Case No. 08-1585

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

KEWEENAW BAY INDIAN COMMUNITY,
named as federally-recognized Indian tribe,
on its own behalf and as parens patriae for its members,

Plaintiff/Appellant

v.

JAY RISING, named Treasurer of the State of Michigan; MICHAEL REYNOLDS, named as Administrator of the Collection Division of the Michigan Department of Treasury; WALTER A. FRATZKE, named as Native American Affairs Specialist of the Michigan Department of Treasury; TERRI LYNN LAND, Secretary of State,

Defendants/Appellees

On Appeal from the United States District Court
for the Western District of Michigan Western Division
Order dated March 27, 2008

BRIEF OF PLAINTIFF-APPELLANT

ORAL ARGUMENT REQUESTED

Respectfully submitted,

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DISCLOSURE OF CORPORATE AFFILIATIONS
AND FINANCIAL INTEREST

Pursuant to 6th Cir. R. 26.1, Plaintiff-Appellant Keweenaw bay Indian Community makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly-owned corporation? If yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

   Answer: No.

2. Is there a publicly owned corporation, not a party to this appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

   Answer: No.

s/Vernle C. (Skip) Durocher, Jr. — Signature of Counsel

October 21, 2008 — Date

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

U.S. CONSTITUTION

FEDERAL TREATIES

FEDERAL STATUTES

FEDERAL RULES

STATE STATUTES

STATEMENT IN SUPPORT OF ORAL ARGUMENT

The Community requests oral argument because this appeal involves important issues of federal tax immunity and constitutional law, as well as rights secured by a treaty between the United States and Chippewa bands to which the Community is successor-in-interest.

JURISDICTIONAL STATEMENT

Plaintiff-Appellant is the Keweenaw Bay Indian Community (the "Community"), a federally-recognized Indian tribe. The Community's claims arose under the U.S. Constitution, federal common law, the Treaty with the Chippewa at La Pointe, Oct. 4, 1842, 7 Stat. 591 (the "1842 Treaty"), 42 U.S.C. §1983, and other federal law. The U.S. District Court for the Western District of Michigan had jurisdiction of this case pursuant to 28 U.S.C. §§1362, 1331, and 1367(a).

The district court's order and judgment of March 27, 2008, was a final decision disposing of all claims in the case. On April 28, 2008, under Fed. R. App. P. 4(a)(1)(A), the Community filed a timely notice of appeal from this order and judgment.

The U.S. Court of Appeals for the Sixth Circuit has jurisdiction of this appeal under 28 U.S.C. §1291.

STATEMENT OF ISSUES

I. Whether the district court erred in failing to hold that federal law categorically prohibits imposition of Michigan's sales and use taxes with respect to the Community's and its members' purchase and use of property and services within the Community's reservation and trust lands.

II. Whether the district court erred in dismissing the Community's claims based on the 1842 Treaty seeking declaratory and injunctive relief regarding imposition of Michigan's sales and use taxes with respect to the Community's and its members' purchase and use of property and services in the area ceded under that treaty.

III. Whether the district court erred in holding that the federal rights underlying the Community's claim based on 42 U.S.C. §1983 are rights that emanate from the Community's sovereign status, rather than rights equally available to any private person.

STATEMENT OF THE CASE

The Community is a federally-recognized Indian tribe. (Second Amended Complaint, ¶6, Record Entry No. ("RE") 30, p.3, ROA p.24.) Appellees are Robert J. Kleine and Jay B. Rising, the current and former Treasurer of the State of Michigan, respectively, with responsibility for overseeing the Michigan Department of Treasury (the "Department"); Michael Reynolds, the administrator

of the Department's collections division; Walter A. Fratzke, the Department's Native American affairs specialist; and Terri Lynn Land, the Michigan Secretary of State. (Defendants' Answer to Plaintiff's Second Amended Complaint, ¶¶7-10, RE 33, pp.3-4; ROA pp.83-84.)[1] Reynolds and Fratzke are sued in their official and individual capacities, Kleine and Land are sued in their official capacities only, and Rising is sued in his individual capacity only. (Plaintiff's Response to Defendants' Motion for Summary Judgment, RE 67, p.3; ROA p.558.)

The Community's Complaint[2] primarily seeks declaratory and injunctive relief against Appellees arising out of violations of federal law. The case, and this appeal, involves two separate sets of circumstances giving rise to the Community's claims. First, Appellees have imposed Michigan's sales and use taxes on the Community's and its members' purchase and use of property and services, in violation of federal law. Second, Appellees have illegally seized federal and state funds destined for the Community and used them to offset taxes purportedly owed by the Community to the State with respect to the Community's retail sales in 1993 and 1994.

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1 The Department is the state agency that enforces the Michigan sales and use tax statutes. The Secretary of State is involved in collecting sales and use taxes with respect to the sale and use of motor vehicles. (Defendants' Answer, ¶7, RE 33, pp.3-4; ROA pp.83-84.)

2 All references to the "Complaint" are to the Second Amended Complaint filed on May 25, 2006. (Second Amended Complaint, RE 30; ROA p.22.)

The Community filed this lawsuit in an effort to enforce federal law with respect to both sets of circumstances. The parties cross-moved for summary judgment with respect to various counts. In an Order and Judgment dated March 27, 2008, the district court granted summary judgment for Appellees[3] and denied the Community's motions. (Order and Judgment, RE 145, pp.1-2; ROA pp.1820-21.)

STATEMENT OF FACTS

A. The Keweenaw Bay Indian Community

The Community is a federally-recognized Indian tribal government and the successor in interest to the L'Anse and Ontonagon bands of Chippewa Indians. The Community exercises powers of self-governance and sovereign jurisdiction over the L'Anse Indian Reservation in Michigan's Upper Peninsula, as well as over lands held in trust by the United States outside the L'Anse Reservation (collectively, the "Reservation"). (LaFernier affidavit of Sept. 26, 2006, ¶3, RE 45-2, pp.2-3; ROA pp.161-62.) The L'Anse Indian Reservation was established for the L'Anse and Lac Vieux Desert bands of Chippewa Indians pursuant to the Treaty with the Chippewa at La Pointe, Sept. 30, 1854, 10 Stat. 1109 (the "1854 Treaty"). The L'Anse Indian Reservation alone comprises 59,840 acres, or 93.5 square miles of territory, encompassing much of L'Anse and Baraga Townships in

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3 Although the district court stated it was granting Appellees' motions, the court in fact rejected some aspects of the motions. See infra pp. 17-18.

Baraga County. Keweenaw Bay Indian Community v. Naftaly, 370 F. Supp. 2d 620, 623 (W.D. Mich. 2005), aff'd, 452 F.3d 514 (6th Cir. 2006). The Reservation constitutes "Indian country" within the meaning of 18 U.S.C. §1151. The Community has approximately 3,339 enrolled members, approximately 893 of whom live on the Reservation. (Misegan affidavit, ¶2, RE 45-3, pp.2-3; ROA pp.204-205.)

B. The 1842 Treaty

Pursuant to the Treaty with the Chippewa at LaPointe, Oct. 4, 1942, 7 Stat. 591 (the "1842 Treaty"), a copy of which is attached as Addendum A, the Chippewa Indians of the Mississippi and Lake Superior, including the L'Anse band, ceded to the United States the western half of Michigan's Upper Peninsula, as well as portions of northern Wisconsin (the "Ceded Area"). 7 Stat. 591. In relevant part, Article II of the 1842 Treaty provides:

> The Indians stipulate . . . that the laws of the United States shall be continued in force, in respect to their trade and intercourse with the whites, until otherwise ordered by Congress.

Nothing in the 1854 Treaty abrogated Article II of the 1842 Treaty.

C. The Michigan Sales and Use Tax Acts

The Michigan Sales Tax Act, Mich. Comp. Laws ("M.C.L.") §§205.51-205.78 (the "Sales Tax Act"), imposes a sales tax on retail sellers equal to 6% of the gross proceeds from retail sales of tangible personal property in Michigan.

M.C.L. §205.52. The parties agree that the legal incidence of the Michigan sales tax falls on the retail seller, because the retail seller is legally obligated to pay the tax under the terms of the Sales Tax Act. M.C.L. §205.52(1).

The Michigan Use Tax Act, M.C.L. §§ 205.91-205.111 (the "Use Tax Act"), imposes a tax on each person for the privilege of using tangible personal property and certain specified services in the state equal to 6% of the price of the property or services. M.C.L. §205.93(1). The use tax does not apply to property upon which the sales tax has been paid. M.C.L. §205.94(1)(a). The use tax is imposed on, among other things, the use of motor vehicles in Michigan if purchased out of state, the use of certain telephone and other telecommunications services, and the use of hotel lodging services. M.C.L. §§205.93(2), 205.93a(1)(a) and (b), 205.93c. The Use Tax Act presumes that tangible personal property purchased outside of Michigan is subject to use tax if brought into Michigan within ninety days of the purchase date. M.C.L. §205.93(1)(a). The parties agree that the legal incidence of the Michigan use tax falls on the consumer.

D. The Transactions at Issue

The Community and its members have purchased and used, and expect to continue to purchase and use, a wide variety of tangible personal property and services within the Community's Reservation. (LaFernier affidavit, ¶¶6-8, RE 45-2, pp.3-4; ROA pp.162-63; Misegan affidavit, ¶¶3-4, RE 45-3, p.3; ROA p.205.)

