UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Mille Lacs Band of Ojibwe, a federally recognized Indian Tribe; Sara Rice, in her official capacity as the Mille Lacs Band Chief of Police; and Derrick Naumann, in his official capacity as Sergeant of the Mille Lacs Police Department, Plaintiffs, v. County of Mille Lacs, Minnesota; Joseph Walsh, individually and in his official capacity as County Attorney for Mille Lacs County; and Don Lorge, individually and in his official capacity as Sheriff of Mille Lacs County, Defendants.	Case No. 17-cv-05155 (SRN/LIB) **PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT THAT THE BOUNDARIES OF THE MILLE LACS INDIAN RESERVATION, AS ESTABLISHED IN 1855, REMAIN INTACT**

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I. INTRODUCTION.

Plaintiffs submit this memorandum in support of their partial summary judgment motion that the original boundaries of the Mille Lacs Indian Reservation remain intact.

A. Legal Standards.

Only Congress can alter or diminish an Indian reservation's boundaries, and its intent to do so must be clearly expressed. *See McGirt v. Okla.*, 140 S. Ct. 2452, 2462-63 (2020); *S.D. v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998); *Oneida Nation v. Vill. of Hobart*, 968 F.3d 664, 674-75 (7th Cir. 2020); *New Town v. United States*, 454 F.2d 121, 125 (8th Cir. 1972) ("there is no authority for an administrative alteration of boundaries").

Disposing reservation lands does not alter reservation boundaries: "Once a block of land is set aside for an Indian reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise." *Solem v. Bartlett*, 465 U.S. 463, 470 (1984); *accord McGirt,* 140 S. Ct. at 2464 ("this Court has explained repeatedly that Congress does not disestablish a reservation simply by allowing the transfer of individual plots, whether to Native Americans or others"); *New Town*, 454 F.2d at 125 (opening reservation to homesteading "not inconsistent with its continued existence as a reservation").

Defendants argue Congress disestablished the Mille Lacs Reservation in: (1) 1863 and 1864 Treaties; (2) the 1889 Nelson Act; (3) 1893 and 1898 Resolutions; and (4) a 1902 Act. An Indian treaty "'must be construed, not according to the technical meaning of its

words to learned lawyers, but in the sense in which they would naturally be understood by the Indians.'" *Wash. v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 676 (1979) (quoting *Jones v. Meehan*, 175 U.S. 1, 11 (1899)). "Indian treaties are to be interpreted liberally in favor of the Indians" and "any ambiguities are to be resolved in their favor." *Minn. v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 200 (1999); *accord Herrera v. Wyoming*, 139 S. Ct. 1686, 1699 (2019); *Wash. State Dep't of Licensing v. Cougar Den, Inc.*, 139 S. Ct. 1000, 1011-12, 1016 (2019) (plurality; Gorsuch, J., concurring). These canons also apply to "acts to which the Indians must give consent before they become operative[,]" such as the Nelson and 1902 Acts. *United States v. First Nat'l Bank*, 234 U.S. 245, 259 (1914). "The justice and propriety of this method of interpretation is obvious and essential to the protection of an unlettered race, dealing with those of better education and skill, themselves framing contracts which the Indians are induced to sign." *Id*.

In opening Indian lands to non-Indian settlement in the late 19th century, Congress "seldom detail[ed] whether opened lands retained reservation status or were divested of all Indian interests." *Solem*, 465 U.S. at 468. Although some Acts diminished reservations, others did not. *Id*. at 469. In *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 355-56 (1962), and *Mattz v. Arnett*, 412 U.S. 481, 497 (1973), the Supreme Court "held that Acts declaring surplus land 'subject to settlement, entry, and purchase,' without more, did not evince congressional intent to diminish the reservations." *Yankton*, 522 U.S.

at 345. "Likewise, in *Solem*, [the Court] did not read a phrase authorizing the Secretary of the Interior to 'sell and dispose' of surplus lands … as language of cession." *Id*. Such acts "'merely opened reservation land to settlement and provided that the uncertain future proceeds of settler purchases should be applied to the Indians' benefit[,]' … [b]ut in doing so, they [did] not diminish the reservation's boundaries." *Neb. v. Parker*, 136 S. Ct. 1072, 1079-1080 (2016) (quoting *DeCoteau v. Dist. Cnty. Court for Tenth Judicial Dist.*, 420 U.S. 425, 448 (1975)).

In contrast, the Act at issue in *Yankton*, which involved "a negotiated agreement providing for the total surrender of tribal claims in exchange for a fixed payment[,]" bore "the hallmarks of congressional intent to diminish a reservation." 522 U.S. at 345 (underscore added for emphasis, here and throughout); *accord Parker*, 136 S. Ct. at 1079 ("Common textual indications of Congress' intent to diminish reservation boundaries include '[e]xplicit reference to cession or other language evidencing the present and total surrender of all tribal interests' or 'an unconditional commitment from Congress to compensate the Indian tribe for its opened land.'") (quoting *Solem*, 465 U.S. at 470). "Similarly, a statutory provision restoring portions of a reservation to 'the public domain' signifies diminishment.'" *Parker*, 136 S. Ct. at 1079 (quoting *Hagen v. Utah*, 510 U.S. 399, 414 (1994)).

The effect of any given Act depends on its language "and the circumstances underlying its passage." *Solem*, 465 U.S. at 469. Absent "explicit language of cession and

unconditional compensation," courts consider events surrounding an Act's passage – "particularly the manner in which the transaction was negotiated with the tribes involved and the tenor of the legislative Reports presented to Congress" – to determine whether there was a "widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation." *Id*. at 471. Post-enactment events, such as "Congress' own treatment of the affected areas, particularly in the years immediately following the opening," may be considered but are of "lesser" significance. *Id*.

Subsequent demographic history may provide "one additional clue as to what Congress expected would happen[,]" *id*. at 472, but "is the least compelling [factor] for a simple reason: Every surplus land Act necessarily resulted in a surge of non-Indian settlement and degraded the 'Indian character' of the reservation, yet … not every surplus land Act diminished the affected reservation." *Yankton*, 522 U.S. at 356; *cf. Parker*, 136 S. Ct. at 1081 (no diminishment even though tribe "almost entirely absent" from disputed territory for more than 120 years). To hold otherwise would mean "the United States could break its treaty obligations and lessen Indian sovereignty not because Congress expressed its intent to do so, but because non-Indian settlers were particularly effective in obtaining reservation land, sometimes by fraud or unfair dealing, or simply by taking advantage of Indian poverty." *Oneida*, 968 F.3d at 684.

When an Act and its legislative history "fail to provide substantial and compelling evidence of a congressional intention to diminish Indian lands," the "traditional solicitude"

due Indian tribes dictates that "diminishment did not take place" and "the old reservation boundaries survived the opening." *Solem*, 465 U.S. at 472; *see also Yankton*, 522 U.S. at 344 (courts resolve ambiguities in favor of Indians and do not lightly find diminishment); *United States v. Grey Bear*, 828 F.2d 1286, 1289 (8th Cir. 1987) ("strong presumption prevails that reservation land and boundaries are to remain intact"), *vacated in other respects*, 836 F.2d 1088 (8th Cir. 1987) (*en banc*).

B. Argument Summary.

The Mille Lacs Reservation was one of six reservations established in an 1855 treaty as permanent homes for Mille Lacs and other "Mississippi Bands." Although the Bands collectively ceded the reservations to the United States in 1863 and 1864 Treaties, the Treaties preserved the Mille Lacs Reservation for the Mille Lacs Band's exclusive occupancy during its good behavior. It is undisputed the Band so understood the Treaties, and many federal officials and other non-Indian observers did so as well, including Senator Henry Rice, the principal draftsperson of the 1863 Treaty. This understanding is consistent with the Treaties' text and is controlling under the Indian canons. Because the Treaties preserved the Reservation for the Band's exclusive occupancy, they did not alter its boundaries.

Congress resolved a dispute over the Reservation's status when, in the Nelson Act, it agreed to recognize the Mille Lacs Reservation as an Indian reservation, on the condition patents would issue for certain non-Indian entries within the Reservation. *See United*

States v. Mille Lac Band of Chippewa Indians, 229 U.S. 498, 507 (1913). Congress's treatment of the Mille Lacs Reservation as a subsisting Indian reservation in 1889 forecloses the argument that the 1863 and 1864 Treaties disestablished the Reservation.

Except for portions of the Red Lake and White Earth Reservations, the Nelson Act provided for the cession and relinquishment of all Minnesota Chippewa Reservations for purposes stated in the Act. Those purposes included allotting lands to Indians (either on their existing reservations or at White Earth), and the regulated sale of surplus lands to timber companies or non-Indian settlers, with proceeds to be held in trust for the Indians. The cession and relinquishment were not absolute but in trust, and did not include allotted lands. *Id*. at 509. No lands were restored to the public domain. *See White v. Wright*, 83 Minn. 222, 227-28, 86 N.W. 91 (1901); *Cathcart v. Minn. & M. R. Co.*, 133 Minn. 14, 18, 157 N.W. 719 (1916). As "trustee in possession[,]" Congress retained the power to make "changes in the management and disposition of the tribal property as it deem[ed] necessary to promote the Indians' welfare," including restoring undisposed lands to the Indians. *Lands Drained by the State of Minnesota*, 58 Interior Decisions 66, 78-80 (Aug. 12, 1942).

Thus, the purpose and effect of the Act were, like the statutes at issue in *Parker*, *Solem*, *Mattz*, and *Seymour*, to reserve some reservation lands for allotment to Indians while opening other reservation lands for sale to timber companies or settlers, with the uncertain future proceeds of such sales to be applied to the Indians' benefit. Unlike the statutes at issue in *Hagen*, *Yankton*, and *Rosebud Sioux v. Kneip*, 430 U.S. 584, 590-92

(1977), the Nelson Act did not provide for the total surrender of all tribal interests in the land, contain an unconditional commitment for payment of fixed-sum compensation, or restore any lands to the public domain. Under these circumstances, Congress did not clearly express its intent to alter reservation boundaries.

This is settled law. In a series of cases, federal and state courts have held that, notwithstanding its cession language, the Nelson Act did not disestablish or diminish reservations on which Indians were entitled to allotments. Because the Mille Lacs Band was entitled to allotments on its reservation, these cases demonstrate the Mille Lacs Reservation was not disestablished by the Nelson Act.

This conclusion is compelled by the negotiations with the Mille Lacs Band. The federal negotiators repeatedly acknowledged and confirmed the Reservation's existence, and the Act was presented to and understood by the Band as a means to strengthen its rights on the Reservation. No one suggested the Act would alter the Reservation's boundaries. Contemporaneous reports to Congress confirmed the Band would take its allotments on the Mille Lacs Reservation and urged the provision of Government services on the Reservation. Within one year, Congress enacted two laws expressly recognizing the Reservation's continued existence.

Defendants' expert, Dr. Driben, opines that the Band intended to relinquish its reservation under the Nelson Act in exchange for allotments on and the removal of whites from the Reservation. However, there is no evidence the Band sought to relinquish the

Reservation it had been struggling for decades to preserve. Dr. Driben cites no statement by Band members before, during or after the negotiations in which they stated they wanted to relinquish or understood they had relinquished the Reservation, and there is overwhelming evidence to the contrary. There is likewise no support for Dr. Driben's theory that Band members believed they needed to relinquish the Reservation to obtain allotments on the Reservation, and substantial evidence to the contrary. Accordingly, Dr. Driben's opinion does not create a genuine factual dispute sufficient to prevent summary judgment.

In violation of the Nelson Act, non-Indians entered the Reservation and dispossessed the Indians. Congress confirmed these entries in 1893 and 1898 resolutions and allowed additional entries. However, those Resolutions exceeded Congress's power "over the property and affairs of dependent Indian wards" and were "[d]oubtless" based on "a misapprehension of the true relation of the government to the lands[.]" *Mille Lac Band*, 229 U.S. at 510. Because they were unlawful and did not themselves purport to change the Reservation's boundaries, the Resolutions did not disestablish the Reservation.

In 1902, Congress offered compensation to "Indians occupying the Mille Lac Indian Reservation" for improvements on the Reservation that had been taken or destroyed by non-Indians, on the condition that Band members agree to remove from the Reservation, but provided that Band members who acquired land within the Reservation could remain on the Reservation. The Act does not purport to affect the Reservation's boundaries, and

the agreement negotiated with the Band under the Act provides that it does not deprive it of any benefits under existing treaties or agreements not inconsistent with the Act. Band members accepted the agreement with the understanding they could acquire lands and remain within the Reservation, and that is what they did.

The Mille Lacs Band withstood a decades-long campaign by timber companies, non-Indian settlers, and federal, state and county officials to force it from its reservation, accompanied by acts of violence and the burning of Band homes and villages. Guided by elders who counseled it to preserve the Reservation, the Band endured enormous hardships to remain at Mille Lacs. The Reservation was preserved for the Band in the 1863 and 1864 Treaties and the Nelson Act, and neither the relentless removal campaign nor the wrongful disposition of Reservation lands changed that. "Unlawful acts, performed long enough and with sufficient vigor, are never enough to amend the law. To hold otherwise would be to elevate the most brazen and longstanding injustices over the law, both rewarding wrong and failing those in the right." *McGirt*, 140 S. Ct. at 2482. Accordingly, the Mille Lacs Reservation's original boundaries remain intact.

II. FACTUAL BACKGROUND.[1]

A. The Mille Lacs Reservation.

The Mille Lacs Reservation "embrace[s]" four fractional townships on, and three

[1] *See* Slonim Declaration for historical documents, deposition transcripts and defendants' expert reports cited herein.

islands within, the southern part of Mille Lacs Lake. It was one of six tracts "reserved and set apart" for the Mississippi Bands' "permanent homes" in 1855. The Indians occupied summer villages along the lakeshore and hunted, fished and gathered natural resources in the Lake and throughout the Reservation's interior.[2]

Many Mille Lacs Band members had mixed Dakota and Ojibwe ancestry, with ancestral ties to the region long pre-dating Ojibwe occupancy. They had – and retain – a profound spiritual and cultural connection to the Lake and surrounding region. In 1880, they described the Reservation as their "home on the beautiful and, to us, lovely Mille Lacs[.]" In 1888, Band leaders explained that, at Mille Lacs, "the Great Spirit has provided us with an abundance of fish, wild rice, maple sugar[,] game and cranberries," and removal would require "a very sudden and great change in our way of living." In 1883, Congressman Knute Nelson described the Reservation as "mainly pine land, rice swamps, blueberry and cranberry marshes[.]" Except the pine, it was "of no account for white men, but [was] good enough for the Indians to live on as they live mainly by hunting, berrying and fishing." According to a Chippewa Commission Chairman, it was "the Indian

[2]2-22-1855 Treaty, Art. 2, 10 Stat. 1165; James McClurken, *A Permanent Home: The Mille Lacs Ojibwe Reservation* 2, 20 (2019) (McClurken Decl. Ex. A) (hereafter, "McClurken"); Bruce White, *The Mille Lacs Reservation: Its Origin and Later History* 25-29, 37-57, 135-44 (2019) (White Decl. Ex. A) ("White").

paradise."[3]

B. 1863 and 1864 Treaties.

After an 1862 Dakota uprising, in which hundreds of settlers were killed, the Government sought to remove the Mississippi Bands to a more northerly location near Leech Lake. In negotiations at Crow Wing, Mille Lacs representatives, led by Shaboshkung, refused to abandon their reservation, emphasizing their good conduct in opposing the uprising. Before traveling to Washington for additional negotiations, Mississippi Band leaders, hoping to prevent removal, agreed other Mississippi Bands would give up their reservations and move to Mille Lacs.[4]

In Washington, Interior Secretary Usher and Indian Affairs Commissioner Dole again proposed removing the Mississippi Bands to Leech Lake, but expected Mille Lacs "would be reluctant to agree to this Treaty, because they had a good home where they were, and were peaceable and had done no harm." The Mississippi Bands opposed removal and proposed an expanded Mille Lacs Reservation. Shaboshkung complained about being "coupled with guilty parties," asserting his people "can live at peace" with whites. Usher

[3]White 17-49; 4-16-1880 *Little Falls Transcript* (Letter from Band Leaders); 1-30-1888 Rice to Atkins (Chiefs Letter 1-2); 7-21-1883 Nelson to Teller 2-3; 7-24-1895 Baldwin to Commissioner.

[4]McClurken 31-41; J. Randolph Valentine, *Mille Lacs Ojibwe Understanding of the Treaty of 1863 and the Nelson Act of 1889* 36-39 (2019) (Valentine Decl. Ex. A) ("Valentine"); White 70-86. Ojibwe names are spelled variously in the historical record; we selected and consistently use a single spelling for each.

was willing to discuss an expanded Mille Lacs Reservation. Dole said local citizens would not tolerate settling all the Indians there, but acknowledged "[i]t may be barely possible that the people of Minnesota will consent to the Indians now living at Millac, to remain there for the present. They may consent in the future for them to remain there forever if they will become good citizens."[5]

When negotiations resumed, Dole said he was inclined to separate the Mille Lacs Band from the other Mississippi Bands:

> So far as the Millacs Reserve is concerned, in consequence of the Indians belonging to that band having behaved so nobly during our difficulties last fall, [if] it can be arranged that they might remain there a year or two until they themselves shall seek out a new home to their satisfaction I shall be glad.

Shaboshkung demanded the right to remain indefinitely:

> How can it be possible to abandon our reservations when we were told to [cede] every inch of the land with the exception of the land for the Reserves. If it is not good enough for an Indian to live upon how can it be good enough for a white man to live on, where we are living now[?] We demand that we should be allowed to live on our Reserves.[6]

With Mille Lacs refusing to abandon its Reservation, the parties sought Senator Rice's assistance, because he could best judge whether local citizens would accept a treaty in which Indians remained at Mille Lacs. After meeting the Mississippi Bands privately,

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[5]McClurken 40-47; Valentine 34-36, 40-47; White 87-90; 1863 Treaty Journal, Typescript 15, 21-27.

[6]McClurken 47-49; Valentine 47-53; White 90-91; 1863 Treaty Journal, Typescript 36-39, 41-42.

