
In the
Supreme Court of the United States

BAY MILLS INDIAN COMMUNITY,
Petitioner,

v.

STATE OF MICHIGAN, MICHIGAN STATE UNIVERSITY
As successor to the Board of Agriculture of the State of Michigan,
and JOHN ENGLER, Governor of the State of Michigan,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF MICHIGAN

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In 1881 did the Trade and Intercourse Act (25 USC 177) prevent the State of Michigan from selling Indian tribal Land acquired by an Indian Tribe in fee in 1857 for non-payment of property taxes?
2. Appellant's property, tribal lands purchased in fee in 1857 were listed on the "non-resident tax role," and no notice of delinquency or sale and no opportunity for redemption were given the Tribe. Assuming that Appellant Indian Tribe had a cause of action against the State of Michigan for taking of its Tribal lands in a tax sale, for denial of due process and equal protection under the Constitution of the United States, must that action be brought only under 42 USC 1983, or does the Constitution of the United States support an action for violation of its due process and equal protection clauses?
3. Does this Court's ruling in Cass County Minnesota vs Leech Lake Band of Chippewa Indians, 524 US 103; 118 S Ct 1904; 141 L Ed2d 90 (1998) bar plaintiff's action when plaintiff's tribal land was taken by the State of Michigan for non-payment of real property taxes in spite of the fact that Congress never removed its trust status.

PARTIES TO THE PROCEEDINGS

Petitioner

Petitioner, Bay Mills Indian Community is a federally recognized Indian Tribe located on its reservation outside of the town of Brimley in Michigan's Upper Peninsula.

Respondents

The State of Michigan, its Governor, John Engler as trustee, successor in office, and Michigan State University (as successor to the Michigan State Board of Agriculture)

Other Parties

There are no other parties

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Bay Mills Indian Community respectfully requests that this Court issue a Writ of Certiorari to review the order entered by the Michigan Court of Appeals and which the Michigan Supreme Court in an order dated October 18, 2001 refused to review.

OPINIONS BELOW

The Order of the Michigan Supreme Court refusing to review the Opinion and Order of the Michigan Court of Appeals has not yet been published, but will appear at ___ Mich.__(2001). It has been reproduced at Appendix A. The Opinion and Order of the Michigan Court of Appeals is published and appears at 244 Mich. App. 739, 626 NW2d 169 (2001) and is reproduced in whole in Appendix B. The opinions and orders appealed from and entered by the Michigan Court of Claims are not published. They are reproduced at Appendix C.

JURISDICTION

The Michigan Supreme Court issued its Order refusing to hear the appeal of Bay Mills Indian Community from the decision of the Michigan Court of Appeals on October 18, 2001. This Court has jurisdiction under 28 USC 1257 (a).

CONSTITUTIONAL PROVISIONS INVOLVED

The due process clause of Fifth and Fourteenth Amendment to the United States Constitution, and the equal protection clauses of the Fourteenth Amendment to the Constitution of the United States provide a right to be notified and heard in any action designed to take away one's peaceful enjoyment of property. In this case the property of plaintiff's predecessor was listed on the non-resident tax role. No notice

of delinquency, sale or redemption was given owners of property listed on the non-resident tax role.

Throughout its early history, the State of Michigan never treated Indian tribes who were owners of real property consistently, denying some (plaintiff herein) equal protection.

STATEMENT OF THE CASE

In July of 1855 the United States entered into a treaty with the Chippewa Indians of the Upper Peninsula of the State of Michigan (11 Stat 621) wherein certain lands were reserved to the Indians. The land in question in this case was within the lands reserved to the Indians in that treaty. (See: Appendix D, Appellant's Complaint in the Court of Claims, pg. 1)

Before Congress could ratify the Treaty or the Executive could withdraw the lands by Executive Order, Boziel Paul purchased the land which is at issue in this case. (See: Appendix D, Appellant's Complaint in the Court of Claims, pg. 1.) It was widely known that lands of Indians could be taken from them by various schemes of the white man. Indians were impoverished and for the most part illiterate. Individual Indians commonly lost lands to speculators and others that preyed upon them while tribal lands were protected by Act of Congress.

