



TESTIMONY OF CHAIRMAN JOSEPH RUPNICK, CHAIRMAN
PRAIRIE BAND POTAWATOMI NATION
TO
THE U.S. HOUSE OF REPRESENTATIVES
SUBCOMMITTEE ON INDIGENOUS PEOPLES OF THE UNITED STATES
ON
H.R. 8380,
THE PRAIRIE BAND POTAWATOMI NATION
SHAB-EH-NAY BAND RESERVATION SETTLEMENT ACT OF 2022

SEPTEMBER 27, 2022

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I. INTRODUCTION.

My name is Joseph Rupnick and I am the Chairman of the Prairie Band Potawatomi Nation (the "Prairie Band" or the "Nation"). We are the descendants of the Potawatomi people that were originally located in the Great Lakes area of what is now Northern Illinois, Northern Indiana, and Southern Wisconsin.¹ Today, most of our 4,500 citizens reside on or near our reservation lands in Kansas.

The reason we are in Kansas is because in the 1830s, the United States government pursued an Indian Removal Policy of clearing out all of the indigenous peoples east of the Mississippi River and taking our lands to allow for American expansion and settlement.

The Prairie Band Potawatomi people were removed from our homelands through a series of treaties with the United States culminating with the Treaty of Chicago in 1833.² Under that Treaty, our ancestors agreed to relinquish ownership of 5 million acres of land in northern Illinois in exchange for lands in the West. As explained in greater detail below, a unique feature of this Treaty is that 1,280 acres of aboriginal Potawatomi land were not relinquished because they were expressly carved out from that Treaty by the U.S. Senate during the ratification process.

Those reserved Potawatomi lands in Illinois (referred to herein variously as the "Reservation," "Shab-eh-nay's Reservation," the "Shab-eh-nay Reservation," or the "Shab-eh-nay Band Reservation") were owned and occupied by a Potawatomi Chief named Shab-eh-nay and his family. I am a descendant of Chief Shab-eh-nay and his fourth great-grandson. Shab-eh-nay was revered by the local non-Indian population that eventually moved into the area because he had warned them of ongoing threats from other Indians that were opposed to White settlement in the area.³ While the 1833 Treaty expressly preserved Shab-eh-nay's land, the United States Land Office sold the Shab-eh-nay Band Reservation in 1849, in clear violation of federal law.⁴

Since that time, the Prairie Band Potawatomi people and our officials have diligently sought to restore our ownership and sovereignty over the Shab-eh-nay Band Reservation. Thirty years ago, my mother, Mamie Rupnicki refocused that effort when she was our chairperson. Twenty years ago, the United States Department of Interior Solicitor's Office twice reviewed the treaty history and concluded that our Reservation still exists and recommended that Congress act to resolve our outstanding claim. That conclusion was further affirmed in 2020, when the United States Supreme Court decided the case of *McGirt v. Oklahoma*,⁵ which held that Indian reservation boundaries remain intact unless Congress expressly acts to disestablish them.

¹ See James A. Clifton, *THE PRAIRIE PEOPLE* 236, 301 (1977).

² See *id.* 216-245.

³ See *id.* at 236.

⁴ See generally, James Dowd, *BUILT LIKE A BEAR: WHICH IS A DESCRIPTIVE NAME FOR ONE OF THE LAST GREAT CHIEFS OF THE "THREE FIRES" IN ILLINOIS, SHABNI* (1979).

⁵ 140 S. Ct. 2452 (2020) (hereinafter "*McGirt*") (available online at: https://www.supremecourt.gov/opinions/19pdf/18-9526_9okb.pdf).

The Shab-eh-nay Band Reservation today is located in rural Dekalb County, Illinois, about a one-hour drive west of Chicago. Ninety percent of the land is occupied by non-Indian governments and individuals under deeds which we understand include language that indicates that ownership is subject to “all rights, claims, or title to the descendants of a Potawatomi Indian Chieftain named Shabbona and his band”. About half of the Reservation is parkland under state and county control, and there are about 30 non-Indian residents. Over the last few years, our Nation has repurchased a little over 10% of the Reservation from willing sellers.

On July 14, 2022, Natural Resources Committee Vice Chairman “Chuy” Garcia, and Representatives Lauren Underwood, Danny Davis, and Jake LaTurner filed H.R. 8380 to settle all outstanding issues associated with the illegal taking of Shab-eh-nay’s Reservation by the federal government in 1849. This follows the introduction of companion legislation in the Senate, S. 3242, by Senator Jerry Moran and Senator Roger Marshall.

If enacted, H.R. 8380 would—

- Confirm the Indian Country status of the 129+/- acres of land within the Reservation that is now owned by the Nation,
- Extinguish the Indian title within the Reservation boundaries of the 1151 acres of land currently occupied by non-Indian governments and individuals,
- Protect the cultural resources and remains of our ancestors located within the Reservation,
- Recognize the Nation’s authority to enter into intergovernmental agreements,
- Allows the Nation to acquire up to 1151 acres of trust land near the Reservation from willing sellers, and
- Provide an initial damages payment to the Nation of \$10 million, and establish a process for reaching a final compensation payment.

