

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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DAVID T. SILVA, GERROD T. SMITH, JONATHAN
K. SMITH, Members of the Shinnecock Indian Nation,

Case No. 18-CV-3648-GRB-SIL

Plaintiffs,

v.

BRIAN FARRISH, JAMIE GREENWOOD, EVAN
LACZI, NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION, SUFFOLK
COUNTY DISTRICT ATTORNEY'S OFFICE, BASSIL
SEGGOS,

Defendants.

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**BRIEF OF MARGERY HUNTER BROWN INDIAN LAW CLINIC ON BEHALF OF
AMICI CURIAE GREAT LAKES INDIAN FISH AND WILDLIFE COMMISSION**

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STATEMENT OF INTEREST

Amicus curiae, the Great Lakes Indian Fish and Wildlife Commission (GLIFWC), is an inter-Tribal agency that, for more than four decades, has exercised delegated authority from its member Tribes related to the administration and management of treaty-reserved, off-reservation hunting, fishing, and gathering rights. This experience gives it a unique perspective on the ability of Tribes and States to exercise their respective regulatory and management authorities in ways that recognize and respect each jurisdiction's sovereignty, rights, and obligations. Because GLIFWC is operated by and for Indian Tribes, it has particular expertise in how Tribes and States can co-manage and co-steward natural resources for the benefit of Indian Tribes, their neighbors, and the resources themselves. Indeed, GLIFWC member Tribes have filed briefs as amici curiae in other cases where Tribes have litigated their rights to fish, hunt, and gather off-reservation, such as in *Herrera v. Wyoming*, 587 U.S. 329 (2019).

SUMMARY OF ARGUMENT

GLIFWC presents this brief to demonstrate to this Court that Tribal management of off-reservation rights, including fishing, can not only co-exist alongside State management, but that respectful cooperation between sovereigns can ultimately benefit the resources themselves. Rather than address the merits of the parties' legal claims, this brief provides information about GLIFWC's on-the-ground co-management of Tribal off-reservation fishing rights, as well as the status of the species under co-management. In detailing its own experiences as a natural resource manager, GLIFWC aims to dispel misconceptions about the exercise of off-reservation usufructuary rights. The GLIFWC model demonstrates that Tribes can manage off-reservation fishery resources sustainably for the benefit not just of Tribal members, but the fisheries themselves.

The briefs filed by the State of New York in this case suggest that Tribes are incapable of effectively managing off-reservation fishing by Tribal members. The State represented to this Court that the aboriginal fishing rights of members of the Shinnecock Nation are, as a matter of course, subject to regulation by the State. The experience of GLIFWC and its member Tribes, which have managed off-reservation fishing, hunting, and gathering rights in Michigan, Minnesota, and Wisconsin for more than four decades, belies the State's baseline assumptions and demonstrates that successful State and Tribal management and regulation over common resources is possible and can be beneficial for all.

ARGUMENT

I. GLIFWC and its member Tribes have managed off-reservation Tribal fishing for more than forty years.

For over four decades, GLIFWC and its eleven member Ojibwe Tribes,¹ in collaboration with the States, have exemplified the sustainable and sovereign management of off-reservation hunting, fishing, and gathering rights across the Ceded Territories of Michigan, Minnesota, and Wisconsin. Rooted in treaties that expressly reserved these rights and affirmed through litigation, GLIFWC's inter-Tribal co-management frameworks have proven not only compatible with state interests but instrumental in supporting ecological health and intergovernmental collaboration.

