Appeal No. 23-1261

In the United States Court of Appeals for the Eighth Circuit

Mille Lacs Band of Ojibwe, *et al.,*

Plaintiffs-Appellees,

v.

County of Mille Lacs, Minnesota,

Defendant-Appellant,

Erica Madore, in her official capacity as Mille Lacs County Attorney;
Kyle Burton, in his official capacity as Mille Lacs County Sheriff,

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA
CIVIL NO. 17-cv-05155-SRN-LIB

BRIEF OF APPELLANT COUNTY OF MILLE LACS, MINNESOTA

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SUMMARY AND REQUEST FOR ORAL ARGUMENT

Through treaties and congressional acts, the Mille Lacs reservation was ceded. Less than a decade after the Band's 1855 reservation was created, the Band ceded its reservation in the Treaties of 1863 and 1864. Those treaties gave the Band a right against removal, but that was surrendered through the Nelson Act of 1889, through which the Band received substantial benefit. And in two early twentieth century cases, the United States Supreme Court twice concluded that the reservation was ceded. In many courts spanning many decades, the Band, the State of Minnesota, and the United States have all acknowledged the cession. The district court erred in disregarding the text of controlling federal treaties, congressional acts, and the reasoning of U.S. Supreme Court case law.

This case is complex and oral argument will assist the court in considering the issues involved in this case. Appellant requests thirty minutes to present its case.

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JURISDICTIONAL STATEMENT

Appellant Mille Lacs County, Erica Madore its County Attorney, and Kyle Burton, its Sheriff, appeal from the final judgment of the United States District Court for the District of Minnesota, the Honorable Susan Richard Nelson presiding, dated January 10, 2023. Appellees asserted jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1362. Appellants filed timely Notices of Appeal dated February 8, 2023. Fed. R. Civ. App. P. 4(a)(1). This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Whether the district court erred in concluding that the Mille Lacs reservation still exists.

Apposite Authorities:

McGirt v. Oklahoma, 140 S. Ct. 2452 (2020)

United States v. Mille Lac Band of Chippewa Indians, 229 U.S. 498 (1913)

United States v. Minnesota, 270 U.S. 181 (1926)

2. Whether the Indian Claims Commission Act's jurisdictional bar precludes the Band's claims.

Apposite Authorities:

Oglala Sioux Tribe of Pine Ridge Indian Reservation v. U.S. Army Corps of Engineers, 570 F.3d 327 (D.C. Cir. 2009)

Oglala Sioux Tribe v. Homestake Mining Co., 722 F.2d 1407 (8th Cir. 1983)

Oglala Sioux Tribe v. United States, 650 F.2d 140 (8th Cir. 1981)

3. Whether laches bars the Band's claims.

Apposite Authorities:

City of Sherrill, N.Y. v. Oneida Indian Nation of New York, 544 U.S. 197 (2005)

Oneida Indian Nation of New York v. Cty. of Oneida, 617 F.3d 114 (2d Cir. 2010)

INTRODUCTION

In 1855, in exchange for ceding large areas of land, Congress and the Mississippi Chippewa entered into a treaty that created six reservations for the Tribe. One of these reservations was located in three townships on the southern shore of Lake Mille Lac, where the Mille Lacs Band of Ojibwe ("Band") lived.

The plain language of treaties, agreements, and acts of Congress compels the conclusion that the reservation was ceded and disestablished. Two Supreme Court decisions, and the Band's own positions in subsequent litigation, also reflected the understanding of all involved that the reservation ceased to exist.

Appellant Mille Lacs County ("County") seeks a determination in this Court that the Band long ago relinquished its rights to the lands originally within the reservation.

STATEMENT OF THE CASE

A. The 1855 Treaty creates a reservation.

In 1855, Commissioner of Indian Affairs George Manypenny invited several Ojibwe chiefs to negotiate a new treaty for the purchase of Ojibwe land and the creation of reservations for the bands. On February 22, the

Ojibwe signed the Treaty of Washington of 1855.[1] The Ojibwe took their new reservations at Gull Lake, Pokegama Lake, Rabbit Lake, Rice Lake, Sandy Lake, and Mille Lacs.[2]

B. The Dakota War of 1862.

Seven years later, in August 1862, the Dakotas began a six-week campaign to drive out white settlers, following crop failures on their reservations and a delay in annuity payments due to the Civil War.[3] Corruption and incompetence in the Upper and Lower Sioux agencies exacerbated their desperate circumstances. As Dakota war parties ranged up and down the center of the state, killing hundreds of settlers, those settlers who survived the initial onslaught fled to Forts Ridgley and Ripley and other military posts for protection.[4]

During the Dakota conflict, Ojibwe chief Hole-in-the-Day (the Younger) of the Gull Lake Band organized a group of warriors.[5] Hole-in-the-Day plotted to attack those barricaded at Fort Ripley, which included the Commissioner of Indian Affairs William Dole.[6] Warned of this threat, and worried they would be blamed for Hole-in-the-Day's attack, Mille Lacs chiefs

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[1] (App. 352; R. Doc. 242-1 at 251 (7 Stat. 736).)
[2] (App. 353; R. Doc. 242-1 at 252 (7 Stat. at 737 (Art. II)).)
[3] (App. 237; R. Doc. 242-1 at 67); (App. 393; R. Doc. 242-1 at 307.)
[4] (App. 395; R. Doc. 242-1 at 309); (App. 237; R. Doc. 242-1 at 67.)
[5] (App. 238; R. Doc. 242-1 at 68.)
[6] (App. 240; R. Doc. 242-1 at 70.)

immediately sent over a hundred of the Band's warriors to protect Fort Ripley and nearby settlements and trading posts.[7]

The Mille Lacs reinforcements worked; Hole-in-the-Day's attack was averted. Commissioner Dole reported, "I feel confident that this diversion of nearly one-half the followers upon whom Hole-in-the-Day doubtless relied, went far in enabling us finally to effect a settlement of the Chippewa difficulties without a resort to arms."[8]

C. In 1863 the government sought to consolidate the Chippewa bands at a new reservation.

After these events, Congress and the Lincoln Administration accelerated removal of the Ojibwe bands to a new reservation, seeking to reduce conflict between the bands and settlers. In Washington, Mille Lacs Chief Shaboshkung took the lead for the Ojibwe, while Secretary Usher and Commissioner Dole represented the government.[9] After an initial impasse, the parties agreed on the terms of the Treaty of March 11, 1863, with the Chippewa of the Mississippi and the Pillager and Lake Winnibigoshish Bands. Under the treaty, the Ojibwes sold the Mille Lacs, Gull Lake, Sandy Lake, Rabbit Lake, Pokegama Lake, and Rice Lake reservations to the

[7] (App. 240-41; R. Doc. 242-1 at 70-71.)
[8] (App. 241; R. Doc. 242-1 at 71.)
[9] (App. 247; R. Doc. 242-1 at 77); (App. 488; R. Doc. 242-4 at 2.)

U.S. in exchange for a new reservation, with significant annuity payments and material support.[10] The explicit language of cession is found in Article I:

> The reservations known as Gull Lake, Mille Lac, Sandy Lake, Rabbit Lake, Pokagomin Lake, and Rice Lake, as described in the second clause of the second article of the treaty with the Chippewas of the 22d February, 1855, are hereby ceded to the United States, excepting one half section of land, including the mission buildings at Gull Lake, which is hereby granted in fee simple to the Reverend John Johnson, missionary.[11]

Despite these cessions, in Article XII the Band was afforded a provisional right to be free from compelled removal:

> *Provided*, That, owing to the heretofore good conduct of the Mille Lac Indians, they shall not be compelled to remove so long as they shall not in any way interfere with or in any manner molest the persons or property of the whites.[12]

Shaboshkung and other chiefs signed the treaty for the Band. The Band ceded their reservation and secured a promise they would not be compelled to leave Mille Lacs.

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

But almost immediately, there was dissatisfaction with the new treaty. The next year, 1864, Hole-in-the-Day and Mis-Que-Dace of Sandy Lake

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[10] (App. 252; R. Doc. 242-1 at 82.)
[11] (App. 513; R. Doc. 242-5 at 2 (12 Stat. 1249)); (App. 373; R. Doc. 242-1 at 272.)
[12] (App. 515; R. Doc. 242-5 at 4.)

traveled to Washington D.C. to renegotiate the 1863 treaty.[13] The two Chiefs, Dole, and Superintendent Thompson negotiated what became the Treaty of May 7, 1864, with the Chippewa, Mississippi, Pillager, and Lake Winnibigoshish Bands.[14] The new treaty significantly enlarged the new reservation to which the various bands were to remove to, but was otherwise substantively the same as the 1863 treaty, with identical language of cession. *Infra,* Part II. President Lincoln proclaimed the 1864 Treaty on March 20, 1865.