We strongly support H.R. 8380 and ask that you support its enactment. Like Chief Shab-eh-nay before us, we have built very positive relations with the local community over the years. Our goal is to resolve the outstanding issues associated with this illegal action by the federal government without resort to divisive, costly, and protracted litigation and disruption to the local community. We are hopeful that you agree with this approach.

What follows is a more extensive analysis of the legal basis for the Nation’s ownership, sovereignty and jurisdiction over Shab-eh-nay’s Reservation and the reasons why Congress should enact H.R. 8380.

II. HISTORICAL BACKGROUND.

The Prairie Band Potawatomi people were greatly affected by the United States government’s Indian Removal Policy of the 1830s, which forced our ancestors

from our aboriginal lands in northern Illinois and removed them to lands in Iowa and later Kansas.⁶

At the Treaty of Prairie du Chien of July 29, 1829,⁷ the Potawatomi and other Indians within the region ceded a large tract of land in what is now Illinois and Wisconsin to the United States for the sum of \$16,000 to be paid “annually, forever, in specie” along with \$12,000 in goods and 50 barrels of salt, which was also to be paid “annually, forever”. (See Exhibit A.) Article III of this Treaty expressly reserved “for Shab-eh-nay, two sections at his village near the Paw-paw Grove” along with reservations of land for two other named chiefs, Wau-pon-eh-see and Awn-kote.⁸ This purpose of this Treaty was to set aside lands for continued Indian occupation but it made no provision for Indian removal.

In 1833, our ancestors agreed in the Treaty of Chicago to relinquish all of our remaining lands in northern Illinois and southern Wisconsin – 5 million acres – and to relocate to an equivalent tract of land west of the Mississippi River.⁹ (See Exhibit B). This Treaty expressly disestablished the reservations set aside for Wau-pon-eh-see and Awn-kote that had been reserved for them under the Treaty of Prairie du Chien.¹⁰

However, Article 5 of the Treaty – which would have similarly extinguished the Indian title of Chief Shab-eh-nay’s land and converted it to his private ownership – was stricken from the Treaty when it was ratified by the U.S. Senate.¹¹ In doing so, the Senate expressly “carved out” Shab-eh-nay’s land from the overall land cession thereby preserving it as aboriginal Potawatomi land with recognized title remaining in Shab-eh-nay and his band.

Following the Treaty of Chicago, most of our ancestors moved to the lands that had been secured for them in the West as agreed, but Chief Shab-eh-nay and his band remained on his lands in Illinois. In 1849, while he was away visiting his relatives in Kansas, the United States General Land Office illegally sold this land without Congressional approval at public auction, and title to the land was passed to non-Indian purchasers. Despite several years of effort afterwards, neither Shab-eh-nay nor his heirs were ever successful in regaining the land or receiving compensation for its illegal sale before he died in 1859.

Notably, no subsequent treaties or federal legislation ever disestablished or diminished the Shab-eh-nay Band Reservation.

⁶ For a summary description of the treaty history between the Potawatomi with the United States, see *Citizen Band of Potawatomi Indians of Oklahoma, et al. v. United States*, 27 IND. CL. COMM. 187 (Mar. 28, 1972).

⁷ 7 Stat. 320 (proclaimed Jan. 2, 1830) (the other Indian nations party to this treaty were the Chippewa and the Ottawa).

⁸ A section constitutes one square mile, or 640 acres.

⁹ Treaty of Sept. 26, 1833, 7 Stat. 431, Art. II (proclaimed Feb. 21, 1835) (other parties included the Chippewa and the Ottawa).

¹⁰ *Id.* Art. III (“Two thousand dollars to be paid to Wau-pon-eh-see and his band, and fifteen hundred dollars to Awn-kote and his band, as the consideration for nine sections of land, granted to them by the 3d Article of the Treaty of Prairie du Chien of the 29th of July 1829 which are hereby assigned and surrendered to the United States.”).

¹¹ See 4 JOURNAL OF THE EXECUTIVE PROCEEDINGS OF THE SENATE 384 (April 7, 1834).

Today, Shab-eh-nay's Reservation is located near Dekalb, Illinois in a rural area of northern Illinois 70 miles west of Chicago. The Reservation is currently occupied by the State of Illinois (Shabbona Lake State Park), the Dekalb county government (Chief Shabbona Forest Preserve), approximately two dozen individuals, a railroad, and other utilities. (See Exhibit C). Some, if not all, of the original deeds to the land within the Reservation include language that ownership is subject to "all rights, claims, or title to the descendants of a Potawatomi Indian Chieftain named Shabbona and his band".

Since 1849, Chief Shab-eh-nay and our Nation's leaders have engaged in a variety of efforts to restore title and jurisdiction over the Shab-eh-nay Band Reservation. We have so far not been successful. Nor have we ever been compensated for the illegal taking of this land by the federal government.

