IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN
GREEN BAY DIVISION

Oneida Nation,

Plaintiff,

v. Case No. 16-CV-1217

Village of Hobart, Wisconsin,

Defendant.

AMICUS CURIAE BRIEF OF THE UNITED STATES IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

The Village of Hobart, Wisconsin ("Village"), seeking to regulate the Oneida Nation ("Nation"), asserts: (1) the Treaty of February 3, 1838, Art. 2, 7 Stat. 566 ("1838 Treaty") between the Nation and the United States—which "reserved [a tract of land] to the said Indians to be held as other Indian lands are held"—did not establish a reservation for the Nation as a whole; and (2) even if the 1838 Treaty did establish a Reservation, it has been diminished. Controlling law, the language of the 1838 Treaty, and the historical record demonstrate that the Reservation was established for the Nation, and that it has never been diminished. For the reasons set forth below, *Amicus Curiae* the United States respectfully urges the Court to grant the Nation's Motion for Summary Judgment and deny the Village's Motion.

BACKGROUND

I. The Oneida Nation and the Oneida Reservation in Wisconsin

In the wake of the War of 1812, the United States instituted a policy of encouraging tribes to leave their ancestral lands in the east in exchange for land in less populated areas to the west. *See* Doc. 92-2 at 23-26 (Frederick E. Hoxie, Ph.D., *A History of Relations Between the Oneida Nation and the United States of America, 1776-1934* ("Hoxie") at 20-23). This change was codified through "removal" treaties. *Id.* at 23-25 (Hoxie at 20-22). The Cherokee and other tribes in the southeastern United States may be the most well-known parties to such treaties, but northeastern tribes, such as a portion of the Oneida in New York, also entered into such treaties. *Id.* at 25-26 (Hoxie at 22-23).

In the 1820s, Oneida communities began to move west to Wisconsin, where they settled to the west of Green Bay, Wisconsin on the Menominee Reservation. *Id.* at 31 (Hoxie at 28); *see also* Doc. 92-5 at 8-9 (R. David Edmunds, Ph.D., *The Oneida Reservation in Wisconsin—Its*

Land, Its People, and Its Governance, 1838-1938 ("Edmunds") at 5-6) (citing Reginald Horsman, *The Origins of Oneida Removal to Wisconsin* in THE ONEIDA INDIAN JOURNEY 64-65 (Hauptman & McLester eds. 1999)). As the Oneida settlers grew in number, the United States entered into a Treaty with the Menominee Tribe to acquire a 500,000-acre tract to serve as "a home for the several tribes of the New York Indians." Treaty of Feb. 8, 1831, 7 Stat. 342, 343 (1831). In 1838, two communities of the Oneida joined together to enter into a treaty with the United States that "reserved to the said Indians to be held as other Indians lands are held a tract of land containing one hundred (100) acres, for each individual, and the lines to be run as to include all of their settlements and improvements in the vicinity of Green Bay." 1838 Treaty, art. 2, 7 Stat. 566-67 (1838). The United States completed the survey in December 1838 and depicted a single tract constituting approximately 65,400 acres, termed the "Oneida Reservation." Doc. 92-14 at 2-3 (John Suydam Survey Map (Dec. 1838) at 1-2).

II. Dawes Allotment Act

The General Allotment Act of 1887, 24 Stat. 388-91 (Feb. 8, 1887) ("Dawes Act"), granted the President of the United States general authority to allot Indian reservations and to hold allotted land in trust for the benefit of an individual allottee for twenty-five years, after which such allotted lands would be fee-patented to the allottee and "discharged of said trust and free of all charge or incumbrance whatsoever." 24 Stat. at 388-89.

The Dawes Act further authorized the Secretary of the Interior to negotiate with Indian tribes for "the purchase and release" of "such portions of [their] reservations not allotted as such tribe shall, from time to time, consent to sell," subject to ratification by Congress, with the proceeds from those sales to be placed in a Treasury Department account for the benefit of such Indian tribe. 24 Stat. at 389-90.

In 1887, the Commissioner of Indian Affairs recommended to the Secretary that the "the President be asked to authorize allotments in severalty to be made to the Indians on the Oneida Reservation, in Wisconsin, under the [General Allotment Act, 24 Stat. 388]." Doc. 92-16 at 7-8 (Letter from Commissioner Atkins to Secretary (Sept. 16, 1887) at 4-5). Most, but not all, of the Oneida Reservation was allotted to individual Oneida members pursuant to the Dawes Act in the late nineteenth century. Doc. 92-5 at 29-30 (Edmunds at 26-27); *see also* Doc. 92-16 at 7-8 (Letter from Commissioner Atkins to Secretary of the Interior (Sept. 16, 1887) at 4-5). The remaining lands were reserved as Tribal trust lands for a school and other purposes. Doc. 92-20 at 4 (1900 Annual Report at 617). Despite the fact that some land remained unallotted, the Secretary did not negotiate to purchase any Oneida lands for non-Indian settlement under the Dawes Act, nor did Congress enact legislation opening any portion of the Oneida Reservation to non-Indian settlement. *Id.*

III. Burke Act

In 1906, Congress amended the Dawes Act. *See* 34 Stat. 182, 182-83 (May 8, 1906) ("Burke Act"). The Burke Act authorized the Secretary, "in his discretion," to issue fee patents to allottees after the Secretary was "satisfied that any Indian allottee is competent and capable of managing his or her affairs." *Id.* at 183. This provision granted the Secretary authority to issue fee patents to "competent" allottees prior to the expiration of the twenty-five year trust period established by the Dawes Act. *Oneida Tribe of Indians of Wis. v. Vill. of Hobart*, 542 F. Supp. 2d 908, 911 (E.D. Wis. 2008). The Burke Act also provided that citizenship would be conferred, and that allotted lands would be subject to state and local jurisdiction, only after allottees received their fee patents. *Id.* at 182.

IV. 1906 Appropriations Act and the 1906 Oneida Provision

Shortly after enacting the Burke Act, Congress enacted an Appropriations Act "for the Indian Department," containing a wide array of provisions applying to many different tribes. *See* Act of June 21, 1906, 34 Stat. 325, 325-384 ("1906 Appropriations Act"). The 1906 Appropriations Act contained Nation-specific provisions that authorized the Secretary, "in his discretion," to issue fee patents to fifty-five specifically named Oneida allottees. *Id.* at 380-81. The Secretary was further

> authorized, in his discretion, to issue a patent in fee to any Indian of the Oneida Reservation in Wisconsin for the lands heretofore allotted to 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.

Id. at 381 ("1906 Oneida Provision").

V. Implementation of the Burke Act and the 1906 Oneida Provision on the Oneida Reservation

On the Oneida Reservation, Superintendent Joseph Hart was responsible for implementing the Burke Act and the 1906 Oneida Provision. Doc. 92-2 at 104 (Hoxie at 101). Mr. Hart engaged in a "cautious approach" when considering whether to issue patents under the Burke Act, concerned about the responsibilities he might incur to ensure that the property was properly cared for by the allottee after the lands were fee-patented, or that he might be responsible that the money earned from the sale of fee-patented lands would be properly managed. *Id.* Mr. Hart often recommended that an allottee only receive a fee patent for a portion, and not the entirety, of an allotment. *Id.* In some instances, Mr. Hart denied the request for a fee patent altogether, "incur[ring] the enmity" of allottees in the process. *Id.* at 106 (Hoxie at 103). Mr. Hart's approach to implementing the Burke Act was unsatisfactory to some Oneida tribal members who sought fee patents to their allotments. *Id.* at 106 (Hoxie at 103). In response

to pressure from those members, Congress enacted the 1906 Oneida Provision. *Id.* at 105-06 (Hoxie at 102-03).

Many of the allotments on the Oneida Reservation, as on other reservations throughout the country, began to lose their trust status after enactment of the Burke Act in 1906. By 1912, there remained approximately 450 Oneida allotments held in trust, constituting approximately 20,000 acres, and another 11,000 acres continued to be held in fee simple by Oneidas. Doc. 105-19 at 3-4 (Letter from Superintendent Hart to Commissioner of Indian Affairs (Mar. 1912) at 2-3). Nevertheless, the United States continued to extend the trust period for some of the Oneida allotments. *See, e.g.*, Doc. 92-45 at 2-3 (Executive Order of 4 May 1918 at 1-2) (extending trust period of allotments "on the Oneida Reservation in Wisconsin" for nine years). And, the 1919 Annual Report for the Commission of Indian Affairs continued to state that the Reservation encompassed 65,466 acres, an area almost identical to the acreage encompassed in the reservation when it first was established in 1838. Doc. 92-70 at 2 (1919 Annual Report at 93).

By the 1930s, approximately 21 allotments remained in trust for individual Oneidas, Doc. 89-153 at 27 (Emily Greenwald, Ph.D., *History of the Oneida Land Base, 1889-1936* at 22). In 1937, 85 acres remained in trust for the Nation, but that amount increased to approximately 1,300 acres by 1939. Doc. 92-5 at 127 (Edmunds at 124). During this period, at least "2,308 acres were owned by tribal members in fee." *Oneida Tribe of Indians of Wis*, 542 F. Supp. 2d at 912. Beginning in the late 1930s, the United States began reacquiring land in trust for the Nation. *Id.* ("As of 1941, according to the Tribe's Division of Land Management, 1,694 acres of Reservation land were held in trust for the Tribe, another 713 acres were held in trust for individual tribal members").

ARGUMENT

I. The 1838 Treaty Established the Oneida Reservation for the Nation

While the Village's primary argument is that the Oneida Reservation was disestablished or, at a minimum, diminished, it also maintains in the alternative that the 1838 Treaty never actually created a reservation for the Oneida Nation. Doc. 102 at 11 (Village Opp. 4). This alternative argument is foreclosed by the plain language of the 1838 Treaty, which is confirmed by the historical context of the Treaty and post-Treaty understandings.

Federal officials negotiated the Treaty with the "chiefs and representatives" of the "First Christian and Orchard Parties of the Oneida Indians residing at Green Bay." Doc. 92-13 (1838 Treaty, 7 Stat. 566 (May 17, 1838)). In Article 1 of the 1838 Treaty, these two communities of Oneida Indians ceded lands set aside for them in prior treaties with the Menominee. Treaty with the Menominees of February 8, 1831, art. 1, 7 Stat. 342; Treaty with the Menominees of October 27, 1832, art. 2, 7 Stat. 405. Article 2 of the 1838 Treaty "reserved . . . a tract of land" that was "to be held as other Indian lands are held" for these two communities of Oneida—referencing them as "the said Indians":

> From the foregoing cession there shall be 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, and the lines of which shall be so run as to include all their settlements and improvements in the vicinity of Green Bay.

Doc. 92-13 (Feb. 3, 1838 Treaty with the Oneida, art. 1, 7 Stat. 566) (emphasis added). The 1838 Treaty, therefore, set aside a Reservation for the Nation.

