No. ____

IN THE
Supreme Court of the United States

LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS,

Petitioner,

v.

GRETCHEN WHITMER, GOVERNOR OF THE STATE OF MICHIGAN, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In 1855, the United States and Petitioner Little Traverse Bay Bands of Odawa Indians entered into the Treaty of Detroit, July 31, 1855, 11 Stat. 621, which "withdr[e]w [land] from sale for the benefit of said Indians" and made substantial promises with respect to these "reserved" lands constituting the "aforesaid reservations." In the years immediately after, Congress acknowledged in statutory text the reservations it had created—describing "the reservation made for the Ottawa and Chippewa Indians of Michigan by the [1855 Treaty]," Act of June 10, 1872, ch. 424, 17 Stat. 381, and referring to the "lands reserved for Indian purposes under the [1855 Treaty]," Act of March 3, 1875, ch. 188, 18 Stat. 516. Despite that clear text, the Sixth Circuit concluded that Congress never created a reservation for the Band because the Treaty provided for allotments to individual members—which, contrary to this Court's repeated holdings, the Sixth Circuit deemed inconsistent with creating a reservation. Pet. App. 25a. The Sixth Circuit then compounded its error by holding that there could have been no reservation because the Band failed to demonstrate that the Treaty separately and expressly called for active federal superintendence of the land, in conflict with then-Judge Gorsuch's opinion for the Tenth Circuit in *Hydro Resources, Inc. v. United States EPA*, 608 F.3d 1131 (10th Cir. 2010) (en banc), holding no such showing is required for reservations. The question presented is:

Whether the 1855 Treaty of Detroit established a federal reservation for the Little Traverse Bay Bands of Odawa Indians?

PARTIES TO THE PROCEEDING

Petitioner in this Court is the Little Traverse Bay Bands of Odawa Indians, a federally recognized Indian Tribe. The Band was the plaintiff in the district court and the appellant and cross-appellee in the court of appeals.

Respondents in this Court are Gretchen Whitmer, in her official capacity as the Governor of Michigan; City of Petoskey, Michigan; City of Harbor Springs, Michigan; Emmet County, Michigan; Charlevoix County, Michigan; Township of Bear Creek; Township of Bliss; Township of Center; Township of Cross Village; Township of Friendship; Township of Little Traverse; Township of Pleasantview; Township of Readmond; Township of Resort; Township of West Traverse; Emmet County Lake Shore Association; The Protection of Rights Alliance; City of Charlevoix, Michigan; and Township of Charlevoix. Gretchen Whitmer was the defendant in the district court and an appellee in the court of appeals. The remaining Respondents intervened as defendants in the district court and were appellees in the court of appeals. City of Petoskey, City of Harbor Springs, Emmet County, and Charlevoix County were also cross-appellants.

RELATED PROCEEDINGS

United States District Court (W.D. Mich.):

Little Traverse Bay Bands of Odawa Indians v. Whitmer, No. 1:15-cv-850 (Aug. 15, 2019)

United States Court of Appeals (Sixth Circuit):

Little Traverse Bay Bands of Odawa Indians v. Whitmer, Nos. 19-2070/2107 (May 18, 2021)

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The Sixth Circuit's opinion is reported at 998 F.3d 269. Pet. App. 1a. The district court opinion is reported at 398 F. Supp. 3d 201. Pet. App. 36a.

JURISDICTION

The Sixth Circuit denied en banc review on June 23, 2021. Pet. App. 111a. Pursuant to this Court's March 19, 2020 and July 19, 2021 orders, this petition is timely filed within 150 days of that order.

TREATY AND STATUTORY PROVISIONS INVOLVED

The 1855 Treaty of Detroit and relevant statutes are reproduced in the appendix. Pet. App. 113a.

INTRODUCTION

This petition concerns an inter-sovereign dispute over jurisdiction in northern Michigan that, as the decision below acknowledged, raises "important questions of federal Indian law." Pet. App. 35a. In the 1855 Treaty of Detroit, the United States "withdr[e]w [land] from sale for the benefit of" Petitioner Little Traverse Bay Bands of Odawa Indians (the "Band"). Pet. App. 114a. The Treaty identified those lands as "reservations" and described them as "reserved … for the band[s]." Pet. App. 116a, 120a. Shortly after, Congress acknowledged in statute the reservations it had created—describing "the reservation made for the Ottawa and Chippewa Indians of Michigan by the [1855 Treaty]," Act of June 10, 1872, Pet. App. 133a, and

referring to the "lands reserved for Indian purposes under the [1855 Treaty]," Act of Mar. 3, 1875, Pet. App. 136a. Federal agents described the lands as "reservations ... set apart ... as the permanent … home of the Indian," Dkt.558-66 at 7718-19,[1] and the Commissioner of Indian Affairs recommended withdrawing more lands for the "enlargement of the Little Traverse Reservation"—which President Lincoln endorsed. Dkt.559-41 at 8355.

Despite this textual and historical evidence, the Sixth Circuit held that the 1855 Treaty had *never* established a reservation. Pet. App. 35a. The decision's consequences for the sovereigns involved are significant. It is an affront to the Band's history—and going forward, it will shape jurisdiction in 140,000 acres of northern Michigan. The Band cannot exercise sovereign rights tied to reservation status, and the federal government lacks the powers it possesses in Indian country. Standing alone, this inter-sovereign dispute would warrant certiorari, as the recent grant in *Ysleta del Sur Pueblo v. Texas*, No. 20-493, 2021 WL 4822674 (U.S. Oct. 18, 2021), shows. But here, there is more: the decision below conflicts with multiple decisions of this Court and other federal circuits, including then-Judge Gorsuch's opinion for the Tenth Circuit in *Hydro Resources, Inc. v. U.S. EPA*, 608 F.3d 1131, 1148-57 (10th Cir. 2010) (en banc).

First, the decision below holds that a treaty that said it created a "reservation" failed to do so. In Indian cases,

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[1] Docket and page numbers refer to filings in the district court below.

as others, "when the meaning of a statute[]" or treaty "is clear," those terms control. *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2469 (2020); *see Herrera v. Wyoming*, 139 S. Ct. 1686, 1701 (2019); *accord Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017) ("[W]e … presume … 'that [the] legislature says … what it means and means … what it says.'"). Consistent with that principle, this Court and other circuits have repeatedly held that when a treaty or statute says it creates an Indian "reservation," it does. No court had held otherwise until the decisions below. Indeed, in restoring the Band to federal recognition in 1994, Congress explicitly recognized that the 1855 Treaty established a reservation for the Band. And three years later, the Department of Interior did too.

Paying little heed to the text, the Sixth Circuit chose instead to tell a story that, because "the treaty provided for allotments of land," it did not establish "a collective Indian reservation." Pet. App. 22a. But *McGirt* warned of "substituting stories for statutes." 140 S. Ct. at 2470. And this story is particularly ill-crafted—and, indeed, led the Sixth Circuit into yet further conflicts. Repeatedly, this Court has held that allotment "is completely consistent with continued reservation status." *Id.* at 2464 (quoting *Mattz v. Arnett*, 412 U.S. 481, 497 (1973)). Were it otherwise, the Court would have badly erred in *Nebraska v. Parker*, 577 U.S. 481 (2016), *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999), *United States v. Thomas*, 151 U.S. 577 (1894), and *United States v. Celestine*, 215 U.S. 278 (1909), all of which found that allotment treaties created reservations. Other courts have held the same.

Indeed, the Sixth Circuit's disregard of this law is especially bewildering because of *who negotiated* the 1855 Treaty: George Manypenny, the principal architect of the United States' Indian reservation policy. Manypenny knew well the significance of the word "reservation" and *specifically envisioned* that reservations would be allotted. Dkt.558-50 at 7537. Consistent with this view, but in conflict with the decision below, the United States has rejected "the fictitious dichotomy between treaties that allowed for allotments and treaties that established … reservations."[2]

Second, the Sixth Circuit required the Band to show that the 1855 Treaty, in addition to establishing a "reservation," separately and expressly committed the federal government to "actively" superintend that reservation. Pet. App. 30a. That requirement conflicts with this Court's cases, which recognize that when Congress creates a reservation, the federal government necessarily acquires the power and duty to superintend it. And that requirement conflicts with the Tenth Circuit's *en banc* decision in *Hydro Resources*. There, then-Judge Gorsuch explained that evidence of active federal superintendence of the land is required for one form of "Indian country"—dependent Indian communities—but not reservations. 608 F.3d at 1148-57. The Second Circuit has held the same.

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[2] United States' Combined Reply at 6, *Saginaw Chippewa Indian Tribe v. Granholm*, No. 05-10296-BC (E.D. Mich. Apr. 19, 2010), Dkt.234 ("United States' Saginaw Chippewa Reply").

The decision below, and the confusion and uncertainty it yields, warrants review. It prevents the Band and the United States from asserting sovereign powers that the United States by treaty promised. It threatens the other Tribes that are parties to the 1855 Treaty. It is at odds with the judgment Congress made in 1994, the considered view the Department of Interior expressed in 1997, and the Department of Justice's position in recent litigation. And it will sow confusion nationwide. Lower courts must now determine whether the word "reservation" in an Indian treaty means an Indian "reservation" (as this Court and other circuits have held) or whether provisions for allotments rob that term of meaning (as the Sixth Circuit held). And they will have to decide whether then-Judge Gorsuch or the Sixth Circuit correctly stated the law as to active federal superintendence over reservations. As *amici* Tribes explained below, the Sixth Circuit's decision "if allowed to stand, has serious potential consequences for [the] sovereignty, intergovernmental relationships, and self-governance" of Indian Tribes. Tribal *En Banc* 6th Cir. Br. at 2, Dkt.121.

The Court should grant certiorari to resolve these important issues. Alternatively, it should call for the views of the Solicitor General, as in *Ysleta del Sur*.

STATEMENT

A. Historical Background.

1. Federal Reservation Policy In The 1850s.

In the early 19th century, federal policy centered on "remov[ing]" tribes from their eastern homelands to unpopulated western lands. Dkt.558-50 at 7548. By

midcentury, however, "tribes were engulfed in the stream of western migration." *Cohen's Handbook of Federal Indian Law* § 1.03[6][a], at 60 (Nell Jessup Newton ed., 2012). Hence, when George Manypenny became Commissioner of Indian Affairs in 1853, he "predicted a crisis in the removal policy and urged its abandonment." *Id.* He pressed a new policy of "concentrating the Indians on small reservations." *Id.*

Manypenny's reservation policy aimed not just at protection but at the Indians' "civilization"—via "[a]griculture, domestic and mechanical arts, English education, Christianity, and individual property (land allotted in severalty)." Francis Paul Prucha, *The Great Father* 317 (1984). "The reservations were, in effect, envisioned as schools for civilization, in which Indians under the control of the [federal Indian] agent would be groomed for assimilation." Cohen § 1.03[6][a], at 60-61.

A central feature of the policy was to allot reservation lands to individual Indians. Manypenny viewed "excessive quantities of land held in common" as among the prior policy's "evils." 1855 Indian Affairs Report, Dkt.558-50 at 7537. In his view, "[w]e can hope for no" improvement "in [Indians'] condition … until they shall have been concentrated upon reservations … [with] the division of the land among them in severalty." *Id.* This "necessary corollary" of the reservation policy "was recommended strongly by Manypenny," Prucha, *supra*, at 327, who aimed to "provid[e] for allotment … in all treaties," Cohen § 1.03[6][b] at 64.

2. The Reservation Policy In Michigan.

In 1836, the United States and the Tribes that would later consummate the 1855 Treaty entered into a treaty by which the Tribes ceded approximately one-third of present-day Michigan in exchange for small reservations. Treaty of Washington, Mar. 28, 1836, 7 Stat. 491. The Senate, however, unilaterally amended the 1836 Treaty to limit the reservations to "five years … and no longer," after which the United States could "remove" the Tribes. *Id.* art. 2; *see* Pet. App. 40a.

In the ensuing years, rumors of removal ran rampant, and Michigan Tribes were "dreading" it. Dkt.558-42 at 7381. But in the early 1850s, Manypenny launched his reservation policy. Cohen § 1.03[6][a] at 60. In keeping with that policy, Henry Gilbert, head of the Michigan Indian Agency, "proposed establishing reservations" as a "permanent home" for the Michigan Tribes. Pet. App. 42a-43a.

As elsewhere, the reservation policy in Michigan sought to achieve "civilization" of the Indians. Dkt.558-47 at 7478. And as elsewhere, allotment was central. In early 1855, Manypenny recommended securing "permanent homes for the Ottawas and Chippewas … and at the same time, to substitute … for their claim to lands in common, titles in fee to individuals for separate tracts." Pet. App. 10a.

3. Negotiation Of The 1855 Treaty.

Manypenny and Gilbert convened with Odawa and Chippewa Tribes in July 1855 to negotiate a treaty embodying the government's reservation policy. Gilbert explained that the government's "object" was "to have

you civilized," and that it "will not permit you" to disperse individually but "will insist on your collecting into communities" where the government would provide "for schools, agricultural and other useful purposes." Dkt.558-09 at 7061, 7075. Tribal representatives understood that the government wished "[t]hat we should be Christians, civilized and educated" and "collect in communities." *Id.* at 7068, 7083. At the same time, individuals would receive allotments, in keeping with Manypenny's reservation policy. *Id.* at 7061. And while Manypenny and Gilbert explained that eventually the bands' reliance on the federal government would cease, this would only happen "if you improve for the next twenty years as fast as you have during the last five." *Id.* at 7075. Until then, the government would "take care of your property." *Id.* Tribal representatives likewise understood their lands would be federally protected, with "not only a rope to our lands, but a forked rope … so that you can hold onto it." *Id.* at 7083.

4. The 1855 Treaty.

The negotiations yielded the 1855 Treaty. Article 1 established reservations for various Tribes and set the terms for allotment. First, it promised that "the United States will withdraw from sale for the benefit of said Indians as hereafter provided, all of the unsold public lands within the State of Michigan embraced in the following descriptions to wit:," after which followed clauses allocating defined tracts for particular bands. Pet. App. 114a. The third and fourth clauses set aside tracts for the Band's predecessors. Pet. App. 114a-115a; *see* Little Traverse Bay Bands of Odawa Indians and the Little River Band of Ottawa Indians Act, Pub. L. No.

103-324, § 4(b)(2)(A), 108 Stat. 2156, 2157-58 (1994). Those are the lands at issue here.

Article 1 then described how those lands would be allotted. Heads of families and single adults could select "any land within the tract *reserved herein* for the band to which he may belong." Pet. App. 116a (emphasis added). The United States would "hold the same in trust" for ten years, or longer as the President in his discretion deemed "necessary and proper." Pet. App. 118a-119a. The United States could also appropriate "land within the *aforesaid reservations* for … churches, school-houses, or for other educational purposes." Pet. App. 120a (emphasis added). And in keeping with its "civilization" goal, in Article 2 the government promised funds for "blacksmith-shops," "agricultural implements and carpenters' tools, household furniture and building materials, [and] cattle," to assist the Tribes in "getting permanently settled" on the lands. Pet. App. 120a-121a.

Manypenny and Gilbert executed the Treaty for the United States. Fifty-four chiefs and headmen, including eight from "Little Traverse Bands," executed it for various Tribes, each with "his x mark." Pet. App. 123a-125a. With some boundary adjustments, the Treaty was ratified by the Senate and signed by President Pierce. Pet. App. 126a-129a; *see* Pet. App. 13a.

5. Subsequent Treatment.

Immediately after, the federal government remained committed to the reservation policy the 1855 Treaty embodied. Federal agents recognized, for example, that "fulfilling the treaty stipulations ... upon the[] [Ottawa and Chippewa] reservations" required "diligence in

guarding the [Indians'] rights ... with the authority of law." Dkt.558-55 at 7632. "[W]hites" had begun "flocking …. [to] where these reservations are located." Dkt.558-65 at 7714. In response, the government acted to "protect [the Indians] upon the reserves set apart for" them. Dkt.558-70 at 7746.

The government also worked toward "civilizing" the Indians. Indian agents educated the Indians (in federal reservation schools), converted them to Christianity (through federally funded missions), and helped them with agriculture and domestic arts (via support like the blacksmith shops contemplated by the 1855 Treaty). *E.g.*, Dkt.558-62 at 7683 (noting that "extensive improvements ha[d] been made on [the Band's] reservation," including establishment of "six schools on this reservation"); *accord*, *e.g.*, 1856 Indian Affairs Report, Dkt.558-53 at 7614; 1859 Indian Affairs Report, Dkt.558-56 at 7642-44.

In these and other reports, federal agents left no doubt that the federal government viewed the lands as reservations. Gilbert's successor, Agent Fitch—who had attended the negotiation of, and signed, the 1855 Treaty—reported in 1858 that he visited "Sault Ste. Marie, Mackinac, Little Traverse, and Grand Traverse … in every case upon a government reservation" created by the 1855 Treaty. Dkt.558-55 at 7631-32. He emphasized that "colonizing [those Indians] … upon ample reservations," with allotment in severalty, was "essential to their elevation." Dkt.558-54 at 7616.

Fitch's successor, Agent Leach, evidenced the same understanding in 1863. Speaking specifically about the Little Traverse lands, he observed that "[t]his

reservation contain[ed] a large amount of good farming land yet unoccupied." Dkt.558-62 at 7683. In turn, Leach's successor—Agent Smith, who had attended and transcribed the 1855 Treaty negotiations—reiterated in 1867 that federal "policy" in Michigan was "to civilize the[] [Indians]" through "the reservation system" with the "allotment thereon to each Indian in severalty." Dkt.558-67 at 7723.

High-level federal officials also recognized the lands as reservations. In 1864, Commissioner of Indian Affairs Dole wrote to the Secretary of the Interior and requested withdrawal of certain townships for "enlargement of the Little Traverse Reservation." Dkt.559-41 at 8355. He recommended "removal of the Indians from" the smaller reservations in Michigan "and locating them all upon the Little Traverse Reservation." *Id.* The Secretary "submitted [that proposal] to the President with the recommendation that the lands within described be withdrawn from sale for the purposes indicated." *Id.* President Lincoln did "as recommended," *id.* at 8356, though President Grant later abandoned the enlargement plan, *id.*

The Tribes also understood the Treaty lands as "reservations." In 1860, two Grand River chiefs requested that supplies be delivered "to the reservation." Dkt.600-62 at 10,814 (also referring to the land as "our reservation"). In 1861, Little Traverse Chief Peter Wakazoo, who had signed the 1855 Treaty, wrote to the Commissioner of Indian Affairs requesting building supplies for "the Emmet County [*i.e.*, Little Traverse] Reservation." Dkt.600-63 at 10,819. And in 1875, Little Traverse Chief Louis Micksawbay and

Andrew J. Blackbird—both treaty signatories, with Blackbird also having served as interpreter—wrote to the Secretary requesting the promised patents for the lands within the Tribes' "several Reservations." Dkt.560-8 at 8706.

6. 1870s Legislation.

As so often happened, non-Indians continued to intrude onto the Band's lands. Dkt.558-67 at 7724-25. Over time, calls to formally open the lands for white settlement gained traction. *E.g.*, Dkt.559-60 at 8528; Dkt.600-100 at 10,932.

In the 1870s, Congress acceded—but confirmed that it understood that the Treaty established a reservation. In 1872, Congress enacted legislation authorizing sale of "lands remaining undisposed of in the *reservation* made … by the treaty of [1855]." Pet. App. 133a (emphasis added). In 1875, Congress amended the statute and referred to "the lands *reserved* for Indian purposes under the [1855] treaty." Pet. App. 136a (emphasis added).

7. Subsequent History.

In 1872, Secretary of the Interior Columbus Delano "misread the 1855 Treaty" as providing that "the federal government no longer had any trust obligations to the tribes." *Grand Traverse Band of Ottawa & Chippewa Indians v. U.S. Att'y W. Dist. of Mich.*, 369 F.3d 960, 961 & n.2 (6th Cir. 2004) (explaining Delano's mischaracterization of the Treaty provision "dissolv[ing]" the umbrella "Ottawa and Chippewa" organization formed to negotiate the Treaty as dissolving the constituent bands themselves). When the

federal government abandoned its duties of superintendence, "all-pervasive land frauds" swept the 1855 reservations. H.R. Rep. No. 103-621, at 3 (1994). "By the end of the 1800s, all that remained of the reservations were the treaty boundaries and isolated Ottawa/Odawa homesteads." *Id.*

The Band, however, did not disappear. As Congress found over a century later, the Band maintained its "political activities" and "authority," "continued to assert [its] treaty-based" relations with the United States, and "continued [its] social and political existence" within the "traditional homelands …. reserved in the … 1855 Treaty." S. Rep. No. 103-260, at 2-5 (1994). Based on these findings, Congress in 1994 reversed Secretary Delano's unlawful administrative termination and restored the Band to federal recognition. In doing so, Congress recognized that the "historical record is clear" that the 1855 Treaty "created what were intended to be permanent reservations for the tribes." *Id.* at 2. Congress thus defined the Band's federal service area with reference to "the boundaries of the reservations for the Little Traverse Bay Bands as set out in Article 1, paragraphs 'third' and 'fourth' of the Treaty of 1855." § 4(b)(2)(A), 108 Stat. at 2157-58. Three years later, in responding to a request to take land into trust for the Band, the Department of the Interior concurred that in "the 1855 Treaty … the parties agreed to create reservations for the [Band]." Little Traverse Indian Lands Opinion at 2 (Nov. 12, 1997), https://bit.ly/3nfX5oU ("Lands Opinion").

B. Proceedings Below.

In 2005, another Tribe—the Saginaw Chippewa

Indian Tribe of Michigan—filed suit against Michigan officials asserting that its 1855 treaty (with withdrawal and allotment language materially identical to the Band's 1855 Treaty) established a reservation. Complaint, *Saginaw Chippewa Indian Tribe of Mich. v. Granholm*, No. 1:05-cv-10296 (E.D. Mich. Nov. 21, 2005), Dkt.1; *see* Treaty with the Chippewa Indians, Aug. 2, 1855, 11 Stat. 633. In 2010, the suit settled. The parties—including Michigan and the United States, which had intervened in the Tribe's favor—stipulated that a "Reservation was established and confirmed by the … 1855 [Saginaw Chippewa] Treaty." Order for Judgment at 3, No. 1:05-cv-10296-BC (E.D. Mich. Dec. 17, 2010), Dkt.284.

In 2015 the Band filed its own suit, seeking a declaration that its 1855 Treaty created a reservation for the Band that still exists today, and an injunction prohibiting Michigan from taking action inconsistent with the land's reservation status. Pet. App. 36a. The district court granted summary judgment to the defendants. It concluded that the 1855 Treaty never created a reservation. Pet. App. 37a. Hence, the court did not reach Defendants' disestablishment argument. Pet. App. 59a n.1.

The Sixth Circuit affirmed. It recognized that under the 1855 Treaty, land was "withdrawn from sale for the benefit of [the Band]," Pet. App. 23a (quoting 1855 Treaty), and it conceded that "the Treaty of 1855 might have set apart land for an Indian purpose," Pet. App. 25a. The court concluded, however, that "the Treaty created an arrangement closer to a land allotment system," which it viewed as inconsistent with

reservation status. Pet. App. 25a. The court's analysis ignored the 1855 Treaty's designation of the Band's lands as "reservations."

The Sixth Circuit did acknowledge that "several … letters from … tribal members [from the period] … speak of 'our reservations'" and "a number of letters between federal Indian officials discuss[] the Treaty's 'reservation' of land." Pet. App. 27a-28a. It also acknowledged that in 1872 Congress referred to "the reservation made … by the treaty of [1855]," Pet. App. 28a (alteration in original) (quoting Act of June 10, 1872). The court, however, dismissed these statements, asserting that "it is unclear … whether … the word 'reservation(s)' [was used] as a legal term of art under federal Indian law, or as it was used in common parlance." *Id.* The court never explained what "reservation" meant in "common parlance," or what Congress—and Manypenny, the reservation system's architect—could reasonably have meant by the term "reservation" other than an Indian reservation.

The Sixth Circuit also held that the Band had to demonstrate that the 1855 Treaty promised the Band not just a reservation, but also—separately—"active federal control" over the lands. Pet. App. 30a (quoting *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 533 (1998)). The court drew that supposed requirement from this Court's cases concerning "dependent Indian communities," which are defined by statute as a type of "Indian country" distinct from reservations. *Compare* 18 U.S.C. § 1151(a) (reservations), *with id.* § 1151(b) (dependent Indian communities). The Sixth Circuit did not attempt to

reconcile its decision with the Tenth Circuit's en banc opinion in *Hydro Resources*, in which then-Judge Gorsuch recognized that when Congress "declar[ed] land to be part of a reservation," no separate inquiry into "active federal control" is required. 608 F.3d at 1151.

The Sixth Circuit also did not decide any disestablishment issue; hence, no such issue is presented here.

REASONS FOR GRANTING THE PETITION

The decision below conflicts with decisions of this Court and other federal circuits, disregards Congress's repeated textual designations of the Band's lands as a "reservation," and imposes as to reservation lands an active superintendence requirement that other circuits have rejected. These departures from well-established law have serious consequences. The Sixth Circuit's decision prevents the Band and the federal government from asserting jurisdiction that the United States by treaty conferred. And if allowed to stand, the decision below will sow confusion in reservation-status cases nationwide. The Court should grant the petition or, alternatively, call for the views of the Solicitor General.

I. The Decision Below Conflicts With Decisions Of This Court And Other Circuits In Holding That The 1855 Treaty Did Not Create A Reservation.

When Congress by treaty identifies lands as an Indian "reservation" those lands become one, and remain so regardless of whether Congress also allots them. This Court and other circuits have repeatedly so held. Today, however, the law is different in the Sixth

Circuit, where the Band's lands were never a "reservation" even though Congress by treaty twice proclaimed them to be so and by statute thrice confirmed the point. Before this litigation, no court anywhere had reached the Sixth Circuit's anti-textual result.

A. By Disregarding Congress's Identification Of The Band's Lands As A "Reservation," The Decision Below Conflicts With Decisions Of This Court And Other Circuits.

The decision below created a conflict, first, by holding that even though Congress identified the Band's lands as an Indian "reservation," those lands were never a reservation.

"Treaty analysis begins with the text, and treaty terms are construed as they would naturally be understood by the Indians." *Herrera*, 139 S. Ct. at 1701. On the one hand, no "particular form of words" is *necessary* to create a reservation, *McGirt*, 140 S. Ct. at 2475; instead, it "is enough that from what has been [done] there results a certain defined tract appropriated" for Indian purposes. *Id.* (quoting *Minnesota v. Hitchcock*, 185 U.S. 373, 390 (1902)). But on the other hand, until the decisions below, one thing had always been *sufficient*: When Congress promises a Tribe a "reservation," those lands become a "reservation." That is because such a promise—at least absent some express contrary statement—will always show that Congress set aside a "defined tract" in order to *reserve it* for Indians. *Hitchcock*, 185 U.S. at 390; *see Celestine*, 215 U.S. at 285 (term "reservation" "is used … to describe any body of land … which Congress has

reserved from sale for any purpose"); *United States v. John*, 437 U.S. 634, 649 (1978) (reservation status of trust lands "completely clarified by the proclamation … of a reservation").

The cases speak with one voice in affirming that a reservation is a reservation. *Hitchcock* found that a reservation was established because—and only because—the treaty "spoke[] of [the tract] as a reservation." 185 U.S. at 389-90. The treaty did so in passing, in authorizing the President to commission a report on "the qualifications and moral deportment of all persons residing upon the reservation." Treaty with the Red Lake and Pembina Bands of Chippewa, Oct. 2, 1863, 13 Stat. 667. But when the treaty termed the tract a "reservation," *Hitchcock* held that the treaty meant what it said. 185 U.S. at 389. Many other decisions, too, have found reservations created by treaties that used similar language. *E.g.*, *Parker*, 577 U.S. at 484 (treaty referred to lands "reserved by the Omahas for their future home" and specified that rights of way could be made "through the reservation," Treaty with the Omaha, Mar. 16, 1854, 10 Stat. 1043); *Celestine*, 215 U.S. at 285 (Manypenny treaty stipulated that lands were "reserved for the present use and occupation of the said tribes" and that "the President may establish the … general reservation at such other point as he may deem" appropriate, Treaty of Point Elliott, Jan. 22, 1855, 12 Stat 927); *accord United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 351-52 (1941).

Lower courts have reached the same result. The Ninth Circuit, for example, found a reservation based on a statement that lands would "be withdrawn from all

form of settlement" and that Congress might wish "to authorize the addition of certain lands to the Mission Indian Reservations." *Chemehuevi Indian Tribe v. McMahon*, 934 F.3d 1076, 1080 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 1295 (2020); *see also, e.g.*, *United States v. McIntire*, 101 F.2d 650, 651 (9th Cir. 1939); *Klamath & Moadoc Tribes & Yahooskin Band of Snake Indians v. United States*, 85 Ct. Cl. 451, 454, 456 (1937), *aff'd*, 304 U.S. 119 (1938); *accord Devils Lake Sioux Tribe v. North Dakota*, 917 F.2d 1049, 1051 (8th Cir. 1990) (treaty provided that "a reservation be set apart," Treaty with the Sissiton and Warpeton Bands, Feb. 19, 1867, 15 Stat. 505); *Pittsburg & Midway Coal Mining Co. v. Yazzie*, 909 F.2d 1387, 1405 (10th 1990) (executive order that "set apart … land 'as a reservation'" used "language [that] … suggest[ed] … [the President] had set aside … lands as a reservation").

