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.*,

Defendants.

Memorandum in Support of Tribe's Motion for Partial Summary Judgment Concerning Congressional Reaffirmation of Rights

---

William A. Szotkowski
Jessica Intermill
Andrew Adams III
Leah K. Jurss
Hogen Adams PLLC
1935 W. County Rd. B2, Ste. 460
St. Paul, MN 55113
Phone: (651) 842-9100
E-mail: bszotkowski@hogenadams.com
jintermill@hogenadams.com
aadams@hogenadams.com
ljurss@hogenadams.com

James A. Bransky
9393 Lake Leelanau Dr.
Traverse City, MI 49684
Phone: (231) 946-5241
E-mail: jbransky@chartermi.net

Donna Budnick
7500 Odawa Cir.
Harbor Springs, MI 49740
Phone: (231) 242-1424
E-mail: dbudnick@ltbbodawa-nsn.gov

Counsel for Plaintiff Little Traverse Bay Bands of Odawa Indians

Table of Contents

Table of Authorities

Cases

Treaties

Statutes

Other Authorities

Rules

> "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." Little Traverse Bay Bands of Odawa Indians and the Little River Band of Ottawa Indians Act, Pub. L. No. 103-324, 108 Stat. 2156, 2158 (1994).[1]

The unique language of Public Law 103-324, the "1994 Little Traverse Bay Bands of Odawa Indians and the Little River Band of Ottawa Indians Act" resolves a central issue in this case: whether the rights that the Tribe had in 1855 were later abrogated or diminished. In this motion, the Tribe does not ask the Court to interpret the 1855 Treaty. What rights the Tribe held in 1855 is a question that must be reserved for trial. But Congress has told us that those rights (whatever they were) were *all* reaffirmed in 1994—*even if* they may have been diminished or abrogated in the intervening years. Because there can be no genuine dispute of material fact concerning this issue and resolving this issue now will avoid unnecessary but extensive discovery, the Tribe asks this Court to follow Congress's directive and hold that regardless of whether any intervening act *arguably* abrogated or diminished the rights, the Reaffirmation Act reaffirmed rights that the 1855 Treaty secured for the Tribe.

Background

I. 1855 Treaty

In 1836, the United States sought to acquire "intercalated" lands used and occupied by Ottawa bands and Chippewa tribes in Michigan, including lands occupied by the Tribe's predecessor bands. *See United States v. Michigan*, 471 F. Supp. 192, 220 (W.D. Mich. 1979). To

[1] Congress amended two sections of the Reaffirmation Act in 1996, but these amendments do not affect the substance of this motion. *See An Act to make certain technical corrections in laws relating to Native Americans, and for other purposes*, Pub. L. No. 104–109, § 2, 110 Stat. 763, 763–64 (Feb. 12, 1996).

accomplish this, federal negotiators "combined the Ottawa and Chippewa nations into a joint political unit solely for purposes of facilitating the negotiation of that treaty." *Grand Traverse Band of Ottawa & Chippewa Indians v. U.S. Att'y for the W. Dist. of Mich.*, 369 F.3d 960, 961 n.2 (6th Cir. 2004). The resulting 1836 Treaty ceded vast tracts but saved for the tribes and bands small compensatory reservations. *See* Treaty with the Ottowas, etc., Mar. 28, 1836, 7 Stat. 491, Art. 2. When the Senate ratified the 1836 Treaty, it unilaterally modified its terms. The Senate inserted a right to remove the tribes and bands from these reservations after five years, leaving the tribes unsure of the future status of their lands. *Id.* at 497.

In the years that followed, tribal leaders issued repeated calls for certainty regarding these lands and worked to remain in the permanent homelands they had occupied for at least two centuries. The culturally distinct Ottawa and Chippewa had "vociferously complained" about their political joinder since the 1836 Treaty. *Grand Traverse Band*, 369 F.3d at 961 n.2; *see also Michigan*, 471 F. Supp. at 220, 247–48. But when, in 1855, the United States agreed to convene a new treaty council, it insisted on negotiating with the same federally created collection of Ottawa and Chippewa signatory bands as the 1836 Treaty. *See* Treaty with Ottawas & Chippewas, July 31, 1855, 11 Stat. 621, preamble (describing the treaty between "the United States, and the Ottawa and Chippewa Indians of Michigan, parties to the treaty of March 28, 1836"). During those 1855 negotiations, the United States agreed to Article 5 of the 1855 Treaty to end the artificial coupling, dissolving the fictional "Ottawa and Chippewa" aggregate that the United States had created for its own convenience. *See* PageID.2675.

Several decades after concluding the 1855 Treaty, some federal officials "ignor[ed] the historical context of the treaty language," and "ceased to recognize the tribes either jointly or separately[,]" believing that Article 5 of the 1855 Treaty *dissolved the underlying bands*, not just

their earlier coupling. *Grand Traverse Band*, 369 F.3d at 961 n.2. This early misinterpretation of Article 5 was the cracked foundation on which the Tribe tried to build its continuing relationship with the federal government. Time and again, when asked to interpret tribal rights, mistaken officials relied on the departmental misinterpretation the bands were "terminated[.]" *See id.* (quoting *Letter from Secretary of the Interior Delano to Commission of Indian Affairs*, at 3 (Mar. 27, 1872)). In doing so, they did not just say there was no tribe; they also said that without a tribe there were no treaty rights. *E.g.* Ex. A, (Field Solicitor stating in response to questions from Tribal ancestor that "absent membership [in a federally recognized tribe], he would have no right to exercise tribal treaty rights to hunt and fish," LT036294); Ex. B (Acting Solicitor stating that "[t]he treaty of 1855 provided that various sections of land in Michigan should be set aside for a number of different bands[,]" LT028950, but that "there are no existing reservations for these Indians," LT028952).

