

UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF MICHIGAN

UNITED STATES, et al. v. MICHIGAN, et al.

No. M26 73 CA (W.D. Mich., May 31, 1985)

Summary

On March 28, 1985, the United States, the Bay Mills Indian Community, the Sault Ste. Marie Tribe of Chippewa Indians, the Grand Traverse Band of Ottawa-Chippewa Indians, the state of Michigan, and various sports fishing organizations reached a negotiated agreement on a fishery allocation and management plan for three affected Great Lakes. On April 10, 1985, the district court entered its consent order approving the agreement. On May 6, 1985, the Bay Mills Indian Community objected to the order and submitted an alternative allocation plan. The court then ordered a hearing for the purpose of determining whether the March 28, 1985 agreement, the Bay Mills Indian Community alternative proposal, or neither, provided the fairest management plan for the Great Lakes. The court also requested briefing on whether the Bay Mills Indian Community had the power to reject the March 28, 1985 agreement, having previously delegated settlement authority to its tribal chairperson.

The court adopts the allocation plan contained in the March 28, 1985 agreement that would establish management zones and rejects the Bay Mills proposal that would allocate 50 percent of the commercial catch to the treaty tribes. The court finds the zonal plan superior to the Bay Mills plan in protecting the Indian reserved treaty fishing right, preserving and managing the resource, reducing social conflict, stabilizing the fishery, and assuring both federal and state funding. The issue of the legality of the Bay Mills Indian Community's action in rejecting the March 28, 1985 agreement is rendered moot by the court's adoption of the zonal plan.

Abridged Text

Before ENSLEN, District Judge

ENSLEN, District Judge

The issues before the court today have been simmering and have been contested from the outset of the instant litigation 12 years ago. However, the controversy predates, by many years, the filing of the complaint, in 1973, by the United States.

Since the opinion of Judge Fox in 1979 [see 6 Indian L. Rep. F-67], this court's principal concern has been one of preservation: preservation of the treaty-reserved rights of the tribal fishers; and preservation of the resource. The years which followed this opinion have been marred by hard feelings, social discord, occasional violence, stipulated court-ordered closures of large portions of the three affected Great Lakes, political posturing, protraction of the instant litigation, some outward manifestations of racism, and concern over the future of Michigan's greatest resources, her people and her natural bounty.

The issues presented are not susceptible of facile and simplistic resolution. While the Treaty, as interpreted by this court, protects tribal fishing rights, the resource is shared by other user groups.

One of the immediate problems presented, then, in 1979 and in the years which followed was and is how to share this treasured resource without diminishing or depleting it, and within the legal rights of the competing users.

Management plans, as is more specifically set forth *infra*, attempted, with both successes and failures, to address this issue. Regulations were promulgated by the sovereigns, court intervention and management were sought, and the parties continued to regard each other with suspicion, cynicism, and occasional hostility.

Nor is there always accord within the user groups, as is partly demonstrated by the instant controversy. The tribes are not currently in agreement as to how most efficiently to allocate the resource; and the members of the various user groups often disagree with their own respective sovereigns.

To further complicate the matter, the resource is not static — it shifts, from year to year, dependent on spawning, fishing harvests, plantings of infants, the presence or absence of predators, weather, access rights of the users, gear utilization, the intervention of this court, et cetera.

In an understatement of some magnitude, this court faces a task not to be envied by the most wise and oracular jurists in this country. But face it and resolve this portion I must, and I will.

The Allocation Issue

From 1979 to the present the various management plans attempted to resolve, on a year-to-year basis, the delicate balance between the treaty users' preservation of their treaty rights and the preservation of their resource as it was being shared.

But in 1983, unsatisfied with these plans, the intervening plaintiffs filed a motion to allocate the fishery resources within the waters ceded by the Treaty of 1836. In a 17-page opinion on April 11, 1984, I decided that this court had the jurisdiction to consider the allocation request, if otherwise legally appropriate.

Allocation was proposed so that the resource could be successfully managed while continuing to protect the treaty rights. While the allocation issue was pending, closures were required in both 1983 and 1984 depriving the user groups of their exploitation of the fishery.

This court ultimately determined that the allocation issue should be formally heard and resolved. Trial was scheduled for April of 1985 — the date being selected so that the issue could be resolved before a closure became necessary during the summer '85 fishing season. The parties and litigating amici were invited to file allocation plans, or objections to allocation, and the docket sheet and court file reflect their positions.

The Settlement Attempt

Litigation had settled the issue of the treaty rights of the affected tribal fishers, but it had not, obviously, ended the controversy. Indeed, increase of tribal harvests, while legally anticipated, exacerbated the tensions of the users, and the preservation of the resource.

Inasmuch as a litigated result had not yet resolved the problem, I attempted to design a technique in an effort to reach an agreed upon resolution as an attractive alternative to a litigated result.

In the fall of 1984, pursuant to Rule 53, Fed. R. Civ. P., I appointed Professor Francis McGovern, of Boston, Massachusetts, special master after full consultation with counsel for the parties.

Indeed, I invited and received nominations for this position from the parties, permitted the parties and litigating amici to interview nominees, and even permitted a veto of sorts on those individuals proposed.

His order of reference, essentially, mandated two priorities:

One, the pretrial management of the allocation issue, including the supervision of discovery; and,

Two, an attempt to negotiate, mediate, and facilitate a settlement of the allocation and management of the resource issues.

Of the two, I am certain it is apparent that the latter was his major challenge and offered the brightest prospect for peace and preservation as I have defined that term.

I was, and is, my view that given the nature of the controversy a stipulated resolution was infinitely superior to a litigated result.

However, given the polycentric nature of the competing user groups, and the finite resource, I was skeptical of this alternative means of dispute resolution.

Nonetheless, as an unreconstructed optimist, if not even a "true believer" in "the impossible dream," I believed that a negotiated resolution was a distinct possibility.

Indeed, the task was formidable. The user groups had some similar and some dissimilar interests and goals. Some sought the same fishing in the same waters; others had differing exploitive goals. The standard to be employed in the negotiations was unclear; the weight to be assigned the varying priorities was indefinite; the maximization of the resource had to be viewed from both economic and behavioral vantage points; the resource application was always shifting — requiring flexibility, and, yet, predictability being clearly mandated.

Additionally, because of the sovereign status of the parties, unlike the litigating amici, it was important to determine who could bind the parties and under what conditions.

In these improbable circumstances, negotiating teams for the parties and litigating amici reached an accord and entered an "Agreement for Entry of Consent Order" [*infra*] signed by representatives of all the parties and all litigating amici, except for some state-licensed commercial fishermen, styled the Ruleau group, who declined to participate.

This agreement, dated and signed March 28, 1985, was presented to the court in the form of a motion for entry of consent order on April 4, 1985, by Bay Mills. As subsequent events unfolded, Bay Mills' position on April 4, while certainly ironic, demonstrated its then legal satisfaction with the March 28 agreement.

Pursuant to Bay Mills' motion, the court, on April 10, 1985, entered its consent order, noting *inter alia* that the agreement protected and preserved all parties' legal rights and interests, and was an appropriate accommodation of their interests in their use of the fishery in treaty waters.

On May 6, however, Bay Mills filed an objection to the consent order, and proposed a different allocation. This objection, it was alleged by Bay Mills, resulted from a rejection of the agreement by tribal vote pursuant to its constitution. The remaining parties and litigating amici nonetheless continued to move the court for entry of an order consistent with the March 28 agreement.

The court then ordered a bifurcated hearing or trial pursuant to Federal Rule of Civil Procedure 42(b) for the purpose of determining whether, one, the March 28 agreement, two, the Bay Mills' so-called 50-50 allocation proposal, or, three, neither provided the fairest and most equitable management plan for the Great Lakes — and which is consistent with the court's clear duty to protect the treaty rights of the tribes while also protecting the resource.

The court also ordered subsequently presentation of the issue of the legality of the Bay Mills rejection of the agreement at the same time as the hearing on allocation.

This hearing was required because the state of Michigan and the litigating amici challenged the legal efficacy of the Bay Mills rejection. Indeed, Michigan, at and just before the

hearing, argued strenuously that the court should first determine that issue since it might be dispositive.

At a pretrial conference on May 6, 1985, following the court's bifurcation ruling, all counsel indicated that a hearing on the two proposed allocation plans could potentially resolve the allocation motions without the necessity of a full trial on all potential plans.

Counsel also agreed that the court could choose one of the two plans, or reject both — the latter alternative permitting a full trial on the allocation issue.

Trial was scheduled for May 10, but was adjourned at Bay Mills' request until May 24, on which date it commenced. It continued through the Memorial Day weekend, and concluded at midday on Tuesday, May 28. The parties and litigating amici were given the opportunity to brief all issues, submit proposed findings of fact and conclusions of law, file stipulations of fact, present evidence, and make oral arguments. They took full advantage of these opportunities and the issues were properly joined when they rested on Tuesday.

The issues, for the purpose of this bifurcated trial or hearing, can be simply stated:

Within the parameters of the major two thesis issues — protection of treaty rights and protection of the resource — first, which of the two allocation plans, if either, ought the court to adopt?

And, secondly, is the Bay Mills rejection of the March 28th agreement legally sufficient and, if not, ought the agreement to be specifically enforced?

I will begin with the allocation issue and with a discussion of the law and the multifaceted analysis necessary to resolve these issues. First as I say, I am turning to allocation.

In a case with which all present today are intimately familiar, the Supreme Court, in *Washington v. Fishing Vessel*, 443 U.S. 658 [6 Indian L. Rep. A-89], in 1979, upheld with slight modifications a 50-50 allocation of the fishery in Washington State. The Indians' 50 percent share was a maximum only, and was subject to reduction as their needs decreased.

The Supreme Court found that allocation appropriate given the relevant treaty language providing that the Indians' rights were held "in common with" the other citizens of the state.

As noted in prior decisions of this court, the absence of such language in the Treaty concerned herein would militate against setting such a maximum figure. See, for example, *U.S. v. Michigan*, 505 F. Supp. 467 at 473. Nevertheless, the case is pertinent here for two important reasons:

First, it endorses the court's power to allocate a fishery in order to effectuate a treaty; and,

Second, it sets forth, albeit in very general terms, a standard for determining appropriate allocation.

