UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Mille Lacs Band of Ojibwe, et al.,

Plaintiffs,

v.

County of Mille Lacs, et al.,

Defendants.

Court File No. 17-cv-05155 (SRN-LIB)

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON RESERVATION CESSION

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

Statutes

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

Other Authorities

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

INTRODUCTION

The Treaty with the Chippewa, 1855, 10 Stat. 1165, set aside six reservations for the Mississippi Chippewa Tribe. One of these reservations was located in four-fractional townships on the southern shore of Lake Mille Lac. The issue for Mille Lacs County, and especially those who live within those townships, is whether that 1855 reservation still encompasses those townships.

Present day federal Indian policy makes reservation status a critical issue to many in Mille Lacs County, for much can turn on whether one resides or does business within what the Mille Lacs Band of Ojibwe ("Band") now claims is its reservation. This question is real, not abstract. While the scope of an Indian tribe's authority to regulate nonmembers may be open to debate and subject to the vagaries of future congressional initiatives, a tribe's power to control who can even enter a reservation is still largely undefined. In 2020, when Covid-19 first surged through this country, one Lakota Tribe blocked access to their reservation and sued the federal government to prevent it from interfering. *See Cheyenne River Tribe v. Trump*, 20-cv-1709 (D.D.C.)(complaint filed June 23, 2020). The Band itself has an ordinance asserting the right "to exclude certain persons from territories under the jurisdiction of the Non-Removable Mille Lacs Band of Chippewa Indians." 2 Mille Lacs Band Stat. Ann §3001(a), a power that the Band

asserts includes non-members. *See Mille Lacs Band of Ojibwe Indians v. Williams*, No. 11-App 06, Slip Op. at 5-6.[1]

The reservation created by the 1855 Treaty was disestablished, first, by a treaty in 1863, again by treaty in 1864, again by a treaty in 1867, and finally, by the 1889 Nelson Act. Moreover, the Mille Lacs Band successfully sued for compensation for what rights they relinquished through the Nelson Act. But the plain language of these treaties and the Nelson Act agreement—confirmed in 1913 and again in 1926 by the Supreme Court—leave no doubt on the issue.

The settled expectations of the vast majority of Mille Lacs County residents is that the reservation created by the 1855 Treaty with the Chippewa has long been disestablished. Supreme Court precedent shows the 1855 reservation no longer exists, and the Band's regulatory authority is confined to lands which the United States holds in trust for them or which the Band owns in fee. This is how the County and local residents and even Band members have long considered the matter. It was also until recently the settled position of the State of Minnesota. The Defendants accordingly seek summary judgment declaring the 1855 reservation disestablished.

STATEMENT OF UNDISPUTED FACTS

The land over which the Mille Lacs Band of Ojibwe asserts reservation rights was the home of the Dakota and the Cheyenne when French explorers arrived in the late seventeenth century. Greysolon Duluth arrived at Mille Lacs in

[1] The Opinion is attached at Declaration of Courtney Carter Ex. 1 ("Ex. 1").

1679, and there, on the southwest side of the lake, found a large Dakota village, Kathio, where no Frenchman had ever been.[2] The following year, 1680, Father Hennepin arrived and met the Dakota and the Cheyenne, whose villages were among the Dakota's.[3] The Ojibwe then drove the Dakota and Cheyenne out of Mille Lacs in the Battle of Kathio. [4]

William W. Warren, a half-blood Ojibwe who was the tribe's earliest historian, first chronicled their origins in his 1852 narrative, which was published in 1885 as History of the Ojibway People by the Minnesota Historical Society. Recounting generations of Ojibwe oral history he learned from tribal elders, Warren wrote that, "Through close inquiry and study of their vague figurative traditions, we have discovered that the Ojibways have attained to their present geographical position, nearly in the center of the North American continent, from the shores of the Atlantic Ocean, about the Gulf of the St. Lawrence River."[5]

In March 1824, the War Department established the Bureau of Indian Affairs and made it responsible for all of the Indian agencies.[6] In 1832 Congress formally created the position of Commissioner of Indian Affairs to oversee the growing bureaucracy,[7] and in 1849 the Bureau of Indian Affairs was transferred

[2] Ex. 2 at 3.
[3] Ex. 3 at 15.
[4] Ex. 4, at 20–23; Ex. 3, at 18; Ex. 5 at 8.
[5] Ex. 6, at 76–77.
[6] *See* Ex. 7.
[7] Ex. 8.

to the U.S. Department of the Interior.[8] As for the land itself, it was first incorporated into the U.S. as the Wisconsin Territory in July 1836, but after the Iowa Territory split off in 1838 and the eastern portion became the state of Wisconsin in 1848, the western part was incorporated as the Minnesota Territory in March 1849.[9]

A. The 1837 Treaty

Wisconsin Territorial Governor Henry Dodge negotiated this treaty from July 20 to July 29, 1837, at St. Peters (now present day Mendota, Minnesota).[10] In the Treaty of St. Peters, the U.S. received a 12-million-acre land cession in exchange for twenty years' worth of annuities, goods, blacksmithing tools, and other provisions. In addition to that consideration, the Ojibwe were promised usufructory rights of hunting, fishing, and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded, as written in Article 5, "during the pleasure of the President of the United States."[11] The Mille Lacs Band was a signatory to this treaty.[12]

Immigration greatly diversified the ceded territory, and by the 1850 Census, more than 6,000 white settlers had arrived.[13]

---

[8] Ex. 9.
[9] Ex. 10.
[10] Ex. 11.
[11] Ex. 11; Ex. 5, at 10-11.
[12] Ex. 11.
[13] Ex. 5, at 11; Ex. 12.

B. 1855 Treaty creates a reservation

In 1855, Commissioner of Indian Affairs George Manypenny invited several chiefs of the Mississippi, Pillager, and Lake Winnibigoshish Bands of the Ojibwe, including the Mille Lacs Band, to meet in Washington to negotiate a new treaty for the purchase of additional Ojibwe land by the U.S. and the creation of reservations conducive to providing services and protection and promoting the Indians' "civilization."[14] These negotiations would, among other things, concentrate the scattered bands of Ojibwe on reserves while buying and opening new lands in Minnesota for non-Indian settlement and use.[15]

The Ojibwe delegation first met with Manypenny in Washington on February 12, 1855. Former trader and now territorial delegate Henry Rice, who had enjoyed a long and mutually beneficial relationship with the Ojibwes, assisted in the negotiations on their behalf. Ten days later, on February 22, the Ojibwes signed what became known as the Treaty of Washington of 1855.[16] Commissioner Manypenny signed for the U.S. Government, Ojibwe signatories included Bagonegiizhig, or Hole-in-the-Day, and Shaboshkung.[17] All in all, the U.S. promised to provide the Ojibwes with nine reservations in the overall treaty, with the Pillagers gaining theirs at Cass Lake, Leech Lake, and Lake

[14] Ex. 5 at 13 (citing Ex. 13, Gorman to Commissioner of Indian Affairs, 16 February 1855, Roll 150 (Chippewa Agency, 1854–1855), Microfilm Number M234 (Letters Received by the Office of Indian Affairs, 1824–1881), RG 75, NARA-DC)).
[15] Ex. 5 at 13; Ex. 14.
[16] Ex. 15.
[17] Ex. 16 at 81, 83–97; Ex. 5 at 16.

Winnibigoshish, while the Mississippi Ojibwe took theirs at Gull Lake, Pokegama Lake, Rabbit Lake, Rice Lake, Sandy Lake, and Mille Lacs.[18]

Representing the Gull Lake Band was Bagonegiizhig, or as he was known in English, "Hole-in-the-Day" (the Younger). Charismatic, he was about thirty years old at the time of the treaty and had succeeded his father Hole-in-the-Day (the Elder) when the latter had died in 1847.[19] Another Ojibwe chief from Mille Lacs, Shaboshkung, which in English meant "He that Passeth under Everything," attended the negotiations but did not speak on the record. He signed the treaty, along with fellow Mille Lacs chief Petud-Dunce.[20]

C. The Dakota War of 1862

The Minnesota Territory achieved statehood in May 1858, becoming the 32nd state in the Union.[21] Three years later the U.S. Civil War began. Then, in August, 1862, the Dakotas began a six-week campaign to drive out white settlers, following crop failures on their reservations and a delay in annuity payments resulting from the Civil War.[22] Corruption and incompetence in the Upper and Lower Sioux agencies exacerbated their desperate circumstances. As Dakota war parties ranged up and down the center of the state, committing numerous

[18] Ex. 15.
[19] Ex. 17 at 193–203; Ex. 5 at 16.
[20] Ex. 15.
[21] Ex. 18.
[22] Ex. 5 at 18; Ex. 19.

atrocities, those settlers who survived the initial onslaught fled to Forts Ridgley and Ripley and other military posts for protection.[23]

Simultaneous with the Dakota conflict, Ojibwe chief Hole-in-the-Day (the Younger) of the Gull Lake Band organized a group of warriors to launch his own war against the white settlers in the Upper Mississippi Valley.[24] Gull Lake chief Gwiiwizhenzhish (Bad Boy), who was a signatory of the 1855 treaty and moved to Mille Lacs after 1862, later reported that "Hole-in-the-Day's headman came to me and told me that Hole-in-the-Day was about to make a treaty with the Sioux, and that they were to fight the whites together…Afterward, I met Hole-in-the-Day and had a talk with him. He said … 'I want your assistance in my undertaking.' He told me they were going to attack the fort [Ripley] and then fall back to the British possessions, and then get the Indians up there to help us."[25]

Hole-in-the-Day then plotted to massacre the garrison, refugees, and government officials barricaded at Fort Ripley, which at that time also included Commissioner of Indian Affairs, William Dole.[26] But an Indian missionary tipped off the both Mille Lacs chiefs and the soldiers at Fort Ripley that Hole-in-the-Day was coming with murderous intent. The Mille Lacs chiefs, worried that they would be blamed for Hole-in-the-Day's attack, immediately sent over a hundred

[23] Ex. 19 at 44–45; Ex. 5 at 18.
[24] Ex. 5 at 19.
[25] Ex. 16 at 128; Ex. 5 at 20.
[26] Ex. 5 at 21; Ex. 16 at 135; Ex. 20 at 220.

of the Band's warriors to protect Fort Ripley and nearby settlements and trading posts.[27]

The Mille Lacs reinforcements worked; Hole-in-the-Day's attack was averted. Commissioner Dole reported, "I feel confident that this diversion of nearly one-half the followers upon whom Hole-in-the-Day doubtless relied, went far in enabling us finally to effect a settlement of the Chippewa difficulties without a resort to arms."[28]

Not long afterwards, the state militia under Henry Sibley rebounded from the Indian onslaught, and federal troops arrived to inflict the first defeats on Little Crow's warriors in mid-September. Dakota resolve soon collapsed, and by October most of the Indians had surrendered, fled, been confined to internment camps, or removed from Minnesota. Estimates of the number of whites altogether killed by the Dakota varied; President Lincoln told Congress:

> In the month of August last the Sioux Indians in Minnesota attacked the settlements in their vicinity with extreme ferocity, killing indiscriminately men, women, and children. This attack was wholly unexpected, and therefore no means of defense had been prodded. It is estimated that not less than 800 persons were killed by the Indians, and a large amount of property was destroyed…The State of Minnesota has suffered great injury from this Indian war. A large portion of her territory has been depopulated, and a severe loss has been sustained by the destruction of property.[29]

[27] Ex. 5 at 21-22; Ex. 16 at 135.
[28] Ex. 20 at 17; Ex. 5 at 23.
[29] Ex. 21; Ex. 5 at 24.

D. In 1863 the government opens negotiations to consolidate the Chippewa band at a new reservation.

In light of Hole-in-the-Day's treachery and planned massacre at Fort Ripley, Congress and the Lincoln Administration decided to accelerate removal of the Ojibwe bands to a new reservation, to protect them from violent retaliation by embittered non-Indian settlers, even though most of the Mille Lacs Band had remained loyal to the U.S.[30]

In response, Mille Lacs Chief Shaboshkung and other chiefs visited Washington, DC to negotiate directly with the Secretary of the Interior and the Commissioner of Indian Affairs.[31]

The Ojibwe bands included those from Gull Lake, Rabbit Lake, Sandy Lake, Rice Lake, Cass Lake, and Mille Lacs. Shaboshkung led the Mille Lacs Band during the ensuing negotiations, but Hole-in-the-Day, lying low in the aftermath of the collapse of his uprising and the Dakota hangings, did not appear, remaining instead in Minnesota.[32]

In Washington, Mille Lacs Chief Shaboshkung took the lead for the Indians, while Secretary Usher and Commissioner Dole represented the government.[33] Commissioner Dole focused on the need for separation by saying:

---

[30] Ex. 5 at 26; Ex. 22.
[31] Ex. 5 at 27-28; Ex. 22, part 2, Shaboshkung 2/27 interview.
[32] Ex. 5 at 28; Ex. 16 at 150-51.
[33] Ex. 5 at 28; Ex. 22, part 3, 3/5 interviews.

> Before you left home you must have all been well satisfied that you could not remain on your present reservations—that the difficulties that the Sioux have had with the whites—together with the difficulty that some of you have had with the settlement[s] render it necessary that you should have a new treaty with the Government.[34]

Shaboshkung opposed removal and the parties reached an impasse.[35] Minnesota Senator Henry Rice had just completed his Senate term and agreed to join the negotiations.[36] As he had done in 1855, Rice then engaged in private negotiations with the Ojibwe delegation without a clerk present to write down what was said. No record of those discussions was apparently kept or has survived in official government records at the National Archives, except the notation that "The Indians…held a private consultation with Senator Rice at the office of the Secretary of the Interior."[37] When he and the Ojibwes emerged from their closed-door meeting, they had an agreement in hand, which he spent the next few days drafting into the formal Treaty of March 11, 1863, with the Chippewa of the Mississippi and the Pillager and Lake Winnibigoshish Bands. Under the terms of its fourteen articles, the Ojibwes sold the Mille Lacs, Gull Lake, Sandy Lake, Rabbit Lake, Pokegama Lake, and Rice Lake Reservations to the U.S. in exchange for a new reservation, tentatively planned at Leech Lake but ultimately established at White Earth, with significant assistance from the Bureau of Indian Affairs.[38]

---

[34] Ex. 5 at 30; Ex. 22 at 1.
[35] Ex. 5 at 30-31; Ex. 22, Treaty Journal, part 3, 3/5 Interviews.
[36] Ex. 5 at 32; Ex. 22 at 18.
[37] Ex. 5 at 33; Ex. 22 at 18.
[38] Ex. 5 at 33.

The explicit language of cession is found in Article 1 of this treaty:

> The reservations known as Gull Lake, Mille Lac, Sandy Lake, Rabbit Lake, Pokagomin Lake, and Rice Lake, as described in the second clause of the second article of the treaty with the Chippewas of the 22d February, 1855, are hereby ceded to the United States, excepting one half section of land, including the mission buildings at Gull Lake, which is hereby granted in fee simple to the Reverend John Johnson, missionary.[39]

Despite these cessions, the Mille Lacs were given the right to be free from compelled removal in Article 12:

> 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.[40]

Shaboshkung and other chiefs signed the treaty for the Mille Lacs Band, and after Senate ratification, it was proclaimed by President Lincoln.[41] The Mille Lacs Band had ceded their reservation and secured a promise that they would not be compelled to leave Lake Mille Lacs.

But almost immediately, there was dissatisfaction with the treaty. By October, when several chiefs of the Mississippi bands met with Ramsey, who had succeeded Rice as U.S. Senator, Naygwonabe of the Mille Lacs Band reported: "There is great disaffections at Mille Lac in regard to the late Treaty. The Treaty

---

[39] Ex. 23; Reverend John Johnson was also known as Enmegahbowh; it was he who disclosed Hole-in-the-Day's plan to attack Fort Ripley. Ex. 16 at 135.
[40] Ex. 23.
[41] Ex. 5 at 34; Ex. 23 at 1252.

made at Washington has made constant trouble among us. If I could tear it to pieces, I would do so for that reason, if for no other."[42]

E. In 1864 Hole-in-the-Day negotiates a new treaty.

The next year, 1864, Hole-in-the-Day, and one other Ojibwe chief, Mis-Que-Dace (Turtle) of Sandy Lake, travelled to Washington D.C. to re-negotiate the 1863 treaty.[43] Dole and Superintendent Thompson sat down with Hole-in-the-Day and Mis-Que-Dace to negotiate what became the Treaty of May 7, 1864, with the Chippewa, Mississippi, Pillager, and Lake Winnibigoshish Bands.[44] The document was effectively identical to the first treaty, with a few exceptions, *infra* Section II.C. The Senate ultimately took up the treaty the following February and ratified it with amendments on February 9, 1865.[45] President Lincoln proclaimed the treaty on March 20, 1865.[46]

F. In 1867 the White Earth Reservation was created.

The reservation at Leech Lake created in 1863 and expanded in 1864 proved to have insufficient resources to sustain the populations who were to move there. Various tribal leaders met in Washington and agreed to cede their lands reserved to them by the 1864 treaty and remove to a new 36 township

[42] Ex. 5 at 37; Ex. 24 at 30-31; Ex. 25 at 4.
[43] Ex. 5 at 39; Ex. 26.
[44] Ex. 5 at 39; Ex. 26.
[45] Ex. 26.
[46] Ex. 5 at 40; Ex. 26.

reservation that became the White Earth Reservation.[47] The Pillager, Cass Lake and Lake Winnibigoshish Bands retained their lands, however.[48]

G. Timber interests and settlers seek to enter the former reservation.

As white settlement moved ever closer to Mille Lacs toward the end of the 1860s, friction grew between the Ojibwes residing on their former reservation and non-Indians entering the region.[49] Accusations were made from time to time that the Mille Lacs Band had violated the good-conduct requirement of Article 12, but investigations consistently found the complaints too insufficient to justify the Bands' forced removal.[50]

Questions of title to lands within the ceded reservation began to arise. Until this question was resolved, the Indian Agent asked the Commissioner that the lands not be thrown open to entry.[51] That agent found that the Land Office in Taylors Falls had allowed the former reservation to be preempted and covered with scrip without any authorization from the General Land Office.[52] The entries had been filed under color of law after Minnesota's surveyor general had ordered a survey of the ceded land the previous year.

