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

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

Plaintiff,

v.

GRETCHEN WHITMER, Governor of the State of Michigan, et al.,

Defendants.

Case No. 1:15-cv-850

Hon. Paul L. Maloney
Magistrate Judge Phillip J. Green

INTERVENING DEFENDANTS EMMET COUNTY LAKESHORE ASSOCIATION AND THE PROTECTION OF RIGHTS ALLIANCE'S
MOTION FOR SUMMARY JUDGMENT

Intervening Defendants Emmet County Lakeshore Association and The Protection of Rights Alliance (the "Associations"), by their counsel Dykema Gossett, PLLC, respectfully request that the Court grant summary judgment pursuant to Fed. R. Civ. P. 56 against Plaintiff and dismiss Plaintiff's claims. In support of its Motion, the Associations submit the following Brief in Support.

Respectfully submitted,

Dated: March 18, 2019

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INTERVENING DEFENDANTS EMMET COUNTY LAKESHORE ASSOCIATION AND THE PROTECTION OF RIGHTS ALLIANCE'S BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Months of litigation and thousands of pages of expert reports have not changed the fact that the plain language of a four-page treaty answers the two questions presently before this Court. Did the 1855 Treaty of Detroit, 11 Stat. 621 (the "1855 Treaty") create a permanent Indian reservation when it temporarily withdrew federally-owned land from market for individual Indians to select land to be patented to them in unrestricted fee? And, if so, does that land remain "Indian Country" today? The answer to both questions is a resounding and unequivocal "No".

Despite the efforts of the Little Traverse Bay Bands of Odawa Indians (the "Tribe") to strain the treaty language to have this Court, 164 years later, declare 337 square miles in Northern Michigan (the "Withdrawn Area") an extant Indian reservation and "Indian Country," the treaty language simply cannot support such a radical alteration of history. The plain language of the 1855 Treaty provided for federally-owned land, ceded by the Tribe's predecessor bands in 1836, to be withdrawn from public market only temporarily. The 1855 Treaty further provided a process for the selection of parcels by *individual Indians*, which parcels were to be patented to those *individual Indians* to own in fee without restriction, with the unselected lands to be placed back on the public market.[1] Congress, through acts in the 1870s, made modest adjustments to the selection process before restoring the unselected lands to public market in accordance with the 1855 Treaty. The plain language of the 1855 Treaty, and the Congressional

[1] While this brief uses terms such as "Indians," "non-Indians" and even "white man," in lieu preferred terms such as "Native Americans," there is no disrespect intended. Such terms are used as they appear in case law discussing relevant legal issues, and records from the Nineteenth Century. While the Associations strenuously disagree with the Tribe's claim that the 1855 Treaty established an extant Indian reservation, their opposition to the Tribe's claims in this case should not be taken as any indication of a lack of recognition or respect for the Tribe, its members, or their culture.

Acts of the 1870s, demonstrate that there was never any intention to convert the Withdrawn Area into a permanent reservation for the Tribe or any other tribes.

There is no need for this Court to go beyond the plain language of the 1855 Treaty itself to find that a permanent Indian reservation was not created. Even if the Court does look beyond the treaty language, however, the relevant treaty journal demonstrates the intention of members of the Tribe's predecessor bands to hold land individually in the same manner as non-Indian citizens. The intent of the parties shown in these records is wholly inconsistent with the Tribe's modern-day argument that a permanent Indian reservation was created back in 1855.

Neither the treaty language itself, nor the contemporaneous records, can establish that the Withdrawn Area satisfies the requisite elements of an Indian reservation or Indian Country. Under established legal standards, an Indian reservation is land set aside by the federal government for Indian purposes under federal superintendence. Here, the land was not "set aside" but only temporarily withdrawn from sale on the public market; the goal was not to further "Indian purposes" but just the opposite; and the Withdrawn Area was not placed under "federal superintendence" then or now. Neither the individual Indians nor the bands were ever bestowed any permanent rights to the federal land. Land selections were patented in fee, without restriction, to *individual Indians*—not to the bands as political entities with restrictions on alienation and use. Moreover, following the 1855 Treaty's implementation, the federal government had no relationship to the Withdrawn Area or its inhabitants—outside of simply selling the unselected land on the public market. Indeed, even assuming that the elements of an Indian reservation were met—which they were not—any purported reservation established by the 1855 Treaty would have been temporary and then necessarily terminated once Congress issued fee patents and restored the remaining lands to public market. Indeed, under any

definition of Indian Country, the Withdrawn Area does not constitute "Indian Country".

Notwithstanding the straightforward matter at hand, the Tribe will attempt to create ambiguities where none exist in an effort to create a genuine issue of material fact as to whether "the 1855 treaty created the reservation," which the Tribe believes is a "trial" issue. (PageID.6757.) But this Court need not entertain semantic arguments because every avenue analyzing the 1855 Treaty leads to the conclusion that no reservation or Indian Country was ever intended to be, or was in fact, established.

Not only would granting the Tribe its requested relief be contrary to the plain language of the relevant treaty documents, it also would cause a seismic and catastrophic shift in the jurisdictional and regulatory landscape of this vast part of Northern Michigan, upsetting the longstanding and settled expectations of local residents, including the members of the Emmet County Lake Shore Association ("ECLA") and The Protection of Rights Alliance (the "Alliance") (collectively, the "Associations"). Zoning, building codes, business regulations, and nuisance laws, as well as some taxes, would not apply to the Tribe itself or any tribal members—which would have myriad negative consequences for the non-Indian citizenry and state and local authorities. As the Associations explained when moving to intervene, non-Indians would likely be unable to effectively influence the adoption and application of zoning and other regulations governing neighboring land and activities conducted by tribal members; the area would be open to additional gaming; issues involving law enforcement would likely arise given the complexities of establishing jurisdiction; the existing justice system would be undermined; non-Indians could involuntarily become subject to tribal regulatory and adjudicatory jurisdiction; the operation of certain federal statutes, particularly environmental laws, would change; and criminal jurisdiction would be fundamentally altered. *See* Brief in Support of the Associations' Motion for

Intervention as of Right or, in the Alternative, by Permission (PageID.277-281). Additionally, granting the Tribe its requested relief here could well spur several other tribes, also signatories to the 1855 Treaty, to file similar actions resulting in even more lands being deemed Indian Country, compounding the jurisdictional confusion.

For the following reasons, the Associations respectfully request that this Court grant summary judgment and dismiss Plaintiff's claims.

STATEMENT OF THE FACTS

I. The 1836 Treaty

The long history between the Tribe and the United States government begins, for purposes of this case, with the March 28, 1836 treaty between the federal government and Odawa and Chippewa Indian bands (the "1836 Treaty").[2] 7 Stat. 491 (1836) (PageID.6825-6831.) Under the 1836 Treaty, Odawa and Chippewa bands "cede[d] to the United States all the tract of country within" certain boundaries, containing vast tracts of property. *Id.*, Art. I. The cession included all of the Withdrawn Area.

As initially drafted, the 1836 Treaty contemplated a "reservation" for the Odawa and Chippewa bands, as follows:

> From the cession aforesaid the tribes reserve for their own use, to be held in common the following tracts, namely: One tract of fifty thousand acres to be located on Little Traverse Bay[.]

Id., Art. II. Prior to ratifying the 1836 Treaty, however, the United States Senate added a five-year temporal limitation on the reservation. (PageID.6825-6831) (adding the language, "for the

[2] This brief uses the term "Odawa," the preferred and official spelling now utilized by the Tribe. In this brief, the term encompasses the signatories of the 1855 Treaty who are the predecessors in interest to the Tribe. In addition to the Tribe, there are several other federally recognized tribes that are successors in interest to the 1855 Treaty signatory bands, each of whom could potentially make similar claims to an extant reservation.

term of five years from the date of the ratification of this treaty, and no longer, unless the United States grant them permission to remain on said lands for a longer period"). The five-year restriction was ratified by the Indian parties, and the 50,000 acres were never surveyed as a reservation. *Id.* With no right to permanently occupy the land, Odawa were left fearing that they could be forced to leave Michigan in the years ahead. *See infra*, p. 4-7.

II. 1855 Treaty Negotiations

In the years following the 1836 Treaty, the Superintendent of Indian Affairs in Michigan, William Richmond, observed that "the Ottowas of Michigan are making great efforts to secure themselves permanent homes, by purchasing lands along rivers and bays of the lake." (PageID.8164.) Richmond continued that the Odawa sought to "participate in the privileges of citizenship" under state law. (PageID.8165.) In January 1855, Odawa members wrote in a petition that they wanted "to pay for land and the Taxes." (PageID.8305-8306.) In July 1855, Odawa members traveled to Detroit to negotiate a new treaty with Commissioner of Indian Affairs George Manypenny, and Federal Indian Agent Henry Gilbert.

During negotiations, Manypenny stated "[t]he Government is desirous to aid you in settling upon permanent homes" and explained that tribal members would own the land individually just as he did:

> I have understood that some of the Indians who have purchased lands have an idea that they will forfeit them, if they take lands under the contemplated treaty. This is a mistake. Your lands are your own as mine are mine, & they cannot be taken from you. If you are disturbed on that point, you may dismiss your apprehension. I remark again that in selecting your lands, you must be careful, very careful, to make such selections as will be best for yourselves & those who come after you.

