IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

OTTAWA TRIBE OF OKLAHOMA,	:	
	:	
Plaintiff,	:	
	:	
v.	:	**Case No. 3:05 CV 7272**
	:	
SAMUEL SPECK, DIRECTOR, OHIO DEPARTMENT OF NATURAL RESOURCES,	:	**JUDGE KATZ**
	:	
	:	
	:	
Defendant.	:	

DEFENDANT SAM SPECK'S REPLY IN SUPPORT OF HIS MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

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I. INTRODUCTION

The Ottawa Tribe of Oklahoma (the "Tribe"), which has no current presence in the State of Ohio, seeks a declaration "that Plaintiff is entitled to exercise its hunting and fishing privileges in all areas of Ohio encompassed by the aforementioned Treaties of Fort Industry, the Treaty of 1807 and the Treaty of 1808." Amended Complaint, at 9. Furthermore, the Tribe claims that it has the right to exercise this privilege in "a commercial manner, subject only to such restrictions as Defendant shall prove by clear and convincing evidence to be (a) necessary conservation measures, (b) the least restrictive alternatives available, and (c) nondiscriminatory." Thus, the Tribe asserts that it has hunting and fishing rights, limited only to least-restrictive, necessary conservation measures, in Royce Areas 53, 54, 66, 70, and a linear tract approximately the width of a road that runs roughly north-south from Fremont to Marion (the so-called "Scarlet Line," which appears in red on the Royce Map of Ohio, Exhibit C to the State's Motion to Dismiss.

A finding that Plaintiff has these privileges would be disastrous for Ohio, as evidenced by the protracted legal battles fought by Michigan regarding fishing rights in Lake Superior. *See United States v. Michigan*, 471 F. Supp. 192 (W.D. Mich. 1979), *aff'd in part*, 653 F.2d 277 (6th Cir. 1981) (decision finding that privilege existed under circumstances very different than the facts of this case); *Grand Traverse Band of Ottawa and Chippewa Indians v. Michigan*, 141 F.3d 635 (6th Cir. 1998) (affirming district court order that municipalities had to provide transient docking at their marinas to facilitate the Indians' commercial fishery); *Bigelow v. Michigan*, 970 F.2d 154, 155-156 (6th Cir. 1992) (describing litigation between Michigan and private licensees regarding the diminishment of the value of their commercial licenses).

Plaintiff is wrong, however, that *United States v. Michigan* provides a blueprint for this Court's determination of the issues in this case. The Michigan cases, and virtually every other hunting and fishing decision issued by the federal courts, concern fishing by Indians with

reservations and a continued presence in the State. For example, the Michigan District Court found that "the Bay Mills Indian Community is a fishing community whose members have always fished for subsistence and commercial purposes. . . . Indian fishermen still live in the same areas and fish on the same fishing grounds as did their ancestors for centuries past." *United States v. Mich*., 471 F. Supp. at 225. This case, in comparison, involves a Tribe that has not been present in Ohio for over 150 years, but who now seeks a declaration of alleged treaty-based privileges. Thus, this case is much closer to *City of Sherrill v. Oneida Indian Nation,* 125 S. Ct. 1478 (2005) and *Cayuga Indian Nation of New York v. Pataki*, 413 F.3d 266 (2d Cir. 2005), in which the courts rejected attempts to revive privileges and rights that had languished for hundreds of years, than it is to *United States v. Michigan*.

The Tribe's claim is not only unprecedented, but also fatally flawed. First, the Tribe seeks a broad declaration of treaty based privileges in a complete factual vacuum. Yes, Defendant denies that Plaintiff still has the privilege they now seek to exercise, but otherwise the only evidence of a concrete dispute is the fact that the Plaintiff has sent a letter indicating its desire to fish using gill nets in Lake Erie. What Plaintiff seeks, then, is a broad declaration of its rights under multiple treaties in a complete factual vacuum, or in other words, an advisory opinion. Under these circumstances, this dispute has not sufficiently sharpened to present this court with a case or controversy. Indeed, Plaintiff cites this court to no case that presents such an abstract question of treaty interpretation.

Nor is this the only jurisdictional defect. The relief sought--a declaration that the Tribe has treaty-based hunting and fishing privileges, including the ability to fish in Lake Erie free from most State regulation--implicates the special sovereign interests of the State of Ohio. Thus, under the Eleventh Amendment, these claims cannot be brought in federal court.

Next, even if Plaintiff has the right to ask this Court a completely hypothetical question regarding treaty interpretation and to have the Court declare rights that interfere with the State's sovereign duty to manage Lake Erie and its natural resources for all Ohioans, the amended complaint must be dismissed for failure to join indispensable parties. Plaintiff characterizes this case as a straightforward question of the interpretation of a number of treaties, but yet surprisingly fails to understand how the party that negotiated and signed the treaties is an indispensable party. Not only is the United States an indispensable party to a case that concerns the interpretation of one of its treaties, but so too is Michigan, whose territory is affected by the Treaty of 1807. If that treaty reserved hunting and fishing rights in Ohio, then presumably it reserved hunting and fishing rights in Michigan, and Michigan has an interest in this lawsuit equivalent to Ohio. If this Court and the Sixth Circuit rule in favor of the Tribe, Michigan's ability to protect its interests, i.e. to argue that those rights do not exist, will be impaired by the decisions entered in this case.

Finally, even if Plaintiff prevails on each of these issues, there are numerous reasons why the Amended Complaint fails to state a claim. First, this Court can reject Plaintiff's treaty-based claims, even at this stage in the proceedings, where there is no ambiguity in the language of the relevant treaties. Thus, there is no right to hunt and fish in Royce Area 53, because the language ceding that land expressly extinguishes all rights to that territory. Likewise, by treaty in 1831, the Ottawa agreed that: "On the ratification of this convention, the privileges of every description, granted to the Ottoway nation within the State of Ohio, by the treaties under which they hold the reservations of land herein ceded [two of the four reservations referred to were reservations created by the Treaty of 1807] shall forever cease and determine." Exhibit K to Motion to Dismiss, Article 17. Thus, at a minimum, claims based on these treaties are amenable

to a motion to dismiss. And notably, this same argument disposes of any claim of any fishing privileges on Lake Erie, which does not abut those areas covered by the other treaties, Royce Areas 54, 70, or the "Scarlet Line," which are all completely land-locked.

Finally, there are a number of sound reasons why the Tribe cannot now assert the right to hunt and fish in large portions of north central Ohio and in the affiliated portions of Lake Erie. In addition to statutes of limitations issues and issues related to previous claims made by the Ottawa regarding Ohio lands, these privileges were abandoned when the Ottawa left the State, or, alternatively, have now been extinguished by the passage of time and the lack of any attempt to exercise these rights. In their complaint, the Tribe concedes that "[p]ursuant to subsequent treaties, all of said bands of Ottawas *agreed* to cede their remaining lands in Ohio to the United States and to be removed to reservations granted them in areas which later became part of the State of Kansas." Amended Complaint ¶ 21 (emphasis added). This Court can take judicial notice of the Treaty of 1831 which was a permissible removal treaty. Accordingly, the Tribe voluntarily removed from Ohio pursuant to that treaty, and the passage of 175 years is sufficient to invoke doctrines of laches, impossibility, and abandonment, as is the fact that the lands in question have been settled and their current use is inconsistent with the exercise of a right to engage in widespread hunting and fishing on what is now predominately private property. For these, and all of the other reasons set forth in Defendant's Motion to Dismiss, the Amended Complaint should be dismissed.

