

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

BRENDA TURUNEN,
Plaintiff,

v.

MICHIGAN DEPARTMENT OF
NATURAL RESOURCES, KEITH
CREAGH, DIRECTOR, MICHIGAN
DEPARTMENT OF NATURAL RESOURCES,
MICHIGAN DEPARTMENT OF AGRICULTURE
AND RURAL DEVELOPMENT, and JAMIE
CLOVER ADAMS, DIRECTOR, MICHIGAN
DEPARTMENT OF NATURAL RESOURCES.
Defendants.

COMPLAINT

INTRODUCTION

1. Plaintiff is a family farmer and a member of the Keweenaw Bay Indian Community (KBIC) residing and farming in the Western Upper Peninsula of Michigan. Plaintiff has been raising crops and livestock for the past 23 years on land located in the territory ceded to the United States of America via the 1842 Treaty between the United States and the Lake Superior Chippewa Indians, 7 Stat. 591 (the 1842 Treaty). Plaintiff's farming operations are conducted pursuant to rights reserved in Article II of the 1842 Treaty and pursuant to a license from KBIC. Plaintiff's treaty-protected farming activities are being threatened by the policies and activities of Defendants which seek to destroy a certain agri-industry in the State of Michigan, so-called hunting estates. To achieve this questionable goal Defendants have sought to prohibit

Plaintiff's pigs through an Invasive Species Order which literally can be applied to any pig in existence. Further, Defendants' policies make no provision for Plaintiff's treaty-protected farming activities and Defendants' seek to impose their regulatory schemes upon Plaintiff. Plaintiff invokes this Court's jurisdiction in order to protect her treaty reserved right to farm within the territory ceded to the United States by the 1842 Treaty.

JURISDICTION AND VENUE

2. This case arises under the 1842 Treaty with the Chippewa, 7 Stat. 591, as well as the Indian commerce clause (Article I, Section 8, Clause 3) and the supremacy clause (Article VI, Clause 2) of the United State Constitution. This court has jurisdiction to consider Plaintiff's claims pursuant to 28 U.S.C. §1362. Venue is appropriate pursuant to 28 U.S.C. §1391(b). Plaintiff seeks a declaratory judgment pursuant to 28 U.S.C. §2201, as well as permanent injunctive relief pursuant to Rule 65, Fed.R.Civ.P..

PARTIES

3. Plaintiff is a member of the Keweenaw Bay Indian Community (KBIC), a federally recognized Indian tribe located in the Western Upper Peninsula of Michigan. Plaintiff lives and works on her family farm located in Baraga County Michigan, adjacent to the KBIC reservation.

4. (a) Defendant Michigan Department of Natural Resources (MDNR) is a Department of the State of Michigan, obligated by Michigan law

to manage and regulate natural resources located within the jurisdiction of the State of Michigan. See, e.g., MCL 299.1, *et seq.* and MCL 16.352, *et seq.*.

(b) Defendant Keith Creagh is the Director of the MDNR and is sued in his official capacity.

(c) Defendant Michigan Department of Agriculture and Rural Development (MDARD) is a Department of the State of Michigan, obligated by Michigan law, among other duties, to inspect and regulate animal industry and to foster direct trading between producers and consumers of agricultural products within the jurisdiction of the State of Michigan. See, e.g., MCL 285.1, *et seq.* and MCL 16.352, *et seq.*.

(d) Defendant Jamie Clover Adams is the Director of the MDARD and is sued in her official capacity.

FACTUAL ALLEGATIONS

5. All factual allegations contained in paragraphs 1-4 above are reasserted and incorporated herein by reference.

6. In the 1842 Treaty at LaPointe between the United States of America and the Lake Superior Chippewa Indians, October 4, 1842, 7 Stat. 591 (the "1842 Treaty"), the Indian signatories ceded large portions of the Western Upper Peninsula of Michigan as well as large portions of Northern Wisconsin to the United States of America.

7. Article II of the 1842 Treaty between the United States of

America and the Lake Superior Chippewa Indians (the "1842 Treaty"), reserved to the Indian¹ signatories the right to hunt on the territory ceded to the United States by the 1842 Treaty (the "Ceded Territory"), along with "the other usual privileges of occupancy". 7 Stat. 591. Keweenaw Bay Indian Community v. Michigan, 784 F. Supp. 418, 421 (W.D. Mich. 1991).

8. This Court must give effect to the terms used in the 1842 Treaty as the Indian signatories would have understood them. Minnesota v. Mille Lacs Band of Chippewa Indians, 562 U.S. 172, 196 (1999).

