UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Mille Lacs Band of Ojibwe, a federally recognized Indian Tribe; Sara Rice, in her official capacity as the Mille Lacs Band Chief of Police; and Derrick Naumann, in his official capacity as Sergeant of the Mille Lacs Police Department, Plaintiffs, v. County of Mille Lacs, Minnesota; Joseph Walsh, individually and in his official capacity as County Attorney for Mille Lacs County; and Don Lorge, individually and in his official capacity as Sheriff of Mille Lacs County, Defendants.	Case No. 17-cv-05155 (SRN/LIB)

[PROPOSED] *AMICUS CURIAE* BRIEF OF THE UNITED STATES IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT THAT THE BOUNDARIES OF THE MILLE LACS INDIAN RESERVATION, AS ESTABLISHED IN 1855, REMAIN INTACT

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INTERESTS OF THE UNITED STATES

The United States maintains a government-to-government relationship with the Mille Lacs Band of Ojibwe ("Band" or "Mille Lacs"), a federally recognized Indian tribe. In 1855, the United States entered into a treaty with the Mississippi Bands of Chippewa ("Mississippi Bands") by which they ceded vast tracts of their aboriginal lands in north-central Minnesota but reserved land for six reservations. 10 Stat. 1165 (Feb. 22, 1855). The Mille Lacs Indian Reservation ("Reservation") at issue here is a tract of approximately 61,000 acres roughly 90 miles north of Minneapolis. The Band filed the instant lawsuit to resolve ongoing disputes with the County of Mille Lacs ("County"), part of which lies within the boundaries of the Reservation, over the scope of the Band's law enforcement authority on the Reservation. The County has actively disputed the continued existence of the Reservation for at least the past two decades, and this same disagreement is at the heart of the law enforcement-related dispute that prompted this lawsuit.

Upon request of the parties, the Court ordered to defer dispositive motions on the scope of the Mille Lacs Band's law enforcement authority until the Court resolves the "issues relating to the status of the 1855 Mille Lacs Indian Reservation." ECF No. 211 at 1-2. On February 1, 2021, the Band and County filed cross-motions for summary judgment advancing their arguments on the status of the Reservation. ECF Nos. 223 and 239. The United States has a substantial interest in ensuring that the Reservation

boundaries remain as established by the 1855 Treaty unless and until Congress expressly changes them.

The scope of federal, tribal, and state jurisdiction depends on the boundaries of the Reservation. As a result, duties and responsibilities of the United States turn on whether the 1855 Reservation remains intact.[1] First, the United States has jurisdiction to prosecute Indian country crimes on the Reservation. The State of Minnesota is one of six states for which Congress in 1953 mandated the transfer of federal civil and criminal jurisdiction over Indian reservations to the states through Public Law 83-280, 18 U.S.C. § 1162(d). In 2010, Congress passed the Tribal Law and Order Act ("TLOA"), Pub. L. 111-211, 124 Stat 2261 (2010), permitting, among other things, a tribe whose Indian country is subject to mandatory jurisdiction to request that the United States reassume concurrent jurisdiction to prosecute violations of the Major Crimes and General Crimes Acts. 18 U.S.C. § 1162(d). Upon request from the Band, on January 26, 2016, the Department of Justice issued a notice that it would assume concurrent jurisdiction over the Band's Indian country effective January 1, 2017, *United States Assumption of Concurrent Federal Criminal Jurisdiction; Mille Lacs Band of Ojibwe*, 81 Fed. Reg. 4335 (Jan. 26, 2016). The Department of the Interior ("Interior") subsequently reached an agreement with the Band that allows certain qualified Band officers to enforce federal law in the Band's Indian country. *Mille Lacs Band of Ojibwe v. Cty. of Mille Lacs*, No. 17-5155,

[1] The Court's resolution of the reservation boundary issue will not impact jurisdiction on lands that are held in trust by the United States for the benefit of the Band and its members.

2020 WL 7489475, at *9 (D. Minn. Dec. 21, 2020). As such, resolution of the Reservation boundary dispute between the Band and County, which implicates the scope of the Band's Indian country, is necessary to the resolution of the law enforcement dispute raised in this case.

Second, Interior, which is the primary federal agency charged with carrying out the United States' obligations and responsibilities relating to Indian tribes, regards the 1855 Reservation's boundaries as remaining intact. Interior's Solicitor analyzed the relevant treaties, congressional acts, legislative history, and factual circumstances regarding the Reservation within the Supreme Court's diminishment/disestablishment framework, and in 2015, based on this analysis reaffirmed the agency's understanding that the subsequent treaties and federal statutes failed to "evince a clear Congressional intent to disestablish the Reservation and, in fact, guaranteed the Band continuing rights to its Reservation." Memorandum from Solicitor to Secretary, M-37032 at 2 (Nov. 20, 2015), ECF No. 150-4 ("M-Opinion").

And third, the U.S. Environmental Protection Agency ("EPA") has for decades exercised federal regulatory jurisdiction throughout the Reservation under several statutes. Under one such statute, the Safe Drinking Water Act's Underground Injection Control Program, 42 U.S.C. § 300j, EPA in 1993 approved the Band's "treatment as a state" status, concluding after consultation with Interior that the Reservation as established in the 1855 Treaty remained intact. Memorandum from EPA Regional Counsel to Water Division Director. Pls.' Ex. in opposition to Defs.' Mot. for Summ. J. on Reservation Cession, ("Pls.' Opp. Ex."), 34, ECF No. 255-15.

INTRODUCTION

The County, seeking to limit the scope of the Band's law enforcement authority, asserts that the Reservation established in 1855 was disestablished by three later treaties with the Mississippi Bands entered into in 1863, 1864, and 1867. The County also asserts that even if these treaties did not disestablish the Reservation, it was disestablished by the Nelson Act of 1889, 25 Stat. 642 (Jan. 14, 1889), as applied to the Band, and the Band's subsequent agreement accepting the Act's terms. The County is incorrect.

Although post-1855 treaties, statutes, and agreements addressed the opening of the Mississippi Bands' lands to non-Indian settlement, including the Reservation set aside as a permanent homeland for the Mille Lacs Band, each of these actions preserved the right of the Band to remain on its Reservation and none of them demonstrated the requisite clear congressional intent to diminish or disestablish the Mille Lacs Reservation. The Reservation's boundaries, therefore, remain intact today.

The United States respectfully urges the Court to grant the Band's Motion for Partial Summary Judgment and deny the County's cross-Motion.

HISTORICAL BACKGROUND

I. The 1855 Treaty created the Reservation

The Mille Lacs Indian Reservation was established in Article 2 of the 1855 Treaty with the Chippewa as one of six "permanent homes" for the Mille Lacs and other Mississippi Bands. 10 Stat. 1165. The Reservation as established in 1855 consists of around 61,000 acres. *Mille Lac Band of Chippewas v. United States*, 47 Ct. Cl. 415, 417

(1912), *rev'd on other grounds, United States v. Mille Lac Band of Chippewa Indians*, 229 U.S. 498 (1913). As part of the Treaty, the Mille Lacs and Mississippi Bands gave up their aboriginal territory, agreeing to "cede, sell, and convey to the United States all their right, title, and interest in, and to, the [other lands in Minnesota] now owned and claimed by them." 10 Stat. at 1165.

II. The 1863, 1864, and 1867 Treaties

In 1862, the Sioux Indians of Minnesota, angered over treaty violations, initiated attacks on the United States and non-Indian settlers, in what later was termed the "Sioux Uprising" of 1862. *Mille Lac Band of Chippewas*, 47 Ct. Cl. at 418. The Sioux sought the support of the Chippewa. *Id*. And the United States, in contrast, sought to secure Chippewa loyalty. *Id*. By refusing to join the Sioux and instead aligning with the United States, Shaw-bosh-kung, chief of the Mille Lacs Band, helped maintain peace in the State. *Id*. at 419.

Following the Sioux Uprising, the United Stated entered into two treaties with the Mississippi Bands in 1863 and 1864, seeking to move the Bands, including Mille Lacs, to an area near Leech Lake. The 1863 Treaty provided that, "[t]he reservations known as Gull Lake, Mille Lacs, Sandy Lake, Rabbit Lake, Pokagamin Lake and Rice Lake, as described in the second article of the treaty with the Chippewas of 22nd February, 1855, are hereby ceded to the United States . . . ." Treaty with the Chippewa of the Mississippi and the Pillager and Lake Winnibigoshish Bands, 12 Stat. 1249 (Mar. 11, 1863). In Article 2, the United States agreed "to set apart [land near Leech Lake] for the future

homes of the Chippewas of the Mississippi." *Id.* Article 3 provided for the United States to make certain additional payments. 12 Stat. at 1250.

Article 12 of the 1863 Treaty offered express protections to the Band due to its loyalty and "good conduct" during the Sioux Uprising. The Treaty did not require removal from the Reservation, instead stating that the Band "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." Art. 12. Even for the other Bands, the removal provisions were conditioned on the United States' future satisfaction of certain provisions of the Treaty. *Id*

The parties to the 1863 Treaty entered into a superseding treaty in 1864, which repeated verbatim most of the 1863 Treaty provisions but adjusted the boundaries of the Leech Lake Reservation. *Compare* Treaty with the Chippewa, 13 Stat. 693 (May 7, 1864) *with* 12 Stat. 1249. The 1864 Treaty retained the prior Treaty's cession language and removal provisions, as well as the provision providing that the Band could remain on its Reservation, "so long as they shall not in any way interfere with or in any manner molest the persons or property of the whites." 13 Stat. 693 at Art. 12. Article I of the 1864 Treaty also granted "one section to Chief Shaw-vosh-kunk, at Mille Lac." *Id*. Art. 1. Articles 3 through 6 of the 1864 Treaty provided for various payments, modified somewhat from the 1863 Treaty, including some that the United States would make to the various Bands and their members. 13 Stat. at 694.

The United States entered into another treaty in 1867 with the Mississippi Bands, including the Mille Lacs Band, wherein the Bands agreed to "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,"[2] replacing the reservation at Leech Lake under the 1864 Treaty with the White Earth Reservation. Treaty with the Chippewa of the Mississippi, 16 Stat. 719 (Mar. 19, 1867). Notably, the 1867 Treaty did not address either Article 1 of the 1864 Treaty, which granted land to Chief Shaw-bosh-kung, or Article 12, which permitted the Band to remain on the Mille Lacs Indian Reservation.

