UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

BRENDA TURUNEN,

Plaintiff,

v

KEITH CREAGH, DIRECTOR, MICHIGAN DEPARTMENT OF NATURAL RESOURCES and JAMIE CLOVER ADAMS, DIRECTOR, MICHIGAN DEPARTMENT OF AGRICULTURE,

Defendants.

No. 2:13-cv-00106

HON. GORDON J. QUIST

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STATE OF MICHIGAN'S BRIEF IN SUPPORT OF ITS MOTION TO DISMISS AMENDED COMPLAINT

(ORAL ARGUMENT REQUESTED)

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INTRODUCTION

Plaintiff Brenda Turunen accuses the Defendants – agency officials of Michigan charged with protecting farming and natural resources – of interfering with her alleged right to raise pigs, even though the Russian boar hybrid pigs in question have been identified as injurious invasive species based on the environmental and property damage such pigs can cause when they escape from their enclosures. State law prohibits the ownership or possession of such pigs. Nevertheless, Plaintiff asserts that she can ignore state law and own and raise these pigs because she is a member of an Indian tribe whose predecessors signed a treaty in 1842 with the United States that guaranteed the tribe the "usual privileges of occupancy" on land that the tribe had ceded to the United States in exchange for money and other consideration. Plaintiff asserts that raising any animals she wants on her farm – no matter how dangerous – is just such an occupancy privilege.

There are many problems with Plaintiff's Amended Complaint, both legal and factual, but perhaps the most significant is that all rights of occupancy that may have been reserved to the tribes signing the 1842 Treaty were extinguished 12 years later when those same tribes signed another treaty (1854 Treaty, 10 Stat. 1109) that abrogated any occupancy rights in the ceded territory in exchange for the tribes being granted full rights of occupancy on various reservations that were created either by the 1854 Treaty, or by later federal action. This extinguishment was recognized by the U.S. Court of Appeals for the Seventh Circuit which held that the "objective" of the 1854 Treaty was to:

> . . . extinguish the Indians' rights of occupancy in Wisconsin and the other states in which the Chippewas were living so that white settlers could farm and build permanent structures without interference from the Indians.

Sokaogon Chippewa Community v. Exxon Corp., 2 F.3d 219, 223 (7th Cir. 1993). Michigan is undeniably one of those "other states" where the Chippewas were living, and Plaintiff's Tribe was one of the tribes whose predecessor signed the 1854 Treaty. *Keweenaw Bay Indian Cmty. v. Naftaly*, 452 F.3d 514 (6th Cir. 2006). Plaintiff admits that her farm is built on land which was ceded to the United States and which is adjacent to, but not part of, the Tribe's reservation. Amended Complaint ¶¶ 1 and 3. Any treaty right of occupancy that may have burdened this land under the 1842 Treaty has thus been extinguished.

Furthermore, as shown below, various federal courts have previously considered the historical record associated with the relevant treaties and have concluded that the Lake Superior Chippewas who were parties to the treaties were hunters, fishers and gatherers – but not farmers. Thus, based on well-established interpretations of the phrase "usual privileges of occupancy," Plaintiff's claim that the treaty tribes would have understood the treaty to protect a privilege to raise commercial farm animals is simply implausible.

As Plaintiff's claims in this case depend entirely on this alleged privilege of occupancy, they cannot succeed because there is no treaty-protected right to raise animals of any kind, particularly for commercial purposes.

Defendants' motion to dismiss should be granted.

Statement of Facts

I. Plaintiff's Amended Complaint.

The following allegations from Plaintiff's Amended Complaint[1] are relevant to this motion to dismiss:

Plaintiff Brenda Turunen is a member of the Keweenaw Bay Indian Community (KBIC). She raises hybrid pigs that she developed through cross breeding techniques. The pigs, which look like certain species of Eurasian wild boar, are sold to hunting ranches where the pigs are "harvested by customers who pay a fee for a simulated hunting experience." Amended Complaint, ¶ 35. Plaintiff's farm is not on the KBIC reservation. The pigs are raised on land located in territory ceded to the United States (ceded territory) in the 1842 Treaty between the United States and the Lake Superior Chippewa Indians, 7 Stat. 591. Article 2 of the 1842 Treaty says, "The Indians stipulate for the right of hunting on the ceded territory, with the other usual privileges of occupancy . . . ." According to Plaintiff, the Indians who signed the Treaty would have believed that Article 2 included a right to engage in animal husbandry such as that now conducted by Plaintiff in the ceded territory. Amended Complaint ¶¶ 13 and 14.

