

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

OTTAWA TRIBE OF OKLAHOMA
13 S. 69
Miami, OK 74355

Plaintiff

vs.

SAMUEL SPECK, DIRECTOR
OHIO DEPARTMENT OF
NATURAL RESOURCES
2045 Morse Road
Columbus, Ohio 43229

Defendant

CASE NO. 3 05cv7272

JUDGE DAVID A. KATZ

FIRST AMENDED COMPLAINT FOR DECLARATORY JUDGMENT

Now comes Plaintiff, Ottawa Tribe of Oklahoma, and for its First Amended Complaint for Declaratory Judgment states as follows:

Identification of the Parties

1. Plaintiff Ottawa Tribe of Oklahoma is a federally recognized tribe organized pursuant to section 3 of the Thomas-Rogers Oklahoma Indian Welfare Act of June 26, 1938 and recognized under the Act of May 15, 1978, Public Law 95-281 (95th Congress).

2. Defendant Samuel Speck is Director of the Ohio Department of Natural Resources, a department of the State of Ohio which is organized and operating pursuant to Title XV of the Ohio Revised Code and which claims authority pursuant to Chapter 1533 thereof to regulate all fishing and hunting in the State of Ohio.

Statement of Jurisdiction

3. Plaintiff is an Indian tribe with a governing body recognized by the United States Secretary of the Interior, therefore jurisdiction is based upon 28 U.S.C. §1362.

4. This suit arises under treaties of the United States of America which were duly ratified by the United States Senate, therefore jurisdiction is also based upon 28 U.S.C. §1331.

5. The Eleventh Amendment to the Constitution of the United States does not bar this suit, as it is one in which Plaintiff seeks declaratory and prospective relief regarding the constitutionality of Defendant's intention to impede, regulate and/or prohibit the rights granted under said Treaties. See, *Ex parte Young* (1908), 209 U.S. 123, 52 L. Ed. 714, 28 S.Ct. 441; *Arnett v. Myers*, 281 F.3d 552 (6th Cir. 2002).

6. A justiciable controversy exists between Plaintiff and Defendant, therefore the Court has authority to grant the relief demanded pursuant to 28 U.S.C. §2201.

Historical Background

8. **Treaty of Fort Industry.** On July 4, 1805, two treaties were signed by the United States and several Indian tribes at Fort Industry, located on the lower Maumee River in present-day Toledo, Ohio. These treaties, which became known, together, as the "Treaty of Fort Industry", were duly ratified by the United States Senate and recorded at 76 Stat. 87.

9. Under one of these treaties, the Indian tribes, signatories to this treaty (hereinafter, the "First Treaty of Fort Industry"), ceded that part of Ohio subsequently known as "Royce Area 53" to the United States and certain Connecticut land companies named therein. The boundaries of the area ceded by this treaty were:

- (a) On the north, the border between the United States and Canada, established under the Treaty of Paris (1783);
- (b) On the east, the boundary established under the Treaty of Greenville (1795);
- (c) On the south, the 41st degree of north latitude; and
- (d) on the west, a north-south line 120 miles due west of the Ohio-Pennsylvania state line.

10. Under the other treaty, the Indian tribes, signatories to this treaty (hereinafter, the "Second Treaty of Fort Industry"), ceded that part of Ohio subsequently known as "Royce Area 54" to the United States. The boundaries of the area ceded by this treaty were:

- (a) On the north, the 41st degree of north latitude;
- (b) On the east, the boundary established under the Treaty of Greenville (1795);
- (c) On the south, the boundary established under the Treaty of Greenville (1795); and
- (d) on the west, a north-south line 120 miles due west of the Ohio-Pennsylvania state line.

11. The Second Treaty of Fort Industry, in Article 5 thereof, made reference to the First Treaty of Fort Industry, as follows:

"To prevent all misunderstanding hereafter, it is to be expressly remembered, that the Ottawa and Chippawa nations, and such of the Pattawatamy nation as reside on the river Huron of Lake Erie, and in the neighborhood thereof, have received from the Connecticut land company, and the company incorporated by the name of "the proprietors of the half million acres of land, lying south of Lake Erie, called "Sufferers' land, the sum of four thousand dollars in hand, and...the further sum of twelve thousand dollars...which several sums is the full amount of their proportion of the purchases effected by this treaty, and also, by a treaty with said companies, bearing even date herewith..."

12. The Second Treaty of Fort Industry, in Article 6 thereof, further provided:

"The said Indian nations, parties to this treaty, shall be at liberty to fish and hunt within the territory and lands which they have now ceded to the United States, so long as they shall demean themselves peaceably."

