

**Case No. 23-1931**

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UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

BAY MILLS INDIAN COMMUNITY, GRAND TRAVERSE BAND OF  
OTTAWA AND CHIPPEWA INDIANS, LITTLE RIVER BAND OF OTTAWA  
INDIANS, LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS

Intervenors-Appellees,

SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS,

Intervenor-Appellant

v.

STATE OF MICHIGAN, and its agents

Defendants-Appellees.

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Appeal from the United States District Court  
Western District of Michigan, Southern Division  
Honorable Paul L. Maloney

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**BRIEF OF INTERVENOR-APPELLEE BAY MILLS INDIAN  
COMMUNITY**

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### **STATEMENT OF JURISDICTION**

The Bay Mills Indian Community (“Bay Mills”) adopts by reference the Statement of Jurisdiction in the briefs of the United States and the State of Michigan, as authorized by Fed.R.App.P. 28(i).

### **STATEMENT OF ISSUES**

Bay Mills adopts by reference the statement of the issues in the brief filed by the United States, as is authorized by Fed.R.App.P. 28(i).

## STATEMENT OF THE CASE

Bay Mills adopts by reference the statement of the case contained in the brief of the United States, as is authorized by Fed.R.App.P. 28(i).

Supplementing that statement, Bay Mills submits the following synopsis of the efforts of the United States and the intervenor Tribes to manage and regulate the activities of Tribal fishers, generated by the 1979 decision in *United States v. Michigan*, 471 F. Supp. 192 (W.D. Mich. 1979), including consultation with the State of Michigan. Those actions are the building blocks upon which the 1836 Treaty fishery has been effectively managed and regulated to the present day, and is most recently embodied in the Great Lakes Fishing Decree challenged in this appeal by the Sault Ste. Marie Tribe (“Sault Tribe”).

Bay Mills supported the 1971 challenge by its Tribal citizen, Albert B. LeBlanc, Sr., to Michigan’s authority to prohibit use of a gill net for fishing in Lake Superior, relying on the language of the Treaty of March 28, 1836, 7 Stat. 491; the result was a decision by the Michigan Supreme Court in *People v. LeBlanc*, 399 Mich 31; 248 NW2d 199 (1976), which recognized the right to fish was protected by the 1836 Treaty, but remanded for further proceedings the

determination as to whether or not the gill net ban was permissible under the “conservation standard”, a three-part test derived from decisions by the United States Supreme Court in cases involving rights to hunt and fish contained in treaties negotiated with Indian Tribes. That test requires the State regulation to be (1) necessary for the preservation of the fish it protects; (2) application of the regulation to Native Americans engaging in treaty-protected usufructuary activities is also necessary for preservation of the fish; and (3) the State regulation does not discriminate against Native Americans. *LeBlanc*, 399 Mich at 64; 248 NW2d at 215.

Federal litigation was initiated in 1973 by the United States on behalf of Bay Mills in this case; an amended complaint was filed in 1976, to include Sault Tribe as a successor in interest to signatory bands of the 1836 Treaty. Appellant’s App. A006-A011.<sup>1</sup> This case proceeded to trial even after *LeBlanc* was decided, as the *LeBlanc* case record was sparse and the federal court was not bound by that decision, as the issues presented are “federal questions.” 28 U.S.C. §1331.

In the absence of a comprehensive decision regarding the continued existence of usufructuary rights reserved by the 1836 Treaty, Bay Mills did not

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<sup>1</sup> For the convenience of this Court, documents in Appellant’s Appendix are utilized in this brief, to the extent that they are relevant.



have comprehensive fishing regulations. Judge Fox acknowledged the existence of the Tribe's fishing regulations in his 1979 decision, stating:

The Bay Mills Indian Community regulates the fishing of its members in the waters of the Great Lakes within the treaty area and requires its members who fish commercially to have a tribal fishing license and a treaty fishing identification card issued by the United States Department of the Interior pursuant to 25 C.F.R. part 256. The tribe has a conservation code and a conservation committee which includes ex officio members from the Michigan Department of Natural Resources and the United States Fish and Wildlife Service. The committee promulgates rules and regulations governing fishing. The tribe imposes and collects a license fee, imposes restrictions on the time, manner and place of taking, and requires its fishermen to submit catch reports.

