UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN – SOUTHERN DIVISION

LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS, a federally recognized Indian tribe,

Plaintiff,

v.

Court File No.15-cv-850
Hon. Paul L. Maloney

RICK SNYDER, Governor of the State of Michigan, *et al.*,

Defendants.

Supplemental Reply Brief in Support of Tribe's Motion for Partial Summary Judgment Concerning 1994 Reaffirmation of Rights

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Clarification of Supplemental Facts

The Tribe agreed that former Tribal Chairman Frank Ettawageshik would testify for the Tribe as a Fed. R. Civ. P. 30(b)(6) witness for a particular, limited purpose, and he appeared at his deposition in that capacity. *See* Ex. A (emails between counsel for the Tribe and the State concerning the depositions). But the Defendants only noticed former Chairman Ettawageshik's deposition as a fact witness, not a Rule 30(b)(6) witness. *See* Ex. B. (State's supplement to the third notice of deposition of Tribe's witnesses). Defendants' questions in a day-long deposition strayed far from the limited Rule 30(b)(6) topic that the Tribe agreed to. After asking whether he was aware that his designation under Rule 30(b)(6) "relates to, basically, the history and work to have the US government recognize or reaffirm its relationship with the tribe," Defendants never again mentioned the witness's dual role during the deposition or clarified when they requested his personal knowledge instead of the knowledge of the Tribe. PageID.5764. Former Chairman Ettawageshik's Rule 30(b)(6) testimony is thus limited to the grounds set forth in counsels' agreement; all other commentary was in his individual capacity. *See, e.g.*, Wright & Miller, 8A Fed. Prac. & Proc. § 2103 (3d ed., 2018 update) ("Surely the notion that the designee speaks for the corporation should be limited to statements made about the topics designated for this witness, as the duty to prepare the witness to testify would be so limited.").

I. Former Chairman Ettawageshik's testimony is not a part of the legislative history of the 1994 Act.

Former Chairman Ettawageshik's deposition statements have no bearing on the pure statutory-interpretation question before the Court, and the Court can decide the Tribe's motion for partial summary judgment because there is no genuine issue of material fact. "When interpreting a statute, we must begin with its plain language, and may resort to a review of

congressional intent or legislative history only when the language of the statute is not clear." *In re Comshare, Inc. Sec. Litig.*, 183 F.3d 542, 549 (6th Cir. 1999). Because the Reaffirmation Act is clear on its face, extrinsic evidence of Congressional intent is unnecessary. But even if the Reaffirmation Act's reaffirmation of "all" rights was ambiguous, the recollection of a single constituent is no substitute for congressional intent or legislative history. Former Chairman Ettawageshik is a key constituent and an important member of the Tribe and its history, but he was not a member of Congress during the passage of the Reaffirmation Act. *See, e.g.*, *Graham Cty Soil & Water Cons. Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 298 (2010) (noting that even a letter written by the primary sponsors of a bill 13 years later was "of scant or no value for our purposes"). "[T]he authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill," *Garcia v. United States*, 469 U.S. 70, 76 (1984), not decades-old recollections of constituents. Advocacy efforts—even successful ones—are irrelevant to Congressional intent and power. *See, e.g.*, *Patchak v. Zinke*, 138 S. Ct. 897, 910 (2018).

II. The State's and Associations' excerpted interpretation of former Chairman Ettawageshik's testimony seeks to create ambiguity where there is none.

Former Chairman Ettawageshik *did not state* that the "Tribe did not obtain a reaffirmation of the reservation in the Reaffirmation Act," PageID.5754, nor did he characterize the reservation as a "poison pill" that had to be left "on the table," PageID.6067. Rather, he testified to the inseparability of the Reservation from congressional reaffirmation, and its discussion of both before Congress:

> [W]e referenced the reservation boundary in the statute and so our service area is anywhere within 70 miles of the reservation as described in the treaty. So we referenced it and we also – in the findings there's an acknowledgement of our treaty rights and we look at the treaty – *the face value of our treaty is there's a reservation. We believe that.* So that we reference these things, both in the findings in the bill and also in the delineation of our service area, and so in a way what we felt that we

> had given up was not getting an absolute clear-cut reaffirmation of the reservation boundary in language that said that in the bill - - [.]

PageID.5796-5797 (emphasis added). Although the State posits that the Tribe "strategically avoided" mention of the Reservation during the congressional lobbying process, PageID.5757, former Chairman Ettawageshik confirmed that the 1855 Treaty Reservation was part of the discussion. *See, e.g.*, PageID.5796-5797, PageID.5803, PageID.5807, PageID.5809 ("[I]t's not like we didn't talk about the reservation[. . . .]").

