UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

BRENDA TURUNEN,

Plaintiff,

v.

Case No. 2:13-CV-106

HON. GORDON J. QUIST

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

Defendants.
_____/

OPINION AND ORDER DENYING MOTION TO DISMISS

On March 29, 2013, Plaintiff, Brenda Turunen, filed a complaint against Defendants, as well as the Michigan Department of Natural Resources and the Michigan Department of Agriculture. Plaintiff requested a declaratory judgment that her farming operation was protected by the 1842 Treaty between the United States and the Lake Superior Chippewa Indians, 7 Stat. 591, and that Michigan laws and regulations could not be imposed on the farm. Plaintiff also sought a permanent injunction to prevent Defendants from enforcing any Michigan law or regulation on her farming operation.

On May 2, 2013, Defendants moved to dismiss, arguing that Plaintiff had failed to properly assert jurisdiction, that the Eleventh Amendment barred suit against the state agency defendants, and that the complaint failed to state a claim. On May 23, 2013, Plaintiff filed an amended complaint, which removed the state agency defendants, amended the asserted grounds for jurisdiction, and added certain factual allegations. Defendants now move to dismiss Plaintiff's amended complaint for failure to state a claim. Fed. R. Civ. P. 12(b)(6).

For the following reasons, the Court will deny Defendants' motion.[1]

I. BACKGROUND

Plaintiff is a member of the Keweenaw Bay Indian Community (KBIC), a federally recognized Indian tribe in Michigan's Upper Peninsula. (1st Am. Compl. ¶ 5.) KBIC is a successor in interest of the L'Anse and Ontonagon bands of the Lake Superior Chippewa Indians. (*Id.* ¶ 25.) In 1842, the Lake Superior Chippewa Indians signed a treaty with the United States of America, 7 Stat. 591 (the 1842 Treaty). (*Id.* ¶ 9.) In the 1842 Treaty, the Indian signatories ceded large portions of the western Upper Peninsula of Michigan, but reserved "the right of hunting on the ceded territory, with the other usual privileges of occupancy." 7 Stat. 591.

Plaintiff lives and works on her family farm, which is located on property adjacent to the KBIC reservation but is within the territory ceded in the 1842 Treaty. (*Id.* ¶¶ 5, 29.) KBIC has licensed Plaintiff to engage in farming and animal husbandry. (*Id.* ¶ 32.) Plaintiff currently raises a unique breed of pig, the "Hogan Hog," on her property. (*Id.* ¶ 32.) Plaintiff sells her pigs locally, statewide, and nationally. (*Id.* ¶¶ 30, 35.)

In 2003, the Michigan Legislature adopted the Invasive Species Act (ISA), Mich. Comp. Laws §§ 324.41301 (2003). In 2010, the Michigan Department of Natural Resources issued an Invasive Species Order (ISO) that placed certain pigs on the ISA prohibited species list. (*Id.* ¶ 51.) Defendants have sought to impose the ISO on Plaintiff's pig farming operations, thus prohibiting Plaintiff from raising the "Hogan Hog." (*Id.* ¶¶ 52, 65.)

II. STANDARD GOVERNING MOTIONS TO DISMISS

A complaint must provide "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are not required, but "a

[1] Although both parties have requested oral argument, the parties have adequately briefed the issues and the Court concludes that oral argument is unnecessary. W.D. Mich. LCivR 7.3(d).

plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do . . . ." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). The Court must accept all of Plaintiff's well-pleaded factual allegations as true and construe them in a light most favorable to Plaintiff to determine whether the complaint establishes a valid basis for relief. *See Bower v. Fed. Express Corp.*, 96 F.3d 200, 203 (6th Cir. 1996). The complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Although the plausibility standard is not equivalent to a "'probability requirement,' . . . it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (quoting *Twombly*, 550 U.S. at 556). "[W]here 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." *Id.* at 679 (quoting Fed. R. Civ. P. 8(a)(2)).

III. Discussion

Plaintiff's claim for relief is centered on the premise that the 1842 Treaty reserved to the Indian signatories certain rights on the territory that was ceded and that her pig-raising operation is included within these reserved rights. Defendants' argument is two-fold. First, Defendants argue that the occupancy rights reserved in the 1842 Treaty did not include the right to raise pigs for commercial purposes. Second, Defendants argue, any occupancy rights that the Indian signatories reserved in the 1842 Treaty were extinguished by a treaty signed in 1854, 10 Stat. 1109 (the 1854 Treaty).

