IN THE UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

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

Plaintiffs,

vs.

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

Defendants.

Case No. 0:17-cv-5155 (SRN/LIB)

AMICUS CURIAE BRIEF OF THE STATE OF MINNESOTA

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IDENTITY AND INTEREST OF AMICI CURIAE

The State of Minnesota ("State") files this amicus brief in support of the Plaintiffs' Motion For Partial Summary Judgment That The Boundaries Of The Mille Lacs Indian Reservation, As Established In An 1855 Treaty, Remain Intact. The State had no role in the events leading to the initiation of this lawsuit, but this Court's decision on the reservation boundaries will impact the State's sovereign interests and the activities of state agencies in the disputed area. The State files this brief to provide its position on the boundary issue and information on the practical impact of the Court's decision in this matter.

INTRODUCTION

After careful review of recent federal case law, the State of Minnesota files this brief in support of the Mille Lacs Band of Ojibwe's (the "Band") position that the Mille Lacs Indian Reservation has never been diminished or disestablished. The State offers arguments on two issues: Recent developments in federal law conclusively establish that the Band is correct, and the State will not be adversely affected by this Court's confirmation that the boundaries of the reservation remain as described in an 1855 treaty.

First, the U.S. Supreme Court's recent decision in *McGirt v. Oklahoma*, 140 S.Ct. 2452 (2020) is dispositive. In *McGirt*, the Supreme Court clarified that courts must rely solely on statutory text to determine congressional intent; contemporaneous usages, customs, and practices should only be examined to the extent necessary to clear up an ambiguity in the text of the law. No congressional action clearly diminishes the Mille

Lacs Reservation boundaries. *McGirt* is therefore dispositive on the question of whether the boundaries of the Mille Lacs Reservation were diminished: they were not.

Second, the State notes that it has and will continue to work cooperatively with the Band's tribal government to ensure efficient governance should this Court determine that the reservation has never been diminished. Thus, the State respectfully requests that the Court grant the Plaintiffs' motion for partial summary judgment on the boundary issue.

ARGUMENT

I. *McGirt* Is Dispositive; The Reservation Boundaries Remain Intact.

The question of whether the Mille Lacs Indian Reservation has been diminished was, for a long period, an open question. Indeed, State officials at various points weighed in on this contentious legal question. But an emerging body of case law, culminating in *McGirt*, has now laid this question to rest. Federal courts have long held that reservations may only be diminished through express acts of Congress. It was unresolved, however, how to best ascertain congressional intent. *McGirt* clarifies that the analysis of congressional intent begins and ends with statutory language.

A. *McGirt* Adjustment to *Solem* Framework

"'[O]nly Congress can divest a reservation of its land and diminish its boundaries,' and its intent to do so must be clear." *Nebraska v. Parker*, 136 S. Ct. 1072, 1078–79 (2016) (quoting *Solem v. Bartlett*, 465 U.S. 463, 470 (1984)). For nearly three decades, courts applied a three-part analysis to assess whether Congress had diminished a reservation. *Solem*, 465 U.S. at 470-472. First and "most probative" was the statutory language used to open the Indian lands. *Id*. at 470. Second was consideration of the

historical context surrounding passage of the relevant treaties and laws, being careful "to distinguish between evidence of the contemporaneous understanding of the particular Act and matters occurring subsequent to the Act's passage." *Id*. at 471. Third was subsequent events, including an examination of who moved onto reservation lands that were opened to settlement. *Id*.

The Supreme Court adjusted this framework in *McGirt* by making statutory text determinative. 140 S.Ct. at 2468. The second and third factors—circumstances surrounding legislative passage and subsequent events—are only relevant to the extent the statutes are ambiguous. *Id*.

McGirt, an enrolled member of the Seminole Nation of Oklahoma, was convicted in an Oklahoma state court of sexual assault. *Id*. at 2459. The issue before the Supreme Court was whether McGirt committed his crimes in Indian country, depriving Oklahoma state courts of jurisdiction. *Id*. McGirt asserted that his crimes took place on the Creek Reservation while the State of Oklahoma argued the Creek Reservation no longer existed. *Id*. at 2460. The Supreme Court agreed with McGirt. *Id*. at 2482.

In concluding that the Creek Reservation has never been disestablished, the *McGirt* court focused exclusively on textual analysis, relying on the lack of any Act of Congress clearly disestablishing the reservation. *Id*. at 2460. The court emphasized that "States have no authority to reduce federal reservations lying within their borders," as that not only would violate the constitutional mandate that federal treaties and statutes are the "supreme Law of the Land" but also would "leave tribal rights in the hands of the

very neighbors who might be least inclined to respect them." *Id*. at 2462 (*citing* U.S. Constitution, Art. I, § 8; Art VI, cl. 2).

