

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 REGARDING JOINDER OF THE
1842 SIGNATORY TRIBES PURSUANT
TO RULE 19 OF THE FEDERAL RULES OF CIVIL PROCEDURE

ORAL ARGUMENT REQUESTED

I. INTRODUCTION.

Plaintiff filed suit seeking protection of her right to engage in farming activities reserved pursuant to the 1842 Treaty between the United States and the Lake Superior Chippewa Indians, 7 Stat. 591 (hereafter the 1842 Treaty). Defendants first unsuccessfully sought dismissal of the action, then sought summary judgment pursuant to Fed.R.Civ.P. 56. This Court *sua sponte* raised the issue of required joinder of parties under Fed.R.Civ.P. 19, citing Keweenaw Bay Indian Community v. Michigan, et al., 11 F.3d 1341 (6th Cir. 1993). The Court then directed the parties to show cause: (1) why the Keweenaw Bay Indian Community (KBIC) and the other successors in interest to the 1842 Treaty tribal signatories are

not required parties to the instant action, (2) if such parties are required, why joinder is not feasible, and (3) if joinder is not feasible, why this action should not be dismissed. In the instant brief Plaintiff will address each of the Court's inquiries in turn.

II. ARGUMENT

(1) Why The KBIC And Other 1842 Treaty Signatories Are Not Required Parties To This Action?

Fed.R.Civ.P. Rule 19(a) states in relevant part:

(a) Persons Required to Be Joined if Feasible.

(1) Required Party. A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:

(A) in that person's absence, the court cannot accord complete relief among existing parties; or

(B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:

(i) as a practical matter impair or impede the person's ability to protect the interest; or

(ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

In Keweenaw Bay Indian Community v. Michigan, et al., *supra*, the 6th Circuit Court of Appeals upheld this Court's dismissal of KBIC's action based on its determination that two absent tribal signatories to the 1842 Treaty were "necessary" and "indispensable" parties¹ to that litigation. When considering Rule 19(a)(A) the

¹Fed.R.Civ.P. 19 has been amended since the KBIC *supra*, decision. Prior to the 2007 amendments Rule 19(a) referred to "necessary" parties whereas the current Rule refers to "required" parties. In addition, the word "indispensable" was removed from Rule 19(b) entirely. These changes were stylistic and not substantive, Philippines v. Pimentel, 553 U.S. 851, 855-856 (2008). Accordingly, despite the use of "necessary" and

facts of the instant controversy compel the conclusion that complete relief can be afforded among the existing parties. As demonstrated in Plaintiff's Statement of Facts included in her brief in opposition to the Defendants's Rule 56 motion, Defendants have specifically targeted Plaintiffs' farming operation, seeking to put her out of business entirely because of their objection to one of the animals she raises pursuant to her treaty right. Justice can certainly be served amongst the parties before the court by a determination of whether the right to farm is indeed reserved by the 1842 Treaty.

As to Rule 19(a)(B), it should be noted here that there are significant differences between this action and KBIC, *supra*, primarily the fact that, unlike the absent tribes in KBIC whose claimed interests were being more or less directly challenged, no conflict exists between Plaintiff's 1842 Treaty farming claims and the absent tribes' interests under the 1842 Treaty. The absent tribes have an interest in establishing and protecting all rights reserved by the 1842 Treaty from state interference, indeed, KBIC itself has granted Plaintiff a license to engage in the precise farming activities at issue in this case. It defies common sense and logic to assert that Plaintiff's efforts to establish and protect her right to farm reserved by the 1842 Treaty would "impair

"indispensable" in KBIC, *supra*, Plaintiff will use the modern Rule 19 lexicon in the instant brief.

or impede the person's ability to protect the interest". Accordingly, the absent tribes are not required parties pursuant to Rule 19(a)(B)(i).

Plaintiff acknowledges, however, that Rule 19(a)(B)(ii) is likely in play here. Were this Court to determine that no right to farm was reserved to the tribal signatories by the 1842 Treaty, KBIC or (far less likely but not impossible) another absent tribe would not be bound by that decision and may in the future bring suit against Defendants for the current, or other future misguided efforts to regulate farms and farmers out of business. It appears that Rule 19(a)(B)(ii) would operate to make at least the KBIC a required party and thus this court must look at its second question to the parties, why joinder is not feasible.