There were numerous occasions in the State of Michigan where Indian tribal lands were deeded... "to the Governor of the State, and his successors in office, for the use and benefit of..." an Indian tribe as a means of protecting the title to the land and safeguarding it for the Indians in perpetuity. (See: Appendix D, Appellant's Complaint in the Court of Claims pg. 1.) The State of Michigan treated tribal ownership of lands without any consistency.

In one such instance involving lands in Lapeer County a Justice of the Supreme Court of the State of Michigan wrote the then Governor of the State that the Indians wanted to sell their lands but could not since they had but the equitable title and the Governor was sitting with the legal title. The Justice asked the Governor to execute a deed, which he did, allowing

the lands to be sold.

In another instance, lands near Athens, Michigan became a State Indian Reservation for which there is no legislative authority.

In yet another instance, the Michigan Legislature voted, by Joint Resolution No 20 of the regular Session of the Michigan Legislature of 1903, replacement lands to a Tribe who had lost their lands by tax sale.

In 1857 Boziel Paul and his wife Mary conveyed the property which is the subject of this action "to the Governor of the State of Michigan and his successors in office in trust for the benefit of the two tribes of Indians of which Sho Wan and O Sho Wan O were chiefs." (See: Appendix D, pg 35a, Appellant's Complaint in the Court of Claims, pg. 1.)

The land was placed on the non-resident tax role by the County Assessor. Owners of lands on the non-resident tax role received no notice of taxes due, no notice of delinquency and no notice of tax sale or redemption. Statutes in existence at the time, 1875-1885 has indicated that only the resident roll received notice and persons who were on the non-resident tax roll received no notice of tax due, tax sale, or redemption rights.

In 1884 and 1885 by a series of deeds the Auditor General of the State of Michigan deeded the Indian tribal lands claimed by the Plaintiff herein to third parties for failure of the Indian tribes to pay real property taxes. After sale, the Indians were evicted from the lands. (See: Appendix D, pg 37a, Appellant's Complaint in the Court of Claims, pg. 3)

Plaintiff, Bay Mills Indian Community, as successor to the two tribes for which the lands were placed in trust, brought this action against the State of Michigan and other interested parties in possession contending (See: Appendix D, pg 36a, Appellant's Complaint in the Court of Claims, pg. 2):

1. That the taxing statute of the State of Michigan was violative of the Constitution of the United States since it provided no notice to the owners of lands placed on the non-residence tax roll thereby denying the plaintiffs predecessors due process of law. (See: Appendix D pg 39a, Appellant's Complaint in the Court of Claims, pg. 5)
2. That the Non Intercourse Act, 25 USC 177, prevented the State of Michigan from transferring title to Indian lands without the permission of the federal Government. (See; Appendix D, pg 38a, Appellant's Complaint in the Court of Claims, pg. 4)
3. That the lands in question being Indian tribal lands were non taxable in the first instance. (See: Appendix D pg 38a, Appellant's Complaint in the Court of Claims, pg. 4,5)
4. That the State of Michigan violated the United States Constitution's due process and equal protection clauses. (See: Appendix D, pg 40a-41a, Appellant's Complaint in the lower court pg. 5, 6)

5.¹ That the State of Michigan violated the State of Michigan constitution's due process and equal protection clauses. (See: Appendix D pg 39a-40a Appellant's Complaint in the lower court, pg. 4, 5)

6. That the Governor of the State of Michigan and his successors in office violated their fiduciary responsibility. (See: Appendix D, pg 37a-38a, Appellant's Complaint in the lower court Pg. 3-5)

As indicated in the next section, the Court of Claims granted Summary Disposition to the defendant State of Michigan on each of the Plaintiff's theories above set forth.

STATEMENT OF PROCEEDINGS IN THE LOWER COURT:

This action was commenced in the Michigan Court of Claims, a Court with jurisdiction over claims against the State of Michigan. This Court did not exist when the claims of the plaintiff first accrued. As to each of the plead theories of recovery against the State of Michigan, the Court of Claims granted Summary disposition. In each such case, the Court of Appeals of the State of Michigan affirmed. (See; Appendix B Opinion of the Michigan Court of Appeals.) The Supreme Court of the State of Michigan denied leave to appeal. (See; Appendix A, Order of the Supreme Court of the State of Michigan.)