E. In 1867 the White Earth Reservation was created.

The reservation at Leech Lake created in 1863 and expanded in 1864 proved to have insufficient resources to sustain the populations who were to move there. Various tribal leaders met in Washington and expressly ceded the lands reserved by the 1864 treaty:

> The Chippewas of the Mississippi hereby cede to the United States all their lands in the State of Minnesota secured to them by the second article of their treaty of March 20, 1865.[15]

[13] (App. 258; R. Doc. 242-1 at 88); (App. 521-25; R. Doc. 242-5 at 23-27 (13 Stat. 693).)
[14] (App. 258; R. Doc. 242-1 at 88); (App. 521-25; R. Doc. 242-5 at 23-27.)
[15] (App. 527-31; R. Doc. 242-5 at 29-33 (16 Stat. 719).)

In exchange, the various bands received a nearly 830,000 acre reservation that became the White Earth Reservation.[16] Shaboshkung and Hole-in-the-Day signed the treaty.

F. Controversy over the provisional right of non-removal in Article XII.

As white settlement moved ever closer to Mille Lacs toward the end of the 1860s, questions of title to lands within the ceded reservation arose. The Agent of the Chippewa Agency found the Land Office in Taylors Falls had allowed the lands to be filed on without express authorization from the General Land Office. The entries were filed under color of law after Minnesota's surveyor general completed a survey of the ceded area in 1870. The General Land Office approved the surveyor's bill for services, which the local office at Taylors Falls took as authorization to allow entries on the former reservation.[17] When the General Land Office Commissioner Drummond learned of this, he informed the Register and Receiver at Taylors Falls not to recognize existing entries.[18]

The Band remained in a tenuous state without a reservation, yet refused to leave for White Earth, as was permitted under Article XII. Nevertheless, the government's position was that the reservation had been

[16] (App. 527-31; R. Doc. 242-5 at 29-33 (16 Stat. 719).)
[17] (App. 265; R. Doc. 242-1 at 95); (App. 533-537; R. Doc. 242-5 at 70-74.)
[18] (App. 266; R. Doc. 242-1 at 96); (App. 539-542; R. Doc. 242-5 at 76-79.)

ceded and the Band would eventually have to move. In his 1873 Annual Report to Congress, Commissioner Edward P. Smith, noted:

> The Mille Lac band of Chippewas in Minnesota remains in its anomalous position. They have sold their reservation, retaining a right to occupy it during good behavior. With this title to the soil it is not deemed expedient to attempt permanent improvements at Mille Lac, unless a title to the reservation can be returned to them on condition that they surrender to Government all moneys acquired in consideration of their cession of the Mille Lac reservation. If this cannot be done, their Indians should be notified that they belong at White Earth, and be required to remove.[19]

The option of granting title to the Band was discussed during a council between Band leaders and Commissioner Smith held in Washington in 1875.[20] Shaboshkung wanted to renegotiate the treaty for a permanent home. But Commissioner Smith was very direct:

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

[19] (App. 267; R. Doc. 242-1 at 97); (App. 545; R. Doc. 242-5 at 101.)
[20] (App. 268; R. Doc. 242-1 at 98); (App. 557; R. Doc. 242-6 at 12.)

> Now you see that does not give you a title to your land at all.[21]

Smith added:

> Now it does not make any difference what the Commissioner, or the Secretary, or the President said to you; if it is not on that paper, then you have no title to your lands.[22]

The commissioner pointed to the 1863 agreement, signed by Shaboshkung, who said, "I knew what was on the paper" and "we did sign the paper giving our land away because the others wanted us to sign with them."[23] No new treaty was signed at the 1875 council.

G. In 1889 Congress passed the Nelson Act.

In 1887 Congress passed the General Allotment Act, which authorized the president to allot land in severalty to Indians then on reservations.[24] Any unallotted "surplus" reservation lands would be opened for non-Indian settlement and sold, with the proceeds going into a trust fund to be managed by the Department of the Interior on the Indians' behalf.[25]

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[21] (App. 268; R. Doc. 242-1 at 98); (App. 554; R. Doc. 242-6 at 9.)
[22] (App. 555; R. Doc. 242-6 at 10.)
[23] (App. 268; R. Doc. 242-1 at 98); (App. 551-58; R. Doc. 242-6 at 12-13); (App. 565; R. Doc. 242-6 at 20.)
[24] (App. 278; R. Doc. 242-1 at 108); (24 Stat. 388 (App. 581; R. Doc. 242-6 at 67).)
[25] (App. 278-79; R. Doc. 242-1 at 108-109); (24 Stat. 390 (App. 583; R. Doc. 242-6 at 69)).

Congressman Knute Nelson of Minnesota's 5th District, which encompassed the former Mille Lacs reservation, introduced the necessary allotment bill for Minnesota in the House of Representatives on January 4, 1888.[26] The act called "for the complete cession and relinquishment in writing of all of [the Chippewa] title and interest in and to all the reservations of said Indians in the State of Minnesota, except the White Earth and Red Lake Reservations."[27] The ostensible purpose of the Nelson Act was to consolidate all Minnesota Chippewa on the White Earth or Red Lake reservations. But Article III allowed individual members to take their allotments on the reservations where they lived.[28]

Secretary of the Interior John Oberly instructed a three-person commission led by former Senator Henry Rice to negotiate the "full cession and relinquishment to the United States of the Indian title and interest in and to the several reservations…."[29]

Concerning Mille Lacs, Oberly recounted:

> This reservation was ceded to the United States by the treaty of May 7, 1864 (13 Stat. 693).

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[26] (App. 590-94; R. Doc. 242-6 at 76-80); (App. 279-80; R. Doc. 242-1 at 109-110.)
[27] (App. 596; R. Doc. 242-6 at 90 (25 Stat. 642).)
[28] 4 William W. Fowell, A HISTORY OF MINNESOTA 222 (1930); (App. 592; R. Doc. 242-6 at 78.)
[29] (App. 282-83; R. Doc. 242-1 at 112-113); (App. 626; R. Doc. 242-6 at 120.)

> The 12th article of said treaty provided as follow [sic]: "that owing to the heretofore good conduct of the Mille Lacs Indians, they shall not be compelled to remove so long as they shall not in any way interfere with or in any manner molest the persons or property of the whites." The Mille Lacs have never forfeited their right of occupancy, and still reside on the reservation.[30]

It was this "right of occupancy" in the ceded lands the Band ultimately relinquished in accordance with the Nelson Act. When the issue of allotments arose, Rice deviated from Oberly's instructions and assured the Band's negotiators that their members could take allotments where they now resided, if the lands "are not claimed by others or occupied" or are not pine lands.[31] Despite Rice's promise that Band members could take allotments on un-entered parcels at Mille Lac, Interior Department officials implementing the Nelson Act allowed the remaining lands to be settled and purchased by non-Indians.[32]

H. Settlers and timber interests file on lands within the former reservation.

Secretary Noble concluded the Band had no title or claim to the former reservation, having sold it to the U.S. Government in 1863. He directed the Commissioner of the General Land Office to proceed to patent these

[30] (App. 283; R. Doc. 242-1 at 113); (App. 641; R. Doc. 242-6 at 135.)
[31] (App. 287; R. Doc. 242-1 at 117); (App. 158, 162-63; R. Doc. 242-7 at 158.)
[32] (App. 292; R. Doc. 242-1 at 122); (App. 828-31; R. Doc. 242-8 at 8-11.)

unpatented claims under Section 6 of the Nelson Act. The Secretary relied on the earlier understanding of Article XII of the 1863 and 1864 treaties as a "favor" or license to further determine that this interest on the land "did not amount in effect to a 'reservation' of these lands upon which the Mille Lacs could take allotments."[33] Under Secretary Noble's reasoning, not only did the Mille Lacs not have any claim to take allotments on those particular lands subject to Section 6 of the Nelson Act, but since none of the lands in the original reservation constituted a "reservation" under the Nelson Act, the Mille Lacs could not take allotments under Section 3 of the Nelson Act on even the remaining lands.[34]

Thereafter, the government's position was that the Band was now without any reservation whatsoever, except at White Earth. The government repeatedly described the Band as those "who have no reservation."[35]

In correspondence to Secretary Noble regarding a dispute over the White Earth allotments, Commissioner of Indian Affairs Morgan noted:

> The total population now on the White Earth Reservation, including the Mille Lacs, who have no reservation, is 3,339. This office has information from the Chippewa Commission to the effect that but few (if any) Indians will remove from the reservations where they now are and take allotments

[33] (App. 837; R. Doc. 242-8 at 17); (App. 295; R. Doc. 242-1 at 125.)
[34] (App. 295; R. Doc. 242-1 at 125); (App. 833-38; R. Doc. 242-8 at 13-18.)
[35] (App. 297; R. Doc. 242-1 at 127); (App. 616-17; R. Doc. 242-6 at 110-111.)

> on the White Earth Reservation. This does not apply to the Mille Lacs as they have no reservation.[36]

The Band complained, but Congress responded by passing a joint resolution dated December 19, 1893, "for the protection of those parties who have heretofore been allowed to make entries for lands within the former Mille Lac Indian reservation in Minnesota."[37] *See infra* Part III.A.

