From: Steve Parks [mailto:steveparks12@hotmail.com]
Sent: Wednesday, January 19, 2011 8:31 AM
To: Bruce Greene
Subject: RE: Attached letter

Dear Mr. Green:

Thank you for your letter dated January 10, 2011.

For the reasons stated in previous correspondence, I am going forward with the prosecution of the Jensen brothers.

A supplemental pretrial conference is scheduled for tomorrow, January 20, 2011.

Very truly yours,

Steve Parks
Delta County Prosecuting Attorney

LAW OFFICES OF
BRUCE R. GREENE
& ASSOCIATES, LLC

January 28, 2011

Louis B. Reinwasser
Assistant Attorney General
P.O. Box 30755
Lansing, MI 48909

Re: Jurisdiction Over the Activities of Sault Ste. Marie Tribe of Chippewa Indians Tribal Members Wade William Jensen and Troy Nestor Jensen – Notice Invoking Dispute Resolution Under Section XIX of the Consent Decree Entered on August 8, 2000 in *United States v. Michigan*, W.D. Mich. Case No. 2:73 CV 26

Dear Mr. Reinwasser:

The purpose of this letter is to notify you that the Sault Ste. Marie Tribe of Chippewa Indians ("Sault Tribe") is invoking the Dispute Resolution procedures set forth at Section XIX of the Consent Decree entered on August 8, 2000 in *United States v. Michigan*, W.D. Mich. Case No. 2:73 CV 26 (hereinafter "2000 Consent Decree"), and the District Court's continuing jurisdiction.

As we have discussed, the Sault Tribe and the State of Michigan ("State") have a fundamental disagreement regarding the State's authority (jurisdiction) to prosecute Troy Nestor Jensen and Wade William Jensen (the "Jensens"), who are Indian and members of the Sault Tribe. The State has charged the Jensens with conspiracy to "purchase, sell or buy fish taken without a commercial fishing license," in violation of state law, MCL 750.157a and MCL 324.48723.

A. The Particulars of the Dispute

1. Factual Background.

As you are aware, a 2009 investigation by the Michigan Department of Natural Resources ("MDNR") concluded that five members of the Sault Tribe were apparently engaging in illegal fishing activity in Little Bay De Noc, Delta County.

Briefly, three tribally licensed subsistence fishermen, Kevin, Andrew and John Schwartz (the "Schwartzes"), were surveilled and investigated over a period of several months for allegedly abusing their subsistence tribal fishing licenses by catching fish (primarily walleye), and selling those fish to the Jensens, who are or have been licensed tribal commercial fishermen. The Jensens, in turn, allegedly sold the walleye to Bay de Noc Fisheries, a State licensed wholesale operator. The Schwartzes were cited into Tribal Court by Conservation Officers of the MDNR for their alleged violations of the *Great Lakes and St. Mary's River Treaty Fishing*

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EXHIBIT
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Regulations, Sault Ste. Marie Tribe of Chippewa Indians Tribal Code, Chapter 20 (hereinafter "Sault Tribe Treaty Fishing Regulations").

In August 2010, after a four day bench trial in the Sault Tribe Tribal Court, the Schwartzes were found liable on 31 of 40 citations. The Tribal Court fined the Schwartzes $4,300.00 for these violations, and imposed court costs against them in the additional amount of $800.00. On top of the fines and court costs, the Schwartzes have been ordered to make restitution in the amount of $15,214.60. In addition to the fines, court costs and restitution amounts, the Tribal Court ordered the immediate seizure and forfeiture of four gill nets, and four snowmobile sleds – models dated 1990, 1991, 1993 and 1996. Last, but not least, their subsistence fishing licenses were revoked by the Tribe. The Schwartzes are appealing the judgment of the Tribal Court to the Sault Tribe Court of Appeals.

The Jensens have not been charged with any violations of the Sault Tribe Treaty Fishing Regulations in connection with the purchase and subsequent resale of walleye caught by the Schwartzes. However, the Jensens have been cited in connection with other treaty fishing activities that violated the Tribe's Treaty Fishing Regulations. Approximately 60 citations issued by the Tribe to the Jensens are presently pending before the Sault Tribe Tribal Court. A bench trial is scheduled for February 10 and 11.

