UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

SAGINAW CHIPPEWA INDIAN TRIBE OF MICHIGAN, on its own behalf and as *parens patriae* for its members,

Plaintiff,

and

THE UNITED STATES OF AMERICA,

Plaintiff-Intervenor,

v

JENNIFER GRANHOLM, Governor of the State of Michigan; MIKE COX, Attorney General of the State of Michigan; ROBERT J. KLEINE, Treasurer of the State of Michigan, each in his/her official capacity; and the STATE OF MICHIGAN,

Defendants,

and

CITY OF MT. PLEASANT and COUNTY OF ISABELLA,

Defendant-Intervenors.
_____/

Case No. 05-10296-BC
Hon. Thomas L. Ludington

STATE DEFENDANTS' RESPONSE TO THE UNITED STATES' MOTION FOR PARTIAL SUMMARY JUDGMENT

CONCISE STATEMENT OF ISSUES PRESENTED

1. A genuine issue of material fact defeats a motion for summary judgment. Defendants raise a genuine issue of material fact. Should the United States' motion for summary judgment be denied?

CONTROLLING OR MOST APPROPRIATE AUTHORITY

FOR THE RELIEF SOUGHT

1. Standard on whether partial summary judgment should be granted that the 1855 Saginaw Treaty and the 1864 Treaty created a reservation: whether there is a genuine issue of material fact.

Fed R Civ P 56(c).

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

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

Martin v. Ohio Turnpike Comm'n, 968 F.2d 606 (6th Cir., 1992).

Introduction

The United States has moved for partial summary judgment on the issue of whether the 1855 Treaty with the Chippewa (1855 Saginaw Treaty)[1] and the 1864 Treaty with the Chippewa Indians (1864 Treaty) [2] created the alleged Isabella reservation instead of simply withdrawing blocks of land from which individual Saginaw Chippewa could select allotments. In support of its motion, the United States conflates two separate meanings of the word "reservation": the one which means an area of land withdrawn or set aside from the public domain for any use and the one which means an area of land withdrawn or set aside for use as an Indian tribal homeland. The parties and the historical experts agree that the 1885 Saginaw Treaty and 1864 Treaty created a "reservation" in the first sense when they withdrew blocks of land from which individual Saginaw Chippewa could select allotments but disagree that they created an American Indian tribal reservation as that term is understood in 11 U.S.C. § 1151, which was tribal land set aside in trust under government supervision.

There is a genuine dispute over whether the 1855 Saginaw Treaty and 1864 Treaty created blocks of land from which individual Saginaw Chippewa could select allotments or an Indian reservation as that term was understood in the mid-nineteenth century.

Statement of Facts

A. Saginaw Chippewa history prior to the 1855 Saginaw Treaty.

The Saginaw Chippewa Indian Tribe (Saginaw Tribe) is the successor in interest to the Swan Creek, Black River and Saginaw Bands of Chippewa Indians that settled in the Saginaw

[1] Treaty with the Chippewa of 1855, 11 Stat. 633 (previously supplied to the Court electronically).
[2] Treaty with the Chippewa Indians of 1864, 14 Stat. 657 (previously supplied to the Court electronically).

Bay region of east-central Michigan. (Anthony G. Gulig, *An Historical Analysis of the Saginaw, Black River and Swan Creek Chippewa Treaties of 1855 and 1864*, 6 (Gulig Report)).[3] The Saginaw Chippewa participated in the French and Indian War against the British, (Gulig Report at 7), and against the Americans in the American Revolution through the War of 1812. (Gulig Report at 7-8.) The Saginaw Chippewa were outspoken negotiators and influential representatives at the 1795 Greenville Treaty[4] resulting from the American victory at Fallen Timbers. (Gulig Report at 7-8.)

Following the establishment of the Michigan Territory in 1805, the Saginaw Chippewa participated in a series of treaties ceding much of the southern and eastern portion of the Michigan lower peninsula to the United States. In 1807, the Swan Creek and Black River bands were one of the parties to a treaty ceding just over five and a half million acres in return for annuities and defined reservations. (Gulig Report at 10-11.)

The Swan Creek and Black River bands concluded another treaty with the United States in 1819[5] that ceded land in return for annuities and large reservations. (Gulig Report at 17-18.) The Chippewa resisted ceding their land, which was valuable for its fur and game resources. (Gulig Report at 17.) By the early 1820s, however, the Chippewa had difficulty making a living off of the reservations. (Gulig Report at 18.) By 1835, the Swan Creek Chippewa indicated they wanted to sell their 1819 reservation lands to avoid the encroaching white population. (Gulig Report at 19.)

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[3] Professor Gulig's report and the other reports cited in this response have been electronically filed with the Court.
[4] *Treaty with the Wyandot*, 7 Stat. 49 (Aug. 3, 1795).
[5] *Treaty with the Chippewa*, 7 Stat. 203 (Sept. 24, 1819).

In 1836, the Swan Creek and Black River bands concluded another treaty (1836 Treaty).[6] Federal policy at the time was to remove American Indians from lands east of the Mississippi to west of the Mississippi. (Gulig Report at 22.) The 1836 Treaty provided for the removal of the Swan Creek and Black River bands and for the Chippewa to receive the profits from the sale of their land. (Gulig Report at 23.) The Chippewa proved unwilling to remove (Gulig Report at 23), and profits proved disappointing because of an economic depression. (Gulig Report at 23-24.)