Most Band members moved to White Earth, but about 900 refused to leave.[38] In 1898, Congress passed another joint resolution that opened the remaining lands for settlement under the public land laws, except for a tract of land to serve as a "perpetual" burial ground for the Band.[39] *See infra* Part III.B.

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

On May 27, 1902, Congress passed legislation that appropriated $40,000 for payments to the remaining Indians at Mille Lacs as reimbursement for their improvements.[40] Under the new law, though, the money could not be paid unless they agreed to remove to White Earth. Experienced Indian inspector James McLaughlin was tasked with securing the Band's agreement to accept the money and move to White Earth.

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[36] (App. 617; R. Doc. 242-6 at 111.)
[37] (App. 845; R. Doc. 242-8 at 31.)
[38] (App. 300-01; R. Doc. 242-1 at 130-131); (App. 847; R. Doc. 242-8 at 33.)
[39] (App. 301; R. Doc. 242-1 at 131); (App. 849; R. Doc. 242-8 at 35.)
[40] (App. 865, 867; R. Doc. 242-8 at 51, 53.)

McLaughlin explained to the Band, "[Y]ou have no claim to the lands upon this reservation; you have ceded all that by your agreement of 1889."[41] Addressing representations Rice made in 1890, McLaughlin said, "I think he must have misunderstood the act, and did not interpret it properly when he made some of the statements that he did…."[42] The Band agreed to the terms, including paying more than 16% of the $40,000 to their attorneys, Gus Beaulieu and Daniel Henderson, who represented them in the negotiations.[43] Indian Agent Michelet reported to the Commissioner of Indian Affairs, in reference to "the Mille Lac Indians occupying the former Mille Lac Reservation" that these negotiations "bids to be the close of the long, drawn out Mille Lac controversy."[44] The Band signed as the "Non-Removal Mille Lacs residing on the former reservation."[45] The 1902 agreement resolved the issue of Rice's unauthorized statement that the Band could take allotments at Mille Lacs when they agreed to remove to White Earth in exchange for payment.

[41] (App. 303-04; R. Doc. 242-1 at 133-134); (App. 900; R. Doc. 242-9 at 32.)
[42] (App. 305; R. Doc. 242-1 at 135); (App. 929-30; R. Doc. 242-9 at 61-62.)
[43] (App. 308; R. Doc. 242-1 at 138); (App. 872; R. Doc. 242-9 at 4.)
[44] (App. 310; R. Doc. 242-1 at 140); (App. 468-69; R. Doc. 242-10 at 5-6.)
[45] (App. 950; R. Doc. 242-9 at 82.)

Mille Lacs Chief Wahweyeacumig moved to White Earth along with several dozen others.[46] Over the next eight years, the numbers of "non-removal" members at Mille Lacs steadily dropped to less than 300, while the numbers who removed to White Earth proportionally increased.[47]

J. The Supreme Court, in two cases, determined the reservation was disestablished.

The effect of the 1863 and 1864 treaties have been the subject of two Supreme Court cases discussed in Part IV, *infra*. First, in 1913, the Court determined compensation due to the Band because the government did not follow the provisos of the Nelson Act. *United States v. Mille Lacs Band of Chippewa*, 229 U.S. 498 (1913). Then, in *United States v. Minnesota*, 270 U.S. 181 (1926), the United States sued to quiet title in the United States for lands illegally patented to Minnesota as swamplands. The United States contended the lands were reservation lands. Some of that land was in the former reservation. And as discussed further below, in both cases the decision rested on the fact the Band had ceded the reservation. *Infra* Part IV.

[46] (App. 310-11; R. Doc. 242-1 at 140-141); (App. 973-74; R. Doc. 242-10 at 10-11.)
[47] Report of Dr. Matt Nelson at 12-14 (App. 990-92; R. Doc. 242-10 at 27-29.)

K. For well over a century, Minnesota exercised jurisdiction over the former reservation.

Following the Nelson Act and Agreement, the State of Minnesota asserted its jurisdiction over lands within the former reservation. Local units of state government were established, including the Townships of Kathio, Isle Harbor and South Harbor, which today comprise all 61,000 acres of the former reservation.[48] Municipalities were established, including the Cities of Isle, Onamia, and Wahkon.[49] The state exercised both criminal jurisdiction over tribal members and enforced civil matters, including trespass.[50] This exercise of state jurisdiction long predated Public Law 280, which took effect in 1953. Indeed, until very recently, Minnesota's long-standing position, held through both GOP and DFL administrations, matched that of the treaties of

[48] Deposition of Bruce M. White, Oct. 16, 2020, at 108-09 (App. 1240-41; R. Doc. 242-10 at 277-278.)
[49] (App. 330, 334; R. Doc. 242-1 at 160, 164, Figure 5 and Figure 11.)
[50] (App. 1245-57; R. Doc. 242-10 at 282-294); (App. 1259-69; R. Doc. 242-10 at 296-308); (App. 1273; R. Doc. 242-10 at 310); (App. 1242; R. Doc. 242-10 at 279.)

1863 and 1864, the Nelson Act, and its admission before the Supreme Court: the 1855 reservation had been ceded.[51, 52]

L. Contemporaneous and subsequent positions by the Executive Branch and by the Chippewa Tribe confirm the termination of the reservation.

The Department of the Interior and the Minnesota Chippewa Tribe both expressed that Mille Lacs did not retain a reservation and was in a different category than the other Chippewa bands.

1. The Department of the Interior affirmed the Reservation was disestablished in its Solicitor's Opinion in 1935.

In 1935, the Solicitor concluded that *all but Mille Lacs* could be considered a reservation under the Indian Reorganization Act and that "the territorial jurisdiction can extend to all the land within the original boundaries of the Chippewa Reservations as they existed in 1889 except for

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[51] (App. 1225-37; R. Doc. 242-10 at 262-274), November 27, 1995 Letter from Governor Arne H. Carlson; letter dated August 9, 1999 from Mike Hatch, Attorney General; letter dated March 30, 2005 from Governor Tim Pawlenty to U.S. Department of Interior; letter dated February 6, 2007 from Attorney General Lori Swanson to Mille Lacs County Attorney; letter dated April 26, 2013 from Governor Mark Dayton to Director of the Office of Tribal Justice within the U.S. Department of Justice; January 21, 2015 letter from Attorney General Swanson to Kevin Washburn, DOI; amicus brief of Minnesota in *County of Mille Lacs v. Benjamin*, App. Dkt. 03-2527.

[52] Until the 1990s, the federal government also took the position that the reservation had been terminated. (*See* (App. 1280; R. Doc. 242-10 at 320); (App. 1335; R. Doc. 242-12 at 159); (App. 1337, 1339, 1341, 1343; R. Doc. 242-13 at 2, 4, 6, 8); (App. 1345; R. Doc. 242-14 at 2); (App. 1347; R. Doc. 242-15 at 2).)

such land as has been disposed of through sale and fee patent by the United States."[53] The Solicitor explained:

> The present Mille Lac Reservation has a somewhat different history. In violation of the trust created by the 1889 act, the United States disposed of all the ceded Mille Lacs lands under the general land laws (*United States v. Mille Lac Band*, *supra*). However many Mille Lac Indians remained on the old site and refused to remove to the White Earth Reservation. Congress then authorized the use of $40,000 of the Chippewa tribal fund to purchase land for 'homeless non-removal Mille Lac Indians who have not heretofore received allotments,' and to hold such land in trust. The present Mille Lac Reservation is this purchased land reservation, 100% of which is still held in trust.[54] But the Mille Lac Band as such has no interest in this reservation.

(*Id.*)

2. The Minnesota Chippewa Tribe's constitution reflects the understanding that the Band was without a Reservation.

The Minnesota Chippewa Tribe adopted its constitution in 1936, and took the same position as reflected in the Solicitor's opinion:

> ARTICLE II-REPRESENTATION AND MEMBERSHIP
>
> Section 1. This constitution for representation shall apply to the White Earth, Leech Lake, Fond du Lac, Bois Fort (Nett Lake), and Grand Portage

[53] (App. 1305; R. Doc. 242-12 at 61.)

[54] After 1916, the federal government purchased some lands in trust for the Minnesota Chippewa Tribe, located within the original reservation boundaries. Subsequently, additional lands have been acquired by the Mille Lacs Band and taken into trust, bringing the total trust lands to 3,660 acres.

Reservations, and the nonremoval Mille Lac Band of Chippewa Indians.[55]

SUMMARY OF ARGUMENT

The Mille Lacs reservation, created by treaty in 1855, was one of six reservations "ceded" to the United States nine years later in the nearly identical 1863 and 1864 Treaties in exchange for payments and a much larger reservation near Leech Lake. In 1867, the Chippewa again ceded their interests in exchange for the more suitable White Earth reservation. Under Article XII of the 1863/64 Treaties, the Band was not subject to forced removal from the former reservation. But this "right of occupancy" was "forever relinquished" by the 1889/90 Nelson Act and Agreement, which also recognized the rights of ownership by non-Indians who had settled on the former reservation before the Act's passage. While the Nelson Act contained a provision allowing Chippewa members to take allotments on their existing reservations instead of at White Earth, it did not allow Mille Lacs Band members to take allotments on the former reservation. Congress additionally expressed its intent that the reservation had been disestablished through Resolutions in 1893 and 1898 that allowed all remaining lands in the "former" reservation to be opened to settlement and sale.

