
No. 81-549

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

State of Michigan, et al.,

Petitioners,

v.

United States of America, et al.,

Respondents.

RESPONDENT TRIBES' BRIEF IN
OPPOSITION TO CERTIORARI

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QUESTIONS PRESENTED
FOR REVIEW

I.

Have the Michigan Supreme Court and the Sixth Circuit Court of Appeals properly concluded that respondent Indian tribes reserved by treaty a right to fish in certain Michigan waters of the Great Lakes?

II.

A. Did the Court of Appeals correctly define the permissible scope of state regulation governing off-reservation treaty fishing?

B. Is this issue ripe for review absent any factual record applying the Court of Appeals' definition?

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Respondents Bay Mills Indian Community
 and the Sault Ste. Marie Tribe of Chippewa
 Indians respectfully submit the following
 brief in opposition to the petition for
 certiorari of the State of Michigan.

OPINIONS BELOW

Petitioners identify and include in
 their appendix numerous district court and
 circuit court opinions below. While all
 of these opinions and orders are a part of
 this litigation, the court of appeals' de-
 cision from which review is sought is dated

July 10, 1981, Pet. 311a, and is now reported at 653 F.2d 277 (6th Cir. 1981). The principal district court opinion reviewed by the court of appeals is reported at 471 F.Supp. 192 (W.D.Mich. 1979), Pet. 18a.^{1/}

STATEMENT OF THE CASE

In April 1973, the United States filed suit in the western district of Michigan against the State of Michigan seeking a declaration that the Indian parties to the Treaty of March 28, 1836 (7 Stat. 491) reserved a right to fish in certain Michigan waters of the Great Lakes.^{2/} Both Bay Mills and the Sault Tribe subsequently petitioned the district court and were accorded status as plaintiff-intervenors.

In order to streamline the litigation,

^{1/} The District Court opinion on remand, found at Pet. 316a, has now been reported at 520 F.Supp. 207 (W.D.Mich. 1981).

^{2/} A map of the ceded waters wherein the reserved right pertains appears in 471 F.Supp. at 277, Pet. 194a.

the United States and the tribes moved, pursuant to Rule 42(b), Fed. R. Civ. P., to sever three issues for separate trial. On July 30, 1976, the district court entered an opinion and order granting the motion and designating the issues: (i) interpretation of the 1836 treaty to determine whether the Indians reserved fishing rights thereunder; (ii) interpretation of the 1855 treaty (11 Stat. 621) to determine whether any fishing rights reserved under the earlier treaty were abrogated subsequently; and (iii) whether the state possessed any jurisdiction to regulate tribal fishers if treaty reserved fishing rights were determined to exist. See 471 F.Supp. at 218, Pet. 58a.

Prior to trial in this case, the Supreme Court of Michigan decided People v. LeBlanc, 399 Mich. 31, 248 N.W.2d 199 (Mich. 1976), reversing a state criminal conviction of a tribal member fishing in violation of state

law. The Michigan Supreme Court held the Indians had reserved a right to fish under the 1836 treaty that was not abrogated by the 1855 treaty. The state high court further ruled that Michigan could regulate tribal members, but only for legitimate conservation purposes and only so long as the regulation did not discriminate against treaty fishers. The United States and the tribal respondents herein were not parties to the LeBlanc litigation.

After trial in 1978, District Judge Noel P. Fox issued a comprehensive decision, United States v. Michigan, 471 F.Supp. 192 (W.D.Mich. 1979), Pet. 18a, addressed to the three severed issues. The decision examined the historical circumstances surrounding the treaties and the Indians' understanding of them. The court held that the treaty tribes had reserved fishing rights in portions of the Great Lakes pursuant to the express reservation contained in

Article Thirteenth of the 1836 treaty and by implication as well, since the heavy dependence of the Indians on the fishery resource led to the conclusion that the tribes would not have knowingly relinquished the right. Id. at 253-59, Pet. 140a-54a. The district court also concluded that because the modern day tribes had adopted conservation codes, were regulating the activities of their fishing members and were receiving technical assistance from the United States through the Interior Department's Fish and Wildlife Service and Bureau of Indian Affairs, the state's authority to impose its own regulations was preempted by the treaty and by the federal and tribal governments' occupation of the field. Id. at 265-74, Pet. 166a-88a.

