UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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

Plaintiffs,

v.

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

Defendants.

No. 1:15-cv-850

HON. PAUL L. MALONEY

ORAL ARGUMENT REQUESTED

GOVERNOR'S BRIEF OPPOSING THE TRIBE'S "HISTORICAL MOTION" FOR PARTIAL SUMMARY JUDGMENT CONCERNING EXEMPTION-DIMINISHMENT AND TITLE-DIMINISHMENT DEFENSES

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2. Should the court disregard the Tribe's statement of historical facts because it is not relevant to this motion and, even if it were relevant, the statement is incomplete and disputed?

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Authority:

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Fed. R. Civ. P. 56

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986)

Celotex Corp. v. Catrett, 477 U.S. 317 (1986)

INTRODUCTION

Plaintiff Little Traverse Bay Bands of Odawa Indians (the Tribe) has twice failed to convince the court to eliminate the reservation diminishment and disestablishment defenses in this case. In this third attempt, the Tribe claims that the Governor (the State) "argues that the allotment-selection process and sale of parcels to non-Indian owners had the 'same or similar legal consequences' as statutory diminishment." (PageID.10112.) But the Tribe selectively quotes the State's Affirmative Defense No. 6 and omits the relevant facts to seek summary judgment of an affirmative defense the State is not asserting. (PageID.66-67.)

The State asserts that, if the court concludes that the Treaty of Detroit, 11 Stat. 621 (July 31, 1855) (1855 Treaty) created a permanent Indian reservation for the Tribe's political predecessors, Congress disestablished the reservation in the 1872 Act, as amended by the 1875 and 1876 Acts (collectively the 1870s Acts).[1] The State's discovery responses, expert reports, and briefing demonstrate that it properly relies on the test explained in *Solem v. Bartlett*, 465 U.S. 463 (1984). Thus, the court must deny this motion as it relates to the State.

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[1] An Act for the Restoration to Market of Certain Lands in Michigan, 17 Stat. 381 (June 10, 1872) (1872 Act); An Act to Amend the Act Entitled 'An Act for the Restoration to Market of Certain Lands in Michigan,' 18 Stat. 516 (March 3, 1875) (1875 Act); An Act Extending the Time Within which Homestead Entries Upon Certain Lands in Michigan May Be Made, 19 Stat. 55 (May 23, 1876) (1876 Act). (PageID.7871, 7888, 7890.)

Further, the historical background in the Tribe's brief is not relevant to this motion and is both disputed and incomplete. Under these circumstances, the court cannot adopt the Tribe's historical facts as settled, whether in the context of this motion or the defense motions for summary judgment.

COUNTER-STATEMENT OF FACTS

The Tribe titles this its "'Historical Motion' for Partial Summary Judgment Concerning Exemption-Diminishment and Title-Diminishment Defenses." (PageID.10102, 10106.) The Tribe's statement of facts starts to provide background that it appears to claim as relevant to the core questions concerning reservation creation, diminishment, or disestablishment that the parties refer to as the topics for the "Historical Motions." (PageID.6454.) But the Tribe never briefs those substantive issues. Instead, it argues that certain Defendants, including the State, have raised affirmative defenses inconsistent with the case law concerning diminishment and disestablishment.

The facts that the Tribe has alleged, much of which relates to nineteenth-century federal Indian policy, are not relevant to its arguments concerning the State's Affirmative Defense No. 6. Providing the court with the relevant facts omitted from the Tribe's brief is simple enough, which the State does in the first argument section of this brief. But ignoring the facts the Tribe has alleged would incorrectly suggest that they are undisputed and complete, which Fed. R. Civ. P.

56(c) does not allow a party opposing a motion for partial summary judgment to do.[2] As a result, and to ensure that the Tribe cannot argue that the facts are undisputed because the State did not counter them, the second part of this brief addresses why those facts are disputed and incomplete.

LEGAL STANDARD

A party seeking summary judgment must demonstrate that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law" concerning the claims or defenses challenged. Fed. R. Civ. P. 56(a). A court reviews all the evidence in the record in the light most favorable to the nonmoving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). A court may only enter summary judgment against the nonmovant if the nonmovant "fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *see also Plott v. Gen. Motors Corp., Packard Elec. Div.*, 71 F.3d 1190, 1195 (6th Cir. 1995).

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[2] To be clear, the State maintains that there is no genuine dispute of material fact on the reservation creation and disestablishment questions raised in its own Historical Motion. (ECF No. 581.) The policies that the Tribe describes in this motion cannot alter the plain language of the 1855 Treaty, the history surrounding it, or the understanding of the parties who endorsed it.

ARGUMENT

I. The court must deny the Tribe's motion for partial summary judgment because the State properly asserts disestablishment by acts of Congress as its affirmative defense.

The Tribe argues that the State claims that the "sale of individual parcels within the Reservation diminished the Reservation's jurisdictional boundaries[.]" (PageID.10130.) Evidently, the Tribe contends that the State's affirmative defense is not grounded in a statute enacted by Congress. The Tribe is wrong.

There are two overarching problems with the Tribe's motion as it concerns the State. First, it excerpts Affirmative Defense No. 6 in a way that creates confusion about the affirmative defense the State is pursuing. Second, even after years of discovery and briefing, the Tribe postures this motion as if it knows nothing more about the State's legal position than what was written in the affirmative defenses filed just weeks after the complaint. The State is not asserting the defense that the Tribe claims. Thus, the motion as it concerns the State must be denied.

