

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Mille Lacs Band of Ojibwe, et al.,

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

Plaintiffs,

v.

County of Mille Lacs, et al.,

Defendants.

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

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ARGUMENT

I. The 1863 and 1864 Treaties contradict the Band's argument.

The Band argues that Article 12 of the 1863 and 1864 Treaties overrides the explicit cession language of Article 1 (ECF 253 at 28-30.) But Article 12 does not state “that the Indians shall not be compelled to remove from their ‘present reservations’” as the Band quotes (*id.* p. 28.). No language in Article 12 creates a legal “right of occupancy,” nor any “right to occupy” for any band. The Band’s argument that the treaties’ Article 12 preserved the former reservation for its “exclusive use,” (*Id.* at 28,) is without textual support. Article 12 provides neither “exclusivity,” nor a right to “use.”¹ It provides no “permanent home.” It does not exclude non-Indians. It offers protection against removal, not a right to possession or exclusion. The right under Article 12 was later referred to as a so-called “right of occupancy,” *United States v. Mille Lac Band of Chippewa Indians*, 229 U.S. 498, 504-05 (1913), but colloquialism lacks textual support in the Treaties.

Article 12 did not create an interest in land—which had already been ceded by Article 1. Article 12 created a right against compelled removal unless its conditions were violated.

The Band argues that its understanding of Article 12 contradicts the fact the ceded reservation became public lands. (ECF 253 at 30.) Subjective

¹ ECF 242, Carter Decl. Ex. 23.

understanding decades later does not trump the legal consequence of a reservation being opened as public lands. *See infra* pp. 7-8.

A. The 1863 and 1864 Treaties have language of cession and an unconditional commitment by Congress to pay.

The Band's argument regarding the 1863-64 Treaties is further unsupported by the coupling of Article 1's explicit cession with Article 3's unconditional compensation. Besides the new reservation created in Article 2, consideration in Article 3 included, among other terms, and a ten-year extension of the then-present annuities and \$16,000 for chiefs. The 1863-64 Treaties had unconditional compensation and explicit language of cession. Where "explicit reference to cession" is buttressed by "an unconditional commitment from Congress to compensate" a tribe there is "an almost insurmountable presumption that Congress meant for the tribe's reservation to be diminished." *Solem v. Bartlett*, 465 U.S. 463, 470-72 (1984).

The Band is wrong in arguing that sum-certain payment is necessary.²

II. Plaintiffs ignore and misconstrue Supreme Court precedent.

Plaintiffs wrongly argue that without "explicit language of cession and unconditional compensation[,]' the Court will find disestablishment only if"

² "[E]xplicit language of cession and unconditional compensation are not prerequisites' for a finding of disestablishment," *McGirt*, 140 S. Ct. at 2485-86. Under *Solem*, "other language evidencing the present and total surrender of all tribal interests" can substitute for explicit cession language. 465 U.S. at 470-71. As stated in *Hagen v. Utah*, "we have never required any particular form of words before finding diminishment." 510 U.S. 399, 411 (1994).

extratextual evidence is consulted. (ECF 253 at 15 (Plaintiffs’ emphasis)(quoting *Solem*, at 471).)

A. Here, under *McGirt*, analysis begins and ends with the text.

McGirt commands that to disestablish a reservation, congressional action is the sole focus. *McGirt v. Oklahoma*, 140 S.Ct. 2452, 2462 (2020).³ If a statute is clear, “[t]here is no need to consult extratextual sources.” *Id.* at 2469. The “only role” extratextual sources play is “to help ‘clear up ... not create’ ambiguity....” *Id.* (citation omitted).⁴

There is no ambiguous language to justify extratextual sources. *McGirt* cautions that courts would be “mistaken” to rely on the second and third *Solem* factors when cession language is unambiguous. *Id.* at 2468. Yet Plaintiffs instruct this Court to do so. Plaintiffs obscure the unambiguous text using extratextual evidence, contravening *McGirt*, which this Court must follow.

