UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

BRENDA TURUNEN,

Plaintiff,

v

No. 2:13-cv-00106

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

HON. GORDON J. QUIST

Defendants.

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STATE DEFENDANTS' OPPOSITION TO PLAINTIFF'S BRIEF REGARDING JOINDER OF THE 1842 SIGNATORY TRIBES PURSUANT TO RULE 19 OF THE FEDERAL RULES OF CIVIL PROCEDURE (ORAL ARGUMENT REQUESTED)

Introduction and Background

Plaintiff's suit attempts to preempt Michigan's regulatory authority over her farming activities and specifically block enforcement of the Michigan Department of

Natural Resources' Invasive Species Order (ISO) adding Russian wild boar and their hybrids to Michigan's list of prohibited invasive species. Plaintiff broadly claims her commercial farming operations, including the commercial production of Russian boar, are protected under Article II of the 1842 Treaty. Despite the undisputed fact that her farm is located outside of the Keweenaw Bay Indian Community's (KBIC) reservation, Plaintiff insists that KBIC and the United States of America have exclusive regulatory authority over her farming operations, to the complete exclusion of Michigan laws and regulations.

Although Plaintiff's claims arise out of the ISO, Plaintiff's Amended Complaint (Dkt. No. 11) seeks expansive declaratory and injunctive relief that goes way beyond the commercial production of Russian boar to include all farming activities. Resolution of Plaintiff's claims depends on the interpretation of the nature and scope of rights reserved by KBIC and the other signatory tribes to the 1842 Treaty (collectively the 1842 Treaty Tribes).

I. The 1842 Treaty Tribes are required parties.

The first step in determining whether this case should be dismissed in the absence of the 1842 Treaty Tribes is determining if they are necessary parties. Generally, Federal Rule of Civil Procedure 19(a)(1) requires a party be joined if, in that person's absence: 1) complete relief among the existing parties cannot be accorded; 2) there is a risk that disposing of the action may impair or impede a person's ability to protect a claimed interest; or 3) disposing of the action leaves an existing party subject to double, multiple, or otherwise inconsistent obligations.

Plaintiff claims that the 1842 Treaty Tribes are not required parties because "Defendants have specifically targeted Plaintiff's farming operation, seeking to put her out of business entirely. . . ." (Pl. Rule 19 Br. 3.) Enforcement of DNR's ISO, however, was not aimed solely at Plaintiff, nor did it discriminate against individuals based on their tribal membership status. To the contrary, the ISO applies to Russian boar and their hybrids statewide, and it has been challenged in several cases in state court. Recently, the Michigan Court of Appeals ruled in the State's favor in these proceedings, finding that the ISO was constitutional in all respects. See *Johnson v. Michigan Dep't of Natural Resources,* Nos. 321337, 321338, 321339, 2015 WL 3476408 (Mich. Ct. App. June 2, 2015), attached as Exhibit A. Plaintiff's husband, Roger Turunen, was an appellee and cross-appellant in the state case, along with several other individuals and business entities that engage in the commercial production of Russian boar. Plaintiff's assertion that the State has targeted her farm, or that it wants to place anyone out of business, is thus untenable. The ISO's purpose is to protect both humans and the environment from the destruction caused by these animals.

Plaintiff next claims that unlike the plaintiff tribe in *Keweenaw Bay Indian Cmty. v. Michigan,* 11 F.3d 1341, 1347 (6th Cir. 1993), the interest of the absent tribes in the instant case is not being directly challenged. In *Keweenaw Bay Indian Cmty.*, the plaintiff tribe (KBIC) sought to exclude the other 1842 Treaty signatory tribes from fishing in certain waters of the Great Lakes. Since the other tribes believed they had a right to fish those waters, the signatory party tribes' positions

were contradictory. Plaintiff believes her interest in this case aligns with that of every 1842 Treaty Tribe. Thus, she argues this case is distinguishable from *Keweenaw Bay Indian Cmty.* and the 1842 Treaty Tribes are not required parties.

But Plaintiff fails to acknowledge that her claim, and the State's defense, puts the nature and scope of the reserved rights under the 1842 Treaty squarely at issue. The State Defendants cannot predict what the 1842 Treaty Tribes' position(s) would be on Plaintiff's novel litigation theory. They may agree with Plaintiff or they may agree with the State. In any case, resolution of Plaintiff's claims in the absence of the 1842 Treaty Tribes undoubtedly has the potential to impair or impede those tribes' ability to protect their indisputable interest in rights under the 1842 Treaty. And if the Court determines that Plaintiff does not have a protected treaty right to commercially raise Russian boar – or perhaps comes to an even more expansive ruling about Plaintiff's farming rights generally – the 1842 Treaty Tribes could seek legal recourse, subjecting the State to double, multiple or otherwise inconsistent obligations. Moreover, treaty rights are not typically regarded as personal property held by individual tribal members, but communal property held by the tribe. *Skokomish Indian Tribe v. United States*, 410 F.3d 506, 515 (9th Cir. 2005) (citing *Whitefoot v. United States*, 293 F.2d 658, 663 (1961)). As such, the appropriate plaintiff in an action such as this would be a tribe.

