—'like a pig in the parlor instead of the barnyard'—'merely a right thing in the wrong place.'" *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408, 434 (1989) (Stevens, J.). In short, the Special Event Ordinance is consistent with the Village's interest in defining the Village's essential character—indisputably "the quintessential

state activity" and one of "the most important functions performed by local government"[29]–and ensuring that a temporary event will not unreasonably impact others in the community.

The Nation does not directly grapple with the fact the Special Event Ordinance protects these interests. Instead, the Nation creates a strawman by claiming that the Village "asserts that its Ordinance is a zoning regulation of the Nation's land" and proceeds to argue that the Special Event Ordinance is not a zoning ordinance. Nation Opp. Br. at 47-49. Contrary to the Nation's characterization of the Village's position, the Village does not claim that the Special Event Ordinance is a zoning ordinance. The Village does submit, however, that the Special Event Ordinance is a land-use ordinance that protects similar interests to those protected by zoning ordinances and which the Supreme Court has indicated would rise to the level of "exceptional circumstances." An ordinance does not have to be a zoning ordinance to implicate a locality's overriding interest in ensuring that a land use does not unreasonably impact others in the community. *Brendale*, 492 U.S. at 433-34 (Stevens, J.) (comparing zoning and nuisance laws).

2. Roads

Further, this case also implicates the Village's interest in controlling public roads to ensure that residents and/or emergency services are not unreasonably impacted by special events. Notably, the Nation does not even attempt to argue this interest does not rise to the level of an exceptional interest, but instead takes the position that its closure of N. Overland Road was authorized by a permit it received from the Wisconsin Department of Transportation ("WDOT"). There is no evidence supporting the Nation's claim. The Nation only points to the fact that its application to the WDOT and Brown County included a map that identified its planned closures of N. Overland Road, but the permit on its face does not mention N. Overland Road or authorize closures of that road. The Nation identifies no evidence that State, County, or Village officials

[29] *See* Village MSJ Br. at 49 n.22.

understood the permit issued as authorizing the closure of Village roads. And, despite representing to the WDOT that the Nation would work with the Village to close N. Overland Road, DSUMF Resp. ¶30, the Nation never requested the Village's permission to do so.[30]

It is also impossible to reconcile the Nation's claim that the Special Event Ordinance is a "sweeping interference with the Nation's right of self-government" with the fact that the Nation applied to other instrumentalities of the state for permits associated with the event. The Nation knew it had no right to close a state or county road without permission; it similarly should not have the right to close a Village road without permission of the Village.

C. The Nation's Interests Do Not Override the Village's Exceptional Interests.

Finally, the Nation still has not identified a federal statute or regulatory scheme applicable to the 2016 Big Apple Fest that would preempt the Village's ordinance. And, although the Nation identifies some concerns it has with respect to the conditions it believes it would have to meet in order to obtain a permit, it does not explain how those conditions override the exceptional circumstances identified by the Village. Nor can it even show such conditions were imposed on it, as it never applied for a permit from the Village. At a minimum, and as the Village explains elsewhere, the Nation should have at least applied for a permit from the Village and, if the Village imposed conditions on the conduct of the Big Apple Fest that the Nation believed did not respect its rights, then a considered judgment could be made about whether the Nation's right to self-governance was truly threatened. Village Opp. Br. at 39-40.

CONCLUSION

For the above reasons, the Court should grant the Village's motion for summary judgment.

[30] The Nation also included the Village's name on the application to WDOT and the County without the Village's permission.

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Respectfully submitted,

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