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Grand Traverse Band of Ottawa and Chippewa Indians v. Director, Michigan Dept. of Natural Resources, Tp. of Leland, Village of Northport C.A.6 (Mich.), 1998.

NOTICE: THIS IS AN UNPUBLISHED OPINION. (The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA6 Rule 28 and FI CTA6 IOP 206 for rules regarding the citation of unpublished opinions.)

United States Court of Appeals, Sixth Circuit.

GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS, Plaintiff-Appellee, Cross-Appellant,

v.

DIRECTOR, MICHIGAN DEPARTMENT OF NATURAL RESOURCES; TOWNSHIP OF LELAND; VILLAGE OF NORTHPORT, Defendants-Appellants, Cross-Appellees.

Nos. 96-2396, 96-2466.

July 1, 1998.

On Appeal from the United States District Court for the Western District of Michigan.

Before **JONES**, **NELSON** and **RYAN**, Circuit Judges.

JONES, Circuit Judge.

*1 This is an appeal and cross-appeal of an award of attorney's fees under 42 U.S.C. § 1988. The full facts of the underlying litigation in this appeal are set out in this court's opinion in *Grand Traverse Band of Ottawa and Chippewa Indians v. Director, Michigan Department of Natural Resources, et. al*, No. 96-1168, 1998 WL 171331 (6th Cir. April 15, 1998). For the purpose of the attorney's fees issue we briefly summarize the pertinent facts.

I.

The Grand Traverse Band of Ottawas and Chippewas ("GTB") sued the Village of Northport, the Township of Leland and the Director, Michigan Department of Natural Resources ("MDNR") chal-

lenging commercial use prohibitions contained in agreements between MDNR and the municipalities that prevented GTB tribal fishers from mooring their commercial fishing vessels at the municipalities' marinas. GTB charged that enforcement of the commercial use restrictions against them deprived its members of the right to fish guaranteed by treaties with the United States in 1836 and 1855, as well as a 1985 consent judgment entered into with the State of Michigan. These documents, GTB asserted, entitled its members to fish certain traditional fishing grounds located in the Great Lakes areas, and to enjoy a right of access to these areas that included mooring access to the municipalities' marinas. GTB also asserted two claims under 42 U.S.C. § 1983, that the enforcement of the commercial use prohibitions violated its rights of due process and equal protection of the laws.

On December 19, 1995, the district court granted summary judgment to GTB on its treaty-based and consent judgment claims to establish mooring access to the municipalities' marinas. The district court granted summary judgment to the municipalities, however, on GTB's equal protection claim, and in a footnote of the opinion declined to rule on the due process claim finding that the claim needed further briefing. J.A. at 530 n. 1. Subsequently, in a letter to the district court on December 29, 1995, GTB voluntarily dismissed the due process claim "in the spirit of comity" because the grant of partial summary judgement in its favor provided GTB with sufficient relief. J.A. at 548. This court affirmed the district court's decision granting transient mooring access to GTB on appeal.

GTB then sought attorney's fees from both Northport and Leland.^{FN1} On August 19, 1996, GTB filed an amended bill of costs for attorney's fees and expenses under 42 U.S.C. § 1988 for the following: 1) approximately 552.59 hours of billed attorney's fees in the primary litigation, at \$175.00 an hour totaling \$96,703.25; 2) 335.43 hours of billed attorney's fees in ancillary federal and state court proceedings^{FN2} concerning: a) the arrest of a GTB

member for mooring at the Northport Marina, and b) access to the Northport marina, at \$175.00 an hour totaling \$58,700.25; 3) expenses in the primary proceeding of \$1,815.06; and 4) expenses in the ancillary state and federal court proceedings of \$617.76. J.A. at 845-46.

FN1. GTB did not seek fees against MDNR. After the filing of the lawsuit, MDNR supported GTB's request for mooring access and submitted a memorandum to the district court in GTB's favor.

