

LIBRARY
Michigan State
University

PLACE IN RETURN BOX to remove this checkout from your record.
TO AVOID FINES return on or before date due.
MAY BE RECALLED with earlier due date if requested.

DATE DUE	DATE DUE	DATE DUE
JUN 17 2006		AUG 09 2009 06 23 10

**EVALUATION AND COMPARATIVE ANALYSIS OF FISHERY MANAGEMENT
POLICIES IN THE 1836 TREATY WATERS OF THE GREAT LAKES**

By

Laura Faitel Cimo

A THESIS

**Submitted to
Michigan State University
in partial fulfillment of the requirements
for the degree of**

MASTER OF SCIENCE

Department of Fisheries and Wildlife

2002

ABSTRACT

EVALUATION AND COMPARATIVE ANALYSIS OF FISHERY MANAGEMENT POLICIES IN THE 1836 TREATY WATERS OF THE GREAT LAKES

By

Laura Faitel Cimo

Fisheries management in the Laurentian Great Lakes remains a challenge due to the lack of natural reproduction of native lake trout stocks (*Salvelinus namaycush*), invasive aquatic species, social conflict between treaty-right Native commercial fishers and state-licensed sport fishers, and lack of cooperative management between tribal and state regulatory agencies. Between 1985 and 2000, fisheries management in the Great Lakes was governed by a court-imposed fisheries management policy, the 1985 Consent Order, which was created to achieve the following goals: 1) promote rehabilitation and conservation of lake trout, 2) reduce social conflict, and 3) provide a framework for joint management of the fishery. To assess the effectiveness of the 1985 Consent Order, individual, in-depth interviews were conducted with pertinent stakeholder groups. Under this policy, most stakeholders believed that lake trout abundance increased, social conflict was reduced, and management of the Great Lakes fishery became more cooperative. However, lack of lake trout fry survival and recruitment remains obstacles for species conservation, and fishing opportunities diminished for some Native fishers. A comparative analysis was also conducted between this policy and its replacement, the 2000 Consent Decree. Most believe lake trout rehabilitation, social conflict, and cooperative management will be improved under the new policy, but the potential for future social conflict exists.

Copyright by
LAURA FAITEL CIMO
2002

This is dedicated to Todd A. Cimo, for all his love and support.

ACKNOWLEDGEMENTS

Dr. Tracy Dobson, Department of Fisheries & Wildlife

Dr. James Bence, Department of Fisheries & Wildlife

Dr. George Cornell, Department of History

Dr. Angela Mertig, Department of Sociology, Department of Fisheries & Wildlife

Ken Gebhardt, U.S. Forest Service (former Fisheries Biologist, Bay Mills Indian Community)

William Rastetter, Attorney for the Grand Traverse Band of Ottawa and Chippewa Indians

Grand Traverse Band of Ottawa and Chippewa Indian Fisheries Management

Jennifer Dale, Editor, *Bay Mills News*

Dr. James Clifton, History Department

Dr. William Hug, Department of Education

Dr. Kimberly Chung, Department of Resource Development

Department of Fisheries & Wildlife faculty, staff, and students

Dave Dempsey, Michigan Environmental Council

Agriculture Experiment Station, Michigan State University

Dr. Michael Kaplowitz, Resource Development

Dr. Lois Wolfson, Department of Fisheries & Wildlife, Institute of Water Research

Gary Pierce, Pierce Cedar Creek Institute

Michigan Sea Grant College

Office of Congressman Ron Kind (D-WI)

Office of Congressman Dale Kildee (D-MI)

TABLE OF CONTENTS

INTRODUCTION.....	1
CHAPTER 1	
LAURENTIAN GREAT LAKES: HISTORY AND RIGHTS TO THE FISHERY.....	9
The Historic Great Lakes Fishery.....	9
Devastation of the Great Lakes Fishery.....	12
Recovery and Rehabilitation of the Great Lakes Fishery.....	17
Great Lakes Fishery Management.....	20
New Vision for Great Lakes Fishery Management.....	22
CHAPTER 2	
NATIVE FISHING RIGHTS.....	27
Legal Rights of Native Americans Under the U.S. Government.....	27
Native Treaty Fishing Rights.....	37
Social Conflict and Litigation over the Great Lakes Fishery.....	56
Negotiating an Agreement for Allocation of the Great Lakes Fishery.....	62
The 1985 Consent Order.....	65
Negotiating for a New Policy – the 2000 Consent Decree.....	70
CHAPTER 3	
EVALUATION AND COMPARATIVE ANALYSIS.....	76
Research Focus.....	76
Foundations of Research.....	77
Research Methods.....	79
Research Design.....	80
Data Collection.....	85
Data Analysis.....	86
Validity and Trustworthiness.....	87
Evaluation Results.....	89
Summary:	
1985 Consent Order as a Management Tool for the Great Lakes Fishery.....	136
Considerations for the Future Under the 2000 Consent Decree.....	137
CHAPTER 4	
DISCUSSION AND POLICY RECOMMENDATIONS.....	143
Social Conflict, Native Sovereignty, and Scales of Power.....	143
Negotiation Processes.....	148
Cooperative Fisheries Management.....	151
Lake Trout Rehabilitation and Conservation.....	154
Allocation, Fishing Opportunities and Communities.....	158
Knowledge and Acknowledgement of Native Treaty Fishing Rights.....	162
Cultural Understanding and Differing Values.....	165

Researcher Reflections.....	167
Research Recommendations.....	170
Conclusion.....	170
APPENDICES.....	172
BIBLIOGRAPHY.....	182

Introduction

Fisheries management currently faces enormous challenges in the Laurentian Great Lakes. The Great Lakes basin covers approximately 754,100 km² of United States and Canada.¹ The basin is composed of 5 lakes that rank among the seventeen largest lakes in the world.² Within the northern portions of lakes Michigan, Huron and Superior, conservation of critical fish stocks currently poses a significant challenge for fisheries managers within the Great Lakes ecosystem. Lake trout (*Salvelinus namaycush*) in particular, which has historically been one of the most important species in the commercial and sport fisheries of the Great Lakes³, has suffered a tremendous population decline since the 1950s.⁴ Proposed reasons for its demise include overfishing⁵, predation by the invasive sea lamprey (*Petromyzon marinus*),⁶ and habitat destruction.⁷

¹ Beeton, A.M., Sellinger, C.E. & D.F. Reid. (1999). An introduction to the Laurentian Great Lakes Ecosystem. In W.W. Taylor & C.P. Ferreri (Eds.), *Great Lakes Fisheries Policy and Management: A Binational Perspective*. (pp. 3-54) East Lansing, MI: Michigan State University Press, p. 3.

² Herdendorf, C.E. (1982). Large lakes of the world. *Journal of Great Lakes Research*: 8(3), 379-412.

³ Smith, S.H. (1972). Factors of ecological succession in oligotrophic fish communities of the Laurentian Great Lakes. *Journal of Great Lakes Research*: 25, 667-693; Haas, R. C. (1978). *Overview of the Great Lakes Commercial Fishery, With Special Emphasis on the Use of Gill Nets and Impoundment Gear* (Technical Report 78-6). Lansing, MI: Michigan Department of Natural Resources, Fisheries Division, p. 3; Lawrie, A.H. (1978). The fish community of Lake Superior. *Journal of Great Lakes Research*: 4, 513-549.

⁴ Selgeby, J.H. (1995). Introduction to the proceedings of the 1994 International Conference on Restoration of Lake Trout in the Laurentian Great Lakes. *Journal of Great Lakes Research*: 21(Supp. 1), 1.

⁵ Eschmeyer, P.H. (1957). The near extinction of lake trout in Lake Michigan. *Transactions of the American Fisheries Society*: 85(1955), 102-119; Christie, W.J. (1974). Changes in the fish species composition of the Great Lakes. *Journal of the Fisheries Research Board of Canada*: 31, 827-854.

⁶ Lawrie, A.H. (1970). The sea lamprey in the Great Lakes. *Transactions of the American Fisheries Society*: 99(4), 766; Christie, W.J. (1974). Changes in the fish species composition of the Great Lakes. *Journal of the Fisheries Research Board of Canada*: 31, 827-854; Smith, B.R. & Tibbles, J.J. (1980). Sea lamprey (*Petromyzon marinus*) in Lakes Huron, Michigan, and Superior: History of invasion and control, 1936-1978. *Canadian Journal of Fisheries and Aquatic Sciences*: 37, 1780-1801.

⁷ Christie, *supra* note 6.

Upon the collapse of this Great Lakes fishery, efforts were made at the international and federal level to address lake trout conservation through control of the sea lamprey,⁸ followed by supplementation with hatchery-raised lake trout. Subsequently, states within the basin began to follow the lead of Michigan's Department of Natural Resources (DNR) in its initiation and implementation of a management plan that emphasized recreational sport fishing while phasing out commercial fishing.⁹ This was done through planting of non-native chinook and coho salmon,¹⁰ placing restrictions on commercial harvest, and reducing the number of commercial licenses.¹¹ The most contentious aspect of these plans, however, was the DNR's prohibition on the use of gill nets – a type of traditional fishing gear used by non-native and Indian commercial fishers. The DNR believed this type of gear caused high lake trout mortality.¹²

Although welcomed by recreational fishers and tourist-dependent industries, this management plan resulted in protests by commercial fishers, including Native American fishers whose ancestors signed historic treaties with the U.S. government reserving their rights to fish in the treaty-ceded waters of the Laurentian Great Lakes.¹³ The controversy over state regulation of treaty-right fishing led to litigation

⁸ Smith, *supra* note 6.

⁹ Tanner, H., Patriarche, M.H. & Mullendore, W.J. (1980). *Shaping the World's Finest Freshwater Fishery*. Lansing, MI: Michigan Department of Natural Resources, p. 33-37.

¹⁰ Proliferation of non-native alewife (*Alosa pseudoharengus*) in the Great Lakes resulted from sea lamprey predation of top predators of the Great Lakes. To restore a predator-prey balance in the northern Great Lakes, while creating a profitable recreational sport fishery, salmonids were stocked. Due to the slow growth, late maturity and lack of voracious feeding, lake trout were not considered to be sufficient species to significantly reduce the populations of alewife (*Alosa pseudoharengus*) in the Great Lakes. *Id.* at 37-38.

¹¹ *Id.* at 33-37.

¹² Haas, *supra* note 3, at 7-8.

¹³ Tribal fishing rights in the northern Michigan waters of Lakes Michigan, Huron and Superior are reserved in the Treaty of Washington (between the United States and the Ottawa and Chippewa), 7 Stat. 491 (March 28, 1836).

throughout the 1970s that culminated in the District Court decision in 1979, *United States v. State of Michigan*.¹⁴ In this case, Judge Fox held that signatory tribes to the Treaty of Washington in 1836¹⁵ had reserved their rights to fish within the ceded waters of the upper Great Lakes that preempted state regulation.¹⁶ The outcome of this court case angered sport fishers who publicly criticized and protested the court decisions and treaty-right tribal fishing. Their protests intensified relations between tribal commercial and non-tribal recreational sport fishers and sparked social conflict and frequent outbreaks of violence.¹⁷

Recognizing that resolution of the conflict was needed for management of the Great Lakes fishery that would preserve lake trout stocks and reduce conflict while providing fishing opportunities for tribes with a treaty right to fish and state-licensed fishers,¹⁸ the Federal District Court in the State of Michigan appointed a “Special

Other treaties reserving tribal fishing rights in parts of Lake Superior within Wisconsin, Minnesota and Michigan include the Treaty of 1842 with the Chippewa, 7 Stat. 591, and the Treaty of 1854 with the Chippewa, 10 Stat. 1109.

¹⁴ *United States v. State of Michigan*, 471 F. Supp. 192 (1979).

¹⁵ In this treaty, the Ottawa and Ojibwa tribes of northern Michigan ceded two-thirds of the territory that comprises the present-day State of Michigan in exchange for goods, services and a reserved right to fish and hunt on ceded land. Treaty of Washington, *supra* note 13.

¹⁶ *United States v. State of Michigan*, *supra* note 14, at 265.

¹⁷ Boats and fishing equipment were damaged and destroyed, physical confrontations occurred, verbal threats were common and Indian children were harassed at school. Schlender, J.H. (1991). Treaty Rights in Wisconsin: A Review. *Northeast Indian Quarterly*: 8(1), p. 8, 11; Connors, D. (1997, February 2). Fishing debate renews tension of years past. *Traverse City Record Eagle*, p. A1; A Timeline of Fisheries in the Region. (1997, February 2). *Traverse City Record Eagle*, p. A4.

¹⁸ In *United States v. State of Michigan*, District Judge Enslen described social conditions at this time. He stated,

Since the opinion of Judge Fox in 1979, this court's principal concern has been one of preservation: preservation of treaty-reserved rights of the tribal fishers; and preservation of the resource. The years which followed this opinion have been marred by hard feelings, social discord, occasional violence, stipulated court-ordered closures of large portions of the three affected Great Lakes, political posturing, protraction of the instant litigation, some outward manifestations of racism, and concern over the future of Michigan's greatest resources, her people and her bounty.

United States v. State of Michigan (1985 Consent Order), 12 ILR 3079, 3087 (1985).

Master”¹⁹ to work with the parties and to come up with a settlement on the allocation and management of the resource. After brief negotiations, the parties were unable to reach a compromise that everyone agreed to, and the court imposed a fisheries management plan to which all but one party agreed, referred to as the “1985 Consent Order.”²⁰

This court-imposed fishery management policy governing the treaty-ceded waters of Lakes Michigan, Huron and Superior established lake trout refuges²¹ to promote lake trout rehabilitation and conservation.²² In order to reduce social conflict and ease management of the fisheries within the treaty-ceded waters, the Order created differential fishing zones for treaty-right tribal commercial fishers outside of areas that were utilized heavily by state-licensed recreational sport fishers.²³ It also imposed restrictions on the use of gill nets in certain waters in hopes of reducing lake trout mortality and social conflict.²⁴

To protect the Great Lakes fishery and provide a framework for joint management between state and tribal regulatory agencies, the 1985 Consent Order

¹⁹ A special master is a “master appointed to act as the representative of the court in some particular act or transaction.” Black, H.C., Nolan, J.R., Nolan-Haley, J.M., Connolly, M.J., Hicks, S.C., & Albrandi, M.N. (1991). *Black’s Law Dictionary*. 6th ed. St. Paul, MN: West Publishing Company, p. 673.

²⁰ *United States v. State of Michigan*, Consent Order 1985 Settlement Agreement 520 F. Supp. 207 (W.D. Mich. 1981) (May 31, 1985); *United States v. State of Michigan*, *supra* note 18.

²¹ The 1985 Consent Order created lake trout refuges, priority rehabilitation zones, and deferred zones. Each of these allowed different levels of lake trout harvest. Use of gill nets or capture of lake trout was prohibited in the refuges. Lake trout total-allowable catches (TACs) were created for rehabilitation zones by the Technical Fisheries Review Committee based on 40-45% total annual mortality; upon attainment of the TACs, all large mesh gill netting and sport fishing had to cease in those areas. Deferred zones were areas in which no lake trout rehabilitation plan was developed. *United States v. State of Michigan*, *supra* note 18, at 3089.

²² *Id.* at 3082-3083, 3089.

²³ *Id.* at 3084-3087, 3090.

²⁴ Gill net use was restricted in areas based on the U.S. Fish and Wildlife Service Lake Trout Rehabilitation Plan (February 8, 1985) and the lake trout rehabilitation plans adopted by the three lake committees of the Great Lakes Fishery Commission. These areas are considered historic lake trout spawning grounds to promote lake trout conservation. Gill nets were also restricted in areas with intense sport fishing activity, such as the Grand Traverse Bay. *Id.* at 3083.

called on the Technical Fisheries Review Committee,²⁵ composed of technical representatives from the Chippewa-Ottawa Treaty Fishery Management Authority, the Michigan Department of Natural Resources, and the U.S. Fish and Wildlife Service's Great Lakes Fishery Laboratory, to collaboratively establish total-allowable-catch limits (TACs) for lake trout in certain zones, based upon 40 to 45 percent total annual mortality of lake trout. Additionally, it required the sharing of data collected by state and tribal regulatory agencies,²⁶ and the parties were required to establish a Joint Enforcement Committee, with the responsibility of coordinating and developing law enforcement.

Several provisions were created in the 1985 Consent Order to prevent future social conflict. A Public Information and Education Committee was established to assist in information dissemination about the Consent Order, to promote understanding of treaty rights and responsibilities, and to provide a clearinghouse for pertinent information.²⁷ The Consent Order also established an Executive Council and a dispute resolution mechanism to resolve any future controversies without judicial intervention.²⁸ It also called for federal and state funding to assist the tribes with implementation of the Consent Order.²⁹

Although the 1985 Consent Order was in place as a regulatory framework for over 15 years and has recently been replaced by a new negotiated agreement – the

²⁵ The Technical Fisheries Review Committee originated from the biological group of the Technical Working Group, which was renamed from the Ad Hoc Technical Working Group. Formed in 1979, the Technical Working Group was established to cooperatively assess the status of certain fish stocks in the treaty-ceded waters of the Lakes Michigan, Huron and Superior and provide data to be used for estimation of surplus production and other management decisions.

²⁶ *United States v. State of Michigan*, *supra* note 18, at 3082, 3091.

²⁷ *Id.* at 3090-3091.

²⁸ *Id.* at 3091.

²⁹ *Id.* at 3093.

2000 Consent Decree³⁰ – the effectiveness of this fisheries management policy in attaining its objectives has not been thoroughly assessed.³¹ Rehabilitation and conservation of critical lake trout stocks, resolution of conflict between state-licensed recreational fishers and treaty-right Native commercial fishers, and cooperation between tribal and state regulatory agencies remain critical issues for the success of any management strategy governing the Great Lakes. Therefore an evaluation of the 1985 Consent Order and a comparative analysis between this policy and the 2000 Consent Decree are important to provide a baseline understanding of past fisheries management policy and help guide future policy decisions between federal, state, and tribal governments.³²

³⁰ *United States v. State of Michigan* (2000 Consent Decree), No. 2:73 CV 26 (W.D. Mich. August 7, 2000).

³¹ Few investigators have studied the 1985 Consent Decree/Order since its implementation. The focus of these investigations included an analysis from the court's perspective and discussions of the impacts of this arrangement on tribal, small boat fishing. Mr. Francis McGovern, court-appointed Special Master, offered an evaluation of this arrangement in terms of economic efficiency for the court. This analysis, however, provided little guidance as to how the parties—who are directly affected by implementation—understood or assessed the Consent Decree/Order. His discussion of complex litigation theories addressed assessment of this agreement from the perspective of the court. McGovern, F.E. (1986). Toward a functional approach for managing complex litigation. *University of Chicago Law Review*: 53(2), 440-493.

Another study by Sargent and Kibbey provided an evaluation of the Consent Decree/Order's impact on tribal, small boat fishermen in the Grand Traverse Bay region of Michigan. According to this study, a large portion of these fishermen dropped out of the fishery after the 1985 Consent Order was implemented. Sargent, M. & Kibbey, R. (1997). *An Assessment of the Impact of the 1985 Consent Decree on Fishing Operations by Grand Traverse Band Members*. Kalamazoo, MI: Community Research and Education Center.

³² Although this research does not immediately address management within the Wisconsin waters of the Great Lakes, rulings from the *Voigt* cases were similar to the case described in Michigan. In 1984, shortly after the *Voigt* ruling in 1983, the Great Lakes Indian Fish and Wildlife Commission (GLIFWC) was formed to implement treaty-right fishing in areas that were ceded by Treaties in 1836, 1837, 1842 and 1854. This intertribal organization represents 11 Ojibwe bands in Minnesota, Wisconsin and Michigan with treaty rights. The GLIFWC and the Wisconsin Department of Natural Resources jointly manage resources off-reservation within treaty-ceded territory through technical working groups (TWGs), committees for specific species, information sharing with respect to biological data analysis, and joint projects, such as fishery assessments. Erickson, S. (2000). *State and tribal resource management in Wisconsin: Strong Management for the Future*. Great Lakes Indian Fish & Wildlife Commission. http://www.glifwc.org/publications/spring00/resource_manage.htm July 14, 2001.

In this study, the 1985 Consent Order was analyzed in terms of its usefulness as a policy tool for the management of the treaty-ceded waters of the Great Lakes fishery through an analysis of fifty individual, in-depth, semi-structured interviews with members of the following stakeholder³³ groups:

- Tribal commercial fishers
- State-licensed recreational sport fishers
- State-licensed charter boat sport fishers
- Tribal biologists
- State biologists (DNR)
- Tribal representatives
- Sport fishing representatives
- DNR representatives
- State of Michigan representatives from the Attorney General's Office.

These same stakeholders were asked to compare this policy to the 2000 Consent Decree to assess changes in policy, its process, and stakeholder perceptions of both policies. Additionally, members of the Public Information and Education Committee and a representative from the Sea Grant College Program were interviewed to assess their perceptions of the 1985 Consent Order, as well as education and awareness of this court-ordered policy.

The need for effective cooperative management strategies between tribal and state regulatory agencies that protect fish stocks and Native treaty fishing rights,

³³ Stakeholders are defined in this research as “*individuals, groups, and formal organizations who have a perceived interest or impact on a particular resource.*” Selin, S. & Chavez, D. (1995). Developing a collaborative model for environmental planning and management. *Environmental Management*, 19(2): 189-195, p. 190.

while maintaining a recreational state-licensed sport fishery, will only increase with the growing recognition of treaty fishing, hunting, and gathering rights throughout the United States. At present, Michigan, Washington, and Wisconsin have tribal and state cooperative fisheries regulatory regimes in place that originate from Indian treaty fishing rights litigation.³⁴ Negotiation processes and subsequent policies that are perceived to be effective by local stakeholders can also provide a model for other countries, such as Canada and Australia, that are in the process of developing cooperative management strategies between tribal and governmental agencies.

In this paper, the first two chapters provide the historic, legal and social context for the 1985 Consent Order and the 2000 Consent Decree. Chapter 1 presents an overview of the history of the Great Lakes fishery and its management, the events that led to the 1985 Consent Order and its replacement policy – the 2000 Consent Decree – and a description of these fishery management policies. Chapter 2 discusses the legal rights of Native Americans under the U.S. Government, based upon historic legislation, case law and treaties. It also presents an overview of treaty fishing right litigation in the States of Washington and Michigan.

The last two chapters describe and discuss the analysis and evaluation that were conducted. Chapter 3 explains the methods that were used to evaluate stakeholder perceptions of the 1985 Consent Order and the 2000 Consent Decree. The results are also presented in this chapter. Lastly, Chapter 4 provides a discussion of the results as well as researcher reflections and recommendations for future policies.

³⁴ Ferguson, K. (1998-1999). Indian fishing rights: Aftermath of the Fox decision and the year 2000. *American Indian Law Review*: 23(1), 97-154.

Chapter 1:

The Laurentian Great Lakes: History and Rights to the Fishery

The Historic Great Lakes Fishery

Prior to the 1830s, several different Native cultures resided in the Great Lakes region and fished within its waters. These people included the Ottawa located in the straits region of northern Lake Huron and Lake Michigan, the Ojibwa communities that predominantly resided in the territory surrounding Lake Superior, and the Potawatomi Indians based in southwestern Minnesota.¹ The Indians of the Great Lakes developed subsistence patterns that included agriculture, hunting, rice gathering, maple sugar production and fishing. However, the Ottawa, Ojibwa and some Huron residing near upper Lakes Michigan and Huron and at the eastern end of Lake Superior relied primarily on fish for their subsistence.²

Rostlund referred to the distinctive Native fishery of the upper Great Lakes region as the “inland shore fishery” to distinguish it from the ocean coastal fisheries, although he believed that the technology and expertise of these fishers were comparable to ocean fisheries. Archeologists and anthropologists have often documented the skill and

¹ The Ottawa, Ojibwa, and Potawatomi Indians referred to themselves as the Anishnabeg, spoke the same dialect of Algonquian, and formed a confederacy, referred to as the “Three Fires.” They shared much of their culture and customs. Hickerson, H. & Wheeler-Voegelin, E. (1974). History of the Chippewa. In D.A. Horr (Ed.), *Chippewa Indians I—The Red Lake and Pembina Chippewa*. New York, NY: Garland Publishing, p. 21; Tanner, H.H. (1974). Report *United States v. State of Michigan* No. M 26-73 C.A., U.S.D.C (Western District of Michigan, Northern Division), p. 1; Cleland, C.E. (1992). *Rites of Conquest: The History and Culture of Michigan's Native Americans*. Ann Arbor, MI: University of Michigan Press, p. 25; Weeks, G. (1992). *Mem-ka-weh: Dawning of the Grand Traverse Band of Ottawa and Chippewa Indians*. Traverse City, MI: Village Press, p. 3.

² Warren, W.W. (1984). *History of the Ojibway People*. St. Paul, MN: Minnesota Historical Society, p. 40, 97; Tanner, H.H. (1987). *Atlas of Great Lakes Indian History*. Norman, OK: University of Oklahoma Press, p. 19.

prominence of fishing among Native peoples in this region.³ Based upon archeological evidence, nets were first used in the lower Great Lakes as early as 2500 B.C., and they were used in the upper Great Lakes between approximately 300 and 200 B.C.⁴ A variety of species were historically taken from the upper Great Lakes, including lake sturgeon (*Acipenser fulvescens*), lake trout (*Salvelinus namaycush*), lake herring (*Coregonus artedii*), shallow-water and deep-water ciscoes (*Coregonus spp.*), and round whitefish (*Prosopium cylindraceum*), often referred to as menominee.⁵ Atticameg, or lake whitefish (*Coregonus clupeaformis*), however, was the most valued species due to its taste and abundance,⁶ and the use of gill nets set on off-shore shoals for the capture of whitefish and lake trout when they spawn in late fall and early winter "constituted the heart of the fishery" according to historical accounts.⁷

With the arrival of the Europeans in the 1500s, Michigan's Indians established trade relations for fur and other goods, including fish.⁸ Europeans expanded into

³ Significantly, Rostlund – who made an extensive review of the literature pertaining to the upper Great Lakes – commented,

I submit that as fishermen, these people from the Great Lakes toward Mackenzie Valley were second to none in aboriginal North America. As a technical achievement, this deep-water gill-net fishery ranks with the Indian halibut fishery of the northwest coast, both very different from the easy catching of shad or salmon that came pouring up the rivers.

Rostlund, E. (1952). Freshwater fish and fishing in Native North America. *University of California Publications in Geography, Vol. LX*. Berkley, CA: University of California Press, p. 29-30.

⁴ Cleland, C.E. (1982). The inland shore fishery of the northern Great Lakes: its development and importance in prehistory. *Society for American Archeology*: 761-783, p. 763, 769.

⁵ *Id* at 767.

⁶ Tanner, *supra* note 1, at 38, 40, 47; Magnaghi, R.M. (1984) *A Guide to the Indians of Michigan's Upper Peninsula 1621-1900*. Marquette, MI: Belle Fontaine Press, p. 8.

⁷ Rostlund, *supra* note 3, at 29-30; Cleland, *supra* note 4, at 763, 777-779; Tanner, *supra* note 2, at 19, 22.

⁸ French explorer, Samuel de Champlain, arrived in the St. Lawrence valley in 1535. His arrival led to the exploration of the Great Lakes region by the French and the establishment of relations between the French and the Indians. As the French settled in the area, fur trading became extensive in the Great Lakes region. The fur trade led to the trading of other goods, including fish. Tobacco, corn, meat, bark, twine, animal skins, baskets, canoes and berries were among the other items that were traded. The arrival of the English brought competition with the French for the valued trade with the Indians of the Great Lakes, and trade was expanded between Indians and Europeans. Cleland, *supra* note 1, at 79, 103, 109.

commercial fishing operations, however,⁹ and in 1830s, the Great Lakes fishery began to change dramatically with the organization of European-owned, large-scale commercial fishing operations, such as the American Fur Company¹⁰ and the Hudson's Bay Company.¹¹ These business ventures, as well as other engineering and technological advances that helped ease preservation and transport of fish,¹² attracted entrepreneurs¹³ and the commercial fishery of the Great Lakes continued to expand into the late 1800s as the fur trade significantly declined.¹⁴

With the development of the commercial fishery within the Great Lakes, the potential for overexploitation grew as technological advances were made in fishing gear that dramatically increased capture efficiency.¹⁵ The continued expansion of the Great

⁹ Tanner, *supra* note 2, at 132.

¹⁰ The American Fur Company, whose main station was located on Mackinac Island, was the most powerful trading entity in the United States, with control over the Upper and Lower Mississippi River valley, Illinois River, Wabash River, Kankakee River, and parts of Wisconsin and the Great Lakes. Magnaghi, *supra* note 6, at 35.

¹¹ Bogue, M.B. (2000). *Fishing the Great Lakes: An Environmental History, 1793-1933*. Madison, WI: University of Wisconsin Press, p. 31.

¹² The openings of various canals to improve navigation, the establishment of the railroad system in the southern Great Lakes region, improved fish preservation methods, and the flourishing fish market in Detroit also helped stir interest in the commercial fishery of the Great Lakes and allowed easier transport and a wider market for Great Lakes fish. Smith, H.M. & Snell, M.M. (1891). Review of the fisheries of the Great Lakes in 1885. In *Report of the Commissioner for 1887*. (pp. 1-333) Washington, D.C.: U.S. Government Printing Office; *Id.* at 29-31, 34-35.

¹³ During the 1870s and 1880s, large numbers of immigrants came to find work in the commercial fishery of the Great Lakes. Smith, *supra* note 12, at 15.

¹⁴ Koelz, W. (1926). Fishing industry of the Great Lakes. (pp. 554-617) In *Report of the U.S. Commissioner of Fisheries, 1925*. Washington, D.C.: Government Printing Office.

¹⁵ In the early 1800s, fishers used haul seines for capture of fish near shore and twine gill nets to catch offshore species. By 1860, pound nets were increasingly used for the harvest of migrating fish, and by 1885, trap nets were used that allowed fishing in deeper waters. Fishing efficiency further increased as fishers began to use steam-tug boats and steam-net lifters in the 1890s. Harvest efficiency continued to increase with the introduction of the highly efficient deep trap net in the 1920s, which could be set at even greater depths and on a wider variety of surfaces, and was constructed with smaller mesh sizes than gill nets, leading to the capture of undersized lake whitefish. Although this gear was banned soon after its introduction, it caused the collapse of whitefish stocks in Lake Huron after 1932. Van Oosten, J., Hile, R., & Jobes, F.W. (1946). The whitefish fishery of Lakes Huron and Michigan with special reference to the deep trapnet fishery. *U.S. Fish and Wildlife Service Bulletin*: 40, 297-394; Brown, R.W., Ebener, M. & Gorenflo, T. (1999). Great Lakes commercial fisheries: Historical overview and prognosis for the future. In W.W. Taylor & C. P. Ferreri (Eds.), *Great Lakes Fisheries Policy and Management, A Binational Perspective*. (pp. 307-354) East Lansing, MI: Michigan State University Press, p. 308-309.

Lakes commercial fishery and development of highly efficient gear led to overfishing of various fish species. In combination with the introductions of non-indigenous species and environmental degradation, the Great Lakes fishery suffered severe consequences, as the abundance of fish species failed to reach their historic yields and several fish populations collapsed.¹⁶

Devastation of the Great Lakes Fishery

Although commercial harvest within the Great Lakes contributed to the reduction in abundance of fish species in the Great Lakes fishery during the late 1800s, land-use changes in the Great Lakes region, due to agricultural development and the timber industry, had profound and detrimental impacts on the water quality of the Great Lakes and its fish habitat. Water quality became impaired through increased sedimentation and eutrophication as forests were clear-cut and wetlands were drained.¹⁷ The timber industry also caused a diminution in water quality as sawdust pollution was washed into the lakes, and the “driving” of logs in rivers to downstream sawmills scoured streambeds, adversely impacting spawning grounds, hindering fish passage, and degrading fish habitat.¹⁸ These modifications led to the decline of stream-spawning fish stocks in the

¹⁶ Christie, W.J. (1974). Changes in the fish species composition of the Great Lakes. *Journal of the Fisheries Research Board of Canada*: 31: 827-854.

¹⁷ Prior to the mid-1800s, there was a tremendous amount of diverse woodlands and wetlands in the Great Lakes region. However, as human populations grew, forests were clear-cut for homes and agricultural cultivation. In the 1880s and 1890s, wetlands were increasingly drained in order to establish farms on these lands. These changes to the landscape resulted in increased erosion, sedimentation and an influx of nutrients and pesticides into streams that fed into the Great Lakes. Water quality diminished as the availability of oxygen for aquatic life declined. Tiner, R.W., Jr. (1984). *Wetlands of the United States: Current Status and Recent Trends*. Washington, D.C.: Government Printing Office, p. 13; Bogue, *supra* note 12, at 116-117.

¹⁸ The timber industry constructed dams for sawmills, which blocked fish migration in tributary streams to the Great Lakes. Smith, *supra* note 12; Beeton, A.M., Sellinger, C.E. & Reid, D.F. (1999). An introduction to the Laurentian Great Lakes ecosystem. In W.W. Taylor & C.P. Ferreri (Eds.). *Great Lakes Fisheries Policy and Management, A Binational Perspective*. (pp. 3-54) East Lansing, MI: Michigan State University Press, p. 46.

Great Lakes, including ciscoes, lake trout, lake whitefish and burbot.¹⁹ The introduction of invasive species, however, had more harmful impacts on the Great Lakes fishery.

One invasive species that had extensive and destructive impacts on the Great Lakes was the parasitic sea lamprey (*Petromyzon marinus*).²⁰ Upon completion of the Welland Canal, this species was able to migrate from the Atlantic Ocean to Lake Erie.²¹ Once observed in Lake Erie in 1921, the sea lamprey spread quickly to the other Great Lakes.²² The sea lamprey's introduction to the upper Great Lakes had detrimental effects on the fishery, as this species attached itself to deepwater fish, sucking on its host's blood and body fluids. Populations of this species were able to increase rapidly in abundance in the Great Lakes because food and habitat were plentiful and there was a lack of predators in these lakes.²³ Additionally, the tributaries to the Great Lakes provided the critical habitat that the sea lamprey needs for spawning.²⁴

The sea lamprey upset the prey-predator relationship of the northern Great Lakes by attacking top predators, particularly lake trout (*Salvelinus namaycush*) and burbot

¹⁹ Berst, A.H. & Spangler, G.R. (1973). Lake Huron: the ecology of the fish community and man's effects on it. *Great Lakes Fishery Commission Technical Report 21*. Ann Arbor, MI: Great Lakes Fishery Commission; Lawrie, A.H. & Rahrer, J.F. (1973). Lake Superior: a case history of the lake and its fisheries. *Great Lakes Fishery Commission Technical Report 19*. Ann Arbor, MI: Great Lakes Fishery Commission; Wells, L. & McLain, A.L. (1973). Lake Michigan: man's effects on native fish stocks and other biota. *Great Lakes Fishery Commission Technical Report 20*. Ann Arbor, MI: Great Lakes Fishery Commission.

²⁰ In its adult form, the parasitic sea lamprey has large, sharp teeth in a circular, disc-shaped mouth which is used to cut into prey fish, attach to the prey, and suck their blood and body fluids. Page, L.M. & Burr, B.M. (1991). *A Field Guide to Freshwater Fishes*. Boston, Massachusetts: Houghton Mifflin Company, p. 14-15.

²¹ The sea lamprey migrated to Lake Ontario from the Atlantic Ocean where it remained until the creation of the Welland Canal between Lakes Erie and Ontario in 1833. This canal bypassed Niagara Falls, a natural barrier for fish passage, and allowed the sea lamprey to emigrate from Lake Ontario to Lake Erie. Smith, B.R. & Tibbles, J.J. (1980). Sea lamprey (*Petromyzon marinus*) in Lakes Huron, Michigan, and Superior: history of invasion and control, 1936-1978. *Canadian Journal of Fisheries and Aquatic Sciences*: 37, 1780-1801.

²² It was discovered in Lake Michigan in 1936, Lake Huron in 1937, and Lake Superior in 1938. *Id.*

²³ *Id.*

²⁴ Mature sea lampreys enter the tributaries of the Great Lakes during the spring and spawn in gravel beds. Manion, P.J. & Hanson, L.H. (1980). Spawning behavior and fecundity of lampreys from the upper three Great Lakes. *Canadian Journal of Fisheries and Aquatic Sciences*: 37, 1635-1640.

(*Lota lota*) and lake whitefish (*Coregonus clupeaformis*).²⁵ Prior to the sea lamprey invasion, lake trout was relatively abundant in the Great Lakes. This species, which was commercially exploited in Lakes Huron and Michigan since approximately the 1830s and in Lake Superior since the 1870s, continued to provide relatively stable landings for commercial harvest throughout the early 1900s.²⁶ In combination with overfishing²⁷ and habitat degradation,²⁸ however, invasion of the parasitic sea lamprey devastated lake trout populations in all three upper Great Lakes, and lake trout populations collapsed in Lakes Michigan and Huron by the mid-1950s and in Lake Superior by the late 1950s.²⁹

With the loss of lake trout in the Great Lakes, non-native fish were able to successfully invade the Great Lakes and disrupt the ecological balance of the Great

²⁵ Lawrie, A.H. (1970). The sea lamprey in the Great Lakes. *Transactions of the American Fisheries Society*, 99(4), 766-774, p. 767-768; Christie, *supra* note 16; Smith, *supra* note 21.

²⁶ Jensen, A.L. (1978). Assessment of the lake trout fishery in Lake Superior, 1929-1950. *Transactions of the American Fisheries Society*: 107, 543-549; Eshenroder, R.L., Payne, N.R., Johnson, J.E., Bowen II, C., & Ebener, M.P. (1995). Lake trout rehabilitation in Lake Huron. *Journal of Great Lakes Research*: 21(Supp. 1), 108-127; Holey, M.E., Rybicki, R.W., Eck, G.W., Brown, Jr., E.H., Marsden, J.E., Lavis, D.S., Toney, M.L., Trudeau, T.N., & Horrall, R.M. (1995). Progress toward lake trout restoration in Lake Michigan. *Journal of Great Lakes Research*: 21 (Supp. 1), 128-151.

²⁷ The relative contribution of overfishing and sea lamprey predation to the devastation of lake trout populations in the Great Lakes has been the source of much debate. According to Pycha and King (1975), the decline of lake trout stocks in the early 1950s could be attributed primarily to "intensive fishing." In contrast, Coble et al. (1990) provided evidence for sea lamprey predation as the main source of lake trout mortality. However, evidence by Eshenroder (1992) and Hansen (1999) suggests that the analysis by Coble et al. (1990) was erroneous, and the decline in lake trout abundance preceded sea lamprey establishment in the Great Lakes. Furthermore, Hansen (1999) provides evidence that fishing pressure on lake trout stocks increased once lake whitefish stocks collapsed in the upper Great Lakes. Pycha, R.L. & King, G.R. (1975). Changes in the lake trout population of southern Lake Superior in relation to the fishery, the sea lamprey, and stocking, 1950-1970. *Great Lakes Fishery Commission Technical Report 28*. Ann Arbor, MI: Great Lakes Fishery Commission, p. 29; Coble, D.W., Bruesewitz, R.E., Fratt, T.W., & Scheirer, J.W. (1990). Lake trout, sea lampreys, and overfishing in the upper Great Lakes: a review and reanalysis. *Transactions of the American Fisheries Society*: 119, 985-995; Eshenroder, R.L. (1992). Decline of lake trout in Lake Huron. *Transactions of the American Fisheries Society*: 121, 548-550; Hansen, M.J. (1999). Lake trout in the Great Lakes: Basinwide stock collapse and binational restoration. In Taylor, W.W. & Ferreri, C. P. (Eds.), *Great Lakes Fisheries Policy and Management: A Binational Perspective*. (pp. 417-453) East Lansing, MI: Michigan State University Press, p. 429-430.

²⁸ Although the relative contribution of habitat degradation has been difficult to assess, there is evidence that it was less significant than overfishing and sea lamprey predation. Yet, it has played a role in decreases in lake trout abundance. Christie, *supra* note 16.

²⁹ Lawrie, *supra* note 25, at 767; Baldwin, N.S., Saalfeld, R.W., Ross, M.A. & Buettner, H.J. (1979). Commercial fish production in the Great Lakes 1867-1977. *Great Lakes Fishery Commission Technical Report 3*. Ann Arbor, MI: Great Lakes Fishery Commission; Smith, *supra* note 21.

Lakes. In particular, the exotic alewife (*Alosa pseudoharengus*) proliferated in Lakes Michigan and Huron.³⁰ Prior to the mid-1940s, the profusion of large piscivorous fish controlled alewife abundance and prevented them from becoming established.³¹ However, after populations of lake trout and other large piscivores declined in the upper Great Lakes, there was an explosion in alewife abundance³² and they were able to establish populations in these lakes.³³ The alewife reduced zooplankton populations³⁴ that many native fish depend on for food, contributing to the decline of several native fish populations.³⁵

In addition to the sea lamprey and the alewife, introduced rainbow smelt (*Osmerus mordax*) negatively impacted the Great Lakes fishery. Intentionally introduced in Lake Michigan in 1912, the rainbow smelt became established in most of

³⁰ The alewife entered Lake Ontario from the Atlantic Ocean via the Erie Canal, where it was observed in abundance in 1873. From Lake Ontario, the alewife migrated into Lake Erie via the Welland Canal and continued into the upper Great Lakes. Koelz, *supra* note 14; Smith, S.H. (1970). Species interactions of the alewife in the Great Lakes. *Transactions of the American Fisheries Society*: 99(4), 754-765.

³¹ Alewives did not become abundant in Lake Huron until after the mid-1940s when lake trout populations had diminished substantially due to sea lamprey predation. Similarly in Lake Michigan, alewives did not appear until 1949. Alewives were commonly found during experimental trawling in 1963, after lake trout abundance had diminished from 1960 to 1962. In contrast, after chemical treatments were applied to control sea lamprey populations in 1962, lake trout abundance increased and alewife populations declined after 1963. Hile, R. (1949). Trends in the lake trout fishery of Lake Huron through 1946. *Transactions of the American Fisheries Society*: 76, 121-147; Miller, R.R. (1957). Origin and dispersal of the alewife, *Alosa pseudoharengus*, and the gizzard shad, *Dorosoma cepedianum*, in the Great Lakes. *Transactions of the American Fisheries Society*: 86, 97-111; Smith, *supra* note 30.

