Case No. 23-1931

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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

BRIEF OF PLAINTIFF-INTERVENOR-APPELLEE GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS

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STATEMENT OF THE ISSUES

As authorized by FED. R. APP. P. 28(i), the Grand Traverse Band of Ottawa and Chippewa Indians (GTB) adopts by reference the statement of the issues in the brief of the United States and also identifies an additional issue pertinent to GTB's unique situation being located within the Grand Traverse Bay region of Lake Michigan: whether judicial estoppel precludes the Sault Ste. Marie Tribe of Chippewa Indians (Sault Tribe) from disputing the zonal plan framework decreed in 1985, including the exclusive Grand Traverse Tribal Zone specified in 2023 Decree.

STATEMENT OF THE CASE

GTB adopts by reference the statement of the case in the brief of the United States as authorized by FED. R. APP. P. 28(i), and submits this supplemental background concerning the additional issue addressed in this brief. Over the five-decades lifespan of this case there have been (as of November 13, 2023) 2,144 docket entries, with 345 of those subsequent to the administrative action closing the case on November 2, 2007. Following is an outline of significant developments in the history of the case highlighting aspects pertinent to GTB's fundamental issue addressed in this brief:

April 9, 1973: United States filed suit as trustee on behalf of Bay Mills (R. 1[1]).

November 19, 1974: Bay Mills intervened (R. 19).

December 12, 1975: Sault Tribe intervened (R. 47).

July 30, 1976: district court entered opinion and order (R. 97 and R. 98) bifurcating Great Lakes fishing issues from inland usufruct rights issues, *see United States v. Michigan*, 471 F. Supp. 192, 218 (W.D. Mich. 1979).[2]

1978-79: district court conducted a trial on the Great Lakes fishing issues.

May 7, 1979: district court entered opinion (R. 334) and declaratory judgment (R. 335), declaring (1) the existence of off-reservation fishing rights within treaty-

[1] Docket entries prior to implementation of PACER are referenced as "R. #" with date of filing, but without any Page ID number.

[2] "(6) This trial has been limited to the issues identified for separate trial by this Court in its Order of July 30, 1976, which are:

(a) Whether the Indians reserved or retained fishing rights in the Great Lakes waters purportedly ceded by them under the Treaty of 1836 (7 Stat. 491);

(b) If the Indians reserved rights to fish in those waters, were those rights abrogated in whole or in part by the Treaty of 1855 (11 Stat. 621); and

(c) Assuming those reserved fishing rights were not abrogated, does the State possess any jurisdiction to regulate the exercise of those rights by treaty tribe members?"

United States v. Michigan, 471 F. Supp. 192, 218 (W.D. Mich. 1979).

cession areas of three Great Lakes, and (2) the State (completely) lacks authority to regulate Indians' "treaty fishing" activities.[3]

August 27, 1979: in case filed by GTASFA against class of individual Indian fishers, state court issued *ex parte* TRO enjoining fishing with gill nets within Grand Traverse Bay.[4]

September 6 and 17, 1979: district court granted TRO (R. 356) and preliminary injunction (R. 377) enjoining state court's August 27, 1979 TRO.

September 19 and 20, 1979: notices of appeal filed by GTASFA (R. 378) and state court (R. 379) from September 17, 1979 order, which were assigned Sixth Circuit Case Nos. 79-1527 and 79-1528.

October 26, 1979: GTB intervened (R. 394; *see* R. 395 and R. 396); the order granting GTB's intervention also granted TRO enjoining defendants from prosecuting GTB members (R. 394).

October 30, 1979: notice of appeal (R. 400) filed from October 26, 1979 order, which was assigned Sixth Circuit Case No. 79-1635 (*see* R. 409, November 13, 1979).

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[3] The declaratory judgment is reported in *United States v. Michigan, id.,* 471 F. Supp. at 278-81.

[4] R. 1974-7, Page ID 11381-83. Copies of the August 27, 1979 complaint, affidavits, and TRO were filed as Exhibits 5A and 5B with GTB's July 27, 2022 response to motion to intervene, R. 1974-6 and R. 1974-7, Page ID 11367-83.

November 15, 1979: United States promulgated regulations (44 Fed. Reg. 65747[5]) governing activities of tribal members exercising Great Lakes fishing rights declared on May 7, 1979; presumably because these regulations were under consideration prior to GTB's intervention on October 26th, the Grand Traverse Band was omitted from their purview.[6] To the extent authorized therein, tribal fishing by Bay Mills and Sault Tribe fishers continued pursuant to these regulations notwithstanding Sixth Circuit stay orders.

November 28, 1979: Sixth Circuit granted stay pending appeal in Case No. 79-1635.[7]

May 28, 1980: Sixth Circuit "remand[ed] the case to the District Court for consideration of preemptive effect of the new federal regulations."[8]

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[5] R. 2075-1, Page ID 12744.

[6] § 256.41(i), 44 Fed. Reg. at 65748 (R. 2075-1, Page ID 12744).

[7] "In case 79-1635, a three-judge panel of this Court on November 28, 1979, likewise granted stay pending appeal. The stay in 79-1635 suspended a temporary restraining order issued by the District Court. The TRO had applied the principles of the decision in the present case -- No. 79-1414 -- to the Grand Traverse Band of Ottawa and Chippewa Indians, in addition to the Indian plaintiffs herein. Our stay in 79-1635 temporarily barred the extension of the May 7, 1979, District Court decision to the Grand Traverse Band." May 30, 1980 Order in No. 79-1414. R. 1974-8, Page ID 11386.

[8] *United States v. Michigan*, 623 F.2d 448, 450 (6th Cir. 1980).

May 30, 1980: Sixth Circuit issued order in No. 79-1414 stating: "the judgment of the District Court is stayed pending final disposition of this appeal."[9] This order also specifically stayed the district court's judgments in three companion cases (Nos. 79-1527, 79-1528, and 79-1635), in effect continuing to prohibit GTB fishers from fishing in their "home waters."

May 11, 1981: expiration date of the federal regulations promulgated November 15, 1979, subsequently amended to extend expiration date to January 1, 1981 (45 Fed. Reg. 28105) and again to May 11, 1981 (46 Fed. Reg. 33-01, *see* WL109634).[10]

July 10, 1981: Sixth Circuit issued decision[11] affirming the district court's declaration regarding the existence of off-reservation fishing rights but modifying the holding as to the State's regulatory authority, instead adopting Michigan Supreme Court's 3-part test in *People v. LeBlanc*, 399 Mich. 31, 58-64 (1976).

October 5, 1983: district court issued order (R. 613) caused by "racehorse"

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[9] R. 1974-8, Page ID 11385. A copy of the May 30, 1980 Order was filed as Exhibit 6 with GTB's July 27, 2022 response to motion to intervene (R. 1974, Page ID 11339).

[10] "(2) The Secretary of the Interior allowed the regulations in question to expire on May 11 of this year, apparently on grounds that he and the Bureau of Indian Affairs should defer to the states in connection with the regulation of Indian treaty fishing in the Great Lakes." *United States v. Michigan*, 653 F.2d 277, 278 (6th Cir. 1981).

[11] *Id.*, 653 F.2d 277.

fishery imposing early-season closures including Grand Traverse region of Lake Michigan (MM-4 & MM-5). R. 2096-8, Page ID 137432.

November 14, 1983: Bay Mills, Sault Tribe, and GTB filed a motion to allocate the resource (R. 621[12]), with the Tribes requesting an equal share vis-à-vis the State: "Their treaty right entitles them to an equal division of the available fishery resource." R. 621, November 10, 1983 Memorandum, at p. 5 (R. 2075-5, Page ID 12773).

April 11, 1984: district court issued an opinion and order (R. 642[13]) regarding its authority to allocate.

April 25, 1984: Bay Mills, Sault Tribe, and GTB filed an amended motion to allocate resource. R. 643.

April 26, 1984: by letter dated April 24, 1984 and filed April 26, 1984 (R. 644), GTB formally notified the district court and other parties that "subsumed within the overall allocation issues is the subsidiary issue involving the equitable

[12] A copy of the motion and memorandum was filed as Exhibit 5 with GTB's February 10, 2023 supplemental response to the Sault Tribe's reconsideration motion. R. 2075-5, Page ID 12766.

[13] A copy of the April 11, 1984 Opinion and Order was filed as Exhibit A with the stipulating parties' February 24, 2023 response to the Sault Tribe's motion to amend 2000 consent Decree and for a Rule 16 pretrial conference. R. 2080-1, Page ID 12877.

apportionment of the tribal share among the plaintiff-intervenor tribes." R. 2081-3, Page ID 12924-12925.

July 21, 1984: stipulation (R. 693) and order (R.694) caused by "racehorse" fishery imposing early-season closures including Grand Traverse region of Lake Michigan (WFM-05).[14] R. 2096-9, Page ID 13744-13754.

1984-1985: district court issued pre-trial orders establishing 2-track process, *i.e.*, mandating both trial schedule and settlement negotiations facilitated by appointed Special Master.[15]

February 20, 1985: GTB filed supplemental pleading (R. 726) formally asserting the necessity of addressing "the subsidiary issue concerning the equitable apportionment among the plaintiff-intervenor tribes of the tribal share of the fishery resource." R. 2081-4, Page ID 12928.

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[14] Only because of an exception for GTB fishers in the 1984 order (paragraph 13) were they not completely prohibited from fishing in their "home waters" as occurred in 1979, 1980, in 1981 until this Court's July 10 decision, and as mandated by the October 5, 1983 order.

[15] *See, e.g.,* R. 697 (September 28, 1984), appointment of Special Master; R. 702 (November 5, 1984), scheduling trial for April 22, 1985; R. 725 (February 13, 1985), Scheduling Order; R. 730 (February 27, 1985), notice of jury term schedule confirming trial scheduled "for week of 4-22-85"; R. 750 (March 19, 1985), Order noting that "negotiations should be conducted 3-25-85"; and R. 751 (March 19, 1985), Amended Scheduling Order noting "negotiations at Lake Superior State College from 3-25-85 thru 3-27-85" and confirming other deadlines leading up to trial scheduled to commence April 22.