Rice stayed up all night drafting the treaty and later wrote to Bishop Henry Whipple "the Indians all left [Washington] satisfied with [it]."[7]

Article 1 of the Treaty provides that "[t]he reservations known as Gull Lake, Mille Lac, Sandy Lake, Rabbit Lake, Pokagomin Lake, and Rice Lake, as described in the second article of the [1855 Treaty], are hereby ceded to the United States." In Articles 2 through 6, the Government agreed to reserve lands near Leech Lake for the Mississippi Bands, make payments, clear lands, and provide oxen, tools and a sawmill. Under Article 12, the Indians were not required to remove from their "present reservations" until the Government fulfilled these stipulations, and the Mille Lacs Band could not be removed at all unless it disturbed the whites:

> It shall not be obligatory upon the Indians, parties to this treaty, to remove from their present reservations until the United States shall have first complied with the stipulations of Articles 4 and 6 of this treaty, when the United States shall furnish them with all necessary transportation and subsistence to their new homes, and subsistence for six months thereafter: *Provided*, That owing to the heretofore good conduct of the Mille Lac Indians, they shall not be compelled to remove so long as they shall not in any way interfere with or in any manner molest the persons or property of the whites.[8]

An 1864 Treaty superseded the 1863 Treaty. It retained the Article 1 cession, excepting certain land grants (including "one section to chief [Shaboshkung], at Mille

[7]McClurken 49-53; Valentine 53-54, 59; White 91-93; 1863 Treaty Journal, Typescript 20, 27, 40; 3-10-1863 Rice to Whipple; 3-18-1863 Rice to Whipple.

[8]3-11-1863 Treaty, 12 Stat. 1249.

Lac"), and the Article 12 non-removal provisions.[9] These provisions reflected the parties' objectives during the 1863 negotiations: separating Mille Lacs from the other Mississippi Bands by terminating the Bands' collective interest in the Mille Lacs Reservation; allowing Mille Lacs alone to remain on its Reservation so long as it did not disturb the whites; and requiring the other bands to remove once the United States fulfilled the treaty stipulations. Given Mille Lacs' steadfast opposition to removal and Rice's assertion that "all" the Indians left satisfied with the Treaty, the Article 12 proviso must have been intended to permit the Band to remain on its Reservation during its good behavior.

The Mille Lacs Band understood the Treaty preserved its reservation, as defendants' ethnohistorian concedes.[10] Upon returning from Washington, Mille Lacs chiefs described the 1863 negotiations to former Indian Agent Joseph Robert:

> [T]he interpreter told us that the Government wanted the other bands to sell their lands to avoid any future trouble, and we were asked to do the same. We told the interpreter we did not come there to sell our homes, we could not, we had no authority to trade or sell any part of our land. But he (the interpreter) said the great father did not want the lands of the good Indians, he did not want our land but if we would sign with all the Chippewas he (the great father) would give us back our land, at once which was done, and in the treaty read to us the great father said because we had always been his friends

[9] 5-7-1864 Treaty, 13 Stat. 693. No Mille Lacs representative participated in the 1864 negotiations, for which there is no record. McClurken 53-55; White 106-07. In 1867, another treaty ceded a portion of the Mississippi Bands' reservation at Leech Lake and established the White Earth Reservation, but did not modify Article 1 or 12 of the 1864 Treaty. 3-19-1867 Treaty, 16 Stat. 719; McClurken 66-67; White 112-13.

[10] *E.g.* Driben Deposition Transcript 65-71 (Slonim Decl. Ex. 162).

we were to keep our homes forever.[11]

In 1867, Mille Lacs chiefs described meeting President Lincoln in Washington in 1863. Lincoln said, "if we would behave ourselves as we have done before that we should be let alone on the land we had before [occupied] for a hundred years or a thousand years or as long as we do not commit any depredations." In 1870, Robert explained that the chiefs "claim the right under the treaty of 1863 or 4 that they should be allowed to remain at that reservation ... providing they would commit no depredations, which they claim they did not."[12]

Others familiar with the Treaties shared this understanding. In 1866, Indian Agent Clark noted an appropriation for the Mississippi Bands' removal did not include Mille Lacs, "who owing to their heretofore good conduct were not to be compelled to remove so long as they did not in any way interfere with or in any manner molest the persons or property of the whites." Bishop Whipple wrote that the "Mille Lac Indians were pledged peaceable possession of their present reservation," and urged the Government to honor that pledge. In 1867, Whipple wrote that Commissioner Dole's promise that, as a reward for their fidelity, the Band would "never be removed," was "received by Sec. Usher and afterward incorporated in [the] treaty." In 1868, Peter Roy, an interpreter at the 1863

[11]3-5-1884 Robert to Wellborn 2. In 1884, Robert added "the said Mille Lacs say and believe this to this day." *Id.* 2-3; *see* White 220.

[12]12-2-1867 Chiefs to Secretary 2; 5-12-1870 Robert to Atcheson 1-2; *see also* White 95-100, 145; 3-16-1863 *National Republican*.

negotiations, wrote that the Government had no right to ask the Band to remove because the Treaty allowed the Band "to remain at Mille Lac as long as they are not injuring the interest of the whites."[13]

C. Timber Trespass and Conflict over the Reservation.

1. Closure of the Reservation.

In 1871, Indian Agent Edward Smith wrote to Indian Affairs Commissioner Parker seeking authority to prevent entries on the Mille Lacs Reservation. Smith wrote that the "reservation, though ceded by the Indians to the Government, should not yet be subject to entry; for the Indians not having been ordered or notified to leave, are, according to their treaty, yet entitled to all their rights upon it." The Band ask[ed] "that their lands be not thrown open to entry, of any kind, so long as they remain[.]" Two months later, Smith reported non-Indians had entered Reservation lands with fraudulent scrip and preemption claims and were taking possession of the land, even though the Band was "still, according to their treaty possessory rights, in that reservation, never having been notified to leave, and no adequate provision for their removal having been made." He asked that all entries "be canceled as without authority of law, and that I may be authorized to protect this reservation from any encroachments until the Indians are removed."[14]

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[13] 2-12-1866 Clark to Cooley 2-3; 3-14-1866 Whipple to Commissioner, Typescript 1-2; 9-21-1867 Whipple to Browning at 1; 6-3-1868 [Roy] to Whipple at 2. *See generally* McClurken 57-86; White 103-34.

[14] 5-1-1871 Smith to Parker 1, 3-4; 7-17-1871 Smith to Parker 1, 3.

Commissioner Parker, "seeing the impropriety of permitting white settlers to go upon the reservation while the Indians were still in occupation," wrote to the General Land Office (GLO) "requesting that no part of said reservation should be considered as subject to entry or sale as public lands, and that the local land officers for the district embracing said reserve be notified accordingly." GLO Commissioner Drummond informed the local land office that lands within the Reservation "are still occupied by the Indians and are not subject to disposal," and ordered it to give public notice "that all settlements [and] entries thereon are illegal and would not be recognized by this Office."[15]

Interior Secretary Delano wrote to Agent Smith that, because the Department had no information that the Indians had violated the Article 12 proviso, they were "entitled to remain at present unmolested on their reservation[.]" He authorized Smith "to notify and warn all white persons against attempting to make settlements or commit trespasses … on the Mille Lac Reservation and against disturbing … in any manner the Indians who legitimately occupy that reservation under the treaty[.]" Simultaneously, Attorney General Akerman ordered prosecution of trespassers "on the Mille Lac Reservation." The *Minneapolis Tribune* reported the U.S. Attorney was instructed "to compel squatters to vacate the Mille Lac lands they have taken from the Indians in violation of treaty stipulations." This was "authoritative action by the national authorities, maintaining the

[15]4-29-1884 H.R. Ex. Doc. 148 at 5; 9-1-1871 Drummond to Register & Receiver.

claims of the Indians to the Mille Lac lands in this state as against the white settlers." As Delano explained, unless the Band's consent to remove was "fairly and honestly obtained …, they should not be removed, so long as their behavior is good. We must make them feel and teach all white men to feel that our treaty stipulations with Indians will be faithfully kept and executed."[16]

Except as discussed below, the Reservation remained officially closed to entries for the next 20 years. Despite this, timber trespasses continued, fueled by a Minneapolis pine-land syndicate,[17] accompanied by pressure to remove the Band. Agent Smith explained:

> Unfortunately for these Indians, their reservation is rich in pine lands, which makes them the prey of lumber-dealers, and a strong pressure is kept up on all sides to secure their early removal. … There is little doubt that, owing to the presence of this valuable pine, the efforts on the part of the whites to get possession will not be relaxed, and it cannot be long before a sufficient pretext will be found to enforce their removal.

Smith suggested selling the pine so the Reservation "will be no longer in demand for the pretended settlement." He also suggested giving Band members "in severalty so much of the reservation as they can occupy," with proceeds from pine sales used for their benefit.[18]

In 1873 and 1874, Smith (now Indian Affairs Commissioner) described the Band's "anomalous position." Because it had "sold [its] reservation, retaining a right to occupy it

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[16] 9-4-1871 Delano to Smith; 9-11-1871 Akerman to Cowen; 9-15-1871 *Minneapolis Tribune*; 10-16-1871 Delano to Smith. *See also* 2-24-1874 S. Ex. Doc. No. 33 at 17-18, 68 (all entries "within the Mille Lacs Indian Reservation" cancelled).

[17] *E.g.*, 2-2-1876 Stowe to Smith; 10-09-1878 Brooks to Hayt.

[18] 11-8-1871 Smith to Clum 589-90.

during good behavior," it was "not deemed expedient to attempt permanent improvements" unless "title to the reservation can be returned to them." In 1875, Band leaders sought Smith's assistance to obtain title. Shaboshkung acknowledged that "[w]e signed the [1863 Treaty] because we were asked to sign with the other Indians who were signing the paper for their land, and we did sign the paper giving our land away because the others wanted us to sign with them," but stated they were assured by the President, the Secretary and the Commissioner that if they were "faithful" and "friendly" to the whites they could remain and live on their reservation for ten, one hundred or one thousand years. Smith warned Band leaders of the ease with which whites could trigger their removal and told them only Congress could provide title to them. However, they had "not lost [their right at Mille Lacs] so long as you behave yourself and nobody can find any fault with you."[19]

2. The Sabin-Wilder Scheme; Chandler and Schurz's Orders.

In 1876, Amherst Wilder and future Senator Dwight Sabin developed a scheme to obtain the Reservation's timber. They would hire someone to make a preemption entry on Reservation farmlands and, when the local land office rejected it, appeal to Washington. If successful, they would then use soldiers' additional homestead rights to enter Reservation timberlands. Their attorneys would assist in Washington, while William

[19]11-1-1873 Report of the Commissioner 12; 1874 Report of the Commissioner 29-30; 2-23-1875 Report of Interviews, Typescript 2-4; 2-25-1875 Council, Typescript 2; *see also* McClurken 104-10.

Folsom, a Minnesota legislator, would seek the Band's removal.[20]

Sabin hired Folsom's son, Frank, to make the entry. It was rejected by the local land office and, on appeal, by the GLO because the Reservation was not open to entry. However, in March 1877 Secretary Chandler held that, although the Band could not be compelled to remove, it did not have an exclusive right to the lands nor were they excluded from sale or disposal by the Government. Chandler claimed the Article 12 proviso "anticipated … that these lands would be settled upon by white persons" and that the Band "might remain, not because they had any right to the lands, but simply as a matter of favor." However, Chandler suspended execution of his decision "until the close of the next regular session of Congress, unless said Indians shall voluntarily remove therefrom prior to that date."[21]

Meanwhile, William Folsom called for the Band's removal. Band leaders sought permission to send a delegation to Washington to "ask our Great Father to permit us to remain where we are and to permit us to take land under the homestead law." They also appealed to Henry Rice, reminding him they had been promised they would always keep their home at Mille Lacs.[22]

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[20]White 160-63, 175, 178-79; 3-17-1876 Wilder to Sabin; 3-18-1876 Wilder to Sabin.

[21]White 163-68; 3-1-1877 Chandler to Commissioner; McClurken 119-20.

[22]White 169-71; 4-14-1877 Chiefs to Commissioner; 10-12-1877 Shaboshkung to Rice.

In June 1878, Secretary Schurz (who succeeded Chandler) prohibited entries on "lands included in the Mille Lac Reservation … until the result of the action of Congress in relation to the right of the Indians in question to occupy the tract of country known as the Mille Lac Reservation … shall have been determined." However, in March 1879, the local land office accepted Frank Folsom's entry and allowed 285 soldiers' additional homestead entries to be made overnight. Schurz cancelled the entries because they were made "in contravention of the specific order of the Department, given with a view to afford opportunity for the adjustment of the rights of the Indians in the reservation."[23]

3. Little Falls Meeting.

In March 1880, Mille Lacs chief Mozomany, Kegwedosay and others travelled to Little Falls seeking assistance to protect the Reservation. Recalling the 1863 negotiations, Mozomany stated he "saw great men in Washington, and they promised us that as long as we behaved ourselves, we could remain on our reservation." Kegwedosay had been informed that "we were about to be robbed of what little we had" and "some person had entered the best part of our reservation." To Mozomany, the 1879 entries appeared "like a match to burn up our country." He was "afraid of that paper" and appealed for help: "My father helped make the treaty; and before he died he called me and asked me to preserve

[23] White 171-78; 4-29-1884 H.R. Ex. Doc. 148 at 9, 13-14.

and keep the reservation."[24]

A committee headed by Nathan Richardson prepared a petition supporting the Band. It described the Band's assistance during the Dakota uprising and "their uniform good behavior since that time." Asserting "an extensive and deep laid plot has been formed, including men of high authority, for the purpose of taking from them the pine that is on their reservation at Mille Lacs[,]" it asked "proper authorities [to] take immediate steps to secure to said Indians their reservation and home at Mille Lacs." Band leaders again recited their understanding of the 1863 Treaty, stating that, because of the Band's assistance during the uprising, "our Great Father in Washington … made us a promise that we should inherit our home on the beautiful and, to us, lovely Mille Lacs forever, or so long as we behaved ourselves well toward our white neighbors."[25]

The committee forwarded the petition to Secretary Schurz in May 1880. In July, Acting Indian Affairs Commissioner Brooks responded that "there is no law authorizing the sale or entry of any of the lands embraced within the Mille Lacs reservation, and in the absence of such law no such sale or entry can be made." To Richardson, it appeared the present administration would protect the Band "from the pine land sharpers," but the latter might yet succeed "in robbing the Indians of their most valuable pine lands." In December,

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[24] 4-9-1880 *Little Falls Transcript*. Mozomany's father was Manoominikeshiinh, an important Band leader who participated in the 1855 and 1863 Treaties. White 27-28, 50, 54, 59-61, 74-75, 87-88, 140-43, App. p. 2.

[25] 4-16-1880 *Little Falls Transcript*.

the *Princeton Union* reported the "pine lands ringsters propose to gobble … up" the Reservation, but Schurz had blocked them and was "very obnoxious to the ringsters."[26]

4. Price's Report.

In April 1882, Indian Affairs Commissioner Price described the Article 12 proviso as "a separate and additional immunity or franchise" conferred upon the Mille Lacs Indians for their conduct during the Dakota uprising. Their removal "was not required, as in the case of the others, but was made dependent upon their continued good conduct." Disagreeing with Chandler, Price held the noninterference clause had reference to "white settlers occupying the surrounding country, their neighbors especially, for there could have been no whites lawfully living upon the reservation at that time, and it was hardly intended in anticipation of the entry and settlement of whites upon the reservation[.]" Because "common occupancy by Indians and whites would be quite impossible[,]" until the Indians were removed "either by their own consent or by reason of the forfeiture of their right of occupancy[,] the whites manifestly must keep out."[27]

Price found no evidence the Indians had "violated the conditions upon which their continued occupancy of the lands in question solely depends." Like Smith, he described

[26]5-15-1880 Richardson to Schurz; 7-23-1880 *Little Falls Transcript*; White 198; 12-16-1880 *Princeton Union*; *see also* 1-30-1888 Rice to Atkins (describing committee members as "honest, reliable, and intelligent gentlemen, whose statements can be relied upon").

[27]4-29-1884 H.R. Ex. Doc. 148 at 4.

their position as anomalous, noting that, because "[t]heir reservation, being rich in pine lands, is the envy of the lumber men, … pressure for their removal will continue," as would "evil influences that have heretofore been brought to bear upon them to effect a forfeiture of their rights[.]" Given their "feeble" tenure, he proposed "they should be removed (with their consent) or, lastly, lands in severalty should be allotted to them where they are at the earliest practicable moment."[28]

Price enclosed a GLO letter showing all entries within the Reservation had been cancelled except those by Folsom, Shaboshkung, and the State. The Band had "continued in occupation of the reservation since the cession of 1863," and the Department had "seen the importance of protecting them in their right of occupancy, as guaranteed to them by said treaty, and to that end [had] refused to allow settlements to be made in their midst." Price did not claim "the Indians have any title or fee in the lands, nor … that the lands are, by the terms of the treaty, excluded from sale and disposal by the United States," but it was clear to him that "the Government is bound to protect the Indians in the continued occupancy thereof, so long as they shall refuse to remove therefrom," unless they forfeit their right by misconduct.[29]

5. Teller's Decision.

In May 1882, Secretary Teller felt "constrained to substantially adhere" to

[28] *Id*. 6-8.

[29] *Id*. 8-10.

