

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION**

SAGINAW CHIPPEWA INDIAN TRIBE)	
OF MICHIGAN,)	
)	
Plaintiff,)	
and)	
)	Case No. 05-10296-BC
THE UNITED STATES)	Honorable Thomas L. Ludington
)	
)	
Intervenor Plaintiff,)	
v.)	
)	
JENNIFER GRANHOLM, et al.,)	
)	
Defendants,)	
and)	
)	
COUNTY OF ISABELLA and CITY OF)	
MT. PLEASANT,)	
)	
Intervenor Defendants.)	
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**UNITED STATES' REPLY BRIEF IN SUPPORT OF ITS MOTION *IN LIMINE*
TO EXCLUDE DEFENDANTS' ROSEBUD SIOUX WITNESSES
AND RELATED TESTIMONY**

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I. INTRODUCTION

The parties stipulated that in order to determine whether several of Defendants' witnesses are relevant, the Court should decide whether the diminishment analysis as set forth in Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 604-05 (1977), and its progeny, *see, e.g.,* South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 343, 349, 351-52 (1998); Hagen v. Utah, 510 U.S. 399, 421 (1994); Solem v. Bartlett, 465 U.S. 463, 479-80 (1984), applies to this case where Defendants admit that no post-treaty congressional act diminished or disestablished the Isabella Reservation. Dkt. No 149, ¶¶ 1, 3-4. Accordingly, the United States submitted a motion *in limine* to exclude Defendants' Rosebud Sioux witnesses and their testimony on the grounds that their expected testimony is irrelevant to the canons of construction for Indian treaties. Dkt. No. 150.

Defendants spend the bulk of their Responses arguing that a treaty can diminish or disestablish an Indian reservation that was created by a prior treaty. This unremarkable and undisputed statement misses the point. The United States is not attempting to prevent Defendants from advancing their legal theories regarding the meaning of the 1855 and 1864 Treaties ("Treaties"). Rather, the question before the Court is which legal framework governs the analysis for ascertaining the Treaties' meaning, including whether they intended to establish, diminish, or terminate a reservation: 1) the unique canons of construction for interpreting congressional legislation as set forth in Rosebud Sioux, and related cases, that seeks to divine congressional intent regarding reservation status in the wake of surplus land acts; or 2) the standard canons of construction for interpreting Indian treaties. The answer is obviously the latter. Therefore, witnesses who are expected to testify about Rosebud Sioux factors, such as non-contemporaneous jurisdictional history, demographics, percentage of Indian land occupancy,

and the “impact” of a declaration as to the Reservation boundaries are irrelevant and inadmissible under Federal Rules of Evidence 401 and 402.

II. ARGUMENT

Defendants fail to refute the United States’ basic argument that the analysis in Rosebud Sioux is inapplicable to this case. They fail to distinguish this case from the long line of Supreme Court cases and the plethora of other cases that employ the standard canons of construction for interpreting Indian treaties. *See* Dkt. No. 150, Ex. A. Instead, they obscure the distinctions between surplus land act cases and treaty interpretation cases and summarily conclude that all of their witnesses are relevant. However, it is well-settled that the purpose of the canons of construction for Indian treaties is to ascertain the parties’ intent and to construe provisions liberally in the tribe’s favor as the Indians would have understood them, *see Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999), and testimony unrelated to that inquiry is irrelevant.

The State relies on Shawnee Tribe v. United States, 423 F.3d 1204 (10th Cir. 2005), for the proposition that testimony concerning the jurisdictional history, the demographic history and the Indian character of the Isabella Reservation area are relevant. *See* State Resp. at 12. Shawnee, however, did not consider such factors.

In Shawnee, the Court sought to determine whether an 1854 treaty terminated the Tribe’s reservation in Kansas. The Court recited the long-established legal framework for interpreting Indian treaties: 1) the intentions of the tribe and the United States must control; 2) treaties are to be construed as the Indians would have understood them; and 3) treaties should be interpreted liberally, or “sympathetically,” in favor of the tribe. 423 F.3d at 1219-20. The Court then

