UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DUSTIN LEE MACLEOD,
Plaintiff,
v.
WILLIAM MORITZ, *et al.*,
Defendants.

No. 5:18-cv-11653-JEL-MKM
HON. JUDITH E. LEVY
MAG. MONA K. MAJZOUB

Dustin Lee MacLeod, Prisoner #956261
Plaintiff
Parnell Correctional Facility
1780 East Parnell Street
Jackson, MI 49201

Phil Bellfy, PhD
Counsel for Plaintiff
5759 S. Ridge Rd.
Sault Ste. Marie, MI 49783

Nathan A. Gambill (P75506)
Assistant Attorney General
Environment, Natural Resources, and Agriculture Division
Attorney for Defendants
P.O. Box 30755
Lansing, MI 48909
(517) 373-7540
gambilln@michigan.gov

/

SECOND MOTION TO DENY DEFENDANTS' MOTION TO DISMISS AND TO SCHEDULE DISCOVERY AND A DATE FOR TRIAL [1]

We would like to re-file our pending Motion to Deny the Defendants' Motion to Dismiss our case "in its entirety."

This re-filing of our Motion to Deny is based on one very simple fact –court filings in this case have revealed that there are "genuine issues of material fact" that the parties cannot resolve, among which

1. In recognition of my client's limited education, while not required to do so, this filing is in compliance with the Plain Writing Act of 2010 (Public Law 111-274).

are the following (the list is not exhaustive; we reserve the right to add other genuine issues of material fact that may arise through discovery):

1. The State, by signing the 2007 Inland Consent Decree, waived its right to claim sovereign immunity in any dispute that arises under the Decree (I-Jurisdiction).
2. The State, by signing the 2007 Inland Consent Decree, agreed that the Decree "shall apply to and be binding upon the Parties, their officers, employees, agencies, subdivisions, successors, and assigns and shall remain binding notwithstanding any future rulings or determinations in any jurisdiction that may be inconsistent with the provisions of this Decree. " (II-Parties Bound)
3. The State, by signing the 2007 Inland Consent Decree, agreed that "public land" is more accurately described as "'1836 Ceded Territory' [meaning] the territory ceded in the 1836 Treaty of Washington, 7 Stat. 491." (3.1 of the Decree)
4. The State, by signing the 2007 Inland Consent Decree, agreed that "The terms 'State' or 'State of Michigan' mean, collectively, the State of Michigan, the Michigan Department of Natural Resources, the Michigan Natural Resources Commission, MDNR Director, MDNR Fisheries Division Chief, MDNR Wildlife Division Chief, MDNR Law Enforcement Division Chief, MDNR Resource Management Deputy, and their successors and any authorized representatives acting on their behalf, or any one of them," which, obviously, includes the named Defendants, even those being charged in their "individual capacities." (3.24 of the Decree)
5. The State, by signing the 2007 Inland Consent Decree, "recognizes the existence of, and defines the extent of, the Tribes' Inland Article 13 Rights on the following lands and Waters within the boundaries of the 1836 Ceded Territory: (a) Public lands and Waters (including, but not limited to, federal and State lands, which currently comprise, approximately, over 4,500,000 acres in the 1836 Ceded Territory); ... (c) Lands and Waters owned by a Tribe, a Tribal member, or the spouse of a Tribal member...." (Section IV of the Decree)
6. The State, by signing the 2007 Inland Consent Decree, agreed that "Each of the Tribes has the right to regulate its members' exercise of Inland Article 13 Rights, the extent of which is defined in this Decree. The State is prohibited from regulating or otherwise interfering with the exercise of such

rights except as provided in this Decree." (Section V of the Decree)

7. The State, by signing the 2007 Inland Consent Decree, agreed that the Decree does not "limit or expand the right of the Tribes or their members to undertake any other activity pursuant to any other applicable law. " (Section 6.1 of the Decree)
8. The State, by signing the 2007 Inland Consent Decree, agreed that "Tribal members: ... (ii) may engage in other historically traditional activities (such as the construction and use of sweat lodges)..." (Section 6.2 of the Decree; see, also, #6, above)
9. The State, in its filings in this case, has agreed that the Sacred Structures destroyed by the Defendants are "sweat lodges." (See 8, above)

