An Ethno-historical Response to the October 5, 2007 Memorandum Submitted by Hobbs, Straus, Dean & Walker to the National Indian Gaming Commission on Behalf of the Prairie Band Potawatomi Nation of Kansas.

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On Behalf of Dekalb County Taxpayers Against the Casino (DCTAC)

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Introduction

On page one of the October 5, 2007 Memorandum to the National Indian Gaming Commission (NIGC) the law firm of Hobbs, Strauss, Dean & Walker (the Firm), representing its client, the Prairie Band Potawatomi Nation (the Tribe) proffered the following six premises as statements of fact with regard to the question of the nature of the historical status of the lands known as Shabbona's Grove. These lands are located within the bounds of Shabbona Township, DeKalb County Illinois,

> "The record demonstrates that : (1) the United States permanently recognized the Nation's Shab-en-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; (3) there is no subsequent Act of Congress or Treaty which alters, diminishes or disestablishes that Reservation in any way; (4) although the land was sold by the United States in 1849, that sale was illegal and void *ab initio* [from the beginning]; (5) the sale was conducted in violation of the terms of the Treaty and the Non-Intercourse Act by agents of the United States who lacked the authority to sell the land; and (6) the Nation's lands lie wholly within the boundaries of its Shab-eh-nay Reservation."

It is the central thesis of this response that the Firm's first premise lacks historical validity, and that the Firm's following five premises being intricately and logically linked to the first premise, also lack similar foundation.

Within this context, the following submission to NIGC maintains:

1. The Firm has made two initial incorrect statements. First, the Firm states the United Nations of Ottawa, Chippewa, and Potawatomi were part of the Wabash Potawatomi and morphed into the Prairie Potawatomi while still in Illinois. The United Nations merged with the Prairie Potawatomi at Council Bluffs, Iowa. Second, the Firm claims that the lands relinquished by the United States in the 1795 Greenville Treaty included those lands in northern Illinois that encompassed the future village site of Shabenay's Band. The line of demarcation depicting "*relinquished*" lands was to the south, that is, it was way to the south of Northern Illinois in the region of the Kankakee River.

2. Any title claims the United Nation's may have had or established to the lands of the future site of Shabenay's village as a result of the August 24, 1816 treaty were extinguished by the United Nations' assent to new tribal boundaries, set by the participating tribes themselves as a result of the August 19, 1825 Treaty.

3. As a result of the new tribal boundaries established by the 1825 Treaty for the "*Ottawa, Chippewa, and Potawatomie*", there remained no pre-existing Indian title to the lands of Shabenay's village between the years 1825 and 1829.

4. The August 29, 1829 Treaty held at Prairie du Chien established federal title to all the lands encompassed by both adjoining land cessions as depicted in the treaty. From this cession Shabenay and his band were given usufructory privileges to their village site over which

the federal government maintained reversionary title to the lands in question.

5. As a consequence of the 1833 Treaty held at Chicago, Shabenay, as a concurring signatory to the treaty in his capacity as a band okama, surrendered the band's corporate usufructory rights to the lands in question. The band, and all other Indian signatories and their people were required to remove from northern Illinois upon ratification of this treaty by the President. Upon the band's abandonment and removal to Iowa, title to these lands reverted back to the federal government. As a consequence, Shabenay attempted to have the lands in question established as a reservation with the fee title vested in himself, with said title being inheritable by his heirs and assigns. There were no alienation restrictions proposed in Shabenay's request. This request was rejected by the Federal Government. Until 1844 Shabenay mistakenly believed that his treaty request had been granted.

6. As part of the 1846 Treaty held at Council Bluffs, Iowa, the Potawatomi coalesced into one politically unified tribe, eliminating the existing band-based political structure. In this same treaty, the Potawatomi sold and ceded all their remaining lands to the Federal Government including any residual land-related rights that may have remained in Illinois.

7. Shabenay's band, the corporate body upon which usufructory privileges were bestowed by the 1829 treaty permanently abandoned

the lands at Shabbonna's Grove on September 15, 1837 in compliance with Article 2nd of the 1833 treaty.

8. Shabenay, as a private individual could not claim any continued usufructory rights to the lands in question after the departure of the corporate band. Realizing this, he attempted to gain fee-simple standing to the former band-utilized lands.

In sum it is the conclusion of this research that: (a) Shabenay's band held only usufructory rights to the lands at Shabbona's Grove there was no treaty-established title; (b) the federal government held the reversionary title rights to the lands at Shabbona's Grove as a consequence of the 1829 treaty at Prairie du Chien; (c) Shabenay, as the band's okama, surrendered the band's usufructory rights by agreeing to the removal stipulation present in the 1833 treaty at Chicago to which he was a signatory; (d) his corporate band abandoned the lands at Shabbona's Grove in 1837 at the direction of the federal government;(e) with this abandonment, the federal government asserted its sovereign reversionary title to the former village lands; (f) any remaining residual rights the band may have had in Illinois were sold or ceded to the United States by virtue of the 1846 Treaty at Council Bluffs: (g) it was entirely within the right of the federal government as feeholder to the lands at Shabbona's Grove to sell these lands at public auction in 1848. The subsequent issuance of federal patents to the purchasers was an affirmation of the legitimacy of these sales.

As an editorial note, all citations denoted by "**DCTAC EXH."** refer to the exhibit number in the September 26, 2007 submission[1] to NIGC by DCTAC. Those citations cited as "**EXH**" refer to an exhibit accompanying this submission.

A Response To:

I. The Shab-en-nay Indian Reservation, Established July 29, 1829, by the Treaty of Prairie du Chien for a Band of Potawatomi Indians in Illinois, Has Never Been Disestablished, and Still Exists Today

A. The Early Potawatomi Treaties

The Firm[2] depicts the geographical spread of the various Potawatomi bands circa 1787-1846 by noting, "*At that time, [1787-1846] the Potawatomis occupied most of the newly opened Northwest Territory*. The Firm, again citing McClurken,[3] erroneously claimed that they occupied "*these lands along with the Ottawas and Chippewas; several treaties were with these tribes jointly-they were sometimes called "the United nations.*" The Potawatomi association with elements of these two tribes (The United Nations) was restricted to the region of northern Illinois. According to the Firm, in the early 1800's there were three political groupings of Potawatomis- *"Potawatomis of the Huron"; "Potawatomis of the St. Joseph"*, and "*Potawatomis of the Wabash*", who " were generally defined as the

[1] An Ethno-historical Evaluation of Land-holdings at Shabbona's Grove, Dekalb County Illinois by James P. Lynch Historical Consulting and Research Services LLC.
[2] October 5, 2007 Memorandum, Hobbs, Strauss, Deam, &Walker:2, citing McClurken, James M., 2007, The Shabehnay Band and its 1829 Reservation :27)
[3] McClurken, James M., 2007, The Shabehnay Band and its 1829 Reservation:27-29,33)

occupants of Northern Indiana and the marsh lands of northern Illinois."[4] This Wabash grouping, "*with additional Potawatomies, eventually became the Prairie Band Potawatomi Tribe*."[5] The Firm asserts that "*The Shab-eh-nay Band was part of this latter group.*"[6]

The Firm seemingly attempts to negate the importance of the Potawatomi political association with the Ottawa and Chippewa by claiming that the so-called "*Wabash*" Grouping included "*covering northern Indiana and Illinois*." The Firm goes on to depict Shabenay and his band as being part of this Wabash group which the Firm asserts morphed into the Prairie Band Potawatomi. However, according to the Indian Claims Commission findings:[7]

> [:192 fn #4] In the Prairie Band case, (sometimes known as the Western Lands case) [Ind Cls. Comm. 4:473,:514, 1956], the Commission found that the Potawatomis consisted of 5 bands or sub-groups with whom the United States dealt separately in obtaining land cessions between 1795-1833. These were stated to be: the United Nations Band (United tribes of Ottawa, Chippewa, and Potawatomis); the Kanakee band; the Wabash Band; the St. Joseph Band; and the Huron Band
>
> [:197-198] …First, with respect to the signatures of Indians listed in the printed versions of the treaty as Potawatomis of the River Saint Joseph, there appear names of chiefs from other areas such as the Illinois River area, the Chicago –Milwaukee area, the Wabash River area…
>
> …Those who signed included leaders of the tribe in the area extending from Detroit through Chicago, namely Okia and Nanaume from the Huron River and Detroit area; Topenbee from the St. Joseph River in southwest Michigan; Keesas or Sun, from the Wabash River vicinity; Wapmeme, or White Pigeon, from northern Indiana; Missenogomaw (or Gomau) from

[4] Ibid:28
[5] Ibid:30
[6] ibid:30
[7] Decisions of the Indian Claims Commission 1972, Vol. 27:192,:197-198, Citizens Band of Potawatomi of Oklahoma, et. al. Potawatomi Tribe of Indians, The Prairie Band of Pottawatomi Indians et. al., Hannahville Indian Community v. United States.

> Lake Peoria and the Illinois River area; Sugganunk, a variant of the name Saukonoek, the Indian name for Billy Caldwell, a prominent leader of the Potawatomis residing in the Chicago-Milwaukee area; and Winnemac, after whom an Indian village was named…

McClurken also contradicts the Firm's assertion[8] wherein he notes: "*Land holdings of the United Nations of the Chippewa, Ottawa, and Potawatomi were recognized in two treaties, the 1816 Treaty of St. Louis and the 1825 Treaty of Prairie du Chien.*" Thus the United Nations were recognized by the United States as a sovereign, separate political entity apart from any other Potawatomi bands. The United States, by ratifying these treaties recognized the United Nations as a politically independent entity having its own defined land base.

The 1846 Council Bluffs Treaty[9] stated: "*Whereas, the various bands of the Pottowautomie Indians, known as the Chippewas, Ottawas, and the Pottowautomies, the Pottowautomies of the Prairie, the Pottowautomies of the Wabash, and the Pottowautomies of Indiana, have, subsequent to the year 1828, entered into separate and distinct treaties with the United States…*" As noted earlier, the 1816 treaty was with "*the United Tribe of Ottawas, Chipawes and Pottowotomees residing on the Illinois and Milwake rivers.*" The 1829 treaty stated "*United Nations of Chippewa, Ottawa, and Potowatami of the Illinois, Milwaukee and Manitock rivers.*" The 1833 Chicago treaty stated, "*The said United Nation of Chippewa, Ottowa, and Potawatamie Indians.*"

[8] McClurken, James M., 2007, The Shabehnay Band and its 1829 Reservation:33
[9] Kappler, Charles J., 1904, Indian Affairs. Laws and Treaties, Volume II, Treaties:557, Washington, Government Printing Office. **DCTAC EXH. 46**

The Chippewa, Ottawa, and Potawatomi Band politically merged with the Prairie Band at Council Bluffs, Iowa, not in Illinois. As the 1846 Treaty noted:

> …and being desirous to unite in one common country, and again become one people…and to abolish all minor distinctions of bands by which they heretofore been divided, and are anxious to be known only as the Potawautomie Nation, they hereby reinstating the national character….

Shabenay and his band were politically part of the United Nations of Ottawa, Chippewa, and Potawatomi up until the time his village band resettled at Council Bluffs, Iowa.

On page three of its October 5, 2007 Memorandum, the Firm claims by virtue of the 1795 Treaty of Greenville[10] that the Indian tribes including the Potawatomi made a treaty of cession with the United States. This treaty drew a boundary line running roughly NE to SW across the middle of Ohio and into Indiana *"…and the U.S. "relinquished" to the tribes title to 'all other Indian lands northward of the River Ohio, eastward of the Mississippi, and westward and southward of the Great Lakes and the waters uniting them'…*" "*southward of the Great Lakes*" would be demarcated by the southern shore of Lake Erie, the southernmost of the Great Lakes. The Firm claims the area not ceded, and therefore claims as "*relinquished*" to the tribes, included Illinois including the future site of Shabenay's

[10] **EXH 1.**Kappler, Charles J., 1904, Indian Affairs. Laws and Treaties, Volume II, Treaties:39, Washington, Government Printing Office. Royce, Charles C., 1899, Indian Land Cessions in the United States, in Eighteenth Annual Report of the Bureau of American Ethnology to the Secretary of the Smithsonian Institution, Washington, Government Printing Office:654-57.

village at Shabbona's Grove. The Firm cites Royce "Map #49 (Ohio), Area 11"[11] in support of this assertion.

However, one notices that Royce Map 49 does not cover Illinois. It depicts Ohio. If the northern boundary of Royce Area 11 is extended westward toward the Mississippi River it would pass through Indiana at mid-state and enter Illinois near the Kankakee River, very well south of Shabenay's village site.

If the use of Royce Map 11 was intended to depict the southernmost edge of the Great Lakes (the southern shore of Lake Erie) and apply that interpretation to the wording of the 1795 Greenville Treaty: "*all other Indian lands northward of the River Ohio, eastward of the Mississippi, and westward and southward of the Great Lakes…*", the lands "*relinquished*" to the tribes could not have encompassed the Shabenay village area. In support of this, Clifton[12] noted, " *In addition to not being involved in the treaty deliberations, the Illinois-Wisconsin Potawatomi never received any of the annual annuity pledged to the Potawatomies by the Greenville agreement.*"

We find that the Firm has made two incorrect statements. The first claims the United Nations of Ottawa, Chippewa, and Potawatomi were part of the Wabash Potawatomi and morphed into the Prairie Potawatomi while still in Illinois. The United Nations actually merged

[11] **EXH.2.** Royce, Charles C., 1899, Indian Land Cessions in the United States, in Eighteenth Annual Report of the Bureau of American Ethnology to the Secretary of the Smithsonian Institution, Washington, Government Printing Office Map 49 Ohio

[12] **EXH. 3.**Clifton, James, A., 1998, The Prairie People Continuity and Change in Potawatomi Indian Culture 1665-1965:172, University of Iowa Press, Iowa City.

with the Prairie Potawatomi at Council Bluffs, Iowa. The Firm's second incorrect statement that the lands relinquished by the United States in the 1795 Greenville Treaty included those lands in northern Illinois that encompassed the future village site of Shabenay's Band. However, the line of demarcation depicting "*relinquished*" lands to the south is very much to the south of Northern Illinois and to the south of Shabbona's Grove.

