UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

SAGINAW CHIPPEWA INDIAN TRIBE OF MICHIGAN,

Plaintiff,

-and-

UNITED STATES OF AMERICA,

Plaintiff-Intervenor,

v.

Case Number 05-10296-BC
Honorable Thomas L. Ludington

JENNIFER GRANHOLM, Governor of the State of Michigan, MIKE COX, Attorney General of the State of Michigan, ROBERT J. KLEINE, Treasurer of the State of Michigan, and the STATE OF MICHIGAN,

Defendants,

-and-

CITY OF MT. PLEASANT, and COUNTY OF ISABELLA,

Defendant-Intervenors.
_____/

ORDER SETTING JOINT MOTION TO ENTER "ORDER FOR JUDGMENT" FOR HEARING AND ESTABLISHING PUBLIC COMMENT PERIOD

The United States of America entered into two treaties with the Swan Creek, Black River, and Saginaw Bands of Chippewa Indians, the first in 1855 and the second in 1864. *See* Treaty with the Chippewa Indians, U.S.-Chippewa, Oct. 18, 1864, 14 Stat. 657 ("1864 Treaty"); Treaty with the Chippewa of Saginaw, Etc., U.S.-Chippewa, Aug. 2, 1855, 11 Stat. 633 ("1855 Treaty"). A treaty is an agreement between two nations or sovereigns. *Washington v. Wash. State Commercial*

Passenger Fishing Vessel Ass'n, 443 U.S. 658, 676 (1979). Pursuant to the U.S. Constitution, any treaty "made, under the Authority of the United States, [is] the supreme Law of the Land." U.S. Const. art. VI, cl. 2; *see also* U.S. Const. art. II, § 2, cl. 2 (providing the president with authority to make treaties with the "Advice and Consent of the Senate").[1] The 1855 and 1864 treaties provided that the United States would withdraw from sale for the benefit of the three Bands the unsold public lands in six townships in Isabella County, Michigan. In exchange, the Bands ceded their remaining lands in Michigan to the United States and relinquished their legal and equitable claims against the United States.

The 1864 Treaty was negotiated and ratified just nine years after the 1855 Treaty to address problems that arose, in significant part, because the United States government had not fulfilled all of its obligations under the 1855 Treaty. The United States never issued certificates confirming Indian ownership of the land, as the treaty required. The United States also did not make certain annuity payments or provide other support it had committed to furnish under the 1855 Treaty. The issues were further complicated when the parties realized that about thirty percent of the land withdrawn from sale by the 1855 treaty for the benefit of the three bands, had already been sold or deeded to other parties. Of the 138,000-acre area that was open for selection and allotment in Isabella County, nearly 40,000 acres had already been sold or deeded to the third parties when the 1855 Treaty was ratified. The 1864 Treaty provided less land for the Bands, not more, but it also included more generous support provisions for the Bands and provided for future land selections by

[1] At the time the 1855 and 1864 treaties were ratified, such instruments were the primary tool used by the federal government for negotiating with and regulating tribes. The practice of entering into treaties with tribes ended in 1871, when Congress passed a statute largely prohibiting it. 25 U.S.C. § 71. Congress also provided the executive branch with authority to enter into contracts with tribes instead of treaties. 25 U.S.C. § 81.

descendants of the band members upon turning twenty-one years of age.

One-hundred-and-fifty years later, on November 21, 2005, Plaintiff Saginaw Chippewa Indian Tribe of Michigan ("Saginaw Chippewa"), the successor to the three bands, filed this case. The amended complaint [Dkt. # 17] asked the Court to affirm that the treaties created a "reservation" that continues today, and that, as a result, the six townships constitute "Indian country" under federal law. 18 U.S.C. § 1151. The Saginaw Chippewa asked the Court to enjoin the named Defendants, the Governor, Attorney General, and Treasurer of the State of Michigan ("State Defendants"), from asserting criminal, civil, or regulatory jurisdiction within the six townships in a manner that is inconsistent with federal law.

