UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES, et al., Plaintiffs, v. STATE OF MICHIGAN, et al., Defendants.	Case No. 2:73 cv 26 HONORABLE PAUL L. MALONEY

MEMORANDUM OF THE SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS IN OPPOSITION TO THE STATE OF MICHIGAN, UNITED STATES, AND FOUR TRIBES' MOTION TO EXTEND GREAT LAKES FISHING CONSENT DECREE TO DECEMBER 31, 2020

The Sault Ste. Marie Tribe of Chippewa Indians (the "Sault Tribe") does not consent to an extension of the 2000 Consent Decree (Dkt. 1458) to December 31, 2020, as requested by the United States, Michigan State, and four tribes (the "Movants"). The Court should instead adopt the 90-day extension proposed in the Sault Tribe's motion on this issue (Dkt. 1883). The shorter extension is proper for two reasons.

First, any extension of the current expiration date must be supported by a showing of good cause and tailored to the circumstances underlying the request. Although the parties have continued negotiations each month, the COVID-19 pandemic impacted the parties' negotiations for a cumulative total time of roughly three months. It is no longer an impediment, so an extension of almost two additional months beyond that time is not merited.

Second, under the Treaty and applicable law, the agreement of all five tribes is required

to continue the "intertribal exclusive fishing zone" provisions in the Consent Decree past its expiration on August 8. The Sault Tribe objects and does not consent to inclusion of those zones in the Decree beyond a 90-day extension.

I. ARGUMENT

A. An extension to December 31, 2020, is not narrowly tailored to the circumstances.

On March 13, 2020, the President of the United States declared a national emergency due to COVID-19. *Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease* (COVID-19) *Outbreak*, The White House (Mar. 13, 2020), https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/. One hundred and four days later, the Movants seek a ***145***-day extension. This requested extension is excessive.

The parties remain accountable for their renegotiation efforts towards a new consent decree. COVID-19 will not go away, and the parties are now well-acquainted with methods of meeting remotely. *See* Joint Brief in Support of the Motion to Extend Great Lakes Fishing Consent Decree to December 31, 2020, Dkt. 1880 at PageID.10669 (6/24/2020) (hereinafter "Movants' Motion") (noting that the parties have "continued their efforts to negotiate a new decree to be in place by the time the current decree expires"); Declaration of Sault Tribal Chairperson Aaron Payment ("Payment Decl."), ¶¶ 4, 6. An extension of the Consent Decree until December 31, 2020 is untethered from the parties' pandemic-related change in circumstances.

In exercising their equitable powers under consent decrees, "federal courts should 'exercise the least possible power adequate to the end proposed.'" *Stone v. City & Cty. of San Francisco*, 968 F.2d 850, 861 (9th Cir. 1992), *as amended on denial of reh'g* (Aug. 25, 1992) (quoting *Spallone v. United States*, 493 U.S. 265, 280 (1990)). Extension of a consent decree

must be accordingly tailored to the facts giving rise to the need for an extension. *See Vanguards of Cleveland v. City of Cleveland*, 23 F.3d 1013, 1020 (6th Cir. 1994) (approving extension of consent decree because it was "suitably tailored to meet" the changed circumstances); *Labor/Cmty. Strategy Ctr. v. Los Angeles Cty. Metro. Transp. Auth.*, 564 F.3d 1115, 1120 (9th Cir. 2009) (extension of consent decree "must be 'suitably tailored to resolve the problems created by the changed . . . conditions'" (quoting *United States v. Asarco Inc.*, 430 F.3d 972, 979 (9th Cir. 2005)); *see also Holland v. New Jersey Dep't of Corr.*, 246 F.3d 267, 288 (3d Cir. 2001) ("the District Court must make specific findings to support its extension of the Consent Decree, and it must tailor this extension to fit with these findings").

The facts show that a fair estimate of the consent decree renegotiation time lost to pandemic-related disruptions is approximately 90 days. Payment Decl., ¶¶ 2-3.This period covers the initial quarantine period mandated by the state and tribal governments, as well as time lost due to the need of these governments to administer the situation, the travel restrictions on the parties, and furloughs and other workplace disruptions. *Id*. Accordingly, an extension of the 2000 Consent Decree for ninety days to November 6, 2020 is the appropriately tailored remedy for the change in conditions attributable to COVID-19.

