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

Oneida Nation,

Plaintiff,

v.

Case No. 16-CV-1217

Village of Hobart, Wisconsin,

Defendant.

DEFENDANT'S BRIEF IN RESPONSE TO *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 (the "Village") respectfully submits this brief in response to the *amicus curiae* brief that the United States has filed in support of the Nation's motion for summary judgment. As the Village has explained elsewhere, the Oneida Reservation[1] was, at a minimum, diminished and the Village is therefore entitled to summary judgment. The United States' brief, which in large part simply parrots the Nation's arguments and the conclusions of the Nation's experts while ignoring the overwhelming record evidence supporting the Village's position, does not establish otherwise. Indeed, the United States' arguments in its brief are strikingly similar to arguments it made in support of the continued existence of the Stockbridge-Munsee Reservation. *See State of Wisconsin v. Stockbridge-Munsee Cmty.*, 366 F. Supp. 2d 698, 747-749 (E.D. Wis. 2004). As this Court is aware, the United States' position in that case was rejected, and the Stockbridge-Munsee Reservation was held disestablished. The Court should reach the similar conclusion here.

ARGUMENT

I. The Treaty of 1838 Was Not Intended to Create a Reservation Held In Common.

On the question of the effect of the Treaty of 1838, the United States adds little to the Nation's arguments, which the Village has rebutted elsewhere. (ECF No. 102 at 4-8.) However, the United States also mischaracterizes the Village's position. For example, with respect to Article 2 of the Treaty—which "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," (ECF No. 92-13)—the Village believes the Treaty was intended to provide individual 100-acre tracts for the Oneida Indians, not a reservation held in common. The United States suggests that the Village's position

[1] For purposes of this brief, the Village will refer to the approximately 65,400 acres set aside under the Treaty of 1838 as the "Oneida Reservation."

is based only on evidence of the contemporaneous understanding of some tribal members,[2] but the Village's position is also supported by other parts of the Treaty including Article 3 of the Treaty (which expressly refers to "the *tracts* reserved in the 2d article") and the margin notes to Article 2 (which refer to the "[r]eservations to be made from said cession"). (ECF No. 92-13.)

The United States completely ignores this relevant text. Rather, like the Nation, the United States interprets the Treaty of 1838 through reference to *different* treaties between the United States and *different* tribes. As the Village has already pointed out, however, the Supreme Court has described such an approach to treaty interpretation as "reveal[ing] a fundamental misunderstanding of basic principles of treaty construction." *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999) (observing that the "argument that similar language in two Treaties involving different parties has precisely the same meaning reveals a fundamental misunderstanding of basic principles of treaty construction").

The United States further argues that even if the Treaty of 1838 was intended to provide individual Oneida with 100-acre parcels, "[t]his fact has no bearing on the reserved status of the land." (ECF No. 126 at 10.) The United States' point appears to be that whether the Treaty of 1838 was intended to create a reservation held in common or instead reserved individual tracts, it still created a reservation. As the Village explains elsewhere, however, the original intent of the Treaty of 1838, and the unique history of the Oneida in Wisconsin, provide context for assessing the subsequent acts of the United States that altered whatever reservation status may have originally attached to the land at issue. (ECF No. 102 at 8.)

[2] Such evidence is directly relevant to the question at hand: how did the Indians themselves understand the terms of the Treaty? *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999) ("[W]e interpret Indian treaties to give effect to the terms as the Indians themselves would have understood them."). Notably, the United States does not cite a single piece of contemporaneous evidence showing a different interpretation by tribal members.

Finally, less than a decade after the federal government entered into a treaty with two small groups of the Oneidas of New York, in 1838, Wisconsin was admitted to the union as the 30th state. The land set aside by the federal government to encompass the state of Wisconsin, did not except therefrom any portion of the 65,400 acres referenced in the 1838 Treaty. Wisconsin Const., art. 2, § 1. This further evidences the fact the area set aside for the group of Oneidas who immigrated from New York, was never intended to be a permanent reservation. Moreover, the individuals that made up the First Christian and First Orchard parties did not have jurisdiction over the land they were occupying. They had the right of use and occupancy but when that land mass was originally set aside for them, it was the federal government that had jurisdiction. That jurisdiction was later transferred to the state of Wisconsin upon its entering the union.

II. The Oneida Reservation Was Diminished or Disestablished.

On the question of whether Congress subsequently diminished or disestablished the Oneida Reservation, the United States—just as the Nation does—repeatedly blurs the distinction between surplus land acts and the allotment of reservations under the Dawes Act. Many of the principles the Supreme Court has developed in the surplus land act context are inapplicable in the allotment context, however, and strictly applying them to the circumstances of the Oneida Reservation would be a mistake.[3] Not all surplus land acts diminished reservations—such acts were designed to open reservations for white settlement, sometimes with and sometimes without diminishing a reservation[4]—but there can be no reasonable dispute that allotment under the

[3] For example, as the Village has explained elsewhere, the types of statutory language on which the Supreme Court has relied to find diminishment or disestablishment in the surplus land act context do not make sense in the context of allotment. (ECF No. 102 at 15-17.)

[4] *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998) ("States acquired primary jurisdiction over unallotted open lands where the applicable surplus land Act freed that land of its reservation status and thereby diminished the reservation boundaries. . . . In contrast, if a surplus land Act simply offered non-Indians the opportunity to purchase land within established

Dawes Act was intended to result in the ultimate termination of a reservation. And, the Oneida Reservation is an "extreme example" of allotment under the Dawes Act. (ECF No. 89-108 at ON00006360.) Indeed, with few exceptions, fee simple patents were ultimately issued and the land passed out of Indian ownership, thus completing the process Congress envisioned would eliminate reservations. And, the passage of the 1906 Oneida Provision, the circumstances surrounding that statute, and the subsequent history of the Oneida Reservation all confirm that the Reservation has been, at minimum, diminished.

A. The United States' arguments with respect to *Solem* factor one lack merit.

1. Congress intended to terminate reservations through full implementation of the Dawes Act.

The United States first argues that allotment under the Dawes Act did not diminish the Oneida Reservation and notes that 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." (ECF No. 126 at 13.) This is true. Nevertheless, it is evident that the then existing Congressional intent was to diminish a reservation once the allotments' trust protection expired. In other words, a reservation would cease to exist once the allotment process was completed—that is, once the 25-year, or extended, trust period for the allotments had expired. The reservation would certainly cease to exist once those allotments passed out of Indian ownership.

Indeed, the Supreme Court has confirmed that "[t]he policy of the [Dawes Act] was the eventual assimilation of the Indian population … and the *gradual extinction of Indian reservations and Indian titles*." *Montana v. United States,* 450 U.S. 544, 559 n.9 (1981) (*quoting Draper v. United States*, 164 U.S. 240, 246 (1896) (emphasis added)). In the era during which

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reservation boundaries, . . . then the entire opened area remained Indian country." (internal quotation marks and citations omitted)).

the Dawes Act was passed, the prevailing federal policy consisted of two principal goals: the civilization of the Indian population and the reduction of existing Indian reservations. *See Montana*, 450 U.S. at 559 n.9. "At the turn of the century, virtually *every congressman believed* that reservations were a thing of the past and would soon disappear with tribal members being assimilated into non-Indian society. Indeed, the policy of assimilation—and the concomitant dissolution of tribal status—was at its zenith around the turn of the century and in the years immediately thereafter." *Wisconsin v. Stockbridge-Munsee Community*, 366 F. Supp. 2d 698, 722-23 (E.D. Wis. 2004) (emphasis added). "The *government's policy* throughout the nineteenth century was eventually to end reservations." *Id.* at 723 (emphasis added). The Dawes Act provided the gradual means for achieving the above ends, and was, at that time, the cornerstone of the assimilationist policy. U.S. Department of Interior, *Federal Indian Law*, 773-76 (1958). *See generally Montana, supra*, 450 U.S. 559 n.9; *Monson v. Simonson*, 231 U.S. 341, 345 (1913); D.S. Otis, *The Dawes Act and the Allotment of Indian Lands*, 3-52, 57-63 (1973 ed.).

