

INDIAN FISHING RIGHTS—FISHERY MANAGEMENT

HEARINGS
BEFORE THE
SUBCOMMITTEE ON
FISHERIES AND WILDLIFE CONSERVATION
AND THE ENVIRONMENT
OF THE
COMMITTEE ON
MERCHANT MARINE AND FISHERIES
HOUSE OF REPRESENTATIVES
NINETY-SIXTH CONGRESS
SECOND SESSION
ON
GREAT LAKES INDIAN FISHING RIGHTS—
H.R. 7232, H.R. 2738, H.J. Res. 246
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Mr. SWIFT. Only when the court of appeals said he could not vacate our injunction without giving us an opportunity to be heard.

Mr. DINGELL. Did he give you a hearing?

Mr. SWIFT. He gave me a hearing. It was an interesting and expeditious hearing. He gave us no relief whatsoever. Then we went to Cincinnati and reversed Judge Fox. As Judge Fox saw it, the State had no right, of any nature, even under the environmental laws of Michigan to save the last fish.

Mr. OBERSTAR. Is the territorial geographical area with which you are concerned, is this beyond waters adjacent to ceded lands?

Mr. SWIFT. No, sir. It is land within the ceded waters. It is this bay right here, which is beyond the reservation.

Mr. OBERSTAR. Beyond treaty waters?

Mr. SWIFT. Within treaty waters, but well beyond any reservation. It is right out this door.

The other point I would like to go back to, are the figures Mr. Hicks gave you as to recent catches which you may be overlooking, although I have noticed you have been very perceptive throughout the long day. The recent catch records show some 45,000 pounds of lake trout, dressed lake trout, as opposed to 23,000 pounds of whitefish. Now remember, the native American attorney says we are only targeting at whitefish, the lake trout are incidental. We have continuously denied that allegation. We think these figures prove it we were right. Obviously, the lake trout are targets and the whitefish are ancillary.

The regulations from the Department of Interior say you can net the whitefish and that you can have a 25 to 30 percent incidental catch of lake trout. What they are fishing for are lake trout, and the whitefish are incidental.

Mr. OBERSTAR. It is important to establish what is the normal catch beyond this rather abrupt rise in catch resulting from Fox's decision and compare those figures with catch for nontreaty fishermen, and I would ask Dr. Tanner to supply that information for the record.

Mr. TANNER. Yes, sir.

[Figures were not submitted in time for printing.]

Mr. BREAUX. Thank you, gentlemen.

The next panel please take their seats at the table.

I will also ask Mr. William Rastetter to also join this panel.

Mr. Tom Gordon.

STATEMENTS OF TOM GORDON, CHAIRMAN, RED CLIFF BAND OF LAKE SUPERIOR CHIPPEWAS; FRED DAKOTA, CHAIRMAN, KEWEENAW BAY CHIPPEWA, ACCOMPANIED BY: KARL FUNKE, DANIEL GREEN, ATTORNEY, SAULT STE. MARIE CHIPPEWA INDIANS; WILLIAM RASTETTER, ATTORNEY, GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS

Mr. GORDON. I am here as chairman of the Red Cliff Band of Lake Superior Chippewa Indians. I wish to register this statement in opposition to H.R. 7232. I submit that this bill is bad Indian policy, bad fishery management policy, and bad energy policy.

The Red Cliff Reservation, the homeland of the Red Cliff Band, is located on the tip of the Bayfield Peninsula on southwestern Lake

Superior. The Red Cliff Reservation is a beautiful place, but it is small—less than 15,000 acres—and the economic opportunities for those who live there are neither great nor diverse. We have some timber, some tourism—and we have fishing.

The Red Cliff Reservation is located next to the Apostle Islands, one of the most productive areas of Lake Superior. This location was an obvious choice for a tribe that has always depended on the lake for its livelihood.

My people have commercial and subsistence fishing rights on Lake Superior. These rights were reserved in the Treaty of 1854 and have been reaffirmed in the courts. We realize that along with these rights we have a responsibility to conserve the fishery resources so that our children and grandchildren will have fish to catch.

We fish for whitefish, chubs, herring—and for lake trout. Most lake trout are caught incidentally in nets set for whitefish, but they are a valuable portion of the harvest. While it is true that the lake trout stocks are not as healthy as they once were, that is not the fault of Indian fishermen. The parasitic sea lamprey, which is at the root of the lake trout problem, was imposed on Great Lakes fishermen by a short-sighted American society. Through no fault of our own, my people have suffered the effects of the lamprey and now must suffer through efforts to destroy or compromise our right to fish for a living.

The lake trout is a valuable resource, and it must be protected. For this reason, the Red Cliff Tribe imposes a lake trout quota, a closed season, fish refuges, and a minimum size limit on its commercial fishermen. Through proper management, the lake trout resource can be restored and conserved. But is it proper management to take away the right to harvest lake trout from the person who must fish for a living and give it to the person who fishes for fun?

Whitefish are the No. 1 commercial species on the Apostle Islands; commercial fishermen are constantly looking for whitefish and trying to hold the incidental lake trout catch to a minimum. But, even fishing strictly for whitefish, a fisherman fills his lake trout quota all too quickly. If the incidental commercial harvest of lake trout is outlawed, many valuable fish will be captured and thrown back—dead. This is surely not the best use to be made of this resource.