A. The Prior Treaties with the Menominee Tribe Confirm that the 1838 Treaty Intended to Set Aside a Reservation for the Nation

The Village seizes on language in the 1838 Treaty describing the tract of land as "containing one hundred (100) acres, for each individual" to argue that the Treaty provided for only individual allotments and not an Indian reservation. *See* Doc. 102 at 13 (Village Opp. 6).

The Village asserts that this understanding is supported by post-Treaty negotiations between some tribal members, who soon after the Treaty was ratified (but before the land was surveyed) sought to exchange individual allotments within the reservation for land further west. *See id.* at 14 (Village Opp. 7). These arguments fail to account for the full history of the Oneida Reservation, which was created out of territory ceded from the Menominee's Reservation. *See Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999) (declaring that in interpreting treaties, courts look to the "larger context that frames the Treaty," including "the history of the treaty, the negotiations, and the practical construction adopted by the parties."). To understand the genesis of the Oneida Reservation, it is important to understand the earlier treaties with the Menominee.

After their relocation from New York, the Oneida were originally settled on lands previously reserved for the Menominee. The February 8, 1831 Treaty with the Menominee Tribe contemplated that a portion of the lands reserved in that Treaty would be ceded to the United States and later "set apart as a home to the several tribes of the New York Indians" upon their relocation. Doc. 92-10 (Feb. 8, 1831 Treaty with the Menominee, art. 1, 7 Stat. 342). The tract set aside for the Menominee Tribe is described as a "reservation." *Id*. (7 Stat. 342, art. 4). In turn, the 1831 Treaty further described the land ceded to the "New York Indians" as lands "to be held by those tribes, under such tenure as the Menomonee Indians now hold their lands, subject to such regulations and alteration of tenure as Congress and the President of the United States shall, from time to time, think proper to adopt." *Id*. Because the lands for a number of the New York tribes were to be carved out from the Menominee lands, the Treaty specified a method for

allocating available lands: "so as not to assign to any tribe a greater number of acres than may be equal to one hundred for each soul actually settled upon the lands . . . ." *Id*. (7 Stat. 342, art. 1).[1]

Set against this backdrop, the reference in the 1838 Treaty to 100 acres for each individual simply constituted a mechanism for establishing the size of the Oneida Reservation and the amount of land needed from the Menominee-ceded tract, rather than an indication that the parties did not intend to create a reservation. This understanding is confirmed by the language in the 1831 Treaty that references 100 acres per "soul" in setting a maximum reservation area for any particular tribe. Doc. 92-10 (Feb. 8, 1831 Treaty with the Menominee, art. 1, 7 Stat. 342). Moreover, the language in the 1831 Treaty that specifies that the New York Indian lands are to be "set apart as a home" and subject to "regulation[]" by the United States is consistent with the understanding that a reservation refers to "land set aside under federal protection for the residence or use of tribal Indians, regardless of origin." COHEN'S HANDBOOK OF FEDERAL INDIAN LAW ¶ 3.04[2][c][ii], at 190 (Nell Jessup Newton ed., 2012); *see also United States v. McGowan*, 302 U.S. 535, 539 (1938) (an Indian reservation consists of land "validly set apart for the use of Indians as such, under the superintendence of the Government," which "retains title to the lands").[2]

The Nation's 1838 Treaty also states that the Oneida tract was to be held "as other Indian lands are held." Doc. 92-13 (1838 Treaty, art. 1). Here, that phrase has a precursor in the 1831 Treaty, which provided that the land for the New York Indians was "to be held by those tribes,

[1] Two subsequent treaties with the Menominee extended a deadline given to the Oneida and other New York tribes to relocate to Wisconsin. Doc. 92-11 (Feb. 17, 1831 Treaty with the Menominee, art. 2, 7 Stat. 346); Doc. 92-12 (Oct. 27, 1832 Treaty with the Menominee, art. 2, 7 Stat. 405). The 1832 Menominee treaty adjusted the boundaries of that Reservation but otherwise confirmed the terms of the February 8, 1831 Treaty. *Id*. (7 Stat. 405).

[2] *See also United States v. John*, 437 U.S. 634, 648-49 (1978) (inquiring whether the land is "validly set apart for the use of the Indians as such, under the superintendence of the Government" in analyzing whether it is Indian country).

under such tenure as the Menominee Indians now hold their lands." Doc. 92-10 (Feb. 8, 1831 Treaty with the Menominee, art. 1, 7 Stat. 342). The Menominee lands were held in trust as a reservation. *Id.* at art. 4 (7 Stat. 342, art. 4) (setting apart land as a "reservation" for the Menominee Indians). Thus, the 1838 Treaty with the Nation implemented the direction that the Oneida lands should be held the same way—in trust as a reservation for the Nation. *See Oneida Tribe of Indians of Wis. v. United States*, 165 Ct. Cl. 487, 491 (1964) (interpreting "as other Indian lands are held" in 1838 Treaty as "equating the Oneidas' tract with that of other Indian *reservations*." (emphasis in original)).

Similar variations of the "as Indian lands are held" language were employed in contemporaneous treaties to mean that the United States would hold the land in trust as a reservation for the tribe.[3] COHEN'S HANDBOOK ¶ 15.04[3][a], at 1007 ("[P]hrases in treaty grants such as 'use and occupancy' and 'as Indian lands are held' are interpreted as vesting recognized and enforceable property rights in the tribes. These peculiarities of phrasing are read simply to state that the United States will hold title in trust for the tribe."). For example, in *Menominee Tribe v. United States*, 391 U.S. 404 (1968), the Supreme Court construed the phrase "for a home, to be held as Indian lands are held," in the Menominee's subsequent 1854 Treaty of Wolf River. There, the Court acknowledged that the Tribe "was granted a reservation" with the right

[3] *See, e.g.*, Treaty with the Winnebago, 7 Stat. 370 (Sept. 15, 1832); Treaty with the Chippewa, 7 Stat. 431 (Sept. 26, 1833). Variations of the phrase also appears in modern Indian statutes, such as the Michigan Indian Land Claims Commission Act (MILCSA), Pub. L. No. 105-143, § 107 (1997), 111 Stat. 2652 (providing that any land acquired with funds from the land trust established under the Act "shall be held as Indian lands are held"). Recently, a district court in Michigan rejected a tribe's argument that the MILCSA lands "held as Indian lands are held" would also constitute "Indian lands" under the Indian Gaming Regulatory Act. *Bay Mills Indian Cmty. v. Snyder*, Op. and Order Granting Defendant Snyder's Mot. for S.J., Case No. 11-cv-00729 (W.D. Mich. Sept. 28, 2018). In so doing, the court expressly did not rely on the understanding of that term from 1800s-era treaties such as the 1838 Treaty, but on the legislative history of MILCSA. *See* Op. at 18-22.

to hunt and fish free from state control and regulation. *Id*. at 405-06. Separately, in *State of Minnesota v. Hitchcock*, 185 U.S. 373 (1902), the Supreme Court took it as undisputed that the Red Lake Indian Reservation, which was initially created by a treaty providing for lands "to be held as Indian lands are held," was held by the United States as trustee for the tribe. *Id.* at 398. The Supreme Court has repeatedly rejected the sort of formalistic approach to what constitutes a reservation that the Village advocates. *See*, *e.g.*, *Oklahoma Tax Comm'n v. Citizen Band*, 498 U.S. 505, 511 (1991) (refusing to distinguish between reservation and tribal trust land for jurisdictional purposes).[4]

B. Even if the 1838 Treaty Intended to Allot the Oneida Reservation, the 1838 Treaty Would Have Still Established a Reservation

The Village points to communications between some members of the Nation and the United States (in particular Commissioner of Indian Affairs Hartley Crawford) immediately after the 1838 Treaty as indicating some members of the Nation thought the Treaty created individual allotments. *See* Doc. 102 at 14 (Village Opp. 7). This fact has no bearing on the reserved status of the land. For example, in *Nebraska v. Parker*, 136 S. Ct. 1072 (2016), a unanimous Supreme Court affirmed the treaty boundaries of the Omaha Reservation, which was created in part by an 1865 Treaty providing that tenure in common would be abolished, and that land would be allotted to Omaha members. *See* 14 Stat. 667, 668; *Smith v. Parker*, 996 F. Supp. 2d 815, 822 (D. Neb. 2014). Allotments to individuals did not alter the status of the Omaha Reservation, nor does it alter the set-aside of the Oneida Reservation. *See also* Treaty with the S'Klallam of 1855, art. 7, 12 Stat. 933 (1855) (treaty establishing reservation authorized the allotment of such

[4] *See also Oklahoma Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 128 (1993) ("Absent explicit congressional direction to the contrary, we presume against a State's having the jurisdiction to tax within Indian country, whether the particular territory consists of a formal or informal reservation, allotted lands, or depending Indian communities.").

reservation and referenced a similar provision in the Omaha treaty). Even accepting the Village's argument that the parties intended for the creation of multiple tracts, that understanding is not inconsistent with establishment of a single "reservation." *See United States v. Celestine*, 215 U.S. 278, 285 (1909) (explaining that a reservation is used in "land law to describe any body of land, large or small, which Congress has reserved from sale for any purpose for which Congress has authority to provide" and "*all tracts* included within it remain *a part of the reservation* until separated therefrom by Congress") (emphases added).

Moreover, the weight of the post-Treaty evidence in this case indicates that the parties understood that a reservation for the Nation had been established. For example, Commissioner Crawford reported in February 1839 that a census had been done showing the "entire reservation at 65,400 acres" and that the survey was completed "agreeably and satisfactorily to the Oneidas." Doc. 92-60 (Letter from Commissioner Crawford to Hon J. R. Poinsett, Secretary of War (Feb. 7, 1839) (explaining that 100-acre formulation was intended to establish the overall size of the reservation); *see also* Doc. 92-14 at 2-3 (John Suydam Survey Map (Dec. 1838) at 1-2) (detailing results of survey showing a single tract for Oneida Reservation).

In sum, the plain language of the 1838 Treaty, informed by the historical context leading up to the Treaty as well as the weight of post-1838 references, demonstrate that a reservation was set aside for the Nation.

II. Congress Did Not Diminish or Disestablish the Oneida Reservation

Only Congress can change the boundaries of an Indian reservation, and they must do so in unequivocal and express terms. *Solem v. Bartlett*, 465 U.S. 463, 470 (1984). There is no statute reflecting any congressional intent whatsoever to diminish or disestablish the Oneida Reservation, and thus the Court should reject the Village's arguments and conclude that the Reservation has remained intact since it was first set aside in 1838. "Once a block of land is set

aside for an Indian reservation and *no matter what happens to title* of individual plots within the area, *the entire block retains its reservation* status until Congress explicitly indicates otherwise." *Id.* (emphasis added). There is a presumption against diminishment, *id.* at 481, and the general rule that "legal ambiguities are resolved to the benefit of the Indians" is given "the broadest possible scope" in diminishment cases, *DeCoteau v. Dist. Cty. Court for Tenth Judicial Dist.*, 420 U.S. 425, 447 (1975).