Former Chairman Ettawageshik recalled an advocacy focus that was "primarily" on the question of the federal–tribal relationship, PageID.5755, PageID.5803, but he did not say that focus was to the exclusion of all other goals. Indeed, full reaffirmation of the United States' relationship with the Tribe necessarily includes reaffirmation of its *treaty* relationship. *See* PageID.5807 (testimony from former Chairman Ettawageshik that in addition to the focus on the relationship with the federal government, Michigan legislators were told of the Tribe's location and territory and were given copies of the treaty). Congress recognized as much. S. Rpt. 103-260, at *2 (May 16, 1994), PageID.3833. The suggestion that Congress did not comprehend the full breadth of its treaty relationship with the Tribe, and the suggestion that local governments would not have supported the bid if they had known the Tribe might want to exercise *all* its promised treaty rights is revisionist. The Act is squarely directed at the entire federal relationship and remedying federal malfeasance concerning all affecting federal rights. *See, e.g.*, H. Rpt. 103-621, at *7 (July 25, 1994), PageID.3850.

III. The State's invitation to ignore Indian Canons of Construction is not supported by judicial precedent.

The State argues that excerpts of former Chairman Ettawageshik's testimony allow this Court to disregard the established Indian canons of construction. It cites to *DeCoteau v. District*

County Court for Tenth Judicial District, 420 U.S. 425, 447 (1975) for the proposition that if the Court finds ambiguity in Congress' reaffirmation of "all" rights and privileges of the Tribe, then it need not follow the well-tread judicial paths that would apply the Indian canons of construction to resolve ambiguities, but can instead look to the deposition testimony of a former tribal chairman, more than two decades after the conduct at issue. PageID.5757. *DeCoteau* reaches no such conclusion. Rather, it examined an "Agreement" that was ratified by Congress, and in that context the Indian canons of construction used to resolve ambiguity could not overcome "clear expressions of tribal and congressional intent." *DeCoteau*, 420 U.S. at 445, 447. *DeCoteau* did not reach the situation that canons are addressed to: determination of *congressional* intent where the statutory language is *not* clear.

Moreover, just as the canons cannot *create* ambiguity in a clear statute, after-the-fact testimony of a tribal leader cannot create ambiguity either. The State's request that this Court rely on after-the-fact testimony of even a key tribal leader to reveal that there is "no ambiguity to resolve under the canons of construction" inverts the statutory-interpretation analysis. PageID.5758. If the Court determines the plain language of the Reaffirmation Act is ambiguous and insufficient to resolve the pending motion, only then should it "look to other persuasive authority in an attempt to discern legislative meaning." *E.g.*, *Brilliance Audio, Inc. v. Haights Cross Comm'ns, Inc.*, 474 F.3d 365, 371 (6th Cir. 2007). At that point of ambiguity, the Court must apply the Indian canons of construction to its analysis, including the "rule by which legal ambiguities are resolved to the benefit of the Indians." *DeCoteau*, 420 U.S. at 447; *Cty of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 268-69 (1992). The Court must "give this rule the broadest possible scope," because the Reaffirmation Act falls into the category of "the complex treaties, statutes, and contracts which define the status of Indian

tribes." *DeCoteau*, 420 U.S. at 447.[1] The deposition testimony of former Chairman Ettawageshik is neither part of the Reaffirmation Act itself, nor part of the Act's legislative history, and as such cannot be used to raise a genuine issue of material fact in the plain language of the Act (as the Associations' posit, PageID.6066) or to resolve any existing ambiguity before the Indian canons of construction are applied (as the State argues, PageID.5758).

Conclusion and Relief Requested

The Tribe does not argue in this Motion for Partial Summary Judgment "that Congress left subtle clues hidden in the language of the Reaffirmation Act," PageID.5758, but instead that a plain reading of the Reaffirmation Act reveals in § 5(a) that Congress reaffirmed "[a]ll rights and privileges of the Bands, and their members thereof, which may have been abrogated or diminished[,]" and that affirmative language of the Act forecloses application of the Defendants' Diminishment Defenses. PageID.3258. If the Court determines that this language is ambiguous, it will have a number of statutory and legislative-history analytical tools and evidence at its disposal to determine what Congress meant when it legislated. None of these tools place importance on the later deposition testimony of a non-Congressmember. Irrelevant factual discovery cannot create fact-questions within the pure question of law this motion presents.

The Tribe respectfully requests that the Court rely on the plain text of the Reaffirmation Act (and if that language is ambiguous, the Act's legislative history) to determine Congress's

[1] While the Reaffirmation Act is a statute of Congress, rather than a treaty itself, because there is no contrary canon at issue, and the congressional act reaffirms the very relationship—and status—of the Tribe itself, the distinction made in *Chicasaw Nation v. United States*, 534 U.S. 84, 95 (2001) is inapplicable. *See Cty of Yakima*, 502 U.S. at 269 ("[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." (quoting *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985)).

intent and grant the Tribe's motion for partial summary judgment. *See generally*, ECF No. 312; ECF No. 352.

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