It may be argued that our fishing methods should be changed to reduce the incidental catch of lake trout in whitefish nets. This idea is behind the "ban the gill net" movement in the State of Michigan. However, there are powerful economic arguments against the conversion of all gill net operations to trap and pound nets. A single trap net outfit can cost well over \$100,000. Trap nets and pound nets cannot supply fresh fish when the demand and price are highest—during late winter and early spring. Conversion from gill nets to trap and pound nets might cause a depletion of the whitefish stocks unless the number of fishermen is drastically reduced. This would reduce the number of jobs in the fishing industry in our area, where employment opportunities are already scarce.

Why is it that the commercial harvest of lake trout is frowned upon? If it is thought that lake trout cannot sustain themselves when harvested commercially, look at the Apostle Islands, where native trout are increasing in the presence of a commercial fishery. Some people think that any fish that tastes good and will take a bait should be strictly a sport fish. However, lake trout in the Great Lakes are not particularly well-suited as a sport fish. Most are caught by trolling with large boats, sometimes far offshore. It may not be long before fuel prices make this sport prohibitively expensive. The harvestable surplus of lake trout can be taken much more efficiently by commercial fishermen than by sport fishermen.

We hear much today about the need for a national energy policy. Yet this bill proposes to impair an efficient food harvesting industry, the commercial fishery, while consigning a major portion of the Great Lakes fishery to the exclusive use of energy-consumptive recreational fisheries. Surely this is inconsistent with a sound energy policy.

My remarks have mostly concerned lake trout, but that is only one of 13 species affected by this bill. Although we do not fish commercially for the other 12 species, I would, of course, object to any proposed abrogation of our rights, especially where, as in the present bill, there is not even the offer of the compensation that would be due.

Although justice would require that compensation be paid if our rights were to be abrogated, no compensation could replace the value our fishery has for us. Money compensation cannot replace the jobs, the cultural continuity, the pride and the purpose that the commercial fishery provides for our people. These are benefits our forefathers bargained for in our treaty, and left us as a legacy. Surely it is wise policy to preserve the time-tested institutions which serve our tribal lands than to destroy them, and then desperately try to recreate them through Federal programs a decade later.

As an alternative to the negative approach taken by this bill, I suggest another more positive one. I suggest that all State, Federal, and international fisheries agencies allow and encourage Indian tribes fishing on the Great Lakes to develop their own fishery management programs. I suggest that these agencies provide the tribe with clear, unbiased information on the limits of the fisheries resources, and assist the tribes in developing their own information-gathering and law enforcement capabilities. And I suggest that the Federal Government fulfill its trust responsibility by providing the funds necessary for the full development of these programs.

Mr. Chairman, adding a few more comments on my statement, I would like to say as chairman of the Red Cliff Tribe we have a member roll of 2,100 people. We are sitting with the DNR in Wisconsin. We are coming to some agreements. We did, just a week ago, enter into a subsistence agreement with the Department. I think in our area, we see that it can be done. I think there are a lot of people talking about whether or not compensation should be due, whether or not Indian people have a right. I would like to stress to this committee, I think as an Indian person, we feel we have gained the same right to govern ourselves the same way you

have claimed to have the right to govern us, and I think the Indian people in this country, in this Nation, have suffered a lot, and I think that it is time, before this Nation looks to the outside world to solve problems, they should begin to solve them at home. We have a suicide rate 13 times the national average, we have infant mortality rates much higher than the rest of the world, the country, and now we are looking at losing one right that we do have, that we can be proud of, and that we can work with, and that is to fish for a living.

There are some people in this Nation that now want to even take that away. You hear of the drunken image of the Indian, you hear of the laziness of the people, and here is the Congress talking about abrogating Indian treaty rights never once talking to an Indian person, never once talking to me. It is sickening. I think it is time that Congress and the U.S. people look at the damage that was created. They took away a culture, took away a life, and made changes without consulting the Indian people as to what you want to do. They have passed many pieces of legislation saying we should all be treated alike. It does not make sense. The only way we can be dealt with fairly is to go to the international court because then people can take a look at the biases and prejudices and deal with people, and I thank you.

Mr. BREAUX. You realize the reason we are here is to listen to you, too. We have not been sitting here since 9:30 with earplugs on. That is why we are here, to listen and work with you to resolve the problem. We are not turning a deaf ear. It is obvious that is the reason for the hearing.

Mr. Dakota, you are next, please.

STATEMENT OF FRED DAKOTA

Mr. DAKOTA. Thank you, Mr. Chairman.

I thank you for the opportunity of being here today. It has been a long day. I have been away from home for a long time, myself.

My name is Fred Dakota. I am the chairman of the Keweenaw Bay Indian Community of the L'Anse Indian Reservation. Accompanying me is Karl Funke, an attorney and member of the tribe who operates the Washington, D.C.-based firm of Karl Funke & Associates.

Based upon certain misconceptions which have been advanced at previous hearings concerning the reserved treaty fishing rights of Indians in the Great Lakes, I would like to preface any remarks with a few well-established doctrines of Federal Indian law.

One, the Indians negotiated the treaties with the United States at least as quasi-sovereign nations. Tribes are neither subdivisions of the state nor instrumentalities of the Federal Government.