The Nation pursued a claim under the Indian Claims Commission Act of 1946 for additional compensation for the loss of our aboriginal lands in northern Illinois and southern Wisconsin. However, the Commission never provided any compensation for the taking of the Shab-eh-nay Band Reservation. In 1962, the Commission awarded our Nation and other Indians additional compensation for the taking of lands subject to the Treaty of Prairie du Chien of 1829.¹² However, this award was limited only to those lands that were ceded to the United States under that Treaty. The Commission understood that that the Shab-eh-nay Band Reservation (and the two other reservations created under that Treaty) were never ceded under that Treaty, and so therefore that acreage was excluded from any damages calculation and award.

In 2006, the Nation purchased back one-tenth of the Reservation (128+/- acres) from the prior non-Indian occupants. (See Exhibit F). While an arms-length transaction, the Nation was compelled to pay more than seven times the fair market value of land located outside the Reservation. We also acquired two other smaller parcels totaling a little more than an acre. (See Exhibits G and H).

In 2014, in an effort to obtain some redress for the wrongful sale of the Reservation, the Nation filed an application with the U.S. Department of the Interior ("DOI") to have our land taken into "trust" status pursuant to the Indian Reorganization Act of 1934.¹³ While the application was pending, the Nation's Council and I felt that the better approach was to work with Congress to address *all* outstanding issues associated with the illegal taking of Shab-eh-nay's Reservation. The trust application, even if it had been granted, would not have addressed the issue of compensation to the Nation, or the Indian title to the 90% of the Reservation currently occupied by the non-Indian governments, entities, and

¹² See 11 IND. CL. COMM. 693 (1962) at:

<https://cdm17279.contentdm.oclc.org/digital/collection/p17279coll10/id/726/rec/9>. The Treaty of Prairie du Chien of 1829 involved lands located in Royce Areas 147 and 148 totaling 3,528,929 acres. 16,640 acres was deducted from the total acreage subject to compensation to acknowledge the lands reserved under Articles III and IV of the Treaty, including the Shab-eh-nay Band Reservation, which were not transferred to the United States.

¹³ See 25 U.S.C. §465.

individuals. As a result, we withdrew the trust application from further DOI consideration and began the effort that led to the introduction of H.R. 8380.

Throughout the years of efforts by Nation officials to regain ownership over the Shab-eh-nay Band Reservation, no other federally-recognized Indian tribe has stepped forward to contest the Nation's claim to the Reservation. Nor has any other tribe challenged the Department of Interior's determination in 2000 that the Prairie Band Potawatomi Nation is the successor-in-interest to Chief Shab-eh-nay. The history of our Nation being the rightful owner of the Reservation has been well documented, was twice confirmed by the Department of Interior solicitors, and should be a conclusion accepted by the Congress.

III. THE CURRENT LEGAL STATUS OF THE SHAB-EH-NAY BAND RESERVATION.

In 1790, one of the first actions of Congress was to enact legislation to prevent sales of Indian lands to non-Indians without the federal government's approval. This law, called the Trade and Intercourse Act, or Nonintercourse Act, was affirmed five times by the Congress and remains in effect to the present day. The current version of the Nonintercourse Act, which was in effect at the time Shab-eh-nay's Reservation was sold in 1849, provides that—

No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.¹⁴

Because Congress expressly recognized the existence of the Shab-eh-nay Band Reservation under the 1829 and 1833 Treaties, the Reservation boundaries remain intact, and all of the land within it remains federally-recognized Indian Country.¹⁵ And because the initial sale in 1849 and all subsequent transactions were never approved by Congress, all of those transactions are void *ab initio*.¹⁶

¹⁴ U.S. Congress, *An Act to Regulate Trade and Intercourse with the Indian tribes*, Act of July 22, 1790 (codified at 25 U.S.C. §177).

¹⁵ See 18 U.S.C. § 1151. The term "Indian Country" is a term of art in federal Indian law and refers to the geographic area over which a federally-recognized Indian tribal government has sovereignty and jurisdiction, and a state government does not. The commonly used definition of Indian Country is taken from the United States Code—

(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation,

(b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and

(c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

¹⁶ See *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 245-246 ("The pertinent provision of the 1793 [Nonintercourse] Act, § 8, like its predecessor, § 4 of the 1790 Act, 1 Stat. 138, merely codified the

The United States government supports the conclusion that the Shab-eh-nay Reservation remains Indian Country. Twenty years ago, the DOI Solicitor's Office issued two separate legal opinions that confirmed the existence of Shab-eh-nay's Reservation and its status as Indian Country. Neither of these opinions have been withdrawn or superseded.