The Congressional record is in accord with case law. During the debates, Senator Hoar described the effects of the bill as follows:

> [I]t is proposed to place these Indians upon land in severalty, and to remove them entirely from the tribal jurisdiction. They are to be subjected by [Section 6] to all the laws, both civil and criminal, of the State or Territory in which they may reside.

11 Cong. Rec. 875 (1881) (ECF No. 89-192). In addition, Senator Coke's description of the jurisdictional effect of the legislation further indicates that the extension of state jurisdiction over allotted reservations was to be complete:

> I have to say that this bill leaves the Indians and their allotments of land, after they shall have been consummated, 'subject to the laws, both civil and criminal, of the State or Territory in which they may reside.' Why are not the Indians and the lands subject now to the jurisdiction of those laws? Simply because the Government of the United States holds a paramount jurisdiction which excludes that of the States and Territories where the Indians and the lands now are. This bill simply proposes to *release the jurisdiction of the United States over these two subjects-matter, the person and the land;* and as soon as that release is made *the jurisdiction of the State or Territory at that moment attaches*.

11 Cong. Rec. 878 (1881) (emphasis added) (ECF No. 89-193). Clearly then, an allotted reservation area was to be fully subject to the jurisdiction of the state, and the United States and therefore the tribe were to have no further special jurisdiction over the allotted area.

Senator Dawes, the Senate sponsor of the Act, described the effects of the legislation in this way:

> I hope the Senate understands the importance of this bill. It is … the beginning of the end of the Indian as Indian. From this time forth under this bill he is to be treated as an individual; each individual Indian is to stand upon his own feet. As he steps down from his tribe under this bill he becomes amenable to the laws of the United States and can, like every other citizen of the United States, appeal to them for protection … As an Indian tribe [sic] *set apart upon a reservation solitary and separated from the rest of the people* of the United States, a quasi-independent people in the midst of the United States, if the bill becomes a law he *passes out of sight*.

15 Cong. Rec. 2277 (emphasis added). In a similar vein, Representative Skinner, one of the sponsors of the Act in the House, stated:

> This means that the tribal relations must be broken up; that the practice of massing large numbers of Indians on reservations must be stopped; that lands must be allotted in severalty.
>
> ***
>
> We offer the pending bill, intending for it to fill the full measure of all these reqirements, and believing that it points out the most direct route to citizenship for the Indian.

18 Cong. Rec. 190 (1886) (ECF No. 89-225 at VH-GRE004188). Thus, the termination of the reservation system was tethered to the idea of assimilation by way of allotment. Little could be more incompatible with the concept of an Indian reservation than the policies supported by Congress in passing the Dawes Act: the reduction of existing reservations, the dissolution of tribal organization, the termination of federal supervision, the extension of state law, and the absorption of previously separate peoples into the mainstream of American society.

The effectuation of these policies cannot be reconciled with the continuation of reservation status. What was then understood to be the definition of reservation – that is, an area

set apart for the use and occupancy of an Indian tribe, not subject to the general jurisdiction of the state – is the antithesis of what was envisioned under the Dawes Act. Nowhere in the legislative history of the Act is there any indication that Congress intended that a reservation area, once allotted and patented in fee simple, would or could remain in reservation status. Since the continuation of reservation status is irreconcilable with the policies of the Dawes Act as evidenced by the legislative history, it must be concluded that Congress intended that a fully allotted and patented reservation would be disestablished by operation of the Act.

The United States notably does not contest that the ultimate goal of the Dawes Act was the termination of reservations allotted under its terms. Instead, the United States raises a number of arguments, based on cases arising in different contexts, to argue that Congress' intent—which was fully effectuated on the Oneida Reservation—was irrelevant.

a) The surplus land act cases on which the United States relies do not foreclose the Village's arguments.

First, the United States argues the Dawes Act's allotment provisions are "indistinguishable" from statutes the Supreme Court has found did not diminish a reservation. (ECF No. 126 at 14.) The United States focuses primarily on four cases: *Solem v. Bartlett*,[5] *Mattz v. Arnett*,[6] *Seymour v. Superintendent of Washington State Penitentiary*,[7] and *Nebraska v. Parker*.[8] But each of those cases is distinguishable, and did not consider the circumstances at issue in this case. Indeed, *Solem, Mattz, Seymour*, and *Parker* addressed the wording of the surplus land provisions of the statues at issue, *not* on allotment language.

[5] 465 U.S. 463 (1984).

[6] 412 U.S. 481 (1973).

[7] 368 U.S. 351 (1962).

[8] 136 S. Ct. 1072 (2016).

For example, the United States claims *Parker* held "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." (ECF No. 126 at 17.) But, that is not an entirely accurate summary. Admittedly, "[t]he 1882 Act also included a provision, common in the late 19th century that enabled members of the Tribe to select individual allotments." *Parker*, 136 S. Ct. at 1077. But, the case focused not on the allotment provisions but on the surplus land language directing the Secretary "to cause to be surveyed, if necessary, and sold" land lying west of the railroad right-of-way. *Id*. at 1074. This unallotted land could then be purchased in 160-acre tracts *by "nonmembers*." Id. at 1077 (emphasis ddded). Focusing only on the language dealing with the disposition of surplus lands the court stated that "[f]rom this text, it is clear that the 1882 Act falls into another category of surplus land Acts: those that 'merely opened reservation land to settlement and provided that the uncertain future proceeds of settler purchases should be applied to the Indians' benefit.'" *Id.* at 1079. In other words, *Parker* is a surplus land act case and not an allotment case. It says nothing about what would happen to a reservation allotted under the Dawes Act for which fee simple patents were ultimately issued and passed out of Indian ownership.

Solem also was a case dealing only with a surplus lands act allowing the Secretary "to sell and dispose" to "non-Indians" the "unallotted" portion of the reservation. 465 U.S. at 465. *Solem* did not consider what happened to allotments to Indians which eventually lost their trust status and ultimately were owned by non-Indians. *Solem* says nothing about what happens to land in that context, which is what must be examined in this case.

The United States' reference to the holding in *Mattz* is similarly flawed. The Village has distinguished *Mattz* elsewhere, (ECF No. 102 at 22), but it is important to note that the relevant

Act in *Mattz* made the reservation "subject to settlement, entry, and purchase" by non-Indians. 412 U.S. at 481. In other words, it was a surplus land act. To the extent *Mattz* commented on allotments, it noted the policy of allotments, including those under the Dawes Act "was to continue the reservation system and the trust status of Indian lands ..." *Id.* at 496. The *Mattz* court went on to state however, that "[w]hen all the lands had been allotted and the trust expired, the reservation could be abolished." *Id.* at 496.

Seymour similarly was a surplus lands act case and does not specifically address what happens to allotments after they pass out of restricted status. Again, the Village has addressed *Seymour* in more detail elsewhere, (ECF No. 102 at 24; ECF No. 119 at 16), but as relevant here the act at issue in that case "provided for the sale of mineral lands and for the settlement and entry under the homestead laws of other *surplus lands* remaining on the diminished Colville Reservation *after allotments* were first made and patents issued [to tribal members]…." *Seymour*, 368 U.S. at 355 (emphasis added). That case also did not specifically address the status in the early twentieth century of allotted land that was patented in fee to tribal members.

