An Ethno-historical Response to the Submittal to the National Indian Gaming Commission by Dickson Wright LLC. on Behalf of the Dekalb County, Illinois Executive Board.

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Introduction

The principle issue at hand is to determine whether the 128 acres of land, and by implication the entire 1,280 acres of land consisting of the original two sections of land "*reserved, for the use*" of Shabenay and his band located within Shabbona Township, Dekalb County, Illinois, are "*Indian lands*" as defined by 25 USC 2704 (4). The 128 acres of land are currently held in fee-simple title by the Prairie Band Potawatomi Nation.

In its October 1, 2007 submission to the National Indian Gaming Commission,[1] (NIGC), Dickenson Wright LLC. by Dennis J. Whittlesey (the Firm), representing the Executive Board of Dekalb County Illinois, opines that the lands in question are not a permanently established, treaty- recognized Indian reservation as claimed by the Prairie Band Potawatomi Nation.[2] Instead, the Firm claims that the lands in question constitute "*Indian lands*" upon which Indian title was never extinguished. The Firm further asserts that subsequent conveyances of these properties were in violation of the Federal Indian Trade and Intercourse Acts (the so-called Non-Intercourse Act).[3]

[1] Dickinson Wright PLLC, Letter, October 1, 2007, Re: Proposed Gaming by Prairie Band Potawatomi Nation in Dekalb County Illinois.
[2] Ibid.: 5
[3] Ibid. :3

Dekalb County Taxpayers Against the Casino (DCTAC) has asserted, on the basis of ethno-historical research conducted by Historical Research and Consulting LLC that was previously submitted to the National Gaming Regulatory Commission[4], that, (1) Indian title to all the lands at Shabbona's Grove (1,280 acres) was extinguished on the basis of the July 29, 1829 Treaty with "*The United Nations of Chippewa, Ottawa, Potawatomie Indians of the Waters of the Illinois, Milwaukee & Manitoouck Rivers*" at Prairie du Chien and subsequently reaffirmed by the "*Pottowautomie Nation*" in Article II of the January 5/17, 1846 Treaty at its Council Bluffs, Iowa reservation;(2) the lands reserved for the "*use*" of Shabenay and his band at Shabbona's Grove were for usufructory purposes only. The federal government retained "*reversionary title*" to these lands. No title right was ever vested in the tribe, corporate band, or in its okama. The federal government has consistently voiced that determination and opinion; (3) the band abandoned the lands at Shabbona's Grove in 1837 as required by "*Article 2d*" of the September 26, 1833 treaty held at Chicago with "*the United Nation of Chippewa, Ottawa, and Potawatamie Indians*" to which Shabenay in his capacity as a Potawatomi okama, was an acknowledging and approbating signatory to the treaty including its removal stipulation; (4) in said treaty, after agreeing to his band's removal west of the Mississippi River, Shabenay requested that the reserved lands upon which his band's village was presently located be granted to him personally in fee-simple holding, which request was denied by the United States

[4] Lynch, James P., 2007, An Ethno-historical Evaluation of Land-holdings at Shabbona's Grove, DeKalb County Illinois, Historical Consulting and Research Services LLC.

Senate: (5)when Shabenay returned to Illinois, in November of 1837, after his former band had abandoned the lands at Shabbona's Grove, he did so without his band; he was no longer a band political leader (okama) amongst the "*Pottowautomie Nation.*"

As an editorial note, all citations denoted by "**DCTAC EXH.**" refer to the exhibit number in the September 26, 2007 submission[5] to NIGC by DCTAC. Those citations cited as "**EXH**" refer to an exhibit accompanying this submission.

I. Comments: The Tribal Parcel

The Firm begins its discussion of the 128 acre parcel located in Shabbona Township, Dekalb County, Illinois with an outright historical deception. In its discussion concerning the July 29, 1829 treaty held at Prairie du Chien, the Firm depicts the treaty as one ratified by three separate Indian tribes: "*the Chippewa, Ottawa, and Potawatomi Indians.*"[6]

The historical reality is that said treaty was with "*The United Nations of Chippewa, Ottawa, Potawatomie Indians of the Waters of the Illinois, Milwaukee & Manitoouck Rivers*", who, prior to said

[5] An Ethno-historical Evaluation of Land-holdings at Shabbona's Grove, Dekalb County Illinois by James P. Lynch Historical Consulting and Research Services LLC.
[6] Dickinson Wright PLLC, Letter, October 1, 2007, Re: Proposed Gaming by Prairie Band Potawatomi Nation in Dekalb County Illinois:2

treaty, had politically united.[7] Indeed, General John McNeil, the senior commissioner in charge of the treaty negotiations in his July 27, 1829 communication to the Secretary of War, referred to the tribes as, " *the Indians properly called the United Tribes of the Illinois…"*[8] The lands of Shabbona's Grove, the site of Shabenay's band's village, were amongst those ceded by the "*United Tribes*" in this treaty.

The salient point is that portions of three historical tribal groups had politically unified into one political entity prior to the first treaty held at Prairie du Chien ("*Prairie du Chiens*") on August 19, 1825[9] with the " *the Sioux and Chippewa, Sacs and Fox, Menomonie, Ioway, Sioux, Winnebago, and a portion of the Ottawa, Chippewa, and Potawattomie, Tribes*." (emphasis added) Article 9 of this treaty, as decided by the participating tribes, demarcated geographical limits within which "*The country secured to the Ottawa, Chippewa, and Potawatomie tribes of the Illinois is bounded….*" Thus, these treaty-defined portions of Illinois-Wisconsin lands were "*secured*" for the exclusive collective use by the three politically- unified tribal fragments. These new tribal lands, delineated for united Ottawa, Chippewa, and Potawatomi, as agreed upon and established by the gathered tribes in 1825, did not contain the site of Shabenay's village at Shabbona's Grove.

