STATE OF MICHIGAN
IN THE COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WALTER JOSEPH CASWELL,

Defendant-Appellant

COA No. 353537

Mackinac County Circuit Court
Lower Court Nos. 19-8346-AR; 18-8347-AR

Hon. Beth Ann Gibson

AMICUS CURIAE BRIEF OF THE SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS

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Date: November 2, 2020

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INTRODUCTION

Pursuant to Michigan Court Rule (M.C.R.) 7.212(H) and leave of court granted on October 12, 2020, the Sault Ste. Marie Tribe of Chippewa Indians ("SSM Tribe") files the following amicus curiae brief.[1] The Circuit Court correctly reversed the District Court's dismissal of the citation against Mr. Caswell. However, neither the District Court nor the Circuit Court addressed the governing legal question of whether a modern-day Internal Revenue Code 501(c)(3) organization that refers to itself as the "Mackinac Tribe of Odawa and Ojibwa Indians" (among other names) is the political successor-in-interest to treaty signatories and thus whether this modern-day organization holds any treaty-reserved rights that could be exercised by Mr. Caswell.[2] The SSM Tribe supports neither party in this matter but seeks amicus participation, as a federally recognized Indian tribe with reserved treaty rights under the 1836 and 1855 treaties, to ensure that this Court is advised and aware of the applicable governing legal principles and to avoid prejudice to the SSM Tribe and the treaty rights of itself and its members.

STATEMENT OF INTEREST

The SSM Tribe is the modern-day political organization of Chippewa bands which inhabited the Michigan Upper Peninsula at and before contact with Europeans. The SSM Tribe is recognized as political successor-in-interest to Chippewa bands that entered into treaties with the United States between 1785 and 1855. *See* Treaty with the Chippewa, June 16, 1820 (7 Stat. 206); Treaty with the Ottawa and Chippewa Nations of Indians, March 28, 1836 (7 Stat. 491);

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[1] No party's counsel other than counsel for the SSM Tribe authored any portion of this brief. No party, party's counsel, or any other person or entity besides the SSM Tribe contributed money to fund preparation or submission of this brief.

[2] This so-called "Mackinac Tribe" organization is actually organized as a 501(c)(3) tax exempt corporation under the name of the "Mackinac Genealogy Native and Ethno History Association," an organization with no governmental authority.

Treaty with the Ottawa and Chippewa, July 31, 1855 (11 Stat. 621); Treaty with the Chippewa of Sault Ste. Marie, Aug. 2, 1855 (11 Stat. 631).

The United States acknowledged the SSM Tribe as a federally recognized Tribal Government in 1972. In 1975, the SSM Tribe intervened in the *United States v. Michigan* litigation to protect the SSM Tribe's aboriginal and treaty right to fish in certain waters of the Great Lakes free from State interference. U.S. District Court Judge Noel Fox found that: "Ancestors and members of the plaintiff tribes have continuously exercised Indian fishing rights since the 1836 Treaty without abandonment." *United States v. Michigan*, 471 F. Supp. 192, 249 (W.D. Mich. 1979). The court found that the "Secretary of the Interior has recognized the plaintiff-intervenor tribes [i.e., the SSM Tribe] as the modern tribal successors to the Indians who were signatory to the Treaty of 1836. The Bay Mills Indian Community and the Sault Ste. Marie Tribe of Chippewa Indians are Indian tribes which are political successors in interest to the Indians who were signatory to the Treaty of March 28, 1836." *Id.* "The fishing right reserved by the Indians in 1836 and at issue in this case is the communal property of the tribes which signed the treaty and their modern political successors; it does not belong to individual tribal members." *Id*. at 271, citing *United States v. Washington*, 520 F.2d 676 (9th Cir. 1975).

