UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES, et al. Plaintiff, v. STATE OF MICHIGAN, et al. Defendant.	Case No. 2:73 CV 26 HONORABLE PAUL L. MALONEY **EXPEDITED CONSIDERATION REQUESTED** **ORAL ARGUMENT REQUESTED**[1]

MEMORANDUM IN SUPPORT OF MOTION FOR RELIEF PURSUANT TO THIS COURT'S CONTINUING JURISDICTION

The Sault Ste. Marie Tribe of Chippewa Indians ("Sault Tribe" or "Tribe") has moved this Court for relief pursuant to this Court's continuing jurisdiction under its decision, judgment and decree in *United States v. Michigan*, 471 F. Supp. 192 (W.D. Mich. 1979), and under Section XXV of the Consent Decree entered into by the parties to the *United States v. Michigan* litigation on August 8, 2000 ("2000 Consent Decree").

At issue in this dispute is whether the Sault Tribe, as opposed to the State of Michigan, has jurisdiction to prosecute Troy Nestor Jensen and Wade William Jensen (the "Jensens"), who are Indian and enrolled 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. The Tribe maintains that, under

[1] The Tribe is requesting oral argument. However, for the reasons set forth in the Tribe's Motion for Expedited Consideration, the Tribe is willing to waive oral argument if a hearing cannot be scheduled before May 10.

United States v. Michigan and the 2000 Consent Decree, the activities of the Jensens are subject to the exclusive jurisdiction of the Tribe and its Tribal Court.

INTRODUCTION AND BACKGROUND

A. Facts and Procedural History

In 2009, an 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 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").

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. Last, but not least, their subsistence fishing licenses were revoked by the Tribe. The judgment of the tribal court was upheld by the Sault Tribe Court of Appeals.

The Jensens have not been charged with any violations of the CORA Fishing Regulations or the *Great Lakes and St. Mary's River Treaty Fishing Regulations, Sault Ste. Marie Tribe of Chippewa Indians Tribal Code, Chapter 20* ("Sault Tribe Treaty Fishing Regulations")[2] 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 activity that violated the Tribe's Treaty Fishing Regulations and/or the CORA Fishing Regulations. Twelve citations issued by the Tribe to the Jensens are presently pending before the Sault Tribe Tribal Court.

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.[3] In other words, the tribal regulations then in effect did not prohibit purchasing subsistence fish from a subsistence fisherman and then re-selling the fish. However, on February 23, 2010, the Sault Tribe Board of Directors adopted Resolution 2010-40 (Exhibit A), codified at § 20.107(1)(b) of the Sault Tribe Treaty Fishing Regulations, which amended Chapter 20 to provide that "[n]o member shall sell or offer for sale any species of fish harvested under a

[2] The Sault Tribe Treaty Fishing Regulations are available at: http://www.saulttribe.com/images/stories/government/tribalcode/chaptr20.pdf.

[3] Prior to the February 2010 amendments, the Sault Tribe Treaty Fishing Regulations did prohibit several activities that related to the incident at issue in this case, particularly to the conduct of the Schwartzes. *See e.g.:*

- § 20.104(1): "No licensee of the Tribe shall fish as an employee of or for shares with a person not licensed to exercise treaty fishing rights. This section shall be liberally interpreted to prohibit a licensee from exercising treaty rights for the benefit of non-Indian entrepreneurs."
- § 20.107(3)(g): "No member possessing a subsistence fishing license shall sell, offer to sell, or exchange (barter) fish or fish parts."
- § 20.107(3)(h): "Fish captured by subsistence fishers shall not be used for any purpose other than consumption by themselves or their families."

subsistence license." 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. (Exhibit B).

On December 16, 2010, the Tribe, through its undersigned legal counsel, sent a letter to Mr. Parks (Exhibit C) 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.[4]

Mr. Parks responded by letter dated December 20, 2010 (Exhibit D), in which he asserted that the actions of the Jensens did not fit within the definition of "fishing activity" under the CORA Fishing Regulations. "Fishing activity" is defined in § III(i) of the regulations as follows:

> (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.

