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.

REPLY BRIEF OF PLAINTIFF-APPELLANT ONEIDA NATION

ARLINDA F. LOCKLEAR *(Counsel of Record)*
4113 Jenifer Street, NW
Washington, DC 20015
(202) 237-0933

JAMES R. BITTORF
KELLY M. MCANDREWS
ONEIDA LAW OFFICE
N7210 Seminary Road
P.O. Box 109
Oneida, WI 54155
(920) 869-4327

PAUL R. JACQUART
JESSICA C. MEDERSON
HANSEN REYNOLDS LLC
301 North Broadway, Suite 400
Milwaukee, WI 53202
(414) 455-7676

VANYA S. HOGEN
WILLIAM A. SZOTKOWSKI
HOGEN ADAMS PLLC
1935 West County Rd. B2, Suite 460
St. Paul, MN 55113
(651) 842-9100

Counsel for Plaintiff-Appellant

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes & Other Authorities:

ARGUMENT

I. The Supreme Court has explicitly rejected the Village's diminishment theory.

The heart of this matter is the application of the Supreme Court's well-established three-part test to determine whether the Oneida Reservation (the "Reservation") has been diminished. *See Nebraska v. Parker,* 136 S. Ct. 1072, 1078 (2016). First, the Court must examine the statute at issue since only Congress can divest a reservation of its status and Congress's intent to do so must be clear. *Id.* at 1079; *Solem v. Bartlett,* 465 U.S. 463, 470 (1984) ("Once a block of land is set aside for an Indian Reservation and no matter what happens to the title of individual plots within the area, the entire block retains its status until Congress explicitly indicates otherwise.")[1] As in all cases of statutory construction, the statutory text is the best evidence of congressional intent to diminish a reservation. *Parker*, 136 S. Ct. at 1079; *South Dakota v. Yankton Sioux Tribe,* 522 U.S. 329, 341 (1998); *Hagen v. Utah*, 510 U.S. 399, 411 (1994). Second, where the text does not provide the necessary clear evidence of congressional intent, courts may rely upon legislative history that "unequivocally reveal[s] a widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation." *Solem*, 465 U.S. at 471; *Parker,* 136 S. Ct. at 1080 (quoting same). Third, and to a lesser extent, subsequent treatment of the area may

[1] The district court held that the Treaty of 1838, 7 Stat. 566, created the Oneida Reservation. [A-14]. The Village of Hobart (the "Village") does not dispute this holding on appeal.

"reinforc[e] a finding of diminishment or nondiminishment based on the text," but cannot "overcome . . . statutory text . . . devoid of any language indicative of Congress's intent to diminish." *Parker,* 136 S. Ct. at 1081-82 (citations and quotations omitted).

Purporting to apply this standard, the district court adopted the Village's unprecedented theory that: 1) the General Allotment Act of 1887 (the "Dawes Act"), which authorized the Secretary of the Interior to allot Indian reservations in his discretion, authorized thereby parcel-by-parcel diminishment of reservations over time as individual allotments passed into the hands of non-Indians in fee title; 2) the reservation status of former allotments obtained by non-Indians in fee title necessarily lapsed, notwithstanding Congress's codification of the long-standing definition of reservations in the Indian country statute; and 3) the so-called "extreme" allotment on the Oneida Reservation distinguishes it from the dozens of other reservations allotted under the Dawes Act. Brief of Defendant-Appellee Village of Hobart, Wisconsin ("Village Br."), pp. 30-33, 70-73, 33-38.[2] The Supreme Court has explicitly rejected the

[2] The Village relies upon cases involving two other reservations as support for its diminishment theory – Eighth Circuit cases regarding the Yankton Reservation and this Court's decision regarding the Stockbridge-Munsee Reservation. But neither of those involved the Dawes Act. The Eighth Circuit cases turned on that Court's construction of an 1894 cession agreement applicable only to the Yankton Reservation and this Court's decision turned on the Court's construction of a 1906 act applicable only to the Stockbridge-Munsee Reservation, which differed from other allotment acts like the Dawes Act. *Yankton Sioux Tribe v. United States Corps of Engineers,* 606 F.3d 895, 899 (8th Cir. 2010); *Wisconsin v. Stockbridge-Munsee Community,* 554 F.3d 657, 666 (7th Cir. 2009); *see* Brief and Appendix of Plaintiff-Appellant Oneida Nation ("Oneida Nation Br."), pp. 34-40.

Village's theory in all these respects and the Village's attempts to distinguish these controlling decisions are wrong. *See* Village Br., pp. 62-75. Supreme Court precedent compels reversal of the judgment below.

A. The Supreme Court has repeatedly construed the Dawes Act, and allotment of reservations thereunder, as leaving reservations intact.

The central tenet of the diminishment theory adopted by the district court is its construction of the Dawes Act as authorizing the parcel-by-parcel diminishment of Indian reservations through allotment and the eventual transfer of fee title to non-Indians. According to the district court and the Village, the Dawes Act contemplated further action by Congress as to unallotted land (*i.e.,* "surplus lands") on reservations to diminish boundaries but the Dawes Act itself authorized the diminishment of reservation boundaries as to allotted land immediately upon the transfer of those parcels to non-Indians as fee patents. [A-21-22]; Village Br., pp. 28-29. The Supreme Court has held otherwise.

First, in *United States v. Celestine,* 215 U.S. 278 (1909), the Supreme Court considered the continuing reservation status of a patented allotment on the Tulalip Reservation. The Court concluded that the parcel retained its reservation status, rejecting a construction of the Dawes Act allotment provisions as abolishing reservations through allotment and the issuance of patents for allotments. *Id.* at 285-87. The Village claims to distinguish *Celestine* because allotment of the Tulalip Reservation

was undertaken under a treaty with the tribe, not the Dawes Act. Village Br., p. 63. But the Village ignores that the *Celestine* Court looked to authority construing the Dawes Act to conclude that Congress did not intend to alter reservation status by allotting a reservation. *Celestine*, 215 U.S. at 287 (citing *Eells v. Ross,* 64 F. 417, 420 (9th Cir. 1894) ("The act of 1887, which confers citizenship, clearly does not emancipate the Indians from all control, or abolish reservations.")). Indeed, the *Celestine* Court considered at length the effect of citizenship for allottees, extended to them under the Dawes Act, and found the grant of citizenship did not release the allottees from federal supervision. *Id.* at 289-90. The *Celestine* Court clearly construed the Dawes Act to retain the reservation status of allotted lands after the issuance of patents, and this construction conflicts directly with the judgment below.

Second, in *Seymour v. Superintendent of Wash. State Penitentiary,* 368 U.S. 351 (1962), the Court considered whether allotment of a reservation under the Dawes Act and eventual conveyance of fee title to non-Indians altered reservation boundaries. After rejecting the state's argument that allotment of the reservation abolished the reservation immediately, the Court went on to consider the state's alternative argument that the boundaries of the reservation "would be diminished by the actual purchase of land within it by non-Indians . . ." *Id.* at 357. The Court held that it did not; the eventual

conveyance of fee title to non-Indians had no effect on reservation boundaries. *Id.* at 359.[3]

The Village attempts to distinguish *Seymour* on specious grounds.[4] The Village implies that the fee title in question was acquired after the adoption of Indian country statute in 1948, thereby justifying a different result. Village Br., pp. 66-67. But this is simply not true; events under consideration in *Seymour* occurred well before 1948, *i.e.,* allotment of the reservation under the 1887 Dawes Act and the sale of surplus reservation lands in 1906. Further, the Court did not inquire, note, or apparently attach any significance to when fee patents were conveyed to non-Indians. 368 U.S. at 354-55. *Seymour* is not distinguishable on that basis.[5] The Village also claims that the case teaches nothing about the Dawes Act because the *Celestine* case, upon which the *Seymour* Court relied, did not involve the Dawes Act. Village Br., p. 65. This is also false. The reservation at issue in *Seymour* was allotted under the Dawes Act (368 U.S. at 354) and, by relying on *Celestine,* the Court clearly understood *Celestine* to be precedent for

---

[3] The Village insists that whether reservation boundaries can be diminished by the conveyance of former allotments in fee to non-Indians remains an open question, citing *Cohen's Handbook of Federal Indian Law.* Village Br., n.9. But the *Seymour* Court plainly addressed the issue and held that reservation boundaries were not altered by these conveyances.