Chandler's decision. Teller acknowledged the Article 12 proviso gave the Mille Lacs Indians "the right to remain on the reservation until they should voluntarily remove therefrom." Absent evidence showing they had disturbed the whites, it had to be presumed they were "rightfully on the reservation and entitled to the protection of the Government in all that was given them" by the Article 12 proviso. However, Teller asserted "[i]t is not claimed that [the Band] originally occupied the entire reservation, or that it is now necessary to exclude white settlers therefrom to keep in good faith the treaty with them." He directed Price to ascertain the quantity of land occupied by and needed for the Indians' support so it "may be reserved from the operation of the homestead and pre-emption laws, [and] the remainder of the reservation may be occupied by the settlers who have in good faith attempted settlement thereon."[30]

In August, Sabin and Wilder's attorneys wrote to GLO Commissioner McFarland. Claiming "the parties in interest" never acquiesced in Schurz's cancellation of their entries, and that Teller's "attention [had] been called to the matter" when he issued his decision, they requested the entries be reinstated. McFarland understood the Reservation, which had been "maintained for the occupation of these Indians in accordance with the treaty

[30]*Id*. 10-12. The Indian Office sent two agents to determine what lands were occupied by the Indians and needed for their support. Neither identified all such lands and instead sought to "contract" the Indians' occupation. The Indian Office took no action on either report. *See* McClurken 131-34, 137-39. For evidence that the Indians used the entire Reservation, *see* White 39-46, 135-44, 202-14, 287-308, Apps. II & III; *see also* Driben Dep. 107-17.

stipulation[,] is to be reduced to the reasonable quantity needed for their support." However, he did "not feel at liberty" to reinstate the entries because the land needed for the Indians had not yet been determined. Instead, as requested by the attorneys (who had met with Teller), McFarland forwarded their request to Teller.[31]

Teller responded he wanted "all the entries heretofore cancelled in the so-called Mille Lac Reservation reinstated for an examination of their *bone fide* character, for if made in good faith the cancelling of such entries was without authority of law," such action being necessary "to save the rights of [the] persons [making the entries] and prevent a conflict with others." When the GLO inquired whether Teller wanted to reinstate entries cancelled in 1871, Teller responded that he "had previously held that there was no reservation, and that the land was public land," but the only entries to be reinstated were those cancelled in 1879 (*i.e.*, Sabin and Wilder's entries).[32]

Examining those entries, the GLO found many conflicted with railroad claims and the 1871 entries. It issued patents for some but sought guidance as to others. By April 1884, patents had issued for 7,655.72 acres:

State swamp lands	701.55 acres
Shaboshkung's 1864 Treaty grant:	664.70 acres
Folsom's preemption entry:	155.82 acres

[31] 4-29-1884 H.R. Ex. Doc. 148 at 15-16.

[32] *Id*. 16. Teller made no attempt reconcile these responses with his May 1882 statement that the Band retained "the right to remain on the reservation" under the Article 12 proviso.

85 soldiers' additional homestead entries: 6,133.65 acres

The local office also permitted new entries, even though the GLO had issued no orders allowing them. One new entrant, David Robbins, claimed his was the first entry "by an actual settler" and was allowed because, "although the local land office did not have any order to open, it reasonably concluded that if a senator [Sabin] could scrip half of [the Reservation] a common settler could have a [160-acre] tract."[33]

In July 1883, Commissioner Price asserted "the pretended settlements are the merest sham"; the entrants had no "claim to consideration whatever" and "ought to be forcibly ejected from the reservation." Congressman Nelson likewise contended "[t]he settlers if any are merely men hired by the pine land operators" and the "clamor for the [Band's] removal comes from the pine land interest and not from any bona fide settlers."[34]

6. 1884 Act.

In 1884, the House requested a report on the Reservation, including whether any lands "heretofore recognized as within [its] limits" had been sold or entered. In April, the Acting Secretary submitted reports from Commissioners Price and McFarland. Price provided his April 1882 report and Teller's May 1882 letter. No complaint had since been made against the Band and, therefore, Price believed they had "not forfeited their right of

[33] *Id*. 16-18; 1-8-1890 Noble to GLO 8 (published at 10 Interior Land Decisions 3); 5-16-1907 *Princeton Union*; White 223-29.

[34] 7-7-1883 Price to Secretary 3; 7-21-1883 Nelson to Teller 2-3.

occupancy guaranteed to them by the treaty[.]"[35]

The July 1884 Indian Appropriations Act provided that "lands acquired from the White Oak Point and Mille Lac bands of Chippewa Indians on the White Earth reservation" in the 1864 Treaty "shall not be patented or disposed of in any manner until further legislation by Congress." In August 1884, the GLO withdrew all lands within the Mille Lacs Reservation from disposal, again closing the Reservation to entry. Acting Secretary Muldrow later explained the 1884 Act was "clearly" intended to protect the Mille Lacs Band in their right of occupancy of the Mille Lacs Reservation, as stipulated in Article 12 of the 1864 Treaty.[36]

7. Northwest Indian Commission.

In January 1886, the Interior Department sought legislation authorizing negotiations with the Minnesota Chippewa for their removal and consolidation at White Earth. The Indians' consent was needed because their reservations were "treaty reservations." The Mille Lacs Reservation, comprising 942 Indians and 61,014 acres, was among the "reservations" the Department proposed "to abandon and dispose of." The Band had ceded the reservation in 1863 but reserved "the right to remain there during good behavior," and had "thus far managed to avoid a forfeiture" of that right. Furthermore, the Government

[35] 4-29-1884 H.R. Ex. Doc. 148 at 1-2, 17.

[36] 7-4-1884 Act, 23 Stat. 76, 89; 1-8-1890 Noble to GLO 8; 4-4-1887 Muldrow to Sparks; White 222-23.

had respected "their right of occupancy" despite strong pressure for their removal "owing to the fact that the reservation is rich in pine timber."[37]

In February 1886, Joseph Robert reported whites were again entering the Reservation. The entrants were "agents and employees of a lot of land jobbers and speculators who tell the Indians they have no right on the reservation" and must get off "peacefully" or they will be put off "by force." The Indians were "nearly frightened to death[.]" Band leaders wrote to Governor Hubbard that whites had come on the Reservation, built houses and told "us that we have nothing more to do with our Reserve." They wished to "inform the President and the Indian Commissioner that we protest against all this and ask that all this be cancelled and leave us in peace." They thought the best solution would be to sell the pine, with proceeds used to build houses and educate their children. Hubbard wrote to the Commissioner that the Band should not be removed without its consent and, in the meantime, it was the Government's duty to protect the Band's property rights on the Reservation from "despoliation." In June, Band chief Maheengaunce and others reported a white man was putting up claim shanties "in close proximity to the Indian wigwams, with a view of preempting land" in case the Band was removed.[38]

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[37]1-25-1886 S. Ex. Doc. No. 44 at 2-5.

[38]White 232-234; 2-9-1886 Robert to Holman; 2-27-1886 Mozomany to Hubbard; 3-4-1886 Hubbard to Commissioner; 6-14-1886 Sheehan to Atkins.

In May 1886, Congress authorized negotiations with the Minnesota Chippewa "for such modification of existing treaties with said Indians and such change of their reservation as may be deemed desirable by said Indians and the Secretary[.]" The Secretary appointed the Northwest Indian Commission, which negotiated two agreements. One, with Chippewa of the White Earth, Leech Lake, and Lake Winnebagoshish Reservations and the Gull Lake Band, provided for their consolidation and allotment at White Earth and the sale of their other reservations. The other, with the Red Lake Chippewa, provided for the surrender of a large portion of their reservation and allotment of lands to them on the remainder. The Commission held councils with Mille Lacs and Fond du Lac but did not reach agreements with them. Mille Lacs refused to relinquish its rights and remove to White Earth. Shaboshkung again recalled meeting the President and Commissioner in 1863:

> They said to us, "Sit quiet where you are; the Mille Lacs will only be a little less splendid than Washington." Why we were told this was because we had always been quiet and peaceable. They told us we might stay here a thousand years if we wished to. For ten years we will sit quiet here. Then for one hundred years, and for one thousand years, and if there be one Mille Lacs living, then he will stay quietly by Mille Lacs.

Mozomany confirmed what Shaboshkung said. "Our young men have kept their part of the contract – to live in peace with the whites. ... Is the one thousand years up that the Great Father has sent you here?" Shaboshkung begged the Commission to "[l]et me live in peace

on my own land. I ask that of you in pity, just let me live here on my own land."[39]

In 1888, as white encroachment escalated, Band leaders sent another petition to Washington stating they "occup[ied] and live[d] upon a small reservation on Lake Mille Lac" and were "firm in [their] determination to remain at Mille Lac[.]" They denied ever intentionally ceding their reservation but requested that, if they retained only "the right to occupy it during good behavior[,]" the Great Father "let us remain at Mille Lac and give us in severalty, the lands on this reservation, not disposed of[.]" They also asked him to "sell the timber that we have no use for at Mille Lac, or in some other way assist us to make ourselves more comfortable where we are." Jonathan Simmons of Little Falls supported their requests, noting "[w]hite men are cutting timber on the reservation and squatters are taking claims all around them and on the very lands they are living on[.]"[40]

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[39] 5-15-1886 Act, 24 Stat. 29, 44; 3-1-1887 S. Ex. Doc. No. 115 at 1-2, 17-20, 30, 37; White 235-42.

[40]White 243-47; 1-30-1888 Rice to Atkins (enclosing petition); 3-1-1888 Simmons to Rice. Dr. Driben cites this petition as the first indication the Band wanted to relinquish its reservation. Driben acknowledges the Band had sought to preserve its reservation since 1863 and, in 1888, still wanted to remain at Mille Lacs. However, he claims that, because the Reservation had failed to prevent white encroachment, their only option was to relinquish the Reservation in exchange for allotments. *E.g.*, Driben Dep. 25-27, 66-75, 86, 90, 96-97, 108-09, 121, 132-35, 152-53, 172-73. However, the 1888 petition says nothing about relinquishing the Reservation, instead reiterating longstanding proposals to sell pine and take lands in severalty to secure the Band's rights on the Reservation. *See* J. Randolph Valentine, *Rebuttal Report* 16-19 (2020) (Valentine Decl. Ex. B) ("Valentine Rebuttal"); *cf*. Driben Dep. 62-64, 125-40 (acknowledging petition contains no mention of abandoning the Reservation). Nor is there any evidence the Band believed it was necessary to relinquish the Reservation to obtain allotments. *See* n.54 *infra*.

D. The Nelson Act.

1. Legislative History.

In 1888, the House Indian Affairs Committee reported on the Northwest Indian Commission agreements and a bill that would become the Nelson Act. The Committee "describe[d] in detail the several reservations and Indian lands affected by [the] measures [under consideration]." A table showing "the name of each Indian reservation, the acreage thereof, and the number of Indians occupying the same" included the Mille Lacs Reservation, comprising "61,014" acres and "942" Indians. According to the Committee, "[t]he Mille Lac Reservation has long since been ceded by the Indians, in fee, to the United States, with a right reserved to the Indians to occupy the same as long as they are well behaved."[41]

The Committee objected to the Commission's agreements but supported legislation to remove Indians on "outlying and scattered reservations" to White Earth, where they would receive allotments. The bill was "a proposal to the Indians, and if not accepted by them is inoperative and nugatory."[42]

The bill was amended on the House floor to allow Indians to remain and take allotments on their existing reservations rather than remove to White Earth. This was a fundamental departure from the Northwest Indian Commission's effort to persuade Indians

[41] 3-1-1888 H.R. Rep. No. 789 at 2, 6.

[42] *Id*. 5-6.

on "outlying" reservations to "abandon" their reservations and remove to White Earth, which had been rejected at Mille Lacs and Fond du Lac, was never accepted at Grand Portage or Bois Forte, and was opposed elsewhere (*see* note 54 *infra*). During floor debate, Congressman Nelson reiterated the bill was "nothing but a proposal," the effectiveness of which depended entirely on the Indians' consent.[43]

When Senator Sabin brought the bill to the Senate floor, it included a new provision stating it did not authorize the sale or disposal under its provisions of any tract upon which there was a "subsisting valid preemption or homestead entry, but any such entry shall be proceeded with under the regulations and decisions in force as of the date of its allowance, and if found regular and valid patents shall issue thereon." This provision was not mentioned on the Senate floor, in a statement by the House Managers explaining the Senate's changes, or in House proceedings on the Conference Report.[44] It later became clear its sole purpose was to secure Sabin and Wilder's entries on the Mille Lacs Reservation.[45]

On the Senate floor, Henry Dawes, Chairman of the Senate Indian Affairs Committee, stated the Chippewas "occupy at the present time quite a number of

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[43]3-8-1888 19 Cong. Rec. House 1887-88.

[44]10-3-1888 19 Cong. Rec. Senate 9129-32; 12-17-1888 20 Cong. Rec. Senate 273-74; 12-18-1888 20 Cong. Rec. House 336-37; 12-20-1888 20 Cong. Rec. House 396-400.

[45]*See* McClurken 181-82; White 248-49; 2-12-1890 Richardson to Welsh Typescript 2.

reservations in Minnesota," and "[t]he greatest value of all these reservations, except the White Earth reservation, is in the pine timber, which has become of immense value." The driving force behind the bill was "to get some method to dispose of the pine timber upon these reservations for the benefit of the Indians – in other words, to capitalize it."[46]

2. Statutory Provisions.

Section 1 of the Nelson Act, 25 Stat. 642 (Jan. 14, 1889), provided for the establishment of a Commission to negotiate with all Chippewa bands in Minnesota "for the complete cession and relinquishment in writing of all their title and interest in and to all the reservations of said Indians[,]" except portions of the Red Lake and White Earth Reservations, "for the purposes and upon the terms hereinafter stated." The cession would be sufficient as to each reservation except Red Lake if made by two-thirds of the male adults of each band "occupying and belonging to such reservations[,]" and approved by the President. The President's approval would "be deemed full and ample proof of the assent of the Indians, and shall operate as a complete extinguishment of the Indian title … for the purposes and upon the terms in this act provided."

Section 3 provided that, after obtaining the proposed cessions, all Minnesota Chippewa, except those at Red Lake, would be removed to White Earth and there receive allotments. However, it contained the House proviso allowing any Indian to choose to

[46]10-3-1888 19 Cong. Rec. Senate 9130.

remain and receive an allotment on his existing reservation:

> *Provided further*, That any of the Indians residing on any of said reservations may, in his discretion, take his allotment in severalty under this act on the reservation where he lives at the time of the removal herein provided for is effected, instead of being removed to and taking such allotment on [the] White Earth Reservation.

Sections 4 and 5 required ceded lands to be surveyed and classified as pine or agricultural lands, with the former to be sold for not less than appraised value. Under Section 6, agricultural lands "not allotted under this Act nor reserved for the future use of said Indians" were to be disposed of under homestead laws.[47] Section 6 also included the Senate proviso regarding subsisting preemption or homestead entries. Section 7 required net proceeds to be held by the U.S. Treasury in a permanent fund for all Minnesota Chippewa Indians, and authorized expenditures for, *inter alia*, establishing and maintaining a system of free schools "in their midst and for their benefit."

3. Mille Lacs Negotiations.

[47]In 1889, the cessions contemplated in Section 1 were believed necessary to sell or dispose the lands under Sections 4-6. As discussed in § II.C.7 *supra*, in 1886, the Department explained Indian consent was needed to dispose of treaty reservations. In 1887, the Commissioner explained the cessions in Northwest Indian Commission's agreements were necessary "to enable the United States to sell and convey said lands, and to give good title to the purchasers thereof." 3-1-1887 Sen. Ex. Doc. No. 115 at 7. In 1887, the General Allotment Act "empowered the President to allot portions of reservation land to tribal members and, with tribal consent, to sell the surplus lands to white settlers." *DeCoteau*, 420 U.S. at 432. It was not until 1903 that the Supreme Court held Congress could unilaterally dispose reservation lands. *See Solem*, 465 U.S. at 470 n.11 (citing *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903)).

The President appointed a Chippewa Commission (including Henry Rice and Joseph Whiting) to negotiate with the Chippewa.[48] In instructing the Commission, Indian Affairs Commissioner Oberly listed the "Mille Lacs" Reservation among those "within the purview of this act" and explained that, although the Reservation had been ceded, "[t]he Mille Lacs have never forfeited their right of occupancy, and still reside on the reservation." Interior Secretary Noble approved Oberly's instructions.[49]

Rice, Whiting and Indian Agent Schuler met the Band on the "Mille Lac Reservation" beginning October 2, 1889. Whiting thanked them for their services during the Dakota uprising and discussed his visit "to the borders of your reservation" to arrange the council. After reading the Act, Rice discussed the 1863 Treaty. He "was there, and [knew] all about it." Had it "been properly carried out [they] would have escaped all the trouble that [had] befallen [them]." Instead, men "who cared more for themselves" than the Indians "thought they found a hole in it" and attempted to "deprive you of your rights" and "drive you from this reservation." However, everything Joseph Robert and Band leaders said was correct; "the understanding of the chiefs as to the treaty was right. Here is the acknowledgment of the Government that you were right, that 'you have not forfeited your right to occupy the reservation.'"[50]

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[48] 3-6-1890 H.R. Ex. Doc. No. 247 at 1.

[49] 5-24-1889 Oberly to Rice 3-4, 16, 19.

[50] 3-6-1890 H.R. Ex. Doc. No. 247 at 163-64.

Rice explained they had come to discuss a proposition "from the Great Council and the President," which was "not like an ordinary treaty." The Band would lose "no rights under the old treaties"; rather, "acceptance of this act will not affect these old matters at all, or weaken your chances of obtaining hereafter your dues, but, on the contrary, leaves you in a stronger position than before." Rice then made an "elaborate [but unrecorded] explanation" of the Act's provisions, which he repeated on October 3. Mozomany thought "this understanding is perfect."[51]

On October 4, Shaboshkung stated the Band wanted to see a map "to show us the size of our reservation, so when we call upon you to show us the extent of our reservation it will be witnessed, not only by the weak eyes of mortal man but by One who sees all things from on high." Rice produced a map "containing all the reservations" and pointed to "the Mille Lacs Reservation, containing three islands in the southern part of the lake[.]" Shaboshkung, Mozomany and Maheengaunce argued the map omitted land on the northwest side of the Reservation, as identified in 1855. Rice said it was too late to correct the mistake, but he would try to find a remedy.[52]

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[51] *Id*. 165-66.

[52] *Id*. 166-67. The Indians' interest in confirming "the extent of our reservation" and their invocation of "One who sees all things from on high" to witness it contradict Dr. Driben's theory that they wanted to relinquish the Reservation. *See* Valentine Rebuttal 11-12.

Discussion then turned to allotments.[53] Maheengaunce stated the Band would take allotments on the Mille Lacs Reservation:

> [A]s you have uttered the words of the law, stating that an Indian can take his allotment on the reservation where he resides, we make known to you that we wish to take our allotments on this reservation, and not be removed to White Earth.

Rice stated they were "entitled to select for your allotments the land called farming lands, all that can be used as such; we do not ask you to dispose of a foot of that." He pledged "nothing [would be] done with the lands until you have your allotments." They would "not only have your farming lands, hay lands, but your hard-wood lands, and sugar bush." The Commission would recommend a sawmill, blacksmith, and other assistance be provided at Mille Lacs and expected "you will have them."[54]

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[53]At Leech Lake, the Commission acknowledged significant opposition to the Northwest Indian Commission agreement, under which "the only home you would have would be White Earth." Having heard the Indians' protests, Congress provided in the Nelson Act that "you may remain here in peace or go to White Earth, as you prefer." 3-6-1890 H.R. Ex. Doc. No. 247 at 126.

