UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF MICHIGAN

BRENDA TURUNEN,
Plaintiff,

v.

File No. 2:13-CV-00106
Hon. Gordon J. Quist

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

PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

ORAL ARGUMENT REQUESTED

I. INTRODUCTION

Defendants have filed a motion to dismiss pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure (Fed.R.Civ.P.), asserting that the complaint in this matter must be dismissed as to all defendants for failure to allege a proper jurisdictional ground and as it lies against the Michigan Department of Natural Resources (MDNR) and the Michigan Department of Agriculture and Rural Development (MDARD) based upon those state departments' Eleventh Amendment immunity. Defendants also seek dismissal of the complaint based upon Fed.R.Civ.P. 12(b)(6) for failure to state a claim on which relief can be granted.

Defendants' motion is confusing. Although no discovery has occurred, defendants rely upon a very narrow reading of findings

made in other cases, by other courts, in other circuits, as though those findings are dispositive of the instant litigation. In this respect defendants' motion seeks to introduce matters outside the pleadings and bears far more resemblance to a motion for summary judgment pursuant to Fed.R.Civ.P. 56 than a Rule 12(b) motion to dismiss. As discussed more fully below, plaintiff has filed an amended complaint pursuant to Fed.R.Civ.P. 15(a)(1)(B). Plaintiff's first amended complaint renders the jurisdictional deficiencies asserted in the motion to dismiss moot. Further, as to defendants' Rule 12(b)(6) assertions, application of the proper standard of review and a fair reading of plaintiff's first amended complaint compels the conclusion that defendants motion to dismiss be denied and that plaintiff be allowed to vindicate her federally protected treaty rights in this Court. Even if plaintiff is mistaken and accepting the allegations in the amended complaint still fails to raise a plausible claim for relief, the attached Affidavit of Ethnohistorian and Anthropologist Richard Allen Carlson, Jr. Demonstrates that the complaint can easily be amended and much greater factual detail provided that would certainly survive defendants' motion.

II. ARGUMENT

A. Jurisdiction.

Defendants assert that in plaintiff's original complaint she failed to allege a proper basis for this Court's jurisdiction.

Defendants are correct. Plaintiff's original complaint contained a clerical error, alleging jurisdiction based on 28 USC § 1362 rather than the general federal question jurisdiction statute 28 USC § 1331. The amended complaint now alleges at Paragraph 4:

> This case arises under the 1842 Treaty with the Chippewa, 7 Stat. 591, as well as the Indian commerce clause (Article I, Section 8, Clause 3) and the supremacy clause (Article VI, Clause 2) of the United State Constitution. This court has jurisdiction to consider Plaintiff's claims pursuant to 28 U.S.C. §1331.

28 USC § 1331 states:

> The district courts shall have original jurisdiction over all civil actions arising under the Constitution, laws, or treaties of the United States.

Plaintiff's complaint now alleges a proper basis to bring this matter within the federal question jurisdiction of this Court. Accordingly, defendants' ground for dismissal rooted in the inapplicability of 28 USC § 1362 is rendered moot by the amended complaint.

Plaintiff's original complaint named the Michigan Department of Natural Resources (MDNR) and the Michigan Department of Agriculture and Rural Development (MDARD) as defendants along with the individual directors of those Michigan departments. Plaintiff hoped that these defendant departments might waive their Eleventh Amendment immunity and move forward to address the merits of this case without resort to the legal fiction created by Ex Parte Young, 209 U.S. 123, 52 L. Ed. 714, 28 S. Ct. 441 (1908). That hope has been dashed making reliance the Ex Parte Young doctrine necessary.

