UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

and

BAY MILLS INDIAN COMMUNITY, SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS, GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS, LITTLE RIVER BAND OF OTTAWA INDIANS, and LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS,

Intervening Plaintiffs,

v

STATE OF MICHIGAN, et al,

Defendants.

File No. 2:73-cv-26

Hon. Paul L. Maloney

STATE OF MICHIGAN'S RESPONSE TO MOTION FOR RELIEF PURSUANT TO THIS COURTS CONTINUING JURISDICTION

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Dated: April 25, 2011

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INTRODUCTION AND SUMMARY OF ARGUMENT

This dispute arises under the provisions of a Consent Decree executed by five Michigan Indian Tribes,[1] the State of Michigan (State) and the United States, that was entered by the Court in 2000 (2000 Consent Decree, Docket #1458) and which resolved a long running dispute between the State and the Five Tribes over the Tribes' treaty rights to harvest fish from certain areas of the Great Lakes that are not in Indian country (Treaty Waters).[2] The 2000 Consent Decree specifically addresses the issue now before the Court: when does the State have authority to enforce its fishing regulations against members of the Sault Ste. Marie Tribe of Chippewa Indians (Sault Tribe) who are participating in the sale of fish harvested from the Treaty Waters? The 2000 Consent Decree provides that the State cannot enforce its laws against Tribal members who are engaged in "fishing activities" in Treaty Waters. 2000 Consent Decree § XVII(A). The Sault Tribe contends here that the sale of fish is a "fishing activity" and that the State can't therefore prosecute Tribal members, such as in the case at hand where two Sault Tribe members are currently being prosecuted in Delta County for a conspiracy to sell walleye in violation of state law (and, because the Tribe did not have a law prohibiting such sales at the time they occurred, will not be prosecuted by any jurisdiction if the Court grants the relief requested in this motion). The State disagrees with the Tribe's contention and establishes below that the 2000 Consent Decree does not preclude the State from prosecuting the Tribal members in question.

The 2000 Consent Decree does not define the phrase "fishing activities," but regulations expressly implementing the Consent Decree that were adopted by the Five Tribes, do:

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[1] The five Tribes are: Bay Mills Indian Community, Grand Traverse Band of Ottawa and Chippewa Indians, Little River Band of Ottawa Indians, Little Traverse Bay Band of Odawa Indians and Sault Ste. Marie Tribe of Chippewa Indians (sometimes referred to jointly as the "Five Tribes.")

[2] A similar Consent Decree was entered in 2007 implementing the resolution of the dispute over the Five Tribes' treaty rights to harvest inland resources in certain defined areas of the Upper and Lower Peninsulas of the State. (see Docket #1799)

> "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.*** (emphasis added). [3]

This is essentially the same definition of "fishing activity" adopted by the Sault Tribe in its own fishing regulations governing subsistence fishing, which state:[4]

> Fishing activity means fishing for, catching, taking or attempting to fish or catch, or take any species of fish from treaty waters, and includes all related activities which occur ***in or on the water***, and the process of loading or unloading fish, nets, or related gear, in or from a boat. (emphasis added)

These definitions make it as clear as possible that "fishing" or "fishing activities" occur *on the water or ice*. The sale of fish to vendors does not take place on the water, and is indisputably not a "fishing activity" as these regulations define it.

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 in part:

> 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. (emphasis added)[5]

The Sault Tribe's argument now that "fishing activities" includes activities that occur off the water or ice is not persuasive in the face of the Tribe's own conclusion that the Jensens' activity was not "treaty-related" and more importantly, the consistent use of this term by all the

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[3] Chippewa Ottawa Resource Center (CORA) Regulations, Section III(i), which can be viewed at: http://www.1836cora.org/documents/CORACODEREVISEDJune42009.pdf (last accessed on April 25, 2011).

[4] Section 20.107(1)(a) of the Sault Tribe's Treaty Fishing Regulations (accessed at http://www.saulttribe.com/images/stories/government/tribalcode/chaptr20.pdf on April 19, 2011).