Two, treaties, as a general matter, were not grants of rights to the Indians, but a grant of rights from them—a reservation of those not granted. *U.S. v. Winans* 198 U.S. 371 (1905). Generally, these treaties relinquished millions of acres of land to the United States and reserved certain rights, often hunting and fishing rights, and greatly reduced acreages of land to the tribes.

Three, such treaties are the "supreme law of the land * * * The Constitution or laws of any State to the contrary notwithstanding."

Article 6, United States Constitution; *Worcester v. Georgia* 31 U.S. 515; *Cooper v. Aaron* 358 U.S. 1 (1958).

Four, the special status of treaty Indians and any special laws enacted for their benefit are not based upon race but rather upon the unique political government-to-government relationship and are thus not subject to challenge based upon impermissible racial classifications and equal protection. *Morton v. Mancari* 417 U.S. 535 (1974); *Fisher v. District County Court* 424 U.S. 382 (1976).

First, I wish to clarify that the Keweenaw Bay Indian community is not a party to the case of *U.S. v. Michigan* nor signatories to the 1936 treaty which reserved fishing rights to some of the other Chippewa and Ottawa Tribes of Michigan.

However, my tribe does have reserved hunting and fishing rights based upon a treaty with the United States in 1954. These rights were upheld in the Michigan Supreme Court case of *Michigan v. Jondreau*, 384 Mich. 539 (1971).

Subsequently the bill which is being considered today, if enacted, would substantially abrogate these rights secured to us through our treaties with the United States.

H.R. 7232 is clearly designed to cleverly transfer regulation of Indian commercial fishing to state control through a delegation of authority effected by Federal law. Such a measure would clearly accomplish two objectives long sought by the State of Michigan, and in particular, the Michigan Department of Natural Resources. First, it would clearly and substantially abrogate the reserved treaty fishing rights of the Indian tribes in the State.

Second, it would vest the State with exclusive control and regulation of all commercial fishing throughout the state to the exclusion of the Indian tribes and the United States as trustee of the Indian tribes.

It is our conviction that H.R. 7232, if enacted, would be:

One, unjust and morally wrong;

Two, unnecessary as alleged conservation and regulatory measure, especially in light of recent developments;

Three, almost certain to increase hostility and litigation rather than lessen it;

Four, very likely to result in State regulation which is unfair to Indians;

Five, destructive of the culture, and economic and subsistence role fishing provides as an integral part of Indian life; and

Six, costly to the Federal Government in that fishing rights are property rights requiring compensation if abrogated.

With respect to the L'Anse Reservation, the tribal bands to which my ancestors belong, gave the United States of America all of the Upper Peninsula of Michigan west of Marquette in accordance with a treaty under which my ancestors received little of economic value except the rights preserved under the treaty and a reservation, which was supposed to be free from non-Indian intrusion, which encompassed an area occupying less than 15 percent of the land area of Baraga County.

Although I believe that there is no evidence that my ancestors did not act in good faith, one could question the good faith of the Government of the United States since most of the land within the reservation was taken from us now, and it appears that there are

those who would wish to take away our right to hunt and fish on the lands and water which we originally gave up.

Considering what has already been taken from us, it would seem to me that only the most unconscionable person would suggest that the few rights which we have left ought also be taken by act of Congress.

I would hope that not only the members of the subcommittee but also the general population of this State, will recognize the importance to the involved Indian people of the few rights preserved by treaty. These rights are much like an inheritance from our ancestors and are among the few things which we, as Indian people, have left from what we once had, and had taken away.

By and large, Indian persons fishing, and also hunting, pursuant to treaty right, do not do so for the thrill of the kill as is the case with most sportsmen, but rather to satisfy basic needs of sustenance, in the case of individual fishermen, and in order to provide a basic minimal income in the case of the commercial fishermen.

The tribes have relied in good faith upon the treaties. It appears very much to the affected Indian people that Congress is perfectly willing to allow the courts to act in matters of this nature so long as decisions unfavorable to Indian people are being rendered, but immediately becomes concerned that congressional action is appropriate as soon as courts begin to construe treaties the way the affected Indian persons always understood them to be.

The State of Michigan contends that the fishery of portions of the Great Lakes are being depleted due to unregulated Indian commercial fishing. Their logical conclusion is that the Indian commercial fishing rights should therefore be abrogated and the State vested with regulatory jurisdiction for purposes of conservation.

We have a number of problems with this scenario.

First, prior to non-Indian settlement of the Great Lakes area Indians had been fishing the lakes for thousands of years without depletion of the fishery resource.

Second, actual depletion of the fishery resource throughout the Great Lakes over the past 136 years or so occurred as a result of unregulated non-Indian commercial fishing and other factors such as pollution, chemical contamination, and migration of the sea lamprey into the Great Lakes resultant from non-Indian activities.

This statement is made based upon a report prepared by the Michigan Department of Natural Resources and submitted by the director, Mr. Tanner, to Governor Milliken in September of last year. This report lays out the various options the State can attempt to use to either abrogate, defeat, modify and/or regulate reserved Indian treaty fishing rights.

This report states that due to the unregulated commercial fishing and the other factors mentioned that: the fish catches went from over 28 million pounds in 1880 to about 7 million pounds in 1965. By the "mid-1960's both fish stocks and commercial fisheries had nearly collapsed"; that several attempts by the State to regulate went down to defeat in the face of pleadings by fishermen that the laws would ruin their business; that it wasn't until 1968 that

the State enacted legislation to bring regulation—132 years after statehood.