B. Chief Shab-eh-nay Was an Important Potawatomi Leader and a Hero to the Local White Settlers; His Band Received the Reservation in Consideration of Shab-eh-nay's Services to the U.S. and the White Community.

1. Early Days

On pages three and four of its October 5, 2007 Memorandum, the Firm, citing Dr. McClurken, states "*Chief Shab-eh-nay was born an Ottawa, but married into a Potawatomi community and became an important Potawatomi leader in the Illinois region."*[13]
"…Afterwards, he moved west with his family, joining Potawatomis who had settled in northern Illinois near Chicago." [14] *"In 1825 the U.S. established the territorial boundaries of the Potawatomis of northern Illinois and southern Wisconsin: the Shab-eh-nay Band's land lay within that territory."*[15]

[13] McClurken, James M., 2007, The Shabehnay Band and its 1829 Reservation:26
[14] Ibid: 27, 30
[15] Ibid:34, Kappler, Charles J., 1904, Indian Affairs. Laws and Treaties, Volume II, Treaties:250, Washington, Government Printing Office. **EXH. 4**. Royce, Charles C., 1899, Indian Land Cessions in the United States, in Eighteenth Annual Report of the Bureau of American Ethnology to the Secretary of the Smithsonian Institution, Washington, Government Printing Office: 722-723, Map Illinois 2.

The existing historical record, according to Dowd and Walters, tells us that by birthright Shabenay was not of the Pottawatomie tribe. According to published secondary accounts[16] Shabenay was an Ottawa Indian who lived amongst the Potawatomi. He was purportedly the son of an Ottawa Indian who had fled to the Kankakee River region from Michigan's Upper Peninsula, the Ottawa's historic homeland, in the aftermath of Pontiac's war (1764). According to Matson,[17] Shabenay ("*Shau-be-na*") was born in a village along the Kankakee River circa 1775 in present day Will County, Indiana. Shabenay married into a Potawatomi band lineage via a union with a daughter of a Potawatomi band okama (chief or head man) who had a village near the mouth of the Fox River. Several years later, following the band okama's death, Shabenay became the band's okama. At a later date, Shabenay convinced the band to move up the Fox River into northern Illinois, settling at what became known as Shabbona's Grove.

With regard to these lands in northern Illinois, initially in its March 13, 2007 Memorandum to Attorney Dennis J. Whittlesey, the Firm addressed the "*Potawatomie*" lands, "…*in northern Illinois*…", as described in Article 9 of the August 19, 1825 Treaty with the Sioux and Chippewa, Sacs, and Fox, Menominie, Ioway, Sioux, Winnebago, and a portion of the Ottawa, Chippewa, and Potawatomi Tribes,[18] as

[16] Dowd, James, 1979, Built Like A Bear:15, Ye Galleon Press, Fairfield Washington, , Walters, Alta P., 1924, Shabonee,:388, Journal of the Illinois State Historical Society, Vol. XVII, No. 3:381-397, Illinois State Historical Society, Springfield. **DCTAC EXH. 4**.

[17] Matson, N., 1876, Sketch of Shau-be-na, A Pottowatamie Chief:415, Report and Collections of the State Historical Society of Wisconsin Volume VII:415-421, E. B. Bolens, Madison **DCTAC EXH.4**

[18] Kappler, Charles J., 1904, Indian Affairs. Laws and Treaties, Vol. II. (Treaties):250,

having established "*treaty-recognized title*". At that time the Firm argued that this treaty was the basis of the Potawatomi's title to the lands at Shabbona's Grove. The implication of this March 13 assertion as well as the statement on pages three and four of its October 5, Memorandum was that Shabenay's Grove lay within these described bounds and thus, according to the March 13 Memorandum, became tribal, title-held land protected by the Federal Indian Trade and Intercourse Acts.

In its October 5, 2007 Memorandum the Firm changed its earlier assertion as to when a "*treaty-recognized title*" was established. The Firm now claims the August 24, 1816 treaty with " *the chiefs and warriors of the united tribes of Ottawas, Chipawas, and Potowotomees, residing on the Illinois and Melwakee rivers*"[19] as the foundation of its claim that the Potawatomi "*recognized title*" to the lands at Shabbona's Grove.

However, the purpose of the 1816 treaty cession was, according to the treaty "*for purpose of removing difficulties between them*" (the United tribes and the Sacs and Foxes of land ownership of the region at issue). The Firm cites on page twenty of its October 5 Memorandum Area 77 of Royce Map18 (Illinois 2) in part to support its claim that Shabenay's village lay within the area of the 1816 treaty but outside the cession lands which "*lies south of a due west line from the southern extremity of Lake Michiga*n." The tribe claims that the land north of this line "*the U.S. agreed to 'relinquish to the said*

Washington, Government Printing Office. **EXH. 4.**

[19] **EXH.5.** Kappler, Charles J., 1904, Indian Affairs. Laws and Treaties, Vol. II. (Treaties):132

[Ottawa, Chippewa and Potawatomi] tribes all the land contained in the aforesaid cession of the Sacs and Foxes (Treaty of November 3, 1804) which lies north of the due west line from the southern extremity of Lake Michigan'." This treaty did encompass the future site of Shabenay's village. As described[20] in the treaty its eastern bounds was the Fox River,

> …to the mouth of the Ouisconsing river and up the same to a point where the Fox River (a branch of the Illinois) leaves the small lake called Sakaegan, thence down the Fox river to the Illinois river, and down the same to the Mississippi….

Did the August 1816 treaty include the lands that were to become the site of Shabenay's band's village? Yes. Did the land boundaries agreed upon by the gathered tribes for the "*Ottawa,Chippewa and Potawatomie Tribes of Indians living upon the Illinois*" in the 1825 treaty encompass the lands that were to become the site of the band village led by Shabenay? The answer is no.

First, the 1825 treaty ceded no lands to the United States.

Second, the Firm is grossly incorrect when it asserts on page three of its October 5 Memorandum that "*In 1825 the U.S. established the territorial boundaries of the Potawatomis of Northern Illinois and southern Wisconsin*."

Third, the United States in this Treaty only agreed to recognize and respect the newly-created boundaries agreed upon by the gathered

[20] **EXH. 6.** Kappler, Charles J., 1904, Indian Affairs. Laws and Treaties, Vol. II. (Treaties): 74

tribes themselves. The United States representatives only function to these treaty proceedings was that of peace mediators. The treaty's preamble clearly states this purpose,

> The United States has seen with much regret, that wars have for many years been carried on between the Sioux and the Chippewas, and more recently between the confederated tribes of Sacs and Foxes, and the Sioux; which if not terminated, may extend to the other tribes, and involve the Indians upon the Missouri, the Mississippi, and the Lakes, in general hostilities. In order, therefore, to promote peace among the tribes, and to establish boundaries among them and the other tribes who live in their vicinity, and thereby to remove all causes of future difficulty, the United States have invited the Chippewa, Sac, and Fox, Menominie, Ioway, Sioux, Winnebago, and a portion of the Ottawa, Chippewa and Pottawatomie tribes living upon the Illinois, to assemble together, and in a spirit of mutual conciliation to accomplish these objects;…

By discussion and agreement among the attending tribes, mediated by the Federal Commissioners, the individual participating tribes, among themselves, came to an understanding of, and agreement to, the land boundaries for their own respective tribes. The Commissioners did not assign lands or boundaries to them. The tribes did so of their own accord. No reservations external to the tribes' set boundaries were established by this treaty.

Fourth, and most importantly and of very special note, those boundaries were agreed upon and established by the presiding tribes for the combined Potawatomi, Ottawa, and Chippewa in Article 9 of this 1825 treaty. Without question these newly-agreed upon and recognized revised boundaries established for the Ottawa, Chippewa, and Potawatomi did not encompass the lands of Shabbona's Grove,

> The Country secured to the Ottawa, Chippewa, and Potawatomie tribes of the Illinois, is bounded as follows: Beginning at the Winnebago village, on

> Rock River forty miles from its mouth and thence running down the Rock river to a line which runs from Lake Michigan to the Mississippi, opposite to Rock Island; thence up that river to the United States reservation, at the mouth of the Ouisconsin; thence with the south and east lines of the said reservation to the Ouisconsin; thence southerly, passing the heads of the small streams emptying into the Mississippi, to the Rock river at the Winnebago village…

These lands, as described in the treaty, were north and west of the Rock River, running north up the Mississippi River to the Ouisconsin (Wisconsin) River, then on a line south to the Winnebago village on the Rock River. The site of Shabenay's village at Shabbona's Grove was not within this boundary-defined area. By agreeing to this agreed-upon boundary, the three tribes, including the Potawatomi, relinquished any territorial claims to the lands east of the Rock River to the western shores of Lake Michigan which were a portion of the lands that were ceded to them by the United States, in Article 2, of the August 24, 1816 Treaty.

It is apparent that the Firm, prior to writing this Memorandum, did not critically evaluate or comprehend the region's historical geography. If it had examined available maps of the region for this time period, especially those found in Tucker's 1942 and Temple's 1975 Supplement of "Indian Villages of the Illinois Country",[21] in particular the following: Plates LII (1829), that depict the Rock River, Mississippi River, and Ouisconsin (Wisconsin) Rivers; Plate LXXXVI (1822) that depicts the Indian boundary line from Lake Michigan to the Mississippi River that is mentioned in the 1825

[21] Tucker, Sarah J. 1942, Indian Villages of the Illinois Country, Volume II, Scientific Papers, Illinois State Museum, Springfield Plates LII, LXXXVI,XCII, LXXXVII. **DCTAC EXH.2**

Treaty; Plate XCIII that depicts the area ceded by the Potawatomi in the 1829 Treaty that included Shabbona's Grove; Plate LXXXVII (1829 Chandler map) that clearly denotes the bounds set by the 1825 Treaty, including the site of the Winnebago village on the Rock River as well as two others and Royce's 1899, "Indian Land Cessions in the United States"[22] in particular Map :Illinois 1 Plate #17, that shows the location of Shabbona's Grove ("*Shab-en-nay', vill*") in Township plat number 38 south-southwest of Chicago, west of the Fox River, and east of Rock River, the location of the Winnebago village on that river (in Township plat #20) 40 miles south of the river's mouth at Lake Winnebago and almost due west from Shabenay's village, the Firm would have realized there was no historical foundation to its assertion that the lands at Shabbona's Grove were within the boundaries agreed upon and established by the gathered tribes in1825. Upon completing this necessary analysis, it should have become readily apparent to the Firm, after a comparison was made to the boundaries depicted in the 1816 treaty that the lands east of the Rock River were abandoned as tribal lands by the "*Ottawa, Chippewa and Potawatomie Tribes of Indians living upon the Illinois*" when they agreed and accepted the new boundaries as defined in the 1825 treaty.

Although the Firm's claim is correct that the future site of Shabbona's Grove lay within the relinquished area of the 1816 Treaty, these maps negate the Firm's legal claim that the lands at Shabbona's

[22] Royce, Charles C., 1899, Indian Land Cessions in the United States, in Eighteenth Annual Report of the Bureau of American Ethnology to the Secretary of the Smithsonian Institution, Washington, Government Printing Office Map Illinois 1#17. **DCTAC EXH. 2.**

Grove were part of those lands within the tribal boundaries so agreed upon for "…*a portion of the Ottawa, Chippewa, and Potawattomis.*…" by the tribes participating in the August 19, 1825 Treaty, a treaty that also included the Sioux and Chippewa, Sacs, Fox, Menominie, Ioway, Sioux, and Winnebago Tribes.

Article 15 of the August 19, 1825 Treaty states,

> This treaty shall be obligatory on the tribes, parties hereto, from and after the date hereof, and on the United States from and after its ratification by the government thereof

This treaty was ratified by Presidential proclamation on February 6, 1826. At that time the federal government's "*recognized title*" of the lands of the united "…*Ottawa, Chippewa, and Potawattomis.*…." was brought into conformity with the bounds established and agreed upon by the tribes who participated in this treaty. The new federally-recognized tribal collective boundary for the three was west of the Rock River and did not encompass the lands that would become Shabenay's village. It is apparent that Shabenay and his band, when they migrated north from the Illinois/Fox River region into northern Illinois, were moving into a region and establishing a village in which neither any Indian tribe nor the federal government had a title claim. The united three tribes vacated their title to this land as a result of the 1825 treaty, the federal government took no action to reassume the title it ceded in 1816. The July 29, 1829 Prairie du Chien Treaty cleared up this title issue.

Whatever title claims the United Nations may have had or established to the lands of the future site of Shabenay's village as a result of the August 24, 1816 treaty were extinguished by the United Nations' assent to their new tribal boundaries set by the tribes themselves as a result of the August 19, 1825 Treaty.

2. The 1829 Treaty.

On page four of its October 5, 2007 submission to NIGC, the Firm stated:

> In the 1829 Treaty, the Potawatomies et al., agreed to cede part of their land in Illinois and Wisconsin. It was contemplated that the ceded land would be taken up by white settlers. Notwithstanding that, Shab-eh-nay wanted to remain where his band was already living, at Paw Paw Grove, in the middle of the ceded area, to which the U.S. agreed, most likely because of Shab-eh-nay's reputation as a friend to the whites. And so, two square miles in the middle of the cession were reserved for the Shab-eh-nay Band…"

First, and of singular importance, is that the July 29, 1829 Prairie du Chien Treaty was with the " *United Nations of Chippewa, Ottawa, and Potawatomie Indians of the waters of the Illinois, Milwaukee, and Manitwoouck Rivers"* not "*the Potawatomies et al*" as stated by the Firm on page four, of its October 5, 2007 Memorandum. This is historically misleading. The Firm's statement inaccurately depicts the participants who collectively made two significant land cessions to the United States in 1829.