*United States v. Michigan*, 471 F. Supp. at 248. A similar finding was made regarding the Sault Tribe's regulations. *Id.* The decision went on to hold that the State could not regulate treaty fishing activities due to federal preemption, *Ibid.* at 270, and Tribal regulation of their fishers. *Ibid.* at 274. Judge Fox's preemption conclusion was based on the power of these respective sovereigns to regulate treaty fishing activities. That conclusion was never tested, because the United States responded to the 1979 decision by enacting comprehensive fishing regulations, pursuant to 25 C.F.R. Part 256 (now codified as Part 249). Published in the *Federal Register* on November 15, 1979, were regulations promulgated by the Bureau of Indian Affairs, in the Department of the Interior, titled "Off-Reservation Treaty Fishing; Great Lakes and Connecting Waters in Michigan Ceded in Treaty of 1836", as a new subpart of 25 CFR Part 256. Bay Mills App. 001-004

Of importance here is the summary rationale for the regulations:

This rule applies to fishing by the members of the Bay Mills Indian Community and the Sault Ste. Marie Tribe of Chippewa Indians, which possesses off-reservation fishing rights secured by that treaty. The regulations were prepared and are being promulgated pursuant to a Memorandum of Understanding with the tribes and after consultation with the Michigan Department of Natural Resources. The Secretary has determined that conservation of the fishery resource within the ceded waters will be enhanced by a single set of comprehensive regulations, and that the advent of fall spawning seasons requires the promulgation of this rule as emergency regulations.

44 Fed. Reg. 65747.

The supplemental information provided for the regulations also discussed the interim management of the Treaty fishery as:

A federal-state-tribal biological team has been at work preparing harvestable surplus estimates for various species in each state statistical district within treaty waters. In the Memorandum of Understanding, the tribes and the Department agreed that when the harvestable surplus of a given species has been taken by all harvesters from a given area, treaty fishing may be closed for species in that area regardless of the proportion of the harvest taken by treaty fishers.

44 Fed. Reg. 65747-48.

Those regulations were amended and republished in the *Federal Register* on April 28, 1980. Bay Mills App. 005-010. The most obvious difference is that the regulations now apply to the Grand Traverse Band of Ottawa and Chippewa Indians, as that Tribe had received federal recognition and had also signed the existing Memorandum of Understanding. 45 Fed. Reg. 28100, 28101.

Also mentioned is an “Ad Hoc Technical Working Group consisting of federal, tribal and state representatives, which made recommendations to all three governments regarding management options, such as managing lake trout to secure natural reproduction. 45 Fed. Reg. at 28101. Of equal importance to the regulatory framework was the establishment of areas in Lake Michigan which were closed to treaty commercial fishers in order to facilitate fish population growth, provided that similar restrictions were enacted by the State of Michigan for its commercial fishers in those areas. *Id.*

The existence of the federally-promulgated regulations caused this Court to confirm the conservation standard as stated in *LeBlanc*, and remand to the trial court the question of federal preemption of state court jurisdiction over the actions of treaty fishers in *U.S. v. Michigan*, 623 F.2d 448 (6<sup>th</sup> Cir. 1980). When these regulations lapsed the following year, the State sought recognition of its authority to regulate the treaty fishery, appealing the holding by the District Court that the Tribes’ collective regulations, based on the lapsed federal regulations, adequately protected the fishery resource and that the State’s regulations failed to meet the conservation standard. *U.S. v. Michigan*, 505 F.Supp. 467 (W.D. Mich. 1980).

In considering the State’s appeal, this Court again held that the State must meet the “conservation standard” which the Michigan Supreme Court held in

*LeBlanc* applied to any regulation of the 1836 Treaty fishery, and even created a stricter test:

As provided in *LeBlanc*, any such state regulations restricting Indian fishing rights under the 1836 treaty, including gill net fishing, (a) must be a necessary conservation measure, (b) must be the least restrictive alternative method available for preserving fisheries in the Great Lakes from irreparable harm, and (c) must not discriminatorily harm Indian fishing or favor other classes of fishermen.

