UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS, a federally recognized Indian tribe,

Plaintiff,

v.

RICK SNYDER, Governor of the State of Michigan,

Defendant.
_____/

Docket No: 15-850

HON. PAUL L. MALONEY

BRIEF IN SUPPORT OF INTERVENOR DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS PURSUANT TO RULE 12(c)

INTRODUCTION

This litigation is the plaintiff's attempt to remake and rewrite well over one hundred fifty years of established history – history that plaintiff's predecessors understood and confirmed. Plaintiff seeks the extraordinary remedy of having this Court declare that some 337 square miles of Michigan's northwestern Lower Peninsula constitute a "reservation" in spite of the fact that the claimed reservation ceased to exist well over a century ago. Plaintiff also asserts these claims without making an affirmative disclosure to the Court that plaintiff's predecessors previously litigated these claims and obtained a judgment against the United States and payment of over $70,000,000.00 as a result of ceding those lands in 1836.

The Court must reject the plaintiff's attempt to revive claims that, if they ever existed, were extinguished decades ago. The plaintiff's claims fail as a matter of law and must be dismissed, once and for all, with prejudice.

RULE 12(c) STANDARD

Courts review a motion brought under Rule 12(c) of the Federal Rules of Civil Procedure, with the same standard as for review of a Rule 12(b)(6) motion to dismiss. *Barany-Snyder v. Weiner*, 539 F.3d 327, 332 (6th Cir. 2008); *Hindel v. Husted*, 875 F.3d 344, 346 (6th Cir. 2017). All well-pled material allegations of the pleadings of the opposing party must be taken as true, and the motion may be granted only if the moving party is nevertheless clearly entitled to judgment as a matter of law. *JPMorgan Chase Bank, N.A. v. Winget*, 510 F.3d 577, 581–82 (6th Cir. 2007); *Hindel, supra* at 346. "To survive a Rule 12(c) motion, 'a complaint must contain direct or inferential allegations respecting all the material elements under some viable legal theory.' *Commercial Money Ctr., Inc. v. Ill. Union Ins. Co.*, 508 F.3d 327, 336 (6th Cir. 2007); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) ('[A] complaint must contain sufficient factual matter, accepted as true, to "'state a claim to relief that is plausible on its face.'" A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.' (citations omitted) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)))." *Hindel, supra* at 346 – 347.

In deciding a Rule 12 motion a court may consider exhibits attached to the Complaint, public records, items appearing in the record of the case, and exhibits attached to defendant's motion to dismiss, as long as they are referred to in the Complaint and are central to the claims contained in the Complaint, without converting the motion to one for summary judgment. *Kreipke v. Wayne State Univ.*, 807 F.3d 768, 774 (6th Cir. 2015); *Bassett v. Nat'l Collegiate Athletic Ass'n*, 528 F.3d 426, 430 (6th Cir. 2008). *Gavitt v. Born*, 835 F.3d

623, 640 (6th Cir. 2016). While defendants have referenced numerous exhibits in this motion, all of those exhibits are public records.

STATEMENT OF FACTS

While it is true that in considering whether to grant a defendant's motion to dismiss pursuant to Rule 12(c) the Court must accept as true all the allegations contained in the complaint and construe the complaint liberally in favor of the plaintiff, the Court need not accept as true legal conclusions or unwarranted factual inferences. *Kottmyer v. Maas*, 436 F.3d 684, 688 (6th Cir. 2006). "Mere labels and conclusions are not enough; the allegations must contain 'factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.' *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009)." *Engler v. Arnold*, 862 F.3d 571, 575 (6th Cir. 2017).

With that in mind, the following **facts** are alleged in the Complaint:

Plaintiff Little Traverse Bay Bands of Odawa Indians is a federally recognized Indian Tribe. The Tribe is the present-day successor of Odawa signatory bands to the 1855 Treaty. (Complaint, ¶ 7). Hundreds of years before the arrival of Europeans, the Odawa Indians migrated into the area now known as Little Traverse Bay, the Beaver, Garden and High Islands in the northwest corner of the Lower Peninsula of Michigan, and the north shore of Lake Michigan in the southeast portion of the Upper Peninsula. The Odawa Indians established villages in these locations. (Complaint, ¶ 15). The first recorded European contact with the Tribe occurred in 1615. Odawa Indians occupied the territory for the next 250 years. (Complaint, ¶ 16).

By the 1830s, the federal government's Indian policy focused on securing treaty cessions of land from Indians, removing Indians from these lands, and encouraging non-

Indian settlement of the lands. (Complaint, ¶ 17). Odawa leaders traveled to Washington DC that culminated in the 1836 treaty negotiations between these Odawa and Chippewa bands with the United States. (Complaint, ¶ 19). In negotiating the 1836 Treaty, certain Odawa and the Chippewa bands retained fourteen reservations. The bands also reserved hunting, fishing, and other usufructuary rights throughout the cession area. In exchange, United States negotiators secured an over-26,000,000-acre cession that included nearly 14,000,000 acres of land that would become northwestern Michigan. (Complaint, ¶ 20). Rather than ratify the Treaty as negotiated, the United States Senate modified the reservation clause, time-limiting it to only five years. (Complaint, ¶ 21). The Odawa and Chippewa accepted this amendment. (Complaint, ¶ 22). The Tribes were permitted to remain on the reservation lands until 1855. (Complaint, ¶ 24). A subsequent treaty was entered into in 1855 between the United States and the plaintiff's predecessors. (Complaint, ¶ 33). This Treaty included a provision for individual tribal members to make selections of parcels of property and receive allotments of the selected land. (Complaint, ¶ 37).

THE INDIAN CLAIMS COMMISSION ACT AND THE PROCEEDINGS BEFORE THE INDIAN CLAIMS COMMISSION.

A. The Indian Claims Commission Act.

Resolution of this motion requires an in-depth review of the proceedings before the Indian Claims Commission. A discussion of that body, its purpose and how it came into existence is therefore in order.

Before 1946, Native American tribes were unable to pursue claims against the federal government without express congressional authorization. *Oglala Sioux Tribe of Pine Ridge Indian Reservation v. U.S. Army Corps of Engineers*, 570 F.3d 327, 331 (D.C. Cir. 2009).

"From the publication of the so-called Merriam Report in 1928 until the Indian Claims Commission Act of 1946 was enacted, Congress was almost constantly engaged in considering various proposals designed to bring about a settlement of outstanding Indian claims on a fair and equitable basis and in as expeditious a manner as possible. It was generally agreed that settlement of Indian claims by means of suits under numerous special jurisdictional acts was both cumbersome and unsatisfactory. As pointed out by the Secretary of Interior in a letter introduced in the record of Senate Hearings on S. 2731 (June 1935, 74th Cong., 1st Sess.) to create an Indian Claims Commission, most jurisdictional acts were in fact inequitable, and recoveries by the Indians in the Court of Claims on legal and equitable claims under such acts were infrequent, with resulting justifiable dissatisfaction by the tribes and their later return to Congress for further redress. (Hearings p. 4.)" *Otoe & Missouria Tribe of Indians v. United States*, 131 F. Supp. 265, 272 (Ct. Cl. 1955).

In response, bills were introduced in both the House and the Senate to address the issue. In general the bills introduced in both houses were of two kinds. One type of bill extended the general jurisdiction of the Court of Claims to cover suits by Native Americans. Under those bills, only claims of a legal or equitable nature could be brought against the United States. The other type of bill provided for the settlement of legal and equitable claims and also for the settlement of "moral" claims that were not otherwise justiciable. *Id*. at 272 – 273.

