UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

SAGINAW CHIPPEWA INDIAN TRIBE OF MICHIGAN,

Plaintiff,

and

THE UNITED STATES OF AMERICA

Intervenor Plaintiff

v.

JENNIFER GRANHOLM, Governor of the State of Michigan in her official capacity, MIKE COX, Attorney General of the State of Michigan in his official capacity, JAY B. RISING, Treasurer of the State of Michigan, and the STATE OF MICHIGAN

Defendant,

and

THE COUNTY OF ISABELLA

Applicant for Intervention

_____/

Case No. 05-10296-BC
Honorable Thomas L. Ludington

MOTION TO INTERVENE AS A DEFENDANT

NOW COMES Larry J. Burdick, Prosecuting Attorney for the County of Isabella, acting at the request of Isabella County, and hereby moves for leave to intervene as a defendant-intervenor in this action, pursuant to Fed. R. Civ. P. 24(a) and 24(b), as a matter of right or, in the alternative, seeks permissive intervention at the discretion of the Court.

Plaintiffs in the present suit seek prospective, injunctive, and declaratory relief asserting that an Isabella Reservation, comprised of five full townships and two half townships, was established pursuant to the treaty of 1855, 11 Stat. 63 (August 2, 1855) and the treaty of 1864, 14

Stat. 657 (October 18, 1964). Plaintiffs seek a permanent injunction prohibiting the State of Michigan from exercising criminal and civil jurisdiction within this claimed "Indian country" area. The County of Isabella disagrees and contends that the treaties did not create a Reservation encompassing all of the lands within the designated townships. The County of Isabella seeks to confirm that only those lands held in trust by the Federal government on behalf of the Saginaw Chippewa Tribe constitutes the Reservation.

The County of Isabella seeks to intervene as a matter of right, as the County has its own significant and protectable interests in regulating property and enforcing civil and criminal laws within its borders. These interests are not adequately represented by the State of Michigan.

In the alternative, the County meets the standards for permissive intervention. The intervention will not cause undue delay or prejudice the rights of the original parties, because although the County has its own unique and substantial interests concerning the lands at question, the County seeks to litigate many of the same issues already before the Court.

Pursuant to Local Rule 17, Isabella County sought concurrence in this motion from each of the parties. Counsel for the Saginaw Chippewa Indian Tribe indicated that they would oppose the County's Motion for Intervention.

WHEREFORE, the County of Isabella respectfully requests that this Court grant its motion to intervene and in support, relies upon the attached brief.

Date: September 18, 2007

s/Larry J. Burdick
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BRIEF IN SUPPORT OF MOTION TO INTERVENE

Introduction:

The Saginaw Chippewa Indian Tribe (hereinafter the "Tribe") and the United States seek a permanent injunction prohibiting the State of Michigan from exercising criminal and civil jurisdiction within the reservation inconsistent with its "Indian country" status. The County of Isabella (hereinafter the "County") seeks to confirm that only those lands held in trust by the Federal government on behalf of the Saginaw Chippewa Tribe constitutes the Reservation. The County seeks to intervene in this action as it has a vital legal interest in the regulation and enforcement of civil and criminal laws within its boundaries.

Argument

The Federal Rules of Procedure Rule 24 allows for intervention as of right or by permission in an action before the district court. Fed. R. Civ. P. 24(a) and (b). Rule 24(a) provides in pertinent part: "Upon timely application, anyone shall be permitted to intervene in an action . . . when the applicant claims that the interest relating to the property . . . which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." Four criteria must be met for intervention as a matter of right: (1) the application is timely; (2) the party must have a substantial legal interest in the case; (3) the party must demonstrate that its ability to protect that interest will be impaired in the absence of intervention; and (4) there must be inadequate representation of that interest by the current party. *See Michigan State AFL-CIO v Miller*, 103

F.3d 1240, 1245 (6th Cir. 1997). If any of these criteria are not satisfied, a motion to intervene must be denied. *Stupak-Thrall v Glickman*, 226 F.3d 467, 471 (6th Cir. 2000).

