No. 19-1981

In the United States Court of Appeals for the Seventh Circuit

ONEIDA NATION,

Plaintiff-Appellant,

v.

VILLAGE OF HOBART, WISCONSIN,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Wisconsin, No. 1:16-cv-01217-WCG.
The Honorable **William C. Griesbach**, Judge Presiding.

BRIEF OF DEFENDANT-APPELLEE VILLAGE OF HOBART, WISCONSIN

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Appellate Court No: 19-1981

Short Caption: Oneida Nation v. Village of Hobart

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The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.

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Village of Hobart

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

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i) Identify all its parent corporations, if any; and

None

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

None

Attorney's Signature: s/ Frank W. Kowalkowski Date: 6/6/19

Attorney's Printed Name: Frank W. Kowalkowski

Please indicate if you are Counsel of Record for the above listed parties pursuant to Circuit Rule 3(d). Yes x No

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

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None

Attorney's Signature: s/ Matthew J. Thome Date: 6/27/19

Attorney's Printed Name: Matthew J. Thome

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ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

None

Attorney's Signature: s/ Derek J. Waterstreet Date: 9/30/19

Attorney's Printed Name: Derek J. Waterstreet

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** _____ **No** X

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

JURISDICTIONAL STATEMENT

The jurisdictional statement of the appellant is complete and correct.

STATEMENT OF THE ISSUES

Activities associated with the Nation's Big Apple Fest occurred on non-trust land owned in fee simple by the Nation, as well as public roads, located within the original boundaries of the approximately 65,400-acre area set aside for the Oneida by an 1838 Treaty. Did the district court properly determine that Big Apple Fest is subject to the Village's Special Event Ordinance because the land and roads at issue were no longer part of the Oneida Reservation? The determination of this issue involves the following sub-issues:

a. Are the parcels of land and roads at issue no longer part of the Oneida Reservation because in *Stevens, et al. v. The County of Brown, et al.*, the U.S. District Court for the Eastern District of Wisconsin determined the Oneida Reservation had been discontinued and that decision is entitled to preclusive effect?

b. Are the parcels of land and roads at issue no longer part of the Oneida Reservation because the reservation was diminished?

STATEMENT OF THE CASE

I. The Allotment of the Oneida Reservation

On February 3, 1838, the United States entered into a treaty with the First Christian and Orchard Parties of the Oneida that resulted in the creation of the

Oneida Reservation.[1] (Dkt. 92-13 at 3.)[2] At its creation, the Oneida Reservation included an area of approximately 65,400 acres. (Dkt. 130 at 7.) [A-7.]

In the late nineteenth century, "Congress retreated from the reservation concept and began to dismantle the territories that it had previously set aside as permanent and exclusive homes for Indian tribes." *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 335 (1998). On February 8, 1887, Congress enacted the General Allotment Act (the "Dawes Act"), which "permitted the Federal Government to allot tracts of tribal land to individual Indians and, with tribal consent, to open the remaining holdings to non-Indian settlement." *Id.*; *see also* 24 Stat. 388 (Act of Feb. 8, 1887) [S.A.-1.] (Dkt. 89-2.) "Within a generation or two, it was thought, the tribes would dissolve, their reservations would disappear, and individual Indians would be absorbed into the larger community of white settlers." *Yankton Sioux Tribe*, 522 U.S. at 335.

The Dawes Act authorized the President to select Indian reservations for the allotment of land in severalty to the Indians residing on those reservations. 24 Stat. at 388. [S.A.-1.] (Dkt. 89-2 at 3.) When reservation land was allotted, Section 5 of the Act directed the Secretary of the Interior to issue patents in the name of the allottees to be held in trust by the United States for a period of twenty-five years "for the sole

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[1] The 1838 Treaty "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." The Village argued that language did not create a reservation, but the district court disagreed.

[2] References to "Dkt." are references to the district court docket, No. 16-C-1217, and pin cites are to the ECF pagination unless otherwise indicated.

use and benefit of the Indian to whom such allotment shall have been made." 24 Stat. at 389. [S.A.-2.] (Dkt. 89-2 at 4.) At the conclusion of the trust period, the United States would convey the land to the Indian allottee in fee simple. Section 6 of the Act provided "[t]hat upon completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside." 24 Stat. at 390. [S.A.-3.] (Dkt. 89-2 at 5.) With respect to any unallotted land remaining on a reservation after allotment had occurred, the Dawes Act allowed for subsequent negotiations with the tribe to sell the land, the terms of which would need to be ratified by Congress in the form of a surplus lands act. 24 Stat. at 389-90. [S.A.-2, S.A.-3.] (Dkt. 89-2 at 4-5.)

Approximately one year after its passage, Oneida leaders unanimously requested application of the Dawes Act to the Oneida. (Dkt. 91 ¶ 4; Dkt. 89-4 at 1, 5.) President Harrison approved the allotment of the Oneida Reservation and, with the exception of small amounts of land set aside for schools and the satisfaction of future allotment claims, the reservation was allotted and trust patents issued to individual Oneida Indians. (Dkt. 91 ¶¶ 5-6.) Because the land available within the Oneida Reservation was not sufficient to provide individual Oneida Indians with the amount of land provided for in the Dawes Act, there was no surplus lands act enacted by Congress. (Dkt. 91 ¶ 7; Dkt. 89-9 at 2; Dkt. 89-156 at 29-30.) After allotment, the federal government considered the Oneida to be citizens of the United States and the State

of Wisconsin and subject to state civil and criminal laws. (Dkt. 91 ¶¶ 9-10; Dkt. 89-12; Dkt. 89-13; Dkt. 89-14.)

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

A. The Burke Act

On May 8, 1906, Congress enacted the Burke Act, which amended the Dawes Act to authorize the secretary of the interior, "in his discretion," to issue fee-simple patents to Indian allottees the secretary determined were "competent." 34 Stat. 182, 183 (Act of May 8, 1906) [S.A.-6.] (Dkt. 89-17 at 4.) The Burke Act also addressed the Supreme Court's decision in *In re Heff*, which had held that an Indian who received a trust allotment under the Dawes Act became a citizen of the United States and subject to the state civil and criminal laws at the time of allotment, and not at the expiration of the 25-year trust period. *In re Heff*, 197 U.S. 488, 502-03 (1905). The Burke Act amended Section 6 of the Dawes Act so Indian allottees would not be subject to state civil and criminal jurisdiction until patents were issued in fee. (Dkt. 91 ¶ 14.) The changes were not intended to affect the status of Indians, like the Oneida, who had already received allotments. (*Id.*; *see also* Dkt. 89-18; Dkt. 89-170 at 4, p. 115:1-22.)

B. The 1906 Oneida Provision

Several weeks after passage of the Burke Act, on June 21, 1906, Congress enacted a provision authorizing the Secretary of the Interior to issue fee patents "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. 325, 381 (Act of June

21, 1906) [S.A.-17.] (Dkt. 89-28 at 59.) (the "1906 Oneida Provision"). Congress enacted the 1906 Oneida Provision after Oneida Indians repeatedly petitioned their congressman, E.S. Minor, as well as other federal officials for legislation giving the Oneida fee simple title to their lands. (Dkt. 91 ¶¶ 17-21.) A delegation of Oneida Indians traveled to Washington D.C. to meet with the Commissioner of Indian Affairs regarding their request and ultimately "asked that some legislation be enacted authorizing the issuance of patents in fee in the discretion of the Secretary of the Interior and on the application of any Indian." (Dkt. 91 ¶¶ 22-23; Dkt. 89-27; Dkt. 89-170 at 3, p. 108:11-109:10.) The 1906 Oneida Provision was drafted in response to these requests. Congressman Minor, who was "an advocate of fee patenting" who "express[ed] support for the idea of eliminating the Oneida's land base," supported the Oneida in their efforts. (Dkt. 91 ¶¶ 22-25; Dkt. 89-27; Dkt. 89-170 at 3-5, 7-8, p. 106:9-107:24, 108:11-109:10, 115:23-116:15, 124:16-23, 209:15-210:8.)

C. The Creation of the Village

In 1903, the Wisconsin state legislature created the towns of Hobart and Oneida "from the territory now embraced within the Oneida Reservation in said counties." (Dkt. 91 ¶ 37; Dkt. 89-42 at 3.) The town of Hobart was subsequently recreated and organized in 1908. (Dkt. 91 ¶ 38; Dkt. 89-43 at 2-4.) Initially, through the election process, Oneida Indians controlled the governments of the towns. (Dkt. 91 ¶ 39; Dkt. 89-32; Dkt. 89-169 at 4, p. 85:14-19.) As a result of Congress's actions allowing for fee patents to be issued to the Oneida, the composition of the towns quickly changed. (Dkt. 91 ¶ 39; Dkt. 89-32 at 4.) By 1909, the Secretary of the Interior had issued fee

patents for approximately 30,000 acres of the area set aside in the Treaty of 1838 and there was a "land rush" of white settlers. (Dkt. 91 ¶¶ 29, 39; Dkt. 89-31 at 2-9; Dkt. 89-32 at 4; Dkt. 89-44 at 2-4; Dkt. 89-170 at 6, p. 127-129.) As a result, the Oneidas living within the Oneida Reservation lost control of the town governments and were outnumbered by the new white residents. (Dkt. 91 ¶ 39; Dkt. 89-32 at 4; Dkt. 89-44 at 3-4.)

By 1917, the year in which the 25-year trust period for the Oneida allotments was to expire, only 106 Oneida allotments remained in trust and over 50,000 acres of the 65,400-acre area set aside under the 1838 Treaty had been alienated from Indian ownership. (Dkt. 91 ¶¶ 30, 33; Dkt. 89-32 at 3; Dkt. 89-33 at 7; Dkt. 89-34 at 2-9.) By the early 1930s, the Oneidas owned less than 90 acres of tribal lands and only several hundred acres of individual allotments in trust out of the approximately 65,400 acres within the original boundaries of the Oneida Reservation. (Dkt. 91 ¶ 98; Dkt. 89-1 at 5; Dkt. 89-111 at 8; Dkt. 89-112 at 2.) In 1934, Congress "drastically changed federal policy toward Indian tribes when it turned away from allotment and assimilation through the passage of the Indian Reorganization Act (IRA), 25 U.S.C. §§ 450 *et seq.*," the purpose of which was "to stop the loss of Indian lands through the allotment process and re-establish tribal governments and holdings." *Oneida Tribe of Indians of Wis. v. Vill. of Hobart, Wis.*, 542 F. Supp. 2d 902, 912 (E.D. Wis. 2008).

III. Subsequent Treatment of Land Within the Oneida Reservation

A. Federal Treatment from 1909 to 1934

Correspondence from federal officials from 1909 through the enactment of the IRA in 1934 repeatedly acknowledged the federal government had no control or jurisdiction over the Oneida allotments for which fee patents had been issued. (Dkt. 91 ¶¶ 44-51, 54-62, 66-71, 75-90; Dkt. 89-46; Dkt. 89-59 through Dkt. 89-66; Dkt. 89-69 through Dkt. 89-74; Dkt. 89-76; Dkt. 89-77; Dkt. 89-81 through Dkt. 89-86; Dkt. 89-90 through Dkt. 89-103; Dkt. 89-164.) Such land comprised the vast majority of the area of the Oneida Reservation. Federal officials at all levels, from the local Indian agents with responsibility for the Oneida to various Commissioners of Indian Affairs, considered the Oneida Reservation, at least as defined by its 1838 boundaries, to no longer exist. *See infra* at pp. 47-50.

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

In the 1930s a number of Oneida Indians, "acting for themselves as well as for and on behalf of the members of the Oneida Tribe of Indians in the State of Wisconsin," sued local governments, including the township of Hobart, seeking recovery of property taxes collected from tribal members and a declaration that the allotment of the Oneida Reservation was illegal. (Dkt. 91 ¶ 40; Dkt. 89-45 at 2-5; Dkt. 89-46; Dkt. 89-47; Dkt. 89-48.) The U.S. District Court for the Eastern District of Wisconsin dismissed the case after accepting the argument made by the defendants that "the

Oneida Reservation was lawfully discontinued, the allotments made thereunder superseding the Indian Treaty." (Dkt. 91 ¶ 41; Dkt. 89-45 at 3; *see also* Dkt. 89-52 through Dkt. 89-55.)

C. The IRA and the Status of the Oneida Reservation through the 1970s

Even after the passage of the IRA, the federal government continued to consider the Oneida Reservation, as defined by its 1838 boundaries, to no longer exist. For example, John Collier, the Commissioner of Indian Affairs and leading advocate for the change in policy brought about the IRA, recognized the Oneida were "not in any real way under Federal jurisdiction" and "ought to be brought into new land as an organized community." (Dkt. 91 ¶ 88; Dkt. 89-102 (emphasis added).) The federal government subsequently worked with the Oneida to purchase a "small reservation" within the boundaries of the "former Oneida Indian Reservation," and continued to refer to the "original Oneida Reservation," the "original reservation," and "the former reservation." (Dkt. 91 ¶ 104; Dkt. 89-119.) At least through the 1970s, documents from within the Bureau of Indian Affairs indicate the reservation for the Oneida was far smaller than 65,400 acres. (See Dkt. 91 ¶¶ 123-25; Dkt. 89-136 through Dkt. 89-138.)

The Oneida also recognized that a 65,400-acre reservation no longer existed, at least into the 1970s. Economic development plans prepared in the 1960s and 1970s variously note that "[t]he reservation had ceased to exist" and refer to "the original reservation" and "the former reservation." (Dkt. 91 ¶¶ 119, 124; Dkt. 89-132; Dkt. 89-

137.) And, in the 1970s, the Oneida Tribe of Indians of Wisconsin, Inc. (i.e., the Nation) published the book History of the Oneida Indians which expressly states "[t]he reservation ceased to exist" and that by the 1920s there was "no reservation." (Dkt. 91 ¶ 121; Dkt. 89-134 at 4-5.) Various scholars also recognized that the Oneida no longer have a 65,400-acre reservation. (*See* Dkt. 91 ¶¶ 114, 116, 122; Dkt. 89-111 at 8; Dkt. 89-129; Dkt. 89-135 at 5-7.)

IV. The 2016 Big Apple Fest

The 2016 Big Apple Fest took place on September 17, 2016. (Dkt. 90 ¶ 19.) It was a public event that was open to, and advertised to, non-tribal members, and was attended by over eight thousand attendees. (Dkt. 91 ¶¶ 138, 140.) Event activities occurred on both land owned in fee and land owned in trust by the Nation, and the Nation also used public roads (which were barricaded at its direction) to shuttle participants for the event. (Dkt. 91 ¶¶ 134-137, 143-144.) The Nation sold apples to non-tribal members at the event, non-tribal vendors also engaged in commercial activity, and the Nation also used non-tribal vendors to assist in conducting the event. (Dkt. 91 ¶¶ 135, 139, 143.) Although the Nation applied to the Wisconsin Department of Transportation and Brown County for a permit to close Highway 54 for the event, it did not submit any application for a permit to the Village, despite contracting with a third-party vendor to place road closure barricades for the event on a road maintained

by the Village. (Dkt. 90 ¶¶ 20, 23; Dkt. 91 ¶¶ 135-136, 142, 144.) The Village subsequently cited the Nation for failing to obtain a permit for the event under the Village's Special Event Ordinance. (Dkt. 90 ¶ 23.)

V. The Special Event Ordinance

The Special Event Ordinance applies to:

> Any temporary event or activity occurring on public or private property that interferes with or differs from the normal and ordinary use of the property or adjacent public or private property which, due to the number of people involved, timing of the event, or other similar factors deemed reasonably relevant by the Village, would require Village services beyond those normally provided.

(Dkt. 90-1 at 3.) The stated purpose of the ordinance is "to address potential impacts on the general public of a special event, including with-out limitation noise, light, dust, traffic, parking, and other public health safety and welfare concerns" as well as "to promote the economic welfare and general prosperity of the community by safeguarding and preserving property values by addressing potential impacts of a special event." (*Id.* at 2.) The permitting process exists to prevent events that would, for example, "disrupt traffic within the Village beyond a reasonably practical solution," "create a likelihood of endangering the public," "interfere with access to emergency services," "cause undue hardship or excessive noise levels to adjacent business or residents," or "require the diversion of Village resources that would unreasonably affect the maintenance of regular Village service levels." (*Id.* at 5.)

VI. The Proceedings Below

The Nation initiated these proceedings before 2016 Big Apple Fest, by filing a complaint in federal district court, seeking a declaration that the Nation, its officials,

and its trust lands are immune from the Special Event Ordinance and that the Village could not enforce the ordinance against the Nation, its officials, and employees. The Nation also sought preliminary and permanent injunctive relief against enforcement of the ordinance. (Dkt. 1.) The district court denied the Nation's request for preliminary injunctive relief, the 2016 Big Apple Fest occurred, and the Village cited the Nation for violating the ordinance. (Dkt. 9; Dkt. 90 at ¶¶ 19-23.) The Nation thereafter amended its complaint to seek an injunction against enforcement of the citation, in addition to declaratory and permanent injunctive relief against enforcement of the ordinance on the Nation, its officials, and employees. (Dkt. 10.)

The parties filed cross-motions for summary judgment. The district court issued a decision and order with the following rulings: (1) the Treaty of 1838 did create a reservation for the Oneida Tribe; (2) a 1933 federal district court decision that determined the reservation was dis-continued did not preclude the Nation from continuing to assert the existence of the reservation; (3) the reservation had been diminished, however, so that the fee-simple parcels and roads on which Big Apple Fest activities occurred were no longer part of the reservation; and (4) the Nation's sovereign immunity barred enforcement of the monetary fine in the Village's citation, but the Village could enforce the ordinance in other ways such as by bringing suit against tribal officers. (Dkt. 130.) [A-1.] Presumably because it concluded the Ordinance applied to Big Apple Fest because of the diminishment of the reservation, the district court did not address the Village's alternative arguments for application of the Ordi-

nance to Big Apple Fest even if the original boundaries of the Oneida Reservation remain intact. (Dkt. 94 at 51-62.)

VII. Rulings Presented for Review

The Nation has appealed from the district court's decision and presented for review the district court's decision that the Oneida Reservation was diminished. Because this Court can affirm on any basis that appears in the record, the Village also requests review of the district court's decision that issue preclusion does not apply to preclude the Nation from arguing the continued existence of the Oneida Reservation.

SUMMARY OF THE ARGUMENT

This Court should affirm the judgment of the court below that the Big Apple Fest, which occurs in part on land owned by the Nation in fee-simple and public roads within the Village, is subject to the Village's Special Event Ordinance. Although the land and roads are within the original boundaries of the Oneida Reservation established in the 1838 Treaty, those boundaries ceased to exist and the Oneida Reservation was, at minimum, diminished. The land and roads at issue are no longer part of a reservation.

I. In 1933, the Town of Hobart and other local governments defended against a lawsuit brought by tribal leaders on behalf of the Oneida Tribe, which sought a declaration that the allotment of the Oneida Reservation was invalid and the recovery of taxes paid to local governments, by arguing that Congress had discontinued the Oneida Reservation. The Eastern District of Wisconsin agreed and dismissed the case. The court decided the issue of whether the Oneida Reservation continued to

exist and concluded that it did not. The resolution of that issue binds the Nation today. Issue preclusion prevents the Nation from claiming the original Oneida Reservation boundaries continue to exist.

II. Even if it is appropriate to consider the issue anew, the district court properly concluded that Congress diminished the Oneida Reservation at least to the extent of the allotments that passed out of Indian ownership in the early twentieth century.

A. The Oneida Reservation was allotted under the Dawes Act, which Congress enacted in 1887 for the purposes of breaking up the reservation system. Although allotment under the Dawes Act did not affect the reservation status of land to the extent allotments remained held in trust, once fee patents were issued for allotments and the allotments were sold to non-Indians the land would lose its reservation status. *See Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994, 1009 (8th Cir. 2010) ("Congress's original expectation that allotments would lose their reservation status as they passed out of Indian ownership and into white hands . . . was not inconsistent with the maintenance of reservation status for the allotted lands so long as they were held in trust."); *Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010, 1030 (8th Cir. 1999).

B. Congress further indicated its intent to diminish the Oneida Reservation by enacting the 1906 Oneida Provision, which authorized the Secretary of the Interior to accelerate the fee-patenting process on the reservation. This Court has acknowledged that abolishing reservations is the reason Congress sought to issue fee patents

to Indians. *Wisconsin v. Stockbridge-Munsee Cmty.*, 554 F.3d 657, 664 (7th Cir. 2009).

C. The circumstances surrounding the 1906 Oneida Provision confirm Congress intended to diminish the Oneida Reservation. Oneida Indians who wanted to remove the final restrictions remaining on allotments requested the legislation. The provision was enacted by Congressmen who wanted to eliminate the Oneida land base and were not satisfied with then existing legislation. The Nation's own expert described the 1906 Oneida Provision as a "remarkable" piece of legislation.

D. Events after the 1906 Oneida Provision confirm Congress's intent. With the exception of the small number of allotments that remained in trust, the Oneida Reservation was treated similarly to the disestablished Stockbridge-Munsee Reservation. Fee-patented land was subject to state taxes and the federal government did not exercise jurisdiction over such land. For decades—into the late twentieth century—federal officials, state officials, scholars, and the Oneida themselves acknowledged that the original Oneida Reservation no longer existed and only a diminished reservation remained.

III. Recognizing the diminishment of the Oneida Reservation does not conflict with Supreme Court precedent. The Supreme Court has identified certain "hallmark" language in its surplus land act cases, but it does not require such language in order to find diminishment. Nor has the Supreme Court foreclosed finding diminishment through the conveyance of allotments to non-Indians, especially when, as here, Congressional statutes, legislative history, and subsequent events confirm an intent for

diminishment. Nor does recognizing the diminishment of the Oneida Reservation conflict with 18 U.S.C. § 1151(a), which simply provides the modern definition of "Indian country" and did not reestablish the reservation status of land that had already ceased to be part of a reservation.

IV. Even if the Oneida Reservation has not been diminished, there are several reasons why the Village can still apply the Ordinance to the Big Apple Fest. The district court did not address these reasons below, but this Court could rely on any of them to affirm the judgment. Alternatively, if this Court determines the Oneida Reservation has not been diminished, this Court should remand to the district court for consideration of the Village's alternative arguments.

STANDARD OF REVIEW

This Court reviews a district court's summary-judgment ruling *de novo*. *Black Earth Meat Market, LLC v. Vill. of Black Earth*, 834 F.3d 841, 847 (7th Cir. 2016). When, as here, the parties submitted cross-motions for summary judgment, this Court reviews the district court's treatment of each motion separately, "construing all facts and drawing all reasonable inferences in favor of the non-moving party." *Id.*

With respect to the Village's argument that issue preclusion prevents the Nation from relitigating the status of the Oneida Reservation, this Court "review[s] a district court's ruling on issue preclusion de novo." *E.E.O.C. v. AutoZone, Inc.*, 707 F.3d 824, 831 (7th Cir. 2013).

With respect to the question of whether the Oneida Reservation has been diminished, this Court has appeared to apply a de novo standard to the question of

whether a reservation has been disestablished or diminished. *Stockbridge-Munsee Cmty.*, 554 F.3d 657; *see also Osage Nation v. Irby*, 597 F.3d 1117, 1122 (10th Cir. 2010) ("[T]he Supreme Court has applied, without comment, a *de novo* standard of review in determining congressional intent regarding reservation boundary diminishment.").

ARGUMENT

This case presents the question of whether the Nation's Big Apple Fest, which occurs in part on land the Nation owns in fee simple and on public roads within the original boundaries of the Oneida Reservation, is subject to the Village's Special Event Ordinance. As the district court recognized, the answer to this question turns, in part, on whether the original boundaries of the Oneida Reservation were diminished—or the entire Oneida Reservation disestablished—such that the fee parcels and public roads at issue were no longer part of a reservation. If disestablishment or diminishment occurred, the fee parcels and roads at issue were not part of an Indian reservation and the Big Apple Fest thus would be subject to the Special Event Ordinance. *See Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973) ("Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State.").

In their briefs, the Nation and its *amici* tell a story of a district court run amok, ignoring controlling Supreme Court precedent and issuing a decision that will have far-reaching implications not just for the Nation but for many other Indian tribes

around the United States. Close inspection, however, reveals these claims as misleading and exaggerated. The district court's conclusion that the Oneida Reservation was diminished is consistent with Congress's intent, as expressed in the Dawes Act, the 1906 Oneida Provision, and other acts. The district court's decision is also consistent with decisions of the Supreme Court, this Court, and other courts of appeal. Indeed, the district court's decision merely affirms a prior district court decision, as well as the mutual understanding of the federal government, the state government, scholars, and the Nation itself until at least the 1970s: a 65,400-acre Oneida Reservation defined by its original boundaries no longer exists.

The current dispute instead represents an attempt by the Nation to rewrite this history and to reassert the Nation's sovereignty over lands that have been under state and local jurisdiction for over a century. The Nation may wish the history of the Oneida Reservation was different, but "we cannot remake history." *Yankton Sioux Tribe*, 522 U.S. at 357 (internal quotations omitted). Here, history and the law compel the conclusion that the land and roads at issue were no longer part of a reservation.