GLIFWC is an inter-Tribal natural resources management agency comprised of eleven Ojibwe Tribes. In a series of treaties negotiated by GLIFWC member Tribes and the United States between 1836 and 1854, the Tribes ceded over sixty million acres of their aboriginal

¹ GLIFWC member Tribes are: in Wisconsin – Bad River Band of the Lake Superior Tribe of Chippewa Indians, Lac Courte Oreilles Band of Lake Superior Chippewa Indians, Lac du Flambeau Band of Lake Superior Chippewa Indians, Red Cliff Band of Lake Superior Chippewa Indians, St. Croix Chippewa Indians of Wisconsin, and Sokaogon Chippewa Community of the Mole Lake Band; in Minnesota – Fond du Lac Band of Lake Superior Chippewa, and Mille Lacs Band of Ojibwe Indians; and in Michigan – Bay Mills Indian Community, Keweenaw Bay Indian Community, and Lac Vieux Desert Band of Lake Superior Chippewa Indians.

territories in areas that would later become parts of the States of Michigan, Minnesota, and Wisconsin.² In those same treaties, the Tribes retained for themselves their rights to fish, hunt, and gather throughout these Ceded Territories, as they had done since time immemorial.

Beginning in the late 1800s and as natural resources became scarcer in the Great Lakes region, the States increasingly began to interfere with the Tribes' off-reservation rights by seeking to subject the Tribes to State resource regulations and going so far as to criminally prosecute individual Tribal members. Conflict between the States and the Tribes came to a head in the early 1970s, as the Tribes and individual Tribal members sought to reaffirm their off-reservation rights in the face of State arguments that these rights no longer existed. *See, e.g., Michigan v. Jondreau*, 384 Mich. 539, 185 N.W. 2d 375 (Mich. 1971); *Wisconsin v. Gurnoe*, 53 Wis. 2d 390, 192 N.W. 2d 892 (Wis. 1972). Through prolonged and varied litigation in state and federal courts, including the Supreme Court, the Tribes were able to reaffirm their legal rights to off-reservation fishing, hunting, and gathering. *See, e.g., United States v. Michigan*, 471 F. Supp. 192 (W.D. Mich. 1979) (reaffirming Michigan Tribes' fishing rights in the Great Lakes); *Lac Courte Oreilles Band v. Voigt*, 700 F.2d 341 (7th Cir. 1983) (reaffirming Wisconsin Tribes' usufructuary rights); *Minnesota v. Mille Lacs Band*, 526 U.S. 172 (1999) (reaffirming Minnesota Tribes' usufructuary rights). Courts found that Tribes could preempt the application of State harvest regulations by enacting their own self-regulatory systems that addressed legitimate State conservation, health, and safety concerns. *See, e.g., Lac Courte Oreilles Band v. Wisconsin*, 668 F. Supp. 1233, 1241–42 (W.D. Wis. 1987); *United States v. Michigan*, 471 F. Supp. at 273; *Mille Lacs Band v. Minnesota*, 861 F. Supp. 784, 836 (D. Minn. 1994).

² Treaty with the Ottawa, Etc., Mar. 28, 1836, 7 Stat. 491; Treaty with the Chippewa, July 29, 1837, 7 Stat. 536; Treaty with the Chippewa, Oct. 4, 1842, 7 Stat. 591; Treaty with the Chippewa, Sept. 30, 1854, 10 Stat. 1109.

In some instances, after the existence of these rights was reaffirmed, further litigation followed to establish the adequacy of Tribal regulations and determine how resources should be allocated. *E.g.*, *Lac Courte Oreilles Band v. Wisconsin*, 686 F. Supp. 226 (W.D. Wis. 1988). In other cases, the parties chose to avoid litigation and negotiate regulations and allocation issues on a periodic basis. *See* Ronald N. Satz, *Chippewa Treaty Rights: The Reserved Rights of Wisconsin's Chippewa Indians in Historical Perspective* 100 (Wisconsin Academy of Sciences, Arts and Letters 1991) and *Lac Courte Oreilles Band v. Wisconsin*, 775 F. Supp. 321 (W.D. Wis. 1991). Where management authority was an issue, different types of court-approved written agreements between Tribes and States were used to set up institutional arrangements to coordinate management.³ For example, although treaty rights were litigated in the 1837 ceded territory in Minnesota, the State and the Tribes entered into a number of agreed-upon protocols that set out the mechanisms by which they would cooperate on management activities. *See, e.g.*, Minn. Dep't of Nat. Res., *Protocol #5: Natural Resource Management in the Minnesota Portion of the 1837 Ceded Territory*, (Dec. 2001). Thus, in the Ojibwe Ceded Territories, management arrangements differ based on the Tribes and States involved, but all entail coordinated or cooperative management and regulation of common resources. In these cases, the Ojibwe Tribes, as governments and as nations, believe that harvest rights carry with them the responsibility to conserve and manage resources as a way to protect the continued existence of the rights themselves.

