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LEELANAU TRANSIT COMPANY, a Michigan Railroad corporation, Plaintiff, v. GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS, an organized Indian Tribe; and JOSEPH C. RAPHAEL, individually and in his official capacity as chairman of the Tribal Council of the Grand Traverse Band of Ottawa and Chippewa Indians, Defendants.

File No. 1:92-CV-240

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

1994 U.S. Dist. LEXIS 2220

February 1, 1994, Decided

JUDGES: [*1] BELL

OPINION BY: ROBERT HOLMES BELL

OPINION

OPINION

Plaintiff Leelanau Transit Company filed this action against the Grand Traverse Band of Ottawa and Chippewa Indians (the "Tribe"), and its Chairman, Joseph C. Raphael, in both his official and individual capacities, seeking declaratory and injunctive relief and damages for trespass over Plaintiff's railroad tracks. Defendants have filed a counterclaim seeking possession of and damages for trespass by the railroad on restricted lands improperly conveyed and/or taken prior to the expiration of their restricted status.

Plaintiff has filed a motion for partial summary judgment as to liability only. Defendants have filed a motion to dismiss their counterclaim, and a motion for judgment on the pleadings.

Plaintiff contends there is no question of fact that it holds valid marketable fee simple title to the railroad property due to its valid deeds and the absence of any challenge to them for 40 years, as provided in the Michigan 40-Year Marketable Record Title Act.

Defendants seek to dismiss their counterclaim without prejudice, and contend that they are entitled to judgment on the pleadings because this Court does not have subject matter jurisdiction over [*2] this controversy, the suit is barred by tribal sovereign immunity, and the United States is an indispensable party.

I.

The following facts are not in dispute:

In 1902 the Traverse City, Leelanau and Manistique Railroad Company ("TCL&MRC") began acquiring a right-of-way for railroad operations between Traverse City and Northport, Michigan. The corridor passed through the Village of Peshawbestown. In 1919 the TCL&MRC conveyed its interest in these properties to Plaintiff, Leelanau Transit Company.

The Grand Traverse Band of Ottawa and Chippewa Indians has existed as a tribe continuously since as early as 1675. *Leelanau Indians, Inc. v. U.S. Dept. of Housing & Urban Dev., 502 F. Supp. 741, 743 (W.D. Mich. 1980)*. Article I, clause fifth of the Treaty of 1855 reserved to the Grand Traverse bands land in the vicinity of the Tribe's current reservation at Peshawbestown. 11 Stat. 621. The Tribe was duly acknowledged as an Indian Tribe and as the political successor in interest to the historic Grand Traverse bands by action of the Department of the Interior effective May 27, 1980. 45 Fed.Reg. 19321 (3/25/80).

Plaintiff describes the [*3] property at issue in its quiet title action in paragraph 8 of its complaint:

> Plaintiff Leelanau, as a Michigan railroad corporation, owns in fee title a corridor of property in Leelanau County, Michigan, which includes the following property:
>
> (a) A corridor of property abutting tribal lands of the Grand Traverse Band in Leelanau county;
>
> (b) A corridor or (sic) property one hundred feet across in width across Lot 2, Block 2 of the Village of Peshawabestown, Suttons Bay Township, Leelanau County, Michigan;
>
> (c) A corridor of property south and east of part of Lot 1, Block 5, Township 30 North, Range 11 West, Village of Peshawabestown, Suttons Bay Township, Leelanau County, Michigan;
>
> (d) Immovable fixtures and personal property on said lands associated with railroad operation, consisting primarily of rails, ties and roadbed.

This property will be referred to as "the Railroad Property".

The two parcels at issue in Plaintiff's complaint are located within the exterior boundaries of the reservation of land set aside for the historic Grand Traverse bands in Article I, clause fifth, of the Treaty of 1855.

In August 1990, pursuant to a directive from the Tribal Council, members [*4] of the Tribe removed a portion of the railroad ties and tracks in order to construct an access road across the railroad so that tribal fishers could trailer their fishing boats to the shores of Grand Traverse Bay.

Plaintiff filed this action to quiet title in the Railroad Property and for damages for trespass.

II.

The Court will begin its analysis by reviewing Defendants' motion for judgment on the pleadings. Although this motion was the last one filed, it raises important threshold issues regarding the ability of this Court to hear this case.