The SSM Tribe is also party to a consent decree regarding the exercise and management of treaty-reserved fishing rights entered into between the State of Michigan, United States, and the four other federally-recognized Indian tribes that are political successors-in-interest to treaty-time Indians that signed the 1836 and 1855 treaties. That consent decree was approved by the U.S. District Court in 2000 but expires this year and is currently under negotiation between the state, federal, and tribal parties. The SSM Tribe, pursuant to its sovereign government authority, regulates the fishing of its tribal members. The 2000 consent decree replaced a prior 1985

consent decree regarding treaty reserved fishing rights to which the SSM Tribe was a party. *United States v. Michigan*, 12 Indian Law Reporter 3079, 3089 (W.D. Mich., May 31, 1985). The SSM Tribe is also party to a 2007 consent decree regarding exercise of treaty hunting rights.

The SSM Tribe has a direct interest in litigation addressing claims of treaty-reserved fishing rights under the 1836 Treaty. The SSM Tribe is concerned that neither the Circuit Court nor the District Court addressed the legal principles that govern the outcome of this matter. Neither the District Court nor the Circuit Court addressed whether the modern-day organization that refers to itself interchangeably as the "Mackinac Tribe of Odawa and Ojibwa Indians," "Mackinac Tribe," and "Mackinac Genealogy Native and Ethno History Association" is the political successor-in-interest to any treaty signatories. Without such a determination of political successorship, neither the modern-day so-called "Mackinac Tribe" organization nor Mr. Caswell can establish treaty fishing rights under the 1836 Treaty or any other treaty.

ARGUMENT

A. Neither the District Court nor the Circuit Court Considered Whether the Modern-Day So-Called "Mackinac Tribe" Organization Is A Political Successor-in-Interest to Treaty Signatories.

The District Court dismissed the citation against Mr. Caswell based on oral testimony of a lay witness that a so-called "Mackinac Tribe of Odawa and Ojibwa Indians" was a signatory to 1836 and 1855 treaties with the United States and that Mr. Caswell was a member of and possessed a "fishing license" issued by the so-called "Mackinac Tribe" organization at the time of his citation. District Court order, p. 4. However, the text of the 1836 Treaty does not show that any entity known as the "Mackinac Tribe of Odawa and Ojibwa Indians" or "Mackinac Tribe" signed the treaty and it is not clear the District Court reviewed that critically relevant document.

Regardless, the District Court did fail to examine whether the modern-day so-called "Mackinac Tribe" organization is the political successor-in-interest to Indians that signed the treaties and that reserved fishing rights under the relevant treaties. Because the Court made no inquiry nor determination that the modern-day "Mackinac Tribe" organization is a political successor-in-interest to treaty signatories there was no basis for the Court to conclude that Mr. Caswell was exercising treaty rights deriving from that organization when cited. The Circuit Court also failed to examine this question, instead relying on the undisputed fact that the modern-day "Mackinac Tribe" organization is not a federally recognized Indian tribe.

Treaty rights reserved under the 1836 treaty are the communal property of the Indian tribes that signed the treaties and their modern political successors-in-interest and the rights do not belong to individual members. *United States v. Michigan*, 471 F. Supp. 192, 271 (W.D. Mich. 1979). An individual may not claim treaty fishing rights merely by descending from a treaty signatory or by receiving authorization from a modern group that claims rights under the treaty. *Id.; see also United States v. Suquamish Indian Tribe*, 901 F.2d 772, 776 (9th Cir. 1990) (finding: "That a tribe includes descendants of treaty-signatory tribes does not alone allow it the fishing rights of a treaty tribe"). Treaty rights are possessed by the Indian tribes that are confirmed as political successors-in-interest to treaty-time signatories. *Id.* Here, neither the District Court nor the Circuit Court addressed that dispositive legal question. Since the modern-day organization that refers to itself as the "Mackinac Tribe of Odawa and Ojibwa Indians" is not shown to be a political successor-in-interest to treaty-time Indians, Mr. Caswell cannot assert treaty fishing rights based on his voluntary membership in that contemporary non-profit organization.

In 1836, bands of Ottawa and Chippewa Indians entered into a treaty with the United States resulting in the cession of their aboriginal territory to the United States. Article XIII of the Treaty provides: "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." In 1973, the United States on its own behalf and on behalf of the Bay Mills Indian Community filed litigation to protect the tribe's aboriginal and treaty right to fish in certain waters of the Great Lakes free from State interference. *Michigan*, 471 F. Supp. at 203. In 1975, the SSM Tribe intervened in the litigation alleging a treaty right to fish in ceded Great Lakes waters. *Id.* at 204.

