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,

Reply in Support of Joint Motion to Enter Order for Judgment Upon Completion of a Public Comment Period and Opportunity For the Parties To Respond

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> As a lifelong resident of Isabella County, it's a little bit hard for me to describe my feelings tonight . . . . I will be voting yes on this resolution because I firmly believe that this is not the end; this is the beginning.
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> — Mt. Pleasant City Commissioner Sharon Tilmann, during November 8, 2010 discussion of resolution to approve the proposed settlement

INTRODUCTION

This action was commenced in 2005, and included a number of named defendants, including the Michigan Attorney General, Mike Cox. During the course of the litigation, the Court asked the parties to explore mediation. Mr. Cox agreed with this request, as did all the parties, and mediation commenced in early 2009. Nevertheless, twenty months after negotiations began, the Attorney General now raises objections to issues long ago resolved during negotiations. But Mr. Cox has not asked the Court to *do* anything as a result of his objections. He *did not argue* that the settlement is unreasonable or that the Court should not enter the proposed Order for Judgment. Rather, it is not clear what actions Mr. Cox desires as a

result of his objections or what is the purpose of his objections.

I. Mr. Cox has not provided any legal authority to prevent entry of the Order for Judgment.

At the outset, it is important to be clear what Mr. Cox's objections *do not* do. They do not identify a single legal basis that would preclude this Court from entering the proposed Order for Judgment. As the Settling Parties described in their motion, a district court should approve a proposed settlement if it "is 'fair, adequate, and reasonable, as well as consistent with the public interest.'"[1] Mr. Cox "opposes the terms of the proposed settlement on three specific grounds[,]"[2] but he *has not* argued that the proposed settlement is unfair, inadequate, unreasonable, against the public's interest, or that approving the negotiated settlement would in any way abuse this Court's substantial discretion.[3] Indeed, Mr. Cox never asserts that the Court should *not* enter the proposed Order for Judgment.[4]

The negotiated settlement was approved by five governmental entities upon the affirmative votes of 25 different elected officials. Mr. Cox complains that the Tribe achieved too much in the settlement, but in reviewing a settlement,

> [t]he court should not attempt to impose its perspective on the parties. The court should only determine whether the decree is within the range of reasonableness. Some reliance may be placed on the ability of competent counsel to accurately assess the strengths and weaknesses of each litigant's case. The decree is a compromise. Neither litigant obtained all that they had hoped to gain initially through litigation.[5]

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[1] *United States v. Lexington-Fayette Urban County Government*, 591 F.3d 484, 489 (6th Cir. 2010) (citing cases).

[2] Objections by Attorney General Michael A. Cox to the Proposed Settlement Between the Plaintiff Saginaw Chippewa Indian Tribe and the State of Michigan ("Cox Objections"), Nov. 10, 2010, Dkt. 274 at 1.

[3] *See e.g. United States v. County of Muskegon*, 298 F.3d 569, 581 (6th Cir. 2002) (reviewing approval of settlement under an abuse-of-discretion standard).

[4] *See generally*, Cox Objections.

[5] *Stotts v. Memphis Fire Dep't*, 679 F.2d 541, 554 (6th Cir. 1982) (citing case), *rev'd on other grounds*, 467 U.S. 561 (1984). In this case, Defendants Cox's current attorneys—the only

Just as a court's "refusal to sign a consent decree based on generalized notions of unfairness is unacceptable[,]"[6] Mr. Cox's unsupported criticism cannot preclude entry of the proposed Order for Judgment. But for the record, the "three specific grounds" Mr. Cox asserted as objections do not legally preclude this Court from entering the proposed Order for Judgment.

II. Mr. Cox's objections to the proposed settlement miss the mark.

Mr. Cox's objections indicate a lack of familiarity with federally mandated mechanics of Indian country, confuse the distinction between jurisdiction and title, fail to heed the supremacy clause of the Constitution of the United States, misanalyze federal caselaw, and fail to comprehend the distinction between executive agreements entered into outside of litigation and a mediated settlement to resolve a live judicial case and controversy. The Court should afford Mr. Cox's objections little weight.

