UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN – SOUTHERN DIVISION

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

Plaintiff,

v.

Court File No.15-cv-850
Hon. Paul L. Maloney

RICK SNYDER, Governor of the State of Michigan, *et al.*,

Defendant.

Tribe's Response to Intervenor Defendants' Motion for Judgment on the Pleadings Pursuant to Rule 12(c)

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TABLE OF CONTENTS

Table of Authorities

Cases

Statutes

Rules

Other Authorities

> "[R]eservation boundary cases do not run afoul of the Indian Claims Commission Act because the courts were being called upon to interpret federal legislation and executive orders, not to set these sources aside or to treat them as void on the basis of centuries-old flaws in the ratification process."
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> *Oglala Sioux Tribe of Pine Ridge Indian Reservation v. U.S. Army Corps of Eng'rs*, 570 F.3d 327, 333 (D.C. Cir. 2009).

Intervenor-Defendants the City of Petoskey, City of Harbor Springs, County of Emmet, and County of Charlevoix (the "Cities and Counties") argue that the Tribe seeks to unwind the 1836 Treaty cession. It does not. They suppose that they Tribe should have brought this 1855 Treaty Reservation claim to the Indian Claims Commission. It could not. They posit that payment for an 1836 Treaty cession *sub silentio* extinguished the Tribe's 1855 Treaty rights. It did not. From top to bottom, the underlying Rule 12(c) motion for judgment on the pleadings is wrong on the facts of this case, wrong on the history, and wrong on the law. Because the single jurisdictional claim the Tribe's Complaint raises was not and could not have been decided by the Indian Claims Commission and is entirely consistent with the title issues that were litigated, none of the estoppel theories that the Cities and Counties rely on bar this suit.

Rule 12(c) Standard and Conversion to Rule 56

In reviewing this motion under Federal Rule of Civil Procedure 12(c), the Court must accept all allegations in the Tribe's complaint as true, view its complaint in the light most favorable to the Tribe, and draw all reasonable inferences in the Tribe's favor. *Gavitt v. Born*, 835 F.3d 623, 639-40 (6th Cir. 2016). Viewed in this light, the Tribe's "complaint must contain either direct or inferential allegations respecting all the material elements under some viable legal theory." *Barany-Snyder v. Weiner*, 539 F.3d 327, 332 (6th Cir. 2008). Courts may

"consider material outside the pleadings" but then must treat the underlying motion as one "for summary judgment under Rule 56 and all parties must be given a reasonable opportunity to present all material pertinent to the motion." *Gavitt v. Born*, 835 F.3d 623, 640 (6th Cir. 2016); *see* Fed. R. Civ. P. 12(d). Under Rule 56, "the burden on the moving party may be discharged by 'showing'–that is, pointing out to the district court–that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Like a Rule 12(c) motion, under Rule 56 "[t]he Court must view the facts and all of the inferences drawn therefrom in the light most favorable to the nonmoving party." *Max Arnold & Sons, LLC v. W.L. Hailey & Co.*, 452 F.3d 494, 499 (6th Cir. 2006). Thus, the Cities and Counties "must point out specifically why the [Tribe] fails to present a genuine issue of material fact as to the nonmoving party's case." *Id.* at 505.

On this motion, it is appropriate to consider matters outside the pleadings—and outside the extensive Indian Claims Commission record. Record evidence places the Tribe's claims under the Indian Claims Commission Act in the proper historical context. And lay testimony illuminates that although the Cities and Counties seek to merge the concepts of title and jurisdiction as applied to the Tribe, they themselves assert governmental authority over every parcel within their territorial jurisdictions—even after they sell that property.

Converting the Cities and Counties' motion to one for Rule 56 partial summary judgment on what they believe to be a properly pled estoppel defense would also resolve a procedural irregularity embedded in the original motion. Although styled as a Rule 12(c) motion for judgment on the pleadings, the Cities and Counties' Answer does not raise any of the affirmative defenses they rely on to ask this Court to dismiss the Tribe's claim. *Compare* Am. Ans., PageID.2770-2771 *with* Fed. R. Civ. P. 8(c)(1) (requiring a party to "affirmatively state" certain

affirmative defenses, including "estoppel," "res judicata" and "statute of limitations") *and* Fed. R. Civ. P. 12(b) ("Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required."). If the Cities and Counties' Answer or Amended Answer had put the Tribe on notice concerning any of these affirmative defenses, the Tribe would have moved to strike them. But because a motion to strike under Rule 12(f) must be filed within 21 days of the responsive pleading, that remedy is no longer available to the Tribe. Instead, it is proper for this Court to convert the Cities and Counties' motion into a Rule 56 motion for summary judgment so that it can consider all the evidence needed to contextualize the motion and grant the Tribe the remedy of entering judgment against these un-plead estoppel affirmative defenses. *See, e.g.*, 5C Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1369 (3d ed.) ("Federal Rule 12(c) should be read in conjunction with several other federal rules authorizing pretrial motions, especially the various Rule 12(b) motions to dismiss, the Rule 12(f) motion to strike, and the Rule 56 motion for summary judgment.").

Factual Background

If the court considers the Cities and Counties' motion under Federal Rule of Civil Procedure 12(c), these are the factual allegations that this Court must take as true:

- "The Tribe has continuously asserted its right to occupy and exercised its sovereign governmental authority within the Reservation." PageID.2, at ¶ 2.
- "The United States government acknowledges the continued existence of the Reservation. But the State of Michigan does not recognize or respect the Reservation boundaries." PageID.2, at ¶ 4.
- "In negotiating the 1836 Treaty, certain Odawa and Chippewa bands retained fourteen reservations, including a 50,000-acre reservation on Little Traverse Bay, and a reservation consisting of the Beaver Islands. The bands also reserved hunting, fishing, and other usufructory rights throughout the cession area. In exchange, U.S. negotiators secured an over-26,000,000-acre cession that included nearly 14,000,000 acres of land that would become northwestern Michigan." PageID.5, at ¶ 20.

- "In the negotiations that resulted in the 1855 Treaty of Detroit, the United States intended to secure permanent communities and homes for the bands and to insulate their communities from non-Indian settlers . . . ." PageID.6, at ¶ 28.

- "The Odawa and Chippewa also intended to reserve lands for their bands and to maintain their political, cultural and economic integrity." PageID.6, at ¶ 29.

- "The 1855 Treaty effectuated the parties' intentions by securing for the Tribe a permanent nearly-216,000 acre reservation." PageID.7, at ¶ 31.

- "The 1855 Treaty sets forth the reservations by surveyed townships." PageID.7, at ¶ 32.

- Two executive orders—one in anticipation of the 1855 Treaty and one following treaty negotiations—withdrew these townships from sale for the bands' use. PageID.6, at ¶ 27, PageID.8, at ¶ 38.

- "The 1855 Treaty included an allotment scheme," PageID.8, at ¶ 37, and Congress passed several Acts to facilitate land sales implementing these treaty terms, PageID.9, at ¶¶ 42-43, but did not diminish or disestablish the 1855 Treaty Reservation's jurisdictional boundary. PageID.9, at ¶ 46.

- "In the decades following ratification of the 1855 Treaty, federal government agents continued to acknowledge the existence of the Little Traverse Reservation." PageID.9, at ¶ 47.

- "[T]he State has been inconsistent in its treatment of the Reservation, and in fact has expressly refused to recognize the Reservation in a number of ways that threaten the Tribe's autonomy and sovereignty, and that violate the 1855 Treaty." PageID.13, at ¶ 51.

- "The State's inconsistent treatment of the Reservation injures the Tribe's ability to fully assert its jurisdiction and sovereignty[.]" PageID.15, at ¶ 52.