In 1836, the Senate rejected a proposed treaty negotiated with the Saginaw Chippewa, but the Saginaw Chippewa remained interested in negotiating. They negotiated three treaties with the United States over the course of the next two years.[7] (Gulig Report, 25-30.) While providing for removal and the sale of Chippewa lands for profits, the same forces that affected the 1836 Treaty affected the Saginaw Chippewa treaties: the Saginaw Chippewa did not want to remove and the economic depression meant their lands could not be sold. (Gulig Report at 30-32.) The Saginaw Chippewa, including the Black River and Swan Creek bands, were landless, having ceded all their land in Michigan. (Gulig Report at 28.) Furthermore, there was little pressure for removal because of the economic depression. (Gulig Report at 32.) During this period, the Saginaw Chippewa, including the Black River and Swan Creek bands, came to realize that owning land individually in their traditional territory and continuing to learn agrarian pursuits was their best alternative. (Gulig Report at 32.) The Saginaw Chippewa had leased or rented land to local whites they liked for decades. (Gulig Report at 33.) The Saginaw Chippewa

[6] *Treaty with the Chippewa*, 7 Stat. 503 (May 9, 1836).
[7] *Treaty with the Chippewa*, 7 Stat. 528 (Jan. 14, 1837); *Treaty with the Chippewa*, 7 Stat. 565 (Jan. 23, 1838); *Treaty with the Chippewa*, 7 Stat. 578 (Feb. 7, 1839).

knew the evolving local conditions and the political and economic climate evolving around them. (Gulig Report at 33.)

The Swan Creek, Black River and Saginaw Chippewa were "active agents" in negotiating their future.[8] They had "a set of ideas about how they wish to protect their communities into the future,"[9] from the seventeenth century on.[10] The tribes had, therefore, a long history of negotiating with the United States by 1855.

B. The 1855 Saginaw Treaty.

By the end of the 1840s, the federal Indian policy of removal began to wane. (Gulig at 34.) Federal policy generally consisted of establishing reservations with land held in common and permanent boundaries on which American Indians could assimilate to the agrarian pursuits. (Gulig Report at 35.) There was also, however, a "systematic effort to persuade tribes to accept allotment of tribal lands in severalty."[11] The different goals of federal Indian policy and the different situations of American Indian tribes led to different types of treaties. In 1856, then Commissioner of Indian Affairs George Manypenny set forth three categories of treaties. First, he identified the category of treaties of peace and friendship. (Gulig Report at 36.) Then he identified the following two categories:

> treaties of acquisition, with a view of colonizing the Indians on reservations; and third, treaties of acquisition, and providing for permanent settlement of the individuals of the tribes, at once or in the future, on separate tracts of land or homesteads, and for the gradual abolition of the tribal character.[12]

[8] Hoxie Deposition, 48, ll. 14-17 (Attachment 1).
[9] Hoxie Deposition, 48, ll. 11-13 (Attachment 1)
[10] *See*, Hoxie Deposition, 44-48 (Attachment 1).
[11] *Cohen's Handbook of Federal Indian Law* § 16.03[2][a].
[12] Annual Report of the Commissioner of Indian Affairs, 1856, 571 (Attachment 2).

The 1855 Saginaw Treaty is a treaty which provides for the permanent settlement of the individual Saginaw Chippewa on separate tracts of land or homesteads and for the gradual abolition of their tribal character. (Gulig at 37.)

The lead up to the 1855 Saginaw Treaty amply demonstrated this. In 1850 Michigan adopted a Constitution that made a "male inhabitant of Indian descent, a native of the United States and not a member of a tribe" a citizen.[13] (Karamanski Rebuttal at 3-4, Gulig Report at 34.) George Bradley, a local missionary, wrote to a senator from Michigan in 1852:

> There is a strong desire manifest among many of them for rapid advancement, they want to own sufficient land to make a farm, and they wish to have it or own it individually. But situated as they are now the prospects are discouraging, very discouraging, and the question arises what can be done for them, and having been a missionary among them for nearly eight years past, and the chiefs and old men come and ask the question, what shall they do to help their children to a permanent home say they shall die soon and they would like to see their children have a permanent home.[14]

George Smith, another local missionary wrote that the Saginaw Chippewa should receive

> a certain amt. of unoccupied, lands to be selected by commissioners in different parcels, this land to be located at the different land offices. by the Individuals who shall be restricted. the land inalienable exept. to members of the nation for a certain number of years. and exempt from taxation for a certain length of time. Something embracing the principles of the foregoing would be that they need, and in the course of a few years, many of them would become good and wholesome citizens.[15]

In anticipation of the 1855 Saginaw Treaty, the United States withdrew land from the public domain. The Secretary of Interior withdrew the land in support of the

> philanthropic policy of furnishing these Indians, who are desirous of becoming cultivators of the soil, with land for that purpose, to the greatest possible extent separated from evil example or annoyance of unprincipled whites . . . with the

[13] Mich. Const. of 1850, Michigan Statutes Annotated, I, p.220 (Attachment 3).
[14] George Bradley to Lewis Cass, 14 December 1852, BIA, NAM, RG 75, M234, f. 721-726, emphasis in original (Attachment 4).
[15] George Smith to Manypenny, 14 March 1854, BIA, NAM, RG 75, M234, R. 404, f. 516-519 (Attachment 5).