A. The settlement properly recognizes the six-township Isabella Reservation boundary.

In his first objection, Mr. Cox objects to the most fundamental principle of the settlement—recognition of the entire six-township treaty area, including both "sold" and "unsold" lands as Indian country. Even though the parties negotiated from this premise for over a year, Defendant Cox now objects to the proposed settlement because it does not follow the *People v. Bennett*[7] or *Moses v. Dept. of Corrections*[8] rulings of the Michigan Court of Appeals.

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attorneys opposing settlement—have barely been on this case for a month and did not participate in the mediation. In contrast, the Settling Parties' attorneys completed extensive expert discovery and briefed the case though the summary-judgment state, and so "were in an excellent position to assess the relative strengths of each litigant's case." *Id.* at 555.

[6] *In re. Smith*, 926 F.2d 1027, 1029 (11th Cir. 1991) (granting mandamus action against district court where district court refused to enter consent decree that did not contravene state or federal statute or policy, and so was consistent with the public interest).

[7] 195 Mich. App. 455, 491 N.W.2d 866 (Mich. Ct. App. 1992).

[8] 247 Mich. App. 481, 736 N.W.2d 269 (Mich. Ct. App. 2007).

Unlike this action, the Tribe was not a party in either the *Bennett* or *Moses* cases, and those courts did not have the benefit of *any* expert or other contemporaneous historical evidence to interpret the text of the Treaties.[9] Mr. Cox himself has not consistently followed those decisions in this case,[10] and this Court certainly is not bound by them.[11]

Mr. Cox's reliance on *Moses* and *Bennett* entirely ignores the United States Constitution's mandate that "all Treaties made, or 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, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding[.]"[12] Interpretation of Indian treaties is controlled entirely by federal—not state—law.[13] If it were not possible for the Court to rule against the State at trial and find that, contrary to *Moses* and *Bennett*, the Tribe has jurisdiction over the entire six-township reservation,[14] then the court could not hear this case. As the Settling Parties described in their motion to enter the proposed Order for Judgment, the Court is well within its discretion to

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[9] *E.g.*, *Bennett*, 491 N.W.2d at 867 ("In this case, the parties have not presented evidence of the negotiations surrounding the formation of the Treaty of October 18, 1864.").

[10] *Compare* Defendants' Answer to Complaint for Declaratory and Injunctive Relief, Dec. 15, 2005, Dkt 2 at 1 ("deny[ing] that the 'historic Isabella Reservation' exists), Defendants' Motion for Partial Summary Judgment, Mar. 5, 2010, Dkt. 223 at 13 ("Defendants deny that the 1855 Saginaw Treaty or the 1864 Treaty created a reservation for the Tribe[.]") *with Bennett*, 491 N.W.2d at 867 ("The Isabella reservation was established by the Treaty of October 18, 1864.") and *Moses*, 736 N.W.2d at 272 ("The parties further agree that [the location at issue] is within the exterior boundaries of the Isabella Reservation according to the treaties of 1855 and 1864, consisting of five townships and the north half of two other townships, all contiguous and situated in Isabella County.").

[11] *See Obeid v. Meridian Automotive Systems*, 296 F. Supp. 2d 751, 754 (E.D. Mich. 2003) (state decisions do not control federal courts' application of federal law).

[12] U.S. Const. Art. VI, § 1.

[13] *E.g.*, *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999).

[14] The Tribe has only made *jurisdictional*, not *territorial* claims, so the Setting Parties could not—and for the record, have not— "ultimately adopted" imaginary land claims "as part of the settlement agreement." *See* Cox Objections, Dkt. 274 at 5.

approve a settlement that bargains for the same result that the parties could reach at trial.[15]

Mr. Cox seemingly relies only on speculative presumptions about what the evidence *could have* shown at trial *if* the Court had decided earlier motions differently and allowed the parties to present excluded *Sherrill* and *Rosebud* testimony.[16] But, Mr. Cox *did not* seek interlocutory appeal of the Court's *Sherrill* and *Rosebud* decisions, so the trial would have proceeded in accordance with that ruling. Though the defendants maintained as their litigation position that "the 'sold lands' and 'swamp lands' at issue have been considered to be subject to the State's jurisdiction for well over a century,"[17] the Tribe has offered witnesses to rebut this defense.[18] Accordingly, even if the Court were to allow the excluded evidence, there is no certainty that the excluded evidence would lead the court to the result Mr. Cox desires.