A. THE 2000 DOI ASSOCIATE SOLICITOR'S OPINION.

On July 24, 2000, DOI Associate Solicitor – Indian Affairs Derril B. Jordan issued a lengthy opinion regarding the legal status of Shab-eh-nay's Reservation.¹⁷ (See Exhibit D). Jordan set forth the treaty history described above and highlighted that, following the Senate's elimination of Article 5 from the 1833 Treaty, "the two sections of land in what is now DeKalb County retained the status of tribal communal land with recognized title remaining in Shab-eh-nay and his Band."¹⁸

In his opinion, Jordan asked and answered two important questions:

1. *What type of title to the Reservation did Shab-eh-nay and his band possess? Has that title been extinguished?*

As discussed above, following an extensive review of the relevant case law, Jordan concluded that it is "evident that the Shab-eh-nay Band Reservation continues to exist" and that, even if Shab-eh-nay had abandoned the Reservation (which he did not), "voluntary abandonment could not extinguish recognized title without Congressional action."¹⁹

2. *What tribe is the successor in interest to the Shab-eh-nay Band?*

Because the Shab-eh-nay Band of Potawatomi Indians no longer existed by that name, Jordan had to determine which federally-recognized tribe had the right to assert ownership and jurisdiction over the Shab-eh-nay Reservation. Jordan, based on the historical materials, concluded that the "Prairie Band of Potawatomi Indians of Kansas has the strongest claim that it is the successor in interest to the Shab-eh-nay Band and is entitled to enforce the land claim."²⁰

At the time Jordan wrote his opinion, the State of Illinois opposed the Nation's claim of jurisdiction over the Reservation. Jordan addressed and dismissed several of the State's objections to the Nation's claim – including that the Reservation was voluntarily abandoned, that later Congressional appropriations legislation had somehow ratified the sale, and that somehow a statute of limitations applying to Indian Claims Commission actions should have been applied.

Jordan closed his opinion with an assessment of the various options for dealing with the "title problem" associated with the non-Indians occupying the

principle that a sovereign act was required to extinguish aboriginal title and thus that a conveyance without the sovereign's consent was void *ab initio*.").

¹⁷ Memorandum from DOI Associate Solicitor Derril B. Jordan to DOI Deputy Secretary David Hayes and Assistant Secretary – Indian Affairs Kevin Gover, *Illinois Land Claim of the Prairie Band Potawatomi*, Jul. 24, 2000. At the time, Mr. Jordan held the highest-ranking Indian affairs legal position within the DOI.

¹⁸ *Id.* at 3.

¹⁹ *Id.* at 11.

²⁰ *Id.* at 12.

Reservation, but fundamentally affirmed that the Reservation remained Indian Country subject to tribal and federal jurisdiction. His four recommendations for action are discussed in a later section of this testimony.

B. THE 2001 DOI SOLICITOR'S OPINION.

On January 18, 2001, DOI Solicitor John Leshy affirmed the Jordan opinion in his own opinion letter stating that, "the Prairie Band has a credible claim for unextinguished Indian title" to the Shab-eh-nay Reservation.²¹ (See Exhibit E). He also stated that "[o]ur research has also led us to the conclusion that the Prairie Band is the lawful successor in interest to Chief Shab-eh-nay and his Band."²²

Leshy acknowledged that the Nation had pursued a claim before the Indian Claims Commission, but that the Commission had awarded damages for the loss of certain aboriginal lands in Illinois, but expressly did not include the Shab-eh-nay Reservation as the basis for further compensation.²³ As a result, Leshy concluded: "[w]e believe the U.S. continues to bear a trust responsibility to the Prairie Band for these lands."²⁴

C. CONGRESSIONAL REACTION TO THE JORDAN AND LESHY OPINIONS.

At the time DOI issued its opinion letters, opposition to the Prairie Band's ownership claim to the Shab-eh-nay Reservation was led by the local Member of the U.S. House of Representatives – Speaker Dennis Hastert. Legislation was filed in both the House and the Senate to extinguish the Prairie Band's ownership of the Reservation without any direct compensation.²⁵ A hearing on the legislation was convened in the House Resources Committee on May 8, 2002, at which significant opposition was expressed from Members supportive of Tribal rights.²⁶ No action was taken on this proposed legislation by the 107th Congress, and the bill was never re-introduced.

D. THE LEGAL EFFECT OF THE U.S. SUPREME COURT'S 2020 MCGIRT DECISION.

The U.S. Supreme Court's recent decision in *McGirt v. Oklahoma*²⁷ confirms the accuracy of the conclusions reached by the DOI Solicitor's Office – that lands within

²¹ Letter from DOI Solicitor John Leshy to House Speaker J. Dennis Hastert and Illinois Governor George H. Ryan, *Land Claim of the Successors of Chief Shab-eh-nay and his Band*, Jan. 18, 2001.

²² *Id.* at 2. As Solicitor, Mr. Leshy was the highest-ranking legal officer within the DOI.

²³ See e.g. *The Pottawatomie Tribe of Indians et al. v. United States*, 42 Ind. Cl. Comm. 354 (Opinion Dkt. 15-D, 29-B, 311, 313, 314-A, 315, Aug. 25, 1978).

²⁴ *Id.*

²⁵ See U.S. Senate, 107th Cong., S.333, *A Bill to Provide for the Equitable Settlement of Certain Indian Land Disputes Regarding Land in Illinois* (Mar. 14, 2001) (<https://www.congress.gov/bill/107th-congress/senate-bill/533>); U.S. House of Representatives, 107th Cong., H.R. 791 (<https://www.congress.gov/bill/107th-congress/house-bill/791/text>).

