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**ARTHUR DUHAMEL, Plaintiff, v. DEPARTMENT OF NATURAL RESOURCES,  
STATE OF MICHIGAN; RONALD O. SKOOG, Director of the Michigan  
Department of Natural Resources; FRANK OPOLKA, Chief, Law Enforcement  
Division, Michigan Department of Natural Resources; JOHN SCOTT, Chief,  
Fisheries Division, Michigan Department of Natural Resources; and Several JOHN  
DOE Defendants, agents, and/or employees of the Michigan Department of Natural  
Resources, Defendants.**

File No. G84-1186

**UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF  
MICHIGAN**

*1987 U.S. Dist. LEXIS 15721*

**January 21, 1987, Decided  
January 22, 1987, Filed**

**PRIOR HISTORY:** *United States v. Michigan*, 471 F. Supp. 192, 1979 U.S. Dist. LEXIS 12552 (W.D. Mich., 1979)

**JUDGES:** [\*1] ENSLEN**OPINION BY:** RICHARD A. ENSLEN**OPINION***OPINION*

Pending before the Court for decision in this case is plaintiff's June 16, 1986 Supplemental Motion for Summary Judgment, in which he requests that the Court enter judgment in his favor on count V of his complaint. The Court conducted a hearing on plaintiff's motion, and other motions that were pending at the time, on July 2, 1986. At that hearing, the Court ordered the parties to submit supplemental briefs on three issues concerning plaintiff's motion. See Order of July 3, 1986. The parties timely filed the requested briefs. For the reasons discussed below, the Court finds that although there is a strong basis for plaintiff's claim against the defendants, he has not pursued the proper course for seeking relief and I therefore must dismiss his case.

*Facts*

The Court discussed the facts of this case in the bench opinion it rendered at the July 2nd hearing. In brief, plaintiff is a member of the Grand Traverse Band of Ottawa and Chippewa Indians, which in turn is a plaintiff in the *United States v. Michigan* proceeding. *United States v. Michigan*, M26-73 (W.D. Mich.). In 1979, this Court ruled in *United States v. Michigan* that [\*2] certain Michigan Indian tribes possess treaty fishing rights, and held that "any laws or regulations of Michigan" concerning Indian fishing that "are inconsistent with the treaty rights of the Michigan Indians . . . are void *ab initio* and of no force and effect as to the plaintiff tribes and their members." *United States v. Michigan*, 471 F. Supp. 192, 281 (W.D. Mich. 1979), *aff'd in part and modified in part*, 653 F.2d 277 (6th Cir.), *cert. denied*, 454 U.S. 1124 (1981). The Court also held that "it is the duty of the state to expunge . . . records [of arrests and prosecutions of Indians for violation of state statutes governing fishing], cease . . . enforcement [of such statutes], and to provide such relief, including payment of damages and expenses, as may be necessary to make the affected Indians whole." *Id.*

In the present action, plaintiff seeks to enforce the rights and duties this Court declared in its 1979 opinion. Specifically, in the remaining count of his complaint, plaintiff requests the Court to declare that defendants have violated his constitutional rights by having failed to expunge his arrest and [\*3] prosecution records, and to

return his confiscated fishing equipment and gear and/or to compensate him for the loss of such equipment and gear, as required by this Court's 1979 decision. In addition, he requests the Court to award him nominal and punitive damages for defendant's failure to have abided by that decision. Plaintiff argues as the legal basis for his claim that such failure on the part of defendants abridged his privileges and immunities as a citizen of the United States and violated his right not to be deprived of his liberty without due process of law.

In its July 2nd opinion, the Court requested the parties to file supplemental briefs on three issues concerning count V of plaintiff's complaint:

[1] whether plaintiff can seek to enforce what may be a tribal right, and can recover damages for defendant's alleged failure to have acceded to his enforcement requests;

[2] whether the Court's 1979 Declaratory Judgment and Decree imposed any mandatory duties on defendants that are specifically enforceable by the Tribe and its members, or rather only declared the parties' rights and obligations, leaving it to the plaintiffs to move for further, mandatory, relief; and  
[\*4]

[3] whether the individual defendants can be held liable in their personal or individual capacities for their alleged failure to have complied with plaintiff's demands that they adhere to paragraph nineteen of the Court's Declaratory Judgment and Decree.

See Order of July 3, 1986 at 2. In their supplemental brief, defendants argue that plaintiff cannot enforce what is in essence a tribal or communal right; that the Court's Declaratory Judgment and Decree did not create any mandatory duties; and that the individual defendants are entitled to claim the defense of qualified immunity. In his supplemental brief, plaintiff notes that count V is directed only at defendants Opolka and Scott in their individual capacities; that he is not attempting to enforce a tribal right, but rather to protect his right to have defendants comply with the law this Court established in its 1979 decision; that defendants Opolka and Scott are not

entitled to a qualified immunity defense; and that the 1979 Declaratory Judgment established defendants' obligations, and that he is entitled to recover for the damages he has suffered because of defendants' failure to have complied with those obligations.

[\*5] *Discussion*

Plaintiff's request for relief is superficially appealing. This Court's opinion and order of May 7, 1979 clearly imposed some obligations on the State:

The State has always lacked authority to arrest and prosecute Indians for violation of its statutes governing fishing, and lacks authority to maintain records of such arrests and prosecutions. It is the *duty of the state* to expunge such records, cease such enforcement and to provide such relief, including payment of damages and expenses, as may be necessary to make the affected Indians whole.