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[7] Kappler, Charles J., 1904, Indian Affairs. Laws and Treaties, Volume II, Treaties:297, Washington, Government Printing Office.**DCTAC EXH. 21**

[8] National Archives and Records Administration, Microfilms, Ratified treaty No. 155, Documents relating to the Negotiation of the Treaty of July, 29, 1829 with the United Chippewa, Ottawa, and Potawatomi Indians. **DCTAC EXH. 22.**

[9] Kappler, Charles J., 1904, Indian Affairs. Laws and Treaties, Volume II, Treaties:250, Washington, Government Printing Office. **DCTAC EXH.1**

Moving ahead to the September 26, 1833 treaty held at Chicago[10], the parties to this treaty were the "*Commissioners on the part of the United States of the one part*" and "*the United Nation of Chippewa, Ottawa, and Potawatamie Indians*" who in this treaty collectively ceded all their remaining lands north of the line demarcating the northern bounds of the 1829 Prairie du Chien Treaty to the United States. It was within the second article of this treaty that the United Nation of Chippewa, Ottawa, and Potawatamie agreed to totally remove themselves from the State of Illinois within one year after ratification of the treaty by the Senate and the President. It will be recalled that as a result of this agreed upon requirement, Shabenay's band abandoned its usufructory privileges to the lands at Shabbona's Grove, when directed to do so by a Federal Removal Agent in September 1837. The Band removed to the Council Bluffs reservation in Iowa.[11] The federal government at that time asserted its reversionary title right to the lands at issue.

It was only subsequent to the Potawatomi's migration to Council Bluffs Iowa and the treaty held there on June 5/17, 1846[12] that this tripartite political unity was dissolved and a singular "*Pottowautomie Nation*" emerged: "*being the same people by kindred, by feeling, and by language, and having, in former periods, lived on and owned their lands in common: and being desirous to unite in one common country,*

[10] Kappler, Charles J., 1904, Indian Affairs. Laws and Treaties, Volume II, Treaties:402, Washington, Government Printing Office. **DCTAC EXH. 25**.

[11] See Dekalb County Taxpayers Against the Casino submission (**DCTAC**) Lynch, "An Ethno-historical Evaluation of Land-holdings at Shabbona's Grove, DeKalb County Illinois" :51-52

[12] Kappler, Charles J., 1904, Indian Affairs. Laws and Treaties, Volume II, Treaties:557, Washington, Government Printing Office. **DCTAC EXH. 46.**

and again become one people." These people now consisted of those of the former Nation, "*the Potowautomies of the Prairie, the Pottowautomies of the Wabash, and the Pottowautomies of Indiana"* all of whom previous to this time had entered into separate political treaty-based relationships with the United States. The United States, by entering into a formal government-to-government relationship via treaty enactments with each of these groups, recognized each as a politically independent sovereign entity. Most importantly, this newly emergent "*Pottowautomie Nation*" did within the Treaty's second article did,

> …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[13], and subsequent thereto ….

The point here is that in both the 1829 Prairie du Chien Treaty and the 1833 Treaty at Chicago, the lands ceded and abandoned were not those belonging to a singular Potawatomi tribe but were those of a collective political entity, *"The United Nations of Chippewa, Ottawa, Potawatomie Indians of the Waters of the Illinois, Milwaukee & Manitoouck Rivers.*" It is granted that the Tribe is the successor in interest to Shabenay's Band, but the Tribe is not the successor of right to the lands upon which Shabenay's village once stood. Why is this so?

[13] This was the August 29, 1821 treaty at Chicago (Kappler, Volume II:198) with the "Ottawa, Chippewa, and Pottawatamie Nations of Indians. See **DCTAC**submission "An Ethno-historical Evaluation of Land-holdings at Shabbona's Grove, DeKalb County Illinois" :58

If we look back to the August 24, 1816 Treaty between the United States and *" the chiefs and warriors of the united tribes of Ottawas, Chipawas, and Potowotomees, residing on the Illinois and Melwakee rivers*"[14] we note that the federal government ceded lands to the '*united tribes*" in northern Illinois that contained the future site of Shabenay's village. As described[15] 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 land boundaries agreed upon by the gathered tribes for the *"Ottawa,Chippewa and Potawatomie Tribes of Indians living upon the Illinois*" in 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,[16] encompass the lands that were to become the site of the Band village led by Shabenay? The answer is no.

In the 1825 Treaty the United States agreed to recognize and respect the newly-created tribal boundaries agreed upon by the leaders of the gathered tribes. The United States representatives only function in these treaty proceedings was that of peace mediators. The treaty's preamble clearly states this purpose,

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[14] **EXH.1.** Kappler, Charles J., 1904, Indian Affairs. Laws and Treaties, Vol. II. (Treaties):132
[15] **EXH.2 .** Kappler, Charles J., 1904, Indian Affairs. Laws and Treaties, Vol. II. (Treaties): 74
[16] **EXH.3 .**Kappler, Charles J., 1904, Indian Affairs. Laws and Treaties, Vol. II. (Treaties):250, Washington, Government Printing Office.

> 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;…

The Commissioners did not assign tribal 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.

Most importantly were the tribal boundaries agreed upon and established by the presiding tribes for the combined Potawatomi, Ottawa, and Chippewa, as stated in Article 9 of the 1825 Treaty. Without question these newly-agreed upon and recognized boundaries established for the Potawatomi, Ottawa, Chippewa 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 <u>west</u> 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, it was east of the Rock River. By acceding 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. The United States was required by the terms of this treaty to acknowledge and respect these changes. The future site of Shabbona's Grove lay within the relinquished area of the 1816 Treaty, but outside the newly recognized boundaries established by the tribes for the Potawatomi, Chippewa, and Ottawa. Thus at the onset of the July 29, 1825 Treaty at Prairie du Chien Shabenay's village lay outside the United Nations established tribal territory. Article 15 of the August 19, 1825 Treaty stated,

> 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

The treaty was ratified by Presidential proclamation on February 6, 1826.

