UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

SAGINAW CHIPPEWA INDIAN TRIBE OF MICHIGAN, Plaintiff, and THE UNITED STATES, Intervenor Plaintiff, v. JENNIFER GRANHOLM, et al., Defendants, and COUNTY OF ISABELLA and CITY OF MT. PLEASANT, Intervenor Defendants.	Case No. 05-10296-BC Honorable Thomas L. Ludington

UNITED STATES' REPLY IN SUPPORT OF THE MOTIONS TO ENTER ORDER FOR JUDGMENT UPON COMPLETION OF A PUBLIC COMMENT PERIOD AND OPPORTUNITY FOR THE PARTIES TO RESPOND

I. INTRODUCTION

The Saginaw Chippewa Indian Tribe, the United States, the City of Mt. Pleasant, Isabella County, the State of Michigan, Governor Granholm, and State Treasurer Rising (collectively the "Settling Parties") have filed motions respectfully requesting that this Court approve and enter their settlement as embodied in the Order for Judgment, after completion of a public comment period and an opportunity for the parties to respond. Dkt. Nos. 271, 273. The Court issued an Order requesting public comment and set a hearing for the motions on November 23, 2010. Dkt.

No. 272. On November 10, 2010, Attorney General Cox filed objections to the proposed settlement. Dkt. No. 274 ("Objection Br."). He set forth three objections: 1) the proposed settlement recognizes that all land, including previously sold and swamp lands, are within the external boundaries of the Isabella Reservation; 2) the agreement establishes an "enclave area" where state law enforcement officers will not routinely enter; and 3) there was not enough public comment.

Despite the Attorney General's objections, the Court should enter and approve the Settling Parties' proposed Order for Judgment as being fair, adequate, reasonable, and in the public interest. The Attorney General's objections concern the merits of the case, disagreements with this Court's previous rulings, and a misunderstanding of the proposed settlement. The third objection was accommodated during negotiations when the Settling Parties struck a compromise and agreed to allow public comments until November 19, 2010. He has not met the "heavy burden of demonstrating that the decree is unreasonable." United States v. Oregon, 913 F.2d 576, 581 (9th Cir. 1990) (internal quotations omitted).

Preliminarily, the Attorney General is neither a necessary party nor the real party-in-interest to this action. Accordingly, his objections should not thwart the settlement reached with the State of Michigan and the Governor. See Mich. Const. art. 5, §§ 1, 8 (1963) (Executive powers of the Governor); Lucas v. Bd. of County Road Comm'rs of Wayne County, 348 N.W.2d 660, 670 (Mich. App. 1984) ("The Attorney General, albeit a constitutional officer, is a member of the executive branch and thereby constitutionally subservient to the Governor as repository of the executive power of the state.").

II. ARGUMENT

A. Standard for District Court Review for Approving a Proposed Settlement

As explained in the United States' Concurring Motion to Enter and Approve the Order for Judgment, a district court in reviewing a proposed settlement for approval "must be satisfied that it is at least fundamentally fair, adequate, and reasonable." United States v. Oregon, 913 F.2d 576, 580 (9th Cir. 1990); see also United States v. Lexington-Fayette Urban County Gov't, 591 F.3d 484, 489 (6th Cir. 2010). Approval of a decree is not a decision on the merits. See Oregon, 913 F.2d at 580; accord In re Beth Smith, 926 F.2d 1027, 1028 (11th Cir. 1991) (In determining whether to approve a settlement, the court should not try the case or substitute its own judgment). Rather, a court's inquiry is "nothing more than an amalgam of delicate balancing, gross approximation and rough justice." Oregon, 913 F.2d at 581 (citations omitted). To conduct its review, a court should limit its proceedings to "whatever is necessary to aid it in reaching an informed, just, and reasoned decision. " Id. at 582 (citations omitted). A court must "stop short of the detailed and thorough investigation of a trial." Id. A negotiated decree is "presumptively valid," and parties filing objections to the proposed decree have a "heavy burden of demonstrating that the decree is unreasonable." Id. at 581 (citations omitted).

