

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

Mille Lacs Band of Ojibwe, a
federally recognized Indian Tribe;
Sara Rice, in her official capacity as
the Mille Lacs Band Chief of Police;
and Derrick Naumann, in his official
capacity as Sergeant of the Mille Lacs
Police Department,

Plaintiffs,

v.

County of Mille Lacs, Minnesota;
Joseph Walsh, individually and in his
official capacity as County Attorney
for Mille Lacs County; and Don
Lorge, individually and in his official
capacity as Sheriff of Mille Lacs
County,

Defendants.

Case No. 17-cv-05155 (SRN/LIB)

**PLAINTIFFS' REPLY
MEMORANDUM OF LAW IN
SUPPORT OF MOTION FOR
PARTIAL SUMMARY JUDGMENT
THAT THE BOUNDARIES OF THE
MILLE LACS INDIAN
RESERVATION, AS ESTABLISHED
IN 1855, REMAIN INTACT**

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Plaintiffs' opening memorandum demonstrated the Mille Lacs Reservation was not disestablished by the 1863 or 1864 Treaties, the Nelson Act, the 1893 or 1898 Resolutions or the 1902 Act. Defendants do not argue the Resolutions or 1902 Act disestablished the Reservation, but rather contend they (and the 1902 Agreement) confirm that the Treaties and Nelson Act did so. Accordingly, we focus on the Treaties and Nelson Act and again show they did not disestablish the Reservation. Subsequent history does not (and cannot) change that.¹

The Treaties

The Treaties did not disestablish the Reservation because they expressly preserved the Mille Lacs Band's right to occupy it. The Article 12 proviso plainly states the Band cannot be compelled to remove from its present reservation unless it interferes with whites. Defendants argue the proviso is not "attach[ed]" to the Reservation, Defendants' Opposition Memorandum (ECF 257) at 19 (Defs.Opp.), but the proviso is found in Article 12, which addresses the Indians' removal from their "present reservations." Because a proviso operates within "the subject-matter of the principal clause[.]" *U.S. v. Morrow*, 266 U.S. 531, 534-35 (1925), the Article 12 proviso's plain meaning prohibited the Band's removal from its present reservation. The history of the Treaties, the negotiations, and the parties' practical construction confirm this. Pls.Opp. 28-29.

¹Defendants' restated preclusion, laches and Indian Claims Commission Act arguments also lack merit. *See* Plaintiffs' Opposition Memorandum (ECF 253) 54-104 (Pls.Opp.).

Because Article 12 prohibited the Band's removal, it necessarily secured the Band's right to remain and occupy its "present reservation," as defendants grudgingly concede. Defs.Opp. 17 ("Article 12 created, perhaps, a so-called 'right of occupancy.'") (citing *U.S. v. Mille Lac Band of Chippewa Indians*, 229 U.S. 498, 504-05 (1913) (*MLB-II*)). The right to remain was highly significant, both practically and legally. "Until the Indians have sold their lands, and removed from them in pursuance of the treaty stipulations, they are to be regarded as still in their ancient possessions, and are in under their original rights, and entitled to the undisturbed enjoyment of them." *New York Indians*, 72 U.S. 761, 770 (1867) (underscore added for emphasis, here and throughout); *see also Fellows v. Blacksmith*, 60 U.S. 366, 370-71 (1857) (even where Indians are obligated to remove, removal may only be effectuated "under [the Government's] care and superintendence[.]" not by "the irregular force and violence of the individuals who ... acquired [the Indians' title], or through the intervention of the courts of justice"). Under the 1863 and 1864 Treaties, the Band could not be removed "in pursuance of the treaty stipulations" because the treaty stipulations prohibited the Band's removal. Accordingly, the Band was entitled to remain in possession of its reservation lands and "to the undisturbed enjoyment of them."²

This preserved the Reservation. Defendants quote *Minnesota v. Hitchcock*, 185 U.S. 373, 389 (1902), in which the Court stated the "mere calling of the tract [at issue] a reservation" did not necessarily make it one, Defs.Opp. 33, but ignore what follows:

²Citing Chandler and Teller's opinions, defendants suggest the Government could have allowed non-Indians to enter the Reservation and crowd the Indians out, Defs.Opp. 34-36, but this construction is irreconcilable with *New York* and *Fellows*.

