# Legal and Historical Analysis

Response To The National Indian Gaming Commission Inquiry Regarding The Prairie Band Potawatomi Nation's Ability To Conduct Class II Gaming In DeKalb, Illinois

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Volume I
Memorandum and Exhibits

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## I. Introduction

On June 12, 2007, the Office of the General Counsel ("OGC") of the National Indian Gaming Commission ("NIGC") informed the Attorney General of the State of Illinois that the OGC intends to conduct an analysis to determine whether the Prairie Band of Potawatomi Nation ("PBPN") can legally conduct class II gaming under the Indian Gaming Regulatory Act ("IGRA") on a site purchased by the PBPN near the Village of Shabbona in DeKalb County, Illinois ("DeKalb Site"). After discussions between representatives of the OGC, the Attorney General, the PBPN, and other governmental entities interested in the outcome of the OGC's legal analysis of this issue, the OGC invited the Attorney General, the DeKalb States Attorney, Shabbona Township, the PBPN, and a citizens' group, the DeKalb County Taxpayers Against the Casino, to submit position papers or legal memoranda with supporting material to the OGC. After its analysis of the issues involved, the OGC plans to issue an advisory opinion.

This is the initial submission of the Attorney General to the OGC providing a factual and legal analysis of the PBPN's plan to conduct class II gaming on the DeKalb Site under the IGRA. The memorandum will address the following issues:

- the history involved in this inquiry;
- the status of the land in light of the Supreme Court ruling in *City of Sherrill, New York v. Oneida Indian Nation of New York, et al.*, 544 U.S. 197 (2005), and cases subsequent;
- the rights of the PBPN to the land in light of the Indian Claims Commission Act;
- the title Shab-eh-nay and his band obtained in the land through the Treaty of 1829 signed at Prairie du Chien, in light of subsequent history and the contemporaneous understanding of the parties to that Treaty;
- whether that title, if any, was extinguished by act of Congress; and
- whether the earlier analysis of the existence of a reservation by an employee of the United States Department of the Interior ("DOI") is accurate in light of current law.

The Attorney General will, in response to the submissions by other parties to this inquiry, discuss whether the PBPN has shown with sufficient certainty that it is the proper successor in interest to Shab-eh-nay and his band and that the DeKalb Site is actually within the boundaries of the land "reserved, for the use of" Shab-eh-nay and his band. As many documents requested by the Attorney General under the Freedom of Information Act have only recently been received by the Attorney General, the response will also address any new issues raised by these documents.

## II. Facts and history

### A. The treaties and contemporaneous events

Four treaties were signed between Indian tribes and the United States in the 1800s that affect the status of the land at issue.

#### 1. 1816 Treaty

In 1816, the United States entered into a treaty of "Peace, Friendship, and Limits"[1] ("1816 Treaty") with the united tribes of Ottawas, Chippewas, and Potawatomis ("United Nation"). The purpose of the 1816 Treaty was to settle a dispute over lands previously ceded to the United States by the Sac and Fox tribes in 1804. In Article 1, the tribes "relinquish[ed]" all of their rights to the United States in the land previously ceded, but were "permitted" to continue to hunt and fish in those areas. Article 2 provided that, in exchange, the United States would give the tribes merchandise and pay them goods over the following twelve years. The United States also "relinquish[ed]" land north of a line drawn straight west from the southern extremity of Lake Michigan to the Mississippi River, except for three leagues square at the mouth of the

[1]Treaty with the Ottawa, Etc., 1816, 7 Stat. 146. (Ex. A.)

Ouisconsing river, and certain tracts not to exceed five leagues square "as the president of the United States may think proper to reserve." The 1816 Treaty does not state that the land relinquished to the tribes would be reserved for them or set aside for them. Instead, the 1816 Treaty, from the language therein, appears to have merely sustained the Indians' aboriginal title in the land discussed in Article 2. (See below for additional analysis of this issue.)

**2. 1829 Treaty**

In 1829, the United States entered into a treaty with the United Nation at Prairie du Chien[2] ("1829 Treaty"). Article 3 of that treaty states, in pertinent part: "From the cessions aforesaid, there shall be reserved, for the use of the undernamed Chiefs and their bands, the following tracts of land, viz: ... For Shab-eh-nay, two sections at his village near the Paw-Paw Grove ..." ("the Village").[3]

**3. 1832 Treaty**

On October 20, 1832, the United States entered into a treaty with the "Chiefs and Headmen of the Potawatamie Tribe of Indians of the Prairie and Kankakee" at Tippecanoe[4] ("1832 Treaty"). As the Potawatomis, at that time, were split into "bitter factions," the United

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[2]Treaty with the Chippewa, etc., 1829, 7 Stat. 320. (Ex. B.)

[3]The nature of the rights to the Village that Shab-eh-nay and his band received in the 1829 Treaty, and specifically whether the Village had reservation status, was the core issue examined in the 2000 memorandum by Derrill Jordan, a DOI attorney. (See section J of this memorandum.) While this memorandum will discuss this issue at length, it is only a small part of the analysis necessary to determine whether the PBPN can conduct class II gaming on the DeKalb Site.

[4]Treaty with the Potawatomi, 1832, 7 Stat. 378. (Ex. C.)

States signed three different treaties in October 1832 with different groups of Potawatomis.[5] Shab-eh-nay was a signatory to the treaty signed on October 20th, which dealt with the cession of land in Illinois. Article 2 of that treaty states, in pertinent part: "From the cession aforesaid the following tracts shall be reserved, to wit: ... For Sho-bon-ier, two sections, at his village." The site of this village is not specified. However, it appears to be a confirmation of Article 3 of the 1829 Treaty, based on the facts surrounding the signing of the treaty. (See discussion below.)

In 1833, the U.S. Attorney General, Roger B. Taney, a future Supreme Court Justice, issued an opinion that discussed the status of "reservations to certain Indians" in the 1832 Treaty.[6] ("1833 AG Opinion") The Attorney General opined that the reservations made in the 1832 Treaty that were excepted from the general cession were "still held under the original Indian title," that is, aboriginal title. "The character of the title to these portions could not be affected by a grant which did not embrace them, and from the operation of which they are in express terms excepted; and as they are still held under the original Indian title, the Indian occupants cannot convey them to individuals, and no valid cession can be made of their interest but to the United States."

**4. 1833 Treaty**

In 1833, the United States entered into a treaty with the United Nation at Chicago[7] ("1833 Treaty"). In Article 1 of this treaty, the United Nation ceded almost all of their remaining land

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[5]Francis Paul Prucha, The Great Father, vols. I and II, University of Nebraska Press (1984), p. 249. Cited herein as "Prucha." (Ex. D.)

[6]Title to the Pottawatomie Reservations, 2 U.S. Op. Atty. Gen. 587, 1833 WL 1036 (1833). (Ex. E).

[7]Treaty with the Chippewa, etc., 1833, 7 Stat. 431. (Ex. F.)

east of the Mississippi to the United States. In Article 2, the United Nation was granted "Indian lands" in a tract of land west of the Mississippi River. In Article 3, Shab-eh-nay was granted $200 per year for life. The other two chiefs to whom land was granted in Article 3 of the 1829 Treaty, Wah-pon-eh-see and Awn-kote, were paid $3,500 total for the land granted to them, which they assigned and surrendered to the United States.

Article 5 of the 1833 Treaty provides:

> The Reservation of two sections of land to Shab-eh-nay by the 2d. Clause of the 3d. Article of the treaty of Prairie du Chien of the 29th July, 1829, shall be a grant in fee simple to him his heirs and assigns forever, and all the individual reservations of land in the treaty concluded at Camp Tippecanoe, dated 20th October 1832, shall be considered as grants in fee simple to the persons to whom they are made, their heirs and assigns forever, ... – Provided that no sale of any of the said reservations shall be valid unless approved by the President of the United States. The 5th Article has been inserted at the request of the said Chiefs who alledge [sic] that the provisions therein contained were agreed to at the time of the making of the said treaties but were omitted to be inserted or erroneously put down. – It is however distinctly understood that the rejection of said Article by the President and the Senate of the United States shall not vitiate this treaty.

Thus, the 1833 Treaty purported to grant to Shab-eh-nay fee title in his Village for himself and his heirs, which was, by the language of this article, the grant that Shab-eh-nay thought he was receiving in the 1829 Treaty.

The Senate struck Article 5 from the 1833 Treaty. The committee recommendation[8] that led to striking Article 5 stated, in pertinent part:

> The committee recommend that the fifth article of the treaty and the fourth article in the supplementary articles be stricken out. It may well be questioned whether there is a power to make such provisions as most of these are, in a treaty: but if there is, the committee think it ought not to be exercised. Such stipulations would be almost certain to end in a provision in favor of individuals not seen or known in the transaction, but upon whose suggestions the stipulations were insisted upon by the Indians.

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[8]Senate Executive Journal, April 7, 1834, p. 384. (Ex. G.)

The 1833 Treaty was not finalized by Congress until February 21, 1835.

**B. After the treaties**

In October 1836, the removal of Shab-eh-nay's band from Illinois began.[9] Shab-eh-nay accompanied his band to Council Bluffs, Iowa, then returned to Illinois in November 1837 with his family.[10] In late 1838, Shab-eh-nay and his family again went west to Council Bluffs. He left the land in the care of Wilbur Walker, apparently a neighbor. It is unclear how long Shab-eh-nay was away from Illinois. It is possible, but not certain, that Shab-eh-nay returned to the Village in 1840 and in 1844.

On December 24, 1841, the Office of the Superintendent of Indian Affairs in St. Louis sent a letter enclosing a letter from "Shab-eh-nay, a Chief of the Potawatamies of the Council Bluffs Sub Agency," in which Shab-eh-nay proposed "to sell his reservation of land to the Government."[11] In Shab-eh-nay's letter of November 8, 1841, he wrote:

> having previously made an application to the Department to Sell the land reserved to me in the 5th article of the Treaty of Chicago of Sept. 26th 1833 and having received an answer from the Com. Of Indian Affairs, Hon. T.H. Crawford through Maj. Jno. Dougherty late Indian Agency that an application would be made to Congress for the necessary appropriation, I beg leave to request you will if practicable cause the amount ($1600) Sixteen Hundred dollars, may be forwarded to me the ensuing year, with the annuities which may be due the Ottawas, Potawatamies [sic] & Chipewas [sic] for the year 1842. Eight hundred dollars per Section is the Sum I have agreed to Sell the Two sections of land above refered [sic] to.[12]

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[9]James Patrick Dowd, Built Like a Bear, Ye Galleon Press (1979), p. 89. Cited herein as "Dowd." (Ex. H.)

[10]*Ibid.*, p. 89-90.

[11]*Ibid.*, p. 128.

[12]*Ibid.*, p. 127.

Shab-eh-nay was at the Village in 1845. There is evidence that Walker attempted, perhaps without Shab-eh-nay's permission, to sell the Village to Coleman Olmstead on October 18, 1845. Also during this time, Olmstead attempted to purchase the land from Shab-eh-nay, but apparently Shab-eh-nay decided to sell the land instead to two brothers, Ansel and Orrin Gates. Shab-eh-nay traveled with the Gates brothers to Washington, D.C. in 1845 to allow the Gates brothers to secure a clear title to the land.[13] This appears to have not resulted in a sale.

Shab-eh-nay returned to the Village in 1846 and remained there until sometime prior to May 1849. At that time, Shab-eh-nay traveled west to visit friends and left William Norton to care for his lands. According to historian James Patrick Dowd, immediately after he left, the land was "overrun with squatters."

In November 1850, the U.S. General Land Office conducted sales to non-Indians of the Village. Shab-eh-nay apparently was not aware of the sales until he returned to Illinois in 1850 or 1851 and learned of the sales from Norton.

In 1852, Congress appropriated $1,600 to pay "Sho-bon-ier" and his heirs for the land reserved in the 1832 Treaty.[14] Historians believe, and historical evidence appears to support, that Congress intended that payment to extinguish rights to the Village. (See below.) In 1856, the House Committee on Indian Affairs affirmed the government's prior conclusion that the land had reverted to federal ownership when Shab-eh-nay's band migrated.[15]

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[13] *Ibid.*, p. 91.

[14] *Ibid.*, p. 131. *See also* Report of the Thirty-Second Congress, Sess. I, Chap. LXVI (1852), p. 20. (Ex. I.)

[15] Report of the House Committee on Indian Affairs, House of Representatives, 34th Congress, 3rd Sess., Report No. 40, December 26, 1859, pp. 1-3. (Ex. J.)