March 28, 1985: after 3-day marathon settlement negotiations, representatives of the then 5 parties (Bay Mills, Sault Tribe, GTB, United States, and State of Michigan) signed an "Agreement for Entry of Consent Decree."

May 9, 1985: as a result of the Bay Mills governing council's vote declining to ratify the agreement, the district court entered a pre-trial order (R. 793) scheduling a trial to begin May 24.

May 24-31, 1985: "Bench Trial" (equitable allocation trial, R. 828-33).

May 31, 1985: district court issued its decision on allocation (R. 833), *i.e.*, the 1985 Decree. 12 I.L.R. 3079 (R. 1890-1, Page ID 10797).[16]

1999-2000: district court issued pre-trial orders establishing similar 2-track process; during this 1999 pretrial process the Sault Tribe again was put on notice that an accommodation would have to be made for GTB within its "home waters."[17]

[16] The May 31, 1985 decision was only reported in the Indian Law Reporter ("I.L.R."). Therefore for the convenience of the district court it was filed on July 8, 2020 as Exhibit 1 with the joint brief of the U.S., State, and four Tribes (subsequently in 2023 designated as the "stipulating parties") in opposition to motion of Sault Tribe to extend the 2000 consent decree, R. 1890. The record designation for the May 31, 1985 decision is R. 1890-1, Page ID 10797; however previously the same document was filed as an exhibit designated ECF 1870-1, so there is a duplicate record designation of this same document as R. 1870-1, Page ID 2111.

[17] *See* R. 1422, GTB's September 21, 1999 statement re: notice pleadings, and R. 1428, GTB's October 1, 1999 list of witnesses.

August 9, 2000: district court issued order entering the 2000 Consent Decree (R. 1458, Page ID 3216-3397), containing the same "Grand Traverse Tribal Zone" (described at Page ID 3227) as Sault Tribe had requested in September 20, 1999 notice pleading, R. 1420.[18]

November 4, 2003: State filed counterclaim (R. 1473) asserting that inland usufruct rights reserved by Tribes in Treaty of 1836 were extinguished by operation of the treaty language.

February 23, 2004: district court entered a Rule 16 Case Management Order (R. 1484) and subsequent orders (*e.g.*, R. 1485, R. 1492, R. 1552, R. 1591, R. 1694, R. 1723) determining trial schedule for the State's counterclaim.

April 7, 2006: district court entered order (R. 1725) again establishing 2-track process (ordering "that this matter be submitted to mediation" and noting that "this process will have no effect on the dates for the final pretrial conference or trial."). R. 1725, Page ID 1160-1161.

November 2, 2007: the "inland" Consent Decree was filed (R. 1799);[19] subsequently every electronic filing under this case contained the statement,

[18] An identical "Grand Traverse Tribal Zone" is described in the 2023 Decree, *see* R. 2132, Page ID 15247.

[19] R. 1799, Page ID 1689-1755; Judge Enslen's signature is at Page ID 1755; the docket entry is "11/05/2007" although the Consent Decree is dated November 2, 2007.

"**WARNING: CASE CLOSED on 11/02/2007**," presumably because resolution of the inland treaty rights completed the litigation process that had been bifurcated in 1976.

SUMMARY OF ARGUMENT

GTB adopts by reference and joins the arguments in the brief of the United States as authorized by FED. R. APP. P. 28(i), but also submits this supplemental brief contending in sections I and II that the relief requested by the Sault Tribe in this appeal is precluded by the doctrines of judicial estoppel and law of the case. Because the entire focus of Sault Tribe's argument is that imposition of the 2023 Decree is an improper injunction, section III informs this Court about evidence in the record demonstrating that imposition of 2023 Decree without Sault Tribe's consent is warranted upon consideration of the elements applicable to issuance of injunctions. Finally, section IV reiterates the request for a declaration that the equitable allocation zonal plan decreed on May 31, 1985 is the law of the case, including the Grand Traverse Tribal Zone specified in the 2023 Decree.

STATEMENT OF THE STANDARD OF REVIEW

GTB adopts by reference the statement of the standard of review in the brief of the United States as authorized by FED. R. APP. P. 28(i).

ARGUMENT

The Sault Tribe contends that the 2023 Decree is a stand-alone "consent" order not connected to previous rulings in this litigation. Seizing upon reference to "perniciousness of consent decrees" in footnote 2 of this Court's May 23, 2023 Opinion in a related case,[20] Sault Tribe overlooks its role four decades earlier in shaping the framework of a judicial decision contrasted in that same footnote: "Indeed, consent decrees 'provide[] the legitimacy of a judicial decision without the reality of a judicial decision.'"(Citation omitted.)

The basic flaw with Sault Tribe's argument is that "the reality of a judicial decision" actually exists in this case. The allocation framework contained in the 2023 Decree involves a second set of modifications of the May 31, 1985 judicial decision initiated by Sault Tribe's November 14, 1983 allocation motion for which it advocated during the 1985 trial. Having benefitted from the 1985 judicial decision (as well as the 2000 Consent Decree modifications) by achieving a two-thirds share of a near-exclusive tribal commercial fishery free from competition of state-licensed commercial fishers whose licenses were eliminated by the 1985 and 2000 Decrees, the Sault Tribe requests this Court to remand this case for allocation trial.

As authorized by FED. R. APP. P. 28(i), GTB adopts by reference the arguments in the brief of the United States. GTB also proffers an additional argument

[20] *United States v. Michigan*, 68 F. 4th 1021, 1023 n.2 (6th Cir. 2023).

related to GTB's unique situation being located within the Grand Traverse Bay region of Lake Michigan where GTB is likely to be adversely impacted if the Sault Tribe were to prevail on this appeal.

I. Judicial estoppel precludes the Sault Ste. Marie Tribe of Chippewa Indians from disputing zonal plan framework decreed in 1985 including exclusive Grand Traverse Tribal Zone specified in 2023 Decree.

A. Factual basis for invoking judicial estoppel doctrine.

> In order to invoke judicial estoppel, a party must show that the opponent took a contrary position under oath in a prior proceeding and that the prior position was accepted by the court. *Reynolds*, 861 F.2d at 472-73.

Teledyne Industries, Inc. v. N.L.R.B., 911 F.2d 1214, 1218 (6th Cir. 1990).

On May 27, 1985, Joseph Lumsden, the Tribal Chairman of the Sault Tribe, testified under oath in support of the zonal plan (by which the Tribes agreed to forgo commercial fishing in areas of importance to tourism/recreational fishing in exchange for eliminating competition by state-licensed commercial fishers in northern waters closer to the Tribes' reservations/historic areas of occupancy). After the Sault Tribe's counsel concluded his direct examination, Judge Enslen asked a few questions (May 27, 1985 trial transcript at pages 841-52), including this colloquy at the conclusion of Chairman Lumsden's testimony:

> THE COURT: If there hadn't been any negotiations and if you know what you know now, if you had to choose between a zonal plan and a percentage plan, assuming allocation in the first place, what would you choose for your tribe, explaining no more than that?
>
> THE WITNESS: Just to answer the question, I, I never preferred an allocation plan. I also preferred a one hundred percent tribal. But that

> is not realistic. I think the best plan is without question, and it has been, my efforts have been directed toward that, have been the zonation plan. It was even more, a more positive zonation plan, exclusive jurisdiction plan, [than] was my original support.

R. 882, May 27, 1985 trial transcript at p. 852, R. 2096-2, Page ID 13696.[21] The Sault Tribe Chairman's testimony also supported the district court's findings regarding the racehorse fishery (R. 882, at p. 816) and social conflict (*id*., at pp. 818-20, 825, 838-39, and 844-45)[22] which the zonal plan resolved.

B. Grand Traverse Bay was "heart of the controversy" prior to 1985 Decree.

Albeit a small fraction of the approximately 14 million acres ceded in the 1836 Treaty,[23] the Grand Traverse region has had an outsized role in the history of this litigation. In no other area did a state court issue orders conflicting with the district

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[21] Chairman Lumsden's direct testimony begins at page 808. Due to page limitation prescribed by W.D. Mich. LCivR 7.1(b), his entire testimony transcript in R. 882 was not included in R. 2096-2, which is limited to Judge Enslen's questions and answers (pp. 841-52), R. 2096-2, Page ID 13685-96.

[22] With respect to "social conflict," Chairman Lumsden confirmed that abuse was documented with school children in the Grand Traverse region. R. 882, at p. 845 (R. 2096-2, Page ID 13689).

[23] "The tribes ceded an area of 13,837,207 acres in the northwest portion of the Lower Peninsula and the eastern portion of the Upper Peninsula. In return, the treaty guaranteed the Anishnaabek permanent reservation lands and perpetual access to natural resources, including hunting and fishing rights." https://www.mackinacparks.com/how-michigan-became-a-state-the-treaty-of-washington-1836/

court's 1979 declaratory judgment,[24] or was the local Tribe enjoined from fishing within waters it had specifically reserved in the Treaty,[25] or were tribal members (including school children) subject to such intense discrimination even though not connected to fishing activities.[26] The turbulence triggered by unrestricted gill net fishing by Sault Tribe fishers within Grand Traverse Bay after the district court's 1979 decision disrupted lives of blameless local Indians and continued to reverberate until the district court's May 31, 1985 decision adopting the equitable allocation zonal plan, R. 833. *See United States v. Michigan*, 12 I.L.R. at 3089-93 (R. 1890-1, Page ID 10807-11).

Prior to commencement of the equitable allocation process[27] by Sault Tribe's November 8, 1983 motion to allocate the resource filed together with Bay Mills and

[24] *See United States v. Michigan*, 712 F.2d 242 (6th Cir. 1983), and August 27, 1979 *ex parte* TRO, R. 1974-7, Page ID 11381.

[25] *Grand Traverse Band of Ottawa and Chippewa Indians v. Director, Michigan Department of Natural Resources*, 141 F.3rd 635, 637-39 (6th Cir. 1988); *see* Affidavit of Bradley J. Gills, Ph.D., R. 2081-1, Page ID 12913, 12915-17.