(PageID.7147-48.) Manypenny assured the Indians that there would be "no necessity for you to remove. . . This idea that the land will be pulled from under you originates either in error, or in

something I cannot comprehend." (PageID.7153.) He specifically addressed fears over temporary restrictions on alienation and reassured the Indians that they would receive "strong papers" that would allow the land to be inherited. *Id.* "I told you at first that while all should have permanent homes, there would be a restriction upon the individual power of alienation. . . You shall have good, strong papers, so that your children may inherit your lands." (PageID.7154.) Manypenny elaborated:

> In relation to the patents I think there will be no difficulty. It shall be absolute title, save a temporary restriction upon your power of alienation. The question of taxes I am not prepared to answer. I am not sure though but that the views of Waw-be-geeg are correct. We want you to be citizens & to be such you must assume the burdens of citizenship.

(PageID.7136.)

While the issues of taxation was not yet finalized, Manypenny unequivocally stated that if the Indians were to hold land like the "white man" and be citizens, they would have to pay taxes just the same. Moreover, since the Indians were to become citizens, they could no longer rely on the federal government for involved oversight of their financial matters. Manypenny stated:

> We understand that it is your desire so to arrange your affairs here that you may attain to the civilization & citizenship of the whites. Now, while I deem it desirable that you shall not waste this money, I want you to reflect that just so long as you leave a fund in the hands of the U.S. you are & will be considered a distinct people. The sooner you break down the barriers between you and the whites, the sooner you will become one people. This both you & the whites desire. Besides it as object for government (for it costs a great deal to manage your affairs) to have you civilized citizens of the State – taking care of yourselves, and that is one object of calling you here. Your Great father is a good father, willing to aid you to the extent of his power but it will be a strange thing if the time can never come, when you may run alone. Among the whites, when a man has children the time comes, or is supposed to come, when they know enough to take care of themselves. So it is with you. We think you should be restricted in the full care of this

> land & money for a few years, yet we think that the time will shortly come when you can take care of them for yourself.

(PageID.7150-51.) Manypenny then proposed the payment of annuities and interest for a period of ten years, and payment of $200,000 that was owed under the 1836 Treaty. *Id.*

In response to requests by the Indian negotiators that the government continue to manage the bands' financial affairs (regarding the payment of $1,700 annually in perpetuity instead of a lump sum payment of $30,000), despite the end of all other obligations between the parties, Gilbert commented:

> The proposition to leave this matter open when we are settling all other matters is one I cannot listen to. 1st, because at the end of Ten years all other matters, except the payment of $200,000 will cease now if we accede to his proposition at the end of that time, this $1700 permanent annuity will be all that will remain between them & the U.S. There are 12, or 13,00 (*sic*) of the Ottawas & Chippewas for the U.S. to keep up this agency for the mere purpose of paying $1700 per capita, will be of great expense to the Government & little benefit to the Indians. And this annuity, which will amount to but $1.60 per head, will grow smaller & smaller, if you increase in numbers. Now we propose to pay you this $30,000 which we think the fair value of it. You need it now to enable you to bet on to your locations; but after ten years, it will be of no earthly use to you or your children. Again, though your treaty provides that this annuity shall be forever, yet like all annuities for an indefinite time, it will cease, whenever you become citizens of the U.S. There is no other way to get along with this matter. The time must come, when you will be citizens, & then, without anything being done, you will lose this annuity.

(PageID.7154.) Manypenny concurred, stating, "That $1700 was granted to your band & when your band dies, as it must when you become citizens it will die with it." (PageID.7154.)

III. The 1855 Treaty

By the end of July 1855, the parties had concluded the 1855 Treaty (Jul. 31, 1855, 11 Stat. 621 (1855) (PageID.6893), with the United States agreeing to *temporarily* withdraw from sale "all the unsold public lands within the State of Michigan embraced in the following

descriptions[.]" *Id.* The 1855 Treaty is clear that the land withdrawn was "unsold public" land owned by the United States, not including lands already sold (including to individual Odawa). *Id.* The land had been ceded in the 1836 Treaty, and therefore was not land to which the bands had some remaining aboriginal right. (PageID.6825-6831.)

Article I of the 1855 Treaty provided that the United States would give each "Ottowa and Chippewa Indian" head of the family, single persons over 21, and each family of an orphan child or single orphan child, certain acres of land in the described lands subject to certain rules and regulation. (PageID.6894-95.) The 1855 provided five years for Indians to select land to be granted to them, another five years for Indians only to acquire lands by purchase, all selected and purchased land to be patented without restriction, and any remaining lands to "be sold or disposed of by the United States as in the case of all other public lands." (PageID.6894-95.) Article II of the 1855 Treaty provided for the temporary payment of annuities. *Id.* Article III contained a release and settlement clause releasing the government from any further obligation to the Odawa.[3] *Id.*

IV. The 1870s Acts

Congress enacted three additional measures in the 1870s (the "1870s Acts") related to the 1855 Treaty. Those Acts were the following: (i) An Act for the Restoration to Market of certain Lands in Michigan, 17 Stat. 381 (June 10, 1872) (the "1872 Act") (PageID.7871), (ii) An Act to Amend the Act entitled "An Act for the Restoration to Market of Certain Lands in Michigan," approved June 10, eighteen hundred and seventy-two, and for other purposes," 18 Stat. 516 (Mar. 3, 1875) (the "1875 Act") (PageID.7888); and (iii) "An Act Extending the Time within

[3] In 1856, further adjustments were made to lands available for selection and purchase under the 1855 Treaty, including the withdrawal of additional lands to match the treaty and the return to market of other lands that were no longer necessary. (PageID.7161-64.)

which Homestead entries upon certain lands in Michigan may be made," 19 Stat. 55 (May 23, 1876) (PageID.7890) (the "1876 Act," collectively with the 1872 Act and 1875 Act, the "1870s Acts"). In the 1872 Act, Congress provided for the issuance of patents to Indians who had not yet received them, allowed Indians and some non-Indians to make homestead entries on the land, and provided that any remaining undisposed of lands "shall be restored to market by proper notice[.]" (PageID.7871.) The 1875 Act amended the 1872 Act to authorize the Secretary of the Interior to cause patents to be issued to 320 members of the Odawa and Chippewa Indians of Michigan, and the disposition of residual lands. (PageID.7888.) Finally, the 1876 Act extended the time under which homestead entries could be made under the 1872 Act. (PageID.7890.)

STANDARD OF REVIEW

A court must "grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). There is no such genuine dispute when "the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." *Hughes v. Gulf Interstate Field Servs.*, 878 F.3d 183, 187 (6th Cir. 2017) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)).

On the issue of interpreting the 1855 Treaty, this Court must construe the 1855 Treaty in accordance with its plain meaning if it is unambiguous. "Courts cannot ignore plain language that, viewed in historical context and given a fair appraisal, clearly runs counter to a tribe's later claims." *Oregon Dep't of Fish and Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 774 (1985). Conversely, if this Court finds that the language of the 1855 Treaty is ambiguous, this Court can construe ambiguous terms "in the sense in which [the 1855 Treaty] language would naturally be understood by the Indians." *Washington v. Washington Commercial Passenger Fishing Vessel*

Ass'n ("Fishing Vessel"), 443 U.S. 658, 675-76 (1979). However, the Tribe bears the burden of proof "for the purpose of showing how the Treaty was understood by the [Indians]." *Yakama Indian Nation v. Flores*, 955 F. Supp. 1229, 1236 (E.D. Wash. 1997).

ARGUMENT

In 2015, 160 years after the 1855 Treaty was signed, the Tribe filed its complaint in this case, asserting, for the first time in federal court, that the 1855 Treaty had established a permanent tribal reservation encompassing all lands embraced within the Withdrawn Area. The Tribe's arguments, however, plainly conflict with the unambiguous language of the 1855 Treaty, which this Court must interpret as written, and the conduct of the Tribe, other tribes, the state, the federal government, and non-Indians over the last 160 years. *Chickasaw Nation v. United States*, 534 U.S. 84, 88-89 (2001) (rejecting application of liberal-construction canon where Court found no ambiguity). The unambiguous language of the 1855 Treaty unequivocally created only a temporary withdrawal of land from the public market, which is evident from the plain language of the 1855 Treaty and reinforced by the 1870s Acts. Alternatively, even if this Court were to determine that the 1855 Treaty created a reservation, the historical record demonstrates that the 1870s Acts disestablished or diminished the alleged reservation.

I. THE 1855 TREATY ONLY TEMPORARILY WITHDREW FEDERAL LAND FROM SALE FOR SELECTION BY INDIVIDUAL INDIANS AND DID NOT CREATE AN INDIAN RESERVATION OR INDIAN COUNTRY.

The Indian law canons of construction do not apply here because the plain *unambiguous* language of the 1855 Treaty, viewed in historical context and given a fair appraisal, is contrary to the Tribe's arguments. *See, e.g., South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506 (1986) ("The canon of construction regarding the resolution of ambiguities in favor of Indians . . . does not permit reliance on ambiguities that do not exist"); *Choctaw Nation v. United*

States, 318 U.S. 423, 432 (1943) ("Indian treaties cannot be re-written or expanded beyond their clear terms to remedy a claimed injustice."); *Jones v. United States*, 846 F.3d 1343, 1352 (Fed. Cir. 2017) ("The Treaty was written in English, however, and we must honor any unambiguous language in the treaty."); *Menominee Indian Tribe of Wisconsin v. Thompson*, 943 F.Supp. 999, 1010 (W.D. Wis. 1996) (canon of liberal construction "does not give the [tribe] free license to invent an interpretation of the treaty that benefits them today"), *aff'd*, 161 F.3d 449 (7th Cir. 1998); *compare Cty. of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985) (the "ambiguous provisions" in Indian treaties should be "interpreted to the [Indians'] benefit).

