UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

SAGINAW CHIPPEWA INDIAN TRIBE OF MICHIGAN, on its own behalf and as *parens patriae* for its members, Plaintiff, and THE UNITED STATES, Plaintiff-Intervenor, vs. 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.	Case No. 05-10296-BC Honorable Thomas L. Ludington

PLAINTIFF SAGINAW CHIPPEWA INDIAN TRIBE OF MICHIGAN'S RESPONSE IN OPPOSITION TO THE SEPARATE MOTIONS OF THE CITY OF MOUNT PLEASANT AND THE COUNTY OF ISABELLA TO INTERVENE AS DEFENDANTS

INTRODUCTION

Plaintiff Saginaw Chippewa Indian Tribe of Michigan (the "Tribe"), by and through its attorneys Jacobson, Buffalo, Magnuson, Anderson & Hogen, P.C. and Sean J. Reed, submits this

Response in Opposition to the Separate Motions of the City of Mt. Pleasant and the County of Isabella to Intervene as Defendants in this action. The Tribe asks this Honorable Court to deny both motions for intervention on the grounds that (1) the motions are extremely untimely; (2) both the City and County's (collectively the "Applicants") interests are adequately represented by the State of Michigan, and (3) this intervention would both prejudice the existing parties and unduly delay the proceedings. The City and County have not, and cannot, meet their burdens either to show entitlement to intervention under Fed. R. Civ. Proc. 24(a) (for intervention as of right) or (b) (for permissive intervention).

The timing of these applications is troubling. Neither the City nor the County has offered any relevant justification for submitting these Motions now. And neither the City nor the County has cited any change in their interests since the start of the case, and they had both actual and constructive knowledge that their interests were implicated from the start. The only recent, material event in the case was the exchange of expert reports between the U.S., the State, and the Tribe in early August of this year. There are no other events that the Tribe is aware of that could have prompted these Motions. Nevertheless, the opinions in the expert reports do not (and cannot) amplify or diminish the City and County's legal interests in this case. In any case, the timing of these Motions suggests an overt effort to delay the course of this litigation.

The Court should view these Motions as part of a continuing attempt by Michigan and its subdivisions to muddy the legal issues in this case, and to buy more time to prepare. The central issue in this litigation is whether the Reservation, as established and defined by the 1855 and 1864 treaties, continues to exist today as Indian Country pursuant to federal law. Therefore, the Tribe has filed claims only for the following relief in this case: (1) a declaratory judgment that

the six-township Isabella Reservation does continue to exist, and (2) an injunction preventing the State from asserting criminal or civil jurisdiction over the Tribe or tribal members within the Reservation in a manner inconsistent with the Indian Country status of the Reservation. *See* Amend. Compl. at 11-12. The present-day jurisdictional impacts associated with the existence of the Reservation are not relevant to the Court's consideration of the central issue and do not provide a basis for intervention. Furthermore, most of the purported complications the City, County, and State are expected to claim are illusory. The Tribe urges the Court to exercise its discretion and deny these applications for intervention.

Statement of Issues Presented:

Are the City and County entitled to intervene where they have had notice that the case has been pending for more than two years, where the schedule has already been moved back due to the United States' intervention as a plaintiff, and where the State of Michigan adequately represents the City and County's interests?

Controlling or Most Appropriate Authority for the Relief Sought by the Plaintiff Tribe:

Fed. R. Civ. Proc. 24(a)-(b)

U.S. v. Tenn., 260 F.3d 587, 592 (6th Cir. 2001)

Stupak-Thrall v. Glickman, 226 F.3d 467, 471 (6th Cir. 2000)

Grutter v. Bollinger, 188 F.3d 394, 397-98 (6th Cir. 1999)

Argument

I. Neither the City nor the County fulfill the standard for intervention as of right under Fed. R. Civ. Proc. 24(a).

An applicant can justify a grant of intervention as of right only upon satisfying *each* of the four elements laid out in the rule:

> Upon *timely* application anyone shall be permitted to intervene in an action . . . when the applicant claims an interest relating to the property or transaction 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.

Fed. R. Civ. Proc. 24(a) (emphasis added).[1] The Sixth Circuit, therefore, like other federal circuits, requires an applicant to make the following showing:

> (1) The application is timely;
>
> (2) The applicant has a "substantial legal interest" in the case;
>
> (3) The applicant's ability to protect that interest will be impaired if the Court does not allow intervention; and
>
> (4) The applicant's interest is not adequately represented by existing parties.

