UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

PHILIP C. BELLFY, *pro per;* MONICA CADY, *pro per;* JAMES A. LEBLANC, *pro per;* DIEDRE J. MALLOY, *pro per;* NATHAN J. WRIGHT, *pro per;* John Does; and Mary Does,

Plaintiffs, *pro se* litigants

v

KEITH CREAGH,

Defendant.

No. 1:15-cv-00282

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BRIEF IN SUPPORT OF THE DIRECTOR OF THE MICHIGAN DEPARTMENT OF NATURAL RESOURCES' MOTION TO DISMISS

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CONCISE STATEMENT OF ISSUES PRESENTED

1. In 1836, the U.S. government entered into a treaty with the Ottawa and Chippewa tribes in which the tribes agreed to cede certain lands to the government on the condition, among others, that the tribes would enjoy usufructuary rights on the lands until they were "required for settlement." All of the ceded land is located within present-day Michigan. In 2007, the State of Michigan and the tribes, with the participation of the U.S. government, stipulated to a detailed consent decree that conclusively defined the tribes' usufructuary rights to the ceded lands within Michigan. On March 19, 2015, the Director of the Michigan Department of Natural Resources authorized the sale of certain Michigan-owned lands within the ceded area to a private company. Individual members of the tribes that entered into the consent decree have filed suit requesting that the transaction be stopped because any sale of public land within the treaty area violates the individuals' usufructuary rights. But neither the 1836 Treaty nor the 2007 Consent Decree forbid the sale of public land within the ceded area. Since the Director is otherwise authorized to approve the sale of publically owned land, the Plaintiffs have failed to state a claim upon which this Court can grant relief.

2. The Plaintiffs also assert claims under the federal Due Process Clause, the Michigan Constitution, and the Michigan Environmental Protection Act. These claims are also without merit.

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Authority: Consent Decree entered in 2007 in *United States v. Michigan,* No. 2:73 CV 26 (W.D. Mich.)

STATEMENT OF FACTS

The Ottawa and Chippewa tribes ceded much of the current State of Michigan to the United States in the 1836 Treaty of Washington (Treaty Area). The tribes retained usufructuary rights in the Treaty Area, however, "until the land [was] required for settlement." (Article 13 of the 1836 Treaty, Ex. 1). In 1973, the U.S. Government filed suit in this Court against the State of Michigan on behalf of the tribes to assert that notwithstanding the 1836 Treaty, the tribes had the right to fish certain areas of the Great Lakes without State regulation. The tribes joined the proceedings, the Court held a trial, and in 1979 this Court determined that the 1836 Treaty had not abrogated the tribes' right to fish the Great Lakes in certain areas. *United States v. State of Michigan*, 471 F. Supp. 192, 258 (W.D. Mich. 1979). The Court's ruling led to extensive negotiations that culminated in the entry of a consent decree in 2000 that determined how tribal fishing in certain areas of the Great Lakes would be managed. However, neither the Court's 1979 ruling nor the 2000 Consent Decree negotiations resolved the extent of the tribes' *inland* usufructuary rights under the 1836 Treaty.

This Court retained jurisdiction over the interpretation and implementation of the 1836 Treaty. Therefore, Michigan filed a counterclaim in 2003 alleging that the tribes no longer had any inland usufructuary rights on any of the ceded lands. The tribes denied the claim. The United States then joined the fray, and filed a supplemental complaint seeking a determination that the tribes only retained usufructuary rights to ceded lands that had not been required for settlement – which Michigan opposed. Ultimately, rather than asking this Court to resolve the

issue, the parties stipulated to the entry of a consent decree in 2007 that was meant to "resolve conclusively" the usufructuary rights the tribes still had on land that had been ceded under the 1836 Treaty. (Consent Decree, Ex. 2 at 6).

Sections VI and VII of the 2007 Consent Decree define which of the tribes' usufructuary rights were not abrogated by the 1836 treaty, and where within the ceded area the tribes can exercise those rights. In short, the tribes can exercise certain usufructuary rights in the following locations within the ceded area: public land, private land that is required to be open to the public, and other private land only with the landowner's written permission. (Consent Decree, Ex. 2 at 12-16). That is, under the Consent Decree, the tribes have no usufructuary rights on private land within the ceded area that is not otherwise required to be open to the public. (Consent Decree, Ex. 2 at 15).

As the Plaintiffs' initial filing indicates, the Director plans to authorize the sale of Michigan-owned lands within the ceded area to Graymont – a limestone mining company. (Pg ID #3). The Plaintiffs allege that this sale violates their aboriginal rights, the 1836 Treaty, the Supremacy Clause, the Due Process Clause, the Michigan Constitution, and the Michigan Environmental Protection Act.

