No. 19-2070

United States Court of Appeals
for the Sixth Circuit

LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS,

Plaintiff – Appellant Cross-Appellee,

v.

GRETCHEN WHITMER, Governor of the State of Michigan,

Defendant – Appellee,

CITY OF PETOSKEY, MI; CITY OF HARBOR SPRINGS, MI; EMMET COUNTY, MI; CHARLEVOIX COUNTY, MI,

Intervenors – Appellees Cross-Appellants,

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

Intervenors – Appellees.

On Appeal from the United States District Court for the Western District of Michigan
The Honorable Paul L. Maloney

BRIEF OF PLAINTIFF – APPELLANT LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

This appeal involves the critical issue whether an 1855 Treaty established a federal Indian reservation for Appellant Little Traverse Bay Bands of Odawa Indians (the "Band"), a federally recognized Indian tribe with a government-to-government relationship with the United States. Given the significance of that issue, the Band respectfully requests oral argument.

INTRODUCTION

On July 31, 1855, the United States and several Odawa (Ottawa) and Ojibwe (Chippewa) Indian tribes in Michigan – including the Band's legal forebears – executed a treaty securing defined tracts of land to each tribe at then-isolated locations in northern Michigan and entitling individual tribal citizens to allotments of land within those tracts. *See* 1855 Treaty, RE558-06. While this lawsuit concerns whether the 1855 Treaty established a reservation for the Band that survives today, this appeal concerns only the first issue germane to that analysis: whether the Treaty established a reservation in the first instance. The district court ruled that it did not and granted summary judgment against the Band. Hence, whether a reservation, if created, exists today was not passed upon below and is not at issue in this appeal.

On the issue before this Court, the district court erred badly. Under long-settled Supreme Court precedent and more than a century of federal land law, an

Indian reservation consists of (1) a defined body of land, (2) withheld from sale by the federal government, and (3) appropriated for Indian purposes. *See Hagen v. Utah*, 510 U.S. 399, 412 (1994); *United States v. Celestine*, 215 U.S. 278, 285 (1909); *Minnesota v. Hitchcock*, 185 U.S. 373, 389-90 (1902); *Leavenworth, Lawrence, and Galveston R.R. Co. v. United States*, 92 U.S. 733, 747 (1875).

The Treaty text squarely meets each of these criteria in establishing a reservation for the Band. It identified a defined tract of land, withdrew it from sale, and dedicated it exclusively to the permanent use and settlement of the Band and its citizens. The Treaty accordingly identifies the lands it set aside as "reserved" and as a "reservation[]," 1855 Treaty, RE558-06, PageID##6894-6895, and nothing in the Treaty remotely suggests these terms were intended to bear other than their plain meaning.

Historical context confirms what the text makes plain. Federal policy at the time, nationally and in Michigan, centered on creating permanent reservations with lands allotted on precisely the terms set forth in the 1855 Treaty. Indeed, the architect of that policy – George W. Manypenny, Commissioner of Indian Affairs from 1853 to 1857 – negotiated the 1855 Treaty. Federal officials in Washington, and Indian agents implementing that policy in Michigan, all repeatedly referred to the Band's land as a "reservation," as did the Indians. Federal courts have stated likewise. *See United States v. Michigan*, 471 F. Supp. 192, 216 (W.D. Mich. 1979)

("In that [1855] treaty ... the United States granted the Indians reservations[.]"). And Congress, in legislation spanning more than a century, has repeatedly recognized the same based on a simple fact:

> The historical record is clear that the Treaty Commissioners and the Indian tribal governmental representatives understood that the 1855 treaty ... created what were intended to be permanent reservations[.]

S. Rep. No. 103-260, at 2 (1994). *See also*, *e.g.*, Little Traverse Bay Bands of Odawa Indians and the Little River Band of Ottawa Indians Act, Pub. L. No. 103-324, § 4(b)(2)(A), 108 Stat. 2156, 2157-58 (1994) (referring to "the reservations for the Little Traverse Bay Bands as set out in ... the Treaty of 1855" [1]).

Despite all of this, the district court ruled that the Treaty "cannot plausibly be read to have created an Indian reservation" for the Band, Opinion, RE627, PageID#12230, becoming the lone voice of dissent after 164 years of federal consensus. It did so based on the fundamentally erroneous assumption that allotment "is inconsistent with the establishment of an Indian reservation." *Id.* PageID#12229. The district court cited no authority for that proposition. Nor could it. The Supreme Court has been clear that allotment "is completely consistent" with reservation status. *Mattz v. Arnett*, 412 U.S. 481, 497 (1973). The United States has likewise rejected "the fictitious dichotomy between treaties that

[1] Congress referred to "reservations" in plural, as the Band's Reservation under the Treaty included non-contiguous tracts.

allowed for allotments and treaties that established ... reservations." United States' Combined Reply in Support of Its Motion for Partial Summary Judgment at 6, *Saginaw Chippewa Indian Tribe v. Granholm*, No. 05-10296-BC, 2010 WL 5185114 (E.D. Mich. Dec. 17, 2010) (No. 234), 2010 WL 3167602.

In laboring to reconcile its embrace of that fictitious dichotomy with the clear reservation-creating text of the Treaty, the district court misconstrued every material provision in the Treaty contrary to its text and long-settled Supreme Court precedent. It dismissed *volumes* of historical evidence reinforcing the reservation status of the Band's land based on that same error. And it ultimately crashed through the guardrails established by the Supreme Court for the proper interpretation of Indian treaties to arrive at a construction of the Treaty espoused in the 19th century to justify the unlawful overrunning of the 1855 reservations by non-Indians. This Court has already rejected that interpretation as a grave misreading of the Treaty's text and purpose, *see Grand Traverse Band of Ottawa & Chippewa Indians v. Office of U.S. Att'y for W. Dist. of Mich.*, 369 F.3d 960, 961-62 & n.2 (6th Cir. 2004), and Congress has disavowed it as "arbitrary," H.R. Rep. No. 103-621 (1994). The Band respectfully urges reversal of a decision so completely unmoored from both text and history.[2]

[2] The Band's trial counsel reasonably sought to develop a full trial record on the establishment and disestablishment questions prior to any appeals. They

STATEMENT OF JURISDICTION

The district court's jurisdiction arose under 28 U.S.C. § 1331. The court entered final judgment on August 15, 2019. Judgment, RE628, PageID#12237. A notice of appeal was timely filed on September 13, 2019. Notice, RE629, PageID#12238. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Whether the district court erred in ruling that the 1855 Treaty "cannot plausibly be read to have created an Indian reservation" for the Band.

STATEMENT OF THE CASE

I. Factual Background

A. Federal Reservation Policy in the 1850s

In the early 19th century, spurred by land hunger and the espoused

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therefore conservatively limited their summary judgment motion to elimination of unsupported defenses. However, if this Court agrees that the Treaty text and surrounding history clearly evidence that the Treaty established a reservation for the Band, the importance of sound guidance on remand and judicial economy would both favor this Court directing the district court to enter summary judgment for the Band on that issue. *See* 28 U.S.C. § 2106 (circuit court may "remand the cause and direct the entry of such appropriate judgment ... as may be just under the circumstances"); *Trustees of Mich. Laborers' Health Care Fund v. Gibbons*, 209 F.3d 587, 594-95 & n.5 (6th Cir. 2000); *Garner v. Memphis Police Dep't*, 8 F.3d 358, 366 (6th Cir. 1993) (citing *Weber v. Dell*, 804 F.2d 796, 798 n.2 (2d Cir. 1986) ("This court has the power in appropriate circumstances to reverse a district court's grant of summary judgment and to grant summary judgment for the nonmoving party.")).

incapacity of Indians to adapt to non-Indian culture, federal policy centered on "removing" tribes from their eastern homelands to vast tracts of unpopulated lands in the west. 1855 Indian Affairs Report, RE558-50, PageID#7548. *See also Keweenaw Bay Indian Cmty. v. Naftaly*, 452 F.3d 514, 518 (6th Cir. 2006) (discussing same). By midcentury, however, "tribes were engulfed in the stream of western migration," and Commissioner of Indian Affairs George Manypenny "predicted a crisis in the removal policy and urged its abandonment." Cohen's Handbook of Federal Indian Law § 1.03[6][a], at 60 (Nell Jessup Newton ed., 2012). *See also Naftaly*, 452 F.3d at 518. Tribes, he explained, would be "trampled under the foot of rapidly advancing civilization, unless our great nation shall ... designate ... reservations of land ... for permanent homes for, and provide the means to colonize, them thereon." 1856 Indian Affairs Report, RE558-52, PageID#7609.

> Hand in hand with protection went another goal, that
>
> of transformation: to induce the Indians all to become cultivators of the soil .... Agriculture, domestic and mechanical arts, English education, Christianity, and individual property (land allotted in severalty) were the elements of the civilization program that was to be the future of the Indians.

Francis Paul Prucha, The Great Father 317 (1984). "The reservations were, in effect, envisioned as schools for civilization, in which Indians under the control of the [federal Indian] agent would be groomed for assimilation." Cohen §

1.03[6][a], at 60-61.

To facilitate this "civilization program," the new reservation policy departed from prior policy in several key respects.

First, reservations would be "permanent." 1855 Indian Affairs Report, RE558-50, PageID#7548. For, as Manypenny explained, "how could the Indian become a cultivator of the soil without a permanent and fixed home and habitation?" *Id*. *See also Naftaly*, 452 F.3d at 518 ("The new policy of the government was to provide 'permanent homes' on the reservations that were set aside for the Indians[.]" (quotation marks omitted)).

Second, reservation lands would be allotted to individuals. As Manypenny explained, "excessive quantities of land held in common" was among the "evils" of prior policy, and "[w]e can hope for no" improvement "in their condition ... until they shall have been concentrated upon reservations ... [with] the division of the land among them in severalty[.]" 1855 Indian Affairs Report, RE558-50, PageID#7537; Cohen § 1.03[6][b], at 61 (allotment was "[a]n important complement to the reservation policy" because it would "instill in Indians the idea of individual property and, through it, civilization").

Third, "the payment … of excessive annuities" would end. *Naftaly*, 452 F.3d at 518-19 (quotation marks omitted). As Manypenny explained, monies owed tribes would instead be invested in the civilization program: "agricultural

implements, and assistance, stock animals" and "mental, moral, and industrial education and training." 1853 Indian Affairs Report, RE558-45, PageID#7432.