At the time of the alleged acts of buying fish from tribal subsistence fishermen and selling those fish to Bay de Noc Fisheries, the Sault Tribe Tribal Code did not prohibit such activities. However, on February 23, 2010, the Sault Tribe Board of Directors adopted Resolution 2010-40, which amended Chapter 20 to provide that "[n]o member shall sell or offer for sale any species of fish harvested under a subsistence license." A copy of Resolution 2010-40 is attached. Thus, although the Jensens' conduct at the time they acquired the walleye and sold them to Bay de Noc Fisheries was not in violation of the Sault Tribe's Treaty Fishing Regulations, it would be a violation now, as a result of the Tribe's adoption of Resolution 2010-40.

On October 25 and October 29, 2010, respectively, Steven Parks, the Delta County Prosecutor, authorized the issuance of warrants for the arrest of Troy and Wade Jensen. The Delta County Prosecutor has charged the Jensens with conspiracy to "purchase, sell or buy fish taken without a commercial fishing license," in violation of state law, MCL 750.157a and MCL 324.48723. State of Michigan, 94th Judicial District, 47th Judicial Circuit, Complaints, Misdemeanor, Case Nos. 2010001110 and MM20100011111.

On December 16, 2010, this office sent a letter to Mr. Parks notifying him of the Tribe's position that the activities of the Jensens are subject to the exclusive jurisdiction of the Tribe and its Tribal Court, pursuant to the 2000 Consent Decree.

Mr. Parks responded by letter dated December 20, 2010, in which he asserted that the actions of the Jensens did not fit within the definition of "fishing activities" under the Chippewa

Ottawa Resource Authority Commercial, Subsistence, and Recreational Fishing Regulations for the 1836 Treaty Ceded Waters of Lakes Superior, Huron, and Michigan (Adopted August 31, 2000, Effective September 7, 2000, and as Revised June 4, 2009) ("CORA Fishing Regulations").

By letter dated January 11, 2011, we provided a more detailed explanation of the basis for the Tribe's position that tribal jurisdiction over the Jensens in this matter is exclusive, and why the State accordingly lacks the authority to prosecute the Jensens. Mr. Parks responded by email on January 19, 2011, that he was "going forward with the prosecution of the Jensen brothers" notwithstanding the concerns raised by the Tribe.

Shortly thereafter, you and I had a discussion in which you indicated that you shared the view of Mr. Parks, which is essentially that the treaty right to harvest fish ends at the shore, and any activity on shore is not subject to tribal regulation. Under this theory, on shore activity, including the purchase and subsequent resale of treaty fish, renders the treaty tribe member subject to State prosecution.

We find no basis for this on shore/off shore distinction in either *United States v. Michigan* or in the 2000 Consent Decree. Nor do we read the CORA Fishing Regulations to limit the Tribe's jurisdiction to off shore "fishing activities."

Because we continue to disagree on the issue of jurisdiction over the Jensens, with this letter, the Tribe is hereby invoking the Dispute Resolution procedures under the 2000 Consent Decree.[1]

2. The Proceedings in *United States v. Michigan* and the Consent Decrees.

In order to understand the Tribe's position, it is necessary to begin with the decision in *United States v. Michigan,* 471 F. Supp. 192 (W.D. Mich. 1979), which is referred to above, and which is also known as the Fox opinion, named after the Honorable Noel P. Fox, who presided over the treaty fishing litigation in federal court in the late 1970s. Prior to that litigation, there were long standing disagreements among the State on the one hand, and the United States, Bay Mills Indian Community, the Sault Tribe, and later the Grand Traverse Band of Ottawa and Chippewa Indians, the Little River Band of Ottawa Indians and the Little Traverse Bay Band of Odawa Indians, on the other. The disagreements related to whether those tribes retained reserved rights to fish, both commercially and for subsistence purposes, in much of Michigan's Great Lakes' waters, pursuant to the Treaty of Washington entered into on March 28, 1836. 7 Stat. 491. Another major piece of the dispute related to whether the State had any right to regulate

[1] We understand that the State may also take action against another individual, Mr. Halvorson, who was also allegedly involved in the unlawful buying and selling of the fishery resource. The Sault Tribe does not challenge the State's jurisdiction to take any appropriate action against Mr. Halvorson. We understand that Mr. Halvorson is a non-Indian and non-member of the Sault Tribe, and as such, is fully subject to the criminal jurisdiction of the State.

treaty tribe members exercising the rights retained under the treaty. Ultimately, the District Court ruled in favor of the tribes and the United States, upholding the treaty tribes' rights to fish, as well as the exclusive right to regulate their members who were involved with the treaty resource and with its exploitation.