When the General Land Office Commissioner Drummond learned of this, he informed the Register and Receiver at Taylors Falls:

---

[47] Ex. 27.
[48] *Id.*
[49] Ex. 5 at 43; Exs. 28-32.
[50] Ex. 5 at 44; Exs. 28-32.
[51] Ex. 5 at 45; Ex. 33.
[52] Ex. 5 at 46; Ex. 34.

> "that these lands are still occupied by the Indians and are not subject to disposal, and you are requested to give public notice by advertisement in a newspaper of general circulation in that neighborhood of the above fact and also that all settlements and entries thereon are illegal and will not be recognized by this office."[53]

In the meantime, the Mille Lacs Band remained in a tenuous state without a reservation but yet refusing to leave for Leech Lake, as was permitted under Article 12. Nevertheless, the Bureau of Indian Affairs' position was that the Mille Lacs reservation had been ceded and the Band would eventually have to move. In his 1872 Annual Report to Congress, Commissioner of Indian Affairs Francis A. Walker commented:

> The Mille Lac Chippewas, who continue to occupy the lands ceded by them in 1863, with reservation of the right to live thereon during good behavior, are indisposed to leave their old home for the new one designed for them on the White Earth reservation. Only about twenty-five have thus far been induced to remove.[54]

Walker's successor, former agent Edward P. Smith, wrote similarly in his 1873 report to Congress, noting:

> "The Mille Lac band of Chippewas in Minnesota remains in its anomalous position. They have sold their reservation, retaining a right to occupy it during good behavior. With this title to the soil it is not deemed expedient to attempt permanent improvements at Mille Lac, unless a title to the reservation can be returned to them on condition that they surrender to Government all moneys acquired in consideration of their cession of the Mille Lac reservation. If this cannot be done, their Indians should be notified that they belong at White Earth, and be required to remove. In its present location, on

---

[53] Ex. 5 at 47; Ex. 35. The Register of a local land office accepted filings, the Receiver the filing fees or cash paid for land purchases. The two officers acted as a tribunal to decide disputes. *See* Ex. 36 at 379, 382-83.

[54] Ex. 5 at 48; Ex. 37 at 23.

> its present tenure, nothing can be done looking toward their civilization."[55]

The option of granting title to the Mille Lacs was discussed during a council between Mille Lacs leaders and Commissioner Smith held in Washington in 1875.[56] There, the commissioner pointed to the written agreement of 1863, which included the removal compromise signed by Shaboshkung, who said that "he knew what was on the paper" and that "we did sign the paper giving our land away because the others wanted us to sign with them."[57] No treaty was signed at the 1875 council.

H. The Folsom Decision.

The next year, 1876, Frank Folsom claimed title to land on the ceded reservation. In examining the claim and the history of these lands since execution of the 1863 and 1864 treaties, Secretary of the Interior Zachariah T. Chandler concluded:

> Under this proviso, it is true that, so long as said Indians do not interfere with the persons or property of the whites, they cannot be compelled to remove; but it by no means gives them an exclusive right to the lands, nor does it, in my judgment, exclude said lands from sale or disposal by the United States.[58]

Despite his interpretation of the treaties, Chandler did not authorize entries on these lands immediately and held all existing claims in status quo.[59]

---

[55] Ex. 5 at 48; Ex. 38 at 12.
[56] Ex. 5 at 49; Ex. 39 at 12.
[57] Ex. 5 at 49; Ex. 40 at 5.
[58] Ex. 5 at 49; Ex. 41 at 5.
[59] Ex. 5 at 50; Ex. 41 at 6.

In 1878 the new Secretary of the Interior, Carl Schurz, reviewed his predecessor's policy regarding entries and claims on the ceded Mille Lacs reservation. Unwilling to run the risk of sanctioning direct confrontation between settlers and the Mille Lacs, Schurz instructed the General Land Office to allow no filings or entries on these lands "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 Lacs Reservation, situated in the State of Minnesota, shall have been determined."[60]

I. In 1889 Congress passed the Nelson Act.

Throughout the 1880s confusion remained regarding the Mille Lacs Bands' ceded reservation and their right to remain on the land.[61] Delegations in 1886 and in 1887 to Mille Lacs failed to resolve the confusion; the Mille Lacs Band would not agree to remove and denied having ceded their reservation.[62]

Despite persistence, the Mille Lacs Band's ability to survive at the former reservation at Mille Lacs Lake was becoming increasingly difficult.[63] Federal Indian policy was moving away from the communal reservation system in favor of allotment in severalty and eventual assimilation. In 1887 Congress passed the General Allotment Act which authorized the president to allot land in severalty to Indians then on reservations.[64] Any unallotted "surplus" reservation lands would

[60] Ex. 5 at 51; Ex. 42 at 13-14.
[61] Ex. 5 at 52-56.
[62] Ex. 5 at 57; Exs. 43-44.
[63] Ex. 5 at 57-58.
[64] Ex. 5 at 59; Ex. 44.

be opened for non-Indian settlement and sold, with the proceeds going into a trust fund to be managed by the Department of the Interior on the Indians' behalf.[65]

Congressman Knute Nelson of Minnesota's 5th District, which encompassed the former Mille Lacs reservation, introduced the necessary allotment bill for Minnesota in the House of Representatives on January 4, 1888.[66] The ostensible purpose to the Nelson Act was to consolidate all Minnesota Chippewa on the White Earth or Red Lake reservations. But Article 3 of the Nelson Act allowed individual tribal members to take their allotments on the reservation where they then lived, which worked directly against consolidation.[67]

---

[65] Ex. 5 at 59-60; Ex. 44.
[66] Ex. 45 at 219; Ex. 5 at 60-61.
[67] The provision allowing individual Band members to take allotments on reservations that were being ceded came up during debate on the Nelson Act. Alabama Representative James E. Cobb offered that provision during floor debate on the act:

> Mr. COBB. I now present a further amendment.
> The Clerk read as follows:
> Add at the end of section 3:
> *Provided further*, That any of the Indians residing on any of said reservations may, in his discretion, take his allotment in severalty under this net on the reservation where he lives at the time the removal herein provided for is effected, instead of being removed to and taking such allotment on the White Earth reservation.
> Mr. HOLMAN. I hope that amendment will be accepted.
> Mr. NELSON. I have no objection to it.
> The amendment was adopted.

19 Ex. 46, Cong. Rec. 1887 (Mar. 8, 1888). This language remained in the final bill that passed on January 14, 1889. As historian William Folwell noted in his

In 1889, President Cleveland signed the Nelson Act into law. Its stated purpose was to establish a process "for the complete cession and relinquishment in writing of all of [the Chippewa Indians in the State of Minnesota's] title and interest in and to all the reservations of said Indians in the State of Minnesota, except the White Earth and Red Lake Reservations."[68]

President Harrison implemented the Nelson Act on February 26, 1889, by appointing Senator Henry Rice, Catholic Bishop Martin Marty, and Joseph Whiting to conduct the negotiations authorized by the Nelson Act and secure the Ojibwes' agreement to remove to White Earth.[69] Rice, now 73 years old and in private business, was appointed chairman of the so-called "Chippewa Commission" based on his prior experience with the Ojibwes and their treaties. On May 24, Secretary of the Interior John Oberly issued specific instructions to Rice and the other commissioners to negotiate the "full cession and relinquishment to the United States of the Indian title and interest in and to the several reservation…."[70]

Concerning the Mille Lacs reservation, Oberly recounted:

> This reservation was ceded to the United States by the treaty of May 7, 1864 (13 Stat. 693).
>
> The 12th article of said treaty provided as follow [sic]: "that owing to the heretofore good conduct of the Mille Lacs Indians, they shall not be compelled to remove so long as they shall not in any way interfere

---

discussion of the amendment, the "logical effect, to nullify concentration, was apparently not perceived." Ex. 48 at 222.

[68] Ex. 47.

[69] Ex. 5 at 63; Ex. 48.

[70] Ex. 5 at 63-64; Ex. 49.

> with or in any manner molest the persons or property of the whites." The Mille Lacs have never forfeited their right of occupancy, and still reside on the reservation.[71]

Oberly was thus willing to concede that the Mille Lacs' occupancy of the ceded reservation, which the Interior Department had previously viewed as a "favor" granted to the band in 1863 and 1864, had become a "right."

Henry Rice brought this concession to Shaboshkung and the Mille Lacs Band when the council convened along the shores of Mille Lacs Lake on October 2, 1889. In affirming that the Mille Lacs had a right to stay on the ceded lands based on their continued good behavior, Rice was assuring them that they were under no threat of forced removal. Oberly and Rice appeared to allow that the Mille Lacs held an interest, termed a "right of occupancy," in some of the ceded lands. It was this limited and sole remaining interest in the ceded lands that the Mille Lacs ultimately relinquished in accordance with the Nelson Act.

Negotiations lasted for days. When the issue of allotments arose, Rice deviated from Oberly's instructions as to where the Mille Lacs had to select their allotments, as Oberly wanted them to move to White Earth. Specifically, when Muhengaunce asked him if Band members could take allotments where they now resided, Rice replied that "There is nothing now to prevent your taking allotments that are not claimed by others or occupied."[72] Rice also explained that the Mille Lacs could only take allotments on the agricultural lands and not the

[71] Ex. 5 at 64; Ex. 49 at 16.
[72] Ex. 5 at 67-68; Ex. 50 at 168.

pine lands.[73] Shaboshkung, Muhengaunce, Monzomaunay, Wauweyaycumig, and the other chiefs announced that they understood that they could take their allotments on hitherto unpatented land at Mille Lacs Lake and that they were thus satisfied with relinquishing their rights under the Article 12 proviso.[74]

After considering the Chippewa Commission's report, President Harrison urged Congress to quickly authorize the additional funds necessary to complete the work contemplated by Sections 4, 5, and 6 of the Nelson Act and make the allotments.[75] Harrison then terminated the Chippewa Commission, by order through the Secretary of the Interior, on April 12, 1890.[76]

Despite Rice's promise that the Mille Lacs Indians could take their allotments on un-entered parcels at Mille Lac, Interior Department officials implementing the Nelson Act proceeded with actions that opened the remainder of the ceded reservation to non-Indian settlement and ownership, precluded the Mille Lacs from obtaining allotments or other form of title on all but a small portion of the ceded reservation, and continued to promote the removal of the Mille Lacs to White Earth.[77]

J. Settlers and timber interest file on land within ceded reservation.

Once the terms of the October 1889 agreement became widely known, and despite Secretary of the Interior John Noble's public notice of March 5, 1890,

[73] Ex. 5 at 68; Ex. 50 at 168, 172-73.
[74] Ex. 5 at 69; Ex. 50.
[75] Ex. 5 at 71-72; Ex. 50 at 2.
[76] Ex. 5 at 72; Ex. 51.
[77] Ex. 5 at 73; Ex. 52.

banning non-Indian access until the removal and allotment process was completed, a land rush by non- Indian settlers and business interests ensued which came quickly into conflict with Mille Lacs' demands for their allotments at the ceded reservation.[78] Secretary Noble concluded that the Mille Lacs had no title or claim to the ceded reservation, having sold it to the U.S. Government in 1863. He therefore directed the Commissioner of the General Land Office on January 9, 1891, to proceed to patent these unpatented claims in accordance with the terms of Section 6 of the Nelson Act. In so doing the Secretary relied on the earlier understanding of Article 12 of the 1863 and 1864 treaties as a "favor" or license to further determine that this interest on the land ". . . did not amount in effect to a 'reservation' of these lands upon which the Mille Lacs could take allotments..."[79] One corollary of Secretary Noble's reasoning was that not only did the Mille Lacs not have any claim to take allotments on those particular lands subject to Section 6 of the Nelson Act, but since none of the ceded lands of the historic 1855 reservation constituted a "reservation" as the term was used in the Nelson Act, the Mille Lacs would not be allowed to take allotments under Section 3 of the Nelson Act on even the remaining ceded lands.[80] Summing up the Bureau of Indian Affairs' position from that point forth, White Earth Indian Agent Benjamin P. Shuler noted in his annual report that "The Mille Lac

[78] Ex. 5 at 75; Ex. 52.
[79] Ex. 53; Ex. 5 at 76.
[80] Ex. 5 at 76; Ex. 53.

Reservation having been opened up for settlement by the honorable Secretary of the Interior, is no longer held to be a reservation."[81]

Subsequently, the government's position that the Mille Lacs Indians were now without any reservation whatsoever, except at White Earth, was clear, and the government repeatedly described the Mille Lacs Band those or they "who have no reservation."[82]

Three years after the Nelson Act had been enacted, a dispute arose over whether the allotments at White Earth should be 160 acres, which was the number permitted under the text of the General Allotment Act when the Nelson Act became law. But in 1891 Congress reduced allotments, and the people seeking allotments at White Earth objected to the smaller number.

In correspondence to Secretary Noble regarding this dispute, Commissioner of Indian Affairs Morgan noted that "The population of the several reservations (except the Red Lake Reservation, the Red Lake Indians being required to take their allotments on that reservation,) is as follows:

Mississippi Chippewas at White Earth	1,202
Mississippi Chippewas of Gull Lake at White Earth	277
Mississippi Chippewas at White Oak Points	656
Mille Lac Band of Mississippi Chippewas (who have no reservation)	973
Total Mississippi Chippewas	3,108

> "As will be seen by the above table," Morgan added, "the total population now on the White Earth Reservation, including the Mille Lacs, who have no reservation, is 3,339. This office has information

[81] Ex. 54 at 260.
[82] Ex. 5 at 78; Ex. 48.

> from the Chippewa Commission to the effect that but few (if any) Indians will remove from the reservations where they now are and take allotments on the White Earth Reservation. This does not apply to the Mille Lacs as they have no reservation."[83]

Chippewa Commission chair Darwin S. Hall referred to the Mille Lacs Band's "so-called reservation."[84]

The Mille Lacs Band complained, and Congress passed a joint resolution dated December 19, 1893, "for the protection of those parties who have heretofore been allowed to make entries for lands within the former Mille Lac Indian reservation in Minnesota."[85]

Many Mille Lacs Band Members moved to White Earth, but about 900 refused to leave the ceded reservation.[86] On May 27, 1898, Congress passed another joint resolution that finally opened the ceded reservation for settlement under the public land laws, except for a tract of land to serve as a "perpetual" burial ground for the Mille Lacs Indians.[87]

K. In 1902, the Band agreed to move to White Earth.

On May 27, 1902, Congress passed legislation that appropriated $40,000 for payments to the remaining Indians at Mille Lacs as reimbursement for their improvements.[88] Under the new law, though, they could not receive their money until after they removed to White Earth or some other authorized reservation.

---

[83] Ex. 48.
[84] Ex. 5 at 78; Ex. 48.
[85] Ex. 56 at 472.
[86] Ex. 5 at 81-82; Ex. 57.
[87] Ex. 5 at 82; Ex. 58.
[88] Ex. 59 at 213.

The Bureau of Indian Affairs sent one of its toughest and most experienced Indian inspectors, James McLaughlin, to Mille Lacs.[89]

McLaughlin explained to the Mille Lacs Band "you have no claim to the lands upon this reservation; you have ceded all that by your agreement of 1889."[90] The Band's chief all but called Rice a liar for telling the Band its members could take allotments on the former reservation.[91] McLaughlin stated "to do justice to Governor Rice, whom I knew very well, I think he must have misunderstood the act, and did not interpret it properly when he made some of the statements to you that he did, as shown by the minutes of his councils."[92]

Eventually, the Band agreed to remove in exchange for $40,000 for improvements that had been made on the land.[93] Of that amount, the Band directed the government to distribute more than 16% to the Band's attorneys, Gus Beaulieu and Daniel Henderson, who represented them in the negotiations.[94]

Having secured the Band's agreement to remove even after it learned that Henry Rice's promises at the October 1889 were false or mistaken, McLaughlin reported to the Secretary of the Interior that he believed "the approval of the agreement will put an end to the long drawn-out Mille Lac controversy."[95] Likewise, Indian Agent Michelet reported to the Commissioner of Indian Affairs,

---

[89] Ex. 5 at 83-84; Ex. 60.
[90] Ex. 5 at 84-85; Ex. 61 at 3.
[91] Ex. 5 at 85; Ex. 61 at 8.
[92] Ex. 5 at 86; Ex. 61 at 32-33.
[93] Ex. 5 at 88-89; Ex. 61 at 64-65.
[94] Ex. 5 at 89; Ex. 60.
[95] Ex. 5 at 90; Ex. 60 at 2721.

in reference to "the Mille Lac Indians occupying the former Mille Lac Reservation" that these negotiations "bids to be the close of the long, drawn out Mille Lac controversy."[96]

Mille Lacs chief Wahweyaycumig moved to White Earth along with several dozen others.[97] But despite the 1902 agreement, some Band members refused to leave the ceded reservation. Over the next eight years, the numbers of Mille Lac "non-removal" Indians at the former reservation steadily dropped while the numbers who removed to White Earth proportionally increased.[98] See *infra* Section IV.C.

L. Subsequent litigation over disposition of lands within the 1855 reservation

When the Mille Lacs Band filed suit under the Special Authorizing Act of 1909 (35 Stat. 619), seeking damages for the opening of the Mille Lacs reservation to settlement under the general land laws, the Mille Lacs Band did not take the position that the Mille Lacs reservation continued to exist. Instead, it took the exact opposition position, that it was entitled to compensation for all of the lands in the former Mille Lacs reservation because it had been extinguished as an Indian reservation and had been terminated.

> [. . .] [T]he United States, through the Interior Department, refused to permit any Mille Lac Indian to take allotment on such reservation; the entire reservation was open to public settlement; such reservation was extinguished as an Indian reservation; all the rights of the Mille Lac in and to such reservation were denied...The Mille

[96] Ex. 5 at 91; Ex. 62 at 224-25.
[97] Ex. 5 at 91-92; Ex. 63.
[98] Ex. 64, Report of Dr. Matt Nelson at 12-14.