The applicability of Michigan's sales and use taxes to these transactions is the primary issue in this appeal. For the Community, these transactions include, among others, the purchase, lease, and use of motor vehicles, office furniture and equipment, propane gas, electricity, and telephone equipment and services. (LaFernier affidavit, ¶8, RE 45-2, p.4; ROA p.163.) For Community members, these transactions include, among others, the purchase, lease, and use of many necessities for their daily lives, such as prepared food, clothing, over-the-counter medicine such as aspirin and cough syrup, personal items such as disposable diapers and toothpaste, furniture, appliances, propane gas for home heating, electricity, and telephone equipment and services. (LaFernier affidavit, ¶¶6-7, 9-14, RE 45-2, pp.3-5; ROA pp.162-164; Misegan affidavit, ¶¶3-5, RE 45-3, p.3; ROA p.205.) With the Community itself and 893 Community members residing on the Reservation, there are hundreds – or more likely thousands – of these transactions that occur each day within the Reservation for the performance of governmental operations and for daily living.

E. The Department's "Informal Process" for Approving Nontaxable Transactions

As discussed below, the applicability of Michigan's sales and use taxes to these numerous daily transactions within the Reservation is governed by bright line rules established by the Supreme Court. Appellees, however, contend that *each time* the Community or any of its members wishes to purchase an item of tangible

personal property or services without payment of Michigan's sales or use tax, the Community or the member must submit to Appellee Fratzke, the Department's Native American affairs specialist, a specific request for a tax exemption and obtain preauthorization before the transaction may proceed on a nontaxable basis. Absent such preauthorization, Appellees contend, the Community and its members must pay the tax and then file a claim for refund, again subject to approval by Fratzke.

Appellees' "informal process" for preapproving the exercise of the Community's federal immunities (the "Informal Process"), (Fratzke affidavit, ¶¶11-29, RE 53-2, pp.5-10; ROA pp.335-40.), has not been adopted in any Department regulations, rules, or other notice. Many of the elements of the Informal Process appear to have been first articulated in response to this lawsuit. For example, in 2003 and 2005, before this lawsuit was filed, two Michigan retailers explained to Community member Jennifer Misegan that they had been told by state officials that they *must* collect Michigan's sales and use taxes in *all* transactions involving individual Community members, because the Community did not have a tax agreement with the state.[4] (Misegan affidavit, ¶¶10-11, Ex. D & E, RE 45-3, pp.2-3, 5, 16-19; ROA pp.204-05, 207, 218-21; Polzin affidavit, ¶3,

[4] A number of Indian tribes in Michigan have entered into tax agreements with the State, but the Community has not, preferring to rely on its long-established federal Indian law immunities from state taxation.

Ex. A, RE 45-5, pp.3-5; ROA pp.228-30.) In May 2006, after this lawsuit was filed, Fratzke informed another Michigan retailer "that tribal members . . . who feel they are due some sort of sales and use tax exemption should write him a letter and he will address their case . . . ." (Stark affidavit, ¶4, Ex. A, RE 45-6, 3-6; ROA pp.233-36.)

For transactions involving the Community itself, prior to this lawsuit Fratzke had required the Community to seek his approval before making any nontaxable purchase. Fratzke explained to one retailer in early 2004 that in order to determine whether the Community could make any particular purchase without imposition of tax, the Department would require the name and title of the individual making the purchase on behalf of the Community, the section of the tribal government using the property or receiving the service, and the use, function, and address of the section. (LaFernier affidavit, ¶15, Ex. F, RE 45-2, pp.5-6, 20-22; ROA pp.164-65, 179-81.)

Fratzke has filed an affidavit in this case setting forth the following list of information he will now require from the Community and its members before he will approve any item for purchase free of Michigan's sales or use tax or for a tax refund:

> (a) Whether the party making the request (the applicant for the exemption) is a federally recognized Indian tribe, a tribal entity, or a member of a federally recognized Indian tribe.

> (b) If the applicant is a federally recognized Indian tribe, the unit purchasing the item, such as the police department or a commercial enterprise owned by the tribe.
>
> (c) If the applicant is a member of a federally recognized Indian tribe, whether he or she resides within his or her own tribe's Indian Country as defined under 18 U.S.C. §1151.
>
> (d) If the applicant is a tribal entity, the tribal membership of its owners, nature of its organization, and whether it is operating within its own tribe's Indian Country as defined under 18 U.S.C. §1151.
>
> (e) The item being purchased and the location of the retailer's business.
>
> (f) Whether the retailer is owned by a federally recognized tribe, a member of a federally recognized tribe, or a tribal entity, or in the absence of such, the nature of the retailer and its business with Indian tribes.
>
> (g) The place where each component of the sale will take place, which may include information regarding (as appropriate) where the sale was solicited, the sale was made, the contract signed, payment made, or delivery made, etc.
>
> (h) Where the item is intended to be used, i.e., exclusively within the tribe or tribal member's Indian Country as defined in 18 U.S.C. §1151, or both inside and outside the Indian Country.
>
> (i) If the applicant is a federally recognized tribe, the function for which the item being purchased will be used and if it can or will be used outside of the tribe's Indian Country as defined in 18 U.S.C. §1151.

(Fratzke affidavit, ¶13, RE 53-2, pp.6-7; ROA pp.336-37.) Fratzke has testified that he was "put[ting] all these [elements] down" on paper for the first time.

(Fratzke deposition, p.275, RE 99-8, p.23; ROA p.954.) Fratzke further explained in his affidavit that "[d]epending on the information provided" he reserved the right to "ask for additional information and documentation in support of the claim for exemption." (Fratzke affidavit, ¶14, RE 53-2, p.7; ROA p.337.)

According to Fratzke, "once [the Department] is provided with adequate information, it can usually provide a determination regarding the taxable status of a sale within a day or two." (Id., ¶26, RE 53-2, p.9; ROA p.339.) While even "a day or two" of delay would be too long for most purchases necessary for the operation of the tribal government and for the daily lives of members, the record shows that the delay is much longer. For example, when a Michigan retailer asked Fratzke whether it could provide the Community with tax-free telephone equipment and services on the Reservation on the basis of an exemption certificate provided by the Community, Fratzke initially acknowledged the retailer's question, but then took twenty more days to respond. (Collins affidavit, ¶¶3-5, Ex. B-D, RE 45-7, pp.3, 7-14; ROA pp.239, 243-50.)

Another example involves claims for refund of sales and use taxes that Community members have been required to pay with respect to their purchases of motor vehicles.[5] In 2005, Community member Todd Chosa prevailed in the

[5] Michigan's Secretary of State has not been willing to register motor vehicle titles without proof of payment of sales or use tax or Fratzke's approval.

Michigan Tax Tribunal in his dispute with the Department over whether Michigan's use tax could validly be imposed under federal law with respect to his motor vehicle purchased outside Michigan, which he principally stored on the Reservation and used in part outside the Reservation. Chosa v. Michigan Dep't of Treasury, MTT Docket No. 283437 (Mich. Tax Trib. Apr. 20, 2005), a copy of which is attached as Addendum B.[6] After the Tax Tribunal decision, the Community began filing claims for refund of sales and use taxes paid by Community members with respect to their purchases of motor vehicles principally stored on the Reservation. (Fratzke affidavit, ¶28, RE 53-2, p.10; ROA p.340; Letter from Baker to Rising, RE 99-7, pp.16-20; ROA pp.865-69.) Fratzke has failed to act on those claims for over three years. (Fratzke affidavit, ¶28, RE 53-2, p.10; ROA p.340.)[7] The record thus demonstrates the absurdity of the notion that Fratzke could address hundreds, perhaps thousands of requests for exemption

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(Polzin affidavit, ¶3, RE 45-5, p. 3; ROA 228; Misegan affidavit, ¶6, RE 45-3, pp. 4-5; ROA 205-06; Fratzke affidavit, Att 3, RE 53-5, p. 2; ROA p. 355.)

6 The Department appealed the Tax Tribunal decision, (Defendants' Answer, ¶48(b), RE 33, p. 16; ROA p. 96.) but later dismissed its appeal with prejudice. (Reply to Defendants' Response to Plaintiff's Motion for Partial Summary Judgment, RE 56-2, p. 15n.10; ROA p. 414.)

7 Fratzke stated that he is holding the claims "pending the outcome of this litigation because Treasury would have to gather additional information in order to make a determination regarding the taxable status of each individual transaction and the Community is challenging Treasury's authority to request that information." (Fratzke affidavit, ¶28, RE 53-2, p. 10; ROA p. 340.)

every day, even if it were feasible for the Community and its members to prepare and file them.

F. The 2005 Offsets Forming the Basis of the Community's 1983 Claim

The events giving rise to the Community's Section 1983 claim began in the fall of 2002, when Appellees Rising, Reynolds, and Fratzke seized federal and state funds owed to the Community and applied those balances to offset sales and use tax assessments dating back to 1993-94. Those 1993-94 tax assessments arose out of tax audits conducted by the Department during a period when the Community and the State of Michigan had an operating tax agreement. The Community had disputed the validity of the assessments and had refused to pay them. In 2002, the Department unilaterally collected the disputed taxes by offsetting them against federal and state funds disbursed to the Community, including funds from the Federal Medicaid Program, Federal Community Health Program, Federal Child Day Care Program, and State Department of Transportation Funds. (LaFernier affidavit of Dec. 14, 2007 (hereinafter "Second LaFernier affidavit"), ¶¶10-12, RE 115, pp.4-5, ROA pp.1411-12.)

When the Community objected to the legality of the 2002 offsets, Appellee Reynolds, acting on instructions from Appellee Fratzke, reversed those offsets, resulting in the return of the offset funds to the Community. (Durocher affidavit, ¶23, Ex. J, RE 121 & 121-3, pp.10 & 33-51; ROA pp.1518 & 1638-56; id., Ex. C,

RE 121-2, pp.68-71; ROA pp.1588-91; DePetro affidavit, ¶4, RE 118, p.2; ROA p.1500; Second LaFernier affidavit, ¶12, RE 115, p.5; ROA p.1412.) Reynolds also purportedly took steps to ensure that similar offsets would not occur in the future. (Durocher affidavit, Ex. C, RE 121-2, pp.65-66; ROA pp.1585-86.)

