UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

SAGINAW CHIPPEWA INDIAN TRIBE OF MICHIGAN, Plaintiff, and THE UNITED STATES, Intervenor Plaintiff, v. JENNIFER GRANHOLM, et al., Defendants, and COUNTY OF ISABELLA and CITY OF MT. PLEASANT, Intervenor Defendants.	)	Case No. 05-10296-BC Honorable Thomas L. Ludington

UNITED STATES' MOTION FOR PARTIAL SUMMARY JUDGMENT

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Pursuant to Federal Rule of Civil Procedure 56, the United States respectfully submits this Motion for Partial Summary Judgment. The plain language and the context surrounding the Treaties compel the conclusion that the Isabella Reservation was established by the 1855 and 1864 Treaties. Moreover, the expert historians agree that a reservation was created.

If this motion for partial summary judgment is granted, the only remaining issues are: 1) whether the Treaties' terms, as understood by the Saginaw Chippewa Tribe and the United States, incrementally diminished the Isabella Reservation as allotments were issued, as Defendants allege, or whether the boundaries remain intact irrespective of the issuance of patents, as the United States and Tribe contend; and 2) whether lands located within the townships identified in the 1855 Treaty and confirmed in the 1864 Treaty that were sold to non-Indians prior to the Treaties are within the exterior boundaries of the Isabella Reservation.

Pursuant to Local Rule 7.1(a), the United States was unable to obtain concurrence from the Defendants on this Motion. The Saginaw Chippewa Indian Tribe does not oppose.

Submitted herewith is the United States' Brief in Support of this Motion for Partial Summary Judgment.

Dated: March 5, 2010

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UNITED STATES' BRIEF IN SUPPORT
OF ITS MOTION FOR PARTIAL SUMMARY JUDGMENT

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CONCISE STATEMENT OF THE ISSUE PRESENTED

1. Should the Court grant partial summary judgment when there is no dispute of material fact because the plain language and the context surrounding the Treaties compel the conclusion that the Isabella Reservation was established by the 1855 and 1864 Treaties, and the expert historians agree that a reservation was created?

CONTROLLING AND MOST APPROPRIATE AUTHORITY

Federal Rule of Civil Procedure 56

Cohen's Handbook on Federal Indian Law, § 3.04[2][c][ii] (2005 ed.)

Treaty with the Chippewa of Saginaw, etc., 11 Stat. 633 (Aug. 2, 1855)

Treaty with the Saginaw, Swan Creek and Black River, 14 Stat. 657 (Oct. 18, 1864)

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986)

Celotex Corp. v. Catrett, 477 U.S. 317 (1986)

Choctaw Nation of Indians v. United States, 318 U.S. 423 (1943)

Keweenaw Bay Indian Cmty. v. Michigan, 784 F. Supp. 418 (W.D. Mich. 1991)

Leavenworth, L. & G.R. Co. v. U.S., 92 U.S. 733 (1875)

McClanahan v. State Tax Comm'n of Ariz., 411 U.S. 164 (1973)

Mescalaro Apache Tribe v. Jones, 411 U.S. 145 (1973)

Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999)

United States v. Celestine, 215 U.S. 278 (1909)

Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979)

I. INTRODUCTION

Pursuant to Federal Rule of Civil Procedure 56, the United States, Plaintiff-Intervenor, respectfully submits this Motion for Partial Summary Judgment. There is no genuine issue of material fact that the Isabella Reservation was established for the Saginaw Chippewa Indian Tribe ("Tribe") by the Treaty with the Chippewa of Saginaw, etc., 11 Stat. 633 (Aug. 2, 1855) ("1855 Treaty") (Ex. 1), and the Treaty with the Saginaw, Swan Creek and Black River, 14 Stat. 657 (Oct. 18, 1864) ("1864 Treaty") (Ex. 2). The plain language and the context surrounding the negotiations and implementation of the Treaties compel the conclusion that the Isabella Reservation was established to serve as a homeland for the Saginaw Chippewa Indian Tribe. Additionally, the expert historians agree that a reservation was created. This Court should grant partial summary judgment, holding that the Isabella Reservation was created by force of the Executive Order of May 14, 1855, and the 1855 Treaty, as confirmed by the 1864 Treaty.

If partial summary judgment is granted, the only remaining disputes are: 1) whether the Treaties' terms, as understood by the Saginaw Chippewa Tribe and the United States, incrementally diminished the Isabella Reservation as allotments were issued, as Defendants allege, or whether the boundaries remain intact irrespective of the issuance of patents, as the United States and Tribe contend; and 2) whether lands located within the townships identified in the 1855 Treaty and confirmed in the 1864 Treaty that were sold to non-Indians prior to the Treaties are within the exterior boundaries of the Isabella Reservation.

II. STATEMENT OF FACTS

A. A Brief History Before the 1855 and 1864 Treaties

The Saginaw Chippewa Indian Tribe ("Saginaw Tribe" or "Tribe") is the successor in

interest to the Swan Creek, Black River and Saginaw Bands of Chippewa Indians.[1/] These bands are part of Ojibwa communities who shared a common language and once occupied vast areas of land along both sides of the international border separating Canada and the United States, including the Great Lakes area. By the mid-1700s, one large subgroup, of which the Saginaw Tribe is a descendant, migrated into what is now Michigan. Hoxie at 4-6; Gulig at 6. By the early to mid-1700s, the Saginaw Tribe in particular inhabited the Saginaw Bay area. Hoxie at 6; Gulig at 6.