The first cession by the Ottawa, Chippewa, and Potawatomi cited in Article I of the 1829 treaty ceded the lands agreed upon for the "*United Nations*" by the gathered tribes in the August 19, 1825 Treaty

at Prairie du Chien discussed earlier in this response. These were for the most part the lands that the Sacs and Fox ceded in the 1804 cession to the United States. These lands were those west of the Rock River to the Mississippi and north to the Wisconsin River. As noted above, this land did not contain the lands that became Shabenay's village site.

The second cession included those lands to the east of the Ottawa, Chippewa, and Potawatomi boundary established by the gathered tribes in the 1825 treaty. These were the lands ceded by the United States in the August 24, 1816 Treaty to the "*united tribes of Ottawas, Chipawas, and Pottowotomees, residing on the Illinois and Melwakee rivers…*"[23] and abandoned by the "*united tribes…*"which contained the site of Shabenay's village in 1825. By the action of this 1829 treaty, the United States formally reestablished its title to these lands wherein the title remained unsettled due to the actions of the 1825 treaty.

In their "*Report of the Commissioners…*" to the Secretary of War dated September 11, 1829[24] the Commissioners commented on these prior treaties,

> On the 27th of July, the United Nations of the Chippewas, Ottawas, and Pottawatomies, concluded to sell, and handed in their propositions, which were accepted by a majority of the Commissioners and a treaty concluded with them on the 29th of the same month, signed by all the Commissioners,

[23] Tucker, Sarah J. 1942, Indian Villages of the Illinois Country, Volume II, Scientific Papers, Illinois State Museum, Springfield Plate XCIII, 1835 Map of Lands Ceded By The Potawatamies, General Land Office. **DCTAC EXH. 2.**

[24] NARA Washington D.C. M234, Roll 696, "Letters Received by the Office of Indian Affairs 1824-1880, Prairie du Chien Agency 1824-1833:6 **DCTAC EXH. 22.**

> by which those Indians cede to the United States, all the country claimed by them on the Mississippi river between Wisconsin and Rock River, as secured to them by the 9th Art. Treaty 25 August 1825, at Prairie du Chien. Also a tract between Lake Michigan and Rock river, immediately north of the line of the purchase in 1826…

The operative phrase is "*by which those Indians cede to the United States, all the country claimed by them*…" This, according to the wording of the Article applied only to the first cession, those lands within the 1825-established boundaries. That is, the lands between the Rock River and the Mississippi, north to the Wisconsin River and down to the village on the Rock River. The article goes on to state "*Also a tract between Lake Michigan and Rock River*", the region containing the site of Shabenay's village. It is significant that there is no mention that the United Nations also laid claim to this tract. It would appear that this cession was meant to clear the title to the lands in this particular tract. If the recognized title was clear for the lands in both cessions, especially the two above-cited tracts that abut one another, why were they not ceded together as one cession if the United Nations claimed title to them both? The United States did the same to clarify the disputed lands claimed by the Sacs and Fox and the united Ottawa, Chippewa, and Potawatomi. The federal government remedied the situation by having the Sacs and Fox cede that land in the November 3, 1804 treaty and by having the United Ottawa, Chippewa, and Potawatomi do the same in the August 24, 1816 treaty.

Unlike the 1816 treaty, there were no exclusions of lands made to the "*United nations*" within either cession. Thus it appears that

Shabenay's village lay in an area to which title was vested in no particular party. The United States allowed Shabenay's band to remain on this land with usufructory rights after the United States cleared the title to this tract. There was no pre-existing title to the lands of Shabenay's village between 1825 and 1829.

Was Shabenay's situation unique within this treaty wherein he and his band had lands "*reserved, for the use…*"? Were any favors rendered to Shabenay in this treaty based upon his reputation? We find neither. What does the historical record tell us?

First, there is no primary source historical evidence supporting the Firm's assertion that Shabenay received a "*reservation*" based on his "*reputation as a friend to the whites."* We find in the citations purportedly supporting this assertion provided by counsel only the following speculative statements: "*Because of his pro-American stance, Shabehney and his Band received a reservation within the Potawatomi's estate*"[25]; " *The status that Shabehnay won during this frontier skirmish, along with the influence of Robinson and Caldwell, helps to explain why the United States capitulated to Shabenay's Band's request for a reservation in northern Illinois*[26] ; " *This land may have been granted* [?] *to Shabenay and his followers, at least in part, for his service to the United States…"*[27]; Despite being implied by the Firm, McClurken, 2007:40 cited in support by the Firm, makes no mention of Shabenay having received a reservation; " *If Shabenay*

[25] McClurken, James M., 2007, The Shabehnay Band and its 1829 Reservation :1, no supporting documentation provided.
[26] Ibid:36, no supporting documentation or citation provided.
[27] Ibid:38, no supporting documentation or citation provided.

and his band had been allowed in 1829 to reserve their village at Paw Paw Grove as a reward for Shabehay's services…"[28] It is apparent here that the Firm has taken Dr. McClurken's speculative statements and presented them as supporting facts.

A second, seemingly minor issue is one of locale. The Nation's counsel consistently portrays the location of Shabenay's village as "*Paw Paw Grove*." Shabenay's village was never at that location. Paw Paw Grove is located nine miles to the southwest of Shabenay's village site. Paw Paw's location is depicted on Royce Map 17, (Illinois 1) at T-37. range 2, east of the third meridian. Shabenay's village was in T-38, range 3, east of the third meridian in the present-day town of Shabbona Township.

What about Shabenay's village, was its situation unique? During the course of the negotiations for the Prairie du Chien Treaty, it was remarked by the federal commissioner in charge of the negotiations, General John M. Neil[29] that,

> I have no objection to grant to the half breeds small portions of Land provided that the position of them shall be left to the President of the United States….

Article IV. of the Prairie du Chien treaty did just that,

> There shall be granted by the United States, to each of the following persons, (being descendants from Indians,) the following tracts of land….The tracts of land herein stipulated to be granted, shall never be

[28] Ibid:49, no supporting documentation or citation provided.

[29] Documents Relating to the Negotiation of the Treaty of July 29, 1829, with the United Chippewa, Ottawa, and Potawatomi Indians, NARA Washington D.C., T494, Roll 2, 0149-0187, Treaties Ratified and Unratified. Prairie du Chien July 27, 1829 Letter of the General John M. Neil, Commissioner. **DCTAC EXH 22.**

> leased or conveyed by the grantees, or their heirs, to any persons whatever, without the permission of the President of the United States. (emphasis added)

Thus the term "*half breeds*" was equivalent to "*being descendents from Indians.*" Outright permanent grants were made to individual "*half-breeds*" that contained alienation prohibitions which required the permission of the President to do so. These individual grants contained not only heirship rights but also alienation and leasing prohibitions. The intent was clearly to keep these grantees and their successors from alienating the federal lands granted to them thus protecting them from land speculators. Thus, the grants did bestow a limited interest in the land to the grantee, it was not in fee-simple holding, but a conditional fee. These "*half-breeds*" were not Indians living in tribal relations. They were "*descendants from Indians*." Among these grantees were individuals such as " *Madiline, a Potawatamie woman, wife of Joseph Ogee, one section west of and adjoining the tract herein granted to Pierre Leclerc, at Paw Paw Grove", "To Pierre LeClerc, one section at the village of the As-sim-in-eh-kon, or Paw Paw Grove", " To Billy Caldwell, two and one half sections on the Chicago Rive, above and adjoining the line of the purchase of 1816."* These grants were considered to be permanent,

> 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.

We note that this is exactly the permanent fee status that Shabenay tried to establish for himself in the Senate-rejected Article Five of the 1833 Chicago treaty discussed below.

In contrast, organized Indian bands such as those of Wou pon-eh-see's band, Shabenay's band, and Awn-kote's band that were still living in tribal relations were not considered to be United States citizens or State residents. As such, they were treated differently under the stipulations of the treaty. There was no language indicative of a permanent status present in Article Three of the 1829 Prairie du Chien Treaty.

Article III. of the Prairie du Chien treaty did something different for such groups,

> 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 Wau pon-eh-see, five sections of land at the Grand Bois, on Fox River of the Illinois, where Shaytee's Village now Stands
> For Shab-eh-nay, two sections at his village near the Paw-paw Grove. For Awn-kote, four sections at the village of Saw-meh-naug, on the Fox River of the Illinois

First, it is clear that the stipulation concerning Shabenay's band was not unique. All three bands were accorded the same usufructory rights to their villages. There were no lands granted to the bands, no presidential approval required for their sale, and no mention of heirship or inheritance rights. The three organized bands that were cited in Article Three of the 1829 treaty resided within the ceded area.[30] Second, from the text we note, the lands "*for the use*" of the

[30] For the locations of these villages see: Royce, Charles C., 1899, Indian Land Cessions in the United States, in Eighteenth Annual Report of the Bureau of American Ethnology to the Secretary of the Smithsonian Institution, Washington, Government Printing Office Map Illinois 1#17.**DCTAC EXH. 2.**

three bands were, as noted earlier, within the area "… *which those Indians cede to the United States, all the country claimed by them*…" that was ceded to the federal government by the terms of the 1829 Treaty. Article Three as we have seen, has the wording ("*From the cessions aforesaid*…*reserved, for the use*") which implies that the lands being "*reserved, for the use*", were *ex post facto* part of those lands ceded via the Prairie du Chien treaty to the United States government.

In return, the three bands, including Shabenay's were being allowed the "*use*" of these ceded lands, "*From the cessions aforesaid*…" Unlike the non-tribal "*half-breeds*", the land set aside for the use by the tribal bands was not being granted, as Dr. McClurken stated,[31] to the bands and their respective okamas, including Shabenay, nor was there any declaration that a permanent reservation was being established for the three bands. When in 1837, the bands were instructed to leave by a Federal Removal Agent, all three bands obliged and departed. The bands did not dispute the government's right to remove them. Thus, unlike the lands "*granted*" to the half-breeds, an element of permanence was not present. Given that situation, no fee holding by anyone other than the federal government to whom the land was ceded by the 1829 Prairie du Chien treaty was possible. Additionally, the land reserved at all three villages was for the *use* of the corporate entity, "…*chiefs and their bands*...", or the okama and his band, not a singular individual such as Shabenay. After the Band left the lands, Shabenay had no standing in

[31] McClurken, James M., 2007, The Shabehnay Band and its 1829 Reservation:38

relation to them. Following Potawatomi cultural practice, land usage or usufructory rights were collective. No single individual had a greater right to usage than anyone else in the band. No title rights, heirship rights or alienation rights were provided within the treaty's text, only the land use. The term "…*use.*…" implies someone other than the user has a controlling interest in that which is being used. As we shall see later in this response there was a chain of administrative opinions from officials within the Indian Office, Interior Department and the General Land Office that the use by Shabenay's band of the lands at Shabbona's Gove was officially opined and declared to be usufructory.

It must also be clearly understood that it was within the political environment promoting the removal of Indian tribes west of the Mississippi that the July 29, 1829 Treaty at Prairie du Chien was negotiated. The establishment of permanent reservations for Indians living in tribal relations, such as Shabenay's band, would have gone against this policy. The underlying goal of this treaty was, in conformity with federal Indian policy, the removal of the Chippewa, Ottawa, and Potawatomi from northern Illinois and their eventual removal westward out of the state to the west side of the Mississippi. For the Potawatomi in northern Illinois, this goal was not achieved until the September 26, 1833 treaty (ratified February 21, 1835) with the "*United Nation of Chippewa, Ottawa and Potawatamie Indians.*…" at Chicago.[32] At the treaty proceedings[33] the following was agreed upon,

[32] Kappler, Charles J., 1904, Indian Affairs. Laws and Treaties, Volume II, Treaties:402,

> …The Chiefs signified a wish to have the general features of this Treaty explained…[41] By this Treaty my Children, you cede to your great father all your lands between Lake Michigan and the Mississippi River. You have made no reservations, You agree to remove.
> It provides that your great Father set apart for your use and occupancy beyond the Mississippi river as much and as good land as you have here…[42] You are required by this Treaty, my children to remove beyond the Northern boundary of Illinois within one year…[43] September 27th 1833… Gov Porter said-Yesterday- a Treaty was concluded by which the Prairie Indians ceded to their great father all the lands which they owned west of Lake Michigan… [34]

Two critical statements were made in the above quoted proceedings: (1) "…*the Prairie Indians ceded to their great father all the lands which they owned west of Lake Michigan*…", (2) "*You have made no reservations, You agree to remove.*"

The federal Commissioners explicitly stated to the attending okamas, without any objections from them, the totality of the cession as well as attesting to the fact that there were no reservations existent within the ceded area, that is, all their former lands "…west of Lake Michigan..." Shabenay's village was within this ceded area.

In 1837 Shabenay and his band were notified of their pending removal by the government's Indian Removal Agent, Lewis Sands. Shabenay's band did not resist or dispute the removal. This removal

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Washington, Government Printing Office. **DCTAC EXH. 25.**

[33] Journal of the Proceedings of a Treaty between the United States and the United Tribes of Pottawatamies, Chippeway & Ottawas. Chicago, Cook County Illinois. September 26, 1833.Treaties Ratified and Unratified NARA Washington D.C., T494, Roll 3:40-43. **DCTAC EXH. 26.**

[34] Tucker, Sarah J. 1942, Indian Villages of the Illinois Country, Volume II, Scientific Papers, Illinois State Museum, Springfield Plate LII. Map of Lands Ceded by the Potawatamies north of 1829 cession to the Michigan territory. **DCTAC EXH. 2.**

was stipulated in the 1833 Treaty noted above. According to Matson,[35] Sands informed,

> …Shau-be-na's band that they had must go west to lands assigned them by the Government in accordance with treaty stipulations. as no one but the chief and his family could remain on the reservation. Shau-be-na concluded to accompany his people

On page six of their October 5,2007 Memorandum, the Firm wrongly claims, *"In 1837 he and his band accompanied the actual removal of the Indians to Council Bluffs, Iowa, intending to return to Illinois after the larger group was settled."* This was a blatantly false assertion. The citation provided by the Firm (McClurken, 2007: 104) states that only "*Shabenay intended to return to the reservation*" not his band. Why only Shabenay and not his band? As we shall see below, Shabenay believed until 1844, when he was informed by his legal counsel to the contrary, that he had, by virtue of Article 5 of the 1833 Chicago treaty assumed personal fee ownership of the lands at Shabbona's Grove. Up until this time Shabenay was unaware that this Article had been stricken from the Treaty by the Senate at the request of the Secretary of War. He returned to Shabbona's Grove in November of 1837 with only his immediate family having been forced to do so by repeated assassination attempts by revenge-seeking Sac, Fox, and Potawatomi.