Thus it would appear that any claims of purported successor-ship in interest to the lands at Shabbona's Grove would depend entirely upon the boundaries set by the 1825 Treaty and the federal

government's interpretation and opinion in regard to the wording within Article three of the 1829 Prairie du Chien Treaty.

Lastly, there is the issue of the removal stipulation present in "*Article 2nd*" of the September 26, 1833 Treaty held at Chicago wherein Shabenay agreed to the removal of his band and the abandonment of the village site by his band within a year of the treaties ratification and his unsuccessful attempt to have his band's former village lands converted into a personal reservation in fee vested to himself via the Senate- rejected Article 5 of the treaty.

II. Comments: The United States Has Never Formally Determined the Legal Land Status for the Shab-en-ney Reserve.

The Firm grossly misrepresented or ignored the historical record in regard to whether the federal government ever formally determined the land status of the acreage at Shabbona's Grove. Particularly disturbing is the Firm's unwarranted misrepresentation made in Section II., A. ("*The Leshy Letter*") within which it attempts to depict the federal government as trying to grant the entire 1,280 acres of Shabenay's Grove to Shabenay in fee simple holding. In fact, the historical record actually depicts Shabenay personally making the attempt to have a reservation established with the fee vested in himself, fully knowing that his band would have to abandon these

lands a year after the 1833 treaty's ratification. This issue will be further addressed below.

Between January 17, 1843 and September 24, 1863, Executive Branch administrators made six opinions and determinations of fact, one of these on behalf of the President of the United States, in addition to one Congressional finding. These determinations and opinions of fact consistently depicted the official federal position that the lands being utilized by Shabenay and his band at Shabbona's Grove were only usufructory[17] in nature, that is, their use was temporary with no title rights vested in either a tribe, Shabenay in his corporate leadership position as okama, or with his band. Most importantly, the federal government declared that it held "*reversionary title*"[18] title to these lands by virtue of the July 29, 1829 Treaty.[19] Let's take a look at each of these.

On January 17, 1843, Commissioner of Indian Affairs, T.H. Crawford wrote to Thos. H. Blake, Commissioner of the General Land Office[20] which at that time was part of the Department of the Interior in regard to the status of the land formerly used by

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[17] "*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.

[18] "*Reversion"*: c.1530- "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.

[19] 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.**

[20] Illinois State Archives, RG. 952.363, Dixon Land Office, Indian Affairs.

Shabenay's band. Within this communication, Commissioner Crawford determined that the lands set aside for Shabenay and his band as well as those similarly set aside for "*Wau-pon-eh-see*" in Article three of the July 29, 1829 treaty were to be interpreted,

> …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)

Thus in 1843, it was Commissioner Crawford's official opinion that the Band's occupation and use of the lands at Shabbona's Grove were only usufructory.

The second was a communication from the Commissioner of Indian Affairs dated November 18, 1845[21] to a Coleman Olmstead of Shabbona Township, Illinois. This letter is especially significant in that it was written by the Commissioner at the behest of the President of the United States and that it clearly stated the status of the lands in question,

> 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

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

> 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 usufruct 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)

In 1845 we have the Commissioner of Indian Affairs writing at the direction of the President, offering the same official opinion that Shabenay and his band's interest of the lands were usufructory and that the land title was vested in the United States.

The third correspondence from the Commissioner of Indian Affairs to Representative John Wentworth of Illinois asserting the federal government's position with regard to the lands at Shabbona's Grove occurred on May 27, 1848.[22] The correspondence 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, 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

[22] 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 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 fourth affirmation was in the form of a July 14, 1849 letter[23] from Commissioner of the General Land Office to Commissioner ofIndian Affairs. This letter is quite telling,

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

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, but that subsequently under instructions of 17th October 1848 from this Office, in consequence of representations from Worsham Gates, the sale was postponed to afford him an opportunity of petitioning Congress- It seems having failed to get

[23] 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. See Dekalb County Taxpayers Against the Casino submission **DCTAC EXH. 34.**

> an act of Congress, confirming the sale, and that the balance of the money "being now due Shabenah," …
>
> It is true Shab eh nah's right to the lands was only a usufruct one, but as his reserve is not for a large area (two sections)…I beg to suggest, in consideration of the meritorious character of that Indian…whether it would not be advisable for the Indian Office to institute an enquiry into the whole merits of the case…could not be warranted in bringing to the notice of Congress, with a recommendation for a confirmatory Act to rest the fee in Shab-en-ay, and to authorize the approval by the President of any conveyance, or conveyances from him…. (emphasis added)

This letter and the opinion voiced therein clearly states that at that time the federal authorities agreed Shabenay and his corporate band did not have any vested title rights to the lands at Shabbona's Grove. The fact that Worsham Gates attempted to obtain federal legislation to gain such title supports this opinion. Gates, by doing what he did, acknowledged federal ownership of the Grove lands and thus attempted to gain ownership by federal enactment. That the General Land Office, a federal agency, placed the lands as available for disposal like any other federal lands also confirms this fact. By law, the agency could only sell federally-owned lands to the public. The fact that the Commissioner also confirmed the long-standing opinion of usufructory privileges only of the Grove acreage and his compassion-based suggestion that a confirmatory act be proposed to assist Shabenay is further confirmation of the federal government's formal position with regard to the lands at Shabbona's Grove, that is, title was vested in the federal government, not a in a tribal or band political entity.