II. ARGUMENT

A. The Amended Complaint Does Not Present A Justiciable Dispute

The Amended Complaint fails to establish a justiciable dispute regarding the Tribe's alleged rights to hunt and fish without permits or licenses, and without complying with any of

the Ohio laws that regulate the taking of wild animals. Declaratory judgment is appropriate "(1) when the judgment will serve a useful purpose in clarifying and settling the legal relations in issue, and (2) when it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding." *Allstate Ins. Co. v. Mercier*, 913 F.2d 273, 277 (6th Cir. 1990). "When neither of these results can be accomplished, the court should decline to render the declaration prayed." *Id.*

In its Response, the Tribe cites the two aforementioned standards and, without any discussion, concludes "this dispute is appropriate for declaratory relief." Plaintiff's Response, at 8. However, when one actually applies the aforementioned standards to the present case, it becomes apparent that neither standard is satisfied.

The Oklahoma Tribe argues that the issue in this case is whether it retains hunting and fishing rights in Ohio and, if so, "the limits on the modern-day exercise of those rights." Plaintiff's Response, at 9-10. In the Amended Complaint the Tribe claims it has the right to hunt and fish in a commercial manner, "subject only to such restrictions as Defendant shall prove by clear and convincing evidence to be (a) necessary conservation measures, (b) the least restrictive means available, and (c) nondiscriminatory." Amended Complaint ¶¶ 32 and 39.

The Tribe has failed to allege a justiciable controversy. The Tribe has had no presence in the State of Ohio since it left the State pursuant to the 1831 Treaty and the Amended Complaint contains no allegations that the Tribe has any members currently residing in Ohio. The Amended Complaint fails to articulate precisely what it intends to hunt and fish; how much it intends to hunt and fish; when it intends to hunt and fish; or even the types of weapons or hunting methods the Tribe intends to employ. Without providing any of this information, the

Tribe nevertheless asserts that a dispute exists and asks this Court to determine that it has a right to engage in these activities, subject to the conservational limits that apply.

The only concrete allegation the Tribe articulates is where it intends to hunt and fish; it asks this Court to declare its rights to hunt and fish in the entire areas described in four almost two-hundred-year-old treaties. Amended Complaint, Prayer for Relief ¶ 2. However, even this leaves the Court and the State asking questions. Only a minuscule percentage of this area is actually State-owned land. The bulk of the land is owned by private citizens, businesses or local governments. Without any information as to exactly what the Tribe intends to do, the Court and the State are left guessing regarding the possible effects of a ruling in the Tribe's favor.

The Tribe argues that its Amended Complaint presents a dispute that is concrete, rather than hypothetical or conjectural. As a result, the Tribe argues, a declaratory judgment is appropriate. In support of its position, the Tribe cites *Oneida Indian Nation of New York v. State of New York,* 194 F.Supp.2d 104 (N.D. N.Y. 2002) and *United States v. Michigan*, 471 F. Supp. 192 (W.D. Mich. 1979).

While it is true that these cases were found to be concrete enough for declaratory judgment to be appropriate, the facts of those cases are easily distinguishable from those present here. For example, in *Oneida Indian Nation of New York v. State of New York*, the Court refused to dismiss the Oneida Nation's case on ripeness grounds. In reaching its conclusion, the Court relied in the facts that members of the Oneida Nation had purchased parts of the land in dispute in the action; that upon purchasing the land, the Indian owners then refused to accept the sovereignty of the State of New York over the land; that the Indian owners refused to pay taxes; and that they had refused to comply with state and local ordinances on the land. 194 F. Supp.2d at 138.

In *Oneida*, the Oneida Nation undertook a series of concrete actions prior to filing its lawsuit. These actions provided the court with a set of real, concrete circumstances upon which the court could issue a decision. Here, the Ottawa Tribe of Oklahoma has taken no such actions. The Tribe does not claim to own or occupy any of the land in question, nor has it done so for approximately 175 years. In fact, the Amended Complaint fails to allege that there is even a single member of the Oklahoma Tribe currently residing in Ohio. The Tribe does not allege that it has purchased boats, nets or other hunting equipment. The Tribe does not provide the Defendant or the Court with any idea as to when it plans to hunt, what types of weapons it plans to use while hunting or what exactly it plans to hunt. For all of these reasons, the Amended Complaint leaves the Court and the State guessing as to the Tribe's actual intentions.

Because this case lacks real or concrete facts, it is impossible for this Court to issue a declaratory judgment on the Amended Complaint that will clarify and settle the legal relations at issue in this case because the dispute is hypothetical and conjectural. Further, the hypothetical circumstances alleged by the Tribe make it impossible for this Court to issue a declaratory judgment that will terminate and afford relief from disputes that have not yet arisen.

Finally, the Tribe argues that the Tenth Circuit decision, *Cheyenne-Arapaho Tribes of Oklahoma v. State of Oklahoma*, 681 F.2d 705 (10th Cir. 1982), is inapplicable because the nature of that suit and the nature of this suit are different. However, the fact that the claim in *Cheyenne-Arapaho* is slightly different than the claim brought by the Tribe here has no bearing on the *Cheyenne-Arapaho* Court's finding that the hunting and fishing rights at issue "must await a dispute presenting specific facts." The *Cheyenne-Arapaho* Court declined to enter an advisory opinion because it "did not know the pertinent facts," *id.*, and that the record demonstrated

nothing about the grant or denial of the asserted hunting and fishing rights and nothing about the need for conservation. *Id.*

The Amended Complaint provides only a sentence or two regarding the Tribe's plans to engage in unregulated commercial fishing, and is completely devoid of any allegations regarding the Tribe's intentions to exercise its alleged hunting privileges. This is particularly interesting in light of the fact that the vast majority of the areas described by the treaties encompass land located miles away from Lake Erie. There is no allegation that the State has ever been approached regarding the Tribe's alleged hunting rights. Without more detailed facts or allegations, the Amended Complaint seeks nothing more than a hypothetical advisory opinion. Because the Plaintiff's claims are not ripe or justiciable, this Court has no jurisdiction over the Plaintiff's claims.

B. The Eleventh Amendment Bars The Ottawa Tribe of Oklahoma's Claims

Neither the State nor any of its officials have waived immunity or consented to be sued in federal court on any of the claims raised in the Tribe's Amended Complaint. Although normally claims seeking only prospective relief against State officials can survive an Eleventh Amendment challenge under the legal fiction enunciated in *Ex Parte Young*, 209 U.S. 123 (1908), that rule does not apply to this action because the Tribe has not asserted an ongoing constitutional violation and the Tribe's claims are actually against the State, not her officials.