The Supreme Court has established "a fairly clean analytical structure" for discerning congressional intent, consisting of a three-part inquiry. *Id.* at 470. The first and most important factor is whether the operative statute reflects a clear congressional intent to diminish a reservation's boundaries: "Congress [must] clearly evince an 'intent to change boundaries' before diminishment will be found." *Id*. at 470 (1984) (quoting *Rosebud v. Kneip*, 430 U.S. 584, 615 (1977)); *Hagen v. Utah*, 510 U.S. 399, 411 (1994) ("the statutory language must establis[h] an express congressional purpose to diminish") (internal quotations omitted)).

Second, absent explicit statutory language, the Court finds diminishment under this second *Solem* factor only "[w]hen events surrounding the passage of [the statute] *unequivocally* reveal a widely-held, contemporaneous understanding" of Congress's intent to diminish the reservation. *Solem*, 465 U.S. at 471 (emphasis added).

Third, and "[t]o a lesser extent," the Court looks at subsequent events that occurred after the statute. *Id.* The Supreme Court, however, "has never relied solely on this third consideration to find diminishment," *Nebraska*, 136 S. Ct. at 1081, and thus subsequent events should not, by themselves, lead to a diminishment finding. *Duncan Energy Co. v. Three Affiliated Tribes of the Fort Berthold Reservation*, 27 F.3d 1294, 1298 (8th Cir. 1994) ("We find this exclusive reliance on the third *Solem* factor to create a quasi-diminishment totally inappropriate."). Thus, "[w]hen

both an act and its legislative history fail to provide substantial and compelling evidence of congressional intention to diminish Indian lands, [courts] are bound . . . to rule that diminishment did not take place and the old reservation boundaries survived the opening." *Solem*, 465 U.S. at 472; *see also Nebraska*, 136 S. Ct. at 1081-82 (subsequent demographic history is "the least compelling evidence" and treatment "by Government officials likewise has 'limited interpretive value'" and cannot overcome the lack of congressional intent to diminish) (quoting *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 355-56 (1998) ("*Yankton*")).

A. *Solem* Factor One: Neither the Text of the Dawes Act Nor the 1906 Oneida Provision Contain Evidence of Congressional Intent to Diminish the Oneida Reservation

The first and most important inquiry under *Solem* is whether the statute at issue evidences a clear intent by Congress to diminish reservation boundaries. The statutory text is "the most 'probative evidence' of diminishment." *Nebraska*, 136 S. Ct. at 1079 (quoting *Solem*, 465 U.S. at 470). Neither the Dawes Act nor the 1906 Oneida Provision contain any language evidencing any congressional intent to diminish the Oneida Reservation.

i. Allotment Under the Dawes Act Did Not Diminish the Oneida Reservation

The Village concedes that the Dawes Act, insofar as it authorized trust allotments to tribal members, did not result in the diminishment of the Reservation. Doc. 102 at 24 (Village Mem. 17). The Village asserts, however, that "allotment [under the Dawes Act] was the first step in a multi-step process that Congress intended and expected would result in the breakdown of reservation boundaries" wherein the "final step" of such process was "the transfer of the fee-patented land to a non-Indian." *Id.* at 24-25 (Village Mem. 17-18). But as set forth below, the Dawes Act neither diminished nor disestablished the Oneida Reservation, despite the fact that some Oneida allotments were fee-patented and conveyed to non-Indians.

1. The Dawes Act's Allotment Provisions Are Indistinguishable from Those Statutes the Supreme Court Has Consistently Found Did *Not* Diminish Indian Reservations

Although the Supreme Court recently confirmed that the *Solem* framework is "well settled" for assessing diminishment, *Nebraska*, 136 S. Ct. at 1078, the Village challenges its applicability here. Doc. 102 at 22 (Village Opp. 15). The Village contends that an analysis other than the *Solem* framework should apply to this case because there is no "surplus land act" at issue. Doc. 94 at 25-26 (Village Mem. 18-19).[5] The Court should reject the Village's attempt to substitute a more lenient or more amorphous standard, especially when the allotment provisions in the Dawes Act are similar in all material respects to the statutory provisions the Supreme Court found did not result in diminishment. *Compare* Dawes Act, 24 Stat. 388-89 (for "any tribe or band of Indians . . . located upon any reservation" the President is authorized "to allot the lands in said reservation in severalty to any Indian) *with* 35 Stat. 460 at issue in *Solem* 465 U.S. at 461-62 (authorizing the Secretary, prior to opening the lands to non-Indians to allow for the exchange of allotments and "to cause allotments to be made to every man, woman, and child belonging to or holding tribal relations in [the] Cheyenne River and Standing Rock Reservations who have not heretofore received the allotments to which they are entitled"); 27 Stat. 52 at issue in *Mattz v. Arnett*, 412 U.S. 481, 494-95 (1973) ("any Indian now located upon said reservation may . . . apply to the Secretary of the Interior for an allotment of land"); and 34 Stat. 80, 80-81 at issue in *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 354-55 (1962) ("the Secretary of the Interior shall cause allotments . . . to be made to all persons belonging to or

[5] This assertion is belied by the language of the Dawes Act itself. *See* Dawes Act, Section 5, 24 Stat. at 389-90 (after allotment, Secretary may negotiate the purchase and release of unalloted lands for sale to non-Indian settlers).

having tribal relations on said Colville Indian Reservation"); 22 Stat. 341 at issue in *Nebraska*, 136 S. Ct. at 1079-80 (lands "shall be allotted . . . in severalty in any part of said reservation").

The statutes evaluated in *Solem*, *Mattz*, *Seymour*, and *Nebraska* stand in sharp contrast to those the Supreme Court *did* conclude resulted in diminishment. *See Yankton*, 522 U.S. at 344-45 (statute ratifying agreement with tribe to "cede, sell, relinquish, and convey" subject lands in exchange for a sum certain demonstrated congressional intent to diminish); *Hagen*, 510 U.S. at 414 (statute requiring certain lands to be "restored to the public domain" reflected congressional intent to diminish); *DeCoteau*, 420 U.S. at 445-46 (statute ratifying agreement with tribe to "cede, sell, relinquish, and convey" subject lands in exchange for a sum certain reflected congressional intent to diminish). The weight of precedent established under *Solem*, *Mattz*, *Seymour*, and *Nebraska* support the Nation's position and control the analysis here.

Moreover, the Village's reliance on briefing in *Carpenter v. Murphy* is unavailing. Doc. 102 at 22-23 (Village Opp. 15-16). The Village seeks to avoid the *Solem* test in this case, arguing that the appropriate standard is the one advocated in briefs filed by the State of Oklahoma and the United States in the Supreme Court in *Carpenter v. Murphy*, No. 17-1107 (U.S.). The United States' brief speaks for itself. However that brief is characterized, the same clear congressional intent to diminish that *Solem* seeks to discern is still required.

Murphy concerns the Muscogee (Creek) Nation, its lands in the former Indian Territory, and a unique legal and factual situation that bears no similarity to the one at issue here. The United States' brief in *Murphy* stated that Congress enacted a series of statutes affecting Muscogee (Creek) lands between 1890 and 1907 that demonstrate congressional intent to go much further than diminishing or disestablishing a reservation. *See* Brief for the United States as Amicus Curiae, No. 17-1107 at 10-11 (July 30, 2018) (arguing that Congress limited the

legislative authority of the Creek Nation; abolished its tribal courts; set a tight timetable for allotment and a rapid end to trust status; distributed tribal funds to individual Indians; and set a date for dissolution of the Tribe in preparation for Oklahoma statehood).

The record regarding the Nation and the Oneida Reservation presented here bears no similarity to the unique context and evidence of congressional intent present in *Murphy*. The Village relies on general authority under the Dawes Act and the 1906 Oneida Provision to argue diminishment, but is unable to point to any specific congressional intent to do anything whatsoever with respect to the Oneida Reservation except to allot it in a manner similar to what occurred on almost every other reservation in the country. The Village has failed to demonstrate any congressional intent to diminish the Oneida Reservation.

2. Congress's General Expectations in the Nineteenth Century Concerning the Future of Indian Reservations After Allotment is Insufficient for a Finding of Diminishment

The Village relies primarily on non-diminishment cases to assert that the purpose of the Dawes Act was to terminate Indian reservations, and that the conveyance of fee-patented lands to non-Indians following allotment was the "final step" that reflected the fulfillment of this goal. Doc. 102 at 24-26. (Village Opp. 17-19). The Supreme Court, however, has "never been willing to extrapolate from this expectation[,] a specific congressional purpose" to diminish reservations simply because fee-patented lands were sold to non-Indians. *Solem*, 465 U.S. at 468-69. Instead, "[o]nce a block of land is set aside for an Indian Reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise." *Id.* at 470 (citing *Celestine*, 215 U.S. at 287).

3. The Presence of Fee-Patented Lands Is Consistent with Continued Reservation Status

The Village contends that when allotted lands were fee-patented and conveyed to non-Indians, such lands lost their "reservation" status. Doc. 94 at 29-30 (Village Mem. 22-23). Diminishment does not turn on whether allotted lands are fee-patented and issued to non-Indians under the Dawes Act, as fee-patented lands, owned by non-Indians, is a common feature found on Indian reservations throughout the United States and is not unique to the Oneida Reservation. Indeed, all of the Supreme Court cases upholding reservation boundaries against diminishment claims have involved fee-patented lands, owned by non-Indians, within the areas alleged to have been diminished. *See Nebraska*, 136 S. Ct. at 1081 (no intent to diminish found in 1882 statute that authorized the sale of fee-patented lands totaling approximately 50,000 acres, within the western portion of the Omaha Reservation, to non-Indians); *Solem*, 465 U.S. at 472-81 (statute authorizing the sale of fee-patented lands within portions of the Cheyenne River and Standing Rock Reservations to non-Indians did not diminish such reservations); *Mattz*, 412 U.S. at 497 (no intent to diminish or disestablish Yurok Reservation found in 1892 statute, "which [did] not differ materially from" Dawes Act in that it authorized the allotment and subsequent sale of remaining lands to non-Indians, and thus was "completely consistent with continued reservation status"); *Seymour*, 368 U.S. at 355-56 (that, after allotment, remaining lands within the Colville Reservation were made available for sale to non-Indians did not reflect an intent to diminish that reservation on a piecemeal basis or otherwise, as such opening "did no more than open the way for non-Indian settlers to own land on the reservation in a manner which the Federal Government, acting as guardian and trustee for the Indians, regarded as beneficial to the development of its wards").