Ancestors of the Saginaw Tribe entered into a series of treaties with the United States in which they ceded vast areas of their lands to the United States in exchange for peace, smaller reservations, usufructuary rights, annuities and goods. In 1795, a larger group of Chippewas, along with eleven other Tribes, signed the Treaty of Greeneville in which the federal government acknowledged Indian ownership of all the lower peninsula of Michigan, with several exceptions, and promised protection from white intrusion. Gulig at 8; Edmunds at 2; Treaty with the Wyandot, etc., 7 Stat. 49 (Aug, 3, 1795). In 1807, the Chippewas ceded their claims to much of southeastern Michigan. Gulig at 10-11; Edmunds at 2; Treaty with the Ottawa, etc., 7 Stat. 112 (1807). In 1819, they ceded another large tract north of the old Indian "Base Line," stretching west from a point just north of modern Jackson, to near modern Kalamazoo, then diagonally northeast to the Thunder River, down that river to Thunder Bay, then south along the western shore of Lake Huron to the northern and western boundaries of the 1807 cession. Gulig at 17; Edmunds at 2-3; Treaty with the Chippewa, 7 Stat. 203 (Sept. 24, 1819). Within this tract, 111,0000 acres were reserved for their use and occupancy. Id. In 1836, the Chippewas and

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[1/] All expert witness reports and rebuttal reports cited herein have been filed with the Court.

Ottawas ceded a huge tract of land (about 13,000,000 acres) which encompassed much of the northern and western sections of Michigan's lower peninsula. Edmunds at 3; Treaty with the Chippewa, etc., 7 Stat. 491 (1836). In 1837 and 1838, the Saginaw Chippewa Tribe agreed in a series of agreements to cede the remainder of their lands in the Lower Peninsula in exchange for payments, and to "remove from the State of Michigan, as soon as a proper location can be obtained."[2/] Treaty with the Chippewa, 7 Stat. 528 (Jan. 14, 1837); *see also* Treaty with the Chippewa, 7. Stat. 547 (Dec. 20, 1837); Treaty with the Chippewa, 7 Stat. 565 (Jan. 23, 1838); Treaty with the Chippewa, 7 Stat. 565 (Jan. 23, 1838).

The 1837 and 1838 agreements were negotiated during the "removal period" when the predominant federal policy towards Native Americans was to remove them from their aboriginal lands towards the west, away from the encroaching non-Indian settlement. However, due to the economic depression of the late 1830s, there was little demand for undeveloped forest lands in Michigan. Hoxie at 41; Edmunds at 2; Gulig at 23-24. Although a few tribal representatives visited prospective land in Missouri, there was little interest among the Chippewa to remove and no significant migration took place.[3/] Gulig at 27, 31, 32, 39; Hoxie at 41. Moreover, there was a decline in federal revenues for the Indian Office during the economic depression. Id. Indian Commissioner T. Hartley Crawford reported in 1840 that he had to "forego" the removal of the Chippewa bands "for lack of funds." Hoxie at 42. "The Chippewas of Saganaw [sic] are in the

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[2/] These agreements are different from several other treaties negotiated at the same time in that removal was not mandatory. *See, e.g.*, 7 Stat. 490, 798, 499, 500, 501, 505, 513, 514, 515; 7 Stat. 502.

[3/] Some Indians returned to Michigan, while others migrated across Lake Huron to Canada. Hoxie at 41, n.74.

same predicament." Id. When the removal of Indians from Michigan did not materialize, missionaries began to settle amongst them. Id. at 43.

By the 1850s, implementation of removal policies effectively had ended. Hoxie at 44; Edmunds at 4. As pioneers headed west and settled, the vast areas of isolated lands ceased to exist, which previously had been available for the removal of Indians. Luke Lea, the Commissioner of Indian Affairs in 1850 argued that instead of removal, "there should be assigned to each tribe for permanent home, a country adapted to agriculture, of limited extent and well-defined boundaries; within which all [Indians] ... should be compelled constantly to remain." Hoxie at 45; Gulig at 35. His successor, George W. Manypenny continued to re-energize the reservation policy. Hoxie at 45. Manypenny wrote in 1856:

> As sure as these great physical changes are impending, so sure will these poor denizens of the forest be blotted out of existence ... unless our great nation shall generously determine that the necessary provision shall at once be made, and appropriate steps be taken to designate suitable tracts or reservations of land, in proper localities, for permanent homes for, and provide means to colonize, them thereon.

Id. at 46. Manypenny represented the consensus view in the 1850s that the power of the federal government should be used to protect Indians by securing permanent homes for them– reservations– away from the influences and friction of white settlers. Id.; Edmunds at 4; Gulig at 40, 41.

B. The 1855 Treaty

In the decades leading up to the 1855 Treaty, the Saginaw Chippewa were essentially without a permanent home, *see* Gulig at 28, because the previous agreements in the late 1830s promised that they could remain on their lands so long as they remained unclaimed by white

settlers. The lack of settlement pressures in the 1830s and 1840s had left the Indians largely undisturbed. But by the 1850s, the demand for timber created an unprecedented expansion into Michigan.[4/] Hoxie at 47. Local businessmen, speculators, and eastern investors enjoyed immense profits and new settlers descended upon central and lower Michigan in droves. As a result, it was apparent that the Saginaw Tribe's homeland and way of life were in imminent danger of disruption. Id.