A. *Subject Matter Jurisdiction*

Defendants' first contention is that dismissal is required by *Rule 12(b)(1)* because the complaint does not establish a basis for federal jurisdiction. If the court does not have subject matter jurisdiction it has no power to do anything other than to dismiss the action. *Morongo Band of Mission Indians v. California State Bd. of Equalization, 858 F.2d 1376, 1380 (9th Cir. 1988), cert. denied, 488 U.S. 1006, 102 L. Ed. 2d 779, 109 S. Ct. 787 (1989)*. "Whenever it appears by suggestion of the parties or otherwise that [*5] the court lacks jurisdiction of the subject matter, the court shall dismiss the action." *F.R.Civ.P. 12(h)(3)*.

Plaintiff alleges in its complaint that this Court has jurisdiction pursuant to *28 U.S.C. § 1331* for the reason that Plaintiff has asserted causes of action that arise under the constitution, laws and/or treaties of the United States. Plaintiff has also asserted that the Court has jurisdiction pursuant to *28 U.S.C. § 2201* because Plaintiff seeks a declaration of its rights.

For the court to have federal question jurisdiction the federal law element must appear on the face of plaintiff's well-pleaded complaint *Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 9-10, 77 L. Ed. 2d 420, 103 S. Ct. 2841 (1983)*.

> Whether a case is one arising under [federal law], in the sense of the jurisdictional statute, . . . must be determined from what necessarily appears in the plaintiff's statement of his own claim in the bill or declaration, unaided by anything alleged in anticipation or avoidance of defenses which it is thought the [*6] defendant may interpose.

Oklahoma Tax Comm'n v. Graham, 489 U.S. 838, 840-41, 103 L. Ed. 2d 924, 109 S. Ct. 1519 (1989) (quoting *Taylor v. Anderson, 234 U.S. 74, 75-76, 58 L. Ed. 1218, 34 S. Ct. 724 (1914))*.

A case comes within the scope of *§ 1331* only if a right or immunity created by the Constitution or laws of

the United States is an essential element of the plaintiff's cause of action. *Gully v. First Nat'l Bank, 299 U.S. 109, 112, 81 L. Ed. 70, 57 S. Ct. 96 (1936)*; *United States ex rel. Kishell v. Turtle Mountain Housing Auth., 816 F.2d 1273, 1275 (8th Cir. 1987)*. Federal jurisdiction is determined solely from the face of the complaint. *Michigan Sav. & Loan League v. Francis, 683 F.2d 957, 960 (6th Cir. 1982)*. Under the well-pleaded complaint rule a complaint is not well-pleaded if it includes a federal question that can be raised properly only as an anticipated defense. *Id.*

The fact that one of the parties to the action is an Indian [*7] tribe does not by itself give rise to federal question jurisdiction *Morongo Band of Mission Indians v. Rose, 893 F.2d 1074, 1077 (9th Cir. 1990)*. Neither does the possible existence of a defense of tribal immunity. *Oklahoma Tax Comm'n v. Graham, 489 U.S. 838, 103 L. Ed. 2d 924, 109 S. Ct. 1519 (1989)*; *Oklahoma Tax Comm'n v. Wyandotte Tribe, 919 F.2d 1449, 1451 (10th Cir. 1990), cert. denied, 111 S. Ct. 2829, 115 L. Ed. 2d 999 (U.S. 1991)*.

Moreover, it is well settled that the Declaratory Judgment Act merely provides an additional remedy; it does not confer federal jurisdiction. *Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 94 L. Ed. 1194, 70 S. Ct. 876 (1950)*; *Louisville & N. R.R. v. Donovan, 713 F.2d 1243, 1245 (6th Cir. 1983), cert. denied, 466 U.S. 936, 80 L. Ed. 2d 457, 104 S. Ct. 1908 (1984)*.

Plaintiff contends that jurisdiction is proper because *Defendants*' claim of right to the property stems from federal treaties [*8] and the Non-Intercourse Act, *25 U.S.C. § 177*. While at first blush Plaintiff appears to be merely anticipating a defense, Plaintiff's position finds ample support.

The Supreme Court has recognized that "federal courts have regularly taken original jurisdiction over declaratory judgment suits in which, if the declaratory judgment defendant brought a coercive action to enforce its rights, that suit would necessarily present a federal question." *Franchise Tax Board, 463 U.S. at 19*. As explained in *Public Service Commission v. Wycoff, 344 U.S. 237, 248, 97 L. Ed. 291, 73 S. Ct. 236 (1952)*:

> Where the complaint in an action for declaratory judgment seeks in essence to assert a defense to an impending or threatened state court action, it is the character of the threatened action, and not of the defense, which will determine whether there is federal-question jurisdiction in the District Court.