In 2010, the DNR issued Invasive Species Order No. 1 of 2010 pursuant to state law. This Order placed Russian boar and other similar pigs on a list of prohibited invasive species. Defendants have sought to impose the Invasive Species

[1] Defendants do not now admit the ultimate truth of any of the allegations in the Amended Complaint, but accept those allegations only as required by the appropriate standard for consideration of motions to dismiss.

Order on Plaintiff's pig farming operations, thereby prohibiting Plaintiff from raising the hybrid pigs. Amended Complaint ¶52.

Plaintiff seeks a declaratory ruling that her pig farming operations are among the other usual privileges of occupancy reserved to the Lake Superior Chippewa in the 1842 Treaty, and that Defendants have no authority to impose Michigan laws or regulations on Plaintiff's pig farming activities. Plaintiff also seeks a permanent injunction prohibiting Defendants from interfering with her pig farming activities.

II. The Historical Record.

Plaintiff's action depends entirely on privileges that she claims from a treaty entered into by the United States and the Lake Superior Chippewa Indians over 160 years ago. In support of the allegations made in this action, Plaintiff's Amended Complaint repeatedly refers to "the historical record" concerning the Lake Superior Chippewa and various treaties. Consultation of this record is necessary to discern what was intended by the phrase "other usual privileges of occupancy" in the 1842 Treaty. While such a record is by definition hearsay, it has been considered by numerous federal courts in the context of treaty claims made by KBIC and by other Lake Superior Chippewa Tribes. Many of these courts conducted extensive fact-finding concerning the Lake Superior Chippewa way of life at the time the treaties were signed, and the treaties themselves, effectively creating a common law historical record. Below are excerpts of relevant portions of just such a fact finding by the District Court judge in *Lac Courte Oreilles Band of Lake*

Superior Chippewa Indians v. Wisconsin, 653 F. Supp. 1420 (W.D. Wis. 1987), a case involving the Lake Superior Chippewa and the same treaty at issue in the case at hand:

> Pursuant to Fed. R. Civ. P. 52(a), I find as fact those matters set forth in the following section of this opinion, under the heading "FACTS."
>
> **FACTS**
>
> **The Chippewa**
>
> The plaintiff bands are recognized by the Secretary of the Interior, each with a government organized pursuant to the provisions of the Indian Reorganization Act, 25 U.S.C. §§ 461 *et seq*. The bands bring this action on behalf of themselves and their members. The bands are political successors in interest to the bands of Lake Superior Chippewa who were parties to the treaties of 1837 and 1842.
>
> The Chippewa are part of a group of the central Algonquian Indians. The central Algonquian include the Chippewa, Potowatomi, Ottawa, Algonquian proper, Illinois and Miami tribes.
>
> The Chippewa in the ceded territory were hunters and gatherers. Their hunting activities included fishing and fowling in addition to traditional notions of hunting. The Chippewa harvested virtually everything on the landscape. They had some use or uses for all the flora and fauna in their environment, whether for food, clothing, shelter, religious, commercial, or other purposes. The Chippewa relied on hunting and gathering for their subsistence. [footnote omitted] They harvested resources for their own immediate, personal use and for use as trade goods in commerce. The Chippewa traded goods for items which contributed to their subsistence. Neither in harvesting resources for commercial purposes nor in harvesting resources for their own use did the Chippewa strive for more than a moderate, satisfactory living. They were indifferent to acquiring wealth beyond their immediate needs.
>
> The Lake Superior Chippewa developed two different types of adaptations to the natural resources around them: the lakeshore and the interior. The lakeshore adaptation was centered around fishing, particularly whitefish and lake trout fishing, but the lakeshore bands also relied on hunting moose, deer, bear, and other animals. Like the interior bands, they collected sap from sugar maple trees for syrup.

They maintained small gardens along the lakeshore.

The interior adaptation was centered around small summer villages on the shores of inland lakes. During the summer months, the interior bands maintained small gardens, hunted, and gathered. In late summer and early fall they harvested wild rice for a winter food source. The interior bands scattered during the winter months to hunt; in the spring they congregated again at the sugaring places.

The Chippewa were divided into independent bands. Each band had its own chief and each occupied a fairly distinct territory. The territories were based on use by a family or a group of families or by the natural resources of the territory. The roving habits of the Chippewa as a whole and the Chippewa's territoriality tended to disperse the Indian population in the ceded territory while avoiding the exhaustion of natural resources. This dispersal diminished, however, as the Chippewa became increasingly involved in trade.