In concluding that the exercise of the treaty rights can only be regulated by the treaty tribes, and not the State of Michigan, the District Court relied heavily on the Supremacy Clause of the Constitution.

> The point of the preemption doctrine, simply stated, is that state regulation in an area where the federal purpose is dominant and state regulation would be at cross purposes with federal objectives is violative of the Supremacy Clause and must fail even where Congress has not explicitly proscribed the reach of state law.

United States v. Michigan, 471 F. Supp. at 266 (emphasis added). Later in the same opinion, the District Court stated that "[f]ederal law provides that Indian tribes retain the inherent sovereign right to regulate and enforce the internal affairs of their members, including hunting and fishing rights." *Id.* at 272. Continuing in that same regard, the District Court also stated later in its opinion:

> Both Bay Mills and the Sault Tribe retain the power to regulate their internal affairs and have adopted constitutions and by-laws under the Indian Reorganization Act of 1934. Both constitutions authorized the tribes to regulate and protect resources under their control. Further, both constitutions authorize the tribes to regulate the internal affairs of their members. Pursuant to the constitutions and by-laws, the tribes have developed conservation codes and fishing regulations. Pursuant to this constitutional and ordinance authority, the treaty fishing activities of the Indians of the plaintiff tribes are comprehensively regulated and enforced.

Id. at 280.

Pursuant to the original Fox opinion, the parties to that litigation, which include the State of Michigan and the United States, as well as the treaty tribes, entered into two subsequent consent decrees, one in 1985 and the second in 2000, after the term of the 1985 Consent Decree expired. These consent decrees were required because although the Fox opinion was comprehensive in its interpretation of the treaty right and the exclusive nature of the tribes' regulatory authority over the exercise of the right and over their members, the District Court opinion was silent with respect to how the fishery resource would be shared between the tribes and the State's licensed fishers, as well as numerous other details regarding how the fishery could be lawfully exploited.

With regard to jurisdiction and enforcement, § XVII(A) of the 2000 Consent Decree (p. 60), states that:

> [T]he courts of the Tribes shall have exclusive jurisdiction over enforcement of the Tribal laws or regulations governing the fishing activities of Tribal members in the 1836 Treaty waters. The State shall not enforce its fishing laws and regulations against Tribal members engaged in fishing activity within the 1836 Treaty waters.

3. The CORA Fishing Regulations.

In 2000, pursuant to the 2000 Consent Decree, the *United States v. Michigan* tribes adopted the CORA Fishing Regulations, the purpose of which is as follows:

> Section I. Purpose.
>
> These Regulations are adopted to govern the commercial, subsistence, and recreational fishing activities of members of the Bay Mills Indian Community, the Grand Traverse Band of Ottawa and Chippewa Indians, the Little River Band of Ottawa Indians, the Little Traverse Bay Bands of Odawa Indians, and the Sault Ste. Marie Tribe of Chippewa Indians in exercising the Great Lakes fishing rights reserved by the Tribes in the Treaty of March 28, 1836. These Regulations are intended to ensure conservation of the fishery resource for future generations of the Tribes and to ensure safe fishing practices.

As stated in Section II, Scope and Application, the "Regulations apply to the commercial, subsistence, and recreational fishing activities of all enrolled members of the Tribes in the 1836 Treaty waters and are in compliance with and implement the [2000] Consent Decree and the Management Plan."

4. Summary of the Sault Tribe's Position.

At issue in this dispute is whether the Jensens' conduct in purchasing fish from the Schwartzes and reselling it to Bay de Noc Fishery constituted a "fishing activity" by tribal members subject to the 2000 Consent Decree and the CORA Fishing Regulations.