9. The 1842 Treaty must be liberally interpreted in favor of the Indians and any ambiguities in that Treaty must be resolved in their favor. Minnesota v. Mille Lacs Band of Chippewa Indians, 562 U.S. 172, 200 (1999).

10. The original Indian signatories to the 1842 Treaty understood the phrase "the other usual privileges of occupancy" in Article II of the 1842 Treaty to include the right farm their lands within the Ceded Territory, including without limitation the right to engage in animal husbandry.

¹Plaintiff understands that use of the term "Indian" may be considered pejorative by this Court and other readers. However, use of the term "Indian" is so thoroughly embedded in the statutes, regulations, court decisions and historical documents relevant to this case that use of the term "Native American" is awkward and potentially confusing. For that reason, unless the context demands otherwise, the term "Indian" shall be used throughout this document when referring to this continent's original inhabitants.

11. Article II of the 1842 Treaty further stipulated "that the laws of the United States shall be continued in force, in respect to their trade and inter course with the whites".

12. The original Indian signatories to the 1842 Treaty understood that continuing the laws of the United States "in respect to their trade and intercourse with the whites" to mean that their Article II farming activities would be governed by their own tribal laws or the laws of the United States of America, not by the laws of the State of Michigan.

13. The policy of the United States at the time of the 1842 Treaty was to encourage farming, including animal husbandry activities, among American Indian people in general, and with the Indian signatories to the 1842 Treaty specifically.

14. The phrase "the laws of the United States ... in respect to their trade and intercourse with the whites" found in Article 2 of the 1842 Treaty refers to the so-called "Trade and Intercourse Acts" which asserted exclusive federal authority over virtually all interactions between Indians and non-Indians.

15. The Trade and Intercourse Acts provided legal authority and funding for the President of the United States to furnish Indians with "useful domestic animals and implements of husbandry".

16. In Article IV of the 1842 Treaty the United States pledges it will provide the Indian signatories with blacksmiths and farmers and creates an "agricultural fund" for the Indian signatories.

Subsequent to the ratification of the 1842 Treaty the United States did in fact provide such agricultural assets to the Indian signatories. Keweenaw Bay Indian Community v. Michigan, 784 F. Supp. 418, 421 (W.D. Mich. 1991).

17. The historical record demonstrates that the United States considered farming to be one of the "usual privileges of occupancy" reserved by Article 2 of the 1842 Treaty. See, e.g. Article V, Treaty of 1795 at Greenville: "The Indian tribes who have a right to those lands, are to quietly enjoy them, hunting, planting and dwelling thereon". 7 Stat. 49. See also, Ottawa Tribe v. Logan, 577 F.3d 634, 638 (6th Cir. 2009).

18. The historical record demonstrates that prior to the negotiation and execution of the 1842 Treaty the United States regularly provided pigs and other domestic animals to Indian people generally and to the Lake Superior Chippewa Indians specifically. See, e.g., Article III of the 1823 Treaty with the Florida Tribes of Indians, 7 Stat. 224, and Article IV of the 1825 Treaty with the Kansa, 7 Stat. 244.

19. The current policy of the United States is to promote Indian self-determination and economic development.

20. The Keweenaw Bay Indian Community ("KBIC") is a federally recognized Indian tribe organized pursuant to the provisions of the Indian reorganization Act of 1934, 25 U.S.C. §476, with a governing Tribal Council duly recognized by the Secretary of the United

States Department of the Interior.

21. KBIC is the modern day successor in interest of the L'Anse and Ontonagon Bands of Lake Superior Chippewa Indians. Keweenaw Bay Indian Community v. Naftaly, 452 F.3d 514, 516 (6th Cir. 2006). Both the L'Anse and Ontonagon Bands of Lake Superior Chippewa Indians were signatories to the 1842 Treaty.

22. The historical record demonstrates that subsequent to the negotiation and signing of the 1842 Treaty the United States regularly provided blacksmiths, farmers, grain and implements of agriculture, including implements of animal husbandry, to KBIC's predecessors in interest.

23. The historical record demonstrates that subsequent to the negotiation and signing of the 1842 Treaty the United States provided pigs and other domestic animals to KBIC's predecessors in interest.

24. KBIC licenses and regulates its members' exercise of the off-reservation rights reserved pursuant to the 1842 Treaty, including the right to farm within the Ceded Territory, to the exclusion of the State of Michigan.

25. Plaintiff has been engaged in farming activities on land located within the Ceded Territory for the past 23 years. During that time she has raised different varieties of crops, cattle and pigs. Plaintiff has been licensed by KBIC to engage in treaty-farming activities, including animal husbandry, within the Ceded

Territory.

26. Plaintiff sells her farm products locally, statewide and beyond Michigan's borders.

27. Breeds of pig traditionally used in large, factory-style pork production facilities have had the hardiness bred out of them. They do not survive in the frigid winters of the Upper Peninsula without heavy infrastructure investments.