B. The Reservation Policy in Michigan

In 1836, the United States and the tribes that would later consummate the 1855 Treaty entered a treaty by which the tribes ceded approximately one-third of present-day Michigan to the United States in exchange for small reservations for each tribe. *See* 1836 Treaty, RE558-02. The Senate unilaterally amended the Treaty soon thereafter to limit the tribes' reservations to "five years ... and no longer," *id.* PageID#6831, after which the United States could "remove them" to the west, *id.* PageID#6828.

The Band and the other tribes thereafter lived in chronic fear of removal, which they "strenuously opposed," Schoolcraft Letter, RE600-28, PageID#10701. *See also* June Letter, RE600-31, Page ID#10716 (discussing same). The tribes' impermanent land tenure also concerned federal officials, who warned in 1843 that "preemptioners will take possession of all their best situations" and thus questioned "how far should they be encouraged in erecting good and permanent buildings?" Rice Letter, RE600-30, PageID#10711.

By midcentury, rumors of removal persisted in Michigan and the tribes were still "dreading" it. 1851 Indian Affairs Report, RE558-42, PageID#7381. Federal officials sought "to quiet their fears ... and assure them that the Government ha[d]

no intention to remove them." *Id*. For in Michigan, as elsewhere, the policy had turned toward permanent reservations and "civilization." As the district court recognized, Henry Gilbert, head of the Michigan Indian Agency, "lamented" that many tribes "had no permanent home" in Michigan and "proposed establishing reservations" for them "to solve the problem." Opinion, RE627, PageID#12185. He noted the need for "improvement in civilization" among them. 1853 Indian Affairs Report, RE558-47, PageID#7478. *See also* 1853 Indian Affairs Report, RE558-45, PageID#7442 (Indians in Michigan should be "brought together in situations where educational enterprise and missionary labor would be brought to bear upon larger numbers[.]").

Allotment would be central to this endeavor. Manypenny "believed that the civilization policy could be achieved through the reservation system," *Naftaly*, 452 F.3d at 518 (quotation marks omitted), and that under it, Indians would be "concentrated upon reservations ... [with] the division of the land among them in severalty," 1855 Indian Affairs Report, RE558-50, PageID#7537. In early 1855, he recommended securing

> permanent homes for the Ottawas and Chippewas, either on the [1836] reservations or on other lands in Michigan belonging to the Government, and at the same time, to substitute … for their claim to lands in common, titles in fee to individuals for separate tracts.

Manypenny Letter (1855), RE559-43, PageID#8376. The Michigan legislature concurred in the need for "permanent homes, and an individual title to the soil ....

To this end it is necessary to obtain reservations for them[.]" 1855 House Report, RE600-49, PageID##10778, 10780.

C. Negotiation of the 1855 Treaty

Manypenny and Gilbert convened with the tribes in Detroit in July 1855. Their intent to negotiate a treaty embodying their new reservation policy is evident in the record of those negotiations. For example, an Indian headman acknowledged the government's desire that the Indians "collect in communities," but stated that some Indians instead preferred "that each may locate for himself, where he pleases." Council Proceedings, RE558-09, PageID##7068-7069. Gilbert explained that, because the government would be providing "for schools, agricultural and other useful purposes .... it will not permit you as individuals to locate promiscuously here and there a tract as your personal wishes may direct. It desires and will insist on your collecting into communities." *Id.* PageID#7061. He added that "it is the object of the government ... to induce you to ... procure a livelihood by agriculture ... [and] in larger numbers ... you will have greater advantages[.]" *Id.* PageID#7067.

The negotiations further reflected the reservation policy's focus on investment in the civilization program in lieu of excessive annuities. The tribes were owed $538,000 under the 1836 Treaty. *See* Manypenny/Gilbert Report, RE559-45, PageID#8411. Under the new Treaty, Gilbert explained, they would

get "the least due" in money and instead "it will be our endeavor to set aside an amount for schools, agricultural and other useful purposes." Council Proceedings, RE558-09, PageID#7061.

Moreover, as allotment was "[a]n important complement to the reservation policy," Cohen § 1.03[6][b], at 61, the lands would be allotted, Council Proceedings, RE558-09, PageID#7073, and the government would "give each individual ... such a title as that he can distinguish what is his [own]," *id.* PageID#7061.

Finally, because Indians were to be "groomed for assimilation" on reservations, Cohen § 1.03[6][a], at 61, Manypenny explained the necessity for government supervision. It was "the object" of the government

> to have you civilized .... We think you should be restricted in the full care of this land and money for a few years .... The government is willing to take care of your property; but if you improve for the next twenty years as fast as you have during the last five ... you can take care of it as well for yourselves[.]

Council Proceedings, RE558-09, PageID#7075. To this end, the Indians would receive "patents" but "[t]here will be some restriction on the right of selling" for as long as "seems right and proper[.]" *Id.* PageID##7061, 7070. The Indians concurred: "We wish not only a rope to our lands but a forked rope … so that you can hold on to it." *Id.* PageID#7083.

D. The 1855 Treaty

Article 1 of the 1855 Treaty established reservations for the various tribes and set the terms on which the lands would be allotted. It first identified the boundaries of each tribe's reservation using township and range legal descriptions, with the two clauses setting aside the Little Traverse Reservation as follows:

> The United States will withdraw from sale for the benefit of said Indians as hereinafter provided, all the unsold public lands within the State of Michigan embraced in the following descriptions to wit:
>
> ....
>
> *Third*. For the Beaver Island band,—High Island, and Garden Island in Lake Michigan, [legal descriptions].
>
> *Fourth*. For the Cross Village, Middle Village, L'Arbrechroche and Bear Creek bands ... [legal descriptions.]

1855 Treaty, RE558-06, PageID#6893. The bands referred to in these clauses are the Band's legal predecessors. *See* § 4(b)(2)(A), 108 Stat. at 2157-58 (referring to "the reservations for the Little Traverse Bay Bands as set out in Article I, paragraphs 'third' and 'fourth' of the Treaty of 1855"). The "Fourth" clause set aside the main body of the Little Traverse Reservation.

Article 1 then set forth how "the aforesaid reservations," 1855 Treaty, RE558-06, PageID#6895, would be allotted. "The United States will give to each ... head of a family, 80 acres of land" and to single adults "40 acres of land[.]" *Id.* PageID#6894. Each could select "any land within the tract *reserved herein* for the band to which he may belong .... [a]t any time within five years," and the United

States would thereafter "hold the same in trust" with restrictions on alienation for ten years, after which "such restriction ... shall be withdrawn[.]" *Id.* PageID##6894-6895 (emphasis added). However, the President retained discretion to continue the restrictions "so long as he may deem necessary and proper." *Id.* PageID#6895.

Article 1 further provided that "[a]ll the land" not selected in the five-year allotment period would, "for the further term of five years," be subject to entry and purchase "by Indians only[.]" *Id.* At the end of that second five-year period the "lands remaining unappropriated by or unsold to the Indians," if any, "may be sold" by the United States. *Id.* And the United States reserved the right to appropriate "land within the aforesaid reservations for … churches, school-houses, or for other educational purposes[.]" *Id.*

Article 2 addressed monies owed the tribes. It devoted monies to "blacksmith shops"; and "agricultural implements and carpenters' tools, household furniture and building materials, cattle, labor, and all such articles as may be necessary ... for them in removing to the homes herein provided and getting permanently settled thereon." *Id.*

Manypenny and Gilbert executed the Treaty for the United States. Fifty-four chiefs and headmen, including eight from "Little Traverse Bands," executed it for the various tribes, each with "his x mark." *Id.* Page ID##6896-6897. With

some boundary adjustments, the Treaty was ratified by the Senate on April 15, 1856, and signed into law by President Pierce on September 10, 1856. *Id.* PageID##6898, 6901.

E. Settling the Reservations

Federal agents believed that "the reservation system" with the "allotment thereon to each Indian in severalty" was "the true way to civilize" the Indians in Michigan. 1867 Indian Affairs Report, RE558-67, PageID#7723. They expected the 1855 Treaty to "lead them to ... the cultivation of the soil." 1855 Indian Affairs Report, RE558-50, PageID#7558. In 1856, a school-house was "erected at Little Traverse," and a blacksmith shop for the Beaver Island Bands was erected on "the reservation selected by these Indians." 1856 Indian Affairs Report, RE558-53, PageID#7614.

A.M. Fitch, who replaced Gilbert as Michigan Agent in 1857, reported that he visited "Sault Ste. Marie, Mackinac, Little Traverse, and Grand Traverse ... in every case upon a government reservation." 1858 Indian Affairs Report, RE558-55, PageID##7631-7632. He noted that "colonizing them ... upon ample reservations," with allotments in severalty, was "essential to their elevation[.]" 1857 Indian Affairs Report, RE558-54, PageID#7616.

By 1859, "most of the reservations [we]re occupied in part by the Indians for whom they were designed," and federal officials continued to "encourage the

industrious in cultivating the soil" by providing "such things as are ... provided for them in the treaty[.]" 1859 Indian Affairs Report, RE558-56, PageID##7642-7644. But agents came to view the larger reservations, including the Band's, as superior. In 1863, Agent Leach (who had replaced Fitch) wrote to the Secretary of the Interior regarding the 1855 Treaty reservations:

> The largest of these is adjoining Little Traverse bay .... and on it are located some twelve hundred Indians.
>
> Quite extensive improvements have been made on this reservation. Some of the most ... thriving Indians in the State are located here. This reservation contains a large amount of good farming land yet unoccupied, and on it might be concentrated several bands of Indians from the smaller reservations .... There are six schools on this reservation, and four missionaries[.]

1863 Indian Affairs Report, RE558-62, PageID#7683. *See also* 1867 Indian Affairs Report, RE558-67, PageID#7725 (recommending that tribes from smaller reservations "settle on the Little Traverse reservation where there is plenty of land and room for them"); Leach Letter, RE559-68, PageID#8621 (same).

On April 12, 1864, Commissioner of Indian Affairs Dole wrote to the Secretary of the Interior, requesting withdrawal of certain townships for "enlargement of the Little Traverse Reservation, with a view to the removal of the Indians from" the smaller reservations "and locating them all upon the Little Traverse Reservation[.]" Executive Order, RE559-41, PageID#8355. President Lincoln ordered that "the lands be withheld from sale as recommended," *id*.

PageID#8356, but the plan ultimately was not implemented.