Despite the Tribe's arguments to the contrary, the 1855 Treaty's plain language is unequivocal. This Court must interpret the 1855 Treaty as it is, and when so done, the only conclusion is that the clear intent, evident on the face of the 1855 Treaty, was to provide a means for individual Odawa to fully assimilate into non-Indian society and terminate all government obligations to the Indian signatories of the 1855 Treaty—not to create a permanent Indian reservation. The Tribe ultimately asks this Court to declare that the land in question is an Indian reservation, and thus "Indian country", which it is not. Even a cursory review of the 1855 Treaty's plain language belies such a conclusion. There is simply is no genuine issue of material fact as to whether the 1855 Treaty created "Indian country," described by the courts as land that "had been validly set apart for the use of the Indians as such, under the superintendence of the Government." *United States v. John*, 437 U.S. 634, 649 (1978). It did not.

A. The 1855 Treaty Only Provided For A Temporary Withdrawal Of Land From Market, Not A Permanent Reservation.

Article 1 of the 1855 Treaty provided, in relevant part:

> The United States will withdraw from sale for the benefit of said Indians as hereinafter provided, all the unsold public lands within the State of Michigan embraced in the following

> descriptions[4]…The United States will give to each Ottawa and Chippewa Indians being the head of family, 80 acres of land … to be selected and located within the several tracts of land hereinbefore described under the following rules and regulations… All the land embraced within the tracts hereinbefore described, that shall not have been appropriated or selected within five years shall remain the property of the United States, and the same shall thereafter, for the further term of five years, be subject to entry in the usual manner and at the same rate per acre as other adjacent public lands are then held, by Indians only; and all lands, so purchased by Indians, shall be sold without restriction, and certificates and patents shall be issued for the same in the usual form as in ordinary cases; and all lands remaining unappropriated by or unsold to the Indians after the expiration of the last-mentioned term, may be sold or disposed of by the United States as in the case of all other public lands.

(PageID.6893.) This Article plainly sets forth an expiration date for the right of individual Indians to be granted or to purchase lands within the tracts withdrawn from public sale. *Id.* At the end of that period, the Article specified that the lands within the tracts withdrawn that were not selected by individual Indians would be returned to the public market. *Id.* This Article also provided that the lands selected would eventually be held by patents-in-fee titles, subject to state law, rather than under federal trust titles held by the United States, with restrictions against alienation. *Id.* Ultimately, there would only be: (1) lands previously appropriated within the tracts (sold lands); (2) lands that had been selected or purchased by *individual* Indians during a ten-year period, all of which would be patented in fee simple title; (3) lands sold or available for sale under public laws to other parties; and, pursuant to another provision within Article I, (4) lands appropriated by the United States for educational purposes.

In other words, the 1855 Treaty only allowed for the individual members of the bands to select or purchase federal land for a *limited ten-year period*. Moreover, there is no indication in

[4] The 1855 Treaty provided for the withdrawal of lands for the members of numerous bands other than the Tribe that is a party to this case.

the 1855 Treaty that the jurisdictional status of the land would change as a result of withdrawal itself, selection by the Indians, or its later "restoration" to the public market. To the contrary, the 1855 Treaty expressly stated that the unselected lands "shall remain the property of the United States" and be "sold or disposed of by the United States *as in the case of all other public lands*." (PageID.6893) (emphasis added).

The 1855 Treaty created a foundation for the Withdrawn Area to be occupied by Indian and non-Indian settlers alike, with no special protections or benefits related to tribal entities. In reviewing the clear, unambiguous language of the 1855 Treaty, the only logical conclusion is that the 1855 Treaty caused the *temporary withdrawal* of lands to settle *individual* Indians, and nothing more. Given the clear language, the disputed area is not a reservation or "Indian Country," as the Tribe asserts.

B. The Withdrawn Area Does Not Meet The Requisite Criteria Of "Reservation" Or "Indian Country" Under Federal Law.

1. An Indian reservation is an area of land set aside for Indian purposes under the superintendence and control of the federal government.

Based on the 1855 Treaty, which as discussed above, unambiguously temporarily withdrew land from sale, the Tribe asks this Court to declare the entire disputed 337 square miles "Indian Country" under 18 U.S.C. § 1151, which defines the term as:

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. §1151.[5] But the United States Supreme Court in *United States v. John*, drawing from earlier court decisions[6], held that the principal test to apply in determining whether a treaty delineated certain lands as Indian reservation was whether the treaty (i) set apart land; (ii) for the use of the Indians; (iii) under the superintendence of the Government. *John*, 37 U.S. at 648-49. Looking squarely at the unambiguous language of the 1855 Treaty, not a single element of this test can be established. It certainly did not: (1) set apart land, (2) for Indian purposes, (3) under the superintendence of the federal government.

2. The 1855 Treaty did not "set apart" land.

Under federal law, "land is 'validly set apart for the use of Indians as such' only if the federal government takes some action indicating that the land is designated for use by Indians." *Buzzard v Okla Tax Comm'n*, 992 F.2d 1073, 1076 (10th Cir 1993). The United States Supreme Court further described this test in *Native Vill. of Venetie Tribal Gov't*, 522 U.S. at 531, n.6, requiring "explicit action" in order "to create or to recognize Indian country." *Id.* There must be evidence that the "federal government has set aside the land for *tribal use* in order to further *tribal interests*." (emphasis added).

In this regard, the language of the 1855 Treaty stands in stark contrast to other treaties of the same year that "set apart" areas for the exclusive use and benefit of Indians under tribal

[5] While this statute is found in the criminal code, the Supreme Court has used it in the civil context and to determine the boundaries in which state and tribal jurisdiction should be asserted. *Alaska v. Native Village of Venetie Tribal Gov*, 522 U.S. 520, 527 (1998) (the Court has recognized that the statute "generally applies to questions of civil jurisdiction").

[6] *John* cites to several prior decisions, including *United States v. Ewing*, 47 F. 809, 813 (D.S.D. 1891) ("we find in the treaty between the United States and the Yankton Sioux, whereby the reservation in Charles Mix county was set apart for the use of the Indians, that the United States, in consideration of the cession of lands made by the Indians, agreed 'to protect the said Yanktons in the quiet and peaceable possession of the said tract of 400,000 acres of land so reserved for their future home'").

control. *See, e.g.*, Treaty with the Walla-Wallas, Cayuses, and Umatillas, 1855, art. 1, 12 Stat. 945; Treaty with the Yakamas, 1855, art. 2, 12 Stat. 951.

The June 9, 1855 Treaty with the Walla-Wallas, Cayuses and Umatillas created a reservation by stating that land:

> Shall be set apart as a residence for said Indians . . . all of which tract shall be set apart, and, so far as necessary, surveyed and marked out, for their exclusive use; nor shall any white person be permitted to reside upon the same without permission of the agent and superintendent.

That same year, the Treaty with the Yakamas stated:

> All which tract shall be set apart, and, so far as necessary, surveyed and marked out, for the exclusive use and benefit of said confederated tribes and bands of Indians, as an Indian reservation; nor shall any white man, excepting those in the employment of the Indian Department, be permitted to reside upon the said reservation without permission of the tribe and the superintendent and agent.

Id.

Manypenny also negotiated the June 22, 1855, treaty with the Choctaw and Chickasaw. This treaty specified boundaries of "the Choctaw and Chickasaw country" and divided it into Choctaw and Chickasaw districts, stating:

> . . . the United States do hereby forever secure and guarantee the lands embraced within the said limits, to the members of the Choctaw and Chickasaw tribes, their heirs and successors, to be held in common; so that each and every member of either tribe shall have an equal, undivided interest in the whole: Provided, however, no part thereof shall ever be sold without the consent of both tribes; and that said land shall revert to the United States if said Indians and their heirs become extinct, or abandon the same.

Treaty of June 22, 1855, 11 Stat. 611 at 612.

While the above treaties established Indian reservations by providing for exclusive Indian use and occupancy, with functioning tribal governments exercising some level of control, the 1855 Treaty did not. The 1855 Treaty expressly provided for the majority of the Withdrawn

Area to be put back onto the public market and sold to non-Indians. The 1855 Treaty only allowed for individual members of the bands to select or purchase federal land for a *limited ten-year period*. Moreover, there is no indication in the 1855 Treaty that the jurisdictional status of the land would change as a result from withdrawal itself, selection by the Indians, or its later restoration to the public market. To the contrary, the 1855 Treaty stated that the unselected lands "shall remain the property of the United States" and be "sold or disposed of by the United States *as in the case of all other public lands*." In short, the land that was temporarily withdrawn from public market was not "set apart" to have a character any different than other public lands patented to non-Indians.