FN2. We refer to three separate proceedings as the “ancillary proceedings” for which GTB seeks attorney's fees. The proceedings arose after a GTB tribal fishermen, George Duhamel, was arrested and prosecuted for criminal trespass when he docked his commercial fishing vessel at the Northport Marina. In response, GTB sought declaratory and injunctive relief in federal court in *United States v. Michigan*, No. 2 73 CV 26, the first of the three separate proceedings, and a case over which the district court had continuing jurisdiction under the terms of the 1985 consent order. Apparently, the resolution of this case rendered that suit superfluous and that action was dismissed as moot. In the second proceeding, Northport commenced civil proceedings in state court against Duhamel seeking an injunction prohibiting Duhamel from mooring his vessel at its marina. GTB defended Duhamel in this state court civil action and also in the state court criminal proceeding concerning the trespass charge. GTB sought attorney's fees for all three of these proceedings, however, only against Northport.

*2 In three separate opinions, the district court granted GTB fees and held the municipalities jointly and severally liable for the entire amount of \$98,518.31 (fees plus expenses) for the primary litigation. The district court determined that although it had declined to address GTB's § 1983 due pro-

cess claim in its initial determination of summary judgment, the claim arose out of the same nucleus of facts as the treaty-based claims and as a prevailing party in the primary litigation GTB was entitled to a fee award. The district court, however, declined to award fees in the ancillary federal and state court proceedings, noting that the municipalities were not even parties to the federal proceedings and that the fees in the state proceedings did not specifically concern GTB, but one of its members.**FN3**The municipalities appeal the district court's award of attorney's fees in the primary litigation and GTB cross-appeals the denial of fees in the ancillary proceedings.

FN3. In one opinion concerning attorney's fees, the district court initially found that GTB might be entitled to fees for the ancillary proceedings, but after further briefings by the parties declined to award fees.

II.

We review a district court's grant of attorney's fees for an abuse of discretion, giving the district court's award of fees “substantial deference.” *Hadix v. Johnson*, 65 F.3d 532, 534 (6th Cir.1995) (citing *Hensley v. Eckerhart*, 461 U.S. 424, 437, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983)). In so doing, we apply a clearly erroneous standard in determining whether the prevailing party has in fact worked the hours claimed; we determine whether the court erred “when reviewing legal questions concerning the relationship of the hours billed to the points on which the party prevailed”; and “we look to see whether the district court has misapplied the reasonable practices of the profession when determining whether a party used poor judgment in billing the opposing party for hours spent on the case.”*Wooldrige v. Marlene Industries Corp.*, 898 F.2d 1169, 1175 (6th Cir.1990).

While each party to a lawsuit ordinarily bears his or her attorney's fees and costs, 42 U.S.C. § 1988 authorizes an award of reasonable attorney's fees to prevailing parties in civil rights litigation. *Hensley*, 461 U.S. at 429. Under that section, which provides

that “[i]n any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985 and 1986 of this title ... the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs,” 42 U.S.C. § 1988(b), a prevailing party will normally recover such fees “unless special circumstances would render such an award [of fees] unjust.” *Hensley*, 461 U.S. at 429 (citation and quotation marks omitted).

In determining a fee award under § 1988, we first must find that the party seeking fees under that section is the “prevailing party.” This requires that a party “obtain at least some relief on the merits of [the] claim” where that relief “materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff.” *Farrar v. Hobby*, 506 U.S. 103, 111-12, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992); see also *Hensley*, 461 U.S. at 433 (“[P]laintiffs may be considered ‘prevailing parties’ for attorney's fees purposes if they succeed on any significant issue in [the] litigation which achieves some of the benefit the parties sought in bringing suit.”) (citation and quotation marks omitted).

*3 The municipalities do not dispute that GTB meets the status of a “prevailing party” under the statute. GTB sought to declare the commercial use restrictions between MDNR and the municipalities unenforceable against them and was granted such relief. This court affirmed that judgment on appeal. Thus, prior to the district court's decision, GTB was not permitted to anchor its fishing vessels at the marinas owned by the municipalities, and it now is. The municipalities were clearly ordered to change their behavior in a way that directly benefits GTB, and given that fact GTB is a prevailing party in this litigation.

The primary contention made by the municipalities on appeal is that although GTB is a prevailing party, its treaty-based claim cannot be utilized as a basis for awarding attorney's fees under § 1988 because it is not an action to enforce § 1983. Treaty interpretation claims, the municipalities argue, do

not support claims under § 1983.

