UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

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

Plaintiff,

and

THE UNITED STATES,

Plaintiff-Intervenor

vs.

JENNIFER GRANHOLM, Governor of the State of Michigan; 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

THE CITY OF MT. PLEASANT,

Defendant-Intervenor.

and

COUNTY OF ISABELLA,

Defendant-Intervenor.

Case No. 05-10296-BC

Hon. Thomas L. Ludington

CITY OF MT. PLEASANT'S RESPONSE TO UNITED STATES' MOTION IN LIMINE AND SAGINAW CHIPPEWA INDIAN TRIBE'S MOTION TO STRIKE AND MOTION IN LIMINE

CONCISE STATEMENTS OF ISSUE PRESENTED

1. May treaties form the basis of the defense of reservation diminishment and should this Court preclude discovery and testimony about the demographic history and the non Indian character of the City of Mt. Pleasant and the "historic Isabella reservation"?

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Brown & Williamson Tobacco Corp. v U.S., 201 F2d 819 (6th Cir., 1953)

Shawnee Tribe v *United States*, 423 F3rd 204 (10th Cir., 2005)

INTRODUCTION

The City of Mt. Pleasant maintains that the treaty with the Saginaw Chippewa Indians of August 2, 1855 ("1855 Saginaw Treaty") and the treaty with the Saginaw Chippewa Indians of October 18, 1864 ("1864 Saginaw Treaty") did not create a reservation for the Saginaw Chippewa Tribe. For the purposes of this Motion only, the City will assume that the Treaties created the "historic Isabella reservation". However, the City asserts that even assuming that the Treaties created the "historic Isabella reservation", the reservation was diminished by the terms of the same treaties.

PROCEDURAL HISTORY

On November 21, 2005, the Saginaw Chippewa Indian Tribe of Michigan (Tribe) filed its Complaint for Declaratory and Injunctive Relief against the State of Michigan Defendants (State). The Tribe challenged the State's exercise of criminal and civil jurisdiction within the "historic Isabella reservation" and asked for declaratory relief and an injunction under the Court's equity jurisdiction, pursuant to 42 USC 1983.

On December 15, 2005 the State filed its Answer to Complaint, asserting that the Tribe had waited over one hundred (100) years to raise its claims of jurisdiction and that during that time the citizens of Michigan transacted business, bought property, and conducted civil and criminal proceedings. The State asserted that the "historic Isabella reservation" had been diminished or disestablished because the vast majority of people within the alleged historic reservation were not members of the Saginaw Chippewa Indian Tribe. The State asserted that units of State government had provided police protection,

fire services, educational, and many other public services to all residents of the historic reservation.

On November 1, 2006 the Court order permitted the United States to intervene. (Docket No. 31) The City of Mt. Pleasant and County of Isabella were permitted to intervene in this matter on November 16, 2007. The City has since filed its answer to complaint and affirmative defenses and amended affirmative defenses.

In its amended affirmative defenses, the City of the Mt. Pleasant asserted that the "historic Isabella reservation" had been disestablished or diminished by the selection of lands by individual Saginaw Chippewa Indian Tribe members as citizens of the State of Michigan, and that the City of Mt. Pleasant exercised civil and criminal jurisdiction over what is now claimed to be the alleged "historic Isabella reservation" for many years, without dispute, and that the majority of people within the alleged "historic Isabella reservation" are not members of the Saginaw Chippewa Indian Tribe of Michigan. (Docket No. 136, Affirm. Defs. 5, 6, 7 and 8).

This Court issued an opinion and order on October 22, 2008 in which it bifurcated the adjudication of substantive claims from remedial implications. The order of the Court directed the parties to file amended witness lists identifying all witnesses they contend may offer relevant testimony and the rationale for the testimony so that any challenges may be resolved. The Court directed that any party that disputes the relevancy of a potential witness shall file a motion in limine setting forth the basis for the challenge. (Docket No. 121)

The City of Mt. Pleasant filed its second amended witness list on October 31, 2008. (Docket No. 130)[1] The City included a number of witnesses under the heading of Jurisdictional History (Rosebud Sioux), Diminishment Witnesses[2]. These witnesses included the director of public safety for the City, who would testify and offer evidence about the City's exercise of jurisdiction within the City limits, including the City's enforcement of that jurisdiction and the police records evidencing such enforcement; the assistant city manager, director of public works, and zoning officials, all of whom would testify about, not only the current services and zoning in the City, but the historic services and zoning by the City within the City limits. Also, included on the City's witness list were individuals to testify about land ownership within the City, and the City's exercise of criminal and civil jurisdiction within the City limits. All of these witnesses would offer testimony and evidence about the non-native character of the area, not just currently, but as demonstrated by the City and County.

The City also included witnesses identified by the State, including Kenneth Darga and Anthony Olkowski, regarding the percentage of land held as Indian country, percentage of Saginaw Chippewa Indian Tribe members in Isabella County, and other mapping and geographic information.