I. The Nation Cannot Relitigate the Status of the Oneida Reservation

In 1933, in *Stevens, et al. v. The County of Brown, et al.* (hereafter *Stevens*), the U.S. District Court for the Eastern District of Wisconsin determined the Oneida Reservation ceased to exist as a result of Congressional action. (Dkt. 91 ¶¶ 40-41; Dkt. 89-45 at 4.) During the proceedings below, the district court concluded *Stevens* did not preclude the Nation from asserting the continued existence of the Oneida Reservation's original boundaries, but that conclusion was incorrect. This Court should affirm the district court's ultimate conclusion—that the Nation's Big Apple

Fest is subject to the Village's Ordinance—because *Stevens* established the Oneida Reservation was lawfully discontinued and that decision is entitled to preclusive effect. Accordingly, the fee land and roads on which Big Apple Fest activities took place were not reservation land.

A. The Village Has Not Waived This Argument

First, the Nation suggests in a footnote that issue preclusion is not before this Court because the Village did not cross-appeal the district court's determination that issue preclusion does not apply. Nation Br. at 13, n. 8. The Nation is wrong. This Court "may affirm summary judgment on any ground supported in the record, so long as that ground was adequately addressed in the district court and the nonmoving party had an opportunity to contest the issue." *Cardoso v. Robert Bosch Corp.*, 427 F.3d 429, 432 (7th Cir. 2005). An appellee is free, without a cross appeal, to "'urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it.'" *Ruth v. Triumph P'ships*, 577 F.3d 790, 796 (7th Cir. 2009) (quoting *Morley Const. Co. v. Md. Cas. Co.*, 300 U.S. 185, 191 (1937)). Indeed, it would be procedurally improper for the Village to raise issue preclusion through a cross-appeal, because the Village relies on this argument to seek affirmance of "the bottom line" of the district court's judgment: the Big Apple Fest is subject to the Village's Ordinance. *See Weitzenkamp v. Unum Life Ins. Co. of Am.*, 661 F.3d 323, 332 (7th Cir. 2011).

B. Issue Preclusion Applies Here

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

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

The district court held issue preclusion does not apply here, in part, "because this case raises different factual and legal questions than those raised in *Stevens*." (Dkt. 130 at 16.) [A-16.] The district court reasoned that "the question raised in Stevens was whether individual members of the Tribe were required to pay local property taxes upon the issuance of fee patents for their allotments" and "the underlying issue in this case is whether the Nation is subject to the regulations of a local municipality in the conduct of its special events." (Dkt. 130 at 17.) [A-17.] The district court also noted "the issue of whether the Nation itself is immune from local regulatory authority was not litigated in *Stevens* to any extent." (*Id.*)

It is not necessary that the same cause of action or subject matter be at issue here as in *Stevens*. Thus, it is not necessary that this case involve a challenge to the payment of local property taxes or that *Stevens* involved whether the Nation is immune from local regulatory authority. Rather, "[i]ssue preclusion . . . bars successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment, *even if the issue recurs in the context*

of a different claim." *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008) (internal quotations omitted) (emphasis added).

This case presents the same question addressed in *Stevens*: whether Congress acted to terminate the Oneida Reservation. The issue was squarely presented in *Stevens*, as the defendants (including the Town of Hobart) moved to dismiss on the ground "[t]hat the Oneida Reservation was lawfully discontinued, the allotments made thereunder superseding the Indian treaty." (Dkt. 91 ¶ 41; Dkt. 89-45 at 3.) And it is squarely presented here, because the question of whether the Big Apple Fest is subject to the Village's Special Event Ordinance turns on whether the Oneida Reservation was disestablished or diminished.

2. The issue was actually litigated.

The *Stevens* court also decided the issue. The court recognized the discontinuance of the Oneida Reservation was one of the grounds on which the motion to dismiss was based,[3] addressed the argument, and concluded the federal government's passage and application of the Dawes Act "[p]lainly . . . resulted in a discontinuance of the reservation." (Dkt. 89-45 at 4.) The court dismissed the case, a final judgment on the merits. (Dkt. 91 ¶ 41; Dkt. 89-45 at 5.) This is all that is required for issue preclusion to apply. *See Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394, 399 n.3

[3] *See, e.g.*, Dkt. 89-52 at 3 (alleging "that the so-called Oneida Reservation has for many years . . . ceased to exist"); Dkt. 89-53 at 5 (moving to dismiss on ground "[t]hat as a matter of law, the act of February 8th, 1887, and the executive order of the President of the United States dated May 21st, 1889, superseded the terms of the treaty . . . .").

(1981) (dismissal for failure to state a claim is decision on the merits entitled to preclusive effect).

3. The determination was essential to the judgment.

The issue was also essential to the judgment in *Stevens*. The court dismissed the plaintiffs' claim because it was "bound by the state statute governing procedure and also limitation." (Dkt. 89-45 at 5.) This holding depended on the court's determination the reservation had been discontinued: "Therefore, when the Hitchcock and other cases referred to are accepted as definitely supporting the third ground assigned—[that the reservation had been discontinued]—it seems to me to follow that the plaintiffs, in seeking to recover taxes, are bound by the state statute governing procedure and also limitation." (*Id.* at 4-5.) The court held 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. The issue was thus necessary to the judgment.

This is the case even if narrower grounds existed for the judgment in *Stevens*.[4] *See Gambino v. Koonce*, 757 F.3d 604, 609-10 (7th Cir. 2014) (issue preclusion under Illinois law even though prior judgment could have been granted on lesser grounds); *Hoult v. Hoult*, 157 F.3d 29, 32 (1st Cir. 1998) ("[A] finding is 'necessary' if it was

[4] The Nation has previously argued the *Stevens* court could have resolved the case by applying the Supreme Court's decision in *Goudy v. Meath*, 203 U.S. 146 (1906), which interpreted the Dawes Act to allow for local taxation of fee patents. The plaintiffs in *Stevens* also challenged the legality of the allotment of the Oneida Reservation. (*See, e.g.*, Dkt. 89-49 at 6-7.) Applying *Goudy* would not have resolved that dispute.

central to the route that led the factfinder to the judgment reached, even if the result could have been achieved by a different, shorter and more efficient route." (internal quotations omitted)). The relevant question is whether the issue "formed the basis of the [prior] court's decision." *Gambino*, 757 F.3d at 610. *Stevens* meets that standard, as the conclusion that the Oneida Reservation was discontinued formed the basis of the court's reasoning. The *Stevens* court stated its resolution of the case "follow[ed]" from its conclusion that the Oneida Reservation had been discontinued. (Dkt. 89-45 at 5.)

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

The second and final reason the district court provided for rejecting issue preclusion was its conclusion that the lawsuit in *Stevens* was brought by members of the Oneida Tribe, rather than the Tribe itself, and "there is no evidence that the Tribe exercised a sufficient degree of control in *Stevens*." (Dkt. 130 at 16.) [A-16.] This reasoning was flawed, however. The complaint in *Stevens* states that it was brought "on behalf of the Members of the Oneida Tribe of Indians" and "on behalf of all members of the Oneida Tribe within the State of Wisconsin, similarly situated as are the complainants." (Dkt. 89-49 at 2-3.) The defendants understood it that way, and contemporaneous reporting described it as a "suit of the Oneida Indian Tribe." (Dkt. 89-46; Dkt. 89-48.) Moreover, exercising "control" is not the only way nonparty preclusion

may occur. *Taylor*, 553 U.S. at 893-95. This case implicates other bases for binding the Nation, which the district court did not address.

First, "a nonparty may be bound by a judgment because she was adequately represented by someone with the same interests who was a party to the suit." *Taylor*, 553 U.S. at 894 (internal quotations and brackets omitted). Adequate representation can occur, for example, when a party to the suit is "[i]nvested by the [non-party] with authority to represent him in an action." Restatement (Second) Judgments § 41(1)(b). This was the case in *Stevens*. The lawsuit in *Stevens* was signed on behalf of the Oneida Tribe of Indians by William Skenandore, a leader of the Tribe, (Dkt. 91 ¶ 40; Dkt. 89-49; Dkt. 89-50), who was "authorized and empowered to act for and on behalf of the Oneida Tribe of Indians of the State of Wisconsin." (Dkt. 89-49 at 2.). The Nation's experts repeatedly pointed to William Skenandore's status as "tribal chairman," "chairman of the Oneida Indians," and "chief" in the late 1920s and early 1930s to support the Nation's claim that the Oneida maintained a tribal government during this time period. (*See, e.g.*, Dkt. 92-2 at 132-36; Dkt. 92-5 at 75-79; Dkt. 120-1 through Dkt. 120-4.) Skenandore described himself as "Presiding Chief Oneida Indians." (Dkt. 89-50 at 4.) Under these circumstances, the result in *Stevens* would have bound the Oneida Tribe. *Cf. Yankton Sioux Tribe v. United States Dep't Health and Human Servs.*, 533 F.3d 634, 641 (8th Cir. 2008) (tribal member's claim precluded because similar suit had previously been filed by the Yankton Sioux Tribe "on its own behalf and on behalf of its individual members"); *Apache Survival Coalition v. United States*, 21 F.3d 895, 907 (9th Cir. 1994) (holding a coalition of tribal members and a tribe

should be treated as a single entity). And, although the Oneida Tribe formed the Nation in 1936 "in order to reestablish our tribal organization," (Dkt. 92-52 at 3), the Nation remains bound as successor-in-interest to the Oneida Tribe.[5]

Second, the *Stevens* case was a class action brought "on behalf of the Members of the Oneida Tribe of Indians, in the State of Wisconsin." (Dkt. 89-49 at 2.) Due process permits preclusive effect against a class. *Cf. Hansberry v. Lee*, 311 U.S. 32, 41 (1940) ("[T]he judgment in a 'class' or 'representative' suit, to which some members of the class are parties, may bind members of the class or those represented who were not made parties to it.").[6] At minimum, *Stevens* made a determination that land subject to fee patents was no longer part of a reservation. That determination would bind any succeeding owners of the land at issue. *Taylor*, 553 U.S. at 894. Adjudications of property status—like the status of the land within the 1838 boundaries of the Oneida Reservation—are "designed to reach directly into the future and to bind it." 18 Fed. Prac. & Proc. Juris. § 4416 (3d ed.). In such cases, "issue preclusion is the essential

[5] The Nation views itself as the successor to the Oneida Tribe of Indians insofar as it seeks the benefit of legal agreements executed prior to its formation—for example, the Treaty of 1838. Moreover, the Oneida Tribe cannot avoid the *Stevens* case by forming a new tribal government in 1936 and then litigating through that proxy. *Taylor*, 553 U.S. at 895.

[6] There should be no dispute that the interests of the plaintiffs in the prior case were aligned with the interests of the members of the Tribe. The plaintiffs understood themselves to be acting in a representative capacity, and there was notice of the suit. *Taylor*, 553 U.S. at 900-01. The suit was publicized and at least one of the plaintiffs was a tribal leader. (Dkt. 91 ¶ 40; Dkt. 89-46; Dkt. 89-47; Dkt. 89-51.)

means for protecting the most fundamental purposes of achieving finality by adjudication." *Id.* Thus, the Nation is bound to the *Stevens* judgment as a succeeding owner of allotments that *Stevens* determined lost their reservation status.

C. Any Request for an Exercise of Discretion Is Unwarranted

The Nation may argue the Court should exercise discretion and not apply the issue preclusion doctrine here. Issue preclusion is not "discretionary," however. *Kairys v. I.N.S.*, 981 F.2d 937, 940 (7th Cir. 1992); *see also United States v. Egan Marine Corp.*, 843 F.3d 674, 678 (7th Cir. 2016) (noting cases "reject[ing] judicial efforts to treat rules of preclusion as dispensable whenever judges prefer another outcome"). Issue preclusion applies even if this Court thinks the *Stevens* decision was erroneous or not sufficiently detailed. "The general rule is that issue preclusion applies to an issue framed in an earlier action even though little or no evidence at all was introduced, or though an inept effort in the first litigation can be substantially improved in a later action." 18 Fed. Prac. & Proc. Juris. § 4419 at n.11 (3d ed.); *id.* at § 4426 ("The premise of preclusion itself is that justice is better served in most cases by perpetuating a possibly mistaken decision than by permitting relitigation."); *see also Firishchak v. Holder*, 636 F.3d 305, 312 (7th Cir. 2011).

The Nation may also argue that issue preclusion does not apply to issues of law. It is true issue preclusion may not have the same force when the issue involved is a "pure question[] of law, unmixed with any common elements of fact," *Chi. Truck Drivers, Helpers and Warehouse Union (Independent) Pension Fund v. Century Motor Freight, Inc.*, 125 F.3d 526, 531 (7th Cir. 1997) (quoting 18 Fed. Prac. & Proc.

Juris. § 4425 (3d ed.)), but that is not the case here. Whether the Oneida Reservation was diminished or disestablished is, ultimately, a legal question, but the answer turns on application of a legal standard to specific facts and circumstances. This is not an "abstract" ruling of law or a "purely legal" question, but instead represents the mixing of a question of law with common elements of fact. *See Irby*, 597 F.3d at 1122 ("While determining congressional intent is a matter of statutory construction, which typically involves a de novo review, to the extent that statutory construction turns on an historical record, it involves a mixed question of law and fact.").

Nor can the Nation avoid issue preclusion by arguing there has been a change in legal environment since *Stevens*. Although subsequent Supreme Court cases have identified examples of factors for courts to consider when conducting the analysis, *infra* at pp. 28-29, the relevant question for disestablishment or diminishment remains the same today as it was when *Stevens* was decided: did Congress intend to diminish or disestablish the reservation. That question has guided the analysis since *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903), in which the Supreme Court held Congress could diminish reservations unilaterally and on which *Stevens* relied. *See also United States v. Celestine*, 215 U.S. 278, 285 (1909) (land remains reservation until separated therefrom by Congress). The court in *Stevens* applied *Hitchcock* when it determined the Oneida Reservation was discontinued.

In sum, this Court should grant preclusive effect to the determination in *Stevens* that Congress discontinued the Oneida Reservation. Accordingly, the Big Apple Fest is subject to the Village's Ordinance.

II. The Oneida Reservation Has Been Diminished

Even if issue preclusion does not apply, this Court should affirm because the district court properly concluded the Oneida Reservation was diminished. Congress indicated its intent to diminish the Oneida Reservation in the 1906 Oneida Provision and other statutes affecting the Oneida Reservation. At minimum, allotments on the Oneida Reservation that passed out of Indian ownership lost their reservation status. *See Gaffey*, 188 F.3d at 1030 (holding the Yankton Sioux Reservation "diminished by the loss of those lands originally allotted to tribal members which have passed out of Indian hands").

A. Legal Standard for Diminishment

The "touchstone to determine whether a given statute diminished or retained reservation boundaries is congressional purpose." *Yankton Sioux Tribe*, 522 U.S. at 343. No "particular form of words" is necessary to alter a reservation's boundaries, and the Supreme Court has rejected a "clear-statement rule." *Hagen v. Utah*, 510 U.S. 399, 411 (1994). "*Even in the absence of a clear expression of congressional purpose in the text of a surplus land Act*, unequivocal evidence derived from the surrounding circumstances may support the conclusion that a reservation has been diminished." *Yankton Sioux Tribe*, 522 U.S. at 351 (emphasis added). The Supreme Court has "been willing to infer that Congress shared the understanding that its ac-

tion would diminish the reservation, *notwithstanding the presence of statutory language that would otherwise suggest reservation boundaries remained unchanged*." *Solem v. Bartlett*, 465 U.S. 463, 471 (1984) (emphasis added).

In a line of cases addressing surplus land acts—acts that opened to non-Indian settlement unallotted lands remaining after the allotment of a reservation—the Supreme Court has identified three factors (the *Solem* factors) to guide the diminishment analysis: (1) "the operative language of the act that purportedly shrinks a reservation," *Stockbridge-Munsee Cmty.*, 554 F.3d at 662; (2) "events surrounding the passage of the act that 'unequivocally reveal a widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation,'" *id.* (quoting *Solem*, 465 U.S. at 471); and (3) events subsequent to the passage of the act, including "the subsequent demographic history of open lands . . . as well as the United States' treatment of the affected areas[.]" *Nebraska v. Parker*, 136 S. Ct. 1072, 1081 (2016) (internals citations and quotations omitted). These factors are not absolutes and cannot replace the fundamental inquiry: determining congressional intent. *See Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 588 n.4 (1977) (internal quotations omitted).

The *Solem* factors also cannot apply to cases involving the status of allotted lands that passed out of Indian ownership the same way they apply to the review of surplus land acts. The concerns that informed the *Solem* framework are not present

when assessing allotted lands that passed into non-Indian ownership.[7] Surplus land acts addressed the unallotted land remaining on a reservation after allotment had already occurred. With respect to unallotted, surplus land, the Dawes Act contemplated that additional Congressional action would need to occur—specifically, negotiations with the tribe to sell the land, the terms of which would later need to be ratified by Congress in the form of a surplus land act. 24 Stat. at 389. [S.A.-2.] (Dkt. 89-2 at 4.) In addition, federal and tribal authorities continued to police opened surplus lands on some reservations. *See Solem*, 465 U.S. at 480. Whereas, other opened surplus lands were turned over to the jurisdiction of state governments. *See Hagen*, 510 U.S. at 421. The *Solem* factors exist to help distinguish those surplus land acts that "'simply offered non-Indians the opportunity to purchase land within established reservation boundaries'" from those that "'freed that land of its reservation status'" so that the State "acquired primary jurisdiction over [the] unalloted opened lands[.]" *Yankton Sioux Tribe*, 522 U.S. at 343 (quoting *Solem*, 465 U.S. at 467, 470)).

No such distinguishing is necessary when assessing the status of allotted lands that were fee-patented and passed out of Indian ownership, however. Congress did not anticipate that any further Congressional action would be required to remove the

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[7] The extent to which the *Solem* factors are relevant outside the context of a surplus land act is an issue the Supreme Court may address in the pending case of *Sharp v. Murphy* (No. 17-1107). *Murphy* raises the question of whether the 1866 territorial boundaries of the Creek Nation within the former Indian Territory of eastern Oklahoma constitute an "Indian reservation." The petitioner has argued that *Solem* should not govern the inquiry, in part because the case does not involve the sale of surplus land to non-Indians. Pet'r. Br., *Sharp v. Murphy*, No. 17-1107, at 48, *available at* https://www.supremecourt.gov/DocketPDF/17/17-1107/55210/20180723232225994_17-1107ts.pdf.

reservation status of the allotted land. Rather, Congress intended that allotted lands would lose reservation status once the land was fee-patented and ultimately sold to non-Indians. *See infra* at pp. 33-37.

B. The Oneida Reservation Was Diminished as Allotments Passed Out of Indian Ownership

1. The Dawes Act was intended to abolish reservations.

As the district court properly recognized, the ultimate goal of allotment under the Dawes Act was the breakup of Indian reservations. The Supreme Court and other courts have recognized this aspect of the allotment era, and the Dawes Act in particular. *See, e.g.*, *Upper Skagit Indian Tribe v. Lundgren*, 138 S. Ct. 1649, 1652 (2018) ("The General Allotment Act represented part of Congress's late Nineteenth Century Indian policy: to extinguish tribal sovereignty, erase reservation boundaries, and force the assimilation of Indians into the society at large." (internal quotations omitted)); *Montana v. United States*, 450 U.S. 544, 559 n.9 (1981) ("The policy of the Acts was . . . the gradual extinction of Indian reservations and Indian titles." (internal quotations and citations omitted)); *Hackford v. Babbitt*, 14 F.3d 1457, 1459 (10th Cir. 1994) ("The [Dawes Act] allowed the breakup of Indian reservations into individual homesteads on which, Congress expected, the Indians would farm and become self-sufficient. The ultimate purpose of the [Dawes Act] was to abrogate the Indian tribal organization, to abolish the reservation system and to place the Indians on an equal footing with other citizens of the country." (internal quotations and brackets omitted)). Indeed, the Congressional record consistently reflects that the purpose behind the federal government's allotment policy in the late-nineteenth and early-twentieth

centuries was the dissolution of the reservation system.[8] Nowhere in the legislative history of the Dawes 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, especially once the allotments were sold to non-Indians.

It is true the Dawes Act does not expressly state that land would lose its reservation status once it was allotted and passed out of Indian ownership, but Congress would not have considered such express language necessary. It was Congress's policy to terminate reservations through allotment. And, as this Court has recognized, a loss of reservation status was the necessary consequence of a change in land tenure on an allotment. *Stockbridge-Munsee Cmty.*, 554 F.3d at 662 ("Today, a reservation can encompass land that is not owned by Indians, 18 U.S.C. § 1151(a), but back 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)); *see also Podhradsky*, 606 F.3d at 1009 (noting "Congress's original expectation that allotments would lose their reservation status as they passed out of Indian ownership and

[8] *See, e.g.*, Dkt. 89-192 [11 Cong. Rec. 875 (1881)]; Dkt. 89-193 [11 Cong. Rec. 878 (1881)]; 15 Cong. Rec. 2277 (Senator Dawes); Dkt. 89-225 [18 Cong. Rec. 190 (1886)]. The legislative history of the Dawes Act is described in detail in the Supreme Court's opinion in *Montana v. United States*, 450 U.S. 544, 559 n.9 (1981) and the Dec. 15, 2017 report of the Village's expert, Dr. Emily Greenwald. Dkt. 89-154.

into white hands"). Congress's purpose for the Dawes Act—the true test for diminishment—is evident.

To be clear, the Village does not claim, nor did the district court hold, that allotment under the Dawes Act necessarily disestablished or diminished the Oneida Reservation or other reservations. "[A]llotting land to Indians is consistent with continued reservation status." *Stockbridge Munsee Cmty.*, 554 F.3d at 664. The Village does not dispute that after the allotment of the Oneida Reservation each individual allotment was held in trust by the United States on behalf of each individual allottee and the reservation status of an allotment remained unchanged so long as the allotment was held in trust. *See Podhradsky*, 606 F.3d at 1009 ("Congress's original expectation that allotments would lose their reservation status as they passed out of Indian ownership and into white hands . . . was not inconsistent with the maintenance of reservation status for the allotted lands *so long as they were held in trust*." (emphasis added)). Rather, the initial act of allotment was the first step in a multi-step process that Congress intended and expected would result in the breakdown of reservation boundaries.

Once the trust period on an allotment expired or was terminated, the federal government relinquished all jurisdiction and a fee patent would issue. Even if the issuance of a fee patent did not terminate the reservation status of the parcel at issue, the final step in the allotment process—the transfer of the fee-patented land to a non-Indian—would do so. Congress's goal of dismantling reservations, its belief that allotting lands was part of that process, and its understanding that reservation status

was coextensive with Indian ownership, demonstrate that Congress intended to diminish the Oneida Reservation as allotted lands passed out of Indian ownership. There should be no doubt the Congress that passed the Dawes Act intended that the sale of allotments on reservations to non-Indians would terminate the reservation status of those allotments.[9]

2. The Eighth Circuit's decisions in *Gaffey* and *Podhradsky* support the Village and the judgment.

Indeed, the Village is simply asking this Court to follow the analysis used by the U.S. Court of Appeals for the Eighth Circuit in *Podhradsky* and *Gaffey*, as the district court did below. Those decisions are part of a line of cases addressing the reservation status of land within the original boundaries of the Yankton Sioux Reservation. Acting under the authority of the Dawes Act and 1891 amendments to that act, the federal government allotted to tribal members approximately 262,300 acres of the approximately 430,405 acre Yankton Sioux Reservation. *Podhradsky*, 606 F.3d at 999; *Gaffey*, 188 F.3d at 1016-17.

Just as with the Oneida Reservation, the vast majority of the allotted parcels lost trust status, either through the early issuance of patents or the expiration of the applicable trust period, and the bulk of the parcels subsequently came to be owned in

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[9] The Nation incorrectly claims the Supreme Court has "flatly rejected" a construction of the Dawes Act that would result in diminishment. Nation Br. at 15. Contrary to the Nation's claim, the Supreme Court has not directly addressed this issue and "whether reservation boundaries can be diminished when allotted lands pass into non-Indian ownership" is "[a]n important pending question." *Cohen's Handbook of Federal Indian Law* § 3.04[3] (2017). This issue is addressed in detail in Part III.C, *infra*.

fee by non-Indians. *Gaffey*, 188 F.3d at 1016; *Podhradsky*, 606 F.3d at 1000.[10] And, as with the Oneida Reservation, executive orders extended the trust period on certain parcels remaining in trust until the 1934 passage of the IRA, which "indefinitely extended the trust periods for outstanding allotments." *See Podhradsky*, 606 F.3d at 1001. And, subsequent to the passage of the I.R.A., the United States began taking land into trust for the benefit of the Yankton Sioux Tribe, just as it did for the Oneida.

Read together, *Gaffey* and *Podhradsky* hold that allotments made to tribal members under the Dawes Act that were continuously held in trust remained part of the Yankton Sioux Reservation. *Podhradsky*, 606 F.3d at 1007-10. The Eighth Circuit held, however, that those lands originally allotted to tribal members that were later transferred in fee to non-Indians "had ceased to be part of the reservation." *Id.* at 1003; *Gaffey*, 188 F.3d at 1030. In assessing the status of the allotted lands, the Eighth Circuit acknowledged the understanding that lands owned by non-Indians would not have been considered a reservation and concluded the reservation was "diminished by the loss of those lands originally allotted to tribal members which have passed out of Indian hands." *Gaffey*, 188 F.3d at 1030; *Podhradsky*, 606 F.3d at

[10] Approximately eighty-five percent of the land allotted on the Yankton Sioux Reservation passed out of trust status. *Gaffey*, 188 F.3d at 1016. The effects of the Dawes Act were more extreme on the Oneida Reservation—approximately ninety-eight percent of the land passed out of trust status with approximately ninety-five percent passing out of Indian ownership. The Oneida were considered "one of the extreme examples" of allotment under the Dawes Act. (Dkt. 91 ¶ 95.)