F. Encroachment

Non-Indians coveted the reservations. Manypenny noted in 1856 that "speculators" on lands set aside by the 1855 Treaty could "ruin the reservation ... for the purposes for which it was designed." Manypenny Letter (1856), RE600-68, PageID#10840. That same year, Gilbert was ordered to investigate encroachments by whites "within the limits of lands reserved" under the 1855 Treaty. Mix Letter, RE600-79, PageID#10868. In 1857, a federal official reported from Grand Traverse about "men who are plundering timber on this reserve[.]" Smith Letter, RE600-80, PageID#10871. At "this reservation," Leach warned of Grand Traverse, "white settlers ... are pressing upon its borders and longing to possess it." 1863 Indian Affairs Report, RE558-62, PageID#7683. In 1865, Agent Smith (Leach's successor) reported that "the whites [were] now flocking .... [to] where these reservations are located" and that "it will be difficult ... to prevent extensive trespasses." 1865 Indian Affairs Report, RE558-65, PageID#7714. Indeed, on "the lands reserved and set apart" by the 1855 Treaty, "[t]respasses are constantly increasing[.]" 1866 Indian Affairs Report, RE558-66, PageID#7718. Whites had "settled" on them, despite that "[t]hese reservations were set apart for the sole benefit of the Indians." 1867 Indian Affairs Report, RE558-67, PageID##7724-7725.

G. The 1870s Legislation

Pressure to ratify white presence on the reservations intensified. Thomas Ferry, congressman from Michigan, wrote to the Secretary of the Interior in 1868 requesting that lands unselected by the Indians in the "Indian reservations in ... Michigan made" under the "Treaty of July 31st 1855" be opened for sale. Ferry Letter, RE559-60, PageID#8528. The Grand Rapids Daily Eagle endorsed Ferry's proposal, as "[t]hose reservations are ... barriers to [non-Indian] settlement[.]" Daily Eagle Article, RE600-100, PageID#10932. In 1870, Ferry introduced a bill to open those lands to sale. He noted in congressional debate that "reservations ... were set apart for these Indians ... in the treaty of 1855." Cong. Globe, 41st Cong., 2d Sess. 5006 (1870). But since then, "many innocent settlers ... have gone on to ... these reservations" and they "should not be ousted." *Id*.

On June 10, 1872, Congress enacted legislation authorizing the sale of "lands remaining undisposed of in the reservation made … by the treaty of July thirty-first, [1855]." Act of June 10, 1872, § 1, 17 Stat. 381, 381. The Commissioner of the General Land Office described the statute as pertaining to "the lands embraced within the ... reservation ... under the Treaty of July 31, 1855." Drummond Circular, RE559-74, PageID#8659. The Commissioner of Indian Affairs likewise understood it to affect "the reservations provided for by the [1855] treaty[.]" Secretary Letter, RE559-76, PageID#8674. The House

Committee on the Public Lands stated that under the 1855 Treaty, "the Indians ... were to be allowed to select from the reservations lands for homesteads [*i.e.*, allotments]," and that the Act of 1872 addressed "the balance of said reserved lands[.]" 1874 House Report, RE559-07, PageID#7881. Congress amended the statute in 1875, referring to "the lands reserved for Indian purposes under the treaty" of 1855. Act of Mar. 3, 1875, § 3, 18 Stat 516, 516.

H. Dispossession of the 1855 Reservations

With their lands thus opened to settlers, the Odawa and Ojibwe, who had ceded one-third of the State of Michigan in exchange for their reservations, were subjected to the worst forms of human avarice and lawlessness. The federal government allowed this to happen because in 1872, as this Court has held, Secretary of the Interior Columbus Delano "misread the 1855 Treaty" as providing that after 1872 "the federal government no longer had any trust obligations to the tribes[.]" *Grand Traverse Band*, 369 F.3d at 961 & n.2. This unlawful federal withdrawal created space for "all-pervasive land frauds" on the 1855 reservations. H.R. Rep. No. 103-621. Agents reported on the "frauds, and robberies" to which the Indians on the Little Traverse Reservation "are almost daily subjected; from their white neighbors." Lee Letter (1876), RE560-09, PageID#8716. The cases of "extreme cruelty" they could "hardly begin to enumerate[.]" Lee Letter (1877), RE560-10, PageID#8721. They reported that the "[r]eservations ... set aside" by

the 1855 Treaty attracted a "class of sharks" that resorted to "every possible means," including violence and rampant fraud, "to dispossess the Indians of their lands and secure settlers of their own race on the same, and this ... they will be able ... to accomplish in a few years." Brooks Letter, RE560-12, PageID##8736-8738.

And that they did. "By the end of the 1800's, all that remained of the reservations were the treaty boundaries and isolated Ottawa/Odawa homesteads." H.R. Rep. No. 103-621. But while Band members were stripped of the lands intended to be their permanent homeland, the Band's reservation boundaries were never abrogated. In 1994, Congress recognized "the boundaries of the reservations for the Little Traverse Bay Bands as set out in Article I, paragraphs 'third' and 'fourth' of the Treaty of 1855," § 4(b)(2)(A), 108 Stat. at 2157-58, based on the finding that "[t]he historical record is clear ... that the 1855 treaty ... created what were intended to be *permanent reservations* for the tribes," S. Rep. No. 103-260, at 2 (emphasis added).

II. The Proceedings Below

The Band filed suit in the district court on August 21, 2015, against then-Governor Snyder. Complaint, RE01, PageID#1. It sought a declaration that the 1855 Treaty created a reservation for the Band that still exists today, and an injunction prohibiting the State from taking any actions with respect to the Band and its members inconsistent with the Reservation's status under federal law. *Id.*

PageID##17-18. On March 18, 2019, Governor Whitmer and intervening defendants moved for summary judgment on grounds that the 1855 Treaty did not create a reservation for the Band. State's Motion, RE581; Municipalities' Motion, RE567; Associations' Motion, RE579. The Governor and one intervenor further argued that if a reservation was created, it was either diminished or disestablished altogether. *See* RE581; RE579. On August 15, 2019, the district court granted all three motions on grounds that the 1855 Treaty "cannot plausibly be read to have created an Indian reservation" for the Band. Opinion, RE627, PageID#12230. The court therefore did not reach the disestablishment or diminishment issues. *Id*. This appeal followed.

SUMMARY OF THE ARGUMENT

In text, structure, and purpose, the 1855 Treaty meets every requirement for establishing a legally constituted Indian reservation. It set aside a defined tract of land for the Band, withdrew it from public sale, and specifically designated it for the use of the Band and its citizens. The law requires precisely this. *See Hagen*, 510 U.S. at 412; *Celestine*, 215 U.S. at 285; *Hitchcock*, 185 U.S. at 389-90; *Leavenworth*, 92 U.S. at 747.

The Treaty's historical context confirms what its text makes plain: the Treaty "created what were intended to be permanent reservations[.]" S. Rep. No. 103-260, at 2. The negotiations reflect the elements of the post-removal-era

federal policy of concentrating Indians on permanent reservations to "civilize" them through "[a]griculture, domestic and mechanical arts, English education, Christianity, and individual property (land allotted in severalty)," Prucha at 317, and the Treaty embodies this policy.

The Treaty's subsequent history likewise reinforces its text. Federal officials – from the highest levels of the federal government to agents in the field – consistently referred to and administered the Band's Treaty lands as a "reservation." *See*, *e.g.*, Wilson Letter, RE559-56, PageID#8507 ("By the 4th Secn. [*i.e.*, the Fourth clause] of Article 1st of Treaty of 31st July 1855 ... the following described lands were *reserved for said Indians*" (emphasis added)); Greenwood Letter, RE559-57, PageID#8512 ("under the ... treaty of July 31st 1855," the Band's Fourth clause lands "*were reserved for these Indians*" (emphasis added)); 1863 Indian Affairs Report, RE558-62, PageID#7683 (discussing the reservation "adjoining Little Traverse bay" and stating that "extensive improvements have been made on *this reservation*…. *This reservation* contains a large amount of good farming land .... There are six schools on *this reservation*" (emphases added)).

Congress as well, for more than a century, has regarded the Band's 1855 Treaty land as a reservation. *See* § 1, 17 Stat. at 381 (authorizing sale of "lands remaining undisposed of in the reservation made … by the treaty of July thirty-

first, [1855]"); § 3, 18 Stat at 516 (referring to "the lands reserved for Indian purposes under the treaty" of 1855); § 4(b)(2)(A), 108 Stat. at 2157-58 (acknowledging "the boundaries of the reservations for the Little Traverse Bay Bands as set out in … the Treaty of 1855").

The district court went astray largely because it viewed allotment as "inconsistent" with reservation status, Opinion, RE627, PageID#12229. To the contrary, allotment and reservation status are "completely consistent." *Mattz*, 412 U.S. at 497. This foundational error led the court to dismiss *all* of the contemporaneous references to the Band's lands as a "reservation" as mere mistakes, and to dismiss that same word in the Treaty as a colloquialism. And the court's conclusions regarding the inferences to be drawn from the Treaty's land provisions flatly contravene long-settled Supreme Court reservation precedents, from *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351 (1962), to *Mattz*, 412 U.S. 481 (1973), to *Solem v. Bartlett*, 465 U.S. 463 (1984), to *Nebraska v. Parker*, 136 S. Ct. 1072 (2016). All of this was undertaken in apparent disregard of the Supreme Court's stated rules for treaty interpretation set forth as recently as last Term in *Herrera v. Wyoming*, 139 S. Ct. 1686, 1701 (2019).

Unbound by the Treaty's text and governing law, the district court ultimately resurrected a 19th-century interpretation of the Treaty that has been expressly rejected by both this Court and by Congress. It should be rejected again here.

ARGUMENT

I. Standard of Review

A district court's grant of summary judgment is reviewed de novo. *Pittman v. Experian Info. Solutions, Inc.*, 901 F.3d 619, 627 (6th Cir. 2018). Summary judgment is proper where there is no genuine dispute of material fact and the movant is entitled to judgment as a matter of law. *Id*. Courts view the facts and draw all reasonable inferences in favor of the non-movant. *Id*. at 628.

II. Principles of Treaty Interpretation

"Treaty analysis begins with the text" and treaties "are construed as they would naturally be understood by the Indians." *Herrera*, 139 S. Ct. at 1701 (quotation marks omitted). "'[A]ny ambiguities are to be resolved in their favor[.]'" *Naftaly*, 452 F.3d at 524 (quoting *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 200 (1999)). Beyond the text, the historical context and the treaty negotiations are "central to the interpretation of treaties." *Mille Lacs Band*, 526 U.S. at 202. *See Herrera*, 139 S. Ct. at 1702 (looking to "the treaty's text and the historical record").