Yet if it was necessary to determine the question we should have little doubt that this was a reservation within the accepted meaning of the term. ... [T]o create a reservation it is not necessary that there should be a formal cession or a formal act setting apart a particular tract. It is enough that from what has been done there results a certain defined tract appropriated to certain purposes. Here the Indian occupation was confined by the treaty to a certain specified tract. That became, in effect, an Indian reservation.

Hitchcock, 185 U.S. at 389-90. Under Article 12, the Band had the right to occupy the Mille Lacs Reservation and was entitled to its “undisturbed enjoyment.” *New York*, 72 U.S. at 770. Because “a certain defined tract [was] appropriated” for Indian occupation, it remained an Indian reservation. *Hitchcock*, 185 U.S. at 390.

This conclusion is also compelled by the Supreme Court’s disestablishment jurisprudence. Because the Treaties did not provide for “the present and total surrender of all tribal interests” in the Reservation, but instead preserved the Band’s right to occupy the Reservation, they did not disestablish it. *McGirt v. Okla.*, 140 S. Ct. 2452, 2464 (2020) (quoting *Neb. v. Parker*, 136 S. Ct. 1072, 1079 (2016)).

Any doubt about this must be resolved in the Indians’ favor. “Indian treaties must be interpreted in light of the parties’ intentions, with any ambiguities resolved in favor of the Indians, and the words of a treaty must be construed in the sense in which they would naturally be understood by the Indians.” *Herrera v. Wyo.*, 139 S. Ct. 1686, 1699 (2019) (internal quotations and citations omitted); *accord Winters v. U.S.*, 207 U.S. 564, 576-77 (1908) (Indian canon “should certainly be applied to determine between two inferences, one of which would support the purpose of the agreement and the other impair or defeat it” because “it cannot be supposed that the Indians were alert to exclude by formal words every inference which might ... defeat the declared purpose of themselves and the Government”).

Defendants' arguments notwithstanding, the Band consistently and repeatedly affirmed its understanding that the Treaties preserved its reservation, and the treaty drafter, Henry Rice, confirmed it was correct. *See, e.g.*, Plaintiffs' Opening Memorandum (ECF 225) at 11-16, 21-22, 29-31, 36 (discussing Band statements in 1863, 1867, 1870, 1871, 1880, 1886 and 1888 and Rice's statements in 1889) (Pls.Mem.). Defendants' expert agreed:

Q. Did band leaders state repeatedly that they understood the 1863 and 1864 treaties to preserve the reservation for them?

A. Yes. In fact, there's a number of documents in the list that you provided me where the Mille Lacs Anishinaabe are saying that quite clearly. From their perspective – I want to emphasize from their perspective – there was no change in the reservation in 1863, or '64, from their perspective.

Q. And do you have any reason to doubt that those statements accurately reflected their understanding of the treaties?

A. No. I think that those statements do reflect their understanding of the agreements of '63 and '64.

Driben Dep. (Slonim Reply Decl. Ex. 1) at 66; *see also id.* 107-17.

Many federal officials agreed. Defendants quote Secretary Delano's 1871 letter to Agent Smith, stating the Indians "cede[d] to the United States under certain conditions their several reservations[,]" Defs.Opp. 4, but omit what follows:

By the proviso, contained in the 12th article of said Treaty it is stipulated that owing to heretofore good conduct of the Mille Lac Indians they shall not be compelled to remove so long as they shall not ... interfere with ... the whites.