In May and June 2005, however, Appellees again offset federal and state funds to which the Community was entitled and applied those funds to the disputed 1993-94 tax assessments. These 2005 offsets involved funds from the Federal Medicaid Program, the Federal Women, Infants & Children ("WIC") Program, the Federal Safe and Stable Families Program, and the Federal Child Day Care Program, as well as state tax refunds. (Second LaFernier affidavit, ¶¶13-14, RE 115, pp.6-7; ROA pp.1413-14; Durocher affidavit, ¶30, RE 121, p.11; ROA p.1519.) The 2005 offsets occurred on five separate occasions over a month-long period, from May 10 to June 8, 2005. (Durocher affidavit., ¶24, Ex. K, RE 121 & 121-3, pp.10 & 53; ROA pp.1518 & 1658; id., ¶25, Ex. L, RE 121 & 121-3, pp.10 & 55-57; ROA pp.1518 & 1660-62.) On May 25, 2005, the Community notified Fratzke of its objection to the offsets and requested that they be reversed. (Id., ¶24, Ex. K, RE 121 & 121-3, pp.10 & 53; ROA pp.1518 & 1658.) When the offsets continued, the Community repeated its objection and request on June 15, 2005. (Id., ¶25, Ex. L, RE 121 & 121-3, pp.10 & 55-57; ROA pp.1518 & 1660-62.) Fratzke responded that the Department was entitled to offset the federal and state

funds, and refused to reverse them even after the Community explained why the offsets were illegal. (Id., ¶26, Ex. M, RE 121 & 121-3, pp.10 & 59; ROA pp.1518 & 1664; id., ¶27, Ex. N, RE 121 & 121-3, pp.10 & 61-71; ROA pp.1518 & 1666-1676.)

G. Proceedings in the District Court

The Community filed this lawsuit in September 2005. The Community sought to establish its federal tax immunities with respect to its own and its members' purchase and use of property and services within the Community's Reservation, as well as within the Ceded Area. (Complaint, Counts IX-XXVI, RE 30, pp.30-52; ROA pp.51-73.) The Community also sought rulings regarding the legality of the 1993-94 sales and use tax assessments and the offsets of the Community's federal and state funds to collect these assessments. (Id., Counts I-V, VII-VIII, & XXVII-XXX, RE 30, pp.23-28, 29-30, 52-54; ROA pp.44-49, 50-51, 73-74.) Finally, the Community sought damages under Section 1983 from Appellees Rising, Reynolds, and Fratzke in their individual capacities to redress injuries to the Community resulting from the 2005 offsets. (Id., Count VI, RE 30, pp.28-29; ROA pp.49-50.)

On September 29, 2006, the Community brought a motion for partial summary judgment on Counts IX and XIII of its Complaint, arguing that categorical rules of federal law prohibit imposition of Michigan's sales and use

taxes on the Community's and its members' purchase and use of property and services within the Reservation. (Plaintiff's Motion for Partial Summary Judgment, RE 44; ROA p.134.) On January 8, 2007, Appellees brought a motion for summary judgment seeking dismissal of the Community's Complaint based on the Eleventh Amendment. (Defendants' Motion for Summary Judgment, RE 63 and 64; ROA pp.487-515.) Appellees' motion also sought summary judgment with respect to the Community's claims based on the 1842 Treaty and Section 1983, among other additional grounds. (Id., RE 64, p.3; ROA p.491.)

On October 31, 2007, before the district court had ruled on the pending motions and before the Community had completed its discovery,[8] Appellees brought a second motion for summary judgment. (Defendants' Second Motion for Summary Judgment, RE 98; ROA p.647.) Appellees' new motion sought summary judgment on various grounds on all of the Community's claims relating to the 1993-94 sales and use tax assessments and to the offsets of the Community's federal and state funds to collect those assessments. The motion also sought summary judgment on the Community's Section 1983 claims on grounds in addition to those asserted in Appellees' first motion. (Defendants' Brief in Support of their Second Motion for Summary Judgment, RE 104; ROA pp 1011-46.) On

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8 The parties previously had agreed to stay discovery pending resolution of the first round of briefings. (Durocher affidavit, ¶¶ 5-22, RE 121, pp. 3-10; ROA pp. 1511-18.)

December 14, 2007, the Community filed a second motion for partial summary judgment on Counts I, II, and V of its Complaint, arguing that the 1993-94 tax assessments violated the Community's federal tax immunities and that the Department's 2005 offsets of the Community's federal funds violated the Community's federal statutory rights. (Plaintiff's Second Motion for Summary Judgment, RE 113 and 114; ROA pp. 1385-1407.)

In an Order and Judgment dated March 27, 2008, in accordance with an Opinion entered the same day, the district court granted summary judgment for Appellees and denied the Community's motions. The district court denied Appellees' overall motion to dismiss on Eleventh Amendment grounds, although it ruled that the Community's claims seeking reversal of the offsets to collect the 1993-94 tax assessments must be dismissed based on the Eleventh Amendment. Op. at 6-9. The court also ruled that the Community lacked standing for its claims seeking a declaratory judgment regarding the legality of the 1993-94 assessments and of the offsets to collect the assessments, and seeking an injunction prohibiting similar offsets in the future. Op. at 9-14. The court found there no longer was any "threat that Defendants will seek to collect any more taxes through offsets or other means" because the disputed offsets had resulted in the collection of all of the disputed tax assessments. Op. at 10.

Reaching the merits, the district court agreed with the Community that Michigan's use tax is categorically barred with respect to the Community's and its members' use of property and services exclusively within the Reservation, but nevertheless awarded summary judgment to Appellees. Op. at 21. With respect to the Community's and its members' use of property principally stored on the Reservation, but used in part outside the Reservation, the district court held that "Defendants must in some way tailor or apportion the [use] tax to the off-reservation use," id., and again awarded summary judgment to Appellees. The court held that the validity of Michigan's sales tax with respect to the sales to the Community and its members within the Reservation "depends on a case-by-case analysis of the Bracker interest-balancing test," id. at 20, referring to the Supreme Court's decision in White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980). In evaluating the legality of Appellees' Informal Process, the district court applied the "minimal burdens" standard of Department of Taxation & Fin. of New York v. Milhelm Attea & Bros., Inc., 512 U.S. 61 (1994), and concluded that the Informal Process satisfies this standard because it is "reasonably tailored to the collection of taxes for those scenarios that are taxable." Op. at 21. Even though neither the Community nor Appellees moved for summary judgment on the merits of the Community's 1842 Treaty claims, the district court granted summary judgment to Appellees on these claims. The district court recognized that this

Court held in Keweenaw Bay Indian Community v. Rising, 477 F.3d 881, 893 (6th Cir. 2007), that "the 1842 Treaty . . . makes federal law applicable to the area governed by the treaty." Op. at 18 n.4. This led the court to conclude that "if taxation is permissible under federal law, it is likewise permissible" under the treaty, so "there is no need for the Court to engage in a separate analysis" of the treaty claims. Id. Finally, with respect to the Community's Section 1983 claim, the court concluded that "[e]ssentially, this case is a battle between sovereigns in which the Community is relying upon its sovereign rights to avoid paying the taxes demanded and set off by the State," and therefore is barred under the principles established by the Supreme Court in Inyo County v. Paiute-Shoshone Indians of the Bishop Community of the Bishop Colony, 538 U.S. 701 (2003). Op. at 16.

SUMMARY OF ARGUMENT

While the district court erred on many issues, the Community has limited its appeal to three issues. First, the court erred in ruling on the Community's motion relating to application of Appellees' sales and use taxes. With respect to the use tax, the court acknowledged that the tax cannot be imposed upon property used by the Community or its members exclusively within the Reservation. Despite this acknowledgement, the court erred in denying the Community's request for declaratory and injunctive relief prohibiting Appellees from imposing the use tax in such cases. It further erred by holding, in direct contradiction to several

Supreme Court decisions, that with respect to Indian-owned property principally stored within the Reservation, Appellees may somehow apportion the use tax to the actual amount of off-reservation use on an ad hoc basis and legitimately collect the apportioned amount.

With respect to the sales tax, under the Supreme Court's holdings long ago in Warren Trading Post Co. v. Arizona Tax Commission, 380 U.S. 685 (1965), and Central Machinery Co. v. Arizona Tax Commission, 448 U.S. 160 (1980), the Indian Trader Statutes, 25 U.S.C. §§261-264, categorically prohibit Appellees from imposing the Michigan sales tax upon retailers for their sales of property to the Community or its members within the Reservation. The district court erred in ignoring these dispositive decisions and by holding that the permissibility of imposing the Michigan sales tax upon retail sales to Indians within Indian country depends on a balancing of the federal, tribal and state interests with respect to *each* such sale.

The court compounded its errors above by holding that Appellees could subject the Community's and its members' enjoyment of their federal tax immunities to Appellees' Informal Process. The Informal Process evaluates the immunity claims at issue under inappropriate and irrelevant criteria, and places severe administrative burdens on the exercise of the immunities, effectively nullifying them. The court improperly evaluated the Informal Process under the

"minimal burdens" standard that was at issue in Rising. This standard, however, applies only "to the collection of valid taxes from non-Indians," Milhelm Attea, 512 U.S. at 73, which are not present here. Appellees can fully monitor, administer, and verify the immunity claims under Michigan's standard procedure for honoring state tax exemptions.