The state appealed the district court's decision to the Sixth Circuit Court of Appeals. On May 28, 1980, the court of

appeals entered a per curiam decision remanding the case to the district court to consider in more detail the issue of federal preemption. United States v. Michigan, 623 F.2d 448 (6th Cir. 1980), Pet. 292a. Although the Secretary of the Interior had been regulating tribal fishers under 25 C.F.R. Part 256 prior to the district court's opinion of May 7, 1979, detailed federal regulations governing treaty fishing in the ceded waters were not published until November 15, 1979.^{3/} The November 1979 regulations were thereafter amended and republished on April 28, 1980.^{4/} The promulgation of these regulations subsequent to the district court's decision prompted the remand for further consideration of the preemption issue. Also, the May 28, 1980

^{3/} 44 Fed. Reg. 65747 (1979). The tribes had been regulating treaty fishers under tribal conservation codes for many years prior to the Secretary of the Interior's regulation, see 471 F.Supp. at 248, Pet. 128a.

^{4/} 45 Fed. Reg. 28100 (1980).

remand decision stated the circuit court's tentative conclusion that:

[I]n the absence of federal regulations occupying the field, the Supreme Court of Michigan in People v. LeBlanc, supra, has correctly stated the applicable standard governing state regulation of gill net fishing.

Id. at 450, Pet. 297a.

Beginning in the fall of 1980, the district court heard testimony from tribal and Interior Department officials regarding the purposes for the Interior Department's promulgation of the comprehensive treaty fishing regulations. Prior to the conclusion of the remanded proceedings, the Secretary of the Interior issued a letter, dated April 21, 1981 (Pet. 309a), to the Governor of Michigan and the chairman of the tribes providing notice of his decision not to extend the federal regulations beyond May 11, 1981, the date upon which they expired, see 46 Fed. Reg. 33,

34 (January 2, 1981). 5/

Immediately thereafter, the court of appeals called for supplemental briefs and reargument of the entire case in response to the state's motion. On July 10, 1981, the court issued the decision that is the subject of the state's petition for certiorari. United States v. Michigan, 653 F.2d 277 (6th Cir. 1981), Pet. 311a. This decision affirmed the district court's interpretation of the treaties, but modified the conclusion that all state regulation of treaty fishers was void ab initio. Instead, the circuit court followed the Michigan Supreme Court's holding in People v. LeBlanc, supra, which permits limited, nondiscriminatory state regulation for legitimate conservation purposes. Id. at 279, Pet. 313a.

5/ These regulations continue to govern treaty fishing pursuant to the order of the court of appeals dated July 16, 1980, Pet. 307a, and because the respondent tribes have adopted them as tribal law, see 653 F.2d at 279, paragraph 5, Pet. 314a.

SUMMARY OF ARGUMENT

Because the decisions of the Sixth Circuit Court of Appeals and the Michigan Supreme Court are in agreement that respondent Indian tribes reserved fishing rights under the Treaty of March 28, 1836, that were not subsequently abrogated by the Treaty of July 31, 1855, there is no occasion for review of this question by the Court. Furthermore, petitioners are precluded by the doctrine of collateral estoppel from denying the existence of the reserved fishing right previously recognized by the Michigan Supreme Court in People v. LeBlanc, supra.

There is no difference in substance between the decisions of the federal and state courts defining the permissible scope of state regulation over the Indian treaty fishery. Indeed, the appeals court stated, in referring to People v. LeBlanc, supra, that it is "a decision which we

believe accurately states the rule of reason and the principles of federal law applicable to this case." 653 F.2d at 279, Pet. 313a.