This Department has no information leading to the belief that this proviso has ever been violated, and is therefore of the opinion that the Mille Lac Indians are entitled to remain at present unmolested on **their reservation** and that their occupancy cannot be disturbed until they shall interfere with or in some manner molest the persons or property of the whites. ... You are authorized ... to notify and warn all white persons against attempting to make settlements or commit trespasses by cutting timber or otherwise on the Mille

Lac Reservation and against disturbing or attempting to disturb in any manner the Indians who legitimately occupy **said reservation** under the treaty before referred to.

Carter Ex. 120 (boldface added, internal modifications normalized). Delano's understanding reflects the Treaties' plain language and follows the Supreme Court's decisions in *New York* and *Fellows*. Plaintiffs are not invoking the Indian canons to alter or revise the Treaties, but to give effect to their plain language and the parties' intent as understood by the Indians and many federal officials.

Finally, this is settled law: the Court of Claims and Claims Court expressly held the Treaties preserved the Reservation for the Band. Pls.Opp. 59-61, 72.

Defendants mistakenly argue the Supreme Court held otherwise. Defs.Opp. 43-52. In its 1913 decision, the Court explained a controversy arose over the meaning of the Article 12 proviso: some government officials asserted it "did not invest the [Band] with any right in the old reservation expressly ceded by Article 1[,]" but the Band asserted it "operated to reserve the lands for their occupancy and use indefinitely, and that the lands could not be opened to settlement while they remained and conducted themselves properly towards the whites in that vicinity." *MLB-II*, 229 U.S. at 501-02. This controversy "was still subsisting" when Congress passed and the Band accepted the Nelson Act, and "was thereby adjusted and composed." *Id.* at 506.

The Act's provisions (especially the Section 6 proviso) demonstrated an intent "to extend the negotiations to the Mille Lac Reservation"; the actions of the commission, the Secretary and the President, "in seeking, obtaining and approving the relinquishment of that reservation, all treated it as within the purview of the act"; and "Congress recognized

[in the 1890 Railroad Act] that the Indians had come to have an interest in the disposal of the lands in that reservation.” *Id.* at 506-07. “[T]he Government thus waived its earlier position respecting the status of the reservation and consented to recognize the contention of the Indians,” which, to reiterate, was that the proviso “reserve[d] the lands for their occupancy and use indefinitely, and that the lands could not be opened to settlement while they remained and conducted themselves properly towards the whites[.]” *Id.* at 507, 502. Thus, the Nelson Act plainly recognized the Mille Lacs Reservation remained a reservation.

This was done “upon the express condition, stated in the proviso to § 6,” that any subsisting, valid preemption or homestead entry would be proceeded with under the regulations and decisions in force at the time of its allowance. *Id.* at 507.

In other words, the controversy was intended to be and was adjusted and composed by concessions on both sides, whereby the lands in the Mille Lac Reservation were put in the same category, and were to be disposed of for the benefit of the Indians in the same manner, as the lands in the other reservations relinquished under the act, but subject to the condition and qualification that all subsisting bona fide preemption and homestead entries should be carried to completion and patent under the regulations and decisions in force at the time of their allowance.

Id. Because “lands in the other reservations” indisputably comprised “reservations,” this too confirmed that lands in the Mille Lacs Reservation comprised a “reservation.”

The Court’s holding that the Nelson Act resolved the Article 12 controversy obviated any need to address the controversy on the merits. Responding to the Band’s argument that no entries could be “regular and valid” under Section 6’s proviso because of the Reservation’s existence, the Court noted the Reservation’s existence “was the very

matter in dispute” and the Band’s interpretation would deprive the proviso of any effect. *Id.* at 508. Accordingly, it held the requirement that entries be “regular and valid” had “special reference to the charge that some of the entries were fraudulent and with the purpose of eliminating such as were of that character.” *Id.* This construction was entirely consistent with the compromise the Court found in the Nelson Act, under which the Government recognized the continued existence of the Reservation and the Indians consented to patenting certain entries within it. Defendants’ argument notwithstanding, the Court did not hold the Treaties disestablished the Reservation. Pls.Opp. 65-69 & n.58.

