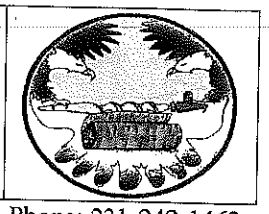
LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS

Tribal Court



Court Mailing Address: 7500 Odawa Circle, Harbor Springs, MI 49740 Phone: 231-242-1462

TRIBAL COURT

Case No: C-200-0914

Timothy LaCroix, *et al.*

Plaintiffs,

vs.

Rick Snyder, Governor Michigan, *et al.*

Defendants.

ORDER OF DISMISSAL FOR LACK OF PERSONAL AND SUBJECT MATTER JURISDICTION

A. Factual Summary and Procedural History

On September 23, 2014, Plaintiffs Article32.org, an advocacy group incorporated under the laws of the Little Traverse Bay Bands of Odawa Indians ("LTBB"); Timothy LaCroix, an LTBB Tribal Citizen and board member of Article32.org; and Phil Bellfy, board member of Article32.org, filed a Complaint seeking immediate injunctive relief against the named Defendants in this case. Defendants are State of Michigan officials. The Plaintiffs' Complaint alleges that the Defendants had authorized or were "poised to immediately issue" fresh water withdrawal permits for fracking activities that threatened to affect areas within the ceded waters of the 1836 Treaty of Washington and 1855 Treaty territory, in violation of LTBB law, State law, Federal law by way of treaty, and the Intergovernmental Water Accord of 2004, which the Plaintiffs maintain prohibit certain fracking activity. Plaintiffs' Complaint, pp. 2-3 (citing LTBB Protection of Great Lakes Code, LTBB Natural Resource Protection Code, Michigan Natural Resources and Environmental Protection Act, Great Lakes—St. Lawrence River Basin Sustainable

Water Resources Agreement, and the Intergovernmental Water Accord of 2004). Specifically at issue is a permit issued by the State of Michigan to Encana Oil (USA), Inc. ("Encana"), for the State Excelsior 5-12 HD1 well (Permit # 60767) located in Excelsior Township, Kalkaska County, Michigan.[1] Encana has since sold its interest in all of its oil and gas leases in Michigan to Marathon Oil Company ("Marathon"). Pursuant to LTBB Rules of Civil Procedure ("LTBBRCP"), R. IX, the Plaintiffs request an immediate injunction enjoining the Defendants from authorizing the complained of fracking activity because the "issuance of fresh-water withdrawal permits by the Defendants would result in irreparable harm" to the resources protected by the aforementioned documents.

Upon receipt and review of the Plaintiffs' Complaint, but prior to receiving the Defendants' Response, the Court issued an Order of Dismissal for Lack of Subject Matter Jurisdiction. *LaCroix, et al. v. Snyder*, No. C-200-0914 (Oct. 2, 2014). The Court reasoned that the documents and agreements cited to in the Plaintiffs' Complaint that purport to give the Plaintiffs standing to seek recourse in this action, either solely authorize Tribal or State officials—not private parties—to bring suit to enforce their terms, or that the agreements serve as unenforceable pledges between the State of Michigan and several of the federally-recognized tribes located in ceded territories within Michigan that do not create a private right of action. *Id.*

In response to the Court's actions, the Plaintiffs filed an appeal of the Court's Order of Dismissal with the Tribal Appellate Court ("Appellate Court"). The Appellate Court did not issue an opinion on the Plaintiffs' appeal on the merits, and instead vacated the Court's Order of Dismissal and remanded the case back to this Court in order to provide the Defendants with an opportunity to file a formal response to the Plaintiffs' original Complaint. *LaCroix & Bellfy v. Synder et al.*, No. A-024-1014 (Little Traverse Bay Bands of Odawa Indians Ct. App. Dec. 12, 2014). Absent such an opportunity to file a response, the Appellate Court reasoned that an Order of Dismissal by the Court was premature as a proper record of the case was not compiled and the Court's opinion was not informed by arguments from all of the parties to the case. *Id.*

On remand, the Clerk of the Court, in accordance with the LTBBRCP, issued a briefing schedule to the parties that, *inter alia*, scheduled a hearing date for January 23, 2015 and provided the Defendants an opportunity to reply to the Plaintiffs' original Complaint. As an opening response, the Defendants filed a Motion to Extend Deadlines, requesting that the Court extend the deadlines for all briefings, hearings, and other actions concerning the Plaintiffs' Complaint for at least thirty days after the Court rules on the Defendants' Motion to Dismiss.[2] Defendants' Motion to Extend Deadlines, *filed on* December 23, 2014. The rationale for the Defendants' Motion to Extend Deadlines

[1] The Defendants' Motion to Dismiss states with supporting documentation, and the Plaintiffs do not contest this point, that Marathon does not at present have authorization to conduct water withdrawal for hydraulic fracturing. It is unclear whether Marathon will seek authorization to conduct water withdrawal for hydraulic fracturing prior to it's the State Excelsior 5-12 HD1 well permit expiring on June 21, 2015.

