United States Department of the Interior

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To: Secretary

From: Solicitor

Subject: Opinion on the Boundaries of the Mille Lacs Reservation

I. INTRODUCTION

This opinion provides my legal conclusion regarding the current status of the Mille Lacs Band of Ojibwe's (Band) Reservation boundaries. The basis of this opinion is a very in-depth, careful review of the relevant historical documents pertaining to the United States' treatment of the Band's land over the course of more than one hundred years. Sadly, this historical overview reveals that the United States' dealings with the Band were not always a shining example of fair and honorable dealings, as it reveals a series of interactions fraught with hidden agendas, arbitrary shifts in policy, utter confusion, and broken commitments. As reflected in the discussion below, on several occasions, the United States was aware of the unauthorized encroachments within the Band's Reservation, but due to external economic and settlement pressures, the government failed to maintain a consistent and clear position on the status of the Band's lands, leading to a gradual, ad hoc opening of the reservation to settlement and development without the requisite, clear Congressional intent to change the boundaries of the Band's Reservation.

Although not necessary to the underlying legal determination, this opinion honors our modern day values and principles of fairness, transparency, and accountability, and strives to set the record straight and not commit the errors of the past. To this end, the evaluation of the legal question in this opinion is guided by long-standing, bedrock principles of Indian law and binding precedent, and not external pressures seeking the least path of resistance in the face of unpopularity or opposition. This approach is consistent with the Department's commitment to uphold the trust responsibility, which imposes the "the highest moral obligations" on the United States regarding its protection of Indian lands.[1] Therefore, as a matter of both law and equity, I conclude that the Band's reservation boundary remains intact and has not been diminished or disestablished.

The existence of the Mille Lacs Reservation boundaries, as established by the 1855 Treaty between the Chippewa and the United States, has long been a source of contention between the Band and non-federal governmental entities, namely Mille Lacs County (County) and, at times, the State of Minnesota (State). Most recently, the dispute has arisen in the context of an application by the Band for concurrent federal jurisdiction over crimes committed in the Band's

[1] *See* Secretarial Order No. 3335, *Reaffirmation of the Federal Trust Responsibility to Federally Recognized Indian Tribes and Individual Indian Beneficiaries* at 1 (Aug. 20, 2014).

Indian country under the Tribal Law and Order Act (TLOA).[2] In the course of the application process, the County has submitted comments arguing that the Mille Lacs Reservation, as defined by the 1855 Treaty, has been disestablished and therefore that the 1855 Treaty boundaries do not constitute the Band's Indian country.[3] In response, the Band submitted its analysis supporting the continued existence of the 1855 Treaty boundaries.[4] In light of the dispute surrounding the boundaries of the Mille Lacs Reservation,[5] the Office of the Solicitor has prepared an opinion as to whether the 1855 Treaty boundaries have been diminished or disestablished to assist the Department of Justice in its consideration of the Band's application and to provide the Department of the Interior's final position on the issue.

This opinion first provides a summary of the factual history surrounding the Mille Lacs Reservation and explanations of the Supreme Court jurisprudence on diminishment or disestablishment of Indian reservations. The opinion then analyzes the relevant treaties, congressional acts, legislative history, and factual circumstances regarding the Mille Lacs Reservation in light of the diminishment/disestablishment framework and ultimately concludes that the Mille Lacs Reservation boundaries, as established by the 1855 Treaty, remain intact. The 1863 and 1864 Treaties, as well as the 1889 Nelson Act, fail to evince a clear Congressional intent to disestablish the Reservation and, in fact, guaranteed the Band continuing rights to its Reservation.

The analysis outlined below is admittedly complex, and the County has offered a different interpretation of the relevant history. However, the courts have established that the sole question is whether Congress clearly intended to diminish or disestablish the Reservation. Such intent is not present here.

II. BACKGROUND

a. *Establishment of the Reservation*

In 1855, several bands of Chippewa Indians, including the Mille Lacs Band, entered into a treaty with the United States that created reservations in the territory of Minnesota. The Treaty "reserved and set apart" six tracts collectively for the "permanent homes" of the Mississippi

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[2] *See* Request for United States Assumption of Concurrent Federal Criminal Jurisdiction, from Melanie Benjamin, Chief Exec., Mille Lacs Band of Ojibwe, to Tracy Toulou, Dir., Office of Tribal Justice, U. S. Dep't of Justice (Feb. 22, 2013).

[3] *See* Response and Appendix by the Cnty. of Mille Lacs in the State of Minn. to the Request by the Mille Lacs Band of Ojibwe for U. S. Assumption of Concurrent Fed. Criminal Jurisdiction (Apr. 25, 2013).

[4] *See* Mille Lacs Band of Ojibwe, Application for Concurrent Federal Criminal Jurisdiction Pursuant to 18 U.S.C. §1162(d), Response to Comments Regarding the Indian Country Status of the Mille Lacs Indian Reservation (Aug. 1, 2013).

[5] The dispute over the status of the Reservation has arisen in prior litigation and is currently at issue in an Interior Board of Indian Appeals proceeding concerning a Departmental decision to acquire land in trust for the Band. *See, e.g., Mille Lacs Cnty. v. Benjamin*, 262 F. Supp. 2d 990 (D. Minn. 2003), *aff'd*, 361 F.3d 460 (8th Cir. 2004), *cert. denied*, 543 U.S. 956 (2004) (suit by Mille Lacs Cnty. and the First National Bank of Milaca seeking a declaratory judgment as to the reservation boundaries; dismissed on standing and ripeness grounds); *Cnty. of Mille Lacs, Minn. v. Acting Midwest Reg'l Dir., Bureau of Indian Affairs*, Docket No. 14-028 (Interior Board of Indian Appeals) (appeal of the Bureau of Indian Affairs (BIA) September 12, 2013 decision to acquire 378.32 acres in trust for the Band; based in part on the argument that the reservation has been disestablished).

bands of Chippewa Indians, including the Band.[6] The Band received the first tract reserved in Article 2, which embraced three fractional townships and three small islands in the southern part of Mille Lacs Lake, consisting of approximately 61,000 acres.[7] Pursuant to the federal government's reservation-based Indian policy, this tract was set apart for the permanent home of the Mille Lacs Band.[8]

b. *The 1863 and 1864 Treaties and Subsequent Interpretation and Settlement*

In the fall of 1862, the Great Sioux Uprising occurred, during which many of the Indians of Minnesota and the Dakotas engaged in open hostility and unrest against the white settlers and military in Minnesota. The Band did not join in the demonstrations or pillaging, but rather denounced the uprising and, in some instances, fought alongside the white men.[9] Due to the hostile relations with other Indians in the State, however, federal officials started negotiating another treaty to move all of the tribes to a consolidated location in Minnesota.[10]

i. Treaty Language and Negotiation

During the treaty negotiations in 1863, there was significant discussion about the Band. In particular, in a meeting between Secretary of the Interior, J.P. Usher, and the Chippewa Indians, the Secretary noted that he expected that the "Millacs would be reluctant to agree to this Treaty, because they had a good home where they were, and were peaceable and had done no harm."[11] Secretary Usher also noted, however, that there was damage to the wild rice and that it was difficult for the whites to distinguish one Indian from another.[12] For these reasons, he encouraged all the Indians to relocate to the Leech Lake Reservation.[13] In a subsequent meeting between Commissioner of Indian Affairs, William P. Dole, and the Chippewa Indians from the Mississippi River, Commissioner Dole noted that the Band should be permitted to remain on the Reservation:

> The whites, it seems, demand [Indian] removal on account of the recent difficulties. I am sure that we will be able to make no treaty by which we can separate the Millac Band and Poughkagemies, and the Sandy Lake bands from the Mississippi Band. I myself am inclined to do so. The Millac Band have earned this from the Government that they ought to be allowed to remain where they are at least for the present.[14]

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[6] Treaty with the Chippewa, U.S.-Chippewa, Feb. 22, 1855, 10 Stat. 1165, Art. 2 (known hereinafter as 1855 Treaty).
[7] *Id.*; *see also* Frederick E. Hoxie, The Mille Lac Reservation: What? When? Where? 19 (2015) (known hereinafter as Hoxie Report); James M. McClurken, A Permanent Home: the Mille Lacs Ojibwe Reservation 22 (2003) (known hereinafter as McClurken Report).
[8] *See* Hoxie Report at 15–20.
[9] *Id.* at 22–23; McClurken Report at 31–34.
[10] *See* Hoxie Report at 23–24.
[11] *See* Interview with J.P. Usher, Sec'y of the Interior and the Chippewa Indians, 15 (Feb. 25, 1863).
[12] *Id.*
[13] *Id.* at 16.
[14] Interview with William P. Dole, Comm'r of Indian Affairs, and the Chippewa Indians from the Miss. River, 37 (Mar. 5, 1863).

Commissioner Dole, however, recognized that the Chippewa people as a whole would continue to encounter difficulties if they attempted to co-exist with the white settlers.[15] In light of the Band's proven loyalty, Commissioner Dole suggested that the Band be allowed to remain on its Reservation for a year or two until the Band selected a new home to its satisfaction.[16] Band members would not stipulate for a one or two-year tenure and persisted in their claim that they had adhered to the 1855 Treaty stipulations and retained the right to stay on the Reservation.[17]

The United States, the Chippewas of the Mississippi, and the Pillager and Lake Winibigoshish bands of Chippewa Indians in Minnesota eventually finalized a treaty in 1863, which provided that "[t]he reservations known as Gull Lake, Mille Lacs, Sandy Lake, Rabbit Lake, Pokagomin Lake and Rice Lake, as described in the second article of the treaty with the Chippewas of 22nd February, 1855, *are hereby ceded to the United States*... ."[18] In Articles 2 through 6, the government agreed to reserve lands in the vicinity of Leech Lake for the Mississippi bands, as well as to make various payments, clear lands, and provide oxen, tools, and a sawmill for the Indians. Importantly, however, Article 12 of the 1863 Treaty specifically allowed the Band to remain on the Reservation by stating:

> It shall not be obligatory upon the Indians, parties to this treaty, to remove from their present reservations until the United States shall have first complied with the stipulations of Articles 4 and 6 of this treaty, when the United States shall furnish them with all necessary transportation and subsistence to their new homes, and subsistence for six months thereafter: 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.*[19]

Thus, the Band could not be removed at all unless it disturbed the "persons or property of the whites." Indeed, the Band would not have agreed to the treaty without the inclusion of the Article 12 provision.[20] Senator Rice, one of the treaty negotiators and drafters, wrote to Bishop Henry Whipple, a local advocate for the Minnesota Indians, stating that "the Indians all left satisfied with the treaty."[21]

The 1863 Treaty did not ultimately resolve the underlying issues and, in 1864, the same parties entered into another treaty. The Treaty with the Chippewa, Mississippi, and Pillager and Lake Winnebigoshish Bands superseded the 1863 Treaty but retained the cession language and removal provisions, including the proviso that the Mille Lacs Indians would not be removed "so long as they shall not in any way interfere with or in any manner molest the persons or property

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[15] *Id.*
[16] *Id.*
[17] *See* McClurken Report at 48.
[18] Treaty with the Chippewa of the Miss. and the Pillager and Lake Winibigoshish Bands, U.S.-Chippewa and Pillager and Lake Winibigoshish Bands, 12 Stat. 1249 (Mar. 11, 1863) (known hereinafter as 1863 Treaty) (emphasis added).
[19] 1863 Treaty, Art. XII (emphasis added).
[20] *See* McClurken Report at 51.
[21] Letter from Sen. Henry Rice to Bishop Henry Whipple (Mar. 18, 1863).

of the whites."[22] The first article of the 1864 Treaty also granted "one section to Chief Shaw-bosh-kung, at Mille Lac."

ii. Subsequent Interpretation and Settlement

In the years following its ratification, the local Indian agents and Departmental officials agreed that the Mille Lacs retained their treaty right to remain on the Reservation.[23] Band members were steadfast in their refusal to move.[24] Nonetheless, non-Indians coveted the valuable timber resources on the Reservation and continued to infiltrate the boundaries and file land claims. These actions were taken despite the Federal Government's awareness and concern regarding the questionable validity of settlers' claims and the Mille Lacs members' pleas for federal assistance.[25]

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[22] Treaty with the Chippewa, Mississippi, and Pillager and Lake Winnibigoshish Bands, U.S.-Chippewa, Mississippi, and Pillager and Lake Winnibigoshish Bands, 13 Stat. 693, Art. XII (May 7, 1864) (known hereinafter as 1864 Treaty). Another treaty was entered into in 1867 by the Chippewa Bands and signed by two Mille Lacs chiefs. *See* Treaty with the Chippewa of the Mississippi, 16 Stat. 719 (Mar. 19, 1867). This treaty did not address the Mille Lacs Reservation or implicate Article 12 of the 1864 Treaty. *See* Hoxie Report at 24.

[23] *See* Letter from Sen. McMasters, et al. to Bishop Henry Whipple (June 3, 1868) ("the government has no Right to asked [sic] them to remove from Mille Lac at this present time and I have told the Indians not to go for the following reasons First: Government has not appropriated any money for the removal... [and] the government made a treaty with the Indians giving the Mille Lac Bands [the right] to remain at Mille Lac as long as they are not injuring the interest of the whites. ... What have [the Mille Lacs] done to cause their removal, nothing, they have not killed any white person and they have not destroyed any property belonging to the whites."); Letter from E.P. Smith, U.S. Indian Agent, to E.S. Parker, Comm'r of Indian Affairs (May 1, 1871) ("The Mill Lac reservation, though ceded by the Indians to the Government, should not yet be subject to entry; for the Indians not having been ordered or notified to leave, are, according to their treaty, yet entitled to all rights upon it ... The Indians clearly have possessory rights in the Reservation until they shall have received formal and sufficient notices to leave."); Letter from Sec'y C. Delano to Indian Agent Edward P. Smith (Oct. 16, 1871) ("I concur with you in the opinion that it is best to remove these Indians provided it can be done with their entire consent fairly and honestly obtained. Without such consent they should not be removed, so long as their behavior is good."); Letter from E.P. Smith, Indian Agent, to Anonymous (Nov. 8, 1872) ("The right of occupancy being the only right of the Indians in this land, it is evident that the Government procured by [the 1864] treaty nothing more than the right to compel the removal of the [Mille Lacs] Indian in case of bad conduct.").

[24] *See* Hoxie Report at 28–30; Letter from Joseph Roberts to Captain George Atcheson (May 12, 1870) ("[The Mille Lacs Indians] are strictly opposed to leaving the reservation. ... They claim the right under the treaty of 1863 or 4 that they should be allowed to remain at that reservation or the country they had occupied before, for four hundred years, providing they would commit no depredations, which they claim they did not. . . .") (emphasis in original); Annual Report of the Comm'r of Indian Affairs to the Sec'y of the Interior at 2 (1872) ("The Mille Lac Chippewas, who continue to occupy the lands ceded by them in 1863, with reservation of the right to live thereon during good behavior, are indisposed to leave their old home for the new one designed on the White Earth reservation. Only about twenty-five have thus far been induced to remove. . . . .").