B. The Supreme Court rejects that sum-certain compensation is required for disestablishment.

Plaintiffs flout that absolute language of cession and relinquishment controls. They ask this Court to apply a rule requiring sum-certain payment for

³ See ECF 241 at 30.

⁴ See ECF 241 at 30-31; *Federal Indian Law—Disestablishment of Indian Reservations—McGirt v. Oklahoma*, 134 Harv. L. Rev. 600, 603 (2020)(stating *McGirt* “explicitly rejected” consideration of second and third *Solem* factors when cession language is clear).

disestablishment under *Grey Bear*, 836 F.2d 1086 (8th Cir. 1987), disregarding *McGirt* and *Hagen*.⁵

Hagen concluded that cession language *without* unconditional compensation demonstrated congressional intent to disestablish. *Id.* Plaintiffs avoid this. *Hagen* rejected the Solicitor General’s argument that precedent “establish[ed] a ‘clear-statement rule,’ pursuant to which a finding of diminishment would require *both* explicit language of cession or other language evidencing the surrender of tribal interests *and* an unconditional commitment from Congress to compensate the Indians.” *Id.* at 411-12 (emphasis added); accord *Wyoming v. EPA*, 875 F.3d 505, 516-17 (10th Cir. 2017) (*Hagen* “expressly rejected the argument that a finding of diminishment requires ‘both explicit language of cession or other language evidencing the surrender of tribal interests *and* an unconditional commitment from Congress to compensate the Indians.’”) (quoting *Hagen*, 510 U.S. at 411). “What matters most is not the mechanism of payment, but rather the ‘language of immediate cession.’” *Wyoming*, 875 F.3d at 517 (quoting *Rosebud*, 430 U.S. at 597).

As to sum-certain payments *Rosebud* said, “While the provision for definite payment can certainly provide *additional* evidence of diminishment, *the lack of such a provision does not lead to the contrary conclusion.*” *Rosebud Sioux Tribe*

⁵ Plaintiffs incorrectly claim Defendants cite no case where cession language by itself sufficed to demonstrate congressional intent to disestablish a reservation. Pls’ Resp. 5. See Defs.’ Mem. (ECF 241 at 78)(citing *Rosebud Sioux Tribe v. Kneip*, 420 U.S. 584, 596-97 (1977)(statutes at issue effected diminishment without sum-certain payment to the Indians).

v. Kneip, 430 U.S. 584, 588 and n.4 (1977) (emphasis added).⁶ The Court thus concluded “the plain language of the [relevant] Act demonstrated the congressional purpose to diminish the Uintah Reservation,” *id.* at 416, notwithstanding later consideration of the second and third *Solem* factors, *id.* at 417-422. Under *McGirt*, the matter ends with the plain language. But even if sum-certain compensation is considered here, the Band received specific consideration in the 1863-64 Treaties. See *supra* I.A.: Act of May 17, 1902, 32 Stat. 254, 268 (ECF 241 at 23-24, 41-43.) This only buttresses what the cession language already compels: intent to disestablish.

III. The Band has no answer to the plain language of the 1889 and 1902 Agreements.

Plaintiffs argue that the Nelson Act did not disestablish the Mille Lacs reservation. (ECF 253 at 32.) But Supreme Court jurisprudence is the opposite. (See ECF 241 at 76-80; ECF 257 at 41-52.) The Nelson Act resolved the dispute over the Article 12 proviso. 229 U.S. at 506 (“[W]e think it is also apparent that this controversy was intended to be and was thereby adjusted and composed.”). (ECF 241 at 30-41; ECF 257 at 13-19.)

⁶ *Hagen* noted, “[i]n fact, the statutes at issue in *Rosebud*, which we held to have effected a diminishment, did not provide for the payment of a sum certain to the Indians.” *Id.* (quoting *Rosebud*, 430 U.S. at 588). The Eighth Circuit in *Rosebud* concluded the language in the 1901 Agreement to “cede, surrender, grant and convey” leaves no doubt as to its meaning. There is a complete relinquishment of right, title, and claim.” *Rosebud Sioux Tribe v. Kneip*, 521 F.2d 87, 94 (8th Cir. 1975). So, too, here the Nelson Act and Agreement provide for the “complete cession and relinquishment in writing of all of title and interest in and to all the reservations.” ECF 241 at 30.