Movants offer no facts to justify extending the decree through the end of the year on the basis of actual delays in the negotiations. Indeed, Movants make no attempt whatsoever to tie the length of the requested extension to the actual events necessitating the extra time. Absent such justification, their proposed time period is improper. As the Movants have not carried their burden to show that an extension until December 31, 2020 is currently warranted by the circumstances, the Court should limit the extension of the Consent Decree to a period matching the facts.

Movants' dire predictions of emergency motion practice if a "regulatory gap" arises from the expiration of the 2000 Consent Decree present a false dilemma. Dkt. 1880 at PageID.10670. Movants utterly fail to explain why the parties could not or would not seek another extension if subsequently-developed facts showed it was necessary or appropriate. The law favors limited extensions of consent decrees, and other courts in similar circumstances have successfully followed this approach. *See, e.g.*, *Ne. Ohio Coal. for the Homeless v. Husted*, 2:06-CV-896, 2013 WL 4008758, at *12 (S.D. Ohio Aug. 5, 2013) (extending consent decree through only one election cycle instead of the requested two cycles and noting that "another extension of the Consent Decree may be appropriate"); *Vanguards of Cleveland*, 23 F.3d at 1020 (extension of consent decree for a "relatively short period of time" to be suitably tailored to the circumstances that warranted the modification). Should a further extension become necessary in the future, the Sault Tribe would be willing to revisit the length of the extension.

Movant's motion also incorrectly assumes that a continuously effective Consent Decree is the only alternative. A decree to govern fishing is not required under applicable law. *See United States v. Michigan*, 653 F.2d 277, 278-79 (6th Cir. 1981). Specifically, the state and the tribes are each entitled to manage and regulate their own fisheries, as long as their self-regulation does not cause a conservation concern.[1] This Court's seminal 1979 decision regarding the tribes' treaty rights presumes the tribes' self-regulatory status. *United States v. Michigan*, 505 F. Supp.

[1] *See, e.g., Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin*, 668 F. Supp. 1233, 1241–42 (W.D. Wis. 1987) (noting that "effective tribal self-regulation of a particular resource or activity precludes state regulation of that resource or activity as to the tribes" and holding that "tribes may regulate their members exclusive of state regulation so long as the tribal self-regulation is effective"); *Shoshone-Bannock Tribes v. Idaho Fish & Game Comm'n*, 42 F.3d 1278, 1281 (9th Cir. 1994) (determining that the State had the power to regulate the tribes' fishing rights only if "the Tribes' self regulation is insufficient to insure the conservation of the salmon"); *Mille Lacs Band of Chippewa Indians v. Minnesota*, 124 F.3d 904, 928 n.43 (8th Cir. 1997), *aff'd sub nom. Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999) ("The State may not impose its own regulations if the Band can effectively self-regulate and if tribal regulations are adequate to meet conservation, public health, and public safety needs." (quoting *Mille Lacs Band of Chippewa Indians v. State of Minn.*, 861 F. Supp. 784, 839 (D. Minn. 1994)).

467, 472–73 (W.D. Mich. 1980) (the state cannot regulate treaty fishing by tribes which "exercis[e] adequate self regulation"); *see also id.* at 492, 494, 496. And, as the Sixth Circuit emphasized, state regulation of treaty fishing is allowed "[o]nly upon a finding of necessity, irreparable harm and the absence of effective Indian tribal self-regulation." *United States v. Michigan*, 653 F.2d at 279. Thirty-five years after the first Decree was entered in this case, no party disputes that the tribes can adequately regulate themselves.

Simply stated, (1) the current facts do not merit an extension beyond 90 days, (2) there is no reason why the parties could not ask this Court for an additional modest extension should the need arise later, and (3) even if there were a gap in time between expiration of the 2000 Consent Decree and a new Decree, the parties are fully able to cooperate and govern themselves during that time. Movants' request for an extension to December 31, 2020, should be denied.