Federal litigation eventually corrected the departmental misinterpretation of Article 5 of the 1855 Treaty. In 1979, this court held Article 5 had "no effect . . . [on] the modern political successor to the treaty Indians." *Michigan*, 471 F. Supp. at 264. And in 2004, the Sixth Circuit also recognized that "the 1855 Treaty of Detroit contained language dissolving the artificial joinder of the two tribes. This language, however, was not intended to terminate federal recognition of either tribe, but to permit the United States to deal with the Ottawas and the Chippewas as separate political entities." *Grand Traverse Band*, 369 F.3d at 961 n.2. Today, every party to this case agrees that "Article 5 of the 1855 Treaty . . . *[d]id not* dissolve the bands who signed the 1855 Treaty[,]" and "*did not* abrogate the rights that the 1855 Treaty granted to those bands who signed the 1855 Treaty and who were political predecessors to the Tribe." PageID.2675 (emphasis added). But the aftershocks of that early error still ripple across the

Tribe's history and its treaty rights.

II. 1994 Reaffirmation Act

In the mid-1980s, the Tribe began a multi-year process to officially reaffirm its relationship with the federal government. Its efforts were realized in 1994, when Congress passed an act "To reaffirm and clarify the Federal relationships of the Little Traverse Bay Bands of Odawa Indians and the Little River Band of Ottawa Indians as distinct federally recognized Indian tribes." Pub. L. No. 103-324, 108 Stat. 2156, 2158 (1994) (the Reaffirmation Act). The Reaffirmation Act's legislative history emphasized that despite certain federal officials' misunderstanding and uncertainty, the Tribe existed and operated as a politically sovereign entity with a relationship with the United States throughout American history. As Michigan Representative Dale Kildee described:

> I know these Indians. My grandparents, who emigrated from Ireland and settled in northern Michigan, traded directly with the grandparents of these Indians . . . As the grandson of those immigrants, I am well aware of these Indians' rich history and tribal culture.

140 Cong. Rec. 19,236 (1994). Although start-from-scratch "recognition" and replace-what-was-taken "restoration" are more common actions for the United States government to take concerning tribes today, that enduring legacy supported "reaffirmation" of an existing relationship and of all the attendant rights of that relationship that inured over time. Frank Ettawageshik, Tribal Chairman at the time of the Reaffirmation Act similarly reflected, "our ancestors who worked on these treaties . . . they negotiated for the right of continued existence. That was the most basic of all the treaty rights, the right of continued existence and the right of acknowledgement of that existence by the Federal Government." *Pokagon Band of Potawatomi Indians Act and the Little Traverse Bay Bands of Odawa Indians and the Little River Band of*

Ottawa Indians Act: Hearing on S. 1066 and S. 1357 Before the S. Comm. on Indian Affairs, 103d Cong. 39 (1994).

The Committee on Indian Affairs Senate Report emphasized that administrative malfeasance ignoring the Tribe and its treaty rights did not reflect *congressional* intent:

> The Committee concludes that the Bands were not terminated through an act of the Congress, but rather they were unfairly terminated as a result of both faulty and inconsistent administrative decisions contrary to the intent of the Congress, federal Indian law and the trust responsibility of the United States. In recommending the legislative reaffirmation and clarification of the federal relationship[] of the Little Traverse Bay Bands . . . the Committee strongly affirms that the trust responsibility of the United States is not predicated on the availability of appropriated funds.

S. Rep. No. 103-260, at 4–5 (1994). The Committee on Indian Affairs explained that its own review of the historical record of the Tribe was "contrary" to the one taken by the BIA. *Id.* at 4. The report concludes by stating, "[t]hese tribes' claim of rights and status as treaty-based tribes, and the need to restore and clarify that status, has been clearly demonstrated." *Id.* at 5. The Tribe's Reaffirmation Act was signed into law on September 21, 1994. To rectify far-ranging governmental malfeasance and the resulting cascade of inequitable treatment, Congress spoke broadly: Section 5(a) of the Reaffirmation Act reaffirmed "all rights and privileges of the Bands . . . which may have been abrogated or diminished" at any point before the Act's passage.

III. Diminishment and Disestablishment Defenses

Although the United States has created hundreds of Indian reservations, it has also allowed settlers to enter and buy land within almost all these reservations' boundaries. The Supreme Court has "stressed that reservation status may survive the mere opening of a reservation to settlement." *DeCoteau v. Dist. Cnty. Ct. for the Tenth Jud. Dist.*, 420 U.S. 425, 444 (1975). It has further stated that "'[o]nly Congress can divest a reservation of its land and

diminish its boundaries,' and its intent to do so must be clear." *Nebraska v. Parker*, 136 S. Ct. 1072, 1078–79 (2016) (quoting *Solem v. Bartlett*, 465 U.S. 463, 470 (1984)).

In this case, each defendant asserts that if the 1855 Treaty created a reservation, that reservation was diminished or disestablished by one or more congressional acts of 1872, 1875, and 1876 (collectively, the Opening Acts).[2] The State's affirmative defenses, which are echoed or directly incorporated by each of the intervenor defendants, claim that the Tribe's "alleged Reservation . . . may have been revoked, diminished, disestablished by Congress or through a combination of other events," including "acts providing for the allotment of lands within the alleged Reservation," and "acts providing for the disposition of public lands to non-Indians within the alleged Reservation," among others. PageID.66–67; *see also* PageID.474 (the Cities and Counties, asserting the affirmative defense that if the Tribe's reservation exists, it "may have been revoked or diminished by Congress by certain events including the allotment of lands, the disposition of public lands to non-Indians, . . . or other subsequent disposition of lands by legal convivence"); PageID.501 (the Charlevoix defendants adopting the affirmative defenses of the State and other intervening municipalities); PageID.599 (the Emmet County Townships incorporating "by reference all other defenses pled by all other defendants"); PageID.678 (the Associations asserting the affirmative defense of "Diminishment," that "Even if Plaintiff at one time had a reservation . . . through the operation of law, Plaintiff's reservation does not include lands patented to or subsequently sold to non-members"); PageID.26 (the State's answer expecting the record to show a "substantially smaller" reservation than claimed by the Tribe);

[2] An Act for the Restoration to Market of certain Lands in Michigan, 17 Stat. 381 (June 10, 1872); An Act to amend the act entitled 'An act for the restoration to homestead-entry and to market of certain lands in Michigan,' approved June tenth, eighteen hundred and seventy-two, and for other purposes, 18 Stat. 516 (Mar. 3, 1875); An act extending the time within which homestead entries upon certain lands in Michigan may be made, 19 Stat. 55 (May 23, 1876).