As explained by the Supreme Court at page 685, quote: "The division arrived at by the district court is also consistent with our earlier decisions concerning Indian treaty rights to scarce natural resources. In those cases, after determining that at the time of the treaties the resource involved was necessary to the Indians' welfare, the court specifically ordered the trial judge or special master, in his discretion, to devise some apportionment that assured that the Indians' reasonable livelihood needs would be met," and I emphasize the last part of that quotation.

In ruling upon this allocation question, the parties have called upon this court's powers as a court of equity. See *United States v. Washington*, 520 F.2d 676, cert. denied, 96 S. Ct. 877.

It has not been seriously contended that either of the two allocation plans before the court fails to provide for the reasonable livelihood needs of the three intervenor-plaintiff

tribes involved. Nor could such an argument be successful. For, having given serious consideration to the provisions of each plan, the court finds that both satisfy the *Fishing Vessel* standard. The basis for this conclusion will be obvious from the fact findings which follow.

Having determined that both the stipulated agreement and the Bay Mills plan satisfy the threshold requirements established by the U.S. Supreme Court, this court's task becomes one of determining which of the two plans accommodates and protects the interests of all concerned to the extent possible.

Although there is a conspicuous absence of legal authority on this subject, I believe the following considerations are appropriate in making this equitable determination:

Preservation and conservation of the resource; impact of the plans on all three tribes; consistency of the plan with the tribal right to fish and the recognition that the resource is shared; reduction of social conflict; feasibility and methods of implementation; protection of Indian fishermen from discrimination in favor of other classes of fishermen; proximity; access; species of fish stocks available; harvestability of fish stocks; the economic impact on Indian fishermen; stability of the fishery; contaminant levels; management and marketing concerns; and flexibility versus predictability of the fishery.

Of course, each of these factors is not to be given equal weight in making my ruling, and has not received equal weight. Of paramount concern to me at all times when sifting through the complex and conflicting evidence has been the desire to reach a fair and equitable decision in keeping with the reserved rights of the tribal fishermen and the preservation of the resource.

On the issue of burden of proof, although there is a considerable dispute between the parties on the question of the appropriate burden of proof in resolving the allocation issue, I believe there should be no burden of proof on the question of which allocation plan should be adopted by this court.

Before the court are two proposed allocation plans:

The parties supporting each plan carry their own burden of establishing that their plan satisfies the appropriate standards. This burden weighs equally on each advocate of the plan before this court.

What follows are my findings of fact, commencing in random fashion with the parties and litigating amici stipulations of fact. This fact section, then, is not necessarily organized as to the categories which follow, but is thusly organized because of the realities dealing with the time that I had available. Later sections will be addressed categorically as the issues were presented by the parties during the hearing.

Comparison of the competing plans, of necessity, must be addressed as the various factors are discussed and decided. A good place to start is the Great Lakes fishery in mid-1985, making some preliminary findings with regard to the resource, the users, preservation necessities, and how the plan embodied in the agreement for entry of consent order — hereinafter I variously refer to that as the "stipulated agreement," the "March 28th agreement," and the "zonal plan," but they all mean the same thing — and how it compares in general with the percentage allocation plan.

#### **The Resource: The Great Lakes Fishery**

*First, the Pursued.* The Great Lakes fishery within the treaty waters is composed of a number of species, including, but not limited to, whitefish, chubs, walleye, perch, lake herring, lake trout, brown trout, steelhead trout, chinook salmon, and coho salmon.

The state of Michigan lists the following species as threatened or endangered: deep-water cisco, short-nosed cisco and

big-eyed chub are endangered; lake sturgeon, lake herring, and short-jaw cisco are threatened.

#### **The Pursued by Category — Sports and Commercial**

*Commercial.* At present, the primary commercial species harvested are whitefish and chubs. Lake trout are permitted to be taken commercially only as an incidental catch under existing tribal regulations. The tribes believe perch and walleye to be commercial species and salmon are commercially harvested at state-owned weirs.

*The Pursued Sports.* At present, the sport fishery primarily pursues in the open waters of the Great Lakes the following species: lake trout, chinook salmon, coho salmon, brown trout, steelhead trout, walleye, and perch.

*The Pursuers.* The Great Lakes fishery is presently exploited principally by three distinct user groups: tribally licensed commercial fishermen, state-licensed commercial fishermen, and state-licensed sportfishermen.

The fishery resource within the treaty waters is presently a shared resource with state-licensed and tribally licensed commercial fishermen and state-licensed sportfishermen pursuing various species within the fishery at the same time.

*State-Licensed Commercial Fishermen.* State-licensed commercial fishermen generally operate larger fishing boats, using only impoundment gear in the pursuit of whitefish or small mesh gillnets in the pursuit of chubs. Under their licenses, they may not fish more than 50 miles from their home ports. They generally pursue whitefish and chubs and are required by state regulation to return lake trout to the water. State commercial fishermen and tribal commercial fishermen often fish in the same waters and pursue the same species.

*Sport Fishermen.* Sport fishermen fish from shore and from boats of various sizes, sometimes reaching in excess of 30 feet in length. They fish exclusively with hook and line and generally fish within two miles of shore, in 150 feet of water or less, and within a reasonable distance of their ports. They pursue species such as chinook and coho salmon and lake trout.

*Tribally Licensed Commercial Fishers.* Tribally licensed commercial fishermen fish within treaty waters, utilizing permits issued by one of three intervening plaintiffs. Tribal commercial fishermen generally fish with gillnets, although some fish with impoundment gear.

The tribal commercial fishery ranges from small boat fishermen, fishing with gillnets, to larger tug operators who fish thousands of feet of gillnet at one time through the use of motorized equipment. The record establishes that, presently, all of these fishermen primarily pursue whitefish and chubs.

A limited tribal subsistence fishery exists under tribal regulation. This subsistence fishery is not at issue in this litigation.

*Preservation of the Resource. Preservation of the Pursued.* It is in the best interest of all parties to conserve and enhance the fisheries resources of the Great Lakes. The fishery within the treaty waters is a managed fishery. For many species, the fishery resources present within the treaty waters do not exist in such numbers and under such conditions that they may be pursued without limitation. Management and regulatory control are essential for the conservation of the resource and the achievement of its economic potential.

Due to the need to manage the fishery resource within the treaty waters, extensive efforts have been undertaken by state, federal, and tribal authorities to measure fishery stocks, especially whitefish, lake trout, and chub species. These measurement efforts have shown that stocks within the treaty waters for different species and in different areas may vary from relative abundance to severe depletion.

*Managing for Preservation.* The tripartite Technical Working Group, hereafter called TTWG, formerly called the Ad Hoc Technical Working Group, consists of technical representatives from the Chippewa-Ottawa Treaty Fishery Management Authority, the Michigan Department of Natural Resources and the U.S. Fish and Wildlife Service.

It was formed in 1979 at the encouragement of the federal court for the purpose of assessing cooperatively the status of certain fish stocks in the treaty-ceded waters of Lakes Michigan, Huron, and Superior, to provide technical data to assist in wise management of the resource, and to estimate surplus production available for exploitation.

The stipulated agreement continues this cooperative arrangement and renames this biological group the Technical Fisheries Review Committee.

The TTWG assessed the status of and established ceilings on the estimated surplus production of whitefish and chub stocks available for fishing exploitation in 1979, 1980, 1981, 1982 and 1984. These ceilings are expressed in terms of Total Allowable Catches, TACs, available in particular geographic areas. Reports were prepared in each of these years describing the findings and recommendations of the group.

TACs are a viable method of establishing wise conservation limits on fishing exploitation of given species of fish. Utilization of TACs as an indicator of the maximum allowable catch by all user groups in a given area, as contemplated by the stipulated agreement, should adequately protect the fisheries resource.

At the present time, TACs are not set for Great Lakes species other than lake trout, whitefish and chubs.

The TACs established for whitefish and chub stocks by the TTWG in 1979, 1981, [sic] 1982 and 1984 were concurred in by the technical representations from the state of Michigan, the United States and the three tribes. No TACs have yet been established for 1985, although the process is underway.

The record establishes that, at present, there is overfishing of whitefish stocks in substantial areas of the treaty waters. In some instances, overfishing is due to the efforts of state-licensed commercial fishermen.

In others, it is due to the efforts of tribally licensed commercial fishermen. In most instances, however, the combined efforts of both have resulted in an overharvest of whitefish stocks.

The "racehorse" fishery disadvantages certain small-boat treaty fishers who do not have the ability to pursue fish stocks at high rate early in the year.

The representatives of TTWG have not in past years agreed upon the degree to which lake trout rehabilitation should be emphasized.

For this reason, the TTWG, and its predecessor, has presented in each report suggested harvest levels compatible with various rates of rehabilitation. From 1979 through 1982, these harvest levels, TACs, were based on minimum size limits and setting aside a portion of the fishable stock for enhancement of the spawning population.

No lake trout TACs were set for 1983. In 1984, TACs were developed on the basis of total annual mortality in the fishable stock at 40 percent, 45 percent, 50 percent, 55 percent, and on a put-grow-take basis, because total annual mortality, in large measure, controls the abundance of spawning stocks and thus the rate of progress toward self-sustainability.

Lake trout generally inhabit the same waters as whitefish and during portions of the year are often intermixed.

Since lake trout and whitefish stocks located in the same areas intermingle during the spring and fall, it is desirable to separate geographically the planting of lake trout from commercially important whitefish stocks to minimize the incidental catch of lake trout.

*Preservation and Great Lakes Fishery Commission.* The Great Lakes Fishery Commission, hereinafter called GLFC, is an international body created by the Convention on Great Lakes Fisheries between the United States of America and Canada, which was signed on September 10, 1954, duly ratified by the United States and Canada, hereinafter the convention, and entered into force and effect on October 11, 1955.

The convention is reported at 6 U.S.T. 2936; see also *Treaties and Other International Acts Series*, T.I.A.S. No. 3326, (State Department). Legislation implementing this convention was enacted by the United States on June 4, 1956, c. 358, 70 Stat. 244, codified at 16 U.S.C. §§ 931-939c.