1009.[11] Applying the reasoning of *Gaffey* and *Podhradsky* here compels the conclusion that the Oneida Reservation was diminished at least to the extent lands allotted to tribal members were transferred in fee to non-Indians.[12]

The Nation attempts to distinguish *Gaffey* and *Podhradsky* by arguing the intent to diminish the Yankton Sioux Reservation was found in a surplus land act, not the Dawes Act. Nation Br. at 34-38. It is true the specific act at issue in *Gaffey* and *Podhradsky* was the 1894 act that ceded the remaining 168,000 acres of unallotted surplus land to the United States.[13] But the allotments at issue in *Gaffey* and *Podhradsky* were part of the nonceded lands on the reservation. The district court rightly ignored the Nation's attempt to draw an artificial distinction between *Gaffey* and this case due to the existence of a surplus land act in *Gaffey*.

Notably, although the *Gaffey* court referenced the 1894 Act when it held the reservation was diminished to the extent allotments were conveyed to non-Indians, the 1894 Act actually said very little about the status of the allotments. (*See* Dkt. 120-5 at 30-35.) Instead, the court found diminishment after reviewing the 1894 Act

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[11] The Eighth Circuit declined to address the question of the reservation status of allotted lands that transferred in fee to individual Indians but never passed out of Indian ownership. *Podhradsky*, 606 F.3d at 1015.

[12] Although arguing the cases are distinguishable, the United States implicitly recognizes these case support the Village as it requests this Court not to follow what it calls "flawed" reasoning. U.S. Br. at 24-26. To the contrary, the Eighth Circuit's decisions are consistent with Supreme Court precedent, as well as this Court's decision in *Stockbridge-Munsee Cmty.*, and demonstrate why the Oneida Reservation has been diminished.

[13] In *South Dakota v. Yankton Sioux Tribe*, the Supreme Court held that Congress diminished the Yankton Sioux Reservation because the unallotted land ceded to the United States in the 1894 Act was severed from the Yankton Sioux Reservation, but did not address the status of allotted land on the reservation. 522 U.S. at 357-58.

and observing that "nothing in its text or the circumstances surrounding its passage suggests that any party anticipated that the Tribe would exercise jurisdiction over non Indians who purchased land after it lost its trust status." *Gaffey*, 188 F.3d at 1028. Citing Section 6 of the Dawes Act, the court noted that some provisions in the 1894 Act "reflect the parties' assumption that an allottee who received full title at the end of the trust period would become subject to the civil and criminal laws of the State or territory in which he resided," such as a provision providing for reserving land for common schools. *Id.* In other words, the Eighth Circuit did not find diminishment based on any express language in the 1894 Act indicating an intent to diminish, as the Nation suggests. Rather, the Eighth Circuit relied on an absence from the act of any language indicating an intent to alter the common understanding that allottments conveyed to non-Indians were no longer reservation land and the existence of provisions consistent with that understanding.

Similar circumstances—and more—are present here, as the district court properly recognized. (Dkt. 130 at 31-32.) [A-31, A-32.] Just as in *Gaffey* and *Podhradsky*, the Oneida Reservation was allotted under the Dawes Act and Congress passed subsequent acts that did not "suggest[] that any party anticipated that the Tribe would exercise jurisdiction over non Indians who purchased land after it lost its trust status." *Gaffey*, 188 F.3d at 1028. For example, in 1917, Congress passed an act authorizing the conveyance of school land within the area set aside by the 1838 Treaty to "the public school authorities of district numbered one of the town of Oneida, Wisconsin, for district school purposes." 39 Stat. 969, 992 (Act of March 2, 1917) [S.A.-

27.] (Dkt. 89-67 at 25.) That Congress passed an act authorizing the conveyance of land to another government for use as a school for all residents (both Indian and non-Indian) indicates Congress's understanding that the jurisdiction of the State would increase over time as the State assumed jurisdiction over the allotments. This is the same type of Congressional intent the court relied on in *Gaffey*. 188 F.3d at 1028.

Moreover, Congress passed the 1906 Oneida Provision discussed below. As with the 1894 Act in *Gaffey*—and as the district court below correctly recognized—nothing in the text or circumstances surrounding the passage of the 1906 Oneida Provision suggests any party anticipated the Nation exercising jurisdiction over non-Indians who purchased land on the Oneida Reservation after it lost trust status (and there is no evidence the Nation did so). Indians who received allotments on the Oneida Reservation became subject to state civil and criminal law no later than the end of the trust period.

The 1906 Oneida Provision also shows Congress went further in demonstrating its intent to diminish the Oneida Reservation than it did with the Yankton Sioux Reservation. As discussed below, the 1906 Oneida Provision went beyond the Burke Act to single out the Oneida Reservation in order to accelerate the issuance of fee patents. The Eighth Circuit did not identify any such act with respect to the Yankton Sioux Reservation, yet the Eighth Circuit nevertheless found the Yankton Sioux Reservation diminished as allotments under the Dawes Act passed out of Indian ownership.

C. The 1906 Oneida Provision Indicates Congress's Intent to Diminish the Oneida Reservation

The Dawes Act alone demonstrates Congressional intent to diminish, at least with the respect to the Oneida Reservation, which is an extreme example of allotment. But there is no need to rely only on the Dawes Act to find intent to diminish, and the district court did not do so. Specifically, Congress further expressed its intent to diminish the Reservation by enacting the 1906 Oneida Provision:

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

(Dkt. 91 ¶ 23; Dkt. 89-27 at 5.) The 1906 Oneida Provision indicates Congress's intent to diminish the boundaries of the Oneida Reservation by specifically authorizing the Secretary of the Interior to issue fee patents to Oneida Indians in advance of the expiration of the Dawes Act's 25-year trust period. By accelerating the passage of allotted lands on the Oneida Reservation into fee-simple ownership, Congress was acting to hasten the end of the reservation.[14]

Indeed, in *Stockbridge-Munsee Cmty.*, this Court addressed the impact of the same 1906 Appropriations Act containing the 1906 Oneida Provision on the Stockbridge-Munsee Reservation. This Court held that a separate provision in that 1906 Act (the "Stockbridge-Munsee Provision") disestablished the Stockbridge-Munsee

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[14] And, as discussed earlier, Congress also indicated its intent to diminish the Oneida Reservation by authorizing the conveyance of land to local school authorities for use as a school for all residents (both Indian and non-Indian). (Dkt. 89-67 at 25.)

Reservation by allotting the reservation in fee simple.[15] As this Court recognized, abolishing reservations is the reason Congress sought to issue fee simple patents to Indians:

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

554 F.3d at 664 (internal citations omitted). As the district court below rightly explained with respect to the Oneida Reservation, "[t]he conclusion that the issuance of fee patents and sale of the land following allotment diminished the reservation is . . . consistent with, if not compelled by," this Court's reasoning in *Stockbridge-Munsee*. (Dkt. 130 at 24-25.) [A-24, A-25.]

The Nation and the United States try to distinguish *Stockbridge-Munsee Cmty.* by pointing out there was no period of trusteeship for allotments on the Stockbridge-Munsee Reservation. Rather, the allotments were issued as fee-simple patents. This argument ignores, however, that in 1906 Congress could not allot the Oneida Reservation in fee simple, as it did with the Stockbridge-Munsee Reservation, because the Oneida Reservation *had already been allotted.* With respect to the

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[15] The United States suggests the 1906 Oneida Provision should not be compared to the 1906 Stockbridge-Munsee Provision, but instead to an earlier 1871 Act this Court held diminished the Stockbridge-Munsee Reservation. U.S. Br. at 26-27. The land at issue in the 1906 Stockbridge-Munsee Provision was part of the "new, smaller, 'permanent reservation'" created by the 1871 act, however, and there is no reason why this Court's observations with respect to the effect of issuance of fee-simple patents on the remaining Stockbridge-Munsee reservation lands are not relevant to assessing the effect of the 1906 Oneida Provision.

Oneida, unlike the Stockbridge-Munsee, there was no need to issue allotments in fee simple, just a need to convert the allotments held in trust to fee-simple parcels.

The difference in language between the 1906 Oneida Provision and the Stockbridge-Munsee provision stems from the fact that the Nation was much farther down the path of having their reservation eliminated than the Stockbridge-Munsee Indian Community was in 1906. The Oneida Provision did not need to restate what had already been accomplished relative to the Oneida. By authorizing the Secretary of the Interior to convert the already-issued allotments to fee-simple patents at his discretion, Congress intended to extinguish those parts of the reservation the Secretary determined should receive fee-simple patents. The only reason Congress would have enacted the 1906 Oneida Provision is "[b]ecause the reservation could only be abolished if the tribal members held their allotments in fee simple" and Congress was paving the way for non-Indians to own the parcels (resulting in a loss of reservation status). *Stockbridge-Munsee Cmty.*, 554 F.3d at 664-65.[16]

It is true that the text of the 1906 Oneida Provision, like the Stockbridge-Munsee provision, lacks certain "hallmarks of diminishment" that the Supreme Court, in its surplus land act cases, has recognized indicate intent to diminish a reservation. But, as this Court has explained, it is not appropriate to expect Congress to employ

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[16] The Nation and the United States also try distinguishing the Stockbridge-Munsee by noting that no trust land remained on the Stockbridge-Munsee Reservation after issuance of the fee patents. But this is a difference of degree, not kind. Although the Oneida Reservation may not have been *disestablished*—because a very small amount of land remained in trust—Congress would have expected that the reservation would be *diminished* as the Secretary of the Interior issued fee patents to the Oneida and the land was sold to non-Indians. *See Gaffey*, 188 F.3d at 1030.

"a set of magic words to signal its intention to shrink a reservation," because during the relevant time periods Congress did not always speak clearly regarding its intentions with respect to the reservation status of Indian lands:

> Congress was not always clear about its intentions for the boundaries of a reservation, primarily because at the turn of the last century, when many allotment acts were passed, it was operating under a different set of assumptions than it does now. Today, a reservation can encompass land that is not owned by Indians, 18 U.S.C. § 1151(a), but back then, the "notion that reservation status of Indian lands might not be coextensive with tribal ownership was unfamiliar . . . ." *Solem*, 465 U.S. at 468, 104 S. Ct. 1161. What's more, Congress believed that all reservations would soon fade away—the idea behind the allotment acts was that ownership of property would prepare Indians for citizenship in the United States, which, down the road, would make reservations obsolete. *Id.* Given these background assumptions, Congress would have felt little need to explicitly address a reservation's boundaries. We cannot, of course, extrapolate a clear intent to diminish a reservation from these generic assumptions. *Id.* at 468-69, 104 S. Ct. 1161. But given this backdrop, we also cannot expect Congress to have employed a set of magic words to signal its intention to shrink a reservation. Absent such clear language, courts look to events surrounding the passage of the act that "unequivocally reveal a widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation," *id.* at 471, 104 S. Ct. 1161, and, "to a lesser extent," events that occur after the passage of the act, *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 344, 118 S. Ct. 789, 139 L.Ed.2d 773 (1998).

554 F.3d at 662.[17] Thus, this Court must conduct its analysis informed by the understanding that the Congress that passed the 1906 Oneida Provision was operating on a different set of assumptions about the requirements for land to be classified as reservation land.

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[17] The Eighth Circuit made a similar observation in *Gaffey*. 188 F.3d at 1022; *see also Yankton Sioux Tribe*, 522 U.S. at 343-44.

D. The Circumstances Surrounding Passage of the 1906 Oneida Provision Indicate Congress's Intent to Diminish the Oneida Reservation

The circumstances surrounding the 1906 Oneida Provision also show clear congressional intent to diminish the Reservation. The 1906 Oneida Provision "was passed at a time where the United States sought dissolution of Indian reservations[.]" *See Irby*, 597 F.3d at 1124. Congress enacted the provision after Oneida Indians repeatedly petitioned the federal government for legislation granting the Oneida fee simple title to their land that would allow them to dispose of their allotments. (Dkt. 91 ¶¶ 16-21; Dkt. 89-19 through Dkt. 89-26.) An Oneida delegation traveled to Washington D.C. to specifically request "that some legislation be enacted authorizing the issuance of patents in fee in the discretion of the Secretary of the Interior and on the application of any Indian." (Dkt. 91 ¶¶ 22-23; Dkt. 89-27; Dkt. 89-170 at 3, p. 108:11-109-10.) This request resulted in Congress authorizing the Secretary of the Interior "to issue a patent in fee to any Indian of the Oneida Reservation in Wisconsin for the lands heretofore allotted him." 34 Stat. at 381 [S.A.-17.] (Dkt. 89-28 at 75.) And, of course, granting the Oneida fee simple titles would "pave[] the way" for non-Indians to own those parcels, thereby breaking up the reservation's boundaries. *Stockbridge-Munsee Cmty.*, 554 F.3d at 664-65.[18]

Notably, when it passed the 1906 Oneida Provision, Congress understood the Oneida to already be subject to state and local civil and criminal law as a result of

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[18] Although the specific history behind the 1906 Oneida Provision is not identical to the history behind the 1906 Stockbridge-Munsee Provision, the two most important facts are. Both the Oneida and the Stockbridge-Munsee petitioned for the legislation that allowed for immediate fee patents and both acts allowed that to happen.

the Supreme Court's decision in *In re Heff*, which interpreted Section 6 of the Dawes Act to provide that an Indian who received a trust allotment became a citizen of the United States and subject to the state civil and criminal laws at the time of the allotment, and not at the expiration of the 25-year trust period. *In re Heff*, 197 U.S. at 502-03.[19] (Dkt. 91 ¶¶ 9-10, 14; Dkt. 89-12 through Dkt. 89-14; 89-17.) Thus, by granting the Secretary of the Interior the authority to issue fee patents to Oneida at his discretion, Congress paved the way for the removal of what it understood to be the last remaining restriction on the land after allotment under the Dawes Act and opened the door for those allotted lands to pass out of Indian ownership. Although this process would not have been instantaneous, Congress's intention unmistakably was that the Oneida Reservation would gradually disappear.

The Nation and its amici now seek to minimize the 1906 Oneida Provision—arguing that the provision "was merely a specific application of the Burke Act," "had the same purpose and effect as the Burke Act," "merely reiterated the Burke Act's similar provision," or "essentially restated provisions of the Burke Act." Nation Br. at 22; U.S. Br. at 21; Wis. Br. at 5. This is not true as a textual matter: the Burke Act only allowed for the issuance of fee patents to "competent" Indians, but the Oneida Provision was broader. Indeed, it would not make sense that Congress would enact

[19] Although the 1906 Burke Act was passed, in part, to overrule *In re Heff*—and includes a provision clarifying that Indians who received allotments would not become subject to section six's general grant of civil and criminal jurisdiction until patents were issued in fee—that change was not intended to affect Indians to whom allotments had already been made (like the Oneida). (Dkt. 89-18; Dkt. 89-170 at 115:1-22.)

the 1906 Oneida Provision after the Burke Act if the 1906 Oneida Provision simply restated the Burke Act's provisions.

Moreover, the Nation's own experts testified much differently during the proceedings below. The Nation's experts described the 1906 Oneida Provision as a "remarkable" provision, passed by Congressmen who were not satisfied with the Burke Act. (Dkt. 91 ¶ 25; Dkt. 92-9 at 29, p. 108:3-109:11.)

For example, one of the Nation's experts testified the 1906 Oneida Provision was added to the 1906 Appropriations Act by Congressman Minor—whom the Nation's expert described as "an advocate of fee patenting" who "express[ed] support for the idea of eliminating the Oneida's land base"—and his allies because they were not satisfied with the Burke Act and "wanted as many fee patents issued as quickly as possible." (Dkt. 89-170 at 3-5, p. 106:9-107:24, 115:23-116:15, 124:16-23.) The Nation's expert testified that Congressman Minor's position was consistent with the position held by "interests who wanted to destroy the reservation and get the tribe out of Wisconsin" and that his position was "consistent with the position taken by those who sought to remove the tribe from Wisconsin." (*Id.* at 6, p. 209:15-210:8.) This view was supported by another of the Nation's experts, who acknowledged the 1906 Oneida Provision was intended to allow non-Indians to gain access to the Oneida's land, which at that time would have resulted in the loss of reservation status. (Dkt. 91 ¶ 26.) *See also Stockbridge-Munsee Cmty.*, 554 F.3d at 662. The effort by the Nation and its amici to minimize the provision is not credible.

E. Subsequent History Confirms Congress's Intent

Events after passage of the 1906 Oneida Provision confirm Congress intended, at minimum, to diminish the boundaries of the Oneida Reservation. Aside from the small number of Oneida allotments remaining in trust, the Oneida Reservation was treated similarly to the disestablished Stockbridge-Munsee Reservation.[20] Just like in the *Stockbridge-Munsee* case, in the aftermath of the 1906 Oneida Provision, the Oneida reservation "was treated, for the most part, as though it had been abolished." *Stockbridge-Munsee Cmty.*, 554 F.3d at 665. As with the Stockbridge-Munsee, subsequent court decisions treated the reservation as if it had been abolished. *Id.* at 665. And, as with the Stockbridge-Munsee, "[t]he land became subject to state taxes, and the Department of the Interior refused to intervene in alcohol-related problems within the original reservation." *Id. See also infra* at p. 47. Federal officials across decades acknowledged that fee patented land—and certainly fee patented land that passed out of Indian ownership—was no longer subject to federal jurisdiction. Decades later, as late as the 1970s, even the Oneida acknowledged that the original reservation no longer existed.

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[20] Although the United States claims the post-1906 treatment of the Stockbridge-Munsee Reservation "was significantly different" from the post-1906 treatment of the Oneida Reservation, U.S. Br. at 28, that claim finds no support in the historical record. In fact, federal officials repeatedly drew parallels between the situation of the Stockbridge-Munsee and the situation of the Oneida. (*See, e.g.*, Dkt. 91 ¶¶ 57-58, 60, 63, 65, 70; Dkt. 89-72; Dkt. 89-73; Dkt. 89-78; Dkt. 89-80; Dkt. 89-85; Dkt. 89-164.) The only real difference is that there remained a small number of trust allotments and some unallotted tribal land, together comprising less than 2 percent of the area within the 1838 boundaries, on the Oneida Reservation. At most, this distinction means this is a case of diminishment, rather than disestablishment.

1. It is appropriate to consider subsequent history in this case.

First, the Nation wrongly argues that "[s]ince the district court here conceded the absence of statutory language indicating an intent to diminish the Oneida Reservation, evidence of subsequent treatment of the Reservation and demographics is . . . insufficient." Nation Br. at 42. The Nation misrepresents the district court's reasoning, however. The district court did not concede the absence of any statutory language supporting its holding, but rather conceded only the absence in this case of certain "hallmarks of diminishment" that are not necessary to find diminishment. (Dkt. 130 at 20.) [A-20.] *See also infra* at pp. 59-60.

Moreover, the Nation wrongly frames the question in terms of "statutory language" instead of Congress's *intent*. The Supreme Court has been clear that diminishment can be found even in the absence of express statutory language. *See supra* at pp. 27-28. To the extent the Nation is suggesting this Court should limit its analysis to the statutory text, and that consideration of subsequent history is inappropriate absent a clear expression of diminishment in the statutory text, the Nation's position conflicts with relevant Supreme Court case law.

The Supreme Court's decision in *Nebraska v. Parker* is not to the contrary. The Nation describes *Parker* as holding that "subsequent treatment of an area is relevant only to reinforce a finding of diminishment based upon statutory language," Nation Br. at 41, but that is wrong for two reasons. First, by framing the issue as one of "statutory language," the Nation ignores the second *Solem* factor—the circumstances surrounding passage of the act at issue—which can support diminishment even if the statutory text does not. *See* 465 U.S. at 471. And, although the Supreme Court in

Parker did acknowledge that it had "never relied solely" on the third *Solem* factor—subsequent history—to find diminishment, it did not foreclose reliance on this factor and consulted it even in the absence of the other two factors. *See* 136 S. Ct. at 1081. Regardless, as discussed in Parts II.C & II.D, *supra*, there is unequivocal contemporaneous evidence of intent to diminish the Oneida Reservation and statutory text supporting that conclusion.

2. The jurisdictional history of the land supports diminishment.

The jurisdictional history of the fee-patented allotments on the Oneida Reservation indicates the Oneida Reservation was, at minimum, diminished. There is no real dispute that state and local governments assumed jurisdiction over the fee-patented allotments, that "[t]he land became subject to state taxes," and that "the Department of the Interior refused to intervene in alcohol-related problems within the original reservation." *Stockbridge-Munsee Cmty.*, 554 F.3d at 665. Numerous statements by officials within the Department of the Interior in the decades after enactment of the 1906 Oneida Provision reflect this shift. A non-exhaustive list of such federal acknowledgements includes the following statements:

- "[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." (Dkt. 89-59.)
- "[T]he Government turns the land loose when it gives patents in fee . . . ." (Dkt. 89-60 at 3.)
- "Politically, the reservation has ceased to exist, and all questions of law are referred to the state court." (Dkt. 89-62 at 3.)
- "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. . . . Federal laws apply only to lands still in trust." (Dkt. 89-63 at 2-3.)

- "[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." (Dkt. 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." (Dkt. 89-65.)

- "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." (Dkt. 89-70.)

- "[A]s these Indians are citizens of the state, they are subject to its laws the same as white persons." (Dkt. 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." (Dkt. 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." (Dkt. 89-74 at 4.)

- "I have just visited two such former reservations, that of the Stockbridges and Munsees, and that of the Oneida." (Dkt. 89-164 at 2.)

- "This reservation, or former reservation, is now much like any white community . . . ." (Dkt. 89-77.)

- "These Indians are solely under the jurisdiction of the state . . . ." (Dkt. 89-80 at 2.)

- "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." (Dkt. 89-81 at 3.)

- "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." (Dkt. 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." (Dkt. 89-87 at 3.)

- "The Oneidas have severed their relationships with the agency with the exception of annuity payments." (Dkt. 89-88 at 34.)

- "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 . . . ." (Dkt. 89-90 at 2.)

- "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 . . . ." (Dkt. 89-93.)

- "[T]he Federal Government does not have jurisdiction over Oneida lands from which the restrictions have been removed . . . ." (Dkt. 89-104 at 3.)

- "[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." (Dkt. 89-102.)

- "[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[.]" (Dkt. 89-103 at 2.)

- "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. . . . 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." (Dkt. 89-104.)

- "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." (Dkt. 89-105 at 3.)

- "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." (Dkt. 89-120.)

As the district court recognized, as late as 1975:

> [T]he United States Department of the Interior's Bureau of Indian Affairs issued a report entitled "Statistical Data for Planning Oneida Reservation," which stated that "the total acreage of this reservation is 2,581 acres—2,108 acres are tribally owned and 473 acres are allotted." The report noted that "by 1930 only a thousand acres remained. In 1934, through a series of land purchases, the acreage was increased to the present amount."

(Dkt. 130 at 35 (internal citations omitted); *see also* Dkt. 89-136.)

Further, during the decades immediately after the 1906 Oneida Provision the State acknowledged the diminishment of the Reservation. In 1931, the Attorney General of the State of Wisconsin wrote a letter addressing jurisdiction with respect to the Oneida:

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

(Dkt. 91 ¶ 76; Dkt. 89-91 at 3.) This assumption of jurisdiction is an acknowledgement of diminishment by the State. *Hagen*, 510 U.S. at 421.[21]

The Nation takes the position that jurisdictional history is irrelevant to the question of diminishment because it reflects an application of the terms of the Dawes

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[21] As late as 1966, the Wisconsin Governor's Commission on Human Rights published a *Handbook on Wisconsin Indians* that noted that as of that date there were only "2,592 acres comprising the Oneida reservation." (Dkt. 89-130 at 7.)

Act. Nation Br. at 42 n.21. The Nation's position is at odds with controlling precedent, however. The Supreme Court, as well as this Court, look to the jurisdictional history of the land at issue when evaluating whether diminishment has occurred. *See 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."); *Hagen*, 510 U.S. at 421 ("The State of Utah exercised jurisdiction over the opened lands from the time the reservation was opened[.]"); *Stockbridge-Munsee Cmty.*, 554 F.3d at 665 ("The land became subject to state taxes, and the Department of the Interior refused to intervene in alcohol-related problems within the original reservation."). Indeed, the Eighth Circuit relied on such evidence in *Gaffey* even though there—as here—the state's exercise of jurisdiction over allotted land that passed out of trust occurred as a function of the Dawes Act. 188 F.3d at 1029.

3. Land tenure and demographic data support diminishment.

The history of land tenure on the Oneida Reservation also supports the district court's diminishment finding. There was an extreme population shift on the Oneida Reservation in the early twentieth century.[22] Within approximately a decade after passage of the 1906 Appropriations Act, over 50,000 acres of the approximately 65,400 acres had been alienated from Indian ownership. (Dkt. 91 ¶ 30; Dkt. 89-32

[22] One of the Nation's experts described the three years after passage of the 1906 Act as a "rush of white settlers" and agreed that the influx of white settlers into the Oneida Reservation was "a rapid process." (Dkt. 89-170 at 6, p. 127:2-129:25.)

through Dkt. 89-34.) By the passage of the IRA in 1934, the Oneida owned less than 90 acres of tribal lands and only a few hundred acres of allotments in trust; at least 95 percent of the reservation area was non-Indian owned. (Dkt. 91 ¶¶ 95, 98; Dkt. 89-1 at 5; Dkt. 89-108 at 14; Dkt. 89-111 at 8; Dkt. 89-112.) The Supreme Court has recognized that when "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. *Solem*, 465 at 471.

