UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

SAGINAW CHIPPEWA INDIAN TRIBE OF MICHIGAN, Plaintiff, and THE UNITED STATES, Plaintiff-Intervenor v. JENNIFER GRANHOLM, et al. Defendants.	)	Case No. 05-10296-BC Honorable Thomas L. Ludington

UNITED STATES' RESPONSE
TO THE CITY OF MT. PLEASANT'S AND THE COUNTY OF ISABELLA'S MOTIONS TO INTERVENE

The United States respectfully submits its response to the City of Mt. Pleasant's and the County of Isabella's Motions to Intervene as defendants, which were filed on September 14, 2007, and September 18, 2007, respectively.

The United States does not oppose the City of Mt. Pleasant's ("City") or the County of Isabella's ("County") permissive intervention so long as their interventions are conditioned in order to avoid substantial disruption of the litigation schedule and prejudice to the parties.[1/]

[1/]It is well-settled that federal courts may limit or impose conditions on the participation of a permissive intervenor. *See* 7C C. Wright & A. Miller, Federal Practice and Procedure § 1922 (2d ed. 2006 Supp.); Bradley v. Milliken, 620 F.2d 1141 (6th Cir. 1980); Southern v. Plumb Tools, 696 F.2d 1321, 1322 (11th Cir. 1983); Ionian Shipping Co. v. British Law Ins. Co., 426 F,2d 186, 191-92 (2nd Cir. 1970) (explaining that the Advisory Committee notes to Fed. R. Civ. P. 24 specifically provide that an intervenor might be subjected to conditions or restrictions

Specifically, the City should not be allowed to designate its own experts, and the City and County should not be allowed to engage in discovery that is not coordinated with the State.[2/]

The United States opposes intervention, whether permissive or of right, to the extent that the City intends to secure additional experts and to the extent the proposed intervenors will engage in discovery that is not coordinated with the State. If additional experts are designated, the existing parties would be required to hire additional experts, expend funds, and use more time to review and/or rebut the new experts. The parties already have exchanged expert reports in this matter and are in the process of preparing rebuttal reports. Depositions will be taken shortly after those rebuttal reports are exchanged. Some discovery has taken place and it would be unduly burdensome on the parties to subject them to numerous discovery requests that are not coordinated. This lawsuit has been pending since November 2005 and it has been nine months since the Court issued a scheduling order setting forth expert witness designation and discovery deadlines. Therefore, the City's intervention would be untimely and prejudicial if they are permitted to prepare their own expert reports and engage in uncoordinated discovery. Such interference with the case would unduly delay the litigation and prejudice the existing parties.

In addition, and regardless of whether the proposed intervenors should be permitted to designate experts or engage in uncoordinated discovery, the United States opposes their

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necessary for the "efficient conduct of the proceedings"). There is some limited disagreement whether limitation or conditions can be imposed on intervenors as of right. See Columbus-America Discovery Group v. Atlantic Mut. Ins. Co., 974 F.2d 450, 469-470 (4th. Cir. 1992). However, many court have imposed conditions on intervenors as of right. *See* Harris v. Pernsley, 820 F.2d 592, 599 (3rd Cir. 1987), *cert. denied*, 484 U.S. 947; McDonald v. E.J. Lavino Co., 430 F.2d 1065, 1073, n.7 (5th Cir. 1970); Ionic Shipping, *supra*.

[2/] The County stated it would rely on the State's experts and would not use its own experts. Accordingly, the United States requests that the City do the same.

intervention as of right because their interests are adequately represented by the State.

I. The City of Mt. Pleasant and the County of Isabella Do Not Meet the Criteria for Intervention as a Matter of Right

The City and County do not meet the criteria set forth in the Federal Rules of Civil Procedure for intervention as a matter of right because their interests are adequately represented by the State of Michigan. The City and County's governmental powers are derived wholly from the State. Additionally, their intervention would be untimely and prejudicial if they engage their own experts, thus substantially altering the litigation time-line and forcing the existing parties to secure additional experts and funds.

Federal Rule of Civil Procedure 24 provides the test for intervention. Rule 24(a)(2) provides, in relevant part, that upon timely application anyone shall be permitted to intervene as a matter of right

> when the applicant claims an interest relating to the property or transaction which is 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.

