

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

File No. 2:73-CV-26

and

Hon. Paul L. Maloney

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,

Plaintiff-Intervenors,

vs.

STATE OF MICHIGAN, et al.,

Defendants,

**JOINT BRIEF IN SUPPORT OF MOTION TO EXTEND GREAT LAKES FISHING
CONSENT DECREE TO DECEMBER 31, 2020**

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, the State of Michigan, and the United States respectfully request this Court to extend the 2000 Great Lakes Fishing Decree (ECF No. 1458) until December 31, 2020. Doing so will give all parties sufficient time to complete negotiations of a replacement decree to address allocation, management and regulation of fishing in 1836 Treaty waters. Absent such extension, there is a likelihood of a gap between the expiration of the current decree on August 8, 2020, and the entry

of a new decree, during which there will be no clearly governing framework to address issues of allocation, management and regulation of the fishery.

I. BACKGROUND

In 1979, this Court affirmed the existence of an off-reservation fishing right in the portions of the Great Lakes ceded to the United States in the 1836 Treaty of Washington, 7 Stat. 491. *United States v. Michigan*, 471 F. Supp. 192 (W.D. Mich. 1979). That right is held by the tribal successors to the Ottawa and Chippewa signatories of the 1836 Treaty. For the last twenty years, the 2000 Great Lakes Consent Decree (“Decree”) has provided the governing framework for fishing in the 1836 Treaty waters. However, that Decree is set to expire twenty years from the date it was entered, August 8, 2000. Decree, § XXII(A).

Since September of last year, the parties have been meeting regularly every few weeks for typically two-day sessions, at first face-to-face, and, starting in March as a result of Covid-19, via video conference. The Covid-19 crisis posed unexpected hardships to the negotiations, requiring several meetings to be canceled as parties needed to divert their attention to issues related to the pandemic. Nevertheless, the parties have continued their efforts to negotiate a new decree to be in place by the time the current decree expires. Moreover, technical workgroups have been established to focus on specific issues, reporting back to the larger group and getting further direction on their work. In short, all parties have expended significant time and effort in securing a new decree. However, negotiations have not proceeded at the expected pace and in March, 2020, the parties jointly stipulated for the appointment of a mediator, ECF No. 1876, which the Court granted, ECF No. 1877.

Nevertheless, even with the assistance of a mediator, it is apparent that negotiations will not conclude before the current decree expires. Therefore, extending the current decree for some

period is necessary to avoid a regulatory gap. The six parties presenting this motion believe that the current decree should be extended until December 31, 2020. The Sault Ste. Marie Tribe of Chippewa Indians has a different view of the matter and has declined to join a stipulation for such an extension.

II. ARGUMENT

Extending the current decree until December 31, 2020, provides the necessary and hopefully adequate time to enable all parties to this case to negotiate a mutually acceptable successor decree that can be in place when the current one expires. The alternative is unacceptable: a regulatory gap during which the five Tribes, the State of Michigan, and the United States will be compelled to protect their sovereign interests in the Great Lakes fishery through recourse to this Court in the form of motions for restraining orders and injunctions against each other. Such emergency motion practice will likely result from the need of each government to avoid irreparable harm either to the fishery resource itself or to their own interests in it. The broader public interest will be served by ensuring that a regulatory framework continues to oversee exploitation of the fishery by each individual government. Judicial economy will also be served because, absent such a regulatory framework, the parties will be left to police each other through motion practice.

Continuing the current decree for a short interim period avoids all that by maintaining the status quo that all parties have lived under for the last two decades. While no party may be fully satisfied with the current decree, the negotiation of a new one provides the appropriate vehicle to seek redress. But without the current decree continuing, negotiation of a new decree becomes more difficult because the resources and time of the parties will be diverted to litigating the disputes that will inevitably arise in the regulatory void that will commence after August 8.

The parties have debated both shorter and longer extensions and the December 31, 2020 extension is the compromise acceptable to the majority. A shorter extension raises at least two problems. First, it means the likelihood of having to go through this a second time is higher. The parties have already wasted valuable time fruitlessly seeking a compromise date acceptable to everyone. The mediator has also been forced to focus on this issue and, in spite of Justice Cavanagh's best efforts, the parties remain at an impasse. Moreover, the negotiation of further extensions provides opportunity for recalcitrant parties to seek leverage in exchange for their agreement to extend. Second, a shorter extension may mean that the decree's regulatory framework will cease in the middle of this year's fishing season, leaving uncertainty as to what happens for the remainder of the season.

III. CONCLUSION

Accordingly, and for the above-stated reasons, 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, the State of Michigan, and the United States respectfully request this Court extend the 2000 Great Lakes Fishing Decree through the end of this year to assist the negotiation of a successor decree.

UNITED STATES OF AMERICA

Dated: June 24, 2020

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Dated: June 24, 2020

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GRAND TRAVERSE BAND OF OTTAWA AND
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Dated: June 24, 2020

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LITTLE RIVER BAND OF OTTAWA INDIANS

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