UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

SAGINAW CHIPPEWA INDIAN TRIBE OF MICHIGAN, on its own behalf and as *parens patriae* for its members,

Plaintiff,

and

THE UNITED STATES OF AMERICA,

Plaintiff-Intervenor,

v

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

Defendants.

and

CITY OF MT. PLEASANT and COUNTY OF ISABELLA,

Defendant-Intervenors.
_____/

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

STATE DEFENDANTS' BRIEF IN RESPONSE TO UNITED STATES' MOTION IN LIMINE AND SAGINAW CHIPPEWA TRIBE'S MOTION TO STRIKE AND MOTION IN LIMINE

CONCISE STATEMENT OF ISSUES PRESENTED

1. A Fed R Civ P 12(f) motion to strike is a "drastic remedy" that should be applied when, as a matter of law, the defense cannot succeed under any circumstances. State defendants have pled a diminishment defense that can succeed. Should the Tribe's and the United States' motion to strike should be denied?

2. Treaties can alter the boundaries of reservations through diminishment and disestablishment. The 1855 and 1864 Saginaw Treaty are treaties. Can the 1855 and 1864 Saginaw Treaties alter the boundaries through diminishment of the alleged "historic Isabella reservation"?

3. Evidence of post-treaty events is admissible in treaty diminishment cases. State defendants' witnesses will present evidence of post-treaty events. Should state defendants' witnesses testifying about the jurisdictional history of the alleged "historic Isabella reservation," the demographic history of Isabella county, and the non-Indian character of the alleged "historic Isabella reservation" be struck?

CONTROLLING OR MOST APPROPRIATE AUTHORITY

1. Standards for Motion to Strike.

   Fed R Civ P 12(f).

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

2. Diminishment by treaty.

   Kindred v Union Pacific Railroad Co, 225 US 582 (1912).

   Stewart v United States and Osage Nation, 206 US 185 (1907).

   Keweenaw Bay Indian Community v Naftaly, 452 F3d 514 (6th Cir 2006), *cert den sub nom, Naftaly v Keweenaw Bay Indian Community*, 549 US 1053 (2006).

3. Striking witnesses.

   Shawnee Tribe v United States, 423 F3rd 1204 (10th Cir 2005).

   Keweenaw Bay Indian Community v Naftaly, 452 F3d 514 (6th Cir 2006), *cert den sub nom, Naftaly v Keweenaw Bay Indian Community*, 549 US 1053 (2006).

INTRODUCTION

State defendants maintain that the Treaty with Chippewa Indian of August 2, 1855 ("1855 Saginaw Treaty")[1] and the Treaty with the Chippewas of October 18, 1864 ("1864 Saginaw Treaty")[2] did not create a reservation for the Saginaw Chippewa. Assuming for argument's sake only that they do, then the State defendants also argue that the alleged "historic Isabella reservation" was diminished by the terms of the same treaties.[3] This is unremarkable. Treaties have often diminished the size of reservations and even disestablished them.[4] The 1855 and 1864 Saginaw Treaties are simply two in a long line of treaties doing so.

The Tenth Circuit of the United States Court of Appeals has ruled that events subsequent to a treaty are relevant to deciding whether a treaty diminished a reservation.[5] State defendants' witnesses that testify about the jurisdictional history of the alleged "historic Isabella reservation," the demographic history of Isabella county, and the non-Indian character of the alleged "historic Isabella reservation" should not be struck.[6]

STATEMENT OF FACTS

The Saginaw Chippewa Indian Tribe (Tribe) seeks a declaratory judgment "declaring that that the six township historic Isabella Reservation, as established by Executive Order and Treaty