Similarly, Mr. Cox's concerns about what "may" happen to criminal convictions if the settlement is approved are unconvincing. The parties acknowledge that they do not have any authority to "cede territory"[19] or otherwise create an Indian reservation. Only a Treaty, Executive Order, or Act of Congress can do that. This settlement only acknowledges what was claimed in the complaint—that the Treaties of 1855 and 1864 created the Isabella Reservation.

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[15] *United States v. County of Muskegon*, 298 F.3d 569, 581 (6th Cir. 2002) (affirming entry of Clean Water Act settlement over objection that "[t]he consent judgment allowed the County to frustrate the prior state court judgment and injunction[.]"); *Brown v. Neeb*, 644 F.2d 551, 563 (6th Cir. 1981) (affirming entry of consent decree that resolved federal race-discrimination claims, though it conflicted with Ohio law, because "[a] federal court's power under the Supremacy Clause to override conflicting state laws and/or private agreements is well established."); *Armstrong v. Adams*, 869 F.2d 410, 414 (8th Cir. 1989) ("Any limitation of power imposed by state law on the Board of Election Commissioners is vitiated by the authority of the district court to remedy constitutional violations that may have occurred during the election.").

[16] Cox Objections, Dkt. 274 at 4-5.

[17] *Id.* at 3.

[18] March 17, 2008 Plaintiff Saginaw Chippewa Indian Tribe of Michigan's First Supplemental Witness List, Dkt. 61at 2-4; Oct. 31, 2008 Plaintiff Saginaw Chippewa Indian Tribe of Michigan's Second Supplemental Witness List, Dkt. 132 at 3-6.

[19] Cox Objections, Dkt. 274 at 3 and 4.

The settlement treats different aspects of the relationships among the parties in different ways. At times, the parties specifically agreed upon retroactive implications of this recognition. For example, the State Income-Tax-Resolution Agreement (an agreement that Mr. Cox *does not* object to in any part) operates retroactively by allowing refund of certain income-tax payments,[20] and the County Revenue Agreement (another agreement that Mr. Cox *does not* object to) applies a payment-in-lieu-of-taxes formula to trust applications going forward, but also operates retroactively to afford the County payments on parcels for which the Tribe trust status is already pending.[21] But the parties also agreed upon two specific provisions of the proposed Order for Judgment to address state convictions under *Bennett* and *Moses*. As to future litigation in general, the proposed Order for Judgment states that:

> [i]n the event that the issue of the boundaries of the Isabella Reservation, or whether land within the Isabella Reservation constitutes an Indian reservation and/or is Indian country, arises in future litigation, administrative proceedings, or future negotiations for intergovernmental memoranda of agreement, the Parties are barred from taking any position contrary to this Order.[22]

As to the criminal convictions Mr. Cox has expressed concern about, the proposed Order for Judgment specifically states that:

> this Order does not disturb any convictions entered before the date of this Order pursuant to the jurisdictional holding of either *Moses v. Dept. of Corrections*, 247 Mich. App. 481, 736 N.W.2d 269 (Mich. Ct. App. 2007) or *People v. Bennett*, 195 Mich. App. 455, 491 N.W.2d 866 (Mich. Ct. App. 1992).[23]

The parties can't control whether tribal members incarcerated under *Bennett* or *Moses* decide to seek review of their convictions in light of this settlement. But, if they do, in addition

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[20] *See* Memorandum of Agreement Regarding Income-Tax Resolution Between the State of Michigan and Saginaw Chippewa Indian Tribe of Michigan at § 2(B)(ii), available at Dkt. 271-7 at 2-3.

[21] Revenue Agreement Between the county of Isabella and the Saginaw Chippewa Indian Tribe of Michigan at § 3, available at Dkt. 271-15 at 4-5.