The court similarly erred with respect to the Community's 1842 Treaty claim. Based on the plain language of the 1842 Treaty, if taxation is impermissible under federal law on the Reservation it likewise must be impermissible under the 1842 Treaty within the Ceded Area, under this Court's holding in Rising that "the 1842 Treaty plainly makes federal law applicable to the Ceded Area . . . ." 477 F.3d at 893 ((quoting Keweenaw Bay Indian Community v. Rising, No. 2:03-CV-111, 2005 WL 2207224, at *11 (W.D.Mich. Sep 12, 2005)). Because Michigan's sales and use taxes are illegal under federal law as applied to the Community's and its members' purchases on the Reservation, the taxes likewise are illegal as applied to the Community's and its members' purchases in the Ceded Area.

Finally, the court's holding with respect to the Community's Section 1983 claim was erroneous because the federal constitutional and statutory rights forming the basis for the claim are not sovereign rights but rather private rights enjoyed by any citizen.

ARGUMENT

I. STANDARD OF REVIEW.

The court of appeals reviews a district court's grant of summary judgment de novo. Sigler v. American Honda Motor Co., 532 F.3d 469, 482 (6th Cir. 2008) (citing Spencer v. Bouchard, 449 F.3d 721, 727 (6th Cir. 2006)). The court of appeals views the evidence and draws all reasonable inferences in favor of the non-moving party. Sigler, 532 F.3d at 482 (citing Singfield v. Akron Metro. Hous. Auth., 389 F.3d 555, 560 (6th Cir. 2004); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986)). When the district court denies a motion for summary judgment "'on purely legal grounds' . . . [and not] based on the finding of a genuine issue of material fact," the district court's denial is reviewed de novo. Barr v. Lafon, 538 F.3d 554, 562 (6th Cir. 2008) (quoting Tenn. ex rel. Wireless Income Props., LLC v. City of Chattanooga, 403 F.3d 392, 395-396 (6th Cir. 2005)).

II. FEDERAL LAW CATEGORICALLY PROHIBITS IMPOSITION OF THE SALES AND USE TAXES IN THIS CASE.

A. Federal Law Categorically Prohibits Imposing the Michigan Use Tax on the Community or its Members with Respect to Tangible Personal Property or Services Exclusively Used or Principally Stored within the Reservation.

The Supreme Court has repeatedly held that a state is categorically barred from imposing a tax upon Indians for activities or transactions that take place within Indian country. In Oklahoma Tax Commission v. Chickasaw Nation, 515

U.S. 450, 458 (1995), the Supreme Court held that, absent express congressional permission to the contrary, federal common law categorically prohibits a state from imposing a tax the legal incidence of which falls "directly on an Indian tribe or its members inside Indian country, rather than on non-Indians."[9]

The same categorical bar applies to property principally stored within Indian country, even if used outside Indian country, unless the *taxing statute itself* tailors the tax to the amount of actual off-reservation use. In Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation, 425 U.S. 463 (1976), the Supreme Court categorically barred the imposition of Montana's personal property tax on Indian-owned motor vehicles garaged within the tribe's reservation, even though tribal members drove their vehicles outside of the reservation. The Court held that the tax, which was assessed annually on the value of each vehicle, could not validly be imposed with respect to the Indian-owned vehicles. 425 U.S. at 468-69, 480-81.

The Court reaffirmed the Moe holding in Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980). Washington

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9 This holding reaffirmed a principle that the Court has consistently enforced for decades. See, e.g., Bryan v. Itasca County, 426 U.S. 373 (1976) (state may not tax Indian-owned personal property within reservation); McClanahan v. Arizona Tax Commission, 411 U.S. 164 (1973) (state may not tax Indians' reservation income); Carpenter v. Shaw, 280 U.S. 363 (1930) (state may not tax Indians' royalty interests in leased allotted lands); The Kansas Indians, 72 U.S. 737 (1867) (state may not tax Indians' real property within reservation).

sought to impose its motor vehicle excise tax, an annual tax based on the value of the vehicle, upon motor vehicles owned by tribal members who lived on the tribe's reservation and drove their vehicles both on and off the reservation. 447 U.S. at 142-43, 162. Washington attempted to distinguish its tax from the Montana tax by describing it as an excise tax imposed for the "use" of motor vehicles within the state. Id. at 163. The Supreme Court rejected this purported distinction, holding that the inherent taxation of on-reservation use under the taxing statute rendered the tax invalid with respect to *any* use of Indian-owned vehicles principally stored within Indian country:

> We do not think that Moe and McClanahan can be this easily circumvented. While Washington may well be free to *levy a tax on the use outside the reservation* of Indian-owned vehicles, it may not under that rubric accomplish what Moe held was prohibited. Had Washington tailored its tax to the amount of *actual off-reservation use*, or otherwise varied something more than nomenclature, this might be a different case.

Id. at 163-64 (emphasis added).

Finally, in Oklahoma Tax Commission v. Sac & Fox Nation, 508 U.S. 114 (1993), the Court removed all doubt that, absent a statutory tailoring of the use tax to the actual amount of off-reservation use, states are absolutely precluded from imposing use taxes upon Indian property principally stored within Indian country. Like Washington, Oklahoma failed to apportion its motor vehicle excise tax and registration fee to apply only to the off-reservation use of Indian-owned vehicles,

with the result that both taxes were necessarily "imposed for use both on and off Indian country." 508 U.S. at 127. As the Court explained:

> Tribal members who live in Indian country consisting solely of scattered allotments likely use their cars more frequently on state land and less frequently within Indian country than tribal members who live on an established reservation. Nevertheless, members of the Sac and Fox Nation undeniably use their vehicles within Indian country. As we said in Colville, had the State "tailored its tax to the amount of actual off-[Indian country] use, or otherwise varied something more than mere nomenclature, this might be a different case. But it has not done so, and we decline to treat the case as if it had." 447 U.S., at 163-64 . . . .

Id. at 128 (bracketing in original).

Michigan's use tax is imposed upon a person for the privilege of using, storing, or consuming within Michigan tangible personal property upon which the Michigan sales tax has not been paid and which is not otherwise exempt. M.C.L. §205.93(1). The legal incidence of the use tax falls upon the user of the property or services, and the trigger of the tax is the use of such property or services. Id. The Use Tax Act does not have any apportionment formula that would tailor the tax to the amount of actual use of property outside Indian country, or that would authorize Appellees to engage in such tailoring.

Accordingly, under the longstanding federal rule reaffirmed in Chickasaw Nation, because the user of property bears the legal incidence of the use tax, federal law categorically bars its application to property of, or services rendered to,

the Community or its members that are exclusively used within the Reservation. In addition, pursuant to Moe, Colville, and Sac & Fox, because the Michigan Use Tax Act does not apportion the use tax to apply only to the actual amount of off-reservation use of Indian property, federal law categorically bars any application of the use tax to property of the Community or its members that is principally stored within the Reservation.

Both the district court and Appellees acknowledge that Michigan's use tax cannot be imposed upon property used by the Community or its members exclusively within the Reservation. Op. at 21 ("If the item will be used exclusively within Indian country, the tax is categorically barred."). (Transcript of Proceedings before Judge Quist (Feb. 27, 2008), RE 140, pp.15 ll. 11-15, 34 ll. 21-23; ROA vol. 3 pp.15 ll.11-15, 34 ll. 21-23.) The district court erred, however, when it inexplicably failed to grant the Community's motion for summary judgment regarding this use tax issue.

The district court also erred in holding that Michigan's use tax applies to Indian-owned property principally stored within the Reservation on the ground that *Appellees*, as opposed to the state legislature, may somehow apportion the use tax to the actual amount of off-reservation use. Op. at 21-22. Colville and Sac & Fox clearly hold that, in the absence of a *statutory* tailoring or apportionment provision, a state is completely barred from imposing a tax on any use, on-reservation or off-

reservation, of Indian-owned motor vehicles principally stored within Indian country. These Supreme Court decisions do not authorize a post hoc administrative apportionment of the tax to the off-reservation use of the property. The Michigan Tax Tribunal has come to the same conclusion, noting that "[t]he Michigan use tax is not specifically designed and explicitly stated as tailored to specific use on and off-reservation. *Without express authorization by statute*, it is improper to impose the tax in this case as the U.S. Constitution prohibits such." Chosa, MTT Docket No. 283437, at 4 (emphasis added).[10]

Because the district court erred by failing to apply the categorical rules of Chickasaw, Moe, Colville, and Sac & Fox, this Court should reverse the district court and hold that Appellees are categorically barred by federal law from imposing the use tax upon the Community or its members with respect to property that is either exclusively used within the Reservation or principally stored within the Reservation.

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[10] Such an informal or ad hoc apportionment of the use tax would violate the most elementary standards of due process because Appellees have not issued any rule governing the method of apportionment, much less an objective, reasonable, well-publicized rule. Moreover, the district court's expectation that Appellees would in fact apportion the use tax to off-reservation use fails to take into account the Department's public and continuing insistence that the "use tax cannot be apportioned" and therefore "the entire amount of tax is owed." Chosa, MTT Docket No. 283437, at 2 (describing the Department's argument).

B. Federal Law Categorically Prohibits Imposing the Michigan Sales Tax upon Retailers for the Sale or Lease of Tangible Personal Property to the Community or its Members within the Reservation.