In Ex Parte Young, *supra*, the Supreme Court held that federal court jurisdiction exists over a suit against a state officer in order to enjoin official actions that violate federal law, even if the State itself is immune from suit under the Eleventh Amendment. The Ex Parte Young doctrine recognizes that if a state official violates federal law, he is stripped of his official or representative character and may be personally liable for his conduct, under such circumstances the State cannot cloak the officer in its sovereign immunity. Young, *supra*, 209 U.S. at 159-160. Where a plaintiff seeks prospective relief to end a state officer's ongoing violation of federal law, such a claim can ordinarily proceed in federal court. Idaho v. Coeur D'Alene Tribe, 521 U.S. 261, 269, 521 U.S. 261; 117 S. Ct. 2028; 138 L. Ed. 2d 438, Hamilton v. Myers, 281 F.3d 520, 528 (6th Cir. 2002), Arnette v. Myers, 281 F.3d 552, 567 (6th Cir. 2002), Milliken v. Bradley, 433 U.S. 267, 289-290, 53 L. Ed. 2d 745, 97 S. Ct. 2749 (1977).

Defendants' motion to dismiss makes it clear that MDNR and MDARD will not waive their Eleventh Amendment immunity. Plaintiff has therefore amended her complaint, seeking relief against the individual defendants named in the original complaint and dropping the state departments from the suit. A fair reading of the factual allegations and the prayers for relief in both the original and amended complaints show that plaintiff is only seeking prospective relief, bringing her cause of action within the purview of the Ex

Parte Young doctrine and rendering defendants' Eleventh Amendment objections moot.

Accordingly, because plaintiff's amended complaint moots both of the jurisdictional objections found in defendants' motion to dismiss, said motion must be denied to the extent it is based upon Fed.R.Civ.P. 12(b)(1).

B. Failure To State A Claim On Which Relief Can Be Granted.

1. Standard of review.

Defendants have attempted to introduce factual matters outside of the pleadings in support of their motion to dismiss. These matters consist of extensive, though highly selective, quotations from the Wisconsin case Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin, 653 F. Supp. 1420 (W.D. Wis. 1987),[1] as well as an admittedly unnecessary and completely bald series of factual assertions regarding "feral swine".[2] See, pp. 8-11, brief

[1]A fair reading of the Lac Courte Oreilles line of cases actually reveals ample historical support for plaintiff's claims. See, e.g., Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voight, 700 F.2d 341 (7th Cir. 1983): "Chippewa Indians in the region of Lake Superior are a peaceable, quiet and inoffensive people, rapidly improving in the arts and sciences; *and they acquire their living by hunting, fishing, manufacturing maple sugar, and agricultural pursuits*." *Id.*, at 348 (emphasis added).

[2]Plaintiff agrees with defendants that these assertions are irrelevant to the motion to dismiss. It should be noted however, that plaintiff's animals are highly domesticated, have never contracted any diseases, are no more likely to carry or cause disease than any other breed of pig. Further, plaintiff has never possessed "feral swine", has never either intentionally or unintentionally allowed her pigs to escape and become feral, has

in support of motion to dismiss. These efforts to depart from the pleadings in a motion to dismiss are inappropriate.

This Court has thoroughly discussed the proper standard of review to follow when considering a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(7) as well as the difference between that motion and a motion for summary judgment pursuant to Fed.R.Civ.P. 56:

> A motion to dismiss under Rule 12(b)(6) tests the sufficiency of the complaint. In evaluating a Rule 12(b)(6) motion to dismiss "all well-pleaded allegations in the complaint are treated as true." *Yuhasz v. Brush Wellman, Inc.*, 341 F.3d 559, 562 (6th Cir. 2003). When matters outside the pleadings are presented in support of a Rule 12(b)(6) motion, the Court may convert the motion to a motion for summary judgment under Rule 56. Fed. R. Civ. P. 12(b). If the court intends to consider materials outside the pleadings, the plaintiff must be provided with notice and a reasonable opportunity to respond in order to prevent the risk of prejudicial surprise. *Id*. See also *Helwig v. Vencor, Inc.*, 251 F.3d 540, 552 (6th Cir. 2001) ("Rule 12 authorizes such a conversion but mandates that parties be given an opportunity to submit materials to support or oppose summary judgment. We have underscored this requirement of 'unequivocal notice' on numerous occasions."); *Harrington v. Painter*, 92 Fed. Appx. 126, 2003 WL 23156645 (6th Cir. 2003) (reversing dismissal where court gave no notice of its intention to treat a Rule 12(b)(6) motion as Rule 56 motion); *Armengau v. Cline*, 7 F. Appx. 336, 343-44 (6th Cir.2001) (same).
>
> Defendants contend that the Supreme Court's recent opinion in *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007), set forth a new, more rigorous pleading standard,