¹ Issues No. 5 and 6 above are not appealed to the United States Supreme Court in this petition.

The claims of the plaintiff and the specific holdings of the Court of Claims and the Court of Appeals (The Michigan Supreme Court refused Leave to Appeal.) are set forth as follows:

1. That the taxing statute of the State of Michigan was unconstitutional since it provided no notice of delinquency, sale or redemption to the owners of lands placed on the non-resident tax roll.

The Court of Claims and the Court of Appeals both held that all such causes of action were barred by the Statute of Limitations of the State of Michigan and that any federal cause of action which the plaintiff might possess had to be brought under 42 USC 1983. Both courts further held that since 42 USC 1983 did not apply to States, plaintiff had no federal cause of action which it could bring against the State of Michigan. (See: Orders and opinions of the Court of Claims at Appendix D. and of the Court of Appeals at Appendix B.)

2. That the Non-Intercourse Act, (25 USC 177), prevented the State of Michigan from transferring title to Indian lands without the permission of the Federal Government.

The Court of Claims and the Court of Appeals both held that the Non-Intercourse Act only applied to voluntary conveyances of lands from an Indian tribe and not to involuntary actions such as conveyance by the State of Michigan for non payment of taxes. (See: Opinions and orders of the court of claims at Appendix D. and of the Court of Appeals at Appendix B.)

3. That the lands in question, being Indian tribal lands were non taxable in the first instance.

The Court of Claims held that these Indian Tribal lands are taxable by the State of Michigan, resting its decision solely upon a total what plaintiff believes to be a misunderstanding of the Supreme Court of the United State's reasoning in Cass County et al vs Leech Lake Band of Chippewa Indians, 524 US 103, 118 S. Ct. 1904, 141 L. Ed2d. 90 (1998). These courts indicated that that Indian tribal lands of the Bay Mills Indian Community were taxable even though they were tribally owned lands. Petitioner plaintiff believes that such a construction of the *Cass County* case is a misunderstanding of the Court's holding. (See: Orders and Opinions of the Court of Claims at Appendix D, and Opinion of the Court of Appeals at Appendix B.)

4. That the State of Michigan violated the United States Constitution's due process and equal protection clauses by failing to give plaintiff's predecessors notice of delinquency and sale, and by treating plaintiff's predecessors differently than they treated other Indian tribes similarly situated.

The court of claims and the Court of Appeals determined that plaintiff's due process and equal protections claims could only be asserted by the plaintiff under 42 USC 1983. Since 42 USC 1983 has been held not to apply to States, plaintiff has no federal constitutional claims that can be heard by the court. Both Courts denied the existence of a direct constitutional cause of action. (See; Orders and opinions of the Court of Claims at Appendix D and opinion of the Court of Appeals at Appendix B.)

5.² That the State of Michigan violated the due process and equal protection clauses of its own constitution.

The Court of Claims held that any such cause of action was barred by the State Statute of Limitations. (Appellant has decided not to further appeal this question.)

6. That the Governor and his successors in office violated their fiduciary duties.

The Court of Claims and the Court of Appeals held that the Governor could not act as a fiduciary since there was no legislative authority allowing him to do so, ignoring the fact that he did so and ignoring the continuing nature of the fiduciary responsibility of the State.

On appeal to the Michigan Court of Appeals, the Court affirmed the holdings of the Michigan court of Claims. This issue being a purely state issue is not included in this Application.

REASONS FOR GRANTING THE WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

1. The Non-Intercourse Act, 25 USC 177, has been interpreted by the Michigan courts to prevent only voluntary alienation of Indian Tribal land, a decision which is clearly erroneous.

(This case brings to this Court the very set of facts

² Plaintiff, Bay Mills Indian Community has decided not to further appeal No. and No. 6, above, being solely state claims.

which the Court indicated it would not opine upon in n5 of Cass County vs Leech Lake Band of Chippewa Indians, 524 U.S. 103; 118 S.Ct. 1904; 141 L.Ed2d 90 (1998) in that the land in question here is land acquired by an Indian Tribe in fee after the land was subject to purchase under the general land Sales act and then withdrawn by eventual Executive Order.)