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[1]When the Court permitted the City to intervene, it precluded the City from calling its own expert witnesses. (Docket No. 50) Additionally, the Court has stayed discovery regarding the jurisdictional history of the City and the non-native character of the City. (Docket Nos. 108 and 148)

[2]Many of these witnesses were also included in Phase II - Remedial Implication of the City's Witness List. This Motion concerns the listing of these witnesses in the Phase I portion of the case, only.

The parties entered into a stipulation (Docket No. 149) indicating that the Defendants contend that the Treaties of 1855 and 1864 themselves diminished the "historic Isabella reservation". The parties agreed that the legal question to be addressed was whether the Treaties themselves could function as an Act of Congress, thereby triggering the *Rosebud Sioux Tribe v Kneip,* 430 US 584 (1977) analysis.

Both the 1855 and the 1864 Treaties make reference to the setting aside of "unsold lands within certain Townships for allotment selection. The City of Mt. Pleasant does not address here whether the "reservation" consists of the six (6) townships, less the "sold lands", but reserves that issue to be decided at the treaty interpretation phase of the case.

STANDARD FOR FRCP 12(f)

In *Brown & Williamson Tobacco Corp. v U.S.,* 201 F2d 819, (6th Cir., 1953) the Court found that the District Court had erred in striking affirmative defenses because it had not been shown that these defenses have no relation to the controversy, the Court explained:

> Partly because of the practical difficulty of deciding cases without a factual record it is well established that the action of striking a pleading should be sparingly used by the courts. *Colorado Milling & Elevator Co.* v *Howbert*, 10 Cir., 57 F2d 769. It is a drastic remedy to be resorted to only when required for the purposes of justice. *Batchelder* v *Prestman*,103 Fla 852, 138 So 473; *Collishaw* v *American Smelting & Refining Co.*,121 Mont 196, 190 P2d 673. The motion to strike should be granted only when the pleading to be striken has no possible relation to the controversy. *Samuel Goldwyn, Inc.*, v *United Artists Corporation, D.C.*, 35 FSupp 633; *Wooldridge Mfg. Co.* v *R. G. La Tourneau, Inc., D.C.*, 79 FSupp 908.
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> *Brown & Williamson* at 822.

This Court, in the matter of *Aqua Bay Concepts, Inc.* v *Grosse Point Bd. of Realtors*, No. 91-CV-74819, 1992 WL 350275, 2 (ED Mich, May 7, 1992) (Exhibit A), found that in light of the drastic nature of a motion to strike, and the defendants' failure to adequately demonstrate the resulting prejudice from the inclusion of the provision, the motion to strike was properly denied. The Court stated:

> Furthermore, courts should not strike a matter "unless the court can confidently conclude that the portion of the pleading to which the motion is addressed is redundant or is both irrelevant to the subject matter of the litigation and prejudicial to the objecting party." *Federal Nat. Mortg. Ass'n* v *Cobb*, 738 FSupp 1220 (N.D.Ind.1990).
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> *Aqua Bay* at 2.

ARGUMENT

Treaties may form the basis of the defense of reservation diminishment and this Court should not preclude discovery and testimony about the demographic and jurisdictional history and the non-native character of the City of Mt. Pleasant and the "historic Isabella reservation".

Assuming for argument sake only that the 1855 Saginaw Treaty and the 1864 Saginaw Treaty created a reservation for the Saginaw Chippewa, the City Defendant asserts that the alleged "historic Isabella reservation" was diminished by those same treaties.

The U.S. Supreme Court has explained in *Choctaw Nation of Indians* v *United States*, 318 US 423 (1943):

> Treaties are generally more closely linked to the historical events surrounding their negotiation and passage than are private agreements. They are, accordingly, "construed more liberally . . ., and to ascertain their meaning we may look beyond the written words to the history of the treaty, the

> negotiations, and the practical construction adopted by the parties."
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> *Choctaw Nation* at 431-432.

The Supreme Court has noted that treaties, by their very terms, can disestablish a reservation. *Kindred* v *Union Pacific Railroad Company*, 225 US 582 (1912) and *Stewart* v *United States and Osage Nation*, 206 US 185 (1907). In addition, several circuits within the United States Court of Appeals have recognized that reservations may be diminished through treaties. *United States* v *Montana*, 604 F2d 1162 (9th Cir., 1979) *rev'd on other grounds, Montana* v *United States*, 450 US 544 (1981), *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).

In *Shawnee Tribe* v *United States*, 423 F3rd 204 (10th Cir., 2005), the 10th Circuit Court of Appeals considered whether an army ammunition plant was located within the historic reservation boundaries of the Shawnee Tribe and, therefore, could not be disposed of by the general service administration. The Court noted that the army ammunition property was located in an area that had been left open for re-cession to the Shawnees. However, the Shawnees did not take this entire land collectively but instead, pursuant to the treaty, individual Shawnee tribal members were entitled to select 200-acre tracts. *Shawnee* at 1209. The *Shawnee* Court observed:

> Congress can terminate an Indian reservation unilaterally, see *Lone Wolf* v *Hitchcock*, 187 US 553, 556; 23 SCt 216, 47 LEd 299 (1903) or pursuant to a treaty between the United States and the affected tribe. *Felix S: Handbook of Federal Indian Law*, 43 (1982).
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> *Shawnee* at 1219.