III. The 1855 Treaty established a reservation for the Band.

A. By its plain text, the 1855 Treaty created a reservation for the Band.

It is well settled that "'reservation' .... is used in the land law to describe any body of land ... reserved from sale for any purpose," including "an Indian reservation[.]" *Celestine*, 215 U.S. at 285. Thus,

> [f]rom an early period … it [was] the practice of the President to order, from time to time, ... parcels of land belonging to the United States to be reserved from sale and set apart for public uses. This power of reservation was exercised for various purposes, including Indian settlement[.]

Hagen, 510 U.S. at 412 (quotation marks and citation omitted) (second ellipses in original). *See also*, *e.g.*, *Hitchcock*, 185 U.S. at 389-90 (discussing "the accepted meaning" of "reservation" and stating that "[i]t is enough that from what has been done there results a certain defined tract appropriated to certain purposes"); *Leavenworth*, 92 U.S. at 747 ("Every tract set apart for special uses is reserved to the government .... whether ... for Indian or for other purposes."); *Shoshone-Bannock Tribes v. Reno*, 56 F.3d 1476, 1479 (D.C. Cir. 1995) ("The United States creates reservations by withdrawing land from the public domain and reserving the land for a particular purpose, such as an Indian reservation[.]").

An Indian reservation, then, consists of: (1) a specific body of land, (2) withdrawn from sale by the federal government, and (3) appropriated for Indian purposes. As the Tenth Circuit has explained:

> A reservation ... not only withdraws the land from the operation of the public land laws, but *also* dedicates the land to a particular public use.... Thus, a reservation necessarily includes a withdrawal; but it also goes a step further, effecting a dedication of the land "to specific public uses." *See also* 63C Am. Jur. 2d *Public Lands* § 31 (2005) ("....'Reserved' lands have been expressly withdrawn from the public domain by statute ... or treaty and dedicated as ... Native American land or for some other specific federal use.")[.]

S. Utah Wilderness Alliance v. BLM, 425 F.3d 735, 784 (10th Cir. 2005) (emphasis added).

Under the plain text of the Treaty, the lands set aside for the Band squarely meet these criteria. First, the Treaty identified a defined body of land. *See* 1855 Treaty, RE558-06, PageID#6893 (setting forth township and range legal descriptions). As this Court long ago recognized, the 1855 Treaty "specifically designated the public lands which should be set apart to satisfy the terms of the treaty[.]" *United States v. Grand Rapids & I. R. Co*., 165 F. 297, 301 (6th Cir. 1908).

Second, the Treaty withheld the lands from sale. *See* 1855 Treaty, RE558-06, PageID#6893 ("The United States will withdraw from sale ... lands ... embraced in the following descriptions[.]").

Third, the Treaty designated the lands for the specific "use[] .... [of] Indian settlement," *Hagen*, 510 U.S. at 412 (quotation marks and citation omitted). Thus, Articles 1 and 2 provided that "[t]he United States will withdraw from sale *for the benefit of said Indians* ... lands ... embraced in the following descriptions," and

provided the means to get them "permanently settled thereon." 1855 Treaty, RE558-06, PageID##6893, 6895 (emphasis added).

The Treaty, then, was an exercise of the "power of reservation," *Hagen*, 510 U.S. at 412, on its face. Fittingly, it expressly designates the lands set apart for the treating tribes as "the aforesaid reservations." 1855 Treaty, RE558-06, PageID#6895. This explicit reference cannot be dismissed as a slip of the pen. It instead reflects the legal status of the land being secured to the Band.

If more is needed, the text continues to supply it. As noted, "[a]llotment ... was a necessary corollary of the ... permanent reservations[.]" Prucha at 327. Accordingly, immediately after setting apart "the aforesaid reservations" for each tribe, Article 1 entitled individual tribal citizens to select allotments "within the tract reserved herein for the band to which he may belong[.]" 1855 Treaty, RE558-06, PageID#6894.

And there is still more. Article 1 also entitled the United States to appropriate "land within the aforesaid reservations for the location of churches, school-houses, or for other educational purposes[.]" *Id*. PageID#6895. Such provisions are strong textual indicia of reservation status. *See Solem*, 465 U.S. at 474 ("It is difficult to imagine why Congress would have reserved lands for [schools and religious] purposes if it did not anticipate that the [affected lands] would remain part of the reservation." (quotation marks omitted)).

The Treaty text evidences the "civilization" goals of the reservation policy elsewhere as well. Article 2 provides that a portion of the tribes' annuities would be devoted to "blacksmith shops" and "agricultural implements and carpenters' tools, household furniture and building materials, cattle, labor[.]" 1855 Treaty, RE558-06, PageID#6895. These textual provisions reflect the central purpose for which reservations were being created in the 1850s: to encourage Indians to emulate white farmers. And permanence was key. Thus, the Treaty committed the government to assist the tribes "in removing to the homes herein provided and getting *permanently* settled thereon." *Id.* (emphasis added). *See Naftaly*, 452 F.3d at 518 ("The new policy ... was to provide 'permanent homes' on the reservations" (quotation marks omitted)). In sum, the text of the 1855 Treaty establishes overwhelmingly that it created a reservation for the Band.

B. The historical context confirms that the 1855 Treaty established a reservation for the Band.

The Treaty's historical context confirms the plain meaning of its text. As detailed above, the Odawa and Ojibwe in Michigan were seeking refuge from the specter of removal just as Manypenny was developing his permanent reservation policy, under which "reservations were ... envisioned as schools for civilization[.]" Cohen § 1.03[6][a], at 60-61. *See supra* at 5-11. Henry Gilbert thus recommended that the tribes be "brought together in situations where educational enterprise and missionary labor would be brought to bear upon" them. 1853 Indian Affairs

Report, RE558-45, PageID#7442. He noted that tribes "had no permanent home" in Michigan and "proposed establishing reservations ... to solve the problem." Opinion, RE627, PageID#12185. The Michigan legislature likewise recommended the tribes be allowed "permanent homes, and an individual title to the soil .... To this end it is necessary to obtain reservations for them[.]" 1855 House Report, RE600-49, PageID##10778, 10780. Manypenny "believed that the civilization policy could be achieved through the reservation system." *Naftaly*, 452 F.3d at 518 (quotation marks omitted). He accordingly sought through the new treaty "to secure permanent homes for the Ottawas and Chippewas" with "titles in fee to individuals for separate tracts." Manypenny Letter (1855), RE559-43, PageID#8376. This would "lead them to ... the cultivation of the soil," 1855 Indian Affairs Report, RE558-50, PageID#7558, and fulfill "the object" of the government "to have [them] civilized," Council Proceedings, RE558-09, PageID#7075.

C. The Treaty's subsequent history reinforces that it created a reservation for the Band.

As detailed above, those involved in implementing the 1855 Treaty well understood it to have created a reservation for the Band. *See supra* at 14-19. Officials at the highest level of the federal government responsible for land and Indian policy consistently referred to the 1855 Treaty lands as reservations in the years after the Treaty took effect. As but a few examples among many, in 1860,

Commissioner of the General Land Office John Wilson, discussing the Little Traverse reservation in particular, stated that under the 1855 Treaty, those "lands were *reserved for said Indians*[.]" Wilson Letter, RE559-56, PageID#8507 (emphasis added). Commissioner of Indian Affairs A. B. Greenwood likewise understood that the Band's 1855 Treaty lands "*were reserved for these Indians*[.]" Greenwood Letter, RE559-57, PageID#8512 (emphasis added). And as noted, agents in the 1860s recommended that tribes from smaller reservations "settle on the Little Traverse reservation where there is plenty of land," 1867 Indian Affairs Report, RE558-67, PageID#7725, with President Lincoln withdrawing additional lands for the contemplated "enlargement of the Little Traverse Reservation," Executive Order, RE559-41, PageID#8355.

Thereafter, on June 10, 1872, in its first legislative act pertaining to the lands set aside by the 1855 Treaty, Congress opened some of those lands to settlement, and specifically referred to them in that statute as lands within "the reservation made ... by the treaty of ... [1855]." § 1, 17 Stat. at 381. The Commissioner of the General Land Office understood that statute as pertaining to "the lands embraced within the ... reservation ... under the Treaty of July 31, 1855." Drummond Circular, RE559-74, PageID#8659. The Commissioner of Indian Affairs understood it as affecting lands "within the reservations provided for by the [1855] treaty[.]" Secretary Letter, RE559-76, PageID#8674. Congress

amended the statute in 1875, describing those lands as "the lands reserved for Indian purposes under the [1855] treaty[.]" § 3, 18 Stat. at 516.

More than a century later, Congress confirmed this same understanding in crystal-clear terms with respect to the Band's reservation. *See* § 4(b)(2)(A), 108 Stat. at 2157-58 (acknowledging "the boundaries of the reservations for the Little Traverse Bay Bands as set out in Article I, paragraphs 'third' and 'fourth' of the Treaty of 1855"). In its Report on that legislation, the Senate Committee on Indian Affairs stated what the historical sources canvassed above make plain: "The historical record is clear that the Treaty Commissioners and the Indian tribal governmental representatives understood that the 1855 treaty ... created what were intended to be permanent reservations for the tribes[.]" S. Rep. No. 103-260, at 2.

IV. The district court misinterpreted the 1855 Treaty.

In the face of all this, the district court found that the Treaty "cannot plausibly be read to have created an Indian reservation[.]" Opinion, RE627, PageID#12230. Its conclusion was the product of a series of related errors, most of them stemming from the district court's erroneous assumption about the incompatibility of reservations and allotment.

A. The district court erred in assuming allotment in severalty and reservation status are mutually exclusive concepts.

The district court's assumption that allotment and reservation status are antithetical pervades its opinion. According to the district court, the Treaty's

provision for "small tracts, in severalty" "*conclusively refute*[*s*] any notion that the lands were to be considered an Indian reservation." *Id.* PageID#12228 (quotation marks omitted) (emphasis added). Thus, the Band's view that "the 1855 Treaty simultaneously created Indian reservations for the Bands while also allowing for allotments.... cannot be sustained because" allotment is "inconsistent with the establishment of an Indian reservation." *Id.* PageID##12228-12229. And while the district court conceded that Agent Gilbert "proposed establishing reservations for ... the Indians," *Id*. PageID#12185, it concluded that "Manypenny clearly departed from Gilbert when it came to the creation of a reservation because" his plan involved "giving them individual allotments," *id*. PageID#12206.