A. The facts concerning the State's Affirmative Defense No. 6.

Throughout this litigation, the State has maintained that the 1855 Treaty did not create an Indian reservation for the political predecessors to the Tribe. (PageID.16-17, ¶¶ 31-32.) At the same time, however, the State recognizes that § 6 of the Reaffirmation Act[3] makes the Tribe's trust lands in Emmet and Charlevoix

[3] Little Traverse Bay Bands of Odawa Indians and Little River Band of Ottawa Indians Act, Pub. L. No. 103-324, 108 Stat. 2156 (Sept. 21, 1994) (Reaffirmation Act).

counties its reservation. But those discrete trust parcels and the two counties do not match the exterior boundaries of the survey townships listed in Article I, Paragraphs Third and Fourth in the 1855 Treaty (hereinafter the listed survey townships).[4] (PageID.17, ¶ 32; PageID.42; PageID.914-916; PageID.9695-9699.) Thus, at multiple places in the answer to the complaint, the State stated that the Tribe's modern-day reservation did not include "the entire area described as the alleged Reservation" in the complaint. (PageID.4, ¶ 4; PageID.8, ¶ 15; PageID.16, ¶ 31; PageID.20, ¶ 40; PageID.25, ¶ 48; PageID.27, ¶ 49; PageID.29, ¶ 50; PageID.35, ¶ 51; PageID.37, ¶ 52; PageID.40, ¶ 57.)

The State asserted Affirmative Defense No. 6 to address the inconsistency between the treaty reservation the Tribe claims and the trust land reservation the Reaffirmation Act provides, stating:

[4] To be clear, this is not a dispute over the location of the boundaries of the Tribe's reservation, but a dispute over whether the Tribe has a treaty reservation in addition to its trust lands under the Reaffirmation Act.

> 6. Plaintiff's reservation does not consist of all the lands claimed as the alleged Reservation. The alleged Reservation may not have been created with the boundaries that Plaintiff claims, or it **may have been** revoked, **diminished, [or] disestablished by Congress** or through a combination of other events with the same or similar legal consequences including, but not limited to:
>
> a. acts providing for the allotment of lands within the alleged Reservation, whether generally applicable in the United States or specifically applicable in Michigan;
>
> b. acts providing for the disposition of public lands to non-Indians within the alleged Reservation;
>
> c. the failure of Plaintiff's predecessors to select available lands within the townships identified in the 1855 Treaty; or
>
> d. the subsequent disposition of lands selected by Plaintiff's predecessors to non-Indian owners.

(PageID.66-67 (emphasis added).) Affirmative Defense No. 6 proffered alternative legal theories, with the text emphasized above stating diminishment or disestablishment affirmative defenses.

As this litigation progressed, the State communicated to the court and the parties that it was focusing on asserting diminishment or disestablishment under Affirmative Defense No. 6. In each instance, the State tied diminishment or disestablishment to acts of Congress. For instance, the State opposed the Tribe's first motion for partial summary judgment, arguing throughout that *Solem* establishes a three-part framework for determining when Congress has diminished or disestablished a reservation – an analysis that requires a Congressional act. (ECF No. 75.) The State again cited *Solem* as the basis for deciding whether Congress diminished or disestablished any treaty reservation in response to the Tribe's second motion for partial summary judgment. (PageID.3669.)

The State also asked its historian, Emily Greenwald, Ph.D., to address whether Congress intended the 1870s Acts to diminish or disestablish a reservation, assuming that the 1855 Treaty had created a reservation. (Ex. A, p. 1.) Her report explained that the State had divided this overarching question about diminishment or disestablishment into three sub-questions:

1. What was Congress's intent in the 1872, 1875, and 1876 acts?
2. What was the contemporaneous understanding of the acts?
3. What was the subsequent history of the area affected by the acts?

(Ex. A, p. 66.) Those questions reflect each part of the *Solem* framework. *See Solem*, 465 U.S. at 470-72. As all three questions in this list expressly indicate, the State's theory inherently involves acts of Congress. Dr. Greenwald expressed her opinion as an expert historian that Congress had intended to disestablish the reservation with the 1870s Act, if the 1855 Treaty had created a reservation. (Ex. A, pp. 3, 66-73; Ex. B, pp. 5, 6, 60.)

None of the exhibits to the Tribe's motion include the State's discovery responses. Nevertheless, if the Tribe had any questions about the affirmative defense, the State's other discovery responses would have made clear what it was asserting. For instance, in answer to Request to Admit No. 99, the State said in relevant part, "If the court in this case determines that the 1855 Treaty did create the reservation that the Tribe claims in this case, Governor Snyder contends that *Congress subsequently disestablished it*…." (Ex. C, p. 41 (emphasis added).) This was a succinct statement of the affirmative defense couched squarely in terms of

Congressional action, i.e., legislation. Moreover, when the State filed its motion for summary judgment on March 18, 2019, the State plainly argued that Congress disestablished any reservation created by the 1855 Treaty when it enacted the 1870s Acts. (PageID.9678-9690.)

B. The State properly asserts that the 1870s Acts disestablished any reservation that the 1855 Treaty created.

According to the Tribe, "Each of the Defendants in this case except the Emmet County Townships asks this Court to hold that sales of individual parcels within the Reservation diminished the Reservation's jurisdictional boundaries." (PageID.10130 (footnote omitted).) The Tribe presents an "excerpt" from the State's Affirmative Defense No. 6 with the following formatting:

> - State's Affirmative Defense No. 6: "The alleged Reservation may not have been created with the boundaries that Plaintiff claims, or it may have been revoked, diminished, disestablished by Congress *or through a combination of other events with the same or similar legal consequences including, but not limited to: … c. the failure of Plaintiff's predecessors to select available lands within the townships identified in the 1855 Treaty; or d. the subsequent disposition of lands selected by Plaintiff's predecessors to non-Indian owners*."

(PageID.10130.) Footnote 5 then quotes lettered subsections (a) referring to allotment and (b) referring to the disposition of public lands to non-Indians before adding, "Significant record evidence disproves these defenses, but they are not the subject of this motion because they are not, on their face, legally insufficient." (PageID.10130.) According to the Tribe, these two defenses in subsections (a) and

(b) must be evaluated under the "three-part test for statutory diminishment." (PageID.10130.)