The S*hawnee* Court acknowledged that questions of whether a reservation has been diminished or terminated more typically arise in the context of interpreting surplus land sales, however, the Shawnee Court found the same factors and analysis persuasive in interpreting that the Shawnee treaty. As the Court explained: "Although the analytical framework for these cases has been aimed primarily at interpreting congressional intent, we found the same factors and analysis persuasive in interpreting the intent of both the Shawnee and congress in this treaty. *See Absentee Shawnee*, 862 F2d at 1420n.3." *Shawnee* at 1220.

The *Shawnee* Court then went on to examine three (3) specific factors to determine whether reservation boundaries have been altered. The Court looked to the following factors:

> First, the most probative evidence is the language used to open Indian lands. *Solem*, 465 US at 470, 104 SCt 161. Second, we consider the historical context surrounding the change. *Id* at 471, 104 SCt 1161. Finally, to a lesser extent, we look to the subsequent treatment of the area in question and the pattern of settlement there as clues to the party's earlier intentions. *Id*.
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> *Shawnee* at 1221.

The *Shawnee* Court noted that there were no magic words required as prerequisites for finding reservation boundaries to have been altered, and that the Court will also look to the act or treaty's historical context. *Shawnee* at 1222.

The Court did note that Courts have also looked to subsequent events for the obvious practical advantages and to decipher a party's earlier intentions. The Court observed:

> Finally, while recognizing that this is an unorthodox and potentially unreliable method of interpretation, the court has also looked to subsequent events "for the obvious practical advantages" and to decipher a party's earlier intentions. *Solem*, 465 US 471-72, N.13. This includes looking to federal and local authorities at purchase to the land in question and to the area's subsequent demographic history.Id. at 471-72, 104 SCt 1161. "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." FN23 *Id* at 471, 104 SCt 1161. However, these latter factors are the "least compelling," *Yankton Sioux*, 522 U.S. at 336, 118 SCt 789, and will not substitute for failure of the instrument's language or contemporaneous history to evidence an intention to terminate all or some of the reservation. See *Pittsburg*, 909 F2d at 1395-96 (citing *Solem*, 465 US at 472, 104 SCt 1161).
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> *Shawnee* at 1222-1223

Even if this Court concludes that a treaty interpretation is the proper analysis, that analysis necessarily includes not just the written words of the treaty but the historical context of the negotiations and treaty and the practical construction adopted by both parties. As the Supreme Court explained in *Minnesota* v *Mille Lacs Band of Chippewa Indians*, 526 US 172; 119 SCt 1187 (1999) when considering the usufructuary rights under a 1837 Treaty:

> The State argues that despite any explicit reference to the 1837 Treaty rights, or to usufructuary rights more generally, the second sentence of Article 1 nevertheless abrogates those rights. But to determine whether this language abrogates Chippewa Treaty rights, we look beyond the written words to the larger context that frames the Treaty, including "the history of the treaty, the negotiations, and the practical construction adopted by the parties." Choctaw Nation v. United States, 318 US 423, 432, 63 SCt 672, 87 LEd 877 (1943); see also *El Al Israel Airlines, Ltd.* v *Tsui Yuan Tseng*, 525 US 155, 167; 119 SCt 662, 142 LEd2d 576 (1999).
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> *Mille Lacs* at 196.

The practical construction aspect of the analysis necessary involves post treaty activity on and concerning the "historic Isabella reservation" including the native and non native population, the land ownership and occupation on native and non native people.

WHEREFORE, the City of Mt. Pleasant respectfully requests that this Court deny the United States' and the Tribe's Motions in Limine.

Dated: February 17, 2009

Respectfully submitted,

LYNCH, GALLAGHER, LYNCH,
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CERTIFICATE OF SERVICE

I hereby certify that on February 17, 2009, I electronically filed **CITY OF MT. PLEASANT'S RESPONSE TO UNITED STATES' MOTION IN LIMINE AND SAGINAW CHIPPEWA INDIAN TRIBE'S MOTION TO STRIKE AND MOTION IN LIMINE** with the Clerk of the Court using the ECF system, which will send notification of such filing to the following: William A. Szotkowski, 1360 Energy Park Drive, Suite 210, St. Paul, MN 55108-5252; Patricia Miller, L'Enfant Plaza Station, P.O. Box 44378, Washington, DC 20026-4378; Larry Burdick, 200 N. Main Street, Mt. Pleasant, MI 48858; and Todd B. Adams, 525 W. Ottawa St., Fl. 6, P.O. Box 30755, Lansing, MI 48909.

Date: February 17, 2009

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