Further, the United States relies on these cases (and other surplus land act cases) to argue that none of the allotment acts being proffered by the Village contain words such as "cede, sell, relinquish, and convey" or "restore to the public domain" as found in situations where the Supreme Court found a reservation was diminished. (ECF No. 126 at 15.) But why would they? The Oneida reservation was fully allotted and there was no land left to "cede, sell, relinquish," "convey," or "restore to the public domain." Language of this nature, used in conjunction with the Oneida reservation, would have been completely nonsensical due to the distinction between surplus land acts and allotment. (ECF No. 102 at 15-17.)

Indeed, while the United States tries to distinguish the facts at issue in the pending Supreme Court case of *Carpenter v. Murphy*, it cannot deny that just a few months ago it stressed in an *amicus curiae* brief to the Supreme Court, that "prior disestablishment cases have [only] considered whether Congress disestablished or diminished a reservation *through 'surplus land Acts'* passed in the late 19th and early 20th centuries *that opened land to non-Indian settlement*." *See* Br. for the U.S. as Amicus Curiae Supporting Petitioner, *Carpenter v. Murphy*, No. 17-1107 (July 2018), at 6, available at https://www.supremecourt.gov/DocketPDF/17/17-1107/55946/20180730184937862_17-1107tsacUnitedStates.pdf. (Emphasis added). The United States went on to argue in *Carpenter v. Murphy*, that "[w]hile those same general principles [the *Solem* factors] are relevant and support disestablishment here, this case is distinct from those the Court has considered before. This case does not concern a single surplus land Act in which Congress 'merely opened reservation land to settlement.'" *Id.* at 6-7. The exact same can be said about the Oneida Reservation. Finally, in *Carpenter v. Murphy*, the United States focused on the power of allotments and argued that Congress envisioned that statutes of the type involved in this case, allowing for fee patented allotments, would "overthrow … the communal system of land ownership," and "extinguish the tribal titles, *either* by cession to the United States *or by allotment and division in severalty*." *See* Br. for the United States as Amicus Curiae Supporting Petitioner, *Carpenter v. Murphy*, No. 17-1107 (July 2018), at 12, available at https://www.supremecourt.gov/DocketPDF/17/17-1107/55946/20180730184937862_17-1107tsacUnitedStates.pdf (emphasis added) (internal quotation marks and citation omitted). The United States' prior acknowledgment of the distinction between terminating a reservation by two separate means, cession or allotments, greatly undermines its position here.

b) The Village is not relying on Congress' "general expectations."

The United States next notes that despite the congressional intent behind allotment acts, the Supreme Court has said it 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." (ECF 126 at 24 citing *Solem*, 465 U.S. at 468-69.) The United States, however, does not provide the full cite. The full cite is that "[a]lthough the Congresses that passed the *surplus land acts* anticipated the imminent demise of the reservation and, in fact, passed the acts partially to facilitate the process, we have never been willing to extrapolate from this expectation a specific congressional purpose of diminishing reservations with the passage of *every surplus land act*." *Solem*, 465 U.S. at 468-69 (emphasis added).

The fact the Supreme Court was not willing to automatically conclude diminishment from "*every*" "*surplus land act*" makes perfect sense. Some might contain language expressly preserving the reservation and others might not. Additionally, that caution is expressly limited to surplus land acts and says nothing about allotments. Moreover, even if that limiting language is applied to allotment acts, all it means is that a court should not instantly conclude an act eliminated a reservation, but should instead consider congressional intent at the time of enactment and review the acts application to a specific reservation. In other words, the Supreme Court has never indicated that the Dawes Act, fully effectuated, cannot result in the diminishment of a reservation. It has however, foreshadowed what its conclusion would be in *Mattz*, in which the Court acknowledged that "[w]hen all the lands had been allotted and the trust expired, the reservation could be abolished." 412 U.S. at 496.

c) Once the Oneida allotments were patented in fee the Reservation would be disestablished.

The United States next argues that diminishment does not turn on whether allotted lands are fee-patented, or sold to non-Indians, because "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." (ECF No. 126 at 17.) Again, however, the United States relies on *Nebraska*, *Solem*, *Mattz* and *Seymour*, which as discussed above did not address the circumstances at issue here.

Indeed, contrary to the United States' claims, it was understood at the time that issuance of fee patents for allotted land would result in the termination of reservation status. This fact informed the Seventh Circuit's decision finding disestablishment with respect to the Stockbridge-Munsee. In *Wisconsin v. Stockbridge-Munsee Community*., 554 F.3d 657 (7th Cir. 2009), the Seventh Circuit acknowledged how the change in title to the land could result in diminishment or disestablishment of a reservation "[b]ecause the reservation could only be abolished if the tribal members held their allotments in fee simple." 554 F.3d at 664. The Seventh Circuit further stated: "[b]y 1910, all the land in the 1856 reservation was sold to non-Indians *or allotted in fee simple*, which meant that Congress paved the way for non-Indians to own every parcel within the original reservation and *ensured that the reservation could be immediately extinguished*." *Id*. at 665 (emphasis added); *see also Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010, 1028 (8th Cir. 1999) (observing "nonceded lands retained their reservation status until they passed out of trust").

In fact, in 1911, the time period relevant here, the Eastern District of Wisconsin was presented with the question of whether the Stockbridge-Munsee Reservation in Wisconsin was terminated by an allotment act. The court held that the reservation initially remained intact but

stated "[i]t may be conceded that when Congress had authorized the allotment in severalty and in fee simple of all the lands belonging to the tribe, and *after* the approval of such allotment and the actual *delivery of the [fee] patents* therefor, *there remained no reservation*." *United States v. Gardner*, 189 F. 690, 694 (E.D. Wis. 1911) (emphasis added). The court then found it unnecessary to determine on which date "the reservation expired"—on the date of approval of the allotments or the delivery of the fee patent. *Id.* at 696. The court again addressed the issue in *United States v. Anderson*, 225 F. 825 (E.D. Wis. 1915), where the court found "the Stockbridge-Munsee Reservation, 'created by treaty and congressional acts, has been *dissolved through the patenting in fee* simple of the lands comprising the same to the members of the tribe, pursuant to [the 1906] Act….'" *Stockbridge-Munsee Cmty.*, 366 F. Supp. 2d at 776 (quoting *Anderson*, 225 F. at 825) (emphasis added).

Other cases relating to the jurisdictional effect of allotments make it clear that any basis for special federal jurisdiction existed only as long as allotments were held in trust. For example, in *United States v. Ramsey*, 271 U.S. 467, 471 (1926), the Court spoke of Congress having "supervisory control" over an allotment "*until the expiration of the trust or the restricted period.*" (emphasis added). Similarly, in *Larkin v. Paugh*, 276 U.S. 431, 439 (1928), the Court held that the issuance of a fee patent "put an end to the authority theretofore possessed by the Secretary of the Interior by reason of the trust." In addition, in both *United States v. Pelican*, 232 U.S. 442, 449 (1914), and *Hallowell v. United States*, 221 U.S. 317, 323-24 (1911), the Court predicated the validity of federal jurisdiction over an allotment on the fact that the land was still held in trust. These cases all show that during the relevant timeframe, it was understood that reservation status, as then defined, did not survive the extinguishment of restricted tribal title.

Therefore, it must be concluded that Congress intended that the policy of disestablishment embodied in the Act be implemented upon the issuance of fee patents.