The 1842 Treaty Tribes are required parties because they have an interest in the nature and scope of the tribes' rights reserved under the 1842 Treaty. Any decision on Plaintiff's claims could potentially impair or impede their rights under

the 1842 Treaty. If they are not joined, the State Defendants would also be subject to double, multiple or otherwise inconsistent obligations in the event the tribes later seek legal recourse.

II. Joinder is not feasible.

Continuing to the next step, the State Defendants agree with Plaintiff that joinder of the 1842 Treaty Tribes is not feasible due to the tribes' sovereign immunity. Therefore, dismissal is appropriate if the 1842 Treaty Tribes are indispensable.

III. The 1842 Treaty Tribes are indispensable, and therefore this case should be dismissed.

Finally, this case should be dismissed because the 1842 Treaty Tribes are indispensable. Rule 19(b) outlines four factors for this Court to consider in determining whether it should "in equity and good conscience" dismiss the action:

> (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.

Importantly, the first factor uses the word "might." Any judgment in this case will necessarily define the nature and scope of rights under the 1842 Treaty. Thus, it might – and almost certainly will – prejudice either the 1842 Treaty Tribes or the State Defendants. The first factor, therefore, supports dismissal.

The Plaintiff fares no better on the second factor. She attempts to fashion measures to lessen the prejudice to the 1842 Treaty Tribes by asking the Court to provide time for the tribes to consider opting in to Plaintiff's case. However, federal courts have held that inviting indispensable tribes to join an action does not lessen the harm that will occur from continuing in their absence. *E.g., Klamath Tribe Claims Comm. v. United States*, 106 Fed. Cl. 87, 96 (2012), *aff'd sub nom.*, *Klamath Claims Comm. v. United States*, 541 F. App'x 974 (Fed. Cir. 2013). And if any of the 1842 Treaty Tribes choose not to join, the fact that they have been invited to opt-in does not diminish the very real risk that these tribes may seek further legal relief in the event of an unfavorable outcome. *Martin v. Wilks,* 490 U.S. 755, 765; 109 S. Ct. 2180; 104 L. Ed. 2d 835 (1989) ("Joinder as a party, rather than knowledge of a lawsuit and an opportunity to intervene, is the method by which potential parties are subjected to the jurisdiction of the court and bound by a judgment or decree."), *superseded by statute on other grounds,* Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071. Accordingly, unless all of the 1842 Treaty Tribes agree to join this suit, dismissal is appropriate.

The third factor asks us to look into the adequacy of a judgment rendered in the 1842 Treaty Tribes' absence. Again, as non-parties, the 1842 Treaty Tribes

would not be bound to the judgment. *Id.* The absent tribes, therefore, could file their own separate lawsuits, presenting their own legal theories, and asserting the tribes' rights under the 1842 Treaty. Rulings in such cases could subject the state to conflicting obligations, which strongly supports a dismissal.

Finally, Plaintiff has many alternative avenues to seek relief, and thus the fourth factor weighs in favor of dismissal. As the court pointed out in *Keweenaw Bay Indian Cmty., supra,* she could seek relief from the Legislature. As a Michigan citizen, Plaintiff has the option to go to Michigan's Legislature to overturn the ISO. She could also persuade the 1842 Treaty Tribes, through their tribal councils, to seek the relief she desires in their own lawsuit. A case brought by the tribes would also be preferable because, as mentioned previously, treaty rights are generally regarded as communal property held by the tribe. *Skokomish Indian Tribe,* 410 F.3d at 515. But even if Plaintiff had no other options, the absent tribes' ability to protect their sovereign interests outweighs Plaintiff's interest in litigating her claims. *Klamath Tribe Claims Comm.*, 106 Fed. Cl. at 96 (holding that where a sovereign tribe cannot be joined owing to sovereign immunity, the entire case must be dismissed even if no alternative remedy exists).

Conclusion

The 1842 Treaty Tribes are necessary and indispensable parties. Any decision by the Court will interpret the 1842 Treaty and decide the nature and scope of the tribes' reserved rights. If they are not joined as parties, the State Defendants face the very real risk of double, multiple, or otherwise inconsistent

obligations. Plaintiff Turunen, on the other hand, has several other appropriate avenues to seek relief.

Accordingly, the State Defendants oppose Plaintiff's Brief Regarding Joinder of the 1842 Signatory Tribes Pursuant to Rule 19 of the Federal Rules of Civil Procedure. The State Defendants believe the Court should dismiss this action for Plaintiff's failure to show cause.

Respectfully submitted,

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Dated: July 27, 2015

LF: Turunen, Brenda v DNR & MDARD USDC/AG# 2013-0041482-A/Response – Opposition to Show Cause Brief 2015-07-27

CERTIFICATE OF SERVICE

I hereby certify that on July 27, 2015 I caused to be electronically filed **State Defendants' Opposition to Plaintiff's Brief Regarding Joinder of the 1842 Signatory Tribes Pursuant to Rule 19 of the Federal Rules of Civil Procedure and 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,

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