PageID.446 (the cities of Petoskey and Harbor Springs, and the counties of Charlevoix and Emmet, denying the Tribe's Complaint ¶ 3 allegation that the reservation has not been diminished or disestablished); PageID.477 (city of Charlevoix and Charlevoix township noting a lack of information concerning ¶ 3); PageID.575 (Emmet county townships denying ¶ 3); PageID.650 (Associations denying ¶ 3 "as described") (collectively, and as listed in Ex. C, the "Diminishment Defenses").

This Court has recognized that the typical tool to answer diminishment questions is the three-step statutory-interpretation test articulated in *Solem*, 465 U.S. at 470, and clarified in *Parker*, 136 S. Ct. at 1078–79. PageID.1361–1365. Although the first two steps focus on the statute at issue and evidence contemporaneous to the statute, the least-instructive third prong of the *Solem* test considers the ensuing history of the area. The 18 intervenor-defendants have identified over six dozen witnesses, *see* Ex. D (summary list of diminishment witnesses) and Ex. E (defendants' Rule 26(a) disclosures), who may have "minimally relevant evidence concerning 'justifiable expectations[,]'" a sub-factor of the third prong of the *Solem* test. PageID.1368-1369.

Argument

I. Partial summary judgment is appropriate to dispose of legally insufficient defenses.

Under the Federal Rules of Civil procedure, parties may seek summary judgment of any "claim or defense—or part of each claim or defense[.]" Fed. R. Civ. P. 56(a). Summary judgment is appropriate where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Id.* at 56(a). Motions for partial summary judgment are subject to the same summary judgment standard under Rule 56. *See Boyd v. Ford Motor Co.*, 948 F.2d 283, 285 (6th Cir. 1991). Both motions test "whether the evidence presents a sufficient disagreement to require submission to the [factfinder] or whether it is so one-sided

that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251–52 (1986). "Where, as here, the issue is solely one of law, summary judgment for one party will usually be appropriate." *Oscar W. Larson Co. v. United Capitol Ins. Co.*, 64 F.3d 1010 (6th Cir. 1995) (granting partial summary judgment "to the extent that it asks this Court to declare the defense legally insufficient"); *see also Office & Prof'l Emp. Int'l Union, Local 9, AFL-CIO v. Allied Indus. Workers Int'l Union*, 397 F. Supp. 688, 691 (E.D. Wisc. 1975), *aff'd sub nom.* 535 F.2d 1257 (7th Cir. 1976) ("If the claim of settlement is an insufficient defense, or even if proved it is not a material fact, then summary judgment may be granted."). In such cases, partial summary judgment is an "appropriate avenue for the 'just, speedy and inexpensive determination' of a matter." *Cloverdale Equip. Co. v. Simon Aerials, Inc.*, 869 F.2d 934, 937 (6th Cir. 1989) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986)). Here, there can be no genuine issue concerning whether the Opening Acts abrogated or diminished the Tribe's 1855 Treaty rights because Congress has instructed that, as a matter of law, they did not.

II. There is no genuine dispute that the 1994 Reaffirmation Act precludes the Diminishment Defenses.

A. The Reaffirmation Act is an exercise of congressional plenary power.

Congress utilized its plenary power over Indian affairs when it passed the Reaffirmation Act. In that Act, it expressly decided to reaffirm "[a]ll rights and privileges" that may have been "abrogated or diminished" prior to September 21, 1994. Established canons direct that "[w]e must presume that Congress says what it means and means what it says, and therefore must apply a statute as it is written, giving its terms the ordinary meaning that they carried when the statute was enacted." *Norfolk S. Ry. Co. v. Perez*, 778 F.3d 507, 513 (6th Cir. 2015) (internal citations omitted). This Court should apply the Reaffirmation Act as Congress wrote it and grant

partial summary judgment against the defendants' Diminishment Defenses.

1. Congress has plenary power over Indian affairs.

In *Lone Wolf v. Hitchcock*, the Supreme Court confirmed Congress's inveterate plenary power over Indian affairs, stemming from treaties, constitutional provisions, and inherited doctrines. 187 U.S. 553, 565–66 (1903) ("Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning . . . ."); *see also Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16–18 (1831); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 543–53, 555 (1832). Courts have consistently reaffirmed Congress's near-full control over Indian tribes, subject only to the Constitution and an acknowledgement of inherent tribal sovereignty. *See Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2030 (2014) (confirming that "tribes are subject to plenary control by Congress"); *Lone Wolf*, 187 U.S. at 565 (noting that plenary power "has always been deemed a political one"); *United States v. Wheeler*, 435 U.S. 313, 323 (1978) (explaining that Congress has plenary power, but "until Congress acts, the tribes retain their existing sovereign powers").

In the context of Indian affairs, plenary power includes "the power to modify or eliminate tribal rights." *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998). Affirmed by the Supreme Court, "Congress . . . has interpreted the Constitution's 'plenary' grants of power as authorizing it to enact legislation that both restricts and, in turn, relaxes those restrictions on tribal sovereign authority[.]" *United States v. Lara*, 541 U.S. 193, 200 (2004).