Isabella County Meets the Standard for Intervention as a Matter of Right:

(1) Timeliness:

The Sixth Circuit has held that there are five factors that should be considered in determining the timeliness prong when considering a motion to intervene: (1) the point to which the suit has progressed; (2) the purpose for which intervention is sought; (3) the length of time preceding the application during which the proposed intervenors knew or should have known of their interest in the case; (4) the prejudice to the original parties due to the proposed intervenors' failure to promptly intervene after they knew or reasonably should have known of their interest in the case; and (5) the existence of unusual circumstances militating against or in favor of intervention. *Johnson v City of Memphis*, 73 Fed. Appx. 123, 131 (6th Cir. 2003) (citing *Linton v Comm'n of Health & Env't*, 973 F.2d 1311, 1317 (6th Cir. 1992). Timeliness is to be evaluated in the context of all relevant circumstances. *Stupak-Thrall v Glickman*, 226 F.3d 467 (6th Cir. 2000). If the litigation has "made extensive progress" before the motion to intervene is filed, it weighs against intervention. *United States v Tennessee*, 260 F.3d 587, 592 (6th Cir. 2001) (quoting *Stupak-Thrall*, 226 F.3d 467 at 475.)

The present suit was filed on November 21, 2005. The United States of America intervened, unopposed, one year later in November 2006. To date, the parties have exchanged witness lists and expert witness materials and have until November 2007 to complete rebuttal expert materials. Discovery will remain open until March 2008. The filing deadline for dispositive motions is May 30, 2008. Although a fair amount of time has elapsed between the

time of the original filing and the County's application for intervention, it appears that the litigation is still in its beginning stages. In *Usery v Brandel*, 87 F.R.D. 670, 675 (W.D. Mich 1980), intervention as of right was allowed where ten months had passed between the filing of the complaint and the motion to intervene, and the suit had "not advanced beyond early discovery." In *Mountain Top Condo. Assoc. v Dave Stabbert Master Builder, Inc.*, 72 F.3d 361, 370 (3rd Cir. 1995), intervention as of right was allowed where four years had passed between the filing of the complaint and the motion to intervene, where no depositions had been taken, no dispositive motions had been filed, and no decrees had been entered during the four year period. The mere passing of time is not the determinative factor in deciding if an application to intervene is timely. The court has to consider the purpose for the request to intervene and whether the original parties will be prejudiced. If allowed to intervene, the County intends on relying on the State's expert witnesses and expert materials already disclosed to the plaintiffs. The County would intend on calling local lay witnesses to comment on the difficulties encountered in attempting to enforce civil and criminal laws when the jurisdictional issues are undefined. Isabella County has a substantial legal interest in the lands at question and if allowed to intervene, the original parties would not be unduly prejudiced.

(2) Substantial legal interest:

The Sixth Circuit has adopted a "rather expansive notion of the interest sufficient to invoke intervention." *Michigan State AFL-CIO v Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997). Courts have long recognized that a governmental entity has sovereign interests in exercising power over individuals and entities in its territory and in having its territory and power recognized by other sovereigns. *Alfred L. Snapp & Sons, Inc. v Puerto Rico*, 102 S.Ct. 3260

(1982). A governmental body's sovereign interest is the type of direct, significant and legally protectable interest that could justify intervention under Rule 24(a)(2). *See Scotts Valley Band of Pomo Indians of Sugar Bowl Rancheria v United States*, 921 F.2d 924, 927-29 (9th Cir. 1990); *see, e.g. Sierra Club v City of San Antonio*, 115 F.3d 311, 315 (5th Cir. 1997); *United States v Oregon*, 745 F.2d 550, 553 (9th Cir. 1984).

Plaintiffs in the present suit seek prospective, injunctive, and declaratory relief asserting that an Isabella Reservation was established under the 1855 and 1864 treaties and that five full townships and two half townships in Isabella County constitute "Indian country" as defined by 18 USC 1151(a) and federal law. Plaintiffs seek a permanent injunction prohibiting the State of Michigan from exercising criminal and civil jurisdiction within the claimed "Indian country" area. Isabella County has a direct and protectable interest in regulating property and enforcing civil and criminal laws within its borders. In 1991, the United States, in its own right, and on behalf of the Saginaw Chippewa Indian Tribe, filed a complaint requesting declaratory and injunctive relief against the State of Michigan, and local units of government, including Isabella County, relative to the issue of the ability of the State and local units to compel and collect property taxes on property owned by tribal members within the boundaries of the Reservation as claimed by the Tribe. Shortly thereafter, the Tribe intervened in the suit as a plaintiff. In addition to the tax issue, the Tribe specifically requested the Court to issue a declaratory judgment indicating that the five townships and two half townships be considered the Reservation. Ultimately, two substantive issues emerged: (1) the jurisdictional boundary of the present day Reservation; and (2) whether fee simple lands owned by the Tribe or its members, located within that boundary, were subject to State property taxes. In 1995, the Court issued an

opinion declining to address the boundary issues, and declaring that tribally-owned lands were subject to State property taxes, even if located within the Reservation boundary. The Plaintiffs filed an appeal to the Sixth Circuit Court of Appeals, who reversed the District Court's ruling, stating that the land was not subject to State taxation. The Defendants, including Isabella County, filed a Petition for Writ of Certiorari with the United States Supreme Court, challenging the ruling of the Sixth Circuit, but the appeal was not heard by the Supreme Court.