2. The text should have been dispositive here too. In the 1855 Treaty, the United States promised to "withdraw from sale … all the unsold public lands" within specified areas for various Tribes. Pet. App. 114a. It did so "for the benefit of said Indians," including (in clauses 3 and 4 of Article 1) for the bands that were the Band's predecessors-in-interest. Pet. App. 114a-115a. And it identified these lands "*reserved* herein for the band[s]" and described the lands as the "aforesaid *reservations*." Pet. App. 116a, 120a (emphases added). When a treaty withdraws lands from sale, for the benefit of Indians, and calls those land "reserved" and "reservations," it creates an Indian reservation. *Supra* 17-19. Had the Sixth Circuit applied the same approach this Court employed in (say) *Hitchcock* or *Celestine* or

the Ninth Circuit employed in *Chemehuevi*, the outcome here would have been different.

Indeed, this case should have been even easier because Congress by statute confirmed that the 1855 Treaty created a reservation. In 1872 and 1875, it enacted statutes that addressed lands falling within "the reservation made … by the treaty of [1855]," Pet. App. 133a, and "the lands reserved for Indian purposes under the [1855] treaty," Pet. App. 136a. *McGirt* found that an 1873 statute—enacted by the same Congress that passed the 1872 Little Traverse statute—containing "references to the 'Creek reservation' and 'Creek India[n] Reservation'" "left no room for doubt" that the Creek Nation's lands were reservations. 140 S. Ct. at 2461 (alteration in original). The result should have been the same here.

3. The Sixth Circuit's contrary reasoning withers under scrutiny.

i. The Sixth Circuit's analysis did not so much as *acknowledge* the 1855 Treaty's text identifying the Band's lands as "reserved" and a "reservation." True, the court *did* acknowledge the correspondence between "tribal members and federal officials us[ing] the word 'reservation(s)'" to describe the Band's lands, as well as Congress's use of that term in the 1872 statute. Pet. App. 28a. As to those statements, Sixth Circuit posited that *McGirt* supported its conclusion that the word "reservation" might mean something besides an Indian reservation. *Id.*

McGirt, however, suggests nothing of the sort. *McGirt* concerned the opposite situation, in a different

era of federal Indian policy. It held that even though the 1832 and 1833 Creek treaties did not identify Creek lands as a "reservation," they nevertheless promised one. 140 S. Ct. at 2461. That the word "reservation" is not *necessary* to create one, *id.*, does not remotely suggest that lands denominated a "reservation" by treaty and statute might not be a reservation. Indeed, the Sixth Circuit's conclusion cannot be squared with the weight *McGirt* placed on "other federal laws" from the 1860s and 1870s that "referred to the Creek Reservation." *Id.*

Moreover, the Creek treaties dated from the early 1830s, and *McGirt* explained that the word "reservation" had not acquired "such distinctive significance" at the time of "[t]hese early treaties." *Id.* at 2461. The 1855 Treaty, however, dates from two decades later. And by then, the meaning of "reservation" was not enigmatic. Indeed, this was the high-water mark of the federal policy inaugurated by Commissioner Manypenny to "concentrat[e] the Indians on small reservations." Cohen § 1.03[6][a], at 60; *supra* 5-6; *see, e.g.*, Noah Webster, *An American Dictionary of the English Language* 845 (1852), https://bit.ly/3kMGwPN ("Reservation[:] ... In the *United States*, a portion of the public land reserved for some special purpose, as for the use of Indians, for schools, &c."). Thus, treaties and statutes regularly used the term "reservation" during this period, and courts have consistently interpreted those instruments to create—no surprise—a

reservation.[3] And it beggars belief to say that Commissioner Manypenny, who negotiated the 1855 Treaty, intended the Treaty term to have a meaning other than that which he repeatedly ascribed to it in the reports creating the federal reservation policy. *Supra* 5-6.

ii. The Sixth Circuit's contra-textual result is especially misguided given the rule "that Indian treaties are to be interpreted liberally in favor of the Indians," with ambiguities "resolved in their favor." *Mille Lacs*, 526 U.S. at 200; *Cnty. of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 269 (1992) (same for statutes). That is the rule because, as Justice Gorsuch has explained, "U.S. negotiators wrote … treat[ies] in English—a language that the [Indians] couldn't read or write." *Wash. State Dep't of Licensing v. Cougar Den, Inc.*, 139 S. Ct. 1000, 1016 (2019) (Gorsuch, J., concurring). Whatever else might be true, the words "reservation" and "reserved" in the 1855 Treaty do not *unambiguously* mean "not a reservation."

The Sixth Circuit also posited that some other treaties spoke (in its view) more clearly in creating reservations. Pet. App. 25a-26a. Treaties and statutes,

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[3] *E.g.*, Treaty with the Omaha, Mar. 16, 1854, 10 Stat. 1043, and *Parker*, 577 U.S. at 484; Treaty of Point Elliot, Jan. 22, 1855, 12 Stat. 927, and *Celestine*, 215 U.S. at 285; Treaty with the Flathead, Kootenay, and Upper Pend d'Oreilles Indians, July 16, 1855, 12 Stat. 975, and *McIntire*, 101 F.2d at 651; *see also, e.g.*, Act of June 12, 1858, ch. 155, 11 Stat. 329, 332 (authorizing federal officials "to remove from any tribal reservation any person found therein" unlawfully); Act of Feb 27, 1851, ch. 15, 9 Stat 574, 580 (referring to 1836 Michigan reservations as "their reservations").

however, do not need neon lights to illuminate clearly. The Sixth Circuit averred, in substance, that the Band's negotiators should have known about other treaties with (say) the Menominee or the Kickapoo and understood that they needed to demand the language in *those treaties*—despite the use of "reserved" and "reservations" in their own. Under the Indian canon, however, courts are to "interpret the treaty as the [Indians] originally understood it in 1855," not "in light of new lawyerly glosses conjured up for litigation … more than 150 years after." *Cougar Den*, 139 S. Ct. at 1019 (Gorsuch, J., concurring).[4]

B. The Decision Below Compounds The Conflicts With Its Holding That Allotment Treaties Cannot Create Reservations.

The Sixth Circuit concluded that the 1855 Treaty could not have meant what it said in part because, even as the Treaty established a "reservation" for the Band, it also provided for allotment and, eventually, unrestricted patents. For this reason, the Sixth Circuit averred that "although the Treaty … might have set apart land for an Indian purpose, that purpose was not a reservation." Pet. App. 25a.

That reasoning badly errs—and, indeed, exacerbates the conflicts between the Sixth Circuit and decisions of

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[4] The Sixth Circuit also cited negotiating history and post-enactment conduct it believed showed that the Treaty parties did not treat the Band's lands as a reservation. Pet. App. 26a-29a. But as explained, far stronger evidence shows the opposite. *Supra* 9-12. And even "mixed historical evidence" would not overcome the 1855 Treaty's clear text. *Parker*, 577 U.S. at 490.

this Court and other circuits. Again and again, this Court has held that allotment is "completely consistent with … reservation status." *McGirt*, 140 S. Ct. at 2464 (quoting *Mattz*, 412 U.S. at 497); *accord Parker*, 577 U.S. at 490; *Hagen v. Utah*, 510 U.S. 399, 429 (1994); *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 356-58 (1962). Other circuits have reached the same conclusion. *E.g.*, *Murphy v. Royal*, 875 F.3d 896, 919 (10th Cir. 2017), *aff'd sub nom. Sharp v. Murphy*, 140 S. Ct. 2412 (2020); *Bugenig v. Hoopa Valley Tribe*, 266 F.3d 1201, 1221 (9th Cir. 2001).

The Sixth Circuit appeared to believe that this case differed because the 1855 Treaty *itself* provided for allotment and eventually patents; in its view, a treaty that both contemplates allotment and identifies the lands as a "reservation" does not *really* create a reservation. Pet. App. 25a, 29a. But Commissioner Manypenny viewed allotment and reservations as fitting hand-in-glove: Indians would be "concentrated upon reservations of limited extent, and provision made for the division of land among them in severalty." Dkt.558-50 at 7537. And Manypenny's view was not idiosyncratic. The leading Indian law treatise confirms that "[b]y 1858, federal policy had shifted fully from removal to concentration on fixed reservations," where land would be "divid[ed] among [Indians] in severalty" to create "schools for civilization." Cohen § 1.03[6][a], at 60-61 (second bracket in original). *See supra* 5-6.

This Court's decisions embrace the same view. Repeatedly, this Court has found that treaties created reservations even when the treaty instrument itself provided for allotment and eventually patents. *Mille*

Lacs recognized that the 1855 Treaty with the Chippewa—which allowed the President to issue patents to allottees, 10 Stat. 1165—"set aside lands in the area as reservations." 526 U.S. at 184. *Parker*, too, observed that another allotment treaty providing for patents, the 1854 Treaty with the Omaha, 10 Stat. 1043, "create[d] a 300,000-acre reservation." 577 U.S. at 484. In *Thomas*, the Court found that Manypenny's 1854 allotment Treaty with the Chippewa, 10 Stat. 1109, provided "for the formation of permanent reservations." 151 U.S. at 582. And *Celestine* concluded that a reservation was created by the Treaty of Point Elliott, 215 U.S. at 285, another Manypenny treaty that provided for allotment and patents, 12 Stat. 927; *see Lummi Indian Tribe v. Whatcom Cnty.*, 5 F.3d 1355, 1356 (9th Cir. 1993) (similar).

The Sixth Circuit also deemed it significant that the Treaty provided only "ten-year restraint[s] on alienation," and for some unrestricted allotments. Pet. App. 24a. But again, *Parker*—for example—recognized that Manypenny's Treaty with the Omaha created a permanent reservation even though it provided for allotments with alienation restrictions subject to removal after statehood by "the legislature of the State." 10 Stat. 1043. And *Mille Lacs*, 526 U.S. at 184, and *Thomas*, 151 U.S. at 582, both recognized that the 1854 Treaty with the Chippewa, 10 Stat. 1109, created permanent reservations even though it allowed the

President to issue allotments with or without restrictions.[5]

The Sixth Circuit's conclusion conflicts with other circuit decisions as well. The Eighth Circuit has determined that various "mid-19th century" treaties created reservations for the Omaha and Winnebago tribes notwithstanding that "most of the treaties provided for a division of Indian land in severalty among the individual Indians." *Thurston Cnty. v. Andrus*, 586 F.2d 1212, 1217 (8th Cir. 1978). The Seventh Circuit has determined that a reservation was created by a treaty that provided for "the new reservation … to be surveyed and allotted to the individual tribal members" "'[a]s soon as practicable.'" *Wis. v. Stockbridge-Munsee Cmty.*, 554 F.3d 657, 660 (7th Cir. 2009) (quoting Treaty with the Stockbridge and Munsees, Feb. 5, 1856, 11 Stat. 663). And the Ninth Circuit has concluded that a reservation was created by a treaty that allowed the President to cause "the lands to be reserved … to be surveyed into lots, and assign[ed]." *Wahkiakum Band of Chinook Indians v. Bateman*, 655 F.2d 176, 178-79 & n.6 (9th Cir. 1981) (quoting Treaty of Olympia, July 1, 1855, 12 Stat. 971); *see also, e.g.*, *Devils Lake*, 917 F.2d at 1051 ("said reservations shall be apportioned" into allotments, Treaty with the Sissiton and Warpeton Bands, 15 Stat.

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[5] Indeed, many treaties contain restriction-removal provisions similar to the Omaha Treaty, *e.g.*, 1854 Treaty with the Ottoe & Missouri, art. 6, Mar. 15, 1854, 10 Stat. 1038; or even incorporate the Omaha Treaty's allotment provisions by reference, *e.g.*, Treaty of Olympia, art. 6, 2 Stat. 971; Treaty with the Yakima, art. 6, June 9, 1855, 12 Stat. 951.

505). All these treaties provided that patents could issue to Indian owners.

Finally, the decision below conflicts with the views of the United States. In the Saginaw Chippewa's now-settled litigation, the United States forcefully rejected "the fictitious dichotomy between treaties that allowed for allotments and treaties that established … reservations." United States' Saginaw Chippewa Reply at 6. Instead, the United States explained, it "is well-settled that reservation boundaries can exist even when allotments in fee are granted."[6] And the United States concluded that there was "no doubt" that the allotment treaty at issue there—which was signed just *two days* after the Band's 1855 Treaty, contained identical withdrawal language, and *incorporated* by reference the 1855 Treaty's "rules and regulations" pertaining to allotment, 11 Stat. 633—created a reservation, and did so "on its face."[7] The United States was correct then, and the Sixth Circuit was incorrect here.

* * *

All this returns us to where we began. The Sixth Circuit should have stuck to the text. And because it did not, it fell into multiple errors that brought it into conflicts with the decisions of this Court, its sister

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[6] United States' Motion in Limine to Strike the Report and Testimony of State Defendant's Witness Anthony G. Gulig at 5, *Saginaw Chippewa Indian Tribe*, No. 05-10296-BC (E.D. Mich. Nov. 23, 2009), Dkt.188.

[7] United States' Motion for Partial Summary Judgment at 17-18, *Saginaw Chippewa Indian Tribe*, No. 05-10296-BC (E.D. Mich. Mar. 5, 2010), Dkt.222.

circuits, and the federal government's considered position.

II. The Decision Below Conflicts With This Court's Cases And Other Circuits In Imposing An Active Superintendence Requirement.

Certiorari should also be granted to resolve yet another important conflict with the potential to destabilize long-accepted principles of federal Indian law. As discussed, this Court has held that "to create a reservation … [i]t is enough that from what has been [done] there results a certain defined tract appropriated" for Indian purposes. *McGirt*, 140 S. Ct. at 2475 (quoting *Hitchcock*, 185 U.S. at 390). In the Sixth Circuit, however, more is now required. The court below held that the Band *also* had to show that the 1855 Treaty expressly provided for "active" federal superintendence of the reservation lands. Pet. App. 30a. This holding conflicts with this Court's cases, then-Judge Gorsuch's opinion for the *en banc* Tenth Circuit in *Hydro Resources*, and the Second Circuit's decision in *Oneida Indian Nation of New York v. City of Sherrill*.[8]

1. Congress has defined "Indian country" by statute to include three types of lands: (1) "reservation[s]" under 18 U.S.C. § 1151(a); (2) "dependent Indian communities"

[8] The Sixth Circuit, oddly, averred that the Band "omit[ted] this element in its brief" before that court. Pet. App. 30a. In fact, the Band devoted 17 pages to the issue of superintendence, including to discussing *Hydro Resources*. Little Traverse 6th Cir. Opening Br. at 49-54, Dkt.51; Little Traverse 6th Cir. Reply Br. at 6-12, 58-65, Dkt.77. Regardless, the Sixth Circuit's error is immaterial here given that the decision below addressed the issue on the merits.

under § 1151(b); and (3) "allotments" under § 1151(c). Each category requires that the federal government set aside particular lands under its guardianship. *John*, 437 U.S. at 649. The categories, however, differ in what more—if anything—is required.

For reservations, the United States need only set aside lands *as a reservation*. The reason is simple: Whenever the United States "set[s] apart … land … as an Indian reservation," that act confers "full authority"—and a solemn duty—"to pass such laws and authorize such measures as may be necessary to give [Indians residing there] full protection." *Thomas*, 151 U.S. at 585. That is because, as this Court has explained, "[*e*]*very* tract set apart for special uses is reserved by the government, to enable it to enforce them"—and "[t]here is no difference, in this respect, whether it be appropriated for Indian or for other purposes"; instead, "[t]here is an equal obligation resting on the government to require that neither class of reservations is diverted from the uses to which it was assigned." *Leavenworth, Lawrence, & Galveston R.R. Co. v. United States*, 92 U.S. 733, 747 (1875). Indeed, treaties and executive orders routinely created reservations by referring to the lands as such, without separately providing for federal superintendence of the land.[9] As these instruments reflect, when the United States promises a reservation,

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[9] *E.g.*, Treaty with the Omaha, 10 Stat. 1043; Treaty with the Chippewa, 10 Stat. 1109; Coeur D'Alene: Exec. Order of Nov. 8, 1873, reprinted in 1 C. Kappler, Indian Affairs: Laws and Treaties 837 (1904); *Seymour*, 368 U.S. at 354 (citing Exec. Order of July 2, 1872, I Kappler, Indian Affairs, Laws and Treaties 916 (2d ed.)).

it need not *also* expressly promise active superintendence. Superintendence instead inheres in the very nature of a "reservation."

Dependent Indian communities differ. This is a "catch-all … category" capturing many types of Indian lands. *Hydro Resources*, 608 F.3d at 1157; *see generally Venetie*, 522 U.S. at 528-30. For this residual category, this Court has required "indicia of active federal control … sufficient to support a finding of federal superintendence"—precisely to ascertain whether the federal government undertook the obligations it *necessarily* assumes when creating reservations. *Venetie*, 522 U.S. at 534.

2. The Sixth Circuit went badly astray in requiring the Band to make such a showing *as to a reservation*.[10] Indeed, to the Band's knowledge, no court prior to this litigation has required anything of the sort. In cases ranging from *Donnelly v. United States*, 228 U.S. 243 (1913)—on which Congress relied when it drafted

[10] The Sixth Circuit likewise erred in concluding that the Band failed to show the indicia of active federal superintendence that the Sixth Circuit (incorrectly) believed was required. The 1855 Treaty provided for *indefinite* federal monitoring of whether the Indians could manage their own lands and allowed the President to withhold patents as long as he deemed "necessary and proper." Pet. App. 118a-119a. The substantial federal supervision that *in fact* occurred, *supra* 9-12, shows that the parties construed the 1855 Treaty in just this way. Indeed, 16 years later, Agent Smith in 1871 advocated for keeping restrictions on alienation in place because "few of [the Indians] are yet competent to take charge of their own affairs" and "ought not to be intrusted with the absolute title." Dkt.558-70 at 7746.

§ 1151's definition of "Indian country"[11]—to *McGirt*, this Court found it "obvious" that the United States by treaty created reservations without devoting a word to whether the treaty *separately* provided for active federal superintendence. *McGirt*, 140 S. Ct. at 2460.[12]

In adopting its incorrect rule, the Sixth Circuit created a direct conflict with the Tenth Circuit's decision in *Hydro Resources*. There, speaking for the *en banc* court, then-Judge Gorsuch endorsed exactly the distinction the Sixth Circuit rejected. He explained that "Congress—not the courts, not the states, not the Indian tribes—gets to say what land is Indian country subject to federal jurisdiction." 608 F.3d at 1151. And he emphasized that it "is long settled that Congress does so *by declaring land to be part of a reservation*, or by authorizing its distribution as Indian allotments." *Id.* (emphasis added). But, Judge Gorsuch cautioned, the rule differs for other Indian lands lacking in such a declaration. Such lands constitute "Indian country" only if "Congress … take[s] some *equally 'explicit action …* to create or to recognize' [the lands as] dependent Indian communities." *Id.* (emphasis added) (quoting *Venetie*, 522 U.S. at 531 n.6). For that reason, Judge Gorsuch concluded that when courts "seek[] to identify *a § 1151(b) 'dependent Indian community*,'" they must "ask whether Congress has … put [the land in question] under federal superintendence." *Id.* (emphasis added).

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[11] *See* 18 U.S.C. § 1151 historical and revision notes to 1948 Act.

[12] *See also, e.g.*, *Parker*, 577 U.S. at 484; *Mille Lacs*, 526 U.S. at 184; *Celestine*, 215 U.S. at 285.

Hence, in the Tenth Circuit, the Band would have needed to establish only that Congress had "declar[ed] land to be part of a reservation," 608 F.3d at 1151—a showing that, as just explained, the Band made. *Supra* Part I. In the Sixth Circuit, however, the Band also had to show active federal superintendence of the reservation lands—a requirement that, in the Tenth Circuit, applies only to dependent Indian communities.

Nor is the conflict limited to the Tenth Circuit. In *Oneida Indian Nation of New York v. City of Sherrill*, 337 F.3d 139 (2d Cir. 2003), the Second Circuit recognized that when Congress creates an Indian reservation, no showing of active federal superintendence is necessary. Just like *Hydro Resources*, the Second Circuit explained that "reservation land … *by its nature* was set aside by Congress for Indian use under federal supervision." *Id.* at 155 (emphasis added). Thus, "[w]hile questions may arise as to whether nonreservation property owned by Indians is in Indian country [under § 1151*(b)*], *there are no such questions with regard to reservation land*." *Id.* (emphasis added). True, this Court reversed that decision on other grounds. *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005). But the Second Circuit has adhered to its conclusions in *Sherrill* that this Court's opinion did not displace. *E.g.*, *Oneida Indian Nation of N.Y. v. Madison Cnty.*, 665 F.3d 408, 443-44 (2d Cir. 2011); *Ctr. N.Y. Fair Bus. Ass'n v. Jewell*, 673 F. App'x 63, 65-66 (2d Cir. 2016). So in the Second Circuit, as in the Tenth, the Band would have prevailed.

III. The Question Presented Warrants Review.

As the Sixth Circuit recognized, this case "raise[s] important questions of federal Indian law." Pet. App. 35a. Those questions warrant this Court's review.

1. To begin, this issue is important in its own right. It arises in the context of a dispute that will determine the allocation of jurisdiction among the Band, the federal government, and Michigan. The resolution of that dispute is of course critical to the Band. Tribal sovereignty and Indian country status go hand in hand: "Federal law … recognize[s] and protect[s] a distinct status for tribal Indians in their own territory." Cohen § 3.04[2][a], at 185. Hence, "[g]enerally speaking, primary jurisdiction over land that is Indian country rests with the Federal Government and the Indian tribe inhabiting it, and not with the States." *Venetie*, 522 U.S. at 527 n.1. But absent this Court's intervention, the Band cannot exercise the jurisdiction that Congress conferred, nor resist improper state incursions on that jurisdiction. Few matters are as life-and-death for Indian nations as reservation existence.

The resolution is important for the federal government as well. Reservation status "trigger[s] a variety of federal civil statutes and rules." *McGirt*, 140 S. Ct. at 2480 (listing examples). Many federal regulatory programs, too, operate differently on reservations. *E.g.* Cohen § 10.02[1] at 789-91. And federal criminal jurisdiction is broader on Indian reservations. 18 U.S.C. §§ 1152, 1153. The decision below diminishes federal authority and impedes the United States' ability to fulfill its responsibilities. And it is contrary to the position of both other branches:

Congress expressed its judgment—in the text of the 1994 statute—that a reservation had been established for the Band, the Department of Interior did the same in its 1997 Indian lands opinion, and the United States in the Saginaw Chippewa litigation took a position that is directly at odds with the decision below. S*upra* 13-14, 27.

2. All that is more than enough. This Court has reviewed other decisions implicating important tribal rights, even when applicable to just one Tribe. *See, e.g.*, *Ysleta del Sur*, 2021 WL 4822674; *Herrera*, 139 S. Ct. 1686; *Cougar Den*, 139 S. Ct. 1000. Here, however, there is much more.

First, this case carries consequences for other Michigan Tribes. The Band, as explained above, was not the only signatory to the 1855 Treaty. Four other federally recognized Tribes are *also* successors to the tribal groups that originally signed. As those Tribes explained below, they have "critical legal and historical interests in having the Treat[y] interpreted fairly and accurately." Tribal *En Banc* 6th Cir. Br. at 2. Those same considerations militate strongly in favor of certiorari.

Second, the decision below creates broad legal confusion that will plague reservation-status disputes nationwide. If Congress set apart a defined tract for a tribe and expressly identified it as a "reservation," was it a reservation? The answer under this Court's cases and in the Ninth Circuit is yes. But if a court follows the decision below, the answer depends on whether Congress and the Tribe *really meant* the words they used. And if a treaty set apart such a tract and called it

a reservation but omitted express references to active federal superintendence over the reservation land—as numerous such treaties, statutes, and executive orders did, *supra* 29 & n.9—did it create a reservation? The answer is yes under this Court's cases and in the Tenth and Second Circuits—but no in the Sixth Circuit and in any court that might follow it. The Court should grant certiorari to resolve conflicts that will unsettle established principles in an already complicated area of the law.

IV. The Court Should Consider Calling For The Views Of The Solicitor General.

Alternatively, given the important federal interests this case implicates, the Court should call for the views of the Solicitor General. Not only will this case determine the scope of many federal duties and powers, but the United States serves as a "guardian and trustee for the Indians." *Solem v. Bartlett*, 465 U.S. 463, 473 (1984). The decision below conflicts with the position of the Department of Interior that "[i]n the 1855 Treaty … the parties agreed to create reservations for the [Band]." Lands Opinion at 2. It also conflicts with the position the United States has recently taken regarding a materially identical treaty. *Supra* 13-14, 27. And it conflicts with Congress's recent legislative judgments about the 1855 Treaty. It therefore would be appropriate for the Court to solicit the views of the Band's trustee.

This Court often requests and receives the views of the United States on whether to grant petitions raising federal Indian-law issues, where the United States is not already a party. *E.g.*, Brief for the United States as

Amicus Curiae, *Herrera*, No. 17-532 (U.S. May 22, 2018) (CVSG brief); Brief for the United States as Amicus Curiae, *Cougar Den*, No. 16-1498 (U.S. May 15, 2018) (same); Brief for the United States as Amicus Curiae, *Dollar Gen. Corp. v. Miss. Band of Choctaw Indians*, No. 13-1496 (U.S. May 12, 2015) (same); Brief for the United States as Amicus Curiae, *Michigan v. Bay Mills Indian Cmty.*, No. 12-515 (U.S. May 14, 2013) (same). Indeed, in *Ysleta del Sur*, this Court recently called for the views of the Solicitor General—and in response, the United States urged this Court to grant certiorari because the decision below "disadvantaged two Indian tribes" and undermined the federal government's "strong interest in supporting Indian self-government.'" Brief for the United States as Amicus Curiae at 19, 22, *Ysleta del Sur*, No. 20-493 (U.S. Aug. 25, 2021). This Court duly granted. Those same considerations favor a grant here—either outright or after a call for the views of the Solicitor General.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Appendix A

United States Court of Appeals
For The Sixth Circuit.

LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS,
Plaintiff-Appellant/Cross-Appellee,

v.

GRETCHEN WHITMER, Governor of the State of Michigan,
Defendant-Appellee,

CITY OF PETOSKEY, MICHIGAN; CITY OF HARBOR SPRINGS, MICHIGAN; EMMET COUNTY, MICHIGAN; CHARLEVOIX COUNTY, MICHIGAN,
Intervenors Appellees/Cross-Appellants,

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

Nos. 19-2070, 19-2107
Argued: December 1, 2020
Decided and Filed: May 18, 2021
Rehearing En Banc Denied June 23, 2021

Affirmed.

Appeal from the United States District Court for the Western District of Michigan at Grand Rapids. No. 1:15-cv-00850—Paul Lewis Maloney, District Judge.

COUNSEL

ARGUED: David A. Giampetroni, KANJI & KATZEN, P.L.L.C., Ann Arbor, Michigan, for Little Traverse Bay Bands of Odawa Indians. Jaclyn Shoshana Levine, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, for Gretchen Whitmer. Jeffrey C. Gerish, PLUNKETT COONEY, Bloomfield Hills, Michigan, for City of Petoskey, City of Harbor Springs, Emmet County and Charlevoix County. R. Lance Boldrey, DYKEMA GOSSETT PLLC, Lansing, Michigan, for Appellees Emmet County Lake Shore Association and Protection of Rights Alliance. **ON BRIEF**: David A. Giampetroni, Riyaz A. Kanji, KANJI & KATZEN, P.L.L.C., Ann Arbor, Michigan, James A. Bransky, LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS, Traverse City, Michigan, for Little Traverse Bay Bands of Odawa Indians. Jaclyn Shoshana Levine, Kelly M. Drake, Laura R. LaMore, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, for Gretchen Whitmer. Jeffrey C. Gerish, PLUNKETT COONEY, Bloomfield Hills, Michigan, for City of Petoskey, City of Harbor Springs, Emmet County and Charlevoix County. R. Lance Boldrey, Jill M. Wheaton, Erin A. Sedmak, DYKEMA GOSSETT PLLC, Lansing, Michigan, for Emmet County Lake Shore Association and Protection of Rights Alliance. Thaddeus E. Morgan, FRASER TREBILCOCK DAVIS & DUNLAP, P.C., Lansing, Michigan, for Township of Bear Creek, Township of Bliss, Township of

Center, Township of Cross Village, Township of Friendship, Township of Little Traverse, Township of Pleasantview, Township of Readmond, Township of Resort, and Township of West Traverse.

Before: BATCHELDER, CLAY, and BUSH, Circuit Judges.

OPINION

CLAY, Circuit Judge.

The Little Traverse Bay Bands of Odawa Indians (the "Band") appeal the district court's decision granting summary judgment to Defendant Governor Gretchen Whitmer, in which the court held that the Treaty of 1855 did not create an Indian reservation for the Band under federal law. The Band has lived in the State of Michigan for centuries. While often referred to as one tribe, the Band consists of several distinct factions, including at least five Ottawa and Chippewa tribes. In the nineteenth century, the Band signed several treaty agreements with the United States government that allowed them to reserve and subsequently own land in Michigan. The meaning of one of those treaty agreements is in dispute here on appeal. For the reasons stated below, this court **AFFIRMS** the district court.

I. BACKGROUND

A. Factual History

Prior to the colonization of the Americas, the Little Traverse Bay Bands of Odawa Indians inhabited for centuries what is now considered northern Michigan. At the turn of the nineteenth century, with the population growing within the United States, more white Americans began to settle in territories like Michigan where the Band resided. As a result, the federal government took tribal land for its settlers and removed tribes, like the Band, to Indian settlements in the West, where they could supposedly be assimilated into American society as citizens. For years, officials in the federal Department of Indian Affairs considered when and how to move tribes westward. Despite federal intentions to move tribes west, the Band in northern Michigan was determined to stay in their home territory. For example, tribal leaders expressed how "[t]he soul shrink with horror at the idea of rejecting our country forever." (ECF No. 559-14 at PageID # 8088.) They intended to "make arrangements with the government for remaining in the Territory of Michigan in the quiet possession of our lands, and to transmit the same safely to our posterity" and would "submit ourselves to the Laws of that country within whose lands we reside." (*Id.* at PageID # 8087–088.)