III. Treatment of the Reservation from 1867 to 1889

In the ensuing years, the Mille Lacs never "interfered with" or "molested" the whites. *See Mille Lac Band of Chippewas*, 47 Ct. Cl. at 429 (reports by Commissioner of Indian affairs in 1871, 1873, 1874, and 1878 stated the Band's conduct was "exemplary" and an 1880 petition from citizens of a neighboring county commended the Band for their peaceful conduct). Nonetheless, non-Indians began to enter the Reservation and file land claims. *Id.* at 423-26. Immediately following the Treaties, Interior officials interpreted the Band as retaining exclusive possession of the Reservation. Beginning in the late 1870s, Interior changed position on two issues: which lands within the Reservation the Band could continue to occupy—all the lands or only those lands they occupied in 1863; and whether the homesteaders could receive land patents within the Reservation to lands not occupied by the Band, which included timber lands.

In 1871, the Band complained to Interior about the mass influx of white settlers on their Reservation. In response, then-Secretary of the Interior Columbus Delano stated in a

[2] The 1864 Treaty was ratified on February 9, 1865 and proclaimed March 20, 1865. 13 Stat. 693.

letter that the "Department has no information leading to the belief that" Article 12 of the 1864 Treaty had been violated and "is therefore of the opinion that the Mille Lac Indians are entitled to remain at present unmolested on their reservation and their occupancy cannot be disturbed until they shall interfere with or in some manner molest the persons or property of the whites." Letter from Sec'y Delano to E.P. Smith, Indian Agent (Sept. 4, 1871), Pls.' Ex. 18, ECF No. 226-18.

The Attorney General of the United States also issued a directive in 1871 to the local district attorney to prosecute any trespassers on the Reservation. *See Mille Lac Band of Chippewas*, 47 Ct. Cl. at 424. Later that same year, Interior removed some unlawful settlers and conducted a study on the nature of the entries. That study concluded that most of the entries were fraudulent; for example, the report found that many of the entries were made by people who were paid by their employers to improve the land and then transfer title to their employers. Report No. 1388, H.R., 60th Cong. 1st Sess., pp. 6-8, Defs.' Ex. 42, ECF No. 242-6 at 49-51. As a result, Interior suspended all entries onto the Reservation. *Id*. 50-51.

Then, on March 1, 1877, then-Secretary of the Interior Zachariah Chandler altered Interior's interpretation of the 1864 Treaty, in the context of deciding an appeal from a denial of an application for a preemption entry on the Reservation, finding that Article 12 did not "exclude [Mille Lacs] land from sale and disposal by the United States." Secretary Chandler Decision, Pls.' Ex. 32, ECF No. 227-10. Chandler, however, directed the General Land Office to not accept further claims on the Reservation and that "all

existing claims o[n] said lands, if any there be, remain in *status quo*" until the next regular session of Congress. *Id*. (emphasis in original).

A year later on June 21, 1878, Chandler's successor, Secretary Carl Schurz directed "that all claims on any of said [Mille Lacs Indian Reservation] lands, if any there be, subject to entry, shall remain in statu[s] quo" and further stated that his directive would "be and remain in full force and effect until the result of the action of Congress in relation to the right of the Indians in question to occupy the tract of country known as the Mille Lac Reservation, situated in the State of Minnesota, shall have been determined." House Exec. Doc. 148, 48-1, pp. 13-14, Pls.' Ex. 44, ECF No. 228-6 at 14-15. And after learning that the General Land Office had authorized additional land entries on the Reservation at the expiration of the time specified in Secretary Chandler's letter, totaling 23,913.46 acres, on May 19, 1879, Secretary Schurz directed the cancellation of the entries. *Id*. at 15. Schurz's successor, Secretary Henry Teller, when faced with the decisions of Secretary Chandler and Secretary Schurz, sent a letter to Commissioner of Indian Affairs Hiram Price recognizing that while the Band was "rightfully on the reservation," it was entitled to occupy only the portion of the Reservation that the members had actually occupied in 1863 or before the occupancy of white settlers. Letter from Sec'y Teller to the Comm'r of Indian Affairs (May 10, 1882), House Exec. Doc. 148, 48-1, pp. 10-12, Pls.' Ex. 44, ECF No. 228-6 at 11-13.

Congress stepped in to address the mass encroachment and confusion in 1884, passing a statute that prevented the Reservation lands from being "patented or disposed of in any manner until further legislation by Congress." 23 Stat. 76, 89. In 1886,

Congress authorized the Secretary of Interior to negotiate with the Mississippi Chippewa in Minnesota regarding treaty rights and reservations, if the parties deemed it desirable. Act of May 15, 1886, 24 Stat. 29, 49 Cong. Ch. 333 at 44. No such agreement was finalized with the Band. In 1888, the Committee on Indian Affairs reported to the House that 948 Mille Lacs members resided on the Reservation. H.R. Report No. 789, 50th Cong., 1st Sess., Pls.' Ex. 55, ECF No. 229-3 at 2.

IV. The Nelson Act

In 1889, Congress enacted the Nelson Act, entitled "An act for the relief and civilization of the Chippewa Indians in the State of Minnesota," 25 Stat. 642 (1889), one of a series of acts passed by Congress pursuant to the Indian assimilation policy of the era. *White Earth Band of Chippewa Indians v. Alexander*, 518 F. Supp. 527, 531-32 (D. Minn. 1981). That policy favored providing individual Indians with allotments and opening up remaining tribal lands (called "surplus lands") to non-Indian settlement, seeking to assimilate the Indians into white society and to encourage them to live an agricultural lifestyle. *Id*.

The Nelson Act authorized the President to designate commissioners—termed the "Rice Commission"—to negotiate with the bands and tribes of Chippewa Indians in Minnesota for the "complete cession and relinquishment in writing of all their title and interest in and to all the reservations of said Indians in the State of Minnesota . . . for the purposes of and upon the terms" of the Act, specifying that all of the Minnesota Indians were to be relocated to the White Earth Reservation and granted allotments in severalty. 25 Stat. 642, Sec. 1, 2 (Jan. 14, 1889). The Act alternatively allowed the Indians to

receive allotments on the reservations where they then resided. *Id*. Sec. 3 (providing that "any of the Indians residing on any of said reservations may, in his discretion, take his allotment in severalty under this act on the reservation where he lives at the time of the removal herein provided for is effected, instead of being removed to" White Earth Reservation).

The Act required approval through separate agreements entered into by a requisite number of Indians belonging to the respective reservations and approval of those agreements by the President. *Id*. Sec. 1. It further stated that the President's "acceptance and approval of such cession and relinquishment" "shall be deemed full and ample proof of assent of the Indians, and shall operate as a complete extinguishment of the Indian title without any other or further act or ceremony for the purposes and upon the terms of this act provided." *Id*.

Section Four of the Act directed the survey of the remaining lands, *id*. Sec 4, and Section Six provided that the lands not allotted or reserved for future use for the Indians "shall be disposed of by the United States to actual settlers only under the provisions of the homestead law." *Id*. Sec. 6. Section Five addressed the sale of pine lands, to be sold at "public auction" for no "less sum than its appraised value" with the remainder sold in private sales for cash. *Id*. Sec. 5. In Section Six, the Act also confirmed the validity of certain pre-Nelson Act land entries by settlers. *Id*. Sec. 6.

Section Seven of the Act directed that the proceeds of the sale of the surplus lands were to be held in a trust to "be placed in the Treasury of the United States to the credit of all the Chippewa Indians in the State of Minnesota as a permanent fund, which shall draw

interest at a rate of five percent per annum" and also specified how the funds may be utilized. *Id*. Sec. 7.

V. The Rice Agreement

Following passage of the Nelson Act, the Commission secured an agreement with the Band, referred to as the Rice Agreement. The Agreement states the Band "occupying and belonging to the Mille Lac Reservation under and by virtue of a clause in the twelfth article of the treaty of May 7, 1864," agreed to and accepted the Nelson Act "and each and all of the provisions thereof." H.R. Ex. Doc. No. 247 at 45-46 (Mar. 6, 1890), Pls.' Ex. 70, ECF No. 230 at 46-47. It provides that they "hereby forever relinquish to the United States the right of occupancy on the Mille Lacs Reservation, reserved to [them] by the twelfth article of the Treaty of May 7, 1864[.]" *Id*. Both the Nelson Act and the Rice Agreement directed the Secretary to serve as sales agent for surplus lands, rather than providing sum certain payments for any lands ceded.

Although the Agreement itself did not explicitly state that the Band members could take allotments within the Reservation, it incorporated the Nelson Act, which expressly permitted such allotments. The negotiations leading up to the Agreement, as well as its subsequent treatment, demonstrate that the Band and federal officials understood that Band members were eligible for such allotments and the Reservation would remain notwithstanding the sale of surplus lands.

During negotiations of the Agreement, Senator Henry Rice, chair of the Commission, explained to the Band that:

> I wish to refer to an old matter that has given you a great deal of trouble. That is the treaty made at Washington some twenty-five years ago. I was there, and know all about it. It was a wise treaty, and if it had been properly carried out you would have escaped all the trouble that has befallen you. Men who cared more for themselves than they did for you thought they had found a hole in it, and that they would take advantage of that and deprive you of your rights. . . . The time has come when I am able to tell you that all he said, all I have said to you, all the chiefs told you who were there and made the treaty is correct; that the understanding of the chiefs as to the treaty was right. Here is the acknowledgment of the Government that you were right, "*you have not forfeited your right to occupy the reservation.*"

H.R. Ex. Doc. No. 247 at 164 (Mar. 6, 1890), Pls.' Ex. 70, ECF No. 230-1 at 67 (emphasis added). Senator Rice further noted that he provided this explanation so that members of the Band "may act without compulsion and without fear of interference with your rights" and in order to "correct all the mistakes that have been made so far as we can." *Id*. He went on to state that the "acceptance of this act will not affect these old matters at all, or weaken your chances of obtaining hereafter your dues, but, on the contrary, leaves you in a stronger position than before." *Id*. at 68.

Negotiation notes show that the Band understood their Reservation's boundaries, and were concerned that the lines be correct. *Id*. at 69-70. The Band did not view the Act as altering or terminating their Reservation. *Id.* at 72-76. Indeed, throughout the negotiations, the Band continued to press for reassurances that the Agreement would be honored by the federal government and that they could stay on their Reservation. *Id*.

The Band understood that the Nelson Act and Rice Agreement were designed to dispose of the timberlands within the Reservation that had caused them so many problems with respect to settlers over the years. *Id*. at 71. As a result, they understood and were assured that the Agreement would protect them, allow them to stay on their

Reservation, and continue their normal hunting, gathering, haying, sugaring and harvesting in traditional areas, without interference. *Id*.