The Indian Trader Statutes, 25 U.S.C. §§261-264, provide, in pertinent part, that the Commissioner of Indian Affairs "shall have the sole power and authority to appoint traders to the Indian tribes and to make such rules and regulations as he may deem just and proper specifying the kind and quantity of goods and the prices at which such goods shall be sold to the Indians." 25 U.S.C. §261. Pursuant to this and other sections of the Indian Trader Statutes, the Commissioner has issued detailed regulations that govern all aspects of trading with reservation Indians. 25 CFR §§140.1-140.26. In Warren Trading Post Co. v. Arizona Tax Commission, 380 U.S. 685 (1965), the Supreme Court unanimously held that the Indian Trader Statutes formed a comprehensive federal scheme that barred the imposition of an Arizona gross receipts tax upon a licensed Indian trader operating within the Navajo Indian Reservation for the trader's sales to Indians. Applying the general balancing test later summarized in Bracker, 448 U.S. 136, the Court concluded that the detailed regulatory scheme imposed by the Indian Trader Statutes and related regulations showed that "Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens upon traders." 380 U.S. at 690. The Court added that the "financial burdens" imposed by such tax on an Indian trader or its Indian

customers "could thereby disturb and disarrange the statutory plan Congress set up in order to protect Indians against prices deemed unfair or unreasonable by the Indian Commissioner." Id. at 691.

Fifteen years later, in Central Machinery Co. v. Arizona Tax Commission, 448 U.S. 160 (1980), the Supreme Court reaffirmed the preemptive bar imposed by the Indian Trader Statutes on state taxation of Indian traders. Arizona sought to impose the same gross receipts tax at issue in Warren Trading upon a one-time sale of eleven farm tractors by an Arizona retailer to Gila River Farms, an enterprise of the Gila River Indian Community, on its reservation. 448 U.S. at 161-62, 164 n.3. The Court found only "two distinctions" between Warren Trading and the case before it: the retailer in Central Machinery did not maintain a place of business on the reservation and had not obtained an Indian trader license. Id. at 164. The Court nevertheless held that the tax could not be imposed on the retailer, concluding that the Indian Trader Statutes "apply no less to a nonresident person who sells goods to Indians on a reservation than they do to a resident trader." Id. at 165. Dismissing the fact that the vendor lacked an Indian trader license, the Court stated that "[i]t is the existence of the Indian trader statutes . . . and not their

administration, that pre-empts the field of transactions with Indians occurring on reservations." Id. [11]

More recently, in Milhelm Attea, 512 U.S. at 73, the Supreme Court reaffirmed its prior holdings prohibiting the direct taxation of Indian traders for sales to Indians within Indian country. New York required wholesalers who sold unstamped cigarettes to Indian tribes or other reservation retailers to comply with certain record keeping, reporting, and substantiation requirements. Id. at 64. The Court upheld the imposition of these administrative duties upon the wholesalers, who qualified as Indian traders, by distinguishing them from the direct taxation of Indian traders struck down by Warren Trading and Central Machinery. Id. at 74-75. The Court emphasized that the administrative burdens placed on the Indian traders stood "on a markedly differing footing from *a tax imposed directly on Indian traders*, on enrolled tribal members or tribal organizations, or on 'value generated on the reservation by activities involving the Tribes.'" Id. at 73 (emphasis added) (citing Colville, 447 U.S. at 156-57).

The Indian Trader Statutes thus categorically bar any direct state taxation of Indian traders for sales to Indians within Indian country, and for this purpose the term "Indian trader" means *any* vendor that makes sales to Indians within their

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11 Despite the Community's thorough discussion of Warren Trading and Central Machinery in its briefs and during oral argument below, the district court failed even to mention these controlling cases in its decision.

Indian country, regardless of whether such vendor has a place of business within such Indian country, regularly makes sales to Indians, or holds a federal Indian trader's license.

The Michigan sales tax is imposed on the retailer for the privilege of engaging in the retail sale of tangible personal property, and the legal incidence of this tax falls directly on the retailer. See, e.g., Op. Mich. Att'y Gen. 7062 (Oct. 4, 2000); Sims v. Firestone Tire & Rubber Co., 245 N.W.2d 13 (Mich. 1976). Liability for the tax is triggered when the vendor makes a "sale at retail" that is not otherwise exempt under the statute. M.C.L. §§205.51(1)(b), 205.52(1). Pursuant to the Indian Trader Statutes preemption principles discussed above, retailers making sales of property to the Community or its members within the Reservation constitute Indian traders for purposes of federal preemption analysis. Accordingly, federal law categorically prohibits Appellees from imposing the Michigan sales tax upon retailers for their sales of property to the Community or its members within the Reservation.

In granting summary judgment to Appellees, the district court erred by ignoring Warren Trading, Central Machinery, and the Indian Trader Statutes and instead holding that the permissibility of imposing the Michigan sales tax upon retail sales to Indians within Indian country "depends on the Bracker interest-balancing test," and a balancing of the federal, tribal, and state interests with

respect to *each* such sale. Op. at 21. The court overlooked the fact that Warren Trading had *already* performed the relevant balancing analysis and concluded that the Indian Trader Statutes categorically bar the state taxes on such sales. For this reason, the Court in Central Machinery did not rebalance the relevant interests with respect to the reservation sale before it, though invited to do so by Justice Stewart's dissent, 448 U.S. at 169-70, and instead simply held that the balancing conclusions reached by Warren Trading were not altered by the unlicensed status of the retailer and its nonresidence within Indian country. Central Machinery, 448 U.S. at 164-65.

The Bracker Court itself noted that Warren Trading had already performed the balancing analysis applicable to on-reservation sales by Indian Traders, and held that the timber tax before it was preempted by the same type of comprehensive federal regulatory scheme as the Indian Trader Statutes which Warren Trading found decisive. Bracker, 448 U.S. at 151 n.15, 152-53. The Supreme Count has recently confirmed the distinction between reservation transactions subject to the Bracker interest-balancing test and the retail sales to Indians within Indian country preempted by the Indian Trader Statutes. See Wagnon v. Prairie Band Potawatomi Nation 546 U.S. 95, 102 (2005) (distinguishing the generally applicable Bracker interest balancing test from Central Machinery, which already has resolved that the Indian Trader Statutes

preempted state taxes imposed upon "a non-Indian's on-reservation sales" to Indians). As a New Mexico state court decision explained in refusing to authorize application of the general interest-balancing test to state taxation of Indian traders, "[r]emand is . . . unnecessary in light of the fact that the U.S. Supreme Court *has already balanced these interests* in Warren Trading Post. In that case, the New Mexico Court of Appeals concluded that, when a sale is made to reservation Indians on the reservation, the state tax on the receipts of the sale is preempted." Laguna Industries, Inc. v. New Mexico Taxation & Rev. Dep't, 845 P.2d 167, 171 n.1 (N.M. Ct. App. 1992) (emphasis added), aff'd, 855 P.2d 127 (N.M. 1993); cf. Ramah Navajo School Board v. New Mexico Bureau of Rev., 458 U.S. 832, 846 (1982) (admonishing the federal and state courts to apply "the letter and the spirit of our decisions" involving the general balancing test to like situations).

Because the district court erred by failing to recognize that the Indian Trader Statutes categorically preempt states from imposing a sales tax "on a non-Indian seller's on-reservation sales," Wagnon, 546 U.S. at 102, this Court should reverse the district court and hold that Appellees are categorically prohibited from imposing the Michigan sales tax upon retailers for their sales of property to the Community or its members within the Reservation.

C. Federal Law Prohibits Imposing the Department's Informal Process on the Exercise by the Community and its Members of Their Federal Immunities.

The district court compounded its errors in ignoring the categorical rules discussed above by holding that Appellees may "begin[] with the presumption that all transactions are taxable," Op. at 21, and impose their Informal Process requiring Appellee Fratzke's preapproval of any exercise by the Community and its members of their federal tax immunities. In support of this holding, the court applied the "minimal burdens" standard under which a state "may impose on reservation retailers minimal burdens reasonably tailored to the collection of valid taxes . . . ," Op. at 20 (quoting Milhelm Attea, 512 U.S. at 73), and cited to the cigarette tax refund process recently upheld by this Court in Rising. Op. at 20. The court's holding regarding the Informal Process is riddled with errors.

First, the Informal Process evaluates the immunity claims of the Community and its members in accordance with inappropriate and irrelevant criteria. As shown above, the federal tax immunities of the Community and its members result from long-standing principles that have evolved into categorical bars to the imposition of state taxes in the factual situations at issue before the district court. In order to qualify for these categorical federal immunities, a purchaser need only show a retailer that (1) he or she is an enrolled Indian tribal member, and (2) his or her residence is located within Indian country. Upon verification of these

requirements, the retailer may not charge any use tax (because the Michigan Use Tax Act does not provide for tailoring), and the retailer may not charge sales tax if (a) the retailer is located upon the reservation, or (b) the purchased products are received by the purchaser at his or her residence. See supra p.3, 1.[12] Appellees' Informal Process, in contrast, requires those claiming a federal immunity to provide not only information about the identity and residence of the purchaser, but also information about the intended use of the purchased item, the intended place of use of the purchased item, the location where the purchase was solicited, contracted and executed, the nature of the retailer, etc. Supra 9-11. Appellees' demand for this information results from their erroneous assumption that exemption from the sales tax depends on the Bracker interest-balancing test and that exemption from the use tax requires exclusive use of property within Indian country. Supra pp.9-11; 18. Because the Informal Process applies incorrect

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[12] See M.C.L. §205.69 (providing that the location of a sale for Michigan sales tax purposes is where the purchaser receives the products if the products are not received by the purchaser at the seller's location). For purposes of analyzing application of a federal tax immunity, the identification and definition of the taxable event of a state tax is determined in accordance with state law. See Wagnon, 546 U.S. at 105-07 (determining the "taxable event" of the Kansas fuel tax in accordance with Kansas law); Tunica-Biloxi Tribe v. Louisiana, 964 F.2d 1536, 1540 n.10, 1541 (5th Cir. 1992) (determining when and where a "sale" takes place in accordance with state law for purposes of deciding whether a federal immunity applies).

standards to the immunity claims of the Community and its members, federal law prohibits the Informal Process from being used to evaluate such claims.

