

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

ANDREW X. AKINS, ET AL.,)	
)	
Plaintiffs)	
)	
v.)	Civil No. 96-83-B
)	
PENOBSCOT INDIAN NATION, ET AL.,))	
)	
Defendants)	

RECOMMENDED DECISION

The plaintiffs, Andrew X. Akins and PENAK, brought the current action against the defendants, the Penobscot Nation¹ and several members of its tribal council, seeking, *inter alia*, damages for conspiracy to deprive Akins of his constitutional rights, a declaratory judgment invalidating a regulation enacted by the tribal council concerning the harvesting of trees on the Nation's land, and the restoration of Akins's stumpage permit rights. By their answer, the defendants deny all pertinent allegations and move to dismiss the action for lack of jurisdiction over the subject matter, Fed. R. Civ. P. 12(b)(1), and for failure to state a claim upon which relief can be granted, Fed. R. Civ. P. 12(b)(6). For the reasons discussed below, the Court recommends that the defendants' motion be granted.

¹ Although the plaintiffs refer to one of the defendants as the "Penobscot Indian Nation" in their complaint and other pleadings, the Court is mindful of and accepts the defendants' suggestion that the party more properly is known and referred to as the Penobscot Nation. *See* 25 U.S.C. § 1722(k) (1983).

I. Motion to Dismiss

A motion to dismiss tests the legal sufficiency of the complaint, and thus does not require the Court to examine the evidence at issue. *Goldman v. Belden*, 754 F.2d 1059, 1067 (2d Cir. 1985). The Court accepts all well-pleaded facts as true, "indulging every reasonable inference helpful to the plaintiff's cause." *Garita Hotel Ltd. Partnership v. Ponce Federal Bank, F.S.B.*, 958 F.2d 15, 17 (1st Cir. 1992). The plaintiff must, however, "set forth factual allegations, either direct or inferential, respecting each material element necessary to sustain recovery under some actionable legal theory." *Gooley v. Mobil Oil Corp.*, 851 F.2d 513, 515 (1st Cir. 1988). The Court need not accept "bald assertions" or "unsubstantiated conclusions." *Correa-Martinez v. Arrillaga-Belendez*, 903 F.2d 49, 52 (1st Cir. 1990). "[I]f the facts narrated by the plaintiff 'do not at least outline or adumbrate' a viable claim, [the] complaint cannot pass Rule 12(b)(6) muster." *Gooley*, 851 F.2d at 515 (quoting *Sutliff, Inc. v. Donovan Companies, Inc.*, 727 F.2d 648, 654 (7th Cir. 1984)).

II. Background

This matter arises out of the plaintiffs' contention that the Penobscot Nation Tribal Council conspired to deprive Akins of his constitutional rights to due process and equal protection of the laws by enacting a facially neutral stumpage permit policy that was, in fact, intended to deprive Akins of his eligibility to continue receiving such permits. The plaintiffs also aver that the policy was adopted in violation of the Maine Administrative Procedure Act, 5 M.R.S.A. §§ 8001-11008 (1989 & Pamph. 1996), and thus is void.

Akins, a member of the Penobscot Nation, resides in Alabama. From the early 1980s until May 1994 he annually received from the Nation stumpage permits to engage in logging operations on the Nation's lands. Akins formed a professional association, PENAK, to aid in performing the

logging operations. Akins is a fifty-one percent owner of PENAK. On December 15, 1993, the Tribal Council voted to amend the stumpage permit policy to restrict the issuance of such permits to enrolled members of the Nation who are residents of the State of Maine. The new policy went into effect on May 18, 1994. In a letter dated May 19, 1994, the Nation advised Akins that he no longer was eligible to receive a stumpage permit.

Akins and PENAK complain that the Nation's new policy was enacted as part of a conspiracy to prevent Akins "from receiving or even being considered for the reissuance of the permits that had been issued to him." Akins avers that the Nation drafted the policy "to appear neutral on its face, but [it] would in fact effect [sic] no other permit holder." As a result, Akins contends that he was denied due process and equal protection of the laws as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1341 (1983 & Pamph. 1996), and the Constitution of the State of Maine.