28. Commencing approximately 14 years ago Plaintiff and her spouse developed the "Hogan Hog", a unique breed of pig carefully cross-bred under her husbandry to maximize hardiness, growth and milk production and to minimize feed consumption.

29. Hogan Hogs are able to withstand the Upper Peninsula winters because they are much hardier than the breeds of pig used in factory-style pork-production facilities. The meat of the Hogan Hog is also tastier and healthier than factory produced pork.

30. The "Hogan Hog" has become a common law trademark that signifies an excellent breed of pig throughout the region and beyond state boundaries.

31. Plaintiff has developed local, state and national markets for the Hogan Hog, including:

(a) Direct sales to consumers who desire the tasty meat of the Hogan Hog.

(b) Direct sales to people who use them as pets and/or as "guard dogs" because of their intelligence, friendly

disposition towards humans and ability to keep predators such as coyotes, fishers, pine martins and even wolves at bay.

(c) The outward resemblance of the Hogan Hog to the wild eurasian boar of North and Central Europe has helped Plaintiff successfully market the Hogan Hog to so-called hunting preserves where the pigs are allowed to roam within fenced open air areas until harvested by customers who pay a fee for a simulated hunting experience in a natural setting.

32. The Michigan Animal Industry Act defines feral swine as: "Feral swine" means swine which have lived their life or any part of their life as free roaming or not under the husbandry of humans. MCL 287.703(27).

33. Feral swine pose a significant threat to Plaintiff's farming operations. Feral swine can cause crop damage, damage to native plants and animals and may be exposed to diseases that can be passed to the animals under Plaintiff's husbandry.

34. The problems caused by feral swine are not dependant on the physical appearance of or the breed of the feral swine. Any pig which escapes and becomes feral can cause such problems. It is the state of being feral that causes problems, not the appearance or breed of pig.

35. Plaintiff supports efforts by tribal, state and federal agencies to eradicate feral swine.

36. Plaintiff does not possess and has never possessed feral

swine.

37. The Hogan Hog is highly domesticated. On the rare occasions where a pig escapes from its pen it does not go far from its food source and quickly returns on its own or is easily lured back to the farm with food.

38. None of Plaintiff's Hogan Hogs, or other domestic livestock, have ever escaped from her farm into the wild and become feral.

39. There has never been an outbreak of pseudo-rabies, tuberculosis or any other disease among Hogan Hogs, or any other animals at Plaintiff's farm.

40. Plaintiff and her spouse have invested millions of dollars in the Hogan Hog, refitting and vertically integrating much of her farming operation to accommodate her unique breed of pig.

41. Plaintiff has always been in full compliance with all applicable KBIC and United States Department of Agriculture (USDA) requirements regarding her livestock and other farming operations.

42. Plaintiff's farm has been visited by representatives of both Defendants MDARD and MDNR. Both agencies were impressed and commented on the clean, efficient and safe design of Plaintiff's farm.

43. Dan Wyant, Director of the Michigan Department of Environmental Quality and former Director of the Michigan Department of Agriculture, commented during his visit that Plaintiff's farm operation was excellent and needed no regulation.

44. In 2003 the Michigan Legislature adopted the Invasive Species Act (ISA), MCL 324.41301, *et seq.*. The ISA prohibited the possession and release of certain fish species as well as genetically engineered non-native fish species and provided penalties for violations.

45. The ISA has been amended to add certain aquatic plants and insects and to revise definitions and penalties for violations. In 2009 the ISA was amended to remove one species, to add additional species including the first mammal species ever placed on the list and to delegate authority to the Defendants MDNR and MDARD to add new species to the list.

46. Pursuant to the delegated authority in the ISA, then-Director of then-Michigan Department of Natural Resources and Environment², issued Amendment 1, 2010 Invasive Species Order (ISO), which placed the following animals on the ISA prohibited species list: "Wild boar, wild hog, wild swine, feral pig, feral hog, feral swine, Old world swine, razorback, eurasian wild boar, Russian wild boar (*Sus scrofa Linnaeus*)."

47. On April 27, 2006 the USDA Invasive Species Advisory Council approved an "Invasive Species Definition Clarification and Guidance White Paper". Page three of that White Paper states:

²Executive Order 2011-1 abolished the Michigan Department of Natural Resources and Environment and transferred its responsibilities and authority to Defendant MDNR and to the Michigan Department of Environmental Quality.

It is also essential to recognize that *invasive species* are not those under human control or domestication; that is, *invasive species* are not those that humans depend upon for economic security, maintaining a desirable quality of life, or survival.

