UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

BRENDA TURUNEN,

Plaintiff,

v

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

Defendants.

No. 2:13-cv-00106

HON. GORDON J. QUIST

Joseph P. O'Leary (P43349)
Attorney for Plaintiff
O'Leary Law Office
P.O. Box 759
Baraga, MI 49908
(906) 353-1144

Glenn Smith (P42704)
Attorney for Plaintiff
Bensinger Cotant & Menkes PC
122 W. Bluff St.
Marquette, MI 49855-4312
(906) 225-1000

Louis B. Reinwasser (P37757)
Special Assistant Attorney General
Margaret A. Bettenhausen (P75046)
Assistant Attorney General
Attorneys for Defendants
Michigan Department of Attorney General
Environment, Natural Resources, and Agriculture Division
525 W. Ottawa, 6th Floor, Williams Bldg.,
P.O. Box 30755
Lansing, MI 48909
(517) 373-7540

STATE OF MICHIGAN'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT (ORAL ARGUMENT REQUESTED)

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INTRODUCTION

Plaintiff claims she has a right under the 1842 Treaty to commercially raise Russian boar. To make her case, she must show that raising pigs for profit was a usual or traditional way of life for the L'Anse Indians at the time of the 1842 Treaty. Plaintiff has failed to identify any historical documents that prove this was the case and instead relies on the unsupported speculations of her experts to support her claim. Case law is clear that expert opinions must be based on sound facts and reasoning and here, the opinions of Plaintiff's experts fall short on both counts. Defendants are entitled to judgment as a matter of law.

I. The test for determining *what is a usual privilege of occupancy* is whether an activity is one of the "usual activities Indians performed in daily life" at the time the treaty was signed.

The test adopted by this and other courts for determining whether an activity would be a "usual privilege of occupancy" under a typical Indian treaty, is whether that activity was a usual practice of the Indians prior to the signing of the treaty. See, e.g., *United States v. Michigan*, 471 F. Supp. 192, 235 (W.D. Mich. 1979), *aff'd*, 653 F.2d 277 (6th Cir. 1981). This is the very "test" that Plaintiff accuses Defendants of concocting[1] (Pl.'s Br. 1), and which was flatly rejected by Plaintiff's

[1] This is a curious about-face from an earlier brief submitted by Plaintiff in this case in which she stated: "Nonetheless, *as correctly pointed out by Defendants*, this Court made it clear in *U.S. v. Michigan* that the phrase 'the other usual privileges of occupancy' was meant as an assurance to the Indian signatories that they could continue to live as they had been *prior to the signing of the treaty*." (Pl.'s Br. In Opposition To Defs.' Mot to Dismiss Amended Complaint, Dkt. # 14, at 7-8 (emphasis added).)

experts in favor of a test that they *did* concoct, i.e., they claim that the government's expectation that the Indians would *become* animal farmers creates a usual privilege of occupancy protected from state regulation, regardless of whether animal farming was a usual activity Indians performed in daily life. (Rebuttal Report, Dkt. #39-7, at 3.) There is no precedent for Plaintiff's new legal test, and even Dr. Cleland's affidavit does not embrace this interpretation of the term "usual privileges of occupancy." In fact, while Plaintiff's attempt to belatedly name Dr. Cleland as an expert should be rejected, his affidavit submitted with her Brief in Opposition to Defendants' Motion for Summary Judgment, Dkt. # 42, is an admission that, for an activity to be considered a usual privilege of occupancy under the 1842 Treaty, it must first be one of the "usual activities Indians performed in daily life." (Cleland Aff., Dkt. # 42-1, Ex. 3, at 6, ¶ 10.)

II. What other Indian bands or tribes were doing is irrelevant.

Being unable to prove that members of her ancestral band at L'Anse, Michigan, were commercial farmers of any kind, let alone commercial *animal* farmers, Plaintiff offers evidence of other Indian bands' farming instead. Her purpose isn't clear, but in any event, this information, even if accurate, is irrelevant. The issue for this Court is to determine what were usual activities for the L'Anse Indians, not for other bands. Even if there was intermarriage and other family relations among bands, there is no question that each band was an

autonomous political/legal entity,[2] so the treaty at issue here preserved only the usual practices of the L'Anse Indians for those Indians. The usual practices of Indians who signed the 1836 Treaty, such as the Chippewa at Sault Ste. Marie or the Ottawa at Cross Village, or the usual practices of any other band, are not legally relevant to the L'Anse Indians who signed the 1842 Treaty. The Indians in L'Anse did not consider themselves members of a Chippewa Nation; they believed themselves bound only by their band's agreements.[3]

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[2] Dr. Cleland made this clear in his 2004 report:

> Each band was totally autonomous politically. . . As might be expected, each band spoke for itself in political decision-making . . . Political constructs such as the Ottawa "tribe" or the "Ottawa-Chippewa Nation" had absolutely no reality for the Ottawa or Chippewa people in the past and have very little today, except in the case where tribes are constituted through recognition by the federal government.