[5] Letter from Eric G. Blubaugh, Tribal Prosecutor, to Jeff Davis, Assistant U.S. Attorney, dated August 4, 2009, attached as Exhibit A) ("Blubaugh letter").

Five Tribes when adopting fishing regulations that expressly implement the provisions of the 2000 Consent Decree.

RELEVANT FACTS

In its Memorandum in Support of Motion for Relief Pursuant to the Court's Continuing Jurisdiction ("Memorandum"), the Sault Tribe recites a variety of facts, many of which are not supported by record evidence, and most of which are not relevant to this motion. The only facts relevant to the motion that aren't already in the record are: 1) Wade and Troy Jensen are the subject of a criminal prosecution in Delta County that charges them with a 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; 2) the Jensens are enrolled members of the Sault Tribe, and were at the time of the alleged illegal conduct; 3) at the time of the alleged illegal conduct, the Sault Tribe did not have any law prohibiting that conduct; and 4) after the fact, and at a time when it was too late for the Tribe to prosecute the Jensens, the Sault Tribe did pass an ordinance that would have prohibited the conduct for which the Jensens have been charged. The State does not dispute these facts. The other factual assertions, for example concerning other Tribal fishers, and other charges brought against the Jensens by the Tribe that do not arise out of the conduct for which the State is prosecuting the Jensens, have no support in the record, in some cases inaccurately depict certain facts and are irrelevant to this motion.

ARGUMENT

I. The Sault Tribe does not have exclusive jurisdiction to prosecute activities of its members that do not occur in Indian country and are not "fishing activities" as that term is used in the 2000 Consent Decree

A. "Fishing Activities" must occur on the water or ice.

1. The plain meaning of the jurisdictional provision in the 2000 Consent Decree supports the State's position

The State does not agree that it does not have jurisdiction to prosecute Wade and Troy Jensen for violations of the State's fishing laws, even though the Jensens are members of the Sault Tribe. As noted above, the 2000 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 Treaty waters (they were charged with an unlawful conspiracy to purchase and/or sell fish, not harvesting fish from Treaty waters). Thus, a common sense reading of the 2000 Consent Decree supports the State's authority to prosecute the Jensens under the circumstances of this case. Nevertheless, the Sault Tribe now asserts that the State cannot prosecute the Jensens because buying and selling fish is "fishing activity" under the 2000 Consent Decree's jurisdictional provision. The plain language of the 2000 Consent Decree does not support this contention. Marketing fish already caught is not normally understood to be "fishing." A person wouldn't even have to have ever been "fishing" to be involved in the buying and selling of fish. For this reason alone, the Sault Tribe's motion should be denied.

2. The CORA Regulations' definition of "fishing activity" supports the State's position here

The State's plain language interpretation and application of the 2000 Consent Decree here is confirmed by regulations formally adopted by the Chippewa Ottawa Resource Authority (CORA)" pursuant to its authority and responsibility to adopt fishing regulations as set forth in the 2000 Consent Decree, Section VI. 2.[6] While the 2000 Consent Decree itself does not expressly define the phrase "fishing activity" as used in the jurisdictional provision that is at issue here, CORA Regulations" Section III(i) defines the term to mean the taking of fish:

> "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 Jensen's' unlawful conduct did not occur on the water or ice, it indisputably would not be considered "fishing activity" under this definition.

While this definition *alone* does not expressly speak to the jurisdiction of the Tribe or the State to regulate activities of Tribal members, as the Sault Tribe now asserts in their Memorandum (pp. 13-14), this does not mean that definition does not have binding legal effect. General definitions are applicable throughout the relevant document(s) wherever and in whatever context the defined term is employed. When so used, the defined term imparts its defined meaning to the provision in which it becomes a part, as in the case at hand where the phrase "fishing activity" is used in Section XVII of the 2000 Consent Decree to establish the respective jurisdictions of the State and the Five Tribes to enforce their fishing regulations.