> Lacs were deprived of their reservation as a home and for every purpose whatsoever.
>
> Such reservation was practically taken from the Mille Lacs on December 19, 1893, by the passage by Congress of the Joint Resolution of that date.
>
> [. . .] The land was taken by others with the consent of the government, the Mille Lacs lost their reservation.
>
> We say *because of this*, a right of action exists in favor of them against the United States under the Act of February 15, 1909.
>
> [. . .] The United States did not fulfill its agreement, did not carry out the provisions of the Act of January 14, 1889, in reference to the Mille Lac reservation; but, suffered entries to be made upon the lands of such reservations [sic], denied to the Mille Lacs the right of allotment upon such reservation, did not classify the lands of such reservation into "pine lands" and "agricultural lands," did not estimate the pine timber on the pine lands, did not sell the pine lands nor the agricultural lands, but finally extinguished the reservation, took the entire reservation away from the Mille Lacs.[99]

The Band also asserted as a conclusion of law, the court should hold:

> That by the Act of Congress of December 19, 1893, the Mille Lac Reservation was extinguished, it was opened to public settlement under the general land laws of the United States; the entries thereon made prior to such Act were legalized, and the Mille Lac Reservation as an Indian reservation ceased to exist.[100]

The United States took the same position before the Court of Claims, except it argued that the Mille Lacs reservation had been ceded under the 1864 Treaty and therefore no compensation was due under the Nelson Act.[101]

---

[99] *See* Ex. 65 at 433, 462, 481.
[100] Ex. 65 at 507.
[101] Ex. 66 at 70-89, 101 ("As the former Mille Lac Reservation was not *ceded* under the act of 1889, it could not be surveyed, divided up, or classified as pine or agricultural lands, and it was therefore not intended to come within the provisions of the act.")

The Court of Claims found that the Nelson Act of 1889 "divested" the Band of its "Indian title" to the 1855 Treaty area lands and ordered compensation for the losses due to the Band under the Nelson Act. *Mille Lac Band of Chippewas v. U.S.*, 47 Ct. Cl. 415, 454 (1912).

The Supreme Court reversed in part the monetary award the Court of Claims granted, but did not reverse that court's finding that the 1855 Treaty area lands were no longer a reservation. *United States v. Mille Lac Band of Chippewa Indians*, 229 U.S. 498, 499-500 (1913). The Supreme Court emphasized the Band's specific agreement to the terms of the Nelson Act: "The agreement with the Mille Lacs, in addition to embodying a cession and relinquishment of the lands in the White Earth and Red Lake Reservations not required for allotments, contained an express assent to all the provisions of the act of 1889, and *an express relinquishment of the lands in the Mille Lacs Reservation*.... *Id.* (emphasis added). The Supreme Court determined that "that no rights of the Indians were infringed in so disposing of lands embraced in such entries." 229 U.S. at 509.

Then, in *United States v. Minnesota*, 270 U.S. 181 (1926), the Supreme Court re-affirmed that the reservation had been ceded. In that original-jurisdiction case, the United States sued Minnesota to cancel land patents or to recover the proceeds the state received from the sale of allegedly improperly, patented lands. One of the patents the United States sought to cancel was issued in 1871 to swamp lands within the 1855 reservation. *Id.* at 191. That patent was

held valid because the 1855 reservation that was ceded in 1863, was again included in Nelson Act cession. *Id.* at 198-99. The Court's opinion refers to the band remaining on or around the ceded reservation. *Id*. at 197.

Both litigants to that case admitted that the 1855 reservation had been ceded. The United States' complaint alleged:

> Plaintiff further says that the Mille Lac Reservation, being one of the small reservations set apart by the treaty of 1855, remained in the possession, occupancy, and use of the Mille Lac band or group continuously, without change of status, until the treaties of 1863 and 1864-65. By those treaties the Indians ceded that reservation to the United States, with a proviso, however (Art. XII), "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." They remained in possession of their reservation until the act of 1889, claiming a right to its continued occupancy and use so long as they did not molest or interfere with the persons or property of the whites. On the passage of the act of 1889, they again ceded their reservation and expressly assented to the provisions of that act.
>
> It was subsequently decided by the Supreme Court of the United States that the lands thus a second time ceded, except such as were embraced in valid preemption and homestead entries, were subject to disposition for the benefit of the Indians under the act of 1889. United States *v*. Mille Lac Indians, 229 U. S. at 498.[102]

Minnesota's answer admitted these allegations. And until very recently, Minnesota's long-standing position, held through both GOP and DFL administrations, matched that of the treaties of 1863 and 1864, the Nelson Act,

[102] Complaint of United States, II. paras. 1-2, in *United States v. Minnesota*, No. 17 (original jurisdiction) (O.T. 1925, Ex. 113).

and its admission before the Supreme Court: the 1855 reservation had been ceded.[103]

Following the Nelson Act and agreement, in the 1890s, the State of Minnesota asserted its jurisdiction over the former Mille Lacs Reservation. Local units of state government were established including the Townships of Kathio, Isle Harbor and South Harbor, which today comprise all 61,000 acres of the former Mille Lacs reservation.[104] Municipalities were established including the Cities of Isle, Onamia and Wahkon.[105] The state exercised both criminal jurisdiction over tribal members and enforced civil matters including trespass.[106] Since this exercise of state jurisdiction long predated Public Law 280, which took effect in 1953, the state and local units of government including the County, County Attorney and Sheriff would have been "interfering" with tribal sovereignty rights in the decades leading up to 1946 if the former 1855 Reservation remained Indian country.

---

[103] Ex. 67, November 27, 1995 Letter from Governor Arne H. Carlson; letter dated August 9, 1999 from Mike Hatch, Attorney General; letter dated March 30, 2005 from Governor Tim Pawlenty to U.S. Department of Interior; letter dated February 6, 2007 from Attorney General Lori Swanson to Mille Lacs County Attorney; letter dated April 26, 2013 from Governor Mark Dayton to Director of the Office of Tribal Justice within the U.S. Department of Justice; January 21, 2015 letter from Attorney General Swanson to Kevin Washburn, DOI; amicus brief of Minnesota in *County of Mille Lacs v. Benjamin*, App. Dkt. 03-2527.
[104] Ex. 68, Deposition of Bruce M. White, Oct. 16, 2020, at 108-09.
[105] Ex. 5 at 111, Figure 5, and 115, Figure 11.
[106] Ex. 69; Ex. 70; Ex. 71; Ex. 68 at 168.

ARGUMENT

I. Summary Judgment Standard.

Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

II. Through a series of treaties and agreements, the Mille Lacs Band ceded both its 1855 reservation and also its communal privilege to stay within the boundaries of the former 1855 reservation.

In *McGirt v. Oklahoma*, 140 S.Ct. 2452 (2020), the Supreme Court held that the language Congress used in a statute or in a tribal treaty, is the dispositive factor in determining whether an Indian reservation has been disestablished. *McGirt* addressed whether a reservation created in an 1823 treaty with the Creek Nation continued to exist, a question that determined whether a crime had been committed in Indian Country, *see* 18 U.S.C. § 1151, and if so, such that petitioner McGirt could only be prosecuted in federal court. The Court said that the Legislature, either the Senate (for treaties) or the entire Congress (for legislation), is the "only place [to] look." *Id.* at 2462. "This Court long ago held that the Legislature wields significant constitutional authority when it comes to tribal relations, possessing even the authority to breach its own promises and treaties." *Id.*

Respondent State of Oklahoma argued that the Court should apply the three-part test for disestablishment used in *Solem v. Bartlett*, 465 U.S. 463 (1984), which, in addition to the interpreting text of the treaty or law, looked at

contemporaneous events (the second *Solem* part) and subsequent events and demographics (the third *Solem* part). The Court simply rejected that argument, deeming it mistaken.

> When interpreting Congress's 'work in this arena, no less than any other, our charge is usually to ascertain and follow the original meaning of the law before us. *New Prime Inc. v. Oliveira*, 586 U.S. ____, ____, 139 S.Ct. 532, 538-539 (2019). That is the only "step" proper for a court of law. To be sure, if during the course of our work an ambiguous statutory term or phrase emerges, we will sometimes consult contemporaneous usages, customs, and practices to the extent they shed light on the meaning of the language in question at the time of enactment. *Ibid.* But Oklahoma does not point to any ambiguous language in any of the relevant statutes that could plausibly be read as an Act of disestablishment. Nor may a court favor contemporaneous or later practices instead of the laws Congress passed.

140 S. Ct. at 2468.

In short, the plain text of a treaty, or in an agreement between a tribe and the federal government controls. As in *McGirt*, there is no ambiguous language in any of these treaties, statutes or agreements. The plain language of the relevant treaties, statutes and agreements compels the conclusion the 1855 reservation has been disestablished.

A. The 1855 Treaty with the Chippewa created the former Mille Lacs reservation.

Federal Indian policy in the mid-Eighteenth Century evolved from a removal policy, *i.e.*, compelling Indian tribes to move westward to as yet unsettled lands, to a reservation policy, *i.e.*, setting aside a defined tract of land for a particular tribe to occupy. In a series of four treaties beginning in 1855, the

federal government implemented this new policy with respect to the Mississippi Chippewa Indians.[107]

In the Treaty with the Chippewas dated February 22, 1855, 10 Stat. 1165, the federal government set aside several reservations for various bands of Chippewa. In Article 1 of this treaty, the

> Mississippi, Pillager, and Lake Winnibigoshish bands of Chippewa Indians hereby cede, sell, and convey to the United States all their right, title and interest in, and to, the lands now owned and claimed by them, in the territory of Minnesota, and included within the following boundaries: [a metes and bounds description of the ceded lands.]

In exchange for that cession, in Article 2 the federal government provided that:

> There shall be, and hereby is, reserved and set apart, sufficient quantity of land for the permanent homes of said Indians; the lands reserved and set apart, to be in separate tracts, as follows, viz: 'For the Mississippi bands of Chippewa Indians, the first to embrace the following fractional townships, viz: forty-two north of range twenty-five west; forty-two north of range twenty-six west; and forty-two and forty-three north of range twenty-seven west;[108] and also the three is lands in the southern part of Mille Lacs.

The first listed reservation had been adequately surveyed to be described by established survey designations. The remaining five reservations by Rabbit Lake,

---

[107] In 1854, Congress authorized the President to negotiate for the cession of all lands the Chippewa claimed in Wisconsin and Minnesota in exchange for the right to individual allotments. Ex. 72, Act of December 19, 1854, 10 Stat. 598 (ch. 77). In article four the act further provided that: "The laws of the United States and the Territory of Minnesota shall be extended over the Chippewa Territory in Minnesota whenever the same may be ceded, and the same shall cease to be 'Indian country'. . ." *Id.* at 599.

[108] These latter two townships later merged into one, now called Kathio Township.

Gull Lake, Pokagomon (now Pokegama) Lake, Sandy Lake and Rice Lake were described by metes and bounds, as were the Pillager, Cass Lake and Lake Winnibigoshish reservations. Article 2 also authorized the President to make individual allotments within a reservation, but no such allotments were ever made under that Article.

B. In 1863, the Mississippi Chippewa agreed to cede their six reservations.

While the 1855 Treaty set aside six reservations for the "permanent homes" of the Mississippi Chippewa, intervening events led to the cession of those six reservations in exchange for a new reservation and other consideration. As described in detail above, the 1862 Dakota Conflict poisoned relations between white settlers and Native American inhabitants. To minimize the chance for additional conflict, the federal government met with a delegation of Chippewa chiefs and head men to negotiate a new treaty that would relocate the bands to a reservation located around Leech Lake. Specifically, in the Treaty with the Chippewa Indians dated March 11, 1863, 12 Stat. 1249, the Mississippi Chippewa bands agreed as follows:

> Article I. The reservations known as Gull Lake, Mille Lac, Sandy Lake, Rabbit Lake, Pokagomin Lake, and Rice Lake, as described in the second clause of the second article of the treaty with the Chippewas of the 22d February, 1855, are hereby ceded to the United States, excepting one half section of land, including the mission buildings at Gull Lake, which is hereby granted in fee simple to the Reverend John Johnson, missionary.

Article II of the 1863 Treaty then provided for a reservation encompassing lands centered at Leech Lake and surrounding the reservations previously

created for the Pillager and Winnibigoshish bands. The 1863 Treaty provided additional consideration on the form of additional annuity payments (Article III), clearing of land on the new reservation, including the Mille Lacs band (Article IV), and tools and draft animals (Article IV). The 1863 Treaty further provided in Article VII that a board of visitors selected by "the chiefs in council" to witness the payment of annuities and to report annually on these payments.

The 1863 Treaty also recognized that relocation to Leech Lake could not be immediate. Article XII thus provided:

> 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 IV and VI 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:

The Mille Lacs Band held out for additional time to stay where they were living. In 1862, when Hole-in-the-Day threatened Fort Ripley, where Commissioner of Indian Affairs Dole was then present, Mille Lacs Band chiefs and their warriors interceded on behalf of Commissioner Dole, and little came of Hole-in-the-Day's escapade. The resulting final text of Article XII included this proviso, giving the Mille Lacs Band a conditional right to stay:

> *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.

The treaty journal for the 1863 Treaty is silent on the negotiation of this proviso, which was reached in an off-the-record meeting between the Mille Lacs

negotiators and then-Senator Henry Rice, who was apparently well known to the Chippewa leaders, having been part of the 1855 treaty negotiations. As he had done in 1855, Shaboshkung signed the 1863 Treaty.[109] Hole-in-the-Day was not present in 1863 to negotiate with Commissioner Dole, whose life he had threatened the year before.

C. In 1864 Hole-in-the-Day procures a new, but substantially similar treaty.

During the negotiations, some of the Chippewa negotiators objected to the new lands, describing them as inadequate to sustain the population expected to move there.[110] In a letter dated June 7, 1863, Hole-in-the-Day wrote Commissioner Dole and President Lincoln:

> But we are unhappy. A number of the chiefs and headmen of our bands have already lost their lives. The young men are full of discontent, and further troubles are threatened unless something can be done to satisfy them, and young and old are not of one mind.
>
> The cause of this trouble and discontent is the late treaty, negotiated by some of the chiefs and headmen, through Mr. Rice, at Washington. It is a bad treaty for my people, although liberal on the part of the government. It requires many of us to give up good homes for poor ones, the very poorest ones that can be selected in the whole northwest, and yet does not even compensate us by removing my people beyond the reach of whiskey. On the contrary, the whiskey trader would succeed far better there than where we now are. This is wrong.[111]

---

[109] The signature page gives a phonetic variant, but his English name is similar to that listed on the 1855 Treaty.

[110] Ex. 22, part 2, 2/27 interview at 8. The treaty journal quotes Shaboshkung: "I do not know where is the best place to remove us to, but the place you propose, I candidly say it is a country of starvation." The Pillager chiefs agreed.

[111] Ex. 73.

Hole-in-the-Day then proposed a new treaty encompassing some additional land:

> If a treaty were made with the Red Lake Indians, a tract of country of the best character for my people might be secured, without any outlay or expense to the government; say that strip of land lying on the Wild Rice river, between 47° and 48° north latitude, and east of the Red river. There is every advantage of good soil, game, fish, rice, sugar, cranberries, and a healthy climate.

In 1864 Hole-in-the-Day traveled to Washington, D.C. to negotiate another treaty. Accompanying him was another Chippewa chief, Mis-Que-Dace, or Turtle, a Sandy Lake chief. The Treaty with the Chippewa Indians May 7, 1864, 13 Stat. 693, contained identical cession language:

> Article I. The reservations known as Gull Lake Mille Lac, Sandy Lake, Rabbit Lake, Pokagomin Lake, and Rice Lake, as described in the second clause of the second article of the treaty with the Chippewas of the twenty-second of February, 1855, are hereby ceded to the United States, ...

Article I of the 1864 Treaty preserved the grant of a one-half section to the Reverend John Johnson, but added grants in fee to full sections to Hole-in-the-Day, Mis-Que-Dace and Shaboshkung. Article II added a large area on the western side of the new 1863 reservation at Leech Lake as well as land extending to the Red Lake River. This is the additional land Hold-in-the-Day described in his June 1863 letter. [112] In Article III, Hole-in-the-Day obtained a $5,000

[112] The land the 1864 Treaty added: "then in a southwesterly direction to Turtle Lake, thence southwesterly to the head water of Rice River, thence northwesterly along the line of the Red Lake reservation to the mouth of Thief River, thence down the center of the main channel of Red Lake River to a point opposite the mouth of Black River, thence southeasterly in a direct line with the outlet of Rice Lake to a point due west from the place of beginning, thence to the place of

payment for the destruction of his house and furniture in 1862. Article XII remained the same, including the proviso for the Mille Lacs band. The only Chippewa negotiators were Hole-in-the-Day and Mis-Que-Dace; Commissioner Dole represented the United States. No treaty journal was kept. On February 9, 1865, the Senate, in Executive Session, approved the 1864 Treaty with one amendment:

> Add to article twelve the following proviso: --
>
> *Provided*, That those of the tribe residing on the Sandy Lake reservation shall not be removed until the President shall so direct.

On February 14, 1865, Hole-in-the-Day agreed to this amendment. 13 Stat. 696.

D. In 1867, along with other Mississippi Chippewa Bands, the Mille Lacs again ceded the lands granted in the 1863 and 1864 Treaties.

The reservation set out in the 1864 Treaty contained insufficient agricultural land, leading the federal government to negotiate another treaty to create the White Earth reservation, which had better natural resources.

Article 1 of the 1867 Treaty reads: "the Chippewas of the Mississippi hereby cede to the United States all their lands in the State of Minnesota secured to them by the second article of their treaty of March 20, 1865 [when the President proclaimed the 1864 Treaty]." In Article 2, the 1867 Treaty set aside 36 townships of land for a new reservation, which were to include the White Earth and Rice Lakes areas.

---

beginning." Ex. 26. William Folwell provided a map of the lands added by the 1864 treaty. Ex. 74 at 194.