III. Discussion

Akins and PENAK brought an eight-count complaint against the defendants. In Count I of the complaint they seek damages pursuant to 42 U.S.C. § 1985(3) (1994)² against the defendants for conspiracy to deprive Akins of his right to equal protection of the laws. In Count II, the plaintiffs

² 42 U.S.C. § 1985(3) (1994) provides in relevant part:

If two or more persons in any State or Territory conspire, . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; . . . the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

claim pursuant to 42 U.S.C. § 1983 (1994)³ that the permit policy adopted by the defendants deprived Akins of his right to due process of law "inherent in [] being a member of the . . . Nation to share in land held in common by the tribe." As part of this Count, the plaintiffs seek damages and a declaration that the Nation's actions are "unlawful and void *ab initio*." Akins and PENAK claim in Counts III and IV that pursuant to the Indian Civil Rights Act and the United States Constitution, Akins has been denied due process and equal protection of the laws. In Count V, the plaintiffs seek a declaration that the new stumpage policy is unlawful and void. In Counts VI through VIII, the plaintiffs assert a variety of state law claims, namely that the Nation is bound by the Maine Administrative Procedure Act and that its new policy is unlawful and void under the Act, and that the defendants' actions violated the rights guaranteed to Akins under the due process and equal protection clauses of the Maine Constitution. The defendants move to dismiss all counts for lack of subject matter jurisdiction, Fed. R. Civ. P. 12(b)(1), and for failure to state a claim upon which relief can be granted, Fed. R. Civ. P. 12(b)(6).⁴

A. Counts I, II, and V: Federal claims pursuant to 42 U.S.C. §§ 1983, 1985 and 28 U.S.C. § 2201

³ 42 U.S.C. § 1983 (1994) provides in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

⁴ Although a recitation of the history of the relevant laws and unique relationship between the Penobscot Nation, federal government, and state ordinarily would be customary at this juncture, the Court declines to proceed through such an exercise at this time, and instead notes the excellent synopsis already set forth by the late Magistrate Judge Keith in *Mitchell v. Passamaquoddy Tribe*, No. 89-0073-B (D. Me. Jan. 9, 1990), *aff'd* (D. Me. Feb. 1, 1990).

In Count I of their complaint Akins and PENAK seek damages pursuant to 42 U.S.C. § 1985(3), alleging that the members of the tribal council conspired to deprive Akins both of "his right to participate in the allocation of stumpage permits" and his Fifth and Fourteenth Amendment rights to equal protection of the laws. The defendants contend that no substantive rights to relief have been alleged by the plaintiffs in view of the fact that the Constitution only applies to the actions of Indian nations through the Indian Civil Rights Act.

In order to assert a proper claim for conspiracy under § 1985, a plaintiff must allege "some racial or perhaps otherwise class-based, invidious discriminatory animus behind the conspirators' action." *Griffin v. Breckenridge*, 403 U.S. 88, 101 (1971). Because § 1985 does not, in itself, create a substantive cause of action, *Great Am.Fed. S. & L. Assn. v. Novotny*, 442 U.S. 366, 372 (1979), the plaintiffs must rely on an independent source for Akins's equal protection claim. *Nero v. Cherokee Nation of Oklahoma*, 892 F.2d 1457, 1462 (10th Cir. 1989). "[F]ederal constitutional protections extend to individual Indians only to the extent incorporated in the I[ndian] C[ivil] R[ights] A[ct]." *Id.* at 1462. It is well settled that the Indian Civil Rights Act creates no federal cause of action. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 64-65 (1978). Not only have the plaintiffs failed to satisfy the jurisdictional requirement for this claim, they have failed on the face of the complaint to establish the discriminatory animus requisite for asserting a § 1985 claim. *See Toineeta v. Andrus*, 503 F. Supp. 605, 608-09 (W.D. N.C. 1980) (tribal member's claim against tribal officials for conspiring to deprive her of possessory rights to tribal land insufficient to claim § 1985(3) conspiracy). Akins and the defendants all are members of the same Nation and, thus, no meritorious claim of discrimination exists for purposes of the statute. *Id.* at 608. Count I thus should

be dismissed both for lack of subject matter jurisdiction and for its failure to state a claim upon which relief may be granted.