* * * *

Although the non-Indians [footnote omitted] attempted to persuade the Chippewa to adopt agriculture as a way of life, the attempt was unsuccessful. The Chippewa never became farmers or adopted the sedentary life-style urged upon them.

* * * *

The Treaties

In 1837 and 1842, the United States entered into treaties with the Lake Superior Chippewa for cessions of land. [footnote omitted] Although the Chippewa ceded certain lands to the United States, they reserved to themselves the right to exercise their hunting and fishing activities in the ceded territory. Article 5 of the Treaty of 1837 provides: The privilege of hunting, fishing, and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded, is guaranteed to the Indians, during the pleasure of the President of the United States. Article II of the Treaty of 1842 provides: The Indians stipulate for the right of hunting on the ceded territory, with the other usual privileges of occupancy, until required to remove by the President of the United States, and that the laws of the United States shall be continued in force, in respect to their trade and intercourse with the whites, until otherwise ordered by Congress.

* * * *

In 1854 the United States again treated with the Chippewa in northern Wisconsin. [footnote omitted] The Treaty of 1854 granted reservations to the Chippewa on portions of the land they had ceded to the United States in 1837 and 1842.

* * * *

When they agreed to the treaties of 1837 and 1842, the Chippewa's understanding was as follows: They were guaranteed the right to make a moderate living off the land and from the waters in and abutting the ceded territory and throughout that territory by engaging in hunting, fishing, and gathering as they had in the past and by consuming the fruits of that hunting, fishing, and gathering, or by trading the fruits of that activity for goods they could use and consume in realizing that moderate living.

* * * *

Commercial Activity

The Lake Superior Chippewa were engaged in the fur trade long before non-Indians came to Wisconsin to trade. From 1634 through the treaty period, when the Chippewa hunted on the lands ceded by the 1837 and 1842 treaties, they did so to meet their immediate personal needs and for the fur trade, both of which were factors in their subsistence.

Throughout the nineteenth century, the Chippewa were participants in an international market economy; they were the producers of commodities, primarily furs, and they controlled the resources that flowed into this economy. The exchange of commodities, furs in particular, was a way of life for both the Indians and non-Indians in the nineteenth century.

In 1825 non-Indians established a trading post on Madeline Island in Lake Superior. Before that, the American Fur Co. had established a trading post at Mackinaw Island.

The traders established inland posts where they had a warehouse and a dwelling. The Indians outfitted themselves for their hunting expeditions at the posts. In general, the Indians were permitted to have their purchases charged to an account. The traders kept track of the Indians' purchases and furs brought in to trade in record books. The Indians who lived near the posts dealt directly with the traders.

> Those who lived further away from the posts dealt with middlemen called "coureurs du bois."
>
> In general, the Indians traded furs and food products to the traders. In return, they received a wide variety of goods: cloth, trinkets, blankets, shawls, kettles and other cooking utensils, gillnet twine, beads, jewelry, sewing utensils, guns and other weapons, combs, lead for making bullets, fire steels, and metal tools. The Indians traded most often for articles that were improvements on things they already had, or that offered more efficient ways of hunting and gathering and otherwise met their needs.
>
> * * * *
>
> By 1854 the Chippewa were organized into semi-autonomous trading bands. By the 1890's, the Chippewa lived by combining traditional hunting and gathering, agriculture, wage labor, and the sale of wood and other products. By 1900 the non-Indian cash-oriented economy was among the several sources of survival to which the Chippewa had adapted and from which they skimmed.

Lac Courte Oreilles Band at 1424-1429.

III. Background information.

While not strictly necessary for the legal analysis required for Defendants' motion, the following information regarding feral swine is included to provide context to this litigation.

Feral swine, or free-ranging pigs, are a national epidemic. Experts estimate at least five million feral swine are located in at least 35 states. (U.S. Department of Agriculture, Animal and Plant Health Inspection Service, "Feral Swine: Damage and Disease Threats," August 2011 (USDA-APHIS brochure found at http://www.aphis.usda.gov/publications/wildlife_damage/content/printable_version/feral_swine.pdf last viewed on April 29, 2013)). Conservative estimates place damage to agricultural crops and the environment created by feral swine

nationwide at $1.5 billion. (*Id.*) Feral swine pose two primary threats: (1) damage to agricultural and environmental resources and (2) disease. (*Id.*) Feral swine routinely engage in two behaviors that cause extensive damage to agricultural lands, forests and water resources – rooting and wallowing. These behaviors destroy the habitat of native plants and animals. (*Id.*) Feral swine have been known to carry diseases that are a risk to wildlife, livestock, pets, and even humans, including pseudorabies, brucellosis, trichinellosis, porcine reproductive and respiratory syndrome, and swine influenza. (*Id.*)

Feral swine in Michigan are a relatively recent problem. Thirty years ago, there were no feral swine sightings reported in the state. As of 2008, feral swine were reported in at least 61 Michigan counties. (http://www.aphis.usda.gov/wildlife_damage/nwrc/publications/08pubs/campbell084.pdf last viewed on April 29, 2013.)