It should be noted that this gross depletion occurred prior to the time that any of the Indian Tribes in Michigan had secured their reserved fishing rights in any of the Great Lakes.

The Michigan Supreme Court did not issue their opinion in the *Jondreau* case until 1971. In contrast to the State, the Keweenaw Bay Indian Tribe quickly established comprehensive regulations governing net size and mesh, fishing hours, prohibited the taking of endangered species, required comprehensive reports of the species, number of pounds of fish caught, area which could be fished, and established a tribal conservation department and tribal court to insure enforcement.

Since the *Jondreau* decision, the catches based on the report of catches by the 14 licensed Indian commercial fishermen—we have had as high as 17 at one time—has remained relatively stable.

The Keweenaw Bay Tribe last year, as a conservation measure, closed the bay to all fishing by its members for a 2-week spawning period and requested that the State do likewise with regard to non-Indian fishing. The State refused, and non-Indian members of the Michigan Ottawa Sportsmen Club sent out members of their club on the day of the fishing ban in deliberate and well-publicized defiance of the tribe's ordinance.

We learned last week that the State has asked the U.S. Fish and Wildlife Service not to plant fish in the waters of Keweenaw Bay. Furthermore, illegal gill net fishing by non-Indians in the waters of Keweenaw Bay is extensive and openly bragged about in some circles. I might add also at this time that we have picked up a few nets that were out in the bay, and I guess our people are not educated enough to know who set the net. It did not smell for Indian, I guess. It could have been white people.

With regard to Keweenaw Bay, the comprehensive regulation of the Indian fishing and the sustained yields run counter to the allegation that the fish resource is being depleted due to so-called unregulated Indian fishing. Their opposition to closing the bay during the lake trout spawning season, their request that the Feds not plant in the bay, and the obvious ease with which non-Indians in the area conduct illegal net fishing might be indicative that the State isn't so concerned with conservation and enhancement as they are in insuring a self-fulfilling prophecy, that is, Indian regulation is nonregulation and results in depletion, therefore, the State should be given regulatory authority over Indian fishing rights.

Which leads us to another basic problem with the State's scenario. The State is operating a put-and-take fishery.

Due, in varying degrees, to the international, Federal, and interstate comanagement in controlling the sea lamprey, the belated regulation of non-Indian commercial fishing—begun in 1968—and significant stocking of salmonid fish by the State and lake trout by the U.S. Fish and Wildlife Service, with the assistance of the State, the fishery resource of the Great Lakes has significantly improved in most areas of the Great Lakes. However, as the fishery resource has improved, both the number of sports fishermen and the catch of both sports and non-Indian commercial fishermen has increased.

According to testimony given by officials of the Great Lakes Fishery Commission before this subcommittee on January 13, 1978:

The Commission has determined that the present planting program as designed, combined with mortality harvest and unknown environmental factors, has not yet been sufficient to establish the desired level of reproduction.

The recreational fishery continues to take large numbers of lake trout * * *.

The Commission went on to say more hatchery facilities were going to be needed to meet the needs for expanding the fishery resource.

At that same hearing Michigan DNR officials testified that sports fishermen were now catching 30 million pounds of whitefish and 200,000 of lake trout. These statistics, given by the DNR and the statements by the Great Lakes Commission clearly demonstrate: (1) that the Indian take is at best 1 percent of the total take in Michigan waters; and (2) that despite all the planting of fish the State is still operating a put-and-take fishery program which benefits mainly non-Indian interests. Yet, DNR, even in light of their own statistics, in 1978 contended and continues to contend that failure to develop a self-sustaining fish stock is due to "unregulated Indian fishing."

Although it has not been finally determined, the 6th Circuit U.S. Court of Appeals, in a per curiam opinion issued on May 28 in the *United States v. Michigan* case, stated that absent a showing of Federal preemption as a result of recently issued Federal regulations governing Indian fishing rights in Michigan that they were inclined to find that the State can regulate Indian fishing as necessary for conservation.

The State DNR officials seem to have a much different definition of the term "conservation." Again, at the hearings in 1978, the Director of DNR stated:

When we come to the definition of "conservation," we must keep in mind that conservation is simply not the perpetuation of the wild fish stock. It also includes allocation within the definition of "conservation" and the greatest good that it will produce.

The greatest good, in this instance, appears to be further expansion of the mainly non-Indian put-and-take fishery.

Since the tribes have only recently been able to establish their right to fish under their treaties with the United States they are a relative newcomer to the impact on the Great Lakes fishery resource. This occurrence has resulted in demand outstripping the DNR's planned supply for expansion of what the States deem their fishery resource. They are simply unwilling to consider either slowing their plans or increasing their regulation of the non-Indian commercial and sport fishery in order to accommodate the inconsiderate and untimely assertion of the Indian tribes of their treaty fishing rights after more than 140 years.

Abrogation of Indian fishing rights via a Federal delegated transfer of regulatory authority over Indian fishing rights to the States via enactment of H.R. 7232 is totally unnecessary. The Department of the Interior recently issued regulations governing Indian fishing rights, in the words of the U.S. Court of Appeals:

* * * are comprehensive. They ban or restrict treaty fishing in certain areas, regulate net mesh size, prohibit harvest of threatened or endangered species and designated sport species, prohibit fishing during the spawning season, prohibit the

setting of nets in certain locations at certain times of the year, and provide for emergency regulatory adjustments in the regulations. (Per Curiam Opinion at 4).