"A study of the numerous bills relating to the proposed final settlement of Indian claims, the accompanying House and Senate hearings, the House and Senate Committee reports, and the debates on the floors of both Houses, reveals that in enacting the 1946

Indian Claims Commission Act, **Congress had certain well-defined purposes in mind**. **Congress wished to settle all meritorious claims of long standing of Indian tribes and bands** whether those claims were of a legal or equitable nature which would have been cognizable by a court of the United States had the United States been subject to suit and the Indians able to sue, or whether those claims were of a purely moral nature not cognizable in courts of the United States under any existing rules of law or equity." *Id*. at 274 – 275. (Emphasis added; footnotes omitted).

On August 13, 1946, the Indian Claims Commission Act ("ICCA"), 60 Stat. 1049, was enacted. "The 'chief purpose of the [Act was] to dispose of the Indian claims problem with finality.' H.R.Rep. No. 1466, 79th Cong., 1st Sess., 10 (1945)." *United States v. Dann*, 470 U.S. 39, 45, 105 S. Ct. 1058, 84 L. Ed. 2d 28 (1985). "The Act created the Indian Claims Commission to adjudicate all claims accruing before its effective date, August 13, 1946. Congress's intention was to 'draw [ ] in all claims of ancient wrongs, respecting Indians, and to have them adjudicated once and for all.' *Temoak Band of W. Shoshone Indians, Nev. v. United States,* 219 Ct. Cl. 346, 593 F.2d 994, 998 (1979); *see United States v. Dann,* 470 U.S. 39, 45–46, 105 S. Ct. 1058, 84 L.Ed.2d 28 (1985)." *Oglala Sioux Tribe, supra,* 570 F.3d at 331.

"Congress deliberately used broad terminology in the Act in order to permit tribes to bring all potential historical claims and to thereby prevent them from returning to Congress to lobby for further redress. *Otoe & Missouria Tribe,* 131 F.Supp. at 272; *see* Indian Claims Commission Act § 2; *Cohen's Handbook of Federal Indian Law* 445 (2005 ed.) (citing H.R.Rep. No. 79–1466, 79th Cong., 1st Sess. 10 (1946)). To balance this permissiveness and to ensure finality, the Act established a 5–year limitation on all claims existing before 1946;

any claim not presented within the 5–year period may not be submitted to any court or administrative agency. Indian Claims Commission Act § 12; *see Pueblo of Santo Domingo v. United States,* 16 Cl. Ct. 139, 142 (1988); *Minn. Chippewa Tribe v. United States (Minn. Chippewa Tribe),* 11 Cl. Ct. 534, 536 (1987)." *Oglala Sioux Tribe, supra,* 570 F.3d at 331.

Pursuant to the ICCA, Native American tribes or their representatives were authorized to file claims with the Indian Claims Commission (ICC) against the United States until August 13, 1951. 60 Stat. 1049, 1052 (1946). Section 12 of the ICCA provided that no claim existing before August 13, 1946, but not presented to the ICC by August 13, 1951, could thereafter be submitted to any court or administrative agency for consideration, nor could any such claim thereafter be entertained by the Congress. 60 Stat. 1049, 1052 (1946). In addition, the ICCA authorized the Court of Claims to adjudicate certified questions of law, as well as appeals of any final determinations, from the ICC. 60 Stat. 1049, 1054 (1946). *Round Valley Indian Tribes v. United States*, 97 Fed. Cl. 500, 505 (2011).

B. Proceedings Before the Indian Claims Commission.

On March 9, 1950, plaintiff's predecessor, Ottawa and Chippewa Indians of Michigan (See, Complaint, ¶¶ 1, 7, 19) filed a Petition with the Indian Claims Commission, Docket 58. (**Exhibit A**). The Petition asserted the Treaty dated March 28, 1836 (7 Stat. 491), ceded to the United States 13,734,000 acres of land in what is now the State of Michigan. The Petition specifically and affirmatively asserted the Ottawa and Chippewa Tribes had ceded to the United States all of Royce Area 205, including the land in which plaintiff Little Traverse Bay Band now claims a reservation:

> On the 27th day of May, 1836, there was concluded between the said Ottawa and Chippewa nations of Indians and the United States a treaty dated March 28, 1836 (7 Stat. 491, II Kappler 450), by the terms of which said Indians ceded to the United States a large tract of country, 13,734,000 acres as

> officially reported by the Commissioner of Indian Affairs in 1840 and by Henry R. Schoolcraft in 1851, situated in what is now the State of Michigan. (Ref. Ottawa and Chippewa Indians of Michigan v. United States, 42 Ct. Cls. 240; Royce map Mich. 205; II Schoolcraft 603).

(Petition, ¶ 2).

The Petition further alleged the Ottawa and Chippewa Indians had exclusive occupancy and Indian title "to the land ceded" at "the time of the cession of 1836." (Petition, ¶ 6). The Petition further affirmatively alleged: "The consideration promised for the 13,734,000 acres in 1836 was $2,309,451.00 – approximately 16.8 cents per acre. This consideration was grossly inadequate and unconscionable." (Petition, ¶ 11). The Petition sought compensation for the reasonable value of the land ceded in the 1836 Treaty, costs and attorney's fees.

A separate Petition (titled a Complaint) was filed with the Indian Claims Commission in 1949 by various Bands and members of the Chippewa Tribe, Docket 18-E. (**Exhibit B**). That Petition also affirmatively asserted the 1836 Treaty made between the United States and the Ottawa and Chippewa Indians ceded "approximately 14,000,000 acres of land in Michigan territory" to the United States. (Exhibit B, ¶¶ 58 – 59 and Map attached). The consideration for the cession of $2,300,000.00, was less than seventeen cents per acre. (Exhibit B, ¶ 60). Plaintiffs asserted the consideration paid by the United States for the cession "amounted to a small fraction of the value of the lands ceded and constituted and was an unconscionable consideration." (Exhibit B, ¶ 26). The Petition also sought compensation for the St. Martin Islands in Lake Superior, which were ceded in the Treaty of July 6, 1820. (Exhibit B ¶¶ 52 – 57). Plaintiffs sought the reasonable and fair value of the lands ceded, interest and attorneys' fees.

The ICC consolidated Dockets 18-E and 58 and issued its first set of Findings of Fact and an Opinion on May 20, 1959, in the "title phase" of the case, addressing the issues of standing of various named plaintiffs and the establishment of title to the land in question. 7 Ind. Cl. Comm. 576 (1959). (**Exhibit C**) The ICC's Findings of Fact included the following:

> 5. Area 205 was ceded to the United States by the Chippewa and Ottawa Nations of Indians on March 28, 1836. The treaty was proclaimed May 27, 1836. The ceded area was described as follows:
>
> > Beginning at the mouth of the Grand river of Lake Michigan on the north bank thereof, and following up the same to the line called for, in the first article of the treaty of Chicago of the 29th of August 1821, thence, in a direct line, to the head of Thunder-bay river, thence with the line established by the treaty of Saginaw of the 24th of September 1819, to the mouth of said river, thence northeast to the boundary line in Lake Huron between the United States and the British province of Upper Canada, thence northwestwardly, following the said line, as established by the commissioners acting under the treaty of Ghent, through the straits, and river St. Mary's, to a point in Lake Superior north of the mouth of Gitchy Seebing, or Chocolate river, thence south to the mouth of said river and up its channel to the source thereof, thence, in a direct line to the head of the Skonawba river of Green bay, thence down the south bank of said river to its mouth, thence in a direct line, through the ship channel into Green bay, to the outer part thereof, thence south to a point in Lake Michigan west of the north cape, or entrance of Grand river, and thence east to the place of beginning, at the cape aforesaid, comprehending all th elands and islands, within these limits, nor hereinafter reserved.
>
> (a) The following reservations appear in Articles Second and Third:
>
> > Article Second. From the cession aforesaid the tribes reserve for their own use, to be held in common the following tracts for the term of five years from the date of the ratification of this treaty, and no longer; unless the United States shall grant them permission to remain on said lands for a longer period, namely: One tract of fifty thousand acres to be located on Little Traverse bay; one tract of twenty thousand acres to be located on the north shore of Grand Traverse Bay, one tract of seventy thousand acres to be located on, or, north of the Pieire