These areas had both good land for farming and abundant timber for use of the inhabitants.[113] The treaty also provided for infrastructure improvements and in Article 7 that each person who had cleared and cultivated 10 acres could receive a certificate entitling that person to 40 acres, up to a total of 160 acres. Shaboshkung signed the 1867 Treaty, as did Hole-in-the-Day.

1. The plain language of three treaties shows unambiguous intent of cession.

In plain unmistakable language in three treaties, the six Mississippi Chippewa lands ceded all "their right, title and interest" to the lands encompassed within the six 1855 reservations. In exchange, these bands received other lands for their use, though without being described as their "permanent home," as was the case with the 1855 Treaty. The federal government also provided other consideration for the cessions in the form of annual payments and various infrastructure improvements. When such language of cession is buttressed by an unconditional commitment from Congress to compensate the Indian tribe for its ceded land, there is an almost insurmountable presumption that Congress meant for the tribe's reservation to be diminished. *See Hagen v. Utah*, 510 U.S. 399, 41-12 (1994); *Solem v. Bartlett*, 465 U.S. 463, 470-71 (1984) (citing *DeCoteau v. Dist. Cty. Ct. for the Tenth Judicial Dist.*, 420 U.S. 425, 447-448 (1975)). Here, there was more than simple diminishment—the reservation at Mille Lacs was disestablished, gone.

[113] Ex. 74 at 195.

2. The plain language of the proviso in Article XII created neither a permanent home nor a permanent or exclusive right to occupancy.

The same conclusion attains for the conditional right to stay provided the Mille Lacs Band. On its face, this proviso did not specify where it actually applied. It simply said the Band members "shall not be compelled to remove" to the new reservation when that was ready. The proviso did not provide for a "permanent home"; the proviso did not grant the Mille Lacs Band any exclusive use of any lands. The proviso did not exclude non-Indians from entering. As detailed *infra* Section IV.B., the ceded reservation had now become public lands. "That the lands ceded in the other agreements were returned to the public domain, stripped of reservation status, can hardly be questioned, and every party here acknowledges as much." *DeCoteau*, 420 U.S. at 446.[114]

The federal government expected in 1863 that the Mille Lacs Band would follow the other bands to Leech Lake, then to White Earth, when the improvements was underway or completed. The Mille Lacs Band instead remained within the former 1855 reservation boundaries, though some Band members were observed living elsewhere in Mille Lacs County or even outside the county.[115] While the 1867 Treaty creating the White Earth Reservation may have been designed to consolidate various Chippewa bands at White Earth, many band members remained where they were. The population at White Earth increased,

[114] Obviously the Band today maintains the opposite, but as discussed, the Band has conceded more than once the 1855 reservation had been ceded. See *supra* pp. 26-28; see *infra* pp. 87-90.
[115] Ex. 75; Ex. 76.

but the census from the Indian Agent at White Earth reported continued Mississippi Chippewa residing at the various ceded reservations.[116]

E. In 1889 Congress enacted legislation to consolidate the Mississippi Chippewa bands including the Mille Lacs, at White Earth.

To facilitate consolidation of the Mississippi Chippewa at White Earth, in 1889 Congress passed what is called the Nelson Act after its chief sponsor, Minnesota Representative Knute Nelson. *See* Act of January 14, 1889, 25 Stat. 642, Ch. 24. That act established a commission to negotiate with the various Chippewa bands a cession once and for all of their interests in their former reservations, plus a cession of right to four townships within the White Earth reservation and any interest in the Red Lake reservation. The commission headed by Henry Rice met with the Mille Lacs Band for several days, resulting in an agreement whereby the Mille Lacs Band, after acknowledging they had "heard, read, interpreted and thoroughly explained to our understanding the act of congress approved January 14, 1889, . . . hereby cede, relinquish, and convey to the United States all our right, title and interest to lands at White Earth …" not required for allotments certain lands at Leech Lake described in the 1867 Treaty and in an 1873 executive order, and any lands at Red Lake not needed for allotments.[117] The Nelson Act agreement also dealt with the Article XII provision, but with different language:

---

[116] *E.g.*, Ex. 77.

[117] *See* Part E, "Signature Rolls, Mississippi Chippewa Indians, Mille Lac Bands," 5 October 1889, found in Ex. 50, House Ex. Doc. No. 247, 45-46.

> "We do also hereby forever relinquish to the United States the right of occupancy on the Mille Lacs Reservation, reserved to us by the twelfth article of the treaty of May 7, 1864 (13 Stat., p. 693)."[118]

In Article 3 the Nelson Act provided that individual band members could take allotments on the former reservations where they were then residing. The Mille Lacs Band members, however, received no allotments on the former reservation. The Department of Interior concluded that the Mille Lacs Band had no reservation, *i.e.,* the proviso in Article XII did not preserve the 1855 reservation. The subtle, but significant difference in the wording of the Band's Nelson Act agreement regarding the proviso reflects that understanding. The Mille Lacs Band ceded, relinquished and conveyed all right title and interest to land on which the Band members may have had ostensible Indian title. But with regard to the Article XII proviso, the Band needed only to relinquish its right under that provision, while not ceding or conveying any interest in the lands embraced within the former Mille Lacs reservation, because the Band had no such interest, having ceded any such interest in 1863, 1864, and 1867.

F. In 1902 the Mille Lacs Band accepted $40,000 to remove to White Earth.

The historic record shows that some Mille Lacs Band members did not leave the area, their Nelson Act agreement notwithstanding. The Band leadership complained that Henry Rice, who led the Nelson Act commission, had promised them they could take allotments on their former reservation. It is true Henry Rice

[118] *Id.*

made that representation, but the government was of the view he had no authority to do so.

The Executive Branch recognized that nearly all the lands within the former reservation had been filed on or patented. In a letter dated March 23, 1900, Interior Secretary Hitchcock informed the House Committee on Indian Affairs that the Department's approval of a bill to appropriate $25,000 to compensate the Mille Lacs Band members for their improvements on lands being claimed by settlers.[119] The Senate had under consideration an appropriation of $50,00 for that purpose.[120] At a council meeting held in May 1900, the Band approved a resolution asking $70,000.[121] Two years later, the House and Senate eventually compromised on $40,000. Act of May 27, 1902, 32 Stat. 245, 268 (ch. 888).

The Interior Department then dispatched Inspector James McLaughlin to negotiate an agreement for the Band's removal to White Earth. McLaughlin was explicit in explaining that Rice had no authority to promise allocations at Mille Lacs. In the end, the Band agreed to accept the $40,000 and remove to White Earth:

> NOW THEREFORE, IN CONSIDERATION of the covenants and agreements of the party of the first part [the United States] herein contained, the said Mille Lacs Indians occupying the former Mille Lac Indian Reservation, parties of the second part, hereby accept the appraisement made by James McLaughlin, U.S. Indian

[119] Ex. 78 at 2.
[120] Ex. 79 at 1.
[121] Ex. 78 at 8.

> Inspector, and Simon Michalet, U.S. Indian Agent, of even date herewith, aggregating Forty thousand dollars, ($40,000), as full compensation for improvements made by them, or any of them, upon lands occupied by them, on said Mille Lac Reservation, and also accept the terms and conditions of said Act of Congress and agree to remove from said Mille Lac Indian Reservation, (except the excepted classes provided for in said Act of Congress), upon payment to them of the said appraised sum of Forty thousand dollars ($40,000).[122]

By 1910 nearly 80 percent of the Mille Lacs Band had removed to White Earth.[123] See *infra* Section IV.C.

Rice made other representations during his meetings with other bands. In a dispute between the Mississippi Chippewa and the Otter Tail Chippewa over whether the Otter Tail could take allotments at White Earth, the Mississippi Chippewa claimed Rice told them they could all take 160 acre allotments in severalty, but if the Otter Tail also took similar allotments at White Earth, there was not enough land available for everyone to receive 160 acres. *See* Opinion of Assistant Attorney General Campbell to Secretary of the Interior. 33 L.D. 298, 300-01 (Oct. 31, 1904). The Assistant Attorney General had this to say about Rice:

> While the letter of the chairman of the commission, April 4, 1892, above quoted, gives color to the contention of the Mississippi band, it is but the opinion of one member of the commission, expressed several years after the event, and can not be regarded as an authoritative construction of the intent and effect of the cession,

---

[122] Ex. 61.

[123] Some 200-300 Band members never moved to White Earth. Eventually the federal government purchased land for their benefit. Even so, those purchases, some outside the 1855 treaty area, did not constitute a reservation. See *infra* Section III.E.

> and still less as an authoritative construction of the act of 1889 under which the commission acted and from which it derived its powers.

Id. at 302.[124]

Rice and his fellow commissioners also apparently promised the Chippewa allotments of 160 acres, whereas the General Allotment Act had been amended to limit individual Indian allotments to 80 acres, down from 160 acres. Section 3 of the Nelson Act incorporated the General Allotment Act provisions. In a letter to the Interior Secretary dated April 28, 1890, Assistant Attorney General Shields opined that the Rice Commission "had no authority to promise the Indians a larger allotment than the law prescribed, and any such promises would not bind the United States. (106 U.S.R. 196, 230)."[125]

The plain language of cession is reflected not just once, but *three* times as the government sought to consolidate the various Chippewa bands at either White Earth or Red Lake. Then, in 1889, the Band relinquished its remaining right of occupancy under the Article XII proviso. The present case is no occasion to rewrite history. As the Supreme Court has observed:

> With the benefit of hindsight, it may be argued that the tribe and the Government would have been better advised to have carved out a diminished reservation, instead of or in addition to the retained allotments. But we cannot rewrite the 1889 Agreement and the 1891 statute. For the courts to reinstate the entire reservation, on the theory that retention of mere allotments was ill-advised, would carry us well beyond the rule by which legal ambiguities are resolved

[124] Ex. 92.

[125] *See* Ex. 118. Congress eventually adopted what was called the Steenerson Act after its chief sponsor, Minnesota Congressman Halvor Steenerson, that raised White Earth allotments to 160 acres. *See* Act of April 28, 1904, 33 Stat. 539 (ch. 1786).

> to the benefit of the Indians. We give this rule the broadest possible scope, but it remains at base a canon for construing the complex treaties, statutes, and contracts which define the status of Indian tribes. A canon of construction is not a license to disregard clear expressions of tribal and congressional intent.

DeCoteau, 420 U.S. at 447. This Court should give effect to the plain language the Senate, Congress and the Mille Lacs Band used.

III. The contemporaneous understanding of the parties to the various treaties and agreements was that the Mille Lacs Band had ceded the 1855 reservation.

McGirt instructs that the express language the legislative branch used determines whether a reservation had been diminished or disestablished. There is no ambiguity whatsoever in any of the three treaties discussed above. Nor is there any ambiguity in the 1889 Nelson Act agreement. Nevertheless, if this Court believes it must examine the contemporaneous understanding, historical context, and the subsequent understanding and pattern of settlement, those factors, part of the second and third steps of the analytical framework developed in *Solem*, also confirm the 1855 Mille Lacs reservation has been disestablished.

A. The Government expected the Mille Lacs Band to remove in short order.

The first cession treaty, that of 1863, was negotiated in the context of the aftermath of the 1862 Sioux uprising. The seminal point of the 1863 treaty was to move the Chippewa bands away from encroaching white settlement. During the negotiations, Secretary Interior Usher addressed the need for relocation to Shaboshkung:

> I want you to understand now that I shall be a party to no arrangement that will starve you. I want you to keep together for the reason that we can take care of you. Your sugar camps will not last many years. The trees will die from cutting so much. You must try to get a living some other way. If you are wise you will be thinking about that now.[126]

Shaboshkung acknowledged as much: "That is very true."[127] Then on the penultimate day of negotiations, Commissioner Dole stated:

> 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, it can be arranged that they might remain there a year or two until they themselves shall seek only a new home to their satisfaction I shall be glad.
>
> They are aware, however, that the White people are already settling near them, that the lands are surveyed and put into market on one side of the lake, and with the bitter feeling that exists in Minnesota between the White man and the Indian, I doubt very much if it is not better for them to make haste in their removal.[128]

It was not only a question of conflict avoidance, but also a potential lack of resources.

One of the provisions of the 1863 Treaty called for the appointment of a board of visitors to report on the monetary payments set out in the treaty. The board included Bishop H.B. Whipple and Bishop Thomas Grace. In their report to the Commissioner of Indian Affairs they wrote:

> The reservations which they now occupy are ceded to the government, and must soon be encroached upon by the settlers, and may lead to unpleasant relations. We respectfully urge upon the department that, in case of removal, every effort should be made to

[126] Ex. 22, part 2, 2/27 interviews at 14.
[127] *Id.*
[128] Ex. 22, part 3, 3/5 interviews at 3-4.

> secure from Congress such appropriations as will be necessary fully to carry out the provisions of the treaty.[129]

By 1870 the Office of the Surveyor General had completed a survey of the four townships that comprised the 1855 reservation.[130] The surveyor's bill for services was approved and his plats were filed at the Land Office at Taylor's Falls. The Register and Receiver at Taylor's Falls considered these steps sufficient to allow preemption and homestead entries. Timber interests also started cutting timber on the former reservation. Indian Agent Edward Smith investigated this activity and reported to the Commissioner of Indian Affairs that logging had taken place, and suggested that notwithstanding the area was prima facie open to entry, no such entries should be allowed.[131] Bishop Whipple also weighed in, advocating that entries should be held in abeyance until funds were appropriated for the Band's removal.[132] In response, the Commissioner of General Land Office, at the request of the Commissioner of Indian Affairs, ordered the Land Office to cancel all entries and publish notice that no entries at Mille Lacs would be allowed until further notice.[133]

That action did not mean the federal government believed the Mille Lacs band had not ceded the 1855 reservation. To the contrary, as noted by Commissioner of Indian Affairs Francis Walker in his report to Congress for 1872:

---

[129] Ex. 80.
[130] Ex. 81 at 2.
[131] Ex. 81 at 3-4.
[132] Ex. 82.
[133] Ex. 83.

> The Mille Lac Chippewas, who continue to occupy the lands ceded by them in 1863, with reservation of the right to live thereon during good behavior, are indisposed to leave their old home for the new one designed for them on the White Earth reservation. Only about twenty-five have thus far been induced to remove. [134]

Walker's successor, the former Indian Agent Edward Smith, made a similar observation in his 1873 report to Congress:

> The Mille Lac band of Chippewas in Minnesota remains in its anomalous position. They have sold their reservation, retaining a right to occupy it during good behavior. With this title to the soil it is not deemed expedient to attempt permanent improvements at Mille Lac, unless a title to the reservation can be returned to them on condition that they surrender to Government all moneys acquired in consideration of their cession of the Mille Lac reservation. If this cannot be done, their Indians should be notified that they belong at White Earth, and be required to remove.[135]

Then, in 1874, Smith reported to Congress:

> The Mille Lacs are located around a lake of the same name, on lands that they ceded in 1863, reserving the right of occupancy during good behavior. Nothing has been done for them beyond the payment of their annuities in cash and goods, which payment is itself a source of demoralization, leading directly to indolence and intoxication. Nothing can be done for them unless they are removed to White Earth, or until fee of the Mille Lacs reserve is restored to them.[136]

---

[134] Ex. 37 at 23.

[135] Ex. 38 at 12.

[136] Ex. 84 at 29-30. The position of Commissioners Walker and Smith is also reflected in many annual reports of individual Indian Agents to the Commissioner of Indian Affairs. *See*, *e.g.*, Ex. 85, Reports of E. Douglass (1873); C. Luse (1883, 1884); T. J. Sheehan (1885, 1887) (available at digicoll.library.wisc.edu/cgi-bin/History/History-idx?type=browse&scope=HISTORY.COMMREP).

B. In an 1875 council in Washington, head chief Shaboshkung admitted the Band had ceded the 1855 reservation.

In February 1875 a delegation of Mille Lacs Band leaders, including Shaboshkung (listed as head chief), traveled to Washington, D.C., where they met with Commissioner of Indian Affairs Smith. The apparent purpose of the council was to allow the Mille Lacs leaders to press their case to remain permanently at Mille Lacs. Commissioner Smith opened the council with a recommendation the Band instead should prepare to move to White Earth:

> I have understood that you wanted to come to Washington to talk about your affairs. I sent to your agent and your friend Robert to come down with you. I know something about your condition. In many respects you are not well off. Something ought to be done for you and by you. When I was with you I was all the time talking to entice you to go to White Earth. I knew that that was the best place for you; that more could be done for you there than anywhere else; but I could never make you see it so. Perhaps now after thinking of it and seeing what is before you, you are prepared to think differently from what you did then.[137]

Commissioner Smith explained the tenuous position the Mille Lacs faced, reminiscent of what Commissioner Dole said in 1863 about depleting food resources:

> The difficulties about your staying at Mille Lac is that you have no ownership in the land. A white man never puts up a house on land that does not belong to him. If I have permission to use a certain pierce of land, for a number of years, even a great many years, if I have only permission to use it, then I would not put up a house on that land; and I should not have much heart to go to work and plow and make fences because I would not know when the man that owned the land would tell me to go away. Now that is just the trouble with you at Mille Lac, with your getting homes there. You have sold your ownership in that country, and something ought to be

[137] Ex. 39 at 4-5.

> done, and you ought to go when you can have land that is your own and have it for nothing. That you could have at White Earth, so that it would be your own forever. There you would have your own land, not all together, in common, but each man would have his own place, his own little house, and his own farm. I think you see for yourselves that what has been told you for years and years is coming along slowly; that you will have to get a living some other way than by hunting and fishing.[138]

Shaboshkung argued they were told they could stay at Mille Lacs as long as they wanted:

> We have ears to hear and eyes to see. We understand this. While in this room many years ago we spoke to the Commissioner and he spoke good words. The President took hold of our hands and promised us faithfully and encouraged us, and he said we could live on our reservation for ten years and if you are faithful to the whites and behave yourselves friendly to the whites you shall increase the number of years to 100, and you may increase it to a thousand years if you are good Indians. And through our good behavior at the time of the war, we were good and never raised hands against the whites the Secretary of the Interior and the President said that we should be considered good Indians, and remain at Mille Lac as long as we want to.[139]

Commissioner Smith explained he wanted interpreters present at this council whom the Band leaders trusted, so they could be sure to understand what Smith was saying. But Smith said that what counted was what was on the paper, i.e., the treaty that they had signed:

> I should not be very sure that it was said or not I want you to know the difference between what a man says and what he puts down in writing. That which was in writing at that time and to which you touched the pen I have. There cannot be any mistake about that I can show you the very paper to which you put your name. It is downstairs now. That paper does not say anything about ten years or a hundred years or a thousand years, but it says that because the

[138] Ex. 39 at 4-5.
[139] *Id.* at 6-7.