Second, contrary to the district court's conclusion, Op. at 20, the propriety of the Informal Process may not be evaluated under a "minimal burdens" standard. The court's abridged quotation from Milhelm Attea (see Op. at 20) fails to acknowledge that the "minimal burdens" standard applies only "to the collection of *valid taxes* from *non-Indians*." Milhelm Attea, 512 U.S. at 73 (emphasis added). The Milhelm Attea principle in turn rests on earlier decisions which approved the imposition of minor administrative duties on retailers to collect *valid* cigarette taxes from *non-Indian or non-tribal member purchasers* within Indian country. Colville, 447 U.S. at 159 (Washington "may impose at least minimal burdens," affixing stamps and collecting the tax on Indian retailers selling cigarettes to nonmembers of the tribe); Moe, 425 U.S. at 483 ("The State's requirement that the Indian tribal seller collect a tax validly imposed on non-Indians is a minimal burden designed to [ensure payment of] . . . a concededly lawful tax."). The taxes challenged by the Community in this case, however, are neither imposed on non-Indians nor valid taxes. Accordingly, the "minimal burdens" cases do not authorize Appellees to impose *any* administrative burdens upon the Community or its members as a condition for enforcing their federal immunities from Michigan's sales and use taxes.

Third, even assuming that the Informal Process could be subject to some sort of "minimal burdens" evaluation standard (which it is not), the Informal Process violates any conceivable standard. As demonstrated above, the Informal Process requires the Community to provide Appellee Fratzke with information that is utterly unnecessary and irrelevant to substantiate the federal immunities at issue, compare supra pp.9-11; with 30-31 and, thus, is the antithesis of a "reasonably tailored" process. Moreover, the Informal Process provides for arbitrary and capricious evaluation of this information. The method and rules governing Fratzke's analysis have not been described or embodied in administrative regulations, published guidance, or even informal communications to Indian tribes or tribal members. Supra pp.8-11. Fratzke has admitted that he had not even compiled a list of the factors he evaluates until after commencement of this litigation, and that the list is subject to change or augmentation at his discretion. Supra pp.10-11. Fratzke also has not revealed his methodology for weighing the various factors or the importance that he gives to any given factor. Fratzke himself has admitted that the Informal Process is subjective. (Fratzke affidavit, ¶11-29, RE 53-2, pp.5-10; ROA pp.335-40.) The Informal Process, in short, consists of nothing more than the unfettered, subjective exercise of Fratzke's arbitrary discretion about what transactions deserve exemption under federal Indian law, and accordingly violates federal law.

The Informal Process not only provides for arbitrary and capricious evaluation of irrelevant information, but places crushing administrative and practical burdens upon the Community and its members that effectively prevents their exercise of clear federal tax immunities. The Community consists of approximately 3,339 members, of whom approximately 893 reside on the Reservation. Assuming conservatively that 600 of these Community members are adults and teens and each of them purchases, on average, three items per day qualifying for federal immunity from sales or use tax, the members would need to draft and submit a total of 1,800 exemption claims per day, 12,600 claims per week, 54,000 claims per month, and 657,000 claims per year in order to obtain preapproval for the exercise of their clearly available federal immunities. Moreover, the Community in the performance of its governmental operations purchases thousands of goods and services on an annual basis as to which exemption claims would need to be drafted and submitted. Both the Community and its members would further need to delay each purchase for a period of weeks or months in order to obtain the preapproval letter from Fratzke. Supra pp.11-12. It is simply absurd to assume, as the district court apparently did, that Fratzke could evaluate and process these claims in a timely and efficient manner and that such evaluation would satisfy a "minimal burdens" standard.

Finally, contrary to the district court's holding, Op. at 20-21, the Rising decision provides no basis for applying the Informal Process to the facts and circumstances of this case. In Rising, this Court upheld a cigarette tax refund process that turned on the Community's position as a cigarette retailer. 477 F.3d at 886-93. The Community was required to pre-pay cigarette tax for its customers on *all* its cigarette sales and then apply for monthly refunds of cigarette tax on its cigarette sales to members (the Community sold the cigarettes to members tax-free). Id. at 885. The Court approved the refund process to safeguard the collection of valid taxes on the Community's non-member customers and to prevent potentially fraudulent purchases of cigarettes by Community members on behalf of nonmembers. Id. at 891-92. The Informal Process in this case, in contrast, requires each retail purchaser – the Community and each of its members – to seek a ruling from Fratzke that the purchase is immune from sales or use tax under federal law. Whereas the Rising process involved just one monthly claim at the retailer level, the Informal Process requires preapproval of an exemption for thousands of specific purchases per month. Unlike the Rising process, moreover, which focused on valid taxes imposed on non-Indians, the Informal Process addresses facially invalid taxes imposed on reservation Indians, as to which

Appellees have provided absolutely no evidence of fraudulent claims.[13] Accordingly, the Rising decision fails to validate use of the Informal Process.

The district court not only overlooked the fatal flaws of the Informal Process and misapplied the Rising decision, it also ignored the fact that the federal immunity claims at issue here can be fully monitored, administered, and verified under Michigan's standard procedure for honoring sales and use tax exemptions ("Standard Procedure"). Under the Standard Procedure, Michigan requires retailers to obtain from a purchaser claiming tax exemption a single-purchase or blanket Form 3372 Certificate of Exemption, a copy of which is attached as Addendum C. The Form 3372 certifies under penalties of perjury the purchaser's name, address, social security or EIN number, and the basis of the exemption claim (purchase for resale, governmental entity, nonprofit organization, etc.). See Mich. Revenue Admin. Bull. 2002-15 (June 10, 2002), a copy of which is attached as Addendum D. The retailer must retain such certificates for a period of four years, but is otherwise permitted to make sales to such purchasers on a tax-free basis. Id. Michigan's Form 3372 collects all the information needed to determine the existence of a federal immunity from Michigan sales or use tax with the exception

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[13] In Rising, the Court emphasized that the State had evidence that one Community member was purchasing between 100 and 152 cartons of untaxed cigarettes per month and selling them over the Internet. 477 F.3d at 885-86. There is no evidence of fraud here.

of whether the sale occurs within the Reservation, which a retailer can immediately determine by applying Michigan's simple sourcing rules and consulting a map. Numerous other states administer federal tax immunities for Indians using exemption certificates like those used under the Standard Procedure. See, e.g., Wis. Dep't Rev. Form S-211, a copy of which is attached as Addendum E; see also Idaho State Tax Comm'n For ST-101; New York Dep't of Tax. & Fin. Form DTF-801; Wash. Dep't of Rev. Form REV 27 0032, copies of which can be found at RE 56-7; pp.430-41. Neither the district court nor Appellees have provided any persuasive reason why the Standard Procedure should not apply to the federal immunities at issue here.

Because the district court erred in holding that Appellees may apply the Informal Process to transactions of the Community and its members that are immune from Michigan sales and use taxes as a matter of federal law, this Court should reverse the district court and hold that Appellees' Informal Process violates federal law.

D. The District Court Erred in Concluding that the Community's Claims Are Not Ripe for Decision.

The district court justified its decision on the additional ground that certain additional tax disputes involving the Community or its members are issues not ripe

for decision. Op. at 22.[14] The court identified only three such "additional tax disputes," id., only two of which have any bearing on the claims at issue here,[15] and neither of these warrants dismissal of these counts on ripeness grounds.

The first of the two "additional" issues is "when and under what circumstances the purchase of a motor vehicle occurs within Indian country (e.g. whether delivery within Indian country is sufficient)." Op. at 22. This is a pure question of law and is governed by clear statutory rules that conclusively determine the location of a sale for sales tax purposes at the location of delivery. See M.C.L. §205.69. This legal question is fully presented by the Community's claim seeking a declaratory judgment that imposition of Michigan's sales tax is prohibited on *all* purchases made by the Community and its members on the Reservation, including the frequently recurring category of motor vehicle purchases. Community members have been required in the past to pay substantial sales taxes with respect to motor vehicles purchases, supra p.11-12, and they surely will continue to purchase motor vehicles in the future. Therefore, the court should

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[14] Ripeness was not raised by Appellees, who clearly viewed the Community's claims as ripe and vigorously contested them on the merits.

[15] The other issue involves construction projects, and the Community does not appeal the district court's ripeness decision with respect to the counts dealing with those projects. The Community did not move for summary judgment on those counts, and does not claim in this lawsuit that categorical rules apply to such projects.

have ruled on this legal question in addressing the Community's claims regarding the imposition of sales tax.

The second "additional" issue that the court identified as not ripe is "whether, and how, Defendants must apportion the use tax for use occurring outside of Indian country." Op. at 22. This, too, is a question of law and is fully presented by the Community's claim seeking a declaratory judgment that imposition of Michigan's use tax is prohibited on all property principally stored on the Reservation and used in part outside the Reservation.[16] Mr. Chosa was required in the past to pay a substantial use tax with respect to his motor vehicle principally stored on the Reservation and used in part outside the Reservation, supra p.12, and Community members surely will continue to store and use motor vehicles under similar circumstances in the future, so the court also should have ruled on this legal question in addressing the Community's claims regarding the imposition of use tax. There is no question that both the first and the second "additional" issues identified by the district court satisfy all three of the factors that this Court considers in evaluating whether an issue is ripe for decision: (1) "the likelihood that the harm alleged by the plaintiffs will ever come to pass"; (2)

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16 As the Community demonstrated above (supra pp. 25-26), *the taxing statute*, not Appellees, must apportion the use tax in order for the tax to legally apply to property principally stored within the Reservation that is used in part outside the Reservation, and Appellees themselves concede that the statute provides no such apportionment.