> Marquetta river, one tract of one thousand acres to be located by Chingassanoo, -- or the Big Sail, on the Cheboigan. One tract of one thousand acres, to be located by Mujeekewis, on Thunder-bay river.
>
> Article Third. There shall also be reserved for the use of the Chippewas living north of the straits of Michilimackinac, the following tracts for the term of five years from the date of ratification of this treaty, and no longer, unless the United States shall grant them permission to remain on said lands for a longer period, that is to say: Two tracts of three miles square each, on the north shores of the said straits, between Point-au-Barbe and Mille Coquin river, including the fishing grounds in front of such reservations, to be located by a council of the chiefs. The Beaver islands of Lake Michigan for the use of the Beaver-island Indians. Round island, opposite Michilimackinac, as a place of encampment for the Indians, to be under the charge of the Indian department. The islands of the Chenos, with a part of the adjacent north coast of Lake Huron, corresponding in length, one mile in depth. Sugar island, with its islets, in the river St. Mary's. Six hundred and forty acres, at the mission of the Little Rapids. A tract commencing at the mouth of the Pississowining river, south of Point Iroquois, thence running up said stream to its forks, thence westward, in a direct line to the Red water lakes, thence across the portage to the Tacquimenon river, and down the same to its mouth, including the small islands and fishing grounds, in front of this reservation. Six hundred and forty acres, on Grand island, and two thousand acres, on the main land south of it. Two sections, on the northern extremity of Green bay, to be located by a council of the chiefs. All the locations, left indefinite by this, and the preceding articles, shall be made by the proper chiefs, under the direction of the President. It is understood that the reservation for a place of fishing and encampment, made under the treaty of St. Mary's of 16th of June 1820, remains unaffected by this treaty.

6. As originally executed the treaty cession of 1836 provided that the above reservations should be permanent. Prior to its approval, it was amended by the Senate of the United States, and, among other things, the reservations provided therein were limited in duration as above recited, and a provision was included in Article Fourth providing that he defendant should pay to the Chippewa and Ottawa Indians:

> * * the sum of two hundred thousand dollars, in consideration of changing the permanent reservations in article two and

> three to reservations for five years only, to be paid whenever their reservations shall be surrendered, and until that time the interest on said two hundred thousand dollars shall be annually paid to the Indians.

Thereafter Henry R. Schoolcraft, as Treaty Commissioner was instructed to and did submit the Senate amendments to the Chippewa and Ottawa Indians at a council called at Michilimackinac on Mackinac Island, and between July 12, 1836, and July 22, 1836, as chiefs and delegates arrived, said amended treaty was approved by the execution of an instrument entitled "Articles of Assent," the first paragraph of which provided:

> Article 1. The Chippewa and Ottawa tribes, confiding in the disposition of the government of the United States to permit them to reside upon their reservations, after the period hereinafter mentioned, until the lands shall be required for actual survey and settlement, (as the white population advances from the South to the North); and considering that no part or provision of the treaty of the twenty eight of March, which is not specified in the Senate's resolution is, ina any manner, affected or altered thereby, hereby cede to the United States, from and after the expiration of Five Years from the date of said resolution, the several reservations made in the second and third articles of the said treaty, and agree to receive the sum of Two hundred thousand dollars offered by the Senate of the United States in consideration of the same. Provided, that the interest on said sum be annually paid to them, agreeably to the tenor of the said resolution of the twentieth of May eighteen hundred and thirty six. It is understood by said tribes, that no part of the sum of two hundred thousand dollars, is to be paid to them, until the reservations are actually surrendered, and that this sum, when so paid and also the interest to be annually paid thereon, in the interim, shall be divided among the local bands agreeably to the ratio fixed for the payment of the annuities in the fourth article of said treaty.
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> * * *

8. Area 205 as above described contained an overall acreage of 13,706,957 acres. It included the reservation above described and the five separate acreages previously acquired by the United States, each containing the following acreages:

Acres	Description (Boyce Areas)
401,971	Reservations under 1836 treaty

9,770	Area 21, located about the Post of Michilimackinac, ceded August 3, 1795.
7,695	Area 22, on the mainland north of Michilimackinac, ceded August 3, 1795.
21,352	Area 23, the Island of Bois Blanc, ceded August 3, 1795, 7 Stat. 49.
10,240	Area 112 at the Falls of St. Mary's river, ceded June 16, 1820, 7 Stat. 206.
1,395	Area 113, St. Martin Islands, ceded July 6, 1820, 7 Stat. 207.
50,452	
452, 423	= Total area in Royce 205 excluded from cession of 1836 according to treaty description.

Id. at 582 – 586.

The ICC also ruled the plaintiffs failed to establish original Indian title to the St. Martin Islands in Lake Huron or to sub-areas U and S of Royce Area 205. (¶¶ 24, 25, 7 Ind. Cl. Comm. at 603).

The next phase of the case was the "valuation phase." In an Opinion and Additional Findings of Fact dated December 23, 1968, the ICC ruled the land ceded in the 1836 Treaty had a fair market value of ninety cents an acre. 20 Ind. Cl. Comm. 137, 140 (1968) (**Exhibit D**). The ICC made the following finding:

> In Finding 26 herein the Commission concluded that petitioners' 'predecessors in interest had original title on March 28, 1836, to 12,446,905 acres' within Royce Area 205 'and that from the cession of said acreage by the treaty of that date, 7 Stat. 491, the petitioner Indians reserved to themselves a total of 401,971 acres.' This leaves a net acreage in Royce Area 205 of 12,044,934 acres to be valued in this phase of the litigation.

Id. at 142. Based on its findings of fact and the record as a whole "the Commission conclude[d] as a matter of law that the subject tract, as a unit, had a fair market value of $10,800,000 as of March 28, 1836." *Id*. at 176. The ICC then directed the case would proceed to a determination of the consideration received by petitioners for the cession, whether the consideration was unconscionable and, if so, what offsets the United States was entitled to under the ICCA *Id* at 140.

The United States subsequently filed a Motion for Preliminary Adjudication that 121,450.75 acres of land allotted to individual members of the Tribes should be deemed to be consideration for the land cession in the 1836 Treaty. The ICC explained the basis for the United States' argument in its January 14, 1970 Opinion and Findings of Fact, 22 Ind. Cl. Comm. 372, 373 (1970) (**Exhibit E**):

> On July 31, 1855, the United States entered into a treaty with 'the Ottawa and Chippewa Indians of Michigan, parties to the treaty of March 28, 1836' (Preamble to the treaty, 11 Stat. 621). Under the terms of Article I of the 1855 Treaty, certain lands within Royce Area 205 were withdrawn from sale for the benefit of the Indians. Out of those lands the Indians were to select allotments. Article I also provided that:
>
> > . . . the benefits of this article will be extended only to those Indians who are at this time actual residents of the State of Michigan and entitled to participate in the annuities provided by the Treaty of March 28, 1836.
>
> Consequently, in the early 1870's 1,863 Ottawa and Chippewa Indians were allotted the small tracts of land which, in the aggregate, made up the 121,450.75 acres which the defendant now contends should be regarded as consideration.