B. The tribal exclusive zones adopted in the 2000 Consent Decree cannot continue without the agreement of all five tribes.

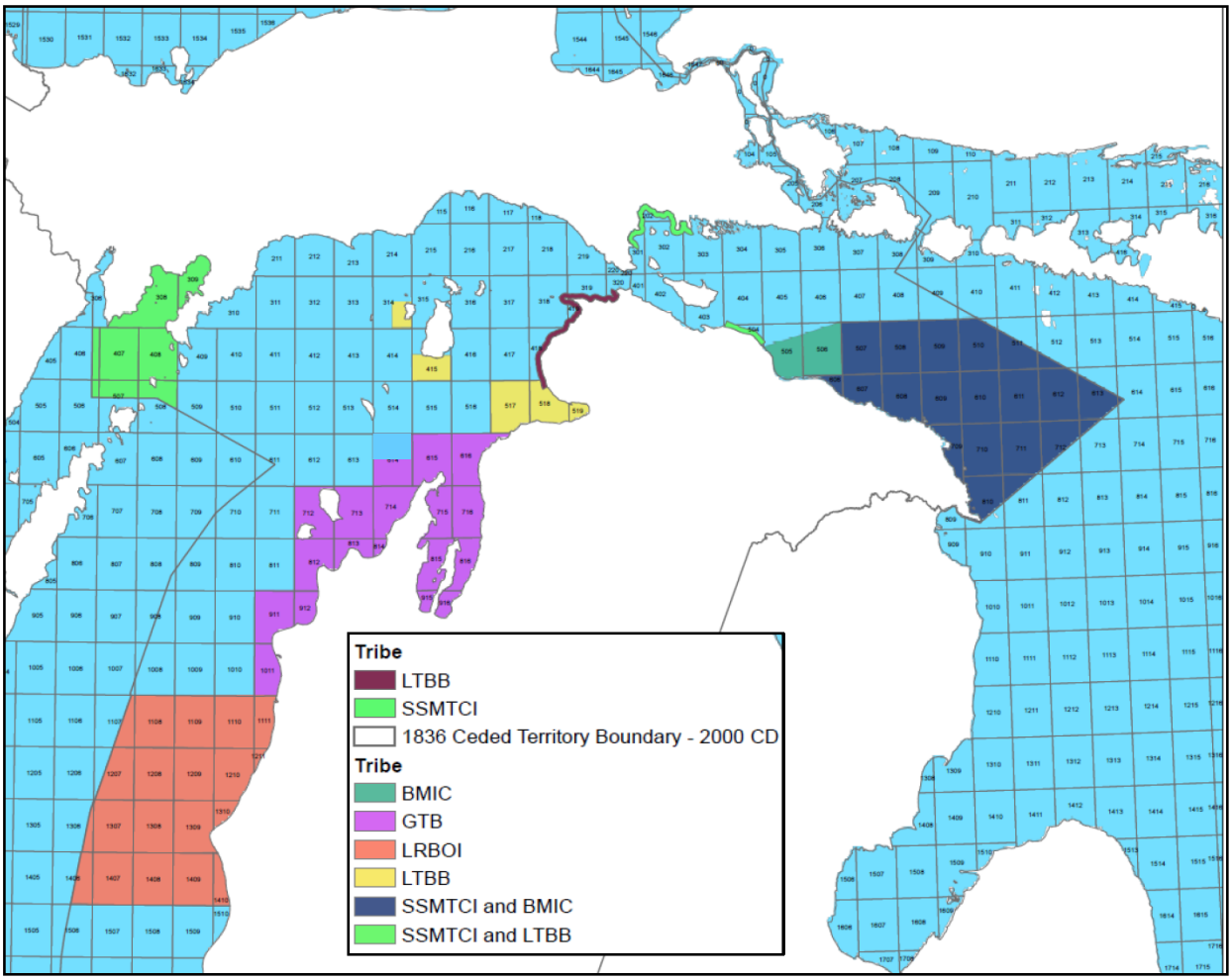
For the reasons described in the Sault Tribe's Memorandum in Support of its Motion to Extend Consent Decree for 90 Days, Dkt. 1883 at PageID.10688-10692 (the "Sault Tribe's Motion"), the tribal exclusive zones contained in the 2000 Consent Decree cannot continue beyond expiration of the Decree absent unanimous agreement among all five tribes.[2] The Sault Tribe will not agree at this time to a continuation of the exclusive zones beyond November 6, 2020, for reasons explained below.