> Mille Lacs have behaved well they shall not be required to move as long as their good behavior shall continue. Now you see that does not give you a title to your land at all.[140]

Shaboshkung admitted he knew what was on the paper he signed:

> About the paper you spoke of. I was very careful to be thoroughly informed about the time which the Government made, and I know what was on the paper.[141]

The council continued for a second day. Shaboshkung again admitted signing the paper, saying "we did sign the paper giving our land away because the others wanted us to sign with them."[142] He suggested that the treaty had been altered after they signed, and asked if it could be changed. Commissioner Smith said only Congress could do that. The council then moved to discuss more prosaic matters, such as needing draft animals and accounting for annuity payments.

The 1875 council demonstrates convincingly that the Mille Lacs leadership knew exactly what they were signing when they "touched the pen" to the 1863 Treaty. Commissioner Smith told them that what was on the paper that counts, the same position the Supreme Court took in *McGirt*. What Shaboshkung was expressing was a sort of seller's remorse, but Commissioner Smith explained to him that what was done, was done, unless Congress intervened.

C. In 1880 the Mille Lac Band asked for a new treaty to better protect their interest.

In a letter dated March 20, 1880, to President Hayes, Shaboshkung and several other chiefs argued their case for a new or revised treaty to protect their

[140] *Id.* at 8.
[141] *Id.* at 11-12.
[142] Ex. 40 at 5.

right to stay at Mille Lacs. The chiefs argued that settlers were making fake accusations against the Band, which they wanted investigated. If the allegations were proven false, "we shall ask for a new treaty or that the one we now have been made definite and perfect, so that pine land thieves will not be able to come upon our reservation as they have done in the past and take our timber without our consent."[143] This plea is a clear concession that the Article 12 proviso offered the Band no protection from non-Indian encroachment.

D. For decades, the Department of Interior held that the Mille Lacs reservation had been ceded to the United States.

In the Nineteenth Century, Indian policy was intertwined with public land policy. Congress encouraged westward expansion through two major pieces of legislation, the Act of September 4, 1841, 5 Stat. 455, ch. 16, which created the preemption system,[144] and the Act of May 30, 1862, 12 Stat. 392, ch. 75, which implemented the homestead system.[145] Congress also provided generous subsidies to facilitate the building of railroads, providing land grants that a railroad could use to finance construction. *See*, *e.g.*, Act of July 2, 1864, 13 Stat. 365, (providing land grants to the Northern Pacific Railroad).

---

[143] Ex. 112.

[144] The Preemption Act allowed eligible persons the right to file a claim to up to 160 acres on surveyed lands if they had lived on the parcel for at least 14 months and paid $1.25 an acre. Congress repealed the Preemption Act prospectively in 1891. *See* § 4 of the Act of March 3, 1891, 26 Stat. 1095, 1097 ch. 561.

[145] The Homestead Act allowed a claimant for a nominal fee to receive a patent for up to 160 acres after five years' residence, though a homesteader could shorten that time by making improvements and paying $1.25 per acre.

Located within The Department of Interior, the General Land Office oversaw the system of local land offices and administered the rules by which preemption and homestead entries were allowed. The General Land Office also adjudicated disputes regarding conflicting claims. In 1887, the Department of Interior started publishing its administrative decisions and interpretive guidance, with Volume I covering rulings from July 1881 to June 1883.[146]

The Department of Interior has had many occasions to consider the validity of entries within the boundaries of the 1855 reservation. As noted in 1871 and 1872, the Department ordered existing entries within those boundaries cancelled. Then in 1877, Interior Secretary Zachariah Chandler addressed the appeal of Frank Folsom from the decision of the General Land Office to reject Folsom's entry of a tract of land within one of the townships set aside by the 1855 Treaty. Under the 1871 directive, the Taylor's Falls land office and the Commissioner of the General Land Office had rejected Folsom's entry. Chandler reversed the decision of the General Land Office and concluded Folsom's filing could be allowed "subject to preemption filing and entry."[147] Chandler considered the 1855 reservation to have been ceded to the United States in both the 1863 and 1864 Treaties. Because "[a]ll of the conditions of said treaties have been complied

[146] The published decisions and opinions of the Department of Interior regarding application of the federal land law may be found at: https://www.doi.gov/solictor/decisions.
[147] Ex. 41 at 6.

with by the United States, the titles to said lands now rests absolutely in the United States."[148]

Chandler then addressed the earlier decision to cancel then-existing entries within the former reservation. That decision was made at the request of the "Indian Office" to prevent the entry or sale as "public lands" until the lands "were no longer needed for Indian purposes." In Chandler's opinion, the proviso in Article 12 of the treaties on which the Commissioner of Indian Affairs relied may have protected the Mille Lacs Band from being "compelled to remove, but it by no means gives them an exclusive right to the land, nor does it, in my judgment, exclude said lands from sale and disposal by the United States" (emphasis in original). The Article 12 proviso only allowed the Mille Lacs Band to remain "as a matter of favor."[149]

Chandler's decision in *Folsom* comports with *McGirt*—he tracked the text of the 1863 and 1864 Treaties precisely. Nevertheless, Chandler invited a legislative resolution of whether the Band could continue to stay, suspending a claim on Folsom's filing and ordering that the Taylor's Falls office not allow any further entries until the close of the next session of Congress. All existing entries were to remain "in statu [sic] quo."[150] While Folsom's filing was suspended, he eventually received his patent.[151] Chandler's decision is dated March 1, 1877,

[148] Ex. 41 at 5-6.
[149] *Id.*
[150] *Id.* at 6.
[151] *See* Ex. 86 at 17-18, which lists Folsom as having received a patent.

during the Second Session of the 44th Congress. The next regular session was the First Session of the 45th Congress, which concluded on December 3, 1877. *See* 7 Cong. Rec. 816-17 (Dec. 3, 1877).

Chandler's successor, Carl Schurz, continued the suspension of entries that Chandler had implemented until Congress had addressed the right of the Mille Lacs Band to stay. Nevertheless, the land office at Taylor's Falls continued to allow entries notwithstanding Schurz's directive. In 1879, the Commissioner of the General Land Office advised Schurz of these new entries and recommended they be cancelled, a recommendation that the Secretary agreed to.[152]

In 1883 the Commissioner of Indian Affairs, Hiram Price, submitted a report dated April 16, 1882 to Interior Secretary Henry Teller in which Price reviewed the history of the 1855 reservation, concluding that it had been ceded to the United States.[153] In correspondence to Price dated May 10, 1882, Secretary Teller agreed with Price:

> Whatever title they had passed by this treaty to the United States, nothing remained in the Indians; but the Government saw fit to say that they need not remove therefrom until they were ready to do so. It was undoubtedly understood by the Government and the Indians that the Indians would ultimately remove therefrom to White Earth, as provided in the treaty, but they have refused to do so and still refuse.
>
> ***

[152] *See id.* at 14.
[153] *Id.* at 4.

> The reservation was public land open to homestead and pre-emption claims, subject only to the rights of the Indians to reside thereon and not to remove therefrom until they wish so to do.[154]

Responding to the appeal of the claimants whose entries Schurz had cancelled, Teller ordered those claims cancelled in 1879 covering some 23,913.46 acres reinstated.[155]

In an opinion dated January 9, 1891, Interior Secretary Noble granted the petition of Amanda Walters and others to make entries on lands within the former Mille Lacs reservation.[156] Senator Cushman Davis wrote on her behalf that the proviso in Section 3 of the Nelson Act giving Indians the right of an allotment on the reservation where they lived applied only to lands reserved under the 1863 treaty, which excluded Mille Lacs. Noble adopted that argument:

> Nevertheless it is also true and adds greatly to the force of the argument that the Mille Lac Indians joined in the agreement under the act of 1889 whereby the Indian lands save in the reservations therein mentioned were ceded to the United States. By this any possible interest the Mille Lacs may have had was transferred to the United States. I think the language of the statute of 1889 that the lands upon which the Mille Lacs have enjoyed the favor of residence so long as they should not interfere with the whites is equivalent to a declaration that this favor or license did not amount in effect to a 'reservation' of these lands upon which the Mille Lacs could take allotments because it was upon these lands *alone* that subsisting valid pre-emption or homestead entries existed or were claimed under the regulations and decisions in force at the dates that they were severally allowed and which this statute declares shall now proceed to patent.[157]

---

[154] *Id.* at 11.
[155] Teller's May 10, 1882 letter did not specifically address the entries cancelled in 1871 and 1872.
[156] Ex. 53, *Amanda J. Walters, et al.*, 12 L.D. 52.
[157] *Id.* at 55.

Noble added further:

> Suffice it to say that the land in question was not a reservation within the meaning of the act. It was ceded in 1863; it had been declared open to entry by successive decisions from the Department under the regulations of the Land Office, and was the very land referred to and intended to be covered by the proviso to section 6 [of the Nelson Act].[158]

Secretary Noble protected the interests of Amanda Walters and other small-holder claimants several months later in *Northern Pac. R.R. v. Walters*, 13 L.D. 230 (Sept. 3, 1891). At issue in that dispute were land grants to two railroads that gave the railroads the right to odd-numbered sections along the line of rail, once the line was definitively fixed by survey and a plat of the selections filed with the General Land Office.[159] If the United States did not have full title to land in one of those sections, the railroad could make an "indemnity," *i.e.*, a substitute selection within ten miles of the line of rail.[160] The railroads' indemnity claims overlapped with those of Walters and other individual claimants.

Secretary Noble rejected the railroads' indemnity claims, reasoning that because the claims covered lands that were then subject to the Mille Lacs Band's right to stay on their former reservation, and the railroads could not choose those parcels as indemnity selections. Secretary Noble reasoned that while the lands the railroads wanted were no longer included in a technical reservation, the right

[158] *Id.* at 56.
[159] Ex. 87 at 232.
[160] *Id.*

to remain was sufficient to make the lands unavailable as indemnity selections.[161] While Walters' entry was valid, the railroads could not make indemnity selections until the surveying required by the Nelson Act was completed. This second decision involving Walters did not overrule the first, but modified the earlier decision only to the extent of requiring entries to proceed under the Nelson Act and not the general land laws of the United States.

The second decision involving Walters created some confusion as to the status of people whose entries had been made under the general land laws and not under the provisions of the Nelson Act. Congress soon acted to validate the existing entries of valid under the general land laws. *See* Act of December 19, 1893, 28 Stat. 576. Interior Secretary Smith discussed the potential hardship of the second Walters decision in *Patrick Fox*.[162] The *Fox* decision involved an entry on land within the boundaries of the former reservation. Secretary Smith reviewed the familiar history of the 1855 reservation, the 1863 and 1864 Treaties and the Article 12 proviso, *id*. at 501. Smith said this about the Nelson Act:

> No specific mention is made in this act of the Mille Lac Indians and the lands occupied by them, which, as was stated above, were ceded to the United States in 1863. However, the Mille Lacs were treated with under said [Nelson] act and they formally relinquished any and all right of occupancy that they possessed upon the lands inhabited by them and removed to the White Earth reservation.[163]

[161] *Id*. at 234.
[162] Ex. 88.
[163] *Id*. at 502.

At this point, the Secretary concluded there were three categories of entries on the Mille Lacs lands: entries made before July 4, 1884, when Congress froze all further entries; entries covered by the December 19, 1893, act of Congress and entries allowed by the special proceedings under the Nelson Act.[164] Fox prevailed because his initial entry was made on March 17, 1884 and fell within the first category, entries that if otherwise proper, could proceed to patent by virtue of Section 6 of the Nelson Act. Smith went on to add that the Land Office had failed to timely object to Fox's claim.[165]

The Interior Department continued to refer to the former Mille Lacs reservation in adjudicating conflicting land claims. Of particular interest is *Ma-Gee-See v. Johnson*.[166] Ma-Gee-See was one of Shaboshkung's sons and claimed a right superior to Johnson, a claim Secretary Hitchcock upheld because the record showed Ma-Gee-See occupied the land claimed by Johnson when he filed his claim. In support, Secretary Hitchcock cited to Department circulars[167] that applied only to non-reservation lands, barring entries under the general land laws if occupied by Indians.[168] The plain inference is that Ma-Gee-See's land, though within the 1855 boundaries, was not considered to be within a reservation.

---

[164] *Id.* at 504.
[165] *Id.* at 505.
[166] Ex. 89.
[167] Ex. 90.
[168] Ex. 89 at 127.

In *Northern Pac. Ry.*,[169] Interior also overruled its 1892 decision involving Amanda Walters. In this 1922 decision the railroad sought to establish a claim to 14 parcels "within the former Mille Lacs Indian Reservation and within the place limits of the grant to the Northern Pacific Railroad (now Railway) Company by the act of July 2, 1864 (13 Stat. 385)."[170] The local land office denied the railroad's claim under the 1892 decision and *Northern Pac. R.R. v. Warren*, 28 L.D. 494 (June 12, 1899).

The Secretary reviewed the history of the 1863 and 1864 treaties and the Nelson Act, and the Supreme Court decision involving the Mille Lacs reservation, concluding:

> It having been thus determined that the treaty of 1863 actually ceded to the United States the lands referred to in the application to adjust, it follows that the subsequent grant to the railroad company operated to convey the fee to the company, subject to the right of occupancy by the Indians (*Buttz v. Northern Pacific Railroad*, 119 U.S., 55), and it became incumbent on the United States to extinguish all claims of the Indians, pursuant to the second section of the granting act—
>
> The United States shall extinguish, as rapidly as may be consistent with public policy and the welfare of the said Indians, the Indian titles to all lands falling under the operation of this act, and acquired in the donation to the (road) named in this bill.
>
> As stated by the Supreme Court in the *Buttz* case, *supra*, the Indians had merely a right of occupancy—a right to use the land subject to the dominion and control of the Government-and the manner, time, and conditions of its extinguishment were matters solely for the consideration of the Government. The act of 1889 provided a method of extinguishing the claims of the Mille Lac band to the lands within the reservation created by the treaty of 1855 and ceded by the treaty

[169] Ex. 91, 49 L.D. 381 (Dec. 30, 1922).
[170] *Id.*

> of 1863, but in the meantime the United States had allowed entries for approximately 55,000 of the little more than 61,000 acres, among them the entries of Evans and the thirteen others, embracing lands within the place limits of the grant to the railroad company. As said entries were made prior to July 1, 1898, the application for adjustment under the act of that date must be allowed.[171]

E. After the Indian Reorganization of 1934, the Department again concluded the 1855 reservation at Mille Lacs was gone.

In 1934 Congress passed the Indian Reorganization Act, 48 Stat. 984, which reversed the federal policy of allotting tribal lands in severalty to individual tribal members. The act also set up a process for establishing or restoring tribal self-government. Section 3 of the act authorized the Secretary of the Interior "to restore to tribal ownership the remaining surplus lands of any Indian reservation heretofore opened, or authorized to be opened ...." 48 Stat. 984. Commissioner of Indian Affairs John Collier recommended to Interior Secretary Harold Ickes that no lands on these opened reservations be sold until tribal organizations could be formed to determine whether or how to accept the responsibilities offered under the 1934 act. 54 L.D. 559, 563 (Aug. 10, 1934).[172] Collier provided Secretary Ickes a list of reservations that had been opened and the acts by which the reservations had been opened. *Id.* at 561-62. Collier's list for Minnesota included seven reservations, all opened by the Nelson Act. The list did not include Mille Lacs.[173]

Within the Office of Indian Affairs a question arose concerning implementation of the Indian Reorganization Act. In an October 27, 1935,

---

[171] Ex. 91 at 395-96.
[172] Ex. 93 at 559.
[173] *Id.* at 561.

memorandum to the Commissioner of Indian Affairs, the Solicitor addressed the question:

> whether several so-called 'reservations' under the Consolidated Chippewa Agency; namely, Leech Lake, Fond du Lac, Mille Lac, Grand Portage, Nett Lake, Vermillion Lake, Deer Creek, White Oak Point and White Earth are reservations in contemplation of the law; and if so, whether the reservations comprise the entire original reservation sites or a portion thereof.[174]

The Solicitor concluded that all but Mille Lacs could be considered a reservation within the contemplation of the Indian Reorganization Act and that "the territorial jurisdiction can extend all the land within the original boundaries of the Chippewa Reservations as they existed in 1889 except for such land as has been disposed of through sale and fee patent by the United States."[175]

Regarding Mille Lacs, the Solicitor took the same position as Commissioner Collier:

> The present Mille Lac Reservation has a somewhat different history. In violation of the trust created by the 1889 act, the United States disposed of all the ceded Mille Lacs lands under the general land laws (*United States v. Mille Lac Band*, *supra*). However many Mille Lac Indians remained on the old site and refused to remove to the White Earth Reservation. Congress then authorized the use of $40,000 of the Chippewa tribal fund to purchase land for 'homeless non-removal Mille Lac Indians who have not heretofore received allotments,' and to hold such land in trust. The present Mille Lac Reservation is this purchased land reservation, 100% of which is still held in trust. But the Mille Lac Band as such has no interest in this reservation.[176]

[174] Ex. 94.
[175] *Id.*
[176] Ex. 95.

F. The 1936 constitution of the Mississippi Chippewa Tribe conformed to Interior's position that the Mille Lacs Band's original reservation was gone.