"whether the factual record is sufficiently developed to produce a fair adjudication of the merits of the parties' respective claims"; and (3) "the hardship to the parties if judicial relief is denied at this stage in the proceedings." Kentucky Press Ass'n, Inc. v. Kentucky, 454 F.3d 505, 509 (6th Cir. 2006).[17]

Because the district court erred in holding that these "additional" issues are not ripe for decision, this Court should reverse the district court and hold that the location of a sale for sales tax purposes takes place at the location of delivery, see M.C.L. §205.69, and that there is no statutory basis for Appellees to apportion the use tax for use occurring outside of Indian country.

E. The District Court Abused its Discretion in Refusing to Enter a Declaratory Judgment for the Community on the Basis of its Discretion under the Declaratory Injunction Act.

For similar reasons, the district court erred in relying on the discretion the court is afforded under the Declaratory Judgment Act, 28 U.S.C. §2201, to avoid issuing a declaratory judgment. In ruling against the Community on this basis, the

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[17] The district court failed to consider the first factor at all and gave only a cursory analysis to the others. As demonstrated in the text, all three factors are satisfied for the purely legal, concrete, and frequently recurring questions of the location of the sale of a motor vehicle and whether there is any basis for apportioning the use tax. See also Whitman v. American Trucking Ass'n, 531 U.S. 457, 479 (2001) (questions of statutory interpretation generally do not benefit from additional factual development); Currence v. City of Cincinnati, 28 Fed.Appx. 438, 441 (6th Cir. 2002) (unpublished) ("A case, generally, is more ripe if it involves questions of law and few contingent future events.").

district court ignored this Court's five-factor test controlling a court's discretion to issue a declaratory judgment:

> (1) whether the declaratory action would settle the controversy; (2) whether the declaratory action would serve a useful purpose in clarifying the legal relations in issue; (3) whether the declaratory remedy is being used merely for the purpose of "procedural fencing" or "to provide an arena for res judicata;" (4) whether the use of a declaratory action would increase friction between our federal and state courts and improperly encroach upon state jurisdiction; and (5) whether there is an alternative remedy which is better or more effective.

Scottsdale Insurance Co. v. Flowers, 513 F.3d 546, 554 (6th Cir. 2008) (quoting Grand Trunk W. R.R. Co. v. Consol. Rail Co., 746 F.2d 323, 326 (6th Cir. 1984)). Failure to apply the factors is reversible error. United States Fire Insurance Co. v. Albex Aluminum, 161 Fed.Appx. 562, 564 (6th Cir. 2006) (unpublished) (citing AmSouth Bank v. Dale, 386 F.3d 763, 785 (6th Cir. 2004)).

The district court's failure even to mention the five-factor test, Op. at 24, warrants reversal on that basis alone. And in any event, application of the five-factor test favors the exercise of jurisdiction to grant a declaratory judgment. The third, fourth, and fifth factors are not present here, because Congress has afforded Indian tribes special access to the federal courts pursuant to 28 U.S.C. §1362 to present federal claims for relief from state taxes. Moe, 425 U.S. at 471-74. The first and second factors support the issuance of a declaratory judgment, which

would settle the controversy concerning the legality of Michigan's sales and use taxes and Appellees' Informal Process and serve the useful purpose of clarifying the future legal duties of the Community, its members, and Appellees with respect to the applicability of federal tax immunities in concrete and frequently recurring transactions.[18]

Because the district court erred in relying on its discretion under the Declaratory Judgment Act, this Court should reverse the district court and hold in favor of the Community on each of the declaratory judgment claims at issue in this appeal.

III. THE DISTRICT COURT'S JUDGMENT ON THE COMMUNITY'S CLAIMS BASED ON THE 1842 TREATY SHOULD BE REVERSED.

The Community's treaty claims are based on Article II of the 1842 Treaty and concern the application of the Michigan sales and use taxes to the Community's and its members' purchases and use of property and services within the Ceded Area, with respect to which "[t]he Indians stipulate[d] that the laws of the United States shall be continued in force, in respect to their trade and intercourse with the whites, until otherwise ordered by Congress." 7 Stat. 591. In Rising, this Court held that "[t]he 1842 Treaty plainly makes federal law applicable

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[18] The district court's refusal to issue a declaratory judgment violated the general principle that when other claims are joined in an action for declaratory relief, as in the case of the Community's claims here for injunctive relief, the district court should exercise jurisdiction over all claims. See Adrian Energy Assoc. v. Mich. Pub. Service Comm'n, 481 F.3d 414, 422 (6th Cir. 2007).

to the Ceded Area . . . ." 477 F.3d at 893 (quoting Rising, 2005 WL 2207224, at *11). The "federal law" at issue in Rising was the federal Indian trade and intercourse laws, which ordinarily apply only within Indian country but which this Court held apply within the Ceded Area pursuant to the 1842 Treaty. The Rising Court nevertheless concluded that such federal law did not preempt the imposition of the Michigan tobacco tax on the Community's tobacco sales within the Ceded Area to non-Indians, because "federal law permits the states to impose their tobacco taxes on cigarette[] sales to nonmembers of the Tribe" (under Moe and Colville). Id. (quoting Rising, 2005 WL 2207224, at *11).

The plain language of the Treaty, confirmed by this Court's reading in Rising, clearly shows that the Community's position on the application of federal law in the Ceded Area is controlling. Accordingly, Michigan's sales and use taxes are illegal as applied to the Community's and its members' purchases in the Ceded Area, as they are on the Reservation, and the district court's judgment on these counts should be reversed as well. If this Court, however, has any doubt about the treaty signatories' intent regarding how federal law should be applied in the Ceded Area – and it should not – the treaty claims should be remanded to the district court for a careful decision on the merits of the claims.[19]

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19 As a provision of an Indian treaty, Article II's meaning and effect, including its effect upon state law, is governed by the intentions of the treaty signatories.

IV. THE COMMUNITY IS A "PERSON" ENTITLED TO SUE UNDER 42 U.S.C. §1983.

The Community asserted a Section 1983 claim for damages against Appellees Rising, Reynolds, and Fratzke in their individual capacities arising out of the 2005 offsets taking federal and state funds belonging to the Community, and Appellees moved for summary judgment on this claim. The district court held that this claim is based upon the Community's sovereign rights, as distinguished from private rights, and therefore is barred under the principles established by the Supreme Court in Inyo County, 538 U.S. 701. Op. at 14-18. This holding is in error, because the Community's Section 1983 claim is in fact based upon federal

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Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 675-76 (1979). In evaluating the effect of Indian treaty provisions, moreover, it is well-established that "Indian treaties are to be interpreted liberally in favor of the Indians, and that any ambiguities are to be resolved in their favor." Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 200 (1999) (citations omitted). Both parties have retained treaty experts, who have prepared reports regarding the signatories' intent and the Indian understanding of Article II. These reports have yet to be entered into the record or considered by the district court, because the only motion brought by the parties with respect to the Community's treaty claims was an early motion brought by Appellees, before the reports were prepared, based solely on Appellees' contention that the Community's treaty claims were barred by *res judicata*. (Defendants' Motion for Summary Judgment, RE 64, pp.3, 20-23; ROA pp.491, 508-11). The treaty experts' reports were prepared with a view to assisting the district court in determining the preemptive effect of federal law, and in particular the Indian Trader Statutes, on the application of the Michigan sales and use taxes in the Ceded Area, and with that assistance the district court may reconsider its conclusion that "there is no need for the Court to engage in a separate analysis of the 1842 treaty." See Op. at 18 n.4.

constitutional and statutory rights that are available to any private person. Thus, the Community's Section 1983 claim for damages should be remanded to the district court so that discovery can be completed and the Community's claim can be addressed on the merits.

With respect to the issue of sovereign versus private rights, the district court did correctly recognize that an Indian tribe can be a proper plaintiff in an action based on Section 1983. The court stated that Inyo County "established the principle that whether a tribe is a 'person' under §1983 depends upon the right the tribe is asserting." Op. at 15. In Inyo County, the Supreme Court held that the Paiute-Shoshone Tribe may not use Section 1983 to vindicate a violation of its *sovereign immunity* by the County and its agents in executing a search warrant against the Tribe and its property. 538 U.S. at 711-12. The Court stated that the "particular claim of relief" brought by the Tribe would determine whether the tribe qualified as a person entitled to bring suit under 42 U.S.C. §1983:

> *It is only by virtue of the Tribe's asserted "sovereign" status that it claims immunity from the County's processes*. . . . Section 1983 was designed to secure private rights against government encroachment, . . . not to advance a sovereign's prerogative to withhold evidence relevant to a criminal investigation. . . . Accordingly, we hold that the Tribe may not sue under §1983 to vindicate the *sovereign right* it here claims.

Id. (emphasis added).

The district court erred in applying these principles to the Community's Section 1983 claim. The court vaguely remarked "that despite the many counts, theories, briefs, and arguments, this case is about the sovereignty of the Community and, also, the sovereignty of the State of Michigan." Op. at 16. The court failed to focus as it should have on the *specifics* of the Community's Section 1983 claim and whether the rights the Community seeks to vindicate in this claim are rooted in the Community's sovereign status.