The Village's efforts to distinguish *Mattz* as limited to the holding that "allotted lands retained their reservation status so long as they remain in trust," Doc. 102 at 29 (Village Opp. 22), is not supported by the decision itself. Indeed, the boundary dispute arose because Mr. Mattz's fishing nets were seized "on land owned by a lumber company," *i.e.*, fee-patented lands, within the reservation. *See Arnett v. Five Gill Nets*, 20 Cal. App. 3d 729, 730 (Cal. App. 1971). Likewise, the Village's contention that *Seymour* is limited to post-1948 fee lands, Doc. 102 at 31 (Village Opp. 24), misses the mark. In *Seymour*, the Supreme Court held that a 1906 statute opening up a portion of the Colville Reservation for allotment and settlement by non-Indians did not diminish the reservation. 368 U.S. at 354-57. Thus, fee-patented lands within the exterior boundary of the Colville Reservation constituted "Indian Country" under 18 U.S.C. § 1151(a), because such lands were "*within the limits of any Indian reservation* under the jurisdiction of the United States Government, notwithstanding the issuance of any patent" (emphasis added). *Seymour* thus confirms that the presence of fee-patented lands is consistent with continued reservation status, and that a finding of diminishment must be based on something other than the mere fact that fee-patented lands were conveyed to non-Indians after allotment.

Nebraska further disproves the Village's diminishment theory. There, lands allotted in the disputed portion of the Omaha Reservation passed out of trust status such that, by 1919, none remained in trust. *Parker*, 996 F. Supp. 2d at 827. This did not affect the continued reservation status of the land, however, and the Supreme Court held that the original boundary remained intact despite changes in land tenure within that reservation. *Nebraska*, 136 S. Ct. at 1081-82.

4. The Village Relies on Eighth Circuit Cases That Are Neither Controlling Nor Persuasive

In advancing the argument that the Oneida Reservation diminished as fee-patented lands were conveyed to non-Indians, the Village relies on two cases from the Eighth Circuit that

involved materially different facts. *See*, *e.g.*, Doc. 94 at 10 (Village Mem. 3) (discussing *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994, 1003 (8th Cir. 2010) and *Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010, 1030 (8th Cir. 1999)). The Village neglects to inform the Court that the analysis in *Podhradsky* and *Gaffey* involved a statute that included language of cession coupled with a sum certain amount of compensation, which a prior Supreme Court decision had held "removed these lands from the reservation and indicated that the [original] boundaries were not maintained." *Gaffey*, 188 F.3d at 1030. Unlike the Dawes Act, the Burke Act, and the 1906 Oneida Provision, the 1894 statute at issue in *Podhradsky* and *Gaffey* reflected an unequivocal congressional intent to change that reservation's boundaries. *See Yankton*, 522 U.S. at 344 (1894 statute provided that the Tribe would "cede, sell, relinquish, and convey to the United States all their claim right, title and interest in and to" the disputed lands, in return for a sum certain payment of $600,000, language the Court concluded was "precisely suited" to terminate the reservation status of such lands); *Gaffey*, 188 F.3d at 1024-1028 (discussing the language of the 1894 statute and the surrounding circumstances of its passage to conclude that Congress intended the reservation be diminished). Moreover, the Eighth Circuit, citing to *Solem*, specifically rejected the notion that allotment and the conveyance of fee-patented lands to non-Indians alone results in diminishment:

> [C]ourts have not been willing to extrapolate from general legislative assumptions and expectations of the late nineteenth century to find in each surplus land act a specific congressional purpose to remove all lands not under Indian control from reservation status. *Solem*, 465 U.S. at 468-69. If Congress' general understanding that tribal ownership was a necessary component of reservation status controlled, all land which passed out of tribal ownership would necessarily be found to have lost its reservation status—a conclusion the Supreme Court has explicitly refused to adopt. *Id.*

Gaffey, 188 F.3d at 1024. *See also Podhradsky*, 606 F.3d at 1009 (citing *Gaffney*, states that specific 1894 statute at issue demonstrated congressional intent that "allotments would lose their reservation status as they passed out of Indian ownership and into white hands").

The Village argues that *Gaffey* did not rely on the 1894 statute to conclude that certain lands of the Yankton Sioux Reservation were diminished on a piecemeal basis as those lands were fee-patented and conveyed to non-Indians, arguing that the 1894 statute was limited to *ceded* lands, and the diminishment occurred in the *unceded* portion of that reservation. Doc. 119 at 18 (Village Reply 12). *Gaffey* plainly concludes, however, after extensively analyzing the 1894 statute and its surrounding circumstances, that "the 1894 [statute] intended to diminish the reservation by not only the ceded land, but also by the [unceded] land which it foresaw would pass into the hands of the white settlers and homesteaders." *Gaffey*, 188 F.3d at 1028.

5. Both the Conferral of Citizenship and the Assertion of State or Local Jurisdiction on Fee Lands Within a Reservation Are Consistent with Continued Reservation Status

The Village's contention that the provisions of the Dawes Act that confer United States citizenship to allottees and extend state and local jurisdiction, *see* 24 Stat. 390, demonstrates congressional intent to diminish the Oneida Reservation, should also be rejected. Citizenship is fully compatible with continued reservation and tribal status. *Celestine*, 215 U.S. at 287 ("The [Dawes Act], which confers citizenship, clearly, does not emancipate the Indians from all control, or abolish the reservations."); *United States v. Webb*, 219 F.3d 1127, 1135 (9th Cir. 2000) ("[N]either allotment, in and of itself, nor the grant of citizenship to Indians holding allotted land under the Dawes Act, revokes the reservation status of such land.") (citing *Mattz*, 412 U.S. at 497).

In 1906, Congress amended the Dawes Act through the Burke Act, which required that citizenship is only conferred, and state and local jurisdiction over fee-patented lands is only

permissible, when fee patents, and not trust allotments, are issued to allottees. *See* 34 Stat. at 182-183. Notably, the scope of state and local jurisdiction over allottees under the Burke Act is not "plenary," but is instead limited to the taxation, sale, and alienability of fee-patented lands within an Indian reservation. *See*, *e.g.*, *County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*, 502 U.S. 251, 264 (1992).[6] That a state or local government may have the authority to tax, condemn, or foreclose on fee-patented lands within a reservation says nothing about the exterior boundary of that reservation. *See Oneida Tribe of Indians of Wis.*, 542 F. Supp. 2d at 920-21 (in case where the Village did not dispute the existence of the Oneida Reservation boundary, court held that, consistent with *Yakima*, the Village could condemn fee-patented lands within the Reservation that were owned by the Nation).

In summary, the Village has failed to demonstrate that allotment under the Dawes Act requires a finding of diminishment simply because some allotted lands were subsequently fee-patented and conveyed to non-Indians. Despite the Village's arguments to the contrary, "general legislative assumptions and expectations of the late nineteenth century," *Gaffey*, 188 F.3d at 1024, are simply not enough to "clearly evince an 'intent to change [the] boundaries'" of the Oneida Reservation. *Solem*, 465 U.S. at 470 (quoting *Kneip*, 430 U.S. at 615).

[6] In *Yakima*, the Supreme Court held that a local county government could impose its ad valorem tax on certain fee-patented land within the Yakama Indian Reservation. 502 U.S. at 253. The land history of these parcels parallels the Village's current theory of diminishment: they were allotted pursuant to Section 6 of the General Allotment Act, 24 Stat. 38, originally in trust; were subsequently fee patented; and many passed out of Indian ownership. But the *Yakima* decision shows that state taxation of fee-patented lands is completely consistent with continued reservation status, disproving, at least implicitly, the Village's theory.

ii. Congress's Grant of Discretionary Authority to the Secretary to Issue Fee Patents to Oneida Allottees Under the 1906 Oneida Provision Did Not Diminish the Oneida Reservation

The Village argues that the "purpose" of the 1906 Oneida Provision was to "transfer[] land owned by Indians to non-Indians" as a means to hasten the termination of the Reservation. Doc. 94 at 35 (Village Mem. 28). As discussed above, the Dawes Act authorized the issuance of allotments to be held in trust for a period of twenty-five years. 24 Stat. 388-91. By 1892, most of the Oneida Reservation was allotted, with the exception of Tribal trust lands reserved for government, religious, and education purposes, as well as some lands reserved to establish future allotments. Doc. 92-5 at 139 (Edmunds at 136); Doc. 92-20 at 4 (1900 Annual Report at 617). The trust status of such allotments were set to expire in or around 1917 unless extended by the President. The 1906 Oneida Provision states:

> That the Secretary of the Interior be, and 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.

34 Stat. 381.

The Village effectively concedes that the 1906 Oneida Provision contains no express language reflecting congressional intent to diminish the Reservation. Doc. 94 at 31-32 (Village Mem. 24-25); Doc. 102 at 26-27 (Village Opp. 26-27). The 1906 Oneida Provision authorized the Secretary, "in his discretion," to issue fee patents to "any Indian *of the Oneida Reservation in Wisconsin*" and that such issuance "shall operate as a removal of all restrictions as to the sale, taxation, and alienation of the lands so patented." 34 Stat. 381 (emphasis added).

On its face, the statute specifically references the Reservation and says nothing about any change whatsoever to its boundaries. Additionally, the 1906 Oneida Provision is silent as to the conveyance of fee-patented lands to non-Indians, and it contains no mandate directing the

issuance of fee patents to any Oneida tribal member. The decision to issue any fee patent *at all* was left to the discretion of the Secretary, creating the possibility that no fee patents would ever issue pursuant to the 1906 Oneida Provision. [7] *See*, *e.g.*, *Poverty Flats Land & Cattle Co. v. United States*, 788 F.2d 676, 678 (10th Cir. 1986) (statute authorizing Secretary "complete discretion" to decide whether to issue patents lacked congressional intent element). *See also Confederated Tribes of Chehalis Indian Reservation v. Washington*, 96 F.3d 334, 343-44 (9th Cir. 1996) ("'Once a reservation is established, there is a strong presumption that it remains intact,' requiring 'substantial and compelling evidence' of an intent on the part of the government to diminish") (citing *DeCoteau*, 420 U.S. at 444) (quoting *Solem*, 465 U.S. at 472).

Moreover, the fact that "all restrictions as to the sale, taxation, and alienation" of allotted lands were lifted when a fee patent was issued under the 1906 Oneida Provision is insufficient for a finding of diminishment, as similar language was employed in the Burke Act, 34 Stat. 183 ("all restrictions as to sale, incumbrance, or taxation of said land shall be removed"), which has never been interpreted as resulting in the diminishment of reservations. There is simply no "clear textual signal," *Nebraska*, 136 S. Ct. at 1080, in the 1906 Oneida Provision that evidences any congressional intent to diminish the Reservation.

