No. 19-2070

In the
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS,

Plaintiff - Appellant Cross-Appellee,

v.

GOVERNOR GRETCHEN WHITMER, Governor of the State of Michigan,

Defendant - Appellee,

CITY OF PETOSKEY; CITY OF HARBOR SPRINGS; EMMET COUNTY, MI; CHARLEVOIX COUNTY, MI,

Intervenors - Appellees Cross-Appellants,

TOWNSHIP OF BEAR CREEK; TOWNSHIP OF BLISS; TOWNSHIP OF CENTER; TOWNSHIP OF CROSS VILLAGE; TOWNSHIP OF FRIENDSHIP; TOWNSHIP OF LITTLE TRAVERSE; TOWNSHIP OF PLEASANTVIEW; TOWNSHIP OF READMOND; TOWNSHIP OF RESORT; TOWNSHIP OF WEST TRAVERSE; EMMET COUNTY LAKE SHORE ASSOCIATION; THE PROTECTION OF RIGHTS ALLIANCE; CITY OF CHARLEVOIX; TOWNSHIP OF CHARLEVOIX,

Intervenors - Appellees.

Appeal from the United States District Court
Western District of Michigan, Southern Division
Honorable Paul L. Maloney

BRIEF FOR DEFENDANT - APPELLEE GOVERNOR GRETCHEN WHITMER

Dana Nessel
Attorney General

Fadwa A. Hammoud (P74185)
Solicitor General

Jaclyn Shoshana Levine
(P58938)
Kelly M. Drake (P59071)
Laura R. LaMore (P79943)
Assistant Attorneys General
Co-Counsel of Record
Attorneys for Governor Gretchen
Whitmer, Defendant - Appellee
Environment, Natural
Resources, and Agriculture
Division
P.O. Box 30755
Lansing, MI 48909
(517) 335-7664

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Michigan Governor Gretchen Whitmer respectfully requests oral argument. This case asks whether Article I, Paragraphs Third and Fourth of the Treaty of Detroit, 11 Stat. 621 (July 31, 1855) (1855 Treaty), as amended, created a permanent Indian reservation for the predecessors to the Little Traverse Bay Bands of Odawa Indians (the Tribe) that still exists today. The answer to that question is critically important to the State of Michigan's sovereignty and jurisdiction over those lands and the other areas identified in Article I of the 1855 Treaty. (Map, R.36-8, PageID#437.)

Oral argument will assist the court in understanding the extensive record and the nuances of the time, place, and perspective of both the Anishinaabek and federal representatives who negotiated the 1855 Treaty. Oral argument will also make clearer the implications of loosening the test for Indian country as the Tribe advocates, thereby expanding where Indian country exists.

JURISDICTIONAL STATEMENT

The Governor does not contest the Tribe's jurisdictional statement.

STATEMENT OF ISSUE PRESENTED

1. To be treated as Indian country under federal law, land must be (1) set aside, (2) for Indian purposes, and (3) subject to federal superintendence. The parties to the 1855 Treaty agreed that the United States would temporarily withdraw from sale unsold public lands in listed townships for eligible band members to select or purchase before the federal government disposed of the remaining lands. Did the district court correctly hold that the terms of the treaty, as understood by the Anishinaabek band leaders in 1855, did not establish reservations that meet the test for Indian country?

INTRODUCTION

When Assagon, Waubojeeg, and other Anishinaabek (Odawa and Ojibwe) band leaders arrived at the treaty council in Detroit in July 1855, they sought what their kinsmen had tried—but failed—to achieve in the Treaty of Washington, 7 Stat. 491, art. 9 (Mar. 28, 1836) (1836 Treaty). Above all, they wished to secure the right to remain in Michigan. But they knew from their own bitter experience with the 1836 Treaty that reservations were not permanent, especially with *gitchi mookomaan* (long knives/non-Indians) clamoring for land. Consequently, they pursued a different strategy to remain in Michigan.

By 1855, band members had purchased tens of thousands of acres of land, convinced Michigan officials to support their efforts to stay, and adopted outward signs that they were "civilized." The 1855 Treaty continued that strategy, enabling band members to acquire more lands to own as individuals under state jurisdiction. The district court correctly concluded based on the extensive record that the band leaders who negotiated the treaty did not want or understand it to create Indian reservations under the federal government's control. Thus, this Court must affirm summary judgment in the Governor's favor.

UNDERSTANDING THE WORD RESERVATION

Understanding this case requires distinguishing between the different meanings of the word reservation. In the 1800s, reservation could be used in its ordinary sense to mean "withholding" or "keeping back" something, without a legal connotation. (1850 Webster's Dictionary, R.600-53, PageID#10790.) When the word had a legal meaning, it did not necessarily mean a reservation for Indians. *United States v. Celestine*, 215 U.S. 278, 285 (1909).

Even when related to Indians, the word reservation had a variety of meanings. Reservation could describe unceded lands with intact aboriginal title, which was Indian country. *See Minnesota v. Hitchcock*, 185 U.S. 373, 388-90 (1902). The word could refer to Indian reservations created out of public domain lands where the United States had extinguished aboriginal title, which it treated as Indian country. *See Donnelly v. United States*, 228 U.S. 243, 255, 269 (1913). Perhaps unexpectedly, the word reservation could also be used in a treaty to convey public domain lands with fee simple title to individuals, creating neither an Indian reservation nor Indian country. *See Jones v. Meehan*, 175 U.S. 1, 10-22 (1899); *see also* 1836 Treaty, art. 9.

The word reservation has never been used exclusively to refer to an Indian reservation that is Indian country within the meaning of 18 U.S.C. §1151. (Compl., R.1, PageID##1-2, 8, ¶¶1, 5, 35.) As this Court reviews the historical record and law, context is important to understanding the meaning of the word reservation.

STATEMENT OF THE CASE

A. The 1836 Treaty council

In 1835, several Anishinaabek bands offered to cede land to the United States. (1836 Journal, R.558-4, PageID##6867-6869.) Harsh circumstances prompted the offer, including threats by the federal government to remove tribes from their lands by force. (*Id.*, PageID##6867-6869, 6873; Blackbird's Song, R.335-4, PageID##3712-3719.) The bands sent a delegation to Washington, D.C., to engage the United States in treaty negotiations. (Hamlin to Cass, R.559-14, PageID##8087-8088.)

As the bands explained to Secretary of War Lewis Cass, the "principal objects" of the trip were to "make some arrangements with [the] government for remaining in the Territory of Michigan in the quiet possession of our lands, and to transmit the same safely to our

posterity." (Hamlin to Cass, R.559-14, PageID#8087.) They did not want to "remove to the west of the Mississippi." (*Id.*) To remain in Michigan, they offered to cede "some Islands on Lake Michigan, and also our claims (with some reserves) on the North side of the Straits of Michillimackinac[.]" (*Id.*, PageID##8087-8088.)

The bands emphasized their spiritual connection to Michigan, saying that the mere thought of leaving made "the soul shrink with horror at the idea of rejecting our country forever…." (Hamlin to Cass, R.559-14, PageID#8088.) They promised to become like the "civilized people" they saw and "submit ourselves to the Laws of that country within whose lands we reside." (*Id.*) But achieving their goal required assistance to transition to agriculture and "in the education of our young people and children[.]" (*Id.*)

Cass appointed Henry Schoolcraft, Acting Superintendent of Indian Affairs for the Michigan Territory, to secure a major land cession from the bands through a treaty. (Cass to Schoolcraft, R.559-15, PageID#8096.) Cass outlined the treaty's terms, saying that it should attempt, "as far as practicable, to extinguish the Indian title as our settlements advance so as to keep the Indians beyond our borders."

(*Id.*) If it was "necessary to allow particular bands to remain upon reservations, those reservations must be held upon the same tenure as the Indians now hold their country, that is, to allow them to retain possession of it 'till it shall be ceded to the United States." (*Id.*) However, the treaty should not grant land to individuals, i.e., "individual reservations." (*Id.*)

At the treaty council in March 1836, Schoolcraft identified the lands the government wanted and offered only "proper and limited reservations to be held in common[.]" (1836 Journal, R.558-4, PageID##6869-6870.) The bands identified the lands they were willing to cede and those they reserved from the cession. (*Id.*, PageID##6875-6876.) The negotiations had difficult moments, some of which Odawa delegate Augustin Hamlin, Jr.,[1] attributed to "white men who wanted reservations," before the band leaders consented to sell their lands. (*Id.*, PageID##6876-6877.)

[1] Hamlin (also called Kanapima) was a highly educated metís man from the Little Traverse Bay area (L'Arbre Croche or *Waganakising*) who spoke and wrote English fluently and was an advocate for the Odawa. (Hamlin Biography, R.335-11, PageID##3773-3791.)

B. The 1836 Treaty's negotiated terms

The negotiators signed the 1836 Treaty and a supplemental article in March 1836. (1836 Treaty, R.558-2, PageID##6825-6831; 1836 Journal, R.558-4, PageID#6877.) In Article First, the bands agreed to "cede to the United States all the tract of country" amounting to almost 14 million acres. (1836 Treaty, R.558-2, PageID#6825; Royce Map, R.558-31, PageID#7266, Area 205.)

Articles Second and Third established where the bands reserved a portion of their aboriginal lands from the cession. (1836 Treaty, R.558-2, PageID##6825-6826.) Article Second explained that the reservations were tracts of land "to be held in common" and specified "[o]ne tract of fifty thousand acres to be located on Little Traverse [B]ay" before identifying the other reservations. (*Id.*, PageID#6825.)

Article Eighth assured the bands that removal would be voluntary, with relocation among the Ojibwe in Minnesota or other lands west of the Mississippi. (1836 Treaty, R.558-2, PageID#6828.) Other articles confirmed the bands' hunting, fishing, and gathering rights and provided them with a twenty-year annuity and additional consideration. (*Id.*, PageID##6826-6831.)

C. The 1836 Treaty as amended

The Senate did not ratify the 1836 Treaty with its negotiated terms. (1839 Annual Report of the Commissioner of Indian Affairs (ARCOIA), R.558-35, PageID##7279-7280.) It limited the reservations "for the term of five years from the date of ratification of this treaty, and no longer unless the United States grant them permission to remain on said lands for a longer period." (1836 Treaty, R.558-2, PageID#6831.) The Senate provided $200,000 to the bands "in consideration of changing the permanent reservations in articles two and three to reservations for five years only…." (*Id.*) The $200,000 would be paid "whenever their reservations shall be surrendered, and until that time the interest on said two hundred thousand dollars" would be paid annually. (*Id.*) Removal remained voluntary, but the amendment to Article Eighth dealt a blow by changing the location for removal to what is now Kansas. (*Id.*, PageID##6828, 6831.)