As we understand the State's position, as articulated in the December 20, 2010 letter from Mr. Parks, the State maintains that the Jensens' activities are not "fishing activities," and, therefore, not protected by the Treaty. The State appears to argue that the scope of the Tribe's

jurisdiction over the Jensens is controlled by the definition of "fishing activities" that appears in the CORA Fishing Regulations. That definition states:

> (i) "Fishing" or "fishing activity" means fishing for, catching, or taking any species of fish, or attempting to fish for, catch, or take any species of fish from 1836 Treaty waters, including all related activities which occur in or on the water or ice, until such time as the vessel or vehicle is moored, tied up, or grounded.

CORA Fishing Regulations, § III(i).

The Tribe disagrees that the definition of "fishing activity" in the CORA Fishing Regulations is intended to limit the Tribe's jurisdiction to activities occurring in or on the water or ice. With all due respect, and for the reasons expressed in this letter, the State's position is simply not supported by the law, as set forth in *United States v. Michigan,* the 2000 Consent Decree and the CORA Fishing Regulations.

First, as you know, in *United States v. Michigan,* Judge Fox recognized that "the Ottawa and Chippewa Indians, and the plaintiff tribes as their successors, reserved an aboriginal right to fish in the waters of the Great Lakes ceded by the Treaty of 1836, which right they may exercise without regulation by the State of Michigan." 471 F. Supp. at 216 (emphasis added). Included in this treaty right was the right to participate in a commercial fishery, which, of course, is essentially the buying and selling of fish. *See id.* at 223 (describing the evidence that "firmly establishes that the Indians of the treaty area were heavily engaged in commercial fishing at the time of the Treaty of 1836" and that tribal members in the 18th century "naturally turned to fish as a commodity which could produce a surplus for trade.")

The description of commercial fishing activity in *United States v. Michigan* clearly goes beyond what took place in or on the water or ice:

> That the treaty Indians were commercial, as well as subsistence, fishermen is also well documented and beyond dispute. The Indians caught fish and traded them for goods available to them from the European market. They were employed by the American Fur Co. to catch fish. Indians operated their own commercial outfits and sold their catch to the American Fur Co. as well.

471 F. Supp. at 256–57. As the Court held in *United States v. Michigan,* the scope of the treaty fishing rights "is defined by the character of Indian fishing at the time of the treaty." *Id.* at 259. At the time of the treaty, it is clear that "fishing activity" included not only the catching of fish for commercial purposes, but also the trading and selling of fish. The Jensens' activity falls squarely within the description of the commercial fishery in *United States v. Michigan.*

Second, by definition, commercial fishing activity requires the buying and selling of fish, activities which are not limited to "in or on the water or ice." As defined in the 2000 Consent Decree, § II(D) (p. 1), "'Commercial fishing' means a fishing activity engaged in for the purpose of sale of fish or parts of fish." (Emphasis added). In contrast, "'Subsistence fishing' means a Treaty fishing activity solely to provide fish for personal or family consumption and not for sale or exchange, […]". *Id.* at § II(W) (p. 1) (emphasis added). In other words, it is the very transaction of sale or exchange that distinguishes commercial fishing activity from subsistence fishing activity. The Jensens' actions, in buying and selling the treaty fishery resource, again fall squarely within the definition of commercial fishing activity.

Moreover, the 2000 Consent Decree clearly reserves to the Tribes the right to regulate commercial fishing activity that takes place off the water. Section VI(A)(5) (p. 19) states (with emphasis added):

> The Tribal Code shall include the following license regulations:
>
> "License and Registration Definitions and Restrictions:
> "(a) A commercial fishing captain license entitles the holder to operate a fishing boat and to participate fully in all commercial fishing activities, including the capture and sale of all species pursuant to these Regulations. It further entitles the holder to employ helpers in such activities. […]"

Similarly, §§ VIII(C)(2)(a) and (b) (p. 43) of the 2000 Consent Decree prohibit certain fish species from being "targeted for harvest or offered for sale or exchange when taken as bycatch during commercial fishing activities." (Emphasis added). These provisions make clear that the activity covered by the 2000 Consent Decree includes the sale or exchange of the fishery resource, not just the catching of fish for commercial purposes.