We would also like the Court to note that the US Supreme Court has recently decided a case that, at its core, is remarkably similar to the case before this Court; this recent ruling, obviously, sets a precedent that is binding on this Court. In its Opinion, the US Supreme Court noted: "In state trial court, Herrera asserted that he had a protected right to hunt where and when he did pursuant to the 1868 Treaty. The court disagreed and denied Herrera's pretrial motion to dismiss [the hunting charges against him]." Herrera v. Wyoming, 587 U. S. ____ (2019) at 5)

We would like to rephrase the section quoted, above, making it relevant to this case: In state trial court, MacLeod asserted that he had a protected right to "construct and use sweat lodges" where and when he did pursuant to the 1836 Treaty of Washington. The court disagreed and denied MacLeod's motion to dismiss the 'trespass' charges against him, and found him "responsible" for trespass.

It is that "trespass" charge that has become the central focus of this case, and an important "genuine issue of material fact" --does the "construction and use of sweat lodges on 'public lands' within the 1836 Ceded Territory" fall under State "trespass" rules, or does such "construction and use" fall within the recognized rights of tribal members under 6.2(a) of the 2007 Inland Consent Decree?

Furthermore, it must also be noted that in that case before the US Supreme Court, Petitioner

Herrera did not argue that his "Tribal rights" were violated by the State court; to the contrary, Herrera argued –successfully, it must be noted-- that his rights as an American Indian, as an individual, as a human being, were violated by his conviction in State court. Again, the Opinion is binding on this Court in the case before it: Individual American Indians, human beings, have a constitutionally-mandated right to "advance a treaty-based defense."

It is also critical to note that "Treaties are the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." (US Constitution, Article VI, Clause 2)

So, this is the central question before this Court in this Motion to Deny: Given the disputed issues presented above, especially, whether or not Petitioner MacLeod can argue in front of a jury that the 1836 Treaty of Washington, and its attendant 2007 Inland Consent Decree, recognizes his individual Treaty-right, his individual human-right, to "construct and use a sweat lodge," which precludes the Defendants from destroying same? Quite obviously, this is a disputed issue that only a "trier of fact," a jury, can decide.

RELIEF SOUGHT

Given that this case poses several genuine issues of material fact, we respectfully ask this Court to deny the Defendants' Motion to Dismiss this case, establish a schedule for discovery, and set a date for a jury-trial (as requested in the Complaint).

RESPECTFULLY SUBMITTED

Philip C. Bellfy, on June 27, 2019

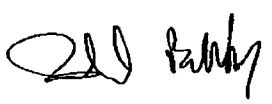
PROOF OF SERVICE

I, Philip C. Bellfy, Counsel for Plaintiff, declare that on June 27, 2019, I placed a true copy of this filing in the United States mail enclosed in sealed envelopes with postage fully prepaid, addressed as follows:

US District Court Clerk's Office
Case No.: 5:18-cv-11653-JEL-MKM
231 W Lafayette Blvd,
Detroit, MI 48226

Nathan A. Gambill (P75506)
Assistant Attorney General
Case No.: 5:18-cv-11653-JEL-MKM
P.O. Box 30755
Lansing, MI 48909

Dustin Lee MacLeod, Prisoner #956261
Parnell Correctional Facility
1780 East Parnell Street
Jackson, MI 49201



Philip C. Bellfy, on June 25, 2019

Phil Bellfy
Sault Tribe Lay Advocate
5759 S. Ridge Rd.
Sault Ste. Marie, MI 49783

TRAVERSE CITY
MI 496 2 L
26 JUN 2019 PM

6/28/19

RECEIVED
JUL - 1 2019
CLERK'S OFFICE
U.S. DISTRICT COURT

US District Court
Case #5:18-cv-11653
231 W. Lafayette Blvd.
Detroit MI 48226

48226$2794