3. The 1855 Treaty's withdrawal of land and land-selection process was not for "Indian purposes."

Not only does the 1855 Treaty fail to set apart land for the Tribe as a whole, the 1855 Treaty also fails to designate land for "Indian purposes." "Indian purposes" is a term of art that has long been held to incorporate a tribal right to land, rather than a right of individual Indians. *United States v. Myers*, 206 F. 387, 394 (8th Cir. 1913). In fact, the 1855 Treaty only states that lands selected by individual members of the bands would eventually be held by patents-in-fee titles and thus subject to state law (including the payment of taxes). The 1855 Treaty did not set aside land to "further tribal interests" or further "any permanent racially defined institutions, rights, privileges, or obligations." *See Chaudhuri*, 802 F.3d at 281, *Venetie*, 522 U.S. at 532-33. And, following *Myers*, courts have found that giving individual Indians rights to occupy, use, and enjoy land is insufficient to create Indian Country. *See United States v MC*, 311 F. Supp. 2d 1281, 1297 (D.N.M., 2004) ("The setting apart of [land] for a BIA school devoted to the education of Native American children . . . in their individual capacity is simply insufficient to [convert the land to Indian Country.]").

Venetie is also instructive on this issue. In *Venetie*, the court found that land was not for Indian purposes when it was transferred to "private, state-chartered Native corporations, without any restraints on alienation or significant use restrictions, and with the goal of avoiding 'any permanent racially defined institutions, rights, privileges, or obligations.'" *Venetie*, 522 U.S. at 532-33. Those "[n]ative corporations c[ould] immediately convey former reservation lands to non-Natives, and such corporations [were] not restricted to using those lands for Indian purposes." *Id.* *Venetie* held that for land to be "set aside for Indian purposes", it must be subject to restrictions preventing the land from being transferred for non-Indian use. *See id.*

The Withdrawn Area, however, was not set aside for the bands to control. In fact, the 1855 Treaty imposed time restrictions and allowed the land to be transferred for non-Indian use. Moreover, the 1855 Treaty did not create any federal oversight ensuring that, once patented, the Indians used the land for tribal, rather than simply individual purposes.[7] There is simply no nexus between the land and Indian purposes set forth in the 1855 Treaty, just as there is no requirement that the Withdrawn Area be entirely settled by individual Indians, which correlates with the fact that the Indian population at the time was insufficient to occupy the entire Withdrawn Area.[8]

[7] Even if this Court accepted the argument that the selected lands that were given to individual Indians based on their membership in the bands as a permanent home was an Indian purpose, as soon as the lands left Indian hands, any such purpose was no longer present. *See Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010, 1028, 1030 (8th Cir. 1999) (once allotted land left Indian hands, it lost its reservation status).

[8] The 337-square miles of the Withdrawn Area contain approximately 215,680 acres. Therefore, even if every selection had been for 80 acres, that would require 2,696 heads of household—considerably greater than the Indian population that existed in 1855. The Indian population of Emmet County in 1860 was only 1,026, with approximately 425 Indians under the age of 15. Exhibit A, 1860 United States Census, Michigan, pp. 233, 36.

Moreover, in *United States v. Myers*, 206 F. 387, 394 (8th Cir. 1913), the Eighth Circuit held that land reserved for an Indian boarding school was not "set aside" for "Indian purposes." *Id.* The tribe in *Myers* ceded all of its land to the United States in exchange for $2,000,000, 480,000 acres of grazing land, allotments of land in severalty, and the promise of a schoolhouse and teacher for 20 years. *Id.* at 391-92. The Eighth Circuit reasoned that land reserved for an Indian boarding school was not "set aside" for "Indian purposes" because the land was subject to "individual wards," rather than subject to the rights of a sovereign. *Id.* at 394. As with the lands at issue in *Venetie* and *Myers*, the 1855 Treaty did not designate land for "Indian purposes" because the remaining federal lands not sold to individual tribe members would be restored to the public market after ten years without any restriction on how the land would be used—which set the stage for the Withdrawn Area to be occupied by Indian and non-Indian settlers alike. This left no special protection or benefit for the Odawa and therefore no express intent for the Withdrawn Area to be used for "Indian purposes."

4. The 1855 Treaty did not leave the withdrawn area under federal superintendence and control.

Finally, there is no evidence in the 1855 Treaty that the federal government intended to exercise continuing superintendence over the Withdrawn Area after patenting the lands; rather, the 1855 Treaty unambiguously *terminated* the federal government's obligations to the bands. The federal superintendence requirement has been described by courts as a "guarantee that the Indian community is sufficiently 'dependent' on the federal government and that the Federal Government and the Indians involved, rather than the States, are to exercise primary jurisdiction over the land in question." *Venetie*, 522 U.S. at 531. Additionally, "it is the land in question, and not merely the Indian tribe inhabiting it, that must be under the superintendence of the Federal Government." *Id.* at 530 n.5 (citations omitted).

There was no federal superintendence over the alleged reservation land in *Venetie* where the federal protection of the land was "limited to a statutory declaration that the land is exempt from adverse possession claims, real property taxes, and certain judgments as long as it has not been sold, leased, or developed." *Venetie*, 522 U.S. at 533. Moreover, *Venetie* held that social, welfare, and economic programs granted to the Indians by the federal government did not constitute federal superintendence. The Supreme Court reasoned that "[s]uch health, education, and welfare benefits are merely forms of general federal aid . . . they are not indicia of active federal control over the Tribe's land sufficient to support a finding of federal superintendence." *Id.* at 534.

Here, nothing in the 1855 Treaty placed any lands under the superintendence of the federal government, let alone the entire 337-square mile Withdrawn Area. In fact, the 1855 Treaty effectively eroded federal oversight of the Tribe by providing the Indians a means to live independently and without federal assistance. While the government's temporary participation was required to execute the negotiated terms of the 1855 Treaty, there is no language by which the federal government maintained any superintendence or control over either the selected or unselected lands, the bands, or the individual Indian landowners. Government annuities, schools, or the grant of land selections thus do not demonstrate federal superintendence.

While the 1855 Treaty did provide that the federal government would initially issue certificates for land selections that included restrictions on alienation, the 1855 Treaty expressly stated that this was temporary and that the Indians would receive patents in fee. In *Buzzard*, the Tenth Circuit found that mere federal restrictions on alienation do not create federal superintendence, holding that "the ability to veto a sale does not require the sort of active involvement that can be described as superintendence of the land." *Buzzard*, 992 F.2d at 1076.

The *Buzzard* court found it determinative that the federal government did not indicate that it was "prepared to exert jurisdiction over the land." *Id.* Under *Buzzard*, even if the certificates issued under the 1855 Treaty had created permanent restrictions on alienation, this alone would be insufficient to demonstrate the significant federal involvement necessary for federal superintendence of land. *See id.*

The 1855 Treaty simply does not meet any articulated view of federal superintendence. To the contrary, the 1855 Treaty systematically removed the federal government's obligations to the Indians—it did not create an obligation to oversee them. *First*, Article I delivered a plan for individual Indians to receive tracts of land to own in fee *without any restrictions*. The Indians could use and dispose of the land as they pleased, with any unselected land remaining in the possession of the federal government. *Second*, Article II provided for *temporary* annuities to financially support the Indians as they settled their lands. The annuities provided for schools, teachers, agricultural implements, carpenter's tools, household items, building materials, cattle, labor, blacksmith shops, and payment for any monies due to the Indians from past treaties. Within ten years, $332,400 would be distributed and an additional $206,000 would then be distributed in four equal annual installments thereafter. Thus, the federal government's financial obligations to the Indians were to be fully satisfied within fourteen years. *Cf. South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 347 (1998) (even where annuities were continued, the reservation was diminished). *Third*, Article III states that once the 1855 Treaty was implemented, the federal government had no further obligations to the Indians under any other treaties. Thus, once the federal government had delivered the land and annuities, no further relationship existed between the federal government and the Withdrawn Area (or its inhabitants). Accordingly, the 1855 Treaty unambiguously provided only a system to prepare individual

Indians for assimilation into non-Indian society and did not establish any federal superintendence.

5. The withdrawn area does not meet the other tests for Indian Country.

In this case, the Tribe's arguments that the Withdrawn Area constitutes "Indian Country" solely based on its allegations that the 1855 Treaty created an Indian reservation under §1151(a). (PageID.1, 17, ¶ 1, 57, I; *see also* PageID.1776, 1780-81). Even if the Tribe now attempted to try to argue that the Withdrawn Area fell under §1151(b) or (c), such an attempt would fail as the disputed land clearly does not constitute a dependent Indian community and there is no un-extinguished Indian title here.

The legal test for whether a dependent Indian community exists is very similar to the test articulated above for reservation lands. *See Venetie*, 522 U.S. at 525-26. The United Supreme Court has held that the term "dependent Indian community" "refers to a limited category of Indian lands that are neither reservations nor allotments, and that satisfy two requirements--first, they must have been set aside by the Federal Government for the use of the Indians as Indian land; second, they must be under federal superintendence." *Id.* at 527. Because, as explained above, there is no evidence that the Withdrawn Area was set aside for the Tribe and no evidence that there was any federal superintendence over the Withdrawn Area, there is not only no reservation created but also no dependent Indian community.

In addition, it is unquestionably clear that the Withdrawn Area does not constitute allotments to which Indian title has not been extinguished. Allotments are generally considered parcels of land held in trust by the United States for individual Indians or held by Indians and otherwise subject to a restriction on alienation. And the Withdrawn Area is certainly not such lands. Moreover, even if such land could have been considered an allotment, any Indian title was extinguished by Congress.

II. THE TREATY JOURNAL REINFORCES THE CONCLUSION THAT THE 1855 TREATY DID NOT CREATE A RESERVATION.

While the plain and unambiguous language of the 1855 Treaty is alone sufficient for this Court to find that it did not create the type of permanent reservation alleged to exist by the Tribe, the contemporaneous Treaty Journal (the "Journal") summarizes the 1855 Treaty negotiations and reinforces that the 1855 Treaty did not create a reservation.