> express understanding that no peculiar or exclusive claim to any of the land so withdrawn can be acquired by said Indians, for whose future benefit it is understood to be made until after they shall by future legislation be invested with the legal title thereto.[16]

President Franklin Pierce ordered, "Let the withdrawal of all the vacant land in Isabella County be made with the express understanding contained in the letter of the Secretary of the Interior to me of the 12th instant."[17]

At roughly the same time, the United States was also contemplating a new treaty with the Ottawas and Chippewas, who were located farther north of the Saginaw Chippewa. (Gulig Report at 45.) The United States reached an agreement with the Ottawa and Chippewa on July 31, 1855 (1855 Ottawa and Chippewa Treaty).[18] (Gulig Report at 46.) There is a treaty journal of the negotiations between the United States and the Ottawa and Chippwa. The Commissioner of Indian Affairs, George Manypenny, and the local Michigan agent, Henry Gilbert, negotiated both the 1855 Ottawa and Chippewa Treaty and the 1855 Saginaw Treaty.

There is no treaty journal for the negotiations with the Saginaw Tribe, but the words of the United States Agent Gilbert from the 1855 Ottawa and Chippewa Journal make it clear that the United States wanted to make Michigan Indians citizens.[19]

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[16] Letter of Robert McClelland to the President of the United States, quoted in Kappler, *Indian Affairs: Laws and Treaties,* 1:847 (April 21, 1855) (Attachment 6).
[17] Executive Order of Franklin Pierce, quoted in Kappler, *Indian Affairs: Laws and Treaties,* 1:847 (May 14, 1855) (Attachment 6).
[18] *Treaty with the Ottawa and Chippewa*, 11 Stat. 621 (July 31, 1855) (previously supplied to the Court electronically).
[19] 1855 Ottawa and Chippewa Treaty Journal, 58-59 of 78 ("The sooner you break down the barriers between you & the whites, the sooner you will become one people. This both you & the whites desire. Besides it as object for Government (for it costs a great deal to manage your affairs) to have you civilized citizens of the State—taking care of yourselves, and that is one object of calling you here") (selected pages are Attachment 7).

The terms of the 1855 Saginaw Treaty show that the United States withdrew two blocks of land—one in Isabella County and one along Saginaw Bay—from which to select individual allotments. The United States would:

> withdraw from sale, for the benefit of said Indians, as herein provided, all the unsold 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…
>
> Second. Townships Nos. 17 and 18 north, ranges 3, 4, and 5 east.[20]

From that land, the United States would:

> give to each of the said Indians, being head of a family, eighty acres of land; and to each single person over twenty-one years of age, forty acres of land; and to each family of orphan children under twenty-one years of age, containing two or more persons, eighty acres of land; and to each single orphan under twenty-one years of age, forty acres of land; to be selected and located within the several tracts of land heretofore described, under the same rules and regulations, in every respect, as are provided by the agreement concluded on the 31st day of July, A.D. 1855, with the Ottawas and Chippewas of Michigan, for the selection of their lands.[21]

Individual Saginaw Chippewa would first receive certificates for their selections and then patents. (Gulig Report at 48-49.)

The purpose of the allotments was to provide the Saginaw Chippewa with a "new start as farmers and land owners in Michigan." (Gulig Report at 50.) There was no mention of a "reservation" or "reserve" within the 1855 Saginaw Treaty. (Gulig Report at 51.) There was no exterior boundary. (Gulig Rebuttal Report, 5.)

The 1855 Saginaw Treaty provided that the Saginaw Chippewa had the exclusive right to purchase land within the two blocks of land set aside for allotments for five years after the

[20] 1855 Saginaw Treaty, art. 1, 11 Stat. at 633.
[21] 1855 Saginaw Treaty, art. 1, 11 Stat. at 633.

Saginaw Chippewa had chosen their allotments.[22] (Gulig Report at 48.) Through incorporation of the 1855 Ottawa and Chippewa Treaty,[23] the Saginaw Treaty provided that once the Saginaw Chippewa had selected their allotments, the allotments would be held in trust by the United States for individual Saginaw Chippewa.[24] It also provided "that "[a]ll the land embraced within the tracts hereinbefore described, that shall not have been appropriated or selected within five years, shall remain the property of the United States."[25] For another five years, the Saginaw Chippewa could purchase unsold, unselected parcels in the block of land.[26] It also provided that "all lands remaining unappropriated by or unsold to the Indians after the expiration of the last-mentioned term, may be sold or disposed of by the United States as in the case of all other public lands."[27] Finally, it provided for restrictions on alienation that lasted ten years.[28] The President could extend the restrictions in appropriate cases.[29]

The United States also agreed to pay the Saginaw Chippewa $220,000 for the Saginaw Chippewa surrendering all their claims to reservations and to annuities.[30] (Gulig Report at 47.) The money was split among that to be paid for educational purposes, for agricultural implements, and for other "articles as may be necessary and useful for them in removing to the homes herein provided, and getting permanently settled thereon."[31]

Article 6 of the 1855 Saginaw Treaty dissolved the tribal organization of the Saginaw Chippewa. Article 6 stated:

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[22] 1855 Saginaw Treaty, art 1, 11 Stat. at 633.
[23] 1855 Ottawa and Chippewa Treaty, art. 1, 11 Stat. at 622.
[24] 1855 Ottawa and Chippewa Treaty, art. 1, 11 Stat. at 622.
[25] 1855 Ottawa and Chippewa Treaty, art. 1, 11 Stat. at 623.
[26] 1855 Ottawa and Chippewa Treaty, art. 1, 11 Stat. at 623.
[27] 1855 Ottawa and Chippewa Treaty, art. 1, 11 Stat. at 623.
[28] 1855 Ottawa and Chippewa Treaty, art. 1, 11 Stat. at 623.
[29] 1855 Ottawa and Chippewa Treaty, art. 1, 11 Stat. at 623.
[30] 1855 Saginaw Treaty, art. 3, 11 Stat. at 634.
[31] 1855 Saginaw Treaty, art. 2, 11 Stat. at 634.