FRCP 24(a)(2). The Sixth Circuit has interpreted Rule 24(a) to require a non-party seeking to intervene as of right to establish four elements:

> (1) the motion to intervene is timely; (2) the proposed intervenor has a substantial legal interest in the subject matter of the case; (3) the proposed intervenor's ability to protect that interest may be impaired in the absence of intervention; and (4) the parties already before the court may not adequately represent the proposed intervenor's interest."

United States v. Michigan, 424 F.3d 438, 443 (6th Cir. 2005) (citing Grutter v. Bollinger, 188 F.3d. 394, 397-98 (6th Cir. 1999)); *see also* Providence Baptist Church v. Hillandale Committee

Ltd., 425 F.3d 309, 315 (6th Cir. 2005).

The United States does not dispute that the City and County have an interest in the litigation. Their interests, however, are adequately represented by the State because their governmental powers are derived wholly from the State. "Municipal corporations have no inherent power. They are created by the state and derive their authority from the state." Bivens v. Grand Rapids, 443 Mich. 391, 397, 505 N.W.2d 239, 241 (Mich. 1993) (citing Marxer v. Saginaw, 270 Mich. 256, 259, 258 N.W. 627 (Mich. 1935)). Thus, any authority the City or County may possess to collect taxes within or assert jurisdiction over Indian Country exists solely due to their status as political subdivisions of the State. The State's interest in litigating the scope or existence of its governmental jurisdiction over Indian Country, then, necessarily covers any governmental interests the City and County may have. The State has been defending this litigation vigorously, including securing numerous experts and witnesses. There is no basis in fact or law to assert that the City and County's interests are not adequately represented by the State.

In terms of timeliness, the Sixth Circuit considers five factors when assessing intervention:

> (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.

Stupak-Thrall v. Glickman, 226 F.3d 467, 473 (6th Cir. 2000). In general, the focus is on how far down the "litigation continuum" the case has evolved at the time a motion to intervene is

filed. *See* Stupak-Thrall, 226 F.3d at 475; *see also* United States v. Tennessee, 260 F.3d 587, 592 (6th Cir. 2001) (stating that "the time of intervention is not the determining factor, but rather 'all circumstances' must be examined to determine the substantive progress that has occurred in the litigation'") (quoting Stupak-Thrall, 226 F.3d at 475).

Here, the City's proposed interventions is untimely and prejudicial if it plans to inject additional experts into the litigation or if the proposed intervenors are allowed to engage in discovery that is not coordinated with the State. The existing parties already have exchanged expert reports and are in the process of preparing rebuttal reports. Depositions will be taken shortly after the exchange of the rebuttal reports. The parties have engaged in some discovery. Contrary to the City's assertion, this case is not "in its infancy." City Mot. to Intervene at 6. Indeed, it is in the middle of the litigation continuum.

Moreover, the designation of new experts or the addition of uncoordinated discovery would without question prejudice the existing parties, by delaying the litigation and increasing litigation-related costs. The United States would have to secure additional experts and funds to allow for the examination of expert reports and the development of rebuttal reports. The United States and the Tribe may have to respond to duplicative or constant discovery requests if the requests are not coordinated. An enlargement of the litigation schedule to allow more time for the new experts and new discovery would be inevitable, creating undue delay and increasing the existing parties' litigation expenses. For example, the United States would will have to ensure that its existing experts can be and are available for periods of time well in excess of their current contractual commitments.

However, if the City and County enter the case as it exists and do not add experts or

cause additional discovery, then there will be minimal disruption to the litigation schedule and minimal prejudice to the existing parties. Such intervention, even if so restricted, should be permissive in nature rather than as a matter of right.

II. The City and County Can be Granted Limited Permissive Intervention to Avoid Substantial Disruption of the Litigation Schedule and Prejudice to the Existing Parties

As explained above, the United States does not oppose the City or County's permissive intervention so long as they do not affect the litigation schedule and prejudice the parties by the addition of new experts and additional, uncoordinated discovery.

For the reasons stated above, the United States respectfully requests that if the City of Mt. Pleasant and the County of Isabella are granted permissive intervention as defendants, the Court conditions their intervention as expressed herein and contained in the United States' Proposed Order Granting Limited Permissive Intervention.

Dated: September 24, 2007

/s/ Patricia Miller

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CERTIFICATE OF SERVICE

This is to certify that on September 24, 2007, the United States' Response to the City of Mt. Pleasant's and the County of Isabella's Motions to Intervene and Proposed Order were filed electronically with the Clerk of the Court using the ECF system which will send notification of such filing to all counsel of record and of counsel of Proposed Defendant-Intervenors.

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