[35] Matson, N., 1876, Sketch of Shau-be-na, a Pottowatamie Chief:420-421, Report and Collections of the State Historical Society of Wisconsin for the Years 1873, 1874, 1875 and 1876, Vol. VII:415-421. **DCTAC EXH.20.** Clifton, James A., 2001, The Prairie People: Continuity and Change in Potawatomi Indian Culture 1665-1995 :296, University of Iowa Press, Iowa City. **DCTAC EXH. 40.**

Shabenay and his immediate family could have remained behind in Illinois as individuals, in part perhaps, in appreciation for his heroic efforts to save the lives of settlers during Black Hawks War. Under the stipulation as agreed to by Shabenay and the other assembled okamas, the members of his band and those of the others remaining in tribal relations had to depart. By remaining behind, Shabenay would have relinquished his authority as a band okama. Perhaps a more compelling reason for Shabenay's accompanying the band west was his annual two hundred dollar annuity payment bestowed by the 1833 Treaty.

The band from Paw Paw Grove and others gathered at Shabbona's Grove in preparation for this migration in 1837. There Lewis Sands addressed the "*Headsmen*" of the Chippewa, Ottawa and Potawatomi concerning the journey. We find, according to Lewis Sands the Federal Removal Agent, that a dispute arose over annuity payments at Shabbona's Grove in early September, a week before the band left the Grove for good. Article 4th of the 1833 treaty clearly noted that such annuities would be paid "*at their location west of the Mississippi*." Sands later issued a letter repeating the fact that no further annuity payments would be paid to the Potawatomi east of the Mississippi River.[36] If Shabenay wanted his annual $200.00 annuity he would have to go to Council Bluffs to get it.

[36] **EXH**. **7**. NARA Washington D.C., Microfilm, RG. 234, Roll 134, Major Events of the Removal of the Potawatomi from Northern Indiana and Northern Illinois Led By Lewis H. Sands 1837:338-341.

Shabbona's band, numbering 142,[37] departed Shabonna's Grove on September 15, 1837. His band along with 145 remaining members of the other two band villages, guided by the half breed "*Billy Caldwell*" (who still maintained his personal grant in fee on the Chicago River) went to settle on the Missouri River at Council Bluffs, Iowa while those belonging to the St. Joseph or Kankakee Potawatomi (later known as the Citizen Potawatomi) numbering 164 went further south to a reservation on the Osage River[38]. The permanent removal of Shabenay's Band was recorded by Lewis H. Sands, the federal Removal Agent in charge of their removal.[39] He noted the many stops and hardships encountered along the way. Nowhere in his journal are there any indications that Shabenay's band intended to return, as claimed by the Firm,[40] to Shabbona's Grove after undertaking such a arduous journey. Shabenay returned to Illinois within two months of his departure, in November of 1837[41] with only his family fleeing from assassination attempts that cost him a son and a nephew. The corporate band had abandoned its use of the lands at Shabbona's Grove. Shabenay was no longer the band's okama. Shabenay, by

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37 Matson, N, 1878, Memories of Shaubena with Incidents Relating to the Early Settlement of the West:241, Chicago, D.B. Cooke & Co.

38 Clifton, James A., 2001, The Prairie People: Continuity and Change in Potawatomi Indian Culture 1665-1995 :296, University of Iowa Press, Iowa City **DCTAC EXH. 40.**

39 **EXH. 7.** NARA Washington D.C. Microfilm, RG. 234, Roll 134, Major Events of the Removal of the Potawatomi from Northern Indiana and Northern Illinois Led By Lewis H. Sands 1837:338-341. A Journal of Occuiences of Emigrating Inds. From Chicago forward by G. Kercheval- Sept 1836, M234, Roll 134, f.264-268.

40 Memorandun, Hobbs, Straus, Dean & Walker, LLP to NIGC, October 5, 2007:6. In making this assertion that the band intended to return, the Firm cited McClurken, 2007: 104-105 as their supporting authority. McClurken merely stated that "*Shabehnay intended to return to the reservation*" not the band. Given that he believed that he was the fee title-holder to these lands by virtue of the rejected Article 5, of the 1833 treaty his return was to be expected. He abandoned his leadership role as a band okama at Council Bluffs and returned to the Grove as a private (as he believed until 1844) land owner. Clearly, the corporate band had abandoned the lands at Shabbona's Grove.

41 Dowd, James, 1979, Built Like A Bear:90, Ye Galleon Press, Washington. **DCTAC EXH.43.**

returning to Illinois, no longer had a band to lead. The newly emergent united tribe of Potawatomi had, in the 1846 treaty disbanded the separate band structure. Shabenay, as an individual did not have, nor was not entitled to any successorship of the lands at the Grove. The lands according to the 1829 treaty were for the use of the corporate band. When the band left, their collective usufructory rights ended, and the federal government reassumed its reversionary title right to the lands in question.

There was no land "*reserved for the Shab-eh-nay Band*." Only land "*reserved, for the use…*"

3. The 1833 Treaty

On page five of its October 5, 2007 Memorandum, the Firm wrote the following,

> …The 1833 Treaty as negotiated by the parties contained a significant clause relating to the 1829 Shab-eh-nay Reservation- Article Five stated that "The Reservation…shall be a grant in fee simple to him his heirs and assigns forever…" with no restrictions stated or implied. This would have converted the Shab-eh-nay's Band's title from federal trust to fee simple title in Shab-eh-nay personally, thus apparently enabling him by his sole signature to sell the land to anyone he pleased, including no doubt, to local land speculators who were highly interested buyers
>
> But in ratifying the treaty the Senate (almost certainly correctly suspecting fraud) struck out Article 5th, so that the Shab-eh-nay reservation continued to be held in trust by the U.S. for the Shab-eh-nay Band as contemplated in the 1829 Treaty.
>
> It may also be noted that the last paragraph of Article 3d of the 1833 Treaty paid $3,500 to the two bands who had received reservations in the same Article of the 1829 Treaty as the Shab-eh-nay Band did, but who

> ceded them to the U.S. in the 1833 Treaty. Nothing was paid to the Shab-eh-nay, nor anything said or implied about ceding its reservation, thus further confirming the continuing federal trust status of the Band's 1829 Reservation.

Total removal of the Potawatomi from the State of Illinois was the federal government's goal of the 1833 treaty. The second article of the Treaty stated,

> And it is the wish of the Government of the United States that the said nation of Indians should remove to the country thus assigned to them as soon as conveniently can be done…It being understood, that the said Indians are to remove from all that part of the land now ceded, which is within the State of Illinois, immediately after ratification….

Shabenay's request to gain title to the lands by the establishment of a fee-held reservation at Shabbona's Grove was a possible attempt, on his part, to circumvent this removal requirement present in this treaty by having the lands of his village granted to him in fee in essentially the same manner, without the alienation restrictions, as did the "*half-breeds*" cited above in Article IV of the July 29, 1829 treaty. Shabenay's was not the only such request of its kind made during the negotiations for the 1833 treaty. Article Three begins with,

> Article 3d. And in further consideration of the above cession, it is agreed, that there shall be paid by the United States the sums of money hereinafter mentioned: to wit:
> One hundred thousand dollars *to satisfy <u>sundry individuals</u>, in behalf of whom reservations were asked, which Commissioners refused to grant.*…[emphasis added]

What exactly did Shabenay request? In a January 17, 1843 letter[42] from Commissioner of Indian Affairs T.H. Crawford, to Thos. H. Blake, Commissioner, General Land Office, Commissioner Crawford noted,

> …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, & Pottowatomis, providing that the aforesaid reservation to Shab eh nay "*shall be a grant in fee simple to him, his heirs and assigns forever*" was stricken out by the Senate….

What opinion was the Commissioner of Indian Affairs sustaining? Commissioner Crawford wrote,

> Sir,
> I have duly considered the tenor of your letter of 16 inst, in connection with the accompanying papers, relative to the survey of the reservation provided for Shab-eh-ney- by the 3. article of the treaty of 29 July 1829, with the Chippewas, Ottawas and Potawatomies.
>
> The 1st article of aforesaid treaty defines the boundaries of the land ceded by it- the 3d. article stipulates that that "from the cessions aforesaid there shall be reserved for the *use* of the undernamed chiefs and their bands, the following tracts of land. " For Shabehney two sections at his village near Paw-paw grove."
>
> The language of the article making the reservation for Shabehney is similar to that used in the 2d. article of the treaties of 20, 26,-&27 October 1832 – with the Potawatomies- which has been construed under an opinion of the Attorney General of 20, Sept. 1833- (see opinion, Atty. Genl. Page 1402) as conferring on the reserves a usufruction right[43] only to the land reserved for them…

[42] Illinois State Archives, RG. 952.363 Dixon Land Office, Indian Files**.** Also in Dowd, James, 1979, Built Like A Bear:139-140, Ye Galleon Press, Washington. **DCTAC EXH. 29.**

[43] "*Usufruct*": circa 1630-, "The right of temporary possession, use, or enjoyment of the advantages of property belonging to another, so far as may be had without causing damage or prejudice" Onions, C.T ed., 1950, The Shorter Oxford Dictionary on Historical Principles, Third Edition, Volume II:2326, Clarendon Press, Oxford University.

If, as the Firm has claimed, Shabenay already had a recognized permanent reservation based upon un-extinguished Indian title, why would he want fee-simple holding? Such a pre-existing reservation or Indian title would not have been affected by the removal stipulation present in the 1833 treaty. Even the later 1846 Council Bluffs Treaty had an exception proviso that exempted "*reservations*" and "*granted*" lands from the treaty's blanket cession of all remaining tribal land rights in Illinois. Such a change in reservation status would have required separate legislation or a specific treaty stipulation. It could not be simply "granted" to Shabenay, especially given the fact that initially the use of the lands at Shabbona's Grove was by the corporate band, not one individual. With a grant in fee as Shabenay requested, he would have become liable to taxation and State jurisdiction. Counsel would have a reader believe that he planned to sell the lands at Shabbona's Grove out from under the feet of his own band to local land speculators. Instead, as mentioned earlier, Shabenay may have been trying to circumvent the removal requirement present within the second article of the 1833 Chicago Treaty, a treaty to which he was a signatory in his capacity as a band okama. It is in-of-itself proof that a permanent treaty-established reservation did not exist at Shabbona's Grove. Shabenay could not have requested a reservation for himself and his band in lieu of their usufruct rights. That would have conflicted with the removal requirement set forth in Article Two "*that the said Indians are to remove from all that part of the land now ceded, which is within the State of Illinois.*" Upon such a removal, the band's usufructory privileges would cease. Instead Shabenay sought

what was given to the "*half breeds*" in the 1829 Prairie du Chien Treaty, a personal grant which fee would be alienable to his heirs and assigns only, and would be outside the 1833 treaty removal stipulations and tribal authority.

The Firm also makes an issue of the fact that the two other bands (those of Wau-pon-eh-see and Awn-kote) that also received usufructory rights to lands in the 1829 treaty, received two thousand and fifteen hundred dollars respectively for the lands "*assigned and surrendered to the United States.*"

First, the Firm committed an act that could destroy the reputation, if not the career, of an historian by deliberately misrepresenting the text of a document. The Firm on page five states, " *...to the two bands who had received reservations in the same Article of the 1829 Treaty as the Shab-eh-nay Band did, but who ceded them to the U.S. in the 1833 Treaty*." The Firm claims these two bands "*ceded*" the lands in question to the United States.

What does the 1833 treaty say in Article 3d? " *Two thousand dollars to be paid to Wau-pon-ehsee and his band, and fifteen hundred dollars to Awn-kote and his band, as the consideration for nine sections of land, granted* ["…reserved, for the use of…"]*to them by the 3d Article of the treaty of Prairie du Chien of the 29th of July 1829 which are hereby surrendered to the United States.*"

"*Ceded*[44]" means: to have given away, yielded, while "*surrendered*"[45] means: to have given up (an estate) to one who has it in reversion or remainder. "*Cede*" implies *a priori* ownership, while "*surrendered*" implies a state of reversion. Words do have meaning, especially in treaties. What counsel has done, by substituting words, is distort the historical context and understanding of an act.

Both bands had "*surrendered*" their usufructory privileges, and in return for that surrender, were given a monetary "*consideration*." These "*considerations*" may have been made under the fourth paragraph of the "*Indian Removal Act of 1830*", which allowed payments to tribes and bands be made for improvements to lands that have added value to the lands being surrendered or ceded.

Why didn't Shabenay and his band receive the same "*consideration*"? They didn't because Shabenay chose a different option. He attempted to gain personal title to the lands at Shabbona's Grove. The treaty draft as he understood it, had his stipulation as well as those of the other requestors for the same title status, written in Article 5. Shabenay may have assumed it was a done deal. The Senate under its constitutional treaty-making authority rejected Article 5. The Senate did not reject the two band's stipulations present in Article 3 that remained in the version signed by the President. By and due to his own actions, Shabenay was left holding an empty bag. He and his

[44] Onions, C.T. ed., The Shorter Oxford Dictionary on Historical Principles, Volume I (A-M) :280, Oxford University, Clarendon Press.
[45] Onions, C.T. ed., The Shorter Oxford Dictionary on Historical Principles, Volume II (N-Z) :2092, Oxford University, Clarendon Press.

band had only usufruct privileges to the lands at Shabbona; Shabenay lost out in his bid for a fee grant. The 1833 treaty mandated removal west for "*United Nation of Chippewa, Ottawa, and Potawatamie Indians*" Shabenay's band lost its usufruct privileges due to the mandated removal.