> The tribal organization of said Indians, except so far as may be necessary for the purpose of carrying into effect the provisions of this agreement, is hereby dissolved.

Providing a reservation in common for American Indians whose tribal organization had been dissolved is "incongruous." (Gulig Report at 50.)

C. The Inter-Treaty Years

The United States was slow to implement the terms of the 1855 Saginaw Treaty, which caused the Saginaw Chippewa to complain. In December 1855, the Saginaw Chippewa selecting land along Saginaw Bay found "the greatest proportion of them are selected by the State as Swamp Lands."[32] The Swamp Land Act of 1850,[33] "made a grant in praesenti; in other words, the title then passed to all lands which at that date were swamp lands, and the only matters thereafter to be considered were those of identification."[34]

Henry Gilbert sent a list of those Saginaw Chippewa who had selected lands in Isabella County and their selections to the Indian office. (Gulig Report at 57-58.) Nothing happened, however, and in 1859, the Saginaw Chippewa complained:

> immediately after the treaty was ratified, our young men, orphans, and family heads made their selections of their farms and notified Gilbert, and gave him descriptions of selections. He requested him 'to locate the same for them.' No locations have been made, and present agent Felch refuses to do so. We are the Saginaws who live on the North Shore of Saginaw Bay….[35] [Gulig Report at 58-59.]

This petition shows the Saginaw Chippewa understood the terms of the 1855 Saginaw Treaty. The petition stated that the Saginaw Chippewa had made their selections of land and directed Gilbert to "locate" the same with the general land office. (Gulig Report at 59.) The Saginaw

[32] Saginaw Chiefs to Manypenny, quoted in Gilbert to Manypenny, 5 December 1855, BIA, RG 75, Letters Received, Mackinac Agency, G-54 & ½ (Attachment 8).
[33] Act of Congress, September 28, 1850, ch. 84, 9 Stat. 519.
[34] *Michigan Land & Lumber Co. v. Rust*, 168 U.S. 589, 591 (1897).
[35] Memorial of Saginaw Band of Chippewa, 21 June 1859, BIA, NAM, RG 75, M234, R. 408, f. 569-573 (Attachment 9).

Chippewa also wanted to know if they could exercise their right to purchase additional lands before the remaining unsold lands were opened for public sales. (Gulig Report at 61.)

In the early 1860s, federal Indian agent Leach noted that that the Saginaw Chippewa still had not received their certificates and wanted them. (Gulig Report, 63-64.) Some Saginaw Chippewa abandoned their selections and purchased land elsewhere. (Gulig Report, 64-65.)

D. The 1864 Treaty

The 1855 Saginaw Treaty did not provide for allotments to those Saginaw Chippewa below the age of 21 who turned 21 after the five year period specified in the treaty. (Gulig Report at 65.) This lacuna became increasingly important to the Saginaw Chippewa as more children reached the age of 21 without having a right to select an allotment. (Gulig Report at 65-66.) The Saginaw Chippewa, therefore, petitioned President Lincoln to use their last annuity payment to purchase lands for those children without a right to select an allotment. (Gulig Report at 66.) In turn, the United States wanted to simplify administration of Indian affairs in Michigan by gathering the Saginaw Chippewa along Lake Huron together with those at Isabella. (Gulig Report at 66.) Finally, keeping the Saginaw Chippewa happy would benefit Lincoln in the upcoming election because they were voters. (Gulig Report at 68.)

The 1864 Treaty resulted. In Article 1 of the treaty the Saginaw Chippewa relinquished the Saginaw Bay townships. (Gulig Report at 68.) Article 2 protected from sale the remaining land in the block of land withdrawn from the public domain at Isabella. (Gulig Report at 69.) Article 3 provided that the children who previously had no right to an allotment when they turned 21 with a right to select an allotment. (Gulig Report at 69.) Article 4 set up a procedure by which Saginaw Chippewa could receive their patents in fee simple if deemed competent. (Gulig Report at 69-70.) Article 8 contains an obvious error, but the only reasonable interpretation is that the 1855 Saginaw Treaty article dissolving the tribal organization of the

Saginaw Chippewa, except as necessary to carry out the purposes of the 1855 Saginaw Treaty and the 1864 Treaty, remained in effect. (Gulig Report at 71-72.)

The many differences between blocks of land from which individual Saginaw Chippewa could select allotments and bounded reservations in the western United States were summarized by Dr. Karamanski in the following chart.

Standing Rock	**Isabella**
Land held in common.	Land held individually.
Lakota restricted to reservation.	Chippewa free to live there or not.
Trade & Intercourse Acts Enforced.	Trade & Intercourse Acts **NOT** enforced.
Indian Court.	No tribal court.
Agency Police Force.	Historically, no agency police force.
Agency jail.	No agency jail.
Indian Agent in residence.	No resident Indian Agent.
Lakota are not citizens.	Saginaw are citizens.