Upon securing the Agreement with the Band, Senator Rice acknowledged that the Band "signified their intention to remain where they are, and will take allotments upon that reservation." Letter from Henry Rice to Thomas Morgan, Commissioner of Indian Affairs (Oct. 12, 1889), Pls.' Ex. 64, ECF No. 229-12 at 2.[3] In December 1889, the Commission also reported that the "Interior Department now holds that—the Mille Lacs Indians have never forfeited their right of occupancy and still reside on the reservation." Report of the United States Chippewa Commission, St. Paul, MN, H.R. Ex. Doc. No. 247 at 22, Pls.' Ex. 70, ECF No. 230 at 23.

President William Harrison approved the Agreement on March 4, 1890. In doing so, he acknowledged that the Act "authorized any Indian to take his allotment upon the reservation where he now resides," and that the Commissioners had reported "quite a general desire was expressed by the Indians to avail themselves of this option" and as a result, the ceded lands could not be offered for sale "until all of the allotments are made." Message from the President of the United States (Mar. 4, 1890), located in H.R. Ex Doc. 247, Pls.' Ex. 70, ECF No. 230 at 2-3. In the years immediately following the Nelson Act and Rice Agreement, however, few Band members received allotments.

[3] The letter from Commissioner Rice also notes that the Mille Lacs for "years" "have lived in fear of being forcibly removed, and have been constantly intruded upon by whites who have sought to dispossess them of their rightful homes." Pls.' Ex. 64, ECF No. 229-12 at 2. He also twice noted and urged "the crying necessity for a saw-mill and a farmer upon the Mille Lac Reservation, with all practicable speed." *Id*. at 4.

VI. Subsequent treatment of the Reservation by Congress, federal courts, and federal officials from 1890 to date

The United States continued to exercise authority over the Reservation for the benefit of the Band following the Rice Agreement. In 1890, less than five months after the approval of the Rice Agreement, Congress granted a "right of way for construction of a railroad through the Mille Lacs Indian Reservation," contingent upon obtaining "the consent of the Indians on said reservation to said right of way and as to the amount of said compensation." Act of July 22, 1890, 26 Stat. 290, 291. The Act also stated that the railroad "shall be located, constructed, and operated with due regard to the rights of the Indians" and further prevented the company from conveying or leasing its rights under the Act, instead stating that if the authorized use ceases, the land "shall revert" back to the Band. *Id*.

Notwithstanding uncertainty whether land grants could be conveyed to non-Indian settlers until Band members received allotments, Congress continued to authorize existing claims by settlers on the Reservation. In 1893, Congress passed a joint resolution confirming the bona fide land entries for white settlers "within the Mille Lacs Indian Reservation." Joint Resolution 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, J. Res. No. 5, 28 Stat. 576 (1893). Congress again enacted a joint resolution in 1898 relating to the Reservation. While setting aside land for a Band cemetery, the resolution provided that "all public lands formerly within the Mille Lac Indian Reservation in the State of Minnesota" were subject to settlement pursuant to public land

laws. Declaring the lands within the former Mille Lac Indian Reservation, in Minnesota, to be subject to entry under the land laws of the United States, J. Res. No. 40, 30 Stat. 745 (1898). Neither Resolution addressed allotments to Band members.

In 1902, Congress appropriated $40,000 for "payment to the Indians occupying the Mille Lac Indian Reservation … for improvements made by them" in an effort to encourage Band members to relocate to the White Earth Reservation or any other reservation in which allotments are made. 32 Stat. 245, 268 (1902). The Act conditioned the funds on the Band agreeing to the Act's terms and further provided that "any Indian who has leased or purchased any Government subdivision of land within said Mille Lac Reservation from or through a person having title to said land from the Government of the United States" could remain on the Reservation. *Id*. The Band refused to agree to the terms of the Act until the agreement included language that "nothing" in the agreement "shall be construed to deprive" the Band "of any of the benefits to which they may be entitled under existing treaties or agreements not inconsistent with the provisions of this agreement or the act of Congress relating to said Indians approved May 27, 1902." *Mille Lac Band of Chippewas*, 47 Ct. Cl. at 423. Approximately one-quarter of the Bands' members—between 323 and 338 individuals—remained on the Reservation. M-Opinion at 15.

The Band claimed that lands within the Reservation had been wrongfully transferred to non-Indians, in violation of the Band's rights to allotments and compensation under the Nelson Act. To address that claim, Congress in 1909 passed an act authorizing the Court of Claims "to hear and determine a suit or suits to be brought by

and on behalf of the Mille Lac band of Chippewa Indians" "against the United States, on account of losses sustained by them or the Chippewas of Minnesota by reason of the opening of the Mille Lac Reservation . . . to public settlement under the general land laws of the United States." Act of February 15, 1909, 35 Stat. 619. The Band brought suit, and the Court of Claims entered judgment against the United States in the amount of roughly $830,000. *Mille Lac Band of Chippewa Indians*, 229 U.S. at 499. The Court of Claims found that the

> Mille Lac Indians have, without exception, upon all occasions and in connection with all controversies relating to the title they possessed to the reservation set apart to them by the treaty of 1855, proclaimed and persisted in their claim of the right of occupancy to said reservation and have continually and openly occupied said reservation from that time until subsequent to the passage of the act of January 14, 1889.

Mille Lac Band of Chippewas, 47 Ct. Cl. at 423.

On review by the Supreme Court, the Court considered whether the Band could recover compensation for certain entries onto the Reservation that occurred before enactment of the Nelson Act. In declining to allow recovery for this set of entries, the Court found that the Nelson Act effected a compromise that resolved the disputes over the validity of the entries. The Court stated that "it is apparent that there was a real controversy between the Mille Lacs and the government in respect of the rights of the former under article 12 of the treaty of 1864, and that the controversy was still subsisting when the act of 1889 was passed by Congress and assented to by the Indians." *Mille Lac Band of Chippewa Indians*, 229 U.S. at 506.

The Court, however, upheld the Bands' claim for compensation for post-Nelson Act entries pursuant to the general land laws and upheld the Band's ownership interest in these lands even though the 1893 and 1898 joint resolutions of Congress purported to confirm or authorize these entries. In concluding that the Rice Agreement permitted disposal of lands pursuant to Section Six of the Nelson Act but not under general land laws, the Court determined that its prior holding in *Minnesota v. Hitchcock*, 185 U.S. 373, 394-95 (1902), was equally applicable to the Reservation:

> The [Nelson Act] cession was not to the United States absolutely, but in trust. It was a cession of all of the unallotted lands. The trust was to be executed by the sale of the ceded lands and a deposit of the proceeds in the Treasury of the United States, to the credit of the Indians, such sum to draw interest at 5 per cent.

Mille Lac Band of Chippewa Indians, 229 U.S. at 509. The Court further stated that "Congress recognized by the act of 1890, shortly following the approval of the agreement, that the Indians had come to have an interest in the disposal of the lands in that reservation." *Id.* at 507. The Court remanded the case back to the Court of Claims for re-assessment of damages. On remand, the Court of Claims awarded the Band $711,828.47 in damages and interest.[4]

[4] On remand, the Court of Claims determined that 31,692.64 acres on the Reservation fell outside of the Nelson Act's Section Six proviso (i.e., entries occurred after enactment of the Nelson Act) and therefore should have been sold for the benefit of the Band. *Mille Lac Band of Chippewa Indians v. United States,* 51 Ct. Cl. 400 (1916). Many years later, the Claims Court held the Band was entitled to compensation for the pre-Nelson Act entries (which basically covered the remainder of the Reservation) relying on the more liberal recovery standards of the Indian Claims Commission Act. *Minnesota Chippewa Tribe v. United States*, 11 Ct. Cl. 221, 240 (1986).

Following the Supreme Court's decision, Congress appropriated funds for the purchase of land for the allotments for Band members. 38 Stat. 582 (1914); 41 Stat. 420 (1920); 42 Stat. 1174, 1191 (1923). By the 1930s, the United States had purchased over 2,000 acres of land and issued close to 300 allotments for Band members on the Reservation. M-Opinion at 17.

In 1934, Congress enacted the Indian Reorganization Act ("IRA"), 25 U.S.C. § 5102, expressly repudiating the allotment policy and indefinitely extending the trust period for all allotments. The Band formally organized with many of the other Minnesota Chippewa Bands following passage of the IRA and remained on the Reservation.[5] In more recent legislation, Congress has referenced the Mille Lacs Indian Reservation. *See* Act of June 27, 1962, 76 Stat. 1320 (authorizing the conveyance of land "located on the Mille Lacs Indian Reservation"); Act of Sept. 27, 1967, 81 Stat. 230 (authorizing the payment of judgment funds to the "tribal governing bod[y] of the ... Mille Lacs Reservation[]"); Water Resources Development Act of 2007, Pub. L. No. 110-114, § 5092 (authorizing assistance for a wastewater infrastructure project for the "Mille Lacs Indian Reservation established by the treaty of February 22, 1855.").

Since 1991, the United States has consistently taken actions in furtherance of its understanding that the Mille Lacs Reservation as established in 1855 remains intact, even

[5] The Band is one of six constituent Bands of the Minnesota Chippewa Tribe. *See* Indian Entities Recognized by and Eligible to Receive Services from the U.S. Bureau of Indian Affairs, 85 Fed. Reg. 5462, 5464 (Jan. 30, 2020); Constitution and By-laws of the Minnesota Chippewa Tribe, July 24, 1936; *see also Mille Lacs Cty. v. Acting Midwest Regional Director, Bureau of Indian Affairs*, 62 IBIA 130, 140-141 (2016) (discussing status of the Band as a federally-recognized tribe).

though prior to that time, the United States took various positions regarding the effects of the 1863 and 1864 Treaties and the Nelson Act on the Reservation. *See* Pls.' Opp. Ex. at 3, ECF No. 255-14 (Field Solicitor at Interior analyzing and concluding in 1991 that the Reservation has not been disestablished); Pls.' Opp. Ex. 34, ECF No. 255-15 (in approving the Band's treatment as a state application, EPA analyzing and concluding in consultation with Interior in 1993 that the Reservation has not been disestablished and therefore the Band may exercise authority over the entire Reservation); M-Opinion (Interior Solicitor concluding in 2015 that the Reservation has not been disestablished); *see supra* p. 3.

According to the 2010 Census, 1,598 of the 4,907 individuals living on the Reservation identified as Indian, amounting to more than 30% of the Reservation's population. M-Opinion at 20. As of April 2020, approximately 3,600 acres of the original 61,000 acres remain in trust for the Band or individual Band members. ECF No. 217 at 3. Approximately 6,000 acres are owned by the Band in fee and 100 acres are owned in fee by individual members. *Id*.