See Stupak-Thrall v. Glickman, 226 F.3d 467, 471 (6th Cir. 2000); *see also Grutter v. Bollinger*, 188 F.3d 394, 397-98 (6th Cir. 1999) (stating all four elements); *Mich. State AFL-CIO v. Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997) (same). The threshold element is whether an application is timely; where it is not, the Court need not proceed to the remainder of the elements, and should deny on this basis. *See Stupak-Thrall*, 226 F.3d at 472, *citing NAACP v. New York*, 413 U.S. 345 (1973). It is solely within the Court's own discretion to determine timeliness (although the

[1] The Tribe notes that the County failed to file a complaint in intervention as required by the Rule 24(c), and asks that the Court order the County to fully comply with the Rule in order to provide full notice of its defenses to the existing parties.

remainder of the elements are subject to de novo review). *Id.*; *see also Grutter*, 188 F.3d at 398. But failure on *any one* of the four factors prevents intervention as of right. *See Linton v. Comm'n of Health and Env't*, 973 F.2d 1311, 1317 (6th Cir. 1992).

Here, the City and County seek to intervene long after they first received notice of this case (and of their interests in the outcome, contrary to the City's claims), and well into the proceedings. The Court should reject these applications on this basis alone. But even if the Court holds the applications are timely, they still fail in the third and fourth elements: the City and County's ability to protect their interests will not be impaired if the Court denies intervention, *because* their interests are adequately represented by the state. The Court should deny intervention as of right for both the City and County.

A. The City and County's applications are not timely.

While the Applicants correctly identify the Sixth Circuit's five-part test to determine timeliness, their analysis is purposely limited, and they simply cannot justify the lateness of these applications. A proposed intervenor that is aware "that its interests may be impaired by the outcome of the litigation is obligated to seek intervention as soon as it is reasonably apparent that it is entitled to intervene." *Tenn.*, 260 F.3d at 594 (citations omitted). This Court applies these factors to determine timeliness:

(1) [T]he 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. *Stupak-Thrall*, 226 F.3d at 473. The Applicants fail on most, if not all, factors.

1. The suit has progressed to an advanced stage, given the action in the case, the unique features of this litigation.

The Applicants' claims that this case is "in its infancy" are incorrect. *See*, *e.g.*, City's Mot. at 6. That the case is at the stage where expert reports have been exchanged, but dispositive motions are not due, does not provide a full picture. The analysis is not confined to how much time has passed between the filing of the complaint and the motion to intervene, or whether discovery has been completed and dispositive motions filed: "[A]ll circumstances must be examined to determine the substantive progress that has occurred in the litigation." *U.S. v. Tenn.*, 260 F.3d 587, 592 (6th Cir. 2001) (citations omitted).

Nearly two years have passed since the Tribe filed this litigation. Extensive progress has been made in the case. The Tribe, the State, and the United States have narrowed the issues before the Court, have hired expert witnesses, have done extensive research developing the historical record surrounding the establishment of the Isabella Reservation, and have exchanged expert reports.

To determine the true stage of the litigation, the Court is entitled to evaluate the full docket to date. *See Stupak-Thrall*, 226 F.3d at 473 (considering entire procedural history in determining intervention motions were untimely). The proceedings indicate not only that there has been significant activity, but show that the schedule has already been seriously delayed by the intervention of the U.S. The State then opposed the U.S.' proposed extension of deadlines,

claiming it would cause undue prejudice to the existing parties. The following examples illustrate the degree to which this case has already been delayed:

Date	**Filing**
5/17/06	Case Management and Scheduling Order setting dispositive motions deadline earlier than requested by parties, February 28, 2007, and stating that the Tribe "shall notify the United States of America that it has until June 15, 2006 to apply to intervene as a party plaintiff in this matter."
6/12/06, 7/07/06, 7/27/06, 10/06/06	Four Orders granting the U.S.' Requests to Extend Time to determine whether to intervene, which the U.S. ultimately did in late October 2006.
12/19/06	Order Granting the U.S'. Motion for Modification of the Case Management and Scheduling Order and Resetting Dates, pushing the dispositive motions deadline to May 30, 2008.

This docket also demonstrates the efforts the U.S. made to keep the Court and existing parties informed that it was determining whether to intervene. The City and County have made no such efforts.