²⁶ See U.S. House of Representatives, Committee on Resources, *Legislative Hearing on H.R. 791, to Provide for the Equitable Settlement of Certain Indian Land Disputes Regarding Land in Illinois; and H.R. 521 to Amend the Organic Act of Guam for the Purpose of Amending the Local Judicial Structure of Guam* (May 8, 2002) (<https://www.congress.gov/107/chr/CHRG-107hrg79494/CHRG-107hrg79494.pdf>).

²⁷ *Id. supra* note 5.

the Shab-eh-nay Band Reservation remain Indian Country subject to the Nation's Indian title and jurisdiction.

McGirt addressed the question of what legal requirements are necessary to extinguish the boundaries of an Indian reservation that was originally established by Congress. The case involved the criminal prosecution of a Seminole Indian by the State of Oklahoma on land within the Creek Nation's reservation established in 1833. The Court held that the Creek reservation had not been disestablished by Congress and thus remained Indian Country, and the State of Oklahoma was without jurisdiction to prosecute any Indian within the reservation.

In rendering its decision, the Court refined the legal "test" necessary to determine whether an Indian reservation has been disestablished or not: "To determine whether a tribe continues to hold a reservation, there is only one place we may look: the Acts of Congress."²⁸

The Supreme Court has long held that Article I, Section 8, Clause 3 of the Constitution grants to Congress "plenary power" over Indian affairs.²⁹ Accordingly, the Court affirmed that states have no authority to modify the boundaries of Indian reservations that have been established by Congress.³⁰ Nor, too, the Court concluded, do the federal courts have any authority to modify reservation boundaries:

Likewise, courts have no proper role in the adjustment of reservation borders...saving the political branches the embarrassment of disestablishing a reservation is not one of our constitutionally assigned prerogatives. '[O]nly Congress can divest a reservation of its land and diminish its boundaries.' So it's no matter how many other promises to a tribe the federal government has broken. If Congress wishes to break the promise of a reservation, it must say so.³¹

The *McGirt* case directs the conclusion that the Shab-eh-nay Band Reservation remains Indian Country. Like the decision in *McGirt*, not only did Congress not disestablish the boundaries of Shab-eh-nay's Reservation under the 1829 Treaty, it expressly preserved those boundaries through subsequent action ratifying the 1833 Treaty. No subsequent treaty or federal legislation has been enacted by the Congress to disestablish those Reservation boundaries.

IV. RELATED ISSUES.

As previously discussed, 90% of the Shab-eh-nay Band Reservation today is occupied by non-Indians, their state and local governments, and a railroad. The Nation itself has re-acquired approximately 10% of the Reservation. But given the passage of time, and intervening developments in federal law, questions arise regarding the Nation's sovereignty and jurisdiction over lands within the Reservation.

²⁸ *McGirt*, *supra* note 5 at 7.

²⁹ See e.g. *Worcester v. Georgia*, 31 U.S. 515 (1832); *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831); *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903).

³⁰ *McGirt*, *supra* note 5 at 7 (citations omitted).

³¹ *Id.* at 7-8 (citations omitted).

A. WHAT IS THE NATION'S AUTHORITY WITHIN THE RESERVATION?

Because the Shab-eh-nay Band Reservation remains unextinguished Indian Country, federal law presumes that the Prairie Band retains sovereignty and jurisdiction over the land within its boundaries regardless of current land ownership. Neither the passage of time, nor the fact that nearly 90% of the Reservation is occupied by non-Indians, is material to the question of whether the Nation retains its sovereign authority over the lands within its Reservation.

The Nation's jurisdiction within the Reservation is strongest with respect to its authority over its own citizens and Indians of other federally-recognized Indian nations.³² For example, the Nation currently asserts jurisdiction within the Reservation through its Law and Order Code.³³ Were a Prairie Band citizen to commit a crime within the Reservation, the Nation could prosecute and punish the offender. Because the offense occurred within Indian Country, and the Nation's law precludes State and DeKalb County jurisdiction, neither the State nor the County would have any authority to charge and prosecute for the same offense. This is exactly the situation now occurring in Oklahoma where, following *McGirt*, the State and local governments have lost their ability to prosecute Indians for offenses within the Creek reservation.³⁴

The Nation's authority over non-Indian conduct within the Shab-eh-nay Reservation is also preserved, albeit with some limitation. For example, the Supreme Court has said that Tribal governments may not generally exercise criminal jurisdiction over non-Indian misconduct within a reservation.³⁵ And that Tribal governments have limited civil regulatory authority over non-Indian activities occurring on land owned by them within a reservation.³⁶

To sustain such tribal authority, the Court has said that Tribes "may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter into consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements" or if their conduct "threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the

³² For purposes of Tribal criminal jurisdiction, Indians of other tribes have the same political status as Indians of the prosecuting tribe. See 25 U.S.C. § 1301(2).