Shab-eh-nay died in 1859. His wife died in 1864. From the 1850s to the 1890s, Shab-eh-nay and members of his family made inquiries about the land that had been sold by the General Land Office. The United States government, including the House Committee on Indian Affairs and individuals within the DOI and Department of War, repeatedly and unanimously responded to these inquiries by stating that the 1829 Treaty had given Shab-eh-nay and his band merely the right to use the land and affirmed the validity of the fee patents.[16] In documents from the 1830s to the 1890s, the United States government determined again and again that the interest conveyed by the 1829 Treaty was usufructary only.[17]

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[16]*See* ex. J and Dowd, pp. 115-179.

[17]*See, e.g.*, Report of the House Committee on Indian Affairs (ex. J); March 21, 1838 letter, "the 2nd article reserved from the cession large quantities of land in favor of certain Indians therein named, who have only a usefunctuary [sic] right to it" (Dowd, p. 120); March 23, 1832 letter, "As he has only a usefunctuary [sic] right to it..." (*Ibid.*); March 21, 1838, "considering Shobonier has only a temporary use and enjoyment of the land ..." (*Ibid.*, p. 128); July 7, 1843 letter discussing the survey of lands reserved for the use of Shab-eh-nay and his band in the 1829 Treaty, "The claim has doubtless gone out of the hands of the Indians..." (*Ibid.*, p. 137); January 17, 1843 letter from General Land Office, comparing land reserved for the use of Shab-eh-nay and his band in the 1829 Treaty with the land reserved in the 1832 Treaty, and finding he had "a usufruction [sic] right only" (*Ibid.*, p. 139-140)("This opinion is sustained and fortified, I think, by the fact that the 5. art. of the treaty of 26. Sept. 1833 ... was stricken out by the Senate."); November 18, 1845 letter, "the treaty gives to Shab-eh-nay or his band no authority to sell the land usefunct [sic] as aforesaid..." (*Ibid.*, p. 143); May 27, 1848 letter, "The treaty gave no authority to Shab-eh-nay to sell the land. It was reserved for the *use* of himself and his band only, and it is the opinion of this office [War Department, Office of Indian Affairs] that when the parties, for whose *use* it was reserved, left it, that it was competent for the United States to sell it as other lands ceded by that treaty which had not been expressly granted to individuals named therein." (*Ibid.*, p. 146); July 14, 1849 letter from the Commissioner of the General Land Office, J. Butterfield requesting an inquiry into the merits of Shab-eh-nay's case, "It is true Shab eh nay's right to the lands was only a *usufruct* one..." (*Ibid.*, p. 150); July 18, 1849 letter, "... the original treaty only gave to Shab-eh-nay and his band, the use of the land – vesting in them no title thereto ..." (*Ibid.*, p. 151); June 25, 1853 letter, "...the title was a mere usufructuary one..." (*Ibid.*, p. 153); October 5, 1854 letter, "The treaty under which this reservation was made, gave to Shab-eh-nay, and his band only the usufruct right thereto." (*Ibid.*, p. 154); April 12, 1856 letter, "It was reserved for the *use* of himself *and his band* only: – that when the parties for whom it was

In the late 1990s, a century after Shab-eh-nay's family ceased making claims, two Indian tribes, the PBPN and Ottawa Tribe of Oklahoma, asserted that they were the rightful successors of Shab-eh-nay and that the 1829 Treaty created a reservation on their behalf, which had not been extinguished. On January 14, 1998, the PBPN asked the Bureau of Indian Affairs to render an opinion on the merits of the PBPN's claim to the land reserved for the use of Shab-eh-nay and his band in the 1829 Treaty.

On January 18, 2001, DOI Solicitor John D. Leshy sent a letter to U.S. Representative J. Dennis Hastert and Illinois Governor George H. Ryan ("Leshy Letter") stating "after considerable review of the relevant facts, we have determined that the Prairie Band has a credible claim for unextinguished Indian title to this land. ... [W]e believe the U.S. continues to bear a trust responsibility to the Prairie Band for these lands. ...[T]he success of any litigation to vindicate this claim is necessarily uncertain."[18]

On March 20, 2003, the PBPN submitted a proposal to the State "to develop and construct a first class gaming, entertainment and resort complex" in DeKalb County, seeking to enter into an agreement with the State authorizing class III gaming, and requesting assistance from the State in obtaining recognition of the alleged reservation status of that land.[19] On April

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reserved, left it, it was competent for the United States to sell it, as other lands ceded by that treaty, which had not been expressly granted to individuals therein..." (*Ibid.*, p. 157); September 24, 1863 letter, "Shab-eh-nay had only a usufruct right to the land" (*Ibid.*, p. 163); September 13, 1864 letter, the land "reverted to the United States" (*Ibid.*, p. 165); and May 2, 1896 letter, "... by decision of the Department the land reverted to the United States to be treated as other public lands..." (*Ibid.*, p. 175.)

[18]Ex. K.

[19]Ex. L.

25, 2006, the PBPN purchased 128 acres near Shabbona (the Ward Farm), allegedly within the area reserved for the use of Shab-eh-nay and his band in the 1829 Treaty.

On September 22, 2006, Principal Deputy Assistant Secretary of Indian Affairs, Michael D. Olsen sent a letter to Representative Hastert stating: "The *Sherrill* decision [*City of Sherrill, New York v. Oneida Indian Nation of New York, et al.*, 544 U.S. 197 (2005)] is of fundamental importance and any assertion of rights over land would require an analysis under these and other relevant cases."[20] ("Olsen Letter") The Olsen Letter also refers to *Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 1031 (1998).[21] It further stated: "Any claim to jurisdiction over Indian owned land within a tribe's former territory, and conversely any claim to immunity from such jurisdiction, will have to deal with the complex application of all the factors referenced by the treaties, courts, and statutes in the context of the specific claim."

## III. Analysis

### A. The meaning of "Indian lands"

Under the IGRA, an Indian tribe can conduct Class II gaming only on "Indian lands" subject to approval and regulation by the Chairman of the OGC. 25 U.S.C.A. § 2710. "Indian lands" is defined in the IGRA as "all lands within the limits of any Indian reservation" and "any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or

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[20]Ex. M.

[21]In *Cass County*, the Supreme Court held that, once Congress has removed former reservation lands from federal protection and made the land fully alienable, tax-exempt status does not automatically attach when a tribe subsequent purchase of the alienable reservation land. *Id.*, at 1910. The Court took this analysis further in *Sherrill* (holding that equitable doctrines prevent the re-establishment of ancient sovereignty in former reservation land that is purchased by the tribe, as discussed below).

individual or is held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power." 25 U.S.C.A. § 2703(4). "Indian lands" is, thus, a critical term in the IRGA because the statute's substantive provisions apply only to gaming on those lands.

The DeKalb Site is held in fee simple by the PBPN. Other land that is allegedly within the boundaries of the Village is held by others, none of whom are Indian tribes or individuals. None of the land is currently held in trust by the United States for the benefit of the PBPN, is subject to restriction by the United States against alienation, or has governmental power exercised over it by the PBPN. Thus, the OGC requested that the Attorney General consider whether the DeKalb Site is within the limits of an Indian reservation, and, if so, whether the PBPN can legally conduct Class II gaming on that site.

The IGRA does not define "Indian reservation." Federal courts have relied on the definition of "Indian country" in 18 U.S.C.A. § 1151 to determine the existence of both federal criminal and civil jurisdiction over an area. *See Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520, 952 (1998).

> [T]he term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

Based on this definition, the PBPN is likely to argue that the land "reserved, for the use of" Shab-eh-nay and his band is "Indian country" because it was an "Indian reservation under the jurisdiction of the United States Government" or was an "Indian allotment[], the Indian title[] to

which [has] not been extinguished." The PBPN is likely to argue that the 1829 Treaty created a permanent reservation for Shab-eh-nay and his band and that they are the legal successors in interest to Shab-eh-nay's band; thus the DeKalb Site is now an Indian reservation upon which they should be allowed to conduct class II gaming. None of these arguments have merit.

In initially considering whether the PBPN can conduct class II gaming on the DeKalb Site, the OGC must consider the dramatic shift in Indian law since the Supreme Court ruling in *City of Sherrill, New York v. Oneida Indian Nation of New York, et al.*, 544 U.S. 197 (2005). Given the ruling in *Sherrill* and its progeny, the PBPN cannot show that by purchasing the DeKalb Site, they renewed any ancient sovereignty over that land.

Also, as the PBPN's claims to the land are based the allegedly improper action of the United States in selling the land, the statute of limitations on ancient land claims set out in the Indian Claims Commission Act bars any further action on any claims of the PBPN to the land by the courts, administrative agencies, and Congress. Even if the DOI takes the DeKalb Site into trust for the PBPN, under 29 U.S.C.A. § 2719, the PBPN would not be able to conduct Indian gaming on the Site.

From a historical context, the 1829 Treaty only gave Shab-eh-nay and his band the right to use the Village, and any interest Shab-eh-nay may have retained in the Village was extinguished by Congress by the appropriation of $1,600 to pay Shab-eh-nay for the land.

Finally, even assuming that the PBPN could overcome all of the above issues, which it cannot, the PBPN must show that they are the proper successor in interest to Shab-eh-nay and his band and that the DeKalb Site is within the original boundaries of the Village.

**B. The PBPN have not revived ancient sovereignty over the DeKalb Site**

The parties to this legal inquiry will present arguments on the historical activities that the PBPN asserts created a reservation that was never validly extinguished by Congress. However, simply because the PBPN recently purchased land in fee simple that it alleges is within the boundaries of the Village does not revive the land's alleged prior status as a reservation. Given the Supreme Court's decision in *Sherrill*, the historical basis for the PBPN's claims is no longer the main issue in determining whether they should be allowed to conduct class II gaming on the Site.[22] Instead, given the similarity of the fact patterns in *Sherrill* and its progeny to this case, the OGC must find that equitable principles prevent the PBPN from reviving any alleged ancient sovereignty over the DeKalb Site.

### 1. The Supreme Court's decision in *Sherrill*

In *Sherrill*, the Oneida Indian Nation ("OIN") and the United States brought suit seeking equitable relief from the application by the City of Sherrill of property taxes on land the OIN purchased in fee in 1997 and 1998. This land was within the boundaries of an area that had been retained by OIN as a reservation in a 1788 treaty with the State of New York. This reservation was later acknowledged by Congress in the 1794 Treaty of Canandaigua. In the 1794 treaty, the U.S. guaranteed OIN's "free use and enjoyment" of the reservation. However, over the next century or so, the state continued to purchase parts of the reservation from the OIN and its members and most of the OIN moved to different locations. By 1920, the OIN retained only 32 acres of the original reservation.

The OIN brought suit against the city seeking equitable relief prohibiting the imposition

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[22]The Olsen Letter stated: "The *Sherrill* decision is of fundamental importance and any assertion of rights over land would require an analysis under these and other relevant cases." (The other case referred to in the letter is *Cass County, supra.*)

of property taxes on the land they purchased within the city limits. The district court ruled that the land was not taxable, and the Second Circuit affirmed. On appeal, the Supreme Court considered the OIN's and the United States' argument that the OIN was not required to pay property taxes to the city. They argued that the purchase in fee simple revived their ancient sovereignty over the land.[23] The Court rejected this theory on the basis of laches, acquiescence, and impossibility.

> [T]his Court has recognized the impracticability of returning to Indian control land that generations earlier passed into numerous private hands. The unilateral reestablishment of present and future Indian sovereign control, even over land purchased at the market price, would have disruptive practical consequences similar to those that led the *Yankton Sioux* Court to initiate the impossibility doctrine: Sherrill and the surrounding area are today overwhelmingly populated by non-Indians, and a checkerboard of state and tribal jurisdiction – created unilaterally at OIN's behest – would seriously burde[n] the administration of state and local governments and would adversely affect landowners neighboring the tribal patches.

*Id.,* at 200 (citations and quotations omitted). The Court held that, under "standards of federal Indian law and federal equity practice," OIN could no longer exercise sovereign control over the land purchased because of "the longstanding, distinctly non-Indian character" of the area and inhabitants, the regulatory control exercised for 200 years by the state, counties, and towns, and OIN's long delay in seeking judicial relief. *Id.*, at 198. In so ruling, the Court warned: "If OIN may unilaterally reassert sovereign control and remove these parcels from the local tax rolls, little would prevent it from initiating a new generation of litigation to free the parcels from local

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[23]This lawsuit was not barred by the Indian Claims Commission Act because OIN's claims were only against the local government. As they lost their land by state action, rather than by the actions of the United States, the United States was not an indispensable party. The OIN had pursued claims against the United States before the Indian Claims Commission in 1951 arguing that the United States had a fiduciary duty to protect the OIN from the state and the United States had knowledge of the improper transfers, but the OIN eventually abandoned these claims.

zoning or other regulatory controls that protect all landowners in the area." *Id.*, at 201.

