Analysis of Shab-eh-nay's 1829 Title

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submitted to the NIGC on behalf of the
DeKalb County Taxpayers Against the Casino

December 26, 2007

In three documents written by James Lynch, DCTAC has raised multiple arguments as to why the site of the former Ward farm in DeKalb County, Illinois, does not qualify as "Indian lands" for the purposes of gaming. A central theme is that Chief Shab-eh-nay and his band held only usufructory rights to the land in question; many other issues are raised as well. In this document, intended as a companion to the others, we focus on the particular issue of "treaty-recognized" title and how that was understood in Shab-eh-nay's era.

In the brief submitted to the NIGC on behalf of the PBPN, submitted by the firm Hobbs, Straus and dated October 5, 2007, it is stated that

> (1) the United States permanently recognized the Nation's Shab-eh-nay Reservation in the Treaty of Prairie du Chien on July 29, 1829...
> (2) under controlling law, reservations may only be disestablished by an Act of Congress or Treaty;

DCTAC argues against these points. Specifically, we demonstrate that the contemporaneous understanding of the Treaty of Prairie du Chien — made clear by documents from the United States Attorney General in 1833, the House of Representatives in 1856, and numerous officials in between — was that the treaty in question created *no* "treaty-recognized title" for Shab-eh-nay and his band. They still held only their original "Indian title" — *ie* aboriginal title — which was properly voided by abandonment or death, and it was fully understood at the time that an Act of Congress was not necessary for such title to terminate.

As evidence of the importance of contemporaneous understanding, we refer here to the letter written on behalf of DCTAC by David Schraver, and dated Oct 4, 2007:

> Whether a reservation exists in the first instance, depends on the intent of the federal government. If a reservation once existed, whether that reservation has been disestablished or diminished depends on the intent of the federal government. Determining the intent of the federal government regarding the existence, disestablishment or diminishment of an Indian reservation is affected by a number of factors including: the language of the treaty or treaties involved; the events surrounding the negotiation and enactment of the treaties; *the contemporaneous understanding of the treaty's effect;* the treatment of the affected area by the federal, state, and local governments and by the tribe over time; the manner in which the Bureau of Indian Affairs and state and local authorities dealt with the lands; whether non-Indian settlers occupied the lands; whether the area has long since lost its Indian character; and the subsequent demographic history of the area. *See,* Solem v. Bartlett, 465 U.S. 463 (1984)

The *Legal and Historical Analysis* document filed by the Illinois Attorney General has additional discussion on the rules of construction for treaties, and on the importance of contemporaneous understanding, on page 31 [quoting from *Choctaw Nation of Indians v United States*, 318 U.S. 423, 1942; emphasis added]:

> Treaties 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.

We argue there was no intent under the language of the 1829 treaty to create a "reservation" in any sense, and particularly in the sense of IGRA. Taney's interpretation of aboriginal title (below) was widely held in Shab-eh-nay's era: the 1829 treaty did not create "reservation title", and there was no intent to create such title.

We may agree that when Shab-eh-nay returned to his parcel in 1853 and found it sold, he was bitterly disappointed. (We do remark, however, that his intention eventually to return as of the time that he departed Illinois, in 1849, is not clear.) There may even be room to question his intent in abandoning the parcel. However, *such argument became moot with the Chief's death in 1859*, as there was no heritability provision in the 1829 treaty. Together with his band's departure from the parcel in 1837, we maintain that the passing of the Chief constituted extinguishment of any aboriginal title.

The Tribe insists that the rules for treaty-recognized title apply, and that the 1829 language "reserved ... for the use of" does not limit the band's rights to usufruction. Indeed, Dr McClurken, in the appendices to his October 2, 2007 report entitled *The Shabehnay Band and its 1829 Reservation*, has produced a table purportedly of all treaties containing the language "reserved ... for the use of", and summarizes the ultimate disposition of the land for each; in most cases, Indian rights were extinguished by a subsequent treaty. We comment on the language of these treaties below, in the section "Treaties using 'for the use of' language;" we note here that none of these other treaties is comparable to Shab-eh-nay's. However, the most important issue is not the "for the use of" language; it is the concept that "reserved" simply meant "held back from the cession," an opinion unequivocally expressed by Taney.

Indian Title and the 1833 Taney Opinion

The idea uniformly comprehended in the minds of government officials of the era was that when some land was "reserved" within a cession of the surrounding area, so that the "reservation" formed a "hole" in the larger cession, then treaty-recognized title was *not* created. Instead, title remained as if the "reserved" parcel were not addressed by the treaty — it was a void. Put another way, if a treaty were to state that a tribe was ceding all of northern Illinois in exchange for a "reservation" consisting of DeKalb County, that was understood to be exactly equivalent to the tribe's ceding all of northern Illinois *except* for DeKalb County, and the DeKalb title would remain unchanged — that is, would remain aboriginal.

The view that title did not change when some land is "reserved" as a "hole" in a larger cession is most clearly expressed in the 1833 opinion of the Attorney General Roger Taney. Taney became Chief Justice of the Supreme Court of the United States three years later, and held that position until his death in 1864. Had Shab-eh-nay's case come before the Supreme Court, it would have been Taney who would have heard it.

Here is the1833 Taney opinion (italics added) in its entirety.

> To the Secretary of War [Lewis Cass]:
> Sir
> In answer to the question you put to me, upon the nature of the title held by the Indians of the tribe of the Pottawatomies of the prairie, in whose favor certain reservations of land were made by the treaty of the 20th of October, 1832, I have the honor to state that, in my opinion, the original Indian title in these reservations was not extinguished on the ratification of the treaty. It ceded, by the first article, a certain tract of country to the United States, and, by the second article, reserved from the cession large quantities of land in favor of certain Indians named. *These reservations are excepted out of the grant made by the treaty, and did not therefore pass by it: consequently, the title remains as it was before the treaty; that is to say, the lands reserved are still held under the original Indian 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.
>
> I am, &c.,
> R. B. Taney
> [Submission of the Illinois Attorney General, Vol 1, tab E: Westlaw: 2 US Op. Atty. Gen. 587, 1833 WL 1036]

We note that Taney did not state merely that original Indian title was not extinguished. He explicitly declared that such reservations "did not therefore pass by" the treaty; that is, that the treaty did not affect the title and so left the original Indian title unchanged.

Shab-eh-nay's parcel was indeed located within larger territory being ceded, specifically, in the second tract defined in Article 1, "[a]nd, also, one other tract of land..." [east-west between Lake Michigan and the Rock River, and north-south between "Grosse Point" (probably in the vicinity of present-day Wilmette and Evanston) and the southern tip of Lake Michigan]. (We here cite the Lynch *Report*, pp 14ff, that Shab-eh-nay's parcel was *outside* the region assigned to the Potawatomi by the August 19, 1825 Treaty with the Sioux *et al*.)

According to documents cited below, Taney's view certainly seems to have been the predominant attitude of the era. Treaty language must be interpreted in accordance with the contemporaneous understanding; therefore it is clear the 1829 treaty must be read as *not* creating treaty-recognized title. We also note there is absolutely nothing in the 1829 treaty to suggest that an explicit "title upgrade" was declared.