Indians and Indian tribes have been, since the earliest days of the Union, wards of the United States. Treaties with the Indians must be interpreted as they would have understood them. Choctaw Nation vs. Oklahoma, 90 S. Ct. 1328; 397 U.S. 620; 25 L. Ed2d 615; rehearing denied, 90 S. Ct. 1834; 398 U.S. 945; 26 L.Ed2d 285 (1970). Acts of Congress must be interpreted so as to give the greatest protection possible to Indians. U.S. vs Drummond, (D.C. Okla 1941) 42 Fed. Supp. 958, affirmed 131 F2d 568, and statutes must be liberally construed in favor of the Indians.

Even before statehood, The Territory of Michigan treated the Indians with care, concern and protection and made it policy that their lands could never be taken from them. Northwest Ordinance of 1787, Art. 3:

"The utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent; and in their property, rights, and liberty they shall never be disturbed..."

Early in statehood, the Supreme Court of the State of Michigan held that the Auditor General, on a tax sale, could not convey Indian property that was subject to a federal restraint on alienation for non payment of taxes. Auditor

General vs. Williams, 94 Mich 180 (1892). In the words of the Court, the State could "Not do by indirection what it could not do directly." The Michigan Supreme Court held that Indian Tribal lands could not be conveyed without the consent of Congress regardless how the Indian tribe obtained title to the lands in question. See also: Tuscorora Indian Nation vs. Federal Power Commission, 265 Fed2d 584, reversed on other grounds 80 S.Ct. 543; 362 U.S. 99; 4 L. Ed2d 584; rehearing denied 80 S.Ct. 858; 362 U.S. 956; 4 L.Ed2d 873 (1959).

Title to the lands which are the subject of this action was obtained beneficially by the Plaintiff's predecessors when one Boziel Paul deeded the subject lands to the "Governor of the State of Michigan and his successors in office in trust for the benefit of the two bands of Indians of which Sho-Wan and O-Sho-Wan-O are chiefs." The deed was executed in 1857.

In 1884 and 1885 the Auditor General of the State of Michigan, disregarding the tribal nature of the lands and the fact that the lands were not alienable, (Due both to the laws of the United States and the trust nature of the deed of Boziel Paul.) deeded the lands to third parties for non- payment of real estate taxes.

The sole basis for a finding by the Court of Claims and the Court of Appeals of the State of Michigan that the subject tribal lands were in fact taxable was the court's interpretation of the reasoning of Cass County vs. Leech Lake Band of Chippewa Indians, 524 U.S. 103; 118 S. Ct. 1904; 141 L. Ed2d 90 (1998), which plaintiff believes both court's either didn't understand, or misinterpreted.

The Leech Lake Indian Reservation in northern Minnesota was set aside for the Leech Lake Band of

Chippewa Indians pursuant to a treaty entered into with the Chippewa in 1855. This particular Band of Indians was dealt with in the Nelson Act of 1889 (25 Stat 642) wherein the Band's reservation lands were alienated, by Congress, from this Band's ownership in three ways: 1) by allotment of parcels of the reservation lands to individual Indians and 2) by sale of the reservation lands at public auction and 3) by sale of the reservation lands to non-Indians.

After 1977, the Band began to purchase back these same reservation lands from persons who had received them from auction sales, general sale, and allotment. In 1993 Cass Lake County began to tax 21 of the parcels that had been reacquired by the Band. The Supreme Court of the United States held that once Congress has made it clear that the Indian tribal lands were no longer under federal protection by dealing with them such as they did in the Nelson Act, and allowing for their sale; the lands when reacquired by the tribe were taxable:

"When Congress makes Indian reservation lands freely alienable, it manifests an unmistakably clear intent to render such land subject to state and local taxation. The repurchase of such land by an Indian Tribe does not cause the land to resume tax exempt status."

Cass County et al vs Leech Lake Band of Chippewa Indians, 524 US 103, 118 S. Ct. 1904; 141 L. Ed2d 90 (1998)

The United States Supreme Court clearly equates Indian real estate tax exemption to the inalienability of the land. If Indian tribal land is inalienable, it is not taxable, unless the federal government has given its approval to a sale

of the tribal lands or otherwise has removed federal protection.