The Village also contends that the Court can infer congressional intent to alter or terminate the Oneida Reservation's boundaries in the absence of any textual support. Doc. 94 at 30-33 (Village Mem. 23-26). But this argument—that congressional silence about the boundaries of the Oneida Reservation should somehow be interpreted as the equivalent of

[7] The Nation put forth evidence demonstrating that most fee patents were issued to Oneida allottees pursuant to the Burke Act. Doc. 92-5 at 39-40 (Edmunds at 36-27) ("the Burke Act, not the 1906 Appropriations Act, rapidly emerged as the catalyst for declaring Oneida competency and issuance of fee patents"). The Village does not dispute this. *See* Doc. 94 at 30 (Village Mem. 23) ("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").

diminishment—contradicts established law and ignores numerous instances during this same period when Congress was unambiguously allotting lands while simultaneously and explicitly terminating reservation boundary lines. *See, e.g.*, 33 Stat. 189, 217-18 (1904) (expressly providing that, after allotment, "the reservation lines of the said Ponca and Otoe and Missouria Indian reservation be, and the same are hereby, abolished"); 31 Stat. 672, 676-77 (1900) (providing that, after allotment and an additional set-aside for grazing lands, "the said Comanche, Kiowa, and Apache Indians hereby cede, convey, transfer, relinquish, and surrender, forever and absolutely, without any reservation whatever, express or implied, all their claim, title, and interest, of every kind and character, in and to the lands embraced in the following-described tract of country in the Indian Territory . . ."). Congress knew how to utilize such language, but chose not to alter the boundaries of the Oneida Reservation in any statute.

Faced with this reality, the Village attempts to draw parallels between the 1906 Oneida Provision and provisions contained in a different part of the 1906 Appropriations Act that have been interpreted as terminating the Stockbridge-Munsee Reservation. *See Wisconsin v. Stockbridge-Munsee Indian Cmty.*, 554 F.3d 657, 664-665 (7th Cir. 2009) (evaluating 34 Stat. 325, 382-383). Those provisions, however, bear no resemblance to the 1906 Oneida Provision. First, the Stockbridge-Munsee provisions mandated the allotment and immediate issuance of fee patents to tribal members, and further authorized the distribution of cash payments to tribal members in lieu of fee patented lands. *Id.* These features set those provisions apart from other allotments acts, such as the Dawes Act, "which restricted the Indian owners from selling their land or required that it be held in trust by the United States." *Id.* at 664. And despite these unique provisions, the court in *Stockbridge-Munsee Indian Cmty.* nevertheless concluded that the text alone was "insufficient to abolish the reservation." *Id.* Moreover, the court did not find

Congressional intent to terminate the Stockbridge-Munsee Reservation based on the fact that fee patents were to issue to tribal members,[8] but instead based on the unique circumstances surrounding those statutory provisions, which the court held reflected a widely-held, unequivocal, contemporaneous understanding that the parties intended to reach "a full and complete settlement of all obligations" to that Indian tribe. *Id.* at 664-65.

iii. Prior Treaties Further Confirm that Neither the Dawes Act Nor the 1906 Oneida Provision Reflect Congressional Intent to Diminish the Oneida Reservation

The lack of congressional intent to diminish the Oneida Reservation is further confirmed by the text of earlier treaties between the United States and the Nation. As set forth above, the Nation had previously secured land in Wisconsin through the February 8, 1831 Treaty with the Menominee, art. 1, 7 Stat. 342, and the October 27, 1832 Treaty with the Menominee, art. 2, 7 Stat. 405. The 1838 Treaty established a new reservation, but also terminated a prior one, doing so in unequivocal terms. The 1838 Treaty "cede[d] to the United States all their title and interest" in the previously reserved lands for a sum certain. Doc. 92-13 at 3 (1838 Treaty, art. 1).

Significantly, the Dawes Act, Burke Act, and 1906 Oneida Provision here speak in much different terms. *See Nebraska*, 136 S. Ct. at 1080 (comparing Omaha's agreement to cede, sell, and convey certain lands pursuant to treaties ratified in 1854 and 1865 with 1882 Act alleged to have diminished the reservation) (citing *Mattz,* 412 U.S. at 504 (comparing statutory text to earlier bills)); *see also Duncan Energy Co.*, 27 F.3d at 1297 ("It would be contrary to the principle of resolving ambiguities in favor of the Indians were we to conclude that Congress intended the same meanings for the vastly different language employed in these two documents

[8] *Wisconsin v. Stockbridge-Munsee Indian Cmty.*, 366 F. Supp. 2d 698, 775 (E.D. Wis. 2004) ("[t]he court's conclusion is grounded upon consideration of the relevant factors set forth by the Supreme Court, [i.e., *Solem*], not simply on the fact that the issuance of fee patents disestablished the reservation.").

[the treaty and the allotment statute] affecting the Tribe."). Congress knew in the 1830s and thereafter how to change reservation boundaries through land cessions or otherwise. Neither the Dawes Act, the Burke Act, nor the 1906 Oneida Provision[9] reflect any congressional intent whatsoever to change the boundaries of the Oneida Reservation.

B. *Solem* Factor Two: Neither the Legislative History of the 1906 Oneida Provision Nor the Circumstances Surrounding its Passage Demonstrate any Unequivocal Intent to Diminish or Disestablish the Oneida Reservation

Because the Dawes Act and the 1906 Oneida Provision both lack "explicit language of cession and unconditional compensation," the Court may premise diminishment on legislative history and circumstances surrounding the passage of those statutes *only if* "events surrounding the passage . . . *unequivocally* reveal a widely-held, contemporaneous understanding" of Congress's intent to diminish the Oneida Reservation. *Solem*, 465 U.S. at 471 (emphasis added); *see also Yankton*, 522 U.S. at 351 (absent clear congressional purpose in the statutory text, "unequivocal evidence" from surrounding circumstances may support diminishment). Because diminishment is not lightly inferred, *Solem*, 465 U.S. at 470, it must be "unequivocally" shown that Congress affirmatively intended to alter reservation boundaries. *Id.* at 470-71. Here, the legislative history and surrounding circumstances fail to show, "unequivocally," any widely-held, contemporaneous understanding of diminished legal boundaries for the Oneida Reservation. Thus, because "both [the] act and its legislative history fail to provide substantial and compelling evidence of a congressional intention to diminish Indian lands," the Court is "bound . . . to rule that diminishment did not take place . . . ." *Solem*, 465 U.S. at 472.

[9] The Village makes a passing reference to an unidentified statute from 1917 authorizing the sale of certain lands on the Oneida Reservation for school purposes. Doc. 119 at 24 (Village Reply 18). As set forth herein, *Solem* controls the diminishment analysis in this case, and thus the Village's failure to engage in that analysis or otherwise demonstrate clear congressional intent to diminish the Reservation with respect to the 1917 statute, or any other statute, fails to advance the Village's argument that the Reservation was diminished.

Neither the Village nor its expert witness has identified any relevant legislative history suggesting that Congress intended to change the boundary lines of the Oneida Reservation, as opposed to merely (1) allotting land to tribal members within the Reservation; and (2) authorizing the Secretary of the Interior, in his discretion, to issue fee patents to some tribal members on the Reservation. The Village's opening brief quickly references the surrounding circumstances of the Dawes Act and the 1906 Oneida Provision, mentioning three items. The Village states that Congress envisioned an end of reservations generally; that some Oneidas favored legislation authorizing the Secretary, in his discretion, to issue fee patents; and that state law would be made applicable to lands on the reservation that passed out of trust status. Doc. 94 at 34-36 (Village Mem. 27-29). But each is consistent with continued reservation status; indeed, each was present in *Nebraska*. *See Parker*, 996 F. Supp. 2d at 822 (Commissioner of Indian Affairs stating that eventual diminishment of reservations "is consonant with sound policy"); *id.* ("the Omaha Tribe . . . request[ed] allotments that would guarantee fee-simple title to the reservation land so allotted); *id.* at 823-24 and 828-29 (reservation not diminished by statute conferring citizenship and extending state law).

While the Village focuses on the Oneida tribal members who sought fee patents, the Village ignores that other Oneida tribal members consistently opposed the issuance of such fee patents. *See* Doc. 92-2 at 98-102 (Hoxie at 95-99). This led Interior to advocate for legislation—which eventually became the 1906 Oneida Provision—reflecting a "middle course" that authorized the issuance of fee patents to those that wanted them, and instead of imposing fee patents on the rest, gave the Secretary the discretionary authority to issue fee patents to other allottees if they so requested. *Id.* at 101-03 (Hoxie at 98-100).

The few references by the Village to surrounding circumstances reveal, in their paucity, something more: the absence of any intent or understanding *at all* that the Oneida Reservation would be diminished. In other cases, isolated statements in the legislative history refer to "diminished" or "reduced" reservations, which prompted the courts to analyze, under the second *Solem* factor, the congressional intent underlying the statements. Yet even then, the courts often ultimately held that no diminishment occurred. *Parker*, 996 F. Supp. 2d at 822, 838, 840 (congressional record references to "diminishing these reservations" and "diminished reserve" do not unequivocally show congressional intent to change reservation boundaries); *Solem*, 465 U.S. at 478 (Senate and House report references to a "reduced" and "diminished" reservation were too isolated and scattered to support a legal finding of congressional intent to diminish); *Lower Brule Sioux Tribe v. State of South Dakota*, 711 F.2d 809, 819-20 (8th Cir. 1983) (isolated congressional references to reservations "as diminished" were ambiguous and did not reflect congressional intent to change reservation boundaries). Here, such statements are entirely absent from the evidentiary record. No evidence, including that offered by the Village, demonstrates a widely-held, contemporaneous, and unequivocal understanding that the 1906 Oneida Provision would lead to the diminishment of the Oneida Reservation in any respect.[10]

[10] The Village contends, citing *Gaffney*, 188 F.3d at 1028, that relevant to the second *Solem* factor is the fact that the 1906 Oneida Provision did not reserve to the Nation the right to assert jurisdiction over non-Indians who moved onto fee-patented lands. Doc. 119 at 20 (Village Reply 14). No such reservation of jurisdiction in the operative statute is required, however, as the Nation retains its inherent right to regulate non-Indians on fee lands within the Reservation when those persons "enter consensual relationships with the tribe" or when their "conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana v. United States*, 450 U.S. 544, 565-66 (1981). This is true even when the act authorizing allotment on such reservation contemplated the issuance of fee patents to tribal members, and conveyed certain reservation lands to the state to be used for school purposes. *See* Crow Allotment Act of 1920, 41 Stat. 751, 752, 756-57 (cited in *Montana* as the statute authorizing allotment of the Crow Reservation).

And in Supreme Court cases actually finding diminishment, the analysis typically includes express statutory statements of diminishment under the first *Solem* factor, together with surrounding circumstances that clearly and unequivocally demonstrate a "widely-held, contemporaneous understanding" that the statute would alter reservation boundaries. *See, e.g.*, *Hagen*, 510 U.S. at 416-17 (diminishment based on "plain language" of statute accompanied by contemporaneous statements from U.S. Indian Inspector to tribal representatives during negotiations: "[C]ongress has provided legislation which will pull up the nails which hold down [the reservation boundary] line and *after next year there will be no outside boundary line to this reservation*.") (emphasis in opinion). Here, both are absent. Neither the text of the Dawes Act or the 1906 Oneida Provision, nor the contemporaneous legislative record, contains anything remotely similar to the evidence found persuasive by the Supreme Court in cases such as *Yankton, Hagen, Rosebud*, or *DeCoteau*, where diminishment was found.