In the Jordan Memorandum [Memorandum by Derril B Jordan, Department of Interior, dated July 24, 2000], it is stated [page 10], citing Cohen, that

> much of the United States' territorial expansion was accomplished through treaties in which American Indian tribes ceded lands to which they held Indian (aboriginal) title in exchange for treaty recognized title to smaller portions of that land which became known as reservations.

We acknowledge this was the understanding with some later treaties, especially west of the Mississippi; in fact, the 1833 treaty may have been of this form: The United Nation ceded part of northern Illinois, and in return received land in Iowa "to be held as other Indian lands are held," ie this time they *did* receive "treaty-recognized title." However, it was clearly **not** the case for the 1829 Treaty of Prairie du Chien. First, the tribes involved ceded the lands to which they held Indian title in exchange not for strengthened title but for "sixteen thousand dollars, annually, forever, in specie", and other consideration. Secondly, the *tribes* received no reservations at all; the three parcels held back from the cession ("reserved", in the sense of Taney) were for the three chiefs and their bands.

The PBPN's *Memorandum*, dated October 29,1998 and which we refer to in the sequel as the *1998 Memorandum*, even appears to acknowledge Taney's opinion. On page 5 there is an extensive citation from the Clifton affidavit stating that

> Therefore, because these tracts had not been ceded to the United States but had been withheld and allocated to the three named bands as political entitles [entities?], the recognized Indian title remained intact.

Later, on page 31 of that *Memorandum*, it is stated that "The doctrine of abandonment does not apply to such lands [held by "recognized title"] but only to lands held pursuant to 'aboriginal' title". But aboriginal title is exactly the applicable form of title, according to Taney and in fact according to the Clifton Affidavit quoted by the *Memorandum* on page 5 ("the recognized Indian title remained intact."). The *Memorandum* acknowledges on page 33 that "...because aboriginal title is dependent upon physical, continuous, and exclusive possession of the land, the voluntary and permanent abandonment of such land will extinguish a tribe's right to that land. Cayuga, 758 F. Supp at 110." In the Shab-eh-nay case, Potawatomi have not held *any* possession of the land from 1849 to 2006.

The 1899 Supreme Court case Jones v. Meehan, 175 U.S. 1, contains two reflections on the Taney opinion that are of historical interest; this case addressed title issues raised by the October 27, 1832 treaty with the Potawatomi while Taney's opinion addressed the October 20 treaty with the same tribe. First, it is observed that the Taney opinion *may* have influenced Congress in its June 30, 1834 amendment of the Nonintercourse Act, which in turn *may* have

recognized sales of land by Indians when authorized by treaty [original pagination, p 12]. But there is no indication in the Court's opinion that Congress disagreed with Taney as to the effect of the October 20, 1832 treaty on original Indian title. Second, the 1899 opinion later suggests that Taney, in a pair of decisions addressing the October 27 treaty decided in 1859 and 1861 in which Taney concurred as Chief Justice of the Supreme Court, reached a "different opinion…upon the effect of similar reservations in a treaty made with another band of Pottawatomies seven days earlier [*ie*, October 20]" [original pagination, p 18]. However, the language used by Article 3 of the October 27 treaty, "the United States agree[d] to *grant* to each of the following persons, the quantity of land annexed to their names, which lands shall be conveyed to them *by patent*" (italics added), is different from the language of the October 20 treaty discussed in Taney's 1833 opinion and from the language of Article 2 of the October 27 treaty, neither of which included the "United States…grant" language of Article 3. The use of different language in Article 2 and Article 3 of the October 27 treaty shows that different consequences were intended by the respective provisions and explains Taney's concurrence in the 1859 and 1861 decisions discussed in Jones v. Meehan. This "grant" language clearly is different than the simple withholding of parcels within a larger cession. (A similar linguistic distinction arising in the 1829 Treaty of Prairie du Chien is raised in the Lynch *Report*, Section III, pp 29-30.)

Finally, we refer to the December 11, 2007 document by James Lynch, *An Ethno-historical Response to the Submittal to the National Indian Gaming Commission by Dickson Wright LLC. on Behalf of the Dekalb County, Illinois Executive Board*, which documents in extensive detail why any current PBPN claim to aboriginal (or, for that matter, treaty) title to the Shab-eh-nay parcel is unsupported by the historical record.

1838 Opinion

In 1838, as described in the Lynch Report, p 23, the Indiana chief Sho-bin-ier petitioned the United States government for a patent for his reserved lands in Indiana. He was denied. The Commissioner of Indian Affairs (not identified in the copy of the letter cited here) wrote:

> It is my opinion, considering that Sho-bon-ier, has only a temporary use & enjoyment of the land which he claims, that a patent ought not to be issued to him; [as an alternative,] Measures will be adopted, to ascertain the precise locality of his village, and to secure to him the rights which the treaty guaranteed.
>
> [Lynch Report, Appendix A, tab 13]

This "temporary use & enjoyment" doctrine would seem to have been the universally held understanding of the era.

We emphasize this 1838 opinion predates by more than a decade the Shab-eh-nay case; that and the 1843 Crawford letter, below, clearly demonstrate that the usufruction principle was not invented retroactively.

1843 Crawford Opinion

On 17 January 1843, T. Hartley Crawford, then Commissioner of Indian Affairs in the War Department, wrote to Thomas Blake, Commissioner of the General Land Office, about the survey of the Shab-eh-nay parcel and some alleged assignees to lots within the parcel. Five years before the General Land Office's decision that the Shab-eh-nay parcel was abandoned and thus could be sold, Crawford wrote:

> The language of the article making the reservation for Shab-eh-nay is similar to that used in the 2d. article of the treaties of 20, 26-&27 October 1832 — with the Potowatomies — which has been construed under an opinion of the Attorney General of 20, Sept 1833 [the Taney opinion, above] as conferring on the reservees a **usufruction right only** to the land reserved for them. This opinion is sustained and fortified, I think, by the fact that the 5. art. of the treaty of 26. Sept 1833 — with the Chippewas, Ottowas, & Potowatomies, providing that the aforesaid reservation to Shab-eh-nay "shall be a grant in fee simple to him, his heris and assigns forever," was stricken out by the Senate.
>
> [Lynch Report, Appendix A, tab 29; note that while the typeset copy of the letter, from *Built like a Bear*, states that the letter is unsigned, the photocopy of the handwritten original clearly *is* signed by Crawford.]

This letter *explicitly cites the Taney opinion*, and establishes that Shab-eh-nay and his band received "a usufruction right only". The conclusion Crawford drew is that Shab-eh-nay could not assign the land to others, a likely reference to

the "Walker purchase" [reference, date]. While the Taney opinion did not say anything about "usufruction rights", we assert that Crawford's conclusion in this regard was an immediate corollary of Taney's opinion that the Indians received no recognized treaty title. Aboriginal title was essentially equivalent to a recognition of a right to use, without any concomitant recognition of formal (that is, "recognized") title.