The *McGirt* court acknowledged that during the so-called "allotment era" much of the Creek Reservation was broken into parcels and sold to individual Indians and non-Indians. 140 S.Ct. at 2463. But the Creek Reservation survived allotment because there was no statute "evincing anything like the present and total surrender of all tribal interests in the affected lands." *Id*. at 2464 (internal quotation marks omitted). And while Congress intruded on the Creek's right to self-governance many times, including eliminating tribal courts and giving Congress power to remove and replace the Creek's principal chief, Congress never completely withdrew recognition of the tribal government. *Id*. at 2465-66.

Significantly, the court said it would be error to rely on historical practices and demographics, both around the time of, and long after, the enactment of all the relevant legislation, to prove disestablishment. *Id*. at 2468. After *McGirt*, "the only 'step' proper for a court of law" is to ascertain and follow the original meaning of the law. *Id*. Contemporaneous usages, customs, and practices should only be examined to the extent necessary to clear up an ambiguity in the text of the law. *See Oneida Nation v. Vill. of Hobart*, 968 F.3d 664, 685-86 (7th Cir. 2020) *reh'g denied* (Sept. 18, 2020) (discussing *McGirt*).

McGirt's reminder that a court's primary job is to "ascertain and follow the original meaning of the law," 140 S.Ct. at 2468, makes it even more difficult to establish the requisite congressional intent to disestablish or diminish a reservation. That is

particularly true given specific rules of construction, known as the Indian canons, courts must apply when determining the original meaning of Indian treaties and agreements. Namely, "Indian treaties must be interpreted in light of the parties' intentions, with any ambiguities resolved in favor of the Indians, and the words of a treaty must be construed in the sense in which they would naturally be understood by the Indians. *Herrera v. Wyoming*, 139 S. Ct. 1686, 1699 (2019) (internal quotation marks and citations omitted). Post-*McGirt*, these rules of construction continue to be the standard by which courts determine congressional intent to dimmish a reservation. *See Oneida Nation*, 968 F.3d at 674-675 (post-*McGirt* discussion of the standard for diminishment, including application of the Indian canons).

B. *McGirt* Applied to Mille Lacs Reservation

McGirt dictates that the language of each congressional action related to a reservation must be examined to determine whether Congress intended its action to diminish the reservation boundaries. For the Mille Lacs Indian Reservation, established in 1855, that means assessing the language of treaties entered into in 1863 and 1864 as well as the Nelson Act of 1889. Thus, this section: (1) discusses establishment of the reservation in 1855; (2) assesses the treaty language of the 1863 and 1864 treaties; and, (3) examines the Nelson Act.

1. Mille Lacs Reservation established by 1855 Treaty

The Mille Lacs Reservation was first established by Article II of the Treaty of 1855, which "reserved and set apart" tracts of land "for the permanent homes" of the Mississippi Bands of Chippewa Indians, which included the Mille Lacs Band. *Treaty*

with the Chippewa, art. 2, February 22, 1855, 10 Stat. 1165. The 1855 reservation encompassed approximately 61,000 acres around Kathio, South Harbor, and Isle Harbor townships in Minnesota. *Cty of Mille Lacs v. Benjamin*, 262 F. Supp. 2d 990, 992 (D. Minn. 2003).

2. 1863 and 1864 Treaties

Assessing congressional intent for the boundaries of the Mille Lacs Reservation begins with treaties in 1863 and 1864, both of which have been understood to assure the Band it could keep its reservation because of its good conduct. Article 1 of the 1863 treaty provided that the Chippewa "hereby cede" the "reservations known as Gull Lake, Mille Lac, Sandy Lake, Rabbit Lake, Pokagomin Lake, and Rice Lake" to the United States. *Treaty with the Chippewa of the Mississippi and the Pillager and Lake Winnibigoshish Bands, 1863*, art. 1, March 11, 1863, 12 Stat. 1249. Article 2 established a new reservation in northwestern Minnesota, later known as the White Earth Reservation, to which all the Chippewa were supposed to remove. *Id*., art. 2.

The treaty made an exception, however, for the Mille Lacs Band:

> [O]wing to the heretofore good conduct of the Mille Lacs Indians, they shall not be compelled to remove so long as they shall not in any way interfere with or in any manner molest the persons or property of the whites.

Id., art. 12.

The removal exception for the Band was in acknowledgment of their loyalty to the United States during a Sioux uprising that took place in Minnesota in the years between the 1855 and 1863 treaties. Some Chippewa attempted to join the Sioux in the uprising,

but the Mille Lacs Band "took 800 men to the defense" of the United States, which "thwarted the attempted union and caused the band to remain at peace with the United States." *Minn. Chippewa Tribe v. United States*, 11 Cl. Ct. 221, 225 (1986).