ARGUMENT

The "framework" the Supreme Court uses to determine whether an Indian reservation has been disestablished or diminished is "well settled." *Nebraska v. Parker*, 136 S. Ct. 1072, 1078 (2016). The "first and governing principle is that only Congress can divest a reservation of its land and diminish its boundaries." *Solem v. Bartlett*, 465 U.S. 463, 470 (1984). And "its intent to do so must be clear." *Parker*, 136 S. Ct. at 1079.

Accordingly, the status of disputed land is one of federal statutory law: "once a block of land is set aside for an Indian reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise." *Solem*, 465 U.S.at 470 (citing *United States v. Celestine*, 215 U.S. 278, 285 (1909)). The Supreme Court has articulated a three-step analysis, often referred to as the *Solem* framework, to evaluate whether Congress intended to alter reservation boundaries:

First, the "most probative evidence of diminishment is, of course, the statutory language used to open the Indian lands." *Hagen v. Utah*, 510 U.S. 399, 411 (1994). No particular words are required, but the statute must "establish an express congressional purpose to diminish." *Id*. (quoting *Solem*, 465 U.S. at 475). Statutes "that simply offer[] non-Indians the opportunity to purchase land within established reservation boundaries" do not provide evidence of congressional intent to diminish a reservation. *Solem*, 465 U.S. at 470. By contrast, "[e]xplicit reference to cession or other language evidencing the present and total surrender of all tribal interests strongly suggests that Congress meant to" diminish. *Id*. To aid in the analysis of the statutory language the Supreme Court has concluded that a court may presume Congress intended to diminish reservation boundaries when it uses language that at the time would have been understood to immediately and inalterably change the status of the land on a part of the reservation in a manner that would be inconsistent with continued reservation status. *See Parker*, 136 S. Ct. at 1079.

Second, courts may look to "the historical context surrounding the passage" of the legislation, to the extent that it sheds light on "the contemporaneous understanding of the particular Act" at issue. *Id*. Probative evidence may include negotiations with the involved tribe "and the tenor of legislative reports." *Solem*, 465 U.S. at 471. Where those sources "unequivocally reveal a widely-held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation," diminishment may be found if the statute's language is otherwise inconclusive. *Id*.

Third, once a court has reviewed the statute's text and context, the court will normally be in a position to resolve the diminishment question: "If both an Act and its legislative history fail to provide substantial and compelling evidence of a congressional intention to diminish Indian lands, [courts] are bound by our traditional solicitude for the Indian tribes to rule that diminishment did not take place and that the old reservation boundaries survived the opening." *Id*. at 472. Nevertheless, a court may, "to a lesser extent," rely on "the subsequent treatment of the area in question and the pattern of settlement there." *S. Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 344 (1998). While those considerations are "an unorthodox and potentially unreliable method of statutory interpretation," they may provide "one additional clue as to what Congress expected." *Solem*, 465 U.S. at 472 & n.13.

The Supreme Court's recent decision in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), addressed the application of the *Solem* three-part framework to statutes. The Court "adjusted the *Solem* framework—in which congressional intent to diminish could be inferred from unequivocal contextual sources even in the absence of textual support—

to a more textual approach consistent with statutory interpretation more generally." *Oneida Nation v. Vill. of Hobart*, 968 F.3d 664, 685 (7th Cir. 2020), *reh'g denied* (Sept. 18, 2020). The *McGirt* Court instructed that "[t]here is no need to consult extratextual sources when the meaning of a statute's terms is clear. Nor may extratextual sources overcome those terms. The only role such materials can properly play is to help 'clear up . . . not create' ambiguity about a statute's original meaning." 140 S. Ct. at 2469 (citing *Milner v. Dep't of Navy*, 562 U.S. 562, 574 (2011)).

Using this three-step framework, as informed by *McGirt,* courts must determine whether Congress clearly intended to change reservation boundaries, as opposed to merely allotting reservation lands and enabling non-Indian settlement and ownership. There is a "presumption" against diminishment. *Solem*, 465 U.S. at 481, and throughout the inquiry, a court must "resolve any ambiguities in favor of the Indians" and "will not lightly find diminishment." *Yankton*, 522 U.S. at 344.

As explained below, there is no evidence of clear congressional intent to diminish or disestablish the Reservation in the language of the treaties, the Nelson Act, or the Rice Agreement nor is there unequivocal evidence in the circumstances surrounding their ratification or enactment. And to the extent that the subsequent treatment of the Reservation is relevant, that evidence is mixed. This ambiguous record, on this least significant factor, must be resolved in favor of the Tribe, and, in any event, cannot overcome the statutory language and historical context. *McGirt*, 140 S. Ct. at 2469.

I. The 1863, 1864, and 1867 Treaties did not disestablish the Reservation

Indian treaties "'must be interpreted in light of the parties' intentions, with any ambiguities resolved in favor of the Indians.'" *Herrera v. Wyoming*, 139 S. Ct. 1686, 1699 (2019) (quoting *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 2006 (1999)). Moreover, the words of a treaty must be construed "in the sense in which they would naturally be understood by the Indians." *Id.* (quoting *Washington v. Washington State Comm. Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 676 (1979)). The well-established standards for interpreting treaties, in general and particularly those with tribes, dictate that a court "look beyond the written words to the larger context that frames the Treaty, including 'the history of the treaty, the negotiations, and the practical construction adopted by the parties.'" *Minnesota*, 526 U.S. at 196 (quoting *Choctaw Nation v. United States*, 318 U.S. 423, 432 (1943)); *see also E. Airlines, Inc. v. Floyd,* 499 U.S. 530, 534-35 (1991).

A. The plain language of the 1863 and 1864 Treaties and negotiations confirm that the United States and Band intended for the Reservation to continue to exist

The plain text of the 1863 and 1864 Treaties expressly preserved the Band's right to remain on the Reservation, thereby demonstrating that the Reservation remained intact. Article 12 of each Treaty states that the Mille Lacs retain the right to remain on the Reservation—due to their good behavior during the 1862 Sioux Uprising—so long as they did not "interfere with" or "molest" the whites. 12 Stat. at 1251; 13 Stat. at 694; *see, supra,* Background § 2, p. 5 (discussing the Band's allegiance to the United States during

the Sioux Uprising). Article 1 of the 1864 Treaty also granted "one section to Chief Shaw-vosh-kunk, at Mille Lac," 13 Stat. at 694.

It is true that both Treaties also include language of cession, Art. 1, 12 Stat. 1249; Art. 1, 13 Stat. 693, but when each treaty is read as a whole, the language of cession cannot be interpreted as the present and total surrender of all the Band's interest. *See, e.g., McGirt*, 140 S. Ct. at 2463 (recognizing clear Congressional intent to diminish or disestablish a reservation when there is an "'[e]xplicit reference to cession or other language evidencing the present and *total surrender of all tribal interests*.'") (quoting *Parker*, 136 S. Ct. at 1079) (internal quotations omitted) (emphasis added). That is particularly true here, where the 1863 and 1864 Treaties expressly provide for the Band's continued occupancy of the Reservation and its lands.

The Treaties do not include the type of cession and sum-certain payment or other language that the Supreme Court has interpreted to effect an immediate and inalterable change to the status of the land within a reservation. *See Yankton*. 522 U.S. at 352 (finding diminishment where statute ratified an agreement with tribe that included cession language and sum-certain payment); *DeCoteau v. Dist. Cty. Court for Tenth Judicial Dist.*, 420 U.S. 425, 445-46 (1975) (finding disestablishment where statute ratified an agreement with tribe that included cession language and sum-certain payment); *see also infra* Argument II.A, pp. 35-36 (further discussing cases involving sum-certain payments).

The Treaties' provisions for various payments are not equivalent to the immediate sum-certain payments for land that have been found to effect a disestablishment or

diminishment. The Treaties provided that the United States would provide the Mississippi Bands with various funds, including an extension of annuity payments to the Indians for ten additional years; payments for settlement of pending depredation claims against the Indians stemming from the Sioux Uprising; payments to assist the Indians in transitioning to an agricultural lifestyle on the new reservation, and limited cash payments to the chiefs of the Bands. 12 Stat. 1249-50; 13 Stat. 693. But there was no payment specifically designated for the Band, let alone a sum-certain, that would have been understood as an immediate payment to the Band or an immediate sale of its lands.

The 1863 Treaty negotiations play an important role in this analysis, because as noted above, treaty terms must be interpreted as a tribe would have understood them. *Herrera,* 139 S. Ct. at 1699. These negotiations reinforce the textual conclusion that the United States and the Bands understood that the Reservation would remain open to the Band following the Treaties. The Treaties included Article 12 because the Band demanded the right under the 1855 Treaty to remain on the Reservation. For example, the Treaty Journal, documenting the negotiations between the United States and Mississippi Bands, makes clear that during the 1863 Treaty negotiations, the Band's chief, Shaw-bosh-kung, demanded the right to stay on the Reservation. *See* Pls.' Ex. 2, ECF No. 226-2 at 39 ("How can it be possible to abandon our reservations when we were told to [cede] every inch of the land with the exception of the land for the Reserves. . . . We demand that we should be allowed to live on our Reserves."). The Treaty Journal also reveals that during the Sioux Uprising, Commissioner of Indian Affairs William Dole promised the Band that they could remain on the Reservation due to their allegiance to the United

States. *See id*. ("I promised, on the part of the Government, that the Millac . . . should [] receive[] their full annuities in goods and money, payable at their reserves, which had never been done before, and that they should not be liable to the payment of damages committed by the balance of the Tribe"). As discussed above, the United States and Band ultimately negotiated language that differed substantially from language in the 1855 Treaty that ceded all right, title, and interest in aboriginal lands, without any qualification. The Band naturally would have understood that the 1863 and 1864 "ceded" language could not have intended the immediate loss of their 1855 Reservation, in light of Article 12, as well as the representations and understandings set forth in the Treaty negotiations.

The Court of Claims so interpreted the record after Congress authorized the Band to bring suit against the United States for opening the lands of the Reservation for settlement, Act of February 15, 1909, 35 Stat. 619, finding that the Mille Lacs have,

> without exception, upon all occasions and in connection with all controversies relating to the title they possessed to the reservation set apart to them by the treaty of 1855, proclaimed and persisted in their claim of the right of occupancy to said reservation and have continually and openly occupied said reservation from that time until subsequent to the passage of the act of January 14, 1889.

Mille Lac Band of Chippewas, 47 Ct. Cl. at 423; *see also id*. at 420-28, 438-39, 442-45. In sum, the language of the Treaties, particularly when considered in connection with their history and the negotiations, do not demonstrate the United States' intent to disestablish. And, to the extent the court views the relevant language of the Treaties as ambiguous, the ambiguities should be resolved in favor of the Band's understanding—

that the Reservation continued to exist following the 1863 and 1864 Treaties. *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970).