In 1936, the Minnesota Chippewa Tribe adopted a constitution that reflects Solicitor Margold's distinction:

> CONSTITUTION OF THE MINNESOTA CHIPPEWA TRIBE
>
> PREAMBLE
>
> We, the Minnesota Chippewa Tribe, consisting of the Chippewa Indians of Minnesota under the Consolidated Chippewa Agency, in order to form a representative Chippewa tribal organization, maintain and establish justice for our Tribe, and to conserve and develop our tribal resources and common property; to promote the general welfare of ourselves and descendants, do establish and adopt this constitution for the Chippewa Indians of Minnesota under the Consolidated Chippewa Agency in accordance with such privilege granted the Indians by the United States under an existing law.[177]
>
> ...
>
> ARTICLE II—REPRESENTATION AND MEMBERSHIP
>
> Section 1. This constitution for representation shall apply to the White Earth, Leech Lake, Fond du Lac, Bois Fort (Nett Lake), and Grand Portage Reservations, and the nonremoval Mille Lac Band of Chippewa Indians.[178]

---

[177] Ex. 95.

[178] The tribe's 1963 revised constitution likewise identifies the same six bands and five reservations, but then refers to the "Nonremoval Mille Lac Band of Chippewa Indians" as an asserted, sixth reservation. Rev. MCT Const., Article III ("The governing bodies of the Minnesota Chippewa Tribal shall be the Tribal Executive Committee and the Reservation Business Committees of the White Earth, Leech Lake, Fond du Lac, Bois Forte (Nett Lake), and Grand Portage Reservations, and the Nonremoval Mille Lac Band of Chippewa Indians, hereinafter referred to as the six (6) Reservations.")

G. Only recently has Interior reversed its position on disestablishment.

In 1991, the Field Solicitor for the Department of Interior reversed course and opined that the 1855 reservation remained intact. It is not apparent from the face of the opinion why the opinion had been requested. Analytically, the 1991 opinion does not mention any of the Department's prior analysis of the question of cession, whether by treaty or agreement. Instead, the author bases his opinion on two congressional acts, one for 1890, the other from 1902, that refer to the Mille Lacs Reservation, as though what happened in 1863, 1864, 1867 or 1889 had no legal effect.[179] The opinion also relies on the *Solem v. Bartlett* three-part analysis. The author asserts "the great majority remained" Mille Lacs. That factual assertion is simply untrue, and the conclusion the author draws from that assertion is unfounded.

---

[179] The 1890 legislation was an act authorizing the construction of a line of rail that would transect part of the former reservation. That act on its face did not purport to overrule the Nelson Act or the agreements reached pursuant to the Nelson Act. The 1890 legislation required Band consent to the route chosen, but by the time the rail line was built, it was built on land patented to non-Indians and sold in fee to the railroad. The 1893 and 1898 acts opening up the 1855 reservation to disposal under the general land laws stripped the 1890 legislation of any legal impact.

The 1902 legislation was to appropriate $40,000 to obtain the agreement of the Mille Lacs Band to move to White Earth. This act simply cannot be considered as a contemporaneous understanding of Congress that the Mille Lacs reservation continued to exist. As Secretary Hitchcock reported to Chair of the Senate Committee on Indian Affairs, the 1902 bill "permits said [Mille Lacs] Indians to take up their residence and obtain allotments in severalty on the White Earth Reservation or on any of the ceded Indian reservations in Minnesota on which allotments are made to Indians." Ex. 79, S. Rept. 340 at 2, 57th Cong. 1st Sess. Mille Lacs, however, was not where Band members could take allotments.

More recently the Solicitor's office again opined the 1855 reservation remain undiminished. Issued in the context of determining where Mille Lacs tribal police could exercise authority to be conferred to them under the Tribal Law and Order Act, the author purported to apply the *Solem* three-part test. She criticized Solicitor Margold's 1935 opinion as having little analysis, when in fact Margold's analysis was more than adequate to address the issue of whether there was a reservation for purposes of the Indian Reorganization Act, and his conclusion found its way into the 1936 Constitution of the Minnesota Chippewa Tribe. The 2015 opinion is entitled to no deference as a matter of law, *Wyoming v. EPA*, 875 F.3d 505, 513 (10th Cir. 2017), and given the *McGirt* decision, a case that came after the 2015 opinion, the plain language of the treaties and Nelson Act agreement must control.

IV. The pattern of settlement from the late 1800s to the early part of the 1900s is additional evidence the 1855 reservation no longer existed.

To the extent still relevant, the third part of the *Solem* analysis of disestablishment looks at what happened on the ground. Were the lands within the reservation settled by non-Indians? What was the resulting population mix? What other evidence of disestablishment is there? The answers to these questions confirm the import of the unequivocal cession language in the 1863, 1864 and 1867 Treaties and the Nelson Act agreement.

A. In 1884 Congress imposed a freeze on further patenting of land within the former reservation.

Following the 1863, 1864 and 1867 Treaties, and until fairly recently, the Department of the Interior consistently held that the 1855 reservation had been ceded. The Department also considered the lands within the 1855 boundaries open to settlement, though as a matter of policy, the Department struggled with reconciling the opening of the former reservation to settlement with the Mille Lacs Band's conditional right to remain. In 1882 the Department of Interior Department sent Inspector George Chapman to the area to determine where Band members were actually living. Chapman recommended the Band be moved to White Earth, but if they remained, he identified two tracts approximately 7,500 acres to be withheld from sale for use by Band members. Chapman also reported that some 400 members of the Band lived along the Snake River, which is in Aitkin County. Nothing came of Chapman's recommendation.

In March 1884 the House of Representatives passed a resolution directing Acting Interior Secretary Joslyn to report to the House whether the Mille Lacs Band had violated the proviso in Article 12 of the 1864 Treaty. The Secretary reported back to the House on April 28, 1884. Included in Joslyn's report was an 1882 letter from Commissioner of Indian Affairs Hiram Price to the Secretary of the Interior where Price wrote:

> In conclusion I will state that it is not claimed by this Bureau that the Indians have any title or fee in the lands, nor am I prepared to say that the lands are, by the terms of the treaty, excluded from sale and disposal by the United States; but it is clear to my mind 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 shall work a forfeiture of their right by reason of future misconduct.

Joslyn also included a report from the Commissioner of the General Land Office that there were entries covering 55,976.94 acres at the local land office.[180] This amounted to over 90 percent of the lands embraced within the 1855 reservation. Commissioner McFarland reported that while many acres had been filed on, far fewer acres had been patented, i.e., where the government had issued an instrument of title.

After receiving the Department's report, Congress acted to maintain the status quo. On July 4, 1884, in an Indian appropriations bill, Congress halted further patenting as follows:

> That the lands acquired from the White Oak Point and Mille Lac bands of Chippewa Indians on the White Earth reservation, in Minnesota, by the treaty proclaimed March twentieth, eighteen hundred and sixty-five shall not be patented or disposed of in any manner until further legislation by Congress.

23 Stat. 76, 89, ch. 180. The reference to White Earth was obviously incorrect. Acting Interior Secretary Muldrow subsequently concluded the reference to White Earth should have been to Mille Lacs. *Robert Lowe*, 5 L.D. 541, 543 (April 4, 1887).

B. Following the *Walters* decision in 1893 and 1898 Congress confirmed the validity of otherwise proper entries.

As discussed earlier, in 1891 Interior Secretary Noble issued his decision in *Amanda Walters* declaring the lands within the former 1855 reservation open to

[180] *See* Ex. 86 at 17-18.

settlement under the general land laws. Then, in a subsequent decision Noble held that lands within the former reservation instead had to be disposed of under the provisions of the Nelson Act. The local land office learned of this later decision on May 3, 1892. From the time of the *Amanda Walters* decision, January 9, 1891, and May 3, 1892, the local land office had registered 232 entries covering 31,659 acres. *See* H. Rept. 149 at 1 (Oct. 30, 1893) 53d Cong. 1st Sess. On September 9, 1893, Representative Baldwin introduced a joint resolution (H. Res. 31) for "the protection of those parties who heretofore been allowed to make entries for lands within the former Mille Lac Indian Reservation in Minnesota." 25 Cong. Rec. 1362 (Sept. 9, 1893). The joint resolution was referred to the Committee on Public Lands. In its report recommending approval, that committee observed:

> The object of the pending bill is to confirm the entries of said lands, made in good faith under the ruling of January 9, 1891, and between that date and the time when said ruling was reversed and the local land officers notified thereof. The occupants of these lands made their entries and paid their money under the general land laws and in accordance with the ruling of the Secretary of the Interior. The subsequent reversal of that ruling by the same Secretary ought not to deprive them of their equitable right to these lands.[181]

On December 19, 1893, Congress passed what had been H. Res. 31 as Joint Resolution 5. *See* 28 Stat. 576. This resolution confirmed that if land entries from January 9, 1891, to May 3, 1892, were "regular in other respects," a "patent shall issue to claimants for the lands embraced therein, as in other cases, on a satisfactory showing of a bona fide compliance on their part with the

[181] Ex. 86 at 1-2.

requirements of the laws under which said filings and entries were respectively allowed." *Id*. President Cleveland signed the joint resolution the next day. 26 Cong. Rec. 458 (Dec. 20, 1893).

The influx of settlers continued through the 1890s, leading Congress on May 27, 1898 to pass another joint resolution to open up the balance of the former reservation to entry under the public land laws.

> *Resolved by the Senate and House of Representatives of the United States of America in Congress assembled*, That all public lands formerly within the Mille Lac Indian Reservation, in the State of Minnesota, be, and the same are hereby, declared to be subject to entry by any bona fide qualified settler under the public land laws of the United States; and all preemption filings heretofore made prior to the repeal of the preemption law by the Act of March third, eighteen hundred and ninety-one, and all homestead entries or applications to make entry under the homestead laws, shall be received and treated in all respects as if made upon any of the public lands of the United States subject to preemption or homestead entry: *Provided*, That lot four in section twenty-eight, and lots one and two in section thirty-three, township forty-three north, of range twenty-seven west of the fourth principal meridian, be, and the same are hereby, perpetually reserved 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.

30 Stat. 745 (Res. 40). President McKinley signed the Joint Resolution shortly thereafter. 31 Cong. Rec. 5417 (June 1, 1898). This Joint Resolution effectively ended the opportunity of Mille Lac Band members to take allotments on their former reservation, had Interior ever considered Band members eligible to do so. The question then became what amount of money was needed to induce Band members to move to White Earth, where there was land available for allotments.

In 1902, when Congress was considering this issue, the Commissioner of Indian Affairs supported paying $25,000, observing:

> Finally, joint resolution of May 17, 1898 (30 Stats., 745), declared all public lands **formerly within the Mille Lac Indian Reservation**, in the State of Minnesota, to be subject to entry by any bona fide qualified settler under the public-land laws of the United States, and declared all preemption filings theretofore made prior to the repeal of the preemption law by the act of March 8, 1891, and all homestead entries or applications to make entry, under the homestead laws shall be received and treated in all respects as if made upon any of the public lands of the United States subject to preemption or homestead entry. This has had the effect of practically exhausting every acre of land on the reservation available for allotment to the Indians. The Indians must, therefore, of necessity either remove from the reservation or secure no lands; and, as recited in the preamble, many of the Indians have improvements of more or less value on the reservation, which they will lose under the filings already made on said lands, it is but just and right that they should be compensated for said improvements (emphasis added).[182]

When Congress appropriated $40,000 in 1914 to purchase land for the Band members who did not move to White Earth notwithstanding the 1902 agreement to do so, all of the land the federal government purchased had already been patented to non-Band members.[183] Starting in 1915, the government purchased additional fee simple lands for the homeless, non-removal Mille Lacs in August 1918, to be held in trust until allotted.[184] Some of this land was within the former reservation, some was not.[185]

---

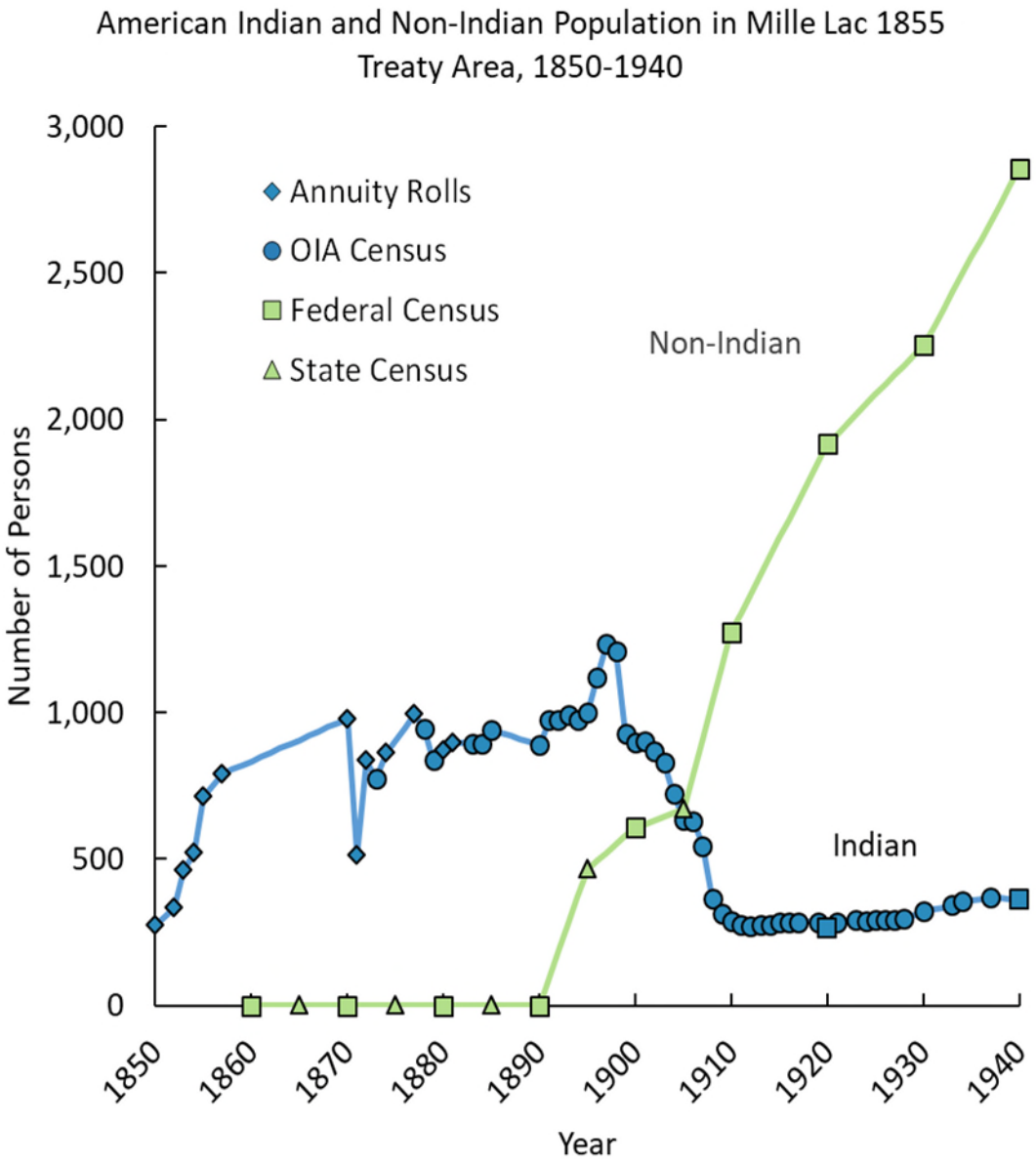
[182] Ex. 79 at 2.
[183] *See* Ex. 97 at 7-9.
[184] Ex. 5 at 96-97; Ex. 97; Ex. 98.
[185] Ex. 5 at 96-98; Ex. 100.

C. After agreeing in 1902 to move to White Earth, the large majority of Band members did so.

As noted earlier, Congress eventually appropriated $40,000 to obtain an agreement from the Mille Lacs Band to remove White Earth. In August 1902 Senior Inspector James McLaughlin obtained the Band's agreement to accept the money and move to White Earth. And after McLaughlin's negotiations, the demographic data show a dramatic shift in the composition of the population in the former reservation. This shift is seen in three data sources, the annual reports from the Indian Agent at White Earth,[186] and the official national and state censuses. Prior to 1900, the annual reports of the Agent at White Earth are the data source. The general range is in the mid 900's for Mille Lacs Band members living in the 1855 reservation area, with the number peaking at around 1200 just prior to the start of the 1900s.

With the start of the first decade of that century, the Agent's enumerations, the state census and the federal census show a sharp drop in Indians reported living in the former reservation,

[186] In 1884, in the same act that closed the 1855 reservation to further entries, Congress required all Indian agencies to count all Indians within their agencies. See Ex. 101.



Ex. 64 at 11.

The decline in the reported numbers of Indians at Mille Lacs is mirrored in reverse by the enumeration at White Earth. By 1914, the Agent at White Earth reported 1,152 "removal" Mille Lacs Indians living at White Earth and only 276

"non-removals" still at the former reservation.[187] By 1920 the number of Mille Lac Band members at White Earth by 1920 made up over one-third of the Indian population.[188] And by 1930 there were 1,608 removal Mille Lacs Indians at White Earth (31 full-blooded and 1,577 mix-blooded) compared to 321 non-removal Mille Lacs Indians living on the former reservation (20 full-blooded and 301 mix-blooded).[189]

Conversely, while the Indian population declined by nearly 70 percent by 1910 on the former reservation, the non-Indian population increased by 110 percent. While the Indian population in the former reservation stabilized by 1920, by 1940 the non-Indian population made up nearly 90 percent of the people living in the former reservation area.

D. The cartographic record also reflects disestablishment.

The cartographic record corroborates that the 1855 reservation had been ceded and opened to settlement. The most compelling cartographic record in that prepared by Charles C. Royce, who was commissioned to prepare a schedule and corresponding maps of all Indian land cessions from 1784 through 1894. His work was first published by the Smithsonian Institution, by the Government Printing Office in 1899 and is available now online.

Royce prepared two maps for Minnesota. One map depicts what Royce referred to as Area 242, the land ceded in the Treaty of St. Peter's, July 29, 1837.

[187] Ex. 5 at 94; Ex. 102.
[188] Ex. 103 at 59. Meyer's data sources are the annual Agent's reports to the Commissioner of Indian Affairs.
[189] Ex. 5 at 100; Ex. 104.

The second Royce map for Minnesota showed later land cessions. The 1855 Mille Lacs reservation was labeled Royce Area 454. In his schedule, Royce noted the specific relinquishment of the Band's right of occupancy.