[25] *See* Hoxie Report at 28, 31–39; Letter from E.P. Smith, Indian Agent, to E.S. Parker, Comm'r of Indian Affairs (July 17, 1871) ("The Indians, as I have explained in previous communications, are still, according to their treaty possessory rights, in that Reservation, never having been notified to leave, and no adequate provision for their removal having been made. But I find that their whole Reservation has been covered since April 5th with scrip and presumptive claims filed in the Taylor's Falls' Office. I also find that there has been no order from the Gen. Land Office making this Reservation subject to entry. . . ."); Letter from Sec'y Delano to E.P. Smith, Indian Agent (Sept. 4, 1871) ("This Department has no information leading to the belief that [Art. 12 of the 1864 Treaty] has ever been violated and is therefore of the opinion that the Mille Lac Indians are entitled to remain at present unmolested on their reservation and that their occupancy cannot be disturbed until they shall interfere with or in some manner molest the persons or property of the whites."); U. S. Notice (Sept. 14, 1871) (announcing that the United States

In exacerbation of the problem of white encroachment, the federal government failed to maintain a clear and consistent understanding of the Band's rights under the 1864 Treaty or the availability of Reservation land for non-Indian settlement.[26] Several Secretaries of the Interior opined on the status of the Mille Lacs Reservation and their positions varied over the years following the 1864 Treaty. For example, in 1871, Secretary Columbus Delano found that while it would be best to remove the Band, Article 12 allowed the Indians to remain unmolested on their reservation "so long as their behavior was good."[27] Secretary Delano instructed the local Indian Agent and General Land Officers to warn "all white persons against attempting to make settlements or commit trespass by cutting timber" or in any manner disturbing the "Indians who legitimately occupy that reservation under the treaty."[28]

Secretary Zachariah Chandler altered this interpretation in an 1877 decision concerning land claims made by Frank W. Folsom, the son of a prominent Minnesota legislator and lumber baron.[29] Like Secretary Delano, Secretary Chandler held that the Band could not be compelled to remove due to Article 12. However, he also determined that this treaty provision did not provide the Band with an exclusive right to the Reservation and therefore did not "exclude [Mille Lacs] land from sale and disposal by the United States."[30] Nonetheless, Secretary Chandler ordered the Commissioner of the General Land Office to hold all existing claims in status quo and disallow any further entries or filings[31] until the close of the next session of Congress unless the Band voluntarily removed in the interim.[32]

The following year, Secretary Carl Schurz directed that a large number of entries made pursuant to Secretary Chandler's decision should be canceled and again ordered that all claims on the Band's land "shall remain in *status quo*."[33] Secretary Schurz directed the local land officers to prevent further entries and claims, "until the result of the action of Congress in relation to the

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Attorney for Minnesota had been instructed to commence proceedings to "compel squatters to vacate the Mille Lac lands they have taken from the Indians in violation of treaty stipulation").

[26] *See* Hoxie Report at 29–48.

[27] *See* Letter from Sec'y Delano to E.P. Smith, Indian Agent (Sept. 4, 1871) (finding that the Mille Lac Indians were entitled to remain unmolested on their reservation and that their occupancy could not be disturbed unless they violated Article 12); Letter from Sec'y C. Delano to Edward P. Smith, Indian Agent (Oct. 16, 1871) ("I concur with you in the opinion that it is best to remove these Indians provided it can be done with their entire consent fairly and honestly obtained. Without such consent they should not be removed, so long as their behavior is good.").

[28] Letter from Sec'y Delano to E.P. Smith, Indian Agent (Sept. 4, 1871).

[29] *See* McClurken Report at 110–11.

[30] *Frank W. Folsom*, Secretary Chandler decision (Mar. 1, 1877) (as quoted in *Amanda J. Walters v. G.W.M. Reed*, Secretary Noble decision (Jan. 9, 1891) (finding that Article 12 of the 1864 Treaty did not "exclude [Mille Lacs] land from sale and disposal by the United States"); *see also* Hoxie Report at 37–38.

[31] Under the Homestead Act of 1862, individuals were eligible for land grants in the public domain if they satisfied certain conditions, including physical settlement on the land in question and filing a preemption claim with the local General Land Office. *See generally* An Act to Secure Homesteads to Actual Settlers on the Public Domain, 12 Stat. 392 (May 20, 1862). After five years of residence or cultivation of the land, the United States would issue a land patent to the individual. *Id.* § 2.

[32] *See* Hoxie Report at 37–38.

[33] Letter from Sec'y C. Schurz to the Comm'r of the General Land Office (June 21, 1878); *see also* Dep't of Interior, *Amanda J. Walters, et al.*, at 2 (Jan. 9, 1891) (describing Sec'y Schurz's May 19, 1879 decision).

right of the Indians in question to occupy the tract of country known as the Mille Lac Reservation situated in the State of Minnesota – shall have been determined."[34]

In 1882, Secretary Henry Teller shifted course and opined that while the Band was "rightfully on the reservation," it was entitled to occupy only the portion of the Reservation that the members had *actually* occupied in 1863 or before the occupancy of white settlers.[35] Accordingly, he found that the other portions of the reservation were subject to homestead and pre-emption claims.[36] As a result of Secretary Teller's order, a new rush of settlers filed claims on the Reservation.[37]

In response to the growing encroachment and the inconsistent treatment of the Reservation by the Department of the Interior, on July 4, 1884, Congress included a provision in its Indian appropriation act directing that Mille Lacs land should not "be patented or disposed of in any manner until further legislation."[38] At that time, non-Indian entries covered approximately 55,000 acres of the Reservation, and some were under investigation for fraud.[39]

In 1886, Congress authorized the Secretary of the Interior to negotiate with the tribes and bands of Chippewa Indians in Minnesota, including the Band, to modify their existing treaties and change their reservations "as may be deemed desirable by said Indians and the Secretary."[40] The Mille Lacs Band "positively refused to enter into any agreement which involved their removal from their present locality."[41] Several negotiation sessions ensued and ultimately failed.[42] Finally, an offer was made to allot lands to Band members within the Reservation. While this option won the acceptance of the Mille Lacs Band, no final agreement was reached.[43]

c. *The Nelson Act*

In 1889, Congress enacted *An act for the relief and civilization of the Chippewa Indians in the State of Minnesota* (Nelson Act). The Nelson Act had several objectives. Congress hoped to convince the scattered reservations of Chippewa Indians to remove to White Earth in order to

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[34] Letter from Sec'y C. Schurz to the Comm'r of the General Land Office (June 21, 1878).
[35] Letter from Sec'y Teller to the Comm'r of Indian Affairs (May 10, 1882) (on file in House Exec. Doc. 148, 48-1, pp. 10–12).
[36] *Id.* at 11.
[37] *See* Hoxie Report at 45.
[38] 23 Stat. 76, 89; *see* Letter from Acting Sec'y (transmitting Report of Comm'r of Indian Affairs) responding to H. R.'s Mar. 21 resolution (Apr. 28, 1884) ("To allow this condition of things to continue is the highest degree demoralizing to these Indians. Either they should be removed (with their consent) or, lastly, lands in severalty should be allotted to them where they are at the earliest practicable moment. They have ever manifested the strongest objection to removal, and it is not known whether their free consent could be obtained to quit their old homes for the White Earth or any other reservation."). *See also* Dep't of Interior, Public Land Decisions from July 1, 1886, to June 30, 1887, at 541–43 (holding that the 1884 Appropriation Act provision governed land disposals at the Mille Lacs Reservation, not the White Earth Reservation).
[39] *United States v. Mille Lac Band of Chippewa Indians in the State of Minn.*, 229 U.S. 498, 502–03 (1913).
[40] Act of May 15, 1886, 24 Stat. 29, 49 Cong. Ch. 333 at 44; *see also* McClurken Report at 143.
[41] Report of the Sec'y of the Interior, 1887, *The Executive Documents of the House of Representatives for the First Session of the Fiftieth Congress 1887-88*, 26 (1889).
[42] *See* McClurken Report at 144–48.
[43] *Id.* at 148; *see* Hoxie Report at 50.

alleviate the pressures of white encroachment and centralize native settlement.[44] Additionally, Congress recognized that the "greatest value" of these reservations was the pine timber reserves and therefore, Congress wanted to secure "some method to dispose of the pine timber upon these reservations for the benefit of the Indians – in other words, to capitalize it."[45] In considering the bill, Congress repeatedly articulated that removal under the legislation would be voluntary and that its provisions would be "inoperative" and "nugatory" if not accepted by the Indians.[46] Congress also recognized the continued presence of the Mille Lacs Reservation, noting that it was comprised of 61,014 acres and 942 Indian occupants.[47]

i. The Statutory Framework

Upon its enactment, the Nelson Act authorized the President to designate commissioners (known as the Chippewa Commission) to negotiate with all the bands and tribes of Chippewa Indians in the State of Minnesota for the "complete cession and relinquishment in writing of all their title and interest in and to all the reservations of said Indians in the State of Minnesota, except the White Earth and Red Lake Reservations."[48] Such agreements with the bands would "operate as a complete extinguishment of the Indian title."[49] Once the bands ceded their lands, they would be removed to the White Earth Reservation where members would receive allotments.[50] Section 3 of the Act provided, however, that individuals could elect to take allotments on the reservation where they resided.[51] The size of allotments was to be determined using the allotment provisions set forth in the 1887 Dawes Act, which authorized 160 acres to each head of a family, 80 acres to a single person or orphan, and 40 acres to persons under the age of 18.[52]

Following the cession, the Act envisioned that the United States would handle the lands in one of three ways: first, lands would be allotted to those tribal members electing to remain where they lived; second, pine lands would be sold at auction to the highest bidder; and third, the remaining surplus or "agricultural lands" would be sold to non-Indians under the Homestead Act of 1862.[53] Section Six included a proviso recognizing "subsisting, valid, preemption or homestead

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[44] *See* Hoxie Report at 50–51.

[45] 19 Cong. Rec. – Senate 9130 (Oct. 3, 1888).

[46] *See generally* H.R. Rep. No. 789, 50th Cong., 1st Sess. at 6 (Mar. 1, 1888); 19 Cong. Rec. – House 1888 (Mar. 8, 1888) (Senator Dawes remarking that the Chippewa Indians "are not to be removed until they consent to this general arrangement" under the proposed legislation).

[47] *See* H.R. Rep. No. 789, 50th Cong., 1st Sess. at 2. This report also notes that "[t]he Mille Lac Reservation has long since been ceded by the Indians, in fee, to the United States, with a right reserved to the Indians to occupy the same as long as they are well behaved." *Id.*

[48] 25 Stat. 642, Sec. 1 (Jan. 14, 1889). *See also* Hoxie Report at 52.

[49] 25 Stat. 642, Sec. 2.

[50] *Id.* Sec. 3.

[51] *Id.* The legislative history concerning the insertion of this provision, allowing Indians to take allotments upon their current reservations, is sparse. *See* 19 Cong. Rec. 1887 (1888) (House debate showing that the relevant language was incorporated into the bill without substantive discussion.).

[52] *See* 25 Stat. 642, Sec. 3 (requiring the allotment process to be in conformity with "the act of February eight eighteen hundred and eighty-seven, entitled 'An act for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes,'" which was commonly known as the Dawes Act); *see also* Dawes Act of 1887, Pub. L. No. 49-119, 24 Stat. 38; McClurken Report at 150.

[53] *Id.* Secs. 3–6; *see also* 20 Cong. Rec – House 397–8 (Dec. 20, 1888) (explanation of the bill by its author and namesake, Minnesota Congressman Knute Nelson).

entr[ies]." No payment of a sum certain amount was provided for the cession of reservation lands; instead "all money accruing from the disposal of said lands...shall...be placed in the Treasury of the United States to the credit of all the Chippewa Indians in the State of Minnesota as a permanent fund."[54] The United States was to expend a portion of the trust fund on establishing and maintaining for the Chippewa Indians a system of free schools "in their midst and for their benefit."[55]

ii. The United States' Negotiations with the Band pursuant to the Nelson Act

In the latter part of 1889, three United States Commissioners negotiated with the Mille Lacs Band to accept the terms of the Nelson Act.[56] The President appointed Henry Rice, Martin Marty, and Joseph Whiting to handle the negotiations.[57] Commissioner Rice, who had negotiated the 1863 Treaty, confirmed his understanding that the Band had not surrendered its right to occupy the Reservation, stating that:

> The time has come when I am able to tell you that...all the chiefs told you who were there and made the [1864] treaty is correct; that the understanding of the chiefs as to the treaty was right. Here is the acknowledgement of the Government that you were right, that 'you have not forfeited your right to occupy the reservation.'[58]

He stated that he wished to "correct all mistakes that had been made so far as we can."[59] Rice told the Band members that this new proposition "from the Great Council and the President" was "not like an ordinary treaty" because the Chippewa would lose "no rights under the old treaties" but instead "leaves you in a stronger position than before."[60]

Commissioner Rice outlined all the parts of the Nelson Act, including the provisions that would allow the Band members to take allotments on the Reservation while at the same time disposing of the pine timber that had caused difficulties over the years.[61] Band members voiced their refusal to leave their permanent homes and their understanding that they could choose to take allotments on the Reservation.[62] When asked to state clearly the facts regarding which lands the government sought to purchase from them, Rice responded:

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[54] *Id.* Sec. 7.
[55] *Id.*
[56] *See* Message from the President transmitting a communication from the Sec'y of the Interior relative to the Chippewa Indians in the State of Minn., H. Exdoc. 247, 51st Cong., 1st Sess. 1 (Mar. 6, 1890).
[57] *Id.*
[58] *Id.* at 164.
[59] *Id.*
[60] *Id.* at 165.
[61] *Id.*; *see also* McClurken Report at 155–56.
[62] *See generally* H.R. Exdoc. 247, 51st Cong., 1st Sess. 168 ("[A]nd as you have uttered the words of the law, stating that an Indian can take his allotment on the reservation where he resides, we make it known to you that we wish to take our allotments on this reservation, and not to be removed to White Earth."); *see also* Hoxie Report at 53–54; *See* McClurken Report at 158.