This situation is similar to that of a state or federal agency promulgating regulations. It is not uncommon for statutory terms to be defined later in regulations adopted by an agency that is

[6] "Each of the Tribes shall adopt the CORA Charter . . . and CORA shall adopt the CORA Regulations, as a part of the Tribes' management and regulation of fishing by their members in the 1836 Treaty waters."

charged with the responsibility to administer the statute. A good example is in the Indian Gaming Regulatory Act, 25 U.S.C. §2701" *et seq*. (IGRA) and its accompanying regulations promulgated by the National Indian Gaming Commission (NIGC). In IGRA, Congress expressly authorized the NIGC to adopt regulations to "implement" the statute. 25 U.S.C § 2706(b)(10).[7] In these regulations, generally found at 25 C.F.R. Part 501 *et seq.*, the NIGC expressly defines words and phrases from IGRA. For example, 25 C.F.R. § 502.4 defines "Class III gaming," a term taken directly from IGRA that plays a central role in the regulatory scheme adopted by Congress to govern gaming by Indian tribes. This agency definition has been cited by courts when considering what activity constitutes Class III gaming for purposes of IGRA.[8] The agency regulations thus operate to legally define terms used in the statute that authorized adoption of the regulations.

While the CORA Regulations do not purport to change the language of the Consent Decree, they clearly are intended to "implement" the Consent Decree (CORA Regulations Section II). The CORA Regulations themselves recognize this relationship with the 2000 Consent Decree:

> These 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 Consent Decree and the Management Plan.[9]

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[7] "The Commission . . . shall promulgate such regulations and guidelines as it deems appropriate to *implement* the provisions of this Act." (emphasis added).

[8] *See,* for example, *United States v. 162 Megamania Gambling Devices*, 231 F.3d 713, 720 (10th Cir. 2000) ("The Commission also clarified Congress's definition of Class III games as follows: 'Class III gaming means all forms of gaming that are not class I gaming or class II gaming, including but not limited to: (a) *Any house banking game*, including . . .' 25 C.F.R. § 502.4 (emphasis added).")

[9] CORA Regulations, Part One: General Matters, Section II. Scope and Application. (emphasis added)

This is analogous to the implementation of a statute through agency regulations as discussed above. When it was the clear purpose of the Court and all the Parties to the 2000 Consent Decree that the CORA Regulations would implement the Consent Decree, the Sault Tribe must produce compelling evidence that the definition in the CORA Regulations of a term used in the 2000 Consent Decree is not conclusive of its meaning. The Decree in question after all is a "Consent" decree, the language of which was hammered out during multiple negotiation sessions that included the same Five Tribes that drafted and adopted the CORA Regulations. It is extremely unlikely that the Tribes would have intended the phrase "fishing activity" in the Consent Decree to have a completely different meaning when they drafted the CORA Regulations.

Yet this is what the Sault Tribe now contends in its Motion, asserting that defined terms "are not substantive regulations – they are simply defined terms."[10] The Sault Tribe does not explain why, however, when the defined term "fishing activities" is plugged into § XVII of the 2000 Consent Decree, it doesn't unambiguously support the State's argument that the Tribes do not have exclusive jurisdiction over the activities of Tribal members that occur off the water or ice. In the example of the IGRA" regulations discussed above, the defined terms are not used only as terms in the regulations themselves. As recognized by the court in *Megamania*, the NIGC's regulations acted to clarify terms in IGRA. In the same manner, the logic of using the CORA Regulations' definition of "fishing activity" to interpret the 2000 Consent Decree is overwhelming.

This conclusion is supported by the fact that the CORA Regulations incorporate numerous definitions directly from the 2000 Consent Decree, in the same manner that the NIGC

[10] Sault Tribe's Memorandum in Support of Motion, p. 14.

regulations incorporate definitions from IGRA. A good example is the definition of "Commercial fishing" adopted by the CORA Regulations (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 CORA Regulations specifically state that, unless otherwise "noted," their listed definitional provisions "are from the Decree. . ." CORA Regulations 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 CORA Regulations did not intend to interpret the phrase "fishing activity" from the Consent Decree when it defined it in its own definitional section. This is evidence that supports the declaration at the beginning of the CORA Regulations that they are "implementing" the Consent Decree.

