UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

Saginaw Chippewa Indian Tribe of Michigan, et al.,

Plaintiffs,

v.

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

Jennifer Granholm, et al.,

Defendants.

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**Saginaw Chippewa Indian Tribe's Reply re. Motion to Strike *Rosebud* Statutory-Diminishment Defense and Supporting Witnesses**

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Regardless of the outcome of this motion, if this case proceeds to trial, this Court *will* address the Defendants' diminishment defense in one form or another.[1] The question here is whether, without a diminishing congressional act, the Defendants may assert a *statutory*-diminishment defense, or whether they must instead present a *treaty*-diminishment defense.[2] The distinction is not academic. A ruling for the Tribe would reset the Phase I witness lists at less than ten total witnesses between the parties.[3] But a ruling for the Defendants would invite a Phase I circus of at least 17 *additional* "jurisdictional-fact" witnesses. Including the witnesses

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[1] Because the Tribe agrees that a treaty can hypothetically diminish a reservation, the State's showy syllogism is unhelpful. The Tribe takes no position here on the State's legal conclusion that "the 1855 Saginaw treaty disestablished existing reservations of the Saginaw Indians," because the issue is not raised by the pleadings. *See* State Defendants' Brief in Response to United States' Motion in Limine and Saginaw Chippewa Tribe's Motion to Strike and Motion in Limine, Feb. 13, 2009, Doc. 152 ("State's Resp.") at 9.

[2] Like each Defendant, the Tribe agrees that the question of whether the Tribe's reservation includes the so-called "sold lands" is not raised by and should not be addressed in this motion.

[3] If a defense witness was offered for both treaty-interpretation and statutory-diminishment evidence, only the statutory-diminishment testimony would be stricken by this motion.

the Tribe would be forced to call in rebuttal, moving from a treaty- to statutory-diminishment defense would *almost quadruple* the total Phase I witness list. This hefty investment of time and resources (by the parties *and* this Court) would be highly prejudicial in light of controlling law that does not call for or even allow statutory analysis to interpret treaties.

**ARGUMENT**

As the State has said, "[t]he 1855 and 1864 Treaties are treaties."[4] This is precisely the point. But Defendants' responses fail entirely to address the arguments of both the United States and the Tribe that *because* the Treaties of 1855 and 1864 are treaties, they must be treated like treaties—not like statutes. At base, the principle that controls this motion is not about Indian law, diminishment, or disestablishment. Rather, it is a matter of constitutional law: because treaties are of a different character than statutes, they must be interpreted differently. Defendants ignore this. They ignore the language of the Constitution. They ignore the history of its adoption. They ignore the Supreme Court's long line of cases analyzing treaties differently than statutes. And they ignore the *Keweenaw Bay* case. But these controlling authorities all agree: treaties must be treated like treaties.

The Tribe does not seek to strike Defendants' *treaty*-diminishment defense. It only asks that the Court strike their *Rosebud statutory*-diminishment defense. The difference is methodological.[5] The *Rosebud* case line (including its consideration of "jurisdictional fact" evidence) was designed to discern congressional intent. There can be no congressional intent of a treaty. So a methodology designed to discern congressional intent has no place in a treaty case. This is precisely the import of the Sixth Circuit's *Keweenaw Bay Indian Community v. Naftaly*

[4] State's Resp. 7.
[5] *See* Table, Methodological Comparison, attached as Exhibit A.

case,[6] despite the Defendants' weak attempts to avoid its holding. The City and County ignore the case entirely. But in the State's own words, to treat this case like a *Rosebud* diminishment case "requires that the Court consider a treaty as the equivalent to an Act of Congress," even though "the Sixth Circuit of the United State Court of Appeals, *in a controlling opinion*, has ruled that a treaty is not the equivalent to an Act of Congress."[7] And the State's one-line argument that *Keweenaw Bay* was "wrongly decided"[8] is utterly silent as to why it could possibly be appropriate to search for *congressional* intent in a *treaty*.

Against this controlling authority and the long parallel lines of Supreme Court cases separating treaty interpretation from statutory-diminishment analysis, Defendants rely on: (1) mischaracterizations of Supreme Court precedent, and (2) non-controlling case law. The City argues that *Rosebud* "jurisdictional facts" are relevant to treaty-interpretation cases because *Choctaw Nation* and *Mille Lacs Band of Chippewa Indians* both look to the "practical construction adopted by the parties[.]"[9] But read in context, the "practical construction" that these cases looked to was not the centuries-later evidence that Defendants seek to introduce—it was the contemporaneous history of the treaties.[10] In other words, the courts in these cases

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[6] *Keweenaw Bay Indian Community v. Naftaly*, 452 F.3d 514, 530 (2005).