> You are entitled to select for your allotments the land called farming lands, all that can be used as such; we do not ask you to dispose of a foot of that. And there will be nothing done with the lands until you have your allotments. You will not only have your farming lands, hay lands, but your hard-wood lands, and sugar bush. You are not compelled, where there are two or three of you, to take land in one place. One can take for the farm, another can take 40 acres in sugar bush, and another can take meadow lands.[63]

Commissioner Rice further stated that "[t]here is nothing now to prevent your taking allotments that are not claimed by others or occupied" and that "none but the pine is to be put into market, and it will take some time to do that."[64] In response to Band member inquiries about how the agreement would affect white settlers on the reservation, Chairman Rice replied that while it was "a matter to be settled in Washington," he did "not think any more will come upon [the] reservation."[65]

Commissioner Rice had also asserted that "acceptance of this act will not affect these old matters at all, or weaken your chances of obtaining hereafter your dues, but, on the contrary, leaves you in a stronger position than before."[66] The Band leaders echoed this understanding, stating that the Commissioners "tell us that we are going to stay here forever, and that they are going to make allotments here to us."[67]

iii. The Nelson Act Agreement between the Band and the United States

Following these promises, the Band entered into an agreement to "forever relinquish to the United States the right of occupancy on the Mille Lac Reservation."[68]

Although the written agreement itself did not articulate the Band's election to take allotments upon its Reservation, the prior negotiations and immediate treatment evince this aspect of the agreement. For example, on October 12, 1889, Commissioner Rice wrote a letter to the Commissioner of Indian Affairs reporting that "Mille Lac adult males, with few exceptions, assented to the propositions offered them. ... They signified their intention to remain where they are, and will take allotments upon that reservation."[69] In December 1889, the negotiators reported "[t]he Interior Department now holds that – The Mille Lac Indians have never forfeited their right of occupancy and still reside on the reservation."[70]

Secretary of the Interior John Noble notified President Harrison of the resolution, stating:

> Your approval, thereof, of the agreement will not open any of the reservations to white settlement, nor render them subject to occupancy or disposal in advance of

[63] H.R. Exdoc. 247, 51st Cong., 1st Sess. 168.
[64] *Id.*
[65] *Id.* at 169.
[66] *Id.* at 165.
[67] *Id.* at 171.
[68] *See United States v. Mille Lacs Band of Chippewa Indians*, 229 U.S. 498, 504–05 (1913).
[69] Letter from Henry Rice to Thomas Morgan, Comm'r of Indian Affairs (Oct. 12, 1889).
[70] *See* H.R. Exdoc. 247, 51st Cong., 1st Sess. 22 (Mar. 6, 1890).

> the complete fulfillment of the preliminary work of surveys, examinations, etc., and in the case of the 'pine lands,' after these preliminaries have been met, the lands must be proclaimed as in market and offered for sale.[71]

The Secretary's report anticipated the continued Indian and federal presence on several of the affected reservations, including Mille Lacs. The Secretary also determined that the pine and agricultural lands could not be offered for sale until the Department ascertained how many Indians elected to take allotments and until those Indians made their individual selections for allotment.[72]

Additionally, the Secretary discussed setting aside land for federal facilities on the reservations, "such as may be necessary for physician, blacksmith, farmer, carpenters, and for missionaries, traders, etc."[73]

The President approved the agreement on March 4, 1890, and transmitted a copy to Congress.[74] In the transmittal letter, he noted the prevailing intention of the Indians to take allotments on their existing reservations pursuant to Section 3:

> The act...evidently contemplated the voluntary removal of the body of all these bands of Indians to the White Earth and Red Lake Reservations; but a proviso in section 3 of the act authorized any Indian to take his allotment upon the reservation where he now resides. The commissioners report that quite a general desire was expressed by the Indians to avail themselves of this option. The result of this is that the ceded land can not be ascertained and brought to sale under the act until all of the allotments are made.[75]

Immediately following the President's approval of the Nelson Act agreements, Secretary Noble, through the Commissioner of Indian Affairs, published public notice to any potential entrants to the Chippewa reserved lands that no land entries were allowed until the Indians' right to take allotments had been exercised.[76] This notice specifically applied to the Mille Lacs Reservation.

d. *Early Treatment of the Ceded Area*

The United States' subsequent treatment of its agreement with the Band under the Nelson Act was inconsistent. Congress initially recognized the continued existence of the Reservation, but then modified its position several years later by joint resolutions deeming the Reservation lands open to settlement under the public land laws. The Department of the Interior also reversed course on several occasions, ultimately maintaining that the Reservation was subject to the

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[71] Letter from John Noble, Sec'y of the Interior, to Benjamin Harrison, President (Jan. 30, 1890) (on file in H. Exdoc. 247, 51st Cong., 1st Sess. 10 (Mar. 6, 1890)).
[72] *Id.* at 10.
[73] *Id.* at 6.
[74] Message from the President of the United States (Mar. 4, 1890), located in H. Exdoc. 247, 51st Cong., 1st Sess. 10 (Mar. 6, 1890).
[75] *Id.* at 2.
[76] *See* Letter from Secretary Noble to the Commissioner of Indian Affairs, and attached *Public Notice Relating to Chippewa Indian Reservation Lands in the State of Minnesota* (Mar. 5, 1890).

Nelson Act and not the public land laws. These inconsistencies were due largely to misinformation and political pressure from white settlers and timber interests. Despite the clear understanding at the time of execution, no allotments were ever issued. And a significant percentage of the Mille Lacs Indians remained on the Reservation.

A few months after the approval of the Mille Lacs agreement under the Nelson Act in 1890, Congress granted a right of way to the Little Falls, Mille Lacs, and Lake Superior Railway Company. Specifically, Congress granted "the right of way for construction of a railroad through the Mille Lacs Indian Reservation," however, the right was contingent upon attaining "the consent of the Indians on said reservation to said right of way and as to the amount of said compensation."[77] The Act further provided that when a portion of the right of way ceased to be used by the railway company, it would revert to the Band.[78]

In that same year, Congress made appropriations for the Secretary of the Interior to pay the Chippewa Indians of Minnesota for damages sustained due to the building of various dams and reservoirs.[79] The appropriations provision specified that a third of the money was to go to "the Mississippi band, now residing or entitled to reside on the White Earth, White Oak Point, and Mille Lac Reservations."[80]

Despite contemporaneous legislative action confirming the continued existence of the Mille Lacs Reservation, there was soon confusion regarding whether the Reservation lands were subject to entry by non-Indians for settlement and logging. This confusion stemmed from rapidly shifting positions taken by then Secretary of the Interior, John Noble. For example, on March 5, 1890, Secretary Noble issued notice regarding entry on the Chippewa lands, stating that the Department could not determine how much of the reservation lands were open to sale or settlement "until the allotments provided for [in the Nelson Act and subsequent agreements] shall have been made."[81] Accordingly, the Secretary concluded that none of the pine or agricultural lands within the various reservations, including the Mille Lacs Reservation, were open to sale or settlement under the homestead law or any other laws at that time.[82]

Yet less than a year later, Secretary Noble held that suspended homestead entries within the Mille Lacs Reservation should be patented under the Section Six proviso of the Nelson Act because he found that the Mille Lacs Reservation did not actually exist as a "reservation" at the

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[77] Act of July 22, 1890, 26 Stat. 290, 291.
[78] *Id.*
[79] *See* Act of Aug. 19, 1890, 26 Stat. 336.
[80] *Id.* at 357.
[81] Department of Interior, Public Notice Relating to Chippewa Indian Reservation Lands in the State of Minnesota at 2 (Mar. 5, 1890).
[82] *Id.* at 3 ("Therefore this is to give notice that none of said land whether 'pine lands' or 'agricultural lands' within the said reservations of the Chippewa Indians in Minnesota, viz: White Earth, Red Lake, Leech Lake, Cass Lake, Lake Winnebagoshish, White Oak Point, *Mille Lac*, Fond du Lac, Boise Fort, Deer Creek, and Grand Portage, are open or will be open to sale to or settlement by citizens of the United States under the homestead law or any other of the land laws of the United States, until advertisement to that effect, as required in [the Nelson Act], shall be given, and then only as provided in said Act.") (emphasis added).

time of the Nelson Act and therefore was not subject to Indian allotments.[83] This conclusion deviated from the many prior, albeit nuanced, Departmental positions regarding the Mille Lacs Reservation.[84] Secretary Noble also alleged that he had assurances that the Band members were no longer interested in remaining on their Reservation.[85] Eight months later, Secretary Noble reversed his position again and held that the Mille Lacs Reservation had been reserved for the Band by the 1863 and 1864 treaties and, therefore, that the Reservation existed at the time of and was subject to the Nelson Act.[86] Secretary Noble did not specifically readdress whether the Band could take allotments pursuant to that act.[87]

By May 1891, entries had been made on reportedly 90% of the land within the Reservation and no allotments had been issued to Band members.[88] In 1892, Secretary Noble reiterated his position that the Mille Lacs Reservation was "not subject to disposition under the general land laws but under the special provisions of the [Nelson Act]."[89] Pursuant to this opinion, the Acting Commissioner of the General Land Office issued a decision holding that all of the recent entries on the Reservation were to be canceled.[90] Yet in 1893, faced with increasing political pressure from white settlers and their reliance on the January 9, 1891, Secretary Noble decision, Congress enacted a joint resolution confirming bona fide land entries for white settlers "within the Mille Lacs Indian Reservation" that had been made between Secretary Noble's January 9, 1891, decision and Secretary Noble's April 22, 1892, decision.[91]

Throughout the 1890s, and in spite of Secretary Noble's final position confirming the applicability of the Nelson Act, the United States generally disregarded the Nelson Act provision promising Band members allotments on the Reservation and, instead, encouraged members to remove to the White Earth Reservation, sometimes using coercive measures such as withholding

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[83] *See generally* Department of Interior, *Amanda J. Walters, et al.*, (Jan. 9, 1891) (known hereinafter as January 9, 1891, Noble Decision). Specifically, Secretary Noble argued that the Mille Lacs Reservation was not a reservation on which Indian allotments could be made because the Nelson Act, and the following Presidential authorization of the Nelson Act agreement with the Mille Lacs, retroactively triggered the cessation agreed upon in the 1863 and 1864 Treaties and, therefore, no "reservation" existed at the time of the Nelson Act. *Id.* at 7–9; *see also* McClurken Report at 184–85.

[84] *See* Hoxie Report at 57–58.

[85] *See* Jan. 9, 1891, Noble Decision at 9–10.

[86] *See generally* Department of Interior, *Northern Pacific R.R. Co., et al v. Walters, et al.*, (Sept. 3, 1891) (known hereinafter as September 3, 1891 Noble Decision) (finding that the right of occupancy under Article 12 of the 1863 and 1864 treaties was "a real and substantial interest or right in the enjoyment of which the Indians were entitled to protection," and, accordingly, that the Reservation lands were not subject to railroad grants issued in 1864); *see also* McClurken Report at 185.

[87] *See* September 3, 1891 Noble Decision (finding that the Mille Lacs land were subject to disposal "as provided for in said [the Nelson] act."); *see also* McClurken Report at 194–195.

[88] *See* McClurken Report at 189, 192.

[89] Sec'y Noble to Comm'r of the General Land Office, Decisions of the Department of the Interior, vol. 14, 497–98 (Apr. 22, 1892); *see also* McClurken Report at 195.

[90] *See* H. Exdoc. 2321 (52-2) 3141 (Jan. 21, 1893); *see also* McClurken at 197–98.

[91] Joint Resolution For the Protection of those Parties who have heretofore been allowed to make entries for lands within the former Mille Lac Indian Reservation in Minnesota, J. Res. 5, 28 Stat. 576 (1893) (known hereinafter as 1893 Joint Resolution); *see also* Letter from Browning, Comm'r of Indian Affairs, to Sec'y of the Interior (Mar. 3, 1896) (explaining that while Secretary Noble's April 22, 1892 "definitely determined the status" of the Mille Lacs Reservation land, it "raise[d] a doubt as to the validity of entries allowed under the decision of Jan. 21, 1891," and Congress responded with the 1893 resolution "to dispel all doubts") (quoting from a contemporaneous letter from the General Land Office); Hoxie Report at 62; McClurken Report at 196–97.

annuities.[92] Nonetheless, Interior officials expressed the futility of persuading the Band to move and, further, recognized the Band's right to take allotments on its own reservation and the Band's persistent desire to do so.[93] Yet efforts to satisfy the Band's allotments rights were frustrated by misinformation regarding the availability of open land within the Reservation and ever-present political pressure from white settlers and the pine timber industry.[94]

In response to these mounting tensions and relying on inaccurate Interior reports regarding the Band's intention and ability to take allotments on the Reservation, Congress enacted another joint resolution in 1898.[95] This resolution provided that "all public lands formerly within the Mille Lac Indian Reservation in the State of Minnesota" were subject to settlement pursuant to public land laws.[96] The resolution also set aside land for a Mille Lacs cemetery within the Reservation.[97] It did not, however, address what rights, if any, the Band members retained with regards to the other reservation lands.

During the early 1900s, white settlers fraudulently claimed additional reservation lands that were occupied by the Indians, forced Band members off their land at gunpoint, and in one documented instance, the Mille Lacs County Sheriff ejected Band members from their homes and burned the structures down.[98] The Act of May 27, 1902, authorized a $40,000 "payment to the Indians occupying the Mille Lac Indian Reservation" in an effort to persuade the Indians to relocate.[99] The Act offered compensation to Band members for improvements "on the Mille Lac Indian Reservation" if they would agree to remove from the Reservation, and provided that Band members who had acquired title to land "within said Mille Lac Reservation" could remain.[100] The Act conditioned its appropriation, however, on the Band's acceptance of its provisions.[101] Band leaders responded unfavorably to the Act but eventually decided they would agree to the legislation if they could use the money to buy land on the Mille Lacs Reservation without actually leaving.[102] Although the government agreed to the Band's proposal, no effort was made

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[92] *See* Hoxie Report at 59–61; *see* McClurken Report at 189–93.
[93] *See* Hoxie Report at 60–61; *see* McClurken Report at 198–200, 204.
[94] *See* Hoxie Report at 62–64; *see* McClurken Report at 205–207; *see also* S.M. Brosius, Indian Rights Ass'n, *The Urgent Case of the Mille Lac Indians* at 3 (Oct. 1901) ("After the [Mille Lacs] Indians had assented to the terms of the 1889 agreement, the whole political machinery of the State seems to have set to work to force the Mille Lacs off their homes and to locate upon the White Earth Reservation."); *see also* Letter from Browning, Comm'r of Indian Affairs, to Sec'y of the Interior (Mar. 3, 1896) (highlighting the confusion surrounding the availability of lands for Indian allotments at the Mille Lacs Reservation and stating that while it had been the understanding of the Indian Office that "all the lands on the Mille Lac Reservation were covered by bona fide entries, and that consequently there were no lands that could be allotted to the Indians" under the Nelson Act, communications from the General Land Office made "evident that this office is in error upon this point") (emphasis in original).
[95] *See* Hoxie Report at 62-64; *see* McClurken Report at 220–25.
[96] 30 Stat. 745 (1898) (1898 Joint Resolution).
[97] *Id.* Congress did not appropriate the money to purchase these cemetery lands until 1905. *See* 33 Stat. 1069 (1905).
[98] *See* McClurken Report at 233–36, 240; *see* S.M. Brosius, Indian Rights Ass'n, *The Urgent Case of the Mille Lac Indians* at 5– 6 (Oct. 1901).
[99] 32 Stat. 245 (1902).
[100] 32 Stat. 245, 268 (1902).
[101] *Id.*
[102] *See generally* McClurken Report at 238–44. The Band members further insisted that the agreement contain a provision specifying that "nothing in this agreement shall be construed to deprive the said Mille Lac Indians of any of the benefits to which they may be entitled under existing treaties or agreements not inconsistent with the provisions of this agreement or the act of Congress relating to said Indians approved May 27, 1902." *Id* at 245.