1848 Medill Opinion

In May 1848, Congressman John Wentworth of Illinois wrote to the Office of Indian Affairs, again asking about the propriety of various deeds granting parcels of the Shab-eh-nay land to settlers. Commissioner of Indian Affairs William Medill wrote back on May 27, 1848, that

> I had the honor to receive your note of 6. instant, in which you ask my attention to the propriety of confirming the three deeds which accompanied it, each executed by Shab-eh-nay, on 1. of December 1845 in this city — one to Ansel A Gates, for 320 acres, one to Orrin Gates for 320 acres, and one to Ansel A Gates for 640 acres, ...
>
> 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 ....
>
> It seems to me therefore, that as the lands referred to are no longer occupied by the persons for whose use they were reserved, that it is competent for the Commissioner of the General Land Office to dispose of the same as other public lands of the United States.
>
> [May 27, 1848 Medill letter: Lynch Appendix A, tab 33]

In the McClurken report it is stated that "Medill ignored the legal rule that a treaty reservation such as Shabehnay's could not be extinguished by abandonment or any event except a subsequent treaty or an Act of Congress" [Report, p 8]. However, in light of the Taney opinion, Shab-eh-nay's parcel was *not* a "treaty reservation"; the parcel did *not* acquire "treaty-recognized title", and, as such, title *was* extinguished by abandonment.

Medill appears to take the argument one step further by explicitly raising the issue of abandonment, when all that was before him was the legality of a sale. In fact the concept of abandonment is inexorably tied to the concept of the sale: if Shab-eh-nay attempted to sell the land, then he himself has expressed an intent to abandon it. The sale is void and the land in question returns to the United States, abandoned, rather than to Shab-eh-nay.

Whether the deeds were ever approved or signed by Shab-eh-nay has been questioned by the PBPN [McClurken, p 80]. We address that below, in the section entitled "The Gates Sales"; it seems probable that the deeds were in fact signed by Shab-eh-nay although his understanding of them may be less certain. We note, however, that Congressman Wentworth personally attested to the deeds' validity [McClurken, pp 85, 86], at which point it becomes difficult to hold Medill to a responsibility for a higher standard of proof. It is not even clear what such a higher standard might be, given the evidence that Shab-eh-nay did in fact execute the documents. Further, Shab-eh-nay later indicated through his attorneys [below, under the heading "Paddock and Ward Inquiry"] that he *had* intended to sell the parcel.

Medill was entirely justified in interpreting the notarized deeds as evidence of abandonment, particularly as it was widely known that the *band* had long since departed from the property. While Dr McClurken points out that, in a bitterly ironic coincidence, Shab-eh-nay may have been residing on the property at that very time, this does not change the fact that the General Land Office was in possession of definitive evidence of abandonment or intent to abandon. There is no reason to suppose that physical departure was required; the deeds represented obvious evidence that abandonment was, in the words of the 1837 Butler opinion, "voluntary and unequivocal; leaving no reasonable doubt either as to the intention of the party, or as to the fact itself."

1849 Butterfield Letter

The lands were declared abandoned, and ordered into sale in August 1848. In 1849, President Taylor had replaced President Polk, and Commissioner Medill was replaced by Commissioner of Indian Affairs Orlando Brown. In July 1849, the new Commissioner of the General Land Office Justin Butterfield wrote to Brown, acknowledging the Medill position to which Brown also adhered. Butterfield asked that some leniency might be shown to Shab-eh-nay, stating

> It is true Shab-eh-nah's right to the lands was only a *usufruct* one [italics in Dowd], but as his reserve is not large ... I beg leave to suggest, in consideration of the meritorious character of that Indian, ... whether in fact this is not such a case as the Indian Office, the special guardian of Indian rights would not be warranted in bringing to the notice of Congress, with a recommendation for a confirmatory Act to rest the fee in Shab-eh-nay....[Lynch Report Appendix A, tab 34, from Dowd]

But nothing came of this; the sale went ahead in November 1849. McClurken states that "the personal knowledge of the federal government's highest official in charge of selling public domain land should have been sufficient for the Commissioner of Indian Affairs to at least make an investigation into the truth of the abandonment matter, but it was not." [McClurken, p. 90] However, Butterfield's letter does not in fact question the abandonment ruling of the Medill decision, *and he does not question that the parcel was abandoned*; he merely suggests that special consideration be extended to Shab-eh-nay, including possible referral to Congress for special legislation entitling Shab-eh-nay to profit from the alleged sale.

1853 and 1854 Mix Opinions

In 1853, upon his return to Illinois and discovery that others now claimed his former home, Shab-eh-nay made inquiries with the federal government, initially with the assistance of John Kinzie [McClurken, p. 99]. Kinzie's letter was answered by Acting Commissioner of Indian Affairs Charles Mix, on 25 June 1853, who wrote back reiterating the Medill opinion. Later, Shab-eh-nay engaged the legal firm Paddock and Ward [McClurken, p. 101], who wrote to the Secretary of the Interior on 26 September 1854. This too was answered by Mix, on 5 October 1854; a copy of his response is in Lynch Appendix A, tab 7. It repeats the Medill opinion: Shab-eh-nay had a usufruct right only, and the property had been considered to be abandoned.

Paddock and Ward Inquiry

Perhaps the most striking thing about the Paddock and Ward inquiry, though, is what it did *not* say. *There is absolutely no claim that Shab-eh-nay did not intend to abandon the land*. In fact, the second paragraph begins

> Shab-eh-nay is here, *says he authorized the sale by the Government* — but has never received anything — he is a worthy man, is in want, has a large family to support and is therefore anxious that his application should be attended to as soon as possible [J Paddock, 26 Sept 1854, Lynch Appendix A, tab 7; emphasis added]

In other words, either Shab-eh-nay *did* in fact consent to the sale, or else he was utterly misunderstood even by his own attorneys. If Medill had earlier misunderstood the situation vis-à-vis abandonment, he was clearly not alone.

There is no evidence that, by 1854, Shab-eh-nay had conveyed to *anyone* that he had not intended to abandon the land. If federal commissioners appeared to ignore the point about whether abandonment had occurred, their ignorance is understandable. Medill, Butterfield, Paddock, and Mix all treated the abandonment as an established and agreed-upon fact.

1856 Report to Congress, and the Manypenny Opinion

In 1856, some "citizens of Illinois" [McClurken, p. 102] — George Wells, John Arman, and RK Swift, friends of Shab-eh-nay — initiated some inquiries. They contacted JR Giddings, Chairman of House Committee on Claims. Giddings forwarded their petition to the House Committee on Indian Affairs, which issued a formal report addressing the Shab-eh-nay claim. The Committee made the clear determination (Illinois AG Report, pp 47ff) that no legislation was needed because the band had only usufructory rights. Here is that Report:

> House Committee on Indian Affairs: Report to Congress:
> 34th Congress, 3d Session, Report no. 40
> December 26, 1856 [cited in Illinois AG Report, Volume 1, tab J]
>
> Mr Pringle, from the Committee on Indian Affairs, made the following REPORT:
>
> The committee on Indian Affairs, to whom was referred the petition of George Wells and others; the petition of John Arman and others; and the petition of R. K. Swift and others; in behalf of the Indian chief Shab-eh-nay, respectfully report:

> That they have had the same under consideration, and have come to the conclusion that the prayer of the petitioners ought not to be granted. For the 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.