Schoolcraft convened a council at Mackinac Island in the summer of 1836 to persuade the bands to accept the Senate's amendments. (Articles of Assent, R.558-5, PageID##6879-6881.) He explained the new reservation cessions and payment terms and clarified that the

bands could reside "upon their reservations" after five years "until the lands shall be required for actual Survey and Settlement, (as the white population advances from South toward the North)[.]" (*Id.*) The bands reluctantly agreed to the changes. (Schoolcraft to Cass, R.600-24, PageID#10689.)

D. Uncertainty

The bands that did not already inhabit the 1836 Treaty reservations gave up the idea of occupying them because the reservations would "all expire in 1841," leaving insufficient time to justify "open[ing] new planting grounds." (1839 ARCOIA, R.558-35, PageID#7280.) With the United States limiting expenditures until the bands "remove[d] to their new homes" in Kansas, the reservation on the Little Traverse Bay was never surveyed. (Harris to Schoolcraft, R.559-16, PageID#8103; Schoolcraft to Mullett, R.559-19, PageID##8129-8130.)

At the federal government's urging, the bands reluctantly sent a delegation to inspect the Kansas removal lands in 1838. (1855 Journal, R.558-11, PageID##7132, 7146.) They remained determined to stay in Michigan.

In 1839, bands from the Little Traverse Bay area outlined their plan to avoid removal in a petition to Michigan Governor Stevens Mason. (Hamlin to Mason, R.559-20, PageID#8132.) They asserted that they were sufficiently "civilized" to remain in Michigan and planned to "purchase homes for ourselves and children," "submit ourselves to the laws of this state," and "support the United States." (*Id.*, PageID#8133.) They knew that Pokagon, a Bodéwadmi[2] band leader, "and others near Kalamazoo [were] buying lands from the United States Government" and had "been told that by that act they became citizens and are so acknowledged by the white people." (*Id.*) The bands hoped to do the same and asked if they could "buy this very place the Little Traverse Bay where we are at present…." (*Id.*)

Mason was pleased that the bands desired to "adopt the customs" and become subject to "the same government as their white brethren." (Mason to Hamlin, R.600-32, PageID#10719.) He explained that

> Indians have a right to purchase lands from the Government; that those who conform to the laws are allowed by the constitution to remain in the State; that they will have secured all the privileges of citizens, except the right of voting, and that that right can only be secured by an amendment of the constitution; and that they will also

[2] The Bodéwadmi (Potawatomi) are also Anishinaabe.

> [have] the same rights with any citizen [to] purchase the lands at Little Traverse Bay when those lands are brought into market.

(*Id.*) Mason suggested the bands apply to Congress for land and express their members' "desire to become citizens." (*Id.*)

In May 1841, band leaders wrote to President John Tyler, asking him to extend the reservations. (Apakosigan, R.559-22, PageID#8143.) They stressed that "most of us have been laboring for some years past to conform ourselves to the customs and condition of the white men" and quoted the treaty provision that allowed the United States to extend the reservations. (*Id.*) The president did not respond, and there is no evidence that the United States extended the reservations.

With no reservations and their future in Michigan uncertain, band members began buying public lands, including lands near the Little Traverse Bay. (Pierz to Lefevere, R.600-34, PageID#10724; Misawakwad, R.600-35, PageID##10725-10726.) Federal representatives viewed the purchases favorably. Indian Agent Robert Stuart suggested in 1843 that Congress might enact a law to allow the Odawa to become citizens and "purchase farms &c." (Stuart to Pierz, R.600-36, PageID#10727.) In 1848, Acting Michigan Superintendent of

Indian Affairs William Richmond noted, "The Ottowas of Lake Michigan are making great efforts to secure themselves permanent homes, by purchasing lands along the rivers and bays of the lake…." (Richmond to Medill, R.559-24, PageID#8164.)

By 1855, band members from the Little Traverse Bay area had acquired "sixteen thousand acres of land, and those at Grand Traverse and other places, nearly as much more; all of which they have, from time to time, bought and paid for at the usual rates." (1855 ARCOIA, R.558-50, PageID#7558.) To stay in Michigan, band members also knew they had to appear willing to live like non-Indians. Missionaries had convinced some band members to adopt Christianity (at least outwardly) and educate their children at English-language schools. (Baraga, R.559-12, PageID##8076-8077; Blackbird's Song, R.335-4, PageID##3718-3719.) Some band leaders had taken English names. (Hamlin to Mason, R.559-20, PageID#8134; Apakosigan, R.559-22, PageID##8143-8150.) Band members also advocated for state citizenship. (Blackbird Book, R.600-125, PageID#11080.)

These and other efforts made the intended impression. Indian Agent Henry Gilbert reported that the "degree of civilization already

attained by these Indians who live along the shore of Lake Michigan is exceedingly gratifying. Many of them have become useful, industrious citizens, and are entitled to and exercise the right of suffrage, and all the privileges pertaining to citizenship." (1855 ARCOIA, R.558-50, PageID#7558.)

As Gilbert noted, Michigan had extended rights, including the right to vote, to "every civilized male inhabitant of Indian descent, a native of the United States and not a member of any tribe[.]" (1850 Michigan Constitution, R.559-28, PageID#8184, 8190; Richmond to Medill, R.559-24, PageID##8164-8165.) The state legislature had also petitioned the federal government "to make such arrangements for said Indians as they may desire, for their permanent location in the northern part of this State" and to provide other assistance. (Joint Resolution, R.559-29, PageID#8205.)

E. A new treaty

By the 1850s, the status quo had become untenable. The bands remained in Michigan on their ceded lands, but feared removal even though westward settlement was making removal impractical. (Kanapima, R.559-30, PageID#8211; Cohen's Handbook, R.606-5,

PageID#11690.) The 1836 Treaty annuities would end in 1856, which would leave landless band members "paupers" and a "continual source of annoyance to her [Michigan's] citizens & expense to her treasury[.]" (Gilbert to Manypenny, R.559-33, PageID#8288.)

In 1854, Gilbert outlined a plan to resolve federal obligations under existing treaties with all bands in Michigan "so that within three or four years all connection with & dependence upon Government on the part of the Indians may properly cease." (Gilbert to Manypenny, R.559-33, PageID##8285-8286.) For the parties to the 1836 Treaty, Gilbert proposed to "set apart certain tracts of public lands in Michigan," from which each family would receive eighty acres of land. (*Id.*, PageID#8286.) The lands would be as "far removed from white settlements as possible" and the title restricted. (*Id.*) Michigan, not the United States, would prescribe the "rules & regulations" for the "white persons" allowed to live among the bands, lift restrictions on alienation, and determine when unselected lands "should be again subject to entry[.]" (*Id.*)

But the bands had their own proposal. In January 1855, they wrote to federal officials, explaining that they were "unanimous" in

their desire to "accumulate property" for their children, continue annual interest payments so they could "pay for lands and the Taxes," and learn the amounts due to them under prior treaties. (Chippeways and Ottawa, R.559-34, PageID##8305-8306.) They explained, "We have purchased lands to make us homes" and were traveling to Washington, D.C. in the hope "that our wish and desire may be granted" by the government. (*Id*., PageID#8305.) The band leaders who traveled to Washington discussed with officials their proposal to obtain more money to buy lands. (1855 Journal, R.558-11, PageID##7139-7140.)

In February 1855, band leaders sent two letters to Commissioner of Indian Affairs George Manypenny asking about money due to them under existing treaties. (Nabunegezhick, R.600-45, PageID#10762; Kowize, R.559-35, PageID#8313.) They wanted the information "soon, that we may know what we should do – we need means to buy more lands and make improvements before the land shall be taken by the white settlers near us." (Kowize, R.559-35, PageID#8313.)

In April 1855, anticipating treaty negotiations, Manypenny asked John Wilson, General Land Office Commissioner, that designated survey townships "be withheld from sale until it shall be determined

whether the same may be required for said Indians." (Manypenny to Wilson, R.559-36, PageID#8320.) Manypenny did not pursue Gilbert's proposal to create reservations under state superintendence. As Wilson explained when he forwarded Manypenny's request to Interior Secretary Robert McClelland,

> The object of withdrawing these lands if understood is, to carry out the philanthropic views of the government in reference to these Indians, ***by enabling them to purchase homes and farms for themselves***, and to acquire the arts and comforts of civilized life, unprejudiced by the evil influence or example of such depraved whites, as might wish to settle among them.

(Wilson to McClelland, R.559-37, PageID#8329 (emphasis added).) The attached map said the lands would be withdrawn "temporarily." (*Id.*, PageID##8326, 8331.)

McClelland recommended that President Franklin Pierce grant the withdrawal request "with the express understanding, that no peculiar, or exclusive claim to any of the land so withdrawn, can be acquired by said Indians for whose benefit it is understood to be made, until after they shall by future legislation be invested with legal title thereto." (McClelland to Pierce, R.559-39, PageID#8343.) On May 14, 1855, President Pierce ordered "the withdrawal [to] take place with the

express understanding contained in" McClelland's letter. (Wilson to McClelland, R.559-37, PageID#8328.)

On May 21, 1855, Manypenny asked McClelland for approval to negotiate a new treaty with these Anishinaabek bands. (Manypenny to McClelland, R.559-43, PageID#8376.) Manypenny proposed to

> secure permanent homes for the Ottawas and Chippewas, either on the reservations or on other lands in Michigan belonging to the Government, and at the same time, ***to substitute*** as far as practicable, ***for their claim in lands in common, titles in fee to individuals for separate tracts***.

(*Id*. (emphasis added).) McClelland approved the proposal. (McClelland to Manypenny, R.559-42, PageID#8372.)

The band leaders were also preparing for treaty negotiations. Federal officials communicated their plan to offer lands so the band leaders could discuss the issue. (1855 Journal, R.558-11, PageID##7134-7135, 7137.) The band leaders convened at Mackinac Island to meet and select interpreters for the treaty council. (*Id*., PageID#7147; Johnston to Manypenny, R.600-55, PageID#10794.)

F. The 1855 Treaty council

The parties arrived in Detroit in July to negotiate the treaty. (1855 Treaty, R.558-6, PageID#6893.) Waubojeeg, a chief from Sault

Ste. Marie, was the *ogima-giigido* (principal speaker) for the Ojibwe. (Driben Dep., R.335-10, PageID#3769.) Assagon, the Cheboygan band's chief, was the *ogima-giigido* for the Odawa, though at times he spoke for all the bands. (*Id.*) Manypenny and Gilbert were the federal treaty commissioners. (1855 Treaty, R.558-6, PageID#6893.)