In *Wisconsin v. Baker, 698 F.2d 1323, 1328-29* (7th Cir.), *cert. denied, 463 U.S. 1207, 77 L. Ed. 2d 1388, 103 S. Ct. 3537 (1983)*, [*9] the State of Wisconsin brought an action for declaratory judgment that the Lac Courte Oreilles Band of Chippewas's attempt to regulate fishing and hunting by nonmembers of the Band in waters within the Band's reservation infringed upon the general public's rights in navigable waters. *Id. at 1326*. The Seventh Circuit determined that the district court had federal question jurisdiction over the suit because it anticipated coercive action by defendants under federal Indian treaties.

> Federal interest in providing a federal forum for a claim that denies the existence of a right founded upon federal law is no less than for a claim that asserts the existence of such a right.

Id. at 1328.

Wisconsin v. Baker was cited with approval by the Sixth Circuit in *Bell & Beckwith v. United States, 766 F.2d 910, 912-13 (6th Cir. 1985)*, in support of the principle that federal question jurisdiction exists in those cases in which the plaintiff's claim, though itself not raising a federal question, asserts a defense to a claim that would raise a federal question and that defendant could have asserted [*10] in a coercive action. *Bell & Beckwith, 766 F.2d at 912-13*. *Id.* [1]

> 1 The prototypical action in which this principle is invoked is a patent case in which a supposed infringer seeks a declaratory judgment that he has not interfered with the rights of the patentee. *Id.*

In this case Plaintiff seeks a declaration that it has a fee title interest in the Railroad Property superior to that, if any, of Defendant Tribe, and that Defendant Tribe does not have any right to possess ion of the Railroad property superior to that of Plaintiff. In the body of the complaint Plaintiff alleges that Defendants have asserted a superior title to the Railroad Property by virtue of certain alleged

treaties or by virtue of the fact that the property is owned by the United States in trust for the benefit of the Tribe. Plaintiff has further alleged that Defendants have taken actual and/or constructive possession of portions of the Railroad Property under claims that they have the sole right of possession [*11] to the property to the exclusion of Plaintiff.

Plaintiff in effect alleges the existence of a potential coercive action by the Tribe arising under federal law. That this is more than a theoretical concern on the part of Plaintiff is confirmed by the fact that the Tribe has filed a counterclaim asserting that it has a right to the Railroad Property based upon federal treaty rights.

There is no question that federal jurisdiction would exist in a coercive action by the Defendants. In *Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 39 L. Ed. 2d 73, 94 S. Ct. 772 (1974)*, the court held that the action for possession brought by an Indian tribe *did* present a federal question because the right to possession was based on federal law. Indians have a federal common-law right to sue to enforce their aboriginal land rights. *County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 235, 84 L. Ed. 2d 169, 105 S. Ct. 1245 (1985)*.

The Court is satisfied that it does have subject matter jurisdiction over this controversy.

B. *Sovereign Immunity*

Defendants' second [*12] contention is that dismissal is required by *Rule 12(b)(1)* because the Defendants are immune under the doctrine of tribal sovereign immunity. The Court will examine the sovereign immunity issue separately with respect to the Tribe and its Chairman, Joseph C. Raphael.

1. The Tribe

The Tribe is an Indian Tribe recognized by the United States pursuant to Section 16 of the Indian Reorganization Act, *25 U.S.C. § 476*, by action of the Secretary of the Interior effective May 27, 1980. As such, defendants claim sovereign immunity

"Indian tribes are 'domestic dependent nations' that exercise inherent sovereign authority over their members and territories. Suits against Indian tribes are thus barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation." *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505, 509, 112 L. Ed. 2d 1112, 111 S. Ct. 905 (1991)* (citations omitted). The Tribe's filing of a counterclaim does not operate as a waiver of its sovereign immunity. *Id. at 509*.

> Indian [*13] tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers. This aspect of tribal sovereignty, like all others, is subject to the superior and plenary control of Congress. But "without congressional authorization," the "Indian Nations are exempt from suit."

Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58, 56 L. Ed. 2d 106, 98 S. Ct. 1670 (1978) (citations omitted).

This case is not unlike *Maynard v. Narragansett Indian Tribe, 984 F.2d 14 (1st Cir. 1993)*, which also involved a trespass claim against an Indian tribe. In that case, the Plaintiff argued that the Tribe's sovereign immunity was not a bar to his trespass action because the Tribe's actions encroached on lands to which the Tribe affirmatively relinquished all legal claim and title. *Id. at 15*. The District Court rejected this argument and the First Circuit affirmed.