[22] Proposed Order for Judgment at § III(F), available at Dkt. 271-2 at 4.

[23] *Id.* at § III(E), available at Dkt. 271-2 at 3-4.

to any procedural hurdles that bar collateral attack of the conviction,[24] the State "may" point to specific language that the Order does not affect the conviction.

If this case was tried and the State lost, the Court could well conclude that the reasoning of *Bennett* and *Moses* convictions was incorrect. This negotiated settlement gives the State *more* protection than the State might have it found for the Tribe at trial. Put simply, the "substantial risk" [25] that Mr. Cox attributes to the settlement is a red herring. The parties have considered this issue. They have addressed this issue. And their negotiations have brought more certainty to the question of *Bennett* and *Moses* convictions than the Mr. Cox would have by trying the case.

B. The Settlement does not overrule or in any way abrogate *Nevada v. Hicks.* [26]

Mr. Cox's second objection is to a specific provision of the State Law-Enforcement Agreement[27] (the "Agreement"), though all law-enforcement officials involved in this case except Mr. Cox support the Agreement and similar City and County Law-Enforcement Agreements. For example, Mt. Pleasant Public Safety Director Anthony Gomez-Mesquita has stated that the negotiated law-enforcement agreements "will formalize many of our successful

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[24] Using Defendant Cox's *Moses* example, Moses did not appeal the 2007 Court of Appeals decision, so has not exhausted his remedies before the Michigan courts. This failure to exhaust state remedies also bars federal courts from considering a habeas petition. *Awkal v. Mitchell*, 613 F.3d 629, 647 (6th Cir. 2010); *Stanford v. Parker*, 266 F.3d 442, 451 (6th Cir. 2001) ("Where a petitioner has not fully and fairly presented a federal claim to the state's highest court . . . , a federal court ordinarily will not consider the merits of that claim"). Even after exhaustion of state-court remedies, a *Bennett* or *Moses* inmate is unlikely to succeed on a federal habeas petition because the proposed Order for Judgment does not likely fall within the limited categories of habeas relief available under the 1996 Antiterrorism and Effective Death Penalty Act. 28 U.S.C. § 2254(d). Indeed, *if* Moses sought collateral review of his conviction and *if* that review was successful, then he *may* still be subject to a federal prosecution. Of course, none of these speculative scenarios are before the Court, and Mr. Cox may not manufacture a hypothetical case or controversy to block this Court's consideration of the proposed Order for Judgment at bar.

[25] Cox Objections at 6.

[26] 533 U.S. 353 (2001).

[27] Law Enforcement Agreement Between the Michigan Department of State Police and the Saginaw Chippewa Indian Tribe of Michigan, available at Dkt. 271-5.

practices. The cross appointment of officers will close the loopholes of jurisdictional authority and ensure prosecution in the appropriate venue."[28] Under federal law, state police do not have jurisdiction over Indians in Indian country,[29] and the Tribe does not have jurisdiction over non-Indians.[30] This distinction complicates the work of both state and Tribal officers in Indian country because they must determine whether a suspect is an Indian or not in order to know whether the officer has authority to arrest the suspect. For example, without any agreement, if a State trooper stopped a speeder but that speeder was an Indian, the trooper could not cite the speeder. The Agreement (like the City and County law-enforcement agreements) addresses this concern by building on the federal-law framework and agreeing that cross-appointed Tribal officers may exercise State authority, and that cross-appointed State officers may exercise Tribal authority. So under this Agreement, that trooper can cite the speeder whether the speeder is Indian or not. If the speeder is Indian, the trooper will cite him under the Tribe's laws using tribal authority under the Agreement; if not, the trooper will cite him under state law using state authority independent of the Agreement.

The County has deputized tribal officers for a number of years, and these agreements replicate that successful model across the parties. But, except for a brief period several years ago, the Tribe has not extended its authority to State, City, and County officers. In order to assure Tribal members that state officers would not overreach this new authority, the Agreement creates a Tribal Enclave—a small pocket around core tribal landholdings—within which State

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[28] S. Field, Indian Country Settlement Gives Police Authority, Nov. 13, 2010, Morning Sun, *available at* http://www.themorningsun.com/articles/2010/11/13/news/srv0000009943500.txt.