Cass County et al vs Leech Lake Band of Chippewa Indians, Ibid, clearly indicates that the land in question must be Indian land first, then subject to Congressional action removing federal protection. If Indian Reservation land is sold off with the consent of Congress, it becomes taxable even if repurchased by the Tribe. However there are some prerequisites to this holding which seem to be ignored by both the Court of Claims and the Court of Appeals: 1) The Land must be Indian reservation land from which Congress removes federal protection. 2) Congress must make it unmistakably clear that the land is free from the trust status and protection of the United States.

None of these prerequisites occurred as to the land in question in the instant case. For example:

1. Congress did not act in regard to the land of the Plaintiff at any time after it became reserved under the Treaty with the Chippewa of the Sault Ste. Marie Bands in 1855 except to cause its removal from sale and application of the General Land Sales Act. There is no unmistakable, clear intention of Congress that the land of plaintiff's predecessors is not under federal protection. In fact, Congress has never spoken on the issue of these lands purchased in fee by the plaintiff's predecessors. The Court of Claims and the Court of Appeals indicate that the General Land Sales Act was an unmistakable intent of Congress that the land be taxed. Both Courts ignore the fact that the land was not reservation land, nor tribal land when the General Sales Act was passed, thus federal protection was not removed. In fact, when Congress eventually approved and ratified the treaty of 1855 with the Chippewa, that was a clear intent of the Congress that the

land NOT be taxed and that federal protection would inure to the land. Unfortunately, before the land could be withdrawn under the terms of the treaty, Boziel Paul purchased it.

2. The land was never sold after it became Indian tribal land except by the unlawful and illegal acts of the State of Michigan which hardly constitutes a clear intention of Congress. It is this petitioner's position that the State of Michigan had no authority to sell these Indian tribal lands without the consent of the United States Congress.

The errors of the Court of Claims and Court of Appeals in reading and applying the Cass County vs. Leech Lake Band of Chippewa Indians case constitute a clearly erroneous decision:

The Court of Claims' and the Court of Appeals' understanding of the *Leech Lake* case is in substantial error. The case does not deal with reservation lands taxability, but rather the taxability of reservation land after it ceases to be reservation land by act of Congress and is repurchased. When Congress allows its sale to third persons, and the land later comes back into the hands of an Indian Tribe through purchase, the intent of Congress was to remove federal protection. The Leech Lake Band of Indians saw Congress dismantle and sell its reservation. The tribe started to buy the land back and contended that when they repurchased former reservation land, it again became non taxable. The Supreme Court of the United States held that once Congress manifests a clear intent that the land be taxable as it did as to the Leech Lake reservation land, it is still taxable when the Indian tribe repurchases it. That holding and reasoning is simply not applicable to the instant lands at issue in this case because:

1. The lands were not reservation lands that were repurchased after Congress manifested an intent that they be taxed. In fact, the only intent that can be clearly seen is when Congress ratified the Treaty with the Chippewas thus removing the lands in question from sale under the General Land Sales Act. Unfortunately, this land was sold before it could be removed from sale. Congress is entirely silent as to the land at issue in this case after it became Indian Tribal Land, having never made any pronouncements on or about it, and never having consented to its sale or removed federal protection.

2. The Michigan Courts were incorrect when they decided that the Trade and Intercourse Acts, specifically 25 USC 177, only applied to voluntary conveyances of land by an Indian Tribe and did not apply to a state tax sale for non payment of real estate taxes.

The Court of Claims granted the Defendants Summary Disposition on all of Plaintiff's federal law claims asserted in this action. Those claims were: 1. That under federal law the State of Michigan cannot tax Indian tribal lands.
2. That under the Trade and Intercourse Act, 25 USC 177, the State of Michigan cannot deed Indian tribal lands for tax sales.
3. That the State of Michigan violated the plaintiff's federal common law rights, AND
4. That the State of Michigan denied the plaintiff due process and Equal protection of the laws.

Bay Mills Indian Community's tribal predecessors either purchased the land in question in this case, or it was purchased for them. The lands were tribal, and were non-

alienable automatically coming under the protection of Congress.

At the least, the Indian tribes had beneficial title to the land. At the most they had fee title to the land in the names of two Indian tribes. It is one of the theories of the Plaintiff that the State of Michigan could not have deeded the Indian owned land to anyone without the permission of the United States due to the Trade and Intercourse Act, 25 USC 177.