These pleadings are a concise statement of several centuries of history. The Tribe will present a complete historical record at trial but included a brief snapshot of historical materials in its Complaint, referencing records that are publicly available at the National Archives and Records Administration, so are "matters of public record" that can be considered under Rule 12(c). *Barany-Snyder v. Weiner*, 539 F.3d 327, 332 (6th Cir. 2008). The Tribe attaches copies of these documents and their transcriptions as exhibits for the Court's convenience.[1] Whether under

[1] The Tribe has previously produced to all parties in discovery those documents that bear an LT bates stamp.

Rule 12(c) or Rule 56, the Court should consider these documents as it reviews the facts that the Tribe has pled and that it will prove.

For example, the Complaint references a May 14, 1855 Letter from the Secretary of the Interior to the General Land Office Commissioner that describes President Pierce's approval to withdraw "certain lands in Michigan for Indian purposes," including the lands eventually set apart for the 1855 Treaty Reservation. PageID.6 at n.8, Ex. A. The August 9, 1855 Executive Order that followed ordered "withdrawn from sale" lands described by the Secretary of the Interior as "in the State of Michigan, in order that selections may be made therefrom for the Ottawas and Chippewas of Michigan, under a treaty concluded on 31st July, 1855." PageID.8 ¶ 39 at n.11, Ex. B. In the years that followed, United States officials consistently recognized the 1855 Treaty reservations. PageID.10, ¶ 47(a) at n.15, Ex. C (describing instructions from the Surveyor General that "it is very necessary to have the survey of the Reservations made without delay"); PageID.10, ¶ 47(b) at n.16, Exs. D and E (correspondence between the Michigan Indian Agent and Acting Commissioner of Indian Affairs discussing the need for "re-surveying in part of reservations provided for the Ottawa and Chippewa of this Agency under the treaty of the 31st of July 1855"); PageID.10, ¶ 47(c) at n.17, Ex. F (asking the Acting Commissioner of Indian Affairs to pay the "Accounts for surveying and locating lands for the Ottawas & Chippewas of Michn on Reservations set apart for them by the treaty of July 31st, 1855"). In fact, in 1869 the Indian Agent wrote to the Commissioner of Indian Affairs proposing "enlarging the Little Traverse Reservation[.]" PageID.11, ¶ 47(d) at n.18, Ex. G.

Outside of the pleadings, the evidence relevant to the Cities and Counties' motion—evidence that this Court must take as true—is this: An 1855 treaty was the last that the Tribe's predecessors entered with the United States, but it was not the first. Different treaties, like

different contracts, do different things. Treaties in 1820 and 1836 ceded territory. *See Treaty with the Ottawas and Chippewas*, 7 Stat. 207 (1820) ("1820 Treaty"); *Treaty with the Ottawas, Etc.*, 7 Stat. 491–97 (1836) ("1836 Treaty"). The 1855 Treaty did not. *Treaty with the Ottawa and Chippewa*, 11 Stat. 621-629 (1855) ("1855 Treaty"). In the late 1800s, Charles C. Royce compiled a list of tribal land cessions nationwide and corresponding maps as part of a Smithsonian Institution report.[2] In federal parlance, the 1820 Treaty cession of the St. Martins Islands became known as Royce Area 113; the 1836 Treaty cession, shown on the Michigan 1 Royce Map in yellow-orange, was Royce Area 205. The Library of Congress maintains the Royce Maps, including Michigan 1, online. Royce Map Michigan 1, Ex. H, *available at* https://www.loc.gov/resource/ g3701em.gct00002/?sp=29 (last visited October 18, 2018).

When Congress created the Indian Claims Commission ("Commission" or "ICC") in the 1940s to hear claims against the United States, Tribal predecessors alleged that the United States had acquired the 1820 and 1836 Treaty cessions for "grossly inadequate and unconscionable" consideration and asked that the "treaties be revised" to grant fair market value for the ceded territory. Pet., ICC Dkt. No. 58, PageID.5116-5117, at ¶¶ 11, 13; Compl., ICC Dkt. No. 18-E, PageID.5131. The Commission consolidated Dockets 18E and 58, noting that "each state two causes of action against the United States, one arising out of the cession on July 6, 1820 . . . and the other arising out of the cession on March 28, 1836 . . . . The ceded areas are identified as Areas 113 and 205, respectively[.]" 7 Ind. Cl. Comm. 576, 576 (May 20, 1959), PageID.5135. Exhibit I summarizes the consolidated Docket 18E and 58 proceedings that followed.

[2] These lists are compiled and available online. *See Indian Land Cessions 1784-1894*, Nat'l Park Serv., U.S. Dep't of Interior, https://www.nps.gov/nagpra/onlinedb/land_cessions/index.htm (last visited Oct. 18, 2018).

Docket 364 arose later and sought an accounting of amounts due under the 1855 Treaty. But of the five claims Docket 364 lodged, only the first even tangentially concerned land—it sought the value of unmade allotments. 35 Ind. Cl. Comm. 385, 387 (Jan. 27, 1975), PageID.5262. The other four claims sought an accounting of amounts improperly expended (or not expended at all), a trust accounting of deposited funds, a claim for annuity payments, and an attorney-fee claim of a lawyer's estate. *Id.* at 388-95, PageID.5163-5270. The Michigan Indian Land Claims Settlement Act ("MILCSA") directed payment for Dockets 18-E, 58, and 364 for the Tribe.[3] 11 Stat. 2653, § 102(a)(1) (1997), PageID.5381. The Tribe's own Judgment Fund Distribution plan similarly concerns payment for claims under Dockets 18-E, 58, and 364. Waganakising Odawa Tribal Code of Law § 7.101 (2018), PageID.5399.

Neither MILCSA nor the Tribe's Judgment Fund Distribution addressed payment for the 1855 Treaty Reservations because Tribal predecessors never lodged any claim concerning the 1855 Treaty Reservation. They raised no 1855 Treaty Reservation because there was no need to revise or account for a treaty promise that was not broken. Despite periodic bureaucratic misfeasance and malfeasance, Congress never altered the United States' 1855 Treaty Reservation promise. *See* Pub. L. No. 103-324, 108 Stat. 2156, 2158 (1994) ("All rights and privileges of the Bands, and their members thereof, which may have been abrogated or diminished before the date of the enactment of this Act are hereby reaffirmed."). And only Congress had that power. *Nebraska v. Parker*, 136 S. Ct. 1072, 1078-79 (2016).

[3] The Act also directed payment to the Sault Ste. Marie Band of Chippewa Indians from a separate Docket 18-R, claim not made by Tribal predecessors.

Argument

The Cities and Counties do not follow the standard Rule 12(c) argument that the Tribe has not pled a material element of its claim. Indeed, they cannot make this argument. The Complaint alleges that all parties to the 1855 Treaty intended to create permanent reservations for the treating bands, that the 1855 Treaty memorialized these intentions, that the United States set apart that that land for Tribal predecessors, and that the Tribe's 1855 Treaty Reservation continues today undiminished. Compl., PageID.6-9, at ¶¶ 27-29, 31, 38, 42-43, 46. These allegations state a claim for reservation-boundary recognition. *See, e.g.*, *Minnesota v. Hitchcock*, 185 U.S. 373, 390 (1902) ("[I]n order to create a reservation . . . . [i]t is enough that from what has been done there results a certain defined tract appropriated to certain purposes."); *Shoshone-Bannock Tribes v. Reno*, 56 F.3d 1476, 1479 (D.C. Cir. 1995) ("The United States creates reservations by withdrawing land from the public domain and reserving the land for a particular purposes, such as an Indian reservation or a national forest or a national park or monument."). Taking as true the Tribe's allegations, the Complaint easily passes the Rule 12(c) test because it alleges each material element of a viable legal theory. *Barany-Snyder*, 539 F.3d at 332. Similarly, under a Rule 56 standard, even taking *only* the historical record incorporated into the Complaint as true, the Cities and Counties cannot demonstrate an "absence of evidence" to support the Tribe's 1855 Treaty Reservation claim. *C.f. Max Arnold & Sons, LLC*, 452 F.3d at 499 (quoting *Celotex Corp.*, 477 U.S. at 325).