Under the Sault Tribe's current theory, the Court is being asked to accept that the Five Tribes intended that the phrase "fishing activity" meant one thing when used in Section XVII of the 2000 Consent Decree to establish jurisdiction of the State and Tribes, and something completely different when used to define the phrase "Commercial fishing." For the Court to reach this conclusion, the Sault Tribe would have to establish that the term "fishing activity" is ambiguous, and then present solid evidence that would rebut the compelling argument that when the Five Tribes defined this phrase in their regulations, they meant the definition to apply everywhere in the CORA Regulations and the 2000 Consent Decree that the term "fishing activity" is found. The Tribe has presented little or no evidence that can reasonably be interpreted as proof of such an intention. It is therefore reasonable to conclude that the exclusive

jurisdiction of the Sault Tribe to enforce its regulations is limited to fishing activities on the water or ice.

3. The Sault Tribe's own separate fishing regulations show a consistent interpretation of the phrase "fishing activity" that supports the State's case

The State's position is confirmed by the Sault Tribe's own fishing regulations, which apply only to Sault Tribe members, that were adopted to supplement what are now the CORA regulations. As noted in the Summary of Argument above, this definition of "fishing activities" also describes only activities that occur on the water and not those that occur on land, other than unloading gear and the catch at the dock. While these regulations do not purport to implement the 2000 Consent Decree, they expressly state that they are intended to supplement the CORA Regulations.[11] They are significant at least to show that the term "fishing activities" is used by the Tribes in a consistent fashion that is substantively different than the definition now proffered by the Sault Tribe.

4. The Sault Tribe previously informed the State that the conduct of the Jensens at issue here was not treaty related and not subject to the Tribe's exclusive jurisdiction to prosecute

The State's interpretation of "fishing activities" was further confirmed when the State was copied on a letter from the Tribal Prosecutor to the Assistant U.S. Attorney (the Blubaugh letter, discussed above) that stated:

> As you are aware, the Michigan DNR revealed in an investigation that concluded earlier this year that five members of the Sault Ste. Marie Tribe of Chippewa Indians were engaging in illegal activity in Little Bay De Noc, Delta County. This activity came under the guise of the Treaty of March 28, 1936, and

[11]Section 20.101(4) states: "These rules . . . supplement the regulations contained in the Chippewa/Ottawa Treaty Fishing Management Authority Regulations." The Chippewa/Ottawa Treaty Fishing Management Authority is the predecessor of CORA. The regulations have been repeatedly amended after entry of the 2000 Consent Decree. See History Note preceding Tribal regulations.

> the 2000 Consent Decree, so the Tribe would seemingly have exclusive jurisdiction to enforce any violations.
>
> 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.

The Sault Tribe's Memorandum in Support of its Motion does not explain why the Tribe has completely reversed its previously stated position regarding its exclusive jurisdiction. It could not be clearer that in 2009, after a "thorough legal" review, the Tribe essentially agreed with the position now taken by the State in this proceeding, e.g., that the Jensens' conduct was not "treaty related" and that the Tribe did not have exclusive jurisdiction to prosecute them.

5. Any regulation by the Sault Tribe of the buying and selling of fish would be concurrent with the State's authority to regulate such activity

While it is true, as noted in the Tribes' Memorandum, that there are a few examples of provisions in the 2000 Consent Decree and in the CORA Regulations that appear to prohibit or regulate the sale of fish under certain limited circumstances, these provisions are not a recognition of an ***exclusive right*** by the Tribe to prosecute illegal sales of fish, which is the specific issue now before the Court. It is not the State's position that the Sault Tribe – or any of the Five Tribes – cannot adopt regulations for the sale of fish taken from Treaty waters. But any such regulation by the Tribes is ***concurrent*** with regulation by the State. The State is not precluded from enforcing its regulations governing the sale of fish merely because a Tribe has adopted regulations that also regulate such sales.