to implement it and the status quo continued.[103] During this time, nearly a thousand Band members enrolled as residents of the White Earth reservation, however, an estimated 323 to 338 non-removal Band members remained on the Reservation by 1912.[104]

e. *The 1913 Supreme Court Decision*

In 1909, Congress waived its sovereign immunity for claims brought by or on behalf of the Band by reason of "the opening of the Mille Lac Reservation...to public settlement under the general land laws."[105] In response, the Band filed suit against the United States for its mishandling and disposal of the Reservation land in violation of the Band's treaties and the Nelson Act.[106] The Band argued that the United States never allowed the Band to exercise its right to take allotments upon the Mille Lacs Reservation and, furthermore, that the United States unlawfully opened up the Reservation to settlement under the general land laws rather than disposing of unallotted lands in accordance with the special provisions in Nelson Act, resulting in the loss of valuable pine lands.[107]

The United States responded that the Band ceded the Reservation in the 1863 and 1864 Treaties, and that the Article 12 proviso "merely permitted [the Band] to remain thereon as a matter of favor."[108] Accordingly, the United States argued that the land was not a reservation for purposes of the Nelson Act.[109] Alternatively, even if it did qualify as a reservation for the Nelson Act, the United States argued that disposal of the lands within the Mille Lacs Reservation was governed by Section Six of the Nelson Act, allowing valid preexisting entries to be patented, rather than under the special process set forth in Sections 4-7 of the Nelson Act.[110] The United States further asserted that the Mille Lacs' interest in the land did not amount to a reservation upon which the Mille Lacs could take allotments under Section 3 of the Nelson Act.[111]

The Court of Claims rejected the arguments of the United States, finding that "[t]he treaties of 1863 and 1864 reserved to the [Band] the Mille Lac Reservation."[112] The court concluded that the United States had wrongly denied the Band the right to dispose of its pine and agricultural

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[103] *See* Hoxie Report at 67–68.
[104] *Id.* at 70.
[105] *See* Pub. L. 60-226, 35 Stat. 619 (1909); *see also* H. Rep. No. 1388, 60th Cong., 1st Sess. at 1 (1908) (finding that the evidence in support of the bill "seems to show that the Mille Lac Reservation has been added to the public domain and entered under the homestead laws but fails to show in terms that any adequate compensation has been given or agreed upon.").
[106] *See Mille Lac Band of Chippewas v. United States*, 47 Ct. Cl. 415 (1912), *rev'd and remanded as to damages*, 229 U.S. 498 (1913); *see also* Hoxie Report at 65–66, 72–77.
[107] Petition, *Mille Lac Band of Chippewas v. United States*, filed in the Ct. Cl., May 28, 1909, NARA-DC, RG205, Docket 30447. *See also* McClurken Report at 253–58 (describing the depositions of Mille Lacs members who recounted failed promises from federal officials that the Band would receive allotments on the Reservation and that white squatters would be removed).
[108] *Mille Lac Band of Chippewas v. United States*, 229 U.S. 498, 502; *see also* Br. for the U. S., *United States v. Mille Lac Band of Chippewa Indians*, filed in the Supreme Court of the U. S., Oct. 1912.
[109] Br. for U. S., *Mille Lac Band of Chippewas v. United States*, 1911 U.S. Ct. Cl. LEXIS 68, **16–**17.
[110] Br. for the U. S. at 48–50, *United States v. Mille Lac Band of Chippewa Indians*, filed in the Supreme Court of the U. S., October1912.
[111] *Id.* at 43.
[112] *Mille Lac Band of Chippewas v. United States*, 47 Ct. Cl. 415, 457.

lands in the manner provided in the Nelson Act and awarded the Band $827,580.[113] The court also found that under the Nelson Act, "the Mille Lacs were entitled to allotments on their reservation in common with the other Indians."[114] The United States appealed to the Supreme Court.

The Supreme Court found that "there was a real controversy between the Mille Lacs and the government in respect to the rights of the [Band] under article 12 of the treaty of 1864" and "the controversy was intended to be adjusted by concessions on both sides" through the Nelson Act.[115] Accordingly, the Court found that the United States violated the cession in trust effectuated by the Nelson Act to the extent that it had improperly disposed of Mille Lacs lands under the general land laws.[116] The Supreme Court reversed in part the Court of Claims decision, however, finding that certain preexisting entries on the Reservation were subject to the Section Six proviso as long as they otherwise complied with existing law and were eligible for patent under the general land laws.[117] The Court remanded the case to the Court of Claims for a reassessment of the damages.[118] Over seventy years later, however, the Band succeeded in recovering the value of lands subject to the Section Six proviso when the Court of Claims determined that "the standard of fair and honorable dealings [was] violated by the government's disposition of the land."[119]

As part of its determination, the Supreme Court evaluated the import of the 1893 and 1898 Joint Resolutions that had legitimized non-Indian land entries and subjected the Mille Lacs Reservation to the public land laws. The Court found that these resolutions "were not adopted in the exercise of the administrative power of Congress over the property and affairs of dependent Indian wards, but were intended to assert, and did assert, an unqualified power of disposal over the lands as the absolute property of the Government," in violation of the Government's trust responsibility to the Band.[120]

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[113] *Mille Lac Band of Chippewas v. United States*, 46 Ct. Cl. 424 (1911), *damages modified by* 47 Ct. Cl. 415 (1912).
[114] *Mille Lac Band of Chippewas v. United States*, 47 Ct. Cl. 415, 455.
[115] *United States v. Mille Lac Band of Chippewa Indians*, 229 U.S. 498, 506-07 (1913).
[116] *Id.* at 509–10. The Supreme Court did not opine on whether the Band should have been afforded the right to select allotments on its Reservation under the Nelson Act.
[117] *Id.* at 508–9.
[118] On remand, the Court of Claims found that 31,692.64 acres on the Reservation did not fall under the Section Six proviso and therefore should have been sold for the benefit of the Band. *Mille Lac Band of Chippewa Indians v. United States*, 51 Ct. Cl. 400 (1916). The court awarded the Band $711,828.47 in damages and interest for the loss of these lands. *Id.* at 408.
[119] *See Minnesota Chippewa Tribe v. United States*, 11 Ct. Cl. 221, 240 (1986), *rev'd and vacated in irrelevant part*, 991 F.2d 810, 1993 U.S. App. LEXIS 16798 (Fed. Cir. 1993). In this litigation, the Band sought compensation for the lands deemed subject to the Section Six proviso using the more liberal recovery standards under the Indian Claims Commission, which was later transferred to the Court of Claims. The Court of Claims determined that the Band was entitled to recover the fair market value of these lands because "the standard of fair and honorable dealings [was] violated by the government's disposition of the land." *Id.* at 240. Although the decision characterized the Band's argument as the "reservation was taken" due to the "series of conveyances confirmed as a result of the Nelson Act," the litigation concerned only compensation for loss of title and did not consider or opine on the continued existence of the Reservation following the Nelson Act.
[120] *Id.* at 509–10. The Court noted the confusion surrounding the Reservation and the rights of the Band, but found that it did "not alter the result" that the land disposals made pursuant to these joint resolutions were wrongful. *Id.* at 510.

Following the Supreme Court decision, in 1914, Congress appropriated $40,000 to buy land on the Mille Lacs Reservation to be held in trust for "non-removal Mille Lacs Indians, to whom allotments have not heretofore been made."[121] The purpose of this appropriation was to begin re-purchasing lands for the approximately 150 remaining Band members at the Mille Lacs Reservation who had not otherwise received allotments at the White Earth Reservation.[122] The United States used this money to purchase approximately 813.65 acres near Vineland, 227 acres near Isle, and 900 acres in Pine County Minnesota, as home sites for non-removed Band members.[123] The United States also opened a school for Mille Lacs children on the Reservation.[124] By the 1930s, the federal government had issued nearly 300 Indian allotments amounting to approximately 2,000 acres at the Reservation, using the funds from the 1914 appropriations act as well as additional appropriations made by Congress in 1920 and 1923.[125]

f. *Interior Positions Concerning the Mille Lacs Reservation*

The Department of the Interior, through the Office of the Solicitor, has opined on the status of the Mille Lacs Reservation several times since the Supreme Court issued its decision on the land claims. Although an earlier opinion with minimal analysis found that the 1855 Reservation boundaries were no longer intact, the more recent, thoroughly considered opinions have reached the opposite conclusion. In 1935, Solicitor Nathan Margold authored a memorandum on whether the Chippewa lands in Minnesota were still reservations and, if so, whether they were comprised of the entire original reservation or portions thereof.[126] The Solicitor examined the language of the Nelson Act and found that the "cession was not absolute but in trust for the sale of the land by the United States for the benefit of the Indians, that this trust constituted a reservation of the lands, and that, therefore, they never became a part of the public domain."[127] The Solicitor concluded that the "original reservations therefore continued to be Indian reservations...even after the effective date of the 1889 act."[128] The Solicitor proceeded, however, to offer a different conclusion regarding the Mille Lacs Reservation. With minimal analysis and a single citation to the Supreme Court's 1913 decision in *United States v. Mille Lac*

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[121] 38 Stat. 582 (1914); *see also* Hoxie Report at 77–82 (describing the advocacy from Band members and Indian Office employees that led to this appropriation to purchase land on the Reservation).

[122] *See* Hearings before the Committee on Indian Affairs United States Senate on H.R. 12579, 63 Cong., 2d Sess., at 69–71 (Mar. 20, 1914). The Assistant Commissioner of Indian Affairs, E.B. Meritt, emphasized that "it is absolutely urgent at this time that we get the appropriation to provide these Mille Lac Indians with some land on which they can live. They will not live on White Earth. They will not live anywhere else than on this reservation and around Mille Lac Lake." *Id.* at 107–08.

[123] *See* McClurken Report at 260.

[124] *Id.* at 261; *see* Hoxie Report at 84.

[125] *See* 38 Stat. 582 (1920) (appropriating $645 for "land purchased for allotment for homeless nonremoval Mille Lacs Indians"); 42 Stat. 1191 (1923) (appropriating $10,000 for "the necessary surveys and enrolling and allotting the homeless nonremoval Mille Lac Indians in Minnesota, to whom allotments have not heretofore been made, on lands purchased for that purpose in accordance with authority granted in [the 1914 appropriations act]"); Hoxie Report at 83, 87; McClurken Report at 259–61.

[126] Chippewa Lands in Minnesota are Reservations, Solicitor Memorandum to the Comm'r of Indian Affairs (Oct. 29, 1935).

[127] *Id.* at 2 (citing *United States v. Minnesota*, 270 U.S. 181 (1926) and *United States v. Mille Lac Band*, 229 U.S. 298 (1913)).

[128] *Id.* at 2.

Band, the Solicitor determined that the present Mille Lacs Reservation consisted only of the trust land purchased with the $40,000 appropriated by Congress in 1914.[129]

In 1942, Acting Solicitor Felix Cohen issued an M-Opinion on the status of ceded Indian lands in Minnesota under the Volstead Act of 1908.[130] In evaluating this issue, the Acting Solicitor touched on the import of the Nelson Act insofar as it allegedly limited Congress' ability to withdraw the formerly ceded lands and restore them to tribal ownership. The Acting Solicitor found that the ceded lands under the Nelson Act remained Indian lands, ceded in trust to the United States, and did not offer any separate analysis for the Mille Lacs Reservation.[131]

In 1968, the Field Solicitor's Office issued a memorandum concerning the hunting and fishing rights of Chippewa Indians in Minnesota.[132] The memorandum similarly found that the Nelson Act constituted a cession in trust for the benefit of Indians, and concluded that "the original reservations continued to be Indian reservations."[133] The Field Solicitor did not offer a separate analysis for the Mille Lacs Reservation.

In 1991, however, the Field Solicitor issued another memorandum, this time squarely addressing whether the Mille Lacs Reservation had been disestablished or diminished.[134] In setting up the analytical structure, the Field Solicitor highlighted the distinction between land title and reservation boundaries and the requisite need to find specific congressional intent to diminish both the Indian title and the boundaries.[135] The Field Solicitor found that although the Nelson Act agreement contained cession language, it was clear at that time that the Band members intended to exercise their right to remain on their ancestral homeland and, "[n]otwithstanding the fact that title to the land passed to others, there is no clear evidence that Congress considered the reservation boundaries either diminished or terminated."[136] Accordingly, the Field Solicitor determined that the Reservation boundaries as established in the 1855 Treaty remained intact.[137]

g. *Modern Recognition of Reservation Status of the Ceded Lands*

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[129] *Id.* at 4.
[130] Status of Public and Indian Ceded Lands Drained by the State of Minnesota under the Volstead Act of May 20 1908, M-30851, 58 I.D. 65 (Aug. 12, 1942).
[131] *Id.* at 79.
[132] Memorandum re: Hunting and Fishing Rights of Chippewa Indians in Minnesota, from Field Solicitor, Minneapolis, to Area Dir., Bureau of Indian Affairs (Sept. 18, 1968).
[133] *Id.* at 9.
[134] Letter re: Mille Lacs Reservation Boundaries, from Mark Anderson on behalf of the Field Solicitor to Earl Barlow, Minneapolis Area Dir., Bureau of Indian Affairs (Feb. 28, 1991).
[135] *Id.* at 2.
[136] *Id.* at 3.
[137] *Id.* at 5. This opinion has been relied upon by the Department several times since its issuance. *See* Letter from Thomas C. Jacobs, Field Solicitor's Office, to Gail Ginsberg, EPA (Apr. 19, 1995) (stating that the Supreme Court's decision in *Hagen v. Utah* did not alter the analysis or conclusion that the Mille Lacs Reservation boundaries encompass the territory described in the 1855 Treaty and were not diminished by the 1864 Treaty or the Nelson Act); Letter from Jean Sutton, Field Solicitor's Office, to Dr. R.D. Courteau (Nov. 5, 1998) (finding that "the boundaries for the Mille Lacs Indian Reservation established in the Treaty of 1855 remain intact, undiminished by the Nelson Act as interpreted by federal courts"); Letter from Jean Sutton, Field Solicitor's Office, to Larry Morrin, BIA (Aug. 16, 2001) (reiterating the conclusion that the 1855 Treaty boundaries remain intact).

In modern times, the Mille Lacs Reservation has been recognized by both Congress and the Environmental Protection Agency (EPA). In several legislative actions, Congress has referenced the Mille Lacs Reservation and the exterior boundaries.[138] For example, in considering legislation in 1990 that would have allowed a 99-year lease with the Minnesota Historical Society on restricted fee land, Congress referred to the "Mille Lacs reservation" and "land within the Reservation boundaries."[139] Congress also passed the Water Resources and Development Act of 2007 which authorized assistance for a wastewater infrastructure project for the "Mille Lacs Indian Reservation established by the treaty of February 22, 1855."[140] In 1996, the EPA determined that the original reservation boundaries, as defined by the 1855 Treaty, remain intact for purposes of the Band's jurisdictional authority to administer EPA delegated regulatory programs.[141] The EPA's determination was grounded, in part, by the Department of the Interior's repeated position that the 1855 Treaty boundaries have not been diminished or disestablished.[142]

Additionally, there are instances of State recognition of the original Mille Lacs Reservation boundaries, although the State has taken the contrary position in other contexts. For example, in 1939, the State of Minnesota enacted legislation making it unlawful for any person to take wild rice grain from waters within "the original boundaries" of the Mille Lacs Reservation, except for persons of Indian blood or residents of the Reservation.[143] The State also enacted legislation in 1991 that authorizes the Band to exercise law enforcement authority "within the boundaries of the Treaty of February 22, 1855, 10 Stat. 1165, in Mille Lacs County, Minnesota."[144] Yet close to that same time, the State also, through the Minnesota Pollution Control Agency, challenged the Band's EPA application to the extent that it concerned the Band's delegated authority over non-trust lands within the 1855 Treaty boundaries.[145] Most recently, the Governor of Minnesota

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[138] *See, e.g.,* Act of June 27, 76 Stat. 1320 (1962) (authorizing the conveyance of land "located on the Mille Lacs Indian Reservation"); Act of Sept. 27, 81 Stat. 230 (1967) (authorizing the payment of judgment funds to the "tribal governing bod[y] of the...Mille Lacs Reservation[]").