In the summer of 1835, the Band contacted President Andrew Jackson to ask whether they could sell some of their land, and in return, stay in Michigan. President Jackson had not considered purchasing the land at first but inquired as to the amount for which the Band would sell the land. Jackson delegated the negotiations to

Michigan representatives, who instructed the Band not to travel to Washington unless requested. Despite that message, and fearful that the United States would remove them by force, tribal members arrived in Washington in December 1835, looking to negotiate. It appears, however, that no federal official met with the Band, and instead, the Band's wishes were communicated through letter.

Following the letter in 1835, the federal government agreed to purchase some of the Band's land and allow them to stay in Michigan temporarily. In 1836, Secretary of War Lewis Cass appointed Henry Schoolcraft, Acting Superintendent of Indian Affairs for the Michigan Territory, to be the federal government's primary negotiator with the Band and to encourage them to move westward after selling their land. In March of 1836, Cass wrote Schoolcraft that he should "procure the land upon proper and reasonable terms for the United States" and "extinguish the Indian titles as our settlements advance so as to keep the Indians beyond our borders." (ECF No. 559-15 at PageID # 8096.)

Treaty of 1836

In March of 1836, the Band traveled to Washington, D.C. to meet with federal officials, including Schoolcraft. On March 15, 1836, Schoolcraft started the negotiations by agreeing to negotiate with delegates of every tribe within the Band. He then asked each tribal leader how much of their land they wanted to sell. To facilitate the agreement, he also proposed that the federal government would pay any debts the Band had to traders in Michigan and distribute annual annuities over twenty years for education, agriculture, and medicine.

Notably, Schoolcraft informed the Band that the President believed "[n]o objection will be made, if you deem it imperative, to your fixing on proper and limited reservations to be held in common; but the President judges it best, that no reservations should be made to individuals." (ECF No. 558-4 at PageID # 6870.)

As the negotiations proceeded, different tribes within the Band, primarily the Chippewas and the Ottawas, differed over how the land should be sold. One tribal leader expressed "fear that the whites, who will not be our friends, will come into our country and trouble us and that we shall not be able to know where our possessions are." (*Id.* at PageID # 6871.) The leader hoped that "some of our white friends [would] have lands among us and be associated with us" to ease tensions between the races. (*Id.*) Later in the negotiation, an Ottawa chief said he would refuse to sell their land after seeing how small the Band's reservation would be. (*Id.* at PageID # 6872.) As others spoke, a delegate from the tribe Labre Croche said he believed that white settlers had pressured the Band into selling their land, and that without this pressure, none of the tribes would agree to sell. In response, Schoolcraft stated that he understood the varying opinions among the different tribes and would agree to purchase land from those who were willing, but he hoped the different tribes could come to a uniform agreement. Schoolcraft proposed a reservation of 100,000 acres to the Band, and by the last day of negotiations on March 28, 1836, the Band decided to agree to Schoolcraft's terms. With negotiations completed, the tribes ceded almost 14 million acres of land to the United States. A third of the ceded land was in the Upper Peninsula of Michigan, while the remaining

two-thirds were located in the Lower Peninsula, and in total, the land equated to one-third of present-day Michigan. In return, the Treaty promised a temporary reservation for the Band in Little Traverse Bay, Michigan, and thereafter, land west of the Mississippi in case the Band decided to move westward. Before the treaty was ratified, the United States Senate added a provision that the reservation would only last "for the term of five years," which the Band reluctantly accepted. (ECF No. 558-2 at PageID # 6831.) In return, the federal government promised the Band $200,000 for "whenever their reservations shall be surrendered." (*Id.*)

Article 1 of the Treaty provides that the Ottawa and Chippewa nations would cede land to the United States located in the eastern portion of the Upper Peninsula of Michigan and the northern portion of the Lower Peninsula. In Article 2, the Band would reserve land "for their own use, to be held in common," including 50,000 acres on Little Traverse Bay, 20,000 acres on the north shore of Grand Traverse Bay, 70,000 acres on or north of the Pieire Marquetta river, 1,000 acres located by Chingassanoo, or the Big Sail, on Cheboigan, and 1,000 acres located by Mujeekewis on Thunderbay River. (*Id.*) Alongside that provision, Article 3 outlined other settlements where the Band could locate under the agreement, including several islands in northern Michigan. And as agreed, Articles 4 and 5 required the United States to provide annuities for 20 years to assist the Band in education, agriculture, and medicine and to settle debts the tribes had with traders in their area. Other provisions provided land west of the Mississippi River in case the Band decided to relocate, supported

tribal members who were of mixed race, and provided reimbursement to the Band's leaders for traveling to negotiate the treaty.

Events leading to the Treaty of 1855

After signing the Treaty of 1836, the Band lived on the temporary reservation amidst an uncertain future in Michigan. The Treaty was meant to expire in 1841. In 1839, the Chippewa faction of the Band wrote to the Governor of Michigan to express "[h]ere alone, in Michigan, it is here that we feel as if we could be happy." (ECF No. 559-20 at PageID # 8133.) They asked the Governor whether those who desired to stay in Michigan would be allowed to, whether they would have the right to buy lands from the government, and whether tribal members would be acknowledged as citizens. Two years later, the Band asked President John Tyler to have the Treaty extended, but no record suggests it ever was. The Treaty expired in 1841, but the United States never removed the Band from Michigan. By the next decade, the federal government had abandoned its plan to move the Band west to a permanent reservation. In March 1854, the head of the Michigan Indian Agency, Henry Gilbert, wrote a letter to the federal Commissioner of Indian Affairs outlining his intentions for the Band, stating, "that within three or four years all connection with & dependence upon Government on the part of the Indians may properly cease." (ECF No. 559-33 at PageID # 8285–286.) In this same letter, Gilbert expressed how he planned to reach this intended goal:

> To set apart certain tracts of public lands in Michigan in locations suitable for the Indians & as far removed from white settlements as possible &

> within which every Indian family shall be permitted to enter without charge & to own and occupy eighty acres of land– The title should be vested in the head of the family & the power to alienate should be withheld– All the land embraced with the tract set apart should be withdrawn from sale & no white persons should be permitted to locate or live among them, except teachers, traders, & mechanics specially authorized by rules & regulations prescribed by the State Government– It may also be safely left to the same authority to terminate the restriction of the power to alienate their lands whenever deemed expedient & at the same time the unappropriated lands in the tracts withdrawn from sale should be again subject to entry.

(*Id.* at PageID # 8286.)

Meanwhile, in January of 1855, the Band wrote to the Commissioner of Indian Affairs, George Manypenny, indicating that they wanted to accumulate property in Michigan to leave to their children. In February of 1855, the Band wrote another letter expressing anxiety over white settlers who were claiming land near them and petitioned to resolve their standing under federal treaties. By 1855, settlement in Michigan had risen steadily. As a result of this trend, Manypenny wanted to set land aside for Indian settlement that would not be sold in the public marketplace. Like Gilbert, Manypenny wanted to allot individual homes to the Band's members, and eventually, end their dependence on the federal government.

In December of 1854, Manypenny petitioned the Commissioner of the General Land Office for specific tracts of land to be set aside in Michigan. In May of 1855, Manypenny, in a letter to Secretary of the Interior Robert McClelland, wrote:

> Measures should now be taken, in my judgment to secure permanent homes for the Ottawas and Chippewas, either on the reservations or on other lands in Michigan belonging to the Government, and at the same time, to substitute, as far as practicable, for their claim to lands in common, titles in fee to individuals for separate tracts of land.

(ECF No. 559-43 at PageID # 8376.)

Following Manypenny's request, and in anticipation of treaty negotiations with the Band, President Franklin Pierce issued an executive order later that May and set aside specific tracts of land earmarked for Indian settlement in what is now Emmet County, Michigan and Isabella County, Michigan.

Negotiations for the Treaty of 1855

In July of 1855, the Band's leaders met with federal and state officials to negotiate the Treaty of Detroit, now known as the Treaty of 1855, where both sides agreed that the Band would stay permanently in Michigan. Gilbert led the negotiations with the Band. On the first day, the Band's leader, Assagon, wanted to settle outstanding obligations the federal government had to the Band from prior treaties. To the Band's disappointment, the government had few obligations remaining under previous treaties after counting treaty

annuities already provided. Manypenny agreed to pay $200,000 to the Band but emphasized that the government wanted the Band to be independent. At several points in the negotiations, the Band requested that the government keep the principal money and subsequently distribute its interest, so the payments would last for future generations. Gilbert refused the request. He wanted the Band to "take care of themselves," and that included being responsible for their own finances. (ECF No. 558-8 at PageID # 7029–031.) Sitting alongside Gilbert, Manypenny told the Band that the government instead wanted to provide the Band with a permanent home. In Manypenny's view, the government did not expect the Band to settle in one location, but would not permit individuals to locate in indistinct locations. Instead, Manypenny was willing to set tracts of land apart for small settlements in different places. He insisted that areas closer together meant the Band's community could have schools and county organizations. The Band agreed to live in proximity to one another but wanted clarification on land ownership, because they feared the land would eventually be taken from them. In response to this concern, Manypenny stated that:

> It will be our desire to give to each individual & head of a family such a title as that he can distinguish what is his own. There will be some restriction on the right of selling. Except that your title will be like the White man's. This restriction will, when it seems wise & proper be withdrawn.

(*Id.* at PageID # 7001.)

After Manypenny spoke, a Band leader at the meeting requested that "[w]e wish that you would give us titles – good titles to these lands. That these papers will be so good as to prevent any white man, or anybody else from touching these lands." (*Id.* at PageID # 7007.) Gilbert stated that the government intended "to allow each head of family 80 acres of lands and each single person over 21 years of age 40 acres of land." (ECF No. 558-9 at PageID # 7067.) And Manypenny suggested that "it will be easier for the government to give you absolute titles," subject to alienation restrictions for a short time period. (*Id.* at PageID # 7070.) On July 31, 1855, after further negotiation, the Band and the federal government signed a treaty outlining the terms of the agreement. At the negotiation's conclusion, the Band's leaders expressed satisfaction with its terms. Before leaving, one Band leader proclaimed, "We are satisfied with what is done. We wish you to carry out the treaty as it made. We believe it to be good." (*Id.* at PageID # 7083.)

The Treaty of 1855

Overall, the Treaty of 1855 reflected the negotiations between the Band and the federal government. Article 1 described the specific tracts of land the United States would withdraw from sale to be made readily available to the Band. *Treaty with Ottowas and Chippewas* (*1855 Treaty*) (July 21, 1855), Art. 1, 11 Stat. 621. This first provision provided each head of the family with 80 acres of land, or each single person over 21 years of age with 40 acres of land. Article 1 also required tribal members to make land selections within two five-year periods to be accompanied with a restriction on resale of the land

for ten years for those who took title in the initial five-year period. The United States reserved ownership of land the Band did not select within the ten-year timeframe. Lastly, that provision stipulated, "[n]othing contained herein shall be construed as to prevent the appropriation, by sale, gift, or otherwise, by the United States, of any tract or tracts of land within the aforesaid reservations." (*Id.*)

The Treaty contained other provisions that are not in direct dispute on appeal. Article 2 described the payments that the United States would disburse to the Band; Article 3 released the United States from any claims arising out of any previous treaties; Article 4 provided for translators to help in communication between the Band and the federal government; Article 5 dissolved the federal organization of Ottawa and Chippewa Indians for purposes of treaty negotiation; and Article 6 made the agreement obligatory and binding, subject to the ratification of the President and the United States Senate. With minor modification, the United States Senate approved the Treaty, and President Franklin Pierce signed the Treaty.

Events following the Treaty of 1855

After Congress ratified the Treaty, the federal government poorly implemented the Treaty's provisions. The Michigan agency charged with its implementation had significant turnover in its leadership that led to a disorganized rollout of land selection. The dysfunction delayed some of the Band's over 5,000 members from purchasing land in a timely fashion. And the federal government did not distribute the annuities on the schedule promised. A Michigan

newspaper, *The Grand Traverse Herald*, described the difficulty the Band had in obtaining land under the Treaty. In a profile in April 1869, a journalist documented that the "Indian Department failed to make such selections of land for said Indians within the time specified in said treaties; in fact, said selections were not completed until the year 1866." (ECF No. 600-101 at PageID # 10937.) Michigan delegates in Congress even considered a resolution to extend the time for tribal members to purchase land but were met with resistance from white settlers who wanted the land to be returned to the public marketplace.

For the most part, the federal government resisted white settlers' demands to occupy the lands held for the ten-year term in the Treaty. But occasionally their efforts were unsuccessful. For example, the Michigan Indian Agency wrote to the federal Commissioner of Indian Affairs in 1865, stating "certain white men through the Agency of Indians had been purchasing some of the lands, which were withdrawn from sale for the use and benefit of the Ottawa and Chippewa Indians in this state." (ECF No. 600-91 at PageID # 10901.) To make matters worse, the federal government did not provide timely title to the land as promised to many Indian families. In 1872, a Michigan Indian Agent wrote to the federal Commissioner of Indian Affairs to express that certain tribes "were not furnished their patents ... [and] we were all surprised to find that only the Mackinaw, and Little Traverse bands were furnished, while the other bands about equal in number were all without patents though they held the same promising official certificates." (ECF No. 600-110 at PageID # 10996.) That same year, Congress passed legislation

allowing unsold land to return back to the public, alongside additional provisions to assist tribal members in receiving patents in subsequent years. As stipulated, the United States returned all unsold land contained in the Treaty back to the marketplace for others to purchase. And eventually, the remaining Band members who wanted to purchase land under the Treaty were able to do so. In total, 1,863 Band members received land covering 121,450 acres. Primarily, Band members received land plots in northwest Isabella County, Michigan and central Emmet County, Michigan. Thereafter, members of the Band settled permanently on the land, each holding an individual title to his or her property. While the Band held title to the lands they selected, over the next several decades, many lost their homes as a result of fraud or tax forfeiture. In the twentieth century, the Treaties the Band signed once again came into dispute.

Events before the Indian Claims Commission

Decades after signing the Treaty, in 1949 and 1951, the Band filed claims before the Indian Claims Commission (ICC) to revisit the agreements the tribes made with the United States. For reference, the ICC was the sole dispute mechanism between tribes and the United States at the time of its creation. Prior to its establishment, tribes were unable to resolve disputes against the United States without congressional approval. *See Otoe & Missouria Tribe of Indians v. United States*, 131 F. Supp. 265, 272 (1955). On occasion, Congress allowed tribes to bring petitions before the Court of Claims, but that proved to be a taxing process, and tribes often returned to Congress for further

redress after unsatisfactory judicial outcomes. See id. To resolve the issue permanently, the federal government established the ICC to adjudicate "both ancient and contemporary tribal claims against the federal government." Indian Claims Commission Act of 1946, § 12 Pub. L. No. 79–726, 60 Stat. 1049. As part of the ICC Act of 1946, Congress required tribes to bring claims within five years for any dispute arising before 1946 or risk waiver of the claims. *See Pueblo of Santo Domingo v. United States*, 16 Cl. Ct. 139, 141 (1988). The ICC held jurisdiction over these disputes on a temporary basis, in hopes of "bring[ing] about a settlement of outstanding Indian claims on a fair and equitable basis and in as expeditious a manner as possible," and was dissolved in 1978. *Otoe & Missouria Tribe of Indians*, 131 F. Supp. at 272. In 1978, the ICC transferred its remaining cases to the Court of Claims, which would resolve any final tribal disputes.

The Band brought three claims before the ICC that are relevant to the present case. In 1949, under ICC Docket No. 58, the Band claimed that the United States provided "grossly inadequate and unconscionable" consideration in exchange for the land that the Band ceded in the Treaty of 1836. (ECF No. 429-1 at PageID # 5116.) In sum, the Band believed that the land was worth more than $1.25 per acre, and yet, the federal government paid 16.8¢ per acre at the time of cession. The Band asked the court for compensation for the reasonable value of the land, attorney's fees, and other expenses that would occur because of the proceedings. The same year, the Chippewa tribe brought a separate case before the ICC, under Docket No. 18E, arguing a claim similar to the one presented in Docket No. 58,

which asserted that the United States had provided inadequate consideration under the Treaty of 1836. In addition, they requested compensation for land ceded because the federal government had executed the relevant treaties under misrepresentation and fraud.

The ICC consolidated both dockets into a single proceeding. On May 20, 1959, the Commission issued a finding of fact, stating in sum that the tribes had ceded 12,044,934 acres of land in 1936, and retained 401,971 acres for themselves as a temporary reservation. *See Chippewa Indians, et al., v. United States*, 7 Ind. Cl. Comm. 576 (1959). Almost ten years later, in 1968, the ICC determined that the value of the ceded land in 1836 was 90¢ per acre, or $10,800,000 in full, after considering its agricultural and farming potential. *See Chippewa Indians, et al., v. United States*, 20 Ind. Cl. Comm. 137 (1968). In response, the federal government argued that the value of the land should be offset by the 121,450 acres allotted to the Band in the Treaty of 1855. In rejecting the government's position, the Commission determined that the purpose of the "1855 Treaty was to return to the individual Ottawas and Chippewas a portion of the lands which they had collectively ceded in [the Treaty of] 1836." (ECF No. 429-5 at PageID # 5218.) In its opinion, the Commission expressed further:

> [B]y granting lands within [northern Michigan] to the Ottawas and Chippewas on an individual basis, the United States achieved a viable alternative to the unworkable plan to relocate these Indians to "the country between Lake Superior and the Mississippi", as expressed in the 1836 Treaty. By allowing these Indians

> continuous possession of the lands which they were authorized to occupy until the specific allotments were selected, the defendant saved itself the effort and expense of relocation as well as the cost of the lands which, in the 1836 Treaty, it had obligated itself to furnish.

(*Id.*)

But the Commission also decided that the government should not pay for land the Band already owned. Instead, the ICC deducted $109,305.67 from the compensation owed to the Band. After a final calculation, it concluded that the Band was owed $10,300,247, which was subsequently amended to $10,109,003.55 in further proceedings.

In 1951, the Band filed a third petition, claiming that the Band was owed compensation for land that was never allotted to them under the Treaty of 1855. The Commission rejected the claim, ruling that the outcome of prior ICC proceedings was the final determination in regards to the Treaties, and the Band was now barred from raising further arguments about the agreements. This ruling was the final legal proceeding regarding the Treaties until the 21st century. Until this day, many members of the Band still reside in northern Michigan.

B. Procedural History

On August 21, 2015, the Band filed a lawsuit in federal court in the Western District of Michigan against Governor Rick Snyder, seeking a declaration that the Treaty of 1855 created a reservation for the Band. As part of the lawsuit, the Band petitioned for an injunction against the State of Michigan to prevent any actions that

ran contrary to the Band's reservation status under federal law. Thereafter, several other parties, including the City of Charlevoix, the Emmet County Lake Shore Association, The Protection of Rights Alliance, and several other townships and cities located in northern Michigan, intervened to litigate their interests in the outcome of the case. On May 20, 2016, the Band filed a motion for partial summary judgment on their claim that the Treaty of 1855 established a reservation, to which Defendant Snyder, and various cities and counties, as Defendant-Intervenors, filed an opposing motion for summary judgment. In his motion, Defendant Snyder argued that 1) the Treaty of 1855 did not meet the three-part test for Indian country; 2) if the Treaty of 1855 created an Indian reservation, it was temporary and terminated when Band members received their patents; and 3) if the Treaty of 1855 created a permanent Indian reservation, Congress disestablished it in the 1870s. Separately, Defendant-Intervenors filed for judgment on the pleadings, claiming that: 1) the Band should be judicially estopped from arguing that a reservation exists because of its prior proceedings before the ICC; 2) the Band should be barred from relitigating claims under the doctrine of issue preclusion because of the same proceedings previously filed before the ICC; and 3) the ICC's statute of limitations barred the Band from raising further claims in relation to the Treaty of 1855.

The district court rejected Defendant-Intervenors' motion for judgment on the pleadings on January 31, 2019. In a well-reasoned opinion, on August 15, 2019, the district court issued an order granting Defendant's and Defendant-Intervenors' motion for summary judgment, stating that the Treaty of 1855 "could not plausibly be

read to have created a reservation." (ECF No. 627.) The Band subsequently filed this timely appeal and Defendant-Intervenors cross-appealed.

II. DISCUSSION

A. The Band's Claim of a Federal Reservation Under the Treaty of 1855

1. Standard of Review

"[T]his court reviews a district court's grant of summary judgment de novo." Rd. *Sprinkler Fitters Local Union No. 669, U.A., AFL-CIO v. Dorn Sprinkler Co.*, 669 F.3d 790, 793 (6th Cir. 2012). Summary judgment may be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). There is a dispute as to a material fact when "the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Smith v. Perkins Bd. of Educ.*, 708 F.3d 821, 825 (6th Cir. 2013) (quoting *Ford v. Gen. Motors Corp.*, 305 F.3d 545, 551 (6th Cir. 2002)). The court must evaluate the evidence in a motion for summary judgment "in the light most favorable to the party opposing the motion." *Nickels v. Grand Trunk W. R.R.*, 560 F.3d 426, 429 (6th Cir. 2009).

2. Relevant Legal Principles

Under federal law, Indian Country is land "validly set apart for the use of the Indians, as such, under the superintendence of the [g]overnment." *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 511, 111 S. Ct. 905, 112 L. Ed. 2d 1112 (1991) (quoting *United States v. John*, 437 U.S. 634, 648–49, 98 S. Ct. 2541, 57 L. Ed. 2d 489 (1978)).

"Indian Country" serves as an umbrella term for Indian reservations, dependent Indian communities, and Indian allotments. *See* 18 U.S.C. § 1151. Despite its present-day meaning, the word reservation, as used in the nineteenth century, "had not yet acquired such distinctive significance in federal Indian law." *McGirt v. Oklahoma*, —— U.S. ——, 140 S. Ct. 2452, 2461, 207 L. Ed. 2d 985 (2020). Most typically, Indian reservations were created through acts of Congress that provided tracts of land to tribes, with the right of self-government and outside the purview of state jurisdiction. (*Id.*) In contrast, Indian allotments were typically smaller lots owned by individual tribal members. *Id.* at 2463 (citing *Cohen's Handbook of Federal Indian Law*, § 1.04 (2012), discussing General Allotment Act of 1887, Ch. 119, 24 Stat. 388). Dependent Indian communities formed a third category that "refer[ed] to a limited category of Indian Lands that are neither reservations nor allotments," but were still set aside by the federal government under federal superintendence. *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 527, 118 S. Ct. 948, 140 L. Ed. 2d 30 (1998).

To assess whether the Treaty of 1855 created an Indian reservation, we look to the governing agreement between the federal government and the Band. Treaties are "interpreted liberally in favor of the Indians." *Keweenaw Bay Indian Cmty. v. Naftaly*, 452 F.3d 514, 524 (6th Cir. 2006) (quoting *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 200, 119 S. Ct. 1187, 143 L. Ed. 2d 270 (1999)). Alongside the treaty's language, we may look "beyond the written words to the larger context that forms the [t]reaty, including 'the history of the treaty, the negotiations, and the practical

construction adopted by the parties.'" *Mille Lacs*, 526 U.S. at 196, 119 S. Ct. 1187 (quoting *Choctaw Nation v. United States*, 318 U.S. 423, 432, 63 S. Ct. 672, 87 L. Ed. 877 (1943)). "[E]xpressions of tribal and congressional intent" are critically important, and "legal ambiguities are resolved to the benefit of the Indians." *DeCoteau v. Dist. Cty. Court for Tenth Judicial Dist.*, 420 U.S. 425, 447, 95 S. Ct. 1082, 43 L. Ed. 2d 300 (1975). Critically, we must look to how "Indians would have understood [the treaty]" at the time it was signed. *Mille Lacs*, 526 U.S. at 197, 119 S. Ct. 1187.

3. Application to the Matter at Hand

The district court properly granted summary judgment to Defendants on their claim that the Treaty of 1855 did not create a reservation for the Band. We hold that the treaty provided for allotments of land, which would not fall under federal superintendence, rather than a collective Indian reservation. Under the Treaty's language, its precedent negotiations, and the practical construction of the Treaty provisions adopted between the parties, the land cannot be said to be "validly set apart for the use of the Indians ... under the superintendence of the [federal] [g]overnment." *Citizen Band*, 498 U.S. at 511, 111 S. Ct. 905 (quoting *United States v. John*, 437 U.S. 634, 649, 98 S. Ct. 2541, 57 L. Ed. 2d 489 (1978)); *see also Mille Lacs*, 526 U.S. at 196, 119 S. Ct. 1187.

i. Land set apart for Indian purposes

Alongside the power of Congress to ratify treaty agreements with tribal nations, "[f]rom an early period

in the history of the government it was the practice of the President to order, from time to time, ... parcels of land belonging to the United States to be reserved from sale and set apart for public uses." *Hagen v. Utah*, 510 U.S. 399, 412, 114 S. Ct. 958, 127 L. Ed. 2d 252 (1994) (quoting *Grisar v. McDowell*, 6 Wall. 363, 381, 18 L. Ed. 863 (1868)). "This power of reservation was exercised for various purposes, including Indian settlement, bird preservation, and military installations, 'when it appeared that the public interest would be served by withdrawing or reserving parts of the public domain.' " *Id.* (quoting *United States v. Midwest Oil Co.*, 236 U.S. 459, 471, 35 S. Ct. 309, 59 L. Ed. 673 (1915)). In the settlement context, land was "validly set apart" when it was "held by the Federal Government in trust for the benefit of the [tribe]." *Citizen Band*, 498 U.S. at 511, 111 S. Ct. 905. In other words, land would be "segregated from the public domain" for a tribe's settlement. *United States v. Pelican*, 232 U.S. 442, 445, 34 S. Ct. 396, 58 L. Ed. 676 (1914).

Under Article 1 of the Treaty of 1855, the Band and the United States agreed to allow land in northern Michigan to be "withdrawn from sale for the benefit of said Indians." *1855 Treaty*, Art. 1, 11 Stat. 621. The Treaty's language makes clear that the land was "held by the Federal Government in trust for the benefit of the [tribe]." *Citizen Band*, 498 U.S.at 511. When "construed liberally in favor of the Indians," we conclude that the land was set apart. *Naftaly*, 452 F.3d at 524.[1]

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[1] Defendants emphasize that the Treaty of 1855 withdrew lands from the public domain only temporarily, and that the temporal

Coupled with this finding, however, we must also inquire into whether the land is used for Indian purposes. *Citizen Band*, 498 U.S. at 511, 111 S. Ct. 905; *see also S. Utah Wilderness All. v. Bureau of Land Mgmt.*, 425 F.3d 735, 784 (10th Cir. 2005) ("[R]eservation necessarily includes a withdrawal; but it also goes a step further, effecting a dedication of the land to specific public uses."). Land used for Indian purposes will be owned with "restraints on alienation or significant use restrictions." *Venetie*, 522 U.S. at 532, 118 S. Ct. 948. If a tribe is free to use the land for non-Indian purposes, courts "must conclude that the federal set aside requirement is not met." (*Id.*) In the instant case, Article 1 of the Treaty contains no textual requirement that the land be used for a specific purpose. *1855 Treaty*, Art. 1, 11 Stat. 621. Instead, it provides for a ten-year restraint on alienation and provision of trusteeship for lands selected by tribal members who were citizens of the state and who took possession of their selected land within the first five-year period after the Treaty's signing, but no restrictions for those members who took possession of land in the second five-year period. (*Id.*) That suggests the parties intended for tribal members to have freedom of title after the full ten-year period. Further, the "lands remaining unappropriated by or unsold to the Indians after expiration of the last-

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nature of the withdrawal negates our conclusion. Not so. The Treaty of 1836, between the Band's predecessors and the federal government, set apart lands temporarily, "for the term of five years from the date of the ratification of th[e] treaty ...." *Treaty with the Ottawas, Etc.* (*1836 Treaty*) (Mar. 28, 1836), Art. 2., 7 State. 491. But both parties agree that the Treaty of 1836 involved a valid set-aside of land and ultimately established a reservation for the Band's predecessors, albeit with a built-in expiration date.

mentioned term" were scheduled to be "sold or disposed of by the United States as in the case of all other public lands." (*Id.*)

We hold that the Treaty created an arrangement closer to a land allotment system than a reservation. *See Cohen's Handbook of Federal Indian Law*, § 3.04[2][c][iv] (2019); *see also id.* at § 16.03[2][e] (describing "public domain allotments" whereby the federal government would authorize Indians who were state citizens to purchase land withdrawn from the public domain and subject to temporary restrictions on alienation and provisions of trusteeship). Therefore, although the Treaty of 1855 might have set apart land for an Indian purpose, that purpose was not a reservation.

Consistent with the above, the language in the Treaty of 1855 is quite different from the Treaty of 1836 that clearly established a reservation between the Band's predecessors and the federal government. *Compare 1855 Treaty*, Art. 1, 11 Stat. 621 (recording lands "withdrawn from sale for the benefit of said Indians hereinafter provided" and detailing a complex procedure for individual Indians and families to make "selections of lands" and to "take immediate possession thereof" with specified restrictions) with *1836 Treaty*, Art. 2, 7 State. 491 (stating plainly that "the tribes reserve for their own use, to be held in common the following tracts ...."). To the extent it is appropriate to examine reservation treaties entered between other tribes and the federal government "from the same era" at issue in this case, *see McGirt*, 140 S. Ct. at 2461 (examining the Menominee's treaty to interpret the

Creek's), those treaties also differ from the Treaty of 1855 in important respects. *See, e.g., Treaty with the Chippewa* (1855), 10 Stat. 1165 ("There shall be, and hereby is, reserved and set apart, a sufficient quantity of land for the permanent homes of the said Indians; the lands so reserved and set apart, to be in separate tracts, as follows ...."); [2] *Treaty with the Menominee* (1854), 10 Stat. 1064 ("[f]or the purposes of giving them ... a permanent home ... to be held as Indian lands are held"); [3] *Treaty with the Kickapoo* (1854), 10 Stat. 1078 ("[S]aving and reserving, in the western part thereof, one hundred and fifty thousand acres for a future and permanent home, which shall be set off for, and assigned to, them by metes and bounds."). [4]

Alongside the Treaty's text, the Treaty negotiations illustrate that the Band and the federal government wished to provide tribal members with individual titles to land (indicative of allotment) rather than communal title (indicative of reservation). Before negotiating the Treaty of 1855, Commissioner Manypenny set aside plots of land that would "substitute, as far as practicable, for their claim to lands in common, titles in fee to individuals for separate tracts of land." (ECF No. 559-43 at PageID # 8376.) During Treaty negotiations, one tribal leader expressed anxiety that, as with the Treaty

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[2] Recognized as having created a reservation in *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 184, 119 S. Ct. 1187, 143 L. Ed. 2d 270 (1999).