Later, the Tribe re-writes the State's Affirmative Defense No. 6, reducing it to just a few words. (PageID.10142.) According to the Tribe, "The State urges that 'the failure of Plaintiff's predecessors to select available lands within the townships identified in the 1855 Treaty; or … the subsequent disposition of lands selected by Plaintiff's predecessors to non-Indian owners' have the '*same or similar legal consequences*' as statutory diminishment." (PageID.10142 (emphasis in Tribe's brief).) This characterization is not true.

1. The Tribe does not accurately represent the State's Affirmative Defense No. 6.

To include the State in this motion, the Tribe has been forced to distort the State's Affirmative Defense No. 6 in several ways. First, the Tribe never quotes the entire affirmative defense. Had it quoted the complete affirmative defense, it would have been immediately clear that the Tribe had omitted the first sentence, which says, "Plaintiff's reservation does not consist of all the lands claimed as the alleged Reservation." (PageID.66.) This sentence provides important context, giving notice from the outset of the litigation that the State would be exploring alternative theories to explain the mismatch between the Tribe's reservation under the Reaffirmation Act and the treaty reservation it claims.

Second, the Tribe actually re-writes the State's Affirmative Defense No. 6 when it claims the State is arguing that "the failure of Plaintiff's predecessors to

select available lands within the townships identified in the 1855 Treaty; or … the subsequent disposition of lands selected by Plaintiff's predecessors to non-Indian owners' have the '*same or similar legal consequences*' as statutory diminishment." (PageID.10142 (emphasis in Tribe's brief).) The Tribe omits the language that refers to a "combination of events" and notes that the State was examining federal allotment acts and other federal acts it might discover. (PageID.66-67.) The Tribe never acknowledges that the State referred directly and independently to diminishment and disestablishment by Congress in the same text.

Third, the Tribe alters the formatting of the State's Affirmative Defense No. 6. By collapsing a partial quote into a bullet point and then later reducing it to selected words from the text, the Tribe creates the misimpression that the lettered examples modify or explain the text referring to diminishment or disestablishment by Congress. (PageID.10130, 10142.) The State was, in fact, pleading defenses "alternatively or hypothetically" as Fed. R. Civ. P 8(d) expressly permits.

The plain language of Affirmative Defense No. 6 included five major alternatives to explain why the Tribe's "reservation does not consist of all the lands claimed as the alleged Reservation":

- The reservation was not created with the boundaries the Tribe claims;
- Congress revoked the reservation;
- Congress diminished the reservation, i.e., made it smaller;
- Congress disestablished the reservation, i.e., terminated its existence; or
- Some other event or events occurred that had the "same or similar legal consequences" as the other theories described.

The references to Congress diminishing or disestablishing a reservation stood on their own; they required no further explanation because they are defined in the case law and the complaint itself referred to diminishment and disestablishment. (PageID.2, ¶ 3; PageID.66-67.) Only the last alternative theory incorporated the lettered examples (a) through (d), and it clearly referenced a "combination of events" including federal statutes.

More than three years into the litigation, it is certainly possible to look at language drafted within weeks of when the complaint was filed and see different ways to express the same ideas more clearly, even if only by numbering these alternative theories separately. But affirmative defenses pursuant to Fed. R. Civ. P. 8(c) are intended simply to provide notice to the plaintiff. *See Brent v. Wayne County Dep't of Human Servs.*, 901 F.3d 656, 680 (6th Cir. 2018). The State's Affirmative Defense No. 6 fulfilled that notice requirement.

It was no surprise at all that the State filed a motion arguing that, if the court concludes that the 1855 Treaty created a permanent Indian reservation, Congress disestablished it by enacting the 1870s Act. (PageID.9678-9690.) Affirmative Defense No. 6 expressly mentioned disestablishment by Congress. (PageID.66.) The Tribe wants this court to parse the language of the State's Affirmative Defense No. 6 to find buried within it a theory legally incompatible with disestablishment. But Fed. R. Civ. 8 does not impose hyper-technical pleading requirements and, consequently, this court should not read Affirmative Defense No. 6 in a hyper-technical way. *See Baker v. City of Detroit*, 483 F. Supp. 919, 921 (E.D.

Mich. 1979) ("hypertechnicality in pleading requirements should be avoided"). The State does not contend that the sale of lands within a reservation – alone – can diminish or disestablish a reservation.

2. The Tribe ignores all the discovery and briefing in this case.

The major problem with the Tribe's motion concerning the State's Affirmative Defense No. 6 is that it ignores what has happened over years of this litigation, as if it had only the text of the affirmative defenses to understand the State's legal theories. But as detailed above, the State has been transparent about its theory that, if the 1855 Treaty created the reservation the Tribe claims, Congress disestablished the reservation by enacting the 1870s Acts.

The Tribe has never been confused about the legal theories that the State decided to pursue under Affirmative Defense No. 6. The Tribe's motion does not cite a single discovery response where the State has indicated that the sale of lands, alone, is enough to diminish or disestablish a reservation. In fact, the Tribe never submitted a single contention interrogatory to the State concerning Affirmative Defense No. 6. *See*, *generally*, *Menominee Indian Tribe of Wis. v. Thompson*, 943 F. Supp. 999, 1007 (W.D. Wis. 1996) (explaining value of contention interrogatory in clarifying treaty claims). Further, the Tribe states that "no Defendant asked follow-up discovery concerning the history or disposition of any parcel" after it produced its database of title histories. (PageID.10132.) This was yet more evidence that the

State does not argue that the sale of lands could, on its own, diminish or disestablish a reservation.