Congress defined "Indian country" in 1949 to include "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." 18 U.S.C. § 1151. According to the Saginaw Chippewa, by withdrawing the six townships from sale for the benefit of the Bands, the treaties created a "reservation" in Isabella County. Moreover, they contend, the reservation has not been disestablished or diminished by a later treaty or act of Congress. Accordingly, it remains a "reservation" and consequently "Indian country" today.

The question of whether or not the six townships are Indian country carries with it a variety of practical considerations concerning jurisdiction over the land and the people living, working, and traveling in those townships. For example, Michigan state courts are without jurisdiction to hear civil actions against Indians that arise within Indian country. *Williams v. Lee*, 358 U.S. 217 (1959). Similarly, the State of Michigan and its constituent counties may not prosecute crimes committed by, or against, Indians in Indian country unless an act of Congress expressly provides otherwise.

See Carole Goldberg & Heather Valdez Singleton, U.S. Dep't of Justice, Public Law 280 and Law Enforcement in Indian Country—Research Priorities 1 (2005) *avaiable at* http://www.ncjrs.gov/pdffiles1/nij/209839.pdf. By contrast, tribal courts may hear civil cases arising in Indian country, as well as criminal cases involving Indian defendants. *See Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978). The U.S. Congress has also enacted several statutes that provide federal law enforcement agencies with some responsibility for prosecuting crimes within Indian country and federal courts with jurisdiction to hear such cases. *See, e.g.*, Indian Country Crimes Act, 18 U.S.C. § 1152; Assimilative Crimes Act, 18 U.S.C. § 13; Major Crimes Act, 18 U.S.C. § 1153. The jurisdictional issues also extend beyond the courts and criminal justice concerns, to include zoning, land use regulations, and taxation.[2]

On May 17, 2006, the Court entered a scheduling order, providing for discovery and motion cutoff dates, noting that it had been informed that the United States was considering intervening as a party. [Dkt. # 22]. The order directed the United States to file its motion to intervene on or before June 15, 2006. As the deadline approached, the United States asked for an extension of the deadline; a process that was ultimately repeated several times as the government further investigated the issues raised in the case. [Dkt. # 22, 23, 24, 25, 26, 27, 28]. With the consent of the other parties, the United States Department of Justice, Environment and Natural Resources Division, Indian Resources Section, ultimately elected to join the case as a Plaintiff with the Saginaw Chippewa on November 1, 2006. [Dkt. # 29, 31]. The Court then extended the scheduling order to provide

[2] By stipulation of the parties, state property taxation of land held in fee simple within the boundaries of the alleged reservation and collection of state sales taxes within the alleged reservation were expressly exempted from attention in this case. [Dkt. # 15]. The parties also agreed that tribal jurisdiction over non-Indians living within the alleged reservation would not be litigated in this case. *Id.*

additional time for the parties to conduct discovery. [Dkt. # 37].

In mid-September of 2007, nearly two years after the case was filed, the City of Mt. Pleasant and County of Isabella also filed motions to intervene as defendants. [Dkt. # 39, 41]. The existing parties did not oppose intervention by the City and County, as long as the progress of the litigation was not disrupted. [Dkt. # 42, 45]. On November 16, 2007, the Court permitted the County and City to intervene, but only on a limited basis. [Dkt. # 50]. The Court emphasized that expert reports—which are of substantial importance because the case requires the Court to inquire into the historical understanding of the treaties—had already been exchanged and that discovery was nearly completed. The Court also noted that the local governments' interests were adequately represented by the State Defendants. Indeed, municipal corporations like the City and County "have no inherent power. They are created by the state and derive their authority from the state." *Bivens v. Grand Rapids*, 505 N.W.2d 239, 241 (Mich. 1993) (citation omitted). Nevertheless, the City and County were permitted to intervene on a limited basis because they had a "legitimate interest" in the litigation and the "best understand[ing]" of local government concerns that might be directly affected by the case.

After a year of motion practice, the Court next addressed whether post-treaty events, what courts have called "jurisdictional history," is relevant to the interpretation of the treaties. More specifically, whether time-based equitable defenses, particularly laches,[3] barred the United States and Saginaw Chippewa from asserting long-neglected rights under the two treaties. In an October

[3]The term "laches" is derived from a french word meaning "slackness" and is used here to describe a legal doctrine. The equitable defense of laches provides that when a party has unreasonably delayed in asserting its rights, and the delay has prejudiced the person or entity against whom relief is sought, the party responsible for the delay may be barred from obtaining relief.