As the Illinois Attorney General report points out, this Report to Congress is a clear contemporaneous statement that *the land was not a reservation*, and that Shab-eh-nay held *no treaty-recognized title*.

The Report attaches the letters of George Manypenny, April 12, 1856, and Wm Medill, Commissioner, May 27, 1848. Here is Manypenny's letter, which is perhaps the clearest contemporaneous analysis of the understanding of the U.S. government:

> Sir: I have the honor to acknowledge the receipt of your letter of the 9th instant, with enclosures, relative to the claim of "Shab-eh-nay", a chief, for whose use a reservation was made in the treaty of July 29, 1829, with the Chippewa, Ottawa, and Potawatomie Indians; and requesting, in behalf of the Committee of Claims of the House of Representatives, a statement of the facts involved by the claim as far as known to this office.
>
> In reply, I have to state, that by the 3d article of the said treaty there was reserved for the use of the said "Shab-eh-nay *and his band* [italics in the original] two sections of land, at his village near the Paw-Paw grove." —(Statutes at Large, vol 7, p 321)
>
> By the subsequent treaty with the same Indians, concluded at Chicago on the 26th of September, 1833, it was by the 5th article thereof, amongst other things, stipulated as follows: "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 of July, 1829, shall be a grant in fee simple to him, his heirs, and assigns forever." —(Statutes at Large, vol 7, p 433)
>
> The Senate of the United States refused to ratify this provision, and struck out the 5th article entirely. —(Statutes at Large, vol 7, p 447, note.)
>
> Shab-eh-nay emigrated with his tribe west of the Mississippi, to lands provided for them by the government, having disposed of his interest in the reserve to Messrs. Ansel A Gates and Orrin Gates. I do not understand this emigration, however, to have been in any manner forced or involuntary; but only in compliance with their treaty stipulations. On the 6th of May, 1848, the deeds to Messrs. Gates were submitted to this office by the Hon. John Wentworth, of Chicago, with the request that the same should be presented to the President for his approval; and upon application, it was decided by the Commissioner of Indian Affairs, Hon. Wm. Medill, that the treaty gave no authority to the reservee to sell the land. It was reserved for the *use* of himself *and his band* only [italics in original]; 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 commissioner therefore declined to recommend the said deeds for the approval of the President. A copy of this letter to Mr. Wentworth, dated May 27, 1848, is enclosed.
>
> This decision was communicated to the Commissioner of the General Land Office on the 29th of May, 1848, and thenceforward the land has been considered and treated by this office as a part of the public domain, and under the exclusive control of the General Land Office.
>
> The enclosures received with your letter are herewith returned.
>
> Very respectfully, your obedient servant, Geo. W. Manypenny, Commissioner.
>
> [To] Hon. HR Giddings, Chairman, Committee of Claims, Ho. Of Reps.

We note that Manypenny also appears completely unaware that the abandonment of the Shab-eh-nay parcel was in any way being contested.

Shab-eh-nay's Death

Chief Shab-eh-nay died in 1859. The parcel had been abandoned by his band in 1837; any claim to the land after 1837 was by Shab-eh-nay individually. There was no provision in the 1829 treaty that the land allocation could pass to heirs, and no evidence to suppose that such a provision was understood by any of the parties. That was the absolute end of the usufruction right. All title and all rights to use were therefore extinguished.

Abandonment

On September 15, 1837, as a consequence of the 1833 Treaty of Chicago, Shab-eh-nay's band departed the Illinois parcel and migrated to the new reservation at Council Bluffs. Shab-eh-nay accompanied them. He had been told that only he and his immediate family could remain behind. He returned to his Illinois home in 1838; that may have been his intent all along but it is also known [Lynch Report, p 53] that Shab-eh-nay found after his arrival in Iowa that he had many enemies there, both from other tribes and within his own band; there were attempts on his life and it is entirely possible that he had originally intended to stay with his band in Iowa, but decided while there that it was safer to return to Illinois.

Why Shab-eh-nay was told that only his immediate family could stay in Illinois is not clear. The Treaty of 1833 called for the United Nation to relocate and did not make any explicit exemption for Shab-eh-nay or his band; on the other hand, the land ceded by that treaty did not include the Shab-eh-nay parcel. In any event, Indian agent Louis Sands informed Shab-eh-nay's band that everyone aside from Shab-eh-nay's immediate family must relocate, and there was no recorded disagreement. Shab-eh-nay and his band had the same understanding of the treaty as Sands.

Perhaps others besides Shab-eh-nay were not aware that Article 5 of the Treaty of 1833 had been stricken. The order that Shab-eh-nay's band must leave would have been consistent with the belief that Article 5 held sway and that the parcel was now held in fee by the chief. However, it is also clear that the Shab-eh-nay parcel was often regarded, by both whites and Indians, as an allocation to Shab-eh-nay for his personal use, the "and band" language notwithstanding. In fact, the stricken Article 5 of the 1833 treaty spells this viewpoint out (emphasis added):

> The 5th Article has been inserted at the request of the said Chiefs who alledge 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. [IL AG, Volume I, p 5; italics added]

(At this point we remark that if we wish to interpret the 1829 treaty as Shab-eh-nay likely understood it, in keeping with the rubric quoted by the Attorney General of the State of Illinois, above, "*they are to be construed, so far as possible, in the sense in which the Indians understood them,*" then we must regard the parcel as having been owned in fee by Shab-eh-nay all along. In this case it may have been wrongly taken from him, and pecuniary compensation may have been due him or his estate, *but the entire claim that the parcel ever constituted Indian lands is dissolved utterly*.)

In the years between 1838 and 1848, Shab-eh-nay made many trips between Illinois and Iowa. These are documented in the reports of McClurken [pp 50-63] and Lynch.

1837: Shab-eh-nay went west to get his band settled; he returned in 1839 without the band
1839: Shab-eh-nay sold 320 acres to Walker, and granted power of attorney to Walker to protect the remaining, unsold, land. This attempted sale would have constituted abandonment of that portion.
1840-1842: Shab-eh-nay went west to visit, returning to Illinois late in 1842
1841, Nov 8: A letter was written to D.D. Mitchell expressing interest in the sale of the entire parcel, from either Shab-eh-nay or Sho-bon-ier, both of whom were then in Council Bluffs
1844: Shab-eh-nay made a brief visit west. Upon his return, he filed a lawsuit a lawsuit over trespassing that was later dropped when the court determined that Shab-eh-nay did not own the land.
1845: The alleged Gates sales occur in September
1845-1848: miscellaneous brief visits west
July 1849-June 1853: Shab-eh-nay went west and the land was sold

When the General Land Office received notice in 1848 that Shab-eh-nay had attempted to sell his property (allegedly to the Gates brothers), and also an opinion from Medill that such an attempted sale constituted abandonment and thus that title reverted to the United States, the land was ordered sold.