U.S. District Court Judge Noel Fox found that: "Ancestors and members of the plaintiff tribes have continuously exercised Indian fishing rights since the 1836 Treaty without abandonment." *Id.* at 249. Judge Fox found that the "Secretary of the Interior has recognized the plaintiff-intervenor tribes as the modern tribal successors to the Indians who were signatory to the Treaty of 1836. The Bay Mills Indian Community and the Sault Ste. Marie Tribe of Chippewa Indians are Indian tribes which are political successors in interest to the Indians who were signatory to the Treaty of March 28, 1836." *Id.* Judge Fox ruled 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, which right they may exercise without regulation by the State of Michigan." *Id.* at 216. Judge Fox further ruled that: "The fishing right reserved by the Indians in 1836 and at issue in this case is the communal property of the tribes which signed the treaty and their modern political successors; it does not belong to individual tribal members." *Id.* at 271, citing *United States v. Washington*, 520 F.2d 676 (9th Cir.

1975).[3] The "Mackinac" organization has never attempted to intervene in the still-pending *United States v. Michigan* proceeding to attempt to establish itself as a treaty-tribe.

The question of whether Mr. Caswell may exercise a treaty right to fish is not answered by whether he is a descendant of a treaty signatory or whether he has membership in a modern-day organization that claims to hold rights of a treaty signatory. The relevant question for purposes of a treaty-status determination is whether the modern-day organization interchangeably referred to in this litigation as the "Mackinac Tribe of Odawa and Ojibwa Indians" and "Mackinac Tribe" is confirmed as a political successor-in-interest to treaty signatories in an appropriate forum and proceeding. Here, there is no evidence that this modern-day so-called "Mackinac Tribe" organization is a political successor-in-interest to treaty signatories; thus, that organization has no treaty rights that Mr. Caswell can share in or exercise.

In *United States v. Washington*, 476 F. Supp. 1101 (W.D. Wash. 1979), which addressed the treaty fishing rights of Indian tribes in the Pacific Northwest, the United States District Court examined a similar question of whether five modern-day tribal entities (the Samish, Snoqualmie, Snohomish, Duwamish, and Steilacoom) were political successors-in-interest to treaty

[3] The Grand Traverse Band of Ottawa and Chippewa Indians ("GTB") intervened in the *U.S v. Michigan* litigation in 1979 as successor in interest to the Grand Traverse Band of Ottawas and Chippewas. *See United States v. Michigan*, 12 Indian Law Reporter 3079, 3089 (W.D. Mich., May 31, 1985); *Grand Traverse Band of Ottawa & Chippewa Indians v. Director, Mich. D.N.R.,* 141 F.3d 635 (6th Cir. 1998) (noting that the GTB is the "successor in interest to the Grand Traverse Band of Ottawas and Chippewas, who along with other Native American tribes, signed two treaties with the United States in 1836 and 1855"). Following their federal recognition in 1994, the Little River Band of Ottawa Indians and the Little Traverse Bay Band of Odawa Indians were granted intervention in *U.S. v. Michigan* as political successors in interest to treaty time Indians. Tribal and state management of the Great Lakes fishery in the ceded waters is currently governed by a consent decree between the United States, State of Michigan, and the five treaty-tribes, which was approved by the federal court in 2000. That consent decree, which expires this year, is the subject of negotiations between the state, federal, and tribal treaty parties.

signatories such that the modern-day entities could claim treaty fishing rights.[4] It was undisputed that descendants of some of these modern tribal entities had signed the relevant treaty. *Id.* at 1108. Some of these tribal entities had prosecuted claims for compensation for their members before the Indian Claims Commission. *Id.* Yet, for each of the five intervening tribes, the federal District Court rejected their claim to be political successors-in-interest to treaty-time Indians because the "members of the [intervenor tribes] do not and have not lived as a continuous separate, distinct and cohesive Indian cultural or political community. The present members have no common bond of residence or association as is attributable to the fact of their voluntary affiliation with the Intervenor entity." *Id.* at 1109. The modern-day intervenors had not continuously "maintained an organized tribal structure in a political sense." *Id.* The "Mackinac" group in this litigation fails this test.