13. **Treaty of 1807.** Subsequently, at Detroit, on November 17, 1807 another treaty was signed by the United States and several Indian tribes. This treaty was duly ratified by the United States Senate and recorded at 7 Stat. 105.

14. Under this treaty, the Indian tribes, signatories to this treaty (hereinafter, the "Treaty of 1807"), ceded another part of Ohio and other territories, the boundaries of which were described as follows:

"Beginning at the mouth of the Miami river of the Lakes, and running thence up the middle thereof, to the mouth of the great Aug Glaize river, thence running due north until it intersects a parallel of latitude, to be drawn from the outlet of Lake Huron, which forms the river Sinclair; thence running north east the course, that may be found, will lead in a direct line to White Rock, in Lake Huron, thence due east, until it intersects the boundary line between the United States and Upper Canada, in said Lake, thence southwardly, following the said boundary line, down said lake through river Sinclair, Lake St. Clair, and the river Detroit, into Lake Erie, to a point due east of the aforesaid Miami river, thence west to the place of beginning.

15. The Treaty of 1807, in Article 5 thereof, further provided:

"It is further agreed and stipulated, that the said Indian nations shall enjoy the privilege of hunting and fishing on the lands ceded as aforesaid, as long as they remain the property of the United States."

16. **Treaty of 1808.** Subsequently, at Brownstone, in the Territory of Michigan, on November 25, 1808, another treaty was signed by the United States and several Indian tribes. This treaty was duly ratified by the United States Senate and recorded at 7 Stat. 112.

17. Under this treaty, the Indian tribes, signatories to this treaty (hereinafter, the "Treaty of 1808"), ceded another part of Ohio and other territories, the boundaries of which were described as follows:

"[A] tract of land for a road, of one hundred and twenty feet in width, from the foot of the rapids of the river Miami of Lake Erie, to the western line of the Connecticut reserve, and all the land within one mile of the said road, *on each side thereof*, for the purpose of establishing settlements along the same; also a tract of land, for a *road only*, of one hundred and twenty feet in width, to run southwardly from what is called Lower Sandusky, to the boundary line established by the treaty of Greenville, with the privilege of taking at all times, such timber and other materials from adjacent lands as may be necessary for making and keeping in repair the said road, with the bridges that may be required along the same."

18. The Treaty of 1808, in Article 4 thereof, further provided:

"It is agreed that the said Indian nations shall retain the privilege of hunting and fishing on the lands given and ceded as above, so long as the same shall remain the property of the United States."

19. The Treaty of 1808, in Article 1 thereof, specifically made reference to the Treaty of 1807, the Treaty of Greenville, and the Treaty of Fort Industry. Thereafter, in Article 5, the Treaty of 1808 further provided:

"The several nations of Indians aforesaid, do again acknowledge themselves to be under the protection of the United States, and of no other sovereign; and the United States on their part do renew their covenant, to extend protection to them according to the intent and meaning of stipulations in former treaties.

20. Representatives of various bands of Ottawa Indians living in Ohio were signatories to all of the foregoing treaties. These included, but were not limited to, representatives of such bands living at Blanchard's fork of the great Auglaize river, at Oquanoxa's village on the Little Auglaize river, and at Roche de Boeuf and Wolf rapids.

21. Pursuant to subsequent treaties, all of said various 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.

22. None of such subsequent treaties expressly mentioned the fishing and hunting privileges hereinbefore set forth.

23 **Treaty of 1862.** On June 24, 1862 a treaty was signed between the United States and “the following-named chief and councilmen of the Ottawa Indians of the united bands of Blanchard's Fork and of Roche de Boeuf, now in Franklin County, Kansas”. This treaty was duly ratified by the United States Senate and recorded at 12 Stat. 1237.

24. Pursuant to this treaty, the aforementioned bands of Ottawas agreed to cede some of their lands in Kansas. While some members of these bands became U.S. citizens, others elected to retain their tribal status.

25. **Treaty of 1867.** On February 23, 1867 a further treaty was signed between the United States and the “united bands of Blanchard's Fork and Roche de Boef”. This treaty was duly ratified by the United States Senate and recorded at 15 Stats. 513.

26. Pursuant to this treaty, those Ottawas who retained tribal status were granted lands in Indian Territory, subsequently part of the State of Oklahoma, and migrated there. Their tribal relationship with the United States continued. *Wiggan v. Conolly*, 163 U.S. 56 (1896)

27. Plaintiff Ottawa Tribe of Oklahoma includes descendants of the Ottawas who were removed from Ohio to Kansas, and who thereafter migrated from Kansas to Oklahoma.

28. Plaintiff is the successor in interest to the Ottawas whose representatives signed the aforementioned Treaty of Fort Industry, and the Treaty of 1807 and the Treaty of 1808, and is entitled to exercise the fishing and hunting privileges granted therein.