Such a situation is no different than when a state and the federal government have concurrent jurisdiction to regulate in a particular area, such as in the case of the regulation of unlawful gambling activities. The State has adopted laws that make it illegal to operate a casino in Michigan except in certain limited circumstances (such as the three casinos licensed to operate in Detroit)[12] while at the same time Congress has enacted laws that also generally make operation of casinos in Michigan unlawful.[13] Merely because one jurisdiction has authority to regulate a particular type of conduct, does not mean that a different jurisdiction is precluded from regulating the same conduct under its laws.

The provision in the CORA Regulations concerning the Tribe's jurisdiction does not say, as the Tribe suggests, that the Tribe has exclusive jurisdiction to prosecute conduct regulated in the CORA Regulations. Sault Tribe's Memorandum, p. 15. What this provision says is "Jurisdiction to enforce ***these Regulations*** upon members of each Tribe is vested exclusively in the tribal court of that Tribe." CORA Regulations, § XXVI(a) (emphasis added). This provision was likely intended first and foremost to make it clear that a Sault Tribe member could not be prosecuted in the tribal court of one of the other Five Tribes. Even if it means that the tribal courts have jurisdiction to enforce the ***CORA Regulations***, exclusive of the State, this still does not say that the State can't enforce its ***own regulations*** against Tribal members. Under the concept of concurrent jurisdiction discussed above, there is no reason the Tribes can't enforce their laws against a Tribal member who is involved in conduct occurring off the water that violates the CORA Regulations, while the State is free to enforce its laws that have been violated if it chooses to do so.

[12] See, for example, MCL 432.218; MCL 750.301 *et seq.*
[13] For example, see 18 U.S.C. § 1955.

6. The Sault Tribe's interpretation of the 2000 Consent Decree will lead to uncertainty regarding whether the State or the Tribe has jurisdiction to prosecute illegal activity that does not occur on the water or ice

The Sault Tribe's stated concern for creating a situation where the State and the Tribe are "debating on an incident by incident basis"[14] who has jurisdiction rings hollow in the present case. It is obvious that abiding by the definition of "fishing activity" set out in the CORA Regulations will facilitate avoidance of situations where the parties are debating who has jurisdiction on an incident-by-incident basis because this definition provides a bright line for both sides to follow when enforcing fishing laws and regulations. The Sault Tribe offers little in the way of guidance to replace the CORA Regulations' clear definition of fishing activity. If "fishing activities" can include conduct that occurs off the water or ice, how will the parties know which has jurisdiction? More importantly, how will law enforcement officers in the field know? If a Tribal fisherman transports the day's catch in a truck that he drives at unsafe speeds, is he subject to State traffic laws, or does the Tribe have exclusive jurisdiction? If a Tribal fisher knowingly sells tainted fish to a restaurant not in Indian country, is the State precluded from prosecuting the seller? Similarly, if a Tribal member opens a restaurant in downtown Detroit that sells fish taken from Treaty waters, is that restaurant subject to state sanitary and health regulations? What factors determine whether particular conduct is "fishing activity" once such conduct spills over onto land? It does not seem like a good policy to put any law enforcement officer in a position where there is little guidance on the type of conduct that can lead to a lawful arrest and prosecution. Using the definition of "fishing activity" from the CORA Regulations brings the clarity necessary to guide such enforcement activities.

[14] Memorandum, p. 16.

II. The opinion of Judge Fox in this case does not affect the current motion because Judge Fox never held that the Tribes have the exclusive right to regulate the buying and selling of fish taken from Treaty waters.

The Sault Tribe asks the Court to accept the notion that the treaty rights recognized in Judge Fox's opinion in *U.S. v. Michigan*[15] were more than just the right to take fish from Treaty Waters for commercial, sport or subsistence purposes. The Sault Tribe asks the Court to go a step further and hold that the treaty right includes an exclusive right to *regulate* the *commercial sale* of such fish. This was not, however, what *U.S. v. Michigan* was about. The issue there was the right to *harvest* the resource without regulation (or minimal regulation as discussed below). The decision in that case, and the Consent Decree entered into to resolve it, recognize the Tribes' right to determine what methods are used by its fishers to take fish, even if they would not be legal under state law, and how much of the resource can be taken (within certain limits set by federal law), again, even if the quotas would violate state law. But this decision only dealt with the *taking* of fish.