In the *Washington* litigation, relied upon by the municipalities, the Ninth Circuit discussed the issue of attorney's fees in Native American treaty cases. See *United States v. Washington*, 935 F.2d 1059 (9th Cir.1991) (*Washington IV*); *United States v. Washington*, 873 F.2d 240 (9th Cir.1989) (“*Washington III*”); *United States v. Washington*, 813 F.2d 1020 (9th Cir.1987) (“*Washington II*”); *United States v. Washington*, 774 F.2d 1470 (9th Cir.1985) (“*Washington I*”). In *Washington II*, the Ninth Circuit found that treaty interpretation claims do not give rise to claims cognizable under § 1983 unless those claims involve “known and well-delineated rights.” *Washington II*, 813 F.2d at 1023. The court noted that throughout the prior litigation in the case concerning the Native Americans' right to fish under several treaties, there was no discussion of the state's violation of the Native Americans' rights under the treaties or the Fourteenth Amendment, because those rights were unknown until after a Supreme Court decision defining those rights. *Id.* The court found, however, that if the State of Washington presently had violated the rights delineated by the Supreme Court in the earlier litigation, there would be an actual conflict between state and federal law which might give rise to a § 1983 action. *Id.* Because the treaty interpretation claims did not involve known and well-delineated rights, the court found that they could not give rise to a § 1983 claim and accordingly could not serve as a basis for awarding attorney's fees. *Id.*

The court also rejected a second alternative basis for § 1988 attorney's fees, that there was a pendent Fourteenth Amendment claim pleaded in the original complaint, finding that any such claims “lurking about were so attenuated and unsubstantial as to be absolutely devoid of merit.” *Id.* (citations and quotation marks omitted). In *Washington III*, the Ninth Circuit again reversed an award of attorney's fees in Phase II of the litigation, finding that the judgment in the case resulted from treaty interpretation and was not based on a violation of rights under the treaty, and as such could not be a basis for an award attorney's fees. *Washington III*, 873 F.2d at 242. In

Washington IV, however, the Ninth Circuit reversed the district court's decision denying a request for fees in the case. The court held that fees were proper in that aspect of the litigation because it was a subproceeding to enforce the Native Americans' rights to take certain fish. *Washington IV*, 935 F.2d at 1061. The court found that previous litigation had attempted to define the treaty rights, but that the subproceeding involved in its case was purely an action to enforce them. *Id.* The court noted that the district court had not been required, as in prior litigation, to interpret the treaties or define the rights conferred, but instead to enforce well-defined rights recognized by both parties. *Id.* Accordingly, the court found that attorney's fees could be awarded on that claim. *Id.*

*4 We decline, however, to decide whether this circuit will adopt the Ninth Circuit's "known and well-delineated rights" test for determining whether treaty claims may properly serve as a basis for awarding attorney's fees under § 1988.^{FN4} Rather, we rely on the basis used to award fees by the district court in this case, that the unaddressed § 1983 claim brought in the suit may serve as a basis for awarding fees.^{FN5}

^{FN4}. We do note, nonetheless, that GTB does have a strong argument that their case, unlike *Washington II* and *Washington III* was a claim to enforce their well-delineated rights. Unlike those cases, GTB did specifically allege that the defendants were violating the treaties, and their right to fish and for access to their fishing grounds had been well established since the litigation in *United States v. Michigan*, 471 F.Supp. 192 (W.D.Mich.1979), modified in part, 653 F.2d 277 (6th cir.1981) and the subsequent consent judgment in that case.

^{FN5}. The district court acknowledged that GTB's alternative basis for seeking attorney's fees was that the treaty claim itself could have been expressed as a § 1983 claim, but found that no purpose would be

served by ruling on that basis. J.A. at 58.