Instead, the Cities and Counties use Rule 12(c) as a crowbar to pry estoppel, res judicata, and statute-of-limitations defenses from their affirmative defense that the "Complaint fails to state a claim upon which relief can be granted." Mot., PageID.4721. Viewed with a full

understanding of the historical record and Indian Claims Commission Act, and a clear eye to the Tribe's Complaint, none of these estoppel theories block this case.

I. The Cities and Counties still misapprehend the nature of the Tribe's suit.

The underlying motion presumes that the Tribe's claim to its Reservation necessarily seeks to "undo" a nearly 200-year-old cession because a tribe cannot both cede ownership of an area *and* retain jurisdiction over that same area. The Cities and Counties cite no law for this proposition. Indeed, there is none.

A. The Tribe's Complaint concerns jurisdiction, not title.

Although the Tribe has taken pains to explain this distinction before—and to reassure frightened intervenor defendants that it does not seek to disturb title to even a single parcel of land within the 1855 Treaty Reservation—the Cities and Counties continue to miss this point. Without a citation to the actual pleadings in this case, they express alarm that the Tribe's single-count Complaint "claim[s] in this Court that the cession was never made[,]" PageID.5098, that the Tribe "wants to reverse course and have this Court declare that some 337 square miles of that cession was never actually ceded[,]" PageID.5100, and that this case seeks to relitigate "the issue of title" already decided, PageID.5104. Each claim is emphatically untrue.

The Tribe specifically pled the fact of the 1836 Treaty cession as historical background in its Complaint. PageID.5, at ¶ 20. But its claim is not about the 1836 Treaty cession, and it is not about title. As the Tribe detailed to this Court more than two years ago:

> **This case is not a land claim.** Land claims assert a current right of possession. Remedies for land claims may be barred by equitable and expectation defenses. *See City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005); *Cayuga Indian Nation of New York v. Pataki*, 413 F.3d 266 (2d Cir. 2005) ("*Cayuga 2d Circuit*"). But as the Tribe has repeated early and often, it does not seek and this suit cannot disturb any title or eject any landowner. Rather, this is a treaty-reservation-boundary case to settle jurisdiction; it cannot and will not disturb title. Compl. ¶ 1, PageID.1 (1855 Treaty created the Reservation); ¶ 3, PageID.2

> (Congress has not diminished the Tribe's Reservation); Demand for Relief ¶ I, PageID.17 (seeking declaratory judgment that Reservation created by 1855 Treaty exists today).

PageID.1300 (emphasis in original) (footnotes omitted). The Tribe further explained:

> Although the Tribe's Complaint offers the historical background that it has "continuously asserted its right to occupy" the Reservation, PageID.2, the right to occupy does not include and the Tribe does not seek any right of title. *Contra, e.g.*, *Yankton Sioux Tribe of Indians v. United States*, 272 U.S. 351 (1926) (claim to title and current right of possession); *Onondaga Nation v. New York*, 500 F. App'x 87 (2d Cir. 2012) ("*Onondaga II*") (claim for recovery of ancestral land); *Oneida Indian Nation of New York v. County of Oneida*, 617 F.3d 114 (2d Cir. 2010) (claims for possession, ejectment, and other claims derivative of claimed current possessory interest); *Onondaga Nation v. New York*, No. 5:05-cv-0314, 2010 WL 3806492 (N.D.N.Y. Sept. 22, 2010) ("*Onondaga I*") (claim to title); *Cayuga 2d Circuit*, 413 F.3d 266 (claim for title and possession)."

Id. at n.2.

The Tribe certainly agrees that the 1836 Treaty ceded nearly 14,000,000 acres of land that would become northwestern Michigan, and that prior proceedings addressed compensation for that cession. But because title is different than jurisdiction, the Tribe *also* exercises off-reservation rights throughout the ceded territory. *See, e.g., United States v. Michigan*, No. 2:73-cv-00026-PLM, PageID.1689 (W.D. Mich. 2007) (docketing the Inland Consent Decree concerning usufructory rights). Moreover, nearly twenty years *after* the 1836 Treaty cession, the 1855 Treaty created for Tribal predecessors an Indian Reservation of designated townships totaling nearly 216,000 acres within the area that was earlier ceded. PageID.7, at ¶¶ 31-32. The Tribe exercises on-reservation jurisdiction throughout that governmental territory. PageID.11, at ¶ 49. These 1855 Treaty-protected jurisdictional rights are entirely independent of title.

B. Under well-established law, title is different than jurisdiction.

For a century, litigants have argued that the jurisdictional rules of Indian country do not apply if a tribe does not own the governed land or the land is within an area governed by another

sovereign, but the Supreme Court repeatedly rejected these arguments. *See, e.g.*, *United States v. Thomas*, 151 U.S. 577, 585 (1894) (tribal authority existed "independently of any question of title"); *Donnelly v. United States*, 228 U.S. 243, 269 (1913) (jurisdiction applied on any "tract of land that, being a part of the public domain, is lawfully set apart as an Indian reservation" even if within a state); *United States v. Celestine*, 215 U.S. 278, 284 (1909) ("[W]hen Congress has once established a reservation, all tracts included within it remain a part of the reservation until separated therefrom by Congress."). In early litigation, the Eighth Circuit put the rule plainly: "the jurisdiction to govern the inhabitants of a country is not conditioned or limited by the title to the land which they occupy in it." *Buster v. Wright*, 135 F. 947, 951 (8th Cir. 1905) (upholding tribal tax on activities on fee lands in town-sites within the reservation).

In contrast, "Indian title," also termed "aboriginal title" is an ancient right "based on aboriginal possession," and a tribe's "continuous and exclusive use of property[.]" *Lipan Apache Tribe v. United States*, 180 Ct. Cl. 487, 491-92 (U.S. Ct. Cl. 1967). That title can be extinguished "by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise." *Id.* at 492 (quotation omitted). A tribe can surrender jurisdictional rights *with* title if it does so expressly. *See, e.g., Oregon Dept. of Fish and Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 767-70 (1985) (holding that "surrender of '*all* their claim, right, *title*, and interest *in and to*'" part of a reservation "was both a divestiture of the Tribe's ownership of the ceded lands and a diminution of the boundaries of the reservation within which the Tribe exercised its sovereignty") (emphasis in original). But time and again, the Supreme Court has held that mere extinguishment of Indian title *does not affect* continued reservation status. *See e.g.*, *Solem v. Bartlett*, 465 U.S. 463, 481 (1984) (fee sale); *Mattz v. Arnett*, 412 U.S. 481, 497 (1973) (allotment); *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 358

(1962) (fee sale); *Celestine*, 215 U.S. at 287 (allotment); *Maxey v. Wright*, 54 S.W. 807 (Ct. App. Ind. Terr. 1900) (land held in severalty); *In re Kansas Indians,* 72 U.S. 737 (1866) (allotment).

C. Record evidence demonstrates that title is different than jurisdiction.

The distinction between jurisdiction and title is not lost on the Cities and Counties when they consider their *own* jurisdictional rights. For example, the Tribe asked Harbor Springs at its deposition to consider properties that it owns in fee and the hypothetical sale of such a property:

> Q: [W]hat if it was in the city limits, would Harbor Springs continue to exercise jurisdiction over it after it was sold?"
> A: I expect so.
> Q. Okay. And I'm going to ask a couple hypotheticals. If a fire occurred on that property after it was sold, would Harbor Springs expect that its fire department would respond?
> A: Yes.
> Q: If a crime occurred on that property after it was sold, would Harbor Springs expect that its police department would respond?
> A: Yes, I would expect so.