### 2. Cases following *Sherrill*

#### a. *Cayuga Indian Nation of New York v. Pataki*

In *Cayuga Indian Nation of New York v. Pataki*, 413 F.3d 266 (2nd Cir. 2005), the Second Circuit considered the appeal of an Indian land claim shortly after the ruling in *Sherrill*. The *Cayuga* case concerned a suit for ejectment originally brought by the Cayuga Indian Nation ("Cayugas") and the United States for the Cayugas' original reservation of land that was recognized in a 1794 treaty with the United States. In two subsequent treaties with the State of New York in 1795 and 1807, the state purchased almost all of the Cayugas' reservation land. The district court ruled for the plaintiffs on all liability issues, but found that the plaintiffs could sustain only a claim for damages for the land from the state.

On appeal, the Second Circuit held that the equitable doctrines relied upon by the Supreme Court in *Sherrill* required that the plaintiffs' claims be dismissed. The court found: "The Supreme Court's recent decision in [*Sherrill*] has dramatically altered the legal landscape against which we consider plaintiffs' claims. ... We understand *Sherrill* to hold that equitable doctrines, such as laches, acquiescence, and impossibility, can, in appropriate circumstances, be applied to Indian land claims, even when such a claim is legally viable and within the statute of limitations." *Cayuga*, at 273. The Second Circuit discussed the broadness of the *Sherrill* ruling:

> Although we recognize that the Supreme Court did not identify a formal standard for assessing when these equitable defenses apply, the broadness of the Supreme Court's statements indicates to us that *Sherrill*'s holding is not narrowly limited to claims identical to that brought by the Oneidas, seeking a revival of sovereignty, but rather, that these equitable defenses apply to "disruptive" Indian land claims more generally. ... [T]he *Sherrill* opinion does not limit application of these equitable defenses to claims seeking equitable relief.

*Id.*, at 274, 275. The court found that while the claims at issue did not involve the reinstatement of tribal sovereignty, the claims involved "comparatively disruptive claims"; thus, they were barred by laches. *Id.*

The Second Circuit concluded that the same considerations "that doomed the Oneidas' claim in *Sherrill* apply with equal force here." It listed those considerations, as follows:

> [g]enerations have passed during which non-Indians have owned and developed the area that once composed the Tribe's historic reservation; at least since the middle years of the 19th century, most of the [Tribe] have resided elsewhere; the longstanding, distinctly non-Indian character of the area and its inhabitants; the distance from 1805 to the present day; the [Tribe's] long delay in seeking equitable relief against New York or its local units; and developments in [the area] spanning several generations.

*Id.*, at 277, *citing Sherrill* (citations and quotations omitted).

The Second Circuit also held that the United States, while traditionally not subject to laches, was subject to laches in this case. *Id.*, at 278-279. Also, even though the district court had ruled, in deciding whether to award prejudgement interest, that the Cayugas were not responsible for the delay in bringing the action, the Second Circuit found that laches applied anyway. *Id.*, at 279.

**b. *Cayuga Indian Nation of New York v. Village of Union Springs***

In *Cayuga Indian Nation of New York v. Village of Union Springs*, 390 F.Supp.2d 203 (N.D.N.Y. 2005) ("*Union Springs II*"), the district court granted the defendants' motion for summary judgment on the application of local zoning and land use laws. In the facts of this case, the Cayugas purchased property located at 271 Cayuga Street in Union Springs within the original boundaries of the Cayuga reservation recognized in a 1794 treaty with the United States, and attempted to establish a class II gaming facility on the property. *Cayuga Indian Nation of*

*New York v. Village of Union Springs*, 293 F.Supp.2d 183, 186 (N.D.N.Y. 2003)("*Union Springs I*"). The defendants issued stop work orders, as the Cayugas had not complied with local land use and zoning laws and regulations, and the Cayugas filed suit, alleging that the property was Indian country. The court issued a permanent injunction against the defendants and found that the land fell within the definition of "Indian country." *Union Springs II*, at 205. While the case was on appeal, but before it was argued, the Supreme Court decided *Sherrill*. *Id.* The Second Circuit remanded the case, and directed the district court to consider whether it should vacate its injunction. *Id.*, at 205-206.

On remand, the district court granted summary judgment on behalf of the defendants. It held that:

> The Nation's efforts to avoid dismissal in light of *City of Sherrill* are undermined by the Supreme Court's focus on the disruptive nature of exemption from taxation by local government. *If avoidance of taxation is disruptive, avoidance of complying with local zoning and land use laws is no less disruptive. In fact, it is even more disruptive.* The Supreme Court clearly expressed its concern about the disruptive effects of immunity from state and local zoning laws, even to the point of citing to this case as an example. Even the lone dissenter, Justice John Paul Stevens, opined that local taxation was the "least disruptive to other sovereigns," and noted that "[g]iven the State's strong interest in zoning its land without exception for a small number of Indian-held properties arranged in a checkerboard fashion, the balance of interests obviously supports the retention of state jurisdiction in this sphere." The Nation is seeking relief that is even more disruptive than non payment of taxes. The Supreme Court's strong language in *City of Sherrill* regarding the disruptive effect on the every day administration of state and local governments bars the Nation from asserting immunity from state and local zoning laws and regulations.

*Id.*, at 206 (citations omitted, emphasis added).

### c. *New York v. Shinnecock Indian Nation*

In *New York v. Shinnecock Indian Nation*, 400 F.Supp. 2d 486 (E.D.N.Y. 2005), the district court denied summary judgment on the question of whether the Shinnecock Indian Nation ("Shinnecocks") could develop a plot of land as a gaming casino. The court found that an issue precluding summary judgment was the nature of the title in which the Shinnecocks held the land; that is, whether the land was held in aboriginal title or title by adverse possession. *Id.*, at 493. The court stated that given the rejection of the "unification theory" (in which the Tribe's unextinguished aboriginal title would merge with its present title to reignite tribal sovereignty) by the Supreme Court in *Sherrill*, the facts of the Shinnecocks' possession must be considered. *Id.* The facts cited by the court showed that the Shinnecocks had occupied the land continuously at least from some time prior to the 1840s, and that neither the town nor the State had ever imposed any taxes on the land. *Id.*, at 494.

### d. *Shinnecock Indian Nation v. New York*

In *Shinnecock Indian Nation v. New York*, 2006 WL 3501099 (E.D.N.Y. 2006), the Shinnecocks sued the state and others for the wrongful taking of lands that had been leased to the tribe in 1703 and requested damages, a declaration of the Shinnecocks' possessory rights to the lands, ejectment, and declaratory and injunctive relief. The district court held that the rulings in *Sherrill* and *Cayuga* warranted dismissal of the Shinnecocks' claims. *Id.*, at *1. The court found that

> the Shinnecocks have not occupied the Subject Lands since 1859; since 1859 the Lands have been the subject of occupation and development by non-Indians (according to the 2005 U.S. Census Bureau Fact Sheet, Suffolk County, N.Y., only .2% of Suffolk County residents are of American Indian descent); over 140 years passed between the alleged wrongful dispossession and the attempt to regain possession; and there has been a

dramatic change in the demographics of the area and the character of the property. *Id.*, at *5. The court held that, even though the Shinnecocks were prevented by institutional barriers from vindicating their rights to the land, their claims were barred by laches. *Id.* The Shinnecocks pointed to the small amount of land involved in their assertion that their claim was not disruptive. The court found that this was not dispositive. "Their attempt to distinguish *Cayuga* must fail, as the test for disruptiveness is not based on strict numeric calculations..." *Id.* The Shinnecocks also claimed that the taking of the land in 1859 "was executed by fraudulent means and threats of intimidation." *Id.*, at 6. This did not change the court's ruling. "Equitable considerations bar plaintiffs' claims irrespective of their viability. ... To be sure, the wrongs about which the Shinnecocks complain are grave, but they are also not of recent vintage, and the disruptive nature of the claims that seek to redress these wrongs tips the equity scale in favor of dismissal." *Id.*

**e. *Seneca-Cayuga Tribe of Oklahoma v. Town of Aurelius, New York***

In *Seneca-Cayuga Tribe of Oklahoma v. Town of Aurelius, New York*, 233 F.R.D. 278 (N.D.N.Y. 2006)("*Aurelius II*"), the district court considered a similar case to that considered in *Union Springs II*, supra. In this case, the Seneca-Cayuga Tribe ("Seneca-Cayugas") purchased 229 acres of land within the defendant towns' boundaries and within the boundaries of the Seneca-Cayugas' reservation established in a 1794 treaty and began constructing a class II gaming facility on the property. *Seneca-Cayuga Tribe of Oklahoma v. Town of Aurelius, New York*, 2004 WL 1945359, *2 (N.D.N.Y. 2004) ("*Aurelius I*"). After the defendant towns attempted to enforce zoning, land use, and taxation laws on the property, the Seneca-Cayugas

filed this lawsuit. After the *Sherrill* and *Cayuga* rulings, the defendants filed a motion for judgment on the pleadings. The court cited to *Union Springs*, supra, in ruling that "the doctrine of impossibility bars the Tribe from asserting immunity from state and local zoning laws and regulations, as well as state and local taxation laws and regulations."*Aurelius II,* at 282.

#### f. *Oneida Indian Nation of New York v. New York*

In *Oneida Indian Nation of New York v. New York*, 2007 WL 1500489 (N.D.N.Y. May 21, 2007), the district court considered claims by the OIN against the State for their unextinguished reservation. The court held that the decisions in *Sherrill* and *Cayuga* barred the plaintiffs' possessory land claims against the state. While the plaintiffs argued that a laches inquiry is fact-intensive, the court held that no additional discovery was necessary based on the findings in *Cayuga*: "the Court finds additional discovery unnecessary, and that the undisputed facts as developed by the parties and in Second Circuit and Supreme Court precedent require the Court to grant Defendants' Motion for summary judgment and dismiss Plaintiffs' possessory land claims." *Id.*, at *7. However, the court held that the plaintiffs' non-possessory claims for damages survived summary judgment as they were non-disruptive. *Id.*, at *7-14.

### 3. Application of *Sherrill* and its progeny to the DeKalb Site

The Supreme Court's ruling in *Sherrill*, and subsequent rulings by the Second Circuit and district courts have provided a roadmap to determining whether equitable doctrines bar the reestablishment of tribal sovereignty over unextinguished reservation land. As discussed in these cases, the following facts establish that laches bars a tribe's claims:

(1) generations have passed in which non-Indians have owned and developed the area that once composed the tribe's historic reservation;

(2) the tribe has lived elsewhere for a long time;

(3) the area and its inhabitants have a longstanding, distinctly non-Indian character;

(4) the state and local governments have asserted control over the land for a long time;

(5) the tribe had a long delay in seeking equitable relief against the state or its local units;

(6) there have been developments in the area spanning several generations; and

(7) the claims by the tribe to the land are disruptive.

The circumstances involved in the PBPN's claims to the Village fit the descriptions in all of the above cases in which the courts found that laches barred the tribes' plans to reassert tribal sovereignty over a former reservation. Here, as in those cases, many generations have passed since Shab-eh-nay and his band resided at the Village, and since that time, non-Indians have owned and developed the area. There is no dispute that Shab-eh-nay's band left Illinois in the mid-1800s; thus, like the tribes in *Sherrill* and *Cayuga*, Shab-eh-nay's band and its successors, whether the PBPN or another tribe, have resided elsewhere since the mid-19th century.

Shabbona Township, DeKalb County and, indeed, the entire State of Illinois have a longstanding, distinctly non-Indian character. There are no Indian reservations within the State. Based on the 2000 census, the American Indian and Alaska Native population is 0.27% of the total population of Shabbona Township, 0.6% of DeKalb County's total population, and 0.58% of the State's total population. The area is overwhelmingly populated by non-Indians. Regulatory control over the DeKalb Site has been constantly exercised by the State and local governments for over 150 years. Until the 1990s, no Indian tribe or individual had raised a claim under the 1829 Treaty to this land in any legal or administrative venue for over a century. The land has

been developed by non-Indians for over 150 years.