The Tribe tries to make up for the absence of any proof that the State is pursuing the theory the Tribe articulates by quoting sections of different expert reports. (PageID.10131-10132.) But none of the quotes identify a theory by the State that the sale of lands without a Congressional act constitutes diminishment or disestablishment. The two quotes from Emily Greenwald, Ph.D., the State's historian, come from chapter 4 of her report, which addresses how Article I of the 1855 Treaty was *implemented* and the problems that occurred even before patents issued for the lands. (PageID.10131-10132.) (Ex. A, pp. 36, 40.) Chapter 4 does not address diminishment or disestablishment at all, focusing instead on the State's primary theory that the 1855 Treaty did not create a reservation and the 1870s Act were intended to implement the treaty's terms. (Ex. A, pp. 36-50.) Chapter 7 separately addressed diminishment and disestablishment and specifically discussed the 1870s Acts in that context. (Ex. A, pp. 66-73.) Nothing in Dr. Greenwald's report supports the Tribe's argument in this motion that the State is arguing that the sale of land, alone, constitutes diminishment or disestablishment of a reservation.

The Tribe also suggests that the "defense" is trying to exploit the evidence that band members were subject to "private thefts" of their lands to support its affirmative defense. (PageID.10143.) But the State has *never* made that argument.

The State's disestablishment argument relies substantially on the language Congress used in the 1870s Acts. (PageID.9679-9682.) The State presents other facts concerning the contemporaneous understanding of the 1870s Acts and the subsequent history within the reservation the Tribe claims because that is the legal framework for deciding these issues. *See Solem*, 465 U.S. at 471-72. Those facts necessarily involve what happened to the land in the listed survey townships after Congress enacted the 1870s Acts. *See*, *generally*, *Nebraska v. Parker*, 136 S. Ct. 1072, 1077-78 (2016) (considering what happened to lands on Omaha Reservation after Congress authorized sale and allotment); *Hagen v. Utah*, 510 U.S. 399, 420-21 (1994) (considering what happened to Uintah Reservation lands after Congress returned them to the public domain). But at no point in its affirmative defenses, discovery responses, or briefing, has the State ever suggested that private parties can unilaterally diminish or disestablish a reservation by theft.

To decide this motion, the court need only look at the State's brief in support of its own motion for summary judgment on the historical issues in this case. (PageID.9678.) Under a subheading that reads, "The *Solem* test," the State quotes *Solem*, 465 U.S. at 470, which says, "Once a block of land is set aside for an Indian Reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise." (PageID.9678.) The Tribe quotes the exact same passage to support its argument that the sale of land, alone, cannot diminish or disestablish a

reservation. (PageID.10143.) Clearly, the State is not asserting the defense that the Tribe claims. The Tribe's motion as it concerns the State must be denied.

The court can stop at this point in the State's brief if it sees no need to consider the historical facts the Tribe alleges to decide this motion. But if the court will consider those facts in the context of this or any other dispositive motion, then the State provides the analysis in the following section to explain why the Tribe is not stating settled facts.

II. The court should refrain from adopting the Tribe's alleged statement of facts because those facts are not material and are disputed.

The Tribe crafts its statement of facts for this motion in an apparent attempt to use nineteenth-century federal Indian policies to cast a favorable light on its view of the history surrounding the Treaty of Washington, 7 Stat. 491 (Mar. 28, 1836) (1836 Treaty) and the 1855 Treaty. But federal policy does not support the Tribe's central premises: (1) that the reservations of aboriginal land under the 1836 Treaty survived past five years, or (2) that the 1855 Treaty created a permanent reservation in the listed survey townships for the bands.

The State asserts that the court should disregard the Tribe's allegations of fact because they do not raise issues relevant, i.e., material, to this motion concerning whether the State has alleged a legally cognizable affirmative defense. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (discussing materiality under Fed. R. Civ. P. 56 and stating that "[f]actual disputes that are irrelevant or unnecessary will not be counted"). Moreover, the court should not adopt these

allegations as established fact for any other dispositive motion filed in this case because the State has demonstrated they are disputed, as required under Fed. R. Civ. P. 56(c). *See Anderson*, 477 U.S. at 250 (summary judgment cannot be granted if "there are any genuine factual issues that … may reasonably be resolved in favor of either party").

A. The reservations limited to five years in the 1836 Treaty did not continue to exist past 1841.

The Tribe provides a short overview of the period when it says that federal policy favored removing indigenous people west of the Mississippi River in return for land cessions in eastern states and territories. (PageID.10115.) *See* 1830 Removal Act.[5] But the Tribe attempts to distance the 1836 Treaty from the removal policy by emphasizing that removal under Article Eighth was voluntary, Henry Schoolcraft did not expect non-Indian settlers to reach northern Michigan for some time, and Articles Second and Third recognized reservations. (PageID.10118.) The Tribe apparently thinks these facts support its theory that the 50,000-acre reservation on the Little Traverse Bay in Article Second of the 1836 Treaty continued to exist after 1841. But that theory is inconsistent both with the removal policy and the 1836 Treaty's terms.

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[5] An Act to provide for an exchange of lands with the Indians residing in any of the states or territories, and for their removal west of the river Mississippi, 4 Stat. 411 (May 28, 1830.) (PageID.7859-7861.)

Federal removal policy, as the Tribe describes it, was intended to open former Indian lands to settlement. (PageID.10115.) Even Henry Schoolcraft knew that securing a land session would lead to the lands in northern Michigan being surveyed and opened to settlement by non-Indians "moving from the South to the North[.]" (PageID.6879.) To that end, the 1836 Treaty did include a land cession (Article First) for a sum certain (Article Fourth), which was extended to include the reservations in Articles Second and Third for an additional $200,000. (PageID.6825-6826, 6831.) The five-year limit on the reservations in the 1836 Treaty was consistent with the cession and with opening the lands to non-Indian settlement because it provided a firm date when the Indian right to possess and occupy the land would end. (PageID.6831, 6879-6880.) Leaving the bands landless and unable to prevent non-Indian settlement encouraged their members to remove voluntarily to Kansas under Article Eighth or to remove to unceded Indian lands held by other Anishinaabe bands in Minnesota. (PageID.6880.)