(Karamanski Rebuttal at 8).

As the United States failed to issue patents, the Saginaw Chippewa became increasingly concerned. (Gulig Report at 76.) There was one attempted fraud, known as the Rust purchase, in 1864. (Gulig Report at 73, 77-78.) In light of such frauds, the Saginaw Chippewa demanded patents and to be made citizens in 1869.[36] (Gulig Report at 78-79; Theodore Karamanski, *The Isabella Indian Reservation: A History of Allotment and the Saginaw Chippewa*, 1870-1934) (Karamanski Report) at 17-18, 21, fn22.) In 1870, the Saginaw Chippewa asked for patents again.[37] (Gulig Report at 82; Karamanski Report at 24, fn 26.)

In a May 1871 petition,[38] the Saginaw Chippewa sought to assert their "independence and manhood." (Karamanski Report at 4.) They did so based not on their sovereignty or upon

[36] Petition of Chippewa Chiefs, 4 June 1869, BIA, NAM, RG 75, M234, R. 408, f. 675-86 (Attachment 10).
[37] Chippewa Chiefs at Isabella to the Secretary of the Interior, 19 December 1870. BIA, NAM, RG 75, M234, R. 409 (Attachment 11).
[38] Petition of Chippewa Chiefs to Ely Parker, 8 May 1871, BIA, NAM, RG 75, M234, R. 409, f. 456; 462-464 (Attachment 12).

federal oversight, but upon their status as citizens of Michigan. (Karamanski at 4.) In fact, they demanded an end to the federal government's flawed guardianship over them. (Karamanski at 4.) The Saginaw Chippewa's status as citizens of Michigan was crucial to avoiding removal and to their autonomy. (Karamanski at 4.)

The United States government was guilty of remarkable incompetence and outright criminal fraud in its implementation of the 1855 Saginaw Treaty and the 1864 Treaty. The intentions of the treaty makers, both white and Indian, were undermined by the Office of Indian Affairs and its agents. The result of this maladministration was the rapid turn over of lands from Chippewa to European-American ownership. (Karamanski Report at 3.)

In 1878, the federal Indian agent in Michigan wrote:

> In reply I beg leave to say the Indians of this Agency pay very little attention to Reservations, a very small proportion of them residing upon any of the State Reservations, and in the sense understood as applying to the term Reservation in the far west nothing of the kind exists in this Agency; If an Indian cultivates land here, it is his own.[39] [Karamanski Report at 57.]

In 1886, the federal Indian agent in Michigan wrote:

> The Indians of Michigan are all citizens, are voters and eligible to hold office. They are not known or recognized by tribal relations either by State laws or treaties; and in every respect, so far as the rights of citizenship are concerned, they stand on an equality with the whites.[40]

[39] Lee to Commissioner of Indian Affairs, July 9, 1878 (Attachment 13).
[40] Annual Report of the Commissioner of Indian Affairs, 1886, 165 (Attachment 14).

ARGUMENT

II. A genuine issue of material fact defeats a motion for summary judgment. Defendants raise a genuine issue of material fact. The United States' motion for summary judgment should be denied.

A. Standard on motion for Summary Judgment.

Summary judgment under Federal Rule of Civil Procedure 56(c) 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."[41] A factual dispute will defeat summary judgment if it is "genuine"; that is, if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party."[42] The issue "must also be material; that is, it must involve facts that might affect the outcome of the suit under the governing law."[43] "When determining whether there is a genuine issue of material fact, a court must view the evidence in the light most favorable to the non-moving party."[44] The genuine issue of material fact

> is not required to be resolved conclusively in favor of the party asserting its existence; rather all that is required is that sufficient evidence supporting the claimed factual dispute be sown to require a jury or judge to resolve the parties' differing versions of truth at trial.[45]

There are numerous genuine issues of material fact sufficient to deny the United States' motion for partial summary judgment.

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[41] *Celotex Corp v. Catrett,* 477 U.S. 317, 322 (1986); Fed. R. Civ. P. 56(c).
[42] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).
[43] *Martin v. Ohio Turnpike Comm'n,* 968 F.2d 606, 609 (6th Cir., 1992), citing *Anderson v. Liberty Lobby, Inc*, 477 U.S., at 248.
[44] *Martin,* 968 F.2d 606, 609 (6th Cir., 1992), citing *Anderson v. Liberty Lobby, Inc*, 477 U.S., at 255.
[45] *Anderson*, 477 U.S. at 249 (citation and quotation marks removed).