[3] Recognized as having created a reservation in *Menominee Tribe v. United States*, 391 U.S. 404, 405, 88 S. Ct. 1705, 20 L. Ed. 2d 697 (1968).

[4] Recognized as having created a reservation in *United States v. Reily*, 290 U.S. 33, 35, 54 S. Ct. 41, 78 L. Ed. 154 (1933).

of 1836, tribal members would not be given true title to the land because "you will take them back." (ECF No. 558-9 at PageID # 7069.) Manypenny responded that "the land will [not] be pulled from you," and the initial restriction of alienation would provide "good, strong papers, so that your children may inherit your lands." (*Id.* at PageID # 7069.) To ease the Band's concerns, he also expressed that "[i]t will be our desire to give each individual and head of a family such a title as that he can distinguish what is his [own.]" (*Id.* at PageID # 7061.) Manypenny believed that restricting resale for five years would encourage permanent settlement on the tracts of land. Thereafter, individual tribal members would be free to use their land as they pleased.

The parties' practical construction of the Treaty of 1855 after its signing further supports our conclusion. For example, shortly after signing the Treaty, the Ottawa Indians of Michigan wrote to the Office of Indian Affairs to request additional educational assistance. In the letter, Andrew J. Blackbird, a tribe leader and historian, observed that the tribe had "abandoned" its "laws, customs and manners" and "renounced their chiefdoms." (ECF. No. 559-48 at PageID # 8424.) He noted that the tribe was now "under the laws of the State of Michigan and the United States," having "equal rights and privileges with American citizens ... to have and to hold, to buy and to sell, to prosecute and be prosecuted ... So we are to be no more as children of men, for we have been such already too long." (*Id.*)

To be sure, the Band points our attention to several other letters from certain tribal members which speak of

"our reservations,"[5] in addition to a number of letters between federal Indian officials discussing the Treaty's "reservation" of land for the Band.[6] But it is unclear in those letters whether the tribal members and federal officials used the word "reservation(s)" as a legal term of art under federal Indian law, or as it was used in common parlance. *See McGirt*, 140 S. Ct. at 2461 (recognizing that the term "reservation" did not always carry with it the "distinctive significance in federal Indian law" that it now does). The same goes for the reference by Congress in the Act of 1872 to "all the lands remaining undisposed of in the reservation made for the Ottawa and Chippewa Indians of Michigan by the treaty of [1855]." Act of 1872, 42nd Cong., Ch. 424, 17 Stat. 381 (June 10, 1872).

Moreover, although the federal government tracked Indian reservations generally, it did not identify the Article 1 lands listed in the Treaty of 1855 as a reservation.[7] And when Congress further discussed the

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[5] (Tribal Chief Letter, ECF. No. 600-62 at PageID # 10814; Indian Letter (1859), ECF. No. 600-60 at PageID # 10810; Indian Letter (1860), ECF. No. 600-62 at PageID # 10814; Indian Letter (1861), ECF. No. 600-63 at PageID # 10819; Indian Letter (1861), ECF. No. 600-64 at PageID # 10827; Ottawa Letter, ECF. No. 560-07 at PageID # 8701; Ottawa and Chippewa Letter, ECF. No. 560-08 at PageID # 8706.)

[6] (Commissioner Dole, ECF. No. 559-41 at PageID # 8355; Commissioner Greenwood, ECF. No. 559-57 at PageID # 8512; Commissioner Clum, ECF. No. 559-76 at PageID # 8674; Commissioner Mix, ECF. No. 600-79 at PageID # 10868; Commissioner Drummond, ECF. No. 559-74 at PageID # 8659; Commissioner Wilson, ECF. No. 559-56, PageID # 8507.)

[7] (1878 Map, ECF. No. 558-28 at PageID # 7260; 1883 Map, ECF. No. 558-29 at PageID # 7262; 1896 Map, ECF. No. 558-30 at PageID # 7264; 1875 ARCOIA, ECF. No. 558-72 at PageID # 7816, 7824; 1876

Treaty of 1855 in the Act of 1876, it omitted the word "reservation" included in the 1872 Act, demonstrating that the lands were no longer withheld from sale and, therefore, were not even reserved in the common sense of the word. Act of 1876, 44 Cong., Ch. 105, 19 Stat. 55 (May 23, 1876). What is more, when the Band began actively lobbying Congress to reaffirm its federal trust relationship—which the federal government had mistakenly repudiated—it did not ask Congress to reaffirm an 1855 Treaty reservation. (ECF. No. 507-1, PageID # 5764, 5796–797, 5802–809.) Finally, the statutory reservation that Congress subsequently established for the Band consists of its trust lands in Emmet and Charlevoix counties in a geographic area that does not match the boundaries of the townships listed in Article 1 of the Treaty of 1855. *See* Little Traverse Bay Bands of Odawa Indians and Little River Band of Ottawa Indians Act, Pub. L. No. 103-324, 108 Stat. 2156, § 6 (1994).

When reviewed in full, "the history of the treaty, [its precedent] negotiations, and the practical construction adopted by the parties" demonstrate that the Treaty did not provide land for Indian reservation purposes; but rather, it was intended to allot plots of land so members of the Band could establish permanent homes. *Mille Lacs*, 526 U.S. at 196, 119 S. Ct. 1187.[8]

ARCOIA, ECF. No. 558-73 at PageID # 7831, 7833; 1877 ARCOIA, ECF. No. 558-74 at PageID # 7838, 7840.)

[8] We recognize, as *McGirt* did, that allotments are not "inherently incompatible with reservation status." 140 S. Ct. at 2475. But a lack of inherent incompatibility with reservation status does not mean

ii. Land under federal superintendence

Federal superintendence is also required to establish an Indian reservation under federal law. *See Citizen Band*, 498 U.S. at 511, 111 S. Ct. 905. Federal superintendence arises where "the Federal Government and the Indians involved, rather than the States, are to exercise primary jurisdiction over the land in question." *Venetie*, 522 U.S. at 531, 118 S. Ct. 948. In that regard, "it is the land in question, and not merely the Indian tribe inhabiting it, that must be under the superintendence of the Federal Government." *Id.* at 530, 118 S. Ct. 948 n.5 (citations omitted). Federal superintendence has thus been found where the United States "*actively* control[s] the lands in question, effectively acting as a guardian for the Indians." *Id.* at 533, 118 S. Ct. 948 (emphasis added). Typically, the federal government controls land through restraints on alienation, indicating that lands are intended to remain under federal jurisdiction. *See, e.g.*, *Pelican*, 232 U.S. at 449, 34 S. Ct. 396.

The Band omits this element in its brief; the omission constitutes a legal error. Repeatedly, the Supreme

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that an Indian reservation is established wherever allotments are provided for. *See United States v. Pelican*, 232 U.S. 442, 449, 34 S. Ct. 396, 58 L. Ed. 676 (1914) (holding that even where a reservation was diminished, the allotments continued to be Indian Country); *see also Cohen's Handbook of Federal Indian Law*, § 3.04[2][c][iv] (2012) (noting that some Indian allotments were not made within reservations). In the final analysis, we hold that based on the Treaty negotiations, and the Treaty's text and construction, neither the Band nor the federal government intended to create an Indian reservation.

Court has included federal superintendence as a requirement for establishing Indian Country generally. *See United States v. McGowan*, 302 U.S. 535, 537, 58 S. Ct. 286, 82 L. Ed. 410 (1938) (declaring the disputed land Indian Country in part because the federal government held ownership of the land to protect dependent Indians living there); *Pelican*, 232 U.S. at 447, 34 S. Ct. 396 (holding that the disputed land was Indian Country where it was "under the jurisdiction and control of Congress for all governmental purposes, relating to the guardianship and protection of the Indians"). We follow the Court's lead.

Under the terms of the Treaty of 1855, the federal government might have exercised some federal superintendence over the land at issue, but not for purposes of maintaining an Indian reservation. Particularly relevant to this discussion is the Supreme Court's decision in *United States v. Pelican*, 232 U.S. 442, 34 S. Ct. 396, 58 L. Ed. 676 (1914). There, the Court found federal superintendence where the Colville tribe's land in Washington State was subjected to restraints on alienation and provisions of trusteeship for a 25-year period. *Id.* at 449, 34 S. Ct. 396. Accordingly, the land "still retain[ed] during the trust period a distinctively Indian character, being devoted to Indian occupancy under the limitations imposed by Federal legislation." *Id.* But the Court in *Pelican* made clear that the Colville tribe did not retain a reservation; their previously established reservation was "diminished," and the federal superintendence discussed was related to the newly established system of allotment. That applies here as well—at least for a portion of the lands at issue. The Band's reservation established in the Treaty of 1836 was

diminished under that Treaty's own terms. *See 1836 Treaty*, Art. 2, 7 Stat. 491. The Band's new arrangement in the Treaty of 1855—pertaining to the lands selected in the first five-year period—were, like those in Pelican, subject to several years of inalienability and trusteeship.[9] *1855 Treaty*, Art. 1, 11 Stat. 621. During that time, they remained "devoted to Indian occupancy" under the limitations imposed by the Treaty. *Pelican*, 232 U.S. at 449, 34 S. Ct. 396. So, under the Treaty of 1855, those tracts of land might appropriately be deemed "under federal superintendence," but only for the time the restraints remained, and only for purposes of allotment, not reservation.

The Treaty's provision for selection of land during the second five-year period and thereafter also supports our conclusion that it did not establish federal superintendence indicative of reservation status. As mentioned previously, the land selected and purchased during those phases were dispersed without any restraints on alienation or other restrictions. *1855 Treaty*, Art. 1, 11 Stat. 621. Plainly, no evidence of federal superintendence exists for the land dealt out in those phases.

Of course, other provisions in the Treaty of 1855 indicate that the federal government did provide continual support for the Band, such as Article 2, which details the disbursement of funds to the Band for

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[9] As written, the Treaty of 1855 subjected the tracts of land selected during the first five-year period to restraints on alienation and provisions of trusteeship for ten years. *1855 Treaty*, Art. 1, 11 Stat. 621. But for many, whose patents did not issue until the 1870s, they lasted much longer. (ECF. No. 559-04; 559-09.)

education, annuities, and agricultural assistance. *Id.* at Art. 2, 11 Stat. 621. But even when accounting for those disbursements, "health, education, and welfare benefits are merely forms of general federal aid[,] ... they are not indicia of active federal control over the Tribe's land sufficient to support a finding of federal superintendence." *Venetie*, 522 U.S. at 534, 118 S. Ct. 948.

Further, during the negotiations, the leaders of the Band made clear that they did not want land under federal superintendence or federal control. Indeed, tribal members made repeated requests during treaty negotiations to have title to land that would be equal to that of their white counterparts. For instance, one tribal leader requested for the Band "to choose like the whites and have their titles." (ECF No. 558-9 at PageID # 7069.) Another leader stated, "we think that we are old enough to take care of our papers[;] ... [w]e think that we can take as good care of your papers as we do of [our ancestors' papers.]" (*Id.* at PageID # 7064.) And like their white counterparts, the Band wanted to become citizens and pay taxes. After hearing the federal government would provide them with titles to land, one leader stated, "[w]e are willing to pay our way up on this land – to pay our taxes as you do. You have opened your heart to give us land; we do not think you ought to feed us and our children forever." (*Id.* at PageID # 7065.)

The government also made clear its desire for Band members to be independent from governmental support. The year before negotiations began, Henry Gilbert wrote to George Manypenny stating, "that within three or four years all connection with and dependence upon

Government on the part of the Indians may properly cease." (ECF No. 559-33 at PageID # 8285-8286.) In reference to money owed to the Band during the negotiations, Gilbert expressed, "we think that the time will shortly come, when you can take care of [the fund] for yourself[,] ... [s]o that I think we must fix a time, when your connection with the U.S. shall cease." (ECF No. 558-8 at PageID # 7030-7031.) Manypenny held a belief similar to Gilbert's. Eventually, Manypenny wanted the tribes to "take care of themselves," and he knew that a permanent home would assist them in achieving full independence. (*Id.* at PageID # 7030-7031.)

The parties' practical construction of the Treaty, discussed previously, further supports the notion that the federal government did not intend, nor did it seek, to guard over any of the land the tribal members owned as it would a reservation. Rather, the United States and the Band negotiated a treaty that the parties believed would finally lead to the Band's independence. The Band's ancestors understood that the treaty would provide individual allotments of land to its members. *See Mille Lacs*, 526 U.S. at 197, 119 S. Ct. 1187. And it appears the Band's ancestors not only agreed to this arrangement, but also desired it, to ensure they would never lose their homes in Michigan. As a result, we find that the Treaty of 1855 did not create a system of federal superintendence sufficient to establish an Indian reservation for the Band.[10]

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[10] Because we affirm the district court's judgment that the Treaty of 1855 did not create an Indian reservation for the Band, we decline to address Defendant-Intervenors' judicial estoppel and issue

III. CONCLUSION

The case before us has raised important questions of federal Indian law. We are tasked with deciding whether a treaty formed well over a century ago created a reservation, even as the word reservation holds different significance today. Upon review of its language, its precedent negotiations, and its practical construction adopted by the parties, we conclude that the Treaty of 1855 did not create a federal Indian reservation; but rather, created a form of land allotment—akin to a public domain allotment—for individuals within the Band to obtain permanent homes. From the record, it is apparent that the Band faced a series of difficult choices, which included whether to leave their home in Michigan or bargain with the United States to stay in Michigan permanently. It is not lost on this court that those decisions were not made in haste or without forethought. In light of those decisions, we reviewed the agreements the Band signed in 1836 and 1855 and sought to determine how the Band would have understood them. The Band chose to provide allotments of land for their members, not a reservation for the tribe. For these reasons, we affirm the district court.

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preclusion arguments raised in their cross appeal. *See Anderson v. Roberson*, 90 F. App'x 886 (6th Cir. 2004) (holding that an appellate court has jurisdiction over issues raised in a protective cross appeal but should not address them unless "it is appropriate to do so after the disposition of the appeal"—*i.e.*, if the court plans to reverse the district court based on its consideration of the main issue on appeal).

Appendix B

UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION.

LITTLE TRAVERSE BAY BAND OF ODAWA INDIANS, Plaintiff,

v.

Gretchen WHITMER, et al., Defendants.

No. 1:15-cv-850

[Signed August 15, 2019]

OPINION

Paul L. Maloney, United States District Judge

Plaintiff, the Little Traverse Bay Band of Odawa Indians (the "Tribe") claims that in 1855, the United States entered a treaty with its predecessors and created an Indian reservation spanning more than 300 square miles in the Northwest portion of Michigan's Lower Peninsula. The Tribe seeks a declaratory judgment from the Court that the claimed reservation has continued to exist to this day and has not been diminished or disestablished by any government action.

The matter is before the Court on the Defendant's and Intervenor-Defendants' motions for summary judgment. Collectively, the Defendants assert that summary judgment is warranted on the Plaintiff's claim for a declaratory judgment and injunctive relief because no Indian reservation was ever created, or in the alternative, any reservation created was subsequently diminished.

First, a word on structure. Whether a reservation was created depends upon the construction of an 1855 treaty between the United States and the Tribe's political predecessors. But treaties between Indian tribes and the United States are not interpreted like other international compacts, other laws, or even other contracts. Instead, when construing an Indian treaty, the Court must "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 v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196, 119 S. Ct. 1187, 143 L. Ed. 2d 270 (1999) (quoting *Choctaw Nation v. United States*, 318 U.S. 423, 432, 63 S. Ct. 672, 87 L. Ed. 877 (1943)). Once versed in the relevant history, "[c]ourts cannot ignore plain language that, viewed in historical context and given a 'fair appraisal,' runs counter to a tribe's later claims." *Or. Dep't of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 774, 105 S. Ct. 3420, 87 L. Ed. 2d 542 (1985).

But ultimately, for the reasons to be explained, the Court concludes that, after a review of the entirety of the historical record, summary judgment is warranted on the Tribe's claims because the 1855 treaty cannot plausibly be read to create an Indian reservation, even when giving effect to the terms as the Indian signatories would have understood them and even when resolving any ambiguities in the Treaty text in favor of the Indians.

I.

Historical Background & The Treaty of 1836.

The Little Traverse Bay Band of Odawa Indians is a federally recognized Indian Tribe that traces its origins back to the Odawa Indians that inhabited land in what is now northern Michigan. The Odawa were first encountered by European explorers in 1615, and they continued to occupy the northwest corner of Michigan's Lower Peninsula and portions of the Upper Peninsula in the centuries that followed.

The Indian tribes in Michigan began ceding territory to the United States in the 1820s and continued in the following decades. By the 1830s, the federal government, under the Jackson Administration, centered government policy on securing treaty cessions of land from Indians, removing Indians to lands further West, and encouraging non-Indian settlement as the United States expanded westward.

In Michigan, this sentiment culminated in the Treaty of 1836 (the "Treaty of Washington") because the Odawa and Chippewa Indians became aware of the United States' removal policy and attempted to negotiate an exchange of their lands for money and the right to remain in Michigan. In a petition to the Secretary of War (who was at the time responsible for government policy relating to the Indian people), representatives stated that the principal objects of their visit were to "make some arrangements" with the government for "remaining in the Territory of Michigan ...." (PageID.8087–8088.) The petition acknowledged that the Odawa did not want to remove to the west of the Mississippi but offered to sell portions of their lands

"with some reserves." (*Id.*) The Bands also emphasized that they wished to assimilate into the culture of the white settlers and sought assistance to do so through various forms of education. (*Id.*)

Shortly after receiving the petition, Secretary of War Cass privately acknowledged that the Chippewa and Odawa lands in Michigan were not a priority, as the United States did not contemplate the settlement of northwestern Michigan by white settlers in the near future. Nevertheless, he directed Indian Agent Henry Schoolcraft to negotiate with the Odawa and Chippewa Tribes in the area to do "full justice" to the Indians, but at the same time, "procure the land on proper and reasonable terms for the United States." (PageID.8096.) Cass instructed Schoolcraft that he could "allow no individual reservations[ ]" to the Indians and was to extinguish Indian title to the extent possible. (*Id.*) Finally, if necessary, particular bands were to be allowed to remain on reservations, but their tenure was to extend only until the United States decided to remove them. (*Id.*)

With the foregoing instructions, Schoolcraft negotiated the Treaty of Washington. First, Schoolcraft consolidated the Chippewa and Odawa Indians into a single (and artificial) political entity for purposes of the treaty negotiations because these separate tribes were generally interspersed, such that the land cessions Schoolcraft sought could not be achieved without having both tribes at the bargaining table.

Generally, the Indian bands who were party to the Treaty agreed to cede aboriginal title to approximately 13,837,207 acres of land within the Northwest Lower Peninsula and a portion of the eastern Upper Peninsula

of Michigan. In exchange, they were to receive six reservations within Michigan, to be "held in common," including a 50,000-acre reservation on Little Traverse Bay, various annuities and payments of debt, and other improvements such as schoolhouses and blacksmiths. Additionally, the Treaty of Washington contained provisions for the removal of the Bands from Michigan to the lands "West of the Mississippi," and the United States agreed to provide suitable lands there and to pay for the Tribe's move and for one year of subsistence.

When the Treaty of Washington went to the Senate for ratification, the Senators unilaterally altered the terms. Most importantly, the Senate added language rendering the reservations effective for only five years. ("For the term of five years from the date of the ratification of this treaty, and no longer, unless the United States grant them permission to remain on said lands for a longer period.") In exchange for this new five-year limitation, the Senate provided for a principal sum of $200,000, to be paid "whenever their reservations shall be surrendered," and until that time, the Bands would receive yearly interest payments. Schoolcraft was then tasked with persuading the signatory Bands to agree to the Senate Amendments to the Treaty. While they "strenuously opposed" the modifications, (PageID.10689), they were satisfied that the lands would not be needed for settlement for many years and that they would be allowed to remain until that time. (*Id.*) Thus, Bands approved the Articles of Assent and the treaty gained legal force. (PageID.6878.)

Events Between 1836 and 1855.

Once the Treaty of Washington was ratified, the Odawa and Chippewa sought other means to stay in

Michigan. In 1839, the Chippewas of Little Traverse Bay wrote to the Governor of Michigan, Stephen Mason, to ask whether they would be allowed to become citizens if they made individual purchases of land from the United States, as other Indian groups near Kalamazoo had done. (PageID.8132–34.) Specifically, the Chippewa asked: (1) whether it would have the right to buy lands from the government; (2) whether those who wished to conform to the laws of Michigan would be allowed by the State to remain; (3) whether such Indians would be considered citizens; and (4) whether they could purchase the lands at Little Traverse Bay where they presently resided. (*Id.*) There is no record of Governor Mason's response.

However, it appears that both the state and federal governments took a permissive attitude towards Indian land ownership. By 1848, the Acting Superintendent of Indian Affairs noted that the Odawa had been "making great efforts to secure themselves permanent homes" along Lake Michigan by "purchasing lands along the rivers and bays of the lake; their position enables them, with moderate efforts, to live well; ... Some of the bands desire to participate in the privileges of citizenship and have presented a petition asking that the subject should be brought to the notice of the State government." (PageID.8164–8166.); *see also United States v. Michigan*, 471 F. Supp. at 242 ("One way the Indians began to cope with [the uncertainty of removal] was to buy land in fee. The missionaries encouraged these purchases and some Indians used annuity money from the 1836 treaty to buy land.").

And more generally, the state government was receptive to the continued presence of Indians in Michigan. For example, the Michigan Legislature

ratified the Michigan Revised Constitution in 1850, which allowed for persons of Indian descent to vote, so long as they were "civilized." However, the Revised Constitution was silent as to citizenship of the Indians. The following year, the Legislature passed a Joint Resolution formally requesting that the United States "make such arrangements for said Indians, as they may desire, for their permanent location in the northern part of this State[.]" (PageID.8205.)

Meanwhile, the federal government took no action to remove the Indians from Michigan. When the five-year term allotted by the Treaty of Washington expired in 1841, several Indian leaders from the Odawa and Chippewa wrote directly to President John Tyler seeking an extension of the reservation term, as the Treaty had expressly contemplated that it could be extended if the United States gave permission to remain for a longer period. (PageID.8143.) Neither President Tyler nor any official in the Bureau of Indian Affairs responded to the petition. Ultimately, the United States took no action to remove the Indians from the reservations in 1841 or any time during the 1840s.

Beginning in the 1850s, settlement in northwest Michigan began to accelerate, and the federal government again took up debate over how to resolve the lack of a permanent home for the Odawa and Chippewa Tribes. For instance, Indian Agent Henry Gilbert lamented that many of the Indian communities in Michigan were scattered across the state, and that some had no permanent home in a report contained within the Report of the Commissioner of Indian Affairs for 1853. (PageID.7442.) He noted that the State was hospitable to the Indians and that the Indians would

likely never consent to removal. He thus proposed establishing reservations for the benefit of the Indians to solve the problem. (*Id.*)

He continued to advocate for his plan in subsequent reports and in private letters to his superior, the Commissioner of Indian Affairs, George Manypenny. (*See, e.g.*, PageID.8285–86.) For example, Gilbert recommended to Manypenny in 1854 that the government should:

> [S]et apart certain tracts of public lands in Michigan in locations suitable for the Indians and as far removed from white settlements as possible and within which every Indian family shall be permitted to enter without charge and to own and occupy eighty acres of land—the title should be vested in the head of the family and the power to alienate should be withheld—All the land embraced with the tract set apart should be withdrawn from sale and no white persons should be permitted to locate or live among them, except teachers, traders, and mechanics specially authorized by rules and regulations prescribed by the State Government—It may also be safely left to the same authority to terminate the restriction of the power to alienate their lands whenever deemed expedient and at the same time the unappropriated lands in the tracts withdrawn from sale should be again subject to entry.

(*Id.*)

Around the same time Gilbert was advocating on their behalf, the Chippewa and Odawa petitioned the United States to set the table for further negotiation,

requesting that the United States inform them of their outstanding treaty rights under the 1836 Treaty. (PageID.8305.) After submitting the Petition in January of 1855, Band leaders traveled to Washington to meet with federal officials and discuss their proposal, although no contemporaneous records of these meetings have been produced.

The month after the meetings in Washington, the Indian representatives sent a follow-up letter to Commissioner Manypenny acknowledging that the Bands would continue to discuss settling the outstanding treaty obligations in the coming summer and requested that any negotiations between the Bands and United States take place in Washington, rather than having the government send representatives to Michigan. (PageID.8313.) The Bands expressed some urgency: "This [the settling of the Tribe's outstanding claims] we want soon, that we may know what we should do–we need means to buy more lands and make improvements before the land shall be taken by white settlers near us." (*Id.*)

After meeting with the Bands in Washington, federal officials exchanged a flurry of internal correspondence in the Spring of 1855 in apparent anticipation of the treaty negotiations. In April 1855, Commissioner Manypenny wrote to the General Land Office Commissioner Wilson "regarding [the United States'] future relations with the Ottawa Indians remaining within the State of Michigan ...." (PageID.8320.) Manypenny requested that the Land Office withhold land within certain townships from sale "until it shall be determined whether the same may be required for said Indians." (*Id.*)

Commissioner Wilson then forwarded the request to the Secretary of the Interior, Robert McClelland. Wilson wrote that the object of withdrawing the lands from public sale was "to carry out the philanthropic views of the government in reference to these Indians, by enabling them to purchase home and farms for themselves, and to acquire the arts and comforts of civilized life, unprejudiced by the evil influence or example of such depraved whites as might wish to settle among them." (*Id.*) Wilson thus recommended to McClelland that President Pierce issue an Executive Order withdrawing the lands from public sale. President Pierce did so on May 14, 1855. (PageID.8325.)

Agent Gilbert was also in contact with Commissioner Manypenny, writing him from his duty station in Michigan. On April 12, 1855, Gilbert wrote to Manypenny to highlight the pressure white settlers were exerting on the lands which would have been suitable for the Bands. He suggested that given the needed haste for the negotiations, it would be better to conduct them in Michigan. (PageID.8335.)

Later that month, Commissioner Manypenny wrote to Secretary McClelland to advise him about the United States' continuing obligation to provide the Bands' with lands West of the Mississippi. (PageID.8345–46.) He explained in part that, "There is no prospect of [the Bands] ever being willing to emigrate, nor does Michigan desire to have them expelled, but will consent to their being concentrated among suitable locations, where their comfort and improvement can be cared for and promoted without detriment to the State or individuals." (*Id.*)

Manypenny wrote again to McClelland on May 21, 1855, apparently in response to McClelland's request that he set forth his views for how best to handle the United States' outstanding obligations to the Tribes. (PageID.8376.) This correspondence appears to be the last word among federal officials on how to best handle resolution of the Indian claims.

In the letter, Manypenny explained that it was his opinion that "an officer or officers of this Department should be designated by the President to negotiate with the Indians with a view of adjusting all matters now in an unsettled condition, and making proper arrangements for their permanent residence in that state." (*Id.*) In his view, the government needed to take measures "to secure permanent homes to the Ottawas and Chippewas, either on the reservations or on other lands in Michigan belonging to the Government, and at the same time, to substitute as far as practicable, for their claim to lands in common, titles in fee to individuals for separate tracts." (*Id.*)

Secretary McClelland wrote back to Manypenny the same day. (PageID.8372.) In concise terms, he stated: I have read your communication of this date, in relation to the condition of the affairs of the Chippewa & Ottowas Indians of Michigan ... and have to inform you that the view therein proposed are approved by the Department." (*Id.*) Accordingly, McClelland endorsed Manypenny's position and authorized Manypenny to pursue these objectives in negotiating a new treaty with the Chippewa and Odawa Indians. Thus, while officials had debated the desirability of placing the Odawa and Chippewa on Indian reservations for several years, their

conclusion was that it was better to give individual tracts of land to families that would hold the land in fee.

Accordingly, with the full backing of the Secretary of the Interior, Commissioner Manypenny traveled to Detroit, Michigan in July of 1855, where he met with Agent Gilbert and representatives from the Indian Bands, including Assagon, Chief of the Cheboygan Band who spoke principally for the Odawa during the negotiations. Together, they spent seven days negotiating what became the Treaty of Detroit.

The Treaty Council.

The negotiations were recorded in a journal, although it is admittedly not a word-for-word transcript. Nevertheless, the journal provides significant insight into the negotiations underpinning what became the Treaty of Detroit, which is now at issue.

Manypenny began the Treaty Council with preliminary remarks, highlighting that the primary reason for the treaty talks was the Bands' belief that there remained outstanding obligations under prior treaties. (PageID.7087.) He explained that he had researched the questions posed to him by the Bands during their prior visit to Washington and was prepared to explain what the United States viewed its obligations to the Bands to be. (*Id.*) Accordingly, Manypenny and Gilbert devoted the first portion of the treaty talks to discussion of the prior treaties and accounted for how and where monies had been paid from the United States to various Bands to meet those prior obligations. (*See* PageID.7087–7092.)