[4] The district court made no attempt to square the diminishment theory it adopted with *Seymour.* It simply ignored the case.

[5] In addition, the same result obtained under the Indian country statute, as the *Seymour* Court held. *See* discussion *infra.*

its construction of the Dawes Act.[6] Thus, the Court's *Celestine* and *Seymour* decisions reject the Village's diminishment construction of the Dawes Act. *See* United States' Brief as *Amicus Curiae* in Support of Appellant Oneida Nation, at 15 ("One need look no farther than *Seymour* to conclude that the district court erred in its diminishment analysis.").[7]

Third, the Court's modern diminishment/disestablishment cases rely upon *Celestine* and *Seymour* for the proposition that the Dawes Act was not intended to alter reservation boundaries, without making any distinction between non-Indians' acquisition of fee title to former allotments or to surplus reservation lands. *See Parker,* 136 S. Ct. at 1080 (statutory schemes that allow non-Indians to own land on the reservation "do not diminish the reservation boundaries,"); *Seymour*, 368 U.S. at 356; *Solem,* 465 U.S. at 470 (once Congress set aside a block of land as a reservation, "and no

---

[6] The *Seymour* Court reversed the Washington Supreme Court, which had held that fee title parcels held by non-Indians were no longer part of the reservation, whether those parcels were "acquired from the federal government either under the Homestead Laws *or by patent in fee issued to Indian allottees." In re Seymour v. Schneckloth*, 55 Wash.2d 109, 112 (Wash. S. Ct. 1959) (emphasis added.). As a result, *Seymour* should be read to reject the meaningless distinction between fee title acquired as a result of allotment and fee title acquired as result of a surplus lands act.

[7] It is also noteworthy that the State of Wisconsin differs with its local government the Village and the district court on the significance of *Seymour* here. Brief of the State of Wisconsin as *Amicus Curiae* in Support of Plaintiff-Appellant Oneida Nation ("State Amicus Br.") at 10 ("Absent evidence of a more specific congressional intent to diminish a reservation, the Supreme Court, unlike the district court, has construed such allotment legislation not as changing reservation boundaries, but as simply providing for non-Indians to settle within those boundaries."), (citing *Seymour* and *Solem).*

matter what happens to the title of individual plots within the area," the entire block retains reservation status unless Congress indicates otherwise, (citing *Celestine,* 215 U.S. at 285)); *South Dakota v. Yankton Sioux Tribe,* 522 U.S. at 343 (Congress's intent must be clear and plain (citation and quotation omitted);[8] *Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584, 587 (1977); *DeCoteau v. District Cty. Court for the Tenth Judicial Dist.,* 420 U.S. 425, 427 (1975); *Mattz v. Arnette,* 412 U.S. 481, 496 (1973).[9]

Numerous lower court decisions also rely upon the Supreme Court's *Celestine* and *Seymour* cases for the proposition that allotment under the Dawes Act and the eventual issuance of fee title to parcels within the reservation (without limitation as to how that occurred) do not alter reservation boundaries. *United States v. Erickson,* 478 F.2d 684, 688 (8th Cir. 1973) (involving an area interspersed with both former allotments and surplus lands parcels and holding that non-Indian acquisition in fee to parcels within the reservation "does not, by itself, affect the exterior boundaries of the

---

[8] As the Nation established in its opening brief, Eighth Circuit cases considering issues left open by the Supreme Court on the Yankton Reservation depended upon their construction of the applicable surplus lands act, not the Dawes Act. Oneida Nation Br., pp. 35-37. The Village's insistence that those cases construe the Dawes Act as authorizing the diminishment of Indian reservations directly contradicts the Eighth Circuit's own understanding of the cases. *See Yankton Sioux Tribe v. United States Army Corps of Engineers,* 606 F.3d 895, 899 (8th Cir. 2010).

[9] Citing *Mattz,* the Village makes the astounding leap from the Court's observation that reservations "could" be abolished after the expiration of the trust period for allotments to the conclusion that allotments *did* lose reservation status once patents for such parcels were conveyed in fee to non-Indians. Village Br., p. 67. Nothing in *Mattz* supports the Village's conclusion.

reservation."); *The City of New Town v. United States,* 454 F.2d 121, 125 (8th Cir. 1972) (all tracts remain a part of the reservation, including those held by non-Indians in fee);[10] *Beardslee v. United States,* 387 F.2d 280, 286 (8th Cir. 1967) ("Other courts almost uniformly have upheld federal jurisdiction or denied state jurisdiction, where the offense was committed by an Indian within the boundaries of a reservation but on particular land not owned by an Indian."); *Ellis v. Page,* 351 F.2d 250, 252 (10th Cir. 1965) (Tenth Circuit has consistently held "that the allotment of lands in severalty *or the conveyance of land to non-Indians*" does not disestablish or diminish reservation) (emphasis added); *State of Wisconsin v. Baker,* 464 F. Supp. 1377, 1382 (W.D. Wis. 1978) ("Courts have repeatedly held that lands which are privately held by non-Indians in fee simple can nevertheless be part of an Indian reservation."). Neither the district court nor the Village acknowledged these cases or made any attempt to distinguish them.

Fourth, the Village unsuccessfully attempts to distinguish the Court's decision in *Montana v. United States,* 450 U.S. 544 (1981), and its progeny. The Village is correct that this line of cases involves tribal jurisdiction over non-Indians on their fee-owned lands on reservations, not the diminishment of reservations. Village Br., pp. 69-70. But this misses the point. The *Montana* line of cases is premised upon the understanding that fee

[10] The Fort Berthold Reservation at issue in the case was subject to a 1910 Act of Congress that mandated allotment, but the 1910 Act provided that allotment was to be done in accordance with the Dawes Act. 36 Stat. 455, § 2 (Act of June 1, 1910). Thus, Fort Berthold was allotted under the Dawes Act, like the reservations in the other cases cited here.

patent lands owned by non-Indians remain part of allotted reservations; those cases hold that activities of non-Indians on those lands may be subject to tribal jurisdiction under limited circumstances as a part of the reservation. *Montana,* 450 U.S. at 565-66. Those cases all involved the Dawes Act and fee patents obtained by non-Indians to former allotments. Oneida Nation Br., pp. 31-33; *see, e.g., Montana,* 450 U.S. at 548 ("[T]he General Allotment Act of 1887, ch. 119, 24 Stat. 388, and the Crow Allotment Act of 1920, 41 Stat. 751, authorized the issuance of patents in fee to individual Indian allottees within the reservation. Under these Acts, an allottee could alienate his land to a non-Indian after holding it for 25 years."). These cases, then, necessarily reject the Village's theory that the Dawes Act authorized the parcel-by-parcel diminishment of reservations through the conveyance of fee patents to non-Indians following allotment. There is no room left for the Village's diminishment construction of the Dawes Act.

B. The Supreme Court has construed the Indian country statute to reject the Village's distinction between non-Indian fee patents acquired from allottees and those acquired under a surplus lands act.

As demonstrated above, the Supreme Court has explicitly rejected the Village's distinction under the Dawes Act between lands allotted to Indians (and ultimately patented in fee to non-Indians) and lands opened up to non-Indians immediately. Even were that not the case, Congress concluded the matter when it defined Indian country as including "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and,

including rights-of-way running through the reservation." 18 U.S.C. § 1151(a). By its literal terms, the statute confirms that the Oneida Reservation includes the fee patented land therein without regard to how the fee patents were acquired.

The Village cannot avoid this statute, as it attempts to do, by limiting its applicability to events alleged to diminish reservations occurring after its enactment in 1948. Village Br., pp. 72-74. This proposed construction means that no allotments at all would be subject to the Indian country statute since Congress stopped the practice of issuing fee patents for allotments in the 1934 Indian Reorganization Act ("IRA"). 48 Stat. 984, § 2, codified at 25 U.S.C. § 5102 (indefinitely extending trust period on remaining allotments). Further, the Village ignores (as did the district court) the Supreme Court's observation in *Celestine* that the term "reservation," unlike the term "Indian country," had long been defined to include parcels to which Indian title had been extinguished, unless Congress had acted to separate those parcels from the reservation. *Celestine*, 215 U.S. at 285. Thus, in 1948, Congress merely confirmed the federal common law definition of reservation; it did not change the definition so as to justify a distinction between fee parcels on reservations acquired before and after 1948. Oneida Nation Br., pp. 47-49.[11] Nor is there anything in the Court's *Solem* decision to the contrary.[12] As the

[11] For this same reason, it is nonsense to suggest, as the Village does, that whether the Indian country statute was intended to have retroactive application is a relevant consideration. *See* Village Br., pp. 74-75.