³² By 1964, alewife became so abundant that they made up to 90% of the total fish biomass by weight in Lakes Michigan and Huron. Tanner, H.A., Patriarche, M.H. & Mullendore, W.J (April 1980). *Shaping the World's Finest Freshwater Fishery*. Lansing, MI: Michigan Department of Natural Resources, p. 22.

³³ Alewives appeared in Lake Superior in 1954, and evidence demonstrates that alewife abundance increased after inshore lake trout populations were diminished by the sea lamprey. Notably, it has been hypothesized that the alewife could not become established in Lake Superior due to the cold temperature of this lake, which is below the thermal tolerance of this species. Bronte, C.R., Selgeby, J.H., & Curtis, G.L. (1991). Distribution, abundance, and biology of the alewife in U.S. waters of Lake Superior. *Journal of Great Lakes Research*: 17, 304-313.

³⁴ Wells, L. (1970). Effects of alewife predation on zooplankton populations in Lake Michigan. *Limnology and Oceanography*: 15(4): 556-565.

³⁵ As the alewife abundance increased in Lakes Michigan and Huron, these lakes experienced decreases in the abundance of yellow perch (*Perca flavescens*) and dramatic declines in lake herring (*Coregonus artedii*), a shallow-water planktivore, during the 1950s. Miller, *supra* note 31; Smith, *supra* note 30; Christie, *supra* note 16.

the Great Lakes during the 1920s and 1930s,³⁶ and it became abundant in Lake Superior by the early 1950s.³⁷ The abundance of smelt particularly affected lake herring populations in the Great Lakes. Populations of this valued commercial species crashed in Lakes Michigan and Huron during the late 1950s due to overfishing and displacement by the smelt and alewife.³⁸ Similarly, lake herring populations plummeted in Lake Superior in the 1970s due to overfishing and possible competition with smelt.³⁹

Overfishing and the introduction of non-indigenous species also affected lake whitefish populations in the Great Lakes. Whitefish populations drastically declined in northern Lake Huron and Lake Michigan during the 1800s, and in Lake Superior during the early 1900s.⁴⁰ Populations recovered, but sea lamprey predation and overfishing caused whitefish stocks to decline again in the late 1950s.⁴¹

³⁶ Van Oosten, J. (1937). The dispersal of smelt, *Osmerus mordax* (Mitchill) in the Great Lakes region. *Transactions of the American Fisheries Society*: 66(1936): 160-161.

³⁷ Lawrie, A.H. & Rahrer, J.F. (1972). Lake Superior: effects of exploitation and introductions on the salmonid community. *Journal of the Fisheries Research Board of Canada*: 29, 765-776; Christie, *supra* note 16.

³⁸ Smith, *supra* note 30, at 743-765; Berst, A.H. & Spangler, G.R. (1972). Lake Huron: effects of exploitation, introductions and eutrophication on the salmonid community. *Journal of the Fisheries Research Board of Canada*: 29:877-887.

³⁹ Brown, *supra* note 15, at 332-333.

⁴⁰ In U.S. waters, whitefish landings went from 1,225 metric tons in 1880 to 270 metric tons in 1899 in northern Lake Huron. In Lake Superior, whitefish harvest also diminished, from 2300 metric tons in 1885 to 172 metric tons in 1922. Historical catch record for Lake Michigan indicates that after an initial decrease in yield, there were fluctuations in yield. Areas of Lake Michigan were depleted of lake whitefish by the 1860s due both to overfishing and the detrimental affects of the forest product industries that developed along its shores. Smith, *supra* note 12; Koelz, *supra* note 14; Jensen, A.L. (1976). Assessment of the United States lake whitefish (*Coregonus clupeaformis*) fisheries of Lake Superior, Lake Michigan and Lake Huron. *Journal of the Fisheries Research Board of Canada*: 33(4):747-759, p. 758; Kuchenberg, T. (1978). *Reflections in a Tarnished Mirror: The Use and Abuse of the Great Lakes*. Sturgeon Bay, WI: Golden Glow Publishers, p. 28, 31-32, 35-36, 41; Beeton, *supra* note 18.

⁴¹ According to Jensen, whitefish stocks were overexploited in the three upper Great Lakes during the 1950s. In Lake Superior, whitefish were less prone to sea lamprey predation than in Lakes Michigan and Huron due to the availability of preferred prey species, such as lake trout, burbot and large chubs. In contrast, in northern Lake Michigan, sea lamprey predation accounted for a much more dramatic reduction in whitefish biomass than commercial harvest during the 1950s. As lamprey predation caused a decline in lake trout abundance in northern Lake Michigan, the sea lamprey preyed on lake whitefish, causing decreases in their abundance. Once sea lamprey controls were put in place, lake whitefish populations were able to recover. Smith, S.H. (1968). Species succession and fishery exploitation in the Great Lakes.

Other species that suffered declines in the Great Lakes were the deepwater ciscoes, often referred to as chubs. Historically comprised of a diverse assemblage of related species,⁴² the deepwater ciscoes experienced tremendous mortality due to a combination of sea lamprey predation, overfishing,⁴³ and increased abundances of non-native fish species.⁴⁴ Although the abundance of chubs increased during the 1950s in Lakes Michigan, Huron and Superior, these species experienced a dramatic decline in Lake Superior by 1990, and several species of chubs have been extirpated from Lakes Michigan and Huron.⁴⁵

Although there have been other introductions of non-indigenous species in the Great Lakes, the sea lamprey, the alewife and the rainbow smelt had the most significant, adverse impacts on the Great Lakes fishery during the 1900s. Together with overfishing and environmental degradation, these introductions left fish populations that once seemed limitless in a degraded state, and the future of the Great Lakes fishery uncertain.

Recovery and Rehabilitation of the Great Lakes Fishery

As the harvest of commercially valued species declined in the early 1900s, fishermen responded by increasing their fishing effort. Yet, increases in fishing effort led to an escalation in the percentage of less desirable species that were harvested and a reduction in total harvest.⁴⁶ As the abundance of valued commercial species diminished

Journal of the Fisheries Research Board of Canada: 25, 667-693; Jensen, *supra* note 40, at 756-757; Brown, *supra* note 15, at 333, 337, 339.

⁴² Coon, T. (1999). Ichthyofauna of the Great Lakes basin. In W.W. Taylor & C.P. Ferreri (Eds.), *Great Lakes Fisheries Policy and Management: A Binational Perspective*. (pp. 55-71). East Lansing, MI: Michigan State University Press, p. 59.

⁴³ Blackfin ciscoes (*Coregonus nigripinnis*) in particular were intensively fished, resulting in their depletion in Lake Michigan by the late 1880s and in Lake Superior by 1907. Koelz, *supra* note 14.

⁴⁴ Smith, *supra* note 41.

⁴⁵ Brown, *supra* note 15, at 333, 335, 337, 339.

⁴⁶ The percentage of less desirable species rose from approximately 20 percent of the total harvest in the 1800s to greater than 50 percent of the total harvest in 1930. Milner stated that, "*More labor, more*

and investment in fishing effort increased, the number of commercial fishers declined.⁴⁷ Concerned about the detrimental impacts of the sea lamprey on the Great Lakes fishery, federal, state and provincial governments began an assessment of control options.⁴⁸ With research efforts underway, the Canadian and United States government signed the *Convention on Great Lakes Fisheries* in 1954 to primarily address the problem of sea lamprey infestation. With the ratification of this convention, the Great Lakes Fishery Commission was established to facilitate cooperation and collaboration between the two countries⁴⁹ on sea lamprey control strategies⁵⁰ and the protection of the Great Lakes fishery.⁵¹ As a result of these efforts, an effective lampricide, TFM (3-trifluoromethyl-4-nitrophenol), was discovered in 1956. After field-testing in 1957 and 1958, the Great

expense, and more skill in the construction and use of nets are required now than formerly, and for the capture of a less quantity of fish." Milner, J.W. (1873). *Report on the Fisheries of the Great Lakes*. Washington, D.C.: Government Printing Office, p. 14-15; Baldwin, *supra* note 29.

⁴⁷ Koelz, W. *supra* note 14, at 591; Baldwin, *supra* note 29; Bogue, *supra* note 11, at 262.

⁴⁸ Weirs were initially constructed to trap lamprey, and electric volts were used to kill them. According to Lawrie, the construction and operation of weirs and electrical barriers in the upper Great Lakes was ineffective for sea lamprey control since weirs were not kept in consistent operation and were wholly inadequate for blocking a majority of the streams that were utilized by lamprey. As these limitations were recognized and the urgency of the problem increased due to the collapse of lake trout in Lake Michigan and infestation of Lake Superior, intense experimentation was initiated by the U.S. Fish and Wildlife Service in January of 1950 to explore a variety of different ways to control sea lamprey populations, including the use of a selective chemical treatment that would kill lamprey larvae, but was benign to other forms of aquatic life. This research was based at laboratory facilities in Hammond Bay, Michigan, under the guidance of Director James Moffett and Dr. Vernon Applegate. At the Hammond Bay laboratory, approximately a hundred tests were run everyday using 6,000 different chemicals to analyze their effect on the sea lamprey and a sought after fish species. It is estimated that 60,000 individual tests were conducted in search of an effective and selective chemical to target lamprey larvae. Lawrie, *supra* note 25, at 769-770; Kuchenberg, *supra* note 40, at 62-63, 67.

⁴⁹ Under the authority of the Great Lakes Fishery Commission, lake committees for each of the Great Lakes facilitate coordination and management activities between the provincial, state and federal governments of Canada and the United States.

⁵⁰ Sea lamprey control and research is funded by both countries, although their share of the funding is apportioned based on the historic value of each country's commercial harvest of lake trout and whitefish and area of water over which each country has jurisdiction in the Great Lakes. Currently, approximately 69% of sea lamprey control and research is paid for by the United States and 31% is paid for by Canada. Great Lakes Fishery Commission (2000). *The Great Lakes Fishery Commission: Established by Treaty to Protect Our Fishery*. Ann Arbor, MI, Fact Sheet, p. 1.

⁵¹ The Great Lakes Fishery Commission is comprised of four appointed Canadian commissioners, four appointed American commissioners and one alternate commissioner. *Id.*

Lakes Fishery Commission began a chemical control program using TFM in Lake Superior in 1958, followed by treatment in Lakes Michigan and Huron in the 1960s.⁵²

With sea lamprey controls in place, rehabilitation efforts, such as hatchery supplementation, began for lake trout.⁵³ However, these efforts did not significantly increase lake trout propagation,⁵⁴ with the exception of some areas of Lake Superior⁵⁵ and one area in Lake Huron.⁵⁶ Thus, despite some progress on sea lamprey control and lake trout rehabilitation in the Great Lakes fishery, sea lamprey predation continued to plague the fishery. Alewife abundance was a particular nuisance to the public since this species experienced massive die-offs in the fall, leaving millions of dead alewife in the Great Lakes to wash ashore, fouling public beaches.⁵⁷ Predation by alewives on eggs

⁵² Fetterolf, C.M. (1980). Why a Great Lakes Fishery Commission and why a sea lamprey international symposium? *Canadian Journal of Aquatic Sciences*: 37, 1588-1593; Smith, *supra* note 21.

⁵³ Stocking for lake trout began shortly after the collapse of the inshore lake trout stocks in Lake Superior. Stocking began in Michigan and Wisconsin in 1952, in Ontario in 1958 and in Minnesota in 1962. According to Hansen, more than 27 million lake trout were stocked by 1970, and more than 90 million were stocked by 1992. Hansen, M.J., Ebener, M.P., Shively, J.D. & Swanson, B.L. (1994). Lake trout. In Hansen, M.J. (Ed.) *The state of Lake Superior in 1992. Great Lakes Fishery Commission Special Publication: 94-1*. (pp. 13-34). Ann Arbor, MI: Great Lakes Fishery Commission, p. 15.

⁵⁴ In the late 1970s, lake trout natural reproduction was inadequate to maintain stocks, and stocking was necessary to support lake trout yield, due in part to the high rate of sea lamprey predation on lake trout. Since 1986, sea lamprey wounding on lake trout has increased slowly in American and Canadian waters of the Great Lakes. Based upon statistical analyses of sea lamprey wounding, the probability of lake trout survival from a sea lamprey attack, and a model estimating interaction between lake trout and sea lamprey, the average death rate for lake trout due to sea lamprey predation is 50,000 annually in the United States waters of the Great Lakes since 1981, compared to an estimated average death rate of 10,000 annually between 1980 and 1981. *Id.* at 27-28, 30.

⁵⁵ Lake trout abundance did increase in Lake Superior during the 1950s and 1960s in areas where stocking occurred or where native populations survived. Lawrie, *supra* note 25, at 774; Hansen, M.J. (Ed.) (1994). *The state of Lake Superior in 1992. Great Lakes Fishery Commission Special Publication: 94-1*, p. 3.

⁵⁶ Despite significant declines in lake trout harvest after 1940, a small remnant population survived in Parry Sound within Georgian Bay. Recently, this population has been recovering, and natural reproduction has been sufficient to sustain this lake trout population. Johnson, J.E. & VanAmberg, J. (1995). Evidence of natural reproduction in western Lake Huron. *Journal of Great Lakes Research*, 21(Supp.1): 253-259; Ebener, M.P. (Ed). (1998). *Lake Trout Rehabilitation Guide for Lake Huron*. Great Lakes Fishery Commission: Ann Arbor, MI, p. 3.

⁵⁷ Tanner, *supra* note 32, at 27-29.

and fry may have also caused significant lake trout mortality.⁵⁸ Additionally, toxic substances may also have prevented lake trout rehabilitation.⁵⁹ Furthermore, despite the decline in the number of commercial fishers, the opportunity for overexploitation loomed large due to the lack of comprehensive regulatory oversight of the U.S. waters of the Great Lakes commercial fishery prior to the 1960s.⁶⁰

Great Lakes Fishery Management

Since the 1800s, management of the Great Lakes fishery has confronted the difficulties of having a variety of jurisdictions with regulatory authority over its waters⁶¹ and with different management philosophies. In response to the deterioration of the Great Lakes fishery, the provincial and federal governments in Canada enacted stringent regulations to conserve fish stocks, while the state and federal governments of the United States focused on artificial propagation of fish stocks through hatcheries and stocking programs.⁶² Thus, management of the Great Lakes fishery has been an amalgamation of various disparate – and sometimes conflicting – policies and regulations since the 1800s.⁶³

⁵⁸ Krueger, C.C., Perkins, D.L., Mills, E.L. & Marsden, J.E. (1995). Predation by alewives on lake trout fry in Lake Ontario: role of an exotic species in preventing restoration of a native species. *Journal of Great Lakes Research*, 21 (Supp. 1): 458-469, p. 464-467.

⁵⁹ Zint, M.T., Taylor, W.W., Carl, L., Edsall, C.C., Heinrich, J., Sippel, A., Lavis, D., & Schaner, T. (1995). Do toxic substances pose a threat to rehabilitation of lake trout in the Great Lakes? A review of the literature. *Journal of Great Lakes Research* 21(Supp. 1): 530-546, p. 539-540.

⁶⁰ Tanner, *supra* note 32, at 53.

⁶¹ Within Canadian waters of the Great Lakes, the federal government exercises management authority over conservation and protection of fish stocks, and the provincial governments have management authority over the commercial fishery. In contrast, eight state governments with riparian access to the U.S. waters of the Great Lakes maintain jurisdiction over the fishery. Brown, *supra* note 15, at 320.

⁶² Milner, J. W. (1872). Report on the fisheries of the Great Lakes: The result of inquiries prosecuted in 1871 and 1872. In *Report for the U.S. Commission of Fish and Fisheries*. Washington, D.C.: Government Printing Office, Appendix A, 42nd Congress, 3rd session, S. Misc. Doc. 74, 20-34; McCullough, A.B. (1989). *The Commercial Fishery of the Canadian Great Lakes*. Ottawa, Canada: Environment Canada, p. 19-21; Bogue, *supra* note 11, at 182, 204.

⁶³ Tanner, *supra* note 32, at 11; McCullough, *supra* note 62.

To resolve the difficulties of inconsistent regulations governing the Great Lakes fishery, representatives of the U.S. states with jurisdiction over the Great Lakes – Michigan, Minnesota, Ohio, and Wisconsin – met with the U.S. Fish and Game Commission in 1883 to reach a consensus on uniform regulations. Although thirteen recommendations were adopted and agreed upon at this meeting, none of them were implemented in any of the states. Unfortunately, this pattern of meeting without success continued until 1954. During this time, twenty-seven interstate or international conferences were held that failed to result in the adoption of consistent regulations.⁶⁴

Although attempts to promulgate standard regulations were unsuccessful, several international commissions were created to facilitate cooperation and coordination in management of the Great Lakes. In 1892, the governments of Canada and the United States established an international commission to investigate management issues of the Great Lakes fishery. The recommendation was made to establish a joint commission with the authority to promulgate regulations for both Canadian and U.S. waters of the Great Lakes.⁶⁵ After the failure of the U.S. and Canada to implement this recommendation, a treaty was developed for the joint regulation of the Great Lakes fishery in shared boundary waters. Ratified by both nations in 1908, this treaty called for the creation of the International Fisheries Commission to prepare uniform regulations. Although this treaty was never enacted, the International Joint Commission was

⁶⁴ True, F.W. (1887). The fisheries of the Great Lakes. In Goode, G.B. (Ed.), *The Fisheries and Fishing Industries of the United States*. (pp. 631-673) Washington, D.C.: U.S. Commission on Fish and Fisheries.

⁶⁵ Piper, D.C. (1967). *The International Law of the Great Lakes: A Study of Canadian-United States Cooperation*. Durham, NC: Commonwealth Studies Center, Duke University Press.

subsequently established in the International Boundary Waters Treaty in 1909 to deal primarily with water quality and quantity issues.⁶⁶

As efforts to coordinate management continued, the State of Michigan was in the process of devising a new management plan for the Great Lakes fishery. The Michigan DNR was concerned that the commercial fishery within the Great Lakes lacked sufficient regulation, resulting in a fishery vulnerable to overexploitation. In the 1960s, Howard Tanner, then Director of the Michigan DNR, expressed anxiety over the increasing abundance of alewife in the Great Lakes and doubt over the success of planted lake trout in the presence of so many alewives. Thus, the DNR recognized the need for alewife control in the Great Lakes.⁶⁷ Another issue the DNR raised during this time was the declining commercial fishery and its failure to provide high economic returns to the state.⁶⁸ As a result, this agency sought to make dramatic management changes that would have significant impacts on the biological, economic and social dynamics of the Great Lakes fishery.

New Vision for Great Lakes Fishery Management

In 1964, the Michigan DNR revealed a new management strategy for the Great Lakes fishery. This new vision, outlined by DNR Director Tanner, emphasized recreational fishing in the Michigan waters of the Great Lakes through the introduction of non-native Pacific salmonids. Although commercial fishing was not prohibited under this new management scheme, establishment of a recreational fishery became the top priority for most Great Lakes fishery managers, and the commercial fishery was only allowed to harvest surplus fish beyond what was caught by state-licensed recreational

⁶⁶ *Id.*; Bogue, *supra* note 11, at 312-313.

⁶⁷ Kuchenberg, *supra* note 40, at 79.

⁶⁸ Tanner, *supra* note 32.

sport fishers. The DNR hoped this plan would control alewife abundance in the Great Lakes through predation by the large, predatory salmonids and convert alewife biomass to productive use.⁶⁹ Furthermore, the DNR believed the best allocation of the Great Lakes fishery resource would be for recreational fishing since the economic value of sport fishing outweighed the value of commercial fishing for the State of Michigan.⁷⁰ They argued that commercial fishers in the upper Great Lakes were reaping the benefits from a publicly owned resource, and that the commercial fishery should be regulated to protect the Great Lakes fishery from further damage. However, this contradicted the management goals of the U.S. Bureau of Commercial Fisheries, which had federal oversight over the Great Lakes fishery. Their goals were to control the sea lamprey, restore native lake trout populations, and work to restore the commercial fishery in the Great Lakes.⁷¹ Thus, the new management strategy of the Michigan DNR resulted in interjurisdictional tension over the management of the Great Lakes fishery.

The new strategy led to the enactment of a new set of regulations on the commercial fishery aimed at reducing their fishing effort. The first restriction limited entry into the commercial fishery of the Great Lakes by requiring that fishers have 50 fishing days in two of the preceding three years in order to obtain a commercial license. This regulation eliminated part-time fishers from participating in the fishery and reduced the number of commercial licenses from 1,100 in 1940 to 300 in 1968.⁷²

⁶⁹ According to Howard Tanner, former Director of Michigan's DNR, "*Management of fish stocks [under the new management plan] would favor the sport fishery whenever and wherever a choice had to be made.*" *Id.* at 32, 35-56.

⁷⁰ Talhelm, D. (1979). *Current Estimates of Great Lakes Fisheries Values: 1979 Status Report*. Ann Arbor, MI: Great Lakes Fishery Commission; Talhelm, D. (Winter 1979). Fisheries: Dollars & cents. *Water Spectrum*, p. 9.

⁷¹ Tanner, *supra* note 32, at 51, 56.

⁷² *Id.* at 53-54.

The next regulation in Michigan divided the Great Lakes fishery into recreational fishing zones, commercial fishing zones, and rehabilitation zones – where gill net use was prohibited. Since most of the Great Lakes waters were designated as recreational or rehabilitation zones, commercial fishing was greatly restricted in the Great Lakes.⁷³ This regulation was protested by commercial fishers who believed that they were being forced into narrow, confined areas where harvest pressure would extirpate fish stocks within the commercial zones and create conflict among fishers.⁷⁴

The third restriction that was placed on commercial fishing in the Great Lakes was a limit on the species that could be harvested commercially. Coho salmon and perch were prohibited from commercial harvest during 1970, and walleye was prohibited in 1973.⁷⁵

The last – and most controversial – restriction on the Great Lakes commercial fishery was the ban on gill net use in 1972, with a four-year time frame for conversion to other commercial fishing gear.⁷⁶ Sport fishers and the Michigan DNR argued that gill nets are unselective, highly efficient gear that kills captured fish and interferes with the recreational sport fishery.⁷⁷ In contrast, commercial fishers argued that gill nets are extremely selective gear and are used by biologists and researchers since they allow capture of live fish. Commercial fishers abhorred this ban since they considered gill nets

⁷³ *Id.* at 55.

⁷⁴ Kuchenberg, *supra* note 40, at 89-90.

⁷⁵ Tanner, *supra* note 32, at 55.

⁷⁶ Opre, T. (1980, June 5). Tribal permits not valid: state to enforce Indian netting ban. *Detroit Free Press*, p. 6D.

⁷⁷ Gill nets: they could seriously deplete the lakes before a court ruling. (1980, July 21). *Detroit Free Press*, p. 4; Connors, P.G. (1999). *Michigan Indian Fishing Rights Controversy*, (Research Report vol. 19, no. 3). Lansing, MI: Michigan Legislative Service Bureau, Legislative Research Division, p. 3.

to be the most versatile, lightweight, and affordable type of fishing gear available, and it is the only type of fishing net that can be used in most of the waters of the Great Lakes.⁷⁸

As the controversy mounted surrounding increased restriction of the commercial fishery in the Great Lakes, the DNR began to stock Pacific chinook salmon (*Oncorhynchus tshawytscha*)⁷⁹ and other game species to develop the state's recreational fishery.⁸⁰ The stocking of chinook salmon brought a fishing frenzy to the Great Lakes as recreational fishers sought the opportunity to catch salmon, and other Great Lakes states followed Michigan's management strategy of developing and prioritizing a recreational fishery, including Ohio, Indiana, Illinois, and Wisconsin.⁸¹ As recreational fishing became the new focus of fisheries managers in the U.S. waters of the Great Lakes, commercial fishers lacked the political organization to take action to stop further restrictions on their harvest.⁸² With the notable exception of the State of Wisconsin,⁸³ commercial fishers within the Great Lakes confronted a powerful coalition and a fight for

⁷⁸ Gill nets can be created in different mesh sizes to specifically target various species. In addition, gill nets do not require large, powerful boats or a large workforce. Kuchenberg, *supra* note 40, at 90-91; Sadewasser, S. (personal communication, November 16, 1998).

⁷⁹ The introduction of salmonid species was favored by the DNR since they could be hatchery-raised so they would not compete with other species for spawning habitat in inland streams. Other desirable characteristics of Pacific salmonids were their brief life cycle, rapid growth, and their voracious appetite. Tanner, *supra* note 32, at 38-40.

⁸⁰ The game species that were stocked between 1966 and 1978 by the Michigan DNR included coho salmon, chinook salmon, lake trout, steelhead, brown trout, splake, and Atlantic salmon. One enormous hurdle to the development of the recreational fishery was the cost of raising fish to be planted in the Great Lakes. However, passage of the *Anadromous Fish Act* by the U.S. Congress in 1965, which allowed for 50/50 cost sharing between states and the federal government for anadromous fish programs, and the collection of license fees starting in 1969, provided funding for the State of Michigan's recreational fishery. Between 1966 and 1978, among the game species that were planted in the Michigan waters of the Great Lakes, there was approximately 39 million coho and 32 million chinook salmonids planted by the DNR. *Id.* at 58-59, 82.

⁸¹ *Id.* at 47, 52.

⁸² Kuchenberg, *supra* note 40, at 102-103; Bogue, *supra* note 11.

⁸³ The State of Wisconsin shifted its management policy towards maintenance of a commercial fishery in the mid-1970s in an effort to accommodate recreational and commercial fishing interests in its waters of the Great Lakes. *Fisheries of the Great Lakes*. (1988). Madison, WI: University of Wisconsin Sea Grant Institute.

their survival as state regulatory agencies and sport fishing groups were joined by the tourism industry in opposing commercial fishing.⁸⁴

Tribal and non-tribal commercial fishers alike opposed the increased restrictions on the commercial fishery and gill net use in the Great Lakes. Significantly, since the ancestors of Ottawa and Ojibwa fishers in the upper Great Lakes reserved the right to fish in historic land cession treaties with the United States government, some Native fishers sought to challenge state regulation of tribal commercial fishing on these grounds. Additionally, Native commercial fishers valued use of the gill net for fishing since it had cultural significance for tribal commercial fishers whose ancestors used gill nets for centuries.⁸⁵ Awareness grew among the Native Americans of northern Michigan that federal recognition of their tribes⁸⁶ and of their treaty rights was necessary to protect them.⁸⁷ This realization brought the issue of state regulation of tribal fishing to the United States judicial system.

⁸⁴ Kuchenberg, *supra* note 40, at 102-103.

⁸⁵ Tanner, *supra* note 2; Cleland, *supra* note 1.

⁸⁶ Restrictions on treaty right tribal fishing led the Sault Ste. Marie band and the Grand Traverse band to seek federal recognition. Weeks, *supra* note 1, at 41.

⁸⁷ Indians will keep fishing. (1980, June 5). *Detroit Free Press*, p. 6D; Bielski, V., Cornell, G. & White, R. (1980, July 21). Indians only ask to keep their age-old right to fish. *Detroit Free Press*, p. 5-6.

Chapter 2: Native Fishing Rights

Legal Rights of Native Americans under the U.S. Government

As growing numbers of settlers in tribal territories increased pressure on the United States government to gain eastern lands from the Indians during the 1700s and 1800s, the legal rights of Native Americans under the U.S. government became a critical issue. Confiscation of tribal lands and fraudulent land deals by white settlers led to various outbreaks of violence between Indians and non-Indians throughout this time.¹ Although the U.S. government treated Indian nations as independent sovereigns in its formulation of international treaties with European nations,² federal Indian policy moved towards guardianship of the tribes with the signing of the Treaty of Hopewell in 1785.³ Acting in trust for the Indians, the U.S. Congress sought to protect Native Americans through the passage of two bills.⁴ The first piece of legislation, the Northwest Ordinance of 1787 (ratified by Congress in 1789),⁵ sought to increase individual ownership of land for Native Americans, subsidize their public education, and secure legal rights and protections of non-Indian citizens who moved to new territories.⁶ This act also protected Indian property from being taken without tribal consent and clarified the role of the

¹ Morison, S.E. (1965). *Oxford History of the American People*. Oxford University Press: New York, NY, p. 445-446; Hyman, H.M. (1986). *American Singularity: The 1787 Northwest Ordinance, the 1862 Homestead and Morrill Acts, and the 1944 G.I. Bill*. University of Georgia Press: Athens, GA, p. 22.

² *American Jurisprudence*, vol. 27. (1940). Jurisprudence Publishers: San Francisco, CA, p. 547; O'Brien, S. (1985). Federal Indian policies and international protection of human rights. In Deloria, V. (Ed.), *American Indian Policy in the Twentieth Century*. (pp. 35-61). University of Oklahoma Press: Norman, OK, p. 43.

³ This treaty states, "The said Indians for themselves and their respective tribes and towns do acknowledge all the Cherokees to be under the protection of the United States of America, and of no other sovereign whosoever." Treaty of Hopewell 7 Stat. 18, 19 (1785).

⁴ Hyman, *supra* note 1, at 28; O'Brien, S. (1989). *American Indian Tribal Governments*. University of Oklahoma Press: Norman, OK, p. 258-259.

⁵ Northwest Ordinance of 1787, 1 Stat. 50; 5 U.S.C. Sec. 479.

⁶ Hyman, *supra* note 1, at 23-24.

United States government as a protector of Native property and rights.⁷ The second law that helped define the role of the United States government towards Native peoples was the Trade and Intercourse Act of 1790.⁸ This law was supposed to protect Indian land from being purchased by any entity other than the United States⁹ and made it a crime to trespass on Indian lands.¹⁰ Yet, at the same time that the U.S. Congress sought to enact legislation that would protect Native Americans on their lands, the principle of “first discovery” erased Native rights to the lands upon which they had resided since 900 B.C. when it emerged from the historic case decision of *Johnson v. McIntosh* (1823).¹¹

In *Johnson*, Justice Marshall held that “the exclusive right of the United States to extinguish [Native] title, ...has never...been doubted”.¹² In this case, he also decided that only Europeans could “discover” land; therefore, the United States owned lands occupied by Indians because these Native peoples were “fierce savages.”¹³ Other judges supported

⁷ The Northwest Ordinance stated,

The utmost good faith shall always be observed towards the Indians; their land and property shall never be taken from them without their consent; and in their property, rights and liberty, they shall never be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws found justice and humanity shall from time to time be made, for preventing wrongs being done to them, and for preserving peace and friendship with them.

Northwest Ordinance, *supra* note 5, at 52.

⁸ Trade and Intercourse Act of 1790, 1 Stat. 137.

⁹ This law stated,

That no person shall be permitted to carry on any trade or intercourse with the Indian tribes, without a license for that purpose...for the use of the United States, conditioned for the true and faithful observance of such rules, regulations and restrictions, as now are, or hereafter shall be made for the government of trade and intercourse with the Indian tribes...That no sale of lands made by any Indians or any nation or tribe of Indians within the United States, shall be valid to any person or persons, or to any state.

Id. at 137.

¹⁰ This act also stated,

Such offender or offenders shall be subject to the same punishment, and shall be proceeded against in the same manner as if the offense had been committed within the jurisdiction of the state or district to which he or they may belong, against a citizen or white inhabitant thereof.

Id. at 138.

¹¹ *Johnson v. McIntosh*, 21 U.S. (8 Wheat) 543 (1823).

¹² *Id.* at 585.

¹³ According to Jennings, “first discovery” was one of five principles used by Europeans in their assertion of sovereignty over American territory and its people. Jennings, F. (1975). *The Invasion of America*:

this idea of “first discovery” and the taking of land from Indians since they believed that Christians could rightfully dominate over non-Christians.¹⁴ As their rights to land were eroded under the principle of “first discovery,” Native rights to self-governance were also challenged on other bases in the courts.

In the decision *Cherokee Nation v. Georgia* (1831),¹⁵ Indians asked the Supreme Court for injunctive relief from laws enacted by the State of Georgia that eliminated all their rights based upon the first article of the United States Constitution.¹⁶ They argued that the relation of Indians to the United States government under this section of the Constitution grants them rights to self-governance without interference by state law. Justice Marshall, however, decided that since the Cherokee Indian tribe was not considered foreign nations,¹⁷ they were not granted standing to bring a suit against the State of Georgia under the U.S. Constitution.¹⁸

Chief Justice Marshall did, however, somewhat contradict this opinion the following year in *Worcester v. Georgia* (1832)¹⁹ where he recognized Native sovereignty

Indians, Colonialism, and the Cant of Conquest. University of North Carolina Press: Chapel Hill, NC, p. 105-106, 127.

¹⁴ *Johnson v. Mc'Intosh*, *supra* note 11, at 573-574; Caldwell-Hill, J.L. (1996). Environment, regulations, and Native Americans. *Northern Kentucky Law Review*, 24(1-2), p. 84-85.

¹⁵ *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831).

¹⁶ The first article states, “The Congress shall have power...to regulate commerce with foreign nations, and among the several States, and with the Indian tribes.” U.S. Constitution, Article I, Sect. 8, clause 3 (1787).

¹⁷ Justice Marshall declared that,

[Indians are]...denominated domestic dependent nations!...they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian...They and their country are considered by foreign nations, as well as by ourselves, as being...completely under the sovereignty and dominion of the United States.

Cherokee Nation v. Georgia, *supra* note 15, at 17.

¹⁸ In his decision, Marshall held, “[T]he majority is of opinion that an Indian tribe or nation within the United States is not a foreign state in the sense of the constitution, and cannot maintain an action in the courts of the United States.” *Cherokee Nation v. Georgia*, *supra* note 15, at 20; Lyons. O. (1992). *Exiled in the Land of the Free: Democracy, Indian Nations and the U.S. Constitution*. Clear Light Publishing: Santa Fe, CA, p. 288.

¹⁹ *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

as a legitimate right.²⁰ In this decision, he stated that Indians were independent nations with exclusive authority over their territory.²¹ Furthermore, Justice Marshall emphasized that the role of the U.S. government was to protect the land and rights of Native Americans, based upon historic treaties – particularly the Treaty of Hopewell.²² Thus, he declared Georgia's laws that erased Indian rights null and void.²³

The decision *Worcester v. Georgia* was critical to Indian rights since it was not distinguished from *Johnson v. McIntosh* or *Cherokee Nation v. Georgia*, and it essentially recognized the rights of Native Americans to their lands and protection of the United States government.²⁴ Importantly, as subsequent court decisions recognized the rights of

²⁰ Cohen, F. (1942). *Handbook of Federal Indian Law*. University of New Mexico Press: Albuquerque, NM, p. XXIV; Prucha, F.P. (1994). *American Indian Treaties: The History of a Political Anomaly*. University of California Press: Berkeley, CA, p. 167.

²¹ In *Worcester* (1832), a Caucasian minister was prosecuted and jailed under Georgia's law that made it illegal for any non-Indian to live on Indian land without permission from Georgia's governor and without taking an oath of allegiance to the State of Georgia. His defense was similar to that of the Cherokee Indians in the *Cherokee Nation* case a year earlier. In his decision, Justice Marshall stated, "...*Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power.*" *Worcester v. Georgia*, *supra* note 19, at 559.

²² By placing themselves under the protection of the stronger U.S. government, Justice Marshall decided that the Indian nations did not surrender their independence and right to self-governance. He stated, ***[T]he settled doctrine of the law of nations is, that a weaker power does not surrender its independence – its right to self-government – by associating with a stronger, and taking its protection...[Upon signing the Treaty of Hopewell] the strong hand of government was interposed to restrain the disorderly and licentious from intrusions into their country, from encroachments on their lands, and from those acts of violence which were often attended by reciprocal murder. The Indians perceived in this protection only what was beneficial to themselves – an engagement to punish aggressions on them. It involved, practically, no claim to their lands, no dominion over their persons. It merely bound the nation to the British crown, as a dependent ally, claiming the protection of a powerful friend and neighbour, and receiving the advantages of that protection, without involving a surrender of their national character.*** [Emphasis added.]

Id. at 562-563; O'Brien, S. (1991). Tribes and Indians: With whom does the United States maintain a relationship? *Notre Dame Law Review*, 66(5), p. 1464.

²³ This decision angered the State of Georgia, and it was not implemented or enforced. Andrew Jackson – Governor of the State of Georgia at that time – declared, "*John Marshall has made his decision. Now let him enforce it.*" Georgia promptly held a lottery to distribute the Cherokee lands, and these Indians were forced to leave their lands. Morison, *supra* note 1, at 450.

²⁴ Chaudhuri, J. (1985). American Indian policy: An overview. In Deloria, V. (Ed.), *American Indian Policy in the Twentieth Century*. (pp. 15-33). University of Oklahoma Press: Norman, OK, p. 23-25.

Indians to regulate their own affairs²⁵ – regardless of their protection under the U.S. government²⁶ – they also emphasized the plenary power of the U.S. Congress over Native Americans.²⁷

As the court system defined the legal rights of Indians, the demand for tribal lands continued to increase, and the government sought ways of peacefully compelling Indians to leave the eastern United States.²⁸ With treaties and other documents establishing their guardianship role towards the Indians, the U.S. government began to formulate plans during President Monroe's administration for concentrating Indians west of the Mississippi into the unsettled territory of the Louisiana Purchase.²⁹ In the 1820s, piecemeal removal of Indians began when tribes in the Old Northwest and southern territories were given the choice of removal from their lands or remaining on their lands

²⁵ Although Indian tribes are not recognized as foreign nations or states, they are considered distinct political entities. The court held in *United States v. Kagama* (1887), "*The Indians have always been recognized as having a semi-independent position...as a separate people, with the power of regulating their own internal and social relations.*" 118 U.S. 375; *American Jurisprudence*, *supra* note 2, at 546-547.

²⁶ *Worcester v. Georgia*, *supra* note 19, at 559.

²⁷ In *United States v. Kagama* (1887), Justice Miller stated,

[T]hese Indians are within the geographical limits of the United States. The soil and the people within these limits are under the political control of the Government of the United States...The territorial governments owe all their powers to the statutes of the United States, conferring on them the powers which they exercise, and which are liable to be withdrawn, modified, or repealed at any time by Congress.

United States v. Kagama, *supra* note 25, at 379.

Furthermore, the court held in *Lone Wolf v. Hitchcock* (1903) that although the Indian right of occupancy of tribal lands is sacred,

When...treaties were entered into between the United States and a tribe of Indians it was never doubted that the power to abrogate existed in Congress, and that in a contingency such power might be availed of from considerations of governmental policy, particularly if consistent with perfect good faith towards the Indians.

187 U.S. 553, 565-566.

²⁸ The government could not forcibly remove these Native people from their land, and was bound to protect the Indians by law and previously signed treaties, such as the Treaty of Ghent. The United States entered into the Treaty of 1814 with Great Britain to end hostilities of the War of 1812. In the Treaty of Ghent, the United States agreed to honor all rights of Indians. Specifically, the United States agreed in the Treaty of Ghent to "*restore to such tribes or nations, respectively, all the possessions, rights, and privileges, which they may have enjoyed or been entitled...previous to such hostilities.*" 8 Stat. 218, p. 222-223; Updyke, F.A. (1915). *The Diplomacy of the War of 1812*. John Hopkins Press: Gloucester, MA, p. 226-227; Prucha, *supra* note 20, at 132.

²⁹ Morison, *supra* note 1, at 445; Pevar, S.L. (1992). *The Rights of Indians and Tribes*. (2nd ed). Southern Illinois University Press: Edwardsville, IL, p. 4.

and becoming United States citizens. Those who chose to leave were promised new lands in exchange for their land, along with payments for travel expenses and improvements that were necessary on their new land.³⁰

Indian removal escalated under President Jackson, a strong proponent of Indian removal, after he encouraged Congress to enact the Indian Removal Act in 1830.³¹ This act allowed eastern lands to be exchanged with the Indians residing in states or territories for their voluntary removal west of the Mississippi River, and it promised Indians protection on their new lands.³² Although the Removal Act was intended to *encourage* removal of Indians from eastern lands, many were forced to leave their lands, while others chose not to leave.³³ At this time, the U.S. government also began initiating land cession treaties to gain Native lands peacefully and satisfy the desire and increasing demand of settlers for additional land.³⁴ Thus, the period from the 1830s until the 1870s was a time of Indian removal from their lands.³⁵

³⁰ Morison, *supra* note 1, at 446.

³¹ Indian Removal Act, 4 Stat. 411 (1830).

³² The Removal Act stated,

[I]t shall and may be lawful for the President of the United States to cause so much of any territory belonging to the United States, west of the river Mississippi...to be divided into a suitable number of districts, for the reception of such tribes or nations of Indians as may choose to exchange the lands where they now reside, and remove there. That it shall and may be lawful to cause such tribe or nation to be protected, at their new residence...and to have the same superintendence and care over any tribe or nation in the country to which they may remove, as contemplated by this act...Provided that nothing in this act contained shall be construed as authorizing or directing the violation of any existing treaty between the United States and any of the Indian tribes.

Id. at 411-412. This act also provided payment for removal, one year's subsistence, and compensation for improvements to the lands.

³³ Prucha, *supra* note 20, at 198.

³⁴ Federal commissioners bribed chiefs and usually intoxicated Indian representatives to obtain their signatures on treaties. Indians were also persuaded to sign by federal officials that urged Indians to sell improvements for cash to pay off their debts with white settlers. Morison, *supra* note 1, at 445.

³⁵ Besides land cession treaties, Indians lost their lands to speculators through fraudulent land deals. Rubenstein, B.A. (1976). Justice denied: Indian land frauds in Michigan: 1855-1900. *Old Northwest* 2(2), p. 133-139; Prucha, *supra* note 20, at 53, 63-64.

As Native Americans were uprooted from their lands and moved onto reservations, some activists and religious leaders became increasingly critical of the Indian policies of the U.S. Government and demanded change to help assimilate Indians into mainstream culture.³⁶ In 1871, the U.S. Congress passed a statute dissolving the ability of the United States to make any future treaties with the Native Americans,³⁷ and the General Allotment Act (Dawes Act) was passed in 1887, which sought to transform Indians into individual landowners, as an alternative to living on reservations.³⁸ One purpose of this act was to promote assimilation of Indians into “American society” by dividing up reservations into individually owned settlements. In addition, the Dawes Act sought to open up more Indian land to settlement by whites through the sale of “surplus” land – Indian land that was leftover after allotments were complete – to be sold to the United States at a reduced rate.³⁹ Therefore, these policies failed to promote land ownership among American Indians.⁴⁰ Additionally, they perpetuated acquisition of tribal

³⁶ Some pro-Indian organizations believed that Indians would benefit through assimilation under U.S. culture and a land allotment system, which provided individual parcels of land. Cohen, *supra* note 20, at 208.