A. The Indian Negotiators Sought To Hold Land In The Same Manner As Non-Indians.

The Journal comports with the plain language of the 1855 Treaty.[9] Indian negotiators wanted to hold land like the "white man," rather than have land held communally for Indian purposes under federal superintendence. Odawa representatives stressed that they were "civilized" and did not want to live as bands, in a manner consistent with the land being used for "Indian purposes." (PageID.7145, 7160.) They did not want to be wards of the federal government; neither "Indian purposes" nor federal superintendence were ever goals expressed by the Indian negotiators themselves. Having entered negotiations for the 1855 Treaty in a precarious position due to the five-year limitation on their right to occupy the land set forth in the 1836 Treaty ((PageID.6825-6831), the Odawa sought this time around to secure "strong title" to any land promised by the government. (PageID.7136.)

Mene-a-du-pe-na-se expressed fear that the government would take away land and wanted the land to be inherited, stating his people wished "to hold this land in the same way" as non-Indians. (PageID.7144.) Odawa negotiator As-sa-gon of the Cheboygan band echoed the theme of distrust and requested "strong titles," in the following terms:

[9] While it is generally accepted that the Journal is not a word-for-word transcript in the same way a court reporter would record every word, it is representative of the positions, statements, and arguments set forth by the individuals to which they are assigned.

> Nothing has been said of how much or in what matter we shall hold these lands. Perhaps, if they are given by word of mouth only they will in time be taken from us. If, then, you wish us to have lands we want strong titles to them.

(PageID.3797, 7136.) The stated desire for "strong title" was repeated by tribal negotiator Waw-be-geeg of the Sault Saint Marie band, who also expressed a desire for "good titles" that would prevent the land from being taken away. He contended that the Indians were ready to take care of their own "papers." (PageID.7136.) In short, Odawa strongly favored obtaining individual title over communal land under federal superintendence—which had proved disastrous for the Odawa in the 1836 Treaty. Waw-be-geeg stated:

> I heard that you intended to give us land before we came here. It was just what I desired, so I called my people together & held a little smoking council. . . *We wish that you would give us titles – good titles to these lands. That these papers will be so good as to prevent any white man*, or anybody else from touching these lands. You our past, for the Chippewas of Ste Marie River, we think that we are old enough to take care of our papers. We have bought lands already & we take care of our papers, that our great father gives us. We think that we can take as good care of your papers as we do of this.

(PageID.7142.)

Odawa negotiators repeatedly articulated that their band members wanted patents for their lands and to have the same rights as other Michigan citizens. For instance, Shaw-wa-sing communicated that his people had bought lands and had been taught "the good way" by the missionaries and wanted the Government "to give [them] patents[.]" (PageID.7144.) Nah-me-wash-ko-lay similarly requested that "patents be issued" to them. (PageID.7143.) And Ke-no-shance asked for a patent that could be inherited and explained that his people wished to farm the land. (PageID.7144.)

In addition, negotiators like Waw-be-geeg agreed to pay taxes on the land. (PageID.7145.) Waw-be-geeg's comments linked the idea of becoming a citizen with individual

land ownership and assimilation, which was a constant theme during negotiations. Waw-be-geeg stated:

> I have already taken your path & become a citizen, only I shall never be able to change the color of my skin. My father, we have accepted the land & wish to live on it. We are able to live – not perhaps in as good style as you do, but still we are able. We are willing to pay our way up on this land – to pay our taxes as you do. . . We will pay our own taxes.

(PageID.7145.) The sentiment was endorsed by Was-son, who stated:

> We know our great father will give us these lands for a homestead. I have abandoned the woods for a maintenance & am now a farmer. I no longer go into the woods & look for wild animals when I want to eat; but I kill on (*sic*) of the cattle I raise for myself.

(PageID.7145.) Likewise, Mene-a-du-pe-na-se also asked that the Government grant "papers" so his people could choose where to live "like the whites & have their titles." (PageID.7152.) He expressed the desire for individual land ownership, stating "[w]hen you told us in the Treaty of 36, that we could buy lands from you, you put us on the same footing as yourself. We are citizens, your law governs us." (PageID.7152.)

There is not a hint anywhere in the Journal that tribal negotiators sought to set apart land for a *tribal reservation* or for any "Indian purpose" under federal superintendence. The Journal confirms that the Odawa negotiating the 1855 Treaty intended to secure title to land like the "white man" because they wanted title to be secure.

B. The Government Negotiators Sought To Provide The Indians A Means To Integrate Into Non-Indian Society.

On the other side of negotiations, the Journal shows that the federal government entered the negotiations with the intent to provide the Indians with homes. Near the beginning of negotiations, Commissioner Manypenny explained the federal goal, stating, "[t]he Government is desirous to aid you in settling upon permanent homes." As explained *supra* at p. 4-6 ,

Manypenny explained that this meant the Indians would hold land as individuals in the same manner as did non-Indians, with "absolute title, save a temporary restriction upon your power of alienation." (PageID.7136.) He further explained that land could be inherited, and, after some discussion of the point, that it would be subject to state property tax. *Id*. ("We want you to be citizens & to be such you must assume the burdens of citizenship."), Manypenny supported Indian citizenship, informing Odawa negotiators that the object of the United States was "to have you civilized citizens of the State." (PageID.7155-56.)

In other words, federal negotiators contemplated that the Odawa would have the same rights as other Michigan citizens, and that the relationship between the federal government and the bands would shortly come to an end. These objectives are utterly inconsistent with the Tribe's claim that the 1855 Treaty created a permanent Indian reservation that was set aside for Indian purposes under federal superintendence.

III. EVEN IF THE 1855 TREATY WAS DEEMED TO HAVE ESTABLISHED A RESERVATION, THE 1870S CONGRESSIONAL ACTS DISESTABLISHED AND/OR DIMINISHED IT.

"Disestablishment" refers to the elimination of a reservation while "diminishment" refers to a reduction in size of a reservation. *Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010, 1017 (8th Cir. 1999). But in the unlikely event that this Court determines that the 1855 Treaty did in fact create a reservation, such a reservation was temporary in nature, being disestablished by the 1870s Acts that effectuated the 1855 Treaty itself. At an absolute minimum, any reservation was diminished to consist of only parcels actually selected by Indians pursuant to Article I. Using some of the "hallmark" language by which Congress indicates an intent to diminish or disestablish, that the lands were "restored to the public domain," *Wisconsin v. Stockbridge-Munsee Cmty.*, 554 F.3d 657, 662-64 (7th Cir. 2009); *see Hagen v. Utah*, 510 U.S. 399, 412-14 (1994), the 1870s Acts ended any "set aside" of the land for the benefit of the Indians and ended

any federal control of the land—as did patenting land selections to individual Odawa members in fee without restrictions.[10]

A. The Traditional *Solem* Factors Do Not Cleanly Apply To The Circumstances Of This Case.

Courts typically apply the three-part test summarized in *Solem v. Bartlett* to determine whether a reservation has been diminished or disestablished by a Congressional act that affects a preexisting Indian reservation by an action not contemplated at the time of the reservation's creation. Often, this is a "surplus land act" that opens the reservation to non-Indian settlement. *See, e.g., Osage Nation v. Irby*, 597 F.3d 1117, 1122 (10th Cir. 2010); *Solem v. Bartlett*, 465 U.S. 463, 467-70 (1984). Other times, the Congressional Act may be effectuating a new agreement between the United States and a tribe occurring after treaties were negotiated. *Nebraska v. Parker*, 136 S. Ct. 1072, 1074 (2016). The *Solem* framework generally presumes a preexisting reservation and focuses on such a subsequent act of Congress, separate and distinct from the transaction that established a reservation.

In this case, however, to the extent that Congress established a reservation pursuant to the 1855 Treaty, its disestablishment and diminishment was contemplated by the 1855 Treaty itself. The 1870s Acts carried out the terms of the 1855 Treaty by ordering that patents be issued and that remaining lands be restored to public market, just as called for by Article I of the 1855 Treaty. Thus, here, unlike the circumstances presumed by *Solem* and its progeny, Congress's subsequent acts were inherently connected to the very establishment of any reservation, in that any reservation was always intended to be temporary. There was no treaty transaction creating

[10] The Associations respectfully request the Court to grant the Associations summary judgment on their disestablishment/diminishment defense regardless of how the Court rules on the threshold question of whether the 1855 Treaty created a reservation. For the reasons already briefed and argued in late 2018, the Tribe's contention that its 1994 Restoration Act somehow overrode the 1870s Acts is misplaced, and should also be resolved at this point.

the reservation followed by a separate action, not contemplated at the time of the treaty, that altered the substance of the treaty agreement. Rather, the 1870s Acts flowed directly from the 1855 Treaty. Therefore, *Solem's* framework may not be the appropriate test under which to analyze this case.[11]

Solem guides courts in specifically determining whether "any particular surplus land act" "formally sliced a certain parcel of land off one reservation," *Solem*, 465 U.S. at 468, 472. Here, such an analysis does not apply because we do not have a preexisting reservation that Congress later divides. This Court is not presented with a surplus land act, a pre-existing reservation, or an allotment scheme. Instead, the federal intent underlying the 1855 Treaty was aimed at ending the federal relationship with the Odawa, and integrating them into the larger, non-Indian society.