Moreover, even if the issuance of a fee patent did not terminate the reservation status of an allotment, the sale of that allotment to a non-Indian would do so. "Regardless of any confusion during the allotment era, there was a 'common understanding of the time' that tribal ownership was 'a critical component of reservation status.'" *Stockbridge-Munsee Cmty.*, 366 F. Supp. 2d at 768 (quoting *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 345 (1998)). Thus, it was generally held that Indian reservation status did not survive the extinguishment of Indian title. *E.g., Clairmont v. United States*, 225 U.S. 551, 560 (1912); *Tooisgah v. United States*, 186 F.2d 93, 98-99 (10th Cir. 1950); *Hollister v. United States*, 145 F. 773, 778 (8th Cir. 1906). "Lands to which the Indians did not have any property rights were never considered Indian country" and "[t]he notion of a reservation as a piece of land, all of which is Indian country regardless of who owns it, would have thus been quite foreign." *Gaffey*, 188 F.3d at 1022; *see also Stockbridge-Munsee Cmty.*, 554 F.3d at 662 ("[B]ack then, the 'notion that reservation status of Indian lands might not be coextensive with tribal ownership was unfamiliar….'" (quoting *Solem*, 465 U.S. at 468)). Thus, the Eighth Circuit has confirmed "Congress's original expectation that allotments would lose their reservation status as they passed out of Indian ownership and into white hands," *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994, 1009 (8th Cir. 2010), and reservations were diminished by the loss of "lands originally allotted to tribal members which have passed out of Indian hands." *Gaffey*, 188 F.3d at 1030.

"Only in 1948 did Congress uncouple *reservation status* from *Indian ownership*, and statutorily define Indian country to include lands held in fee by non-Indians within reservation boundaries." *Stockbridge-Munsee Cmty.*, 366 F. Supp. 2d at 751 (quoting *Solem*, 465 U.S. at

468). In other words, in the early 20th century, the timeframe relevant to this case, the Supreme Court has confirmed reservation status was lost once allotted land fell out of Indian ownership. Therefore, even if for some reason the elimination of the trust status for the allotments did not end the Oneida reservation, which it did, it was disestablished (or at least diminished) when at least 95% of the reservation passed out of Indian ownership.

In sum, the case law establishes that the act of allotment alone does not disestablish the allotted reservation nor divest the federal government of jurisdiction. At the same time the case law and the Congressional record also indicate that allotment carried to completion—that is, allotment of the entire reservation, together with the expiration of the trust period on the allotted lands and sale to non-Indians—results in disestablishment. The Oneida situation presents the relatively unusual instance where the allotment process was fully carried out. Virtually all the lands in the reservation were allocated and the trust period for virtually all allotments expired. As the Commisioner of Indian Affairs John Collier said in 1937, "[t]hey lost more than 95 percent of all their land under the fee patenting operation. They are one of *the extreme examples* of the disastrous operation of the old type of allotment such as was had under the 1887 act." (ECF No. 89-108.) It is on this basis that the Oneida circumstances can be distinguished from those cases finding the continuance of reservation status or of federal jurisdiction. Since virtually all of the Oneida Reservation was allotted, and virtually all of the allottees received fee patent, the Dawes Act was thereby fully effectuated and the reservation was disestablished.

d) There is no merit to the United States' attempt to distinguish relevant Eighth Circuit cases.

The United States claims that "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.'" (ECF No. 126 at 27 (citing *Gaffey*, 188 F.3d at 1030).)

That statement is misleading in several respects. In *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998), the Supreme Court held that a proposed landfill site was not part of the reservation because that land was "ceded" under the 1894 Act. *Id.* at 358. The Supreme Court specifically reserved the question of whether the 1894 Act had disestablished the entire reservation or whether a diminished reservation continued to exist within the nonceded lands. *Id.* That is the question that the Eighth Circuit later answered in *Gaffey*. The Eighth Circuit's conclusion was that the allotments, which were not transferred via the cession language, had passed out of Indian hands and into white ownership and, therefore ceased to be part of the reservation. 188 F.3d at 1030. Contrary to the United States' suggestion, *Gaffey* was not based on cession language.

When deciding the narrower question of whether the unceded allotted lands remained part of the reservation, (the topic the Supreme Court expressly decided not to rule upon in the early case) the Eighth Circuit started its analysis as follows:

> Members of Congress in 1894 operated on a set of assumptions which are in tension with the modern definitions of Indian country, and the intentions of that Congress and of the 1892 negotiating parties are what we must look to here. At the turn of the century, Indian lands were defined to include "only those lands in which the Indians held some form of property interest: trust lands; individual allotments, and, to a more limited degree, opened lands that had not yet been claimed by non-Indians." *Solem*, 465 U.S. at 468, 104 S.Ct. 1161. Lands to which the Indians did not have any property rights were never considered Indian country. The notion of a reservation as a piece of land, all of which is Indian country regardless of who owns it, would have thus been quite foreign. Congress in the late nineteenth century was operating on the assumption that reservations would soon cease to exist, *see id*, and on the behalf that allotting lands, and purchasing those left allocated, were steps in the process of eventually dismantling the reservation system. *See United States v. Southern Pacific Transp. Co.*, 543 F.2d 676, 695 (9th Cir. 1976). The 1894 Congress would

> have felt little pressure to specify how far a given act went toward diminishing a reservation and would have had no reason to distinguish between reservation land and other types of Indian country. *See id.*

Gaffey, 188 F.3d at 1022. The *Gaffey* court thus held, "[f]or these reasons," "that the Yankton Sioux Reservation has not been disestablished, but that it has been further [in addition to the ceded land] diminished by the loss of those lands originally allotted to tribal members which have passed out of Indian hands. These lands are not part of the Yankton Sioux Reservation and are no longer Indian country within the meaning of 18 U.S.C. § 1151." *Id.* at 1030.

The United States is also incorrect when it claims the Village neglected to inform the Court that *Gaffey* and *Podhradsky* involved a statute that included language of cession. The Village specifically stated that "although the *Gaffey* court referenced the cession agreement when it held the reservation was diminished to the extent allotments were conveyed to non-Indians, the cession agreement actually said very little about the status of the nonceded lands." (ECF 119 at 19-20.) The Village has explained above and elsewhere why *Gaffey* is relevant to this case and supports the Village's position. (ECF No. 94 at 20-23; ECF No. 102 at 19-21; ECF No. 119 at 13-15.) Moreover, *Cohen's Handbook of Federal Indian Law* confirms, at the very least, that whether the transfer of allotted land to a non-Indian results in it losing its reservation status is "an important pending question." Cohen's Handbook of Federal Indian Law § 3.04[3] (2017).

e) Conferral of citizenship and assertion of state and local jurisdiction provide additional evidence of loss of reservation status.

The United States next argues that the Village is relying only on the provision of the Dawes Act that confers citizenship on allottees to demonstrate congressional intent to diminish the Oneida reservation. (ECF No. 126 at 28.) That is not the Village's position. It is not the allotting of land under the Dawes Act, nor the granting of citizenship alone, that has resulted in the Oneida reservation being diminished. After all, the original allotments (the first step) under

the Dawes Act were to be held in trust for a minimum of 25 years. During that period, regardless of the grant of citizenship (the second step), the land was still under federal control with restrictions against alienation. It is the next step in the process, the transformation of those trust allotments into fee patents under the Dawes Act and the 1906 Oneida Provision, combined with citizenship, which results in the loss of jurisdiction and reservation status. At that point, the tribal member and his land are completely emancipated from federal control.[9]

The United States' discussion of state and local jurisdiction under the Burke Act is also misleading. Relying on *County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*, 502 U.S. 251, 264 (1992), the United States claims that such jurisdiction is "limited to the taxation, sale, and alienability of fee-patented lands within an Indian reservation." (ECF No. 126 at 21.) But, that is simply a statement of a type of jurisdiction that state and local governments are *today* allowed to exercise over such lands within a reservation's boundaries. It is not relevant to the question here, which is whether reservation status was lost in the first place. Moreover, as discussed in more detail *infra* at 24-25, the Supreme Court has been clear that a transfer of primary jurisdiction from the federal government to state and local governments, which did occur with respect to the Oneida in the early twentieth century, is an indicator that disestablishment or diminishment has occurred.