29. Such privileges remain in full force and effect and the rights of Plaintiff to enjoy same are binding upon the Defendant, notwithstanding the removal of the aforementioned Ottawa bands from Ohio to Kansas as aforesaid. See, *Minnesota v. Mille Lacs Band of Chippewa Indians, et al*, (1999), 526 U.S. 172, 143 L.Ed.2d 270, 119 S.Ct. 1187.

30. Plaintiff may exercise such treaty fishing and hunting privileges in all areas of Ohio encompassed by the aforementioned Treaty of Fort Industry, the Treaty of 1807 and the Treaty of 1808.

31. In exercising its said privileges, Plaintiff may do so 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) non-discriminatory. *United States et al. v. State of Michigan Natural Resources Commission et al.*, 653 F.2d 277 (6th Cir. 1981).

Facts Regarding the Controversy Between the Parties

32. Earlier this year, Plaintiff informed Defendant of its intention to exercise its fishing and hunting privileges and requested Defendant's recognition thereof.

33. However, after presenting applicable historical and legal authority in two meetings with Defendant, Plaintiff was unable to obtain such recognition.

34. After the second meeting on June 1, 2005, Defendant issued a press release to the effect that Plaintiff's predecessors had relinquished their hunting and fishing privileges in Ohio. (A copy of this press release is attached hereto as Exhibit A.)

35. On June 2, 2005, Plaintiff sent a letter to Defendant expressing its intention to exercise its fishing privileges in Lake Erie and offering to avoid recreational fishing areas. No response was received. (A copy of this letter is attached hereto as Exhibit B.)

36. Since such date Defendant has not changed its position and Plaintiff believes that Defendant will obstruct Plaintiff's exercise of its aforesaid treaty privileges.

Claim for Declaratory Judgment

37. Plaintiff incorporates by reference the allegations contained in the foregoing paragraphs 1-36.

38. An actual controversy exists regarding whether Plaintiff may exercise its hunting and fishing privileges in all areas of Ohio encompassed by the aforementioned Treaty of Fort Industry, the Treaty of 1807 and the Treaty of 1808.

39. Plaintiff claims the right to do so in a commercial manner, subject only to the restrictions as described in Section 31 hereof. Defendant denies that such privileges continue to exist.

40. Plaintiff fears that unless this Court declares the rights of the parties in connection with this controversy, it shall be unable to exercise such privileges without risk of criminal prosecution and/or civil liability.

41. By virtue of the foregoing, an actual and justiciable controversy exists, by reason of which Plaintiff is entitled to a declaratory judgment as demanded herein. Such judgment will both clarify and settle the legal relations in issue, and terminate and afford relief from the uncertainty, insecurity and controversy giving rise to this case. See, *Northern Ins. Co. of New York v. Olmstead*, 238 F. Supp. 2d 923 (N.D. Ohio 2003).

WHEREFORE, Plaintiff Ottawa Tribe of Oklahoma demands judgment as follows:

(1) that the Court declare the rights and other legal relations of the parties in connection with the controversy described herein;

(2) that the Court find that Plaintiff is entitled to exercise its hunting and fishing privileges in all areas of Ohio encompassed by the aforementioned Treaty of Fort Industry, the Treaty of 1807 and the Treaty of 1808;

(3) that the Court further find that such exercise is subject only to such restrictions as described in Section 31 herein;

(4) that the Court order such other and further relief as shall be deemed necessary and proper; and

(5) that Plaintiff be awarded its costs and reasonable attorneys' fees.

Respectfully submitted,

/s/ Richard D. Rogovin

Richard D. Rogovin (0022002)
William M. Harter (0072874)
FROST BROWN TODD LLC
10 West Broad Street, Suite 2300
Columbus, OH 43215
(614) 559-7234 (Phone)
(614) 464-1737 (Fax)
email: rrogovin@fbtlaw.com
email: wharter@fbtlaw.com
Attorneys for Plaintiff

/s/ William C. Caughey

William C. Caughey (0005567)
900 South Boundary
Perry Town Square
Suite 8A
Perrysburg, OH 43551
(419) 872-1688 (Phone)
(419) 872-1795 (Fax)
email: wcaughey@email.toast.net
Attorney for Plaintiff

/s/ Daniel T. Spitler

Daniel T. Spitler (0023291)
131 E. Court Street
Bowling Green, OH 43402
(419) 352-2535 (Phone)
(419) 353-8728 (Fax)
email: dspitler@shynlaw.com
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was filed electronically this 22nd day of September, 2005. 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. Parties who do not receive this filing via the Court's electronic filing system will receive a copy by regular U.S. mail.

/s/ William M. Harter

William M. Harter

Counsel for Plaintiff

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