This brings us to the question of why the fifth article was stricken by the Senate. The Firm (page 5) would have a reader believe that the Senate "*almost certainly correctly suspecting fraud"* had the article removed. We must remember that there were others, "*sundry individuals*", who requested the same bestowal of fee ownership as did Shabenay, so the Senate, according to counsel's thinking, must have suspected massive fraud for that body to have taken collective action against all the requestors, including Shabenay. Counsel has provided no documentation to substantiate this "…*fraud*…" assertion. No evidence was presented to support this hypothesis. What really happened?

Senator White's report gives us an indication as to why Article V was "*stricken*". The Senate Committee recommended that Article 5 be stricken in part over the question "*whether there is a power to make such provisions*…" First and foremost was the fact that the Federal Government as feeholder to these lands maintained its reversionary right when the Band's usufructory rights ceased. The provision Senator White spoke of was the establishment of government-recognized Indian reservations to be held in fee by the private Indian

individuals so named in the deleted Article 5. Such actions would also be in contradiction of the 1830 Indian Removal Act. Removal west of the Mississippi was the statutory-based national Indian policy mandated by the Indian Removal Act of 1830[46]. The establishment of more reservations east of the Mississippi would be in contravention of existing law. The presence of many small reservations was causing problems in implementing the federal policy of removal west of the Mississippi. As Clifton[47] noted:

> ...These were the small "band reservations" awarded by the Tippecanoe treaties in October 1832. By 1834 these reservations were occupied by twenty-six "chiefs and headmen," the leaders of as many small villages…It was the recognition of the problems caused by these small reservations that had made Secretary of War Cass insist that no personal or "band" reservations be allowed at the Chicago negotiations in 1833.

This situation led directly to the denial, at the request of Secretary Cass, of Shabenay's request as part of the "*stricken*" Article 5 of the September 26, 1833 treaty at Chicago for a reservation in fee simple. Additionally, if the Senate had agreed with Article 5, and if, for the sake of argument, Shabenay's band did have Indian title to the lands at Shabbona's Grove, a separate cession of the purported reservation to the federal government would have had to have occurred before Shabenay could have received a grant fee-title from the government for the lands at Shabbona's Grove. The Senate did not have this authority to do so without a specific legislative act. Instead, the attempted actions by the Commissioners with regard to Shabenay's

[46] 1830 "Act to Provide for an exchange of lands with the Indians residing in any of the states or territories and for their removal west of river Mississippi"

[47] Clifton, James A., The Prairie People: Continuity and Change in Potawatomi Indian Culture 1665-1965,: 244 University of Iowa Press, Iowa City**. DCTAC EXH. 28**

request for personal fee-simple status suggest that the title to the land was not vested in the band, but was usufructory in nature. Thus a simple stipulation in the 1833 treaty would not have been sufficient to vest Shabenay with fee-simple title.

It was also reported by the General Land Office in Cincinnati on May 2, 1833[48] that all the initial land surveys encompassing the lands of the 1829 Prairie du Chien cession had been surveyed. This included the initial Township plats such as T38 N (Shabbona) within the ceded area. Under its mandate, the United States Surveyor General could only survey federally-owned lands.[49] The fact that the lands of Shabbona's Grove were included in this survey provides an additional argument that the lands there were federally-owned.

Article Three of the 1833 treaty goes on to state,

> …Two hundred dollars to be paid to Joseph Lafromboise and two hundred dollars a year *to be paid to Shabehnay,* for life….(emphasis added)

Why did Shabenay receive the $200.00 yearly annuity? Article Three tells us why,

> Article 3d. And in further consideration of the above cession, it is agreed, that there shall be paid by the United States the sums of money hereinafter mentioned: to wit:

[48] Letter to Elijah Hayward Esq. General Land Office Washington from M.J. William, General Land Office, Cincinnati. NARA Washington, M477, Roll5, Letters Sent by the Surveyor General of the Territory Northwest of the River Ohio: 1797-1854, Vol. D, April 20, 1831-January 7, 1835. **DCTAC EXH. 30.**

[49] This office, formally established as the Geographer of the United States by Act of Congress on April 25, 1796 under its director, was tasked to survey such government-owned lands into regular parcels that could be auctioned off by GLO in order to provide funds for the U.S. Treasury Department.

> One hundred thousand dollars *to satisfy sundry individuals, in behalf of whom reservations were asked, which Commissioners refused to grant…*

An individual reservation in fee was asked for, such a reservation in fee was denied. Therefore, a reservation did not exist.

This comes back to the fact that Shabenay and his band did not occupy a permanent federal treaty-established reservation at Shabbona's Grove as a result of the 1829 treaty. There was no pre-existing treaty-established title to the land by virtue of either the 1816 or 1825 treaties. If the Senate had agreed with Article Five, and if a treaty-recognized title and reservation had existed, a separate land cession of the Shabbona Grove lands to the United States extinguishing the purported existing treaty-recognized title (that both the Firm and the Nation claims of the reservation lands), would had to have been enacted by the Senate and signed into law by the President. After this first land cession by the Indians, a second grant, this time from the United States to Shabenay in fee simple would have had to occur before Shabenay could have received fee-title to the lands at Shabbona's Grove as a privately owned reservation. This was something that the Senate could not do within the context of the agreed-upon removal stipulation in the1833 treaty. By agreeing to removal from the lands at Shabbona's Grove, Shabenay, as the band okama, was *de facto* ceding to the United States any existing rights the corporate band may have held to the lands in question. Shabenay simply may not have been aware for a considerable period of time that the Senate had rejected his fee-simple request. In fact, Shabenay did not become aware of this deletion until informed of it by legal counsel

in 1844. This would have accounted for his later attempts to sell the lands at Shabbona's Grove to the Gates brothers and even an attempt to sell the lands to the federal government. He simply believed that he held fee-simple rights to the lands that his band had abandoned in 1837. What we find in 1837 was Shabenay and his band simply abandoning the lands reserved for their use upon the instructions of Federal Removal Agent Lewis Sands. At that time the corporate usufructory privileges granted to the band by the federal government under the terms of the 1829 treaty ended.

Shabenay, being aware of the removal stipulation present in the 1833 treaty, knew that his band had to remove to Iowa. Not realizing that his request for fee simple holding was denied, and knowing that his band's removal ended their usufructory privileges and believing that he now had fee ownership of the Shabbona lands, Shabenay believed that he could accompany his band to Iowa, collect his annuity, and then return to the Grove which he now believed he privately owned. Dr.McClurken concedes this point, mentioning that Shabenay did not become aware that he did not hold the fee to the lands at Shabbona's Grove until 1844, some ten years after the 1833 treaty was ratified by the Senate and signed into law by the President.[50] This line of reasoning explains his later behavior, when no longer a band okama, and his band no longer having usufructory rights to the lands due to removal and subsequent abandonment, believing he had the private fee to the lands in question, he signed a

[50] McClurken, James M. 2007, The Shabehnay Band and its 1829 Reservation: 60-61, J.M. McClurken and Associates, Lansing, Michigan.

power of attorney to protect his land in his absence. Still believing he had the fee to the lands, he later raised the issue of his lands purportedly being illegally trespassed upon. Shabenay also attempted to sell portions of the land and lease other portions. Finally, Shabenay raised the controversy over its sale by the Government Land Office.

The bottom line is, that by signing the 1833 treaty at Chicago as a band okama, Shabenay committed his band to the treaty's removal or abandonment requirement as agreed upon in Article II of the 1833 treaty. At the same time he sought within this treaty to have the Shabbona lands converted into private ownership, that is, he sought to become the private fee-holder of a recognized reservation alienable to his heirs and assigns. He believed this to be so until informed otherwise in 1844. The band's 1837 removal to Council Bluffs ended the band's usufructory privileges to the lands at Shabbona's Grove.

As to Shabenay's motives for doing so we cannot say with certainty. He may have been trying to prevent the band's removal by agreeing to the removal stipulation, and then seeking to take personal possession of the land, thus removing it or at least his family, from tribal relations. A darker motive might have been a desire to become a private landholder at the expense of his band's removal. When the band was required to remove to Iowa, Shabenay, in the eyes of his people became the villain.[51] It is no wonder he was so roughly treated and despised by his own people while in Iowa, not to mention the

[51] Skinner, Alanson, 1927, The Mascoutens or Prairie Potawatomi Indians, Part II-Mythology and Folklore:389-390, Bulletin of the Public Museum of the City of Milwaukee, Vol.6, No. 3:327-411. **DCTAC EXH. 44**

avenging acts by the Sac and Fox against him and his family that cost him a son and a nephew.[52]

4. The 1846 Treaty

On page seven of the October 5, 2007 Memorandum to NIGC, the Firm stated the following in regard to the June 5/17, 1846 Treaty with the "*Pottowautomie Nation*"

> In 1845 the United States proposed a treaty to consolidate all the Potawatomi bands on one reservation. The Potowatomis had now morphed into two main groups of Potawatomis-one living on the Osage River Reservation in Missouri…and the other that lived on the Council Bluffs Reservation in Iowa**.**

The Firm failed to address the most salient aspects of this treaty. The June 5/17, 1846 treaty abolished the band distinctions within the tribe and established a unified "*Pottowautomie Nation*." What counsel also failed to address in this portion of its October 5 Memorandum to NIGC was the important land cession stipulation contained within Article 2 of this treaty which was addressed in DCTAC's August 29, 2007 submission (pages 57-59) and in Dr. McClurken's October 2, 2007 Report (pages 42-44).

> Article 2. read as follows,
>
> Article 2. The said tribes of Indians hereby agree to sell and cede, and do hereby sell and cede, to the United States, all the lands to which they have claim of any kind whatsoever, and especially the tracts or parcels of lands ceded to them by the treaty of Chicago, and subsequent thereto, and now, in whole or part, possessed by their people…It being understood that these

[52] Matson, N., 1876, Sketch of Shau-be-na, a Pottowatamie Chief, Report and Collections of the State Historical Society of Wisconsin for the Years 1873, 1874, 1875 and 1876, Vol. VII:420-421. **DCTAC EXH. 40.** Dowd, James, 1979, Built Like A Bear:89-90, Ye Galleon Press, Washington. **DCTAC EXH. 43**

> cessions are not to affect the title of the said Indians to any grants or reservations made to them by former treaty.

This selling and ceding of all their existing land rights was total. The only exclusions were those lands considered reservations by the federal government and lands granted in restricted fee to "*half breeds.*" The only remaining reservations assigned to the Potawatomi were at the Osage River and Council Bluffs.

We have noted earlier in this submission that the tribal land boundaries agreed upon and established by the participating tribes to the "*United tribes of Ottawas, Chipwas, and Pottowotomees.…*" in 1825 did not encompass the lands at Shabbona's Grove, nor was Shabenay a signatory to either the 1816 or the 1825 treaties. We have also noted in the 1825 treaty that the tribal land boundaries were set and established by the participating tribes themselves, not by the federal government. The new tribal boundary area established by the tribes for the united tribes did not include those ceded by the United States in the 1816 treaty. Thus the united tribes abandoned their recognized title to the lands within this tract in favor of those west of the Rock River. The various claims made by the Nation that treaty-established title to the lands of Shabenay's village was created by virtue of the 1816 treaty lack an historical foundation.

In regard to the 1846 treaty's Article 2 reservation exclusion, that a permanent reservation was never established for Shabenay and his band was clearly stated by the federal government. The response to a letter sent by Shabbona Township resident Mr. Coalman Olmstead to

the President was delegated to the Commissioner of Indian Affairs, who wrote in November of 1845,[53]

> Sir,
> Your communication to the President of the United States of 15 ultimo has been referred to this office-With reference to your statement in relation to your purchase of a portion of the land set apart for the *use* of Shab-eh-nay and his band- by the 3d. art of the treaty of 1829 with the Chippewas, Ottowas & Potowatomies- and your request to be informed whether the President will "sanction the deed" which you have for the land-on condition that you pay to Shab eh nay the balance he alleges to be due him on account of it. I have to state that as the treaty gives to Shab-eh-nay or his band no authority to sell the land usefrunct as aforesaid- The President cannot give his sanction to any sale that may have been made of it-Shab eh nay & his band under the treaty has only the occupant right- the reversionary[54] title is in the United States which can be extinguished by authority of law. (emphasis added)

The Commissioner of Indian Affairs letter clearly opines and affirms, at the request of the President, that the reversionary title to the lands circa 1845 was vested in the United States and that Shabenay and his band had previously held only usufructory privileges to the land. As a result, the President cannot sanction any sales Shabenay may make. Thus this opinion affirms the fact that a permanent treaty-based "*reservation*" was never established for Shabenay and his band. The lands at Shabbona's Grove would not come under the exceptions statement stated at the end of Article 2 in the 1846 treaty.

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[53] Letter, November 18, 1845, Commissioner of Indian Affairs to Coalman Olmstead, Shabbona's Grove, DeKalb County, Illinois. Dowd, James, 1979, Built Like A Bear:143, Ye Galleon Press, Washington. **DCTAC EXH. 32.** McClurken, James M., 2007, The Shabehnay Band and its 1829 Reservation: Binder #3, 18
November 1845

[54] "*Reversion"*: c. 153 0-"The right to succeeding to the possession of something after another is done with it…" *Reversionary*: c.1651- "Entitled to the reversion in something." Onions,C.T., 1950 ed., The Shorter Oxford English Dictionary on Historical Principles, Third Edition, Volume II:1727-1728,Clarendon Press, Oxford University.

What about a land "*grant*" as the second stipulated exception in Article 2 of the 1846 Council Bluffs treaty?