B. The term "reservation" in 18 U.S.C. 1151 requires bounded land set aside under federal supervision.

Section 1151 of Title 18 of the United States Code defines "Indian country" to include

> Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) 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, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.[46]

Although a statute establishing criminal jurisdiction, 18 U.S.C. 1151 has been used for establishing civil jurisdiction as well.[47] The House Report accompanying this provision states that:

> Definition is based on the latest construction of the term by the United States Supreme Court in *U.S. v. McGowan*, 58 S. Ct. 286, 302 U.S. 535, following *U.S. v. Sandoval*, 34 S. Ct. 1, 5, 231 U.S. 28, 46. (See also, *Donnelly v. U.S.*, 33 S. Ct. 449, 228 U.S. 243; and *Kills Plenty v. U.S.*, 133 F.2d 292, certiorari denied, 1943, 63 S.Ct. 1172. [48]

These cases emphasize the importance of federal supervision over the land. In *United States v. McGowan*, [49] the United States Supreme Court held that the "Reno colony" was Indian country.[50] The Reno Colony "is composed of several hundred Indians residing on a tract of 28.38 acres of land owned by the United States."[51] Congress's "purpose . . . in creating this

[46] 11 U.S.C. § 1151.
[47] *DeCoteau v. Dist. County Court for Tenth Judicial Dist.*, 420 U.S. 425, 427 n.2 (1975).
[48] Staff of the Committee on the Judiciary House of Representatives, 80th Cong.,1st Sess., *Revision of Title 18, United States Code* (Comm. Print 1947) A92 (Attachment 15).
[49] *United States v. McGowan*, 302 U.S. 535 (1938).
[50] *McGowan*, 302 U.S. at 539.
[51] *McGowan*, 302 U.S. at 537.

colony was to provide lands for needy Indians scattered over the State of Nevada, and to equip and supervise these Indians in establishing a permanent settlement."[52]

Similarly, the United States Supreme Court in *United States v. Sandoval*,[53] stated its question as:

> whether the status of the Pueblo Indians and their lands is such that Congress competently can prohibit the introduction of intoxicating liquor into those lands notwithstanding the admission of New Mexico to statehood.[54]

Finding that the Pueblos were "dependent communities . . . [with an] . . . Indian lineage, isolated and communal life, primitive customs and limited civilization,"[55] the *Sandoval* Court found that Congress could.

In *Donnelly v. United States*,[56] the United States Supreme Court found that "Congress itself recognized the Hoopa Valley Reservation as lawfully existing."[57] *Kills Plenty v. United States*[58] involved a recognized reservation as well.[59]

"Reservation" in 11 U.S.C. § 1151 means the bounded set aside of land under United States supervision.

C. There is a genuine issue of material fact over the meaning of the language of the 1855 Saginaw Treaty.

State defendants maintain that the 1855 Saginaw Chippewa Treaty did not create an American Indian tribal reservation. The United States disagrees. (United States' Brief, *passim.*) The language of the 1855 Saginaw Treaty never uses the word "reservation" or "reserve." It uses

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[52] *McGowan*, 302 U.S. at 537.
[53] *United States v. Sandoval*, 231 U.S. 28 (1913).
[54] *Sandoval*, 231 U.S. at 38.
[55] *Sandoval*, 231 U.S. at 47.
[56] *Donnelly v. United States*, 228 U.S. 243 (1913).
[57] *Donnelly*, 228 U.S. at 257.
[58] *Kills Plenty v. United States*, 133 F.2d 292 (8th Cir. 1943), *cert. den.*, 319 U.S. 759 (1943).
[59] *Kills Plenty*, 133 F.2d at 294-95.

the language "withdraw for the benefit of said Indians."[60] It also does not withdraw for the benefit of a tribe but for "Indians."

There is a genuine issue of material fact over the meaning of the language of the 1855 Saginaw Treaty.

D. There is a genuine issue of material fact over whether the Saginaw Chippewa became citizens of Michigan not subject to the guardianship of the federal government through the 1855 Saginaw Chippewa Treaty.

The Saginaw Chippewa became citizens of the state of Michigan not subject to the guardianship of the federal government through the 1855 Saginaw Chippewa Treaty. The United States denies this is an issue of material fact. This is a genuine issue of material fact over whether the Saginaw Chippewa wanted to become citizens.

The issue of whether the Saginaw Chippewa wanted to become citizens in the mid-nineteenth century is material to the ultimate issue of whether the 1855 Saginaw Treaty and the 1864 Treaty created a bounded reservation under federal supervision. "The goal of the 1855/1864 treaties had been to transform the Saginaw Chippewa into ordinary citizens through the award of individual tracts of land from the six townships reserved for that purpose." (Karamanski Report at 43.) The Saginaw Chippewa's desire to become citizens not subject to federal guardianship makes it more likely that the Saginaw Chippewa wanted individual tracts of land from a block of land withdrawn for that purpose instead of a reservation held in common for a tribal homeland.

This issue is genuine because a reasonable jury could find that the Saginaw Chippewa wanted to become citizens. As described in more detail in the statement of facts, federal officials both before and after the 1855 Saginaw Treaty described one of the goals of the treaty as the "gradual abolition of tribal character" and making the Saginaw Chippewa citizens as provided for

[60] 1855 Saginaw Treaty, art. 1.

in the 1850 Michigan Constitution. In petitions submitted by the Saginaw Chippewa, they expressly asked to become citizens not subject to the guardianship of the federal government. (Karamanski Report at 4.)

The issue of whether the Saginaw Chippewa wanted to become citizens of the state of Michigan not subject to federal guardianship is a genuine issue of material fact.

E. There is a genuine issue of material fact over whether the 1855 Saginaw Treaty reserved land in common for the Saginaw Chippewa.

State Defendants show that the 1855 Saginaw Treaty did not reserve land in common for the Saginaw Chippewa. The United States argues this is irrelevant. There is a genuine issue of material fact over whether the 1855 Saginaw Treaty reserved land in common for the Saginaw Chippewa.