The Amended Complaint asks this Court to declare that the Tribe holds interests in Ohio land that are contrary to Ohio's special sovereign interests in her land, namely Ohio's right to regulate the use of the waters of Lake Erie. In *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997) a majority of the Supreme Court recognized that, even when state officials are sued as individuals, the State itself has a continuing interest in the litigation whenever state policies or

procedures are at stake. *Id.* at 269. Applying the rationale behind the Eleventh Amendment to the facts before it, the Court determined that the tribe's suit implicated special sovereignty interests.

As the State explained in its Motion to Dismiss, this case is on point with *Coeur d'Alene* in two ways. First, it too concerns the State's sovereign right to control the use of navigable waterways. Second, the Tribe, like the Coeur d'Alene, expressly seeks a declaration that it has a privilege that places it beyond the State's power to regulate the use of its lands. The Tribe seeks a declaration not to simply use Lake Erie, which of course its members may do, on the same terms that apply to every other member of the public, but to do so "without restriction or regulation by the Defendant." Amended Complaint, Prayer for Relief.

The Tribe argues that the State mischaracterizes the Amended Complaint in arguing that the Tribe seeks to divest the State of all regulatory control over the lands at issue. It argues this is inaccurate because the complaint states that "the Tribe's exercise of hunting and fishing rights would be subject to certain, limited types of conservation measures." Plaintiff's Response, at 14. However, according to the Amended Complaint, the Tribe seeks the right to hunt and fish "in ***all*** areas of Ohio encompassed by the Treaty of Fort Industry, the Treaty of 1807, and the Treaty of 1808." Amended Complaint ¶ 30. The Tribe claims it has a right to hunt and fish in a commercial manner "***subject only to*** such restrictions as [the State] shall prove by clear and convincing evidence to be (a) necessary conservation methods, (b) the least restrictive alternatives available, and (c) non-discriminatory." Amended Complaint, ¶ 31.

For the Tribe to claim that it does not seek to divest the State of all regulatory control over the former treaty lands is disingenuous. According to the Tribe, the only potential restriction on its alleged hunting and fishing privileges would be an extremely limited

conservational restriction.[1] Further, it would be this Court's decision, not the State's, as to whether the Tribe's actions trigger the limited restriction proposed by the Tribe. The relief the Tribe seeks in this lawsuit would essentially divest the State of its special sovereign interests of regulating hunting and fishing activities.

Even more disturbing is the impact this case may have on the State's special sovereign interests in protecting its citizens. As demonstrated in the State's Motion to Dismiss, the lands encompassed in the aforementioned treaties cover vast stretches of Ohio. The overwhelming majority of that area is property which lies miles from Lake Erie. In that area are hundreds of thousands of homes, schools, churches and businesses. If the only restriction on the Tribe's alleged hunting and fishing privileges in all of the treaty areas is a limited conservational restriction, implicitly, this leaves the state without the ability to prevent the Tribe from engaging in activity that may place its citizens at risk. With no other ability to regulate the Tribe, the State arguably could not even regulate where the Tribe hunts and fishes or the types of weapons used by the Tribe to hunt and fish in its former treaty areas. Without the ability to regulate the Tribe, the State would be powerless to prevent the Tribe from hunting with automatic weapons in people's backyards, school playgrounds or church parking lots. Surely the State's special sovereign interest in protecting its citizens is implicated here.

The Tribe argues that this case does not implicate the State's special sovereignty interests within the meaning of *Coeur d'Alene.* Plaintiff's Response, at 12. This argument is premised upon the Sixth Circuit companion cases *Arnett v. Myers*, 281 F.3d 552 (6th Cir. 2002) and *Hamilton v. Myers*, 281 F.3d 520 (6th Cir. 2002). In *Arnett* and *Hamilton*, the Sixth Circuit

[1] It appears that the Tribe relies on *United States v. State of Michigan Natural Resources Commission*, 653 F.2d 277 (6th Cir. 1981), for the premise that it can freely hunt and fish unimpeded by the State and subject only to these conservational restrictions. However, a closer look reveals that *Michigan Natural Resources* is easily distinguishable from the present case.

found that state regulations prohibiting duck blinds on areas to which the plaintiffs' asserted riparian fishing rights did not implicate the "special sovereignty interests" of the state. The claims in those cases are considerably less invasive than the claims brought here, however, and of critical importance to an analysis of the Eleventh Amendment, the Tennessee state courts had already determined that riparian fishing rights existed.

In *Arnett* and *Hamilton*, private landowners sought declaratory and injunctive relief against the director and board members of two Tennessee wildlife agencies. Plaintiffs alleged that the removal of duck blinds from a lake abutting their properties constituted an illegal search and seizure and a denial of due process under the Fourth, Fifth and Fourteenth Amendments. The State agencies argued that the plaintiffs' claims were barred by sovereign immunity. The Sixth Circuit disagreed and found that state regulations prohibiting duck blinds on areas to which the plaintiffs asserted riparian fishing rights did not implicate the "special sovereignty interests" of the state. However, it did so in the context of a case in which the Supreme Court of Tennessee had previously established that the ownership of the lands in question carry with them "the exclusive right of fishery in the waters." *State ex rel Cates v. West Tennessee Land Co.*, 127 Tenn. 575, 158 S.W. 746, 752 (Tenn. 1913).

Not only had the *State* courts already adjudicated the existence of the property interests underlying the claims in *Arnett* and *Hamilton*, but the relief sought also was far less invasive than the instant request. In this case, the Tribe seeks a declaration that it possesses a virtually unlimited right to hunt and fish, activities traditionally regulated by the State. Thus, its claims implicate the sovereign interests of the State of Ohio and, no matter how captioned, are claims against the State as a sovereign, which are barred by the Eleventh Amendment. For these reasons, the Tribe's claims must be dismissed as a matter of law.

C. The Court Should Dismiss the Plaintiff's Amended Complaint For Failure to Join Indispensable Parties

Tribe asserts that it has retained hunting and fishing rights pursuant to four different treaties, and that the State of Ohio is unlawfully interfering with the exercise of its rights. In each instance, the treaties in question, which form the basis for the claims, are treaties between Indian tribes and the United States. Consequently, as is explained in the State's Motion to Dismiss, the United States is an indispensable party to any action based on these treaties.

1. The United States is a necessary party to this action

In its Response, the Tribe argues that the United States is not a necessary party because the Tribe can obtain the relief it seeks without the United States. It supports this argument stating "the Tribe does not seek relief with respect to any lands owned by the United States." Plaintiff's Response at 16. This statement contradicts the very claims the Tribe raises. Two of the treaties upon which the Tribe bases its hunting and fishing rights specifically state that the signatory tribes' hunting and fishing privileges were conditioned by the words: "as long as they [the lands ceded aforesaid] remain the property of the United States," The Treaty of 1807, 7 Stat. 105, Article 5; and "so long as the same [the lands given and ceded as above] shall remain property of the United States." The Treaty of 1808, 7 Stat. 112, Article 4. Motion to Dismiss, Exhibits E and F. For the Tribe to argue that it does not seek relief to any lands whose owners derive title from the United States is disingenuous.