Plaintiffs' assertion about other Nelson Act cases overlooks that "[t]he Nelson Act treated various bands or tribes and reservations differently." *White Earth Band v. Alexander*, 683 F.2d 1129, 1135 (8th Cir. 1982); *see also* (ECF 257 at 52-58 (discussing other Nelson Act cases).)

Plaintiffs asserts the "trust" the Nelson Act created also contradicts disestablishment. (ECF 253 at 32.) But the Nelson Act did not create a technical trust. *Chippewa Indians of Minnesota v. United States*, 307 U.S. 1, 3 (1939). The Nelson Act provided a bargained-for exchange whereby the Band received benefits of the Nelson Act in exchange for allotments (ultimately at White Earth) and the right to participate in the common fund that held the proceeds from lands sold. *See Minnesota Chippewa Tribe v. United States*, 11 Cl. Ct. 221, 229-30 (1986).

Plaintiffs argue that because Rice promised allotments at Mille Lacs, their understanding controls. But Indian understanding cannot be used to avoid plain language. *See United States v. Minnesota*, 466 F. Supp. 1382, 1388 (D. Minn. 1979)("[E]ven Indian treaties cannot be re-written or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties."), *aff'd*, 614 F.2d 1161 (8th Cir. 1980). Rice apparently also made promises of 160-acre allotments that were unfounded, and "could not bind the United States." (ECF 241 at 43-44 (citing *United States v. Lee*, 106 U.S. 196 (1882))).

The Band does not discuss the 1902 agreement and so Defendants refer the Court to their opposition brief. (ECF 257 at 61-71.)

IV. The Band misconstrues the Supreme Court’s 1913 and 1926 decisions.

The Band incorrectly asserts that in 1913 the Court “made no determination regarding the status of the Reservation under the Nelson Act of following the unlawful disposal of its lands.” (ECF 253 at 68.) The Court considered the Nelson Act as resolving the dispute over the status of the former reservation based on the Article 12 proviso. 229 U.S. at 504. The Court also rejected as inconsistent with the Nelson Act’s section 6 proviso the Band’s argument that the reservation continued to exist, as that proviso “had an office to perform and must be given effect.” *Id.* at 508. Because “no rights of the Indians were infringed in so disposing of lands embraced in such entries [within the terms of the proviso]” the Court reversed the Court of Claims on this critical point and necessarily determined the reservation had been ceded by the 1863-64 Treaties. *Id.* at 509.

As Defendants explained previously, (ECF 257 pp. 48-52), in *United States v. Minnesota*, 270 U.S. 181 (1926), Minnesota prevailed in a quiet title action where the United States sought to establish title to 153,000 acres patented to the State under the Swamp Lands Act. The Band never addressed this case in its opening brief and now tries to argue away the holding, asserting that the Court did not address reservation status in 1871, when Minnesota received a patent to

701.35 acres within the former reservation, or the effect of section 6 of the Nelson Act. (ECF 253 at 69, 79.)

For the Court to rule for Minnesota, the Court had to hold that the lands to which Minnesota received a patent in 1871 were not “reserved, sold, or disposed of.” This holding necessarily meant that lands in 1871 were not within a reservation, since virtually by definition lands within a reservation are not public lands. Act of Sept. 4, 1841, 5 Stat. 453, 456; Act of May 20, 1862 12 Stat. 392.

V. Plaintiffs’ ICCA argument misstates both facts and law.

In 1946, the United States’ position, as shown by the 1935 Solicitor’s Opinion and the MCT Constitution, was that the Mille Lacs Band lacked a reservation. 1951 was the Band’s deadline to challenge that position.

Plaintiffs’ arguments—that the allotments should have been made to the Band; that the Nelson Act relinquishment somehow preserved the reservation; that the 1893 and 1898 Resolutions were “unlawful”; and that the 1902 Act and Agreement did not confirm disestablishment—could have been challenged under the ICCA. The Band would have been challenging a right that the United States was denying; the Commission had jurisdiction.