Not one of these conclusions – which form the spine of the district court's decision – is accompanied by citation to any legal authority. And none exists. To the contrary, the Supreme Court has explained that allotment is "completely consistent" with reservation status and does not "even suggest" a contrary conclusion. *Mattz*, 412 U.S. at 497. Indeed, the 1854 Manypenny treaty at issue in *Naftaly* authorized the President to allot "to each head of a family ... eighty acres of land[.]" Treaty with the Chippewa, art. 3, 10 Stat. 1109 (1854). This Court, in a statement irreconcilable with the district court's view of allotment, described that treaty as "set[ting] aside permanent reservations[.]" *Naftaly*, 452 F.3d at 519. Likewise, Manypenny's 1854 Treaty with the Omaha allowed for "the land hereby

reserved ... to be surveyed into lots," Treaty with the Omaha, 10 Stat. 1043 (1854), and the Supreme Court unanimously held that land – before *and after* allotment – to be a permanent reservation. *Parker*, 136 S. Ct. 1072. *See also Celestine*, 215 U.S. at 285 (upholding reservation status of land allotted under an 1855 treaty, which provided for "the lands hereby reserved ... to be surveyed into lots," 12 Stat. 927 (1855)).

Allotment in fact represented an overriding federal policy "to continue the reservation system[.]" *Mattz*, 412 U.S. at 496. The whole point of reservations beginning in the 1850s was to prepare the Indians to adopt the ways of the white farmers by emulating their use, ownership, and occupation of land. Allotment was thus "a *necessary corollary* of the ... permanent reservations[.]" Prucha at 327 (emphasis added). *See also*, *e.g.*, Cohen § 1.03[6][b], at 61 (allotment was "[a]n important complement to the reservation policy").

In sum, the district court's conclusion that the Treaty "cannot plausibly be read to have created an Indian reservation," Opinion, RE627, PageID#12230, rests on a demonstrably false legal premise. As discussed in the following sections, that seminal error led it to misinterpret every material provision of the Treaty.

B. The district court misinterpreted the Treaty's use of "reservation."

As noted, the Treaty explicitly refers to the lands set aside for the Band as "reserved" and as a "reservation[]." With the latter reference, the United States

retained the right to appropriate for churches and schools "any tract or tracts of land within the aforesaid reservations[.]" 1855 Treaty, RE558-06, PageID#6895. The district court, however, concluded that "reservations" here does not mean "reservations." The term was instead inserted

> to *avoid* creating an ambiguity that would be created if the text read: "Nothing contained herein shall be ... construed ... to prevent the appropriation ... by the United States, of any tract of land within the *aforesaid tracts*."
>
> Under such a reading, "tract" would mean both the small selection land appropriated by the United States for a church or schoolhouse *and* the larger section of land withdrawn from public sale .... To avoid such an ambiguity, the treaty drafters inserted the word "aforesaid reservations" to refer back to the land ... within the numbered paragraphs that would be withdrawn from sale.

Opinion, RE627, PageID#12223 (first three ellipses in original).

The district court went badly astray with this theorizing. First, it ignored the fundamental principle of textual analysis: that drafters intend text to "mean[] … what it says[.]" *Conn. Nat. Bank v. Germain*, 503 U.S. 249, 253-54 (1992). The court instead speculated that the drafters *created* an ambiguity – *i.e.*, using the word "reservations" in an Indian land treaty when they meant something else – in order to *avoid* an ambiguity. That makes no sense. By contrast, if the term "reservations" is given its plain meaning, there is no ambiguity *at all* in the government's right to appropriate for churches or schools "any tract or tracts of land within the aforesaid reservations." It makes perfect sense.

And if the parties truly did not understand the Treaty to have created reservations, they had endless options besides "reservations" to avoid the district court's purported ambiguity – *e.g.*, "any tracts of land within the aforesaid boundaries," or "any land within the aforesaid tracts," and so on. The only fair conclusion is that they used "reservations" because they meant "reservations." The district court – confined by its erroneous assumption about allotment – *strained* to read the word "reservations" out of the Treaty. *See Herrera*, 139 S. Ct. at 1701 ("Treaty analysis begins with the text").

Second, the district court's approach violates settled rules of treaty interpretation. For even had its analysis made grammatical sense, there is no basis to suggest that the Indian signatories – each of whom signed the 1855 Treaty with "his x mark" – would have understood a nuance of English grammar so intricate *and latent* that it took the district court several paragraphs to explain. As Justice Gorsuch recently admonished in a case involving another 1855 treaty, "the U.S. negotiators wrote the treaty in English – a language that the [Indians] couldn't read or write." *Wash. State Dep't of Licensing v. Cougar Den, Inc.*, 139 S. Ct. 1000, 1016 (2019) (Gorsuch, J., concurring). "Our job," then, "is to interpret the treaty as the [Indians] originally understood it in 1855 – not in light of new lawyerly glosses conjured up for litigation ... more than 150 years after the fact." *Id.* at 1019. *See also*, *e.g.*, *Herrera*, 139 S. Ct. at 1701 (treaties "are construed as they

would naturally be understood by the Indians" (quotation marks omitted)); *Naftaly*, 452 F.3d at 523-24 (same).

The district court violated this fundamental edict. Its approach to treaty interpretation was simply not permissible under well-established precedent, whether at summary judgment or any other stage of the proceedings.

C. The district court misinterpreted the Treaty's restrictions on alienation.

According to the district court, "the temporary restrictions on alienation are only consistent with individual allotments, and not Indian reservation." Opinion, RE627, PageID#12224. Once again, no support exists for this proposition. The General Allotment Act, under which more than a hundred reservations were allotted, Cohen § 16.03[2][b], at 1073, authorized allotments with temporary restrictions on alienation. General Allotment Act, § 5, 24 Stat. 388, 389 (1887). Those provisions were "completely consistent" with reservation status. *Mattz*, 412 U.S. at 496-97. The 1854 Manypenny treaty at issue in *Naftaly* gave the President discretion to place on allotments "restrictions of the power of alienation," art. 3, 10 Stat. 1109, including the "power to remove such restrictions," 452 F.3d at 520. Yet this Court well understood that treaty as having established "permanent reservations[.]" *Id*. at 519. The treaties at issue in *Parker* and *Celestine* also provided for allotments with temporary restraints on alienation, 10 Stat. 1043 (art. 6); 12 Stat. 927 (art. VII), and unanimous Supreme Courts held them to have

created reservations, *Parker*, 136 S. Ct. at 1077; *Celestine*, 215 U.S. at 286. The district court's opinion is again a lonely outlier in its conclusory assertions.

D. The district court misinterpreted the Treaty's "by Indians only" purchase provision.

The Treaty provided that the lands remaining unselected for allotments would be subject to purchase "in the usual manner and at the same rate per acre as other adjacent public lands are then held, by Indians only[.]" 1855 Treaty, RE558-06, PageID#6895. The district court found this provision incompatible with reservation status for two reasons, both erroneous. First, if the unselected lands could be

> sold "in the usual manner and at the same rate ..." as other public lands, then the land had *always remained in the public domain and had never been set apart for the Tribe to use a reservation*.

Opinion, RE627, PageID##12224-12225 (ellipses in original) (emphasis added).

This reasoning cannot be squared with the text. The Treaty explicitly "withdr[e]w from sale" – *i.e.*, it separated from the public domain – "*all* the unsold public lands ... embraced in the following descriptions[.]" 1855 Treaty, RE558-06, PageID#6893 (emphasis added). This included the land referenced by the district court. Moreover, the cited provision applied to entry and purchase "*by Indians only*" – a limitation in no way characteristic of the public domain. Moreover, if those unselected lands had "always remained in the public domain," Congress would not have needed to enact special legislation in the 1870s to open them to

settlement. Nor would it have specifically referred to them in that legislation as "lands *remaining ... in the reservation*," § 1, 17 Stat. at 381 (emphasis added), or "lands reserved for Indian purposes under the [1855] treaty," § 3, 18 Stat. at 516.

Second, the district court concluded that reservation status "cannot be reconciled" with the fact that the unappropriated lands "could be disposed of as *other* public land" because "[p]ublic land and Indian reservations are mutually exclusive[.]" Opinion, RE627, PageID#12226. The district court, then, dismissed as "colloquial[]," *id.* Page ID#12228, the Treaty's direct identification of the lands as "reserved" and as "reservations," while interpreting the adjective "other" as dispositive evidence of non-reservation status, *id.* Page ID#12226. This again exemplifies how not to construe a treaty, which is negotiated

> on the part of the United States ... by ... masters of a written language, understanding the ... *various technical estates known to their law* ... [while] the Indians ... are *wholly unfamiliar with all the forms of legal expression* ... ; and ... the treaty must therefore be construed, *not according to the technical meaning of its words to learned lawyers,* but in the sense in which they would naturally be understood by the Indians.

Jones v. Meehan, 175 U.S. 1, 11 (1899) (emphases added). *See Herrera*, 139 S. Ct. at 1701 (treaties "are construed as they would naturally be understood by the Indians" (quotation marks omitted)); *Naftaly*, 452 F.3d at 523-24 (same).

Even were its approach permissible, the district court's reasoning is again unsound. In *Solem*, for example, even a direct reference in a *statute* to lands as

"public domain" was "hardly dispositive" because opened reservation lands "could be conceived of as being in the 'public domain' inasmuch as they were available for settlement." 465 U.S. at 475 & n.17. In fact, Congress and courts often disregard the distinction invested with such significance by the district court. *See*, *e.g.*, Act of April 8, 1864, § 6, 13 Stat. 39, 41 (providing for surveying of "Indian or other reservations ... [under] the rules and regulations under which *other public lands* are surveyed" (emphasis added)); Act of Feb. 15, 1901, 31 Stat. 790, 790 ("An Act Relating to rights of way through certain ... reservations, and other public lands"); *Metro. Water Dist. v. United States*, 830 F.2d 139, 140 (9th Cir. 1987) (referring to "the boundary between the Fort Mojave Reservation and other public land"), *abrogated on unrelated grounds*, *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209 (2012); *Yankton Sioux v. United States*, 53 Ct. Cl. 67, 78 (1917) ("the reservation was surveyed with other public lands in the vicinity").