It is well settled that if a party prevails on a non-fee-generating claim that is pendent to a fee-generating § 1983 claim, fees may be awarded for the entire action if the non-fee-generating claim is "substantial" and both claims arose out of a common nucleus of operative fact. *See Maher v. Gagne*, 448 U.S. 122, 132-33 n. 15, 100 S.Ct. 2570, 65 L.Ed.2d 653 (1980) ("The legislative history makes it clear that Congress intended fees to be awarded where a pendent constitutional claim is involved, even if the [other] claim on which the plaintiff prevailed is one for which fees cannot be awarded....[I]f the claim for which fees may be awarded meets the 'substantiality test ... attorney's fees may be allowed even though the court declines to enter judgment for the plaintiff on that claim, so long as the plaintiff prevails on the non-fee claim arising out of a 'common nucleus of operative fact.'"') (citations omitted); *see also Seaway Drive-In, Inc. v. Township of Clay*, 791 F.2d 447, 451-52 (6th Cir.1986); *Carreras, v. City of Anaheim*, 768 F.2d 1039, 1050 (9th Cir.1985); *Williams v. Thomas*, 692 F.2d 1032, 1036 (5th Cir.1982); *Lund v. Af-fleck*, 587 F.2d 75, 77 (1st Cir.1978); *Seals v. Quarterly County Court of Madison County, Tennessee*, 562 F.2d 390, 393-94 (6th Cir.1977).

The test for substantiality is quite liberal and does not even require that the claim be supported by the evidence. *Seaway*, 791 F.2d at 452-53. Indeed, "a claim is insubstantial [only] if it is 'obviously without merit' or if 'its unsoundness so clearly results from the previous decisions of [the Supreme Court] as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy.'" *Id.* at 452 (citation omitted). Thus, "[t]he claim must be 'so insubstantial, implausible, foreclosed by prior decisions of [the Supreme Court] or otherwise completely devoid of merit as not to involve a federal controversy....'" *Id.* (citation omitted).

We find, as did the district court, that the unaddressed § 1983 due process claim was substantial.^{FN6}GTB argued that the municipalities

deprived GTB and its tribally licensed fishers of their treaty reserved property rights in the fisheries' resources, and deprived its members of entitlement to a protected liberty interest when they were jailed for mooring at the marinas and prevented from pursuing their occupations. The district court upon initial review declined to grant summary judgment and dismiss the claim on the merits although it could have done so, finding that the resolution of the claim was not clear, and it needed further briefing. The district court then determined with regard to the issue of attorney's fees, that the claim was substantial to the extent it claimed deprivation of procedural due process by the municipal defendants. Upon review we agree. Although there is clearly insufficient evidence to support a judgment on the claim, it is not so wholly without merit as to be insubstantial and completely implausible. The district court in granting summary judgment on the treaty-based claim noted that GTB's fishers were being unreasonably deprived of their ability to commercially harvest fish from traditional fishing areas by the denial of mooring at the marinas, an interest which may serve as a basis for constitutional relief. *Cf. Wilkerson v. Johnson*, 699 F.2d 325, 328 (6th Cir.1983) (finding that plaintiff was unconstitutionally deprived of liberty interest when prevented from pursuing business); *cf. also Greene v. McElroy*, 360 U.S. 474, 492, 79 S.Ct. 1400, 3 L.Ed.2d 1377 (1959) (noting that the right to employment and to follow a chosen profession free from unreasonable governmental interference were liberty and property rights protected by the Constitution); *Schware v. Bd. of Bar Examiners*, 353 U.S. 232, 238, 77 S.Ct. 752, 1 L.Ed.2d 796 (1957) (same).

FN6. We do not rely on GTB's § 1983 equal protection claim as a basis for an award of fees because the district court granted summary judgment to the municipalities on that claim, and accordingly it should not be used as a basis for fees. *See McDonald v. Doe*, 748 F.2d 1055, 1057 (5th Cir.1984) (finding that an award of attorney's fees could not be based on a failed civil rights claim).

*5 We also conclude that the district court correctly determined that the claim was reasonably related and based on a common core of operative facts as the treaty-based claims. Essentially, all of the claims advanced by GTB were based on the fact that the municipalities refused to allow GTB to moor its commercial fishing vessels at the marinas, and simply were alternative arguments for challenging the commercial use restrictions. Thus, the district court did not err by finding that GTB may be awarded attorney's fees for this case.

III. Reasonable Fees

The municipalities contend that even if GTB was properly found to be entitled to fees, the amount of the fees was not reasonable. The municipalities challenge both the \$175 per hour rate of GTB's attorney William Rastetter, and the number of hours charged by him. The municipalities further contend that the district court should have reduced the fee award to take into account the "limited" success of GTB and should have apportioned fees against the state defendant, MDNR.