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[55] (App. 1310; R. Doc. 242-12 at 66.) Mille Lacs was singled out and placed in a different category than the other five bands who held reservations, because the Tribe understood that the reservation had been terminated as such.

While most Mille Lacs members had removed to the White Earth reservation by 1900, in 1902 Congress appropriated $40,000 for the remaining "non-removal Mille Lacs" members as payment for their improvements at Mille Lacs upon their agreement to remove and take their allotments at White Earth. The 1902 Agreement expressly contained these provisions. The Band later filed suit in the Court of Claims in 1911 and then before Indian Claims Commission for payment for the lands based on the "termination" and "extinguishment" of the reservation. The Supreme Court of the United States, in 1913 and 1926, found that the reservation had been ceded by the 1863/64 Treaties. The Court also found the Band had "relinquished" their claims to the reservation in the Nelson Act. The Indian Claims Commission in 1964 confirmed that the Supreme Court had found the reservation had been ceded in 1864. The jurisdictional and time bars of the Indian Claims Commission Act also preclude the assertion of Appellee's claim the reservation was never disestablished. Lastly, the equitable doctrine of laches bars the Band from disrupting long-settled expectations and seeking to revive reservation status to lands it ceded 160 years ago. Whether this Court looks to the plain language of the treaties and legislation, or also

considers contemporaneous and subsequent events, the conclusion is the same: the reservation was disestablished.[56]

ARGUMENT

I. Review is de novo.

This Court reviews de novo grants of summary judgment. *Cox v. First Nat'l Bank*, 792 F.3d 936, 938 (8th Cir. 2015).

II. The plain language of the treaties, acts of Congress, and agreements compels the conclusion that the original reservation was disestablished.

In determining whether an Indian reservation has been disestablished, the language Congress used in a statute or tribal treaty is dispositive. *McGirt v. Oklahoma*, 140 S.Ct. 2452 (2020). *McGirt* addressed whether a reservation created in an 1823 treaty with the Creek Nation continued to exist, a question that determined whether a crime had been committed in Indian country. *See* 18 U.S.C. § 1151. If so, McGirt could be prosecuted only in federal court. Respondent State of Oklahoma argued that the Court should apply the three-part test for disestablishment used in *Solem v. Bartlett*, 465 U.S. 463 (1984), which, in addition to interpreting the text of the treaty or law, looked at contemporaneous events (the second *Solem* part) and subsequent events and demographics (the third *Solem* part). The Court

[56] The County adopts the brief of Appellants Madore and Burton as to Parts III-VI.

simply rejected that argument.[57] Rather, the Acts of Congress are the "only place [to] look." *Id.* at 2462. In short, the plain text of a treaty or agreement between a tribe and the federal government controls. Here, the plain language of the relevant treaties, agreements, and acts of Congress demonstrates that the reservation was disestablished.

A. In three treaties, the Band unmistakably ceded its reservation.

In plain, unambiguous language in three treaties, the Mississippi Chippewa bands ceded all "their right, title and interest" to the lands encompassed within the six 1855 reservations.[58] In exchange, these bands received other lands for their use; a new reservation that was expanded in 1864, and another, better, reservation in 1867.[59] The federal government provided annual payments and various infrastructure improvements in consideration for the cessions. When such language of cession is buttressed

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[57] The status and future of the *Solem* three-part analysis is uncertain. Although the majority in McGirt diminished the *Solem* test, the dissent, comprised of four justices, cited to *South Dakota v. Yankton Sioux*, 522 U.S. 329 (1998), which applied *Solem* in a unanimous decision. The Sixth Circuit also recently applied *Solem*-type factors in finding disestablishment. *Little Traverse Bay Bands of Odawa v. Whitmer*, 998 F.3d 269 (6th Cir. 2021).

[58] *Supra*, pp.5-7.

[59] Another reservation listed in Article I—the Rabbit Lake Indian Reservation—was held disestablished in a decision from the Minnesota Supreme Court. *State v. Adams*, 89 N.W. 2d 661, 674 (Minn. 1957).

by an unconditional commitment from Congress to compensate the Indian tribe for its ceded land, there is an almost insurmountable presumption that Congress meant for the tribe's reservation to be diminished. *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 596-97 (1977). However, "'explicit language of cession and unconditional compensation are not prerequisites' for a finding of disestablishment," *McGirt*, 140 S. Ct. at 2485-86. And "other language evidencing the present and total surrender of all tribal interests" can substitute for explicit cession language. *Solem*, 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). *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).

The touchstone on disestablishment is congressional intent, and unequivocal words of cession indicate Congress intended disestablishment. *Solem*, 465 U.S. at 473, n.15. Here, in each of three treaties, there is unequivocal language of cession. There was a quid pro quo of land for land

in each treaty. Each treaty had unconditional promises to provide other consideration, including payment for lands ceded and improvements made.

McGirt answers the question of what happened to the 1855 reservation. It was ceded in plain language. Importantly, the 1867 treaty explicitly ceded all 1855 reservations except Leech Lake. There was no proviso for the Mille Lacs in the 1867 treaty. While the proviso in Article XII was assumed to survive and subsequently became the focus of much dispute, the Mille Lacs reservation, *qua* reservation, was ceded. What remained was not a reservation, but rather a terminable right to avoid removal to White Earth so long as the Band maintained good behavior. Shaboshkung signed the 1867 treaty, as did Hole-in-the-Day. Here, there was more than diminishment—the reservation at Mille Lacs was disestablished, gone. The district court misconstrued this plain language of cession and elevated the proviso in Article XII to supersede this plain language. That was error. On its face, the proviso refers only to a conditional right against being forced to remove, and nowhere mentions a reservation. *McGirt* holds that Congress must use express language of cession; here, Congress certainly did so, not just once, but three times.

B. Under the Nelson Act, the Band explicitly ceded any rights under the Article XII proviso.

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

The same conclusion attains for the conditional right to stay provided the Band. Article XII had one rule and one exception, the proviso. The rule delayed the Indians' removal obligations until after the United States had complied with its obligations. The proviso delayed the Band's removal obligations indefinitely, so long as they maintained good behavior.

On its face, neither the rule nor the exception created a reservation. The proviso did not specify where it actually applied. It simply said the Band members "shall not be compelled to remove" to the new reservation when that was ready. The proviso did not provide for a "permanent home." The proviso did not grant the Band any exclusive use of any lands. The proviso did not exclude non-Indians from entering. As detailed *infra* Part IV.B, the ceded reservation had now become public lands. *Cf. DeCoteau v. Dist. Cty. Ct. for the Tenth Judicial Dist.*, 420 U.S. 425, 446 (1975)("That the lands ceded in the other agreements were returned to the public domain, stripped

of reservation status, can hardly be questioned, and every party here acknowledges as much.").[60]

C. Through the Nelson Act, the Band relinquished its rights under Article XII.

The Nelson Act and Agreement also dealt with the Article XII provision, but with different language:

> We do also hereby forever relinquish to the United States the right of occupancy on the Mille Lacs Reservation, reserved to us by the twelfth article of the treaty of May 7, 1864.[61]

In Article III the Nelson Act provided that individual band members could take allotments on the former reservations where they were then residing. The Mille Lac Band members, however, received no allotments on the former reservation. In 1891 Interior Secretary Noble concluded that the Band had no reservation, *i.e.,* the proviso in Article XII neither preserved the reservation nor created a new one.[62] The subtle, but significant difference in the wording of the Band's Nelson Act Agreement regarding the proviso

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[60] Obviously the Band today maintains the opposite, but as discussed, the Band has conceded more than once the 1855 reservation had been ceded. *See infra* Part V.

[61] (App. 596-600; R. Doc. 242-6 at 89-94.)

[62] *Amanda J. Walters*, 12 L.D. 52, 56 (1891) (App. 834; R. Doc. 242-8 at 14, 18) ("Suffice it to say that the land in question was not a reservation within the meaning of the [Nelson] act. It was ceded in 1863; it had been declared open to entry by successive decisions from the Department under the regulations of the Land Office, and was the very land referred to and intended to be covered by the proviso to section 6.").

reflects that understanding. The Band ceded, relinquished, and conveyed all right, title, and interest to land on which the Band members may have had ostensible Indian title. But regarding the Article XII proviso, the Band needed only to relinquish its right of occupancy, because the Band had no other interests, having ceded any in 1863, 1864, and 1867.