The regulation of gambling and control over zoning and land use is extremely important to the State of Illinois, DeKalb County, Shabbona Township, and the surrounding landowners. As discussed in *Union Springs* and *Aurelius*, it represents at least as strong an interest to the State and local governments as the contested property taxes in *Sherrill* did to that locality. The inability of the State, County, and Township to enforce their gambling, zoning, and land use laws and regulations, even on discrete parcels of land,[24] would be highly disruptive to governance of the area.

As the facts considered in this submission are virtually identical to the facts in *Sherrill* and the cases that follow it, the OGC should find that the PBPN's claims to the DeKalb Site are barred by the equitable doctrines cited by the Supreme Court in *Sherrill*.

### C. The PBPN's sole remedy for its claims under the 1829 Treaty was under the Indian Claims Commission Act

In determining whether the IGRA authorizes the PBPN to conduct class II gaming on the DeKalb Site, the OGC is barred by the Indian Claims Commission Act ("ICCA") from considering the PBPN's claim that the 1829 Treaty created a reservation on that land on their behalf that has not been validly extinguished. The PBPN had the opportunity to raise its claim to the Village before the Indian Claims Commission ("Commission") under the ICCA. As the PBPN failed to file a claim to this land with the Commission prior to August 13, 1951, the last date of the five-year period set by Congress in the ICCA during which pre-1946 tribal claims

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[24]The PBPN council has stated that they do not plan to bring ejectment actions against individual landowners, but that if an individual or entity offers land for sale within the boundaries of the Village, the PBPN are likely to buy that land. Thus, while the PBPN currently own two parcels of land in DeKalb, their holdings are likely to increase in a piecemeal fashion.

could be filed, its claim for the land cannot "thereafter be submitted to any court or *administrative agency* for consideration,"[25] nor can that claim "thereafter be entertained by the Congress." ICCA § 12, 25 U.S.C. § 70k (1976) (emphasis added).

### 1. The *Navajo Tribe* case

The 10th Circuit addressed similar issues in *Navajo Tribe of Indians v. State of New Mexico, et al.*, 809 F.2d 1455 (10th Cir. 1987). In that case, the Navaho Tribe brought an action in 1982 in federal district court for a declaratory judgment to affirm its title to unallotted lands within an Executive Order reservation that were restored to the public domain before all of the allotments to Tribe members living on the reservation that were mandated by Congress had been made. (The Tribe had previously filed a claim with the Commission seeking compensation for the cession of its lands, including the lands at issue in the 1982 case, and the Commission had found that the Tribe was entitled to compensation.) The district court ruled that it had no jurisdiction to hear the case because the case fell within the exclusive jurisdiction of the Commission. The main issue before the 10th Circuit was whether section 12 of the ICCA divested the district court of jurisdiction over the issues raised in the 1982 case. The court considered the history of the Commission:

> ...Congress ... enacted the Indian Claims Commission Act in 1946, creating a quasi-judicial body to hear and determine all tribal claims against the United States that accrued before August 13, 1946. The ICCA confined the Commission's jurisdiction to tribal claims that accrued before its 1946 enactment, while it conferred jurisdiction on the Court of Claims to adjudicate any tribal claim accruing after 1946 that would be cognizable in the Court of Claims if the claimant were not an Indian tribe. ICCA § 24, 28 U.S.C. §

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[25]The NIGC is an administrative agency. *See, e.g., Colorado River Indian Tribes v. National Indian Gaming Commission*, 466 F.3d 134, 135 (D.C.Cir. 2006) ("The Act established the Commission as an agency within the Department of the Interior."); *Shakopee Mdewakaton Sioux Community v. Hope*, 16 F.3d 216 (8th Cir. 1994).

> 1505 (1982). Congress also limited the period for filing tribal claims with the Indian Claims Commission to five years. Any claim that accrued before August 13, 1946, and which was not filed with the Commission by August 13, 1951, could not "thereafter be submitted to any court or administrative agency for consideration," nor could such a claim "thereafter be entertained by the Congress." ICCA § 12, 25 U.S.C. § 70k (1976).

*Id.*, 809 F.2d at 1460. The court found that Congress intended the ICCA to be extremely broad and apply to "'*all possible claims.*'" *Id.*, 809 F.2d at 1465, *quoting* H.R. Rep. No. 1466, 79th Cong., 2d Sess. 1350, 1349, 1356 (1945)(emphasis added by court). The Commission was authorized to hear claims against the United States on behalf of any Indian tribe, band, or other identifiable group of American Indians in five categories:

(1) claims in law or equity arising under the Constitution, laws, treaties, and executive orders;

(2) all other claims in law or equity, including those in tort, on which the claimant would have been able to sue if the United States was subject to suit;

(3) claims that would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable in a court of equity;

(4) claims arising from a taking by the United States, whether as a result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; and

(5) claims based on fair and honorable dealings not recognized by any existing rule of law or equity.

*Id.*, 809 F. 2d at 1465.

The claims of the PBPN to the Village would have fallen within this extremely broad grant of jurisdiction and, under the ICCA, the PBPN would not have been able to revive the alleged reservation status of the land. On the contrary, if their claim for this land had been timely brought before the Commission, and if the Commission had ruled in their favor, their sole

remedy would have been monetary compensation. As the 10th Circuit ruled in *Navajo Tribe*:

> Although the ICCA did not expressly address the extent of the Commission's remedial powers, the Commission, in one of its early opinions, construed the ICCA as limiting the available relief "to that which is compensable in money." The legislative history of the bills extending the life of the Commission confirms that this early interpretation of the ICCA was correct. According to one subcommittee report, the ICCA reflected a congressional policy that "[t]ribes with valid claims would be paid in money. No lands would be returned to a tribe." Furthermore, in response to a committee member's question whether the Commission "ever make[s] any adjudications which convey title to land for the Indian person," Chief Commissioner Watkins explained: "[W]e are an arm of the Congress for one definite purpose: to consider these ancient Indian claims. They either get an award in cash or their case is dismissed and they do not get anything. That is as far as they go."... The Tribe, even if it had timely filed its claim under the ICCA, could not have quieted title in these lands or maintained an action in ejectment. ... The Tribe simply would have had to accept just monetary compensation if the Commission found their claim to title valid. This restriction as to remedy represents a fundamental policy choice made by Congress out of the sheer, pragmatic necessity that, although *any* and *all* accrued claims could be heard before the Commission, land title in 1946 could not be disturbed because of the sorry injustices suffered by native Americans in the eighteenth, nineteenth, and early twentieth centuries. Those injustices would have to be recompensed through monetary awards.

*Id.*, 809 F.2d at 1461, 1467 (citations omitted).

By enacting the ICCA, Congress gave Indian tribes their sole opportunity to address their ancient claims to land that was wrongfully taken from them by the United States government, and any other claims that accrued prior to 1946. After the statute of limitations ran on the ICCA, tribes could no longer raise claims to land that arose prior to 1946 before any court, administrative agency, or Congress. The Navajo Tribe argued that the court's interpretation of the ICCA means that valid Indian titles in land would be "'extinguished by implication'" and constituted "'a backhanded assertion of eminent domain powers'" *Id.*, 809 F.2d at 1469. The court disagreed.

> The ICCA did *not* backhandedly extinguish valid Indian titles; it provided the long-overdue opportunity to litigate the *validity* of such titles and to be recompensed for

> Government actions inconsistent with those titles. The Tribe was unambiguously given a five-year period to assert its title to these lands "or forever hold [its] peace." The pre-1946 actions of the Government in ostensibly returning the lands to the public domain and in issuing land patents to such land certainly should have alerted the Tribe to its responsibility to timely bring suit to settle the conflicting claims. The Tribe was put on clear notice that any claim not properly presented to the Commission could not "thereafter be submitted to any court or administrative agency ... nor ... entertained by Congress." By sleeping on its claim, the Tribe simply lost its forum to litigate the pre-1946 actions of the Government that were inconsistent with its alleged title.

*Id.*, 809 F.2d at 1469-1470 (citations omitted).

**2. The ICCA bar to administrative agency action on pre-1946 claims**

The ICCA's statute of limitations not only prevents tribes from litigating their pre-1946 land claims, but also bars administrative agencies from taking action on these claims. For example, the DOI relied on *Navajo Tribe* when it ruled that it was barred from taking action on a claim brought by the Pueblo of Sandia that approximately 10,000 acres of land were incorrectly excluded from a patent issued to the Pueblo because of an incorrect survey. *Pueblo of Sandia Boundary*, 96 Interior Dec. 331, 1988 WL 410394 (D.O.I. 1988). The DOI found "[t]he failure to challenge the patent until 1983, some 120 years after its issuance, is the most troubling circumstantial evidence involving this claim." *Id.*, 96 Interior Dec. at 355. The DOI further held "even if the Pueblo's claim to the 10,000 acres had any plausibility or color of merit, this Department would, in our view, indisputably be barred by the ICCA from taking administrative action on it and possibly by the Quiet Title Act as well. This is particularly true in view of the availability to the Pueblo as early as the 1859 survey of all of the facts and circumstances upon which it now relies." *Id.*, 96 Interior Dec. at 360. The DOI concluded that even if the Pueblo had shown that the survey was in error, it was precluded from taking any action because of the ICCA. *Id.*, 96 Interior Dec. at 361.

Given these rulings, the PBPN may not now bring *any* claims based on the 1829 Treaty and/or the 1850 sale of the Village by the General Land Office before any court, administrative agency, or Congress. In addition, the ICCA clearly bars administrative agencies, like the DOI and NIGC, from taking action on such a claim. Thus, in examining the PBPN's request for a legal opinion as to the ability of the PBPN to conduct Class II gaming on the DeKalb Site, the OGC is barred from considering the PBPN's claims that the land lies within a reservation created by the 1829 Treaty that was wrongfully taken by the General Land Office in 1850 and was never validly extinguished. Similarly, should the PBPN ask the Secretary of DOI to take their newly purchased land into trust for them, the Secretary may also not consider those claims.

As the PBPN failed to raise any timely claim to this land before the Commission, for which it would have been compensated if the Commission had deemed its claim to the land valid, the PBPN cannot now benefit from its inaction by asking the OGC to find that the alleged reservation status of the land has been revived or was never lost and that the PBPN can conduct class II gaming on the land.

**D. The PBPN litigated issues from the 1829 Treaty with the Commission**

The PBPN, along with other bands of Potawatomis ("Petitioners"), did bring a claim under the 1829 Treaty before the Commission, in which the Commission discussed the land reserved for the use of Shab-eh-nay and his band. *Citizen Band of Potawatomi Indians of Oklahoma, et al. v. United States*, 11 Ind. Cl. Comm. 641 (1962)[26] and 15 Ind. Cl. Comm. 234 (1965),[27] *aff'd in part and rev'd in part,* 179 Ct.Cl. 473, 391 F.2d 614 (1967), *cert den.*, 389 U.S.

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[26]Ex. N.

[27]Ex. O.

1046 (1968) and 390 U.S. 957 (1968), *on remand* 30 Ind. Cl. Comm. 144 (1973).[28] In that action, the Petitioners claimed that they had received inadequate compensation for the land ceded to the United States under the 1829 Treaty. The Commission ruled that the amount paid by the United States was unconscionably low. It found that the value of the land contained in the 1829 Treaty at the time the treaty was signed was $2,470,264.30. *Id.,* 15 Ind. Cl. Comm. at 239a. From this amount, the Commission subtracted the $364,901 in consideration paid by the United States, and $10,790.28, which represented the value of "allowable gratuitous offsets," and awarded the petitioners (including PBPN) the net balance of $2,094,573.02.[29]

The "allowable gratuitous offsets" discussed by the Commission were the 16,640 acres that were set aside for individuals and bands under Articles 3 and 4 of the 1829 Treaty. This included the land reserved for the use of Shab-eh-nay and his band. The PBPN knew, or should have known, at the time this case was before the Commission that this land had been sold to others by the United States government. However, based on the findings of fact and other documents memorializing the arguments before the Commission, the PBPN never raised this issue with the Commission or requested payment from the United States for this land, although claims were raised regarding land granted to individuals under Article 4 of the 1829 Treaty.[30]

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[28]Ex. P.

[29]On appeal, the Court of Claims ruled that the Commission had miscalculated that amount because it did not determine the value of the actual land that had previously been selected by the United States under a prior treaty, and remanded the case to the Commission for that finding and calculation. *Id.,* 391 F.2d at 625. On remand, the Commission set the net award at $4,104,818.98 for the lands ceded by the petitioners under the 1829 Treaty. 30 Ind. Cl. Comm. at 168 and 204.