Henry Gilbert, the Indian Agent assigned to Michigan tribes, wrote Manypenny in 1853 concerning the Michigan Indians:

> I propose ... to set apart certain tracts of public lands in Michigan in locations suitable for the Indians and as far removed from white settlement as possible and within each Indian family shall be permitted to enter without charge and to won and occupy eighty acres of land. The title should be vested in the head of the family and no white person should be permitted to locate or live among them, except teachers, trader and mechanics specially authorized ....

Hoxie at 50. Gilbert also stated that the Indians were scattered throughout the State and "could not be effectually reached by teachers and missionaries unless they are colonized and have a permanent home with an interest in the soil." Id. He noted that the lands in Michigan were rapidly being acquired, so the government should act promptly.[5/] Id. at 51.

In December of 1854, Manypenny forwarded a recommendation to the General Land Office ("GLO") requesting the withdraw of public lands from sale "in consideration of certain

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[4/] It is estimated that the value of the timber extracted from Michigan exceeded the value of gold taken from California by more than $1 billion from 1837-1897. Hoxie at 47.

[5/]In the early 1850s, local missionaries wrote the Indian Office of the Tribe's condition and their need for a "permanent home." Hoxie at 50, 52; Gulig at 39.

contemplated arrangements with the Indians in Michigan during the ensuing spring." Id. at 52. Nine days later, the GLO forwarded a recommendation to the Secretary of the Interior ("Secretary") who, four months later, recommended to President Franklin Pierce that the withdrawal take place. Id. On May 14, 1855, President Franklin Pierce issued an Executive Order that withdrew from sale "all the vacant lands in Isabella County" from sale in anticipation of the upcoming treaty negotiations. Id. at 52; Gulig at 54; I Charles J. Kappler, Indian Affairs: Laws & Treaties 846-47 (1904).

On May 21, 1855, Manypenny sent a memorandum to the Secretary urging negotiations "to secure permanent homes to the Ottawas and Chippewas," which the Secretary approved. Hoxie at 53. Agent Gilbert reminded Manypenny that the Saginaw Tribe "need land to settle on more than any Indians we have ...." Id.; Gulig at 45. A few weeks later, on July 31, 1855, Manypenny reached an agreement with the Ottawa and Chippewa. Treaty with the Ottawa and Chippewa, 11 Stat. 621 (July 31, 1855). On August 2, 1855, he reached one with the Saginaw Tribe. 11 Stat. 633 (Aug. 2, 1855)[6].

There is no treaty journal for the negotiations with the Saginaw Tribe. However, there is one for the Ottawa and Chippewa. This Court has already determined that the Ottawa and Chippewa treaty journal is relevant and helpful in interpreting the Saginaw Treaty. *See* Order Denying Motions to Exclude Testimony of Expert Witnesses at 30-31, Dkt. No. 221 (Feb. 4, 2010). The treaties were negotiated by the same federal officials in a continuous process dealing with the Chippewas and Ottawas of Michigan, and only a few days apart. Id. Manypenny and

[6]The Senate ratified the 1855 Treaty on April 15, 1856, and the President proclaimed it on June 21, 1856.

Gilbert made three major points in negotiations with the Ottawa and Chippewa.

First, the United States no longer intended to remove Indians from Michigan and that the "government is desirous to aid you in settling upon permanent homes." Hoxie at 54. Second, the United States wanted the Indians to settle in small communities, in part to simplify the provision of federal assistance. Id. Gilbert stated the government did not expect that:

> [A]ll the Indians in Michigan will locate in one place and is willing to set aside tracts sufficient for small settlement in different places, but it will not permit you as individuals to locate promiscuously here and there a tract as your personal wishes may direct. It desires and will insist on your collecting into communities. It desires that these communities shall be as large as possible; because it will be cheaper in support of schools, township and county organizations.

Id. at 54-55. Third, the government promised to protect the Indians from those who would try to separate them from their land and to aid the Tribes' adaptation to American lifestyles.[7] Id. at 55.

The 1855 Treaty with the Saginaw Tribe accomplished many of the goals set forth in the Ottawa and Chippewa Treaty. Article 1 ordered the withdrawal of "six adjoining township of land in the county of Isabella to be selected by said [Saginaw, Swan Creek and Black River] Indians within three months from this date." Article 1 also withdrew two townships near Saginaw Bay from sale to be set aside for bands in that area. The Tribe released the federal

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[7] One of the tribal leaders at the Ottawa and Chippewa treaty negotiations stated:

> We are satisfied with what is done. We wish you to carry out the treaty as it is made. We believe it to be good. We wish not only a rope to our lands—but a forked rope, which is attached to all our interests so that you can hold on to it. This treaty is of great importance to us and our children, and we trust you to carry it out faithfully.

Hoxie Rebuttal at 12-13. The metaphor of a "forked rope" that would tie federal power to "all our interests" demonstrates that the Indian leaders desired and expected federal protection to continue into the future. Id.

government from liability for the payments of funds from the sale of their lands under the 1837 Treaty under Article 3.