The Band seeks to set aside congressional resolutions that opened the former reservation lands to sale under the general land laws. The Band seeks to nullify the 1902 Agreement wherein they agreed to remove from the “former reservation” and take allotments at White Earth. “Former reservation” cannot be reconciled with any claim that Plaintiffs do not seek to set aside the 1902

Agreement. *See Oglala Sioux Tribe v. U.S. Army Corps of Engineers*, 570 F.3d 327 (D.C. Cir. 2009).

Oglala held the ICCA bars reservation-boundary cases that seek “to set aside [federal legislation and executive orders] or to treat them as void on the basis of centuries’ old flaws in the ratification process.” Here, Plaintiffs seek to set aside the 1893 and 1898 Resolutions as void because of alleged flaws in the process. ICCA bars this.

VI. Two federal prosecutions between 1890 and 1953 are not evidence against disestablishment.

Plaintiffs cite two federal prosecutions in the early 1930s as evidence against disestablishment. From at least 1890 to 1953, when Minnesota was granted full criminal jurisdiction under Public Law 280, state and local governments were exercising civil and criminal jurisdiction throughout the former reservation, including criminal prosecutions of tribal members.⁷ The criminal prosecution for murder clearly occurred on Allotment Number 106, purchased in trust for Band members after 1914.⁸ This is what the Solicitor’s 1935 Opinion⁹ described as the “Mille Lacs Reservation.” The reference to the reservation in connection with that prosecution makes this clear.

⁷ *See* 1st Carter Decl., Ex. 69-71; Ex. 68 at 168.

⁸ Slonim Decl., Ex. 8 (Feb. 2, 2021 Decl.).

⁹ 1st Carter Decl., Ex. 94.

VII. Congressional and administrative references to the ‘Mille Lacs Reservation’ are not persuasive in determining disestablishment.

Since the 1935 Solicitor’s Opinion,¹⁰ any reference to the Mille Lacs Reservation is a reference to the lands purchased in trust after 1914 for Mille Lacs Band members. Additionally, the Supreme Court has expressly held that “the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.” *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 355-56 (1998) [citation omitted]. Moreover, the citation to Minn. Stat. § 626.90 as purporting to recognize the 1855 Mille Lacs Reservation is disingenuous because Subd. 7 specifically disclaims any impact on “current reservation boundaries.

VIII. The Band misstates the fundamental nature of its claims in denying it is precluded.

The Band argues that its claims arise from Defendants’ alleged interference with the exercise of its inherent and federally delegated law enforcement authority beginning in 2016. Thus, the Band argues, it is not precluded, because these claims did not arise until that time. (ECF 253 at 74.)

This argument defies common sense. The scope of the Band’s law enforcement authority and the lands over which the Band may exercise that authority *in the absence of a cooperative law enforcement agreement with the local law enforcement agency*, as required by state statute, *require* a determination of whether the reservation exists and where. That Plaintiffs’

¹⁰ 1st Carter Decl., Ex. 94.

current claim is based on subsequent factual developments does not mean that previous rulings necessarily are thrown out. Further, “litigation seeking to establish ownership of property provides the clearest example of results dictated by the need for repose.” *Harrington v. Inhabitants of Town of Garland, Me.*, 551 F. Supp. 1371, 1378 (D. Me. 1982), *aff’d*, 715 F.2d 1 (1st Cir. 1983)(quotation omitted). This principle underlies *Nevada v. United States*, where the Supreme Court held that the subsequent suit, which was based on fishing rights, was barred by the earlier litigation based on irrigation needs, because the prior action was intended to be an all-inclusive adjudication of water rights. 463 U.S. 110, 129-133 (1983).

This case is similar. The law-enforcement interference claim requires a determination of *where* the Band possesses such jurisdictional authority. On lands over which the Band has no such authority, Defendants cannot have interfered with the Band’s authority. The prior litigation’s question is the same: are the reservation boundaries intact over all 61,000 acres? That matter has been litigated before and accordingly, the Band is now barred from bringing a claim based on the reservation’s existence.