There are two distinct concepts here: *harvesting* of fish and the *sale* of fish once they have been harvested. Neither the 1836 Treaty nor the Fox opinion, describe a right for the Tribes to exclusively regulate the buying and selling of fish.

In fact, the 1836 Treaty doesn't actually address *either* harvesting or the sale of fish, but the Court found that the right to *take* fish was implied:

> In addition to the implied right to fish, plaintiffs also rely on explicit language in the treaty in support of their claims. Article XIII provides that: The Indians stipulate for the right of hunting on the lands ceded, with the other usual privileges of occupancy, until the land is required for settlement.
>
> 7 Stat. 495. This language constitutes an explicit reservation of a right broad enough to include the ***taking of fish*** from the Great Lakes for subsistence and

[15] *United States v. Michigan***,** 471 F. Supp. 192 (W.D. Mich. 1979).

commercial purposes.[16]

Just because Judge Fox recognized a treaty right to take fish for commercial sale, it does not logically follow that the activity of selling the fish taken, or the exclusive right to regulate the selling, are also treaty rights. The Court was only making it clear that the State could not regulate the *taking* of fish by Tribal members, whether they were going to consume the fish themselves, or sell them to third parties.

For example, Judge Fox could have said the treaty right only included a right to take fish for subsistence purposes. This would have necessarily put a practical limit – some number representing how many fish a Tribal member could personally use – on the number of fish Tribal members could lawfully take. Allowing instead for fish to be taken for commercial purposes removes any subsistence limitation on the number of fish that can be harvested. This was the purpose of noting that the Tribes could harvest for commercial sale. The purpose was not to recognize some additional treaty right to exclusively regulate the sale of the fish taken under the Treaty as the Sault Tribe now contends.

In its Memorandum, the Sault Tribe unsuccessfully attempts to find some language in Judge Fox's decision that supports its claim that the Court somehow said that the Tribes have the exclusive right to regulate the buying and selling of fish. The best it can do is note the references to *taking* fish for commercial purposes and then try to extend this to an exclusive right to regulate the buying and selling of fish. But Judge Fox's decision is explicit: he implied from very broad language preserving the right to hunt as well as other privileges of occupancy, that the treaty included a right to "take" fish for subsistence and commercial purposes. It is not

[16] *United States v. Michigan***,** 471 F. Supp. 192, 213 (W.D. Mich. 1979) (emphasis added).

logical that from this implied right to *take* that a further implication should occur to support a right to regulate the buying and selling of fish.[17]

This is confirmed by the regulations adopted by the Tribes themselves that define "fishing activity" to mean only the activity that occurs on the water or ice. It is no coincidence that this is the same term used in the Consent Decree to define the jurisdiction of the Tribes to regulate Tribal member activities. To ignore this definition when determining the Tribes' exclusive jurisdiction to regulate members' activities – as the Sault Tribe now demands – will place State law enforcement personnel in the uncomfortable position of trying to decide on an incident-by-incident basis what falls within the Consent Decree's undefined "fishing activity" category so that they can determine whether or not to enforce state fishing regulations. This was not the intention of the Court when it held that the Five Tribes had the treaty right to harvest fish for commercial purposes.

[17] On page 7 of its Memorandum, the Sault Tribe asserts that Judge Fox ruled that the Tribes have the exclusive right to regulate their members who were involved with the treaty resource and with its "exploitation." There is no citation to the Fox opinion to support this assertion, nor does the Tribe anywhere cite language from the decision that says the Tribes have the exclusive right to regulate the buying and selling of fish. The State is unaware of any such finding made by Judge Fox. At best, as noted in footnote 7 of the Tribe's Memorandum, the Tribes have the right to regulate the actual taking of fish, subject to State regulation that is necessary for the conservation of the resource.

CONCLUSION

For these reasons, the State respectfully disagrees with the Sault Tribe's position, and respectfully asks that this Motion to Enforce be denied in its entirety with prejudice.

Respectfully submitted,

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