[2] Defendants filed their Motion to Dismiss Plaintiffs' Complaint on January 16, 2015.

concerned insufficient time under the briefing schedule for the Defendants to file a Motion to Dismiss, and for the Plaintiffs to subsequently respond, before the scheduled hearing on January 23, 2015. After reviewing the Defendants' Motion to Extend Deadlines and receiving no objection to the Motion from the Plaintiffs within the time allowed in LTBBRCP, Rule XIII, the Court found good cause for granting the Motion, and issued such an Order on February 6, 2015. *LaCroix et al. v. Snyder et al.*, No. C-200-0914 (Feb. 6, 2015).

On February 9, 2015, the Court heard oral argument on the Defendants' Motion to Dismiss.[3] During the hearing on the Defendants' Motion to Dismiss, the Defendants, through their Attorney, Assistant Attorney General Jaclyn Shoshana Levine, argued that the Plaintiffs' Complaint should be dismissed for lack of personal jurisdiction over the Defendants. Specifically, the Defendants, through their oral argument and brief, argued that Article IV of the LTBB Constitution, read in conjunction with Article III, Section H of the LTBB Constitution, holds that the jurisdiction of the Tribe extends to "any and all persons or activities" within the territory of the LTBB set out in the Treaty of 1855, 11 Stat. 621, and in the Treaty of 1836, 7 Stat. 491, "plus any lands outside of those boundaries which are now or in the future declared to be [LTBB] reservation" by the Department of the Interior. LTBB Const. arts. III, Section H; art. IV, Sections A, B. Jurisdiction *over members* of the LTBB additionally extends beyond the territory outlined in the 1855 and 1836 treaties "whenever they are acting pursuant to, or jurisdiction is created or affirmed by treaty, LTBB law, Federal law relating to the tribe or its members, or any "compact, contract or other agreement entered into pursuant to applicable law pertaining" to the LTBB or its members. *Id.* at art. IV, Section B.[4]

Because the well in question in this action is located in Excelsior Township, Kalkaska County, Michigan, which the Defendants contend is outside of the Tribe's 1855 and 1836 Treaty territory and part of land and mineral rights owned by the State of Michigan, and is not otherwise part of any reservation declared by the Department of the Interior, the Defendants argue that the Court lacks jurisdiction over them based on the aforementioned constitutional provisions.

Additionally, the Defendants, in their brief, argue that the Court lacks subject matter jurisdiction to hear and address the issues complained of in the Plaintiffs' Complaint. Although the Defendants' brief also claims that Federal law prohibits the Court from exercising jurisdiction over the Defendants, the Defendants at oral argument emphasized to the Court their belief that the matter can be resolved on the basis of LTBB law alone.

The opinion of the Court follows.

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[3] The Court notes that the Plaintiffs, despite being properly served by First Class Mail to their addresses on file, failed to appear at the hearing on the Defendants' Motion to Dismiss.

[4] It has been established in the Defendants' Brief and supporting affidavits, that none of the Defendants are members of the Little Traverse Bay Bands of Odawa Indians and that none of the Defendants are members of federally-recognized Indian tribe, something that the Plaintiffs do not contest.

B. Discussion

Personal and Territorial Jurisdiction

As a general matter, the Court notes that it must possess both personal jurisdiction over the parties to a case and subject matter jurisdiction in order to rule on the merits of a case. *See* LTBBRCP, R. XVI(b)(2). Parties against whom a claim has been made "may move the Court to dismiss the claim of the adverse" parties for "lack of jurisdiction over the person." *Id.* With respect to personal jurisdiction, the LTBB Constitution defines the extent of Tribal jurisdiction over both members and nonmembers. Specifically, Article IV.B of the Constitution states:

> "The jurisdiction of the Little Traverse Bay Bands of Odawa Indians shall **extend to all territory set forth in Section (A) of this article and to any and all persons or activities therein** based upon the inherent sovereign authority of the Little Traverse Bay Bands of Odawa Indians and Federal law. The jurisdiction includes but is not limited to air, water, surface, subsurface, natural and cultural resources, and any interests therein. Jurisdiction over members of the Little Traverse Bay Bands of Odawa Indians shall extend beyond the territory set out in Section (A) whenever they are acting pursuant to . . ."

Article IV.A of the Constitution explains that the "territory of the Little Traverse Bay Bands of Odawa Indians shall encompass all lands and waters within the Reservation as defined in Article III (H) and any other lands which are now and hereafter owned or acquired by the Little Traverse Bay Bands of Odawa Indians or held in trust for the Tribe by the United States.