[12] The Village's statement that the Court declined to apply the Indian country statute in *Solem* is flat-out wrong. The Court specifically indicated that the question in

Supreme Court has repeatedly indicated, Indian reservations as defined in the Indian country statute included fee land unless Congress, either before or after 1948, altered the reservation boundaries. *Solem*, 465 U.S. at 467; Oneida Nation Br., p. 46-47.[13] Stated otherwise, by confirming the long-standing definition of reservation in the Indian country statute, Congress made plain that the non-Indian acquisition of fee patents within a reservation alone does not diminish an Indian reservation.

Finally, the Supreme Court has specifically construed the Indian country statute as including all fee patents on reservations, whether acquired by non-Indians from former allottees or as a result of a surplus lands act. As discussed above, the Court held in *Seymour* that land held in fee by a non-Indian remained a part of the Colville Reservation, relying upon *Celestine.* The *Seymour* Court also held that this issue had been put to rest by Congress when it enacted the Indian country statute. The Court went on to address the state's proposed construction that the Indian country statute language "notwithstanding the issuance of patents . . ." referred only to those patents

---

the disestablishment claim before it (based on events occurring in 1908) would be governed by the Indian country statute "because the entire opened area is Indian country under 18 U.S.C. § 1151(a)" unless Congress had diminished the reservation. *Solem*, 465 U.S. at 467.

[13] Thus, there is no inconsistency between the Oneida Nation's argument and this Court's decision in *Stockbridge-Munsee*. Congress can, and in some instances has, acted to diminish or disestablish reservations. Unless it does so, however, parcels on reservations held in fee title by non-Indians remain Indian country under the literal terms of the Indian country statute, which codified the federal common law definition of Indian reservations.

still held by an Indian, not those held by non-Indians, much like the Village's argument here. 368 U.S. at 358. The Court rejected the distinction. It reasoned that such a rule would make jurisdiction over the reservation depend upon a title check of individual parcels, thereby producing precisely the extreme checker-boarding that Congress sought to avoid. *Id.* As a result, the Court upheld the Indian country status of the reservation, including all fee patents and without regard to how the non-Indian fee title holder acquired his or her property. Just as under *Seymour*, the entire Oneida Reservation remains Indian country, including those non-Indian fee patents acquired from former allottees.

C. The Supreme Court's most recent case on reservation diminishment rejected the Village's "extreme allotment" diminishment theory.

The Village concedes that the Dawes Act does not expressly provide that land would lose its reservation status once it was allotted and passed out of Indian ownership.[14] Village Br., p. 31. But the Village insists that diminishment nonetheless resulted from the "extreme allotment" that occurred on the Oneida Reservation, the eventual loss of Indian title to the "vast majority" of allotments, and the exercise of state jurisdiction over allottees upon the expiration of the trust period for their allotments. *Id.* at 33-38. The Supreme Court considered and rejected circumstances even more extreme

[14] The Village insists that "The Dawes Act alone demonstrates congressional intent to diminish . . . " but argues that the 1906 Oneida Provision confirmed this intent. Village Br., p. 38. The Oneida Nation discusses this provision *infra.*

than those allegedly exhibited at Oneida,[15] however, in *Parker* and ruled that the reservation at issue had not been diminished. The Village's theory must likewise fail.

The Omaha Reservation considered in *Parker* was subject to an 1882 Act of Congress that provided for the allotment of the western part of the reservation and sale of surplus lands in the area to non-Indians.[16] *Parker,* 136 S. Ct. at 1077-78. Some tribal members took allotments in the western part opened for sale to non-Indians. *Id.* By 1919, fee patents had been issued for all these allotments. *Smith v. Parker,* 996 F. Supp. 2d 815, 827 (D. Neb. 2014). Because tribal members comprised less than 2% of the population of the opened part of the reservation by 1900, these fee patents almost certainly included allotments that had been transferred to non-Indians. *Id.* at 828-30. Nebraska admitted that the 1882 Act lacked any statutory indication of an intent to diminish the reservation, *id.* at 836, and the lower courts did not identify any unequivocal contemporary evidence that the act was intended to diminish the reservation. *Smith v. Parker,* 774 F.3d 1166, 1169 (8th Cir. 2014).

---

[15] For the reasons discussed *infra*, the Village's summary of historical circumstances following allotment at the Reservation is inaccurate in significant respects. Even assuming *arguendo* the accuracy of the Village's summary, it is clear under *Parker* that allotment alone cannot diminish the Reservation in the absence of congressional intent to alter the Reservation boundaries.

[16] Even though the Omaha Reservation was allotted under a special act that predated the Dawes Act, the 1882 statute presaged the Dawes Act by imposing a 25-year trust period for all allotments, at the end of which the United States would issue a fee patent to the allottee. *Parker,* 136 S. Ct. at 1077. Thus, the Court in *Parker* observed that the policy reflected in the 1882 Act was the same as the Dawes Act, citing *Solem* for the congressional purpose and goal. *Id.*

In making its case for diminishment in the Supreme Court, Nebraska framed its case much as the Village does here. It argued that all Indian title to the opened area had been lost (through both conveyance of former allotments and direct sale of surplus lands); that the understanding in 1882 was that reservation status would not survive loss of Indian title; and that the state had continuously exercised jurisdiction over the area since 1882 with no objection from the tribe or the United States. (Dkt. 105-8) (Brief for Petitioners, *Nebraska v. Parker*). Nebraska asserted that the Supreme Court in *Solem* sanctioned *de facto* diminishment under these circumstances. (*Id.* at 51).

The Supreme Court unanimously rejected Nebraska's diminishment theory. The Court agreed with the lower courts that the 1882 Act lacked any "hallmarks of diminishment." *Parker,* 136 S. Ct. at 1079. On the second factor – the existence of a contemporary, unequivocal, and widely held understanding that the legislation would shrink the reservation – the Court held that isolated statements made by some legislators to that affect were insufficient. *Id.* at 1080. On the third factor – subsequent demographic history and treatment by the United States – the Court indicated that such evidence is only relevant to reinforce a finding of diminishment based upon text. *Id.* at 1081 ("But this Court has never relied solely on this third consideration to find diminishment.") Thus, this third consideration has never before overcome a lack of congressional intent. *Id.* at 1082. Finally, the Court noted the so-called "justifiable expectations" of non-Indians in the area but concluded that such expectations cannot

diminish a reservation – only Congress can do so. *Id.* (citing *Rosebud Sioux Tribe,* 430 U.S. at 605).

The Village's diminishment theory cannot be reconciled with either the analysis or the result in *Parker.* The Court made clear in *Parker* that either clear statutory language or an unequivocal and widely held understanding of statutory text is necessary to support diminishment of a reservation. The Village concedes there is no such text in the Dawes Act and the cases discussed above establish there was no widely held understanding that the Dawes Act itself reflected an intent to diminish reservations. The *Parker* Court also made clear that, however "extreme" the circumstances might be regarding the loss of Indian character of an area, these circumstances alone cannot diminish a reservation. Further, the *Parker* Court affirmed the continued existence of the western part of the Omaha Reservation, including former allotments now held in fee, without regard to how fee title to the parcels was acquired. Because the Omaha Reservation survived allotment, even under the extreme circumstances there, the Oneida Reservation survived allotment as well.

II. The Village fails to identify an unequivocal, widely held view that the 1906 Oneida Provision was intended to diminish the Reservation.

Reluctant to rely solely upon the Dawes Act (presumably because of the contrary construction of the Supreme Court), the Village claims to find a further expression of Congress's intent to diminish the Reservation in the 1906 Oneida Provision. Village Br., pp. 38-45. But the Village's analysis depends upon a distorted application of the well-

established framework governing diminishment claims. There is nothing in the Village's unfocused discussion of the 1906 Oneida Provision that evidences a congressional intent to diminish the Reservation.