³³ See P.B.P.N. Law and Order Code § 20-4-1, which provides that—

In all cases involving the Shab-eh-nay Reservation, the jurisdiction of the Nation and the substantive and procedural requirements of this Title shall apply, provided that, if the substantive requirements of this Title directly conflict with the substantive requirements of the laws of the Illinois or DeKalb County, compliance with those requirements shall be sufficient for the purposes of tribal law. However, in no event shall the jurisdiction of the State of Illinois or DeKalb County or the procedural requirements of Illinois state law or DeKalb County code apply to any activity within the boundaries of the Shab-eh-nay Reservation.

³⁴ See *e.g.* *Deerleader v. Crow*, (No. 20-CV-0172-JED-CDL, Jan. 15, 2021)(ordering release from state custody of Creek Indian who committed a crime within the 1866 Creek reservation following *McGirt* due to underlying conviction being outside of state authority).

³⁵ See *Oliphant v. Suquamish*, 435 U.S. 191 (1978).

³⁶ See *Montana v. United States*, 450 U.S. 544 (1981).

tribe.”³⁷ Thus, a Tribal government’s authority within a reservation can be asserted in many contexts. For example, Tribal governments cannot be required to pay local property taxes on lands they re-acquire from non-Indians within their reservation.³⁸

In sum, it can be concluded that the Nation retains sovereignty and jurisdiction within the Shab-eh-nay Band Reservation, particularly over Indians and even over non-Indians in certain circumstances.

B. DOES THE NATION HAVE AUTHORITY TO CONDUCT GAMING WITHIN THE RESERVATION?

Yes, the Nation currently has authority to conduct gaming activities within the Reservation pursuant to federal law.

Under the Indian Gaming Regulatory Act (“IGRA”),³⁹ all federally-recognized tribes have authority to conduct gaming activities on fee lands located within their reservations. IGRA states that tribes have authority to conduct any gaming activity on “Indian lands”, which is defined as—

- (A) all lands within the limits of any Indian reservation; and
- (B) any lands title to which is held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power.

At this time, the Nation has not pursued the development of any gaming operations. Pursuant to IGRA, however, it has the unilateral ability to engage in Class I and Class II gaming and, subject to the negotiation of a compact with the State of Illinois, could pursue Class III gaming activities as well.⁴⁰

This conclusion was confirmed by Department of Interior Principal Deputy Assistant Secretary Wizipan Garriott at the legislative hearing on H.R. 8380 held before the U.S. House of Representatives Subcommittee for Indigenous Peoples of the United States on September 14, 2022.⁴¹

C. WHAT ARE THE RIGHTS OF THE NON-INDIAN RESERVATION OCCUPANTS?

Currently, the non-Indian residents, governments, and entities within the Reservation occupy lands within Indian Country that they do not lawfully own. Regardless of the fact that these non-Indians acquired their occupancy claims through

³⁷ *Id.* at 565-566.

³⁸ In a decision last year by the Second Circuit Court of Appeals, *Cayuga Nation v. Seneca County*, the court upheld a Tribal government’s assertion of sovereign immunity against county property tax collection on land re-purchased within its historic reservation. While the court in that case recognized that the county had the authority to assess property taxes on the land, it denied the county any practical remedy for collection. Instead, it simply recommended that the county pursue either a tax collection agreement with the Tribe or “seek appropriate legislation from Congress.” See *Cayuga Indian Nation of New York v. Seneca County*, (No. 19-0032, Oct. 23, 2020).

³⁹ See 25 U.S.C. §§ 2701 *et seq.*

⁴⁰ See 25 U.S.C. § 2710(d).

⁴¹ See Hearing Video Recording at: https://naturalresources.house.gov/hearings/hybrid-scip-legislative-hearing_september-14-2022--.

arms-length real estate transactions in the past, each of them purchased a title “clouded” by the original violation of the Nonintercourse Act. Moreover, the non-Indian ownership interests by deed are subject to the interests of Chief Shab-eh-nay and his descendants, e.g. the Nation.⁴²

Federal courts have held that Tribal governments in such a situation have no unilateral right to eject non-Indian occupants to recover occupancy of their land.⁴³ Generally, that power rests solely with the federal government, absent scenarios such as expired leasing arrangements.⁴⁴

Nonetheless, the lands occupied by the non-Indian governments and individuals within the Shab-eh-nay Band Reservation remain within Indian Country and are subject to the Nation’s unextinguished sovereignty and jurisdiction. Accordingly, the Nation retains traditional real property ownership rights to secure its interests, subject to potential defenses, that include the ability to sue current occupants for trespass and damages and other remedies.

Litigation remedies such as this are inherently controversial given that the non-Indian occupants are most likely not aware that they have acquired “clouded” title in the first place due to settled expectations that they “own” the land that they or their ancestors have purchased.⁴⁵ But worse yet, if such approach were pursued, no conclusive remedy

⁴² See Katherine F. Nelson, *Resolving Native American Land Claims and the Eleventh Amendment: Changing the Balance of Power*, 39 VILL. L. REV. 525, 549-550 (1994) (citations omitted) (available online at <https://digitalcommons.law.villanova.edu/vlr/vol39/iss3/1/>). This has potentially significant legal consequences for those in such a position, as the following law review analysis of Indian land claim actions generally describes:

Most of the claim areas are currently inhabited by non-Natives. They include private homeowners, businesses and farms, as well as the local and state governments. Filing a land claim action places a cloud on title to the land within the claim area. Title insurance companies are reluctant to write title insurance in claim areas, making land transfers virtually impossible. Potential buyers have difficulty getting mortgages, and landowners cannot sell their land. Stagnation in the real estate market, in turn, harms other segments of the economy within the claim area and, sometimes throughout the state. Outside businesses are reluctant to start new ventures in the region while existing business[es] are reluctant to expand. Tribal land claims can also affect the state and local governments’ ability to raise revenue by impairing their bond ratings.