"Indian tribes and their governing bodies possess common-law immunity from suit. They may not be sued absent express and unequivocal waiver of immunity by the tribe or abrogation [*14] of tribal immunity by Congress." *Burlington N. R.R. Co. v. Blackfeet Tribe of Blackfeet Indian Reservation, 924 F.2d 899, 901 (9th Cir. 1991)*. The extent of tribal sovereign immunity is not affected by the nature of the remedy sought. The immunity extends to actions for monetary, declaratory and injunctive relief. *See Hardin v. White Mountain Apache Tribe, 779 F.2d 476, 478 (9th Cir. 1985)*; *Maynard v. Narrangansett Indian Tribe, 798 F. Supp. 94, 96 n. 1 (D.R.I. 1992), aff'd, 984 F.2d 14 (1st Cir. 1993)*.

There is no question that the Grand Traverse Band is immune from suit.

2. Joseph C. Raphael

The Court turns to the question of Joseph C. Raphael, tribal chairman, who has been sued in his official and individual capacities.

Although the tribe's sovereign immunity is not defeated by allegations that it acted beyond its powers, tribal officials are not necessarily protected by the tribe's immunity from suit. *Santa Clara Pueblo v. Martinez, 436 U.S. 49, 59, 56 L. Ed. 2d 106, 98 S. Ct. 1670 (1978)*; *Imperial Granite Co. v. Pala Band of Mission Indians, 940 F.2d 1269, 1271 (9th Cir. 1991)*. [*15] Tribal immunity only extends to individual tribal officials acting in their representative capacity and within the scope of their authority. *Imperial Granite, 940 F.2d at 1271*. *Stock West Corp. v. Taylor, 942 F.2d 655, 664 (9th Cir. 1991)*.

This limited exception to tribal sovereign immunity is based upon the analysis in *Ex Parte Young, 209 U.S. 123, 52 L. Ed. 714, 28 S. Ct. 441 (1908)*. In *Ex Parte Young* the Court held that the *Eleventh Amendment* did not bar an action for prospective equitable relief barring a state official from engaging in unconstitutional actions. An action under *Ex Parte Young* is an "official-capacity" action. *Kentucky v. Graham, 473 U.S. 159, 167 n. 14, 87 L. Ed. 2d 114, 105 S. Ct. 3099 (1985)*.

The *Ex Parte Young* exception to sovereign immunity applies to Indian tribes as well as states. *Northern States Power Co. v. Prairie Island Mdewakanton Sioux Indian Community, 991 F.2d 458, 460 (8th Cir. 1993)*. The exception has been explained as follows: [*16]

> The situation is different, however, when the law under which the official acted is being questioned . . . . When the complaint alleges that the named officer defendants have acted outside the amount of authority that the sovereign is capable of bestowing, an exception to the doctrine of sovereign immunity is invoked . . . . If the sovereign did not have the power to make a law, then the official by necessity acted outside the scope of his authority in enforcing it, making him liable to suit.

Id. at 460 (quoting *Tenneco Oil Co. v. Sac and Fox Tribe of Indians, 725 F.2d 572, 574 (10th Cir. 1984)*).

In *Northern States* the Eighth Circuit held that tribal officials were not immune from a suit to enjoin enforcement of a tribal nuclear radiation control ordinance. Because the ordinance was preempted by federal law the tribal council members were acting to enforce an ordinance that the tribe had no authority to enact. By acting beyond the scope of their authority they placed themselves outside of the tribe's sovereign immunity. *Id. at 462*.

Similarly, in *South Dakota v. Bourland, 949 F.2d 984 (8th Cir. 1991)*, [*17] *rev'd on other grounds, 124 L. Ed. 2d 606, 113 S. Ct. 2309 (1993)*, the Eighth Circuit allowed a suit against tribal officials seeking to enjoin them from regulating hunting and fishing activities of non-Indians on certain lands within the reservation, to proceed in the absence of the Tribe. Although the issue addressed by the court was indispensable parties rather than immunity, the court's reasoning is instructive:

> Although the State attacks the validity of the Tribe's regulations, its claim is premised on the argument that "the conduct against which specific relief is sought is beyond the officer's powers and is, therefore, not the conduct of the sovereign. . . . The power has been conferred in form but the grant is lacking in substance because of its . . . invalidity."

Id. at 989.

On the other hand, in *Imperial Granite* the court held that the tribal officials were immune from suit. The court noted that the complaint alleged no individual actions by any of the tribal officials named as defendants, and the only apparent action taken by those officials was to vote as members of the Band's governing [*18] body against permitting Imperial to use a road across the reservation. Because the suit failed to allege any viable claim that the tribal officials acted outside their authority, the suit was nothing more than a suit against the Band and was barred by sovereign immunity. *940 F.2d at 1271-72*.