In response to the increasing number of feral swine, the Michigan Department of Natural Resources took steps to address the problems the swine were creating:

> On December 9, 2010, the director of the Department of Natural Resources and Environment (DNRE) issued Invasive Species Order Amendment No. 1 of 2010 ("the ISO amendment"). Pursuant to the ISO amendment, "wild boar, wild hog, wild swine, feral pig, feral hog, feral swine, Old world swine, razorback, [E]urasian wild boar and Russian wild boar (*Sua scrofa Linnaeus*)" were added to the list of species prohibited under the invasive species act, MCL 324.41301 *et. seq*. Under the invasive species act, parties in unlawful possession of prohibited species are subject to civil and criminal penalties. MCL 324.41309. The ISO amendment provided that the additions to the list of prohibited species would become effective on July 8, 2011, and directed that defendant consult with the Michigan Department of

> Agriculture on "the development of a phased compliance protocol" for the implementation of the ISO amendment. It was decided that enforcement of the ISO amendment will be deferred until March 31, 2012, to allow "owners of shooting and breeding facilities," such as plaintiffs, an opportunity "to cease possession of all such swine before determinations of noncompliance will be rendered."

Michigan Animal Farmers Ass'n v. Department of Natural Res. and Env't, unpublished opinion *per curiam* of the Court of Appeals, issued March 1, 2012, (Docket No. 305302) (Attached as Exhibit A). In that case, the Michigan Animal Farmers Association, which is a non-profit corporation whose members own and operate farms that raise or keep various breeds of swine, including Old World Swine, Razorback, Eurasian Boar, and Russian Boar, challenged the Invasive Species Order on various grounds. The Michigan Court rejected the challenge and upheld the Invasive Species Order. As part of its ruling, the Court held that the DNR was obligated under the mandatory listing provision of Part 413, MCL 324.41302(3), to add Russian boar to the list of invasive species. *Id*. at 5-7. Roger Turunen, Brenda Turunen's husband, admitted in a sworn affidavit in the Michigan Animal Farmers case that he owns hundreds of Russian boar. (Turunen aff, ¶ 5, attached as Exhibit B.)

It is apparent that in this federal action, Brenda Turunen asserts possession of the same animals her husband, Roger Turunen, has claimed ownership of in litigation in a separate case he brought in a Michigan court. (Roger Turunen Complaint, attached as Exhibit C.) The actions Brenda Turunen here alleges that the Michigan Department of Natural Resources (DNR) and the Michigan Department of Agriculture and Rural Development (DARD) have taken with respect

to her farming operations and animals, appear to be the actions that DNR and DARD took as alleged in the Michigan court litigation by Plaintiff's husband, Roger Turunen. For reasons not explained in that lawsuit, Brenda Turunen is never mentioned as owning any Hogan Hogs, even though the allegations in that lawsuit bear striking similarity to those made here by Ms. Turunen. Also, Roger Turunen is not identified as being a tribal member in either lawsuit.

ARGUMENT

I. Legal standard for motions to dismiss.

As this motion is brought under Fed. R. Civ. P. 12(b)(6), dismissal is required when the complaint "fails to state a claim upon which relief can be granted." Although this Court must "accept as true any well-pleaded factual allegations in the plaintiff's Complaint," it "need not accept any legal conclusions or unwarranted factual inferences." *Berrington v. Wal-Mart Stores, Inc.*, 696 F.3d 604, 607 (6th Cir. 2012).

This standard was fleshed out in *Lutz v. Chesapeake Appalachia, L.L.C.*, WL 2321338, 2-3 (6th Cir. 2013) (Attached as Exhibit D) which held:

> "Despite [the] liberal pleading standard, we may no longer accept conclusory legal allegations that do not include specific facts necessary to establish the cause of action." [*Ohio Police & Fire Pension Fund v. Standard & Poor's Fin. Servs., LLC,* 700 F.3d 829, 835 (6th Cir. 2012).] (citation and internal quotation marks omitted). "Rather, the complaint has to 'plead [ ] factual content that allows the court to draw the reasonable inference that the defendant[s are] liable for the misconduct alleged.'" *Id.* (quoting *Ashcroft v. Iqbal,* 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009)). "If the [plaintiffs] do 'not nudge[ ] their claims across the line from conceivable to plausible, their

> complaint must be dismissed.'" *Id.* (quoting *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)).