⁴³ See *Cayuga Indian Nation v. Pataki*, 413 F.3d 266 (2d. Cir. 2005).

⁴⁴ See Anthony Cardinale and Carl Allen, *Salamanca Property Owners Who Have Not Signed Leases Ordered to Leave Homes*, May 3, 1997, THE BUFFALO NEWS (reporting on federal court order to evict non-Indian trespassers from Seneca reservation) (available online at: https://buffalonews.com/news/salamanca-property-owners-who-have-not-signed-leases-ordered-to-leave-homes/article_ef0307c0-9061-57d8-9ec3-76521380d669.html).

⁴⁵ See *supra* note 42, at 550 (citations omitted):

Tribal land suits also generate hostility and exacerbate existing antagonism among Native Americans, local residents and the state. Over the years, differing life styles, sovereignty disputes, conflicting land claims and prejudice have often generated distrust between Indians and local residents, as well as between Indians and the state. Generally, Native Americans have not inhabited the disputed land for years, even centuries. Whereas some of the non-Native inhabitants may have occupied the land for generations. Assuming that they or their ancestors had acquired fee title, the current inhabitants naturally believe that after so many years they have an inherent right to the land. Suddenly, these inhabitants find their homes, businesses and way of life threatened.

could be reached as no court has authority to clear Indian title or modify reservation boundaries – only Congress has that authority under federal law.

D. IS THE U.S. GOVERNMENT LIABLE FOR A BREACH OF ITS TRUST RESPONSIBILITY TO PROTECT THE NATION’S OWNERSHIP OF THE RESERVATION?

The Nation asserts that the United States remains liable for a breach of its trust responsibility by illegally selling Shab-eh-nay’s Reservation in 1849, and this has been conceded by the Department of the Interior. In 2001, the Department of the Interior Solicitor’s Office concluded that, “[i]t is our opinion that the United States government is responsible for the dispossession of Shab-eh-nay’s Band as well as the cloud on the titles of the non-Indian settlers who purchased land in the claimed areas.”⁴⁶

In that opinion, the Solicitor’s Office went on to assert that it believes that the Nation could not bring suit against the United States for money damages due to the statute of limitations contained within the Indian Claims Commission Act. This is a debatable assertion, but the Solicitor nonetheless acknowledged that the Nation was owed compensation for the illegal taking of Shab-eh-nay’s land, and that Congressional action was necessary to redress the clouded title of the non-Indian Reservation occupants.

Since 2001, case law governing breach of trust actions has evolved, and accordingly a conclusive answer to the merits of a breach of trust action by the Nation is beyond the scope of this testimony. Such analysis, however, were it to lead to a bar against legal action brought by the Nation against the United States, would not bar legal action against the current occupants of the land for a violation of the Nonintercourse Act and ongoing trespass.

In sum, the underlying misconduct by United States officials is undeniable, is acknowledged by the United States’ own lawyers, and is thus the basis for Congressional action to provide legal and financial redress to the Nation and the non-Indian governments and individuals currently occupying lands within the Reservation.

This position was confirmed by the Department of Interior at the hearing on H.R. 8380 held before the House of Representatives Subcommittee for Indigenous Peoples of the United States on September 14, 2022. The Department witness, Principal Deputy Assistant Secretary Wizipan Garriott, expressed the Department’s support for “the goal of H.R. 8380 to settle the Prairie Band Potawatomi Nation’s land claims related to the wrongful sale of the Shab-eh-nay Reservation” and its desire to work with the Nation and Congressional sponsors to finalize the legislation.⁴⁷ Moreover, the Department confirmed that no other federally-recognized tribe had expressed any claim to the Reservation as a successor-in-interest.

⁴⁶ See Jordan Opinion, at 18.

⁴⁷ See Statement of Wizipan Garriott, Principal Deputy Assistant Secretary of Interior for Indian Affairs, Sept. 14, 2022 at: <https://naturalresources.house.gov/imo/media/doc/SCIP%20Hrg%2009.14.22%20-%20Testimony%20-%20Hon.%20Garriott.pdf>.

E. WHAT ARE THE DAMAGES OWED TO THE NATION?

The Nation has been deprived of its ownership and use of the Shab-eh-nay Reservation since 1849, the year that the General Land Office sold the land at public auction without Congressional authorization. During that time, the Nation has been denied the cultural, social, and economic benefit of those lands.