E. The district court misinterpreted the Treaty's provision regarding unselected lands.

Article 1 provides that "all lands remaining unappropriated by or unsold to the Indians ... may be sold or disposed of by the United States as in the case of all other public lands." 1855 Treaty, RE558-06, PageID#6895. According to the district court, the signatories could not have intended permanent reservations because they "always understood" that those lands "would eventually be disposed

of like other public lands." Opinion, RE627, PageID#12226 (quotation marks omitted). The district court found in this point the "strongest support of all" for its decision, *id*. PageID#12225, but well-established precedent is directly to the contrary. The Supreme Court long ago put to rest the notion that provisions that "open the way for non-Indian settlers to own land on the reservation" are per se incompatible with reservation status, *Seymour*, 368 U.S. at 356, and unanimously reaffirmed that principle just four years ago, *Parker*, 136 S. Ct. at 1080; *see also Solem*, 465 U.S. at 469 n.10 (same).[3] The district court's conclusory assertion cannot be squared with this controlling precedent.

Moreover, the district court's speculation that the parties "always understood" the unselected lands "would" be sold contradicts the text, which says that unappropriated lands "may" be sold, 1855 Treaty, RE558-06, PageID#6895. In fact, the text entitled the Indians to select for allotments "*any land* within the tract reserved," and then to purchase "[*a*]*ll the land*" remaining unselected. *Id.* PageID##6894-6895 (emphases added). That is, the Treaty entitled the Indians to claim *every square inch of it*, leaving no unappropriated lands to sell. Among the

[3] That unappropriated lands would "remain the property of the United States," 1855 Treaty, RE558-06, PageID#6895, likewise does not undermine reservation status. *See*, *e.g.*, *Surplus Trading Co. v. Cook*, 281 U.S. 647, 650-51 (1930) ("It is not unusual for the United States to own ... lands which are set apart and used for public purposes.... A typical illustration is found in the usual Indian reservation[.]").

reasons the Indians did not do so was, as the district court recognized, that "[t]he United States ... failed to make some of the promised annuity payments," which "frustrated Indians from purchasing land as contemplated by the second five-year period," and that "this treaty provision was suspended" due to frauds funneling these lands to whites. Opinion, RE627, PageID##12195-12196.

F. The district court misinterpreted the Treaty Journal.

Based on the Treaty negotiations, the district court concluded that

> the Bands did not want reservations; they wanted to hold lands as white settlers did. This is abundantly clear from the Treaty Journal.... The 1855 Treaty provided precisely what they bargained for.

Opinion, RE627, PageID##12226-12227. As a preliminary matter, the Treaty of course did not allow the Indians to hold land "as white settlers did." For example, it mandated their acreage and locations, required that they aggregate with their respective tribes, and placed the titles in trust with restrictions on the Indians' power to alienate. Manypenny and Gilbert made each of these distinctions clear during the negotiations. *See*, *e.g.*, Council Proceedings, RE558-09, PageID##7061, 7066-7067, 7069-7070.

What the district court meant in saying that the Treaty provided that the Indians would "hold lands as white settlers did" is that the Treaty provided they would hold land in severalty. And this is where the district court again ran into trouble because of its erroneous assumption about the incompatibility of

reservations and allotment. What the parties discussed in the negotiations was precisely Commissioner Manypenny's reservation policy.

Thus, just as reservations were specifically intended "to induce the Indians all to become cultivators of the soil," Prucha at 317, Gilbert told the Indians the government would "induce you to settle upon the soil, and procure a living by agriculture," Council Proceedings, RE558-09, PageID#7067. Just as Manypenny believed Indians should be "concentrated upon reservations" with "the division of the land among them in severalty," 1855 Indian Affairs Report, RE558-50, PageID#7537, the Indians were told they would be "collect[ed] into communities," Council Proceedings, RE558-09, PageID#7061, and the government would "allow each head of family 80 acres," *id*. PageID#7067. Just as the new reservation policy would "avoid ... excessive annuities," *Naftaly*, 452 F.3d at 518 (quotation marks omitted), in favor of "civilization" measures, Gilbert explained that the government would pay "the least due" in annuities, and instead devote funds for "schools, agricultural and other useful purposes," Council Proceedings, RE558-09, PageID#7061. Finally, because "[t]he reservations were ... envisioned as schools for civilization," Cohen § 1.03[6][a], at 60-61, Gilbert explained that "[t]he government is willing to take care of your property; but if you improve for the next twenty years as fast as you have during the last five ... you can take care of it as well for yourselves," Council Proceedings, RE558-09, PageID#7075. For it was

the "object for government ... to have you civilized[.]" *Id*. *See also id*. PageID#7083 ("We find your advice good. That we should be … civilized[.]").

With respect to the Indian perspective, the district court's sweeping conclusion that "the Bands did not want reservations" is again flatly inaccurate. Some did:

> Wau-be-jeeg.... I heard that you intended to give us land .... It was just what I desired .... We ... picked out three portions of land where we wish to reside and divide into three parties.
>
> ....
>
> Shaw-wa-sing.... [F]or the three bands north of the straits ... we wish to make one location together. The land where we come from is good. We want to locate there.

Id. PageID##7064-7065. And some did not:

> I understand ... our father ... wants us to collect in communities .... but .... it is the wish of many of us that ... each may locate ... where he pleases.... [W]e want to choose like the whites[.]

Id. Page ID##7068-7069. But these latter *did not get what they sought*. As Gilbert explained: "The government ... will not permit you as individuals to locate promiscuously .... [and] will insist on your collecting into communities." *Id.* PageID#7061. The Treaty negotiations, then, provide no more support for the district court's interpretation than does the rest of the historical record, or the Treaty text itself.

G. The district court dismissed without warrant overwhelming evidence that those responsible for implementing the Treaty understood it to have created reservations.

The district court's errors continued in its wholesale dismissal of voluminous subsequent history evidence as to the understanding of both the United States and the Band in the immediate wake of the treaty. It acknowledged that between 1855 and 1872, the Indians and their interpreters, as well the commissioners and agents who negotiated the Treaty and their successors who carried it into effect, "regularly referred" to the Treaty lands as reservations. Opinion, RE627, PageID#12197. These references were numerous, were made in a variety of contexts including legal ones, and their sweep included Congress. *See supra* at 14-19. In its volume, duration, and consistency, this evidence is overwhelming, yet the district court dismissed *all of it* in two fell swoops.

First, it noted that "some of these references are not easily understood" because, while Article 1 contains eight clauses setting aside lands, agents Fitch, Leach, and Smith referred in their annual reports to more than eight reservations. Opinion, RE627, PageID#12198. Thus, these "seemingly erroneous reports .... have less evidentiary value based on this peculiarity." *Id.* PageID##12198-12199.

The district court misapprehended the reports. Leach and Smith both understood the 1855 Treaty to have created fourteen reservations, *see*, *e.g.*, 1863 Indian Affairs Report, RE558-62, PageID#7683; 1865 Indian Affairs Report,

RE558-65, Page ID#7714, and this number squares with the text of Article 1 – because while that Article contains eight clauses setting aside lands, some of them include more than one reservation.

Agent Leach described each of the 1855 reservations in detail in 1863, enumerating fourteen reservations in terms tracking precisely the eight clauses in Article 1:

> The Ottawas and Chippewas have fourteen reservations. The largest of these is adjoining Little Traverse bay [1, Fourth clause]....
>
> ....
>
> East of the reservation just described ... lies a small reservation in Cheboygan county [2, Seventh clause]....
>
> Another important ... reservation is located between Grand Traverse Bay and Lake Michigan [3, Fifth clause]....
>
> On the east side of Grand Traverse bay ... lies a small reservation [4, also Fifth clause]....
>
> Another important ... reservation lies in Oceana and Mason counties [5, Sixth clause]....
>
> ....
>
> There is a reserve of one township ... in Muskegon county [6, also Sixth clause]....
>
> Another reservation ... covers Garden and High islands, in Lake Michigan [7, Third clause]....
>
> There are also two reservations in Mackinac county [8-9, Second clause]....
>
> The Sault Ste. Marie band of Ottawas and Chippewas have four reservations [10-13, First clause]….
>
> There is also a small reservation near Thunder Bay [14, Eighth clause][.]

1863 Indian Affairs Report, RE558-63, PageID##7692-7693. This covers eight clauses and fourteen reservations.

The district court dismissed these statements by speculating that Leach may have been mistaking for reservations mere "groupings" of allotments where individuals "had made their selections near each other." Opinion, RE627, PageID#12198. However, it is simply impossible to read Leach's description of the "fourteen reservations" and reasonably conclude he was referring to "groupings." For example:

> The largest of these is adjoining Little Traverse bay.... and on it are located some twelve hundred Indians.... This reservation contains a *large amount of good farming land yet unoccupied, and on it might be concentrated several bands of Indians from the smaller reservations*[.]

1863 Indian Affairs Report, RE558-63, PageID#7692 (emphasis added). It is likewise impossible to read the statements of Agent Smith as referring to groupings of selected allotments. *See*, *e.g.*, 1867 Indian Affairs Report, RE558-67, PageID##7724-7725 ("The Indians have rights on these reservations in addition to that of making individual selections," and there is "so much *unselected land on some of their reservations*[.]" (emphasis added)).

Agent Fitch's references to other than fourteen reservations, *see* Opinion, RE627, PageID#12198, do not detract from this evidence. Fitch became agent in 1857, before most of the reservations had even been surveyed. He lamented that "their reservations" were not "better understood." 1858 Indian Affairs Report,

RE558-55, PageID#7632. It is nevertheless clear that Fitch, like the others, understood "reservations" to refer to the full tracts set aside for the tribes. *See*, *e.g.*, 1859 Indian Affairs Report, RE558-56, PageID#7642 ("without the aid of Government ... many years will elapse before the reservations will be occupied"); 1857 Indian Affairs Report, RE558-54, PageID#7616 ("those to whom reservations had been assigned expressed a strong desire that ... they would forthwith select their lots"). And like Leach and Smith, Fitch recommended bands from the smaller reservations be "coloniz[ed] ... upon the larger reservations[.]" 1859 Indian Affairs Report, RE558-56, PageID#7643.

Plainly, when these agents used the term "reservations," they were referring to the tracts set aside for the tribes in the eight clauses of Article 1. The explanation for the references to fourteen reservations is apparent on the face of the treaty, and the illusory "peculiarity" fastened upon by the district court again provides no warrant for ignoring the plain language of the Treaty and the clear understanding of those who negotiated and implemented it.