[26] *See, e.g.,* Affidavit of Nancy Kida, R. 2096-4, Page ID 13717-21; June 28, 1983 article titled "Ease suffering, Indians plead," R. 1974-11, Page ID 11392-93; and October 8, 1982 article titled "Bay fishing dispute splits Indian tribes," R. 1974-10, Page ID 11391.

[27] *See* pages 4-11 of GTB's brief in the Coalition's related appeal for discussion regarding the 1983-85 process resulting in the May 31, 1981 judicial decision. Case No. 23-1944, Document: 42, Page ID 10-17.

GTB (R. 621, *see* R. 2075-5, Page ID 12766), the "lead counsel for the Michigan tribes" acknowledged in 1982 that "the heart of the controversy is Grand Traverse Bay" which had "become the fulcrum of the dispute because of its importance to the state tourism industry and its equal importance to the Grand Traverse Band." March 12, 1982 article titled "Fishing in GT Bay may be core issue in collapsed talks," R. 2096-10, Page ID 13755-56. When it invoked the equitable allocation process in 1983, the Sault Tribe understood that an accommodation would have to be made for GTB whether it be by settlement or adjudicated judicial resolution.

C. Prior to 1985 Decree GTB was deprived of fishing opportunities and GTB's members were harmed by discrimination triggered by Sault Tribe fishing efforts within Grand Traverse Bay.

Subsequent to intervening on October 26, 1979 (R. 394) – and despite not having contributed to the "racehorse"[28] fishery in Grand Traverse Bay after the district court's May 7, 1979 decision – GTB was enjoined[29] from exercising treaty-reserved fishing rights in its "home waters" adjacent to GTB's reservations secured in the 1836 and 1855 Treaties depicted on the map of the Grand Traverse region

[28] The zonal plan implemented by the district court in 1985 partially was in response to the 1979-84 "racehorse" fishery, *see* 12 I.L.R. at 3082, 3083, 3084-85, and 3086-87 (R. 1890-1, Page ID 10800, 10801, 10802-05).

[29] This Court stayed the district court's TRO (R. 394) on November 28, 1979 (*see* May 30, 1980 Order, R. 1974-8, Page ID 11386), thereby enabling continuing enforcement of the state court's August 27, 1979 TRO against GTB fishers.

captioned "GTB 6-County Service Area, Reservations Described in 1836 and 1855 Treaties, and Historic Villages/Fishing Sites." R. 2081-1, Page ID 12918.[30]

This Court's May 30, 1980 Order summarizes the repercussion of the Upper Peninsula Tribes' "intensive gill net fishing" in Grand Traverse Bay during the summer of 1979:

> We granted the stay in cases 79-1527 and 79-1528 in order to avert the strong possibility that intensive gill net fishing by the Bay Mills Indian Community and the Sault Ste. Marie Tribe of Chippewa Indians would irreparably damage the piscatorial ecosystem of Grand Traverse Bay. The stay in 79-1635 was a product of our concern that excessive gill net fishing by the Grand Traverse Band could work similar irreparable damage throughout Michigan's territorial waters.

R. 1974-8, Page ID 11386. *See also United States v. Michigan*, 623 F.2d 448, at 449 (6th Cir. 1980): "We found on the basis of the record before us that unless the order is stayed there is a strong possibility that the fishery, the fish supply and spawning grounds in Grand Traverse Bay will be irreparably damaged or destroyed by continued intensive gill net fishing." None of that "intensive gill net fishing" was conducted by GTB fishers, yet they were enjoined from fishing in their "home waters."

The unrestricted fishing and resulting "controversy" caused by fishers licensed by Sault Tribe and Bay Mills prompted the United States (as plaintiff in this

[30] This map is referenced in and attached to the Affidavit of Bradley J. Gills, Ph.D., R. 2081-1, Page ID 12913.

litigation and as trustee of the 1836 Treaty Tribes' fishing rights) to promulgate regulations on November 15, 1979, 44 Fed. Reg. 65747.[31] Presumably because these regulations were under consideration prior to GTB's intervention on October 26th, the Grand Traverse Band was omitted from their purview,[32] resulting in the two Upper Peninsula Tribes being authorized to fish in portions of Grand Traverse Bay while the local Tribe continued to be enjoined by the preexisting state court and Sixth Circuit orders. Even though GTB was added six months later when the regulations were amended,[33] it remained uncertain whether GTB was protected by this Court's May 28, 1980 ruling (623 F.2d 448) because only Bay Mills and Sault Tribe were parties to that appeal. Then two days later this Court issued an order (R. 1974-8, Page ID 11386) apparently continuing the injunction against the Grand Traverse Band. Therefore in 1980 GTB members were advised that they risked being arrested if they were to fish in their "home waters."[34]

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[31] Exhibit 1 filed with Grand Traverse Band's Supplemental Response to Sault Tribe's Reconsideration Motion (R. 2046) R. 2075-1, Page ID12744.

[32] *Id*., § 256.41(i), 44 Fed. Reg. at 65748 (R. 2075-1, Page ID 12744).

[33] *See* 45 Fed. Reg. 28100 (April 28, 1980).

[34] During 1980 GTB fishers did not harvest any fish in their Grand Traverse Bay "home waters" (statistical unit MM-4), however Upper Peninsula Tribes continued to fish pursuant to the federal regulations. *See* Affidavit of Erik Olsen, R. 2075-3, Page ID 12755-12759.

During the five years prior to the May 31, 1985 equitable allocation decree, the ramifications of the unrestricted "racehorse" fishing by Sault Tribe members continued to harm GTB members, both with respect to their ability to harvest fish and with respect to "backlash" experienced by them. In addition to the prohibition upon GTB fishers prior to this Court's July 10, 1981 decision (653 F.2d 277), orders were entered on October 5, 1983 (R. 613, also R. 2096-8, Page ID 13741) and July 21, 1984 (R. 694, also R. 2096-9, Page ID 13753) imposing early season closures upon tribal commercial fishing within the Grand Traverse region.[35] Only because of an exception for GTB fishers in the 1984 order (paragraph 13) were they not completely prohibited from fishing in their "home waters" as occurred in 1979, 1980, until July 10, 1981, and as mandated by the 1983 order.

No such closures were ordered in the "home waters" of the Upper Peninsula Tribes in Whitefish Bay of Lake Superior. Nor was the discrimination suffered by their members as intense as that experienced by GTB members living in the Lake Michigan "Gold Coast"[36] region. By geographic happenstance, the territory

[35] In 1985 the district court found that "the present fishery lacks predictability and stability … due to the yearly closures and the 'racehorse' fishery." 12 I.L.R. at 3083 (R. 1890-1, Page ID 10801).

[36] March 12, 1982 article titled "Fishing in GT Bay may be core issue in collapsed talks," R. 2096-10, Page ID 13755-56 ("The Gold Coast has become perhaps the most important place in the Midwest because of the recreational aspects of Grand and Little Traverse bays," quoting the "lead counsel for the Michigan tribes").

occupied by the historic Grand Traverse bands became "ground zero" of the "shared resource" and "social conflict" concerns addressed in the district court's 1985 decision.[37]

D. GTB's litigation position asserted prior to 1985 agreement/decree.

Prior to 1985 the situation for the local Indians in the Grand Traverse region was intolerable.[38] Therefore by letter dated April 24, 1984 and filed April 26, 1984 (R. 644), the Grand Traverse Band formally notified the Court and other parties that "subsumed within the overall allocation issues is the subsidiary issue involving the equitable apportionment of the tribal share among the plaintiff-intervenor tribes." R. 2081-3, Page ID 12924-12925. GTB put the Sault Tribe and other parties on notice that "the Grand Traverse Band desires to reserve the right to seek an equitable apportionment from the District Court." *Id.* Then the following year (prior to the court-ordered settlement negotiations scheduled in late March) GTB filed a February

[37] *Compare* the 2019 state-licensed charter-boat reports showing *de minimis* activity in Lake Superior's Whitefish Bay ("Brimley-Paradise") with activity in the Grand Traverse region. R. 2081-2, Page ID 12920-22.

[38] *See* June 28, 1983 article titled "Ease suffering, Indians plead," R. 1974-11, Page ID 11392-11393; Affidavit of Nancy Kida, R. 2096-4, Page ID 13717; Affidavit of Sherry Robinson, R. 2096-5, Page ID 13723; Affidavit of Brian Springstead, R. 2096-7, Page ID 13737; and the February, 1985 findings and recommendations of Michigan Civil Rights Commission, R. 2096-3, Page ID 13697. *See also* April 20, 1979 article titled "Sportsmen declare war on netters," R. 1974-5, Page ID 11365; March, 1982 articles, R. 1974-9, Page ID 11388; and October 8, 1983 article titled "Bay fishing dispute splits Indian tribes," R. 1974-10, Page ID 11391.

20, 1985 supplemental pleading (R. 726) formally asserting the necessity of addressing "the subsidiary issue concerning the equitable apportionment among the plaintiff-intervenor tribes of the tribal share of the fishery resource." R. 2081-4, Page ID 12928. Thus it was clear prior to the 1985 settlement negotiations that, if an overall agreement were to be reached, it would be necessary to address GTB's specific concerns about preserving fishing opportunities within its "home waters." *Id*., R. 2081-4, Page ID 12927-32.

In 1985 GTB was prepared to litigate the "home waters" claim, and had listed an historian as a trial witness who was deposed on March 6, 1985,[39] and who subsequently filed a report[40] informing the parties of historical evidence supporting the proposition that each 1836 Treaty Tribe controlled access to resources within traditional territory of occupancy. In response the March 28, 1985 settlement agreement including the overall zonal plan specified an exclusive GTB tribal zone. It was not what could have been achieved for GTB in litigation solely focused on fishing opportunities within GTB's traditional "home waters," but it was a compromise that GTB was willing to live with in order for the Tribes collectively to achieve a better overall deal with the State.