The GLFC was organized in April of 1956 and assumed its duties as set forth in the convention in July 1956. GLFC has two major responsibilities:

First, to develop coordinated programs of research in the Great Lakes and, on the basis of the findings, recommended measures that will permit the maximum sustained productivity of stocks of fish of common concern;

The second, to formulate and implement a program to eradicate or minimize sea lamprey populations in the Great Lakes.

GLFC has created a lake committee for each of the five Great Lakes. Each lake committee is presently composed of senior fishery management personnel from provincial and state resource agencies bordering the respective lakes.

When the committees are confronted with technical problems that need resolution, they appoint ad hoc or standing technical committees composed of scientific and technical specialists from within the cooperating agencies or from other agencies and universities, and charge these specialists with devising the most scientifically justifiable recommendations. These recommendations from the technical committee are submitted to the lake committee for endorsement and incorporation into fishery management strategies.

The Lake Trout Technical Committees for Lakes Superior, Michigan and Huron are composed of representatives from the Great Lakes states bordering the respective lakes, from the Chippewa-Ottawa Treaty Fishery Management Authority, from the Fish and Wildlife Service and from the province of Ontario in the case of Lakes Superior and Huron.

Lake trout rehabilitation plans are now completed for each of the three lakes and have been approved by the respective lake committees.

*The Efforts to Preserve Lake Trout and Its Relationship to Other Species.* Lake trout was once an abundant and valuable fishery resource of the Great Lakes. After supporting a highly profitable commercial fishery for almost a century, the lake trout underwent a virtual collapse in the late 1940s and early 1950s as a result of three principal causes:

One, overfishing;

Two, heavy predation on lake trout by the increasingly widespread sea lamprey; and,

Three, deteriorating habitat quality in some areas of the Great Lakes.

In response to the precipitous decline of lake trout and other species, the governments of Canada and the United States entered into the convention, which specifically directed the efforts of the GLFC toward the control and eradication of parasitic sea lamprey. The Commission has emphasized the goal of rehabilitating lake trout as well as other damaged fish resources.

The rehabilitation of lake trout is an important goal. Among the reasons given for this goal is the fact that the lake trout were an important component of the Great Lakes ecosystem and have evolved in concert with the other elements of the ecosystem.

The indigenous lake trout have demonstrated a superior



adaptability to the available Great Lakes. In addition, history has demonstrated that the lake trout are of tremendous economic and social value to the public at large. Finally, the lake trout serve as a barometer of the health of the lakes.

Rehabilitation of the lake trout requires a combination of three strategies:

First, the total annual mortality from sea lamprey predation and premature and excessive harvest must be reduced;

Second, the opportunity for successful reproduction must be maximized by maintaining and improving habitat and by selecting and managing stocking sites in accordance with prime lake trout habitat; and,

Third, the quality of the stocked fish must be improved and the quantity of fish to be stocked must be increased.

Lake trout have been planted annually in Lake Superior since 1958, in Lake Michigan since 1965, and in Lake Huron since 1972. These plantings have been an intensive, joint effort of the U.S. Fish and Wildlife Service, the state of Michigan, other Great Lakes states, and the province of Ontario. The fish supplied for planting are produced by the U.S. Fish and Wildlife Service, state of Michigan, other Great Lakes states, and the province of Ontario.

Under the aegis of the GLFC, the states, in the 1970s, established the formula for allocating hatchery produced fish among the upper three Great Lakes and for allocating each lake's share among the respective states bordering each lake.

In 1982, under the aegis of the Council of Lake Committees, GLFC, allocations to the remaining two Great Lakes were included in the formula.

From 1971 through 1982, in excess of 2.1 million hatchery-produced lake trout, fingerlings and yearlings have been planted each year in the treaty-ceded waters of Lakes Michigan, Huron and Superior. This major hatchery and planting program is accomplished jointly by the U.S. Fish and Wildlife Service and Michigan Department of Natural Resources.

In 1983 and 1984, technical problems at state and federal hatcheries prevented achievement of former production levels, and plantings in 1983 were only 1.8 million and in 1984 were 1.7 million.

*The Stipulated Agreement and Zone Management Versus a Percentage Allocation Plan, Some Findings.* There presently exists an identifiable conflict between the various user groups within the treaty waters. This conflict includes, but is not limited to:

A. a conflict between state-licensed and tribally licensed commercial fishermen over the pursuit of available commercial stocks;

B. a conflict between users of sport-fishing gear and commercial fishing gear utilized in the same area;

C. a conflict between sport fishermen and tribal commercial fishermen over the take of lake trout and other species by both.

The threat of conflict and violence cannot stand in the way of the exercise of treaty rights. Certain practical limitations exist on the court's ability to police the fishery and preserve fish stocks, however, in light of the huge area encompassed by the treaty waters and the large number of potential users of those waters.

It is in the best interest of all parties if the resource is shared in a manner which permits full exercise of the treaty right while minimizing conflicts between users.

The court also finds that the present fishery lacks predictability and stability. This impairs the full opportunity of the various user groups of the fishery to maximize the benefits to be obtained from the fishery as well as the parties' abilities to manage and plan the future development of the fishery resource.

The lack of predictability and stability within the fishery impairs the benefits of the fishery for the tribes by inhibiting the reasonable development of markets and marketing opportunities.

The tribes are presently not able to predict available catches, due to the yearly closures and the "racehorse" fishery. As a result, they cannot readily make those investments necessary to exploit the fishery resource.

Finally, the tribes cannot predict where conflicts may arise that may impair their ability to pursue fishery stocks that are available for harvest.

The lack of predictability and stability impairs the ability of the state and its licensees to plan for, and invest in, fisheries enhancement and maintenance programs and facilities. As a result, the full potential of the resource is not realized by either state-licensed commercial fishermen or sport fishermen.

The stipulated agreement establishes zones within which the licensees of one or more of the parties would be permitted to fish. In some zones, the methods whereby fishing may be prosecuted are limited.

Lake trout refuges, which are specified in paragraph 17 of the stipulated agreement, are in the same vicinities, though with slight variations in configuration, as are the refuges set forth in the Fish and Wildlife Service's Lake Trout Rehabilitation Plan of February 8, 1985, and in the lake trout rehabilitation plans adopted by the three lake committees of the GLFC.

The refuges are located in areas where historical evidence shows a high incidence of natural lake trout reproduction.

The primary rehabilitation zones for lake trout that are specified in paragraph 17 of the stipulated agreement are in the same vicinities as, but are somewhat smaller than, the primary or high priority zones set forth in the Fish and Wildlife Service's Lake Trout Rehabilitation Plan of February 8, 1985, and in the lake trout rehabilitation plans adopted by the three lake committees of the GLFC.

The stipulated agreement established slightly smaller primary rehabilitation zones than were advocated by the lake committees and the Fish and Wildlife Service, thereby making more water available for prosecution of a gillnet fishery by tribally licensed fishers than would be available under those plans. The rehabilitation of lake trout in such areas is deferred.

A 15-year management plan, as contemplated by the stipulated agreement, for the fishery resource is appropriate at this time for the following reasons:

A. an established long-term management plan provides the stability needed in the planning process since the fishery within the treaty waters is a regulated fishery relying on sophisticated management techniques;

B. predictability within the fishery will allow tribal members to maximize the economic benefit from the fishery through economic development and investment with predictable returns;

C. establishment of long-term treaty and non-treaty zones will permit the state to employ long-term strategies for sport fishery development, such as planting protocols in non-treaty zones; and,

D. the establishment of long-term state management zones will permit economic development and planning by affected communities and individuals.

The agreement protects the fishery resource by protecting lake trout stocks and providing for lake trout rehabilitation; by providing for the continuous systematic monitoring of fishery stocks on a cooperative basis so that all parties having an interest in this shared resource may agree on the scope and

breadth of that resource.

It is in the best interests of the resource and all of the parties to develop and implement uniform methods of marking and identifying commercial fishing gear and to coordinate and cooperate in the enforcement of the regulations of each resource management party. The stipulated agreement pursues those goals. See paragraph 31 of the stipulated agreement.

It is in the best interests of the resource and all of the parties to improve the gathering and exchange of technical data and to coordinate data collection efforts.

These efforts should provide the information needed to protect and manage the fisheries resource on a long-term basis under the plan provided in the stipulated agreement.

The designation of additional funds for fishery assessment contemplated by the stipulated agreement will increase the available technical data.

Those findings that I have just made as I indicated were scattered and were largely taken from the stipulations of the parties and litigating amici at this trial. What follows are additional findings, and I will label each one as I come to it. First, a label that I call "The Availability and Harvestability of Fish Stocks Under the Competing Plans."

The availability of the resource is central to almost all fishers, not only in this controversy, but in any waters which offer the potential of a yield of the pursued to the pursuers. Sometimes availability and harvestability are confused in the minds of the fisher-pursuers.

In one sense, it is like the Michigan lottery. The potential is there, but the result is in doubt. Of course, the odds are better, but predictability has been a lost art in this controversy. The reasons for this lack of predictability are many, and are often mentioned in this opinion.

They include numbers of fishers, availability of the resource, weather, available gear, market price, the specter of the "racehorse" fishery, management and enforcement, integrity with regard to reporting fish harvests, et cetera, et cetera.

While this question is important, and needs to be addressed, it is not the only consideration in the pursuit of a wise management plan which protects the treaty rights of the tribes, and the preservation of the resource.

To those with a short view, it appears to be central. To those with a larger view, however, it is but one factor to be balanced and considered with factors like stability, predictability, and preservation.

Each of the proponents of the two plans before the court in this bifurcated hearing addressed the issues of availability and harvestability at length.

The experts disagree on future numbers, and even disagree on what year should be used as a base for measuring the future. Perhaps, as with all inexact sciences, that is to be expected. Given the conflicting data about the future, it is pertinent to examine the problem and the resolutions of both plans.

*The Bay Mills Problem With the March Agreement and Its Current Proposal.* A former tribal chairperson was of the opinion that Bay Mills didn't want to have any ceded water closed to it. Notwithstanding that fact, he signed an agreement in principle in 1982 requiring the establishment of tribal and state zonal fishing waters. He explains that all he intended was to report the zonal idea to the community for its consideration.

Bay Mills suggests a quota resolution "ensuring" 50 percent of the commercial catch to all of the tribes. It is left to future management bodies to determine how 50 percent can be factored into a shifting and uncertain resource.