Third, the State's apparent reliance on the CORA Fishing Regulations is also misplaced. It is correct that the CORA Fishing Regulations define "fishing activities." However, that definition section, standing by itself, is not mandatory, prohibitory or indeed much of anything else except a defined term in a section of a set of regulations. It does not purport to speak to jurisdiction of the Tribe to regulate and/or punish its members. As explained above, at the time of the Jensens' activities, their act of buying and selling subsistence fish was not prohibited by the Tribe. However, now such activity is prohibited. If that regulation were in place before the Jensens activities occurred, the Tribe doubts there would be any suggestion that the State could take action to prosecute the Jensens.

Section III(d) of the CORA Fishing Regulations adopt the same definition of "Commercial fishing" as the 2000 Consent Decree. ("'Commercial fishing' means a fishing activity engaged in for the purpose of sale of fish or parts of fish.") Like the 2000 Consent

Decree, the CORA Fishing Regulations describe "tribal commercial fishing" much more broadly than activity occurring in or on the water or ice. For instance:

- Section XIII(f) and (g) restricts the "possession" or "retention" of walleye caught commercially, and prohibits the sale of undersized walleye.

- Section XIX(e) states (with emphasis added) that "[s]ubsistence fishers shall not sell or otherwise exchange for value any of the catch."
- Section XX(a) of the CORA Fishing Regulations, which is identical to Section VI(A)(5) of the Consent Decree, demonstrates that commercial fishing activity includes the sale of the fishery resource: "A commercial fishing license entitles the holder to operate a fishing boat and to participate fully in all commercial fishing activities, including the capture and sale of all species pursuant to these Regulations." (Emphasis added).

- Section XXVI(e) provides that "[a]ll traps, nets and other equipment, vessels, snowmobiles, vehicles, and other means of transportation used to aid in the taking, possessing, selling, purchasing, offering for sale or purchase, transporting, delivery, receiving carrying, shipping, exporting, or importing any fish, eggs, or parts of fish in violation of these Regulations shall be subject to seizure and may be forfeited by the appropriate tribal court." (Emphasis added).

Clearly, the conduct being regulated in these provisions is not simply conduct related to fishing activity "in or on the water or ice."

Like the 2000 Consent Decree, the CORA Fishing Regulations, at § XXVI(a), state that the Tribe has exclusive jurisdiction over violations by tribal members:

> Jurisdiction to enforce these Regulations upon members of each Tribe is vested exclusively in the tribal court of that Tribe.

(Emphasis added). Because the Regulations clearly include within commercial fishing activity the buying and selling of the fishery resource, and because the Jensens are tribal members, the Sault Tribe Tribal Court has exclusive jurisdiction over the Jensens' activities in this case.

The State's position is also untenable from a practical and a policy standpoint. First, if the assumptions articulated in Mr. Parks' letter are correct, persons like the Jensens would be subject to tribal regulations under some circumstances, but would be treated as non-Indians

under other circumstances, such as the circumstances at issue herein. Such a result is untenable from the Tribe's perspective. It does no good for either the Tribe or the MDNR to be required to debate each time there is an alleged violation of State and/or tribal regulations regarding whether the Indian offender is to be treated as a tribal member versus being treated as a non-Indian. Take, for example, the use of gill nets. Clearly, such activity is prohibited under State law, but permitted under tribal law. No one would suggest that simply because the Tribe has not proceeded against a member for fishing with gill nets that the State is free to prosecute that same member under State law.

Second, as you know, the whole thrust of the *United States v. Michigan* litigation in one way or another dealt with the buying and selling of fish. Indeed, the very subject of the treaty right is the fishery resource, which the Jensens were buying and selling. Your assumption that the Jensens' activities are not "fishing activities" within the meaning of the CORA Fishing Regulations reflects an overly narrow reading of the term fishing activities, which is in conflict with the history and context of the *United States v. Michigan* litigation. As a practical matter, it simply does not make sense for the buying and selling of fish to be somehow deemed not to be a "fishing activity." And, as described above, this position is not supported by the language of the 2000 Consent Decree or the CORA Fishing Regulations.

Third, and most importantly, it is simply not good public policy to create a system whereby two separate sovereigns are debating on an incident by incident basis which sovereign has jurisdiction over Indian members/fishers.