Ex. J at 123:11-23. The City of Petoskey agreed:

> Q: . . . [H]as Petoskey sold any lands within its boundaries?
> A: Yes.
> Q: Does Petoskey contend that it still has jurisdiction over those parcels of land?
> A: If they are indeed within the city, yes, we would contend that.

Ex. K at 122:3-9. Emmet County, too, agreed that even if it sold a parcel, "the County still is obligated to provide all the services it would provide to any property in the county." Ex. L at 134:13-15. It would similarly continue to exercise law-enforcement and other jurisdiction over the property. *Id.* at 134:23 – 135:16. Indeed, as counsel for the Cities and Counties mused, the answers to these questions concerning the independence of jurisdiction from ownership are "so obvious they are hiding." *Id.* at 135:22-23. Even so, in their motion the Cities and Counties do not once explain why the self-evident principle that jurisdiction is different than—and not dependent upon—title does not *also* apply to the Tribe.

D. The Tribe's Complaint asserts rights under the 1855 Treaty, not the 1836 Treaty.

Finally, it is important to note that the Cities and Counties' assessment that the Tribe seeks recognition of its 1855 Treaty Reservation *and* reservations under the 1836 Treaty is false. Br., PageID.5100. The Tribe's Complaint lodges a single claim that "The Reservation as set forth in Article 1 of the 1855 Treaty of Detroit, paragraphs Third and Fourth exists today[.]" Compl., PageID.16, at ¶ 55. And its demand for relief seeks interpretation of the 1855 Treaty. *Id.* at PageID.17. The 1836 Treaty, including its creation of *other* reservations that were addressed by the Commission, is relevant historical background that can help a factfinder determine the Indian negotiators' intent in bargaining for reservations—permanent homes—in 1855 negotiations. But the Tribe's suit does not seek to enforce the 1836 Treaty's reservations.

II. The Cities and Counties misapprehend the nature of the Indian Claims Commission.

While much of the Cities and Counties' 15-page fact section discussing Tribal predecessors' claims before the Commission is accurate, much is also drawn in overblown, conclusory characterizations that omit important nuances and context. *See* Br., PageID.5081-5096. The Tribe detailed these errors when the Emmet County Townships asked the Tribe to admit the truth of many of the Cities and Counties characterizations *after* the Cities and Counties filed this motion. *Cf.* PageID.5084-5090; Ex. M at 11-13, and 24-25. Fundamentally, ICC decisions about *some* issues are not ICC decisions about *all* issues, and indeed, there are many questions the ICC could not decide at all.

A. The Indian Claims Commission decisions determined 1820 Treaty and 1836 Treaty title claims.

Dockets 18-E and 58 stated claims concerning the 1820 Treaty cession of Royce Area 113 and the 1836 Treaty cession of Royce Area 205. In a half-dozen decisions spanning over twenty years, the Commission looked squarely at those claims and the United States's defenses,

valued the cessions, subtracted offsets and compensation already made, and ultimately determined that the United States owed the treating tribes over $10 million for their 1820 Treaty and 1836 Treaty cessions. That amount was the difference between the fair market value of the 1820 and 1836 cessions and what the United States had already paid. *See* Indian Claims Commission Dockets 18-E and 58 Decision Summary, Ex. I. But these decisions did not reach *other rights* under the 1820 and 1836 treaties. *See, e.g.*, *United States v. Michigan*, 653 F.2d 277, 278 (6th Cir. 1981) ("The treaty-guaranteed fishing rights preserved to the Indians in the 1836 Treaty, including aboriginal rights to engage in gill net fishing, continue to the present day as federally created and federally protected rights. The protection of those rights is the solemn obligation of the federal government."), *cert. denied* 454 U.S. 1124 (1981). And the dockets did not raise or reach claims under any *other treaty*. *See Mille Lacs Band of Chippewa Indians v. Minnesota* (*Mille Lacs Cir. Ct.*), 124 F.3d 904, 923 (8th Cir. 1997) (holding that an ICC decision concerning a treaty cannot dispose of claims under a different treaty), *aff'd*, 526 U.S. 172 (1999).

B. The Indian Claims Commission could not hear the 1855 Treaty Reservation claim.

The Indian Claims Commission Act was a remedial statute and although it empowered the Commission to decide a broad range of claims, its powers were not limitless. First, the Act only allowed the Commission to hear claims *against the United States*. 25 U.S.C. § 70(a), 60 Stat. 1050 (1946). Under its plain jurisdictional grant, the Commission "could not hear" claims like the instant one "against State defendants." *Mille Lacs Band of Chippewa Indians v. Minnesota* (*Mille Lacs D. Ct.*), 853 F. Supp. 1118, 1198 (D. Minn. 1994), *aff'd*, 124 F.3d 904 (8th Cir. 1997). And the Commission had only compensatory—not declaratory—powers. It could not award the value of a right that was not lost, and "had no jurisdiction to extinguish title on its own authority; it simply had jurisdiction to award damages for takings or other wrongs that occurred on or before August 13, 1946." *United States v. Dann*, 873 F.2d 1189, 1198 (9th Cir.

1989). Instead, "[t]he ICC would have dismissed any claim relying on existing rights for lack of jurisdiction." *Mille Lacs D. Ct*., 853 F. Supp. at 1139.

Reservation-boundary cases thus stand apart from the broad variety of claims cognizable by the Commission. "None of the Supreme Court's Indian reservation cases addresses *any* dispute between a tribe and the United States, whether over the validity of the agreements or otherwise. Rather the cases involve jurisdictional disputes between a tribe and a state government, disputes the Court resolves by interpreting federal laws." *Oglala Sioux Tribe*, 570 F.3d at 333 n.5 (citing cases). In these reservation-boundary cases, "the courts were being called upon to interpret federal legislation and executive orders, not to set these sources aside or to treat them as void on the basis of centuries-old flaws in the ratification process[,]" and so could not have been submitted to the Commission. *Id.* at 333. The Tribe's 1855 Treaty Reservation claim follows precisely this pattern. Tribal predecessors did not—and could not have—taken the claim to the Commission.

C. The United States could seek to offset the value of an extant right from a judgment valuing extinguished rights, but offset defenses were not required or guaranteed.

From time to time, the Commission did consider whether to offset the value of an existing reservation from an award. But it did so in the context of the United States' offset defense—not an affirmative tribal claim—and only if the reservation was a "gratuity" that did not exist under some other claim of right. The discretionary nature of this inquiry was express:

> the Commission *may* also inquire into and consider all money or property given to or funds expended gratuitously for the benefit of the claimant and if it finds that the nature of the claim and the entire course of dealings and accounts between the United States and the claimant in good conscience warrants such action, *may* set off all or part of such expenditures against any award made to the claimant, ...

25 U.S.C. § 70(a), 60 Stat. 1050 (1946) (emphasis added). In this analysis, "the obligation is on the Government to prove its offsets[.]" *United States v. Assiniboine Tribes of Indians*, 428 F.2d

1324, 1332 (Ct. Cl. 1970) (citing cases). The Act "permits the Commission to exercise a certain amount of discretion in determining whether gratuitous payments should be offset against awards made to Indian tribes." *Id.* at 1333. And on appeal, the United States bore the burden of proving the Commission's denial of an offset was arbitrary. *Id.* Thus, even if the United States proved that a tribe retained a reservation, the Commission would not offset the value of that reservation unless the United States *also* proved the reservation was a gratuity—a promise that the United States made without bargained-for consideration.