[9] It is also interesting to note that, in its recent *amicus* brief to the Supreme Court, the United States does identify as one of the factors that evidences disestablishment the fact that Congress "made members of the Creek Nation citizens of the United States." *See* Br. for the U.S. as Amicus Curiae Supporting Petitioner, *Carpenter v. Murphy*, No. 17-1107 (July 2018), at 17, available at https://www.supremecourt.gov/DocketPDF/17/17-1107/55946/20180730184937862_17-1107tsacUnitedStates.pdf. It is not clear why the United States now believes that factor is of no consequence in this case.

2. The 1906 Oneida Provision confirms the Oneida Reservation was diminished.

When referring to the 1906 Oneida Provision, the United States claims the Village is incorrect in stating the 1906 Oneida Provision was designed to "transfer land owned by Indians to non-Indians as a means to hasten the termination of the Reservation." (ECF No. 126 at 30.) This is not, however, a view held only by the Village. Two of the Nation's experts confirmed this to be the case. One of the Nation's experts testified that Congressman Minor, who supported the Nation's petition for this legislation, was "an advocate of fee patenting" who "express[ed] support for the idea of eliminating the Oneida's land base." (ECF No. 89-170 (Hoxie Tr. at 109:4-10, 106:9-107:24).) The Nation's expert then testified that the Oneida special language was inserted into the 1906 Appropriations Act by Congressman Minor because Congress was not satisfied with the Burke Act and "wanted as many fee patents issued as quickly as possible." (ECF No. 89-170 (Hoxie Tr. at 115:23-116:15, 124:16-23).) The Nation's expert further confirmed that Congressman Minor's interests were consistent with "the interests who wanted to destroy the reservation and get the tribe out of Wisconsin" and that his position was "consistent with the position held by those who sought to remove the tribe from Wisconsin." (ECF No. 89-170 (Hoxie Tr. at 209:15-210:8).) One of the Nation's other experts similarly indicated the Oneida specific language was designed to allow non-Indians to "gain access to the Oneida's land." (ECF No. 89-169 (Edmunds Tr. at 109:12-22).)

The United States also points to the fact that the 1906 Provision makes reference to the Oneida "reservation." (ECF No. 126 at 22.) The Village has never disputed that when the 1906 Oneida Provision was enacted there was still some land held in trust and, therefore, there was still some semblance of a reservation. But it is this Act which was specifically designed to hasten the elimination of that portion of the reservation that still existed at that time.

Furthermore, the reason the Oneida Provision did not mandate the Secretary to immediately issue allotments, and thereafter fee patents, is because for the Nation all of the allotments had already occurred. The Nation was much farther down the path of having their reservation eliminated than the Stockbridge-Munsee Indian Community was in 1906. The difference in language between those two Acts is not because of a congressional intent to diminish one of the reservations and preserve the other but simply the result of the fact the Oneida Provision did not need to restate what had already been accomplished relative to the Oneida. (ECF No. 119 at 18-20.)

Moreover, just like the Stockbridge-Munsee 1906 provision, the one relating to the Nation did not contain any provisions restricting the Indian owners from selling their land or requiring it to be held in trust as was the case of the Dawes Act. As the Seventh Circuit explained, "[t]he intent to extinguish what remained of the reservation is born out by the act's provision for allotments in fee simple." *Stockbridge-Munsee Cmty*., 554 F.3d at 664. It was the ability for the Secretary to immediately allow the land to become held in fee, which is the case in both Acts, which led the Seventh Circuit to ask the question "[w]hy include this peculiar provision? Because the reservation could only be abolished if the tribal members held their allotments in fee simple." *Id.* Although the history behind the two acts is not identical the two most important facts are. Both tribes petitioned for the legislation that allowed for immediate fee patents and both acts allowed that to happen. Additionally, just like in the *Stockbridge-Munsee* case, in the aftermath of the act, the Oneida reservation "was treated, for the most part, as though it had been abolished." *Id.* at 665. It would be strange indeed to conclude the Oneida reservation was not disestablished like the Stockbridge-Munsee Community's because the 1906 Oneida

Provision contained somewhat different language (which was a result of the fact the Oneida disestablishment process was already underway).

3. The Oneida's prior treaties are both distinguishable and irrelevant.

The United States next notes that the 1838 Treaty established a new reservation while simultaneously terminating the prior one by clearly stating that the Treaty "'cede[d] to the United States all their title and interest' in the previously reserved lands for a sum certain." (ECF No. 126 at 33.) The United States then states that the Dawes Act, Burke Act, and 1906 Oneida Provision speak in much different terms. That is because the 1838 Treaty was designed to terminate the entire original reservation via cession language and then to create a new one. The Dawes Act, designed 50 years later, was intended to fulfill the new federal policy of ending reservations via allotments. Nothing can be gained by a comparison of these different documents, designed for different purposes, unless it is to note that the 1838 Treaty already contemplated individual ownership granting "one hundred acres to each individual" rather than to the tribe as a whole.

B. The United States' treatment of *Solem* factor two is both legally and factually flawed.

With respect to *Solem* factor two—events surrounding the passage of the relevant act—the United States suggests the Village is relying on only three items: (1) "that Congress envisioned an end of reservations generally"; (2) "that some Oneidas favored legislation authorizing the Secretary, in his discretion, to issue fee patents"; and (3) "that state law would be made applicable to lands on the reservation that passed out of trust status." (ECF No. 126 at 27.) Citing the district court's decision in *Parker*, the United States argues that each of these items is "consistent with continued reservation status." As set forth below, however, the United States'

discussion omits relevant evidence and wrongly suggests that three listed items do not support the termination of reservation status.

First, notably absent from the United States' discussion is any mention of the Nation's own experts, who candidly acknowledged that the 1906 Oneida Provision was enacted for the purpose of transferring land owned by Indians to non-Indians and was the result of efforts by those who supported "the idea of eliminating the Oneida's land base." *Supra* at 19. Nor does the United States mention the Seventh Circuit's decision in *Stockbridge-Munsee Cmty.*, which held that the issuance of fee patents was evidence of congressional intent to terminate reservation status even in the absence of "hallmark language suggesting that Congress intended to disestablish the reservation." 554 F.3d at 664-665. Indeed, while the United States argues that the Supreme Court cases finding diminishment "typically include[] express statutory statements of diminishment under the first *Solem* factor," (ECF No. 126 at 29), the Village has cited several examples of cases in which diminishment or disestablishment has been found in the absence of express statutory statements. (ECF No. 102 at 11-12.) There is ample evidence of the circumstances surrounding Congress's treatment of the Oneida, not mentioned by the United States, that reflect a clear congressional intent the Reservation would be diminished as fee patents were issued to individual Oneida. (ECF No. 94 at 27-29.)

Second, the United States is wrong to suggest that the Village is basing its position simply on the fact that Congress envisioned an end of reservations generally. Rather, the Village, like the Seventh Circuit, believes this fact must be a "background assumption," that under the circumstances in the late-nineteenth and early-twentieth centuries "Congress would have felt little need to explicitly address a reservation's boundaries," and that "we . . . cannot expect Congress to have employed a set of magic words to signal its intention to shrink a reservation."

Stockbridge-Munsee Cmty., 554 F.3d at 662. This fact, as well as Congress's understanding during the relevant timeframe that reservation status was coextensive with Indian ownership, provides necessary context for evaluating Congress's actions with respect to the Oneida.

Moreover, with respect to the Village's argument that the completion of the allotment process under the Dawes Act would terminate reservation status, the Village is not relying on Congress's "general" vision. Rather, the congressional intent with respect to the Dawes Act is specifically relevant to the question of what Congress understood would happen to reservations, like the Oneida Reservation, for which the allotment process was taken to completion. As already discussed, the legislative history of the Dawes Act establishes beyond doubt that Congress expected that the completion of the allotment process would terminate reservation status. *See supra* at 4-7.