Lutz and *Berrington* relied on the recent Supreme Court decision, *Ashcroft v. Iqbal,* 556 U.S. 662 (2009), which clarified the bar for survival of borderline claims, requiring judges to exercise their experience and judgment to determine whether an action states a "plausible" claim for relief:

> Second, only a Complaint that states a plausible claim for relief survives a motion to dismiss . . . . Determining whether a Complaint states a plausible claim for relief will, as the Court of Appeals observed, be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense . . . . But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the Complaint has alleged – but it has not "show[n]" – "that the pleader is entitled to relief." Fed. Rule Civ. Proc. 8(a)(2).

Ashcroft v. Iqbal at 556 U.S. 679. Here, Turunen is asking this Court to allow her and any other tribal member who asserts an ancestral connection to the 1842 Treaty, to breed and raise and even unintentionally release any creature that they desire throughout the entire western half of Michigan's Upper Peninsula – with no concern for the safety and other interests of the state or its citizens. This claim does not pass the plausibility test and should be rejected for that reason as well as the other grounds discussed in this brief.

II. Plaintiff's Amended Complaint fails to state a cause of action.

A. The Amended Complaint does not allege a plausible claim for relief as the animal farming activities Plaintiff admits she is conducting are not included in the usual privileges of occupancy addressed in the 1842 Treaty.

Plaintiff's entire case hinges on the notion that she enjoys a "right" to raise hybrid pigs commercially, and that this "right to engage in animal husbandry," Amended Complaint ¶ 13, comes to her through the 1842 Treaty which reserved to the Lake Superior Chippewa the right to hunt in the ceded territory, as well as the "other usual privileges of occupancy." *Id.* Commercial pig farming is obviously not protected by the right to hunt, so if it isn't a "usual privilege of occupancy," the 1842 Treaty is of no service to Plaintiff's case.

This phrase has previously been interpreted by this Court – albeit with regard to the Treaty of 1836, 7 Stat., 491, entered into by other Michigan Chippewa Tribes – to mean living in the manner the signatory Indians were accustomed to at the time the treaty was signed:

> Dr. Tanner testified that "the usual privileges of occupancy can be interpreted to mean living in the way that the Indian people have always been in the habit of living." (Tr. 264.)
>
> > I think that this particular type of a provision was of considerable importance to Indian people. It usually winds up a treaty and is given as kind of assurance to them that they can continue to live in the manner that they have been accustomed to, and have no fear that their life will be disrupted. (Tr. 265.)
>
> Further, Dr. Tanner testified that the term "usual privileges of occupancy" includes the use of all natural resources for economic and ceremonial purposes and for travel. (Tr. 265.) It includes hunting, fishing, gathering berries, collecting grains, gathering rush for mats and the like. (Tr. 266.) Dr. Clifton's testimony corroborates Dr. Tanner's on the meaning of the term "usual privileges of occupancy."

> The Indians could ". . . make use of natural resources as they were accustomed to doing or had been doing." (Tr. 2278.)
>
> Article Thirteenth[2] was extremely important to the Indians for several reasons. (Tr. 274; See also Ex. P-44, 44A.) First, as previously stated, it was explained to the Indians to mean that their usual way of life would not change after the treaty was consummated: (Article Thirteenth) was to indicate and reassure Indian people that they could continue living the way they had been living. (Tr. 278.)

United States v. Michigan, 471 F. Supp. 192, 235 (W.D. Mich. 1979). There is no reason not to apply the same approach to interpreting the phrase "usual privileges of occupancy" in the 1842 Treaty. Thus, Plaintiff will have to show that in 1842 the "usual way of life" for her ancestors included raising pigs for commercial purposes.

There can be little doubt, however, that the Lake Superior Chippewa that signed the 1842 Treaty would *never* have equated the phrase "usual privileges of occupancy" with a right to commercially raise pigs of any sort, let alone the now asserted right to farm hybrid "Hogan Hogs" that Plaintiff alleges she created and trademarked.[3] Even if Plaintiff's ancestors may have kept a garden, or even some livestock in a pen for subsistence purposes – and there are no facts alleged in the Amended Complaint to support even this notion of raising animals for subsistence – this would be a far cry from the sort of activity that Plaintiff now wishes to engage in free from State regulation.