³⁷ 25 U.S.C. §71 (1871).

³⁸ General Allotment Act, 24 Stat. 388 (1887).

³⁹ Rapid settlement and development of the Western U.S. occurred during the 1880s, leading to continued demand for acquisition of tribal lands. The theory of tribal assimilation into civilized society was one justification for confiscating communal tribal lands and allotting smaller individual parcels of lands to Indians. In 1881, President Chester Arthur introduced the idea of assimilation of Indians into American society in his first annual address to Congress. In his address to the nation, President Arthur proposed a plan to bring Indians into the mainstream of American life by introducing the Indians to “*the customs and pursuits of civilized life and gradually to absorb them into the mass of our citizens.*” Senator Henry Dawes of Massachusetts agreed with the President’s plan, and he sought to make assimilation and Native land allotment a national policy, while continuing acquisition of Native land for settlement. American Friends Service Committee (1970). *Uncommon Controversy: Fishing Rights of the Muckleshoot, Puyallup and Nisqually Indians*. University of Washington Press: Seattle, WA, p. 45-46; Cohen, *supra* note 20, at 78; Deloria, V. & Lytle, C.M. (1983). *American Indians, American Justice*. University of Texas Press: Austin, TX, p. 8-9.

⁴⁰ The failure of this policy stemmed from the failure of the U.S. government to recognize that Indian ideas of land ownership differed radically from Western ideas of ownership. Indian “ownership” was communal, not individual, and after Indian lands were held in trust by the U.S. government for 25 years, Indians did not seek to receive the land title in fee simple under the General Allotment Act. Morison, *supra* note 1, at 753.

lands by the U.S. government and white settlers and extinguished the rights of Native Americans to their own lands.⁴¹ Thus, the rights of Native Americans to their lands continued to erode throughout the 1800s and into the early 1900s under the assimilation policies of the U.S. government.⁴²

These policies came under assault, however, as the poverty and destitute conditions of Indian reservations became known in the 1930s.⁴³ As the Commissioner of the Bureau of Indian Affairs sought to restore tribal self-governance, Congress responded through passage of the Indian Reorganization Act (IRA), or the Wheeler-Howard Act, in 1934.⁴⁴ Among its provisions, this legislation put a halt to allotment of Indian lands, authorized any remaining surplus reservation lands to revert to tribal ownership,⁴⁵ and allowed greater self-governance through establishment of tribal governments and courts.⁴⁶ Importantly, this law was upheld by the judicial system despite various legal

⁴¹ In 1881, the land holdings of Native Americans were approximately 155,632,312 acres, and by 1889, these holdings were reduced to 104,314,349 acres. By 1934, two-thirds of tribal lands had been transferred to non-Native ownership. Fey, H. & McNickle, D. (1959). *Indians and Other Americans*. Harper & Brothers: New York, NY, p. 70-79; O'Brien, *supra* note 2.

⁴² For example, in 1885, the U.S. Congress passed the Seven Major Crimes Act, which extended federal jurisdiction to seven specific crimes on Indian reservations. This act also granted the U.S. government jurisdiction over crimes occurring between Indians for the first time. In addition, Indian children were removed from their parents' care and sent to boarding schools where they were taught in English. The purpose of these boarding schools was to help assimilate Indian children into society. Act of March 3, 1885, 23 Stat. 362, 376; O'Brien, *supra* note 22, at 1465; Lyons, *supra* note 18, at 319.

⁴³ In 1928, the Brookings Institution published a report entitled, "The Problem of Indian Administration," on the substandard living conditions of Native Americans. This report -- referred to as the "Meriam Report" due to its direction by Lewis Meriam -- provided a thorough analysis of the economic and social environments of Native Americans and offered guidance on how to improve their conditions. American Friends Service Committee, *supra* note 39, at 48; Prucha, F.P. (1975). *Documents of United States Indian Policy*. University of Nebraska Press: Lincoln, NE, p. 219-221; Deloria, *supra* note 39, at 12-13.

⁴⁴ Indian Reorganization Act, 48 Stat. 984 (1934).

⁴⁵ After 40 years of implementation of the Indian Reorganization Act, approximately 595,000 acres were purchased for tribal use; in contrast, Indian nations had lost approximately 90 million acres between 1887 and 1934. Thus, this policy was unsuccessful in restoring lands to tribal ownership. Caldwell-Hill, *supra* note 14, at 93-94.

⁴⁶ Under this law, no powers vested in tribes under past laws and treaties could be diminished without tribal consent. American Friends Service Committee, *supra* note 39, at 48-49; Cohen, *supra* note 20, at 86; Deloria, *supra* note 39, at 13-14.

challenges to its separate treatment of Native Americans under the equal protection clause of the U.S. Constitution.⁴⁷

As demonstrated by this chronology of legislative action, the status of tribes in the U.S. changed from that of independent sovereigns to domestic dependent nations, and federal tribal policy evolved from removal and establishment of reservations, to attempted assimilation in mainstream American culture, to promotion of tribal self-governance.⁴⁸ In the late 1940s through the 1960s, a fundamental shift occurred in federal Indian policy towards forced assimilation through the termination of relationships between the U.S. government and the tribes,⁴⁹ making Indians subject to the same laws as other U.S. citizens.⁵⁰ To facilitate termination, Congress created the Indian Claims Commission (ICC)⁵¹ in 1946 to expedite all outstanding claims with the tribes and provide some just compensation for Indians who were precluded from bringing claims before existing courts.⁵² This shift in federal Indian policy towards termination was also

⁴⁷ In the case of *Morton v. Mancari* (1974), for example, the courts upheld the legality of the Indian preference provision of the 1934 Indian Reorganization Act. 417 U.S. 535; O'Brien, *supra* note 22, at 1467.

⁴⁸ O'Brien, *supra* note 4, at 258.

⁴⁹ By 1961, the U.S. Congress terminated its relationship with 109 Indian bands and tribes. O'Brien, *supra* note 2, at 44.

⁵⁰ House Concurrent Resolution 108, 83rd Congress, 1st session, passed August 1, 1953. *U.S. Statutes at Large* 67:B132; O'Brien, *supra* note 4, at 258.

⁵¹ Act of August 11, 1946. 60 Stat. 1049.

⁵² In 1863, the U.S. Congress prohibited the Court of Claims from hearing any suits involving Indian treaty claims without a special jurisdictional act admitting the Indian nation into court. Therefore, prior to creation of the ICC, there was little resolution for tribes seeking retribution for injustices, including underevaluation of their land and lack of government compliance with treaty provisions. The ICC was authorized to award monetary compensation to the tribes, but it could not return land, to the dismay of many tribes who sought to have their land returned. Act of March 3, 1863, *supra* note 42, at 767; American Friends Service Committee, *supra* note 39, at 49; Washburn, W.E. (1985). Land claims in the mainstream. In Sutton, I. (Ed.) *Irredeemable America*. University of New Mexico: Albuquerque, NW, p. 23-24; Rosenthal, H.D. (1990). *Their Day in Court: A History of the Indian Claims Commission*. Garland Press: New York, NY, p. 170; Lyons, *supra* note 18, at 288.

illustrated by enactment of Public Law 280, which gave certain states permission to assume jurisdiction over Indian reservations.⁵³

The outcry that resulted from the termination policies and the refusal of tribes to surrender their right to self-governance led to a critical development in federal Indian policy under President Nixon towards tribal self-determination during the late 1960s and 1970s.⁵⁴ This shift in federal Indian policy led to the passage and enactment of several laws by Congress that promoted self-determination and economic development.⁵⁵ Yet, as the U.S. Government sought to encourage greater tribal self-governance, state regulatory agencies desired to maintain their jurisdiction over hunting and fishing rights on Native American lands.⁵⁶ The assertion of regulatory authority by some states over tribal hunting and fishing resulted in litigation in various parts of the nation, and tribes fought to protect hunting and fishing rights that had been reserved in historic land cession treaties.

⁵³ Public Law 280. 83rd Congress, 1st session, passed August 15, 1953. *U.S. Statutes at Large* 67: 588-90.

⁵⁴ In his Special Message on Indian Affairs on July 8, 1970, President Nixon stated, *It is long past time that the Indians policies of the Federal government began to recognize and build upon the capacities and insights of the Indian people. Both as a matter of justice and as a matter of enlightened social policy, we must begin to act on the basis of what the Indians themselves have long been telling us. The time has come to break decisively with the past and to create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions.*

In his conclusion, he emphasized,

As recently as August of 1953, in House Concurrent Resolution 108, the Congress declared that termination was the long-range goal of its Indian policies. This would mean that Indians would eventually lose any special standing they had under Federal law...[and] be assimilated into the society at large....In short, the fear of one extreme policy, forced termination, has often worked to produce the opposite extreme: excessive dependence on the Federal government....This, then, must be the goal of any new national policy toward the Indian people: to strengthen the Indian's sense of autonomy without threatening his sense of community.

Message From the President of the United States Transmitting Recommendations for Indian Policy. *H.R. Doc. No. 363, 91st Congress, 2nd session* (1970).

⁵⁵ These laws included the Indian Civil Rights Act of 1968, the Indian Self Determination Act of 1975, the Indian Child Welfare Act of 1978, the Indian Tribal Government Tax Status Act of 1982, the Indian Religious Freedom Act of 1978, and the Indian Gaming Regulatory Act of 1988. O'Brien, *supra* note 4, at 258; Pevar, *supra* note 29, at 8-9.

⁵⁶ McCorquodale, S.M. (1999). Historical and contemporary policies regarding off-reservation hunting by Native Americans. *Wildlife Society Bulletin*, 27(2), 446-455, p. 451.

Native Treaty Fishing Rights

When the U.S. government sought to gain Indian lands through land cession treaties during the 1800s, the reservation of rights within these documents often included the rights to fish and hunt in traditional locations.⁵⁷ Treaties with Indian nations have the same force and effect as treaties with foreign nations,⁵⁸ are considered the supreme law of the land,⁵⁹ and can only be abrogated by an Act of Congress.⁶⁰ Therefore, these historic documents remain an important source of Indian fishing and hunting rights.⁶¹ However, the extent of these rights has been called into question as various states sought to exert regulatory power over fish and game management.

Significantly, state laws cannot be applied to Indian tribes if they interfere with tribal rights to self-governance, or if they are preempted by treaties or federal law.⁶² Tribal members cannot be restricted from crossing private land to access treaty-protected traditional fishing locations,⁶³ and they cannot be charged a license fee to exercise their treaty rights.⁶⁴ Yet, if state interests are affected sufficiently, some courts have determined that they may override tribal self-governance, and the states may regulate

⁵⁷ In *United States v. Winans* (1905), Justice McKenna held that treaty rights are not rights that have been given to the Indians, “but a grant of rights from them – a reservation of those not granted.” 198 U.S. 371, 381.

⁵⁸ *Worcester v. Georgia*, *supra* note 19, at 515.

⁵⁹ Article VI, clause 2 of the U.S. Constitution states,

This constitution, and the laws of the United States shall be made in pursuant thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding.

⁶⁰ *Lone Wolf v. Hitchcock*, *supra* note 27, at 553.

⁶¹ Significantly, a reservation of hunting and fishing rights is not necessary on tribal lands since they are part of the tribe’s larger set of rights bestowed upon them with ownership of the land. Cohen, *supra* note 20, at 285-286.

⁶² *Missouri v. Holland*, 252 U.S. 416 (1920); *Williams v. Lee*, 358 U.S. 217, 220 (1959).

⁶³ *United States v. Winans*, *supra* note 57, at 384.

⁶⁴ *Tulee v. Washington*, 315 U.S. 681, 685 (1942).

treaty-right tribal fishing. However, the extent of this regulation was unclear.⁶⁵ Some of the first and most influential cases that sought to define Native treaty fishing rights and determine the extent of permissible state regulation of these rights originated from the State of Washington.

Native Treaty Fishing Rights: State of Washington

Conflict over state regulation of treaty right tribal fishing erupted in Washington during the late 1960s as the Department of Game banned the use of nets to harvest anadromous salmon and steelhead trout in the Puyallup and Nisqually Rivers,⁶⁶ due to dramatic declines in these fish stocks.⁶⁷ This ban extended over treaty-protected rights of the Puyallup and Nisqually Indians to net fish for subsistence and commercial purposes within these waters where they had been fishing for centuries, and their ancestors had reserved this right in the Treaty of Medicine Creek of 1854.⁶⁸ This treaty contained the following important clause, “*The right of taking fish, at all usual and accustomed*

⁶⁵ State regulation of tribal treaty fishing rights was first discussed in the decisions of *United States v. Winans* (1905). In *Winans*, the court held, “[S]urely it was within the competency of the Nation to secure to the Indians such a remnant of the great rights they possessed as ‘taking fish at all usual and accustomed places.’ Nor does it restrain the State unreasonably, if at all, in the regulation of the right.” *United States v. Winans*, *supra* note 57, at 384. In *New Mexico v. Mescalero Apache Tribe*, the Court also held, “State jurisdiction is preempted by the operation of federal law if it interferes with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority.” 462 U.S. 324, 334 (1983); Canby, W.C. (1998). *American Indian Law in a Nutshell* (3rd ed). West Group: St. Paul, MN, p. 82-83.

⁶⁶ *Puyallup Tribe v. Department of Game of Washington*, 391 U.S. 392, 395-396 (1968); Canby, *supra* note 65, at 429-430.

⁶⁷ Several factors have been cited for the demise of the salmonid stocks in these rivers, including significant increases in non-Indian commercial and recreational harvest. In 1969, Indians harvested approximately 5% of salmon harvested in the States of Oregon and Washington, as the sportfishing harvest of chinook salmon increased from 84,400 in 1946 to 267,000 in 1969 and the number of non-Indian commercial fishing licenses increased from 1,822 trollers in the State of Washington in 1965 to 3,232 in 1977. The Washington Department of Fisheries also blamed environmental degradation – resulting from increased development in the Pacific Northwest – for salmon depletion. Dams have blocked fish passage; water quality has diminished due to agricultural, industrial and sewage disposal and runoff; riverbank vegetation were also reduced, causing greater sedimentation; and water has been withdrawn for irrigation, leading to increased water temperatures. American Friends Service Committee, *supra* note 39, at 165; House of Representatives Report No. 1243, 96th Congress, 2d. Session 1, 34 (1980).

⁶⁸ Treaty with the Nisquallys, 10 Stat. 1132 (1855).

grounds and stations, is further secured to said Indians, in common with all citizens of the Territory.”⁶⁹ As the regulatory agency in the State of Washington exerted jurisdiction over the exercise and management of treaty-right tribal fishing, Indians in this region and around the country started becoming more active in fighting violations of their treaty rights through demonstrations and protests.⁷⁰ Litigation ensued as the State of Washington sought an injunction against the tribes, and the case of *Puyallup Tribe v. Department of Game of Washington* reached the U.S. Supreme Court in 1968.⁷¹ In its decision, the Court affirmed the decision of the Washington State Supreme Court, granting the Indians the right to fish off-reservation at accustomed sites⁷² that were protected under the Treaty of Medicine Creek.⁷³ The Court held that the tribes could hunt and fish off-reservation without state regulation, unless the state regulation is in the interest of conservation and does not discriminate against the Indians.⁷⁴ This decision,

⁶⁹ *Id.* at 1132-1133.

⁷⁰ In response to encroachment on their treaty rights, activist Indian organizations were formed, such as the National Indian Youth Council (NIYC) and the American Indian Movement (AIM). “Fish-ins” were held in the State of Washington to publicize tribal treaty rights, as well as the “Trail of Broken Tears,” which resulted in the seizure of the Bureau of Indian Affairs headquarters. *Hearings Before the Subcommittee on Indian Affairs of the Committee on Interior and Insular Affairs*. House of Representatives, 92nd Congress, 2d session, (1972), p. 162-171; Deloria, V. (1974). *Behind the Trail of Broken Treaties*. Delacorte Press: New York, NY, p. 25-27; Prucha, *supra* note 20, at 410-415.

⁷¹ *Puyallup v. Department of Game*, *supra* note 66.

⁷² As Indians surrendered greater amounts of land and became concentrated within smaller reservations, off-reservation fishing remained critical for subsistence and ceremonial practices. Hornstein, D.T. (1982). Indian fishing rights return to spawn: Toward environmental protection of treaty fisheries. *Oregon Law Review*, 61(1), p. 102-103.

⁷³ *Puyallup v. Department of Game*, *supra* note 66, at 402-403.

⁷⁴ The Court held,

The treaty right is in terms the right to fish “at all usual and accustomed places.” We assume that fishing by nets was customary at the time of the Treaty; and we also assume that there were commercial aspects to that fishing as there are at present. But the manner in which the fishing may be done and its purpose, whether or not commercial, are not mentioned in the Treaty. We would have quite a different case if the Treaty had preserved the right to fish at the “usual and accustomed places” in the “usual and accustomed” manner. But the Treaty is silent as to the mode or modes of fishing that are guaranteed....the manner of fishing, the size of take, the restriction of commercial fishing, and the like may be regulated by the State in the interest of conservation, provided the regulation meets the appropriate standards and does not discriminate against the Indians.

Id. at 398.

referred to as *Puyallup I*, was significant because it allowed some state regulation of treaty right tribal fishing⁷⁵ under “appropriate standards.”⁷⁶

Subsequent to this ruling, Washington State’s Department of Game banned all tribal net fishing of steelhead trout in order to provide sufficient harvest for the sport fishery, and the case returned to the U.S. Supreme Court.⁷⁷ In this ruling, the Supreme Court held that the conservation measures implemented by the Washington Department of Game discriminated against the Indians,⁷⁸ and that accommodation had to be made for

⁷⁵ Significantly, Johnson (1972) pointed out that there is no valid legal basis for state power over treaty-right tribal fishing as the Court determined in *Puyallup I*, since treaties are the supreme law of the land under the supremacy clause of the U.S. Constitution, and the U.S. Congress has not authorized state regulation of these rights. He argued that although the treaty phrase, “in common with all citizens of the Territory” is often cited as the source of states’ rights to regulate tribal fishing, this phrase should be interpreted to permit non-tribal harvest in addition to tribal harvest of the fishery, as the Court held in *State v. Satiacum*. In this case, the Washington State Supreme Court concluded that off-reservation fishing was not subject to state regulation as long as the U.S. government has not abrogated the right. 314 P.2d 400, 406 (1957); Johnson, R.W. (1972). The states versus Indian off-reservation fishing: A United States Supreme Court error. *Washington Law Review*, 47(2), p. 207-209.

⁷⁶ In the decision, *Puyallup v. Department of Game*, Justice Douglas held that, *The treaty right is in terms the right to fish “at all usual and accustomed places.” We assume that fishing by nets was customary at the time of the Treaty; and we also assume that there were commercial aspects to that fishing as there are at present. But the manner in which the fishing may be done and its purpose, whether or not commercial, are not mentioned in the Treaty... But the Treaty is silent as to the mode or modes of fishing that are guaranteed. Moreover, the right to fish at those respective places is not an exclusive one. Rather, it is one “in common with all citizens of the Territory.” Certainly the right of the latter may be regulated. And we see no reason why the right of the Indians may not also be regulated by an appropriate exercise of the policy power of the State. The right to fish “at all usual and accustomed” places may, of course, not be qualified by the State, even though all Indians born in the United States are now citizens of the United States... But the manner of fishing, the size of the take, the restriction of commercial fishing, and the like may be regulated by the State in the interest of conservation, provided the regulation meets the appropriate standards and does not discriminate against the Indians.*

Puyallup Tribe v. Department of Game, *supra* note 66, at 398.

These “appropriate standards” in *Puyallup* were later defined by the U.S. Supreme Court: *[T]he “appropriate standards” requirement means that the State must demonstrate that its regulation is a reasonable and necessary conservation measure, ...and that its application to the Indians is necessary in the interests of conservation.*

Antoine v. Washington, 420 U.S. 194, 207 (1975).

⁷⁷ *Department of Game of Washington v. Puyallup Tribe (Puyallup II)*, 414 U.S. 44 (1973).

⁷⁸ According to Justice Douglas of the U.S. Supreme Court, the Supreme Court of Washington upheld the Department of Game of Washington’s prohibition on tribal netting of steelhead trout since “*the catch of the steelhead sports fishery alone in the Puyallup River leaves no more than a sufficient number of steelhead for escapement necessary for the conservation of the steelhead fishery in that river* [quoting 80 Wash. 2d. 573].” However, Justice Douglas reversed this ban on the condition that it was discriminatory against the Indians. He held,

Indian treaty right fishing and non-Indian fishing. Thus, fishing opportunities must extend to both user groups. The Court remanded the case to the lower court for a determination of a fair apportionment of the steelhead catch between the Indian net fishers and non-Indian sports fishers.⁷⁹ Notably, the Court clarified that if a ban on fishing is needed to save a species from extirpation, then the ban should apply to Indians and non-Indians alike.⁸⁰

Changing circumstances resulted in the usual fishing locations of the Puyallup and Nisqually Indians being designated as on-reservation, instead of off-reservation sites. Among the issues considered when the *Puyallup* case returned to the U.S. Supreme Court for the third time in 1976,⁸¹ the tribes asserted that the State of Washington could not regulate tribal on-reservation fishing, and therefore could not regulate fishing at the tribes' usual and accustomed sites in the Puyallup and Nisqually Rivers.⁸² The Court disagreed, stating that the tribes' right to fish was not an exclusive one and that a fair

There is discrimination here because all Indian net fishing is barred and only hook-and-line fishing entirely pre-empted by non-Indians, is allowed...If hook-and-line fishermen now catch all the steelhead which can be caught within the limits needed for escapement, then that number must in some manner be fairly apportioned between Indian net fishing and non-Indian sports fishing so far as that particular species is concerned...The aim is to accommodate the rights of Indians under the Treaty and the rights of other people.

Id. at 48-49.

⁷⁹ *Puyallup Tribe v. Department of Game of Washington (Puyallup III)*, 433 U.S. 175 (1976).

⁸⁰ The Court stated,

We do not imply that these fishing rights persist down to the very last steelhead in the river...The police power of the State is adequate to prevent the steelhead from following the fate of the passenger pigeon, and the Treaty does not give the Indians a federal right to pursue the last living steelhead until it enters their net.

Puyallup II, *supra* note 77, at 49.

⁸¹ *Puyallup III*, *supra* note 79, at 165.

⁸² Many of the "accustomed grounds and stations" where the tribes fished were determined in 1974 to be on-reservation sites, although these lands were no longer owned by the tribes. Therefore, the tribes sought to have the court determine the extent of state jurisdiction over these on-reservation sites that were previously thought to be off-reservation sites. *United States v. State of Washington*, 496 F.2d 620 (9th Cir.) (1974).

allocation of the fishery would be impossible if the tribes had unlimited harvest of the fishery.⁸³

The *Puyallup* decisions of the Supreme Court were significant because they demonstrated a shift in judicial interpretation of treaty fishing rights towards allowing state regulation of these rights when there is a demonstrated need for conservation – both off-reservation and on-reservation – so long as the regulation does not discriminate against the Indians.⁸⁴ These decisions are also important because they eroded treaty rights and tribal sovereignty.

As the *Puyallup* cases were in litigation, the United States brought suit in Federal District Court on behalf of seven Indian tribes⁸⁵ seeking an interpretation of treaties⁸⁶ and an injunction requiring the State of Washington to protect the Indians' share of the anadromous fish runs.⁸⁷ After studying the complex issues surrounding this case for three and a half years, District Court Judge Boldt provided an extended opinion outlining the principles for regulation of treaty right tribal fishing.⁸⁸ He distinguished federally protected treaty fishing rights of Indians, from the privilege of citizens within the State of

⁸³ *Puyallup III*, *supra* note 79.

⁸⁴ Importantly, state regulation of on-reservation treaty fishing rights is rare, as this decision was overturned by the Supreme Court in *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658, 683-684 (1979).

⁸⁵ The plaintiff tribes included the Hoh Tribe, Lummi Tribe, Makah Tribe, Muckleshoot Tribe, Nisqually Tribe, Puyallup Tribe, Quileute Tribe, Quinault Tribe, Sauk-Suiattle Tribe, Skokomish Tribe, Squaxin Island Tribe, Stillaguamish Tribe, Upper Skagit River Tribe and Yakima Nation. *United States v. State of Washington*, 384 F.Supp. 312, 326-327 (W.D.Wash. 1974), *aff'd*, 520 F.2d. 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976).

⁸⁶ Nearly identical language to the important phrase within the Treaty of Medicine Creek with the Puyallup and Nisqually Indians is also found in the other treaties with Indians within the State of Washington, including the Treaty of Point Elliot, 12 Stat. 927 (1863); and the Treaty with the Yakima, 23 Stat. 951 (1863).

⁸⁷ *United States v. State of Washington*, *supra* note 85.

⁸⁸ Prucha, *supra* note 20, at 404-405.

Washington to fish under state regulation.⁸⁹ The “Boldt decision,” as it was referred to, was significant since it was one of the first cases to consider allocation of a treaty fishery. In his opinion, Judge Boldt examined a first federal district court decision in which the court held that the state has a responsibility to regulate its fishery so Indians have an opportunity for a fair and equitable share of the harvest.⁹⁰ He decided that the Indians were entitled to between 45% and 50% of the harvestable run of fish – in addition to the fish caught on reservations for ceremonial and subsistence purposes, and Judge Boldt entered an injunction that required regulations to be adopted by the State that protected Indian treaty fishing rights.⁹¹ The U.S. Supreme Court upheld this decision in 1979.⁹²

This decision sparked protests and confrontations in Washington, including vandalism of tribal fishing equipment and shootings.⁹³ Non-Indian fishers argued against tribal treaty fishing rights as unfair “superior rights,”⁹⁴ which led to litigation in state court.⁹⁵ Social tension and turmoil became so great that the Congressional delegation from the State of Washington asked President Carter to appoint a federal task force to resolve the controversy.⁹⁶ Defiance of the District court’s ruling⁹⁷ led to supervision of

⁸⁹ McMinds, G.R. (1979). The Northwest fishing rights controversy: An Indian perspective. *North American Wildlife Conference Transactions*. No. 44, p. 605-606.

⁹⁰ *Sohappy v. Smith*, 302 F. Supp. 899 (1969). In *U.S. v. Washington*, the formula Judge Boldt used for allocation of the fishery was based on calculations that were conducted for each river and each run of fish. *United States v. Washington*, *supra* note 85, at 416-417.

⁹¹ *Id.*

⁹² *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, *supra* note 84, at 658-708.

⁹³ Deloria, *supra* note 70; McMinds, *supra* note 89, at 605-608, 612-613; Senate Report No. 667, 96th Congress, 2d. Session, 1-2 (1980).

⁹⁴ Williams (1986) purports in his essay that non-conservationist Indians abuse of treaty rights are to blame for the overharvest of species. Williams, T. (1986). *Don't Blame the Indians: Native Americans and the Mechanized Destruction of Fish and Wildlife*. GSJ Press: South Hamilton, MA.

⁹⁵ The District Court decision was challenged on the basis that treaty interpretation in favor of the Indians violated the Equal Protection Clause under the fourteenth Amendment of the U.S. Constitution. *Puget Sound Gillnetters Association v. Moos*, 565 P.2d 1151 (1977); *Washington State Commercial Passenger Fishing Vessel Association v. Tollefson*, 571 P.2d 1373 (1977).

⁹⁶ The Task Force was appointed, and the report was completed in June of 1978. In its report, the Task Force recommended that there is an increase in the available fish for harvest, a reduction in the fishing

the state fishery by the Federal District Court,⁹⁸ and collective review of Judge Boldt's decision and several state court decisions by the U.S. Supreme Court in 1979. In this case, *Washington v. Washington State Commercial Passenger Fishing Vessel Association*,⁹⁹ the Supreme Court determined that Indian and non-Indian fishers must be granted a share of the fishery.¹⁰⁰ Importantly, the Court held that the maximum allowable tribal harvest of the total available fish runs is 50%.¹⁰¹ In subsequent decisions surrounding these issues, the Supreme Court has applied, clarified and developed these judicial principles guiding state regulation of treaty right tribal fishing.¹⁰²

effort of non-Indian fishers, and an increase in harvest opportunities for treaty-right tribal fishers. Senate Report, *supra* note 93, at 3.

⁹⁷ The State of Washington was adamantly opposed to this ruling and refused to enforce it. Prucha, *supra* note 20, at 405.

⁹⁸ *United States v. Washington*, 459 F.Supp. 1020 (W.D.Wash), *aff'd*, 573 F.2d 1123 (9th Cir. 1978).

⁹⁹ *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, *supra* note 84, at 672-673.

¹⁰⁰ The Court held,

The purport of our cases is clear. Non-treaty fishermen may not rely on property law concepts, devices such as the fish wheel, license fees, or general regulations to deprive the Indians of a fair share of the relevant runs of anadromous fish in the case area. Nor may treaty fishermen rely on their exclusive right of access to the reservations to destroy the rights of other "citizens of the Territory." Both sides have a right, secured by treaty, to take a fair share of the available fish. That, we think, is what the parties to the treaty intended when they secured to the Indians the right of taking fish in common with other citizens.

Id. at 684-685.

¹⁰¹ The Court explained,

It bears repeating, however, that the 50% figure imposes a maximum but not a minimum allocation...the central principle here must be that Indian treaty rights to a natural resource that once was thoroughly and exclusively exploited by the Indians secures so much as, but no more than, is necessary to provide the Indians with a livelihood – that is to say, a moderate living. Accordingly, while the maximum possible allocation to the Indians is fixed at 50%, the minimum is not.

Id. at 686-687.

¹⁰² For example, it determined that the state cannot limit Indian rights to harvest fish and game that remain on-reservation, the tribes' share of 50% of the fishery includes state-raised hatchery fish and applies to the total harvestable run of fish. State regulation of treaty fishing must be the least restrictive method necessary, maintain treaty rights as co-equal to other uses of the fishery, and provide fair opportunities to the tribes to take a fair portion of fish from each run. *United States v. State of Washington*, 694 F.2d 188 (9th Cir. 1982), *cert. denied*, 463 U.S. 1207 (1983); *United States v. State of Washington*, 759 F.2d 1353 (9th Cir. 1985); *United States v. State of Washington*, 774 F.2d 1470 (9th Cir. 1985); *United States v. State of Oregon*, 769 F.2d 1410 (9th Cir. 1985).

Beyond their important contribution to the fields of Indian law and Native treaty fishing rights, the Washington cases were significant in laying a foundation for litigation of treaty fishing in other parts of the country, including the State of Michigan.

Native Treaty Fishing Rights: State of Michigan

In 1930, the first court case was brought forth in the State of Michigan over state regulation of tribal treaty fishing rights. In this case, *People v. Chosa*,¹⁰³ members of the L'Anse Band in Baraga County were convicted of violating state fishing laws in the Keweenaw Bay of Lake Superior. Since Keweenaw Bay within the L'Anse Reservation was set aside by treaties, the defendants argued that the Chippewa retained the right to fish and hunt off-reservation in these waters.¹⁰⁴ Upon appeal to the Michigan Supreme Court, the court held that although Indians retained the rights to hunt and fish on their reservation under historic treaties, the Indians were not immune from state laws off-reservation.¹⁰⁵

This decision defined the relationship of Indian treaty fishing under Michigan law until 1965, when William Jondreau, a Chippewa Indian, brought another challenge to state regulation of treaty protected fishing rights after being arrested for illegal possession of four lake trout. Upon appeal of this case to the Michigan Supreme Court in 1971,¹⁰⁶ Jondreau argued that he had the right to fish in treaty-ceded waters without state regulation¹⁰⁷ based upon Articles 2 and 11 of the Treaty of September 30, 1854.¹⁰⁸

Although the Michigan Supreme Court unanimously overruled *People v. Chosa* and

¹⁰³ *People v. Chosa*, 252 Mich 160; 233 N.W. 205 (1930).

¹⁰⁴ In the Treaty of July 29, 1837 and the Treaty of October 4, 1842, the Chippewa Indians ceded western Michigan, northern Wisconsin and eastern Minnesota. Kappler, C.J. (1940-1941). *Indian Affairs: Laws and Treaties*. Washington, D.C.: Government Printing Office, p. 491-493, 542-545.

¹⁰⁵ *People v. Chosa*, *supra* note 103.

¹⁰⁶ *People v. Jondreau*, 384 Mich. 539 (1971).

¹⁰⁷ *Id.* at 541-542.

¹⁰⁸ Treaty of September 30, 1854, 10 Stat. 1109.

agreed with Jondreau,¹⁰⁹ the implications of this decision were not clear since the court limited its ruling to the Ottawa and Chippewa bands of the L'Anse Reservation and the Bay Mills Indian Community, and it did not address the distinction between state regulation of on-reservation or off-reservation fishing.¹¹⁰ Even though this case decision was narrow in its holding, it represented a pivotal shift away from state regulation of treaty-protected fishing rights within the State of Michigan.¹¹¹

In a similar case in 1971, Albert LeBlanc, a Bay Mills Chippewa, challenged the state's authority to issue regulations over tribal fishing with the assistance of the Upper Peninsula Legal Services.¹¹² LeBlanc had been arrested for commercial fishing without a state license and fishing with gill nets in Lake Superior. The Michigan DNR had prohibited use of gill nets since they believed these nets caused high fish mortality.¹¹³ LeBlanc asserted that Ottawa and Chippewa Indians maintained off-reservation fishing rights under Article XIII of the Treaty of Washington – often referred to as the 1836 Treaty.¹¹⁴ This particular treaty was extremely significant since under its terms Ottawa and Chippewa bands ceded most of northwestern Michigan in the Lower Peninsula and most of the Upper Peninsula of Michigan to the United States government.¹¹⁵ In exchange for the land granted to the United States government, the Ottawa and Chippewa

¹⁰⁹ *People v. Jondreau*, *supra* note 106, at 552.

¹¹⁰ Brandimore, K. (1978). Indian law – treaty fishing rights – the Michigan position. *Wayne Law Review*, 24(3): 1187-1204, p. 1196; Connors, P.G. (1999). *Michigan Indian Fishing Rights Controversy*. (Research Report vol. 19, no. 3). Lansing, MI: Michigan Legislative Service Bureau, Legislative Research Division, p. 5.

¹¹¹ Importantly, the Michigan Supreme Court in the case of *Jondreau* rejected the assertion made in *Puyallup I* that state regulation of treaty right fishing is permissible for purposes of conservation. *People v. Jondreau*, *supra* note 106, at 552.

¹¹² *People v. LeBlanc*, 55 Mich. App. 684 (1974), 399 Mich. 31 (1976).

¹¹³ Tanner, H.A., Patriarche, M.H., & Mullendore, W.J. (1980). *Shaping the World's Finest Freshwater Fishery*. Lansing, MI: Michigan Department of Natural Resources, p. 55.

¹¹⁴ Treaty of Washington, 7 Stat. 491 (1836).

¹¹⁵ *Id.*; Tanner, H.H. (1974). Report *United States v. State of Michigan* No. M 26-73 C.A., U.S.D.C (Western District of Michigan, Northern Division), p. 12.

Indians reserved in the treaty, “...*the right of hunting on the land ceded, with the other usual privileges of occupancy, until the land is required for settlement.*”¹¹⁶ As a descendant of Chippewa ancestors that were signatories to the 1836 Treaty, LeBlanc was granted the right to fish without a state license by the Michigan Court of Appeals. However, the Court remanded the case to the circuit court to determine if the State of Michigan’s prohibition on gill net use was necessary to prevent depletion of fish stocks,¹¹⁷ based upon the ruling of the U.S. Supreme Court in the 1968 case of *Puyallup Tribe v. Department of Game*.¹¹⁸ In this case, the Supreme Court ruled that although state law cannot qualify Indian fishing rights protected by treaty, states could regulate aspects of fishing as long as the regulations are nondiscriminatory to the Indians and are necessary for the conservation of fish.¹¹⁹

Upon appeal of this case, the Michigan Supreme Court ruled in favor of LeBlanc in 1976.¹²⁰ Justice Williams held that descendants of Ottawa and Chippewa Indian bands maintained fishing rights under the 1836 Treaty that could only be restricted by state regulations that meet the standards established in the *Puyallup* case. Thus, the Michigan Supreme Court affirmed the Michigan Court of Appeals decision and remanded the case to the circuit court for a determination of whether or not the State of Michigan’s

¹¹⁶ Treaty of Washington, *supra* note 114.

¹¹⁷ *People v. LeBlanc*, *supra* note 112, at 691-693.

¹¹⁸ *Puyallup v. Department of Game*, *supra* note 66.

¹¹⁹ In *People v. LeBlanc*, the Michigan Court of Appeals based its arguments on the precedence of the U.S. Supreme Court decision of *Tulee v. State of Washington*, 315 U.S. 681, 684-685 (1942). In this decision, Justice Black stated that state regulation of treaty right Indian fishing may be necessary for conservation purposes, although imposition of license fees on Indians for treaty right fishing is not permissible. He stated,

...while the treaty [Treaty with the Nisqually and Other Indians, 10 Stat. 1132, 1133 (1854)] leaves the state with power to impose on Indians, equally with others, such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish, it forecloses the state from charging the Indians a fee.

People v. LeBlanc, *supra* note 112, at 691-693.

¹²⁰ *Id.*

prohibition on gill net use: 1) was necessary for preservation of the fish stocks protected by the regulation; 2) must be applied to Chippewas for preservation of the fish stocks; and 3) was not discriminatory.¹²¹ Importantly, although the 1836 Treaty did not contain the same provision as the Treaty of Medicine Creek, in which Washington tribes reserved fishing rights, “*at all usual and accustomed grounds and stations...in common with all citizens of the territory* [Emphasis added],”¹²² the Michigan Supreme Court determined that the reserved treaty rights of the Michigan tribes were not exclusive rights.¹²³

As *LeBlanc* was in remand, two other important cases were litigated that affected Native rights in the State of Michigan. The first case was resolution of a dispute by the Indian Claims Commission between the Bay Mills Indian Community, the Sault Ste. Marie Band of Chippewa Indians, and the Grand Traverse Band of Ottawa and Chippewa Indians against the U.S. Department of Interior. This case was brought by the tribes who sought fair compensation when they ceded over twelve million acres of northern Michigan lands to the U.S. government under the 1836 Treaty. The Commission ruled that the tribes had retained “aboriginal title” over the ceded lands. At the time of land cession, the U.S. only paid the Indians twelve cents per acre, although the lands had been

¹²¹ *Id.* at 64.

¹²² Treaty of Medicine Creek, 10 Stat. 1132 (1855).

¹²³ Justice Williams held that based on Article 13 in the Treaty of Washington which states, “The Indians stipulate for the right of hunting on the lands ceded, with the other usual privileges of occupancy, until the land is required for settlement,” must be interpreted to indicate that “...the interests and rights of the other citizens of the territory were to be taken into account.” Although Justice Williams stated that Indians are granted rights different from the citizens of Michigan, he interpreted Article 13 of the Treaty of Washington to mean that “...as in *Puyallup Tribe*, *supra*, the Indians hold their off-reservation fishing rights in common with the citizens of the State of Michigan.” *People v. LeBlanc*, *supra* note 112, at 60-61.

Brandimore (1978) disputes this interpretation of the court under the canons of treaty interpretation that requires the court system to base their interpretation of treaties on how the Indians would have understood them at the time of signing. Since the waters of the Great Lakes could never be settled, Brandimore argues that the court misconstrued the Treaty of Washington in its interpretation. Brandimore, *supra* note 110, at 1198.

worth ninety cents per acre. Thus, the Commission awarded compensation to the tribes for the value of these lands.¹²⁴

The second significant pending case involved a case over state regulation of tribal treaty fishing rights in federal court in the western district of Michigan. Due to the state's resistance to treaty-right fishing, the United States Departments of Justice and the Interior sought to fulfill their trustee responsibilities with respect to the tribes of northern Michigan by bringing a suit against the State of Michigan on April 9, 1973 on behalf of the Bay Mills Indian Community and itself to protect the tribe's rights to fish in certain waters of the Great Lakes. They argued that these rights were obtained by aboriginal occupation and use of these waters and by various treaties, including the Treaty of Ghent of 1814, and the 1836 Treaty. In this case, the United States asked that the State of Michigan be enjoined from restricting the Indians' treaty fishing rights in the Great Lakes.¹²⁵ The Bay Mills Indian Community intervened in this action on December 12, 1974, and named individual officials of the Michigan Department of Natural Resources (DNR) as defendants in its complaint. Bay Mills alleged that they had a reserved exclusive fishing right in Whitefish Bay of Lake Superior without state regulation, and they sought declaratory and injunctive relief from state interference with its fishing rights. On October 28, 1975, the Bay Mills Indian Community added the DNR as a defendant and alleged a treaty protected right to fish in all ceded areas of the Great Lakes under the 1836 Treaty without state regulation. Later, the Sault Ste. Marie tribe of

¹²⁴ *Bay Mills Indian Community v. U.S.*, 26 Indian Claims Commission 538 (1972).

¹²⁵ *United States v. State of Michigan*, 471 F. Supp. 192, 203-204 (W.D. Mich. 1979). *remanded*, 623 F.2d 448 (6th Cir. 1980), *as modified*, 653 F.2d 277 (6th Cir. 1981), *cert. denied*, 454 U.S. 1124 (1981).

Chippewa Indians and the Grand Traverse Band of Ottawa and Chippewa Indians intervened in this action as plaintiffs.¹²⁶

In their response to these claims, the State of Michigan, representing itself and the DNR, alleged that the Ottawa and Chippewa Indians of northern Michigan gave up their treaty fishing rights when they ceded territory under the 1836 Treaty.¹²⁷ The state also claimed that the federal Removal Act of 1830¹²⁸ forced the displacement of the Indians from northern Michigan and an abandonment of their fishing rights. Furthermore, the State of Michigan alleged that tribal fishing rights under the 1836 Treaty were abrogated in the Treaty of 1855, in which the Ottawa and Chippewa Indians released the United States from its legal and equitable claims to the tribes under previous treaties.¹²⁹ From the suit brought by the United States and the defenses raised by the State of Michigan, three issues were examined by federal district court Judge Fox in this trial: 1) did Indians reserve fishing rights in the ceded waters of the Great Lakes under the 1836 Treaty;¹³⁰ 2) if these rights were retained, were they given up or diminished by the subsequent Treaty of 1855;¹³¹ and 3) if these reserved fishing rights were given up or diminished by the Treaty of 1855, does the State of Michigan have jurisdiction to regulate treaty right fishing by the Indians?¹³²

Judge Fox determined that the burden of proof for the tribes to establish that they reserved fishing rights in the treaty-ceded waters of the Great Lakes was to demonstrate historic use and dependence upon the fishery. To meet this burden of proof, historic

¹²⁶ *Id.* at 204.

