



## July Case Law Update July 31, 2020

A summary of court opinions decided during the month of July affecting planning in Wisconsin<sup>1</sup>

### ***Wisconsin Supreme Court Opinions***

[No planning-related cases to report.]

### ***Wisconsin Court of Appeals Opinions***

[No planning-related cases to report.]

### ***U.S. Court of Appeals for the 7<sup>th</sup> Circuit Opinions***

#### **The Boundaries of the 1838 Oneida Reservation Remain in Tact**

In the words of the Federal Seventh Circuit Court of Appeals, [Oneida Nation v. Village of Hobart](#) is “a test of power and jurisdiction between the [Oneida] Nation and the Village of Hobart, Wisconsin,” over the Village’s demand that the Oneida Nation obtain a special event permit from the Village for the Nation’s annual Big Apple Fest. The case delves into the sad and complex history of the U.S. Government’s relationship with the sovereign First Nations.

In 1838, the Oneida Nation entered into a treaty with the U.S. Government establishing the Oneida Reservation in what would later become the State of Wisconsin. The Treaty followed an almost two-decade effort by the U.S. Government to remove the Tribe from their homeland in the State of New York. The Treaty reserved to the Oneida Tribe “a tract of land containing one hundred (100) acres, for each individual, and the lines of which shall be so run as to include all their settlements and improvements in the vicinity of Green Bay.” After a census of the Oneida, the U.S. Government surveyed and established a reservation of approximately 65,000 acres in compliance with the Treaty. Land within the reservations was held in trust by the U.S. Government with no individual ownership of land.

In 1887, Congress enacted the Dawes Act allowing for the allotment of reservation lands into individual parcels held by individual tribal members. The U.S. Government allotted the Oneida Reservation in Wisconsin soon after passage of the Dawes Act. Many tribal members sold their allotted lands to non-tribal members. By 1917, only 106 Oneida allotments remained in trust, and over 50,000 of the 65,000 acres of reservation land were owned by non-tribal members.

In 1934, the U.S. Government’s policy toward tribal land reversed course. Congress passed the Indian Reorganization Act, to stem the loss of tribal land holdings brought on by allotment but also to give tribes the opportunity to re-establish their governments and land holdings. In 1934, Oneida tribal

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<sup>1</sup>Previous updates are available at: [wisconsin.planning.org/policy-and-advocacy/law-updates/case-law-updates/](https://wisconsin.planning.org/policy-and-advocacy/law-updates/case-law-updates/)

members voted in favor of organizing under the Act. The U.S. Secretary of the Interior approved the Oneida Constitution in 1936. Since then, the Nation has acquired in fee many of the parcels that had previously been allotted and sold to non-tribal members. Within the borders of the reservation today, there is a mixture of land held in trust for the Nation by the U.S. Government, land owned in fee by the Oneida Nation, and land owned by non-tribal members. The Village of Hobart is located entirely within the Oneida Reservation boundaries established by the 1838 Treaty.

Since 2009, the Nation has held an annual cultural event called the “Big Apple Fest.” The Big Apple Fest is free and open to the public. It is intended to educate the public about Oneida history and culture, and it offers a range of activities. The Fest takes place on both land held in trust for the Nation by the U.S. and fee land owned by the Nation that is located within the Village. The event is subject to the Nation’s laws and regulations. Oneida Nation personnel (including police) oversee the event to ensure compliance with the Nation’s ordinances pertaining to health, public safety, waste disposal, and sanitation.

In 2016, the Village of Hobart adopted a Special Event Ordinance that applies to any temporary event or activity occurring on public or private property. The Village informed the Nation that it would either have to apply for and obtain a permit for the 2016 Big Apple Fest or face a penalty under the Ordinance. The Nation did not apply for a permit and conducted the 2016 Big Apple Fest under its own laws.

The Nation filed this action in response to the Village's demand that it comply with the Ordinance. The issue in the case is whether the Oneida Reservation defined by the 1838 Treaty remains intact, so the land within the boundaries of the Reservation is “Indian country.” The legal term “Indian country” is defined to include “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.” Once land is set aside for a Reservation, no matter what happens to the title of individual plots within the area, the land retains its reservation status until Congress explicitly indicates otherwise. Generally states and local governments do not have authority to regulate tribes within reservations.

The Village of Hobart argued that the Reservation was diminished piece by piece when Congress allotted the Reservation among individual tribe members and allowed the land to be eventually sold to non-tribal members. The Court of Appeals acknowledges that the Reservation was created by treaty and it can be diminished or disestablished only by Congress but the Court found that Congress had not done either of those things. According to the Court, there was no evidence of a “clear congressional purpose to diminish the reservation.” The Court cites the recent U.S. Supreme Court case [McGirt v. Oklahoma](#), 140 S.Ct. 2452 (2020), decided in June. The *McGirt* decision (dealing with a criminal law matter) upheld the Indian country status of the Muscogee (Creek) Reservation covering a great portion of the State of Oklahoma. According to the Seventh Circuit Court of Appeals, “*McGirt’s* allotment analysis has turned what was a losing position for the Village into a nearly frivolous one.”

The Village retains jurisdiction over non-tribal owned lands within the reservation. The Court did note that there may be circumstances in which isolated fee land of the tribe may be subject to local regulation, but the Village presented no reason to believe that such circumstances are present here.