To the extent the federal and state courts may differ on this issue, the abstract language of the court of appeals defining the scope of permissible state regulation should only be considered by the Court, if at all, in the context of a record reflecting application of that standard to concrete facts. No such record exists at this time.

There is no justification for petitioners' assertion that review is warranted because of threatened harm to the fishery resource. The comprehensive regulations currently governing tribal members adequately protect the fishery and prevent its depletion.

ARGUMENT

I. THE MICHIGAN SUPREME COURT AND THE SIXTH CIRCUIT COURT OF APPEALS BOTH CONCLUDED THAT RESPONDENT TRIBES HAVE A TREATY RIGHT TO FISH IN CERTAIN WATERS OF THE GREAT LAKES.

Petitioners contend that the decisions of the district court and court of appeals are inconsistent with the Michigan Supreme Court's decision in People v. LeBlanc, supra, and with decisions of this Court on which the LeBlanc decision is predicated. To the contrary, the most notable aspect of this litigation is the extent to which the Michigan Supreme Court and the federal courts are in complete agreement on the fundamental issues of treaty interpretation and the tribes' fishing rights in the Great Lakes.

A. Under the 1836 Treaty the Tribes Reserved Rights to Fish That Were Not Diminished by the 1855 Treaty.

The Treaty of Washington, dated March 28, 1836 (7 Stat. 491), Pet. 1a, was a treaty of cession made between the United

States and certain amalgamated bands of Ottawa and Chippewa Indians living in the northern portion of the lower peninsula and eastern portion of the upper peninsula of what is now the State of Michigan. The principal purpose for the treaty from the perspective of the United States was to extinguish the Indians' aboriginal title, thereby making vast tracts of land available for the westward movement of non-Indian settlers.

The treaty tribes or bands were heavily dependent upon the natural resources of the area for their livelihood. In particular, the Indians were fishers who utilized the seemingly inexhaustible fishery resource of the Great Lakes. 471 F.Supp. at 221-25, Pet. 65a-74a. The Indians traveled by canoe and utilized gill nets to harvest all species, but especially lake whitefish and lake trout.

When the Indians granted to the United

States their ownership in the land and waters of the Great Lakes described in Article First of the 1836 treaty, they reserved all those rights not specifically conveyed. Washington v. Fishing Vessel Association, 443 U.S. 658, 674-85 (1979); United States v. Wheeler, 435 U.S. 313, 327 n.24 (1978); Seufert Brothers Co. v. United States, 249 U.S. 194, 198 (1919); Winters v. United States, 207 U.S. 564, 576 (1908); United States v. Winans, 198 U.S. 371, 380-81 (1905). Among the reserved rights was their aboriginal right to continue to fish in the ceded waters of the Great Lakes. 653 F.2d at 278, Pet. 312a; 471 F.Supp. at 255-56, Pet. 143a-46a.

In addition to the implied right to fish, the tribes and the United States relied on explicit language in the treaty in support of their claims. Article Thirteenth of the 1836 treaty provides:

The Indians stipulate for the right

of hunting on the lands ceded, with the other usual privileges of occupancy, until the land is required for settlement.

7 Stat. 495, Pet. 8a. The federal courts and the Michigan Supreme Court agreed that this language constituted an explicit reservation of a right to take fish from the Great Lakes. 471 F.Supp. at 258-59, Pet. 151a-53a; People v. LeBlanc, supra, 248 N.W.2d at 203-04. These holdings are in accord with this Court's decision in Menominee Tribe of Indians v. United States, 391 U.S. 404, 406 (1968) (Treaty of Wolf River setting aside home for Indians "to be held as Indian lands are held..." includes the right to hunt and fish). See also, Kimball v. Callahan, 493 F.2d 564, 566 (9th Cir. 1974), cert. denied, 419 U.S. 1019 (1974); State v. Tinno, 94 Idaho 759, 497 P.2d 1836, 1389-90 (1972). Further, both the Michigan Supreme Court and the lower federal courts agreed that the phrase "until the land is

required for settlement" was not intended to limit the Indians' reserved right to fish in the Great Lakes. 471 F.Supp. at 235-38, 258-59, Pet. 97a-105a, 151a-53a; People v. LeBlanc, supra, 248 N.W.2d at 207.