As you know, at the time the Jensens purchased fish from the Schwartzes, such activity was not prohibited under the Tribe's fishing regulations. Thus, the tribal fishing regulations prohibited subsistence fishermen like the Schwartzes from selling fish they caught pursuant to their subsistence licenses.[2] However, the conduct of the Jensens was not a violation of tribal regulations at the time they purchased treaty caught fish from the Schwartzes and sold the fish to a State licensed wholesaler in Escanaba. To correct that gap in the Tribe's regulations, the Tribe adopted Resolution 2010-40, in February, 2010, which provides that "[n]o member shall sell or offer for sale any species of fish harvested under a subsistence license." Sault Tribe Treaty Fishing Regulations, § 20.107(1)(b). Obviously, the gap closed by the Tribe by enacting the new provision could not be applied after the fact to the Jensens. The passage of Resolution 2010-40 was an exercise of the Tribe's jurisdiction to control and regulate activities of its members that relates to the subject of the Treaty right, which of course, is the fishery itself. Whether the Tribe had prohibited the particular conduct of the Jensens at the time of their activities, of course, does not determine whether the Tribe has and had jurisdiction over the Jensens to regulate their conduct as it relates to the fishery resource.

[2] "No member possessing a subsistence fishing license shall sell, offer to sell, or exchange (barter) fish or fish parts." Sault Tribe Treaty Fishing Regulations, § 20.107(g).

B. The Provision of the 2000 Consent Decree Involved

As cited previously, § XVII(A) of the 2000 Consent Decree (p. 60), with regard to jurisdiction and enforcement, states that:

> [T]he courts of the Tribes shall have exclusive jurisdiction over enforcement of the Tribal laws or regulations governing the fishing activities of Tribal members in the 1836 Treaty waters. The State shall not enforce its fishing laws and regulations against Tribal members engaged in fishing activity within the 1836 Treaty waters.

The Tribe believes that it has exclusive jurisdiction over the Jensens under this provision.

C. Suggested Resolution of the Problem

The Tribe respectfully urges that the State take action to ensure that the charges currently pending against the Jensens in Delta County are dropped for the reasons set forth in this letter. In the event that you continue to insist that the State has jurisdiction over the Jensens, the Tribe respectfully requests that the proceedings against the Jensens be stayed until after the dispute resolution mechanisms under the 2000 Consent Decree are exhausted.

As you know, § XIX of the 2000 Consent Decree sets forth the procedures for Dispute Resolution. We sincerely hope that this dispute can be resolved informally, and that the State will recognize the Tribe's exclusive jurisdiction over the Jensens and, accordingly, drop the pending State charges.

We look forward to receiving your response within ten days of receipt of this letter, as required under the 2000 Consent Decree, § XIX(A)(3) (p. 65). As you likely know, if correspondence does not resolve the dispute, the parties must meet within 15 days of your response to attempt to resolve the matter. *See* 2000 Consent Decree, § XIX(A)(4) (p.66).

If we are unable to resolve the disagreement through informal negotiations, the Consent Decree also provides for the parties to participate in mediation, and/or to go before the Federal District Court. As the Tribe has expressed to you in this letter and in our previous communications with the State, the subject of its jurisdiction is of central significance and importance to the Tribe, as well as the smooth operation of the exercise of each party's jurisdiction over its members and their activities. The Tribe therefore intends to pursue this matter to the fullest extent necessary to protect its treaty rights.

LAW OFFICES OF
BRUCE R. GREENE
& ASSOCIATES, LLC

Thank you for your consideration of the Tribe's position, as set forth in this letter.

Very truly yours,

Bruce R. Greene
Stephanie Zehren

Cc: Members, Sault Tribe Board of Directors
Thomas L. Dorwin, General Counsel
Steven C. Parks, Delta County Prosecutor
Jeffrey Parker, Chairman, Bay Mills Indian Community
Derek J. Bailey, Chairman, Grand Traverse Band of Ottawa & Chippewa Indians
Larry Romanelli, Tribal Ogema, Little River Band of Ottawa Indians
Ken Harrington, Chairman, Little Traverse Bay Band of Odawa Indians
Jane A. TenEyck, Executive Director, Chippewa Ottawa Resource Authority
Thomas Gorenflo, Chairman, C.O.R.A. Biological Services Division
Rodney Stokes, Director, Michigan Department of Natural Resources
Dennis Knapp, Tribal Coordinator, Michigan Department of Natural Resources
Kelley Smith, Fisheries Chief, Michigan Department of Natural Resources
Hon. Kenneth Salazar, Secretary, U.S. Department of the Interior
Diane Rosen, Midwest Regional Director, Bureau of Indian Affairs
Tom O. Melius, Region III Director, U.S. Fish & Wildlife Service
Jeffrey Davis, Assistant United States Attorney
Daniel T. Green
William Rastetter
James Bransky
Kathryn Tierney

STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL

BILL SCHUETTE
ATTORNEY GENERAL

P.O. Box 30755
LANSING, MICHIGAN 48909

February 14, 2011

Mr. Bruce R. Greene
Law Office of Bruce R. Green & Associates, LLC
1500 Tamarack Avenue
Boulder, CO 80304

Re: Sault Ste. Marie Tribe of Chippewa Indians (Sault Tribe) notice of dispute resolution concerning prosecution by State of Wade and Troy Jensen

Dear Mr. Greene:

Please accept this as the State of Michigan's response to your letter of January 28, 2011 invoking dispute resolution under Section XIX of the 2000 Consent Decree. Thank you again for agreeing that this response could be sent on February 14, 2011.

The State does not agree that it does not have jurisdiction to prosecute Wade and Troy Jensen for violations of the State's commercial fishing laws, even though the Jensens are members of the Sault Tribe.[1] As you note in your letter, the Consent Decree defines when the State can and cannot enforce its fishing laws when Tribal members are involved. Section XVII. A. of the Consent Decree states in relevant part: "The State shall not enforce its fishing laws and regulations against Tribal members engaged in ***fishing activity*** within the 1836 Treaty waters." (emphasis added) There is no dispute here that the Jensens are Tribal members. There is also no dispute that they were not charged with any activity that directly involved the taking of fish from the 1836 Treaty waters (they were charged with an unlawful conspiracy to purchase and/or sell fish, not harvesting fish from the Treaty waters). Thus, a logical reading of the Consent Decree supports the State's authority to prosecute the Jensens under the circumstances of this case.

The State's interpretation and application of the Consent Decree here is confirmed by the Tribal Code which was adopted by the Chippewa Ottawa Resource Authority (CORA) pursuant to its authority and responsibility to adopt fishing regulations as set forth in the Consent Decree, Section VI. 2. While the Consent Decree itself does not define the phrase "fishing activity" as used in the jurisdictional provision that is at issue here, Tribal Code Section III(I) includes the following definition:

[1] The State's participation in the dispute resolution process is not in any way intended to be a waiver of the State's right to prosecute the Jensens for violating the State's fishing laws and regulations.

> "Fishing" or "fishing activity" means fishing for, catching, or taking any species of fish, or attempting to fish for, catch, or take any species of fish from 1836 Treaty waters, including all related activities which occur in or on the water or ice, until such time as the vessel or vehicle is moored, tied up, or grounded.

Since the Jensens unlawful conduct did not occur on the water or ice, it would not be considered "fishing activity" under this definition. I understand your position that this definition does not expressly speak to the jurisdiction of the Tribe or the State to regulate activities of Tribal members, but that is generally true of all definitional provisions of agreements, statutes and regulations. General definitions are applicable throughout the relevant document(s) wherever and in whatever context the defined term is employed.

While the Tribal Code does not purport to change the language of the Consent Decree, it clearly is intended to implement the Consent Decree (Tribal Code Section II), and in fact incorporates numerous definitions directly from the Consent Decree. A good example is the definition of "Commercial fishing" adopted by the Tribal Code (Section III(d)) and which is identical to the definition in the Consent Decree (Section II. D.). This definition reads in both documents: "'Commercial fishing' means a ***fishing activity*** engaged in for the purpose of sale of fish or parts of fish." (emphasis added). The Tribal Code specifically states that, unless otherwise "noted," its listed definitional provisions "are from the Decree. . ." Tribal Code Section III. The definition of Commercial fishing has no notation suggesting that it does not come from the Decree. Since the phrase "fishing activity" is found in both definitions, it would be difficult to argue that the Tribal Code did not intend to interpret the phrase "fishing activity" from the Consent Decree when it defined it in its own definitional section. When that same phrase is then used in Section XVII of the Consent Decree to establish jurisdiction of the State and Tribes, it is a stretch to ask the State to now ignore how the Tribes themselves have interpreted the phrase "fishing activity" as it is used both in the Tribal Code and in other sections of the Consent Decree. It does not seem likely that the phrase "fishing activity" would have a definition in the jurisdiction section of the Consent Decree different from its definition when used to define the phrase "Commercial fishing." It is therefore reasonable to conclude that the exclusive jurisdiction of the Tribe to enforce its regulations is limited to fishing activities on the water or ice.