Similarly, "[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 n. 12-13. Here, these considerations also support the district court's diminishment finding. By the early 1930s, fewer than half of the Oneidas lived at or within the immediate environment of the reservation. (Dkt. 91 ¶¶ 69, 99; Dkt. 89-1 at 6; Dkt. 89-84; Dkt. 89-113 at 12; Dkt. 89-114.) According to a study prepared by the League of Women Voters in 1966, "1960 census figures for the Town of Oneida listed a total population of 2,520, including 786 Indians; for the town of Hobart, a total population of 2,343, with 552 Indians." (Dkt. 89-131 at 23.) Even today, the U.S. Census Bureau estimates that white residents make up approximately 80% of the population of the Village. (Dkt. 91 ¶ 127.)

4. Subsequent treatment by the courts supports diminishment.

Contemporaneous treatment by the courts also supports the district court's diminishment finding. *See Stockbridge-Munsee Cmty.*, 554 F.3d at 665 (relying on

court statements regarding status of Stockbridge-Munsee reservation). For example, even if the federal court's decision in *Stevens* that the Oneida Reservation was discontinued is not entitled to preclusive effect, it is strong evidence of how federal officials viewed the Oneida Reservation. Other court decisions reflected this view as well. *See United States v. Hall*, 171 F. 214 (E.D. Wis. 1909) (recognizing that the Oneida Reservation was a "former . . . reservation").

5. The Nation recognized the original boundaries of the reservation ceased to exist.

Finally, a diminishment finding is also supported by the Nation's own statements through at least the 1970s, as well as statements by various scholars over the decades. For example, in 1966, the Oneida Industrial Planning Committee, under the direction of the Oneida Tribal Council, prepared a "Provisional Overall Economic Development Plan for the Oneida Indian Reservation" that described "The Oneida Reservation" as follows:

> The government purchased land in the area of the original reservation, and today there are 2,601.05 acres of Oneida lands scattered over the former reservation. Of these lands, 2,067.89 acres are tribally owned and 433.16 acres are allotted. Tribal affairs are now directed by a tribal council of four officers who are elected by the tribal membership living within the area of the old reservation from among the same population.

(Dkt. 91 ¶ 119; Dkt. 89-132 at 2 (emphasis added).) In 1973, the Oneida Tribe of Indians of Wisconsin, Inc. (i.e., the Nation) published the History of the Oneida Indians, which states:

> By the 1920's, all but a few hundred acres of the 650,000 [sic] was in white hands; the tribe itself held but 80 acres allocated for educational purposes. The reservation ceased to exist yet the tribe continued as a legal entity. . . . During the 1920's the Oneidas were in an anomalous state. The federal government limited its obligation to the annuity question. With no reservation, all other

> services usually provided by the BIA were assumed by the towns, counties and states.

(Dkt. 91 ¶ 121; Dkt. 89-134 at 4-5.) A 1977-79 Overall Economic Development Plan prepared by the Oneida Tribe of Indians expressed a similar view: "[t]he reservation had ceased to exist." (Dkt. 91 ¶ 124; Dkt. 89-137.) Indian history scholars also recognized the diminishment of the Oneida Reservation, including scholars who consulted with the Oneida. (*See, e,g.*, Dkt. 91 ¶¶ 113-14, 122, 125; Dkt. 89-111 at 7-8; Dkt. 89-113 at 9, 15; Dkt. 89-135 at 7; Dkt. 89-138 at 10.)

6. There is no "mixed record" on the question of diminishment.

Finally, the Nation suggests the district court's discussion of the subsequent history evidence was "cherry-picked" and directs this Court to pieces of evidence the Nation claims the district court ignored. Nation Br. at 42-45. None of the evidence on which the Nation relies provides a basis for questioning the district court's finding of diminishment, however, or for concluding there is a "mixed record" of subsequent treatment of the land at issue.

First, the Nation cites an opinion from Wisconsin's Attorney General in 1981 that the Oneida Reservation, as originally established, still existed. The 1981 Attorney General opinion is too far removed temporally from the allotment of the Reservation and the 1906 Oneida Provision to provide any insight into Congress's intent, however. *See Irby*, 597 F.3d at 1126 (evidence contemporaneous to litigation "is too far removed temporally from the 1906 Act to shed much light on 1906 Congressional

intent").[23] Far more relevant is the Wisconsin Attorney General's position in 1931, discussed *supra* at p. 50, which supports diminishment. (Dkt. 89-91.)

Second, the Nation argues "the district court ignored multiple official reports of the Commissioner of Indian Affairs after allotment documenting the United States' view that the Oneida Reservation consisted of 65,400 acres, including allotted and fee patented lands." Nation Br. at 42-43. The "reports" it cites are not considered jurisdictional statements of the status of the Oneida Reservation after enactment of the 1906 Oneida Provision, however, and are not reliable indicators of the status of the Oneida Reservation. *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.") (internal citation omitted); *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.").

The "reports" primarily consist of statistical tables and statistics that include references to the "Oneida Reservation," but which also include references to the

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[23] For the same reason, this Court should similarly reject the United States' attempt to rely on late-twentieth century or early twenty-first century subsequent history evidence, such as a 2014 statement by the U.S. Fish and Wildlife Service and recent assertions of jurisdiction by the EPA. U.S. Br. at 2.

Stockbridge-Munsee Reservation years after that reservation was disestablished.[24] For example, the Nation cites a 1919 table as listing the Oneida Reservation with an area of 65,466 acres, but the same table lists the Stockbridge and Munsee Reservation with an area of 8,920 acres.[25] (Dkt. 92-70.) Similarly, the Nation cites an excerpt from a 1927 report that describes the total land area of the Oneida Reservation as 65,617.77 acres (Dkt. 89-85 at 14-16), but the same report includes reservation figures for the Stockbridge & Munsee Reservation that show a total land area of 11,160 acres despite that reservation's disestablishment. (Dkt. 89-85 at 14; *see also* Dkt. 92-59) Indeed, notwithstanding the Nation's attempt to cherry-pick language from the report, the 1927 report expressly refers to the "former Oneida Indian reservation" and the "former reservation." (Dkt. 89-84 at 3; Dkt. 89-85 at 5.)

Third, the Nation cites the process leading to the Department of the Interior's approval of the Nation's Constitution under the IRA, but the Department's treatment of the Nation during that process is consistent with diminishment.[26] Notably, the

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[24] The Nation also cites to a report from 1900, before passage of the 1906 Oneida Provision. Nation Br. at 43, n. 22.

[25] *See also* Dkt. 92-35 (includes references to "Stockbridge" and "Stockbridge-Munsee").

[26] The Nation compares its adoption of an IRA Constitution to the Stockbridge-Munsee, which was not initially eligible to adopt an IRA constitution because the Department determined the Stockbridge-Munsee lacked a land base. This difference in treatment is simply a reflection of the fact that the Stockbridge-Munsee Reservation had been disestablished, whereas the Oneida Reservation had been diminished. It suggests only that the Nation had a reservation, but says nothing about the size of the reservation. Contemporaneous documentation establishes, however, that the Department understood the Oneida to be in possession of a much smaller, diminished reservation. (Dkt. 89-107 ("Only a few tracts of the former large reservation retain a restricted status."); Dkt. 89-108 at 14 ("They lost more than 95 percent of all their land under the fee-patenting operation."); *see also* Dkt. 89-104; Dkt. 89-105; Dkt. 89-120.)

Department did not approve the Nation's draft constitution that described the Nation's jurisdiction as extending to the Oneida Reservation as defined in the 1838 Treaty. (Dkt. 92-49.) Instead the Department approved revised language that referred only to the "jurisdiction of the [Nation] . . . within the present confines of the [Reservation]." (Dkt. 92-52.) The "present confines" meant the confines as of 1936 (the time the Nation's constitution was drafted)—not 98 years prior in 1838—by which time the Reservation had been diminished drastically to the extent that the reservation had practically "ceased to exist." (Dkt. 89-137.) The "present confines" referenced in the Nation's Constitution were much less than the approximately 65,400 acres that comprised the area set aside in the Treaty of 1838. (Dkt. 92-52.)[27]

Fourth, the Nation references an alleged "survey" conducted by one of its experts, Dr. Edmunds, of the historical record. Dr. Edmunds's methodology consisted of reviewing documents for references to the "Oneida Reservation" and treating such references as acknowledgements that the Oneida Reservation as defined by its 1838 boundaries continued to exist.[28] (Dkt. 92-9 at 41, p. 156:2-157:10.) A reference to the "Oneida Reservation" or the "reservation" in a document provides no insight into whether the reference is to the entire 65,400-acre set aside in the 1838 Treaty or to a diminished reservation, however, and Dr. Edmunds made no attempt to distinguish

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[27] The Nation also cites the letter recommending conduct of an election on the Oneida Constitution as recognizing the Oneida Reservation, but the letter says nothing about how large the reservation was as of 1936. Nation Br. at 44.

[28] Notably, the Nation did not introduce into the record many of the documents on which Dr. Edmunds apparently relied; his descriptions of the documents are hearsay.

between "considered jurisdictional statements" and mere references to a known location.[29] (Dkt. 89-154 at 28-34) (explaining "Edmunds gives equal weight to documents with very different levels of detail, claims contradictions in documents where they do not exist, and interprets documents as being in support of his argument that are, at best, ambiguous"). Indeed, many of the documents cited by Dr. Edmunds used the phrase "Oneida Reservation" to refer to a small amount of tribally owned land, not the 65,400-acre reservation defined by the 1838 Treaty. (*Id.*)[30]

There is simply no merit to the Nation's suggestion that the "bulk of the historical record" is at odds with the district court's finding of diminishment. As discussed above, the historical record unequivocally demonstrates that through at least the mid-twentieth century all the relevant parties—the federal government, the State of Wisconsin, scholars, and the Nation—understood that a 65,400-acre Oneida Reservation no longer existed.

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[29] For example, Dr. Edmunds treated a reference to the "Oneida Reservation" in a 1930 statistical table as evidence of the Oneida Reservation's continued existence, but the document also referenced the "Stockbridge Reservation" despite that reservation having been disestablished in 1906. (Dkt. 92-9 at 42, p. 158:2-159:21; Dkt. 89-6.) Dr. Edmunds admitted that under his methodology the reference to the Stockbridge Reservation was an acknowledgement by the federal government of the continued existence of that reservation, which would conflict with this Court's approach to disestablishment in *Stockbridge Munsee Cmty.*

[30] The Nation claims the Village's expert testified there was a "mixed record" on subsequent history, but omits the expert's testimony that the historical record makes "a strong case that the reservation boundaries cease to exist." (Dkt. 103-12 at 33, p. 124:8-10.)

III. THE NATION'S REMAINING ARGUMENTS LACK MERIT

A. "Hallmark" Termination Language Is Not Necessary to Find Diminishment

The Nation suggests the district court improperly found diminishment "despite the admitted absence of any statutory language indicating this result," Nation Br. at 20, but this mischaracterizes the district court's reasoning, the governing legal standard, and the Village's position. As already discussed *supra* at pp. 27-28, diminishment turns on Congressional intent and such intent can be found "[e]ven in the absence of a clear expression of congressional purpose in the text." *Yankton Sioux Tribe*, 522 U.S. at 351. If the Nation is suggesting that particular "statutory language" is necessary to find diminishment, it is proposing a standard the Supreme Court has rejected. *See supra* at p. 27.

Moreover, the district court did not "concede[] the absence of statutory language indicating an intent to diminish the Oneida Reservation." Nation Br. at 23. In addition to referencing the Dawes Act and the Burke Act, the district court relied on the text of the 1906 Oneida Provision as indicating an intent to diminish the Oneida Reservation through its "singling out the Oneida Reservation, in particular, and allowing the Secretary to quickly issue fee patents at his discretion." (Dkt. 130 at 23.) [A-23.]

The district court did acknowledge, however, that the statutory language in this case lacks certain "hallmarks of diminishment"—for example, cession language, language restoring the land to the public domain, or provisions providing for payment of a sum certain to the Oneida—that the Supreme Court, in its surplus land act cases,

has stated indicate Congress intended to diminish a reservation. (Dkt. 130 at 20.) [A-20.] Finding diminishment even in the absence of such language is entirely proper, however, as this Court and others have recognized. *Stockbridge-Munsee Cmty.,* 554 F.3d at 664 (finding disestablishment even though "[t]he 1906 Act . . . included none of the hallmark language suggesting that Congress intended to disestablish the reservation"); *see also Irby*, 597 at 1124 (reservation disestablished even though "neither the Osage Allotment Act nor the Oklahoma Enabling Act contain express termination language"); *Gaffey*, 188 F.3d at 1030 (reservation diminished to the extent allotted lands for which fee patents were issued were then sold to non-Indians).

Both the Nation and the United States direct this Court's attention to the absence of such "hallmarks" and argue there should be no difference in the diminishment analysis between cases involving surplus land acts and allotment. Nation Br. at 41; U.S. Br. at 14.[31] As the district court properly recognized, however, the examples of statutory language on which the Supreme Court has relied in its surplus land act cases would not make any sense in the allotment context. (Dkt. 130 at 21.) [A-21.]

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[31] The United States argues to this Court that "the Supreme Court has never suggested that the difference between allotment and the sale of 'surplus' lands affects the diminishment analysis," U.S. Br. at 14, but the United States is currently advocating for such a distinction before the Supreme Court. In its briefing in *Sharp v. Murphy*, the United States acknowledges that the Supreme Court's prior disestablishment cases "have considered whether Congress disestablished or diminished a reservation through 'surplus land Acts'" and further argues that the types of language on which the Supreme Court has focused in surplus land cases—"the phrase 'public domain,' language of cession, and the provision of 'a lump-sum payment'"—would be inappropriate when Congress acted to break up tribal territory through allotment. U.S. Br., *Sharp v. Murphy*, No. 17-1107, at 6, 24, *available at* https://www.supremecourt.gov/DocketPDF/17/17-1107/55946/20180730184937862_17-1107tsacUnitedStates.pdf.

For example, it would make no sense for an allotment act to contain cession language, because cession and allotment were two alternative ways of eliminating a tribal land base. Nor would one expect to see language expressly restoring land to the public domain in an allotment act, as opposed to a surplus land act, because allotment did not transfer land into government ownership.[32] Similarly, the absence of any provisions providing for payment of a sum certain to the Oneida for their reservation lands means nothing in this case because such a provision would be out of place in an allotment act. Congress had no need to make a lump sum payment to the Oneida because the "lands were conveyed through allotment to their own members rather than to the federal government." [33] Pet'r Br. *Sharp v. Murphy*, No. 17-1107, at 49; *see also* U.S. Br., *Sharp v. Murphy*, No. 17-1107, at 25.

B. The District Court Did Not Rely on Congress's "General Expectations"

The Nation also suggests the district court inappropriately relied on Congress's "generalized expectation and belief" in the late 1800s and early 1900s that "the reservation system would cease to exist," pointing to the Supreme Court's statement in *Solem* 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

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[32] "The public domain was the land owned by the Government, mostly in the West, that was available for sale, entry, and settlement under the homestead laws, or other disposition under the general body of land laws." *Hagen*, 510 U.S. at 412 (internal quotations omitted).

[33] When federal officials sold the site of the Oneida Boarding School in 1924, the federal government effectively made a lump sum payment to the Oneida by distributing the proceeds of the sale to the Oneida on a per capita basis. (Dkt. 91 ¶ 64; Dkt. 89-79.)

specific congressional purpose of diminishing reservations with the passage of every surplus land act." 465 U.S. at 468-69. This argument is misplaced. The Supreme Court's statement in *Solem* is focused on surplus land acts, and says nothing about allotments. This makes sense because, as already discussed, some surplus land acts diminished reservations and others did not. The Supreme Court has never held that the Dawes Act, fully effectuated, cannot result in the diminishment of a reservation through allotment, however. Indeed, it has suggested otherwise. *Mattz v. Arnett*, 412 U.S. 481, 496 (1973) ("When all the lands had been allotted and the trust expired, the reservation could be abolished.").

Moreover, even if the limiting language in *Solem* 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 application to a specific reservation. That is precisely what happened here. The district court focused on the specific intent behind the Dawes Act, and also relied on Congress's singling out of the Oneida Reservation in the 1906 Oneida Provision, the historical context in which the 1906 Oneida Provision was enacted, and the treatment of the land at issue after enactment of the 1906 Oneida Provision.

C. The Judgment Below Does Not Conflict With Governing Supreme Court Authority

The Nation and the United States point to several Supreme Court decisions that, they claim, demonstrate the district court erred and that the Oneida Reservation has not been diminished. The Nation and the United States exaggerate and, in

certain instances, misrepresent these decisions. Contrary to their claims, the Supreme Court has not "repudiated" or "rejected" the theory of diminishment the district court applied below. Indeed, although the Nation claims the Supreme Court has held that the conveyance of allotted lands to non-Indians does not diminish a reservation, no Supreme Court case so holds and this is considered "[a]n important pending question." *Cohen's Handbook of Federal Indian Law* § 3.04[3] (2017) ("An important pending question is whether reservation boundaries can be diminished when allotted lands pass into non-Indian ownership.").[34]

1. *Celestine*

First, the Nation claims that in *United States v. Celestine* the Supreme Court "considered the effect of allotment under the Dawes Act on reservation boundaries" and "did not indicate or imply that its holding was contingent upon continued ownership of the parcel by an Indian." Nation Br. at 26. This mischaracterizes the issue in *Celestine*. The land at issue in *Celestine* was not allotted under the Dawes Act, but rather under the terms of a treaty with the Indian tribe at issue. 215 U.S. at 285-86. Moreover, although the Nation misleadingly refers to a "fee patent" being the subject of *Celestine*, suggesting no restrictions on ownership, under those treaty terms, the allotments remained subject to "conditions against alienation or leasing, exemption

[34] The treatise takes the position that such lands should not lose reservation status, but it does so by taking issue with the Supreme Court's observation in *Solem v. Bartlett* that reservation status was coextensive with tribal ownership at the turn of the century. The Supreme Court's pronouncement on this issue has been applied by lower courts, however, including the Seventh Circuit's decision in *Stockbridge Munsee Cmty.* and the Eighth Circuit's decision in *Gaffey*.

from levy, sale or forfeiture," and were "not to be disturbed by the state without the consent of Congress." *Id.* at 286. Indeed, the Nation disingenuously claims the district court here improperly distinguished *Celestine* by noting "the allotment remained in the tribal member's possession." Nation Br. at 26. The district court did note that factual difference, but actually distinguished *Celestine* by noting that the patent in *Celestine* contained the restrictions discussed above. (Dkt. 130 at 24.) [A-24.]

The Dawes Act was only relevant in *Celestine* because the case raised the question of whether application of the Dawes Act's citizenship provision—which applied to allotments made "under any law or treaty" (as well as to allotments under the Dawes Act)—disestablished the reservation. Unlike allotments under the Dawes Act, however, the allotments at issue in *Celestine* were not subject to the Dawes Act's grant of state criminal and civil jurisdiction over allottees. Indeed, the Supreme Court specifically distinguished Indians allotted under the Dawes Act. It was in this context that the Supreme Court held that allotments of restricted patents, combined with citizenship, did not result in a loss of reservation status. That the Supreme Court in *Celestine* went out of its way to explain that certain provisions in the Dawes Act did not apply in that case—for example, that "[t]here is not in this case in terms a subjection of the individual Indian to the laws, both civil and criminal, of the state; no grant to him of the benefit of those laws; no denial of the personal jurisdiction of the United States"—indicates the Court's holding likely would have been different had it

been addressing allotments issued under the Dawes Act. 215 U.S. at 291. *Celestine* has little to say regarding the question at issue in this case.[35]

2. *Seymour*

The Nation and the United States also cite the Supreme Court's decision in *Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351 (1962), as conflicting with the district court's decision. The Nation, in particular, suggests that *Seymour* stands for the proposition that allotment, and the conveyance of former allotments to non-Indians, does not diminish a reservation. But this reads too much into *Seymour*.

First, the Nation uses *Seymour* to perpetuate its mischaracterization of *Celestine* by claiming the court in *Seymour* read *Celestine* to hold that allotment under the Dawes Act, including the eventual conveyance of former allotments to non-Indians, had no effect on reservation boundaries. Nation Br. 27 (citing *Seymour*, 368 U.S. at 359). The court in *Seymour* could not have read anything into *Celestine* relating to allotments under the Dawes Act because *Celestine* did not have anything to do with allotments under the Dawes Act but, rather, allotments under treaties specific to that tribe, which as stated above were significantly different. Consequently, *Seymour* is silent on the intent of the Dawes Act.

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[35] The Ninth Circuit's decision in *Eells v. Ross*, 64 F. 417 (1894), which the Supreme Court cited in *Celestine*, similarly did not involve allotments under the Dawes Act, the effect of the Dawes Act's grant of state jurisdiction over allottees under the Dawes Act, or the effect of a subsequent transfer of an allotment under the Dawes Act to a non-Indian. 64 F. at 419-20.

Moreover, *Seymour* related to a criminal action and was a surplus lands act case that did not specifically address what happens to allotments after they pass out of restricted status.[36] The case depended upon an application of 18 U.S.C. § 1151(a), which was passed in 1948 and "uncouple[d] reservation status from Indian ownership." *Solem*, 465 U.S. at 468. Prior to the passage of § 1151(a), it was well-established that land lost its reservation status when it passed out of Indian ownership. *See Stockbridge-Munsee Cmty.*, 554 F.3d at 662; *Gaffey*, 188 F.3d at 1028. As the Eighth Circuit explained in *Podhradsky*:

> Prior to the passage of § 1151, land had generally ceased to be Indian country when Indian title was extinguished. *See, e.g.*, *Clairmont v. United States*, 225 U.S. 551, 558, 32 S. Ct. 787, 56 L.Ed. 1201 (1912). Section 1151(a) abrogated this understanding of Indian country and, with respect to reservation lands, preserves federal and tribal jurisdiction even if such lands pass out of Indian ownership. *See Seymour*, 368 U.S. at 357-58, 82 S. Ct. 424 (concluding that under § 1151(a) reservation status applies even when land is purchased by a non Indian); *see also Solem*, 465 U.S. at 468, 104 S. Ct. 1161 ("Only in 1948 did Congress uncouple reservation status from Indian ownership . . . .").

606 F.3d at 1007; *cf. Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408, 424 (1989) (White, J.) (noting that *Seymour* and *Mattz* concluded "merely that allotment is consistent with continued reservation status"); *Hydro Resources, Inc. v. U.S. E.P.A.*, 608 F.3d 1131, 1157 (10th Cir. 2010) ("In *Seymour*, the Court simply observed the obvious: subsection (a), by its express terms, includes within the definition of Indian country *all* lands within the congressionally prescribed

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[36] The act at issue "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 354-55 (emphasis added).

boundaries of a reservation, including private fee lands.") Importantly, the rule established by § 1151(a) was not retroactive—it did not recreate the reservation status of lands that had already lost that status. Thus, just as the Eighth Circuit recognized in *Gaffey* and *Podhradsky*—cases that post-date the *Seymour* decision—this Court should conclude that allotted lands on the Oneida Reservation for which fee simple patents were issued and which were subsequently sold to non-Indians prior to 1948 ceased to be reservation lands.

3. *Mattz*, *Solem*, *Parker*, and *Moe*

The Nation and the United States also rely on other Supreme Court decisions to varying degrees, but none addressed the question of the reservation status of allotments that had been fee-patented and passed out of Indian ownership. To the contrary, each case involved land that was subject to 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 ..." 412 U.S. 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.* The observation in *Mattz* that allotted lands retain their reservation status so long as they remain in trust—is consistent with and supports the Village's position: that allotted lands on the Oneida Reservation lost their reservation status once fee patents were issued and the lands passed out of Indian ownership. As relevant here, *Mattz* stands only for the proposition that the initial act of allotting lands under the Dawes Act did not terminate a reservation, as the allotted

lands retained their reservation status prior to the expiration of the trust period. *Podhradsky*, 606 F.3d at 1008.

Solem 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 465-69 & n.10. *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.

Parker focused not on the allotment provisions of the act at issue 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. 136 S. Ct. at 1077. This unallotted land could then be purchased in 160-acre tracts *by "nonmembers*." *Id.* (emphasis added). 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. *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.

Finally, *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976), did not present the question of diminishment via full effectuation of Dawes Act, but instead addressed the ability of a state to tax the activities of reservation Indians.

D. The Judgment Below Is Not Inconsistent With the Supreme Court's Jurisprudence Regarding Tribal Authority Over Non-Indians On Reservations

The Nation suggests the Supreme Court's jurisprudence addressing tribal authority over non-Indians on reservations also undermines a finding of diminishment. The Nation appears to suggest that—because the Supreme Court has established rules governing tribal authority over non-Indians on reservations—the Supreme Court has implicitly rejected the proposition that allotments under the Dawes Act would lose their status as reservation land when fee-patented and sold to non-Indians. But those cases assume the existence of a reservation, which is not the case here. Additionally, this is an unjustified leap of logic.