The 1855 treaty (11 Stat. 621), Pet. 9a, was negotiated to address two principal matters: providing permanent homes for the Indians in Michigan and settling claims the Indians had for goods, services and annuities promised by the United States under the 1836 treaty but never delivered. The federal courts concurred with the Michigan Supreme Court that the 1855 treaty had no impact whatsoever on the fishing right reserved by the Indians under the earlier treaty. 471 F.Supp. at 262-65, Pet. 160a-65a; People v. LeBlanc, supra, 248 N.W.2d at 209-12.

The state argued to the Michigan Supreme Court and the lower federal courts that a release clause (Article 3, Pet. 16a)

in the 1855 treaty operated to abrogate rights reserved under the 1836 treaty. The Michigan Supreme Court rejected this contention:

While it is conceivable that the United States intended "claims...for other things" in the Treaty of 1855 to refer to fishing rights reserved by the Chippewas in the Treaty of 1836, such seems highly unlikely given the complete absence of any discussion of the termination of such rights in the treaty negotiations.

In any case, it is clear that the Chippewas and the Ottawas would not have understood Article Three of the Treaty of 1855 to terminate hunting and fishing rights reserved in the Treaty of 1836 given the absence of any mention of such prospect.

People v. LeBlanc, supra, 248 N.W.2d at 211. The district court's opinion is in accord, 471 F.Supp. at 243-47, 262-63, Pet. 116a-25a, 160a-63a, and the Sixth Circuit upheld this conclusion, 653 F.2d at 278, Pet. 312a.

In summary, the federal courts and the state supreme court, which reviewed and scrutinized exhaustively the treaties

at issue herein, reached identical conclusions. Each ruled that the Indian signatories reserved the right to fish in the waters of the Great Lakes ceded by Article First of the Treaty of 1836. Each ruled that the later Treaty of 1855, negotiated with the same bands as the earlier treaty, did not abrogate in any way the prior reserved right. Since there is no conflict between the decisions of the Sixth Circuit and Michigan's court of last resort and since these courts have interpreted the treaties consistently with decisions of this Court, there is no occasion for review by this Court.

B. The State Is Precluded By Operation of Collateral Estoppel From Relitigating the Issue of the Existence of the Tribes' Treaty Fishing Rights.

Under the doctrine of collateral estoppel, Michigan and its citizens are bound by the resolution of the treaty interpretation issues decided in People v.

LeBlanc, supra. Indeed, it is difficult to imagine a more classic case for application of the doctrine.

"Under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." Montana v. United States, 440 U.S. 147, 153 (1979) (citations omitted). It is undisputed that in LeBlanc the Michigan Supreme Court actually and necessarily determined that the Chippewa Indians reserved fishing rights in the 1836 treaty that were not extinguished or affected by the 1855 treaty. That determination is therefore conclusive against Michigan and its citizens in this suit. Further, LeBlanc is binding not only on the state itself, but also on all of its citizens and fishing groups.

Washington v. Fishing Vessel Association, supra, 443 U.S. at 692 n.32.