Commercial farming of animals by Tribes in the ceded territory just did not occur before 1842 in any significant way. Even the scant support for this notion

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[2] Article 13 of the 1836 Treaty included the "usual privileges of occupancy" provision.

[3] The Court can reasonably presume from this allegation that such hogs never existed in the ceded territory prior to Plaintiff's tinkerings with the species.

cited in the Amended Complaint suggests entirely otherwise. While Plaintiff cites to two treaties that she alleges demonstrate that "the United States regularly provided pigs and other domestic animals to Indian people generally and to the Lake Superior Chippewa Indians specifically," Amended Complaint ¶ 22, this allegation does not show either that the Lake Superior Chippewa *raised* farm animals (as opposed to simply eating the animals given pursuant to the Treaty), nor, since the treaties cited involved Indians in Florida and Missouri, even that *the Lake Superior Chippewa* received farm animals from the government for *any* purpose.

Moreover, the Treaty with the Kansas Nation, as well as the 1854 Treaty, make it clear that along with the farm goods delivered by the government to the Tribes, there was also a promise to provide outside farmers "to aid and instruct [the Indians] in their agriculture" (Treaty of Kansas 1825, 7 Stat. 244, article 4) or "to instruct them in farming" (1854 Treaty, article 12).[4] If the Lake Superior Chippewa Tribes had been conducting regular farming operations as part of their customary activities, there would have been no need to send farmers to the Tribes to teach them how to farm.

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[4] Although the 1842 Treaty did not have similar language regarding farming instruction, it did provide funds to pay for two farmers, presumably for such educational assistance. Article 4. See also, *Keweenaw Bay Indian Cmty. v. Naftaly*, 452 F.3d 514, 517 (6th Cir. 2006) ("The events at Keweenaw Bay following the signing of the 1842 Treaty were significant. In accord with the treaty, farmers and blacksmiths were provided to the L'Anse band . . .")

In fact, farming goods and assistance were promised to the tribes, not because the Lake Superior Chippewa were necessarily interested in obtaining them, but rather because the federal government wanted the Indians to take up farming. "The hope was that the Chippewas would 'settle down' and live like white men, farming the reservations." *Sokaogon Chippewa Community v. Exxon Corp.*, 2 F.3d 219, 224 (7th Cir. 1993). This hope, however, did not bear fruit: "Although the non-Indians attempted to persuade the Chippewa to adopt agriculture as a way of life, the attempt was unsuccessful. The Chippewa never became farmers or adopted the sedentary life-style urged upon them." *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin*, 653 F. Supp. 1420, 1425 (W.D. Wis. 1987).

The historical record developed by federal courts in numerous prior treaty cases paints an entirely different picture than what is suggested, but not supported by citation to the historical record, in the Amended Complaint. At the time of the 1842 Treaty, the Lake Superior Chippewa, including Plaintiff's ancestors, relied on hunting, fishing and gathering to sustain their lives: "The Indians subsisted before the coming of European society, consistent with their traditional lifestyle, which included annual rounds of hunting and trapping in the Winter and fishing in the Spring, Summer and Fall." *Keweenaw Bay Indian Cmty. v. Naftaly*, 452 F.3d 514, 516 (6th Cir. 2006); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, 700 F.2d 341, 364 (7th Cir. 1983) ("Turning first to the Indian understanding of the treaty, the [Lac Courte Oreilles Band] was heavily dependent on the exercise of their usufructuary activities throughout the ceded region at the time of the treaty

negotiations. Even if some Indians contemplated turning to agriculture as a principal means of subsistence, there is no indication such a transition had been implemented to any extent at the time of the treaty.")

This Lake Superior Chippewa way of life was carefully considered by the trial court in the *Lac Courte Oreilles Band* case. As set forth in the Statement of Facts, Judge Doyle made comprehensive findings based on the evidence presented in that case. Nowhere is there any suggestion in these facts that animal husbandry played any role in tribal life when the 1842 Treaty was signed. The Lake Superior Chippewa were hunters, fishers and gatherers, and any commercial activity they engaged in involved the fruits of their hunting, fishing and gathering activities.