The Bay Mills' 50-50 plan also presents the question of how to allocate the tribal 50 percent among the tribes. For example, witness Ebener believes that one-half of the whitefish catch was by the Soo Tribe.

How will the allocation be divided between the tribes? Who will decide that allocation? How will the Bay Mills plan address tribal big-boat fishers as compared to small-boat fishers? The Bay Mills plan leaves these questions unanswered.

A Bay Mills witness testified that he did not believe the tribes would be limited to 50 percent. He predicted a perpetual series of negotiations with the state, and a series of trade-offs.

The Bay Mills plan would require closure for large-mesh gillnet fishing when one-half of the TAC is reached; and would require closure when 50 percent of the lake trout TAC was reached without regard to whether 50 percent of the whitefish had been harvested by the tribes.

Bay Mills' major objection to the March agreement stems from the closures to Bay Mills fishing in, one, Grand Traverse Bay, two, Hammond Bay, and, three, the Bays de Noc. It must be remembered that, under the agreement, Grand Traverse Bay is largely reserved to another tribal entity involved in this case. Hammond Bay will not be closed for the next five years, while the Bays de Noc will be closed to tribal fishing immediately.

Despite these closures, the experts unanimously agreed, and Bay Mills conceded, that tribal harvests would increase, not decrease, in the 15 years contemplated by the March agreement.

Estimates varied from an increase of 300,000 pounds of whitefish to over one million pounds annually. Additionally, as discussed elsewhere, increases should occur with the introduction of new commercial species.

It is difficult to predict what increases in the harvest would occur under the Bay Mills plan. This is caused by unpredictable variables, i.e., from what base year do you measure increases? 1983, for example, was a better year than 1984 and better than 1982. When will closures be required under a percentage quota plan? Will a "racehorse" fishery drastically reduce the tribal small-boat fishers from attaining predictable market goals? Et cetera.

What is known about the Bay Mills plan is, that while it may provide flexibility, it lacks predictability, stability, and invites the continued social conflict so evident in the past.

The Bay Mills plan perpetuates, in addition to social conflict, the past difficulties in effective management, enforcement, and marketing. It is also not blessed with the state and federal funding available under the March zonal plan, which could serve to diminish some of the problems presented by Bay Mills' quota plan.

While some displacement and shifting seems inevitable under the zonal plan, these unhappy consequences appear to be outweighed by the advantages of the zonal plan.

The percentage allocation plan in Washington State appears to have created more problems than it has solved, and the court is constantly petitioned to redress apparent inequities. As discussed elsewhere in this opinion, it creates a "racehorse" fishery requiring the users to obtain their percentage first so that their competition will not overfish and cut fishers below their 50 percent. The result is overfishing, and court-mandated closures.

Tribal gillnetters would have to be exceedingly careful regarding their incidental catch of lake trout because to exceed that TAC would require closure of the commercial whitefish species.

*The March Zonal Plan.* The zonal plan, by contrast, presents stability. A tribal fisher knows where to fish and can

plan. There is a long-term sense of management and accountability. There is a separation of treaty and non-treaty fishers in certain areas, separating the different users in space so as to reduce conflicts and to provide certainty. The zonal plan is much superior for the lake trout harvest. It avoids the adverse impact on lake trout, so important to the fishery, by creating separate zones for whitefish efforts and lake trout rehabilitation areas.

While relocation as I have discussed and will discuss will affect some, the focus of the zonal plan is to locate tribes proximately to where they live. The zonal plan, for the most part, discourages a "racehorse" fishery and gives the tribes the opportunity to regulate the fishery over time.

The zonal plan is for 15 years. This reduces annual modifications and adds stability by permitting the tribes to plan commercially and to improve the economics of their marketing efforts.

While the Bays de Noc will be closed under the zonal plan, and is productive for whitefish, no Bay Mills fishermen fished there in the most productive tribal year, 1983. It would not appear that Bay Mills will be greatly adversely affected by the Bays de Noc closure.

By contrast, in Whitefish Bay 123 percent of the TAC was harvested by the tribes in 1983. Under the Bay Mills plan, the tribes would be limited to 50 percent of the TAC, and could thus suffer a substantial loss in the harvest.

In the opinion of Chairman Lumsden, the statistics indicate that the tribes will improve their harvest under the zonal plan and realize a substantially improved take of the fish. In his opinion, and I agree, any expansion of the fishery is good, and the additions of salmon, perch, walleye, and lake trout will improve the flexibility and the economics of tribal fishers.

Gains to Bay Mills in other areas, including plantings, more than offset the Bay Mills' loss in Grand Traverse Bay. The Hammond Bay closure is not only effective five years from now, but Bay Mills fishers, with better access, can go north which is closer to their community.

The gain in MH-1, where state commercial fishers previously harvested 500,000 pounds of whitefish, is especially important to the tribes, and particularly for the small-boat fishery.

The March 28 agreement provides for greater availability and predictability, greater harvests for treaty fishers, without the obvious social conflict, early closures, ineffective enforcement and management, and without the uncertainty.

Under this zonal plan some 60 percent to 70 percent of the commercial whitefish will be available to the tribes as contrasted to the uncertain 50 percent envisioned by the Bay Mills plan.

My conclusion that the March 28 zonal plan increases the harvestability for the tribes and preserves the tribal right to fish in the ceded waters, while also preserving the resource is based on the March 28 agreement; the proposed Bay Mills quota plan; the testimony of witnesses Lumsden, Ebener, Teeple, Tadgerson, Horn, Wright, Eger, Hatch, Skip Parrish and Irma Parish; and Exhibits BMIC 17 and 19, Amici "A," government numbers 11, 12 and 13, and BMIC 23, 24, and 25.

*Access to Treaty Waters.* The evidence reveals that tribal fishers, in some instances, have difficulty in gaining access to treaty-ceded waters. This is particularly true of the small-boat fisher, who makes little and needs to fish all year long.

Chairman Lumsden testified, and the court agrees, that the agreement of March 1983, requires the state to help find access sites, and Lumsden observes that trust fund monies ought to be used for this purpose.

The Bay Mills proposal for quota rights does not address

the problem at all, but the March 28 agreement does; and for this reason alone the March 28 plan is superior to Bay Mills' plan on the question of access.

On the question of plantings, I previously made certain findings on plantings, particularly regarding lake trout.

I find that the March agreement provides for plantings of other species, too, and for the development of other commercial fishery, than whitefish and chubs — for example, walleye, yellow perch, salmon and lake trout.

These plantings will benefit the fishery — for large and small boats. Particularly important to Bay Mills is that walleye and perch are in-shore species which are more accessible to small-boat operators. These plantings provide a real opportunity for Bay Mills and the other tribal fishers to expand their fishery to other species.

Provisions in the March agreement for planting lake trout annually in Whitefish Bay is intended, specifically, to build up the lake trout fishery for the tribes, and the testimony discloses that this fishing area is heavily utilized by Bay Mills fishers. Furthermore, the state has already begun implementation by planting these trout very close to shore and, quote, "deep in the heart of Whitefish Bay."

Chairman Lumsden, of the Sault, believes there to be dramatic implications in the plantings of walleye, perch, salmon, and lake trout because it establishes other target species for the tribes which will have a good economic impact on tribal fishers.

The new species can all be harvested in northern Lake Huron by small-boat fishers, a prime fishing area for Bay Mills fishers.

The Bay Mills plan does not provide for any plantings, only for a division of what is left if anything. The planting plan contained in the March agreement is infinitely superior to the Bay Mills quota plan, and especially for Bay Mills. I specifically find that the balance heavily favors the March plan on the issue of plantings.

These findings are based, in part, on the agreement, and the testimony and exhibits offered by witnesses Horn, Eger, Wright, Skoog, Hartman, and Lumsden.

*Management.* The March plan will result in sound resource management and a stable fishery without which all users will be damaged.

A zonal plan takes into account that not all portions of the lakes are suitable for a small-boat fishery, since some areas are suitable for tugs and trap nets. Since the treaty fishers are, like all fishers, pursuing different goals, the March plan provides for the tribes making their own internal decisions on these choices.

The zonal plan would be easier to manage than Bay Mills plan. The state would manage recreational fishers, the tribes theirs, and importantly an executive council is created to manage, plan, implement and assist in enforcement. This joint management of zones provides flexibility as to actual management techniques.

The zonal plan of cooperative management eases the social conflicts and tensions which have been present. Indeed, as Lumsden testified, tensions eased after the March signing and he sees joint communication over the joint management provisions.

Court review in the past has, unfortunately, been an impediment to fishery management. The executive council, and the still-to-be-formed dispute resolution techniques will serve to keep the management where it belongs — jointly shored [sic] in port — and out of the court where it does not belong.

Resource management, with its concomitant enforcement and resolution of dispute mechanisms will aid all fishers and particularly treaty fishers. The Bay Mills plan lacks, totally,

management techniques such as are provided in the zonal plan, and this strongly favors the March plan.

These findings were based largely on the March agreement and the testimony of witnesses Lumsden, Horn, and Wright.

**Marketing.** Fifty percent of all species available would be the Bay Mills plan. There are no estimates on what this would be other than whitefish, chubs, lake trout. There is currently no marketing system for harvesting large numbers of salmon. Salmon are presently harvested by tribes, but not in substantial numbers.

Small-boaters, or even large-boaters, are victimized by present marketing concepts. The tribes take what the wholesaler gives; they have no bargaining position. Funds could improve this. The Indians need to get involved in the wholesaling and marketing of their own fish. I find it now to be a form of exploitation of the tribes.

In the past, there has been little cooperation with regard to the marketing aspects. Under the stipulated agreement, the tribes will have the say in the marketing. Funds are available for this process. The tribes will greatly benefit from their own markets and from not being subject to markets over which they have absolutely no control.

Secretary Horn when he testified indicated that the funds available were voluntary, but they were provided because of the settlement. He was not sure if those funds provided for fishery cooperation and marketing studies would be sufficient to establish that particular objective. That is why, he testified, the \$3 million trust fund appeared, to cover unforeseen costs and expenses; and there were, he said, no strings on the dollar, only that they be used to promote and enhance the fishery.

The tribes, he added, may ask for more money, and the United States will work with them on it.

The group could vote to take from the trust fund. It was totally flexible.