C. *Solem* Factor Three: Subsequent Treatment of the Oneida Reservation Reveals that, With Limited Exception, Federal, State, and Local Officials All Considered the Original Boundary of the 1838 Oneida Reservation as Intact

Lastly, under *Solem* and its progeny, courts consider the subsequent treatment of the reservation for "additional clue[s]" as to Congress's intent. *Nebraska*, 136 S. Ct. at 1081 (quoting *Solem*, 465 U.S. at 471). While such information has "some evidentiary value," *id.*, such value is "limited," and "the least compelling." *Id.* at 1082 (quoting *Yankton*, 522 U.S. at 355). Inconsistencies in the subsequent treatment of an area do not tip the balance in favor of finding congressional intent to diminish a reservation. *Id.* at 478. Thus, the Supreme Court "has never relied solely on this third consideration to find diminishment." *Nebraska*, 136 S. Ct. at 1081.

Evidence as to subsequent demographic history, or extensive evidence that Federal Government officials asserted the view that the subject reservation had been diminished, cannot overcome the lack of congressional intent under the first and second factors of the *Solem* inquiry.

Id. at 1081-82 ("[I]t is not our role to 'rewrite' the 1882 Act in light of this subsequent demographic history."). Thus, because the Dawes Act and the 1906 Oneida Provision, and the circumstances surrounding their passage, "fail to provide substantial and compelling evidence of congressional intention to diminish Indian lands, the Court is "bound . . . to rule that diminishment did not take place and that the old reservation boundaries survived the opening." *Solem*, 465 U.S. at 472.

As demonstrated below, and as detailed by the Nation, there is substantial evidence that federal and state authorities have recognized the continued existence of the Oneida Reservation boundary throughout the twentieth century, as that boundary was established in the 1838 Treaty. The United States will not attempt to repeat in detail here the *Solem* third factor analysis that has already been the subject of much briefing to the Court, and has been laid out in the many expert reports and additional expert deposition transcripts filed on the record. Rather, the United States will highlight certain *Solem* third factor facts that it believes are helpful in showing this Court that the record of post-allotment treatment of the Oneida Reservation is mixed, with most evidence weighing in favor of continued Reservation status. Certain government officials indeed took sometimes inconsistent or ambiguous positions concerning the continued existence of the Oneida Reservation at different times. That mixed record cannot, however, overcome the lack of any congressional intent to diminish the Oneida Reservation. *Nebraska*, 136 S. Ct. at 1081-82 (a "'mixed record' of subsequent treatment" cannot overcome the lack of congressional intent under the first two *Solem* factors).

i. With Limited Exception, the U.S. Department of the Interior Has Consistently Treated the Oneida Reservation as Neither Diminished Nor Disestablished

Congress has entrusted Interior with responsibility for Indian affairs. *See*, *e.g.*, 25 U.S.C. § 2 ("The Commissioner of Indian Affairs shall, under the direction of the Secretary of the

Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs and of all matters arising out of Indian relations"). *See also U.S. v. Wheeler*, 435 U.S. 313, 328 n.27 (1978); *Seymour*, 368 U.S. at 357 (citing Interior as the agency having primary responsibility for Indian affairs, and agreeing with Interior's interpretation that a statute did not diminish the reservation).

The Village has referred, from a voluminous record, to several statements by Interior officials to highlight that those individuals made ambiguous statements concerning the size and status of the Oneida Reservation in the early twentieth century. Doc. 94 at 38-39 (Village Mem. 31-32). As the Nation discussed, Doc. 104 at 35-43 (Nation Opp. 32-40), such statements are overwhelmed by the remainder of the record, which reflects the contrary view. As set forth below, there are multiple examples of statements by the same or other Interior officials, from the same time periods, which contradict the statements upon which the Village relies. Even if the statements the Village relies upon reflected a view by a particular Interior official as to the status of the Oneida Reservation (and, as the Nation has demonstrated, such statements are ambiguous at best), the contrary statements discussed below establish that the historical record is merely mixed, and is thus insufficient for a finding of diminishment.

For example, Interior officials considered allotment to be consistent with continued reservation status, including when fee-patented lands were sold to non-Indians. In 1908, the Indian Superintendent reported that "few families of white people have moved *on to the reservation*," and that it would take several more years "before any considerable white settlement is made "*on the reservation*." Doc. 92-37 at 2 (Letter from Superintendent Joseph Hart to the Commissioner of Indian Affairs (Mar. 16, 1908) at 1) (emphasis added). In 1912, Mr. Hart reported that the pace of issuing fee patents to Oneida tribal members had slowed and that tribal

members had been successful in retaining their fee-patented lands "on the Reservation." Doc. 105-19 at 4-5 (Letter from Superintendent Joseph Hart to the Commissioner of Indian Affairs (Mar. 1912) at 3-4). Such statements are consistent with the May 4, 1918 Executive Order signed by President Wilson, extending the trust period for allotments "on the Oneida Reservation in Wisconsin" for an additional nine years. Doc. 92-45 at 2-3 (Executive Order of 4 May 1918 at 1-2). If the Reservation only extended to trust parcels as the Village contends, then it would follow that the President or Interior officials would refer to the Reservation as those trust parcels, but they do not. Instead, the trust allotments are *on* the Reservation, *i.e.*, located within the exterior boundary of that Reservation as it was first established. Moreover, "white families" could not move onto fee-patented lands *on* the Reservation, if the Reservation was only comprised of trust lands as the Village argues.

Interior officials continued to reference the Oneida Reservation as intact for the next several decades, despite the fact that the Reservation was comprised of both trust and fee-patented lands. For example, in 1921 Chief Clerk C. F. Hauke responded to Benjamin Powless's request for an allotment "on the Oneida Indian reservation," stating that Interior could not "recognize your right to an allotment *on the reservation*." Doc. 105-27 at 2 (Letter from Chief Clerk C. F. Hauke to Benjamin Powless (Jan. 20, 1921) at 1) (emphasis added). In 1925, Hauke wrote the Secretary about another request "for an allotment of land *on the Oneida Indian Reservation*, under the jurisdiction of the Keshana Agency, in Wisconsin." Doc. 105-30 at 2 (Letter from Chief Clerk C. F. Hauke to the Secretary of the Interior (Oct. 1, 1925) at 1) (emphasis added). Mr. Hauke described the person requesting the allotment as having been "born *on* the Oneida Reservation" prior to its allotment. *Id.* (emphasis added). That Mr. Hauke would refer to the Oneida Reservation in the same manner both before and after it was allotted,

including during a period (1925) when a significant portion of the Reservation had been fee-patented, illustrates that he understood that the Reservation boundary was still intact, even if the land tenure of parcels within that boundary had changed.

In and after 1934, Commissioner John Collier made several statements supporting the continued existence of the Oneida Reservation. In 1936, for example, Mr. Collier wrote the Secretary discussing the 1934 election held pursuant to Section 18 of the IRA, *see* 25 U.S.C. § 5125, and discussed a forthcoming election that was to be held "for the purpose of enabling the members of the Oneida Indian Tribe *of the Oneida Reservation in Wisconsin* to vote on the adoption of a proposed Constitution and By-laws." Doc. 92-66 at 2 (Letter from Commissioner John Collier to the Secretary of the Interior (Apr. 23, 1936) at 1) (emphasis added). Oneida tribal members who lived "away from the reservation,"[11] were nevertheless still considered to be "*of* the Oneida Reservation" *Id.* These views are reflected in a letter Assistant Commissioner Zimmerman sent to the Secretary in 1937, recommending approval of a corporate charter of "the Oneida Tribe of Indians of the Oneida Reservation in Wisconsin." Doc. 105-71 at 2 (Letter from Assistant Commissioner Zimmerman to the Secretary of the Interior (Apr. 7, 1937) at 1). Mr. Zimmerman reported that the Nation had adopted its Constitution and By-laws in an election wherein more than "30 per cent of those eligible to vote" cast a ballot. *Id.* Interior officials derived this figure by calculating the number of votes based on residence "away from" or "within the original reservation." *See* Doc. 105-2 at 12 (Kiel at 8 (citing Letter from Superintendent Frank Christy to Commissioner John Collier (June 8, 1936) (ON00009789)). The Reservation boundary, as it was established in the 1838 Treaty, thus had material legal

[11] *See* Doc. 105-2 at 12 (Douglas M. Kiel, Ph.D., *A History of the Oneida Reservation Boundaries, 1934-1984* ("Kiel") at 8 (citing Letter from Superintendent Frank Christy to Commissioner John Collier (June 8, 1936) (ON00009789)).

import in the 1930s as Interior officials worked to implement the IRA. These documents show that Interior officials made decisions based on such boundary, and not on the location of trust parcels within that boundary.[12]

Over time, Interior's position with respect to the continued existence of the Oneida Reservation boundary only strengthened. In 1941, for example, the Acting Commissioner wrote to Senator Robert LaFollette, Jr., responding to inquiries concerning the exercise of criminal jurisdiction within the exterior boundary of the Oneida Reservation. Doc. 105-58 at 2 (Letter from Acting Commissioner to Senator Robert LaFollette, Jr. (Feb. 19, 1941) at 1). The Acting Commissioner described the Nation's Executive Committee as being "located *on the reservation* in the Town of Oneida, Outagamie County, and the town of Hobart, Brown County, Wisconsin." *Id.* (emphasis added). The letter discussed the Nation's request for additional law enforcement support on the Reservation. *Id.*

At a time prior to the enactment of 18 U.S.C. § 1151, the Acting Commissioner did not disclaim the jurisdiction to provide such additional law enforcement, but instead stated that funding limitations prevented the agency from fulfilling the request. *Id.* The Assistant Commissioner further stated that the office was writing the "superintendent who has jurisdiction *over the Oneida Reservation*" in order to determine whether such law enforcement position could be established. *Id.* (emphasis added). This letter demonstrates that Interior officials

[12] To the extent early twentieth century understanding as to the scope of federal jurisdiction in Indian country over fee-patented lands is relevant to the diminishment analysis, statements during that period demonstrate that Interior officials believed federal jurisdiction extended to fee-patented lands within the Oneida Reservation. For example, in 1934, Mr. Collier wrote to an Oneida tribal member referring him to "your superintendent" Frank Christy, the Indian agent at the Tomah Agency. Doc. 89-157 at 11-12 (R. David Edmunds, Ph.D., *Reply to "Response to Reports of R. David Edmunds and Frederick E. Hoxie Submitted by Emily Greenwald* ("Edmunds' Reply") at 8-9). In 1937, Mr. Collier also wrote to Senator R. Ryan Duffy about conditions on the Oneida Reservation and explained that the "[g]ranting of patents in fee does not remove Indians from federal jurisdiction." *Id.* at 12 (Edmunds' Reply at 9).

believed the towns of Oneida and Hobart were within the exterior boundary of the Reservation, and that the assertion of criminal jurisdiction in such areas did not depend on the existence of trust parcels. This view is consistent with a 1946 letter from the Assistant Secretary to the Attorney General, concerning an allotment "located on the Oneida Indian Reservation, which is under the jurisdiction of Mr. Peru Farver, Superintendent of the Tomah Indian Agency." Doc. 105-59 at 2. While the allotment at issue was "restricted," *id.*, notably its location is described as *on* the Oneida Indian Reservation, and not a "diminished" or otherwise reduced reservation.