[54]*Id*. 168. These passages further undermine Dr. Driben's theory that the Band intentionally relinquished the Reservation in agreeing to the Nelson Act. Driben acknowledges the Band never said it wanted to relinquish its reservation. *E.g*., Driben Dep. 25-27, 146-47, 185-86, 197. Indeed, he acknowledges that, by itself, relinquishing the Reservation was not what the Band wanted. *Id.* 249-50 ("[i]f they just got rid of the reservation, that wouldn't be anything … they'd have nothing"). Driben's theory rests on the assumption that the Band needed to get rid of the Reservation to get what, according to Driben, it really wanted, which was land in severalty (*i.e*., allotments). *See id*. ("acquiring land in severalty … was the whole – that was the thing they wanted"). However, Driben provides no evidence to support the premise for his theory: that the Band believed it was necessary to relinquish the Reservation to obtain allotments. He acknowledges the

That afternoon Rice discussed "a law of Congress authorizing missionaries to use a piece of land upon every reservation[,]" which could be used for a school at Mille Lacs. Maheengaunce inquired about whites making themselves "masters of the meadows inside our reservation" and who cut hay "on our Reservation"; the cutting of pine trees "[i]nside this reservation"; and the "many white people who have taken land here":

> How is the Government to dispose of them? Are they going to go away soon, and is this question forever settled so far as the Indian is concerned? Are we going to meet with any more difficulties relative to our land and our possessions here, and our rights?

Rice said Agent Shuler would handle hay and timber trespasses, and Shuler promised to stop them. As to white people, Rice said it was "a matter to be settled in Washington." Although some had "papers[,]" he did "not think any more will come upon your reservation, and perhaps some who are merely visiting you will leave." Other cases were different and would be carefully looked into, but whatever was done would be "for the

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Chippewa Commission never informed the Band it had to relinquish its reservation to obtain allotments. *See id*. 32, 146-147. In negotiations with other bands, the Commission stated the opposite, informing them the Commission "did not come to take [the land] away, but to make it secure for you[.]" 3-6-1890 H.R. Ex. Doc 247 at 180. At Mille Lacs, when Maheengaunce stated "we wish to take our allotments on this reservation[,]" he made clear the Band did not believe it was necessary to relinquish the Reservation to obtain allotments. Professor Valentine provided evidence, which Driben did not address, that the Indians did not believe they needed to relinquish the Reservation to obtain allotments but, instead, believed allotments would strengthen and make permanent their rights on the reservation. *See* Valentine 26-27; Valentine Rebuttal 2-3, 22-23. All available evidence thus indicates that, in seeking allotments, the Indians were seeking to preserve – not relinquish – the Reservation.

best, in the interest of justice and to your satisfaction."[55]

Maheengaunce also asked whether an Indian could "go outside of the reservation to hunt deer" and about the status of "mixed-bloods residing inside of the reservation with us" and those "outside of the reservation." William Hanks, who had purchased land outside the reservation, asked whether he had "a right to more land on the reservation." Maheengaunce asked about "the Snake River Indians, those who are of this reservation[,]" and where their allotments would be made – on the Snake River "or on this reservation?" Rice responded that "mixed-bloods residing upon your reservation and … belonging to your tribe will be treated the same as yourselves"; that if Hanks was a recognized Band member, he had "the same interests here as if [he] had not purchased the lands … outside"; and that the Snake River Indians "stand upon the same footing that you do on this reservation" and can only take allotments "on this reservation or at White Earth."[56]

During the final council, Band members and the Commission confirmed that, if the Band agreed to the Act, they would receive allotments and be allowed to remain permanently on the Reservation; only pine lands would be sold to raise money for improvements; and the problems caused by whites would be resolved in Washington. Maheengaunce urged Band members to accept the proposal, stating it was "a settlement of all our past difficulties. … They tell us we are going to stay here forever, and that they are

[55]3-6-1890 H.R. Ex. Doc. No. 247 at 169.

[56]*Id*. at 169-70.

going to make allotments here to us." Shaboshkung said what pleased him most was what the Commission was going to do for Band members "who reside on this reservation": it seemed "as if this reservation was shaking all the time, on account of the excitement and conflicting interests[,]" but they would depend on the Commission to "quell that shaking" by "hav[ing] their allotments made here, and made solid under their seats, solider and solider every move of their bodies[.]" Kegewdosay told Rice that "we have heard from your own mouth, from the Commission … that we are going to have our allotments on our old reservation where we have resided." Whiting closed the council urging the Indians to avoid alcohol; "[t]he man who brings [alcohol] on your reservation, or near your reservation where it can be got, is your enemy."[57]

The Mille Lacs agreement states the Indians "occupying and belonging to the Mille Lac Reservation under and by virtue of a clause in the twelfth article of the treaty of May 7, 1864," agreed to and accepted the Nelson Act "and each and all of the provisions thereof." It provides that they "grant, cede, relinquish, and convey to the United States" all their "right, title, and interest in and to" lands not needed for allotments in the White Earth, Red Lake and Mississippi Chippewa Reservations, and "hereby forever relinquish

[57] *Id*. 171-75. Dr. Driben's theory that the Band intentionally relinquished its reservation in agreeing to the Nelson Act is inconsistent with all this evidence. Nowhere in the journal does the Band seek to be rid of their reservation and nowhere do the Commissioners or Agent Schuler state the Band will lose its reservation; to the contrary, they all refer repeatedly to the Reservation and its continued existence. *See* Valentine Rebuttal 22-26.

to the United States the right of occupancy on the Mille Lacs Reservation, reserved to [them] by the twelfth article of the Treaty of May 7, 1864[.]"[58] The agreement parallels those negotiated with other Chippewa bands under the Act. Specifically, every agreement negotiated with a band occupying a reservation other than White Earth or Red Lake contains a provision ceding the band's rights on its reservation.[59] However, in consenting to the Act "and each and all of the provisions thereof," the bands reserved their right to allotments on their existing reservations under the Section 3 proviso and the benefits to be derived from the sale of their pine and other surplus lands.

Congress believed the Nelson Act cessions were necessary so reservation lands not needed for allotment nor "reserved for the future use of [the] Indians" could be sold (or "capitalized," as Senator Dawes said) for the Indians' benefit.[60] For Mille Lacs, the net effect was to obtain allotments on their existing reservation while authorizing the Government to sell timber lands within the Reservation for their benefit, as Agent Smith, Commissioner Price and the Band itself previously proposed (*see* nn.18, 28 and 41 *supra*).

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[58]3-6-1890 H.R. Ex. Doc. No. 247 at 45-46.

[59]*See id*. 59 (Indians "occupying and belonging to the Grand Portage Reservation … grant, cede, relinquish, and convey to the United States all our right, title, and interest in and to the said Grand Portage Reservation"), 60-61 (Fond du Lac), 63 (Bois Fort and Deer Creek).

[60]*See* n.47, *supra.* At Grand Portage, the Commission stated the purpose of the cession was to enable the land to be allotted to the Indians: "you must understand that you cede this to the United States for the purpose of getting a patent for the land in severalty; otherwise [the Secretary] could not give you the patents." 3-6-1890 H.R. Ex. Doc. No. 247 at 179.

4. Contemporaneous Reports.

One week later, Rice informed Indian Affairs Commissioner Morgan that the Mille Lacs Indians had "assented to the propositions offered them" and "signified their intention to remain where they are, and will take allotments upon that reservation." He recommended a Government sawmill and farmer so they "may have on the Reservation a person competent to advise them [and] to make known to the Agent all proper complaints." Rice added: "[u]pon this Reservation there are now probably one hundred squatters"; some had taken "the gardens the Indians had made, and built thereon, appropriating to their own use the fields which the Indians had broken and cultivated with much labor[.]" The Band claimed no patent could legally have been issued on "any land embraced in the Reservation, consequently no authority has or can be given to dispossess them of any part of it without their consent." Rice did not suggest the Band's agreement to the Nelson Act authorized issuing patents to non-Indians, or that Rice understood the Act in that way. Instead, he noted that, "[a]s many of the settlers have only board shanties without other improvements, they can leave at any time without serious loss[,]" and "[i]n the interest of justice this subject cannot be too rigidly examined, or at too early a period."[61]

[61] 10-12-1889 Rice to Morgan 1-2. Rice's letter further undermines Dr. Driben's theory that the Band intentionally relinquished its reservation by agreeing to the Act. Rice made no mention of the Band relinquishing the Reservation. To the contrary, he reported they would take allotments on the Reservation and that they asserted there was no authority to issue patents on or "dispossess them of any part of it[.]" Again, the evidence shows the Band was seeking to preserve – not relinquish – the Reservation.

The Chippewa Commission's December 1889 report to Morgan stated Band members were "intelligent, cleanly, and well behaved" and "neighboring white settlers gave them a good name." Even many whites who made claims on the Reservation "testified to the harmless conduct of the Indians[,]" whose "principal fault seems to lie in possessing lands that the white man wants." According to the Commission, the 1863 and 1864 Treaties "confirmed the belief that they were not only permanently located, but had the sole occupancy of the reservation." Further, "[t]he Interior Department now holds that—'The Mille Lac Indians have never forfeited their right of occupancy and still reside on the reservation.'"[62]

The Commission stated lumber syndicates "rob[bed] [the Band] of their pine," some whites "had the shameless audacity to take from the Indians land the latter had, with much labor and perseverance, put into cultivation," and "[s]quatters [were] now settling upon this reservation, and the interest of the Indians ignored." It believed there were some "well intentioned but misled whites" on the Reservation, and urged their right to remain be resolved quickly.[63]

The Commission noted "the various bands decided to take their allotments on their respective reservations, and have constructively done so," and requested lands be set aside for government buildings and the Indians' common use on each reservation. Although it

[62] 3-6-1890 H.R. Ex. Doc. No. 247 at 22.

[63] *Id*. at 22-23.

hoped the bands would remove to White Earth, the Commission endorsed these requests. Its schedule showing the "number of acres in the Chippewa reservations" included 61,014 acres in the "Mille Lac" Reservation.[64]

In January 1890, Secretary Noble denied David Robbins' application to patent his 1883 entry under the Nelson Act's Section 6 proviso. Although "the language of the proviso might authorize" the patent, it had to be construed in keeping with the entire Act and the Government's treaty obligations, which were "fully recognized" in Section 1. Specifically, by providing for "the complete cession and relinquishment of all their title and interest," Congress recognized "the cession by the treaty of 1863 was not a 'complete' cession, but that the Mille Lacs still retained an interest, the right of occupancy during good behavior, by virtue of the proviso to that effect to section twelve of said treaty." No action could be taken until the Band's cession was obtained "and accepted and approved by the President."[65]

Three weeks later Noble transmitted the Commission's report to President Harrison. He confirmed the Band's good conduct and hoped its agreement would help resolve the difficulties it confronted on its "reservation." Noble explained the Act's ceded lands

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[64] *Id*. 24-25, 27.

[65] 1-8-1890 Noble to GLO 8. Noble discussed Chandler and Price's conflicting views "as to who are the 'whites' to whom reference is made in [the Article 12] proviso[,]" and found additional support for Price's view that the proviso did not contemplate white entry onto the Reservation. *Id*. 5-6.

("except possibly those of the Red Lake Reservation and the four townships ceded in the White Earth Reservation") could not "be offered for sale or settlement until the Indians of the several reservations who elect to remain and take allotments where they are shall have … made their individual selections for allotment." He, too, supported the Indians' request that land be set aside on "each reserve for Government buildings," and enclosed a draft bill to pay for damages from lumber dams, with one-third going "to the Mississippi Band, now residing or entitled to reside on the White Earth, White Oak Point, and Mille Lacs Reservations[.]"[66]

President Harrison approved the agreements on March 4, 1890. He noted the Act "authorized any Indian to take his allotment upon the reservation where he now resides[,]" and that the Commissioners reported "quite a general desire was expressed by the Indians to avail themselves of this option." The ceded lands could not be offered for sale "until all of the allotments are made."[67]

The next day, Noble prepared a Public Notice "to notify all persons apt to enter upon [Chippewa] reserved lands as to the rights of the Indians." It noted the Indians' right "to take allotments under the Act on the reservation where they resided at the time of the negotiations[.]" Consequently, except at Red Lake and White Earth, lands to which Indian title would be extinguished "within the boundaries of the several reservations" could not

[66]3-6-1890 H.R. Ex. Doc. No. 247 at 5, 6, 10, 12.

[67]*Id*. 1-2.

be determined until the allotments were made, and the reservations, including Mille Lacs, remained closed to entry.[68]

5. Contemporaneous Acts.

Within six months, Congress enacted two laws recognizing the continued existence of the Mille Lacs Reservation. The Act of July 22, 1890, 26 Stat. 290, granted a right-of-way for "construction of a railroad through the Mille Lacs Indian Reservation" and the right to take 320 acres of lands "in said reservation" for railroad purposes "upon paying to the United States for the use of said Indians such sum" as the Secretary may direct. The reservoir-damage appropriation was enacted on August 19, 1890, 26 Stat. 336, 357, providing for payment to the "Mississippi band, now residing or entitled to reside on the White Earth, White Oak Point, and Mille Lac Reservations[.]"

E. Indian Dispossession.

1. Unlawful Entries.

In January 1890, Nathan Richardson reported squatters entering the Mille Lacs Reservation, "putting up their shanties" where Band members had cleared gardens. By February, squatters claimed "nearly all" reservation lands. Whites told Indians they would be removed, while Indians "submit[ted] to the indignities heaped upon them[,]" believing the Government would fulfill its promises. Mozomany's son, Ayndusogeshig, returned

[68] 3-5-1890 Noble to Commissioner.

from the spring log drive to find a new house on his land and his own house being used as a blacksmith shop.[69]

On March 5, 1890 – the day Noble directed public notice be given that the Reservation remained closed – Agent Schuler reported the Band was "complain[ing] bitterly" about squatters encroaching on their land, with "nearly every quarter section … taken and much of it occupied by the whites cutting much of the timber on their claims, and even depriving [the Indians] of their gardens and meadows." The squatters believed "this Reservation" would soon be opened to settlement and was "now legal plunder; but the Indians were led to understand that this place should be the home of those who wished to remain and take their allotments[.]" Because of "the great number of squatters already there and the uncertainty of the situation," Schuler took no action. Noble directed Commissioner Morgan to report "what steps [were] being taken to remedy the evils complained of" because "[t]he rights of the Indians must be protected[.]"[70]

The *Princeton Union*'s editor-publisher supported the settlers. He reportedly presented a petition seeking the Band's removal and, according to Richardson, was "very officious in getting white men to go on to the reservation knowing that they had no legal rights there."[71]

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[69]White 266-71; 1-22-1890 Richardson to Noble; 2-12-1890 Richardson to Welsh; 1901 *Urgent Case of the Mille Lac Indians* at 4.

[70]3-5-1890 Schuler to Commissioner; 3-20-1890 Noble to Commissioner.

[71]McClurken 185; White 272; 6-27-1890 Richardson to Noble.

In July 1890, Rice asked Morgan whether Mille Lacs Indians could make preemption entries on reservation lands. No response has been found, but Indian Inspector McLaughlin and Indian Agent Michelet later reported the local Land Office refused such entries. They reported whites had "burned and destroyed the dwellings and other buildings of the Indian, and forced the Indian to leave the land which he considered his own[.]" Once an Indian settled on a new location, "he was subjected to similar treatment and again driven from his home, and in this way became homeless[.]" The Indians were subjected to "all sorts of schemes of white settlers to obtain possession of the lands they occupied, in which the aggressors were not only aided by the county officials, but the Indians were even refused protection of consideration by the local Land Office officials." When they applied for homesteads, they were denied the privilege. "The fields they had cleared were appropriated and made use of by the whites and the Indians forced from their locations without receiving any compensation for the loss they thus sustained."[72]

Band leaders provided similar accounts. In 1897, they wrote that, despite the Chippewa Commission's promise that "our allotments of land would be made on the Mille Lac Reservation," in less than one year "whites came upon the Mille Lac Reservation, took possession of the lands regardless of our improvements, and drove us out of our houses, which they are now using as barns and warehouses." In 1900, Band leaders wrote that,

[72]7-18-1890 Rice to Morgan; 9-10-1902 McLaughlin and Michelet to Secretary 3-4.

before allotments could be made under the Nelson Act, "our reservation was again opened to settlement, and not only the vacant lands were entered but those upon which our houses were built and our gardens located. Since then we have been driven out of our houses by the settlers who claim the lands upon which they are located."[73] In 1909, asked whether the Government moved whites off the Reservation after the Nelson Act, Ayndusogeshig testified that, "[i]nstead of moving them off they came onto the reservation in big swarms, like mosquitoes and settled there after the treaty was signed." The whites "took possession of all our property, our little gardens, even our blueberry patches" and "drove us out of our rice fields[.]" Ayndusogeshig "was driven twice out of [his] little house" and "they did the same thing to all the Mille Lac Chippewas there." When the Indians "didn't go they would take our household stuff and set it on fire and drove us away and scattered us all over."[74]

2. Noble's Decisions.

In 1891 and 1892, Noble issued three decisions regarding the Reservation. In the January 1891 *Walters* decision, the issue was whether "homestead" entries suspended by the 1884 Act should be patented following approval of the Nelson Act agreements.[75] Noble held they could, but also stated the Mille Lacs Reservation was not a "reservation"

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[73]7-21-1897 Petition 4; 3-14-1900 Wahweyaycumig to Secretary.

[74]White 333-34; 7-30-1909 Ayndusogeshig Dep. 233-34.