B. The 1867 Treaty did not impact the Band's retained rights to the Reservation recognized in the 1863 and 1864 Treaties

As to the 1867 Treaty to which the County points, the Supreme Court has recognized that this Treaty is not relevant to the status of the Reservation or the lands therein because it simply changed the land reserved in the 1864 Treaty for removal from the Leech Lake Reservation to the White Earth Reservation. *See Mille Lac Band of Chippewa Indians*, 229 U.S. at 501 ("A treaty negotiated in 1867 (16 Stat. at L. 719) eliminated a considerable portion of the large tract reserved by article 2 of the treaty of 1864 and substituted a new tract, consisting of thirty-six townships, which came to be known as the White Earth Reservation. This treaty is not important here."). The Court found that this Treaty did not impact the protections afforded the Band in Article 12 of the 1863 and 1864 Treaties. Nor did the 1867 Treaty affect federal officials' understanding of the rights of the Band preserved in Article 12.

C. Subsequent treatment of the Reservation by the United States and Band confirm the Reservation remained intact following the 1863, 1864, and 1867 Treaties

The County misreads the Treaties, but also incorrectly asserts that *McGirt* held that a court is limited to the plain text of a treaty in determining whether a treaty disestablishes a reservation. ECF No. 241 at 41-42. The County fails to take into account the distinct context presented here, which was not at issue in *McGirt*. In *McGirt*, the Court considered whether an 1893 Act, which authorized the Dawes Commission to

negotiate an agreement with the Creek Nation in Oklahoma for allotment of their lands pursuant to the General Allotment Act, disestablished the reservation. Thus, *McGirt* construed legislative actions, rather than a treaty. In the context of treaties, the Supreme Court instructs courts interpreting treaties to look beyond the language of a treaty when attempting to glean the parties' intent. *See Minnesota,* 526 U.S. at 202 ("[R]eview of the history and the negotiations of the agreements is central to the interpretation of treaties.").

Not only do the history and language of the Treaties demonstrate the continued existence of the Reservation, subsequent treatment of the Reservation in the years following the Treaties shows that it was not disestablished by the Treaties. Reports by Interior stated that Mille Lacs members met their end of the bargain as enunciated in Article 12—they did not "interfere[] with" or "molest[]" the whites and instead remained peaceably on their Reservation. *See Mille Lac Band of Chippewas*, 47 Ct. Cl. at 429 (citing Interior Reports and other evidence demonstrating the Band's continuous peaceful conduct in the 1870s and early 1880s).

Federal officials also expressed their understanding that by virtue of the express retention of the Band's right of occupancy in the Treaties, the Reservation had not become part of the public domain such that it was open to settlement. Secretary Delano in 1871 opined that the "Mille Lac Indians are entitled to remain at present unmolested on their reservation and that their occupancy cannot be disturbed until they shall interfere with or in some manner molest the persons or property of the whites." Pls.' Ex. 18, ECF No. 226-18. Further, the Attorney General of the United States issued a directive in 1871

to the local district attorney to prosecute any trespassers on the Reservation in order to protect that Band's interest. *See Mille Lac Band of Chippewas*, 47 Ct. Cl. at 424.

Subsequent Interior officials, faced with the increasing pressure of non-Indian encroachment on the Reservation, continued to recognize that the Band, by virtue of Article 12 of the Treaties, possessed the right to remain on the Reservation, but they had differing interpretations of the scope of the right and whether the Band's retained interest in the Reservation remained exclusive or closed the Reservation to settlement. *See* Pls.' Ex. 32, ECF No. 227-10 (Secretary Chandler in 1877 concluding that Article 12 of the treaties did not prevent sale and disposal of Reservation lands but preventing General Land Office from accepting further land claims); Pls.' Ex. 44, ECF No. 228-6 at 14-15 (Secretary Schurz in 1878 directing that land claims remain pending until Congress determines the "effect to the right of the Indians" to the Reservation and cancelling entries of nearly 24,000 acres of Reservation); Pls.' Ex. 44, ECF No. 228-6 at 11-13 (Secretary Teller in 1882 stating that the Band was "rightfully on the reservation" but only entitled to occupy the portion of the Reservation that the members had actually occupied in 1863 or before the occupancy of white settlers). This mixed record is insufficient to demonstrate that there was an unequivocal, widely-held understanding that the Reservation had been terminated following the 1863 and 1864 Treaties, and in any event cannot overcome the history and language of the Treaties.

Similarly, the fact that settlers began to flood the Reservation does not alter the conclusion that the Band's Reservation continued to exist following the two Treaties. *See, e.g., McGirt*, 140 S. Ct. at 2473 (rejecting Oklahoma's argument that the "speedy and

persistent movement of white settlers" onto the Creek reservation favored disestablishment because the "history proves no more helpful in discerning statutory meaning"). Notably, Congress' enactment of a statute in 1884 prohibiting patenting or disposing any lands within the Reservation pending further legislation, 23 Stat. 76, 89 (July 4, 1884), strongly supports a conclusion that Congress understood that the Reservation boundaries remained intact following the Treaties.

The decisions of the Court of Claims and the Supreme Court confirm, although with somewhat different reasoning, that the Band retained a compensable property interest in the Reservation after the 1863 and 1864 Treaties, which would *only* be true if the Reservation boundaries remained intact after the Treaties and the Band retained rights to some portion of the lands within those boundaries. *See Mille Lac Band of Chippewas*, 47 Ct. Cl. at 457 ("The treaties of 1863 and 1864 reserved to the claimants the Mille Lac Reservation. They remained as a band in open, notorious possession of the same, a lawful notice to the world of a claim of title"); *Mille Lac Band of Chippewa Indians*, 229 U.S. at 507 (Congress "consented [in the Nelson Act and Rice Agreement] to recognize the contention of the Indians" that they continued to possess a reservation following the treaties).[6]

[6] The County misreads these decisions in numerous respects. For example, the County claims that, because the Supreme Court held that Section 6 of the Nelson Act precluded the Band from recovering compensation for certain pre-Nelson Act land entries, it impliedly held that "the 1855 Mille Lacs reservation was not in existence after the treaties of 1863-64." ECF No. 257 at 44. That is incorrect. While the Supreme Court acknowledged controversy over the status of the Reservation after the 1863 and 1864 Treaties, the Nelson Act, including Section 6, applied by its express terms only to "reservations," not to former or disestablished reservations. 13 Stat. 642, 643. And, the

Finally, had the Treaties evinced a clear congressional intent to disestablish the Reservation, as the County contends, there would have been no controversy over the status of Reservation in the late 1800s, no need for the federal government to apply the Nelson Act to resolve the controversy by addressing the Band's rights on the Reservation through negotiation of the Rice Agreement, no basis for the Supreme Court to hold that disposals of land pursuant to the 1893 and 1898 Joint Resolutions violated the arrangement created by the Nelson Act and Rice Agreement, and ultimately no basis for the Band to recover the compensation from the United States for post-Nelson Act disposals of land. *See id*. The County's arguments, therefore, are at odds with history and logic, as well as in conflict with the language of the Treaties.

II. The Nelson Act and Rice Agreement did not disestablish the Reservation

A. The language of the Nelson Act does not demonstrate an intent to disestablish the Reservation

The Nelson Act authorized commissioners to negotiate agreements with the Indians of Minnesota to secure "the complete cession and relinquishment in writing of all their title and interest in and to all the reservations." 25 Stat. 642, Sec. 1 (1889). Congress qualified this language, however, by stating that the cessions would be "*for the purposes and upon the terms of this act provided.*" *Id*. (emphasis added); *see also id.* ("the acceptance and approval of such cession and relinquishment by the President . . . shall, be

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Supreme Court acknowledged that the President, the Department of the Interior, the commissioners, and the Band had all treated the Reservation as "within the purview of the [A]ct." *Mille Lac Band of Chippewa Indians*, 229 U.S. at 507. The Court's decision thus confirms that the Reservation continued to exist after the Treaties.

deemed full and ample proof of assent of the Indians, and shall operate as a complete extinguishment of the Indian title without any other or further act or ceremony whatsoever *for the purposes and upon the terms of this act provided*.") (emphasis added). The purposes of the Nelson Act were enunciated in the following sections of the Act—to survey the lands, to provide allotments to the Indians on the White Earth Reservation *or* on the reservation where they resided, to categorize the remaining land as either pine lands or agricultural lands, and to open the unallotted lands for sale to non-Indians. *Id*. Secs. 4-6. The pine lands were to be sold at "public auction" for no "less sum than its appraised value" with the remainder sold in private sales for cash. *Id*. Sec. 5. The agricultural lands that were not allotted or reserved for future use for the Indians were to "be disposed of by the United States to actual settlers only under the provisions of the homestead law." *Id*. Sec. 6. The Band subsequently agreed to the Act's terms in the Rice Agreement. *See, supra*, pp. 12-14 (discussing Rice Agreement and negotiations).

Congress undoubtedly intended in the Nelson Act to move away from the collective ownership of land on most of the Mississippi Bands' reservations and to open unallotted land within reservations to settlement. But under settled Supreme Court and Circuit precedent, that is not sufficient to demonstrate clear congressional intent to disestablish a reservation. In the late nineteenth and early twentieth centuries, surplus land acts allotted land to Indians and provided for the sale of surplus land to non-Indians on almost all then-existing reservations. Nevertheless, most of these reservations' boundaries remain intact today. The "mere fact that a reservation has been opened to settlement does not necessarily mean that the opened area has lost its reservation status."

Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 586–87 (1977). Nor does the allotment of reservation land by itself alter reservation boundaries. *Mattz v. Arnett*, 412 U.S. 481, 497 (1973) ("[A]llotment under the ... Act is completely consistent with continued reservation status").

As the Court stated in *Solem*, 465 U.S. at 468-69, "[a]lthough the Congresses that passed the surplus land acts anticipated the imminent demise of the reservation and, in fact, passed the acts partially to facilitate the process, we have never been willing to extrapolate from this expectation a specific congressional purpose of diminishing reservations with the passage of every surplus land act." In fact, the Court has stated to find otherwise "would confuse the first step of a march with arrival at its destination." *McGirt,* 140 S. Ct. at 2465. This Court has similarly held that the "opening of an Indian reservation for settlement by homesteading is not inconsistent with its continued existence as a reservation." *City of New Town v. United States*, 454 F.2d 121, 125 (8th Cir. 1972).