¹²⁷ Treaty of Washington, *supra* note 114.

¹²⁸ Indian Removal Act, *supra* note 31.

¹²⁹ Treaty of 1855, 11 Stat. 624.

¹³⁰ Treaty of Washington, *supra* note 114.

¹³¹ Treaty of 1855, *supra* note 129.

¹³² *United States v. State of Michigan*, *supra* note 125, at 218.

records of the upper Great Lakes were presented by several anthropologists that revealed an increasing significance of the Great Lakes fishery over time to the Indian people of the treaty ceded area within the upper Great Lakes for subsistence and commercial fishing. During the trial, historians provided evidence that fishing remained an important source of food and income after European settlement.¹³³

In his determination of whether or not the tribes reserved fishing rights in the ceded waters of the Great Lakes, Judge Fox also analyzed the 1836 Treaty while adhering to a set of legal principles, referred to as the "Canons of Treaty Interpretation."¹³⁴ These canons result from the particular circumstances of treaty negotiations, in which Indians did not speak English, they were reliant upon translators who stood to gain from the treaties, and they were under the protection of the United States government.¹³⁵ One of these fundamental canons for such cases is that treaties should be construed as Indians would have understood them.¹³⁶ The second canon is that ambiguous expressions must

¹³³ *Id.* at 221-225.

¹³⁴ Fishing rights of Native Americans are defined by the interpretation of the land secession treaties that were signed during the 1800s. However, the U.S. court system lacked legislative guidelines to follow in treaty interpretation, and it looked to historic decisions to serve as guiding principles. These decisions, or "Canons of Treaty Interpretation," provide the criteria to be used by the courts when interpreting treaties between Indians and the U.S. government. Cohen, *supra* note 20; Hunt, J.D.L. (1984). The canons of Indian treaty and statutory construction: a proposal for codification. *University of Michigan Journal of Law Reform*, 17(3): 681-713; Bederman, D.J. (1994). Revivalist canons and treaty interpretation. *UCLA Law Review* 903: 953-1034.

¹³⁵ *Jones v. Meehan*, 175 U.S. 1, 10-11 (1899).

¹³⁶ In *Jones v. Meehan*, Justice Gray declared,

In construing any treaty between the United States and an Indian tribe, it must always...be borne in mind that the negotiations for the treaty are conducted, on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy...[and] that the Indians, on the other hand, are a weak and dependent people, who have no written language and are wholly unfamiliar with all the forms of legal expression, and whose only knowledge of the terms in which the treaty is framed was imparted to them by the interpreter employed by the United States; and that the treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians [Emphasis added].

Id. Also see: *Worcester v. Georgia*, *supra* note 19, at 581; *Id.*; *U.S. v. Shoshone Tribe* 304 U.S. 111,116 (1938); *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970).

be resolved in favor of the Indians.¹³⁷ The third canon of treaty interpretation is that treaties must be liberally construed in good faith towards the Indians.¹³⁸ Importantly, any abrogation or modification of treaty rights must be explicit,¹³⁹ and the tribe reserves any rights not expressly granted to the U.S. government.¹⁴⁰ Adherence to these canons led Judge Fox to decide that the Ottawa and Chippewa tribes would not have interpreted the 1836 Treaty as a relinquishment of their right to fish, since fishing was critical to their existence.¹⁴¹ Thus, Judge Fox held that the Ottawa and Chippewa Indians did not give up their fishing rights in the 1836 Treaty, and these rights were reserved.¹⁴²

In contrast to the claims made by the State of Michigan that the removal of tribes from their lands in northern Michigan – under the 1836 Treaty and the Removal Act of 1830 – terminated their treaty fishing rights, Judge Fox held that the Indians did not relinquish their rights since they were never removed from their lands. He stated that the

¹³⁷ *Winters v. United States*, 207 U.S. 564, 576-577 (1908); *McClanahan v. Arizona Tax Commission* 411 U.S. 164, 174 (1973); *Bederman*, *supra* note 134, at 966-967.

¹³⁸ *Choctaw Nation v. United States*, 318 U.S. 431 (1943).

¹³⁹ In *Menominee v. United States*, the court disagreed with an interpretation of the Termination Act, 18 U.S.C. §1162 (1970), which abrogated treaty rights of the Menominee Tribe. The court stated, *We decline to construe the Termination Act as a backhanded way of abrogating the hunting and fishing rights of these Indians. While the power to abrogate these rights exists...the intention to abrogate or modify a treaty is not to be lightly imputed to Congress.*

Menominee v. United States, 391 U.S. 404, 412-413 (1968).

¹⁴⁰ Treaties were “not a grant of right to the Indians, but a grant of a right from them – a reservation of those not granted.” *United States v. Winans*, *supra* note 57, at 381.

¹⁴¹ Judge Fox declared,

Because of documented evidence demonstrating that Indians were absolutely dependent upon fishing for subsistence and their livelihood, and reading the treaty as the Indians must have understood it, they would not have relinquished their right to fish in the ceded waters of the Great Lakes. Since the treaty does not contain language granting away the prior right to fish, the right remains with the Indians and was confirmed by the 1836 treaty.

United States v. Michigan, *supra* note 125, at 253.

¹⁴² In his opinion, Judge Fox held,

The right [to fish] is implied because it was never explicitly ceded away by the Indians; thus, they retained it. The reason it was not granted was because the Indians were too heavily dependent upon fish as a source of food and for their livelihood to ever relinquish this right.

Id. at 259.

1836 Treaty was not an obligatory removal treaty,¹⁴³ and that Indian removal was not required from northern Michigan under the Removal Act of 1830.¹⁴⁴ Therefore, the Ottawa and Chippewa Indians of northern Michigan were not forced from their lands,¹⁴⁵ and their treaty fishing rights were not lost.¹⁴⁶

To address the issue raised by the state that the rights of the Ottawa and Chippewa Indians to fish ceded waters of the Great Lakes under the 1836 Treaty were abrogated by the 1855 Treaty, the minutes of meetings leading to the creation of this treaty were reviewed by Judge Fox. The minutes failed to mention fishing or fishing rights, and instead demonstrated a consolidation of U.S. government debts to the Indians of northern Michigan,¹⁴⁷ including compensation for damage to Sault Ste. Marie's fishery at St.

¹⁴³ In his opinion, Judge Fox discussed three classifications for treaties of the 1830s: 1) land base reduction treaties; 2) permissive removal treaties; and 3) obligatory removal treaties. Upon analysis of correspondence of treaty delegates, treaty minutes and treaty instructions, Judge Fox held that the 1836 Treaty was a land base reduction treaty in part, and a permissive removal treaty in part. In contrast to other obligatory removal treaties in the southeastern United States – where removal pressure was greatest – the 1836 Treaty failed to state that Indian removal out west was necessary due to population pressures. *Id.* at 239-240.

¹⁴⁴ This legislation merely provided the President of the U.S. with authorization to offer Indians an exchange of their homelands for lands west of the Mississippi River. Judge Fox described the voluntary nature of the 1836 Treaty towards Indian removal:

The language of the 1836 treaty does not mandate removal of the Indians. It stated that, "...as soon as the said Indians desire it..." and later in the Article "...When the Indians wish it, the United States will remove them..." To argue that this language mandates removal is patently absurd.

Id. at 260.

¹⁴⁵ Judge Fox held that the failure of Indians to leave their lands in northern Michigan provides evidence that their reserved rights were not abrogated. He stated,

The fact that the Indians stayed in Michigan expresses their intentions more eloquently than any other fact which has been presented to the court. The Indians did not remove. Because the Indians stayed in Michigan and it has been previously determined that they retained their aboriginal rights and Treaty of Ghent rights to fish in the Great Lakes, they retain the right to fish in the waters of the Great Lakes today.

Id. at 261.

¹⁴⁶ The State of Michigan argued that the phrase "...until the land is required for settlement" in Article 8 of the Treaty of Washington meant that the Indians temporarily stipulated for the usual privileges of occupancy, such as hunting and fishing rights. Judge Fox held that since the ceded waters of the Great Lakes were not required for settlement, the tribes retained their treaty fishing rights. *Id.* at 259.

¹⁴⁷ Judge Fox held,

In summary, then, the 1855 treaty was negotiated to address two principal issues: first, the provision of permanent homes for the Ottawa and Chippewa in Michigan; and second, the

Mary's rapids.¹⁴⁸ Thus, he decided the Treaty of 1855 did not remove fishing rights that were previously reserved under the 1836 Treaty.¹⁴⁹

In resolving the final issue of whether the state has authority to regulate treaty-right fishing, Judge Fox looked at principles of Indian law and the U.S. Constitution. According to the Supremacy Clause of the U.S. Constitution¹⁵⁰ and the preemption doctrine within federal areas of authority, federal laws supercede all state regulations. Hence, state fish and game management is preempted when a federal treaty or statute addresses the same subject, even where Congress has explicitly granted states power.¹⁵¹ Under federal law, Indian tribes have the right to regulate and enforce the internal affairs of their tribal members, including hunting and fishing rights.¹⁵² Therefore, Judge Fox held that the tribes of northern Michigan have the right to regulate off-reservation treaty fishing of their members,¹⁵³ and state authority to regulate the fishing of these tribes has been preempted by tribal regulations.¹⁵⁴ Reflecting upon Judge Boldt's decision in

settlement and consolidation of monies and services owed to the Indians under previous treaties and in particular the Treaty of March 28, 1836.

Id. at 242-246.

¹⁴⁸ Under a treaty in 1820, Chippewas ceded certain lands at Sault Ste. Marie to the United States and secured a perpetual right of fishing and encampment along the St. Mary's River. When construction of a canal and locks at the St. Mary's River displaced Indians encamped at their fishing locations and destroyed their fishing areas, these Indians sought compensation from the federal government in the Treaty of 1855 for the loss of their secured rights under the Treaty of 1820. Treaty of 1820, 7 Stat. 206 (1821); Treaty of 1855, *supra* note 129.

¹⁴⁹ Even as Article 5 of the Treaty of 1855 dissolved the Ottawa and Chippewa Nation, Judge Fox determined that treaty rights of these tribes were not affected. The only impact this dissolution had on federal and tribal relations was that the Indian tribes were no longer treated as a single entity. His decision was based upon the fact that the Ottawa and Chippewa Nation was created by the United States to facilitate land cession in 1836. *United States v. State of Michigan*, *supra* note 125.

¹⁵⁰ U.S. Constitution, *supra* note 59.

¹⁵¹ Despite the regulatory power of the state over fish and game management, the federal government may preempt state control over this management through legislation or a treaty. U.S. Constitution, *supra* note 16; *Geer v. Connecticut*, 161 U.S. 519 (1896); *Missouri v. Holland*, *supra* note 62, at 432.

¹⁵² U.S. Constitution, *supra* note 16.

¹⁵³ Treaty of Washington, *supra* note 114; U.S. Constitution, *supra* note 16.

¹⁵⁴ Under 25 C.F.R. §256.46 (subpart D), the Secretary of the Interior offered implementation of a federal plan for states to participate in treaty-right fishing regulations and preempted state regulation of tribal

United States v. Washington,¹⁵⁵ he also distinguished the treaty fishing rights of Indians and the privilege of other citizens in the State of Michigan to fish.¹⁵⁶

The decision of *United States v. Michigan* had far-reaching implications for tribal treaty-right fishers, because it granted them self-regulation without interference by the DNR in the species that are harvested, the purpose for which they are harvested, and the time and manner in which they are harvested.¹⁵⁷ The 1979 decision of *United States v. Michigan*, or the “Fox” decision,¹⁵⁸ heated the emotions of stakeholders in the Great Lakes fishery. As Native fishers rejoiced at the judicial recognition of their treaty fishing rights, non-Native commercial and recreational fishers were outraged, and the State of Michigan faced mounting social conflict between Native and non-Native fishers. Across Lake Michigan, tension and violence was also increasing between Native and non-Native fishers in Wisconsin, as treaty-fishing rights were being litigated.¹⁵⁸ Similar to the

fishing. This regulation, passed in 1967, provided a way for off-reservation fishing rights to be regulated to meet conservation goals while giving deference to tribal fishing rights.

¹⁵⁵ Based upon Judge Boldt’s finding in *United States v. State of Washington*, Judge Fox stated, “*The Treaty of March 28, 1836 guarantees a right to fish which is distinct from the privilege to fish enjoyed by other citizens of the State of Michigan.*” *United States v. State of Michigan*, *supra* note 125, at 266.

¹⁵⁶ There has been some debate over whether or not Judge Fox correctly applied the Canons of Treaty Interpretation to the case of *United States v. State of Michigan*. According to Covington & Pittman (1992), this decision unjustly benefits a “most favorite minority.” They were also critical of the historic analysis conducted by Judge Fox. In contrast, Deleckta (1980) argues that Judge Fox’s interpretation is correct, since it was based upon the intent of the Indians, not the white men who negotiated the treaties. Covington, G.M. & Pittman, P.M. (1992). *Don’t Blame the Treaties: Native American Rights and the Michigan Indian Treaties*. Altwerger and Mandel Publishing: West Bloomfield, MI, p. 10-11, 151-158; Deleckta, D.H. (1980). State regulation of treaty Indians: hunting and fishing rights in Michigan. *Detroit College Law Review* p. 1097, 1118.

¹⁵⁷ Judge Fox ruled,

The mere passage of time has not eroded, and cannot erode the rights guaranteed by solemn treaties that both sides pledged on their honor to uphold. The Indians have a right to fish today wherever fish are to be found within the area of cession – as they had at the time of cession – a right established by aboriginal right and confirmed by the Treaty of Ghent, and the Treaty of 1836. The right is not a static right anymore that it was during treaty times. The right is not limited as to the species of fish, origin of fish, the purpose of use or the time or manner of taking. It may be exercised utilizing improvements in fishing techniques, methods and gear.

United States v. State of Michigan, *supra* note 125, at 280-281.

¹⁵⁸ After Chippewa Indians were arrested for spearfishing in treaty-ceded territory within the State of Wisconsin, the Lac Courte Oreilles Band sued the Secretary of the Wisconsin Department of Natural Resources for interfering with its treaty fishing rights under treaties in 1837 and 1842. In this case, Judge

fishery of the Pacific Northwest, the Great Lakes fishery became a focal point for social conflict as Native fishers sought to exercise their legally recognized treaty rights despite strong opposition from state regulatory agencies and powerful sport fishing constituencies.

Social Conflict and Litigation over the Great Lakes Fishery

After the *Jondreau* decision in 1971,¹⁵⁹ the DNR and sport fishing organizations reported that the use of large-mesh nylon gill nets by Indian fishers threatened to deplete the Great Lakes fishery, especially in Grand Traverse Bay and Sault Ste. Marie, and devastate the local tourist economy.¹⁶⁰ The Michigan DNR had previously banned gill nets since they believed this type of fishing gear failed to discriminate between target and nontarget species.¹⁶¹ Threats were made by sport fishers to destroy Indian fishing equipment and shoot netters.¹⁶² Relations surrounding Lake Michigan, particularly in the

James Doyle of the federal district court of western Wisconsin ruled against the tribe on the grounds that their treaty rights were extinguished by a subsequent treaty in 1854. Upon appeal, the U.S. Court of Appeals (7th Circuit) reversed this decision, in 1983 and restored the tribe's treaty rights. *Lac Courte Orielles Band of Lake Superior Chippewa Indians v. Voigt (LCO I)*, 700 F.2d 341(1983), *cert. denied*, 464 U.S. 805 (1983).

Opposition to tribal harvest and joint management of walleye, muskellunge and other fisheries was strong and bitter. "Treaty Beer" – whose proceeds were used to fight Chippewa treaty fishing rights in court, was one of the best-selling beers for a time in northern Wisconsin. Social tension mounted as protests against Chippewa spearfishing were held; racially motivated insults were frequently displayed at these gatherings, including, "Save a walleye, spear an Indian," and "Save two walleyes, spear a pregnant squaw." Violence was triggered and intensified at rallies hosted by anti-Indian organizations, including "Protect Americans' Rights and Resources" (PARR) and "Stop Treaty Abuse-Wisconsin." In March 1991, Judge Crabb of the federal district court of western Wisconsin issued an injunction against "Stop Treaty Abuse-Wisconsin" to stop assault, battery, and obstruction of treaty right fishing. Cleland, C.E. (1990). Indian treaties and American myths: roots of social conflict over treaty rights. *Native Studies Review*, 6(2), 81-87; *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Stop Treaty Abuse-Wisconsin, Inc.* Opinion and Order No. 91-C-117-C (W.D. Wis. 1991); Schlender, J.H. (1991). Treaty rights in Wisconsin: a review. *Northeast Indian Quarterly*, 8(1): 4-16, p. 4; Wilkinson, C.F. (1991). To feel the summer in the spring: the treaty fishing rights of the Wisconsin Chippewa. *Wisconsin Law Review*, (3):375-414, p. 376; Prucha, *supra* note 20, at 400.

¹⁵⁹ *People v. Jondreau*, *supra* note 106.

¹⁶⁰ Helmbrecht, R.K, Mackety, S., & MacMullan, R.A. (1971, July 16). *Report of the Governor's Special Task Force on Indian Fishing Rights*. Lansing, MI, p. 1-2; Editorial. (1980, July 21). Gill nets: they could seriously deplete the lakes before a court ruling. *Detroit Free Press*, p. A14.

¹⁶¹ MICH. COMP. LAWS ANN. §302.1 (Supp. 1977); Tanner, *supra* note 113, at 55.

¹⁶² Editorial (1971, June 30). *North Woods Call*, p. 6.

Grand Traverse Bay area, were already tense and filled with animosity¹⁶³ due to declines in whitefish and lake trout populations in Whitefish Bay within Lake Superior.¹⁶⁴ Tribes were blocked from entering the Great Lakes at access points, and boats, nets and vehicles were vandalized.¹⁶⁵ Sportsmen's organizations, sport editorial writers and state officials helped fan the flames of protest against tribal fishing and gill net use through various editorials, media publications, and rallies that incited anger.¹⁶⁶ Threats and confrontations continued throughout the 1970s, and the Fox decision in 1979 sparked even greater hostility and violence between tribal and non-tribal fishers.¹⁶⁷

The Michigan DNR and sport fishing organizations were infuriated by the Fox decision because the authority of the state to regulate the exercise of treaty fishing rights was preempted, and a seemingly endless trail of litigation ensued to challenge this decision.¹⁶⁸ A motion was filed in October 1979 by the state with the Sixth Circuit U.S.

¹⁶³ Even Indian children were subjected to threats and name-calling, thus perpetuating anti-Indian sentiment. Cleland, *supra* note 158.

¹⁶⁴ Indian fishing rules protested. (June 1980). *Michigan Out-of-Doors*, p. 11-12.

¹⁶⁵ Helmbrecht, *supra* note 160; Indians resume gill net fishing. (September 1979). *Michigan Out-of-Doors*, p. 103; Bielski, V., Cornell, G. and White, R. (1980, July 21). Indians only ask to keep their age-old right to fish. *Detroit Free Press*, p. 5-6.

¹⁶⁶ Editorial, *supra* note 162; Williams, C.H. & Neubrech, W. (1976). *Indian Treaties – American Nightmare*. Outdoor Empire Publishing: Seattle, WA, p. 1-2 (inflammatory rhetoric is found throughout the text); Fishermen look to Congress after Indian rights ruling: Judge Fox's far-reaching decision heightens concern over future of Great Lakes fishery resource. (July 1979). *Michigan Out-of-Doors*, p. 32-35.

¹⁶⁷ Blanchard, B. (Producer & Director). (1982). *Difference of Rights*. [Film]. Available from Lansing Community College. In addition, the Michigan Department of Civil Rights documented a widespread pattern of discrimination and harassment against Indians in northern Michigan in the years following the Fox decision.

¹⁶⁸ As appeals were filed in the U.S. Court of Appeals for the Sixth Circuit, the federal district court and the U.S. Supreme Court, the Grand Traverse Area Sports Fishing Association petitioned a state circuit court to enjoin gill net fishers from fishing in state statistical zone MM-4 without a state license. As a result of this motion, Judge Forester, of the Thirteenth Judicial Circuit of the State of Michigan, issued a temporary restraining order banning gill net fishing in these waters. *Grand Traverse Area Sports Fishing Association v. Clarence Maudrie et al.* File No. 79-7510 (13th Circuit Court, Grand Traverse County). This decision was in direct conflict with the decision of Judge Fox and was overturned. *United States v. State of Michigan*, 508 F.Supp. 480, 493 (W.D. Mich. 1980).

The Michigan United Conservation Clubs (MUCC) brought an action against members of the Bay Mills Indian Community under Michigan's Environmental Protection Act to enjoin all Indians from violating state fishing regulations since MUCC alleged that their fishing activities would likely impair and

Court of Appeals for a stay of judgment¹⁶⁹ pending the state's appeal.¹⁷⁰ Michigan claimed that since the Fox decision, irreparable harm had been done to lake whitefish and lake trout stocks in the Great Lakes due to unregulated tribal fishing. The U.S. Court of Appeals agreed with the concerns of the State of Michigan and granted a stay of Judge Fox's decision.¹⁷¹ Upon issuance of comprehensive, interim regulations governing off-reservation treaty fishing in the Great Lakes by the Secretary of Interior on November 15, 1979,¹⁷² and its amended interim rules on April 28, 1980,¹⁷³ the U.S. Court of Appeals found that these federal regulations were sufficiently comprehensive to protect the Great

destroy the fish population of the Michigan waters of the Great Lakes. A permanent injunction was ordered by the court from commercial fishing in the Michigan waters in the Great Lakes without compliance with state regulations. The court held that the tribe had no treaty right to harvest fish planted in the Great Lakes. *Michigan United Conservation Clubs v. Anthony*, 90 Mich. App. 99, 110, 113-114 (1979); Firestone, J. (1979, May 9). State court rule on fishing rights contradicts feds. *State News*, p. 12-13.

¹⁶⁹ A "stay" refers to the act of arresting a judicial proceeding by the order of the court. Thus, a "stay of judgment" refers to arresting execution of the court's ruling. Black, H.C., Nolan, J.R., Nolan-Haley, J.M., Connolly, M.J., Hicks, S.C., & Albrandi, M.N. (1991). *Black's Law Dictionary*. 6th ed. St. Paul, MN: West Publishing Company, p. 983.

¹⁷⁰ Judge Fox denied the request for a stay of judgment since the state failed to demonstrate its regulations were necessary or nondiscriminatory. *United States v. State of Michigan*, 505 F. Supp. 467, 491-496 (W.D. Mich. 1980). On September 21, 1979, Michigan Attorney General Frank Kelley petitioned the U.S. Court of Appeals for the Sixth Circuit in Cincinnati, Ohio, to stop implementation of the Fox decision until the State of Michigan's appeal was decided. Case No. 79-1414, United States Court of Appeals, 6th Cir., Memorandum and Opinion of the Honorable Albert J. Engel (September 21, 1979).

¹⁷¹ Honorable Albert Engel stayed the judgment due to concern that unless gill net fishing was stopped in state statistical zone MM-4, the area would be depleted of fish. On October 19, 1979, a three-judge panel continued the stay pending appeal to the federal district court. Case No. 79-1527, United States Court of Appeals, 6th Cir., Circuit Judges Weick, Celebrezze and Merritt (October 19, 1979).

¹⁷² The Department of Interior (DOI), Bay Mills Indian Community, and Sault Ste. Marie tribe entered into a Memorandum of Understanding (MOU) governing regulation of treaty fishing. After receiving federal recognition in 1980, the Grand Traverse Band of Ottawa and Chippewa Indians became a party to the MOU as well. Under this agreement, the tribes were charged with development of a joint, comprehensive set of regulations governing fishing of their members. These regulations were developed in consultation with the U.S. Fish and Wildlife Service and the Michigan DNR, and upon determination by the DOI that these regulations met conservation needs of the Great Lakes fishery, they were published as an interim rule on November 15, 1979. 25 C.F.R. §256.46, *supra* note 154; 44 Federal Register 65747 (1979); Weeks, G. (1992). *Mem-ka-weh: Dawning of the Grand Traverse Band of Ottawa and Chippewa Indians*. Village Press: Traverse City, MI, p. 19.

¹⁷³ Although the Department of the Interior recognized the necessity of amending the interim regulations for protection of the fishery, it was unable to publish final regulations governing off-reservation fishing in the Great Lakes after review of the comments and testimony. 25 C.F.R. §256.46, *supra* note 154; 45 Federal Register 28100 (April 28, 1980).

Lakes fishery.¹⁷⁴ After this Court remanded the case¹⁷⁵ to see if the rules met the standards of *People v. LeBlanc*,¹⁷⁶ and the federal district court determined that fishing regulations issued by the State of Michigan were preempted by the federal Secretary of Interior regulations.¹⁷⁷

As the case of *United States v. Michigan* continued through the appeals process, the Secretary of Interior's federal regulations over Great Lakes fishing were allowed to expire on May 11, 1981.¹⁷⁸ This was done to give deference to the State of Michigan

¹⁷⁴ To promote lake trout reproduction, the regulations closed grids 513, 514, 613 and 614, which includes the Fox Island and South Fox Island Shoal of the Lake Michigan statistical district MM-3, to treaty fishing by any method contingent upon the State of Michigan designating these areas as fish sanctuaries. The regulations disallowed target fishing for lake trout, but did permit some incidental catch subject to regulations. The tribes agreed to limit their total-allowable-catch (TAC) limits of lake trout as presented by the Ad Hoc Technical Working Group. Under the regulations, each treaty commercial fisher was required to carry a tribal commercial fishing identification card or helpers card. Commercial fishing nets were required to be clearly marked with a buoy showing the identification card number of the user, and a report had to be submitted to the Michigan DNR, Bureau of Indian Affairs, and the Great Lakes Fishery Laboratory of the U.S. Fish and Wildlife Service detailing monthly catch, including the kind and amount, the gear fished, the species and amount harvested, and fishing location. Tribal fishing activities were limited under these new regulations to eliminate gill net fishing south of 45 degrees North latitude in Grand Traverse Bay and Little Traverse Bay of Lake Michigan. Lastly, waters connecting Lakes Superior and Huron were closed to treaty commercial fishing, including St. Mary's River. 25 C.F.R. 256.46; *United States v. State of Michigan*, *supra* note 170, at 492-493.

¹⁷⁵ A "remand" is to send back (usually to a lower court) for conduct of new hearings of a limited nature, an entirely new trial, or for further action. Black, *supra* note 169, at 896.

¹⁷⁶ Under *People v. LeBlanc*, any state regulation that restricts Indian fishing rights under the 1836 treaty, (a) must be a necessary conservation measure, (b) must be the least restrictive alternative method available for preserving fisheries in the Great Lakes from irreparable harm, and (c) must not discriminatorily harm Indian fishing or favor other classes of fishermen.

People v. LeBlanc, *supra* note 112. The U.S. Court of Appeals, Sixth District Court stated that, *People v. LeBlanc*... appears to correctly state the law applicable to gill net treaty fishing by Indians in the Great Lakes. That case held that the State may regulate gill net fishing if necessary to preserve fish from extinction or prevent irreparable damage to fish supplies or destruction of fisheries...[W]e remand the case to the District Court for consideration of the preemptive effect of the new federal regulations [issued by the Secretary of the Interior].

United States v. State of Michigan, 623 F.2d 448, 449-450 (6th Cir. 1980).

¹⁷⁷ On May 28, 1980, the Court of Appeals remanded Case 79-1414 to the federal district court to determine if the amended interim regulations issued by the Secretary of Interior preempted state regulations. On May 30, 1980, the Circuit Court Judge Merritt stayed the district court's decision pending appeal since there was concern over irreparable damage to the fishery. The plaintiff tribes sought to have the Circuit Court's motion vacated since the Secretary of Interior's regulations were adequate to protect species of concern. The Circuit Court three-judge panel on July 16, 1980 modified its ruling that tribal treaty right fishing be regulated by the Secretary of the Interior regulations. Case No. 79-1414, *supra* note 170; Case No. 79-1528, United States Court of Appeals, 6th Cir. (July 16, 1980).

¹⁷⁸ *United States v. State of Michigan*, 653 F.2d 277, 278 (6th Cir. 1981).

over regulation of Indian treaty right fishing in the Great Lakes.¹⁷⁹ As a result, the State of Michigan issued emergency regulations governing gill net fishing that were less protective of Indian treaty rights than the expired Secretary of Interior regulations.¹⁸⁰ With the expiration of federal regulations and issuance of emergency state regulations, the State of Michigan asked for a reversal of the district court's ruling¹⁸¹ so it could impose and enforce its regulations on treaty-right tribal fishers.¹⁸² The U.S. Court of Appeals concluded that since treaty rights are federally protected rights, the federal government is responsible for their protection. Therefore, the Court of Appeals held,

[I]f Indian fishing is not likely to cause irreparable harm to fisheries within the territorial jurisdiction of the State of Michigan, the state may not regulate it. The state bears the burden of persuasion to show by clear and convincing evidence that it is highly probable that irreparable harm will occur and that the need for regulation exists. In the absence of such a showing, the state may not restrict Indian treaty fishing, including gill net fishing.¹⁸³

As a result of this reasoning, the Court of Appeals determined that the previously enacted comprehensive rules governing gill net fishing by the Secretary of Interior should remain in effect as interim rules, instead of imposing more restrictive state regulations, since the state failed to meet the burden of proof outlined by the Court.¹⁸⁴

¹⁷⁹ It is suggested that the change in Administrations from President Carter to President Reagan put political pressure on the Department of Interior to give the State of Michigan control over treaty-right fishing. Milliken asks Reagan to rescind federal Indian fishing regulations. (January 28, 1981). *State News*, p. 2; Connors, *supra* note 110, at 9.

¹⁸⁰ *United States v. State of Michigan*, *supra* note 178.

¹⁸¹ *United States v. State of Michigan*, *supra* note 170.

¹⁸² *United States v. State of Michigan*, *supra* note 178.

¹⁸³ The U.S. Court of Appeals also stated,

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, and no principle of federalism requires the federal government to defer to the states in connection with the protection of those rights.

United States v. State of Michigan, *supra* note 178, at 279.

¹⁸⁴ Another reason why the Court of Appeals was unwilling to impose the State of Michigan's emergency regulations on gill net fishing was that the District Court had not made its final determination regarding the preemptive nature of the Secretary of Interior's regulations. The District Court decided on August 18,

While treaty-right tribal fishing rights were being litigated in the judicial system, fishers on the waters were experiencing economic hardship and continued social conflict. Large-scale, state-licensed commercial producers were forcing small-scale Native producers in northern Michigan out of the fishery. These producers fished with trap nets during the spring and early months and were able to out compete Native gill net fishers early in the fishing season.¹⁸⁵ In addition, late-season closures for conservation purposes hurt Native fishing operations since this was the time when gill net operations were not competing with trap net operators, and prices for fish were higher.¹⁸⁶

Social conflict persisted in and out of the waters of the Great Lakes during the 1980s,¹⁸⁷ and vandalism to fishing nets and boats caused severe capital losses for Indian operators.¹⁸⁸ In response to the threats of diminishing economic opportunities and continuance of violence, the tribes brought a motion to allocate the treaty waters between the tribes and the state.¹⁸⁹ Adjudication on these issues was scheduled for April 22, 1985.¹⁹⁰ In the interim, the tribes' legal position had been strengthened by denial of the

1891, that the preemptive issue was a moot point. Since the tribes of northern Michigan had already adopted the Secretary of Interior's regulations as part of their Conservation Codes when the Secretary allowed its regulations to lapse, the District Court argued that the Court of Appeals has already sanctioned these regulations. Therefore, no further consideration is necessary. *United States v. State of Michigan*, 520 F. Supp. 207, 210-211 (W.D. Mich. 1981).

¹⁸⁵ Bishop, R.C. & Cleland, C.E. (1984). *An Assessment of the Economic Conditions of the Bay Mills Indian Community, Sault Ste. Marie Tribe of Chippewa Indians, and Grand Traverse Band of Ottawa and Chippewa Indians, and a Cost-Return Analysis of Treaty Commercial Fishermen—1981*. Manuscript, p. 16-17.

¹⁸⁶ According to Bishop and Cleland, prices for lake whitefish were highest during two periods of peak demand. The first period was during March and April, when the Michigan wholesale price averaged \$1.38 per pound in 1981, and the second period occurred during September and October, when the price averaged \$0.80 per pound. Throughout the year, lake whitefish prices varied from \$0.35 per pound in early summer to \$2.00 in late winter. *Id.* at 14-17.

¹⁸⁷ State of Michigan Attorney General Frank Kelley asked the federal government to assist Michigan in protecting citizens from acts of violence. Fishermen, *supra* note 166; Weeks, *supra* note 172, at 56-57.

¹⁸⁸ Bishop, *supra* note 185, at 16.

¹⁸⁹ Indian Tribes' Amended Motion to Allocate Resource, *United States v. Michigan*, Civil Action No. M26-72 (W.D. Mich. April 25, 1984).

¹⁹⁰ *United States v. State of Michigan* (1985 Consent Order), 12 ILR 3079, 3088. (1985).

1
 2
 3
 4
 5
 6
 7
 8
 9
 10
 11
 12
 13
 14
 15
 16
 17
 18
 19
 20
 21
 22
 23
 24
 25
 26
 27
 28
 29
 30
 31
 32
 33
 34
 35
 36
 37
 38
 39
 40
 41
 42
 43
 44
 45
 46
 47
 48
 49
 50
 51
 52
 53
 54
 55
 56
 57
 58
 59
 60
 61
 62
 63
 64
 65
 66
 67
 68
 69
 70
 71
 72
 73
 74
 75
 76
 77
 78
 79
 80
 81
 82
 83
 84
 85
 86
 87
 88
 89
 90
 91
 92
 93
 94
 95
 96
 97
 98
 99
 100
 101
 102
 103
 104
 105
 106
 107
 108
 109
 110
 111
 112
 113
 114
 115
 116
 117
 118
 119
 120
 121
 122
 123
 124
 125
 126
 127
 128
 129
 130
 131
 132
 133
 134
 135
 136
 137
 138
 139
 140
 141
 142
 143
 144
 145
 146
 147
 148
 149
 150
 151
 152
 153
 154
 155
 156
 157
 158
 159
 160
 161
 162
 163
 164
 165
 166
 167
 168
 169
 170
 171
 172
 173
 174
 175
 176
 177
 178
 179
 180
 181
 182
 183
 184
 185
 186
 187
 188
 189
 190
 191
 192
 193
 194
 195
 196
 197
 198
 199
 200
 201
 202
 203
 204
 205
 206
 207
 208
 209
 210
 211
 212
 213
 214
 215
 216
 217
 218
 219
 220
 221
 222
 223
 224
 225
 226
 227
 228
 229
 230
 231
 232
 233
 234
 235
 236
 237
 238
 239
 240
 241
 242
 243
 244
 245
 246
 247
 248
 249
 250
 251
 252
 253
 254
 255
 256
 257
 258
 259
 260
 261
 262
 263
 264
 265
 266
 267
 268
 269
 270
 271
 272
 273
 274
 275
 276
 277
 278
 279
 280
 281
 282
 283
 284
 285
 286
 287
 288
 289
 290
 291
 292
 293
 294
 295
 296
 297
 298
 299
 300
 301
 302
 303
 304
 305
 306
 307
 308
 309
 310
 311
 312
 313
 314
 315
 316
 317
 318
 319
 320
 321
 322
 323
 324
 325
 326
 327
 328
 329
 330
 331
 332
 333
 334
 335
 336
 337
 338
 339
 340
 341
 342
 343
 344
 345
 346
 347
 348
 349
 350
 351
 352
 353
 354
 355
 356
 357
 358
 359
 360
 361
 362
 363
 364
 365
 366
 367
 368
 369
 370
 371
 372
 373
 374
 375
 376
 377
 378
 379
 380
 381
 382
 383
 384
 385
 386
 387
 388
 389
 390
 391
 392
 393
 394
 395
 396
 397
 398
 399
 400
 401
 402
 403
 404
 405
 406
 407
 408
 409
 410
 411
 412
 413
 414
 415
 416
 417
 418
 419
 420
 421
 422
 423
 424
 425
 426
 427
 428
 429
 430
 431
 432
 433
 434
 435
 436
 437
 438
 439
 440
 441
 442
 443
 444
 445
 446
 447
 448
 449
 450
 451
 452
 453
 454
 455
 456
 457
 458
 459
 460
 461
 462
 463
 464
 465
 466
 467
 468
 469
 470
 471
 472
 473
 474
 475
 476
 477
 478
 479
 480
 481
 482
 483
 484
 485
 486
 487
 488
 489
 490
 491
 492
 493
 494
 495
 496
 497
 498
 499
 500
 501
 502
 503
 504
 505
 506
 507
 508
 509
 510
 511
 512
 513
 514
 515
 516
 517
 518
 519
 520
 521
 522
 523
 524
 525

U.S. Supreme Court to grant *certiorari*,¹⁹¹ which allowed the Fox decision, as amended, to stand.¹⁹²

Negotiating an Agreement for Allocation of the Great Lakes Fishery

In October of 1983, the State of Michigan changed its position on Indian treaty fishing rights, and acknowledged the existence of these rights.¹⁹³ They began to host meetings with various stakeholder groups to try to reach a negotiated allocation agreement. Unfortunately, these attempts failed to generate a settlement, and Judge Enslen, Judge Fox's successor in the federal District Court, was forced to intervene in the process and attempt to find a resolution.¹⁹⁴ This task was challenged by the lack of legal standards for the court to follow in allocating the Great Lakes fishery between competing users. Judge Enslen also realized the potential for future conflict if a solution was imposed.¹⁹⁵ More significantly, he was being forced to make complicated management decisions that would affect the sustainability of the Great Lakes, the livelihood of tribal commercial fishers and the lucrative Michigan sport fishery. Based upon these conditions and the failure to resolve these issues through previous litigation, he decided

¹⁹¹ *Certiorari* means "to be informed of." The Supreme Court of the United States uses this common law principle to issue a written judicial order to lower courts so that they may inspect judicial proceedings and determine if any irregularities exist. To deny *certiorari* means that the U.S. Supreme Court does not wish to hear a case, and the ruling of the lower court stands. Black, *supra* note 169, at 156.

¹⁹² *United States v. State of Michigan*, *supra* note 125.

¹⁹³ Although it is unclear why the State of Michigan changed its position on treaty-right tribal fishing, Doherty offers several hypotheses. One idea is that as Governor Milliken and Howard Tanner left their roles in 1982, when Milliken decided not to run for reelection, and as Judge Noel Fox left the bench in 1983, the state was released from its entrenched position in adamant opposition to treaty-right tribal fishing. Another is that Deputy Undersecretary of the Interior, William Horn, under Secretary of the Interior, James Watt, was instructed to try and achieve a settlement while under the Reagan Administration. Although the proposal that Horn established was rejected by the State of Michigan, these events may have encouraged the State of Michigan to try and reach a negotiated settlement. Lastly, the State of Michigan may have recognized that they stood a strong likelihood of being defeated at trial. Doherty, R. (1990). *Disputed Waters: Native Americans and the Great Lakes Fishery*. Lexington, KY: University of Kentucky, p. 116-120.

¹⁹⁴ Connors, *supra* note 110, at 11.

¹⁹⁵ McGovern, F.E. (1986). Toward a functional approach for complex litigation. *University of Chicago Law Review*, 53(2): 440-493.

that the parties themselves should develop a management plan through alternative dispute resolution (ADR) techniques, rather than litigation.¹⁹⁶

A special master¹⁹⁷ was appointed by Judge Enslen to prepare the case for trial while exploring possibilities for a settlement by both sides. The special master, Francis McGovern, was given the responsibility of negotiating, mediating, and facilitating a resolution of the management and allocation issues surrounding the Great Lakes fishery between the parties and stakeholder groups of recreational and commercial fishers.¹⁹⁸ The parties included the State of Michigan, the U.S. Government, Bay Mills Indian Community, Sault Ste. Marie Tribe of Chippewa Indians, and the Grand Traverse Band of Ottawa and Chippewa Indians. Although various recreational sport-fishing and state-licensed commercial fishers were denied the right to intervene as a party to the litigation of *United States v. Michigan*,¹⁹⁹ they were able to participate in the proceedings as litigating *amici curiae*,²⁰⁰ and were allowed to participate in the court-supervised negotiations for an agreement over allocation of the Great Lakes fishery. The litigating *amici* groups included the Michigan United Conservation Clubs (MUCC), Grand Traverse Area Sport Fishing Association (GTASFA), Michigan Charterboat Association, the Michigan Steelhead and Salmon Fisherman's Association, and a group of individual state-licensed commercial fishers.²⁰¹

¹⁹⁶ *United States v. State of Michigan*, *supra* note 190, at 3079-3080.

¹⁹⁷ A special master is a "master appointed to act as the representative of the court in some particular act or transaction." Black, *supra* note 169, at 673.

¹⁹⁸ *United States v. State of Michigan*, *supra* note 190, at 3079-3080.

¹⁹⁹ *United States v. State of Michigan*, 89 F.R.D. 307, 308-314 (W.D. Mich. 1980); *Id.* at 3088.

²⁰⁰ *Amicus curiae* means "friend of the court." A person or organization with a strong interest in the matter of a judicial action, but is not a party to the action, may petition the court for permission to file a brief "ostensibly on behalf of a party but actually to suggest a rationale consistent with its own views." Black, *supra* note 169, at 54.

²⁰¹ *United States v. State of Michigan*, *supra* note 190, at 3088.

