

STATE OF MICHIGAN
DISTRICT COURT FOR THE 94th JUDICIAL DISTRICT
DELTA COUNTY

STATE OF MICHIGAN,
Plaintiff,

v

JOHN HALVERSON,
Defendant,
TROY JENSEN,
Defendant,
WADE JENSEN,
Defendant.

CASE NO: 10-738-SM

CASE NO: 10-737-SM

CASE NO: 10-736-SM

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**SUPPLEMENTAL BRIEF IN SUPPORT OF THE JENSEN DEFENDANT'S
MOTION TO DISMISS, AND TO MODIFY THE RELIEF SOUGHT UNDER THEIR
ORIGINAL MOTION**

Whether this Court has subject matter jurisdiction over the criminal charges against the Jensen defendants hinges upon application of the ruling in *United States v. Michigan*, 471 F. Supp. 192 (W.D. Mich. 1979), known as the "Fox opinion" (after the presiding judge in that case, the Honorable Noel P. Fox), and the consent decrees that were entered into in 1985 and 2000 to effectuate the Fox opinion. The court in *United States v. Michigan* retained continuing

jurisdiction of that 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.” *Id.* at 281.

On February 24, 2011 the Jensen defendants, *in pro per*, filed a Motion to Dismiss based on the exclusive jurisdiction of the Sault Ste. Marie Tribe of Chippewa Indians. The record does not reflect whether this Court has ruled on the Motion. On April 14, 2011, at 4:00 p.m. present Counsel for the Jensen defendants filed a Motion to Dismiss based on the exclusive jurisdiction of the Sault Ste. Marie Tribe of Chippewa Indians and additional jurisdictional arguments. The Motion to Dismiss has been scheduled for a hearing on April 21, 2011 at 1:00 p.m.

On April 14, 2011 at 7:00 p.m. the Sault Ste. Marie Tribe of Chippewa Indians (“Sault Tribe” or “Tribe”) invoked the federal court’s continuing jurisdiction in *United States v. Michigan* to determine whether the pending criminal prosecution of the Jensen defendants in this Court violates the ruling in *United States v. Michigan* and the 2000 Consent Decree implementing that ruling.

On April 15, 2011, Jensen filed a Motion for the District Court to take Judicial Notice of Pending Federal Motion by the Sault Ste. Marie Tribe of Chippewa Indians Asserting that the Tribe has Exclusive Jurisdiction under the Consent Decree entered in *U.S. v. Michigan*, Case No. 2:73 CV 26, along with the Motion and Exhibits filed by the Sault Ste. Marie Tribe on April 14, 2011.

In light of the pending proceeding in *United States v. Michigan*, the Jensen defendants seek leave to supplement the legal arguments in support of their motion to dismiss, and in addition, request alternatively that this Court stay this action pending the federal court’s

resolution of the pending enforcement motion filed by the Sault Tribe in *United States v. Michigan*.

I. The 2000 Consent Decree is a binding contract and this Court should enforce its express provisions which grant the federal District Court for the State of Michigan continuing jurisdiction to enforce the contract

A consent decree is "[a] court decree that all parties agree to." *Black's Law Dictionary* 441 (8th ed. 2004). Consent decrees and judgments are binding contracts. *Brown v. Neeb*, 644 F.2d 551, 557 12 (6th Cir. 1981). Thus the interpretation and application of a consent decree or judgment presents a question of contract interpretation. *Huguley v. General Motors Corp.*, 67 F.3d 132 (6th Cir. 1995). The ruling in *United States v. Michigan* is implemented through a 2000 Consent Decree between the State of Michigan, the federal government, the Sault Ste. Marie Tribe and four other Michigan tribes. Because the Consent Decree was formed in the State of Michigan, it is interpreted under Michigan law. *Sawyer v. Arum*, 690 F.2d 590, 593 (6th Cir. 1982). Under Michigan law, "the primary goal in the construction or interpretation of any contract is to honor the intent of the parties." *Rasheed v. Chrysler Corp.*, 445 Mich. 109, 517 N.W.2d 19, 29 n.28 (Mich. 1994). The Court "must look for the intent of the parties in the words used in the instrument." *Michigan Chandelier Co. v. Morse*, 297 Mich. 41, 297 N.W. 64, 67 (Mich. 1941).