A. Hourly Rate

When considering a petition for attorney's fees the starting point is the lodestar calculation, which is calculated by multiplying the number of hours reasonably spent on the litigation by a reasonable hourly rate. *Wayne v. Village of Sebring*, 36 F.3d 517, 531 (6th Cir.1994) (citing *Hensley*, 461 U.S. at 433). The district court has broad discretion to determine a reasonable hourly rate. *Id.* at 533. A reasonable rate should be based on prevailing market rates in the community for the services rendered by similar attorneys of comparable skill, experience and reputation. *Hadix*, 65 F.3d at 536 (citation omitted). The district court determined that GTB's request for attorney's fees at a rate of \$175 per hour was reasonable and we agree. William Rastetter, the attorney who represented GTB, has been practicing law for more than 25 years, has represented GTB for several years in this litigation, and has special expertise in federal and Indian law. The district court, which is very familiar with this litiga-

tion, having continuing supervisory authority over the 1985 consent judgment regarding GTB's right to fish, recognized the specialized practice in federal and Indian law that this work required, and noted that the defendants themselves had initially conceded that the \$175 per hour rate sought by GTB was reasonable. J.A. at 44-45. GTB also submitted several affidavits from attorneys in the Traverse City area providing that the rate for attorneys with special expertise was \$175 per hour or more. J.A. at 645, 650, 654. Thus, we find that the district court did not abuse its discretion in determining that a rate of \$175 was reasonable based on the experience and expertise of GTB's attorney and the prevailing market rate in the community.

B. Hours Expended

The next issue is whether the amount of hours charged by GTB's counsel were reasonable. In determining whether the hours requested are reasonable, this court uses a three-tiered approach. The first step is to review the district court's determination that the party has actually worked the hours set forth in the bill of costs for clear error. *Wooldrige*, 898 F.2d at 1176. We then determine whether the district court erred in determining legal questions concerning the relationship between the hours billed and the point on which the party prevailed. *Id.* Finally, we determine whether the district court misapplied reasonable practices of the profession when billing the opposing party for the hours spent. *Id.* The municipalities argue that GTB's attorney listed various tasks performed each day, but offered only a total number of hours worked per day without separating hours by subject matter or task, which they argue made it impossible to estimate the amount of time spent on any individual tasks and to determine whether that time was reasonable. They also argue that fee entries were excessive, redundant or otherwise unnecessary.

*6 We reemphasize that it is the district court, with its "superior understanding of the litigation," that is best suited for determination of the reasonableness of the fees. *Hensley*, 461 U.S. at 437. Additionally, GTB's counsel, is of course "not required to record

in great detail how each minute of his time was expended....[It is enough that counsel] ... identify the general subject matter of his time expenditures." *Id.* at 437 n. 12. GTB's attorney requested fees for time involving this litigation encompassing more than two years, documenting each activity expended in the litigation. J.A. at 587-617, 704-07. The district court provided a concise and clear explanation as to why it felt that the hours requested were reasonable, noting that the extensive legal briefings filed in the case illustrated the complex issues involved and supported the amount of time billed by GTB's attorney. It concluded that the total hours of 552.59, for more than two years worth of work, was reasonable given the large demands of the litigation. J.A. at 46. While GTB's attorney did not specify in minute detail the amounts of time each separate activity required, it is apparent that the district court did not clearly err by finding that GTB's counsel in fact performed the services listed on his billing statements on a given day and for the number of hours provided. Moreover, the municipalities make only generalized objections to the number of hours on appeal, and only directly challenge work done with respect to the ancillary proceedings (work which the district court declined to award fees for).

C. Reduction for "Limited" Success

The municipalities argue that the fee award should be reduced based on the "limited" success of GTB, because it was granted transient mooring access as opposed to a permanent right to moor at their marinas. This argument is wholly without merit and borders on the frivolous. GTB never requested a right of permanent mooring, but simply that the commercial use restrictions be declared unenforceable against it. J.A. at 24. This relief is precisely what the district court ordered. The fact that the district court granted a transient right to access the marinas, in common with the recreational public, does not in any way obviate the degree of success obtained by GTB. In fact, GTB "has obtained excellent results ... [and its] attorney should recover a fully compensatory fee ... encompass[ing] all hours reasonably expended on the litigation..." *Hensley*, 461

U.S. at 435.