The Ninth Circuit Court of Appeals affirmed the District Court's ruling in *Washington II*, 641 F.2d 1368 (9th Cir. 1981). First, it noted its prior appellate ruling in *Washington I* that "treaty-tribe status is established when 'a group of citizens of Indian ancestry is descended from a treaty signatory and has maintained an organized tribal structure.'" *Washington II*, 641 F.2d at 1371. "We have defined a single necessary and sufficient condition for the exercise of treaty rights by a group of Indians descended from a treaty signatory: the group must have maintained an organized tribal structure." *Id.* Affirming the District Court's conclusion that none of the intervenor tribes possessed treaty rights, the Ninth Circuit explained:

> The appellants [intervenor tribes] point to their management of interim fisheries, pursuit of individual members' treaty claims, and social activities as evidence of tribal organization. But the district court specifically found that the appellants had not

[4] Prior cases interpreting the 1836 Treaty at issue in this proceeding have cited to and relied upon the robust body of case law interpreting the Stevens Treaties in the Pacific Northwest in which treaty tribes reserved off-reservation fishing and hunting rights. *See, e.g, Michigan.* 471 F. Supp. at 271, citing *United States v. Washington*, 520 F.2d 676 (9th Cir. 1975)

> functioned since treaty times as 'continuous separate, distinct, and cohesive Indian cultural or political communities.' 476. F. Supp. at 1105, 1106, 1107, 1109, 1110. After close scrutiny, we conclude that the evidence supports this finding of fact. Although the appellants now have constitutions and formal governments, the governments have not controlled the lives of the members. Nor have the appellants clearly established the continuous informal cultural influence they concede is required.

Washington II, 641 F.2d at 1373. *See also Suquamish*, 901 F.2d at 776 (descending from a treaty-signatory tribe is not alone sufficient to confirm treaty fishing rights of a contemporary tribe as a treaty-tribe); *United States v. Oregon*, 29 F.3d 481, 485 (9th Cir. 1994) (stating "the critical issue, however, is whether the tribes have shown that they have maintained political cohesion with the tribal entities created by the treaties and receiving fishing rights").

Here, Mr. Caswell relies on oral testimony that a "Mackinac Tribe" was a signatory to the relevant 1836 and 1855 treaties. That testimony is not supported by the text of the 1836 treaty itself or any other treaty. But, even if it were correct that a treaty-time "Mackinac Tribe" or its representatives signed a relevant treaty, that does not answer the question of whether the modern-day organization which now calls itself the "Mackinac Tribe" and the "Mackinac Tribe of Odawa and Ojibwa Indians" and which is also organized as a 501(c)(3) corporation under the name of the "Mackinac Genealogy Native and Ethno History Association" is a political successor-in-interest entitled to exercise the rights of treaty-time Indians. Clearly, it is not sufficient to simply create an organization and name it as an Indian tribe to attain a treaty right to hunt and fish. To establish such treaty rights, modern tribal organizations must show they are political successors-in-interest to the treaty signatories. Here, that showing has not been made.

For example, in *United States v. Washington*, the Intervenor Duwamish Tribe of Indians organization was composed primarily of descendants of Indians known at treaty-time as the Duwamish and who were specifically named in the Treaty of Point Elliott. *Id.* at 1104. Four signatories were identified as signing the treaty for the treaty-time Duwamish Indians, including