Additionally, the existing parties have developed their cases to this point based upon their mutual expectations under their Joint Stipulation. And the fact that expert reports have been exchanged is a key feature of this litigation schedule. This type of treaty litigation, by nature, must rely heavily on historians performing a detailed analysis of historical documents housed at collections around the U.S. To the extent that the City will seek to retain expert historical expert witnesses, even though the County has agreed not to do so, it could profoundly impact the litigation. Additionally, both the City and County will name additional lay witnesses, desire discovery, and will duplicate efforts by the State to develop the same defenses. In short, there will undoubtedly be substantial delays to the litigation, which has already been extended, and the suit has progressed relatively far on the litigation continuum.

2. The purpose for which the City and County seek intervention, to the extent it is not pretextual, is not compelling.

The State's disclosures of expert and lay witnesses show that the State will cover all the ground and more that the City and County propose to address if permitted to intervene, as discussed below. The City states that its interests are not protected, because this case may bind it due to the *stare decisis* effect of the decision, and that the City should be allowed to "participate in the development of the legal issues in this case and this Court should allow intervention to save it, and the parties substantial time and expense." City's Motion at 7-8. The Tribe does not dispute that this case may have *stare decisis* effect, or that the City may have once had a legitimate interest in the case. But "the mere fact that a lawsuit may impede a third party's ability to recover in a separate suit ordinarily does not give the third party a right to intervene." *See Mountain Top Condo. Assoc. v. Dave Stabbert Master Builder, Inc.*, 72 F.3d 361, 367 (3rd Cir. 1995). Now, the existing parties have reasonably narrowed the issues in this litigation via stipulation, and the City's opportunity to become a party has passed.

3. Both Applicants knew of their interest in the case from the start of the case.

The most troubling aspect of the Applicants' Motions is that neither the City nor the County has offered any valid or reasonable explanation for the long delay in joining this action. And there is voluminous evidence that the City and County *did* have notice from the start. The mere fact that the case was filed, and that these are public entities, with full legal staffs, and with public access to the Court's records, is sufficient to constitute at least constructive notice to them of their interests in this case. Furthermore, there has been widespread news coverage of the

litigation. This is well-established means of showing the timing of a potential intervenor's actual notice of interests. *See Stotts v. Memphis Fire Dept.*, 679 F.2d 579, 583 (6th Cir. 1982). Not only did the Tribe send out a press release stating that it planned file the suit before it did so in December 2005, but on October 29, 2005, the Mt. Pleasant Morning Sun published an article entitled "Tribe plans boundary suit." *See* Exhibit 1-a-b, attached hereto. The central details of the Tribe's claim to the six-township area were listed, along with details of federal agencies' treatment of the six-township area as reservation land. *Id.* at Ex. 1-b; *see also* Ex. 1-c ("Tribe sues Mich. for township sovereignty," Detroit Free News (12/23/05)); Ex. 1-d ("Tribe challenge likely," Mt. Pleasant Morning Sun (1/23/06).) On December 23, 2005, Isabella County Commissioner George Green even offered a quote on the issue of the lawsuit. *See* Ex. 1-e ("Tribe: This land is our land," Saginaw News (12/23/06).) Because their interests have remained the same since this litigation began, and because they had actual notice of their interests, there is no legitimate basis for the Applicants' delay.

In fact, the County offers no reason for the lateness of its Motion, and the City's only justification should be disregarded. The City claims that before receiving a June 20, 2007 letter from the U.S. Census Bureau that it "had not previously been advised that there was a dispute about how land was treated for purposes of the Census." City's Mot. at 6. But previously, the City cites the 2000 United States Census as the source of its 25,946 population figure. *Id.* at 4; *see also* http://www.mt-pleasant.org/Info/demographics.htm (official City of Mt. Pleasant website also including the population figure and 2000 Census as source). In the 2000 U.S. Census, which is available on-line, there is a map of Isabella County that clearly demarcates the six-township Isabella Reservation and encompasses part of Mt. Pleasant. *See* Ex. 2-a-c, attached

hereto. Therefore, the City's claim that it had no earlier notice that the U.S. Census Bureau treated Mt. Pleasant as falling within the borders of the Isabella Reservation is somewhat dubious, as Mt. Pleasant expressly relies on *other* U.S. Census data. In short, both the City and County knew of their interests prior to the start of the case.

4. Due to the Applicants' failure to promptly intervene upon learning of their interests in the case, there would now be extreme prejudice to the original parties, should the Applicants be permitted to intervene.