2. Congress relies on plenary power to interpret and reinterpret tribal rights.

Congress uses its plenary power over Indian affairs to change and modify existing legislation to best match tribal, local, state, or federal priorities. In 2004, the Supreme Court in *United States v. Lara* summed Congress's plenary power over Indian affairs:

> Congress, with this Court's approval, has interpreted the Constitution's 'plenary' grants of power as authorizing it to enact legislation that both restricts and, in turn, relaxes those restrictions on tribal sovereign authority. . . After all, the Government's Indian policies, applicable to numerous tribes with diverse cultures, affecting billions of acres of land, of necessity would fluctuate dramatically as the needs of the Nation and those of the tribes changed over time.

541 U.S. at 202; *see also United States v. Archambault*, 206 F. Supp. 2d 1010, 1016 (D.S.D. 2002). "The courts have upheld national power to establish the parameters of the government-to-government relationship with tribes." Cohen's Handbook of Federal Indian Law § 5.02[3] (2005 ed.).

Beyond using its plenary power to establish tribal rights in the first instance, Congress also uses its plenary power in Indian affairs to alter court rulings misinterpreting its directives. For example, in *Duro v. Reina*, 495 U.S. 676 (1990), the Supreme Court held that tribes could not exercise criminal jurisdiction over non-member Indians in their tribal courts. Just six months later, Congress amended the Indian Civil Rights Act to override the Supreme Court, and specified that "the inherent power of Indian tribes" includes the ability "to exercise criminal jurisdiction over all Indians." 25 U.S.C. § 1301(2). The Supreme Court later affirmed Congress's ability "to change 'judicially made' federal Indian law" as constitutionally permissible. *Lara*, 541 U.S. at 207.

Congress also uses its plenary power to restore tribal rights it earlier abrogated. *See, e.g.*, Cow Creek Band of Umpqua Tribe of Indians Recognition Act, Pub. L. No. 97-391, 96 Stat. 1960 (1982) (legislatively reversing 25 U.S.C. 691 (1954) *et seq*. and restoring tribal rights); Ysleta del Sur Pueblo and Alabama and Coushatta Indian Tribes of Texas Restoration Act, Pub. L. No. 100-89, 101 Stat. 666, 667 (1987) (legislatively reversing 82 Stat. 93 (1968) and restoring tribal rights); Coquille Restoration Act, Pub. L. No. 101-42, 103 Stat. 91 (1989) (legislatively

reversing 68 Stat. 724 (1954) and restoring tribal rights). Put simply, congressional plenary power over Indian affairs is nearly absolute: what Congress says goes.

3. The Reaffirmation Act was an exercise of congressional plenary power.

Congress exercised its plenary power over Indian affairs when it reaffirmed federal recognition of the Tribe. The "Findings" Section of the Reaffirmation Act revealed congressional displeasure with the BIA's then-current relationship with the Tribe and set the stage for Congress to use its plenary power to correct mistakes it saw in the BIA's historic and contemporary treatment of the Tribe. After describing the BIA's initial funding-driven failure to formalize its relationship with the Bands, Congress noted that in 1975, the Northern Michigan Ottawa Association, an umbrella group that included the Tribe

> petitioned under the Act of June 18, 1934 (25 U.S.C. 461 et seq.; commonly referred to as the "Indian Reorganization Act"), to form a government on behalf of the Bands. *Again in spite of the Bands' eligibility, the Bureau of Indian Affairs failed to act on their request*.

Reaffirmation Act, § 2(9) (emphasis added). Against this background, Congress used the Reaffirmation Act to exercise the same power to reaffirm and engage in a government-to-government relationship with the Tribe that is has used since ratification of the first formal treaty between an Indian tribe and the new republic. *See Cali. Valley Miwok Tribe v. United States*, 515 F.3d 1262, 1263 (D.C. Cir. 2008) (explaining that federal recognition "is 'a formal political act confirming the tribe's existence as a distinct political society, and institutionalizing the government-to-government relationship between the tribe and the federal government'" (quoting Cohen's Handbook § 3.02[3])). Although the unique circumstances leading to the Tribe's reaffirmation are rare, Congress has restored many tribes following congressional termination (a process by which Congress ends the United States' relationship with a tribe by statute), and has

extended federal recognition to several others. *See* Cohen's Handbook §§ 302[5], 302[8](c).

With the Reaffirmation Act, though, Congress did more than just reaffirm federal recognition of the Tribe. It also reaffirmed "[a]ll rights and privileges of the Bands, . . . which may have been abrogated or diminished before the date of the enactment of this Act." Reaffirmation Act, § 5(a). Although several formerly terminated tribes' restoration acts include similar language restoring "all rights and privileges," in those acts, Congress specified that it reaffirmed only those "rights and privileges" destroyed by a particular terminating statute. *See, e.g.*, Cow Creek Band of Umpqua Tribe of Indians Recognition Act, Pub. L. No. 97-391, 96 Stat. 1960 (1982) ("All rights and privileges of the tribe . . . which may have been diminished or lost under the Act approved August 13, 1954 (25 U.S.C. 691 et seq.), are restored[.]"); Ysleta del Sur Pueblo and Alabama and Coushatta Indian Tribes of Texas Restoration Act, Pub. L. No. 100-89, 101 Stat. 666, 667 (1987) ("All rights and privileges of the tribe . . . which may have been diminished or lost under the Tiwa Indians Act are hereby restored."); Coquille Restoration Act, Pub. L. No. 101-42, 103 Stat. 91 (1989) ("Except as provided in subsection (d) of this section, all rights and privileges of this Tribe . . . which were diminished or lost under the Act of August 13, 1954 (68 Stat. 724), are hereby restored[.]"). In the Plaintiff Tribe's Reaffirmation Act, Congress exercised the same restorative plenary power, but spoke more broadly to ensure that it reached every potential abrogation or diminishment that may have occurred before its enactment.