The treaty council began on Wednesday, July 25. (1855 Journal, R.558-11, PageID#7125.) In his opening remarks, Manypenny expressed his intent to "talk of general matters & especially of locations for homes." (*Id.*) When negotiations began, Assagon pressed for an accounting of every category of unpaid funds under five earlier treaties, including the 1836 Treaty. (*Id.*, PageID##7125-7134.) The questions he and other band leaders asked about money were so pointed that some of Gilbert's responses were recorded as if they were accounting entries. (Handwritten 1855 Journal, R.558-7, PageID##6913-6914.)

On the afternoon of July 26, having failed to convince Manypenny that the United States had more financial obligations to the bands, Waubojeeg raised the federal land offer. (1855 Journal, R.558-11, PageID##7130-7134.) He said, "Before we left the Saut [Sault Ste. Marie] we were told that we should receive lands in this state in the

place of lands West of the Mississippi. If so, in what manner will the matter be arranged?" (*Id.*, PageID##7134-7135.) Waubojeeg described what the Indians wanted, saying, "We wish if it is your design thus to give us lands to accept them & to locate them where we please. That is all." (*Id.*, PageID#7135.)

Gilbert responded to Waubojeeg that the "Government is willing to provide you with homes & is willing that those homes shall be in the State of Michigan." (1855 Journal, R.558-11, PageID#7135.) Assagon asked about the title and amount of land being offered, saying that if "you wish us to have lands we want strong titles to them," referring to patents.[3] (*Id.*, PageID#7136.) Manypenny explained that the federal government planned to "give each individual & head of a family such a title as that he can distinguish what is his own. There will be some restriction on the right of selling. Except that your title will be like the White man's. This restriction will, when it seems wise & proper be withdrawn." (*Id.*)

[3] The Odawa and Ojibwe language (Anishinaabemowin) called patents or deeds *zwaangangin mazin'iganan*, meaning strong papers. (Valentine Dep., R.335-12, Page ID##3795-3796.)

The next day, Assagon stated that the Indians had decided to take money, not land. (1855 Journal, R.558-11, PageID#7137.) Manypenny countered that land would last longer than money and explained that how to select those lands could be "easily remedied." (*Id.*, PageID#7138.) Cass, who attended the council as a private citizen, also encouraged the band leaders to accept the proposal. (*Id.*)

Waubojeeg then revealed that his band members had already identified the lands they wanted and that he had maps of those lands. (1855 Journal, R.558-11, PageID#7139.) Paybahmesay, Wasson, Nahmewashkotay, Shawwasing, and Kenoshance next accepted the land offer and asked questions about the amount and location of lands, title, and taxes. (*Id.*, PageID##7139-7141.)

Manypenny answered the band leaders' questions and explained the process for selecting lands, adding:

> We do not expect that each head of a family can select his own particular piece of land here today, but that each band has its mind fixed, or can have it fixed, on some particular part of the country, within which they can select the tracts they desire. ***Now it is necessary that the body of land you so select shall be withdrawn from sale, so that you may select your particular homes in it hereafter***. In relation to the patents I think there will be no difficulty. It shall be an absolute title, save a temporary restriction upon your power of alienation.

(1855 Journal, R.558-11, PageID#7141 (emphasis added).) That afternoon, Gilbert met with the band leaders to "designate the points where they wish to locate." (*Id.*)

On July 28, Manypenny quelled concerns that band members would forfeit the lands they already owned by accepting lands under the treaty, saying, "Your lands are your own, as mine are mine, & they cannot be taken from you." (1855 Journal, R.558-11, PageID#7141.) Gilbert also addressed locations that had to be adjusted to avoid conflicts and to ensure there were adequate lands available to select. (*Id.*, PageID##7142-7143.) The parties bargained over the amount of land, who would be entitled to select lands, money for improvements, and when band members would be able to take care of the land and money on their own. (*Id.*, PageID##7146, 7148, 7150-7152.)

After Assagon and Waubojeeg made a point of adjourning for the Christian sabbath, the parties resumed negotiations on Monday, July 30. (1855 Journal, R.558-11, PageID##7147-7148.) Assagon asked the federal government to keep the principal due under the treaty and to pay the interest as an ongoing annuity. (*Id.*, PageID#7150.) Gilbert refused, explaining that it was a financial burden for the government

"to manage your affairs" and that it would prevent the band members from "attain[ing] the civilization & citizenship of the whites." (*Id.*) The United States' goal was "to have you civilized citizens of the State-taking care of yourselves." (*Id.*) Band members "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." (*Id.*, PageID#7151.) He proposed to "fix a time, when your connection with the U.S. shall cease," suggesting ten years. (*Id.*)

The next day, after addressing remaining issues, the band leaders endorsed the 1855 Treaty. (1855 Journal, R.558-11, PageID#7156.) As Assagon said, "The treaty is signed & we are satisfied. Our father has been liberal with us. All we now hope is that the treaty will be honestly executed." (*Id.*, PageID#7160.)

G. The 1855 Treaty

In Article I of the 1855 Treaty, the United States promised to "withdraw from sale for the benefit of said Indians as hereinafter provided, all the unsold public lands within the State of Michigan" in townships listed in eight numbered paragraphs. (1855 Treaty, R.558-6, PageID#6893.) Article I addressed a range of issues, including the

process for band members to select and purchase lands that had been withdrawn from sale, a land certificate and patent process, and the right to inherit land. (*Id.*, PageID##6894-6895.) Article I confirmed that "all lands remaining unappropriated by or unsold to the Indians … may be sold or disposed of by the United States as in the case of all other public lands." (*Id.*, PageID#6895.)

Article 2 provided $538,400 to the bands, including the $200,000 for surrendering the 1836 Treaty reservations. (1855 Treaty, R.558-6, PageID##6895-6896; Manypenny and Gilbert to Mix, R.559-45. PageID##8398, 8411.) Article 3 secured for the federal government a "release and discharge" of "all liability" under "former treaty stipulations" for "land, money or other thing guaranteed to said tribes[.]" (1855 Treaty, R.558-6, PageID#6896.) Article 4 continued interpreters for five years, or longer at the president's discretion. (*Id.*) Article 5 "dissolved" the "Ottawa and Chippewa Nation." (*Id.*) Article 6 required the Senate and President to ratify the treaty for it to become binding. (*Id.*) Critically, the treaty did not provide for removal.

On August 9, 1855, President Pierce "temporarily" withdrew additional lands from sale to match the lands described in the treaty.

(Executive Orders, R.559-41, PageID##8356-8359.) Gilbert met with the bands that autumn. (1855 Treaty Amendments, R.558-12, PageID#7162.) With the bands' agreement, Gilbert proposed eliminating several locations where settlers had already claimed land and preserving pre-existing land claims and Indian land purchases. (*Id.*, PageID##7162-7164.)

In 1856, federal officials again adjusted the lands available under Article I. (Gilbert to Manypenny, R.559-49, PageID##8435-8466.) The amended treaty also included Gilbert's proposal concerning lands claimed and purchased before the treaty. (1855 Treaty Amendments, R.558-12, PageID##6898-6999.)

The Senate ratified the amended treaty in April 1856. (1855 Treaty, R.558-6, PageID#6901.) The bands approved the amended treaty that summer. (*Id.*, PageID##6899-6901.) President Pierce proclaimed it on September 10, 1856. (*Id.*, PageID#6898.)

H. After 1855

The process under Article I did not go well. A succession of Indian agents failed to implement the land selection and patent process. (Taylor to Browning, R.559-61, PageID#8538.) Some patents were

issued more than a decade after the treaty provided. (Patent, R.582-4, PageID#9713.) Many band members were unable to purchase lands. (Walker to Interior, R.600-106, PageID#10974.)

By 1864, Indian Agent William Leach believed that, if the United States issued patents to band members, "their lands would very soon be squandered, and they would once more become homeless wanderers." (1864 ARCOIA, R.558-64, PageID#7701.) He proposed a new treaty that would create a large reservation at the Little Traverse Bay or a small number of reservations where "[a]ll the lands" would "be forever set apart for the use and occupancy of said Indians & their descendants," and other Michigan Indians. (Leach to Dole, R.600-143, PageID#11308.) But the United States never entered another treaty with these bands.

As time passed, non-Indians began demanding access to the lands withdrawn from sale. (Grand Traverse Herald, R.559-62, PageID#8553; Grand Traverse Herald, R.559-63, PageID##8560-8565.) Michigan's Congressional delegation asked the Interior Secretary to issue patents to band members and return the remaining lands to market pursuant to the treaty. (Ferry to Browning, R.559-60, PageID#8528.) Congress

responded by enacting laws in 1872, 1875, and 1876 requiring the United States to implement the treaty's terms by issuing the remaining patents and returning the unselected lands to market. (1872 Act, R.559-4, PageID#7871; 1875 Act, R.559-9, PageID#7888; 1876 Act, R.559-10, PageID#7890.)

After Congress passed the 1870s Acts, federal agents issued the rest of the patents promised in the 1855 Treaty and returned the remaining land to market. (Patent, R.582-5, PageID#9715; Tract Book, R.335-17, PageID#3822.) The population in what are now Emmet and Charlevoix counties rapidly became majority non-Indian. (Guthrie Rep., R.582-6, PageID##9716-9754.) Many band members eventually lost the lands they had selected under the 1855 Treaty to tax forfeiture and fraud. (1877 ARCOIA, R.558-74, PageID#7837.)

From the 1870s onward, state and local government assumed jurisdiction over the Little Traverse Bay region. (Traverse Region, R.560-47, PageID#9099, 9102.) When band members' descendants sporadically appear in records over the following decades, they are described as state citizens, not inhabitants of an Indian reservation. (Duvernay to DOI, R.560-50, PageID#9128; Assistant Secretary to

Dusernay [sic], R.560-51, PageID##9130-9131; 1931 Annual Statistical Rep., R.560-53, PageID#9136; Michigan Indian Defense Association, R.560-54, PageID##9144-9146, 9150-9156; Burns to COIA, R.560-55, PageID#9162; Wakefield to Stevenson, R.560-57, PageID#9173.)

I. The district court's decision

Below, the Governor filed a "Historical Motion" for summary judgment arguing that: (1) the language of, and history surrounding, the 1855 Treaty demonstrate that it did not create an Indian reservation that meets the three-part test for Indian country; (2) if the 1855 Treaty created an Indian reservation, it was temporary and terminated when band members received their patents; and (3) if the 1855 Treaty created a permanent Indian reservation, Congress disestablished it in the 1870s Acts. (Governor's Br., R.582, PageID##9619-9691.)