Interior's later opinions, statements, and other actions also treat the Oneida Reservation as undiminished. For example, in 1964, the Bureau of Indian Affairs prepared a report concerning Indian tribes served by its Great Lakes Agency, including the Nation, and described the Oneida Reservation as it was originally established in the 1838 Treaty:

> The Oneida Indian Reservation is located in the East central portion of the state of Wisconsin, lying diagonally in Brown and Outagamie Counties, with part of the East boundary of the reservation inside the city limits of Green Bay, Wisconsin.

Doc. 105-2 at 31 (Kiel at 27 (quoting Bureau of Indian Affairs, *Ten Year Economic Program* (Oct. 2, 1964) (ON00006101)). And in 1983, the Interior Field Solicitor concluded "that allotment has not affected the reservation's original boundaries." Doc. 105-38 at 9, 34 (Memorandum from Attorney Naomi Woloshin to Wisconsin Attorney General Bronson C. La Follette ("Woloshin Mem.") at 7, 32).

The U.S. Fish and Wildlife Services ("USFWS") has also rejected prior diminishment arguments. USFWS has prescribed special early-season migratory bird hunting regulations for certain tribes under guidelines established in 1985. The Nation proposed, and USFWS approved, tribal regulations for the Oneida Reservation since 1991, without any objection from the Village until 2014. Then, in 2014, in response to proposed rules for the 2014-15 hunting season, the

Village argued, for the first time to USFWS, that the Oneida regulations should be removed based on a theory that the Reservation had been diminished. The USFWS considered and rejected the Village's argument, and approved the proposed regulations. *See* 79 Fed. Reg. 52,226, 52,229 (Sept. 3, 2014) ("we disagree with the Village's assertions that the Oneida Reservation has been disestablished or diminished").

The record thus further supports a finding that Congress did not intend to diminish the Oneida Reservation, and is wholly insufficient for finding otherwise under controlling precedents. *Nebraska*, 136 S. Ct. at 1082 ("This 'mixed record' of subsequent treatment," including "treatment of the disputed land by Government officials . . . cannot overcome the statutory text, which is devoid of any language indicative of Congress' intent to diminish").

ii. The U.S. Environmental Protection Agency Has Recognized its Regulatory and Program Jurisdiction Throughout the Oneida Reservation, Further Confirming No Diminishment Has Occurred

The U.S. Environmental Protection Agency ("EPA") has approved the State of Wisconsin to administer several federal environmental laws on lands *outside* Indian country, but EPA retains authority—to the exclusion of the State —to implement these statutes on reservation lands. EPA's Indian country jurisdiction is not limited to lands held in trust, but also generally includes all lands within the limits of any Indian reservation, notwithstanding the issuance of any fee patents. *See, e.g.*, 40 C.F.R § 49.2(b); *id.* § 71.2; *id.* § 122.2; *id.* § 131.3(k); *id.* § 232.2; *id.* § 258.2; *id.* § 501.2 (all mirroring the "Indian country" definition in 18 U.S.C. § 1151).[13]

[13] The Village maintains that 18 U.S.C. § 1151 is unconstitutional, purportedly based on "recent pronouncements," Doc. 94 at 52 n.18 (Village Mem. 45 n.18), but the Village's argument contains virtually no analysis, and similar arguments have long been rejected. *See Hilderbrand v. Taylor*, 327 F.2d 205, 207 (10th Cir. 1964) (citing Supreme Court decisions that "recognize the power of Congress to fix the jurisdiction of federal courts over crimes by or against Indians even though committed on patented land within an Indian reservation" under § 1151, and holding that "[w]e have no doubt as to the constitutionality of the statute").

Significantly, as relevant to the *Solem* third factor analysis, EPA has asserted its regulatory authority throughout the entire Oneida Reservation. For example, EPA, rather than the State, retains authority to implement the National Pollutant Discharge Elimination System ("NPDES") permit program within Indian country within Wisconsin under the federal Clean Water Act ("CWA"). *See id.* § 123.1(h); *see also* 2017 Construction General Permit Appendix B at 6 (EPA permit WIR10I000 applicable to stormwater discharges from construction activity in Indian country within the State of Wisconsin).[14] Pursuant to that authority, EPA has asserted jurisdiction over lands within the exterior boundaries of the Oneida Reservation. *See* 66 Fed. Reg. 65,957 (Dec. 21, 2001) (EPA's NPDES general permit "proposed to cover discharges within Indian country, including the . . . Oneida Indian Reservation").[15]

EPA has proposed other draft permits to facilities for discharges within the Oneida Reservation. *See*, *e.g.*, Notice of Draft NPDES Permit for Village of Hobart, Case No. 1:10-cv-137-WCG, Dkt. 25-1 at 4 of 9 ("A Federal NPDES permit is being issued for Hobart MS4 discharges located within the boundaries of the Reservation of the Oneida Tribe of Indians of Wisconsin");[16] Draft NPDES Permit for Brown County ("permit for . . . separate storm sewer

[14] *Available at* https://www.epa.gov/npdes/epas-2017-construction-general-permit-cgp-and-related-documents (last accessed Oct. 9, 2018).

[15] *See also* 65 Fed. Reg. 26,607, 26,610 (May 8, 2000) ("Wisconsin is not authorized to carry out its WPDES program in Indian Country, as defined in 18 U.S.C. § 1151. This includes . . . [l]ands within the exterior boundaries of the . . . Oneida Indian Reservation").

[16] As the Court is aware, the Village previously attempted to use this draft permit to assess utility fees on trust lands within the Oneida Reservation. *Oneida Tribe of Indians of Wisconsin v. Vill. of Hobart, Wis.*, 891 F. Supp. 2d 1058 (E.D. Wis. 2012), *aff'd* 732 F.3d 837 (7th Cir. 2013). Neither the draft permit nor the exterior boundaries of the Oneida Reservation were at issue in that case, although the Seventh Circuit recognized that "non-Indian parcels in Hobart are technically part of the surrounding Oneida Reservation as well"; that "the village is entirely within the boundaries of the Oneida reservation;" and that the Village acknowledged EPA authority on the Reservation "by applying for a runoff permit not from the state but from the EPA." 732 F.3d at 838, 893, 841.

system . . . within the Oneida Reservation").[17]

EPA Region 5 is also responsible for issuing Clean Air Act ("CAA") operating permits to major sources within the exterior boundaries of Indian reservations in Wisconsin pursuant to 40 C.F.R. Part 71, and has done so for facilities within the Oneida Reservation. *See, e.g.*, Statement of Basis for Part 71 Permit Administrative Amendment – Cintas Corporation at 2 (EPA is permitting authority for the facility "located within the Oneida Tribe of Indians of Wisconsin's reservation.").[18]

Finally, EPA Region 5 is also responsible for issuing CAA permits under the federal minor new source review program in Indian country in Wisconsin under 40 C.F.R. Part 49, and has done so for facilities within the Oneida Reservation. *See*, *e.g.*, Final Part 49 Permit for Prestige Custom Cabinetry & Millwork, Inc. at 1 (permit for facility "located on non-tribally owned fee lands within the exterior boundary of the Oneida Tribe of Indians of Wisconsin's reservation").[19]

iii. Subsequent Treatment of the Oneida Reservation by Courts Further Confirms that the Oneida Reservation was Neither Diminished Nor Disestablished

The Village argues that issue preclusion bars the Oneida Nation's claims in this case, citing *Stevens v. Cty. of Brown* (E.D. Wis. Nov. 3, 1933), Doc. 89-45, and, to a lesser extent, *United States v. Hall*, 171 F. 214 (E.D. Wis. 1909). Neither case has the preclusive effect that

[17] *Available at* http://maps.gis.co.brown.wi.us/web_documents/Planning/MS4.pdf (last accessed Oct. 9, 2018). EPA has not yet issued final permits for these dischargers and it is cognizant of the present litigation involving the boundary of the Reservation. Clarification of the boundary of the Reservation would provide needed certainty in defining the respective roles of federal, state, and tribal regulators within the Oneida Reservation.

[18] *Available at* https://www.regulations.gov/contentStreamer?documentId=EPA-R05-OAR-2017-0746-0002&contentType=pdf (last accessed Oct. 9, 2018).

[19] *Available at* https://www.regulations.gov/contentStreamer?documentId=EPA-R05-OAR-2017-0220-0001&contentType=pdf (last accessed Oct. 9, 2018).

the Village urges.

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." *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008) (internal citation and quotations omitted). *Stevens* was filed by individual Oneida Indians challenging taxes imposed upon individually owned lands. The Nation was not a party to the *Stevens* case, *see* Doc. 104 at 6-7 (Nation Opp. 3-4), and the "general rule" of issue preclusion does not apply when "a judgment does not depend on a given determination" or when "a change in [the] applicable legal context intervenes." *Bobby v. Bies*, 556 U.S. 825, 834 (2009) (citations and quotation marks omitted). Here, both criteria are satisfied. The *Stevens* court's statement about the status of the Reservation was unnecessary because the Dawes Act expressly authorized such taxation of fee-patented lands. Dawes Act, 24 Stat. at 389. And the Supreme Court later clarified in *Yakima* that certain state taxation of lands allotted and fee-patented under the Dawes Act is consistent with continued reservation status. 502 U.S. at 251.

Without any analysis or legal support, *Stevens* concluded that "the Dawes Act . . . resulted in a discontinuance of the reservation." Doc. 89-45 at 3-5. The Supreme Court subsequently rejected the basis for *Stevens*' conclusion, however, when it expressly repudiated the idea that allotment alone diminished or changed reservation boundaries. *Mattz*, 412 U.S. at 497; *Seymour*, 368 U.S. at 358-59 *Stevens* is not entitled to any preclusive effect.

The Village also relies on the statement from *Hall* that "a large fraction of the territory formerly known as the Oneida Reservation is owned and occupied by white men." 171 F. at 218. But neither the case itself nor the statute at issue dealt with actual reservation boundaries. And for issue preclusion purposes, the applicable law in *Hall* was overruled shortly after the opinion.