He also testified that \$150,000 was available for study to increase the financial return to the tribes, including, obviously, the marketing aspects.

It is obvious from the testimony and exhibits that many tribal fishers currently are unable to market their harvest with any bargaining power whatsoever. They are at the whim of the wholesalers largesse or lack thereof.

The March plan provides funds for improving market and economic conditions of the tribal fishers. Since the Bay Mills quota plan does nothing to improve marketing, the March plan is infinitely superior to that of Bay Mills, and it is in the best interests of all of the tribes.

This finding is based on the March agreement, and the testimony of witnesses Ebener, Lumsden, and especially Horn.

**Lake Trout.** Much has already been said in this opinion about lake trout. The parties to this phase of the litigation do not differ much as to their recognition of the importance of lake trout rehabilitation. I find that this rehabilitation is very important to all users, and especially the tribes. Bay Mills would adopt essentially the same lake trout rehabilitation plan. However, the Bay Mills plan would require closure for large-mesh gillnet fishing when one-half of the TAC is reached — and this could mean that one-half of the whitefish will not be able to be harvested by Bay Mills and others, under its plan.

While, therefore, in agreement on lake trout rehabilitation, the March plan prevents Bay Mills and other tribal fishers from losing their opportunity to pursue permitted whitefish harvests unnecessarily.

#### **Cooperation and Dispute Resolution and Enforcement, Treated Together**

The Bay Mills plan is difficult to enforce. The social con-

licts which have occurred create, indeed, enforcement problems. Quotas themselves are difficult to enforce, and enforcement is costly to all parties.

The creation of the executive council to address disputes, to make modification requests of the court where necessary, and the ability to resolve conflicts short of court intervention — by the March agreement — is certainly an improvement of the present ad hoc approach, which has not worked.

Under the Bay Mills proposal, the cooperation envisioned by the zonal plan would revert to the past ad hoc approach, to no user benefit.

Measures which have worked in the past, however, are institutionalized in the zonal plan, including enforcement provisions, marketing, fish wholesale records, and the state is required by the March plan to provide better data, while continuing to utilize TTWG.

Cooperation is essential for if there is none all will try to exploit the source at the expense of the others, the fishery suffers and some, particularly small-boat fishers, suffer dramatically. The zonal plan encourages cooperation, causing, among other matters, increased cooperation from the state — because there will now be, under the zonal plan, a common interest which was not being served heretofore.

While not a majoritarian finding, by any means, the cooperation is also enhanced by the numbers of parties and litigating amici who already agree with the zonal plan set forth in the March agreement. The spirit of agreement is a marked improvement to the totally court-mandated management allocation plan.

This finding that the March plan provides for increased cooperation, improved enforcement, and the addition of a dispute resolution technique and forum is based on the March agreement and the testimony of witnesses Horn, Wright and Lumsden.

#### **Data Collection Exchange**

It must be obvious to all that it is good for the fishery managers to share information and data with each other. The stipulated agreement provides for this and requires the exchange of data, and provides for funding for the production of more information.

Witness Hatch is a Great Lakes biologist who believes that it is important to be gathering and exchanging data between the user groups. He testifies, and I agree, that it is better working as a team to get better results. In Hatch's opinion, and I agree, the stipulated agreement encourages the gathering and sharing of data, should improve the ability to predict future available harvest, and even provides money for this.

While the exchange of data today was quite good, he testified, working with groups of TTWG, Fish and Wildlife Service, the fundings under the stipulated agreement would enhance the amount of information available for exchange.

The witness Ebener testified about problems in the past getting information and passing of same between the groups, and points out, and I agree, that the Bay Mills plan does not deal with the problem, but the March plan does; and it is apparent that, like other areas of cooperation, data collection and exchange are essential for a well-managed fishery.

#### **The "Racehorse" Fishery**

During the hearing, many witnesses referred to what they described as a "racehorse" fishery, and I made an earlier finding on this issue.

In a "racehorse" fishery everyone is out to get what they can and as fast as they can. Such a fishing competition is currently taking place in the commercial fishery — state trap-net fishers are racing tribal gillnetters. The former will catch most of the TACs before tribal fishers even get the opportunity to fish.



This results, of course, in a glut on the market, prices drop, and the entire commercial fishery suffers, especially small-boat tribal fishers.

To eliminate this unnecessary race, the March plan would allocate the resource among the various users with each managing its own, together with joint management. Of course, a "racehorse" fishery could still occur, but now it could be controlled by effort limitations, and even quotas.

Can the Bay Mills plan alter this? The tribes would get 50 percent area-wide. If unable to negotiate with the state for more of a quota, and there is clearly no guarantee of an alteration despite the hope of at least one Bay Mills witness, all the tribes would be stuck with a system like the one that prevails now. The Bay Mills plan would require annual agreement for each and every management unit between the tribes, and the state, and failing in this endeavor the "racehorse" fishery continues without abatement.

Furthermore, without such annual agreements, the present political problems would continue, and the tribes themselves would have to be in agreement as to allocation between them — which does not, from the evidence, seem likely.

Clearly the zonal plan of March 28 addresses this problem in a workable fashion, and the Bay Mills plan does not. This finding is based largely on the March agreement and the testimony of witness Ebener.

*Funding.* Of course, this court lacks the power to order any of the sovereigns to pay sums to advance its goals of a well-managed fishery which would preserve the treaty rights of the tribal fishers while preserving the resource as well.

The negotiating parties at the Soo, however, agreed to seek significant funds from the United States and from the state of Michigan.

One of my questions, before the allocation hearing, was would these two sovereigns maintain their posture in light of the requirements of this court to rule, lacking Bay Mills' acquiescence in the March agreement.

Director Skoog specifically indicated to the court that the state will provide the funds or seek the funds from the legislature, and utilized the language in the trial that the state was, quote, wedded, end quote, to the agreement.

Since the agreement requires funding, Director Skoog testified the funding will be sought and supplied. Undersecretary Horn made the same comments to the court during his testimony on Saturday, I believe it was. That is to say, that the United States would comply with the funding provisions. There was testimony further that the state and the United States agreed to provide it, the money, above what currently exists for a series of actions regarding the fishery:

First, with regard to assessment work, increased knowledge of the fishery and better management;

Secondly, for the tribal enforcement exercise, to protect the fishery for the legitimate use and benefit of the tribes;

Third, the marketing study, of marketing opportunities, which I have already spent so much time addressing. This agreement would put the tribes in control of a large share of the commercial fishery so they could better manage;

Fourth, the money to implement the management studies;

Fifth, the housing of the cooperative authority at the Soo;

Sixth, \$1,500,000 for the creation of a fund with the proceeds for the tribe [sic] each year to enhance, promote, manage the fishery, and given to them under the stipulated agreement.

He noted, finally, that the funding was of course voluntary, but was not available at all under the percentage allocation schemes.

Well, while it is probably not necessary to make the finding, it must be obvious many fishermen have trouble from

year to year with financing. Hopefully, this funding will keep many of them in business. Chairman Lumsden addressed that subject specifically.

Although the funds are voluntary, they provide, they are provided because of the settlement agreement of March. Mr. Horn testified that he was not sure if those funds were sufficient to establish the cooperative, and that is why he addressed the \$3 million trust funds [sic], to cover unforeseen costs and expenses. It is apparent that funding available under the March agreement remains should I decide that the March 28 plan is superior to the Bay Mills or any other court-ordered management plan. The Bay Mills plan, indeed any other non-negotiated plan would not be eligible and would be unable to provide this necessary asset. Such funding aids so many of the trouble aspects of this litigation that its potential presence is a blessing to all of the users of this resource.

A few more words about preservation and conservation. I have already, earlier, made several findings about preservation. It is one of my two axis considerations in all phases of this litigation. I make these additional findings for emphasis and to elaborate on what has already been said;

Government Exhibits 7, 9, 10, 11, 12, and 13 demonstrate, among other obvious conclusions, that the combined sport and tribal harvests for 1980 and 1981 exceeded the established TACs. Tribal harvests alone exceeded the TACs established for 1982 and 1984. It is apparent that exceeding a TAC anywhere at anytime slows or entirely stops the rehabilitation process of lake trout, and diminishes the availability of whitefish and chubs.

When TACs are met or exceeded, the management process is to require that fishing be discontinued. One needs excellent management to accomplish this, and the management groups have sent the parties to this court several times already seeking closures. This slows the required discontinuance of fishing process considerably.

The March agreement will result in sound management of the resource and a stable fishery without which all users are damaged.

The March plan provides much more resource protection under sound management than the Bay Mills plan. The goals of the Interior Department as described by Undersecretary, Deputy Undersecretary Horn, enhances the opportunity to preserve the resource, and this benefits all users, particularly the tribes.

*Social Conflict.* Social conflict has been addressed elsewhere. This brief recitation of this phenomenon is intended to compare the competing plans with regard to reduction or elimination of this conflict. There was considerable testimony on the social conflict issue. Previous conflict has been caused by competition for the resource between state and tribal commercial fishers. Also between sport and tribal fishers, with regard to TAC, of lake trout, time, space — for example, gillnets in important sports areas. Conflicts here are reduced because zones keep the tribes out of these areas for the large part. One witness, I think Director Skoog, testified with regard to the social conflict issue. His appraisal was that public reaction to the stipulated agreement was in general excellent.

The Bay Mills plan is difficult in terms of reducing social conflict; in fact, would appear in many instances that it might increase the conflict. Chairman Lumsden troubled the court by testifying that the social conflict included Indian children being harassed at school, physical confrontation occurring on the beaches, public access roads being closed by townships and counties. He was concerned in particular with media stories about what had happened.

He testified, however, that the stipulated agreement helps,

that he noticed a reduction in tension after the signing had been reported in the media.

He further testified that the zones were helpful to avoid conflict. He, in the media situation, indicated there had been a dramatic change in groups previously hostile to tribal fishing. He views the removal of tensions as being important perhaps over and above all other issues.

This could have happened I suppose with any agreement. Even those not totally satisfied feel they can work within the stipulated agreement. The March 28th plan does much to reduce the serious conflict and attempts to restore peace to our Great Lakes.

