UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS, a federally recognized Indian tribe,

Plaintiff,

v.

RICK SNYDER, Governor of the State of Michigan,

Defendant.
_____/

Docket No: 15-850

HON. PAUL L. MALONEY

INTERVENOR DEFENDANTS' REPLY TO PLAINTIFF'S RESPONSE TO MOTION FOR JUDGMENT ON THE PLEADINGS

The Intervenor Defendants, Emmet County, Charlevoix County, the City of Petoskey and the City of Harbor Springs, submit this Reply Brief to address the plaintiff's Response to the Motion for Judgment on the Pleadings.

Introduction

The Response Brief advances several arguments that reflect the plaintiff's attempt to parse out discrete issues and defeat them in detail. This approach is understandable because it allows the plaintiff to ignore the defendants' overarching position that the claims raised in the Complaint are all issues that were, or should have been, decided by the ICC. The plaintiff also ignores the allegations in its own Complaint of the relationship between the 1836 Treaty and 1855 Treaty. The plaintiff attempts to divorce the two treaties from one another and focus only on the 1855 Treaty. For the reasons that follow the plaintiff's arguments must be rejected and the defendants' Rule 12(c) motion should be granted.

A. Relationship Between the 1836 and 1855 Treaties.

The plaintiff's Response states "it is important to note the Cities and Counties assessment that the Tribe seeks recognition of its 1855 Treaty Reservation and reservations under the 1836 Treaty is false." (Response, p. 13). The plaintiff asserts it seeks recognition of the purported reservation only under the 1855 Treaty. *Id*. While that is an accurate statement if one only considers discrete portions of the Complaint, it ignores the relationship between the 1836 and 1855 Treaties as described in the allegations in the Complaint as a whole.

The plaintiff's Complaint alleges Odawa leaders traveled to Washington DC to negotiate with the United States. Those negotiations resulted in the 1836 treaty (Complaint, ¶ 19). In negotiating the 1836 Treaty, certain Odawa and the Chippewa bands retained fourteen reservations. The bands also reserved hunting, fishing, and other usufructuary rights throughout the cession area. In exchange, United States negotiators secured an over-26,000,000-acre cession that included nearly 14,000,000 acres of land that would become northwestern Michigan. (Complaint, ¶ 20). Rather than ratify the Treaty as negotiated, the United States Senate modified the reservation clause, time-limiting it to only five years. (Complaint, ¶ 21). The Odawa and Chippewa only accepted this amendment upon assurances from Michigan agent and U.S. negotiator Henry Schoolcraft that the United States would not enforce the five-year limit and the bands could remain on their reservation beyond the five-year sunset. (Complaint, ¶ 22). The Complaint alleges the Odawa understood Schoolcraft's assurances to mean that they would, in fact, **never be removed from the reserved land in Michigan**. (Complaint, ¶ 23)(Emphasis added).

While plaintiff does seek recognition of a permanent reservation under the terms of the 1855 Treaty, that claim is premised on the allegation and assertion that the Tribe never

surrendered the land in which they now claim a reservation. The plaintiff alleges it retained permanent reservations through the 1836 Treaty and has continuously possessed the reservation since the 1836 Treaty.

According to the plaintiff, the 1855 Treaty simply clarified the existence of the permanent reservations created by the 1836 Treaty. "Although the United States never removed the Odawa, the Odawa nevertheless lived in constant fear of **being forced from their reserved lands**. **This uncertainty as well as the United States' failure to fulfill certain obligations under the 1836 Treaty prompted negotiation for a new treaty**. (Complaint, ¶ 25)(Emphasis added). "The United States never did remove the Odawa, and instead tacitly gave permission for them to remain **on their reservations** beyond the five-year term **and continuously recognized that the Odawa retained their reservation from 1841-1855**." (Complaint, ¶ 24)(Emphasis added). Thus the 1836 Treaty is much more than "relevant historical background." (Response, p. 13). It is the lynchpin of the plaintiff's entire case. The plaintiff's own Complaint acknowledges the 1855 Treaty was (in its view) intended to re-confirm the permanent reservations created by the 1836 Treaty. (Complaint, ¶ 25).