While it is absolutely clear from the historical record that animal husbandry of any kind was not part of the Lake Superior Chippewa way of life in 1842, it is even clearer that *commercial* animal farming was completely foreign to these tribes. This is a relevant distinction. Even if there was some evidence that the Lake Superior Chippewa owned farm animals for subsistence purposes, this would not support an interpretation of the 1842 Treaty that would insulate Plaintiff's large-scale commercial farming activities from regulation by the State. In *U.S. v. Michigan*, the Court rejected the State's argument that the commercial fishing activities of contemporary tribes had no genesis in the 1836 Treaty, not because the distinction between commercial and subsistence fishing was irrelevant, but rather because the tribes in that case presented compelling evidence that commercial fishing was in fact a part of their way of life when the treaty was signed. *United*

States v. Michigan, 471 F. Supp. 192, 238-257 (W.D. Mich. 1979) *aff'd*, 653 F.2d 277 (6th Cir. 1981). It is a fair inference from that opinion that if the tribes had failed to present such evidence, the Court would likely have found that even if *subsistence* fishing was a treaty-protected right, the tribal members' contemporary *commercial* fishing activities would not have been so protected.

Thus, Plaintiff's claim here that she can raise Hogan Hogs by the hundreds no matter what impact her activities may have on State natural resources cannot be sustained. Plaintiff's vague allegation in her Amended Complaint that the Indians who signed the Treaty would have believed that Article 2 included a right to engage in animal husbandry is an "unwarranted inference," *Berrington*, *supra*, given the contrary conclusions drawn from the historical record by other courts. Likewise, in light of the well-documented legal fact that the Lake Superior Chippewa were hunters, fishers and gatherers in 1842, Plaintiff's claim that her commercial animal farming activities are protected by the 1842 Treaty just isn't plausible and should be dismissed.

B. The Amended Complaint does not allege a viable action as any privileges of occupancy granted by the 1842 Treaty were extinguished by the 1854 Treaty.

Even if the Court is not persuaded at this time that there is no plausible argument that Plaintiff's operation of a commercial hog farm is a privilege of occupancy contemplated by the 1842 Treaty, this Amended Complaint must nevertheless be dismissed because *all occupancy rights granted in the 1842 Treaty were extinguished by the 1854 Treaty*.

The extinguishment of 1842 Treaty rights was thoroughly discussed and then affirmed as a matter of law by the Seventh Circuit in an opinion authored by Judge Posner 20 years ago. *Sokaogon Chippewa Community v. Exxon Corp*., 2 F.3d 219 (7th Cir.1993). In that case, the Sokaogon tribe, which like KBIC was one of the Lake Superior Chippewa Tribes, signed both the 1842 and the 1854 Treaties. While a reservation was created for the Tribe, apparently it was somewhat delayed and many of the tribal members continued to occupy land in the ceded territory but outside any tribal reservation. When it was discovered that this tract of land harbored potentially valuable mineral deposits, the Tribe sought an order from the court establishing its right to occupy the disputed tract of land. The trial court granted summary judgment against the Tribe and the Tribe appealed.

The Seventh Circuit engaged in a thoughtful discussion of the issues raised by the Tribe, including noting that usufructuary rights such as hunting and fishing were preserved in the ceded territory for all the signatory tribes, but that the rights of occupancy specifically sought by the Tribe had been extinguished by the later

treaty which granted the tribes permanent reservations. In that regard the court stated:

> We must however consider the possible bearing of the distinction emphasized in previous cases, in particular *Lac Courte Oreilles Band v. Voigt*, 700 F.2d 341, 362-65 (7th Cir. 1983), between usufructuary rights and rights of occupancy. The former are rights in particular uses of land, such as (with reference to typical Indian uses) picking berries, trapping beavers, fishing, and performing religious rights at ancestrial burial grounds. The latter are rights of permanent occupancy. The 1842 treaty, while ceding lands occupied by the Chippewa Indians to the United States, had reserved to them the right to hunt and "the other usual privileges of occupancy" until removed by order of the President. This oddly worded grant (for the right to hunt is not a privilege of occupancy, but of use) we interpreted in *Voigt* to cover both usufructuary and occupancy rights, and we held that the treaty of 1854 had abrogated only the latter, and only for tribes covered by that treaty. The idea behind the treaty, we explained, was that the Indian tribes that were party to it would be given reservations as their place of permanent occupation but that they could continue to use the land outside the reservations for hunting and so forth until the time came when their using it would impede occupation by white settlers.
>
> The 1854 treaty does not distinguish explicitly between usufructuary and occupancy rights. It does not, moreover, appear to cede any land in Wisconsin – that land had been ceded by the 1842 treaty, in which the reservation of "other privileges of occupancy" had appeared. The interpretation of the 1854 treaty in *Voigt* as extinguishing occupancy rights was an inference from the fact that the treaty established Indian reservations and from the purpose reasonably to be ascribed to the treaty. The reservations created a place for the Chippewas to enjoy occupancy rights because they would no longer have such rights off the reservations. The hope was that the Chippewas would "settle down" and live like white men, farming the reservations.
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> * * * *
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> All this considered, we think the grant of summary judgment was proper. The defendants presented an interpretation of the treaty that was sensible, consistent with and indeed implied by its language, and consistent with all reasonably substantiated facts concerning the circumstances in which the treaty had been negotiated and signed. *The treaty's purpose*, as could be gathered from its words and logic and