[75]1-9-1891 Noble to GLO 5-7 (published at 12 Interior Land Decisions 52). Walters was a widow from whom Sabin and Wilder acquired a soldier's additional homestead right. White 272-73.

on which the Indians could take allotments, allegedly because subsisting valid preemption or homestead entries only existed on the Mille Lacs Reservation and such entries were to proceed to patent under the Section 6 proviso. Noble did not address the Band's right to allotments on Reservation lands not subject to the Section 6 proviso asserting, incorrectly, that Band members no longer wanted allotments on the Reservation.[76] A January 1891 departmental letter stated "the Mille Lac lands should be disposed of as other public lands under the general land laws[.]"[77]

In September 1891, Noble reversed himself in *Northern Pacific Railroad*, which involved Mille Lacs Reservation lands sought by railroads. The GLO held the lands were excepted from railroad withdrawal orders because they "were already in a state of reservation." The railroads cited *Walters* for the proposition that, after the 1863 and 1864 Treaties, "there no longer existed a technical Indian reservation including these lands." Noble held, however, the Article 12 right of occupancy was "a real and substantial interest or right in the enjoyment of which the Indians were entitled to protection," and was therefore an "appropriation as excepted [the lands] from [the withdrawal] orders." Although Noble asserted – erroneously – that the Band "consented to remove to the White Earth Reservation[,]" he held lands within the Reservation could only be disposed of under

[76]1-9-1891 Noble to GLO 8-10. All experts agree the Band continued to want allotments on the Reservation throughout the 1890s. McClurken 188-89; White 274; Driben Dep. 141-43, 159-61, 226-27.

[77]4-22-1892 Noble to GLO 497 (published at 14 Interior Land Decisions 497).

the Nelson Act.[78]

The April 1892 *Mille Lac Lands* decision addressed the conflict between the departmental letter directing disposition of reservation lands under the general land laws and *Northern Pacific Railroad*'s holding that "said lands were to be disposed of under [the Nelson Act]" and held *Northern Pacific Railroad* was controlling.[79] The *Princeton Union* reported this decision, while "root[ing] out" the railroad claims, would "invalidate and set aside all entries made by persons in [the] reservation since 1889" and "give the Mille Lacs Indians the right to select lands in the old reservation[] under the severalty act."[80] The GLO agreed, holding all new homestead and preemption entries "must be disallowed and cancelled."[81]

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[78]9-3-1891 Noble to GLO 230-31, 233-34, 236 (published at 13 Interior Land Decisions 230).

[79]4-22-1892 Noble to GLO 497-98. In another contest with the Northern Pacific, attorney Oscar Taylor argued the 1863 Treaty created "an estate in the Indians of which they could not be legally divested during their continued good behavior" and did not "contemplate[] the transfer of the land from the Government to other grantees while the land was in the occupation of the Indians." Such a transfer would place "the Government in a position where it would be impossible for it to protect the conditional estate granted the Indians by the provision of the treaty." Indeed, "[t]he idea of such a transfer or any other disposition of the land so long as the Indians conformed to the conditions laid down is repugnant to the proviso and must therefore be rejected." White 311-12, 315-16; 5-9-1892 *In re Warren*.

[80]5-5-1892 *Princeton Union*.

[81]1-21-1893 H.R. Rep. 2321 at 2. In the period between *Walters* and *Mille Lac Lands*, Commissioner Morgan asserted, without explanation, that the Mille Lacs Band had no reservation. 4-20-1892 Morgan to Secretary at 15-16.

3. 1893 Resolution.

In response, "the whole political machinery of the State seems to have set to work to force the Mille Lacs off their homes."[82] Senator Washburn introduced a resolution to grant patents to "settlers who took up land on the Mille Lacs reservation when it was declared open[.]" The *Princeton Union* argued the resolution was necessary to protect "settlers who took their land on this reservation during the period when it was open to settlement under a mistaken ruling of the department." It hoped "the pesky Indians may be speedily removed to White Earth or hades[.]"[83]

According to a House report, 109 homesteads, 131 preemptions and one soldier's declaratory statement, totaling 31,659.74 acres, had been allowed under *Walters*. Because *Mille Lac Lands* would dispossess the entrants, prompt congressional action was needed.[84]

On the Senate floor, Senator Palmer stated the Resolution "proposes to establish entries within an Indian reservation" and asked "whether that would not defeat one of the objects of the reservation[.]" Washburn replied the Resolution "affects only some three hundred settlers who filed their claims during the last four or five years and have made improvements." He added "[t]he Mille Lacs reservation is really no longer an Indian reservation[,]" but provided no support for that claim. He incorrectly asserted "[t]he

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[82]1901 *Urgent Case of Mille Lacs Indians* at 3.

[83]McClurken 198-199; White 313-15; 5-19-1892 *Princeton Union*; 7-14-1892 *Princeton Union*; 11-17-1892 *Princeton Union*; 12-29-1892 *Princeton Union*.

[84]1-21-1893 H.R. Rep. 2321 at 1-2.

Indians are remaining there only through sufferance"; under the Nelson Act, "those Indians are to be entirely removed to" White Earth; and "the resolution "does not in any way affect the rights of Indians[.]"[85]

The 1893 Resolution provides that "all bona fide pre-emption or homestead filings or entries allowed for lands within the Mille Lac Indian Reservation" between the dates of the *Walters* and *Mille Lac Lands* decisions (the latter having "definitely determined that said lands … could only be disposed of according to [the Nelson Act]") were "confirmed where regular in other respects, and patent shall issue to the claimants for the lands embraced therein[.]" Although the Resolution's title refers to the "former" Mille Lacs Reservation, the text does not.[86]

4. The Band Resists Removal.

A large majority of Band members remained on the Reservation throughout the 1890s, making their living by hunting, fishing, gathering and logging.[87] To induce their removal, the Government withheld payments due them.[88] In October 1894, writing as

[85]12-21-1893 *Princeton Union*; White 315.

[86]12-19-1893 Joint Resolution, 28 Stat. 576.

[87]McClurken 188-95, 200-18; White 282-84, 287-308, 317-18; 7-24-1895 Baldwin to Commissioner; 4-8-1897 Beaulieu to Commissioner.

[88]McClurken 194-95; 12-19-1891 Schuler to Commissioner; 12-26-1891 Noble to Commissioner; 12-26-1891 Noble to Hall; 10-18-1892 Hall to Morgan; 1-21-1893 Wahweyaycumig to Ruffee; 9-19-1893 Rice to Campbell; 9-23-1893 Campbell to Browning.

"your Children who reside on the Mille Lac Reservation[,]" Band leaders stated they had suffered greatly since the payments were withheld. They knew their Great Father had "so far as he could do so [given] away our homes at Mille Lac, to strangers who are here for the purpose of [dispossessing] us." However, they had "never consented to give up our lands" and proposed "to [retain] possession of them until a court of competent jurisdiction shall decide that we have no legal right to [retain] possession of our reservation."[89]

In March 1895, Gus Beaulieu wrote to Interior Secretary Hoke Smith on the Band's behalf. He stated the Government's treatment of the Band was "almost inhuman; they have been driven out of their log huts and from their garden patches by the whites, and their reservation has been taken from them by sheer force, and not by any concessions made by them." The Band assented to the Nelson Act "upon the condition that they would receive their allotments of land in severalty upon the Mille Lacs Reservation." "[C]oercive measures would [not] secure their removal[.]" Rather, "the poverty and welfare of nearly a thousand persons demand" payment of their annuities.[90]

In June 1895, again writing as your Children "residing on our Reservation at

[89]10-10-1894 Wahweyaycumig to Great Father. Dr. Driben did not review this letter in forming his opinion that the Band intentionally relinquished its reservation in 1889. When asked why they still claimed to reside on the Reservation if they viewed it as an existential threat, he dismissed the statement as simply "locat[ing] themselves" without indicating "there was a reservation there[.]" He also dismissed their desire "to [retain] possession of our reservation" – something they had been saying for decades – as not "coming from the community itself." Driben Dep. 204-09.

[90]3-5-1895 Beaulieu to Smith.

MilleLac," Band leaders insisted "such inhumane treatment" would never induce them to remove. "[We] will continue to live on our Reservation at MilleLac & entertain the hope, that the Great Master of life, will soften the hearts of those who are [withholding] our payments from us and induce them to give us the money that is due us."[91]

In July 1895, Chippewa Commission Chairman Baldwin met Band leaders at Mille Lacs. They declined all "advances towards removal" because of "their attachment to the Mille Lac country" and promises made to them "that they should not be compelled to remove from Mille Lac but have their allotments and home there[.]" Baldwin proposed no further removal efforts as they "seemed better fed, better clothed, more contented and more intelligent than the [Indian] removals" at White Earth. It was "the intention of the Government to locate these Indians about the shores of Lake Mille Lac, and this arrangement would have been carried out but for the rascally manipulations of the Pine Land Ring of this State." The "country about the Lake is the Indian paradise, and it is unfortunate and unjust that it was not reserved for them."[92]

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[91] 6-9-1895 Wahweyaycumig to Great Father. Asked why Band leaders would declare their intent to "continue to live on our Reservation" if they had intentionally relinquished the Reservation in 1889, Dr. Driben asserted their intent to "live on our Reservation" did not mean they believed they had a reservation but could not say how they would have expressed such a belief. Driben Dep. 212-14. For Driben's response to other statements that, on their face, indicated Band leaders did not think they had relinquished their Reservation – such as their request that their friends "fight hard for our rights on this reservation" and their assertion that they would not remove "from the Mille Lac Reservation" – *see id*. 222-31.

[92] 7-24-1895 Baldwin to Commissioner.

In 1896, Agent Allen reported "[a] large majority of the Mille Lac Indians reside at Mille Lac" and had "not been paid their annuities … for many years[.]" In 1897, Inspector Wright reported that "it was represented to them that if they did not desire to remove to the White Earth reservation, they could remain where they were." He concluded that, because the Indians "never promised or agreed to go to White Earth, they were justly entitled to their share of moneys due them under treaty." Interior authorized the long-withheld payments two months later.[93]

5. Right to Allotments.

In 1896, Oscar Taylor, the attorney who opposed the railroad claims (*see* n.79 *supra*), sought special legislation granting additional lands to settlers. In May, now-Senator Nelson wrote to Taylor that the measure had been given "a black eye" by a GLO expert, William Conway. Conway "review[ed] in a comprehensive matter the status of the Mille Lacs lands," and "show[ed] how the department, and indeed [C]ongress itself, must regard the rights of the Indians." He confirmed the Band did not elect to go White Earth, "refusing, on the contrary, to leave the Mille Lacs reservation" and seeking allotments there in accordance with the understanding when they consented to the Nelson Act. Although most of the lands "appear to have been otherwise disposed of[,]" there were "five or six thousand acres remaining in the Mille Lacs reservation not embraced in valid and adverse

[93]4-6-1896 Allen to Commissioner; 1-7-1897 Wright to Francis; 3-9-1897 Acting Secretary to Commissioner.

claims[.]" If special legislation conferred rights on persons who went "on these lands while reserved from settlement under existing law, for the benefit of the Indians," no lands would be left for Indian allotments. The *Princeton Union* concluded "there is very little probability that settlers upon Mille Lacs lands who have no entries, will be permitted to make homesteads."[94]

GLO Assistant Commissioner Best likewise believed new settlers had "no standing under the law, except as trespassers on reserved Indian land[.]" In February 1896, Best wrote that, "[a]s the law now stands they will have the same opportunity as other parties to acquire said lands when they are legally disposed of as provided for by the [Nelson Act]." However, "until the allotments to the Indians have been completed," it would not be known "how much of said lands will be subject to disposal[.]" Upon receiving Best's letter, Indian Affairs Commissioner Browning requested a description "of all lands on the Mille Lac Reservation subject to allotment to the Mille Lac Indians under the [Nelson Act,]" which he would use to "instruct the Chippewa commission to allot the lands in severalty to the Indians."[95]

The Interior Department reaffirmed the Band's right to allotments on the Mille Lacs Reservation in 1897. Acting Indian Affairs Commissioner Thomas Smith discussed the Article 12 proviso, "in view of the various decisions by the Department sometimes holding

[94]2-27-1896 *Princeton Union*; 5-14-1896 *Princeton Union*.

[95]McClurken 206-07; 3-3-1896 Browning to Secretary.

that the lands were subject to entry and at others that they were not." Smith held they were not and, therefore, "the status of the lands embraced within the Mille Lac reservation, as originally established, has been, since the treaty of 1864, that of an Indian reservation subject in the full meaning of the term to the Indian right of occupancy." Due to the Nelson Act and 1893 Resolution, there were "three classes of lands within the Mille Lacs reservation," namely: (1) those subject to the Nelson Act's Section 6 proviso; (2) those subject to the Resolution; and (3) those "held by the Government subject to allotment or sale under the [Nelson Act]." Smith did not believe lands to which "the Indian title has been fully and completely extinguished" could constitute a reservation, but asserted "the lands embraced in class three … are lands of the United States reserved by law for a specific purpose, namely, to be allotted to the Indians who desire to remain there or sold for the benefit of the Chippewas of Minnesota[.]" Secretary Bliss agreed.[96]

In June 1897, Band leaders requested allotment of "unpatented lands of the Mille Lacs reservation, amounting to several thousand acres," to Band members and fulfillment of the Chippewa Commission's promises of a blacksmith, farmer and physician "upon the Mille Lacs reservation." They had "not lost sight of our rights in equity to the lands and improvements from which we have been driven by white settlers." The leaders signed a petition again reciting their understanding of the 1863 and 1864 Treaties and the Nelson

[96]6-14-1897 Smith to Secretary 4-6, 10-11; 6-16-1897 Bliss to Stringer.

Act; under the Treaties "the Mille Lac Reservation [would] continue to remain Indian lands, and be occupied by the Mille Lac bands" and under the Nelson Act "allotments of land would be made on the Mille Lac Reservation[.]"[97]

The Band reiterated these requests in a September 1897 meeting with Chippewa Commission Chairman Hall. In October, the *Princeton Union* reported "Assistant Secretary Ryan has the Mille Lacs matter in charge" and "favors giving unallotted lands on the reservation" to Band members, while Secretary Bliss and GLO Commissioner Hermann believe the best solution "is for the government to live up to its treaty promises." Settlers, however, wanted "the reds removed to White Earth, pack and parcel[.]"[98]

6. 1898 Resolution.

In 1897, Congressman Morris proposed allowing settlers to make entries and obtain patents on Mille Lacs Reservation lands. At a November council "within the Mille Lac Indian Reservation[,]" the Band appointed Wahweyaycumig, Mahquanewanequa and Ayndusogeshig to press the Band's claims to allotments "upon this reservation" and oppose

[97]McClurken 213-15; 7-21-1897 Petition 4; 8-5-1897 *Princeton Union*; 8-19-1897 *Princeton Union*. The Band leaders' request for allotments and services on "the Mille Lac Reservation," based on their understanding that, under the Nelson Act, allotments were to be made on "the Mille Lac Reservation," is inconsistent with Dr. Driben's theory that they knowingly relinquished the Reservation when they agreed to the Act. The same is true of their assertion that, within one year after they accepted the Act, "whites came upon the Mille Lac Reservation, took possession of the lands regardless of our improvements, and drove us out of our houses[.]" 7-21-1897 Petition 4.

[98]McClurken 216-18; 1-16-1913 H.R. Rep. 1336 at 888-92; 10-7-1897 *Princeton Union*.

Morris's proposal.[99] Hermann prepared an adverse report on Morris's proposal, which Indian Affairs Commissioner Jones intended to endorse. However, the reports would not be submitted to Congress until Morris and Senator Davis were heard. In February 1898, fearing a possible reversal in the Government's position, Wahweyaycumig wrote that "[t]he Mille Lac Indians will never remove to White Earth no matter how bad we get beat[,]" and asked Gus Beaulieu to "fight hard for our rights on this Reservation."[100]

On March 12, 1898, Acting Indian Affairs Commissioner Tonner wrote to Secretary Bliss stating he had received a communication from Hermann reporting on H.R. 5178 to allow settlers to perfect land titles in the Mille Lacs Reservation. Hermann reported that 42,685.44 acres within the Reservation had been patented; about 12,796.99 acres were embraced in pending entries, filings, selections and rejected homestead applications; and about 5,305.24 acres remained unappropriated. Tonner believed "the lands must either be allotted to the Indians or sold for their benefit[.]" The Chippewa Commission had "assured them that if they so desired they should take their allotments in severalty on the Mille Lac Reservation, as provided for in section 3 of the Act …, just as the Fond du Lac band might take their allotments on the Fond du Lac Reservation." Indeed, "if the Commission had not made these promises to the Mille Lac Indians they never would have signed the

[99]11-18-1897 Council Minutes.

[100]1-27-1898 *Princeton Union*; 2-17-1898 *Princeton Union*; 2-23-1898 Wahweyaycumig to Beaulieu; 3-3-1898 Beaulieu to Secretary.

agreement." The Indian Office had not conceded the pending entrants "have equities that should be recognized as against the Indians" and did "not desire to make such a concession now." However, as a compromise, the Office would not oppose the bill if it were amended to: (1) exclude all rejected applications and those made since the local land office received the 1892 *Mille Lac Lands* decision; and (2) authorize the Secretary to allot unappropriated lands to Band members who would not remove to White Earth. It was "so apparent" that applications and entries made since notice of the 1892 decision should not be confirmed "as to require no argument concerning them."[101]

Tonner received another letter from Hermann pertaining to H. Res. 35, which would declare lands within the "former Mille Lac Indian Reservation" subject to entry. Hermann saw no need for the Resolution insofar as it concerned entries between January 21, 1891, and April 22, 1892, as they had been confirmed in 1893. Hermann also believed preemption filings after April 22, 1892, should not be confirmed, "as this would be re-enacting the pre-emption law [which had been repealed in 1891] for the benefit of a few persons seeking to acquire rights on a small Indian reservation[.]" Tonner recommended the Resolution not pass.[102]

According to the *Princeton Union*, "officials at Washington were at first disposed to allot the unpatented lands in the so-called Mille Lacs reservation, including school

[101] 3-12-1898 Tonner to Secretary 1-5.

[102] *Id*. 6-7.

sections, to the Indians[, b]ut this proposition was vigorously combatted" by the settlers' friends and state officials. When Chippewa Commission Chairman Hall was summoned to Washington, he informed the authorities that what little land was left at Mille Lacs "would be of no benefit to the Indians, and he favored removing them to White Earth."[103]

On March 17, Secretary Bliss returned Tonner's March 12 report to Commissioner Jones "for reconsideration and amendment in accordance with the conclusion reached at our conference of this date." Jones submitted a new report the same day, asserting Chairman Hall "sees no justice in compelling, or even allowing, the Indians to take refuse land" at Mille Lacs." As long as the matter remained in dispute, the Indians would "be slow to remove to the White Earth Reservation, where their condition could be greatly improved." Jones was now "of the opinion that the interests of the Indians would be promoted by the passage of the bill" if "a clause be added exempting from entry and from settlement all Indian burial grounds upon the reservation."[104]

Also on March 17, the *Princeton Union* reported Congressman Morris had "won a victory in at last convincing the [GLO] that the Mille Lacs Indians should be removed to White Earth and the land given to settlers." Commissioner Hermann

> took an entirely opposite view only a few weeks ago and was ready to so report, but Morris had the report held up until he could present some facts regarding the reservation … and so ably did he argue that the commissioner

[103]3-10-1898 *Princeton Union*.