The Court of Claims granted Summary Disposition and the Court of Appeals affirmed with the Supreme Court of the State of Michigan refusing to hear the case, holding that the Trade and Intercourse Act applied only to voluntary conveyances by the tribes themselves and not to conveyances by the State for non payment of taxes. The Courts of Michigan apparently ignoring a long string of United States Supreme Court decisions and a decision of the Michigan Supreme Court in Auditor General vs Williams, 94 Mich 180 (1892) that Indian lands could neither be taxed nor sold for nonpayment of taxes.

The Court of Claims, in granting Summary Disposition and discussing the Non-Intercourse Act, said:

"...it is clearly addressed to voluntary alienation of Indian owned land, not tax sales of the land purportedly held in trust for Indians."

See: Appendix D, Opinion and Order of the Court of Claims dated 1-29-99.

The holding of the Michigan Court of Claims, affirmed by Michigan's Appellate Courts flies in the face of

a long history of decisions of federal courts, at all levels, to the contrary, and should not be allowed to stand.

The Court of Appeals applies a different reasoning than any other court to the application of the Trade and Intercourse Act. The Michigan Courts hold that by giving Boziel Paul a patent to the land, Congress and the United States relinquished any trust relationship it had. And that when the Indian tribe acquired the land by fee, it did not regain its protected status. That is clearly wrong. The trust relationship under the Trade and Intercourse Act doesn't come into being until the land becomes Indian tribal lands, which in this case was when Boziel Paul deeded the land at least beneficially, to the two Indian tribes, Plaintiffs predecessors. It is then that the Act asserts its protection. The decision of the Michigan Courts in this case clearly undercuts and interferes with federal law.

3. The Trade and Intercourse Act, 25 USC 177 creates a trust relationship with the United States and no State may convey Indian owned lands without the permission of the federal government. No Indian Tribe holds legal title to its lands and no State can extinguish an Indian tribal title to land:

As early as 1825, the Federal Courts of the United States held that Indians do not hold legal title to fee lands. Seisin of lands of Indian tribes is in the Sovereign. Jackson vs. Porter, (CC NY 1825) Fed. Case No 7, 143. Only the Sovereign, the United States, can extinguish that title. Joint Tribal Council of Passamaquoddy vs. Morton, (CA. Me 1975) 528 F2d 370; Bennett County, S.D. vs. US, (CA SD 1968) 394 F2d 8; U.S. vs 7,4053 Acres of Land, (CC ANC 1938) 97 F2d 417.

Thus, Plaintiffs predecessors could not hold legal title to the subject land. It was held either by the Governor of the State of Michigan in Trust or by the federal government. In either case, the land was inalienable and non taxable.

The following cases and citations are all illustrative of the fact that Indian Lands may not be conveyed in any way, voluntarily or non-voluntarily without the permission of the United States:

1. In United States vs. 2,005.32 Acres of Land, (1958 DC SD) 160 F. Supp 193, the federal court held that a state may not condemn Indian lands without permission of the United States. Even the United States could not condemn Indian lands without the approval of Congress. Bear vs. United States, (1985 DC Neb) 611 F. Supp 589, aff'd (1987 CA8, Neb) 810 Fed2d 153. If a state could not condemn Indian tribal lands, it certainly couldn't sell them for non-payment of taxes.

2. The property of Indians may not be taken from them by adverse possession or otherwise without the consent of the United States. United States vs 7,405.3 Acres of Land, (1938, CA4 NC) 97 Fed2d 417.

3. Indian title to land is a matter of federal law and cannot be extinguished without federal consent. United States vs Boylan, (1920, CA2 NY) 265 F 165. This opinion relies upon numerous Supreme Court of the United States decisions in support of the proposition that no Indian tribal land may be sold or conveyed by anyone without the consent of the United States.