In practice, this structure meant that the United States did not take all reservation questions to the Commission and did not receive an offset for every reservation claim it made. If the United States did not believe that it could prove that a reservation promise was gratuitous, it might not spend limited resources pressing the claim. And indeed, the Commission denied questionable claims. For example, when the United States claimed that a 743,257.19 acre reservation offset the value of an award for the Wichitas, the Commission agreed that the reservation existed, but denied the offset because the Wichitas "did not accept the reservation as a gratuity and in fact it was no gift." *United States v. Delaware Tribe of Indians*, 427 F.2d 1218, 1227 (Ct. Cl. 1970) (quotation omitted). The Commission determined that the reservation was consideration for tribal promises and could not offset an award. *Id.* The Court of Claims upheld this reasoning and result on appeal, and the Wichita retained their reservation without a commensurate offset of their Commission award. *Id.*

In Dockets 18-E and 58, the Commission valued and eventually awarded compensation for the 1836 Reservations because through inferential reasoning it believed that they were part of the ceded territory. 26 Ind. Cl. Comm. 538, 540-41 (Dec. 29, 1971), PageID.5239-5240. In contrast, the Commission did not make any award or offset decision concerning the 1855 Treaty

Reservation. Against the Commission's claim and proof structure, the logical conclusion is that Tribal predecessors did not believe that the 1855 Reservation was ceded and that—for any number of reasons—the United States did not bring an offset claim to the Commission.

D. The Indian Claims Commission awards did not implicitly or *sub silentio* determine the value or existence of rights.

The Commission could *only* grant the United States offsets after specifically "considering the nature of the claim and the course of dealings between the parties[.]" *Assiniboine Tribes of Indians*, 428 F.2d at 1333. Moreover, the Commission could not extinguish rights—it could only value what had been extinguished. *See Dann*, 873 F.2d at 1198. Put differently, the Commission *could not* have implicitly decided the question of the 1855 Treaty Reservation's existence, and its award for the value of ceded land *could not* extinguish other still-existing treaty rights.

The *Mille Lacs* case illustrates these principles applied to modern-day arguments. When the Mille Lacs Band sought to establish continued usufructory rights, Minnesota argued that the "ICC must have implicitly decided that the usufructory rights were extinguished or it could not have awarded compensation for the ceded lands based upon their highest and best uses[,]" a valuation that "necessarily encompassed those claims." *Mille Lacs D. Ct.*, 853 F. Supp. at 1136. Intervening landowners similarly argued that even if the rights were not included in the highest-and-best-use valuation, "the value of these rights would have been subtracted from" that valuation as an offset. *Id.* at 1136-37. The district court rejected both arguments, holding that "[i]f the ICC had been awarding compensation for the reserved rights, it would have had to make a finding that they were extinguished." *Id.* at 1137.

On appeal, the Eighth Circuit agreed: "We cannot accept the conclusion that [the ICC] extinguished an important body of rights bargained for and explicitly reserved in a treaty without any mention of those rights." *Mille Lacs Cir. Ct.*, 124 F.3d at 925, *aff'd*, 526 U.S. 172 (1999).

The Eighth Circuit specifically distinguished the Supreme Court's decision that the Klamath expressly surrendered jurisdiction with title. "In *Klamath*, the Supreme Court used the ICC's silence on the issue of hunting and fishing rights . . . . to buttress its conclusion as to the *interpretation* of the Tribe's agreement with the United States." *Id.* at 926 (emphasis in original). Extending ICC silence to preclude rights not at issue in Commission proceedings "is to give *Klamath* an interpretation it simply cannot bear." *Id.*; *see also Ottawa Tribe of Okla. v. Speck*, 447 F. Supp. 2d 835, 842 (N.D. Ohio 2006) ("Cession of ceded land only acts to extinguish privileges and rights not expressly reserved.") (citing *Klamath,* 473 U.S. at 765–66).

III. The Tribe's claim is not barred by issue preclusion or claim preclusion.

The Sixth Circuit has oft noted the "perennial confusion over the vocabulary and concepts of the law of preclusion," and its "hope that future litigants, in the interests of precision and clarity, will formulate arguments which refer solely to issue or claim preclusion." *Heyliger v. State Univ. & Comm. College Sys. of Tenn.*, 126 F.3d 849, 852 (6th Cir. 1997) (internal quotation removed). Although styled only as "issue preclusion," the Cities and Counties' arguments that the Tribe already litigated, or should have litigated, the 1855 Treaty Reservation claim invoke both doctrines. Neither bars this case.

A. Issue preclusion does not bar the Tribe's Complaint.

"Issue preclusion refers to the effect of a judgment in foreclosing relitigation of a matter that has been litigated and decided." *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 77 n. 1 (1984). In the Sixth Circuit, the federal test of issue preclusion requires that:

> (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-Pacific Consumer Products LP v. Four-U-Packaging Inc., 701 F.3d 1093, 1098 (6th Cir. 2012) (internal emphasis removed) (quoting *Cobbins v. Tenn. Dep't of Transp.*, 566 F.3d 582, 589-90 (6th Cir. 2009)).

To be sure, some courts have held that Commission decisions concerning title are issue preclusive in later litigation also concerning that title. For example, where Commission proceedings determined that the United States had extinguished aboriginal title to defined tracts of land, and the Pueblo later argued that it still held title to of these tracts, the Court of Claims held that "plaintiff gave up its right to assert title to the lands contained therein. Similarly, the defendant gave up the right to contest the fact that the government had extinguished these lands." *Pueblo of Santo Domingo v. United States*, 16 Cl. Ct. 139, 140-42 (U.S. Cl. Ct. 1988). The Ninth Circuit has similarly held that a Commission decision concerning title can be an issue-preclusive bar even without mutuality of the parties—but only as to later cases concerning *title to the same land*. *Western Shoshone Nat'l Council v. Molini*, 951 F.2d 200, 202 (9th Cir. 1991) (an ICC award for taking of title "constituted a general determination of title which bars the Shoshone from asserting title against the State of Nevada"). Here, the ICC reached final judgment, but on the merits of claims fundamentally different than the Tribe's 1855 Treaty Reservation boundary claim presented by the Tribe's Complaint.

1. The 1855 Treaty Reservation boundaries were not raised or actually litigated in the Indian Claims Commission proceedings.

Where an issue was not actually litigated in an ICC claim, it cannot issue-preclude later litigation. For example, even as the Supreme Court determined that appropriation of a Commission judgment extinguished aboriginal title and barred parties from asserting further aboriginal title claims, it recognized that the plaintiffs also "claim[ed] to possess individual as well as tribal aboriginal rights[,]" and remanded the case for decision of the individual rights.

United States v. Dann, 470 U.S. 39, 50 (1985). In follow-up proceedings, the Ninth Circuit noted that "payment for the taking of a aboriginal title establishes that *that title* has been extinguished." *United States v. Dann*, 873 F.2d 1189, 1194 (9th Cir. 1989) (emphasis added). But "[t]hat leaves for decision the question whether the Danns may successfully claim individual aboriginal title." *Id.* at 1195. Even payment of the Commission award did not extinguish claims that were not actually litigated below.

Courts must examine the record and pleadings of an ICC proceeding "to determine whether an issue was actually litigated and necessary to the outcome of a case." *Mille Lacs D. Ct.*, 853 F. Supp. at 1137. For example, where the Mille Lacs Band's operative ICC complaint "d[id] not contain any reference to hunting, fishing, and gathering privileges" under an 1837 treaty, even though an ICC decision awarded the Mille Lacs Band "compensation for the lands ceded under the 1837 Treaty[,]" the court concluded that "the issue of whether the usufructory rights had been extinguished was not litigated before the ICC." *Id.* at 1137. The Eighth Circuit affirmed the *Mille Lacs* district court's issue-preclusion decision and further explained that the Band's predecessor's ICC petitions for relief under *other* treaties could not bar the Band's 1837 treaty usufructory claims. *Mille Lacs Cir. Ct.*, 124 F.3d at 923. The Supreme Court agreed that the Band retained the usufructory rights in the same 1837 treaty that ceded now-compensated-for lands, and that those rights survive today. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999); *see also Swim v. Bergland*, 696 F.2d 712, 718 (9th Cir. 1983) (stipulated settlement of ICC claims for compensation for extinguished occupancy rights did not bar later grazing-rights claims where "[t]he Tribes' petition before the Indian Claims Commission did not plead any extinguished grazing rights"); *Speck*, 447 F. Supp. 2d at 842 ("Absent specific

language addressing the reserved hunting and fishing rights, the decisions of the ICC do not reflect actual litigation of that issue.").