Whether Raphael is immune from being sued in his official capacity turns on whether the complaint alleges that he took action that was outside the scope of his authority as tribal chairman.

In this case Plaintiff alleges that Raphael has asserted the Tribe's right to physical dominion over the Railroad Property, that he has taken actual and/or constructive possession of the Railroad Property, that he trespassed upon the Railroad Property and that he has destroyed certain Railroad Property.

The Court believes that because Plaintiff asserts a superior right to the Railroad Property, these allegations are sufficient to allege that Raphael acted outside the amount of authority that the Tribe was capable of bestowing upon him, and accordingly, this conduct may be the subject of prospective equitable relief.

Raphael is also subject to suit in his individual capacity. In [*19] *Maynard* the court noted that although Plaintiff's extraterritorial argument had no effect against the Tribe, it might apply if used against Indians as individuals. *798 F. Supp. at 97.* [2] Absent express federal law to the contrary, Indians going beyond the reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the state. *Oklahoma Tax Comm'n, 498 U.S. at 511* (citing *Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148-49, 36 L. Ed. 2d 114, 93 S. Ct. 1267 (1973)).*

> 2 Significantly, in contrast to this case, the Plaintiff in *Maynard* chose not to sue individual members of the Tribe as defendants. *Maynard, 984 F.2d at 16 n.1* Accordingly, upon finding the Tribe immune from suit, the entire action was dismissed.

Because there are allegations that Raphael himself trespassed [*20] on Railroad Property, the action against him in his individual capacity for both equitable relief and damages is not barred by Sovereign immunity.

C. *Failure to Join Necessary Party*

Defendants' third contention is that dismissal is required by *Rule 12(b)(7)* and Rule 19(b) because the United States is an indispensable party which cannot be joined due to its sovereign immunity.

The United States is generally considered an indispensable party to any suit brought to establish an interest in Indian trust land. *Imperial Granite, 940 F.2d at 1272* n. A (citing *Minnesota v. United States, 305 U.S. 382, 386, 83 L. Ed. 235, 59 S. Ct. 292 (1939)).* In *Imperial Granite* the court stated in dicta that the United States was an indispensable party to a suit brought to establish title to an easement in a road across the Indian reservation, and that inability to join the United States must result in dismissal. *940 F.2d at 1272 n. 4.* In *Imperial Granite* there was no question that the land at issue was Indian trust land. *Id.* [3]

> 3 Similarly, in *Minnesota* the Court stated:
>
> > [The United States] is confessedly the owner of the fee of the Indian allotted lands and holds the same in trust for the allottees. As the United States owns the fee of these parcels, the right of way cannot be condemned without making it a party.

[*21] *South Dakota v. Bourland,* on the other hand, the Eighth Circuit determined that neither the United States nor the Tribe was an indispensable party to an action against tribal officials to enjoin them from regulating hunting and fishing activities of non-Indians on land within the reservation taken for construction of a reservoir. *949 F.2d at 988.* The lands at issue in *Bourland* were non-fee lands and land taken by the United States for flood control and for a reservoir project.

In *Bourland* the district court held that the tribal defendants did not have authority to regulate non-Indian hunting and fishing on non-Indian fee land. The tribal defendants did not appeal this determination. As to the taken land, the district court assumed that the United States was an indispensable party with respect to the taken area, but held that the case could proceed in its absence. This determination was upheld on appeal. *949 F.2d at 989.*

In this case Plaintiff has presented a prima facie case that it holds the Railroad Property in fee. As discussed in more detail below, Defendants have not come forward with sufficient evidence that [*22] the Railroad Property is held in trust by the United States for the Tribe. Accordingly, the property involved in this case is most like the non-Indian fee property involved in *Bourland.* The United States is not an indispensable party to such an action.

III.

Plaintiff seeks partial summary judgment on Counts I and II of its complaint, contending there is no issue of fact as to liability on either count of the complaint. Because the Tribe is immune from suit, the Court examines this motion only as it relates to Defendant Joseph C. Raphael, in both his individual capacity and his official capacity as Chairman of the Tribal Council.

Under *Rule 56(c) of the Federal Rules of Civil Procedure*, summary judgment is proper if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. In evaluating a motion for summary judgment the Court must look beyond the pleadings an assess the proof to determine whether there is a genuine need for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)*. If Plaintiff carries its [*23] burden of showing there is an absence of evidence to support an essential element of the Defendants' case, the Defendants must demonstrate by affidavits, depositions, answers to interrogatories, and admissions on file, that there is a genuine issue of material fact for trial. *Celotex Corp. v. Catrett, 477 U.S. 317, 324-25, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)*. The mere existence of a scintilla of evidence in support of Defendants' position is not sufficient to create a genuine issue of material fact. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)*. The proper inquiry is whether the evidence is such that a reasonable jury could return a verdict for Defendants. *Id. See generally, Street v. J.C. Bradford & Co., 886 F.2d 1472, 1476-80 (6th Cir. 1989)*.