Isabella County was named as an original defendant in the 1991 lawsuit because the County has its own significant legal interests in the land at question. Those same legal interests remain today, and Isabella County should be allowed to intervene to ensure that those interests are adequately protected.

(3) Potential Impairment:

The Sixth Circuit has held that a proposed intervenor's burden to demonstrate that its interest may be impaired in the absence of intervention is not an onerous task. "To satisfy this element of the intervention test, a would-be intervenor must show only that impairment of its substantial legal interest is possible if intervention is denied. This burden is minimal." *Gutter v Bollinger*, 188 F.3d 394, 399 (6th Cir. 1999). Currently, Isabella County regulates and enforces civil and criminal laws in the land at question. A determination by this Court that these lands constitute "Indian country" would severely limit the County's ability to enforce these laws.

(4) Inadequate Representation:

A proposed intervenor's burden in showing inadequate representation of its interests is minimal. *Linton v Commissioner of Health & Evn't.*, 973 F.2d 1311, 1319 (6th Cir. 1992). A showing of possible inadequate representation is sufficient to meet such a burden. *Id.* This

burden has been described as minimal because it need only be shown "that there is a *potential* for inadequate representation." *Grutter v Bollinger*, 188 F.3d 394 (6th Cir. 1999) (emphasis in original). In *Grutter*, the Court of Appeals held that the burden of proof concerning inadequacy of representation remains the same when the existing party is a governmental entity. *Id*. at 400. "[I]t may be enough to show that the existing party who purports to seek the same outcome may not make all of the prospective intervenor's arguments." *Id.*

Although the State of Michigan and Isabella County share similar interests in this action, there can be no assurance that the State will advance all of the County's arguments. In fact, the State's proposed witness list does not include any local "nuts and bolts" witnesses, such as on-the-scene police officers or children protective services workers, to provide testimony regarding the difficulties caused by uncertain jurisdictional boundaries.

Isabella County Meets the Standard for Permissive Intervention

Permissive intervention is within the court's discretion under Fed. R. Civ. P. Rule 24(b). It provides in pertinent part: "Upon timely application anyone may be permitted to intervene in an action . . . when an applicant's claim or defense and the main action have a question of law or fact in common . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." An applicant for permissive intervention, therefore, must prove that the motion for intervention is timely, that there is at least one common question of law or fact, and that balancing of undue delay, prejudice to the original parties, and any other relevant factors, favors intervention. *Michigan State AFL-CIO v Miller*, 103 F.3d 1240, 1248 (6th Cir. 1997).

As indicated earlier, this application is "timely" in that the lawsuit is still in its beginning stages (i.e. witness lists have been exchanged, discovery remains open until March 2008, the deadline for any dispositive motions is May 2008.) Since Isabella County shares many of the same interests as the State of Michigan, the original parties would not suffer undue prejudice from intervention by the County. Isabella County should be allowed to intervene as it has its own significant interests in regulating property and enforcing civil and criminal laws within its borders.

Conclusion:

WHEREFORE, for the reasons stated herein, the County of Isabella respectfully requests that this Court allow it to intervene as a Defendant as a matter of right, or in the alternative by permission, and should allow the County of Isabella to intervene as a Defendant.

Date: September 18, 2007

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CERTIFICATE OF SERVICE

I hereby certify that on September 18, 2007, I electronically filed Isabella County's Motion to Intervene, with the Clerk of the Court using the ECF system, which will send notification of such filing to the following: Sean J. Reed, 7070 E. Broadway Rd., Mt. Pleasant, MI 48858; William A. Szotkowski, 1360 Energy Park Drive, Suite 210, St. Paul, MN 55108-5252; Patricia Miller, L'Enfant Plaza Station, P.O. Box 44378, Washington, DC 20026-4378; and Todd Adams, 525 W. Ottawa St., Fl. 6, P.O. Box 30755, Lansing, MI 48909.

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