4. The Trade and Intercourse Act of the United States, 25 USC 177 applies to all Indian tribes and no Indian lands

may be conveyed without the consent of the United States. Passamaquoddy Tribe vs. Morton, (1975 DC ME) 388 F. Supp 649, aff'd (1975, CA1 Me) 528 Fed2d 370

5. In Golden Hill Paugussett Tribe of Indians vs Weicker, (1993, DC Conn) 839 F Supp 130 the court dismissed, without prejudice, a suit brought by the tribe to recover land conveyed by the State of Connecticut without federal permission because the tribe was not federally recognized. Bay Mills Indian Community is a federally recognized Indian Tribe and, but for the ruling of the Michigan Courts, should be able to maintain an action under the Trade and Intercourse Act for return of Indian tribally owned land conveyed by the State of Michigan without federal permission.

In granting Summary Disposition of Plaintiff's federal law claims, the Court of Claims impliedly held that the Plaintiff has no common law right of action for the recovery of its land or for money damages. The Court of Claims is incorrect. The federal courts recognize such a right of action. Oneida County New York vs Oneida Indian Nation, (US NY 1985) 105 S. Ct 1245, 470 US 226, 84 L Ed.2d 169. rehearing den. 105 S. Ct 2173, 471 US 1062, 85 L. Ed. 2d 491.

While a State court has made the decision on this first impression issue, to wit: land purchased by tribes in fee are subject to federal restrictions on alienation. Jicarilla Apache Tribe vs Board of County Comm, N.M. App1998, 862 P2d428, 116 NM 320 cert granted 873 P2d 270, 117 NM 524, cert den 865 P2d 1197, 116 NM 553 reversed 883 P2d 136, 118 NM 550 the Supreme Court of the United States has not decided the question. See Note 5, Cass County vs Leach Lake Band of Chippewa Indians, 524 US 103, 118 S. Ct.

1904, 141 L. Ed2d 90 (1998) where this Court specifically states that its decision does not apply to the facts in the instant case.

4. The Michigan Appellate Courts have incorrectly held that plaintiff's claims of denial of due process of law and denial of equal protection of the laws could only be brought under 42 USC 1983 which does not apply to states.

The tribal property, subject of this action, was not taxed for a while in the 1850s and 1860s, but was taxed for some years in the late 1870s and early 1880s and placed on the non-resident tax role. (Non residents received no actual notice of sale or taxes due, or delinquency. This procedure is claimed by the Plaintiff to be unconstitutional for it denies federal due process of law.)

The Indians in the 1850s-1880s and beyond were not sophisticated in the ways of the white man. They were impoverished, and their property was sold by the State of Michigan for the non payment of taxes, in this case in a series of deeds in 1884 and 1885.

Bay Mills Indian Community became the successor to the original tribes when they joined Bay Mills. This claim was brought against the State of Michigan in the Court of Claims for the wrongful taking of Indian tribal lands. This issue deals with only two counts of Plaintiff's multi-count Complaint, one alleging violation of Due Process and the other violation of the Equal Protection of the Law, both under the United States Constitution.

In its order granting the Defendant's Summary Disposition, the Michigan Court of Claims held that in order for the Plaintiff to bring a claim of violation of Federal Due Process or Equal Protection, it must do so under 42 USC 1983 and that statute was the only cause of action available to the Plaintiff. The Court of Claims further held that the Plaintiff could not maintain a 42 USC 1983 cause of action against the State of Michigan because the State was not a "person" within that statute. Plaintiff maintains that there is a direct action against the State of Michigan based upon the United States Constitution. Strader vs Troy, (CA 4 N.C.) 1978, 571 F2d 1263. If the Court of Claims and the Court of Appeals are correct, the State of Michigan and for that matter, all of the other states can thumb their nose at the federal Constitution and regularly deprive their citizens of federal due process and federal equal protection and there is nothing that anyone can do about it. The only available remedy would be under 42 USC 1983 a remedy not available against the State of Michigan.

Both the Due Process and Equal protection clauses have their origin in the Bill of Rights which was intended by the founders to act as a limitation on the power of government. Nashville C&S, L Railway vs. Waters, 294 US 405, 79 L. Ed. 949, 55 S. Ct. 486 (1935); Nebbia vs. New York, 291 US 502, 78 L. Ed. 940, 54 S. Ct. 505, 89 ALR 1469 (1934); Eubank vs. Richmond, 226 US 137, 57 L. ED. 156, 33 S. Ct. 79; Hodgson vs. Vermont, 168 US 262, 42 L. Ed. 461, 18 S. Ct. 80 (1897). Restraints upon the actions of the States. Brown vs. New Jersey, 175 US 172, 44 L. ED. 119, 20 S. Ct. 77 (1899). See also: Annotation: 56 ALR2d 895 Sect. 1, et. seq.