B. The Reaffirmation Act reaffirmed the Tribe's 1855 Treaty rights regardless of potential diminishment.

The text of the congressional language is plain—it reaffirms *all* rights and privileges. That inclusive language necessarily reaffirms any rights the 1855 Treaty afforded the Tribe. Moreover, the Reaffirmation Act reaffirmed all 1855 Treaty rights regardless of whether

intervening events *may* have abrogated or diminished those rights. The Tribe hotly disputes that the Opening Acts diminished its reservation, but Congress has told the parties and this Court that that dispute is not genuine. With Section 5(a), Congress wiped the slate clean of any diminishment questions. The Reaffirmation Act succinctly waived aside any abrogation or even *potential* abrogation to conclusively restore all 1855 Treaty rights as they existed in 1855.

1. The plain text of the Reaffirmation Act forecloses every Diminishment Defense.

Section 5(a) of the Reaffirmation Act states, in its entirety:

> SEC. 5. REAFFIRMATION OF RIGHTS.
>
> (a) IN GENERAL. 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.

The first step in any judicial interpretation of legislation is to "determine whether the statutory text is plain and unambiguous." *Carcieri v. Salazar*, 555 U.S. 379, 387 (2009). When the language is unambiguous, the bedrock rule of statutory interpretation is to consider only the language Congress enacted, making "this first canon [] also the last: judicial inquiry is complete." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) (internal citations and marks omitted). This plain-language canon has been the first stop of courts for over a century: "It is elementary that the meaning of the statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the law-making body which passed it, the sole function of the courts is to enforce it according to its terms." *Caminetti v. United States*, 242 U.S. 470, 485 (1917).

Recently, a decision of this district considered Congress's use of the word "all" and ascribed its plain-English meaning: "'All' is an inclusive adjective that does not leave room for unmentioned exceptions." *Hertel v. Bank of Am., N.A.*, 897 F. Supp. 2d 579, 582 (W.D. Mich.

2012). Many other courts have considered "all" in both statutory and contractual contexts, and have affirmed its broad, encompassing meaning. *See, e.g., Cnty. of Oakland v. Fed. Housing Fin. Agency*, 716 F.3d 935, 940 (6th Cir. 2013) ("In other words, a straightforward reading of the statute leads to the unremarkable conclusion that when Congress said 'all taxation,' it meant *all* taxation."); *Knott v. McDonald's Corp.*, 147 F.3d 1065, 1068 (9th Cir. 1998) (noting that expressly assigning "*all* [their] right, title and interest" in a franchise was "admittedly broad," but "not ambiguous," and that "'all' is an all-encompassing term and leaves little doubt as to what rights [Plaintiffs] assigned . . . and what rights they retained. In short, 'all' means all."); *Sander v. Alexander Richardson Invs.*, 334 F.3d 712, 716 (8th Cir. 2003) ("The term 'any and all' used in the exculpatory clause is all-encompassing and leaves little doubt as to the liability from which the boat owners released the Yacht Club."). "All" means all, and the Reaffirmation Act reaffirmed *all* rights, including every right the Tribe secured under the 1855 Treaty.

Moreover, the Reaffirmation Act's reaffirmation of all rights, whether or not those rights "may have been abrogated or diminished before the date of the enactment of this Act," Reaffirmation Act, § 5(a), leaves no room for the defendants to argue that 1855 Treaty rights were diminished or otherwise abrogated between 1855 and 1994. Matching the "diminishment" language of *Solem* and its progeny, Congress told the world that the Opening Acts don't matter: the rights are reaffirmed. Cases considering re-recognition of tribal status following termination actions confirm that courts interpret clauses restoring the rights and privileges of these tribes broadly. In *United States v. Long*, the Seventh Circuit explained that the Menominee Restoration Act "makes clear that Congress intended to eliminate termination as a policy and practice and to restore the Menominee Tribe to its pre-'termination' status . . . Courts have construed the Restoration Act to effect a full restoration of the Menominee Tribe's pre-Termination Act

powers." 324 F.3d 475, 482 (7th Cir. 2003). Similarly, in *Klamath Tribes of Oregon v. Pacificorp*, the district court stated that "the Klamath Indian Tribe Restoration Act not only restores federal services and protections to the Klamath Tribe, it explicitly 'restored' all treaty rights that were 'diminished or lost' under the Klamath Termination Act[,]" including the overwise-arguably-extinguished fishing rights at issue. No. Civ. 04-644-CO, 2005 WL 1661821, at *5 (D. Or. July 13, 2005)(rejecting Klamath's claim for damages on other grounds), Ex. F.

Recognition that congressional action returns a tribe to a previous-in-time status is directly applicable here when considering the effect of the Tribe's Reaffirmation Act on the Diminishment Defenses. But unlike acts restoring congressionally terminated tribes, the Tribe's Reaffirmation Act does not limit the "all rights and privileges" restoration language to rights ended by a particular act; it instead applies globally to *every* right or privilege "which may have been abrogated or diminished before the date of the enactment of this Act." Reaffirmation Act, § 5(a). Those rights include the rights conferred by the 1855 Treaty.

2. Tools of statutory construction confirm that the Reaffirmation Act forecloses every Diminishment Defense.

Standard tools of statutory interpretation, like the Reaffirmation Act's plain language and Indian law canons of construction, demonstrate that the Reaffirmation Act nullifies all proffered Diminishment Defenses. As "[t]he cardinal principle of statutory construction is to save and not to destroy, . . . [i]t is our duty to give effect, if possible, to every clause and word of a statute." *United States v. Menasche*, 348 U.S. 528, 539 (1955) (internal quotations omitted); *see also Montclair v. Ramsdell*, 107 U.S. 147, 152 (1882). This rule against surplusage requires a court to construe statutes "so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (quoting 2A N.