In *United States v. Michigan*, 471 F. Supp. 192 (W.D. Mich. 1979), the federal court upheld the treaty tribes' fishing rights and the tribes' exclusive sovereign power to regulate the fishing activities of their own tribal members. After years of costly litigation and the expiration of the 1985 Consent Decree, the 2000 Consent Decree was the product of many compromises on all sides to reach agreement on the best ways for managing the fishery resources. In resolving their differences, the parties expressed an explicit and unequivocal understanding that the Tribes

possessed *exclusive* jurisdiction, that is, *to the exclusion of State jurisdiction*, to regulate the fishing activities of their own tribal members. Specifically, in regards to jurisdiction and enforcement, the 2000 Consent Decree states in relevant part at § XVII, p. 60:

“[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 members engaged in fishing activity within the 1836 Treaty waters.” (emphasis added).

With the pending prosecution of the Jensen defendants under state law, the State of Michigan has not lived-up to its side of the bargain.

At issue in this case is whether the Jensens' conduct of buying fish from a subsistence tribal fisherman and re-selling those fish to Bay de Noc fisheries constitutes "fishing activity" covered under the above provision of the Consent Decree. This is a matter of contract interpretation for the federal court in *United States v. Michigan* because that court expressly retained continuing jurisdiction “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.

The enforcement motion filed by the Sault Tribe in *United States v. Michigan* seeks a court ruling that the Sault Tribe has exclusive jurisdiction over the fishing activities of its tribal members, including the activities of the Jensen defendants, which the State is here seeking to prosecute. As explained in the Tribe’s *Memorandum in Support of Motion for Relief Pursuant to this Court’s Continuing Jurisdiction* (Doc. 1820), at 11-18, if the federal court determines that the activities of the Jensen defendants constitutes “fishing activity” under the express terms of the 2000 Consent Decree, the ruling will be binding on the State of Michigan and all its agents and employees, including the Delta County Prosecutor in this action.

II. Jensen has a interest in establishing the Sault Ste. Marie Tribe of Chippewa Indians' exclusive jurisdiction to avoid the probability of dual prosecution by the State and the Sault Ste. Marie Tribe of Chippewa Indians.

The origin of the Sault Ste. Marie Tribe's exclusive jurisdiction is based on the recognition of the origins of tribal sovereignty. The sovereign nature of Indian tribes and their consequent judicial authority has been recognized by the Supreme Court in the Marshall Trilogy of *Johnson v. Macintosh*, 21 US (8 Wheat.) 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) (1831); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832) all the way to the present day conception of Tribal Sovereignty by recent Supreme Court decisions identifying inherent tribal sovereign status as the basis for tribal exclusive jurisdiction. *Montana v. United States*, 550 U.S. 544 (1981).

Indeed, the view of Sault Ste. Marie Tribe having exclusive jurisdiction in this matter is consistent with current Supreme Court conceptions of inherent tribal sovereignty. In *Montana v. United States*, supra, the Court held that at least where there was no showing that tribal interests were affected, a tribal lacked inherent power to regulate hunting and fishing by non-Indians; however, the Court recited that the Tribe retained power to protect self-government. And to control "internal relations", which the Court described narrowly as including "the power to punish tribal offenders...to determine tribal membership, to regulate domestic relations among members." At 564. *Montana* announced an exception to the general rule that a tribe has governmental power over its territory, and for purposes of Jensen's argument, this territory includes off-reservation fishing recognized by *U.S. v. Michigan*, unless a treaty or statute takes it away. Precisely the opposite has occurred here in the development of the Fox Opinion on 1979 and the subsequent *U.S. v. Michigan* appeals with the promulgation of federal regulations recognizing the jurisdiction of tribes to regulate off-reservation fishing. Sault Ste. Marie's