(2) Why Joinder Is Not Feasible?

Plaintiff acknowledges that joinder is not feasible in this case because of the sovereign immunity of the Keweenaw Bay Indian Community and the other absent tribes. That tribes possess sovereign immunity, even for off-reservation commercial activities, is thoroughly ingrained in Federal Indian Law jurisprudence. The doctrine of tribal sovereign immunity was most recently reaffirmed by the United States Supreme Court in Michigan v. Bay Mills Indian Community, ___ U.S. ___, 134 S.Ct 2024, 2029, 188 L. Ed. 2d 1071, 1080 (2014). Accordingly, absent Congressional abrogation of that immunity, or consent from the tribe itself, KBIC, and the other

absent tribes, are immune from suit and cannot be joined. This leads to the final question posed by the Court.

(3) If Joinder Is Infeasible, Why This Action Should Not Be Dismissed?

Since KBIC and (arguably) the other absent tribes are required parties who cannot be joined, this Court must determine whether the case should proceed without the absent tribes' presence. KBIC, *supra*, 11 F.3d at 1346. Fed.R.Civ.P. 19(b) sets out a four-part analysis for courts to consider when determining whether the inability to join a required party necessitates dismissal of the action:

(b) When Joinder Is Not Feasible. If a person who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed. The factors for the court to consider include:

- (1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;
- (2) the extent to which any prejudice could be lessened or avoided by:
 - (A) protective provisions in the judgment;
 - (B) shaping the relief; or
 - (C) other measures;
- (3) whether a judgment rendered in the person's absence would be adequate; and
- (4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

Rule 19(b) should not be applied in a rigid manner, it should be governed by the practicalities of each individual case. An entire suit should not be dismissed if meaningful relief can still be accorded amongst the parties who are present. KBIC, *supra*, 11 F.3d at 1346.

In all events it is clear that multiple factors must bear on the decision whether to proceed without a required person. This decision "must be based on factors varying with the different cases, some such factors being substantive, some procedural, some compelling by themselves, and some subject to balancing against opposing interests".

Philippines, *supra*, 553 U.S. at 863 (quoting Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102 (1968)).

As to factor (1), it is difficult to argue with the notion that a judgment rendered in KBIC's (or the other 1842 treaty tribes') absence might prejudice the tribes. Indeed, the prejudice to KBIC (and, arguably, to the other 1842 treaty tribes) from a judgment rendered without it stems from the same potential impairment of the same legally protected interest that makes KBIC a required party in the first place. See, e.g., Dawavendawa v. Salt River Project Agricultural Improvement and Power District, 276 F.3d 1150, 1162 (9th Cir. 2002).

Having conceded the potential prejudice to KBIC or any other 1842 Treaty tribe, Plaintiff nonetheless asserts that such prejudice can be considerably lessened or avoided pursuant to Rule 19(b)(2). The very interests KBIC and other 1842 Treaty tribes have in the outcome of this litigation gives them the right to intervene in the action in order to protect those interests. Fed.R.Civ.P. 24(a) provides:

(a) Intervention of Right. On timely motion, the court must permit anyone to intervene who:

- (1) is given an unconditional right to intervene by a federal statute; or
- (2) claims an interest relating to the property or

transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Consistent with Fed.R.Civ.P. 19(b)(2)(C) this court can delay a determination on this issue, direct Plaintiff to formally notify KBIC and the other absent tribes that they have the ability and opportunity to intervene in order to protect whatever their claimed interest might be. If the missing tribes intervene their presence would render this entire Rule 19 discussion moot because the absent parties would now be before the Court. To the extent a tribe declines to intervene, any prejudice would be of their own making, thereby lessening that prejudice, especially when balanced against factor (4) discussed below.