Cleland, Charles, Report on the Treaty Relations Between the Ottawa and Chippewa of Michigan and the United States, Carlson Dep. Ex. 5, Jan. 7, 2015, excerpt attached here are Ex. A.

[3] Dr. Cleland confirms this:

> Politically, the band was the largest autonomous decision making group in Chippewa society. Despite years of intense effort by the United States in the nineteenth century to create more complex and encompassing political institutions, such as "the Chippewa tribe" or the "Mississippi Chippewa," it was not successful. The band remained the effective political institution of Chippewa society . . . . In their mythology, the creation of true humans the Anishnabeg and the historic diffusion of Anishnabeg clans over the landscape was the *only basis* for any common identity linking Chippewa bands. Thus, for the Chippewa of the nineteenth century, the "Chippewa Tribe" had *no internal economic, social or political reality* . . . . Each and every treaty between the Chippewa and the United States shows that it was the band leaders who negotiated and signed the agreements. *When a band was not represented, the treaty had no force for that group.*

Cleland, Charles, Preliminary Report of the Ethnohistorical Basis of the Hunting, Fishing, and Gathering Rights of the Mille Lacs Chippewa, published in Fish in the Lakes, Wild Rice, and Game in Abundance: Testimony on Behalf of Mille Lacs

Nor would the L'Anse Indians' knowledge of farming by other bands of Indians during the early 19th century, even if true, lead to the conclusion that the L'Anse Indians were also farming. While Dr. Carlson states it is "likely" that Indians from different bands talked to each other, it is also just as likely that these conversations were infrequent and unrelated to farming. Without proof, what individual Indians may have talked about 170 years ago is pure speculation.

And given the great distances between L'Anse and anywhere in lower Michigan, or even Sault Ste. Marie (well over 200 miles), in 1842 traveling roundtrip to these destinations for a conversation would have been a major undertaking. There is no proof sporadic interaction between these bands caused dramatic cultural change to the usual daily activities of the Indians in L'Anse. To the contrary, the evidence shows that the L'Anse Indians had sustained themselves for centuries by the seasonal round of hunting, fishing and gathering which demanded a semi-nomadic existence. Greenwald, Emily, *Lake Superior Chippewa Rights Under Article 2 of the 1842 Treaty of LaPointe,* Dkt. # 39-6 at 12. Even if they had heard from their relatives or friends that other Indians had cows or pigs on farms – which Plaintiff has provided no evidence of – barring some significant event beyond their supposed conversations, there is no evidence such a dramatically new lifestyle was incorporated into their existence in the brief timespan Plaintiff suggests. The cultural ties between the separate bands and tribes were limited to

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Ojibwe Hunting and Fishing Rights, comp. James M. McClurken (East Lansing: Michigan State University Press, 2000) (emphasis added), cited in footnote 44 to Plaintiff's experts' rebuttal report, excerpt attached here as Ex. B.

common creation myths and a language, see n. 3; the evidence does not establish that significant lifestyle changes automatically transferred from band to band.

While Plaintiff tries to give the impression that the change was inevitable because the Indians were aware of farming, a moment's reflection strongly suggests that the single largest driver of a band's usual practices was likely the band's immediate environment, not what bands in other locales were doing.

Turning to agriculture may have been a natural progression for Indians in the Lower Peninsula, given the markedly different climate and terrain in the western Upper Peninsula, but it is pure speculation to extrapolate from the experience of the Ottawa Indians to conclude that the L'Anse band of Chippewa must have been growing crops and raising pigs in 1842. (Pl.'s Br. 17.) Even Dr. Cleland acknowledges that crop production "was not really feasible on the shores of Lake Superior because of the poor soil and very short growing season." (Cleland Aff. ¶15.) These differences can't just be ignored because it is inconvenient for Plaintiff.

III. Plaintiff has not identified historical evidence showing that her ancestors were commercially farming animals as a usual practice when the treaty was signed.