The appeals court has further indicated that it is inclined to rule that the State can regulate Indian fishing rights when necessary for conservation.

In Indian fishing disputes, such as this, the Federal courts have repeatedly stated that they have met with recalcitrance and concerted efforts by State officials and competing non-Indian groups to ignore the law.

Given the disparate political power of the State and its coalition of non-Indian constituent groups vis-a-vis the tribes and given the past experience in the States of Washington and Oregon in similar cases, a transfer of regulatory authority as contemplated in H.R. 7232 would almost certainly result in biased regulation to the detriment of Indians.

We contend that cooperation and comanagement of the fishery resource could work and ultimately benefit both Indians and non-Indians. It is working this way in Washington State.

Finally, I would like to note that on the Columbia River Basin in the Northwest, major development of hydroelectric power dams have over the years severely depleted the salmon and steelhead runs up the rivers. Last month, the Interstate and Foreign Commerce Committee marked up and reported out the Northwest regional power bill, H.R. 6677. This bill, if enacted, will authorize major new hydroelectric and nuclear power development throughout the Columbia River system.

I also note that Congressman Dingell was instrumental in successfully sponsoring numerous provisions of that bill which provide for the enhancement, protection of the fishery resource for both Indian and non-Indian fishers. The provisions also specifically recognize the comanagement responsibility for the tribes with the States and Federal entities by including such tribes on various advisory and technical task forces.

I would urge Congressman Dingell to an enhancement approach to this situation for the benefit of all rather than an unnecessary abrogation approach.

Thank you.

Mr. BREAUX. Thank you, Mr. Dakota, very much.

Next, Mr. Dan Green.

STATEMENT OF DANIEL GREEN

Mr. GREEN. Mr. Chairman, my name is Daniel Green, an attorney for the Sault Ste. Marie Tribe. I am also representing that tribe in the fishing rights litigation. I am appearing on behalf of Mr. Joseph Lumsden, who is unable to appear here today.

I understand Mr. Lumsden is submitting his statement separately and I would request it be incorporated into the record.

[Statement was not received in time for printing.]

Mr. GREEN. I will briefly state the position of the Sault Ste. Marie Tribe. Basically, the tribe opposes the resolution, for the reason the tribe has long relied on the Great Lakes for its subsistence. The Chippewa are the poorest segment, of the depressed economy of the Upper Peninsula and there is no replacement for this resource. The House resolution would impair their ability to

earn their living. For that reason, we believe it constitutes an abrogation of the treaty right. The tribe is not interested in the concept of selling its fishery to the State. No amount of money could provide the livelihood and jobs for future generations that treaty fishery would. Furthermore, the treaty fishery is a cultural peculiarity to the tribe. It would be difficult to continue the tribe's culture in the absence of the fishery.

That concludes the statement as to the tribe's position. But I would be happy to answer any questions.

Mr. BREAUX. Mr. Rastetter.

**STATEMENT OF WILLIAM RASTETTER, MICHIGAN INDIAN
LEGAL SERVICES ON BEHALF OF THE GRAND TRAVERSE
BAND OF OTTAWA AND CHIPPEWA INDIANS**

Mr. RASTETTER. It is a brief overview as to what we consider to be the complications of this proposed amendment. If the committee desires a more detailed analysis, we will be happy to provide such upon request. If there is anybody else present who wishes copies of my statement, I do have extra with me.

The right of the Chippewa and Ottawa Nations to fish the Great Lakes for both subsistence and commercial purposes was reserved by the Indians and guaranteed to be protected by the U.S. Government in the Treaty of Ghent and in the treaties of 1836 and 1855. The Federal Government has a fiduciary duty to enforce the promises made in those treaties and to assure that they remain unaltered by State regulation.

The proposed amendments to the Black Bass Act are unconstitutional since treaties may only be abrogated by specific legislative intent. Although they do not expressly abrogate treaty rights, the amendments would, by implication, deny tribes their right to fish—an economic mainstay and means of self-sufficiency. Thus, treaty-guaranteed rights are effectively abrogated in the economic interest of a small group of sports fishers.

Congress should direct its efforts to the development of tribal hatcheries and controlling toxic substances causing environmental degradation. This would allow for enhancement of the resource for the benefit of the entire community and provide an important commercial food resource, while protecting the treaty rights of Indians which the U.S. Government has promised to uphold.

I. The Ottawa and Chippewa Indians have an unrestricted and treaty-protected right to fish which the U.S. Government has a duty to protect.

A. The Ottawa and Chippewa Indians who were parties to the treaty of 1836 and to the treaty of 1855 implicitly reserved their right to fish in the territory ceded to the United States under those treaties.