ARGUMENT

I. The Director is authorized by both state and federal law to approve the sale of Michigan-owned land within the ceded area.

Michigan law expressly authorizes the Director to approve the sale of Michigan-owned land to private parties. There is no federal law that forbids such a

sale simply because the Michigan-owned land is within the area ceded by the 1836 Treaty. Therefore, the Plaintiffs claims must fail.

A. Standard of Review

First, it is important to note that the Director does not agree that the Plaintiffs' initial March 17, 2015 filing is a pleading contemplated by Rules 7 and 8. Fed. R. Civ. P. 7(a) and 8(a). It appears to actually be a motion under Rule 65. Fed. R. Civ. P. 65(a). This Court's March 17, 2015 order denying the Plaintiffs' request for a temporary restraining order also notes that the Plaintiffs' filings as of that date did not include a complaint. (Doc #4, Pg ID #27). However, the courts that have established the law for deciding a motion under Fed. R. Civ. P. 12(b)(6) are virtually always reviewing actual pleadings – so they use the word "complaint." Any reference in this brief to the word "complaint" is only because the case law uses that word – not because a complaint has been filed in this case.

When reviewing a motion under Rule 12(b)(6), the Court assumes that well-pleaded "allegations in the complaint are true (even if doubtful in fact)," though the Court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal quotations and citations omitted). Once the Court assumes the truth of well-pleaded allegations that are not couched as legal conclusions, it determines if the complaint has managed to state a claim "under some viable legal theory." *Handy-Clay v. City of Memphis, Tenn.*, 695 F.3d 531, 538 (6th Cir. 2012) (internal quotation omitted). Here, the Plaintiffs cannot show "any set of facts consistent

with the allegations in the complaint" that would entitle them to relief under any of the legal theories advanced in the complaint. *Twombly*, 550 U.S. at 563. Therefore, the Plaintiffs have failed to "state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6).

B. The Director is authorized by Michigan law to approve the sale of Michigan-owned lands to private entities.

The Michigan Department of Natural Resources (DNR) has the general authority to manage, buy, sell, and exchange land, or interests in land. Mich. Comp. Laws § 324.503(2). Specifically, DNR can designate public land "surplus" under certain circumstances, and sell the surplus land to a private person. Mich. Comp. Laws § 324.2131 and Mich. Comp. Laws § 324.2132. DNR also has authority to exchange public lands for new public lands. Mich. Comp. Laws § 324.2104.

The head of the DNR is the Director. Mich. Comp. Laws 324.99921(III.A.2). As shown in the statutes cited above, as head of the DNR, the Director is authorized by Michigan law to approve the sale of Michigan-owned land to private entities.

C. Neither aboriginal rights nor federal law forbids the Director from exercising his statutorily-granted authority to approve the sale of Michigan-owned land.

The Plaintiffs' primary contention seems to be that a combination of their aboriginal rights and the 1836 Treaty – which the Supremacy Clause elevates above state law – forbids the Director from authorizing the sale of Michigan-owned lands

if those lands are located within the ceded area. (Pg ID #13-14).[1] The Plaintiffs also assert a claim under the federal Due Process Clause. None of the Plaintiffs' contentions have any merit.

1. All of the Plaintiffs' aboriginal rights to use land within the ceded area are contained in the 2007 Consent Decree.

The 1836 Treaty was not a "grant of right to the Indians, but a grant of rights from them. . . ." *State of Michigan*, 471 F. Supp. at 254 quoting *United States v. Winans*, 198 U.S. 371, 381 (1905). The proper "conceptual framework" to understand the 1836 Treaty, therefore, is that "the Indians were the grantors of a vast area they owned aboriginally and the United States was the grantee," and the Indians retained any rights "not relinquished when [they] convey[ed] their aboriginal title." *Id*.

As the Plaintiffs indicate, when the Chippewa and Ottawa tribes ceded their aboriginal title to the ceded area within Michigan to the United States, they "stipulate[d] for the right of hunting on the lands ceded, with the other usual privileges of occupancy, until the land is required for settlement." (Article 13 of the 1836 Treaty, Ex. 1). Once the 1836 Treaty was ratified by Congress, it became the "supreme Law of the land" under the Supremacy Clause. U.S. Const. art. VI, cl. 2.

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[1] As an initial matter, it is not clear that the individual Plaintiffs have standing to assert claims related to the 2007 Consent Decree. *See United States v. State of Michigan*, 471 F. Supp. 192, 271 (W.D. Mich. 1979) ("The fishing right reserved by the Indians in 1836 and at issue in this case is the communal property of the tribes which signed the treaty and their modern political successors; it does not belong to individual tribal members.").