The term "Reservation" is defined in Article III.H to mean:

> "[A]ll lands within the boundaries of the reservations for the Little Traverse Bay Bands of Odawa Indians as set out in Article I, paragraphs third and fourth of the Treaty of 1855, 11 Stat. 621, plus any lands set out in Articles Second and Third of the Treaty of March 28, 1836, 7 Stat. 491, in the event that the 1836 reservation is determined to include lands which are not included within the 1855 reservation, plus any lands outside of those boundaries which are now or in the future declared to be Little Traverse Bay Bands of Odawa Indians reservation by the U.S. Department of the Interior."

The Treaty of 1855, Article 1, paragraphs third and fourth, identify the townships in Emmett and Charlevoix Counties set aside as a reservation for the LTBB:

> "Third. For the Beaver Island Band—High Island, and Garden Island, in Lake Michigan, being fractional townships 38 and 39 north, range 11 west—40 north, range 10 west, and in part 39 north, range 9 and 10 west.

> Fourth. For the Cross Village, Middle Village, L'Arbrechroche and Bear Creek bands, and of such Bay du Noc and Beaver Island Indians as may prefer to live with them, townships 34-39, inclusive, north, range 5 west—townships 34 to 38, inclusive, north range 6 west—townships 34, 36, and 37 north, range 7 west, and all that part of township 34 north, range 8 west, lying north of Pine River."

By the plain language of Article III.H, Article IV.A, and Article IV.B of the Constitution, this Court and Tribe lack jurisdiction over all territory outside of the defined provisions detailed above as well as over "any and all persons or activities therein."[5]

As is detailed in exhibits provided by the Defendants, the State Excelsior 5-12 HD1 well does not occur within the territory defined in Article IV.A of the Constitution. Specifically, the State Excelsior 5-12 HD1 well lies in Excelsior Township, described as township 27 north, range 7 west, falling outside of the range of the townships reserved to the LTBB in the Treaty of 1855. Ex. F, Permit (location and footages box) in the case file. This range, which is within Kalkaska County, is south of the Treaty of 1855 reservation. Moreover, the Defendants have established, and the Plaintiffs do not contend otherwise, that the State of Michigan owns the land and mineral rights to the State Excelsior 5-12 HD1 well. Ex. A, Fitch Affidavit, P. 8, in the case file. Therefore, the land is not held in trust (and declared as Reservation land by the Department of the Interior) and considered as reservation land subject to the jurisdiction of the LTBB. Accordingly, the Court is required to dismiss this action for lack of personal jurisdiction over the Defendants for the acts alleged in the Plaintiffs' Complaint.

Subject Matter Jurisdiction

The Court reaches the same conclusion as this matter relates to subject matter jurisdiction. Decisions issued by a court on the merits while lacking subject matter jurisdiction leaves the decisions void *ab initio*. *See Dillon v. Dillon*, 187 P. 27 (Cal. App. 1919); *In Re Application of Wyatt*, 300 P. 132 (Cal. App. 1931). That is to say that, when a court is not granted the authority, either by statute or other means, to hear a dispute, but does so anyway, the ruling is without effect and unenforceable. *Id.* Thus, a finding by the Court that it lacks subject matter jurisdiction to hear a case presents a fatal blow to a petitioning party's complaint. The LTBBRCP that governs this issue is Rule XVI(b)(1), which states that a "party against whom a claim has been made may move the Court to dismiss the claim of the adverse party" for "lack of jurisdiction over the subject matter."

Turning to the Plaintiffs' Complaint, the Court notes that the Plaintiffs are barred by both LTBB and State law from either maintaining a private cause of action against the Defendants to enforce the LTBB and State laws, treaty rights, and compacts cited in the Complaint or barred from filing an action seeking enforcement of said agreements in an

[5] The Court notes that Articles Second and Third of the Treaty of March 28, 1836, 7 Stat. 491, do not appear to include lands presently part of the LTBB Reservation which are not included within the Treaty of 1855 reservation boundaries.

LTBB court. More specifically, by their plain and explicit language:

(1) WOTC 4.604(B), "Violations of Federal Law Based on Treaties," states that the "LTBB will take any appropriate and necessary action to prevent" "[a]ny drilling, sale or diversion which has the potential for impacting the waters of Lakes Michigan, Superior or Huron ceded by the 1836 Treaty of Washington." By stating that the "**LTBB** will take **any** appropriate action," the Code is clear that the only Tribe, and not individual Tribal Citizens or Tribal corporations, may bring suit to enjoin parties from engaging in "drilling" or "diversion" activities with the potential to impact the waters ceded by the 1836 Treaty of Washington in violation of Tribal or Federal law.;