A. The Village cannot avoid the necessity of a clearly expressed congressional intent to diminish the Reservation.

The Village accepts that the 1906 Oneida Provision lacked any hallmark language of diminishment.[17] Village Br., p. 40. It relies entirely on the discretionary authority in the 1906 Act to issue fee patents as proof of congressional intent. Village Br., pp. 40-41. But this is a restatement of the Dawes Act itself, also discretionary, and adds nothing beyond that Act to establish a congressional intent to diminish the Reservation. The Village attempts to minimize the significance of this omission by suggesting that the Court's framework is applicable only to surplus lands acts. Village Br., p. 28. This is incorrect.

There is nothing in the Supreme Court's framework indicating that it is limited to surplus lands acts. To the contrary, because it takes an act of Congress to diminish a reservation, this framework is simply an application of the general rules of statutory

[17] The Village makes only one argument based upon statutory text: that the 1906 Oneida Provision lacked the adjective "competent" that appeared in the Burke Act, thereby suggesting that Congress's intent in the 1906 Oneida Provision was broader than that in the Burke Act. Village Br., pp. 43-44. The Village cites no legislative history that sheds any light on Congress' word choice. And, of course, the presence or absence of this single word says nothing at all about Congress's intent regarding reservation boundaries. *See Parker*, 136 S. Ct. at 1081 (statements indicating a tribal desire to dispose of land to non-Indians do not support a diminishment finding.)

construction to the specific context of any act of Congress claimed to diminish Indian reservations. *Parker,* 136 S. Ct. at 1079 ("As with any other question of statutory interpretation, we begin with the text of the 1882 Act, the most 'probative evidence' of diminishment" (quoting *Solem,* 465 U.S. at 470)). As such, there is no tension between this framework and the inquiry here requiring congressional intent to diminish the Oneida Reservation in the 1906 Oneida Provision. *See* Village Br., p. 28.[18]

There is also nothing in the *Hagen* Court's formulation of this well-established standard indicating that something less than a clear expression of a congressional intent to diminish is sufficient. Contrary to the Village's argument, the Court did not reject the "clear statement" rule in that case. Village Br., p. 27. The Solicitor General had proposed a finding of diminishment that "would require both explicit language of cession or other language evidencing the surrender of tribal interests and an unconditional commitment

---

[18] The Village suggests that the Supreme Court might reconsider the application of the usual framework for diminishment/disestablishment outside the context of a surplus lands act in *Sharp v. Murphy* (No. 17-1107). Village Br., n. 7. The Village's representation of the petitioner's position there is misleading. Actually, the petitioner denies the applicability of the framework to any extent because the Dawes Act did not apply to the territory in question. Petitioner's Brief, *Sharp v. Murphy,* No. 17-1107, at 48, *available at https://www.supremecourt.gov/DocketPDF/17/17-1107/5521/20180723232225994_17-1107ts.pdf* ("This case involves no ordinary allotment. Congress exempted the Five Tribes from the General Allotment Act. § 8, 24 Stat. 391."). The Village also misconstrues the United States' position in *Murphy.* The United States argues that the case turns upon the unique history of the Five Civilized Tribes in Oklahoma and a series of Acts applicable only to those tribes. *Id.,* Brief for the United States as *Amicus Curiae* Supporting Petitioner, pp. 7-17. There is no reason to believe that the Court will make any finding relevant to the Dawes Act or the Oneida Reservation.

from Congress to compensate the Indians." *Hagen,* 510 U.S. at 411. The Court rejected the idea that these particular terms were required and held that other statutory text – such as the restoration-to-the-public-domain provision – could demonstrate a similarly clear intent to diminish. *Id.* at 411-12. Indeed, this public domain provision is now known as one of the "hallmarks" of diminishment, along with language of cession and payment of a sum certain. *Parker,* 136 S. Ct. at 1079. As a result, it remains the rule that there must be a clear expression of congressional intent to diminish a reservation.

B. There is no indication in the 1906 Oneida Provision, much less a clear expression, of a congressional intent to diminish the Reservation.

1. There is no statutory language evidencing an intent to diminish.

The first order of business in any discussion of the 1906 Oneida Provision is to correctly state its terms. The Village fails to do so. The Village represents that it consisted of a single statement that authorized the Secretary, in his discretion, to issue patents in fee "to any Indian of the Oneida Reservation." Village Br., p. 38. The Village ignores the first part of the provision authorizing the Secretary, in his discretion, to issue fee patents to 56 listed Oneida allottees. 34 Stat. 380.

The Village's omission is significant because the first part reveals the impetus for the 1906 Oneida Provision, *i.e.,* a response to the requests for fee patents made by a small minority or Oneida allottees. Notably, even as to those named Oneida allottees, the Secretary's authority was discretionary, not mandatory. This suggests that Congress

contemplated continuing federal responsibility over all allottees on the Reservation, even those who had specifically requested a fee patent, and serves to further highlight the differences between it and the distinct, mandatory Stockbridge-Munsee provisions.

The 1906 Congress plainly knew how to indicate its intent to disestablish an Indian reservation when it decided to do so. In the case of Stockbridge-Munsee, it *mandated* the immediate issuance of fee patents to *all* allottees on that reservation. 34 Stat. 382. These terms necessarily meant that no allottee would continue to hold trust land at Stockbridge-Munsee, in contrast to the Oneida Reservation where the continued presence of trust land was plainly contemplated in both parts of the 1906 Oneida Provision. This Court concluded that the distinctive Stockbridge-Munsee language was intended to immediately abolish that reservation in light of that tribe's unique history and distinguished that reservation from those, like Oneida, that were subject to the discretionary Dawes Act allotment scheme. *Stockbridge-Munsee Community*, 554 F.3d at 664. Moreover, the Village's explanation for this difference in treatment by Congress, *i.e.*, that Oneida had already been allotted, is simply fatuous. Village Br., pp. 39-40. Whether or when allotments had been issued, Congress could have just as easily mandated the immediate issuance of fee patents to all Oneida allottees, as it did for Stockbridge-Munsee. The 1906 Congress did not do so and this different statutory language has legal consequences.

2. There is no widely-held, contemporaneous understanding of the 1906 Oneida Provision as intended to diminish.

Because the Village cannot avoid the framework governing claimed diminishment acts and admits the absence of statutory language, it relies most heavily upon claimed evidence of a contemporaneously held belief that the 1906 Oneida Provision was intended to diminish the Reservation. Here, too, the Village fails, for several reasons.

First, this factor examines the manner in which the transaction leading to the act was negotiated with the tribe or legislative reports regarding the act to identify the necessary congressional intent. *Parker,* 136 S. Ct. at 1080-81; *South Dakota v. Yankton Sioux Tribe,* 522 U.S. at 351; *Solem,* 465 U.S. at 478. On this score, the Village cites the request for fee patents by individual Oneida allottees. Village Br., p. 42. But only a minority of Oneida allottees requested fee patents, thus resulting in the short list of individual allottees made eligible for fee patents in the 1906 Oneida Provision. *See also* (Dkt. 151-5 at 131) (in 1912, the Oneida voted "overwhelmingly" to defeat a federal proposal to remove restrictions on all trust allotments)). The Village also cites the general views of local Congressman Edward Minor in support of the issuance of fee patents on the Reservation, none of which appear in any legislative history of the 1906 Oneida Provision. Village Br., p. 44. Further, neither the petition of a minority of Oneida allottees nor the general views of Congressman Minor says anything at all about the Reservation boundaries; they only address the desire to authorize the issuance of fee

patents. As such, these tidbits are even less meaningful than the actual legislative history considered by the Court in *Parker*, *i.e.*, statements that the tribe and locals wanted to sell the land to those who might reside upon it and cultivate it. 136 S. Ct. at 1081. "Nothing about this statement or other similar statements unequivocally supports a finding that the existing boundaries of the reservation would be diminished." *Id.*

Second, the contemporaneous evidence must relate *to the act claimed to diminish the reservation itself.* The Supreme Court has been very clear that this factor is tied to specific circumstances surrounding the enactment of the act in question. *Hagen,* 510 U.S. at 411; *South Dakota v. Yankton Sioux Tribe,* 522 U.S. at 341, 351. But the Village relies largely upon general assumptions and understandings relating to allotment that were not particular to the 1906 Oneida Provision itself. Village Br., pp. 41-43. Of course, the Supreme Court explicitly rejected such assumptions and expectations as sufficient basis for a diminishment finding. *Solem,* 465 U.S. at 469-79 (Court declined to extrapolate an intent to diminish from common expectation at the time regarding the imminent demise of reservations).[19]

Third, the Village suggests that the 1906 Oneida Provision was somehow unique and profound, justifying a singular result for the Oneida Reservation. Village Br., pp. 37,

[19] The assumption at the time that the demise of reservations was imminent, which underlay nearly all federal statutes relating to tribal lands at the time, is a recurring theme in the Village's argument on both the Dawes Act and the 1906 Oneida Provision. Village Br., pp. 30, 32, 41, 42 & 44. This heavy reliance on a consideration already rejected by the Supreme Court exposes the lack of actual authority for the Village's position.