The district court's second basis for dismissing the myriad other references to the lands as "reservations" between 1855 and 1872 – indeed to dismiss *all of them* – was that

> the references were made during the time for treaty implementation – i.e. they occurred while Band members alone were entitled to select (and then purchase) lands. At that stage, to a layman, the land would bear many of the characteristics of an Indian reservation.

Opinion, RE627, PageID#12227.

This reasoning amounts to no more than this: everyone involved understood the lands to be reservations, and everyone was mistaken. But it was not just laymen. Leach, who had served in Congress, was no layman. Nor was Manypenny, the very architect of the new federal reservation policy, who identified the lands as "reservations" in the Treaty itself. Nor were Commissioners of Indian Affairs Dole ("enlargement of the Little Traverse Reservation," Executive Order, RE559-41, PageID#8355) and Greenwood (under Fourth clause of Article 1, lands "were reserved for these Indians," Greenwood Letter, RE559-57, PageID#8512). Nor were Acting Commissioners of Indian Affairs Clum ("the reservations provided for by the [1855] treaty," Secretary Letter, RE559-76, PageID#8674) and Mix (the "lands reserved ... under the [1855] treaty," Mix Letter, RE600-79, PageID#10868). Nor were Commissioners of the General Land Office Drummond ("the reservation ... under the [1855] Treaty," Drummond Circular, RE559-74, PageID#8659) and Wilson (by the Fourth clause, "lands were reserved for said Indians," Wilson Letter, RE559-56, PageID#8507). Nor, obviously, was Congress. *See* § 1, 17 Stat. at 381 ("the reservation made ... by the [1855] treaty"); § 3, 18 Stat. at 516 ("lands reserved for Indian purposes under the [1855] treaty").

These were instead entities and individuals at the highest level of the federal government responsible for formulating and implementing United States Indian reservation law and policy – all of whom knew allotment to be a central feature of the 1855 Treaty when they referred to the lands as reservations.

Furthermore, the Odawa and Ojibwe *were* laymen. Their understanding that the Treaty (which expressly referred to their lands as "reservations") created "our reservation," Chiefs' Letter, RE600-62, PageID#10814, cannot be dismissed as ignorance of the law, but must instead be taken as evidence in favor of interpreting the Treaty to have done just that. *Herrera*, 139 S. Ct. at 1701 ("treaty terms are construed as they would naturally be understood by the Indians" (quotation marks omitted)).[4]

The district court's effort to nullify a vast and consistent body of references to the Treaty as creating "reservations" – much as it labored to bleach that same word from the Treaty itself – reflects a misunderstanding of the court's role, whether at summary judgment or any other stage of adjudication. The court

[4] References in the record to the Indians referring to the 1855 Treaty lands as reservations abound. *See*, *e.g.*, Indian Letter (1859), RE600-60, PageID#10810; Indian Letter (1860), RE600-62, PageID#10814; Indian Letter (1861), RE600-63, PageID#10819; Indian Letter (1861), RE600-64, PageID#10827; Ottawa Letter, RE560-07, PageID#8701; Ottawa and Chippewa Letter, RE560-08, PageID#8706.

unfortunately viewed the evidence through the prism of its conclusion rather than the other way around, and its conclusion suffered greatly as a result.

H. The district court erred in its "federal superintendence" analysis.

According to the district court, "the principal test for assessing whether land [i]s an Indian reservation" requires a federal set-aside of land and *also* "ongoing federal superintendence over the land[.]" Opinion, RE627, PageID##12203, 12215. It concluded that the 1855 Treaty did not evidence such superintendence. *Id.* PageID#12217.

In fact, as demonstrated above, a reservation requires a defined body of land, withdrawn from sale, and set apart specifically for Indian purposes. *See supra* at 24-25 (citing *Celestine*, 215 U.S. at 285; *Hagen*, 510 U.S. at 412; *Hitchcock*, 185 U.S. at 389-90). The Band's 1855 Treaty lands readily meet that standard. *See supra* at 25-27.

The district court instead invoked the test for "Indian country" status under 18 U.S.C. § 1151, which includes *three* categories of land, only one of which is reservation land. But unlike the other two categories in section 1151, federal superintendence is *inherent* in the concept of a reservation as a matter of law. *See*, *e.g.*, *United States v. Thomas*, 151 U.S. 577, 585 (1894) ("whenever the United States set[s] apart any land ... as an Indian reservation ... [it has] full authority to pass such laws and authorize such measures as may be necessary to give to these

people full protection in their persons and property"). This is why even lands patented to non-Indians (which clearly are not under active federal superintendence) are Indian country if they fall within a reservation. *See* 18 U.S.C. § 1151 (Indian country includes "all land" within a reservation "*notwithstanding the issuance of any patent*" (emphasis added)). Thus, none of the Supreme Court cases cited by the district court analyzed "ongoing federal superintendence over the land" when determining the Indian country status of reservation lands. *See Donnelly v. United States*, 228 U.S. 243, 269 (1913) ("nothing can more appropriately be deemed 'Indian country' ... than a tract of land that, being a part of the public domain, is lawfully set apart as an Indian reservation"); *United States v. John*, 437 U.S. 634, 649 (1978) (finding land "declared by Congress to be held in trust ... for the benefit" of Indians to be a reservation with no analysis of ongoing superintendence over land); *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 511 (1991) ("As in *John* ... this trust land is 'validly set apart' and thus qualifies as a reservation[.]"). *See also Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 528 (1998) (explaining that the "superintendence" element of the Indian country test derives from three Court precedents involving "lands that were not reservations").

The issue, however, is academic. For even were the district court's purported test applicable to reservations, the court erred in applying it. The 1855

Treaty was an instrument of federal superintendence. As federal agents well understood, "fulfilling the treaty stipulations ... upon their reservations" required "diligence in guarding their rights ... with the authority of law[.]" 1858 Indian Affairs Report, RE558-55, PageID#7632. And because the lands were "reserved and set apart ... for their use," the Indian "for years to come must have ... a guardian[.]" 1866 Indian Affairs Report, RE558-66, PageID#7718.

Accordingly, the tribes would reside at federally approved locations within federally drawn and enforced boundaries, around which "guards and restrictions are thrown[.]" 1855 Indian Affairs Report, RE558-50, PageID#7532. The United States would govern the selection of land for a decade *at least*. 1855 Treaty, RE558-06, PageID##6894-6895. It would hold the allotments in trust for up to sixteen years after 1855 with discretion to continue that period "so long as [the President] may deem necessary and proper." *Id.* PageID#6895. The Indians were told during the negotiations that this period could extend "for the next twenty years," Council Proceedings, RE558-09, PageID#7075, and the Treaty in fact placed no time limit on it at all, 1855 Treaty, RE558-06, PageID#6895.

The district court dismissed all of this in favor of conclusory assertions ungrounded in any legal authority. It reasoned, for example, that ongoing superintendence – and hence reservation status – was lacking because "after the temporary restraint on alienation ... the lands would be freely alienable[.]"

Opinion, RE627, PageID#12215. However, as the Supreme Court stated in *United States v. Pelican*, 232 U.S. 442, 447 (1914) – a seminal "superintendence" precedent, *see Venetie*, 522 U.S. at 528-29 – that lands subject to temporary restraints on alienation are "under the jurisdiction and control of Congress ... relating to the guardianship and protection of the Indians, is not open to controversy." Nor would this conclusion change after alienation. *See* 18 U.S.C. § 1151 (Indian country status of reservation land unaffected by "the issuance of any patent").

The district court further asserted that the Treaty ended federal superintendence because "continued federal superintendence over the Tribes[] ... would *inhibit* their ability to assimilate into 'civilized' life." Opinion, RE627, PageID#12208 (emphasis added). This turns both law and history on their heads. Federal superintendence was the very *means* by which the government's civilization goals would be accomplished. In *Pelican*, the Court described superintendence in these very terms:

> These Indians are yet ... [in] a condition of pupilage .... They occupy these lands with the consent and authority of the United States ... [*as*] *part of the national policy by which the Indians are to be ... prepared for assuming the habits of civilized life, and ultimately the privileges of citizenship*.

232 U.S. at 450 (emphasis added) (quotation marks omitted).

As discussed above, the 1855 Treaty was intended to implement this policy,

not end it. *See supra* at 5-15. The tribes were to be "collect[ed] ... into colonies" precisely because "[t]hey would then be so situated as to receive instruction[.]" 1847-48 Indian Affairs Report, RE558-39, PageID#7341. Agents would (and did) instruct the Indians in agriculture and assist them "in building their houses, furnishing them oxen, agricultural implements, seeds[.]" 1858 Indian Affairs Report, RE558-55, PageID#7633. Agents provided both inducement[5] and desperately needed assistance.[6] And they monitored it all in extraordinary detail.[7] As Agent Leach stated, seven years after the Treaty was signed, "civilization, as all history proves, is a plant of slow growth," and therefore "[t]he Indian needs a watchful guardian, and he needs him constantly." 1862 Indian Affairs Report, RE558-61, PageID#7675. *See also id.* PageID#7676 (recommending

[5] *See* Indian Letter (1859), RE600-60, PageID#10810 ("Last Fall you told us that the one that would make the best clearing on the Reservation you would make them a present of a cow[.]").

[6] *See* Indian Council Letter, RE600-59, PageID#10807 ("[W]e are very thankful .... If you had not brought provisions for us we would have starved .... [W]e have planted the seed you gave us[.]"). *See Pelican*, 232 U.S. at 450 ("[T]he fundamental consideration is the protection of a dependent people.").

[7] A typical agency report – issued more than a decade after the Treaty took effect – recorded the Indians' "Acres of land cultivated, 10,792. Bushels of wheat raised, 3,443; estimated value, $7,970. Bushels of corn, 30,951; value, $27,917.... Bushels peas .... turnups .... rice gathered .... hay cut .... Horses owned .... Cattle .... Swine .... Sheep .... Pounds sugar .... Lumber sawed, 892,971 feet[.]" 1867 Indian Affairs Report, RE558-67, PageID#7726. *See also*, *e.g.*, 1865 Indian Affairs Report, RE558-65, PageID#7712 (same); 1866 Indian Affairs Report, RE558-66, PageID#7719 (same).

concentrating Indians on larger 1855 reservations so "[t]hey would then be under the constant supervision of the agent").