The 1864 treaty repeated the relevant langue from the 1863 treaty. *Treaty with Chippewa, Mississippi, and Pillager and Lake Winnibigoshish Bands, 1864*, art. 12, May 7, 1864, 13 Stat. 693. Far from expressly disestablishing the reservation, the plain language of the 1863 and 1864 treaties demonstrates Congress' understanding that the reservation would continue to exist so long as the Band continued its "good conduct." *Cf. McGirt*, 140 S.Ct. at 2469 (reiterating that once "a reservation is established, it retains that status until Congress explicitly indicates otherwise," and cautioning against judicial abrogation of treaties) (internal quotations omitted).

Even in the early 1900s, the language in the 1863 and 1864 treaties was understood as unambiguously ensuring the Band could keep its reservation. *See Mille Lac Band of Chippewas v. United States*, 47 Ct. Cl. 415, 443, 457 (1912) *rev'd on other grounds* 229 U.S. 498 (1913) (noting the "language of article 12 [of the 1864 treaty] is not ambiguous and if considered apart from the context of the whole instrument could convey but one meaning," which was that the "treaties of 1863 and 1864 reserved to the [Band] the Mille Lac Reservation.").

3. The Nelson Act

In 1889, Congress enacted the Act of January 14, 1889, 25 Stat. 642, also known as the Nelson Act, which established a process to negotiate with the Chippewa the "complete cession and relinquishment in writing of all their title and interest in and to all

the reservations of said Indians," except for portions of the White Earth and Red Lake Reservations. 25 Stat. 642, ch. 24., s.1. The Nelson Act was designed to concentrate the Chippewa population on the White Earth Reservation, but the Act provided an exception for those Indians who selected allotments on the reservation on which they were then living. *Id*. at s.3.

The Band, accordingly, entered into an agreement to relinquish to the United States "the right of occupancy" on the reservation, but statements during and after the negotiations indicated that the Band planned to take allotments and remain on the reservation. *See United States v. Mille Lacs Band of Chippewa Indians*, 229 U.S. 498, 504-05 (1913); H.R. Ex. Doc. 247, 51st Cong., 1st Sess., at 171, 174. Indeed, the Court of Claims found that following passage of the Nelson Act the Band "persisted in their right of occupancy and approved agreements with the distinct understanding that all claims under the former treaties should be preserved," and the Band's understanding that their reservation remained intact was manifested not only by their words but also "by the dogged persistence with which they retained their residence on the Mille Lac Reservation." *Mille Lac Band*, 47 Ct. Cl. at 446.

Courts previously analyzing the Nelson Act's impact on other Chippewa reservations in Minnesota have concluded that the Act's "purpose was not to terminate the reservation or end federal responsibility for the Indian but rather to permit the sale of certain of his lands to homesteaders and others." *Leech Lake Band of Chippewa Indians v. Herbst*, 334 F. Supp. 1001, 1004-1005 (D. Minn. 1971); *see also State v. Clark*, 282 N.W.2d 902, 907-908 (Minn. 1979) (holding Nelson Act did not disestablish the White

Earth Reservation but did diminish it by explicitly ceding four townships); *State v. Forge*, 262 N.W.2d 341, 347 (Minn. 1977) (concluding Nelson Act did not clearly manifest an intent to disestablish the Leech Lake Reservation); *State v. Jackson*, 16 N.W.2d 752, 757 (Minn. 1944) ("The 'complete extinguishment of the Indian title,' referred to in the Nelson Act, was 'effective only as to the residue' of the Leech Lake Reservation remaining after the Indians residing thereon had taken their allotments in severalty.").

Even the Supreme Court has acknowledged that Congress, when enacting the Nelson Act, did not unilaterally diminish or disestablish reservations but instead established a process for negotiations, with the hope of gaining the assent of the Indians to willingly remove from their reservations. *Mille Lacs Band of Chippewa Indians*, 229 U.S. at 506 ("A manifest purpose of the [Nelson Act] was to bring about the removal to the White Earth Reservation of all the scattered bands residing elsewhere than on the Red Lake Reservation, the Mille Lacs as well as the others; and *this was to be accomplished, not through the exertion of the plenary power of Congress, but through negotiations with and the assent of the Indians*.") (emphasis added).

Previous courts' analyses of the Nelson Act are equally applicable to that Act's impact on the Mille Lacs Indian Reservation, leading to the conclusion that the Nelson Act did not disestablish the Mille Lacs Reservation. Moreover, all prior interpretations of the Nelson Act are in keeping with *McGirt's* observation that "[f]or years, States have sought to suggest that allotments automatically ended reservations, and for years courts have rejected the argument." 140 S.Ct. at 2464.