The Michigan courts seem to ignore the fact that the Supreme Court of the United States has held that there are,

indeed, direct causes of action based upon Constitutional violations unless congress has provided an alternative remedy which can substitute as a means of recovery directly under the Constitution and viewed as equally effective as a direct Constitutional claim. Carlson vs. Green, 100 S. Ct. 1468 at 1471, 446 US 14, 64 L. Ed.2d 15 (1980) Quoted with approval: Wilkie vs. State of Arizona, 161 Ariz 541, 779 P2d 1200 (1989).

The Supreme Court of the United States has sanctioned direct constitutional claims in limited situations, Bivens vs Six Unidentified Narcotics Agents, 403 US 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971); Davis vs. Passman, 442 US 228, 99 S. Ct. 2264, 60 L. Ed. 2d 846 (1979); and Carlson vs. Green, 446 US 14, 100 S. Ct. 1468, 64 L. Ed.2d 15 (1980). This instant case presents a fact situation which demands inclusion in that group of cases allowing a direct Constitutional claim against the State, especially since it is brought in a Court set up by the State Legislature to hear such claims.

Quite contrary to the opinion of the Michigan Court of Claims and the Michigan Court of Appeals in this case, 42 USC 1983 is not the only way in which an action for a constitutional violation can be brought. A claim can be made directly from the Constitution when, for whatever reason, 42 USC 1983 is not available. Verdon vs. Consolidated Rail Corp., (SD N.Y. 1993) 828 F. Supp. 1129; Three Rivers Cablevision Inc. vs City of Pittsburgh, (DC. PA. 1980) 502 F. Supp. 1118.

42 U.S.C. 1983 is not available to the plaintiff because the State of Michigan cannot be sued under that section and further because Plaintiff's cause of action rests on facts which had their origin in 1884-1885 long predating the statute.

The 11th Amendment to the Constitution of the United

States prevents the State of Michigan being sued in the federal courts. This problem is avoided entirely by bringing this action in a State court, especially a State Court set up to hear claims against the State.

It can be argued that the Eleventh Amendment is a bar against a direct Constitutional claim being made in a federal court against a State, but there would be no bar if the action, based on a direct Constitutional claim, were brought in a state court, especially one set up by the state for bringing claims against it, such as the Michigan Court of Claims. Idaho et. al. vs Cour d'Alene Tribe, 521 US 261, 117 S. Ct. 2028, 138 L. Ed. 2d 438 (1997).

In this instant case, the Plaintiff Appellant, Bay Mills Indian Community, lost its lands by direct and wrongful actions of the State of Michigan in taxing and selling Indian Tribal lands. The taxing statute under which all of this was done is constitutionally infirm for failure to provide any notice of taxes due, taxes delinquent, tax sale, or to provide a method for redemption. The wrongful taking of this property by the State of Michigan, violates federal due process requirements. Because the State of Michigan treated other Indian Tribes much differently under very similar circumstances, equal protection also has been denied. Recognized federal causes of action, should have been allowed to go forward in the Michigan Court of Claims.

Certiorari jurisdiction is warranted to correct the errors presented and to clarify the federal law.

CONCLUSION

The petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Michigan Supreme Court
Lansing, Michigan

SC: 118795
COA: 218580
Court of Claims: 96-016482-CM

Entered: October 18, 2001

BAY MILLS INDIAN COMMUNITY,)
Plaintiff-Appellant,)
))
v)
))
STATE OF MICHIGAN,)
STATE BOARD OF AGRICULTURE,)
BOARD OF TRUSTEES OF MICHIGAN)
STATE UNIVERSITY, JOHN ENGLER,)
GOVERNOR)
Defendants-Appellees.)

Maura D. Corrigan, Chief Justice

Michael F. Cavanagh, Elizabeth A. Weaver, Marilyn Kelly
Clifford W. Taylor, Robert P. Young, Jr., Stephen J.
Markman, Justices