[139] H.R. Rep. No. 101-686, at 2 (Sept. 10, 1990).

[140] Pub. L. No. 110-114, § 5092. There is also an earlier House Conference Report that itemizes an appropriation "to the Mille Lacs Band of Ojibwe located on the Mille Lacs Reservation, as established in the Treaty of 1855." H.R. Rep. No. 108-401 at 1142 (2003), *reprinted in* 2004 U.S.C.C.A.N. 3, 425.

[141] *See* Memo re: Competing Claim of Jurisdiction in Mille Lacs Band of Chippewa's Application for Treatment as a State for Underground Injection Control Program, from Gail C. Ginsberg, Regional EPA Counsel, to Dale S. Bryson, Director of the EPA Water Division (Sept. 25, 1993); Memo re: Application of the Mille Lacs Band of Chippewa Indians for Treatment in the Same Manner as a State for Purposes of Administering the Underground Injection Control Program under Sections 1422/1425 of the Safe Drinking Water Act – OGC Concurrence, from Jonathan Z. Cannon, General Counsel, to Robert Perciasepe, EPA Assistant Administrator for Water (Apr. 15, 1996); Memo re: Approval of the Mille Lacs Band of Minnesota Chippewa Section 1451 Treatment as a State (TAS) Application for the Underground Injection Control Program, from Robert Perciasepe, EPA Assistant Administrator, to Valdus V. Adamkus, Regional Administrator for EPA Region V (May 7, 1996).

[142] *See* Memo re: Competing Claim of Jurisdiction in Mille Lacs Band of Chippewa's Application for Treatment as a State for Underground Injection Control Program, from Gail C. Ginsberg, Regional EPA Counsel, to Dale S. Bryson, Director of the EPA Water Division at 7 (Sept. 25, 1993) (relying on the 1991 Field Solicitor Opinion to the Regional BIA).

[143] *See* Minn. Laws 1939, 231, § 2 (codified at Minn. Stat. § 84.10 (2014)); applicable regulatory provisions at Minn. Adm. Code § 6284.0600.

[144] *See* Minn. Stat. § 626.90 (2007).

[145] *See* Memo re: Competing Claim of Jurisdiction in Mille Lacs Band of Chippewa's Application for Treatment as a State for Underground Injection Control Program, from Gail C. Ginsberg, Regional EPA Counsel, to Dale S. Bryson, Director of the EPA Water Division at 5–6 (Sept. 25, 1993).

submitted a letter to the Department of Justice concerning the Band's TLOA application, expressing that the State's "longstanding position has been, and continues to be, that the boundaries of the Mille Lacs Reservation are limited to approximately 4,000 acres of land held in trust by the federal government."[146]

Of the original 61,000 acres reserved for the Band in the 1855 Treaty, today 2,610 acres are in trust for the Band and individual members.[147] The Band holds fee title to 5,146 acres and an additional 84 acres are held in fee by individual Band members.[148] The total acreage of these various types of Band landholdings constitutes approximately 13% of the Reservation.[149] According to the 2010 Census, 1,598 of the 4,907 individuals living on the Reservation identified themselves as Indian, which amounts to over 30% of the Reservation's population.[150] The seat of the Band's tribal government is located within the Reservation boundaries.[151] Additionally, the Band has compacted with the Bureau of Indian Affairs (BIA) and the Indian Health Service (IHS) to provide federal programs and services, such as realty, law enforcement, and health care, within the Reservation.[152]

III. LEGAL FRAMEWORK

The Supreme Court has established a "fairly clean analytical structure" for determining whether a particular congressional act diminished or disestablished a reservation.[153] Several governing principles instruct this analysis. First, "only Congress can divest a reservation of its land and

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[146] Letter from Mark Dayton, Governor of Minn., to Tracy Toulou, Dir. of the Office of Tribal Justice, Dep't of Justice, re: Mille Lacs Band of Ojibwe Tribal Request for Federal Concurrent Criminal Jurisdiction (Apr. 26, 2013); *see also* Letter from Alan Gilbert, Solicitor General, Office of the Attorney General, to Kevin Washburn, Assistant Sec'y – Indian Affairs, re: the Mille Lacs Reservation boundaries (Jan. 21, 2015).

[147] Land and Real Estate Services Office, Mille Lacs Band of Ojibwe, Report on Mille Lacs Band Lands at 1 (Feb. 4, 2015). The Band has compacted the realty program from the BIA.

[148] *Id.*

[149] *Id.* As the report shows, the Band also has a reversionary interest in 10 acres, as well as a competing title claim to 10 additional acres, but the inclusion of this acreage does not markedly change the percentage of the Band's current landholdings in its original Reservation.

[150] This information was generated by selecting Minnesota, AIAN Areas, and the Mille Lacs Reservation and Off-Reservation Trust land in the U.S. 2010 Census Interactive Population Search feature, *available at* http://www.census.gov/2010census/popmap/ipmtext.php?fl=27/ (last visited February 3, 2015). While the 2010 Census uses the category "American Indian and Alaska Native" rather than specifying tribal affiliation, in 2007 the Band reported that approximately 2,100 of its members resided on the Reservation. *See* Mille Lacs Band of Ojibwe Fact Book, 1, *available at* http://www.millelacsband.com/pdf/FactBook.pdf (Feb. 2007). This suggests that most if not all of the individuals identifying as Indian for the U.S. Census are Band members.

[151] *See* Mille Lacs Band of Ojibwe, Tribal Government Facilities, http://millelacsband.com/tribal-government-home/tribal-government-facilities/ (last visited Mar. 23, 2015).

[152] *See* Compact of Self-Governance between the Mille Lacs Band of Ojibwe Indians and the United States of America Department of the Interior (Sept. 26, 1995); Compact of Self-Governance between the Mille Lacs Band of Ojibwe and the United States of America for Indian Health Service Programs (Oct. 10, 2004). Additionally, the Band, the BIA, and the State of Minnesota entered into a cooperative agreement concerning wildland fire protection "within the Mille Lacs Reservation." Cooperative Fire Agreement between the United States Department of the Interior, Midwest Regional Office, and the Mille Lacs Band of Ojibwe, and the State of Minnesota Department of Natural Resources for the Wildland Fire Protection of the Mille Lacs Reservation, AFG2010014 (effective Apr. 14, 2011).

[153] *Solem v. Bartlett*, 465 U.S. 463, 470 (1984).

diminish its boundaries."[154] "Once a block of land is set aside for an Indian reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise."[155] Moreover, "there is a presumption in favor of the continued existence of a reservation," which requires that any contrary intent of Congress "must be clearly expressed."[156] Therefore, diminishment "will not be lightly inferred."[157] Furthermore, any ambiguities in a statute are to be resolved in favor of the Indians.[158]

The Supreme Court has established a three-prong test for analyzing whether a given statute diminished or altered a reservation's boundaries or simply offered non-Indians the opportunity to purchase land within the reservation.[159] The most probative evidence of congressional intent is the language of the statute itself.[160] Next, courts will look at the circumstances surrounding the passage of the act.[161] Third, but to a lesser extent, courts will look to events that occurred after the passage of the act to decipher congressional intent.[162]

The analysis begins with the statutory language. Courts read statutes as a whole to determine congressional intent.[163] Although the Supreme Court has never required a particular form of words,[164] when there is explicit reference to a cession or total surrender of all tribal interests in the land coupled with an unconditional commitment from Congress to pay the tribe for its land, there is an "almost unsurmountable presumption" that Congress intended to disestablish the reservation.[165] Even with cession language coupled with sum certain compensation, however, courts also look to the legislative history and surrounding circumstances to determine congressional intent.[166]

For example, the Supreme Court has found that language to "cede, sell, relinquish and convey" in exchange for a sum certain payment, and in light of the surrounding circumstances and legislative history, terminated the boundaries of the Lake Traverse Reservation.[167] Additionally, the Supreme Court has found that language providing for the "restoration of unallotted reservation lands to the public domain" or broadly subjecting reservation lands to the public land laws as indicative of diminishment.[168] In contrast, language that simply authorized the Secretary of the Interior "to sell or dispose of" unallotted lands with the proceeds from the sale of those

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[154] *Id.* at 470.
[155] *Id.* (citing *United States v. Celestine*, 215 U.S. 278, 285 (1909)).
[156] *See, e.g., South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998) (intent to diminish must be "clear and plain") (citation omitted); *Solem*, 465 U.S. at 470 (intent to diminish must be "clearly evince[d]"); *DeCoteau v. District County Court*, 420 U.S. 425, 44 (1975) (intent to disestablish must be "clear").
[157] *Solem*, 465 U.S. at 470.
[158] *Yankton Sioux*, 522 U.S. at 344 (citations omitted).
[159] *Solem*, 465 U.S. at 470.
[160] *Id.*
[161] *Id.*
[162] *Id.* at 471.
[163] *Id.* at 476.
[164] *Hagen v. Utah*, 510 U.S. 399, 411 (1994).
[165] *Solem*, 465 U.S. at 470–71.
[166] *DeCoteau*, 420 U.S. at 445.
[167] *Id.* at 425.
[168] *Hagen*, 510 U.S. at 412–14; *see also Seymour v. Superintendent*, 368 U.S. 352, 354–55 (1962).

lands to be distributed to the tribe was deemed insufficient to completely divest the Indian interest in the lands, and thus did not diminish the Colville Reservation boundaries.[169]

The Supreme Court next turns to the circumstances surrounding the passage of the act, including its relevant legislative history to determine congressional intent. The Court has expressly "decline[d] to abandon [its] traditional approach to diminishment cases, which requires [an examination of] all the circumstances surrounding the opening of a reservation."[170] The reasons are deeply rooted in history. As explained in *Yankton Sioux*, "Congress naturally failed to be meticulous in clarifying whether a particular piece of legislation formally sliced a certain parcel of land off one reservation because the notion that reservation status may not be equal to tribal ownership was unfamiliar."[171] Therefore, the courts have reviewed surrounding circumstances to determine congressional intent on a case-by-case basis. Indeed, "congressional intent must be clear, to overcome the general rule that doubtful expression are to be resolved in favor of ... the wards of the nation, dependent upon its protection and good faith."[172] Accordingly, the Court has been willing to infer Congressional intent to diminish or disestablish a reservation when the events surrounding the passage of the act, including the manner of negotiations with the tribes and the tenor of legislative documents, "unequivocally reveal a widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation."[173] The Court has not, however, been willing to extrapolate a specific congressional purpose to disestablish a reservation from the general expectations in the allotment era.[174]

Lastly, but to a lesser extent, the Court looks to events that occurred after the passage of the act, such as the way Congress, the BIA, and local authorities dealt with the land in question immediately after its opening, to determine congressional intent.[175] Least probative is the demographics of the opened area. "Where non-Indian settlers flooded into the open portion of the reservation and the area has long-since lost its Indian character," the Court has acknowledged disestablishment may have occurred.[176] "Resort to subsequent demographic history is, of course, an unorthodox and potentially unreliable method of statutory interpretation."[177] Moreover, "[t]here are ... limits to how far we will go to decipher Congress' intent in any surplus land Act. When both the Act and its legislative history fail to provide substantial and compelling evidence of a congressional intention to diminish lands, we are bound by our traditional solicitude for the Indian tribes to rule that diminishment did not take place and that the old reservation boundaries survived the opening."[178]

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[169] *Seymour v. Superintendent*, 368 U.S. 352 (1962); *see also Mattz v. Arnett*, 412 U.S. 481, 499 (1973) (reservation not terminated by discretionary allotment act that opened land for settlement).
[170] *Hagen*, 510 U.S. at 412.
[171] *Yankton Sioux*, 522 U.S. at 343.
[172] *DeCoteau*, 420 U.S. at 444.
[173] *Solem*, 465 U.S. at 471.
[174] *Id.* at 468; *Mattz*, 412 U.S. at 499 (rejecting general congressional hostility to the reservation system as supporting termination of boundaries).
[175] *Solem*, 465 U.S. at 471.
[176] *Id.*
[177] *Id.* n.13.
[178] *Id.* at 472 (citations omitted).

IV. ANALYSIS

We begin our analysis with the 1863 and 1864 Treaties, finding that the language of the treaties, surrounding circumstances, and subsequent events do not evince clear congressional intent to disestablish the Reservation. We then look to the language of the Nelson Act, as well as the circumstances surrounding its enactment and the Agreement entered with the Band thereunder, and determine that while there exist some conflicting evidence, the totality of the circumstances do not substantiate a finding of disestablishment. An examination of the subsequent events, including the Supreme Court's decision on the Band's land claims and the judicial treatment of the Nelson Act, and demographics also supports the conclusion that the Reservation has not been disestablished.

Although not necessary for our legal analysis, the conclusion in this opinion comports with the principles of morality, fairness, and accountability that are the core foundation of the trust responsibility,[179] all of which counsel in favor of limiting reliance on indirect and implicit evidence regarding the status of the Band's Reservation. The Band was given a reservation by the Treaty of 1855, and to date, there is no unequivocal evidence that those reservation boundaries have changed. A tortured and complex history due to the concomitant pressures and encroachment of white settlement do not in and of themselves eviscerate the legal commitments made by the United States. To rely today on implicit and incomplete evidence to destroy treaty-based reservation boundaries would perpetrate a modern day offense against the Band, who has already suffered unjust treatment of this nature in the past.

a. *The 1863 and 1864 Treaties Did Not Disestablish the Reservation*

i. The Language of the 1863 and 1864 Treaties

We start our inquiry with the most probative evidence of congressional intent, the language of the treaties themselves, and conclude that the treaties' protection of the Band's right to remain on the Reservation demonstrates Congress' understanding that the Reservation would continue to exist, albeit contingent on the Band's behavior. As discussed *supra*, in 1863 and 1864 the Chippewa bands and the United States entered into two treaties that were generally intended to remove members of the bands to the Leech Lake Reservation. Despite the fact that both treaties provided that all the subject reservations, including the Mille Lacs Reservation, were "ceded" to the United States,[180] Article 12 guaranteed to the Band alone the right to remain on its Reservation "so long as [it] shall not interfere with or in any manner molest the persons or property of the whites."[181] Therefore, while the Band ceded its fee title to the Reservation, the treaties expressly preserve the Band's right of occupancy.