Allowing the City and County to intervene at this late date prejudices all the parties. The City and County would have an unfair advantage that the expert witness disclosure and intervention Rules are designed to prevent: they would have access to all of the other parties' expert materials prior to their review and analysis of the case. Moreover, the relief the Tribe seeks is in part injunctive—with each passing day, the Tribe and its members continue to be subject to unjustifiable incursions by the state on tribal jurisdiction in Indian Country, which affects many aspects of the Tribe's day-to-day life, as detailed in the Amended Complaint. That certain issues may center on the designation of the Reservation 150 years ago in no way diminishes the continuing prejudice--any ongoing diminishment of tribal sovereignty is not de minimus damage.

5. The Applicants have articulated no "unusual circumstances" that militate in favor of intervention, but the Tribe has detailed "unusual circumstances" that militate against intervention.

Unusual circumstances militating against intervention include both the expert participation to date, and the existence of a stipulation between the existing parties. The City and the County may seek to reopen issues that the named parties have agreed to narrow, and allowing intervention on those terms would only frustrate the orderly prosecution of this litigation.

B. The Applicants' interests are already adequately represented by an existing party, the State.

A proposed intervenor must at least show that "there is a *potential* for inadequate representation." *Grutter v. Bollinger*, 188 F.3d 394 (6th Cir. 1999). While this is not a high standard, there is still a presumption of adequate representation when the proposed intervenor shares the same "ultimate objective" as one of the parties, which the proposed intervenor must overcome. *See Prunell v. City of Akron*, 925 F.2d 941, 950 (6th Cir. 1991). To the extent that the Applicants' concerns regarding "jurisdictional confusion" are even germane to the case, they are indistinguishable from the State's claims of the same thing: any additional evidence on the City and County level would merely be cumulative. *See also Bivens v. Grand Rapids*, 443 Mich. 391, 397, 505 N.W.2d 239, 241 (Mich. 1993) (citations omitted) (discussing municipal corporations and stating that subdivisions of the state "are created by the state and derive their authority from the state."). The City and County cannot meet their burden to show inadequate representation.

The State, City and County all oppose a ruling by this Court that the Isabella Reservation continues to exist today as established and defined by the treaties of 1855 and 1864 and remains Indian country pursuant to federal law today. The State already has witnesses addressing those issues. There is no reason that the City and County could not participate as *amici curiae*, which would not impede the litigation schedule, and which the Tribe would not oppose. *See Bradley v. Milliken*, 828 F.2d 1186, 1194 (6th Cir. 1987) (motion to intervene denied in part because applicants' interests were sufficiently covered by amicus participation).

1. The "different interests" the Applicants claim are not actually distinguishable from the articulated interests of the State.

The City unreasonably cites the Joint Stipulation as an indicator that its interests will not be protected, in that the Tribe stipulated that it "specifically does not seek remedies" related to State property and the collection of state sales taxes. City's Mot. at 8. In fact, the existence of the stipulation cuts the other way: the Sixth Circuit has recently considered the existence of a stipulation narrowing the issues between the existing parties as a factor in denying an application to intervene. *See U.S. v. Mich.*, 424 F.3d 438, 443 (6th Cir. 2005). The court there reasoned that the purported intervenor would require adjudication of additional matters, and the intervenors interests were already adequately represented. *Id.* Also, the City and County had the opportunity from the start to become part of this litigation; that a stipulation was entered without mentioning them is a circular argument. Moreover, the language of the Stipulation does not actually support an argument of specific prejudice to the City's interests. Additionally, the City's (and the County's) other claims that the State will not protect its interests actually show that additional witnesses will merely add to the "jurisdictional confusion" argument pile. *See, e.g.*, City Mot. at 8-9 (discussing City's interest in its collection of taxes, ability to enforce zoning regulations, and the City's ability "to respond to alleged criminal law violations."); Cty. Mot. at 5 (discussing intent to call "local lay witnesses" to testify regarding civil and criminal law enforcement "when the jurisdictional issues are undefined," and intent to call "nuts and bolts" witnesses such as police officers and child protection workers.)

The inquiry into a proposed intervenor's substantial interest is "necessarily fact-specific," and the facts show that the City and County's interests are more than adequately represented by the State. *See Grutter*, 188 F.3d at 398. The State has already demonstrated it intends to call

witnesses regarding all the "jurisdictional confusion" issues that the City and County name, including witnesses regarding:

- State tax policies and enforcement in Isabella County;
- Economic effects of suspending collection of income and other taxes in Isabella County;
- Effect on law enforcement of "declaring" the six townships Indian Country;
- Three witnesses to testify regarding the percentage of Tribe's members in Isabella County, percentage of Isabella County land held as Indian Country, and other demographic information;
- Two expert witnesses with Ph.D.s in history to testify regarding the 1855 and 1864 treaties and other relevant historical issues; and
- An expert witness to testify regarding the "effects of dual sovereignty on zoning and other local matters."