[29] *E.g., U.S. v. John*, 437 U.S. 634, 651 (1978) (holding Major Crimes Act jurisdiction preempts states).

[30] *United States v. McBratney*, 104 U.S. 621 (1881).

officers may only enter in their official capacities for particular purposes.[31] The Agreement *does not* prevent State officers from routinely patrolling certain major roads through the enclave or from entering any part of the Enclave off duty.[32] And the Agreement *does not* prevent cross-appointed State officers from entering the enclave to respond to a 911 or other emergency call, or from entering the enclave in fresh pursuit of a suspect.[33] Absent one of these circumstances, State officers would require Tribal permission to enter the Enclave for any other law-enforcement purpose,[34] but the Agreement *does not* affect a Cross-Appointed *Tribal* officer's authority within the Enclave.[35]

Viewing the Agreement in its entirety, by entering into the Agreement the State *increases* its law-enforcement presence throughout the Isabella Reservation by instantly adding up to 40 federally trained Tribal officers to the State's force at no cost to the State, and by allowing the State to exercise criminal jurisdiction over Indians throughout the great majority of the Tribe's Indian country. Moreover, by its own terms, the Agreement "may not be construed to . . . accomplish any act that violates State or federal law,"[36] so it *could not* "effectively overrule

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[31] Law Enforcement Agreement Between the Michigan Department of State Police and the Saginaw Chippewa Indian Tribe of Michigan § 7, available at Dkt. 271-5 at 7. The City and County law-enforcement agreements also contain include provisions that similarly limit the purposes for which City and County officers may enter the Enclave. Law Enforcement Agreement Between the City of Mt. Pleasant and the Saginaw Chippewa Indian Tribe of Michigan § 7, available at Dkt. 271-10 at 6-7; Law Enforcement Agreement Between the County of Isabella and the Saginaw Chippewa Indian Tribe of Michigan § 7, available at Dkt. 271-14 at 7.

[32] Law Enforcement Agreement Between the Michigan Department of State Police and the Saginaw Chippewa Indian Tribe of Michigan § 7(A), available at Dkt. 271-5 at 7.

[33] *Id.*

[34] *Id.*

[35] *See generally id*. at § 7, available at Dkt. 271 at 7.

[36] *Id.* at § 2(A), available at Dkt. 271 at 4.

Hicks for one tribe in one [s]tate."[37] Instead, Mr. Cox simply misunderstands the mechanics of the Enclave.

Contrary to Mr. Cox's assertions, the Agreement *does not* "surrender [] State authority" over the Enclave, but only makes concessions about how the State will exercise its authority within the enclave. That is, under the Agreement, the State retains all authority it would otherwise have in the Enclave, but agrees that cross-appointed Tribal officers will exercise the State's non-routine patrol and non-emergency response jurisdiction in the Enclave. The only difference between law-enforcement inside and outside of the enclave is what badge the officer acts through in exercising State jurisdiction.

Moreover, this arrangement does not in any way violate *Hicks*. First, the legal issue in *Hicks* was *not* (as Mr. Cox states without citation[38]) whether the state had authority to execute an on-reservation search warrant against a member for off-reservation conduct. Rather, the question before the *Hicks* Court, and the question upon which the *Hicks* Court ruled, was one of tribal-court jurisdiction.[39] To reach its decision, the Court *assumed* the game warden had authority to issue the warrant, but it did not decide the issue. Here, there is no *Hicks* problem because even if the State does have authority to execute an on-reservation warrant against a Tribal member for off-reservation conduct, it can do so—it need only enlist the aid of a cross-appointed Tribal officer. The parties specifically discussed this very issue in negotiations and arrived at this

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[37] Cox Objections, Dkt. 274 at 7.
[38] Cox Objections, Dkt 274 at 6.
[39] *Hicks*, 533 U.S. at 355 ("This case presents the question whether a tribal court may assert jurisdiction over civil claims against state officials who entered tribal land to execute a search warrant against a tribe member suspected of having violated state law outside the reservation.").