(2) WOTC 4.1110 authorizes only LTBB officers, and other tribal, state, or federal law enforcement agencies, as approved by Tribal Council, to bring suit to enforce the LTBB Natural Resource Protection Code (individuals and corporations are not authorized to bring suit to enforce the provisions of the Code).;

(3) MCL 324.1701, "Natural Resources and Environmental Protection Act," states that "[t]he attorney general or any person may maintain an action in the **circuit court** having jurisdiction where the alleged violation occurred or is likely to occur for declaratory and equitable 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" (emphasis added). While this section authorizes private parties to bring suit to enforce the Michigan Natural Resources and Environmental Protection Act, the section is clear that such actions may only be brought in an appropriate Michigan **circuit court**. As the court of general jurisdiction for the Little Traverse Bay Bands of Odawa Indians, a sovereign, dependent nation with a government-to-government relationship with the United States distinct and separate from state political entities, this Court, or any LTBB court for that matter, is clearly not a Michigan circuit court. Accordingly, MCL 324.1701 neither grants the Defendants standing to bring suit to enforce the Natural Resources and Environmental Protection Act in *this* Court nor authorizes the Court to hear such a claim.;

(4) Section 600(4) of the Great Lakes—St. Lawrence River Basin Sustainable Water Resources Agreement of 2005, which states that a "[p]erson who is not a [p]arty to this Agreement may not seek dispute resolution under this Agreement," authorizes only parties to the Agreement to seek enforcement of the Agreement. The Great Lakes—St. Lawrence River Basin Sustainable Water Resources Agreement of 2005, which is an **agreement between and among several states**, clearly excludes the Plaintiffs, as non-parties to the

agreement, from filing suit to enforce its terms.; and

(5) The Intergovernmental Water Accord of 2004's operative clause states that "The Governor and the undersigned Tribes affirm their joint commitment to the preservation, restoration and enhancement of the Great Lakes ecosystem and pledge to work together to clean-up the pollutants now present . . ." The language in this clause is merely a pledge between the State of Michigan and the several federally-recognized tribes in Michigan to take certain actions and does not create a private right of action to enforce a failure to faithfully adhere to the pledge.

As is clear from a plain reading of the aforementioned texts, the Plaintiffs do not have and cannot maintain a private cause of action against the Defendants in this matter.[6] The aforementioned texts are, thus, inapplicable, which leaves the Plaintiffs with no statutory or other legitimate basis to support their motion for immediate injunctive relief against the named Defendants. Accordingly, the Court must dismiss the motion for a lack of subject matter jurisdiction.

Tribal Jurisdiction over Nonmembers under Federal Law

Because this matter can be adjudicated without interpreting Federal case law on the constitutional limits of tribal jurisdiction over non-Indians, and the Plaintiffs do not contend that any Federal law—other than the Treaty of 1836, which this Court has already determined does not authorize private rights of action—on the subject compels or otherwise authorizes this Court to assert jurisdiction over the Defendants in contravention of the LTBB Constitution, the Court declines to address the Federal law issues.

C. Conclusion

In light of the above findings, the Court GRANTS the Defendants' Motion to Dismiss and DISMISSES the Plaintiffs' Complaint. Additionally, as the Court has granted the Defendants' Motion to Dismiss, the Defendants' Motion to Extend Deadlines is moot and the Plaintiffs are free to file an appeal in accordance with the LTBB Court Rules.

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[6] The Court additionally notes that the 1836 Treaty of Washington, as an agreement between the governments of the U.S. and the Odawa and Chippewa nations, does not grant the Plaintiffs in this case a private right of action under these circumstances. Indeed, with the exception of some grants made to individual members of the Odawa and Chippewa nations, which are not at issue here, the Treaty is an agreement between sovereigns, not private parties; for the purposes of this action, the Treaty places obligations on governments, which private parties may not enforce absent explicit language and authorization otherwise. *See* Treaty with the Ottawa, Mar. 28, 1836, 7 Stat. 491; *U.S. v. Michigan*, No. M26-73 C.A. (W.D. Mich. 1979) (nothing that the fishing rights "reserved by the [Odawa and Chippewa Indians] in 1836 . . . is the communal property of the tribes . . . it does not belong to individual tribal members"). The Court, thus, cannot create an implied private right of action for the Plaintiffs under the Treaty—and the Treaty does not create an explicit right of action—for an agreement made between sovereigns, though such a right of action undoubtedly exists with the successors in interest to the Odawa and Chippewa nations that were signatories to the Treaty.

IT IS SO ORDERED

3/4/15
Date

Allie Greenleaf Maldonado, LTBB Chief Judge

CERTIFICATE OF MAILING

I certify that on this date copies of this *Order* were served to the parties by First-Class and/or Internal Mail.

March 6, 2015
Date

Tribal Court Officer