> structure and the background circumstances, and for that matter the subsequent history up to the creation of the Sokaogon's own reservation in the 1930s, *was to extinguish the Chippewa Indians' occupancy rights throughout the ceded (including previously ceded) areas in exchange for annual payments and for occupancy rights in reservations that would be established by the federal government.*
>
> * * * *
>
> No doubt . . . the tribes that were parties to the 1854 treaty did not actually relinquish their right of occupancy until the reservations promised in the treaty were actually created; otherwise there would have been an interval in which they had no right of occupancy anywhere. *But once the reservations in which the Sokaogon had rights of occupancy were created, their rights of occupancy under the 1842 treaty, as distinct from their usufructuary rights under it, ceased.*

Sokaogon Chippewa Community at 223-225 (emphasis added).

There is no reason to deviate here from the ruling of the Seventh Circuit. The issue before this Court is identical to the one decided in that case – whether the occupancy rights of the Lake Superior Chippewa were extinguished by the 1854 Treaty. Obviously, if they have been extinguished, Plaintiff's case here must be dismissed.

Plaintiff attempts to cure this flaw in her original complaint by asserting in her Amended Complaint that the signatories to the 1842 Treaty would have considered "farming a usufructuary right . . . similar to hunting, fishing and gathering." The implication is that if farming is a usufructuary right, it would not have been extinguished by the 1854 Treaty. However, merely asserting that the Indians in 1842 "considered farming a usufructuary right" without alleging specific facts to support that assertion does not pass the pleading standard established by the Sixth Circuit in *Lutz*: ". . . we may no longer accept conclusory legal allegations

that do not include specific facts necessary to establish the cause of action." *Lutz*, *supra.* Plaintiff added a bibliography that she claims supports her invocation of the historical record, but merely listing names of articles and authors does nothing to satisfy the specificity required in pleadings.

There are other problems with the Amended Complaint. Even Plaintiff's allegation that farming is "similar" to hunting, fishing and gathering just does not ring true. Usufructuary rights like hunting, fishing and gathering imply only a temporary presence and minimal physical occupation of the land. *Sokaogon Chippewa Community v. Exxon Corp.*, 805 F. Supp. 680, 701 (E.D. Wis. 1992). Commercial farming on the other hand, requires more than just the ephemeral *use* of someone else's land. To raise livestock commercially, a farmer must provide a place for those animals to live and grow, which requires protecting them from the elements and keeping them from seeking greener pastures. Raising farm animals requires permanent structures such as fencing and barns.

Plaintiff's own operations prove this point. Plaintiff recognizes the importance of fencing in her operations due to the threat posed by feral swine, Amended Complaint ¶¶ 37 and 38, and admits that she has invested millions of dollars in her farming operation to accommodate her unique breed of pig, Amended Complaint ¶ 44.

But even if Plaintiff's farming operations were not on the order of a multi-million dollar operation, animal husbandry necessarily requires more than just the passing *use* of the land, or the *use* of the products of the soil and the wildlife.

Animal farming requires permanent occupancy. Judge Posner recognized this in his decision noting that the "objective" of the 1854 Treaty was to: ". . . extinguish the Indians' rights of occupancy in Wisconsin and the other states in which the Chippewas were living so that white settlers could farm and build permanent structures without interference from the Indians." *Sokaogon Chippewa Community*, at 223. If the Tribes were allowed to farm anywhere they wanted in the ceded territory, it would have made it difficult for the white settlers to conduct their own farming operations, which was the purpose of the 1854 Treaty. Any farming by the Tribes was to be limited to the reservations: "The hope was that the Chippewas would 'settle down' and live like white men, farming the reservations." *Id.* at 224.

Merely alleging in her Amended Complaint that her ancestors in 1842 considered farming to be a usufructuary right is not a plausible allegation in the face of the record created by numerous courts which have heard hours of testimony from various ethnohistorians addressing the question of how the Lake Superior Chippewas lived in 1842. There is no good reason to try these matters yet another time. This case should be dismissed for failing to state a claim.

CONCLUSION AND RELIEF REQUESTED

For these reasons, the State respectfully requests that its motion to dismiss be granted in its entirety.

Respectfully submitted,

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Dated: June 6, 2013