Under the Nelson Act, the bands were to receive funds from land sales. *Rosebud*, 420 U.S. at 596-97. This did not mean the Band had title to the land, for on that point there was no dispute: Indian title had been ceded in 1863 and 1864.[63] Under the Nelson Act, Congress made payment to resolve the Article XII controversy, using proceeds from land sales within the ceded reservation and land sales from other Mississippi Chippewa reservations.

The district court's determination that Congress evinced no clear intent to cede the entire Mille Lacs reservation rests on an untenable position regarding congressional intent and Supreme Court precedent. The court erred in holding there was no clear expression of congressional intent of reservation disestablishment, as the relevant treaties and acts expressed unambiguous language of cession—cede, relinquish, convey—and provided compensation and other consideration for the cession.

[63] The Supreme Court's 1913 decision rested on that point.

The present case is no occasion to rewrite history. As the Supreme Court has observed:

> With the benefit of hindsight, it may be argued that the tribe and the Government would have been better advised to have carved out a diminished reservation, instead of or in addition to the retained allotments. But we cannot rewrite the 1889 Agreement and the 1891 statute. For the courts to reinstate the entire reservation, on the theory that retention of mere allotments was ill-advised, would carry us well beyond the rule by which legal ambiguities are resolved to the benefit of the Indians. We give this rule the broadest possible scope, but it remains at base a canon for construing the complex treaties, statutes, and contracts which define the status of Indian tribes. A canon of construction is not a license to disregard clear expressions of tribal and congressional intent.

DeCoteau, 420 U.S. at 447. This Court should give effect to the plain language Congress used.

III. The plain language of two congressional acts and events following the Nelson Act confirmed the earlier cession and disestablishment of the Mille Lacs reservation.

The district court also selectively read the post-Nelson Act congressional acts and agreements when finding that the Band never ceded, relinquished, or conveyed its rights to the reservation. After the Nelson Act was passed and the Band agreed to "forever relinquish" its remaining interest in the lands, Congress passed two acts that protected entries made prior to the Nelson Act on lands within the former reservation, referring to it as such.

A. In 1893, Congress confirmed entries within the former reservation.

In 1893, Congress passed legislation that provided "for the protection of those parties who have heretofore been allowed to make entries for lands within the *former* Mille Lac Indian Reservation in Minnesota." 28 Stat. 576. The reference to "former" reservation was deliberate and unambiguous. Congress had already terminated the lands' reservation status and thus was referring to the area's current status—the *former* reservation. Furthermore, through the 1893 Resolution, Congress ratified the sales of land contained within the former reservation. Congress' ratification affirmed that the additional lands that had gone to patent could lawfully pass into the hands of non-Indians, as the lands had lost their reservation status.

B. In 1898, Congress reaffirmed that the reservation had been disestablished.

In 1898, Congress passed a joint resolution that opened the entire area to settlement and sale. Notably, the plain language of the Resolution used the term "former reservation" and "lands formerly within the Mille Lac Indian Reservation." 30 Stat. 745 (Res. 40). As in 1893, congressional intent was clear: the area was a "former" reservation.

The 1898 Resolution opened the entirety of the "reservation" to settlement and sale. This is a clear congressional expression of disestablishment. *See DeCoteau*, 420 U.S. at 446-47. Following the 1898

Resolution, all lands passed into private ownership.[64] There is no case where the entirety of a reservation has passed into private ownership, yet reservation status remained intact.[65] *See Hagen*, 510 U.S. at 414; *South Dakota v. Yankton Sioux*, 522 U.S. 329, 333.

C. The district court erred by ignoring Supreme Court precedent that did not deem these resolutions unlawful nor set them aside.

The district court ignored that the Supreme Court, in 1913, did not set aside these congressional resolutions, nor deem them unlawful. *See* 229 U.S. at 506, 509-10. Rather, the Supreme Court found that the manner of allocating the sale proceeds of the lands was "wrongful" as to a portion of the former reservation, and thereby violated the rights of the Mille Lacs Band in the "trust"[66] created by the Nelson Act. *Id*. at 509. The 1893 and 1898 resolutions could not have been unlawful, because the land sales to settlers that occurred pursuant to those resolutions would have been ineffective in transferring ownership of the lands opened to settlement under the general

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[64] Only 80 acres out of 61,000 were allotted to a Band member, and the Band was compensated for even these 80 acres by the Court of Claims in 1916. *Mille Lac Band v. United States*, 51 Ct.Cl. 400 (Cl.Ct. 1916).

[65] Additionally, the proviso setting aside a burial place for the Band would be surplusage if the land remained a reservation. The Band understood that it was not a reservation any longer, because it would not need to reserve burial grounds if the Band held Indian title to the lands.

[66] *See Chippewa Indians of Minnesota v. United States,* 307 U.S. 1, 3 (1939)(holding the Nelson Act did not create an actual trust).

land laws. That did not occur. Rather, the Court awarded damages to be placed in the Nelson Act fund for some of the lands that were disposed of under the general land laws instead of through the Nelson Act. The Court found that Congress "intended to assert, and did assert, an unqualified power of disposal over the lands as the absolute property of the Government." 229 U.S. at 510. To ignore this analysis was error.

D. The 1902 Act also confirmed the reservation had long been ceded.

By 1902, the vast majority of Band members had already moved to White Earth and taken allotments there. Congress, in the 1902 Act and Agreement, again expressed that the Band would be paid for improvements made if those remaining agreed to remove from the former reservation.[67] 32 Stat. 245 (May 27, 1902). But Mille Lacs was not a place where Band members could take allotments.

The plain language of the 1902 Act reflects the understanding that the Band could not take allotments at Mille Lacs. The purpose of the Act was removal from Mille Lacs in exchange for payment, with allotments given at White Earth, all inconsistent with Mille Lacs being an existing reservation.[68] References within the Agreement's language to "reservation" are colloquial

[67] (App. 126, 127, 132; R. Doc. 167-1 at 7, 8, 13.) The Agreement uses the term "former reservation" five times.
[68] Present day value of the payment provided is in excess of $1.3 million.

references to a location that had already been referred to numerous times as a "former" reservation.[69] The Band was represented by two attorneys during the negotiation process. The Band's signing members acceded to the Agreement as the "non-removal Mille Lacs Band residing on the former reservation."[70]

Like the 1893 and 1898 Resolutions, the 1902 Act and Agreement similarly express clear congressional intent of disestablishment. There would be no reason to pay Band members for their improvements if they remove from lands if those lands continued to be an Indian reservation.

E. The district court erred when concluding that these acts did not evince reservation disestablishment by Congress.

The district court failed to construe the plain language of the previous treaties and the Nelson Act, which extinguished all the Band's rights to the reservation. With respect to the 1893 Resolution, the Court held that the "resolution does not reflect a clear intent to disestablish the Mille Lacs Reservation, [t]he 1893 Resolution simply permitted disposal of reservation land under the general land laws, rather than under the Nelson Act." (App. 1501; R. Doc. 313; Add. 88.) But Appellants' position was that the 1863/64

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[69] *See* Driben Declaration, ¶¶9-10 (App. 1401-02; R. Doc. 259 at 5-6); Rife Deposition 14:8-21; 76:17-22; 86:11-15; 152:22-153:2 (App. 1354-58; R. Doc. 258-2 at 72-76.) *McGirt*, 140 S.Ct. at 2461.

[70] (App. 121; R. Doc. 167-1 at 2-12.)

treaties effectuated disestablishment and gave the Band only a conditional right against compelled removal. The Nelson Act later extinguished that right. The treaties and the Nelson Act together reflect the total extinguishment of any claim by the Band to the land, which the subsequent congressional resolutions support. Likewise, the 1893 and 1898 Resolutions are sufficient expressions of congressional intent to disestablish a reservation.[71] The consequent opening of all lands to settlement shows that Congress was taking the next step with lands that had formerly been Indian country. *See Yankton Sioux*, 522 U.S. at 335.

The district court also misinterpreted the 1902 Act, which handles the disposition of the lands *after* they had been extinguished as a reservation by the earlier treaties and the Nelson Act. It alone did not disestablish the reservation, but rather reflects that disestablishment had already occurred.

The district court cites to Chief Wahweyeacumig raising old claims of being entitled to take allotments on the lands at Mille Lacs to support its conclusions. (App. 1451; R. Doc. 313; Add. 38.) But the court confuses the language of negotiation with the language contained in the actual agreements. Further, to the extent there was a misunderstanding before the agreement was signed, McLaughlin was clear: "you have no claim to the

[71]*See Hagen*, 510 U.S. at 413-415.

lands upon this reservation; you have ceded all that by your agreement of 1889."[72] Wahweyeacumig's statement demonstrates the Band acknowledged McLaughlin's position on reservation status:

> It is their [Band members'] desire that you go around and appraise the value of the improvements made by the Indians on the former reservation.[73]

Ultimately, the non-removal Band members agreed to remove from the former reservation to White Earth in exchange for payment.