Applying its well-established framework, the Supreme Court has held in five cases that Congress did not intend to disestablish or diminish a reservation when it enacted a surplus land statute or applied an allotment statute to the reservation lands: *Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351, 354 (1962) (Colville Reservation); *Mattz*, 412 U.S. at 481-82 (Klamath River Reservation); *Solem*, 465 U.S. at 472-81 (Cheyenne River Reservation); *Parker*, 136 S. Ct. at 1078-82 (Omaha Reservation); *McGirt*, 140 S. Ct. at 2464 (2020) (Creek Nation). In each of these cases, Congress allotted reservation lands to individual Indians, and authorized the sale of

unallotted lands to non-Indians in fee-simple ownership, without changing the reservation's boundaries. And, even where the surplus land acts include language of cession, the Supreme Court has never found that language by itself sufficient to diminish or disestablish a reservation, without additional and powerful indicia of congressional intent to immediately alter the reservation's boundaries or immediately render the land incompatible with continued Indian use (such as returning land to the public domain or the inclusion of cession and express sum-certain language).

Moreover, the Eighth Circuit has "conclude[d] that the '*cede, surrender, grant, and convey' language of the [] Act, standing alone, does not evince a clear congressional intent to disestablish* the Devils Lake Indian Reservation" in North Dakota. *United States v. Grey Bear*, 828 F.2d 1286, 1290 (8th Cir. 1987), *vacated in part on other grounds on reh'g en banc*, 836 F.2d 1088 (8th Cir. 1987), *cert. denied*, 493 U.S. 1047 (1990) (emphasis added). And, the Seventh Circuit, in a case decided after *McGirt*, held that none of the statutes addressing allotment of the Wisconsin Oneida Reservation diminished the Reservation there when each "statute moved members of the Nation toward individual ownership of Reservation land in fee, but none addressed the status of the Reservation or the underlying tribal interests in Reservation land." *Oneida Nation*, 968 F.3d at 676, *reh'g denied* (Sept. 18, 2020).[7]

[7] The County incorrectly argues that the statute of limitations of the Indian Claims Commission Act or the equitable doctrine of laches bars the Band's action to confirm the boundaries of its 1855 Treaty Reservation. As is apparent from the numerous Supreme Court, Court of Appeals, and District Court decisions that have adjudicated in the last 70 years the question whether reservations were disestablished or diminished, up to and including the Seventh Circuit's 2020 decision in *Oneida Nation*, 968 F.3d 664, neither

The statutes evaluated in *Seymour*, *Mattz*, *Solem*, *Parker, McGirt*, *Oneida Nation* and *Grey Bear* stand in sharp contrast to other statutes where the Supreme Court has found clear congressional intent to disestablish or diminish the reservation at issue: an 1891 statute ratifying an agreement with the Sisseton-Wahpeton Tribe to "cede, sell, relinquish, and convey" the lands of the Lake Traverse Indian Reservation in exchange for a sum certain payment disestablished the reservation, *DeCoteau,* 420 U.S. 425; a 1902 statute requiring certain lands to be "restored to the public domain" diminished the Uintah Indian Reservation, *Hagen*, 510 U.S. at 415; and an 1894 statute ratifying an agreement with the Yankton Sioux Tribe to "cede, sell, relinquish, and convey" unallotted lands of the Yankton Sioux Reservation in exchange for a sum certain diminished the reservation, *Yankton*, 522 U.S. at 344-58. In these three cases, the Court found clear congressional intent to diminish or disestablish based on language in the surplus land act that at the time would have been understood to immediately and inalterably change the status of some or all of the land in the reservation in a manner that would be inconsistent with continued reservation status. *See Parker*, 136 S. Ct. at 1079.

In *DeCoteau* and *Yankton*, the Court understood that language of cession and sum-certain in the acts immediately sold the tribal lands out from under the tribes, rendering the lands incompatible with continued reservation status and therefore presumptively diminishing or disestablishing the reservation. *Hagen*, in contrast, found congressional

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the Indian Claims Commission Act nor laches bars otherwise justiciable controversies like this one regarding reservation boundaries.

intent to diminish based on language in a surplus land act that expressly rendered surplus lands part of the public domain. 510 U.S. at 414. Once again, the Court found that lands clearly and immediately returned to the public domain opened them to the public pursuant to public land laws, transforming them into the antithesis of trust land. As a result, the Court found that Congress must have intended to alter the reservation boundaries accordingly.

And as to the fourth case in which the Supreme Court has found diminishment, *Rosebud*, 430 U.S. 584, although the relevant statute contained cession language coupled with a $2.50 per acre cash payment, the Court found congressional intent to alter the reservation elsewhere. The "Court held that the circumstances surrounding the passage of the Rosebud Acts unequivocally demonstrated that Congress meant to diminish the Rosebud Reservation." *Solem*, 465 U.S. at 469 n.10. *Rosebud* thus based its finding of diminishment on the statute's language of cession in conjunction with the parties' express intent to effectuate an earlier 1901 agreement between the tribe and the United States, which included a payment of sum certain and, if ratified, would have diminished the reservation. *Rosebud*, 430 U.S. at 587, 590-91, 596-601. In contrast, and as demonstrated below, the Nelson Act and Rice Agreement do not include language of sum-certain payment or return to the public domain, or any other indicia that Congress would have considered the lands incompatible with continued use by the Band.

The Nelson Act did not restore surplus lands to the "public domain." The Supreme Court recognized as much in 1913 when it concluded that the cession in the Nelson Act and Rice Agreements was not "absolute," but "in trust," demonstrating that the

Reservation was not ceded to the public domain. *Mille Lac Band of Chippewa Indians*, 229 U.S. at 509 (explaining that the Reservation lands not subject to Section 6 of the Nelson Act "were to be disposed of thereunder for the benefit of the Indians" and quoting *Minnesota*, 185 U.S. at 394: "'The cession was not to the United States absolutely, but in trust'").[8] The Nelson Act also vested the Band with the right to take allotments on its Reservation. 13 Stat. at 643, Sec. 3 (right to take allotments on reservations).[9] In *Solem*, the Court found that "permission to continue to obtain individual allotments on the affected portion of the reservation" "suggests that the Sale Area "would for the immediate future remain an integral part of the . . . Reservation." *Solem*, 465 U.S. at 474.

Nor did the Nelson Act provide for a sum-certain payment to the Band. There was no fixed and immediate payment for the Reservation lands as there was in *Yankton* and *DeCoteau*; instead, as agreed to by the Band in the Rice Agreement incorporating the

[8] The Court ruled in a similar manner in *Ash Sheep v. United States*, 252 U.S. 159, 164-66 (1920), finding that ceded but unsold lands retained their status as "Indian lands." *See also DeCoteau*, 420 U.S. at 448. (relying on *Ash Sheep* to distinguish the surplus land act from the act at issue in *Mattz*). Although the status of lands may be distinct from whether a reservation remains intact, the Court in *Hagen,* 510 U.S. at 414, found that the future status of land in an act provides evidence of Congress' intent regarding whether an act constitutes an immediate and total surrender of all tribal interests.

[9] The County quotes language from the Supreme Court's 1913 decision that references "cession and relinquishment," ECF No. 257 at 42-43, without acknowledging that the Supreme Court held that the Nelson Act and Rice Agreement effected a relinquishment and cession *in trust* or that the Nelson Act permitted Band members to take allotments on the Reservation. This selective and misleading quotation of the Supreme Court's decision mirrors the County's references to "cession and relinquishment" in the Nelson Act itself, which the County relies upon without acknowledging that the Act explicitly clarifies that the "cession and relinquishment" would be "for the purposes and upon the terms hereinafter stated [in the Act.]" 13 Stat. 642; *see* ECF No. 257 at 39.

Act's terms, payment would be paid as sales were made. To that end, Congress created a trust fund where the proceeds from the sale of the surplus lands would be used for the benefit of the tribe with the Secretary of the Interior as trustee. 25 Stat. at 645, Sec. 7.

The Supreme Court has never found diminishment or disestablishment in these circumstances. Rather, the Court has consistently concluded that tribes are not deemed to have negotiated away all rights in their territory in exchange for an uncertain future return from future land sales. *See Parker*, 136 S. Ct. at 1077 (finding no diminishment of the Omaha Reservation where surplus lands act provided that "after paying all expenses incident to and necessary for carrying out the provisions of th[e] act," proceeds were to "be placed to the credit of said Indians in the Treasury of the United States."). That conclusion applies with particular force here; by setting up the trust, Congress opted to continue its federal responsibility to the Band, which indicates an intention to continue the Reservation. *See Seymour*, 368 U.S. at 356; *Solem*, 465 U.S. at 473. The lack of a sum-certain payment here weighs heavily against diminishment or disestablishment.

Further, this Court has twice concluded that the Nelson Act did not terminate other Mississippi Bands' reservations. *Leech Lake Band of Chippewa Indians v. Herbst*, 334 F. Supp. 1001, 1004-05 (D. Minn. 1971) (the purpose of the Nelson Act "was not to terminate the reservation or end federal responsibility for the Indian but rather to permit the sale of certain of his lands to homesteaders and others."); *Melby v. Grand Portage Band of Chippewa Indians,* 1998 WL 1769706, at *8 (D. Minn. Aug. 13, 1998) (finding that "the statutory language of the Nelson Act does not disestablish the entire [Grand Portage] reservation, because it reserved parcels of land for Indians who elected to

remain on the reservation. Such language does not amount to the requisite clear Congressional intent needed to abolish a reservation").

In *Leech Lake Band*, the Court rejected the State of Minnesota's position that the Nelson Act had terminated the Leech Lake Reservation, recognizing that while, like here, there were times that federal officials viewed the reservation as terminated, the United States and Leech Lake Band were in that suit aligned in taking the position that the Leech Lake Band retained its rights to hunt and fish on their reservation. *Leech Lake Band,* 334 F. Supp. at 1004. The Court noted that the State in *Leech Lake Band* was in "the anomalous position of attempting to show that the views of the two contracting parties, as these views are reflected in treaty, executive orders, laws and actual practice, are contrary to the position now urged by these contracting parties." *Id*. The County is in the same anomalous position here. For the same reasons, the Court should reject the County's assertions that the Reservation has been disestablished by virtue of the Nelson Act.[10]

[10] The Minnesota Supreme Court has also held the Nelson Act and subsequent agreements did not terminate Mississippi Bands' reservations. *State v. Forge*, 262 N.W.2d 341, 346 (Minn. 1977); *State v. Clark*, 282 N.W.2d 902, 907 (Minn. 1979). Two federal courts, however, found that different agreements pursuant to the Nelson Act diminished the White Earth and Red Lake Reservations. Those agreements differed from the Band's; they included negotiations of new boundaries and specific closures of certain areas to allotment, circumstances not present here. *United States v. Minnesota,* 466 F. Supp. 1383 (D. Minn. 1979), *aff'd sub nom. Red Lake Band v. Minnesota,* 614 F.2d 1161 (8th Cir. 1980) *(per curiam), cert. denied,* 499 U.S. 905 (1980); *White Earth Band,* 518 F. Supp. 527.