Third, the United States points out that some Oneida tribal members opposed the issuance of fee patents prior to the expiration of the twenty-five year trust period for allotments on the Reservation. When the 1906 Oneida Provision was enacted, however, it was well-established that tribal consent was not necessary for Congress to alter a reservation's boundaries. *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 588 (1977) ("By the time of the first of these Acts, in 1904, Congress was aware of the decision of this Court in *Lone Wolf v. Hitchcock*, 187 U.S. 553, 23 S. Ct. 216, 47 L. Ed. 299 (1903), which held that Congress possessed the authority to abrogate unilaterally the provisions of an Indian treaty."). And, the record shows that the 1906 Oneida Provision was procured through the efforts of those Oneida who *did* want fee simple patents to be issued for land on the Reservation, that the Oneida wanted to be "wholly relieved from Government control," and that early issuance of fee patents was the desire of a unanimously elected "General Council" of the Oneida. (ECF Nos. 89-20; 89-21; 89-22; 89-24; 89-26; 89-27.)

The United States fails to explain the legal relevance of the fact that some Oneida opposed the early issuance of fee patents, but evidence of the desires of the Oneida who were a driving force behind the 1906 Oneida Provision supports finding diminishment or disestablishment.

Fourth, this Court should reject the United States' attempt to minimize the contemporaneous understanding that state law would apply to lands on the Reservation that passed out of trust status. The United States claims that such a transfer of jurisdiction is "consistent with continued reservation status," but that is simply not correct. It may be true that some courts have held that a reservation still exists *notwithstanding* such a transfer of jurisdiction, but such an understanding is still evidence that supports a finding of disestablishment or diminishment. Indeed, in the context of surplus land acts, the Supreme Court has indicated that such a transfer of jurisdiction is what distinguishes a surplus land act that frees land of its reservation status from one that does not:

> States acquired primary jurisdiction over unallotted open lands where 'the applicable surplus land Act freed that land of its reservation status and thereby diminished the reservation boundaries.' *Solem*, 465 U.S., at 467, 104 S. Ct., at 1164. In contrast, if a surplus land Act 'simply offered non-Indians the opportunity to purchase land within established reservation boundaries,' *id.*, at 470, 104 S. Ct., at 1166, then the entire opened area remained Indian country.

Yankton Sioux Tribe, 522 U.S. at 343. The United States itself argues that a defining feature of an Indian reservation is "federal protection" and "the superintendence of the Government." (ECF No. 126 at 8.) And, of course, the Supreme Court and Seventh Circuit have been clear that the jurisdictional history of the land is relevant to assessing diminishment and that a state's unquestioned exercise of jurisdiction over the disputed area supports a finding that diminishment has occurred. *See, e.g.*, *Yankton Sioux Tribe*, 522 U.S. at 357 ("The State's assumption of jurisdiction over the territory, almost immediately after the 1894 Act and continuing virtually unchallenged to the present day, further reinforces our holding."); *Stockbridge-Munsee Cmty.*,

554 F.3d at 665 ("The land became subject to state taxes, and the Department of the Interior refused to intervene in alcohol-related problems within the original reservation.")

C. The United States' discussion of subsequent history evidence does not alter the fact that the Reservation has been, at minimum, diminished.

Finally, with respect to the third *Solem* factor, the United States joins the Nation in asking this Court essentially to ignore the subsequent history of the Reservation. (ECF No. 126 at 30.) The United States cites *Solem* to suggest that this Court is "bound" to rule in the Nation's favor because, according to the United States, "the Dawes Act and the 1906 Oneida Provision, and the circumstances surrounding their passage, 'fail to provide substantial compelling evidence of congressional intention to diminish lands.'" *Id.* As discussed above and elsewhere, however, there is unequivocal contemporaneous evidence of intent to at least diminish the Reservation and statutory text supporting that conclusion. *Solem* itself recognized that subsequent events are themselves relevant to assessing congressional intent. 465 U.S. at 471. Moreover, although the Supreme Court in *Parker* wrote that it had "never relied solely on [subsequent history] to find diminishment," 136 S. Ct. at 1081, it did not foreclose reliance on this factor and consulted it even in the absence of the other two factors.

The United States goes on to claim that the subsequent events record in this case is "mixed" and that such a "mixed" record cannot overcome a lack of congressional intent under the first two *Solem* factors. (ECF No. 126 at 30.) Again, the Village believes the first two *Solem* factors do indicate a congressional intent to diminish the Reservation. Regardless, the subsequent event evidence is not "mixed" and an assessment of that evidence leads to only one reasonable conclusion: the Oneida Reservation has at least been diminished. The Village will not recount all of this evidence here, but will instead respond to the evidence highlighted by the United States, in order to explain why such evidence does not create a "mixed" record.

1. The treatment of the area by the Department of the Interior supports the Village's position.

First, with respect to the views of the Department of the Interior, the United States, like the Nation, repeatedly seizes on the use of phrases like "on the reservation" or "on the Oneida Indian Reservation" in correspondence by Interior officials to claim the officials "considered allotment to be consistent with continued reservation status" or "continued to reference the Oneida Reservation as intact." (ECF No. 126 at 31-32.) In doing so, however, the United States—again like the Nation in its own briefing—makes no attempt to distinguish between "considered jurisdictional statements" and mere references to a known location. *See United States v. Oklahoma Gas & Elec. Co.*, 318 U.S. 206, 216 (1943) ("It is true that the opinion in *United States v. Reily* . . . used the term 'Kickapoo Reservation' to describe a region of Oklahoma as of a time subsequent to the dissolution. It is clear from the context of the opinion, however, that this term was used in a geographical and not a legal sense, much as one still speaks of the Northwest Territory."); *Gaffey*, 188 F.3d at 1029 n.11 ("The use of the term 'Yankton Sioux Reservation' in such documents, without more, cannot be said to be a considered jurisdictional statement regarding the specific status of the remaining Indian lands.").[10] Vague uses of the phrase "on the Reservation" cannot be considered the equivalent of specific statements by Interior officials over decades referring to the area as a "former reservation" and acknowledging that, with the limited exception of the small number of allotments still held in trust and small amounts of tribal land, jurisdiction had passed from the federal government to state and local governments. Indeed, a review of the examples cited by the United States shows that, contrary to the United States' claims, when Interior officials specifically addressed the

[10] *See also Osage Nation v. Oklahoma ex rel. Oklahoma Tax Commission*, 597 F. Supp. 2d 1250, 1259 (N.D. Okl. 2009) ("Although the Act mentions the 'Osage Indian Reservation,' as do some subsequent enactments, it plainly does so only to describe a known geographic area.").

status of the land within the original Reservation boundaries, they repeatedly recognized that such land was no longer under federal government jurisdiction or part of a reservation.