Another measure the Court could fashion under Fed.R.Civ.P. 19(b)(2)(C) which would eliminate, or at least alleviate the Defendants' potential exposure to multiple lawsuit and inconsistent outcomes would be to simply proceed to judgment with the parties before it² and retain jurisdiction over the merits of the action. It has long been established that federal courts can retain jurisdiction over cases before them in order to give effect to the judgment or to effectuate the parties rights. See, e.g. Bd. of Educ. v. Missouri, 936 F.2d 993, 995-996 (8th Cir. 1991), Battle v.

²Whether they be the parties currently before the Court or those parties and any tribes who chose to intervene pursuant to Rule 24(a).

Liberty Nat'l Life Ins. Co., 877 F.2d 877, 880 (11th Cir. 1989). Retaining jurisdiction allows the Court to both take action against the original parties, as well as new parties that may interfere with the judgment. See, e.g., Bd. of Educ. of Indep. Sch. Dist. 89 v York, 429 F.2d 66 (10th Cir. 1970), Miss. Valley Barge Line Co. v. United States, 273 F.Supp. 1, 6 (E.D. Mo. 1967). The ability of federal courts to retain jurisdiction over actions before them has been recognized by at least one district court as a common sense solution to the problems of piecemeal litigation arising from the fact that federal courts are courts of limited jurisdiction. N.Y. State Ass'n for retarded Children, Inc., v. Carey, 438 F.Supp. 440, 446 n.6 (E.D.N.Y. 1977).

If this Court proceeds to judgment and retains jurisdiction, and if the Defendants are indeed sued again over the subject matter of this litigation, whether by KBIC, or by one or more of the other missing 1842 Treaty tribes, this Court would have authority to revisit the judgment based upon any new facts or issues raised by those tribes. This procedure would not necessarily prevent multiple lawsuits, but it would greatly lessen the expense and time involved with multiple litigation by ensuring that a forum with knowledge of the issues will actually adjudicate all of those issues, even though it will be in multiple phases. Retaining jurisdiction would not necessarily eliminate all possibility of different outcomes, but would considerably reduce that possibility, an acceptable risk

when balanced against factor (4) discussed below.

Factor (3) weighs in favor of proceeding to judgment with the parties that are before the Court. Certainly a judgment can be fashioned that would be adequate amongst those parties, regardless of the presence of KBIC or the other 1842 treaty tribes. The duties and obligations of Plaintiff vis-a-vis Defendants would be determined by that judgment. The duties and obligations of missing parties may be handled as described in the discussion of factor (2) above.

Factor (4), whether the plaintiff would have an adequate remedy if the action were dismissed for non-joinder weighs heavily in favor of proceeding to judgment. Plaintiff is seeking to protect rights reserved by her ancestors in a solemn treaty of peace with the United States of America. Treaty rights are sacred to Plaintiff and to her People and thus determining the nature and scope of those rights and seeking to protection of those rights in a court of law is of the utmost importance. It is axiomatic in our legal system that:

The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever [s]he receives an injury. One of the first duties of government is to afford that protection ... "[I]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded."

Marbury v. Madison, 5 U.S. 137, 163 (1803).

In the instant case, if the court concludes that the absence

of KBIC and the other 1842 Treaty tribes compels dismissal of this action, Plaintiff will be left without any forum anywhere to litigate her federally protected treaty right to farm. That conclusion is compelled by the legal fact that tribal sovereign immunity applies in all courts, be they federal, state or tribal. See, e.g., Michigan v. Bay Mills, *supra*, 134 S.Ct. at 2030-2031. Defendants have set out to destroy Plaintiff's livelihood and way of life and they will undoubtedly continue to do so. This leaves Plaintiff with a legal right but no legal remedy, a result anathema to our entire system of jurisprudence.

III. CONCLUSION

For all the reasons advanced above, this Court should allow Plaintiff an opportunity to notify KBIC and the other absent 1842 treaty tribes of the pendency of this litigation and their right to intervene in this action pursuant to Fed.R.Civ.P. 24. After allowing a reasonable opportunity to intervene, the Court should proceed to render judgment with the parties before it and retain jurisdiction over the merits of the action in order to protect defendants against the risk of multiple litigation and inconsistent outcomes.

Respectfully submitted,

Date: July 13, 2015

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