Four days later[24], Commissioner of Indian Affairs, Orlando Brown responded to General Land Office Commissioner Butterfield's July 14 letter,

> Sir:
> I have received your letter of the 14th inst. Which relates to the usufruct right of Shab-eh-nay and his band, to two sections of land at his village, near Paw Paw Grove, Illinois, as provided by the 3d article of the treaty of 29 July 1829 with the Chippewa, Ottawa and Potowatomie Indians…It also appears that other persons than Mr. W. Gates have heretofore alleged claims to portions of the said two sections of land by purchase; and in each instance those claimants have been informed that the treaty gave no authority to Shab-eh-nay or his band to sell, and that the President could not sanction any sale that might have been made. If injustice has resulted to the Indians or to the parties claiming under them their remedy is with Congress, where, if their claims are regarded as just, ample satisfaction can be made either by the award of other lands, or equivalent in money
>
> Under these circumstances, 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)

The sixth such opinion and determination made by federal authorities occurred on September 24, 1863.[25] In this correspondence, the Acting Commissioner of Indian Affairs wrote to the Secretary of the Interior and stated the following,

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[24] 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.**

[25] Letter, 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.**

> 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 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)

Additionally, The House of Representatives in a Report filed by the Honorable J. R. Giddings, Chairman, Committee of Claims, to that body[26] concurred with the aforementioned positions and opinions on the basis of an opinion rendered by George W. Moneypenny, Commissioner of Indian Affairs who wrote on April 12, 1856 in regard to "*Shab-eh-nay and his band..,*"

> …It was reserved for the use of himself and *his band* only; that when the parties for whose use it was reserved left it, it was competent for the United States to sell it….

The consistent thread of federal opinion from the President, the Commissioner of Indian Affairs, the Commissioner of the General Land Office, and Congress was that no title to the lands at Shabbona's Grove was ever vested in Shabenay and his band. These opinions also affirmed the fact that any existing Indian title to these lands had been extinguished by virtue of the July 29, 1829 Prairie du Chien treaty. Additionally the federal government steadfastly opined that the Indians use of the lands reserved under the 1829 Treaty of Prairie du Chien was usufructory, that is, a non-titled, temporary use of

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

federally-owned lands such as those at Shabbona's Grove. The federal government held reversionary title to these lands.

A. "The Leshy Letter"

It is important to note at the onset that the Firm did not identify the Leshy correspondence as a legal "*opinion*" as the Tribe has so often identified it as. According to the Firm, the so-called "*Leshy Letter*" arrived at two conclusions. First, it concluded "*that the Nation [Prairie Band Potawatomi Nation] is the lawful successor in interest to Chief Shab-eh-nay and his Band"* a point readily concurred. Second, Solicitor Leshy "*concluded that the Nation "has a credible claim for unextinguished Indian title" to lands within the Shabenay Reserve*." The historical record does not support such a determination.

It is a point agreed to that the "Nation" may be a historical successor in interest to/of the former tribal corporate band per se, but exception is taken whether the "*Nation*" has any successor rights to the lands utilized by this Potawatomi band at Shabbona's Grove. At this historical point in time, (circa 1829) the lands encompassing the region that contained the lands of Shabonna's Grove were not part of the territory agreed upon by the convening tribes at the 1825 treaty for the "*…Ottawa, Chippewa, and Potawattomis…."*

In its October 5, 2007 Memorandum the Nation changed its earlier assertion as to when a "*treaty-recognized title*" was established. The Nation originally claimed that such a title was established by the 1825

Prairie du Chien Treaty. In the new Memorandum to NIGC it was changed to 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*."[27] The Nation now claims said 1816 treaty as foundational to its claim that "*recognized title*" to the lands at Shabbona's Grove was established at that time as opposed to the later 1825 treaty.

The purpose of the 1816 treaty cession was, as discussed earlier, 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 Nation 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 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 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[28] 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

[27] **EXH.1.** Kappler, Charles J., 1904, Indian Affairs. Laws and Treaties, Vol. II. (Treaties):132
[28] **EXH. 6.** Kappler, Charles J., 1904, Indian Affairs. Laws and Treaties, Vol. II. (Treaties): 74

> Sakaegan, thence down the Foc river to the Illinois river, and down the same to the Mississippi….

Did the later August 1816 treaty include the lands that were to become the site of Shabenay's bands 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 Nation is grossly incorrect when, on page three of its October 5 Memorandum, it asserts that "*In 1825 the U.S. established the territorial boundaries of the Potawatomis of Northern Illinois and southern Wisconsin*."

Third, the United States in said treaty only agreed to recognize and respect the newly-created boundaries agreed upon by the gathered tribes themselves. The United States representatives to these treaty proceedings only function 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 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 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 northerly 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, lands that were ceded to them by the United States, in Article 2, of the August 24, 1816 Treaty. These were the lands that contained the future location of Shabenay's band's village.

We now find that the Royce maps cited above also negate the legal claim that the lands at Shabbona's 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, and Fox, Menominie, Ioway, Sioux, Winnebago, and 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 boundaries established and agreed upon by the tribes that participated in the federally-mediated 1825 treaty. The new federally-recognized boundaries for these three

tribes was west of the Rock River and did not encompass the lands that would become Shabenay's village. It is apparent that when Shabenay and his band, migrated north from the Illinois/Fox River region into northern Illinois, they were moving into a region and establishing a village in which they had no title claim. The united three tribes vacated their title to this land as a result of the 1825 treaty. The federal government took no immediate action to reassume the title they ceded in 1816. Due to the presence of Shabenay's village as well as those of "*Wau-pon-eh-see*" and " *Awn-kote*" in this region, the Federal Commissioners sought and received a second cession in the July 29, 1829 Prairie du Chien Treaty that cleared up any residual title issues.

What title claim 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.