In Count II the plaintiffs claim pursuant to 42 U.S.C. § 1983 that the Nation's new stumpage policy deprives Akins of the due process of law to which he is entitled as a member of the Penobscot Nation. The basis for the plaintiffs' § 1983 claim is that the acts of the Nation constitute state action thereby subjecting them to the jurisdiction of this Court. This Court already has had occasion to pass on the question whether a plaintiff may seek redress against an Indian tribe pursuant to § 1983. In *Mitchell v. Passamaquoddy Tribe*, No. 89-0073-B (D. Me. Jan. 9, 1990), *aff'd* (D. Me. Feb. 1, 1990), this Court rejected an argument similar to the one now advanced by the plaintiffs that a tribe may under Maine law be liable for its actions pursuant to § 1983. In *Mitchell*, the plaintiff, a police officer at the Passamaquoddy Tribe, brought an action against the Tribe pursuant to § 1983 for race discrimination. The plaintiff argued that because a section of the Maine Implementing Act, the law delineating the contours of tribal powers, confers on the Passamaquoddy Tribe certain rights and obligations of a Maine municipality, 30 M.R.S.A. § 6206(1) (1996), the tribe may, like a municipality, be deemed to have engaged in action "under color of state law" for purposes of § 1983. Rejecting the argument, this Court held that the "Tribe has not simply become a municipality of the State of Maine," *Mitchell*, No. 89-0073-B, slip op. at 6, and, after highlighting those areas of tribal sovereignty that distinguish the Tribe from a municipality, concluded that the particular actions of the Tribe in that case could not be deemed state action for purposes of § 1983. *Id.* at 8.

This Court again concludes that the plaintiffs have failed to state a claim under § 1983 because there has been no action by the Nation under color of *state* law for purposes of § 1983 liability. The Penobscot Nation is a federally recognized, sovereign Indian tribe represented by its

Governor and Tribal Council. 25 U.S.C. §§ 1722(k), 1725(i) (1983). § 1983 is applicable only when a person acts "under color of any statute, ordinance, regulation, custom or usage of any state or territory or the District of Columbia." 42 U.S.C. § 1983. The Court finds that the Tribal Council's action in this case was taken under color of tribal law. Regulating timber harvesting on tribal lands and meeting as a body to regulate such activity are inherently self-regulatory actions of a sovereign. As this Court noted in *Mitchell*, the Maine Implementing Act makes clear that internal tribal matters include tribal government, and such activity "shall not be subject to regulation by the State." 30 M.R.S.A. § 6206(1) (1996); *Mitchell*, No. 89-0073-B, slip op. at 6. It is well settled that although the Indian tribes are "no longer 'possessed of the full attributes of sovereignty,' they remain a 'separate people with the power of regulating their internal and social relations.'" *Santa Clara Pueblo*, 436 U.S. at 55 (quoting *United States v. Kagama*, 118 U.S. 375, 381-82 (1886)). Courts previously have held that certain provisions of the Bill of Rights as well as the provisions of the Fourteenth Amendment "do not constrain the authority of Indian tribes in the exercise of their powers of local self-government." *Mitchell*, No. 89-0073-B, slip op. at 4-5 (citing in part *Santa Clara Pueblo*, 436 U.S. at 56 & n.7).

Because the action Akins and PENAK now complain of, the Tribal Council's enactment of a new stumpage permit policy for tribal lands, was taken under color of tribal law, there has been no action under color of state law, and, thus, the Nation may not be held liable under § 1983. *See R.J. Williams Co. v. Fort Belknap Housing Auth.*, 719 F.2d 979, 982 (9th Cir. 1983), *cert. denied*, 472 U.S. 1016 (1985); *Dry Creek Lodge, Inc. v. United States*, 515 F.2d 926, 931 (10th Cir. 1975); *Bruette v. Knope*, 554 F. Supp. 301, 304 (E.D. Wisc. 1983) (actions taken under color of tribal law are beyond reach of § 1983). Having determined that the actions of the Nation's Tribal Council are

not subject to the provisions of § 1983, the Court does not reach the issue whether there has been any deprivation of Akins's federal rights to support his claim. Accordingly, the Court recommends that Count II be dismissed pursuant to Fed. R. Civ. P. 12(b)(1) and (6).