*U.S. v. Michigan*, 653 F.2d 277, 279 (6<sup>th</sup> Cir. 1981), *cert. denied*, 454 U.S. 1124 (1981). This Court again remanded to the trial court, but this time with a directive that the regulations issued by the Bureau of Indian Affairs in April, 1980, continue in full force and effect while the trial court worked through which state court proceedings were preempted by the existence of federal regulation of the treaty fishery. Counsel for the United States and for the Tribes each advised this Court during oral argument that the Tribes were adopting all regulations originally promulgated by the Bureau of Indian Affairs and were doing so jointly under the Chippewa Ottawa Treaty Fishery Management Authority (COTFMA). This Court recognized that tribal regulation would now serve as the preemption basis, and admonished the District Court that “[o]nly upon a finding of necessity, irreparable harm and the absence of effective Indian tribal self-regulation should the District Court sanction and permit state regulation of gill net fishing.” *Id.*

Thereafter, the three Tribes' fishers were regulated by COTFMA, and sought District Court approval to modify them intermittently, as authorized by this Court, citing Rule 65, Federal Rules of Civil Procedure. *Id.*

In 1984, the Tribes jointly sought an allocation of the fishery resource contained in the 1836 Treaty Great Lakes waters. Appellant's App. A061-A063. As explained in the accompanying memorandum in support of the motion, allocation was deemed necessary for tribal fishers to have the opportunity to harvest in light of State-licensed fishers taking the total allowable catch in certain management units. Appellant's App. A064-A073. The court determined that it had the authority to issue allocation orders and established a process by which the actual allocation elements would be determined. Appellant's App. A074-A080.

The comprehensive Agreement approved by the District Court in 1985 embodies certain core principles first utilized in the BIA's fishing regulations promulgated in 1979 and revised in 1980:

- \* Regulation of the fishing activity of 1836 Tribes' members is drafted and adopted by the Tribes acting together as the Chippewa Ottawa Treaty Fishery Management Authority (COTFMA).

- \* The interagency group of biologists is established as a standing committee, with one representative from the Tribes' Management Authority, one from Michigan Department of Natural Resources, and one from the Great Lakes

Fishery Laboratory of the U.S. Fish and Wildlife Service, which is charged with the same responsibilities as the previous working group.

\* Areas of water may be closed for biological reasons or to reduce gear conflict. Restrictions on fishing gear may be imposed as to season or location or both.

\* Zones are identified within which Tribal commercial fishing may occur, and areas which are closed to Tribal commercial fishing, or in which fishers of a particular Tribe have exclusive commercial fishing opportunity.

A new component is also added, which is the Executive Council; it is comprised of the Tribal chairpersons, the Director of the Michigan Department of Natural Resources, and the Secretary of the Interior, or their designated representatives. The body meets not less than annually, and is authorized to resolve disputes among the parties. Its purpose was to facilitate resolution of controversies without the necessity of seeking court resolution.

The 2000 Consent Decree, entered as an order of the Court on August 8, 2000, R 1458, Page ID 3216-3400, as a successor to the 1985 Decree, follows the above framework, as well. Two additional Tribes were federally recognized and intervened in the case as modern day successors in interest to bands which signed the 1836 Treaty; their inclusion caused the formation of a successor inter-tribal regulatory body, as well; the Tribes created the Chippewa Ottawa Resource

Authority (CORA) and its Charter constitutes Appendix A to the 2000 Consent Decree. R 1458, Page ID 3338-3350.

The 2000 Decree can best be characterized as a refinement to the general principles utilized by the United States, the State and the Tribes in previous comprehensive management Decrees.