The district court detailed the 1855 Treaty's history. (Op., R.627, PageID##12180-12199.) It held that the Tribe had to meet the three-part test used to determine jurisdiction in Indian country under 18 U.S.C. §1151. (*Id.*, PageID##12202-12205.) Quoting *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498

U.S. 505, 511 (1991), the court explained that the test required it to "assess whether the Treaty 'validly set apart' the disputed lands 'for the use of the Tribe as such, under the superintendence of the Government.'" (*Id.*, PageID#12205.)

Applying the Indian country test, the district court held that the 1855 Treaty did not set aside lands for the bands or subject lands to federal superintendence. (Op., R.627, PageID##12209-12217.) Accordingly, it granted summary judgment to the Governor and Intervenors without reaching their diminishment and disestablishment affirmative defenses. (*Id.*, PageID#12230.) The court dismissed as moot the Tribe's Historical Motion, which did not seek summary judgment of the reservation creation issue in its favor. (*Id.*)

STANDARD OF REVIEW

This Court reviews de novo a district court's decision to grant summary judgment. *See F.T.C. v. E.M.A. Nationwide, Inc.*, 767 F.3d 611, 629 (6th Cir. 2014).

LEGAL STANDARD

Summary judgment is proper if the non-movant "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). 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).

INDIAN CANONS OF CONSTRUCTION

"Indian treaties are … interpreted liberally in favor of the Indians," and "any ambiguities are to be resolved in their favor." *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 200 (1999) (citations omitted). Courts may look "beyond the written words to the larger context that frames the [t]reaty, including 'the history of the treaty, the negotiations, and the practical construction adopted by the parties.'" *Id.* at 196 (quoting *Choctaw Nation v. United States*, 318 U.S. 423, 432 (1943)). But the canons do not "permit reliance on ambiguities that do not exist," *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506 (1986), or allow courts to "disregard clear

expressions of tribal and congressional intent," *DeCoteau v. Dist. County Court for Tenth Judicial Dist.*, 420 U.S. 425, 447 (1975).

SUMMARY OF ARGUMENT

To be treated as Indian country under federal law, land must be (1) set aside, (2) for Indian purposes, and (3) subject to federal superintendence. The 1855 Treaty temporarily withdrew from sale all unsold public lands in listed townships from which eligible band members could select lands, or later purchase lands, which does not meet any element of the Indian country test. History confirms that the band leaders wanted and understood the 1855 Treaty to make band members individual landowners under state jurisdiction, not create reservations under federal superintendence for the bands. If the 1855 Treaty created Indian reservations, they were temporary and terminated when the United States issued patents to band members. The Tribe's arguments concerning the federal reservation policy, post-treaty documents using the word "reservation," and *dicta* in a handful of cases do not require reversing the district court's decision or entitle the Tribe to summary judgment.

ARGUMENT

The Intervenors provide a number of additional arguments concerning why the 1855 Treaty did not create a reservation for the Tribe's predecessors that constitutes Indian country, which the Governor does not repeat. She does not join the cross-appeal.

I. The language of the 1855 Treaty did not create Indian reservations that meet the definition of Indian country.

The language of the 1855 Treaty did not create Indian reservations that meet the definition of Indian country in 18 U.S.C. §1151. Because a treaty's unambiguous meaning is enforceable, *Choctaw*, 318 U.S. at 432, the district court's decision to grant summary judgment to the Governor and Intervenors must be affirmed.

A. The Tribe must meet the Indian country test.

The Tribe alleged that the 1855 Treaty created permanent Indian reservations out of public domain lands and those reservations meet the definition of Indian country in 18 U.S.C. §1151. (Compl., R.1, PageID#17, ¶57.) In *Citizen Band*, 498 U.S. at 511, the Supreme Court explained that, to be Indian country, land must be: (1) set apart; (2) used "as such," meaning used for Indian purposes; and (3) subject to

federal superintendence. The *Citizen Band* test applies to every type of Indian country under 18 U.S.C. §1151, including Indian reservations, making it applicable to this case. *See Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 527-530 (1998).

B. The treaty did not set apart lands.

For land to be "set apart" as a reservation that is Indian country, it must be "segregated" or removed "from the public domain." *United States v. Pelican*, 232 U.S. 442, 445 (1914). The term "public domain" refers to lands the United States owns that are subject to general land laws. *See Barker v. Harvey*, 181 U.S. 481, 490 (1901). Land cannot simultaneously be in the public domain and be an Indian reservation because those statuses are incompatible. *See Hagen v. Utah*, 510 U.S. 399, 413 (1994); *Ute Indian Tribe v. Utah*, 716 F.2d 1298, 1305 (10th Cir. 1983). There are at least eight features of Article I that demonstrate it did not segregate lands from the public domain.

First, the introductory clause to Article I says that the United States will "withdraw from sale for the benefit of said Indians as hereinafter provided all the unsold public lands" within the listed survey townships. (1855 Treaty, R.558-6, PageID#6893.) This clause

does not say that the United States will "set apart" any lands from the "public domain," or use similar terms. The language required the United States to temporarily stop selling public lands in the listed townships so band members would not have to compete with settlers or speculators for prime locations.

The limited scope of this introductory clause is apparent from the fact that "withdraw" is its only verb. The clause does not require the United States to take any other action concerning the listed townships. Case law is clear that withdrawing land from sale does not, alone, create a reservation. *See United States v. Midwest Oil Co.*, 236 U.S. 459, 481 (1915); *S. Utah Wilderness All. v. Bureau of Land Mgmt.*, 425 F.3d 735, 784-85 (10th Cir. 2005), as amended on denial of reh'g (Jan. 6, 2006).

Second, the end of the introductory clause in Article I states that it applies to the lands "embraced in the following descriptions to wit:" – referring to eight numbered paragraphs that list townships and band names. (1855 Treaty, R.558-6, PageID#6893.) Numbering the paragraphs did not establish reservation boundaries or signal that the United States set apart land for the named bands because the

paragraphs required nothing more than the withdrawal. Paragraphs Third and Fourth illustrate this point: neither has a verb. The numbered paragraphs identify only where the United States would withdraw unsold public lands from sale.

Third, the introductory clause in Article I requires the numbered paragraphs to be read in connection with the terms "hereinafter provided." (1855 Treaty, R.558-6, PageID#6893.) In those terms, the United States said it would "give to each" eligible band member an amount of "land to be selected and located within the several tracts of land hereinbefore described under the following rules and regulations …." (*Id.*, PageID#6894.) The next sentence adds, "Each Indian entitled to land under this article may make his own selection of any land within the tract reserved herein for the band to which he may belong," with the Indian agent to resolve any conflicting selections. (*Id.*) These two provisions explain that the numbered paragraphs in Article I identify where eligible members of each named band could select lands.

The phrase "tract reserved herein" does not imply that the numbered paragraphs created Indian reservations. (1855 Treaty, R.558-6, PageID#6894.) The phrase ties the geographic areas in the

numbered paragraphs to the land selection process. That meaning is apparent because "tract reserved herein" is used in parallel with the phrase "several tracts of land hereinbefore described" in the prior sentence. (*Id.*) Because the 1855 Treaty does not give the bands a right to select, purchase, own, or govern the lands in the townships, those lands were not set apart for the bands.

Fourth, Article I temporarily restricted the alienation of the land selections. (1855 Treaty, R.558-6, PageID#6894.) The United States would issue an unrestricted patent within ten years in most cases. (*Id.*) Once the United States issued the patent, the federal government could not set apart the land because it lacked title to it. *See U.S. ex rel. Bowlegs v. Lane*, 43 App. D.C. 494, 496 (D.C. Cir. 1915) ("[W]hen a patent for public land has been issued and recorded, the land is no longer a part of the public domain….").

Fifth, Article I expressly states that "[a]ll the land embraced within the tracts hereinbefore described," meaning the numbered paragraphs, "that shall not have been appropriated or selected within five years, shall remain the property of the United States…." (1855 Treaty, R.558-6, PageID#6895.) This clarifies that any remaining lands

in the listed townships continued to be part of the public domain. The treaty reinforces that conclusion by granting band members five years to purchase lands by "entry in the usual manner and at the same rate as other adjacent public lands are then held[.]" (*Id.*) The comparison between the unselected lands in the listed townships and "other adjacent public lands" underscores that they were all in the public domain.

Further, allowing band members the right of "entry in the usual manner and at the same rate" is a direct reference to acquiring lands under the general land laws that governed land in the public domain. (1855 Treaty, R.558-6, PageID#6895.) *See Newhall v. Sanger*, 92 U.S. 761, 763 (1875). Article I also said that "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[.]" (1855 Treaty, R.558-6, PageID#6895.) In other words, the United States would sell lands to band members like it sold other lands in the public domain.

Sixth, the United States anticipated that it would open the remaining lands to non-Indian settlement. Consequently, it retained

rights to dispose of "any tract or tracts of land within the aforesaid reservations for the location of churches, school-houses, or for other educational purposes…." (1855 Treaty, R.558-6, PageID#6895.) The treaty did not limit the United States to disposing of lands during the ten-year period under Article I to benefit the bands or band members, indicating that the word "reservation" in this sentence merely referred to where it would withdraw lands. This clause also demonstrated that the withdrawal was only temporary and that the United States had the right to dispose of the remaining lands.

Seventh, at the end of the ten-year land selection and purchase process, Article I explicitly states that "all lands remaining unappropriated by or unsold to the Indians … may be sold or disposed of by the United States as in the case of all other public lands." (1855 Treaty, R.558-6, PageID#6895.) In other words, withdrawing unsold public lands from sale had no effect on their status as part of the public domain. That left the United States free to dispose of the land however it chose. *See Sioux Tribe of Indians v. United States*, 94 Ct. Cl. 150, 171 (1941), aff'd, 316 U.S. 317 (1942).

Finally, the amendments to Article I preserved existing land claims and the band members' rights to the lands they had purchased before the treaty. (1855 Treaty, R.558-6, PageID##6898-6899.) Article I, therefore, accounted for all the land in the townships, ensuring that there were no lands set apart from the public domain.

In summary:

1. Lands that band members or others acquired ***before*** the 1855 Treaty were not part of the public domain and were never withdrawn from sale.
2. Lands that band members selected or purchased ***under*** the 1855 Treaty would be patented immediately or within ten years, vesting title in individual owners.
3. Lands remaining unselected or unpurchased ten years ***after*** the 1855 Treaty could "be sold or disposed of by the United States as in the case of all other public lands."

By design, the 1855 Treaty did not set apart lands from the public domain as an Indian reservation.