The plaintiffs seek a declaratory judgment in Count V that the Nation's permit policy is "unlawful and void *ab initio*" under the Equal Protection and Due Process Clauses of the United States Constitution. The Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202 (1994), does not create any substantive rights or provide any basis for federal court jurisdiction. *Colonial Penn Group, Inc. v. Colonial Deposit Co.*, 834 F.2d 229, 232 (1st Cir. 1987). As this Court noted in *Mitchell*, "[a]ny constraint on the Tribe's action . . . does not flow from the Constitution, but rather from the Indian Civil Rights Act, Any violation of that [A]ct would be cognizable only in the Tribal Court." *Mitchell*, No. 89-0073-B, slip op. at 9 n.7 (citing *Santa Clara Pueblo*, 436 U.S. at 65). Concluding that the plaintiffs have no substantive federal constitutional rights against the Penobscot Nation capable of being asserted in this Court, the Court recommends that this Count be dismissed as well for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted.

B. Counts III and IV: Claims pursuant to the Indian Civil Rights Act, 25 U.S.C. §§ 1301--1341

The plaintiffs seek damages and injunctive relief for violations of their constitutional rights pursuant to the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1341. The Act imposes "certain restrictions upon tribal governments similar, but not identical, to those contained in the Bill of Rights and the Fourteenth Amendment," including the plaintiffs' claims to due process and equal protection of the laws. *Santa Clara Pueblo*, 436 U.S. at 57. The Act does not, however, establish a federal cause of action. *Id.* at 64. "[T]he Indian Civil Rights Act confers no subject matter jurisdiction. The

only federal relief available under the Indian Civil Rights Act against a tribe or its officers is a writ of habeas corpus." *Wheeler v. Swimmer*, 835 F.2d 259, 261 (10th Cir. 1987) (citing *Santa Clara Pueblo*). Because the plaintiffs claims are only actionable in tribal forums such as the Penobscot Nation Tribal Court, *Mitchell*, No. 89-0073-B, slip op. at 9 n.7; *see also Santa Clara Pueblo*, 436 U.S. at 64-65; *Wheeler*, 835 F.2d at 261, the Court recommends that Counts III and IV be dismissed for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1).

C. Counts VI, VII, and VIII: State law claims

The plaintiffs aver in Counts VI and VII that the Nation is a municipality pursuant to 30 M.R.S.A. § 6206(1) and, as such, must abide by the Administrative Procedure Act when implementing tribal policies such as the one at issue. In Count VIII, the plaintiffs claim that the Nation violated Akins's rights to due process and equal protection of the laws under the Maine Constitution.

The Court finds, as discussed above, that the Nation is protected from state regulation of "internal tribal matters," 30 M.R.S.A. § 6206(1), that the action plaintiffs complain of does constitute such an internal matter, that the Nation is not to be viewed for purposes of this action as a municipality, *Mitchell*, No. 89-0073-B, slip op. at 6, and that the Maine Administrative Procedure Act is inapplicable to the instant matter, *id.* at 10. For these same reasons, the Court finds that the Nation is not subject to the plaintiffs' state constitutional law claims. Accordingly, the Court recommends that Counts VI, VII, and VIII be dismissed for lack of subject matter jurisdiction and for failure to state claims upon which relief can be granted.

IV. Conclusion

For the foregoing reasons, the Court hereby recommends that the defendants' motion to dismiss all counts of the plaintiffs' complaint either for lack of subject matter jurisdiction, Fed. R. Civ. P. 12(b)(1), or for failure to state claims upon which relief can be granted, Fed. R. Civ. P. 12(b)(6), be GRANTED.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) (1988) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

Eugene W. Beaulieu
United States Magistrate Judge

Dated in Bangor, Maine on February 26, 1997.