The July 29, 1829 Prairie du Chien Treaty was a two-part land cession by the United Nations. The first cession by the Ottawa, Chippewa, and Potawatomi cited in Article I of the 1829 treaty cited the lands agreed upon for the "*United Nations*" by the gathered tribes in the August 19, 1825 Treaty at Prairie du Chien discussed earlier. 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 Rock River to the Mississippi River 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 addressed above included those lands to the east of the Ottawa, Chippewa, and Potawatomi boundary established by the gathered tribes in the 1825 treaty. These, as noted earlier, 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…*"[29] 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 in which the title had remained unsettled due to the actions of the 1825 intra-tribal treaty.

Furthermore, Article III of the July 29, 1829 Prairie du Chien Treaty with the "*United Nations of Chippewa, Ottawa, and Potawatamie Indians…*" clearly states "*From the cessions aforesaid….*", thus telling us that we are speaking of lands that were ceded by the above "*United Nations…*" that were after-the-fact to be allowed for the "*…use of the undernamed Chiefs and their bands….*" The nature of this use by Shabenay's band was consistently described by the federal government as temporary "*usufructory*" privileges with no vesting of title to the band or its okama. As we have seen elsewhere[30], in the aftermath of Shabenay's and his band's

[29] 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.**

[30] See DCTAC submission. "An Ethno-historical Evaluation of Land-holdings at Shabbona's Grove,

abandonment of the lands at Shabbona's Grove in September 1837 in compliance with the terms of the 1833 treaty at Chicago, and Shabenay's return without the band two months later, Shabenay returned to Shabbona Township, no longer a band okama or chief. His band remained on the federally-established Council Bluffs Reservation. Shabenay no longer had the political authority of a tribal leader. His subsequent actions with regard to the Grove lands in Illinois were solely for personal gain.

It is a point of historical fact that the lands encompassing Shabbona's Grove were ceded to the United States in the second land cession depicted in Article I of the July 29, 1829 treaty. We have seen above that Shabenay and his band were allowed the use (usufructory privileges) of this ceded land by the federal government. We have also seen a consistent trail of documented opinions and determinations by governmental officials that Shabenay's and his band's residence at Shabbona's Grove was usufructory in nature with no vested title to the okama nor his band. Within "*Article 2.*" of the June 15/17, 1846 Treaty at Council Bluffs[31] with the "*Pottowautomie Nation*", the tribe "*hereby agreed 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….*"

DeKalb County Illinois" :54

[31] Kappler, Charles J., 1904, Indian Affairs. Laws and Treaties, Volume II, Treaties:557, Washington, Government Printing Office. **DCTAC EXH. 46.**

It was made quite clear that neither Shabenay nor his band had, nor maintained, Indian title to the lands at Shabbona's Grove. If such title did indeed remain, why would Shabenay have attempted to gain title from the federal government in 1833? By this very attempt to gain a fee title from the federal government, Shabenay acknowledged the federal government as title-holder to the lands at Shabbona's Grove. Shabenay wanted the federal government to grant the lands in question to him personally. He was seeking title from the federal government. If the Tribe was indeed the title-holder, why didn't Shabenay approach the gathered okamas at the 1833 treaty proceedings and ask them to give him the land? The chain of federal correspondence cited earlier, especially the two dated November 18, 1845 and July 18, 1849 specifically mention that the fee to the lands at Shabbona's Grove was vested in the United States and not to any Indian or tribal entity.

Having determined on numerous occasions that the lands at Shabbona's Grove were indeed federal lands, their disposal, in the aftermath of the band's 1837 abandonment, fell under the authority and became the responsibility of the Government Land Office. The authority and activities of this office were dealt with extensively in the Ethno-historic Report submitted to the National Indian Gaming Commission by "*Dekalb County Taxpayers Against the Casino*"[32] and need not be reiterated here.

[32] See Chapter VII, page 60- in DCTAC's submitted report

Leshy was entirely incorrect when he implied that the sale of the lands at Shabbona's Grove to Reuben Allen and William Marks on November 5, 1849 was in violation of the Federal Indian Trade and Intercourse Act. The lands in question were conveyed to the United States via the July 29, 1929 treaty at Prairie du Chien. The treaty was approved by the US. Senate and signed into law by the President in January 830. The lands were ordered by the General Land Office to be made available for sale on August 12, 1848, eleven years after Shabenay's band abandoned the site. On June 1, 1850 federal patents providing legal validation for the lands purchased by Allen and Marks were issued by federal authorities to both grantees.

One last issue concerning the "*Leshy Letter*" remains to be addressed. Very strong exception is taken to the Firm's assertion that "*In 1833, the United States proposed to grant the Shab-eh-nay Reserve in fee simple to [Chief Shab-eh-nay], his heirs and assigns forever.*" Article 3 of the September 26, 1833 Treaty at Chicago with the "*United Nation of Chippewa, Ottawa, and Potawatamie Indians"* stated, "*One hundred thousand dollars to satisfy sundry individuals, in behalf of whom reservations were asked, which Commissioners refused to grant.*" From this sum, Shabenay received a yearly life annuity of $200.00. Its purpose? As Senator White stated in the Senate ratification proceedings[33] of this treaty,

> This sum is to be given in lieu of Sundry reservations which had been asked for individuals.

[33] Senate Executive Journal, April 7, 1834, page 382.

The preceding quotation notes that reservations were asked for but "*which Commissioners refused to grant*". Who were the Commissioners representing? They were the representatives of the United States government. On what factual basis can Attorney Whittlesey and the Firm infer that the United States was trying to obtain a reservation for the requestors, among whom was Shabenay? What was Shabenay asking for? In a January 17, 1843 letter[34] 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….