The 2023 Decree, R. 2132, Page ID 15236-15301, is the latest example of the effort required to encompass the concerns and capabilities of seven governments to respond to long-term changes in the Great Lakes fishery, as well as to successfully plan to address significant risks to the fishery caused by environmental factors, rather than by harvest. That response has created an Environmental Committee, which is tasked with facilitating the identification of adverse elements which if unaddressed will reduce the fishery's productivity, through loss of habitat, or introduction of invasive species which compete with native fish species for food. R. 2132, Page ID 15298.

Forty-five years of cooperative management of the Great Lakes fishery has resulted in the Decree which Sault Tribe now appeals.

## ARGUMENT

Bay Mills adopts by reference the arguments, including applicable standards of review, contained in the brief of the United States, as authorized by Fed.R.App.P. 28(i). As Bay Mills is the only party in this case which has previously objected to entry of a comprehensive management and regulatory framework for the Treaty fishery, Bay Mills submits the following to provide context to the arguments contained in Appellant's Brief.

### **I. Objection to Entry of the Comprehensive Management and Regulatory Plan Presented to the District Court Must Be Based on the Record.**

Bay Mills representatives signed the initial agreement for entry by the court of a consent order on March 28, 1985, and its counsel subsequently filed a motion on behalf of all parties for entry of the Decree. Bay Mills was then required to file objection to the Decree's contents due to the "rejection" of the agreement by the Tribe's members by a vote required by its Constitution, which was filed on May 6, 1985. See, *United States v. Michigan*, 12 ILR at 3080; Appellant's App. A082. The gravamen of the objection was the allocation of fishing opportunity as provided in the agreement; Bay Mills proposed instead an equal allocation of 50-50 between tribal and state-licensed fishers. A hearing was initially scheduled for May 10, 1985, which at Bay Mills' request, was moved to May 24, 1985. During the multi-day hearing, Bay Mills and all other parties, including "litigating amici"



submitted briefs, submitted proposed findings of fact and conclusions of law, filed stipulations, presented evidence, and made oral argument. *Id.* The District Court described the issue to be resolved through the allocation hearing as deciding whether either allocation system “accommodates and protects the interests of all concerned to the extent possible.” *U.S. v. Michigan*, 12 ILR at 3081.; Appellant’s App. A083.

The factors identified in that decision as the appropriate considerations to take into account are just as relevant to the agreement which is the subject of this appeal; they are:

Preservation and conservation of the resource; impact of the plans [for allocation] on all three tribes; consistency of the plan with the tribal right to fish and the recognition that the resource is shared; reduction of social conflict; feasibility and methods of implementation; protection of Indian fishermen from discrimination in favor of other classes of fishermen; proximity; access; species of fish stocks available; harvestability of fish stocks; the economic impact on Indian fishermen; stability of the fishery; contaminant levels; management and marketing concerns; and flexibility versus predictability of the fishery.

*Id.*

These factors are not abstract in nature. Each depends upon the evaluation of significant factual elements which are presented through evidence, rather than through legal argument. In the short time available to the parties in 1985; each had to present in less than 30 days since Bay Mills’ objection was filed all information available to that party in great detail. Bay Mills not only submitted its detailed

allocation plan by area and species, but it also presented evidence regarding tribal fishers' gear preferences, favored fishing areas, available data on tribal harvest by species and by area, and the like. See *United States v. Michigan*, 12 ILR at 3084; Appellant's App. A086.

The most significant difference in the 1985 situation from that presented in this appeal is that Bay Mills proffered a detailed allocation plan for the court to consider as an alternative to that agreed upon by the other parties, which it supported with evidence. Sault Tribe instead submitted 137 objections R 2077, Page ID 12804-12822 to the proposed Decree on February 10, 2023. By that time, the District Court had stated several times from the bench that it would utilize the criteria established by Judge Enslen in his 1985 evaluation of the competing allocation plans presented by Bay Mills on the one side, and the other parties on the other. The criteria are also recited verbatim in the Court's opinion approving entry of the proposed Great Lakes Fishing Decree. R 2130, Page ID 15110. Sault Tribe did not support its written objections with any form of evidence; there were no affidavits, no scholarly or scientific publications, not even an article from a newspaper or other generally published source. Bay Mills presented witnesses, as did the other parties in support of the proposed Decree, and Judge Enslen's opinion discusses the received evidence and the weight which was accorded to each item.