Id. at 374-375. In rejecting the United States' argument that it was entitled to a set-off for the value of the individual allotments the ICC reasoned:

> The effect of the provisions of Article I of the 1855 Treaty was to return to the individual Ottawas and Chippewas a portion of the lands which they had

> collectively ceded in 1836, but on which they had continued to reside, the 1836 Treaty having specifically accorded the Indians the right of hunting and 'other usual privileges of occupancy' on the ceded lands until they should be required for settlement.
>
> Thus by granting lands within Royce Area 205 to the Ottawas and Chippewas on an individual basis, the United States achieved a viable alternative to the unworkable plan to relocate these Indians to 'the country between Lake Superior and the Mississippi,' as expressed in the 1836 Treaty. By allowing these Indians continuous possession of the lands which they were authorized to occupy until the specific allotments were selected, the defendant saved itself the effort and expense of relocation as well as the cost of the lands which, in the 1836 Treaty, it had obligated itself to furnish.
>
> We do not agree, however, with the defendant's contention that the allotted lands were part of the consideration for the 1836 cession and should be valued as of the dates of patent. . . .
>
> . . . The decision does not establish that the allotments to individual Chippewas and Ottawas were a collective substitution of consideration, or that the parties so intended them to comprise consideration for the 1836 Treaty.

Id. at 375-377. The ICC, however, then went on to rule the United States was not obligated to pay the plaintiffs for the value of the land, since individual tribal members became owners of the land through the individual allotments:

> However, it is apparent that the individual allotments were of the Indians' own land, and the defendant should not be obligated to pay **additional** compensation for them.
>
> Since the 121,450.75 acres are to be excluded from the lands for which the plaintiffs may recover **additional** compensation, the Commission will deduct $109,305.67 (90c per acre) for the entire tract taken as a whole, as previously determined by this Commission.

Id. at 377. (Emphasis added). The ICC then determined the net acreage for which the United States had to pay additional compensation was 11,923,483.25 which had a fair market value of $10,690,694.33. *Id*. at 380.

Plaintiffs filed a motion for rehearing related to the issue of original Indian title in St. Martin Islands and sub-areas "U" and "S" of Area 205. The Commission granted the motion and held "that the Chippewa and Ottawa Indians did have recognized title to Royce Area 113 (St. Martin Islands) and all of Royce Area 205, including sub-areas 'U' and 'S'." 24 Ind. Cl. Comm. 50, 52 (1970). (**Exhibit F**). Therefore, the ICC ruled that the 1,395 acres of St. Martins Islands, the 956,160 acres of sub-area U and the 253,440 acres of sub-area S must be included in the land for which additional compensation must be paid. *Id*. at 53.

The ICC subsequently determined the 1,209,600 acres of sub-areas U and S had a value of ninety cents an acre and a total value of $1,099,640. 26 Ind. Cl. Comm. 538, 539 (1971). (**Exhibit G**). The Commission also determined the St. Martin Islands land had a value of eighty cents an acre. *Id*. at 540.

The Commission then revisited its earlier ruling that the 401,971 acres of reservation land should be excluded from the land for which the plaintiffs could seek additional compensation:

> The last tracts to be evaluated are the reservations which were provided for in the amendments to the 'Second' and 'Third' articles of the 1836 Treaty and which comprised 401,971 acres. Originally, the parties intended that these lands would be set up as permanent reservations for the exclusive use of the Ottawa and Chippewa Indians. Prior to approval of the 1836 Treaty, these articles were amended by the Senate whereby the duration of the reservations was limited to a period of five years from the ratification of the treaty or to any longer period which might be permitted by the United States. As consideration for these cessions (changing permanent reservations to reservations of limited duration), the 'Fourth' article of the 1836 Treaty stipulated that the Indians would receive the principal sum of $200,000 to be held in trust by the United States, and the defendant would pay the interest thereon until the reservations were actually surrendered. At that time the principal amount would be paid over to the Indians.
>
> Interest was paid annually to the Chippewa and Ottawa Tribes from 1836 through 1856, a period of twenty years. In all, plaintiffs received $240,000 in interest payments ($12,000, 6% annually, for 20 years).

> The 401,971 acres of reservation lands should be valued as of the effective date of the 1836 Treaty, and since they were contiguous to plaintiffs' lands within Royce Area 205, we see no reason why they should not be valued at $0.90 per acre, or a total of $361,773.90.

Id. at 540-541. The I.C.C. then listed "the overall evaluation of the subject lands:"

1.	11,923,483.25 acres (22 Ind. Cl. Comm. 272 (1970))	=	$10,690,694.33
2.	401,971 acres (reservation lands)	=	361,773.90
3.	1,209,600 acres (sub-areas 'U' and 'S'	=	1,088,640.00
4.	1,395 acres (Royce Area 113)	=	1,116.00
	13,536,449.25 acres		$12,142,224.23 value

Id. at 541. The Commission then addressed whether the consideration paid by the United States for the cession was unconscionable.

> The Treaty of March 28, 1836, provided for total payments of $1,653,334.46, plus 6% interest on $200,000, by defendant. The total payments made by the defendant to the plaintiffs amounted to $1,821,628.06. The Commission's evaluation of the 1836 cession ($12,141,108.23) is over seven times the amount that was due under the 1836 Treaty. Therefore, we find that the consideration provided for the plaintiffs in the 1836 Treaty was unconscionable.

Id. at 542. The ICC next reviewed various expenditures that were disputed by the parties. The first issue the Commission addressed was the $240,000.00 in interest payments the Tribes received from 1836 through 1856.

> The first item involves the $240,000 in interest payments the plaintiffs received pursuant to the 'Fourth' article of the 1836 Treaty. As we noted earlier, the Indians had agreed under the 1836 Treaty to change their permanent reservations to ones of limited duration, and the United States agreed to pay the Indians $200,000 ' . . . whenever their reservations shall be surrendered, and until that time the interest on said two hundred thousand

> dollars shall be annually paid to said Indians.' The plaintiffs contend that the interest paid annually by the defendant under this provision cannot be deemed to be consideration since they were the beneficial owners of the principal sum of $200,000 from which the interest was theoretically derived. Therefore, the plaintiffs argue that they are entitled to the interest free of any contention that the amounts so paid are any part of the consideration for the treaty. The defendant would have us credit the United States with both the principal and interest, or $440,000, as consideration for the treaty.
>
> Plaintiff's theory of the case would result in a double recovery. It disregards the fact that during all the time the interest was being paid the plaintiffs had the possession and use of the reservations. **The plaintiffs suffered no detriment until they lost possession of these reserves, and at that time obtained possession of the principal sum of $200,000 and had already received $240,000 in interest**. Plaintiffs' contention on this point must be overruled.

Id. at 542 – 543. (Emphasis added; footnotes omitted). The Commission determined the plaintiffs were entitled to a judgment of $10,319,996.71 less any allowable gratuitous offsets. *Id*. at 546. The Commission allowed gratuitous offsets in the amount of $19,749.68. *Id*. at 548, and issued a final award in favor of plaintiffs in the amount of $10,300,247.03. *Id*. at 349. The Commission subsequently issued an amended judgment in the amount of $10,109,003.55 to account for $191,243.48 paid to the Grand River Ottawa Indians. 27 Ind. Cl. Comm. 94, 97 (1972). (**Exhibit H**).