the Suquamish chief, Seattle, who signed as chief of the Duwamish and Suquamish. *Id.* at 1104. Similarly, the modern-day Snoqualmie Tribal Organization was composed of descendants of Indians who were known as Snoqualmoo at treaty-time. *Id.* at 1108. The Snoqualmoo were named in and were a party to the Treaty of Point Elliott. *Id.* Nevertheless, those modern-day tribal organizations claiming treaty rights deriving from Duwamish and Snoqualmoo treaty-time signatories could not establish the maintenance of a "continuous separate, distinct and cohesive Indian cultural or political community" since treaty time as required to establish their status as political successors-in-interest of treaty signatories. *Id.* at 1105 (re Duwamish); at 1109 (re Snoqualmie).[5] Here, Mr. Caswell makes no argument and offers no evidence that the modern-day 501(c)(3) organization that calls itself the "Mackinac Tribe" has maintained itself as a "continuous separate, distinct and cohesive Indian cultural or political community" since treaty time. The District Court made no findings that this modern-day organization, a voluntary association of individuals organized as a non-profit corporation, is the political successor-in-interest to a treaty signatory. Such a finding obviously requires factual and legal development. Absent any such findings, the District Court erred in concluding that Mr. Caswell could exercise any treaty rights based on his membership in that organization.

The modern-day Mackinac organization has not maintained itself as a continuous separate, distinct, and cohesive Indian cultural or political community since treaty-time. There is

[5] Courts have also dismissed attempts by individuals to claim treaty rights deriving from the treaty-time Snoqualmoo or Snoqualmie Indians even if those individuals were direct descendants of treaty signatories. *Posenjak v. Dept. of Fish & Wildlife of Wash*., 74 Fed. Appx. 744 (9th Cir. 2003); *State v. Snyder*, Case No. 73893-3-I, 2017 Wash. App. LEXIS 779 (Wash. App. 2017) (affirming Snoqualmoo Indian's conviction for illegal elk hunting because neither modern-day Snoqualmoo nor Snoqualmie tribes had treaty rights). The modern-day tribal organizations, to which those individuals claimed membership in, were not political successors-in-interest to the treaty signatories and had no treaty rights that could be exercised by the individual members. *Id*.

considerable overlap in membership between the amicus SSM Tribe and this so-called Mackinac Tribe organization. Since its federal recognition in 1975, the SSM Tribe's membership rolls have consisted of many descendants of the Mackinac bands. As Mr. Adams admitted in the District Court: "And so what the [SSM] Tribe did is they closed the rolls after so many Mackinac people was in there, and the people that I have as enrollment with the Mackinac Tribe is the Mackinac people that the [SSM] Tribe closed the rolls and wouldn't let those people in. That's – that is us." Pretrial and Motion Hearing Transcript, p. 10, lines 15-20. The organization calling itself the "Mackinac Tribe" consists of individuals who either desired to leave the SSM Tribe's membership or who have been denied membership in the SSM Tribe. In fact, Mr. Adams, the self-described "chairman" of the alleged "Mackinac Tribe" that testified in support of Mr. Caswell in the District Court has apparently claimed membership in the SSM Tribe in prior federal proceedings. *Adams v. Bureau of Indian Affairs*, 50 IBIA 354 (2009). While Mr. Caswell, Mr. Adams, and other individuals may voluntarily form their own group to associate with, they cannot establish the political continuity necessary to establish treaty tribe status. It is the SSM Tribe, not the modern-day "Mackinac Tribe" which has been found as political successor-in-interest to the 1836 treaty-time Indians. *Michigan*, 471 F. Supp. at 249.

In *Adams v. Bureau of Indian Affairs*, 50 IBIA 354 (2009), Mr. Adams and another individual that claimed membership in the "Mackinac Tribe of Odawa and Ojibwa Indians" challenged the Bureau of Indian Affairs' failure to counter-sign treaty fishing identification cards that had been issued by the "Mackinac Tribe."[6] The IBIA explained that the "Appellants

[6] The Mr. Adams at issue in the IBIA proceeding is apparently the same Mr. Adams that testified here in the District Court. It appears that Mr. Adams ("chairman" of the so-called "Mackinac Tribe") desires a platform, through his non-profit "Mackinac Tribe" organization, to fish in Great Lakes waters free from any form of either state or tribal sovereign management authority.