When provided the opportunity to file proposed findings of fact and conclusions of law, Appellant filed a restatement of its previously filed objections. R 2123; Page ID 14828-14859. Yet, without shame or explanation, Appellant filed a “supplemental filing re economic issues” on July 26, 2023, which contained a report titled “Material Circumstances and Fishing Activity of the Sault Ste. Marie Chippewa Tribe”, dated January 4, 2019. R2127, Page ID 15046 and R2127-1. Page ID 15054. The existence of this report was not cited in the objections to the Decree filed by Appellant in February 2023, R 2077, five months previously.

Appellant’s claim that its substantive objections were ignored is difficult to accept, when the record clearly indicates that the opportunity to present whatever evidence the Appellant chose to submit was available.

Bay Mills did not prevail in its 1985 objections to the proposed Decree before the Court at that time, but at least it met its burden of proof. As Judge Enslen stated, the Bay Mills plan “may provide flexibility, it lacks predictability, stability, and invites the continued social conflict so evident in the past. *United States v. Michigan*, 12 ILR at 3084; Appellant’s App. at A086.

Sault Tribe failed to meet its burden of production and persuasion in the court below, and its arguments before this Court to extenuate that failure are unpersuasive.

## **II. Tribal Zones Effectuate Inter-Tribal Allocation of the Fish Available to the Treaty Fishery.**

Tribal Zones have existed in each of the comprehensive management and regulatory frameworks embodied in the Decrees entered in 1985, 2000, and 2023. One purpose of the Zones is to facilitate allocation of harvest opportunity between fishers licensed by their Tribes and those licensed by the State. The Zones also are designed, and serve, as ensurance that the Tribes' allocation of harvest opportunity is also equitably shared among them. In the Inter-Tribal Zones, fishing is open to Tribal commercial fishers licensed by any 1836 Tribe, subject of course to the applicable regulations for that activity. In contrast, the Tribal Zones are open to fishing by one, or at most, two Tribes' fishers.<sup>2</sup> The Zones are located in areas which provide a highly important fishing opportunity to the Tribe's fishers whose name is associated with the Zone, and are designed to ensure that the fishing opportunity is available throughout the year. That fishing opportunity may be shared with fishers from other Tribes, if the Zone's Tribe so decides.

Another advantage of the zonal approach to allocation is that administration of allocation is easier when applied by geographic area. Judge Enslen was correct when he observed in his 1985 decision that allocation by species and by Tribe in

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<sup>2</sup> The Bay de Noc Zone in Lake Michigan and the Southern Lake Huron Trap Net Zone are open to fishing by Sault Tribe fishers; in addition Little Traverse Band fishers may fish in the Bay de Noc Zone and Bay Mills fishers may fish in the Trap Net Zone.

each management unit, as Bay Mills had then advocated, “may provide flexibility, [but] it lacks predictability, stability ...[and] perpetuates...the past difficulties in effective management, enforcement, and marketing.” *United States v. Michigan*, 12 ILR at 3084, Appellant’s App. A087.

Nothing filed in the District Court or before this Court indicates that Sault Tribe is even aware that allocation of harvest opportunity is not limited to the fishery licensed by the State and that fishery licensed by each of the Tribes. Allocation of fishing opportunity among the Tribes’ fishers must also occur in any effective management framework. It is not clear that Sault Tribe is aware of that second, but equally important, allocation issue. Its brief does not address it. However, under the Decree framework currently on appeal, the maintenance of Tribal Zones is the best means to achieve equitable sharing of the Treaty fishery resources.