For example, the United States points the Court toward two statements by Chief Clerk C.F. Hauke in which Hauke used the phrases "on the reservation" and "on the Oneida Indian Reservation" in 1920s correspondence. (ECF No. 126 at 32-33.) The letters on which the United States relies do not purport to be a specific discussion of the Reservation's status, its boundaries, or jurisdiction over the area, however. (ECF Nos. 105-27; 105-30.) And, the record shows that when such specific questions were posed to Hauke, he acknowledged the change in the status of the fee-patented lands. (ECF No. 89-59 ("[Y]ou are advised that when an Indian allottee receives a patent in fee simple . . . his land is subject to taxation, *and also to the jurisdiction of the town, county and state in which he resides*." (emphasis added)).) And, Hauke's acknowledgements were consistent with those of other officials across decades in the early twentieth century. A non-exhaustive list of such acknowledgements includes the following statements:

- "[T]he Government turns the land loose when it gives patents in fee . . . ." (ECF No. 89-60.)
- "Politically, the reservation has ceased to exist, and all questions of law are referred to the state court." (ECF No. 89-62.)
- "The Oneida reservation has been divided into two townships with a full set of officers in each . . . . The maintenance of order now devolves upon the township and county officers, and requires only the co-operation of this Office. . . . [F]ederal laws apply only to lands still in trust." (ECF No. 89-63.)
- "[T]he power of the State to tax personal property extends to such personal property of Oneida Indians as is not held in trust for them by the United States." (ECF No. 89-64.)
- "When a patent in fee is issued for the allotment of an Indian, it becomes subject to taxation the same as property of a white man." (ECF No. 89-65.)
- "*Originally* the reservation consisted of 65,312 acres . . . ." (ECF No. 89-66 (emphasis added)).

- "The Oneida Reservation . . . *comprised* a tract of land eight by twelve miles, containing approximately 65,400 acres . . . Under an Act of Congress, the Oneidas have obtained fee simple patents, and at the present time all this land, except 151 acres reserved for school purposes, etc. has been allotted." (ECF No. 89-69 (emphasis added).)

- "This I presume means the former Oneida Reservation. It is my understanding that since the allotment of the Oneida Reservation the lines are broken down, reservation regulations no longer applying." (ECF No. 89-70.)

- "[A]s these Indians are citizens of the state, they are subject to its laws the same as white persons." (ECF No. 89-71.)

- "The Oneidas are likewise citizens and their allotment was completed more than thirty years ago. All of these allotees, or their heirs, but about thirty have received final patents releasing them and their lands from all Federal supervision." (ECF No. 89-72.)

- "As to the land affairs of the fee patent Indians, their administration must be by the Indians themselves, or through the local courts." (ECF No. 89-74.)

- "I have just visited two such former reservations, that of the Stockbridges and Munsees, and that of the Oneida." (ECF No. 89-164.)

- "This reservation, or former reservation, is now much like any white community . . . ." (ECF No. 89-77.)

- "These Indians are solely under the jurisdiction of the state . . . ." (ECF No. 89-80.)

- "There are no lands remaining under the jurisdiction of the Federal Government except the few allotments continued under trust and the small area heretofore mentioned as having reverted to the status of tribal land." (ECF No. 89-81.)

- "Upon the issuance of patent the Government had no further control over the land, and it thereafter became subject to the laws of the state." (ECF No. 89-82.)

- "The Oneida Reservation was a small one and every available acre was consumed in the allotments. There remain only such tracts as constitute cancelled allotments." (ECF No. 89-87.)

- "The Oneidas have severed their relationships with the agency with the exception of annuity payments." (ECF No. 89-88.)

- "The tribal affairs of the Oneida Indians were practically wound up many years ago, with the exception of a small annuity under certain of the old treaties. There is no longer any reservation in the usual sense of the term . . . ." (ECF No. 89-90.)

- "There are only a few small tracts of tribal Indian land within the limits of what was formerly the Oneida Indian Reservation. . . . the Oneida Indian Reservation has been broken up . . . ." (ECF No. 89-93.)

- "[T]he Federal Government does not have jurisdiction over Oneida lands from which the restrictions have been removed . . . ." (ECF No. 89-104.)

In light of these specific statements regarding the specific questions at issue, the United States should not be allowed to claim a "mixed record" based on vague uses of the phrase "on the Reservation" divorced from any context.

The United States points to similar uses of the phrase "of the Oneida Reservation" by John Collier. But, again, when addressing the specific question of the federal government's jurisdiction over fee-patented lands, Collier acknowledged that such jurisdiction no longer existed. In a February 24, 1934 memorandum, for example, he wrote: "[T]he Oneidas were allotted, and through fee patenting and other allotment procedures they lost all of their land. And they are living practically unprotected and not in any real way under Federal jurisdiction." (ECF No. 89-102.) A few weeks later, Collier wrote to an Oneida Indian: "[O]f the 65,608 acres originally included in your reservation, only 777 acres now remain in trust status. The balance of your reservation has been allotted and patented in fee . . . . The Government, therefore, has no further jurisdiction over these lands[.]" (ECF No. 89-103.) In June 1934, Collier wrote to tribal members:

> Practically all of this allotted land has passed from government supervision through sale and the issuance of fee patents. For this reason, nothing could be gained through resurvey of the exterior boundary of the reservation lands.
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> ***
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> As the Federal Government does not have jurisdiction over Oneida lands from which the restrictions have been removed, the owners of such lands are, therefore, responsible to local authorities for any objectionable saloons or road houses that may be located thereon.

(ECF No. 89-104.) And, in December 1934, Collier wrote:

> The records of this Office show that the United States has fully discharged all of its treaty obligations to the Oneida Indians, except a small annual payment to be made perpetually. Fee patents have been issued for most of the land, but a few allotments remain under governmental control and supervision.

(ECF No. 89-105.)[11]

As another example, the United States points to a letter from 1941, regarding a request for a law enforcement officer for the reservation, that includes the phrases "on the reservation" and "over the Oneida Reservation." (ECF No. 126 at 34.) The United States claims that these phrases represent an acknowledgment of the Reservation's original boundary. Such a conclusion cannot be drawn from the document, however. (ECF No. 105-58.) Indeed, months after the 1941 correspondence on which the United States relies, the Superintendent of the Tomah Indian Agency wrote to the Commissioner of Indian Affairs a letter addressing a request by an Oneida for funds for a boundary survey of the Oneida Reservation and stated:

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

(ECF No. 89-120 at ON00009531.) Moreover, while the Village does not dispute that after passage of the IRA the Interior Department came to believe an Oneida Reservation existed, other documents make clear that the Interior Department did *not* think this reservation was defined by the original 1838 boundaries but was instead a separate smaller reservation. (ECF Nos. 89-119; 89-120; 89-121; 89-122.)

[11] The United States also notes that Interior officials determined who was eligible to vote in elections under the I.R.A. in part by looking at residence "within the original reservation," but the United States fails to explain why the use of the original Reservation borders in this manner has any legal significance to the diminishment analysis. Indeed, that federal officials referred to the "*original* reservation" is an indication that they understood that reservation to no longer exist.

In fact, the only specific statements from Interior officials the United States identifies in which officials expressly take the position that the original reservation boundaries remain intact are from *the 1980s* and continuing to present day. (ECF No. 126. at 35-36.) Such statements, occurring decades after the congressional acts at issue, are of little relevance to assessing Congress's intent with respect to the Oneida Reservation. *Osage Nation v. Irby*, 597 F.3d 1117, 1126 (10th Cir. 2010) (evidence from 1990s and 2000s does not "shed much light on 1906 Congressional intent"); *see also Solem*, 465 U.S. at 471 (observing that "treatment of the affected areas, *particularly in the years immediately following the opening*, has some evidentiary value" (emphasis added)).

2. The EPA's current views regarding its jurisdiction are not relevant.

Similarly, the EPA's relatively recent assertions of regulatory authority throughout the entire area within the 1838 boundaries of the Oneida Reservation provide little insight into assessing congressional intent in the late-nineteenth and early-twentieth centuries.[12] Evidence that the EPA today is issuing permits for activities within the original boundaries of the Reservation should not create a "mixed" record for purposes of this Court's analysis of congressional intent over one hundred years ago.