[104]3-17-1898 Bliss to Commissioner; 3-17-1898 Jones to Secretary.

was convinced of his error and now will support Morris' bill.[105]

On March 18, Bliss forwarded Hermann's revised report and Bliss's own report to Congress. Hermann's revised report quoted the Band's agreement to the Nelson Act and claimed the last clause, relinquishing the Band's right of occupancy under the 1864 Treaty, was "not necessary" to extinguish its title to the lands, "the words occurring before in the agreement being sufficient for that purpose." Accordingly, Hermann claimed the Band "elected … not to take allotments on what was their own particular reservation" and "any hindrance on this account to the passage of the bill [was] removed." Bliss likewise asserted the Indians "elect[ed] not to take any allotments on [their] reservation, which, under the terms of the Nelson Act, they might have done."[106] He therefore saw no reason why settlers who went on the lands in good faith under the belief "they were vacant public lands of the United States" should not be allowed to perfect title, contending "[s]uch an act would be no infringement upon the right of the Indians[.]"[107]

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[105] 3-17-1898 *Princeton Union*.

[106] 5-9-1898 S. Rep. 1007 at 3-4. Hermann and Bliss's reading of the agreement was mistaken and contradicted everything said during the negotiations. The words preceding the last clause were insufficient to extinguish the Band's right of occupancy on its reservation because they related to other reservations. The record of the negotiations and the reports of the Chippewa Commission demonstrate unequivocally that the Band elected to take allotments on its reservation, as federal officials repeatedly confirmed. *See* §§ II.D.3-4 and II.E.4-5 *supra* and n.116 *infra*.

[107] 5-9-1898 S. Rep. 1007 at 4. Bliss did not explain how settlers could have had a good faith belief that the lands were "vacant public lands of the United States." As discussed above, settlers burned and destroyed the Indians' buildings, appropriated the

Upon receipt of these reports, Congress adopted a Joint Resolution declaring "all public lands formerly within the Mille Lac Indian Reservation … subject to entry … under the public land laws" and that preemption entries made before repeal of the preemption act and homestead entries "shall be received and treated in all respects as if made upon any of the public lands of the United States" subject to such entries. A proviso "perpetually reserved" three lots "as a burial place for the Mille Lac Indians, with the right to remove and reinter thereon the bodies of those buried on other portions of said former reservation."[108]

7. 1902 Act.

In 1900, archaeologist Jacob Brower and anthropologist David Bushnell visited the Reservation and encountered Indian villages along the lakeshore from Wigwam Bay to Isle. In March, Band delegates wrote Interior Secretary Hitchcock that their young men had "stubbornly refused to leave the reservation and insist[ed] upon the fulfillment of the [Nelson Act agreement], in relation to allotting lands to them at Mille Lac." The delegates had been appointed to present the Band's claims arising from opening of the Reservation and non-fulfillment of the Nelson Act, but not "to settle any matter which will relinquish

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Indians' fields, and forced the Indians from their lands – all contrary to any notion that the lands were "vacant." Further, no one could have believed the lands were subject to disposition as public lands after Noble's 1892 *Mille Lac Lands* decision – a fact Tonner thought "so apparent … as to require no argument[.]"

[108] 5-27-1898 Joint Resolution, 30 Stat. 745.

our claims to rights upon this reservation[.]" They explained that "through the influence of pine syndicates [the Reservation] was opened to settlement in violation of treaty stipulations." Under the Nelson Act, they ceded their right to occupy the Reservation "as a band, but reserved the right to take allotments in severalty thereon." However, before the allotments were made "our reservation was again opened to settlement" and they were driven out of their houses by settlers.[109]

Senator Nelson introduced S. 3396 to pay for "improvements of such of the Mille Lac Indians as remove from their reservation" and to permit them to obtain allotments at White Earth or another reservation. Commissioner Jones supported the bill because the 1898 Resolution "had the effect of practically exhausting every acre of land on the reservation available for allotment to the Indians" and, therefore, they must "of necessity either remove from the reservation or secure no lands[.]" The Senate Indian Affairs Committee supported the bill, but a minority report recommended "the land occupied by white people upon the Mille Lac Reservation be purchased" and "restored to its original Indian owners[.]" The Band opposed the bill because the proposed payment ($25,000) was

[109]White 144, 323-26; 11-7-1899 Council Minutes; 3-14-1900 Wahweyaycumig to Secretary. Dr. Driben argues the statement that "we ceded our rights to the reservation to occupy it as a band but reserved the right to take allotments in severalty thereon," acknowledges that the Band intentionally ceded the Reservation in 1889. However, the statement is consistent with the understanding that, by exchanging the right of occupancy for allotments, the Band strengthened its rights on the Reservation. Driben reaches a contrary conclusion by rejecting multiple statements in which Band leaders confirmed their belief that the Band retained its reservation after the Nelson Act. *See* Driben Dep. 282-94.

inadequate and it would "deprive us of our free and unrestricted action in regard to selecting homes for ourselves individually, either by purchase or otherwise."[110]

In July 1900, Secretary Hitchcock rejected an 1891 homestead entry on lands "within what was formerly the Mille Lac Indian reservation[.]" A Band member, Megesee, had resided on two lots embraced in the entry since 1882, erected a house and barn thereon, and cultivated the land. Hitchcock held the entry invalid as to those lots because lands in the "possession, occupation and use of Indian inhabitants" are not "unappropriated public lands" subject to homestead entries. Megesee had been driven from the land by the entrant's threats "accompanied by a display of fire arms" and Megesee's arrest by the sheriff.[111]

Megesee later obtained an Indian allotment on the land, but other similarly situated Band members did not. For example, in an unreported 1896 decision, the Department cancelled a settler's entry on land occupied and improved by Che Nodin, but the land was later patented to another settler. Similarly, a settler was allowed to patent land that had been occupied, cleared and cultivated by Gogee, even though Gogee had applied for an allotment.[112]

Band members who remained on lands patented to settlers were forced off. In May

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[110]McClurken 229-35; 4-30-1900 S. Rep. 1089 at 1-2, 6; 6-7-1900 S. Doc. 446 at 2.

[111]White 291, 318-19; 7-5-1900 *Megesee v. Johnson*.

[112]White 301-02, 319-22; ; 10-1-1907 Megesee Allotment; 6-6-1901 Gogee to Commissioner; 8-15-1901 *Princeton Union*; 2-1-1916 Anderson Patent.

1901, the County Sheriff evicted and burned the houses of 25 Band families under Negwanabe's leadership. In June, David Robbins wrote on behalf of Band leaders, asking the Indian Affairs Commissioner "to stop this forceable ejection now being done by different parties from their houses and lands under color of state laws – and their houses being burnt[.]" Settlers had gone "to the local land offices and by false statements that no one lived [on] or occupied" the lands "obtained filings and finally proved up by the same kind of false oaths[.]"[113]

In 1902, S. 3396 was reintroduced with an increased appropriation of $40,000 and a proviso allowing Band members who acquired lands within the Mille Lacs Reservation to remain. The House committee report incorporated the Band's objection to and much of the minority report on the original bill, noting, "[o]ut of the tangle of verbiage of which treaties, laws and rulings are composed the Indians of the Mille Lac Reservation are able only to realize that somewhere in their dealings with the white race bad faith has been extended to them." The committee supported the bill so the Band, "from whom the land has been taken, perhaps with their consent but without their knowledge, may receive satisfactory compensation, in order that they may the more willingly vacate the reservation which has been taken from them by various treaties." As enacted, the bill appropriated $40,000

> [f]or payment to the Indians occupying the Mille Lac Indian Reservation …

[113] 6-7-1901 Robbins to Commissioner.

> for improvements made by them … upon … said Mille Lac Indian Reservation … upon condition of said Indians removing from said Mille Lac Reservation: *Provided*, That any Indian who has leased or purchased any Government subdivision of land within said Mille Lac Reservation from or through a person having title to said land from the Government of the United States shall not be required to move from said reservation[.]

There is no reference to a "former" reservation in the title or text of the Act.[114]

McLaughlin and Michelet met Band members in August 1902 to secure their agreement to the Act. They insisted the Band had ceded its rights on the "former Mille Lacs Reservation" under the Nelson Act, but also asserted (incorrectly) the reason allotments were not made was because all the land had been appropriated before the Act's passage.[115]

Band leaders disputed McLaughlin and Michelet's account of the Nelson Act. Wahweyaycumig stated Rice had "pointed to the different directions defining our reservation" and said "this land would be allotted to us," and that they would "notice the movement of the white men from our territory immediately upon the acceptance of the treaty." He did not "recognize this act that you have read to me today as the one that was presented and ratified" in 1889. McLaughlin did not dispute his account but claimed Rice misunderstood the Act.[116]

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[114]4-25-1902 H.R. Rep. 1784; 5-27-1902 Act, 32 Stat. 245, 268.

[115]McClurken 240-43; 1902 Records PDF 32, 48-56.

[116]1902 Records PDF 56-61; *see also* 9-10-1902 McLaughlin and Michelet to Secretary 5-6 (Chippewa Commission records support Indians' account of negotiations).

McLaughlin and Michelet assured the Band that accepting the 1902 Act would not affect "any just and legal claims that you have" and they would "[lose] no rights" by agreeing to remove. Wahweyaycumig later testified Band members were afraid the agreement "would impair our rights on the Mille Lac Reservation[,]" but "[a]ll the way through his talk" McLaughlin told them that "if we would take this $40,000 it would not impair our rights in this Mille Lac Reservation." The $40,000 was for destroyed property:

> The Indians at Mille Lac lost their property through the white people burning their houses and burning everything what they got and everything in them. A great deal of property was destroyed at the time belonging to the Indians, and that was what we were getting that money for. … [The Indians] gardens were taken by the white people. The Indians were driven away.[117]

Band leaders wanted the payment made while they remained at Mille Lacs so they could purchase lands there. Ayndosogeshig wanted to purchase five tracts where Band members had settled, and understood there would be no objection "if any of the Indians wished to take an allotment on any of the other reservations and return to live upon this land[.]" McLaughlin said he would support making the payment at Mille Lacs if the Band agreed to remove once the payment was made.[118] With the Band indicating its assent, he and Michelet prepared a list of the Band's improvements. The list did not include wild-rice beds, hunting and trapping grounds, berry patches or other resources not seen as

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Dr. Driben concedes that, in 1902, Band leaders denied they had relinquished their Reservation in 1889. Driben Dep. 255-72, 275-78.

[117]1902 Records PDF 67-68; 7-29-1909 Wahweyaycumig Deposition PDF 11-13.

[118]McClurken 245-46, 250-51; 1902 Records PDF 72-79.

improvements, but documented Band settlements throughout the Reservation.[119]

Band members signed the agreement prepared by McLaughlin and Michelet. It refers, in places, to the "former" reservation, and provides that Band members – "except the excepted classes" under the 1902 Act, *i.e.*, those who acquired lands on the Reservation – would remove once arrangements had been made for them on the reservation of their choosing. It did not deprive them "of any benefits to which they may be entitled under existing treaties or agreements not inconsistent with [its] provisions" or the 1902 Act. A Band resolution declaring how the Band wanted the moneys disbursed was recorded in the "[m]inutes of a council of the Mille Lac Chippewa Indians occupying the Mille Lac Indian Reservation[.]" The minutes refer repeatedly to the Reservation and, like the 1902 Act, make no reference to a "former" reservation.[120]

F. Non-Removal Mille Lacs Indians.

Many Band members left the Reservation after the 1902 Agreement, but others remained, and many who left returned. Although the Indian Office maintained separate rolls for "removal" and "non-removal" Indians, the precise number of Band members on the Reservation at any time is difficult to determine, partly because there was no mechanism to transfer individuals who returned from the "removal" to the "non-removal" roll. However, it is undisputed that at least two-to-three hundred Mille Lacs Band members

[119]White 214, 332-33, Apps. II & III; 1902 Records PDF 5-22.

[120]McClurken 246-47; 1902 Records PDF 2-4, 23-28.

always remained at Mille Lacs.[121]

In 1905, Michelet wrote that, at the time of the 1902 agreement, about 43 Band members were "permitted to remain on [the former Mille Lacs] reservation, owing to the fact that they were owners of land on said reservation." Other Band members remained or returned to the Reservation due to delays in building houses for them at White Earth and lack of available land on other reservations. In 1908, Wahweyaycumig (who had removed in 1903) wrote to Indian Affairs Commissioner Leupp that many who came to White Earth within the past year had not been provided houses and "[a] good many have also returned to Mille Lac, after having selected allotments at White Earth[.]" Leupp acknowledged housing delays led some Band members to return to Mille Lacs. In 1909, Agent Howard reported that many of Mille Lacs Indians, after receiving their allotments and having houses built on them, disposed of both the allotment and buildings and returned "to their old home at Mille Lac."[122]

In 1912, a Justice Department Special Agent testified he was at the "Mille Lac Reservation" during the summer and fall. He found 17 tepees or wigwams with perhaps three or four families in each, and recounted another village burning, this one involving

[121] *See* James McClurken, *Rebuttal of the Expert Report of James P. Rife*, 7-13 (2020) (McClurken Decl. Ex. C) ("McClurken Rebuttal"); Matthew Nelson, *Expert Report Regarding Demographics of Mille Lacs County, 1850-1940*, 2, 10-12 (2019) (Slonim Decl. Ex. 159); 9-8-2020 Nelson Dep. 94-95.

[122] 1-16-1913 H.R. Rep. 1336 at 532; 2-29-1908 Wahweyaycumig to Commissioner; 3-13-1908 Leupp to Wahweyaycumig; 12-4-1909 Howard to Commissioner.

Kegwedosay's son Wadiina, who resided near present-day Cove. A former agency employee confirmed this account, including the presence of "many women and children." An Indian Department Inspector testified the majority of Band members "never desired to settle" at White Earth; after getting allotments they returned "to Mille Lac, in some instances selling their allotments for a mere nominal consideration." Later in 1912, the White Earth Supervisor described the condition of Indians residing at Mille Lacs and suggested purchasing lands for them there.[123]

In 1914, Congress authorized the use of $40,000 from the Nelson Act fund to purchase "lands for homeless non-removal Mille Lacs Indians, to whom allotments have not heretofore been made[.]" Assigned to purchase the land, McLaughlin sought land in areas where Band members already owned land, including 40 acres Band members had purchased near Isle. By 1921, the Indian Office had purchased 813.65 acres near Vineland, 277 acres near Isle, and 900 acres in Pine County.[124]

The Band's continuing presence on the Reservation was documented in 1920, when a local landowner circulated a petition making charges against Band members and urging their removal to White Earth. The petition was written by the Mille Lacs County Attorney

[123]1-16-1913 H.R. Rep. 1336 at 990, 995-96, 1036-37; 1912 Hauke to Howard; *see* White 251-52, 323, 340-49 (describing Wadiina's background and the burning of his and other villages in 1911).

[124]8-1-1914 Act, 38 Stat. 582, 590-91; McClurken 262-63; White 350-59; 9-6-1917 McLaughlin to Commissioner; 5-10-1921 Meritt to Ketcham.

and signed by 136 County residents, including the County Attorney, Auditor, Treasurer, Sheriff and Register of Deeds. After visiting Vineland to investigate, the White Earth Indian Agent rejected the charges as "naked and bare statements …. not supported by the evidence." Band members had "gardens and truck patches in which they raise corn, beans, potatoes, onions, tomatoes, cabbage and other vegetables." When not working at home, they worked on farms, at sawmills and elsewhere. They had "home places[,]" including "residence houses that do very well" and hunted, fished, made maple sugar, gathered wild rice and picked berries. As to removal, they had "sold their White Earth allotments and do not have any lands there to go upon." The request was "without any reason and cannot be given a moment's favorable consideration."[125]

In 1923, Congress appropriated money to survey, enroll and allot "the homeless nonremoval Mille Lacs Indians[.]" In 1925, the Indian Office allotted 856.35 acres to 156 Band members on lands acquired in Vineland and Isle, reserving other lands for agency and school purposes, and later opened a school there. After the Minnesota Chippewa Tribe organized in 1936, the Government acquired additional lands within the Mille Lacs Reservation as part of a Mille Lacs Lands project under the Indian Reorganization Act.[126]

By 2010, 1,598 of the 4,907 individuals living on the Reservation identified as

[125]5-12-1920 Wadsworth to Commissioner; 4-4-1920 Ayer to Wadsworth.

[126]1-24-1923 Act, 42 Stat. 1174, 1191; McClurken 263-64; White 359-60; 9-30-2019 Squires Rep. Figs. 20-41; 4-2-1924 Wadsworth to Burke; 4-24-1924 Meritt to Pequette.

Indian, amounting to more than 30% of the Reservation's population.[127] The United States now owns about 3,600 acres within the Reservation in trust for the Band, the Minnesota Chippewa Tribe or individual Indians; the Band and its members own another 6,100 acres in fee. These lands comprise about 16% of the Reservation. The Band's government center, housing all three branches of Band government, administrative agencies and Band police, is located on the Reservation. The Band owns and operates schools, health clinics, community centers, housing, water and wastewater infrastructure, a gaming complex and other businesses on the Reservation.[128]

III. *MILLE LAC BAND v. UNITED STATES*

In 1909, Congress authorized the Band to sue for losses sustained by opening the Reservation to settlement. 2-15-1909 Act, 35 Stat. 619. The Court of Claims held the 1863 and 1864 Treaties "reserved to the [Band] the Mille Lacs Reservation," but most of the Reservation lands were subsequently, unlawfully taken from the Band. *Mille Lac Band of Chippewas v. United States*, 47 Ct. Cl. 415, 457 (1912). On appeal, the Supreme Court held: (1) the Nelson Act resolved the controversy over the Reservation by accepting the Band's understanding of the 1863 and 1864 Treaties, while permitting valid subsisting entries on Reservation lands to be patented; (2) the Band's "relinquishment" of the

[127]11-20-2015 Memorandum from Solicitor to Secretary 19 (2015 M Opinion) (ECF No. 150-4).

[128]Quist Decl. (ECF No. 160).

