LTBB vs. SNYDER - LITIGATION UPDATE

This litigation update regarding the pending lawsuit brought by the Little Traverse Bay Bands of Odawa Indians is being provided by the Emmet County Lakeshore Association and The Protection of Rights Alliance.

Why we (and you should) care about this litigation:

We are all pure volunteers, serving without any compensation for our efforts other than the knowledge that we are doing what is necessary to preserve our way of life in Northern Michigan. One of the allures of this area is the relative absence of change. Yet if the Tribe prevails, this area will be changed forever – and none of the changes will be beneficial to non-Indians.

The potential impacts of a victory by the Tribe include lessening of property values; loss of State permitting or regulatory authority; loss of local zoning and regulatory control over the Tribe *and any of its members;* tax exemptions for Tribal members that will hurt schools and local governments as well as local merchants; the proliferation of gaming; and the ability of Tribal courts to assert jurisdiction over non-Indians.

We emphatically are not "anti-Indian;" however, in this litigation the Tribe is asserting claims that will turn 160+ years of history on its ear. This is not a case in which the Tribe is attempting to rectify old wrongs committed years ago. To the contrary, this is a case in which the Tribe is seeking to attach an interpretation to Treaties in 1836 and 1855 that is contrary to common understanding, practice and governance for at least the last eight generations.

The Tribe is the aggressor; we merely want to preserve the way of life we have enjoyed for generations. Large corporations have "bet your company" cases that warrant an all-out defense. This is a "*bet your community*" case that warrants the same.

Overview of the Tribe's Claims

The lawsuit was originally filed in Fall of 2015 in the United States District Court for the Western District of Michigan. The original defendant was Governor Snyder. In the lawsuit the Tribe seeks a declaration that Treaties in 1836 and 1855 between the United States and the Tribe's ancestors, granted to the Tribe a reservation of 337 square miles of northwest Michigan that includes almost all of Emmet County and large portions of Charlevoix County. A map showing the breathtaking breadth of these claims is attached. If the relief requested in the complaint is granted, this entire area will be "Indian Country" and the Tribe will have primary sovereign authority, with commensurately reduced authority in the State and local governments.

Indian law is an arcane world unto itself and extremely counter-intuitive. Most people assume that a case involving Treaties that are 160+ years old could not have much impact on their daily lives. However, when we requested Dykema Gossett PLLC, our legal counsel with great expertise in Indian law, to analyze the consequences of the Tribe's claims and to make that analysis known, both counties (Emmet and Charlevoix) and *every* city and township within the impacted area recognized the stakes and rushed to intervene in the case. In addition, we convinced the Court to allow us to intervene to protect the interests of private individuals and

businesses – interests that the court found to be similar to, but also different than, those of the State and local governments.

Current Status

The Court has divided the case into two Phases. Phase 1 is limited to: (i) a determination of whether the Treaties actually created a reservation, and (ii) if so, whether the U.S. Congress has ever diminished or disestablished that reservation. The Court has already ruled (consistent with rulings in other cases), that *only* action by the U.S. Congress can diminish an Indian reservation. Hence, the Court has already determined that *the 160+ years of State and local jurisdiction over the area, the justifiable expectations of generations of non-Indians in the area, and the long passage of time before the Tribe chose to assert its current claims, are virtually irrelevant to the issues involved in Phase 1.*

The key issue in Phase 1 is essentially a contract dispute; i.e., the proper interpretation of the Treaties (particularly the 1855 Treaty). In the world of Indian law, the legal standard of interpretation turns on *what the Indian negotiators understood the Treaties to mean at that time.*

To attempt to divine that understanding, the parties have retained a host of expert witnesses who will be called upon to testify on issues such as the circumstances that prompted the Treaties, what were the Indian negotiators trying to accomplish, what was the U.S. government trying to accomplish, and why the Treaties were drafted in a particular manner. The expert witnesses range from historians to ethno-historians, demographics specialists, linguistic specialists and other specialists who can "opine" on other seeming obscure (but evidentially important) topics.

In total, the parties have identified 15 expert witnesses, 9 for the Tribe alone. For most of 2017 these experts performed extensive research and authored 11 reports and rebuttal reports that were exchanged among the parties pursuant to court order. The experts reviewed hundreds of thousands of pages of historical records ranging from notes of the negotiations, to personal diaries, to historical perspectives on the individuals involved in the negotiations, to federal Indian policy as it evolved prior to the Civil War, to words used by the Tribe's predecessor to describe applicable concepts such as individual (vs. communal) ownership of property. The primary report of the Tribe's primary expert alone was *1,200 pages.*

Starting in January 2018, the parties have conducted an exhaustive schedule of depositions of their respective experts. Because the case in large part will turn on the credibility and thoroughness of the expert testimony, these depositions will play a crucial role in the outcome of the case. *Each of the parties recognizes that this case in all likelihood will turn on the credibility of the experts and the quality of the lawyering in bolstering or undercutting expert testimony.*

Following completion of the depositions of the expert witnesses, the parties will start deposition of fact witnesses – and 82 potential fact witnesses have been named. Not all of them will be deposed, and the Tribe has filed a motion for partial summary judgment that could substantially reduce the number of potential fact witnesses. In this motion the Tribe seeks a determination that the 1994 federal legislation granting the Tribe federal recognition also confirmed that no prior act of the U.S. Congress had disestablished or otherwise diminished the Reservation that

the Tribe claims was established in the 1836 and 1855 Treaties. The 1994 federal legislation was the result of a sustained lobbying effort by the Tribe, and its lobbyists included language in the legislation that the Tribe claims supports this position, despite the fact that a number of contrary actions were taken by the U.S. Congress and federal government in the decades closely following the 1855 Treaty.