McGovern determined that the best method for distribution of the common resources of the Great Lakes fishery among competing users was through "integrative bargaining," where negotiators attempt to find a settlement that reconciles or 'integrates' the needs of both parties.²⁰² The Court hoped this approach would achieve an optimal solution that offered equitable allocation and a reduction in conflict.²⁰³ However, the representatives participating in the negotiations were put on an intense and shortened discovery schedule of several months during which McGovern met with the party representatives separately to determine their interests. During this process, special master McGovern also utilized "computer-assisted negotiation," in which computer models were used to examine hypothetical solutions and assess if these solutions met the inconsistent interests of the parties.²⁰⁴

When the expedited discovery process was completed, representatives and interested parties were asked to meet in Sault Ste. Marie on March 25, 1985 to participate in an intense negotiation session.²⁰⁵ With the pending trial date set for April 22, the parties were under tremendous pressure to reach an agreement. The representatives

²⁰² According to McGovern, this technique would allow the parties to identify their interests, share their interests and try to determine which allocation plans would maximize the interests of the parties and reduce conflicts of interest based on an economic analysis of integrative bargaining. McGovern, *supra* note 195, at 459.

²⁰³ *United States v. State of Michigan*, *supra* note 190.

²⁰⁴ According to McGovern, one tribe valued the "*traditional cultural values of Indian fishing, another desired to maximize the tribes' overall economic benefit, and the third valued accommodation consistent with limited tribal fishing in one area of Lake Michigan.*" The United States represented the interests of the tribes, who sought to maximize their harvest opportunities, as well as the U.S. Fish and Wildlife Service, who was interested in restoration of the Great Lakes fishery and reductions in harvest, if necessary to accomplish these goals. The State of Michigan also represented a variety of competing interests, including those of the Michigan DNR, sport fishing organizations, the tourism industry, the state-licensed commercial fishers and the general public. McGovern, *supra* note 195, at 462-465.

²⁰⁵ Representatives at the negotiations included William Horn, United States; Elizabeth Valentine and Ronald Skoog, State of Michigan; Bruce Greene, Arnie Parrish, Jr., and Irma Parrish, Bay Mills Indian Community; Joseph Lumsden, Sault Ste. Marie Tribe of Chippewa Indians; and Greg Bailey and Joseph Raphael, Grand Traverse Band of Ottawa and Chippewas Indians.

worked continuously for three days,²⁰⁶ and a fifteen-year management plan was completed on March 28, 1985.²⁰⁷ The management plan was approved by the District Court on April 10, 1985.²⁰⁸ However, on May 6, 1985, the Bay Mills Indian Community objected to the agreement and submitted to the District Court an alternative allocation plan for its consideration. Judge Enslen rejected this alternative plan and ordered entry of the negotiated plan, referred to as the 1985 Consent Order.²⁰⁹

The 1985 Consent Order

The court-imposed fishery management policy governing the treaty-ceded waters of Lakes Michigan, Huron and Superior established lake trout refuges, priority rehabilitation zones, and deferred zones to promote lake trout rehabilitation and conservation. Each of these zones allowed different levels of lake trout harvest. Use of gill nets or capture of lake trout was prohibited in the refuges. In contrast, lake trout harvest was managed in the rehabilitation zones using total-allowable catches (TACs). TACS were created based on 40-45% total annual mortality of lake trout. Upon attainment of the TACs, all large mesh gill netting and sport fishing was prohibited in the rehabilitation zones. Deferred zones were areas in which lake trout rehabilitation plans were not developed.²¹⁰

²⁰⁶ According to one of the participants, the representatives worked until after midnight during the first two days of negotiations, and on the third night, the representatives worked through the night to complete a document by the following morning. Hicks, W. (1985, March 22). *Grand Traverse Area Sport Fishing Association Newsletter*, p. 1; Hicks, W. (1985, April 18). *Grand Traverse Area Sport Fishing Association Newsletter*, p. 1-2; Weeks, *supra* note 172, at 47.

²⁰⁷ Michigan Department of Natural Resources. (May 1985). Treaty fishing agreement heralds new era. *Natural Resources Register*, p. 4-7.

²⁰⁸ *United States v. State of Michigan*, *supra* note 190.

²⁰⁹ *United States v. State of Michigan*, Consent Order 1985 Agreement, 520 F.Supp. 207 (W.D. Mich. 1981)(May 31, 1985); *United States v. State of Michigan*, *supra* note 190, at 3088.

²¹⁰ TACs were established by the Technical Fisheries Review Committee, which was created under the Order. *United States v. State of Michigan*, *supra* note 190, at 3082-3083, 3089.

In order to reduce social conflict and ease management of the fisheries within the treaty-ceded waters, the 1985 Consent Order created different fishing zones for treaty-right tribal commercial fishers outside of areas that were utilized heavily by state-licensed recreational sport fishers.²¹¹ It imposed restrictions on the use of gill nets in certain waters in hopes of reducing lake trout mortality and social conflict.²¹² Additionally, an Information and Education Committee was created to “to promote greater understanding among the stakeholders” regarding the agreement. The committee was also given the responsibilities of assisting in information dissemination about the Consent Order, promoting understanding of treaty rights and responsibilities, and providing a clearinghouse for pertinent information.²¹³ Furthermore, the Consent Order established an Executive Council and a dispute resolution mechanism to resolve any future controversies without judicial intervention.²¹⁴

To protect the Great Lakes fishery and provide a framework for joint management, the 1985 Consent Order called on the Technical Fisheries Review Committee,²¹⁵ composed of technical representatives from the Chippewa-Ottawa Treaty Fishery Management Authority, the Michigan Department of Natural Resources, and the U.S. Fish and Wildlife Service’s Great Lakes Fishery Laboratory, to collaboratively

²¹¹ *Id.* at 3084-3087, 3090.

²¹² Gill net use was restricted in areas based on the U.S. Fish and Wildlife Service Lake Trout Rehabilitation Plan (February 8, 1985) and the lake trout rehabilitation plans adopted by the three lake committees of the Great Lakes Fishery Commission. These areas are considered historic lake trout spawning grounds to promote lake trout conservation. Gill nets were also restricted in areas with intense sport fishing activity, such as the Grand Traverse Bay. *Id.* at 3083.

²¹³ The Information and Education Committee was composed of a representative from each tribe, the Michigan DNR, and the federal Bureau of Indian Affairs. *Id.* at 3090-3091.

²¹⁴ *Id.* at 3091.

²¹⁵ The Technical Fisheries Review Committee originated from the biological group of the Technical Working Group, which was renamed from the Ad Hoc Technical Working Group. Formed in 1979, the Technical Working Group was established to cooperatively assess the status of certain fish stocks in the treaty-ceded waters of the Lakes Michigan, Huron and Superior and provide data to be used for estimation of surplus production and other management decisions.

establish the TACs for lake trout in rehabilitation zones, based upon 40 to 45 percent total annual mortality. It also required the sharing of data collected by state and tribal regulatory agencies.²¹⁶ The parties were also required to establish a Joint Enforcement Committee, with the responsibility of coordinating and developing law enforcement.²¹⁷

Lastly, the 1985 Consent Order called for federal and state funding to assist the tribes with implementation of the Consent Order. Among other requests, the Court asked the federal government to assist the tribes with fish marketing, law enforcement, and stock assessments, and the state was asked to provide funding for technical assistance for conversion of tribal fishers from gill nets to impoundment gear.²¹⁸

The 1985 Consent Order remained in place as a management framework for the Great Lakes fishery over the following fifteen years. Throughout this time, the 1985 Consent Order continued to be litigated as controversies arose. The Grand Traverse Band contested the closure of two of the most productive grids in Grand Traverse Bay within Lake Michigan²¹⁹, and the Bay Mills Indian Community protested closure of Hammond Bay in Lake Huron.²²⁰ When the State of Michigan sought to have the court enforce

²¹⁶ *United States v. State of Michigan* *supra* note 190, at 3082, 3091.

²¹⁷ *Id.* at 3090-3091.

²¹⁸ The Court also called for federal funding to assist the tribes with renovation of a Treaty Water Conservation Office in Sault Ste. Marie, and technical assistance. State funding was also requested for assistance in tribal fish market development and lake trout plantings in Whitefish Bay. *Id.* at 3093.

²¹⁹ Grids 616 and 716 were closed to Grand Traverse Band tribal fishers by January 1, 1988, on the condition that impoundment gear and technical assistance – to help convert tribal fishers from gill nets to impoundment gear – be provided. According to the 1985 Consent Order,

In grids 616 and 716, only the Grand Traverse Band may fish commercially subject to seasonal spawning closures and other agreed conservation measures. However, the parties further agree that the Grand Traverse Band shall be limited to commercial fishing with impoundment gear in these grids after January 1, 1988, provided that impoundment gear and technical assistance is made available to the Grand Traverse Band.

Id. at 3090.

²²⁰ By January 1, 1990, tribal fishers from Bay Mills Indian Community were scheduled to stop fishing in Hammond Bay. *United States v. State of Michigan*, No. M26-73 (W.D. Mich. October 15, 1992); Weeks, *supra* note 172, at 46-47; Ferguson, K. (1998-1999). Indian fishing rights: Aftermath of the Fox decision and the year 2000. *American Indian Law Review*, 23(1): 97-154, p. 134-137.

closures that were mandated in the 1985 Consent Order, Judge Enslen granted the state's motion, but he ordered the DNR to promptly develop a cooperative experimental program to help the Grand Traverse Band develop a small boat impoundment fishery as an alternative to gill net fishing.²²¹ Failure of the experimental program to establish a viable small boat impoundment fishery led to litigation over the loss of small boat fishing opportunities for the Grand Traverse Band.²²² Adjudication and tension between Native and non-Native fishers continued as tribal fishers were prevented from mooring their commercial fishing vessels at public marinas in the cities of Northport and Leland,²²³ and when the state sought an injunction against the Grand Traverse Band for the harvest of salmon.²²⁴ The state also asked the court to enjoin federal and tribal biologists from conducting a gill net assessment in Lake Huron under the 1985 Consent Order.²²⁵

²²¹ *United States v. State of Michigan*, *supra* note 220.

²²² According to the State of Michigan, over \$600,000 was spent to provide trap nets and other costs for the conversion experiment of fishers from gill nets to trap nets. They argued that impoundment gear is still a viable option. Grand Traverse Band's Motion Requesting Modifications of the 1985 Consent Judgment, *United States v. State of Michigan*, No. 2:73-CV-26 (M26-73)(W.D.Mich. January 15, 1997), p. 2; Response to Informational Filing by the Grand Traverse Band of Ottawa and Chippewa Indians, *United States v. State of Michigan*, No. 2:73-CV-26 (M26-73)(W.D. Mich. 1997), p. 4-5; Ferguson, *supra* 220, at 135-138.

²²³ The federal district court and the U.S. Court of Appeals for the Sixth Circuit held that the 1985 Consent Order provided Grand Traverse Band with the right to fish in its traditional fishing grounds, and these rights include mooring access to marinas. *Grand Traverse Band of Chippewa and Ottawa Indians v. Director of Michigan Department of Natural Resources, Township of Leland and Village of Northport*, 971 F. Supp. 282 (W.D. Mich. 1995), *aff'd*, Case No. 96-1168, 6th Cir. (April 15, 1998).

²²⁴ Another important dispute over the 1985 Consent Order occurred when the Grand Traverse Band began to harvest salmon within Grand Traverse Bay. Sport fishers were enraged, and they asked the State to stop the tribe's salmon harvest. When State of Michigan sought an injunction against the tribe, Judge Enslen ruled that a limited salmon fishery was permitted near Belanger Creek in Grand Traverse Bay, Lake Michigan. Conners, D. (1996, August 23). New dispute flares over fishing rights. *Traverse City Record Eagle*, p. A1; Conners, D. (1997, August 28). Court won't hear gill-net dispute until December. *Traverse City Record Eagle*, p. A1; State of Michigan's Brief in Support of Defendant's Motion for a Preliminary Injunction, *United States v. State of Michigan*, No. 2:73-CV-26 (M26-73)(W.D. Mich. Filed August 29, 1997), p. 6; Judge Enslen decided that two tribal fishers could be licensed to fish for salmon, and their nets were required to be set at eight feet below the surface of the water. *United States v. State of Michigan*, No. 2:73-CV-26 (M26-73)(W.D. Mich. September 11, 1997), p. 1-2.

²²⁵ In May 1998, federal and tribal biologists began a research gill net assessment between Hammond Bay and Alpena, Lake Huron. The State of Michigan and DNR objected to the assessment as a violation of the terms of the 1985 Consent Order. Upon filing a motion for an injunction, the federal district court enjoined the tribes from continuing the research and ordered biologists from all the parties to review the tribal

With the expiration of the 1985 Consent Order pending on May 31, 2000, the parties recognized the need for a new fisheries management policy within the treaty-ceded Michigan waters of the Great Lakes. The stakeholders desired a more flexible agreement that would prevent the continuous social conflict and need for litigation as experienced under the 1985 Order. They also hoped to rehabilitate lake trout under a new policy. Despite the conservation measures of the 1985 Consent Order, lake trout rehabilitation remained an elusive goal for Great Lakes fishery management. Furthermore, two additional tribes had gained federal recognition as signatory tribes to the 1836 Treaty since the 1985 Order. These two tribes, the Little River Band of Ottawa Indians near Manistee, Michigan and the Little Traverse Band of Odawa Indians located near Petoskey, Michigan, expressed interest in pursuing a share of the Great Lakes treaty fishery.²²⁶ Recognizing these challenges of the 1985 Consent Order and the difficulty of having two additional parties interested in an allocation of the fishery resource, representatives from Michigan's Attorney General office, DNR, Bay Mills Indian Community, Sault Ste. Marie Band, Grand Traverse Band, Little River Band, Little Traverse Band, various sport fishing organizations – including MUCC, Hammond Bay Area Association, Michigan Fish Producers Association and Grand Traverse Area Sport Fishing Association²²⁷ – met with Judge Enslen on October 15, 1998, at a status conference hearing to formally begin the negotiation process for a new policy.²²⁸

research proposal to come to a consensus on how the research could be conducted. Grinold, D. (Ed.) (1998). Letter from Michigan Governor John Engler to Denny Grinold, Michigan Charter Boat Association. In *Grand Traverse Area Sport Fishing Association Newsletter*, 1(3), p. 1,3.

²²⁶ United States' Request for Relief. *United States v. State of Michigan*, No. 2:73-CV-26 (M26-73)(W.D. Mich. September 20, 1999), p. 2; Shulz, S. (2001). *United States v. Michigan: Treaty Fishing Rights in the Great Lakes*. Presentation for a seminar in the Department of Fisheries & Wildlife, Michigan State University, East Lansing, MI.

²²⁷ Together with the Michigan Chamber of Commerce, Michigan Council of Trout Unlimited, Michigan Steelhead and Salmon Fishing Association, Blue Water Sport Fishing Association and Burt Lake

Negotiating For a New Policy – The 2000 Consent Decree

With the formal initiation of negotiations for a new fisheries management policy, representatives from the parties began to meet to discuss initial proposals submitted by the tribes and the State of Michigan.²²⁹ During negotiation sessions in 1999, the party representatives sought resolution of their differences on these proposals, and chose John Bickerman as a mediator to assist the parties in negotiations.²³⁰

In contrast to the negotiation process of the 1985 Consent Order, the parties conducted the negotiations under a confidentiality agreement over more than two years. The parties met separately and jointly with mediator Bickerman in an effort to reach a final agreement.²³¹

During these negotiations, the State of Michigan advocated a modified zonal approach, similar to that used in the 1985 Consent Order; on the contrary, the tribes sought less of a zonal approach. They preferred greater flexibility and an expansion of tribal fishing waters.²³² All parties agreed that lake trout rehabilitation was one of the most critical goals, yet they disagreed as to what strategies should be adopted.

Preservation Association, the Hammond Bay Area Association and Grand Traverse Area Sport Fishing Association formed the Michigan Fisheries Resource Conservation Coalition in 2000. This organization was created in response to the pending expiration of the 1985 Consent Order. Great Lakes Sport Fishing Council. (2000, January 23). Coalition formed to protect Michigan's Great Lakes fisheries. *Weekly News: Fishery News of the Great Lakes Basin*, p. 2; Schultz, *supra* note 226.

²²⁸ Joint Status Report. *United States v. State of Michigan*, Case No. 2:73-CV-26 (M26-73)(W.D.Mich. September 1, 1999), p. 1; Springstead, B. (1998). Making progress. *Grand Traverse Area Sport Fishing Association Newsletter*, 1(3), p. 2.

²²⁹ An initial tribal proposal for the new fisheries policy was submitted on January 29, 1999, the first state proposal was offered on March 31, 1999, and the first full negotiation session began on April 21, 1999. Shulz, *supra* note 226.

²³⁰ The parties met formally for negotiation sessions in Sault Ste. Marie on July 26-27 and August 24-25, 1999. On August 24, 1999, Mr. John G. Bickerman, Founder and President of the Bickerman Dispute Resolution Group, was confirmed as the chosen mediator for this case. Joint Status Report, *supra* note 228, at 2-5.

²³¹ Tribes, state reach fishing agreement. (2000, July 14). *Detroit Free Press*, p. 3B; Ekdahl, J. (personal communication, August 29, 2000).

²³² Joint Status Report, *supra* note 228.

wa
am
US

Elimination of gill net use – or a significant reduction, at minimum – was a priority for the State of Michigan and the sport fishing organizations. In contrast, it was important for the tribes to maintain and enhance fishing opportunities.

These challenges seemed insurmountable to reaching a final agreement until a breakthrough occurred in negotiations as state-licensed trap net fishermen in the Bay de Noc region of Lake Michigan offered to sell their commercial fishing operations.²³³ This offer provided the potential reduction in non-tribal fishing effort necessary to allow an expansion of tribal fishing opportunities, while reducing the amount of gill net in the Great Lakes fishery by at least 14 miles.²³⁴ Significant progress was made in the negotiations, and by July 13, 2000, John Bickerman announced that an “agreement in principle” was reached.²³⁵

As the parties came closer to reaching an agreement, however, the Grand Traverse Band continued to dispute proposals for its fishing waters.²³⁶ In July of 2000, members of this band faced an alleged threat made by Governor Engler that if the band did not sign the agreement, it would face litigation over its “Turtle Creek Casino” land.²³⁷ Litigation

²³³ Michigan Department of Natural Resources. (August/September 2000). A new beginning: Historic Great Lakes fishery agreement signed August 7. *Natural Inquirer, Special Edition*, p. 3.

²³⁴ Under the buy-out plan that was accepted, tribal commercial fishers are expected to convert from gill nets to trap net operations that previously belonged to nine state-licensed fishers in the Bay de Noc region. At least eight of these fishers will be from the Sault Ste. Marie Band and up to two fishers from the Grand Traverse Band. Under the final plan, these fishers agree to relinquish their rights to gill net and release all lake trout that is incidentally harvested. *United States v. State of Michigan* (referred to as “2000 Consent Decree”), Case No. 2:73-CV-26 (M26 73) (W.D. Mich. August 7, 2000), p. 78-79; Dale, J. (October 2000). Seven sovereigns sign 2000 Consent Decree. *Tribal Fishing*, 3(4), p. 1,4.

²³⁵ According to the DNR, a conceptual agreement was reached by the parties at midnight on April 27, 2000. Cool, K. (2000, April 28). *The State of Michigan and Native American Tribes Announce Major Breakthrough in Settlement Negotiations*. Department of Natural Resources: Lansing, MI, p. 1.

²³⁶ Carlson, E. (2000, July 20). Duhamel nix treaty: Native fisherman says Band would compromise rights. *The Leelanau Enterprise*, 123(43), p. 1, 15.

²³⁷ An attempt to place conditions upon tribal treaty fishing rights was attempted in the State of Michigan was made in 1997 when state Senator David Jaye (R-Macomb County) proposed a “No Fish, No Chips” amendment to H.B. 4767, casino approval legislation. This resolution would have prevented tribes from using gill nets or “face the loss of their casino ‘poker chips’ privileges.” Jaye, D. (1997, June 4). *No Fish*,

over the land on which the casino sits would be harmful to the tribe since its profits are used to provide social services and educational funds for the Grand Traverse Band.²³⁸

After the media brought attention to this issue, a spokesman for the Governor denied these allegations.²³⁹

In the midst of this controversy, however, a final agreement was reached in August of 2000. The Bay Mills Indian Community hosted an official signing ceremony on August 7, 2000 for this document, referred to as the “2000 Consent Decree.”²⁴⁰ Importantly, it was signed by all the parties²⁴¹ and was supported by a number of sport fishing organizations.²⁴²

The 2000 Consent Decree differs from the 1985 Consent Order in a variety of important ways. First, its duration is twenty years, rather than fifteen. Compared to the 1985 Consent Order, it is lengthy and complex.²⁴³ According to the parties, the goals of this agreement are dissimilar to the 1985 plan’s goals. Instead of focusing on fisheries allocation and reduction of social conflict, the new agreement focuses more on lake trout

No Chips. State of Michigan House of Representatives, Press release, p. 1; Kellman, S. (1997, November 8). Panel hears protests over gill netting. *Traverse City Record Eagle*, p. A1, A2.

²³⁸ Carlson, E. (2000, July 13). Turtle Creek enters fish talks. *The Leelanau Enterprise*, 123(42), p. 1, 16. This information was also provided through conversations with several members from the Grand Traverse Band during and members of the local community during July of 2000.

²³⁹ Spokesman John Truscott for Governor Engler responded to the question of whether the State of Michigan is trying to link the negotiations for the new fisheries management agreement with litigation over the lands on which the Turtle Creek casino sits: “*The only thing the fishing treaty negotiations and the Turtle Creek issue have in common is that they are going on at roughly the same time...The two issues are, and have been, entirely separate.*” Carlson, E. (2000, July 20). Fishing for a gill-net solution: Band negotiators reach “agreement in principle.” *The Leelanau Enterprise*, 123(43), p. 15.

²⁴⁰ 2000 Consent Decree, *supra* note 24; Dale, *supra* note 234.

²⁴¹ Bradsher, K. (2000, August 8). Michigan pact resolves battle over limits on Indian fishing. *New York Times*, p. 12A; Michigan Department of Natural Resources, *supra* note 233; Dale, *supra* note 234.

²⁴² For example, the newsletter of the Grand Traverse Area Sport Fishing Association stated, “*To answer the question that everyone is asking: ‘is this [the 2000 Consent Decree] a good agreement for sport fishers?’ YES.*” Springstead, B. (2000, August 25). The agreement. *Grand Traverse Area Sport Fishing Association*, 1(7), p.1; Michigan Department of Natural Resources, *supra* note 233.

²⁴³ The 1985 Consent Order is 36 pages in length, and the 2000 Consent Decree is 120 pages in length. *United States v. State of Michigan*, *supra* note 190, at 3088; 2000 Consent Decree, *supra* note 234.

rehabilitation and resource protection. Reportedly, it is based more on science,²⁴⁴ while considering economic and social issues, such as fishing opportunities and social conflict.²⁴⁵

Lake trout rehabilitation should be promoted under the 2000 Consent Decree since lake trout harvest in deferred zones (under the 1985 Order) will now be strictly regulated, and penalties are enacted for overexploitation.²⁴⁶ Temporal and spatial gear restrictions under the new agreement should offer greater protection for lake trout, as well as the reduction in gill net use as some tribal fishers convert to trap nets. The parties agreed to remove at least 14 million feet of gill net from the Great Lakes fishery.²⁴⁷ In northern Lake Huron alone, lake trout mortality is expected to be reduced from 80% to a maximum of 45%.²⁴⁸ Refuges and restrictions on lake trout harvest should result in greater biomass. Lake trout catch limits and maintenance of crucial sea lamprey control measures will also help in lake trout recovery.²⁴⁹

In contrast to the 1985 Consent Decree, allocation of the fishery under the 2000 Consent Decree is based upon allocation of species, rather than zones. Under this

²⁴⁴ In northern Lake Huron, for example, a limited gill net fishery for whitefish is allowed during the fall under the 2000 Consent Decree. This fishery resulted from a scientific assessment that was conducted in 1999, which demonstrated that a gill net fishery could be conducted which allows minimum incidental catch of lake trout. Ebener, M.P., Gebhardt, K., & Johnson, J. (2001). *Final Interim Report Summarizing the Spatial, Temporal, and Bathymetric Distribution of Lake Trout and Lake Whitefish in Northern Lake Huron in 1998 and 1999*. Report Prepared by the Lake Huron Technical Subcommittee of the Technical Fisheries Committee.

²⁴⁵ Michigan Department of Natural Resources, *supra* note 233, at 1-5; Dale, *supra* note 234; Smith, K. (2001). *Treaty Fishing in the Great Lakes: Year 2000 Consent Decree*. Presentation for a seminar in the Department of Fisheries & Wildlife, Michigan State University, East Lansing, MI.

²⁴⁶ 2000 Consent Decree, *supra* note 234, at. 101-107.

²⁴⁷ The elimination of 14 million feet of gill nets was calculated based upon the reduction in fishing effort necessary to achieve the target total annual mortality rate of 45% for lake trout and the number of tribal commercial fishers that would be willing to convert from gill nets to trap nets. Bence, J. (personal communication, May 31, 2002).

²⁴⁸ Cool, *supra* note 235.

²⁴⁹ 2000 Consent Decree, *supra* note 234, at 40-49; Sharp, E. (1998, July 30). Commission targets lamprey source. *Detroit Free Press*, p. 1-4.

allocation regime, the tribes are allocated harvest of “commercial” species and the State of Michigan’s sport fishery is allocated “sport” species.²⁵⁰

The parties have stated that the 2000 Consent Decree will expand fishing opportunities for tribal commercial and sport fishers. Fishing opportunities are expected to increase for tribal fishers through the availability of trap net operations from the buy-out of Bay de Noc fishers, reduction of competition with existing gill net fishers, and opening of previously closed waters. It is anticipated that sport-fishing opportunities will increase as tribal gill net use is significantly reduced, more lake trout are protected, and sport species are allocated solely for the state’s recreational fishery.²⁵¹

Similar to the 1985 Consent Order, under the new agreement fisheries management should be a cooperative effort through data sharing and interjurisdictional organizations. These organizations include the newly created Chippewa Ottawa Resource Authority (CORA),²⁵² Technical Fisheries Committee (TFC),²⁵³ and Joint Modeling Committee. An important feature of the 2000 Consent Decree will be the establishment of lake trout harvest limits through mutual agreement.²⁵⁴ This measure should not only foster continued cooperation, but facilitate lake trout management efforts.

²⁵⁰ Lake whitefish, round whitefish, bloater chubs, and burbot are some of the species designated as “commercial” species for tribal harvest. Species such as chinook salmon, coho salmon, steelhead, and brown trout are designated as “sport” species for recreational harvest. Harvest of lake trout, lake herring, walleye and perch – considered both a commercial and sport species – will be equally divided among the tribes and the State of Michigan. 2000 Consent Decree, *supra* note 234.

²⁵¹ *Id.*; Michigan Department of Natural Resources, *supra* note 233, at 1-3, 5; Dale, *supra* note 234.

²⁵² CORA was previously identified under the 1985 Consent Order as the Chippewa Ottawa Treaty Fishery Management Authority (COTFMA). *Chippewa Ottawa Resource Authority Charter and Rules of Procedure of the Ottawa Resource Authority (CORA Charter)*. In *United States v. State of Michigan*, (2000 Consent Decree.) Case No. 2:73-CV-26 (M26 73) (W.D. Mich. August 7, 2000), APPENDIX A.

²⁵³ The TFC is an intergovernmental body comprised of biologists seeking to resolve fisheries management issues in the Great Lakes based upon the best available science and consensus. Bickerman, J. (2000, August 7). *Parties in United States v. Michigan, 1836 Treaty Great Lakes Fishing Issue, Agree to 20 Year Settlement*. Press release. Department of Natural Resources: Lansing, MI, p. 2.

²⁵⁴ 2000 Consent Decree, *supra* note 234, at 40-49.

Other interjurisdictional organizations with responsibilities under this agreement include the Law Enforcement Committee and Executive Council that were created by the 1985 Consent Order. In contrast to the 1985 Consent Order, the Law Enforcement Committee under the 2000 Consent Decree will jointly enforce provisions of the agreement.²⁵⁵

Notably, the Public Information and Education provision of the 1985 Consent Order was not included within the 2000 Consent Decree. However, the new fisheries policy does have a public education component. In particular, the tribes will be responsible for hosting community meetings to provide information and discuss issues related to the 2000 Consent Decree upon request from members of the sport fishing community or the DNR.²⁵⁶

Lastly, the 2000 Consent Decree includes a conflict resolution mechanism to help avoid litigation over issues that arise under the agreement. Unlike the dispute resolution mechanism of the 1985 Consent Order, emphasis in the mechanism of the new policy is placed on intergovernmental consultation between the tribes and the State of Michigan. Only once consultations fail can a party petition to the court for relief. Under this new system, the parties anticipate that there will be fewer court interventions than under the 1985 Consent Order.²⁵⁷

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ Bickerman, *supra* note 253, at 2; 2000 Consent Decree, *supra* note 234.

Chapter 3: Evaluation and Comparative Analysis

Research Focus

The 1985 Consent Order set forth a number of goals for fishery management within the treaty-ceded waters of the upper Great Lakes, including rehabilitation and conservation of lake trout stocks, resolution of social conflict between state-licensed recreational fishers and tribal commercial fishers, cooperation in the joint management of the Great Lakes fishery between tribal and state regulatory agencies and protection of treaty-right tribal fishing.¹ The Consent Order was significant since it had critically important goals that would be difficult to achieve. It was also the first time that the court created and imposed a fishery management policy in the State of Michigan. Yet, a comprehensive evaluation of this court-imposed fisheries management policy governing the treaty-ceded waters of the upper Great Lakes has not been conducted, giving rise to this study.

The 1985 Consent Order was evaluated using qualitative research methods. Additionally, a comparative analysis was done between this policy and its replacement, a recently negotiated court-supervised policy, referred to as the 2000 Consent Decree. The goal of the study was to provide an understanding of the perceived effectiveness of fisheries management under the 1985 Consent Order, an examination of perceived changes and perceptions of the 2000 Consent Decree and recommendations for future fisheries management policies between state and tribal governments.

¹ *United States v. State of Michigan* (1985 Consent Order), 12 ILR 3079, 3083-3088 (W.D. Mich. 1985).

Foundations of Research

The theoretical perspective – which influenced the study’s focus, methods, and analysis – was *interpretivism*.² Founded on the view that different people construct meaning or understanding of the same phenomena in different ways,³ interpretivism examines understanding of social reality.⁴ Interpretive policy analysis focuses on the meanings of policies, values, or beliefs of affected policymakers and stakeholders.⁵

The type of interpretivism used in this policy evaluation research was *phenomenology*. This theoretical framework is based in philosophy and sociology, and it examines how social phenomena are understood, experienced and perceived by their participants.⁶ Researchers conducting studies from a phenomenological perspective do not assume that they understand what phenomena mean to respondents.⁷ Prejudice is avoided in this type of research by “giving voice” to the respondents through representation of their responses as accurately as possible.⁸

² Patton, M.Q. (1990). *Qualitative Evaluation and Research Methods*. (2nd ed.). Newbury Park, CA: Sage Publications, p. 87; Crotty, M. (1998). *The Foundations of Social Research: Meaning and Perspective in the Research Process*. Sage Publications: Thousand Oaks, CA, p. 3, 7-8, 17.

³ The epistemology, or theory of knowledge that is inherent in this theoretical perspective, is constructivism. Constructivism reflects the view that individuals socially construct meaning. Crotty, *supra* note 2, at 3, 8-9.

⁴ Schwandt, T.A. (1994). Constructivist, interpretivist approaches to human inquiry. In Denzin, N.K. and Lincoln, Y.S. (Eds.), *Handbook of Qualitative Research*. (pp. 118-137) Sage Publications: Thousand Oaks, CA, p. 125; Fischer, F. (1995). *Evaluating Public Policy*. Nelson-Hall: Chicago, IL, p. 2; Crotty, *supra* note 2, at 66-67.

⁵ Yanow, D. (2000). *Conducting Interpretive Policy Analysis*. Sage Publications: Thousand Oaks, CA, p. 9-10, 14-22.

⁶ Geertz, C. (1973). *The Interpretation of Cultures*. New York, NY: Basic Books; Taylor, S. J. & Bogdan, R. (1984). *Introduction to Qualitative Research Methods: The Search for Meaning*. (2nd ed.) New York, NY: John Wiley Press, p. 1-2; Patton, *supra* note 2, at 69-71.

⁷ Crotty, *supra* note 2, at 78-80.

⁸ Strauss, A.L. and Corbin, J. (1998). *Basics of Qualitative Research Techniques and Procedures for Developing Grounded Theory*. (2nd ed.) Sage Publications: Thousand Oaks, CA, p. 43-44.

The study was premised upon Patton's *utilization-based, formative evaluation*.⁹

The focus of utilization-based evaluation is on "intended use by intended users;" thus, the stakeholders play an active role in defining the criteria for policy or program evaluation, as well as the evaluation itself.¹⁰ The researcher facilitates stakeholder assessment of the policy to ensure that the results and policy recommendations are meaningful and applicable to decision-makers.¹¹ Formative evaluation serves the purpose of improving a specific policy for a certain group of people. This type of evaluation often uses qualitative methods, since it is limited in its scope as applied research, and it is not generalizable beyond the setting under study.¹² This study was based upon Patton's utilization-based formative evaluation since consideration of the site-specific history and social conditions was considered important for evaluating these complex fisheries management policies and making useful recommendations.

Bobrow and Dryzek suggest that policy analysis from the perspective of policy makers alone fails to produce new or challenging information. Information provided by policy-makers has the outcome of "serving power – not dispersing it, or countervailing it, or criticizing it."¹³ Yet, decision-makers must be involved in policy analysis so results will be pertinent and useful.¹⁴ To provide a pragmatic evaluation of the 1985 Consent Order and comparative analysis with the 2000 Consent Decree, this research was conducted from the perspective of its affected stakeholders, including policy makers.

⁹ Patton, M.Q. (1997). *Utilization-Focused Evaluation: The New Century Text*. (3rd ed.) Sage Publications: Thousand Oaks, CA.

¹⁰ *Id.* at 20, 241-247.

¹¹ *Id.* at 21-24, 237.

¹² *Id.* at 68-69, 76, 79; Strauss, *supra* note 8, at 214; Herman, J.L., Morris, L.L. & Fritz-gibbon, C.T. (1987). *Evaluator's Handbook*. Newbury Park, CA: Sage Publications; Patton, *supra* note 2, at 156.

¹³ Bobrow, D.B. & Dryzek, J.S. (1987). *Policy Analysis by Design*. Pittsburg, PA: University of Pittsburgh Press, p. 168.

¹⁴ Patton, *supra* note 9, at 48.

Research Methods

Qualitative research methods are usually described as “naturalistic” or “interpretive” inquiry since the researcher does not manipulate the research setting while trying to understand concepts, explanations or actions.¹⁵ Another important characteristic of qualitative research methods is that they use inductive reasoning, which can elucidate a deeper understanding of social phenomena, compared with quantitative research.¹⁶ Although qualitative research does not provide a statistical measure of the causal relationships between variables, it is rich in description¹⁷ and allows the researcher to identify and understand how phenomena occur.¹⁸ A qualitative approach to evaluating natural resource use – which considers historical, social, political, contexts as well as environmental conditions – can provide a more insightful and effective evaluation.¹⁹ Importantly, the overarching research question involved complex, interrelated concepts. Qualitative research methods provided detailed and descriptive data that was necessary for evaluating stakeholder perceptions of the 1985 Consent Order and making comparisons to the 2000 Consent Decree.

An analysis of stakeholder perceptions of the 1985 Consent Order and the 2000 Consent Decree would not have been feasible using quantitative survey methods since the

¹⁵ Patton, *supra* note 2, at 39; Bogdan, R. & Bilken, S. (1992). *Qualitative Research for Education: An Introduction to Theory and Methods*. Boston, MA: Allyn & Bacon, p. 29-30; Lin, A.C. (1998). Bridging positivist and interpretivist approaches to qualitative methods. *Policy Studies Journal*, 26(1): 162-180, p. 162.

¹⁶ Strauss, A.L. & Corbin, J. (1990). *Basics of Qualitative Research: Grounded Theory Procedures and Techniques*. Newbury Park, CA: Sage Publications, p. 23; Bogdan, *supra* note 15, at 21-32; Maxwell, J.A. (1996). Qualitative research design: an interactive approach. *Applied Social Research Methods Series*, vol. 41. Thousand Oaks, CA: Sage Publications, p. 17.

¹⁷ Bogdan, *supra* note 15, at 1-21, 31.

¹⁸ Lin offers a compelling argument for the use of both quantitative and qualitative techniques in policy analysis. Lin suggests using quantitative analysis for identification of causal relationships between variables and qualitative analysis for assessing the causal mechanisms to explain how these variables are related. Lin, *supra* note 15, at 165.

response rate of tribal fishers was expected to be extremely low. This was anticipated due to a lack of trust and lack of participation by tribal fishers. Additionally, there were inadequate means to distribute the surveys since some tribal fishers do not maintain a permanent residence year-round. Without the participation of tribal fishers, the analysis would not have provided meaningful results.

Research Design

The overarching research question in this study was: *How do stakeholders perceive the 1985 Consent Order as a management tool for the 1836 Treaty waters of the Great Lakes?* The overarching research question was evaluated in terms of stakeholder perceptions of provisions they believed were important in this fisheries management policy. These key provisions included:

- Lake trout refuges and zones;
- Establishment of assigned zones for tribal commercial fishers; and
- Gill net use and restrictions.

For this evaluation, two preliminary instruments were drafted. The first was created for fishers, and the second was created for biologists and representatives. These instruments were drafted based upon review of pertinent background information, including literature, media, court rulings, reports and legislation.²⁰ They were also developed from discussions with key informants, or people considered by others to be knowledgeable on the research topic (see Appendix A: Research Timeline, Phase I). A tribal representative, a biologist from the Michigan DNR, and a representative from the

¹⁹ McCay, B.J. and Jentoft, S. (1998). Market or community failure? Critical perspectives on common property research. *Human Organization*, 57(1): 21-29, p. 24-29.

sport fishing community reviewed the preliminary instruments and provided comments and suggestions. Their feedback was reviewed, and the instruments were revised accordingly.

The instruments were tested in a pilot interview with a sport-fishing representative and a tribal fisher. These people were chosen for the pilot interviews since they were knowledgeable about the Great Lakes fishery, the 1985 Consent Order, and the 2000 Consent Decree. Further revisions were made to address concerns that arose from the pilot interview (see Appendix A: Research Timeline, Phase II).

Preliminary interviews were conducted in the fall of 1999, and formal interviews started in June of 2000, as the 1985 Consent Order was coming to termination and negotiations were ongoing for the 2000 Consent Decree. Minor revisions were made to the instruments during data collection (see Appendix A: Research Timeline, Phase III & IV; Appendix B: Final Research Instrument for Fishers; Appendix C: Final Research Instrument for Biologists and Representatives).²¹ Interviews were completed in January of 2001, after the 2000 Consent Decree was signed and in its implementation phase (see Appendix A: Research Timeline, Phase V).

²⁰ According to Strauss and Corbin, a literature review can provide the necessary information to understand the research topic and provide ideas for questions and sampling during the initial stage of research. Strauss, *supra* note 8, at 48-52; Yanow, *supra* note 5, at 31.

²¹ *Id.* at 31-33.

In the final design of this study, the perceived effectiveness of the 1985 Consent Order as a management tool for the 1836 Treaty waters of the Great Lakes was analyzed through individual, in-depth, semi-structured interviews with members from the following stakeholder groups:

- Tribal commercial fishers (from the Bay Mills Indian Community, Grand Traverse Band of Ottawa and Chippewa Indians, Sault Ste. Marie band of Chippewa Indians);
- State-licensed sport fishers;
- State-licensed charter boat fishers;
- Tribal biologists (from the Bay Mills Indian Community, Grand Traverse Band of Ottawa and Chippewa Indians, Inter-Tribal Fisheries Assessment Program);²²
- DNR biologists;
- Tribal representatives (from the Bay Mills Indian Community, Grand Traverse Band of Ottawa and Chippewa Indians, Sault Ste. Marie band of Chippewa Indians);
- DNR representatives;
- Sportfishing and charter boat fishing representatives; and
- State of Michigan representatives from the Attorney General's Office.

These same stakeholders were asked to compare the 1985 Consent Order to the 2000 Consent Decree to assess changes in policy, the process of policy development, and compare stakeholder perceptions of both policies.

²² Although the Sault Ste. Marie band does not have its own biologists, it has access to scientific expertise of biologists working at the Inter-Tribal Fisheries Assessment Program (ITFAP). Furthermore, CORA, the

Representatives that were solicited for participation included formal and informal party representatives of the stakeholder groups. Most representatives played a role in the negotiations for the 1985 Consent Order and/or the 2000 Consent Decree. Members of the Public Information and Education Committee and a regional representative from the Sea Grant College Program also participated in this study. They discussed their perceptions of information and education under these policies.

Interviews were conducted in a manner that was most convenient for the respondent in order to achieve the greatest compliance. Face-to-face interviews were conducted at respondents' homes, places of employment, at marinas, and on a boat. When it was not convenient for respondents to participate in face-to-face interviews, they were conducted by telephone. These interviews were completed using a telephone-operated tape recorder, upon permission of the respondent.

Recreational sport fishers were selected through purposive sampling of fishers, or sampling of select respondents.²³ Fishers were solicited for participation by approaching them at various marinas and public access boat launch sites²⁴ throughout the 1836 Treaty waters of the Great Lakes.²⁵ Each recreational sport fisher who arrived at the site was asked the same set of questions to determine their eligibility and willingness to participate in an interview. Interviews were sought with sport fishers who fished the

Chippewa-Ottawa Resource Authority – previously known as COTFMA, the Chippewa-Ottawa Treaty Fishery Management Authority – oversees tribal management of its fisheries.

²³ Patton, *supra* note 2, at 179-180, 183.

²⁴ Each marina and public boat launch site was visited for two hours by the researcher to solicit fishers.

²⁵ Visits were made to the following marinas and public access sites in an attempt to solicit sport fishers for their participation: Grand Traverse Bay, West Arm, west side, Greilickville Marina (along M-22); Grand Traverse Bay, East Arm, east side, Bowers Harbor, public access site; Grand Traverse Bay, East Arm, west side, public access site; Grand Traverse Bay, West Arm, west arm, public access site; Northport marina; Leland marina; Sutton's Bay marina; Charlevoix marina; Traverse City marina; Acme marina; Whitefish Point, public access site; Brimley, public access site; Whitefish Point public access site; Cheboygan marina; Rogers City public access site.