As explained above in the Statement of Facts, the United States instituted an ongoing lawsuit in this Court essentially to determine the meaning of Article 13 in modern-day Michigan. Ultimately, the Court held that "by the Treaty of 1836 the Indians impliedly reserved a right to fish commercially and for subsistence in the ceded waters of the Great Lakes." *State of Michigan*, 471 F. Supp. at 258. But the Court's 1979 opinion did not resolve the extent to which tribes had reserved usufructuary rights on land. As explained above in the statement of facts, that issue was "conclusively" resolved by the 2007 Consent Decree. (Consent Decree, Ex. 2 at 6).

Article VI of the 2007 Consent Decree "defines the extent of the Tribes' Inland Article 13 Rights. . . ." (Consent Decree, Ex. 2 at 12). The Tribes' Inland Article 13 Rights include the right to "Hunt, Fish, Trap, and Gather natural resources," "engage in other historically traditional activities," and "obtain assistance from non-Tribal members to engage in the foregoing activities." *Id*. at 13. Considering the qualification in the 1836 Treaty that the tribes only reserved rights on ceded land "until the land is required for settlement," (Article 13 of the 1836 Treaty, Ex. 1), Article VII of the 2007 Consent Decree defines the "lands and waters on which tribal members may exercise Inland Article 13 Rights." (Consent Decree, Ex. 2 at 13). The tribes may exercise their reserved Inland Article 13 rights in the following locations within the ceded area: public land, private land that is required by law to be open to the public, and other private land only with the landowner's written permission. (Consent Decree, Ex. 2 at 14-15).

Following this Court's approval of the 2007 Consent Decree, what kinds of rights the tribes have in the ceded area, and where those rights can be exercised within the ceded area, are no longer open questions. The 2007 Consent Decree "conclusively" resolved them. (Consent Decree, Ex. 2 at 6). There is nothing in the 2007 Consent Decree that prohibits the sale of public land, nor gives tribes the ability to stop the sale of public land. Therefore, a prohibition on the sale of public land is not one of the rights the tribes reserved or obtained under the 1836 treaty. So there is nothing about the tribes' aboriginal rights, the 1836 Treaty, or the Supremacy Clause that somehow prohibits the Director from using his authority under state law to approve the sale of public land to private entities.

A similar issue in Wisconsin was litigated in court, rather than resolved by consent decree, but still reached essentially the same result achieved in the 2007 Consent Decree. In a procedurally complex case, the Lac Court Oreilles Band of Lake Superior Chippewa Indians asserted claims against the State of Wisconsin under certain treaties, arguing that the tribe could exercise usufructuary rights on public land free from state regulation. *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, 700 F.2d 341, 343 (7th Cir. 1983). At one point in the litigation, the district judge entered an order that the tribes had usufructuary rights "to those portions of the ceded territories that were not privately owned as of March 8th, 1983." *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. State of Wisconsin*, 760 F.2d 177, 180 (7th Cir. 1985). That is, the district court did

what the Plaintiffs here are trying to do: put a freeze on the amount of land available for the tribes' usufructuary use.

On appeal, the Seventh Circuit Court of Appeals reversed and remanded. The court noted that, like the lands ceded by the 1836 Treaty at issue in here, the lands ceded in Wisconsin "were ceded for the purpose of eventual settlement." *Id.* at 182. The court ruled that "'settlement' by non-Indians" is "synonymous with 'private ownership.'" *Id.* And land that goes "into private hands" after March 8, 1983 "simply should not be subject to the reserved usufructuary rights." *Id.*

On remand, the district court did just what the 2007 Consent Decree did. Rather than prohibiting Wisconsin from ever selling public land where the tribes had usufructuary rights, the court determined that the tribes could not exercise usufructuary rights on lands "that are privately owned *as of the time* Chippewa exercise of usufructuary rights is contemplated or carried on." *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. State of Wisconsin*, 653 F. Supp. 1420, 1432 (W.D. Wis. 1987) (emphasis added). Similarly, article VII of the 2007 Consent Decree says that the tribes can exercise usufructuary rights on public land, private land required to be open to the public, but no private land without the owner's permission. (Consent Decree, Ex. 2 at 14-15). But nothing the 2007 Consent Decree – similar to the rulings in the Wisconsin litigation – somehow prohibits the same parcel of land within the ceded area from shifting among the three categories identified in article VII.