The Treaty promised to distribute land to heads of families (80 acres), single people over twenty-one (40 acres), and orphans (40 acres). This distribution would occur "under the same rules and regulations" as provided for in the Ottawa and Chippewa Treaty concluded to two days earlier. Those rules declared that the land distributed would be held in trust by the United States for at least ten years, and that this trust status would continue until issuance by the United States of a fee simple title. The August 2 agreement thus extended federal protection to Indian landholders for at least ten years, after which the President had the right to reatin the trust status "so long as he may deem [it] necessary and proper."

Finally, the United States promised various payments as substitutes for annuities owed on past treaties and as compensation for the thousands of acres of Chippewa land that had not been sold under the 1837 Treaty. These payments would be used for education, tools, building materials and other supplies, as well as to build the Indians both a grist mill and a saw mill, and to pay off their debts to traders and merchants. The largest single amount, $137,600, was to be distributed on a per capita basis to tribal members in twelve annual payments. Finally, Article 6 of the Treaty stated that the group's "tribal organization" would be "dissolved … except so far as may be necessary for … carrying into effect the provisions of this agreement."[8/]

In September 1855, when the GLO suggested that the Chippewas might find it difficult to find six townships in Isabella County completely free of white claims, Indian agents rejected the

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[8/] Although the historians disagree as to the meaning of this article, those interpretations do not affect the issues presented in this Motion.

idea that the Indians should be interspersed among white settlers. Hoxie at 58; Edmunds at 5. In February of 1856, Agent Gilbert submitted a schedule of the lands selected for the Isabella "community" pursuant to the 1855 Treaty. Hoxie at 59. However, the GLO responded that a man named David Ward had selected several portions of the proposed reservation using military warrants. Manypenny protested that the Executive Order of May 14, 1855, nullified the Ward selection. Hoxie at 59. But, the Secretary decided Ward's selections were valid by claiming that the Executive Order withdrawing public lands from sale was legally effective on the date it arrived in the mail on May 22 and not when it was signed on May 14. Id. Moreover, the State of Michigan claimed certain swamp lands, and federal officials had granted a right-of-way and additional lands to a railroad company. Edmunds at 7-8. As a result, Gilbert submitted a revised list of townships, thus separating the Indians from white settlement as much as possible. Hoxie at 59; Edmunds at 7.

Many of the United States' promises in the 1855 Treaty were not forthcoming. Agent Gilbert reported in the fall of 1856 that "[n]othing has yet been done under the treaty of August 2, 1855," including the fact that annuities, construction of a saw mill, and other support failed to come. Hoxie at 60. A.M. Fitch, who replaced Gilbert as the local Indian Agent, reported in the fall of 1858 that "many of the Chippewas of Saginaw removed a year since to the reservation assigned to them in Isabella county, where, after spending the very long and severe winter, they found themselves in the spring reduced to extreme destitution and suffering for want of food." Id. at 61. A year later, he visited "their reservation" and found them "in great want."[9] Id. at 61.

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[9] Other correspondence from federal government officials and missionaries during the same time period refer to the Isabella reserve as the Indian's "permanent home," "community," and "reservation." *See* Hoxie at 61, n.124.

In the spring of 1859, nearly four years after the treaty negotiations, the Commissioner of Indian Affairs formally notified the GLO of the tracts selected in Isabella County under the 1855 Treaty. Id. at 61. As further evidence of the United States' desire to keep the Indians separate from white settlers, the Commissioner added: "I would remark that in case any pre-emption claims have been admitted upon any of the tracks specified, it will be necessary to retain a sufficient quantity of the continuous lands to make up such deficiency." Id. at 61-62. The GLO responded that 35,000 acres of the 138,340 acres of the specified tracks had been sold or otherwise disposed. During the four year lapse, the lands in the withdrawn area were sold, trespassed upon, illegally leased, or plundered of its timber and abandoned. Id.; Edmunds at 8. By 1860, the Indian Office modified the boundaries of the reservation, which excluded claims by non-Indians as much as possible.[10/] Edmunds at 7-8. Still, no certificates of selection had been issued to the Indians for their allotments. Edmunds at 8.

C. The 1864 Treaty

In his annual report for 1858, Fitch explained that "two reservations, by the treaty of 1855, were provided for these Indians; one of them which was designated for what is called the Bay Indians, is entirely unsuitable for agriculture purposes." Gulig at 56. Fitch was referring to the Saginaw Bay reservation as unsatisfactory. Id. Fitch states "[t]hey are unanimous in requesting a new reservation in lieu of the one granted in the treaty referred to, and are waiting with some anxiety for a decision in this matter." Id. Fitch reiterated his concern in his 1859 annual report that the Saginaw Bay Reservation was unsatisfactory. Id. at 59. In 1861, Fitch

[10/] Township 16 North, Range 3 West had replaced Township 15 North, Range 6 West. Township 14 North, Range 5 West placed the southern halves of Township 14 North, Ranges 3 and 4 West. Edmunds at 8.

wrote the Indian Office inquiring about the Indians in Isabella county purchasing additional lands and asked, "Can they at any time go to the Land Office locate & pay for lands within the bounds of their reservation?" Gulig at 61.