Michigan waters of the upper Great Lakes and lived in the area.²⁶ Those fishers willing to participate in an interview to discuss a Great Lakes fisheries management policy were asked to provide their name and telephone number. These participants were contacted within a week to determine a date and time that was convenient for them to conduct an interview. Charter boat sport fishers were solicited to participate in an interview through snowball sampling.²⁷ Despite efforts by the researcher to solicit sport fishers from a wide geographic area throughout the Michigan waters of the Great Lakes, recreational and charter boat sport fishers that participated fished mainly in Lake Michigan and in the Grand Traverse Bay region.

To solicit interviews with tribal fishers required the assistance of a critical *gatekeeper* within the Grand Traverse Band and Bay Mills Indian Community.²⁸ The gatekeeper from each tribe was a biologist and/or representative that provided permission and information on how to solicit participation from tribal fishers. They played a vital role in allowing entry into the community and legitimizing the research through their recognition of the project's validity and legitimacy. Snowball sampling was also used to

²⁶ Each fisher was told:

"Hello, my name is Laura. I'm a graduate student at Michigan State University.

May I ask you a few questions?

[If the response is yes] Do you live in the area?

Do you fish the Great Lakes? [If so] Which of the Great Lakes do you fish?

How long have you been fishing in _____?

[If they fish in the northern Great Lakes] Would you be willing to participate in an interview evaluating a fisheries management policy in the Michigan waters of the northern Great Lakes? To participate, you will be interviewed for approximately 20-30 minutes at a place and time that is convenient for you. All participation is completely voluntary. Would you be willing to participate?

[If the response is yes] All interviews will be strictly confidential and you will remain anonymous in all reports of findings. Upon request results may be available to you. If you have any questions or concerns about participating in the study, you can contact David E. Wright, Chairperson of the University Committee on Research Involving Human Subjects at 355-2180."

²⁷ When asked to provide the names of anyone that I should speak with regarding this issue, all recreational sport fishers provided the names and contact information for charter boat sport fishers in the area. Patton, *supra* note 2, at 176, 182.

solicit tribal fishers that would be willing to participate. Sault Ste. Marie fishers were solicited through word of mouth and by a visit and/or a telephone call.²⁹

Tribal and DNR biologists/representatives, sport-fishing and state representatives that were involved in the negotiations for the 1985 Consent Order and 2000 Consent Decree were also asked to participate in the study. Snowball sampling was also used to solicit participants that would provide an interesting, illustrative or unique perspective.

Data Collection

Data were collected from audio taped recordings of interviews, transcriptions of these interviews and fieldnotes.³⁰ During the interview, reflective notes were written down to provide guidance in future data analysis and interpretation.³¹ These notes contained personal accounts, impressions, thoughts, and ideas that came to mind during interviews. Memos were created to provide detailed information on personal reflections. Descriptive information on the context surrounding interviews was documented to aid data analysis and interpretation.³²

Although there are no steadfast rules for sample size in qualitative inquiry, the number of interviews depended upon saturation of data.³³ Instead of focusing on a minimum sample size, qualitative sampling maximizes the opportunities for making

²⁸ A "gatekeeper" is someone who has either formal or informal authority to control access to a research site and/or research participants. Bogdan, R. & Taylor, S.J. (1975). *Introduction to Qualitative Research Methods: An Phenomenological Approach to the Social Sciences*. Wiley: New York, NY, p. 30-32.

²⁹ A Sault Ste. Marie fisher was introduced to me through Bay Mills, and I believed the fisher was from the Bay Mills Indian Community. Upon conducting the interview, I discovered that the fisher was a member of the Sault Ste. Marie tribe.

³⁰ Clandinin, *supra* note 8, at 420.

³¹ Bilken, S. & Bogdan, R. (1992). *Qualitative Research for Education: An Introduction to Theory and Methods*. Boston, MA: Allyn & Bacon, p. 107, 121-122.

³² *Id.* at 119-122

³³ Patton, *supra* note 2, at 185.

comparisons through selection of information-rich cases to study in depth.³⁴ According to Lincoln and Guba, samples should be selected “to the point of redundancy...sampling is terminated when no new information is forthcoming” from new information sources.³⁵ As interviews were conducted, the researcher took note when interview data failed to provide new information, as members within the same stakeholder group offered repetitive responses. This lack of new information and repetition dictated the conclusion of data collection with each stakeholder group. However, the researcher made every effort to conduct interviews with individuals representing different perspectives to allow the greatest comparison of responses.³⁶ Overall, 50 individual interviews were conducted (see Appendix D: Interview Summary for a summation of how many interviews were conducted with each stakeholder category).

Data Analysis

Throughout the study, qualitative interview data were organized by stakeholder group, or the identification of interview respondents.³⁷ Based upon examination of responses, tribal biologists and representatives were combined into one stakeholder group

³⁴ Strauss, *supra* note 8, at 202-203; Patton, *supra* note 2, at 169.

³⁵ Lincoln, Y.S. & Guba, E.G. (1985). *Naturalistic Inquiry*. Newbury Park, CA: Sage Publications, p. 202.

³⁶ Sport fishers were solicited from expensive private marinas, as well as public marinas and boat launches throughout the treaty-ceded, Michigan waters of the Great Lakes. Although attempts were made to solicit fishers with a diversity of social variables and from different geographical locations, all sport fishers seen were male Caucasians who mainly fished in the Grand Traverse Bay region, and most fishers were approximately over 35 years of age. Tribal fishers were asked to participate from Grand Traverse Band, Bay Mills Indian Community and Sault Ste. Marie. Among the fishers willing to participate, both current and former fishers participated from Grand Traverse Band; most of the fishers who participated from Bay Mills Indian Community were former fishers; and only one current fisher participated from Sault Ste. Marie. Notably, a gatekeeper did not provide access to the Sault Ste. Marie, although assistance was provided from one of the leaders in the tribal community.

³⁷ This data organization technique was based partially on Whyte’s “orienting theory” that is used to provide guidance for data analysis and Patton’s organization of qualitative data. Whyte, W.F. (1984). *Learning from the Field: A Guide from Experience*. Beverly Hills, CA: Sage Publications, p. 118-121; Patton, M.Q. (1987). *How to Use Qualitative Methods in Evaluation*. Newbury Park, CA: Sage Publications, p. 147.

and DNR biologists and representatives were combined into another group. This was done due to similarities in the responses of biologists and representatives from the tribes and the DNR and the overlap in their responsibilities. Recreational sport fishers and charter sport fishers were separated into two separate stakeholder groups due to their different levels of knowledge regarding the 1985 Consent Order.

The qualitative interview data for each group was compiled and organized based upon the *content analysis method*. This method entailed asking repeated questions about the meaning and significance of statements in search of patterns and themes.³⁸

Transcribed texts were reduced and organized based upon *analytic categories*, or categories that were developed and articulated by respondents.³⁹ The organization of data was verified using Glaser and Strauss' *constant comparative method*.⁴⁰

Data analysis was conducted throughout each phase of data collection. Data analysis provided an understanding of how the participants perceived the Consent Decree as management policy. Secondly, data analysis guided future inquiry by illustrating the need for minor revisions to research questions, pointing out deficiencies in the data, and follow-up questions that needed to be asked to resolve inconsistencies or clarify data interpretation.

Validity and Trustworthiness

Potential distortions may occur in qualitative data due to the failure of stakeholders to recollect past feelings and attitudes, or framing of responses to persuade

³⁸ *Id.* at 147-152; Clandinin, *supra* note 30, at 423; Strauss, *supra* note 8, at 66.

³⁹ Lincoln, *supra* note 35, at 337.

⁴⁰ Glaser, B.G. & Strauss, A.L. (1967). *Discovery of Grounded Theory: Strategies for Qualitative Research*. Chicago, IL: Aldine, p. 3.

or please the interviewer.⁴¹ Due to these potential problems, the researcher must compare responses, remain cognizant of the respondents' state of mind, and follow procedures to ensure validity and trustworthiness of data.⁴²

Validity and trustworthiness of the data were established in the study through the following procedures:

- comparison of stakeholder responses to pertinent literature;
- *triangulation*,⁴³ through conducting interviews with different stakeholder groups and utilization of various sampling techniques for sport fishers (purposive and snowball sampling);
- maintenance of a skeptical attitude and validation in subsequent interviews; and
- adherence to research procedures.⁴⁴

Validity and trustworthiness were also established through *member checks*, or testing of categories, classification, and conclusions with members of the stakeholder groups from which data were collected.⁴⁵ Upon the initial completion of data analysis, preliminary results were shared with select key informants from each stakeholder group. Each informant was chosen based upon their knowledge and expertise on the 1985 Consent Order and/or the 2000 Consent Decree. The informants were asked to review the draft results and provide any feedback and comments that they may have (see

⁴¹ Whyte, *supra* note 37, at 122-124.

⁴² *Id.* at 124-126.

⁴³ Some types of triangulation are:

- 1) Data – using different data sources;
- 2) Investigator – using different investigators;
- 3) Theory – using multiple theoretical perspectives on the same data set; and
- 4) Methodological – using different methods of analysis.

Denzin, N.K. (1978). *The Research Act: A Theoretical Introduction to Sociological Methods*. McGraw-Hill: New York, NY; Patton, *supra* note 2, at 187-198; Neuman, W.L. (2000). *Social Research Methods: Qualitative and Quantitative Approaches*. (4th ed.). Allyn & Bacon: Boston, MA, p. 170-171.

⁴⁴ Strauss, *supra* note 8, at 44-46.

Appendix A: Research Timeline, Phase VI). In two cases, results were revised based upon key informant feedback.

Evaluation Results

Stakeholder perceptions of the 1985 Consent Order and the 2000 Consent Decree were influenced by their knowledge of these fishery management policies. Therefore, stakeholder knowledge was examined prior to analysis.

Knowledge of the 1985 Consent Order and 2000 Consent Decree

A majority of stakeholders were very familiar with the 1985 Consent Order, with the exception of most recreational sport fishers.⁴⁶ However, these fishers were generally aware that a policy was in place, and they knew about the prohibition of gill netting below the 45th parallel in Grand Traverse Bay under this policy.⁴⁷ Many stakeholders were very familiar with the 2000 Consent Decree, except for recreational sport fishers, some charter boat sport fishers, some tribal fishers, and a few DNR biologists/representatives.⁴⁸

Analytic Categories

Stakeholders identified the following categories as significant, as revealed from the analysis of interview data:

⁴⁵ Lincoln, *supra* note 35, at 290, 313-316.

⁴⁶ The most common response from recreational sport fishers to the question, "Are you familiar with the 1985 Consent Order?" was "*The what?*" Another common response was, "*No.*"

⁴⁷ One recreational sport fisher illustrated the response of most informed sport fishers regarding the 1985 Consent Order's restriction on tribal gill net fishing below the 45th parallel in Grand Traverse Bay, *Is the rules they came up with? I don't know much about it. I only know they [Native fishers] can't fish below the 45th parallel.*

Most of the recreational sport fishers were unaware of other provisions of the 1985 Consent Order. Generally, charter boat fishers had greater awareness of these provisions.

⁴⁸ The details of this agreement were not made available to the public until August of 2000, so it was not expected that all respondents would have known the details of this policy. However, a majority of respondents were very familiar with this document since they were involved with the negotiations directly or indirectly.

- Lake trout rehabilitation and conservation;⁴⁹
- Fishing opportunities and communities;
- Social conflict;
- Knowledge and perceptions of Native treaty fishing rights;
- Fisheries management between tribal and state regulatory agencies; and
- Negotiations and the negotiation processes leading to the 1985 Consent Order and the 2000 Consent Decree.

The results and relationships between provisions of the 1985 Consent Order and these analytic categories are described below, and they are organized by analytic category. (For visual illustration of the relationships between policy provisions and the analytic categories, see Appendix E: Cognitive Map – Interview Data Analysis Results).

I.) 1985 Consent Order: Lake Trout Rehabilitation and Conservation

A majority of stakeholders believed that lake trout rehabilitation and conservation were not promoted under the 1985 Consent Order, despite a variety of conservation measures within this fisheries management policy. Stakeholders discussed lake trout rehabilitation and conservation in terms of the following policy provisions and factors:

- a. Refuges and zones;
- b. Gill net use and restrictions;
- c. Role of science in policy-making; and

⁴⁹ At the start of the research project, respondents were asked about lake trout conservation. However, once interviews were conducted with biologists/representatives, they clarified that lake trout rehabilitation is the goal in Lakes Huron and Michigan, and lake trout conservation is the goal in Lake Superior. A tribal biologist/representative explained:

When talking about lake trout, you should probably say “rehabilitation” instead of “conservation” because in [Lakes] Huron and Michigan, the lake trout are virtually all stocked—they’re not reproducing. In Lake Superior, it’s the flip of that. The lake trout are mostly all wild and naturally reproduced. There’s very little stocking, and now in Michigan waters of the Great Lakes there will be no stocking pursuant to rehabilitation.

d. Lack of commitment.

I.) a. *Refuges and Zones*

A majority of respondents from all stakeholder groups believed that the establishment of lake trout conservation refuges, priority rehabilitation and deferred zones⁵⁰ under the 1985 Consent Order failed to promote lake trout rehabilitation and conservation.⁵¹

Respondents discussed a variety of biological factors they believed were responsible for the ineffectiveness of lake trout conservation refuges, rehabilitation and deferred zones for lake trout rehabilitation and conservation. The biological factors that were mentioned include:

- Lack of natural reproduction in Lake Michigan and Lake Huron;
- Sea lamprey predation;
- Salmonid predation; and
- Lack of fry survival and recruitment.

According to respondents from the tribes⁵² and the DNR, these important factors prevented lake trout rehabilitation and conservation under the 1985 Consent Order.

⁵⁰ Stakeholders referred to “refuges” when discussing lake trout conservation refuges established under the 1985 Consent Order. However, in their discussions of lake trout rehabilitation and conservation within the refuges, they also spoke of the priority rehabilitation and the deferred zones. Thus, although the research instrument asks for stakeholder perceptions of the lake trout conservation refuges, responses included discussions of the priority and deferred zones. The charter boat sport-fishers were not aware of the distinction between the lake trout conservation refuges and the priority rehabilitation and deferred zones. Therefore, during the interviews, every effort was made to try and elicit whether or not the respondent was discussing their perceptions of the refuges or the zones by asking fishers to refer to geographic locations as a point of reference. This allowed the researcher to recognize whether or not they were discussing perceptions of a location that was within a refuge or a zone.

⁵¹ As further evidence of the failure of lake trout refuges to promote lake trout rehabilitation and conservation, a tribal biologist/representative stated, “*The only lake that we’ve had successful natural reproduction and actual rehabilitation [of lake trout] is Lake Superior, and it doesn’t have a refuge in it.*”

⁵² Responses from fishers and biologists/representatives from each of the tribes – Grand Traverse, Bay Mills Indian Community, and Sault Ste. Marie – were not analyzed collectively. However, many of their responses were similar. Thus, responses that were similar amongst respondents from the three tribes were lumped together, and differences in responses of the tribes were illuminated. In some cases, there were differences in responses from current and former fishers; these are highlighted as well.

Although the absence of naturally reproducing lake trout stocks was discussed by a majority of stakeholders, they offered many different reasons as to why natural reproduction did not occur. Some tribal and DNR biologists/representatives perceived that natural reproduction did not occur since reefs were not being imprinted by hatchery-raised lake trout.⁵³ Members from each category of stakeholders believed that lake trout were not reproducing since lake trout experienced mortality prior to sexual maturation.⁵⁴

Many stakeholders within each stakeholder category, with the exception of recreational sport fishers, mentioned sea lamprey predation as an important source of lake trout mortality and another critical factor that prevented lake trout rehabilitation and conservation under the 1985 Consent Order.⁵⁵ According to many stakeholders from the tribes, the DNR and the State of Michigan, although sea lamprey control programs have been somewhat effective in reducing their abundance in the Great Lakes, these programs have not significantly reduced lake trout mortality.⁵⁶ Tribal fishers from Grand Traverse and Bay Mills and a few tribal biologists/representatives also blamed salmonid predation

⁵³ One tribal biologist/representative offered this explanation:

In the northern refuge, they've got three different lake trout strains that run in there, and they've got three different reefs that they've [U.S. Fish and Wildlife Service] are stocking...As part of the modeling experiment and everything, they're looking at the CWTs (coded wire tags) and they're finding out that returns [of stocked lake trout]... to one of the reefs is virtually zero. So they're dumping all these fish out of there, and the fish aren't... imprinting on it and don't come back – they're leaving and not coming back [to spawn].

⁵⁴ A DNR biologist/representative illustrated this perception:

You expect lake trout, as a very weak swimming fry to emerge from the rocks at less than an inch or slightly more than an inch and survive for a year or two to make it to the size that we plant [salmonids] in order to get survival?! It just doesn't happen! Those fish don't make it.

According to one former tribal fisher,

[T]he lake trout can't survive. It takes six to eight years for mature lake trout to spawn. Gill nets catch them before then...Plus there's the lamprey, sportie fishermen, other fish—all these things prevent the fish from reaching maturity. They dump 100,000 pounds of fingerlings. Who knows how many survive to six to eight years after dodging nets, spoons, lamprey trying to suck the life out of them?! That's why I think the lake trout refuges are wrong.

⁵⁵ A tribal fisher also perceived sea lamprey as an important factor preventing lake trout rehabilitation and conservation: *"They [sea lampreys] killed so many trout, so many trout!... We could bring in a trout that had four lampreys on it!"*

and competition for lake trout mortality and unsuccessful lake trout rehabilitation and conservation.⁵⁷

Tribal and DNR biologists/representatives also mentioned the lack of lake trout fry survival and recruitment as important obstacles to lake trout rehabilitation and conservation. Some tribal biologists/representatives believed that lake trout did not survive due to thiamine-deficiency and early mortality syndrome (EMS). One DNR biologist/representative believed that the wrong genetic strains of lake trout were stocked in Lake Michigan and Huron, hindering their survival.

Although most stakeholders perceived that the lake trout refuges were not effective at promoting lake trout rehabilitation and conservation, several tribal and DNR biologists/representatives – and a few sport fishers and sport fishing representatives – believed that the refuges were necessary to reduce lake trout mortality. Among these stakeholders, tribal and DNR biologists/representatives believed that the refuges were necessary for lake trout rehabilitation and conservation only as part of a larger strategy to resolve the remaining obstacles to lake trout natural reproduction.⁵⁸

⁵⁶ One DNR biologist/representative stated, “The federal government hasn’t met their goal in sea lamprey control.”

⁵⁷ One tribal biologist/representative explained,

Treaty fishermen have always thought that the introduction of the salmon made it more difficult for lake trout to rehabilitate because they take over the main predator role, and when lake trout compete with salmon for the same food source...something’s got to give. Since these fish [salmon] are not native, their introduction into the ecosystem is probably going to have unforeseen consequences...the lake that did not have salmon introduced—Lake Superior—and guess where the lake trout recovered?

⁵⁸ One tribal biologist/representative described this perception of the role that refuges played in lake trout rehabilitation and conservation:

They [refuges] may be a necessary condition, but they haven’t been sufficient, so we’re looking for other bottlenecks to reproduction. But I think there’s enough consensus that having refuges in an area where the biomass is sufficient will – if the other problems are licked – will lead to successful natural reproduction. The only lake that we’ve had successful natural reproduction and actual rehabilitation is Lake Superior, and it doesn’t have a refuge in it, so obviously it isn’t critical to success or leads to success by itself, but it may lead to success someday.

Other tribal and DNR biologists/representatives believed that the establishment of conservation refuges was beneficial, although not necessary, since they helped re-build stocks and increase lake trout biomass.⁵⁹ Importantly, this increased biomass should promote lake trout rehabilitation in the future, once other obstacles to natural reproduction are overcome. A few biologists/representatives from the tribes and the DNR also perceived that the refuges were beneficial since they protect historic lake trout spawning habitat.⁶⁰

On the contrary, a few DNR biologists/representatives disagreed with the concept of establishing refuges as a way to rehabilitate lake trout stocks. One respondent from the DNR believed that lake trout are no longer able to reproduce naturally in Lake Michigan and Lake Huron, and he contradicted the perception that the refuges provided better spawning habitat for lake trout.⁶¹ Another DNR biologist/representative believed

⁵⁹ One DNR biologist/representative illustrated this belief:

I think they're good [lake trout refuges], and in fact, [in] the northern Lake Michigan refuge...in particular was successful because despite gill nets all around the refuge and high extraction rates around the refuge, stocks have gradually built up. So yeah, I think technically speaking, you wouldn't need refuges [if you were] appropriately managing the mortality of the species, but I still think they're a reasonable thing to layer on top of rehabilitation efforts.

⁶⁰ According to one tribal biologist/representative,

The Lake Committees [established under the Great Lakes Fishery Commission] had established a lake trout plan which includes refuges...The focus of that plan, in Lake Huron and Michigan, was to emphasize the refuges. These were the areas where the habitat was the best, where we thought lake trout could reproduce, and we stocked there very heavily—we being the federal government.

⁶¹ This DNR biologist/representative stated,

I think the opportunity to establish...self-sustaining lake trout populations...in Lake Michigan and Lake Huron—I don't think it's possible {in a quiet voice}. The primary reason that I think it's not possible is the presence of the alewife and smelt...I think that the biological mix and the physical habitat of the lakes themselves have changed to a point that the spawning techniques of the lake trout will no longer function. Now it won't be absolutely zero, but it will be so low as to make preposterous any management scheme based on the sustaining of naturally reproducing populations [of lake trout].

He also said, “I don't think that the lake trout can spawn in the refuges any better than they can spawn anywhere else! They can try it and continue the façade, but it's not going to work!”

that the refuges have had no affect on lake trout stocks, and therefore are unnecessary for lake trout rehabilitation and conservation.⁶²

I.) b. Gill Net Use and Restrictions

In general, perceptions of stakeholders towards gill net restrictions were related to stakeholders' perceptions of gill net use and its impact on lake trout mortality. DNR biologists/representatives, sport fishers, sport fishing and state representatives strongly opposed gill net use. They discussed gill net use as the most significant source of lake trout mortality and an obstacle to lake trout rehabilitation and conservation.⁶³ Nearly all recreational and charter boat sport fishers, as well as sport fishing representatives, perceived that gill net use was destructive and solely responsible for significant reductions in lake trout and other fish species since the 1950s.⁶⁴ Therefore, they believed that limiting tribal harvest was the only way to protect fish stocks in the Great Lakes.⁶⁵

⁶² One DNR biologist/representative explained,

I have a very different perspective of refuges than probably anyone else you'll talk to...I think the concept was that you have this area that is closed to fishing, and therefore the fish will do well there. The problem is that they don't stay there! They still achieve the same mortality rates when they come off as they would if this area were open. The concept being that these have been historical reefs, so we need to keep the fish there protected, blah, blah, blah. Well, we did that for 15 years, and what do we have to show for it? Not very much. I believe if you set your regulations—I don't care if it's commercial or recreational—properly so that your mortality rates are where they need to be, you don't necessarily have to have refuges! You just don't.

⁶³ In the 1960s, incidental catch of lake trout in the harvest of lake whitefish and chubs was determined by the DNR to present a problem for lake trout recovery. As a result, the Natural Resources Commission of the DNR banned large-mesh gill nets in 1968 and 1969 and required replacement of this gear with trap nets to reduce bycatch of lake trout and other species. Brege, D.A. and Kevern, N.A. (1978). *Michigan Commercial Fishing Regulations: A Summary of Public Acts and Conservation Commission Orders (1865-1975)*. Michigan Sea Grant Program: Ann Arbor, MI.

⁶⁴ One charter boat fisher explained,

There's no reason to let them [tribal fishers] keep using gill nets since they've harmed the fishery...by killing the fish stocks! People will tell you that fishing in the Great Lakes was fantastic before the whole tribal fishing rights issue came up. Before that all started, the fishery was excellent. Once Judge Fox's decision came out and the Indians began commercially fishing here, the fishery suffered. There's nowhere near what we used to have.

⁶⁵ According to one sport-fishing representative, "[W]e'll never see natural reproduction until there's no gill net fishing and there's unlimited sport fishing."

These stakeholders believed that gill net restrictions under the 1985 Consent Order were insufficient to promote lake trout rehabilitation and conservation.⁶⁶

On the contrary, tribal fishers and biologists/representatives from Grand Traverse, Bay Mills and Sault Ste. Marie were not opposed to gill net use, and they believed that biological sources of mortality, such as sea lamprey predation, were more important obstacles to promotion of lake trout rehabilitation and conservation under the 1985 Consent Order. Some tribal stakeholders believed that the DNR and the State of Michigan are opposed to all gill net use and that false information has been spread about the selectivity of gill nets, which has led to intolerance of gill net fishing.⁶⁷ Many of these tribal stakeholders believed that the restrictions on gill net use in the 1985 Consent Order were unnecessary, particularly when there are appropriate restrictions on seasonal harvest and depths.⁶⁸ Furthermore, all tribal fishers, tribal biologists/representatives and

⁶⁶ A charter boat sport fisher exemplified the response of most sport fishers, sport-fishing representatives, and DNR biologists/representatives:

I don't think it's [gill net restrictions under the 1985 Consent Order] enough. Gill nets kill off all the fish, including the juveniles and species that they're not targeting. I don't think gill nets should be allowed at all.

⁶⁷ One current fisher illustrated this perception with the following quote:

It's [the gill net] a selective gear. It's hard for people to understand that. It's been drilled in guys' heads that it's bad.

According to a tribal biologist/representative,

[W]hen this controversy started, when it got into the courts with the treaty rights being sought to be established... the reason was that the Michigan DNR was trying to eliminate gill net use by commercial fishermen... It was at that point that tribal members – who happened to be licensed commercial fishermen by the State of Michigan – started asserting their rights under the [1836] treaty, because gill nets, in this area, have been shown to be used since about the time of Christ... It is a very effective fishing method, if you know what you're doing... [B]ack when the lake trout populations took a nose dive, primarily because of sea lamprey infestation, but gill nets made a much easier thing to blame because the state had control over that... they convinced everybody over the course of the next couple of generations that gill nets were the villain.

⁶⁸ According to one tribal biologist/representative, “Biologically speaking... data supports the ability of gill net fishers to... target whitefish during certain seasons at certain depths, and actually harvest very, very clean catches of whitefish and very few other incidental species – 90% whitefish and fewer lake trout.”

a few respondents from the DNR believed that tribal and recreational harvest both account for lake trout mortality.⁶⁹

Although most stakeholders believed that gill net use and restrictions influenced lake trout rehabilitation and conservation, some respondents believed that the lack of science, as a basis for policy-making in devising the 1985 Consent Order, hindered lake trout rehabilitation and conservation.

I.) c. *Role of Science in Policy-Making*

Tribal biologists/representatives from the Grand Traverse Band and Bay Mills, along with several respondents from the DNR and a few sport-fishing representatives, believed that the lake trout refuges and zones failed to promote rehabilitation and conservation in part because they were based on politics, not science.⁷⁰ Beyond the establishment of lake trout refuges and zones, many tribal fishers from Grand Traverse, Bay Mills, and Sault Ste. Marie and tribal biologists/representatives also expressed concern over the political basis for gill net restrictions in the 1985 Consent Order.⁷¹

⁶⁹ A DNR biologist/representative stated,

Lake trout populations have kind of waxed and waned in some areas. I'll give you a couple of examples tied right close to the same spot...By far, the highest source of mortality was...tribal commercial [harvest] in Grand Traverse Bay. Just on the other side of the peninsula—in the Leland area—the mortality was also way too high, and the primary cause of mortality there was recreational [harvest]. That's an interesting case because they're almost side-by-side.

⁷⁰ A DNR biologist/representative shared this concern and stated,

There were pretty vast areas that were declared to be deferred for lake trout rehabilitation. That's always been one of my personal issues...I don't think it's a rational thing to do, just because of the lay of the land out there. The most important areas for lake trout reproduction were the same areas that we deferred!...So, that was just bad. It was almost guaranteed that rehabilitation wasn't going to work.

⁷¹ One tribal biologist/representative stated,

A lot of it IS political, I mean, we can't fish south of the 45th parallel for the better part of the year down to the 900 grids at all. That's political. We can't fish south of the 45th on the other side. You know, all of that's strictly political...There's no biology involved. It's...gear, a user conflict, for the most part, to avoid user conflict. The state doesn't want, doesn't think that a commercial and recreational fishery can coexist in harmony together.

A few tribal biologists/representatives from the Grand Traverse Band and Bay Mills also discussed concerns over the DNR's failure to conduct sufficient scientific assessments of the stocked, non-native fish that they plant for the sport fishery. A few believed that the DNR was more concerned about tribal harvest than the ecological health of the Great Lakes fishery when devising the 1985 Consent Order.⁷²

Most tribal fishers also perceived that the State of Michigan and the DNR has taken advantage of the need for lake trout rehabilitation and conservation and used it to justify decisions that harm fishing opportunities for the tribes. A few sport-fishing representatives commented that the sport fishery has benefited from the need for lake trout rehabilitation, since it has led to a reduction in tribal gill net fishing.⁷³

I.) d. *Lack of Commitment*

Stakeholders discussed that a lack of commitment to fulfillment of several provisions under the 1985 Consent Order was also responsible for the failure of lake trout rehabilitation and conservation. One of these provisions was the enforcement and establishment of quotas, or total-allowable-catch limits (TACs), on lake trout harvest within the priority rehabilitation zones.

A majority of respondents from the tribes, DNR, state and sport-fishing organizations believed there was a lack of commitment to enforcement of TACs on lake trout harvest. Some of these respondents also believed that deferred zones hindered lake trout

⁷² One tribal biologist/representative illustrated this perception:

It was just totally stunning—the lack of biological studies that were done...they kept dumping non-native fish. They've brought exotics and haven't evaluated the impacts. They're so worried about Indians taking a fish instead of looking at what their recreational fishery has done.

⁷³ One sport-fishing representative expressed this sentiment: *"Lake trout rehabilitation worked well for us [sport fishers]. It's permitted the restriction of gill netting."*

rehabilitation and conservation since no limits were set on lake trout harvest within these areas.

A few tribal and DNR biologists/representatives discussed the failure of the tribes and the DNR to establish TACs for lake trout after the first few years under the 1985 Consent Order. They perceived that the lack of commitment to creating TACs was another important factor that adversely impacted lake trout rehabilitation and conservation.⁷⁴

State representatives, tribal and DNR biologists/representatives believed that enforcement of TACs under the 1985 Consent Order was insufficient due to a lack of political will.⁷⁵ According to these stakeholders, the lack of political will resulted from having no accountability or oversight without judicial intervention. Since the court often failed to provide a satisfactory or timely remedy, none of the parties desired to go to court, and they failed to hold each other accountable for not adhering to the provisions of the 1985 Consent Order.⁷⁶ A few tribal and DNR biologists/representatives and state representatives perceived that the inflexibility of the Consent Order and its dispute resolution mechanism prevented the parties from solving problems as they arose, and led to continuous adjudication over aspects of the policy. One state representative discussed

⁷⁴ One DNR biologist/representative emphasized this point:

[T]he parties didn't adhere to developing TACs, total-allowable-catches, that would have protected trout. We just dropped that, and people just went out and fished. Then everyone looked at the stocks and said, "Oh, my God! Lake trout mortality rates are at 70%! What are we going to do?" And nobody would do anything.

⁷⁵ One DNR biologist/representative explained,

Early on, we [DNR] to enforce total-allowable-catches, and I think everybody—because of lack of diligence—kind of lost the will to make it happen.

⁷⁶ The lack of enforcement was reiterated by a state representative in the following demonstrative quote:

There weren't adequate enforcement mechanisms, and by the end of the 15 years, everybody was looking the other way. There was almost a gentleman's agreement that nobody's in compliance... On the state side, we really couldn't take the tribes to court because our hands weren't clean. It was a mutual problem. There were areas where BOTH sides were in excess of the TAC [total-allowable-catch] limits.

how inflexibility encouraged litigation and discouraged cooperative problem solving by the parties.⁷⁷

Some tribal and sport fishers, as well as representatives for the Grand Traverse Band, DNR, State of Michigan and sport-fishing organizations, perceived that the inability of the State of Michigan and DNR to convert tribal fishers in the Grand Traverse Band from gill nets to trap nets was another important limitation for lake trout rehabilitation and conservation under the 1985 Consent Order. Many of these stakeholders believed that the State of Michigan and the DNR are to blame for not fulfilling its commitment to converting the tribes to trap nets.⁷⁸ In contrast, a few DNR representatives, one state representative and some recreational sport fishers blamed the tribal fishers for their lack of conversion from gill nets to trap nets.⁷⁹

II.) Comparison of the 1985 Consent Order and 2000 Consent Decree:

Lake Trout Rehabilitation and Conservation

Although most tribal and DNR biologists/representatives and sport fishing and state representatives believed that lake trout rehabilitation and conservation should be promoted under the new 2000 Consent Decree, questions remain over whether or not these management actions will promote lake trout rehabilitation and conservation, and

⁷⁷ According to one state representative,

But it [1985 Consent Order] was a pretty rigid system—it wasn't flexible at all, and the parties tended to respond to one another in a pretty rigid way... Under the '85 Decree,...there was a high likelihood that if the other side was over their limit, the perception was that the only way you were going to get anything done was to haul them into court...It's an expensive, cumbersome process that tends to exacerbate the differences between the parties and to discourage their ability to work together.

⁷⁸ One sport-fishing representative said, “There was a lot of promises made by the state, and the state didn't come through on conversion [to trap nets], getting the tribes set up and getting the boats here in a timely manner.”

⁷⁹ A recreational sport fisher stated,

The state pushed hard to put them [tribal fishers] in selective gear. They paid a lot of money towards helping fishers convert in the interest of the fishery.

most respondents were hesitantly optimistic.⁸⁰ A majority of respondents who participated in the negotiations for the 2000 Consent Decree believed that greater commitment is necessary under the 2000 Consent Decree to ensure that lake trout rehabilitation and conservation is successful. Biologists/representatives from the tribes and the DNR, along with sport fishing and state representatives believed that lake trout rehabilitation and conservation has been expanded under the 2000 Consent Decree. They perceived that the following significant changes in the new policy will promote lake trout rehabilitation and conservation: improvements to the lake trout refuges and zones, greater restrictions on gill net use, increased conversion of tribal fishers from gill nets to trap nets, a greater role of science in policy-making, and a stronger commitment to fulfillment of the provisions within the 2000 Consent Decree.

II.) a. *Refuges and Zones*

Despite the perceived failure of lake trout refuges and zones under the 1985 Consent Order, these concepts were included in the new agreement. Biologists and representatives from each stakeholder group discussed how significant changes to the refuges and zones should help promote lake trout rehabilitation and conservation.⁸¹ These changes include placing lake trout harvest limits in all areas, thereby eliminating deferred zones. Most tribal and DNR biologists/representatives and sport fishing and

⁸⁰ A tribal biologist/representative remarked,

Lake trout rehabilitation has expanded under the 2000 [Consent Decree] compared to '85, although I have to add that it does not necessarily mean that they'll [lake trout] start reproducing naturally, but there will be more adults spawning. We don't know if their young will survive any better.

⁸¹ A tribal biologist/representative explained,

In the 2000.....the changes with the lake trout were: the refuges stayed the same, the deferred zones were discontinued...Tribal fishermen were not happy about that. So now that all the areas are under some type of lake trout harvest limit, unlike the 1985 Order where there were deferred zones where you could catch as much as you want without consequence. That's a rather major change to the tribal fishing regulations and the major change to the lake trout rehabilitation plan.

state representatives believed that these changes should be beneficial in combination with additional restrictions on gill net use.

II.) b. *Gill Net Use and Restrictions*

According to all biologists and representatives from each stakeholder group, gill net use is expected to be significantly decreased under the 2000 Consent Decree – by at least 14 million feet – through conversion of gill net fishers from Grand Traverse and Sault Ste. Marie to trap net operations. This reduction in gill net was calculated based upon the necessary diminution in gill net effort to achieve 40-45% lake trout mortality. These tribal fishers will convert to trap nets as they take over state-licensed, non-tribal commercial fishing operations that were operated in Bay de Noc. These operations became available through a voluntary buyout of nine state-licensed commercial fishers by the State of Michigan. Representatives from the tribes, DNR, state, and sport-fishing organizations perceive that the reduction in gill net use should help protect adult lake trout stocks, while allowing tribal fishing opportunities to expand.⁸² According to many of these stakeholders, the voluntary buy-out is the critical factor in the 2000 Consent Decree. They perceive that the agreement to convert tribal fishers from gill nets to Bay de Noc trap net operations was critically important to allow expansion of tribal fishing opportunities in a manner that was acceptable to all parties.

So now, in both lakes deferred zones are gone and lake trout are stocked there... There's some nice historically important lake trout reefs in deferred zones.

⁸² One DNR biologist/representative illustrated this perception:

Our position was the 1985 Decree worked pretty well from an allocation standpoint, so we're going to start with that with a few tweaks... It wasn't until February of 1999 when... two things happened. The Fish Producers came to us and said, "We're willing to sell out 10 operations if you guys'll buy them on a 'willing seller, willing buyer' basis. We will turn over those operations so that the tribes can get into trap nets." When we looked at that opportunity and remove that gill

II.) c. *Role of Science in Policy-Making*

Most stakeholders perceived that the 2000 Consent Decree's provisions dealing with lake trout rehabilitation and conservation were based upon science, in contrast to the 1985 Consent Order, since biologists played a central role in the policy negotiations.⁸³ Most stakeholders discussed that there needed to be a stronger commitment to lake trout rehabilitation and conservation under this new policy if it was going to be successful.

II.) d. *Lack of Commitment*

A majority of tribal and DNR biologists/representatives, sport-fishing and state representatives believed that there would be a greater commitment to enforcement under the 2000 Consent Decree, compared to the 1985 Consent Order. Tribal and DNR biologists/representatives discussed how enforcement should be facilitated under the 2000 Consent Decree due to unambiguous language and an increase in resources for enforcement.⁸⁴ Importantly, one DNR biologist/representative stated that if problems

net effort out of the water, then we have a real shot at lake trout rehabilitation if we'll commit to putting size limits and regulations in place that we need.

⁸³ A DNR biologist/representative similarly said, *We're excited about this new 2000 agreement. We think the biological basis for it—fishing effort linked to biological assessment—will provide greater protection of the resource. There's a greater professional commitment to the management of a shared resource. It offers benefits to each side. It works for the benefit of everyone by better protecting the resource.*

In response to the question, "Do you think the new agreement is more biologically sound than the 1985 Consent Order? A DNR biologist/representative remarked, "Definitely not." One tribal biologist/representative stated,

If the Consent Decree was based upon science, they would have looked at different issues. They would have looked at the interaction of alewife and salmon, the survival of lake trout and whitefish...If the state was interested in biological evaluation, they'd look at alewife, since there's evidence now that there may be early mortality syndrome occurring. The state needs to decide what to do, but that might mean action that would affect the salmon.

⁸⁴ One DNR biologist/representative provided this example, *There are penalties for exceedance of total-allowable-catches this time that were just left vague last time [under the 1985 Consent Order]....It's real this time, unlike '85. We were much more deliberate in defining the kinds of fishing, the times of fishing, and the species to be fished for than we were in 1985. There was a lot of ambiguity in the 1985 agreement that could be explained several ways.*

arise with respect to enforcement, the parties will have a change to work problems amongst themselves without adjudication.

III.) 1985 Consent Order: Fishing Opportunities and Communities

Most tribal fishers from Grand Traverse and Bay Mills believed that the 1985 Consent Order detrimentally affected their fishing opportunities, and former fishers blamed this policy on their inability to continue fishing for a living. With this loss of fishing opportunities, former fishers described the devastating impact of the 1985 Consent Decree on their fishing communities.⁸⁵ Yet, current tribal fishers from Grand Traverse, Bay Mills and Sault Ste. Marie described how they did relatively well under the 1985 Consent Order, compared with how they expected to fare under the 2000 Consent Decree.⁸⁶ Similarly, one charter boat sport fisher perceived that his fishing improved under the 1985 Consent Order, but was skeptical about his opportunities under the 2000 Consent Decree.

Fishers – tribal commercial, recreational and charter boat sport fishers – perceived that the provisions within the 1985 Consent Order adversely impacted fishing opportunities and communities. In particular, respondents discussed how the following policy provisions detrimentally affected their fishing opportunities and communities:

- a. Gill net use and restrictions; and

⁸⁵ One former tribal fisher stated,

To show its affect...it would be best to look at our community in its entirety...I could walk you through...and how you all kinds of ex-fishermen...One time, I sat down and wrote down the households that were affected by fishing...At that time, the households affected by fishing would have been two-thirds...That's the impact on this community. There's all kinds of people who would love to be on that lake, but we're not. I'm one of them.

⁸⁶ A tribal fisher explained,

We were waiting for 2000 with the hope that we could obtain a better agreement [than the 1985 Consent Order]...Faced with what we're looking at now, it doesn't seem so bad! At least I could make a living...but it was very oppressive. We barely survived it. Only if you compare it to how very bad this new agreement is, I can say it was acceptable.

- b. Assigned zones.

III.) a. *Gill Net Use and Restrictions*

Most tribal fishers from Grand Traverse and Bay Mills and tribal biologists/representatives believed that the restrictions on gill net use under the 1985 Consent Order adversely affected fishing opportunities and the ability of fishers to sustain their livelihood, particularly small boat gill net fishers.⁸⁷

Most recreational and charter boat sport fishers, in contrast, believed that their fishing opportunities diminished due to tribal gill net fishing,⁸⁸ and that there were too many tribal fishers utilized gill nets. These stakeholders expressed their opposition to all tribal fishing with gill nets, although one recreational sport fisher and one charter boat sport fisher were only opposed to tribal harvest of salmon. These sport fishers perceived that tribal gill net fishing decimated the Great Lakes fishery and was responsible for a reduction in their fishing opportunities.⁸⁹ According to many recreational sport fishers, extensive gill net use by the tribes has ruined the sport fishery in some locations and caused the decline of sport fishing communities.⁹⁰

⁸⁷ One former tribal fisher demonstrated this sentiment, *"They regulated small boat fishermen out of business... There are very few small boat fishermen anymore. Very few."*

⁸⁸ A charter boat sport fisher remarked,

[T]he policy that MIS-managed the Great Lakes [referring to the 1985 Consent Order]... It let the Indians rape our resources!... They were allowed to gill net the entire area above the 45th parallel, which includes this area... The state didn't represent us during those negotiations. They caved in to make a deal.