Plaintiff now asserts, contrary to the allegations in the Complaint, that its predecessors did, in fact, cede all of the area of Royce Area 205 to the United States – including the area in which it now claims a permanent reservation. Plaintiff's argument in its Response Brief is that in the 1855 Treaty the United States agreed to re-create a permanent reservation consisting of 337 square miles. However, as just explained, the factual allegations in the Complaint belie that argument. The Complaint alleges the Tribe had always retained the reservations from the 1836 Treaty. Thus, the 1836 Treaty is an

integral part of the plaintiff's claims in this case and the 1855 Treaty cannot be considered without also considering its relationship to the 1836 Treaty.

B. Purpose of the ICC

The purpose of the Indian Claims Commission was to provide a means for "a prompt and final settlement of all claims between the Government and its Indian citizens, and that the best way to accomplish this purpose is to set up temporarily an Indian Claims Commission which will sift all these claims, subject to appropriate judicial review, and bring them to a conclusion once and for all." 92 Cong.Rec. 5312 (1946)." *United States v. Dann*, 470 U.S. 39, 46, 105 S. Ct. 1058, 84 L. Ed. 2d 28 (1985). "Before 1946, tribes were unable to pursue claims against the federal government without express congressional authorization. *Otoe & Missouria Tribe of Indians v. United States,* 131 Ct.Cl. 593, 131 F.Supp. 265, 272 (1955); *see Cohen's Handbook of Federal Indian Law* 443 (2005 ed.). The 1946 Act created the Indian Claims Commission to adjudicate all claims accruing before its effective date, August 13, 1946. Congress's intention was to 'draw [ ] in all claims of ancient wrongs, respecting Indians, and to have them adjudicated once and for all.'" *Oglala Sioux Tribe of Pine Ridge Indian Reservation v. U.S. Army Corps of Engineers*, 570 F.3d 327, 331 (D.C. Cir. 2009). "Congress deliberately used broad terminology in the Act in order to permit tribes **to bring all potential historical claims** and to thereby prevent them from returning to Congress to lobby for further redress." *Id*. (Emphasis added).

C. ICC Jurisdiction

Plaintiff asserts the ICC could not have entertained a "reservation boundary" case, citing the *Oglala Sioux* case. There are two fundamental flaws in the plaintiff's argument. The first is the plaintiff is once again attempting to change the nature of the case, in this

instance into a "reservation boundary dispute." This is not a boundary dispute case; this is a case to decide whether a reservation even exists. Characterizing the case as a reservation boundary dispute presupposes the existence of a reservation. The defendants' position, obviously, is that there is no reservation. Thus the plaintiff's citation to the *Oglala Sioux* case is inapposite for its stated proposition.

The second fatal flaw in the plaintiff's argument is that the *Oglala Sioux* case also holds the ICC **did** have jurisdiction over the issue of whether a reservation existed. Plaintiff neglects to quote the sentence immediately preceding the "reservation boundary" statement: "The Tribe answers that the Indian Claims Commission Act does not bar suits to determine a reservation's boundaries. This is generally true, but **the Tribe puts the matter much too broadly**." *Id*. (Emphasis added). In addition to the language cited in Part B, the court explicitly stated: "[The Tribe] cannot obtain review of a historical land claim otherwise barred by the Act by challenging present-day actions involving the land." *Id*. at 332. As the defendants explained in the original Brief, the courts have acknowledged this is the type of historical claim that was within the jurisdiction of the ICC. *United States v. Dann,* 470 U.S. 39, 45, 105 S.Ct. 1058, 1062, 84 L.Ed.2d 28 (1985); *Navajo Tribe of Indians v. State of New Mexico*, 809 F.2d 1455, 1460 (10th Cir. 1987); *Western Shoshone Nat. Council v. Molini*, 951 F.2d 200, 202 (9th Cir. 1991).