The parties to the 1836 Treaty understood that the reservations under the 1836 Treaty expired in 1841, regardless of the fact that the United States did not force band members to remove. As Henry Schoolcraft said in 1837, "Their reservations will expire in 1841, after which, they [the bands] will possess no further right to a residence on the lands, but the conditional usufructuary right contained in the 13th article" of the 1836 Treaty. (PageID.7274.) Chiefs from the bands that were parties to the 1836 Treaty also petitioned President Tyler in May 1841, noting that the reservations "will expire by limitation on the 27th of the

current month" and asked him to "extend the time for which we have held our reservations[.]" (PageID.8143.) There is no evidence that President Tyler granted the request. Thus, there is no evidence supporting the Tribe's argument that the reservations under the 1836 Treaty survived past 1841 even though the federal government did not forcibly remove band members from the ceded lands.

B. Federal reservation policy does not support the Tribe's claim that the 1855 Treaty established a reservation for its political predecessors.

The Tribe provides an overview of federal policy in the 1850s and 1860s when the federal government favored establishing Indian reservations as an alternative to removal, which had become impracticable. (PageID.10116.) The Tribe explains that the reservation policy was a way to keep Indians and non-Indians separate and to "civilize" Indians. (PageID.10116.) But the 1855 Treaty does not reflect the reservation policy, and the mere existence of that policy cannot create a reservation out of the 1855 Treaty.

1. The 1855 Treaty was not designed to isolate Indians from non-Indians.

Contrary to the Tribe's argument, the 1855 Treaty did not keep Indians and non-Indians separate. (PageID.10116.) By 1855, non-Indians were already living in northern Michigan and land was being settled rapidly, as Henry Gilbert recognized before (PageID.8288), during (PageID.7142), and after the treaty council (PageID.7163-7164). Despite this settlement, the 1855 Treaty did not exclude non-Indians from living in or acquiring lands in the listed survey townships in Article I.

Article I established that any remaining unsold lands in the listed survey townships were part of the public domain and subject to disposition by the United States under public land laws – without limitation on who could acquire them. (PageID.6895.) Additionally, the United States reserved the right to begin to establish the basic infrastructure for non-Indian settlement by acquiring and disposing of lands for schools and churches at any time. (PageID.6895.) Thus, the 1855 Treaty was not consistent with any federal policy intended to keep Indians and non-Indians separate.

The Tribe also notes that Henry Gilbert proposed amendments to the locations in the 1855 Treaty where lands would be withdrawn from sale. (PageID.10123, 7162.) According to the Tribe, those proposed amendments were in "keeping with prevailing federal policy," "worked to keep the bands' selections compact and contiguous," and "relocate[d] the bands away from white settlement." (PageID.10123.) But the situation in Michigan was far different from the America west of the Mississippi and, as a result, the amendments to the 1855 Treaty do not reflect the reservation policy.

Henry Gilbert was concerned with whether there would be sufficient land available for band members to select under the terms of the 1855 Treaty. He said so directly at the 1855 Treaty council. (PageID.7142-7143.) In his November 24, 1855, letter to Commissioner Manypenny forwarding the proposed amendments to the 1855 Treaty, he also explained the proposal to exclude lands south of the Pine River, saying, "No more than 3 or 4 sections remain unsold & the Indians do not

want it & have no objection to the Amendment." (PageID.7163.) The Tribe points to no evidence in the record indicating that these changes were the product of any federal Indian policy designed to keep Indians and non-Indians apart consistent with the reservation policy, contrary to the terms of the 1855 Treaty itself.

2. The 1855 Treaty did not create a reservation to "civilize" members of the bands.

Nor was the 1855 Treaty intended to establish a reservation to "civilize" band members. The bands that were parties to the 1855 Treaty had no need to be placed on reservations to convince them of the benefits of adopting aspects of non-Indian culture. By the time the federal government shifted to a reservation policy, members of these bands had been – for decades – strategically changing the way they lived in order to appear "civilized" to avoid removal. Not only did they seek education in English, they adopted Christianity, sought state citizenship, and engaged in forms of agriculture and skilled work. (PageID.3778-3780, 7558, 8190.)

These efforts and the desire to be "civilized" appear repeatedly in the bands' petitions to government officials starting before 1836. (PageID.8088, 8132-8133, 8143, 8305). These efforts at assimilation also came up in observations by federal officials (PageID.7273, 7331, 7335-7336, 7341-7342, 7558, 8346) and other non-Indians (PageID.8075-8076, 8112-8113, 8205). Assagon (PageID.7137), Waubojeeg (PageID.7140), Wasson (PageID.7128), Shawwasing (PageID.7140), Andrew J. Blackbird (PageID.7144) and other band leaders who spoke at the 1855 Treaty

council repeatedly stressed that they lived in a manner that already resembled the lives of non-Indians or otherwise had adopted habits similar to them.

Commissioner Manypenny and Henry Gilbert also knew that members of these bands had progressed toward "civilization," with some band members already achieving the status of landowners, taxpayers, and citizens by 1855. (PageID.7140, 7150, 7558.) Commissioner Manypenny cited their "very rapid advancement in civilization" and progress toward state citizenship when explaining the 1855 Treaty to Charles Mix, who was the Acting Commissioner of Indian Affairs, the week after the 1855 Treaty council. (PageID.8412.) Commissioner Manypenny cited the same distinctions four months later in his annual report for 1855. (PageID.7532.)

There was no need to place these band members on reservations to advance any goal of "civilizing" them. Giving them land to own individually and farm, rather than a reservation, was the 1855 Treaty's method of moving them further down the path of "civilization." As Commissioner Manypenny explained in 1856, "[U]nder the liberal provisions of the treaties of 1855, by which every family is to receive a homestead from the public domain, and the friendly feelings manifested toward them by the people of that State, present indications would seem to justify the hope that they will attain a much higher state of civilization…." (PageID.7589.)