The Tribe also argues that the United States is not a necessary party because "this action will not impair or impede the ability of the United States to protect any of its interests and will not subject the United States to any inconsistent obligations." Plaintiff's Response at 16. This too is an erroneous argument. It was the United States, not the State of Ohio, which negotiated and entered into the treaties with the signatory tribes. Currently there are no federally recognized

tribes or reservations in Ohio. The Tribe's attempt to acquire usufructuary rights in Ohio threatens to change this. Such a change clearly impacts the United States. In addition, the United States has "an interest relating to the subject of the action" and nonjoinder "as a practical matter [may] impair or impede [its] ability to protect that interest." The United States may find itself subject to obligations with which it does not agree depending upon this Court's interpretations of its treaties. For all of these reasons, the United States is a necessary party to this action.

2. The United States is an indispensable party to this litigation

Not only is the United States a necessary party, but it is also indispensable. The United States cannot be joined as a party because of its sovereign immunity. However, the interests of the United States, the interests of Ohio and her citizens, and the courts' interest in complete and efficient resolution of disputes all indicate that this action should not go forward in the absence of the United States.[2]

As was explained in the State's Motion to Dismiss, a number of Circuits have determined, in circumstances similar to this case, that the United States is an indispensable party. *See* Motion to Dismiss, at 27-29; *Nichols v. Rysavy*, 809 F.2d 1317 (8th Cir. 1987); *Navajo Tribe of Indians v. New Mexico*, 809 F.2d 1455 (10th Cir. 1987). The Tribe attempts to distinguish this case from *Nichols* and *Navajo Tribe* arguing that this case does not challenge any action of the United States. The Tribe claims that this action "proceeds on the premise that the Tribe's treaties with the United States are valid." Plaintiff's Response at 17. However, this is an inaccurate characterization of the Tribe's claims. The Tribe's claims ignore the express language of the treaties that were negotiated and signed by the United States and the signatory tribes. As is more

[2] Of course this Court has the ability to invite the United States to express its views on the indispensable argument and the overall merits of the Tribes claims.

fully explained in Sections II(A) and V(H)(1) of the State's Motion to Dismiss, the direct language of the Connecticut Land Company Treaty signed in 1805 at Fort Industry forever barred the signatory tribes from the ceded territory and extinguished all hunting and fishing rights.

Similarly, as is more fully explained in Sections II(B), II(C), V(H)(2) and V(H)(3) of the State's Motion to Dismiss, the direct language of the Treaty of 1807 and the Treaty of 1808 make it clear that the signatory tribes can continue enjoying the privilege of hunting and fishing on these lands only as long as they remain the property of the United States. The overwhelming majority of the lands over which the Tribe now asserts hunting and fishing rights under these treaties has been transferred by the United States to private individuals and local governments. Any assertion that the tribe retains usufructuary rights over these transferred lands directly contradicts the language of the treaties the United States negotiated. Therefore, the interpretation of the treaties between the Indian tribes and the United States remain at issue in the present cause of action.

Finally, it is important to note the drastic effect this claim may have on the Treaty of 1831, negotiated and signed by the United States and bands of Ottawa Indians. As is more fully explained in Section II(F)(4) of this Reply, the Treaty of 1831 was a removal treaty negotiated pursuant to the Indian Removal Act of 1830. Because this was a permissive removal treaty and all of the Ottawa bands ultimately chose to leave Ohio, all of the tribes' hunting and fishing rights were extinguished. If this Court were to find that the Tribe's alleged ancestors' hunting and fishing rights were in fact not extinguished, the United States could very well be forced into a position to have to further compensate the Tribe or private property owners for issues it has already properly resolved through treaty.

The Tribe is attempting to obtain a court-ordered interpretation of treaties entered into by the United States government, without including the United States in the lawsuit. The interpretation the Tribe seeks would affect the rights of the United States, the rights of Ohio and her political subdivisions as well as many present day landowners in Ohio. Additionally, although the State of Ohio and present day landowners own the majority of land in Ohio, United States owns and occupies various parcels of the land at issue (i.e., Federal courthouses, military bases, etc.). Such an attack cannot proceed in equity and in good conscience in the absence of the United States.

3. Michigan is an indispensable party

As is explained in the State's Motion to Dismiss, the State of Michigan's rights under the Treaty of 1807 are such that the Tribe's claims based on that treaty cannot be adjudicated without the State of Michigan. Most of the land mass ceded in that treaty is now in the State of Michigan, not Ohio. Accordingly, the determination that the Treaty of 1807 creates usufructuary rights that survive to the modern day may as a practical matter impair or impede Michigan's ability to protect its own interests. *See* Civil Rule 19(a).

In addition, to the extent that the Tribe argues that it has continuing rights to fish in western Lake Erie under the Treaty of 1807 or any other treaty, the exercise of those rights in Ohio will affect the State of Michigan, whose citizens also fish in Lake Erie. Fish do not respect boundary lines, and fishing pressure in Ohio will affect the fish available to Michigan fisherman as well.

For all of the above reasons, the United States and the State of Michigan are indispensable parties to this action.

D. Plaintiff's Claims Are Barred By The Statutes Of Limitation Set Forth In The Indian Claims Commission Act And 28 U.S.C. §2415

There is absolutely no dispute that the ICC bars the Tribe from bringing any claims against the United States "in law or equity arising under the Constitution, laws, treaties of the United States, and executive orders of the President." ICCA, §2, 60 Stat. 1049, 1050 (1946). And, the Tribe's claim that it has hunting and fishing privileges from treaties negotiated by and entered into by the United States (not the State of Ohio) could not now be pursued against the United States. It makes absolutely no sense that the Tribe should now be permitted to bring the exact same type of claim, but avoid the ICCA statute of limitation by essentially seeking relief against a party who had no involvement with the negotiation or signing of the treaties in question. And, contrary to Plaintiff's assertions, this is part of the holding of *Navajo Tribe of Indians v. New Mexico*, 809 F.2d 1455, 1471 (10th Cir. 1987) and was also implied by the court in *Oglala Sioux v. Homestake Mining Co.*, 722 F.2d 1407, 1411 (8th Cir. 1983).