Whether the 1855 Saginaw Treaty reserved land in common for the Saginaw Chippewa is a material issue. The United States Supreme Court has stated:

> Our inquiry is informed by the understanding that at the turn of this century, Congress did not view the distinction between acquiring Indian property and assuming jurisdiction over Indian territory as a critical one, in part because the notion that reservation status of Indian lands might not be coextensive with tribal ownership was unfamiliar. . . .[61]

In other words, before 1900, Congress thought that an Indian reservation was tribally owned. The fact that the Tribe did not own the block of land from which individual Saginaw Chippewa selected individually owned parcels of land makes it unlikely that the 1855 Saginaw Treaty created an American Indian tribal reservation.

[61] *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998) (citation omitted).

This is a genuine issue because a reasonable jury could find that the Saginaw Tribe did not own the land in common at Isabella.[62] The 1855 Ottawa and Chippewa Treaty, incorporated by reference into the 1855 Saginaw Treaty, is unequivocal about the status of the parcels in the block of land withdrawn from the public domain. When the Saginaw Chippewa made their selections, the land was held in trust for them individually by the United States until they were issued patents with restrictions on alienation. Unsold parcels within the block of land withdrawn from the public domain and not selected by the Saginaw Chippewa "remain the property of the United States."[63] Individual Saginaw Chippewa could purchase land from the unselected, unsold land as well.[64] It also provided that "all lands remaining unappropriated by or unsold to the Indians after the expiration of the last-mentioned term, may be sold or disposed of by the United States as in the case of all other public lands."[65]

The United States Supreme Court has recognized such "allotment" treaties in *The Kansas Indians*.[66] It stated:

> [The 1854 Treaty] did not contemplate that the Indians should enjoy the whole tract, as the quantity for each individual was limited to two hundred acres. The unselected lands were to be sold by the government.[67]

There is a genuine issue of material fact over whether the Tribe owned land in common.

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[62] Unlike treaties where a tribe retained aboriginal title to land reserved from a cession, the 1855 Saginaw Treaty did not reserve any land with aboriginal title because the Saginaw Chippewa were landless after the 1837 treaties. (Gulig Report at 28.) Some treaties create reservations on the public domain, just not this treaty.
[63] 1855 Ottawa and Chippewa Treaty, art. 1, 11 Stat. at 623.
[64] 1855 Ottawa and Chippewa Treaty, art. 1, 11 Stat. at 623.
[65] 1855 Ottawa and Chippewa Treaty, art. 1, 11 Stat. at 623.
[66] *The Kansas Indians*, 72 U.S. 737 (1866).
[67] *The Kansas Indians*, 72 U.S. at 753.

F. There is a genuine issue of material fact over whether Article 6 of the 1855 Saginaw Treaty dissolved the tribal organization of the Saginaw Chippewa.

Article 6 of the 1855 Saginaw Treaty dissolved the tribal organization of the Saginaw Chippewa. (Gulig Report at 50; Karamanski Report at 6.) The United States admits to a genuine issue of fact over whether Article 6 dissolved the tribal organization of the Saginaw Chippewa but argues that the issue is irrelevant to deciding its motion. (United States' Brief, 8, note 8.) The dissolution of the tribal organization of the Saginaw Chippewa is, however, relevant to deciding whether an American Indian tribal reservation existed at Isabella.

Article 6 of the 1855 Saginaw Treaty states:

> The tribal organization of said Indians, except so far as may be necessary for the purpose of carrying into effect the provisions of this agreement is hereby dissolved.[68]

If, as State defendants argue, Article 6 accomplishes what it says it will do,[69] then it becomes highly unlikely that the 1855 Saginaw Treaty established an American Indian tribal reservation at Isabella.

For example, In *Wyandotte Nation v. Unified Government of Wyandotte County*,[70] plaintiff argued that an 1855 treaty did not validly cede certain areas.[71] The *Wyandotte Nation* Court rejected this argument, noting, among other things, that "plaintiff's construction of the 1855 treaty would be nonsensical in the context of Article 1, which refers to and contemplates

[68] *1855 Saginaw Chippewa*, art. 6, 11 Stat. at 634.
[69] State defendants argue that the Saginaw Tribe was dissolved except for purposes of carrying out the 1855 Saginaw Chippewa exactly as stated by the United States Supreme Court. *See United States v. Holliday*, 70 U.S. 407, 419 (1865).
[70] *Wyandotte Nation v. Unified Government of Wyandotte County*, 222 F.R.D. 490.
[71] *Wyandotte Nation*, 222 F.R.D. at 496.

the total dissolution of the Wyandotte tribe."[72] Similarly, here it makes no sense for the United States to create an American Indian tribal reservation for a tribe that is being dissolved.

As the United States admits to a genuine issue of fact and the issue is material, it defeats a motion for summary judgment.

G. There is a genuine issue of material fact over whether the Saginaw Chippewa wanted their patents in fee simple.

By the late 1860s and early 1870s, the Saginaw Chippewa wanted patents for their lands in fee simple. (Gulig Report at 78-79, 82-83; Karamanski Report at 15-18, 24.) The United States either denies this or argues that it is not a material fact or both. There is a genuine issue of material fact over whether the Saginaw Chippewa wanted their patents in fee simple.