In his annual report for 1863, Fitch's successor, D.C. Leach, stated that the bands had not completely located to Isabella County. Hoxie at 62. He also criticized the conditions of the Saginaw Bay reservation and suggested that the welfare of the tribe "would be greatly promoted by removal to the larger reserve, and more productive lands of Isabella county ...." Id. at 62. At the same time, the "chiefs and headsman" of the group who had already settled in Isabella County petitioned the Indian Office for permission to use their annuities to purchase more land "in the reservation." Id. at 63. Their goal was to provide "for our young men and women" and to avoid giving this land to white settlers who "we fear ... will disturb us very much and break up our settlement." Id. Agent Leach in 1864 wrote the Commissioner informing him that "that portion of these Indians residing in Saginaw Bay are now willing to remove to the principal reservation in Isabella County ...." Id. at 63; Gulig at 66.

On September 3, 1864, the Commissioner Dole authorized new treaty negotiations for the purpose of achieving "a concentration of them ... on the Isabella County reserve." Hoxie at 63. The Commissioner suggested that "Indians who have made selections outside of the six reserved townships" be allowed to exchange these for land "within the reserved townships." Id. He stated, "one great object in negotiating Treaties with the Indians is to secure an abandonment of their numerous smaller reservations and a concentration of them upon at least three, if possible, two, reserves." Gulig at 67. Dole also wanted to provide for allotments "in like quantities under similar restrictions as contained in the treaty of 1855." Id. Additionally, the treaty should

provide for "those born thereafter" to be eligible to select allotments "so long as any unselected land remains in the townships reserved." Id.

The treaty conference began on October 15, 1864. Hoxie at 64. H.J. Alvord, the principal commissioner, told the Saginaw Tribe that "it was the wish of the government that they should all live together upon one reservation." Id. On October 18, 1864, the United States entered into a treaty with the Saginaw Tribe. 14 Stat. 657 (Oct. 18, 1864).[11/] Article One released all claims to land outside the Isabella reserve as well as any claims to land selected "in lieu of lands sold or disposed of by the United States upon their reservation at Isabella." By this clause, the Chippewas agreed that they would not seek compensatory lands or money in lieu of the lands (approximately 35,695 acres) within their Isabella Reservation that were claimed by others before the 1855 Treaty, such as State school lands, railroad lands and rights-of-way, or other non-Indian properties. Edmunds at 9.[12/]

Article 2 of the 1864 Treaty "set apart for the exclusive use, ownership, and occupancy of the said Chippewas of Saginaw, Swan Creek, and Black River, all of the unsold lands within the six townships in Isabella County, reserved to said Indians by the treaty of August 2, 1855." Article 2 formalized the adjusted boundaries of the reservation created under the 1855 Treaty and described them as follows:

> The north half of township fourteen, and townships fifteen and

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[11/] The Senate ratified the Treaty on May 22, 1866, and the President proclaimed it on August 16, 1866.

[12/] They also relinquished their right to individually purchase surplus lands within the reservation, so that they would be awarded to other Indians. Commissioner of Indian Affairs William Dole hoped to conduct treaties with other Chippewas to place them on the Isabella Reservation. Edmunds at 11.

> sixteen north, of range three west; the north half of township fourteen and township fifteen north, of range four west, and townships fourteen and fifteen north, of range five west.

The Saginaw bands were instructed to make selections "upon the Isabella reservation" according to a formula similar to what had been used nine years earlier: 80 acres for family heads (chiefs were to get an additional 80 acres), and forty acres for all single adults and orphans. The 1864 Treaty added a clause intended to exhaust the supply of unsold lands:

> And for each other person now living, or who may be born hereafter, when he or she shall have arrived at the age of twenty-one years, forty acres, so long as any of the lands in said reserve shall remain unselected, and no longer.

Article 3, the final significant provision with regard to land titles directed the Indian agent for Michigan to compile a list of all persons who had selected lands pursuant to the 1855 Treaty or who were eligible to select them in the future pursuant to the 1864 Treaty, and to indicate which were "competent" which were "not so competent." The Treaty stipulated that:

> [T]hose who are intelligent, and have sufficient education, and are qualified by business habits to prudently manage their affairs, shall be set down as 'competents,' and those who are uneducated or unqualified in other respects to prudently manage their affairs, or who are idle, wandering or dissolute habits, and all orphans, shall be set down as 'those not so competent.'

"Competents" would receive fee simple titles to their land; "not so competents" would receive titles directing that their land "shall never be sold or alienated to any person or persons whomsoever without the consent of the Secretary of the Interior for the time being." Other provisions of the 1864 agreement insured that there would be adequate support for the consolidated reservation and that the community there would receive continued federal protection. Funds were committed for a manual labor school, as well as to support the Methodist

church in its operation (provided its administration continued to win the approval of the Interior Department), and to create an agricultural fund to be administered by the Indian Office.

In October of 1864, Principal Commissioner Alvord described the Treaty to Commissioner Dole. "[T]he Indians relinquish their right to the several townships upon Saginaw Bay and agree to make selections in severalty upon the Isabella reservation." Gulig at 72.

In the annual report for 1866, the Commissioner wrote that "[g]ood effects are anticipated from the operation of this treaty, in the concentration of the people upon one reservation, and the establishment of a good school thereon." Id. at 66. The following year, the new agent for Michigan's Indians wrote in a similar vein, remarking that "eighteen years of observation and experience among the Michigan Indians leave no doubt in my mind that the reservations system, for the present at least, is the best method yet devised to rescue them from their wild and savage state ...." Id.