The existence of Supreme Court cases addressing tribal authority over non-Indians on reservations says nothing about the specific question of the reservation status of land allotted under the Dawes Act that was transferred in fee to non-Indians, which as noted above is an important pending question. There are other ways—consistent with continued reservation status—that non-Indians could come to own land on a reservation. For example, non-Indians could come to own land on a reservation through the enactment of a surplus land act under the Dawes Act that results in the *unallotted* land on a reservation being purchased by non-Indians. Or, a non-Indian could purchase an allotment that was issued under the terms of an allotment

act other than the Dawes Act.[37] Or, Congress could extend a reservation's boundaries to encompass land already owned by non-Indians.[38] In each of these scenarios, the reservation status of the land might be maintained notwithstanding its purchase by a non-Indian. But none involve the question presented here.

Finally, as discussed *supra* at p. 37 and *infra* at p. 75, the resolution of this case—as does every case involving questions of diminishment or disestablishment—turns on the unique facts and circumstances surrounding allotment on the Oneida Reservation. That reservations exist in which non-Indians own land, and that the Supreme Court has had to establish rules to guide jurisdictional disputes on such reservations, says nothing about whether the Oneida Reservation has been diminished or disestablished.

E. The District Court Properly Applied 18 U.S.C. § 1151

There is also no merit to the Nation's argument that the district court "refus[ed] to apply the Indian Country statute"—18 U.S.C. § 1151—during the proceedings below. Nation Br. at 45. The district court rightly recognized that § 1151 controls the question of whether a particular piece of land is "Indian country." Because § 1151 includes "land within the limits of any Indian reservation" within its definition of

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[37] For example, although the Nation claims the Crow Reservation at issue in *Montana* had been allotted under the Dawes Act, Nation Br. at 31, that was only true for trust patents issued to "minors and incompetent Indians." Allotments to competent Indians on the Crow Reservation were made under the terms of the 1920 Crow Allotment Act. 41 Stat. 751, 751 (Act of June 4, 1920).

[38] *See, e.g.*, *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645 (2001).

"Indian country," the district court next properly recognized that the relevant question is whether the land at issue in this case was diminished from the Oneida Reservation prior to the passage of § 1151 in 1948. (Dkt. 130 at 17-18.) [A-17-18] If it was so diminished, the land was not reservation land and thus not Indian country under § 1151(a). The Nation's arguments to the contrary are meritless.

First, the Nation cites *Solem* in support of its argument, Nation Br. at 46, but that decision actually supports the Village's (and the district court's) framing of the analysis. In *Solem* the Supreme Court recognized that only if the reservation was not diminished would the land at issue be considered Indian country under § 1151(a). The Supreme Court did not rely on § 1151(a) as controlling the question of whether the reservation had in fact been diminished or disestablished and thus was no longer Indian country, however. The Nation's suggestion that the Supreme Court "explicitly applied the Indian country statute" to the issue of diminishment is not true. Nation Br. at 46. The Supreme Court answered the question of whether diminishment occurred in *Solem* by analyzing Congress's intent in 1908, not by applying § 1151(a). Indeed, the other cases cited by the Nation recognize that the relevant question is whether a reservation has been diminished or disestablished via another act, because that answer controls whether land is Indian country under § 1151(a).

The Nation tries to manufacture a distinction between the historical treatment of Indian country on the one hand, and reservations on the other, by arguing that "Indian country had been historically defined by reference to Indian title" and "reservation . . . had never been defined by reference to Indian title." Nation Br. at 47-48.

According to the Nation, as well as some of its amici, before the enactment of § 1151(a) in 1948, a reservation encompassed all land within reservation boundaries (even land owned by non-Indians) and § 1151(a) merely codified this historical definition. Nation Br. at 48; NCAI Br. at 18-22.

This argument is at odds with both Supreme Court precedent and this Court's decisions. In *Solem*, the Supreme Court explained that "[t]he notion that reservation status of Indian lands might not be coextensive with tribal ownership was unfamiliar at the turn of the century" and that "[o]nly in 1948"—with the enactment of § 1151—"did Congress uncouple reservation status from Indian ownership." 465 U.S. at 468. As this Court explained in *Stockbridge-Munsee Cmty.*: "Today, a reservation can encompass land that is not owned by Indians, 18 U.S.C. § 1151(a), but back then, the 'notion that reservation status of Indian lands might not be coextensive with tribal ownership was unfamiliar . . . .'" 554 F.3d at 662 (quoting *Solem*, 465 U.S. at 468); *see also Gaffey*, 188 F.3d at 1022. The Nation's argument to the contrary contradicts these controlling precedents.

Finally, what the Nation is suggesting the district court should have done—and, presumably, is requesting this Court do—is to apply § 1151(a) to determine the reservation status of land that passed out of Indian ownership prior to the enactment of § 1151(a). In other words, the Nation is suggesting that § 1151(a)'s modern definition of Indian country applies to the question of whether the Oneida Reservation was diminished in the early twentieth century.

But, what matters here is not the intent of the Congress in 1948. Rather, what matters is the intent of the Congress that passed the acts alleged to have altered the reservation's boundaries, i.e., the intent of the Congress in 1887 (when the Dawes Act was passed), 1906 (when Congress passed the Oneida Provision), and 1917 (when Congress passed an act authorizing the sale of school land to public school authorities). *See Yankton Sioux* Tribe, 522 U.S. at 355 ("[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." (internal quotations and citation omitted)). As those Congresses expected allotments that passed out of Indian ownership would cease to be reservation land and would be under state jurisdiction, this Court must read those acts in light of that understanding and hold the Oneida Reservation diminished to the extent allotted land passed out of Indian ownership. *Gaffey*, 188 F.3d at 1022 ("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."). It is elementary that congressional intent must be determined using the understanding at the time of enactment. *See also Rosebud*, 430 U.S. at 613, n.47 (determining congressional intent behind a 1910 surplus land act by looking to the most recent court decisions at the time defining Indian country, notwithstanding

the 1948 enactment of § 1151). The Nation's attempt to recast Congress' intent in 1871 and 1906 using a change in the law in 1948 is baseless.[39]

At bottom, the Nation's argument is simply a rehash of an argument rejected by the district court in *Stockbridge-Munsee Cmty.* The Stockbridge-Munsee argued to the district court, just as the Nation does here, that passage of § 1151(a) contradicted the theory that transfer of land title altered reservation status.[40] The State explained, however that "a subsequent Congress cannot alter the intent of a prior Congress and, even if it could, § 1151 did not alter the definition of 'reservation,' thereby somehow retroactively recreating a reservation that had disappeared long ago." *Stockbridge-Munsee Cmty.*, 366 F. Supp. 2d at 750. The district court agreed with the State and rejected the Stockbridge-Munsee's argument "that the 1948 enactment of the definition of 'Indian country' somehow restored the original reservation boundaries." *Id.* at 769. Rather, the court explained that § 1151(a) simply "clarified the jurisdictional status of land within the boundaries of *existing* reservations by providing that even fee-patented lands within a reservation constitute 'Indian Country.'" *Id.* (emphasis added). The court also held that "the change in definition of 'Indian country' in 1948 did not and could not alter the 'common understandings' of

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[39] Moreover, even if it could somehow negate the intent of prior congresses, § 1151 does not help the Nation's cause. It merely clarified the jurisdictional responsibilities within an existing reservation, but does not itself determine whether a reservation exists. *See DeCoteau v. Dist. Cnty. for Tenth Judicial Dist.*, 420 U.S. 425, 427, n.2 (1975).

[40] *Wisconsin v. Stockbridge-Munsee Cmty.*, 366 F. Supp. 2d 698, 746-47 (E.D. Wis. 2004) (defendants argued that § 1151 contradicts plaintiffs' position that a fully-patented reservation cannot remain a reservation and claimed that transfer of title was not paramount).

Congress at the time it passed the Act of 1871 and the Act of 1906." *Id.* In short, the court held that if the land at issue had lost its reservation status by the time § 1151 was enacted, § 1151 did not restore that status.[41] This Court should reach the same conclusion.

F. The Nation and Its Amici Exaggerate the Impact of a Diminishment Finding

Finally, although the Nation and its amici repeatedly suggest that the district court's diminishment finding could affect other tribes and reservations, such concerns are overblown. Each case involving a question of diminishment or disestablishment ultimately turns on its own set of circumstances, including this one. This case presents a number of unique and distinguishing circumstances, including but not limited to: (1) the "remarkable" 1906 Oneida Provision; (2) the statute authorizing the sale of land to public school authorities for use as a school for Indians and non-Indians; (3) the rapidity of the land tenure and demographic changes on the Oneida Reservation; (4) the decision in *Stevens*, which was described at the time as "unique in that it is the only case of its kind that has ever been brought by a tribe of Indians on the theory that the Indian reservation had not been legally discontinued," (Dkt. 89-48); (5) the recognition at the time that the Oneida were an "extreme example" of land loss as a

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[41] Indeed, when Congress enacted § 1151 in 1948, a mechanism for reestablishing the reservation status of previously diminished and disestablished reservations already existed in the I.R.A. *See Podhradsky*, 606 F.3d at 1011-13 (holding that former reservation land reacquired in trust under the IRA has its reservation status restored); *see also City of Sherrill, N.Y. v. Oneida Indian Nation of New York*, 544 U.S. 197, 220 (2005) (fee-to-trust mechanism in IRA "provide[s] a mechanism for the acquisition of lands for tribal communities that takes account of the interests of others with stakes in the area's governance and wellbeing.").

result of allotment (Dkt. 89-108 at 14); (6) the treatment of the affected areas by the federal government for decades after allotment; and (7) the Nation's own acknowledgment until at least the 1970's that the reservation had ceased to exist. Affirmance of the district court would not "place[] in jeopardy" every other reservation allotted under the Dawes Act, as the Nation claims. Nation Br. at 51.

Further, although the State of Wisconsin raises concerns regarding certain practical impacts it believes may flow from a finding of diminishment, such concerns are irrelevant to the legal question before the Court. Moreover, the State's concerns are, largely, overblown. As noted above, there is no basis for the State's concern that finding diminishment of the Oneida Reservation will call into question the status of other Indian reservations in Wisconsin. And, while the State suggests that a finding of diminishment may call into question the legality the Nation's gaming facilities on land that was placed into trust after 1988—because such lands can only be used for gaming if they are "within or contiguous to the boundaries of the tribe's reservation," or if tribal gaming on the land has otherwise been approved through a special approval process—the decision below did not address the reservation status of such trust land. Wis. Br. at 18-19.[42]

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[42] For example, in *Podhradsky* the Eighth Circuit held that land which was diminished from a reservation nevertheless reacquired reservation status when it was placed into trust under the I.R.A. 606 F.3d at 1016. The Village takes no position in this litigation on the question of whether former allotments that lost reservation status but were subsequently repurchased and placed into trust under the I.R.A. reacquired reservation status.

IV. Big Apple Fest Is Subject to the Special Event Ordinance Even If It Occurred Entirely Within Indian Country

Finally, even if this Court disagrees with the district court, and concludes the Oneida Reservation as defined by the 1838 Treaty remains undiminished, that does not mean the Nation is entitled to judgment in this dispute. There are a number of scenarios in which a state or local government can regulate activities occurring on an Indian reservation. During the proceedings below, the Village argued that it could apply the Ordinance to Big Apple Fest, even if the Oneida Reservation was undiminished, for a number of reasons. (*See* Dkt. 94 at 51-62; Dkt. 119 at 33-36.) The district court did not issue a decision with respect to these arguments, however.[43]

First, in an October 23, 2017 Decision and Order, the district court concluded that "absent Congressional authorization, a State may only regulate the property or conduct of a tribe or tribal-member in Indian country in 'exceptional circumstances'" and that the Village had the burden of showing that such circumstances exist here in order to apply the Ordinance to conduct occurring on a reservation. (Dkt. 66 at 6.) [A-46.] In a follow-up order, however, the district court invited the Village to raise the issue on summary judgment if the Village believed the district court "erred in its description of the law in preliminarily determining burdens of proof of the respective parties." (Dkt. 68.)

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[43] Contrary to the Nation's suggestion, the Village has not "waived any claim that exceptional circumstances justify departure from the usual rules of federal pre-emption that prohibit local government regulation of tribes on reservations and preclude the imposition of the Village's Ordinance upon the Nation on an undiminished Reservation." Nation's Br. at 12. The district court did not address this issue and, as the prevailing party below, the Village is free to urge in support of affirmance any argument in the record.

During briefing on the parties' cross-motions for summary judgment, the Village argued that application of the Ordinance to the Nation satisfied this "exceptional circumstances" test, for a number of reasons. For example, the Village argued that the Ordinance is a land-use ordinance that serves the same purposes as other types of land-use regulations, including zoning regulations, that the Supreme Court has indicated would likely apply to Indian-owned fee land within a reservation.[44] (Dkt. 119 at 35.) The Village also argued that the Ordinance protects the Village's interest in controlling the use of public roads within its borders in order to ensure that Village residents and/or emergency services are not unreasonably impacted by large-scale events conducted within the Village. (*Id.* at 29-30.) Nevertheless, the district court did not address these arguments, presumably because doing so was unnecessary given the district court's diminishment finding. If the issue had been addressed, it is difficult to imagine how the district court could have ruled the Nation's decision to close a Village road without the Village's consent or pursuant to some type of permitting process was not an exceptional circumstance.

Similarly, the district court also did not address the Village's arguments on summary judgment, made at the district court's invitation, that application of the

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[44] Although the Supreme Court has not yet addressed this specific issue, based on its comments in other cases the Supreme Court is likely to conclude that Indian tribes cannot assert immunity from state and local zoning and land-use regulations with respect to fee land on reservations. *See City of Sherrill,* 544 U.S. at 220; *id.* at 226 n.6 (Stevens, J., dissenting); *Brendale*, 492 U.S. at 440-47.

Ordinance to the Nation did not require satisfaction of the "extraordinary circumstances" test. For example, the Village argued that the Ordinance was an exercise of *in rem* jurisdiction over fee land within the Village's borders, not *in personam* jurisdiction over the Nation, and could be applied to the Big Apple Fest using the same reasoning the district court applied in a previous dispute between the Village and the Nation regarding condemnation rights. (Dkt. 94 at 53-54.) *Oneida I*, 542 F. Supp. 2d at 926. The Village also argued that application of the Ordinance was supported by the reasoning in a number of Supreme Court decisions, including *City of Sherrill, N.Y. v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005), *Brendale v. Confederated Tribes and Bands of Yakima Nation*, 492 U.S. 408 (1989), and *Strate v. A-1 Contractors*, 520 U.S. 438 (1997). (Dkt. 94 at 54-57.) And, finally, the Village argued that application of the Ordinance to the Big Apple Fest should be assessed using the Supreme Court's balancing test for determining whether state law applies to activity on an Indian reservation. (*Id.* at 57-61.) Any one of these arguments would support application of the Ordinance to the Big Apple Fest.

Indeed, the Nation implicitly admitted that it is subject to state and local jurisdiction with respect to the Big Apple Fest when it applied to the Wisconsin Department of Transportation ("WDOT") and Brown County for a permit to close a state highway associated with the Big Apple Fest. Nevertheless, the Nation did not apply to the Village for a permit for the event, even though the event also required the closure of a road maintained by the Village in addition to the state highway. It is impossible to reconcile the Nation's position that the Special Event Ordinance should

not apply to Big Apple Fest when the Nation applied to other state and local government entities for permits associated with the event. The Nation knew it had no right to close a state or county road without permission; it similarly should not have the right to close a Village road without permission of the Village.

This Court could rely on any of these arguments to affirm the district court's judgment, even if this Court determines that the Oneida Reservation is undiminished. Alternatively, however, if this Court reverses the district court's diminishment finding, this Court should vacate the judgment and remand to the district court. The district court could then consider in the first instance whether the Village's alternative arguments allow for application of the Ordinance to the Big Apple Fest.

CONCLUSION

This is the second time a district court has held that the Oneida Reservation, as defined by its original boundaries, no longer exists. The judgment of the district court should be affirmed.

Respectfully submitted this 4th day of November, 2019.

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Dated: November 4, 2019

s/ Frank W. Kowalkowski
Frank W. Kowalkowski
One of the Attorneys for Defendant-Appellee

CERTIFICATE OF SERVICE

I hereby certify that on November 4, 2019, the Brief of Appellees was filed with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Frank W. Kowalkowski
Frank W. Kowalkowski

SUPPLEMENTAL APPENDIX

TABLE OF CONTENTS TO STATUTORY APPENDIX

Remedy by existing law not impaired.

SEC. 2. That nothing in this act contained shall prevent, lessen, impeach, or avoid any remedy at law or in equity which any owner of letters patent for a design, aggrieved by the infringement of the same, might have had if this act had not been passed; but such owner shall not twice recover the profit made from the infringement.

Approved, February 4, 1887.

Feb. 8, 1887.

CHAP. 119.—An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes.

President authorized to allot land in severalty to Indians on reservations.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in all cases where any tribe or band of Indians has been, or shall hereafter be, located upon any reservation created for their use, either by treaty stipulation or by virtue of an act of Congress or executive order setting apart the same for their use, the President of the United States be, and he hereby is, authorized, whenever in his opinion any reservation or any part thereof of such Indians is advantageous for agricultural and grazing purposes, to cause said reservation, or any part thereof, to be surveyed, or resurveyed if necessary, and to allot the lands in said reservation in severalty to any Indian located thereon in quantities as follows:

Distribution.

To each head of a family, one-quarter of a section;

To each single person over eighteen years of age, one-eighth of a section;

To each orphan child under eighteen years of age, one-eighth of a section; and

To each other single person under eighteen years now living, or who may be born prior to the date of the order of the President directing an allotment of the lands embraced in any reservation, one-sixteenth of a section: *Provided*, That in case there is not sufficient land in any of said reservations to allot lands to each individual of the classes above named in quantities as above provided, the lands embraced in such reservation or reservations shall be allotted to each individual of each of said classes pro rata in accordance with the provisions of this act: *And provided further*, That where the treaty or act of Congress setting apart such reservation provides for the allotment of lands in severalty in quantities in excess of those herein provided, the President, in making allotments upon such reservation, shall allot the lands to each individual Indian belonging thereon in quantity as specified in such treaty or act: *And provided further*, That when the lands allotted are only valuable for grazing purposes, an additional allotment of such grazing lands, in quantities as above provided, shall be made to each individual.

Provisos.

Allotment pro rata if lands insufficient.

Allotment by treaty or act not reduced.

Additional allotment of lands fit for grazing only.

Selection of allotments.

SEC. 2. That all allotments set apart under the provisions of this act shall be selected by the Indians, heads of families selecting for their minor children, and the agents shall select for each orphan child, and in such manner as to embrace the improvements of the Indians making the selection. Where the improvements of two or more Indians have been made on the same legal subdivision of land, unless they shall otherwise agree, a provisional line may be run dividing said lands between them, and the amount to which each is entitled shall be equalized in the assignment of the remainder of the land to which they are entitled under this act: *Provided*, That if any one entitled to an allotment shall fail to make a selection within four years after the President shall direct that allotments may be made on a particular reservation, the Secretary of the Interior may direct the agent of such tribe or band, if such there be, and if there be no agent, then a special agent appointed for that purpose, to make a selection for such Indian, which election shall be allotted as in cases where selections are made by the Indians, and patents shall issue in like manner.

Improvements.

Proviso.

On failure to select in four years, Secretary of the Interior may direct selection.

Allotments to be made by special agents and Indian agents.

SEC. 3. That the allotments provided for in this act shall be made by special agents appointed by the President for such purpose, and the agents in charge of the respective reservations on which the allotments are directed to be made, under such rules and regulations as the Secretary of the Interior may from time to time prescribe, and shall be certified by such agents to the Commissioner of Indian Affairs, in duplicate, one copy to be retained in the Indian Office and the other to be transmitted to the Secretary of the Interior for his action, and to be deposited in the General Land Office.

Certificates.

Indians not on reservations, etc., may make selection of public lands.

SEC. 4. That where any Indian not residing upon a reservation, or for whose tribe no reservation has been provided by treaty, act of Congress, or executive order, shall make settlement upon any surveyed or unsurveyed lands of the United States not otherwise appropriated, he or she shall be entitled, upon application to the local land-office for the district in which the lands are located, to have the same allotted to him or her, and to his or her children, in quantities and manner as provided in this act for Indians residing upon reservations; and when such settlement is made upon unsurveyed lands, the grant to such Indians shall be adjusted upon the survey of the lands so as to conform thereto; and patents shall be issued to them for such lands in the manner and with the restrictions as herein provided. And the fees to which the officers of such local land-office would have been entitled had such lands been entered under the general laws for the disposition of the public lands shall be paid to them, from any moneys in the Treasury of the United States not otherwise appropriated, upon a statement of an account in their behalf for such fees by the Commissioner of the General Land Office, and a certification of such account to the Secretary of the Treasury by the Secretary of the Interior.

Fees to be paid from the Treasury.

Patent to issue.

SEC. 5. That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: *Provided*, That the President of the United States may in any case in his discretion extend the period. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: *Provided*, That the law of descent and partition in force in the State or Territory where such lands are situate shall apply thereto after patents therefor have been executed and delivered, except as herein otherwise provided; and the laws of the State of Kansas regulating the descent and partition of real estate shall, so far as practicable, apply to all lands in the Indian Territory which may be allotted in severalty under the provisions of this act: *And provided further*, That at any time after lands have been allotted to all the Indians of any tribe as herein provided, or sooner if in the opinion of the President it shall be for the best interests of said tribe, it shall be lawful for the Secretary of the Interior to negotiate with such Indian tribe for the purchase and release by said tribe, in conformity with the treaty or statute under which such reservation is held, of such portions of its reservation not allotted as such tribe shall, from time to time, consent to sell, on such terms and conditions as shall be considered just and equitable between the United States and said tribe of Indians, which purchase shall not be complete until ratified by Congress, and the form and manner of executing such release shall also be

To be held in trust.

Conveyance in fee after 25 years.

Provisos.

Period may be extended.

Laws of descent and partition.

Negotiations for purchase of lands not alloted.

Lands so bought to be held for actual settlers if arable.

prescribed by Congress: *Provided however*, That all lands adapted to agriculture, with or without irrigation so sold or released to the United States by any Indian tribe shall be held by the United States for the sole purpose of securing homes to actual settlers and shall be disposed of by the United States to actual and bona fide settlers only in tracts not exceeding one hundred and sixty acres to any one person, on such terms as Congress shall prescribe, subject to grants which Congress may make in aid of education: *And provided further*, That no patents shall issue therefor except to the person so taking the same as and for a homestead, or his heirs, and after the expiration of five years occupancy thereof as such homestead; and any conveyance of said lands so taken as a homestead, or any contract touching the same, or lien thereon, created prior to the date of such patent, shall be null and void.

Patent to issue only to person taking as homestead.

Purchase money to be held in trust for Indians.

And the sums agreed to be paid by the United States as purchase money for any portion of any such reservation shall be held in the Treasury of the United States for the sole use of the tribe or tribes of Indians; to whom such reservations belonged; and the same, with interest thereon at three per cent per annum, shall be at all times subject to appropriation by Congress for the education and civilization of such tribe or tribes of Indians or the members thereof. The patents aforesaid shall be recorded in the General Land Office, and afterward delivered, free of charge, to the allottee entitled thereto. And if any religious society or other organization is now occupying any of the public lands to which this act is applicable, for religious or educational work among the Indians, the Secretary of the Interior is hereby authorized to confirm such occupation to such society or organization, in quantity not exceeding one hundred and sixty acres in any one tract, so long as the same shall be so occupied, on such terms as he shall deem just; but nothing herein contained shall change or alter any claim of such society for religious or educational purposes heretofore granted by law.

Religious organizations.

Indians selecting lands to be preferred for police, etc.

And hereafter in the employment of Indian police, or any other employes in the public service among any of the Indian tribes or bands affected by this act, and where Indians can perform the duties required, those Indians who have availed themselves of the provisions of this act and become citizens of the United States shall be preferred.

Citizenship to be accorded to allottees and Indians adopting civilized life.

SEC. 6. That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property.

Secretary of the Interior to prescribe rules for use of waters for irrigation.

SEC. 7. That in cases where the use of water for irrigation is necessary to render the lands within any Indian reservation available for agricultural purposes, the Secretary of the Interior be, and he is hereby, authorized to prescribe such rules and regulations as he may deem necessary to secure a just and equal distribution thereof among the Indians residing upon any such reservations; and no other appropriation or grant of water by any riparian proprietor shall be authorized or permitted to the damage of any other riparian proprietor.

Lands excepted.

SEC. 8. That the provision of this act shall not extend to the territory occupied by the Cherokees, Creeks, Choctaws, Chickasaws, Seminoles, and Osage, Miamies and Peorias, and Sacs and Foxes, in the Indian Territory, nor to any of the reservations of the Seneca Nation of New York Indians in the State of New York, nor to that strip of territory in the State of Nebraska adjoining the Sioux Nation on the south added by executive order.

Appropriation for surveys.

SEC. 9. That for the purpose of making the surveys and resurveys mentioned in section two of this act, there be, and hereby is, appropriated, out of any moneys in the Treasury not otherwise appropriated, the sum of one hundred thousand dollars, to be repaid proportionately out of the proceeds of the sales of such land as may be acquired from the Indians under the provisions of this act.