C. The treaty did not require lands to be used for Indian purposes.

If the 1855 Treaty had set apart lands from the public domain, the lands would have to be for "'the use of the Indians as such'" to be Indian country. *Citizen Band*, 498 U.S. at 511 (quoting *United States v. John*, 437 U.S. 634, 648-49 (1978)). Use by the Indians "as such" means that

the lands must be subject to "restraints on alienation or significant use restrictions" to ensure they are used for Indian purposes, not conveyed to non-Indians or used for other purposes. *Venetie*, 522 U.S. at 532-33 (1998).

For instance, in *John*, 437 U.S. at 649, the United States purchased lands for the Choctaw, took the lands into trust, and later proclaimed the lands a reservation. Those trust and proclamation steps ensured the lands would be used for Indian purposes, which required them to be treated as Indian country. *Id.* Similarly, in *Pelican*, 232 U.S. at 449, the federal government allotted part of an Indian reservation, but the lands remained Indian country while subject to the restriction on alienation because they were "devoted to Indian occupancy under the limitations imposed by Federal legislation."

There are no similar land restrictions in the 1855 Treaty. The restriction on alienation for land selections ended when patents issued. (1855 Treaty, R.558-6, PageID#6895.) The lands band members purchased in the second five-year treaty period were "sold without restriction[.]" (*Id.*) Once the band members obtained their patents, the lands could be sold and used for non-Indian purposes. The treaty

neither required band members to use or occupy the lands, nor excluded non-Indians. Therefore, the townships listed in Article I were not dedicated to Indian purposes.

D. The treaty did not impose ongoing federal superintendence over lands.

An Indian reservation must be "under the superintendence of the Government" to be Indian country. *Citizen Band*, 498 U.S. at 511 (internal quotation marks omitted); *see also* 18 U.S.C. §1151(a) (Indian reservation must be "under the jurisdiction of the United States Government" to be Indian country). Federal superintendence requires the federal government to "actively control[] the lands in question, effectively acting as a guardian for the Indians." *Venetie*, 522 U.S. at 533. Federal superintendence typically coincides with a restriction on alienation, indicating that the lands are intended to continue under federal jurisdiction. *See United States v. McGowan*, 302 U.S. 535, 539 (1938); *Pelican*, 232 U.S. at 451.

The 1855 Treaty did not commit the United States to governing the lands in the townships listed in Article I. To the contrary, the 1855 Treaty permitted band members to "sell and dispose" of lands they

acquired before the treaty. (1855 Treaty, R.558-6, PageID#6899.) It did not restrict the sale of lands purchased under the treaty. (*Id.*, PageID#6895.) And the restriction on alienation for selections ended when patents issued, leaving the lands free from federal oversight. (*Id.*) *See Bowlegs*, 43 App. D.C. at 496.

Other limits in the 1855 Treaty also signaled the end of federal superintendence. For instance, the payments in Article 2 distributed principal (not merely interest), included the $200,000 for surrendering the 1836 Treaty reservations, and did not extend beyond ten years. (1855 Treaty, R.558-6, PageID#6895-6896.) Article 3 "release[d] and discharge[d]" perpetual annuities under prior treaties. (*Id.*) Article 4 provided interpreters only for a limited period. (*Id.*)

More importantly, the 1855 Treaty did not maintain an Indian agent or agency to supervise the bands or the lands their members acquired. (1855 Treaty, R.558-6, PageID##6895-6896.) The last role for an Indian agent under the 1855 Treaty was at the end of the first five-year period, when the agent in Detroit had to forward the land selection list to the Office of Indian Affairs. (*Id.*, PageID#6894.) The 1855 Treaty

did not create a structure for the federal government to govern the lands band members selected or purchased under its terms.

E. Neither the facts nor the law support the Tribe's proposed reservation test.

The Tribe argues that, to prevail, it only need prove that the 1855 Treaty created "(1) a defined body of land, (2) withheld from sale by the federal government, and (3) appropriated for Indian purposes." (Br. 2.) This test substantially lowers the Tribe's burden as the plaintiff and expands the category of lands treated as Indian reservations. No court has used this test to determine whether a treaty created an Indian reservation out of public lands temporarily withdrawn from sale.

Nor do any of the cases the Tribe cites support its proposed test. *Hagen*, 510 U.S. at 412, *S. Utah*, 425 F.3d at 784, and *Shoshone Bannock Tribes v. Reno*, 56 F.3d 1476, 1479 (D.C. Cir. 1995), each make general statements about types of reservations under federal law. *Celestine*, 215 U.S. at 285, confirms that extinguishing aboriginal title eliminates Indian country status unless Congress takes other action. *Hitchcock*, 185 U.S. at 389-90, and *Leavenworth, L. & G.R. Co. v. United States*, 92 U.S. 733, 747 (1875), both involved unceded Indian

lands. These decisions are irrelevant because the Tribe does not claim a reservation of unceded lands, and generalities about federal law do not make the lands described in Article I Indian country.

Even if the Tribe articulated the correct test for its reservation creation claim, the 1855 Treaty does not satisfy that test. First, the Tribe contends the 1855 Treaty identified a "defined body of land" by listing townships. (Br. 25.) But Article I did not say that the townships established a reservation boundary or a territory for the bands.

The Tribe attempts to bolster its argument by quoting a fragment of a sentence from *United States v. Grand Rapids & I.R. Co.*, 165 F. 297, 301 (6th Cir. 1908), as proof that Article I "set apart" lands for the 1855 Treaty. (Br. 25.) That case asked whether lands withdrawn from sale but "excluded" from the 1855 Treaty were conveyed under a railroad land grant statute enacted before the treaty was proclaimed. *Grand Rapids*, 165 F. at 300-02. The courts determined that the 1855 Treaty was not effective until proclaimed, but that it would be inequitable to cancel patents issued to landowners. *Id*. at 302-04. *Grand Rapids* did not decide the Tribe's Indian reservation claim.

Turning to the second part of the proposed test, the Tribe states that the 1855 Treaty withheld land from sale. (Br. 25.) But the Tribe ignores that Article I withdrew lands from sale *temporarily*. The Tribe does not contend those lands remain withdrawn from sale today. Nor does it explain what happens under its test when a treaty returns lands to market.

Under the Tribe's logic, the United States cannot temporarily withdraw lands from sale because the withdrawal permanently sets them apart from the public domain. But lands withdrawn from sale cannot, without more, be permanently set apart because they are "still within the disposing power of [C]ongress." *Wisconsin Cent. R. Co. v. Forsythe*, 159 U.S. 46, 55 (1895). Further, the Tribe's argument is inconsistent with the United States' unambiguous right to sell or dispose of all remaining lands after ten years. (1855 Treaty, R.558-6, PageID#6895.)

Finally, the Tribe argues that the 1855 Treaty satisfies the third part of its proposed test because it designates land for Indian settlement. (Br. 25.) But the treaty did not require the band members who selected or purchased land under the treaty to live on those lands.

By issuing patents to band members, preserving non-Indian land claims, and reserving the United States' authority to dispose of remaining lands, the 1855 Treaty also made the listed townships open to non-Indian settlement. Thus, the 1855 Treaty did not require the lands listed in Article I to be used for Indian settlement. Those lands are not an Indian reservation and Indian country today—even under the Tribe's test.

F. The treaty did not allot reservation lands.

The Tribe casts the 1855 Treaty as an allotment treaty. (Br. 26-27, 30-32.) "Allotment is a term of art in Indian law. It means a selection of specific land awarded to an individual allottee from a common holding." *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 142 (1972) (citation omitted). In short, allotment converts reservation lands held in common to individual ownership. Under the Tribe's theory, Article I created a reservation so it could simultaneously be broken into individually owned parcels.

The 1855 Treaty is not an allotment treaty. The treaty does not use the word allotment or refer to common ownership. The Tribe suggests that the phrases "aforesaid reservations" and "tract herein

reserved" in Article I confirm that the treaty created commonly held lands. (1855 Treaty, R.558-6, PageID#6894; Br. 26, 32-34.) But those phrases are used in the same way as the phrases "several tracts of land hereinbefore described," "land described herein," and "the tracts hereinbefore described" to refer to the numbered paragraphs in Article I. (1855 Treaty, R.558-6, PageID##6894-6895.) Reservation and reserved are used in their ordinary sense, meaning "withholding" or "keeping back" something, i.e., withdrawing land from sale. (1850 Webster's Dictionary, R.600-53, PageID#10790.)

Moreover, these phrases do not describe commonly held lands that could be allotted. These two sentences relate to individual land selections by eligible Indians and the United States' right to dispose of lands for church and school purposes. (1855 Treaty, R.558-6, PageID##6894, 6895.) Using those phrases avoided the ambiguity that would have occurred if the treaty used the words land or tract to refer both to individual parcels and the unsold lands in the larger areas withdrawn from sale. (Op., R.627, PageID#12223).

The Tribe also claims that the reference to churches and schools in Article I is "strong textual indicia of reservation status" under *Solem v.*

Bartlett, 465 U.S. 463 (1984). (Br. 26.) But the parties in *Solem* agreed that the Cheyenne River Sioux Reservation existed. 465 U.S. at 464. Further, the statute in *Solem* authorized the Interior Secretary to "set aside portions of the opened lands 'for ***agency***, school, and religious purposes, to remain reserved as long as needed, and as long as agency, school, or religious institutions are maintained thereon ***for the benefit of said Indians***.'" *Id.* at 474 (emphasis added).

Unlike the statute in *Solem*, the 1855 Treaty did not limit the United States to appropriating land for schools and churches for Indians. (1855 Treaty, R.558-6, PageID#6895.) Nor does the 1855 Treaty mention using land for an "agency," i.e., the headquarters and residence from which a federal Indian agent would oversee Indian reservations and the Indians living there, because the treaty did not continue federal superintendence over the lands. *See generally Blair v. McAlhaney*, 123 F.2d 142, 142 (4th Cir. 1941). Merely mentioning schools and churches is not evidence that the 1855 Treaty created and allotted Indian reservations.

The Tribe also notes that Article 2, Paragraph Second of the 1855 Treaty offered band members a variety of items "and all such articles as

may be necessary and useful for them in removing to the homes herein provided and getting permanently settled thereon." (1855 Treaty, R.558-6, PageID#6895.) The Tribe cites *Keweenaw Bay Indian Cmty. v. Naftaly*, 452 F.3d 514, 518 (6th Cir. 2006), to suggest that the term "permanent homes," which is not used in the 1855 Treaty, is associated with a federal reservation policy that focused on "civilizing" native peoples and making them live like non-Indian farmers. (Br. 27.)