43-44. But the Village fails to deal with the common appearance of such provisions for tribes, effectively admitting that the 1906 Oneida Provision was *not* unique. There were numerous similar provisions for other reservations in the 1906 appropriations act itself, including Omaha, White Earth, and others. 34 Stat. 326, Ch. 3504, Act of June 21, 1906. The White Earth provision was more disruptive than the Oneida Provision; it *mandated* the issuance of fee patents to an entire class of allottees and authorized the issuance of fee patents to all others. Although the continuing reservation status of the White Earth Reservation was vigorously contested by the State of Minnesota, the state made no reference at all to the 1906 provision in its unsuccessful challenge. *See State v. Clark,* 282 N.W.2d 902, 907 (Minn. 1979) (citing *Leech Lake Band of Chippewa Indians v. Herbst,* 334 F. Supp. 1001, 1005 (D. Minn. 1971). There is, then, no authority for the notion that these common provisions reflected a congressional intent to diminish particular reservations.

Finally, the Village fails to address the limited impact of the 1906 Oneida Provision on the Reservation. As the Oneida Nation observed in its opening brief, the record regarding the issuance of fee patents on the Reservation shows that the vast majority of those patents were issued under authority of the Burke Act, not the 1906 Oneida Provision. Oneida Nation Br., p. 5. In the absence of any indication that Congress intended in the Burke Act to diminish reservations (a position that even the Village does not embrace), it is difficult to see how the issuance of fee patents to Oneida allottees done largely under that act rather than the 1906 Oneida Provision diminished

the Reservation. As a minor statutory provision that expressly contemplated the continuation of trust land on the Reservation, made no reference to Reservation boundaries, lacked any legislative history indicating an intent to diminish the Reservation, and had very limited impact on the ground, the 1906 Oneida Provision cannot bear the weight of the Village's diminishment theory.

III. The Village's revisionist history of the subsequent treatment of the Oneida Reservation cannot and does not support diminishment of the Reservation.

Under the circumstances of this case, the Court need not consider the subsequent history and United States' treatment of the Oneida Reservation. Even were the Court to do so, there is compelling historical evidence that supports reversing the district court's diminishment finding.

A. Given the absence of a statutory basis for diminishment, the Court need not consider the subsequent history and United States' treatment of the Reservation.

It is difficult to determine whether the Village's muddled analysis of the subsequent treatment of the Oneida Reservation relates to the second or the third factor under the Supreme Court's governing framework. At times, the Village presents this history as related to the contemporaneous understanding of the 1906 Oneida Provision and, at other times, the Village presents this history as related to the subsequent treatment of the Reservation by the United States. *Compare* Village Br., pp. 45, 50, 51, *with* Village Br., pp. 46, 52. Because the overwhelming majority of the Village's historical presentation relates to events occurring "decades" after the 1906 Oneida Provision,

though, it is not relevant to the intent of the 1906 Oneida Provision. *See* Village Br., pp. 47, 60. The Supreme Court's standard is clear that the second factor – historical context surrounding passage of the act – must be *contemporaneous* with the act. *Hagen*, 510 U.S. at 411 (the Court has "been careful to distinguish between evidence of the contemporaneous understanding of the particular Act and matters occurring subsequent to the Act's passage."); *see also South Dakota v. Yankton Sioux Tribe,* 522 U.S. at 341, 351; *Solem,* 465 U.S. at 471.[20]

The Village's disquisition on the subsequent history of the Reservation can only be relevant to the third factor. This factor may confirm a finding of diminishment based upon the text, but the Supreme Court "has never relied solely on this third consideration to find diminishment." *Parker,* 136 S. Ct. at 1081. In particular, the Court will not rely upon a historical record that is mixed. As the Court put it, a "'mixed record' of subsequent treatment of the disputed land cannot overcome the statutory text, which is devoid of any language indicative of Congress' intent to diminish." *Parker,* 136 S. Ct. at 1082 (quoting *South Dakota v, Yankton Sioux Tribe*, 522 U.S. at 356). The Village's own expert has already acknowledged that, at a minimum, the subsequent

[20] Out of the documents cited by the Village, the closest in time to the 1906 Oneida Provision are three from 1909. Village Br., p. 47 (citing Dkts. 89-59, 89-60, 89-62). None of the cited documents, including these three, makes any reference at all to the 1906 Oneida Provision. Whatever the import of these documents otherwise, they are irrelevant to the meaning of the 1906 Oneida Provision.

treatment of the Reservation is a "mixed record." (Dkt. 105-7 at pp. 123-24). In her words:

> There is a mixed record in that the term 'Oneida Reservation' is used frequently in documents that don't attach it to a specific extent; *and there are documents that appear to reflect an understanding that the entire extent still existed* along with the documents that I've been talking about that indicate that the reservation shrank in extent or perhaps altogether was disestablished.

(*Id.* (emphasis added)). The Village's observation that its expert concluded that the record, overall, supported diminishment of the Reservation is beside the point. *See* Village Br., n.30. The point is that the historical record must be viewed as "mixed" and, as such, cannot overcome the "statutory text, which is devoid of any language of Congress' intent to diminish." *Parker*, 136 S. Ct. at 1082. Because the subsequent history alone, particularly one showing a mixed record, cannot alone support diminishment, the Court need not reach this third factor.

B. The historical record of subsequent treatment of the Reservation does not support the Village's diminishment theory.

The Village overlooks many documents in the historical record and attempts to discount others regarding the continuing existence of the Oneida Reservation. Village Br., pp. 47-54. Whatever the merits of the would-be explanations (and they generally lack merit as discussed *infra*), the historical record as highlighted in the Oneida Nation's opening brief plainly establishes that the record contains these documents. Oneida

Nation Br., pp. 42-45. As such, the historical record does *not* confirm that the Reservation has been diminished:[21]

• The Village cites documents relating to creation of two townships under state law within the Oneida Reservation as evidencing a federal belief that the Reservation no longer existed. Village Br., pp. 5-6, 47-48. This is not correct. In 1909, the Bureau of Indian Affairs appointed an agent to investigate the creation of those towns on the Reservation in response to Oneida complaints. The federal investigator observed:

> At first, it seemed to me that there might be a federal question in the matter of whether the State could go ahead and organize municipal territory included in an Indian reservation *where no formal opening of surplus lands or obliteration of reservation lines had ever taken place,* but on further inquiry and examination I found decisions of the State Court of Wisconsin based on decisions of the U.S. Supreme Court which seemed to leave no doubt whatever as to this question . . .

(Dkt, 92-62 at p. 2 (emphasis added)). The federal agent concluded that the state could organize local municipalities within the Reservation, even though it had not been diminished or abolished, and advised the Oneidas not to object. (*Id.* at p. 5).

---

[21] It bears emphasis that the Village bears the burden of proof on this and other aspects of its diminishment claim. [A-42].