³ *See e.g.*, MICH. DEP'T OF NAT. RES., *2007 Inland Consent Decree FAQs*, available at https://www.michigan.gov/documents/dnr/2007_Inland_Consent_Decree_FAQs_9.28.17_604502_7.pdf. The Consent Decree is outside the scope of GLIFWC's operations, but is implemented through the Chippewa Ottawa Resource Authority. *See also* Memorandum of Understanding Between the Fond du Lac Band of Lake Superior Chippewa and the State of Minnesota on Resource Management in the 1854 Ceded Territory (Dec. 8, 2017), available at https://www.leg.mn.gov/docs/2018/other/181224/governor/assets/2017_12_08_483_STATE_DEFS.pdf (setting out procedures to share information relevant to resource management in the 1854 Ceded Territory and coordinate resource management plans).

GLIFWC was created in 1984 through the merger of the Great Lakes Indian Fisheries Commission and the Voigt Intertribal Task Force, two inter-Tribal resource management authorities that formed in 1982 and 1983, respectively. These entities continue to operate within GLIFWC as standing committees with defined authorities. GLIFWC's overarching governing body is its Board of Commissioners, which establishes policy and overall guidance for GLIFWC's work. The Great Lakes Indian Fisheries Committee facilitates intertribal coordination with respect to Tribal harvest and management of the Great Lakes—primarily Lake Superior—and its tributaries. The Voigt Intertribal Task Force retains primary responsibility for intertribal co-management, including approval of quotas, in the inland portion of the 1837 and 1842 Ceded Territories.

Tribally adopted conservation codes serve as the basis for the regulation and enforcement of off-reservation treaty harvest quotas, methods, and seasons. GLIFWC assists with permitting, monitoring, and enforcing these harvest regulations. GLIFWC staff also conduct natural resources assessments and work with states, partner agencies, organizations, and the public on cooperative natural resources enhancement and stewardship.

In Wisconsin, tribal representatives are also included in all State species management committees that pertain to Ceded Territory resources. This role is often delegated to GLIFWC staff, who work with State biologists to share scientific models and assessment data to help determine mutually agreed-upon quotas for a variety of species. GLIFWC then recommends harvest quotas to its Voigt Intertribal Task Force, which formally adopts them.

GLIFWC also has conservation enforcement officers that patrol the ceded territories during open seasons and cite tribal violators into Tribal courts. State wardens are also authorized to cite tribal members into tribal court, however generally state wardens turn evidence of

violations over to GLIFWC wardens who investigate and issue the appropriate citation. Through these systems, GLIFWC member Tribes assume responsibility for implementing their rights in a way that provides opportunities for Tribal members to exercise their rights, that assures the continued quantity and quality of natural resources that lie at the base of those rights, and that ensures mutual respect and coordination among all governments exercising concurrent authority in the ceded territories.

A. GLIFWC and its member Tribes cooperatively manage shared fisheries with States.

Although GLIFWC was originally formed in large part due to adversarial litigation, GLIFWC has ultimately helped to increase cooperation between the States and the Tribes. The exercise of treaty rights within Wisconsin, in particular, is highly regulated and closely monitored, with State, Tribal, and GLIFWC biologists and enforcement officers working collaboratively for the benefit of the resources and the health and safety of the public. Rather than impeding the States' ability to manage wildlife, GLIFWC has developed mutually respectful relationships with State and federal agencies,⁴ and, upon the reaffirmation of off-reservation rights, its member Tribes quickly developed the capacity and tools needed to ensure effective administration and enforcement of the exercise of their members' treaty-reserved rights.⁵