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[39] *See* R. 854 (Robert Doherty's March 6, 1985 deposition filed August 14, 1985).

[40] *See* R. 790 (May 8, 1985).

E. GTB's litigation position asserted prior to 2000 Consent Decree.

During the 1999 pretrial process, the Sault Tribe likewise was put on notice that an accommodation would have to be made for GTB within its "home waters."[41] Sault Tribe not only acquiesced but also advocated for an expansion of GTB's zone as well as continuation of the overall 1985 equitable allocation framework during the 1999-2000 process that resulted in the 2000 Consent Decree (R. 1458), *see* Exhibit A1 to Joint Status Report filed September 1, 1999 (R. 1416) by which Sault Tribe together with Bay Mills and Little River proposed continuation of the overall zonal plan (Section IV) and specifically proposed the Grand Traverse Tribal Zone subsequently included in 2000 Consent Decree (Section IV.C.1.(b.));[42] *see also* notice pleading ("Relief Requested Upon Expiration of This Court's 1985 Order …") filed September 20, 1999 by Sault Tribe together with Bay Mills and Little River (R. 1420) which requested adoption of the "Three Tribes' Plan" presented with the Joint Status Report, *i.e.*, the overall zonal plan containing the specific Grand Traverse Tribal Zone.

[41] On September 21, 1999 GTB filed a statement (R. 1422) re: September 20th deadline for notice pleadings. On October 1, 1999 GTB filed a list of witnesses (R. 1428).

[42] The July 13, 1999 Scheduling Order (R. 1411) required Joint Status Report to be filed by September 1 and each party's notice pleadings by September 20.

Ultimately the 2000 Consent Decree continued the 1985 equitable allocation framework including an almost exclusive tribal commercial fishery. *See, e.g.,* section IV.B., R. 1458, Page ID 3241-3241 ("State-licensed or permitted commercial fishing shall be prohibited in all 1836 Treaty waters except the following: …"). GTB again achieved a tribal zone exclusive of the other Tribes, but agreed to limitations benefitting tourism and recreational fishers as part of an overall deal that continued the basic premise (zonal plan) of the 1985 agreement implemented by the May 31, 1985 equitable allocation decree.

F. GTB's litigation positions were consistent with expert opinions that 1836 Treaty Tribes controlled access to resources within traditional territory of occupancy.

The record of this case contains historical evidence supporting the proposition that predecessors of the current 1836 Treaty Tribes controlled access to resources within their traditional territories of occupancy. A summary of such evidence was included in one of the Tribes' joint expert reports prepared for the "inland" phase of this litigation that ultimately was settled by Consent Decree entered on November 2, 2007 (R. 1799). *See* section entitled "Ottawa-Chippewa Territoriality" (pages 89-101) within Chapter Three of the expert report entitled "The Meaning of Article 13 of the Treaty of Washington, March 28, 1836," by

Gregory E. Dowd, University of Michigan (2004). R. 2096-13, Page ID 13761.[43] In 2005 the Sault Tribe joined GTB and the other three 1836 Treaty Tribes in providing the Court with this expert witness report that refutes the erroneous premise[44] underlying Sault Tribe's assertion that "tribal exclusive zones … cannot continue beyond expiration of the [2000] Decree absent unanimous agreement among all five tribes." R. 1887, Page ID 10771.

Contrary to Sault Tribe's assertion[45] that exclusive zones require consent of all Tribes, pre-1836 Treaty history analyzed in previously filed expert reports confirms that an "outsider" tribal member must obtain the local Tribe's consent to fish within its tribal zone ("home waters"). Consent is required; but the necessary consent is given *by* the local Tribe *to* an "outsider" – not consent to the local Tribe by "outsider" Tribes. *See* pages 3-5 of Affidavit of Bradley J. Gills, Ph.D., R. 2081-1, Page ID 12915-12917.

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[43] This report was transmitted to the district court by letter dated September 15, 2005. R. 1639, Page ID 375, also R. 2096-12, Page ID 13759. Due to page limitation prescribed by W.D. Mich. LCivR 7.1(b), only pages 89-101 of the Dowd report were filed as Exhibit L (R. 2096-13, Page ID 13761) with GTB's April 17, 2023 supplemental response to Sault Tribe' objections to the proposed decree (R. 2096).

[44] Sault Tribe's erroneous premise is that "the 1836 Treaty gives each tribe the right to fish *throughout* the ceded waters, …" R. 1887, Page ID 10771.

[45] *See* July 24, 2020 Opinion at p. 6, R. 1892, Page ID 10823.

G. GTB forwent 1985 and 2000 litigation positions in reliance upon an exclusive tribal zone being included within the zonal plan framework of 1985 and 2000 decrees.

In 1985 GTB forwent its litigation position asserted in docket entries 644[46] and 726[47] in reliance upon the exception[48] within the "grand bargain"[49] accepted and advocated for by Sault Tribe. GTB's perspective was summarized by counsel during the 1985 trial: the zonal allocation plan agreement advocated for by Sault Tribe, the United States,[50] and state defendants[51] "does not address in full the concerns raised in the supplemental pleadings …"; GTB's "position [was] that had we been negotiating on our own we would have ended up with a more favorable situation,

[46] R. 2081-3, Page ID 12924.

[47] R. 2081-4, Page ID 12927.

[48] *See* "VIII. Grand Traverse Area" section of 1985 decree, 12 I.L.R. at 3091 (R. 1890-1, Page ID 10809).

[49] The "grand bargain" was the essential element of the 1985 zonal allocation plan described in pages 8-11 of GTB's brief in the Coalition's related appeal (Case No. 23-1944, Document: 42, Page ID 14-17).

[50] *See* testimony of William P. Horn, Deputy Undersecretary of the Department of the Interior, R. 881, May 26, 1985 trial transcript starting at p. 533.

[51] *See* testimony of Ronald O. Skoog, Director, Michigan Department of Natural Resources, R. 882, May 27, 1985 trial transcript at p. 765 (direct examination starting at p. 784).

but obviously inherent in any negotiations is compromise, …" GTB counsel's opening statement, May 26, 1985 trial transcript, R. 881 at p. 457.

GTB counsel also informed the district court that the overall zonal plan had not been considered prior to the court-ordered March 25-27 settlement negotiations that resulted in the March 28, 1985 agreement: "Keep in mind that even though this consent agreement embraces a zonal plan[,] that none of the parties had put on the table the zonal allocation plan prior to the consent agreement being negotiated." *Id*., at p. 458. Because the primary inducement (to the Tribes) of the zonal allocation plan was elimination of competition from state-licensed commercial fishers, the overall zonal plan benefitted the Sault Tribe much more than GTB,[52] yet "GTB relinquished its litigation positions (both in 1985 and 2000) and agreed to limitations demanded by the state defendants due to the importance of the Grand Traverse region to tourism and state-licensed recreational fishers." Grand Traverse Band's Supplemental Response To Sault Tribe's February 10, 2023 Motion (R. 2078), R. 2081, Page ID 12906.

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[52] In 1985 there was no competition with state-licensed commercial fishers within Grand Traverse Bay because the State previously prohibited all commercial fishing in those waters, having designated Grand Traverse Bay exclusively for tourism and recreational fishing. *See* June 11, 1974 letter labeled "Plf.Ex.34" filed October 15, 1985 with summary judgment motion and brief in *Duhamel v. Michigan Department of Natural Resources*, W.D. Mich. File No. G 84-1186 ("At present, all commercial fishing is prohibited in the Grand Traverse Bay area, …"), R. 2096-11, Page ID 13757.

In 1999-2000 the Sault Tribe again acceded to necessity of carving out exceptions within the overall zonal plan for the local Lake Michigan Tribes (Little River and Little Traverse as well as GTB). Tribal zones were (in the 2000 Consent Decree) and continue to be (in the 2023 Decree) designated for these Tribes. Overall these fishing opportunities are quite limited compared to the expanses of fishing grounds in Lake Superior and northern waters of Lakes Michigan and Huron easily accessible to Sault Tribe fishers, yet these tribal zones are a necessary exception within the overall zonal plan because these Tribes' ancestors specifically reserved a right to fish in their traditional waters adjacent to territory they historically occupied.[53]

In 2000 GTB again forwent its litigation position asserted in R. 1422 filed September 21, 1999 ("GTB may fish throughout its traditional fishing grounds adjacent to lands occupied by the historic Grand Traverse Bands") in reliance upon Sault Tribe's acquiescence to the "Grand Traverse Tribal Zone" specified in Section IV.A.1.e.(1) [and Section IV.A.1.d.(2)(a)] of the 2000 Consent Decree (R. 1458, Page ID 3227-3230). This identical zone is reiterated in the 2023 Decree, *see* R. 2132, Page ID 15247.

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[53] *See Grand Traverse Band of Ottawa and Chippewa Indians v. Director, Michigan Department of Natural Resources, supra,* 141 F.3d at 637 (including fn. 2) and 638-39, and Affidavit of Bradley Gills, PhD., R. 2081-1, Page ID 12915-17. *See also* excerpt of Dowd report, R. 2096-13, Page ID 13765-77.

H. GTB's reliance resulted in significant compromise that remains justified only if the zonal management plan of May 31, 1985 equitable allocation decree continues to include the exclusive Grand Traverse Tribal Zone.

The magnitude of GTB's reliance is demonstrated by considering the likely outcome if GTB had been litigating/negotiating one-on-one with the State rather than collectively with the Upper Peninsula Tribes. Sacrificing its own self-interest, GTB agreed to spatial and seasonal limitations upon the exercise of treaty fishing rights within its "home waters" so that the Sault Tribe could achieve (in 1985) and maintain (in 2000 and with the 2023 decree) the exclusive commercial fishery it agreed to and advocated for in 1985 – including two-thirds of the overall tribal harvests.[54]

GTB was willing – and remains willing – to sacrifice self-interest for the greater collective good of the five Tribes (especially considering the peace[55] accomplished by the zonal plan framework of the May 31, 1985 equitable allocation

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[54] "[Sault Tribe's] average annual treaty fishing harvest since 2010 amounts to 67% of the treaty fishing share (and has reached up to 78% of particular species under the 2020 Consent Decree), despite area closures, gear restrictions, and a reduction in harvestable species for several species of fish since the 2000 Consent Decree was implemented." 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, R. 1887, Page ID 10772-10773.