3. Indian reservations in the nineteenth century were coercive and inhospitable.

The Tribe glosses over the reality of what it meant to have a reservation in the 1800s in its explanation of the federal reservation policy. For instance, the

Tribe cites COHEN'S HANDBOOK OF FEDERAL INDIAN LAW (COHEN'S HANDBOOK, § 1.03[6][a], p. 60 (Nell Jessup Newton, ed., 2012), stating that as "early as 1850, Commissioner [of Indian Affairs] Luke Lea outlined a policy of 'concentrating the Indians on small reservations of land, and of sustaining them there for a limited period, until they can be induced to make the necessary exertions to support themselves….'" (PageID.10116 (alterations in the Tribe's brief).) But the full passage from which the Tribe cites (Ex. D, pp. 60-61) does not describe a benevolent federal policy, or even a neutral policy.

Rather, the federal government envisioned reservations as a method to coerce indigenous people to abandon their ways of life and become farmers at the risk of starvation. (Ex. D, p. 60.) Reservations were "schools for civilization, in which Indians *under the control of the agent* would be groomed for assimilation." (Ex. D, p. 61 (emphasis added).)

> *They were not, however, voluntary schools*. The *military* was used to prevent the "intrusion of improper persons upon them, to afford protection to the agents, and to aid in *controlling the Indians and keeping them within the limits assigned to them*. Commissioner Francis Walker stated that reservations would place Indians "under a *strict reformatory control by the agents of the Government*" and isolate them from "influences inimical to peace and virtue." Walker asserted that as Indians abandoned the "roving state" and became agriculturalists, they would need less reservation land. The surplus could then be consolidated and sold to non-Indians. The civilization program, the removal policy, and the reservation system were all directed toward the broader goal of obtaining landholdings from the Indians while incorporating them into American life.

(Ex. D, p. 61 (footnotes omitted, emphasis added).) According to footnote 283, the only substantive footnote in the block quote above, Commissioner of Indian Affairs Francis Walker believed that the Indians

> "should be made as comfortable on, and as uncomfortable off, their reservations as it was in the power of the Government to make them; that such of them as went right should be protected and fed, and *such as went wrong should be harassed and scouraged without intermission*…. Such a use of the strong arm of Government is not war, but discipline."

(Ex. D, p. 61 n. 283 (quoting Sec. Interior Ann. Rep., Sen. Exec. Doc. No. 36-2, p. 394 (1859) (alterations in COHEN'S HANDBOOK, emphasis added).) The Tribe, however, never mentions any of these negative aspects of the reservation policy noted in the very same section of COHEN'S HANDBOOK that it cites.

It is understandable that the modern-day Tribe sees the benefits of having an expanded reservation where it could exercise jurisdiction and obtain additional federal benefits. But it is hard to imagine that members of the bands would choose the harsh treatment of a reservation under the prevailing mid-nineteenth-century federal policy over living as landowners and Michigan citizens.

4. Establishing a reservation 4.5 times larger than the former 50,000-acre reservation under the 1836 Treaty would have been inconsistent with the federal reservation policy.

As the passage from COHEN'S HANDBOOK quoted above notes, the federal reservation policy was part of the United States' "broader goal of obtaining landholdings from the Indians …." (Ex. D, p. 61.) The Tribe makes no effort to address this component of the reservation policy because its theory is directly inconsistent with it. According to the Tribe, the 1855 Treaty gave the bands named in Article I, Paragraphs Third and Fourth of the 1855 Treaty a permanent reservation that was roughly ***4.5 times larger*** than the 50,000 acres of aboriginal

lands reserved around the Little Traverse Bay in Article Second of the 1836 Treaty. In return, the bands ceded no additional lands. The Tribe's theory is the antithesis of the federal government's policy that used reservations to acquire Indian lands.

This theory that the federal government would provide hundreds of thousands of acres of land for Indian reservations while receiving nothing in return also would have made no sense to the federal representatives or the band leaders who negotiated the 1855 Treaty. The federal government's desire to acquire all Indian lands in Michigan and to minimize or eliminate Indian reservations was apparent in its direct dealings with the bands. The United States had been acquiring land from the bands in Michigan since 1795. *See* Treaty of Greenville, 7 Stat. 49 (Aug. 3, 1795). When Lewis Cass issued instructions for the 1836 Treaty council, he told Henry Schoolcraft to acquire all the Indian lands he could purchase from the bands and to limit the Indian reservations in Michigan. (PageID.8096.) The Senate was even clearer, requiring the reservations recognized under the 1836 Treaty to terminate after five years. (PageID.6831.)

These earlier cessions left the bands with no land to cede in 1855. Individual band members had lands that they had purchased since the 1840s, but the United States did not demand those lands as part of the treaty negotiations with the bands. As Commissioner Manypenny said at the 1855 Treaty council, "We are seeking no lands - nothing from you." (PageID.7127.) Thus, the Tribe's suggestion that federal reservation policy is the relevant context for the 1855 Treaty is missing a significant

piece of supporting evidence – lands ceded by the Indians to the United States. (Ex. D, p. 61.)

Moreover, while the federal representatives were willing to provide public lands in Michigan for band members to develop into farms, they were unwilling to provide more land than individual band members needed to farm. For instance, Assagon first proposed that every Indian man, woman, and child be allowed to select 160 acres of land, rather than the 80 acres for a head of a family and 40 acres for a single person that had been proposed. (PageID.7143, 7146.) But Commissioner Manypenny said that Assagon's proposal would be "too much, especially for his [Assagon's Cheboygan] band, who before dinner, he told us, had enough land & didn't want any more." (PageID.7146.) The 1855 Treaty ultimately incorporated the federal proposal for the number of acres available for each eligible band member to select.