Once Manypenny and Gilbert had discussed the various payments and annuities, talk at the Treaty

Council turned to land. The Bands recalled that under the 1836 Treaty, the United States had promised to acquire land west of the Mississippi for them. (PageID.7095.) The Bands were aware, by the time of the Treaty Council, that the possibility existed that the United States would provide lands in Michigan, rather than requiring them to move west and requested that the government allow them to select the lands necessary for their settlement: "Before we left the Saut we were told that we should receive lands in this state in place of land west of the Mississippi. If so, in what manner will the matter be arranged? We wish if it is your design thus to give us lands to accept and locate them where we please." (*Id.*)

Manypenny responded that "the Government is desirous to aid you in settling upon permanent homes. As it is not desired to remove you, it will be a matter of conference between us as to how this shall be done and how much land shall be given to you." (*Id.*)

Agent Gilbert then added that the United States maintained its obligation to pay $200,000 under the 1836 Treaty, and in addition, the government would "provide ... homes & is willing that those homes shall be in the State of Michigan." (*Id.*) Gilbert explained that the first priority in resolving these issues was the location of the land. He explained that the government did not expect all of the Bands to live in one location, but would instead provide tracts sufficient for small settlements in different places, but that the Bands should "collect[ ] into communities." (*Id.*)

After Agent Gilbert's explanation, the Treaty Council adjourned for the day. When the parties returned the following day, they again took up selection

of the lands. Band leaders voiced concern with the selection process; they did not want to select lands without seeing them in person. Assagon stated: "When a white man wants to buy land, he does not go blind fold & buy a piece he does not know, and so it is with us. The lands where we come from are not so good as the lands here. Much of them are heavy & swampy & we must select only such as are good for agriculture." (PageID.7097.) Accordingly, Assagon declared that the Bands would not select any lands until they could see them in person.

Manypenny quickly put this concern to rest: "The difficulty in selecting land can be easily remedied. It is not the desire of your great father to give you bad lands. I think you should have as good as the whites & it is not asked of you to select your individual farms here. We merely wish you to determine generally the sections of the state in which communities of you wish to locate." (PageID.7098.)

Talks then turned to the amount of land to be given and the type of land ownership to be granted. Many of the Indian representatives emphasized that they had already been successfully purchasing lands and requested that the lands to be given to them be issued with patents, so "as to prevent any white man, or anybody else from touching these lands." (PageID.7099.)

After hearing from the representatives, Manypenny agreed to the request: "In relation to the patents I think there will be no difficulty. It shall be an absolute title, save a temporary restriction upon your power of alienation." (PageID.7101.) He also explained how to remedy the land-selection problem:

> I think the difficulty with regard to the selection of lands may be remedied. We do not expect that each head of a family can select his own particular piece of land here today, but that each band has its mind fixed, or can have it fixed on some particular part of the country, within which they can select the tracts they desire.

(PageID.7101.) That afternoon, Gilbert met with Band representatives to designate the areas where the Bands wished to locate.

The following day, the negotiations continued, and more details were hashed out. For instance, Manypenny explained that the lands to be given would not result in Indians forfeiting lands that they had already purchased. (PageID.7102.) Agent Gilbert also clarified that "it is the intention of the Government to allow each head of a family 80 acres of land & each single person over 21 years of age[,] 40 acres." (PageID.7103.)

Finally, the federal officials continued to emphasize that the government intended for the land to be used as permanent homes for individual Indians families: "Now this idea that the land will be pulled from under you originates either in error, or something I cannot comprehend. I advise you all to shut your ears to it. I told you at first that while all should have permanent homes, there would be a restriction upon the individual[']s power of alienation. And all these difficulties the young man made in his speech, about the land descending to your heirs ... are wrong. You shall have good, strong papers, so that your children may inherit your lands." (PageID.7105.)

By July 30, the Band leaders assented to accept land rather than money, and the negotiations turned to other topics, including who would be entitled to take the land offered, how the United States would pay the $200,000 principal owed to the Bands, taxes, and settlement of other payments and annuities. Assagon, speaking on behalf of all the Odawa and Chippewa, requested that the federal government retain the principal ($200,000) owed to the Bands under the 1836 Treaty and maintain the yearly interest payments: "It is our design not to spend it all but leave it in your hands." (PageID.7146.) Earlier in the negotiations, other representatives had voiced similar feelings. One representative, Wasson, analogized the ongoing federal annuities and interest payments to "a little swan"–stating that he did not wish to cut the swan open, but instead to "let him live, that our father may feed him & he may continue to bring us shillings in his bill." (PageID.7128.)

Agent Gilbert refused the Bands request by harkening back to Wasson's swan metaphor. He said, "The Government must pay the money at all events, & only desires you to dispose of it for the best. In all your deliberations I want you to take good care of that little swan Wasson told us about." (PageID.7150.)

When the negotiations resumed later that afternoon, Gilbert continued, explaining that the goal of the United States with respect to the negotiations, was to "have you civilized citizens of the State–taking care of yourselves." (*Id.*) Gilbert then made his proposal for gradually ending the United States' administration of the Bands' annuities and payments:

> Among the whites, when a man has children the time comes, or is supposed to come, when they

> know enough to take care of themselves. So it is with you. We think you should be restricted in the full care of this land & money for a few years, yet we think that the time will shortly come, when you can take care of them for yourself. Now though we advise you to take care of the little swan, we want you to remember that by & by he will get so old that he will not pay for keeping. The government is willing to take care of your property; but if you improve for the next twenty years as fast as you have during the last five, I tell your great father that you can take care of it as well for yourselves, as he can for you. So that I think we must fix a time, when your connection with the U.S. shall cease. Now I make this proposition to you, that the U.S. pay you the interest of your money for ten years, besides $10,000 per yr of the principal. Then in addition to that $200,000 will be due to you at the end of ten years, & that at that time the whole amount be paid to you–unless the Indians & the President think it better to extend the time further. That will be a subject for agreement at that time. That will give you an annuity for ten years, which will average about $23,000 per yr.

(PageID.7151.)

Ultimately, the Bands agreed with Gilbert. As Assagon put it:

> Our Father, our minds have been a little troubled. Now since our little swan is to live ten years & not diminish by age, we wish you to feed him, & are willing to take the interest & the $10,000 for ten years. And we wish you in the meantime to take

> good care of the swan, so that we shall find him in good order. (PageID.7152.)

Accordingly, the Treaty Journal clearly demonstrates that United States negotiated to end its administration of the Tribes' monetary affairs within ten years, and the Tribes agreed to those terms. (*Id.*)

After resolving these issues, each of the Bands signed the Treaty. Assagon stated, "The treaty is signed & we are satisfied. Our father has been liberal with us. All we now hope is that the treaty will be honestly executed." (PageID.7160.)

The Treaty of Detroit.

The resulting Treaty of Detroit is reflective of the negotiations captured in the journal and the parties' stated intentions in the months leading up to the treaty negotiations. In Article I, the Bands and the United States addressed land. In general terms, Article I provided that the United States would withdraw large swaths of land in Michigan from sale for each Band, so that eligible Indians (heads of families, unmarried adults, and orphans) within each Band could make their own selections of land within their Band's designated area, for which they would hold the patent (after a ten-year restraint on alienation). Land selections were to take five years. Once that period expired, the United States would make the unselected lands within the larger, Band-designated sections available for purchase exclusively to members of the Bands—i.e., an additional five-year window where the land was not available for white settlement. And finally, once both five-year windows ended, any lands that had gone unselected and unpurchased would remain the property of the United

States, which could dispose of it just as it could "other public land."

The remaining treaty provisions established the timeline for the United States' payments to the Band, stipulating that the United States would make all of the requisite payments within ten years (Article 2), a release of any claims arising under prior treaties (Article 3), the continued provision of interpreters (Article 4), the dissolution of the artificial political entity Schoolcraft had created to join the Odawa and Chippewa Tribes (Article 5), and established that the terms were binding upon the treaty signatories upon ratification (Article 6).

After the treaty was signed, Manypenny and Gilbert transmitted a report to the Acting Commissioner of Indian Affairs, Charles Mix. (PageID.8410–8412.) The men recapped the negotiations and summarized the terms of the treaty as executed. (*Id.*) A few days later, President Pierce issued an executive order to have the lands subject to the treaty be "temporarily withdrawn from sale." (PageID.8358.)

In November 1855, the Treaty was not yet ratified, but Manypenny spoke of it in his Annual Report.

Manypenny wrote:

> New conventional arrangements, deemed requisite with the Indians in the State of Michigan have been entered into with confederate tribe of Ottowas and Chippewas .... By them, the Indians are to have assigned permanent homes to be hereafter confirmed to them in small tracts, in severalty. Such guards and restrictions are thrown around their lands and limited annuities as cannot fail, if faithful

> regarded and respected, to place them in comfortable and independent circumstances.

(PageID.7532 (emphasis added).)

Agent Gilbert similarly described the Treaty negotiations in his own report dated October 10, 1855, which was appended to Manypenny's report:

> New arrangements relative to their [the Bands'] unsettled claims upon the United States were settled by articles of agreement and convention, concluded at Detroit, on the 30th of June last....
>
> As the articles agreed upon have not yet been ratified it may not be proper for me to allude particularly to their details. I will only say of them that the main feature is a provision securing to each family and to such single persons as are provided for, a home in Michigan; and I cannot doubt that if the treaty is ratified it will effectually check their roving habits and lead them to become permanently located, and to depend more entirely upon the cultivation of soil for subsistence.

(PageID.7558 (emphasis added))

The Senate and President then ratified the Treaty of Detroit with few modifications, none of which are particularly relevant here. First, Gilbert proposed some minor modifications to the contours of some of the parcels because of difficulties allocating the lands within them; the Bands agreed with the modifications, and the changes were incorporated upon Senate ratification. The Senate also added a term to protect settlers with preemption claims, as it appeared that a very small

number of settlers—Gilbert references three cases in one of his letters—had pre-existing claims to parcels of land that was withdrawn from sale by the government to be given to Band members. Finally, federal officials made one additional adjustment to the lands available for selection under the Treaty in 1856, but this was again pre-approved by the Bands. The Treaty was formally ratified on April 15, 1856 and later proclaimed on September 10, 1856.

Post-Treaty Events.

While the Court's obligation is to interpret the legal meaning of the 1855 treaty, it must do so with an eye toward what the parties to the treaty—and especially the Indian signatories—understood the terms to be. Therefore, the Court must also account for the post-treaty actions between the Indians and the United States as they are at least minimally probative of the parties' understanding of the treaty's legal effect, recognizing, however, the direction of *Klamath*, that the Court cannot ignore plain treaty language which runs counter to the Tribe's claims. *Cf. Solem v. Bartlett*, 465 U.S. 463, 472, 104 S. Ct. 1161, 79 L. Ed. 2d 443 (1984) (explaining that subsequent history of land is relevant in disestablishment context to ascertain Congressional intent).

As an initial matter, the Treaty was not well-implemented. The government was slow to compile the list of eligible Indians, and even many of those who were promptly recognized as eligible did not have their selections recorded. Compounding the error, the Indian Agents responsible for passing along the selections repeatedly transmitted land descriptions rife with incorrect descriptions such that they could not be

recorded by the General Land Office. (PageID.10972–76; PageID.10951–52 (Agent Long recounting the failures of previous Indian Agents to diligently report the Indians' land selections).) There were additional failures by the government to ensure that once a selection was made and recorded, a certificate to the land issued to the selecting Indian.

The United States also failed to make some of the promised annuity payments. The failed annuity payments were problematic as they frustrated Indians from purchasing land as contemplated by the second five-year period from which the land was withheld from sale by white settlers. Ultimately, this treaty provision was suspended, once the government recognized that some eligible Indians were essentially acting as straw purchasers, using money supplied by white settlers to purchase lands from the government, and then selling to the white settlers.

There was also significant turnover among the federal officials charged with implementing the treaty terms after 1855. Gilbert and Manypenny did not remain in office long enough to see the terms of the treaty implemented. In particular, the Indian Agent for Michigan changed frequently during the time for administration of the treaty terms. There were at least four Indian Agents in Michigan after Gilbert: Smith, Fitch, Leach, and Long.

The turnover in federal office led to confusion. As early as 1862, Agent Leach lamented that the Indian settlements were "widely scattered" across Michigan. Then in 1864, Agent Leach wrote to Indian Affairs Commissioner Dole to recommend that the "Little Traverse Bay Reservation" be "enlarge[d]."

(PageID.10907.) Around the same time, Commissioner Dole wrote another Indian Affairs employee, H.J. Alvord, to request that Alvord assist Agent Leach "in negotiating treaties with the Indians of the State of Michigan." (PageID.10909.) Dole explained that the "great object" of the contemplated treaties was to "secure an abandonment of numerous smaller reservations and concentration of them upon at least three and if possible two reserves." (PageID.10909.) Specifically it would be desirable for "the Ottawas and Chippewas ... to relinquish[ ] ... their smaller reservations and concentra[te] upon ... 'the Great and Little Traverse reserves.' " (PageID.10910.)

Additionally, the federal government misconstrued Article 5 of the Treaty. The Bands had negotiated to end the artificial coupling of the Odawa and Chippewa Tribes. *See United States v. Michigan*, 471 F. Supp. at 247–48. But by the late 1860s, the treaty terms had been sufficiently muddled that the government erroneously interpreted the 1855 treaty to cease all relations with the Bands once the final annuity payment had been made—something no one had contemplated in 1855. And in fact, the federal government terminated federal recognition of the Bands in 1872.

Ultimately, it was not the executive branch which resolved the issues arising out of the 1855 Treaty, but Congress. In 1872, Congress passed an act stating that "all lands remaining undisposed in the Reservation made for the Ottawa and Chippewa" would be "restored to market." Congress passed additional acts in 1875 and 1876, building on the 1872 Act and ensuring that the Indians entitled to lands under the 1855 treaty received

their patents, but otherwise restoring the land for public sale.[1]

Finally, the Court notes that during the time period from 1855 to 1872, there was significant discussion among federal officials, Indians, and the public, of the land as "reserves" and "reservations." For example, Indians and their interpreters regularly referred to Reservations in communications with federal officials. (*See* PageID.10798 (Chief Shawwahno's headmen "got a map of their Reserve"); PageID.3987 (Chief Oshawwano went to "survey the land I pointed out to you last July for our reservation.); Medaawmaig-Gilbert, 1.8.1857, PageID.10801 ("in regard to our Reservations"); Hamlin-Fitch, 2.28.1859, PageID.10803 ("Little Traverse Reserve"); Cobmosay-Fitch, 7.4.1859, PageID.10807 (Council held "on the Ind. Reservation," and report of "very bad men on this Reservation").

Similarly, Commissioner Manypenny wrote to the Commissioner of the General Land Office in 1856 after it came to light that the General Land Office intended to issue patents to a few white settlers that had purchased land within the territory reserved to the Bands. Manypenny wrote that the withdrawal of the lands was "as fully set apart for Indian purposes" so he urged the Land Office to vacate the patents made to white settlers. (PageID.10836.) Manypenny also wrote in his 1856 Annual Report to Congress that he had directed that a blacksmith shop located at Grand Traverse to be moved "to the Reservation selected by the Indians." (PageID.7614.) Similarly, Agent Gilbert transmitted a

[1] While the Court believes this description to be an accurate summary of the Opening Acts, it expresses no opinion as to whether the lands in question were disestablished or diminished.

list of descriptions for selections of land made by the Band members in 1857: "I transmit here with list of Ottawa & Chippewa Indians ... who have already selected lands on the several reservations, with a description of the tract or parcel selected in each case." (PageID.10844 (emphasis added).) And leading up to 1872, many Annual Reports of the Commissioner of Indians Affairs to Congress regularly referred to the tracts withdrawn under the 1855 Treaty as "reserves" or "reservations." *See, e.g.*, 1857 ARCOIA, PageID.7618 (reporting that "the reserves assigned to the Ottawas and Chippewas under the late treaty have been partially surveyed.").

However, some of these references are not easily understood. For example, Indian Agent Fitch claimed in the 1858 report that the "Ottawas and Chippewas have twelve reservations". 1858 ARCOIA, PageID.7633. By the next year, Agent Fitch wrote that the Ottawas and Chippewa had *seventeen* reservations, which had been created "under the treaty of 1855." 1859 ARCOIA, PageID.7658. And Fitch's error was continued in later reports. *See* 1860 ARCOIA, PageID.7664 (reporting on the "seventeen reservations in this agency"); 1861 ARCOIA, PageID.7669 (reporting on visits to "most of their reservations"); 1863 ARCOIA, PageID.7683-7685 (reporting on the "fourteen reservations" of the Ottawa and Chippewa and advocating for consolidation on "the Little Traverse reservation"). 1867 ARCOIA, PageID.7724 (the "reservations are 14 in number.").

It is not at all clear how Fitch arrived at this number, as even the Tribe's interpretation of the Treaty, as asserted in this case, is that it created eight reservations via the land descriptions contained in the numbered

paragraphs within Article I. These seemingly erroneous reports are just another example of the confusion that arose during treaty implementation.

One possible explanation for the inflated number of "reservations" is that the individual band members eligible for land had made their selections near each other. Leach, not having been at the Treaty Council, could have considered these groupings to be "reservations," as the land was not yet available for settlement by non-Indians. In any event, the reports written by Agent Leach and the other Indian Agents that followed him have less evidentiary value based on this peculiarity.

II.

A. Summary Judgment

Summary judgment is appropriate only if the pleadings, depositions, answers to interrogatories and admissions, together with the affidavits, show there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *see, e.g.*, *Tucker v. Tennessee*, 539 F.3d 526, 531 (6th Cir. 2008).

The burden is on the moving party to show that no genuine issue of material fact exists, but that burden may be discharged by pointing out the absence of evidence to support the non-moving party's case. *Bennett v. City of Eastpointe*, 410 F.3d 810, 817 (6th Cir. 2005) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)). The facts, and the inferences drawn from them, must be viewed in the light most favorable to the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2505,

91 L. Ed. 2d 202 (1986). Once the moving party has carried its burden, the non-moving party must set forth specific facts, supported by record evidence, showing a genuine issue for trial exists. Fed. R. Civ. P. 56(e).

"The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson*, 477 U.S. at 255, 106 S. Ct. 2505 (citing *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 158–59, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970)). The question, then, is "whether the evidence presents a sufficient disagreement to require submission to the jury or whether it is so one-sided that [the moving] party must prevail as a matter of law." *Anderson*, 477 U.S. at 251–252, 106 S. Ct. 2505; *see, e.g.*, *Resolution Trust Corp. v. Myers*, 9 F.3d 1548 (6th Cir. 1993) (citing *Anderson*, 477 U.S. at 249, 106 S. Ct. 2505) (noting the function of the district court "is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial").

B. Treaty Construction

As mentioned in the opening paragraphs, the Court must "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 v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196, 119 S. Ct. 1187, 143 L. Ed. 2d 270 (1999) (quoting *Choctaw Nation v. United States*, 318 U.S. 423, 432, 63 S. Ct. 672, 87 L. Ed. 877 (1943)). Once versed in the relevant history, "[c]ourts cannot ignore plain language that, viewed in historical context and given a 'fair appraisal,' runs counter to a tribe's later claims." *Or.*

Dep't of Fish & Wildlife v. Klamath Indian Tribe, 473 U.S. 753, 774, 105 S. Ct. 3420, 87 L. Ed. 2d 542 (1985).

An examination of the historical context is especially important because it "provides insight into how the parties to the Treaty understood the agreement[,]" and the Court must give effect to the treaty terms "as the Indians themselves would have understood them." *Mille Lacs*, 526 U.S. at 197, 119 S. Ct. 1187. Additionally, to the extent that the Treaty contains ambiguities, they must be "resolved from the standpoint of the Indians," *Winters v. United States*, 207 U.S. 564, 576–77, 28 S. Ct. 207, 52 L. Ed. 340 (1908), so long as the words used "are susceptible of a more extended meaning than their plain import as connected with the tenor of their treaty." *Soaring Eagle Casino v. NLRB*, 791 F.3d 648, 656 (6th Cir. 2015).

III.

A. Preliminary Matters

The briefing on the motions for summary judgment has raised several distinct legal issues that bear on the ultimate question of whether a reservation was created. For example, one set of Intervenor-Defendants claims that the Court is not required to reach the historical record because the terms of the 1855 Treaty are clear on their face. But as the Court has explained, these Defendants are incorrect, and the Court must include and account for historical context in its analysis. *Mille Lacs*, 526 U.S. at 196, 119 S. Ct. 1187; *Klamath*, 473 U.S. at 774, 105 S. Ct. 3420.

Similarly, there is a debate among the litigants about the use of treaties to which the Tribe's predecessors were not a party. Put simply, several other treaties

negotiated by Commissioner Manypenny—from around the same time but involving other Indian tribes—use standard language to establish Indian reservations. The Defendants, to varying extents, rely on these other treaties to suggest that the 1855 Treaty of Detroit did not create an Indian reservation.

The Court will not consider such treaties when assessing whether an Indian reservation was created. The United States Supreme Court explicitly rejected a comparable approach in *Mille Lacs*. 526 U.S. at 202, 119 S. Ct. 1187 ("An argument that *similar* language in two Treaties involving different parties has precisely the same meaning reveals a fundamental misunderstanding of basic principles of treaty construction." (emphasis added)). The Supreme Court's position was grounded in the Indian Canons; injecting the history and context of another tribe (with a different background, potentially different language, and different priorities) would eviscerate the requirement that the Court view the treaty from the signatory tribe's perspective. *See id.* ("[A]n analysis of the history, purpose, and negotiations of *this Treaty* leads us to conclude that the Mille Lacs Band did not relinquish their 1837 Treaty rights in the 1855 Treaty." (emphasis in original)).

Now, the Supreme Court *did* compare treaties involving different tribes in *Mille Lacs*, as the Defendants point out. However, the Court did so to conclude that an Indian tribe's usufructuary rights were *not* extinguished:

> The entire 1855 Treaty, in fact, is devoid of any language expressly mentioning—much less abrogating—usufructuary rights. Similarly, the Treaty contains no language providing money for

> the abrogation of previously held rights. These omissions are telling because the United States treaty drafters had the sophistication and experience to use express language for the abrogation of treaty rights. In fact, just a few months after Commissioner Manypenny completed the 1855 Treaty, he negotiated a Treaty with the Chippewa of Sault Ste. Marie that expressly revoked fishing rights that had been reserved in an earlier Treaty. *See* Treaty with the Chippewa of Sault Ste. Marie, Art. 1, 11 Stat. 631 ("The said Chippewa Indians surrender to the United States the right of fishing at the falls of St. Mary's ... secured to them by the treaty of June 16, 1820").

Id. at 196, 119 S. Ct. 1187. In other words, the lesson of *Mille Lacs* is that the use of treaties involving other Indian tribes is not a two-way street. While comparator treaties might be useful when deciding whether the United States had negotiated for the extinguishment of a pre-existing right, they cannot be used to assess what an Indian tribe understood the language of a treaty to mean.

The Court also notes that treaties previously negotiated by the same Indian tribe *can* be considered for the same reasons that other treaties involving other tribes cannot. Because both the treaty at issue and any prior treaties are part of the tribe's history, there is no risk that the use of language would be understood differently by the tribe's members. This practice is supported by *Mille Lacs* as well, because the Court interpreted an 1855 Treaty in part by reference to an 1837 Treaty involving the same Indian tribe. *See, e.g.*,

526 U.S. at 195–97, 119 S. Ct. 1187. Accordingly, the Court will consider the 1836 Treaty of Washington in its overall assessment of the historical context at issue now.

Finally, the litigants offer up substantially different interpretations of the most fundamental legal concept now at issue: What does it take for the United States to create an Indian reservation, as that term is used in 18 U.S.C. § 1151?

As a general matter, Congress defined Indian Country as: (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government; (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state; and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same." 18 U.S.C. § 1151. Courts apply these definitions of Indian Country in both civil and criminal matters, although § 1151 is technically within the criminal code. *See, e.g.*, *Buzzard v. Oklahoma Tax Comm'n*, 992 F.2d 1073, 1076 (10th Cir. 1993) ("For purposes of both civil and criminal jurisdiction, the primary definition of Indian country is 18 U.S.C. § 1151.").

The question, therefore, is what is required to create an Indian Reservation under § 1151(a)? Several cases are worth discussion on this point. First, in *Donnelly v. United States*, the defendant had been convicted in federal court of a murder that occurred within the limits of an Indian reservation known as the "Extension of the Hoopa Valley Reservation." 228 U.S. 243, 33 S. Ct. 449, 57 L. Ed. 820 (1913). The issue was whether the territory

constituted "Indian Country" to convey jurisdiction to the federal courts. The Court ultimately concluded that it was, as "nothing [could] more appropriately be deemed 'Indian Country' ... than a tract of land that, being a part of the public domain, is lawfully set apart as an Indian reservation." *Id.* at 269, 33 S. Ct. 449. Notably, this case was decided well before Congress passed § 1151.

United States v. John, a post § 1151 case, involved an Indian charged and convicted in federal court for assault. 437 U.S. 634, 98 S. Ct. 2541, 57 L. Ed. 2d 489 (1978). There, the lower courts held that the Indian Reorganization Act did not apply to the Choctaw Reservation, because at the time it was enacted, the Mississippi Choctaw were not a federally recognized Indian Tribe. Thus, when the Secretary of the Interior issued a proclamation in 1944 purporting to proclaim a reservation for the Mississippi Choctaw under the authority granted by the Indian Reorganization Act, it was ineffective. Accordingly, the Fifth Circuit had vacated the conviction because it concluded that the district court lacked jurisdiction because the assault had occurred on land that was not "Indian Country."

The issue for the Supreme Court was whether the land was "Indian Country," when it had been: (1) purchased by the United States for the Choctaw, (2) later taken into trust, and (3) later still, been proclaimed to be a reservation. It first noted that the principal test for assessing whether land was an Indian reservation was "whether the land in question 'had been validly set apart for the use of the Indians as such, under the superintendence of the Government.'" *Id.* at 649, 98 S. Ct. 2541 (quoting *United States v. Pelican*, 232 U.S. 442,

34 S. Ct. 396, 58 L. Ed. 676 (1914)). It then concluded that "[t]he Mississippi lands in question here were declared by Congress to be held in trust by the Federal Government for the benefit of the Mississippi Choctaw Indians who were at that time under federal supervision." *Id.* Accordingly, it found that "[t]here is no apparent reason why these lands, which had been purchased in previous years for the aid of those Indians, did not become a "reservation," at least for the purposes of federal criminal jurisdiction at that particular time." *Id.*

Next up is *Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 118 S. Ct. 948, 140 L. Ed. 2d 30 (1998). There, the Supreme Court's task was to interpret "dependent Indian Community" as that term was used in 18 U.S.C. § 1151(b). The *Venetie* Court noted that prior to the passage of § 1151(b), it had decided a series of cases and concluded that in some circumstances both "dependent Indian Communities" and "Indian allotments" were "Indian Country." *Id.* at 528–29, 118 S. Ct. 948. In a footnote, the Court also explained that in addition to Indian allotments and dependent Indian communities, it had held, "not surprisingly, that Indian reservations were Indian Country." *Id.* at 528 n.3, 118 S. Ct. 948 (citing *Donnelly*, 228 U.S. at 243, 33 S. Ct. 449).

Finally, the Supreme Court again used the three-prong *John* test in *Oklahoma Tax Commission v. Citizen Band*, albeit with little discussion, and in the context of a resolving a claim of tribal sovereign immunity. 498 U.S. 505, 511, 111 S. Ct. 905, 112 L. Ed. 2d 1112 (1991) (quoting *John*, 437 U.S. at 648–49, 98 S. Ct. 2541). Of note, the Court rejected Oklahoma's attempt to establish a different test for Indian Country, which

would have distinguished trust land from reservations. *Id.*

The Defendants rely on the *John* test, asserting that an Indian Reservation is created by: (1) an action setting apart land; (2) a requirement that the land set apart be used "as such," meaning used for Indian purposes; and (3) federal superintendence over the land. The Tribe sees it differently. Under its view of the law, the reservation-creation test is "flexible," and simply requires some federal action creating a "set aside" of land. It relies primarily on *Donnelly* for this proposition.

After a full review of the caselaw, the Court does not find the Tribe's position persuasive; there is no basis for concluding that the test for whether a reservation was created should be different in this case and distinguished from the chosen test the Supreme Court has repeatedly cited to evaluate whether a reservation was created.

While the *Venetie* Court cited *Donnelly* in a footnote—solely to establish that Indian reservations are "Indian Country"—it does not mean that the *Donnelly* "test" is the prevailing standard for creation of an Indian reservation. If it was the prevailing standard, the Court would have used it in *Citizen Band* just two terms later. And as recently as March 2019, other federal district courts have applied the *John* test when interpreting a treaty to assess whether a reservation was created. *See Oneida Nation v. Village of Hobart*, 371 F. Supp. 3d 500, 509 (E.D. Wis. 2019). Accordingly, when interpreting the 1855 Treaty in historical context, and with an eye toward what the Indian signatories understood, the Court will assess whether the Treaty "validly set apart" the disputed lands "for the use of the Tribe as such, under the superintendence of the

Government." *Citizen Band*, 498 U.S. at 511, 111 S. Ct. 905.

B. The 1855 Treaty and the Creation of a Reservation

Having dispatched with the preliminaries, the Court now takes up the core dispute: Whether the terms of the 1855 Treaty can be reasonably read to create a reservation from the perspective of the signatory Bands.

1. Pre-Treaty Negotiations

The Court will not repeat the lengthy historical record here, but a few points bear emphasis.

First, the intentions of the United States in agreeing to negotiate a treaty with the Tribe's predecessors are clear from the historical record. By 1855, officials had for years debated the best way to resolve the government's outstanding obligations under the 1836 Treaty, and how best to navigate the conflicts created by the deluge of white settlers that were descending upon Michigan, in increasingly close proximity to several Indian tribes. Some officials, like Agent Gilbert, favored the creation of reservations for the Bands.