agreed-upon arrangement. But if in practice this arrangement doesn't work, the State is free to terminate the Agreement "at any time for any reason" upon 60 days' notice.[40]

Mr. Cox's reticence to agree to allow another sovereign to exercise jurisdiction is perhaps understandable, but that is the nature of compromise. Each of the parties to the Agreements have negotiated away some of their autonomy in exchange for other benefits. For example, the Tribe made similar concessions in both the City and County zoning and local-regulation agreements by agreeing to apply certain specified ordinances to Tribal members, and so allowing the local governments to exercise the Tribe's authority over its members in limited circumstances. The Tribe cannot conceive of any other circumstance where it would agree to such an arrangement, but it agreed here because those concessions secured others from the Defendants—like recognition of the Tribal Enclave. Conversely, in exchange for concessions about how it will exercise its jurisdiction in the Enclave, the State secured additional highly trained manpower at no expense to the State, support for Bureau of Indian Affairs deputization, cross-appointment by the Tribe, and the certainty afforded by the entirety of the global settlement.

This global settlement is an integrated design of carefully-crafted provisions, some of which are compromises, some of which benefit one or more parties more than others, and some of which benefit all parties. Each provision is integral to the whole. The deletion of any provision could result in the collapse of the entire settlement. It was the responsibility of the parties' leaders to balance these concessions and gains to determine whether, on the whole, the entire package of provisions and agreements best served their constituents' interests. Each of the sovereign governments decided that it did. As the Isabella County Sherriff stated, "Am I 100 percent happy with this agreement? No. But when you look at the big picture, there's so much

[40] Law Enforcement Agreement Between the Michigan Department of State Police and the Saginaw Chippewa Indian Tribe of Michigan § 21, available at Dkt. 271-5 at 12.

liability without the cross deputization."[41] Mr. Cox's misunderstanding of the Tribal Enclave provision and misstatement of *Hicks* is no reason to overrule the carefully measured judgment of these leaders and deny entry of the proposed Order for Judgment and attached agreements.

C. The settlement-approval processes provided more public notice than the law requires, and properly settled litigation between the parties.

Finally, Mr. Cox complains that the negotiated process for public comment on the settlement "is wholly unsatisfying,"[42] but it provides *greater* opportunity for public comment than the Attorney General typically uses in other cases. Mr. Cox, and other Attorneys General, have settled a host of lawsuits, including those concerning such hot-button issues as abortion and Indian hunting-and-fishing rights without public comment. There was no legal requirement for public input here, but the parties fashioned a process to allow post-approval public comment to accommodate Mr. Cox's stated preference for public participation in settlement of this litigation.

As a practical matter, settlement and litigation communications are almost always private because disclosing these communications would jeopardize litigation strategy and all but ensure that the parties would not reach an agreement. Under the mediation agreement—committed to by all of the parties, including Mr. Cox—the Parties *couldn't* have taken extensive public comment before approval because the agreement contained a confidentiality provision that forbid public negotiation and renegotiation of the terms of the settlement during the mediation. Nevertheless, within these strictures, the parties *did* include and accommodate the needs of key on-the-ground personnel of each of the parties to ensure that the Agreements will work in practice, not just on paper. And in fact, the County did not approve the agreements until *after* it

[41] S. Field, Indian Country Settlement Gives Police Authority, Nov. 13, 2010, Morning Sun, *available at* http://www.themorningsun.com/articles/2010/11/13/news/srv0000009943500.txt.
[42] Cox Objections, Dkt. 274 at 8.

took public comment at a meeting held *after* the press reported that the Tribe, State, United States, and City had reached agreement.