B. The historical context and legislative history of the Nelson Act and the Rice Agreement do not demonstrate an unambiguous intent to diminish or disestablish the Reservation

The Supreme Court in *McGirt* makes clear that extratextual sources may not be considered if a statute's terms are unambiguous. *McGirt*, 140 S. Ct. at 2469. Nevertheless, these sources may be looked to if any ambiguity remains after review of the statute. *Id*. Such extratextual considerations include the historical context "surrounding the passage" of the legislation, to the extent that it sheds light on the "contemporaneous understanding" of the particular Act at issue, such as evidence of negotiations with the involved tribe "and the tenor of legislative reports." *Solem*, 465 U.S. at 471. Here, the legislative history of the Nelson Act and the negotiations of the Rice Agreement, applying the Act to the Band, favor a finding of no diminishment or disestablishment.

While the bill as introduced did not initially contain a provision permitting Indians on reservations other than White Earth and Red Lake to receive allotments on their respective reservations, the House amended the bill shortly after introduction to provide that "any of the Indians residing on any of said reservations may, in his discretion, take his allotment in severalty under this act on the reservation where he lives." Pls.' Ex. 57, ECF No. 229-5 at 2. The Senate debate on the Nelson Act reveals that Congress' primary motivation was to allow for timber extraction and that this would be done through consent of the Indians. 19 Cong. Record-House 1886-1888 (Oct. 3, 1888), Pls.' Ex. 58, ECF No. 229-6 at 2. The debate shows how it was to be achieved: the Chippewa Indians who did not select allotments on their respective reservations were to remove, with their

consent, to the White Earth and Red Lake Reservations, *title* was to be transferred to the United States, and the proceeds from the timber sales were to be placed in a trust fund for the benefit of the Indians. *Id*. There is no indication—let alone a clear expression—that Congress intended to terminate the reservation status of the land. Rather, the debates show that Congress intended the Act to create a trust fund for the Indians by extracting the timber as part of the continued trust relationship. Pls.' Ex. 57, ECF No. 229-5 at 2.

In addition, documents from the Rice Commission negotiations and contemporaneous correspondence show that the Band understood that the Nelson Act and Rice Agreement allowed members to take allotments on their Reservation. Thus, Band members could remain on the Reservation and it would retain its Indian character. *See Solem*, 465 U.S. at 474. Rice further explained to the Band in negotiations that it would lose no rights secured under the previous treaties. H.R. Ex. Doc. No. 247 at 165-166, ECF No. 230-1 at 68-69. Negotiation notes show that the Band understood the boundaries of its Reservation, and was concerned that the lines be correct. *Id*. at 69-70. The Band did not view the Act as terminating its Reservation. *Id*. at 69-70. Indeed, throughout the negotiations, the Band continued to press for reassurances that the Agreement would be honored by the federal government and that they could stay on their Reservation. *Id*.

The Band also understood that the Nelson Act and Rice Agreement were designed to dispose of the timberlands that had caused them so many problems with respect to settlers over the years. *Id*. Evidence shows that the Indians thought that the Agreement

allowed them to stay on their Reservation and continue their normal hunting, gathering, haying, sugaring and harvesting in traditional areas. *Id*. at 71.

While the Rice Agreement did not explicitly address allotments for Band members on the Reservation, Pls.' Ex. 70, ECF No. 230 at 46-47, the Agreement accepted the provisions of the Nelson Act, which authorized such allotments.[11] And in approving the Rice Agreement, the President recognized that the ceded lands "can not be ascertained and brought to sale under the act until all of the allotments are made." *Id*. at 3.

C. Congress' treatment of the Reservation following the Nelson Act and Rice Agreement demonstrates an understanding that the Reservation remained intact

The Court may look to subsequent treatment of the Reservation in order "to shed[] light on what the terms found in a statute meant at the time of the law's adoption." *McGirt*, 140 S. Ct. at 2469; *see also Solem*, 465 U.S. at 471 (recognizing that post-enactment events, such as "Congress' own treatment of the affected areas, particularly in the years immediately following the opening," may also be considered). Such subsequent treatment does not support a finding of either disestablishment or diminishment here.

Congress passed a railroad right-of-way act within months of the President's approval of the Rice Agreement. Act of July 22, 1890, 26 Stat. 290, 291. That Act recognizes that the Band maintained a reversionary interest in the granted railroad right-

[11] The agreements with the other bands occupying a reservation other than White Earth or Red Lake contain similar language that does not explicitly reference allotment on their reservations but adopt the terms of the Nelson Act permitting such allotments. Pls.' Ex. 70, ECF No. 230 at 60 (Grand Portage); 61-62 (Fond du Lac); 64 (Bois Fort and Deer Creek).

of-way.[12] *Id*. If the Nelson Act and the Rice Agreement had terminated the Reservation, any reversion for the right-of-way would have been to the public domain, not the Band. Just a few months later, in 1890, Congress appropriated funds to the Chippewa Indians of Minnesota "for damages sustained on account of the building of dams and reservoirs" affecting their lands, and apportioned one-third of the damages to go to the Mississippi Bands, "now residing or entitled to reside on the White Earth, White Oak Point, and Mille Lacs Reservations." Act of August 19, 1890. 26 Stat. 336, 357.

Shortly thereafter, however, Congress in 1893 and 1898 authorized existing claims by settlers on the Reservation. 28 Stat. 576, 30 Stat. 745. The 1898 Resolution set aside land for a Band cemetery, but neither Resolution addressed allotment. And while the 1898 Resolution purported to open "all public lands formerly within the Mille Lac Indian Reservation in the State of Minnesota" 30 Stat. 745, the 1893 Resolution recognized the continued existence of the Reservation. 28 Stat. 576 (confirming "bona fide pre-emption or homestead filings or entries allowed for lands *within the Mille Lee Indian Reservation*" based on an Interior decision "holding that the lands within said reservation were subject to disposal as other public lands under the general land laws") (emphasis added).

Five years later, Congress appropriated $40,000 for "*payment to the Indians occupying the Mille Lac Indian Reservation* … for improvements made by them" in an

[12] This Act is consistent with Article 8 of the 1855 Treaty, which states: "All roads and highways, authorized by law, the lines of which shall be laid through any of the reservations provided for in this convention, shall have the right of way through the same; the fair and just value of such right being paid to the Indians therefor; to be assessed and determined according to the laws in force for the appropriation of lands for such purposes." 10 Stat. 1165.

effort to relocate Band members to the White Earth Reservation or any other reservation in which allotments are made. 32 Stat. 245, 268 (1902) (emphasis added). That 1902 Act conditioned the funds on the Band agreeing to the Act's terms and further provided that "any Indian who has leased or purchased any Government subdivision of land *within said Mille Lac Reservation* from or through a person having title to said land from the Government of the United States *shall not be required to move from said reservation*." *Id*. (emphasis added). The Band subsequently refused to agree to the terms of the Act until the agreement included language preserving its entitlements under existing treaties or agreements not inconsistent with the 1902 Act. *Mille Lac Band of Chippewas*, 47 Ct. Cl. at 423. Such an act would not have been necessary if the Reservation had been disestablished and the Band's right of occupation had been terminated.

And in 1909, Congress passed an act authorizing the Band to bring suit against the United States due to "opening of the Mille Lac Reservation . . . to public settlement under the general land laws of the United States." 35 Stat. 619. The legislative history of the 1909 Act indicates that the Committee on Indian Affairs supported passage of the bill as introduced in order to afford the Band the opportunity to "show what rights, if any, remain to them under treaties and agreements heretofore made with the Government." H.R. 1388, 60th Cong. at 1.

The Band brought suit pursuant to the Act, and the Court of Claims entered judgment against the United States in the amount of roughly $830,000. *Mille Lac Band of Chippewa Indians*, 229 U.S. at 499. On review by the Supreme Court, the Court rejected the United States' arguments that the Reservation entered the public domain by virtue of

the 1864 Treaty cession language[13] and instead upheld the Court of Claims' determination that Article 12 of the 1864 Treaty effected a retained interest by the Band in the Reservation lands. Although the Court declined to allow monetary recovery for entries that occurred before the Nelson Act, given that Section Six of the Act authorized "valid, pre-emption or homestead entry . . . if found regular and valid, patents shall issue thereon." 25 Stat. at 645, the Court did determine that the Band could recover compensation for the entries made following the Nelson Act and Rice Agreement stemming from Congress' 1893 and 1898 Resolutions purporting to confirm or authorize

[13] To the extent the County may argue that the federal government should be estopped from taking the position it does herein as a result of these early positions in the context of the litigation stemming from the 1909 Act, that argument should be rejected. First, the Supreme Court rejected the United States' position before the Court of Claims and again in the Supreme Court in 1913 when it held Congress' 1893 and 1898 Joint Resolutions were unlawful and the provisions of Nelson Act applied to disposal of lands within the Reservation upon signing of the Rice Agreement. *Mille Lac Band of Chippewa Indians*, 229 U.S. at 509–10. Because the doctrine of judicial estoppel only prevents a party from assuming a contrary position when it "assumes a certain position in a legal proceeding, and succeeds in maintaining that position," *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001), the doctrine does not apply in circumstances, like here, where a court rejects those earlier positions. And second "it is well settled that the Government may not be estopped on the same terms as any other litigant." *Heckler v. Cmty. Health Servs. of Crawford County, Inc.,* 467 U.S. 51, 60 (1984); *see also N. Dakota ex rel. Olson v. Centers for Medicare & Medicaid Servs.*, 403 F.3d 537, 541 (8th Cir. 2005) ("Equitable estoppel is granted against the government only in extraordinary situations"). That is because "broad interests of public policy may make it important to allow a change of positions that might seem inappropriate as a matter of merely private interests." *New Hampshire*, 532 U.S. at 749 (quoting 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4477, p. 784 (1981)). Even if estoppel otherwise applied, the development of Supreme Court jurisprudence since the early twentieth century on treaty interpretation and the standards for disestablishment of a reservation warrants a revisiting of the status of the Reservation. *See, e.g., City of Duluth v. Fond du Lac Band of Lake Superior Chippewa*, 708 F. Supp. 2d 890, 898 (D. Minn. 2010) ("judicial estoppel does not apply if there has [] been a change in the law").