apparently are members of the Sault Ste. Marie Tribe, but contend that the rules and regulations of the Sault Ste. Marie Tribe deny them eligibility to exercise treaty fishing rights, notwithstanding their membership." *Id.* at fn. 4. The BIA refused to counter-sign the cards because the "Mackinac Tribe" was not federally recognized and because such entity was not recognized as a successor-in-interest to the tribes that signed the Treaty of 1836. *Id.* at fn. 5 (acknowledging that five federally-recognized tribes [SSM, Bay Mills, Little River Band, Little Traverse Bay Band, and GTB] are recognized successors in interest to the 1836 treaty signatories). The individuals who make up the so-called "Mackinac Tribe" organization are persons who are became unsatisfied with, or were not entitled to, membership in the SSM Tribe. Pretrial and Motion Hearing Transcript, p. 10, lines 15-20. The so-called "Mackinac Tribe" organization lacks the continuous political continuity necessary to achieve treaty-tribe status. Thus, Mr. Caswell has no treaty fishing rights that derive from his membership in that modern organization and, for that reason, the Circuit Court's reversal of the District Court was proper.

B. Federal Recognition Does Not Determine Treaty-Tribe Status.

The Circuit Court, in reversing the District Court's dismissal of Mr. Caswell's charges, relied on *Mackinac Tribe v. Jewell*, 829 F.3d 754 (D.C. Cir. 2016). *Jewell* addressed whether the organization calling itself the "Mackinac Tribe" could compel the Secretary of Interior to convene an election under the Indian Reorganization Act of 1934. *Id.* at 755. The D.C. Circuit held qualification for such an election under federal law required federal recognition as an Indian tribe pursuant to the federal acknowledgement/recognition process in 25 C.F.R. Part 83. *Id.* at 757-58. Because the "Mackinac Tribe" is not federally recognized, its suit was dismissed. *Id.*

The issue of acknowledgement as a federally recognized Indian tribe is not synonymous with or determinative of the question of whether an Indian tribe possesses reserved treaty fishing rights that can be exercised by members of such treaty-tribe. *United States v. Washington*, 593

F.3d 790, 800-801 (9th Cir. 2010) (en banc). Here, as discussed above, the organization calling itself the "Mackinac Tribe" is not a treaty-tribe and does not possess any treaty fishing rights that could be exercised by Mr. Caswell because it is not the political successor-in-interest to treaty signatories. Nor, as the Circuit Court found, is that organization acknowledged as a federally recognized Indian tribe. While amicus SSM Tribe agrees that the Circuit Court's reversal of the District Court is correct, amicus urges this Court to avoid any ruling that federal recognition is by itself determinative of treaty-tribe status. *Id.*

The Ninth Circuit Court of Appeals addressed the relationship and explained the important differences between federal recognition under the Part 83 process and the existence of treaty reserved rights. In *United States v. Washington*, 520 F.2d 676 (9th Cir. 1975) ("*Washington I*"), the Ninth Circuit affirmed that two tribes (the Stillaguamish and the Upper Skagit) possessed treaty fishing rights under the Treaty of Point Elliott despite the fact those tribes were not federally recognized. *Id.* at 692-93. "Nonrecognition of the tribe by the federal government and the failure of the Secretary of the Interior to approve a tribe's enrollment may result in loss of statutory benefits, but can have no impact on vested treaty rights." *Id.*

Following the Ninth Circuit's ruling in *Washington I*, other non-recognized tribal entities intervened in the *United States v. Washington* litigation in an effort to obtain treaty-tribe status. *United States v. Washington*, 641 F.2d 1368 (9th Cir. 1981) ("*Washington II*"). The District Court denied treaty-tribe status to each of the five intervenors and relied, in part, on their lack of federal recognition. *Id.* at 1371. Although the Ninth Circuit affirmed the District Court's ruling that none of the five intervenors was entitled to exercise treaty fishing rights as a treaty-tribe, the Ninth Circuit also ruled that the non-recognition of the intervenors was not determinative. *Id.*

See also Suquamish, 901 F.2d at 772, n. 10 ("Federal recognition by the Department of Interior is not required for a tribe to obtain treaty tribe status").