It is true, of course, that neither the tribes nor the United States were parties to the LeBlanc litigation and that collateral estoppel is being used here offensively, not defensively. It is, however, now firmly settled that non-parties can use collateral estoppel both offensively and defensively so long as the party against whom the estoppel is asserted had a full and fair opportunity to be heard. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 329-31 (1979); Blonder-Tongue Laboratories v. University of Illinois Foundation, 402 U.S. 313 (1971). There can be no unfairness in holding Michigan bound by the issues actually and necessarily litigated in LeBlanc because: (a) the state filed the case and chose the forum; (b) the state had every incentive to litigate LeBlanc to a successful

conclusion and took its battle all the way to the Michigan Supreme Court; (c) it is likely the state made a calculated decision not to seek review of LeBlanc in this Court; (d) the judgment in LeBlanc was not inconsistent with any previous decision in which the issues were litigated in an adversary context; (e) there are no different or greater procedural opportunities available to the state in this case that were unavailable in LeBlanc; (f) the United States and the tribes will not be unjustifiably rewarded for staying out of the LeBlanc litigation because there was no opportunity for them to intervene in the state court criminal prosecution of an individual Indian; (g) there have been no changes in the relevant and controlling facts; (h) there have been no changes in the controlling legal principles; (i) the questions expressly and definitely presented in this action are the same as

those definitely and actually litigated and adjudged adversely to the state in the state court action; and (j) there are no special circumstances justifying an exception to general estoppel principles. Compare Montana v. United States, supra, 440 U.S. at 155-64; Parklane Hosiery Co. v. Shore, supra, 439 U.S. at 331-33.

For these reasons, petitioners herein are collaterally estopped from relitigating the existence of the tribes' fishing rights under the 1836 and 1855 treaties. Since there are no novel or important collateral estoppel issues presented by this case which make application of the doctrine unfair to petitioners, the use of offensive collateral estoppel by the tribes and United States would preclude reaching the merits of the treaty interpretation issues. Thus, review by this Court is not appropriate.

II. THE MICHIGAN SUPREME COURT AND THE SIXTH CIRCUIT COURT OF APPEALS SIMILARLY DEFINED THE SCOPE OF PERMISSIBLE STATE REGULATION OVER THE TREATY FISHERY AND, EVEN IF THEIR STANDARDS DIFFER, THIS ISSUE IS NOT RIPE FOR REVIEW.

A. There Is No Difference In Substance Between the Standard Prescribed by the Sixth Circuit and the Previous Decision of the Michigan Supreme Court.

The district court held that the state lacked any authority to regulate the exercise of treaty reserved fishing rights.

This conclusion was based upon federal preemption arising from the treaties and because the record before the court indicated the tribes were self-regulating effectively. 471 F.Supp. at 270-74, Pet. 178a-88a.

The court of appeals disagreed with the district court and followed the rule established by this Court that states, including Michigan, do have limited authority to regulate the off-reservation exercise of treaty fishing rights. The

appeals court stated:

The right of the Indians to engage in gill net fishing is not absolute, however. It is subject to a rule of reason. In the absence of federal regulation, that right is subject to the type of state regulation outlined by the Michigan Supreme Court in People v. LeBlanc, 248 N.W.2d 199 (1976), a decision which we believe accurately states the rule of reason and the principles of federal law applicable to this case. As provided in LeBlanc, any such state regulations restricting Indian fishing rights under the 1836 treaty, including gill net fishing, (a) must be a necessary conservation measure, (b) must be the least restrictive alternative method available for preserving fisheries in the Great Lakes from irreparable harm, and (c) must not discriminatorily harm Indian fishing or favor other classes of fishermen.

653 F.2d at 279, paragraph 2, Pet. 313a.

Defining the scope of permissible state regulation in substantially similar language, the Michigan Supreme Court relied upon the standard evolved in this Court's decisions in Antoine v. Washington, 420 U.S. 194 (1975); Department of Game v. Puyallup Tribe (Puyallup II), 414

U.S. 44 (1973); Puyallup Tribe v. Department of Game (Puyallup I), 391 U.S. 392 (1968); and lower court decisions in United States v. Washington, 520 F.2d 676 (9th Cir. 1975), cert. denied, 423 U.S. 1086 (1976); Sohappy v. Smith, 302 F.Supp. 899 (D. Ore. 1969). People v. LeBlanc, supra, 248 N.W.2d at 212-215.