[4] 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.

The term "fishing activity" is not defined in the 2000 Consent Decree. Section I of the 2000 Consent Decree provides that, "[i]n the event of a conflict, the provisions of this Decree shall control over the provisions of the CORA Charter, Tribal Plan, and Tribal Code."

By letter dated January 10, 2011 (Exhibit E), the Tribe's undersigned legal counsel 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 (Exhibit F), that he was "going forward with the prosecution of the Jensen brothers" notwithstanding the concerns raised by the Tribe.

On January 28, 2011, the Tribe's undersigned legal counsel sent a letter to Louis B. Reinwasser, Assistant Attorney General (Exhibit G), which again set forth the Tribe's position, and formally invoked the Dispute Resolution procedures under the 2000 Consent Decree.

The State responded on February 14, 2011 (Exhibit H).[5] The view of the State apparently is that the treaty right to harvest fish ends at the shore, and any activity on shore is not subject to tribal regulation. In other words, according to the State, the definition of "fishing activity" under the CORA Fishing Regulations in fact indirectly defines the jurisdiction of the Tribe to regulate and control the activities of its members. Under this theory, on shore activity, including the purchase and subsequent resale of treaty fish, renders the treaty tribe member subject to State prosecution.

The Sault Tribe and the State have met several times by teleconference – on February 22, March 11, and March 17, 2011 – in an effort to resolve this matter informally through good faith negotiations, as required by the dispute resolution provisions in the 2000 Consent Decree. The

[5] Under § XIX(A)(3) of the 2000 Consent Decree, the State had ten (10) days in which to respond to the Tribe's letter. However, the Tribe agreed to the State's request for additional time to respond.

other tribes that are signatories to the 2000 Consent Decree and the Assistant U.S. Attorney, Western District of Michigan, participated in those negotiations. Unfortunately, the negotiations were not successful. Based on the negotiations, and on the fact that the State is proceeding with its prosecution of the Jensens in State court in Delta County with a jury trial set for May 10, the Tribe determined that formal mediation would be futile, and is, accordingly, invoking the judicial resolution procedures at Section XIX(C) of the Consent Decree.[6]

The Tribe finds no basis for the State's on shore/off shore distinction in either *United States v. Michigan* or in the 2000 Consent Decree. Nor does the Tribe read the CORA Fishing Regulations to limit the Tribe's jurisdiction to off shore "fishing activity." The exercise of this Court's continuing jurisdiction is necessary because of the ongoing disagreement on the issue of jurisdiction over the Jensens, and because of the State's insistence not only to prosecute the Jensens, but to proceed with those prosecutions notwithstanding the filing of the instant motion, and notwithstanding this Court's deliberation regarding whether the Tribe or the State has exclusive jurisdiction in this matter.

B. This Court's Prior Proceedings in *United States v. Michigan* and the Consent Decrees

In order to understand the Tribe's position, it is necessary to begin with this Court's 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 1970s through the early 1980s,

[6] Under § XIX of the 2000 Consent Decree, which sets forth the dispute resolution procedures, the parties involved in the dispute and any other parties who desire to attend are required to meet at least once within fifteen days after the response by the recipient parties to attempt to resolve the matter by informal, good faith negotiations. 2000 Consent Decree, § XIX(A)(4). If the dispute is not resolved by informal negotiations, the parties may agree to attempt to resolve the matter by mediation. *Id.* at § XIX(B). "If the parties do not agree to resolve the matter by mediation, or if mediation attempts are unsuccessful, a party or parties may seek relief from the Court as provided by the Federal Rules of Civil Procedure and the Local Rules of the Western District of Michigan." *Id.* at § XIX(C)(1).

before he stepped down from the case. 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 treaty tribe members exercising the rights retained under the treaty. Ultimately, this 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.[7]

In concluding that the exercise of the treaty rights can only be regulated by the treaty tribes, and not the State of Michigan, this 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.