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[1] Treaty with Chippewa Indians, 11 Stat 633 (August 2, 1855).
[2] Treaty with the Chippewas, 14 Stat 657 (October 18, 1864).
[3] State defendants do not address whether the reservation consists of the six townships minus the "unsold lands" but reserves that issue for a later date.
[4] The Saginaw Chippewa Indian Tribe acknowledges that a treaty can abrogate another treaty. Saginaw Chippewa Indian Tribe, *Memorandum in Support of Motion to Strike* Rosebud *Statutory Defense and Supporting Witnesses*, 4 (Dkt # 151). The United States does not argue that treaties cannot diminish reservations, only that witnesses testifying as to certain post-treaty facts are irrelevant. United States, *United States' Brief in Support of its Motion* in Limine *to exclude Defendants'* Rosebud Sioux *Witnesses and Related Testimony*, 1-2 (Dkt # 150).
[5] *Shawnee Tribe v United States*, 423 F3rd 1204 (10th Cir 2005).
[6] One witness sought to be struck, Anthony Olkowski, may also testify about an 1855 map.

in 1855 and affirmed by Treaty in 1864, exists today as an Indian reservation and is Indian country pursuant to federal law."[7] The Tribe also seeks an injunction

> permanently enjoining Defendants, their officers, agents, servants, employees and attorneys, and anyone acting in concert with them: 1) from asserting criminal jurisdiction over the Tribe or Tribal members within the historic Isabella Reservation in a manner that federal law would not allow in Indian country; 2) from asserting civil regulatory jurisdiction over the Tribe or Tribal members within the historic Isabella Reservation in a manner that federal law would not allow in Indian country; and 3) from taking any actions within the historic Isabella Reservation that would interfere with the rights of the Tribe and its members under federal law relating to Indian country.[8]

The State defendants pled as an affirmative defense that:

> 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. Michigan has 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.[9]

ARGUMENT

I. A Fed R Civ P 12(f) motion to strike is a "drastic remedy" that should be applied when, as a matter of law, the defense cannot succeed under any circumstances. State defendants have pled a diminishment defense that can succeed. Therefore, the Tribe's and the United States' motion to strike should be denied.

Federal Rule of Civil Procedure 12(f) states that upon the motion of a party, "the court may order stricken from any pleading any insufficient defense."[10] The court has discretion in ruling on a motion to strike, but it is a "drastic remedy" that should be "sparingly used."[11] An

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[7] Saginaw Chippewa Indian Tribe, Amended Complaint, Prayer for Relief, 11 (Dkt # 17).
[8] Tribe, Amended Complaint, 11-12.
[9] State Defendants' Amended Answer to Amended Complaint for Declaratory and Injunctive Relief, Affirmative Defenses, paragraph 5, and *see*, State Defendants' Amended Answer to Complaint in Intervention of the United States, Affirmative Defenses, paragraph 5.
[10] Fed R Civ P 12(f).
[11] *Brown & Williamson Tobacco Corp v United States*, 201 F2d 819, 822 (6th Cir 1953).

affirmative defense should be struck "if, as a matter of law, the defense cannot succeed under any circumstances."[12] "The motion to strike should be granted only when the pleading to be striken [sic] has no possible relation to the controversy."[13]

A noted treatise states that "a motion to strike for insufficiency was never intended to furnish an opportunity for determination of disputed and substantial questions of law; these questions quite properly are viewed as determinable only after discovery and a hearing on the merits."[14] This avoids the danger of advisory opinions. It avoids a second danger. "Close or new questions of law should not be resolved on a motion to strike which is ordinarily not appealable and which, if appealed pursuant to 38 USC § 1292(b), would create piecemeal litigation."[15]

State defendants have pled a viable diminishment defense. It should not be stricken.

II. Treaties can alter the boundaries of reservations through diminishment and disestablishment. The 1855 and 1864 Saginaw Treaties are treaties. The 1855 and 1864 Saginaw Treaties can alter the boundaries through diminishment of the alleged "historic Isabella reservation."

State Defendants maintain that the 1855 Saginaw Treaty and the 1864 Saginaw Treaty did not create a reservation for the Saginaw Chippewa. Assuming for argument's sake only that

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[12] *Smith v Blue Ribbon Transp*, 2007 US Dist LEXIS 19200 (WD Mich 2007) (internal quotation marks omitted) *quoting*, *Ameriwood Indus Int'l Corp v Arthur Anderson & Co*, 961 F Supp 1078, 1083 (WD Mich 1997), *United States v Am Elec Power Serv Corp*, 218 F Supp 2d 931, 936 (D Ohio 2002).