Both *People v. LeBlanc*, 399 Mich. 31, 248 N.W.2d 199 (1976) and *United States v. Michigan*, 471 F. Supp. 197 (1979) clearly establish the Indians' reservation of their aboriginal fishing rights under the treaty of 1836. As defined in *United States v. Winans*, 198 U.S. 370 (1905), a treaty, "... was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted." 198 U.S. at 381. The implication of a reserved fishing right by the courts is solidly based on extensive historical and anthropological

documentation regarding the Indians' dependence on the fishing resource at the time of the treaty-making. "The record below clearly indicates that fishing was central to the Chippewa way of life at the time the treaty of 1836 was signed." 399 Mich. at 41. "In order to reach a conclusion that the Indians were not dependent upon this valuable fishery resource, the court would have to ignore hundreds of years of recorded testimony and thousands of years of prehistoric information." 471 F. Supp. at 256. Thus, by not expressly granting their right to fish to the U.S. Government, while at the same time depending heavily upon the resource for food and trade, the Indians reserved "the right to fish Michigan treaty waters to the full extent necessary to meet the tribal members' needs." *United States v. Michigan*, opinion of May 9, 1980, M26-73 C.A.

These rights were not abrogated in any way by the treaty of 1855 *People v. LeBlanc* and *United States v. Michigan*.

B. Reserved Indian fishing rights include commercial as well as subsistence fishing.

As was noted in the *LeBlanc* decision, article fourth of the treaty of 1836 expressly provided for the delivery of materials to be used in the Indian fishing business, active at the time. The importance of the commercial fishery to the Indians has been further documented by the writings of Henry Schoolcraft, in which he refers to the inestimable value of the Indian fishing trade to commerce at the time of the 1836 treaty. 399 Mich. at 42. "From the beginning of the commercial market, as we understand and use that term today, the Indians were participants." 471 F. Supp. at 257.

C. The Ottawa and Chippewa Indians are economically dependent on their commercial fishing right and the U.S. Government has a duty, as established by treaty, to protect that right.

The subsistence and commercial fishing rights established and preserved by the Treaty of Ghent and the treaties of 1836 and 1855 include the right to fish for lake trout. Obviously, the Indian commercial fishery is and always was based on a continuing supply of major Great Lakes fishes, including lake trout. Any depletion of this species subsequent to the treaty-making is due, not to the exercise of centuries-old fishing practices and techniques by the Indian fishermen, but to a host of other contemporary industrial practices and regulatory decisions having direct impact on the Great Lakes fish populations. The Indians' commercial fishing right should not be curtailed for the benefit of sports fishing interests, in abrogation of established treaty rights. Rather, steps must be taken to insure a continuing supply of the fish which have been and continue to be both an economic mainstay for the Indian community and a major food source for the people of Michigan.

D. The duty to protect these treaty-based Indian fishing rights by the Federal Government includes the preemption of State regulations which would abrogate those rights in any way.

Judge Fox, in *United States v. Michigan*, has upheld the Indians' aboriginal fishing rights—"rights which have survived for over 12,000 years and are valid to this day . . .", 471 F. Supp. at 203—in their original, unrestricted state. The State of Michigan's proposal to require Indians to compete for licenses with other fishers was expressly struck down in that opinion. Citing the supremacy clause of the U.S. Constitution, the court held that "(u)nder the law as it

presently stands, only Congress has the power to regulate Indian treaty right fishing in the areas of the Great Lakes covered by the treaties before this court." 471 F. Supp. at 274.

II. The proposed amendments to the Black Bass Act are unconstitutional.

A. The amendments discriminate against a treaty-protected right.

Even assuming that the rule of *U.S. v. Michigan* may be modified on review and that some regulation of Indian fishing may be permissible, the proposed amendment to the Black Bass Act is still clearly unconstitutional. The U.S. Supreme Court has determined that the right to fish, secured by treaty, may not be qualified by a State, and may only be regulated when essential for preservation of a species from extinction and when such regulation does not discriminate against the Indians. *Puyallup Tribe v. Department of Game of Washington*, 391 U.S. 392 (1968).

The regulation under consideration today cannot meet the "no discrimination" requirement. Sec. 11(b) of the proposed amendment would prohibit only commercial fishermen from taking lake trout, while totally securing that privilege to sports fishermen. In *Puyallup II*, the Supreme Court held that a State ban on all net fishing for steelhead amounted to discrimination against the Indians in that it allocated the entire steelhead run to sports fishermen. The court found that discrimination existed because "all Indians net fishing * * * (was) barred and only hook-and-line fishing entirely pre-empted by non-Indians, * * * (was) allowed." 414 U.S. at 48. The effect of H.R. 7232 would be precisely that of the regulation in *Puyallup II*; it would discriminate against the Indians, and therefore, would be unconstitutional.

In *Michigan* also, where the specific treaty rights in issue have been considered by the Michigan Supreme Court, the court, citing *Puyallup*, found that "(d)irect regulation of treaty Indian fishing rights is permissible only after the State has proven that it cannot serve conservation by regulating the rights of citizens not possessing treaty fishing rights." *People v. LeBlanc*, 399 Mich. 31, 248 N.W.2d 199, 215 (citing *Puyallup*, 520 F.2d 676, 686). No indication exists in the proposed amendment that the banning of all commercial fishing which would result in the taking of some lake trout is necessary for conservation purposes. No evidence exists that the regulation of non-Indian citizens has been considered or attempted and that such regulation is incapable of effecting conservation goals.