Commissioner Manypenny and Henry Gilbert would have had to abandon federal interests to replace a 50,000-acre reservation of aboriginal lands that had expired in 1841 with a 216,000-acre reservation created out of the public domain. Those federal interests included, among other things, setting a date to end federal management of daily affairs for the bands and setting the stage for band members to be subject to state and local jurisdiction. (PageID.7141, 8285-8286.) Continuing federal superintendence indefinitely over such a large reservation would have been directly inconsistent with those express federal goals. Further, its clear that Commissioner Manypenny and Henry Gilbert did not abandon those federal

interests when negotiating the 1855 Treaty. As Henry Gilbert remarked, "it costs a great deal to manage your [the bands'] affairs" and so it was the United States' goal "to have you civilized citizens of the State– taking care of yourselves. And that is one object of calling you here." (PageID.7150.)

Nor would the band leaders who negotiated the 1855 Treaty have expected to obtain large reservations on top of the payments and other consideration that they received under the 1855 Treaty. First, while negotiating the treaty, the band leaders first insisted on obtaining money, not land. (PageID.7128-7135, 7137.) When they acquiesced to the land offer, they expressly demanded individual land ownership and did not discuss new reservations. (PageID.7136, 7139, 7144.) Second, the band leaders agreed to and endorsed the 1855 Treaty, which incorporated the amount of land for individual band members that the federal representative had proposed. (PageID.7160.) Third, the band leaders failed to convince the federal negotiators that the bands had any legal right to compensation for the lands in Kansas and other consideration under Article Eighth of the 1836 Treaty. (PageID.7132-7133, 7135, 7137, 7139, 8394-8395.) Thus, band leaders had nothing substantial to offer in return for a 216,000-acre reservation.

Simply put, none of the parties who negotiated the 1855 Treaty would have expected it to create the large reservation the Tribe claims in this case.

C. The 1855 Treaty was not an allotment treaty.

The Tribe also takes a wrong turn when it refers to allotment as a compliment to the federal reservation policy. (PageID.10117.) The Tribe, quoting

COHEN'S HANDBOOK, § 1.03[6][b], p. 61, explains that, "[t]o federal eyes, allotment was 'a means to both free land for white settlement and to instill in Indians the idea of individual property, and through it, civilization.'" (PageID.10117.) (Ex. D, p. 61.) But once again, the 1855 Treaty does not fit within any such federal policy.

First, for a treaty to allot reservation lands in severalty, a reservation must exist – otherwise there would be no "tribal ownership in some lands [that] would be converted into title held by individual tribal members" as COHEN'S HANDBOOK, § 1.03[6][b], p. 61, states. (Ex. D, p. 61.) Had the 1855 Treaty created a reservation, the lands would have been set apart, restricted for Indian purposes, and subject to federal superintendence. *See Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 511 (1991). Henry Gilbert and/or Commissioner Manypenny had used similar terms in other treaties shortly before July 1855. *See*, *e.g.*, Treaty with the Chippewa, 10 Stat. 1165 (Feb. 2, 1855); Treaty of La Pointe, 10 Stat. 1109, art. 2 (Sept. 30, 1854). But the language creating a reservation is missing from the 1855 Treaty. As a result, the 1855 Treaty did not include any variation on the word "allot" or "allotment" to suggest that it was dividing that reservation into individual parcels.

Second, contrary to the Tribe's position, there was no reason to allot lands in the 1855 Treaty to free it for non-Indian settlement. The 1855 Treaty addresses the *opposite* problem. The unsold lands in the listed survey townships were already in the public domain and could be sold to non-Indians. Had President Pierce not

withdrawn those lands from sale on a temporary basis, the band members would have had to compete with non-Indian settlers to obtain good farm land.

Third, the federal government had no need to teach the members of these bands the "idea of individual property." (Ex. D, p. 61.) Members of these bands had been acquiring thousands of acres of individual property for years before the 1855 Treaty. (PageID.7558.) In fact, the bands had inquired about purchasing land around the Little Traverse Bay as early as 1839. (PageID.8133.) The land-selection process in Article I of the 1855 Treaty ensured that any eligible band members could acquire their own lands to farm. But the repeated discussions of individual land ownership at the 1855 Treaty council made clear that the members of these bands already knew that the federal government encouraged them to own lands as part of an effort to "civilize" them. (PageID.7140, 7145.)

Finally, the Tribe's theory that the 1855 Treaty both created a reservation and allotted it with the same stroke of a pen is hard to understand. The land in the listed survey townships were already in the public domain and could be conveyed directly by the United States to eligible band members. Creating a reservation for the express purpose of transferring the same lands to individual ownership was a completely unnecessary step. Thus, the federal allotment policy is not the framework for understanding the 1855 Treaty or suggesting that it created a reservation.

D. *Dicta* cannot replace the evidence in this case.

Through the hard work of their respective experts, the parties have amassed a large body of historical and ethnohistorical documents that provide the evidence the court needs to decide this case. Many of those documents were already filed with the court by the time the Tribe filed this motion. Curiously, the Tribe chose not to cite many of those documents when drafting its statement of facts in this motion. Instead, the Tribe frequently quotes or cites *United States v. State of Mich.*, 471 F. Supp. 192 (W.D. Mich. 1979) (*U.S. v. Michigan*), as well as *Red Lake Band, et al. v. United States*, 7 Ind. Cl. Comm. 576 (1959) (ECF No. 429-3) and *Red Lake Band, et al. v. United States*, 20 Ind. Cl. Comm. 137 (1975) (ECF No. 429-10). But neither of those cases decided the issues concerning the 1855 Treaty raised here.