Shabenay was not seeking a land grant for a tribal corporate band, he was seeking a reservation with fee title for himself , which incidentally, would include only his heirs and assigns, which implies by the word "*assigns*" that no alienation restrictions would have applied. No mention is made of the band being part of or rights to this requested grant. When Shabenay, in his capacity as his band's okama signed the treaty, he committed his band to abandoning the lands at Shabbona's Grove and removal west of the Mississippi River, an act that later caused great resentment towards him by his own people. If the Article 5 provisions had remained in the 1833 treaty and Shabenay had received his grant as he had requested, his grant would have given

[34] 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**.

him clear fee-simple holding of the lands at issue unless an alienation proviso had been attached. The October 30, 1899 US. Supreme Court decision in Jones v. Meehan found,[35]

> …when the United States, in a treaty with an Indian tribe, and as part of the consideration for the cession by the tribe of country to the United States, make a reservation to a chief or other member of the tribe of a specified number of sections of land, whether already identified, or to be surveyed and located in the future, the treaty itself converts the reserved sections into individual property; the reservation, unless accompanied by words limiting its effect, is equivalent to a present grant of complete title in fee simple; and that title is alienable by the grantee at his pleasure, unless the United States, by provision of the treaty, or an act of Congress, have expressly or impliedly prohibited or restricted its alienation[36]

We find in Article three of the 1829 Treaty such "*limiting*" words, "*there shall be reserved, for the use of….*" If, as the Firm claims, a reservation was established via this article in the 1829 Treaty, then the lands at Shabbona's Grove would have to be considered to be individual property held in fee simple, not Indian or tribal reservation land. The fact that Shabenay requested a fee-simple grant from the federal government in 1833 is proof that a tribal-held reservation was not created by the 1829 Prairie du Chien treaty.

This brings us to the issue concerning the claims made by the Nation and the Firm. If Shabenay as a "*chief*" did receive a grant for a reservation at Shabbona's Gove by virtue of Article III of the July 29, 1829 treaty at Prairie du Chien, according to the findings of Jones v. Meehan, Shabenay would have had an unrestricted, fee-simple title to

[35] 175 US. 1, 22 (http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=175&invol=1)
[36] 175 US. 1,22 (http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=175&invol=1)

the lands at the Grove without any alienation restrictions and would have been free to convey portions or the entirety of the Grove lands at his pleasure. Thus his conveyances to the Gates would have been valid. As evinced by the historical record, this was clearly not the case. It would also fall outside the parameters of the Federal Indian Trade and Intercourse Acts in that the lands would have been privately fee-owned with no alienation restrictions. Shabenay was unaware, until informed by his own legal counsel in 1844, that his request to have the lands at Shabbona's Grove granted in fee-simple holding to him was denied by the United States Senate.

The bottom line is, if Shabenay and his band did not have Indian title to the Shabbona Grove lands prior to the 1833 treaty negotiations, why would Shabenay have sought such a reservation in fee simple holding from the federal government in 1833? Shabenay did so due to the fact that he and the other Indian signatories to the 1833 treaty had committed their people to removal. He attempted to take personal advantage of this situation for his own benefit.

In sum, on the basis of the historical record, the Firm was quite disingenuous in making the assertion that the Band's corporate title to the lands at Shabbona's Grove was established by virtue of the 1829 Prairie du Chien Treaty. It is very clear from the record that (a) Shabenay's band had only temporary usufructory rights to the land in question; (b) the federal government held reversionary title to these lands.

B. "The Olsen Letter"

The September 22, 2006 letter from Deputy Assistant Secretary Olsen to Representative Dennis J. Hastert (The Olsen Letter) stated,

> Any claim to jurisdiction over Indian owned land within a tribe's former territory, and conversely any claim to immunity from such jurisdiction, will have to deal with the complex application of all the factors referenced by treaties, courts and statutes in the context of the specific claim.

Deputy Assistant Secretary Olsen also remarked that, "*The department has not yet reviewed this land to determine if it would be considered Indian land within the definition of IGRA.…"* Yet we have ample historical evidence that between the years 1843 and 1863 the Commissioner of Indian Affairs, as well as Congress made such adetermination and consistently reiterated this determination as to the nature of land occupancy and use by Shabenay and his band in relation to the 1,280 acres of land at Shabbona's Grove. The operant terms in these determinations were "*usufruct*" and "*reversionary title*" The Commissioner of Indian Affairs made it very clear that title to the lands in question was vested in the United States, not the Potawatomi, Ottawa, or Chippewa.

III. Comments: "The Shab-eh-nay Reserve May Constitute Unextinguished Indian Title But Has Never Enjoyed Reservation Status"

A. "IGRA's Definition of "Indian Lands"

The historical facts that pertain to the lands of Shabbona's Grove make it quite clear that a federally-recognized Indian reservation was not established upon these lands by the federal government. This issue was discussed in detail in Chapter Three (page 27) of the ethno-historic research previously submitted on this matter by the DeKalb County Taxpayers Against the Casino (DCTAC) to the National Indian Gaming Commission.

Additionally the historical record depicts no trust relationship regarding this acreage nor was one possible without the tribal entity having a title right to be placed into trust. No such title right was ever recognized or acknowledged by the United States government. As for alienation restrictions, it was made abundantly clear that Shabenay did not have the right to convey the Grove lands. This was not due to any existent "*trust*" relationship with the federal government, but was due to the fact that the federal government held reversionary title to the land by virtue of the July 29, 1829 Treaty of Prairie du Chien. Any residual notion of Indian title to the lands at Shabbona's Grove was extinguished at that time. After that time, only the federal government had the right to convey the lands at Shabbona's Grove. The Tribe, as the present-day fee-simple owner of 128 acres of the former Shabbona Grove lands, can convey this acreage at its pleasure if it so desires.

B. "Relevant Case Law"

No comments are made due to the legal aspects being addressed.