---

fully supported efforts to eradicate feral swine, has been in full compliance with federal and state disease eradication programs and has been praised by a former Director of the Michigan Agriculture for her excellent farming operation. See, 1st Amended Complaint, ¶¶35-47. Fortunately this debate does not have to occur at this time since, unlike defendants' irrelevant and self-serving allegations about feral swine, plaintiff's allegations about her animals must be accepted as true for purposes of this motion to dismiss.

> requiring a complaint to allege facts showing that the plaintiff's entitlement to relief is plausible, rather than merely possible. *Id*. at 1964-65.
>
> Bell Atlantic focused on pleading requirements rather than evidentiary requirements: "Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." Id. at 1965. *Bell Atlantic* did not suggest that an inquiry into the truth of the factual allegations would be appropriate under Rule 12(b)(6). On the contrary, the Supreme Court specifically noted that "Rule 12(b)(6) does not countenance . . . dismissals based on a judge's disbelief of a complaint's factual allegations," and that "a well-pleaded complaint may proceed even if it appears 'that a recovery is very remote and unlikely.'" *Id*. (quoting *Neitzke v. Williams*, 490 U.S. 319, 327, 109 S. Ct. 1827, 104 L. Ed. 2d 338 (1989); *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974)).

Cont'l Identification Prods. V. Entermarket Corp., 2007 U.S. Dist. LEXIS 75069, File No. 1:07-CV-402, W.D. Mich. 2007.

Defendants in their motion to dismiss have engaged in precisely such an inappropriate inquiry into the truth of the factual allegations in the complaint. This is inappropriate as suggested buy this Court and, as discussed below, accepting the allegations in her amended complaint as true demonstrates that plaintiff has alleged sufficient facts to raise her right to relief far above mere speculation.[3]

2. The 1854 Treaty with the Lake Superior Chippewa Indians terminated the Indian signatories right to possess and occupy land in the ceded territory, but did not terminate the "other usual privileges of occupancy" reserved in Article 2.

[3]Further, as the attached Affidavit dramatically shows, plaintiff's claims are not only plausible, they are probable.

Article 2 of the 1842 Treaty at LaPointe between the United States of America and the Lake Superior Chippewa Indians, October 4, 1842, 7 Stat. 591 (the "1842 Treaty") states:

> 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 white, until otherwise ordered by Congress.

It is beyond dispute, and defendants do not dispute, that this Article operated to reserve to the Indian signatories certain usufructuary rights, that is rights of use, on the territory ceded. See, e.g., Lac Courte Oreilles Band v. Wisconsin *supra*. Further, it has been held that the usufructuary rights reserved by the Indian signatories in the 1842 Treaty were NOT extinguished by the September 30, 1854 Treaty with the Chippewa, 10 Stat. 1109 (the "1854 Treaty"). Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voight, 700 F.2d 341, 365 (7th Cir. 1983).

Defendants concede the continued existence of the usufructuary rights reserved by Article 2 of the 1842 Treaty. They acknowledge that these rights include hunting, fishing, trapping and gathering but they reject the notion that they also included farming. This rejection is illogical. The plain wording of the treaty refers to "the right of hunting on the ceded territory, with the other usual privileges of occupancy". Yet the Indian's understanding of that phrase has been repeatedly held to include fishing, trapping and gathering activities, as well as hunting. That understanding is

controlling because Indian Treaties must be interpreted as the Indian signatories understood them. Minnesota v. Mille Lacs Band of Chippewa Indians, 562 U.S. 172, 196 (1999). Further, Indian treaties must be liberally interpreted in favor of the Indians and any ambiguities in that Treaty must be resolved in their favor. *Id.*, 562 U.S. at 200. As noted by this Court in the case cited by defendants, the term "usual privileges of occupancy" would have indicated to the Indian people that they could "continue living in the way they had been living." U.S. v. Michigan, 471 F. Supp. 192, 235 (W.D. Mich. 1979). Accordingly it is axiomatic that if the Indians were engaged in farming activities at the time the 1842 Treaty was negotiated and signed and understood such activities to be among the unnamed "usual privileges of occupancy", like fishing, trapping and gathering, then farming would also be a treaty protected usufructuary right.[4]