Other cartographic evidence of cession of Minnesota include:

- 1905 General Land Office's map/annotated with "ceded Mille Lac Ind. Res."
- 1907 map published by Shedd and Bright Mfg. Co. of Austin showing no Mille Lacs reservation.
- 1912 Bureau of Indian Affairs diagram of ceded and reserved Chippewa lands in Minnesota, describing the Mille Lacs reservation ceded by the Treat of May 7, 1864.
- 1915 map distributed by realtor Eugene Trask showing lands for sale around Mille Lacs Lake but no reservation.
- 1917 Bureau of Indian Affair's map showing available to purchase for the "homeless" Mille Lacs.
- 1928 General Land Office map of Minnesota showing a nature preserve at Mille Lacs Lake but no reservations.
- 1966 J. William Trygg map based on the original U.S. Land Surveyors' plats and field notes showing no reservations.[190]

In sum, the pattern of settlement reflects the express language of what happened with the Treaties of 1863, 1864, and 1867 and the Nelson Act. The Mille Lacs Band, along with all other bands of the Mississippi Chippewa Tribe, ceded the 1855 reservation. Then in 1889, the Mille Lacs Band ceded all interests in former reservation lands Minnesota except at White Earth and also relinquished the right provided them in the proviso in Article 12 of the 1863 and

[190] Exs. 105-11.

1864 Treaties. European settlers and timber interests filed claims on essentially all lands within the former reservation. After 1902 a large majority of Mille Lacs Band members moved to White Earth, and by 1940, the former reservation was overwhelmingly non-Indian in population.

V. The Band's claims are barred by the doctrines of claim preclusion, issue preclusion, and judicial estoppel.

A. The Band's claims are barred by claim preclusion because the Supreme Court has already concluded the reservation does not exist.

The Band seeks a declaration that the reservation established in the 1855 Treaty was not disestablished by subsequent congressional action. The Court cannot grant Plaintiffs' requested relief without determining that the 1855 reservation still exists. Though the Band has never before brought a claim seeking a declaration of its investigatory and jurisdictional authority over the 1855 Treaty area, the Band and the Minnesota Chippewa Tribe, of which the Band is a constituent member, have previously litigated the claim of reservation cession. Because reservation cession has been decided in final judgments in previous cases, the Band's claims are barred by claim preclusion. The Court must grant summary judgment in favor of Defendants on that basis.

The doctrine of res judicata, or claim preclusion, applies when (1) a prior suit resulted in a final, merits judgment; (2) that suit's jurisdiction was proper; (3) the prior suit and the current suit involve the same parties or those in privity; and (4) both suits are based upon the same claims or causes of action. *Elbert v. Carter*, 903 F.3d 779, 782 (8th Cir. 2018).

Claim preclusion prevents a party from relitigating any claim or defense that available to the parties in a prior action, whether or not actually litigated or decided. *Canadian St. Regis Band of Mohawk Ind. v. New York*, 146 F. Supp. 2d 170, 187 (N.D.N.Y. 2001). Res judicata is especially important in cases involving real property, *Nevada v. United States*, 463 U.S. 110, 129 n.10 (1983), and "Indian land claims are not entitled to a special exemption from res judicata principles[.]" *Bear v. U.S.*, 810 F.2d 153, 157 (8th Cir. 1987) (internal citations omitted).

1. In 1913, the Supreme Court confirmed the Band had ceded its reservation.

As discussed earlier, see *supra* p. 26, in the early 1900s, the Mille Lac Band of Chippewas sued the United States for losses sustained under entries made on lands in the 1855 Treaty area. In 1912, the Court of Claims found that the Nelson Act of 1889 "divested" the Band of "Indian title" to the 1855 Treaty area lands and ordered compensation due to the Band under the Nelson Act. *Mille Lac Band of Chippewas v. United States*, 47 Ct. Cl. 415, 454 (1912). As explained earlier, the Band itself asserted that because the reservation was ceded in 1889, they were entitled to compensation for the patenting of their lands—not for a finding that the 1855 reservation still existed. See *supra* pp. 26-28. The parties understood that Indian title to the lands had been divested, and therefore it was assumed and

reiterated as a finding of fact that the reservation had been ceded and extinguished as a reservation."[191]

The government obtained Supreme Court review. The Court outlined the issues it faced in the decision as follows:

> The judgment was sought and was rendered on the theory that the lands were set apart and reserved for the occupancy and use of the Mille Lac Band by treaties of February 22, 1855, 10 Stat. 1165; March 11, 1863, 12 Stat. 1249, and May 7 1864, 13 Stat. 693, and *were subsequently relinquished to the United States pursuant to the act of January 14, 1889*, *supra*, upon certain trusts therein named, and that in violation of those treaties and that act they were opened to settlement and disposal under the general land laws of the United States and were disposed of thereunder, to the great loss and damage of the Mille Lac band or the Chippewas of Minnesota.
>
> The arguments at the bar and the briefs are addressed to these questions: 1. The scope of the jurisdictional act. 2. The rights of the Indians in the lands under the treaties of 1863 and 1864. 3. The effect to be given to the act of 1889 and its acceptance by the Indians. 4. Whether the disposal of the lands, or any of them, under the general land laws was violative of the rights of the Indians.

United States v. Mille Lac Band of Chippewa Indians, 229 U.S. 498, 499-500 (1913) (emphasis added).

The Supreme Court subsequently summarized the Nelson Act's purpose and effect as aiming "for the *cession and relinquishment of all their reservations, excepting the White Earth and Red Lake Reservations*...." *Id*. at 503 (emphasis added).

The Supreme Court described the Band's specific agreement to the terms of the Nelson Act:

---

[191] *See* Ex. 65 at 507, No. II; Ex. 66 at 119.

> The agreement with the Mille Lacs, in addition to embodying a cession and relinquishment of the lands in the White Earth and Red Lake Reservations not required for allotments, contained an express assent to all the provisions of the act of 1889, and *an express relinquishment of the lands in the Mille Lac Reservation*, as is shown by the following excerpt from the agreement."

Id. (emphasis added) The Court then quoted from the Nelson Act agreement the adult males of the Band had signed).

The Court even discussed the dispute over the meaning of the proviso in Article 12 until the passage of the Nelson Act:

> [T]he controversy was intended to be and was adjusted and composed by concessions on both sides, whereby 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....

Id. at 507.

The Court determined that the Nelson Act achieved a compromise over the surrender of the Article 12 proviso rights and required payment for extinguishing that right:

> We are accordingly of opinion that the act of 1889, to which the Indians fully assented, contemplated and authorized the completion, and the issuing of patents on, all existing pre-emption and homestead entries in the Mille Lac tract which, in the course of proceedings in the Land Department, should be found to be within the terms of the proviso to § 6, and therefore that no rights of the Indians were infringed in so disposing of lands embraced in such entries.

229 U.S. at 508-09.

In terms of structure, the Nelson Act was like the transaction in Rosebud: the Indians were to receive funds from land sales. *Rosebud Sioux Tribe v. Kneip*,

420 U.S. 584, 596-97 (1977). The payment did not mean the Band had title to the land, for on that point there was no dispute: Indian title had been ceded in 1863 and 1864.

2. In 1926, the Supreme Court affirmed, as it did in 1913, the 1855 reservation no longer existed—it had been ceded to the United States.

The Court reaffirmed its 1913 holding on cession in *United States v. Minnesota*, 270 U.S. 181 (1926). There the United States sued Minnesota to cancel land patents or to recover the proceeds the state received from the sale of allegedly improper patented lands.[192] One of the offending patents was issued in 1871 on swamp lands within the 1855 Treaty area. *Id.* at 191. Minnesota argued that the Court lacked original jurisdiction because the real party in interest was the Mississippi Chippewa Tribe. Not so, said the Court, because the United States had a direct interest from its guardianship over the Indians. *Id.* at 194.

The Court upheld the 1871 patent of lands within the former reservation because in 1863 the Mille Lac and five other reservations were ceded to the United States. *Id.* at 198-99. In short, the 1871 patent to Minnesota was valid as to the lands within the 1855 reservation because those lands had been ceded to the United States, and no guardianship obligation was attached to those lands.

---

[192] In its complaint the Unites States affirmatively alleged that the Mille Lacs reservation had been ceded by the 1863 and 1864 Treaties and again when assenting to the Nelson Act. Complaint of United States, II. paras. 1-2, in *United States v. Minnesota*, No. 17 (original jurisdiction) (O.T. 1925, Ex. 113); Minnesota admitted that allegation in its answer. Answer of Minnesota, II., in *United States v. Minnesota*, No. 17 (original jurisdiction) (O.T. 1925, Ex. 114).

The United States further argued that the Ojibwe negotiators did not understand or were misled about the cession made in the 1855 Treaty. The Court rejected that argument because when "a treaty is made and proclaimed it becomes a law of the United States, and the courts can no more go behind it for the purpose of annuling [sic] it in whole or in part than they can go behind an act of Congress." *Id*. at 201.

The Court held the only lands improperly patented to Minnesota were some 706 acres within the Leech Lake, Winnibigoshish and Cass Lake reservations. *Id*. at 215.

The fundamental issue in *United States v. Minnesota* regarding the boundaries of the 1855 reservation was before the Supreme Court in 1913 and decided then. Importantly, in 1913 the parties themselves did not dispute that, under the Nelson Act, the lands comprising the various Chippewa reservations, including that the Mille Lacs claimed, were ceded to the Government. The dispute was over whether the terms were properly construed when it came to assessing the value of the lands disposed of under the Nelson Act and whether the Band should be compensated for its losses. Then in 1926, with the United States acting as trustee for the Band, the Supreme Court reaffirmed the 1855 reservation had been ceded.

All elements of claim preclusion are met against the Band today. First, the 1913 suit resulted in a final judgment on the merits, as did the 1926 action. Second, no one can dispute the federal courts had jurisdiction; indeed, the 1913

suit arose under the Court's appellate jurisdiction, and the 1926 action was bought under the Supreme Court's original jurisdiction. Third, this suit, like the earlier cases, is based on the same claims: that the 1855 reservation was extant. Here, the Band has had a full and fair opportunity by itself or through its guardian, the United States, to litigate the issue of reservation boundaries in that action. *See*, *e.g.*, *Mashpee Tribe v. Watt*, 707 F.2d 23, 24-25 (1st Cir. 1983) (holding that res judicata applied to bar the Tribe's claim, despite non-identical defendants, because all claims were the same, or logically dependent upon, the earlier claim").

Additionally, although the County, County Attorney, and Sheriff were not defendants in the earlier actions, this case falls squarely within the exceptions to the *res judicata* mutuality requirement outlined by the Supreme Court. *See Nevada v. United States*, 463 U.S. 110 (1983). In *Nevada*, the parties sought to adjudicate water rights. The Court acknowledged that although an earlier case, Orr Ditch, was an equitable action to quiet title and therefore an *in personam* case, it should be considered *in rem*, because "everyone involved in *Orr Ditch* contemplated a comprehensive adjudication of water rights intended to settle once and for all the question of how much of the Truckee River each of the litigants was entitled to." *Id.* at 143. "Nonparties such as the subsequent appropriators in this case have relied just as much on the *Orr Ditch* decree in participating in the development of western Nevada as have the parties of that case." *Id.* at 144.

The same logic applies here. Although the Defendants were not a party in 1913 and 1926, they have relied on the previous holding as having settled this issue. The Indian rights determined and compensation given in the Court of Claims and Supreme Court decisions are analogous to the water rights at issue in Nevada. Therefore, an exception to mutuality of claim preclusion should apply, and bar the Band's attempt to relitigate the reservation status.

Because res judicata bars the Band's claim, summary judgment should be granted for Defendants.

3. The Band is bound by the finding that the Mille Lacs Reservation was expressly ceded by the 1864 Treaty.

The Indian Claims Commission, in Docket 18-N, filed by the Minnesota Chippewa Tribe and the Mille Lacs Band, found that the Mille Lacs reservation was ceded by the 1864 Treaty, held that the plaintiffs had no claim under the 1864 Treaty, and dismissed the claim. *Minnesota Chippewa Tribe, et al. v. United States*, 14 Ind. Cl. Comm. 226, 229-230 (1964).[193] "The [Supreme] Court held that the lands in the Mille Lac Reservation were expressly ceded by the 1864 Treaty." *Id.* at 297. "By the 1864 Treaty the Mississippi Bands ceded five reservations [. . .]" *Id.* at 300.[194] The plaintiffs appealed, but settled in 1965 and

[193] Ex. 115.

[194] The reference to five reservations includes Mille Lacs—Royce Area 454. Sandy Lake and Rice Lake were combined in the Petition as Royce Area 455, so the six reservations ceded by the 1864 Treaty were now five. 14 Ind. Cl. Comm. at 227.

the appeal was withdrawn. *Minnesota Chippewa Tribe, et al. v. United States*, 15 Ind. Cl. Comm. 466, 467 (1965).[195]

The Court of Claims in 1982 applied res judicata to bar further claims under the 1855, 1864, and 1867 Treaties. *Minnesota Chippewa Tribe v. U.S.*, 230 Ct. Cl. 761 (1982). "Pursuant to the 1864 Treaty, plaintiffs ceded the five reservations to the United States, and as consideration received Royce Area 507." *Id.* at 771. "Plaintiffs, by their stipulated settlement, have waived any objections to the application of res judicata to the instant claims under the 1855, 1863, 1864, and 1867 Treaties. This result obtains by virtue of express settlement language barring any and all claims that plaintiffs 'have or could have' brought in Nos. 18 B and 18-N." *Id.* at 772.

B. Issue preclusion bars the Band from relitigating the issues central to prior judgments affirming the 1855 reservation was ceded.

Issue preclusion typically "bars relitigation of an issue of fact or law raised and necessarily resolved by a prior judgment." *Bravo-Fernandez v. U.S.*, 137 S. Ct. 352, 358 (2016). "[T]he whole premise of collateral estoppel is that once an issue has been resolved in a prior proceeding, there is no further factfinding function to be performed." *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 336 n.23 (1979). Issue preclusion has five elements: (1) the party sought to be precluded in the second suit must have been a party, or in privity with a party, to the original lawsuit; (2) the issue sought to be precluded must be the same as the

[195] Ex. 116.

issue involved in the prior action; (3) the issue sought to be precluded must have been actually litigated in the prior action; (4) the issue sought to be precluded must have been determined by a valid and final judgment; and (5) the determination in the prior action must have been essential to the prior judgment. *Sandy Lake Band of Mississippi Chippewa v. United States*, 714 F.3d 1098, 1102–03 (8th Cir. 2013).

Here, as with claim preclusion, the issues the Band seeks to resolve in this litigation have already been resolved. The Band was a party in the original lawsuit in 1912. The issue of the effect of the Nelson Act—the divestment of Indian title to the lands encompassed by the 1855 Treaty—is the same issue that underlies the present dispute. That issue was litigated and was determined by a valid and final judgment. Lastly, the determination of the disposition of lands—and the compensation due to the Band as a result—was essential to the judgment in the earlier litigation.

Issue preclusion does not require identity of claims in the first and second suits. *Menominee Indian Tribe of Wisc. v. Thompson*, 943 F. Supp. 999, 1019 (W.D. Wis. 1996), *aff'd*, 161 F.3d 449 (7th Cir. 1998). It only requires that the determination have been essential to the prior judgment. *Sandy Lake Band*, 714 F.3d at 1103. Whether the lands encompassed by the 1855 Treaty and the Nelson Act remained Indian country, or were ceded to the United States through the 1863, 1864, and 1867 Treaties and the Nelson Act, were essential to the courts'

determinations in the earlier litigation. It was at the core of their analyses of the disposition of lands and the compensation to which the Band was entitled.

Nonmutual collateral estoppel is still appropriate when the party against whom it is asserted had a full and fair opportunity to litigate the issue. *See Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 329, 332 (1979). Thus it is immaterial that today's Defendants were not parties in the previous litigation. Because the elements of issue preclusion are all met, the Court should grant summary judgment for Defendants.

C. The Band's present assertion regarding the 1855 reservation is contrary to its earlier assertions and is thus barred by judicial estoppel.

Judicial estoppel prevents a party from assuming one position in a legal proceeding, succeeding, and then assuming a contrary position. *Scudder v. Dolgencorp, LLC*, 900 F.3d 1000, 1006 (8th Cir. 2018). Absent good cause, a party should not be allowed to gain an advantage by litigation on one theory, and then seek another advantage by pursuing an incompatible theory. *Id.*

Courts weigh three considerations in deciding whether to apply judicial estoppel:

> 1) a party's later position must be clearly inconsistent with its earlier position, 2) whether the party succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled, and 3) whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

Baouch v. Werner Enters., Inc., 908 F.3d 1107, 1113 (8th Cir. 2018) (quoting *New Hampshire*, 532 U.S. at 750-51).

Here, the Band has taken positions in earlier litigation that are inconsistent with its present position.[196] For example, in briefing before the Court of Claims in 1986, the Minnesota Chippewa Tribe and the Band argued that:

> By an 1863 treaty, as modified by an 1864 Treaty, the six Mississippi Chippewa Bands, including Mille Lac, ceded the separate reservations set aside by the 1855 treaty in exchange for what became known as the White Earth Reservation. [. . .] Article 12 of both treaties contained a special provision guaranteeing to the Mille Lac Indians the right to remain in possession of their reservation "so long as they shall not in any way interfere with or in any manner molest the persons or property of the whites."

Plaintiffs' Motion for Summary Judgment of Liability Arising out of Disposition of Mille Lac Reservation Lands, United States Claims Court, May 8, 1986, at 2.[197] Further, the Tribe and the Band explained that in 1886, when there were further negotiations to remove the constituent Chippewa bands to White Earth, the commissioners told them "'You know your reservation has been sold and the title passed to the United States. It has been opened to settlers and many patents have been issued to white men and many are still trying to get in.' [. . .] But the Mille Lacs 'insisted upon their right of occupancy of the Mille Lac Reservation and refused to' agree to move from the reservation." *Id.* at 5. The brief then

[196] In addition, the Band in 1911 took the position repeatedly that the Mille Lacs Reservation was "extinguished as an Indian reservation" and "ceased to exist." See *infra* pp. 26-27.
[197] Ex. 117.

details the conversations of Senator Rice with the Band during the Nelson Act. Plaintiffs then assert:

> In the light of these explanations and understandings the Mille Lac Band assented to the 1889 Act. By that assent the Band relinquished the right to occupy the Mille Lac Reservation reserved 'by Article 12 of the 1863 and 1864 treaties' and subjected itself to the 1889 Act.