C. "Language in the Treaty of Prairie du Chien"

This research concurs with the Firm's conclusion. "*Article III of the Treaty of Prairie du Chien contains no such language that would suggest the United States intended to create a permanent reservation for Chief Shab-eh-nay and his Band.*" The comparison of Potawatomi treaty language was discussed in Chapter IV, pages 45-50 of DCTAC's previous ethno-historic submission.

D. "Treaties Creating Permanent Indian Reservations"

This research also concurs with the conclusions rendered by the Firm with regard to the language in the treaty illustrations provided. It further concurs with the stated conclusion that "*None of the reservation elements found in these four treaties accompany the set aside for Shab-eh-nay's Band under Article II of the Treaty of Prairie du Chien*."

IV. Comments: "Conclusion"

The historical record is clearly at odds with the Firm's principal conclusion and assertion that the Nation, is the lawful successor in interest to the lands "*reserved, for the use of the undernamed Chiefs and their bands….*", that is, the two sections of land at Shabbona's Grove. As noted in the body of this submittal, the lands of the second cession ceded in Article I of the 1829 Prairie du Chien Treaty to the United States were not part of the 1825 designated tribal lands of "*The United Nations of Chippewa, Ottawa, Potawatomie Indians of*

the Waters of the Illinois, Milwaukee & Manitoouck Rivers". The previous ethno-historical research submission,[37] by DCTAC' as well as the above noted that the tribal land boundaries established in the August 19, 1825 Treaty at Prairie du Chien as agreed upon by the participating tribes for a, "*… portion of the Ottawa, Chippewa, and Potawattomie, Tribes"* did not encompass the lands of Shabbona's Grove, Shabenay's future village site. As the Nation's legal memorandum to Attorney Whittlesey[38] concludes, this treaty laid the foundation for the Potawatomie's *"treaty-recognized title"* to the region. The Nation now claims the earlier 1816 treaty as its foundation, not realizing that this land was abandoned by the "*United Nations...*" in the 1825 treaty. The Firm, in turn mistakenly argues in its submission that this treaty-recognized Indian title to the lands of Shabbona's Grove began as a result of language present in Article Three in the 1829 Prairie du Chien Treaty.

Nowhere in the 1829 Prairie du Chien Treaty's text was land granted to Shabenay and his band as the Firm asserts. As demonstrated above, the federal government's opinion was that the Band had only usufructory privileges. It was also the federal government's position that it alone held reversionary rights to this land. We find in Article IV of the 1829 treaty lands being "*granted*", "*There shall be granted by the United States.…*" to others, but not to Shabenay. If these lands had been "*granted*" to Shabenay and his band

[37] Dekalb County Taxpayers Against the Casino submission, Lynch "An Ethno-historical Evaluation of Land- holdings at Shabbona's Grove, DeKalb County Illinois" :13-16

[38] Memorandum, March 13, 2007 from Charles A. Hobbs and M. Francis Ayer of Hobbs, Strauss, Dean & Walker, LLP to Dennis Whittlesey.

by this treaty, as Shabenay attempted to have done in 1833, the lands, as we have discussed earlier, would have been vested in fee-simple title to Shabenay with no alienation restrictions, unless specifically stipulated within the treaty's language. There would not have been any tribal or Indian title established, title would have been vested solely in Shabenay as a private individual. There was no politically separate "*Potawatomie Nation*" at this time. It must be remembered that the goal of this treaty was the removal of all tribal entities out of Illinois via the extinguishment by purchase or abandonment of all Indian title. Establishing a tribal title by this treaty would have been in contradiction to the treaty's intent and those of Congress and the President. In his March 30, 1829 progress report to General John McNeil[39], Treaty Commissioner Eaton stated,

> The Congress of the United States appropriated by the Act of the 26th of May 1828 the sum of fifteen thousand dollars for certain objects therein enumerated and of which was to enable the President to extinguish the title to certain mineral lands claimed by the Winnebagoes, Potawatamies, Ottawas and Chippewa Indians east of the Mississippi and south of the Ouisconsin River …The agreement contemplates a treaty to be held at the time of fulfilling the above obligation, for the purpose of extinguishing by purchase, the mineral country claims by the aforesaid tribes of Indians…..

Additionally, there is no reference in either the 1829 treaty text, the Treaty's recorded proceedings, or in the Commissioner's communications with the Secretary of War where the word or term "*withdrawn*" was used indicating that the lands at Shabbona's Grove were not part of the ceded lands as this term was used in the Firm's

[39] NARA Washington D.C., RG. 234, Roll 696, Letters Received by the Office of Indian Affairs 1824-1880, Prairie du Chien Agency 1827-1833. Documents Relating to the Negotiations of the treaty of July 29, 1829, with the United Chippewa, Ottawa, and Potawatomi.

submission to the National Indian Gaming Commission. The Firm substituted "*withdrawn*"[40] in the place of the actual text which read "*From the cessions aforesaid, there shall be reserved for the use…*", not "*withdrawn.*" The substitution and use of this word by the Firm advances a connotation directly at odds with the existent historical record discussed above. In historical analysis, this practice would be considered nonprofessional and unethical. The lands at Shabbona's Grove remained part of the 1829 ceded lands as witnessed by the band's required abandonment of the Grove in 1837. If the Band had legal title to the lands at the Grove it could not have been ordered to remove from it by Federal Removal Agent Lewis Sands in August/September 1837 unless the land in question was specifically ceded to the United States. We also have Shabenay's assenting signature to the 1833 Chicago Treaty (*"Shab-eh-nay"*) which stipulated in the treaty's second article, *"…that the said Indians are to remove from all that part of the land now ceded, which is within the State of Illinois, immediately upon ratification*[February 21, 1835] *of this treaty…*" In this same Treaty Shabenay tried to have a personal reservation established at Shabbona's Grove. Who did he try to get it from? Certainly Shabenay did not attempt to attain it from the gathered okamas of the United Nations. Shabenay sought instead to obtain it from the federal government who was the fee-holder of these lands. It was rejected by the Senate. Why? The presence of many

[40] Dickinson Wright PLLC, Letter, October 1, 2007, Re: Proposed Gaming by Prairie Band Potawatomi Nation in Dekalb County Illinois :7

reservations, were in retrospect deleterious to the federal policy of removal west of the Mississippi. As Clifton[41] 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."