⁸⁹ One charter boat sport fisher illustrated the sentiment of most sport fishers towards tribal gill net use: *"In general, the sport fishers are opposed to Indian fishing because they're using gill nets. We feel they're taking too much of the fishery."*

⁹⁰ One recreational fisher explains how he perceives tribal fishing has impacted his community in Northport:

Before 1980, approximately 20 years ago, Northport was full of lake trout. You couldn't cast out without snagging one off the wall of the marina. Now, no lake trout come in near the wall. Natives have fished heavily in this area, and that combined with the phosphate levels explain why there's no fish here... There used to be boats and cars waiting to get here. People used to come here on vacation. Now they go to Leland and Suttons Bay.

Sport fishers and sport fishing representatives, most DNR biologists/representatives and state representatives believed that it would be in everyone's best interest if all tribal fishers would switch from using gill nets to using trap nets.⁹¹ These respondents, along with several tribal fishers and biologists/representatives from Grand Traverse, Bay Mills and Sault Ste. Marie, discussed some benefits of using trap nets over gill nets.⁹² When asked for their opinion about converting from gill nets to trap nets, fishers from the Grand Traverse Band, Bay Mills and Sault Ste. Marie were not opposed to conversion from gill nets to trap nets, and some tribal fishers believed that trap net operations could be easier to fish.⁹³ Furthermore, according to fishers from Bay Mills and Sault Ste. Marie, most fishers have converted to trap nets.⁹⁴

Yet, a few tribal fishers from Grand Traverse and Bay Mills believe there are some fishers that do not wish to convert.⁹⁵ Most respondents discussed a number of

⁹¹ One state representative expressed this sentiment:

Conversion will be beneficial to large gill net fishers since trap nets produce a better product, they are easier since you don't need to retrieve your nets as often. It's more expensive and you need crew...Trap nets require more skills...[But for] those taking part in conversion, it's a win-win proposal.

⁹² As illustrated by one tribal biologist/representative:

Two things about trap nets: one is that the catch-per-effort is higher, generally, than it is with gill netting, and another point is that trap netted fish tend to have higher commercial value than if the same fish are caught by gill net because the quality is better. That's because they're held live in the net. They're [trap nets] easier to tend...because with a gill net, the fish will die in the net, and you have to get out and lift that net or lose your fish...and if the weather's bad and you can't get out to tend it, the fish in the net are dead and they're not sellable...There are a lot of reasons [for conversion], but primarily economic.

⁹³ A current tribal fisher responded with a sentiment similar to other fishers:

I'd convert [to trap nets]. But I'm not on the list. They took all the fishers from the tribes [in Grand Traverse and Sault Ste. Marie] and each had to fish a certain length of net. But I didn't fish enough net to qualify for conversion, even though I think I have...I told them I'd like to convert.

⁹⁴ One tribal fisher demonstrated a common response when he stated, "A large part of our fishery is [now] trap netters." A tribal biologist/representative explained,

Once...a gill netter has gotten to a certain size, they saw trap netting as a logical way to extend their economic value of the fishery, so they were converting on their own.

⁹⁵ This sentiment is illustrated by the following quote by a former tribal fisher:

Some just want to fish the old traditional way—they didn't want to use trap nets...Gill nets are cheaper, easier to move, and it's much easier and cheaper to start a business. Trap nets take

obstacles to conversion from gill nets to trap nets. According to these stakeholders, conversion required an extraordinary amount of capital investment, a larger crew, a larger boat, and more expertise.⁹⁶ Additionally, they described how trap net operations limit the seasons, depths and surfaces that can be fished.⁹⁷

Beyond these problems that stakeholders associated with conversion from gill net fishing to trap net fishing, tribal fishers from the Grand Traverse Band, Bay Mills and Sault Ste. Marie and tribal biologists/representatives believed it was more important that gill net fishing was preserved under the 1985 Consent Order since it provided opportunities for small boat operators that could not afford to convert and upgrade to larger fishing operations. A few tribal biologists/representatives explained that the tribes value maintenance of fishing opportunities for small-boat operators, so preservation of the gill net fishery is necessary. Tribal fishers and biologists/representatives from the Grand Traverse Band and Bay Mills stated that they strongly believe tribal fishers should have the right to choose which type of fishing operation to use.⁹⁸ Importantly, they

more learning. They take a lot more work. Once they're set up, you simply move the nets, empty one net, and then go to the next. Trap nets do real well...but gill nets do too.

⁹⁶ One current tribal fisher illustrated the difficulty with trap nets:

I used to work for _____...they wanted everyone to go in on trap nets, and you'd have to make your money right away in the spring and early fall and get ready to pull out. It's such an expensive net and you got to have expensive equipment...A lot of the DNR state conservationists would like you to believe that you can just run out there with any kind of boat with a trap net! There's no such thing!

⁹⁷ A former tribal fisher expressed his frustration with trap nets,

Trap nets are only a seasonal fishery. You can only fish with them in the spring and fall. Their use requires conversion of your boat [too].

Another former tribal fisher further described the limitations on fishing seasons and depths:

Certain times of the year you can do more with a gill net than you can with a trap net. You can't go and put a trap net...where there's gravel or rocks...where a gill net...no matter what's on the bottom, it doesn't hurt your net...You cannot anchor trap nets where there are rocks!

⁹⁸ One tribal biologist/representative explained,

As far as if you're a fisherman and you want to fish trap net or gill net, that's your choice. But it's literally shutting people out to only have a trap net fishery. It comes down to that it's their tribe and their choice. But it impacts other people.

In addition, a DNR biologist/representative stated,

believe that since the tribes have a treaty right to use gill nets, they should retain the opportunity to participate in gill net fishing.

Most tribal fishers perceived that under the 1985 Consent Order, it was necessary to upgrade to larger fishing operations to sustain their livelihood. Some fishers and tribal biologists/representatives expressed frustration at the failure of fish prices to rise with inflationary pressures because while the cost of equipment increases, their profits do not.⁹⁹

The desire of small boat gill net fishers to upgrade under the 1985 Consent Order raised some concerns for a few tribal biologists/representatives and a respondent from the DNR. They discussed fishing capacity as a problem associated with the encouragement of conversion of all small gill net boats to larger trap net operations.¹⁰⁰ Although gill net use and restrictions were considered critical provisions under the 1985 Consent Order, tribal respondents discussed that the closing of waters, through the creation of assigned fishing zones, was one of the most influential aspects of the 1985 Consent Order.¹⁰¹

There was anger...even in my family. "You're taking food off the table with these restrictions on fishing." But you're taking away their way of life. There was a lot of emotions and hard feelings. Now, they've been bought out [from fishing].

⁹⁹ One tribal biologist/representative explained,

I think the biggest problem is that the small boats are having a harder and harder time of just making a living, of competing. They're just having a hard time because the price per pound just isn't going up for them, and with the small boats, they're limited to what they can physically go out and catch. So, they're wanting to upgrade.

¹⁰⁰ An explanation was given by a tribal biologist/representative:

Well, if...[small-boat operations] upgrade, you put a further squeeze on the remaining small boats...The resource can only absorb so much and support so many. So what direction do you go in when a small boat fisher isn't making a living but wants to upgrade?

¹⁰¹ A tribal biologist/representative stated,

There were opportunities [for fishing] that were lost, traditional fishing areas that were lost, and I think that's why the 1985 Consent Order affected people the way it did.

Another former tribal fisher illustrated the perception of a majority of these stakeholders:

We [the tribes] own all these treaty-ceded waters. Our ancestors fished these waters and signed the treaty. We have rights to fish wherever we want in these waters. The state doesn't own these waters, but they're trying to give us part of what already belongs to us.

III.) b. *Assigned Fishing Zones*

Tribal fishers from Grand Traverse, Bay Mills and Sault Ste. Marie and tribal biologists/representatives strongly opposed assigned fishing zones since they limited fishing opportunities for the tribes. Stakeholders from Bay Mills, in particular, discussed how they opposed the 1985 Consent Order due to its closure of traditional fishing waters.¹⁰² Notably, a few tribal fishers from Bay Mills and Sault Ste. Marie believed that the establishment of exclusive fishing zones was unfair.¹⁰³ Yet, several tribal biologists/representatives discussed that the creation of an exclusive fishing zone may have been necessary for the Grand Traverse Band since other tribes favored fishing in the Grand Traverse Bay area.

Most recreational and a few charter boat sport fishers were unaware of the assigned fishing zones for the tribes, although most charter boat sport fishers had a general understanding of these zones. These fishers did not have an opinion about how these zones may have affected fishing opportunities.

IV.) *Comparison of the 1985 Consent Order and 2000 Consent Decree:*

Fishing Opportunities and Communities

A majority of tribal and DNR biologists/representatives, sport fishing and state representatives believed that all parties compromised in the 2000 Consent Decree

¹⁰² One tribal biologist/representative explained,

[O]ne of the basic oppositions to the 1985 allocation Order was the shut-down of a substantial number of areas that Bay Mills fishers found valuable to fish in. It made it more difficult for what we call "our small boat fishery" to have places where it was safe to fish.

¹⁰³ A current tribal fisher expressed these sentiments:

Well, I didn't think it was right. The fishermen in the old days, and what I learned from my Ma and everybody, they [tribal fishers] followed the fish. It didn't matter what tribe or what band of Indians it was, you followed the fish. If you lived in a particular area...you followed the fish in that area. Sometimes areas would cross, and that's how the tribes got "interbred," you might say. They would go where the fish was, and in those fish camps, they would get to know their neighbors, different bands of Indians. To make one area exclusive over another band of Indians

negotiations, which resulted in an agreement that was more equitable and provided sufficient fishing opportunities for all sides, compared with the 1985 Consent Order.¹⁰⁴ The perception by most tribal and DNR biologists/representatives and state representatives was that tribal and sport fishers would have greater fishing opportunities under the new 2000 Consent Decree. Despite a decrease in allowable gill net harvest, they believed that tribal and sport fishers will have increased fishing opportunities under the 2000 Consent Decree, relative to the 1985 Consent Order, due to the opening of access to waters that were closed off under the 1985 Consent Order.¹⁰⁵ Most representatives involved in the 2000 Consent Decree negotiations believed the gill net restrictions are an acceptable compromise since additional fishing opportunities will be provided for tribal and sport fishers.¹⁰⁶

was wrong. That's the court...politics. Nothing to do with the fish, and it shouldn't have had nothing to do with the people, but it did.

¹⁰⁴ One DNR biologist/representative further illustrated this sentiment, *I think it [2000 Consent Decree] was a win-win for all of the parties...everybody got something, and everybody gave a little something too. Both sides are not happy about many things, which tells you that you probably hit some common ground...it's all about compromise...A little give and take...as long as what you do ultimately protects that resource and you provide a good and diverse and flexible opportunity for everybody.*

¹⁰⁵ A state representative also stated, *We restructured the way the fishery was allocated. Instead of allocating by zones and fencing everybody off in different area of the lake...as happened in '85 – "Here's your water, you take care of it, it's your problem, we'll be over here." Instead of dividing it by zones, it was divided by species. Under the current agreement [2000], essentially there is [tribal] fishing throughout the lakes. There are gear restrictions in most of Lake Michigan...but there will be tribal commercial fishing in those waters. Under the '85 Decree, that whole area was closed off to tribal commercial fishing and was restricted to state fishing...In our approach towards the resource, we're not segregating water to the same degree [as in the 1985 Consent Order].*

¹⁰⁶ A tribal biologist/representative exemplified the impact of these changes on Sault Ste. Marie, *[Tribal] fishing opportunities have increased substantially [under the 2000 Consent Decree]. Our whitefish harvest will...increase about 50% over the previous years we think, and that is...primarily because of the trap netting opportunities in Bay de Noc, which was closed to us in '85 and in the water south of Hammond down to Alpena, to the treaty line, which was also closed to us. We have room to expand our commercial fishery without increasing the number of fishers and have...a larger number of economically viable fishing operations, while at the same time, not increasing our lake trout harvest...So we have expanded fishing opportunities, and we will take advantage of them. At the same time, we will increase our protection of the sport species by converting to trap nets and reducing or eliminating harvest of non-target species.*

Tribal fishers from Grand Traverse, Bay Mills, and Sault Ste. Marie in contrast, perceived that their fishing opportunities would be adversely affected under the 2000 Consent Decree due to the new restrictions and limits on harvest.¹⁰⁷ A few current tribal fishers had opinions about the opportunities to convert to trap netting under the new agreement, but they differed amongst those fishers who were offered the chance to participate in the conversion and those who were not.¹⁰⁸

Importantly, some DNR and state representatives expressed an awareness that tribal fishers valued having a choice to fish with gill nets or trap nets.¹⁰⁹ A few tribal biologists/representatives reiterated this sentiment in their explanation that Bay Mills and Grand Traverse did not agree to participate in the conversion of gill nets to trap nets since fishing opportunities would be adversely impacted.¹¹⁰

¹⁰⁷ One current tribal fisher illustrated the perception of most other current tribal fishers: “[I]f the state would have just rubberstamped the old agreement that they had for the last 15 years, everyone would’ve been happy.”

¹⁰⁸ One tribal fisher stated,

They’re in the process of picking who’s going to go down to Alpena—which is a lucrative fishery because it’s...not been open to ordinary fishermen for quite a while, 20 or 30 years. They had two permit fishermen fishing under the state...Those guys have been catching a bigger fish all these years and catching lots of them.

¹⁰⁹ The following sentiment was expressed by a DNR biologist/representative:

The last factor was that the way we structured it, the thing was absolutely voluntary. The tribes were clearly not prepared to go back to their members and say, “You, you, you and you are all converting.” There’s nobody that’s being forced to convert. The notion is that the package is being structured so that it’s attractive enough to the fishermen that they will see it as being to their advantage to convert and so it’s voluntary. I think that’s very critical from the tribal perspective.

¹¹⁰ A biologist/representative explained,

There had to be an agreement by each of those tribes that they would put an absolute cap on the amount of fishing effort their members could have, which would mean that you would put a cap on the number of fishers who could participate. That, in Bay Mills’ view, is saying that certain people can benefit from a tribal right, and certain people cannot. There is no way they were going to do that. In Bay Mills’ view, every single person that wishes to fish should have the right to do so, and the tribe would not agree to pick and choose who could fish and who could

V.) 1985 Consent Order: Social Conflict

According to several DNR biologists/representatives, sport-fishing and state representatives, the 1985 Consent Order was created to resolve social conflict between tribal commercial and state-licensed, sport fishers during the late 1970s and early 1980s.¹¹¹ Stakeholder perceptions of changes in social conflict under the 1985 Consent Order varied between and among the different categories of respondents. A majority of representatives from the tribes, DNR, sport fishing organizations and the state believed that social conflict has been greatly reduced under the 1985 Consent Order, relative to how bad conditions were prior to this policy.¹¹² Notably, some stakeholders discussed that although there has been a decrease in social conflict, instances of conflict still occur occasionally. Some recreational sport fishers and most charter boat sport fishers within the Grand Traverse Bay perceived that social conflict has diminished under the 1985 Consent Order, but that tension still exists.

Amongst tribal fishers, perceptions differed somewhat depending on the geographic location where stakeholders fished and whether or not they were currently fishing. Most tribal fishers that fished outside of the Grand Traverse Bay region perceived that social conflict has been reduced under the 1985 Consent Order, with the

not...This is a treaty right held by the tribe. Therefore, certain people should not be able to enrich themselves from that benefit and others cannot because they can't get into the fishery.

¹¹¹ According to one sport-fishing representative,
It was the conflict of the late '70s which prompted the agreement. When Judge Fox handed down his decision, all hell broke loose. There were physical confrontations, fights. Tribal and sport fishers avoided coming into harbor to avoid fighting. There were bumper stickers, "Save a salmon—spear an Indian." There were major confrontations. Someone was going to get killed...People were shooting. They were threatened.

¹¹² One sport-fishing representative illustrated this sentiment:
[The tribes] will tell you differently, and say there's still quite a bit of conflict, but you have to put it in the context of the times. Back then [before the 1985 Consent Order], it was horrible. Now, I don't have any empirical evidence to back this up, it's just anecdotal evidence, but from what I've been told, relations were at their worst back then. There was a lot of violence. You don't have

exception of one current fisher from Bay Mills.¹¹³ On the contrary, most current tribal fishers within the Grand Traverse Bay region believed that social conflict has not declined during the 15 years of implementation of the 1985 Consent Order. Most former tribal fishers within Grand Traverse perceive that violence has decreased, but that a tremendous amount of animosity and hostility still exists between tribal and sport fishers that has the potential to lead to future social conflict.¹¹⁴

Geography was discussed as an influential factor by a few tribal fishers, tribal biologists/representatives, and charter boat sport fishers, since it is related to population density and the number of competing user groups. Beyond geographic location, stakeholders perceived that provisions of the 1985 Consent Order and other factors influenced stakeholders' perceptions of social conflict. These included:

- a. Gill net use and restrictions;
- b. Lack of commitment to enforcement of vandalism;
- c. Assigned fishing zones; and
- d. Shifts in attitudes.

V.) a. *Gill Net Use and Restrictions*

Recreational and charter boat sport fishers, some DNR biologists/representatives and sport-fishing representatives indicated that gill net use was the largest source of

anything like that today. Putting it in the context of how bad things were, conflict has been drastically reduced.

¹¹³ Although most fishers outside of Grand Traverse perceived that social conflict has decreased under the 1985 Consent Decree, one current tribal fisher from Bay Mills believed it has not. He responded, "They talk about 'calmer waters.' What the hell are they talking about?!"

¹¹⁴ A current tribal fisher illustrated this sentiment,

That's one thing they promised us was peace. There's been no peace... Three years ago, I was on my boat with my wife and two young kids. [A sport fisher] yelled that we'd better get our Indian asses out of ____ if we wanted to leave with them in one piece. He said he didn't give a f_ck who was on the boat. He looked directly at the women and children on the boat. He was threatening women and children.

animosity and hostility towards tribal fishing.¹¹⁵ Recreational and charter boat sport fishers discussed their lack of support for the use of gill nets. A few fishers mentioned that gill nets can be cut loose, and set out into the open water where they continue to kill fish. Importantly, tribal fishers and tribal biologists/representatives discussed how sport fishers often caused floating nets by cutting the buoys from the nets. They perceived that nets were continually cut until sport fishers became educated on the consequences.¹¹⁶

Sport fishers – recreational and charter boat – and a few sport-fishing representatives also perceived that gill net use was a safety hazard for many sport fishers, resulting in animosity and hostility towards tribal gill net fishing and social conflict. A few sport fishers described the same incident where a sport fishing boat become entangled in a gill net in the Grand Traverse Bay area that they believed was not properly marked, and a fisher drowned.¹¹⁷ When asked about proper marking of nets, one tribal fisher explained that the nets are marked, but they are marked with small buoys to prevent vandalism. The fisher explained that if law enforcement would prevent destruction of fishing gear, then the tribes could safely mark their nets with larger buoys.¹¹⁸

¹¹⁵ One DNR biologist/representative explained, “Things will never get better until you get equal fishing opportunities and reduce gill net fishing effort to what the fish stocks can hold.”

¹¹⁶ One tribal biologist/representative explained,

[W]e do on occasion get some nets cut. If they [sport fishers] come across a net, they'll cut them up or cut the buoys off. But I think a lot of them have been more educated to where they shouldn't do that because if they lose a net, they're [the net] going to continue fishing.

¹¹⁷ A sport-fishing representative explained the frequently told story about this event:

I've seen where people have been caught up in them [gill nets] and the dangers that they can have when they're on the surface... Well, all three men in the Straits area were killed, were drowned!... They were... sport fishing, and their downriggers had been caught in them, and then the back part of the boat that the motor is attached had gotten caught, and then so you have this area of trap net on your boat, which takes the buoyancy out of your boat—the boat can't go up or down—it was flooded and there was three people killed.

¹¹⁸ He stated,

In the past, ...one of the fishermen...marks his nets the way he's supposed to, but he wants to keep small buoys because...every time—I don't care when it is—every time a fisherman goes over there

V.) b. *Lack of Commitment*

Tribal fishers from Grand Traverse, Bay Mills and Sault Ste. Marie also discussed how the lack of commitment by local law enforcement officers to prosecute vandalism under the 1985 Consent Order fostered social conflict. A few current and former tribal fishers blamed state law enforcement officers for allowing instances of social conflict to occur and even encouraging social conflict under the 1985 Consent Order.¹¹⁹ They perceived that the state law enforcement officers failed to prosecute incidents of violence against tribal fishing gear.

Despite stakeholder perceptions that the lack of commitment to enforcement fostered social conflict, biologists and representatives of all parties believed that assigned fishing zones helped reduce social conflict.

V.) c. *Assigned Fishing Zones*

Most tribal and DNR biologists/representatives, sport-fishing and state representatives, perceived that assigned fishing zones helped reduce social conflict by separating user groups.¹²⁰ A few DNR biologists/representatives and sport-fishing representatives observed that the zones were beneficial for preventing social conflict by keeping tribal fishers out of waters that were densely populated with sport fishers.¹²¹

and sets his nets...they disappear, they're gone...a sportie gets pissed off, and he goes over to the nets and destroys them. That's what happens. We can't prove it because we can't catch them. So the fishermen keep their buoys small...

¹¹⁹ According to a current fisher,

It was the state's fault that all this trouble came up in the first place, for sabotaging boats and all that type of stuff...No the state didn't do that, but they more or less sanctioned it because they didn't do anything to stop it affirmatively.

¹²⁰ A tribal biologist/representative illustrated,

I think that the zoning approach was a necessary, but not very satisfactory compromise reached in '85 to get an agreement...Given that the climate at the time was so much more hostile—at least in social terms—that separating the fishers made a good deal of sense.

¹²¹ One DNR biologist/representatives demonstrated this perception:

Several tribal biologists/representatives believed that the exclusive fishing zones in Grand Traverse Bay in particular helped reduce social conflict and simplified management within this contentious region.¹²²

V.) d. *Shift in Attitudes*

Some of the respondents – including several former tribal fishers, tribal and DNR biologists/representatives, a few recreational sport fishers, and state representatives – perceived that social conflict has been gradually reduced due to growing adjustment or acceptance to tribal fishing.¹²³ In contrast, several tribal fishers from Grand Traverse and respondents from the DNR believed that negative attitudes towards tribal fishing have not changed.¹²⁴

They [the zones] definitely reduced conflict. We put tribal fishers in an area where there were the least sport fishers. We kept tribal fishers out of Grand Haven, Frankfort, and Manistee where big sport fishing groups exist.

¹²² One tribal biologist/representative explained these sentiments:

Keep in mind that Bay Mills fishers used to fish down there many years ago, and there have been very hard feelings about Bay Mills fishers in Grand Traverse Bay. Bay Mills fishers went down there, they harvested fish, and then they left...Grand Traverse Band stays down there and they still have to deal with the societal issues – conflicts with other user groups...I think the assigned zones do, in some ways, reduce conflict.

¹²³ Additionally, a charter boat sport fisher remarked,

I think people have gotten used to it...the ruling. I mean, you heard a lot about Judge Fox for years and years...negative comments about Indian fishing that we've all heard about in the news about read about...I think as times goes by, it's more accepted. People just realize that's the way it's going to be, for better or worse.

A state representative expressed this perception:

Social conflict went way down. In 1984 and 1985 you had armed patrols on the beaches, car windows being smashed, guns being fired, nets being vandalized, threats of violence on both sides, and it was a real powder keg...One of the good things about the 1985 agreement was that it did mark boundaries...It drew lines in the lake and over a period of time as people became accustomed to that, social expectations about the fishery adjusted to the agreement and people knew what to expect, and the level of violence went down.

¹²⁴ One current tribal fisher illustrated this perception:

They [sport fishers] came to swamp me when I first arrived there...[That was] three to four years ago. They came out with a bunch of boats. There was waving and yelling. They left me alone eventually. Now they want to chit-chat. But they carry the same attitude in their minds and hearts. They haven't changed.

VI.) Comparison of the 1985 Consent Order and 2000 Consent Decree: Social Conflict

Although many respondents perceived that social conflict diminished under the 1985 Consent Order, a few tribal and DNR biologists/representatives, as well as respondents from the state, expressed a concern that there is potential for conflict between tribal and sport fishing gear under the 2000 Consent Decree. They believe the potential exists due to the opening up of waters to gill net fishers. Without education of the fishing public, these respondents expressed concern that the opening of waters may lead to renewed social conflict.¹²⁵ Yet, one state representative discussed that this may not be problematic due to the reduction in gill net fishing as more tribal fishers move into trap net operations.¹²⁶

Although sport fishers, their representatives, and respondents from the DNR and the state discussed gear conflict as a potential source of problems under the 2000 Consent Decree, tribal stakeholders also believed that a lack of accurate knowledge about Native treaty fishing rights influenced social conflict under the 1985 Consent Order.

¹²⁵ One DNR biologist/representative remarked,

[W]e wanted to find a way so that not only did we protect the resource, but that we just as much opportunity for both of groups involved as possible. That means you're going to have these fisheries interacting, which we tried to segregate last time. Every time we have mobile and stationary gear, you have a problem. So, there's a lot of education you need to do.

¹²⁶ The representative explained,

I think there is certainly some concern to the extent that gill nets will be in places that they hadn't appeared before [under the 1985 Consent Order] and there could be an increase in potential for social conflict. But under the new agreement...in fact, there's a reduction of gill net activity...Most of the waters that the tribes will be moving commercial activity into that were closed to them under '85...will primarily in the form of trap net operations. In most of these areas, sportsmen are accustomed to seeing trap net operations and in fact, they get along with it very well. You find fishermen fishing near the trap nets on the theory that the nets are attracting fish, so that should work fairly well.

VII.) 1985 Consent Order: Knowledge and Perceptions of Native Treaty Fishing Rights

All tribal fishers and most biologists and representatives from all stakeholder groups knew that Native fishing rights originated from the 1836 Treaty. In contrast, nearly all sport fishers and one sport-fishing representative did not know or understand why the tribes have rights to fish the Great Lakes. Still, some of the sport fishers who knew about Native treaty fishing rights demonstrated that they did not understand these rights. Sport fishers frequently described treaty rights as “special rights,” and they believed that tribal treaty-right fishers are “playing the best of both worlds,” compared to the non-Native fishers.¹²⁷ Importantly, the few sport fishers that were aware of treaty-fishing rights failed to acknowledge the existence of these rights.¹²⁸

Many tribal stakeholders believed that sport fishers generally were unaware of Native treaty fishing rights.¹²⁹ Most tribal and sport fishers within the Grand Traverse Bay region believed that a lack of knowledge and understanding of tribal treaty rights have perpetuated intolerance and social conflict under the 1985 Consent Order.¹³⁰ A few

¹²⁷ A recreational sport fisher illustrated the most common response among sport fishers when describing relations between tribal and sport fishers under the 1985 Consent Order:

There's a lot of animosity, even now. A lot of Natives are playing the best of both worlds. They want the benefits of living in the United States, being a United States citizen, but they also want their sovereign rights.

¹²⁸ Age may represent an influential social variable on stakeholder perceptions of Native treaty-fishing rights. The two recreational sport fishers that were less hostile toward tribal fishers and perceived that there is validity in tribal claims for fishing rights were the only respondents that were less than 45 years old. Notably, these respondents also believed that tribal fishing should be allowed, but that it should not detrimentally impact the sport fishery.

¹²⁹ One former tribal fisher explained this perception,

Perhaps if we had an educational program about treaty rights, the real story about gill nets and their depths as I explained to you, perhaps it would be better. Perhaps it won't ever get better. But it might. Then the only ones who would hate Indians would be the ones who hate the Jew and other groups—those people that are just racist...If I was uneducated and only read what I saw in the papers, then I'd be one pissed off son-of-a-bitch, thinking, "They're [the Indians] taking all the fish!" There's a lack of education.

¹³⁰ One DNR biologist/representative responded, “Sport fishers feel that Indians are getting special rights and it's not fair.”

tribal and DNR biologists/representatives shared this belief. Tribal stakeholders perceived that sport fishers' lack of knowledge and understanding of Native treaty fishing rights stemmed from:

- a. Misinformation; and
- b. Lack of education.

VII.) a. *Misinformation*

Many tribal fishers, biologists/representatives discussed misinformation as a critical obstacle to understanding and tolerance of tribal fishing. They discussed the difficulties in combating this misinformation.¹³¹ They faulted the local media, sport-fishing organizations, DNR, and politicians for failing to educate the public and disseminating false information, such as referring to the 1985 Consent Order as a "treaty."¹³² This statement is further supported by the reference to the 1985 Consent Order as a treaty by several sport fishers.¹³³

Another example of misinformation was that tribal fishing is not managed or regulated.¹³⁴ Notably, one tribal biologist/representative believed this misconception has

¹³¹ One member of the Public Information and Education Committee stated, *It's hard to combat the misinformation that exists... We help reporters, media people—we correct fallacies. One particular fallacy—people in the media, the public, and the DNR were confusing the Consent Decree with a treaty... It's hard to do though... to combat the misinformation and tales. Somebody will go on radio, "They [the Indians] want treaty rights to fish" or "They want to expand their treaty waters"—it starts with a little bit of false information, and people begin to confuse the agreement with a treaty. During an NPR segment, for example, I heard a sport fishing association president give misinformation. He wasn't even well informed.*

¹³² One tribal biologist/representative expressed this sentiment, *I'm extremely frustrated by the media. The media says it's a treaty. It's not. It's a management plan... Perhaps it's more sensational [to say it's a treaty]—it gets people's attention. Or they think the general public is so ignorant that they won't know the difference. It's misleading.*

¹³³ In response to the question, "Are you familiar with the 1985 Consent Order"? A few sport fishers responded as this particular charter boat sport fisher, *"The treaty, you mean? I was aware of it, though I don't know all the details."*

¹³⁴ A charter boat sport fisher responded, *"There's never been relations [between tribal and sport fishers]! I mean, how can there be? While we're bombed with regulations, they [the Indians] have at it!"* Similarly, another charter boat sport fisher remarked, *"[O]verall their fishing is unregulated. The biomass they're taking—nobody checks. No one is checking."*

been perpetuated by the DNR's failure to portray the tribes as having a role in the management of the Great Lakes fishery.¹³⁵

VII.) b. *Lack of Education*

According to several tribal fishers, tribal and DNR biologists/representatives and a few state representatives, there has been a lack of education about Native treaty fishing rights. They discussed that this omission may have influenced stakeholder perceptions of these rights.¹³⁶ According to a Sea Grant representative, educational programs have not been held on Native treaty fishing rights and the 1985 Consent Order due to confusion over how to present these issues and a lack of resources.¹³⁷ In contrast, the Public Information and Education Committee members mentioned their constant involvement in education through press releases, a website, and dissemination of information – including the informational booklet, entitled, “The 1836 Treaty Guide” by COTFMA’s Public Information and Education Committee. However, the decision of the DNR to pull support from the final version of this publication was discussed as a cause of contention

¹³⁵ This biologist/representative stated,

I think the general public for many years has been under the impression that the tribes will do what they want to do, how they want to do it, because that's in the early years how the DNR portrayed the tribal fishery. The tribal fishery management capacity developed over the years and in large part that was never brought to the public's attention. It may not be as bad now—in the past couple of years. Through the '80s and certainly the '90s, unless a sport fishing group was represented or came to meetings that...the tribes were on, they wouldn't know that we were even involved [in fisheries management]! You can tell that by reading the sport fishing newsletters or newspapers and outdoor papers...When they refer to the tribes as though they were...off in the distance—and the DNR was the one doing all the work. It's not like that.

¹³⁶ One state representative stated, “The notion is that the root of a lot of prejudice [against tribal fishing] is—if not ignorance—at least lack of knowledge.”

¹³⁷ The representative explained,

It's not out of the question [to do an education/outreach program], but timing was not right. There's also the question, “How to do it?” There's a handful of people with limited resources. We're partners with all key elements. We've tried to put workshops on the agenda. There were requests 15 years ago... The court is trying to compromise between competing users. It's out of our hands. The court has to give the rules for people to abide by. This issue can't be addressed with an educational program. I don't see a clear path for education. I don't see an avenue to do this. There's lots of other avenues, lots of other important issues to address—low lake levels, land

within the committee.¹³⁸ Upon inquiry into the reasoning for the DNR's withdrawal of support for the booklet, a member of the committee explained that the DNR could not support some of the statements that were made in the final version of the booklet.¹³⁹

Despite the difficulties with completing the informational booklet, the respondents believed that the committee served a very important role in disseminating information.

Some tribal respondents believe there is potential for social conflict under the 2000 Consent Decree due to the continued lack of understanding and acceptance of tribal treaty right fishing.¹⁴⁰ However, they perceived that greater education and awareness could increase understanding and acceptance of tribal fishing.

VIII.) Comparison of the 1985 Consent Order and 2000 Consent Decree: Knowledge and Perceptions of Native Treaty Fishing Rights

Some tribal fishers and representatives from each category stated that education about the 2000 Consent Decree is needed to avoid some of the user conflicts that arose under the 1985 Consent Order. A Sea Grant representative stated that educational programs on the 2000 Consent Decree had been discussed and attempted, but they were

use. There are lots of educational programs addressing stewardship of Great Lakes resources. But this issue is nebulous. It is difficult to grasp.

¹³⁸ One member of the Committee explained,

It was decided that we needed more education...The Committee started doing it [the informational booklet]...We were working together, but at the last draft, the DNR didn't want to be a part of it...The DNR had pulled out after all that work....[The DNR] said it was too late....After it was out for more than 1 year {looking disapprovingly}. I don't know the unofficial reason.

¹³⁹ A Committee member stated,

[The DNR] was involved in its creation. Yet in the final editing, there were problems with the language. The problem was that everyone wrote a separate section from their own perspective...in the final stages, there were some things said that compromises the appropriate point of view, from...[the DNR's] perspective. Some people felt pride of ownership. They weren't willing to modify their statements.

¹⁴⁰ One DNR biologist/representative illustrated this sentiment,

There's a possibility with the new agreement of new conflict. I've heard rumblings of conflict. Some people argue that the tribes have the right to fish beyond what other fishers are allowed. They feel the tribes should have no extra rights. You're never going to convince everyone that the tribes deserve special rights.

hampered by the status of negotiations and the confidentiality agreement of the parties.¹⁴¹ Yet, stakeholders perceived that education is going to be necessary to address fishers' lack of knowledge about the new agreement and helped avoid some of problems that were experienced under the 1985 Consent Order.

Significantly, the Public Information and Education Committee was discontinued in the new agreement. Some respondents believed discontinuation of the Committee was a mistake, and others believed that it was purely an oversight. A few DNR biologists/representatives and state representatives believed that education was going to be an important component within the 2000 Consent Decree, although it will not involve the Committee.¹⁴²

IX.) 1985 Consent Decree: Fisheries Management Between Tribal and State Agencies

According to tribal and DNR biologists/representatives, fisheries management has improved under the 1985 Consent Order since this policy mandated a systematic approach for the tribal and state regulatory agencies to conduct fish population assessments.¹⁴³ Biologists and representatives from all parties also believed that

¹⁴¹ The representative stated,

Due to the confidentiality, we could only discuss history since we're all very familiar with the history as it's been in place for 15 years. We said, "maybe not." The situation was always in the "state of flux" and it was being dealt with officially and arbitrated with the court system. We are hampered by it [secrecy]. But secrecy is a good thing—educational efforts would probably lead to a good discourse without guidance.

¹⁴² A state representative discussed that the approach used in the 2000 agreement is a more attractive alternative to the Public Information and Education Committee:

But there is some better stuff in there [than the Public Information and Education Committee]... There is a Law Enforcement Committee made up of community representatives that will meet on a regular basis, and the whole point is that those folks can bring to the Law Enforcement Committee problems that they're running across. So there's a formalized process for input from non-treaty fishers in the process. There is a provision within the agreement that basically says that CORA will organize and conduct community meetings involving local sport fishing groups and local governmental officials upon request.

¹⁴³ One DNR biologist/representative illustrated this belief,

Like I said, it's partly because of the 1985 Consent Decree, we got on the ball and systematically sampled a lot more of the populations. These models that have been developed required many years of data to operate well and ...the models that we were using [prior to 1985] were pretty

management of the Great Lakes fishery became more cooperative between the state and tribal regulatory agencies under the 1985 Consent Order, although a few tribal and DNR biologists/representatives discussed a few contentious issues, such as an assessment that was initiated by the tribes in Lake Huron.¹⁴⁴ Some tribal biologists/representatives also discussed that one the benefits of the 1985 Consent Order was creation of the Chippewa Ottawa Treaty Fishery Management Authority (COTFMA) as a governing body for increasing cooperation between the tribes. Importantly, tribal and DNR biologists/representatives believed that fisheries management within the Great Lakes has become more cooperative because representatives of the tribes under COTFMA and the state worked together on Lake Committees under the authority of the Great Lakes Fishery Commission (GLFC). Some stakeholders discussed how the fisheries committee formed under the 1985 Consent Order failed to provide meaningful input into joint management issues surrounding the Great Lakes fishery. However, they described how this committee's role was replaced by the GLFC's Lake Committees.¹⁴⁵

Some stakeholders discussed that the degree of cooperation in management between tribal and state regulatory agencies tended to vary, depending on the level of management and on the individuals involved. A few tribal biologists/representatives

simplistic, partly because these new models were not available, and partly because the data were not available!

¹⁴⁴ A DNR biologist/representative illustrated,

We have biologists working together on lake trout research. Management has been cooperation for 10 years. It's getting to be more and more cooperative as time goes on. I suspect there should be more of the same under the new agreement.

¹⁴⁵ One tribal biologist/representative explained,

The value of the Lake Committees is...it's a holistic biological look at the lake and its problems...rather than the GFC historically had a tendency of focusing just on the Consent Order. It seemed like a duplication of effort for the GFC to get together and talk about certain biological things that the Lake Committees were already talking about and are doing on a whole lake-wide basis, rather than a grid, or management-unit basis....We met, we did status of stocks reports, we did all the biology...but the Lake Committees were doing that stuff too plus more! It was the same

believed that managers within the Fisheries Division of DNR do not work cooperatively with the tribes, although some of the local biologists do.¹⁴⁶ However, most tribal and DNR biologists/representatives and the state representatives discussed that the tribes' increased management expertise and capacity has fostered greater trust and cooperation in management of the Great Lakes fishery resource.¹⁴⁷

Many tribal and DNR biologists/representatives perceived that management also became more cooperative due to an increase in open communication and information sharing under the 1985 Consent Order.¹⁴⁸ To demonstrate their commitment to open communication and information sharing, a few tribal biologists/representatives discussed that they shared catch data from individual fishers with the DNR, despite resistance from

people...just different hats. So after awhile, the GFC ...just started fading away and the same people met under a different hat and got it done there.

¹⁴⁶ One tribal biologist/representative stated,

When we get...into Fisheries Division, they don't want our help...and they don't want us to do nothing...Sometimes the local biologists...[one that] works with us a lot...get slapped down from the top, saying, "Hey, I don't want you working with the tribe on this project." ...There isn't anything he can do. His hands are tied.

¹⁴⁷ One tribal biologist/representative remarked that it's taken a long time for the DNR to recognize the talents and contribution of the tribal biologists. The biologist/representative stated,

I think it took more into 1995...Before, every management agency, including the Great Lakes Fishery Commission, recognized the expertise and experience and what would say is "non-biased" science produced by the tribes' biologists. They were chairs of Lake Committees. They served on various task forces that were set up under the Commission. I would say that recognition of tribal biologists as being just as interested in the resource came from other agencies before it came from the Michigan DNR.

Similarly, a DNR biologist/representative further illustrated this perception and how it helped promote cooperation during negotiations for the 2000 Consent Decree,

One thing about the 1985 Order, or the intervening years since 1985, is that all the tribes have biologists on board. Some of them have very good biologists. The Sault band doesn't have biologists, but they use COTFMA biologists...those biologists are on many of the same committees as state biologists...So we gradually developed trust in one another and respect for their opinions. Sometimes we don't agree with them, but basically they're fundamentally pretty good biologists. I think that helped this go around during negotiations [for the 2000 Consent Decree]...that the biologists could often agree on contentious issues and resolve at least the resource level issues.

¹⁴⁸ One tribal biologist/representative stated,

I think all along [after the 1985 Consent Order] cooperation has improved...I try very, very hard to work with the state and federal employees and biologists, and I actually try to talk straight with people...In the past, however, it's always been a case where you've always been kind of hesitant.

the tribal fishers.¹⁴⁹ Yet, a few DNR biologists/representatives believed that some tribes were not cooperative in sharing individual fishers' information as required under the 1985 Consent Order.¹⁵⁰

X.) Comparison of the 1985 Consent Order and 2000 Consent Decree:

Fisheries Management Between Tribal and State Agencies

The 2000 Consent Decree replaced the tribal authority of COTFMA with the Chippewa Ottawa Resource Authority (CORA),¹⁵¹ so the respondents expect that cooperation between the tribes will continue to be fostered under the new agreement. Several tribal and DNR biologists/representatives also expect that there will be a renewed commitment – by tribal and state agencies – to share information and maintain open communication. Respondents mentioned that the opportunity for tribal and DNR regulatory agencies to comment on each other's management strategies under the 2000 Consent Decree should help. Respondents from the tribes, DNR and the State of

¹⁴⁹ Another tribal biologist/representative explained that the sharing of catch data from individual fishers was so difficult for the tribes,

There's a...cultural difference. When it comes to information about individual fishers, the state's policy is that its licensed fishers are there at the grace of the public, and they're given the privilege of using a public resource, and economically benefiting from it...Information about their individual activities on the water are public information and they have to make available to the state. On the tribal side, there's great concern about the disclosing the identity of individual fishers, and that is a very difficult issue. On part, it's a cultural difference, but it's a real difference. From our side, there was difficulty in [the state] understanding the tribal position...that if the names are disclosed, people will not be honest about the information they give.

¹⁵⁰ One DNR biologist/representative remarked,

Sharing data—it's a one-way street. We give the tribes our data, but it's very difficult to get their data....I can't say we've never received their data....It's very slow in coming.

