

71 of 92 DOCUMENTS

**BAY MILLS INDIAN COMMUNITY, SAULT STE. MARIE TRIBE OF
CHIPPEWA INDIANS, and GRANT TRAVERSE BAND OF OTTAWA AND
CHIPPEWA INDIANS, Federally Recognized Indian Tribes, Plaintiffs, v.
FERROCLAD FISHERY LIMITED, a Canadian corporation, JAMES VICTOR
GREENSLADE, as master of the vessel Last Time, and as agent for Ferroclad
Fishery Limited, and EDWARD GEORGE SMITH, Defendants.**

File No. M88-69

**UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF
MICHIGAN**

1988 U.S. Dist. LEXIS 17684

July 18, 1988, Decided

July 19, 1988, Filed

JUDGES: [*1] ENSLEN

OPINION BY: RICHARD A. ENSLEN

OPINION*OPINION*

This matter is before the Court on the defendant's motion to dismiss brought pursuant to *Federal Rule of Civil Procedure 12(b)(6)*. For the reasons stated below, the Court will deny the motion.

Facts

Plaintiffs in this action are several Indian tribes recognized by the Secretary of the Interior which benefit from certain treaty-reserved rights to fish in the Great Lakes.¹ Under a consent decree entered by this Court in the case of *United States v. Michigan*, No. M26-73 (W.D. Mich.), the tribes enjoy exclusive rights to exploit fishery resources in certain designated areas of Lake Michigan, Lake Superior, and Lake Huron. *See, United States v. Michigan*, 471 F. Supp. 192 (W.D. Mich. 1979), modified, 653 F.2d 277 (6th Cir. 1981); cert. denied, 454 U.S. 1124 (1981). As the court acknowledged in that case, plaintiffs hold these rights, "by virtue of aboriginal occupation and use, the Treaty of Ghent of 1814 and the Treaty with the Ottawa and Chippewa Nation of 1836." *Id.* at 203. In

their complaint, the tribes allege that the defendants own and operate a commercial [*2] fishing vessel known as the Last Time which has "consistently and systematically crossed the Canada/United States border for the purpose of harvesting fish from an area of Lake Superior . . . in which Plaintiffs are entitled to the exclusive commercial fishing harvests," under the consent decree mentioned above. Complaint PP5-6. Plaintiffs seek attachment of the vessel and its property, preliminary and permanent injunctive relief enjoining defendants from continuing to fish in plaintiff's waters, and damages for fish wrongfully taken by the defendants in the past.²

1 Specifically, the plaintiffs include the Bay Mills Indian Community, Sault Ste. Marie Tribe of Chippewa Indians and Grand Traverse Band of Ottawa and Chippewa Indians. For convenience, this opinion will refer to plaintiffs collectively as "the tribes."

2 It appears that the Last Time is the subject of a forfeiture proceeding by the State of Michigan in Chippewa County Circuit Court, case number 7619. The defendants argue in that proceeding that the vessel was improperly seized in Canadian waters.

[*3] In their motion, the defendants argue that, while the plaintiffs may possess certain exclusive fishing rights in the Great Lakes, those rights do not rise to the level of a property interest. Defendants assert that neither

the Treaty of 1836, nor the consent decree based upon that treaty granted the plaintiff tribes a "fee interest in any of the hunting or fishing interests . . . granted such tribes under the various treaties. . . ." Motion for Dismissal at 3. Since plaintiffs do not own a "fee interest" in these rights, defendants conclude that, "there can be no actionable claim by [plaintiffs] against individuals for conversion, trespass, etc., arising as a result of "illegal fishing in treaty-ceded waters." Reply Brief for Defendants at 2. Defendants assert that plaintiffs' cause of action, if any, is against the State of Michigan for negligently failing to enforce the consent decree. *Id.* at 3.