**III. Collective Regulation of the Treaty Fishery by the Tribes Is the Most Effective Means to Manage the Fishery for the Benefit of Tribal Members Currently Fishing and for those Generations to Come.**

There can be no doubt that the Tribes do not, under any circumstances, favor State regulation of harvesting activities of Tribal members whose right to engage in those activities is guaranteed by Treaty. In fact and in law, the imposition of regulations which have many purposes other than protecting a fishery resource from irreparable harm is directly contravened by the “conservation standard”

which applies to 1836 Treaty harvesting activities. There may some day be a circumstance in which a particular State regulation could meet that strict standard, but the Tribes prefer to ensure that the natural resources on the lands and waters within the 1836 Treaty area are protected by regulations developed, enforced and administered by the Tribes. That “effective Tribal self-regulation” preemption has been sanctioned by this Court for over 40 years. In that time, no State regulation of a Treaty-guaranteed activity has been upheld as necessary to protect the resource. For that reason, the adoption of specific regulations by the Tribes has been an integral part of the periodic negotiations and consultations for the development of an updated and comprehensive management framework for the Great Lakes fishery. The Tribes agree to promulgate regulations which they consider appropriate to protect the fishery from irrevocable harm. By doing so, they are not bending a knee to some resource cartel, the Tribes are exercising their responsibility to the natural world and their members to protect and enhance the Great Lakes waters and the aquatic life which lives there. That is the true meaning and effect of “effective tribal self-regulation.”

Tribal self-regulation cannot be effective if each Tribe chooses to enact only those regulations which apply to their own harvesters. That principle is well known, as was first discussed in reference to 1836 Treaty Great Lakes fishing by the BIA, when promulgating fishery regulations immediately after the issuance of

the 1979 decision by Judge Fox. The announcement of the regulations issued on November 15, 1979 in the *Federal Register* under 25 CFR Part 256 pronounced:

The Secretary has determined that conservation of the fishery resource within the ceded waters will be enhanced by a single set of comprehensive regulations, and that the advent of the fall spawning seasons requires the promulgation of this rule as emergency regulations.

Bay Mills App.

In each Decree regarding the overall management and protection of the Great Lakes Treaty fishery, the substantive regulations are detailed and comprehensive, and require a uniform and objective regulatory content that each Tribe agrees to adopt and enforce. In addition, there is also acknowledgement that specific circumstances may cause one or more Tribes to adopt regulations applicable only to their own fishers; however, the Tribes may only enact regulations which are more restrictive than those identified in the Decree in effect at the time, not less.

Solo regulatory authority over a Tribe's commercial fishermen is claimed by the Sault Tribe as its right, but the Tribe must acknowledge that the complex biological composition and size of the Great Lakes waters are not ecosystems in which separate, differing regulations of the same fish stocks in the same geographic area by several Tribes, each of which is regulating their own members.

Fish migrate freely throughout the Treaty-ceded waters and beyond. They are not constrained by geographic boundaries which exist only on a map, and swim, feed, spawn where they choose. Similarly, environmental threats to the fishery—such as climate change, invasive species, and pollution events—are not limited by fish management unit area lines. In these circumstances, effective regulation for one sovereign is necessarily dependent upon the effectiveness of all other sovereigns' regulations applicable to the area, or species. In turn, all the regulating sovereigns must coordinate their regulatory activities and work together to assess the effectiveness of a regulation or regulatory scheme, and further, if necessary, make collective, cooperative regulatory adjustments when necessary to preserve a shared resource. This is the goal of co-management agreements such as the 2023 Great Lakes Fishing Decree.

For one heretofore participating government to assert that it can accomplish its obligations to protect the fishery resource on its own, without any consideration of the impact of such a management strategy, risks serious impairment of the collective management efforts of the other sovereign governments. It therefore places an unacceptable risk on the shared Treaty right and the sustainability of the resource as a whole. That risk is serious, and not just conjecture. Unilateral regulatory systems applicable to a shared resource cannot be countenanced, which



is the reason that such a management strategy is not “effective tribal self-regulation.”

## CONCLUSION

It is the position of the Bay Mills Indian Community that the provisions of the 2023 Great Lakes Fishing Decree preserve treaty-reserved rights of tribal fishers and preserve the fishery resource, and the Tribe respectfully requests that this Court affirm the district court’s entry of the Decree.

Respectfully submitted,

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