Later, in *Greene v. United States*, 996 F.2d 973 (9th Cir. 1993), the Tulalip Tribes (an Indian tribe with federally-reserved treaty fishing rights) sought to intervene in an action between the Samish Tribe and the Department of the Interior regarding the Samish Tribe's effort to obtain federal acknowledgment. *Id.* at 975. Tulalip argued that federal recognition of Samish would lead to claims by Samish that it could exercise treaty fishing rights. *Id.* at 976. The Ninth Circuit affirmed denial of intervention on grounds that the determinations of federal acknowledgement and of treaty-tribe status are distinct. "Federal recognition is not a threshold condition a tribe must establish to fish under the Treaty of Point Elliott. . . . Other Washington tribes, including the Stillaguamish and the Upper Skagit, have treaty fishing rights even though not federally recognized." *Id.* at 976-77, citing *United States v. Washington*, 520 F.2d 676 (9th Cir. 1975). "Federal recognition does not self-execute treaty rights claims." *Id.* at 977. *See also Greene v. Babbitt*, 64 F.3d 1266 (9th Cir. 1995) ("*Greene II*") (holding that a prior denial of status as a treaty-tribe does not preclude pursuit of federal recognition under Part 83 because the issues of treaty tribe status and federal recognition are fundamentally different).

Finally, in *United States v. Washington*, 593 F.3d 790 (9th Cir. 2010) (en banc) ("*Washington IV*"), the Ninth Circuit sitting en banc again affirmed that questions of federal recognition and treaty-tribe status are distinct. In *Washington IV*, the Court addressed the question of whether the Samish Tribe (one of the five intervenors found to not hold treaty rights in *Washington II*) should be able to re-open the denial of its treaty claims in *Washington II* due to the federal government's subsequent acknowledgement of the Samish Tribe as a federally-

recognized Indian tribe. *Id.* at 792-93. The Ninth Circuit held that subsequent federal recognition is not sufficient grounds to re-open a prior denial of treaty-tribe status.

> In *Greene II*, we denied any estoppel effect of *Washington II* on the Samish Tribe's recognition proceeding, because treaty litigation and recognition proceedings were 'fundamentally different' and had no effect on one another. *Greene II*, 64 F.3d at 1270. Our ruling was part of a two-way street: treaty adjudications have no estoppel effect on recognition proceedings, and recognition has no preclusive effect on treaty rights litigation. Indeed, to enforce the assurance in *Greene II* that treaty rights were 'not affected' by recognition proceedings, the fact of recognition cannot be given even presumptive weight in subsequent treaty litigation. To rule otherwise would not allow an orderly means of protecting the rights of existing treaty tribes on the one hand, and groups seeking recognition on the other.

Washington IV, 593 F.3d at 800-801. The Ninth Circuit elaborated on the importance of keeping treaty-status and federal recognition determinations separate.

> Recognition, or 'acknowledgement,' serves a host of purposes for the group that succeeds in achieving it. It establishes a 'government-to-government relationship' between the recognized tribe and the United States. 25 C.F.R. 83.2. It is a 'prerequisite to the protection, services, and benefits of the Federal government available to Indian tribes by virtue of their status as tribes.' *Id.* Federal recognition brings its own obvious rewards, not the least of which is the eligibility of federal money for tribal programs, social services, and economic development.' *Greene I*, 996 F.2d at 978.
>
> It interjects unnecessary and distracting considerations into recognition proceedings if treaty tribes find it necessary or are permitted to intervene to protect against future assertion of treaty rights by the tribe seeking recognition. Such intervention has the potential to interfere unnecessarily with a tribe's establishing its entitlement to recognition because of the speculative possibility that some administrative finding might have an impact on future treaty litigation. The best way of avoiding such difficulties, we conclude, is to deny intervention by tribes seeking to protect their treaty rights, and to deny any effect of recognition in any subsequent treaty litigation. This is the course we adopt.

Washington IV, 593 F.3d at 801.

Here, while it is correct that the modern-day "Mackinac" organization is not a federally recognized Indian tribe, this Court should avoid any ruling that federal recognition alone is determinative of treaty-tribe status. In addition to not being a federally-recognized Indian tribe, the so-called "Mackinac" organization is also not established as the political successor-in-interest

to treaty-time Indians; thus, for that reason, it was incorrect for the District Court to dismiss the citation against Mr. Caswell on the basis of treaty rights.