B. Attorney General Cox Has Not Demonstrated the Proposed Settlement is Unfair, Inadequate, or Unreasonable

The Attorney General's objections concern the merits of the case, disagreements with this Court's previous rulings, and a misunderstanding of the proposed settlement. His objection about public participation was accommodated during negotiations when the Settling Parties compromised and agreed to allow a public comment period until November 19, 2010. None of

the objections overcome the settlement's presumption of validity or demonstrate that the settlement is not fair, adequate, reasonable, and in the public interest.

1. It is Fair, Reasonable, In the Public Interest and Consistent with Federal Law for the Settlement to Include All Lands Within the Boundaries of the Reservation.

Attorney General Cox's first objection is that he should defend the State's "reasonable claim" that "sold lands" and "swamp lands" never "pass[ed] to the Tribe." Objection Br. at 1-2. He states the settlement will "cede territory" that has been "considered to be subject to the State's jurisdiction for well over a century." Id. at 3. This objection goes to the merits of the case, assumes its outcome, and relies on facts that this Court has ruled inadmissible. See Op. and Order Granting U.S. Mot. in Limine, Dkt. No. 121 (Oct. 22, 2008) (ruling equitable defenses unavailable) ("Sherrill Order"); Op. and Order Grating U.S. Mot. in Limine, Dkt. No. 161 (April 29, 2009) (ruling jurisdictional factors inadmissible). If this case were to proceed to trial and the evidence were admitted after appeal, the Tribe and the United States have ample evidence to refute these assertions regarding jurisdiction. But, for purposes of approving the settlement, this Court need not delve into the merits of the case. See Oregon, 913 F.2d at 580; In re Beth Smith, 926 F.2d at 1028.

Moreover, it appears the Attorney General misunderstands the proposed settlement. His objection conflates property ownership with jurisdictional authority. Under principles of Indian law, property ownership is not the same as jurisdictional authority. See 18 U.S.C. § 1151(a) (Indian Country is "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation."); see also Montana v. United States, 450 U.S. 554

(1981) (discussing jurisdiction over non-Indian owned fee land within boundaries of a reservation). An Indian reservation is a place within which a tribe may exercise jurisdictional authority, but a tribe may not own all the land within its reservation boundaries. See Felix Cohen, Cohen's Handbook of Federal Indian Law, § 15.02 at 967 (2005 ed.); id. at § 15.02 at 966 (an "incomplete list" of property interests within reservations); see also, Solem v. Bartlett, 465 U.S. 463, 468-70 (1984) (explaining that some reservation boundaries continue to exist despite the opening of the reservation for sale of land to non-Indians in fee); Keweenaw Bay Indian Cmty. v. Michigan, 784 F. Supp. 418, 426 (W.D. Mich. 1991) (lands sold prior to the treaty are nonetheless within the boundaries of the reservation).

The proposed settlement does not discuss, implicate, or disrupt property title of the previously sold lands or swamp lands (or any property) and does not conclude that they "pass[ed] to the Tribe." The proposed settlement does not "cede territory." The proposed settlement merely defines the Isabella Reservation boundaries for jurisdictional purposes but it leaves property ownership unaffected.

The Attorney General specifically objects to provision III. E. in the proposed settlement that states the parties' future conduct will not be governed by Moses v. Department of Corrections, 736 N.W.2d 269 (Mich. Ct. App. 2007) or People v. Bennett, 491 N.W.2d 866 (Mich. Ct. App. 1992).[1/] As a result of the negotiation process, it was reasonable for the parties

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[1/] The objection also states that previous criminal convictions may be called into question. Objection Br. at 2, 3. However, the second portion of provision III. E. obviates his objection:

> To the extent that this Order conflicts with the decisions 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), or any other court or administrative decision, order, judgment, argument, position, or

to recognize the distinction between property ownership and jurisdiction, and to agree that they will proceed in the future in a manner that minimizes a checkerboarded – and thus substantially more confusing – jurisdictional framework. This provision adds predictability and reliability for the governmental authorities, which in turn provides an increased level of safety for the public. Contrary to the Attorney General's statement, the State still has jurisdiction over the previously sold and swamp lands to the same extent any state has jurisdiction over non-Indians and/or non-Indian fee land within Indian Country. Moreover, the proposed settlement's approach is consistent with the federal statute defining Indian Country, 18 U.S.C. § 1151(a). See also Seymour v. Superintendent of Wash. State Penitentiary, 368 U.S. 351, 358-59 (1962) ("Such an impractical pattern of checkerboard jurisdiction was avoided by the plain language of § 1151...."). It is also consistent with federal case law. See Cardinal v. United States, 954 F.2d 359 (6th Cir. 1992); Keweenaw Bay, 784 F. Supp. 418 (holding lands previously disposed of prior to a similar treaty are within the boundaries of the Indian reservation). Lastly, Moses and Bennet are state lower court decisions whose interpretations of federal law are not binding on this Court, see Johnson v. Yellow Cab Transit Co., 321 U.S. 383, 391 (1944), and therefore this Court has the discretion and authority to approve the settlement provision III. E.

Attorney General Cox argues that State legislative approval is typically required when actions affect "the relationship between land held by the State and land held by the Tribe."

> stipulation, this Order controls, **except that in order to respect the finality of prior state-court criminal judgments, 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)**.

Objection Br. at 4. As explained above, however, the proposed settlement does not affect property title. Furthermore, state law does not define jurisdiction in Indian Country. Federal law does. See U.S. Const. art. I § 8 cl. 3; id. art. II § 2 cl. 2; id. art. VI cl. 2; Morton v. Mancari, 417 U.S. 535, 551-52 (1974); see also Sherrill Order at 18-19 (discussing federal government plenary authority). This Court has the authority to declare that previously sold lands and swamp lands are within the boundaries of the Isabella Reservation, and as such, it can approve the proposed settlement which does the same. 28 U.S.C. §§ 1362, 1331; see Armstrong v. Adams, 869 F.2d 410, 413-14 (8th Cir. 1989) (court has jurisdiction to approve settlement in election fraud case because it has authority to issue a similar remedy for election fraud). The negotiated settlement provisions that eliminate a checkerboard jurisdictional framework do not deprive the State of territory or property. They are fair, reasonable, in the public interest, and consistent with federal law.

2. The State/Tribe Law Enforcement Cross-Deputization Agreement Does Not Deprive the State of Jurisdiction.

The Attorney General asserts that the cross-deputization agreement provision which provides that state officers will not routinely enter the "Tribal Enclave" is inconsistent with Nevada v. Hicks, 533 U.S. 353 (2001), and state law. This objection misconstrues the proposed agreement. The provision does not alter the scope of state law and is consistent with federal law, including Hicks. Additionally, this provision is a product of detailed negotiations where the parties specifically discussed this issue and arrived at a compromise.

The cross-deputization agreement extends – not diminishes – the State's law enforcement presence in Indian Country. It extends to state officers the authority to exercise tribal law. In

turn, it extends to tribal officers the authority to exercise state law. Within a small area called the "Tribal Enclave," state law still applies to the extent federal law allows it in Indian Country. But, instead of a state officer executing a state warrant within the Enclave, for example, a tribal officer will do so under color of state law pursuant to the cross-deputization authority. For routine patrols, a tribal officer will exercise Tribal and State authority within the Enclave. But, the State still will have jurisdiction to prosecute the crime if it otherwise would have jurisdiction to do so under federal law. Additionally, if there is an emergency or a 911 dispatch, if the state officer is in fresh pursuit, or if the state officer is called into the Enclave by the Tribal police, he or she has no restrictions in the Enclave area at all. The purpose of the cross-deputization agreement is to increase communication, cooperation, and certainty for the public and their governing bodies. No longer will the officers have to worry about their authority.