The Band's occupancy right is afforded special protection, as the Supreme Court has recognized, because "the Indians' right of occupancy has always been held to be sacred; something not to be taken from him except by his consent, and then upon such consideration as should be agreed

[179] *See* Secretarial Order No. 3335, *Reaffirmation of the Federal Trust Responsibility to Federally Recognized Indian Tribes and Individual Indian Beneficiaries* at 1 (Aug. 20, 2014).
[180] 1863 Treaty, Art. I; 1864 Treaty, Art. I.
[181] 1863 Treaty, Art. XII; 1864 Treaty, Art. XII.

upon."[182] Thus, when read as a whole, the treaties do not constitute "the present and total surrender of all tribal interests."[183] Article 12 is not limited in duration to a set amount of time but rather conditions the Band's right to remain on its good behavior, a condition that could continue indefinitely. Indeed, there is no evidence that the Band ever failed to meet this condition under the treaty.

Notably, unlike the 1902 Act in *Hagen v. Utah* and the 1892 Act in *Seymour v. Superintendent*, neither treaty included language providing for the restoration of the Band's Reservation land to the public domain. To the extent that the fee title was ceded, the treaties do not specify that the public land laws govern their disposal, nor would this approach seem logical given that the fee title was subject to the Band's right of occupancy.[184]

Additionally, neither treaty provided clear sum certain compensation in exchange for the Band's Reservation. Rather, Article III of both the 1863 and 1864 Treaties describes various payments to be made, including the extension of existing annuities and the payment of $30,000 to enable the Indians to "pay their present just engagements." These payments were to be made to all the signatory parties and were not delineated on a reservation-by-reservation or band-by-band basis. This situation is distinguishable from *Decoteau v. District County Court* where the Supreme Court determined that the Lake Traverse Reservation was disestablished because, in addition to cession language, the relevant act provided for a sum certain payment per acre of ceded land.[185]

Taken as a whole, the treaties do not, on their face, evince "the present and total surrender of all tribal interests" nor do they unequivocally demonstrate a congressional intent to disestablish the Mille Lacs Reservation.

ii. Negotiations of the 1863 and 1864 Treaties

The circumstances surrounding the formation of the treaties similarly do not reveal unequivocal congressional intent to disestablish the Reservation. Rather, these circumstances demonstrate the United States' understanding that the Mille Lacs Band had a right to stay on its Reservation. Due to the Band's refusal to join the Indian uprising, the United States believed the Band had "earned" the right to remain on its lands, "at least for the present."[186] Evidence of the negotiations surrounding the treaties reflects that the Band was in fact determined to stay on its Reservation.[187] The contemporaneous understanding by both the Band and the United States was that the Band had the right to remain on their Reservation as long as its members satisfied the conditions in Article 12. Therefore, the plain language of the treaties themselves, drawn from

[182] *Minnesota v. Hitchcock*, 185 U.S. 373, 389 (1902). This decision further highlights that the United States may hold fee title to a tract of land and that fact does not in and of itself affect the reservation status of such land.
[183] *See Solem v. Bartlett*, 465 U.S. at 470.
[184] The confusion over whether the Band's lands were in some way subject to the public land laws, given Congress's failure to address this question in the treaties themselves, is highlighted in the discussion, *supra* Section II.b., concerning the myriad Secretarial positions taken between 1864 and 1889.
[185] *DeCoteau*, 420 U.S. at 448.
[186] Interview between William P. Dole, Commissioner of Indian Affairs, and the Chippewa Indians from the Mississippi River (Mar. 5, 1863).
[187] *See supra*, text on pages 3–4 and accompanying notes.

the circumstances surrounding the drafting of the treaties, supports the conclusion that the Reservation remained intact.

iii. Subsequent events to the 1863 and 1864 Treaties

Nothing in later events following the 1863 and 1864 Treaties alters this conclusion; to the contrary, the evidence demonstrates that federal officials found that the Band had remained in good conduct and therefore had preserved its right to stay on the Reservation.[188] Indeed, the majority of Band members exercised that right to remain and chose not to relocate to Leech Lake.[189] Nonetheless, federal officials repeatedly expressed their hope that the Band would *voluntarily* relocate, primarily to alleviate the mounting pressures from state politicians and the onslaught of unauthorized white settlers.

Although the Department consistently held that the Band retained a right to occupy the Reservation, it was less consistent as to whether the Reservation was subject to entry by non-Indians under the public land laws.[190] In spite of the fact that local United States Attorneys were instructed to prosecute squatters, white settlers continued to move onto the reservation and submit applications for land patents, encouraged by the negligence of local land officers who allowed entries to be filed contrary to official agency directives.[191] Congress attempted to halt the rising tensions by mandating that the Reservation land should not be disposed of in any manner until further legislation, and by authorizing negotiations with the Band.[192] The United States' repeated attempts to negotiate relocation with the Band reflect the federal understanding that the Band had a right to occupy the Reservation and could only be removed voluntarily.

Accordingly, the subsequent events do not weigh in favor of disestablishment or diminishment. Rather, the evidence shows that both the United States and the Band understood that the Band maintained a right to its Reservation, although the exclusivity of that legal right was unclear. Furthermore, the movement of white settlers onto Reservation lands was often met with opposition by the federal government or, at the very least, an attempt to maintain the status quo while seeking further guidance from Congress. These events and the resulting change in demography do not amount to "substantial and compelling evidence of a congressional intention to diminish lands," particularly where the federal government acknowledged that there was questionable white encroachment onto the Reservation.

Considering the evidence as a whole, and in light of the "traditional solicitude to Indians," the 1863 and 1864 Treaties did not diminish or disestablish the Mille Lacs Reservation nor do subsequent events indicate otherwise.

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[188] *See supra*, text on pages 4–5 and accompanying notes.
[189] *See* Annual Report of the Comm'r of Indian Affairs to the Sec'y of the Interior at 2 (1872) ("The Mille Lac Chippewas, who continue to occupy the lands ceded by them in 1863, with reservation of the right to live thereon during good behavior, are indisposed to leave their old home for the new one designed on the White Earth reservation. Only about twenty-five have thus far been induced to remove. . . .").
[190] *Supra*, text at pages 5–7 and accompanying notes.
[191] *Supra* Section II.b.ii.
[192] *Supra*, text at page 7 and accompanying notes.

b. *The Nelson Act Did Not Diminish or Disestablish the Reservation*

i. The Language of the Nelson Act and Agreement

As discussed *supra*, in 1889, Congress responded to growing demand for Chippewa land by passing the Nelson Act. The Nelson Act authorized and directed the President to designate commissioners to negotiate with the various bands of Chippewa in the State of Minnesota for the "complete cession and relinquishment in writing of all their title and interest in and to all the Reservations." The Act anticipated that the subject Indians would then be moved to the White Earth Reservation where they would take allotments. Section 3 of the Act, however, provided that the Indians could elect to take allotments on their own reservations and not remove to the White Earth Reservation. In disposing of the land under the Nelson Act, the United States was to allot the reservations to Indians first, auction off the timber lands second, and lastly sell the unallotted lands as homesteads. The proceeds of such sales were to go into a trust fund for the benefit of the Chippewa Indians.

Pursuant to the Nelson Act, the Band and the United States entered into an agreement. The Agreement provided that the Band accepted the Nelson Act and "each and all of the provisions" and that the Band "forever relinquish[ed] to the United States the right of occupancy on the Mille Lac Reservation, reserved to us by the twelfth article of the treaty of May 7, 1864."

Considered in isolation, and without reference to other provisions in the Nelson Act and the negotiations with the Band, Section One of the Nelson Act and the resulting agreement arguably suggest an intent by the Band to relinquish occupancy of the Reservation. Language of complete cession alone, however, is not dispositive. Indeed, the District Court examined the language of cession contained in the Nelson Act in addressing another Band of Chippewa, and the State's argument that this language is plain on its face, and determined that contrary to that language, the Act's purpose "was not to terminate the [Leech Lake] reservation or end federal responsibility for the Indian but rather to permit the sale of certain of his lands to homesteaders and others."[193] The District Court stated that "[i]f it was the intention of Congress to disestablish the...Reservation, the Congress knew how to say so in clear language."[194] Furthermore, while the Supreme Court has found that language of total cession "strongly suggests" diminishment,[195] it has never found such language to be independently determinative. In *Rosebud Sioux Tribe v. Kneip*, for example, the Court relied on the acts' language of cession to find disestablishment but only in conjunction with evidence of continuity of purpose with a prior unratified agreement that all parties agreed would have disestablished a portion of the reservation.[196] The Court found that the prior unratified agreement provided an "unmistakable baseline purpose of disestablishment" that carried forward with the later congressional acts.[197]

Moreover, we cannot view Section One of the Nelson Act in isolation. Section 3 of the Act allowed the Indian inhabitants to take allotments upon their own reservations, in lieu of being

[193] *See Leech Lake Band v. Herbst*, 334 F. Supp. 1001, 1004–05 (D. Minn. 1979).
[194] *Id.* at 1005.
[195] *See Solem v. Bartlett*, 465 U.S. at 471.
[196] *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 591–92 (1977).
[197] *Id.*

removed, and the Band expressed its intent to utilize this option. The allotment provision is central to maintaining the Indian character and reservation status, as already determined by courts who have examined the effect of the Nelson Act on other subject reservations and found that no disestablishment occurred where the Indians were allowed to select allotments on the opened lands.[198] As the Minnesota State Supreme Court explained, and the District Court agreed, "[h]ad Congress intended to terminate completely the [subject] Reservation...we believe that it could have, and would have, expressed this intention with more definiteness and, in all likelihood, would not have permitted the Band, by § 3 of the Nelson Act, to continue to settle within the boundaries of the reservation."[199] Thus, when viewed as a whole, the Nelson Act demonstrates an intent to allow the Indians to remain on their reservations held in the form of individual allotments, thereby preserving its Indian character.

Additionally, the Act did not provide for sum certain payments of the ceded lands; rather, it provided for a cession in trust of the lands not needed for the Indian allotments. Relevant caselaw has found that land disposals made in trust without sum certain payment fail to demonstrate congressional intent to disestablish the underlying reservation.[200] For example, in *Seymour v. Superintendent*, the Supreme Court found that Congress did not intend to diminish the south half of the Colville reservation where the legislative act provided that proceeds from the sale of surplus lands would be placed in the Treasury for the benefit of the tribe.[201] Sum certain payment is not a requisite to diminishment, however, as the Supreme Court determined in *Rosebud Sioux*. Yet the lack of sum certain payment in *Rosebud Sioux* is distinguishable on a number of factors, including the fact that the negotiated agreement with the tribe, on which the congressional acts were based, *did* provide for sum certain payment.[202] Moreover, in *Rosebud Sioux*, the negotiations with the tribe expressly addressed the new size and shape of the reservation as a result of the agreement.[203]

Finally, both the Act and the Agreement lack language concerning the restoration of Reservation lands to the public domain which, as discussed *supra*, further supports the continued existence of the Reservation.

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[198] *See infra* Section IV.b.iv. There is also judicial precedent not pertaining to the Nelson Act that has considered the statutory provision of allotments in the opened area to be a factor against finding disestablishment. *See Solem v. Barlett*, 465 U.S. at 474 (highlighting that the tribe was given permission to obtain individual allotments on the affected portion of the reservation before the land was officially opened to non-Indian settlers); *Smith v. Parker*, 996 F. Supp. 2d 815, 836 (D. Neb. 2014), *aff'd by* 2014 U.S. App. LEXIS 23963 (8th Cir. Dec. 19, 2014), *cert. granted*, (U.S. Oct. 1, 2015) (No. 14-1406) (finding that the provision allowing Indians to take allotments on the opened part of the reservation "suggest[s] that Congress intended the land...to remain part of the Omaha Reservation"). Although *DeCoteau v. District County Court* held that the reservation was disestablished even though the tribe had been allowed to select allotments within the boundaries, that case is distinguishable where the authorizing act included a sum certain payment per acre of disposed lands and provided for the return of unallotted lands to the "public domain." *See generally* 420 U.S. 425.

[199] *See State v. Forge*, 262 N.W. 2d 341, 346 (Minn. 1977); *see also Melby v. Grand Portage Band of Chippewa Indians*, 1998 WL 1769706, *8 (D. Minn. 1998).

[200] *See, e.g., Seymour v. Superintendent*, 368 U.S. at 356; *Mattz v. Arnett*, 412 U.S. at 495–97. These holdings are further supported by the principle that Indian land cessions made in trust to the federal government remain Indian lands for the benefit of the Indians until they are validly sold to non-Indians by the prescribed measures set forth in the applicable agreement or legislation. *See Ash Sheep Co. v. United States*, 252 U.S. 159, 166 (1920).

[201] *Seymour*, 368 U.S. at 356.

[202] *See Rosebud Sioux Tribe*, 430 U.S. 584, 590–92.

[203] *Id.*

Viewed in its totality, the language of Nelson Act and the subsequent Agreement do not unequivocally demonstrate a congressional intent to diminish or disestablish the Reservation. Rather, they show that Congress intended to dispose of surplus agricultural and pine lands while providing the subject bands with allotments on their existing reservations should the band members elect not to relocate to the White Earth Reservation. The relinquishment language in the Agreement was only agreed upon by the Bands based on the prior commitments that the Band members' treaty right to occupy the reservation would not be "forfeited" and they would lose "no rights under the old treaties" but instead be "in a stronger position than before."[204]

ii. Legislative History of the Nelson Act and Negotiations with the Band

The surrounding circumstances demonstrate the pervasive understanding that the Band would remain on its Reservation by taking allotments and that no actual cession of the lands would occur before then. The legislative history for the Nelson Act shows Congress's commitment, at the time, to the policies of allotment and assimilation, as well as Congress's goal to capitalize on the reservation pine resources "for the benefit of the Indians." The legislative history, however, does not explain the significance of the affected tribes' rights to take allotments upon their existing reservations or speak to the specific question of reservation disestablishment.[205] More illustrative on this point are the subsequent negotiations that took place between the Chippewa Commission and the Band for the purpose of entering into an agreement pursuant to the Nelson Act.

As explained, *supra*, the Commission acknowledged the existence of the Mille Lacs Reservation and the Band's continuing rights to the Reservation which, according to the Commission, would not be lost and would in fact be "stronger" under the new agreement.[206] When presented with the options set forth in the Nelson Act, the Band repeatedly and uniformly voiced its intent to continue residing on the Reservation by exercising its option to take allotments thereon pursuant to Section 3.[207] The Commission accepted the Band's intentions and promised the Band members that they were "entitled to select for [their] allotments the land called farming lands, all that can be used as such."[208] The Commission further promised the Band that there would be "nothing done with the lands until you have your allotments," meaning the federal government would not begin disposing of the remaining pine and agricultural lands until the Band's allotments were selected. The negotiations contained no discussion of the particulars of which land would be selected or whether the shape and size of the Reservation would be affected.

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[204] *See* H.R. Exdoc. 247, 51st Cong., 1st Sess. 164–65.

[205] *See* 19 Cong. Rec. 1887 (1888) (House debate showing that the Section 3 language regarding allotments on existing reservations was incorporated into the bill without substantive discussion).