The issue of whether the Saginaw Chippewa wanted their patents in fee simple is material to the issue of whether the 1855 Saginaw Treaty created an American Indian tribal reservation. In *Shawnee Tribe v. United States*,[73] the general question was whether General Services Administration of the United States was required to transfer a surplus munitions plant to the Shawnee.[74] In order to resolve this question the *Shawnee Tribe* Court needed to resolve whether an 1854 treaty created a reservation. In ruling that the 1854 treaty did not create a reservation, the *Shawnee Tribe* Court stated:

> In addition, we are struck by the fact that, under Article 2, the Shawnee received only individual rights to select discrete, and potentially scattered, individual plots. Although scattered ownership itself certainly does not lead to a conclusion of termination, we are cognizant that a reservation is created—or for that matter retained—when 'from what has been done there results a certain defined tract appropriated for certain purposes.' There was no 'set apart' of a reservation—or territorial boundaries—in this Treaty.[75]

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[72] *Wyandotte Nation*, 222 F.R.D. at496.
[73] *Shawnee Tribe v. United States*, 423 F.3rd 1204 (10th Cir. 2005).
[74] *Shawnee Tribe*, 423 F.3d at 1210.
[75] *Shawnee Tribe*, 423 F.3d at 1225 (citations omitted).

Similarly, the Saginaw Chippewa wanting their patents in fee simple is contrary to them wanting to hold land in common and consistent with their desire to be citizens of Michigan. They did not want an American Indian tribal reservation.

A genuine issue of fact over whether the Saginaw Chippewa wanted their land in fee simple exists. The 1855 Saginaw Treaty provided for patents in fee simple after 10 years.[76] In 1869, the Saginaw Chippewa expressly petitioned the President for their patents in fee simple. (Gulig Report at 78-79); (Karamanski Report at 17-18.)

There is a genuine issue of material fact over whether the Saginaw Chippewa desired their land in fee simple.

H. There is a genuine issue of material fact over whether casual references to "reservation" in the 1864 Treaty indicate an American Indian tribal homeland existed.

The 1864 Treaty was a continuation of the 1855 Saginaw Treaty that casually referred to the "reservation" at Isabella several times. The United States argues that these references prove that an American Indian tribal homeland existed at Isabella. (United States' Brief, *passim*). There is a genuine issue of material fact over whether casual references to "reservation" in the 1864 Treaty indicate an American Indian tribal homeland.

The issue over whether casual references to "reservation" in the 1864 Treaty indicate an American Indian tribal homeland is material. It is what the plaintiffs seek to prove.

The factual issue is genuine. The 1864 Treaty has the same intent as the 1855 Saginaw Treaty to make the Saginaw Chippewa citizens of Michigan. (Gulig Report at 65-68.) The 1864 Treaty mentioned trust land only in connection with a manual labor school and did not create an American Indian tribal reservation of land held in trust for the Tribe. (Gulig Report at 70, 72.) The Saginaw Chippewa retained their right to get land in fee simple, although this was now tied

[76] 1855 Ottawa and Chippewa Treaty, art. 1, 11 Stat. at 623.

to a determination of competency instead of the passage of years. (Gulig Report at 69-70.) Article VIII, while containing an error, made clear that the Tribe would still be dissolved. (Gulig Report at 71-72.) The Saginaw Chippewa demanded to become land-owning citizens in 1869 and 1871 as well as to the dissolution of the Tribe. (Gulig Report, at 78-79, 83-84.)

In *Absentee Shawnee Tribe of Indians of Oklahoma v. Kansas*,[77] the Tenth Circuit interpreted an 1854 treaty with the Shawnee. Ruling

> all the land selected, as herein provided, west of said parallel line, and that set apart to the respective societies for schools, and to the churches before named, shall be considered as part of the two hundred thousand acres *reserved* by the Shawnee.[78]

Finding that the Shawnee "have some support for their position [that disputed land was owned by the Shawnee] in the literal language of the Treaty, the *Absentee Shawnee Tribe* Court rejected the Shawnee's argument that they owned the land because of its context and the historical record.[79]

CONCLUSION

The United States moved for partial summary judgment on the issue of whether the 1855 Saginaw Treaty and 1864 Treaty created a "reservation." The United States conflates, however, two meanings of the word "reservation," one of which is a "reservation" under 18 U.S.C. § 1151 and one which is not. One definition of "reservation" means an area of land withdrawn from the public domain for any use and one means an area of land withdrawn or set aside for use as an American Indian tribal homeland. The parties and the historical experts agree that the 1885 Saginaw Treaty and 1864 Treaty created a "reservation" in the first sense when they withdrew

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[77] *Absentee Shawnee Tribe v. Kansas*, 862 F.2d 1415 (10th Cir. 1988), *cert. den.*, 490 U.S. 1046 (1989).
[78] *Absentee Shawnee Tribe*, 862 F.2d at 1420 (emphasis in original), *quoting*, 1854 Treaty, art. 2, 10 Stat. 1053, 1054.
[79] *Absentee Shawnee*, 862 F.2d at 1420-1421.

blocks of land from which individual Saginaw Chippewa could select allotments, but disagree that it created an Indian reservation as that term was understood in the mid-nineteenth century, which was land set aside in trust for use by an American Indian tribe.

Respectfully submitted,

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SOM reply to US partial judgment.doc

PROOF OF SERVICE

On the date below, I electronically filed the following document with the Clerk of the Court, U.S. District Court, Eastern District, using the ECF system, which will send notification of such filing to all counsel of record.

State Defendants' Response to the United States' Motion for Partial Summary Judgment

Dated: April 2, 2010

/s/ Todd B. Adams
Todd B. Adams