The history of the Isabella Reservation after the 1864 Treaty are detailed in the expert reports in this case. Dr. Edmunds' report and rebuttal report in particular outline the treatment of the lands after the 1864 Treaty and how the Indians and the federal officials repeatedly, and almost without exception, refer to the six-townships as an extant reservation.[13/] The post-1864 Treaty era is often riddled with fraud, corruption, trespass, theft, unscrupulous businessmen,

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[13/] There was a period (approximately 1889-1894) when the local Indian Office at Mackinac was closed and government-to-government relations with the Saginaw Chippewa were handled by the Mt. Pleasant Isabella School. Edmunds at 21-43. This time period may not be relevant to determining the intent of the parties. But, the superintendents of the school were inconsistent in calling the land reservation, probably in an effort to avoid the overwhelming duties imposed upon them to run a school, deal with allotments, decide probate matters and the like. Id. With the exception of one single letter, the Indians themselves consistently referred to the land as their reservation during this period. Edmunds at 39-42.

timber speculators, collusion and conspiracy. For various reasons – including the corruption surrounding the rich timber resources – the allotment process and issuance of certificates did not go well. Although this history is important, it is not material for the purposes of this motion.

III. STANDARD FOR SUMMARY JUDGMENT

Summary judgment is appropriate "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c)(2); *see* Spotts v. United States, 429 F.3d 248, 250 (6th Cir. 2005). The moving party bears the burden of proving that there are no genuine issues of material fact. *See* Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). Material facts are only those which are identified by the substantive law as being so. *See* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); Midwest Media Prop., L.L.C. v. Symmes Twp., 503 F.3d 456, 469 (6th Cir. 2007) (a fact is material only if it has the effect of establishing or refuting an element of a defense under the appropriate principle of law). Factual disputes that are irrelevant or unnecessary do not preclude summary judgment. *See* Anderson, 477 U.S. at 248. Additionally, mere speculation of a factual dispute will defeat a motion for summary judgment: "A genuine dispute between the parties on an issue of material fact must exist to render summary judgment inappropriate." Monette v. Elec. Data Sys. Corp., 90 F.3d 1173, 1177 (6th Cir.1996). Determination of whether a factual issue is genuine requires consideration of the applicable evidentiary standards. Thus, in most civil cases, the Court should decide "whether reasonable jurors could find by a preponderance of the evidence that the [non-moving party] is entitled to a verdict." Anderson, 477 U.S. at 252.

IV. STANDARD FOR INTERPRETING INDIAN TREATIES

The canons of Indian treaty construction are well-established and long settled. "A treaty, including one between the United States and an Indian tribe, is essentially a contract between two sovereign nations." Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 675 (1979) (citation omitted). As such, it is the intention of both parties that control the interpretation. Id. The Supreme Court has explained that:

> [T]he United States, as the party with the presumptively superior negotiating skills and superior knowledge of the language in which the treaty is recorded, has a responsibility to avoid taking advantage of the other side. The treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians.

Id. at 675-76 (citation omitted); *see also* Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 196 (1999); United States v. Winans, 198 U.S. 371, 380-81 (1905); United States v. Washington, 157 F.3d 630, 642-43 (9th Cir. 1998). Moreover, treaties are to be interpreted liberally in favor of the Indians and treaty ambiguities are to be resolved in their favor. *See* McClanahan v. State Tax Comm'n of Ariz., 411 U.S. 164, 175 (1973); Winters v. United States, 207 U.S. 564, 576-77 (1908). "How the words of the Treaty were understood by [the Indians], rather than their critical meaning, should form the rule of construction." Keweenaw Bay Indian Cmty v. Michigan, 784 F. Supp. 418, 424-25 (W.D. Mich. 1991) (quoting Worchester v. Georgia, 31 U.S. (6 Pet.) 515, 582 (1832)). Thus, the Indians' understanding of the treaty terms is critical in interpreting the treaties. To ascertain the parties' intentions and the Indian's understanding, courts may look "beyond the written words to the larger context that frames the Treaty, including 'the history of the treaty, the negotiations, and the practical construction

adopted by the parties.'" Mille Lacs, 526 U.S. at 196 (quoting Choctaw Nation of Indians v. United States, 318 U.S. 423, 432 (1943)); *see* Ottawa Tribe of Oklahoma v. Logan, 577 F.3d 634, 641 (6th Cir. 2009).

V. ARGUMENT

The plain language of the Treaties, and the context surrounding them, clearly establish that the Isabella Reservation was created by the 1855 and 1864 Treaties. The expert historians agree that a reservation was created. Therefore, there is no dispute of material fact that the Isabella Reservation was established, and the United States is entitled to partial summary judgment on this issue.

A. The plain language of the Treaties leaves no doubt that the Isabella Reservation was established.

The plain language of the Treaties leaves no doubt that the Isabella Reservation was established. The operative language in Article I of the 1855 Treaty states:

> The United States will withdraw from sale, for the benefit of said Indians, as herein provided, all the unsold public lands within the State of Michigan embraced in the following description, to wit:
> First. Six adjoining townships of land in the county of Isabella, to be selected by said Indians within three months from this date, and notice given thereof to their agent.
> Second. Townships Nos. 17 and 18 North, ranges 3, 4, and 5 east.

This language sets aside land for the Saginaw Tribe.