In Count I of its complaint Plaintiff seeks a declaration that it has a fee simple title in the Railroad Property superior to that, if any, of the Tribe. The Court cannot address the quiet title claim against the Tribe since it is immune from [*24] suit. "A decree quieting title does not extinguish the property rights of persons not made parties to the action." *Giegling v. Helmbold, 357 Mich. 462, 465*; *98 N.W.2d 536, 537 (1959)*.

The absence of the Tribe, however, does not prevent the Court from addressing the additional relief sought in Count I against Defendant Raphael. Plaintiff seeks an order enjoining Defendant Raphael from "entering upon, claiming an interest in, or interfering with Plaintiff Leelanau Transit company's rights to ownership and possession and control of the Railroad Property." Since Raphael claims no personal interest in the property, this is not technically a quiet title action. However, since Defendant Raphael's claim of an interest in the Railroad Property is based upon his contention that the Tribe has a superior right to the property, the Court must consider this assertion of the Tribe's Interest in the property.

In an action to quiet title, the Plaintiff has the burden of proof and must make out a prima facie case of title. Once the Plaintiff makes out a prima facie case, the defendant has the burden of proving superior right or title in Itself. [*25] *Stinebaugh v. Bristol, 132 Mich.App. 311, 316, 347 N.W.2d 219 (1984)*; *Boekeloo v. Kuschinski, 117 Mich.App 619, 628-29, 324 N.W.2d 104 (1982)*.

The only two parcels described with specificity in the complaint are a corridor across Lot 2, Block 2 and a corridor south and east of part of Lot 1, Block 5 in the Village of Peshawbestown. These are the only parcels that the Court considers to be at issue in Plaintiff's complaint.

In support of its motion for summary judgment Plaintiff asserts that the TCL&MRC acquired title to the railroad corridor by deeds which were duly recorded with Leelanau County. Plaintiff has presented several examples of the original railroad deeds, but none of them refer explicitly to Lot 2, Block 2 or Lot 1, Block 5. *(See* Exh. I and Exh. 3, pp. 118-121, 126 & 128). However, Plaintiff has come forward with a copy of the June 16, 1919, deed from the TCL&MRC to Plaintiff which purportedly covers all of the railroad property extending from Traverse City to Northport. (Exh. 2). The deed was duly recorded in 1920. It is undisputed that there has been no recorded claim of [*26] any kind by Defendants, their predecessors in interest or individual tribe members or their ancestors against the Railroad regarding the railroad corridor on Lot 2, Block 2 or Lot 1, Block 5.

Plaintiff contends that it must be deemed to hold valid marketable fee simple title to the Railroad Property due to its valid deeds and the absence of any challenge to them for forty years, as provided in the Michigan 40-Year Marketable Record Title Act, *M.C.L.A. § 565.101 et seq.*; M.S.A. § 26.1271 at seq.

Defendants correctly assert that there is no federal statute of limitations governing federal common-law actions by Indians to enforce property rights. *Oneida Indian Nation, 470 U.S. at 240-41*. State laws of adverse possession and statutes of limitations do not bar actions to established Indian ownership of land. *Id. at 240 n. 13. See also Imperial Granite, 940 F.2d at 1272* ("The whole purpose of trust land is to protect the land from unauthorized alienation; Imperial cannot acquire property rights in trust property by prescription.").

Although [*27] the Marketable Record Title Act is not binding against Indian Tribes, Plaintiff properly relies

on the Act to make out a prima facie case of superior title. The burden accordingly shifts to Defendant Raphael to prove that the tribe has a superior right or title to the property.

Defendant Raphael asserts that the railroad corridor extends across parcels which are owned by the United States in trust for the Tribe. In support of this assertion Defendant has submitted a map allegedly prepared by the Leelanau County Planning Department and the affidavit of Defendants, attorney Neither the map nor the affidavit constitute the type of evidence necessary to avoid entry of summary judgment.

Rule 56(e) provides that opposing affidavits "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Defendants, evidence does not meet the requirements of *Rule 56(e)*.

While Defendant Raphael has argued that conveyances or takings of lands allotted to the members of the historic Tribe under the Treaty of 1855 during the period prior to the expiration of their [*28] restricted status were void, he has come forward with no evidence that the conveyances were in fact made prior to the expiration of their restricted status.