IX. The Band is collaterally estopped from re-litigating the issue of the reservation boundary.

The Band’s opposition raises the “change-in-law” exception to issue preclusion. (ECF 253 at 77-78.) But the Band mischaracterizes the prior litigation, the Supreme Court’s holdings, and that the boundary issue was *actually litigated*. The Band must be collaterally estopped from re-litigating it.

A. The Band's brief mischaracterizes the prior litigation.

With respect to the 1912 Court of Claims decision, the Band admits that the “effect of the Treaties on the Reservation’s status was at issue and actually litigated by the parties[.]” (ECF 253 at 78.) But the Band argues that “plaintiffs’ claims here are not precluded because the Court of Claims agreed with the Band[.]” (*Id.*) The problem is, despite the Band’s mischaracterization of the case law, the Supreme Court affirmed *no* part of the Court of Claims decision. 229 U.S. at 510. The Supreme Court’s analysis of the matter was different, as was its conclusion. Whether the Court of Claims agreed with the Band has no bearing on whether the Band is estopped from relitigating the issue, because that decision was reversed by the Supreme Court and remanded back to the Court of Claims.

The litigation history supports this. At no point in the litigation history laid out by Defendants (ECF 257 at 83-94) did the Band assert that the boundaries were intact. At no point did the Band’s claims or arguments imply that position. The Band suggests now that the *absence* of this position’s plain assertion means that the matter has never been litigated. Rather, the Band understood the reservation had been lost, and instead sought damages to compensate their loss.

1. The effect of the 1863-64 Treaties and the Nelson Act was actually litigated.

As noted above, the Band admits 1863-64 Treaties’ effect was at issue in the 1912 litigation. The Supreme Court’s reversal in 1913 was based on its determination that the reservation was disestablished in 1863-64, and any rights under Article 12 were resolved by the Nelson Act, under which the United States

obtained the Band's unequivocal relinquishment of its right of occupancy. (*See* ECF 257 at 76-77.)

B. The change-in-law exception is inapplicable here.

Plaintiffs now assert that even if the issue of the reservation was actually litigated, a “change in law” exception applies to circumvent res judicata. (ECF 253 at 84-89.) Their arguments’ conclusion is that “[t]he ultimate test is one of congressional intent, which must be clearly expressed.” (*Id.* at 87, internal citations omitted.)

Defendants do not disagree with this conclusion. The language of the treaties and the Nelson Act is clear. The canon of construction that places unambiguous language as meaning’s primacy primary source was reinforced by *McGirt* but has long been a fundamental principle in the law. There is no change in law such to undermine these myriad earlier decisions.

X. Judicial estoppel precludes the Band from asserting the reservation boundaries remain intact.

The Band argues that it should not be bound by its multiple contrary positions. (*See* ECF 253 at 89-98.) It then claims that any change in the Band’s position is because it “evolved” during the litigation, (*id.* at 94) and that its contrary position now “reflects changes in federal law and policy over the past 100 years pertaining to reservation status,” (*id.* at 95.)

This is simply not enough. The litigation record here is plain: neither the Band, the United States, nor the Minnesota Chippewa Tribe argued that the reservation remained fully intact following the 1863-64 treaties and the Nelson

Act. The Band took the *opposite* position to receive compensation for its lands. The Band suggests that the Band's attorneys in the 1910s believed this was the best they could do. Regret is no exception to judicial estoppel, and as late as 1986 the Band did not claim the boundaries remained intact. Plaintiffs should be held to those positions.

XI. Accepting the Band's argument on laches subverts the doctrine.

Artful pleading does not overcome laches. The scope of the Band's law enforcement authority depends *only* on whether the reservation exists, not on the dispute over the cancellation of the cooperative agreement in 2016.

CONCLUSION

Plaintiffs' motion should be denied.

Respectfully submitted,

Dated: March 8, 2021

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