Finally, in laboring to find a lack of superintendence where superintendence is clear, the district court resorted to two legal theories that have been utterly discredited – one by Congress and the other by this Court. The first involves the fact that reservation lands ended up in non-Indian hands through fraud and other means, contrary to the requirements of the 1855 Treaty. According to the district court, this "provides a vivid demonstration of the *lack* of federal superintendence," Opinion, RE627, PageID#12215, because

> once a sale ... was consummated, *the government lacked any continuing interest in the land, and thus lacked any ability to regulate the lands under the 1855 Treaty*. If the parties understood the land to be ... an Indian reservation, the United States could have (and likely would have) rescinded the sales[.]

Id. PageID#12216 (emphasis added).

The district court cited no Treaty text or other authority for this conclusory theory. And none exists. This theory emerged in the 1890s to *rationalize* the failure of certain federal officials to protect the tribes from the "all-pervasive land frauds" on the 1855 reservations. H.R. Rep. No. 103-621. That failure has now been understood for what it was. As the House Report supporting the 1994 legislation reaffirming the Band's historic rights explained, federal officials in the 1890s espoused

> a theory that when title to reservation lands passed from Indian hands to those of American citizens, the Ottawa/Odawa somehow lost jurisdiction on their reservations and the United States in some mysterious way was released from the treaty-mandated trust relationship with the tribe.

Id. The Report rightly rejected the theory as "arbitrary and unilateral," *id.*, and the district court should not have sought to resurrect it here.

The district court's other, equally discredited theory is that because the 1855 Treaty provided for annuities for only a finite period of years, "the Bands clearly understood that the 1855 Treaty did not provide for ongoing federal superintendence." Opinion, RE627, PageID#12216. Federal officials in the nineteenth century likewise used this argument to rationalize the unlawful disavowal of the 1855 Treaty promises by federal officials. As this Court has explained, in 1872, "Secretary [of the Interior] Delano interpreted the 1855 treaty as providing ... that upon finalization of those [annuity] payments .... the federal government no longer had any trust obligations to the tribes[.]" *Grand Traverse Band*, 369 F.3d at 961 n.2. This Court held squarely that this was a "misread[ing of] the 1855 Treaty" arrived at by "[i]gnoring the historical context[.]" *Id.* at 961 & n.2. The now-rejected theory plunged the Band into generations of poverty, landlessness, and cultural near-annihilation as federal officials undertook a "total" abdication of their solemn responsibilities to uphold the treaty promises made in exchange for the tribes' vast cessions of land. H.R. Rep. No. 103-621. As a result,

"[b]y the end of the 1800's, all that remained of the reservations were the treaty boundaries and isolated Ottawa/Odawa homesteads." *Id*.

A century and a half later, and despite the benefit of this Court's and Congress's conclusions that federal officials had misread the Treaty, the district court has adopted that same interpretation. Indeed, the court has taken it a step further to assert that the 1855 treaty never promised the Band a reservation *in the first place* – a theory never before espoused even by those undertaking to dispossess the Indians of their lands. The district court's misreading, in square contravention of a holding of this Court, should not be allowed to stand. The Odawa and Ojibwe relinquished approximately one-third of present-day Michigan in exchange for a commitment to the faithful interpretation of a treaty they could not read. "We place all that is ours in your hand and trust that you will do us justice." Council Proceedings, RE558-09, PageID#7060. The theories exhumed by the district court from the dust bin of history were not justice. They have been rejected before and should be rejected again.

CONCLUSION

The Band respectfully urges the Court to reverse the district court's decision and to direct that court to enter summary judgment in favor of the Band on the issue of reservation establishment.

Dated this 3rd day of February, 2020

Respectfully submitted,

By: /s/ David A. Giampetroni

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David A. Giampetroni

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Plaintiff – Appellant Cross-Appellee, per Sixth Circuit Rule 30(g), hereby designates the following portions of the record on appeal:

Description of Entry	Date	Record Entry No.	Page ID No.
Complaint	08/21/2015	RE01	1, 17-18
Treaty of March 28, 1836	02/08/2019	RE558-02	6828, 6831
Treaty with the Ottawa and Chippewa Indians of Michigan, July 31, 1855	02/08/2019	RE558-06	6893-6898, 6901
Proceedings of a Council with the Chippeway & Ottawas of Michigan, July 25, 1855	02/082019	RE558-09	7060-7061, 7064-7070, 7073, 7075, 7083
Annual Report of the Commissioner of Indian Affairs, 1847-1848 (Excerpts)	02/08/2019	RE558-39	7342
Annual Report of the Commissioner of Indian Affairs, 1851 (Excerpts)	02/08/2019	RE558-42	7381
Annual Report of the Commissioner of Indian Affairs, 1853 (Excerpts)	02/08/2019	RE558-45	7432, 7442
Annual Report of the Commissioner of Indian Affairs, 1853 (Excerpts)	02/08/2019	RE558-47	7478
Annual Report of the Commissioner of Indian Affairs, 1855 (Excerpts)	02/08/2019	RE558-50	7532, 7537, 7548, 7558
Annual Report of the Commissioner of Indian Affairs, 1856 (Excerpts)	02/08/2019	RE558-52	7609
Annual Report of the Commissioner of Indian Affairs, 1856 (Excerpts)	02/08/2019	RE558-53	7614
Annual Report of the Commissioner of Indian Affairs, 1857 (Excerpts)	02/08/2019	RE558-54	7616

Annual Report of the Commissioner of Indian Affairs, 1858 (Excerpts)	02/08/2019	RE558-55	7631-7633
Annual Report of the Commissioner of Indian Affairs, 1859 (Excerpts)	02/08/2019	RE558-56	7642-7644
Annual Report of the Commissioner of Indian Affairs, 1862 (Excerpts)	02/08/2019	RE558-61	7675-7676
Annual Report of the Commissioner of Indian Affairs, 1863 (Excerpts)	02/08/2019	RE558-62	7683
Annual Report of the Commissioner of Indian Affairs, 1863 (Excerpts)	02/08/2019	RE558-63	7692-7693
Annual Report of the Commissioner of Indian Affairs, 1865 (Excerpts)	02/08/2019	RE558-65	7712, 7714
Annual Report of the Commissioner of Indian Affairs, 1866 (Excerpts)	02/08/2019	RE558-66	7718-7719
Annual Report of the Commissioner of Indian Affairs, 1867 (Excerpts)	02/08/2019	RE558-67	7723-7726
House Committee on the Public Lands, Ottawa and Chippewa Indian lands in Michigan, 43d Cong., 1st sess., H. Rept. 186, 1874, 1, serial 1623	02/08/2019	RE559-07	7881
Executive Orders Relating to Indian Reserves (Washington: Government Printing Office, 1902), May 14, 1855 – July 1, 1902 (Excerpts)	02/08/2019	RE559-41	8355-8356
George W. Manypenny, Commissioner of Indian Affairs, to Robert McClelland, Secretary of the Interior, May 21, 1855	02/08/2019	RE559-43	8376
George W. Manypenny and Henry C. Gilbert, Commissioners, to Charles E. Mix, Acting Commissioner of Indian Affairs, August 7, 1855	02/08/2019	RE559-45	8411
J. Wilson, Commissioner, General Land Office, to A. B. Greenwood, Commissioner of Indian Affairs, February 24, 1860	02/08/2019	RE559-56	8507
A. B. Greenwood, Commissioner of Indian Affairs, to Joseph S. Wilson, Commissioner, General Land Office, March 3, 1860	02/08/2019	RE559-57	8512
T. W. Ferry et al., to O. H. Browning, Secretary of the Interior, June 5, 1868	02/08/2019	RE559-60	8528

D. C. Leach to E. S. Parker, Commissioner of Indian Affairs, October 19, 1869	02/08/2019	RE559-68	8621
Willis Drummond, Commissioner, General Land Office, Circular, July 5, 1872	02/08/2019	RE559-74	8659
Restoration to Market of Certain Lands in Michigan, 42d Cong., 3d sess., February 10, 1873	02/08/2019	RE559-76	8674
Ottawa chiefs of Mason County to E. P. Smith, Commissioner of Indian Affairs, April 17, 1875	02/08/2019	RE560-07	8701
Ottawa and Chippewa Indians of Charlevoix, Emmet, and Cheboygan counties to Secretary of the Interior, June 10, 1875	02/08/2019	RE560-08	8706
George W. Lee, Indian Agent, to Commissioner of Indian Affairs, December 16, 1876	02/08/2019	RE560-09	8716
Geo. W. Lee, Indian Agent, to J. Q. Smith, Commissioner of Indian Affairs, January 13, 1877	02/08/2019	RE560-10	8721
E. J. Brooks, Special Agent, GLO, to E. A. Hayt, Commissioner of Indian Affairs, January 12,1878	02/08/2019	RE560-12	8736-8738
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Intervening Defendants Emmet County Lakeshore Association and the Protection of Rights Alliance's Motion for Summary Judgment	03/18/2019	RE579	
The Governor's Motion for Summary Judgment of Historical Issues	03/18/2019	RE581	
Henry R. Schoolcraft to T. Hartley Crawford, March 30, 1841	04/24/2019	RE600-28	10701
Justin Rice to Robert Stuart, Superintendent of Indian Affairs, March 31, 1843	04/24/2019	RE600-30	10711
Hamlin June to Chas. P. Babcock, Superintendent of Indian Affairs, September 9, 1850	04/24/2019	RE600-31	10716

House Report of the committee on Indian Affairs No. 33, 1855	04/24/2019	RE600-49	10778, 10780
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Cob mosey et al., to D.C. Leach, August 7, 1860	04/24/2019	RE600-62	10814
Peter Wakazoo et al., to A.B. Greenwood, January 31, 1861	04/24/2019	RE600-63	10819
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Geo. W. Manypenny to R. McClelland, April 10, 1856	04/24/2019	RE600-68	10840
Chas. E. Mix to H. C. Gilbert, March 25, 1856	04/24/2019	RE600-79	10868
Geo. N. Smith to Henry C. Gilbert, February 9, 1857	04/24/2019	RE600-80	10871
Grand Rapids Daily Eagle, July 14, 1868	04/24/2019	RE600-100	10932
Opinion	08/15/2019	RE627	12185, 12195-12199, 12203, 12206, 12208, 12215-12217, 12223-12230
Judgment	08/15/2019	RE628	12237
Notice of Appeal	09/13/2019	RE629	12238