The Bay Mills proposal will not only not reduce conflicts, it may well serve to increase them. Bay Mills witnesses have candidly admitted they intend to continue to bargain for greater than 50 percent of some species, which bargain, even though in the form of a trade-off, may be perceived by non-tribal fishers as unfair and avaricious even though it is not. It is axiomatic that a non-zonal plan creates more contact among the pursuers, and if the past is any barometer, more conflict as well as more contact.

I need address only two more issues, and in reaching the conclusion on allocation:

And first is what I have labeled as the "*Skoog Testimonial Controversy*."

At the hearing, Dr. Ronald O. Skoog, Executive Director of the Department of Natural Resources, was called by the state to give testimony. Bay Mills, prior to his testimony, moved to admit parts of his deposition, taken February 14, 1985, in Lansing, pursuant to Rule 32(a)(2) of the Federal Rules of Civil Procedure.

The state opposed the offer first on Rule-32 grounds, and later on relevance grounds, under Rule 32. I reserved ruling on relevancy since I had not read the deposition, but ruled that 32(a)(2) would permit introduction. The state then moved to introduce all of his deposition under Rule 32(a)(4), and I received it.

The controversy arose because Bay Mills alleged that Skoog in his deposition favored a quota management system for the Great Lakes as opposed to a zonal allocation plan of management. I have now read the deposition in its entirety and make the following findings:

First, Dr. Skoog preferred, on February 14th, negotiation to take all fishers to a management scheme which would be beneficial to all and which protects the resource. At page 28.

He also preferred a quota system as a management device, at page 30 and following.

Third, he testified that he was initially, and I underscore the word "initially," against a zoning plan, at page 71;

Fourth, his opposition to zoning was for nondiscriminatory reasons. He wanted if possible all parties to be able to participate in all the fishery. Page 72.

Finding number five. Importantly, however, at page 75, he answered a question thusly, quote: "So I would say, some sort of a zoning from that point of view if we can find a way of doing it in a feasible manner ought to be looked at." End quote.

The "point of view" comment stemmed from his concern of controlling two different user groups using the same waters and his desire to avoid social conflict in the public interest.

Sixth, by March 28th he was and continues to be from his testimony in court an enthusiastic supporter of the March 28th agreement. In fact, he testified as I indicated earlier that the state is "wedded" to the agreement.

Seventh, he further testified, in May, that the state has already complied with certain planting provisions, that the public reaction to the agreement was generally good; and that

the state will continue to seek legislative funding if the agreement remains in full force and effect.

While the court expects the state to comply with its orders, it is comforting to know that Dr. Skoog took part in the negotiations, signed the agreement, and remains committed to it.

His deposition testimony, and his in-court testimony help persuade me that the March 28th agreement is in the best interests of the state and all of its citizens, including the tribes.

*The Cleland Controversy.* Trial of the allocation issue was interrupted by arguments that witness Charles Cleland's testimony should not be permitted since he relied, in part at least, on an untrustworthy sampling of members of the Bay Mills Community in order to gain economic information about small-boat fishers.

Initially, and after perfunctory research, I ruled that he could testify but could not rely on the suspect sampling. Following a two-hour lunch recess in which additional law was cited, I decided to allow his testimony, and to decide later whether it should be admissible, and if admissible, what weight if any said testimony should be accorded.

Following his appearance, a motion to strike his testimony was made and reserved by the court. After reviewing his testimony, I have decided to deny the motion to strike, but have not further researched the admissibility issue.

Dr. Cleland testified as an anthropologist. I place little weight on his economic analysis of the small-boat fishery. The testimony of small-boat fishers was far more persuasive, one of whom had, contrary to Cleland's testimony, gone into large-boat fishing on a part-time basis.

Of greater importance, however, is the fact that he never has read the March 28th agreement, and has no opinion whatsoever about the competing plans in this bifurcated hearing. He merely testifies [*sic*] that he understands why the Bay Mills Community rejected the agreement, not its economic necessity in doing so.

Suffice it to say that Dr. Cleland's testimony neither adds to nor detracts from the issue and, therefore, moots the need to decide the legal issue.

Having already ruled that both the March 28th agreement and the Bay Mills plan meet the requirements established by the Supreme Court in the *Fishing Vessel* case, I now conclude, based on the findings of fact just cited, that the allocation plan contained in the March 28th agreement should be adopted by this court.

The evidence overwhelmingly supports the conclusion that the zonal plan is superior, both in terms of protecting the Indian reserved treaty fishing right, and for the preservation of the resource.

As a court of equity, I am compelled to conclude that the March 28th plan is in the best interests of all tribes involved, specifically including Bay Mills, and should be implemented in its entirety.

*The Legality of the Bay Mills Indian Community Rejection and the Specific Performance Issue.* The state of Michigan, and the litigating amici participating in the allocation hearing, vigorously importune the court to declare, on legal and equitable grounds, that Bay Mills had no power to reject the March 28th agreement, having previously delegated settlement authority to its tribal chairperson and conservation chairperson, both of whom were at the negotiations and were signatories of the agreement.

Alternatively, it is urged that since there has been detrimental reliance by the state, the agreement must be specifically enforced.

With equal vigor Bay Mills, the United States and the other

two tribal intervening plaintiffs urge this court not to interfere in the Bay Mills government functions, and particularly not to substitute federal law for tribal law, nor to impose federal interpretations on the Bay Mills constitution — traditional notions, it seems to me, of comity and federalism.

Having decided the allocation issue contrary to the Bay Mills proposal, it is unnecessary for me to reach the issue, and I decline to do so. Indeed, it is mooted by my allocation decision.

(Seven pages of Judge's informal comments to the parties deleted.)

### Agreement for Entry of Consent Order\*

#### I. Recitals

1. This litigation was initiated in 1973 by the United States of America, on its own behalf and on behalf of the Bay Mills Indian Community (hereinafter Bay Mills), against the state of Michigan and several named officers employed by the Michigan Department of Natural Resources (hereinafter MDNR). Subsequently, Bay Mills (in 1974), the Sault Ste. Marie Tribe of Chippewa Indians (hereinafter the Sault Tribe) (in 1975), and the Grand Traverse Band of Ottawa/Chippewa Indians (hereinafter the Grand Traverse Band) (in 1979) intervened as party plaintiffs.

2. On May 7, 1979, this court issued a lengthy opinion interpreting certain federal treaties, reported at 471 F. Supp. 192 [6 Indian L. Rep. F-67] (W.D. Mich. 1979). Thereafter, the opinion was modified by the court of appeals, 653 F. 2d 277 [8 Indian L. Rep. 2132] (6th Cir. 1981). The Supreme Court declined to accept *certiorari*, 454 U.S. 1124 (1981).

3. On numerous occasions subsequent to this court's opinion referred to in paragraph 2, the parties have invoked the court's continuing jurisdiction to resolve controversies and disputes among themselves. Those controversies and disputes have involved primarily conservation closures necessitated by the threat of overharvest of various fish stocks.

4. In the fall of 1983, the three intervenor tribes filed a motion to allocate the resource between themselves and the state. The motion was amended in late spring 1984 and is presently pending before the court. Trial is scheduled to commence on April 22, 1985.

5. Subsequent to the filing of the tribes' motion, the Michigan United Conservation Clubs (hereinafter MUCC), the Grand Traverse Area Sport Fishing Association, the Michigan Steelhead and Salmon Fishermen's Association, the Michigan Charter Boat Association (hereinafter the sport fishing organizations) and a large group of individually named state-licensed commercial fishermen (hereinafter the Rureau petitioners) sought to intervene as party defendants. The court reserved decision on those motions and allowed the petitioners to participate in these proceedings as litigating amici curiae.

6. In the fall of 1984, the court appointed Special Master Francis E. McGovern for the dual purposes of supervising pretrial matters and attempting to facilitate a settlement among the parties and litigating amici.

7. This agreement results from extensive negotiations among the parties and litigating amici. The parties understand fully that by entering into this agreement they are foregoing trial before the court. Nonetheless, they believe this agreement represents the best opportunity to preserve and protect the resource, their respective rights and interests and initiate the cooperative efforts required to manage a common resource for differing user groups.

8. The parties and litigating amici agree to the entry of a consent order consistent with the terms and provisions set forth herein by signing this agreement.

#### II. Commercial Whitefish Fishery Management

9. For the immediate future, the parties will continue to rely on the establishment of whitefish TACs. The state favors a phase-in of a 19-inch size limit on whitefish which, in its view, may make it possible to abandon annual TACs in favor of longer term harvest limits. In addition, that limit may better protect breeding stocks. The state will submit this proposal as part of the agenda for the first meeting of the Technical Fisheries Review Committee, as described herein.

##### 10. Lake Michigan

a) The tribes shall refrain from commercial fishing in the following whitefish management units, which are designated on the maps attached hereto [omitted]; except under joint authorization as provided for in this agreement:

- i) WFM-01, WFM-07, and WFM-08 in their entirety;
- ii) WFM-06, in all grids except 714.

b) In WFM-05, east of a line running from Nine Mile Point in grid 518, north to Seven Mile Point in grid 518.

c) In WFM-05, except under the provisions set forth in article VIII for the Grand Traverse Bay area, and under paragraph 48 below.

d) In WFM-02, north of a line from Wiggins Point in grid 21 to Dutch Johns Point in grid 212.

##### 11. Lake Huron

The tribes shall refrain from commercial fishing in the following whitefish management units which are designated on the maps attached hereto [omitted], except under joint authorization as provided for in this agreement:

a) WFH-05;

b) In WFH-04, grids 407-409, 507-511, 606-613, and in grids 505 and 506, south of a line from Hammond Bay Harbor buoy running northeasterly to the point where grids 406, 407, 506, and 507 meet.

##### 12. Lake Superior

The tribes shall refrain from commercial fishing in the following whitefish management units as designated on the maps attached hereto [omitted], except under joint authorization as provided for in this agreement:

a) In WFS-04; and

b) In WFS-05, except as provided in paragraph 16.

13. The state shall promptly remove state commercial licensees in the following areas:

a) Lake Huron in grids 202, 301-306, 401-406 and 504-505.

b) Lake Superior in WFS-06, WFS-07 and WFS-08.

14. The state shall reduce immediately whitefish harvest by state-licensed commercial fishers by 250,000 pounds in WFM-03 and WFM-04.