Reservation was subject to express trusts created in the Nelson Act; (3) the 1893 and 1898 Resolutions could not be sustained under *Lone Wolf* and were based on a misapprehension of the Government's relationship to the lands; and (4) all non-Indian entries on the Reservation after the Nelson Act were unlawful. *Mille Lac Band*, 229 U.S. at 503, 506-07, 509-10. On remand, the Court of Claims determined 29,335.5 acres came within the Nelson Act's Section 6 proviso, while 31,692.64 acres were unlawfully disposed of in violation of the Indians' rights. *Mille Lac Band of Chippewa Indians v. United States*, 51 Ct. Cl. 400, 400-01 (1916).

IV. ARGUMENT.

A. The 1863 and 1864 Treaties Preserved the Reservation.

The plain language of the 1863 and 1864 Treaties preserved the Mille Lacs Reservation by prohibiting the Band's removal from its "present reservation" unless it disturbed the whites. In *Minnesota v. Hitchcock*, 185 U.S. 373, 389-90 (1902), the Supreme Court stated lands held by Indian title, where "the fee ... was in the United States, subject to a right of occupancy by the Indians," comprised an Indian reservation:

> It is enough that from what has been done there results a certain defined tract appropriated to certain purposes. Here the Indian occupation was confined by the treaty to a certain specified tract. That became, in effect, an Indian reservation.

Id. at 390.[129] The 1863 and 1864 Treaties likewise "appropriated" the Mille Lacs

[129] *Hitchcock* observed the Government could convey the fee, but the purchaser

Reservation for the continued occupancy of the Band. As Secretary Noble held, the Band's right of occupancy was "a real and substantial interest or right in the enjoyment of which the Indians were entitled to protection," and was therefore an "appropriation as excepted them from [railroad withdrawal] orders."[130] Because the Band retained the right to occupy the Reservation, the land was not "divested of all Indian interests" and thus remained an Indian reservation. *Solem*, 465 U.S. at 468.

The Indian understanding compels this conclusion. Band leaders repeatedly asserted they understood (and were assured by Lincoln, Usher, Dole and Rice) that the Treaties reserved the Reservation for their exclusive use as long as they behaved well. There is no dispute as to the Indians' understanding and if there is any ambiguity in the treaties' language, the Indians' understanding controls.

Non-Indians familiar with the negotiations shared the Band's understanding, and Rice confirmed it in 1889. In 1871, Agent Smith, Commissioners Parker and Drummond, Secretary Delano and Attorney General Akerman all concluded the Treaties preserved the Band's right to occupy the Reservation and precluded non-Indian entries. This shared

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would not acquire the right of possession until the Indians' right of occupancy was extinguished. *Id*. at 389. This is how Commissioner Price viewed the Mille Lacs Reservation: the United States held and could convey fee title, but remained obligated to protect the Band's right of occupancy. 4-29-1884 H.R. Ex. Doc. No. 148 at 10. *See also* 11-8-1872 Smith to Unknown ("[t]he right of occupancy being the only original right of the Indians in this land, it is evident that the Government procured by this [1863] treaty nothing more than the right to compel the removal of the Indians in case of bad conduct").

[130]9-3-1891 Noble to GLO Commissioner at 234.

understanding of the Treaties by both the Indians and senior Government officials charged with their administration and enforcement is fatal to any claim of disestablishment.

The Chandler and Teller opinions, procured by politically powerful interests seeking access to reservation timber, do not alter the result. Chandler asserted the Treaties contemplated non-Indian entries on the Reservation but did not reconcile such entries with the Band's right to remain. His view was inconsistent with the Band's understanding (which he never mentioned) and prior federal interpretations, and was subsequently rejected by Secretary Schurz, Acting Commissioner Brooks, Commissioner Price, Henry Rice, Secretary Noble, Oscar Taylor, Acting Commissioner Smith, and the Claims Court – all of whom concluded that the Treaties did not permit non-Indian entries on the Reservation.

Chandler's attempt to reduce the Treaty guarantee that the Band "shall not be compelled to remove" to a "favor" was also mistaken. Because that guarantee was incorporated in the Treaties after negotiations in which the Band refused to remove and demanded the right to live on its Reservation, it was not a "favor." *See Jones*, 175 U.S. at 11-12 (rejecting construction of treaty language as"'indicat[ing] a favor conferred, rather than a right acknowledged'" because it would "'do injustice to the understanding of the parties'") (quoting *Worcester v. Ga.*, 31 U.S. 515, 582 (1832) (McLean, J., concurring)).

Teller acknowledged the Band had a "right" of occupancy under Article 12, but asserted it was limited to a portion of the Reservation. This assertion was contrary to the

Band's understanding and to prior and subsequent federal interpretations (including by the Court of Claims). It finds no support in the Treaties' language, which prohibits the removal of the Band from its "present reservation[,]" not a portion thereof. Also, as Commissioner McFarland explained, Teller was attempting to reduce a Reservation that had been "maintained for the occupation of these Indians in accordance with the treaty stipulation[.]"[131] That attempt was unavailing because only Congress can diminish reservation boundaries. *Yankton*, 522 U.S. at 343; *New Town*, 454 F.2d at 125 (no authority for "administrative alteration of boundaries").

Reliance on Chandler and Teller's opinions is misplaced for additional reasons. First, the brief opening they triggered was closed in 1884, when Congress halted disposition of Reservation lands "to protect these Indians in their right of occupancy of that territory," as stipulated in the Treaty.[132] This, again, was an "appropriat[ion]" of the land for "Indian occupation," which is an Indian reservation. *Hitchcock*, 185 U.S. at 390.

Second, in the Nelson Act, Congress and the Executive Branch recognized the continued existence of the Reservation. The House committee report expressly identified the Mille Lacs Reservation as a reservation subject to the Act.[133] In Section 1, Congress recognized that the 1863 cession "was not a 'complete' cession, but that the Mille Lacs still

[131]4-29-1884 H.R. Ex. Doc. 148 at 15.

[132]4-4-1887 Muldrow to Sparks.

[133]3-1-1888 H.R. Rep. No. 789 at 2.

retained an interest, the right of occupancy during good behavior, by virtue of the [Article 12] proviso[.]"[134] In instructing the Chippewa Commission, Commissioner Oberly listed the Mille Lacs Reservation among those "within the purview of the act[.]"[135] During the negotiations, Rice, Whiting and Schuler affirmed the Band's understanding of the 1863 Treaty, produced a map depicting the Reservation, and repeatedly referred to and acknowledged its existence.[136] The agreement drafted by the Government reaffirmed that the Band "occup[ied] and belong[ed] to the Mille Lac Reservation under and by virtue of" the Article 12 proviso.[137] The reports submitted by Rice, the Commission and Secretary Noble likewise acknowledged the existence of the Reservation, as did Secretary Noble's March 5, 1890, public notice.[138] All of this is inconsistent with the claim that the 1863 and 1864 Treaties disestablished the Reservation.

Third, *Mille Lac Band* forecloses the argument that the Treaties disestablished the Reservation. In deciding whether the disposition of lands within the Reservation violated the Nelson Act, the courts considered whether the Mille Lacs Reservation was a "reservation" subject to the Act. The Supreme Court explained a controversy had arisen over the effect of the Article 12 proviso. *Mille Lac Band*, 229 U.S. at 501-02. Some federal

[134] 1-8-1890 Noble to GLO at 8.

[135] 5-24-1889 Oberly to Rice et al. at 3-4, 16.

[136] *See* § II.D.3 *supra*.

[137] 3-6-1890 H.R. Ex. Doc. No. 247 at 45.

[138] *See* § II.D.4 *supra*.

officials contended the proviso "did not invest the Mille Lacs with any right in the old reservation expressly ceded by Article 1 of the treaty," while the Band (and, as shown *supra*, many other federal officials) "maintained that the proviso operated to reserve the lands for [the Band's] occupancy and use indefinitely, and that the lands could not be opened to settlement while they remained and conducted themselves properly towards the whites in that vicinity." *Id*. at 502.

The Court of Claims resolved this dispute in favor of the Band, holding the 1863 and 1864 Treaties "reserved to [the Mille Lac Indians] the Mille Lacs Reservation." *Mille Lac Band*, 47 Ct. Cl. at 457. After discussing the circumstances leading to the Treaties, the parties' understanding, the subsequent history, and the applicable canons, the Court found as a fact that, at the time of the Treaties were executed, the Band "understood and believed that they were reserving to themselves the right to occupy the Mille Lac Reservation." *Id*. at 421. Indeed, "[t]he language of the proviso would be difficult to construe in any other way than the granting of a right of occupancy to the Mille Lac Band." *Id*. at 440.[139]

On appeal, the Supreme Court did not address the merits of the dispute, but held it

[139]The Claims Court reached the same conclusion 74 years later. *See Minn. Chippewa Tribe v. United States*, 11 Cl. Ct. 221, 239 (1986) ("the purpose of the 1863 and 1864 treaties was to assure that the band could keep its reservation because of its 'good conduct'"). Thus, the two courts that have considered this issue on the merits have held the Treaties preserved the Reservation for the Band.

was "adjusted and composed" in the Nelson Act. *Mille Lac Band*, 229 U.S. at 506. Specifically, "the Government ... waived its earlier position respecting the status of the reservation and consented to recognize the contention of the Indians," on the condition that certain prior entries within the Reservation could "be carried to completion and patent under the regulations and decisions in force at the time of their allowance." *Id*. at 507. Because the Band contended the Article 12 proviso reserved the lands for their "occupancy and use indefinitely," *id*. at 502, by agreeing to their contention Congress confirmed that the Treaties did not disestablish the Reservation.

B. The Nelson Act Preserved the Reservation.

1. Nelson Act Cases.

Several courts have analyzed whether the Nelson Act disestablished or diminished Chippewa reservations. The first case involved Leech Lake, but counsel, including the Minnesota Attorney General, represented a decision would "affect the rights of the Chippewa tribe" on the White Earth, Nett Lake, Fond du Lac, Mille Lacs and Grand Portage Reservations. *Leech Lake Band of Chippewa Indians v. Herbst*, 334 F. Supp. 1001, 1003 (D. Minn. 1971). Although the Leech Lake Band agreed under the Nelson Act to "grant, cede and relinquish and convey to the United States … all [its] right, title and interest" in and to lands within its reservation, this Court held the Act did not disestablish its reservation. *Id*. at 1002-04 (internal quotation omitted, emphasis normalized). While the Act's apparent objective was to induce the Indians to take allotments at White Earth, it

"provided that members of the tribe could alternatively accept allotments on their own Leech Lake Reservation." *Id*. at 1004. Thus, the purpose of the Act "was not to terminate the reservation or end federal responsibility for the Indian but rather to permit the sale of certain of his lands to homesteaders and others." *Id.* at 1004-05.

Minnesota's Supreme Court followed *Leech Lake* in *State v. Forge*, 262 N.W.2d 341 (Minn. 1977), *appeal dismissed*, 435 U.S. 919 (1978) (Leech Lake Reservation), and *State v. Clark*, 282 N.W.2d 902 (Minn. 1979) (White Earth Reservation). The court emphasized the Chippewa were authorized to take allotments on their respective reservations, and that Congress did not clearly evince an intent to terminate either reservation. It distinguished *DeCoteau*, 420 U.S. 425, which involved similar cession language. The "most significant distinction" lay "in the differing understandings" of the Indians; "the White Earth Indians desired to keep the reservation intact and understood that it would remain so except for the four townships of pine reserves ceded outright to the United States." *Clark*, 282 N.W.2d at 908 (footnote omitted).

In *United States v. Minnesota*, 466 F. Supp. 1382 (D. Minn. 1979), *aff'd sub nom. Red Lake Band of Chippewa Indians v. Minnesota*, 614 F.2d 1161 (8th Cir.) (*per curiam*), this Court, without citing *Leech Lake*, held the Nelson Act diminished the Red Lake Reservation. It found the Act's cession language "precisely suited" for eliminating Indian title and conveying all the Red Lake Band's interest in the ceded lands, and that the legislative history made clear the purpose of the Act was to restore the land to the public

domain and open it to settlement. 466 F. Supp. at 1385, 1387; *but see Cathcart*, 133 Minn. at 18, 157 N.W. at 720 (lands ceded under Nelson Act "not 'unappropriated public lands'"); *White*, 83 Minn. at 227-28 (Nelson Act did not restore lands to public domain). Notably, Red Lake Band members could not take allotments on lands they ceded.[140] During the negotiations, Rice told them they must not "expect to keep all [their] reservation," and they discussed "the lines of what they think will be the proper reservation for them to retain."[141]

In *White Earth Band of Chippewa Indians v. Alexander*, 518 F. Supp. 527, 530 (D. Minn. 1981), *aff'd*, 683 F.2d 1129 (8th Cir. 1982), this Court precluded the State from relitigating *Clark's* holding that 32 of the 36 townships at White Earth had not been disestablished. However, relying on *Red Lake*, the Court found the Nelson Act's language and the agreement ceding the other four townships "precisely suited" to diminish the White Earth Reservation. *Id.* at 532-34. "No allotments of land in severalty to Indians were ever made in the four northeastern townships as they were on the other thirty-two townships comprising the Reservation." *Id*. at 533. During the negotiations, the Commissioners told the White Earth Indians that "should your present reservation be reduced[,] should some townships be taken off, that land will have the same status as the land just ceded at Red

[140] 3-5-1890 Public Notice 3.

[141] 3-6-1890 H.R. Ex. Doc. No. 247 at 80-81; James McClurken, *Supplemental Report Regarding the Mille Lacs Indian Reservation* 2, 4-6 (2018) (McClurken Decl. Ex. B) ("McClurken Supp.").

Lake." *Id*. at 532-33 (quoting 3-6-1890 H.R. Ex. Doc. No. 247 at 96).[142]

The Eighth Circuit affirmed. 683 F.2d 1129. In holding the State was properly precluded from relitigating the 32 townships' status, it held *Leech Lake*, *Forge*, and *Clark* (finding the Nelson Act did not disestablish the Leech Lake or White Earth Reservations) were consistent with *Red Lake* and *White Earth* (finding portions of those reservations diminished). As to White Earth, "the four townships [were] subject to different provisions of the Act … because no allotments of land to Indians were made" there. *Id*. at 1134.

In *Leech Lake Band of Chippewa Indians v. Cass County*, 108 F.3d 820, 821-22 (8th Cir. 1997), *aff'd in relevant part*, 524 U.S. 103, 106, 108 (1998), the court confirmed that the Leech Lake "reservation has never been disestablished or diminished" despite changes in land ownership. In *Melby v. Grand Portage Band of Chippewa*, 1998 WL 1769706 at *8 (D. Minn. Aug. 13, 1998), this Court held that, "because it reserved parcels of land for Indians who elected to remain on the reservation[,]" the Nelson Act did not contain "the requisite clear Congressional intent needed to abolish a reservation."

Collectively, these cases hold that the Nelson Act did not disestablish reservations on which allotments were to be made to Indians; only areas in which no allotments were to be made, and as to which the negotiators referred expressly to a change in boundary lines

[142]*See also* 3-6-1890 H.R. Ex. Doc. No. 247 at 105 (Rice's statement that White Earth reservation would be reduced by "four townships"); McClurken Supp. 6-10.

or reservation status, were diminished.[143] This is settled law, and it demonstrates the Mille Lacs Reservation was not disestablished by the Nelson Act.

First, Mille Lacs Band members were entitled to allotments on their Reservation. This was how the Act was explained to them and was critical to their assent. Once Secretary Noble determined lands within the Reservation could only be disposed of under the Nelson Act, Assistant Commissioner Best, Commissioner Browning, Clerk Conway, and Acting Commissioners Smith and Tonner recognized the Band was entitled to allotments on its Reservation. The Court of Claims agreed, holding that "the Mille Lacs were entitled to allotments on their reservation in common with the other Indians." *Mille Lac Band*, 47 Ct. Cl. at 455. The Supreme Court held that, under the Nelson Act, "the lands in the Mille Lac Reservation were put in the same category, and were to be disposed of for the benefit of the Indians in the same manner, as the lands in the other reservations relinquished under the act[.]" *Mille Lac Band*, 229 U.S. at 507. As such, Mille Lacs Band members were entitled to allotments on their Reservation under the Section 3 proviso.

The Section 6 proviso does not change this. That proviso's principal effect was that

[143]Secretary Noble's report to President Harrison cautioned that no lands could be offered for sale or settlement "except possibly those on the Red Lake Reservation and the four townships ceded in the White Earth Reservation … until the Indians of the several reservations who elect to remain" select their allotments. 3-6-1890 H.R. Ex. Doc. No 247 at 10; *see also* 3-5-1890 Noble to Commissioner (Public Notice at 3). Thus, the distinction drawn in the cases has historical support in the contemporary understanding of the Act by those charged with administering it.

most Reservation timberlands were transferred to Sabin and Wilder instead of being sold under the Act's pine-land provisions. Since timberlands would have been sold in any event, the proviso did not affect the Band's right to allotments or put it in a different position than Indians at Leech Lake, Grand Portage or other reservations preserved by the Act. The proviso itself, the purpose of which was not explained when it was added to the bill, makes no reference to altering the Reservation's boundaries, and the Band was not informed during the negotiations that it might have that effect. The Supreme Court held it was a "condition" for recognizing the continued existence of the Reservation, not a provision that disestablished or diminished the Reservation. *Id*. at 507.

Second, there was no discussion of a change in reservation boundaries during the Mille Lacs negotiations. Instead, the discussion focused on the Band's desire to remain on its Reservation, the rights of Band members and whites on the Reservation, and government services to be provided on the Reservation. Unlike at Red Lake and White Earth, there was no reference to revised reservation "lines," "reduc[ing]" their "present reservation" or "tak[ing] off" townships.

Thus, under settled law, the Mille Lacs Reservation was not disestablished or diminished by the Nelson Act.

2. Supreme Court Cases.

The same result obtains under the Supreme Court's reservation-boundary jurisprudence. The inquiry begins with the Act's language and the circumstances

underlying its passage. *Solem*, 465 U.S. at 469. Although the Nelson Act contains cession language, such language alone does not support a finding of disestablishment or diminishment. *See Grey Bear*, 828 F.2d at 1290 (language of cession without an unconditional commitment for compensation does not support finding of disestablishment).[144] The "cession and relinquishment" to be obtained under the Act was not unconditional but for specific purposes. Those purposes included allotment and sale of lands within each reservation, for which cession and relinquishment were considered necessary. *See* nn.47 & 60 *supra*.