But *Naftaly* said, "The new policy of the government was to provide 'permanent homes' on the reservations that were set aside for the Indians and upon which trespass by non-Indians would not be tolerated." 452 F.3d at 518 (internal quotation marks omitted). The Tribe omits this reference to reservations being "set aside" for Indians because the 1855 Treaty did not set aside any lands for the bands. Nor did the 1855 Treaty bar non-Indian settlement or provide a framework for the federal government to exercise superintendence over the lands to prevent trespass. The "homes" referenced in Article 2 were the band members' individual lands.

Finally, the Tribe argues that the district court misunderstood that a reservation can be allotted without eliminating the reservation

boundaries. (Br. 3, 22, 30-32.) The district court twice recognized that principle. (Bifurcation Op., R.91, PageID##1363-1364; Reaffirmation Order, R.555, PageID#6739.) The text from the court's opinion that the Tribe quotes does not refer to allotment. (Op., R.627, PageID#12228.) Rather, the court unambiguously—and correctly—held that the 1855 Treaty did not create reservations. There were no lands to allot.

II. The historical record demonstrates the Anishinaabek did not want or understand the 1855 Treaty to create Indian reservations.

We know how the Anishinaabek understood the 1855 Treaty because they told us in words and deeds that have survived across centuries. The 1855 Treaty council journal is a particularly rich part of the historical record. Though not a verbatim transcript, the journal is compelling evidence that the Anishinaabek and Americans intended the 1855 Treaty to provide band members with individual landownership under state jurisdiction, not Indian reservations under federal superintendence. This Court must affirm summary judgment in the Governor's and Intervenors' favor because the district court considered the extensive historical evidence and properly viewed the treaty from the Anishinaabek negotiators' perspective to conclude that there was no

question of fact requiring trial. *Mille Lacs*, 526 U.S. at 196; *Celotex*, 477 U.S. at 322.

A. The parties planned to make band members individual landowners subject to state jurisdiction.

The American and Anishinaabek negotiators planned to make band members landowners under state jurisdiction in the 1855 Treaty. The bands announced their plans decades before 1855. In 1835, when the bands wrote to Cass, they anticipated that band members would become "civilized" and subject to state law. (Hamlin to Cass, R.559-14, PageID#8088.) Before ceding their lands in 1836, band leaders inquired whether "they could procure land for their children either by grant or purchase from [the] government after they have transferred it." (Johnston to Schoolcraft, R.600-17, PageID#10655.) The bands' 1839 petition to the Michigan governor outlined their plan to purchase lands and become state citizens. (Hamlin to Mason, R.559-20, PageID#8133.)

The bands executed their plan. Band members bought tens of thousands of acres of public lands. (1855 ARCOIA, R.558-50, PageID#7558.) They advocated for citizenship by soliciting an opinion from a judge, meeting with the legislature and the governor, and

engaging allies. (Blackbird Book, R.600-125, PageID#11080; Pierz to Lefever, R.600-34, PageID#10724; Stuart to Pierz, R.600-36, PageID#10727.)

The bands did not change their plan when they pursued the new treaty. By 1855, the Michigan constitution provided male Indians a path to citizenship and Michigan had asked the federal government to provide for landless Indians who remained in the state. (1850 Michigan Constitution, R.559-28, PageID#8184, 8190; Joint Resolution, R.559-29, PageID#8205.) The bands told federal officials they planned to seek money due under treaties to acquire more land. (Chippeways and Ottawa, R.559-34, PageID#8305.)

When some band leaders met with Manypenny a few months before the negotiations, he explained that the United States would pay them money under the new treaty. (1855 Journal, R.558-11, PageID##7139-7140.) The bands agreed to accept money, confirming in February 1855 that they needed "means to buy more lands and make improvements before the land shall be taken by the white settlers near us." (Kowize, R.559-35, PageID#8313.) When the band leaders convened at Mackinac before the negotiations, they "agreed not to take

lands, but money." (1855 Journal, R.558-11, PageID##7143, 7147.) Money left them free of federal control.

Federal officials did not want to create reservations for these bands. Indian agents in Michigan had been reporting on the bands' "desire to obtain land, on which to build and live like the white people" since the 1840s. (1846-1847 ARCOIA, R.558-38, PageID#7337.) The officials viewed their landownership favorably. (1845 ARCOIA, R.558-37, PageID#7330; 1847-1848 ARCOIA, R.558-39, PageID#7342; 1851 ARCOIA, R.558-41, PageID#7368; 1852 ARCOIA, R.558-43, PageID#7394.)

Though Gilbert proposed reservations for the bands in 1854, he did not envision reservations subject to federal superintendence. (Gilbert to Manypenny, R.559-33, PageID#8286.) Gilbert suggested that Michigan would assume jurisdiction over the reservations, allowing the federal government to close the Michigan Indian Agency. (*Id.,* PageID##8287-8288.) Thus, his plan for state reservations required "the concurrence of the State Authorities." (*Id.,* PageID#8287.)

Manypenny was aware of "the liberal policy of the State & her citizens," which left "no necessity" for the bands to remove. (1855

Journal, R.558-11, PageID#7144.) He also knew that settlers were acquiring the lands that the band members wanted. (Kowize, R.559-35, PageID#8313; Gilbert to Manypenny, R.559-33, PageID#8288.) So Manypenny asked the General Land Office to withdraw public lands from sale temporarily to allow band members to "purchase homes and farms for themselves." (Wilson to McClelland, R.559-37, PageID#8329.) He did not ask for lands to be set apart for a reservation under federal jurisdiction. (Manypenny to Wilson, R.559-36, PageID#8320.)

No one instructed Manypenny to negotiate reservations. Interior Secretary McClelland approved withdrawing lands from sale with the "express understanding" that Indians did not have rights to lands until they obtained "legal title." (McClelland to Pierce, R.559-39, PageID#8343.) President Pierce's executive order authorizing the withdrawal adopted McClellan's "express understanding." (Wilson to McClelland, R.559-37, PageID#8328.) Manypenny later confirmed that he was authorized to offer "titles in fee to individuals for separate tracts" in place of commonly held lands in the treaty negotiations. (Manypenny to McClelland, R.559-43, PageID#8376; McClelland to Manypenny, R.559-42, PageID#8372.)

All these references to land title point directly to individual landownership in fee simple. None of the parties went to the treaty council in 1855 to create Indian reservations.

B. The parties agreed to give band members lands not subject to federal superintendence.

At the treaty council, band leaders consistently pursued unrestricted, individual landownership. They wanted the United States to grant them unrestricted patents, which would sever federal interest in and oversight for the lands. *See Bowlegs*, 43 App. D.C. at 496. Manypenny and Gilbert agreed to this condition.

Band leaders spent the early council days questioning Gilbert about the money the United States owed the bands under old treaties. (1855 Journal, R.558-11, PageID##7126-7135.) They acted consistently with their express intent to acquire funds to purchase more lands. (*Id.*, PageID##7143, 7147.) When no additional money seemed forthcoming, Waubojeeg began the land discussion. (*Id.*, PageID##7134-7135.)

The band leaders unanimously sought individual landownership. Assagon asked for "strong titles[.]" (1855 Journal, R.558-11, PageID#7136.) Waubojeeg requested "titles—good titles to these lands,"

explaining that the "papers will be so good as to prevent any white man, or anybody else from touching these lands." (*Id.*, PageID#7139.) Wasson said that the band leaders were asking "that patents be issued to us with our lands," which Nahmewashkotay, Shawwasing, and Kenoshance confirmed. (*Id.*, PageID##7139-7140.) Blackbird asserted that the band leaders wanted "papers, so that each may locate for himself, where he pleases," meaning that band members should be able to "choose like the whites & have their titles." (*Id.*, PageID#7144.) Near the end of the land discussion, Waubojeeg reiterated that he had "accepted the land & want[ed] a good paper for it, so that I can hold the land just as I can hold the paper." (*Id.*, PageID#7145.)

Manypenny reassured the band leaders that they would have individual landownership. (1855 Journal, R.558-11, PageID#7136.) For instance, Blackbird expressed concern that the lands the federal government was offering might be "taken back," that the band members could not "do what we please with it," or "give it to our children or relations when we die." (*Id.*, PageID#7144.) Manypenny corrected him, saying in part, "And all these difficulties the young man made in his speech, about the land descending to your heirs &c, are wrong. You

shall have good, strong papers, so that your children may inherit your lands." (*Id.*)

Manypenny also said the United States would give a title that would allow "each individual & head of a family" to "distinguish what is his own," using the terms "patent" and "absolute titles." (1855 Journal, R.558-11, PageID##7136, 7145.) When Manypenny mentioned a restraint on alienation, he described the restriction as temporary and said that the title was "like the White man's" and an "absolute title." (*Id.*, PageID##7136, 7141.) He made clear that the band members would have lands without conditions.

Manypenny and Cass also stressed that it was important that band members own land like non-Indians, explicitly comparing the title they would receive under the treaty to the "white man's" title. (1855 Journal, R.558-11, PageID##7136, 7138.) The title the band leaders sought, and which the United States agreed to give, was fee simple ownership without federal superintendence.

C. The parties identified townships to allow band members to select farms, not to set apart lands.

The discussions that led to the lists of townships in Article I related to individual land selections. Band leaders initially questioned how land selection would work. As Assagon said,

> When a white man wants to buy land, he does not go blind fold, & buy a piece he does not know, & so it is with us. The lands where we come from are not so good as the lands here. Much of them are heavy & swampy & we must select only such as are good for agriculture. And this is the decision we have come to, that we cannot select any lands until we see them, & know whether they are good.

(1855 Journal, R.558-11, PageID#7137.) Manypenny replied that the "difficulty in selecting land can be easily remedied." (*Id.*, PageID#7138.) At the treaty council, band leaders would "determine generally the sections of the state in which communities of you wish to locate." (*Id.*) Band members would choose their "individual farms" later, after determining which lands were good. (*Id.*) The band leaders accepted this two-step plan. (*Id.*, PageID##7139-7140.)

Manypenny later confirmed the purpose for selecting lands at the council, saying:

> We do not expect that each head of a family can select his own particular piece of land here today, but that each band has its mind fixed, or can have it fixed, on some particular part of the country, within which they can select the tracts

> they desire. ***Now it is necessary that the body of land you so select shall be withdrawn from sale, so that you may select your particular homes in it hereafter***….

(1855 Journal, R.558-11, PageID#7141 (emphasis added).) Gilbert also urged the band leaders to return home and "get maps of the townships [to] find out how much has been sold & what belongs to the state" to know which lands band members could select. (*Id.*, PageID#7142.) Withdrawing townships was tied to individual landownership.

As the parties talked about the land selection process, they discussed band members settling in "communities." (1855 Journal, R.558-11, PageID#7136.) This was not an oblique reference to Indian reservations. Many of the band members already lived in villages that had schools, churches, and missionaries. (*Id.*, PageID##7133, 7140, 7144.) As Waubojeeg said, "Where we come from we live like you do." (*Id.*, PageID#7155.)