Judge Enslen found in *Grand Traverse Band of Ottawa and Chippewa Indians v. Leelanau Indians, Inc.*, No. G83-834 (W.D. Mich. Jan. 30, 1985), that subsequent to the Treaty of 1855, many of the reserved lands passed from the ownership of the descendants of the original allottees.

> 7. Notwithstanding the fact that approximately 87,000 acres were reserved for selection by the historic Grand Traverse bands, . . . by the time of the Great Depression in the 1930s most of these "reserved" lands had passed from the ownership of the descendants of the original allottees. Much of this acreage reverted to the ownership of the State of Michigan due to failure to pay property taxes.

(Liber 283, p. 509, Exh. 3, P. 3).

According to the proofs submitted by Plaintiff, members of the Tribe conveyed their interest in the Railroad Property to the TCL&MRC or to others who in turn conveyed to the railroad.

Indian lands may be lost by conveyance. "Montana and Brendale establish that when an Indian tribe conveys ownership of its tribal lands to [*29] non-Indians, it loses any former right of absolute and exclusive use and occupation of the conveyed lands." *South Dakota v. Bourland*, 124 L. Ed. 2d at 619 (citing *Montana v. United States, 450 U.S. 544, 67 L. Ed. 2d 493, 101 S. Ct. 1245 (1981)*, and *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation, 492 U.S. 408, 106 L. Ed. 2d 343, 109 S. Ct. 2994 (1989))*.

From the record it appears that the Tribe and the United States have long-recognized the rights of the railroad in the corridor.

In settlement of the case before Judge Enslen, Leelanau County, in a deed approved by the U.S. Bureau of Indian Affairs, quitclaimed significant property interests in Peshawbestown to the Grand Traverse Band on March 27, 1991, including land in Blocks 2 and 5:

> EXCEPTING the right, title and interest of the Traverse City, Leelanau and Manistique Railroad company reflected in the deeds recorded in Liber 31, pages 47, 48, 52, 53, 64 and 66 at the Office of the Register of Deeds for Leelanau County, Michigan.

(Liber 329, [*30] pp. 366-369, Exh. 3, pp. 449-452).

Defendants point out that the deeds in favor of the TCL&MRC which are referenced in the March 27, 1991, deed, do not specifically reference property in Lot 2, Block 2 or Lot 1, Block 5. Taken together, however, the referenced deeds do transfer to the railroad significant property in Suttons Bay Township. Some of the deeds describe the property transferred to the railroad by geographical description or reference to property owners without specifying lot and block numbers. There is no evidence of an intent to exclude certain portions of the corridor from this general exception.

The superiority of the railroad title is more clearly established with respect to Lot 1, Block 5. A warranty deed from Richard Garthe and Caroline Garthe dated December 22, 1981, conveyed to the United States in

trust for the Tribe, Lot One of Block 5 of the Village of Peshawbytown, "subject to the rights of the Leelanau-Manistique Railroad Company pursuant to Deed recorded May 29, 1903." (Exh. 5). The Department of the Interior approved the acquisition of the trust property subject to the rights of the Leelanau-Manistique Railroad Company. (Exh. 6). The United States Department [*31] of the Interior issued a proclamation dated January 6, 1984, proclaiming the trust lands located in Leelanau County as the Grand Traverse Indian Reservation. The proclamation includes as trust land that part of Lot one (1) of Block 5 "lying North and West of the Leelanau-Manistique Railroad Right-of-Way." (Exh. 4).

Defendant Raphael has raised several other defenses to Plaintiff's claim of superior title. He contends that Plaintiff has abandoned the railroad corridor. He notes that the railroad corridor through the current tribal lands has not been used for rail purposes for 20 years and that Plaintiff abandoned the right-of-way in a procedure before the Interstate Commerce Commission ("ICC") in 1975.

Defendant Raphael has not submitted sufficient proof of abandonment. Abandonment requires proof of both nonuse and some clear and decisive act showing an intent to abandon and release the right. *McMorran Milling Co. v. Pere Marquette Ry., 210 Mich. 381, 393-94, 178 N.W. 274 (1920)*; *Ludington & N. Ry. v. Epworth Assembly, 188 Mich.App. 25, 33, 468 N.W.2d 884 (1991)*. Approval of abandonment by the [*32] ICC is only a determination that cessation of service would not hinder the ICC's purposes. It is not a determination that the railroad has abandoned its lines. *Vieux v. East Bay Regional Park Dist., 906 F.2d 1330, 1339* (9th Cir.), *cert. denied, 498 U.S. 967, 112 L. Ed. 2d 414, 111 S. Ct. 430 (1990)*.