The proposed amendment is even more troublesome when applied to the treaty rights of the Ottawas and Chippewas. The standard permitting State regulation was largely decided in the context of a treaty with tribes in the State of Washington that states "The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the territory * * *" [emphasis added]. The treaty of 1836—and 1855—with Michigan's Ottawas and Chippewas, in contrast, contains no language indicating that Indian fishing rights are to be shared with all other State citizens. Thus, the treaty rights of Ottawas and Chippewas are not shared rights subject to limitation as in the Washington situation. The treaty of 1836 se-

cures to the Ottawas and Chippewas a right to take fish which takes precedence over the privilege of Michigan citizens to take fish.

B. The amendments do not consider the duty of the United States to protect Indian tribes.

Despite the fact that the treaties of 1836 and 1855 secure for the Indians alone the right to take fish free of State interference and without any requirement of equal allocation, the tribes have proposed and incorporated into the Federal regulations at 25 CFR 256.46 provisions for allocation among tribe and State fishers.

These poundage limitation provisions for allocation among tribe and State fishers would have provided for natural reproduction. Thus, the tribes have recognized that the interests of a number of the user groups are compatible and that allocations between those groups is a workable option. The ultimate solution to the problem, as demonstrated by the Washington fishery, is enhancement of the resource through coordination of tribal and State fisheries, increasing hatchery capacity, and development of cooperative management practices.

Rather than developing a proposal that acknowledges the Federal Government's fiduciary duties to Indian tribes, H.R. 7232 advocates a plan which clearly discriminates against the Ottawa and Chippewa Indians' treaty-secured right to take fish. H.R. 7232 would have the effect of completely terminating the tribes' protected use of gill nets, which would destroy the Indians' centuries-old commercial fishery. The proposed amendment allocates the entire fishery to "sporting purposes" in complete disregard of the Indians' treaty-protected rights.

The termination of the tribes' commercial fisheries would destroy the sole economic base of a number of tribes. Fishing provides the major source of employment for tribal members. By destroying the economic base of tribes, this amendment deprives the tribes of the right to self-sufficiency, to employment, and to the pride which accompanies the performance of work of value to society.

The proposed amendment strikes much deeper, however, than the obliteration of tribal economies. Fishing is central to the cultural heritage of the Chippewas and Ottawas. As far back as 2500 B.C., the tribes of this region were fishing in Great Lake waters using the traditional gill-netting method. The tribes have chosen to fish, despite the fact that the income derived from fishing is not great when compared with the risks accompanying the occupation. One storm carries the potential for destroying a fisherman's equipment. Boats overturn and fishermen drown. Yet, tribal communities have pursued fishing because it provides a tie to a cultural heritage, in an age when nearly every other cultural tie is becoming extinct.

While Congress does, ultimately, have the power to abrogate a treaty right, such a decision is of great magnitude and therefore the Supreme Court has determined that congressional intent to abrogate a treaty will not be lightly imputed. The Court has stated that "absent explicit statutory language * * * (it will be) extremely reluctant to find congressional abrogation of treaty rights." *Menominee Tribe v. United States*, 391 U.S. 404, 413 (1968). Thus, if this amendment were to become law in its present form, the courts

would ultimately determine that the amendment had failed to abrogate the Chippewa and Ottawa treaty right, as no language explicitly stating that intent is present.

The Court, in adopting the explicit abrogation rule, considered this Nation's solemn oath to the Indian nations, and this Government's duty of fair and honorable dealing with Indian tribes. In construing agreements regarding Indians, any doubts will be resolved in favor of the tribes, a weak and unlettered people. The Court appears to have been concerned that every Member of Congress be aware of the effect proposed legislation would have on Indian treaties.

Such a concern is applicable in the instant situation. Congress must deal fairly and honestly with the Indians' treaty-protected fishing rights. If Congress desires to abrogate treaties, it must acknowledge on the face of this legislation that the law would act to abrogate the treaty rights of the Chippewas and Ottawas to fish in Great Lakes' waters. Anything less than such an explicit recognition of this legislation's impact on treaty rights would be dishonest.

Even if Congress chooses the harsh and ill-advised course of action in abrogating the treaty rights of the Chippewas and Ottawas, it cannot avoid the duty to compensate the tribes for the loss of their economic base. Due process requires just compensation for the permanent loss of a tribal economic base. The valuation of any permanent loss is difficult. Nevertheless, it is clear that the compensation required for the permanent loss of a tribal economy would be very great.

The proposed amendment is an attempt to appease a vocal segment of the constituency by proposing a "political" solution to what is essentially a legal problem. The sports fishing groups which have generated so much political opposition to Indian fishing are blind to the one essential fact: the Supremacy Clause of the U.S. Constitution mandates that the Federal Government preserve the Indian fishery. Furthermore, there is no doubt that the Indians were engaged in a commercial fishery when these treaty rights came into existence.

The sacrifice of treaty rights, the supreme law of the land, to the economic interests of the State and sports fishermen not only is in callous disregard of the solemn oath of this Nation, but does not provide for enhancement of the resource. The same type of controversy that exists here has occurred in the State of Washington. There the solution has been found in providing Indian tribes with extensive capacity to develop new fish-rearing programs. This new hatchery capacity benefits all user groups. In contrast, H.R. 7232 caters to one affluent group at the tribes' expense. By severely curtailing the compensable property rights of Indian tribes, the United States will be subject to large monetary claims. A more viable solution is to assist Indian tribes in enhancing the resource which will ultimately benefit the entire population by providing a major food source and protecting important cultural and traditional practices.