[13] *Brown & Williamson*, 201 F2d at 822.

[14] 5 C. Wright & A. Miller, *Federal Practice and Procedure*, § 1381, 800-01 (footnotes omitted).

[15] *Mohegan Tribe v State of Conn*, 528 F Supp 1359, 1362 (D Conn 1982) (internal citations omitted); *see also*, *Beattie v Centurytel, Inc*, 234 FRD 160, 174 (ED Mich 2006) ("If the sufficiency of the defense depends upon disputed questions of law or fact, then a motion to strike should be denied.") (internal citations omitted).

they do, then the State Defendants also argue that the alleged "historic Isabella reservation" was diminished by the terms of the same treaties.[16]

Many treaties have diminished the boundaries of American Indian reservations, even to the extent of disestablishing reservations entirely. The 1855 and 1864 Treaties are treaties. They can, therefore, diminish the boundaries of the alleged "historic Isabella reservation."

The United States Supreme Court has recognized that treaties can diminish or disestablish reservations. In *Kindred v Union Pacific Railroad Company*,[17] the Supreme Court noted,

> By the treaty of 1829, 7 Stat 327, with the Delaware Indians it was provided that certain lands in the fork of the Kansas and Missouri rivers should be "conveyed and forever secured" to those Indians "as their permanent residence." By the treaty of May 6, 1854, 10 Stat 1048, parts of the reservation so established were relinquished and the remainder retained for a "permanent home." Article 11 of this treaty declared that at the request of the Delawares the diminished reservation should be surveyed . . . .[18]

In *Stewart v United States and Osage Nation*,[19] the Supreme Court described an Indian reservation that had been diminished by a treaty.

> Except for the treaty between the United States and the Osage Indians, relative to the lands in question, and the passage of appropriate legislation by the United States, the lands would never have been sold, as they were not public lands of the United States for the sale of which Congress had already provided under its general legislation. The treaty, however, provided that the lands described in article 1 were to be surveyed and sold under the direction of the Secretary of the Interior on the most advantageous terms, for cash, as public lands are surveyed and sold under existing laws; and under article 2 the lands were to be sold for the benefit of the Indians by the Secretary of the Interior, under such rules and regulations as he might from time to time prescribe, under the direction of the Commissioner of the General Land

[16] State defendants do not address here whether the reservation consists of the six townships minus the "unsold lands" but reserve that issue for a later date.
[17] *Kindred v Union Pacific Railroad Co*, 225 US 582 (1912).
[18] *Kindred*, 225 US at 590.
[19] *Stewart v United States and Osage Nation*, 206 US 185 (1907).

> Office, as other lands are surveyed and sold; and under article 16, in case of the removal of the Indians, the diminished reserve was to be disposed of by the United States in the same manner and for the same purposes as provided in relation to the so-called trust lands.[20]

Several circuits of the United States Court of Appeals have explicitly recognized that treaties can diminish reservations. In *Shawnee Tribe v United States*,[21] the Tenth Circuit held that a treaty diminished a reservation through allotment and sale to the public. It stated: "Congress can terminate an Indian reservation unilaterally, or pursuant to a treaty between the United States and the affected tribe."[22]

The Ninth Circuit has also recognized that a treaty can diminish a reservation. In *United States v Montana*,[23] which was reversed and remanded on other grounds, it stated

> The Crow Indian Reservation is the remnant of a much larger tract of land recognized as Crow lands by the United States in the Treaty of Fort Laramie of 1851, 11 Stat. 749. In 1868, this original reservation was diminished from one of 38,351,174 acres to one of approximately 8,000,000 acres by the Second Treaty of Fort Laramie, 15 Stat. 649.[24]