The plaintiff also argues the ICC could not hear claims against the States, and since the plaintiff has brought suit against the State of Michigan, the ICC could not have entertained the issues raised in this lawsuit. This argument is too clever by half. Once again the plaintiff presupposes the existence of a permanent reservation and claims the State of Michigan refuses to recognize its obligations vis-à-vis the claimed reservation. However, if

there is no reservation, neither the State nor the local municipal entities have any obligations that would be created by the existence of a reservation. Additionally, plaintiff's citation to *Mille Lacs Band of Chippewa Indians v. State of Minn.*, 853 F. Supp. 1118, 1198 [sic 1139] (D. Minn. 1994), *aff'd* 124 F.3d 904 (8th Cir. 1997), is inapposite. The *Mille Lac Bands* case addressed the issue of usufructuary rights, not the issue of the existence of a reservation. The existence of a reservation was not disputed; the issue was whether the State could enforce its laws regarding hunting and fishing. In the present case the plaintiff is explicitly attempting to obtain a declaratory judgment of the existence of a reservation; there is no issue of usufructuary rights in this litigation. The relief the plaintiff seeks in this case would not have been barred by the jurisdictional limitations referred to by the court in the *Mille Lacs Band* case statement:

> **The Band's claims in this action are based on its position that its usufructuary rights were never extinguished**. The ICC would have dismissed any claim relying on existing rights for lack of jurisdiction. Moreover, the Band's claims for present violations of those rights did not accrue until long after August 13, 1946, and the ICC would not have had jurisdiction over them. The ICC also could not hear the Band's claims because it was limited to adjudicating claims against the United States, and the Band is seeking relief against State defendants.

Mille Lacs Band, supra, 853 F. Supp. at 1139. (Emphasis added). Another key distinction is that the plaintiff in the *Mille Lacs Band* case could not have made the United States a defendant because it played no part in enforcing State hunting and fishing laws. Here, in contrast, the United States **was** the other party in the ICC proceedings and in the 1836 Treaty and the 1855 Treaty. In this case plaintiff chose to use a surrogate defendant in the State of Michigan in its attempt to have this Court declare the existence of a reservation. The plaintiff cannot avoid the judicial estoppel effect of its ICC claims through the artifice of naming a party that played no part in the underlying treaties.

D. The ICC Proceedings and the 1855 Treaty

The plaintiff's Response also ignores the fact that the ICC **did** consider the status of the land in which the plaintiff now claims a permanent reservation. In Docket No. 364 the plaintiff's predecessors sought an accounting under the 1855 Treaty. The ICC described the historical background of the 1855 Treaty in its Opinion of January 27, 1975, 35 Ind. Cl. Comm. 385 (1975) (**Exhibit J**):

> The plaintiffs ceded their last remaining tribal land to the defendant by a treaty dated March 28, 1836, 7 Stat. 491. Originally, the treaty provided for permanent reservations in Michigan; but by Senate amendment, the reservations were each limited to a 5-year term, after which the Indians were to be removed west.
>
> The 1855 Treaty marked the Government's abandonment of the removal scheme. **Article I partially restored the land ceded in 1836, this time in the form of individual allotments**. Lake Superior Bands of Chippewa Indians v. United States, Dockets 18-E and 58, 22 Ind. Cl. Comm. 372, 375 (1970).

Id. at 386. (Emphasis added). The first claim in the Petition was "for the value of the land which members of the tribe were entitled to have allotted to them under the 1855 Treaty, but which was allegedly not so allotted." *Id*. at 387. The United States moved to dismiss that claim. The ICC granted dismissal, holding:

> **Assuming, without deciding, that the tribe had a claim for the value of such of its ceded lands as ought to have been allotted but were not, that claim has already been paid**. In Lake Superior Bands, supra, the Commission excluded only the 121,450.75 acres which were actually allotted under the 1855 Treaty from the area ceded in 1836 for which the plaintiff was awarded additional compensation. We asked no questions about whether some of the rest of the land should have been allotted; **we awarded compensation for it all.** The plaintiff's first claim here, if valid, merely overlaps part of the claim that was satisfied in Lake Superior Bands.
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> Final judgment in the prior litigation was entered on December 29, 1971. Bay Mills Indian Community v. United States, Dockets 18-E and 58, 26 Ind. Cl.

> Comm. 562, amended 27 Ind. Cl. Comm. 94 (1972). **It follows that the plaintiff's first claim in the instant docket is now barred.**

Id. at 387 – 388. (Emphasis added). This holding demonstrates two significant points: (1) the relationship between the 1836 Treaty and the 1855 Treaty and (2) the fact the plaintiff's predecessors raised the status of the land at issue in this case in Docket No. 364. Those points are significant in deciding both the judicial estoppel and the collateral estoppel issues.