The issue surrounding communities related to band members being able to select farmlands where they pleased. As Blackbird said, the bands knew that the federal government wanted the Indians "to collect in communities, where we may educate our children, have churches & schools & become prosperous." (1855 Journal, R.558-11,

PageID#7144.) They understood the offer and felt "thankful for it, but we feel sorry because we own lands in different parts of the state where we already have schools & churches & improvements, to which we are attached." (*Id.*) They wanted band members to be able to select lands near existing Indian settlements.

Manypenny and Gilbert left it to the band leaders to decide the general location where band members would select their individual "farms." (1855 Journal, R.558-11, PageID#7142.) They hoped that the bands would gather into larger communities, not to restrict who lived there or subject them to federal superintendence, but "because it will be cheaper in support of schools township & County organizations." (*Id.*, PageID##7136, 7142.) They also knew the treaty would withdraw more land than necessary to ensure there were adequate unsold lands suitable for farming and to allow equal-sized farms. (*Id.*, PageID#7142.) They did not intend to give band members more land than they could individually farm, which is why Manypenny told Assagon that his request that every band member receive 160 acres of land was "too much[.]" (*Id.*, PageID##7142, 7146.)

The parties never discussed granting the bands or band members rights to or jurisdiction over unselected or unpurchased lands in the townships. Nor did they discuss compelling the band members to leave lands they had previously purchased to live in the listed townships. Withdrawing the land merely made the individual land selections possible.

D. The parties never discussed reservations in connection with Article I.

The Tribe heavily edits statements by Waubojeeg and Shawwasing to argue that some band leaders wanted reservations. (Br. 42.) Waubojeeg and Shawwasing did not mention reservations and made those statements *after* Manypenny explained the land selection process. (1855 Journal, R.558-11, PageID##7138, 7139-7140.) Read in context, they were referring to the general areas where their band members would later select individual lands. (*Id.*, PageID##7139-7140.) Moreover, in those same statements, both men reminded the Americans that their band members had already purchased lands and emphasized they wanted patents. (*Id.*) They did not want reservations.

Had the treaty parties wanted to create reservations, they had the common vocabulary to negotiate the issue just as they had negotiated reservations at the 1836 Treaty council. (1836 Journal, R.558-4, PageID#6870, 6871-6872, 6876.) Anishinaabemowin used the word *ashkonigan* (Odawa dialect) or *ishkonigan* (Ojibwe dialect) to refer to reservations. (Otchipwe Dictionary, R.559-31, PageID#8231; Otchipwe Dictionary, R.559-32, PageID#8273; Valentine Rebuttal Rep., R.335-13, PageID#3800.) Some band leaders even read and wrote English. (Blackbird Appeal, R.559-48, PageID##8424-8425.) The parties also had skilled interpreters, including Hamlin and interpreters the Anishinaabek chose themselves. (1855 Journal, R.558-11, PageID#7128, 7147; Driben Dep., R.335-10, PageID##3770-3772.) As the Tribe's linguist conceded, "you couldn't get better interpreters than were at this treaty." (Valentine Dep., R.616-8, PageID#12073.)

Despite the capacity to negotiate reservations, the parties did not discuss reservations under the 1855 Treaty. The parties used a variation on the word "reserve" in only four ways at the treaty council. Assagon, Gilbert, and Manypenny each referred to "reservations" under the 1836 Treaty, making that context apparent by mentioning the

$200,000 ($200 boxes) for their reservations. (1855 Journal, R.558-11, PageID##7130, 7135, 7147.) Gilbert used the term "reservation of land" when addressing a question about money Leonard Slater received in lieu of a reservation in the 1836 Treaty. (*Id.*, PageID#7134.) Gilbert referred to a $20,000 "reserved annuity." (*Id.*, PageID#7135.) Manypenny said that the parties had "held in reserve" some important issues. (*Id.*, PageID#7149.) None of those statements referred to the lands subject to Article I.

The term used most often during the treaty negotiations to refer to lands under Article I was simply "land" or "lands," which appeared dozens of times and was used by at least nine band leaders, Manypenny, and Gilbert. (1855 Journal, R.558-11, PageID##7134-7159.) Manypenny and Gilbert additionally used "farm" and "tract." (*Id.*, PageID##7136, 7138, 7141-7142, 7159.) Wasson also referred to "lands for a homestead." (*Id.*, PageID#7140.) There was a clear, mutual desire to create individual landownership.

Manypenny and Gilbert also spoke about the Article I lands as "homes," "locations for homes," "permanent homes," "particular homes," a "suitable home," and "new homes." (1855 Journal, R.558-11,

PageID##7125, 7135, 7141, 7144, 7146, 7149.) They viewed the lands subject to the treaty on equal footing with the lands the band members purchased before the treaty, which both the Americans and Anishinaabek referred to as the Indians' "homes." (Hamlin to Mason, R.559-20, PageID#8133; Richmond to Medill, R.559-24, PageID#8164; Chippeways and Ottawa, R.559-34, PageID#8305.)

The band leaders plainly wanted band members to own land. None of the parties understood the 1855 Treaty to create reservations.

E. The Tribe's arguments are not evidence.

The Tribe relies on federal policy, post-treaty documents using the word reservation, and *dicta* to argue that the 1855 Treaty created reservations. But the Tribe has no evidence that the parties who negotiated the 1855 Treaty thought it created Indian reservations.

Throughout its brief, the Tribe argues that the 1855 Treaty must have created permanent Indian reservations because Manypenny favored reservations. But according to the book the Tribe cites, Manypenny favored reservations "[f]or the border tribes, who were blocking white expansion into Kansas and Nebraska." PRUCHA, THE GREAT FATHER 326 (1984). His policy was not directed at Michigan.

Further, taking communal land holdings away from (not giving it to) Indians was a central tenet of the reservation policy. (Cohen's Handbook, R.606-5, PageID#11690.) Manypenny favored assigning "permanent reservations, ***reduced in size to be sure***, where the Indians already were," i.e., on their existing reservations. PRUCHA 326 (emphasis added). Under the Tribe's theory, Manypenny violated the reservation policy by ***increasing*** the former 50,000-acre reservation on the Little Traverse Bay to more than 215,000 acres for bands that had no reservations to cede. Federal policy did not dictate that result.

Nor did the 1855 Treaty create reservations to "civilize" band members.[4] (Br. 10, 14, 21, 27-28.) Manypenny's "commitment to a reservation system as a means of promoting the civilization" focused on "the Indians in the Far West[.]" PRUCHA 326. Moreover, reservations were only a means to an end. "The doctrine of private property was, of course, an essential part of the American way that the Indians hand long been expected to accept." *Id.*, 327. These bands had already

[4] The Governor does not contend that the Anishinaabek surrendered their culture, only that they outwardly adapted to survive their difficult circumstances.

embraced property ownership. Reservations would have been a step backward from federal policy's "civilization" goal.

At the treaty council, Manypenny and Gilbert did not express concern that allowing band members to become landowners rather than forcing them to live on reservations would impair their ability to become "civilized." Rather, they were concerned that continuing annuity payments made band members dependent on the federal government, a result the 1855 Treaty avoided by ending payments after ten years – not by creating reservations. (1855 Journal, R.558, PageID##7127, 7150-7151.)

The Tribe also cites a series of post-treaty documents that used the word reservation. (Br. 28-29, 43-48.) Each of those documents was written before or while the United States issued patents and returned the remaining lands to market. In that context, it was accurate to refer to those larger areas as reserved because they were withheld from sale and band members could not sell the lands they had selected. (1850 Webster's Dictionary, R.600-53, PageID#10790.) The Tribe fails to provide analysis and evidence to show that any of those documents used

the word reservation as a legal term of art referring to lands set apart for Indian purposes and subject to federal superintendence.

Moreover, the federal government did not regard the townships listed in Article I as Indian reservations. Had Article I created Indian reservations, Indian agent Leach would not have proposed a new treaty using the reservation-creation language missing from the 1855 Treaty. (Leach to Dole, R.600-143, PageID#11308.) Further, though the federal government tracked Indian reservations, it did not identify the Article I lands as reservations. (1878 Map, R.558-28, PageID#7260; 1883 Map, R.558-29, PageID#7262; 1896 Map, R.558-30, PageID#7264; 1875 ARCOIA, R.558-72, PageID#7816, 7824; 1876 ARCOIA, R.558-73, PageID#7831, 7833; 1877 ARCOIA, R.558-74, PageID#7838, 7840.)

Finally, there is no consensus among the courts and Congress that the 1855 Treaty created Indian reservations. (Br. 2-4, 19, 25.) None of the cases the Tribe cites decided its reservation claim. *Grand Rapids*, 165 F. at 300-04, decided the status of lands excluded from the treaty. *Grand Traverse Band of Ottawa & Chippewa Indians v. Office of U.S. Atty. for W. Div. of Michigan*, 369 F.3d 960, 962 n.2 (6th Cir. 2004), commented on the federal misinterpretation of Article 5 of the 1855

Treaty, not Article I. *United States v. Mich.*, 471 F. Supp. 192, 259 (W.D. Mich. 1979), held that the bands did not cede their right to fish in the 1836 or 1855 Treaties and did not rule on any issue involving reservations under the 1855 Treaty.

Nor has Congress enacted any law declaring the boundaries of the townships listed in Article I to be Indian reservations. In the 1872 and 1875 Acts, Congress used the word reservation in its common sense to mean lands withheld from sale. (1872 Act, R.559-4, PageID#7871; 1875 Act, R.559-9, PageID#7888.) That meaning is clear from the title and substance of the 1872 Act, in which Congress returned the unselected lands to market after requiring the United States to issue patents to implement the 1855 Treaty. The 1875 Act merely extended the process under the 1872 Act. The next year, when Congress enacted the 1876 Act, it omitted the word reservation altogether, demonstrating that the lands were no longer withheld from sale and, therefore, were not reserved. (1876 Act, R.559-10, PageID#7890.)

Further, when the Tribe began actively lobbying Congress to reaffirm the two governments' relationship, it did not ask Congress to reaffirm an 1855 Treaty reservation. (Ettawageshik Dep., R.507-1,

PageID##5764, 5796-5797, 5802-5809.) The statutory reservation that Congress subsequently established for the Tribe consists of its trust lands in Emmet and Charlevoix counties in a geographic area that does not match the boundaries of the townships listed in Article I, Paragraphs Third and Fourth as amended. (Map, R.1-1, PageID#19.) *See* Little Traverse Bay Bands of Odawa Indians and Little River Band of Ottawa Indians Act, Pub. L. No. 103-324, 108 Stat. 2156, §6 (1994). As recently as 2014, the Bureau of Indian Affairs listed the Tribe's reservation solely as its trust lands, not a treaty reservation. (BIA FOIA Response, R.75-3, PageID#911; BIA Trust Land Log, R.75-4, PageID##913-916.) Congress has not recognized an 1855 Treaty reservation for the Tribe and has left that land without federal superintendence since it ordered patents issued in the 1870s.

