

Office of the Tribal Attorney
Keweenaw Bay Indian Community



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October 15, 2015

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CLERK
U.S. DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
BY: clp/ SCANNED BY: HW-10/22/15

The Honorable Gordon J. Quist
U.S. District Judge
482 Federal Building
110 Michigan Ave. NW
Grand Rapids, MI 49503

Re: *Brenda Turunen v. Keith Creagh, Director Michigan Department of
Natural Resources, et al.*, File No. 2:13-cv-00106-GJQ

Dear Judge Quist,

The Keweenaw Bay Indian Community ("the Tribe") was recently contacted by attorney Joseph O'Leary with respect to the above-referenced litigation ("the Litigation"). As your honor may know, in the Litigation Mr. O'Leary represents the plaintiff Brenda Turunen, an enrolled member of the Tribe. The Tribe is a successor in interest to the Treaty with the Chippewa, 1842, 7 Stat. 591 (hereinafter "Treaty of 1842"), the Treaty that Ms. Turunen asserts protects her farming operation from the application of state law. I write this letter to advise the Court of the Tribe's position with respect to this matter, but the Tribe does not waive its sovereign immunity from uncontested suit in doing so.

The Tribe is aware of its right to intervene in this case, as a successor in interest to the Treaty of 1842 and whose Treaty rights are integral to Ms. Turunen's claims in the Litigation. After careful consideration, the Tribe declines to intervene in the Litigation. Furthermore, the Tribe believes that it is a required party to a suit that would adjudicate its rights under the Treaty of 1842, and that without its participation, the suit should be dismissed.

Federal Rule of Civil Procedure 19 provides guidelines for determining whether it is necessary to dismiss a case when a required party cannot be joined. *See Glancy v. Taubman Centers, Inc.*, 373 F.3d 656, 664 (6th Cir. 2004); *see also Laethem Equip. Co. v. Deere & Co.*, 485 Fed. Appx. 39, 43 (6th Cir. 2012) (applying *Glancy* under 2007 revisions to Fed. R. Civ. P. 19). Under Rule 19, this "requires a determination regarding whether the absent party is necessary to the litigation; if so, whether the absent party can be joined in the litigation; and if joinder is infeasible, whether the lawsuit can nevertheless proceed 'in equity and good conscience.'" *Sch. Dist. v. Sec'y of the United States Dep't of Educ.*, 584 F.3d 253, 264 (6th Cir. 2009) (*en banc*) (citing *Kickapoo Tribe v. Babbitt*, 43 F.3d 1491, 1494, 310 U.S. App. D.C. 66 (D.C. Cir. 1995)). Indian tribes are immune from suits in state and federal court, and therefore are not subject to joinder. *See Makah Indian Tribe v. Verity*, 910 F.2d 555, 557 (9th Cir. 1990). The inquiry thus focuses on the elements of necessity and indispensability.

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The Tribe is a Party Required to be Joined if Feasible.

Rule 19(a) provides guidelines on determining whether an individual or entity is a necessary party. Rule 19(a) provides:

(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.

(2) *Joinder by Court Order*. If a person has not been joined as required, the court must order that the person be made a party. A person who refuses to join as a plaintiff may be made either a defendant or, in a proper case, an involuntary plaintiff.

(3) *Venue*. If a joined party objects to venue and the joinder would make venue improper, the court must dismiss that party.

Fed.R.Civ.P. 19(a).

In the Treaty of 1842, the Tribe reserved certain rights. These reserved rights are legal interests of the Tribe, making the Tribe a necessary party to actions affecting those legal interests. *Keweenaw Bay Indian Community v. State*, 11 F.3d 1341, 1347 (6th Cir. 1993). A judgment in a dispute that implicates those rights could define the reserved rights narrowly, impairing and impeding the Tribe's ability to exercise its reserved rights. See *Glancy*, 373 F.3d at 671. The state may also be subject to multiple lawsuits involving the Tribes and various tribal members claiming an interest in the Treaty of 1842. *Keweenaw Bay Indian Community*, 11 F.3d at 1347. Adjudication of the various suits could result in conflicting rights and obligations.

Although sovereign immunity can be waived, tribes cannot be compelled to participate in actions affecting their interests. *Kickapoo Tribe of Indians of Kickapoo Reservation in Kansas v. Babbitt*, 43 F.3d 1491, 1498 (D.C. Cir. 1995) (failure to intervene is not a component of the prejudice analysis where intervention would require the absent party to waive sovereign immunity) (citing *Wichita & Affiliated Tribes*, 788 F.2d at 776); *Fluent v. Salamanca Indian Lease Auth.*, 928 F.2d 542, 547 (2d Cir. 1991); *Makah Indian Tribe*, 910 F.2d at 560.

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The Tribe is a necessary party to this case, but tribal sovereign immunity shields the Tribe from being compelled to participate.

The Action Must Be Dismissed Because the Tribe Cannot be Joined.

Courts employ the balancing test in Rule 19(b) to determine the indispensability of a party. Rule 19(b) provides:

(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.

Fed.R.Civ.P. 19(b).

Prejudice to an absent party requires the court to determine whether any of the currently participating parties can adequately represent the absent party's interests. *Glancy*, 373 F.3d at 672. Within the instant case, none of the named parties can adequately represent the Tribe's interests. The State of Michigan would be the Tribe's opposing party in a suit over its reserved rights under the Treaty of 1842; and while an individual tribal member of the Keweenaw Bay Indian Community may share some of the Tribe's interests in a treaty rights case, the Tribe represents many tribal members, and promulgates and enforces its own regulations which may in some circumstances be adverse to the interests of certain individual members.

Treaty rights cases have historically involved litigation between states and tribes, with state laws restricting tribal members only when state regulation is necessary to protect public health, safety, or the natural resource. *See e.g. Lac Courte Oreilles v. Voigt*, 668 F.Supp. 1233 (W.D. Wisc. 1987). This has involved a close review of several factors, including whether applying state regulation to a tribe or tribal members is necessary to effectuate its purpose, whether state regulation is the least restrictive alternative available to accomplish the purpose, and whether any tribal laws, regulations, courts, and law enforcement systems may be adequate to accomplish the purpose. In the Tribe's absence, it is unlikely that the parties will be able to

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present the necessary evidence on the impact of state regulation on other Tribal members or Tribal interests, or on whether Tribe is undertaking self-regulation that could accomplish the same purpose being pursued by the State. Without this evidence, the Court will be unable to render judgment on the treaty rights claim.

A tribe's interest in maintaining its sovereign immunity may outweigh a plaintiff's interest in litigating a claim. *Confederated Tribes of Chehalis Indian Reservation*, 928 F.2d at 1500; *Fluent*, 928 F.2d at 547. Dismissing the Plaintiff's claim would not preclude the Plaintiff from seeking a remedy in state court or from petitioning the legislature and state executive branch for a change in state law and regulations. However, allowing the case to proceed might force the Tribe to intervene in the litigation as the only way to protect its rights.

The Tribe respectfully requests that the Court find that it cannot "in equity and good conscience" proceed without the Tribe, and dismiss the case.

Sincerely,

A handwritten signature in black ink that reads "Danielle Webb". The script is cursive and fluid.

Danielle Webb
Assistant Tribal Attorney

cc: Mr. Joseph O'Leary, Attorney at Law