*United States v. Michigan*, 471 F. Supp. at 281 (emphasis added). As one of the "affected Indians," moreover, plaintiff is entitled to the benefits of the Court's ruling. The Court, however, also contemplated further proceedings to monitor and to enforce its decree. *Id.* In particular, it took plaintiffs' application for an injunction under advisement. *Id.* The Court thus, as plaintiff acknowledges, did not "impose any mandatory duties" on the defendants. Plaintiff's Supplemental Brief at 8. Correspondingly, however, defendants are not entitled to ignore the duties the Court had established [\*6] merely because the Court's order was declaratory and not injunctive in nature.

The issue, then, is how to compel defendants to abide by the duties the Court established in its 1979 opinion and order. The present case suggests one way to compel compliance: Allow the Indian fishermen who are the beneficiaries of that opinion and order to initiate separate suits against defendants seeking relief under the theory that defendants' failure to have complied with the Court's opinion and order violates the fishermen's constitutional rights. Specifically, the Court could find that defendants' failure to have expunged the fishermen's criminal convictions and records violates the privileges and immunities that the Court recognized in its 1979 opinion, and violates the fishermen's liberty interests because

defendants are maintaining the records unlawfully. Presumably, then, every Indian fishermen who has a fishing-related criminal arrest and conviction that falls within the scope of the Court's opinion and order would be entitled to sue to enforce his right to have that arrest and conviction expunged, and to recover damages for defendants' noncompliance with such opinion and order.

Plaintiff [\*7] presents a plausible way for the Court to compel defendants to comply with its 1979 opinion and order, and to ensure that the beneficiaries of that opinion and order receive its full benefit. Given the circumstances of this case, however, I do not believe that plaintiff's way is the proper one. The Court finds, rather, that plaintiff should raise his compliance issues in the ongoing *United States v. Michigan* proceeding, and should seek to compel compliance through the contempt process or by other appropriate means in that proceeding. The contempt process is a method by which parties may seek to compel compliance with a court order. *E.g.*, *Kendrick v. Bland*, 740 F.2d 432, 439 (6th Cir. 1984); *Stassi v. Hogan*, 606 F. Supp. 349, 352 (N.D. Ga. 1985); *Morgan v. Barry*, 596 F. Supp. 897, 898-99 (D.D.C. 1984). I believe, moreover, that plaintiff would be able to seek enforcement of his rights under the Court's 1979 opinion and order in the *United States v. Michigan* proceeding.

*Rule 71 of the Federal Rules of Civil Procedure* states that "when an order is made in favor of a person who is not a party to the action, [\*8] he may enforce obedience to the order by the same process as if he were a party." FRCP 71. Plaintiff is not a party to the *United States v. Michigan* proceeding, although his tribe does represent his interests in that proceeding. He is, however, a beneficiary of the Declaratory Judgment and Decree the Court issued in that proceeding on May 7, 1979. *See Moore v. Tangipahoa Parish School Board*, 625 F.2d 33, 34 (5th Cir. 1980) (a person falls under rule 71 if he comes within the zone of interests the court's order protects). As such, the Court believes that plaintiff would be able to seek enforcement of the Declaratory Judgment and Decree in the proceeding. *See Berger v. Heckler*, 771 F.2d 1556, 1565-66 (2d Cir. 1985); *South v. Rowe*, 759 F.2d 610, 612 n.1 (7th Cir. 1985); *Lasky v. Quinlan*, 558 F.2d 1133, 1137 (2d Cir. 1977); *United States v. American Society of Composers, Authors and Publishers*, 341 F.2d 1003, 1008 (2d Cir.), cert. denied, 382 U.S. 877

(1965). The Court also believes that plaintiff would be able to gain some relief through that enforcement process. [\*9] *See In re Knave*, 760 F.2d 343, 351 (1st Cir. 1985); *Commodity Futures Trading Commission v. Skorupskas*, 605 F. Supp. 923, 944 (E.D. Mich. 1985). Since plaintiff's proper procedure is to work through the ongoing *United States v. Michigan* proceeding as opposed to filing a separate constitutional action, the Court will dismiss the present action without prejudice.

I am not completely comfortable with this resolution of plaintiff's case. He presents a strong case that defendants have failed to comply with an order of this Court that established certain benefits for tribal fishermen, such as the plaintiff. On the other hand, a person aggrieved by a party's failure to comply with a court order generally seeks to remedy his grievance through the contempt process and other enforcement measures. Plaintiff has produced no reason why the Court should excuse him from following that course of action. I also note that requiring plaintiff to raise his issues in the *United States v. Michigan* proceeding will allow all interested parties to have input into the Court's ultimate decision. The Court thus concludes that plaintiff should first attempt [\*10] to remedy his grievance through appropriate measures in the *United States v. Michigan* proceeding, and on that basis will dismiss this case without prejudice.

DATED in Kalamazoo, MI: January 21, 1987

RICHARD A. ENSLEN, U.S. District Judge

#### JUDGMENT ORDER

In accordance with the opinion dated January 21, 1987;

IT IS HEREBY ORDERED that plaintiff's June 16, 1986 Supplemental Motion for Summary Judgement is DENIED;

IT IS FURTHER ORDERED that this case is DISMISSED without prejudice.

DATED in Kalamazoo, MI: January 21, 1987

RICHARD A. ENSLEN, U.S. District Judge