IV. The Supreme Court has twice confirmed that the reservation was terminated.

A. In 1913 the Supreme Court confirmed the reservation had been ceded.

In 1909, the Band obtained congressional authorization to sue the United States for losses resulting from entries made in the former reservation. *See* Act of Feb. 15, 1909, 35 Stat. 619. When the Band filed suit under the 1909 Act, the Band did not claim that the Mille Lacs reservation continued to exist. Instead, it took the exact opposition position: that it was entitled to compensation for all of the lands in the former reservation because it had been extinguished and terminated as an Indian reservation.[74] The Band also asserted that the Court of Claims should hold as a conclusion

[72] (App. 303-04; R. Doc. 242-1 at 133-134); (App. 900; R. Doc. 242-9 at 32.)
[73] 1902 Treaty Journal at 44 (App. 941; R. Doc. 242-9 at 73.)
[74] (*See* App. 1012, 1041, 1060; R. Doc. 242-10 at 49, 78, 97.)

of law that, pursuant to the 1893 Resolution, "the Mille Lac Reservation as an Indian reservation ceased to exist."[75] The United States agreed that the reservation had been terminated but argued that cession had taken place under the 1864 Treaty and therefore no additional compensation was due under the Nelson Act.[76]

In 1912, the Court of Claims found that the Nelson Act of 1889 "divested" the Band of "Indian title" to the 1855 Treaty area lands and ordered compensation, for all 61,000 acres, due to the Band under the Nelson Act. *Mille Lac Band of Chippewas v. United States*, 47 Ct. Cl. 415, 454 (1912). The Band asserted that because the reservation was ceded in 1893,[77] it was entitled to compensation for the patenting of the Band's lands. It did not assert that the reservation still existed. The parties understood that Indian title to the lands had been divested, and it was assumed and reiterated as a finding of fact that the reservation had been ceded. *Id.* at 419 (Finding IV).

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[75] (App. 1086; R. Doc. 242-10 at 123.)
[76] (App. 1209; R. Doc. 242-10 at 246.)
[77] (App. 1086; R. Doc. 242-10 at 123, No. II ("That by the Act of Congress of December 19, 1893, the Mille Lac Reservation was extinguished, it was opened to public settlement under the general land laws of the United States; the entries thereon made prior to such act were legalized, and the Mille Lac Reservation as an Indian reservation ceased to exist.").)

The 1912 case was about the right of occupancy under Article XII of the 1864 Treaty; not the cession under Article I. The Court of Claims held that the Band "reserved to themselves *the right of occupancy* of the Mille Lac Reservation as defined in said treaties." *Id.* at 436. The thing reserved was a "right of occupancy," not the reservation itself, which had already been ceded in the 1863 and 1864 treaties.

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

> The judgment was sought and was rendered on the theory that the lands were set apart and reserved for the occupancy and use of the Mille Lac Band by treaties of February 22, 1855, 10 Stat. 1165; March 11, 1863, 12 Stat. 1249, and May 7, 1864, 13 Stat. 693, and *were subsequently relinquished to the United States pursuant to the act of January 14, 1889*, *supra*, upon certain trusts therein named, and that in violation of those treaties and that act they were opened to settlement and disposal under the general land laws of the United States and were disposed of thereunder, to the great loss and damage of the Mille Lac band or the Chippewas of Minnesota.

United States v. Mille Lac Band of Chippewa Indians, 229 U.S. 498, 499-500 (1913) (emphasis added). Thus, the relinquishment of the reservation was central to the 1913 decision. The district court contended that the Supreme Court "did not address, whether the Nelson Act, by permitting the allotment and disposal of reservation land, operated to disestablish the

Mille Lacs Reservation." (App. 1499; R. Doc. 313; Add. 86.) But the text of the 1913 opinion directly contravenes that conclusion.

The Supreme Court subsequently summarized the Nelson Act's purpose and effect as aiming "*for the cession and relinquishment of all their reservations, excepting the White Earth and Red Lake Reservations*, 229 U.S. at 503 (emphasis added). "A manifest purpose of the [Nelson] Act was to bring about the removal to the White Earth Reservation of all the scattered bands residing elsewhere than on the Red Lake Reservation, the Mille Lacs as well as the others[.]" *Id.* at 506. The Court found that the Chippewa Commission, the Secretary of the Interior, and the President sought, obtained, and approved the relinquishment of the Mille Lacs reservation. *Id.* at 507.

The Court quoted the 1889 agreement, including the language where the Band did "*forever relinquish to the United States the right of occupancy on the Mille Lac reservation*," and said the Act "contained an *express assent* to all the provisions of the act of 1889, and an *express relinquishment* of the lands in the Mille Lac Reservation." *Id.* at 504-05 (emphasis added).

The Court also addressed the dispute over the meaning of the proviso in Article XII until the passage of the Nelson Act:

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

> Mille Lac Reservation were put in the same category, and were to be disposed of for the benefit of the Indians in the same manner, as the lands in the other reservations relinquished under the act[.]

Id. at 507.

The Court determined that the Nelson Act achieved a compromise over the surrender of the Article XII proviso rights and required payment for extinguishing that right. *Id.* at 508-09. This compromise did not mean the reservation remained a recognized federal reserve, rather, it meant the Band was entitled to compensation for giving up its right of occupancy under Article XII. The Band surrendered its Indian title in the 1863 and 1864 treaties.

Further, the Court squarely rejected the Band's arguments premised on the existence of the 1855 reservation at the time of the entries (*i.e.*, reservation existence through 1889):

> On behalf of the Indians it also is said that the proviso was limited to "regular and valid" pre-emption and homestead entries, and that no entry of lands *within* an Indian reservation could come within that limitation. But this assumes the *existence of the Mille Lac Reservation at the time of the entries*, which was the very matter in dispute.

Id. at 508 (emphasis added). In other words, the Court recognized that this argument plainly raised the issue of the reservation's existence. Then, in the very next sentence, the Court unequivocally addressed the issue. It explained

that the Band's position must be rejected in light of the section 6 proviso to the Nelson Act:

> Besides, the interpretation suggested [that the reservation existed at the time of the entries] could not be accepted without wholly rejecting the proviso, . . . Of course, the proviso *cannot* be rejected. It had an office to perform and must be given effect.

Id. (emphasis added). By expressly *accepting* the proviso to section 6 and formally recognizing its effect, the Court expressly *rejected* the Band's interpretation that the reservation was in existence at the time of the entries. Put simply, the Mille Lacs reservation was not in existence after the treaties of 1863-64. *Id.* This is binding precedent.

The Court also rejected the Band's contention that it did not understand the terms of the Nelson Act or the effect of the proviso to section 6, through which the Band acknowledged the cession and disestablishment of the 1855 reservation. 229 U.S. at 507-09. The Court held that the Nelson Act's terms were "plain" and "unambiguous" and that the Band had unequivocally consented to and ratified the Act. *Id.* at 507-08. The Court described the Band as "seeking, obtaining and approving the relinquishment of that reservation" through the Nelson Act negotiations. *Id.* at 507. Consequently, "the Indians, no less tha[n] the United States, [were] bound by the plain import of the language of the act and the agreement." *Id.* at 508.

In sum, the Court held that "no rights of the Indians" were infringed by the settlement and sale of lands subject to the section 6 proviso in the Nelson Act:

> We are accordingly of opinion that the act of 1889, *to which the Indians fully assented, contemplated and authorized the completion, and the issuing of patents on, all existing pre-emption and homestead entries in the Mille Lac tract* which in the course of proceedings in the Land Department should be found to be within the terms of the proviso to § 6 [validation of the 1863-1864 cession and disestablishment process relating to bona fide entries], and therefore that *no rights of the Indians were infringed in so disposing of lands embraced in such entries*. And we think the evident purpose of the proviso requires that it be held to include entries of that class theretofore passed to patent, of which there were some instances during the early period of the controversy.

Id. at 508-09 (emphasis added). None of the Band's rights were infringed by the Nelson Act because the reservation had been disestablished by the 1864 Treaty. The Court reversed the Court of Claims on this critical point and necessarily determined the reservation was ceded and disestablished in the treaties of 1863-1864.[78]

Despite the Court's determination that the Band was entitled to no compensation for the section 6 proviso lands, the Court did award the Band some compensation. *Id.* at 509. This compensation, however, was not based

[78] In 1964, the Indian Claims Commission confirmed this holding: "The Court held that the lands in the Mille Lac Reservation were expressly ceded to the United States by the 1864 Treaty." *Minnesota Chippewa Tribe, et al. v. United* States, 14 Ind. Cl. Comm. 226, 297 (1964).

upon a continued reservation, but rather based upon a takings analysis. *Id.* The first part of the analysis rested on the premise that the Band expressly relinquished its Article XII rights under the treaties of 1863-64 in the Nelson Act proceedings. *Id.* at 504-05. In exchange for this relinquishment, however, the Court held that the Nelson Act granted to the Band: 1) the opportunity "to share in the proceeds of the disposal of a vast acreage of lands in which they otherwise would have had no interest," *id.* at 508; and 2) the opportunity to have an interest in the disposal of certain lands within the reservation *which they otherwise would not have enjoyed*. *Id.* at 507.