Mr. Cox has pointed to no applicable law to support his objection concerning this process. His citation to North Dakota and Montana law is hardly persuasive. North Dakota statutes describe notice provisions for agreements entered between tribes and public agencies, but that notice occurs "after the parties to an agreement have agreed to its contents[.]" N.D. Cent. Code § 54-40.2-03.1. Here, the legislative bodies could not have known whether they agreed to the contents of the settlement before they held a vote on the settlement.[43] Montana law allows public agencies to enter into an agreement with a tribe to perform "any administrative service, activity, or undertaking that a public agency or a tribal government entering into the contract is authorized by law to perform[,]"[44] but *only* requires public notice for *tax* agreements.[45] And neither the North Dakota nor Montana laws have anything to do with the mediated settlement of litigation. In fact, under *Michigan* law regarding *litigation* situations, the Michigan Legislature has confirmed that public bodies *do not* have to conduct settlement negotiations in public.[46]

Similarly, Mr. Cox's sweeping statement that "[g]enerally, a change of this magnitude between the State and the Tribe requires an act of the Legislature[,]"[47] is simply incorrect. Generally, the relationship between tribes and states is controlled by federal law,[48] and gaming

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[43] MCL 15.263 Sec. 3(2) (requiring that action be taken at a public meeting).
[44] Mont. Code Ann. § 18-11-103(1)(a).
[45] *Id.* at § 18-11-103(4).
[46] MCL 15.268 Sec. 8(e) ("A public body may meet in a closed session only for the following purposes . . . To consult with its attorney regarding trial or settlement strategy in connection with specific pending litigation, but only if an open meeting would have a detrimental financial effect on the litigating or settlement position of the public body).
[47] Cox Objections, Dkt. 274 at 3.
[48] U.S. Const. Art. I § 8 cl. 3, Art. II § 2 cl. 2, Art. VI cl. 2.

compacts—the single example of Michigan legislative authority that Mr. Cox points to—is no exception. The only reason the State has *any* role in approving gaming compacts is because the Indian Gaming Regulatory Act requires certain Indian gaming to be performed in accordance with a state-tribal compact.[49]

And here again, *other state's* procedures for approving *consensual executive agreements* are doubly inapposite. First, regardless of whether Montana or Idaho requires legislative approval of agreements between their subdivisions and tribes, Michigan does not. Second, and more fundamentally, this is not a case of consensual negotiations between contracting strangers. The parties negotiated this settlement under the authority of court-facilitated mediation, and propose recognition of the Isabella Reservation not as a simple contractual matter, but as the means to settle a live judicial case and controversy under federal law. So unlike other state-tribal cooperative agreements, this proposed settlement "has attributes both of a contract and of a judicial act."[50] In this judicial context, the Michigan Constitution vests the executive power of the State in the Governor,[51] and expressly authorizes the Governor to litigate in the name of the State.[52] The Supreme Court of Michigan has held that the executive power to bring claims "inevitably" includes "the authority to settle and release such claims."[53] The people of the State of Michigan gave the Governor, as Chief Executive of the State, the power to do here precisely what she has done.[54] Given that this case solely involves a question of federal law, and that the Governor has the authority to resolve litigation involving the State, the Michigan Legislature has no role in deciding whether or not to resolve this matter.

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[49] 25 U.S.C. § 2710(d)(1)(C).
[50] *Stotts*, 679 F.2d at 556.
[51] 1963 Const. of Mich. Art. V § 1.
[52] *Id.* at V § 8.
[53] In re. Certified Question, 638 N.W.2d 409, 414, 465 Mich. 537, 546 (Mich. 2002)
[54] 1963 Const. of Mich. Art. V §§ 1, 8.

CONCLUSION

This is not the end. It is the beginning. The Settling Parties have carefully crafted, through the proposed Order for Judgment and accompanying agreements that would take effect if the Order is entered, a foundation for the future. Mr. Cox has not argued that the settlement does not meet the Sixth Circuit's reasonableness standard, and has not given the Court a single reason why it should not enter the Order for Judgment over his objection. The City of Mt. Pleasant, Isabella County, State of Michigan, and Saginaw Chippewa Indian Tribe of Michigan respectfully request that this Court exercise its sound discretion to enter the proposed Order for Judgment.

Dated: November 19, 2010

SAGINAW CHIPPEWA INDIAN TRIBE OF MICHIGAN

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Dated: November 19, 2010.

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Certificate of Service

I certify that on November 19, 2010, I electronically filed the foregoing document 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.

s/ Jessica Intermill

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