No hearing date has been set on the Tribe's motion for partial summary judgment. In the meantime, and in response to a separate motion filed by the Tribe, the Court postponed the discovery cut-off date from May 22, 2018 to September 27, 2018. Unless the merits of the case are decided on motion (unlikely), the trial of this case (set for 5 weeks) will start in mid-to-late 2019.

Hence, there is a definite schedule for Phase I and a definite need to defend the case NOW to maximize the chances of a successful defense. The ultimate ruling in Phase I will be based on the Court's assessment of the expert reports, the expert witnesses' testimony and other findings of fact by the Court that will be difficult, if not impossible, to reverse on appeal. Moreover, a victory by the Tribe in Phase I will create an enormous amount of legal and practical uncertainty that in and of itself will be devastating to people living in what will then be Indian Country.

If the Tribe wins Phase 1, Phase 2 will focus on the issue of whether, and to what extent, the ability of the Tribe to exercise its sovereign authority within its Reservation (as determined in Phase 1) should be limited by equitable considerations resulting from the long passage of time during which Indian sovereignty was not exercised. The parameters and validity of these equitable factors are extremely nebulous, evolving and unpredictable. And Phase 2 could last 20 years or more, depending on when the Tribe chooses to assert various jurisdictional claims.

There is only one Supreme Court decision, from 2005, referring to these considerations (sometimes called the *Sherrill* defenses based on the name of that case). There is very little case law regarding the specific application of these equitable considerations. The law is muddled, but appears to be evolving to favor tribal claims at the expense of States, their local governments and non-Indians in general. Moreover, the equitable considerations flowing from the passage of time will not even apply to some important issues, such as the Tribe's ability to control environmental permitting for non-Indians and to impose liquor regulations on bars and restaurants.

While the Tribe claims publicly that it would like to settle its claims, the unanimous conclusion of the defendants is that settlement is highly unlikely, and certainly won't occur until the eve of trial (unless one or more of the defendants, particularly the State, decide to capitulate in the meantime). Among other reasons, there is *irrefutable* evidence that the Tribe has been planning this litigation for more than a decade, *and that, contrary to its public position, the Tribe seeks in this case to assert the full range of its sovereign authority within the claimed Reservation.* These claims are antithetical to the authority and interests of the State, all local governments, and private non-Indian residents, visitors and businesses. The Tribe appears to be committed to spending many, many millions of dollars to win the case. Lead counsel for the Tribe is a nationally recognized Indian rights law firm out of Minnesota, and the Tribe is sparing no effort or expense - 12 lawyers have appeared *of record* for the Tribe, with up to 4 lawyers attending a single deposition.

Why are private lawyers needed?

The overall defense essentially involves three (3) distinct interests – (i) those of the State; (ii) those of the local counties, cities and townships; and (iii) those of private individuals and businesses. Only the attorneys for ECLA and the Alliance are committed to representing the private interests, and these attorneys also have the deepest understanding and experience in Indian law. This why the Tribe has identified the Alliance and our attorneys as a primary target for their publicity campaign and in discovery efforts in the lawsuit.

Largely through the efforts of our attorneys, the defendants have been closely coordinating the efforts of their lawyers and experts to minimize expense and maximize effect. There is a joint defense agreement, and the work of the defense experts has been allocated among the parties, although the counties, cities and townships have limited resources that they can devote to the defense of the case.

The Attorney General represents the State. To date the Attorney General's Office has stepped up to the plate and carried a significant share of the defense. However, the Attorney General's Office has a number of other legal matters competing for limited resources. Moreover, there are precious few lawyers in the Attorney General's Office with significant expertise in Indian law, and historically these positions have seen significant turnover. More fundamentally, the State is a political animal, and an ideological change in the offices of Governor or Attorney General (both of which are certain to change later this year) could result in the State seeking to settle the case on terms that would not be acceptable to private individuals and businesses. In fact, this very sort of settlement was forced by Governor Granholm in a somewhat similar case involving the Saginaw Band of Chippewa Indians, in defiance of the position of the then Attorney General.

It was this possibility that prompted the two counties and the impacted municipalities to intervene in this case, as well as ECLA and the Alliance. The counties and municipalities want to protect their governmental authority over such matters as zoning, licensing, taxation, law enforcement, etc., while ECLA and the Alliance are intent on protecting the interests of private individuals and businesses. The importance of this separate representation was specifically recognized by the Court when it granted leave for ECLA and the Alliance to intervene in the case in the face of strong objections by the Tribe. We believe that it is essential to keep our attorneys fully engaged, not only to help the other defendants, but also to protect the interests of private parties if the politics change and the other defendants withdraw, settle or scale back.

While a considerable amount of money has been raised to date through a variety of sources and one large private foundation grant, the amount raised to date is less than half of what we project will be needed to defend this case through trial. For this reason, we are asking a select group of community leaders to step forward and help lead our efforts to raise the remaining resources necessary to continue a proper defense. Unlike the Tribe, which is using casino money, and the other defendants, which are using taxpayer dollars, ECLA and the Alliance must seek private contributions to support their efforts.

All donations can be made to the Protection of Rights Alliance Foundation, which is a recognized Section 501(c) charitable institution under the Internal Revenue Code.

U.S. Federal Court Lawsuit

filed by

Odawa Indians Tribe

to establish the

Odawa Indians Reservation