To assist in identifying its economic loss, the Nation retained the renowned economic consulting firm, CompassLexecon, to estimate the Nation's economic loss for the wrongful taking of Shab-eh-nay's Reservation. Accordingly, to its report, "the best measure for compensation due to the Nation is \$99.1 million as of the end of 2018."⁴⁸ (See Exhibit I).

In addition, it is estimated that it will cost the Nation approximately \$25 million to repurchase 1,151 acres of land to replace the lands lost within the Reservation (See Exhibit J.) Under H.R. 8380, this land would be located within the Reservation or "Replacement Area" and become part of the "Restored Reservation."

V. OPTIONS FOR REDRESS.

There are several different options to address the consequences of the federal government's illegal taking of the Shab-eh-nay Band Reservation and to resolve the clouded title of the current non-Indian occupants. Twenty years ago, after confirming the validity of the Reservation's status, DOI Associate Solicitor Derril Jordan outlined four potential options for redress—

1. *Negotiate directly with all of the interested parties to draft and propose legislation to Congress to settle the claim.*
2. *Refer the matter to the United States Court of Federal Claims.*
3. *Request the Department of Justice to sue the current landowners on behalf of the successor(s) in interest to Shab-eh-nay's Band.*
4. *Do nothing.*

The Congressional settlement approach is the best approach for resolving all outstanding issues associated with the wrongful taking of Shab-eh-nay's Reservation. It was the right approach 20 years ago and it is the right approach today.⁴⁹

⁴⁸ See Eric Henson, CompassLexecon, *Valuation of the Illinois Land Claim of the Prairie Band Potawatomi Nation*, Aug 30, 2022.

⁴⁹ Associate Solicitor Jordan devoted most of his attention to the first option – pursuing a Congressional resolution of the Nation's claim and all of the related issues—

...the Executive Branch of the United States could play a role in resolving the cloud on the title created by the claim by negotiating directly with all of the interested parties. This approach would involve working with the Prairie Band of Potawatomi and the State of Illinois to draft and present to Congress federal legislation which would clear the title of the current landowners and provide a compensation package for the Prairie Band of Potawatomi. This approach would guarantee a detailed analysis of all of the issues and it also avoids the unseemly possibility of holding innocent land owners responsible for the alleged misdeeds of the United States. It is

In the alternative, litigation against the United States government, State and local officials, and the non-Indian occupants would be expensive, time-consuming, and fundamentally unfair to the Prairie Band. It is also certainly unfair to the current non-Indian occupants, who have long-settled, albeit misplaced, ownership expectations. From the perspective of the United States, it is also potentially more expensive as the federal government's liability is clear, but the scope of damages owed to the Nation is not. Litigation, of course, is also divisive and disruptive and threatens years of good will that the Nation has cultivated with the local residents based upon a long-recognized reverence for Chief Shab-eh-nay. Moreover, litigation would be inconclusive, as the courts can only recognize unextinguished Indian title, cannot craft settlements or modify reservation boundaries, or appropriate funds to pay damages.

In his 2001 opinion, DOI Solicitor John Lesly echoed this recommendation:

[T]here is much to be said for pursuit of a settlement for ratification by Congress that would avoid the time, expense, and acrimony of litigation. We have long encouraged such settlements of credible claims, and there would appear to be genuine possibility here of amicable resolution.

Notably, neither of the DOI Solicitor opinions recommend that the DOI take administrative action to address the Nation's claim. The reason is simple – there is no administrative action that the Executive Branch can take to remedy the multitude of consequences associated with the illegal sale of the land by federal officials in 1849. Only Congress has the authority to resolve violations of the Nonintercourse Act, provide compensation to the aggrieved Indian tribe, and if necessary, settle the claim and modify or extinguish aboriginal and recognized Indian title.

It is true that the DOI has authority to take land into trust and, in so doing, re-recognize the Nation's sovereignty and jurisdiction over a portion of the Reservation. But the DOI has no authority to expend funds necessary to settle the Nation's damages claim without Congressional authorization and appropriation. And it has no authority to clear the title of the non-Indians living within the Reservation. If a comprehensive solution is to occur, that solution must come from Congress.

VI. CONCLUSION.

It has been 189 years since the United States promised Chief Shab-eh-nay that he and his descendants would retain lands in Illinois to own and live on forever. Since that time, the Prairie Band Potawatomi people have never ceased fighting to regain our ownership and control over Shab-eh-nay's Reservation. We have worked hard over the last 30 years, and we expended millions of our own dollars to re-purchase land within our Reservation as part of our effort to regain federal acknowledgement of our ownership and sovereignty. Twenty years ago, top officials in the United States Department of the

likely that the United States would need to provide a substantial contribution to the settlement due to its role in the erroneous conveyances.

*TESTIMONY OF THE PRAIRIE BAND POTAWATOMI NATION
IN SUPPORT OF H.R. 8380*

Interior agreed that the Nation had been wronged and advised that Congress act to resolve the injustice.

H.R. 8380 corrects an historical wrong to the Prairie Band Potawatomi people and does so in a way that causes no disruption to the local community. We, the descendants of Chief Shab-eh-nay, ask that the Congress remedy this historic injustice by enacting H.R. 8380 into law.