On August 13, 1951 the Ottawa-Chippewa Tribe of Michigan filed a separate Petition with the Commission, which was assigned Docket No. 364, seeking an accounting under the Treaty of 1855, 11 Stat. 621. See, 30 Ind. Cl. Comm. 288 (1973). (**Exhibit I**). The Commission noted "[t]he petition in Docket 364 includes four claims arising in whole or in part under the treaty of July 31, 1855, 11 Stat. 621. Such claims are not duplicated in any other case decided by or pending before the Commission." *Id*. at 292. The ICC determined that the real parties in interest in Docket 364 were identical to those in Dockets 18-E and 58. *Id*. at 288 – 289.

The ICC described the historical background of the 1855 Treaty in its Opinion of January 27, 1975, 35 Ind. Cl. Comm. 385 (1975) (**Exhibit J**):

> The plaintiffs ceded their last remaining tribal land to the defendant by a treaty dated March 28, 1836, 7 Stat. 491. Originally, the treaty provided for permanent reservations in Michigan; but by Senate amendment, the reservations were each limited to a 5-year term, after which the Indians were to be removed west.
>
> The 1855 Treaty marked the Government's abandonment of the removal scheme. Article I partially restored the land ceded in 1836, **this time in the form of individual allotments**. Lake Superior Bands of Chippewa Indians v. United States, Dockets 18-E and 58, 22 Ind. Cl. Comm. 372, 375 (1970).

Id. at 386. (Emphasis added). The United States moved to dismiss the first claim in the Petition which was "for the value of the land which members of the tribe were entitled to have allotted to them under the 1855 Treaty, but which was allegedly not so allotted." *Id*. at 387. The Commission agreed and dismissed the claim:

> **Assuming, without deciding, that the tribe had a claim for the value of such of its ceded lands as ought to have been allotted but were not, that claim has already been paid**. In Lake Superior Bands, supra, the Commission excluded only the 121,450.75 acres which were actually allotted under the 1855 Treaty from the area ceded in 1836 for which the plaintiff was awarded additional compensation. We asked no questions about whether some of the rest of the land should have been allotted; we awarded compensation for it all. The plaintiff's first claim here, if valid, merely overlaps part of the claim that was satisfied in Lake Superior Bands.
>
> Final judgment in the prior litigation was entered on December 29, 1971. Bay Mills Indian Community v. United States, Dockets 18-E and 58, 26 Ind. Cl. Comm. 562, amended 27 Ind. Cl. Comm. 94 (1972). It follows that the plaintiff's first claim in the instant docket is now barred.

Id. at 387 – 388. (Emphasis added). The ICC entered a Final Award in the amount of $25,233.11 in Docket No. 364. 40 Ind. Cl. Comm. 6, 88 – 89 (1977). (**Exhibit K**).

Based on the final judgments rendered by the ICC the United States was obligated to appropriate funds to pay those judgments. *See*, 25 U.S.C. § 70u ("When the report of the

Commission determining any claimant to be entitled to recover has been filed with Congress, such report shall have the effect of a final judgment of the Court of Claims, and there is authorized to be appropriated such sums as are necessary to pay the final determination of the Commission."); 31 U.S.C. § 724a ("There are appropriated, out of any money in the Treasury not otherwise appropriated, such sums as may be necessary for the payment, not otherwise provided for, as certified by the Comptroller General, of final judgments, awards, and compromise settlements, which are payable in accordance with the terms of ... awards rendered by the Indian Claims Commission ...."); *United States v. Dann*, 470 U.S. 39, 41 – 43, 105 S. Ct. 1058, 84 L. Ed. 2d 28 (1985).

Although the funds to satisfy the ten million dollar judgment in Docket 18-E/58 were appropriated on October 31, 1972 and held in trust, no agreement was reached on distribution of the judgment funds until 1997. H.R. 1604, a bill to provide for the division, use and distribution of the judgment funds was introduced by Representative Kildee on May 14, 1997. (**Exhibit L**). H.R. 1604 was enacted as Public Law 105-143, 111 Stat. 2652, in December 1997. (**Exhibit M**). By the time the distribution statute was enacted the fund had grown in value to approximately $70,000,000.00. (**Exhibit N**). Under the provisions of the statute the Little Traverse Bay Band was to receive 17.3 percent of the judgment fund. (Exhibit M, Sec. 104(a)(5)). Plaintiff received $14,946,239.18 from the judgment fund and established a Tribal Plan and Trust Fund Board to oversee use of the judgment funds. (**Exhibit O, Waganakising Odawa, Tribal Code of Law, Title VII, §§ 7.101, 7.203(C)**).

ARGUMENT

I. THE PLAINTIFF'S CLAIMS ARE BARRED BY THE DOCTRINE OF JUDICIAL ESTOPPEL, AS PLAINTIFF AFFIRMATIVELY ASSERTED IN PRIOR PROCEEDINGS THAT IT CEDED TO THE UNITED STATES ALL OF THE LAND IN WHICH IT NOW CLAIMS A RESERVATION AND OBTAINED A JUDGMENT AGAINST THE UNITED STATES BY PREVAILING ON THAT CLAIM.

"[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." *Davis v. Wakelee,* 156 U.S. 680, 689, 15 S.Ct. 555, 39 L.Ed. 578 (1895). The doctrine, known as judicial estoppel, protects the integrity of the judicial process by preventing a party from taking a position inconsistent with a position unequivocally and successfully asserted by the same party in another proceeding. See *Reynolds v. Commissioner of Internal Revenue,* 861 F.2d 469, 472 (6th Cir.1988); *Edwards v. Aetna Life Insurance Co.,* 690 F.2d 595, 598 (6th Cir.1982). The purpose of the doctrine is to protect the courts "from the perversion of judicial machinery." *Edwards,* 690 F.2d at 599.

In *New Hampshire v. Maine*, 532 U.S. 742, 750–751, 121 S. Ct. 1808, 1815, 149 L. Ed. 2d 968 (2001), the Supreme Court identified several factors that typically inform the decision whether to apply the doctrine in a particular case:

> "First, a party's later position must be 'clearly inconsistent' with its earlier position. *United States v. Hook,* 195 F.3d 299, 306 (C.A.7 1999); *In re Coastal Plains, Inc.,* 179 F.3d 197, 206 (C.A.5 1999); *Hossaini v. Western Mo. Medical Center,* 140 F.3d 1140, 1143 (C.A.8 1998); *Maharaj v. Bankamerica Corp.,* 128 F.3d 94, 98 (C.A.2 1997). Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding

> would create 'the perception that either the first or the second court was misled,' *Edwards,* 690 F.2d, at 599. Absent success in a prior proceeding, a party's later inconsistent position introduces no 'risk of inconsistent court determinations,' *United States v. C.I.T. Constr. Inc.,* 944 F.2d 253, 259 (C.A.5 1991), and thus poses little threat to judicial integrity. See *Hook,* 195 F.3d, at 306; *Maharaj,* 128 F.3d, at 98; *Konstantinidis,* 626 F.2d, at 939. A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

Additionally, judicial estoppel typically applies to factual assertions rather than legal contentions. *Longaberger Co. v. Kolt*, 586 F.3d 459, 471 (6th Cir. 2009), *abrogated on other grounds by Montanile v. Bd. of Trustees of Nat. Elevator Indus. Health Benefit Plan*, 136 S. Ct. 651, 655, 193 L. Ed. 2d 556 (2016).