D. Apportionment

Finally, the municipalities argue that the district court should have apportioned fees against defendant MDNR. They maintain that MDNR is the more culpable defendant because the agreements restricting the commercial use of their marinas were drafted by MDNR, and GTB initially filed suit only against MDNR and later joined the municipalities as defendants.

GTB, however, did not request fees from MDNR because MDNR assisted GTB in its assertion of a right to moor at the marinas. The Joint Status Report filed on February 5, 1995, observed: “the [MDNR] has indicated a willingness to relieve the municipal government defendants of the contractual obligation prohibiting commercial use if requested to do so by these defendants.” J.A. at 82. In addition, MDNR filed a memorandum supporting GTB's motion for summary judgment. *Id.* at 405-16. Specifically, MDNR argued that GTB's use of the mooring slips did not violate the commercial use contained in the agreements; maintained that the municipalities had obstructed the 1985 consent order; and requested that the district court enter an order requiring the municipalities to permit GTB to moor. It is within the district court's discretion to apportion fees among defendants. *Anderson v. Flexel Inc.*, 47 F.3d 243, 251 (7th Cir.1995); *Koster v. Perales*, 903 F.2d 131, 139 (2d Cir.1990). The court may consider the relative culpability of the parties against whom fees are awarded and the proportion of time spent litigating against each of those parties. *Koster*, 903 F.2d at 139. Taking those factors into consideration, we find that the district court properly declined to apportion fees against MDNR.

IV.

*7 In the cross-appeal, GTB maintains that the district court erred in denying its request for attorney's fees for the ancillary proceedings in the *United States v. Michigan* litigation, as well as the state court civil and criminal litigation involving GTB

member, George Duhamel. An award of fees for ancillary proceedings is proper if the work was “useful and of a type ordinarily necessary” to secure the relief requested in the primary proceeding. *Webb v. Dyer Cty. Bd. of Ed.*, 471 U.S. 234, 243, 105 S.Ct. 1923, 85 L.Ed.2d 233 (1985). It is within the discretion of the district court to decide whether ancillary fees are appropriate. *Id.* at 243-44; see also *Pennsylvania v. Delaware Valley Citizens' Council*, 478 U.S. 546, 561, 106 S.Ct. 3088, 92 L.Ed.2d 439 (1986),

The district court found that although some of the legal work performed in the *United States v. Michigan* case may have aided in the subsequent action against the municipalities, it would be patently unfair and contrary to established law to assess these defendants for such fees since neither defendant appeared as a party in the earlier matter. It further concluded that it was doubtful that the hours were necessary or useful to the resolution of this litigation. We agree. The district court was within its discretion to deny fees for the ancillary proceedings where neither of the municipalities were parties to that litigation and indeed were informed by the district court that they would not be permitted to file pleadings in that litigation. J.A. at 42. Moreover, there is no evidence that the work done in the *United States v. Michigan* proceeding was necessary to the primary litigation. Similarly, the district court did not err by declining to award attorney's fees for the state court ancillary proceedings. GTB was never a named party of those criminal proceedings and the work, as the district court noted, was performed largely on behalf of someone other than GTB. Moreover, we generally do not grant attorneys fees when a party chooses to defend criminal proceedings before instituting civil rights litigation relating to the matter. See *Greer v. Holt*, 718 F.2d 206, 208 (6th Cir.1983).

We AFFIRM.

RYAN, Circuit Judge.

In my dissenting opinion in *Grand Traverse Band of Ottawa & Chippewa Indians v. Director, Michigan Department of Natural Resources*, 141 F.3d 635 (6th Cir.1998), I stated:

149 F.3d 1183, 1998 WL 385891 (C.A.6 (Mich.))

(Cite as: **149 F.3d 1183**, **149 F.3d 1183 (Table)**)

In my judgment, the Grand Traverse Band of Ottawa & Chippewa Indians is not entitled to moor its fishing vessels at the marinas at Leland or Northport either by virtue of the Treaties of 1836 and 1855, or by virtue of the consent judgment between the tribe and the State of Michigan.

I explained my reasons for that view, but my colleagues were not persuaded and held otherwise.

Consequently, for the reasons explained in my brother's opinion in this case, I agree that the plaintiff's unaddressed but not insubstantial [42 U.S.C. § 1983](#) claim justifies an award of attorney fees under [§ 1988](#).

C.A.6 (Mich.),1998.

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