So it is here. Docket 58 asserted claims under the 1820 and 1836 Treaties, not the 1855 Treaty. *See* Pet., ICC Dkt. No. 58, PageID.5113-5118. Docket 18-E asserted claims under nearly two dozen treaties, none the 1855 Treaty at issue here. *See* Compl., ICC Dkt. No. 18-E, PageID.5119-5133. The Cities and Counties have not argued otherwise. Fundamentally, the ICC's determination of rights under these treaties "cannot collaterally estop the [Tribe] from later bringing claims for . . . rights *under a different treaty*." *Mille Lacs Cir. Ct.*, 124 F.3d at 923 (emphasis in original). To be sure, in determining fair compensation for the cession, the Commission considered the effect of individual allotments under the 1855 Treaty on the total value of the 1836 Treaty ceded territory. 22 Ind. Cl. Comm. 372, 377 (Jan. 14, 1970), PageID.5222 (explaining that because "it is apparent that the individual allotments were of the Indians' own land, . . . the defendant should not be obligated to pay additional compensation for them"). But "allotment in severalty to individual Indians . . . is entirely consistent with continued reservation status." *Navajo Tribe of Indians v. New Mexico*, 809 F.2d 1455, 1475 (10th Cir. 1987) (quotation omitted); *see also, e.g.*, *Mattz*, 412 U.S. at 497 (1973 *Celestine*, 215 U.S. at 287. Reservation status has absolutely nothing to do with ownership. *See e.g., Solem*, 465 U.S. at 481; *Seymour*, 368 U.S. at 358; *Maxey*, 54 S.W. at 810-11; *In re Kansas Indians,* 72 U.S. at 756-57, 758, 759-60. This decision that land was allotted did not actually litigate any question concerning the 1855 Treaty Reservation boundary.

Similarly, although Docket 364 sought an accounting of amounts due under the 1855 Treaty, it also did not raise—or decide—the question of the Tribe's 1855 Reservation claim. None of the five claims concerned territorial jurisdiction—or even cession. *See* 35 Ind. Cl.

Comm. 385, 387-395 (Jan. 27, 1975), PageID.5262-5270. The single claim concerning land sought "the value of 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, PageID.5262. The Commission quickly dismissed this claim because "that claim has already been paid" in the earlier Docket 18-E and 58 decision concerning allotments. *Id.* at 387-88, PageID.5262-5263; *see also* Ex. I (summarizing 22 Ind. Cl. Comm. 372 (Jan. 14, 1970)). As in the Docket 18-E and 58 decisions, the Tribal predecessors did not raise, and the parties did not actually litigate the 1855 Treaty Reservation boundary in Docket 364. Rather, the 1855 Treaty promise of allotments to individual Indians was separate and distinct from the Treaty's Article 1 paragraphs third and fourth promise of Reservations to bands. 1855 Treaty, PageID.1739 (describing allotments "to be selected and located within the several tracts of land hereinbefore described"). ICC claims and decisions that did not actually litigate the 1855 Treaty Reservation boundary cannot bar decision of that boundary now.

2. Determination of the 1855 Treaty Reservation boundaries was not necessary to the outcome of the prior proceedings.

As section II(C) describes above, some Commission decisions considered the continuation of reservations, but some didn't, and some did not rely on a boundary decision even where a reservation continued to exist. The Commission *did* consider disposition of the 1836 Treaty reservations. Decisions first excluding the 1836 Treaty reservations from the valuation, 20 Ind. Cl. Comm. 137, 142 (Dec. 23, 1968), PageID.5180, and then including them, 26 Ind. Cl. Comm. 538, 541 (Dec. 29, 1971), PageID.5240, were necessary to the final valuation outcome. *See*, Ex. I. But those decisions do not concern the 1855 Treaty Reservation. The Cities and Counties' again-unsupported conclusion that if the Commission had believed that Tribal predecessors retained an 1855 Reservation, it "would not have been entitled to receive

compensation" for that acreage, Br., PageID.5099, is belied by cases like *Delaware Tribe of Indians*, 427 F.2d at 1227. Their suggestion that the Commission could extinguish the bargained-for 1855 Treaty Reservation without saying so is foreclosed by *Mille Lacs*. *Mille Lacs Cir. Ct.*, 124 F.3d at 925, *aff'd*, 526 U.S. 172 (1999). And their supposition that a reservation "would not have been part of any cession[,]" Br., PageID.5099, ignores that the 1820 and 1836 Treaty cessions occurred decades before Tribal predecessors bargained for the 1855 Treaty Reservation.

The Cities and Counties rely on *Western Shoshone* to argue necessary (but implied) extinguishment of 1855 Treaty Reservation rights. After an initial issue-preclusive holding that the Commission's title determination forbid the Shoshone from raising the question of title in a second suit, the Ninth Circuit considered whether the Shoshone's "aboriginal and treaty reserved hunting and fishing rights survive the extinguishment of title." *Western Shoshone Nat'l Council*, 951 F.2d at 202. Although the Supreme Court consistently holds that jurisdictional rights are independent of title, *Western Shoshone* read its *Klamath* decision concerning an express surrender of jurisdiction with title to hold "that the conveyance of title includes hunting and fishing rights, absent an express reservation of those rights." *Id.* Considering the Western Shoshone's rights, the Ninth Circuit distinguished the longstanding case line that holds "that treaty-based rights cannot be extinguished absent an express termination of those rights[,]" finding those cases inapplicable because "there is no treaty" protecting Western Shoshone usufructory rights. *Id.* at 203. Moreover, because 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[,]" the historical record did not once mention usufructory rights—let alone retention of those rights. *Id.* at 201, 203 (internal quotation and marks removed). Without a treaty or other historical evidence expressly reserving usufructory rights,

the Ninth Circuit held that the ICC's earlier decision that title was extinguished also extinguished usufructory rights.

But the facts of this case could not be farther from *Western Shoshone* and *Klamath*. Never mind that this district has *already* held that the Tribe's 1836 Treaty usufructory rights survived that same treaty's cession of title, and that the Sixth Circuit agreed. *United States v. Michigan*, 471 F. Supp. 192 (W.D. Mich. 1979); *Michigan*, 653 F.2d at 278-79, *cert. denied* 454 U.S. 1124 (1981). The Tribe's Complaint concerns rights promised by an 1855 Treaty—one inked almost two decades *after* the Tribe's 1836 cession. *Klamath* cannot apply here where the 1855 Treaty made no cession and expressly reserved jurisdictional rights. This Court should decline the invitation to stretch *Western Shoshone*'s fact-bound holding and its built-in overextension of *Klamath* to transform *all* land cessions into general surrenders of every treaty right—including rights not yet promised.

But the Cities and Counties don't just get the law wrong. They also ignore that the Commission *did* describe the 1855 Treaty reservations, including the Tribe's 1855 Treaty Reservation, in the very decisions they proffered as exhibits to their motion. The Commission determined that "Between 1855 and 1872 the Ottawas and Chippewas of Michigan consisted of 49 or 50 bands of Indians living on 14 reservations scattered about the state, accessible only 'over the worst of roads,' or by boat in advance of the winter freeze." 40 Ind. Cl. Comm. 6, 57 (Apr. 1, 1977), PageID.5344; *see also id.* at 21, PageID.5308. Those scattered reservations were created by Article 1 of the 1855 Treaty. 1855 Treaty, PageID.1738-1739. The Commission said as much. 7 Ind. Cl. Comm. 576, 589 (May 20, 1959), PageID.5148 (finding that under the 1855 Treaty, "certain public lands were to be set aside for the use of individuals and bands of Chippewa and Ottawa Indians"); 22 Ind. Cl. Comm. 372, 379 (Jan. 14, 1970), PageID.5224

("The plaintiffs continued to use a portion of the lands ceded by them to the defendant. This arrangement was made permanent by Article 1 of a Treaty of July 31, 1855 . . . . That first article provided that certain of the ceded lands were withdrawn from sale for the benefit of the Indians and that, out of those lands, the Indians were to select individual allotments."). Extinguishment of the 1855 Treaty Reservation was not necessary to the Commission's compensation decisions. Rather, throughout the course of their extended proceedings, the Commission reached decisions on title and compensation with full knowledge of the existence of the 1855 Treaty Reservation.