C. The So-Called "Mackinac Tribe" is Not a Government and Has No Governmental Power to Regulate Fisheries

The leading authority on federal Indian law states:

> "Tribes have the power to make substantive criminal and civil laws unless that power is preempted or limited by federal law." Cohen's Handbook of Federal Indian Law (2005 Edition), § 4.01 [2][c], p. 214.

Further, Indian tribal governments retain the authority to regulate off reservation exercise of treaty reserved fishing rights by their members. That authority to regulate necessarily "includes the authority to enforce their off-reservation regulations through arrests and equipment seizures." Cohen supra § 18.04 [3][a], p. 1142. Tribal governments also possess authority to regulate tribal fishing "in the interests of conservation" *Id*.

An Internal Revenue Code section 501(c)(3) organization such as the current "Mackinac" group has no such governmental authority. The IRS does not have the authority to determine the existence of an Indian tribe as a government. Thus the so called Mackinac group has no authority to regulate fishing by time, manner, gear, or location, etc. It has no authority to make arrests nor issue fines and or seizure of gear nor any other governmental action that would be considered normal for governments. It has no authority to issue legally binding regulations designed to protect conservation of fisheries resources. Thus Mr. Caswell's claim that he can fish where he wants, how he wants and when he wants without regard to any governmental authority amounts to a free for all, non-regulated fishing activity which could be extraordinarily dangerous for the resource.

The federal Ninth Circuit has also elaborated on the disruption that would result to existing treaty tribe interests and to the regime of state and tribal fisheries co-management if

federal recognition allowed re-opening of adverse treaty status determinations. Considerations of finality "loom especially large in this case, in which a detailed regime for regulating and dividing fishing rights has been created in reliance on the framework in *Washington I*." *Washington IV*, 593 F.3d at 800. The Court noted disruption and possible injury that would occur to existing treaty-tribes in the form of across-the-board dilution of the shares of total harvest of all treaty tribes. *Id.* In addition, treaty claims of newly recognized tribes may directly compete with those of existing treaty tribes who are political successors in interest of treaty-time Indians. *Id.* Those considerations are likewise relevant here where there are five federally recognized treaty tribes that share the finite fishery resource and which manage that resource pursuant to their sovereign governmental authority and in cooperation with the State of Michigan pursuant to court approved consent decrees.[7] Here, Mr. Caswell, Mr. Adams, and the modern-day "Mackinac" organization seek an end-run around state and tribal sovereign governmental fishery-management authority.

In summary, the federal Ninth Circuit has concluded that federal recognition is not determinative of treaty-tribe status and vice versa. [8] But here, because the "Mackinac"

[7] While there are twelve federally recognized Indian tribes in Michigan, only the five tribes who are political successors-in-interest to the 1836 treaty signatories are parties to the consent decrees that currently address hunting and fishing on ceded lands. Other federally recognized Indian tribes in Michigan are subject to different treaties that involve different land areas and contain different rights and obligations not at issue here.

[8] The Sixth Circuit Court of Appeals has not specifically addressed the relationship between federal recognition and treaty-tribe status. However, in an unreported opinion, Judge Enslen of the Western District of Michigan dismissed the Little Traverse Bay Bands of Ottawa Indians ("LTBB") complaint that LTBB possessed treaty fishing rights as political successors in interest to signatories of the 1836 Treaty for failure to exhaust administrative remedies on grounds that LTBB had not yet sought acknowledgement of its status as a federally-recognized Indian tribe with the Department of the Interior. *Little Traverse Bay Bands of Ottawa Indians v. Mich.*, 1988 U.S. Dist. LEXIS 18078 (W.D. Mich. 1988). While Judge Enslen found it appropriate for the federal recognition determination to precede a determination of treaty-status,

organization is neither a treaty-tribe nor a federally recognized tribal government, the Circuit Court's reversal of the District Court was correct and should be affirmed.

Respectfully Submitted,

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Date: November 2, 2020

Judge Enslen did not suggest that a determination of federal recognition would necessarily lead to a determination of rights under the relevant treaty. Federal recognition is not synonymous with treaty status.