Contrary to the district court's holding, the Community's Section 1983 claim is expressly premised on violations of its *private rights*. The Community alleges that the 2005 offsets to collect the 1993-94 sales and use taxes violated: (1) constitutional rights to be free from takings of property without just compensation, unreasonable seizures of property, and deprivations of property without due process of law guaranteed by the Fourth, Fifth, and Fourteenth Amendments; and (2) federal statutory rights to have federal Medicaid, WIC, Child Care, and Promoting Safe and Stable Families program funds used only for the strict purposes delineated by Congress. Supra p. 15 (referring to §1983 claim) These rights are private rights that do not depend on the Community's status as a sovereign Indian tribe. See Inyo County, 538 U.S. at 702 (distinguishing the sovereign character of the tribal claims before it from claims that, for instance, "the County lacked probable cause or the warrant was otherwise defective"); Wilder v.

Virginia Hosp. Ass'n, 496 U.S. 498, 509-10 (1990); Westside Mothers v. Olszewski, 454 F.3d 532, 539-41, 543-44 (6th Cir. 2006) (both holding that certain provisions of Medicaid statute created rights enforceable under Section 1983 in the circumstances of those cases).

The district court's conclusion here directly conflicts with the court's previous holding in Rising. In Rising, the district court upheld the Community's right to bring a Section 1983 claim against violations of many of the same constitutional rights which are at issue here, i.e., the Community's rights to be free of unreasonable searches and seizures and to due process under the Fourth, Fifth, and Fourteenth Amendments. See Keweenaw Bay Indian Community v. Rising, No. 2:03-CV-111, slip op. at 21 (W.D. Mich. Sept. 30, 2004) (Bell, C.J.).[20] Noting that the Community's constitutional claims in that case asserted "private rights that are not designed to advance a sovereign's right to sovereignty," the court rejected the defendants' argument in that case that Inyo County precluded the Community's Section 1983 claim. Id. The district court should have reached the same conclusion with respect to the constitutional rights at issue here.

The Community's Section 1983 claim based on violations of federal statutory rights concerns only the offsets of *federal* funds payable to the Community pursuant to the Medicaid, WIC, Child Care, and Promoting Safe and

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20 This issue was not before this Court in the Rising appeal.

Stable Families programs. The Community's rights in these federal funds are not rooted in its sovereign status, but are available to *any* recipient of these program funds. The district court erroneously concluded, without any factual support and with virtually no discussion of the relevant statutory provisions, that the Community "is entitled to these funds only because it is a sovereign." Op. at 17. The district court erroneously focused on the reasons it believed the Community was receiving the federal funds in the first place, reasons which are entirely irrelevant to the actual violation of federal rights at issue: the misappropriation of those funds for a purpose not authorized by Congress. The Community has the same rights as any other recipient of federal funds not to have them misappropriated by state officials.

Although it is premature to address the merits of the Community's Section 1983 claim, the Community alleges that the offsets of the Community's federal funds violated 31 U.S.C. §1301(a), which states that "[a]ppropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law," and also violated the express prohibitions against misuse by the states of federal program funds which are contained in the statutes establishing the Medicaid, WIC, Child Care, and Promoting Safe and Stable Families programs. In each of these programs, Congress has enlisted the states as partners with the federal government in administering the programs and

appropriated federal funds to the states for use in accordance with detailed conditions established by Congress.[21] See, e.g., 42 U.S.C. §§618(a)(1), 618(b)(1), 618(c), 629b(a)(4), 629f(a), 629g, 629h(a), 629i(a)(2), 1396, 1396a, 1396b(a), 1396c, 1786(a), 1786(c)(2), 1786(f), 1786(g), 9858c(a), 9858c(c)(3), 9858g(b)(2)(A) & (B).[22] If a state chooses to participate in these programs, it must comply with the federal statutes governing the use of program funds. See, e.g., Lapeer County Med. Care Facility v. Michigan, 765 F. Supp. 1291, 1294 (W.D. Mich. 1991) (Medicaid program).

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[21] The district court referenced the fact that funds may be appropriated directly from Congress to Indian tribes under these programs, with the tribes functioning in a similar capacity to the states in these instances. Op. at 17. All of the offset federal funds, here, however, were appropriated to the State of Michigan for distribution in accordance with federal law.

[22] For example, in the case of the Medicaid program, federal appropriations are made "[f]or the purpose of enabling each State . . . to furnish (1) medical assistance on behalf of families with dependent children and of aged, blind, or disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services, and (2) rehabilitation and other services to help such families and individuals . . . ." 42 U.S.C. § 1396. In order to receive such appropriations, the State must "have submitted, and had approved by the Secretary, [a] State pla[n] for medical assistance," id., satisfying each of approximately seventy congressionally mandated requirements, none of which permits any use of the federal funds to pay a health care provider's debts owed to the State. 42 U.S.C. § 1396a. The amount payable to each State is computed with reference to expenditures by the State for medical assistance, with no exception permitted allowing States to collect debts. 42 U.S.C. § 1396b(a). Each State must comply with the State plan or risk loss of federal funding and other sanctions. 42 U.S.C. § 1396c.

Even if it mattered at all why the federal funds had been disbursed for the Community, which it does not, it is demonstrably not true that the Community's "right to receive the funds at issue was dependent on its status as a sovereign." Op. at 17. The district court only cursorily discussed the complex statutory schemes which are at issue. The court's holding fails to take into account how the Medicaid and other federal programs at issue work, and why funds appropriated and paid over to the State of Michigan pursuant to these programs later were intended by the federal government for payment to the Community.[23] In the case of the Medicaid and WIC program funds in particular, the programs involving the most significant offsets,[24] the Community receives these funds not because it is a sovereign, but because it operates a medical clinic that serves patients who qualify for Medicaid benefits and is a "local WIC agency" designated by the State of Michigan to serve needy women, infants, and children. (Second LaFernier affidavit, ¶¶11, 13, 14, Ex. B, RE 115 and 115-2, pp.5-7, 7-28; ROA pp.1412-14, 1421-42.); see also Health

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[23] In its response to Appellees' motion for summary judgment on the Section 1983 claim, the Community submitted an affidavit pursuant to Fed. R. Civ. P. 56(f) outlining the reasons it was unable to present various facts relating to the Section 1983 claim. See (Durocher affidavit, ¶¶5-22, RE 121, pp.3-10; ROA pp.1511-18.) The court never addressed this issue, and instead simply made a conclusory decision that the rights relating to these funds were tied to the Community's sovereign status.

[24] Of the $34,166.31 in offset federal funds, $28,670.42 consisted of WIC program funds and $4,157.61 consisted of Medicaid program funds. (Second Amended Complaint, ¶42, RE 30, pp.12-13; ROA pp.33-34.)

and Human Services Department, http://www.kbic-nsn.gov/html/health.htm (last visited Oct. 17, 2008) (describing Community's medical clinic); WIC Agency List, http://www.michigan.gov/mdch/0,1607,7-132-2942_4910_4920---,00.html (last visited Oct. 17, 2008) (describing Community as an eligible local agency in the WIC program). Numerous private, nonsovereign organizations also receive Medicaid and WIC program funds in the same circumstances,[25] and could bring this very same Section 1983 claim if state government officials offset the organization's Medicaid and WIC program funds to pay the organization's unrelated debts to the state.

Because the district court erred in dismissing the Community's Section 1983 claim for damages, this Court should reverse and remand to the district court so the parties can complete discovery and the district court can address the merits of the claim.

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[25] Several organizations designated by the State of Michigan as "local WIC agencies" are revealed on the Guidestar website to be private, nonprofit organizations, not sovereign governments. Many of them, like the Community, also operate medical clinics where they serve Medicaid patients. Their tax returns posted on the Guidestar site show that they receive federal Medicaid funds from the State of Michigan. One of these organizations, merely by way of example, is InterCare Community Health Network. See http://www.guidestar.org/pqShowGsReport.do?partner=guidestar&npoId=35348 (last visited Oct. 17, 2008) (describing organization's nonprofit programs); http://www.guidestar.org/FinDocuments/2007/382/009/2007-382009364-03c1832d-9.pdf (last visited Oct. 17, 2008) (reporting over $9.3 million of Medicare/Medicaid payments).

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's grant of judgment in favor of Appellees on the claims at issue in this appeal and order that judgment be entered for the Community on such of these claims that seek declaratory and injunctive relief, and remanding with directions to enter the declaratory and injunctive relief that has been requested on these claims and for a determination of such additional relief, including attorneys fees and damages, as is appropriate.

Dated: October 21, 2008

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FOR THE SIXTH CIRCUIT

KEWEENAW BAY INDIAN COMMUNITY,
named as federally-recognized Indian tribe,
on its own behalf and as parens patriae for its members,

Plaintiff/Appellant

v.

JAY RISING, named Treasurer of the State of Michigan; MICHAEL REYNOLDS, named as Administrator of the Collection Division of the Michigan Department of Treasury; WALTER A. FRATZKE, named as Native American Affairs Specialist of the Michigan Department of Treasury; TERRI LYNN LAND, Secretary of State,

Defendants/Appellees

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(A)(7)(B) and (C) AND SIXTH CIRCUIT RULE 32

The undersigned hereby certifies, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B) and (C) and Sixth Circuit Rule 32, that this brief (exclusive of the corporate disclosure statement, the statement with respect to oral argument, the table of contents, the table of citations, the statement of the issues, and any addendum, and any certificate of counsel) contains 13,606, as ascertained using the word count feature of Microsoft Office Word 2003 SP2 word processing software in 14 point font size used to prepare the brief.

October 21, 2008.

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CERTIFICATE OF SERVICE

I do herby certify that on the 21st day of October, 2008, I electronically filed the Brief of Plaintiff-Appellant by using the Sixth Circuit Court of Appeal's CM/ECF system which will send a notice of electronic filing to the attorneys of record:

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