Petitioners argue that the circuit court's standard for permissible regulation, while purporting to follow LeBlanc, in fact is more strict, Pet. 13. While it is true the appeals court used slightly different language than the state's high court, there is no indication it intended any departure from the standard established by this Court and followed in LeBlanc. Indeed, the Sixth Circuit has consistently referred to the LeBlanc decision as being a correct statement of the applicable principles of federal law. See 653 F.2d at 279, Pet. 313a; 623 F.2d

at 449, 450, Pet. 295a, 296a-97a.

B. This Issue Is Not Ripe for Review.

To the extent there is a difference in the definition of the standard for permissible state regulation of treaty fishers articulated by the LeBlanc court and the Sixth Circuit, the Court ought not review this purported difference in the absence of a record applying the standard.

Under the Sixth Circuit's July 10, 1981 decision and remand, the state is now empowered to invoke the district court's jurisdiction for approval of specific state regulation of treaty fishers. 653 F.2d at 279, paragraph 6, Pet. 314a. The appeals court declined to determine whether any proposed state regulations conformed to the federal standard because the state had not yet introduced any evidence in the district court to support the legitimate conservation need and

non-discriminatory effect of such regulations. Id. at 279, paragraph 4, Pet. 313a-14a.

Shortly after the court of appeals' decision, the state informed the district court and the parties that it had no present intention to offer any regulations to the district court for approval. Pet. 322a-23a. Thus it is possible the abstract standard for permissible state regulation defined by the appeals court will never be applied in the future.

Judicial review is not appropriate until the state proposes regulations and submits proof in support of the need for such regulation. Any alleged difference in the circuit court's definition should only be considered by the Court in the context of a specific case or controversy, and then only after the district court and court of appeals have first considered the matter.

C. The Treaty Tribes' Self-Regulation Adequately Protects the Fishery Resource.

The tribes regulate their fishers under joint tribal regulations and conservation codes, and any changes in these regulations must first be submitted to the district court for approval. 653 F.2d at 279, paragraph 5, Pet. 314a. The tribes utilize fishery biologists under their own employ and those from the Interior Department's Fish and Wildlife Service to advise them regarding the condition of the fish stocks and the need to adjust tribal regulations to manage and protect the resource.

The tribal regulations are comprehensive, restricting time, place and manner of treaty fishing. There are lake-wide spawning closures and limits on the total allowable harvest for each critical species. Depth and size restrictions

govern the use of gill nets. The regulations impose detailed reporting requirements on licensed fishers; and certain conditions must be met before annual licenses are issued. See generally 45 Fed. Reg. 28100 (April 15, 1980).

The regulations are enforced in tribal court by tribal and Interior Department conservation officers. Further, pursuant to an order of the Sixth Circuit, Pet. 307a, Michigan Department of Natural Resources' conservation officers are empowered to enforce tribal regulations.

Because of this comprehensive system of regulation and enforcement, the fishery resource will not suffer depletion. The tribes have regulated their members for many years and, if their regulations continue to be successful, the application of state regulations may never be necessary. Moreover, if the state believes the resource is endangered under tribal

regulation, it is free at any time to submit its own regulations to the district court for approval.

CONCLUSION

There is no conflict between the Michigan Supreme Court and the Sixth Circuit Court of Appeals over treaty interpretation and the existence of the right to fish in the Great Lakes. Similarly, both courts are in substantial agreement on the scope of permissible state regulation. Even if there were differences in the prescribed scope, the Court should not review the standard in the absence of a record reflecting the state's effort to support the legitimate need for its regulations. Although the state has no present intent to invoke the district court's jurisdiction, it is free to do so anytime if it believes the treaty fishing is harming a resource. In the meantime, tribal regulations protect

and preserve the fishery resource. For these reasons, the tribal respondents urge the Court to deny the writ.

Dated: November 1981

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