Secretary Cass's intervention led to the denial 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 that would have provided; "*aforesaid reservation to Shab eh nay shall be a grant in fee simple to him, his heirs and assigns forever…"* These stricken words yield to us two very important facts: Shabenay and his band did not have a permanent reservation established at Shabbona's Grove as a result of the July 29, 1829 Prairie du Chien treaty; neither Shabenay nor his band held any fee title interest to the lands there in 1833. The 1833 Treaty at Chicago did not alter either of these facts. Indeed Secretary of War Cass' instructions[42] to the treaty Commissioners was,

> Decline, in the first instances, to grant any reservations either to the Indians or others, and endeavor to prevail upon them to remove….

In addition, the "*Pottowautomie Nation*" the successor in interest to the former "*…Potawatami of the Illinois, Milwaukee, and*

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[41] Clifton, James A., The Prairie People: Continuity and Change in Potawatomi Indian Culture 1665-1965,: 244 University of Iowa Press, Iowa City.) "An Ethno-historical Evaluation of Land-holdings at Shabbona's Grove, DeKalb County Illinois" **DCTAC EXH. 28**

[42] **EXH 4.** Prucha, Francis P., 1984, The Great Father: The United States Government and the American Indians, Vol. II:247, University of Nebraska Press, Lincoln.

Manitoouck Rivers did in the January 5/17, 1846 treaty at Council Bluffs "*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…*"

In its conclusionary statement in its submission to NIGC, the Firm goes on to state, "*However, the only conclusion we can make as to the legal status of the land is that the current status of the land is unextinguished Indian title- but not necessarily a permanent reservation qualifying for gaming under IGRA.*" What title?

First, as we have just noted, Shabenay and his band did not have a reservation or title to the Grove lands in 1833. The federal government held reversionary title to these lands. Second, the 1825 Treaty (which was also held at Prairie du Chien) established boundaries for the politically united Potawatomi, Ottawa, and Chippewa, that did not include Shabbona's Grove, which according to the Nation's legal counsel in its March 13, 2007 Memorandum, was foundational to the Nation's claim to Indian title. Third, the 1829 Treaty at Prairie du Chien clearly extinguished any residual or remaining rights to the lands in the second cession and certainly did not create Indian title to the lands that encompassed the Grove. Fourth, in the 1846 Council Bluffs treaty the "*Pottowautomie Nation*" as the successor in interest to the former "*…Potawatami of the Illinois, Milwaukee, and Manitoouck Rivers*" ceded all the lands that the Nation held at that time or claimed subsequent to the August 29,

1821 Treaty at Chicago.[43] Supporting documentation, especially the opinions and determinations repeatedly generated from numerous Commissioners of Indian Affairs support this conclusion as well as the clear intent of the federal government for convening the 1829 treaty, "*the purpose of extinguishing by purchase, the mineral country claims by the aforesaid tribes of Indians.*"

The Firm's position stated in its September 2007 NIGC submission is that the 1829 Treaty, *"…gave Chief Shab-eh-nay and his Band recognized rights to treaty title, or Indian title but did not expressly confer permanent reservation status on the lands."* As we have seen from the historical record, the only rights conferred to Shabenay in his position as an okama of a corporate band was a usufructory right with no vested title.

Lastly, the Firm asserts that the Interior Department has "*never made a formal determination on the land status on the Shab-eh-nay Reserve or the Tribal Parcel.…*" As the historical evidence previously presented in the September 26, 2007 Dekalb County Taxpayers ethno-historical submission and in the historical evidence presented earlier in this submission depicts, it is abundantly clear that numerous opinions and determinations concerning the issue and title status of the lands of Shabbona's Grove had been repeatedly made by administrators within the Executive Branch, including one made by the Commissioner of Indian Affairs at the direction of the President of

[43] Dekalb County Taxpayers Against the Casino submission "An Ethno-historical Evaluation of Land-holdings at Shabbona's Grove, DeKalb County Illinois" :58

the United States. Never once did the Justice Department call into question any of these opinions and determinations made with regard to the lands at Shabbona's Grove. Bottom line is that the United States held the reversionary title to the lands at Shabbona's Grove.

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Appendix 1

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, Sociocultural 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.

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

Associates 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.
- 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, , Native American.
- Public speaking: public, private organizations, governmental testimony.
- Public Relations, Marketing, and Sales.

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 bid)

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 2nd Circuit Court of Appeals pending recognition
19. Golden Hill Paugussett, land claims; City of Shelton, Connecticut, 1994. Stay 2nd Circuit Court of Appeals, pending recognition
20. Golden Hill Paugussett, land claims; City of Bridgeport, Connecticut, 1995.
    Stay 2nd Circuit Court of Appeals pending recognition
21. Golden Hill Paugussett, land claims; Town of Seymour, Connecticut, 1994. Stay 2nd Circuit Court of Appeals 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 2nd Circuit Court of Appeals pending recognition
24. Golden Hill Paugussett, land claims; Town of Trumbull, Connecticut, 1995. Stay 2nd Circuit Court of Appeals 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. By "Theire Own Free Act & Deed": Connecticut Land Relations with Indian Tribes, 1496-2003. Heritage Books, 2006.

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

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

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

5. 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.

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

7. 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.

8. 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.

9. 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.

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

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

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

13. California Mission Studies Association.

Appendix II

Supporting Documentary Exhibits