Plaintiff's brief and the expert reports on which it relies are full of sweeping statements concerning two separate factual circumstances: 1) commercial activities of the Chippewa Indians such as selling furs and 2) gardening activities of the Indians. By filling her briefs with the details of these *separate* activities, Plaintiff apparently hopes to create the *illusion* of proof that her ancestors were engaged in

commercial farming as a usual practice when the treaty was signed, even though there is no documentary evidence that these Indians were in fact farming for commercial purposes.[4] Just because the Indians traded some items doesn't automatically mean they traded *everything* they touched, but this is the argument Plaintiff seems to be making. (Pl.'s Br. 5.) Plaintiff's own experts admitted that there is no historical evidence to support their claim that the Indians were farming domestic animals for commercial purposes in 1842. (Defs.' Br. 1.)

Defendants have never claimed that the pre-treaty Indians did not engage in commerce, or that they didn't have subsistence gardens. There are numerous historical documents that support these facts. But unlike the detailed evidence of the commercial fur and fish trade, there is simply no evidence of commercial farming occurring at this time. This silence in the historical record cannot be ignored. At a minimum, it confirms commercial farming was not a usual practice. And even if there were some outliers who sold a potato or squash to a fur trader, this would not make farming (much less raising pigs) for profit a *usual* activity of the Indians that would have been protected by the treaty.

Nor does the fact the pre-treaty Indians had gardens automatically mean they can conduct any other activity that might fall under the rubric of "agriculture," free from state regulation. This Court has indeed said in *United States v. Michigan*,

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[4] Plaintiff insists that her experts identified historical documents that prove the Indians sold potatoes, but as shown in Defendants' main brief, those documents only show that the Indians sold maple sugar and wild rice, both undomesticated natural resources that were *gathered* not farmed, and that the Indians grew lots of potatoes. Any notion that those potatoes were sold and not stored for later use by the Indians is pure speculation. (Defs.' Br. 10-11.)

supra, that tribes can use modern fishing equipment to exercise their treaty right to fish commercially in the Great Lakes. But this right exists now only because the pre-treaty Indians had a robust commercial fishing practice. (Defs.' Br. 18.) It does not follow from the commercial fishing ruling however, that because some pre-treaty Indians had subsistence gardens they can operate commercial animal farms as a treaty right. Using modern nets is still commercial fishing. Raising pigs to be sold to hunting ranches is not the modern equivalent of raising vegetables for food, or even for profit.

This logic is confirmed by *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin,* 758 F. Supp. 1262 (W.D Wis. 1991), where the Indians argued that the lack of evidence of logging pre-treaty did not defeat their claim of a treaty right to harvest timber because there *was* ample evidence that their ancestors had used trees for bark, sap, boughs and needles. The court disagreed, pointing out that the Indians' use of trees was qualitatively different than commercial logging, which "is an activity that is wholly different in purpose and effect from utilizing parts of trees for specialized purposes." *Id.* at 1271. Likewise, using farmland to grow crops is a wholly different purpose from using it to raise farm animals. The lack of evidence of the latter absolutely defeats Plaintiff's claim here.

IV. The Indian canon of construction is not applicable.

Plaintiff attempts to fix her problem of having no historical evidence to support her claim that animal farming is a usual privilege of occupancy, by arguing

that the Court must accept her interpretation of the treaty because it favors her as an Indian. While courts have construed ambiguities in treaties and federal statutes so as to favor Indians, this cannot reasonably mean that the Court *must* agree with an Indian's interpretation every time. Moreover, there must first be an ambiguity for the canon even to be employed. *South Carolina v. Catawba Indian Tribe,* 476 U.S. 498, 506 (1986) ("The canon of construction regarding the resolution of ambiguities in favor of Indians, however, does not permit reliance on ambiguities that do not exist; nor does it permit disregard of the clearly expressed intent of Congress.").

Here, the courts have already determined what that phrase "usual privileges of occupancy" means. To be a usual privilege of occupancy, an activity must have been a *usual activity* of the Indians when the treaty was signed. The disputed question before *this* Court is merely a factual inquiry of whether commercial pig farming was a usual activity of the L'Anse based Indians in 1842. The construction canon does not apply to mere fact questions; Plaintiff still has the burden of proving facts by a preponderance of the evidence.

In the absence of any proof that commercial pig farming occurred among her ancestors in 1842, Plaintiff says it doesn't matter because the federal government wanted the Indians to become animal farmers. She relies on other provisions in the treaty to support this claim, but these provisions are not ambiguous at all. They do not give any rights of any kind to the Indians, other than rights to receive payment for their ceded lands in the form of certain limited agricultural resources.

Specifically, Article 4 of the Treaty grants the Indians several sums of money, including $1,000 to pay for two farmers and $5,000 for an agricultural fund to be spent at the discretion of the Secretary of War. From this agreement to pay these amounts, Plaintiff argues that she and other members of her Tribe have a treaty right to farm in the ceded territory free from any state regulation.