"Great nations like great men keep their word." The greatness of this Nation in the eyes of the world community is ultimately determined not by our material wealth, but by our human compas-

sion. If this Nation cannot uphold its promises to this country's native peoples, it hardly can hold itself out to the world as an advocate of human rights.

I will be happy to answer questions that the committee may have. Thank you.

Mr. BREAU. Thank you for your comments and for your summarizing of your testimony.

None of you have to worry about going nonstop. We sat in Alaska for 13 hours with only one stop for lunch.

Dr. Tanner in testimony this morning in response to a question I had about the State operating a management program which would regulate the commercial taking of lake trout, lake trout, and fish in general, they are willing on behalf of the State to negotiate. I do not want to put words in his mouth, but I understood they would do that and at the same time negotiate with the various Indian tribes as to gear, et cetera, in order to assure they have some handle and control over the fish.

I would like to have your opinion on that proposal. He indicated that had not been successful because of reluctance on the part of the Indian tribes to accept such a proposal.

Mr. Green.

Mr. GREEN. I have participated in numerous negotiating sessions with the department of natural resources, State attorney general's office, and the State of Michigan. It is true, those sessions have not produced a great deal of success, although it should be agreed that some progress has been made. The principal problem we have had in reaching any agreement with the State is that basically the State's bottom line is an immediate and indefinite or at least a 1-year moratorium on all Indian gill netting. It is not some Indian gill netting, but all Indian gill netting, all starting immediately. We cannot take that, because the people are fishing now and there is nothing else to do.

The subject of conversion to more selective gear has been discussed by a number of previous witnesses. The idea of conversion is not totally antithetical to the tribe. We are not totally opposed to it. However, an enforced program would be something very difficult to live with. Most of the tribal fishermen are small operators whose operations are not susceptible to conversion. When the State ordered its commercial licensees to convert, only a few large operators were able to do so. Of the 1,500 licensed in the early 1960's, only 120 survive today, perhaps 150.

The Sault Tribe's fishermen largely operate from small open boats, with outboard motors, boats of up to 25 feet in length powered by outboard motors. It would involve a great expenditure of money to convert, and these small operations could not do it.

Then last, a substantial part of the Sault Tribe's fishing effort, is susceptible to conversion. A congressional action which took the form of encouragement through a grant or loan program to encourage the larger treaty fishing operations to convert might well have the desired effect.

I think it is not true that complete conversion of the fishery to selective gear is necessary or desirable from the Department of Natural Resources point of view. It might well be the middle ground where a substantial conversion could be accompanied by a

requirement that in critical fishing areas nothing but selective gear be used. But this is something that can only be reached by negotiation and not imposed from the outside. We have never come close to reaching that kind of middle ground.

Mr. BREAUX. You are talking about a potential possible settlement not by an act of Congress and not by a court decision and additional expensive litigation but by negotiating by the persons involved. I would rather see that than seeing the Congress having to act, and Supreme Court decisions and lawyers making a lot of money on the thing, or not getting paid for what they have done. But what are the real prospects of that occurring? This thing has dragged on for a long period of time. Do you see any realistic possibility of that occurring?

Mr. GREEN. Well, a settlement that recognizes the existence of a special and different right in the Indians of the treaty tribes and that recognizes their needs and recognizes the fact that as holders of a treaty guaranteed right they are not entitled only to the leavings of the State commercial fishery, such a settlement is conceivable, it is possible. I have to say with my knowledge of the parties and having been involved in litigation for 5 years we have not been successful in reaching that in the past. In the future, it would require either a different resolution in the courts or else a change in the attitudes of the parties.

Mr. BREAUX. Congressman Dingell.

Mr. DINGELL. Thank you, Mr. Chairman.

Mr. Gordon, you are here on behalf of which band?

Mr. GORDON. The Red Cliff Band in Wisconsin.

Mr. DINGELL. Do you have regulations with regard to taking the fish?

Mr. GORDON. Yes, sir.

Mr. DINGELL. Are they in writing?

Mr. GORDON. Yes, sir.

Mr. DINGELL. Will you send them to us?

Mr. GORDON. Yes, I will.

[The information follows:]

RED CLIFF BAND OF LAKE SUPERIOR CHIPPEWAS,
RED CLIFF TRIBAL COUNCIL,
Bayfield, Wis., June 16, 1980.

Hon. JOHN BREAUX,
Chairman, Subcommittee on Fish and Wildlife Conservation and the Environment,
Washington, D.C.

DEAR SIR: Please find enclosed a copy of the commercial fishing regulations promulgated by the Red Cliff Conservation Commission, pursuant to the Red Cliff Conservation Code, as requested by Mr. Oberstar at the June 6th field hearing in Traverse City, Michigan.

Mr. Oberstar also requested a copy of the Memorandum of Understanding regarding subsistence fishing which has been negotiated with the Wisconsin Department of Natural Resources. This document will be forthcoming soon, after it has been signed by both parties.

Also enclosed is a statement for the hearing record from Richard Gurnoe, Chairman, Red Cliff Fishing Committee.

Thank you for the opportunity to testify at the Traverse City hearing.

Sincerely,

THOMAS J. GORDON, Tribal Chairman.

Enclosures.