inherent power based on original tribal sovereignty is a condition precedent for the exercise of exclusive tribal jurisdiction and Mr. Jensen has a fundamental interest in assuring Sault Ste. Marie has exclusive jurisdiction to avoid potential duplicative prosecution by both the State and the Sault Ste. Marie Tribe. If Mr. Jensen prevails in his exclusive jurisdiction argument, then the State cannot prosecute him for acts given rise to the alleged violation of law. In the similar situation of *Duro v. Reina*, 495 US 676 (1990), the Supreme Court held that the retained sovereignty of an Indian tribe did not include criminal jurisdiction over non-member Indians on its reservation. Congress over-ruled the court by defining tribal powers of self-government to include "the inherent power of Indian tribes hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians." 25 U.S.C.A. § 1301(2). This legislation raised the question whether Congress, by so acting, had conferred powers on the Tribe to punish non-member Indians, or whether Congress had merely recognized inherent tribal power to assert such jurisdiction. The question was settled by the Supreme Court in *U.S. v. Lara*, 541 U.S. 193, 210 (2004), holding that the Tribe's prosecution of a non-member Indian after enactment of the legislation was an exercise of the tribe's inherent sovereign power, accordingly, the prosecution was not a violation of the double jeopardy provision of the U.S. Constitution, since the prosecutions were by separate sovereigns, both the federal government and tribal government. *Lara* set forth examples of congressional actions creating or expanding tribal sovereignty. *Lara* referred to congressional actions and recognitions of tribes, as well as the restoration of terminated tribes. In the same manner, the development of off-reservation treaty-fishing under the *U.S. v. Michigan* line of cases and the implementing Consent Decree, CORA regulations, and federal regulations, have recognized and reinstated the exclusive tribal jurisdiction of the Sault Ste. Marie Tribe to prosecute Jensen's alleged fishing offense.

III. The United States District Court, Western District of Michigan, has continuing jurisdiction to enforce and interpret the provisions of the 2000 Consent Decree and therefore this Court should dismiss or stay this case under recognized principles of comity.

The Sixth Circuit Court of Appeals has repeatedly held that district courts have continuing jurisdiction to enforce and implement their 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).

Consistent with the federal court's express retention of continuing jurisdiction in *United States v. Michigan*, 471 F. Supp. at 281, the parties' 2000 Consent Decree states in relevant part at § XXV p. 72:

"The Court shall retain continuing jurisdiction over this case for purposes of enforcing this Decree, the Tribal Plan, and the CORA Charter." (emphasis added).

The former Chief Judge who entered the 2000 Consent Decree, the Honorable Richard Enslen, is no longer presiding over the case; the case has now been assigned to the Honorable Paul L. Maloney. With the pending motion filed by the Sault Ste. Marie Tribe of Chippewa Indians in *United States v. Michigan* to enforce the 2000 Consent Decree, the issue of whether the conduct

in question here is "fishing activity" is a matter of contract interpretation by Judge Malony. If this Court does not grant the Jensen defendants' motion to dismiss for lack of subject matter jurisdiction, the Court should in the alternative stay this action under generally recognized principles of comity and in the interests of judicial economy. *See Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 586 (1999) ("Most essentially, federal and state courts are complementary systems for administering justice in our Nation. Cooperation and comity, not competition and conflict, are essential to the federal design.").

CONCLUSION

The Jensens are both licensed Sault Ste. Marie tribal commercial fisherman, regulated by the exclusive jurisdiction of the Sault Ste. Marie Tribe under the ruling in *U.S. v. Michigan*, the 2000 Consent Decree, and the CORA regulations. The Sault Ste. Marie Tribe of Chippewa Indians has filed a Motion for Relief in the United States District Court, Western District of Michigan, to decide whether the activities of the Jensen defendants at issue in this case constitute "fishing activity" under the 2000 Consent Decree. Accordingly, this court should immediately dismiss this case for lack of subject matter jurisdiction, or in the alternative, stay these proceedings in deference to federal court under generally recognized principles of comity and to avoid duplicative litigation.

RESPECTFULLY SUBMITTED,



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