However, using the Indian canon of construction to create a usual privilege of occupancy out of a promise to pay for two farmers and some farming resources is erroneous. The promise to pay is not ambiguous. In exchange for the ceded lands, the Indians were to receive the promised amounts of money and resources. This provision created only a right to receive the specified consideration. If the federal government had not paid the money it promised, the Indians would have a claim for payment, nothing more. The language is clear and there is no need to rely on the canon of construction to create some new right out of whole cloth.

V. Tribal members are not sovereign.

Even if Indian tribes are sovereign entities, as Plaintiff asserts in her response, Pl. Br. 23-24, *their members are not*, particularly when they act outside the reservation as is the undisputed fact here. This was recently affirmed by the Supreme Court, which, while upholding a tribe's sovereign immunity from suit for illegal gaming, made it clear that "tribal immunity does not bar such a suit for injunctive relief against *individuals*, including tribal officers, responsible for unlawful conduct." *Bay Mills Indian Cmty v. Michigan*, 572 U.S. __, 134 S. Ct. 2024, 2035 (2014). Being a tribal member is not a license to ignore state law.

VI. 25 U.S.C. §181 is a viable federal law that applies here.

Plaintiff asserts that 25 U.S.C. § 181 was intended only to fix a problem created by the Dawes Act. She cites to no case or other source to support that claim. And the language of §181 suggests otherwise. If it was intended to address only situations involving lands allotted to Indians, then it would have limited its prohibition to "property." Instead it clearly and broadly prohibits a white man who marries an Indian woman from benefitting from any "property, privilege or interest whatever" to which any member of the woman's tribe may be entitled.

While this statute may have protected some Indian women from losing their allotted lands, it also clearly serves the separate legitimate purpose of limiting Indian privileges *to Indians.* This is apparent from the structure of the statutory prohibition. It is not limited to prohibiting a husband from only obtaining a benefit to which his Indian wife might be entitled. He is denied any benefit available to *any member* of his wife's tribe. Obviously, this prohibition wasn't intended only as a protection of real property. It is unlikely that the Dawes Act created a significant problem of white men marrying Indian women so they could unscrupulously buy land *from Indians who were not their wives*. They would not have had to marry an Indian to buy allotted lands; as Plaintiff points out, many tribes lost their land base precisely because individual Indians sold their allotments to white men. Section 181 then must have had some other purpose. Since §181 unambiguously imposes its prohibition concerning other tribal members' interests, it can only legitimately be interpreted as intending to deny a white husband such benefits, even if it had the additional purpose of protecting Indian wives from losing their allotments.

Plaintiff's argument that this interpretation would deny the white husband of an Indian their family home, cars and pets makes no sense. Section 181 only denies a white husband interests or privileges to which his Indian wife would be entitled because of her status as an Indian. Plaintiff is not claiming such an interest in her home, cars, or pets, so §181 has no bearing on that property. The treaty right that she asserts, however, if it exists (Defendants adamantly assert it does not), would be a privilege that only Indians can assert, and it makes complete sense that Plaintiff's husband should not obtain a benefit from that privilege.

Here, as shown in Defendants' main brief, while Plaintiff may have bare legal ownership of the invasive pigs, they are in the possession of and housed on land owned by a corporation which is wholly owned by her husband, Roger Turunen, who is being paid approximately $32,000 a month to raise the pigs. (Defs.' Br. 3.) While Defendants have not been able to discern the precise financial relationship among the corporation, Plaintiff, and her husband, because Plaintiff has flatly refused to produce properly requested financial information,[5] it is clear that Roger Turunen is subject to state law. At a minimum, any decision of this Court should make it clear that the treaty does not shield his activities from state regulation.

[5] (Defs.' Br. 9.) Plaintiff assured Defendants that she would be seeking a protective order for these documents, but no motion for a protective order has been filed.

VII. The clean hands doctrine is not applicable.

As noted by Plaintiff, the clean hands doctrine requires that a party seeking an equitable remedy must act equitably. Plaintiff seeks an equitable remedy, but she does not have clean hands.

Laches is effectively a variation of the clean hands and waiver doctrines that requires a plaintiff to act in a timely manner and not sit on actionable claims. As shown in Defendants' main brief, Plaintiff asserts that she complied with all state farming regulation for 23 years without asserting the treaty claim she now raises, even though, *under her theory of the case*, she had a breach of treaty claim when the state first began regulating her farming activity. It is only because she now objects to a *particular* state law that she has sued the state seeking an injunction. However, her claim in this Court depends only on (1) the fact that the state is regulating her farming activity and (2) her argument that she can farm free of all state laws. This claim could have been asserted the first time she submitted to state farming laws. It has nothing to do with the specifics of the invasive species law she now refuses to comply with. Equity does not favor sitting on claims for long periods of time.