In sum, plain language, the parties’ intentions, Indian understanding, and applicable law all demonstrate the Treaties preserved and did not disestablish the Reservation; the Court of Claims and Claims Court so held; and the Supreme Court held Congress accepted the Indians’ contention regarding the continued existence of the Reservation in the Nelson Act. Defendants’ argument that the Treaties disestablished the Reservation is meritless.

The Nelson Act

The Nelson Act also did not disestablish the Reservation. When read as a whole (something defendants never do), the Act fails to provide clear congressional intent to disestablish reservations on which allotments were to be made to the Indians. As to those reservations, the Act sought only a cession in trust, did not provide fixed-sum compensation, provided for Indian allotments and the reservation of additional lands for Indian use, and established a trust to, *inter alia*, provide Indian schools “in their midst.” 25 Stat. 642, § 7; *see* Pls.Mem. 34-35, 87-91; Pls.Opp. 2-4. The absence of clear congressional intent to disestablish is confirmed by the surrounding circumstances,

especially as to Mille Lacs: negotiations with the Band, reports to Congress, and contemporaneous Acts all recognized the Reservation's continued existence. Pls.Mem. 35-47, 91-95; Pls.Opp. 4-5. Subsequent history cannot alter the Nelson Act's meaning especially where, as here, it involved wholesale violation of the Band's rights and violent, unlawful dispossession of Band members from reservation lands. *McGirt*, 140 S. Ct. at 2468-70, 2482; Pls.Mem. 47-50, 67-68, 72-73, 95.³

This too is settled law: the Nelson Act did not disestablish those reservations where Indians were entitled to allotments and no change in reservation boundaries was discussed.

³Defendants argue *MLB-II* did not set aside or deem the 1893 or 1898 Resolutions unlawful. Defs.Opp. 59. While the remedy was limited to money damages, the Court expressly held the Resolutions violated the Nelson Act and were based on "a misapprehension of the true relation of the Government to the lands[.]" 229 U.S. at 509-10. Moreover, neither resolution purported to change reservation boundaries; the 1893 Resolution merely allowed lands entered under a mistaken ruling to be patented, while the 1898 Resolution was based on the mistaken belief that the Reservation had been disestablished previously. Pls.Mem. 53-54, 60-65, 96-98.

Similarly, the word "former" in the 1902 Agreement (but not in the 1902 Act) was based on McLaughlin's mistaken understanding of the Nelson Act and cannot amend that Act. *Compare* Defs.Opp. 61, 71 with Pls.Mem. 68-71; Pls.Opp. 27-28, 34-35; *McGirt*, 140 S. Ct. at 2469 (extratextual sources cannot overcome statute's terms).

Defendants argue post-1902 demographic data show the Band understood it had given up the right to stay at Mille Lacs, but no evidence supports that inference. Defs.Opp. 8-9. In the 1902 negotiations, the Band denied it had given up the right to stay at Mille Lacs, as defendants' expert concedes. Pls.Mem. 69-70 & n.116. Band members left because of the Government's unlawful failure to make allotments to them and unlawful transfer of reservation lands to non-Indians. *Id.* 55 (discussing 1894 letter from Band leaders stating they knew the Great Father had "so far as he could do so [given] away our homes at Mille Lac, to strangers who are here for the purpose of [dispossessing] us," while insisting they had "never consented to give up our lands[.]" and 1895 letter stating Band members had been "driven out of their log huts and from their garden patches by the whites, and their reservation ... taken from them by sheer force, and not by any concessions made by them").

Pls.Mem. 82-86 (discussing Nelson Act cases). Because the Mille Lacs Band was entitled to allotments on its reservation, and no one referenced a change in reservation boundaries during the negotiations, the Nelson Act did not disestablish the Reservation.