In this case all of these criteria have been met and judicial estoppel must apply to bar plaintiff's claims. The plaintiff alleges that, as the present-day successor of Odawa signatory bands to the 1855 Treaty (Complaint, ¶ 7), it has a reservation "which stretches 32 miles north-to-south from the northern tip of Michigan's lower peninsula along the eastern shore of Little Traverse Bay." (Complaint, ¶ 1). The plaintiff seeks a declaration from the Court confirming the existence and boundaries of the claimed reservation. (Complaint, ¶ 5). However, plaintiff's predecessors affirmatively asserted in prior proceedings before the Indian Claims Commission that all of the land in which plaintiff now claims a reservation was ceded to the United States. As a result of that prior proceeding the Little Traverse Bay Band was awarded nearly fifteen million dollars in compensation for that land cession out of a total judgment of nearly seventy million dollars. The plaintiff is estopped from now changing the position it successfully asserted before the ICC and claiming in this Court that the cession was never made.

As detailed above, the plaintiff's predecessors filed a claim in the ICC affirmatively asserting they had title to all of the land ceded in the Treaty of Washington of 1836 and that the payment received from the United States was unconscionably low. As detailed in the ICC's Findings of Fact, Opinions and Judgments, a voluminous factual record was developed in the ICC proceedings. Based on that factual record the ICC ultimately determined the plaintiff's predecessors had title to all of the land ceded in 1836 (Royce Area 205); that only temporary reservations were established and the land making up those temporary reservations was eventually surrendered by the Tribes; that individual allotments were made to members of the Tribes, who took individual title to those allotments; and that the compensation paid by the United States for the ceded land was unconscionably low. As a result of finding in favor of the plaintiff's predecessors the ICC awarded a judgment of over ten million dollars, which grew to over seventy million dollars before it was distributed. The Little Traverse Bay Band – plaintiff in this litigation – received a distribution of nearly fifteen million dollars from the judgment funds.

The plaintiff's position in this litigation is "clearly inconsistent" with the position taken by its predecessors in the ICC litigation. In the ICC the plaintiff's predecessors affirmatively alleged – and proved – they had ceded title in the entirety of Royce Area 205. There was no suggestion that permanent reservations were retained by the Tribes. If such reservations had been retained plaintiff would not have been entitled to receive compensation for them; those lands would not have been part of any cession. Plaintiff's predecessors did not claim permanent reservations existed in the ICC proceedings and the United States did not claim a set-off for any reservations. The Tribes demanded compensation for all of Royce Area 205 and they prevailed on those claims. In this

litigation, however, plaintiff takes a directly contrary position. It now asserts large permanent reservations were created by the 1855 or 1836 treaties. This position is "clearly inconsistent" with the position that all of Royce Area 205 was ceded to the United States in 1836. The first criterion is satisfied.

The second criterion is whether the plaintiff was successful in persuading the earlier tribunal to accept its position. Again, that criterion has been met. The plaintiff's predecessors were successful in prosecuting their claims in the ICC and obtained a multi-million dollar judgment as a result.

The third consideration identified by the Supreme Court is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped. The defendants submit this criterion is also easily satisfied. The plaintiff, after receiving nearly $15,000,000.00 in judgment funds from the ICC proceedings, is now seeking to have this Court ignore the prior proceedings, ignore the history that plaintiff's predecessors relied on to obtain that judgment, and declare a reservation exists – and has existed for at least the last 160 years. The plaintiff "would derive an unfair advantage" if not estopped. Although the plaintiff does not seek monetary damages in this case, it has already obtained a significant monetary award for taking the contrary position. In a classic example of "having one's cake and eating it too," *Reynolds v. Comm'r,* 861 F.2d 469, 472 (6th Cir.1988), plaintiff now wants to reverse course and have this Court declare that some 337 square miles of that cession was never actually ceded but was instead made into a permanent reservation. This is the quintessential example of a party deriving an unfair advantage by asserting inconsistent positions.

Although all of the criteria identified by the Supreme Court have been met, "[a]dditional considerations may inform the doctrine's application in specific factual contexts." *New Hampshire v. Maine, supra*, 532 U.S. at 751. The defendants submit there are additional considerations that demand application of the doctrine in this case. It should not be lost on the Court that the plaintiff has not named the United States as a party in this litigation. There are doubtless any number of reasons for this; the most obvious is that any such claims would be barred as a matter of law by the ICC proceedings. Section 22 of the Indian Claims Commission Act, 25 U.S.C. § 70u, stated that (1) payment of any claim, after a determination under the Act, shall be a full discharge of the United States of all claims and demands touching any of the matters involved in the controversy, and (2) a final determination against a claimant made and reported in accordance with the Act **shall forever bar any further claim or demand against the United States arising out of the matter involved in the controversy**. See, *W. Shoshone Legal Def. & Ed. Ass'n v. United States*, 531 F.2d 495, 504 (Ct. Cl. 1976). Knowing the ICC judgment foreclosed any possibility of bringing this demand for the declaration of a reservation against the United States, the plaintiff instead targeted the State of Michigan as a defendant. However, at no point in these proceedings has the plaintiff ever affirmatively disclosed the prior ICC proceedings brought by plaintiff's predecessors; the fact that over $70,000,000.00 was paid by the United States for the cession as a result of those proceedings; or the fact that the plaintiff itself received nearly $15,000,000.00 of those judgment funds. Instead, plaintiff has litigated this case as though those irrefutable facts do not exist. The plaintiff's failure to make a full disclosure of this history should be another factor weighing in favor of applying judicial estoppel.

Additionally, the plaintiff has never asserted the claim that it has permanent reservations in previous litigation. For example, in *Little Traverse Bay Bands of Odawa Indians, et. al. v. Great Spring Waters of America, Inc., et. al.*, 1:02-cv-127, the plaintiff sought a declaratory judgment and injunctive relief related to the commercial removal of over 200,000,000 gallons of water per year in Mecosta County. In its Complaint plaintiff affirmatively alleged that it was the successor to the Odawa and Chippewa Indians who ceded the land described in Article First of the 1836 Treaty and that land "is now included within the State of Michigan." (**Exhibit P**, Complaint ¶ 6). Nowhere in the Complaint did plaintiff allege that it had permanent reservations in any portion of the 1836 cession.

Moreover, plaintiff cannot claim the 1855 Treaty independently created reservations notwithstanding the cessions through the 1836 Treaty. Plaintiff's predecessors brought a claim in the ICC arising out of the 1855 Treaty in addition to the claim arising under the 1836 Treaty. At no time was a claim advanced that permanent reservations were created by the 1855 Treaty. In fact the parties and the ICC all recognized the 1855 Treaty created a program of individual allotments to Tribe members – in contradistinction to reservations. Had plaintiff's predecessors believed permanent reservations were created the ICC proceedings would have had to account for that assertion. That assertion was never made and the plaintiff in this case is judicially estopped from now arguing permanent reservations were created.

This case presents a textbook example of when the doctrine of judicial estoppel should apply. Plaintiff must not be permitted to ignore prior history and its own litigation history in order to pursue claims that directly conflict with its earlier positions. The plaintiff's claims must be dismissed.

II. THE PLAINTIFF'S CLAIMS ARE BARRED BY THE DOCTRINE OF ISSUE PRECLUSION, AS PLAINTIFF'S PREDECESSORS IN INTEREST LITIGATED THE ISSUE OF TITLE TO THE LAND IN QUESTION AND OBTAINED A FINAL JUDGMENT BASED ON RESOLUTION OF THAT ISSUE.

Issue preclusion or collateral estoppel prevents parties from "raising an argument that they already fully litigated in an earlier legal proceeding." *Anderson v. City of Blue Ash*, 798 F.3d 338, 350 (6th Cir. 2015). The purpose of issue preclusion "is to promote the finality of judgments and thereby increase certainty, discourage multiple litigation, and conserve judicial resources." *Westwood Chem. Co., Inc. v. Kulick,* 656 F.2d 1224, 1227 (6th Cir. 1981).