[55] *See* Affidavit of Nancy Kida (¶14), R. 2096-4, Page ID 13722, and Affidavit of Brian Springstead (¶¶ 11-12, and 19-20), R. 2096-7, Page ID 13738-39**.**

decree). However it would not be fair to continue imposing these restrictions upon GTB within its "home waters" unless the permissive system incorporated within the Tribal Plan and Tribal Code of the 2000 Consent Decree (continued in the 2023 Decree) for controlling access to fishing opportunities within GTB's exclusive tribal zone remains intact. Consistent with the history summarized in section I.F., *supra* at pages 22-23, the 2023 Decree's Tribal Plan[56] and Tribal Code[57] prescribe a permissive system by which Tribes with exclusive fishing zones may grant permission to members of other Tribes.[58] This permissive system is continued in the 2023 Decree. Unless this aspect of the overall 1985 equitable allocation zonal plan is continued, the racehorse fishery and resultant early-season closures likely

[56] *See* Section IV. ("Tribal Zones") of Appendix B, the Management Plan for the 1836 Treaty Great Lakes Waters ("Tribal Plan"), R. 2132-2, Page ID 15316, at 15323.

[57] *See* Section V.(a), https://www.1836cora.org/wp-content/uploads/2024/05/CORA-Fishing-Regulations-Revised-March-14-2024-complete-w-Appendix-12.pdf

[58] The 2000 Consent Decree describes tribal zones in Section IV.A. (R. 1458, Page ID 3223-3241); these zones are an extension of and consistent with the zonal plan adopted by the district court in 1985, *see* July 24, 2020 Opinion at page 5, R. 1892, Page ID 10822. The 2023 Decree describes similar tribal zones in Section IV.A. (R. 2132, Page ID 15244-57).

will reoccur, vitiating the *quid pro quo* for which GTB agreed to spatial and seasonal limitations upon the exercise of treaty-fishing rights within its "home waters."[59]

I. Judicial estoppel precludes the Sault Tribe from abandoning the 1985 equitable allocation zonal plan.

"Judicial estoppel is an equitable doctrine that preserves the integrity of the courts by preventing a party from … achieving success on one position, then arguing the opposite to suit an exigency of the moment." *Teledyne Industries, Inc. v. N.L.R.B.*, *supra*, 911 F.2d at 1217-18 (citation omitted). *See, generally*, 18B Wright, Miller and Cooper, *Federal Practice and Procedure*, §§ 4477, *et seq.* (2019).

Judicial estoppel encompasses elements of equitable estoppel including whether another party has acted in reliance. *Id.,* 18B *Federal Practice and Procedure* § 4477.1. During the processes resulting in the 1985, 2000, and 2023 decrees, GTB significantly compromised its litigation positions in reliance upon inclusion of an exclusive tribal zone consistent with the historical permissive system by which Tribes with exclusive fishing zones may, but are not required to, grant permission to members of other Tribes to fish within their "home waters."[60]

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[59] Recall that GTB fishers were prohibited from fishing within their "home waters" in all or portions of four of the six years prior to the 1985 settlement negotiations and subsequent May 31, 1985 equitable allocation decree – the consequence of an unrestricted racehorse fishery by members of Sault Tribe and Bay Mills fishing in Grand Traverse Bay far from their Upper Peninsula "home waters."

[60] The 2000 Consent Decree describes tribal zones in Section IV.A. (R. 1458, Page ID 3223-3241); these zones are an extension of and consistent with the zonal plan

GTB's reliance in 1985 and 2000 was motivated by desire to reduce discrimination against tribal citizens and to assure that GTB's fishers would be able to harvest fish without early-season closures necessitated by a racehorse fishery. Both have been accomplished. The Sault Tribe made no effort to refute affidavits attesting that those conditions are likely to return if Sault Tribe were no longer bound by the zonal plan framework of the May 31, 1985 equitable allocation decree:

> 14. If the ceded waters in the Grand Traverse region were to be opened up again to commercial fishing from all 1836 treaty tribes, I fear that tensions which have been relieved by the previous consent decrees could reappear and damage the peaceful coexistence of local sport and Indian fishers that has existed for decades, thereby potentially causing a resurgence of harassment of Indian fishers and non-fishers alike.

Affidavit of Nancy Kida, R. 2096-4, Page ID 13722.

> 9. *** There really aren't sufficient fish available for us few GTB-licensed commercial fishers, and if fishers from other tribes were to commence fishing within GTB's tribal zone it would result in early-season closures to avoid exceeding the quotas mandated by court order. Those fishers from the U.P. would move on to other areas; but we would be devastated. We live here (in the Grand Traverse region); this is where we conduct business and have our customers. We need to be able to fish year-round in order to survive.

Affidavit of Cindi John, R. 2096-6, Page ID 13729.

> 9. Without the constraints dictated by the 2000 Consent Decree, increased fishing efforts by Sault Tribe fishers within Grand Traverse Bay would cause irreparable harm to GTB. Due to the whitefish collapse, there simply are not enough fish for GTB alone. GTB annually

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adopted by the district court in 1985, *see* July 24, 2020 Opinion at page 5, R. 1892, Page ID 10822. The 2023 Decree describes similar tribal zones in Section IV.A., R. 2132, Page ID 15244-57.

> meets the available Lake Trout harvest limit within MM-4, and has had to close its fishery multiple times within the past ten years to prevent incurring a penalty under the terms of the 2020 Decree.

Affidavit of Erik Olsen, R. 2075-3, Page ID 12757.

The Cindi John and Erik Olsen affidavits confirm that as whitefish stocks diminished, GTB fishers' economic situation became dire; and that in order to survive economically GTB's fishers must be able to harvest fish throughout the year. Therefore, in response to the collapse of whitefish substantially reducing available fish harvests within the its tribal zone – and in additional reliance upon the zonal plan framework of the May 31, 1985 equitable allocation decree continued in the 2000 Consent Decree – GTB invested more than $1,500,000.00 in a fish processing facility enabling tribally-licensed fishers to sell processed fish directly to restaurants and to individuals at farm markets. Affidavit of Stephen C. Feringa, R. 2096-14, Page ID 13779-80. Early-season closures necessitated by the return of a racehorse fishery would vitiate this reliance factor.[61]

The Erik Olsen affidavit describes how limited the fishing opportunities are for GTB fishers within their "home waters." R. 2075-3, Page ID 12756-12759. Nonetheless, in reliance on the commitment of other Tribes (including Sault Tribe) to forgo commercial fishing within the exclusive zones designated for GTB in the

[61] Affidavit of Erik Olsen, R. 2075-3, Page ID 12755-12757, and Affidavit of Cindi John, R. 2096-6, Page ID 13729.

1985 and 2000 decrees, GTB relinquished its litigation positions (both in 1985 and 2000) and agreed to limitations demanded by the state defendants due to the importance of the Grand Traverse region to tourism and state-licensed recreational fishers. It is not hyperbole to say that GTB sacrificed for the greater good. For example, *compare* the seasonal closures within GTB's "traditional fishing grounds"[62] (referred to in this brief as "home waters") to the lack of similar closures within the traditional waters of Sault Tribe (and Bay Mills) in Whitefish Bay of Lake Superior.[63] This sacrifice was (and remains) necessary to accomplish an overall equitable allocation framework acceptable to the State (which incidentally also enables Sault Tribe to benefit from the status quo) – although GTB would not have made this sacrifice without continuation of the exclusive Grand Traverse Tribal Zone.

Having advocated for at trial in 1985 and achieved an exclusive tribal commercial fishery throughout most of the 1836 Treaty cession waters free of the competition with state-licensed commercial fishers that had prompted the 1983

[62] *Grand Traverse Band of Ottawa and Chippewa Indians v. Director, Michigan Department of Natural Resources, supra,* 141 F.3d at 638-39.

[63] *Compare* section IV.A.1.e.(2)(b)ii.-iii. of the 2000 Consent Decree (R. 1458, Page ID 3228) with section IV.A.3.a.(1) (R. 1458, Page ID 3240). This disparity is continued in the 2023 Decree, *compare* section IV.A.1.e. (R. 2132, Page ID 15248-51) with section IV.A.3.a. (R. 2132, Page ID 5257).

allocation motion, the Sault Tribe now wants more. If allowed, the litigation process requested by Sault Tribe would result in retaining this primary benefit of the 1985 Decree and adding to it, *e.g.*, gaining "opportunity to fish on all species" and "opening … closed areas"[64] – the epitome of having one's cake and eating it, too. "The doctrine of judicial estoppel forbids a party 'from taking a position inconsistent with one successfully and unequivocally asserted by the same party in a prior proceeding.' *Reynolds v. Commissioner of Internal Revenue*, 861 F.2d 469, 472-73 (6th Cir.1988) (citations omitted)." *Teledyne Industries, Inc. v. N.L.R.*B., *supra*, 911 F.2d at 1217 (footnote omitted).

In *New Hampshire v. Maine*, 532 U.S. 742 (2001), the Supreme Court applied judicial estoppel to an original action between two states that arose from an earlier consent decree. Previously in 1977, New Hampshire and Maine agreed to fix the boundary between them at the "middle" of the Piscataqua River's main navigation channel. More than two decades later, New Hampshire again sought to adjudicate the boundary and argued, contrary to the prior decree, that the Piscataqua River boundary runs along the Maine shore, putting the entire Portsmouth Harbor within New Hampshire territory. The Supreme Court deemed New Hampshire's claim

[64] Sault Tribe's February 10, 2023 motion at page 3, R. 2078, Page ID 12826. These assertions are repeated in Sault Tribe's April 11, 2023 Motion, R. 2091, Page ID 13297.

inconsistent with the earlier position, noted that the state had benefitted from the 1977 decree, and held it would not be inequitable to hold New Hampshire to the agreement:

> . . . the consent decree was sufficiently favorable to New Hampshire to garner its approval. Although New Hampshire now suggests that it "compromised in Maine's favor" on the definition of "Middle of the River" in the 1970's litigation, . . . that "compromise" enabled New Hampshire to settle the case . . . on terms beneficial to both States. Notably, in their joint motion for entry of the consent decree, New Hampshire and Maine represented to this Court that the proposed judgment was "in the best interest of each State."