[30]The Petitioners contended that the Commission erred in not including the 9,600 acres granted to individuals under Article 4 of the 1829 Treaty in the amount for which they were

Because the PBPN failed to bring its claim for the land reserved for the use of Shab-eh-nay and his band in the 1829 Treaty before the Commission prior to August 13, 1951, as required by the ICCA, any claim brought before any court, administrative agency, or Congress that the land they now own in fee simple has retained or should be granted reservation status because of the 1829 Treaty is time-barred. In addition, given that the sole remedy allowed by the ICCA was monetary compensation, the PBPN would never have been able to revive the alleged reservation status of the land.

### E. Even if the Secretary of the Interior takes the land into trust for the PBPN, gaming would not be authorized by the IGRA

The IGRA, 25 U.S.C.A. § 2701 *et seq.*, defines "Indian lands" as "all lands within the limits of any Indian reservation" and "any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power." 25 U.S.C.A. § 2703(4)(A) and (B). Given the ruling in *Sherrill* that the purchase of land within the boundaries of a historic reservation does not revive a tribe's ancient sovereignty over that land, the PBPN cannot convincingly argue that the DeKalb Site is within an Indian reservation. The PBPN purchased the DeKalb Site in fee simple, and the title is not held by the United States in trust for the PBPN nor is it subject to restriction by the United States against alienation. Further, the PBPN does not exercise governmental power over the

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compensated, and asserted that these grants were bribes given to named individuals to get those individuals to influence the other Indians to sign the treaty. The Commission and Court of Claims found no evidence of fraud or undue influence because no protest was made at the time of the grants. The Court of Claims held that "it is too late in the day to conjure up a fraud now." 391 F.2d at 623. The Petitioners, however, never contested the grants in Article 3 of the 1829 Treaty.

DeKalb Site. Thus, the DeKalb Site does not qualify as "Indian lands" under the IGRA and the PBPN cannot conduct any activities, including gaming, on this site that is not in compliance with local ordinances and state laws and regulations.

The Supreme Court in *Sherrill* found that the appropriate means for OIN to use its fee-owned lands for its tribal community was to petition the Secretary of the Interior to take the lands in trust for the benefit of the Tribe under 25 U.S.C. § 465. The PBPN could petition the Secretary to take the DeKalb Site into trust for the benefit of the PBPN to escape state and local taxation and establish a tribal community on the land. However, even if the Secretary takes the DeKalb Site into trust for the benefit of the PBPN, gaming under the IGRA would not be allowed. Under 25 U.S.C.A. § 2719, gaming is not allowed on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988. 25 U.S.C.A. § 2719(a). If the Secretary takes the site into trust, any type of gaming offered by the PBPN would be required to comply with the laws and regulations of the State and any applicable ordinances of the County and Township because the DeKalb Site would not fall within any exception[31] to the general prohibition on

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[31]If the Secretary were to take the land into trust for the PBPN, it would not fall within any exception to the prohibition on gaming because: (1) the lands were not located within or contiguous to the boundaries of the PBPN's reservation on October 17, 1988 (the claim of the PBPN that the 1829 Treaty created a reservation that was never extinguished cannot now be considered by the DOI or any other administrative agency under the ICCA) (25 U.S.C.A. § 2719(a)(1)); (2) the PBPN has an existing reservation in Kansas (25 U.S.C.A. § 2719(a)(2)); (3) the Governor of the State of Illinois is unlikely to concur in any finding by the Secretary that a gaming establishment would not be detrimental to the surrounding community (25 U.S.C.A. § 2719(b)(1)); (4) the land would not be taken into trust as a part of a settlement of a land claim (25 U.S.C.A. § 2719(b)(1)(B)(i)); (5) the land would not be the PBPN's initial reservation (25 U.S.C.A. § 2719(b)(1)(B)(ii)); (6) the PBPN is not an Indian tribe that has been restored to Federal recognition (25 U.S.C.A. § 2719(b)(1)(B)(iii)); and (7) the land is not included in any of the specific exceptions cited (25 U.S.C.A. § 2719(b)(2) and (3)). While the Secretary has not adopted regulations setting forth procedures to be followed in determining whether gaming should be allowed on land brought into trust for a tribe after October 17, 1988, that determination

gaming.

### F. The DeKalb Site is not an Indian reservation

The Supreme Court has established special rules of construction for treaties between the federal government and Indian tribes.

> [T]reaties are construed more liberally than private agreements, and to ascertain their meaning we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties. Especially this is true in interpreting treaties and agreements with the Indians; they are to be construed, so far as possible, in the sense in which the Indians understood them, and in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people. But even Indian treaties cannot be re-written or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties.

*Choctaw Nation of Indians v. United States*, 318 U.S. 423, 431-432 (1942) (citations and quotations omitted). "[W]here the words of a treaty are not clear or unambiguous, we should review both the history and purpose of the Article in question in an effort to determine its true meaning. To help us in this search, appropriate landmarks are, inter alia, the instructions to the treaty commissioners, their report to their superior, the treaty preamble, the President's message transmitting the treaty to Congress and the subsequent treatment given to the terms of the treaty by the United States and the Indians." *Citizen Band of Potawatomi Indians of Oklahoma*, 391 F.2d at 619.

The words in the 1829 Treaty "reserved, for the use of" have been interpreted in different ways. For at least six decades following the treaty, the United States government, including the

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would be subject to review under the Administrative Procedure Act, 5 U.S.C. §§ 2719(b)(1)(A), and the state and local entities affected by the determination would have standing to challenge that determination. *See* American Indian Law Deskbook, Conference of Western Attorneys General, p. 426-427, fn. 55. (Ex. Q.)

House Committee on Indian Affairs of the United States Congress, uniformly and unanimously interpreted the language to give only a right of use in the land.[32] Over 150 years later, however, this language has been interpreted by the PBPN and at least one federal government employee[33] to establish a permanent reservation. Other treaty language important to this case has similarly been interpreted differently; such as, whether the 1816 Treaty created a reservation or merely acknowledged aboriginal rights to the land and whether "Sho-bon-ier" in the 1832 Treaty referred to Shab-eh-nay or another individual. Thus, in construing the meaning of the treaties here, we must consider the history, the negotiations between the parties, the practical construction of the treaties by the parties, the understanding of the parties, particularly Shab-eh-nay and his band, to the treaties, and the subsequent interpretation of the language.

**1. The title of the land reserved for the use of Shab-eh-nay and his band**

The general standard for determining whether recognized title was granted to an Indian tribe is that "Congress, acting through a treaty or statute, must be the source of such recognition, and it must grant legal rights of permanent occupancy within a sufficiently defined territory. ... There must be an intention to accord or recognize a legal interest in the land." *Sac and Fox Tribe v. United States*, 315 F.2d 896, 897 (Ct.Cl. 1963), *cert. den.*, 375 U.S. 921 (1963).

> Congress must affirmatively intend to grant the right to occupy and use the land permanently. By 'recognition', the courts have meant that Congress intended to acknowledge, or if one prefers, to grant, to Indian tribes rights in land which were in addition to the Indians' traditional use and occupancy rights exercised only with the permission of the sovereign. ...[I]n this context, 'acknowledgement' is a synonym for 'recognition' and both require some affirmative grant or acceptance of more-than-

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[32]See footnote 17 *supra*.

[33]Derrill Jordan, an attorney for the Division of Indian Affairs in DOI, found that language created a permanent reservation. (See section J below for a review of this analysis.)

permissive rights.

*Id.*, at 900 (citations and quotations omitted).

In contrast, aboriginal title vests when a tribe has held actual, exclusive, and continuous use and occupancy for a long time. *Sac and Fox Tribe*, at 903. Indians hold only an equitable possessory interest, not a property interest, in their aboriginal lands. *Choate v. Trapp*, 244 U.S. 665, 671 (1912); *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 279 (1955).

**a. Character of ownership rights in land in the 1816 Treaty**

In *Sac and Fox Tribe*, *supra*, the Court of Claims considered a treaty that was very similar to the 1816 Treaty. In that treaty, "[t]he Indians ceded all claims to the land east and south of that line; the United States *relinquished*, in consideration, all claims to Indian lands (with defined exceptions)" in other areas. *Id.*, at 898 (emphasis added). The court held that this treaty did not grant recognized title. Similarly, in the 1816 Treaty, the United States merely relinquished its rights to the land in Article 2 in consideration for the United Tribes ceding the land in Article 1. Thus, as the 1816 Treaty did not grant recognized title to the land in Article 2 to the United Tribes, Shab-eh-nay would have only had aboriginal title to the land in his Village prior to the 1829 Treaty.

**b. Character of Shab-eh-nay's band's ownership rights from the 1829 Treaty**

In Article 1 of the 1829 Treaty, the United Tribes ceded their aboriginal lands to which the United States had relinquished its claims in the 1816 Treaty. From the lands ceded to the United States, Article 4 of the treaty gave grants of land to individuals. These grants required that: "The tracts of land herein stipulated to be granted, shall never be leased or conveyed by the

grantees, or their heirs, to any persons whatever, without the permission of the President of the United States." These were permanent grants of land, and thus gave recognized title to the individuals receiving the land. See *Sac and Fox Tribe*, *supra*.

In contrast, the land set aside for Shab-eh-nay and his band was not "granted" out of the land ceded to the United States and Article 3 contained no language relating to permanent occupancy. It did not give Shab-eh-nay and his band additional rights in the Village beyond their aboriginal rights of use to the land. Instead, Article 3 "reserved, *for the use of*" Shab-eh-nay and his band "[f]rom the cessions aforesaid" "two sections at his village near the Paw-paw Grove." 1829 Treaty, Article 3 (emphasis added). Shab-eh-nay's band held aboriginal title to the Village before the treaty. As the title to the land never passed to the United States and Article 3 does not contain language evidencing an intention to establish a permanent reservation for Shab-eh-nay and his band, the band's ownership rights retained their character as aboriginal title. *Sac and Fox Tribe*, at 900. The argument that the government did not intend to grant a permanent reservation to Shab-eh-nay and his band is supported by the United States policy memorialized shortly thereafter in 1830 in the Removal Act, which provided that the government wished to clear the land east of the Mississippi of its Indian inhabitants to make room for non-Indian settlement.[34] It is further supported by the unanimous contemporaneous understanding of the federal government that the 1829 Treaty allowed Shab-eh-nay and his band only a right of use to the land.[35] Given the 1833 AG Opinion as to the aboriginal nature of grants in the 1832 Treaty, at the time of these events, the government as a whole did not consider such language in treaties with Indian tribes to

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[34]Prucha, p. 243.

[35]See footnote 17 *supra*.

create permanent rights to land.

Further, the 1829 Treaty gave the right to use the land to Shab-eh-nay *and his band.* The 1829 Treaty gave no personal rights to the land to Shab-eh-nay. As stated in the 1829 Treaty, he was at the time the Chief of his band. No one contests that his band left Illinois after the ratification of the 1833 Treaty. Thus, at the time of the 1850 sale of the land by the General Land Office, the band was not in possession of the land; indeed, the band had long before abandoned the land, even if Shab-eh-nay and his immediate family remained living on it. In 1850, long after the band had left Illinois, was he still their Chief? Indeed, did the band even exist as an entity in 1850? If not, Shab-eh-nay, even merely as a member of the band (if he still could be called that), would have retained no rights to the land. *See Choate,* at 671 ("The individual Indian had no title or enforceable right in the tribal property").

**c. Character of Shab-eh-nay's band's ownership rights from 1832 Treaty**

Article 2 of the 1832 Treaty refers to the land reserved for the use of Shab-eh-nay and his band in the 1829 Treaty. However, for the purposes of analyzing the type of title that Shab-eh-nay and his band had in the land, the 1832 Treaty simply confirmed the 1829 Treaty and does not appear to change the character of the title from the 1829 Treaty. In addition, the 1833 AG Opinion found that the grants in the 1832 Treaty gave only the rights to use the land to the individuals named. Further, as Congress appropriated $1,600 to pay "Sho-bon-ier" for the land in the 1832 Treaty, Congress plainly extinguished any rights that Shab-eh-nay may have had through this treaty. (See below.)