The Nelson Act required Congress to give the Band an amount of money equal to the amount of the money that the lands would have generated if they would have been disposed of in the same manner as the other lands disposed of pursuant to the Nelson Act. *Id.* at 509 ("[W]e are of opinion that [the non §6 lands] came within the general provisions of the act, and were to be disposed of thereunder for the benefit of the Indians, in like manner as were the ceded lands in the other reservations."). Consequently, because the United States disposed of the non-section 6 proviso lands under the general land laws rather than selling them in accordance with the Nelson Act, the United States was required to compensate the Band under the 1909 jurisdictional statute authorizing the Band to sue for alleged damages. *Id.*

This, however, did *not* mean that the Band retained its reservation. It only meant the United States had to pay into the Nelson Act fund the value of the non-section 6 lands within the former reservation.

Ignoring contrary language in the Court's 1913 decision, the district court asserted that the decision did not address whether the Nelson Act disestablished the reservation. (App. 1468; R. Doc. 313; Add. 55.) But that conclusion ignores the discussion the Court had on the status of the lands and the effect of the Nelson Act on the lands. Neither party claimed the reservation still existed. But the Court's discussion of the impact of the Nelson Act and the terms the Band agreed to, including the "relinquishment of the lands of the Mille Lacs reservation" is clear. The Band had ceded the reservation and was entitled to compensation for the loss of the land. It did not hold that the reservation continued to exist. The district court's analysis was error.

B. In 1926, the Supreme Court again concluded that the reservation had been ceded and was thus public lands.

In 1926 the Court reaffirmed its 1913 conclusion that the Mille Lacs reservation had been ceded back to the United States. *United States v. Minnesota*, 270 U.S. 181, 198-99 (1926). The district court failed to acknowledge that determination, reasoning simply that reservation disestablishment was not at issue in that case. (App. 1499; R. Doc. 313; Add.

86.) But the district court missed that the Court necessarily held that the reservation had been ceded.

At issue in the 1926 decision was whether Minnesota lawfully held title to tens of thousands of acres of land patented to the state as swamp lands. 270 U.S. at 192. In 1860, Congress extended the 1850 Swamp Lands Act to Minnesota, but with an explicit limitation that Minnesota could not obtain title to "any lands which the government of the United States may have reserved, sold, or disposed of" prior to the 1860 act. Act of March 12, 1860, 12 Stat. 3. It was federal land policy that "as the exigencies of public service required, parcels of land belonging to the United States [were] to be reserved from sale and set apart for public uses." *Grisar v. McDowell*, 73 U.S. 363, 381 (1868). Public lands were open to settlement under preemption or homestead rights,[79] but the Interior Department could not issue patents to anyone for lands within an Indian reservation. *United States v. Carpenter*, 111 U.S. 347 (1884)(cancelling patent issued within a Minnesota reservation); *cf. Missouri, K. & T. Ry. v. Roberts*, 152 U.S. 114 (1894)(grant of a right of way to a railroad extinguished Indian right of occupancy).

Pursuant to the 1860 act, 701.55 acres within the former reservation were patented to Minnesota. *Minnesota*, 270 U.S. at 199-200 (referring to

[79] *See* 5 Stat. 453, 12 Stat. 392.

"about 700 acres" that "were patented to the state under the swamp land grant" on May 13, 1871). In 1923, the United States sued Minnesota to cancel patents covering, or to recover the sale proceeds of, approximately 153,000 acres of land that the United States claimed had been improperly patented to the state—including the 701.55 acres. *Id.* at 192.

The federal government argued that title to those lands was improperly granted to the state because they had been "appropriated or set apart for the Chippewas" and consequently, title to those lands could not pass to the state under the terms of the 1860 act. *Id.* Included within the disputed lands were 11,311.11 acres within the former reservation claimed by the state as swamp lands.[80]

The Court held that Minnesota's title to those 701.55 acres had been determined in the 1913 lawsuit, as confirmed on remand in the Court of Claims. *Mille Lacs Band of Chippewa Indians v. United States*, 51 Ct. Cl. 400, 400 (1916)(Finding II, referring to land "Patented May 13, 1871--swamp-land act"); *see Minnesota*, 270 U.S. at 199 (discussing the 1913 suit and holding "the United States is without right to any recovery here in respect of the lands as to which it was adjudged there to be free from any

[80] *See* H Ex. Doc. 148, MILLE LAC INDIAN RESERVATION IN MINNESOTA, 48th Cong. 1st Sess. at 9, 17. (App. 1291, 1299; R. Doc. 242-11 at 107, 115).

obligation or responsibility to the Indians. So the lands in the patent of May 13, 1871, need not be considered further"). The Court held that the state was entitled, under the 1860 statute, to receive title to all other lands except for approximately 706 acres found to be within the Leech Lake reservation. *Id.* at 215. The Leech Lake lands were not public lands to which the 1860 act applied. *Id.* at 208, 215.

This result confirmed that in 1871, the reservation no longer existed, and the right to remain afforded by the Article XII proviso did not remove the 701 acres from being public lands to which the 1860 act applied. Likewise, for the over 11,000 acres of swamp lands the State claimed within the former reservation, the State obtained its interest under the 1860 Act *in presenti*, i.e., effective after being surveyed as swamp land. A later patent simply confirmed the State's interest. To hold as it did, the Court necessarily had to find the lands within the former reservation to be public lands.

Essential to that holding was that the Mille Lacs reservation had been ceded to the United States and was no longer a reservation. The district court misinterpreted the 1926 decision as resting on the proviso of Section 6 of the Nelson Act, which expressly confirmed preemption and homestead entries, but was silent as to swamp lands. 25 Stat. 642, 644-45. On remand, the Court of Claims specifically found that the 1871 patent was a swamp land patent,

which could only issue if the land had not been otherwise reserved. *See* 51 Ct. Cl. at 400. Because the United States prevailed only on 706 acres patented in the Leech Lake reservation, 270 U.S. at 215, it necessarily follows that Minnesota prevailed on the remaining swamp lands within the former reservation.[81] Thus, the Supreme Court has twice held, on the merits, that the 1855 reservation was disestablished. The 1926 decision cannot be interpreted any other way. The district court's rejection of that conclusion is plainly error.

V. The Band has repeatedly asserted that the reservation was ceded and accepted compensation for that cession.

In several previous actions, the Band or the Minnesota Chippewa Tribe has sought compensation for the loss of Indian title to the lands originally in the reservation and has been compensated for those losses. The Band did not argue in these actions that the reservation continued to exist as such. Rather, the Band asserted in legal filings that the reservation had been "extinguished as an Indian reservation;" that the Band "relinquished such reservation to the United States;" and that the Band "remained in possession until the passage of the Nelson act…under the provisions of which act the Mille Lac

[81] In House Ex. Doc 148 at 17 (App. 1299; R. Doc. 242-11 at 115), the Commissioner of the General Land Office reported that Minnesota had selected and claimed a total as swamp lands 11,311.11 acres, including those covered by the 1871 patent.

band relinquished to the United States the said Mille Lac reservation." Importantly, the Band could not have received payment for its losses from the lands ceded if it had not sustained such losses. But the Band *was* ordered compensation for the losses, and not just for some of the lands within the former reservation; all 61,000 acres were accounted for. *Supra* Part IV.A. Yet in the present action, the Band asserts a contrary position—that it has never lost Indian title to these lands and that none of these treaties, congressional acts, or earlier court decisions had any effect on the reservation's status.

A. In 1909, 1916, 1982, and 1986 the Band asserted before the Court of Claims and the Supreme Court that the Reservation had been ceded and sought payment for the taking.

In its petition before the Court of Claims in 1909, the Band argued that it was entitled to greater financial compensation than it had received because Indian title had been extinguished and the reservation's Indian status had been terminated.[82] The United States also took the position that the reservation's Indian status had been terminated, but argued that the Band's rights to the land were ceded even earlier, under the 1864 Treaty.[83]

As discussed in Part IV.A., *supra*, the Court of Claims held that the Nelson Act "divested" the Band of "Indian title" to the lands reserved under

[82] (App. 1086; R. Doc. 242-10 at 123.)
[83] (App. 1160-79; R. Doc. 242-10 at 197-216, 228.)

the 1855 Treaty, and ordered compensation for those losses that the Band was owed under the terms of the Nelson Act. 47 Ct. Cl. at 454.