Plaintiff in turn relies on decisions with implied holdings and decisions that are readily distinguishable. The court in *Sokaogon Chippewa Community v. Wisconsin*, 879 F.2d 300 (7th Cir. 1989) never held that the statute of limitations did not apply to the other defendants; instead the court reversed based upon its conclusion that the district court wrongly dismissed the remainder of the case on the grounds that the United States was not an indispensable party. *Id.* at 305. And, *Oneida Indian Nation of New York State v. County of Oneida*, 194 F. Supp.2d 104, 125 (N.D.N.Y. 2002) is also readily distinguishable on the basis that in that case the tribes had independent causes of action against the State of New York for entering into its own land transactions with the Indians in violation of the Non-Intercourse Act. *See id.* at 112. In this case, where there is no distinction between the cause of action asserted here and those that could have

been raised before the ICC, this Court should bar the Tribe's creative attempts to achieve multiple bites at the apple.

So, too, with the statute of limitations set forth in 28 U.S.C. 2415. If the Tribe would be barred from bringing this action against the United States, it should also be barred from bringing it against Ohio.

E. Plaintiff's Claims Are Barred By Res Judicata, Collateral Estoppel, And/Or Release Because The Ohio Ottawa Have Been Compensated By The Indian Claims Commission

This Court may take judicial notice of the decisions and statutes indicating that in fact the Ottawa received payment for the resolution of claims by the ICC. Payment of a claim under the ICC is a full discharge of "all claims and demands touching any of the matters involved in the controversy," and all other matters that could have been claimed and were not. *United States v. Dann*, 470 U.S. 39 (1985). Whether this rule of law fits within the doctrine of release, res judicata, or collateral estoppel, the result is the same: having actually participated in proceedings before the ICC and having received compensation related to the extinguishment of their rights and privileges in Ohio in the very same territory on which they now claim a retained right to hunt and fish, the Tribe cannot sue again and pretend that its rights have not been, or could not have been, litigated in those proceedings.

The Tribe opposes these arguments with case law that is not on point. First, the Tribe relies on *Cayuga Indian Nation of New York v. Cuomo*, 667 F. Supp. 938, 947 (N.D.N.Y. 1987), *rev'd on other grounds*, 413 F.3d 266 (2d Cir. 2005) for the proposition that res judicata does not bar actions against other parties. In that case, however, the court held that "as the court has already concluded that the ICC was created to resolve claims against the United States, the plaintiffs could not have proceeded against non-federal defendants, *at least not against those*

who did not derive title directly from the United States. . . ." (emphasis added). In this case, however, there is no party who does not derive title from the United States, as there was in that case where certain property owners traced their title back to illegal transfers between New York and the tribes. To the extent that the United States enters treaties that benefit the States who ultimately obtain jurisdiction over those lands, the State and the United States are in privity such that earlier proceedings between the United States and the tribe related to the same territory have preclusive effect.

F. The Ottawa Tribe Of Oklahoma's Amended Complaint Fails To State A Claim For Which Relief Can Be Granted, And Thus Must Be Dismissed

In its Response, the Tribe balks at the State's attempts "to divide and conquer the Tribe's claim by parsing each relevant Treaty individually." Plaintiff's Response at 30. However, examining each treaty individually is exactly what this Court must do to resolve the Tribe's allegations. The Amended Complaint asserts claims for hunting and fishing rights based on the two 1805 Treaties of Fort Industry, the Treaty of 1807 and the Treaty of 1808. After examining each of these four treaties individually, it becomes apparent that none of these treaties establish the rights asserted in the Amended Complaint. Additionally, pursuant to the Treaty of 1831, any remaining hunting and fishing privileges that the Ottawa may have had in Ohio were extinguished. For all of these reasons, this case must be dismissed.

1. The canons of treaty construction permit this Court to find that privileges were extinguished

The Tribe greatly overstates the benefits that they derive from the canons of treaty construction. It is true that a number of canons of construction apply to Indian treaty interpretation because of the unique relationship between the United States and Native American tribes, however, these canons are not nearly as one-sided as Plaintiff would lead this Court to

believe. For example, a court may nevertheless find that rights or privileges have been extinguished because "[a] canon of construction is not a license to disregard clear expressions of tribal and congressional intent, nor can a court "remake history." *DeCoteau v. District County Court*, 420 U.S. 425, 447, 449 (1975). And, as the U.S. Supreme Court has said, a federal court "cannot ignore plain language that, viewed in historical context and given a fair appraisal, clearly runs counter to a tribe's later claims." *Oregon Dept. of Fish and Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 774 (1985) (internal quotation marks and citation omitted). *See also South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 346 (1998) (citing *Klamath* for the same proposition).

In this case, applying all of the customary canons of construction of Indian treaties when interpreting the Ottawa treaties involving Ohio land, the treaties do not support the Ottawa claim to hunting and fishing privileges in northern Ohio.

2. The two treaties of 1805 are in fact two separate treaties and cannot be construed as one

The Tribe argues that the two treaties of 1805 should be viewed as one document. Plaintiff's Response at 31-32. A consideration of the history and purposes of the two treaties does not support this view. On October 1, 1804, Philip Bradley, Chairman of the Directors of "the proprietors of the half million acres of land lying south of Lake Erie called Sufferers' land" wrote a letter to the President of the United States requesting a commissioner to negotiate with the Indians to extinguish their title to the land that had been granted to the Sufferers. *American State Papers*, Indian Affairs, 1:702, Attached as Exhibit L. Then, on February 28, 1805, the Directors of the Connecticut Land Company wrote to President Jefferson, also requesting a commissioner to negotiate with the Indians for the land owned by the land company adjacent to the Sufferers' land. *Id*. Subsequently, Charles Jouett was appointed as a commissioner to

negotiate with the Indians on behalf of the land companies. He was given the following written instructions by Henry Dearborn, Secretary of War.

> The object of the proposed treaty being principally that of affording the Connecticut land companies (who hold the pre-emptive right, under the State of Connecticut, to a certain part of the land above described) an opportunity to purchase the Indian title to the lands claimed by the said companies, your duties will chiefly consist in notifying the chiefs of the several nations, who are interested, of the time and place of holding said treaty; and in presiding thereat, for the purpose of seeing that any bargain, which the agents of the said companies may enter into with the proper representatives of the Indian nations, shall be fair and just, and well understood by the parties.

American State Papers, Indian Affairs, 1:703, Attached as Exhibit L. (Defendant requests that the Court take judicial notice of these historical documents.)

Thus, the main objective for Jouett was to oversee the sale of the land that came later to be designated Royce Area 53. Jouett's supervision of this process was required by law, which said "No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, within the bounds of the United States, shall be of any validity, in law or equity, unless the same be made by treaty or convention, entered into pursuant to the Constitution." 2 Stat. 139.

Jouett's instructions from Dearborn continued:

> If the Indian chiefs shall appear disposed to cede, not only the lands claimed by the Connecticut companies, but any part, or the whole of their lands, lying between the lands, claimed by the said companies, and the present boundary, as established at the treaty of Greenville, and since run and marked by the United States, you are authorized to negotiate with them for so much of the same as they will consent to cede. . .

American State Papers, supra at 703. Exhibit L.

The tribes agreed to both cessions (the Connecticut Land Company Treaty, Royce Area 53 and the Federal Treaty, Royce Area 54), signing both treaties on the same day. However, clearly, two separate transactions took place.

