

Emmet County Lakeshore Association and Protection of Rights Alliance Litigation Update: *Little Traverse Bay Bands of Odawa Indians v. Whitmer*

On May 13, 2019, the parties to the case filed the last of their written briefs asking the Court to rule on either the entire case or certain aspects of it without holding a trial. Oral argument is scheduled for the last week of June, but no specific date has been set yet. The Associations expect oral argument to consume most of the day, as the Court has been prepared to discuss issues in detail in the past.

ECLA and PORA's Motion for Summary Judgment

The Associations filed a motion arguing that the 1855 Treaty's language is not ambiguous and the Court must simply read the Treaty to understand that it never established a permanent Indian reservation. The Treaty provides that land, owned by the federal government, was temporarily withdrawn from public sale to allow individual Indians the ability to make land selections to own individually, just as any other land owners. The Treaty expressly contemplated that after the period for Indian land selections, the unselected lands would be restored to the public market and sold. Alternatively, the Associations argued, in the event the Court finds that the Treaty established a reservation, any such reservation was diminished or disestablished when Congress passed acts in the 1870s ("1870s Acts") mandating the restoration of the lands to sale and that fee patents be issued to the individual Indians for their land selections.

The Tribe responded by arguing that the Court must look beyond the language of the Treaty to understand what it meant. The Tribe then pointed to a litany of historical documents that used the word "reservation" or "reserve" to refer to the area of land withdrawn from sale. Based on this, the Tribe claimed the Treaty was ambiguous as to whether a reservation was created and that any ambiguity must be resolved in the Tribe's favor. The Tribe rejected the "test" used by the Associations (and other defendants) to determine whether land can be considered "Indian Country" and advocated for a more "flexible" test. The Tribe also argued that the 1870s Acts did not diminish or disestablish their supposed reservation. While the Tribe's response is facially persuasive, a closer reading reveals significant issues with the Tribe's arguments.

The Associations' reply pointed out that while the Tribe claimed the Treaty was ambiguous, it failed to actually identify any specific treaty language that could have been interpreted by the Indians in 1855 as having created a permanent tribal reservation. Thus, the Tribe failed to raise any argument that would prevent the Court from interpreting the Treaty as written. The Associations also dissected the Tribe's "flexible" test for Indian Country, revealing it was not grounded in legal authority, nor were the Tribe's arguments regarding diminishment.

The Other Defendants' "Historical" Motions

The State and the Cities and Counties (joined by the Townships) also filed motions setting forth arguments similar to that of the Associations. The Tribe's response to these motions was similar. In their replies, the State and the Cities and Counties also argued that the Tribe failed to identify any plausible ambiguity in the Treaty nor explain how it could have been read to establish

an Indian reservation. The State's reply focused on rebutting specific historical factual arguments made by the Tribe. The Cities and Counties focused on the Tribe's legal arguments regarding the standard under which the Court should interpret the Treaty.

The Tribe's Motion for Summary Judgment

The Tribe filed a motion to dismiss certain "disestablishment or diminishment" defenses, by which all Defendants argue that Congress disestablished or diminished any reservation by putting lands back on the market. The Tribe largely mischaracterized the defendants' defenses, using strawman arguments, in an effort to obtain a court order precluding the defendants from making certain arguments during trial. All defendants responded explaining to the Court that the Tribe simply got their arguments wrong. The motion largely targeted what the Tribe called the Associations' "exemption-diminishment" defense. The Associations responded by disentangling the legal issues for the Court and explaining that the Tribe's argument was nothing more than an attempt to shift its burden of proof to the defendants.

The Tribe's reply focused on the Associations' defense, continued to argue the same points, and essentially pled for the court to grant its motion to narrow issues that could be addressed at trial, in the interest of efficiency and reducing confusion. The Tribe attempted to appear sympathetic because it had so many defendants against which it must prosecute its claims.

Non-Historical Motions

The State filed a motion arguing that the Court lacks jurisdiction over the case because federal courts may only resolve actual controversies, which the Tribe has failed to identify – an actual factual dispute over how the Tribe has been harmed by the State asserting its jurisdiction. The Tribe responded that the case was about boundary lines and that the boundary dispute in itself is enough of a controversy for the Court to have jurisdiction. The Tribe also claimed that it did identify specific controversies to the State, and the State failed to seek discovery on the identified issues. The State replied by pointing out that it is not the State's burden to set forth an actual controversy, detailing the Tribe's failures to do so, and explaining that no legal authority allows a mere boundary dispute to qualify as an actual controversy. If the State were to succeed in this motion, the dismissal would be without prejudice, which would allow the Tribe to re-file its claim. The Associations filed a response simply stating that if the Court agrees with the State that no controversy exists, the Court should not dismiss the case but allow the Tribe the opportunity to amend its complaint to allege an actual controversy, but not in any other way. Otherwise, if the case is dismissed, the Tribe could simply re-file and fix any issues with its complaint or theories, and potentially restart the clock on expert discovery.

Finally, the Tribe filed a motion seeking dismissal of the Cities' and Counties' "release" defenses, which assert that Article 3 of the Treaty, which released the United States from any further obligations to the Tribe, could operate to bar this lawsuit. The Tribe argued that this clause in the 1855 Treaty could not and did not release any claims based on the 1855 Treaty, but only to claims from prior treaties. The Cities and Counties responded that their defense is intended to apply to the extent that the Tribe bases any of its claims in this case on pre-1855 Treaties. The Tribe has been coy regarding whether it believes it has any existing rights to a reservation under

an 1836 Treaty. In its reply, the Tribe avoided the issue again, stating that it only seeks an order stating that Article 3 of the Treaty did not preclude rights set forth in the 1855 Treaty itself.

If the defendants' motions are denied, this case should go to trial in 2020. Trial is expected to span several weeks. Some factors could operate to delay the case, however. First if the Court takes a very long time to rule on these motions, this could push the trial back. Second, if the Court grants the State's jurisdictional motion, there will likely be a period of discovery concerning the specific disputes the Tribe presents in an amended complaint. And finally, the U.S. Supreme Court is poised to rule any day in a similar reservation claim case from Oklahoma. It is possible that the decision in that case could require discovery into additional issues in this case.