Defendants contend these cases (completely ignored in their opening brief) are a “mixed bag,” Defs.Opp. 52-58, but the Eighth Circuit held they are consistent and reflect different provisions of the Act applicable in each case, especially the provision for allotments. *White Earth Band of Chippewa Indians v. Alexander*, 683 F.2d 1129, 1134 (8th Cir. 1982). Defendants’ argument that the decisions finding no disestablishment are inconsistent with *McGirt*, Defs.Opp. 54-57, is wrong because *McGirt* reaffirmed the requirement for clear congressional intent to disestablish a reservation, and did not abandon previous holdings that cession language alone is insufficient. Pls.Opp. 2-6. Defendants’ argument that the Nelson Act cases are no longer good law simply underscores the radical departure from settled law they seek and would wreak havoc on Indian reservations throughout northern Minnesota.

Defendants’ attempt to distinguish the Mille Lacs Reservation from the reservations that were not disestablished is unavailing because it relies on post-Nelson Act events resulting from the unlawful dispossession of Mille Lacs Band members. Defs.Opp. 71-72. No other band endured the heartless displacement endured by the Mille Lacs Band, but that does not alter the Nelson Act, which placed the Mille Lacs Reservation in “the same category” as the other reservations. *MLB-II*, 229 U.S. at 507. The only difference was the Section 6 proviso, which was designed to protect Sabin and Wilder’s entries and reveals

no intent (let alone clear intent) to disestablish. Pls.Mem. 33, 86-87; *see McGirt*, 140 S. Ct. at 2464 (allowing transfer of individual plots does not disestablish reservation).

Professor Driben’s testimony does not create a fact issue precluding summary judgment. First, Driben’s testimony cannot supply the requisite congressional intent to disestablish, which is absent in the Nelson Act. Second, Driben’s testimony that the Band made a conscious decision to relinquish the Reservation is methodologically flawed because it is not based on—and is directly contrary to—what the Band actually said and did before, during, and after the Nelson Act negotiations. *See* White Rebuttal Rep. (ECF 237-4) 2-4, 15-16, 56-57 (discussing methodological flaws); Valentine Rebuttal Rep. (ECF 236-2) 2-3 and throughout (same); Pls.Mem. 93 n.148.

Driben asserts it is “false” to claim he “‘cite[d] no statement by Band members before, during or after the negotiations in which they stated they wanted to relinquish or understood they had relinquished the Reservation.’” Driben Decl. (ECF 259) 2-3 ¶ 6 (quoting Pls.Mem. 7-8). However, Driben repeatedly testified there were no such statements. *E.g.*, Driben Dep. 25-27, 82-83, 146-47, 185-86, 197. Submitting a declaration to contradict deposition testimony does not create a genuine fact issue. *See Crater Corp. v. Lucent Techs., Inc.*, 625 F. Supp. 2d 790, 798 n.7 (E.D. Mo. 2007); *Marathon Ashland Petroleum v. Int’l Bhd. of Teamsters Local No. 120*, 300 F.3d 945, 951 (8th Cir. 2002).

Driben now identifies a single “statement” allegedly supporting his opinion, asserting “[m]ore than two thirds of the eligible male electors in the Mille Lacs bands endorsed the agreement in which they agreed to ‘the complete cession and relinquishment in writing of all their title and interest in and to’ the Mille Lacs Reservation.” Driben Decl.

2-3 ¶ 6 (quoting Nelson Act). However, no Band member mentioned this passage from the Act during the negotiations. *See* ECF 230-1 at 163-76. In their agreement, Band members accepted the Nelson Act as a whole, including critical passages Driben omits, such as those stating the cession and relinquishment were for purposes stated in the Act, providing for Indian allotments on existing reservations (the provision that dominated the negotiations and was critical to the Band’s acceptance of the Act), and providing other reservation lands could be reserved for Indian use. How Band members understood the entire Act cannot be determined by quoting one passage out of context.