Moreover, the *Solem* framework directs the Court to determine Congressional intent first by examining the language of the Congressional statute at issue. *See Solem*, 465 U.S. at 470. Specifically, the Court is to look for "[e]xplicit reference to cession or other language evidencing the present and total surrender of all tribal interests" and when combined with language that Congress would compensate the tribe for the land, the language is especially clear in favor of disestablishment. *Id.* at 470-71; *see also Chaudhuri*, 802 F.3d at 282 ("Congress—not the

[11] The applicability of the *Solem* framework outside the context of surplus land acts is presently under consideration by U.S. Supreme Court in *Carpenter v. Murphy*, No. 17-1107. In that case, the Petitioner argues that the *Solem* framework does not apply outside the context of surplus land acts because "[w]ords of cession and purchase in surplus land acts show diminishment, but such words were unnecessary . . . where Congress used allotment to achieve the same result as cession, i.e., elimination of tribal territory." Br. for Petitioner, *Carpenter v. Murphy*, No. 17-1107, at 48; *see also* Br. for United States, *Carpenter v. Murphy*, No. 17-1107, at 24 (noting that language of cession to the United States would be inapposite when land was distributed to tribal members). It is notable that the Tenth Circuit emphasized in *Murphy* that the federal statutes at issue there "lack[ed] any of the textual 'hallmarks' demonstrating congressional intent to disestablish," such as "restored to the public domain"--the same operative language used in the 1870s Acts at issue here. *Murphy v. Royal*, 875 F.3d 896, 948-49 (10th Cir. 2017).

courts, not the states, not the Indian tribes—gets to say what land is Indian country subject to federal jurisdiction"). But here, *Solem's* framework aimed at uncovering some historical record of language demonstrating cession and purchase does not apply. It would make no sense to use language of cession when referring to either lands distributed to individual Indians in which the bands held no interest or unselected lands being placed on the public market that were ***already owned*** by the federal government. When the Odawa entered negotiations for the 1855 Treaty, they had no tribally-held land, no Indian title, to cede. Neither the 1855 Treaty nor the 1870s Acts broke apart an existing Indian reservation into allotments and left a question open as to the status of the unallotted lands. To the contrary, through the 1855 Treaty and 1870s Acts, Congress provided for individual Indians to select and purchase, to hold in fee, public, federally-owned land, which was temporarily withheld from the public market, and then restored to the public market following the end of the selection process. Words of cession and purchase naturally would not apply because the Odawa had no land to cede.

Given the above, although hallmark language concerning the "restoration of lands to the public domain" is present in the 1870s acts, there is no reason for the inclusion of other "hallmark language" recognized under *Solem's* framework as traditionally being considered to show an intent to disestablish/diminish—because the 1870s Acts are not surplus land acts subsequently allotting and opening a reservation. The 1855 Treaty established a process by which to incorporate individual Indians into non-Indian life. The 1870s Acts ensured that process was conducted and concluded. In other words, the 1855 Treaty and the 1870s Acts were separate documents effectuating the same ultimate transaction – the transfer and patenting in fee of land to individual Indians and not to a tribe – which never established a reservation.

Considering these distinctions from the typical *Solem* cases, *Solem's* framework is a poor fit here. The *Solem* factors, however, are not rigid absolutes that must all be met in order to find diminishment or disestablishment. As the Supreme Court has repeatedly reaffirmed, the "touchstone to determine whether a given statute diminished or retained reservation boundaries is congressional purpose." *Yankton Sioux Tribe*, 522 U.S. at 343; *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 588 n.4 (1977) ("The focus of our inquiry is congressional intent."). Here the congressional purpose is clear. The 1855 Treaty and 1870s Acts allowed individual Indians to select and purchase public, federally-owned land, to own in fee without restrictions, which was temporarily withheld from sale and subsequently restored to the public domain. The 1855 Treaty contemplated that the Withdrawn Area would be used and occupied by Indians and non-Indians alike – settling on farms. Congress had no intention to create a permanent Indian reservation, as it planted the seeds of any reservation's own destruction in the 1855 Treaty itself, and subsequently ensured those terms were effectuated by passing the 1870s Acts.

While this Court may find *Solem* instructive, it should not be the sole means of analyzing diminishment and disestablishment in this case. Instead, this Court should defer to *Hagen v. Utah*, 510 U.S. 399 (1994), which stands for the proposition that application of the *Solem* factors are flexible and held that "restoration of unallotted reservation lands to the public domain evidences a congressional intent with respect to those lands inconsistent with the continuation of reservation status." *Id*. at 414, *see also id.* ("Our cases considering *operative* language of restoration have uniformly equated it with a congressional purpose to terminate reservation status.") (emphasis in original). If there was ever a "reservation" here, the restoration of unselected lands to the public market logically leads to the same conclusion.

B. To The Extent That The Court Applies *Solem*, The Factors Confirm That Any "Reservation" Was Disestablished or Diminished.

Solem provides a three-part analysis. First, the most probative evidence of intent to diminish a reservation is the operative language of the act that purportedly shrinks a reservation. *Solem*, 465 U.S. at 470. As discussed above, there is certain "hallmark language" used by Congress that courts recognize as indicating an intent to disestablish or diminish a reservation. *See Stockbridge-Munsee Cmty.*, 554 F.3d at 662-64 . However, courts "cannot expect Congress to have employed a set of magic words to signal its intention to shrink a reservation." *Id.* at 662. Second, absent such language, courts should look to events surrounding the passage of the act that "unequivocally reveal a widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation," *Solem*, 465 U.S. at 471, and, third, "to a lesser extent," events that occur after the passage of the act. *Id.; see also Yankton Sioux Tribe*, 522 U.S. at 344.

Diminishment or disestablishment is accomplished under the present factual circumstances because the 1870s Acts, on their face, demonstrate express congressional purpose to diminish or disestablish. Any "reservation" boundaries were diminished to the extent that the unselected lands were restored to the public domain and the reservations of selected parcels were disestablished by Congress ordering that fee patents be issued and ending federal services. Further, the historical context surrounding the 1855 Treaty and 1870s Acts establishes that the parties intended to diminish or disestablish any reservation in the event that one had been created. Last, but not least, examining "all circumstances surrounding the opening of the reservation" supports diminishment because "non-Indian settlers flooded into the opened portion of [the] reservation and the area has long since lost its Indian character[.]" *Solem*, 465 U.S. at 471. Any reservation purportedly created by the 1855 Treaty cannot exist today in light of the

unambiguous language of the 1855 Treaty and the 1870s Acts requiring selections to be patented in fee and unselected land restored to the public domain.

1. The 1855 Treaty and 1870s Acts demonstrate Congress's express purpose to end any possible reservation through either disestablishment or diminishment.

The 1855 Treaty itself and the 1870s Acts ended any possible temporary reservation created by the 1855 Treaty; under the disestablishment and diminishment doctrines, no reservation could exist today. By causing fee patents to issue, without restrictions, conveying the land in fee simple to individual Indians, Congress expressly intended to abolish federal superintendence and any reservation status the selected parcels may have held, thereby, disestablishing any reservations consisting of selected lands. As the Seventh Circuit recently stated, abolishing reservations is the reason Congress sought to issue fee simple patents to Indians. In *Stockbridge-Munsee Community*, the court reasoned:

> ***The intent to extinguish what remained of the reservation is born out by the act's provision for allotments in fee simple.*** This provision sets the 1906 Act apart from most allotment acts, like the 1871 Act, which restricted the Indian owners from selling their land or required that it be held in trust by the United States. Why include this peculiar provision? Because the reservation could only be abolished if the tribal members held their allotments in fee simple.
>
> ***
>
> By 1910, all the land in the 1856 reservation was sold to non-Indians or allotted in fee simple, which meant that Congress paved the way for non-Indians to own every parcel within the original reservation and ensured that the reservation could be immediately extinguished.

554 F.3d at 664 (internal citations omitted) (emphasis added). *See also, Gaffey*, 188 F.3d at 1028, 1030 (once allotted land left Indian hands, it lost its reservation status). "Congress believed that all reservations would soon fade away—the idea behind the allotment acts was that ownership of property would prepare Indians for citizenship in the United States, which down

the road would make reservations obsolete." *Stockbridge-Munsee Community*, 554 F.3d at 662; *see also Pittsburg & Midway Coal Mining Co. v. Yazzie*, 909 F.2d 1387, 1421 (10th Cir. 1990). In fact, had Congress wished that the selected parcels maintain some reservation status, it would have placed restrictions on the deeds or taken the selected parcels into trust. Like in *Stockbridge-Munsee Community*, the terms of the 1855 Treaty and the 1870s Acts demonstrate that all land within the Withdrawn Area was to be sold to non-Indians or patented in fee simple to Indians, paving the way for the entire area to eventually be held either by non-Indians or by Indians holding land in the same fashion as non-Indians, thereby disestablishing any reservation.[12]

Even under a diminishment analysis, it is clear that Congress intended to diminish any possible reservation by restoring lands to the public domain. In fact, in the hallmark case on public domain diminishment (*Hagen, supra*), the United States Supreme Court held that congressional restoration of lands to the public domain demonstrated Congress' intent to diminish any reservation. *Hagen* states:

> In light of our precedents, we hold that *the restoration of unallotted reservation lands to the public domain evidences a congressional intent with respect to those lands inconsistent with the continuation of reservation status*. Thus, the existence of such language in the operative section of a surplus land Act indicates that the Act diminished the reservation.