[7] In *United States v. Michigan*, 653 F.2d 277, 279 (6th Cir. 1981), the 6th Circuit held that the state may regulate tribal fishing if three conditions are met. "[A]ny … state regulations restricting Indian fishing rights under the 1836 treaty … (a) must be a necessary conservation measure, (b) must be the least restrictive alternative method available for preserving fisheries in the Great Lakes from irreparable harm, and (c) must not discriminatorily harm Indian fishing or favor other classes of fisherman." (Emphasis added). *Citing People v. LeBlanc*, 248 N.W.2d 199 (Mich. 1976). The State bears the burden of persuasion to show by clear and convincing evidence that State regulation of Indian fishing is necessary and that is highly probable that irreparable harm will occur in the absence of such regulation. "In the absence of such a showing, the state may not restrict Indian treaty fishing." 653 F.2d at 279. Moreover, since the 6th Circuit's opinion, the State has consistently declined to regulate the activities of treaty tribe fishers, instead opting to regulate its own State licensed fishers, while the tribes regulate member fishers.

United States v. Michigan, 471 F. Supp. at 266 (emphasis added). Later in the same opinion, this 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, this 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, this Court's 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, states:

> [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.

C. 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."

ARGUMENT

A. This Court Has Continuing Jurisdiction to Resolve This Dispute, Which Arises Under the 2000 Consent Decree Entered in *United States v. Michigan*.

It is well-established that this Court has continuing jurisdiction to implement and enforce its decrees. The Fox opinion states: "The court retains jurisdiction of this case for the life of this decree to take evidence, to make rulings and to issue such orders as may be just and proper upon the facts and law, and in the implementation of this decree." *United States v. Michigan*, 471 F. Supp. at 281. Likewise, Section XXV of the 2000 Consent Decree is entitled "Continuing

Jurisdiction" and states: "The Court shall retain continuing jurisdiction over this case for purposes of enforcing this Decree, the Tribal Plan, and the CORA Charter."

The Sixth Circuit Court of Appeals has repeatedly held that a district court has continuing jurisdiction to enforce and implement its decrees. "A district court has the jurisdiction to enforce consent decrees. Such decrees are settlement agreements subject to continued judicial policing." *Grand Traverse Band of Ottawa & Chippewa Indians v. Director, Mich. Dep't of Natural Resources*, 141 F.3d 635, 641 (6th Cir. 1998), *citing Vanguards of Cleveland v. City of Cleveland*, 23 F.3d 1013, 1017–18 (6th Cir. 1994) and *Williams v. Vukovich*, 720 F.2d 909, 920 (6th Cir. 1983) (internal quotations omitted). Judicial approval of a consent decree places the power and prestige of the court behind the agreement reached by the parties. *Williams*, 720 F.2d at 920.

"Once approved, the prospective provisions of the consent decree operate as an injunction." *Id.*, *citing Plummer v. Chemical Bank*, 668 F.2d 654, 659 (2d Cir. 1982). As stated by the Sixth Circuit in *Vanguards of Cleveland*:

> The injunctive quality of a consent decree compels the approving court to: (1) retain jurisdiction over the decree during the term of its existence, (2) protect the integrity of the decree with its contempt powers, and (3) modify the decree if changed circumstances subvert its intended purpose.

23 F.3d at 1017–18, *citing Williams*. Even if the consent decree does not expressly grant the district court jurisdiction to modify the decree (which is not the case here), it is well-settled that "courts retain the inherent power to enforce agreements entered into in settlement of litigation pending before them." *Sarabia v. Toledo Police Patrolman's Ass'n*, 601 F.2d 914, 917 (6th Cir. 1979) (*quoting Aro Corp. v. Allied Witan Co.*, 531 F.2d 1368, 1371 (6th Cir. 1976)).