We emphasize the point that abandonment was not declared simply because Shab-eh-nay left the area for some years, but because the deeds presented *compelling evidence that he intended to leave permanently.*

As one last point about abandonment, McClurken notes "it seems unlikely that a man who did not intend to return to farm property would have left ... livestock on the land" [McClurken, p. 96]. We have modest experience with a variety of livestock, and are baffled by this sentence. Even horses cannot be left unattended for *four years* with any expectation that they would still be in the vicinity upon ones return. It is more likely the animals were simply set free.

The Gates Sales

According to one claim, Shab-eh-nay sold his parcel to Ansel [or Asel] and Orrin Gates in December 1845, while in Washington DC for work on the 1846 Treaty of Council Bluffs. McClurken and the Tribe have made much of the theory that the sales were entirely fraudulent; the Tribe in its *1998 Memorandum* even goes so far as to refer to the Brothers Gates as the "Bogus" Gates [p 19]. That the sale was invented of whole cloth seems unlikely, though; we outline below the considerable circumstantial evidence that the attempt to sell existed. Furthermore, it is entirely plausible that Shab-eh-nay *did* intend to leave Illinois permanently, and tried to get what he could for the land.

The only evidence *against* Shab-eh-nay's attempted sale to the Gates brothers is that he eventually returned. But his return was four years later. Furthermore, in the decade between 1839 and 1849 when Shab-eh-nay lived intermittently on the parcel without his band, he only spent a cumulative six or seven years actually in residence.

McClurken states that although Shab-eh-nay was indeed in Washington, DC at the time of the alleged sale, he would have attended the readings for the 1846 Treaty of Council Bluffs, and "would have learned on the day before or on the day after the supposed sale that such a transaction was illegal" [McClurken, p 80]. But legality of the sale would on the face of it have been the Gates brothers' problem, not Shab-eh-nay's. McClurken also states, again as evidence against the Gates sale, that Shab-eh-nay had already tried to sell part of this land to Walker, but Shab-eh-nay knew that sale had been voided, and in any event Shab-eh-nay had never been fully paid by Walker and was believed to have been dissatisfied with Walker's performance as custodian for the remaining land [McClurken, p 58].

McClurken documents many land claims on the Shab-eh-nay parcel, particularly in 1845 and after. The Gates sales were in 1845. It seems odd that Shab-eh-nay would have known of none of these later sales claims, but odder still that he would have known of them, not agreed to them, and yet raised no protest.

In order to resell or improve their land, Ansel and Orrin Gates would have needed the deeds recorded, but the absence of such recording is *not* cause to doubt the deeds' existence. It is likely that the deeds were never recorded simply because the Messrs. Gates (or possibly Warham Gates) discovered during their inquiries with Congressman Wentworth that they were worthless. The *1998 Memorandum* points to Ansel Gates' recording of an 1847 deed as evidence that the unrecorded 1845 deed was fraudulent. However, it seems more likely Ansel still held some hope that the status of the 1847 deed was different from that of the 1845 deed; there is, for example, no evidence of federal involvement regarding the 1847 deed.

The above are circumstantial and/or indirect. There is stronger evidence of a sale attempt. First, there is the above-mentioned point, under the subhead "Paddock and Ward Inquiry," that when Shab-eh-nay engaged the attorneys Paddock and Ward, they wrote to the Federal government and **acknowledged** "Shab-eh-nay is here, *says he authorized the sale by the Government....*" Nowhere in the various biographical materials about Shab-eh-nay do we find any suggestion that he had trouble making himself understood by the whites. If there had been no sale attempt, the intent of this letter from Shab-eh-nay's attorneys seems *very* hard to fathom.

Second, there is the letter from Coalman (or Coleman) Olmstead to President Polk, on October 15, 1845, in which Olmstead states that he had purchased part of the Shab-eh-nay parcel from Wilbur Walker, who had earlier purchased it from Shab-eh-nay. Olmstead wanted to petition for good title, and had agreed to pay Shab-eh-nay the balance owed but Shab-eh-nay had evidently decided to sell instead to the Gates brothers. Olmstead wrote:

> .... I offered through his interpretors Messrs Robertson & Forsythe in September to pay what was due [Shab-eh-nay] from Walker provided he would sanction the sale. To this he consented.
>
> Afterwards, meeting with some designing men who wished to obtain possession of this land he was persuaded not to do it. This I learned through his interpretor Mr Forsythe.

> One of those men Mr Gates has gone to Washington, as I understand, in company with Shabbona to make out a title to the land and get it sanctioned by your Excellency. [Dowd p. 142, cited at Lynch Appendix A, Tab 50]

This is clear evidence of intent to sell. [On page 22 of the *1998 Memorandum*, it is acknowledged that Robertson and Forsyth (as it is spelled there) were indeed *friends* of Shab-eh-nay.]

The Gates brothers may indeed have been nefarious, but we do not know. As to price, they must at least have outbid Olmstead. Dowd recounts a theory that the Gates brothers had told Shab-eh-nay he was retaining title to 100 acres for his personal homestead:

> Instead [of selling to Olmstead], the Gates brothers would purchase the land: 640 acres to each. Most of our secondary accounts claim that Shabbona reserved 100 acres for himself and family. The Gates brothers even built a log cabin for him in the grove. It seems incredible, but perhaps Shabbona had no actual conception of a section of land (640 acres). Now the Gates boys purchased (with a small down payment) 1280 acres. Where was Shabbona's 100 acres? [Dowd, p 90, cited at Lynch Appendix A, tab 42]

The cabin, if it was in fact built by the Gates brothers, is further evidence of a material exchange.

The great weight of the evidence is that Shab-eh-nay did put his mark to documents agreeing to sell his parcel. When William Medill in 1848 held these documents in his hands, he was within his scope of authority in interpreting them as evidence of abandonment. Any conjecture about the circumstances does not affect the legitimacy of Medill's interpretation.

