UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BAY MILLS INDIAN COMMUNITY Plaintiff, v. GOVERNOR RICK SNYDER, in his official capacity, Defendant.	Case No. 1:11-cv-0729-PLM Hon. Paul L. Maloney

DECLARATION OF ROBERT N. CLINTON

Declaration of Prof. Robert N. Clinton

1. My name is Robert N. Clinton. I am the Foundation Professor of Law at the Sandra Day O'Connor College of Law at Arizona State University, an Affiliated Faculty member of the ASU American Indian Studies Program, and a Faculty Fellow in the Center for Law, Science, & Innovation.

2. I have been retained by Dorsey & Whitney LLP, as counsel for the Bay Mills Indian Community, to provide expert opinion testimony in this matter regarding the status of land acquired under the Michigan Indian Land Claims Settlement Act. A complete list of my publications in the last ten years is attached hereto as Exhibit A. I have not testified as an expert at trial or in a deposition in the last four years. I am being compensated for my work on this matter at the rate of $250 per hour.

3. I received a B.A. in political science from the University of Michigan in 1968 and J.D. from the University of Chicago Law School in 1971.

4. I joined the faculty of the University of Iowa College of Law in 1973, where I taught until 2000. While at the University of Iowa College of Law, I served as the Wiley B. Rutledge Professor of Law and as a founder and an Affiliated Faculty Member of the American Indian and Native Studies Program of the University of Iowa College of Liberal Arts.

5. I have visited as a scholar or teacher at the law schools of the University of Michigan, Arizona State University, Cornell University, University of San Diego and the Faculty of Law of Victoria University in Wellington, New Zealand.

6. I serve as Chief Justice of the Winnebago Supreme Court and the Hopi Appellate Court and as Justice for the Colorado River Indian Tribes Court of Appeals and the

Hualapai Tribal Court of Appeals and as a Judge *pro tem* for the San Manuel Band of Serrano Mission Indians. I also served for twenty years as Justice of the Cheyenne River Sioux Tribal Court of Appeals, served as a temporary judge or arbitrator for other tribes, and acted as an expert witness or consultant in Indian law cases.

7. I teach and write extensively on the subjects of federal Indian law, tribal law, Native American history, constitutional law, and federal courts.

8. I am the co-editor of, and contributor to, Cohen's Handbook of Federal Indian Law (1982 ed.), co-author of casebooks on Indian law and federal courts, multiple editions of American Indian Law: Native Nations and the Federal System, Colonial and American Indian Treaties, and over 25 major articles on federal Indian law, American constitutional law and history, and federal courts, including:

a. *Enactment of the Indian Gaming Regulatory Act of 1988: The Return of the Buffalo to Indian Country or Another Federal Usurpation of Tribal Sovereignty?*, 42 Arizona State Law Journal 17-97 (2010).

b. *The Curse of Relevance: An Essay on the Relationship of Historical Research to Federal Indian Litigation*, 28 Arizona Law Review 29-46 (1986).

c. *Reservation Specificity and Indian Adjudication: An Essay on the Importance of Limited Contextualism in Indian Law*, 8 Hamline Law Review 543-597 (1985).

d. *Judicial Enforcement of the Federal Restraints on Alienation of Indian Land: The Origins of the Eastern Land Claims*, 31 Maine Law Review 17-90 (1979) (co-authored with Margaret Tobey Hotopp).

9. For my analysis, I reviewed the following materials:

a. Michigan Indian Land Claims Settlement Act, Pub. L. 105-143 (hereafter referred to as "MILCSA");

b. Treaty with the Wyandot (Aug. 3, 1795), 7 Stat., 49;

c. Treaty with the Creeks (June 29, 1796), 7 Stat., 56;

d. Treaty with the Creeks (Aug. 7, 1790), 7 Stat., 35;

e. Treaty with the Winnebago, (Sept. 15, 1832), 7 Stat., 370;

f. Treaty with the Chippewa (Sept. 26, 1833), 7 Stat., 431;

g. Treaty with the Oneida (Feb. 3, 1838), 7 Stat., 566;

h. Treaty with the Menominee (May 12, 1854), 10 Stats, 1064

i. Treaty with the Choctaw, 7 Stat. 333;

j. Treaty with the Cherokee, 7 Stat. 478;

k. *Johnson v. M'Intosh*, 21 U.S. 543 (1823);

l. *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831);

m. *Worcester v. Georgia*, 31 U.S. 515 (1832);

n. *The New York Indians*, 72 U. S. 761 (1866);

o. *The Kansas Indians*, 72 U. S. 737 (1866); and,

p. U.S. Department of Interior Indian Lands Opinion (December 21, 2010).

10. Based on my review of the materials described above, as well as my knowledge and experience of American Indian history, law, and treaties, including developments in the legal treatment of Indian land holdings and the terms and descriptions for Indian landholdings, it is my opinion that the phrase "held as Indian lands are held," and variations on that phrase such as "to be holden by the same tenure as other Indian lands," Treaty with the Stockbridge Tribe (Nov. 24, 1848), 9 Stat., 955, or simply "the Indian lands," Treaty with the Wyandot (Aug. 3, 1795), 7

Stat., 49, constituted legal terms of art used to designate Indian land that was, or would be: 1) under the ownership and governmental authority of an Indian tribe; and, 2) held in restricted fee (i.e., fee simple subject to the restraint on alienation by the United States currently set forth in 25 U.S.C. § 177). The meaning applied both when lands were identified by specific legal descriptions (*e.g.*, Treaty with the Winnebago, (Sept. 15, 1832), 7 Stat., 370) and in referring generally to lands that a tribe may acquire in the future (*e.g.*, Treaty with the Creeks (June 29, 1796), 7 Stat., 56).