•The Village cites multiple federal documents and a 1931 state document referring to citizenship of Oneida allottees and state jurisdiction over and taxability of allotments upon expiration of the 25 year trust period. But these are functions of the Dawes Act itself, not a congressional intent to diminish the Oneida Reservation in particular. *See* Village Br. p. 38; [S. A.-2, 3] (Dawes Act, §§ 5, 6); *Goudy v. Meath,* 203 U.S. 146, 149 (1906) (state tax laws were among those to which allottees were subjected upon issuance of fee patents under the Dawes Act). Further, the Village relies here solely on cases where the Supreme Court found statutory intent to diminish; it ignores the Court's holding in *Parker* that state jurisdiction cannot diminish a reservation in the absence of a congressional intent to do so. *Parker,* 136 S. Ct. at 1081.

•The Village cites multiple federal documents indicating the loss of title by Oneida allottees. Village Br., pp. 48-50. These documents made no comment about Reservation boundaries. And as discussed *supra*, the Supreme Court has been clear that change in title alone does not alter reservation boundaries.

•The Village dismisses two of three direct federal statements in annual reports in the early twentieth century about the extent of the Reservation

(as including the allotments therein) because the same federal officials made similar statements about the Stockbridge-Munsee Reservation. Village Br., p. 55-56. It appears that these federal statements were not taken into account in proceedings leading up this Court's decision on that reservation. *See Wisconsin v. Stockbridge-Munsee Community*, 366 F. Supp. 2d 698 (E.D. Wis. 2004). In any event, whether those federal officials' statements were not considered or were determined to be in error regarding that reservation tells the Court nothing regarding their separate statements about the Oneida Reservation. The Village makes no attempt to distinguish the third one in 1927, also specifically including allotments as part of the Reservation. (Dkt. 93-59).

•The Village makes general statements about demographic data that are as selective as the district court's purported analysis of the historical record. The Village asserts that there was "an extreme population shift" right after 1906. Village Br., p. 51. But there are actual numbers in the record that dispel the Village's sweeping statement. In 1910, census sheets for the Town of Hobart showed 710 Oneidas and 77 non-Indians living within the Town. And in 1930, the census sheets showed 422 Oneidas along with 663 non-Indians living within the Town of Hobart. (Dkt. 106 at

¶ 39). Moreover, it should be noted that this data reflects relative populations in the Town of Hobart; the Village provides no Reservation-wide data.

- The Village relies upon a handful of descriptions of the Reservation as "former" or similar terms. Village Br., p. 48. But these are passing references, not "considered jurisdictional statements." Village Br., p. 58. The Village objected to the Oneida Nation's assessment that the majority of the historical record supports continuing Reservation status because the Village did not deem them to be considered jurisdictional statements. By the Village's own standard, then, it has no historical evidence in support of diminishment.

The single most significant event reflecting the United States' subsequent treatment of the Reservation is the federal decision to approve an IRA constitution for Oneida in 1936. The Village concedes that the federal government concluded that the Oneida Nation was eligible to organize under the IRA because it was in occupation of the Reservation. Village Br., p. 57. But the Village claims that the meaning of the term "Oneida Reservation" had changed at some unspecified point in time such that it referred in 1936 to only remaining trust lands on the Reservation, not the full extent of

the Reservation as established in the 1838 Treaty. The Village's revisionist history is contrary to the actual administrative record on this issue.

As backdrop for federal deliberations on the issue, it should be noted that federal policy at the time explicitly contemplated tribal jurisdiction over fee lands within reservations. In its Basic Memorandum on Drafting Tribal Constitutions (to provide tribes with guidance on drafting an IRA constitution), the Department of the Interior advised that there was no "legal obstacle" to the exercise of tribal jurisdiction over fee patented lands within reservations. (Dkt. 93 at ¶ 4). In accordance with this guidance, the first draft constitution submitted by the Oneida Nation extended tribal jurisdiction to the Oneida Reservation defined by reference to the 1838 Treaty. The Department criticized this section of the draft because the 1838 Treaty Reservation boundaries "represented a diminution of the reservation established by the treaty of October 27, 1832." (*Id.* at ¶ 42). The Department recommended that all references to treaties be omitted to avoid confusion and instead, the constitution should simply refer to "the present confines of the Oneida Reservation." (*Id.* at ¶ 43). The constitution was revised accordingly. (*Id.* at ¶¶ 44-46).

In his letter referring the revised Oneida Constitution to the agent to conduct an election on adoption, the Commissioner of Indian Affairs addressed the necessary

predicates for an IRA constitution. On the existence of a reservation, the Commissioner made plain that he meant the Reservation as established in the 1838 Treaty:

> By the provisions of the treaty of February 3, 1838 (7 Stat. 566), the Oneida Indians ceded to the United States all their right, title an interest in the land set apart for them in the first article of the treaty with the Menominees of February 8, 1831 (7 Stat. 405). Out of the lands thus ceded there were reserved a 100-acre tract for each individual to be held as other Indian lands are held, etc. The Oneida Reservation has been subsequently recognized as such by Executive orders of May 19, 1917 and May 4, 1918, extending the trust periods on certain allotments made to Indians on the Oneida Reservation in Wisconsin.

(*Id.* at ¶ 45). The Constitution was overwhelmingly approved by tribal members at the election held for that purpose. (*Id.* at ¶¶ 48-50). Thus, the reference to the "present confines of the Oneida Reservation" meant the Reservation as defined in the 1838 Treaty, not merely remaining trust land.

IV. The Village cannot raise its issue preclusion and exceptional circumstances claims in the absence of a cross-appeal and neither provides a basis to modify the judgment below.

In proceedings below, the Oneida Nation vigorously contested two affirmative defenses asserted by the Village: first, that the Nation is barred from defending against the claimed disestablishment of its Reservation by the preclusive effect of the judgment in *Stevens v. County of Brown* (E.D. Wis. Nov. 3, 1933) (unpublished decision) (Dkt. 89-45); [A-15]; and second, that even if the Reservation boundaries remain intact, the Village is nonetheless entitled to enforce its Ordinance against the Oneida Nation due to

alleged exceptional circumstances. [A44-45]. The district court rejected both these affirmative defenses: first, it held that the Village failed to establish the elements of issue preclusion; and second, it held that, while the Village could regulate the Nation in its conduct on fee lands (the Reservation having been diminished), the Village could not regulate the Nation on its trust lands (the trust lands being Indian country and implicitly holding the Village had failed to establish exceptional circumstances.) [A16-17, A-36]. The Village did not cross-appeal as to either affirmative defense.

Were this Court to consider and affirm on either of these affirmative defenses, it would effectively alter the judgment below to either revoke the 1838 Reservation altogether or expand the Village's claimed regulatory authority over the Nation to include trust land as well as fee land. This cannot be done in the absence of a cross-appeal by the Village. In any event, neither affirmative defense is correct on the merits.

A. The Village cannot seek affirmance on either issue preclusion or exceptional circumstances in the absence of a cross-appeal.

The Village is correct that, as a general principle, an appellee can urge an appellate court to affirm on any basis appearing in the record without a cross-appeal, but the Village fails to note that there is a significant limitation on this general principle. Village Br., p. 18, n. 43. In *Morley Co., v. Md. Casualty Co.,* the Supreme Court articulated this limitation:

> Without a cross-appeal, an appellee may '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 . . . ' *What he may not do in the absence of a cross-appeal is to 'attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below.'*

300 U.S. 185, 191 (1937) (emphasis added; internal citation and quotation omitted). The Supreme Court has since adhered to this limitation, describing it as an "inveterate and certain" rule. *Greenlaw v. United States,* 554 U.S. 237, 260 (2008) (it takes a cross-appeal to justify a remedy in favor of appellee). This Court has faithfully applied this limitation. *1000 Friends of Wisconsin, Inc., v. United States Dep't of Transportation,* 860 F.3d 480, 483 (7th Cir. 2017) (a court of appeals cannot modify a judgment to make it more favorable to a party that did not file a notice of appeal); *Weitzenkamp v. Unum Life Ins. Co. of Am.,* 661 F.3d 323, 332 (7th Cir. 2011) (a cross-appeal is appropriate if a prevailing party seeks a judgment different from that of the district court); *United States. v. Lawrence,* 535 F.3d 631, 638 (7th Cir. 2008) (it is impermissible for an appellate court to alter a judgment to benefit a nonappealing party). The Village's issue preclusion and exceptional circumstances arguments are barred by this limitation.