We have seen Shabenay's attempt, in the Senate-stricken Article 5 of the September 26, 1833 treaty, to have the lands at his village granted to him in fee simple as a reservation,

> 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 and his heirs and assigns forever…

The lands of Shabenay's village were not held by treaty-recognized Indian title, the lands of the village were not a reservation, these village lands were not part of any grant, although Dr. McClurken (page 38) depicted the lands at Shabbona as being "*…granted to Shabehnay and his followers*" as a result of the 1829 Prairie du Chien treaty. This is simply not true. If, as the Tribe claims previous to the 1829 Treaty, the band held treaty-recognized title to the village lands, how could land be granted to Shabenay and his band in the 1829 Treaty, unless the United States held the title to the lands previous to the treaty and subsequently granted it. The Nation cannot have it both ways.

What we have are lands occupied and used at Shabbona's Grove solely under usufructory privileges with title vested in the United States. If any residual usufructory rights remained for the lands at Shabbona's Grove, such land and remaining residual right, if any, clearly came under the cessions clause of Article 2 of the 1846 treaty. Dr. McClurken's conclusion that "*The title to the Shabehnay*

Reservation remained Indian land held in trust by the United States"[55] in the aftermath of the July 22, 1846 ratification of the Council Bluffs treaty has no historical foundation.

In a January 17, 1843 letter[56] from Commissioner of Indian Affairs T.H. Crawford to Thos. H. Blake, Commissioner, General Land Office, Commissioner Crawford noted,

> Sir,
> I have duly considered the tenor of your letter of 16 inst, in connection with the accompanying papers, relative to the survey of the reservation provided for Shab-eh-ney- by the 3. article of the treaty of 29 July 1829, with the Chippewas, Ottawas and Potawatomies.
>
> The 1st article of aforesaid treaty defines the boundaries of the land ceded by it- the 3d. article stipulates that that "from the cessions aforesaid there shall be reserved for the *use* of the undernamed chiefs and their bands, the following tracts of land. " For Shabehney two sections at his village near Paw-paw grove."
>
> The language of the article making the reservation for Shabehney is similar to that used in the 2d. article of the treaties of 20, 26,-&27 October 1832 – with the Potawatomies- which has been construed under an opinion of the Attorney General of 20, Sept. 1833- (see opinion, Atty. Genl. Page 1402) as conferring on the reserves a usufruction right only to the land reserved for them…

Five years later, and two years after the ratification of the 1846 treaty, W. Midell, the War Department's Commissioner of Indian Affairs continued the chain of federal government's usufructory opinions with regard to Shabenay and his band's occupation of the

[55] McClurken, James M., 2007, The Shabehnay Band and its 1829 Reservation:43.
[56] Illinois State Archives, RG. 952.363 Dixon Land Office, Indian Files**.** Also in Dowd, James, 1979, Built Like A Bear:139-140, Ye Galleon Press, Washington. **DCTAC EXH. 29.**

lands at Shabbona's Grove. Commissioner Midell wrote in a May 27, 1848 letter[57] to Representative John Wentworth, the following,

> Sir,
> 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, and conveying the land reserved for the *use* of said Shab-eh-nay and his band by the 3rd. article of the treaty concluded with the Chippewa, Ottawa and Potowatomie Indians on 29, July 1829.
>
> *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 5. article of a treaty concluded with the same Indians on 26 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.
>
> 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 Comr. Of the General Land Office to dispose the same as other public lands of the United States….(emphasis added)

The 1846 treaty clearly extinguished any residual land title or claims that the United Nations may have had in Illinois. The reference to the treaty at Chicago confirms that Illinois was part of this extinguishment area. Shabenay, not having any individual right to the land at Shabbona's Grove, clearly held no titled interest there. The initial declaration in the 1829 treaty "*reserved, for the use*" was for

[57] Letter, War Department, Office of Indian Affairs, to Hon. John Wentworth, House of Representatives-US. Dowd, James, 1979, Built Like A Bear:146-147, Ye Galleon Press, Washington. **DCTAC EXH. 33.**

the corporate band, not one person. The lands at Shabbona's Grove did not meet the exceptions (reservations, granted lands) proviso contained within Article 2 of the 1846 treaty.

C. Commissioner of Indian Affairs Ruling of Abandonment in 1848, and Public Sale of the Shab-en-nay Reservation in 1849

1. Commissioner of Indian Affairs Ruling of Abandonment.

On page eight of its October 5, 2007 memorandum to NIGC, the Firm stated the following,

> As stated above, the Gates brothers sought the aid of Congressman John Wentworth to help them get federal approval of the Gates' supposed deeds to the entire reservation. Wentworth did not achieve that, but he did achieve having the Reservation illegally opened for white settlers

The Firm continues to quote fragments of Commissioner Medill's May 27, 1848 response to Congressman Wentworth[58]. The following is the response of the Commissioner. The portions quoted by the Firm are in bold type,

> Sir,
> 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, and conveying the land reserved for the *use* of said Shab-eh-nay and his band by the 3rd. article of the treaty concluded with the Chippewa, Ottawa and Potowatomie Indians on 29, July 1829.
>
> 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,**

[58] Letter, May 27, 1848, War Department, Office of Indian Affairs, to Hon. John Wentworth, House of Representatives-US. Dowd, James, 1979, Built Like A Bear:146-147, Ye Galleon Press, Washington. **DCTAC EXH. 33.**

> **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 5. article of a treaty concluded with the same Indians on 26 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.**
>
> **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 Comr. Of the General Land Office to dispose the same as other public lands of the United States**….

The Firm in its editing of the Commissioner's letter, left out the most important analytical statement in the 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,*" Was this the first such statement and opinion rendered by a standing Commissioner?

Five years previously, in a January 17, 1843 letter from T.H. Crawford, Commissioner of Indian Affairs to Thos. H. Blake, Commissioner, General Land Office[59], Commissioner of Indian Affairs Crawford opined,

> Sir,
> I have duly considered the tenor of your letter of 16 inst, in connection with the accompanying papers, relative to the survey of the reservation provided for Shab-eh-ney- by the 3. article of the treaty of 29 July 1829, with the Chippewas, Ottawas and Potawatomies.
>
> The 1st article of aforesaid treaty defines the boundaries of the land ceded by it- the 3d. article stipulates that that "from the cessions aforesaid there shall be reserved for the *use* of the undernamed chiefs and their bands, the following tracts of land. " For Shabehney two sections at his village near Paw-paw grove."

[59] Illinois State Archives, RG. 952.363 Dixon Land Office, Indian Files**.** Also in Dowd, James, 1979, Built Like A Bear:139-140, Ye Galleon Press, Washington. **DCTAC EXH. 29.**

> *The language of the article making the reservation for Shabehney is similar to that used in the 2d. article of the treaties of 20, 26,-&27 October 1832 – with the Potawatomies- which has been construed under an opinion of the Attorney General of 20, Sept. 1833- (see opinion, Atty. Genl. Page 1402) as conferring on the reserves a usufruction right only to the land reserved for them.* This opinion sustained and fortified, I think, by the fact that the 5 art. of the treaty of 26 Sept. 1833-with the Chippewas, Ottowas, & Pottowatomis, providing that the aforesaid reservation to Shab eh nay "shall be a grant in fee simple to him, his heirs and assigns forever" was stricken out by the Senate…. (emphasis added)

The Firm would want the reader to believe, on the basis of a partial quotation that Congressman Wentworth, "*…did achieve having the reservation illegally opened for white settlers.*" Commissioner Crawford opined in 1843 that Shabenay and his band had "*…a usufruction right only to the land reserved for them.*"

In a November 18, 1845 letter in response to a Mr. Olmstead's letter to the President, the response was delegated to the Commissioner of Indian Affairs,[60]

> Sir,
> Your communication to the President of the United States of 15 ultimo has been referred to this office-With reference to your statement in relation to your purchase of a portion of the land set apart for the *use* of Shab-eh-nay and his band- by the 3d. art of the treaty of 1829 with the Chippewas, Ottowas & Potowatomies- and your request to be informed whether the President will "sanction the deed" which you have for the land-on condition that you pay to Shab eh nay the balance he alleges to be due him on account of it. I have to state that as the treaty gives to Shab-eh-nay or his band no authority to sell the land usefrunct as aforesaid- The President cannot give his sanction to any sale that may have been made of it-Shab eh nay & his band under the treaty has only the occupant right- the

[60] Letter, November 18, 1845, Commissioner of Indian Affairs to Coalman Olmstead, Shabbona's Grove, DeKalb County, Illinois. Dowd, James, 1979, Built Like A Bear:143, Ye Galleon Press, Washington. **DCTAC EXH. 32.**

> *reversionary title* is in the United States which can be extinguished by authority of law. (emphasis added)

The Commissioner of Indian Affairs wrote the above at the request of the President. It clearly affirmed their respective beliefs and opinions that Shabenay and his band had no previous right to the Grove lands other than usufruct. The United States Government held reversionary title to the lands in question. When the band ceased use of the land it reverted back to the federal government. Neither he nor his band ever had any authority to sell the lands there. That decision was left up to the federal government as title-holder to determine. In a July 14, 1849 letter to the Commissioner of the General Land Office from the Commissioner of Indian Affairs it was noted,[61]

> In connexion with this matter, you refer to the decision of the Indian Office of the 27th May 1848, stated in the transcript of a letter of that date to Mr. Wentworth, as communicated to my predecessor, in which decision it is held 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 Commr. Of the General Land Office to dispose of the same as other public lands of the United States."* I find consequently that under date 12 August 1848 these lands had been ordered into market…(emphasis added)

On April 12, 1856, George W. Moneypenny, Commissioner of Indian Affairs wrote[62] in regard to "*Shab-eh-nay and his band..,*"

> …I do not understand this emigration, however to have been in any manner forced or involuntary; but only in compliance with their treaty stipulations….

3. The General Land Office Public Sale in 1849.

[61] Letter, J. Butterfield, Commissioner, General Land Office to Orlando Brown Esq., Commissioner of Indian Affairs. , Dowd, James, 1979, Built Like A Bear:149-150, Ye Galleon Press, Washington. **DCTAC EXH. 34.**

[62] **EXH. 8.** House of Representatives, 94th Congress, 3rd Session, Report No. 40, "Shab-eh-nay-Indian Chief":2

On page ten of its October 5 Memorandum, the Firm states the following,

> Before the public sale on 5 November, 1849[63], Shab-eh-nay departed on his extended trip to the Kansas Reservation. He apparently assumed that the United States was still holding the Illinois Reservation in trust for the Band. This is indicated by his shocked reaction when he returned sometime before June 1853 and saw his Band's reservation entirely occupied by settlers….

The Firm seems to have forgotten that in 1844[64]Shabenay was informed by his legal counsel that he did not own the land in fee. [65] We also know on the basis of the November 18, 1845 Commissioners letter that the United States held the "*reversionary title*" to the lands of Shabonna's Grove under the usufructory privileges which ceased when the band abandoned the Grove on September 15, 1837.

Thus the Commissioner of Indian Affairs was on solid ground when he wrote on November 5, 1849, *" as the lands referred to are no longer occupied by the persons for whose use they were reserved, that it is competent for the Commr. Of the General Land Office to dispose of the same as other public lands of the United States."*[66]

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[63] Shabenay was at St. Louis on May 25, 1848 where he was paid his annuity and at the Fort Leavenworth, Kansas Agency on November 12, 1850, where he was paid his annuity for 1848 and 1849. He was still there in October of 1852. He was in Indiana in October of 1854. McClurken, James M. 2007, The Shabehnay Band and its 1829 Reservation: 60-61, J.M. McClurken and Associates, Lansing, Michigan Binder #3 Records of Annuity Payments from the United States to Shabehnay…
McClurken, James M. 2007, The Shabehnay Band and its 1829 Reservation: 60-61, J.M. McClurken and Associates, Lansing, Michigan. See also McClurken Binder# 3, 18 November 1845

[64] McClurken, James M. 2007, The Shabehnay Band and its 1829 Reservation: 60-61, J.M. McClurken and Associates, Lansing, Michigan. See also McClurken Binder# 3, 18 November 1845

[65] October 5, 2007 Memorandum, Hobbs, Strauss, Deam, &Walker:2, citing McClurken, James M., 2007, The Shabehnay Band and its 1829 Reservation :6-7

[66] Letter, J. Butterfield, Commissioner, General Land Office to Orlando Brown Esq., Commissioner of Indian Affairs. , Dowd, James, 1979, Built Like A Bear:149-150, Ye Galleon Press, Washington. **DCTAC EXH. 34.**

Additionally, Dr. McClurken[67] asserted that the Commissioner of the General Land Office "*relied only on an 1848 opinion written by Commissioner William Medill as its authority for the land sale.*" As will be seen below, there were three such similar consistent opinions rendered prior to Commissioner Medill's 1849 letter. All of them considered Sabenay's band usage of the lands at Shabbona's Grove as being usufruct. There was no reservation status that needed to be changed "*by the President or by Congress*."

A Response To:

II. At the Time the Shab-eh-nay Reservation was Established by the 1829 Treaty the Potawatomis Owned Treaty-Recognized Title to the Land Surrounding that Reservation.

On pages 19-20 the Firm addresses the issue of Indian title. The title argument presented in this Memorandum is different from that written by the Firm in a Memorandum on March 13, 2007 to Attorney Dennis J. Whittlesey of Hobbs, Strauss, Dean &Walker, legal counsel representing the interests of the DeKalb County Executive Committee, although Attorney Whittlesey's fees were being paid by the Firms client, the Prairie Band Potawatomi Nation (PBPN).

At that time the Firm claimed title on the basis of the 1825 treaty. It has been shown earlier in this submission that the lands at Shabbona were not within the boundaries of the 1825 treaty. Here the Firm is

[67] McClurken, James M. 2007, The Shabehnay Band and its 1829 Reservation: 16, J.M. McClurken and Associates, Lansing, Michigan.

arguing that on the basis of the 1816 treaty with the "*united tribes of Ottawas, Chipawas, and Pottowotomees residing on the Illinois and Melwakee rivers, and their waters, and on the southwestern parts of Lake Michigan*" Indian title was established over the lands that included the site of Shabenay's village at Shabbona's Grove.