Id., 532 U.S. at 752.[65] Similarly, four decades after it agreed to, advocated for, and benefited from the zonal plan including as a component GTB's exclusive fishing zone, Sault Tribe is precluded by the judicial estoppel doctrine from staking out a greater claim than it agreed to and benefitted from under the 1985 equitable allocation zonal plan.

Sault Tribe's contention that the 1985 trial was not a full-blown judicial proceeding with finality consequences is to no avail. Although it is true that the

[65] Importantly, New Hampshire's reliance on Supreme Court precedent questioning the application of estoppel to states was rejected. *New Hampshire v. Maine*, 532 U.S. at 755. Recognizing that public policy might sometimes counsel against usage of the doctrine, the Court distinguished such circumstances from New Hampshire's tactics in the case at hand, describing it as "a case between two States, in which each owes the other a full measure of respect." *Id.,* at 756. Likewise, the parties to this case (and to the March 1985 compromise that led to the district court's 1985 judicial decision adopting the equitable allocation zonal plan) are the federal and state governments and sovereign Indian nations owing one another the same degree of dignity.

parties agreed that the district court could choose from the two plans in a "bifurcated hearing … without the necessity of a full trial on all potential plans" (12 I.L.R. at 3080, R. 1890-1, Page ID 10798)), this was a voluntary choice subject to election of remedies equitable defenses. The five-day trial was the culmination of a 2-track process governing trial preparation and settlement discussions. When the settlement agreement was rejected by one of the parties, the district court switched to the trial track, conducting a series of pre-trial scheduling hearings (*see* R. 778, 784-85, 791, and 793-96). Ultimately, it was each party's choice as to what position to take at trial, and Sault Tribe elected to advocate for a plan embracing the terms of the March 28, 1985 agreement subsequently rejected by Bay Mills. The Sault Tribe (and any other party) could have advocated for another allocation plan at trial, but chose not to.

Four decades later Sault Tribe now requests this Court to remand for a Rule 16 conference, presumably for the purpose of charting a litigation schedule under which it would seek far greater commercial fishing opportunities than provided in the 2023 Decree. If this case were remanded for trial, other parties could assert an election of remedies' defense as an equitable barrier equivalent to a Rule 8(c) affirmative defense.[66] Whether as an affirmative defense or as an element of judicial

[66] Election of remedies is among the equitable defenses not specifically listed in Rule 8(c) that may be asserted in defense to a claim. 5 Wright, Miller and Spencer, *Federal Practice and Procedure* § 1271, at p. 627 (2021).

estoppel,[67] Sault Tribe's election of remedies in 1985 is an equitable barrier to relief requested in this appeal.

II. 1985 equitable allocation zonal plan is law of the case.

Other stipulating parties cite the 1985 decree and *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658 (1979) ("*Fishing Vessel*") as law of the case both with respect to the factors to be considered by the district court and standard of review on appeal,[68] which is correct. But the 1985 decree also is law of the case with respect to the overall zonal plan framework of state-tribal allocation. The May 31, 1985 judicial decision was the culmination of the process identified by the Supreme Court in the *Fishing Vessel* case and final judicial decision regarding an equitable allocation requested by the Sault Tribe's motion filed November 14, 1983. No party appealed from the district court's order entered on May 31, 1985 (R. 833). Combining the former procedures distinguishing between actions at equity ("decree") and law ("judgment"), FED. R. CIV. P. 54(a) defines judgment as including "a decree and any other order from which an appeal lies." Due to the district court's continuing jurisdiction, no judgment was entered

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[67] *See* 18B *Federal Practice and Procedure*, *supra,* § 4477.

[68] *See* Case No. 23-1944, Document: 38, pp. 33-34, and Document: 36, pp. 13-14 and 29-31.

closing the case, but the 1985 equitable allocation decree suffices for "finality" purposes. *See* 10 Wright, Miller and Kane, *Federal Practice and Procedure* § 2651 (2014). The overall zonal plan advocated for by Sault Tribe and adopted as a judicial decision in 1985 therefore is law of the case.[69]

III. Assuming validity of Sault Tribe's argument, nonetheless injunction elements warrant imposition of 2023 Decree without Sault Tribe's consent.

The Sault Tribe had an opportunity in the proceedings below to respond to evidence that the injunctive effect of the 2023 Decree is justified,[70] but failed to do so. Considering the relevant Rule 65 factors:[71]

— the purported injunction (*i.e.*, imposition of 2023 Decree) would not cause Sault Tribe irreparable injury because its commercial harvests under the modified 1985 equitable allocation decision exceed what it would be entitled to under common law, and all of the "treaty waters" remain open to subsistence fishing by Sault Tribe members notwithstanding the zonal plan applicable to commercial fishing;

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[69] Footnote 12 of the district court's Opinion Regarding the Approval of the 2023 Decree states: "Judge Enslen's 1985 opinion regarding the differing allocation plans is among the law of this case (*see* ECF No. 2040 at PageID.12149)." R. 2130, Page ID 15103.

[70] *See* Section B of Grand Traverse Band's Supplemental Response to Sault Tribe's Reconsideration Motion (R. 2046), entitled "Injunction Elements Warrant Extension of 2000 Consent Decree", R. 2075, Page ID 12728-39.

[71] *See* 11A Wright, Miller and Kane, *Federal Practice and Procedure* § 2948, at 123-24 (2013).

— the balance of hardships weighs against Sault Tribe because "going it alone" or opting out of the zonal management plan of the past four decades would destroy the framework of the overall zonal plan decreed in the 1985 equitable allocation judicial decision, and withdrawal from the joint-tribal regulations threatens harm both to the fishery resource and to the other Tribes by jeopardizing effective tribal self-regulation,[72] and

— the public interest is served by continuing the zonal plan allocation framework of the past four decades as modified in the 2023 Decree, and in protecting the fishery resource for all users by assuring continuation of effective Indian tribal self-regulation.

A. Continuing the status quo (restrictions on fishing activities mandated by 2023 Decree) would not cause substantial harm to Sault Tribe.

Analyzing potential irreparable injury requires consideration of the allocation of fish harvests to which the Sault Tribe would be entitled in the absence of the State-Tribal allocation agreement embodied within the 2023 Decree.

[72] "Only 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." *United States v. Michigan*, *supra*, 653 F.2d at 279.

(1.) Benchmark allocation formula absent consent of parties to replacement decree.

Despite statements in decisions predating the 1985 Decree interpreted by representatives of the Sault Tribe as warranting an allocation to the Tribes of all available fish "to the full extent necessary to meet the tribal members' needs",[73] other parties concur that the benchmark should be a "50-50" formula generally applicable under common law.

> The logic of the 50% ceiling is manifest. For an equal division – especially between parties who presumptively treated with each other as equals – is suggested, if not necessarily dictated, by the word "common" as it appears in the treaties. Since the days of Solomon, such a division has been accepted as a fair apportionment of a common asset, and Anglo-American common law has presumed that division when, as here, no other percentage is suggested by the language of the agreement or the surrounding circumstances. *E.g.*, 2 American Law of Property § 6.5, p. 19 (A. Casner ed. 1952); E. Hopkins, Handbook on the Law of Real Property § 209, p. 336 (1896).

Fishing Vessel, *supra*, 443 U.S. at 686 fn. 27. *Accord, Lac Courte Oreilles Band of Lake Superior Chippewa Indians, et al., v. Wisconsin,* 740 F. Supp. 1400, 1417-18 (W.D. Wisc. 1990). In 1985 the district court noted *Fishing Vessel's* "standard for determining appropriate allocation." *United States v. Michigan*, 12 I.L.R. 3079, at 3080 (W.D. Mich. May 31, 1985), R. 1890-1, Page ID 10798.

[73] *United States v. Michigan*, 505 F.Supp. 467, at 472 (W.D. Mich. 1980).

(2.) Law of the case – "shared" resource.

The only equitable allocation decision in this case was premised upon the shared fishery resource precept:

> While the Treaty, as interpreted by this court, protects tribal fishing rights, the resource is shared by other user groups.
>
> One of the immediate problems presented, then, in 1979 and in the years which followed was and is how to share this treasured resource without diminishing or depleting it, and within the legal rights of the competing users.

Id., 12 I.L.R. at 3079, R. 1890-1, Page ID 10797; *see also* discussion at 12 I.L.R. 3080-81, R. 1890-1, Page ID 10798-99 (re: "court's powers as a court of equity" to make an equitable determination as to which tribal plan "accommodates and protects the interests of all concerned to the extent possible.").

(3.) Premise of the 2000 and 2023 Great Lakes fishing decrees.

The lake trout management section of the 2023 Decree states in VII.A.7. at page 31 (R. 2132, Page ID 15270): "Lake trout shall be allocated approximately equally between the State and the Tribes, though the precise allocation of each species varies from one management unit to another."[74] Other species are not subject to allocation formulas due to the basic framework of the overall zonal plan implemented by the 1985 judicial decision: that whitefish (the mainstay of the Great

[74] This language is similar to the 2000 Consent Decree, *see* R. 1458, Page ID 3256.

Lakes' commercial fishing industry) is primarily allocated to the Tribes after elimination of the State's commercial fishers; that in exchange the Tribes forgo commercial fishing in areas important to the State's tourism/recreational fishing interests; and that particular "sports" species remain "off-limits" to tribal commercial fishers.[75] That this framework resulted in slightly better than an overall "50-50" allocation to the Tribes was an inducement the State was willing to extend in order to achieve its goals in the zonal plan.

(4.) Equitable allocation among the Tribes.