In deposition testimony, Driben rejected reliance on language from the Act and its implementing agreements to determine Indian understanding. Having previously worked with the Grand Portage Band, Driben was asked whether its agreement to “grant, cede, relinquish and convey to the United States all our right, title and interest in and to the said Grand Portage Reservation in the state of Minnesota” was evidence Grand Portage relinquished its reservation under the Act; Driben answered “[n]o” because the agreement shed no light on the Indians’ understanding. Driben Dep. 50-52.

Driben also conceded that, by itself, relinquishing the Reservation was not what the Mille Lacs Band wanted. *Id.* 249-50 (“If they just got rid of the reservation, that wouldn’t be anything they’d have nothing.”). Driben’s theory rests on the assumption Band members needed to get rid of the Reservation to get what Driben alleges they really wanted: land in severalty (*i.e.*, allotments). *See id.* (“acquiring land in severalty ... was the whole—that was the thing they wanted”). However, Driben provided no evidence to support this assumption and all available evidence is to the contrary. Pls.Mem. 31 n.40, 38-39 n.54.

Indeed, he testified the Band could obtain allotments without relinquishing the Reservation:

Q. Could they request allotments on the reservation without wanting to part with the reservation?

A. That is my understanding, yes, they could have done that. But that's not what they wanted to do, because the reservation was the issue.

Q. Okay. The fact that they requested allotments doesn't mean that they wanted to part with the reservation?

A. In and of itself, no. But, again, don't take that in isolation. Take it in the context of everything.

Driben Dep. 139-40; *see also id.* 251-55 (conceding Indians understood they could take allotments at White Earth without relinquishing that reservation).⁴

Finally, Driben testified that, when the Band agreed to the Nelson Act, it wanted to maintain its connection to the lands at Mille Lacs and understood it could do so under the Act: Band members would receive allotments at Mille Lacs; they would maintain villages and encampments there; they would continue to hunt, fish, trap, and gather plants there; they would rely on the Government to remove non-Indians from and prevent timber and hay trespasses and flooding of rice crops on the reservation; and pine lands would be appraised and sold for their benefit. *Id.* 140-46, 156-61, 164-69. Because this is not remotely close to the present and total surrender of all tribal interests necessary for

⁴Driben attempts to walk back this testimony, but his new declaration identifies no evidence that the Band believed it was necessary to get rid of the Reservation to obtain allotments and does not address substantial contrary evidence. Driben Decl. at 3-4 ¶ 7.

disestablishment, Driben's testimony provides no impediment to summary judgment that the Nelson Act, like the Treaties, did not disestablish the Reservation.

Conclusion

For reasons stated here and in plaintiffs' prior memoranda, the Court should grant summary judgment that the Reservation's 1855 boundaries remain intact.

DATED: March 8, 2021.

Respectfully submitted,

LOCKRIDGE GRINDAL NAUEN P.L.L.P.

s/ Charles N Nauen

Charles N. Nauen (#121216)

David J. Zoll (#0330681)

Arielle S. Wagner (#0398332)

100 Washington Avenue South, Suite 2200

Minneapolis, MN 55401

Tel: (612) 339-6900

Fax: (612) 339-0981

cnnauen@locklaw.com

djzoll@locklaw.com

aswagner@locklaw.com

ZIONTZ CHESTNUT

s/ Marc Slonim

Marc Slonim, WA Bar #11181

Beth Baldwin, WA Bar #46018

Wyatt Golding, WA Bar #44412

Anna Brady, WA Bar #54323

2101 Fourth Ave., Suite 1230

Seattle, WA 98121

Phone: 206-448-1230

mslonim@ziontzchestnut.com

bbaldwin@ziontzchestnut.com

wgolding@ziontzchestnut.com

abrady@ziontzchestnut.com

Attorneys for Plaintiffs