The Connecticut Land Company Treaty was signed by Jouett on behalf of the United States, two agents of the land companies, and representatives of the Indian tribes. The land companies paid to the Indians $4,000.00 in cash and the balance of the purchase price (total of $18,916.67), was placed in trust with the government for distribution to the Indians with the annuity paid in the other treaty. 7 Stat. 87, Article 5, Motion to Dismiss, Exhibit B, Art. 5. This treaty was proclaimed on April 24, 1806.

The Federal Treaty was signed by Jouett and representatives of the Indian tribes. For this land the United States was to pay an annuity to the Indian Tribes. 7 Stat. 87, Article 4, Motion to Dismiss, Exhibit B, Art. 4. This treaty was proclaimed on January 25, 1806.

While the land company treaty is not mentioned in Royce's *Indian Land Cessions in the United States* or listed in the Statutes at Large, there is no doubt but that there were two separate treaties. The two land cessions are referred to separately (thus two different Royce numbers are assigned), and there is no question but that the Connecticut Land Company treaty is a valid and legitimate treaty. Furthermore, the treaties differ in the rights retained by the tribes to the separate cessions. The land in the Connecticut Land Company Treaty was purchased by the land companies and the language of that treaty clearly extinguishes all rights. See Motion to Dismiss at 6, 35-36. In contrast, the cession in the other Federal Treaty involved land that was not being immediately claimed by the land companies or anyone else other than the federal government, and that treaty reserves hunting and fishing privileges "within the territory and lands which they have no ceded to the United States." *Motion to Dismiss*, Exhibit B, Art. VI.

Courts cannot "under the guise of [liberal] interpretation . . . rewrite congressional acts [i.e., treaties] so as to make them mean something they obviously were not intended to mean." *Menominee Tribe of Wisconsin v. Thompson*, 161 F.3d 449, 457 (7th Cir. 1998), *cert. denied*, 526

U.S. 1066 (1999), *quoting Confederated Bands of Ute Indians v. United States*, 330 U.S. 169, 179 (1947). To say that these two separate treaties should be viewed as one is to ignore the very obvious fact that they were different agreements with different purposes. To say that a condition of one of them should apply to the other, when the treaty does not specify that to be the case, is to manufacture an alternative interpretation on no basis whatsoever. The fact that they were signed on the same day, and that each made reference to the other, in no way supports the contention that they should be viewed as one document. Even a liberal interpretation does not allow facts to be altered to this degree.

3. Ottawa hunting and fishing privileges under the Treaties of 1807 and 1808 were conditional, and the condition having occurred, the privileges were then extinguished

Treaty reserved hunting and fishing privileges can be extinguished by conditions of the treaty itself. *See Menominee v. Thompson*, 161 F.3d at 459-61. In the case of the treaties of 1807 and 1808, the hunting and fishing privileges were conditioned by the words immediately following the statement of the rights: "as long as they [the lands ceded aforesaid] remain the property of the United States," The Treaty of 1807, 7 Stat. 105, Article 5; and "so long as the same [the lands given and ceded as above] shall remain property of the United States." The Treaty of 1808, 7 Stat. 112, Article 4. Motion to Dismiss, Exhibits E and F. The express language of the treaties makes it clear that when the land ceded in the treaty was transferred to private or non-federal governmental owners, any hunting and fishing rights no longer existed.

The Tribe bases its claim to hunting and fishing rights under the treaties of 1807 and 1808 on an alternative interpretation of the unambiguous phrase "as long as they remain the property of the United States." The Tribe argues that this phrase should be interpreted to mean that the signatory tribes had hunting and fishing rights as long as the land lay within the bounds

of the United States. This completely distorts and expands the actual treaty language. The Tribe premises this distorted interpretation on the idea that the status of the Northwest Territory was in doubt until the end of the War of 1812. On the contrary, in 1807 and 1808, the Revolutionary War was long over, and the Indians were no doubt well aware of the victor in that war and of the general international boundary set by the Treaty of Paris in 1783. Ohio became a state in 1803 and the Indians who lived in this area were no doubt well aware of that fact in 1807 and 1808. The argument that the United States government, in a formal federal document (a federal Indian treaty with the status of federal law), would have openly provided for the possibility that United States territory would be lost to British Canada in some prospective future war is simply preposterous. In the absence of a reasonable basis for an alternative understanding by the Indian signatories for the phrase "property of the United States," the plain language of the treaty must be accepted.

The Tribe contends that a literal interpretation of the treaties would have permitted the United States to "unilaterally terminate the Indians' hunting and fishing rights without notice and without consideration." In fact, the treaties themselves provided the notice that the hunting and fishing privileges were conditional and the Treaty of 1807 also provided for the consideration in the way of money, goods, and services.

"Even though legal ambiguities are resolved to the benefit of the Indians, courts cannot ignore plain language [contained in a treaty] that . . . clearly runs counter to a tribe's later claims." *Oregon Dept. of Fish and Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 774 (1985). A simple reading of the treaties of 1807 and 1808 reveals unambiguous treaty language that provides for the extinguishment of the Indians' hunting and fishing rights upon sale of the land, an event that occurred more than a century and a half ago.

4. Any treaty-reserved hunting and fishing rights to Ohio land by the Ottawa Tribe were extinguished by subsequent treaties

A thorough reading of the treaties referenced in the Tribe's claim, provides a historical record of federal policy toward the Indians in Ohio; from the establishment of the Greenville Treaty boundary line, to further land cessions by the Indians, to the establishment of Indian reservations in Ohio, to the removal of the Indians west of the Mississippi.

Although never mentioned in its Amended Complaint, the Tribe argues that the 1795 Treaty of Greenville bolsters its claim to hunting and fishing rights in Ohio. The Treaty of Greenville was essentially a peace treaty negotiated after the Indians were defeated in the Battle of Fallen Timbers. It provided for an exchange of prisoners and set conditions for peaceful co-existence in the Northwest Territory, and recognized a right of occupancy by the Indians in certain territory north and west of the Greenville Treaty boundary line, as described in Article V of the treaty. It is this Article on which the Ottawa rely in claiming hunting and fishing rights in all of northwestern Ohio. Specifically, the Ottawa claim that no subsequent treaty extinguished their alleged rights to hunt and fish in this land.

Courts have addressed Article V of the Greenville Treaty, and the effect of subsequent treaties on the Greenville Treaty provisions, several times. In *Williams v. Chicago*, the Greenville Treaty was found to convey to the Indians, as described in Article V, "a right of continued occupancy; and that when this was abandoned all legal right or interest which both tribe and its members had in the territory came to an end." *Williams v. City of Chicago*, 242 U.S. 434, 437-38 (1917). The Treaty of Greenville did not establish boundaries between tribes in the Article V Indian territory, but such boundaries were defined by subsequent treaties with particular tribes over particular land. *See Miami Tribe of Oklahoma v. United States*, 146 Ct. Cl. 421, 425-46 (1959).