GLIFWC works with its member Tribes to draft model off-reservation conservation codes, based on court mandates and stipulated agreements with the States, for its member Tribes

⁴ Br. for Resp'ts Bad River Band of Lake Superior Chippewa Indians and Lac du Flambeau Band of Lake Superior Chippewa Indians at 6, *Minnesota v. Mille Lacs Band*, 526 U.S. 172 (1999) (No. 97-1337), 1998 WL 665020 ("The cooperation of tribal and state governments in the implementation of treaty rights prior to final court decisions we believe to be truly unprecedented in the United States.")

⁵ *Id.* ("Since the interim agreements depend upon tribal enforcement under tribal law, the Tribes quickly established the tools needed for the task.")

to adopt; Tribal members that violate these codes are cited into Tribal courts.⁶ This ability of GLIFWC member Tribes to self-regulate has been integrated into statutes at the State level. *See, e.g.,* Wis. Stat. § 175.41 (extending many of the same statutory safeguards and protections to GLIFWC officers that are afforded to other law enforcement officers in the state); Minn. Stat. § 626.94 (providing that Tribal conservation officers can exercise the same powers as conservation officers employed by the Minnesota Department of Natural Resources). These arrangements have made judicial intervention in State-Tribal disputes the exception rather than the rule. State legislatures and State officials have lauded the cooperative management they have enjoyed with GLIFWC.⁷ For instance, in 2009, the Wisconsin Legislature recognized the Tribes' and GLIFWC's "important role . . . in the preservation and protection of the natural resources of the ceded territory." 2009 Wis. Senate J. Res. 40 (June 30, 2009).

The resources at the base of these treaty rights are healthy and unimpaired by the exercise of treaty rights. A joint federal, State, and Tribal fishery assessment published in 1991 concluded that treaty fishing activities did not harm the resource. Further, the report concluded that Tribal harvest is "conservative and completely monitored" and that "lakes with tribal harvest are studied and monitored more than lakes without tribal quotas." U.S DEPARTMENT OF THE INTERIOR, CASTING LIGHT UPON THE WATERS: A JOINT FISHERY ASSESSMENT OF THE WISCONSIN CEDED TERRITORY 78 (1991). GLIFWC's ability to work alongside multiple State and federal

⁶ *E.g.,* Wisconsin 1837 and 1842 – Off-reservation Conservation Code, *available at* https://glifwc.org/sites/default/files/uploads/documents/2025-01/Wisconsin.1837.1842.Model.Off.Reservation.Conservation.Code_.2024Dec.pdf; Minnesota 1837 – Model Off-Reservation Conservation Code, *available at* https://glifwc.org/sites/default/files/uploads/documents/2025-01/Minnesota1837.Conservation.Code_.2016.pdf.

⁷ Following the first spring treaty fishing season, the head of the Minnesota DNR praised the "excellent working relationships" among Tribal, GLIFWC, and DNR staffs. Letter from Sando to Kmiecik of 5/15/98. Similarly, at the conclusion of the first treaty deer hunting season in Minnesota, the manager of St. Croix State Park wrote congratulatory letters to the Mille Lacs and Fond du Lac Bands stating: "[Y]ou have laid the cornerstone on which to build a long term relationship based on common sense and cooperation." Letter from Nelson to Wedll of 11/18/97; Letter from Nelson to Martineau of 11/20/97.

entities in managing all manner of off-reservation Tribal usufructuary rights demonstrates that effective Tribal co-management of resources, in close cooperation with other agencies, is both possible and beneficial.⁸

B. Tribes are uniquely incentivized to conserve natural resources under the doctrine of conservation necessity and Tribal customary law.