15. In years subsequent in 1985, the state shall reduce state-licensed commercial whitefish harvest in all areas within the treaty-ceded waters outside those areas described in paragraphs 10, 11, and 12 in order to accommodate the expanding tribal harvest. The parties expect that during the life of this agreement, the commercial harvest for whitefish outside said areas described in paragraphs 10, 11, and 12 shall be prosecuted by treaty fishers exclusively. The state shall not license any new persons or additional effort in treaty waters for any species outside areas described in paragraphs 10, 11, and 12, without the prior written consent of the tribes; provided, however, the tribes' consent will not be unreasonably withheld if there is surplus fish available for harvest that cannot otherwise be taken by treaty fishers.

16. In Lake Superior grids 934, 1034, 1035, 1036, 1134,

\* [Editor's Note: As a result of the trial, the court entered the Agreement for Entry of Consent Order as an order of the court.]

1135, 1136, 1234, 1235, 1236, 1334, 1335, 1336, 1434, 1435, 1436, 1534, 1535, and 1536 the Sault Tribe shall authorize not more than one large mesh gill net operation for taking whitefish. This permit shall be subject to the appropriate TAC limits for whitefish and shall automatically expire for the year when the incidental take of lake trout exceeds 50 percent of the lake trout TAC established by the Technical Fisheries Review Committee. This special permit fishery shall terminate on January 1, 1990.

Concurrent with the termination of this permit, the state shall provide to the Sault Tribe one state commercial fishing license which shall authorize whitefish fishing in these grids in Lake Superior, subject to state regulations and enforcement.

### III. Lake Trout

17. Lake trout rehabilitation shall be accomplished by means of a system of refuges, priority rehabilitation zones, and deferred zones, as represented on the attached maps [omitted]. There shall be no commercial fishing with gill nets in such refuges. Commercial fishing with trap nets shall be permitted in refuges, but live lake trout shall be released. Lake trout TACs will be established for rehabilitation zones by the Technical Fisheries Review Committee (referred to herein), based on 40 to 45 percent total annual mortality. When the TAC for lake trout is reached in a primary lake trout rehabilitation zone, all large mesh gill netting and sport fishing for lake trout shall cease.

a) In Lake Michigan there shall be a primary rehabilitation zone which includes all of WFM-04, except for grids 317, 318, 417, 418 and 419, all of WFM-05, except for grids 610, 611 and 612. Within said rehabilitation area, the following grids shall constitute a refuge: south half of grid 313; south half of grid 314; grids 413, 414; south half of grid 415; grids 513, 514, 515 and 516; and the northwest quarter of grid 517; grid 613; and the north half of grid 614.

In addition, there shall be a refuge in the following grids located all or in part in the state of Michigan: 1606; 1607; 1706; 1707; 1806; 1807; 1906, and 1907 within treaty waters.

b) In Lake Huron, there shall be a primary rehabilitation zone which includes all of MH-2 in the treaty-ceded waters. In addition, in MH-1 it shall include grids 305, 306, the south half of 407, 507, 508, and 607. A refuge shall be located in 307, 308, 309, 310, the north half of 407 and grids 408, 409, and 410. Gill net fishing shall be allowed in grids 305 and 306 only after May 15. Those portions of grids 505 and 506 south of the line from the Hammond Harbor buoy described in paragraph 11(b) shall become a primary rehabilitation zone on January 1, 1990.

c) In Lake Superior, there shall be a primary rehabilitation zone which includes all of WFS 04-05.

### IV. Walleye

18. In 1985 the state agrees to stock 50,000 walleye fingerlings in, or near, the Brevort River which empties into Lake Michigan. From 1986 to 1989, the state agrees to stock an annual average of 100,000 fingerlings. From 1985 to 1989 the state and the tribes will cooperate in the rearing of said fish in order to prepare the tribes to take over the program in 1990.

19. Until such time as a tribal assessment fishery demonstrates the feasibility of the commercial harvest of walleye by treaty fishermen in Lake Huron, the tribes shall refrain from the commercial harvest of walleye in Lake Huron. In any event, the commercial harvest of walleye by treaty fishermen shall be limited to statistical grids 202, 301, 302, 303, 304, 305, 306, 401, 402, and 403.

### V. Perch

20. Until such times as a tribal assessment fishery demonstrates the feasibility of the commercial harvest of perch by treaty fishermen in Lake Huron, the tribes shall refrain from the commercial harvest of perch in Lake Huron. In any event, the commercial harvest of perch by treaty fishermen shall be limited to statistical grids 202, 301, 302, 303, 304, 305, 206, 401, 402, and 403.

21. To the extent available, the state shall stock substantial numbers of perch from thinning operations associated with Upper Peninsula inland lakes at sites in northern Lake Michigan. The tribes and the MDNR shall agree on the precise location of the stocking.

### VI. Salmon

22. Beginning in 1985, the state agrees to stock, on an annual basis, 250,000 salmon fingerlings in statistical district MH-1. The plantings are to occur at an appropriate stream location on which the tribes and the MDNR agree. Beginning in 1986, an additional 100,000 salmon fingerlings shall be planted at a location upon which the tribes and the MDNR agree; likewise, beginning in 1987, an additional 150,000 salmon fingerlings shall be planted, bringing the total plant to 500,000 salmon fingerlings annually, for so long as desired under this agreement. The use of suspended gill nets for the commercial harvest of salmon by treaty fishers is prohibited prior to August 16 and after October 30 of each year and outside of a two-mile radius from the stream mouths where such plantings occur.

### VII. Bloater Chubs

#### 23. a) Lake Michigan

The tribes shall refrain from harvesting bloater chubs in Lake Michigan from the following statistical districts, except as otherwise provided in this agreement:

- i) MM-1;
- ii) MM-5;
- iii) MM-6; and
- iv) MM-7.

v) The parties expect that during the life of this agreement, the commercial harvest for chubs outside those areas described in 23(a)(i)-(iv) shall be prosecuted by treaty fishers exclusively. The state shall not license any new persons or additional effort outside said areas described in 23(a)(i)-(iv) without the prior written consent of the tribes; provided, however, the tribes' consent shall not be unreasonably withheld if there is surplus available for harvest that cannot otherwise be taken by treaty fishers.

#### b) Lake Huron

In statistical district MH-1 and MH-2, the tribes shall authorize an assessment fishery for chubs in calendar year 1985; provided, however, the harvest from said fishery shall not exceed 200,000 (round) pounds during said calendar year and shall be closely monitored for the presence of *Coregonus reghardi*. In subsequent years, the nature and extent of the chub fishery in Lake Huron shall be determined by the Technical Fisheries Review Committee; provided that available harvest shall be shared between the state and the tribes.

#### c) Lake Superior

The available chub fishery shall be shared between the state and the tribes.



### VIII. Grand Traverse Bay Area

24. In order to facilitate lake trout rehabilitation in the Grand Traverse Bay area, commercial fishing by the tribes in this area shall be limited as follows:

a) The commercial harvest of any species shall be consistent with the TAC as established by the Technical Fisheries Review Committee. The incidental catch of lake trout associated with whitefish harvest in this area shall be limited to TACs which are derived from total mortality rates for lake trout developed by the Technical Fisheries Review Committee.

b) In grids 915 and 916, commercial fishing by either gill net or impoundment gear is prohibited.

c) In grids 815 and 816, only Grand Traverse Band may fish commercially and may only use impoundment gear in the period from September 15 to May 30, subject to seasonal spawning closures and other agreed conservation measures. It is further agreed that lake trout caught incidentally in these grids will be returned to the water. Fishing with gill nets is prohibited in grids 815 and 816.

d) In grids 616 and 716, only the Grand Traverse Band may fish commercially subject to seasonal spawning closures and other agreed conservation measures. However, the parties further agree that the Grand Traverse Band shall be limited to commercial fishing with impoundment gear in these grids after January 1, 1988, provided that impoundment gear and technical assistance is made available to the Grand Traverse Band.

e) In grids 615, 714, and 715 only the Grand Traverse Band may fish commercially, subject to seasonal spawning closures and other agreed conservation measures.

25. The Grand Traverse Band has an interest in additional fishing opportunities adjacent to its service area in WFM-06 and 07 north of the 1100 series of grids inclusive, both for chubs, utilizing small mesh gill nets deeper than 40 fathoms, and other species, utilizing impoundment gear. In 1985, one chub permit will be issued jointly by the Grand Traverse Band and the state if the Grand Traverse Band acquires the capacity for harvesting chubs. Dependent upon both availability of stocks and tribal needs in subsequent years, additional opportunities for chubs and/or other species can be made available to the Grand Traverse Band pursuant to jointly issued state-tribal authorization.

26. a) As large mesh gill net fishing in grids 517 and 518 is phased out under terms of this agreement, the Grand Traverse Band's commercial fishing in these grids shall be limited to the restrictions which then apply in grids 616 and 716 as identified in 24(d).

b) Notwithstanding the provisions contained in paragraphs 24-26(a), in calendar year 1985 the Technical Fisheries Review Committee shall determine the Grand Traverse Band's whitefish harvest through August. In the event there are available whitefish stocks for harvest, Bay Mills and Sault Tribe fishermen shall be permitted to harvest them in grids 715 and 716 with large mesh gill nets.

### IX. Regulation of the Fishery

27. The tribes and the state shall continue in effect all current rules, regulations, or orders according to their terms unless and until modified, amended, or rescinded pursuant to the method provided herein.

28. No rule, regulation, or order shall be adopted, modified or rescinded where such adoption, modification, or rescission would conflict with the substantive requirements of this agreement.

29. Prior to adopting, modifying, amending, or rescinding any rule, regulation, or order, the party proposing such

action shall provide to all other parties to this agreement notice in writing of such proposed action as follows:

a) In the case of rules or regulations, not less than 30 days' notice shall be provided.

b) In the case of regulatory orders not deemed an emergency, not less than 10 days' notice shall be provided.

c) In the case of emergency orders, notice shall be provided as soon as practicable. An emergency shall be defined as an event posing an imminent threat to the public health, safety, welfare or to the natural resources.

30. Upon adoption of any rule change, a written copy of the rule change shall be provided to all parties to this agreement within 10 days.