However, when the time for treaty negotiations drew near, Secretary McClelland requested that Gilbert's superior, Commissioner Manypenny set forth his view for the government's handling of the negotiations. Manypenny did so in his May 21, 1855 letter, and his view diverged significantly from the proposals Gilbert had continually promoted. Commissioner Manypenny wrote that the government ought to "take measures" to "secure permanent homes to the Ottawas and Chippewas, either on the

reservations or on other lands in Michigan belonging to the Government, *and at the same time, to substitute as far as practicable, for their claim to lands in common, titles in fee to individuals for separate tracts*." Based on this language, Manypenny clearly departed from Gilbert when it came to the creation of a reservation because he urged the government to provide permanent homes for the Indians by giving them individual allotments, to be held in fee, in exchange for their claims to lands held in common.

However, Manypenny's proposal also created a problem. Where would the government get the land to give to the Bands? The first dependent clause addresses precisely this question because the lands would come from "either ... the reservations or ... other lands in Michigan belonging to the Government[.]"

Manypenny's use of "the reservations" is instructive because it makes clear that he is referring to *existing* reservations, as opposed to creating new reservations. This is a clear reference to the reservations created by the 1836 Treaty. Keep in mind, these reservations were temporary, but the Bands had been allowed to remain on them throughout the 1840s and up until 1855 because the lands had not been required for white settlement. Accordingly, Manypenny was suggesting that because the temporary reservations had never been settled, the government could draw from those lands to provide permanent homes to the individual Indians, who hold fee title to their separate parcel of land.

In the same letter, Manypenny also explained that the outstanding $200,000 payment from the United States to the Tribes for relinquishment of the reservations could be reduced by "the value of the lands

which they might receive in lieu of the old reservations[,]" with the aggregate value to be paid "in such manner as would be acceptable and beneficial to them—being invested or paid as might hereafter be agreed on." (*Id.*)

In summary then, Manypenny's letter—as adopted by McClelland—identified the two primary objectives of the United States for the impending treaty negotiations: (1) the provisioning of permanent homes for Indians who had signed the 1836 Treaty, with said homes being broken into "separate tracts" with the title in fee belonging to the individual, rather than being held in common by the Band; and (2) the settlement and consolidation of monies and services owed to the Indians under previous treaties.

Second, the Indian motives in the lead-up to the 1855 Treaty are also readily apparent because the Bands wrote a petition to the United States explaining their objectives. In part, they requested that the interest payments they were receiving under the Treaty of 1836 be dispensed to their children "*to enable them to pay for lands and the Taxes*[.]" They also expressed a desire to settle the outstanding obligations for the same reasons: "[W]e need means to buy more lands and make improvements before the land shall be taken by white settlers near us." Accordingly, the unmistakable intention of the Bands going into the treaty negotiations was securing additional monetary compensation so that they could continue to successfully buy up lands as they had been since at least the 1840s.

2. Treaty Negotiations

The Court also considers the Treaty Journal strong evidence to be considered within the broader historical context. The Supreme Court repeatedly relied on such a treaty journal to divine the Indian understanding of the treaty at issue in *Mille Lacs*. *See, e.g.*, 526 U.S. at 185, 197, 222, 119 S. Ct. 1187.

The Treaty Journal captures the sentiment of the pre-negotiation history just discussed. Manypenny and Gilbert repeatedly emphasized that the lands would be given to individual Indian families, with patents, so that the lands would remain with each family indefinitely. Manypenny explained that the Band members would hold lands just as he did.

The pair also assuaged concerns among the representatives that the selected lands would be worthless or uninhabitable. Their solution was to allow each Band to generally designate the region of Michigan where the Band wished to reside so that the Government could withdraw the land from public sale without further delay to prevent further advances by white settlers. Then, once the land was withdrawn from sale, the individuals entitled to land would be allowed to make their selection after doing the necessary exploration and evaluation to ensure that the land they selected would be suitable for settlement. Finally, Gilbert and Manypenny emphasized that the government wanted to end its control and administration of the Tribes' resources because continued federal superintendence over the Tribes' lands and resources would inhibit their ability to assimilate into "civilized" life.

Manypenny's negotiating tactics mirror his ideal course of action for the government, as described in his letter to Secretary McClelland. First, he offered separate tracts of land to the Indians, for which each family would hold title in fee in exchange for settling the outstanding 1836 Treaty obligations and without providing for any lands to be held in common as a reservation. And then he consolidated the monetary obligations owed to the Bands and established an end-date for the United States' continued administration of the funds.

3. The 1855 Treaty

Ultimately, "[c]ourts cannot ignore plain language that, viewed in historical context and given a 'fair appraisal,' runs counter to a tribe's later claims." *Or. Dep't of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 774, 105 S. Ct. 3420, 87 L. Ed. 2d 542 (1985). Therefore, since the Court has set forth what it views to be the relevant pre-Treaty historical context, it will now evaluate the legal effect of the 1855 Treaty.

a. Have the lands been "validly set apart" for use as a reservation?

The first element for creation of a reservation is a federal set-aside of land for use as an Indian reservation. *John*, 437 U.S. at 648–49, 98 S. Ct. 2541. There is no dispute that Article 1 allocates land. However, the parties disagree as to whether the terms amount merely to individual allotments or whether they were intended to create a reservation. The Court thus must turn to the terms themselves.

Article I provides:

The United States will withdraw from sale for the benefit of said Indians as hereinafter provided, all the unsold public lands within the State of Michigan embraced in the following descriptions to wit:[2]

* * *

> *Third*, for the Beaver Island,—High Island, and Garden Island in Lake Michigan, being fractional townships 38 and 39 north, range 11 west—40 north, range 10 west, and in part 39 north, range 9 and 10 west.
>
> *Fourth*, for the Cross Village, Middle Village, L'Arbrechroche and Bear Creek Bands, and of such Bay Du Noc and Beaver Island Indians as may prefer to live with them, townships 34 to 39, inclusive north, range 5 west—townships 34 to 38, inclusive north, range 6 west,—townships 34, 36, and 37, north, range 7 west, and township 34 north, range 8 west.

* * *

The United States will give to each Ottowa and Chippewa Indian being the head of a family, 80 acres of land, and to each single person over twenty-one years of age, 40 acres of land, and to each family of orphan children under twenty-one

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[2] Article I then delineates parcels of land for each of the eight Bands or groups of Bands present at the negotiations in separate, numbered paragraphs. The Court has included only Paragraphs Third and Fourth below because those paragraphs relate to the Tribe's predecessors.

years of age containing two or more persons, 80 acres of land, and to each single orphan child under twenty-one years of age, 40 acres of land to be selected and located within the several tracts of land hereinbefore described under the following rules and regulations:

Each Indian entitled to land under this article may make his own selection of any land within the tract reserved herein for the band to which he may belong—Provided, That in case of two or more Indians claiming the same lot or tract of land, the matter shall be referred to the Indian agent, who shall examine the case and decide between the parties.

For the purpose of determining who may be entitled to land under the provisions of this article, lists shall be prepared by the Indian agent, which lists shall contain the names of all persons entitled, designating them in four classes.... Such lists shall be made and closed by the first day of July, 1856, and thereafter no applications for the benefits of this article will be allowed.

At any time within five years after the completion of the lists, selections of lands may be made by the persons entitled thereto, and a notice thereof, with a description of the land selected, filed in the office of the Indian agent in Detroit, to be by him transmitted to the Office of Indian Affairs at Washington City.

All sections of land under this article must be made according to the usual subdivisions; and

fractional lots, if containing less than 60 acres, may be regarded as forty-acre lots, if over sixty and less than one hundred and twenty acres, as eighty-acre lots. Selections for orphan children may be made by themselves or their friends, subject to the approval of the agent.

After selections are made, as herein provided, the persons entitled to the land may take immediate possession thereof, and the United States will thenceforth and until the issuing of patents as hereinafter provided, hold the same in trust for such persons, and certificates shall be issued, in a suitable form, guaranteeing and securing to the holders their possession and an ultimate title to the land. But such certificates shall not be assignable and shall contain a clause expressly prohibiting the sale or transfer by the holder of the land described therein.

After the expiration of ten years, such restriction on the power of sale shall be withdrawn, and a patent shall be issued in the usual form to each original holder of a certificate for the land described therein, Provided That such restriction shall cease only upon the actual issuing of the patent; And provided further That the President may in his discretion at any time in individual cases on the recommendation of the Indian agent when it shall appear prudent and for the welfare of any holder of a certificate, direct a patent to be issued. And provided also, That after the expiration of ten years, if individual cases shall be reported to the President by the Indian agent, of persons who may then be incapable of managing

their own affairs from any reason whatever, he may direct the patents in such cases to be withheld, and the restrictions provided by the certificate, continued so long as he may deem necessary and proper.

* * *

All the land embraced within the tracts hereinbefore described, that shall not have been appropriated or selected within five years shall remain the property of the United States, and the same shall thereafter, for the further term of five years, be subject to entry in the usual manner and at the same rate per acre, as other adjacent public lands are then held, by Indians only; and all lands, so purchased by Indians, shall be sold without restriction, and certificates and patents shall be issued for the same in the usual form as in ordinary cases; and all lands remaining unappropriated by or unsold to the Indians after the expiration of the last-mentioned term, may be sold or disposed of by the United States as in the case of all other public lands.

Nothing contained herein shall be so construed as to prevent the appropriation, by sale, gift, or otherwise, by the United States, of any tract or tracts of land within the aforesaid reservations for the location of churches, school-houses, or for other educational purposes, and for such purposes purchases of land may likewise be made from the Indians, the consent of the President of the United States, having, in every instance, first been obtained therefor.

> It is also agreed that any lands within the aforesaid tracts now occupied by actual settlers, or by persons entitled to pre-emption thereon, shall be exempt from the provisions of this article; provided, that such pre-emption claims shall be proved, as prescribed by law, before the 1st day of October next.
>
> Any Indian who may have heretofore purchased land for actual settlement, under the act of Congress known as the Graduation Act, may sell and dispose of the same; and, in such case, no actual occupancy or residence by such Indians on lands so purchased shall be necessary to enable him to secure a title thereto.

Article I thus accomplishes the broad withholding of land envisioned by Manypenny to solve the land-selection problem (raised by the Bands during the Treaty negotiations) in its first breath; the United States "agreed to withdraw from sale," all of the unsold public land within the eight numbered paragraphs that followed for the "benefit of the Indians."

In other words, Paragraphs 3rd and 4th identified the broader parcels of land from which heads of households within the Bands would carve out their 80-acre sections as promised in the Treaty Journal—a promise that is effectuated by the very next paragraph:

> "The United States will give to each Ottowa and Chippewa Indian being the head of a family, 80 acres of land... to be selected and located within the several tracts of land hereinbefore described under the following rules and regulations: ...."

Accordingly, the most basic treaty terms relating to land are clear and unambiguous from the face of the Treaty. The United States obligated itself to withdraw from public sale swaths of land, as had been designated by the various Bands at the Treaty Council. The purpose of the withdrawal was to ensure that adequate land was available to give every head of a family 80 acres of land (with smaller parcels for orphans and other eligible Indians).

But the last clause in the foregoing paragraph makes clear that the land is subject to additional "rules and regulations[.]" Foremost among these additional rules is a requirement that "[e]ach Indian entitled to land under this article may make his own selection of any land within the tract reserved herein for the band to which he may belong." This additional restriction meant that entitled Indians were limited to selecting land from within the bigger parcel chosen by their representative at the Treaty Council.

After these geographic terms establishing which lands would be withdrawn from sale for each of the Bands, Article I continues, setting forth additional procedures for determining eligibility, documenting land selections, and disposing of the lands once Indian selections were finished.

First, the Treaty directs the Indian Agent to prepare a list of names for persons eligible to take lands under the treaty terms. Once the list of names was completed, eligible Indians had five years to make their selections; another nod to the concerns of Band representatives that the persons selecting land should have time to see the lands in person and carefully decide on a parcel before making the formal selection. Once a selection of

land was made, it was the Indian Agent's duty to transmit the land description to the government in Washington to begin the process of issuing a patent to the landholder.

The patent process was also laid out in comprehensive detail by the Treaty. First, once a selection was made, the person selecting the land could take immediate possession. The United States was also obligated to issue a certificate to memorialize the selection, which also started the clock on the non-alienation period: "After the expiration of ten years, such restriction on the power of sale shall be withdrawn, and a patent shall be issued in the usual form to each original holder of a certificate for the land described therein[.]"

In addition to the land *selection* procedures, the Treaty also allows for a second five-year window for Indians to make additional land *purchases*. In this second window, "[a]ll the land embraced within the tracts hereinbefore described,"—that is, all of the land identified in the numbered paragraphs—"that shall not have been appropriated or selected within five years" remained the property of the United States. However, the United States agreed to allow the signatory Bands the exclusive right to purchase the lands with "entry in the usual manner and at the same rate per acre, as other adjacent public lands are then held[.]" With respect to lands purchased in this second window, the United States would issue patents immediately and there would be no restraint on alienation.

Finally, after both five-year windows closed, the parties contemplated that there would remain land within the designated parcels that had not been selected

or purchased. These lands could "be sold or disposed of by the United States as in the case of all other public lands."

When the Treaty is placed in the proper historical context and interpreted with that context in mind, the only reasonable conclusion is that the plain and unambiguous terms do not create a federal set aside of land for use as a reservation, nor did the Tribe's predecessors understand them to do so. As described, Article I clearly and methodically laid out what the parties intended to accomplish:

> (1) Band representatives at the Treaty Council identified a particular area of Michigan where their members would be able to select a 40 to 80 acre parcel of land depending on their familial status;
>
> (2) the United States withdrew the designated lands from public sale so they would not otherwise be sold and would remain available for selection by individual band members;
>
> (3) the United States (through the Indian Agent) would compile a list of eligible members within a year;
>
> (4) The individual Band members were then allowed five years to make their land selection from the parcel designated by their representative at the Treaty Council;
>
> (5) Once a selection of land was made, the United States issued a certificate, which authorized the selector to possess the land, but which would contain a restraint on alienation for ten years;

> (*5*) Then, once the five-year term for land selection expired, all the lands not selected "remain[ed] the property of the United States," and the government continued to withhold them from public sale, to allow Band members purchase the unselected land at the same prices and using the same methods as other public land was sold;
>
> (*6*) Finally, ten years after the Band members were first able to make their selections, any land that had gone unselected and unpurchased could be "sold or disposed of by the United States as in the case of all other public lands."

These terms are perfectly consistent with Manypenny's stated desire that the United States provide permanent homes to the Ottawa and Chippewa by providing them with individual tracts of land, with the title to the land being held in fee by each head of household. And it is precisely what was debated and painstakingly negotiated during the Treaty Council, as evidenced by the Treaty Journal.

With this understanding, the Court concludes that the 1855 Treaty failed to create an Indian reservation because it did not create a federal set aside of land for Indian purposes. *See Citizen Band*, 498 U.S. at 511, 111 S. Ct. 905.

b. Did the Treaty establish ongoing federal superintendence?

In addition to creating a federal set-aside of land for Indian purposes, the Treaty must demonstrate ongoing federal superintendence over the land to meet the elements of a reservation. It fails to do so.

First, the parties agreed that after the temporary restraint on alienation, the land would be owned by the individuals, who would hold patents, and the lands would be freely alienable: "After the expiration of ten years, such restriction on the power of sale shall be withdrawn, and a patent shall be issued in the usual form to each original holder of a certificate for the land described therein[.]" While the Treaty provided a narrow exception for Indians deemed to be incompetent, the expectation of the Bands was that certificate-holders would receive their patents after the temporary restraint on alienation lifted and that they would be free to hold or dispose of the lands as white settlers held their lands. Additionally, there is no evidence in the record that a patent was ever withheld from an Indian certificate-holder on the basis of incompetency. Moreover, any lands that went unpurchased and unselected could be freely disposed of "as other public lands"—meaning that they could be made available for homesteading, used as a military installation, or for any other purpose as decided by the federal government.

For the land *purchased* by the Indians—as opposed to land *selected*, there were not even temporary restraints on alienation or other indicia of ongoing federal superintendence: "[A]ll lands, so purchased by Indians, shall be sold without restriction, and certificates and patents shall be issued for the same in the usual form as in ordinary cases[.]" Accordingly, the Bands expected to be able to freely dispose of these lands immediately. And this did occur; there were reports of Indians purchasing land, but then selling the lands to white settlers.

While this practice ultimately resulted in the suspension of the land-purchasing window, it provides a vivid demonstration of the *lack* of federal superintendence. The government was able to suspend further purchases by Indians because the lands which had not yet been selected or purchased remained property of the United States.

However, the government was not otherwise able to intervene into the straw-purchases made by white settlers because once a sale between the government and a Band member was consummated, the government lacked any continuing interest in the land, and thus lacked any ability to regulate the lands under the 1855 Treaty. If the parties understood the land to be set aside as an Indian reservation, the United States could have (and likely would have) rescinded the sales by the Indians because the sales frustrated the primary objective of the Treaty—establishing "permanent homes" for the Odawa and Chippewa Indians. Instead, the United States could only suspend further sales to Indians to prevent any additional straw purchases.

Next, Article Two establishes that the United States would pay a total of $538,400 to the Bands in various sums and at various rates, but that all the payments would be concluded within ten years. Recall the discussion of the "little swan" from the Treaty Journal: While the Bands wished for ongoing federal oversight through the continued annuities payments, the government was not interested in such an arrangement. Gilbert even went so far as to borrow the metaphor of the little swan to explain why the government would not accept such an arrangement. Under these circumstances, the Bands clearly understood that the

1855 Treaty did not provide for ongoing federal superintendence.

The other articles of the Treaty do not implicate federal superintendence in any fashion. Article 3 released the government from any of the promises it made under the 1836 Treaty. Article 4 provided for the continued provision of interpreters at Sault Ste. Marie, Mackinac, and the Grand River for five years, or longer if the President deemed it necessary. Providing interpreters at government expense does not rise to the level of superintendence. The remaining Articles (*5* & *6*) do not create any substantive rights or obligations and thus cannot bear on the question of reservation creation.

Under these circumstances, the Treaty lacks the hallmarks of ongoing federal superintendence and the Tribe's claim that a reservation exists must fail for this additional reason. *See Citizen Band*, 498 U.S. at 511, 111 S. Ct. 905.

IV.

The Tribe's arguments in favor of a reservation having been created are not persuasive.

First, as a general matter, the Tribe opts not to offer a coherent recitation of the relevant historical context or of the 1855 Treaty. It instead provides a seemingly never-ending series of tables of "sample record facts" which it then disputes with fragmentary quotations, divorced of their context and quoted in isolation. By way of example, refer to the Tribe's Table 4, which is reproduced below. (PageID.11839–41.)

Table 4: Sample record facts contrary to State's claim that the Treaty Negotiators agreed to "unrestricted, individual land ownership" not a permanent reservation. Br. PageID.9666-9669.	
McClelland-President, 4.12.1855, JA.113, PageID.8343	Recommending setting aside lands to be to the "greatest possible extent separated from evil example a [sic] annoyance of unprincipled whites who might be suposed [sic] to settle" near or among the Indians.
Manypenny-McClelland, 4.25.1855, JA.114, PageID.8346	Recommending that they be "concentrated upon suitable locations" like those who have had "fixed locations . . ."
Manypenny-Gilbert, 5.11.1855, PageID.3983	"[T]he whole subject of their alleged claims and unsettled business is now under the consideration of the department, as well as the propriety of at once locating them permanently upon reservations."
Tract Book, T38N, R6W, PageID.3822	Tract book representative of the Emmet and Charlevoix County withdrawals marked "This Twp reserved for Indian purposes by Order of the President May 14, 1855. See instructions to R&R [Register & Receiver] May 16, 1855."
1855 Journal, JA.10, PageID.7156	"This treaty is for the permanent benefit of you & your children & we have not talked of its provisions with a forked tongue."

Id., PageID.7135	Manypenny, "The Government is desirous to aid you in settling upon permanent homes."
Id., PageID.7140	Shawwasing, "The land where we come from is good. We want to locate there . . . [w]e consider this land a gift."
Id., PageID.7142	Gilbert, "We have looked over the maps since yesterday & have been compelled to change your locations in some respects; but this only changes the boundaries . . ." Gilbert, "What the Government wants is for all Indians to share alike . . ."
Id., PageID.7144	Manypenny, "[A]ll should have permanent homes" secured by "good, strong papers"
Id., PageID.7146	Manypenny, "It is our design now to give in the language of the [1836] Treaty a 'suitable home.'"
Id., PageID.7156	Manypenny, "This treaty is for the permanent benefit of you & your children & we have not talked of its provisions with a forked tongue."

Valentine, TA.123, PageID.11074-11077	"The importance of patents is clear, as they provide the legal means of protecting the Chippewas from ever being removed from their reservation." Describing Ojibwe use of "permanent homes" and "strong papers" as terms "guaranteeing and safeguarding ownership[.]" Explaining "The Concept of Patent and Deed in the Ojibwe Language" and the importance of Commissioner Manypenny's discussion of strong papers. Describing the "lack of direct equivalents in Ojibwe for almost every land term in the treaty[.]" Describing the single Anishnabemowin word for both patents and trust certificates
Valentine Rebuttal, TA.152. PageID.11347-11376	Linguistic analysis demonstrating that the Indian negotiators understood that the 1855 Treaty provided permanent homes in "bounded areas that would have been understood as reservations."
Id., PageID.11363-11369	Discussing translation of the word "reservation"
St.Br.Ex.B, PageID.9710	The Indians understood that they "will receive patents for [their] lands, which will be the establishment of permanent occupation of your Reservations, which you will never be ordered to leave."

Manypenny-Hendricks, 4.8.1856, TA.66, PageID.10836	Describing lands "set apart for Indian purposes"
Smith-Dougherty Letter, 2.8.1858, TA.74, PageID.10857	Concerning cancellation of non-Indian claims in "Ind. Reserve lands"
1867 ARCOIA, JA.66, PageID.7725	Stating "reservations were set apart for the sole benefit of the Indians"
Wilson-Taylor, 5.5.1868, TA.91, PageID.10903	Stating that certain tracts of land, "having been withdrawn and reserved" under the 1855 Treaty were not available for settlers
Hoxie, TA.153, PageID.11382- 11387	Historical analysis of the 1855 Treaty considering contemporaneous understanding of public land law and federal Indian policy

Many of the entries within the table are misleading. Refer to the second entry within the table, which reads:

Manypenny-McClelland, 4.25.1855	• Recommending that they be "concentrated upon suitable locations" like those who have had "fixed locations"

Here's what Manypenny actually wrote:

> There is no prospect of their ever being willing to emigrate, *nor does Michigan desire to have them expelled*, *but will consent to their being concentrated upon suitable locations*, where their comfort and improvement can be cared for

> and promoted without detriment to the State or individuals.

(PageID.8346 (emphasis added).) The Tribe's attribution of the quote is thus incorrect, as Manypenny was not *recommending* anything; the letter laid out in objective fashion the issues the Bands were experiencing in Michigan and the State's attitude towards them. (*Id.*)

And not only is the entry misleading, but Table 4 is conspicuously devoid of reference to Manypenny's May 21, 1855 letter, where he *did* make a recommendation to Secretary McClelland—one that does not support the Tribe's position. As previously discussed, Manypenny wrote that "as far as practicable" the United States should create permanent homes for the Bands by providing separate tracts of land to be held by individuals in fee. It was this recommendation that McClelland endorsed, and which became the official policy position of the federal government going into the Treaty negotiations. McClelland's May 21 letter also undercuts the Tribe's reliance on the other internal federal communications that predate it, contained in Entries 1–3.

Additionally, Manypenny and Gilbert confirmed after their negotiations that this objective had been achieved. Gilbert reported that the "main feature" of the 1855 Treaty was "a provision securing to each family and to such single persons as are provided for, a home in Michigan[.]" (PageID.7558) Manypenny summarized the effect of the treaty by explaining that the "Indians are to have assigned permanent homes to be hereafter confirmed to them in small tracts, in severalty." (PageID.7532.)

Now consider Entry 7 to Table 4, which is a quotation from the Treaty Journal:

PageID.7140	• Shawwasing, "The land where we come from is good. We want to locate there . . . [w]e consider this land a gifts."

Shawwasing's full statement reads:

> I have come forward to speak my mind upon the subject [settling the Bands' outstanding claims]. I accept your proposals. I will not differ from my brethren. I speak for those who live on the north side of the Straits of Macinac. Knowing that you wish us to be of one mind I say for the three bands North of the Straits, that we wish to make one location, together. The land where we come from is good. We want to locate there. *We wish you to know that some of us have bought lands. We have now a missionary with us to teach us the good way. We wish you to give us patents wherever we locate.* We consider this land a gift.

(PageID.7140 (emphasis added).)

Thus, when the language strategically omitted by the Tribe is returned to Shawwasing's statement and read in its proper context, the record demonstrates that he wanted to communicate that some of the Indians within his Bands had already been purchasing land. He understood that the lands offered by the government would be owned by individuals, as he requested that the government provide patents—note the use of the plural form—for wherever they chose to locate. Under these circumstances, Shawwasing's quote provides no support

for the Tribe's theory that the Band representatives understood they were bargaining for a reservation.[3]

While these are just two examples, they are emblematic of the Tribe's briefing. It has proffered pages upon pages of this hit-and-run argumentation, leaving the Court to run down each of the quotes, to be placed in the proper context, and to then ascertain what the "fact" is that should be drawn from the proffered citation. This is plainly insufficient.

The Tribe's discussion of the Treaty in the briefing is similarly flawed because it does not provide a cohesive interpretation of the Treaty as a whole and instead isolates particular phrases from the Treaty to suggest that it was possible that the Bands understood that they were to receive reservations.

Primarily, the Tribe suggests that language like "tract reserved" or "aforesaid reservations" is indicative of the Tribe's understanding that the Treaty created an Indian reservation. Take, for instance, the first time that "tract reserved" appears in the text of the Treaty:

> Each Indian entitled to land under this article may make his own selection of any land within the *tract reserved* herein for the band to which he may belong—Provided, That in case of two or more Indians claiming the same lot or tract of land, the matter shall be referred to the Indian agent, who shall examine the case and decide between the parties.

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[3] Notably, Entry 7 is the only entry in Table 4 addressing Indian understanding. The remaining entries are all from the perspective of federal officials.

The Tribe suggests that the use of "tract reserved" here means that the Band members understood the Treaty to create a reservation. That is not the case. When placed in the proper context, this language clearly and unambiguously refers to the numbered paragraphs that immediately precede it. It simply means that eligible Indians were entitled to make their selection of land from within the larger tract designated for his Band. For example then, the head of a family within the Beaver Island band was thus limited to selecting an 80-acre parcel from within the land description referenced in the Paragraph Third, rather than any of the other seven parcels withheld from sale for the other Bands to make their selections. The use of "tract reserved" is not capable of a broader meaning when placed in this context.

Similar contextualization derails the Tribe's position regarding another paragraph, which references "tracts of land within the aforesaid reservations." That paragraph states:

> Nothing contained herein shall be so construed as to prevent the appropriation, by sale, gift, or otherwise, by the United States, of <u>any tract or tracts of land within the aforesaid reservations</u> for the location of churches, school-houses, or for other educational purposes, and for such purposes purchases of land may likewise be made from the Indians, the consent of the President of the United States, having, in every instance, first been obtained therefor.
>
> It is also agreed that any lands <u>within the aforesaid tracts</u> now occupied by actual settlers, or by persons entitled to pre-emption thereon,

> shall be exempt from the provisions of this article; provided, that such pre-emption claims shall be proved, as prescribed by law, before the 1st day of October next.

The Tribe asserts that the reference to "aforesaid reservations" is indicative of an intent to create an Indian reservation. Again, the Court does not find that this paragraph supports that construction when it is read in full. As pointed out by the Intervenor-Defendants, the use of the word "reservations"—or a similar term—was necessary here to *avoid* creating an ambiguity that would be created if the text read: "Nothing contained herein shall be ... construed ... to prevent the appropriation ... by the United States, of any tract of land within the *aforesaid tracts*."

Under such a reading, "tract" would mean both the small selection land appropriated by the United States for a church or schoolhouse *and* the larger section of land withdrawn from public sale for selection by eligible Indians. To avoid such an ambiguity, the treaty drafters inserted the word "aforesaid reservations" to refer back to the land descriptions contained within the numbered paragraphs that would be withdrawn from sale. This interpretation is confirmed by the language in the following sentence as the drafters reverted to referring to the withdrawn parcels as "aforesaid tracts."

The Treaty Journal also makes abundantly clear that the Band representatives understood that the purpose of their designating the tracts of land that appear in the numbered paragraphs was to withdraw the land from sale for future selections by individuals. The idea came directly from Manypenny as his proposed solution to expressed fears among the Bands that their selected

lands would be inhospitable. Once Manypenny offered this solution, none of the Band representatives maintained their concern about inhospitable lands, and after some deliberation, each of the Bands decided where their lands would be located. No discussion of reservations or land held in common occurred.

Other sections of the treaty make clear that the numbered paragraphs were not intended to demarcate reservation boundaries. As the Defendants note, the temporary restrictions on alienation are only consistent with individual allotments, and not Indian reservation. As the State says, in most cases, the United States contemplated that it would issue a patent to the land after ten years, unless the Indian Agent requested that a patent be withheld because the individual landowner was incompetent to care for the land himself. And the 1855 Treaty explicitly linked the restraint on alienation to the issuance of a patent: "Provided That such restriction [the restraint on alienation] shall cease only upon the actual issuing of the patent[.]" The State argues that if the government imposed only temporary restrictions on the land, then it was no longer in the public domain, and it could no longer be "set apart" for the creation of a reservation.

Building on this argument, the State notes that even after the initial five-year period for selections, the treaty provided that the unselected lands, "for the further term of five years, [would] be subject to entry in the usual manner and at the same rate per acre, as other adjacent public lands are then held, by Indians only." The State says that if the unselected lands within in the numbered paragraphs were to be sold "in the usual manner and at the same rate ..." as other public lands, then the land had

always remained in the public domain and had never been set apart for the Tribe to use a reservation.