1. Effective Tribal self-regulation preempts the application of State regulation in conservation, with conditions.

Once courts have affirmed the existence of an off-reservation treaty right, they have declined to allow states to circumvent those Tribes' ability to manage and harvest pursuant to that right. *See Washington v. Wash. State Com. Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 685 (1979) (holding that the Tribe was entitled to harvest fish at an "equitable measure of the common right"); *see also Mille Lacs Band*, 526 U.S. at 176 (holding "that the Chippewa retain the usufructuary rights guaranteed to them under the 1837 Treaty"). Instead, courts recognize that "Indian treaty rights can coexist with state management of natural resources." *Mille Lacs Band*, 526 U.S. at 204. The doctrine of conservation necessity allows for "accommodat[ion of] both State[] interests in management of its natural resources" and Tribal exercise of usufructuary rights. *Id.* at 205. Therefore, States may only "impose reasonable and necessary nondiscriminatory regulations . . . in the interest of conservation." *Id.* But if a Tribe responsibly regulates and manages a natural resource, it retains the right to regulate its own members "free of state controls" as "the legitimate conservation interests of the state are not infringed." *United States v. Washington*, 520 F.2d 676, 686 (9th Cir. 1975).

⁸ This is not to say the States and Tribes always agree. When disagreements arise, the Tribes and the States have mechanisms in place to settle their differences. These have included informal negotiations, formal dispute resolution, and in a few instances, the court's jurisdiction.

2. *GLIFWC's experiences demonstrate the practical application of Tribal values in resource management and the regulation of off-reservation harvest.*

Tribes are incentivized to conserve natural resources not only economically, but culturally and spiritually as well. *See Nelson v. Yurok Tribe*, 5 NICS App. 119 (May 7, 1999) (recognizing “the laws of the Creator” and the Tribal Constitution mandate that the Tribe maintain “harmony with nature, over that of traditionally exercising a fishing right.”). Traditional law principles govern how Tribal nations interact with the surrounding world. Under Tribal customary law, Tribal governments and their citizens often share reciprocal duties and responsibilities to protect and conserve natural resources for future generations. *See generally* Kekek Stark, *Bezhigwan Ji-Izhi-Ganawaabandiyang: The Rights of Nature and its Jurisdictional Application for Anishinaabe Territories*, 83 Mont. L. Rev. 79 (2022). This duty extends beyond human relationships as Tribal protocols require “restraint, respect, and reciprocity” for animal life. ROBIN WALL KIMMERER, *THE SERVICEBERRY: ABUNDANCE AND RECIPROCITY IN THE NATURAL WORLD* 62 (Scribner 2024). These traditional principles of mutual reliance inform Tribal management efforts.

The starting point for understanding these traditional law principles from the perspective of GLIFWC member Tribes⁹ is the concept of *mino-bimaadiziwin* – to live a good life in harmony with creation. *See Restoule v. Canada*, 2018 ONSC 7701, Elder Kelly Tr., Vol. 21 at 2866-67, 2934 (Nov. 1, 2017) (“According to Elder Fred Kelly, two of the organizing principles of Anishinaabe law and systems of governance were *pimaatiziwin* everything is alive and everything is sacred . . .”). “Mino-bimaadizwin . . . serves as a form of fundamental law.” *Spurr*

⁹ Shinnecock Nation may have similar belief systems to GLIFWC member Tribes as both share roots with the Algonquian linguistic family. *See* DAVID H. PENTLAND & H. CHRISTOPH WOLFART, *BIBLIOGRAPHY OF ALGONQUIAN LANGUAGES*, xviii (Univ. of Manitoba Press 1982).

v. Tribal Council, No. 12-005APP (Nottaweseppi Huron Band of Potawatomi 2012). To achieve the fundamental law of *mino-bimaadiziwin*, one must physically and spiritually care for and respect all of creation. Kekek Stark, *Anishinaabe Inaakonigewin: Principles for the Intergenerational Preservation of Mino-Bimaadiziwin*, 82 Mont. L. Rev. 293, 304 (2021).