The opinion in *U.S. v. Michigan* specifically addressed the three issues that had been tried in the first phase of that case:

> (a) Whether the Indians reserved or retained fishing rights in the Great Lakes waters purportedly ceded by them under the Treaty of 1836 (7 Stat. 491);
>
> (b) If the Indians reserved rights to fish in those waters, were those rights abrogated in whole or in part by the Treaty of 1855 (11 Stat. 621); and
>
> (c) Assuming those reserved fishing rights were not abrogated, does the State possess any jurisdiction to regulate the exercise of those rights by treaty tribe members?

U.S. v. Michigan, 471 F. Supp. at 218. Although Bay Mills Indian Community claimed that, under the 1836 Treaty, it had a reservation in Lake Superior adjacent to its reservation lands, the district court expressly declined to decide that question because it was outside the scope of the issues that had been

defined for trial. *See id*. at 265. Thus, *U.S. v. Michigan* did not decide any reservation issues.

The *Red Lake* opinions come from a single proceeding in the Indian Claims Commission in which the "Ottawa and Chippewa Indians of Michigan" and others sought additional compensation for the land cession in the 1836 Treaty and in the Treaty with the Ottawas and Chippewas, 7 Stat. 207 (July 6, 1820) (1820 Treaty). As the Tribe stated in an earlier brief, the Indian Claims Commission was never asked to decide any claims concerning a reservation under the 1855 Treaty in *Red Lake* because its "Tribal predecessors never lodged any claim concerning the 1855 Treaty Reservation." (PageID.5839.)

Because neither of these cases decided the issues presented in this litigation, statements from those decisions the Tribe suggests are relevant to interpreting the 1855 Treaty are *dicta*, not binding precedent. *See Slusser v. United States*, 895 F.3d 437, 440 (6th Cir. 2018) ("We generally treat *dicta* as non-binding."); *United States v. Hardin*, 539 F.3d 404, 412 (6th Cir. 2008) (noting that part of decision that was not "essential" to the court's "resolution of a case" is *dicta*). For the most part, the Tribe cites these opinions as a shortcut. But there are instances where the non-binding nature of *U.S. v. Michigan* and the *Red Lake* opinion is important to understand because certain statements or suggestions in those opinions are unfounded or are properly disputed based on the evidence developed in this litigation.

For instance, the Tribe copies a map from *U.S. v. Michigan*, 471 F. Supp. at 277, and cites a passage indicating that the "land reserves" under the 1855 Treaty "correspond, for the most part, with the land reserves provided for under the 1836 Treaty," *id.*, at 243. But the district court in *U.S. v. Michigan* was not citing historical evidence, it was citing an exhibit created by one of the parties, likely the Bay Mills Indian Community.[6] The federal government never surveyed the Little Traverse Bay reservation under the 1836 Treaty. (Ex. E, p. 169.) As a result, the map could not state the location of reservations on the Little Traverse Bay under the 1836 Treaty. At best, it was speculation about that location. Nor should the Tribe want the district court's off-topic musings concerning reservations to be binding law because the court was under the impression that "most" of the "permanent reservations" created under the 1855 Treaty "no longer exist."[7] *U.S. v. Michigan*, 471 F. Supp at 207.

Moreover, the district court's opinion in *U.S. v. Michigan* makes any number of assumptions that are not supported by the evidence. For example, the district court assumed that band members signed the 1836 Treaty with a mark, rather than

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[6] A similar map is included in the Michigan Supreme Court's earlier decision in *People v. LeBlanc*, 248 N.W.2d 199, 217 (1976), a case involving a Bay Mills tribal member who asserted the right to fish with gill nets in Lake Superior without a state license.

[7] The Bay Mills Indian Community does not claim a reservation under the 1855 Treaty. Instead, it describes its reservation as consisting of lands "purchased under the Act of June 19, 1860 (12 Stat. 58), and to such other land within or without said boundary lines as may be added thereto under any law of the United States, except as otherwise provided by law." (Ex. F, Art. II.)

by writing their names, was solely a consequence of illiteracy. *See U.S. v. Michigan*, 471 F. Supp at 228. But even band members who could read and write in English, like Andrew J. Blackbird who became a federal interpreter and wrote a book in English, made a mark in treaties rather than signing their names. (PageID.6897, 11079.) The court in *U.S. v. Michigan* misunderstood the legally consequential act from the Anishinaabe perspective, which was touching a pen to the treaty paper – not writing.

Similarly, the court in *U.S. v. Michigan*, 471 F. Supp at 215 and 216, drew broad conclusions about the poor quality of interpretation by "white interpreters" at treaty councils. The court was, apparently, unaware that Augustin Hamlin, Jr., was a highly educated métis man from L'Arbre Croche who interpreted in both 1836 and 1855. (PageID.6874-6875, 6876, 7134.) He was joined by other good interpreters at the 1855 Treaty council. (PageID.3794.) The court's assumptions interpretation in *U.S. v. Michigan* cannot interject doubts about Indian understanding into this case where the evidence is clear.

To attempt to catalog each instance in which the *U.S. v. Michigan* and *Red Lake* opinions depart from the evidence in this case is unnecessary to resolve this motion. But suffice it to say, the State has relevant historical, anthropological, and ethnohistorical evidence, as well as expert testimony, that sheds light on the history surrounding the 1855 Treaty and the parties' understanding of it. Evidence developed to answer the legal questions in this case – not *dicta* from other cases – will determine the outcome.

CONCLUSION AND RELIEF REQUESTED

For the foregoing reasons, the State respectfully requests that the court deny this motion concerning its Affirmative Defense No. 6 and disregard the Tribe's statement of historical facts.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE CONCERNING WORD LIMIT

This brief complies with the word limit for historical motions established in the court's order concerning the administration of dispositive motions. (PageID.6455, 6710.) Excluding the parts of the document exempted by L. Civ. R. 7.2, this brief contains no more than 16,500 words. This document contains 8,285 words as counted by Microsoft Word 2016.

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