22, 2008 opinion and order [Dkt. # 121], the Court determined the laches defense was inapplicable to this case because, among other reasons, time-based equitable defenses like laches are generally inapplicable against the United States. The Court emphasized that treaties cannot be diminished or disestablished by local or state government authorities. Unless a later act of Congress or the Constitution provides otherwise, the treaties remain the "supreme Law of the Land." U.S. Const. art. VI, cl. 2. Moreover, interpretation of Indian treaties is governed by the language of the treaties and the contemporaneous understanding of the treaties, not subsequent events. Accordingly, the Court barred the introduction of evidence of so-called jurisdictional history unless it was relevant for some other purpose.

The City and County then moved for certification of the jurisdictional history question to the Sixth Circuit Court of Appeals for interlocutory appeal, but the Court denied the motion on December 12, 2008, concluding that interlocutory appeal would unnecessarily delay the case. [Dkt. # 147]. On March 23, 2009, the Court held a telephone status conference and the parties agreed to "facilitate" the case with an independent mediator while continuing to proceed, in parallel, with the litigation. [Dkt. # 159]. The parties agreed to utilize the assistance of Eugene Driker as the facilitator. The objective of the facilitation was to inventory the parties' contemporary objectives and to investigate consensus alternatives to litigation. The parties' efforts to mediate a consensual resolution of the case were not shared with the Court. Correspondingly, the Court focused on the parties' motion practice.

On April 29, 2009, the Court entered a further order limiting the scope of the evidence to be introduced at trial. [Dkt. # 161]. The Court concluded, as it had earlier, that events which occurred long after the treaties were ratified were not particularly relevant to the question of what the text of

the treaties provide and what the parties intended at the time the treaties were adopted many years ago. The Court granted motions filed by the Saginaw Chippewa and the United States, and excluded jurisdictional history evidence related only to post-treaty diminishment of the reservation. *See Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977). The Court acknowledged that the reservation, if established by the treaties, could later be diminished by an act of Congress. In this instance, however, Congress had never acted to diminish the size of the alleged reservation. Accordingly, while jurisdictional facts may be relevant under *Rosebud Sioux* to aid in determining Congress's intent when diminishing a reservation by legislation, they remain irrelevant where it is undisputed that there was no intervening congressional act. In the absence of a later act of Congress, treaty interpretation must focus on the language of the treaty and the contemporary understanding of the parties. *See Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 194–98 (1999).

In November 2009, the parties completed discovery and filed a series of motions challenging the admissibility of historical expert testimony and reports in anticipation of trial. Each party argued that the opposing parties' historical experts lacked sufficient training or reached unreliable conclusions based on insufficient data, and that as a result, the testimony of the opposing parties' experts should be excluded at trial. *See* Fed. R. Evid. 702. The Court, however, concluded that the historians' specialized knowledge would aid in interpreting the treaties, and that each historian had utilized sufficiently reliable data and methods to testify at trial. [Dkt. 221]. To the extent that there were deficiencies in any expert's report or proposed testimony, those deficiencies would be considered when evaluating the weight of the evidence at trial.

On March 5, 2010, the United States and the State Defendants each filed motions for partial summary judgment. The United States argued that there is no genuine issue of material fact as to

whether the treaties created a reservation, and that the only issue for trial should be the boundaries of the reservation. [Dkt. # 222]. The State Defendants argued that even if a reservation was created, a proposition the State Defendants disputed, it never included land that was sold or deeded to other parties by the United States before the treaties were ratified. [Dkt. # 223]. The Court held a hearing on the motions on June 22, 2010, and was prepared to issue an opinion and order on the merits of the motions on July 15, 2010.

Just before the opinion was to be issued, however, the parties indicated during a telephone status conference that they believed that a consensual settlement on a range of issues was possible. They asked that the Court delay issuing an opinion on the dispositive motions.