3. Tribal predecessors did not fully or fairly litigate the 1855 Treaty Reservation claims in the Indian Claims Commission proceedings.

In the end, the Cities and Counties do not point to even one place in the ICC record that could show that the Commissioners considered the 1855 Treaty Reservation boundary question that the Tribe's Complaint presents—let alone that they fully or fairly considered the question. Indeed, the Cities and Counties admit as much. Br., PageID.5102 ("At no time was a claim advanced that permanent reservations were created by the 1855 Treaty."). By conflating title and jurisdiction, the Cities and Counties miss the issue-preclusion mark. Final decision of title under 1820 and 1836 Treaties simply did not determine jurisdictional boundaries under an 1855 Treaty.

B. Claim preclusion and the rule against claim splitting do not bar the Tribe's Complaint.

"Claim preclusion refers to the effect of a judgment in foreclosing litigation of a matter that never has been litigated, because of a determination that it should have been advanced in an earlier suit." *Migra*, 465 U.S. at 77 n. 1. Sometimes termed "the rule against splitting" a claim, *Garagallo v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 918 F.2d 658, 661 (6th Cir. 1990), to bar a claim under this doctrine, a party must demonstrate that "the following four elements are present: (1) a final decision on the merits; (2) a subsequent action between the same parties or their privies; (3) an issue in a subsequent action which should have been litigated in the prior

action; and (4) an identity of the causes of action," *Wilkins v. Jakeway*, 183 F.3d 528, 532 (6th Cir. 1999). Although the Sixth Circuit decided *Wilkin* on other grounds, it posited that if a claimant "could have" brought a claim in earlier proceedings, then it "should have." *Id.* at 532 n.4. It further opined that the third element is satisfied where cases "clearly encompassed the same set of facts[.]" *Id.* Put differently, "a prior proceedings triggers res judicata only for claims that could have been decided in that proceeding[.]" *Anderson v. City of Blue Ash*, 798 F.3d 338, 351 (6th Cir. 2015).

The Cities and Counties presume (again without citation) that "[t]he relief plaintiff seeks in this case – a declaration of a reservation—is a claim that could have been advanced in the ICC proceedings." Br., PageID.5111. That presumption is incorrect. Although the Cities and Counties rely on *Navajo Tribe* for the proposition that the Commission's jurisdiction was broad, their brief's five-page discussion of that case omits this passage:

> [A]djudicating reservation boundaries is conceptually quite distinct from adjudicating title to the same lands. One inquiry does not necessarily have anything in common with the other, as "title and reservation status are not congruent concepts" in Indian law. *Ute Indian Tribe v. Utah*, 773 F.2d 1087, 1097 (10th Cir. 1985) (en banc) (Seymour, J., concurring), *cert. denied*, 479 U.S. 994, 107 S.Ct. 596, 93 L.Ed.2d 596 (1986). In fact, "allotment in severalty to individual Indians and subsequent entry by non-Indians is entirely consistent with continued reservation status." *Id.* at 1094 (citing *Mattz v. Arnett*, 412 U.S. 481, 93 S.Ct. 2245, 37 L.Ed.2d 92 (1973)). Fee title to such land was neither considered nor affected.

Navajo Tribe, 809 F.2d at 1475 (footnote removed). As *Navajo Tribe* emphasized, courts must look to "the underlying substantive claim" to determine whether a claim should have been filed with the Commission. *Id.* at 1468. And the law is clear that the Tribe *could not* have taken its 1855 Treaty Reservation claim to the Commission. Unlike the *Navajo Tribe* claim to invalidate federal law, the Commission "would have dismissed any claim relying on *existing* rights for lack of jurisdiction." *Mille Lacs D. Ct.*, 853 F. Supp. at 1138 (emphasis added), *aff'd*, 124 F.3d 904

(8th Cir. 1997). The Tribe's 1855 Treaty Reservation claim was no different. "[R]eservation boundary cases do not run afoul of the Indian Claims Commission Act because the courts were being called upon to interpret federal legislation and executive orders, not to set these sources aside or to treat them as void on the basis of centuries-old flaws in the ratification process." *Oglala Sioux Tribe*, 570 F.3d at 333. Thus, it is "generally true" that "the Indian Claims Commission Act *does not bar suits to determine a reservation's boundaries*." *Id.* (emphasis added) (distinguishing the Oglala Sioux Tribe's claims as ones seeking treaty revision).

Even if the Commission could hear a complaint concerning existing rights, it could only hear one *against the United States*. The Cities and Counties briefly acknowledge this critical limitation on the Commissions' powers. *See* Br., PageID.5084; Br., PageID.5111. But they skip over the fact the Tribe did not bring a claim against the United States *because the United States recognizes the 1855 Treaty Reservation* and is not the party that has injured the Tribe. *id.* at ¶¶ 47, 51-52, PageID.9, 13-15. Taking these allegations (and the historical documents that the Tribe incorporated into its Complaint) as true, the Tribe could not have brought the 1855 Treaty Reservation claim to the Commission. Accordingly, under *Anderson*, the Tribe cannot be required to have brought a claim to a tribunal that could not hear it and claim preclusion cannot bar the Tribe's claim here. *Anderson*, 798 F.3d at 351.

Nor are the underlying facts and causes of action in this case and the ICC cases the same. The Federal Court of Claims addressed a similar argument when the United States argued that an earlier judgment concerning the taking of lands without compensation and payment of that claim barred a later claim for an accounting that alleged mismanagement of those judgment funds. *Round Valley Indian Tribes v. United States*, 97 Fed. Cl. 500 (U.S. Ct. Fed. Cl. 2011). Applying that circuit's adoption of the analogous *Parklane Hosiery* test (which collapses the Sixth

Circuit's third and fourth claim-preclusion elements into a single question of whether "the second claim is based on the same set of transactional facts as the first"), *Round Valley* held that the first claim did not bar the second. *Id.* at 515-16. The court compared the two complaints and reasoned that because the earlier claims' focus on land claims and valuation concerned different transactional facts than the later suit's allegations concerning later-day mismanagement of the funds, the first claim could not bar the second. *Id.* Even a brief comparison of the ICC petitions concerning compensation claims under *other* treaties or treaty provisions to the Tribe's 1855 Treaty Reservation claim demonstrates that the causes of action consider different claims, analyzing different facts under different tests. *Compare* Pet., ICC Dkt. No. 58, PageID.5113-5118 *and* Compl., ICC Dkt. No. 18-E, PageID.5120-5133 *with* Compl., PageID.1-18. The Tribe has not split any claim.