As for the issue preclusion argument, the Village proposes to substitute the broader *Stevens* judgment for the judgment of the district court. In *Stevens*, the court entered judgment on a motion to dismiss, holding that the Reservation was

"discontinued" by application of the Dawes Act to the Reservation and that the 1838 Treaty creating the Reservation was, thereby, superseded. (Dkt. 89-45 at p. 3 (allotment under the Dawes Act "resulted in a discontinuance of the reservation, and a recognition of the power of the state to incorporate the lands in the towns in question.")); (*Id.* at 4). By contrast, the judgment below declined to find that the Reservation had been disestablished, holding instead that the Reservation had been diminished and leaving the 1838 Treaty in effect. [A-39]. Substitution of the *Stevens* judgment for that of the district court would impair the Nation's rights that depend upon existence of a reservation, *e.g.*, whether the Nation was eligible to organize under an IRA constitution and, perhaps, the land-into-trust process under the IRA. The Village made and abandoned these very claims earlier in this litigation. (Dkt. 12, Affirmative Defenses). Indeed, these defenses are a standard part of the legal repertoire the Village employs against the Nation.[22] The Village cannot be allowed to further prejudice the Nation's rights in these respects by broadening the judgment below in the absence of a cross-appeal. *Lawrence*, 535 F.3d at 638.

Affirmance based on exceptional circumstances would similarly expand the district court's judgment to allow the Village to regulate Nation activity on its trust land

[22] For example, in a pending administrative appeals, the Village asserts that the Nation is ineligible for the IRA because the Reservation had been disestablished. *See, e.g., Village of Hobart v. Midwest Regional Director, Bureau of Indian Affairs*, 57 IBIA 4 (2013) (vacating and remanding for further agency consideration on other grounds).

as well as its fee lands. As the district court ruled, the exceptional circumstances test, if met, allows states to regulate tribal activity within Indian country. [A-44-45.] The district court's judgment rejected Village authority to regulate the Nation on what it deemed to be the Nation's diminished Indian country. [A-37-38] (". . . only those portions of the original Reservation held in trust by the United States for the benefit of the Nation, as well as any allotments still under trust patents, constitute Indian country" and are not subject to the Ordinance)]. But were the Village to prevail here on its exceptional circumstances claim, all of the Nation's activities, including on trust land, would be subject to Village regulation. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987) (in exceptional circumstances, a state or local government may regulate the on-reservation activities of tribes).

These are no small matters to the Nation. Whether the Reservation has been diminished (under the district court judgment) or disestablished (under the *Stevens* judgment) implicates not only the Village's ability to regulate the Nation's activities under its Ordinance but also a host of other issues and relations not present in this appeal. Whether exceptional circumstances exist to justify Village regulation of the Nation on its trust lands may also implicate matters beyond the application of the Village's Ordinance to the Nation. The Village was required to cross-appeal on these

weighty matters if it sought reconsideration of the district court's judgment in these respects.

B. There is no basis for affirming the judgment below based on the preclusive effect of the *Stevens* judgment or on claimed exceptional circumstances.

1. The Village failed to establish the elements of issue preclusion.

The Village accurately states but misapplies the standard governing issue preclusion. Village Br., p. 19. The Village incorrectly claims that the parties and issues in *Stevens* are the same as those here and that the issue was essential to the judgment in *Stevens.*

a. There is no identity of parties or interests.

The plaintiff in *Stevens* was a class of individual Oneida allottees who held fee patents on the Reservation – a class that excluded tribal members who continued to hold trust allotments on the Reservation as well as the Nation itself. (Dkt. 89-45 at 2). Identity of parties is the most important factor because it is based upon due process considerations. "It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." *Taylor v. Sturgell,* 553 U.S. 880, 881 (2008); *Blonder-Tongue Laboratories, Inc. v. University of Ill. Foundation,* 402 U.S. 313, 329 (1971) (due process requires that defensive

use of issue preclusion can only be made against a plaintiff who was a party to the first suit); *Perry v. Globe Auto Recycling, Inc.,* 227 F.3d 950, 953 (7th Cir. 2000).

Neither is this one of those "limited circumstances" where a party can bind a nonparty in later litigation because of identity in interests. *Richards v. Jefferson County,* 517 U.S. 793, 798 (1996); Village Br., p. 23. This is a high standard and requires the party in the first suit to have the same interest as a nonparty in the later suit, sometimes referred to as privity. *Richards*, 527 U.S. at 798, 801; *Highway J Citizens Group v. United States Dept. of Transportation,* 656 F. Supp. 2d 868, 882 (E.D. Wis. 2009) (there must be a relationship giving rise to a fiduciary duty by the party in the earlier suit to bind a non-party in the later suit); *Dexia Credit Local v. Rogan,* 629 F.3d 612, 628 (7th Cir. 2010). Because the Nation held no fee patents itself, it had no legal interest at all in the taxability of those patents, the issue litigated in *Stevens*.[23] In addition, the Nation's governmental interests in the general well-being of its members are distinct from the pecuniary interests of those members in their claimed tax immunity. *Cf. Richards*, 517 U.S. at 801 (corporate interests of municipality are distinct from the pecuniary interests of its resident taxpayers).

[23] Trust patents were issued on the Reservation to tribal members only. (Dkt. 93 at ¶¶ 18, 21). When fee patents were issued for those allotments, they were also held by tribal members only.

The cases cited by the Village do not support a finding of identity of interests here. Village Br., pp. 23-24. In *Yankton Sioux Tribe v. United States Dep't Health and Human Serv.,* 553 F.3d 634 (8th Cir. 2008), the tribe itself filed the first suit on behalf of its members to assert tribal members' interests, and a tribal member filed the second suit on the same claim. The court held that the tribal member was bound by the earlier suit filed by the tribe on the same claim in its representative capacity, there being a precise identity of interests between the plaintiffs in the two actions. *Id.* at 640-41. *Apache Survival Coalition v. United States*, 21 F.3d 895 (9th Cir. 1994), is similar. The plaintiff in the first action, an association consisting of only tribal members, was found to adequately represent the interests on the same claim in a second suit filed by individual tribal members. Indeed, the court there found such complete alignment of interests that the two plaintiffs could be "treated as a single entity." *Id.* at 907. The situation here is the exact opposite. The plaintiff in *Stevens* was not the Oneida Nation, not even all tribal members, and they cannot be said to have acted in a representative capacity for the Nation itself, which had no legal interest in the taxability of individual fee patents. Thus, the required identity of interests is lacking. *Richards,*517 U.S. at 801.

b. There is no identity in issues.

The required identity of issues between the *Stevens* judgment and this one is also missing. This is an exacting factor that requires precise identity between the issue

decided in the earlier and second cases. *Crot v. Byrne,* 957 F.2d 394, 397 (7th Cir. 1992); *see also Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 326 (1979). As the district court explained, the question in *Stevens* was whether individual Oneida allottees could recover the local property taxes they had paid upon fee patents that had been issued for their allotments. (Dkt. 89-45 at p. 2). The question here is the Nation's inherent authority to adopt and be governed by its own laws in the conduct of special events on the Reservation, a matter not before the court in *Stevens* and upon which the court made no comment.

c. The issue here was not necessary to the *Stevens* judgment.

Issue preclusion also requires that the issue in the second suit was essential in the first, another missing element here. Village Br., p. 21. In *Stevens,* there was a complete answer to the taxability of the Oneida allottees' fee patents in the terms of the Dawes Act itself without regard to Reservation status. The act provided that allottees "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. 388, § 6. The Supreme Court had decided well before the *Stevens* case that this provision authorized the imposition of state tax laws upon allotments held in fee patent along with other state laws. *Goudy*, 203 U.S. at 149. As a result, the *Stevens* court's comment about the "discontinuance" of the Reservation made in this context was arguably dictum that this Court can disregard.

Kokkonen v. Guardian Life Ins. Co. of American, 511 U.S. 375, 379 (1994) (courts must adhere to holdings, not dicta); *United States v. Crawley,* 837 F.2d 291, 292 (7th Cir. 1988). In any event, the *Stevens* holding regarding Reservation status was not necessary. *Bobby v. Bies,* 556 U.S. 825, 834 (2009) (holding must be necessary to have preclusive effect).

d. Discretion counsels against issue preclusion.