Id. at 13.

The brief then details the subsequent litigation the Band entered into in order to receive adequate compensation for the loss of its lands. The Claims Court held that the Band was entitled to recover for the loss of the entire 61,028.14-acre reservation. *Id.* at 14-15.

Finally, the Tribe and the Band set out their argument for the 1986 Claims Court litigation:

> The claimants' position is that the 1863 and 1864 treaties reserved the Mille Lac Reservation to the Mille Lac Band for so long as the Band complied with the condition of Article 12; that the Band did comply with the condition; that the United States, in violation of standards of fair and honorable dealings (a) opened the reservation lands to disposal under the public land laws in violation of the treaties; (b) "positively and repeatedly assured (the Mille Lacs) that they (the reservation lands) were within its (1889 Act) terms" and in reliance on such assurances induced the Band to assent to the 1889 Act (47 Ct. Cl. 451); (c) made no explanation or disclosure that highly technical and legalistic language in the Section 6 proviso exposed the Band to the loss of over 90% of its reservation land then under entry; (d) disposed of the Band's reservation land under the public land laws both before and after the 1889 Act although the law was crystal clear that the Interior was entirely without authority to issue valid patents to Indian lands; and (e) failed to pay the fair market value of the land and timber so disposed of. But for the Government's unfair and dishonorable dealings, but for the use of the legalistic Section 6 proviso as a pretext for taking the Band's property, all of the reservation land would have been disposed of initially under the Nelson Act. The claimants would have received the benefit of the

> 1889 Act compensation plus the right under the Indian Claims Commission Act, to recover the fair market value of those lands, less payments on the claims.

Id. at 16-17. The first sentence of its Argument section, which follows, is this: "The sole issue on this motion is whether the United States *in disposing of the Mille Lac reservation land* acted in accord with the revision and fair and honorable dealings clauses of the Indian Claims Commission Act (25 U.S.C. 70a)." *Id.* at 17 (emphasis added).

Later, the Tribe and the Band, in setting forth the earlier findings of the Court of Claims, say: "The facts are essentially settled. Here we have the advantage of findings by the Court of Claims in prior litigation between the same parties. Underlying these findings is the record in the adjudicated case. There should be no dispute on the facts essential to the issue of liability." *Id.* at 18. Paragraph 9 of the "Proposed Findings of Uncontroverted Facts," submitted with Plaintiffs' brief in 1986 says: "This act [the Nelson Act] further provided for the appointment of commissioners to negotiate with the Chippewa Indians in Minnesota for the cession of their reservations, and in compliance therewith the commissioners so appointed held councils with the Mille Lac Indians on their reservation, occupied by them since the treaty of 1855, represented to them that they came within the terms of the act of 1889, and by virtue of said representation *secured their assent and a written relinquishment of their reservation as contemplated by the act*..." Proposed Findings, at 10.

In the 1986 decision, the Court of Claims held that the Band was entitled to recover fair market value for 29,335 acres of reservation land that were disposed of by the Government prior to the Nelson Act. It held that the Chippewa Tribe could not recover for the portion of its claim concerning the land and timber paid for under the Nelson Act. *Minnesota Chippewa Tribe v. U.S.*, 11 Ct. Cl. 221, 240-241 (Cl. Ct. 1986).

These earlier briefs and decisions demonstrate that the elements of judicial estoppel are satisfied here. First, the Band's position now is clearly inconsistent with the earlier position before the Court of Claims, where the Band had admitted cession and relinquishment. Second, the Band persuaded the court to accept its earlier position. Importantly, the Tribe and the Band said that the facts were undisputed as established in the even earlier judicial findings of the Court of Claims, and relied on those findings in the 1986 brief. Therefore, to accept the Band's present argument is to say *multiple* courts have been misled. *See New Hampshire v. Maine*, 532 U.S. 742, 749 (2001). In essence, the Tribe (and the Band) in 1986 asserted the same view of the historical record as Defendants in the present litigation. These opposing positions are precisely what judicial estoppel is intended to prevent. The Band here should not be able to disavow.

VI. The equitable doctrine of laches bars the Band's claim regarding the 1855 reservation.

The Band's claims are also barred by laches. The Supreme Court had held that "[t]he principle that the passage of time can preclude relief has deep roots in our law[.]" *City of Sherrill, N.Y. v. Oneida Indian Nation of New York*, 544 U.S.

197, 217 (2005). Laches, as applied to long-delayed claims of Indian tribes to historic lands, consists of three factors: (1) the length of time at issue between an historical injustice and the present day; (2) the disruptive nature of claims long delayed; and (3) the degree to which these claims upset the justifiable expectations of individuals and entities far removed from the events giving rise to the plaintiffs' injury. *Oneida Indian Nation of New York v. County of Oneida*, 617 F.3d 114, 127 (2d Cir. 2010). Since the Supreme Court's decision in *City of Sherrill*, lower courts have applied its holding to mean that "equitable doctrines, such as laches, acquiescence, and impossibility, can, in appropriate circumstances, be applied to Indian land claims, even when such a claim is legally viable and within the statute of limitations." *Cayuga Indian Nation of N.Y. v. Pataki*, 413 F.3d 266, 273 (2d Cir. 2005); *see also Wolfchild v. Redwood Cty.*, 91 F. Supp. 3d 1093, 1105 (D. Minn. 2015), *aff'd,* 824 F.3d 761 (8th Cir. 2016) (dismissing Mdewakanton Sioux claims of trespass that necessarily depended on their possessory land claims "[b]ased on the sound reasoning set forth in *Cayuga Indian Nation*").

Here, the equitable considerations are similarly satisfied. First, the Band's claims regarding reservation cession accrued when the relevant legislation were passed in the 1800s. The Supreme Court held the 1863 and 1864 treaties ceded the 1855 treaty area land to the United States in its decisions in 1913 and 1926. See *infra* Sections V.A.1. and 2. It cannot revive those claims in an action brought in 2017 merely because such claims fall under the guise of sovereign and federal

authority to investigate violations of federal, state, and tribal law. This Court should apply the law as the Court did in *Wolfchild*: the Band's claims flow from the 1863 and 1864 treaties, and the land at issue was subsequently sold to third parties no later than the 1889 Nelson Act.

Second, the Band's claim is inherently disruptive of settled expectations and governance. As this Court explained, "Indian land claims asserted generations after an alleged dispossession that are inherently disruptive of state and local governance and the settled expectations of current landowners and are subject to dismissal on the basis of laches, acquiescence, and impossibility." *Wolfchild*, 91 F. Supp.3d at 1105 (quoting *Stockbridge-Munsee Cmty. v. New York*, 756 F.3d 163, 164 (2d Cir. 2014)). As in *Wolfchild*, the lands at issue here are predominantly owned and settled by non-members, dating back to the 1800s. Since that time, landowners have used and occupied the properties, improved and developed land for agriculture, businesses, and residences. The land has been governed and taxed by the State of Minnesota and the County. *See* 91 F. Supp. 3d at 1104.

Finally, the County and residents here have justifiable expectations that are grounded in many decades of state exercise of regulatory jurisdiction. *See City of Sherrill,* 544 U.S. at 215. Such expectations merit heavy weight in analyzing whether a claim should be equitably barred by laches. *Id.* A finding that the 1855 Treaty Area is now comprised of 61,000 acres of reservation land would greatly disrupt these expectations. Equity requires a different result, especially when the

Band has received monetary compensation for the losses it sustained for the reservation cession. This Court should follow the framework established in *City of Sherrill* and applied by this Court in *Wolfchild* and hold that the Band's claim is equitably barred.

VII. The Indian Claims Commission Act bars the claim by the Mille Lacs Band that the reservation was never disestablished.

A. In 1946 Congress created a tribunal to decide all types of tribal claims.

The Indian Claims Commission Act, enacted in 1946, created a special judicial body before which Indian tribes could file claims of all kinds against the United States Government. 60 Stat. 1049 (ch. 959).

The ICCA not only waived all statutes of limitation going back to 1776, but allowed claims of any kind or nature, whether arising in law or in equity as legal principles, and "moral" claims that could be characterized as violating notions of "fair and honorable dealings that are not recognized by any existing rule of law or equity." 60 Stat. 1049 (ch. 959), § 2. Virtually any interaction between the government and Indian tribes was subject to question before the Indian Claims Commission. In this way Congress "provide[d] for a final adjudication of all tribal claims." 102 Cong. Rec. 119351 (July 6, 1956). But as Congress opened the door to past claims, it barred later ones:

> [N]o claim existing before such date [August 13, 1946] but not presented within such period [five years] may thereafter be submitted to any court or administrative agency for consideration. . . 60 Stat. 1049 § 12.

See 122 Cong. Rec. 10319-20 (April 9, 1976) ("All claims arising before 1946 must be filed within five years of the date of the Act. Such claims that were not filed would be barred.").

B. The Mille Lacs Band claims regarding the continued existence of the Mille Lacs Reservation are barred by the ICCA.

The claims encompassed by the Indian Claims Commission Act were extraordinarily broad and included claims that "would result" if treaties or agreements were "revised" on grounds such as fraud or duress; claims "arising under the Constitution, laws, [or] treaties of the United States"; and "claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity." ICCA, 60 Stat. 1049-1050, § 2(1), (3), and (5).

"Congress intended to draw in all "claims of ancient wrongs," regarding Indians and "to have them adjudicated once and for all." *Temoak Band of W. Shoshone Indians v. United States*, 593 F.2d 994, 998 (Cl. Ct.), *cert. den.* 444 U.S. 973 (1979). The ICCA provided that these claims would be disposed of with "finality." *United States v. Dann*, 470 U.S. 39, 45 (1985) (quoting H.R. Rept. No. 1466, 79th Cong., 1st Sess. 10 (1945) (House ICCA Report)).

Section 12 of the ICCA provides that all claims that could be brought under the Statute and that existed as of the Statute's enactment in 1946, are barred unless brought within five years of enactment. 60 Stat. 1052 (ch. 959). Section 2 of the ICCA defined the scope of claims that a tribe could bring. 60 Stat. 1050 (ch. 959). The ICCA was intended to create a mechanism for resolving a broad range

of potential claims against the United States and to provide closure for these claims.

The claims of the Mille Lacs Band fall within the provisions of Section 2(3): "Claims which would result if treaties, contracts and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a Court of equity." 60 Stat. 1050. The Band alleges that its claims here are "claims arising under the Constitution, laws [or] treaties of the United States" under ICCA Section 2(1), and the aforementioned "moral" claims provisions of ICCA Section 2(4) and (5). *Id.*

This litigation by the Band regarding the 1855 reservation necessarily seeks to revise or modify the plain language of treaties, congressional acts and resolutions, and the 1902 Agreement. The Band wants this Court to change the outcome of actions that occurred before 1946, and under which the 1855 reservation was ceded, relinquished, and "extinguished" as an Indian reservation. The Band wants this Court to change the outcome of actions under which the Band was deprived of allotments at Mille Lacs and agreed to remove to White Earth and take their allotments there instead of on the "former Mille Lacs Reservation." This action against Mille Lacs County is an example of the prohibited "artful pleading" that is designed to circumvent the ICCA. *See Oglala Sioux Tribe of Pine Ridge v. U.S. Army Corps of Engineers*, 570 F.3d 327, 332 (D.C. Cir. 2009); *cf. Block v. N.D. Ex Rel Bd. of Univ. & Sch. Lands*, 461 U.S. 273,

284-85 (1983) (artful pleading cannot avoid the limitations period in Quiet Title Act); *United States v. Mottaz*, 476 U.S. 834, 847-48 (1986) (Quiet Title Act can bar untimely claims under the General Allotment Act).

In Oglala, the court explained:

> [The Tribe] cannot obtain review of an historical land claim otherwise barred by the Act by challenging present-day actions involving the land. *Catawba Indian Tribe of S.C. v. United States*, 24 Cl. Ct. 24, 29-30 (1991). Nor can it circumvent the statutory limitation by styling its grievances as claims for equitable relief against federal officers in their individual capacities, *see* Pet'r Reply Brief at 19. If the Tribe's essential claim is time-barred, reaching these "officer suits" would mean that the Tribe could litigate claims arising before 1946, in direct defiance of Congress's intent in passing the Act. *Cf. Block*, 461 U.S. at 284-85; *Mottaz*, 476 U.S. at 846-47.

570 F.3d at 332.

In *Oglala* the court gave an exhaustive explanation of the history of the Indian Claims Commission Act and the types of claims that could be submitted and if covered, were barred. 570 F.3d at 332-33.

As to claims by the Oglala Sioux Tribe that the ICCA does not bar suits to determine a reservation's boundaries, the court found that the tribe had put the matter much too broadly.

> The reservation boundary cases do not run afoul of the Indian Claims Commission Act because the courts were being called upon to interpret federal legislation and executive orders, not to set these sources aside or to treat them as void on the basis of centuries-old flaws in the ratification process. In the words of the Act, the cases do not involve 'claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake.' But that is precisely what the Tribe's first three claims do involve.

Id. at 333.[198]

The same is true here. The "essential claim" by the Band is based on the actions of the United States that occurred before 1946. The Band seeks to set aside the plain language 1902 Agreement, and the 1893 and 1898 congressional resolutions (both signed by the President), and instead to revise them on grounds of fraud, duress, unconscionable consideration, and mutual or unilateral mistake. There is no question that the Band filed a claim in the Indian Claims Commission on this basis:

> Plaintiffs' motion for Summary Judgment of Liability arising Out of Disposition of Mille Lac Reservation Land. Based on the Treaties of 1863 and 1864, Plaintiffs contend that the Mille Lac band was promised a reservation in return for their good conduct, but that through a series of conveyances confirmed as a result of the Nelson Act, that reservation was taken from them. Under Clauses 3 and 5 of 25 U.S.C. § 70a, they seek, for the Band, the fair market value of the land which the Supreme Court in 1913 held had not been ceded under the Nelson Act, and for the Tribe, the fair market value of the acreage which was then ceded.

Minnesota Chippewa Tribe v. United States, 11 Cl. Ct. 221, 234-35 (Cl. Ct. 1986).

After reciting the various histories of the treaties with the Band, the Court discussed how:

> Congress confirmed the decision to open the reservation by enacting legislation envisioned by the 1884 Act with the Nelson Act, which Congress confirmed by its December 19, 1893 Resolution (28 Stat.

[198] In two earlier decisions, the Eighth Circuit Court of Appeals also rejected the efforts by the Oglala Sioux Tribe by artful pleading to circumvent claims regarding title to the Black Hills by instead naming the State of South Dakota and then Homestake Mining Company as defendants in suits on the basis that these were not previously rejected claims against the United States. *See Oglala Sioux Tribe v. United States*, 650 F.2d 140 (8th Cir. 1981), and *Oglala Sioux Tribe v. Homestake Mining Co.*, 722 F.2d 1407 (8th Cir. 1983).

> 576). In 1898, it declared this reservation subject to entry under the public land laws and confirmed all preemption entries previously made. J. Res. 40, 30 Stat. 745.

11 Cl. Ct. at 236.

The court further explained:

> Plaintiffs [including the Mille Lacs Band] point to this history and intend that the United States acted in violation of standards of fair and honorable dealings and that the Nelson Act should be revised. The claim thus falls under Clause 3 (revision) and Clause 5 (fair and honorable dealings) of Section 2 of the Indian Claims Act.

Id. The Court ultimately concludes that the Band is entitled to recover for the pre-1889 dispositions of the reservation. The Band could proceed with its claims under Clause 5. *Id*. at 238.

The Band makes the same claims here, but attempts to draw the opposite conclusion: instead of ceding and disestablishing the Mille Lacs reservation, as the Band long claimed, the same course of action by the United States preserved the Mille Lacs reservation. This transparent effort is barred by the ICCA.

CONCLUSION

The United States Supreme Court has twice ruled that the 1855 reservation was ceded to the United States. This Court, especially after the *McGirt* decision, must adhere to that precedent. There may be lands within Mille Lac County that qualify as Indian Country, but the Defendants are entitled to a declaration that the 1855 reservation is gone.

Dated: February 1, 2021

TAFT STETTINIUS & HOLLISTER LLP

By *s/ Scott G. Knudson*
Scott G. Knudson (#141987)
Scott M. Flaherty (#388354)
2200 IDS Center
80 South Eighth Street
Minneapolis, Minnesota 55402
Telephone: (612) 977-8400
Fax: (612) 977-8650
Email: sknudson@taftlaw.com
sflaherty@taftlaw.com

ATTORNEYS FOR DEFENDANT JOSEPH WALSH

Dated: February 1, 2021

KELLEY, WOLTER & SCOTT, P.A.

By *s/ Douglas A. Kelley*
Douglas A. Kelley (#54525)
Brett D. Kelley (#397526)
Stacy L. Bettison (#315886)
Centre Village Offices, Suite 2530
431 South Seventh Street
Minneapolis, MN 55415
Telephone: (612) 371-9090
Fax: (612) 371-0574
Email: dkelley@kelleywolter.com
bkelley@kelleywolter.com
sbettison@kelleywolter.com

ATTORNEYS FOR DEFENDANT DON LORGE

Dated: February 1, 2021

NOLAN, THOMPSON, LEIGHTON & TATARYN, PLC

By *s/ Randy V. Thompson*
Randy V. Thompson (#122506)
Courtney E. Carter (#390284)
1011 1st Street South, Suite 410
Hopkins, MN 55343
Telephone: (952) 405-7171
Fax: (952) 224-0647
Email: rthompson@nmtlaw.com
ccarter@nmtlaw.com

ATTORNEYS FOR DEFENDANT COUNTY OF MILLE LACS, MINNESOTA

13085558v14