The Court concurred with the request. The parties have not seen the opinion and do not know how the Court would have addressed the issues. Similarly, before the proposed "Order for Judgment" was filed, together with the joint motion to enter the "Order for Judgment," the Court was unaware of the provisions of the order and the terms of the agreements that were attached.

The parties have kept the Court informed of their continued negotiations during an in-person status conference held on September 21, 2010, and telephone status conferences held on October 4, October 15, October 21, October 22, October 27, and November 5, 2010. The parties did indicate that they all desired a procedure for solicitation of public questions and commentary, which the Court would review in conjunction with its consideration of the proposed consent judgment. The parties indicated their belief that a public comment period would ensure that as many issues as could be anticipated had been thoroughly considered and responsibly addressed by the consent judgment.

Now before the Court is the parties' joint motion to enter the proposed "Order for Judgment" following a public comment period. The Court has considered the joint motion and finds there is

good cause to grant the parties' request. Before providing the procedure for receiving public comments, however, it is important to briefly describe the standard by which the Court will review the proposed consent judgment and any comments received from the public.

The review process proposed by the parties is, perhaps, unusual in the context of a civil case where the primary focus has been on interpreting Indian treaties, but it is certainly not unprecedented in the broader context of civil litigation. *See, e.g., United States v. Lexington-Fayette Urban Cnty. Gov't*, 591 F.3d 484 (6th Cir. 2010). Courts often provide for notice and comment periods on proposed settlements or consent judgments in cases were a large number of people, and many groups of people, may have an interest in the terms of the agreement or the outcome of a case. Examples include class action lawsuits, shareholder derivative suits, bankruptcy cases where a receiver has been appointed, and antitrust cases brought by the United States. *See* Federal Judicial Center, *Manual for Complex Litigation* § 13.14 (4th ed. 2004). Accordingly, the Court will review the parties' proposed consent judgment in an effort to ensure that it is fair, reasonable, and adequate to the interested parties, and that it is consistent with the public interest. *Cf.* 15 U.S.C. § 16(e) (describing standard of review for antitrust consent judgments); Fed. R. Civ. P. 23(e)(2) (describing standard of review for class action settlements); *Lexington-Fayette Urban Cnty. Gov't*, 591 F.3d at 489 (describing standard for review of proposed consent decree in a Clean Water Act case brought by the United States); *see also* Federal Judicial Center, *Manual for Complex Litigation* § 21.62 (4th ed. 2004) (citing examples of factors to be considered in class action context).

Accordingly, it is **ORDERED** that a hearing to address the parties' joint motion for entry of "Order for Judgment" and the public comments will be held on **November 23, 2010 at 10:00 a.m.**

It is further **ORDERED** that any person or entity that wishes to provide public comment on the negotiated settlement may send comments to:

Saginaw Chippewa v. Granholm Settlement Comments
Case No. 05-10296-BC
P.O. Box 32991
Detroit, MI 48232

The comments will be collected by Eugene Driker and forwarded to each party and the Court. Comments will not be considered unless they are received by **November 19, 2010 at 5:00 p.m.**, they are typewritten, they are signed by the commenter, they identify the commenter by name and address, and they include a case caption that substantially resembles the form caption reproduced in Appendix A. All comments will be retained by the Court until the case is closed, and some comments may be made part of the public record.

It is further **ORDERED** that the parties are **DIRECTED** to provide the Court with a summary of the public comments received, along with the parties' responses, on or before **November 22, 2010 at 5:00 p.m.**

s/Thomas L. Ludington
THOMAS L. LUDINGTON
The United States District Judge

Dated: November 10, 2010

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing order was served upon each attorney or party of record herein by electronic means or first class U.S. mail on November 10, 2010.

s/Tracy A. Jacobs
TRACY A. JACOBS

Appendix A

UNITED STATES DISTRICT COURT
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-and-

_____
(name of commenter)

Commenter.
_____/

SAGINAW CHIPPEWA V. GRANHOLM SETTLEMENT COMMENT

[insert typewritten pages with your comment here]

_____
(signature)

_____
(printed name)

_____
(street address)

_____
(city, state, and zip code)