1837 Butler Opinion

On page 35 of the *1998 Memorandum* it is stated that, "In an opinion of May 23, 1837, the Attorney General specifically examined whether abandonment could apply to the Treaty of 1814 and 1817 with the Creek Indians. He found that the treaty had explicit language concerning abandonment." However, that treaty also had explicit language indicating that the reservations "shall inure to the said chief or warrior, *and his descendants*". No such heritability provision was included in the 1829 Treaty allocating Shab-eh-nay his parcel; it is logical to conclude that explicit rules regarding abandonment and termination of title go hand in hand with explicit assurances that title is otherwise heritable. Here is that opinion (in part):

> May 23, 1837, Opinions of the Attorney General, Vol 3, p 230
> Benjamin F Butler, to Hon. Levi Wordburg
>
> Rights of Indian Reservees
>
> Summary: The reservees under the Creek Treaty of [9th August] 1814, and the act of 1817, have not power to lease their lands; the renting for a term of years and removal from the state may be regarded as an abandonment of their reservations.
>
> On their abandonment, the title becomes immediately vested in the United States by operation of law, and is to be then treated as if then for the first time acquired by treaty.
>
> The Commissioner of the General Land Office asks:
>
> 1. What circumstances are to be considered as constituting an abandonment of a reservation; by what proof must these circumstances be established; and by whom is the decision to be made, as to the reservation having reverted to the United States in consequence of such abandonment thereof by the reservee?
>
> .....
>
> I. The first of these questions embraces several particulars, which I will notice in their order.
>
> 1st. The first article of the treaty of 1814 provides,

> where any possession of any chief or warrior of the Creek nation, who shall have been friendly to the United States during the war, and taken an active part therein, shall be within the territory ceded by these articles to the United States, every such person shall be entitled to a reservation of land within the said territory, of one mile square, (to include his improvements,) as near the center thereof as may be, which shall inure to the said chief or warrior, and his descendants, as he or they shall continue to occupy the same, who shall be protected by and subject to the laws of the United States; but upon the voluntary abandonment thereof, by such possessor, or his descendants, the right of occupancy or of possession of said lands shall devolve to the United States, and be identified with the right of property ceded hereby."

> The act of 1817, so far as regards the tenure on which the reservations are to be held, is in substance the same as the treaty. The tract reserved to the friendly Indian is to be held by him and his descendants "so long as he or they shall continue to occupy the same," and no longer.
>
> **Those circumstances, and those only**, by which the party ceases to occupy the reservation, should be considered as constituting abandonment thereof. I cannot particularly define them in advance, further than to say that they must be voluntary and unequivocal; leaving no reasonable doubt either as to the intention of the party, or as to the fact itself.
>
> In the case of Peter Random, mentioned in the letter of the Commissioner, who is said to have occupied and cultivated his reservation until 1833, and then to have leased it for twenty years, by a formal written lease, reserving rent, and removed to Louisiana, where he now resides, — I should think that there could be no doubt, if such are the facts, that his occupancy has ceased, and that he had voluntarily abandoned his reservation. In my judgment, the reservee has no power to make a lease, nor do I think he can, without a manifest violation of the words, object, and spirit of the treaty, be regarded as an occupant of the reservation, after he has ceased to have any direct personal connexion with the use and enjoyment of the land....
>
> 2d. The circumstances constituting a *cesser* of occupation, and an abandonment of the reservation, must, like all other facts necessary to be proved in judicial proceedings, be established by competent and credible evidence, to be produced to any tribunal in which the question shall arise for investigation and decision.
>
> I consider the words of the treaty as creating what is technically known as a collateral limitation....
>
> It will, therefore, follow that no judicial proceedings or actual entry on the part of the United States will be necessary to vest the estate in the United States.

The *1998 Memorandum* quotes part of this 1838 opinion, and interprets the phrase in bold above, "Those circumstances, and those only," as meaning that abandonment ends title only if there is an explicit abandonment clause; that is, "those circumstances" refers to the provision of such a clause. This interpretation is then used to support the theory that, as the 1829 treaty granting use of land to Shab-eh-nay contained no such clause, then in Shab-eh-nay's case abandonment could not have meant loss of treaty rights.

However, when one looks at the full context of Butler's opinion, it seems clear that this phrase should be parsed quite differently: Butler is in fact referring to his preceding sentence in which he states "so long as he or they shall continue to occupy the same;" abandonment is purely and simply determined by lack of occupancy and there is no legal option for an Indian to continue to hold on to the land while residing elsewhere. "Those circumstances," in other words, refers to the circumstances of the alleged abandonment; *eg* was it voluntary and unequivocal? Did the reservee leave outright, or did the reservee lease the parcel to someone else? A more modern wording would be "*The* circumstances, by which the party ceases to occupy the reservation, should be considered *when determining* abandonment."

As evidence for this view, first, Butler is speaking to a very specific question, regarding the 1814 treaty and a specific instance of apparent abandonment; it seems unlikely that he would take the opportunity to expand his reach to a general theory of reservation abandonment without acknowledging that shift in passing. Further, the remainder of Butler's opinion made it clear that the issue in front of him was whether or not the land in question *had* been abandoned; he concludes that Peter Random's attempted lease of the land did constitute abandonment. When he writes, "2d. The circumstances constituting a *cesser* of occupation," it is clear that he means the circumstances that determine whether or not the land is abandoned.

Survey

Taney's interpretation of title — that no treaty-recognized title was created — clarifies an otherwise mystifying issue regarding Shab-eh-nay's land. The 1829 treaty granted him "two sections at his village near the Paw Paw grove;" however, the precise description — Section 23, the east half of Section 26, the west half of Section 25 — wasn't established until over ten years later, *after* the band had departed for Iowa. The vagueness of the 1829 description is striking; there was no attempt at specification of "metes and bounds". Had the United States negotiators understood themselves to be awarding "treaty-recognized title", this vagueness is puzzling; leaving the important details of treaty-recognized title to the whim of the surveyors seems casual. However, that approach made sense if it was understood that no changes in title were being approved.

We remark in passing that the land proposed for a casino site by the PBPN — the former Ward farm — is actually outside the historical boundaries of the oval heavily wooded region that in 1829 was known as Shabbona's Grove; the Ward farmland was included by the survey team (not the treaty negotiators!) in the Shabbona parcel only for the purpose of defining sections consistent with the rectilinear survey grid. (See Lynch Appendix A, Tab 48, or *Combination Atlas Map of DeKalb County, Illinois*, by Thompson and Everts, Geneva, Illinois, 1871, or any other early plat book in which the forested areas are marked.) If Shab-eh-nay did intend to retain 100 acres of the parcel after his transaction with the Gates brothers, it is very likely that his 100 acres would not have overlapped the current PBPN property.

Treaties using "for the use of" language; cf McClurken Chart 1

In Dr McClurken's Appendices to his Report, there appears a chart (Chart 1, in Binder 1) identifying reservations listed as having been established for the "use" of bands and tribes. The apparent purpose of this chart is to demonstrate that the phrase "for the use of" did not automatically mean a usufruction-only right. In light of the Taney opinion, this is irrelevant — the primary issue is that treaty-recognized title did *not* attach to reserved lands that were inholdings from a larger, enclosing cession. Although most of the "reservations" listed by Dr McClurken were in fact later disestablished by treaty, our preceding arguments based on the Taney opinion demonstrate that cession by treaty was neither necessary nor required. It was merely the most common form, reflecting the fact that abandonment was *not* common.

In *none* of these "reserved ... for the use" examples is there a case similar to Shab-eh-nay's, where there was no heritability provision, no language about fee-simple title, and the reservee was not of mixed descent (*ie* was not a United States citizen). It seems to us that McClurken's list *supports* the thesis of the Lynch *Report* that "reserved ... for the use," *without further qualification*, created a right of usufruction only, which was not perpetual and was terminated by abandonment.