Hall involved an alleged violation of an 1897 liquor statute, 29 Stat. 506, which

prohibited, among other things, alcohol sales (1) "to any Indian to whom allotment of land has been made while the title to the same shall be held in trust by the Government"; and (2) to "any Indian . . . over whom the Government . . . exercises guardianship." As to the first prohibition, Congress extended the statute only to trust allotments, and *Hall* actually re-affirmed "the jurisdiction which the federal government retains to protect and regulate the allotted lands." *Id.* at 218. The statute did not apply to lands held in fee. The Court reasoned further that liquor laws are "separate and apart from the jurisdiction which the federal government retains to protect and regulate the allotted lands." *Id.* Therefore, the Court focused on the second prohibition in the statute and analyzed the degree of federal guardianship over the individual Indians in the case. Relying on *In re Heff*, 197 U.S. 488 (1905), *Hall* reasoned that the Dawes Act resulted in "emancipation" from federal control. *Id.* But shortly after *Hall*, the Supreme Court overturned this principle, and held that neither the Dawes Act nor the grant of citizenship were incompatible with continued federal jurisdiction. *United States v. Nice*, 241 U.S. 591, 598 (1916); *see id.* at 601 ("the decision in [*Heff*] is not well grounded, and it is accordingly overruled").

For the third factor of the *Solem* analysis, and like other contradictory statements from this time, it is also not clear whether the statements in *Stevens* and *Hall* are referring to the actual exterior boundaries of the Oneida Reservation, or whether they are referring to Indian ownership within a still-existing reservation. And both decisions are contrary to others—both post-dating allotment and post-dating *Stevens* and *Hall* —that refer to the Oneida Reservation as in existence. *See Oneida Tribe of Indians of Wis. v. Vill. of Hobart, Wis.*, 732 F.3d at 838-39 (stating that "non-Indian parcels in Hobart are technically part of the surrounding Oneida Reservation" and that "the village is entirely within the boundaries of the Oneida reservation"); *Oneida Tribe of Indians of Wis. v. State of Wis.*, 518 F. Supp. 712, 713 (W.D. Wis. 1981)

("Plaintiff Oneida Tribe of Indians of Wisconsin occupies a reservation situated in Brown and Outagamie Counties in the state of Wisconsin."); *LaRock v. Wis. Dep't of Revenue*, 621 N.W.2d 907, 908 (Wis. 2001) (petitioner "living and working on the Oneida Reservation" was subject to state taxation of "income earned on the Oneida Reservation" because she was "a member of the Menominee Tribe rather than the Oneida Tribe"); *Village of Hobart v. Brown Cty.*, 801 N.W.2d 348 (Wis. Ct. App. 2011) ("The Oneida Tribe of Indians of Wisconsin occupies a reservation encompassing approximately 65,400 acres in Brown and Outagamie Counties" and "the Village [of Hobart] is comprised of 21,566 acres located within the boundaries of the Oneida reservation."); *State v. King*, 571 N.W.2d 680 (Wis. Ct. App. 1997) (affirming trial court ruling that Oneida tribal members were fishing within the Oneida Reservation's borders).[20]

Unlike *Stevens* and *Hall*, *State v. King* focused directly on the boundaries of the Oneida Reservation. *Id.* at 681. The State of Wisconsin cited Oneida tribal members for fishing within 500 feet of a dam in Brown County, which the State alleged to be outside the Oneida Reservation. *Id.* at 681-82. The State argued not that the Reservation was diminished, but that the treaty-established reservation boundary was the west bank of Duck Creek, which would have placed the fisherman outside the Reservation. *Id.* at 682. The tribal members argued that the Oneida Reservation boundary was the "thread" of the creek such that their fishing occurred within the Reservation. *Id.* at 681. Significantly, it was understood by all parties the Oneida Reservation was still in existence; indeed, the State presented testimony of multiple surveyors, citing 150 years of reservation surveys. *Id.* at 682. The trial court concluded that the tribal

[20] According to the Wisconsin Attorney General's Office, there was an additional case involving an Oneida tribal member convicted of murder in state court prior to the enactment of Public Law 280. Doc. 105-38 at 42 (Woloshin Mem. at 40). The defendant was later discharged from custody after successfully petitioning for a writ of habeas corpus, which was granted by the state court "on the basis that the crime occurred on land located within boundaries of the Oneida Reservation as defined by the treaty of February 3, 1838 (7 Stat. 566)." *Id.*

members were fishing within the boundaries of the Oneida Reservation, and the court of appeals affirmed. *Id.* at 685-86.

iv. Subsequent Treatment of the Oneida Reservation by the State of Wisconsin, Local Counties, and Local Towns and Municipalities Further Confirms that the Oneida Reservation was Neither Diminished Nor Disestablished

The State of Wisconsin and local counties and towns have also recognized the undiminished treaty boundaries of the Oneida Reservation. In 1903, the State Legislature explicitly recognized the continued existence of "the Oneida Reservation" when it created the towns of Hobart and Oneida. Doc. 92-36 (Laws of Wis. ch. 339 (1903)); *see also Parker*, 996 F. Supp. 2d at 829 (state legislature expressly recognized the continued existence of Omaha Reservation when it established Thurston County within and in reference to the Reservation).

In 1981, the State of Wisconsin Attorney General formally opined that the allotment and fee-patenting of lands within the Oneida Reservation did not diminish its boundaries, and that "Congress has not extinguished, diminished, or terminated the reservation as originally established." Doc. 105-37 at 7 (Letter from Wisconsin Attorney General Bronson C. La Follette to Secretary Carroll Besadny, Wisconsin Department of Natural Resources (Aug. 21, 1981) at 6). The opinion was written three years prior to the Supreme Court's opinion in *Solem*.

In 1984, an attorney in the State Attorney General's Office prepared an additional 41-page analysis of the Oneida Reservation utilizing the three-part test from *Solem*, which was decided earlier that year. Doc. 105-38 (Woloshin Mem.). The 1984 analysis—described by the State Deputy Attorney General as a supplement to the 1981 opinion—determined that nothing in the text or legislative history of the Dawes Act, Burke Act, or 1906 Appropriations Act suggested that Congress intended for allotment and fee-patenting of the Oneida Reservation to result in diminishment. *Id.* at 25, 28, 30 (Woloshin Mem. at 23, 26, 28). The analysis also

considered subsequent administrative treatment and criminal jurisdiction over the Reservation, and concluded that "all relevant material strongly suggests that the original 1838 boundaries of the Wisconsin Oneida Indian Reservation remain virtually unchanged." *Id.* at 43 (Woloshin Mem. at 41). Arguments about *Stevens* and *Hall* were also considered, analyzed, and ultimately rejected as not controlling the outcome of the Reservation boundary issue. *Id.* at 40-42 (Woloshin Mem. at 38-40).

Local counties and towns have also recognized the undiminished treaty boundaries of the Oneida Reservation in their intergovernmental agreements with the Nation. *See Parker*, 996 F. Supp. 2d at 832 (relying in part on motor fuel tax agreement between the Omaha Tribe and the State of Nebraska regarding sales on the Omaha Reservation). For example, the Nation has entered service agreements with Brown County, Outagamie County, the Village of Ashwaubenon, and the Town of Oneida, recognizing and defining the "Oneida Reservation" as "encompassing approximately 65,400 acres." *See* Service Agreement Between Oneida Tribe of Indians of Wisconsin and Brown County;[21] Intergovernmental Service Agreement Between Oneida Tribe of Indians of Wisconsin and Outagamie County Drainage Board;[22] Service Agreement Between Oneida Tribe of Indians of Wisconsin and Village of Ashwaubenon;[23] Cooperative Governance Agreement Between Oneida Nation and Town of Oneida.[24] It appears

[21] *Available at* https://oneida-nsn.gov/wp-content/uploads/2016/02/BrownCountyServiceAgreementandAmendments.pdf (last accessed Oct. 9, 2018).
[22] *Available at* https://oneida-nsn.gov/wp-content/uploads/2016/02/OutagamieCountyDrainageBoardIntergovernmentalService.pdf (last accessed Oct. 9, 2018).
[23] *Available at* https://oneida-nsn.gov/wp-content/uploads/2016/02/Service-Agreement-with-Ashwaubenon-2014.pdf (last accessed Oct. 9, 2018).
[24] *Available at* https://oneida-nsn.gov/wp-content/uploads/2016/02/2016-2021-Cooperative-Governance-Agreement-Between-Oneida-Nation-and-Town-of-Oneida-signed-7-2728-2017-1.pdf (last accessed Oct. 9, 2018).

that the Nation also once had a separate service agreement with the City of Green Bay, again recognizing, at least then, that the Oneida Reservation "encompasses approximately 65,400 acres." *See* Service Agreement Between Oneida Tribe of Indians of Wisconsin and City of Green Bay.[25]

The Town of Oneida's website declares that "[t]he entirety of the Town lies within the boundaries of the Oneida Indian Reservation." *See* https://www.townofoneida.org/ (last accessed Oct. 9, 2018); *see also Parker*, 996 F. Supp. 2d at 830 (citing Thurston County website, which declared: 'The two reservations [the Omaha Indian and Winnebago] are still in existence today and cover the entire Thurston County area.'").

v. Maps and Demographic Evidence Further Confirm that the Oneida Reservation was Neither Diminished Nor Disestablished

The Village cites to four maps as further support for its argument that the Oneida Reservation was treated as diminished in the twentieth century. Doc. 94 at 47 (Village Mem. 40) (citing Doc. 91 ¶¶ 108-12 (maps prepared by the Bureau of Indian Affairs, the State of Wisconsin, the U.S. Department of Agriculture, and Rand McNally)). Such maps, however, are simply part of a "mixed record" that also contains maps showing the Oneida Reservation as it was established by the 1838 Treaty. *See*, *e.g.*, Doc. 105-63 at 4 (Bureau of Indian Affairs Map (1952) (showing Oneida Reservation boundary intact)); Doc. 105-2 at 31 (Kiel at 27 (citing ON00010254–55, U.S. Geological Survey Map of the State of Wisconsin (1968) (showing the "[R]eservation's continuously undiminished boundaries")).

The Village also points to demographic data for support, but such evidence is "the least compelling" in the diminishment analysis, as changes in population were anticipated as lands

[25] *Available at* https://oneida-nsn.gov/dl-file.php?file=2016/02/CityofGreenBayServiceAgreement.pdf (last accessed Oct. 9, 2018).

were opened up to non-Indian settlement. *Nebraska*, 136 S. Ct. at 1082. And if such data cannot overcome the lack of congressional intent under the first two *Solem* factors in *Nebraska*, where 98% of the population in the disputed area was non-Indian, *see Parker*, 996 F. Supp. 2d at 828, the data offered by the Village, *e.g.*, Doc. 94 at 37 (Village Opp. 30) ("white residents make up approximately 80% of the population of the Village"), cannot produce that result here.

CONCLUSION

The 1838 Treaty between the Nation and the United States established the Oneida Reservation for the Nation. The Oneida Reservation was not diminished by the Dawes Act, the Burke Act, the 1906 Oneida Provision, or any other statute. Accordingly, the United States respectfully urges the Court to grant the Nation's Motion for Summary Judgment and deny the Village's Motion.

Respectfully submitted this 12th day of October, 2018.

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