The Sault Tribe's motivation for rejecting the terms of the 2023 Decree and requesting an allocation trial is to litigate for a larger share of the fishery and to gain access to areas "off-limits" (*i.e.*, zoned for other users) under the 1985 equitable allocation zonal plan. This requires examination of the current actual proportionate share of the available harvest by competing user groups, and what each might be entitled to under applicable law.

(a.) Tribal or individual tribal members' right?

Critically,

> [t]he 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

[75] The 2023 Decree section VIII.J. entitled "Species Not Authorized for Commercial Harvest" (R. 2132, Page ID 15275) is continued verbatim from the 2000 Consent Decree, *see* R. 1458, Page ID 3288-89.

> their modern political successors; *it does not belong to individual tribal members*.

United States v. Michigan, supra, 471 F. Supp. at 271-72 (emphasis added and citations omitted); *see also* paragraph 16 of the 1979 declaratory judgment, 471 F. Supp. at 280.

(b.) Inter-tribal allocation absent consent of parties to replacement decree.

The Sault Tribe benefitted from a greater share of the fishery harvests under the 2000 Consent Decree that continues in the 2023 Decree than it would be entitled to if a trial were held to determine a formula by which the fishery resource within the 1836 Treaty cession area of Lakes Huron, Michigan and Superior should be allocated between the five Tribes. Presumably the Sault Tribe would disagree with the assertion that each Tribe is entitled to an equal share, contending that their total membership and relative share of the overall tribal fishery warrant a greater allocation than the other Tribes. However, the common law noted by the Supreme Court with respect to allocation of resources among sovereigns applies equally to allocation among tribal sovereigns as it does to an overall allocation between the State and Tribes collectively:

> Since the days of Solomon, such a division [an equal division] has been accepted as a fair apportionment of a common asset, and Anglo-American common law has presumed that division when, as here, no other percentage is suggested by the language of the agreement or the surrounding circumstances.

Fishing Vessel, supra, 443 U.S. at 686 fn. 27 (citations omitted).

Fishery biologists for the tribal, state, and federal parties concur that the zonal plan declared by the district court in 1985 and continued in the 2000 and 2023 decrees has resulted in the Tribes harvesting slightly more than 50% of the total fish.[76] The Sault Tribe acknowledged to the district court that its commercial fishers currently harvest two-thirds[77] of the communal share that the five Tribes are entitled to under common law. Considering the 2021 lake trout allocation percentage,[78] the Sault Tribe had an allocation of two-thirds of almost 60%, *i.e.*, approximately 40% of harvests by all user groups (tribal and state) within the 1836 Treaty cession waters. Even assuming only a 50% overall tribal allocation, compared to the common law formula of one-fifth (20%) of the Tribes' 50% communal share (*i.e.*, 10% of all harvests), the Sault Tribe is far better off under the "constraints" of the 2023 Decree than the alternative of a court-ordered allocation formula.

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[76] Olsen Affidavit ¶ 11, R. 2075-3, Page ID 12757.

[77] Sault Tribe's July 8, 2020 memorandum opposing other six parties' motion to extend 2000 Consent Decree, R. 1887, Page ID 10772-73.

[78] "[I]n 2021 the Tribes harvested approximately 58% of the total lake trout harvested …." Olsen Affidavit ¶ 12, R. 2075-3, Page ID 12758.

Currently there is no need for inter-tribal allocation under the common law formula.[79] But if inter-tribal allocation were required, the provision contained in the "inland" Consent Decree approved by district court's November 2, 2007 order (R. 1799) provides an appropriate formula:

> 17.4 For any species subject to allocation under this Section XVII, or for any species determined in the future to require allocation, each Tribe shall be entitled to one-fifth of the Tribal allocation, provided that the Tribes shall develop mechanisms to share the available Tribal harvest when a Tribe is unable to fully utilize its one-fifth share.

R. 1799, Page ID 1729.

The point being that Sault Tribe cannot establish the requisite showing of harm caused by the 2023 Decree. In fact, the opposite is true: the entire treaty cession area remains open to its members for subsistence fishing,[80] and under the framework of the 2023 Decree its commercial fishers remain able to harvest more fish than Sault Tribe would be entitled to if inter-tribal allocation were litigated under precedent of Anglo-American common law.

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[79] Olsen Affidavit ¶ 13, R. 2075-3, Page ID 12758.

[80] Notwithstanding the zonal plan's prohibitions re: commercial fishing, tribal subsistence fishing remains open throughout the entire cession area including within other Tribes' zones as well as for species "off-limits" to commercial fishers, see 2023 Decree section XI.D. (R. 2132, Page ID 15278-79).

B. Balancing the hardships weighs against the Sault Tribe.

(1.) Joint-Tribal regulatory structure is necessary to protect fishery resource.

The Sault Tribe contends that the 2023 Decree impermissibly imposes an injunction interfering with its sovereign right to self-regulate. However the law of the case is that a joint-tribal management/regulatory structure is necessary to protect the fishery resource. In fact, a "single set of comprehensive [inter-tribal] regulations" has existed continuously for the past 44 years.[81] In 1981 this Court mandated that these inter-tribal regulations should continue until modified by the district court: "The United States and the Indian tribes represent to the Court that the tribes have adopted and will carefully enforce as a regime of tribal self-regulation the comprehensive rules regarding gill net fishing previously enacted by the Secretary of the Interior which were allowed to expire on May 11, 1981." *United States v. Michigan*, 653 F.2d 277, at 279 (6th Cir. 1981). Modifications of these comprehensive rules occurred in conjunction with approval of the 1985, 2000 and

[81] In response to the Sault Tribe's failure to regulate its commercial fishers subsequent to Judge Fox's May 7, 1979 declaratory judgment, the Secretary of the Interior promulgated emergency regulations on November 15, 1979, having "determined that conservation of the fishery resource within the ceded waters will be enhanced by a single set of comprehensive regulations, …" 44 Fed. Reg. 65747, at 65748 (Nov. 15, 1979), §256.40, R. 2075-1, Page ID 12744.

2023 decrees.[82] Judicial authority to modify these inter-tribal regulations does not require the parties' unanimous consent.[83] Contrary to Sault Tribe's contention, the joint-tribal management/regulatory structure actually preserves its sovereign self-regulation right considering the possibility that state regulations could be imposed if necessary "for preserving fisheries in the Great Lakes from irreparable harm." *Id*., 653 F.2d at 279.

(2.) By preserving framework of 1985 equitable allocation decree, the 2023 Decree prevents return of racehorse fishery thereby precluding irreparable harm to the Grand Traverse Band.

The 1985 zonal plan adopted with Sault Tribe's agreement and advocacy at trial benefitted the largest tribal participant (both by number of fishers and share of harvest) in the fishery. In continuing the zonal plan, the 2000 Consent Decree also solidified the Sault Tribe's role as the largest participant in the tribal fishery by facilitating "buy-outs" of additional state-licensed commercial fishers beyond those eliminated by the 1985 Decree and providing the vessels/gear to Sault Tribe fishers.

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[82] Each subsequent decree dictated contents of the joint-tribal regulations ("comprehensive rules"), *see*: 1985 decree, ¶¶ 27-28, 12 I.L.R. at 3091, R. 1890-1, Page ID 10809; 2000 Decree, section VI.A., R. 1458, Page ID 3247-48; and 2023 Decree, section VI.A., R. 2132, Page ID 15262-64.

[83] For example, this district court's March 19, 1982 Opinion and Order (534 F. Supp. 668 (W.D. Mich. 1982)) was entered over the State's objection, and Bay Mills opposed the 1985 Decree.

See 2000 Consent Decree, Section X., R. 1458, Page ID 3292-3300. By sheer numbers, the Sault Tribe is the backbone of the zonal plan. The entire structure of the 1985 equitable allocation would collapse if the Sault Tribe were permitted to opt out, thus harming the other six parties and threatening return of the racehorse fishery and social discord addressed in the 1985 judicial decision implementing the zonal plan.

Without the constraints dictated by the 2023 Decree, increased fishing efforts by Sault Tribe fishers within Grand Traverse Bay would cause irreparable harm to GTB. Due to the whitefish collapse, there simply are not enough fish for GTB alone; any fish harvested by outsiders would be the death knell to the local Tribe's fishers. Olsen Affidavit ¶ 9, R. 2075-3, Page ID 12757; and John Affidavit ¶ 9, R. 2096-6, Page ID 13729.

(3.) Sault Tribe's misguided litigation position could backfire causing substantial harm both to itself and to the other intervening-plaintiff Tribes.

> 1. The treaty-guaranteed fishing rights preserved to the Indians in the 1836 Treaty, including the aboriginal rights to engage in gill net fishing, continue to the present day as federally created and federally protected rights. The protection of those rights is the solemn obligation of the federal government, …

United States v. Michigan, *supra*, 653 F.2d at 278. Albeit in 1981 this Court was focused upon preserving tribal "treaty rights" from encroachment by the state, this obligation also extends to the protecting the Tribes from foolhardy positions likely

to erode the extent of their rights previously decreed in this litigation. One example is the Sault Tribe's rejection of the zonal management plan it advocated for in 1985:

> The Court cannot imagine a scenario in which a zonal plan for the Treaty waters does not exist—the Great Lakes fishery would be a free-for-all, and the Court has no doubt that a lack of a zonal plan in the Decree would lead to the demise of the fishery in its entirety.

Opinion Regarding the Approval of the 2023 Decree, R. 2130, Page ID 15160-61. Another example, based on a different aspect of this Court's 1981 decision, is the district court's conclusion that "[t]here exist substantial risks to the Tribes if this case went to trial (see ECF No. 2119 at PageID.14620-21.)" *Id*., Opinion, R. 2130, Page ID 15161; *see* discussion *id*., at Page ID 15161-62.

C. The 2023 Decree serves the public interest.

The public interest is served by effectuating federal policy articulated in the October 5, 2021 Decision Memorandum, R. 2075-6, Page ID 12777 ("The Department's longstanding view is that the integrity of inter-tribal fish and wildlife commissions like CORA is important to the exercise of the Department's trust responsibility to all affected tribes."). *See also* March 12, 1986 Memorandum to the BIA Area Director from the DOI Assistant Secretary-Indian Affairs, R. 2075-7, Page ID 12780.