Some of the parcels listed as "reserved for the use" were for individuals; others were for bands, and some allotments were for entire tribes. There is evidence that large-scale tribal allotments were understood differently; see the October 1, 2007 brief by Dennis Whittlesey, submitted earlier as part of these proceedings, pp 5-6, or the Supreme Court case Jones v. Meehan, 175 U.S. 1 (1899) [referred to in Lynch's *Response...to...Dickson Wright...*, p 31], in which it was decided that small reservations for chiefs, in the absence of words limiting the effect, were fee-simple grants. Many large-scale tribal allocations, for example, received supporting services such as blacksmiths, gunsmiths, teachers, agronomists, or physicians. At the very least, it was much less likely for abandonment to have been an issue with large-scale allocations.

25 October 1805, with the Cherokee, at Tellico Tennessee
http://digital.library.okstate.edu/kappler/Vol2/treaties/che0082.htm
The language here, all in Article 2, appears on its face to list *exceptions* to the bulk cession that is identified at the beginning of the Article; this is precisely in line with the later Taney opinion. The language "from the cessions aforesaid" is not used explicitly. The exceptions (at least the first two of the three) also appear to be on the perimeter of the cession.

> The Cherokees ... cede to the United States, all the land which they have heretofore claimed, lying to the north of the following boundary line: [line specified], reserving at the same time to the use of the Cherokees a small tract lying at and

> below the mouth of Clinch river..., together with two other sections of one square mile each, one of which is at the foot of Cumberland mountain, at and near the place where the turnpike gate now stands; the other on the north bank of the Tennessee river, where the Cherokee Talootiske now lives

Other than the non-ceded section containing the home of Talootiske (which is not reserved *for* Talootiske), there are no individual or band allocations.

20 September 1816, with the Chickasaw, at the Chickasaw Council House
http://digital.library.okstate.edu/kappler/Vol2/treaties/chi0135.htm
Article 2 begins "The Chickasaw nation cede to the United States (with the exception of such reservations as shall hereafter be specified)". Article 4 then spells out the exceptions. Once again, the overall tone is completely consistent with the Taney opinion: the Chickasaw are ceding all of the bulk territory *except* for the tracts listed in Article 4.

The tracts in Article 4 are "reserved to the Chickasaw nation" in the opening sentence of the Article; each of the four individual tracts are listed as "for the use of" some specified individual, *and heirs*. There is no similar "and heirs" provision in the Shab-eh-nay allocation of the 1829 Treaty of Prairie du Chien. While Article 4 of the Chickasaw treaty does contain an explicit abandonment clause, it seems likely that its inclusion simply went hand-in-hand with the "and heirs" provision.

29 September 1817, with the Wyandots (and Ottawa), Miami of Lake Erie
http://digital.library.okstate.edu/kappler/Vol2/treaties/wya0145.htm
At the end of Article 6 it is stated that "There shall also be reserved for the use of the Ottawas Indians, but not granted to them, a tract of land on Blanchard's fork...." The context of this sentence is that it immediately follows a long series of awards beginning "The United States also agree to grant, by patent, in fee simple...." It is thus clear that the language "but not granted to them" is there for *emphasis*, to distinguish the final usufruction clause from the preceding fee-simple clauses. It is likely that "not granted to them" was intended in this context as equivalent to "reserved for the use of." In any event, "reserved for the use of" in this treaty clearly means something other than a permanent treaty-recognized award. The land "reserved for the use" is reserved for the entire tribe; although the second tract is described as "to include Oquanoxa's village", there is no evidence that the allocation was in any way specific to Oquanoxa. There is no inheritability provision tied to this allocation, as there is no individual to whom it was allocated.

In Article 8 there are individual grants "by patent, in fee simple;" most of the grantees appear to be U.S. citizens ("half-breeds", or adoptees, or whites who had chosen to live with the tribe). The following 17 September 1818 treaty adds, in Article 3, alienation restrictions on these individual grants.

17 September 1818, with the Wyandots, St Mary's Ohio
http://digital.library.okstate.edu/kappler/Vol2/treaties/wya0162.htm
This treaty declares itself to be supplementary to the preceding one, above. In Article 1 it is stated that (italics added) "[the tracts of land] shall not be thus granted, but shall be *excepted from the cession made by the said tribes* to the United States, reserved for the use of the said Indians." The italicized words clearly indicate that the authors of the treaty had the same understanding as Taney's. Article 1 also has explicit "held by them and their heirs forever" language, unlike the 1829 treaty. Article 2 then spells out allotments; we note that these are very large, *tribal* (not band or chief) allotments. Somewhere associated with either Article 1 or 2, there is also the marginal note, "The grants in the treaty of 29th Sept., 1817, to be considered only as reservations for the use of the Indians;" this was apparently added for emphasis and not to materially alter the terms.

Article 3 adds an alienability restriction to the individual grants in the preceding treaty.

6 October 1818, Miami nation, St Marys, Ohio
http://digital.library.okstate.edu/kappler/Vol2/treaties/mia0171.htm
Article 2 spells out reservations "from the cessions aforesaid", consistent with Taney. These are very large parcels of land, for the use of entire tribes. Article 3 contains a lengthy list of modest grants to specific individuals. The first grant, to Chief Jean Bapt. Richardville, is to be in fee simple. The remaining grants do not contain the "fee-simple" language, but they are for specific individuals "*and their heirs*." Article 6 adds alienability restrictions to all individual grants except Chief Richardville's.

Article 5 calls for an “agent”, a blacksmith, a gunsmith, and two mills for the primary allocation; again making it clear that this was to be a major tribal homeland, not a band reservation.

24 September 1819, with the Chippewa, Saginaw, Michigan
http://digital.library.okstate.edu/kappler/Vol2/treaties/chi0185.htm
Article 2 allocates 100,000 acres in fifteen large grants. Article 3 contains smaller allotments for individuals, using the language, “There shall be reserved, for the use of each of the persons hereinafter mentioned *and their heirs*, which persons are all Indians by descent....” These allocations differ from Shab-eh-nay’s by this inheritability provision.

29 August 1821, with the Ottawa, Chippewa, and Potawatomi, in Chicago
http://digital.library.okstate.edu/kappler/Vol2/treaties/ott0198.htm
Article 2 spells out large tracts using the language, “from the cessions aforesaid, there shall be reserved....” Article 3 spells out individual allocations which “shall be granted by the United States to each of the following persons, being all Indians by descent, *and to their heirs*.” Many of the grantees are of mixed descent, or are related to whites by marriage.

3 June 1825, with the Kansa, at St Louis
http://digital.library.okstate.edu/kappler/Vol2/treaties/kan0222.htm
Article 2 states, “From the cession aforesaid, the following reservation for the use of the Kansas nation of Indians shall be made....” The land then allocated is huge, thirty miles wide, and mention is made of Indian agents, teachers, and a blacksmith.

Article 6 makes “the following reservations ... for each of the half breeds of the Kanzas nation;” no mention is made of “reserved for the use of”, and no mention is made of inheritance rights. The language here is perhaps the closest to Shab-eh-nay’s, except that the reservees, as “half-breeds”, are U.S. citizens, unlike Shab-eh-nay.