IV. Judicial estoppel does not bar the Tribe's Complaint.

Held against the Complaint that the Tribe actually filed, the Cities and Counties' judicial estoppel claim is spurious—at best. The Cities and Counties charge (still without record citation) that the Tribe changed its position by first arguing and proving that the 1836 Treaty ceded territory, but now arguing "that the cession was never made." Br., PageID.5099. Far from "litigat[ing] this case as though those irrefutable facts do not exist[,]" Br., PageID.5105, the Tribe specifically included the fact of the 1836 Treaty cession in its Complaint as background to the 1855 Treaty Reservation claim that it asserted. Compl., PageID.5, at ¶ 20. There are serious candor concerns in raising a Rule 12(c) motion for judgment on the pleadings that argues that the Tribe has not "ma[de] a full disclosure[,]" Br., PageID.5101, but does not mention that the Tribe pled the very fact it purportedly concealed. But there is no unfair advantage in pressing a distinct claim concerning a different treaty that is entirely consistent with Commission decisions but

could not have been taken to the Commission. *See Menominee Indian Tribe of Wisc. v. Thompson*, 161 F.3d 449, 455 (7th Cir. 1998) (judicial estoppel could not bar usufructory right claim where before the ICC the tribe "alleged that the United States had underpaid them for the *title* to their Wisconsin lands" but that ICC "record does not contain any evidence revealing a claim of, or discussion about, use rights") (emphasis in original).

Without law or facts to lean on, the Cities and Counties lash out at the Tribe with "additional considerations" that are unsupported accusations and double standards. They first accuse that the Tribe "targeted" the State of Michigan instead of bringing this claim against the United States to avoid the Indian Claims Commission Act's statute of limitations. Br., PageID.5101. But that is not "the most obvious" reason that the Tribe sued Governor Snyder instead of the United States. *Id.* The *most* obvious reason is the one the Tribe pled: "The United States government acknowledges the continued existence of the Reservation. But the State of Michigan does not recognize or respect the Reservation boundaries." Compl., PageID.2, at ¶ 4; *see also* PageID.13-15, at ¶¶ 51-52. Controlling law required the Cities and Counties to take these well-pled allegations as true. *Gavitt*, 835 F.3d at 640.

Nor does the cavil that the Tribe has not pled the 1855 Treaty Reservation's existence in entirely unrelated litigation support judicial estoppel. The Cities and Counties do not plead their own boundaries when they sue on issues distinct from territorial jurisdiction. *See, e.g.*, Ex. N (Charlevoix County complaint to recover debt without pleading its territorial jurisdiction); Ex. O Emmet County complaint to exercise eminent domain over a parcel without pleading its territorial jurisdiction); Ex. P (Harbor Springs complaint concerning a collective bargaining agreement without pleading its territorial jurisdiction). Faulting the Tribe for not pleading the facts of its territorial jurisdiction in a complaint concerning injury to usufructory rights *outside*

that jurisdiction makes no more sense than faulting a city or county for failing to plead their own boundaries in every suit they commence. Br. Page ID.5102. Judicial estoppel has no place here.

V. The Indian Claims Commission Act does not bar this case.

As a final volley, the Cities and Counties contend that the Indian Claims Commission Act itself bars this case. Although that Act includes a strict statute of limitations, it has no other independent preclusive effect. Commission decisions can bar later claims for issue-preclusive and claim-preclusive reasons, but courts apply those doctrines and their underlying principles to determine an ICC decision's estoppel value. *See, e.g.*, *Round Valley Indian Tribes*, 97 Fed. Cl. at 514-15; *Western Shoshone Nat'l Council*, 951 F.2d at 202; *Navajo Tribe of Indians*, 809 F.2d at 1468. To the extent the Cities and Counties argue that the Act bars the Tribe's claim on estoppel grounds rather than statute-of-limitations grounds, those arguments fail for the same reason its issue-preclusion and claim-preclusion arguments fail.

The Indian Claims Commission Act's Section 12, though, instructed that "The Commission shall receive claims for a period of five years after the date of the approval of this Act and no claim existing before such date but not presented within such period may thereafter be submitted to any court[.]" 25 U.S.C. § 70(k), 60 Stat. 1052 (1946). This hard-and-fast statute of limitations was a defining feature of the Act. But it did not change the Act's limitation of the Commission's jurisdiction to "claims against the United States[.]" 25 U.S.C. § 70(a), 60 Stat. 1050 (1946). It was incumbent upon tribes to assert in a Commission proceeding filed before 1951 every claim against the United States that had accrued before 1946. But the Act had no effect on a tribe's claims against parties other than the United States. *See, e.g.*, *Oglala Sioux Tribe*, 570 F.3d at 333 n.5; *Mille Lacs D. Ct.* 853 F. Supp. at 1139.

In many cases, the Act's Section 12 time bar is straightforward. *See, e.g.*, *Minnesota Chippewa Tribe v. United States*, 11 Cl. Ct. 534, 535-40 (U.S. Cl. Ct. 1987) (dismissing 1986 claim against the United States for improper nineteenth-century allotment as time-barred). It operates outside of Commission proceedings when a tribe brings a claim that it *could have* brought to the Commission. For example, in 1982, the Navajo Tribe sued New Mexico, asking a federal court to declare that it held equitable title to certain lands that it had not put at issue during earlier Commission claims. *Navajo Tribe of Indians*, 809 F.2d at 1462. "The essence of the Tribe's complaint" was that 1908 and 1911 Executive Orders allowing sale of certain lands were "null and void[,]" and "[o]n this basis, the complaint attacked the validity of all subsequent patents issued by the United States." *Id.* The district court relied on the Act's statute of limitations to dismiss the claim and the Tenth Circuit affirmed. Because the claim sought to revise (not enforce) federal actions and accrued in 1908 and 1911—well before 1946—the tribe could not bring it after 1951. *Id.* at 1470-71.

Similarly, the D.C. Circuit held that the Act barred the Oglala Sioux Tribe's modern claim that certain properties were still part of the Great Sioux Reservation despite an 1889 Act that would "dissolve the Great Sioux Reservation[,]" but would "take effect only when consent had been obtained from three-fourths of all adult male Sioux" as an 1868 treaty required. *Oglala Sioux*, 570 F.3d at 329-30. The Oglala argued that this consent was ineffective because "the United States did not validly implement the 1889 Act, rendering it a nullity." *Id.* at 331. Affirming the district court's dismissal of the claims, the D.C. Circuit agreed that the Act's five-year limitations period barred the claims. *Id*. It reasoned that the claim fit squarely within the Act's grant of jurisdiction to revise treaties on the ground of fraud, duress, unconscionable consideration, or other equitable considerations. *Id.* Because the Oglala "surely knew that such

an action arose before 1946[,]" its claim must have been brought to the Commission before 1951. *Oglala Sioux Tribe*, 570 F.3d at 332-33.

By its terms, the Act's statute of limitations does not apply to the Tribe's 1855 Treaty Reservation claim. Foremost, the Tribe's claim was not—and is not—against the United States. Compl., PageID.2, at ¶ 4, PageID.9, at ¶ 47. Because claims to enforce federal law against other parties are outside the Commission's jurisdiction, the Act's statute of limitations cannot bar them. *Mille Lacs D. Ct.*, 853 F. Supp. at 1138-38, *aff'd*, 124 F.3d 904 (8th Cir. 1997). And unlike *Navajo Tribe* and *Oglala Sioux Tribe*, the Tribe does not argue for invalidation of federal law—it asks to enforce it. Compl., PageID.17. The Tribe's Complaint is a prototypical reservation-boundary complaint. Like the typical reservation-boundary case, "the Indian Claims Commission Act does not bar suits to determine a reservation's boundaries." *Oglala Sioux Tribe*, 570 F.3d at 333 n.5.

Conclusion

At bottom, it is the Cities and Counties—not the Tribe—who seek to remake history and the record of this case to argue that the Tribe should have asserted an 1855 Treaty Reservation claim against a party who had not injured it before a Commission who lacked jurisdiction to hear the claim and who had no authority to do anything about it, and that since the Tribe did not assert that claim, it can't do so now. That is not the law. The Cities and Counties have not satisfied the test of claim preclusion, issue preclusion, or judicial estoppel, and the Tribe's claim is not barred by the statute of limitations in an inapplicable act. This Court should deny the pending Rule 12(c) motion and enter judgment against the Cities and Counties on their unpled issue preclusion, claim preclusion, judicial estoppel, and statute of limitations defenses.

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