The 1842 Treaty reserved to the Indian signatories "the right of hunting on the ceded territory, with the other usual privileges of occupancy, until required to remove by President of the United States." 7 Stat. 591. When interpreting the rights reserved in such a treaty, a court must "give effect to the terms as the Indians themselves would have understood them." *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196, 119 S. Ct. 1187, 1200 (1999). In doing so, a court may examine the historical record to "provide[] insight into how the parties to the Treaty understood the terms of the agreement." *Id.* Such treaties must be "interpreted liberally in favor of the Indians," and "any ambiguities are to be resolved in their favor." *Id.* at 200, 119 S. Ct. at 1202 (internal citations omitted).

Defendants argue that the Indian signatories to the 1842 Treaty would never have considered commercial pig farming to be among "the usual privileges of occupancy" because the tribes in the ceded areas did not engage in commercial farming of animals when the Treaty was signed. Defendants point to the decisions of other courts that have interpreted the 1842 Treaty, and ask this Court to rely on their descriptions of activities undertaken by the Lake Superior Chippewa. These other courts did not, however, face the issue before this Court — specifically, whether the Lake Superior Chippewa engaged in farming or animal husbandry. *See Keweenaw Bay City Indian Cmty. v. Naftaly*, 452 F.3d 514, 516 (6th Cir. 2006) (determining whether property held by the KBIC tribe or its members was subject to state taxes); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, 700 F.2d 341, 364 (7th Cir. 1983) (determining whether Indian signatories to the 1854 Treaty retained hunting, fishing, trapping, and gathering rights). Although the descriptions of Indian life in these decisions may be instructive, they are not determinative of the instant case.

Moreover, the Court rejects Defendants' assertion that interpreting the Treaty does not involve a factual inquiry. To interpret the Treaty, the Court must examine the historical record to determine the intent of its signatories. *See Mille Lacs Band of Chippewa Indians*, 526 U.S. at 196,

119 S. Ct. at 1200. Other courts that have interpreted the treaties at issue have relied on testimony regarding the historical record. *See Keweenaw Bay Indian Cmty. v. Michigan*, 784 F. Supp. 418, 420 (W.D. Mich. 1991) (noting that the record was fully developed during an eight-day trial, which included testimony from expert historians); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin*, 653 F. Supp. 1420, 1424 (W.D. Wis. 1987) (noting that the court's findings of fact were based on evidence presented at trial). Plaintiff has sufficiently alleged that the historical record demonstrates that the Indian signatories to the 1842 Treaty understood the phrase "usual privileges of occupancy" to include commercial farming and animal husbandry. At this stage, Plaintiff must be permitted the opportunity to prove this allegation.

Defendants' next argument, that the 1854 Treaty extinguished any occupancy right that the Indian signatories had reserved in the 1842 Treaty, also fails. Both parties agree that the 1854 Treaty did not extinguish any usufructuary[2] rights reserved in the 1842 Treaty. This is consistent with a Seventh Circuit decision that thoroughly examined the issue. *See Sakaogon Chippewa Cmty. v. Exxon Corp.*, 2 F.3d 219, 223 (7th Cir. 1993) (finding that the 1842 Treaty reserved both usufructuary and occupancy rights, and that the 1854 Treaty abrogated only the latter). Plaintiff has alleged that, when the 1842 Treaty was signed, the Indian signatories to the Treaty considered farming a usufructuary right, similar to hunting, fishing, and gathering. Again, at this stage, Plaintiff must be given an opportunity to prove this allegation.

For the foregoing reasons, Defendants' Motion to Dismiss Plaintiff's Amended Complaint (dkt. no. 13) is hereby **DENIED**.

IT IS SO ORDERED.

Dated: October 4, 2013

/s/ Gordon J. Quist
GORDON J. QUIST
UNITED STATES DISTRICT JUDGE

[2] Relating to the "right of using and enjoying the fruits or profits of an estate . . . belonging to another . . . ." WEBSTER'S THIRD INTERNATIONAL DICTIONARY 2524 (1966).