The law is clear that there "is no magic in the word 'reservation.'" Mescalaro Apache Tribe v. Jones, 411 U.S. 145, 161 (1973). Land withdrawn from sale or reserved by the federal government for Indian purposes constitutes a reservation. In United States v. Celestine, 215 U.S. 278, 285 (1909), the Supreme Court discussed the definition of "reservation:"

> The word [reservation] is used in the land law to describe any body of land, large or small, which Congress has reserved from sale for any purpose. It may be a military reservation, or an Indian reservation, or, indeed, one for any purpose for which Congress has authority to provide, and, when Congress has once established a reservation, all tracts included within it remain a part of the reservation until separated therefrom by Congress.

Id. at 285. Similarly, in United States v. McGowan, 302 U.S. 535 (1938), the Supreme Court explained no magic words were necessary:

> [I]t is immaterial whether Congress designates a settlement as a 'reservation' or 'colony.' In the case of United States v. Pelican, 232 U.S. 442, 449, this Court said: 'In the present case, the original reservation was Indian country simply because it had been validly set apart for the use of the Indians as such, under the superintendence of the government.'

Id., 302 U.S. at 538-39. Thus, an Indian reservation is land withdrawn from sale or reserved by the federal government for the Indians' use. The operative language of the 1855 Treaty on its face meets this definition.

The 1864 Treaty formalized the reservation boundaries and explicitly identifies the land as a reservation. It begins with the preamble that "the agreement and convention made and concluded at the *Isabella Indian Reservation*, in the State of Michigan ...." (emphasis added). Article I states that the bands:

> [H]ereby release to the United States the several townships of *land reserved to said tribe by said [1855] treaty* aforesaid, situate and being upon Saginaw Bay, in said State.
> The said Indians also agree to relinquish to the United States all claim to any right they may possess to locate lands in lieu of lands sold or disposed of by the United States *upon their reservation at Isabella*, and also the right to purchase the unselected lands *in said reservation*, *as provided for in the first article of said [1855] treaty*.
> Article 2. In consideration of the foregoing relinquishments, the

> United States *hereby agree to set apart for the exclusive use, ownership, and occupancy of the said Chippewas of Saginaw, Swan Creek, and Black River, all of the unsold lands within the six townships in Isabella County*, *reserved to said Indians by the treaty of August 2 1855*, aforesaid, and designated as follows, viz: The north half of township fourteen, and townships fifteen and sixteen north, of range three west: the north half of township fourteen and township fifteen north, of range four west, and townships fourteen and fifteen north, range five west.

14 Stat. 657 (emphasis added). Article 2 states the Indians residing at Saginaw Bay reservation "may proceed to make selections of land upon the *Isabella reservation*." (emphasis added).

When the United States "set apart for the exclusive use, ownership and occupancy" the lands in Isabella County reserved under the 1855 Treaty, it was without a doubt creating a reservation by the plain language of the operative phrase. Moreover, the Treaty itself repeatedly refers to the land as "reserved," "a reserve," "Isabella Indian Reservation," "their reservation at Isabella," and "Isabella reservation." To construe the 1864 Treaty as not establishing and indeed confirming the Isabella Reservation that was set apart under the 1855 Treaty would nullify the plain language.[14/]

B. The context surrounding the Treaties support the conclusion that the Isabella Reservation was established.

As outlined in the Statement of Facts, the circumstances surrounding the Treaties also show that the intent of the Indians and the United States was to establish the Isabella Reservation.

By the 1850s, the prevailing federal policy was to create a "permanent home" with "well-defined boundaries" on which Indians could receive plots of land suitable for agriculture and

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[14/] If there is any ambiguity in the operative phrases of the 1855 and 1864 Treaties, they must be resolved in the Indians' favor. *See* McClanahan, 411 U.S. at 175.

"constantly remain." Statement of Facts, *supra,* at 4; see also *Cohen's Handbook on Federal Indian Law,* § 1.03[6][a] (2005 ed.). Indian Affairs officials advocated the creation of a reservation in order to set the Saginaw Tribe apart from non-Indians thereby minimizing friction between the Indians and the settlers. Id. Immediately prior to the 1855 Treaty, the local missionaries advocated for a "permanent home " for the Saginaw Chippewa, and the local Indian agent proposed setting aside "tracts of public land" that were "far removed from white settlement" and giving the Indians allotments where no white person would be permitted. Id. at 5. Commissioner Manypenny recommended withdrawal of the lands from sale for the Indians in anticipation of treaty negotiations. Id. at 5-6. Secretary of the Interior McClelland made a similar recommendation, and President Pierce issued an Executive Order on May 14, 1855, withdrawing "all vacant lands in Isabella County." Id. Prior to negotiations, Manypenny told the Secretary that they should "secure permanent homes" for the Ottawa and Chippewa, and that the Saginaw "need land to settle on more than any other Indians we have ...." Id. at 6. The Ottawa and Chippwea treaty journal shows that the intent surrounding a similar treaty, negotiated by the same representatives, was to create a permanent home for the Indians, concentrated in a community, with title to land that could not be taken, and with continued protection from the federal government. Id. at 6-8. The expert witness reports reference the numerous documents that refer to the land as a reservation – by both the Indians and the United States – in the period between the 1855 and 1864 Treaties. *See e.g*, id. at 8-10.