Specifically, the Nelson Act: (1) contains (in Sections 3 & 6) express provisions permitting the Indians to take allotments under the General Allotment Act on their existing reservations and permitting agricultural lands "to be reserved for the future use of [the] Indians"; and (2) provides (in Sections 4-7) for the cession of unallotted lands in trust for the Indians' future benefit, including the provision of schools "in their midst." As Senator Dawes explained, the object was "to capitalize" the "timber upon these reservations for the benefit of the Indians."[145] This statutory scheme is analogous to those at issue in *Seymour*,

[144]Although cession language has been present in some cases in which the Supreme Court has found diminishment, the use of similar language in the Nelson Act does not necessarily have the same effect. *See Mille Lacs Band*, 526 U.S. at 202 (rejecting assumption that "similar language in two Treaties involving different parties has precisely the same meaning"); *Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010, 1020 (8th Cir. 1999) (applying *Mille Lacs* rule to surplus lands agreement).

[145]10-3-1888 19 Cong. Rec. Senate 9130.

Mattz, *Solem* and *Parker*, and suggests the Secretary "was simply being authorized to act as the Tribe's sales agent." *Solem*, 465 U.S. at 473.

In *Seymour*, 368 U.S. at 356, provisions allowing sale of mineral lands and settlement under the homestead laws after allotments were made to Indians did "no more than open the way for non-Indian settlers to own land on the reservation in a manner which the Federal Government, acting as guardian and trustee for the Indians, regarded as beneficial[.]" In *Mattz*, 412 U.S. at 497, the Court held provisions for allotments and sale of surplus lands in the General Allotment Act, and in Acts extending those provisions to particular reservations, are "completely consistent with continued reservation status." In *Solem*, 465 U.S. at 474, provisions authorizing the Secretary to set aside portions of the lands opened to non-Indian settlement for agency, school, and religious purposes, and allowing Indians to obtain allotments before the land was opened, indicated that "the opened area would remain part of the reservation." In *Parker*, the Court held acts that "'merely opened reservation land to settlement and provided that the uncertain future proceeds of settler purchases should be applied to the Indians' benefit[,]' … [did] not diminish the reservation's boundaries." 136 S. Ct. at 1079-80 (quoting *DeCoteau*, 420 U.S. at 448).

Mattz emphasized that, while earlier versions of legislation did not provide for Indian allotments and instead provided for removal, the final version "provided for allotments to the Indians and for the proceeds of sales to be held in trust for the maintenance

and education, not the removal, of the Indians." 412 U.S. at 504 (internal quotation omitted). These provisions "compel[led] the conclusion that efforts to terminate the reservation by denying allotments to the Indians failed completely." *Id*. Here, the longstanding effort to remove the Chippewa to White Earth and to "abandon and dispose" of "outlying" reservations failed when the Nelson Act was amended to permit the Chippewa to take allotments and remain on their existing reservations.

The Nelson Act is unlike statutes found to have disestablished or diminished reservations. Unlike statutes in *DeCoteau*, 420 U.S. at 445-46, and *Yankton*, 522 U.S. at 344-45, the Nelson Act does not contain language of cession and an unconditional commitment to pay a fixed-sum for ceded lands.[146] Unlike *Rosebud*, 430 U.S. at 590-92, there is no "baseline purpose of disestablishment" derived from an agreement containing a cession and sum certain compensation. And unlike the statute in *Hagen*, 510 U.S. at 412, the Nelson Act does not expressly restore lands to the "public domain." *See White*, 83

[146]Rather than providing fixed-sum compensation, the Nelson Act provided that money accruing from the disposal of lands under its provisions, after deducting expenses of implementing the Act, would be placed in the Treasury to the credit of the Chippewa as a permanent fund. As in *Parker*, the Act provided only "'that the uncertain future proceeds of settler purchases should be applied to the Indians' benefit.'" 136 S. Ct. at 1079 (quoting *DeCoteau*, 420 U.S. 425); *accord Grey Bear*, 828 F.2d at 1290. Moreover, Congress "retained undiminished plenary power over both the lands ceded and the funds realized" and, as "trustee in possession[,]" could "make such changes in the management and disposition of the tribal property as it deem[ed] necessary to promote the Indians' welfare." 58 Interior Decisions at 79. This is the opposite of an unconditional commitment to provide fixed-sum compensation.

Minn. at 227-28, 86 N.W. at 93; *Cathcart*, 133 Minn. at 18, 157 N.W. at 720.

At a minimum, because the Nelson Act does not contain "explicit language of cession and unconditional compensation[,]" it is necessary to consider events surrounding its passage, "particularly the manner in which the transaction was negotiated with the tribes involved and the tenor of the legislative Reports presented to Congress[,]" to determine if there was a "widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation." *Solem*, 465 U.S. at 471. The Supreme Court pointed to compelling contemporaneous evidence in each case in which it held reservation boundaries disestablished or diminished. In *DeCoteau*, 420 U.S. at 433, an Indian negotiator stated that "'[w]e never thought to keep this reservation for our lifetime.'" In *Rosebud*, 430 U.S. at 591-92, a Government negotiator explained the cession would "'leave your reservation a compact, and almost square tract … about the size and area of Pine Ridge Reservation.'" In *Hagen*, 510 U.S. at 417, the Government negotiator stated "'[C]ongress has provided legislation which will pull up the nails which hold down that line [the reservation boundary] and <u>after next year there will be no outside boundary line to this reservation</u>'" (emphasis in original). In *Yankton*, 522 U.S. at 352, the Government negotiator admonished the tribe that the "'reservation alone proclaims the old time'" and it "must … break down the barriers and invite the white man with all the elements of civilization.'"

As discussed above (*see* § IV.B.1), there were statements suggesting a change in

reservation boundaries during the Red Lake and White Earth negotiations, but only regarding the portions of those reservations on which no allotments could be made. There were no statements suggesting any change in Reservation boundaries during the Mille Lacs negotiations. To the contrary, the continued existence of the Reservation dominated the discussions. For decades, the Mille Lacs Band had been seeking to preserve its Reservation. In 1880, Mozomany explained that "[m]y father helped make the treaty; and before he died he called me and asked me to preserve and keep the reservation."[147] Government negotiators presented the Nelson Act to the Band as confirmation of its understanding of the 1863 Treaty, and a means to put it in a "stronger position" to retain its Reservation in the future. Similar to *Passenger Fishing Vessel*, 443 U.S. at 676, "[Rice] and his associates were well aware of the 'sense' in which the Indians were likely to view assurances regarding their [reservation]." Through four days of negotiations, repeated references to the Reservation, examination of a map depicting its boundaries, and discussions about the rights of Band and non-Band members "on," "upon," "inside" and "outside" the Reservation, it was never suggested that the Reservation would cease to exist or that its boundaries would be affected by the Act.

Section 3's provision for allotments was critical to the Band's agreement. Government officials long had bemoaned the "anomalous" and "feeble" nature of the

[147] 4-9-1880 *Little Falls Transcript*.

Band's rights on the Reservation. In 1875, Commissioner Smith told Band leaders that they needed land title to secure their rights on the Reservation. Band leaders took that message to heart and, in 1888, requested Reservation lands be allotted to them, just as Smith and Price previously proposed. The Nelson Act promised allotments that would provide the very title they had been told was necessary to secure the Reservation. Shaboshkung's plea to quell the "shaking" that plagued the Reservation by making allotments "solid under their seats, solider and solider every move of their bodies[,]" made this understanding clear and is fatal to the claim that the Act disestablished the Reservation. *See McGirt*, 140 S. Ct. at 2475 (rejecting argument that tribe's receipt of fee title instead of the usual Indian right of occupancy was incompatible with reservation status); *Indian Country, U.S.A., Inc. v. Okla.*, 829 F.2d 967, 975-76 (10th Cir. 1987) (rejecting argument that treaty provision conferring stronger (fee simple) title than right of occupancy left tribal land base with less protection under federal law).[148]

[148] As discussed in nn.40, 52, 54, 57, 61, 89, 91, 97, 109, and 116 *supra,* there is no support for Dr. Driben's theory that, without ever saying so, the Band intentionally relinquished the Reservation when it agreed to the Nelson Act and overwhelming evidence to the contrary. Given the Indian canons, Driben's theory does not create a genuine factual dispute precluding summary judgment. *See Dalberth v. Xerox Corp.*, 766 F.3d 172, 189 (2d Cir. 2014) (summary judgment appropriate where the nonmoving party's expert's opinion was "as a matter of law, unsustainable on this record") (internal quotation omitted); *Eckelkamp v. Beste*, 315 F.3d 863, 868 (8th Cir. 2002) (summary judgment appropriate where expert opinion "fundamentally unsupported"); *see also Mille Lacs Band of Chippewa Indians v. Minn. Dep't of Natural Res.*, 861 F. Supp. 784, 817-18 (D. Minn. 1994) (rejecting Driben's argument that the Band intended to relinquish usufructuary rights in 1855), *aff'd*, 124 F.3d 904 (8th Cir. 1997), *aff'd*, 526 U.S. 172 (1999).

The Band requested lands be reserved for "a place where our schools, etc., shall be," and Rice "hoped you will have a superintendent and blacksmith, farmer, a man to run your mill, and physician, and that there will also be schools and missionaries."[149] It is difficult to imagine why Section 6 allowed lands to be reserved "for such purposes if [Congress] did not anticipate that the opened area would remain part of the reservation." *Solem*, 465 U.S. at 474. Similarly, the reports to the President and Congress referred to difficult issues created by squatters within the Reservation, and the Band's intent to take allotments on its Reservation; they made no suggestion that the Act would alter the Reservation's boundaries. As in *Clark*, 282 N.W. 2d at 908, the evidence demonstrates the Band desired to keep the Reservation intact, and all parties understood their agreement would do so.

In the Nelson Act's immediate aftermath, the President and Congress recognized the Reservation's continued existence. One day after President Harrison approved the agreements, Secretary Noble issued a Public Notice warning that non-Indians entering the Mille Lacs Reservation would be prosecuted as trespassers.[150] Four months later, Congress passed and the President signed an act granting a right of way "for the construction of a railroad through the Mille Lacs Indian Reservation." One month later, the President signed an act directing a payment to the "Mississippi band, now residing or entitled to reside on the … Mille Lac Reservation[]." These are "unambiguous, contemporaneous[]

[149] 3-6-1890 H.R. Ex. Doc. No. 247 at 175.

[150] 3-5-1890 Noble to Commissioner (attaching Public Notice).

statement[s]" by the Executive Branch and Congress that the Nelson Act did not disestablish the Mille Lacs Reservation. *Rosebud*, 430 U.S. at 602-03 (citing "unambiguous, contemporaneous[] statement" of Chief Executive in support of disestablishment).

Because the subsequent opening of the Reservation to new non-Indian entries was based on the mistaken *Walters* decision and was a flagrant violation of the Nelson Act, it does not reflect "what Congress expected would happen." *Solem*, 465 U.S. at 472. The "wrongful disposal" of Reservation lands under the 1893 and 1898 Resolutions was "[d]oubtless" based on "a misapprehension of the true relation of the Government to the lands," *Mille Lac Band*, 229 U.S. at 509-10, and thus sheds no light on the meaning of the Nelson Act.[151] Despite the wrongful opening and sustained efforts to rid the Reservation of Indians – including fraudulent claims that lands were unoccupied, County and Land Office officials refusing to assist Band members seeking homesteads, and burning Band homes and possessions – the Band persevered on the Reservation and received allotments there in the 1920s. The "seat of tribal government" remains on the Reservation and "most

[151] *See Shawnee Tribe v. United States*, 423 F.3d 1204, 1228 (10th Cir. 2005) (discounting subsequent history where record suggested Indians may have left reservation under duress); *Duncan Energy Co. v. Three Affiliated Tribes of the Fort Berthold Reservation*, 27 F.3d 1294, 1298 (8th Cir. 1994) (exclusive reliance on *Solem*'s third factor for quasi-diminishment "totally inappropriate"); *Pittsburgh & Midway Coal Mining Co. v. Yazzie*, 909 F.2d 1387, 1396 (10th Cir. 1990) (subsequent events and demographics cannot overcome substantial and compelling evidence from Act and events surrounding its passage).

important tribal activities take place" there. *Solem*, 465 U.S. at 480 (citing these factors in finding reservation not diminished); *cf. Hagen*, 510 U.S. at 421 (noting seat of tribal government was not located in disputed area in finding diminishment); *Duncan Energy*, 27 F.3d at 1298 n.4 (court not convinced *Solem*'s third factor supports diminishment where, *inter alia*, seat of tribal government is located within disputed portion of reservation).

"When both an Act and its legislative history fail to provide substantial and compelling evidence of a congressional intention to diminish Indian lands, [the Court is] bound by [its] traditional solicitude for the Indian tribes to rule that diminishment did not take place." *Solem*, 465 U.S. at 472. In this case – as the Eighth Circuit, this Court and the Minnesota Supreme Court have held – there is no substantial and compelling evidence of congressional intent to diminish reservations subject to allotment under the Nelson Act. The surrounding circumstances – particularly the negotiation of an agreement at Mille Lacs and contemporaneous statements by Congress and the Executive Branch – make this conclusion inescapable.

C. The 1893 and 1898 Resolutions Did Not Disestablish the Reservation.

Neither the 1893 nor the 1898 Resolution disestablished the Reservation. First, notwithstanding Congress's power to alter Indian treaties, it can only do so when exercising its "administrative power … over the property and affairs of dependent Indian wards." *Mille Lac Band*, 229 U.S. at 509-10. Congress has no power to appropriate Indian property and treat it as its own. *See Chippewa Indians of Minn. v. United States*, 301 U.S. 358, 375-

76 (1937); *Choate v. Trapp*, 224 U.S. 665, 674, 678 (1912) (Congress has no authority to deprive Indians of property rights vested by prior laws or contracts); *Jones*, 175 U.S. at 32 (congressional resolution has no effect upon rights previously acquired under Indian treaty). Because the 1893 and 1898 Resolutions asserted "an unqualified power of disposal over the lands as the absolute property of the Government[,]" they exceeded Congress's authority and were unlawful. *Mille Lac Band*, 229 U.S. at 509-10; *see* 1-27-1943 Solicitor's Opinion M-31156 at 6 & n.14 (Congress has only disposed of Indian property without Indian consent for non-Indian purposes "when the facts and applicable law had not been adequately presented," and in each case such "enactments were held unconstitutional in whole or in part," citing *Mille Lac Band*, *Choate*, and *Jones*). Because the 1893 and 1898 Resolutions were unlawful, they had no effect on boundaries of the Reservation. *See Jones*, 175 U.S. at 32.

Second, neither Resolution purported to change the Reservation's boundaries. The 1893 Resolution confirmed it had been "definitely determined" that "lands within the Mille Lac Indian Reservation" could only be disposed of under the Nelson Act, and simply permitted patents to be issued on lands "mistakenly" entered "within said reservation." It did not purport to alter the Reservation's boundaries or suggest the Reservation no longer existed. *See McGirt*, 140 S. Ct. at 2464 ("Congress does not disestablish a reservation simply by allowing the transfer of individual plots, whether to Native Americans or

others.").[152]

The 1898 Resolution was based on erroneous reports that the Band elected not to take allotments on the Reservation and, therefore, that the Resolution "would be no infringement upon the right of the Indians[.]"[153] Because it was based on the erroneous premise that the Reservation no longer existed, it did not itself purport to disestablish the Reservation or alter its boundaries. Determining whether that premise was correct –that is, whether the Reservation had been disestablished by earlier acts when Congress adopted the 1898 Resolution – "is the peculiar province of the judiciary." *Jones*, 175 U.S. at 32. Because the Reservation had not been disestablished, the Resolution had "no effect upon the rights previously acquired by the plaintiffs." *Id.*

D. The 1902 Act Did Not Disestablish the Reservation.

After the 1898 Resolution practically exhausted all Reservation land available for allotment, the Band sought compensation for the loss of its improvements without relinquishing its "rights upon this reservation[.]" Congress appropriated $40,000 to pay for the Indians' improvements "on [the] Mille Lac Indian Reservation." Although the payment was conditioned on the Band's agreement to remove, the Act expressly provided

[152]The reference to the "former" reservation in the Resolution's title (but not its text) may reflect confusion about the Reservation's status but does not alter the Resolution's meaning. *See United States v. McCrory*, 119 F. 861, 864 (5th Cir. 1903) (absent ambiguity in text, title of act cannot alter meaning).

[153]5-9-1898 S. Rep. 1007 at 4.

Band members who acquired "land within said Mille Lac Reservation" could remain. *See* § II.E.7 *supra*.

In the ensuing negotiations, McLaughlin and Michelet assured the Band it would lose no rights by agreeing to remove. Band members understood "if we would take this $40,000 it would not impair our interest in the Mille Lac Reservation"; they could use a portion of the money to purchase lands on the Reservation; and if they took allotments elsewhere they could "return and live upon this land[.]" The agreement they signed allowed those who acquired lands on the Reservation to remain and provided it would not deprive them "of any benefits to which they may be entitled under existing treaties or agreements not inconsistent with" the agreement or 1902 Act. *See id*.

The net effect was to leave the Reservation's status unchanged. Congress provided funding to pay for improvements taken or destroyed by settlers and stipulated Band members would have to remove unless they acquired their own lands within the Reservation. It did not purport to alter the Reservation's boundaries. In the coming years, Congress would appropriate funds to acquire lands for Band members, including lands within the Reservation. Under the 1902 Act, Band members residing on Reservation lands, whether acquired by the Government or themselves, are not "required to remove from [the] reservation."

V. CONCLUSION.

The Mille Lacs Band was promised a reservation as a permanent homeland on its

ancestral lands in 1855. The 1863 and 1864 Treaties and Nelson Act preserved the Reservation. Neither the callous and inhumane campaign to remove the Band from its reservation nor the unlawful disposition of reservation lands changed that. As noted at the outset, "[u]nlawful acts, performed long enough and with sufficient vigor, are never enough to amend the law. To hold otherwise would be to elevate the most brazen and longstanding injustices over the law, both rewarding wrong and failing those in the right." *McGirt*, 140 S. Ct. at 2482. The Mille Lacs Reservation's original boundaries therefore remain intact.

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Respectfully submitted,

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