Hagen, 510 U.S. at 414 (emphasis added). Indeed, while there must be an "express congressional purpose to diminish" for courts to find diminishment, *Solem*, 465 U.S. at 475, courts have never required any "particular form of words before finding diminishment." *Hagen* 510 U.S. at 411.

[12] Also like *Stockbridge-Munsee Community*, the intent of the 1855 Treaty was to be "a full and complete settlement of all obligations" of the United States and required a full settlement of claims. *Id.* at 664.

In *Hagen*, when the prescribed deadline expired on allotments made to individual tribal families, the subject treaty provided that "all the unallotted lands within said reservation shall be restored to the public domain" and was subject to homesteading at a prescribed price. *Hagen*, 510 U.S. at 403-04; 32 Stat. 263 (1902); *Pittsburg & Midway Coal Mining Co. v. Yazzie*, 909 F.2d 1387, 1409 (10th Cir. 1990) (demonstrating in detail "the historic usage of restoration language to terminate [reservation] boundaries and acceptance of such language by the federal courts as language of termination"). The same was true of the 1855 Treaty and the 1870s Acts.

The 1855 Treaty withdrew lands from sale for selection and purchase by *individual Indians* for a finite and prescribed period of time, after which "all lands remaining unappropriated by or unsold" to the Indians after ten years "may be sold or disposed of by the United States *as in the case of all other public lands.*" (PageID.6895) (emphasis added). Congress further directed in the 1872 Restoration Act that, after an approved time extension, "the secretary [of interior] shall proceed to restore the remaining lands to market…and after such restoration *they shall be subject to the general laws governing the disposition of the public lands of the United States*[.]" 17 Stat. 381 (1872) at 381 (emphasis added). Therefore, even if the 1855 Treaty created a reservation by setting aside lands for the Tribe's "Indian purposes" under federal superintendence for a limited time period (which the Associations dispute), the 1855 Treaty *also* dictated that same reservation's diminishment by Congressional restoration of those lands to the public domain. Likewise, when the 1870s Acts implemented the restoration of the unallotted lands, any reservation created by the 1855 Treaty consisting of the unselected parcels no longer existed.

Congress similarly confirmed its express purpose to restore the unallotted lands to the public domain by referring to the lands as compared with "all *other* public lands."

(PageID.6895) (emphasis supplied). Lands in the public domain, according to *Hagen*, are those "available for sale, entry, and settlement under the homestead laws, or other disposition under the general body of land laws." *Hagen*, 510 U.S. at 412-13 (*quoting* E. Peffer, The Closing of the Public Domain 6 (1951)). And lands reserved—even for Indian purposes—when restored to the public domain, are then freed from their previous public use. *Id*. (*citing Sioux Tribe v. United States*, 316 U.S. 317, 323 (1942)). The 1855 Treaty and 1870s Acts evidence Congress' intent to return the unselected lands to the public domain, which is "inconsistent with" reservation status. *See Hagen*, 510 U.S. at 414; *Yazzie*, 909 F.2d at 1403 (noting that "lower courts have accepted the view that restoration language is synonymous with extinction of reservation status"). Thus, under either theory (disestablishment or diminishment), any reservation that was created under the 1855 Treaty was completely erased by the same transaction, which included the 1870s Acts.

2. The 1855 Treaty and the 1870s Acts do not simply open the land to settlement.

This is not a case where reservation lands were merely opened to settlement by non-Indians and not restored to the public domain. Congress authored language akin to the guarantee that lands would be "restored to public domain" when in the 1872 Act, it instructed the Secretary of Interior to "restore the remaining lands to market… and after such restoration they shall be *subject to the general laws governing the disposition of the public lands of the United States*[.]" 17 Stat. 381 (1872) at 381 (emphasis added); *see also* PageID.6895 (describing treating the unallotted lands "as in the case of all other public lands"). This language is in stark contrast to circumstances where courts have found that lands were being maintained for Indian purposes and merely opened for settlement. *Yazzie*, 909 F.2d at 1404 (finding no case exists where language

restoring land to the public domain, without more, was not accepted by the courts as terminating reservation status).

Cases where courts found that lands were merely opened for settlement are easily distinguishable. For instance, in *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 355 (1962), lands were to have not been returned to the public domain because the subject statute "repeatedly" referred to the subject reservation "in a manner that makes it clear that the intention of Congress was that the reservation should continue to exist as such." *Id.* The *Seymour* court further reasoned that "[t]he Act did no more than open the way for non-Indian settlers to own land on the reservation *in a manner which the Federal Government, acting as guardian and trustee for the Indians, regarded as beneficial to the development of its wards.*" *Id.* at 356 (emphasis added).

Similarly, the *Solem* court likened the Secretary of the Interior to the tribe's "sales agent" where the Secretary was merely authorized to "sell and dispose" of certain lands and provide monies to the tribe, without any further instruction from Congress as to how the lands would be treated after the sale. *Solem* 465 U.S. at 473. But unlike *Seymour* and *Solem*, Congress in the 1872 Act specifically stated that the unselected lands shall be treated just like *all other* public lands and be subject to the general laws governing the disposition of the public lands of the United States, paralleling the language of Article I of the 1855 Treaty. There are no references indicating that any Indian reservation would continue to exist, no indication that the land would be used in a way to benefit Indians who were wards of the government, no indication of tribal use or occupancy, and no indication of money being allocated to the Tribe or its members as a result of the sale of such lands. Thus, in contrast with cases where courts found that reservations were merely opened to settlement by non-Indians, there is no room for doubt that Congress in the

1870s Acts intended unselected lands to be restored to the public domain and any reservation, consisting of the unselected lands, purportedly created by the 1855 Treaty would have been diminished.

3. The historical context of the 1870s Acts proves Congress's intent to disestablish any reservation.

Since the statutory text of the 1855 Treaty and the 1870s Acts return the unselected lands to the public domain, the Court need not go further under the *Solem* analysis. But if this Court does, the second *Solem* factor demonstrates diminishment and disestablishment. Under the second factor, courts consider "events surrounding the passage" of the statute. *Solem*, 465 U.S. at 471. Even if statutory language "would otherwise suggest reservation boundaries remained unchanged," courts must nonetheless find that Congress altered the borders if evidence at step two "unequivocally reveal[s] a widely-held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation." *Id.* Considerations include "the manner in which the transaction was negotiated with the tribes . . . and the tenor of legislative reports presented to Congress." *Id.*

The 1870s Acts flow from the 1855 Treaty's language requiring unselected lands be restored to public market. The 1870s Acts were passed to effectuate the terms of the 1855 Treaty, and to address tardiness in the government's administering of the selection and patenting process. S. Res. 42d Cong., Doc. No. 50 (1871). The 1872 Act, among other things, restored land to the public market, allowed homestead entries of land by "bona fide" settlers who entered before January 1, 1872, and provided for the issuance of patents to both Indians and non-Indians who purchased land separate from Indians' selections. 17 Stat. 381 (1872). Likewise, the 1875 Act was passed to amend the 1872 Act and issued 320 patents to Indians who had not yet received them. The 1872 Act then allowed settlers in the Withdrawn Area to enter under

Homestead statutes or purchase at a minimum price. 18 Stat. 516 (1875). The 1876 Act authorized additional patents be issued and the remaining unselected lands to be opened for homestead entry. 19 Stat. 55 (1876). Accordingly, the 1870s Acts "unequivocally reveal[] a widely held, contemporaneous understanding" that the Withheld Area would no longer be set aside for Indian purposes. *See id.*

While there is a clear historical record related to Congress's intent to return the unselected lands after the 1855 Treaty to the public domain, there is no indication that Congress intended an Indian reservation. Historically, if there were such an intent, Congress would have indicated that Indians retained rights to, or should be compensated for the sale of, such lands. But that did not occur here. Instead, Congress caused patents in fee to issue for the selected lands and the restoration of unselected lands to the public domain.

4. The subsequent history of the land shows that any reservation was fully disestablished.

The third step under *Solem* requires the Court to consider "events that occurred after the passage" of the relevant statute. *Solem*, 465 U.S. at 471. "Where non-Indian settlers flooded into the opened portion of a reservation and the area has long since lost its Indian character, we have acknowledged that *de facto*, if not *de jure*, diminishment may have occurred." *Id.* The federal government's treatment of the land is also relevant, particularly that of Congress and the Bureau of Indian Affairs ("BIA"). *Id.*

From the enactment of the 1870s Acts until the present time, the Withdrawn Area has not maintained its "Indian character." In the years following 1876, the federal government relinquished its control over the Withdrawn Area, the State of Michigan assumed jurisdiction, state and local governments recognized the Odawa as citizens, and the Odawa were no longer

recognized as a tribe.[13] Exhibit B, CIA Annual Report 1885, p. 113. *See Solem*, 465 U.S. at 471 (emphasizing the analysis of the third factor regarding the years "immediately following" passage of the relevant laws).

And while there is significant evidence that no reservation existed, there is scant information to suggest that the Withdrawn Area was regarded as a reservation after the 1870s. Supreme Court Justice Samuel Alito recently recognized during the *Carpenter v. Murphy* oral argument:

> There's a fundamental principle of law that derives from Sherlock Holmes, which is the dog that didn't bark. And how can it be that none of this was recognized by anybody or asserted by the Creek Nation, as far as I'm aware, for 100 years?

Carpenter v. Murphy, No. 17-1107, Trans., p. 53 (Nov. 27, 2018) (PageID.6413). Justice Alito was referencing the lack of any claim to a reservation for more than a century; the point is even stronger here, where even more time has elapsed without any such claim.