In addition to offering witnesses regarding all the issues of jurisdictional overlap the City and County cite, and the State has proposed even to offer examples directly pertinent to local activities. The Applicants' interests are more than adequately represented

2. That the City and County were previously named as parties in an earlier case relating to their jurisdiction within the six-township area has nothing to do with the intervention analysis.

That the City and the County may have, at one time, been able to articulate an interest in the litigation is not at issue here. Their status as defendants in an earlier series of cases brought by the Department of Justice on behalf of the Tribe and against the State of Michigan, the City of Mt. Pleasant, and other subdivisions of the State does not inform the intervention analysis. *Id.*; *see also U.S. on Behalf of Saginaw Chippewa Tribe v. Mich.*, 882 F.Supp. 659 (E.D. Mich. 1995); *rev'd and remanded*, 106 F.3d 130 (6th Cir. 1997); *cert granted, Mich. v. U.S.*, 524 U.S.

923 (1998) (judgment vacated and remanded for further proceedings). But the fact that the City and County were both parties in that case, and that it dealt in part with the six-township Isabella Reservation boundaries, demonstrates that, at least by 1997, they have been on notice that any determination of whether this constituted Indian Country could affect their ability to tax or conduct other activities therein.

II. Neither the City nor the County fulfill the standard for permissive intervention under Fed. R. Civ. Proc. 24(a).

Just as for intervention as of right, to justify permissive intervention, an applicant must first show that its application is timely. *See* Fed. R. Civ. Proc. 24(b). If it cannot do so, the Court must deny the application. In addition, the applicant must show that "an applicant's claim or defense and the main action have a question of law or fact in common," and the Court must also "consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." *See also Mich. State AFL-CIO v. Miller*, 103 F.3d 1240, 1248 (6th Cir. 1997). The determination of undue delay or prejudice is entrusted to the Court's discretion.

But even if the Court holds the applications are timely, the City and County have failed to fulfill the other elements. While the Tribe does not dispute that the applicants' claims have questions of law and fact in common with the main action, allowing intervention at this point would cause undue delay and prejudice to the other parties in the case, as discussed above. The Court should also deny the motions for permissive intervention.

III. In the alternative, should the Court allow the City and County to intervene, the Tribe requests that the Court impose strict limitations on the City and County's participation.

Even if the Court does allow permissive intervention, it is empowered under the Fed. R. Civ. Proc. 24 to impose strict limitations on such intervention, and the Tribe asks that it do so. As noted in the Commentary to the 1966 Amendment to Rule 24, even an intervention of right "may be subject to appropriate conditions or restrictions responsive among other things to the requirements of efficient conduct of the proceedings." *See also Ionian Shipping Cop. v. British Law Ins. Co.*, 426 F.2d 186, 191-92 (2nd Cir. 1970) (stating conditions are permitted under Rule 24(a), and noting such conditions are also allowable for permissible intervention). Other circuits have expressly extended the same permission for permissive intervenors. *See, e.g., Van Hoomissen v. Xerox*, 497 F.2d 180, 181 (9th Cir. 1974). The Tribe requests, at a minimum, that the limitations here include the following: (1) the City and County may not add expert witnesses; (2) all existing stipulations and agreements on issues, discovery, and experts between the existing parties are binding on the intervenors; (3) the City and County must coordinate any discovery with the State, and maintain the current litigation schedule.

Conclusion

Neither the City nor County can justify intervention as of right or permissive intervention. Their Motions are untimely, and they can offer no reasonable explanation for their delay. The Tribe respectfully requests that the Court to deny both Motions in their entirety.

Respectfully submitted,

September 27, 2007

s/ William A. Szotkowski

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UNITED STATES DISTRICT COURT
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SAGINAW CHIPPEWA INDIAN TRIBE OF MICHIGAN, on its own behalf and as *parens patriae* for its members, Plaintiff, and THE UNITED STATES, Plaintiff-Intervenor, vs. 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.	Case No. 05-10296-BC Honorable Thomas L. Ludington

Certificate of Service

I hereby certify that on September 27, 2007, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system, which will send notification of such filing to the following:

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and I hereby certify that there are no non-ECF participants listed in the case that require service by U.S. mail.

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