Moreover, this Court has previously exercised its continuing jurisdiction in this case and under the consent decrees. *See e.g., United States v. Michigan*, 623 F.2d 488, 449 (6th Cir. 1980) (describing ruling of Judge Fox enjoining, under this Court's continuing jurisdiction, certain Michigan officials from interfering with Indian gill net fishing and enjoining certain Michigan state judges from proceeding any further in a state court action to determine the right of Indians to engage in gill net fishing in Grand Traverse Bay).

Accordingly, this Court has jurisdiction to entertain the Tribe's motion and to grant the relief sought by the Tribe.

B. The Activities of the Jensens are Subject to the Exclusive Jurisdiction of the Tribe and its Tribal Court.

At issue in this dispute is whether the Sault Tribe or the State has jurisdiction over the Jensens' conduct in purchasing fish from the Schwartzes and reselling it to Bay de Noc Fishery, notwithstanding the fact that at the time of the alleged purchase and sale of the fish, such conduct was not proscribed by the Sault Tribe Tribal Code and/or the CORA Fishing Regulations.[8]

The State appears to argue that the scope of the Tribe's jurisdiction over the Jensens is controlled by the definition of "fishing activity" that appears in § III(i) of the CORA Fishing Regulations, and, specifically, is limited only to activities that "occur in or on the water or ice".

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. The State's position simply is not supported by the law, as set forth in *United States v. Michigan,* the 2000 Consent Decree and the CORA Fishing Regulations.

[8] As previously mentioned, this loop hole in the Sault Tribe's regulations was closed after the Tribe realized that the conduct of the Jensens, at the time it occurred, was not proscribed conduct.

First, 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." 471 F. Supp. at 216. Included in this treaty right was the right to participate in a commercial fishery, which, of course, includes not only the right to harvest fish, but the right to buy and sell fish, as well. *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 the fishing rights reserved thereunder included not only the right to catch fish for commercial purposes, but also the right to trade and sell fish. The Jensens' activity falls squarely within the description of the commercial fishery in *United States v. Michigan*.

Second, the term "commercial fishing" subsumes the buying and selling of fish, activities which generally do not occur "in or on the water or ice." As previously noted, the 2000 Consent Decree does not define "fishing activity." However, "commercial fishing" is defined in the 2000 Consent Decree at § II(D) to mean "a fishing activity engaged in for the purpose of sale of fish or

parts of fish." (Emphasis added). In contrast, "'[s]ubsistence 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) (emphasis added). In other words, it is the very transaction of sale or exchange that distinguishes commercial fishing from subsistence fishing. The Jensens' actions, in buying and selling the treaty fishery resource, again fall squarely within the type of conduct that is regulated by the treaty tribes.

Moreover, the 2000 Consent Decree clearly reserves to the Tribes the right to regulate commercial fishing functions that take place off the water. Section VI(A)(5) 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) 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. Like many regulations, the CORA Fishing Regulations include a list of defined terms, including the definition of "fishing activity" that the State has hinged its argument on in asserting jurisdiction over the Jensens in the Delta County case. The defined terms, however, are not the

source of the regulation, nor do the defined terms – by themselves – regulate any activity. Defined terms are not regulatory in nature and do not mandate or prohibit any particular activity. To the contrary, one must look to the actual provisions of the regulations in order to understand what activity is regulated, and how. One refers back to the defined terms when a defined term is used in a subsequent, substantive regulation. Put another way, defined terms do not mandate any action or regulate any activity because they are not substantive regulations – they are simply defined terms; tools we use to interpret and decipher substantive regulations. In sum, the State must be able to point to some provision in the substantive regulations that compels the conclusion that it (the State) has jurisdiction over the Jensens in the circumstances presented by this case. It is far too simplistic to suggest that the matter in dispute can be resolved by reference to a non-substantive, defined term.

Most importantly, the defined term 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' conduct, 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' conduct occurred, the Tribe doubts there would be any suggestion that the State could take action to prosecute the Jensens.