Defendants claim that the 1854 Treaty extinguished all rights of occupancy reserved in the 1842 Treaty based on Sokaogon Chippewa Community v. Exxon Corp., 2 F.3d 219 (7th Cir. 1993). That assertion is disingenuous. Sokaogon involved a claim by the Sokaogon Chippewa Community that the 1842 Treaty gave them the right to "possess and

[4]Federal courts have recognized usufructuary rights far more exotic that mere farming. Based on the Indian signatories' understanding of the 1842 Treaty, the district court in Sokaogon Chippewa Community v. Exxon Corp., 805 F. Supp. 680 (E.D. Wis. 1992) held that the "usual privileges of occupancy" included mineral rights in the territory ceded. *Id.*, at 699.

occupy a 12 mile by 12 mile tract of land in Northern Wisconsin", land owned by the Exxon Corporation. Sokaogon Chippewa Community v. Exxon Corp., 805 F. Supp. 680, 685 (E.D. Wis. 1992). The Wisconsin District Court rejected the claim, noting that "it is apparent that there is a distinction between usufructuary privileges and the right to possess and occupy land under the 1854 Treaty. *Id.*, 805 F. Supp. at 700. The 7th Circuit Court of Appeals reinforced that distinction while affirming the lower court:

> 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.

Sokaogon Chippewa Community, *supra*, 2 F.3d at 223-224.

In the instant case the plaintiff does not claim the right to possess and occupy land owned by others. She claims the right to make use of her own land in the same fashion as the original 1842

Treaty signatories did, by farming and "other usual privileges of occupancy". While the 1854 Treaty extinguished any right the 1842 Treaty signatories had to "possess and occupy" land in the ceded territory which has been titled to others, it did not extinguish their usufructuary rights on public lands. Accordingly, as demonstrated below, because the Indian signatories understood those rights to include farming activities, the 1854 Treaty did not extinguish plaintiff's right to farm her own land in the ceded territory.

3. The term "hunting and the other usual privileges of occupancy" was understood by the Indian signatories to include farming.

As discussed above, for purposes of this motion to dismiss the allegations in the amended complaint must be accepted as true. Review of those allegations reveal that the "historical record" relied upon for the plaintiff's allegations are derived from at least 18 highly reliable historical sources. See, 1st Amended Complaint, ¶¶8(a)-(r). Those historical sources demonstrate that the original Indian signatories to the 1842 Treaty understood the phrase "the other usual privileges of occupancy" to include the right to commercially farm their lands within the Ceded Territory, including without limitation animal husbandry, and that such farming activities were a usufructuary right just like hunting, fishing, trapping and gathering. See, 1st Amended Complaint, ¶¶13-14. Based upon the historical sources referenced, the original

Indian signatories understood that the 1842 Treaty subjected them to the laws and regulations of the United States, not those of the State of Michigan. See, 1st Amended Complaint, ¶¶15-18. The Keweenaw Bay Indian Community is a successor in interest of two of the original Lake Superior Chippewa Bands that signed the 1842 Treaty. See, 1st Amended Complaint, ¶25. Plaintiff is a member of KBIC and has been farming her land in the ceded territory pursuant to the 1842 Treaty for the past 23 years and is licensed by KBIC to engage in such activity. See, 1st Amended Complaint, ¶¶28-30.