The public interest additionally is served by preserving the basic framework of the 1985 judicial decision allocating the fishery resource among the competing user groups. The parties have coexisted peacefully under the zonal plan implemented

by the district court's May 31, 1985 equitable allocation decision, and the Tribes collectively have benefited from an overall allocation exceeding the common law benchmark. Six of the seven parties are content with this arrangement (1985 zonal plan); and none other than the Sault Tribe quarrels with the district court's observations at pages 66-70 of the August 24, 2020 Opinion, R. 2130, Page ID 15160-64.

> In sum, the zonal plans of the decrees, including the Proposed Decree, are some of the most important—if not the most important—provisions preserving the Treaty rights in the decrees. The zonal plans contained in the Proposed Decree reduce social conflict, preserve the fishery, promote the Treaty rights, appreciate the shared resource, and ensure feasible implementation of the Proposed Decree. The Court has no doubt that overruling this objection benefits all the Parties to the Decree.

Id., R. 2130, Page ID 15164.

IV. Renewed request for declaratory judgment.

In late summer 2018 the Tribes commenced the process of discussing a replacement for the 2000 Consent Decree due to expire on August 8, 2020. After meeting among themselves in eight sessions during 2018-19 (17 days), on September 19, 2019 the Tribes commenced the seven-party sessions with state and federal government (and amici) representatives, including seven additional sessions (15 days) prior to COVID-19 suspension of in-person meetings in March, 2020.

Although the confidentiality agreement prohibits discussion of specific issues, pleadings filed by the Sault Tribe in June and July, 2020 confirm that the

continuation of exclusive tribal zones was a major stumbling block in achieving a unified tribal negotiation position.[84] *See* Sault Tribe's June 24, 2020 memorandum in support of motion to extend 2000 Consent Decree, R. 1883, Page ID 10688-92, and Sault Tribe's July 8, 2020 memorandum opposing other six parties' motion to extend 2000 Consent Decree, R. 1887, Page ID 10771.

The district court addressed this issue head-on:

> It is not clear to the Court that the law states that the tribes each possess the right to access all of the 1836 Treaty waters, as the Sault Ste. Marie Tribe suggests. The Sault Ste. Marie Tribe relies on Judge Fox's 1979 opinion in *United States v. Michigan*, [4]71 F. Supp. 192 (W.D. Mich.1979). However, that opinion was appealed, and the Sixth Circuit issued a short opinion that appears to have rendered much of Judge Fox's opinion dicta. *United States v. State of Michigan*, 653 F.2d 277, 279 (6th Cir. 1981). This question of law will have a cascade of consequences, and it is not fully briefed in this procedural motion. Therefore, the Court declines to make changes to the consent Decree at this time based on these grounds.
>
> In any event, the burden of proof weighs equally on both parties when evaluating proposed fishery management plans. *United States v. Michigan*, 12 I.L.R. at 3081. Judge Enslen made a number of findings in support of the exclusive fishing zones, ultimately concluding that a zonal plan "provides for greater availability and predictability, greater harvests for treaty fishers, without the obvious social conflict, early closures, ineffective enforcement and management, and without the uncertainty [of other plans]." *Id*. at 3085. The Sault Ste. Marie Tribe has not presented *any* proof that they will be harmed by the continuation of the exclusive zones beyond their proposed extension of November

[84] "[I]t is now clear that part of the reason that the parties have been unable to reach agreement is the Sault Ste. Marie Tribe's position regarding the exclusive fishing zones." July 24, 2020 Opinion, R. 1892, Page ID 10821.

> 8, 2020, and as such, has not presented sufficed proof to counter Judge Enslen's findings.

July 24, 2020 Opinion, R. 1892, Page ID 10823.

The Sault Tribe made no effort whatsoever in the subsequent four years to meet this burden. Nonetheless the unproven contention – that exclusive zones require the consent of each party – has shaped Sault Tribe's litigation positions including this appeal.

In contrast, GTB put evidence in the record refuting Sault Tribe's contention. *See* pages 2-5 of Affidavit of Bradley J. Gills, Ph.D., R. 2081-1, Page ID 12914-12917; *see also* excerpt of October 11, 2004 expert report of Gregory E. Dowd, Ph.D., R. 2096-13, Page ID 13765-77. This evidence demonstrates that under no circumstances would Sault Tribe be able to meet its burden. Yet never the twain shall meet.

Unless this issue is resolved, when the 2023 Decree expires the other parties once again may be stymied by the Sault Tribe's intransigence. This can be avoided – and judicial economy preserved – by this Court issuing the declaratory judgment requested below: "GTB requests a declaration that the equitable allocation zonal plan decreed on May 31, 1985 is the law of the case, including the Grand Traverse Tribal Zone specified in the proposed decree." Grand Traverse Band's April 17, 2023 supplemental response to Sault Tribe's objections to proposed decree, R. 2096, Page ID 13678. The Declaratory Judgment Act (28 U.S.C. § 2201(a)) and FED. R.

CIV. P. 57 authorize issuance of declaratory judgments at any stage of a proceeding, including on appeal. *See* 10B Wright, Miller and Kane, *Federal Practice and Procedure* § 2755 (2016).

V. Conclusion

The fact that the parties periodically may modify the terms of the 1985 equitable allocation zonal plan does not mean that upon expiration of each successive Great Lakes fishing decree any party is entitled to a *sui generis* allocation trial. Finality is a fundamental premise of our jurisprudence. Neither the Sault Tribe nor any other party is entitled to a "do-over." The 1985 equitable allocation judicial decision (*i.e.*, the equitable allocation zonal plan) is law of the case.[85]

Moreover, the Sault Tribe is precluded by the judicial estoppel doctrine from challenging GTB's exclusive fishing zone. Like New Hampshire, the Sault Tribe is precluded from staking out a greater claim than it agreed to under the equitable allocation zonal plan for which it advocated during the 1985 trial. *New Hampshire v. Maine, supra*, 532 U.S. at 755-56.

[85] If relief from the 1985 judgment actually were justified, the appropriate remedy lies under FED. R. CIV. P. 60 (b).

Respectfully submitted,

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Dated: May 31, 2024

CERTIFICATE OF COMPLIANCE

Certificate of Compliance with Type-Volume Limit,
Typeface Requirements, and Type-Style Requirements.

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), this brief contains not more than 13,000 words. The brief contains 12,816 words.

2. The brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

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ADDENDUM - DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Pursuant to 6 Cir. R. 30(g)(1), Plaintiff-Intervenor-Appellee Grand Traverse Band of Ottawa and Chippewa Indians designates the following portions of the record on appeal:

DESCRIPTION OF ENTRY	DATE	RECORD ENTRY NO.	PAGE ID NO.
Judgment on appeal, Relevant orders and opinions of the district court (6 Cir. R. 30(g)(1)(A)(iii), (iv))			
Opinion Regarding the Approval of the 2023 Decree	August 24, 2023	R. 2130	15095
2023 Decree	August 24, 2023	R. 2132	15236
Opinion	July 24, 2020	R. 1892	10818
Inland Consent Decree	November 2, 2007	R. 1799	1689
2000 Decree	August 8, 2000	R. 1458	3216
1985 Decree	May 31, 1985	R. 1890-1	10796
Opinion and Order Regarding Motion to Allocate Resource	April 11, 1984	R. 2080-1	12876
Closure Order	October 5, 1983	R. 2096-8	13741
Other Parts of the Record (6 Cir. R. 30(g)(1)(A)(vi))			
Affidavit of Sherry Robinson	April 17, 2023	R. 2096-5	13723
Affidavit of Brian Springstead	April 16, 2023	R. 2096-7	13737
Affidavit of Erik Olsen	February 10, 2023	R. 2075-3	12753
Affidavit of Cindi John	February 8, 2023	R. 2096-6	13727
Affidavit of Steve Feringa	February 6, 2023	R. 2096-14	13778
Affidavit of Bradley J. Gills, Ph.D.	November 21, 2022	R. 2081-1	12912
Affidavit of Nancy Kida	April 27, 2022	R. 2096-4	13717
Decision Memorandum	October 5, 2021	R. 2075-6	12776
Memorandum of Sault Tribe in Opposition to Motion to Extend Great Lakes Fishing Consent Decree	July 8, 2020	R. 1887	10767

Other Parts of the Record (6 Cir. R. 30(g)(1)(A)(vi))			
Map of Angler Data	May 2020	R. 2081-2	12919
"The Meaning of Article 13 of the Treaty of Washington, March 28, 1836" (excerpt)	2004	R. 2096-13	13761
GTB Witness List	October 1, 1999	R. 1428	3623
GTB Statement re: Notice Pleadings	September 21, 1999	R. 1422	3675
Memorandum to BIA Director	March 12, 1986	R. 2075-7	12779
Trial transcript (Lumsden testimony excerpt)	May 27, 1985	R, 2096-2	13682
Michigan Civil Rights Commission Report	February 27, 1985	R. 2096-3	13697
GTB Supplemental Pleading	February 20, 1985	R. 2081-4	12926
Stipulation Modifying Regulations	July 21, 1984	R. 2096-9	13744
GTB Letter to district court and parties re: equitable apportionment	April 24, 1984	R. 2081-3	12923
Motion to Allocate Resource and Memorandum in Support	November 14, 1983	R. 2075-5	12765
Article, "Bay fishing dispute splits Indian tribes"	October 8, 1983	R. 1974-10	11391
Article, "Ease suffering, Indians plead"	June 28, 1983	R. 1974-11	11392
Article, "Fishing in GT Bay may be core issue in collapsed talks"	March 12, 1982	R. 2096-10	13755
Articles	March 1982	R. 1974-9	11388
Article "Sportsmen declare war on netters"	April 20, 1979	R. 1974-5	11365

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CERTIFICATE OF SERVICE

I certify that on May 31, 2024, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users, or if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record as designated below.

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