### d. Analysis of characterization of Shab-eh-nay's band's title to the land in light of the 1833 Treaty

From the language of the 1829 Treaty, along with the Senate's action in striking Article 5 from the 1833 Treaty, which prevented the land from becoming owned in fee simple by Shab-eh-nay, and the understanding of the government officials at the time, it appears that the land "reserved, for the use of" Shab-eh-nay and his band was intended by the U.S. government to continue to be non-permanent and held in aboriginal title. As discussed above, there is no language in Article 3 of the 1829 Treaty to demonstrate any intention of granting a permanent reservation for the use of Shab-eh-nay and his band, in contrast to the language granting title to land to individuals under Article 4. This is supported by the reference to the land in Article 2 of the 1832 Treaty – Shab-eh-nay's band must have required assurance that the government did not extinguish their aboriginal title to the land in the cession in that treaty.

The 1833 Treaty contains further evidence that Shab-eh-nay and his band held only aboriginal title to the land. The 1833 Treaty is a result of the Removal Act, which was passed in 1830. Prior to that time, the United States government had adopted a policy of removing Indian tribes to lands west of the Mississippi to facilitate settlement of the land east of the Mississippi by non-Indians.[36] This was formalized in the Removal Act. Article 2 of the 1833 Treaty required "that the said Indians are to remove from all that part of the land now ceded, which is within the State of Illinois, immediately on the ratification of this treaty..." As Article 5 was to have granted Shab-eh-nay and his heirs fee title in his Village, the 1833 Treaty clearly anticipated that any other individuals who were part of Shab-eh-nay's band, but who were not members of his

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[36]Prucha, p. 243.

immediate family, would migrate west with the other Indians who were subject to this treaty. Indeed, that is what happened.[37] Thus, as of the 1833 Treaty, there was no understanding by any individual or the government that the 1829 Treaty created a permanent reservation for Shab-eh-nay and his band.

In fact, the inclusion of Article 5 of the 1833 Treaty was a major departure from the plan set by the Secretary of War at the time. In 1833, the Secretary wrote the following to the commissioners who were negotiating with the Potawatomis at Chicago:

> Decline, in the first instances, to grant any reservations either to the Indians or others, and endeavor to prevail upon them all to remove. Should you find this impracticable, and that granting some reservations will be unavoidable, that course may be taken in the usual manner, and upon the usual conditions. But I am very anxious that individual reservations should be circumscribed within the narrowest possible limits. The whites and half-breeds press upon the Indians, and induce them to ask for these gratuities, to which they have no just pretentions; and for which neither the United States nor the Indians receive any real consideration. The practice, though it has long prevailed, is a bad one, and should be avoided as far as possible.[38]

This is likely the reason that the commissioners attempted to grant Shab-eh-nay fee title in the Village rather than simply allowing the continuation of his band's aboriginal title, and why Wau-pon-eh-see and Awn-Kote and their bands received payment for the lands that were reserved for their use in Article 3 of the 1829 Treaty. In 1843, the Senate resolved not to allow any more reservations for individuals to be made in treaties.[39]

At the time of these treaties, Shab-eh-nay had a completely different understanding of the

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[37]Dowd, p. 89.

[38]Cass to commissioners, April 8, 1833, *Senate Document* no. 512, 23-1, serial 246, p. 652, *cited in* Prucha, p. 247.

[39]Prucha, p. 247.

ownership status of the land "reserved, for the use of" Shab-eh-nay and his band in the 1829 Treaty. Shab-eh-nay considered his rights to the land to be that of a fee simple landowner, as demonstrated by language included in the stricken Article 5 of the 1833 Treaty: "The 5th Article has been inserted at the request of the said Chiefs who alledge [sic] that the provisions therein contained were agreed to at the time of the making of the said treaties but were omitted to be inserted or erroneously put down." Thus, Shab-eh-nay asserted at the time of the 1833 Treaty that the agreement between himself and the United States that should have been set forth in the 1829 Treaty was for a grant of the land in fee simple to Shab-eh-nay, and not a reservation for himself and his band.

From the Senate Committee's 1834 recommendation that Article 5 of the 1833 Treaty be stricken (see above), it appears that the committee was not entirely sure that the Congress had the power to make a grant of land in fee simple to an Indian chief. This uncertainty may have arisen, in part, from the 1833 AG Opinion.

Documents drafted near the time of these treaties show that the understanding of the federal government and its agents, including the Congressional House Committee on Indian Affairs, from the 1830s to at least the 1890s, and possibly beyond that time, was that the 1829 Treaty granted to Shab-eh-nay and his band only the right to use the land, but that if the land was abandoned through attempts to sell the land or actually vacating the land, the band's rights to the land would cease.[40] The government did not deviate from this analysis of the land grant in any letter or other document discovered by historian James Patrick Dowd in his exhaustive reprinting

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[40]See footnote 17, *supra*.

of documents from this era referencing Shab-eh-nay and Sho-bon-ier.[41]

Thus, Shab-eh-nay thought that the 1829 Treaty granted him fee simple title in his Village, based on the statements in Article 5 of the 1833 Treaty. The United States government considered Article 3 of the 1829 Treaty to have given Shab-eh-nay and his band merely the right to use the land, which would cease to exist if the land were abandoned. *No one* at the time of the 1829 Treaty intended the treaty to create a permanent tribal reservation for Shab-eh-nay and his band. As Shab-eh-nay thought that the 1829 Treaty gave him fee ownership of the land, but the federal government at the time believed that grant to have given only the right to use the land, which would be terminated on abandonment, the possibility that the 1829 Treaty created a permanent Indian reservation was not considered by anyone alive at the time and should not be considered now by the OGC.

> [I]n interpreting treaties and agreements with the Indians; they are to be construed, so far as possible, in the sense in which the Indians understood them, and in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people. *But even Indian treaties cannot be re-written or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties.*

*Choctaw Nation of Indians*, 318 U.S. at 431-432 (citations and quotations omitted, emphasis added). While Shab-eh-nay believed he was receiving fee simple title to the Village in the 1829 Treaty, the language of that treaty clearly did not grant fee title. This is bolstered by the initial inclusion of Article 5 of the 1833 Treaty, which attempted to give Shab-eh-nay what the 1829 Treaty did not – fee title in the land. Because the Senate struck Article 5 prior to ratification, fee title never vested in Shab-eh-nay. Thus, Shab-eh-nay could not have had any individual

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[41]Dowd, pp. 115-175.

ownership interest in the Village.

The federal government, both the executive and legislative branches, consistently interpreted the 1829 Treaty as having given only the right of use of the land to Shab-eh-nay and his band. Prior to the final years of the 20th Century, over 150 years after the 1829 Treaty, there is no evidence that any individual or entity within the federal governmental determined the 1829 Treaty to grant anything greater than that.

> [W]here administrative practice has been consistent and generally unchallenged, such "practice has peculiar weight when it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion (and) making the parts work efficiently and smoothly ***." And where such practice is disputed in later years, more weight should be given to the interpretation made closer in time to the making of the law to be construed.

*Citizen Band of Potawatomi Indians of Oklahoma*, 391 F.2d at 621 (internal citations omitted), *citing Norwegian Nitrogen Co. v. United States*, 288 U.S. 294, 315 (1933). As the federal government consistently held that the language in the 1829 Treaty granted Shab-eh-nay and his band only the use of the Village in the face of repeated challenge by Shab-eh-nay and his family and friends for over half a century, great weight should be given to this construction of the treaty.

**G. Congressional Action**

Congress has plenary power over Indian affairs, including the power to modify or eliminate tribal rights. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998). Congress can alter the terms of an Indian treaty, and its intent to do so must be "'clear and plain.'" *Id.*, *quoting United States v. Dion*, 476 U.S. 734, 738-739 (1986). The Supreme Court, in determining if Congress intended to modify or eliminate treaty rights, will consider the historical context of Congress' action and, "to a lesser extent, the subsequent treatment of the area in

question and the pattern of settlement there." *Id.*, at 344. While the rule by which legal ambiguities are resolved in favor of the Indians will be given a broad scope, "it remains at base a canon for construing the complex treaties, statutes, and contracts which define the status of Indian tribes." *DeCoteau v. District County Court for Tenth Judicial Dist.*, 420 U.S. 425, 447 (1975). "A canon of construction is not a license to disregard clear expressions of tribal and congressional intent." *Id.*

**1. The 1832 Treaty**

In 1852, Congress appropriated $1,600 to "Sho-bon-ier" for his interest in the land granted to him in the 1832 Treaty.[42] This appears to have been done in response to a letter from Shab-eh-nay in 1841 asking the United States to pay him $1,600 for the Village.[43] This appropriation represents a "clear and plain" act of Congress that served to ratify the actions taken by the DOI and extinguish any title Shab-eh-nay had in the Village. *Yankton Sioux Tribe,* at 343.

While the PBPN is likely to argue that the reference to "Sho-bon-ier" in the 1832 Treaty meant a half-French, half-Potawatomi individual who resided in Indiana, this conclusion is incorrect.

The 1832 Treaty was signed by "Shab-e-neai," but not by "Sho-bon-ier" or "Cheval-ier."[44] As discussed above, Article 2 contains the following language: "From the cession aforesaid the following tracts shall be reserved, to wit: ... For Sho-bon-ier, two sections, at the

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[42]Ex. I.

[43]Dowd, p. 127.

[44]The scriveners of the treaties would have taken down the names of the Indians phonetically.

Village." The "cession aforesaid," in Article 1, included only land in northern Illinois.

Article 4 of the 1832 Treaty contained the following language: "There shall be paid by the United States, the sum of one thousand four hundred dollars to the following named Indians, for horses stolen from the during the late war, as follows, to wit: ... To Sho-bon-ier, or Cheval-ier, for one ditto, forty dollars. 40 ..."[45]

The repetition of names similar to Shab-eh-nay, Sho-bon-ier, and Cheval-ier in the treaty shows how common those names must have been and that the use of a different spelling of Shab-eh-nay's name would not have been unlikely.[46] For instance, individuals named "Jean B. Chavallier," "Sho-bon-ier," "Francis Sho-bon-nier," "Shab-e-neai," She-bon-e-go," "Francois Cho-van-ier," "Joseph Shawnier," and "John Bt. Chevalier" are included in various sections of the treaty. In addition, within the 1832 Treaty there are several areas in which different spellings for possibly the same person were used. For instance, Wah-pon-seh's name was spelled this way in Article 2, as "Wah-pou-seh" in Article 4, and as "Wah-pon-seh" again in the signature section. Similarly, "Qua-qui-to" and "Ka-qui-tah"; "Min-e-maung" and "Mix-e-maung"; "Francis Sho-bon-nier" and "Francois Cho-van-ier"; "Naa-a-gue" and "Ne-be-gous"; "Masco" and Mas-co"; "Waub-e-sai" and "Wah-be-no-say"; "Mo-swah-en-wah" and "Ma-sha-wah" or "Mo-swa-en-wah"; and "Jean B. Chavallier" and "John Bt. Chevalier." Consistent spelling was clearly not a priority.

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[45]Historian James Patrick Dowd surmised that this payment was for a pony that Shab-eh-nay rode to death in warning non-Indian settlers of the approaching Black Hawk warriors during the Black Hawk War. See Dowd, p. 87, fn 2.

[46]There are at least thirty-five different spellings of Shab-eh-nay's name used in historical documents. See Dowd, p. 12.

Most importantly, whether these spellings represent the same person or different people makes no difference to our argument. What they demonstrate is that the spellings of names listed in the 1832 Treaty do not reflect accurately the actual individuals included in the treaty. Thus, as we cannot rely on the treaty to tell us whether "Sho-bon-ier" was Shab-eh-nay, the PBPN's argument that the names in the treaty show that the 1832 Treaty did not include a grant to Shab-eh-nay is completely unconvincing. Instead, we must rely on historical analysis.

Overwhelming historical evidence supports the conclusion that "Sho-bon-ier" was Shab-eh-nay, including that: (1) the group of Potawatomis involved in this treaty included Shab-eh-nay; (2) the land ceded to the United States in this treaty was near, contiguous to, or surrounding the Village; (3) the land reserved for the use of another chief, Wah-pon-seh, and his band from Article 3 in the 1829 Treaty was also re-confirmed;[47] (4) Potawatomis from Indiana were not included in the treaty signed by Shab-eh-nay; (5) the land was set aside "at the Village," similar language used in the 1829 Treaty; and (6) reliable and competent individuals, including one who was a witness to the treaty, swore in signed affidavits shortly after the treaty was completed that the grant was to an Indian living in Illinois, rather than one in Indiana.