In and of themselves the foregoing allegations, accepted as true, state a plausible cause of action for plaintiff. See the discussion in Section 2.B.2 above. There is, however, much more support for the plausibility of plaintiff's claimed treaty right. Irrespective of the Indians understanding of the terms of a treaty:

> Treaties and Congressional acts involving Native Americans are meant to be construed to effect the purposes for which they were executed or enacted. "The underlying premise is that Congressional intent will control." *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 586, 51 L. Ed. 2d 660, 97 S. Ct. 1361 (1976), citing *DeCoteau v. District County Court*, 420 U.S. 425, 444, 95 S. Ct. 1082, 43 L. Ed. 2d 300 (1975). A court may look to the words of the treaties and the surrounding circumstances in determining the government's intent. *Mattz v. Arnett*, 412 U.S. 481, 505, 37 L. Ed. 2d 92, 93 S. Ct. 2245 (1973). If ambiguities exist in the wording of the treaties, they are to be resolved in the Native Americans' favor, but this "general rule does not command a determination that reservation status survives in the face of congressionally manifested intent to the contrary." *Rosebud Sioux Tribe*, 430 U.S. at 587.

Sokaogon Chippewa Community, *supra*, 805 F. Supp. At 693. In the instant case, "the words of the treaties and the surrounding

circumstances" compel the conclusion that the phrase "the other usual privileges of occupancy" were understood and intended by the United States itself to include commercial farming and animal husbandry activities.

Article 2 of the 1842 Treaty, the very Article in which usufructuary rights are reserved, states: "that the laws of the United States shall be continued in force, in respect to their trade and inter course with the whites". 7 Stat. 591. This is an explicit reference to the so-called "Trade and Intercourse Acts" which asserted exclusive federal authority over virtually all interactions between Indians and non-Indians, proof that the United States intended that federal law, not state law would control the Indian signatories' exercise of usufructuary activities on the ceded territory. The Trade and Intercourse Acts also provide the President with legal authority and funding to promote such commercial agricultural activities on the ceded territory. See, 1st Amended Complaint, ¶¶15-22. This is further proof of Congressional intent as well as ratification of the 1842 Treaty which in Article IV provides the Indian signatories with blacksmiths and farmers and creates an "agricultural fund". 7 Stat. 591. More support that promotion of commercial agricultural pursuits by the Chippewa signatories was one of the objects sought by the United States in the Treaty. See, 1st Amended Complaint, ¶¶19-21. The behavior of the United States subsequent to the treaty is relevant and it is clear

that the United States did in fact provide such agricultural assets to the Indian signatories. Keweenaw Bay Indian Community v. Michigan, 784 F. Supp. 418, 421 (W.D. Mich. 1991).

The defendants' efforts to impose their regulations on plaintiff's activities and otherwise interfere with her treaty efforts are set forth in ¶¶52-60 and 65. These efforts directly contravene not only the Indian signatories' understanding of Article 2 of the 1842 Treaty, they contravene the understanding and intent of the United States itself.

4. Even if accepting the factual allegations in plaintiff's amended complaint as true fails to convince this Court that a plausible claim for federal relief exists dismissal is not an appropriate remedy. Instead she should be allowed to amend her complaint again and plead facts with more detail.

Assuming *arguendo* that plaintiff's amended complaint does not plead facts with sufficient specificity to survive the Rule 12(b)(6) analysis described above, dismissal of the entire action is not an appropriate remedy. Rather, plaintiff should be given leave to further amend her complaint and plead facts in greater detail to support her claim. "It is a principle of basic fairness that a plaintiff should have an opportunity to flesh out her claim through evidence unturned in discovery." Williams v. Duke Energy Int'l, Inc., 681 F.3d 788, 803 (6th Cir. 2012). Leave to amend a complaint "shall be freely given when justice so requires," Fed. R.Civ.P. 15(a)(2). Leave to amend should not be denied unless there

is evidence of undue delay, bad faith, undue prejudice to the non-movant, or futility, Coe v. Bell, 161 F.3d 320, 341 (6th Cir. 1998)(citing Brooks v. Celeste, 39 F.3d 125, 130 (6th Cir. 1994).