The Village is wrong that courts lack discretion whether to apply issue preclusion. Village Br., p. 25. In *Kairys v. Immigration and Naturalization Service,* 981 F.2d 937 (7th Cir. 1992), this Court noted that the Supreme Court held in *Parklane Hosiery* that the exercise of discretion in applying issue preclusion was appropriate in certain circumstances and explained:

> The context of this statement [in *Parklane*] is critical. The Court was discussing the use of collateral estoppel by a nonparty to the original proceeding against the defendant in that proceeding, an extension of the doctrine beyond its conventional core that the Court held was discretionary. No extension of the doctrine is involved in the present case.

Kairys, 981 F. 2d at 940. Because the Nation was not a party in *Stevens*, the Court has discretion in the application of issue preclusion. *United States v. Egan Marine Corp.,* 843 F.3d 674, 677-78 (7th Cir. 2016) (application of non-mutual preclusion is a matter of wise public policy).

This Court identified two principal considerations of wise public policy that counsel against application of issue preclusion in *Chicago Truck Drivers, Helpers and*

Warehouse Union (Independent) Pension Fund v. Century Motor Freight, Inc., 125 F.3d 526 (7th Cir. 1997), both of which are present here. First, the issue did not receive "the kind of analysis needed to decide such an important issue." *Id.* at 530. It is undeniable that the claimed discontinuance of the Reservation found in *Stevens* is an important issue with profound implications for the Oneida Nation. Nonetheless, the issue was decided by the *Stevens* court based solely on an issue of statutory construction, *i.e.*, the meaning of the Dawes Act, and without any reference to the Supreme Court's contrary construction of the Act in *Celestine*. *See* discussion *supra* at 3-4. Second, it is not wise public policy to bind a nonparty in a previous judgment based upon a pure issue of law. *Chicago Truck Drivers*, 125 F. 3d at 531-32. Despite the Village's suggestion to the contrary, the *Stevens* judgment was not a mixed issue of fact and law, having been decided on a motion to dismiss without development of or reference to historical or other facts.

It would be fundamentally unfair to bind the Oneida Nation to the *Stevens* judgment to which it was not a party and which was based upon an erroneous and analytically thin construction of the Dawes Act. To do so would apply a different construction of the Act to the Nation than that applied to the numerous other tribes allotted under the Dawes Act. To do so would constrain the Nation in the exercise of its inherent, self-governing authority in a manner not experienced by any other federally

recognized tribe. The Court should not countenance this result. See *Amici Curiae* Brief of the National Congress of American Indians, et al., pp. 22-30.

2. The Village has not demonstrated the presence of exceptional circumstances.

The parties in this litigation differed sharply over the alleged existence of exceptional circumstances that would justify the imposition of the Village's Ordinance upon the Nation and the district court held that the Nation's activities on its trust lands, a species of Indian country, were not subject to the Village's Ordinance. [A-36]. The district court necessarily determined, then, that the Village failed to establish exceptional circumstances as to the diminished Reservation, a holding that the Village did not cross-appeal. This Court need not reach this issue and certainly need not remand the issue to the district court for yet further consideration.

The record is clear that the Village simply failed to meet the legal standard for the existence of exceptional circumstances. The bar to establish such circumstances is a high one since the general rule is that state or local regulation of tribes in Indian country is pre-empted. *Cabazon,* 480 U.S. at 215; *New Mexico v. Mescalero Apache Tribe,* 462 U.S. 324, 331-32 (1983). The pre-emption of state and local authority in such circumstances is based upon "traditional notions of Indian sovereignty and the congressional goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development." *Cabazon,* 480 U.S. at 217. State or local interests

must be sufficient to overcome these federal policies and goals. In *Cabazon*, the state sought to regulate the tribe's conduct of gaming in Indian country and identified organized crime as its concern. Nonetheless, the *Cabazon* Court concluded that even this weighty concern was not "sufficient to escape the pre-emptive force of federal and tribal interests." *Id.* at 221.

The only interest identified by the Village falls so far below the *Cabazon* standard that it necessarily fails. The Village seeks to impose its Ordinance upon the Oneida Nation to facilitate its control over Village roads, an interest far less weighty than that found insufficient in *Cabazon*. Village Br., pp. 79-80. Further, it is undisputed that the Oneida Nation applied for and obtained a permit for the temporary closure of roads incidental to the conduct of the Big Apple Fest from the Wisconsin Department of Transportation and Brown County Highway Commissioner. (Dkt. 86-3). The Oneida Nation submitted a detour map of the roads to be closed, as required by the permit application, and the map depicted portions of the Village road (N. Overland Road) that the Nation intended to temporarily close. (Dkt. 89-144 at p. 2; Dkt. 39-145 at p. 2). Thus, the Nation had State and County approval for the closures, including the Village road.[24]

[24] That the Nation applied for this permit admits nothing regarding the applicability of the Village's Ordinance. *See* Village Br., p. 79. By so applying, the Oneida Nation merely acknowledged that states have heightened interests in the operation of its highway system that is open to the public, even in Indian country. *Strate v. A-1 Contractors,* 520 U.S. 438, 455-56 (1997).

Yet in the pursuit of this narrow interest, the Village proposes a sweeping regulation of the Nation's inherent right of self-governance on the Reservation in the conduct of special events. The Village's Ordinance would authorize it to impose a wide-range of conditions on the conduct of special events (conditions unrelated to road usage), an obligation to employ and pay for services of Village law enforcement personnel, and the authority to shut down an event even while in progress – all in the Village's unilateral discretion. (Dkt. 90-1 at § 250-7). The Ordinance takes no account of the Nation's own laws on any of these matters, effectively suspending all Nation laws that would otherwise govern the conduct of special events.

None of this justifies the imposition of the Ordinance upon the Oneida Nation in Indian country and the district court implicitly so held. There is no basis for altering the district court's judgment with respect to the Nation's trust land (or Indian country) and no need to remand for further consideration of the Village's claimed narrow interests.

CONCLUSION

It would be difficult to overstate the disruptive consequences of the judgment below. It unsettles long-standing governmental relations that the Nation has enjoyed for decades with the State of Wisconsin and other local governments on the Reservation. *See* State Amicus Br., pp. 13-20. It also unsettles the status of literally millions of acres throughout Indian country that were allotted under the Dawes Act and have since

passed in fee patent to non-Indians. It necessarily means that the Cheyenne River Reservation considered in *Solem,* the Crow Reservation considered in *Montana,* and the Omaha Reservation considered in *Parker,* were all diminished, contrary to the Supreme Court's conclusion regarding each of them. And it does all this based upon a construction of the Dawes Act that is directly contrary to Supreme Court precedent. For all these reasons, the judgment below should be reversed.

Dated this 9th day of December 2019

Respectfully submitted,

ONEIDA LAW OFFICE
James R. Bittorf
Kelly M. McAndrews
N7210 Seminary Road
P.O. Box 109
Oneida, WI 54155
jbittorf@oneidanation.org
kmcandre@oneidanation.org
(920) 869-4327

/s/ Arlinda F. Locklear
Counsel of Record
4113 Jenifer Street, NW
Washington, DC 20015
alocklearesq@verizon.net
(202) 237-0933

HANSEN REYNOLDS LLC
Paul R. Jacquart
Jessica C. Mederson
301 N. Broadway, Suite 400
Milwaukee, WI 53202
pjacquart@hansenreynolds.com
jmederson@hansenreynolds.com
(414) 455-7676

HOGEN ADAMS PLLC
Vanya S. Hogen
William A. Szotkowski
1935 West County Road B2, Suite 460
St. Paul, MN 55113
vhogen@hogenadams.com
bszotkowski@hogenadams.com
(651) 842-9100

CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) and Circuit Rule 32, because this document contains 11,765 words (per the court's order of November 26, 2019), excluding the parts of the document exempted by Fed. R. App. P. 32(f).

This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally-spaced typeface using WordPerfect 12 in 12-point Palatino Linotype style font.

Dated: December 9, 2019

/s/ Arlinda F. Locklear
Arlinda F. Locklear

Counsel for Plaintiff-Appellant
Oneida Nation

CERTIFICATE OF SERVICE

I hereby certify that on December 9, 2019, the Reply Brief of Plaintiff-Appellant 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/ Arlinda F. Locklear
Arlinda F. Locklear