[7] Nov. 14, 2008 State Defendants' Motion in Limine to Exclude Saginaw Chippewa Indian Tribe of Michigan's Unnamed Witnesses, Doc. 141 at 6 (citing *Keweenaw Bay*, 452 F.3d 514) (emphasis added). Despite these earlier statements, the State now argues that because "the decision concerned taxation," *Keweenaw Bay* should not control this case. State's Resp. 10. But *Keweenaw Bay* was not so limited. It held that no treaty can express congressional intent because, fundamentally, treaties are not Acts of Congress. *Keweenaw Bay*, 452 F.3d at 530-31.

[8] State's Resp. at 10.

[9] *Mille Lacs Band of Chippewa*, 526 U.S. at 197; *Choctaw Nation*, 318 U.S. at 432.

[10] *Mille Lacs Band of Chippewa*, 526 U.S. at 197 (interpreting an 1855 treaty in light of statements in the 1855 Treaty Journal and earlier 1837 negotiations between the parties); *Choctaw Nation*, 318 U.S. at 431 n.7 (interpreting a 1902 Agreement in light of the agreements negotiations, and statements made by the parties in 1910).

engaged in the second step of the treaty-interpretation analysis—just as the Court should here.[11]

So Defendants are left with three cases purporting to apply the three-step *Rosebud* analysis in treaty-diminishment cases.[12] None are controlling here—but neither are they persuasive. Each case *first* recognized the significance of the rules of treaty interpretation,[13] *and* that the Supreme Court created the statutory-diminishment analysis in the limited context of evaluating congressional acts, not treaties,[14] before it purported to apply the statutory-diminishment methodology either with scant[15] or no[16] explanation of *why* statutory analysis of a treaty is appropriate. In fact, there is no indication that the issue of whether statutory-diminishment methodology can apply to a treaty claim was even briefed. Defendants give absolutely no explanation of how a court that is actually confronted with this question—particularly in *this* circuit where *Keweenaw Bay* is law—could reasonably reach this result.

In this context, the Tribe's motion to strike is entirely appropriate. Each Defendant has stipulated that the time to test the viability of the *Rosebud* defense is now,[17] so the suggestion that this issue should not be resolved until "after discovery and a hearing on the merits"[18] is

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[11] *See* Table, Methodological Comparison, at Exhibit A. In fact, the parties' expert reports do address the contemporaneous history of the Treaties' negotiation and ratification. These issues *will* be explored at trial.

[12] *Shawnee Tribe v. United States*, 423 F.3d 1204 (10th Cir. 2005); *Oneida Indian Nation of New York v. City of Sherrill*, 337 F.3d 139 (2d Cir. 2003); *Cayuga Indian Nation of New York v. Village of Union Springs*, 317 F. Supp. 2d 128 (N.D.N.Y. 2004).

[13] *Shawnee*, 423 F.3d at 1219-20; *Sherrill*, 317 F. Supp. 2d 158; *Cayuga*, 317 F. Supp. 2d at 138.

[14] *Shawnee*, 423 F.3d at 1220; *Sherrill*, 317 F. Supp. 2d at 159; *Cayuga*, 317 F. Supp. 2d at 140.

[15] *Shawnee*, 423 F.3d at 1220 ("Although the framework of these cases has been aimed primarily at interpreting Congressional intent, we find the same factors and analysis persuasive in interpreting the intent of both the Shawnee and Congress in this Treaty."); *Cayuga*, 317 F. Supp. 2d at 139 (relying only on the *Sherrill* case, which controlled in its circuit).

[16] *Sherrill*, 317 F. Supp. 2d at 159-61.

[17] Stipulation, Jan. 7, 2009, Doc. 149 ("Stipulation") at ¶ 4.

[18] State's Resp. 6. *See also* City's Resp. at 7.

disingenuous. The question presented is one of constitutional law and no discovery or development of the factual record can inform it.[19] Under *Keweenaw Bay* and the Supreme Court's long commitment to segregating treaty interpretation from statutory interpretation, three cases from outside the circuit that seem not to have even considered the differences between treaties and statutes cannot make the question of whether to allow statutory analysis of a treaty "substantial," "close," or even "new." The statutory-diminishment defense must be stricken.

**CONCLUSION**

Accepting the Defendants' invitation to apply statutory-diminishment principles to this treaty case would be like painting with a hammer. The statutory-diminishment analysis is the wrong tool for this task, and using it anyway would make an inartful mess. Under *Keweenaw Bay* and the U.S. Constitution, Defendants' *Rosebud* statutory-diminishment defense must fail.

Dated: March 3, 2009

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[19] *Contra Aqua Bay Concepts, Inc. v. Grosse Point Bd. of Realtors*, No. 91-CV-74819, 1992 WL 350275 (E.D. Mich. May 7, 1992), at *2 (denying 12(f) motion to strike a pleading where "there is no dispute over the materiality and relevance of the challenged paragraph," and discovery would allow the party to develop the facts of the relevant allegation).

**Certificate of Service**

I hereby certify that on March 3, 2009, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system, which will send notification of such filing to the following:

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and I hereby certify that there are no non-ECF participants listed in the case that require service by U.S. mail.

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