48. Defendants MDNR and MDARD have sought to impose the ISO on Plaintiff's 1842 Treaty-protected farming operations.

49. On December 13, 2011 the MDNR issued a declaratory ruling (DR) dictating how the MDNR will identify pigs prohibited by the ISO. The MDNR declaratory ruling rejects identification by genotype in favor of eight listed physical characteristics, and a ninth characteristic consisting of "characteristics not currently known to the MDNR."

50. Four of the DR characteristics involve the coloration or patterns found on the animals' fur and/or bristles. One involves "underfur", one involves tail structure, one ear structure and one involves skeletal structure. These physical characteristics are all based upon the work of Dr. John Mayer, a nationally respected expert on feral pigs.

51. Most of the DR characteristics have been acknowledged to be unreliable identification techniques by Dr. Mayer himself since they vary wildly according to age and gender of individual animals.

52. The Defendants have acknowledged that one of the DR characteristics, involving striped piglets, is utterly unreliable.

53. Two of the DR characteristics used to identify pigs prohibited by the ISO, involving tails and ears, can be found on virtually

every pig on earth.

54. The DR characteristics allow the Defendants to place any animal within the provisions of the ISO. For example, Dr. Mayer examined video images of two Hogan Hogs and determined that they *did not* possess the DR characteristics. Digital photographs of the very same Hogan Hogs were shown to a MDNR biologist in Marquette, Michigan who arrived at the exact opposite conclusion and determined that these pigs *did* possess the DR characteristics.

55. On February 23, 2012 TV6 in Marquette, Michigan aired a television article about Plaintiff's farming operations. In response, a staff member of the MDNR asserted in the very next TV6 news report on the subject that pigs bearing the DR characteristics carried diseases such as toxo-plasmosis, trichinosis, brucillosis, pseudo rabies and tuberculosis.

56. The MDNR televised statements gave the general public the false impression that Plaintiff's pigs and other animals were infected with one or more of these diseases.

57. Diseases such as toxo-plasmosis, trichinosis, brucillosis, pseudo rabies and tuberculosis affect all breeds of pig the same, regardless of their physical appearance.

58. The USDA has instituted a highly successful, nation-wide brucellosis and pseudo-rabies eradication program.

59. In her animal husbandry practices Plaintiff has always followed the USDA protocols for eradication of brucellosis, pseudo-

rabies and other diseases.

60. Plaintiff's Hogan Hogs are no more likely to carry disease than any other breed of pig.

61. Defendant MDARD has attempted to interfere with Plaintiff's right to engage in commerce regarding her 1842 Treaty-protected farming operations and the products thereof by:

(a) First withholding, then imposing conditions on acquisition of ear tags necessary to ship Hogan Hogs from her farm in the Ceded-Territory to markets in Pennsylvania and New York.

(b) By arbitrarily disapproving Certificates of Veterinary Inspection issued by her veterinarian for the animals shipped.

(c) By engaging in a pattern of harassment targeted at Plaintiff's veterinarian in order to discourage him from working for Plaintiff.

(d) Upon information and belief, by informing governmental officials in New York and Pennsylvania that Plaintiff's Hogan Hogs were an invasive species that carried disease.

FIRST PRAYER FOR RELIEF

62. All factual allegations contained in paragraphs 1-61 above are reasserted and incorporated herein by reference.

63. Plaintiff seeks a declaration from this court pursuant to 28 U.S.C. §2201 that her farming operations within the Ceded Territory are among the "other usual privileges of occupancy" reserved to the Indian signatories in Article II of the 1842 Treaty.

64. Plaintiff further seeks a declaration from this Court pursuant to 28 U.S.C. §2201 that the Keweenaw Bay Indian Community and the United States of American possess exclusive regulatory authority over Plaintiff's 1842 Treaty-protected farming activities, and that the Defendants have no authority to impose Michigan laws or regulations on Plaintiff's farming operations conducted pursuant to the 1842 Treaty and the license from KBIC.

SECOND PRAYER FOR RELIEF

65. All factual allegations contained in paragraphs 1-64 above are reasserted and incorporated herein by reference.

66. Plaintiff seeks a permanent injunction pursuant to Rule 65 Fed.R.Civ.P., enjoining Defendants from enforcing their ISO or any other State of Michigan laws or regulations upon Plaintiff's 1842 Treaty-protected farming operations.

67. Plaintiff further seeks a permanent injunction pursuant to Rule 65 Fed.R.Civ.P., enjoining Defendants from otherwise interfering with Plaintiff's ability to engage in commerce associated with her 1842 Treaty-protected farming operations and the products thereof.

Respectfully submitted,

Date: _____

s/ Joseph P. O'Leary
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