All the while, non-Indian settlers flooded into the Withdrawn Area, which clearly lost its Indian character. Between 1870 and 1880, the time "immediately following" passage of the 1870s Acts, *see Solem*, 465, U.S. at 471, the Native American population, once consisting of approximately 91% of the population in 1870, steeply declined to approximately 16% by 1880.

[13] In fact, it took the Tribe well over a century after the 1855 Treaty to lobby Congress for reaffirmation of its tribal status by way of the 1994 Reaffirmation Act. Pub. L. No. 103-324, 108 Stat. 2156, 2158 (1994). And yet, the legislative history of the 1994 Act, and the 1994 Act itself, are devoid of any notion that the Tribe claimed an extant reservation of 337 square miles in Northern Michigan. This coincides with the deposition testimony of former Tribal Chairman Frank Ettawageshik, who testified that the Tribe's primary political purpose in consummating the 1994 Act was overcoming the administrative termination of the tribe itself (*i.e.*, "reaffirm the tribe") and not "getting an absolute clear-cut reaffirmation of the reservation boundary." PageID.6055-56. The Tribe left the dubious existence of its reservation status "on the table" because Plaintiff believed its inclusion in the bill may well have caused Congress to reject the legislation. *Id*.

(Exhibit C, Demographer Report, p. 5). And the Indian population presently remains below 5% in both Emmet and Charlevoix counties, as it has throughout the entire twentieth and twenty-first centuries. *Id.* *See also*, *Yankton Sioux Tribe*, 522 U.S. at 356-57 (*quoting Solem*, 465 U.S. at 471 n.12) ("When an area is predominately populated by non-Indians with only a few surviving pockets of Indian allotments, finding that the land remains Indian country seriously burdens the administration of State and local governments."). Accordingly, census information evidences disestablishment of the purported reservation.

Furthermore, the State of Michigan's "longstanding assumption of jurisdiction" over an area that is "over 90% non-Indian" demonstrates that the any extant reservation was subsequently disestablished. This "'jurisdictional history' . . . demonstrates a practical acknowledgment that the Reservation was diminished." *Osage Nation v. Irby*, 597 F.3d 1117, 1127 (10th Cir. 2010) (*quoting Hagen*, 510 U.S. at 421). Moreover, the parties' understanding of the 1855 Treaty and 1870s Acts "has created justifiable expectations that should not be upset" by a reading of the Acts that strains credulity by concluding that the intent of the Acts "was other than to disestablish." *Rosebud Sioux Tribe*, 430 U.S. at 604-05; *see also, Little Traverse Bay Bands of Odawa Indians v. Snyder*, 194 F. Supp. 3d 648, 656 (W.D. Mich. 2016) (Maloney, J.) (finding justifiable expectations a relevant factor in the disestablishment analysis). As the Supreme Court recognizes, a belated finding that an Indian reservation exists "would seriously disrupt the justifiable expectations of the people living in the area." *Hagen v. Utah*, 510 U.S. at 421; *see also Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 220 (2005) (resurrection of tribal sovereignty "would adversely affect landowners neighboring the tribal patches"). The justifiable expectations argument may not be absolutely dispositive on the issue, but certainly weighs in favor of this Court declaring that the alleged extant reservation no longer exists.

On the other hand, if the Withdrawn Area is declared "Indian Country," jurisdictional complexities will arise that would take decades to sort out. Among them, state and local governments would lack regulatory jurisdiction over the Tribe *or any of its members* other than in exceptional circumstances. *See Bryan v. Itasca Cnty*, 426 U.S. 373, 375-77 (1976); *New Mex. v. Mescalero Apache Tribe*, 462 U.S. 324, 331-32 (1983). Zoning restrictions, building codes, business regulations, and nuisance laws, as well as certain taxes, would be inapplicable to tribal members. This would result in non-Indian residents ("Residents") of the Withdrawn Area being denied the right to compete on a level playing field as Odawa members would not be subject to the same laws, regulations and taxes. Non-Indian residents would almost assuredly be unable to enforce zoning and other regulations governing neighboring land and activities owned or operated by Tribe members, which are critical to maintaining the character and property values in the Withdrawn Area.

There are numerous other non-Indian resident concerns that should weigh on this Court's justifiable expectations analysis, if one is necessary. For example, all land within the area would be immediately eligible for gaming, with State jurisdiction preempted.[14] Residents would thus be denied federal protections against gaming on land acquired after 1988. 25 U.S.C. § 2719; *See, e.g., Citizens Against Casino Gambling v. Hogen*, no. 07-CV-0451S, 2008 U.S. Dist. LEXIS 52395 (W.D.N.Y Jul. 8, 2008) (private citizens may challenge Indian lands determination that would enable tribal gaming without compliance with a provision of 25 U.S.C. § 2719 requiring consideration of local impacts). In addition, state and local authorities would lack the authority to prosecute members of the Tribe (or other federally acknowledged tribes), for criminal acts.

[14] *See* Exhibit D, Memorandum from Cindy Shaw to NIGC Acting Gen. Counsel, Tribal jurisdiction over gaming on fee land at White Earth Reservation (Mar. 14, 2005), available at http://www.nigc.gov/images/uploads/indianlands/56_whiteearthbandofchippewaindns.pdf.

This would compromise law-enforcement efforts in the region. *See* United States Department of Justice, Criminal Resource Manual 689 (1997) (providing overview of the various scenarios and which government entity likely has jurisdiction over each scenario); *Hagen*, 510 U.S. 399 (determining which governmental entity had jurisdiction over a distribution of a controlled substance allegation).

Jurisdiction in general would be severely complicated. Non-Indian residents could unwittingly become subject to tribal regulatory and adjudicatory jurisdiction. For example, residents who enter into contractual relationships with tribal members could become subject to the Tribe's jurisdiction to regulate conduct within a reservation. *See Montana v. United States*, 450 U.S. 544, 565-66 (1981) (noting that a tribe may regulate certain "activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements"). And even if residents avoid contractual relationships with the Tribe, they could be subject to tribal claims of regulatory and judicial authority based on the alleged impacts of their activities on "the political integrity, the economic security, or the health or welfare of the tribe"--an ambiguous jurisdictional test that invites ongoing regulatory uncertainty and dispute. *Id.*

Additionally the operation of certain federal statutes, particularly environmental laws, changes when reservation boundaries are implicated. For example, Clean Water Act programs currently administered by the State of Michigan would be administered by the federal Environment Protection Agency, unless expressly delegated to the Tribe. *Cf. Mich. Dept. of Envtl. Quality v. U.S.E.P.A.*, 318 F.3d 705 (6th Cir. 2003). The Tribe could obtain the right to establish and administer its own water quality standards (33 U.S.C. § 1313, 40 C.F.R. § 131), enforcement (33 U.S.C. § 1319), NPDES permits (33 U.S.C. § 1342(b), 40 C.F.R. § 123) and

dredge and fill permits (33 U.S.C. § 1344, 40 C.F.R. §232-3). This would leave non-Indian residents requiring environmental permits (such as developers who seek to disturb more than one acre of ground in construction activities, *see* 40 C.F.R. § 122) at the mercy of the federal government, and potentially the Tribe itself. These non-Indian residents could also be subject to dual regulation by the State, should the State enforce separate state environmental laws.

Finally, there are a number of other federal statutes implicated by the granting of reservation status. Federal law requires sales of alcohol within reservation boundaries to comply with tribal ordinances in addition to state law. 18 U.S.C. § 1161. While federal law provides an exception for alcohol sales on land owned in fee by a non-Indian in a non-Indian community, 18 U.S.C. § 1154(c), that has not stopped tribes from asserting such authority, seeking to impose taxes on non-members, and forcing litigation in tribal court. *See, e.g.*, *Smith v. Parker*, 774 F.3d 1166 (8th Cir. 2014) (holding that the Omaha Tribe could regulate and tax alcohol sales in a village with a 99.17% non-Indian population), *aff'd*, 136 S.Ct. 1072, 1082 (2016) (affirming that reservation had not been diminished, while "express[ing] no view about whether equitable considerations" under Sherrill may curtail the tribe's jurisdiction). Having not treated the Withdrawn Area as a reservation until the present, there are justifiable expectations that would be deeply damaged and non-Indian residents within the Withdrawn Area would suffer unjust consequences from the seismic shift in jurisdiction that would result from granting the Tribe its requested relief.

CONCLUSION

The 1855 Treaty provided the Odawa an opportunity to transition from tribal life into non-Indian life as citizens living independently of the federal government. That was the bargained for exchange that propelled the 1855 Treaty and secured the Odawa the right to remain

in Michigan and prevent the ever present threat of removal. The 1855 Treaty, by its plain and unambiguous language, failed to expressly establish a reservation and otherwise lacks language that sets apart land for Indian purposes under federal superintendence. Alternatively, if this Court finds that a reservation was created, there is conclusive evidence that any such reservation was disestablished as a result of the 1870s Acts effectuating the 1855 Treaty's vision of patenting lands in fee simple to individual Indians without restrictions and restoring the unselected land to the public domain. For these and other reasons, this Court should grant the Associations' motion for summary judgment against the Tribe.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 18, 2019, I electronically filed the foregoing document with the Clerk of the Court using the ECF system which will send notification of such filing to counsel of record. I hereby certify that I have mailed by United States Postal Service the same to any non-ECF participants.

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