The purpose of the 1816 treaty, according to the treaty, was "*for purpose of removing difficulties between them*" (the United tribes and the Sacs and Fox of land ownership of the area). The Firm cites (page 20 of the Memorandum) Area 77 of Royce Map18 (Illinois 2)[68] in part to support its claim that Shabenay's village lay within the area of the 1816 treaty outside the cession lands which lie south of a due west line from the southern extremity of Lake Michigan. The Nation claims that the land north of this line:

> "the U.S. agreed to "relinquish to the said [Ottawa, Chippewa and Potawatomi] tribes all the land contained in the aforesaid cession of the Sacs and Foxes which lies north of the due west line from the southern extremity of Lake Michigan….

This land north of the east-west demarcation line as depicted by Royce on Map 18, Illinois 2, Area 148 was in part ceded back to the United States via the July 29, 1829 treaty at Prairie du Chien as depicted by the General Land Office on its 1835 "*Map of Lands Ceded by the Potawatamies.*" [69] This cession included the lands

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[68] **EXH.4.** Royce, Charles C., 1899, Indian Land Cessions in the United States, in Eighteenth Annual Report of the Bureau of American Ethnology to the Secretary of the Smithsonian Institution, Washington, Government Printing Office, Map 18, Illinois 2, Area 77.

[69] Tucker, Sarah J. 1942, Indian Villages of the Illinois Country, Volume II, Scientific Papers, Illinois State Museum, Springfield Plate XCIII. General Land Office Map of Lands Ceded by the Potawatamies 1832. **DCTAC EXH. 2**

encompassing the future site of Shabenay's Village. As presented earlier, from those ceded to the United States lands, Shabenay and his band were allowed continued usufructory privileges under the federal government's reversionary title. Any remaining vestige of recognized Indian title for lands ceded by the United tribes in 1816 to the area would have been extinguished by Article One of this 1829 treaty. Shabenay's band's usufructory privileges ceased when Shabenay signed the September 26, 1833 treaty at Chicago in which a removal stipulation in Article 1 was agreed upon by all the signatories. Under this Article Shabenay's band was among those required to remove a year after the Treaty was ratified (February 21, 1835). The band abandoned the village site in September of 1837. With the extinguishment of the band's usufructory privilege, the title to the land reverted back to the federal government.

Looking at this situation from a historical vantage point that is within the context of the period within which these events occurred, one sees the historical and political setting within which these events transpired. That is, the era of removal. Most of all we have a clear record of the thinking and opinions of those responsible for the carrying out of national Indian policy and those governmental officials responsible for the disposal of government-owned lands within the border-states and territories.

What did these responsible authorities have to say? What were their official governmental opinions concerning the lands and the

occupants at Shabbona's Grove? We have a clear chain of such opinions and conclusions.

Beginning with a January 17, 1843 letter[70] from Commissioner of Indian Affairs T.H. Crawford, to Thos. H. Blake, Commissioner, General Land Office, Commissioner Crawford we find a clear opinion as to the status of the lands at Shabbona's Grove from the Commissioner of Indian Affairs,

> Sir,
> I have duly considered the tenor of your letter of 16 inst, in connection with the accompanying papers, relative to the survey of the reservation provided for Shab-eh-ney- by the 3. article of the treaty of 29 July 1829, with the Chippewas, Ottawas and Potawatomies.
>
> The 1st article of aforesaid treaty defines the boundaries of the land ceded by it- the 3d. article stipulates that that "from the cessions aforesaid there shall be reserved for the *use* of the undernamed chiefs and their bands, the following tracts of land. " For Shabehney two sections at his village near Paw-paw grove."
>
> The language of the article making the reservation for Shabehney is similar to that used in the 2d. article of the treaties of 20, 26,-&27 October 1832 – with the Potawatomies- which has been construed under an opinion of the Attorney General of 20, Sept. 1833- (see opinion, Atty. Genl. Page 1402) as conferring on the reserves 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, & Pottowatomis, providing that the aforesaid reservation to Shab eh nay "shall be a grant in fee simple to him, his heirs and assigns forever" was stricken out by the Senate…. (emphasis added)

[70] Illinois State Archives, RG. 952.363 Dixon Land Office, Indian Files**.** Also in Dowd, James, 1979, Built Like A Bear:139-140, Ye Galleon Press, Washington. **DCTAC EXH. 29**

Two years later, on November 18, 1845, a second letter was sent by the Commissioner of Indian Affairs regarding a letter that was sent to the President by a Coalman Olmstead regarding Shabenay and Shabbona's Grove[71]

> Sir,
> Your communication to the President of the United States of 15 ultimo has been referred to this office-With reference to your statement in relation to your purchase of a portion of the land set apart for the *use* of Shab-eh-nay and his band- by the 3d. art of the treaty of 1829 with the Chippewas, Ottowas & Potowatomies… I have to state that as the treaty gives to Shab-eh-nay or his band no authority to sell the land usefrunct as aforesaid- The President cannot give his sanction to any sale that may have been made of it-Shab eh nay & his band under the treaty has only the occupant right- *the reversionary title is in the United States* which can be extinguished by authority of law (emphasis added)

Three years later, in a May 27, 1848 letter[72] from W. Midell of the Office of Indian Affairs (War Department) to Representative John Wentworth, Commissioner Midell stated,

> Sir,
> 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, and conveying the land reserved for the *use* of said Shab-eh-nay and his band by the 3rd. article of the treaty concluded with the Chippewa, Ottawa and Potowatomie Indians on 29, July 1829.
>
> 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,

[71] Letter, Commissioner of Indian Affairs to Coalman Olmstead, Shabbona's Grove, DeKalb County, Illinois. Dowd, James, 1979, Built Like A Bear:143, Ye Galleon Press, Washington. McClurken, 2007, Binder #3, November 18, 1845. **DCTAC EXH. 32**

[72] Letter, War Department, Office of Indian Affairs, to Hon. John Wentworth, House of Representatives-US. Dowd, James, 1979, Built Like A Bear:146-147, Ye Galleon Press, Washington. **DCTAC EXH. 33.**

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 5. article of a treaty concluded with the same Indians on 26 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.

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 Comr. Of the General Land Office to dispose the same as other public lands of the United States….(emphasis added)[73]

In a July 14, 1849 letter[74] from J. Butterfield, Commissioner of the General Land Office to Orlando Brown, the Commissioner of Indian Affairs, the position and conclusion made by the former Indian Commissioner was still being maintained and supported by the Interior Department.

Sir,

I have received your letter of the 10th. Instant, enclosing me a copy of one you had received from Mr. W. Gates of Paw Paw Grove Illinois, relative to the Reservation for the use "of *Shab-eh-nay,*" and his band of "two sections at his village, near the Paw Paw Grove," under the treaty concluded on the 29th July 1829 with the Chippewas and Ottawas;- which reserve is fully laid down on our Township plat, & there designated as

Section 23
The W ½ of Section 25 &
E ½ of Section 26
T38. N.R. 3 East 3d P.M. Illinois

[73] McClurken (2007:8) claimed 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 act of Congress." What McClurken ignored was the fact that the chain of evidence herein presented opines that (a)Shabenay's band held only usufructory rights, (b) The Federal Government held the reversionary rights to the lands at Shabbona's Grove, (c) Shabenay, as the band's okama surrendered those usufructory rights by agreeing to the removal stipulation in the 1833 treaty at Chicago, (d) His corporate band abandoned the lands at Shabbona's Grove in 1837.

[74] Letter, J. Butterfield, Commissioner, General Land Office to Orlando Brown Esq., Commissioner of Indian Affairs. , Dowd, James, 1979, Built Like A Bear:149-150, Ye Galleon Press, Washington **DCTAC EXH. 34.**

> In connexion with this matter, you refer to the decision of the Indian Office of the 27th May 1848, stated in the transcript of a letter of that date to Mr. Wentworth, as communicated to my predecessor, in which decision it is held 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 Commr. Of the General Land Office to dispose of the same as other public lands of the United States."* I find consequently that under date 12 August 1848 these lands had been ordered into market…(emphasis added)

In a July 18, 1849 letter[75], Commissioner Brown made it explicitly clear that Shabenay and his band had only "*usufruct right*" to the two sections of land at his village,

> … and as the original treaty only gave to Shab-en-ney and his band, the use of the land-vesting in them no title by the treaty of 26. Sept. 1833 (such provision therein having been stricken out by the Senate,) and as those of the party now claiming by purchase for the reserve, to procure the passage of a law securing such title, have alike failed; it appears to me that this office should not now go behind its decision of 27th May 1848, referred to in your letter, and reopen the case….(emphasis added)

Four years (June 25, 1853) after Commissioner Brown's letter, a letter from the same office[76] from the Acting Commissioner maintained the same conclusions and position as did the July 18, 1849 letter

> The two sections of land, to which you refer, were reserved "for the use of Shabonay and his band," under the treaty of the 29th of July 1829; and, as the persons for whose *use* alone they were thus reserved, ceased to occupy them, they were held to have reverted to the United States, and to be subject to the disposal of by the Genl. Land Office as other public lands of the United States. As the title was a mere usufructuary one, was also

[75] Letter, Orlando Brown Esq., Commissioner of Indian Affairs to J. Butterfield, Commissioner, General Land Office. Dowd, James, 1979, Built Like A Bear:151, Ye Galleon Press, Washington. **DCTAC EXH. 17.**

[76] Letter, Acting Commissioner of Indian Affairs to John H. Kinze, Chicago, Illinois. Dowd, James, 1979, Built Like A Bear:152-153, Ye Galleon Press, Washington. **DCTAC EXH. 6**

> held that it was not competent for the reservee or his legal representation to sell or dispose of the land to third parties. (emphasis added)

When Shabenay's purported plight concerning his land at Shabbona became a *cause celebre* in Illinois, two states attorneys wrote to the Secretary of the Interior in June of 1853 asking to obtain information in this regard. Chas. A. Mix, the Acting Commissioner of Indian Affairs was directed by the Secretary to respond to their query[77].

> Gentlemen,
> The Secretary of the Interior, to whom you addressed a communication dated 26th, ult. Asking whether the "land reserved to the Pottawatamie Chief Shab-eh-nay" under the treaty of 29th, July 1829, has been sold, has referred the same to this Office for answer.
>
> The treaty under which this reservation was made, gave to Shab-eh-nay, and his band only usufruct right thereto. It did not vest in him, or, with him or his band, a title in fee, and it was decided by this office as long since, as May 1848, that in as much as said land had been abandoned by the Indians for whom it had been reserved, that it was "competent for the Commissioner of the General Land Office to dispose of the same as other public lands of the United States." It will be seen therefore, that in the opinion of this Office Shab-eh-nay, has no claim upon the United States on account of the reservation referred to….(emphasis added)

Nine years later, the issue was still active. Mix, in response to a query from the Secretary of the Interior wrote back[78],

> In the case of two sections to Sha-eh-nay, at his village near Paw Paw Grove, under treaty of Chippewa and others at Prairie du Chien, it appears from the files in this office that he left the reservation and went West of

[77] Letter, October 5, 1854,Chas A. Mix, Acting Commissioner of Indian Affairs, to Messrs Paddock & Ward Attorneys. Dowd, James, 1979, Built Like A Bear:154, Ye Galleon Press, Washington. **DCTAC EXH. 35.**

[78] Letter, September 24, 1863, Charles E. Mix, Acting Commissioner of Indian Affairs to J.P. Usher, Secretary, Department of the Interior. Dowd, James, 1979, Built Like A Bear:163, Ye Galleon Press, Washington. **DCTAC EXH. 36.**

> the Mississippi to live, and by decision of the Department it was held that Shab-eh-nay had only a usufruct right to the land and having left it to live elsewhere the land reverted to the United States to be treated as other public lands- (emphasis added)

Thus we have eight consistent opinions over a twenty-year period rendered by governmental officials directly involved in the carrying out of federal Indian policy. These were people who were involved in daily activities carrying out this policy. Their knowledge was first-hand unlike the purported Solicitor Leshy's "opinion" rendered one hundred and forty-eight years after the Mix opinion and one hundred and sixty-eight years after the 1843 opinion rendered by Commissioner Crawford. Compare these two, consistency is the watchword.

Conclusions

This submission began by positing the six assertions made by the Firm in support of its contention that the lands currently owned in fee by its client, the Prairie Band of the Potawatomi Nation, are "Indian lands."

(1) "*the United States permanently recognized the Nation's Shab-en-nay Reservation in the treaty of Prairie du Chien on July 29, 1829…*"

We have seen in the historical evidence presented above that this was not the case. Of paramount significance was the Commissioner of Indian Affairs conclusion and statement rendered on November 18, 1845 on behalf of the President,

> …The President cannot give his sanction to any sale that may have been made of it-Shab eh nay & his band under the treaty has only the occupant right- *the reversionary title is in the United States* which can be extinguished by authority of law….

We have also presented a total of eight consistent opinions made over a twenty-year (1843-1863) period by federal authorities (Commissioner of Indian Affairs and the Commissioner of the Government Land Office) that opine that Shabenay and his corporate band held only usufructory privileges to the lands at Shabbona's Grove. This is what the federal government allowed Shabenay and his band.

The lands at Shabbona's Grove were not, after 1825, under the umbrella of Indian title. When the United Ottawa, Chippewa, and Potawatomi accepted their new tribal lands and their boundaries as created and agreed upon by all the participating tribes in the 1825 treaty, the United Nations abandoned their title to the lands east of this new tribal homeland. These lands were ceded to the United Nations by the United States in the 1816 treaty. The United Nations' lands as established and agreed upon by the participating tribes did not encompass the future site of Shabenay's village. The United States agreed to only recognize these new tribally-created boundaries.