a. The phrase "Indian lands" indicated a status distinct from lands held by other groups or by individuals; the United States recognized that a tribe held not just a right to possession (subject, as explained below, to the right of the sovereign alone to acquire the land should the tribe choose to sell or exchange it, to the lands in question) but also governance rights over the land. This recognition follows from the unique history of the relationship between sovereign Indian tribes and European, and later American governments. The Indian tribes retained a quasi-sovereign status in their relations with the Europeans and Americans. A fundamental element of the Indian tribes' sovereign status is, and was, that they exercised governmental power over their lands to exclusion of state authority.

a.i. There is ample historical evidence of the United States' recognition of tribes as such. For example, the Supreme Court recognized that Indian tribes were "distinct communit[ies] occupying [their] own territory." *Worcester v. Georgia*, 31 U.S. 515, 557 (1832). The laws of the states had "no force" on lands held by the tribes. *Id.*

a.ii. Another example is the United States' recognition of Indian tribes' right to govern their land "withdrawn from the operation of state laws" is a function of their status as political entity subject only to "the government of the Union" and "from necessity there can be no divided authority." *The Kansas Indians*, 72 U. S. 737, 756 (1866).

b. The phrase "held as Indian lands are held" refers to land held in a legal status that today would be called a restricted fee status.

b.i. "Held as Indian lands are held" would not have been used to refer to land held in trust by the United States for an Indian tribe. The holding of tribal land in trust for the benefit of Indian tribes, as opposed to individual Indians, constitutes a relatively modern phenomenon, established by the 1934 Indian Reorganization Act— a hundred years after the meaning of "held as Indian lands are held" was established." Virtually none of the nineteenth Indian treaties employed the term trust to refer to tribal land holdings intended to be long-term, as opposed to short term set asides intended for sale to non-Indians. Rather, variants of the terminology "as Indian lands are held" far more commonly was invoked for the purposes described above.

b.ii. When the United States recognized particular lands as being held by Indians, whether by treaty or statute, the nature of the Indians' property right—from the perspective of U.S. law—transformed from aboriginal title, *i.e.*, a basic right of occupancy and subsistence, to something more— a recognized vested property right that today we

would call a fee simple title. Land recognized by the United States as Indian land in this way corresponds to a vested property right protected by the Fifth Amendment, a point confirmed by the United States Supreme Court. *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 277–278 (1955). In contrast, where land is held in aboriginal title, a tribe does not have a vested interest protected by the Fifth Amendment.

b.iii. In some cases, the United States specifically designated Indian lands as "fee simple." *E.g.*, Treaty with the Choctaw, 7 Stat. 333; Treaty with the Cherokee, 7 Stat. 478. These treaties were entered for the same purposes—that is to establish a territory for the tribe separate from the area in which it had held aboriginal title—and the lands granted were recognized to be on the same footing, as the treaties that use the phrase "held as Indian lands are held." *See* Indian Removal Act § 3 ("in the making of any such exchange or exchanges, it shall and may be lawful for the President solemnly to assure the tribe or nation with which the exchange is made, the United States will forever secure and guaranty to them, and their heirs or successors, the country so exchanged with them…").

b.iv. With respect to Indian tribes holding title directly, e.g., in fee simple, the United States has regulated the sale of Indian land by statute since 1790. The constitutional status of Indian tribes as dependent domestic nations has been understood since at least the

1830s to include an obligation of guardianship by the United States with respect to any commercials transactions between Indians and non-Indians. *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831). Moreover, "the Indian right of occupancy creates an indefeasible title to the reservations that may extend from generation to generation, and will cease only by the dissolution of the tribe, or their consent to sell to . . . [a] party that is authorized to deal with the tribe in respect to their property, and this with the consent of the government." *The New York Indians*, 72 U. S. 761, 771 (1866). See generally, Robert N. Clinton and Margaret Tobey Hotopp, *Judicial Enforcement of the Federal Restraints on Alienation of Indian Land: The Origins of the Eastern Land Claims*, 31 Maine Law Review 17 (1979).

b.v. The mechanism for the United States holding of tribal land (as opposed to tribal funds or individual allotments to Indians) in trust for a tribe—was not established until 1934 with the passage of the Indian Reorganization Act.

c. The usage of "held as Indian lands are held" described in ¶ 10.a-b, above, is consistent with judicial articulation of tribal land rights contemporaneous to the use of the phrase in treaties, as well as the interpretation by modern courts. E.g., *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831) (contemporaneous usage); *Oneida Tribe of Indians v. United States*, 165 Ct. Cl. 487, 490-491 (Ct. Cl. 1964) (modern interpretation).

d. The phrase "held as Indian lands are held," as used in MILCSA § 107, through usage in treaties, and in light of the political and legal status of Indian tribes as distinct political communities contemporaneous to such usage, was established as a term of art that Congress employed in MILCSA to describe land that the tribe held in restricted fee status that was under the governmental power of an Indian tribe, exclusive of state, but not federal authority; and that term was, and is, understood to indicate that the land in question is subject to a restraint on alienation by the United States established by 25 U.S.C. § 177 and subject to Indian governance, without any further actions by the Tribe or the United States. The fact that Congress understood and relied upon this distinction is further reinforced by the fact that the provisions for the land acquisition use of Self-Sufficiency Funds for the Sault Ste, Marie Tribe of Chippewa Indian in Section 108(f) of MILCSA expressly were required, unlike the provisions for Bay Mills, that any lands acquired with such funds be "held in trust by the Secretary for the benefit of the tribe."

Date: March 17, 2017

Robert N. Clinton

Prof. Robert N. Clinton