As described in detail in the Sault Tribe's Motion, the five tribes have a collective and indivisible right to the 1836 ceded waters. *Id.* at PageID.10688. Because the 1836 Treaty gives each tribe the right to fish *throughout* the ceded waters, zones that abrogate that right by excluding certain tribes from treaty-secured waters require agreement of all five tribes. *Id.* at

[2] The tribal exclusive zone provisions are in Section IV.A of the 2000 Consent Decree, Dkt. 1458 at PageID.3223-3240, and Section IV of the Five Tribe Management Plan, *id.* at PageID.3358-3360.

PageID.10688-10691. The parties agreed to exclusive zones in the 2000 Consent Decree to provide opportunities for the then-relatively recently recognized tribes to develop their fisheries. *See id.* at PageID.10670; *see also* Payment Decl. ¶ 9; Declaration of Brad Silet ("Silet Decl.") ¶ 5; Dkt. 1458 at PageID.3354 (the Five Tribe Management Plan under the 2000 Consent Decree contains features "that are designed to accommodate . . . recently reaffirmed Tribes").

The current exclusive zones cover a significant portion of the 1836 Treaty waters:



Silet Decl. ¶ 6.

The Sault Tribe takes exclusion of tribal fishers from treaty waters very seriously. Payment Decl. ¶ 8. It has the largest fishing population of the five tribes that are party to the 1836 Treaty. *Id.*; Silet Decl. ¶ 3. The Sault Tribe's average annual treaty fishing harvest since

2010 amounts to 67% of the treaty fishing share under the 2000 Consent Decree, and has reached up to 78% of particular species, despite limitations on tribal fishers' opportunities to harvest due to exclusive zones, other area closures, gear restrictions, and a reduction in harvestable species for several species of fish since the 2000 Consent Decree was implemented. Silet Decl. ¶ 3.

The signatories to the 1836 Treaty gave up approximately 14 million acres of their aboriginal homelands in return for the vital promise that they could continue fishing as they always had. Payment Decl. ¶ 7. Treaty rights are the tribes' heritage and the legacy of their ancestors, and the Sault Tribe opposes the ongoing prohibition of its fishers from exercising those rights as promised in the Treaty. *Id.* Having accommodated the recently recognized tribes' desire to develop their fisheries by means of exclusive zones for two decades or more, it is time for all five tribes to resume fishing through the full extent of the 1836 Treaty waters. *Id.* ¶ 9; *see also* Silet Decl. ¶¶ 7-16.

The areas that are now exclusive zones are important fishing areas for all the tribes. This includes during the winter season. If exclusive zones are removed from the 1836 Treaty waters (whether through a new Decree or otherwise), past fishery harvest data indicates that the Sault Tribe and other tribes will have an active fishery during the time period between November 6 and December 31. *See* Silet Decl. ¶¶ 16-17.

In the event that the Court finds that an extension of the Decree to December 31, 2020 is appropriate under the circumstances, the Sault Tribe has prepared a proposed amended Decree and a Five Tribe Management Plan removing the exclusive zones, and would be happy to submit that proposal for the Court's review should it become necessary.

II. CONCLUSION

For the reasons set forth above, this Court should deny the Movants' Motion and instead order a 90-day extension of the 2000 Consent Decree. If the Court decides an extension to

December 31 is warranted, it should only be granted without the exclusive fishing zones.

Respectfully submitted this 8th day of July, 2020.

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CERTIFICATE OF COMPLIANCE

I certify that in compliance with LCivR 7.3(b)(i), I used Microsoft Word 2010 to calculate that there are 2,052 words contained in this Memorandum.

DATED: July 8, 2020, at Seattle, Washington.

s/Lauren J. Kine
Lauren J. King