(2) "*under controlling law, reservations may only be disestablished by an Act of Congress or Treaty…"*

In his July 14, 1849 letter to the Commissioner of the General Land Office, the Commissioner of Indian Affairs stated,

> *" as the lands referred to are no longer occupied by the persons for whose use they were reserved, that it is competent for the Commr. Of the General*

> *Land Office to dispose of the same as other public lands of the United States."*

The controlling document in this situation was the July 29, 1829 Treaty of Prairie du Chien, specifically Article III and the stipulation, "*there shall be reserved, for the use of the undernamed Chiefs and their bands…"* It has been the consistent opinion and understanding by the federal government that the "*use*" of the reserved "*ceded*" lands was usufruct and that no permanent reservation was ever established for any of the bands so cited in this Article. As the Commissioner of Indian Affairs, in a January 7, 1843 letter to the Commissioner of the General Land Office stated,

> The language of the article making the reservation for Shabehney is similar to that used in the 2d. article of the treaties of 20, 26,-&27 October 1832 – with the Potawatomies- which has been construed under an opinion of the Attorney General of 20, Sept. 1833- (see opinion, Atty. Genl. Page 1402) as conferring on the reserves a usufruction right only to the land reserved for them.

When in 1833, Shabenay, in his capacity as okama of the corporate band, affixed his signature to the treaty document, he committed his band to removal west of the Mississippi River and the abandonment of the lands at Shabbona's Grove as stipulated in Article 2,

> And it is the wish of the Government of the United States that the said nation of Indians should remove to the country thus assigned to them as soon as conveniently can be done…

In accordance with Article 2 of the September 26, 1833 treaty held at Chicago, an instrument that was duly reviewed, amended, and passed by the Senate and signed into law by the President, Shabenay's

band, at the direction of the federal government, abandoned the lands at Shabbona's Grove on September 15, 1837.

Within this same treaty Shabenay attempted to have the corporate usufruct right to these lands converted into fee-owned title in his name. The Senate rejected this request.

(3) "*there is no subsequent Act of Congress or Treaty which alters, diminishes or disestablishes that Reservation in any way...*"

As noted above in (2), the band's corporate usufruct right to the lands was "*disestablished*" when the corporate band's okama affixed his name to the 1833 treaty instrument in the name of the band agreeing to abandon the lands at Shabbona's Grove and remove west of the Mississippi River.

(4) "although the land was sold by the United states in 1849, that sale was illegal and void ab initio [from the beginning]…"

The sale of the lands at Shabbona's Grove was made by the General Land Office on November 5, 1849 at public auction to Reuben Allen and William Marks, at the direction of the Commissioner of Indian Affairs. Both Allen and Marks received Federal patents issued on June 5, 1850 attesting to the legality of the sale.

(5) "the sale was conducted in violation of the terms of the treaty and the Non-Intercourse Act by agents of the United States who lacked the authority to sell the land…"

The sale of the lands at Shabbona's Grove was made in accordance with the standard practice of the day. The lands were federal lands, acquired by a lawful treaty, ratified, and signed by the President on January 2, 1830. At that point the lands at Shabbona's Grove formally came under the jurisdiction of the United States. The lands were located within the State of Illinois. These lands were held under a federally-held reversionary title during the time period that Shabenay and his band utilized the usufructory privileges allowed them under the 1829 treaty.

The Federal Indian Trade and Intercourse Act in effect at this time did not encompass federally-owned lands upon which Indians were allowed to reside under usufruct privileges nor did it apply to sales made by Indians to the United States.

(6) "the Nation's lands lie wholly within the boundaries of its Shab-eh-nay Reservation."

The Nation currently owns in fee, lands that lie within the historic bounds of two sections of land historically known as Shabbona's Grove "*but not within the historic boundaries of Shabenay's reservation.*"

Appendix I. Vitae of James P. Lynch

JAMES PATRICK LYNCH

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I. TITLE.

Ethno-historic Consultant/ Researcher (Anthropology & History).
Genealogical Researcher.
Historic Title Researcher/Consultant.
Federal Indian Policy Consultant.

II. EDUCATION.

Ph.D, Anthropology/History (abd.) (Ethnohistory, Socio-cultural Change). History of New York and New England Indians, University of Connecticut 1984-1991.

Master of Arts, Anthropology/History (Ethnohistory), Indians of the Northeast, Wesleyan University, Middletown, Connecticut 1983.

Bachelor of Arts, Sociology/Anthropology, Religious Studies, Southern Connecticut State University, New Haven, Connecticut 1980.

Associate in Arts, Mattatuck Community College, Waterbury, Connecticut 1978.

Title Searching, University of Connecticut, West Hartford, 2001

Advanced Title Searching, University of Connecticut, West Hartford,2001

Real Estate Law, University of Connecticut, West Hartford, 2002.

Federal Indian Law, Connecticut Bar Association, New Britain, 2002.

III. EXPERTISE

- Fourteen years experience as a private ethnohistorical consultant.
- Federal tribal recognition criterion and regulations.
- Archival research.
- Document interpretation.
- Historic Land title research.
- Land into Trust issues.
- Federal Indian Policy.
- Qualified expert witness in both federal and state courts.
- Connecticut/Massachusetts/ Rhode Island/New York/ Rhode Island/Pennsylvania/ New Jersey/ California/Illinois history.
- Connecticut Colonial laws and statutes.
- New York Colonial laws and statutes.
- Pennsylvania/New Jersey Colonial laws and statutes.
- Historical application of Federal Trade and Intercourse laws.
- Genealogical research,
- Public speaking: public, private organizations, governmental testimony.

IV. FEDERAL ACKNOWLEDGEMENT RESEARCH.

Santa Ynez Band of Chumash Indians, California. 2006-
Shinnecock Tribe of Indians of New York 2004-2007 (decision pending)
Golden Hill Paugussett Tribe: 1993-2005 (recognition denied)
Paucatuck Eastern Pequot Tribe: 1998-2005 (recognition denied)
Eastern Pequot Tribe: 1998-2005 (recognition denied)
Mashantucket Tribal Nation :2000-2001
Hassanamisco Nipmuc Tribe: 2001 (recognition denied)
Schaghticoke Tribe of Kent, Connecticut: 2000-2007 (recognition denied)
Western Mahican, New York: 2001 (abandoned recognition efforts)

V. LAND CLAIMS, HISTORICAL TITLE RESEARCH, LAND INTO TRUST, HISTORIC RESEARCH/CONSULTING.

1. Prairie Band of Potawatomi Indians, Shabbona, Illinois, land into trust.

2007

2. Ho-Chunk tribe of Winnebago Indians, Lynwood, Illinois, land into trust. 2007
3. Santa Ynez Band of Chumash Indians, California, land into trust. 2007
4. Lytton Rancheria, California, land into trust. 2006
5. Delaware Tribe of Indians v. State of Pennsylvania 2004-2006 04-CV-00166 Case dismissed in defendants favor 11/8/05.
6. Town of Southampton, New York et al., v. Shinnecock Tribal Nation 2004-2006 (03-CV-3243/3466) decided in Plaintiffs favor 10/31/07
7. Northern Araphaho-Wind River Reservation, Wyoming 2005.
8. Schaghticoke Tribe of Kent, land claims; Kent Connecticut/ Cornwall, Connecticut 2001-2006
9. Mashantucket Pequot Reservation, Cedar Swamp land survey, Town of Ledyard 2000.
10. Eastern Pequot Tribe, land claims; North Stonington/ Ledyard, Connecticut, 1999-2005.
11. Historical title Research: Santa Ynez, California 2002.
12. Historical title research, Easton, Pennsylvania 2005.
13. Historical title research; Town of New Milford, Connecticut, 1998.
14. Historical title research; Town of Sharon, Connecticut, 1998.
15. Historical title research; Town of Salisbury, Connecticut, 1998.
16. Historical title research; Town of New Fairfield, Connecticut, 1998.
15. Historical title research; Towns of North Stonington, Ledyard, and Preston, Connecticut 1989-1990.
16. Historical Title Research; Town of Woodstock, Connecticut, 2001.
17. Historical Title Research; Town of Kent, Connecticut, 2002.
18. Golden Hill Paugussett, land claims; People's Bank of Bridgeport, Connecticut,1996. Stay Federal District Court pending recognition
19. Golden Hill Paugussett, land claims; City of Shelton, Connecticut, 1994. Stay Federal District Court, pending recognition
20. Golden Hill Paugussett, land claims; City of Bridgeport, Connecticut, 1995. Stay Federal District Court pending recognition
21. Golden Hill Paugussett, land claims; Town of Seymour, Connecticut, 1994. Stay Federal District Court, pending recognition
22. Golden Hill Paugussett, land Claims; Town of Southbury, Connecticut, 1993. Case decided in Defendants favor.
23. Golden Hill Paugussett, land claims; Town of Orange, Connecticut, 1995. Stay Federal District Court, pending recognition
24. Golden Hill Paugussett, land claims; Town of Trumbull, Connecticut, 1995. Stay Federal District Court, pending recognition.
25. Application of Federal Indian Trade and Intercourse Acts in Connecticut, 2002

VI. ADDITIONAL RESEARCH.

1. Genealogical research, Mashantucket Pequot, CBS. News, 60 Minutes II,

2. Genealogical research, Mashantucket Pequot, Mr. Jeff Benedict, author;
3. Historical/Archaeological Impact Study, Hopkinton, Rhode Island 1983. U.S. Department of Transportation.
4. Historical/ Archaeological Impact Study, Glocester, Rhode Island. 1983. U.S. Department of Transportation.

VII. PUBLIC CLIENTS.

Berchem, Moses & Devlin PC.
Milford, Connecticut.

Carmody & Torrence PC.
Waterbury, Connecticut.

Cohen & Wolf PC.
Bridgeport, Connecticut

Connecticut State Attorney Generals Office
Hartford, Connecticut.

Day, Berry & Howard
Hartford, Connecticut.

Morgan, Angel & Associates
Washington, D.C.

Nixon Peabody LLP
Garden City, New York

Nixon Peabody LLP
Rochester New York

State of Pennsylvania, Office of the Governor

Perkins Coie LLP.
Washington, D.C.

POLO/POSY.
Santa Ynez, Los Olivos California

Robb and Ross LLP.
Mill Valley, California

Sienkiewicz & McKenna
New Milford, Connecticut.

Wiggins & Dana
New Haven, Connecticut.

Winnick, Vine, Welch & Donnelly
Shelton, Connecticut.

VIII. PUBLICATIONS, ARTICLES, AND PROFESSIONAL PRESENTATIONS.

1. The Santa Ynez Chumash: A question of legitimacy, Capitol Weekly, Sacramento, California, November 22, 2007

2. By "Theire Own Free Act & Deed": Connecticut Land Relations with Indian Tribes, 1496-2003. Heritage Books, 2006.

3. Gideon's Calling: The Founding and Development of the Schaghticoke Indian Community at Kent, Connecticut 1638-1854. Heritage Books, 2007.

4 The Issue of Tribal Sovereignty, The Reservation Report, June 2005, New Century Communications.

5. The Individual as Sovereign in a Representative Republic. The Reservation Report, April 2006, New Century Publications.

6. The Iroquois Confederacy and the Adoption and Administration of Non-Iroquois Individuals and Groups Prior to 1756. In: Man in the Northeast, Volume 38 Fall 1985.

7. The Administration of Tributary Nations by the Iroquois Confederacy 1700-1762, delivered before the Annual Conference on Iroquois Research, Rensellaerville, New York 1983

8. The Iroquois Concept of Person as it Relates to Behavior Among the 17th and 18th Century Iroquois, delivered before the Annual Conference on Iroquois Research, Rensellaerville, New York 1984.

9. From Conestoga to Logstown: The Development and Application of Iroquois Administration of Tributary Groups and Nations, delivered before the Annual

Conference on Iroquois Research, Rensellaerville, New York 1985.

10. Coping and Responding to Culture Contact: The Huron Response to French Acculturative Pressures 1615-1639, delivered before the Annual Conference on Iroquois Research, Rensellaerville, New York 1985.

12. The Cornplanter and Tonawanda Seneca; A Study of Differential Sociocultural Change 1780-1810, delivered before the Annual Conference on Iroquois Research, Rensellaerville, New York1986

13. Sociocultural Change and the Development of the Allegany Reservation 1797-1826, delivered before the Annual Conference on Iroquois Research, Rensellaerville, New York 1987.

IX. PROFESSIONAL ACTIVITIES.

1. American Indian Archaeological Institute; Washington, Connecticut; Educational Lecturer 1977- 1981.

2. University of Connecticut, Storrs Connecticut; Lecturer in Anthropology, 1983-1985.

3. Public Archaeology Survey Team (PAST.) Storrs, Connecticut, 1983-1984.

4. Guest Speaker, Rotary Club of Litchfield County, Effects of Tribal Recognition and Indian Land Claims: 2001.

5. Testimony before Connecticut Legislative Planning and Development Committee on House Bill 5072 An Act Concerning Colonial Land Grants: 2002.

6. Seminar Panelist, Local Effects of Federal Recognition of Indian Tribes, Town of Mashpee, Massachusetts, October, 2002.

7. Seminar Panelist, Federal Recognition in Historical Perspective, Annual Conference, Citizens Equal Rights Alliance, Washington D.C. 2004.

8. Conference Panelist, Documentation Issues Concerning Tribal History and Recognition, Society of American Archivists, Boston, Massachusetts, August 2004.

9. Society for Connecticut History.

10. Associate Editor (research) of the monthly Reservation Report published by New Century Communications, Reedville, Virginia.

11. Speaker/Panelist: CERA conference on Tribal recognition and sovereignty, Washington D.C. 2005.

12. Speaker: One Nation United Conference, Washington D.C., The Sovereignty-Plenary Contradiction in Federal Indian Policy, May 2006.

13. Speaker: NCALG conference, Federal Recognition, Arlington, Virginia 2007

14. California Mission Studies Association.

Appendix II. Supporting Documentary Exhibits