Finally, the Second Circuit in *Oneida Indian Nation v City of Sherrill*,[25] before being reversed on other grounds, extensively considered whether a treaty could disestablish a reservation.[26]

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[20] *Stewart*, 206 US at 191.
[21] *Shawnee Tribe v United States*, 423 F3rd 1204 (10th Cir 2005).
[22] *Shawnee Tribe*, 423 F3d at 1220 (citation omitted).
[23] *United States v Montana*, 604 F2d 1162 (9th Cir 1979), *rev'd on other grounds*, *Montana v United States*, 450 US 544 (1981).
[24] *The United States v Montana*, 604 F2d at 1164.
[25] *Oneida Indian Nation v City of Sherrill*, 337 F3d 139, *rev'd on other grounds*, *City of Sherrill v Oneida Indian Nation*, 544 US 197 (2005)
[26] *See Oneida Indian Nation*, 337 F3d 158-165 (so considering).

This universal recognition that treaties can diminish or disestablish a reservation is because treaties express the will of the President, the Saginaw Chippewa Tribe, and of two-thirds of the Senate and are treated as the equivalent of acts of Congress in United States jurisprudence. A treaty is the equivalent of an act of Congress under the Supremacy Clause of the United States Constitution: "all Treaties . . . which shall be made . . . under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby."[27] Treaties are self-executing.[28] The requirement for clear congressional intent occurs in the surplus land acts cases because the surplus acts are acts of Congress and may be unilateral.[29]

Furthermore, there are many treaties diminishing or disestablishing reservations.[30] If the contrary argument is accepted, then all the treaties diminishing or disestablishing reservations did not do so. Ruling that a treaty could not diminish or disestablish a reservation would create a jurisdictional and jurisprudential nightmare.

Even the 1855 Saginaw Treaty disestablished existing reservations of the Saginaw Indians, which plaintiffs have not challenged.[31] In fact, the Saginaw Chippewa Indian Tribe acknowledges that a treaty can abrogate another treaty.[32] The United States does not argue that

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[27] US Const, art VI, cl 2.
[28] *Francis v Francis*, 203 US 233, 238 (1906).
[29] *See Mattz v Arnett*, 412 US 481, 494-97 (unilateral 1892 Act).
[30] *See*, *e g*, *Treaty with the Menomonees*, 11 Stat 679, 679 (Feb 11, 1856) (cession in article 1); *Treaty with Menomonee Indians*, 10 Stat 1064, 1064 (May 12, 1854) (cession in article 1), *Treaty of the Menomonee Tribe of Indians*, 9 Stat 952, 952 (Oct 18, 1848) (reservation in article III).
[31] 1855 Saginaw Treaty, art 8. "The said Chippewas of Saginaw, and of Swan Creek and Black River, hereby cede to the United States all the lands within the State of Michigan heretofore owned by them as reservations."
[32] Saginaw Chippewa Indian Tribe, *Memorandum in Support of Motion to Strike* Rosebud *Statutory Defense and Supporting Witnesses*, 4 (Dkt # 151).

treaties cannot diminish reservations, only that witnesses testifying as to certain post-treaty facts are irrelevant.[33]

In *Keweenaw Bay Indian Community v Naftaly,*[34] the Sixth Circuit rejected an argument that a treaty could serve as the "clear congressional intent necessary to allow state taxation of reservation lands."[35] This decision concerned taxation, not diminishment or disestablishment. Even if it had, it was wrongly decided as shown by the cases and reasoning above.

Treaties can and have altered the boundaries of reservations through diminishment and disestablishment. The 1855 and 1864 Saginaw Treaties can legally diminish the alleged "historic Isabella reservation."

III. Evidence of post-treaty events is admissible in treaty diminishment cases. State defendants' witnesses will present evidence of post-treaty events. State defendants' witnesses testifying about the jurisdictional history of the alleged "historic Isabella reservation," the demographic history of Isabella county, and the non-Indian character of the alleged "historic Isabella reservation" should not be struck.