[206] H.R. Ex. Doc. 247, 51st Cong., 1st Sess. 165. *See also* H.R. Rep. No. 789, 50th Cong., 1st Sess. at 2 (demonstrating that Congress also recognized the continued existence of the Reservation during its deliberations of the Nelson Act).

[207] *See* H.R. Exdoc. 247, 51st Cong., 1st Sess. 168 ("[A]nd as you have uttered the words of the law, stating that an Indian can take allotments on the reservation where he resides, we make it known to you that we wish to take our allotments on this reservation, and not to be removed to White Earth."); Hoxie Report at 53–54; McClurken Report at 158.

[208] H.R. Exdoc. 247, 51st Cong., 1st Sess. 168.

The Commission relayed the Band's intentions back to Washington, and the President reported to Congress that most of the Chippewa bands elected to take allotments under the Act and provided Congress with the Commission's report of its negotiations with the Band.[209] Therefore, immediately following the enactment, all the federal parties understood that the Mille Lacs would remain on their reservation and take allotments. Moreover, the federal parties understood that these Indian allotments were to be issued before the pine and agricultural land could be surveyed and sold to non-Indians.[210] The federal government's position was publicly conveyed via the Department of the Interior's published notice that no land entries on the Chippewa reserved lands, including the Mille Lacs Reservation, were to be allowed until the Indians' right to take allotments had been exercised and that unlawful entrants would be treated as trespassers.[211] Most notably, as discussed below, the carefully negotiated quid pro quo between the United States and the Band to implement the Nelson Act provisions, including the side agreement, was never consummated as the United States failed to provide allotments to the Band members, and furthermore, allowed additional white settlement to occur in contravention of the agreed-upon approach and the terms of the Nelson Act. Thus, the complete and absolute cession never occurred.

The circumstances surrounding the Band's agreement under the Nelson Act stand in stark contrast to the surrounding circumstances of the legislative acts at issue in both *DeCoteau* and *Rosebud Sioux*. In *DeCoteau*, spokesmen for the Sisseton and Wahpeton Indians were quoted as saying "[w]e never thought to keep this reservation for our lifetime" and expressing their desire to benefit from the land sales.[212] Additionally, in *Rosebud Sioux*, both the negotiations with the Rosebud Sioux Tribe and the subsequent congressional debate on the surplus lands acts contained express discussion of the new shape and size of the reservation that would result from the proposed legislation.[213]

Accordingly, the surrounding circumstances weigh against a finding of diminishment or disestablishment.

iii. Subsequent Events and Demographics

Shortly after the approval of the Mille Lacs agreement under the Nelson Act, Congress recognized the continued existence of the Reservation. In one instance, Congress granted "the right of way for construction of a railroad through the Mille Lacs Indian Reservation," conditioning that right on "the consent of the Indians on said reservation to said right of way and as to the amount of said compensation."[214] This Act further provided that when a portion of the

[209] *See supra*, text on pages 10–11 and accompanying footnotes.
[210] *Id.*; *see, e.g.*, Message from the President of the United States (Mar. 4, 1890), located in H. Exdoc. 247, 51st Cong., 1st Sess. 2 (stating that "that the ceded land can not be ascertained and brought to sale under the act until all of the allotments are made").
[211] *See* Letter from Sec'y Noble to the Comm'r of Indian Affairs, and attached *Public Notice Relating to Chippewa Indian Reservation Lands in the State of Minnesota* (Mar. 5, 1890).
[212] *DeCoteau*, 420 U.S. at 433.
[213] *Rosebud Sioux Tribe*, 430 U.S. at 591–95 (detailing the negotiations between the United States and the tribe, including a federal official's explanation to the tribe that "[t]he cession of Gregory County" by ratification of the agreement "will leave your reservation a compact, and almost square tract, and would leave your reservation about the size and area of Pine Ridge Reservation") (internal quotations and citations omitted).
[214] Act of July 22, 1890, 26 Stat. 290, 291.

right of way ceased to be used by the railway company, it would revert to the Band.[215] Separately, Congress made appropriations for the Secretary of the Interior to pay the Chippewa Indians of Minnesota for damages sustained due to the building of various dams and reservoirs.[216] The appropriations provision specified that a third of the money was to go to "the Mississippi band, now residing or entitled to reside on the...Mille Lac Reservation[]."[217] Neither the right of way nor the appropriations legislation would have been necessary if Congress had considered the Reservation disestablished.

Later in time, contrary positions arose regarding the effect of the Nelson Act Agreement, including whether Band members could take allotments upon its Reservation and to what extent the Reservation was open to further white settlement. Perhaps most significantly, Secretary Noble's series of changing opinions greatly obfuscated the situation[218] and led to many additional entries by non-Indians, the validity of which were questionable. Nonetheless, the historical record is also replete with federal officials' recognition of the Band's right to take allotments, and the federal government's failure to enable the Band members to do so. Although Congress ratified the entries made by non-Indians in reliance upon Secretary Noble's earlier opinion and proclaimed "public lands" within the reservation as subject to public land laws,[219] the Supreme Court has found that the disposals pursuant to these congressional resolutions were "wrongful" and that the congressional resolutions were "doubtless[ly]" based on a "misapprehension of the true relation of the Government to the lands."[220] Furthermore, and in contrast, just a few years before issuing the 1893 Joint Resolution, Congress had passed legislation explicitly recognizing the Mille Lacs Reservation and the Band's rights thereon.[221]

Despite the federal government's initial failure to protect the Band's right to the Reservation by issuing allotments to Band members, as promised during the Nelson Act negotiations, throughout the 20th century and into the present, the federal government has demonstrated its intent to not alter the Reservation's status by working with the Band to rebuild the Band's landholdings within the Reservation through the provision of allotments and the acquisition of trust land.[222] For example, in 1914, Congress passed legislation appropriating funds to buy some land on the Reservation to be held in trust for "non-removal Mille Lacs Indians" whom had not received allotments at White Earth."[223] While the 1914 appropriation, and subsequent related

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[215] *Id.*
[216] Act of Aug. 19, 1890, 26 Stat. 336.
[217] *Id.* at 357.
[218] Although, as explained *supra*, Secretary Noble ultimately determined that the Mille Lacs Reservation *did* qualify as a reservation under the Nelson Act, which strongly suggested that the Band members could elect to take allotments under the Section 3 proviso.
[219] *See* 1893 Joint Resolution and 1898 Joint Resolution. Congress also referred to the Reservation as "added to the public domain" and "entered under the homestead law" in the context of justifying the waiver of sovereign immunity for the Band's Court of Claims suit. *See* H. Rep. No. 1388, 60th Cong., 1st Sess. at 1 (1908). These statements were made almost twenty years after the Nelson Act, however, and should be accorded less weight. Furthermore, the statements were made for the purpose of illustrating how the Reservation may have been illegally mishandled, in contrast to what Congress intended to effectuate with the Nelson Act and subsequent agreement.
[220] *United States v. Mille Lac Band of Chippewa Indians in the State of Minnesota*, 229 U.S. 498, 509–10.
[221] *See* Act of July 22, 1890, 26 Stat. 290, 291; Act of Aug. 19, 1890, 26 Stat. 336.
[222] *See supra* Section II.f.
[223] *See* 38 Stat. 582 (1914); Hearings before the Committee on Indian Affairs United States Senate on H.R. 12579, 63 Cong., 2d Sess., at 69–71, 101–08 (Mar. 20, 1914).

appropriations, helped to re-purchase approximately 2,000 acres of land, there is no evidence, as the State seems to suggest,[224] that Congress intended the newly purchased lands to fully discharge its obligations under the Nelson Act. There is nothing in the statutory language or legislative history of the 1914 appropriation reflecting any such intent by Congress to alter the status of the Reservation through these acquisitions. Nor could the appropriation have that effect, given that the 2,000 acres amounted to only a small portion of the tens of thousands acres that were promised to the Band members at the time the Nelson Act was effectuated.[225]

In the last several decades, Congress has assumed the continued existence of the Reservation in considering and enacting legislation[226] and, in 1991, the Department of the Interior squarely opined that the Reservation remains intact.[227] The federal government has more recently confirmed the existence of the 1855 Treaty boundaries on several occasions, such as through the EPA's 1996 approval of the Band's jurisdictional authority to administer EPA delegated regulatory programs throughout the Reservation as established by the 1855 Treaty.[228] The Band has also compacted with the BIA and IHS to provide federal programs and services, such as realty, law enforcement, and health care, within the Reservation.[229]

The endurance of the Reservation's Indian character is further demonstrated by the fact that over 30% of the Reservation's population identifies as Indian, and approximately 13% of the Reservation lands are held by the Band and its members. The Eighth Circuit has recently affirmed the continued existence of the Omaha Indian reservation boundaries even though Indians comprise less than 2% of the population in the disputed area, although that decision is

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[224] *See* Letter from Alan Gilbert, Solicitor General, State of Minnesota, to Kevin Washburn, Assistant Secretary – Indian Affairs, Department of the Interior, at 3 (Jan. 21, 2015) (stating that after the 1916 Court of Claims decision, the United States bought approximately 4,000 acres of land "to form the boundaries of the reservation for the Mille Lacs Band").

[225] *See* McClurken Report at 260; Hoxie Report at 87. As explained *supra* Section II.c, the Nelson Act authorized 40–160 acre allotments per individual, which the Band, consisting of nearly 950 members at the time, indicated it would select on its own Reservation.

[226] *See, e.g.,* Act of June 27, 76 Stat. 1320 (1962) (authorizing the conveyance of land "located on the Mille Lacs Indian Reservation"); Act of Sept. 27, 81 Stat. 230 (1967) (authorizing the payment of judgment funds to the "tribal governing bod[y] of the...Mille Lacs Reservation[]"); H.R. Rep. No. 101-686, at 2 (Sept. 10, 1990) (referring to the "Mille Lacs reservation" and "land within the Reservation boundaries"); Pub. L. No. 110-114, § 5092; H.R. Rep. No. 108-401 at 1142 (2003), *reprinted in* 2004 U.S.C.C.A.N. 3, 425 (itemizing an appropriation "to the Mille Lacs Band of Ojibwe located on the Mille Lacs Reservation, as established in the Treaty of 1855); Water Resources and Development Act of 2007, Pub. L. No. 110-114, § 5092 (authorizing assistance for a wastewater infrastructure project for the "Mille Lacs Indian Reservation established by the treaty of February 22, 1855").

[227] *See* Letter re: Mille Lacs Reservation Boundaries, from Mark Anderson on behalf of the Field Solicitor to Earl Barlow, Minneapolis Area Director, Bureau of Indian Affairs (Feb. 28, 1991).

[228] *See supra* Section II.f, g.

[229] *See* Compact of Self-Governance between the Mille Lacs Band of Ojibwe Indians and the United States of America Department of the Interior (Sept. 26, 1995); Compact of Self-Governance between the Mille Lacs Band of Ojibwe and the United States of America for Indian Health Service Programs (Oct. 10, 2004). Additionally, the Band, the BIA, and the State of Minnesota entered into a cooperative agreement concerning wildland fire protection "within the Mille Lacs Reservation." Cooperative Fire Agreement between the United States Department of the Interior, Midwest Regional Office, and the Mille Lacs Band of Ojibwe, and the State of Minnesota Department of Natural Resources for the Wildland Fire Protection of the Mille Lacs Reservation, AFG2010014 (effective Apr. 14, 2011).

currently subject to Supreme Court review.[230] Moreover, the evidence regarding state jurisdiction does not heavily weigh one way or another because state law has recognized and deferred to tribal authority in some contexts.[231] Furthermore, providing greater certainty and ensuring comprehensive law enforcement coverage is also in the public interest. Therefore, a determination that the Reservation boundaries remain intact would not likely "disrupt the justifiable expectations of the people living in the area."[232]

When viewed in light of the appropriate standard, the mixed and sometimes contradictory subsequent treatment of the Reservation does not clearly and unequivocally demonstrate a congressional intent to disestablish or diminish the Reservation. Rather, the historical record illustrates that when the Nelson Act agreement was signed with the Band, all parties understood that the Band would continue to reside on its Reservation, although in allotted form, and this understanding began to erode over time due to misinformation and the enormous political pressure placed on Departmental officials and Congress to open up the Reservation to settlement. Even though the federal government failed to provide the promised allotments to Band members under the Nelson Act, the Reservation has endured and maintained its Indian character.

iv. Federal Courts Have Held that the Nelson Act did not, in and of itself, Disestablish other Minnesota Chippewa Reservations

Judicial considerations of other Minnesota Chippewa reservations, such as Leech Lake, White Earth, Red Lake, and Grand Portage, have concluded that the Nelson Act did not, in and of itself, operate to disestablish these reservations. For example, both the Federal District Court and the Minnesota State Supreme Court have determined that the Leech Lake Reservation was not disestablished by the Nelson Act[233] and the Eighth Circuit Court of Appeals and the United States Supreme Court have relied upon that precedent.[234] The District Court for Minnesota held that it was "apparent in light of events before and after the passage of the Nelson Act that its purpose was not to terminate the reservation or end federal responsibility for the Indian but rather to permit the sale of certain of his lands to homesteaders and others."[235] Examining the language of the Nelson Act, the Minnesota State Supreme Court found that "[h]ad Congress intended to terminate completely the Leech Lake Reservation ... we believe that it could have, and would have, expressed this intention with more definiteness and, in all likelihood, would not have permitted the Band, by § 3 of the Nelson Act, to continue to settle within the boundaries of the reservation."[236]

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[230] *See Smith v. Parker*, 996 F. Supp. 2d 815 (D. Neb. 2014), *aff'd by* 2014 U.S. App. LEXIS 23963 (8th Cir. Dec. 19, 2014), *cert. granted*, (U.S. Oct. 1, 2015) (No. 14-1406).
[231] *See supra* Section II.g.
[232] *See Hagen v. Utah*, 510 US at 421.
[233] *Leech Lake Band of Chippewa Indians v. Herbst*, 334 F. Supp. 1001 (D. Minn. 1979); *State v. Forge*, 262 N.W. 2d 341 (Minn. 1977).
[234] *See Leech Lake Band v. Cass County*, 108 F.3d 830 (8th Cir. 1997); *Cass County v. Leech Lake*, 524 U.S. 103 (1998). The Supreme Court decision in *Cass County* also helps illustrate the distinction between divestiture of Indian title, to which the Court was concerned, and disestablishment of reservation status, to which the Court assumed intact even though the fee title had largely gone out of Indian hands.
[235] *Leech Lake Band of Chippewa Indians*, 334 F. Supp. at 1003.
[236] *State v. Forge*, 262 N.W. 2d 341, 347 (Minn. 1977).