Singer, Statutes and Statuatory Construction §46.06 (6th ed. 2000)). The Reaffirmation Act includes two operative sections concerning the application of federal law to the Tribe. Section 4 extends "[a]ll laws and regulations of the United States of general application to Indians" to the Tribe, and sets forth federal service areas to define federal responsibilities moving forward. Section 5(a) separately reaffirms "[a]ll rights and privileges of the Bands" as those rights previously existed, bringing them into the present whether or not past actions of any kind "abrogated or diminished" those rights in the intervening time period. Having already afforded the Tribe access to modern federal privileges in Section 4, Section 5(a) must accomplish something different; namely, reestablishing historic tribal rights in their entirety.

Under a separate interpretive canon, "when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 551 (1974); *see also Menominee Tribe of Indians v. United States*, 391 U.S. 404 (1968) (construing tribal termination act and law concerning tribal jurisdiction *in pari materia*). The only way to read the Opening Acts and the Reaffirmation Act consistently is to hold that if the 1855 Treaty created a reservation, the Opening Acts opened that reservation to non-Indian ownership but did not diminish the reservation boundary.

Moreover, applying "the fundamental principle of statutory construction (and indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used[,]" reaches the same result. *Deal v. United States*, 508 U.S. 129, 132 (1993). In *Carcieri v. Salazar*, the Supreme Court considered the Indian Reorganization Act's application to tribes not federally recognized in 1934, and used statutory context to reveal the meaning of the word "now." 555 U.S. at 391. It explained that "the statutory context makes

clear that 'now' does not mean 'now or hereafter' or 'at the time of application,'" and that "Congress limited the statute by the word 'now' and 'we are obliged to give effect, if possible, to every word Congress used.'" *Id.* (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979)). Consistent with the methods that the Supreme Court used in *Carceri*, this Court should consider Congress's reaffirmation of "[a]ll rights and privileges" of the Tribe in the statutory context of its findings that federal misinterpretation blocked the Tribe from exercising its rights, and that the Tribe has maintained its political and social existence in its ancestral homeland. Reaffirmation Act, § 2. In this context, "every word Congress used" must be given effect, and "[a]ll rights and privileges" must not be limited to only some rights and privileges or certain types of potential diminishment. *Carceri*, 555 U.S. at 391; Reaffirmation Act, § 5(a). Rather, Congress reaffirmed all of the Tribe's rights and privileges, including 1855 Treaty rights, and rejected every potential-diminishment argument, including the Diminishment Defenses.

3. The Reaffirmation Act's legislative history confirms that it forecloses every Diminishment Defense.

Because Section 5(a) is clear, reviewing legislative history of the Reaffirmation Act is unnecessary and irrelevant. *See Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 253–54 (2010) (Scalia, J. concurring in part). The Sixth Circuit has stated that "[w]hen interpreting a statute, we must begin with its plain language, and may resort to a review of congressional intent or legislative history only when the language of the statute is not clear." *In re Comshare, Inc. Sec. Litig.*, 183 F.3d 542, 549 (6th Cir. 1999). But even if the Court finds that the language of the Reaffirmation Act ambiguous, congressional intent and legislative history confirm that Section 5(a) forecloses the Diminishment Defenses.

The legislative history of the Reaffirmation Act overwhelmingly supports the plain text reading of the Reaffirmation Act. Opposition statements in the record relate to the *process* that the Tribe used, not to any specific opposition of Section 5(a). *See, e.g.*, 140 Cong. Rec. 19,230–36 (1994). In contrast, in the House's consideration of H. Res. 501 and the text of S. 1357, Representative Kildee, the author of the legislation, recognized—and advocated for—the far-reaching effects that the Reaffirmation Act would have for the Tribe.

> Mr. Chairman, too many generations of tribal leaders have been forced to struggle just to get the Government to recognize and enforce the promises made to their tribes. The time to acknowledge our obligations to these tribes is long overdue. These bills will permit this and future generations of tribal leaders to address the more pressing problems of providing for the economic and social welfare of their people.

140 Cong. Rec. 19,236 (1994). As a sponsor of the bill, the statement that Representative Kildee intended its passage to rectify earlier failures to deliver on the United States' promises to the Tribe deserves substantial weight. *See Nat'l Woodwork Mfrgs. Ass'n v. NLRB*, 386 U.S. 612, 640 (1967). Michigan Representative Pete Hoekstra also spoke to the underlying reasons for this legislation: "Fair and equitable treatment has been absent from our Government's policy toward these tribes in the past—it is time to restore honor and decency to our Nation's treatment of these native Americans." 140 Cong. Rec. 19,239 (1994). Following this discussion, the House Committee on Natural Resources Chairman George Miller went through the bill section by section, and although Wyoming Representative Craig Thomas offered and withdrew an amendment relating to tribal membership, there were no amendments offered to Section 5(a). *See id.* at 19,241–42.

Tribal representatives also made Congress aware, during hearings from written and oral testimony, that the Reaffirmation Act would reshape the balance of sovereign power on the

ground of the Tribe's reservation. "[W]e're not here asking for services or asking for money[,] we're asking for the relationship that our ancestors negotiated very carefully when they negotiated the treaties." *Pokagon Band of Potawatomi Indians Act and the Little Traverse Bay Bands of Odawa Indians and the Little River Band of Ottawa Indians Act: Hearing on S. 1066 and S. 1357 Before the S. Comm. on Indian Affairs*, 103d Cong. 39 (1994) (statement of Frank Ettawageshik, Chairman, Little Traverse Bay Bands of Odawa Indians). "The reaffirmation of our government-to-government relationship with the United States will help us to reestablish our land base and help us to perpetuate our way of life." *Id.* at 41 (statement of Shirley Oldman, Treasurer, Little Traverse Bay Bands of Odawa Indians). These witness statements demonstrate that the Congress that reaffirmed "all rights and privileges" knew—and intended—that decision would revive potentially-broken treaty promises. The legislative history is replete with similar statements demonstrating that Congress intended to treat the Tribe as the sovereign nation it has always been, and to reaffirm every right and privilege that may have been abrogated or diminished in the century and a half between 1855 and the Reaffirmation Act.