E. Judicial Estoppel and Collateral Estoppel

The plaintiff makes two related arguments to attempt to avoid the effect of the ICC proceedings – which should have put this issue to rest "once and for all." First, plaintiff argues the United States might not have wanted to expend scarce resources proving that a reservation existed and therefore the United States was entitled to a set-off for the land set aside for such a reservation, citing *United States v. Delaware Tribe of Indians*, 427 F.2d 1218, 1220 (Ct. Cl. 1970). The plaintiff then argues the ICC "did not make any award or offset decision concerning the 1855 Treaty Reservation." (Response, pp. 16 – 17). The logical conclusion, according to the plaintiff, is that "Tribal predecessors did not believe that the 1855 Reservation was ceded . . . " *Id*.

The Indian Claims Commission Act, 25 U.S.C. § 70a, addressed the issue of money, property and gratuities paid or given to the Tribes:

> * * * (T)he Commission may also inquire into and consider **all money or property given to** or funds expended gratuitously for the benefit of the claimant and if it finds that the nature of the claim and the entire course of dealings and accounts between the United States and the claimant in good conscience warrants such action, **may set off all or part of such expenditures** against any award made to the claimant, * * *." (Emphasis added).

In the ICC proceedings involving the land and treaties at issue in this case the United States sought offsets for, *inter alia*, "presents" in the amount of $1,369.00 and Tribal delegate expenses in the amount of $636.05. 26 Ind. Cl. Comm. 538, 547 (1971) (**Exhibit G**). The ICC allowed neither of these expenses as offsets. The plaintiff cannot seriously contend the United States would expend "scarce resources" litigating offsets of $600.00 and $1,300.00 (and losing) but would not litigate an offset for 337 square miles of land. To state the proposition is to dismiss it as absurd.

The plaintiff's second argument, that the ICC did not did not make any award or offset decision concerning the 1855 Treaty Reservation once again presupposes the existence of a permanent "1855 Treaty Reservation." As discussed in Part D, the ICC in Docket No. 364 **did** consider the status of the land in which the plaintiff now claims a permanent reservation.

As discussed at length in the Brief in Support, the ICC ultimately ruled the 401,971 acres of reservation land identified in the 1836 Treaty was land for which the plaintiffs could seek additional compensation. 26 Ind. Cl. Comm. 538, 540-541 (1971). (**Exhibit G**). The ICC also addressed the 1855 Treaty in both Docket No, 364 and 18E/56.

If a reservation existed, either as a result of the 1836 Treaty, or as plaintiff now argues as a result of the 1855 Treaty without regard to the 1836 Treaty, the United States would obviously have raised that as a defense to the claim for additional compensation for the original cession or in response to the demand for an accounting under the 1855 Treaty. The United States attempted to argue the individual allotments constituted additional consideration for the cession, but the ICC rejected that argument. The United States did not argue during the ICC proceedings in the 1950s, 1960s or 1970s that they should not have to

pay additional compensation for reservation land occupied by the Tribes because all parties to the ICC proceedings understood and agreed no such reservations existed.

The ICC record cited demonstrates the elements for judicial estoppel have been met. (1) The plaintiff's position in this litigation is "clearly inconsistent" with the position taken by its predecessors in the ICC litigation. (2) The plaintiff's predecessors were successful in prosecuting their claims in the ICC and obtained a multi-million dollar judgment as a result. (3) The plaintiff would derive an unfair advantage by asserting inconsistent positions. (4) The plaintiff has never asserted the claim that it has a permanent reservation in previous litigation.

Since the ICC did address the purpose and effect of the 1855 Treaty and specifically addressed the land in which the plaintiff now claims a permanent reservation, the elements for collateral estoppel have been met.

RELIEF REQUESTED

The defendants respectfully request the Court grant their Motion for Judgment on the Pleadings pursuant to Rule 12(c) and issue an order dismissing the plaintiff's Complaint with prejudice.

Respectfully submitted,

Dated: November 7, 2018

By: /s/ Michael Bogren

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