Two years later, the Minnesota State Supreme Court reiterated its position in a case involving the White Earth Reservation, finding that if "[the Nelson Act] did not terminate the reservations from which the Indians were to be removed then, *a fortiori*, it did not terminate the reservation they moved to."[237] The District Court for Minnesota also confirmed its interpretation of the Nelson Act, holding that the Grand Portage Reservation was not disestablished "because [the Nelson Act] reserved parcels of land for Indians who elected to remain on the reservation" and "such language does not amount to the requisite clear Congressional intent needed to abolish a reservation."[238] All these decisions focused on the importance of the Section 3 provision to take allotments upon existing reservations and the surrounding history demonstrating that the vast majority of Chippewa Indians, including Mille Lacs, elected to do so. As the Minnesota State Supreme Court explained, "[h]ad Congress intended to terminate completely the Leech Lake Reservation...we believe that it could have, and would have, expressed this intention with more definiteness and, in all likelihood, would not have permitted the Band, by § 3 of the Nelson Act, to continue to settle within the boundaries of the reservation."[239]

Diminishment of reservations subject to the Nelson Act has been found on two occasions concerning specific portions of the Red Lake[240] and White Earth Reservations.[241] The diminishment resulted not from the boilerplate language of the Nelson Act, but rather from the particular negotiations and resulting agreements between the individual band and the Chippewa Commission. These negotiations and agreements, unlike those entered into by the Leech Lake and Grand Portage Bands, focused on the new size and boundaries of the resulting reservation and expressly carved out portions from the existing reservations.[242] In fact, the Commissioner of Indian Affairs instructed the Chippewa Commission to precisely define the boundaries of the

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[237] *State v. Clark*, 282 N.W.2d 902, 907 (Minn. 1979), *cert denied*, 445 U.S. 904 (1980). It should also be noted that the Minnesota State Supreme Court explicitly considered *Rosebud Sioux* and *DeCoteau* and confirmed that its diminishment analysis of the Nelson Act was consistent with the standards set forth by the United States Supreme Court in these cases. *See* 282 N.W.2d at 907.

[238] *Melby v. Grand Portage Band of Chippewa Indians*, 1998 WL 1769706, *8, *10 (D. Minn. 1998).

[239] *State v. Forge*, 262 N.W. 2d at 346.

[240] *See United States v. Minnesota*, 466 F. Supp. at 1384, 1387–1388 (discussing how the Nelson Act agreement with the Red Lake band specifically ceded a portion of its reservation but retained the rest), *aff'd sub nom. Red Lake Band v. Minnesota*, 614 F.2d 1161 (8th Cir.) (*per curiam*), *cert denied*, 499 U.S. 905 (1905). The Red Lake decision concerned whether the Band retained hunting and fishing rights—usufructory rights generally associated with land title—to a portion of its reservation that it specifically ceded in its Nelson Act agreement, and therefore did not directly address disestablishment of the reservation boundaries.

[241] *White Earth Band v. Alexander*, 518 F. Supp. 527 (D. Minn. 1981) (finding diminishment of the White Earth Reservation to the extent of four townships). The prior State Supreme Court decision holding that the White Earth Reservation boundaries had not been disestablished concerned 32 townships constituting the bulk of the reservation. *See generally State v. Clark*, 282 N.W.2d 902.

[242] *United States v. Minnesota*, 466 F. Supp. at 1384, 1387–1388 (discussing how the Nelson Act agreement with the Red Lake band specifically ceded 2.4 million acres of its reservation but retained the rest); H.R. Exec. Doc. No. 247, 27–28, 80–81 (Mar. 6, 1890) (agreement with the Red Lake Band providing that the Band ceded all the reservation land "not embraced in the following described boundaries" and then setting forth in detail the new reservation boundaries); *White Earth Band v. Alexander*, 518 F. Supp. at 531 (describing the White Earth agreement which provided that the Band would cede all its interest in the four specified townships); *see also State v. Clark*, 282 N.W.2d at 906 n.13, 908 (explaining that the White Earth Indians "desired to keep the reservation intact and understood it would remain so except for the four townships of pine preserves *ceded outright* to the United States) (emphasis added).

White Earth and Red Lake Reservations.[243] Indian allotments could not be selected on the tracts specifically removed from the Red Lake and White Earth Reservations.[244]

The Mille Lacs Band's situation most closely aligns with the Leech Lake and Grand Portage Bands, as opposed to the White Earth and Red Lake Bands. The Mille Lacs Band's agreement included language of seemingly absolute and complete relinquishment to all its title and interest in the Reservation, however the agreement did not delineate new boundaries or specify particular tracts to be removed from the Reservation. And as was the case with all the agreements entered into pursuant to the Nelson Act, while the Band's agreement did not expressly reference the Band's intention to select allotments upon its Reservation pursuant to Section 3, the surrounding circumstances demonstrate that the United States knew and accepted that most of the Chippewa Indians, including the Band, intended to do so and that such allotment, in a timely and adequate basis, was a precondition to effectuating the side agreement.[245]

c. *The Supreme Court Decision in* Mille Lac v. United States *Is Not Dispositive*

Additionally, the Supreme Court's determination of the Band's land claims in *Mille Lac v. United States* does not determine or even weigh in favor of diminishment or disestablishment. This decision dealt only with the issue of land title and the United States' liability for improperly disposing of tracts of land within the Reservation, which is a separate legal question from disestablishment or diminishment of reservation boundaries.[246] The purpose of the litigation was to determine whether compensation was owed to the Band for the illegal disposition of valuable pine lands; the Court did not examine the present state of the Reservation or whether the applicable surplus land acts affected the boundaries of the Reservation.[247]

The United States asserted that the Band had only a permissive right of occupancy and not a reservation at the time of the Nelson Act, and therefore the Reservation was not subject to the Nelson Act's provisions.[248] The Supreme Court, however, disagreed.[249] The Court specifically

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[243] *See White Earth v. Alexander*, 518 F. Supp. at 532 (describing the instructions to the Commissioners, which directed that the "boundaries of the tracts so reserved by you (the diminished White Earth and Red Lake Reservations) must be definitely determined and fixed and accurately described").

[244] *See id.* at 533 (finding that unlike the intact reservation containing 32 townships, no Indian allotments were selected on the 4 townships at issue); H.R. Exec. Doc. No. 247, 3 (Secretary Noble report referring to "[t]he boundaries of the diminished reservation, from which allotments to the Red Lake Chippewas are to be made"); *id.* at 10 ("It is not seen how any of the ceded lands, *except possible those of the Red Lake Reservation and the four township ceded in the White Earth Reservation*, can be offered for sale or settlement until the Indians...shall have made their individual selections for allotment.") (emphasis added).

[245] *See, e.g.,* Message from the President of the United States (Mar. 4, 1890), located in H. Ex. Doc. 247, 51st Cong., 1st Sess. 10 (Mar. 6, 1890) ("The act...evidently contemplated the voluntary removal of the body of all these bands of Indians to the White Earth and Red Lake Reservations; but a proviso in section 3 of the act authorized any Indian to take his allotment upon the reservation where he now resides. The commissioners report that quite a general desire was expressed by the Indians to avail themselves of this option. The result of this is that the ceded land can not be ascertained and brought to sale under the act until all of the allotments are made").

[246] For the same reasons, the 1986 Court of Claims' decision on the Band's claims in *Minnesota Chippewa Tribe v. United States* does not determine or weigh in favor of diminishment or disestablishment. *See supra* note 119.

[247] The County and the State Attorney General's Office rely heavily on this decision to argue that the Reservation has been disestablished or diminished. However, as explained above, the Supreme Court did not consider or decide that legal issue, and accordingly, the doctrines of res judicata and issue preclusion do not apply.

[248] *Mille Lac Band of Chippewa Indians in the State of Minnesota*, 229 U.S. at 506–507.

found that the Mille Lacs Reservation held the same status as other reservations included in the Nelson Act and, therefore, was subject to its provisions regarding land sales.[250] That finding was sufficient to determine that the United States was liable for damages for its improper disposal of land within the Reservation under the public land laws.[251] The Court did not further opine on the status of the Reservation or its boundaries following the passage of the Nelson Act, and as the Court has explained in other contexts, the transfer of land title within a reservation does not equate to the disestablishment or diminishment of that reservation.[252]

Similarly, the 1986 Court of Federal Claims decision only concerned compensation for the Band's loss of title to individual tracts of land and did not opine on the Reservation status as a whole following the Nelson Act. In allowing the Band to recover compensation for the United States' improper disposal of lands under Section Six of the Nelson Act, the decision did emphasize that the United States is "bound by every moral and equitable consideration to discharge its trust with good faith and fairness."[253] The court ultimately determined that the United States failed to meet the standard of fair and honorable dealings in its handling of the Band's lands following the 1863 and 1864 Treaties.[254] Therefore, this decision further illustrates the questionable enforceability of any concessions made by the Band in the face of such unexemplary conduct by the federal government.

As a final point, the position taken in Solicitor Margold's 1935 opinion, and adopted by the State,[255] that the Mille Lacs Reservation is comprised solely of repurchased trust lands is unsubstantiated and does not control our analysis. The Solicitor lacked the benefit of the Supreme Court's disestablishment/diminishment framework, which was not established until 1984. His cursory analysis relied exclusively on the Supreme Court's decision in *United States v. Mille Lac* that the United States improperly disposed of the Band's land under the general land laws, as well as the fact that, following the Supreme Court decision, Congress appropriated funds to repurchase in trust some of those lost lands. The Solicitor did not examine the legislative history of these appropriations, which offer no evidence that Congress considered the newly purchased lands to effectively consummate the promises made in the Nelson Act.[256] Nor did the Solicitor consider the fact that the approximately 2,000 acres repurchased with these appropriations were substantially less than the tens of thousands of acres promised to the Band

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[249] *Id.* at 507 ("[T]he government thus waived its earlier position respecting the status of the reservation . . . .").
[250] *Id.*
[251] *Id.* at 509.
[252] *See Solem v. Bartlett*, 465 U.S. 463, 470 ("Once a block of land is set aside for an Indian reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise."); *Seymour v. Superintendent*, 368 U.S. 352, 358 (dismissing the argument that lands patented in fee to non-Indians are no longer part of the reservation because it would create "an impractical pattern of checkerboard jurisdiction").
[253] *Minnesota Chippewa Tribe v. United States*, 11 Ct. Cl. at 237.
[254] *Id.* at 240.
[255] *See* Letter from Alan Gilbert, Solicitor General, State of Minnesota, to Kevin Washburn, Assistant Secretary – Indian Affairs, Department of the Interior, at 3 (Jan. 21, 2015) (stating that after the 1916 Court of Claims decision, the United States bought approximately 4,000 acres of land "to form the boundaries of the reservation for the Mille Lacs Band").
[256] The legislative history instead focused on contemporary factual questions, such as whether Band members would be willing to instead move to public lands, to which it was concluded they would not. *See, e.g.*, Hearings before the Committee on Indian Affairs United States Senate on H.R. 12579, 63 Cong., 2d Sess., at 101–08 (Mar. 20, 1914).

during the Nelson Act negotiations. Moreover, Solicitor Margold's analysis reflects the pre-1948 tendency to treat title ownership and reservation boundaries as synonymous, an approach that has since been rejected by Congress and the Supreme Court.[257] As the Supreme Court has clarified, loss of Indian title does not equate to diminishment of the reservation—specific congressional intent to diminish or disestablish the reservation must be found.[258] Solicitor Margold made no such finding. Furthermore, Solicitor Margold ignored the fact that in the same act seeking cession of the Mille Lacs Reservation, Congress also specifically provided for the Band to take allotments upon its reservation and, in the years following the Nelson Act, Congress expressly recognized the existence of the Reservation.[259] Consequently, the 1935 Solicitor's opinion is withdrawn to the extent that it contradicts the analysis contained herein.

V. CONCLUSION

"The congressional intent must be clear to overcome the general rule that doubtful expressions are to be resolved in favor of the [Indians]."[260] This standard is the keystone of our inquiry. Accordingly, we find that neither the 1863/1864 Treaties nor the Nelson Act disestablished the Mille Lacs Reservation. As demonstrated above, the language of the Treaties and the Act provided the Band with a right to remain on its existing Reservation, and this right overrode the other expressions of cessation. Furthermore, the surrounding circumstances and the events that followed do not support a finding of unequivocal congressional intent to disestablish. Rather, the complex historical treatment of the Mille Lacs Reservation tells a narrative of the Band's determination to retain its land and the United States' fluctuating adherence to the clear promises made during both treaty negotiations and the Nelson Act negotiations. The United States' admittedly illegal disposition of lands within the Reservation boundaries does not, and cannot, suffice to show an unambiguous desire by Congress to disestablish the Reservation. And although much of the Band's landholdings were lost through this process, as the Supreme Court has explained, "[w]hen both the Act and its legislative history fail to provide substantial and compelling evidence of a congressional intent to diminish lands, we are bound by our traditional solicitude for the Indian tribes to rule that diminishment did not take place and that the old reservation boundaries survived the opening."[261] Accordingly, we find that the Mille Lacs Reservation, as it was established by the 1855 Treaty, remains intact.

On a final note, today's determination provides much needed clarity and paves the way for a more harmonious relationship between the Tribe, State, and local governmental entities. And as already recognized by these sovereigns,[262] intergovernmental agreements are a tried and true mechanism for addressing law enforcement issues that traverse jurisdictional lines. Furthermore, if the Department of Justice approves the Band's TLOA application, the application of this

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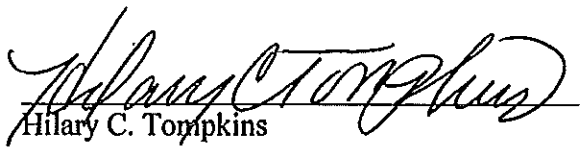
[257] *See Solem v. Barlett*, 465 U.S. at 468 (explaining that "the notion that reservation status of Indian lands might not be coextensive with tribal ownership was unfamiliar" until 1948, when Congress passed a statute to "uncouple reservation status from Indian ownership, and statutorily define Indian country to include lands held in fee by non-Indians within reservation boundaries.") (citing to 18 U.S.C. § 1151).
[258] *See Solem*, 465 U.S. at 470 (citing *United States v. Celestine*, 215 U.S. 278, 285 (1909)).
[259] *See* Act of July 22, 1890, 26 Stat. 290; Act of Aug. 19, 1890, 26 Stat. 336.
[260] *Lower Brule Sioux Tribe v. South Dakota*, 711 F.2d 889 (1983) (quoting *Decoteau*, 420 U.S. at 444).
[261] *See Solem*, 465 U.S. at 472.
[262] *See* Minn. Stat. § 626.90 (2007) (providing for the cross-deputization of Band members and authorizing cooperative agreements between the Band and County concerning law enforcement services).

boundary determination means that federal resources and expertise will be directed at combating serious criminal activity on the Reservation, to the benefit of all sovereigns involved.[263]

This opinion was prepared with the assistance of Jody Cummings, Deputy Solicitor for Indian Affairs, Eric Shepard, Associate Solicitor for Indian Affairs, Jennifer Turner, Assistant Solicitor, Branch of Environment and Lands, Division of Indian Affairs, and Bethany Sullivan, Attorney-Advisor, Branch of Environment and Lands, Division of Indian Affairs.



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[263] *See* Request for United States Assumption of Concurrent Federal Criminal Jurisdiction, from Melanie Benjamin, Chief Exec., Mille Lacs Band of Ojibwe, to Tracy Toulou, Dir., Office of Tribal Justice, United States Dep't of Justice at 2–5 (Feb. 22, 2013) (detailing the disproportionately high crime rates on the Reservation and the presently insufficient law enforcement resources provided by the Band, State, and local governmental entities).