In sum, the Tribe has failed to demonstrate that a genuine question of material fact exists concerning whether the 1855 Treaty Indian reservations that requires trial or that it is entitled to judgment as a matter of law.

III. If the 1855 Treaty created Indian reservations, they ceased to exist under the treaty's terms.

If this Court did conclude that the 1855 Treaty created Indian reservations, the Governor maintains that those reservations were temporary and have since terminated. Only by restricting alienation could the United States ensure that any of the lands in the townships listed in Article I would be used for Indian purposes subject to its superintendence. *Citizen Band*, 498 U.S. at 511. But the treaty ended the restriction on alienation imposed on land selections "upon the actual issuing of the patent[.]" (1855 Treaty, R.558-6, PageID#6895.) The treaty did not authorize the United States to include additional restrictions on alienation in the patents themselves, providing that the patents must be issued "in the usual form," i.e. without restrictions. (*Id.*) Nor did it provide for any federal superintendence over the lands after patents issued.

The parties who negotiated the treaty knew that the restrictions on alienation and federal superintendence were finite. As Gilbert said, "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." (1855 Journal, R.558-11,

PageID#7151.) The band leaders accepted the ten-year period he proposed.

Though the United States issued some patents before 1872, the 1870s Acts required the United States to issue the remaining patents due under the 1855 Treaty. (Patent, R.582-4, PageID#9713.) The patents referred to the 1855 Treaty and conveyed unrestricted title. (Patent, R.582-5, PageID#9715.) Tract books confirmed that the United States had returned the remaining lands to market, reversing the withdrawal and ending any Indian reservations. (Tract Book, R.335-17, PageID#3822.) Thus, if the townships listed in Article I were ever within Indian reservations, they are not Indian country today.

CONCLUSION AND RELIEF REQUESTED

For the foregoing reasons, the Governor respectfully requests that this Court affirm the district court's decision granting summary judgment to her and the Intervenors because the 1855 Treaty did not create Indian reservations that exist today.

Respectfully submitted,

Dana Nessel
Michigan Attorney General

Fadwa A. Hammoud (P74185)
Solicitor General

/s/ *Jaclyn Shoshana Levine*
Jaclyn Shoshana Levine (P58938)
Kelly M. Drake (P59071)
Laura R. LaMore (P79943)
Assistant Attorneys General
Co-Counsel of Record
Attorneys for Defendant-Appellee
Governor Whitmer
Environment, Natural Resources, and Agriculture Division
P.O. Box 30755
Lansing, MI 48909
(517) 335-7664
levinej2@michigan.gov

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CERTIFICATE OF COMPLIANCE

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1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because, excluding the part of the document exempted by Federal Rule of Appellate Procedure 32(f), this brief contains no more than 13,000 words. This document contains 12,986 words.

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/s/ *Jaclyn Shoshana Levine*
Jaclyn Shoshana Levine
(P58938)
Assistant Attorney General
Co-Counsel of Record
Attorneys for
Defendant-Appellee
Governor Whitmer
Environment, Natural
Resources, and Agriculture
Division
P.O. Box 30755
Lansing, MI 48909
(517) 335-7664
levinej2@michigan.gov

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I certify that on May 20, 2020, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record (designated below).

/s/ *Jaclyn Shoshana Levine*
Jaclyn Shoshana Levine
(P58938)
Assistant Attorney General
Co-Counsel of Record
Attorneys for
Defendant-Appellee
Governor Gretchen Whitmer
Environment, Natural
Resources, and Agriculture
Division
P.O. Box 30755
Lansing, MI 48909
(517) 335-7664
levinej2@michigan.gov

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Defendant-Appellee Michigan Governor Gretchen Whitmer, per Sixth Circuit Rule 28(a), 28(a)(1)-(2), 30(b), hereby designated the following portions of the record on appeal:

Description of Entry	Date	Record Entry No.	Page ID No. Range
Complaint for Declaratory and Injunctive Relief	08/21/2015	R.1	PageID##1–18
Map of Little Traverse Bay Bands of Odawa Indians Reservation and Trust Lands	08/21/2015	R.1-1	PageID#19
Defendant Governor Rick Snyder's Answer to Complaint for Declaratory and Injunctive Relief and Affirmative Defenses	09/15/2015	R.5	PageID##24–68
Map of Lands Set Aside Under the 1855 Treaty with Ottawa and Chippewa	02/12/2016	R.36-8	PageID#437
Order Granting Motions to Intervene with Respect to Local Units of Government	02/17/2016	R.38	PageID##442–443
Intervening Defendants City of Petoskey, City of Harbor Springs, Emmett	02/17/2016	R.39	PageID##444–475

County, and Charlevoix County's Answer to Plaintiff's Complaint and Affirmative Defenses			
Intervening Defendants City of Charlevoix and Charlevoix Township's Answer to Complaint for Declaratory and Injunctive Relief and Affirmative Defenses	02/17/2016	R.40	PageID##476–501
Opinion and Order Granting Applicants' Motion to Intervene Under Rule 24(B)	03/10/2016	R.50	PageID##568–573
Answer to Plaintiff's Complaint by Intervening Defendants Emmet County Townships	03/16/2016	R.51	PageID##574–600
Answer and Defenses of Proposed Intervenors Emmet County Lake Shore Association and Protection of Rights Alliance	03/10/2016	R.64	PageID##648–679
Michigan Department of Licensing and Regulatory Affairs FOIA Request to the Bureau of Indian Affairs (May 5, 2014)	06/17/2016	R.75-2	PageID##908–909
Bureau of Indian Affairs' Response to Michigan Department of Licensing	06/17/2016	R.75-3	PageID##910–912

and Regulatory Affair's FOIA request (May 9, 2014)			
Bureau of Indian Affairs Trust Land Log for the Little Traverse Bay Bands of Odawa Indians (2014)	06/17/2016	R.75-4	PageID##913–916
Opinion and Order Bifurcating Case and Granting in Part and Denying Without Prejudice in Part Plaintiff's Motion for Partial Summary Judgment	07/06/2016	R.91	PageID##1357–1370
Defendants City of Petoskey, City of Harbor Springs, Emmet County and Charlevoix County Amended Answer to Plaintiff's Complaint and Affirmative Defenses	10/02/2017	R.238	PageID##2740–2771
Amended Answer to Plaintiff's Complaint by Intervening Defendants Emmet County Townships	10/03/2017	R.240	PageID##2773–2798
Governor Snyder's Brief Opposing Partial Summary Judgment	04/25/2018	R.335	PageID##3645–3676
Excerpt from Theodore J, Karamanski, Blackbird's Song: Andrew J. Blackbird	04/25/2018	R.335-4	PageID##3706–3719

and the Odawa People (2012)			
Excerpts from Deposition of Paul Driben, Ph.D. (March 19, 2018)	04/25/2018	R.335-10	PageID##3764–3772
James M. McClurken, Augustin Hamlin, Jr.: Ottawa Identity and the Politics of Presence, in Being and Becoming Indian, Biographical Studies of North American Frontiers (James A. Clifton, ed.)	04/25/2018	R.335-11	PageID##3773–3791
Excerpts from Deposition of J. Randolph Valentine, Ph.D. (February 8, 2018)	04/25/2018	R.335-12	PageID##3792–3797
Excerpts from J. Randolph Valentine, Rebuttal Report of J. Randolph Valentine (November 14, 2017)	04/25/2018	R.335-13	PageID##3798–3800
Tract book for Fractional Township 38 North, Range 6 West	04/25/2018	R.335-17	PageID##3821–3824
Governor Snyder's Supplemental Brief Opposing Partial Summary Judgment	10/17/2018	R.507	PageID##5751–5758
Excerpts from the Deposition of Frank Ettawageshik (June 13, 2018)	10/17/2018	R.507-1	PageID##5759–5821

Tribe-State Joint Status Report Concerning Dispositive Motions	12/17/2018	R.547	PageID##6453–6459
Order Concerning Administration of Dispositive Motions	01/02/2019	R.552	PageID##6709–6710
Order Regarding Tribe's Reaffirmation Motion for Partial Summary Judgment	01/31/2018	R.555	PageID##6737–6740
Joint Appendix of Historical Documents	02/08/2019	R.558	PageID##6805–6807
Joint Appendix Exhibit Index	02/08/2019	R.558-1	PageID##6808–6823
Treaty of March 28, 1836, 7 Stat. 491	02/08/2019	R.558-2	PageID##6824–6831
Journal of 1836 Treaty Negotiations, March 15–28, 1836, LOC-HRSP, R.24. (Handwritten)	02/08/2019	R.558-3	PageID##6832–6862
Journal of 1836 Treaty Negotiations, March 15–28, 1836. Records of a Treaty concluded with the Ottawa and Chippewa Nations, at Washington D.C. March 28, 1836, Papers of Henry Rowe Schoolcraft, Library of Congress, Manuscript Division, Washington, D.C. (Transcript)	02/08/2019	R.558-4	PageID##6863–6877

Articles of assent to the amendments of the resolution of the Senate of the United States ratifying the treaty of the twenty-eighth of March 1836, dated July 2, 1836, NAM M668 R8:89–95, 97–117	02/08/2019	R.558-5	PageID##6878–6890
Treaty with the Ottawa and Chippewa Indians of Michigan, parties to the treaty of March 28, 1836 (July 31, 1855), 11 Stat. 621–629, Ratified Apr. 15, 1856, Proclaimed Sep. 10, 1856	02/08/2019	R.558-6	PageID##6891–6901
Proceedings of a Council with the Chippeways & Ottawas of Michigan held at the City of Detroit, by the Hon. George W. Meanypeny & Henry C. Gilbert, Commissioners of the United States dated July 25, 1855, NARA-DC, RG 123, Records of the United States Court of Claims, General Jurisdiction Case Files, 1855–1939, Box 1888 (Handwritten)	02/08/2019	R.558-7	PageID##6902–6977
Proceedings of a Council with the Chippeways & Ottawas of Michigan held at the City of Detroit, by	02/08/2019	R.558-11	PageID##7124–7160

the Hon. George W. Meanypeny & Henry C. Gilbert, Commissioners of the United States, July 25, 1855 (Transcript by Plaintiff Tribe)			
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