Prior to the 1864 Treaty, Indian Agent Fitch reported that there were "two reservations" but that the Saginaw Bay reservation was unsuitable for farming, and the Indians were suffering. Id. at 10. He stated the Indians were requesting a "new reservation." Id. His successor, D.C.

Leach, reported their poor conditions and urged that they be removed to "the larger reserve ... of Isabella county." Id. at 11. The Indians at Isabella reported that they were concerned that there was not enough land for their heirs to make selections. In 1864, Leach informed the Commissioner that the Indians on the Saginaw Bay Reservation "are now willing to remove to the principal reservation in Isabella County." Id.

Commissioner Dole authorized new treaty negotiations to concentrate them "on the Isabella reserve" and to provide for selection of their offspring. Id. at 11. At the negotiations, the Tribe was told the government wished "that they should all live together upon one reservation." Id. at 12. The result was the 1864 Treaty. The Indians ceded the Saginaw Bay Reservation, the United States "set apart for the exclusive use, ownership, and occupancy" the lands "within the six townships in Isabella county, reserved to said Indians by the treaty of August 2, 1855, " and the allotment provisions were broadened and extended. Id. at 13. There can be no dispute as to the existence and content of these documents, which demonstrate that the parties to the Treaties intended to establish the Isabella Reservation.

C. The expert witnesses agree that the Isabella Reservation was established by the 1855 and 1864 Treaties.

There is no factual dispute that the Isabella Reservation was established by the 1855 Treaty and the 1864 Treaty. The State's historians agree and admit that a reservation was created.

As long ago as 1875, the Supreme Court recognized that a reservation is simply land withdrawn from sale, set aside, or reserved by the government for a specific purpose:

> Every tract set apart for special uses is reserved to the government, to enable it to enforce them. There is no difference, in this respect,

> whether it be appropriated for Indian or for other purposes. There is an equal obligation resting on the government to require that neither class of reservations be diverted from the uses to which it was assigned.

Leavenworth, L. & G.R. Co. v. U.S., 92 U.S. 733, 747 (1875). As *Cohen's Handbook on Federal Indian Law* explains:

> The term "Indian reservation" originally meant any land reserved from an Indian session to the federal government regardless of the form of tenure. During the 1850's, the modern meaning of Indian reservation emerged, referring to land set aside under federal protection for the residence or use of tribal Indians, regardless of origin. In the 1850's, the federal government began frequently to reserve public lands from entry for Indian use. This use of the term "reservation" from public land law soon emerged with the treaty use of the word to form a single definition describing federally protected Indian tribal lands without depending on any particular source.

Cohen's, § 3.04[2][c][ii] (citations omitted).

During his deposition, the State's historian, Anthony Gulig, admits that an Indian reservation can be defined as land withdrawn from the public domain and set aside for Indian purposes. Gulig Dep. vol. I, 84:20-87:8 (Feb. 4, 2008) (Ex. 1). He admits that he did not discuss this or other definitions of reservations in his Report, but restricted himself to discussing whether the Treaties in this case created a reservation land base that was held in trust or in common by the Tribe. Gulig Dep. vol. II, 103:17-104:22 (Feb. 5, 1008); id. 109:5-110:1 (Ex. 2). Gulig admits the1855 Treaty created a reservation. Gulig Dep. vol. I, 90:1-9; id. vol. II, 196:24-197:1-2; id. 77:17-78:2 (Ex. 3). He further admits the 1864 Treaty established a reservation. Guig Dep. vol. I, 84:23-85:2; id. 85:21- 86:8; Gulig Dep. vol. II, 129:10-17; id. 170:16-171:2 (Ex. 4). He admits that a reservation can exist even though it is comprised of allotment land. Gulig Dep. vol. II,

74:20-75:5 (Ex. 5). Although he states in his Rebuttal Report that the Treaties did not create a "bounded reservation," he explains in his deposition that he uses the term "bounded Indian reservation" synonymously with land held in trust. Id. 130:21-131:11 (Ex. 6).

The State's other historian, Theodore Karamaksi, also agrees that the definition of reservation includes land set aside by the United States for Indian purposes. Karamanski Dep. vol. I, 107:19-25; id. 108:16-20 (Feb. 6, 2008) (Ex. 7). Karamanski readily agrees that the 1855 Treaty created two reservations: the Isabella Reservation and the Saginaw Bay Reservation. Karamanski Dep. vol. I, 117:16-118:7; Karamanski Dep. vol. II,198:5-13 (Feb. 7, 2008) (Ex. 8). Although Karamaski believes that the unsold lands were not within the boundaries of the Reservation (*see infra*), and that the Reservation was incrementally diminished as allotments were made, he nevertheless does agree that the 1864 Treaty reserved the six-townships for the Isabella Reservation as established in the 1855 Treaty. Id. vol. I, 119:11-22; 120:21-121:2 (Ex. 9).

VI. CONCLUSION

For the foregoing reasons, the United States respectfully requests that the Court grant its Motion for Partial Summary Judgment. There is no dispute of material fact because the plain language and the context surrounding the Treaties compel the conclusion that the Isabella Reservation was established by the 1855 and 1864 Treaties, and the expert historians agree that a reservation was created.

Dated: March 5, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on March 5, 2010, the United States' Motion for Partial Summary Judgment was filed electronically with the Clerk of the Court using the ECF system which will send notification of such filing to all counsel of record.

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