Rights of way not affected.

SEC. 10. That nothing in this act contained shall be so construed as to affect the right and power of Congress to grant the right of way through any lands granted to an Indian, or a tribe of Indians, for railroads or other highways, or telegraph lines, for the public use, or to condemn such lands to public uses, upon making just compensation.

Southern Utes may be removed to new reservation.

SEC. 11. That nothing in this act shall be so construed as to prevent the removal of the Southern Ute Indians from their present reservation in Southwestern Colorado to a new reservation by and with the consent of a majority of the adult male members of said tribe.

Approved, February 8, 1887.

Feb. 8, 1887.

CHAP. 120.—An act to declare a forfeiture of lands granted to the New Orleans, Baton Rouge and Vicksburg Railroad Company, to confirm title to certain lands, and for other purposes.

Certain lands granted to New Orleans, Baton Rouge and Vicksburg R. R. Co. forfeited.
Vol. 16, p. 579.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the lands granted to the New Orleans, Baton Rouge and Vicksburg Railroad Company by the act entitled "An act to incorporate the Texas Pacific Railroad Company and to aid in the construction of its road, and for other purposes," approved March third, eighteen hundred and seventy-one, are hereby declared to be forfeited to the United States of America in all that part of said grant which is situate on the east side of the Mississippi River, and also in all that part of said grant on the west of the Mississippi River which is opposite to and coterminous with the part of the New Orleans Pacific Railroad Company which was completed on the fifth day of January, eighteen hundred and eighty-one; and said lands are restored to the public domain of the United States.

Certain lands confirmed to New Orleans Pacific R. R. Co., assignee of New Orleans, Baton Rouge and Vicksburg R. R. Co.

SEC. 2. That the title of the United States and of the original grantee to the lands granted by said act of Congress of March third, eighteen hundred and seventy-one, to said grantee, the New Orleans, Baton Rouge and Vicksburg Railroad Company, not herein declared forfeited, is relinquished, granted, conveyed, and confirmed to the New Orleans Pacific Railroad Company, as the assignee of the New Orleans, Baton Rouge and Vicksburg Railroad Company, said lands to be located in accordance with the map filed by said New Orleans Pacific Railway Company in the Department of the Interior October twenty-seventh, eighteen hundred and eighty-one and November seventeenth, eighteen hundred and eighty-two, which indicate the definite location of said road: *Provided*, That all said lands occupied by actual settlers at the date of the definite location of said road and still remaining in their possession or in possession of their heirs or assigns shall be held and deemed excepted from said grant and shall be subject to entry under the public land laws of the United States.

Proviso. Lands of actual settlers at the time excepted.

When grant to be in effect.

SEC. 3. That the relinquishment of the lands and the confirmation of the grant provided for in the second sections of this act are made and shall take effect whenever the Secretary of the Interior is notified that

Leaving drugs, etc., on streets, etc., prohibited.

implement, appliance, or other agency for the treatment of disease, injury, or deformity. That, except as may be otherwise authorized by law, no person shall throw, cast, deposit, drop, scatter, or leave, or cause to be thrown, cast, deposited, dropped, scattered, or left, any drug, medicine, or chemical, or any compound or combination thereof, upon any public highway or place, or, without the consent of the owner or occupant thereof, upon any premises in the District of Columbia.

Exhibition of titles restricted.

SEC. 17. That it shall be unlawful for any person not legally licensed as a pharmacist to take, use, or exhibit the title of pharmacist, or licensed or registered pharmacist, or the title of druggist or apothecary, or any other title or description of like import.

Jury exemption.

SEC. 18. That all persons licensed under this Act as pharmacists, and actively engaged in the practice of their profession, shall be exempt from jury duty in all courts of the District of Columbia.

Penalty for violations.

SEC. 19. That any person violating any of the provisions of this Act shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine not exceeding two hundred dollars or by imprisonment not exceeding six months, or by both such fine and imprisonment, in the discretion of the court, and if the offense be continuing in its character, each week or part of a week during which it continues shall constitute a separate and distinct offense. And it shall be the duty of the major and superintendent of police of the District of Columbia and of the corporation counsel of said District to enforce the provisions of this Act.

Enforcement.

Repeal.

SEC. 20. That all Acts and parts of Acts inconsistent with the provisions of this Act be, and the same are hereby, repealed.

Approved, May 7, 1906.

May 8, 1906.
[H. R. 11946.]
[Public, No. 149.]

CHAP. 2348.—An Act To amend section six of an Act approved February eighth, eighteen hundred and eighty-seven, entitled "An Act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes."

Lands in severalty to Indians.
Vol. 24, p. 390, amended.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section six of an Act approved February eighth, eighteen hundred and eighty-seven, entitled "An Act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes," be amended to read as follows:

Citizenship rights to allottees on issue of fee simple title.

"SEC. 6. That at the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in section five of this Act, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made and who has received a patent in fee simple under the provisions of this Act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up within said limits his residence, separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such

Indian to tribal or other property: *Provided*, That the Secretary of the Interior may, in his discretion, and he is hereby authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent: *Provided further*, That until the issuance of fee-simple patents all allottees to whom trust patents shall hereafter be issued shall be subject to the exclusive jurisdiction of the United States: *And provided further*, That the provisions of this Act shall not extend to any Indians in the Indian Territory."

Proviso. Restrictions removed.

Jurisdiction in trust patents continued.

Indian Territory not included.

That hereafter when an allotment of land is made to any Indian, and any such Indian dies before the expiration of the trust period, said allotment shall be cancelled and the land shall revert to the United States, and the Secretary of the Interior shall ascertain the legal heirs of such Indian, and shall cause to be issued to said heirs and in their names, a patent in fee simple for said land, or he may cause the land to be sold as provided by law and issue a patent therefor to the purchaser or purchasers, and pay the net proceeds to the heirs, or their legal representatives, of such deceased Indian. The action of the Secretary of the Interior in determining the legal heirs of any deceased Indian, as provided herein, shall in all respects be conclusive and final.

Fee simple patents to allottees' heirs.

Sale of.

Disposal of proceeds.

Approved, May 8, 1906.

CHAP. 2438.—An Act To authorize the construction of dams and power stations on the Coosa River at Lock Two, Alabama.

May 9, 1906.
[H. R. 15534.]
[Public, No. 150.]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any riparian owner, whether person, company, or corporation having authority therefor under the laws of the State of Alabama may hereafter erect, maintain, and use a dam or dams in or across the Coosa River, in the State of Alabama, at such points at or near Lock Two as they may elect and the Secretary of War may approve, between a point on the eastern side of the river in the abandoned portion thereof at a point below the United States Government dam at Lock Two and above the navigable portion of the river between Locks Two and Three, for the purpose of erecting, operating, and maintaining power stations and to maintain inlet and outlet races or canals and to make such other improvements on the eastern bank of the Coosa River between the two points above mentioned as may be necessary for the development of water power and the transmission of the same, subject always to the provisions and requirements of this Act and to such conditions and stipulations as may be imposed by the Chief of Engineers and the Secretary of War for the protection of navigation and the property and other interests of the United States.

Coosa River, Ala. Right to dam, etc., near Lock Two, granted.

Location.

SEC. 2. That detailed plans for the construction and operation of a dam or dams and other appurtenant and necessary works shall be submitted by the person, company, or corporation desiring to construct the same to the Chief of Engineers and the Secretary of War, with a map showing the location of such dam or other structures, with such topographical and hydrographic data as may be necessary for a satisfactory understanding of the same, which must be approved by the Chief of Engineers and the Secretary of War before work can be commenced on said dam or dams or other structures; and after such approval of said plans, no deviation whatsoever therefrom shall be made without first obtaining the approval of the Chief of Engineers

Secretary of War to approve plans, etc.

River at a point between Columbus, Georgia, and Franklin, Georgia, in the State of Georgia, in accordance with the provisions of the Act entitled "An Act to regulate the construction of bridges over navigable waters," approved March twenty-third, nineteen hundred and six. *Ante*, p. 84.

SEC. 2. That the right to alter, amend, or repeal this Act is hereby expressly reserved. Amendment.

Approved, June 20, 1906.

CHAP. 3449.—An Act To authorize the Georgia, Florida and Alabama Railway Company to construct three railroad bridges across the Chattahoochee River, one at or near the city of Eufaula, Alabama, and two between said city of Eufaula and the city of Columbus, Georg

June 20, 1906.
[H. R. 19816.]
[Public, No. 257.]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Georgia, Florida and Alabama Railway Company, a corporation organized under the laws of the States of Florida and Georgia, its successors and assigns, be, and they are hereby, authorized to construct, maintain, and operate three railroad bridges and approaches thereto across the Chattahoochee River, one at or near the city of Eufaula, Alabama, and two between said city of Eufaula and the city of Columbus, Georgia, in accordance with the provisions of the Act entitled "An Act to regulate the construction of bridges over navigable waters," approved March twenty-third, nineteen hundred and six.

Chattahoochee River.
Georgia, Florida and Alabama Railway Company may build three bridges across, in Alabama and Georgia.
Ante, p. 84.

SEC. 2. That the right to alter, amend, or repeal this Act is hereby expressly reserved. Amendment.

Approved, June 20, 1906.

CHAP. 3504.—An Act Making appropriations for the current and contingent expenses of the Indian Department, for fulfilling treaty stipulations with various Indian tribes, and for other purposes, for the fiscal year ending June thirtieth, nineteen hundred and seven.

June 21, 1906.
[H. R. 15331.]
[Public, No. 258.]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums be, and they are hereby, appropriated, out of any money in the Treasury not otherwise appropriated, for the purpose of paying the current and contingent expenses of the Indian Department, for fulfilling treaty stipulations with various Indian tribes, and in full compensation for all offices the salaries for which are specially provided for herein for the service of the fiscal year ending June thirtieth, nineteen hundred and seven, namely:

Indian Department appropriations.

I. GENERAL PROVISIONS.

General provisions.

PRESIDENT.

Under the President.

To enable the President to cause, under the provisions of the Act of February eighth, eighteen hundred and eighty-seven, entitled "An Act to provide for the allotment of lands in severalty to Indians," such Indian reservations as in his judgment are advantageous for agricultural and grazing purposes to be surveyed or resurveyed, for the purposes of said Act, and to complete the allotment of the same, including the necessary clerical work incident thereto in the field and in the Office of Indian Affairs, and delivery of trust patents, so far as allotments shall have been selected under said Act, twenty-five thousand dollars.

Allotments in severalty.
Vol. 24, p. 388.

Rations to mission schools.

Mission schools on an Indian reservation may, under rules and regulations prescribed by the Commissioner of Indian Affairs, receive for such Indian children duly enrolled therein, the rations of food and clothing to which said children would be entitled under treaty stipulations if such children were living with their parents.

Continuing alienation restrictions.

That prior to the expiration of the trust period of any Indian allottee to whom a trust or other patent containing restrictions upon alienation has been or shall be issued under any law or treaty the President may in his discretion continue such restrictions on alienation for such period as he may deem best: *Provided, however*, That this shall not apply to lands in the Indian Territory.

Proviso. Indian Territory excepted.

Under the Secretary

SECRETARY.

Purchase of supplies to be advertised.

That no purchase of supplies for which appropriations are herein made, exceeding in the aggregate five hundred dollars in value at any one time, shall be made without first giving at least three weeks' public notice by advertisement, except in case of exigency, when, in the discretion of the Secretary of the Interior, who shall make official record of the facts constituting the exigency, and shall report the same to Congress at its next session, he may direct that purchases may be made in open market in amount not exceeding three thousand dollars at any one purchase: *Provided*, That supplies may be purchased, contracts let, and labor employed for the construction of artesian wells, ditches, and other works for irrigation, in the discretion of the Secretary of the Interior, without advertising as hereinbefore provided: *Provided further*, That as far as practicable Indian labor shall be employed and purchases in the open market made from Indians, under the direction of the Secretary of the Interior.

Exception.

Provisos. Irrigation.

Open-market purchases, etc.

Use of surplus for subsistence deficiencies.

That the Secretary of the Interior, under the direction of the President, may use any surplus that may remain in any of the appropriations herein made for the purchase of subsistence for the several Indian tribes, to an amount not exceeding twenty-five thousand dollars in the aggregate, to supply any subsistence deficiency that may occur: *Provided*, That any diversions which shall be made under authority of this section shall be reported to Congress with the reason therefor in detail, at the session of Congress next succeeding such diversion: *Provided further*, That the Secretary of the Interior, under direction of the President, may use any sums appropriated in this Act for subsistence, and not absolutely necessary for that purpose, for the purchase of stock cattle for the benefit of the tribe for which such appropriation is made, and shall report to Congress, at its next session thereafter, an account of his action under this provision: *Provided further*, That funds appropriated to fulfill treaty obligations shall not be so used: *Provided further*, That in lieu of the milch cows, mares, and implements to be issued to Sioux allottees under the provisions of section seventeen of the "Act to divide a portion of the reservation of the Sioux nation of Indians in Dakota into separate reservations and to secure the relinquishment of the Indian title to the remainder, and for other purposes," approved March second, eighteen hundred and eighty-nine, the Secretary of the Interior may, in his discretion, issue to any allottee entitled to benefits under said section who shall petition therefor an equal value in good stock cattle.

Provisos. Report of diversions.

Stock cattle from subsistence funds.

Treaty funds.

Stock cattle to Sioux.

Vol. 25, p. 895.

Extension of time to settlers in Minnesota.

That the homestead settlers on all ceded Indian reservations in Minnesota who purchased the lands occupied by them as homesteads be, and they hereby are, granted an extension of one year's time in which to make the payments now provided by law.

Transfer of funds for employees, etc.

That when not required for the purpose for which appropriated, the funds herein provided for the pay of specified employees at any agency may be used by the Secretary of the Interior for the pay of other

employees at such agency, but no deficiency shall be thereby created; and, when necessary, specified employees may be detailed for other service when not required for the duty for which they were engaged; and that the several appropriations herein or heretofore made for millers, blacksmiths, engineers, carpenters, physicians, and other persons, and for various articles provided for by treaty stipulation for the several Indian tribes, may be diverted to other uses for the benefit of said tribes, respectively, within the discretion of the President, and with the consent of said tribes, expressed in the usual manner; and that he cause report to be made to Congress, at its next session thereafter, of his action under this provision.

Rejection of bids.

That whenever after advertising for bids for supplies in accordance with the provisions of this Act those received for any article contain conditions detrimental to the interests of the Government, they may be rejected, and the articles specified in such bids purchased in open market, at prices not to exceed those of the lowest bidder, and not to exceed the market price of the same, until such time as satisfactory bids can be obtained, for which immediate advertisement shall be made: *Provided*, That so much of the appropriations herein made as may be required to pay for goods and supplies, for expenses incident to their purchase, and for transportation of the same, for the year ending June thirtieth, nineteen hundred and seven, shall be immediately available, but no such goods or supplies shall be distributed or delivered to any of said Indians prior to July first, nineteen hundred and six.

Open-market purchases.

Proviso.
Amount for supplies immediately available.

Allotments in severalty.
Vol. 24, p. 388.

That the Act entitled "An Act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes," approved February eighth, eighteen hundred and eighty-seven, be, and is hereby, amended by adding the following:

Lands not liable for prior debts.

No lands acquired under the provisions of this Act shall, in any event, become liable to the satisfaction of any debt contracted prior to the issuing of the final patent in fee therefor.

Trust funds.

That no money accruing from any lease or sale of lands held in trust by the United States for any Indian shall become liable for the payment of any debt of, or claim against, such Indian contracted or arising during such trust period, or, in case of a minor, during his minority, except with the approval and consent of the Secretary of the Interior.

Interest on funds held for minors.

That the shares of money due minor Indians as their proportion of the proceeds from the sale of ceded or tribal Indian lands, whenever such shares have been, or shall hereafter be, withheld from their parents, legal guardians, or others, and retained in the United States Treasury by direction of the Secretary of the Interior, shall draw interest at the rate of three per centum per annum, unless otherwise provided for, from the period when such proceeds have been or shall be distributed per capita among the members of the tribe of which such minor is a member; and the Secretary of the Treasury is hereby authorized and directed to allow interest on such unpaid amounts belonging to said minors as shall be certified by the Secretary of the Interior as entitled to draw interest under this Act.

Sales within reclamation projects.

That any Indian allotted lands under any law or treaty without the power of alienation, and within a reclamation project approved by the Secretary of the Interior, may sell and convey any part thereof, under rules and regulations prescribed by the Secretary of the Interior, but such conveyance shall be subject to his approval, and when so approved shall convey full title to the purchaser the same as if final patent without restrictions had been issued to the allottee: *Provided*, That the consideration shall be placed in the Treasury of the United States, and used by the Commissioner of Indian Affairs to pay the construc-

Proviso.
Proceeds.

tion charges that may be assessed against the unsold part of the allotment, and to pay the maintenance charges thereon during the trust period, and any surplus shall be a benefit running with the water right to be paid to the holder thereof.

Commissioner.

COMMISSIONER.

Irrigation.

For construction of ditches and reservoirs, purchase and use of irrigating tools and appliances, and purchase of water rights on Indian reservations, in the discretion of the Commissioner of Indian Affairs, under the direction of the Secretary of the Interior and subject to his control, one hundred and fifty-five thousand dollars, of which twenty-five thousand dollars shall be made immediately available: *Provided*, That the Commissioner of Indian Affairs, under the direction of the Secretary of the Interior, may employ superintendents of irrigation, who shall be skilled irrigation engineers, not to exceed four, as in his judgment may be necessary to secure the construction of ditches and other irrigation works in a substantial and workmanlike manner.

Proviso. Skilled engineers.

Surveying and allotting.

For survey and subdivision of Indian reservations and of lands to be allotted to Indians, and to make allotments in severalty, to be expended by the Commissioner of Indian Affairs, under the direction of the Secretary of the Interior, fifteen thousand dollars.

Tuberculosis sanitarium. Investigation, etc., for.

That the Commissioner of Indian Affairs, under the supervision of the Secretary of the Interior, is hereby authorized to investigate and report to Congress upon the desirability of establishing a sanitarium for the treatment of such Indians as are afflicted with tuberculosis, and to report upon a location and the cost thereof, and also upon the feasibility of utilizing some present Government institution therefor; said report to include, as far as possible, the extent of the prevalence of tuberculosis among Indians.

Indian Reform School. Designation to be made.

The Commissioner of Indian Affairs, under the direction of the Secretary of the Interior, is hereby authorized and directed to select and designate some one of the schools or other institution herein specifically provided for as an "Indian Reform School," and to make all needful rules and regulations for its conduct, and the placing of Indian youth therein: *Provided*, That the appropriation for collection and transportation, and so forth, of pupils, and the specific appropriation for such school so selected shall be available for its support and maintenance: *Provided further*, That the consent of parents, guardians, or next of kin shall not be required to place Indian youth in said school.

Provisos. Funds available.

Consent of parents, etc., not necessary.

Annual report modified. Vol. 19, p. 199.

That so much of the section three of the Act of August fifteenth, eighteen hundred and seventy-six, as required the Commissioner of Indian Affairs to embody in his annual report a detailed and tabular statement of all bids and proposals received for any services, supplies, and annuity goods for the Indian service, together with a detailed statement of all awards of contracts made for any such services, supplies, and annuity goods for which said bids or proposals were received, is hereby repealed, and hereafter he shall embody in his annual report only a detailed statement of the awards of contracts made for any services, supplies, and annuity goods for the Indian service; and that so much of the Acts of March second, eighteen hundred and ninety-two, and April twenty-first, nineteen hundred and four, which require the Commissioner to report annually the names of all employees in the Indian service is hereby also repealed.

Detailed statement of contracts.

Reporting employees repealed. Vol. 27, p. 5. Vol. 33, p. 217.

Suppressing liquor traffic.

To enable the Commissioner of Indian Affairs, under the direction of the Secretary of the Interior, to take action to suppress the traffic of intoxicating liquors among Indians, twenty-five thousand dollars, fifteen thousand dollars of which to be used exclusively in the Indian Territory and Oklahoma.

Support of schools.

For support of Indian day and industrial schools, and for other educational purposes not hereinafter provided for, one million three hundred thousand dollars;

Buildings, construction, etc.

For construction, purchase, lease, and repair of school buildings, and sewerage, water supply, and lighting plants, and purchase of school sites, and improvement of buildings and grounds, four hundred and fifty thousand dollars;

In all, one million seven hundred and fifty thousand dollars.

Transporting pupils.

For collection and transportation of pupils to and from Indian schools, and also for the transportation of Indian pupils from all the Indian schools and placing of them, with the consent of their parents, under the care and control of such suitable white families as may in all respects be qualified to give such pupils moral, industrial, and educational training, under arrangements in which their proper care, support, and education shall be in exchange for their labor, sixty thousand dollars: *Provided*, That not exceeding five thousand dollars of this amount may be used under direction of the Commissioner of Indian Affairs in the transportation and placing of Indian pupils in positions where remunerative employment can be found for them in industrial pursuits. The provisions of this section shall apply to native pupils brought from Alaska.

Proviso. Positions for pupils.

Alaska natives.

Supervision of expenditures.

That all expenditure of money appropriated for school purposes in this Act shall be at all times under the supervision and direction of the Commissioner of Indian Affairs, and in all respects in conformity with such conditions, rules, and regulations as to the conduct and methods of instruction and expenditure of money as may be from time to time prescribed by him, subject to the supervision and control of the Secretary of the Interior: *Provided*, That not more than one hundred and sixty-seven dollars shall be expended for the annual support and education of any one pupil in any school herein specifically provided for, except when, by reason of epidemic, accident, or other sufficient cause, the attendance is so reduced or cost of maintenance so high that a larger expenditure is absolutely necessary for the efficient operation of the school affected, when the Commissioner of Indian Affairs, with the approval of the Secretary of the Interior, may allow a larger per capita expenditure, such expenditure to continue only so long as the said necessity therefor shall exist: *Provided further*, That the total amount appropriated for the support of such school shall not be exceeded: *Provided further*, That the number of pupils in any school entitled to the per capita allowance hereby provided for shall be determined by taking the average enrollment for the entire fiscal year and not any fractional part thereof.

Provisos. Limit per capita expense.

Total for school.

Determining per capita allowance.

MISCELLANEOUS.

Supplies. All expenses.

Telegraphing, telephoning, and purchase of Indian supplies: To pay the expense of purchasing goods and supplies for the Indian service, including inspection and pay of necessary employees; advertising, at rates not exceeding regular commercial rates, and all other expenses connected therewith, and for telegraphing and telephoning, and for transportation of Indian goods and supplies, including pay and expenses of transportation agents and rent of warehouses, two hundred and ninety thousand dollars, and warehouses for the receipt, storage, and shipping of goods for the Indian service shall be maintained at the following places: New York, Chicago, Omaha, Saint Louis, and San Francisco.

Warehouses.

Agency buildings.

For buildings and repairs of buildings at agencies and for rent of buildings for agency purposes, and for water supply at agencies, seventy-five thousand dollars.

Vaccination.

For pure vaccine matter and vaccination of Indians, five thousand dollars.

Printing in schools. R. S., sec. 3786, p. 744.

That the provisions of section thirty-seven hundred and eighty-six of the Revised Statutes of the United States shall not apply to such work of the Indian Department as can be executed at the several Indian schools.

Right of way through Indian lands. Vol. 30, p. 990, amended.

That section two of an Act of Congress entitled "An Act to provide for the acquiring of rights of way of railroad companies through Indian reservations, Indian lands, and Indian allotments, and for other purposes," approved March second, eighteen hundred and ninety-nine, be, and the same hereby is, amended so as to read as follows:

Width.

"SEC. 2. That such right of way shall not exceed fifty feet in width on each side of the center line of the road, except where there are heavy cuts and fills, when it shall not exceed one hundred feet in width on each side of the road, and may include grounds adjacent thereto for station buildings, depots, machine shops, side tracks, turnouts, and water stations, not to exceed two hundred feet in width by a length of three thousand feet, and not more than one station to be located within any one continuous length of ten miles of road."

For stations, etc., increased.

General officers and employees.

II. GENERAL OFFICERS AND EMPLOYEES.

BOARD OF INDIAN COMMISSIONERS.

Citizen commission. Vol. 16, p. 40.

For expenses of the commission of citizens, serving without compensation, appointed by the President under the provisions of the fourth section of the Act of April tenth, eighteen hundred and sixty-nine, four thousand dollars, of which amount not to exceed three hundred dollars may be used by the commission for office rent.

INSPECTORS.

Inspectors. Irrigation.

For pay of eight Indian inspectors, two of whom shall be engineers, one to be designated as chief, competent in the location, construction, and maintenance of irrigation works, at two thousand five hundred dollars per annum each, except the chief engineer, who shall receive three thousand five hundred dollars, twenty-one thousand dollars.

Expenses.

For traveling expenses of eight Indian inspectors, at three dollars per day when actually employed on duty in the field, exclusive of transportation and sleeping-car fare, in lieu of all other expenses now authorized by law, and for incidental expenses of negotiation, inspection, and investigation, including telegraphing and expenses of going to and going from the seat of government, and while remaining there under orders and direction of the Secretary of the Interior, for a period not to exceed twenty days, twelve thousand eight hundred dollars.

SUPERINTENDENT OF INDIAN SCHOOLS.

Superintendent of schools.