4. The Indian canons of construction confirm the Reaffirmation Act forecloses every Diminishment Defense.

Federal courts have developed specific canons of construction to interpret treaties and legislation involving Indian tribes. "The canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians." *Oneida Cnty., N.Y. v. Oneida Indian Nation of New York State*, 470 U.S. 226, 247 (1985). Fundamentally, "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985); *see also United States v. Celestine*, 215 U.S. 278, 290 (1909) (relying on "the rule that the

legislation of Congress is to be construed in the interest of the Indian"). The Supreme Court, Sixth Circuit, and this Court rely on this canon of construction time and again. *See Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 269 (1992) ("When we are faced with . . . two possible constructions, our choice between them must be dictated by a principle deeply rooted in this Court's Indian jurisprudence: '[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.'" (alteration in original) (quoting *Blackfeet Tribe*, 471 U.S. at 766)); *see also Chickasaw Nation v. United States*, 53 U.S. 84, 94 (2001); *Choate v. Trapp*, 224 U.S. 665, 675 (1912) ("This rule of construction has been recognized, without exception, for more than a hundred years[.]"); *Grand Traverse Band*, 369 F.3d at 971; *Sault Ste. Marie Tribe of Chippewa Indians v. United States*, 576 F. Supp. 2d 838, 848–51 (W.D. Mich. 2008); *Michigan*, 471 F. Supp. at 252-53 (collecting cases).

Applying these canons to a state's argument that events that occurred between a treaty's signing and a restoration statute had diminished treaty rights, an Oregon district court stated:

> Given that "'canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians,'" the court must construe the Restoration Act "liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766, 105 S. Ct. 2399, 85 L.Ed.2d 753 (1985) (quoting *County of Oneida*, 470 U.S. at 247). If construed in favor of the Klamath Tribe, the Restoration Act arguably restores the right of the Tribe to enforce its treaty fishing rights if extinguished by virtue of Oregon statutes of limitations rendered applicable under the Klamath Termination Act.

Klamath Tribes of Oregon, 2005 WL 1661821, at *5. The same should result here. Congress passed the Reaffirmation Act to specifically address the unique circumstances of the Tribe and the 150 years that the Tribe spent trying to rectify federal misinterpretation of the 1855 Treaty it carefully bargained for. Although Section 5(a) of the Reaffirmation Act is plain, if it were

ambiguous, the Indian canons of construction require that the Court resolve that ambiguity in the Tribe's favor. *See Blackfeet Tribe*, 471 U.S. at 766. Construing Section 5(a) of the Reaffirmation Act in the Tribe's favor would reaffirm the Tribe's 1855 Treaty "rights and privileges," whatever they were, in their 1855 bargained-for state.

C. The *Solem v. Bartlett* test for reservation diminishment does not apply here.

The Reaffirmation Act disposes of the building fight over whether, if the 1855 Treaty created a permanent reservation for the Tribe, the Opening Acts diminished or disestablished the reservation. *See* PageID.66–67; PageID.474; PageID.501; PageID.599; PageID.650. While courts have stated that the typical tool to answer that question is to apply the test articulated in *Solem*, 465 U.S. at 470 and clarified in *Parker*, 136 S. Ct. at 1078–79, the Tribe's Reaffirmation Act renders *Solem*'s statutory-interpretation tool unnecessary in this case.

1. The *Solem* test to determine congressional intent in unclear land-opening acts cannot apply here where the Reaffirmation Act directs interpretation of the Opening Acts from their passage to 1994.

In diminishment and disestablishment cases, a court must determine whether an Act postdating a treaty reduced or abolished a previously extant reservation. *E.g.*, *Parker*, 136 S. Ct. 1072; *Solem*, 465 U.S. 463; *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 586 (1977) ("The mere fact that a reservation has been opened to settlement does not necessarily mean that the opened area has lost its reservation status."). The focus is on interpreting the opening act—not the treaty. Courts use the *Solem* test to determine Congressional intent where "surplus land Acts did not clearly convey 'whether opened lands retained reservation status or were divested of all Indian interests.'" *Parker*, 136 S. Ct. at 1079 (quoting *Solem*, 465 U.S. at 468)); *see also Solem*, 465 U.S. at 468 ("Congress naturally failed to be meticulous in clarifying whether a particular piece of legislation formally sliced a certain parcel of land off one reservation."). Under *Solem*, courts

must analyze the text of subsequent acts used to open Indian lands, circumstances surrounding the opening, and subsequent treatment of the reservation, always with an eye toward discerning congressional opening-act intent. *Parker*, 136 S. Ct. at 1079. In this case, the defendants point to *six dozen* lay witnesses who have "minimally relevant evidence" of congressional intent. PageID.1369; *see also, e.g.*, Ex. E at 25, 35 (identifying a City of Petoskey witness who "may testify in Phase I" concerning "practices, policies, and procedures related to administration of the parks and recreation system of the city[.]").

But the *Solem* framework presupposes that Congress's intent concerning diminishment or abrogation is unclear. *See, e.g.*, *Parker*, 136 S. Ct. at 1080 (examining historical evidence where there is a "lack of clear textual signal that Congress intended to diminish the reservation"); *Solem*, 465 U.S. at 471 (describing tools "to decipher Congress's intentions"). In the unique circumstances of this case, the Reaffirmation Act renders the *Solem* test unnecessary. In 1994, Congress spoke plainly: whether or not the Opening Acts diminished the reservation, Congress reaffirmed "all" rights that may have been "abrogated or diminished[,]" including 1855 Treaty rights that may or may not have been diminished by the Opening Acts. The Reaffirmation Act obviates the need for any diminishment analysis between 1855 and 1994.