GLIFWC honors and protects its non-human relatives, fish, in accordance with *mino-bimaadiziwin* while at the same time, honoring and protecting treaty rights and Tribal sovereignty within the Ceded Territories of 1836, 1837, 1842, and 1854. GLIFWC's member Tribes depend on healthy ecosystems and the fish, plants, and wildlife that these ecosystems support. In turn, the fish, plants, and wildlife rely on the efforts of GLIFWC to support a healthy resource base, and on Tribes and Tribal members to take only what is needed to sustain themselves. The underlying principles of Tribal customary law demonstrate how Tribes' obligation to respect and protect fish resources results in a mutual benefit for all.

C. GLIFWC and Tribal co-management has benefited fish populations and ecosystems.

GLIFWC's efforts in the Great Lakes region show that when States and Tribes work collaboratively, Tribal exercise of usufructuary rights can benefit fish populations and associated ecosystems. GLIFWC and its member Tribes' co-management has significantly contributed to the improvement and sustainability of fish populations through the implementation of a range of scientific, conservation, and law enforcement initiatives. These initiatives have benefited not only Tribal communities but also the broader public and fish habitat.

Through initiatives available to it and other Great Lakes Tribes, such as the Great Lakes Restoration Initiative ("GLRI") and Circle of Flight, GLIFWC has developed programs that support wetland conservation and aquatic habitat restoration by employing natural resource scientists and technicians who conduct ecosystem monitoring and research. Their data collection

helps track fish population trends, water quality, and invasive species impacts, supporting adaptive and informed fishery management decisions. This scientific approach helps maintain resilient aquatic ecosystems and these efforts are critical to restore and protect the spawning and nursery habitats of native fish species such as lake sturgeon, walleye, and muskellunge.

Tribes also possess a wealth of traditional ecological knowledge that informs their management practices. This knowledge, accumulated over generations, provides Tribes with robust, region-specific knowledge to support the implementation of effective conservation strategies. GLIFWC promotes healthy lifestyles as well as the transfer of knowledge from elders to youth, by encouraging participation in treaty-reserved activities like fishing. These types of generational teachings encourage respect for the treaty-reserved rights, the continuation of lifeways and for the beings – resources – themselves. Programs such as youth leadership camps teach Tribal youth about natural resource careers and the ecological importance of fish and wildlife, promoting long-term stewardship.

GLIFWC has used interviews with Tribal elders and harvesters as a co-equal source of knowledge, alongside institutional, sometimes known as “western,” science to assess the vulnerability of fish and other beings to climate change. These interviews provide specific place-based observational data that allows GLIFWC to make management and regulatory recommendations to member Tribes and partner agencies based on centuries of observations of how beings and people react to changes on the landscape.¹⁰

CONCLUSION

GLIFWC and its member Tribes’ stewardship of the Great Lakes Region is a successful example of tribal off-reservation fishery conservation and management that is led by Tribes. The

¹⁰ GREAT LAKES INDIAN FISH AND WILDLIFE COMMISSION, AANKI-BIMAADIZIIMAGAK O’OW AKI 332 (2023).

close working relationships between GLIFWC, its member Tribes, and State agencies demonstrate that respectful partnerships allow overlapping jurisdictions to exercise their respective authorities in ways that are complementary, responsive to changing environmental conditions, and supportive of a healthy natural resource base. These initiatives support biodiversity and have resulted in healthy fish populations and habitats. The affirmation of treaty rights in the Great Lakes region and the swift commitment to cooperation by Tribes and the States has resulted in collaborative conservation efforts. This has led to success in the continuation of Tribal lifeways, to continued commercial and recreational fishing by non-Tribal members, and to the health and continued sustainability of the fishery. A similar opportunity would be available to the State of New York and the Shinnecock Nation should the Tribe's rights be recognized. Even so, the doctrine of conservation necessity does not by default provide the State with the authority to regulate the Shinnecock's fishing rights. In practice, the doctrine provides that the State may only step in if Tribal self-regulation is insufficient to conserve the species or protect public safety. However, when both sovereigns dedicate themselves to respectful partnership, responsibly regulate their apportioned share of the fishery, and work together to manage and protect the resource, the result can be improvements to the fishery that neither party could achieve on its own.