Four requirements must be met before issue preclusion applies: (1) the precise issue must have been raised and actually litigated in the prior proceedings; (2) the determination of the issue must have been necessary to the outcome of the prior proceedings; (3) the prior proceedings must have resulted in a final judgment on the merits*;* and (4) the party against whom estoppel is sought must have had a full and fair opportunity to litigate the issue in the prior proceeding. *Georgia-Pac. Consumer Prod. LP v. Four-U-Packaging, Inc.*, 701 F.3d 1093, 1098 (6th Cir. 2012). Since issue preclusion is being asserted defensively, there is no need for the parties to be identical in the two proceedings. "The fact that two distinct defendants were sued in *Myers Supply* and this case has no significant bearing on whether issue preclusion applies. Because the defendant in this case is the party invoking issue preclusion, defensive collateral estoppel, rather than offensive collateral estoppel, applies. Mutuality between the parties is not required in defensive collateral estoppel cases so long as 'the plaintiff has had a full and fair opportunity to litigate the contested issue previously.' *McAdoo v. Dallas Corp.,* 932 F.2d 522, 523 (6th

Cir.1991)." *Georgia-Pac. Consumer Prod. LP v. Four-U-Packaging, Inc.*, 701 F.3d 1093, 1098–1099 (6th Cir. 2012).

All of the requirements for issue preclusion have been met in this case. First, the issue of title to the land was at the heart of the ICC proceedings. The plaintiff's predecessors proved they had title to all of Royce Area 205 and that they ceded all of that land to the United States in 1836. Second, a determination of that issue was absolutely necessary to the outcome of the ICC proceedings. The plaintiff's predecessors could not have obtained judgment against the United States unless they proved they had title to the land and passed title to the United States in 1836. Third, the prior proceedings did result in a final judgment of over $10,000,000.00 which had grown to over $70,000,000.00 by the time it was distributed; plaintiff itself received nearly $15,000,000.00 of the judgment funds. Finally, the plaintiff's predecessors had a full and fair opportunity to litigate the issue of title to the land. As previously discussed, plaintiffs in the ICC proceedings could not have obtained a judgment against the United States unless they successfully litigated the issue of title to the land. All of the elements of issue preclusion have been met. The plaintiff's claims must be dismissed.[1]

III. THE PLAINTIFF'S CLAIMS ARE BARRED BY THE INDIAN CLAIMS COMMISSION ACT.

Although a good deal of the history of the Indian Claims Commission Act is discussed above (*supra*, beginning at page 4), some additional history is necessary at this point. Until 1946, Indian tribes could not prosecute claims against the United States unless

[1] The doctrines of judicial estoppel and issue preclusion – or collateral estoppel – are similar but not interchangeable. The primary distinction between judicial estoppel and issue preclusion is that the judicial estoppel focuses upon the conduct of the party against whom it is asserted while the issue preclusion doctrine merely depends on the existence of a prior adjudication. Additionally, the doctrine of judicial estoppel is designed to protect the courts while issue preclusion is designed to protect the parties.

they obtained a specific enabling act from Congress. Although the Court of Claims was created to hear claims against the United States, Congress excluded from that court's jurisdiction Indian claims based on treaties. Act of March 3, 1863, ch. 92, § 9, 12 Stat. 765, 767. Sovereign immunity barred litigation of non-treaty claims. Tribes repeatedly petitioned Congress for special jurisdictional acts authorizing the Court of Claims to hear their claims against the United States but they were generally unsuccessful. *Navajo Tribe of Indians v. State of New Mexico*, 809 F.2d 1455, 1460 (10th Cir. 1987).

The Meriam Report, an independent study conducted by the Institute for Government Research criticized the hit and miss manner of resolving Indian claims against the Government. The Meriam Report recommended the establishment of an independent, fact-finding commission to facilitate the judicial solution of outstanding Indian claims against the United States. After studying various proposals, Congress ultimately enacted the Indian Claims Commission Act in 1946, creating a forum in which all tribal claims against the United States that accrued before August 13, 1946 could be litigated. *Id.* Congress limited the period for filing tribal claims with the Indian Claims Commission to five years. Any claim that accrued before August 13, 1946, and which was not filed with the Commission by August 13, 1951, could not "thereafter be submitted to any court or administrative agency for consideration," nor could such a claim "thereafter be entertained by the Congress." ICCA § 12, 25 U.S.C. § 70k (1976). *Navajo Tribe of Indians, supra*, 809 F.2d at 1460–1461.

The history of the *Navajo Tribe* case began with the Tribe filing a claim with the ICC seeking compensation for the cession of its lands to the United States under the Treaty of June 1, 1868, 15 Stat. 667. The Tribe contended that it held aboriginal title to

approximately forty million acres of land at the time of the Treaty and that the United States had paid an unconscionably low amount for the land. The ICC determined that the Tribe did in fact hold aboriginal title to most of the forty million acres claimed, that this land had been ceded to the United States under the 1868 Treaty, that the United States had paid unconscionably low consideration for the land and that the Tribe was entitled to additional compensation. *Navajo Tribe of Indians v. United States,* 23 Ind. Cl. Comm. 244, 254–255 (1970). Final judgment awarding the Tribe $14.8 million for the value of the land was entered on September 18, 1981. *Navajo Tribe, supra,* 809 F.2d at 1461–1462.

The Navajo Tribe then brought an action in federal district court on October 6, 1982 seeking primarily a declaratory judgment that the Tribe had equitable title to the unallotted lands that were added to the Navajo Reservation by two Executive Orders and that the United States breached its fiduciary duty to the Tribe by restoring those lands to the public domain in two subsequent Executive Orders. The gist of the Tribe's complaint was that the Executive Orders were null and void because all Navajos were not first granted an allotment. The complaint named as defendants the United States in its capacity as "guardian and trustee of the Navajo Indians," the State of New Mexico, and various private and corporate landowners who claimed title to the lands by virtue of patents issued by the United States. *Id*. at 1462.

The District Court granted the defendants' Rule 12 motions to dismiss, finding the claims accrued prior to 1946 and were barred by the ICC proceedings. *Id*. On appeal the Tribe argued that title to the land was never extinguished. The Tribe asserted that, because the ICC was only authorized to award money damages for the extinguishment of title to Indian lands, its suit, which sought to establish the Tribe's existing title to land, could not

have been entertained by the ICC *Id*. at 1463. In rejecting this argument the Tenth Circuit first stated: "The Tribe's assertion that the Indian Claims Commission was only empowered to hear controversies involving a 'taking' of land, where Indian title was concededly extinguished, entails far too restrictive an interpretation of the word 'claim' under the ICCA. The statute's purpose, explicit provisions, and legislative history belie such a narrow construction. The 'chief purpose of the [ICCA was] to dispose of the Indian Claims problem with finality.' *United States v. Dann,* 470 U.S. 39, 45, 105 S.Ct. 1058, 1062, 84 L.Ed.2d 28 (1985) (quoting H.R.Rep. No. 1466, 79th Cong., 1st Sess. 10 (1945))." *Navajo Tribe, supra,* 809 F.2d at 1464.

The Tenth Circuit then explained why the claim asserted by the Navajo Tribe was foreclosed by the ICC proceedings:

> Consistent with the views expressed by the House Committee on Indian Affairs, the ICCA authorized the Commission to hear claims arising under five specific categories:
>
> > The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska: (1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President; (2) all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit; (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity; (4) claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; and (5) claims based upon fair and honorable

> dealings that are not recognized by any existing rule of law or equity.

ICCA § 2, 25 U.S.C. § 70a (1976).