For pay of one superintendent of Indian schools, three thousand dollars.

Expenses.

For necessary traveling expenses of one superintendent of Indian schools, including telegraphing and incidental expenses of inspection and investigation, one thousand five hundred dollars: *Provided*, That he shall be allowed three dollars per day for traveling expenses when actually on duty in the field, exclusive of cost of transportation and sleeping-car fare, in lieu of all other expenses now allowed by law:

Provisos. Per diem.

Other duties.

And provided further, That he shall perform such other duties as may be imposed upon him by the Commissioner of Indian Affairs, subject to the approval of the Secretary of the Interior.

INTERPRETERS.

Interpreters.

For payment of necessary interpreters, to be distributed in the discretion of the Secretary of the Interior, four thousand dollars; but no person employed by the United States and paid for any other service shall be paid for interpreting.

POLICE.

Police.

For services of officers at twenty-five dollars per month each, and privates at twenty dollars per month each, of Indian police, to be employed in maintaining order and prohibiting illegal traffic in liquor on the several Indian reservations and within the Territory of Alaska, in the discretion of the Secretary of the Interior, for the purchase of equipments, and for the purchase of rations for policemen at nonration agencies, two hundred thousand dollars.

MATRONS.

Matrons.

To enable the Secretary of the Interior to employ suitable persons as matrons to teach Indian girls in housekeeping and other household duties, at a rate not to exceed sixty dollars per month, and for furnishing necessary equipments, and renting quarters where necessary, twenty-five thousand dollars: *Provided*, That the amount paid said matrons shall not come within the limit for employees fixed by the Act of June seventh, eighteen hundred and ninety-seven.

Proviso. Additional. Vol. 30, p. 90.

FARMERS AND STOCKMEN.

Farmers and stockmen.

To enable the Commissioner of Indian Affairs to employ practical farmers and practical stockmen, subject only to such examination as to qualifications as the Secretary of the Interior may prescribe, in addition to the agency farmers now employed, at wages not exceeding seventy-five dollars each per month, to superintend and direct farming and stock raising among such Indians as are making effort for self-support, one hundred and twenty-five thousand dollars: *Provided*, That the amounts paid said farmers and stockmen shall not come within the limit for employees fixed by the Act of June seventh, eighteen hundred and ninety-seven: *Provided further*, That the Commissioner of Indian Affairs may employ additional farmers at any Indian school at not exceeding sixty dollars per month, subject only to such examination as the Secretary of the Interior may prescribe, said farmers to be in addition to the school farmers now employed.

Provisos. Additional. Vol. 30, p. 90.

At schools.

JUDGES.

Judges, Indian courts.

For compensation of judges of Indian courts, twelve thousand dollars.

CONTINGENCIES.

Contingencies.

For contingencies of the Indian Service, including traveling and incidental expenses of Indian agents and of their offices, and of the Commissioner of Indian Affairs; also traveling and incidental expenses of special agents, at three dollars per day when actually employed on duty in the field, exclusive of transportation and sleeping-car fare, in lieu of all other expenses now authorized by law, and expenses of going to and going from the seat of government, and while remaining there under orders and direction of the Commissioner of Indian Affairs, for a period not to exceed twenty days; for pay of employees not otherwise provided for, and for pay of special agents, at two thousand dollars per annum each, seventy-five thousand dollars.

INDIAN AGENTS—PROVISO.

Indian agents. Salaries not available for Army officers.

The appropriations for the salaries of Indian agents shall not take effect nor become available in any case for or during the time in which any officer of the Army of the United States shall be engaged in the performance of the duties of Indian agent at any of the agencies above named; and the Commissioner of Indian Affairs, with the approval of the Secretary of the Interior, may devolve the duties of any Indian agency or part thereof upon the superintendent of the Indian school located at such agency or part thereof whenever in his judgment such superintendent can properly perform the duties of such agency. And the superintendent upon whom such duties devolve shall give bond as other Indian agents.

School superintendents may act as agents.

Bond.

Arizona.

ARIZONA.

San Carlos Agency. Agent.

For pay of Indian agent at the San Carlos Agency, Arizona, one thousand eight hundred dollars.

Apaches, etc. Support, etc.

For support and civilization of the Apache and other Indians in Arizona and New Mexico who have been or may be collected on reservations in Arizona and New Mexico, two hundred and twenty-five thousand dollars: *Provided*, That the unexpended balance for the fiscal year nineteen hundred and six is hereby appropriated and made available for nineteen hundred and seven.

Proviso. Balance available.

Pima Agency. Support, etc., of Indians.

For support and civilization of the Indians of Pima Agency, Arizona, forty thousand dollars, to be expended for their benefit in such manner as the Secretary of the Interior, in his discretion, may deem best.

FORT MOJAVE SCHOOL.

Fort Mojave school.

For support and education of two hundred Indian pupils at the Indian school at Fort Mojave, Arizona, thirty-three thousand four hundred dollars;

For pay of superintendent of said school, one thousand six hundred dollars;

For general repairs and improvements, five thousand dollars;

For irrigation for farm, five thousand dollars;

In all, forty-five thousand dollars.

PHOENIX SCHOOL.

Phoenix school.

For support and education of seven hundred Indian pupils at the Indian school at Phoenix, Arizona, one hundred and sixteen thousand nine hundred dollars;

For general repairs and improvements, eight thousand dollars;

For pay of superintendent at said school, two thousand five hundred dollars;

Heating system, sixteen thousand dollars;

In all, one hundred and forty-three thousand four hundred dollars.

TRUXTON CANYON SCHOOL.

Truxton Canyon school.

For support and education of one hundred and thirty-five pupils at the Indian school at Truxton Canyon, Arizona, twenty-two thousand five hundred and forty-five dollars;

Pay of superintendent, one thousand five hundred dollars;

General repairs and improvements, three thousand dollars;

In all, twenty-seven thousand and forty-five dollars.

Incidentals.

For general incidental expenses of the Indian service in Arizona, including traveling expenses of agents, one thousand five hundred dollars.

Statutes, page nine hundred and twenty-seven), containing restrictions upon sale and alienation, may sell and convey the northwest quarter of the southwest quarter of section twenty-four, township thirty-four north, range two east, Willamette meridian, Washington, being forty acres of his allotment, but that such conveyance shall be under the supervision and subject to the approval of the Secretary of the Interior, and when so approved shall convey full title to the purchaser; also the south half of the north half of the southeast quarter of section twenty-three, township thirty-four north, range two east, Willamette meridian, or any part thereof, in the discretion of the Secretary of the Interior; and this conveyance, if any, shall be under the supervision and subject to the approval of the Secretary of the Interior, and when so approved shall convey full title to the purchaser.

Lizzie Peone. May sell part of allotment.

That Lizzie Peone, allottee numbered three hundred and thirty-one in what was formerly the north half of the Colville Indian Reservation, in the State of Washington, and to whom a trust patent has been issued containing restrictions upon alienation, may sell and convey any part of her allotment, but such conveyance shall be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe, and when so approved shall convey full title to the purchaser the same as if a final patent without restriction had been issued to the allottee.

Yakima allottees. Fee-simple patents to certain.

That the Secretary of the Interior be, and he is hereby, authorized, in his discretion, to issue fee-simple patents to the following parties for the lands heretofore allotted them: L. F. Laqua, a Yakima Indian, to his allotment, numbered seven hundred and eighty; Susan Stone (Swasey), a Yakima Indian, to her allotment, numbered two hundred and eighty-six; Suis Sis Kin, or Loupe Loupe Charley, numbered four, Yakima, now Waterville, Washington; Charles Wannassy, Yakima allottee, numbered one thousand six hundred and eighteen; Margaret Sar Sarp Kin, numbered six, Washington; and the issuance of said patents shall operate as a removal of all restrictions as to the sale, incumbrance, or taxation of the lands so patented.

Franklin P. Olney. Fee-simple patent to.

That the Secretary of the Interior be, and he is hereby, authorized, in his discretion, to issue a patent in fee simple to Franklin P. Olney, a Yakima Indian, for the land covered by his allotment numbered five hundred and eighty-three; and the issuance of said patent shall operate as the removal of all restrictions as to sale, incumbrance, or taxation of the land so patented.

WISCONSIN.

Wisconsin.

Agent, La Pointe Agency.

For pay of Indian agent at the La Pointe Agency, Wisconsin, one thousand eight hundred dollars.

HAYWARD SCHOOL.

Hayward school.

For the support and education of two hundred pupils at the Indian school at Hayward, Wisconsin, thirty-three thousand four hundred dollars;

Pay of superintendent, one thousand five hundred dollars;

General repairs and improvements, five thousand dollars;

Shop building, four thousand dollars;

In all, forty-three thousand nine hundred dollars.

TOMAH SCHOOL.

Tomah school.

For support and education of two hundred and fifty Indian pupils at the Indian school, Tomah, Wisconsin, forty-one thousand seven hundred and fifty dollars;

For pay of superintendent at said school, one thousand seven hundred dollars;

For general repairs and improvements, three thousand dollars;

In all, forty-six thousand four hundred and fifty dollars.

Chippewas of Lake Superior. Support, etc.

For support and civilization of the Chippewas of Lake Superior, Wisconsin, to be expended for agricultural and educational purposes; pay of employees, including pay of physician, at one thousand two hundred dollars; purchase of goods and provisions, and for such other purposes as may be deemed for the best interest of said Indians, seven thousand dollars.

Pottawatomies. Investigation of claims for unpaid annuities.

That the Secretary of the Interior be, and he is hereby, directed to cause an investigation to be made of the claims of the Pottawatomie Indians of Wisconsin, as set forth in their memorial to Congress, printed in Senate Document Numbered One hundred and eighty-five, Fifty-seventh Congress, second session, and to report thereon to Congress at the beginning of the next session thereof, showing on the best information now obtainable what number of said Indians continued to reside in the State of Wisconsin after the treaty of September twenty-sixth, eighteen hundred and thirty-three, their proportionate shares of the annuities, trust funds, and other moneys paid to or expended for the tribe to which they belong, in which the claimant Indians have not shared, the amount of such moneys retained in the Treasury of the United States to the credit of the claimant Indians as directed by the provision of the Act of Congress approved June twenty-fifth, eighteen hundred and sixty-four; if none have been so retained the amount that should have been annually so retained under said law, showing also what disposition has been made of the annuities, trust funds, and other moneys of said tribe, with the amounts and the status of any now remaining to their credit in the Treasury or otherwise. He will also cause an enrollment to be made of said Pottawatomie Indians.

Vol. 13, p. 172.

Enrollment.

Oneida allottees. Fee-simple patents to certain.

That the Secretary of the Interior be, and he is hereby, authorized, in his discretion, to issue fee-simple patents to the following parties for the lands heretofore allotted to them: (Compson) Doxtater, William Cornelius, Ida Powless, Daniel H. Cooper, Charles Elm, Abram Elm, Catherine Nynham, Joshua Cornelius, Lehi Wheelock, Dennison Wheelock, Rachel Peters Jones, Jerusha Peters, and Alice Cornelius, Oneida allottees numbered one hundred and thirty seven, fifty-seven, two hundred and twenty-four, seven hundred and sixty-nine, twelve hundred and seventy-two, twelve hundred and seventy-one, thirteen hundred and ninety-eight, fifteen hundred and fourteen, three hundred and seventy-three, twenty-one, three hundred and ten, eleven hundred and thirty-seven, and sixty-two, respectively; Jacob Doxtater, allottee numbered one thousand and ninety-nine; Rachel Elm, allottee numbered eight hundred and seventy-nine; Jerusha Powless, allottee numbered fourteen hundred and eighty-three; Hendrix Skenandooh, allottee numbered eight hundred and four; Hannah Hayes, allottee numbered three hundred and five; Dolly Ann Doxtater, allottee numbered one hundred and seventy-four; Martin Williams, allottee numbered four hundred and twenty; Moses Webster, allottee numbered eleven hundred and thirty-five; Adam King, allottee numbered one hundred and twenty-one; Elizabeth Nynham, allottee numbered one thousand and seventy-five; Elijah John, allottee numbered five hundred and six; Silas Webster, allottee numbered thirteen hundred and fifty; Henry Cooper, allottee numbered three hundred and thirty-eight; David King, allottee numbered two hundred and one; Job Silas, allottee numbered three hundred and thirty-three; Joseph Skenandooh, allottee numbered five hundred and seventy-three; James Silas, allottee numbered two hundred and fifty-five; John Parkhurst, allottee numbered two hundred and thirty-six, and David Adams, allottee numbered five hundred and

ninety-four, Oneida Indians; Isaiah Sycles, Schuyler Nynham, Archie Wheelock, Truman Doxtater, Sophia Webster, Mary Webster, Jane Parkhurst, Henry Wheelock, Eva Jourdan, William Archquette, Sarah Hill, Frank Button, Sylvester Button, Margaret Thomas, William Christjohn, Frank Cornelius, Alice Cornelius, Hannah Hill, Sarah Sycles, Adam P. Cornelius, Thomas John, Esther Christjohn, Joseph Metozen, and James Wheelock, Oneida allottees numbered six hundred and seventy-seven, thirteen hundred and ninety-nine, ten hundred and sixty-one, ten hundred and seventy-nine, one hundred and eighty-four, eleven hundred and eighty-three, twelve hundred and seventy-seven, three hundred and forty-four, eight hundred and thirty-nine, seven hundred and twenty, four hundred and seventy-one, three hundred and seventy-six, twelve hundred and sixty-eight, eight hundred and seventy-six, twelve hundred and thirty-eight, seven hundred and seventeen, seven hundred and eighteen, one hundred and forty-eight, fourteen hundred and eighty-six, seven hundred and thirteen, seven hundred and thirty-three, three hundred and sixty-four, one hundred and forty-two, and sixteen, respectively, and Michel Buffalo, Red Cliff allottee numbered twenty-eight, and the issuance of said patents shall operate as a removal of all restrictions as to the sale, incumbrance, or taxation of the lands so patented.

Michel Buffalo.

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

Oneida Reservation. Fee-simple patents to Indians to.

To enable the Commissioner of Indian Affairs to pay in behalf of Ann Francis, a Chippewa Indian woman, and lineal descendant of Bow kow ton den, for printing record in the case of Francis against Francis, now pending in the Supreme Court, involving her title to land claimed under treaty and patent, and such briefs as may be necessary therein, one hundred and seventy-five dollars, or as much thereof as may be necessary.

Ann Francis. Payment of. *Post*, p. 656.

That the Secretary of the Interior be, and he is hereby, authorized, in his discretion, with the consent of the Indians of the La Pointe or Bad River Reservation, to be obtained in such manner as he may direct, to set apart lots ten, eleven, and twelve, section twenty-five, township forty-eight north, range three west, on the La Pointe Reservation in Wisconsin, for an Indian town site, and to cause the lands described to be surveyed and platted into suitable lots, streets, and alleys, and to dedicate said streets and alleys and such lots or parcel as may be necessary to public uses, and to cause the lots to be appraised at their real value, exclusive of improvements thereon or adjacent thereto, by a board of three persons, one of whom shall be the United States Indian agent of the La Pointe Agency, one to be appointed by the Secretary of the Interior, and one selected by the Indians of the La Pointe band of Chippewas, who shall receive such compensation as the Secretary of the Interior may prescribe, to be paid out of the proceeds of the sale of lots sold under this Act, and when so surveyed, platted, and appraised, the President may issue patents to the Indians of the said reservation for such lots on the payment by them of the appraised value thereof, on such terms as may be approved by the Secretary of the Interior, and the net proceeds of such sales shall be placed to the credit of the La Pointe band of Chippewa Indians: *Provided*, That no person shall be authorized to purchase lots on the lands described other than members of said La Pointe band of Indians, and those now owning permanent improvements there shall have the preference right for six months from the date such lots shall be offered for sale within which to purchase tracts upon which their improvements are situated, but no lot shall be sold for less than the appraised

La Pointe Reservation. Establishment of Indian town site, Odanah.

Provisos. Sales restricted to La Pointe Indians.

valuation; but if any person entitled fails to take advantage of this provision, the agent of the La Pointe Agency shall appraise the improvements on the unsold lots, and any member of the La Pointe band of Chippewas, on the payment to the owner of the appraised value of the improvements, shall have the preference right for six months from the date of such payment to purchase such unsold lot or lots at their appraised value on such terms as may be approved by the Secretary of the Interior: *Provided further*, That the patents to be issued shall contain a condition that no malt, spirituous, or vinous liquors shall be kept or disposed of on the premises conveyed, and that any violation of this condition, either by the patentee or any person claiming rights under him, shall render the conveyance void and cause the premises to revert to the La Pointe band of Chippewa Indians, to be held as other tribal lands.

Liquor restriction.

Cemetery lot.

That the northeast quarter of the northeast quarter of section thirty-four, township forty-eight north, range three west, be set aside and dedicated as a burial ground, and for such other purposes as may be approved by the Commissioner of Indian Affairs, for the use of the members of the La Pointe band of Indians. And the Secretary of the Interior is hereby authorized to sell and dispose of the merchantable timber growing thereon in such manner as he may deem best, for cash, and to expend the proceeds derived therefrom in paying the cost of surveying and platting the village of Odanah, in improving the cemetery site, and for public improvements in said village.

Sales of timber.

Stockbridge and Munsee tribe.

STOCKBRIDGE AND MUNSEE TRIBE.

Allotments in fee simple to members. Vol. 27, p. 745.

That the members of the Stockbridge and Munsee tribe of Indians, as the same appear upon the official roll of said tribe, made in conformity with the provisions of the Act of Congress approved March third, eighteen hundred and ninety-three, entitled "An Act for the relief of the Stockbridge and Munsee tribe of Indians in the State of Wisconsin," and their descendants, who are living and in being on the first day of July, nineteen hundred and four, and who have not heretofore received patents for land in their own right, shall, under the direction of the Secretary of the Interior, be given allotments of land and patents therefor in fee simple, in quantities as follows:

Distribution.

Proviso. Head of a family.

To each head of a family, one-eighth of a section: *Provided*, That such allotment to the "head of a family" shall be deemed to be a provision for both husband and wife, or the survivor in the event of the death of either.

To each single person not provided for as above, one-sixteenth of a section.

That where a patent has heretofore been issued to the head of a family (a married man) the same shall be deemed to have been in satisfaction of the claims of both husband and wife, and no further allotment shall be made to either of such persons under this Act: *Provided*, That the children of such parents shall be entitled to allotments hereunder in their own right, if enrolled as members of the tribe.

Proviso. Children.

Allotment if land insufficient.

That as there is not sufficient land within the limits of the Stockbridge and Munsee Reservation to make the allotments in the quantities above specified, all available land in said reservation shall first be allotted to the heads of families and single persons residing thereon, until said reservation land shall be exhausted, the additional land that may be required to complete the allotments to be obtained in the manner hereinafter specified: *Provided*, That the Secretary of the Interior may make such rules and regulations as he may deem necessary to carry out the requirements of this Act as to making and designating allotments.

Proviso. Rules.

Acceptance of selections.

That it shall be obligatory upon any member of said tribe who has made a selection of land within the reservation, whether filed with the

tribal authorities or otherwise, to accept such selection as an allotment, except that the same shall be allotted in quantity not to exceed that hereinbefore authorized: *Provided*, That where such selection does not equal in quantity the allotment hereinbefore authorized, the allottee may elect to take out of the lands obtained under the provisions of this Act the additional land needed to complete his or her quota of land, or in lieu thereof shall be entitled to receive the commuted value of said additional land in cash, at the rate of two dollars per acre, out of the moneys hereinafter appropriated.

Proviso. Other land or cash to complete allotment.

That those members of said tribe who have not made selections within the reservation shall be entitled to the option of either taking an allotment under the provisions of this Act, or of having the same commuted in cash, at the rate of two dollars per acre, out of the moneys hereinafter appropriated: *Provided*, That the election of any member to take cash in lieu of land shall be made within sixty days after the date of the approval of this Act.

Option to take cash instead of lands.

Proviso. Time limit.

That for the purpose of obtaining the additional land necessary to complete the allotments herein provided for the Secretary of the Interior is hereby authorized and directed to negotiate, through an Indian inspector, with the Menominee tribe of Indians of Wisconsin for the cession and relinquishment to the United States of a portion of the surplus land of the Menominee Reservation in said State, or to negotiate with the authorities of said State, or with any corporation, firm, or individual, for the purchase of said additional land: *Provided, however*, That in no event shall any agreement of cession or contract of purchase so negotiated stipulate that a sum greater than two dollars per acre shall be paid for the land so obtained: *And provided further*, That no such agreement or contract shall have any force or validity unless the same shall be approved by the Secretary of the Interior; or said Secretary may, in his discretion, utilize such unappropriated public lands of the United States as may be required to complete the allotments.

Negotiation for additional lands from Menominees, etc.

Provisos. Limit of price.

Approval.

That certain members of the Stockbridge and Munsee tribe having made selections of land on tracts patented to the State of Wisconsin under the swamp-land Acts, and having made valuable improvements thereon, the Secretary of the Interior is hereby authorized to cause said improvements to be appraised by an inspector or special agent or Indian agent of his Department, and to pay to the owners, as their interests may appear, the appraised value of said improvements, in all not to exceed the sum of one thousand dollars, out of the moneys hereinafter appropriated.

Purchase of swamp lands from Indians.

That the sum necessary to carry out the provisions hereof the Secretary of the Treasury is directed to pay out of the Stockbridge consolidated fund in the Treasury of the United States, which fund on the thirty-first of October, nineteen hundred and four, amounted to seventy-five thousand nine hundred and eighty-eight dollars and sixty cents, under the direction and upon the warrant of the Secretary of the Interior.

Payment from tribal funds.

WYOMING.

Wyoming

For support and civilization of Shoshone Indians in Wyoming, twelve thousand dollars.

Shoshones. Support, etc.

SHOSHONE SCHOOL.

For support and education of one hundred and seventy-five Indian pupils at the Indian school, Shoshone Reservation, Wyoming, twenty-nine thousand two hundred and twenty-five dollars;

Shoshone school.

For pay of superintendent at said school, one thousand eight hundred dollars;

CHAP. 146.—An Act Making appropriations for the current and contingent expenses of the Bureau of Indian Affairs, for fulfilling treaty stipulations with various Indian tribes, and for other purposes, for the fiscal year ending June thirtieth, nineteen hundred and eighteen.

March 2, 1917.
[H. R. 18453.]
[Public, No. 369.]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums be, and they are hereby, appropriated, out of any money in the Treasury not otherwise appropriated, for the purpose of paying the current and contingent expenses of the Bureau of Indian Affairs, for fulfilling treaty stipulations with various Indian tribes, and in full compensation for all offices and salaries which are provided for herein for the service of the fiscal year ending June thirtieth, nineteen hundred and eighteen, namely:

Indian Department appropriations.

For the survey, resurvey, classification, and allotment of lands in severalty under the provisions of the Act of February eighth, eighteen hundred and eighty-seven (Twenty-fourth Statutes at Large, page three hundred and eighty-eight), entitled "An Act to provide for the allotment of lands in severalty to Indians," and under any other Act or Acts providing for the survey or allotment of Indian lands, $100,000, to be repaid proportionally out of any Indian moneys held in trust or otherwise by the United States and available by law for such reimbursable purposes and to remain available until expended: *Provided*, That no part of said sum shall be used for the survey, resurvey, classification, or allotment of any land in severalty on the public domain to any Indian, whether of the Navajo or other tribes, within the State of New Mexico and the State of Arizona, who was not residing upon the public domain prior to June thirtieth, nineteen hundred and fourteen: *Provided further*, That $5,000 of the above amount shall be used for an investigation and report on the merits of the claim of the Indians of the Warm Springs Reservation in Oregon to additional land arising from alleged erroneous surveys of the north and west boundaries of their reservation as defined in the treaty concluded June twenty-fifth, eighteen hundred and fifty-five (Twelfth Statutes at Large, page nine hundred and sixty-three), and the Secretary of the Interior is hereby authorized to make such surveys or resurveys as may be necessary to complete said investigation and report.

Surveying, allotting in severalty, etc.
Vol. 24, p. 388.

Repayment.

Provisos.
Use in New Mexico and Arizona restricted.

Warm Springs Reservation, Oreg.
Investigating claims of Indians on, for additional lands.
Vol. 12, p. 963.

Surveys, etc.

For the construction, repair, and maintenance of ditches, reservoirs, and dams, purchase and use of irrigation tools and appliances, water rights, ditches, lands necessary for canals, pipe lines, and reservoirs for Indian reservations and allotments and for drainage and protection of irrigable lands from damage by floods, or loss of water rights, including expenses of necessary surveys and investigations to determine the feasibility and estimated cost of new projects and power and reservoir sites on Indian reservations in accordance with the provisions of section thirteen of the Act of June twenty-fifth, nineteen hundred and ten, $235,000, reimbursable as provided in the Act of August first, nineteen hundred and fourteen, and to remain available until expended: *Provided*, That no part of this appropriation shall be expended on any irrigation system or reclamation project for which specific appropriation is made in this Act or for which public funds are or may be available under any other Act of Congress; for pay of one chief inspector of irrigation, who shall be a skilled irrigation engineer, $4,000; one assistant inspector of irrigation who shall be a skilled irrigation engineer, $2,500; for traveling and incidental expenses of two inspectors of irrigation, including sleeping-car fare and a per diem of $3 in lieu of subsistence when actually employed on duty in the field and away from designated headquarters, $3,200; in all, $244,700: *Provided also*, That not to exceed seven superintendents of irrigation, six of whom shall be skilled irrigation engi-

Irrigation, drainage, etc.
Available until expended.