And the final clause in this section of Article I provides the strongest support of all. After both five-year terms for Indian settlement of the lands ended, the treaty stipulated that "all lands remaining unappropriated by or unsold to the Indians after the expiration of the last-mentioned term, may be sold or disposed of by the United States as in the case of all other public lands."

If the remaining lands (those that had not been selected or purchased) could be disposed of by the United States "as other public lands[,]" then the lands described in the numbered paragraphs could not be an Indian reservation. In other words, the Treaty could not simultaneously set the lands aside as reservations while also allowing for the United States to dispose of the land in any manner it wished.

The Tribe also isolates the language "for the band[s]," which is included in the eight numbered paragraphs designating the territory each Band had selected to be withdrawn from sale at the Treaty Council. As previously discussed, Article I identifies eight parcels of land to be withdrawn from public sale. The text reads:

> The United States will withdraw from sale for the benefit of said Indians as hereinafter provided, all the unsold public lands within the State of Michigan embraced in the following descriptions to wit:
>
> * * *

> Third, *for the Beaver Island band* [fractional township coordinates]
>
> Fourth, For the Cross Village, Middle Village, L'Arbrechroche and Bear Creek Bands, and of such Bay Du Noc and Beaver Island Indians as may prefer to live with them [fractional township coordinates]."

The Tribe suggests that the language "For the band" could be understood as creating a reservation. Once again, this interpretation suffers from a failure to reconcile the treaty as a whole.

The provisions that follow—the procedures for individuals to select lands, the procedures for which patents to the land would issue, and the process for the land to be disposed of as "other public land" once the temporary withdrawal from sale expired—rely on the fractional township descriptions contained in the numbered paragraphs. The land being "for the band" is consistent with interpreting the numbered paragraphs as identifying a large parcel of land from which individual band members would make their own carve-outs.

Any interpretation of "for the bands" that is more expansive cannot be reconciled with the terms that follow and particularly cannot be reconciled with the sunset clause which mandated that after ten years, any unselected or unpurchased land could be disposed of as *other* public land. Public land and Indian reservations are mutually exclusive; land must be taken out of the public domain to become an Indian reservation. Thus, the descriptions used in the numbered paragraphs cannot memorialize reservation borders because it was

always understood by the treaty signatories that the lands described within the numbered paragraphs but not chosen would eventually be disposed of like "other public lands." There is thus no ambiguity created by "for the bands."

To be clear, the Bands knew how to bargain for a reservation if they had wanted to. The Treaty Journal for the 1836 Treaty contains a wealth of discussion about reservations. (PageID.6870; 6872; 6874.) And in fact, the 1836 Treaty established several Indian Reservations using standard language of reservation creation. *See* Treaty of March 28, 1836, art. 2 ("From the cession aforesaid the tribes reserve for their own use, to be held in common the following tracts ...."). The Court can thus infer that the Bands were capable of bargaining for an Indian Reservation if they desired to do so. *Mille Lacs*, 526 U.S. at 195–97, 119 S. Ct. 1187.

But the Bands did not want reservations; they wanted to hold lands as white settlers did. This is abundantly clear from the Treaty Journal. Remember, these Bands had negotiated for and received Indian reservations in the 1836 Treaty. However, the Government then reformed the treaty terms, rendering the reservations temporary and causing the 19-year period of distrust and uncertainty that triggered the need for further negotiations in 1855.[4] The Treaty

[4] The Court also notes that the reservation created in the 1836 Treaty at Little Traverse Bay was 50,000 acres. Under the Tribe's theory of the 1855 Treaty, the government purportedly agreed to create a reservation spanning more than 300 square miles. Given the government's stated intentions discussed previously, the Court finds it exceedingly unlikely that the government would have agreed to such terms.

Journal reveals that the Band representatives were fully aware of this history, and it informs their insistence that any lands given to them by the United States come with patents, such that no white man could "touch" their lands.[5] It is clear from the record that the Bands believed that the only way to guarantee their permanent place in Michigan was to hold patents to the lands themselves; the federal government had already demonstrated to the Bands that it could not always be trusted to make good on its promises to hold land for them. The 1855 Treaty provided precisely what they bargained for.

And finally, the Tribe relies heavily on the post-Treaty historical record, which contains references to the "reserves" and "reservations" in correspondence by Indians and federal officials in the immediate post-Treaty era. But when these references are put into context by the Treaty Journal and the entirety of the historical record, such evidence does not present a sufficient disagreement to require submission to a factfinder, even with all justifiable inferences in the Tribe's favor. *Anderson*, 477 U.S. at 251–252, 106 S. Ct. 2505.

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[5] The Tribe's expert witness claims that it is not clear whether the Bands could understand the difference between lands held in common as reservations and lands held in fee as allotments because of difficulties translating English into Anishinaabemowin. However, this claim is fatally undercut by the Bands' previous treaty negotiations, which establish that they were able to distinguish between the different types of land ownership despite any linguistic difficulties. In fact, the Bands initiated the treaty negotiations by offering to sell their lands, "with some reserves." In 1855, the Bands—with full knowledge of the 1836 Treaty—could not have mistaken Manypenny's offer of land as an offer to establish Indian Reservations under these circumstances.

As an initial matter, the references were made during the time for treaty implementation—i.e. they occurred while Band members alone were entitled to select (and then purchase) lands. At that stage, to a layman, the land would bear many of the characteristics of an Indian reservation. Most importantly, the land was not open to white settlement. But it is clear from the Treaty Journal and the Treaty text that the *signatories* to the Treaty understood that the lands designated to be withdrawn from sale would eventually be disposed of as other public land, once the time for selections and purchases expired. So while the land may have colloquially been referred to as "reserves" or "reservations," the surrounding context makes clear that those terms were not used in the sense that the United States had created a permanent set-aside of land for Indian purposes through the 1855 Treaty. Additionally, the post-Treaty accounts of Manypenny and Gilbert conclusively refute any notion that the lands were to be considered an Indian reservation. (*See* PageID.7532 (Manypenny: "[T]he Indians are to have assigned permanent homes to be hereafter confirmed to them in small tracts, in severalty[.]"); PageID.7558 (Gilbert: "[T]he main feature is a provision securing to each family and to such single persons as are provided for, a home in Michigan[.]").

It is also of note that the Tribe changed course at oral argument, offering its own theory of treaty interpretation for the first time, which similarly sliced-and-diced the Treaty until it no longer bore any

resemblance to the terms signed by the Bands and ratified by the United States.[6]

Under the Tribe's reading, the 1855 Treaty simultaneously created Indian reservations for the Bands while also allowing for allotments. The Tribe reaches this result by dividing Article I into two finite sections (which are shaded red and blue in the demonstrative exhibit). It would have the Court rewrite the Treaty so that the first sentence of Article I reads: "The United States will withdraw from sale for the benefit of said Indians ~~as hereinafter provided~~, all the unsold public lands within the State of Michigan" contained within the eight descriptions that followed. It would then have the Court conclude that Article I ends with the numbered land descriptions, so that all of the rules and procedures that followed for the provisioning of the land to individual Indians would come within a newly-constituted Article II.

But that's not the way the treaty is structured. All the disputed terms fall within Article I. And "as hereinafter provided" bestows meaning on the action described in the first sentence of Article I. It means that the terms and conditions that follow relate back to the United States' withdrawal of the land. In other words, the withdrawal of land for the benefit of the Indians was not done unconditionally; it was done for the purpose described in Article I and under the terms provided by the same. When read in this manner, the Tribe's interpretation cannot be sustained because the additional terms and conditions on the United States'

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[6] Since there is no record of the Tribe's treaty construction in the briefing, the Court has attached the demonstrative exhibit provided by the Tribe at oral argument as an exhibit to this Opinion.

withdrawal of the land is inconsistent with the establishment of an Indian reservation.

As has been thoroughly discussed, when the United States allows for individual Indians to select land, which they would hold in fee, it does not meet the requirement of a federal set aside for Indian purposes or federal superintendence. Similarly, when the United States maintains its ability to dispose of the alleged Indian reservation after a finite time "as in the case of other public lands," then no Indian reservation is established. Article I does precisely these things. In sum, it is only through a vast re-writing of the Treaty, that the Tribe arrives at its conclusion that an Indian reservation was created.

Under these circumstances, the Court "cannot ignore plain language that, viewed in historical context and given a 'fair appraisal,' runs counter to a tribe's later claims." *Klamath*, 473 U.S. at 774, 105 S. Ct. 3420. Here, the Court has given the Tribe's claims a fair appraisal by undertaking an extensive review of the historical record and a close read of the 1855 Treaty. After a full review, the Court concludes that the 1855 Treaty simply cannot bear the construction that the Tribe would place on it, *especially* considering the historical context. The Tribe's predecessor bands bargained for—and received—permanent homes in Michigan in the form of individual allotments. They did not bargain for an Indian reservation, and no such reservation was created by the unambiguous treaty terms because the terms do not establish a federal set aside of land for Indian purposes or indefinite federal superintendence over the land. *See Citizen Band*, 498 U.S. at 511, 111 S. Ct. 905.

V.

The Tribe asserts that their predecessors understood that a treaty requiring the United States to withdraw land from sale for their benefit created an Indian reservation. But when the Treaty is placed in the relevant historical context, it cannot plausibly be read to have created an Indian reservation, and the Tribe's predecessors did not believe that it did so. Accordingly, summary judgment is warranted on the Tribe's claims. Additionally, since the Court concludes that no reservation was created, it does not reach the Defendants' arguments in the alternative for disestablishment.

ORDER

For the reasons explained in the accompanying opinion, the Defendants' motions (ECF Nos. 567; 579; 581) for summary judgment are **GRANTED**.

Plaintiff's motions for partial summary judgment on various defenses (ECF Nos. 573; 585) are **DISMISSED AS MOOT**.

IT IS SO ORDERED.

JUDGMENT TO FOLLOW.

Date: August 15, 2019

/s/ Paul L. Maloney
Paul L. Maloney
United States District Judge

Attachment

Treaty #2

FRANKLIN PIERCE,

PRESIDENT OF THE UNITED STATES OF AMERICA: July 31, 1855.

TO ALL PERSONS TO WHOM THESE PRESENTS SHALL COME, GREETING:

Preamble.

WHEREAS a treaty was made and concluded at the city of Detroit, in the State of Michigan, on the thirty-first day of July, eighteen hundred and fifty-five, between George W. Manypenny and Henry C. Gilbert, commissioners on the part of the United States, and the Ottowa and Chippewa Indians of Michigan, parties to the treaty of March twenty-eighth, eighteen hundred and thirty-six, which treaty is in the words and figures following, to wit:

Title.

Articles of agreement and convention made and concluded at the city of Detroit in the State of Michigan this thirty-first day of July, one thousand eight hundred and fifty-five, between George W. Manypenny and Henry C. Gilbert, commissioners on the part of the United States and the Ottowa and Chippewa Indians of Michigan, parties to the treaty of March 28, 1836.

The bargain

In view of the existing condition of the Ottowas and Chippewas, and of their legal and equitable claims against the United States, it is agreed between the contracting parties as following:—

Certain lands in Michigan to be withdrawn from sale.

ARTICLE I. The United States will withdraw from sale for the benefit of said Indians as hereinafter provided, all the unsold public lands within the State of Michigan embraced in the following descriptions to wit:

Tracts for the bands

For the use of the six bands at and near Sault Ste. Marie.

First. For the use of the six bands residing at and near Sault Ste. Marie, sections 13, 14, 23, 24, 25, 26, 27, and 28, in township 47 north, range 5 west; sections 18, 19, and 30 in township 47 north, range 4 west; sections 11, 12, 13, 14, 15, 22, 23, 25, and 26, in township 47 north, range 3 west, and section 29 in township 47 north, range 2 west; sections 2, 3, 4, 11, 14, and 15 in township 47 north, range 2 east, and section 34 in township 48 north, range 2 east; sections 6, 7, 18, 19, 20, 28, 29, and 33, in township 46 north, range 2 east; sections 1, 12, and 13, in township 45 north, range 1 east, and section 4 in township 44 north, range 2 east.

For the use of the bands north of the Straits of Mackinac.

Second. For the use of the bands who wish to reside north of the Straits of Mackinac, townships 42 north, ranges 1 and 2 west; township 43 north, range 1 west, and township 44 north, range 12 west.

For the Beaver Island band.

Third. For the Beaver Island band.—High Island, and Garden Island in Lake Michigan, being fractional townships 38 and 39 north, range 11 west—40 north, range 10 west, and in part 39 north, range 9 and 10 west.

For certain other bands.

Fourth. For the Cross Village, Middle Village, L'Arbrechroche and Bear Creek bands, and of such Bay du Noc and Beaver Island Indians as may prefer to live with them, townships 34 to 38, inclusive north, range 5 west—townships 34 to 38, inclusive north, range 6 west,—townships 34, 36, and 37, north, range 7 west, and township 34 north, range 8 west.*

For bands who are usually paid at Grand Traverse township.

Fifth. * For the bands who usually assemble for payment at Grand Traverse township 32 north, range 10 west—townships 29 to 32, north inclusive, range 11, west—townships 29 to 31, north inclusive, range 12 west—township 29 north, range 13 west, and the east half of township 29 north, range 9 west.

* See amendments, post, p. 54.

For the Grand River bands, including that of Me-tay-o-meg.

*Sixth.** For the Grand River bands, including the land of which Me-tay-o-meg is chief—four adjoining townships of land in the county of Mecosta, and four adjoining townships north of Muskegon River, and west of range 12 west, which two locations, of four townships each, are to be selected by said Grand River Indians within three months from this date and notice thereof given to their agent.

For the Cheboygan band.

*Seventh.** For the Cheboygan band, one township of land in Cheboygan county, to be selected and notice given as above provided.

For the Thunder Bay band.

Eighth. For the Thunder Bay band, section 25 and 36 in township 30 north, range 7 east, and section 32 in township 30 north, range 8 east.

Purchase for bands who wish to locate near the Missionary lands at Iroquois Point.

Should either of the bands residing near Sault Ste. Marie determine to locate near the lands owned by the missionary society of the Methodist Episcopal church at Iroquois Point, in addition to those who now reside there, it is agreed that the United States will purchase as much of said lands for the use of the Indians as the society may be willing to sell at the usual government price.

Grant of land to each Indian.

The United States will give to each Ottowa and Chippewa Indian being the head of a family, 80 acres of land, and to each single person over 21 years of age, 40 acres of land, and to each family of orphan children under 21 years of age containing two or more persons, 80 acres of land, and to each single orphan child under 21 years of age, 40 acres of land to be selected and located within the several tracts of land hereinbefore described under the following rules and regulations:—

Selections for individuals

Selection how made.

Each Indian entitled to land under this article may make his own selection of any land within the tract reserved herein for the band to which he may belong—*Provided*, That in case of two or more Indians claiming the same lot or tract of land, the matter shall be referred to the Indian agent, who shall examine the case and decide between the parties.

List of those entitled to be prepared.

For the purpose of determining who may be entitled to land under the provisions of this article, lists shall be prepared by the Indian agent, which lists shall contain the names of all persons entitled, designating them in four classes. Class 1st, shall contain the names of heads of families; class 2d, the names of single persons over 21 years of age; class 3d, the names of orphan children under 21 years of age, comprising families of two or more persons, and class 4th, the names of single orphan children under 21 years of age, and no person shall be entered in more than one class. Such lists shall be made and closed by the first day of July, 1856, and thereafter no applications for the benefits of this article will be allowed.

Selections may be made within five years.

At any time within five years after the completion of the lists, selections of lands may be made by the persons entitled thereto, and a notice thereof, with a description of the land selected, filed in the office of the Indian agent in Detroit, to be by him transmitted to the office of Indian Affairs at Washington City.

To be according to usual subdivisions.

All selections of land under this article must be made according to the usual legal subdivisions; and fractional lots, if containing less than 60 acres, may be regarded as forty-acre lots, if over sixty and less than one hundred and twenty acres, as eighty-acre lots. Selections for orphan children may be made by themselves or their friends, subject to the approval of the agent.

Possession may be taken at once.

After selections are made, as herein provided, the persons entitled to the land may take immediate possession thereof, and the United States will thenceforth and until the issuing of patents as hereinafter provided, hold the same in trust for such persons, and certificates shall be issued in a suitable form guaranteeing and securing to the holders their possession and an ultimate title to the land. But such certificates shall not be assignable and shall contain a clause expressly prohibiting the sale or transfer by the holder of the land described therein.

Sale within ten years forbidden.

* See amendments, post, p. 86.

After the expiration of ten years, such restriction on the power of sale shall be withdrawn, and a patent shall be issued in the usual form, to each original holder of a certificate for the land described therein, provided that such restriction shall cease only upon the actual issuing of the patent; and provided further that the President may in his discretion at any time in individual cases on the recommendation of the Indian agent when it shall appear prudent and for the welfare of any holder of a certificate, direct a patent to be issued. And provided also, that after the expiration of ten years, if individual cases shall be reported to the President by the Indian agent, of persons who may then be incapable of managing their own affairs from any reason whatever, he may direct the patents in such cases to be withheld, and the restrictions provided by the certificate, continued so long as he may deem necessary and proper. After ten years a patent shall issue and restriction on sales cease.

Should any of the heads of families die before the issuing of the certificates or patents herein provided for, the same shall issue to the heirs of such deceased persons. Provision for case of death.

The benefits of this article will be extended only to those Indians who are at this time actual residents of the State of Michigan, and entitled to participate in the annuities provided by the treaty of March 28, 1836; but this provision shall not be construed to exclude any Indian now belonging to the Garden River Band of Sault Ste. Marie. To whom this treaty shall extend.

Residue within tracts

All the land embraced within the tracts hereinbefore described, that shall not have been appropriated or selected within five years, shall remain the property of the United States, and the same shall thereafter, for the further term of five years, be subject to entry in the usual manner and at the same rate per acre as other adjacent public lands are then held, by Indians only; and all lands, so purchased by Indians, shall be sold without restriction, and certificates and patents shall be issued for the same in the usual form as in ordinary cases; and all lands remaining unappropriated by or unsold to the Indians after the expiration of the last-mentioned term, may be sold or disposed of by the United States as in the case of all other public lands. After five years the remaining lands may be entered in the usual manner by Indians for five years, and then by any one.

Nothing contained herein shall be so construed as to prevent the appropriation, by sale, gift, or otherwise, by the United States, of any tract or tracts of land within the aforesaid reservation for the location of churches, school-houses, or for other educational purposes, and for such purposes purchases of land may likewise be made from the Indians, the consent of the President of the United States, having, in every instance, first been obtained therefor.* Grants for churches, schools &c. may be made. Indians may sell with President's consent.

ARTICLE 2. The United States will also pay to the said Indians the sum of five hundred and thirty-eight thousand and four hundred dollars, in manner following, to wit: Payments to said Indians.

First. Eighty thousand dollars for educational purposes to be paid in ten equal annual instalments of eight thousand dollars each, which sum shall be expended under the direction of the President of the United States; and in the expenditure of the same, and the appointment of teachers and management of schools, the Indians shall be consulted, and their views and wishes adopted so far as they may be just and reasonable. $80,000 in ten equal annual instalments.

Second. Seventy-five thousand dollars to be paid in five equal annual instalments of fifteen thousand dollars each in agricultural implements and carpenters' tools, household furniture and building materials, cattle, labor, and all such articles as may be necessary and useful for them in removing to the homes herein provided and getting permanently settled thereon. $75,000 in five equal annual instalments.

Third. Forty-two thousand and four hundred dollars for the support of four blacksmith shops for ten years. $42,400 for blacksmith's shops.

Fourth. The sum of three hundred and six thousand dollars in coin, as follows:—ten thousand dollars of the principal and the interest on the whole of said last-mentioned sum remaining unpaid at the rate of five per cent. $306,000 "to be paid per capita."

* See amendments by adding clauses, post, pp. 26, 27.

annually for ten years, to be distributed *per capita* in the usual manner for paying annuities. And the sum of two hundred and six thousand dollars remaining unpaid at the expiration of ten years, shall be then due and payable, and if the Indians then require the payment of said sum in coin, the same shall be distributed *per capita* in the same manner as annuities are paid, and in not less than four equal annual instalments.

$35,000 in ten annual instalments.

Fifth. The sum of thirty-five thousand dollars in ten annual instalments of three thousand and five hundred dollars each to be paid only to the Grand River Ottawas, which is in lieu of all permanent annuities to which they may be entitled by former treaty stipulations, and which sum shall be distributed in the usual manner *per capita*.

The bargain

Liabilities under former treaties released.

ARTICLE 3. The Ottawa and Chippewa Indians hereby release and discharge the United States from all liability on account of former treaty stipulations, it being distinctly understood and agreed that the grants and payments hereinbefore provided for are in lieu and satisfaction of all claims, legal and equitable on the part of said Indians jointly and severally against the United States, for land, money or other thing guaranteed to said tribes or either of them by the stipulations of any former treaty or treaties; excepting, however, the right of fishing and encampment secured to the Chippewas of Sault Ste. Marie by the treaty of June 16, 1820.

Interpreters.

ARTICLE 4. The interpreters at Sault Ste. Marie, Mackinac, and for the Grand River Indians, shall be continued, and another provided at Grand Traverse, for the term of five years, and as much longer as the President may deem necessary.

Future federal relationship

Tribal organization dissolved in most respects.

ARTICLE 5. The tribal organization of said Ottawa and Chippewa Indians, except so far as may be necessary for the purpose of carrying into effect the provisions of this agreement, is hereby dissolved; and if at any time hereafter, further negotiations with the United States, in reference to any matters contained herein, should become necessary, no general convention of the Indians shall be called; but such as reside in the vicinity of any usual place of payment, or those only who are immediately interested in the questions involved, may arrange all matters between themselves and the United States, without the concurrence of other portions of their people, and as fully and conclusively, and with the same effect in every respect, as if all were represented.

Future treaties how made.

Treaty, when to be binding.

ARTICLE 6. This agreement shall be obligatory and binding on the contracting parties as soon as the same shall be ratified by the President and Senate of the United States.

In testimony whereof the said George W. Manypenny and the said Henry C. Gilbert, commissioners as aforesaid, and the undersigned chiefs and headmen of the Ottawas and Chippewas, have hereto set their hands and seals, at the city of Detroit the day and year first above written.

GEO. W. MANYPENNY, [L. S.]
HENRY C. GILBERT, [L. S.]
Commissioners on the part of the United States.

J. LOGAN CHIPMAN, } *Secretaries.*
RICH'D M. SMITH, }

Sault Ste. Marie Bands.

O-SHAW-WAW-NO-KE-WAIN-ZE, chief,	his x mark.	[L. S.]
WAW-BO-JIEG, chief,	his x mark.	[L. S.]
KAY-BAY-NO-DIN, chief,	his x mark.	[L. S.]
O-MAW-NO-MAW-NE, chief,	his x mark.	[L. S.]
SHAW-WAN, chief,	his x mark.	[L. S.]
PI-AW-BE-DAW-SUNG, chief,	his x mark.	[L. S.]
WAW-WE-GUN, headman,	his x mark.	[L. S.]
PA-NE-GWON, headman,	his x mark.	[L. S.]
BWAN, headman,	his x mark.	[L. S.]

Executed in the presence of

JNO. M. D. JOHNSTON,
JOHN F. GODFROY,
GBT. JOHNSTON,
AUG. HAMLIN,
L. CAMPAU,
JOSEPH F. MORSEL,
G. D. WILLIAMS,
P. B. BARNEAU,
A. M. FITCH,
W. H. GODFROY.
} *Interpreters.*

And whereas the said treaty having been submitted to the Senate of the United States for its constitutional action thereon, the Senate did, on the fifteenth day of April, eighteen hundred and fifty-six, advise and consent to the ratification of the same, with amendments, by a resolution in the words and figures following, to wit:

"IN EXECUTIVE SESSION, SENATE OF THE UNITED STATES,
April 15, 1856.

"*Resolved*, (two thirds of the Senators present concurring,) That the Senate advise and consent to the ratification of the treaty made and concluded with the Ottowas and Chippewas, on the thirty-first day of July, eighteen hundred and fifty-five, with the following

AMENDMENTS.

Amendments. Article 1.

ARTICLE 1. At the end of the "*Fourth*" clause, strike out the words "township 34 north, range 8 west," and insert the words: "all that part of township 34, north range, 8 west, lying north of Pine River."

SAME ARTICLE. Strike out the "*Fifth*" clause, in the following words: "for the bands, who usually assemble for payment at Grand Traverse, township 32 north, range 10 west; townships 29 to 32 north, inclusive, range 11 west; townships 29 to 31 north, inclusive, range 12 west; township 29 north, range 13 west, and the east half of township 29 north, range 9 west," and insert, in lieu thereof, the following: "for the bands, who usually assemble for payment at Grand Traverse, townships 29, 30, and 31, north range 11 west, and townships 28, 30, and 31 north range 12 west, and the east half of township 29, north range, 9 west."

SAME ARTICLE. Strike out the "*Sixth*" clause, in the following words: "for the Grand River bands, including the band, of which Me-tay-o-meg is chief, four adjoining townships of land in the county of Mecosta, and four adjoining townships north of Muskegon River, and west of range 12 west, which two locations of four townships each, are to be selected by said Grand River Indians within three months from this date, and notice thereof given to their agent," and insert, in lieu thereof, the following: "for the Grand River bands, township 12, north range 15 west, and townships 15, 16, 17, and 18, north range, 16, west."

SAME ARTICLE. Strike out the "*Seventh*" clause, in the following words: "for the Cheboygan band, one township of land in Cheboygan county, to be selected, and notice given, as above provided;" and insert, in lieu thereof, the following: "for the Cheboygan band township 35, and 36, north range, 3 west.

Rights of settlers by preemption, saved.

SAME ARTICLE. Add the following at the end thereof:

"It is also agreed that any lands within the aforesaid tracts now occupied by actual settlers, or by persons entitled to preemption thereon, shall be exempt from the provisions of this Article; provided, that such pre-

emption claims shall be proved, as prescribed by law, before the first day of October next."

Indian purchasers under Graduation Act may sell.

"Any Indian, who may have heretofore purchased land for actual settlement under the act of Congress, known as the Graduation Act, may sell and dispose of the same; and in such case, no actual occupancy or residence by such Indians on land so purchased shall be necessary to enable him to secure a title therein."

Grant to mission of Presbyterian Church at $1.25 per acre.

"In consideration of the benefits derived to the Indians on Grand Traverse Bay by the school and mission established in 1838, and still continued by the Board of Foreign Missions of the Presbyterian Church, it is agreed that the title to three separate pieces of land, being parts of tracts Nos. 3 and 4, of the west fractional half of section 35, township 30 north, range 10 west, on which are the mission and school buildings and improvements, not exceeding in all sixty-three acres, one hundred and twenty-four perches, shall be vested in the said Board on payment of $1.25 per acre; and the President of the United States shall issue a patent for the same to such person as the said Board shall appoint."

Further payment of $40,000 to pay debts.

"The United States will also pay the further sum of forty thousand dollars, or so much thereof as may be necessary, to be applied in liquidation of the present just indebtedness of the said Ottawa and Chippewa Indians; provided, that all claims presented shall be investigated under the direction of the Secretary of the Interior, who shall prescribe such rules and regulations for conducting such investigation, and for testing the validity and justice of the claims, as he shall deem suitable and proper; and no claim shall be paid except upon the certificate of the said Secretary that, in his opinion, the same is justly and equitably due; and all claimants, who shall not present their claims within such time as may be limited by said Secretary within six months from the ratification of the treaty, or whose claims, having been presented, shall be disallowed by him, shall be forever precluded from collecting the same, or maintaining an action thereon in any court whatever; and provided, also, that no portion of the money due said Indians for annuities, as herein provided, shall ever be appropriated to pay their debts under any pretence whatever; provided, that the balance of the amount herein allowed, as a just increase of the amount due for the cessions and relinquishments aforesaid, after satisfaction of the awards of the Secretary of the Interior, shall be paid to the said Chippewas or expended for their benefit, in such manner as the Secretary shall prescribe, in aid of any of the objects specified in the second article of this treaty."

Balance to be paid to the Chippewas.

Attest:

ASBURY DICKINS, *Secretary.*

And whereas the said amendments having been submitted to the chiefs and headmen of the Ottawa and Chippewa tribes of Indians, the said chiefs and headmen having heard the same read and explained to them, did assent to and ratify the same, by an instrument, in the words and figures following, to wit:

Assent of Indians to Senate amendments.

We, the undersigned chiefs and headmen of the Chippewa Indians living near Sault Ste. Marie, Mich., having had the amendments adopted by the Senate of the United States to the treaty concluded at Detroit on the 31st day of July, 1855, fully explained to us and being satisfied therewith, do hereby assent to and ratify the same.

In witness whereof we have hereto set our hands this 27th day of June, A. D. 1856.

PI-AW-BE-DAW-SUNG,	his x mark.
TE-GOSE,	his x mark.
SAW-GAW-JEW,	his x mark.
SHAW-ANO,	his x mark.

Appendix C

Nos. 19-2070/2107

UNITED STATES COURT OF APPEAL FOR THE SIXTH CIRCUIT

FILED June 23, 2021

LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS, Plaintiff-Appellant/Cross-Appellee, v. GRETCHEN WHITMER, GOVERNOR OF THE STATE OF MICHIGAN, Defendant-Appellee, CITY OF PETOSKEY, ET AL., Intervenors-Appellees/Cross-Appellants, TOWNSHIP OF BEAR CREEK, ET AL., Intervenors-Appellees.	)	ORDER

BEFORE: BATCHELDER, CLAY, and BUSH, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the

petition were fully considered upon the original submission and decision of the cases. The petition then was circulated to the full court.[*] No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

Further, the motion of Bay Mills Indian Community, Little River Band of Ottawa Indians, Sault Ste. Marie Tribe of Chippewa Indians and Grand Traverse Band of Ottawa and Chippewa Indians, for leave to file a brief as amici curiae in support of the petition for rehearing en banc is denied.