At the time of the 1832 Treaty, there were three treaties signed, each involving different groups of Indians from different areas of Illinois, Indiana, and Michigan. The treaty signed by Shab-eh-nay involved only the "Prairie and Kankakee" band, which only ceded lands in Illinois near the Kankakee River. That treaty did not include any land in Indiana. Two completely

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[47] This shows that the parties to the 1832 Treaty re-confirmed the language of the 1829 Treaty to ensure that their lands were not accidentally ceded. Ankote (or Awn-kote as he is known in the 1833 Treaty), the other chief for whom land was reserved for the use of himself and his band, was not a signatory to the 1832 Treaty, which explains why his land is not mentioned therein.

separate treaties were signed by Indians from other areas, including Indiana. The French and Potawatomi individual referred to in the Jordan Memo would not have been granted any land in the treaty signed by Shab-eh-nay because the Potawatomis from Indiana signed a completely separate treaty.[48] The land given to individuals in Article 2 of the 1832 Treaty was "[f]rom the cession aforesaid"; that is, the only land passed in Article 2 was in or abutting the land in Illinois that was ceded to the United States by the Illinois Potawatomis. Thus, no land in Indiana would have been passed in that treaty.

James Patrick Dowd's book contains reprints of several documents regarding this land.[49] There appears to have been some confusion as to who "Sho-bon-ier" referred to in these documents. Some clearly refer to Shab-eh-nay, the Illinois chief, and some refer to the half-Potawatomi, half-French individual in Indiana. Notwithstanding the confusion, the most reliable historical documents point to Shab-eh-nay as the recipient of the land under the 1832 Treaty, rather than the individual from Indiana. An affidavit is reprinted in Dowd's book that was made on November 4, 1837 by Solon Robinson, the Clerk of the Circuit Court of Lake County, Indiana. Mr. Robinson swore that "Sho-bon-ier" in the 1832 Treaty was an Indian who lived in Illinois, not in Indiana. This was confirmed contemporaneously by Th. J.V. Owen,[50] an Indian agent who was present at the signing of the 1832 Treaty and who was a witness thereto, and by

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[48]Prucha, p. 249.

[49]Dowd, pp.116-134.

[50]Th. J.V. Owen wrote: "The reservation of two Sections of land to Sho-bon-ier by Treaty of 20 Oct. 1832 – must according to the provisions of the Treaty be located within the limits of the tract of land ceded to the United States, by said Treaty, and as no part of said Tract lies within the State of Indiana the location cannot consequently be made in that State." (Dowd, p. 117).

Luman A. Fowler, the Sheriff of Lake County, Indiana, and several others, including an associate judge and county commissioners.[51]

In a July 18, 1849 letter, the Commissioner of Indian Affairs wrote to the Commissioner of the General Land Office that "'Shab-eh-nay,' ... made application for the appropriation by Congress of $1600 as compensation to him for the two sections of land reffered [sic] to."[52] Correspondence between "W. Gates," who may have been one of the Gates brothers or a relative of the brothers, from Paw Paw in Illinois, and the Commissioner of Indian Affairs in Washington, D.C. also supports the finding that "Sho-bon-ier" was Shab-eh-nay. On August 23, 1853, Gates wrote requesting information as to whether "Shobboney" had been paid his "Proseeds" for "the land sold at Dixon land office – some 2 years since."[53] The Acting Commissioner wrote back that the sum "was remitted to the proper officer for payment," but that he had no information as to whether it had been paid. On August 16, 1897, Shab-eh-nay's son, Oh mes sah, wrote a letter requesting information about the payment for the land, asserting that neither Shab-eh-nay nor his children received any money and stating that he had heard Chief Simon Pokagon of Benton Harbor, Michigan received the money instead.[54]

Thus, the circumstances surrounding the 1832 Treaty at the time it was signed, along with the understanding of contemporaries of Shab-eh-nay, including his family and a witness to the signing of that treaty, show that it is extremely unlikely that "Sho-bon-ier" referred to a half-

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[51] *Ibid*, pp. 116-118.

[52] *Ibid.*, p. 151.

[53] *Ibid.*, p. 132.

[54] *Ibid.*, p. 176.

French, half Potawatomi individual who lived in Indiana. There is overwhelming historical evidence that the reference to the two sections "at the Village" was the Village referred to in the 1829 Treaty, and that the individual named "Chevalier" or "Sho-bon-ier" and his descendants either were confused as to whether a reservation had been made on his behalf or attempted to take advantage of the phonetic spelling in the 1832 Treaty.

From the totality of the circumstances, the 1832 Treaty simply confirmed the grant of land to Shab-eh-nay that had been made in the 1829 Treaty. Given all of the evidence, it is almost a certainty that "Sho-bon-ier" referred to Shab-eh-nay and the "two sections, at the Village" referred to the Village.

**2. Congress extinguished Shab-eh-nay's rights under the 1832 Treaty**

"Consistent with the 'plenary power of legislation' in regard to Indian affairs, Congress may extinguish tribal interest in real property subject to the stricture of the fifth amendment to the United States Constitution requiring just compensation for deprivation of property interests." *Burlington Northern R.R. v. Fort Peck Tribal Executive Bd.*, 701 F.Supp. 1493 (D.Mont. 1988) (*citing Shoshone Tribe v. United States*, 299 U.S. 476 (1937); *Choate*, 224 U.S. 665 (1912); *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974)). Payment for lands provides unambiguous proof of congressional intent to extinguish treaty rights. *See U.S. v. Gemmill*, 535 F.2d 1145, 1149 (C.A.Cal. 1976) ("[A]ny ambiguity about extinguishment that may have remained after the establishment of the forest reserves, has been decisively resolved by congressional payment of compensation to the Pit River Indians for these lands."); *see also Ute Indian Tribe v. State of Utah*, 716 F.2d 1298, 1314 (C.A.Utah 1983). "'[T]he face of the Act,' and its 'surrounding circumstances,' and 'legislative history' are all important considerations in

determining congressional intent regarding Indian lands." *DeCoteau*, at 445, *quoting Mattz v. Arnett*, 412 U.S. 481, 505 (1973).

In 1852, Congress appropriated $1,600 to "Sho-bon-ier" for his interest in the land granted to him in the 1832 Treaty.[55] This appears to have been done in response to a letter from Shab-eh-nay in 1841 asking the United States to pay him $1,600 for the Village.[56] This appropriation represents a "clear and plain" act of Congress extinguishing any rights Shab-eh-nay may have retained in the Village and ratifying the earlier action of the General Land Office in selling the land to non-Indian settlers. *Yankton Sioux Tribe*, at 343. Thus, as the overwhelming evidence points to any interest in the land being extinguished in 1852, no Indian title to the Village could survive that Congressional action.

### 3. Congress confirmed that Shab-eh-nay's band had only a right of use in the 1829 Treaty

Congressional action was not necessary to extinguish the rights granted to Shab-eh-nay and his band in the 1829 Treaty because Congress never intended to grant a permanent reservation on their behalf in that treaty. On December 26, 1856, the House Committee on Indian Affairs of the United States Congress made a Report to Congress.[57] The Report addressed the petitions of George Wells, John Arman, and R.K. Swift and others on behalf of Shab-eh-nay for the Village. The Report stated: "That they have had the same [the petitions] under consideration, and have come to the conclusion that the prayer of the petitioners ought not to be granted. For the

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[55]Ex. I.

[56]Dowd, p. 127.

[57]Ex. J.

reasons that have influenced your committee to come to this conclusion they refer to the annexed letter from the Commissioner of Indian Affairs, and to the copy of a letter from a late Commissioner of Indian Affairs accompanying the same."

The first of these letters was from Commissioner Geo. W. Manypenny of the DOI's Office of Indian Affairs, to the Honorable J.R. Giddings, the Chairman of the Committee, on April 12, 1856. The letter referenced deeds presented by Ansel and Orrin Gates to the Village, and stated that the 1829 Treaty gave Shab-eh-nay no authority to sell the land reserved for the use of himself and his band.

> It was reserved for the *use* of himself *and his band* only; that when the parties for whose use it was reserved left it, it was competent for the United States to sell it, as other land ceded by that treaty, which had not been expressly granted to individuals named therein; that the action of the Senate upon the 5th article of the treaty of September 26, 1833, before mentioned, confirmed this view; that as the lands referred to were no longer occupied by the persons for whose use they were reserved, it was competent for the Commissioner of the General Land Office to dispose of the same as other public lands of the United States.

The second letter referenced by the House Committee was from Commissioner William Medill of the War Department, Office of Indian Affairs, to the Honorable John Wentworth of the House of Representatives on May 27, 1848. This letter stated:

> The treaty gave no authority to Shab-eh-nay to sell the land. It was reserved for the *use* of himself and his band only; and it is the opinion of this office, that when the parties for whose use it was reserved left it, that it was competent for the United States to sell it as other lands ceded by that treaty, which had not been expressly granted to individuals named therein. This view is confirmed by the fact that the 5th article of a treaty concluded with the same Indians on 26th September, 1833, which stipulated that the reservation made by the treaty of 1829 should be a grant in fee simple to Shab-eh-nay, his heirs, and assigns forever, was stricken out by the Senate.

The action of the House Committee on Indian Affairs in expressly considering petitions filed on behalf of Shab-eh-nay and expressly declining to act on those petitions because of the

above letters was "clear and plain." *See Yankton Sioux Tribe*, at 738-739. The Committee on Indian Affairs, which is an arm of Congress, clearly and plainly upheld the determination of the Office of Indian Affairs that the language of the 1829 Treaty gave Shab-eh-nay and his band only the right to use the land.

Under Supreme Court cases demonstrating the importance of considering the historical context of the action of Congress in determining whether Congress intended to extinguish treaty rights, *id.*, at 344, it is critical to note that the House Committee on Indian Affairs did not find that there were any treaty rights to Shab-eh-nay and his band that were left to be extinguished from the 1829 Treaty, this conclusion was reported to the entire Congress, and no further action was taken or contemplated. *See City of Richmond v. J.A. Croson*, 488 U.S. 469 (1989) ("The factfinding process of legislative bodies is generally entitled to a presumption of regularity and deferential review by the judiciary.") The Committee Report represents congressional understanding and clearly and plainly demonstrates that Congress intended to grant Shab-eh-nay and his band only the right to use the Village in the 1829 Treaty and had no intention to create a permanent reservation. "There is no particular form for congressional recognition of Indian right of permanent occupancy. It may be established in a variety of ways but there must be the definite intention by congressional action or authority to accord legal rights, not merely permissive occupation." *Tee-Hit-Ton,* at 278-279. Given that Congress never created a permanent reservation on behalf of Shab-eh-nay and his band, as confirmed by the House Committee on Indian Affairs, there was no need for Congress to affirmatively extinguish the non-existent reservation.

## H. Is the PBPN the successor to Shab-eh-nay's band?

While the Leshy Letter found that the PBPN had a credible claim that they were the successor in interest to Shab-eh-nay's band, it does not appear that this issue has been decided in any other forum or with evidence presented by any other Indian tribe. In fact, historical analysis shows that prior to and after the 1833 Treaty, the Potawatomis did not move west as a group. In fact, they "were an example of drawn out, piecemeal removal of Indians from the old Northwest."[58] There is evidence that, after the 1833 Treaty, at least some of the Illinois Potawatomis moved first to the Platte Purchase in Missouri and then to Council Bluffs in Iowa.[59] This may have included Shab-eh-nay's band. However, as Potawatomis who remained on small, individual reservations gave up their lands by treaty and moved west, some of them settled in Kansas along the Osage River.[60] Other Potawatomis "drifted northward in Michigan and Wisconsin and never left the eastern states at all, and about twenty-five hundred (nearly a third of the total Potawatomi population) moved into Canada."[61]

Given this fractionalization of the Potawatomis, the PBPN should be required to show that they are the actual successor in interest to Shab-eh-nay's band. In addition, the PBPN should be required to show that Shab-eh-nay's band continued to exist as a unit after the removal west, and did not split into multiple groups or disband entirely.

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[58]Prucha, p. 248.

[59]*Ibid.*, p. 251-252.

[60]*Ibid*, p. 252.