Here, the substantive provisions of the CORA Fishing Regulations make clear that the conduct being regulated is not simply conduct related to fishing activity "in or on the water or ice" and that tribal jurisdiction is not intended to be limited to "fishing activity," as defined in the definitional section. 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." (Emphasis added).

- 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).

It is clear that these CORA regulations pertain to the purchase and sale of treaty fish, and that the substantive provisions are not tied in any manner to the on shore/off shore distinction referred to in the defined term of "fishing activity," and relied on so heavily by the State in support of its argument.

Moreover, even the other defined terms in the CORA Fishing Regulations undercut the State's argument. 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.

As in 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' conduct in this case.

The State's position is also unworkable from a practical and a policy standpoint. If the assumptions articulated by the State 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. 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.

The State appears to rely heavily on the notion that the Jensens' conduct will go unpunished unless the Delta County prosecutor can file criminal charges against them. Simply because the conduct of the Jensens was not violative of the tribal regulations at the time the alleged activities occurred does not somehow vest the State with jurisdiction. Take, for example, the use of gill nets. Clearly, such activity is prohibited under State law, but not prohibited under tribal law. No one would suggest that simply because the Tribe does not prohibit members fishing with gill nets that the State is free to prosecute that same member under State law because such activity is prohibited under State law.

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. The assertion that the Jensens' activities are not "fishing activity" within the meaning of the CORA Fishing Regulations reflects an overly narrow reading of the term fishing activity, which is in conflict with the history and context of the *United States v. Michigan* litigation, and is inconsistent with the substantive regulations of CORA, which address the buying and selling of fish without reference to the on shore/off shore distinction. 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.

As previously stated, 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.[9] 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 resource 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

[9] "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).

over the Jensens to regulate their conduct as it relates to the fishery resource. Indeed, as the Court of Appeals noted in one of its prior decisions in this case, *United States v. Michigan,* 623 F.2d 448, 450 (W.D. Mich. 1980), the question of whether the State may exercise jurisdiction "may depend in part on the existence of viable tribal councils capable of enforcement." The fact that the Sault Tribe has now issued regulations that directly address the conduct at issue is relevant in determining whether the State or the Tribe has exclusive jurisdiction.

RELIEF REQUESTED

The Sault Tribe seeks an Order from this Court declaring that the Tribe has exclusive jurisdiction over tribal members, including the Jensens, for their conduct at issue herein as it relates to the fishery resource, notwithstanding that the Tribe's regulations did not prohibit the buying and selling of treaty subsistence fish at the time. As discussed earlier in this memorandum brief, the provisions of the 2000 Consent Decree, once adopted and approved by the Court, "operate as an injunction." *Williams,* 720 F.2d at 920. Thus, the Court's ruling on the Tribe's motion would bind the State of Michigan, and all of its agents and employees, including the Delta County Prosecutor. *See Grand Traverse Band of Ottawa and Chippewa Indians v. Michigan Dep't of Natural Res., et al.,* 141 F.3d 635, 641–42 (6th Cir. 1998) ("it is well settled that third parties who interfere with a court order may be enjoined from doing so" and that even citizens of the State which was a party to the prior proceedings are bound by the decision) (internal citations omitted).

CONCLUSION

For the reasons stated herein, the Tribe respectfully requests that its Motion for Relief be granted and that the Court declare that the Tribe has exclusive jurisdiction over tribal members, including the Jensens, for their conduct herein as it relates to the fishery resource.

Respectfully submitted this 14th day of April, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on April 14, 2011, I electronically filed the foregoing document with the Clerk of the Court using the ECF system which will send notification of such filing to counsel of record. I hereby certify that I have also sent a true and correct copy of the foregoing document by United States Postal Service and, where an electronic mail address was available, by electronic mail, to the following individuals in accordance with Section XIV(C) of the 2000 Consent Decree:

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