Investigating new projects.
Vol. 36, p. 858.

Reimbursable, etc.
Vol. 38, p. 583.

Provisos.
Use restricted.

Irrigation inspectors.

Superintendents of irrigation.

neers and one competent to pass upon water rights, and one field-cost accountant, may be employed.

Suppressing liquor traffic.

For the suppression of the traffic in intoxicating liquors among Indians, $150,000: *Provided*, That automobiles or any other vehicles or conveyances used in introducing, or attempting to introduce, intoxicants into the Indian country, or where the introduction is prohibited by treaty or Federal statute, whether used by the owner thereof or other person, shall be subject to the seizure, libel, and forfeiture provided in section twenty-one hundred and forty of the Revised Statutes of the United States.

Proviso.
Seizure of vehicles for violations.

R. S., sec. 2140, p. 373.

Relief, preventing disease, etc.

For the relief and care of destitute Indians not otherwise provided for, and for the prevention and treatment of tuberculosis, trachoma, smallpox, and other contagious and infectious diseases, including transportation of patients to and from hospitals and sanatoria, $350,000: *Provided*, That not to exceed $90,000 of said amount may be expended in the construction and equipment of new hospitals at a unit cost of not exceeding $15,000: *Provided further*, That this appropriation may be used also for general medical and surgical treatment of Indians, including the maintenance and operation of general hospitals, where no other funds are applicable or available for that purpose: *And provided further*, That out of the appropriation of $350,000 herein authorized, there shall be available for the maintenance of the sanatoria and hospitals hereinafter named, and for incidental and all other expenses for their proper conduct and management, including pay of employees, repairs, equipment, and improvements, not to exceed the following amounts: Blackfeet hospital, Montana, $10,000; Carson hospital, Nevada, $10,000; Cheyenne and Arapahoe hospital, Oklahoma, $10,000; Choctaw and Chickasaw hospital, Oklahoma, $20,000; Fort Lapwai sanatorium, Idaho, $40,000; Laguna sanatorium, New Mexico, $17,000; Mescalero hospital, New Mexico, $10,000; Navajo sanatorium, New Mexico, $10,000; Pima hospital, Arizona, $10,000; Phoenix sanatorium, Arizona, $40,000; Spokane hospital, Washington, $10,000; Sac and Fox sanatorium, Iowa, $25,000; Turtle Mountain hospital, North Dakota, $10,000; Winnebago hospital, Nebraska, $15,000; Crow Creek hospital, South Dakota, $8,000; Hoopa Valley hospital, California, $8,000; Jicarilla hospital, New Mexico, $8,000; Truxton Canyon camp hospital, Arizona, $8,000; Indian Oasis hospital, Arizona, $8,000.

Provisos.
Amount for new hospitals.

General treatment, etc.

Allotment to specified hospitals and sanatoria.

Support of schools.

For support of Indian day and industrial schools not otherwise provided for, for other educational and industrial purposes in connection therewith, $1,600,000: *Provided*, That not to exceed $40,000 of this amount may be used for the support and education of deaf and dumb or blind Indian children: *Provided further*, That not more than $200,000 of the amount herein appropriated may be expended for the tuition of Indian children enrolled in the public schools: *Provided further*, That no part of this appropriation, or any other appropriation provided for herein, except appropriations made pursuant to treaties, shall be used to educate children of less than one-fourth Indian blood whose parents are citizens of the United States and of the State wherein they live and where there are adequate free school facilities provided and the facilities of the Indian schools are needed for pupils of more than one-fourth Indian blood: *And provided further*, That no part of this appropriation shall be used for the support of Indian day and industrial schools where specific appropriation is made.

Provisos.
Deaf and dumb, or blind.

Public school pupils.

Parentage restriction.

Not for designated schools.

School and agency buildings, etc.

For construction, lease, purchase, repair, and improvement of school and agency buildings, including the purchase of necessary lands and the installation, repair, and improvement of heating, lighting, power, and sewerage and water systems in connection therewith, $400,000: *Provided*, That of this amount $300 may be expended for the purchase of a perpetual water right and right of

Provisos.
Sisseton Agency, S. Dak.

way across the lands of private individuals, for the purpose of running a pipe line from a certain spring or springs located near the Sisseton Indian Agency buildings, South Dakota, to said buildings, the purchase of such water right to include sufficient land for the construction of a small cement reservoir near such spring or springs for the purpose of storing the water so acquired: *Provided further*, That not to exceed $500 of the amount herein appropriated may be used for the acquisition on behalf of the United States, by purchase or otherwise, of land for a site for the Mesquakie Day School, Sac and Fox, Iowa: *Provided further*, That the Secretary of the Interior is authorized to allow employees in the Indian Service who are furnished quarters necessary heat and light for such quarters without charge, such heat and light to be paid for out of the fund chargeable with the cost of heating and lighting other buildings at the same place: *And provided further*, That the amount so expended for agency purposes shall not be included in the maximum amounts for compensation of employees prescribed by section one, Act of August twenty-fourth, nineteen hundred and twelve.

Sac and Fox School, Iowa.

Heat and light to employees.

Not included in compensation.

For collection and transportation of pupils to and from Indian and public schools, and for placing school pupils, with the consent of their parents, under the care and control of white families qualified to give them moral, industrial, and educational training, $72,000: *Provided*, That not exceeding $5,000 of this sum may be used for obtaining remunerative employment for Indian youths and, when necessary, for payment of transportation and other expenses to their places of employment: *Provided further*, That where practicable the transportation and expenses so paid shall be refunded and shall be returned to the appropriation from which paid. The provisions of this section shall also apply to native Indian pupils of school age under twenty-one years of age brought from Alaska.

Transporting, etc., pupils.

Provisos.
Industrial employment.

Refunds.

Alaska pupils.

For the purposes of preserving living and growing timber on Indian reservations and allotments, and to educate Indians in the proper care of forests; for the employment of suitable persons as matrons to teach Indian women and girls housekeeping and other household duties, for necessary traveling expenses of such matrons; and for furnishing necessary equipments and supplies and renting quarters for them where necessary; for the conducting of experiments on Indian school or agency farms designed to test the possibilities of soil and climate in the cultivation of trees, grains, vegetables, cotton, and fruits, and for the employment of practical farmers and stockmen, in addition to the agency and school farmers now employed; for necessary traveling expenses of such farmers and stockmen and for furnishing necessary equipment and supplies for them; and for superintending and directing farming and stock raising among Indians, $475,000, of which sum not less than $75,000 shall be used for the employment of additional field matrons: *Provided*, That the foregoing shall not, as to timber, apply to the Menominee Indian Reservation in Wisconsin: *Provided further*, That no money appropriated herein shall be expended on or after January first, nineteen hundred and seventeen, for the employment of any farmer or expert farmer at a salary of or in excess of $50 per month, unless he shall first have procured and filed with the Commissioner of Indian Affairs a certificate of competency showing that he is a farmer of actual experience and qualified to instruct others in the art of practical agriculture, such certificate to be certified and issued to him by the president or dean of the State agricultural college of the State in which his services are to be rendered, or by the president or dean of the State agricultural college of an adjoining State: *Provided*, That this provision shall not apply to persons now employed in the Indian Service as farmer or expert farmer: *And provided further*, That this shall not apply to Indians employed or to be employed as assistant

Preserving timber, etc., on Indian lands.

Matrons.

Agricultural experiments, etc.

Farmers and stockmen.

Field matrons.

Provisos.
Menominee Reservation.

Farmers to have competency certificates.

Present employees excepted.

Indian employees.

Tests of soils, etc.

farmer: *And provided further*, That not to exceed $25,000 of the amount herein appropriated shall be used to conduct experiments on Indian school or agency farms to test the possibilities of soil and climate in the cultivation of trees, cotton, grains, vegetables, and fruits: *Provided, also*, That the amounts paid to matrons, foresters, farmers, physicians, and stockmen herein provided for shall not be included within the limitation on salaries and compensation of employees contained in the Act of August twenty-fourth, nineteen hundred and twelve.

Allowances to specified employees. Vol. 37, p. 521.

Supplies. Purchases, etc.

For the purchase of goods and supplies for the Indian Service, including inspection, pay of necessary employees, and all other expenses connected therewith, including advertising, storage, and transportation of Indian goods and supplies, $300,000: *Provided*, That no part of the sum hereby appropriated shall be used for the maintenance of to exceed three warehouses in the Indian Service.

Proviso. Warehouses.

Telegraph and telephone messages.

For telegraph and telephone toll messages on business pertaining to the Indian Service sent and received by the Bureau of Indian Affairs at Washington, $8,000.

Legal expenses in allotment suits.

For witness fees and other legal expenses incurred in suits instituted in behalf of or against Indians involving the question of title to lands allotted to them, or the right of possession of personal property held by them, and in hearings set by the United States local land officers to determine the rights of Indians to public lands, $1,000: *Provided*, That no part of this appropriation shall be used in the payment of attorneys' fees.

Proviso. No attorneys' fees.

Citizen commission.

For expenses of the Board of Indian Commissioners, $10,000.

Indian police.

For pay of Indian police, including chiefs of police at not to exceed $50 per month each and privates at not to exceed $30 per month each, to be employed in maintaining order, for purchase of equipments and supplies and for rations for policemen at nonration agencies, $200,000.

Judges, Indian courts.

For pay of judges of Indian courts where tribal relations now exist, $8,000: *Provided*, That no part of this, nor of any other sum, shall be used to pay any judge for the Pueblo Indians of New Mexico, and that no such judge shall be appointed for such Indians by any United States official or employee.

Proviso. For Pueblo Indians prohibited.

Contingent expenses. *Post*, p. 1107.

For pay of special agents, at $2,000 per annum; for traveling and incidental expenses of such special agents, including sleeping-car fare, and a per diem of not to exceed $3 in lieu of subsistence, in the discretion of the Secretary of the Interior, when actually employed on duty in the field or ordered to the seat of government; for transportation and incidental expenses of officers and clerks of the Office of Indian Affairs when traveling on official duty; for pay of employees not otherwise provided for; and for other necessary expenses of the Indian Service for which no other appropriation is available, $135,000: *Provided*, That not to exceed $5,000 of this amount shall be immediately available.

Proviso. Amount immediately available.

Indian Service inspectors.

For pay of six Indian Service inspectors, exclusive of one chief inspector, at salaries not to exceed $2,500 per annum and actual traveling and incidental expenses, and $4 per diem in lieu of subsistence when actually employed on duty in the field, $30,000.

Determining heirs of allottees.

For the purpose of determining the heirs of deceased Indian allottees having any right, title, or interest in any trust or restricted property, under regulations prescribed by the Secretary of the Interior, $100,000: *Provided*, That the Secretary of the Interior is hereby authorized to use not to exceed $25,000 for the employment of additional clerks in the Indian Office in connection with the work of determining the heirs of deceased Indians, and examining their wills, out of the $100,000 appropriated herein: *Provided further*, That the provisions of this paragraph shall not apply to the Osage Indians, nor to the Five Civilized Tribes of Indians in Oklahoma.

Provisos. Clerks in Indian Office.

Osages and Five Civilized Tribes excepted.

Encouraging farming industry, etc., among Indians.

For the purpose of encouraging industry and self-support among the Indians and to aid them in the culture of fruits, grains, and other crops, $400,000, or so much thereof as may be necessary, to be immediately available, which sum may be used for the purchase of seed, animals, machinery, tools, implements, and other equipment necessary, in the discretion of the Secretary of the Interior, to enable Indians to become self-supporting: *Provided*, That said sum shall be expended under conditions to be prescribed by the Secretary of the Interior for its repayment to the United States on or before June thirtieth, nineteen hundred and twenty-five: *Provided further*, That not to exceed $50,000 of the amount herein appropriated shall be expended on any one reservation or for the benefit of any one tribe of Indians.

Provisos.
Repayment.

Limitation of expenditures.

Passenger-carrying vehicles.
Maintenance.

That not to exceed $200,000 of applicable appropriations made herein for the Bureau of Indian Affairs shall be available for the maintenance, repair, and operation of motor-propelled and horse-drawn passenger-carrying vehicles for the use of superintendents, farmers, physicians, field matrons, allotting, irrigation, and other employees in the Indian field service: *Provided*, That not to exceed $15,000 may be used in the purchase of horse-drawn passenger-carrying vehicles, and not to exceed $30,000 for the purchase of motor-propelled passenger-carrying vehicles, and that such vehicles shall be used only for official service: *Provided further*, That the Secretary of the Interior may hereafter exchange automobiles in part payment for new machines used for the same purpose as those proposed to be exchanged.

Provisos.
Purchases limited.

Exchanges permitted.

Livestock of Indians.
Payment for destruction of diseased, etc.

For reimbursing Indians for live stock which may be hereafter destroyed on account of being infected with dourine or other contagious diseases, and for expenses in connection with the work of eradicating and preventing such diseases, to be expended under such rules and regulations as the Secretary of the Interior may prescribe, $75,000, said amount to be immediately available and to remain available until expended: *Provided*, That not to exceed $15,000 of this amount may be used in reimbursing Indians for horses killed previous to the passage of the Act of May eighteenth, nineteen hundred and sixteen, for which they have not heretofore been reimbursed.

Proviso.
Previous losses.

Ante, p. 128.

Sale of school, etc., lands not needed.

That the Secretary of the Interior is hereby authorized to cause to be sold, to the highest bidder, under such rules and regulations as he may prescribe, any tract or part of a tract of land purchased by the United States for day school or other Indian administrative uses, not exceeding one hundred and sixty acres in any one tract, when said land or a part thereof is no longer needed for the original purpose; the net proceeds therefrom in all cases to be paid into the Treasury of the United States; title to be evidenced by a patent in fee simple for such lands as can be described in terms of the legal survey, or by deed duly executed by the Secretary of the Interior containing such metes-and-bounds description as will identify the land so conveyed as the land which had been purchased: *Provided*, That where the purchase price was paid from tribal funds, such proceeds shall be placed in the Treasury of the United States to the credit of the respective tribes of Indians.

Patent in fee to purchaser.

Proviso.
Credit to Indians.

Rights of way through Indian lands.
Vol. 33, p. 65, amended.

That the following provision of the Act approved March eleventh, nineteen hundred and four (Thirty-third Statutes, page sixty-five), authorizing the Secretary of the Interior to grant rights of way across Indian lands for the conveyance of oil and gas, to wit: "No such lines shall be constructed across Indian lands, as above mentioned, until authority therefor has first been obtained from, and the maps of definite location of said lines approved by, the Secretary of the Interior," be, and the same is hereby, amended to read as follows:

Approval of title.

"Before title to rights of way applied for hereunder shall vest, maps of definite location shall be filed with and approved by the

Proviso.
Temporary permits.

Secretary of the Interior: *Provided*, That before such approval the Secretary of the Interior may, under such rules and regulations as he may prescribe, grant temporary permits revocable in his discretion for the construction of such lines."

Arizona and New Mexico.

ARIZONA AND NEW MEXICO.

Support of Indians in.

SEC. 2. For support and civilization of Indians in Arizona and New Mexico, including pay of employees, $330,000.

Fort Mojave School.

For support and education of two hundred Indian pupils at the Indian school at Fort Mojave, Arizona, and for pay of superintendent, $35,200; for general repairs and improvements, $3,800; in all, $39,000.

Phoenix School.

For support and education of seven hundred Indian pupils at the Indian school at Phoenix, Arizona, and for pay of superintendent, $119,400; for general repairs and improvements, $12,500; for remodeling and improving heating plant, $15,000; in all, $146,900.

Truxton Canyon School.

For support and education of one hundred pupils at the Indian school at Truxton Canyon, Arizona, and for pay of superintendent, $18,200; for general repairs and improvements, $3,000; in all, $21,200.

Gila River Reservation.
Continuing irrigation system.
Vol. 33, p. 1051.

For continuing the work of constructing the irrigation system for the irrigation of the lands of the Pima Indians in the vicinity of Sacaton, on the Gila River Indian Reservation, within the limit of cost fixed by the Act of March third, nineteen hundred and five, $10,000; and for maintenance and operation of the pumping plants and canal systems, $10,000; in all, $20,000, reimbursable as provided in section two of the act of August twenty-fourth, nineteen hundred and twelve (Thirty-seventh Statutes at Large, page five hundred and twenty-two), and to remain available until expended.

Repayment, etc.
Vol. 37, p. 522.

Colorado River Reservation.
Extending irrigation system.
Vol. 36, p. 273.

For the construction and repair of necessary channels and laterals for the utilization of water in connection with the pumping plant for irrigation purposes on the Colorado River Indian Reservation, Arizona, as provided in the act of April fourth, nineteen hundred and ten (Thirty-sixth Statutes at Large, page two hundred and seventy-three), for the purpose of securing an appropriation of water for the irrigation of approximately one hundred and fifty thousand acres of land and for maintaining and operating the pumping plant, canals, and structures, $15,000, reimbursable as provided in said Act, and to remain available until expended.

Papago Indian villages.
Water supply for.

For improvement and sinking of wells, installation of pumping machinery, construction of tanks for domestic and stock water, and for the necessary structures for the development and distribution of a supply of water and for maintenance and operation of constructed works, for Papago Indian villages in southern Arizona, $20,000.

Navajos.
School facilities.
Vol. 15, p. 669.

To enable the Secretary of the Interior to carry into effect the provisions of the sixth article of the treaty of June first, eighteen hundred and sixty-eight, between the United States and the Navajo Nation or Tribe of Indians, proclaimed August twelfth, eighteen hundred and sixty-eight, whereby the United States agrees to provide school facilities for the children of the Navajo Tribe of Indians, $100,000: *Provided*, That the said Secretary may expend said funds, in his discretion, in establishing or enlarging day or industrial schools.

Proviso.
Discretionary use.

Navajo Reservation.
Developing water supply.

For continuing the development of a water supply for the Navajo Indians on the Navajo Reservation, $25,000, to be immediately available, reimbursable out of any funds of said Indians now or hereafter available.

Operating Ganado project.

For the maintenance and operation of the Ganado irrigation project on the Navajo Indian Reservation in Arizona, $3,000, reimbursable under such rules and regulations as the Secretary of the Interior shall prescribe.

Gila River.
Dam, etc., to divert water for irrigating lands, etc.

For completing the construction by the Indian Service of a dam with a bridge superstructure and the necessary controlling works for

WISCONSIN.

Wisconsin.

Hayward School.

SEC. 24. For the support and education of two hundred and fifty Indian pupils at the Indian school at Hayward, Wisconsin, including pay of superintendent, $43,200; for general repairs and improvements, $8,000; in all, $51,200.

Tomah School.

For support and education of two hundred and seventy-five Indian pupils at the Indian school, Tomah, Wisconsin, including pay of superintendent, $47,925; for general repairs and improvements, $8,000; for addition to laundry and equipment, $3,000; for addition to school building, $8,500; for addition to girls' building, $8,500; for purchase of additional land, $3,600; for a storage battery, $1,500, or as much thereof as may be necessary, same to be immediately available; in all, $81,025.

Chippewas of Lake Superior.
Support, etc.

For support and civilization of the Chippewas of Lake Superior, Wisconsin, including pay of employees, $7,000.

Pottawatomies.
Support, etc.

For support, education, and civilization of the Pottawatomie Indians who reside in the State of Wisconsin, including pay of employees, $7,000.

Wisconsin Band of Pottawatomies, Wis. and Mich.
Support, etc.
Vol. 38, p. 102.

For the support and civilization of those portions of the Wisconsin Band of Pottawatomie Indians residing in the States of Wisconsin and Michigan, and to aid said Indians in establishing homes on the lands purchased for them under the provisions of the Act of Congress approved June thirtieth, nineteen hundred and thirteen, $100,000, or so much thereof as may be necessary, said sum to be reimbursed to the United States out of the appropriation, when made, of the principal due as the proportionate share of said Indians in annuities and moneys of the Pottawatomie Tribe in which they have not shared, as set forth in House Document Numbered Eight hundred and thirty (Sixtieth Congress, first session), and the Secretary of the Interior is hereby authorized to expend the said sum of $100,000 in the clearing of land and the purchase of houses, building material, seed, animals, machinery, tools, implements, and other equipment and supplies necessary to enable said Indians to become self-supporting:

Repayment.

Use of amount.

Provided, That in order to train said Indians in the use and handling of money, not exceeding $25,000 of the above appropriation may be paid to them per capita, or be deposited to their credit subject to expenditure in such manner and under such rules and regulations as the Secretary of the Interior may prescribe.

Proviso.
Cash per capita payment, etc.

Menominees.
Self-support from tribal funds.

The Secretary of the Interior is hereby authorized to withdraw from the Treasury of the United States in his discretion, the sum of $387,000 of the tribal funds of the Menominee Indians in Wisconsin, arising under the provisions of the Acts of June twelfth, eighteen hundred and ninety (Twenty-sixth Statutes at Large, page one hundred and forty-six), and March twenty-eighth, nineteen hundred and eight (Thirty-fifth Statutes at Large, page fifty-one), section twenty-six of the Act of March third, nineteen hundred and eleven (Thirty-sixth Statutes at Large, page one thousand and seventy-six), and any Acts amendatory thereof, and under such regulations as he may prescribe to expend the same to aid said Indians to fit themselves for, or to engage in, farming or such other pursuits or avocations as will enable said Indians to become self-supporting, or in the case of the old, decrepit or incapacitated member of the tribe, for support: *Provided*, That in the case of those who engage in farming upon the Menominee Reservation, that prior to authorization to make expenditures for farming purposes upon lands not heretofore entirely cleared of all merchantable timber, the Forest Service of the Indian Bureau shall make a survey of same and shall certify that such lands have been cut over and cleared of all merchantable timber, or that

Vol. 26, p. 146.

Vol. 35, p. 51.

Vol. 36, p. 1078.

Provisos.
Removal of merchantable timber from farming lands.

Disposing of timber not detrimental to Menominee Forest.

Limitation.

Per capita in cash to enrolled tribal members.

Share of minors to parent, etc.

Individual credit on reaching eighteen.

Regulation of deposits.

Forest that such timber be removed, and that such Forest Service of the Indian Bureau shall also certify that the lands proposed to be cleared are not necessary to the preservation of the Menominee Forest, and would be more valuable to the Menominee Indians if used for agricultural or grazing purposes; that any merchantable timber cut hereunder shall be disposed of in the manner provided by law for the disposition of timber cut upon the Menominee Reservation, and the authorization herein contained, in so far as it applies to the merchantable timber on said lands, shall not be construed so as to increase the total amount of said timber authorized to be cut in any one year: *Provided further*, That the funds herein authorized, together with the $300,000 authorized by the Indian appropriation Act, approved May eighteenth, nineteen hundred and sixteen (Public Numbered Eighty, page thirty-eight), may in the discretion of the Secretary of the Interior, be apportioned on a per capita basis among all enrolled members of the Menominee Tribe, a per capita payment of $50 to be made immediately after the passage of this Act to each member of said tribe, and the remainder of the share of each Indian to be deposited to his or her credit: *Provided*, That the per capita share of each minor under eighteen years of age in said sum so apportioned shall be deposited to the credit of the parent, guardian, or other person having the custody and care of said minor, the per capita share of such minors or the unexpended balance of same when any such minors shall arrive at the age of eighteen years shall be withdrawn from the amount of the parent, guardian, or other person and deposited to the account of such minors. All deposits made to the credit of individual members of the Menominee Tribe to parents, guardians, or other persons under the terms of this Act shall be subject to expenditure under the regulations governing the handling of individual Indian money.

Oneida.
Transfer of school and land to.

Condition.

That the Secretary of the Interior be, and he is hereby, authorized to convey to the public school authorities of district numbered one of the town of Oneida, Wisconsin, for district school purposes, the tract of land and buildings thereon now occupied by the district school and described as lot A of section one, township twenty-two north range eighteen east of the fourth principal meridian, containing sixty-six one-hundredths acres, on condition that whites and Indians shall be admitted on equal terms in any school established thereon.

Oneida school lands.
Sale of lots.

Proviso.
Proceeds to Indians.

That the Secretary of the Interior be, and he is hereby, authorized to sell, at not less than an appraised value, lot X of section thirty-four, township twenty-four north, range eighteen east of the fourth principal meridian, containing one acre, and lot X of section twenty-three, township twenty-three north, range nineteen east of the fourth principal meridian, containing one acre, heretofore reserved for schools: *Provided*, That the proceeds of the sale shall be expended for the benefit of the Oneida Indians under the direction of the Secretary of the Interior.

Wyoming.

WYOMING.

Shoshones.
Support, etc.

SEC. 25. For support and civilization of Shoshone Indians in Wyoming, including pay of employees, $15,000.

Reservation school.

For support and education of one hundred and seventy-five Indian pupils at the Indian school, Shoshone Reservation, Wyoming, including pay of superintendent, $31,475; for general repairs and improvements, $5,000; in all, $36,475.

Fulfilling treaty.
Vol. 15, p. 676.

For support of Shoshones in Wyoming: For pay of physician teacher, carpenter, miller, engineer, farmer, and blacksmith (article ten, treaty of July third, eighteen hundred and sixty-eight), $5,000 for pay of second blacksmith, and such iron and steel and other materials as may be required, as per article eight, same treaty, $1,000 in all, $6,000.