In the Reaffirmation Act, Congress chose incredibly precise and specific language. Unlike other restoration acts, Congress did not limit reaffirmation to those rights and privileges which may have been altered only by specific, named pieces of legislation. *See, e.g.*, Cow Creek Band of Umpqua Tribe of Indians Recognition Act, Pub. L. No. 97-391, 96 Stat. 1960 (1982); Ysleta del Sur Pueblo and Alabama and Coushatta Indian Tribes of Texas Restoration Act, Pub. L. No. 100-89, 101 Stat. 666, 667 (1987); Coquille Restoration Act, Pub. L. No. 101-42, 103 Stat. 91 (1989). Instead, it reaffirmed "all" rights and privileges through the date of the Act.

Further, Congress chose to use the words "abrogate" and "diminish"—the language of a century of reservation-diminishment caselaw—to express the ways that it supposed that the Tribe's rights may have been altered. *See, e.g.*, *Parker*, 136 S. Ct. at 1081 & n.1.

In its bifurcation order, this Court determined that "equitable defenses do not lie in the first phase of this case." PageID.1365. Echoing caselaw, it stated in part that to answer the threshold questions concerning "reservation creation and diminishment," it must "look to congressional intent alone, with the 'statutory language,' 'all circumstances surrounding the opening of a reservation,' and 'contemporaneous and subsequent understanding of the reservation,' informing its analysis." PageID.1364. The text of the Reaffirmation Act offers controlling evidence of Congress's intent concerning the Opening Acts, and this Court should follow Congress's directive that reaffirming "all rights and privileges" that may have been "abrogated or diminished" in the time "before the date of the enactment of this Act." Reaffirmation Act, § 5(a). There is no need to use *Solem*'s analysis to divine Opening Act intentions because Congress has already told us how to interpret them: the Opening Acts did not abrogate or diminish any tribal right.

2. There were no Opening Acts passed after 1994, so this Court need not use the *Solem* test at all in the case.

Because the Reaffirmation Act directs that nothing *before* 1994 could diminish the Tribe's 1855 Treaty rights, it is only necessary to answer one additional question to resolve this motion: Did any statute *after* 1994 diminish 1855 Treaty rights? As detailed above, the Supreme Court has repeatedly stated that only Congress can diminish or disestablish a reservation. *See Solem*, 465 U.S. at 470. Since there are no statutes concerning the Tribe after 1994, none could have diminished the Reservation, and there is no need to resort to the *Solem* test in this case.

Rather, granting partial summary judgment in favor of the tribe on the Diminishment Defenses will leave for trial the core question at the heart of this case: Did the 1855 Treaty guarantee the Tribe the Reservation?

3. The Court should enter summary judgment in the Tribe's favor against the Diminishment Defenses.

In unconditional and far-ranging legislation, Congress reset the Tribe's rights—including its 1855 Treaty rights—to afford the Tribe the benefit of its government-to-government relationship with the United States and the promises that the Tribe had bargained for. In 1994, Congress reaffirmed all rights whether earlier actions may have diminished them or not, and it has not spoken since.

The plain text of the Reaffirmation Act and multiple tools of statutory interpretation all point to just one result: Congress instructed that the Diminishment Defenses fail as a matter of law. Under these unique circumstances, the defendants cannot offer any "evidence on which a reasonable [factfinder] could return a verdict for [them]." *Chappell v. City of Cleveland*, 585 F.3d 901, 913 (6th Cir. 2009) (emphasis omitted). Rather, the defenses are "legally insufficient," and summary judgment against the defenses is appropriate. *Oscar W. Larson Co. v. Untied Capitol Ins. Co.*, 845 F. Supp. at 445, 449 (W.D. Mich. 1993). Under these circumstances, summary judgment is an "appropriate avenue for the 'just, speedy and inexpensive determination' of a matter." *Cloverdale Equip. Co.*, 869 F.2d at 937 (quoting *Celotex Corp.*, 477 U.S. at 327). Summary judgment on this issue would allow the parties and this Court to focus discovery and trial on the root of the dispute—reservation creation—without spending time and resources litigating potential-diminishment questions that Congress has already answered.

Conclusion

A logical, clear reading of an act of Congress should always prevail over a strained one. The parties must take to trial the ultimate-issue question of whether the 1855 Treaty created the Reservation as the permanent home for the Tribe. But against Congress's statements in the Reaffirmation Act, there can be no genuine dispute under the summary judgment standard about whether the Opening Acts diminished or abrogated those rights the 1855 Treaty afforded: Congress says they did not. The Tribe respectfully requests that the Court grant its motion and enter partial summary judgment against the defendants' Diminishment Defenses.

/s/ Jessica Intermill
William A. Szotkowski
Jessica Intermill
Andrew Adams III
Leah K. Jurss
Hogen Adams PLLC
1935 W. County Rd. B2, Ste. 460
St. Paul, MN 55113
Phone: (651) 842-9100
E-mail:bszotkowski@hogenadams.com
jintermill@hogenadams.com
aadams@hogenadams.com
ljurss@hogenadams.com

Dated: March 28, 2018

James A. Bransky
9393 Lake Leelanau Dr.
Traverse City, MI 49684
Phone: (231) 946-5241
E-mail:jbransky@chartermi.net

Donna Budnick
7500 Odawa Cir.
Harbor Springs, MI 49740
Phone: (231) 242-1424
E-mail:dbudnick@ltbbodawa-nsn.gov

Counsel for Plaintiff Little Traverse Bay Bands of Odawa Indians