After *McGirt*, the inquiry ends here. If the relevant law is not ambiguous, there is no need to consider other context or subsequent history. No congressional act provides a clear expression of congressional intent to diminish or evidences the "present and total surrender of all tribal interests." 140 S.Ct. at 2463 (quotation omitted). Thus, the Mille Lacs Indian Reservation continues to consist of the approximately 61,000 acres identified in the 1855 treaty.

II. THE STATE CAN ACCOMMODATE A FEDERAL COURT DECISION RECOGNIZING THE 1855 RESERVATION BOUNDARIES.

A decision by this Court granting the Band's motion for summary judgment—confirming that the boundaries of the Mille Lacs Indian Reservation remain as described in the 1855 treaty—will not have an outsized impact on the State. Indeed, in Minnesota state courts the State itself has taken the position that the Mille Lacs Reservation has never been diminished. Respondent's Brief at 18, *Joseph Walsh, et al. v. State of Minnesota*, No. A20-1083 (Minn. Ct. App. Dec. 8, 2020); State's Memorandum of Law in Support of Motion to Dismiss at 7-10, *Joseph Walsh, et al. v. State of Minnesota*, No. 62-cv-19-8709 (Ramsey Cty Dist. Ct., February 19, 2020). Similarly, Minnesota state agencies recently have taken actions recognizing the reservation boundaries as remaining intact since 1855, with the most obvious of such actions being Minnesota Department of Transportation's installation of road signs that read "Misi-zaaga'iganiing/Mille Lacs Reservation/Established in 1855 Treaty" on highways on the outer edges of the reservation as spelled out in the treaty. *See* Tim Harlow, *Highway signs don't resolve dispute over Mille Lacs Band reservation boundary*, Star Trib. (Minneapolis), Feb. 1,

2021, https://www.startribune.com/highway-signs-don-t-resolve-dispute-over-mille-lacs-band-reservation-boundary/600017404/?refresh=true.

Moreover, the Supreme Court's holding in *McGirt* had a much greater impact on Oklahoma in terms of land and population. 140 S.Ct. at 2479 (scope of the Creek Reservation swept in "most of Tulsa and certain neighboring communities," and "the affected population [t]here is large and many of its residents will be surprised to find out that they have been living in Indian country this whole time"). But as the *McGirt* court pointed out, there are many examples of "significant non-Indian populations . . . liv[ing] successfully in or near reservations today." *Id*. at 2479. This is certainly true in the State of Minnesota where we have seven Anishinaabe (Chippewa, Ojibwe) reservations.[1] Also, just as *McGirt* noted Oklahoma and its Tribes had proven they could "work successfully together as partners," *id*. at 2481, the same is true of Minnesota and its Tribes. In fact, the Mille Lacs Band and various state agencies have intergovernmental cooperative agreements already in place to clarify and guide regulatory responsibilities in the 1855 treaty area. Ongoing intergovernmental cooperation can be relied upon to ensure continuity and efficient governance.

Finally, state agencies with missions that overlap with federal agencies will benefit from the clarity provided by a federal court decision on the reservation boundaries. For example, federal agencies like the U.S. Environmental Protection Agency and the Federal Highway Administration already recognize the 1855 reservation boundaries. In the past,

[1] Minnesota website, "Minnesota Indian Tribes," https://mn.gov/portal/government/tribal/mn-indian-tribes/, last visited February 8, 2021.

the Minnesota Pollution Control Agency and Minnesota Department of Transportation had to navigate boundary-related issues in working with the federal agencies, although more recently—after the State acknowledged it agrees with the federal government regarding the reservation boundaries—state agencies have been able to work with their federal partner agencies more efficiently. A decision from this Court, recognizing the 1855 treaty boundaries and at long last ending the dispute between Mille Lacs County and the Band, will allow state and federal agencies to work unimpeded in their shared missions.

CONCLUSION

For the foregoing reasons, the State of Minnesota respectfully requests this Court grant the Band's motion for partial summary judgment.

Dated: February 8, 2021

Respectfully submitted,

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AMICUS CURIAE CERTIFICATE OF COMPLIANCE WITH LIMITS OF L.R. 7.1

Consistent with the Local Rule 7.1, the undersigned hereby certifies and affirms that the foregoing Amicus Curiae Brief of the State of Minnesota complies with the limits in Local Rule 7.1(f) and with the type-size limits of Local Rule 7.1(h). The memorandum contains 3,058 words, as measured by the word-count function of Microsoft Word 2010 applied specifically to include all text, including headings, footnotes, and quotations.

Dated: February 8, 2021

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