these entries.[14] *Mille Lac Band of Chippewa Indians*, 229 U.S. at 499. In concluding that the Nelson Act agreement permitted disposal of lands pursuant to the Section Six of the Nelson Act but not under general land laws, the Court determined that Congress was not empowered to dispose of the land under general lands laws because the cession under the Act and Rice Agreement was not absolute but in trust.[15] *Id.*

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[14] The County asserts that because the Supreme Court noted that "no rights of the Indians were infringed" by the application of Section 6 of the Nelson Act, it "necessarily determined the reservation was ceded and disestablished in the treaties of 1863-1864." ECF No. 257 at 45. But that is incorrect—the Court was simply making the point that Band's rights were not infringed because in the Rice Agreement the Band assented to the terms of the Nelson Act, and in doing so it assented to Section 6. *Mille Lac Band of Chippewa Indians*, 229 U.S. at 508-09 (noting that "the Indians fully assented" to the Nelson Act). Further, the County incorrectly claims that in 1926, the Supreme Court "reaffirmed its 1913 holding on cession" in *United States v. Minnesota*, 270 U.S. 181 (1926). ECF No. 257 at 56. In *Minnesota*, the United States asked the Court to cancel seven land patents it had issued to the State of Minnesota or to award compensation where ownership of the land had passed to others because of the rights of the Chippewa Indians in the lands. *Minnesota*, 270 U.S. at 191-92. One of these patents, the patent of May 13, 1871 (for 662.75 acres), was for land within the borders of the Mille Lacs Reservation. *Id.* at 196-99. After briefly discussing the 1855, 1863, and 1864 treaties and the Nelson Act, the Court held that the United States could not recover with respect to this particular patent, because the validity of the patent had been confirmed via application of Section 6 of the Nelson Act. *See id.* at 199 (citing a final decision of the Court of Claims that identified lands, including those covered by the patent of May 13, 1871, for which the Supreme Court's 1913 decision precluded recovery). Under these circumstances, the Court reasoned that the patent "need not be considered further." *Id.* The Court's discussion then turned to "other reservations," where patents issued for land between 1900 and 1912. *Id.* at 199-200. The County seeks to confuse all of this, including by citing and quoting sections of the Court's opinion that addressed "other reservations" (*i.e.*, not the Reservation), largely comprised of lands the Mississippi Bands had ceded all their right, title, and interest in and to, without qualification, under the 1855 treaty. ECF No. 257 at 50-51; *see* 10 Stat. at 1166.

[15] In its cross-motion, the County does not argue that the joint resolutions disestablished the Reservation. This in all likelihood is because the Supreme Court, distinguishing its holding in *Cherokee Nation v. Hitchcock*, 187 U.S. 294 (1902) and *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903), held that the 1893 and 1898 joint resolutions "were not

One year after the Supreme Court's decision, Congress appropriated $40,000 for the purchase of land on the Reservation to be held in trust for "non-removal Mille Lacs Indians, to whom allotments have not heretofore been made." 38 Stat. 582 (1914). Additional appropriations for the purchase of allotments was made in 1920 and 1923. 41 Stat. 420 (1920); 42 Stat. 1174 (1923). These various congressional enactments following the Nelson Act and Rice Agreement, and the Supreme Court's decision, demonstrate that with the limited exception of the 1898 Resolution (which the Supreme Court later found as wrongful), Congress recognized the continued existence of the Reservation.

III. Treatment of the Reservation by the federal government after the Nelson Act

The County asserts that Interior officials consistently treated the Reservation as ceded or terminated following the Nelson Act and Rice Agreement, but the evidence is mixed, at best. It points to Secretary John Noble's January 9, 1891 letter concluding that the Mille Lacs Indian Reservation was not a reservation within the meaning of the Nelson Act, stating that it was ceded in the 1863 Treaty. ECF No. 241 at 69. But the County fails to recognize that one day following the President's approval of the Nelson Act agreements, Secretary Noble on March 5, 1890, authorized the issuance of a public notice that the Mississippi Bands, including the Mille Lacs, elected to take allotments on their reservation and that the none of the lands within the "reservations of the Chippewa

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adopted in the exercise of the administrative power of Congress over the property and affairs of dependent Indian wards, but were intended to assert, and did assert, an unqualified power of disposal over the lands as the absolute property of the government." *Mille Lac Band of Chippewa Indians*, 229 U.S. at 509-10. Thus, the disposal of land under the general land laws, even though authorized by these resolutions, was "wrongful" and in violation of the trust established by the Nelson Act and Rice Agreement. *Id.*

Indians of Minnesota, viz . . . . Mille Lac . . are open or will be open to sale to or settlement by citizens" until advertised as such. Pls.' Ex. 68, ECF No. 229-16 at 4. Further, the Secretary reversed his January 1891 statement in September of that same year when he concluded that Reservation lands were excepted from railroad withdrawal orders, recognizing the Band's "right to the use and occupancy thereof for an indefinite period of time was conferred upon and guaranteed to said Indians" by Article 12 of the 1863 treaty. Pls.' Ex. 77, ECF No. 231-4 at 6. He also noted that this right was "a real and substantial interest or right in the enjoyment of which the Indians were entitled to protection." *Id*.

In the ensuing years, Interior addressed the status of the reservations subject to the Nelson Act, coming to differing conclusions. In a 1935 memorandum, Solicitor Nathan Margold analyzed the language of the Nelson Act and determined that the reservations subject to the Act continued to be Indian reservations because the cessions contained in the agreements were not absolute but in trust; therefore, this "trust constituted a reservation of the lands, and that, therefore, they never became a part of the public domain." Defs.' Ex. 94, ECF No. 242-12 at 59. He also concluded, however, that because the United States had "[i]n violation of the trust created in the" Nelson Act "disposed of all the ceded Mille Lacs lands under the general land" laws, and, therefore, allotments had to be re-purchased following Congress' appropriations of funds, the Reservation included only the repurchased trust lands. *Id*. at 61. The Margold memorandum, however, did not purport to address whether there was clear congressional intent to disestablish the

Reservation. Instead, he based his conclusion on the United States' error in disposing of the land, not the effects of the Nelson Act and Rice Agreement.[16]

In any event, Interior has revisited Solicitor Margold's decision on two occasions and concluded that the Reservation remains intact: (1) the 1991 Field Solicitor opinion stating: "[n]otwithstanding the fact that title to the land passed to others, there is no clear evidence that Congress considered the reservation boundaries either diminished or terminated;" Pls.' Opp. Ex. at 33, ECF No. 255-14 at 3, and (2) a 2015 Interior's Solicitor M-Opinion analyzing the relevant treaties, congressional acts, legislative history, and factual circumstances regarding the Reservation within the diminishment/disestablishment framework and affirming that the subsequent treaties and federal statutes failed to "evince a clear Congressional intent to disestablish the Reservation and, in fact, guaranteed the Band continuing rights to its Reservation." M-Opinion at 5.

In addition, upon request from the Band, on January 26, 2016, the Department of Justice issued a notice that it would assume concurrent jurisdiction over the Band's Indian country effective January 1, 2017. 81 Fed. Reg. 4335 (Jan. 26, 2016). And the EPA has for decades exercised federal regulatory jurisdiction throughout the Reservation under several statutes, including making a determination that the Reservation as

[16] Further, in 1942 and 1968, Interior officials determined that lands ceded under the Nelson Act were ceded in trust without affecting the reservation status of the lands, but did not separately address Mille Lacs. *See* Pls.' Ex. 157, ECF No. 234-9 at 15 (1942 Solicitor's Opinion); Pls.' Opp. Ex. 26, ECF No. 255-7 at 9 (1968 Field Solicitor's Opinion determining that following the Nelson Act, "it seems clear that the original reservations continued to be Indian reservations.").

established in the 1855 Treaty remains intact has when approving the Band for "treatment as a state" status in 1993 under the Safe Drinking Water Act's Underground Injection Control Program, 42 U.S.C. § 300j. Pls.' Opp. Ex. 34, ECF No. 255-15.

IV. The County's assertion of the equitable argument of laches fails

In a final effort to argue against the continued existence of the Reservation's 1855 boundaries, the County asserts the equitable doctrine of laches applies, analogizing the Band's lawsuit to the "Indian land claims" addressed in *Cayuga Indian Nation v. Pataki*, 413 F.3d 266 (2d Cir. 2005), and *Wolfchild v. Redwood Cty.*, 91 F. Supp. 3d 1093, 1105 (D. Minn. 2015). ECF No. 241 at 89-92. But the Band's lawsuit does not seek to recover damages for, or possession of, lands wrongfully taken in the distant past. Rather, this lawsuit arises from relatively recent actions taken by the County to interfere with the Band's exercise of law enforcement authority on the Reservation (including authority under state law), based on the County's view that the Reservation was disestablished.

In addition, whether Congress intended to diminish or disestablish the boundaries of the Reservation is both analytically distinct from and logically prior to any questions concerning the extent to which the Tribe may assert sovereign authority over non-trust lands or non-Band members within the Reservation's borders once those borders are properly understood. *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197, 215 n.9 (2005) (recognizing the distinction between a request for equitable relief against a tribe and a claim that the tribe's reservation has been disestablished by Congress). Furthermore, the principles applied in the cases cited by the County have never been applied to bar enforcement of rights of Indians under treaties (or federal laws). Moreover,

the sort of equitable arguments relied on in *City of Sherrill* and the other cited cases, if applied here, would limit the scope of federal jurisdiction, including law enforcement authority, on the lands within the Reservation, and directly impact the federal interests in these lands. Accordingly, the equitable arguments fail for the additional reason that they are grounded in doctrines that do not apply to the United States.

And in any event, the Supreme Court held more than a century ago that only Congress can diminish a reservation. *See Celestine*, 215 U.S. at 284; *City of Sherrill*, 544 U.S. at 215 n.9. And most recently in *McGirt*, the Supreme Court expressly rejected the notion that a *de facto* diminishment through non-Indian settlement of reservation lands provides a basis for a court to find diminishment *de jure*. *McGirt*, 140 S. Ct. at 2469 (emphasis in original) (stating that subsequent treatment of the Reservation cannot serve "as an alternative means of proving disestablishment or diminishment."). The County's argument contradicts this well-established precedent, positing that the passage of time or the actions of the Band or federal officials, rather than Congress, can alter reservation boundaries. This Court should reject the County's effort to rewrite Supreme Court precedent.

CONCLUSION

The 1855 Treaty established the Mille Lacs Indian Reservation as a permanent homeland for the Band. The Reservation was not disestablished or diminished by any subsequent treaty with the Mississippi Bands, the Nelson Act, or any other statute.

Accordingly, the United States respectfully urges the Court to grant the Band's Motion for Partial Summary Judgment and deny the County's Motion.

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