ENTERED BY ORDER OF THE COURT

/s/ Deborah S. Hunt
Deborah S. Hunt, Clerk

[*] Judges White and Readier recused themselves from participation in this ruling.

Appendix D

Treaties and Statutes Involved

Treaty of Detroit, July 31, 1855, 11 Stat. 621

FRANKLIN PIERCE,

PRESIDENT OF THE UNITED STATES OF AMERICA:

TO ALL PERSONS TO WHOM THESE PRESENTS SHALL COME, GREETING:

WHEREAS s treaty was made and concluded at the city of Detroit, in the State of Michigan, on the thirty-first day of July, eighteen hundred and fifty-five, between George W. Manypenny and Henry C. Gilbert, commissioners on the part of the United States, and the Ottowa and Chippewa Indians of Michigan, parties to the treaty of March twenty-eighth, eighteen hundred and thirty-six, which treaty is in the words and figures following, to wit:

Articles of agreement and convention made and concluded at the city of Detroit, in the State of Michigan, this the thirty-first day of July, one thousand eight hundred and fifty-five, between George W. Manypenny and Henry C. Gilbert, commissioners on the part of the United States, and the Ottawa and Chippewa Indians of Michigan, parties to the treaty of March 28, 1836.[AB]

In view of the existing condition of the Ottowas and

[A] Ratified April 15, 1856.

[B] Proclaimed Sept. 10, 1856.

Chippewas, and of their legal and equitable claims against the United States, it is agreed between the contracting parties as follows:

ARTICLE 1. The United States will withdraw from sale for the benefit of said Indians as hereinafter provided, all the unsold public lands[C] within the State of Michigan embraced in the following descriptions, to wit:

First. For the use of the six bands residing at and near Saulte Ste. Marie, sections 13, 14, 23, 24, 25, 26, 27, and 28, in township 47 north, range 5 west; sections 18, 19, and 30, in township 47 north, range 4 west; sections 11, 12, 13, 14, 15, 22, 23, 25, and 26, in township 47 north, range 3 west, and section 29 in township 47 north, range 2 west; sections 2, 3, 4, 11, 14, and 15 in township 47 north, range 2 east, and section 34 in township 48 north, range 2 east; sections 6, 7, 18, 19, 20, 28, 29, and 33 in township 45 north, range 2 east; sections 1, 12, and 13, in township 45 north, range 1 east, and section 4 in township 44 north, range 2 east.[D]

Second. For the use of the bands who wish to reside north of the Straits of Macinac townships 42 north, ranges 1 and 2 west; township 43 north, range 1 west, and township 44 north, range 12 west.

Third. For the Beaver Island Band - - High Island, and Garden Island, in Lake Michigan, being fractional townships 38 and 39 north, range 11 west - - 40 north, range 10 west, and in part 39 north, range 9 and 10

[C] Certain lands in Michigan to be withdrawn from sale.

[D] For use of the six bands at and near Sault Ste. Marie.

west.[EF]

Fourth. For the Cross Village, Middle Village, L'Arbrechroche and Bear Creek bands, and of such Bay du Noc and Beaver Island Indians as may prefer to live with them, townships 34 to 39, inclusive, north, range 5 west - - townships 34 to 38, inclusive, north, range 6 west - - townships 34, 36, and 37 north, range 7 west, and all that part of township 34 north, range 8 west, lying north of Pine River.[G]

Fifth. For the bands who usually assemble for payment at Grand Traverse, townships 29, 30, and 31 north, range 11 west, and townships 29, 30, and 31 north, range 12 west, and the east half of township 29 north, range 9 west.[H]

Sixth. For the Grand River bands, township 12 north, range 15 west, and townships 15, 16, 17 and 18 north, range 16 west.[I]

Seventh. For the Cheboygan band, townships 35 and 36 north, range 3 west.[J]

Eighth. For the Thunder Bay band, section 25 and 36 in township 30 north, range 7 east, and section 22 in township 30 north, range 8 east.

[E] For the use of the bands north of the Straits of Mackinac.

[F] For the Beaver Island band.

[G] For certain other bands.

[H] For bands who are usually paid at Grand Traverse Township.

[I] For the Grand River bands.

[J] For the Cheboygan band.

Should either of the bands residing near Sault Ste. Marie determine to locate near the lands owned by the missionary society of the Methodist Episcopal Church at Iroquois Point, in addition to those who now reside there, it is agreed that the United States will purchase as much of said lands for the use of the Indians as the society may be willing to sell at the usual Government price.[KL]

The United States will give to each Ottowa and Chippewa Indian being the head of a family, 80 acres of land, and to each single person over twenty-one years of age, 40 acres of land, and to each family of orphan children under twenty-one years of age containing two or more persons, 80 acres of land, and to each single orphan child under twenty-one years of age, 40 acres of land to be selected and located within the several tracts of land hereinbefore described, under the following rules and regulations:[M]

Each Indian entitled to land under this article may make his own selection of any land within the tract reserved herein for the band to which he may belong - - *Provided*, That in case of two or more Indians claiming the same lot or tract of land, the matter shall be referred to the Indian agent, who shall examine the case and decide between the parties.[N]

[K] For the Thunder Bay band.

[L] Purchase for bands who wish to locate near the missionary lands at Iroquois Point.

[M] Grant of lands to each Indian.

[N] Selection, how made.

For the purpose of determining who may be entitled to land under the provisions of this article, lists shall be prepared by the Indian agent, which lists shall contain the names of all persons entitled, designating them in four classes. Class 1st, shall contain the names of heads of families; class 2d, the names of single persons over twenty-one years of age; class 3d, the names of orphan children under twenty-one[O] years of age, comprising families of two or more persons, and class 4th, the names of single orphan children under twenty-one years of age, and no person shall be entered in more than one class. Such lists shall be made and closed by the first day of July, 1856, and thereafter no applications for the benefits of this article will be allowed.

At any time within five years after the completion of the lists, selections of lands may be made by the persons entitled thereto, and a notice thereof, with a description of the land selected, filed in the office of the Indian agent in Detroit, to be by him transmitted to the Office of Indian Affairs at Washington City.[P]

All sections of land under this article must be made according to the usual subdivisions; and fractional lots, if containing less than 60 acres, may be regarded as forty-acre lots, if over sixty and less than one hundred and twenty acres, as eighty-acre lots. Selections for orphan children may be made by themselves or their friends, subject to the approval of the agent.[Q]

[O] List of those entitled to be prepared.

[P] Selections may be made within five years.

[Q] To be according to usual subdivisions.

After selections are made, as herein provided, the persons entitled to the land may take immediate possession thereof, and the United States will thenceforth and until the issuing of patents as hereinafter provided, hold the same in trust for such persons, and certificates shall be issued, in a suitable form, guaranteeing and securing to the holders their possession and an ultimate title to the land. But such certificates shall not be assignable and shall contain a clause expressly prohibiting the sale or transfer by the holder of the land described therein.[RS]

After the expiration of ten years, such restriction on the power of sale shall be withdrawn, and a patent shall be issued in the usual form to each original holder of a certificate for the land described therein, Provided That such restriction shall cease only upon the actual issuing of the patent; And provided further That the President may in his discretion at any time in individual cases on the recommendation of the Indian agent when it shall appear prudent and for the welfare of any holder of a certificate, direct a patent to be issued. And provided also, that after the expiration of ten years, if individual cases shall be reported to the President by the Indian agent, of persons who may then be incapable of managing their own affairs from any reason whatever, he may direct the patents in such cases to be withheld, and the restrictions provided by the certificate, continued so long as he may deem necessary and

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[R] Possession may be taken at once.

[S] Sale within ten years forbidden.

proper.[T]

Should any of the heads of families die before the issuing of the certificates or patents herein provided for, the same shall issue to the heirs of such deceased persons.[U]

The benefits of this article will be extended only to those Indians who are at this time actual residents of the State of Michigan, and entitled to participate in the annuities provided by the treaty of March 28, 1836; but this provision shall not be construed to exclude any Indian now belonging to the Garden River band of Sault Ste. Marie.[V]

All the land embraced within the tracts hereinbefore described, that shall not have been appropriated or selected within five years shall remain the property of the United States, and the same shall thereafter, for the further term of five years, be subject to entry in the usual manner and at the same rate per acre, as other adjacent public lands are then held, by Indians only; and all lands, so purchased by Indians, shall be sold without restriction, and certificates and patents shall be issued for the same in the usual form as in ordinary cases; and all lands remaining unappropriated by or unsold to the Indians after the expiration of the last-mentioned term, may be sold or disposed of by the United States as in the case of all other public lands.[W]

[T] After ten years a patent shall issue and restrictions on sales cease.

[U] Provision for case of death.

[V] To whom this treaty shall extend.

[W] After five years the remaining lands may be entered in the usual manner by Indians for five years, and then by anyone.

Nothing contained herein shall be so construed as to prevent the appropriation, by sale, gift, or otherwise, by the United States, of any tract or tracts of land within the aforesaid reservations for the location of churches, school-houses, or for other educational purposes, and[X] for such purposes purchases of land may likewise be made from the Indians, the consent of the President of the United States, having, in every instance, first been obtained therefor.[Y]

ARTICLE 2. The United States will also pay to the said Indians the sum of five hundred and thirty-eight thousand and four hundred dollars, in manner following, to wit:[Z]

First. Eighty thousand dollars for educational purposes to be paid in ten equal annual instalments of eight thousand dollars each, which sum shall be expended under the direction of the President of the United States; and in the expenditure of the same, and the appointment of teachers and management of schools, the Indians shall be consulted, and their views and wishes adopted so far as they may be just and reasonable.[AA]

Second. Seventy-five thousand dollars to be paid in five equal annual instalments of fifteen thousand dollars each in agricultural implements and carpenters' tools, household furniture and building materials, cattle,[BB]

[X] Grants for churches, schools, etc., may be made.

[Y] Indians may sell with President's consent.

[Z] Payments to said Indians.

[AA] Eighty thousand dollars in ten equal annual installments.

[BB] Seventy-five thousand dollars in five equal annual installments.

labor, and all such articles as may be necessary and useful for them in removing to the homes herein provided and getting permanently settled thereon.

Third. Forty-two thousand and four hundred dollars for the support of four blacksmith-shops for ten years.[CC]

Fourth. The sum of three hundred and six thousand dollars in coin, as follows: ten thousand dollars of the principal, and the interest on the whole of said last-mentioned sum remaining unpaid at the rate of five per cent annually for ten years, to be distributed per capita in the usual manner for paying annuities. And the sum of two hundred and six thousand dollars remaining unpaid at the expiration of ten years, shall be then due and payable, and if the Indians then require the payment of said sum in coin the same shall be distributed per capita in the same manner as annuities are paid, and in not less than four equal annual instalments.[DD]

Fifth. The sum of thirty-five thousand dollars in ten annual installments of three thousand and five hundred dollars each, to be paid only to the Grand River Ottawas, which is in lieu of all permanent annuities to which they may be entitled by former treaty stipulations, and which sum shall be distributed in the usual manner per capita.[EE]

ARTICLE 3. The Ottawa and Chippewa Indians hereby release and discharge the United States from all liability on account of former treaty stipulations, it being

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[CC] Forty-two thousand four hundred dollars for blacksmith shops.

[DD] Three hundred and six thousand dollars "to be paid per capita."

[EE] Thirty-five thousand dollars in ten annual installments.

distinctly understood and agreed that the grants and payments hereinbefore provided for are in lieu and satisfaction of all claims, legal and equitable on the part of said Indians jointly and severally against the United States, for land, money or other thing guaranteed to said tribes or either of them by the stipulations of any former treaty or treaties; excepting, however, the right of fishing and encampment secured to the Chippewas of Sault Ste. Marie by the treaty of June 16, 1820.[FF]

ARTICLE 4. The interpreters at Sault Ste. Marie, Mackinac, and for the Grand River Indians, shall be continued, and another provided at Grand Traverse, for the term of five years, and as much longer as the President may deem necessary.[GG]

ARTICLE 5. The tribal organization of said Ottawa and Chippewa Indians, except so far as may be necessary for the purpose of carrying into effect the provisions of this agreement, is hereby dissolved; and if at any time hereafter, further negotiations with the United States, in reference to any matters contained herein, should become necessary, no general convention of the Indians shall be called; but such as reside in the vicinity of any usual place of payment, or those only who are immediately interested in the questions involved, may arrange all matters between themselves and the United States, without the concurrence of other portions of their people, and as fully and conclusively, and with the same effect in every respect, as if all were

---

[FF] Liabilities under former treaties released.

[GG] Interpreters.

represented.[HHII]

ARTICLE 6. This agreement shall be obligatory and binding on the contracting parties as soon as the same shall be ratified by the President and Senate of the United States.[JJ]

In testimony whereof the said George W. Manypenny and the said Henry C. Gilbert, commissioners as aforesaid, and the undersigned chiefs and headmen of the Ottawas and Chippewas, have hereto set their hands and seals, at the city of Detroit the day and year first above written.

Geo. W. Manypenny, (L.S.)
Henry C. Gilbert, (L.S.)
Commissioners on the part of the United States.

J. Logan Chipman,
Rich'd M. Smith,
Secretaries.

Sault Ste. Marie Bands:

O-shaw-waw-no-ke-wain-ze, chief, his x mark. (L.S.)
Waw-bo-jieg, chief, his x mark. (L.S.)
Kay-bay-no-din, chief, his x mark. (L.S.)
O-maw-no-maw-ne, chief, his x mark. (L.S.)
Shaw-wan, chief, his x mark. (L.S.)
Pi-aw-be-daw-sung, chief, his x mark. (L.S.)
Waw-we-gun, headman, his x mark. (L.S.)
Pa-ne-gwon, headman, his x mark. (L.S.)

[HH] Tribal organization dissolved in most respects.

[II] Future treaties; how made.

[JJ] Treaty; when to be binding.

Bwan, headman, his x mark. (L.S.)
Taw-meece, headman, his x mark. (L.S.)
Naw-o-ge-zhick, headman, his x mark. (L.S.)
Saw-gaw-giew, headman, his x mark. (L.S.)

Grand River Bands:

Ne-baw-nay-ge-zhick, chief, his x mark. (L.S.)
Shaw-gwaw-baw-no, chief, his x mark. (L.S.)
Aish-ke-baw-gosh, 2d chief, his x mark. (L.S.)
Nay-waw-goo, chief, his x mark. (L.S.)
Ne-be-ne-seh, chief, his x mark. (L.S.)
Waw-be-gay-kake, chief, his x mark. (L.S.)
Ke-ne-we-ge-zhick, chief, his x mark. (L.S.)
Men-daw-waw-be, chief, his x mark. (L.S.)
Maish-ke-aw-she, chief, his x mark. (L.S.)
Pay-shaw-se-gay, chief, his x mark. (L.S.)
Pay-baw-me, headman, his x mark. (L.S.)
Pe-go, chief, his x mark. (L.S.)
Ching-gwosh, chief, his x mark. (L.S.)
Shaw-be-quo-ung, chief, his x mark. (L.S.)
Andrew J. Blackbird, headman, his x mark. (L.S.)
Ke-sis-swaw-bay, headman, his x mark. (L.S.)
Naw-te-naish-cum, headman, his x mark. (L.S.)

Grand Traverse Bands:

Aish-quay-go-nay-be, chief, his x mark. (L.S.)
Ah-ko-say, chief, his x mark. (L.S.)
Kay-quay-to-say, chief, his x mark. (L.S.)
O-naw-maw-nince, chief, his x mark. (L.S.)
Shaw-bwaw-sung, chief, his x mark. (L.S.)
Louis Mick-saw-bay, headman, his x mark. (L.S.)
May-dway-aw-she, headman, his x mark. (L.S.)
Me-tay-o-meig, chief, his x mark. (L.S.)
Me-naw-quot, headman, his x mark. (L.S.)

Little Traverse Bands:

Waw-so, chief, his x mark. (L.S.)
Mwaw-ke-we-naw, chief, his x mark. (L.S.)
Pe-taw-se-gay, headman, his x mark. (L.S.)
Ke-ne-me-chaw-gun, chief, his x mark. (L.S.)
May-tway-on-daw-gaw-she, headman, his x mark. (L.S.)
Me-ge-se-mong, headman, his x mark. (L.S.)
Pi-a-zhick-way-we-dong, headman, his x mark. (L.S.)
Key-way-ken-do, headman, his x mark. (L.S.)

Mackinac Bands:

O-saw-waw-ne-me-ke, chief, his x mark. (L.S.)
Ke-no-zhay, headman, his x mark. (L.S.)
Peter Hanse, headman, his x mark. (L.S.)
Shaw-be-co-shing, chief, his x mark. (L.S.)
Shaw-bway-way, chief, his x mark. (L.S.)
Pe-ane, headman, his x mark. (L.S.)
Saw-gaw-naw-quaw-do, headman, his x mark. (L.S.)
Nay-o-ge-maw, chief, (Little Traverse,) his x mark. (L.S.)

Executed in the presence of - -

Jno. M. D. Johnston,
John F. Godfroy,
Gbt. Johnston,
Aug. Hamlin,

Interpreters.

L. Campau,
Joseph F. Mursul,
G. D. Williams,
P. B. Barbeau,
A. M. Fitch,

W. H. Godfroy.

And whereas the said treaty having been submitted to the Senate of the United States for its constitutional action thereon, the Senate did, on the fifteenth day of April, eighteen hundred and fifty-six, advise and consent to the ratification of the same, with amendments, by a resolution in the words and figures following, to wit:

"IN EXECUTIVE SESSION, SENATE OF THE UNITED STATES,

April 15, 1856.

"*Resolved*, (two thirds of the Senators present concurring,) That the Senate advise and consent to the ratification of the treaty made and concluded with the Ottowas and Chippewas, on the thirty-first day of July, eighteen hundred and fifty-five; with the following

AMENDMENTS.

ARTICLE I. At the end of the "*Fourth*" clause, strike out the words "township 34 north, range 8 west," and insert the words: "all that part of township 34, north range, 8 west, lying north of Pine River."

SAME ARTICLE. Strike out the "*Fifth*" clause, in the following words: "for the bands, who usually assemble for payment at Grand Traverse, township 32 north, range 10 west ; townships 29 to 32 north, inclusive, range 11 west; townships 29 to 31 north, inclusive, range 12 west; township 29 north, range 13 west, and the east half of township 29 north, range 9 west," and insert, in lieu thereof, the following: "for the bands, who usually assemble for payment at Grand Traverse, townships 29, 30, and 31, north range 11 west, and townships 29, 30,

and 31 north range 12 west, and the east half of township 29, north range, 9 west."

SAME ARTICLE. Strike out the "*Sixth*" clause, in the following words: "for the Grand River bands, including the band, of which Me-Lay-o-meg is chief, four adjoining townships of land in the county of Mecosta, and four adjoining townships north of Muskegon Ricer, and west of range 12 west, which two locations of four townships each, are to be selected by said Grand River Indians within three months from this date, and notice thereof given to their went," and insert, in lieu thereof, the following: "for the Grand River bands, township 12, north range 15 west, and townships 15, 16, 17, and 18, north range, 16, west."

SAME ARTICLE. Strike out the "*Seventh*" clause, in the following words: "for the Cheboygan band, one township of land in Cheboygan county, to be selected, and notice given, as above provided;" and insert, in lieu thereof, the following: "for the Cheboygan band township 35, and 36, north range, 3 west.

SAME ARTICLE. Add the following at the end thereof: "It is also agreed that any lands within the aforesaid tracts now occupied by actual settlers, or by persons entitled to preemption thereon, shall be exempt from the provisions of this Article; provided, that such preemption claims shall be proved, as prescribed by law, before the first day of October next."

"Any Indian, who may have heretofore purchased land for actual settlement under the act of Congress, known as the Graduation Act, may sell and dispose of the same; and in such case, no actual occupancy or residence by such Indians on land so purchased shall be necessary to

enable him to secure a title thereto."

"In consideration of the benefits derived to the Indians on Grand Traverse Bay by the school and mission established in 1838, and still continued by the Board of Foreign Missions of the Presbyterian Church, it is agreed that the title to three separate pieces of land, being parts of tracts Nos. 3 and 4, of the west fractional half of section 35, township 30 north, range 10 west, on which are the mission and school buildings and improvements, not exceeding in all sixty-three acres, one hundred and twenty-four perches, shall be vested in the said Board on payment of $1.25 per acre; and the President of the United States shall issue a patent for the name to such person as the said Board shall appoint."

"The United States will also pay the further sum of forty thousand dollars, or so much thereof as may be necessary, to be applied in liquidation of the present just indebtedness of the said Ottawa and Chippewa Indians; provided, that all claims presented shall be investigated under the direction of the Secretary of the Interior, who shall prescribe such rules and regulations for conducting such investigation, and for testing the validity and justice of the claims, as he shall deem suitable and proper; and no claim shall be paid except upon the certificate of the said Secretary that, in his opinion, the same is justly and equitably due; and all claimants, who shall not present their claims within such time as may be limited by said Secretary within six months from the ratification of the treaty, or whose claims, having been presented, shall be disallowed by him, shall be forever precluded from collecting the same, or maintaining an action thereon in any court whatever; and provided, also,

that no portion of the money due said Indians for annuities, as herein provided, shall ever be appropriated to pay their debts under any pretence whatever; provided, that the balance of the amount herein allowed, as a just increase of the amount due for the cessions and relinquishments aforesaid, after satisfaction of the awards of the Secretary of the Interior, shall be paid to the said Chippewas or expended for their benefit, in such manner as the Secretary shall prescribe, in aid of any of the objects specified in the second article of this treaty."

Attest: ASBURY DICKINS, *Secretary*.

And whereas the said amendments having been submitted to the chiefs and headmen of the Ottawa and Chippewa tribes of Indians, the said chiefs and headmen having heard the same read and explained to them, did assent to and ratify the same, by an instrument, in the words and figures following, to wit:

We, the undersigned chiefs and headmen of the Chippewa Indians living near Sault Ste. Marie, Mich., having had the amendments adopted by the Senate of the United States to the treaty concluded at Detroit on the 31st day of July, 1855, fully explained to us and being satisfied therewith, do hereby assent to and ratify the same.

In witness whereof we have hereunto set our hands this 27th day of June, A.D. 1856.

Pi-aw-be-daw-sung, his x mark.
Te-gose, his x mark.
Saw-gaw-jew, his x mark.
Shaw-ano, his x mark.
Waw-bo-jick, his x mark.

Ray-bay-no-din, his x mark.
Shaw-wan, his x mark.
O-me-no-mee-ne, his x mark.
Pay-ne-gown, his x mark.
Waw-we-gown, his x mark.
Ma-ne-do-scung, his x mark.
Naw-we-ge-zhick, his x mark.
Yaw-mence, his x mark.
Bawn, his x mark.

Signed in presence of - -

Ebenzr Warner,
Jno. M. Johnston, United States Indian Interpreter.
Placidus Ord.

We, the undersigned chiefs and headmen of the Ottowa and Chippewa nation, having heard the foregoing amendments read and explained to us by our agent, do hereby assent to and ratify the same.

In witness whereof we have hereto affixed our signatures this 2d day of July, A.D. 1856, at Little Traverse, Mich.

Waw-so, his x mark.
Mwaw-ke-we-naw, his x mark.
Ne-saw-waw-quot, his x mark.
Aw-se-go, his x mark.
Ke-zhe-go-ne, his x mark.
Kain-waw-be-kiss-se, his x mark.
Pe-aine, his x mark.
Pe-taw-se-gay, his x mark.
Ke-ne-me-chaw-gun, his x mark.
May-tway-on-day-gaw-she, his x mark.
Me-ge-se-mong, his x mark.

Key-way-ken-do, his x mark.
Nay-o-ge-maw, his x mark.

In the presence of - -
Henry C. Gilbert, Indian Agent,
Aug. Hamlin, Interpreter,
John F. Godfroy, Interpreter,
G. T. Wendell,
A. J. Blackbird.

We, the chiefs and headmen of the Ottawa and Chippewa Indians residing near Grand Traverse Bay, having heard the foregoing amendments adopted by the Senate of the United States to the treaty of July 31, 1855, read, and the same having been fully explained to us by our agent, do hereby assent to and ratify the same.

Done at Northport on Grand Traverse Bay, Mich., this 5th day of July, A.D. 1856.

Aish-quay-go-nay-be, his x mark.
Ah-ko-say, his x mark.
O-naw-mo-neece, his x mark.
Kay-qua-to-say, his x mark.
Peter-waw-ka-zoo, his x mark.
Shaw-bwaw-sung, his x mark.
Louis-mick-saw-bay, his x mark

In presence of - -
H. C. Gilbert, Indian agent,
J. F. Godfroy, interpreter,
Geo. N. Smith,
Peter Dougherty,
Normon Barnes.

We, the undersigned, chiefs and headmen of the Grand River bands of the Ottawa and Chippewa Indians of

Michigan having heard the amendments of the Senate to the treaty of the 31st of July, 1855, read, and the same having been fully explained to us, do hereby assent to and ratify the same.

Done at Grand Rapids in the State of Michigan this 31st day of July, A.D. 1856.

Caw-ba-mo-say, his x mark.
Shaw-gwaw-baw-no, his x mark.
Aish-ke-baw-gosh, his x mark.
Waw-be-gay-kake, his x mark.
Ne-ba-ne-seh, his x mark.
Ching-gwosh, his x mark.
Mash-caw, his x mark.
Gaw-ga-gaw-bwa, his x mark.
Note-eno-kay, his x mark.
Ne-baw-nay-ge-zhick, his x mark.
Pay-baw-me, his x mark.
Shaw-be-quo-ung, his x mark.
Men-daw-waw-be, his x mark.

In presence of - -
John F. Godfroy, United States interpreter.
Wm. Cobmosy,
F. N. Gonfry.

Act of June 10, 1872, ch. 424, 17 Stat. 381

CHAP. CDXXIV.--*An Act for the Restoration to Market of certain Lands in Michigan.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all the lands remaining undisposed of in the reservation made for the Ottawa and Chippewa Indians of Michigan by the treaty of July thirty-first, eighteen hundred and fifty-five, shall be restored to market by proper notice, under direction of the Secretary of the Interior, as hereinafter provided.

SEC 2. That said unoccupied lands shall be open to homestead entry for six months from the passage of this act by Indians only of said tribes who shall have not made selections or purchases under said treaty, including such members of said tribes as have become of age since the expiration of the ten years named in the treaty; and any Indian so entitled shall be permitted to make his homestead entry at the local office within the six months aforesaid of not exceeding one hundred and sixty acres, or one-quarter section of minimum, or eighty acres of double minimum land, on making proper proof of his right under such rules as may be prescribed by the Secretary of the Interior: *Provided*, That the collector of customs for the district in which said land is situated is hereby authorized, and it is made his duty to select for such minor children as would be entitled under this law as heirs of any Indian.

SEC. 3. That all actual, permanent, bona fide settlers on any of said lands who settled prior to the first day of

January, eighteen hundred and seventy-two, shall be entitled to enter either under the homestead laws or to pay for at the minimum or double minimum price, as the case may be, not exceeding one hundred and sixty acres of the former or eighty acres of the latter class of land on making proof of his settlement and continued residence before the expiration of six months from the passage of this act.

SEC. 4. That all selections by Indians heretofore made and regularly reported and recognized as valid and proper by the Secretary of the Interior and commissioner of Indian affairs, shall be patented to the respective Indians making the same; and all sales heretofore made and reported where the same are regular and not in conflict with such selections, or with any other valid adverse right, except of the United States, are hereby confirmed, and patents shall issue thereon as in the other cases according to law.

SEC 5. That immediately after the expiration of said six months, the secretary shall proceed to restore the remaining lands to market by public notice of not less than thirty days, and after such restoration they shall be subject to the general laws governing the disposition of the public lands of the United States; *Provided*, That none of the lands herein mentioned shall be subject to or taken under any grant of lands for public works or improvements, or by any railroad company.

APPROVED, June 10, 1872.

Act of Mar. 3, 1875, ch. 188, 18 Stat. 516

CHAP. 188.—An act to amend the act entitled "An act for the restoration to homestead-entry and to market of certain lands in Michigan," approved June tenth, eighteen hundred and seventy-two, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the act approved June tenth, eighteen hundred and seventy-two, entitled "An act for the restoration to market of certain lands in Michigan," be, and hereby is, amended so as to authorize the Secretary of the Interior to cause patents to be issued to three hundred and twenty members of the Ottawa and Chippewa Indians of Michigan, for the selections found to have been made by them, but which were not, prior to the passage of said act, regularly reported and recognized by the Secretary of the Interior and Commissioner of Indian Affairs; and the remainder of said lands not disposed of, and not valuable mainly for pine-timber, shall be subject to entry under the homestead-laws, for one year from the passage of this act; and the lands remaining thereafter undisposed of shall be offered for sale at a price not less than two dollars and fifty cents per acre.

SEC. 2. That all Indians who have settled upon and made improvements on section ten, in township forty-seven north, of range two east, and section twenty-four in township forty-seven north, of range three west, Michigan, shall be permitted to enter not exceeding eighty acres each, at the minimum price of land, upon

making proof of such settlement and improvement before the register of the land-office at Marquette, Michigan; and when said entries shall have been completed in accordance herewith, the remaining lands embraced within the limits of said sections shall be restored to market.

SEC. 3. That all actual, permanent, bona-fide settlers on any of the lands reserved for Indian purposes under the treaty with the Ottawa and Chippewa Indians of Michigan of July thirty-first, eighteen hundred and fifty-five, shall be entitled to enter not exceeding one hundred and sixty acres of land, either under the homestead laws or to pay the minimum price of land, on making proof of his or her settlement and continued residence before the expiration of ninety days from the passage of this act: *Provided*, That such settlers do not claim any of the lands heretofore patented to Indians, or in conflict with the selections found to have been made by Indians referred to in the first section of this act, and shall have settled upon said lands prior to the first day of January, eighteen hundred and seventy-four.

Approved, March 3, 1875.