The Supreme Court, as discussed in Part IV.A., *supra*, reversed in part the monetary award by the Court of Claims, but did *not* reverse the court's finding that the lands had been terminated as a reservation. 229 U.S. at 499-500 ("[The Nelson Act contained] an express relinquishment of the lands in the Mille Lacs Reservation"). In 1916, the Band acknowledged the holding by the Supreme Court in its own filings before the Court of Claims:

> At the time of the trial counsel for claimant believed that there could not be any valid, subsisting preemption or homestead entries upon any part of the Mille Lac reservation. Counsel believed this because it believed the Mille Lac reservation was an Indian reservation...*In this particular case, however, the Supreme Court have found to the contrary*.[84]

In 1982, the Band, through the Minnesota Chippewa Tribe, again sought compensation and adequate consideration for the Tribe and its constituent bands, including Mille Lacs. *See Minnesota Chippewa Tribe v. U.S.*, 230 Ct. Cl. 761, 762 (1982). The Court of Claims rejected the Tribe's claims, holding that because the Tribe had previously executed a stipulated settlement in earlier litigation before the Court of Claims, res judicata barred

[84] (App. 1379-80; R. Doc. 258-5 at 21-22, Brief for Claimant, emphasis added.)

the Tribe's claims regarding the 1855, 1863, 1864, and 1867 Treaties. *Id.* at 772. Importantly, the Band *did not argue* in the 1980s that the reservation retained Indian status. No party to the action disputed the findings of fact of the Indian Claims Commission previously. *See id.* at 770-72 (citing 14 Ind. Cl. Comm. at 230: "The Commission held that plaintiffs did not introduce any evidence of fair market value for the ceded areas that would exceed the fair market value of Royce Area 507, received as consideration, and on this basis dismissed plaintiffs' unconscionable consideration claim arising out of the 1864 Treaty"). Yet again, the Band was only seeking additional compensation for the lands it also agreed had been relinquished.

As recently as 1986, the Band similarly sought compensation for losses under wrongful land dispositions. *Minnesota Chippewa Tribe v. United States*, 11 Cl. Ct. 221 (Cl. Ct. 1986). It claimed that "the Mille Lac band was promised a reservation in return for their good conduct, but that through a series of conveyances confirmed as a result of the Nelson Act, that reservation was taken from them." *Id.* at 234-35. The Band made no arguments that the Nelson Act preserved the Mille Lacs reservation.

VI. The jurisdictional bar of the Indian Claims Commission Act prohibits claims accruing before 1946.

The Indian Claims Commission Act established a tribunal to decide and "adjudicate[] once and for all" claims by tribes against the government.

60 Stat. 1049; *Temoak Band of W. Shoshone Indians v. United States*, 593 F.2d 994, 998 (Ct. Cl. 1979). Section 12 of the ICCA provides that all claims that could be brought under it and that existed at the time of its enactment in 1946 must be brought within five years or be time-barred, and that no court or administrative agency has jurisdiction to hear such claims. 60 Stat. 1052.

Here, the record is beyond peradventure that by 1946, the Mille Lacs Indians, the Minnesota Chippewa Tribe, the United States Department of Interior, the State of Minnesota, and the U.S. Supreme Court all recognized that the 1855 Mille Lacs Reservation had been disestablished. There was no contrary authority. Further, the "essential claim" by the Band here is based on actions of the United States that occurred before 1946, and finding in favor of the Band's claims of law enforcement authority over all 61,000 acres *necessarily requires* setting aside the plain language in the relevant treaties and congressional acts. If the reservation was terminated as an Indian reservation, the Band has no authority (outside of trust lands) to exercise its tribal law enforcement authority. Only through judicial revision of the plain language contained in these previous actions wherein the reservation was ceded, relinquished, and extinguished as an Indian reservation, and for which the Band was compensated, may the Band be entitled to possess

inherent tribal law enforcement authority outside of trust lands. The court in *Oglala Sioux Tribe of Pine Ridge Indian Reservation v. U.S. Army Corps of Engineers*, 570 F.3d 327, 333 (D.C. Cir. 2009), held claims such as these are barred by the ICCA:

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

The district court quoted the above passage in its order but omitted the last sentence.

Oglala holds that a tribe "cannot obtain review of an historical land claim otherwise barred by the Act by challenging present-day actions involving the land." *Id.* at 332. Further, it explains that a tribe cannot "circumvent the statutory limitation by styling its grievances as claims for equitable relief against federal officers in their individual capacities. If the Tribe's essential claim is time-barred, reaching these 'officer suits' would mean that the Tribe could litigate claims arising before 1946, in direct

defiance of Congress's intent in passing the Act." 570 F.3d at 332 (internal citations omitted).

This Court similarly held that the Oglala Sioux Tribe could not relitigate claims of title to the Black Hills by naming the State of South Dakota and later the Homestake Mining Company as defendants, because such claims ran afoul of the ICCA. *Oglala Sioux Tribe v. United States*, 650 F.2d 140 (8th Cir. 1981); *Oglala Sioux Tribe v. Homestake Mining Co.*, 722 F.2d 1407 (8th Cir. 1983). In 1981, this Court explained:

> This precise statutory language [of the ICCA] reflects Congress' intention to provide a one-time, exclusive forum for the resolution of Indian treaty claims…We conclude that the Oglala's cause of action, as an Indian claim accruing before 1946 and arising under the constitution, comes within this exclusive jurisdiction of the Indian Claims Commission.

650 F.2d at 143. There is no exception, in the plain text of the ICCA, for reservation boundary claims.[85] Congress intended the ICCA to be "a one-time, exclusive forum for the resolution of Indian treaty claims." 650 F.2d at 143.

The fact that the Band's *present-day* law enforcement claims against Appellants could not have arisen and did not arise before 1946 does not

[85] Appellants do not assert that the Band's claim regarding the reservation's status is a reservation boundary claim; rather, that reservation boundary claims are also not excluded from the ICCA.

change the fact they are barred by the ICCA.[86] Because the "essential claim" involves the status of reservation lands, which was precisely the kind of claim required to have been brought under the ICCA, it is now barred under that Act. Under the district court's approach, however, the Oglala Sioux could presently bring a claim for law enforcement interference in the Black Hills and circumvent the plain language of the ICCA and this Court's holdings. This cannot hold. The ICCA's jurisdictional and time bar precludes the Band's claims here.

VII. The Band's claim regarding reservation status is barred by laches.

Laches, as applied to long-delayed claims of Indian tribes to historic lands, consists of three factors: (1) the length of time at issue between an historical injustice and the present day; (2) the disruptive nature of claims long delayed; and (3) the degree to which these claims upset the justifiable expectations of individuals and entities far removed from the events giving rise to the plaintiffs' injury. *Oneida Indian Nation of New York v. Cty. of Oneida*, 617 F.3d 114, 127 (2d Cir. 2010).

Here, the elements of laches are met. First, the Band's claims regarding reservation cession accrued when the relevant legislation was passed in the

[86] There is no evidence that any party claimed or believed that the Mille Lacs lands retained reservation status in 1946.

1800s. It cannot revive its claims in an action brought in 2017 merely because such claims fall under the guise of sovereign and federal authority to investigate violations of federal, state, and tribal law.

Second, the Band's claim is inherently disruptive of settled expectations and governance. "Indian land claims asserted generations after an alleged dispossession that are inherently disruptive of state and local governance and the settled expectations of current landowners and are subject to dismissal on the basis of laches, acquiescence, and impossibility." *Wolfchild v. Redwood Cty.*, 91 F. Supp. 3d 1093, 1105 (D. Minn. 2005). As in *Wolfchild*, the lands at issue here are predominantly owned and settled by non-members, dating back to the 1800s. Since that time, landowners have used and occupied the properties, and improved and developed land for agriculture, businesses, and residences. The land has been governed and taxed by the State of Minnesota and the County. *See id.* at 1104.

Finally, the County and residents here have justifiable expectations that are grounded in well over a century of the State of Minnesota's exercise of regulatory jurisdiction. *See City of Sherrill, N.Y. v. Oneida Indian Nation of New York*, 544 U.S. 197, 215 (2005). Such expectations merit heavy weight in analyzing whether a claim should be equitably barred by laches. *Id.* A finding that these lands exist within a reservation would greatly disrupt these

expectations. Equity requires a different result, especially when the Band has received monetary compensation for the losses it sustained for the cession of its reservation in previous congressional Acts. *See supra* Parts II-V. This Court should follow the precedent established in *City of Sherrill* and applied in *Wolfchild* and hold the Band's claim here on the reservation equitably barred.

CONCLUSION

Less than a decade after the Band's 1855 Reservation was created, the Band ceded its reservation in the Treaties of 1863 and 1864. The United States Supreme Court has twice ruled that the reservation was ceded to the United States. Through the Nelson Act of 1889, the Band knowingly surrendered its right against removal created by the Treaties of 1863 and 1864 in exchange for substantial benefit. In many courts spanning many decades, the Band, the State of Minnesota, and the United States have all acknowledged the cession. The district court erred in granting Appellees' motion for summary judgment and holding the reservation was never disestablished. This Court should reverse that error.

Dated: May 1, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned counsel for Appellant County of Mille Lacs, Minnesota certifies that this brief complies with the requirements of Fed. R. App. P. 32(a) in that it is printed in 14 point, proportionately spaced typeface utilizing Microsoft Word 2016 and contains 12,918 words, including headings, footnotes and quotations and that the brief has been scanned for viruses and is virus-free.

Dated: May 1, 2023

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CERTIFICATE OF SERVICE

I hereby certify that on May 1, 2023, I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: May 1, 2023

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