3. Subsequent treatment by the courts supports the Village's position.

Astoundingly—despite the fact that at least twice in the early twentieth century judges on this court confirmed that the Oneida Reservation had been discontinued—the United States

[12] Moreover, the EPA's view on the existence of the reservation and its ability to therefore issue NPDES permitting authority to the Nation is not as clear as the United States suggests. The EPA first authored a draft permit for the Nation in April 2010. The Village formally objected during the 30-day comment period on the grounds the reservation was disestablished. To this day, the EPA has declined to issue an actual permit to the Nation. Wisconsin NPDES Permits available at https://www.epa.gov/npdes-permits/wisconsin-npdes-permits (last accessed Nov. 12, 2018). It is also relevant to note that in April 2010, the EPA also issued a draft permit to the Village for the same land within the Village.

seems to take the position that subsequent treatment of the reservation by the courts supports the position of the Nation and the United States. There is simply no merit to this claim.

First, the United States' attack on the preclusive effect of the decision in *Stevens, et al. v. County of Brown, et al.* falls flat. Like the Nation, the United States suggests that issue preclusion does not apply because the court's determination that the Oneida Reservation had been discontinued "was unnecessary." But the relevant question when determining whether a finding is "necessary" to a judgment is whether the determination was central to the reasoning that led to the judgment, not whether there was an alternative ground for the judgment that existed but on which the court did not rely. (ECF No. 119 at 5-6.) And there can be no reasonable dispute that the conclusion that the Oneida Reservation had been discontinued was central to the *Stevens* court's reasoning. The court concluded that, because the Oneida Reservation had been discontinued, the plaintiffs were bound to follow state law regarding the procedure for seeking recovery of taxes and challenging the legality of the organization of local governments, and expressly stated that its resolution of the case "follow[ed]" from its conclusion that the Oneida Reservation had been discontinued. (ECF No. 89-45.)

The United States also suggests that the subsequent Supreme Court cases in *Mattz* and *Seymour* created an intervening legal principle by repudiating the idea that allotment alone diminished or changed reservation boundaries. As the Village has already explained here and elsewhere, however, both of these cases are distinguishable and neither expressly holds that the Dawes Act cannot diminish a reservation once it has been fully implemented to its intended conclusion. The decision in *Stevens* was made under the same legal principle that applies to disestablishment today—only Congress can diminish or disestablish a reservation—and there is thus no reason to avoid giving the decision in *Stevens* preclusive effect. (ECF No. 119 at 10.)

Finally, the United States cites a number of cases from the 1980s, 1990s, and 2000s in which the existence of the Oneida Reservation was assumed,[13] but these cases—like other late-twentieth and early-twenty-first century evidence cited by the United States—do not provide much insight into Congressional intent in the early twentieth century. Even if the decisions in *Stevens* and *Hall* are not entitled to any kind of preclusive effect, the observations made in those cases are still far more relevant to an assessment of Congressional intent than statements made decades later in decisions that did not specifically address the question of whether the reservation was diminished or disestablished.

4. Treatment by state and local governments supports the Village's position.

There is also little merit to the United States' argument that the State of Wisconsin and local governments have treated the Oneida Reservation as undiminished.

First, the United States points to Wisconsin's enactment of legislation in 1903 to create the towns of Hobart and Oneida and claims that a reference to "the Oneida Reservation" in the legislation "recognized the continued existence of 'the Oneida Reservation.'" (ECF No. 126 at 42.) That a Wisconsin state statute from *1903* references "the Oneida Reservation" says nothing about how the state viewed the status of fee-patented land within the original boundaries of the reservation either before or after its sale to a non-Indian. This legislation occurred before the 1906 Oneida provision and before any significant fee patenting had occurred.

[13] In at least one of the cases cited by the United States, the court was ruling on a motion to dismiss and therefore was likely reciting the allegations in the Nation's own complaint. *Oneida Tribe of Indians of Wis. v. State of Wis.*, 518 F. Supp. 712, 713 (W.D. Wis. 1981). Another refers to an Oneida Reservation, but provides no indication of the size or boundaries of the reservation. *Cf. La Rock v. Wis. Dep't of Revenue*, 621 N.W.2d 907, 908 (Wis. 2001). Other cases appear to have been decided on summary judgment, without the existence of the reservation having been made an issue in the case. *Cf. Oneida Tribe of Indians of Wis. v. Village of Hobart, Wis.*, 732 F.3d 837 (7th Cir. 2013); *Village of Hobart v. Brown Cnty.*, 801 N.W.2d 348 (Wis. Ct. App. 2011).

Second, it is notable that the United States' discussion of the subsequent treatment of land within the reservation's original boundaries by State and local governments then skips forward several decades, to the 1980s. In doing so, the United States omits any discussion of the contemporaneous—and therefore far more relevant—state and local government actions in the years immediately following the 1906 Act and the fee-patenting of land on the Reservation.

For example, the United States, like the Nation, focuses on analyses prepared in the State Attorney General's office in the 1980s, but these analyses are too far removed temporally from the allotment of the reservation and the 1906 Act "to shed much light on 1906 Congressional intent." *Osage Nation*, 597 F.3d at 1126. Far more relevant is the State Attorney General's position in 1931, which was that the state had jurisdiction over allotments that had passed out of trust status and that the federal courts would have jurisdiction only over "the small amount of tribal land remaining and the individual allotments which are still held in trust." (ECF No. 89-91.) This assumption of jurisdiction is an acknowledgement of diminishment by the State. *Hagen v. Utah*, 510 U.S. 399, 421 (1994).

Similarly, although the United States points to recent intergovernmental agreements between the Nation and other local governments, these agreements are not binding on the Village and they provide little insight into Congressional intent in the late-nineteenth and early-twentieth centuries with respect to the status of the Reservation. The United States simply ignores the far more relevant fact that local counties and towns expressly invoked the termination of the Reservation when defending against the lawsuit in *Stevens,* thereby indicating a more contemporaneous understanding that the Reservation as defined by its 1838 boundaries had ceased to exist. Moreover, the local governments *won* and the matter was settled. For the next several decades, through at least the 1970s, the United States cites no evidence that State, county,

or local governments believed the 1838 boundaries continued to exist. Although some local governments may now be willing to agree with the Nation's position, and thereby rewrite history, the decades-long history of local government jurisdiction over fee patented land within the original boundaries of the Reservation cannot seriously be disputed.

5. Maps and demographic evidence support the Village's position.

Finally, the United States argues that the map evidence in this case is mixed, pointing to maps from the 1950s and 1960s that purport so to show the original boundaries of the Reservation intact. As an initial matter, one of the maps the United States claims exists does not appear to be in the record, as the United States instead cites to a description of the map by one of the Nation's experts. The other map cited by the United States is from 1952 and does show an Oneida Reservation, but it also shows a Stockbridge Munsee Reservation. (ECF No. 105-63.) Its reliability as an accurate indicator of the status of the reservation boundaries is therefore suspect. Regardless, more maps from the relevant time period support the Village's position. (ECF Nos. 89-123; 89-124; 89-125; 89-126).

Moreover, although the United States argues that demographic data is "the least compelling" evidence in a diminishment analysis, it does not dispute that the demographic data here supports the Village's position. And, while "[r]esort to subsequent demographic history" may be an "unorthodox and potentially unreliable method of statutory interpretation," it is well-established that "[w]hen an area is predominately populated by non-Indians with only a few surviving pockets of Indian allotments, finding that the land remains Indian country seriously burdens the administration of State and local governments." *Solem*, 465 at 471-72 nn. 12-13. Where, as here, "non-Indian settlers flooded into the opened portion of a reservation and the area has long since lost its Indian character," such facts provide additional evidence supporting a finding of diminishment. *Id.* at 471.

CONCLUSION

For the above reasons, and for the reasons explained in the Village's filings at ECF Nos. 94, 102, and 119, the Court should grant the Village's motion for summary judgment and deny the Nation's motion for summary judgment.

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Respectfully submitted,

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