Besides sitting on this treaty claim, she admitted in her deposition that the sole purpose for having her buy the pigs from her husband's corporation was to try to defeat application of the state's invasive species law. (Defs.' Br., Ex. C, 36-37.) It was clearly an attempt to manipulate the relationships of Plaintiff, her husband,

the corporation and the farming activities at issue in a way to support Plaintiff's claim for an injunction. Such an artifice should not support an equitable claim.

Plaintiff's assertions that the state has acted inequitably are also unpersuasive. Plaintiff fails to mention that the order she relies on to argue that the DNR Order is unconstitutional is currently under review by the Michigan Court of Appeals, which granted DNR's application for leave to appeal. Moreover, the circuit court's ruling contradicts the Court of Appeals' earlier ruling that the DNR Order was a lawful exercise of DNR's authority, misapplies the legal standard for summary disposition, and employs improper legal analysis. Also, Plaintiff's assertions about the state's actions misrepresent the state court litigation. Plaintiff has crafted a story based on cherry-picked portions of transcripts and an inaccurate depiction of the court proceedings, and her conclusions are unsupported by the trial court record when viewed as a whole.

Finally, Plaintiff inaccurately describes the facts of *City of Sherrill v. Oneida Indian Nation,* 544 U.S. 197 (2005). The Tribe in that case wasn't asserting "sovereign control over state lands or landowners titles" as asserted by Plaintiff. (Pl.'s Br. 31.) The Tribe already had title to the land and just wished to treat it as reservation land. Effectively, the Tribe didn't want the land to be subject to state laws, just like Plaintiff doesn't want her farming activities to be subject to state law. There are numerous relevant similarities between the two cases as noted in Defendants' main brief, and Plaintiff's attempt to distinguish them is not persuasive.

VIII. The Court should not consider the new expert reports from Carlson and Jackson.

Plaintiff improperly attaches a new report from each of her experts. (Pl.'s Br., Exs. 1 and 2.) These reports should be stricken or at least given no weight by the Court as they violate the Court's scheduling order, which required the filing of all such reports by October 10, 2014. These reports do not address any new evidence introduced by Defendants and it would not be fair to allow additional reporting after discovery has closed and Defendants cannot depose the witnesses.[6] This is especially true since the primary purpose of the reports is to explain and excuse the lack of evidence supporting their opinions that the L'Anse Indians' usual activities included commercial farming, which could have been addressed in their earlier reports.

[6] While Defendants attached a brief affidavit from Dr. Greenwald to their summary judgment motion, this affidavit was strictly limited to addressing an historical document that Plaintiff relied on for the first time in her experts' rebuttal report, so it could not have been addressed in Dr. Greenwald's primary report.

CONCLUSION AND RELIEF REQUESTED

For these reasons, the State respectfully requests that its motion for summary judgment be granted in its entirety.

Respectfully submitted,

Bill Schuette
Attorney General

/s/ Louis B. Reinwasser
Louis B. Reinwasser (P37757)
Special Assistant Attorney General
Margaret A. Bettenhausen (P75046)
Assistant Attorney General
Environment, Natural Resources,
and Agriculture Division
6th Floor, Williams Building
525 West Ottawa Street
P.O. Box 30755
Lansing, MI 48909
louis.reinwasser@gmail.com
bettenhausenm@michigan.gov

Dated: March 26, 2015

LF: Turunen, Brenda v DNR & MDARD USDC AG# 2013-0041482-A/Reply – 2015-03-26

CERTIFICATE OF SERVICE

I hereby certify that on March 26, 2015 I electronically filed **State of Michigan's Reply in Support of Its Motion for Summary Judgment (Oral Argument Requested)** and this **Certificate of Service**, with the Clerk of the Court using the ECF system, which will send notification of such filing to ECF participants in this matter.

Respectfully,

Bill Schuette
Attorney General

/s/ Louis B. Reinwasser
Louis B. Reinwasser
Special Assistant Attorney General
Margaret A. Bettenhausen (P75046)
Assistant Attorney General
Environment, Natural Resources,
and Agriculture Division
6th Floor, Williams Building
525 West Ottawa Street
P.O. Box 30755
Lansing, MI 48909
louis.reinwasser@gmail.com
bettenhausenm@michigan.gov

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