This interpretation was further confirmed when the State was copied on a letter from the Tribal Prosecutor to the Assistant U.S. Attorney (dated August 4, 2009) that stated:

> After a thorough legal and factual review of the matter, the Board of Directors for the Sault Ste. Marie Tribe of Chippewa Indians concluded that the activity that Wade and Troy Jensen engaged in may not be treaty-related, and thus the Tribe has no recourse in pursuing the Jensens. However, we can and will pursue the activity of the subsistence fishermen in our Tribal Court.

> Based upon the above, whatever enforcement the United States Attorney can pursue would not seem to violate the 2000 Consent Decree's exclusive enforcement provision.

For reasons that have not been explained, it appears that the Tribe has changed its position and is now claiming, through your letter, that it does possess exclusive jurisdiction to prosecute the Jensens for their unlawful conduct. We respectfully suggest that the Tribe's initial analysis was consistent with the language of the Consent Decree and the Tribal Code and that it does not have exclusive jurisdiction to prosecute the Jensens.

While it is true, as you suggest, that there are a couple of examples of regulations in the Tribal Code that appear to prohibit or regulate the sale of fish, we do not believe these provisions are a recognition of an exclusive right by the Tribe to prosecute illegal sales of fish, and even if there was such an intention, it would not be enforceable since it would conflict with the enforcement provisions of the Consent Decree, which control in the event of a conflict. Consent Decree, Section I. Moreover, at least one example you identify in your letter is internally inconsistent. Section XX(a) of the Tribal Code pertains to a commercial fishing license which "entitles the holder to operate a fishing boat and to participate fully in all commercial fishing activities, including the capture and sale of all species pursuant to these Regulations." While this at first blush appears to regulate the sale of fish, this would be inconsistent with the definition of "fishing activities" that governs the meaning of the use of that phrase in the Code. Since "fishing activities" clearly involve only activities that occur on the water or ice, the "sale" of species is not logically "include[ed]" in the activities nominally authorized by this section of the Tribal Code.

Likewise, the provision that seems to prohibit the sale of undersized walleye appears to be more of an afterthought than part of a scheme to regulate the retail and wholesale selling of fish caught by Tribally licensed fishers. If the Tribal Code were intended as such a regulatory vehicle, there would surely be more regulations directed to the buying and selling of the harvested fish. It does not make sense to impute an intent to regulate buying and selling activities of Tribal members from these isolated references to the sale of fish taken on a commercial license, particularly where they conflict with the clear intent of the Tribal Code to pertain to fishing activities as it defines them – activities that end when the boat reaches the dock.

I understand your concern for creating a situation where the State and the Tribe are "debating on an incident by incident basis" who has jurisdiction. I submit however, that abiding by the definition of "fishing activity" set out in the Tribal Code provides a bright line for both sides to follow when enforcing fishing laws and regulations. It would seem that the Tribe's current position would require law enforcement officers to interpret the words of Judge Fox when determining whether or not certain conduct which has not occurred on the water or ice, but is somehow related to such activity, is enforceable under State or Tribal law. We do not want to put any law enforcement officer in such a position and believe that the State's interpretation of the Consent Decree brings the clarity necessary to guide such enforcement activities.

For these reasons, the State respectfully disagrees with your position, and will not drop the prosecution of the Jensens as you request.[2] Of course, the State will be glad to meet to discuss this matter as required by the Consent Decree. Please feel free to contact me at your convenience to make arrangements for such a meeting.

Very truly yours,

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[2] The State does not intend this initial response to be an exhaustive list of the grounds supporting its stated position. It reserves the right to raise other grounds in the event this dispute is not resolved informally.