

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

SAGINAW CHIPPEWA INDIAN TRIBE

Case No. 05-10296-BC

Honorable Thomas L. Ludington

Plaintiff,

and

THE UNITED STATE 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 and THE CITY
OF MT. PLEASANT

Intervenor-Defendants.

**ISABELLA COUNTY'S COMBINED RESPONSE TO UNITED STATES' MOTION IN
LIMINE AND SAGINAW CHIPPEWA INDIAN TRIBE'S MOTION TO STRIKE AND
MOTION IN LIMINE**

CONCISE STATEMENT OF ISSUE PRESENTED

1. Treaties themselves have operated to diminish or disestablish the boundaries of reservations and evidence of post-treaty events is admissible in such cases. Since federal and local authorities' approaches to the lands in question and the area's subsequent demographic history can be considered in determining whether a reservation's boundaries have been altered, the Defendants' proposed jurisdictional witnesses should not be stricken.

CONTROLLING OR MOST APPROPRIATE AUTHORITY

1. Standards for Motions to Strike

Fed. R. Civ. P. 12(f)

Ameriwood Industries International Corp. v Arthur, 961 F.Supp. 1078, 1083 (W.D. Mich. 1997)

Brown & Williamson Tobacco Corp. v United States, 201 F.2d 819, 822 (6th Cir.1953)

Kelley v Thomas Solvent Co., 714 F. Supp 1439, 1442 (W.D.Mich. 1989)

2. Diminishment/Disestablishment by Treaty

Cayuga Indian Nation of New York v Village of Union Springs, 317 F. Supp. 2d 128 (N.D.N.Y. 2004)

Hagen v Utah, 510 U.S. 399, 410-411 (1994)

Solem v Bartlett, 465 U.S. 463, 468-469 (1984)

INTRODUCTION

Isabella County agrees with the State of Michigan that the treaties at question in this case¹ did not create a reservation as alleged by the Plaintiffs. Assuming *arguendo* that the treaties did create a reservation as alleged by the Plaintiffs², such reservation was diminished by the operation of the treaties themselves.

ARGUMENT

1. Fed. R. Civ. P. 12(f) Standards for Striking Defense/Witnesses

_____ Fed. R. Civ. P. 12(f) provides that upon the motion of a party, or upon the court's own initiative, "the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Motions to strike affirmative defenses under [Rule 12\(f\)](#) are addressed to the court's discretion, although they are generally disfavored. *Ameriwood Industries International Corp. v Arthur*, 961 F.Supp. 1078, 1083 (W.D. Mich. 1997). Such motions are to be considered carefully and not freely granted; striking an affirmative defense "is a drastic remedy to be resorted to only when required for the purposes of justice." *Brown & Williamson Tobacco Corp. v United States*, 201 F.2d 819, 822 (6th Cir.1953); *Kelley v Thomas Solvent Co.*, 714 F. Supp 1439, 1442 (W.D.Mich. 1989). Thus, such a motion should only be granted "when the pleading to be stricken has no possible relation to the controversy." *Brown* at 822.

¹Treaty with Chippewa Indians, 11 Stat 633 (August 2, 1855) and Treaty with the Chippewas, 14 Stat 657 (October 18, 1864).

²The County maintains that lands that were sold or conveyed to the State of Michigan before the treaties were executed never became part of any alleged reservation. See *Department of Corrections v Moses*, 274 Mich App 481 (2007); *People v Bennett*, 195 Mich App 455 (1992).

2. Treaties regarding the disposition of Indian land must be interpreted in the same way as statutory language in that congressional intent to diminish or disestablish a reservation must be clearly expressed.

Isabella County agrees with the State of Michigan's response to the Plaintiffs' Motions in Limine and Motion to Strike regarding the diminishment issue and thus adopts the State's arguments on this issue as its own in this matter. The County agrees with the State of Michigan that treaties themselves have diminished the boundaries of a reservations and have disestablished reservations. In the case at hand, assuming *arguendo* that a reservation was indeed created by the 1855 and 1864 Treaties, such reservation was diminished by the terms of the treaties themselves.

Whether a particular treaty or Congressional act was intended to extinguish some or all of an existing reservation requires a case-by-case analysis. *Solem v Bartlett*, 465 U.S. 463, 468-469 (1984). Three factors are considered in determining whether a reservation's boundaries have been altered. *See Hagen v Utah*, 510 U.S. 399, 410-411 (1994). First, the most probative evidence is the language used to open Indian lands. *Solem*, 465 U.S. at 470. Second, the historical context surrounding the change is considered. *Id.* at 471. Third, to a lesser extent, the subsequent treatment of the area in question and the pattern of settlement there as clues to the parties' earlier intentions is considered. *Id.* There are no magical words required for finding that reservation boundaries have been altered. *Id.* The Court may look at the act or treaty's historical context. *Id.* The Court may also consider federal and local authorities' approaches to the lands in question and to the area's subsequent demographic history. *Id.* at 471-72. "Where non-Indian settlers flooded into the opened portion of a reservation and the area has long since lost its Indian character, we have acknowledged that *de facto*, if not *de jure*, diminishment may have occurred." *Id.* at 471.

In *Cayuga Indian Nation of New York v Village of Union Springs*, 317 F. Supp. 2d 128 (N.D.N.Y. 2004), the Cayuga Nation of New York (“Nation”) filed suit seeking declaratory and injunctive relief and a declaration that the property in question was Indian Country pursuant to 18 U.S.C. 1151(a)³. The defendants (the Village of Union Springs, Town of Springport, and the County of Cayuga) argued, *inter alia*, to the extent a reservation was established for the Nation by a 1794 treaty, it was disestablished by an 1838 treaty. The Court, recognizing that congressional intent to terminate a reservation is a necessary prerequisite to a finding of disestablishment, went on to thoroughly analyze the treaties in question to determine if the reservation had been disestablished by the 1838 treaty. *Id.* at 138. “Treaties with the United States regarding the disposition of Indian land must be interpreted in the same way as statutory language, that is to say, congressional intent to terminate Indian title must be clearly expressed.” *Id.*

In the case at hand, the Defendants’ have pled as an affirmative defense that if a reservation was created as alleged by the Plaintiffs, it has been diminished or disestablished by the terms of the treaties themselves.⁴ The law provides that diminishment may be found though a

³18 U.S.C. 1151(a) provides:

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.

⁴All the defendants have pled diminishment as an affirmative defense. Isabella County specifically pled, “The Saginaw Chippewa Indian Tribe’s alleged “historic Isabella Reservation” has been diminished or disestablished by the selection of lands by individual Saginaw Chippewa Indian Tribe members as citizens of the State of Michigan. The State of Michigan and the County of Isabella have exercised jurisdiction over the alleged “historic Isabella Reservation” for many years without dispute. The vast majority of people within the alleged “historic Isabella Reservation” are not members of the Saginaw Chippewa Indian Tribe of Michigan.”

statutory act or through the terms and operation of treaties, so long as there has been a clear expression of congressional intent to do so. The Defendants' proposed jurisdictional/demographic witnesses will provide evidence regarding the events subsequent to the treaties in question. Since federal and local authorities' approaches to the lands in question and the area's subsequent demographic history can be considered in determining whether a reservation's boundaries have been altered, the Defendant's proposed diminishment witnesses should not be stricken.

Date: February 16, 2009

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CERTIFICATE OF SERVICE

I hereby certify that on February 16, 2009, I electronically filed Isabella County's Combined Response to the United States' Motion in Limine and the Saginaw Chippewa Indian Tribe's Motion to Strike and Motion in Limine, 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.

Date: February 16, 2009

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