Courts have found that treaty rights can be extinguished only by the clearest of language. That does not mean however, that they cannot be extinguished. Treaty rights can be limited by conditions of the treaty itself, or extinguished by subsequent treaties or other acts of Congress. *See Menominee v. Thompson*, 161 F.3d at 457-62. In addition, "Courts must construe successive treaties in conjunction with the language of earlier treaties." *Id*. at 457. In this way, the subsequent treaties with the Ottawa defined their boundaries and rights to certain parts of Ohio land.

With the two treaties of 1805, the tribes ceded two portions of land within the land described in Article V of the Greenville Treaty in exchange for money from the land companies and from the United States. As discussed above, in Royce Area 53, the language of the subsequent treaty clearly extinguishes hunting and fishing privileges, along with all other rights. The language includes these words: "[the Indians]. . . have ceded, remised, and released, and quit claimed, and by these presents do cede, remise, release and forever quit claim. . . forever, all the interest, right, title, and claim of title. . . of, in, and to, all of the lands of said companies. . .for them, the said companies, respectively, to have, hold, occupy, peaceably possess, and enjoy, the quit claimed premises, forever, free and clear of all let, hindrance, or molestation, whatsoever; so that the said nations [of Indians]. . . and the posterity of the said nations, shall be forever barred." Motion to Dismiss, Exhibit A, Second Paragraph. It is difficult to imagine how the Ottawa could hunt and fish on land where they were "forever barred." Thus, the land company treaty of 1805 extinguished any then existing privileges or rights in Royce Area 53.

As stated above, the hunting and fishing privileges reserved under the treaties of 1807 and 1808, which also relate to land referenced in Article V of the Greenville Treaty, were conditional, and were extinguished when the land ceded was no longer property of the United

States. The Treaty of 1807 also is the first treaty in which the Ottawa in Ohio ceded land and were granted certain portions of land within the ceded land to live on, designated reservations. The tribes that signed the treaty ceded a large area of land (mostly in Michigan), in exchange for smaller reservations of land, money, goods, and services. In this historical context it is very reasonable that the Indians would have negotiated to be able to continue hunting and fishing in the surrounding area, and it is also reasonable that the United States would agree to that provision until the land was sold.

Moreover, in the Treaty of 1808 the tribes ceded only land for two roads to the United States. These two roads were to go through Indian territory to connect then still separated sections of land that were owned by the United States. Since the surrounding land was still Indian territory, and the roads were not even built yet, it is reasonable that the Indians would have negotiated for continued hunting and fishing privileges. Since the United States eventually wanted settlers along the road and even reserved extra width for one of the roads for settlement, it is reasonable that the United States would agree to these privileges until the land was sold. When the conditions provided for under the treaties of 1807 and 1808 (that the land was no longer property of the United States) were fulfilled, then the hunting and fishing privileges in those areas were extinguished.

The Treaty of 1831 provided that "[o]n the ratification of this convention, the privileges of every description, granted to the Ottoway nation within the State of Ohio, by the treaties under which they hold the reservations of land herein ceded [the Treaties of 1807 and 1817], shall forever cease and determine." 7 Stat. 359, Article 17, Motion to Dismiss, Exhibit K, Art. XVII. It is really this treaty, of 1831, that both confirms all earlier extinguishment of rights and

privileges, and extinguishes any hunting and fishing privileges of the Ottawa in Ohio land that may have existed as of 1831.

The Treaty of 1831 was a *removal* treaty pursuant to the Indian Removal Act of 1830,[3] as stated in the "whereas" clause at the beginning of the treaty. See Motion to Dismiss, Exhibit K. The Ottawa agreed to cede their reservation land in Ohio, in exchange for land west of the Mississippi. Ottawa residing on *Roche de Boeuf* and Wolf Rapids reservations established by the Treaty of 1807 were parties to this treaty, as were Ottawa residing on Blanchard's Fork and Oquanoxa's Village, reservations established by treaty in 1817.

The bands residing on Blanchard's fork of the Great Auglaize River and at Oquanoxa's Village on the Little Auglaize River, agreed at the time of this treaty to cede their reservations to the United States and to move west of the Mississippi. They were to be provided with new land west of the Mississippi, goods, money from the sale of their Ohio reservations, expenses of the removal, and cost of subsistence on the new reservation for one year.

The bands residing at *Roche de Boeuf* and at Wolf Rapids did not agree at the time to move west of the Mississippi, but they did agree to cede their Ohio reservations for money from the sale of the land. When and if these bands moved west of the Mississippi, they were to receive land, expenses of the move, and subsistence for one year. Provisions were made for certain of the group to live on the land where they were for three years only. This second group did in fact remove and the additional provisions were given. The preamble to the Treaty of 1831 clearly states that the move was to establish permanent homes for the Indians west of the Mississippi. The treaty specifically discusses the sale of the land by auction and the disposition of the proceeds. While it may be arguable that the Ottawa who did not yet agree to the removal

[3] The Indian Removal Act, passed by Congress in 1830, authorized the President to offer Indians the opportunity to exchange their land for other land west of the Mississippi. 4 Stat. 411.

would expect that they could continue to hunt and fish in the area around where they still lived, it is not remotely arguable that the Ottawa would have expected that they would retain hunting and fishing rights to this land after they moved 1,000 miles away.

The Tribe cites *Minnesota v. Mille Lacs*, in which the Supreme Court found that a later treaty (that was silent regarding hunting and fishing privileges) did not abrogate fishing and hunting rights provided for by an earlier treaty. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999). The facts in that case are quite different from the case at hand. In *Mille Lacs*, the court examined the negotiations and history of the treaty and found that the *purpose* of the subsequent treaty was limited to a land transfer, and that the purpose was crucial in determining whether hunting and fishing rights were abrogated. *Id.* at 196-200. The tribes involved ceded land in exchange for smaller reservations within the ceded land. The treaty was silent as to any hunting and fishing privileges in the ceded land and the court found that this was because they were never intended to be abrogated in that treaty. Here, even though the Treaty of 1831 does not precisely say "The Ottawa Tribe hereby relinquishes all hunting and fishing rights in Ohio," neither is it exactly silent. The Treaty of 1807 identifies hunting and fishing rights retained as a "privilege." The treaty of 1831 extinguishes all "privileges" granted under the Treaty of 1807. Further, the purpose of the Treaty of 1831 was removal, and therefore the language is sufficient to extinguish the hunting and fishing rights.

A definition of the term "removal treaty" is given in footnote 3 of *Menominee v. Thompson* as "a treaty in which an Indian tribe agrees to leave its traditional lands and move to lands with which the tribe has no traditional ties." *Menominee v. Thompson*, 161 F.3d at 454. In the *Menominee* case, the court found that because of removal provisions in treaties the tribe gave up hunting and fishing rights on ceded land. "[T]he Menominee could not reasonably have

expected to continue hunting and fishing on the land ceded in 1848, considering the Tribe had just agreed to leave the Wisconsin land and move to the Minnesota reservation approximately 300 miles away." *Id*. at 458. The court found this even though the Indians involved never did leave Wisconsin.