Similarly, while Defendant Raphael has argued that he, on behalf of the tribe, has a defense of necessity to the alleged trespass since the Tribe's fishing grounds reserved in the treaty of 1836 and confirmed by this Court in *United States v. Michigan, 471 F. Supp. 192 (W.D. Mich. 1979)*, he has presented no evidence in support of his claim.

"The plain language of *Rule 56(c)* mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. *Celotex, 477 U.S. at 322* (quoted in *Moore, Owen, Thomas & Co. v. Coffey, 992 F.2d 1439, 1444 (6th Cir. 1993))*. [*33]

Because Plaintiff has established a prima facie case of superior title, and Defendant Raphael has failed to come forward with evidence sufficient to create an issue of fact with respect to title to the railroad corridor through Lot 2, Block 2 and Lot 1, Block 5, or to the trespass, the Court is required to enter judgment for Plaintiff on Count I of its complaint as against Defendant Raphael only.

A declaratory judgment will be entered enjoining Defendant Raphael in both his individual and his official capacities from entering upon, claiming an interest in, or interfering with Plaintiff Leelanau Transit Company's rights to ownership and possession and control of the Railroad Property at issue in this matter.

In Count II Plaintiff alleges that Joseph Raphael and other members of the Tribal Council agreed to direct Unknown persons to enter onto, destroy, and take control of certain Railroad Property. Plaintiff further alleges that on or about August 23, 1990, Defendant Raphael individually destroyed and took control of certain Railroad Property.

Defendant Raphael has admitted that pursuant to a directive from the Tribal Council agents of the Tribe removed a section of railroad tracks [*34] and ties from the Railroad Property.

The Court having determined that the Plaintiff has a superior right to the property, and there being no issue of fact as to the trespass, Plaintiff is entitled to a judgment as a matter of law as to liability for the trespass. The damages associated with the trespass is an issue of fact for trial.

IV.

In their counterclaim Defendants seek to regain possession of restricted lands and to recover damages from the Leelanau Transit Company for trespass to these lands. Defendants do not identify in their counterclaim what lands are at issue. They merely allege that Plaintiff cannot establish valid title "to *much* of the railroad corridor within the townships described in Article I, clause Fifth of the Treaty of 1855." (emphasis added). Defendants have now filed a motion to dismiss their

counterclaim voluntarily without prejudice.

Defendants assert that they do not have sufficient time or funds to proceed with the counterclaim at this time. Defendants contend that they filed the counterclaim under the assumption that the United States would intervene in the action and provide representation. Defendants further contend that due to unforeseen circumstances [*35] the United States has not made a determination whether to provide legal representation to the Defendants or to intervene as a party. They also contend that they are unable to complete the research necessary to pursue the counterclaim at this time.

Since the Court has dismissed Plaintiff's action against the Tribe, the Court finds no prejudice will result from dismissal of the Tribe's counterclaim. Defendants request to dismiss without prejudice will accordingly be granted.

An order consistent with this opinion will be entered.

Date: February 1, 1994

ROBERT HOLMES BELL

UNITED STATES DISTRICT JUDGE

ORDER - February 2, 1994, Filed

In accordance with the opinion entered this date,

IT IS HEREBY ORDERED that Defendants' motion for judgment on the pleadings (Docket # 37) is GRANTED IN PART and DENIED IN PART. The motion is GRANTED as to the Defendant Tribe and DENIED as to Defendant Raphael in both his official and individual capacities.

IT IS FURTHER ORDERED that Plaintiff's action against the Tribe is DISMISSED.

IT IS FURTHER ORDERED that Plaintiff's motion for partial summary judgment (Docket # 20) is GRANTED IN PART and DENIED IN PART. Partial summary judgment is GRANTED as to [*36] the request for declaratory relief against Joseph C. Raphael in Count I and liability for trespass against Joseph C. Raphael in Count II.

IT IS DECLARED that Defendant Joseph C. Raphael is enjoined in both his individual and his official capacities from entering upon, claiming an interest in, or interfering with Plaintiff Leelanau Transit Company's rights to ownership and possession and control of the Railroad Property at issue in this matter.

IT IS FURTHER ORDERED that Defendants' motion to dismiss counterclaim (Docket # 33) is GRANTED.

IT IS FURTHER ORDERED That Defendants' counterclaim is DISMISSED without prejudice.

Date: February 2, 1994

ROBERT HOLMES BELL

UNITED STATES DISTRICT JUDGE