[61]*Ibid.*

## I. Is the DeKalb Site on the original location of the Village?

The PBPN should be required to show evidence that the DeKalb Site is within the original surveyed area of the Village. James Patrick Dowd wrote:

> In Tribute to Shabbona, the DeKalb County Forest Preserve District purchased a grove, consisting of slightly less than one hundred acres in March of 1941. This was not Shabbona's original grove, but is located a few miles east and north of his old home, near the present town of Shabbona, Illinois. (Sec. 23-38-3) ... We would do well, at this point, to mention that the town of Shabbona did not officially come into existence until 1872. Shabbona's Grove was the name of the original town, but when the railroads came, almost the whole town moved north. Today, for all practical purposes, Shabbona Grove is a ghost town. Only a few remnants of old buildings mark the spot.[62]

As the DeKalb Site is located next to the DeKalb County Chief Shabbona Forest Preserve, which the PBPN assert is part of the Village reserved for the use of Shab-eh-nay and his band in the 1829 Treaty, and is very near the present day Village of Shabbona, this statement throws the PBPN's claim that the DeKalb Site is within the original boundaries of the Village into doubt.

## J. The Department of Interior pre-2006 analysis of the PBPN's claims was fundamentally flawed

It is likely that in their submission to the OGC the PBPN will rely heavily on the pre-2006 analysis by the Department of the Interior of their claims. The Leshy Letter addressed those claims. It stated, in pertinent part: "[W]e have determined that the Prairie Band has a credible claim for unextinguished Indian title to this land. ... Our research has not revealed any subsequent treaty or Act of Congress which authorized the conveyance of these lands. ... Because [the 1850] sale was not approved or authorized by Congress, there is a credible argument that it violated the Non-Intercourse Act. ... The success of any litigation to vindicate this claim is necessarily uncertain..." The PBPN have asserted that the Leshy Letter shows that the DOI has determined

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[62]Dowd, p. 93.

that their claims to the DeKalb Site are valid. However, the language of the Leshy Letter demonstrates that it is not determinative, for instance: "credible claim"; "credible argument"; and "necessarily uncertain." Thus, the conclusions of the Leshy Letter cannot be construed as an official DOI authentication of the PBPN's claims to the DeKalb Site.

The Leshy Letter was followed by a second DOI letter that questioned the PBPN's claims. The Olsen Letter considered the statement in the Leshy Letter that "[t]he success of any litigation to vindicate this claim is necessarily uncertain..." The Olsen Letter stated that case law, including the Supreme Court's ruling in *Sherrill*, "is of fundamental importance and any assertion of rights over land would require an analysis under these and other relevant cases." It further asserted that:

> [T]he status of the land must be determined prior to gaming occurring on this land. ... The Department has not yet reviewed this land to determine if it would be considered Indian land within the definition of IGRA ... Any claim to jurisdiction over Indian owned land within a tribe's former territory, and conversely any claim to immunity from such jurisdiction, will have to deal with the complex application of all the factors referenced by the treaties, courts, and statutes in the context of the specific claim.

Based on the Olsen Letter and the indecisive nature of the Leshy Letter, it is clear that the DOI has not reached any final determination on the PBPN's claims regarding the DeKalb Site. Further, the conclusions discussed in the Leshy Letter are based upon an internal DOI memorandum dated July 24, 2000, which was drafted by Derrill B. Jordan, Associate Solicitor for the Division of Indian Affairs, to David Hayes, Deputy Secretary, and Kevin Gover, Assistant Secretary of Indian Affairs ("Jordan Memo").[63] The analysis in the Jordan Memo is obsolete because it was written before the Supreme Court's ruling in *Sherrill*, a ruling that

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[63]Ex. R.

"dramatically altered the legal landscape against which" Indian land claims are considered. *Cayuga*, at 273. In addition, the Jordan Memo relied on limited information and, in both its understanding of the facts and the law involved, the Jordan Memo is simply incorrect. Thus, the OGC cannot rely on the Leshy Letter and the Jordan Memo in determining whether the PBPN can conduct class II gaming on the DeKalb Site.

### 1. The Jordan Memo

Naturally, as the Jordan Memo was written in 2000, it did not consider the *Sherrill* ruling; thus, the analysis is not in accordance with current law. However, the analysis in the Jordan Memo is flawed in several particulars of law and fact beyond that "the legal landscape" has changed "dramatically" since it was written.

#### a. The Jordan Memo was based solely on the PBPN's submission

The Jordan Memo, by its terms, "relied solely on the historical analysis of the Prairie Band of Potawatomi's experts..."[64] No other Indian tribes, including the Ottawa Tribe of Oklahoma, submitted materials considered in this memorandum as to their claims to the land, although Jordan claimed to be "willing to consider any materials presented by other tribes."[65] While the State of Illinois submitted "a number of factual and legal arguments in support of the theory that the Shab-eh-nay Band Reservation has been disestablished by Congress," Jordan dismissed the State's submission as "erroneous."[66] As such, the Jordan Memo cannot be considered a complete analysis of the issues involved in determining the status of the land in

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[64]Jordan Memo, p. 20.

[65]*Ibid.*, p. 12, fn. 27.

[66]*Ibid.*, p. 13.

question.

**b. The Jordan Memo contains incorrect statements of law**

The Jordan Memo contains incorrect statements of law, which undermine the reliability of his legal conclusions and should prevent the OGC from relying on his memorandum. For instance, it states that "[t]he Indian Claims Commission Act is not a legal bar to tribal claims of trespass against third parties occupying the claimed area" and "[t]he United States' sovereign immunity is not relevant to any claim which a tribe may file against those currently in possession of the land in the disputed area."[67] This is legally incorrect. *See, e.g., Navaho Tribe, supra* (holding that the United States was an indispensable party in litigation by the Tribe to cancel all patents, grants, assignments, leases, and other conveyances of the land at issue, and thus, the claims against other defendants must be dismissed).

The Jordan Memo also states that "[t]he distinction between the two types of 'Indian title' was not important because the United States paid compensation to Indian tribes for their lands whether or not their title had been recognized in a treaty or statute."[68] While this may be correct in cases in which tribes seek compensation for their lands, the issue of what title Shab-eh-nay's band had in the Village is an important consideration here. The contemporaneous interpretation of that title was that it was aboriginal, that is, for the use of the land only (*U.S. v. Gemmill*, 535 F.2d 1145, 1147 (9th Cir. 1976) ("Indian title is a permissive right of occupancy granted by the federal government to the aboriginal possessors of the land") *citing Johnson v. McIntosh* (1823) 21 U.S. (8 Wheat.) 543, 573-74, 5 L.Ed. 681, 688 (Marshall, C. J.)), while the PBPN argue that

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[67] *Ibid.*, p. 17.

[68] *Ibid.*, p. 10.

the 1829 Treaty created a permanent reservation in the Village.

The Jordan Memo relies on *Citizen Band of Potawatomi Indians of Oklahoma*, 391 F.2d at 622-625, for the assertion that the Court of Claims held that the United Tribes received "recognized title" to land discussed in the 1816 Treaty. However, an examination of the pages cited in that opinion does not reveal any discussion by the Court of Claims as to the type of title in which the land "relinquish[ed]" by the United States in the 1816 Treaty was held by the Indians. Instead, it is earlier in the opinion when the Court of Claims uses the term "recognized title." *Id*, at 616. However, in that statement, the court was not discussing the type of title the tribes had in the land. The full sentence was: "Subsequently, the United States entered into the treaty dated August 24, 1816, with the United Nation, wherein the United States recognized title in the United Nation to part of the land contained in the cession of the Treaty of 1804." *Id.* The court was not considering what type of title the tribes held in this land; it was using the word "recognized" as a verb, rather than an adjective, stating that the United States "recognized" that the tribes had a valid title to the land. Thus, the evidence and the case law show that the 1816 Treaty did not grant "treaty recognized title" as suggested in the Jordan Memo; but instead, as the language in the 1816 Treaty suggests, merely relinquished any claim of the United States to that land, which resulted in the tribes simply retaining their aboriginal title. This is especially likely given the analysis of nearly identical treaty language in the *Sac and Fox Tribe* case, finding that the treaty language did not create recognized title in the land on behalf of the tribe, but instead "recognized" the Indians' aboriginal title.

The Jordan Memo discusses that the Court of Claims decision under the ICCA on the land discussed in *Citizen Band of Potawatomi Indians of Oklahoma*, *supra*, paid the tribes in that

action for land ceded to the United States in the 1829 Treaty, but did not include payment for the land addressed in Articles 3 and 4 of that treaty. It appears to infer that, as the Village was not included in the court's determination of that case and the PBPN was never compensated for it, the Village is still an active reservation, and the PBPN can still raise their claims to that land. However, this analysis completely ignores the statute of limitations in the ICCA.

**c. The Jordan Memo contains incorrect statements of fact**

The Jordan Memo contains incorrect statements of fact. The Jordan Memo discussed briefly the grant to "Sho-bon-ier" in the 1832 Treaty, which the PBPN have asserted refers to a half-French, half-Potawatomi individual in Indiana, and adopted the PBPN's view. However, while the Jordan Memo relied extensively on James Patrick Dowd's biography of Shab-eh-nay, Built Like A Bear, it failed to consider that Dowd believed that the reference to "Sho-bon-ier" in the 1832 Treaty relates to Shab-eh-nay.[69] It also appears that Mr. Jordan did not know that the 1832 Treaty would not have included a grant of land in Indiana, given that the Potawatomis from Indiana signed a different treaty at that time. The Jordan Memo states that Sho-bon-ier was a signatory to the 1832 Treaty.[70] This is incorrect, unless one accepts that "Shab-e-neai" and "Sho-bon-ier" in the 1832 Treaty were the same person – Shab-eh-nay. The full facts surrounding the signing of that treaty, as well as signed testimony by individuals alive at the time, one of whom was a witness to the signing of that treaty, demonstrate that while there may have been an individual from Indiana named "Sho-bon-ier" alive at the same time as Shab-eh-nay (or more likely, several individuals with the names of Sho-bon-ier, Shab-eh-nay, Chevallier, and the like),

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[69]Dowd, pp. 87-88.

[70]Jordan Memo, p. 3.

there is no way that individual would have been granted land in the 1832 Treaty. As Mr. Jordan did not consider this information at the time he drafted the Jordan Memo, his conclusions regarding this treaty are erroneous.

While the Jordan Memo mentions letters that contained passing references to the contemporaneous understanding of individuals in the government that the 1829 Treaty gave Shab-eh-nay and his band only the use of the land rather than a permanent reservation, it failed to thoroughly consider the 1833 AG Opinion and the other overwhelming evidence that in the mid-19th Century the United States government repeatedly and unanimously considered that the title granted to Shab-eh-nay and his band in the 1829 Treaty was only the right to use the land. Further, the Jordan Memo did not address the November 8, 1841 letter from Shab-eh-nay to the Superintendent of Indian Affairs asking Congress to appropriate $1,600 to buy the land from him, nor that Congress appropriated $1,600 in 1852 for "Sho-bon-ier" for the land.

The Jordan Memo discounted that Congress, through the report of the House Committee on Indian Affairs on December 26, 1856, found that the 1829 Treaty granted Shab-eh-nay and his band only the right to use the land, and did not create a permanent reservation. As Congress, through that House Report, verified the actions of the General Land Office, no further action would have been required by Congress. Thus, the statement in the Jordan Memo that "Congress did not enact a statute or resolution as a result of the 1856 House report," and thus no Congressional action was taken to dissolve any reservation, is erroneous.[71] At that time, the land had been owned by non-Indians for seven years. By the findings of the House Committee, there was no reservation left to be dissolved. This House Report establishes Congress' approval of the

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[71] *Ibid.*, p. 17.

interpretation of the 1829 Treaty as giving Shab-eh-nay and his band only the right to use the land. No further Congressional action was necessary to extinguish a nonexistent reservation.

## IV. CONCLUSION

Under *Sherrill*, the PBPN's purchase of land in fee simple that was allegedly part of the Village does not revive any ancient sovereignty over the land. Further, the PBPN's claim to the Village is time-barred by the ICCA, and cannot be brought before any court, administrative agency, or Congress. The PBPN had the opportunity to seek compensation for the alleged taking of the land by the federal government in its action before that Commission, but failed to raise the claim at that time. Moreover, even if the Secretary takes the land into trust for the PBPN, the IGRA would prohibit gaming from taking place on the land.

The history of the treaties involving the Village shows that the 1829 Treaty did not establish a permanent reservation on behalf of Shab-eh-nay and his band, especially in light of the unanimous, repeated contemporaneous confirmation of this by both the executive and legislative branches of the federal government. In addition, after Congress appropriated $1,600 to him for the land, Shab-eh-nay retained no rights in that land no matter what Shab-eh-nay's interest in the Village was prior to that appropriation.

For all of these reasons, the OGC must find that the PBPN may not conduct class II gaming on the DeKalb Site.