Standard

In deciding a motion to dismiss under *Rule 12(b)(6)*, the court must determine whether plaintiffs' complaint sets for sufficient allegations to establish a claim for relief. The court must accept all allegations in the complaint at "face value" and construe them in [*4] the light most favorable to the plaintiffs. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *Windson v. The Tennessean*, 719 F.2d 155, 158 (6th Cir. 1983); *Amersbach v. City of Cleveland*, 598 F.2d 1033, 1034-35 (6th Cir. 1979); *Davis v. Elliot Co. v. Caribbean Utilities Co.*, 513 F.2d 1176 (6th Cir. 1975). The court cannot dismiss plaintiffs' complaint unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of its claim which would entitle it to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

Discussion

Although defendants assert that plaintiffs' complaint rests upon a faulty assumption that the Treaty of 1836, the consent decree and the court's opinion in *nited States v. Michigan*, 471 F. Supp. 192 (W.D. Mich. 1979) granted them a property right to exclusive fishing in certain areas of the Great Lakes, the court believes that it is the defendants who premise their claim upon a faulty assumption. Both parties' arguments revolve around the following passage in Judge Fox's opinion.

Indian title to land has never been a fee; [*5] it has always been a right to use and occupy lands claimed by the United States. This interest in land gives the tribes holding it the right to fish, hunt, gather fruits and cross the land. It is analogous to a profit apprendre or an easement.

471 F. Supp. at 276. While it is true that the court has never explicitly defined plaintiff's fishing rights as a "fee interest" in the fish themselves, the fact, standing alone, does not defeat plaintiffs' claim. First, Judge Fox's opinion clearly grants plaintiffs a property right in the fishery resources of the Great Lakes. For example, the court's opinion notes that, "The Ottawa and Chippewa Indians, and the plaintiff tribes . . ., reserved an aboriginal right to fish in the waters of the Great Lakes ceded by the Treaty of 1836, which right they may exercise without regulation by the State of Michigan." *Id.* at 216. Later in its opinion, the court held that, "The fishing right reserved by the Indians . . . is the communal property of the tribes which signed the treaty and their modern political successors. . . ." *Id.* at 271. In fact, the very quotation relied upon by defendants [*6] establishes that the tribes hold an enforceable property right since it is axiomatic that a profit apprendre or an easement is a property right enforceable through an action for trespass, conversion or ejectionment.³ The fact that the court refused, correctly, to designate plaintiff's interest a "fee interest" does not render that interest wholly unenforceable.

3 See, e.g. *United States v. Southern Pacific Transportation Co.*, 543 F.2d 676 (9th Cir. 1976) (regarding easement over reservation lands held by private party); 25 *AmJur2d Easements PPI*, 4, 11, 120-122 (1966) and cases cited.

Equally well-established is the right of Indian tribes to enforce these interests, with or without the aid of the federal government, through litigation in the federal courts. As one district court in a recent Indian land case noted:

During the long history of adjudications involving the conveyability of Indian land, rarely have courts noted their reliance on any statutory basis for the cause of action. [*7] It appears to have been simply assumed that title to land necessarily included the ability to assert ownership rights in a court of proper jurisdiction, for "how can it be said to be any title at all which cannot be asserted in a court of justice by the owner to defend or obtain possession?" *Green v. Biddle*, 21 U.S. (8 *Wheat.*) 1, 11 (1823) (Story, J.). . . . Accordingly, the Supreme Court could

confidently state in *Marsh v. Brooks*, 49 U.S. (8 How.) 223, 232 (1850), "that an action of ejectment could be maintained on an Indian right of occupancy and use, is not open to question."

Cayuga Indian Nation of New York v. Cuomo, 565 F. Supp. 1297, 1319 (N.D.N.Y. 1983).⁴ More recently, the United States Supreme Court affirmed these same principles in *Oneida v. Oneida Indian National*, 470 U.S. 266 (1985), when it noted that, ". . . Indians have a common-law right of action for an accounting of 'all rents, issues and profits,' against trespassers on their land," and held that an Indian tribe could maintain an action for damages for the occupation and use of unlawfully conveyed tribal lands. *Id.* at [*8] 235-36 (quoting, *United States v. Santa Fe Pacific R. Co.*, 314 U.S. 339 (1941)).⁵

4 Although the case caption does not reflect this fact, the defendants in *Cayuga* included many private, non-governmental entities including Miller Brewing Company, Consolidated Rail Corp., and "various commercial and individual landowners." 565 F. Supp. at 1298, 1303.