The language is sweeping, including even claims "based upon fair and honorable dealings" which did not otherwise constitute recognized actions at law or equity. As the legislative history indicates, Congress did not enumerate the cognizable claims under the new Act to narrowly circumscribe the Commission's jurisdiction. Rather, Congress desired to finally provide a forum for the resolution of all possible accrued claims.

> Congress wished to settle all meritorious claims of long standing of Indian Tribes and bands whether those claims were of a legal or equitable nature which would have been cognizable by a court of the United States had the United States been subject to suit and the Indians able to sue, or whether those claims were of a purely moral nature *not* cognizable in courts of the United States under any existing rules of law or equity.

Otoe & Missouria Tribe of Indians v. United States, 131 Ct.Cl. 593, 131 F.Supp. 265, 275 (1955) (emphasis in original). Both commentators and Congress recognized that many Indian claims were going unheard because of the prior practice necessitating passage of individual jurisdictional acts for each suit. The ICCA was a remedial, reform statute to address that injustice. **In drafting the expansive language in section 2, Congress wanted to avoid just what the Tribe maintains here—that "it had a meritorious claim which the Claims Commission was not authorized to consider**." 92 Cong.Rec. 5312 (1946).

We do not dispute that a frequent claim brought under the ICCA involved a taking of a land interest for less than adequate compensation. This tendency, however, in no way means that it was the sole land-interest claim within the Commission's jurisdiction. The classes of cognizable cases delineated in the Act were intended to mirror those "which have heretofore received congressional consideration in the form of special jurisdictional acts." H.R.Rep. No. 1466, 79th Cong., 2d Sess. 1356 (1945). Congress determined that the ICCA should supplant the prior practice of enacting special jurisdictional legislation. Thus, the character of cases brought under such legislation, indicative of the type of case envisioned to be brought before the new Commission so that individual jurisdictional acts would no longer be necessary, is very telling as to the dimensions of the Commission's ability to hear a particular controversy.

> In *Yankton Sioux Tribe of Indians v. United States,* 272 U.S. 351, 47 S.Ct. 142, 71 L.Ed. 294 (1926), the Tribe sought clarification of its asserted title to lands—not compensation for a taking of lands, Indian title to which had been concededly extinguished. Congress obliged by providing jurisdiction in the Court of Claims "to hear, and report a finding of fact, as between the United States and the Yankton tribe of Indians of South Dakota as to the interest, title, ownership and right of possession of said tribe" to a certain tract of land. *Id.* at 352, 47 S.Ct. at 142. The act clearly granted jurisdiction to litigate just what the Navajo Tribe would like to litigate in this case—the validity of Indian title to land.

Navajo Tribe, supra, 809 F.2d at 1465–1466. (Emphasis added).

The Tenth Circuit then held that the limitation on remedies available in the ICC did not affect that body's jurisdiction over the types of claims it could hear:

> [The Navajo Tribe] asserts that not only must the underlying legal or equitable right, duty, or obligation sued upon be within the Commission's statutory purview, but also the remedy sought or preferred must be within the Commission's power to award—else jurisdiction does not lie. We disagree. **It is well within Congress' power to provide a forum in which all Indian claims could be heard but to restrict the remedy available for such claims.** As we interpret section 2 of the ICCA, the underlying substantive claim—not the character of relief requested by the Tribe—must determine the Commission's jurisdiction. If the character of the relief sought were determinative, the ICCA's express policy of finality could be undermined by any Indian tribe that, having failed to pursue its remedy under the ICCA, now prefers the return of its lands to money damages. As the Supreme Court noted in *Block v. North Dakota,* 461 U.S. 273, 285, 103 S.Ct. 1811, 1818, 75 L.Ed.2d 840 (1983), "**It would require the suspension of disbelief to ascribe to Congress the design to allow its careful and thorough remedial scheme to be circumvented by artful pleading**."

Navajo Tribe, supra, 809 F.2d at 1467–1468 (Emphasis added; footnote omitted).

The Ninth Circuit also directly addressed this issue in *Western Shoshone Nat. Council v. Molini*, 951 F.2d 200, 202 (9th Cir. 1991). In 1951, the Temoak Band of Indians filed suit under the ICCA on behalf of the Western Shoshone Tribe, stating a claim based on extinguishment of tribal rights to lands in Nevada and other states. *Shoshone Nation or Tribe of Indians v. United States,* 11 Ind.Cl.Comm. 387, 419 (1962). The ICC concluded that

the Shoshone title had been extinguished, "by gradual encroachment by whites, settlers and others, and the acquisition, disposition or taking of their lands by the United States...." *Id.* at 416. The Commission later valued the land taken and ordered the United States to pay $26 million to the Shoshone in compensation for "full title extinguishment." *Temoak Band of Western Shoshone Indians v. United States,* 593 F.2d 994, 999, 219 Ct.Cl. 346, 356 (*Temoak Band*), *cert. denied,* 444 U.S. 973, 100 S.Ct. 469, 62 L.Ed.2d 389 (1979). *Western Shoshone Nat. Council supra*, 951 F.2d at 201.

In 1986, the Shoshone brought an action against the State of Nevada, arguing that Nevada's wildlife regulations interfered with Shoshone aboriginal and treaty-reserved rights to hunt and fish. In defense, Nevada relied on the *Shoshone Nation* litigation, and argued that the Shoshone no longer held any title to the land in question. The district court agreed with Nevada's position and entered summary judgment in its favor. *Id*.

The Shoshone appealed and argued that the *Shoshone Nation* litigation in the ICC only involved an adjudication of rights between the United States and the Shoshone Indians, and that the ICC proceedings did not bar their action against the State of Nevada. In support of that argument the Shoshone pointed out that the statutory bar of 25 U.S.C. § 70u only applies to actions against the United States. They therefore argued that although they had been paid $26 million for loss of title, they were nonetheless entitled to relitigate the issue of title against the State of Nevada. *Id*. at 202. The Ninth Circuit disagreed:

> The Shoshone's argument has already been rejected in this circuit. In *United States v. Dann,* 873 F.2d 1189 (9th Cir.1989) (*Dann*), *cert. denied,* 493 U.S. 890, 110 S.Ct. 234, 107 L.Ed.2d 185 (1989), two Shoshone Indians asserted tribal title as a defense to a trespass claim. In rejecting this defense, we stated that 'the [Commission proceeding and subsequent] payment for the taking of a [sic] aboriginal title establishes that the title has been extinguished.' *Id.* at 1194; *see also id.* at 1199 ('the payment of the claims award establishes conclusively that a taking occurred'). We did not suggest that the

> Commission's determination of title applied only in actions against the United States. *See id.*

The Ninth Circuit concluded: "We hold that the award in *Shoshone Nation* constituted a general determination of title which bars the Shoshone from asserting title against the State of Nevada." *Id*.

The enactment of the ICCA and with it the creation of the Indian Claims Commission provided plaintiff relief which resulted in a seventy million dollar judgment for the cession of the land now at issue. Even though the plaintiff's claims are not brought against the United States, the ICCA nevertheless bars this action. Congress sought to deal with the issue of tribal land claims "with finality." The relief plaintiff seeks in this case – a declaration of a reservation – is a claim that could have been advanced in the ICC proceedings. Regardless of whether it **was** asserted in the ICC proceedings, the ICCA bars the claim at this juncture.

RELIEF REQUESTED

The defendants respectfully request the Court grant their Motion for Judgment on the Pleadings and issue an order dismissing the plaintiff's Complaint with prejudice.

Respectfully submitted,

Dated: August 6, 2018

By: /s/ David K. Otis

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