2. The Plaintiffs' fail to state a claim under the Due Process Clause.

The Plaintiffs claim that their due process rights were violated because they "were afforded no opportunity to challenge [Mich. Comp. Laws § 324.2131]." (Pg ID #16). That statute was put in place by Public Act 60 in 1995. Nothing in the Plaintiffs' March 17, 2015 filing alleges or even hints that the passage of Public Act 60 did not go through the ordinary public deliberation process just as any other public act passed by the Michigan Legislature. And the Plaintiffs even say that they do no seek an order from the court to declare the statute unconstitutional. (Pg ID #5). So it is far from clear why the Plaintiffs even invoke the Due Process Clause. The Plaintiffs', therefore, fail to state a claim under the Due Process Clause upon which this Court can grant relief.

D. None of the Plaintiffs' ancillary state law claims forbid the Director from exercising his statutorily-granted authority to approve the sale of Michigan-owned land.

The Plaintiff also asserts claims under Michigan's Constitution, apparently Mich. Const. art. IV, § 52, and the Michigan Environmental Protection Act. Mich. Comp. Laws § 324.1701 *et seq*. As an initial matter, it is not clear this Court has pendant jurisdiction over these claims because the absence of alleged facts makes it difficult to ascertain whether the state law claims "arise out of the same common nucleus of operative fact as the federal claim." *Kauffman v. Allied Signal, Inc., Autolite Div.*, 970 F.2d 178, 187 (6th Cir. 1992). Regardless, this Court's exercise of any pendant jurisdiction is discretionary. *Id*. And the Court should abstain from exercising pendant jurisdiction "to avoid needless conflict with the administration

by a state of its own affairs." Wright & Miller, 17A Fed. Prac. & Proc. Civ. § 4244 (3d ed.).

More directly, however, the Plaintiffs fail to state a claim under either the Michigan Constitution or the Michigan Environmental Protection Act. The provision of the Michigan Constitution the Plaintiffs appear to invoke is art. IV, § 52, which reads:

> The conservation and development of the natural resources of the state are hereby declared to be of paramount public concern in the interest of the health, safety and general welfare of the people. The legislature shall provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction. [Mich. Const. art. IV, § 52].

This provision simply imposes a duty on Michigan's Legislature to "provide for" the protection of Michigan's natural resources. And the Legislature fulfilled that duty when it passed the Michigan Environmental Protection Act in 1970. *Petition of Highway US-24, in Bloomfield Twp., Oakland Cnty.*, 392 Mich. 159, 182-84 (1974).

The Plaintiffs' March 17, 2015 filing does not contain any factual allegations to explain how the Director's approval of a land sale affects the Legislature's duty under art. IV, § 52 – especially since the Legislature already fulfilled that duty 45 years ago. Therefore, the Plaintiffs' claim under the Michigan Constitution contains virtually no information, let alone "enough [information] to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 545.

The Plaintiffs also fail to state a claim under the Michigan Environmental Protection Act (MEPA). Under MEPA, a person "may maintain an action in the

[state] circuit court having jurisdiction where the alleged violation occurred or is likely to occur" in order to seek "relief against any person for the protection of the air, water, and other natural resources and the public trust in these resources from pollution, impairment, or destruction." Mich. Comp. Laws § 324.1701(1). By MEPA's own terms, the Plaintiffs are required to seek relief from a state trial court – not this Court. Moreover, there is no indication in the Plaintiffs' March 17, 2015 filing that the Director's act of approving a land sale has any effect on the environment or natural resources. The Michigan Supreme Court has squarely held that the government's *approval* of an action does not fall with MEPA – only the action itself does. *Preserve the Dunes, Inc. v. Dep't of Envtl. Quality*, 471 Mich. 508, 519 (2004). So MEPA can only be used to seek relief against the entity that will do the actual action, not the government entity that simply approved or permitted the entity's request to do the action. *Id*. at 524.

The Plaintiffs' claims under state law are no more than "labels and conclusions." *Twombly*, 550 U.S. at 545. Therefore, the Plaintiffs' state law claims are not claims upon which this Court can grant relief. Fed. R. Civ. P. 12(b)(6).

CONCLUSION AND RELIEF REQUESTED

The Plaintiffs' March 17, 2015 filing does not contain factual allegations sufficient to show that the Plaintiffs' can obtain relief under any viable legal theory. Nothing about the Plaintiffs' aboriginal rights, the 1836 Treaty, the Supremacy Clause, the Due Process Clause, the 2007 Consent Decree, the Michigan Constitution, or the Michigan Environmental Protect Act forbids the Director from using his express statutory authority to approve the sale of Michigan-owned land within the ceded area to a private entity.

Therefore, the Director requests that the Court dismiss all of the Plaintiffs' claims in their entirety. The Director also requests any other relief the Court considers appropriate.

Respectfully submitted,

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