The law enforcement agreement does not run afoul of Hicks. Hicks concerned whether a tribal court had jurisdiction over a game warden's alleged violations of tribal law and federal civil rights laws while executing a state warrant (which was approved by the tribal court) for an off-reservation crime. The Court held that the tribal court did not have jurisdiction. The Court reasoned that it is not essential to tribal self-government to have authority over state officers who are exercising authority under state law. Id. at 364-65. There is nothing in the cross-deputization agreement that unlawfully extends tribal court jurisdiction over state law enforcement officers. State officers are free to issue warrants under state law within the Enclave, but only need to coordinate and seek assistance from tribal officers, which was done in Hicks. Such coordination and communication is precisely what the Settling Parties seek in the proposed settlement. Moreover, if the Tribe and the State find that the arrangement needs to be modified, they are free

to re-negotiate a new agreement.

3. The Parties Addressed Attorney General Cox's Public Notice Concern During Negotiations by Agreeing to Allow a Public Comment Period on the Proposed Settlement.

The Attorney General's office has been involved in the negotiations since their inception in the Spring of 2009. During the negotiations, compromises were reached to accommodate some of his concerns. Specifically, his office requested a public comment period. The Attorney General acknowledges that there is no legal requirement that the public participate in the settlement of this case. Nevertheless, in the spirit of negotiating and compromising, the other parties agreed to allow a public comment period and the Court approved this procedure. See Order Setting Joint Motion to Enter "Order for Judgment" Hearing, Dkt. No. 272 (November 10, 2010). Additionally, the City and County formally approved the settlement at public meetings. Although the parties were bound by a confidentiality agreement while the negotiations were on-going, the Settling Parties are committed to educating the public, have taken steps to do so, and are addressing public comments. The Attorney General states that only the Court has the power to "undo" the proposed settlement. Objection Br. at 7. However, the Settling Parties are free to modify their agreements and the proposed settlement based upon comments received. The Settling Parties' negotiated compromise that allows for a public comment period is reasonable and in the public interest.

In sum, the proposed settlement is a product of good faith and arms-length negotiations that lasted almost two years. It was reached with the assistance of a professional mediator and with the utilization of personnel who have expertise in the various substantive fields. Attorney General Cox does not demonstrate how proceeding with the litigation – which involves

substantial costs and risks – is in the public interest. If the litigation resumes, there will be years of trials, appeals, and possible remands. There will be corresponding years of unsettled questions of jurisdictional authority on a day-to-day basis. The proposed settlement puts to rest the most pressing areas of confusion and provides the parties and the public a stable framework in which to live, work, and govern. It also provides a solid base for continuing a cooperative relationship moving forward. The proposed settlement is fair in light of the risks and benefits received. The Attorney General's objections have not met the "heavy burden of demonstrating that the decree is unreasonable." Oregon, 913 F.2d at 581.

III. CONCLUSION

For the foregoing reasons and for the reasons stated in the Settling Parties' Joint and Concurring Memoranda in Support, the United States respectfully requests that the Court grant the Settling Parties' Joint and Concurring Motions to Enter the Order for Judgment.

Dated: November 19, 2010

Respectfully submitted,

IGNACIA S. MORENO
Assistant Attorney General
Environment and Natural Resources Division
s/ Patricia Miller
PATRICIA MILLER
U.S. Department of Justice
Environment & Natural Resources Division
Indian Resources Section
L'Enfant Plaza Station
P.O. Box 44378
Washington, D.C. 20026-4378
Telephone: (202) 305-1117
Telefax: (202) 305-0271
patti.miller@usdoj.gov
Attorneys for the United States

CERTIFICATE OF SERVICE

This is to certify that on November 19, 2010, the United States' Reply in Support of its Joint and Concurring Motions to Enter Order for Judgment Upon Completion of a Public Comment Period and Opportunity For the Parties To Respond 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.

s/ Patricia Miller
PATRICIA MILLER
U.S. Department of Justice
Environment & Natural Resources Division
Indian Resources Section
L'Enfant Plaza Station
P.O. Box 44378
Washington, D.C. 20026-4378
Telephone: (202) 305-1117
Telefax: (202) 305-0271
patti.miller@usdoj.gov
Attorney for the United States