23 October 1826, with the Miami, on the Wabash River
http://digital.library.okstate.edu/kappler/Vol2/treaties/mia0278.htm
Article 2 makes, “the following reservations, for the use of the said tribe.” Article 3 states, “There shall be granted to each of the persons named in the schedule hereunto annexed, *and to their heirs*....” The only place that the phrase “reserved for the use” appears is in the annexed schedule, and then only for the final entry: “two sections ... to be reserved for the use of the Metchinequea.” This is again a *tribal* allocation (though small); it is the only tribal allocation in the annexed schedule.

19 September 1827, with the Potawatomi, at St Joseph
http://digital.library.okstate.edu/kappler/Vol2/treaties/pot0283.htm
This treaty is clearly different from the others listed here. It exchanges a series of miscellaneous scattered tracts “heretofore reserved for the use of the said Tribe” by the Treaty of 29 August 1821 (and perhaps other treaties) for a list of contiguous surveyed sections in Michigan, in the vicinity of what is now Kalamazoo County. As this new land allocation is not a subset of the old, the Taney opinion would not apply. Perhaps recognizing this, the treaty states that the land is to “be reserved for the use of the said tribe, *to be held upon the same terms on which Indian reservations are usually held*” (italics added).

There are no individual or band allocations.

21 September 1832, with the Sacs and Foxes, Rock Island
http://digital.library.okstate.edu/kappler/Vol2/treaties/sau0349.htm
This is a rather more punitive treaty than the others listed here; this is a treaty of military surrender. For example, Article 7 addresses prisoner exchanges.

In Article 1 the tribes cede to the U.S. all their lands “with the exception of the reservation hereinafter made”; that reservation is spelled out in Article 2. It is four hundred square miles; the Taney opinion would apply as it is contained within the larger cession. Provision is made also for a blacksmith and gunsmith.

There are no individual or band allocations.

28 March 1836, with the Ottawa and Chippewa, Washington DC
http://digital.library.okstate.edu/kappler/Vol2/treaties/ott0450.htm
Article 2 states, "From the cession aforesaid the tribes reserve for their own use...." But the lands are so reserved only for five years, after which they too are ceded to the United States. Article 3 contains miscellaneous smaller allocations, most either subject to the same five-year term limit or, in one case, to be "under the charge of the Indian department." None are to individuals. Article 6 states, "The said Indians being desirous of making provision for their half-breed relatives, and the President having determined, that individual reservations shall not be granted...;" the treaty then goes on to spell out terms for pecuniary compensation for half-breeds.

26 December 1854, with the Niskwali, Puyallup, ...at Medicine creek
http://digital.library.okstate.edu/kappler/Vol2/treaties/nis0661.htm
This is a much later treaty, and the first listed here from the West Coast. Article 2 states, "There is, however, reserved for the present use and occupation of the said tribes and bands, the following tracts of land", but it is not clear to us whether the land reserved was part of the larger cession of Article 1 or not. Articles 8 and 9 deal with conduct of members of the tribe; Article 10 agrees to the establishment of a school, and provision of a blacksmith, carpenter, agronomist, and physician; this is again a large tribal allocation.

There are no individual allocations and no allocations to specific bands.

22 January 1855, with the Dwamish, Suquamish, and others, at Point Elliot
http://digital.library.okstate.edu/kappler/Vol2/treaties/dwa0669.htm
As in the preceding treaty, we do not know if the land "reserved for the present use and occupation of the said tribes and bands" is part of the larger cession or not. Again, there is provision for a school, etc, and other infrastructure appropriate for a large tribal allocation, and there are no individual allocations and no allocations to specific bands.

City of Sherrill v. Oneida Indian Nation Revisited

We earlier submitted a document dated September 26, 2007, *The Prairie Band and the Sherrill Decision*, in which we argued that regardless of the reservation status of the Shab-eh-nay property, the Sherrill decision would still apply and therefore the tribe would have to go through the 25 U.S.C. §465 land-into-trust process before being able to build a gaming facility. The office of the Illinois Attorney General submitted a much stronger argument along the same lines.

We note, however, that in the Hobbs, Straus, Dean & Walker brief dated October 5, 2007, there appears on page 25 the following sentence:

> If the lands at issue constitute reservation lands, Congress has determined they are Indian Lands and that is the end of the inquiry.

This is presumably a reference to 2703(4)(A): Indian lands include "all lands within the limits of any Indian reservation." We submit that in the City of Sherrill v Oneida Indian Nation decision, the Supreme Court has ruled rather decisively that that is *not* the end of the inquiry. Where lands have not been in a tribe's possession or sovereign control for a long time, the tribe (and the NIGC) may be barred by laches and other equitable doctrines from treating such *repurchased* lands, even within a reservation or former reservation, as Indian lands if certain conditions are met (as we have argued they are in the present circumstance). Furthermore, given these conditions — longstanding non-Indian character of the area, non-Indian regulatory authority, tribe's long delay in seeking judicial relief — the only way to return such lands to the status of "reservation" or "Indian lands" in the sense of IGRA is through the 25 U.S.C. §465 land-into-trust process.

Whatever the decision regarding reservation status of the Shab-eh-nay parcel, we see no way that a claim Sherrill is irrelevant can be made seriously. And while there may remain the factual question as to whether the Shab-eh-nay land situation meets all the criteria of Sherrill, we have already argued that the answer is yes, and upon seeing the PBPN's submission we feel that our case is even stronger. The one earlier uncertainty was whether the PBPN had ever sought judicial relief regarding the Shab-eh-nay land claim, and the McClurken history makes it abundantly clear that the answer is no. The Shab-eh-nay claim was even withdrawn from the Indian Claims Commission filing [McClurken, pp.

141-142]. For over 150 years the PBPN has not sought judicial review of the land-sale decision, and the community surrounding the present-day town of Shabbona has settled expectations based on this long silence. The applicability of Sherrill must be resolved before any gaming project can be approved by the NIGC.

Conclusions

When the 1829 Treaty of Prairie du Chien was negotiated, the understanding on the part of the United States was that treaty-recognized title was *not* being created. The Taney opinion makes this clear. The understanding on the part of Chief Shab-eh-nay was equally clear: as the stricken Article 5 of the 1833 treaty makes plain, *he* thought he was getting fee-simple title in 1829. Neither side had any thoughts of treaty-recognized title.

Without treaty-recognized title, it is clear that federal officials from Medill to Mr Pringle of the 34th Congress acted properly with regard to the sale of the Shab-eh-nay parcel. The parcel was in good faith found to be abandoned, and therefore was properly subject to sale at auction.

Even the one remaining controversial point — that Shab-eh-nay had not intended abandonment — seems thin. While there may have been mischief afoot, it is unlikely that the Gates deeds were fakes, and even Shab-eh-nay, through his lawyers, did not dispute the abandonment ruling.

While we respect the Prairie Band Potawatomi's distress that Shab-eh-nay should be treated poorly after his heroic services to the early settlers, and come to an ignominious end, there is absolutely no merit in the claim that the land in question remains a federal Indian reservation.