The facts in *United States v. Michigan*, cited frequently by the Ottawa to support their Ohio claim, are also very different from the case at hand. There, the court found the first treaty in question, from 1836, to have characteristics of a land reduction treaty and a permissive removal treaty. *United States v. Michigan*, 471 F. Supp. 192 (W.D. Mich. 1979), *remanded on other grounds*, 623 F.2d 448 (6th Cir. 1980), *modified in part on other grounds*, 653 F.2d 257 (6th Cir. 1981). But, none of the Indians ever did remove and the federal government took no further steps to effect a removal. "Since it was permissive and since removal from the treaty area never took place, the classification of the treaty as a removal treaty has no bearing or relevance to the issue in question." *Id*. at 241- 42. The case at hand is the opposite. The Treaty with the Ohio Ottawa in 1831 was a permissive removal treaty in which the removal was complete. Thus, the fact that the Ottawa did agree to removal, as is stated in the Amended Complaint, *is* determinative regarding the extinguishment of hunting and fishing rights. The Treaty of 1831 extinguished all previous rights and privileges in Ohio for the Ottawa bands that were parties to the treaty.

Further, the court in *U.S. v. Michigan* found that "[T]he Indians understood that they would go on hunting and fishing for as long as any Indians lived in Michigan." *Id*. at 238. The Indians suing over their fishing rights in Michigan stayed in that area, and continued to make a living by fishing, up to the present time. In fact, in all of the treaty cases cited by the Ottawa to support their claim in Ohio, the Indian tribes stayed in the area in question and continued to

exercise their hunting and fishing rights. That element is missing from the case at hand, as the Plaintiffs have not been present in Ohio for over 150 years. The Supreme Court recently found in *City of Sherrill v. Oneida Indian Nation of New York*, that the tribe had been absent from the land in question for almost 200 years, and so could not revive its original rights in the land. *City of Sherrill, New York v. Oneida Indian Nation of New York, et al.*, 125 S. Ct. 1478 (2005).

Giving consideration to the actual words of the Ottawa treaties, an examination of the historical context to determine what the parties meant at the time, particularly what the Indians involved would have understood, and giving consideration to the special canons for interpreting Indian treaties, the Ottawa Tribe of Oklahoma has failed to establish any set of facts to support its claim to treaty-reserved hunting and fishing rights within Ohio's boundaries.

G. The Plaintiff's Claims Are Barred By Laches

The Tribe's Amended Complaint should be dismissed pursuant to the doctrine of laches. Laches is a "'negligent and unintentional failure to protect one' rights.'" *Coalition for Government Procurement v. Federal Prison Industries, Inc.*, 365 F.3d 435 (6th Cir. 2004). Laches applies when there has been "(1) unreasonable delay in asserting one's rights; and (2) a resulting prejudice to the defending party." *Id.* at 437.

The Tribe argues that the Amended Complaint does not establish that the Tribe's delay in bringing this action was unreasonable. It argues that while the treaties upon which the Tribe's claim is based were signed in the early 1800's, "that does not mean that the Tribe had to assert its claim *shortly thereafter*." Plaintiff's Response at 38 (emphasis added). While it is true that the Tribe may not have had to assert its claim "shortly after" the treaties were signed, waiting almost two-hundred-years certainly constitutes an unreasonable delay.

The Tribe also argues that the Amended Complaint does not establish any prejudice to the Plaintiff from the delay in bringing this action. According to the Amended Complaint, the treaties upon which the Tribe now relies were negotiated and signed by the signatory tribes and the United States almost two hundred years ago. Nowhere in the Amended Complaint does the Tribe allege that the State of Ohio was in anyway involved in these treaties. The very fact that the State, which was never involved in the treaty process to begin with, is now forced to go back almost two hundred years and litigate over these almost two century old treaties establishes prejudice.

Further, the State is prejudiced because the land the tribe now seeks to hunt and fish on has changed dramatically over the last two hundred years. Although the Tribe argues that the prejudice to third parties who will not be bound by the results of this litigation is not an issue, the very suggestion that strangers to this litigation, such as private, commercial and governmental land owners, will not be bound by the results of this litigation is disingenuous. The Tribe asks this Court to declare it has a property right to hunt and fish on all of the property within the former treaty areas. These areas, however, which used to be forests, plains and marshes are now houses, churches and businesses. Over the last two centuries these territories, predominantly owned and used by these third party land owners, have changed considerably.

For all of these reasons, the doctrine of laches bars the hunting and fishing claims presented by the Tribe. Accordingly this action should be dismissed.

H. The Plaintiff Has Abandoned Any Privilege Or Rights That It May Have Once Had In Ohio Lands

The Tribe argues that that this court cannot dismiss the Amended Complaint on abandonment grounds because abandonment requires not only non-use of a property right, but

also an intent to abandon that right. Plaintiff's Response, at 39. This intent, the Tribe argues, is not clear on the face of the complaint. *Id.* at 38.

The State respectfully disagrees. First, the State disagrees with any characterization of Indian hunting and fishing rights as property "rights." These are privileges related to occupancy, not property rights as that term is used as a legal term of art. Second, and most importantly, the State disagrees that it is not clear, from the face of the Amended Complaint, that the Ottawa abandoned their right to exercise any such privilege a very long time ago. The Amended Complaint states that "[p]ursuant to subsequent treaties, all of said bands of Ottawas agreed to cede their remaining lands in Ohio to the United States and to be removed to reservations granted them in areas which later became part of the State of Kansas." Amended Complaint ¶ 21. In *City of Hamilton v. Harville*, 63 Ohio App.3d 27 (Ohio Ct. App. 1989), one of the cases cited by the Tribe, the court found occasional, infrequent or even complete non-use is not sufficient in itself to establish the existence of an "abandonment," absent other evidence tending to prove the *intent* to abandon. *Id.* at 30 (emphasis original). Agreeing to cede its land and to be removed to another state hundreds of miles away clearly shows intent to abandon any and all alleged usufructuary rights that the Ottawa may have had in Ohio.

Additionally, as is described in Section II(F)(4) of this Reply, the Treaty of 1831 was a removal treaty that ultimately extinguished all Ottawa rights to hunt and fish in Ohio. The Ottawa's signing of this treaty and the Ottawa's ultimate decision to leave Ohio further demonstrates intent to abandon any alleged hunting and fishing rights the signatory tribes may have had in Ohio.

III. CONCLUSION

For the foregoing reasons, Defendant Speck respectfully requests this Court to dismiss Plaintiff's Amended Complaint.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 5, 2006, a copy of Defendant's Reply was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system. I further certify that a copy of the foregoing has been served by regular U.S. mail upon all parties for whom counsel has not yet entered an appearance and upon all counsel who have not entered their appearance via the electronic system.

/s/ Damian W. Sikora ____
DAMIAN W. SIKORA