Although leave to amend is not to be granted if such amendment would be futile, plaintiff's amendments would be far from that. Attached to this brief as EXHIBIT 1 is the Affidavit of Richard Allen Carlson, Jr., an Ethnohistorian and Anthropologist who has done extensive research on the question of both the Indian signatories' and the United States government's understanding of the meaning of Article 2 of the 1842 Treaty. As demonstrated in the Carlson affidavit, the phrase "the other usual privileges of occupancy" would have meant to all parties to the 1842 Treaty that commercial farming activities, including animal husbandry was one of the usufructuary rights reserved to the Indian signatories.

Even a cursory reading of the Carlson affidavit reveals that the defendants' understanding of the nature and of the Lake Superior Chippewa Indians' commercial activities is naive. The Carlson affidavit makes clear that for at least 1½ Centuries prior to the 1842 Treaty the Chippewa of Lake Superior had been actively engaged in international commerce. Their so-called "subsistence" activities were actually commercial activities as they traded furs, fish, corn, potatoes, hay, wood, maple sugar and animals for either money or other goods of value to them. Hence, virtually all of their activities at treaty-time were "commercial" activities.

The defendants' assertion that the Chippewa signatories to the 1842 treaty were not engaged in "large scale" farming activity has already been considered and rejected by this Court over three decades ago when considering the scope of treaty reserved usufructuary rights:

> The scope of the Indian right to fish at the present time is defined by the character of Indian fishing at the time of the treaty. Accordingly, the retained aboriginal right is not limited to any geographical area within the ceded area. Evidence has revealed that the Indians of 1836 fished extensively over the entire ceded area. They had the means to cover the entire ceded area and went where the fish were to be found. Therefore, the right cannot be limited in any artificial manner to imaginary and unrealistic boundaries within the area of cession. Choctaw Nation of Indians v. United States, 318 U.S. 423, 431-32, 63 S. Ct. 672, 87 L. Ed. 877 (1943).
>
> Similarly, the means used to fish were not restricted by the Treaty of 1836 nor by the Indians in any other agreement with the United States. The Indians' right to fish, like the aboriginal use of the fishery on which it is based, is not a static right. The reserved fishing right is not affected by the passage of time or changing conditions. The right is not limited as to species of fish, origin of fish, the purpose of use or the time or manner of taking. The right may be exercised utilizing improvements in fishing techniques, methods and gear. It may expand with the commercial market which it serves, and supply the species of fish which that market demands, whatever the origin of the fish.

U.S. v. Michigan, *supra*, 471 F. Supp. at 259-260.

The Carlson affidavit demonstrates in great detail that both the Indians and the federal government considered commercial farming activities to be one of the "other usual privileges of occupancy" reserved in Article 2 of the 1842 Treaty. This court has made clear that the scale of such activities at the time of the

Treaty is irrelevant. Thus, before granting defendants' motion to dismiss, plaintiff should be given an opportunity to amend her complaint and add further factual detail from the Carlson affidavit that would eliminate any doubts about the strength of plaintiff's claims. Such an amendment would not be futile and would further demonstrate that the instant action presents a plausible, indeed a probable, cause of action in this Court.

III. CONCLUSION

It is truly remarkable when historical Indian tribes and the federal government were in perfect lockstep regarding their understanding and intentions when entering into an Indian treaty. Hence, it is truly difficult to imagine a more plausible claim than that being asserted by the plaintiff herein. Accordingly, for all of the reasons stated above, this court should deny defendants' motion to dismiss and allow plaintiff her day in Court to vindicate her federally protected rights. If the Court is inclined to treat defendants' motion to dismiss as a motion for summary judgment, plaintiff asks that she be allowed to provide further, conclusive proof that her claims are fully supported by the facts of this case.

Date: May 30, 2013

s/ Joseph P. O'Leary
Joseph P. O'Leary (P43349)
O'LEARY LAW OFFICE
419 U.S. 41 North
Baraga, MI 49908
(906) 353-1144
ATTORNEY FOR PLAINTIFF