### X. Standing Committees

The parties create the following standing committees:

#### 31. Joint Enforcement Committee

a) The membership of this committee shall consist of one representative from each tribe, from the Michigan Department of Natural Resources and from the Bureau of Indian Affairs. A representative of the Michigan Department of State Police and Michigan Sheriff's Association may participate on an ad hoc basis.

b) The committee shall:

- i) coordinate, to the greatest extent possible, the fisheries law enforcement responsibilities of the parties;
- ii) pursue the development of uniform methods of marking and identifying commercial fishing gear;
- iii) exchange information on enforcement and prosecution efforts by the parties;
- iv) perform those other duties and responsibilities as are assigned to it jointly by the parties or under the terms of this agreement.

#### 32. Technical Fisheries Review Committee

a) The membership of this committee shall consist of one representative of the Chippewa-Ottawa Treaty Fishery Management Authority or its successor, the Michigan Department of Natural Resources, and the United States Fish and Wildlife Service, Great Lakes Fishery Laboratory.

b) The committee shall meet not less than annually.

c) The committee shall:

- i) issue an annual report on the status of fish stocks within treaty waters;
- ii) make recommendations to resource managers on harvest levels and limits thereon;
- iii) make recommendations as to the need for assessment efforts in particular fish stocks or waters;
- iv) monitor the assessment efforts of the parties;
- v) perform such other duties and responsibilities as directed jointly by the parties or required under this agreement.

d) It is agreed that an immediate assessment of the forage stocks is necessary.

#### 33. Information and Education Committee

a) The membership of this committee shall consist of a representative of each tribe, the Michigan Department of Natural Resources, and the Bureau of Indian Affairs.

b) The committee shall meet not less than semi-annually.

c) The committee shall:

- i) undertake to educate and inform the public regarding this agreement and the activities of the parties pursuant thereto;
- ii) promote understanding of treaty rights and responsibilities;
- iii) provide a central clearinghouse for information relating to the treaty, this agreement, and the activities of the



parties hereunder, including the activities and reports of all standing committees or any other committee created by the executive council; and

iv) perform such other duties and responsibilities as directed jointly by the parties or required under this agreement.

#### XI. Executive Council

34. The parties shall create an executive council which shall meet and confer not less than annually regarding the state of the fishery resource, the implementation of this agreement, expenditure of funds except as otherwise provided herein and any disputes related hereto.

35. The executive council shall consist of the tribal chairpersons, the director of the MDNR and the Secretary of the Interior, or their duly authorized representatives.

36. Prior to seeking relief from the court regarding any dispute arising under this agreement, the parties shall utilize the procedures set forth below:

a) The complaining party shall provide not less than 30 days' written notice of the dispute to all other parties.

b) The executive council shall then meet and confer in an attempt to resolve the dispute.

c) In the event of an emergency involving this agreement, posing an immediate threat of irreparable harm to a party, that party may petition the court for relief notwithstanding the requirement of subparagraphs (a) and (b) above.

37. In lieu of procedures described in paragraph 36, the parties may adopt an alternative method of dispute resolution which establishes standards of review, additional powers and procedures, and assigns appropriate weight to decisions rendered.

#### XII. Data Collection and Exchange

38. *Sportfishing.* The state of Michigan shall collect information on the activities of sport fishermen within the treaty waters and provide that information to the tribes or their designated agent.

a) The data collected shall include, but not be limited to, information on the species caught or pursued by sport fishermen, the areas and depths fished, and to the extent possible, the sport fishing catch shall be reported in a manner compatible with the report of the commercial catch.

b) The methodology used to measure the sport fishing catch and/or effort shall be submitted to the Technical Fisheries Review Committee for review and comment.

39. *Commercial Catch Records.* The state and the tribes shall provide to all parties commercial catch data for fishers within the treaty-ceded waters.

##### 40. Retail Sales Records

a) The tribes shall adopt a regulation requiring tribally licensed commercial fishers to issue a bill of sale to any retail outlet purchasing "game fish" from such fishers. "Game fish" shall be defined as set forth in the Michigan Sportsmen Fishing Law, MCLA 301.6; MSA 13.1596.

b) The bill of sale required hereunder shall contain the name of the tribal fisher, the amount and species of fish sold, the date of sale, and the signature of the fisher.

##### 41. Wholesale Fish Dealers Records

a) The parties agree to provide copies of all reports of wholesale fish dealers to any party requesting the same.

b) All wholesale fish dealers licensed by a party to this agreement shall comply with the following record-keeping and reporting requirements:

i) A record of each purchase of fish shall be made in triplicate, signed by the seller and the buyer, indicating the

name of the seller, the date, the seller's identification number, the amount of each species sold, and the price paid for each species. The licensed wholesaler and seller shall each retain one copy. One copy shall be mailed to the Treaty Waters Conservation Office in Sault Ste. Marie by the 10th day of the month following the month in which the transaction occurred.

ii) Licensed wholesale fish dealers shall require identification from each seller of fish.

c) A licensed wholesale fish dealer may only purchase fish from a state or tribally licensed commercial fisher, or other legal source of fish.

d) Beginning in 1986, the provisions of this section shall be made conditions of all wholesale fish dealers licenses issued or renewed by a party, and appropriate rules may be promulgated.

42. The parties shall promptly exchange all information received by them related to contaminant levels in fish in treaty waters.

#### XIII. Federal Contribution

43. The tribes shall have the authority to void this agreement or any portion thereof, upon not less than 60 days' prior written notice to the state and the Department of the Interior, unless the following funds and assistance are timely provided by the Department of the Interior:

a) In fiscal year 1985, \$150,000 to be used by the tribes for a study to examine methods to increase the financial return to the tribes and tribal fishery from the marketing of the treaty harvest.

b) In fiscal year 1985, an additional \$180,000 to the tribes for their conservation program, which include law enforcement, tribal courts and the tribal biological assessment project.

c) For the assessment of fish stocks available for commercial harvest within treaty-ceded waters, an additional \$75,000 to the Fish and Wildlife Service (FWS) during fiscal year 1985.

d) For the construction, acquisition and/or renovation of a building in Sault Ste. Marie to be utilized for the Treaty Waters Conservation Office, \$150,000 to \$200,000 by the end of the fiscal year 1986.

If funded, the parties will establish a Treaty Waters Conservation Office to house biologists, enforcement officers, and other personnel involved in management of the commercial fish in treaty waters and to serve as a central location for information related to the fishery, including catch reports, assessment data, and research. The office will also provide information and assistance to fishermen and others.

e) As a direct grant to the tribes, \$250,000 to be used to implement the recommendations from the study described in paragraph 43(a).

f) Technical assistance to the tribes to assist in implementing the recommendations from the study described in paragraph 43(a).

g) \$1,500,000 for the creation of a Treaty Waters Fisheries Management Fund, which shall not relieve the DOI's existing responsibility for the continued support of tribal programs. Interest from the fund shall be used for fisheries management activities.

44. [Omitted.]

#### XIV. State Contribution

45. The state agrees to seek funding for certain programs and to seek to provide funds as follows:

a) To match the amount of funds to be provided to the tribes by the DOI for fisheries management activities set forth

in paragraph 43. The state shall also provide consultation and assistance for the development of fisheries markets and marketing strategies. Not less than \$100,000 of the state's contribution shall be used for the conduct of jointly agreed upon fisheries stock assessment work. Fish from said assessment shall be harvested by tribal licensees.

b) The state will consider grant requests from the tribes to obtain impoundment gear acquired by the state from displaced state-licensed commercial fishermen.

c) The state shall seek the necessary authority and appropriation of no less than \$1,500,000 for the Treaty Waters Fisheries Management Fund. The state shall contribute its funding subsequent to federal funding specified in paragraph 43(g) above. Interest from the fund shall be used for fisheries management activities for the benefit of the treaty fishery. For the interest derived from the state contribution, a separate accounting shall be made by the state. State funds shall not be spent without concurrence of the state representative on the executive council.

46. The state shall plant annually 150,000 fingerling lake trout in Whitefish Bay beginning in calendar year 1985, at locations agreed upon by the state and the tribes. In the event such plantings do not occur, the state shall use its best efforts to provide a reasonable alternative fishing opportunity to the tribes. Failure to do so will allow the tribes to suspend the restrictions contained in paragraph 48 upon 30 days' prior written notice.

47. In the event the state fails to fulfill any of the obligations set forth in paragraphs 45 and 46 above, the tribes may petition the court for modification or termination of this agreement, or other appropriate order.

#### XV. Miscellaneous

48. Notwithstanding the provisions in paragraph 10(c) above, in grid 517 in Lake Michigan and that portion of grid 518 west of a line starting at Nine Mile Point and running north to Seven Mile Point in Lake Michigan, licensed tribal fishermen may fish during the period January 1 through May 31 and October 1 through October 31, of each year until October 31 of 1990. Five years after the plantings provided for in paragraph 46, this area shall be closed to commercial fishing by the tribes except as specifically provided in article VIII for the Grand Traverse Band. The remaining portions of grids 518 and 519 shall be closed to all tribal fishing.

49. Notwithstanding the provisions in paragraph 11(b) above, in Lake Huron that portion of grid 506 west of a north-south line extending from Forty Mile Point to the northern limit of that grid and all of grid 505 will be available for large mesh gill net fishing by licensed tribal fishermen from May 1 through December 31 (excluding spawning closure during the month of November) until December 31, 1989. After December 31, 1989 tribal fishing shall be closed south and east of a line described above in paragraph 11(b).

50. There shall be no dual licensing of commercial fishermen by the state and by the tribes.

51. Sport fishing is permitted anywhere in treaty waters subject to state regulation.

52. Any unlicensed fishermen fishing in state-licensed fishing areas shall be subject to enforcement by the state.

#### XVI. Duration of Agreement

53. This agreement shall be effective upon execution by all signatories and shall continue for 15 years thereafter. During the life of this agreement, the parties may amend it by written agreement approved by the court in the same manner in which it was initially adopted.

54. Upon expiration of the terms of this agreement, or if earlier terminated for any reason, the provisions, restrictions and conditions contained herein shall no longer govern the parties in any manner whatsoever.

#### XVII. Continuing Jurisdiction

55. The court shall retain continuing jurisdiction over this matter including disputes arising from the reduction of harvest by state licensees for the life of this agreement and thereafter.

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