Plaintiffs seek to strike state defendants' witnesses testifying about the jurisdictional history of the alleged "historic Isabella reservation," the demographic history of Isabella county, and the non-Indian character of the alleged "historic Isabella reservation." The *Shawnee Tribe* Court considered post-treaty events in deciding whether a reservation is diminished.

The *Shawnee Tribe* Court also explained why it considered post-treaty events as follows:

> Questions of whether a reservation has been diminished or terminated have more typically arisen in the context of interpreting surplus land acts, pursuant to which historic Congresses unilaterally sought to open Indian lands for non-Indian settlement. Although the analytic framework for these cases has been aimed primarily at interpreting Congressional intent, we find the same factors and

[33] United States, United States' Brief in Support of its Motion *in Limine* to exclude Defendants' *Rosebud Sioux* Witnesses and Related Testimony, 1-2 (Dkt # 150).
[34] *Keweenaw Bay Indian Community v Naftaly,* 452 F3d 514 (6th Cir 2006), *cert den sub nom, Naftaly v Keweenaw Bay Indian Community,* 549 US 1053 (2006).
[35] *Keweenaw Bay Indian Community,* 452 F3d at 530-531.

analysis persuasive in interpreting the intent of both the Shawnee and Congress in this Treaty.[36]

[36] *Shawnee Tribe*, 423 F3d at 1220 (citations omitted).

Accordingly it considered:

> subsequent events "for the obvious practical advantages" and to decipher parties' earlier intentions. This includes looking to federal and local authorities' approaches to the lands in question and to the area's subsequent demographic history. "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."[37]

State defendants seek to call three witnesses as to testify about the jurisdictional history of the alleged "historic Isabella reservation," the demographic history of Isabella county, and the non-Indian character of the alleged "historic Isabella reservation." The first, Anthony Olkowski, may also testify as to a map of land disposed of prior to May 14, 1855, which is relevant to treaty interpretation. He should not be struck for that reason alone.

Olkowski will also testify as to several present day maps and accompanying data. Don Seal provided underlying data for some of the maps. Ken Darga will testify to the demographics of Isabella County and the alleged "historic Isabella reservation."

Keweenaw Bay Indian Community does not foreclose these witnesses from testifying about post-treaty events in a treaty-diminishment case. It did not even consider the question. It merely held that treaties could not express the clear congressional intent necessary to enable state taxation of reservation fee lands.

CONCLUSION

State Defendants maintain that the 1855 and 1864 Saginaw Treaties did not create a reservation for the Saginaw Chippewa. Assuming for argument's sake only that they do, then the State Defendants also argue that the alleged "historic Isabella reservation" was diminished by the

[37] *Shawnee Tribe* 423 F3d at 1222, *quoting*, *Solem v Bartlett*, 465 US 463, 471-72 & n 13.

terms of the same treaties. Many treaties have diminished, even disestablished, reservations. The 1855 and 1864 Saginaw Treaties are two of them.

The *Shawnee Tribe* Court has ruled that events subsequent to a treaty are relevant to deciding whether a treaty diminished a reservation.[38] State defendants' witnesses testifying to the jurisdictional history of the alleged "historic Isabella reservation," the demographic history of Isabella county, and the non-Indian character of the alleged "historic Isabella reservation" should not be struck.[39]

Respectfully submitted,

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s:cases/2005/saginaw chippewa/response brief

[38] *Shawnee Tribe v United States*, 423 F3rd 1204 (10th Cir 2005).
[39] One witness sought to be struck, Anthony Olkowski, may also testify about a 1855 map.

PROOF OF SERVICE

On the date below, I directed my secretary, Robbin Clickner, to electronically file the following document with the Clerk of the Court, U.S. District Court, Eastern District, using the ECF system, which will send notification of such filing to all counsel of record.

State Defendants' Brief in Response to United States' and Saginaw Chippewa Tribe's Motion to Strike and Motion in Limine

Dated: February 13, 2009

/s/ Todd B. Adams

Todd B. Adams