recited the legal framework for interpreting whether a congressional act diminished or terminated a reservation.^{1/} Id. at 1220-23. It conceded that the latter framework is utilized “in the context of interpreting surplus land acts, pursuant to which historic Congresses unilaterally sought to open Indian lands for non-Indian settlement.” Id. at 1220. Although the Court stated that it found the factors for interpreting surplus land acts helpful for ascertaining the parties’ intent in the 1854 treaty, it did not actually engage in the broad post-treaty and modern analysis that Defendants urge here. The only subsequent event that the Court considered was whether the Shawnee tribal members abandoned Kansas freely or under duress immediately following the 1854 treaty. *See id.* at 1227-28. It did not look at the jurisdictional history, demographics, percentage of Indian land occupancy, or the “impact” of declaring the existence of the reservation. Indeed, ultimately the Court found that the Tribe’s immediate post-treaty movements favored neither party. *See id.* at 1228. Shawnee does not stand for the proposition that Defendants’ witnesses and their testimony are relevant.

The County cites Cayuga Indian Nation of New York v. Village of Union Springs, 317 F. Supp. 2d 128, 139-43 (N.D.N.Y. 2004), in an effort to make their witnesses relevant. It is true that the Court in Cayuga conflated congressional intent with the tribe’s and United States’ intent. Nevertheless, similar to Shawnee, the only subsequent event considered by the district court was the immediate post-treaty movement of Indians and non-Indians onto and off the reservation. *See id.* at 142. In fact, it found that an influx of non-Indians onto unlawfully dispossessed Indian

^{1/} The Court emphasized that looking to subsequent events is an “‘unorthodox and potentially unreliable’ method of interpretation,” id. at 1222 (quoting Solem, 465 U.S. at 471-72), and that these events are the “‘least compelling’” factors, id. at 1223 (quoting Yankton Sioux, 522 U.S. at 336).

lands was not evidence of congressional intent to diminish. *See id.* at 142. Cayuga does not help Defendants either.

Lastly, Defendants' attempt to minimize the import of Keweenaw Bay Indian Community v. Naftaly, 452 F.3d 514 (6th Cir. 2006) is unavailing. Defendants state that the issue in Keweenaw Bay was taxation, and thus is inapplicable to this case.^{2/} While it is true the immediate question before the Court concerned taxation, the larger issue before the Court was identical to the issue here: whether a court can discern clear congressional intent by interpreting a treaty. The Court held it could not. *See id.* at 530-31.

Congress may allow state taxation of reservation lands but "only if it expresses its clear intention to do so." *Id.* at 527. Similarly, Congress can diminish or disestablish a reservation, but it must "clearly evince" its intent to do so. Solem, 465 U.S. at 470. In Keweenaw Bay, the State of Michigan alleged that an 1854 treaty constituted clear congressional intent to allow state taxation of Indian reservation lands.^{3/} The Sixth Circuit began its analysis with a recitation of the long-standing principles governing treaty interpretation, which the United States is urging this Court to follow. *See id.* at 522-24. The Court rejected the State of Michigan's claim that a treaty is an expression of clear congressional intent. *See id.* at 531-32. The 1854 treaty, therefore, did not provide the clear congressional intent necessary to allow State taxation of reservation lands. *See id.* at 533.

^{2/} Defendants also state the case was wrongly decided. Nevertheless, it is binding Sixth Circuit precedent.

^{3/} It is interesting to note that the Sixth Circuit found certain opinions of Anthony G. Gulig, the same historian used by Defendants in this case, "not . . . persuasive" and containing "unsupported conclusory assertion[s]." *Id.* at 526

Keweenaw Bay governs this case because the Rosebud Sioux factors only come into play when discerning clear congressional intent to diminish a reservation. The Sixth Circuit has held that a treaty does not represent clear congressional intent. As such, Rosebud Sioux factors are inapplicable. If a treaty itself diminished or terminated a reservation, as Defendants allege, the question is not congressional intent. The question is the parties' intent, with terms being construed liberally in favor of the Tribe as the Indians would have understood them. Keweenaw Bay is directly on point and controlling.

III. CONCLUSION

For the foregoing reasons and for the reasons set forth in its opening brief, the United States respectfully requests that the Court grant its Motion *in limine* to exclude Defendants' Rosebud Sioux witnesses and their testimony.

Dated: February 24, 2009

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on February 24, 2009, the United States' Reply Brief in Support of its Motion *in limine* to Strike Defendants' Rosebud Sioux Witnesses and Related Testimony was filed electronically with the Clerk of the Court using the ECF system which will send notification of such filing to all counsel of record.

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