5 The Court finds these cases to be on point despite the fact that they refer to land rather than to fishing rights. Indian rights to land reserved or granted under a treaty are not, in general, properly denominated a "fee interest," since those rights are held in trust with the federal government and are subject to severe restraints on alienation incompatible with the general concept of a fee interest. *See, e.g.*, 25 U.S.C. § 177.

Second, the fact that the defendants in this case are private rather than governmental entities does not, as defendants argue, require that the case against them be dismissed. There [*9] is no requirement that Indians enforce their property rights solely against the state or federal government. Indeed, as is true of every other type of property right, they may protect their property against encroachment by an entity. Many cases involving Indian property rights have involved private entities, either as named defendants or as members of an entire class of defendants. *See, e.g.*, *Cayuga*, *supra* note 4; *Mashpee Tribe v. New Seabury Corp.*, 427 F. Supp. 899 (D. Mass.

1977). The fact that most cases involving Indian property rights name governmental agencies as defendants is a product of historical accident rather than legal necessity, since many of these cases involve questionable land transactions between Indian tribes and state or federal governments. In the typical case, history reveals that the Indian tribe sold or ceded its land to a state government and the state thereafter conveyed those lands to private individuals. When an action to recover these lands is later brought, both the state and the present, usually private owner, are named as defendants. Nor are state governments or the federal government always necessary parties [*10] to such lawsuits. In *Mashpee*, for example, the court denied a motion to dismiss based upon non-joinder of the United States and the State of Massachusetts, holding that these entities were not indispensable parties to a suit for the return of unlawfully conveyed Indian lands. There is, in short, no legal support for defendants' assertion that plaintiffs may only enforce their fishing rights against, "state action amounting to a limitation of Indian Treaty fishing rights." Reply Brief at 3.

Finally, the fact that the State of Michigan purports to own all fish in the Great Lakes is simply irrelevant to plaintiffs' claim. *See, M.C.L. 308.1*, M.S.A. 13.1491 ("All fish of whatever kind found in the waters of . . . the Great Lakes . . . shall be and are declared to be, the property of the State . . ."). Plaintiffs here need not rely upon an ownership interest in the fish themselves. They rely instead upon their clearly established property right to exploit that resource in certain areas of the Great Lakes. Whether plaintiffs own both the fish and the right to harvest those fish, or simply the right to harvest has no bearing upon whether defendants violated plaintiffs' property [*11] right by harvesting fish in areas designated for the tribes' exclusive use. The complaint here seeks damages and injunctive relief based upon the defendants' alleged conduct in fishing in tribal waters. It is not premised upon the tribes' ownership of the fish found in those waters but upon their ownership of the right to harvest those fish. Whatever the state's ownership interest in the fish might be, it appears clear to this Court that the tribes have the exclusive right to commercially harvest fish in the designated areas. If defendants infringed that right by engaging in commercial fishing in tribal waters, plaintiffs would appear to be entitled to compensation for that infringement of their exclusive fishing rights.

Since I can find no merit in the legal arguments

advanced by defendants in the instant motion, and since the facts as pled could conceivably entitle the tribes to the relief sought, defendants' motion to dismiss is denied.

DATED in Kalamazoo, MI: July 18, 1988

RICHARD A. ENSLEN, U.S. District Judge

ORDER

In accordance with the written opinion dated July 18,

1988;

IT IS HEREBY ORDERED that Defendant's Motion for dismissal Pursuant to FRCP 12(b)(6) is [*12] DENIED.

DATED in Kalamazoo, MI: July 18, 1988

RICHARD A. ENSLEN, U.S. District Judge