¹⁵¹ A tribal biologist/representative explained how the tribes work cooperatively under their single management authority under the auspice of the Great Lakes Fishery Commission:

Participants on the Lake Committees include every agency that has authority on that lake...They are members of the Great Lakes Fishery Commission, the fisheries management umbrella organization and the Commission then recognizes each of these agencies as manager and therefore they're members of the Lake Committee...The tribes in the 2000 agreement recognizes CORA, Chippewa-Ottawa Resource Authority as the regulatory body for the fishery. Regulations will be passed by CORA. The agreement does not recognize the individual tribes as a management authority—it recognizes CORA

Michigan also discussed their expectation that there would be greater commitment and compliance under the 2000 Consent Decree.

XI.) *Comparison of the 1985 Consent Order and 2000 Consent Decree:*

Negotiations and Negotiation Processes

In general, representatives of the tribes (from the Bay Mills Indian Community, Grand Traverse Band, and Sault Ste. Marie), DNR, sport-fishing organizations and the State of Michigan perceived that the negotiations and negotiation process that led to the 2000 Consent Decree were more constructive than those that led to the 1985 Consent Order, and the parties were more satisfied with the outcome. The respondents discussed that a number of factors changed the process and dynamics in negotiations, including:

- a. Accommodation of other parties' interests;
- b. Cooperation between the representatives;
- c. Shift in attitudes of the party representatives;
- d. Communication between the representatives; and
- e. Approaches to negotiation.

XI) a. *Accommodation*

According to several tribal fishers and biologists/representatives, the negotiations for the 1985 Consent Order failed to produce an acceptable result since the DNR was unwilling to accommodate any other interests.¹⁵² Importantly, one current tribal fisher discussed that if the state had sought to accommodate the tribes' interests, they would not

¹⁵² One tribal biologist/representative illustrated this perception:

So you've got one side not accommodating, saying ... "We want to minimize you." And then the tribes saying, "We want to maximize it [the tribal fishery]." There wasn't a sense of accommodation by either side at that time, or an attitude of accommodation. In the negotiations [for the 1985 Consent Order], there was trade-off of course, but if the tribes said, "Hey, this is really a problem for us. Why can't we work this little piece out?" There wasn't that

have gone to court to push for recognition of their treaty fishing rights. This fisher believed that the state's failure to seek any accommodation left the tribes with no other choice.¹⁵³ According to a majority of tribal and DNR biologists/representatives, sport-fishing and state representatives, there was a greater amount of accommodation – by both sides – in the negotiations for the 2000 Consent Decree.¹⁵⁴

XI.) b. *Cooperation*

Representatives of the parties also perceived that negotiations were more constructive for the 2000 Consent Decree, compared with those leading up to the 1985 Consent Order, due to an increase in cooperation among the various party representatives. Most of these respondents discussed dramatic changes that occurred during the 2000 Consent Decree negotiations. They revealed the shift from entrenched posturing in the beginning of the negotiations – which they blamed on the 1985 Consent Order – to more cooperative problem-solving that took place as the negotiations leading up to the 2000 Consent Decree progressed.¹⁵⁵ Representatives of the parties also discussed the

[accommodation of interests] back then. It was more cut and dry. You want this, I want that, so forget it."

¹⁵³ This fisher said,

That's the state's own fault for that being done [being taken to court by the tribes]. They were offered at one time – by the fishermen that were in court – that if they would let 12 tribal licenses fish unrestricted in these areas that they wouldn't push for their rights. They didn't take it...So I kind of chuckled, because I knew...those guys [head of the DNR] and they wanted a fishery just for sportsmen – they didn't want any commercial fishermen at all. That was their attitude for years.

¹⁵⁴ A tribal biologist/representative stated,

In 2000, I think the state did accommodate and the tribes did too. Both sides were far more accommodating. They listened more to the other side and did their best to accommodate...Sometimes they would accommodate as far as they could until a hammer fell on their head from their constituents back home. The tribes gave some stuff up they wanted and they'd wanted since 1985! I think they backed off on those things to accommodate, and the state did the same.

¹⁵⁵ A tribal biologist/representative stated,

Initially...[we] were forced to work together [in 2000], but what happened is that the negotiations moved from positions that each party took and debated to problem-solving for how we can accommodate each other's interests...Once we went from defending positions that each of us had

perception that relationships between the party representatives became more cooperative as they worked towards the common goal of reaching an agreement without litigation.¹⁵⁶

In contrast, one sport-fishing representative did not perceive that there was greater cooperation in the 2000 Consent Decree negotiations.¹⁵⁷ One DNR biologist/representative also remarked how difficult it was to convince the tribes to allow the sport-fishing groups an opportunity to participate in negotiations for the 2000 Consent Decree. However, his perception was that the relationships between the participants became more cooperative over time.¹⁵⁸ This sentiment was reiterated when one tribal biologist/representative discussed his perception that the sport-fishing groups played an especially constructive role in the negotiations for the 2000 Consent Decree.¹⁵⁹

A few DNR and state representatives believed that the state kept in constant communication with the sport-fishing groups in an effort to protect their interests. One

that seemed to be irreconcilable to how can we solve this problem of meeting both of our interests in the specific case, then...[we] came up with creative solutions.

¹⁵⁶ One state representative replied,

Relations were very bad in the beginning. Over time, during the negotiations, there was a greater appreciation of the different parties' interests. We all started to work together. Relations over time became more cooperative as we began to work together...Each entity had different goals, but all agreed that it was better to come to an agreement outside the courtroom. We all shared that goal.

¹⁵⁷ The sport-fishing representative responded,

Cooperation? There was no cooperation! I mean, we were sitting at opposite ends of the issue! We had to fight long and hard this time around even to get a seat at the negotiation table! The tribes wouldn't even let us sit at the table, whereas in the old agreement, the court saw the value of having us be a part of the negotiations. Only after a long fight were we allowed to sit at the table...But, after a while, I think they realized that it was important for us to be speaking in the tent with them than to be outside the tent taking pot shots. But no. There was no cooperation. I mean, you have separate stances and different interests.

¹⁵⁸ The biologist/representative explained,

We pushed very hard to keep the amicus groups at the table, and the tribes didn't even want them in the room. They hated them, because they knew that they were the ones causing all the heartache. That took a long time, and in fact, ultimately what we got was not just a better relationship between the state and these individual groups, but relations between all of the groups vastly improved.

¹⁵⁹ A tribal biologist/representative explained,

One of the heartening things about these negotiations was that the amici groups – MUCC and the Coalition group, that included sport fishers from Hammond Bay and Bay de Noc, and other areas

state representative also stressed the importance of including sport-fishing organizations in negotiations and making sure their interests were represented in the 2000 negotiations.¹⁶⁰ A sport-fishing representative discussed how representatives from the State of Michigan and the DNR met frequently with the groups and sought to obtain their feedback on various proposals. Importantly, they believed that the state did a much better job representing their interests in the negotiations, compared with 1985.

Notably, all respondents that were involved in the negotiations for either the 1985 Consent Order or the 2000 Consent Decree remarked that the biologists had been working cooperatively prior to the negotiations for the new agreement. They believed this helped foster cooperation amongst the other participants.¹⁶¹

XI.) c. *Shift in Attitudes*

According to several tribal and DNR biologists/representatives and a sport-fishing representative, the shift in attitudes from the participants involved in the 1985 Consent

– was that these organizations played a positive role and were accepting of the approach of problem-solving, rather than defending positions, and wound up supporting the 2000 Decree.

¹⁶⁰ This representative from the State of Michigan explained, *I don't think we could have accomplished what we did without their participation...On our side, we kept on pretty close contact with those groups that were represented...when we went to the tribes and made a proposal, we had had a chance to talk with representatives of the sport fishing community, get feedback from them, and know that they would support the proposal...[T]hat's important for us because ultimately, in order for this thing to work, there has to be public acceptance of it, and so to have these folks involved in the process – who had a direct line out to important constituent groups in the community – we think was critical to enabling the state to move into positions that were acceptable to both the tribes and the sport fishing community. It couldn't have worked without them.*

¹⁶¹ A DNR biologist/representative remarked, *The biologists have always worked well together. We use the same measurements, the same management tools, we speak the same language. So there hasn't been an uncooperative relationship. There's been a positive environment...It's been more of a policy conflict regarding the leadership disagreeing about treaty right fishing and what that means.*

Similarly, a tribal biologist/representative stated, *I think that it's [cooperation] always been there. Biologists work on a very different level than politicians do. Among biologists, biologists get along...[W]e've always cooperated together. The tribal, state, and federal biologists are all members of the Great Lakes Fishery Commission process. We're all involved in the specialized lake committees, subcommittees, technical committees. We all work together.*

Order to those in the 2000 Consent Decree dramatically improved the level of cooperation between the parties.¹⁶² In particular, a few tribal biologists/representatives discussed the shift in attitude of party representatives from intolerance towards recognition and acceptance of treaty fishing rights.¹⁶³ Tribal and DNR biologists/representatives and state representatives perceived that the recognition and acceptance of Native treaty fishing rights by the DNR and the State of Michigan led to greater cooperation in the 2000 Consent Decree negotiations, compared with the 1985 Consent Order negotiations.¹⁶⁴

Many of these respondents discussed how cooperative particular individuals were during the negotiations for the 2000 Consent Decree. They perceived that increased accommodation and cooperation were attributable to the attitudes of some new participants in the negotiations, particularly new representatives for the State of Michigan, the DNR and the sport-fishing organizations.¹⁶⁵ One sport-fishing

¹⁶² A DNR biologist/representative reiterated this sentiment, and stated,
I heard some stories, talking to the old tribal guys that were involved in 1985, some of their old fishermen and some of their policy people would tell us, "Shoot, in 1983, 1984, Fisheries Division [of the DNR] wouldn't even talk to the tribe." They didn't want them there, they hated them, they wouldn't even acknowledge them. That's just going to put you in an arena of tension for years. It's not going to get you anywhere, and while you're busy fighting, the resource is going down the tubes.

¹⁶³ One tribal biologist/representative illustrated this belief:
Now, currently they're taking a position...that the treaty fishing right is a valid, legal right that needs to be accommodated by the state, as opposed to flat out engaged in warfare and rhetoric against it, pitting the citizens of the state against it. ...In some respects, we're seeing a change in attitude among the sport-fishing folks who aren't necessarily pleased by the existence of treaty fishing, but they realize it's here to stay.

¹⁶⁴ A state representative stated,
I think one thing that helped from the tribes' standpoint, I think there was a growing perception that while the interests of the state were in many respects different from the tribes, the state did recognize and accept – as a starting point – the existence of the treaty right...I almost sense that the tribes were expecting...that the state – after all these years – was unable to come to the acceptance of the existence of the treaty right...The issues were difficult, but once the state recognized their right and the tribes and their representatives as sovereigns, I think that over time...there was a greater sense of trust.

¹⁶⁵ One tribal biologist/representative illustrated this sentiment,

representative and a DNR biologist/representative perceived that attitudes and cooperation improved in part due to changes in leadership within their organizations.¹⁶⁶

Yet, a few stakeholders attributed the shift in attitudes partially to the fact that some party representatives have been working together on these issues for over 15 years.

XI.) d. *Communication*

Most respondents who had been involved in the 2000 Consent Decree negotiations discussed how cooperation increased during negotiations in part due to an increase in communication between the parties.¹⁶⁷ These respondents believed that communication was critical to improving negotiations between the parties. A few respondents discussed how communication improved once trust was fostered by the parties' adherence to the confidentiality agreement during the 2000 Consent Decree negotiations.¹⁶⁸

The negotiations [for the 2000 Consent Decree] would have gone differently if it weren't for a couple players in this who made an agreement happen, as opposed to the court, and I think he's [John Wernet] is one of them. He was a real-mediator type, strong when he had to be, accommodating too, and upfront. If he wasn't accommodating, he'd tell you....rather than trying to disguise himself.

¹⁶⁶ A DNR biologist/representative discussed attitudes of their representation in 1985, [Our former representative] *flat out believes there is no right and the tribes should never have been allowed to fish...He's just one of those guys who never believed—it didn't matter what the court said—they should just shut them down and this shouldn't be happening...That was one of our goals – to repair that damage and find a place where we could work together in the long haul. Part of it was the fact that there were different people this time, not necessarily for the tribes...We had different people in top level positions with different perspectives. They were willing to try and make this work, as opposed to '85 when they were not.*

¹⁶⁷ A DNR biologist/representative shared this sentiment, *I don't think at that time [1985] there was any communication...except at the Executive levels. There certainly wasn't at our level...the United States, the tribes and us. Our relationship with the amicus groups wasn't all that great either. They're the ones who were always upset and in conflict over the 1985 Decree and forced us to go to court...we decided that we needed...to improve communication with all of the groups, not just the amicus groups. We have much more open communication than we ever did. Much more.*

¹⁶⁸ A tribal biologist/representative expressed this sentiment, *This time around, ...and this is really important too, the parties agreed to a gag order. The media didn't hear about this stuff, and even the sport fishermen who don't work for government, but they were at the table, they – as far as I can tell – held to their agreement not to take this back [to their organizations]. They could have started fires all over the place, they could have sabotaged so many aspects of this agreement by releasing it to the media in its unrefined state...Parties were*

XI.) e. *Comparison of Approaches*

Representatives described how the parties had hired a mediator, instead of having a court-appointed Special Master – as they did in the 1985 Consent Order negotiations – to assist with the negotiations for the 2000 Consent Decree. An important distinction that was made by the representatives was the difference of power between Special Master, Francis McGovern, and the mediator, John Bickerman. According to many representatives of the tribes, DNR, sport-fishing organizations and the State of Michigan, the parties had less power and control over decisions during the negotiations for the 1985 Consent Order, compared to the 2000 Consent Decree, which provided the parties with greater sense of empowerment.¹⁶⁹

One significant contradiction with this perception that the parties had more power and control during the 2000 Consent Decree negotiations came from tribal and biologists/representatives of the Grand Traverse Band of Ottawa and Chippewa Indians, as well as rank and file sport fishers. These respondents discussed how the tribe had been blackmailed by the State of Michigan – by Governor Engler’s office – to either accept the 2000 Consent Decree, or face litigation over their rights to land upon which one of the

open and they weren't spreading rumors. In 1985, that wasn't the case...Back in '83, '84 when negotiations were going on, it was just a firestorm of misrepresentation and rumor and propaganda...which hurt negotiations, and it hurt relationships. We didn't have that this time around.

¹⁶⁹ A DNR biologist/representative described it this way, *It was completely different. Francis McGovern had all the authority of the court. Francis is a true arbitrator, and with the authority he had, he could do things that Bickerman couldn't do, could never dream of doing... [During] negotiations [that McGovern held] in the Sault, there were rarely days when the parties were all together. They were all in separate rooms, and Francis would run from room to room, trying to...cut deals, that kind of thing. Bickerman was, in the true sense of the word, a mediator. He had no authority. None. He couldn't do anything but try to get us together, try to figure out what the issues were...try to find where there was common ground...I think that was helpful...to build the ability to talk and create these relationships that I hope will carry us forward. In 1985, that wasn't the case. You had one guy with all the power. "This is what you're taking," run to another room, "This is what you're taking."*

tribe's casinos lies, the Turtle Creek casino.¹⁷⁰ Thus, Grand Traverse Band fishers believed that their treaty rights were held hostage by the State of Michigan.¹⁷¹

Many representatives discussed the differences between the approaches used by the mediator, John Bickerman, versus the approach used by the Special Master, Francis McGovern. Importantly, some tribal fishers and tribal biologists/representatives discussed how McGovern chose inappropriate people to represent the interests of the tribes during the 1985 Consent Order negotiations.¹⁷² According to some tribal fishers, the lack of appropriate representation during the final negotiation session for the 1985 Consent Order resulted in a final document that did not include what had been negotiated prior to this session, and was unacceptable to the Bay Mills Indian Community.¹⁷³ In

¹⁷⁰ An illustrative remark by a current tribal fisher was:

It's nothing short of blackmail. They threatened the economic base of this tribe. They put the council between a rock and a hard place. I hold no animosity towards the council. I respect the difficulty of their position. But it doesn't make it right....It's a "take it or leave it" deal, or they'll litigate Turtle Creek...There's a dispute over the lands we built it on..

One charter boat sport fisher reiterated,

I'm surprised they [Grand Traverse Band] did sign the new agreement. But the word on the street is that the Turtle Creek casino is tied into the new agreement. I heard it from several reliable sources that the Department of the Interior and the Department of Justice and other tribes told the Grand Traverse Band to "get in line and sign." The Grand Traverse Band wanted no part of the agreement because it limits their fishing...The Band initially rejected the new agreement. They wanted...below the 45th parallel to be a viable gill net fishery. I've heard it from a number of sources that they were told, "You can catch a few fish or keep your casino." I heard in an effort to get them to sign, they tied the casinos and the new agreement.

¹⁷¹ An illustrative remark was made by a tribal biologist/representative: "To stand back and look at this thing from a distance, you'll realize that the power trumps the [treaty] right in many respects."

¹⁷² One current tribal fisher remarked, "They put pressure on these people that knew nothing about the fishery. They were non-fishing families, and they're the ones that negotiated that first 1985 Consent Decree."

¹⁷³ A former tribal fisher explained,

Actually he [Francis McGovern] didn't want me to sit in on the negotiations! So ___sat in on negotiations, but I was there. Now, a lot of times I left the room, but I was satisfied with what we negotiated on that deal. But when we got done negotiating, all the lawyers and everybody sat down to write these up. When they come out with that, it was entirely different than what we'd negotiated! What we negotiated, there wasn't very much in there. They were doing it to satisfy who they called, "The Master." The lawyers...re-wrote everything in that negotiations. We might as well have never sat down and just told them, "Go ahead and do what you want..." That's just what the Master wanted in the first place.

contrast, many stakeholders believed that their interests were represented during the negotiations for the 2000 Consent Decree.

Several representatives from the tribes and the DNR criticized the techniques that were used in the 1985 Consent Order negotiations, such as setting unrealistic timelines for completion, failing to work cooperatively with all the parties – instead of treating the three tribes as one entity – in an open negotiation process, and in some instances, forcing representatives to make decisions.¹⁷⁴ Respondents described how John Bickerman took a different approach in trying to work with the parties and meet with all the interested party representatives. A few representatives complained that the right people weren't always brought into discussions, but overall, most representatives were pleased with the assistance he provided.¹⁷⁵

According to all representatives that were involved in the negotiations for the 2000 Consent Decree, one key difference between the negotiations leading to the 1985 Consent Order and the 2000 Consent Decree was the time commitment of the participants. Tribal and DNR biologists/representatives described how the negotiation process for the 1985 Consent Order involved bringing participants to Sault Ste. Marie,

¹⁷⁴ One tribal biologist/representative illustrated some of the criticisms:

Francis McGovern used labor management techniques in the 1985 negotiations...I contend that those techniques were inappropriate in the context because those techniques have to deal with boiling down the large group to a couple of key people, putting those key people in a room, and locking them up until they hammer out a deal...What Francis McGovern did...was to employ those techniques on the assumption that you had two sides – the state on one side, and the tribes on the other. In doing that, what happened in '85 was that each of the tribes was not present in that small session. You had one representative from all of the tribes...but there wasn't one unified tribal position.

¹⁷⁵ A tribal biologist/representative illustrated this perception,

I think Bickerman helped in providing the forum more than anything...he provided a way for people to get together....At times he would have group A meet with group C, and other times group D and group E. He'd try to bring people together for certain issues. I think he missed some things. There was a couple of pretty serious items that he messed up on, in my opinion. He should have put the right people together – the right groups together – and he didn't. I don't know that we could have done it without a mediator....if you get a result, something worked!

locking representatives in a room, and forcing them to make decisions after three non-stop days of intense negotiations, despite the participants' lack of sleep and consultations with others.¹⁷⁶

In contrast, the representatives discussed the extensive time commitment that they made for the 2000 Consent Decree negotiations. They stated that John Bickerman was instrumental in initiating discussions with representatives of all the affected parties to discover what their interests and concerns were for the new agreement, prior to the beginning of any formal negotiations.¹⁷⁷ The representatives of all parties perceived that the time commitment helped build trust among the participants, which helped the negotiations.¹⁷⁸

¹⁷⁶ One former tribal fisher discussed his perceptions of the 1985 Consent Order negotiations, *"Hurry up, hurry up, hurry up!" Everything was, "Hurry up" ... [T]here was a few...scared of Judge Enslin. The way they wrote that up was more or less to satisfy...and get it done just as quick as you could!*

A DNR biologist/representative also stated,

In 1985, we didn't go through a negotiation process, like we did here [for the 2000 Consent Decree]...The judge...brought in a court Master – a Special Master – and some consultants, and they just started to hammer out a deal, and it got to the point where the judge had had enough, and he locked people in a room...up at the Sault, and they hammered out a deal in three days.

¹⁷⁷ A description provided by a DNR biologist/representative that illustrates the 2000 Consent Decree negotiation process:

The DNR started meeting informally with the tribes in 1998 to initiate discussion regarding the new agreement. They began meeting formally with the tribes in spring of 1999. They've been trying to lay the groundwork; each side offered proposals, and each side has been modifying these proposals. Through these meetings, each side has been trying to get the perspective of each other. It has been a healthy exploration process. It's been a good way to understand each other—a mutually beneficial process. The federal government, state government and tribal government have been meeting. John Bickerman was the negotiator. On September 13, 1999 he met with all the entities as a group. Since then he'd been meeting with the groups individually to explore their points of view.

¹⁷⁸ One DNR biologist/representative illustrated this sentiment,

That's one thing these negotiations did over two years. We walked in the first day, and nobody trusted anybody because of our history. It took us awhile to understand that we were all kind of the same, had the same goals...because in '85, things were different...It was very antagonistic. It started that way for us, and over the two years things changed 180 degrees. It's very positive now... We got to know each other because we were together so much. That helps...It took both sides a long time to build up their credibility, especially us...Once you have trust and credibility, the rest comes.

XII.) *Summary:*

1985 Consent Order as a Management Tool for the Great Lakes Fishery

Perceptions of the effectiveness of the 1985 Consent Order as a management tool for the Great Lakes fishery varied between stakeholder groups. All respondents believed that the 1985 Consent Order was not effective in terms of promoting lake trout rehabilitation and conservation within the Michigan, treaty-ceded waters of the Great Lakes. They perceive that the conservation refuges failed to promote natural reproduction, although they helped increase stock biomass and protected historic spawning habitat. Several respondents also criticized the policy's lack of flexibility, which led to continuous and inefficient litigation, and impeded enforcement efforts. They believe these factors may have frustrated lake trout recovery measures. Importantly, however, these representatives believed that the 1985 Consent Order was effective in providing a new structural framework under which the tribes and the DNR worked cooperatively in fisheries management.

Lastly, according to all tribal and sport fishers, the 1985 Consent Order was unsuccessful as a management tool for providing fair fishing opportunities for their communities. Tribal stakeholders were bitterly disappointed in this policy's failure to protect fishing opportunities for small boat gill net fishers. At the same time, sport fishers were frustrated by any allowance of gill netting under the 1985 Consent Order.

Biologists and representatives from the tribes, DNR, State of Michigan, and the sport fishing organizations believed that the 1985 Consent Order helped reduce social conflict through separation of user groups and through allocation of the fishery.

Furthermore, it provided a venue for increased cooperation and communication through the negotiation process as the 1985 Consent Order was coming to termination.¹⁷⁹

In contrast, tribal and sport fishers in the Grand Traverse Bay region, as well as a current fisher from Bay Mills, perceived that the 1985 Consent Order was ineffective as a management tool for reducing social conflict. These fishers perceived that social conflict has not diminished since 1985, although outbreaks of violence have decreased. These tribal respondents believed that this policy failed to address the animosity that stems from a lack of education and understanding of treaty fishing rights. Sport fishers, in contrast, believed that the policy failed since it provides “special rights” to Indians.

Tribal fishers from outside the Grand Traverse Bay region – mostly former fishers – perceived that social conflict has diminished under the 1985 Consent Order. They do not attribute the reduction to the policy, however, but instead to the passage of time and greater tolerance or acceptance of these rights by non-Native fishers.

XIII.) Considerations for the Future under the 2000 Consent Decree

Many biologists/representatives from the tribes and DNR, as well as sport fishing and state representatives, anticipate that the 2000 Consent Order will be more effective than the 1985 Consent Decree as a management tool for the Great Lakes. This expectation stems from stakeholder perceptions of:

- increased commitment to lake trout rehabilitation and conservation;
- enhanced fishing opportunities for tribal fishers due to the acquisition of trap net fishing operations from the state;

¹⁷⁹ One representative from the State of Michigan stated,
I think the 1985 agreement was part of the process that gets us to where we're at, but I anticipate and hope that there will be a much higher degree of cooperation and communication now. Things have evolved.

- enhanced fishing opportunities for sport fishers due to a reduction of at least 14 miles of gill nets;
- greater flexibility in fisheries management; and
- increased commitment to enforcement.

One important and illustrating statement made by a tribal biologist/representative is that the effectiveness of the 2000 Consent Decree does not depend upon cooperation among the party representatives, but its ability to set up a framework for fisheries management and allocation that the parties will abide by over the long-run.¹⁸⁰

Stakeholders discussed some potential problems for the future under the 2000 Consent Decree. The problems that were raised surrounded the following issues:

- Implementation;
- Allocation;
- Control and fisheries management; and
- Invasive species control and prevention.

XIII.) a. *Implementation*

Several tribal and DNR biologists/representatives predict that there will be several problems associated with implementation of the 2000 Consent Decree. In particular, they believe that the new requirements for development of lake trout harvest guidelines will be extremely difficult to implement.¹⁸¹ A few respondents from the tribes and the DNR also

¹⁸⁰ One tribal biologist/representative expressed this concern,
Cooperation has improved [but it is] probably short-term...I think, frankly, that the institutions themselves are stronger than the personalities of their representatives. I think that a part of the [2000] Decree itself is self-executing. There are things that certain people must do, things that certain agencies must do, regardless of who is holding the position at any particular time. Those, I think, are crafted well enough that it will work for the long-run.

¹⁸¹ One tribal biologist/representative expressed this sentiment,
We have many more tasks... We got some tough hills to climb here. We're going to have to find a way to manage using these...harvest guidelines... We're going to have our moments where there's

discussed the impossibility of implementing various provisions of the 2000 Consent Decree without sufficient funds.¹⁸² Their concern is that despite good intentions of the parties, adequate funding is necessary for implementation of the agreement.

Another concern that was raised by respondents from the tribes and DNR were related to the problems of compliance and enforcement under the 2000 Consent Decree, due to its complexity.¹⁸³ Some of the tribal and DNR biologists/representatives also raised the issue of monitoring larger fishing operations, compared to small boat, gill net operations.

XIII.) b. Allocation

Several tribal and DNR biologists/representatives also discussed issues related to allocation of the fishery, particularly since there are two additional federally recognized tribes within northern Michigan that were included in the 2000 Consent Decree – the Little Traverse Band and the Little River Band. Respondents mentioned that the

going to be disagreements – disagreeing with what the [fisheries population assessment] model spits out, disagreeing over what the harvest report could have or should have been, disagreement over, “Is this really a big deal? We’re over [the harvest guidelines] by one percent. Are we going to have to make a major regulations over one percent...?” That kind of stuff still awaits us. I guess then we’ll see how accommodating we are when some of those gray areas arise.

¹⁸² This sentiment is illustrated by one DNR biologist/representative, *The biological collection of data, the enforcement through surveillance and inspection is an enormous undertaking. I’ve said it at public hearings, and I will continue to say until I get evidence to the contrary, that it is going to cost more to administrate and to enforce than the fishery is worth. If you add up the Conservation Officers and the biologists and all the time that’s going to be put into this IF we enforce the stipulations and then you figure out what the sale value of that fish is—if taken commercially—it’s going to cost more. So, the probable result—in my opinion—is that it will never be enforced. It’s just based on the current budget and the number of people available. Unless there’s an infusion of money, which the Governor and this legislature has not seemed willing to do, than you’re going to take what biologists you have and what Conservation Officers you have and use them as efficiently as you can. But that’s going to take away from other good department programs and it’s not going to be adequate.*

¹⁸³ One DNR biologist/representative illustrated this perception, *The problem with the current agreement, from my perspective,...it is so complicated to enforce and if you were a fisherman, so complicated to comply with, that it’s going to be a source of great difficulty if in fact, the elements of that agreement are enforced...*

Similarly, a tribal biologist/representative stated, *“They should have re-approved the old agreement. The new agreement is some 157 pages long, is complicated,...it’s too complex for fishers to understand.”*

challenge of lake trout rehabilitation and fishery management within the Michigan waters of the Great Lakes will be significantly increased by having to allocate between five tribes and the sport fishery, especially if there are declines in fish abundance.¹⁸⁴ Another tribal biologist/representative highlighted the pending concern over whether or not the Little Traverse Band will license a large number of new gill net fishers. However, a majority of stakeholders described the extraordinary difficulties associated with sustaining a livelihood based on commercial fishing. Several respondents commented that the parties are counting on this tribe not to add a significant amount of gill net effort to the Great Lakes fishery.¹⁸⁵

XIII.) c. *Control and Fisheries Management*

A few tribal and DNR biologists/representatives mentioned the difficulty with having joint management of the Michigan waters of the Great Lakes fishery due to the DNR's belief that it has sole management authority over the Great Lakes fishery. Since the 2000 Consent Decree's success is predicated on having cooperation in fisheries management, a few biologists/representative discussed the concern that the DNR will have to strive towards maintaining cooperation with the tribes in Great Lakes fishery management, if the 2000 Consent Decree is going to be a successful management tool.

¹⁸⁴ Similarly, a DNR biologist/representative raised this concern, *"I think things will be fine unless we have a real downturn in fish supply. If competition for fish becomes more extreme, it will become more difficult."*

¹⁸⁵ One tribal biologist/representative remarked,

The 2000 Order will result in a significant reduction in gill net, and the only way that might not occur is if Little Traverse gears up and makes up the difference, which they are allowed to do. I think the state is banking on the fact that commercial fishing isn't something you get into. It's a nasty job, and there's not a lot of money in it. If it ain't in your blood, then you probably won't last long...[T]hey retired 14 million feet of Sault tribe and some Grand Traverse [gill net] effort – where does it get them if Little Traverse gears us and fishes 14 million feet?...[H]istory has shown us that fishermen who jump into this thing, don't last long. We got 20 years behind us with lots of fishermen who've come and gone... They [Little Traverse] may put some fishermen on the water. They'll probably be small operation... That's my expectation and I think it has to be the state's, or else they didn't get very far [in the 2000 Consent Decree].

Several tribal biologists/representatives gave the example of the DNR's anger over some walleye stocking that was conducted in Grand Traverse Bay by the tribe under the 1985 Consent Order.¹⁸⁶ In contrast to this perspective, the DNR biologists/representatives discussed that their opposition to the walleye stocking was based on the fact they believed the Bay did not provide proper walleye habitat. They also expressed the concern that the tribe had made a stocking decision without consulting the DNR.¹⁸⁷

Several DNR biologists/representatives discussed their belief that the DNR has sole management authority over the fishery, but some also expressed a willingness to share the management responsibilities with the tribes, as long as they can work together.¹⁸⁸ Notably, most state biologists/representatives and state representatives perceived that there would be cooperation in management under the 2000 Consent Decree between the tribes and the DNR.

¹⁸⁶ One tribal biologist/representative stated,

The state was upset when the tribes began a small walleye stocking program in Grand Traverse Bay, even though they'd been stocking enormous amounts of salmon and trout without biological evaluations of these programs. 80,000 fingerlings of walleye were planted by the tribe, an insignificant amount biologically, and the state was in an uproar... They don't want to lose control or power over management of the resource. It's about power and control.

¹⁸⁷ A DNR biologist/representative illustrated this perception:

Generally, this [walleye stocking]... is not a good idea, because I don't think it's really walleye habitat. I think we're better served NOT doing that.

¹⁸⁸ One state representative expressed this belief:

The state's view at the outset was that under state and federal law, we believe that the state alone has the authority to manage the resource – not the federal government, not the tribes – but the state. The tribes have a treaty right, the state has to respect that right, its management has to be conducted in deference to that right... The tribes... want to be involved and believe they have a right to be involved in management decisions... Nobody is really surrendering management authority. What we've agreed to do is to conduct the management in a cooperative way.

A DNR biologist/representative illustrated this sentiment,

This is a particularly sticky issue for us [the DNR]. We believe that we have the [sole] management authority... But, we also understand that the tribes have their own fisheries, and as long as they're committed to monitoring and regulating those fisheries accordingly. They've done an outstanding job this time around in terms of the structures they've set up, the policies they've set up... They will manage their own fisheries. That was made pretty clear, and we accept that as long as we have the ability to work with them to monitor and make sure things are on track, in the same way they want the ability to monitor us and keep things on track.

One important consideration for future fisheries management within the Great Lakes under the 2000 Consent Decree is lake trout rehabilitation. According to one DNR biologist/representative, if natural reproduction of lake trout is not successfully promoted under the 2000 Consent Decree, this could erode the foundation upon which the agreement is based.¹⁸⁹ Most respondents, however, perceived that among the available alternatives, the 2000 Consent Decree was the best opportunity for promotion of natural reproduction and lake trout rehabilitation and conservation. The only other management challenges that were discussed were invasive species.

XIII.) d. *Invasive Species Control and Prevention*

According to many respondents from each category, control and prevention of exotic species remained significant obstacles to fisheries management within the Great Lakes Basin.¹⁹⁰ A few tribal biologists/representatives discussed how management agencies tend to focus on fishing, although invasive species present a far greater threat to the ecosystem. They believe that an inadequate amount of attention and resources is given to aquatic, invasive species, and until they are made a priority, these species will continue to pose an enormous biological threat.

¹⁸⁹ This sentiment is illuminated in the quote below by a DNR biologist/representative:

I don't think there'll be any structural flaws that'll make the [2000] Decree tumble other than lake trout rehabilitation. If it doesn't happen, the tribes will want to re-open areas. There's no reason not to have gill nets if the stocks aren't self-sustaining.

¹⁹⁰ One current tribal fisher offered this perspective, which illustrates the concern of most fishers regarding the impact of exotic species on the Great Lakes fishery:

They [DNR] introduced all these exotics, and now we're into a real nightmare, because all these exotics that are coming in with this ballast water...some of them are starting now that are going to affect the fishery. We've got 159 or 157 different exotic species that come in with ballast water in the last 10 years. If those things come to pass, and do as much damage as just 2 of them that they know about—one of the them is the zebra mussel and the other one is a tiny water flea. They displace Diaporia, which is a main food for perch, walleyes, herring, menominee, whitefish..There's no food there for fish. They've done that in the last 3 years...So there's big changes going on [in the Great Lakes], and nothing that man can do other than shut the St. Lawrence seaway off...You have to do it [exotic species management through ballast water treatment and control] at the federal level...Something has to be done.

Chapter 4: Discussion and Policy Recommendations

As a result of litigation and subsequent recognition of Native treaty fishing rights, the number of management agreements between Native and state or provincial regulatory agencies to cooperatively manage fisheries allocation and social conflict has been on the rise in recent years within the United States and Canada.¹ Evaluation of these policies requires an examination of the ecological, historic, social, cultural, political and economic conditions surrounding the fishery of concern from the perspective of stakeholders, since they have a significant impact on the effectiveness of these policies.² An investigation of the conditions surrounding the Great Lakes fishery – in conjunction with an analysis of stakeholder perceptions of the 1985 Consent Order and the 2000 Consent Decree – led to the following important discussion and recommendations for future fisheries management policies of the tribal and state regulatory agencies within the 1836 treaty waters of the Great Lakes that seek to address social conflict over fisheries allocation and management, in light of judicially recognized treaty-fishing rights and diminished lake trout stocks. This evaluation of stakeholder perceptions of the 1985 Consent Order and the 2000 Consent Decree also led me to formulate my own conclusions about some important issues surrounding these policies and their direction.

Social Conflict, Native Sovereignty and Scales of Power

Some respondents perceived that social conflict emerged when the DNR began to exert its management authority over fishing in the Michigan waters of the Great Lakes,

¹ Pinkerton, E. (Ed). (1989). *Cooperative Management of Local Fisheries: New Directions for Improved Management and Community Development*. University of British Columbia Press: Vancouver, B.C.

² Selin, S. and Chavez, D. (1995). Developing a collaborative model for environmental planning and management. *Environmental Management*, 19(2):189-195, p. 190; McCay, B.J. and Jentoft, S. (1998). Market or community failure? Critical perspectives on common property research. *Human Organization*, 57(1): 21-29, p. 24-29.

and establish a recreational fishery through the stocking of non-native salmonids.³ The state's management and re-allocation strategy towards a recreational fishery precluded consideration of Native fishing rights,⁴ which increased social conflict as the state began to restrict tribal fishing opportunities.⁵

Other stakeholders believed that the Fox decision led to increased social conflict as the tribes began to exercise their rights to self-management as a sovereign government,⁶ and exert their judicially recognized treaty fishing rights.⁷ Upon

³ According to former representatives of the DNR, the utilitarian model of Gifford Pinchot was followed in the management and re-allocation of the Great Lakes fishery during the 1960s from a commercial fishery to a recreational fishery. This model was used since the DNR valued a management strategy that would provide "the greatest good, for the largest number, for the longest time." Pinchot also valued economically-efficient use of natural resources, meaning that natural resources were not underused or overused. Pinchot, G. (1947). *Breaking New Ground*. Harcourt Brace: New York, NY.

⁴ Despite the intertribal differences between the Bay Mills, Sault Ste. Marie and Grand Traverse bands, they shared common values with respect to the Great Lakes fishery. Each band valued protection of their sovereign treaty rights and commercial fishing opportunities for all members that want to fish. They believed in providing fishers with a viable livelihood and preservation of small-boat, gill-net fishing opportunities. In contrast, the State of Michigan and DNR valued protection and enhancement of recreational fishing opportunities for salmonids and other game species. The management scheme was also in direct contrast to the federal government's focus on protection of the commercial fishery, creating tension between the two jurisdictions.

⁵ Burnett argues that there is "inherent conflict" in state regulation of treaty-right tribal fishing – even for the purposes of conservation – since state conservation measures are intended to protect stocks for the non-Native recreational fishery. Burnett, M.A. (1996). The dilemma of commercial fishing rights of indigenous peoples: a comparative study of the common law nations. *Suffolk Transnational Law Review*, XIX(2): 398-434, p. 404.

⁶ Under international law, treaties are a vehicle by which sovereign nations relate to each other. Indian treaties that the Chippewa and Ottawa made with Europeans and the United States are a demonstration of tribal sovereignty. Although the Bay Mills Indian Community, Sault Ste. Marie and Grand Traverse Band of northern Michigan have a legal right to exert management authority over natural resources, due to their Native sovereignty and rights of aboriginal title, the tribes had not exercised this right. Federally recognized Indian tribes have the right to participate in fisheries management and the creation of fishing regulations. Qualified tribes have the right to manage their own treaty fisheries. State regulation is unnecessary when tribal management is sufficient to conserve fish species. *Sohappy v. Smith*, 302 F. Supp. 899, 912 (D. Ore. 1969); Busiahn, T.R. (1984). An introduction to Native People's fisheries issues in North America. *Fisheries*, 9(5): 9-11, p. 9; Kickingbird, K. (1985). What's past is prologue: the status and contemporary relevance of American Indian treaties. *St. Thomas Law Review*, 7(3): 603-629, p. 604-605.

⁷ The Court held in *United States v. State of Michigan*,

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...no principle of federalism requires the federal government to defer to the states in connection with the protection of those rights. The responsibility of the federal government to protect Indian treaty rights from encroachment by state and local governments is an ancient and well-established responsibility of the national government.

recognition of these rights by the courts, these stakeholders perceived that the State of Michigan and the DNR fought incessantly against treaty-fishing rights.⁸ Subsequently, social conflict increased between state and tribal regulatory agencies during the 1970s and 1980s.

These assertions are consistent with the belief that social conflict arises over natural resources management between the three levels of federalism in the United States – the federal, state, and tribal governments – or “geographic scales,” when one or more governments seek to expand their jurisdiction.⁹ Importantly, as the federal government in recent years has been emphasizing self-determination and self-governance for tribes throughout the United States,¹⁰ the states have often attempted to centralize their power and extend their authority over local Indian populations within their geographic boundaries.¹¹ As in the State of Michigan, attempts by states to expand their authority have been resisted by Native peoples, and they have fought to preserve their rights of self-governance as a “third sovereign,” or “third geographic scale,” within the American

653 F.2d 277 (1981).

⁸ The DNR resisted any relinquishment of their management authority and did not accommodate tribal fishing interests in its management plans. Bielski, V., Cornell, G. and White, R. (1980, June 21). Indians only ask to keep their age-old right to fish. *Detroit Free Press*, pg. 5-6; Cleland, C.E. (1990). Indian treaties and American myths: roots of social conflict over treaty rights. *Native Studies Review*, 6(2): 81-87.

⁹ Silvern refers to tribal, state and federal governments as geographic scales that have some overlap in jurisdiction and hierarchy in power. Silvern, S.E. (1999). Scales of justice: law, American Indian treaty rights and the political construction of scale. *Political Geography*, 18: 639-668.

¹⁰ Tribal self-governance has been promoted by the court in *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 335 (1983) and in various federal legislation, including the Indian Reorganization Act of 1934, 25 U.S.C. §476, 477 (1988), and the Indian Self-Determination and Education Assistance Act, Public Law No. 93-638, 25 U.S.C. §450 (1988). A number of U.S. Presidents have also encouraged self-governance. President's Special Message to the Congress on the Problems of the American Indian: The Forgotten American. (March 6, 1968). *Public Papers 1, 1968-69*, pg. 335 (President Johnson); President's Message to Congress on Indian Affairs (July 8, 1970). *Public Papers 1970*, pg. 564 (President Nixon); Statement on Indian Policy (January 24, 1983). *Public Papers 1, 1983*, pg. 96 (President Reagan); Memorandum of April 29, 1994, Government-to-Government Relations with Native American Tribal Governments. 59 Fed. Reg. 22,951 (President Clinton).

¹¹ Reynolds, L. (1984). Indian hunting and fishing rights: the role of tribal sovereignty and preemption. *North Carolina Law Review*, 62(4): 743-793, p. 743-744; Silvern, *supra* note 9, at 640-641.

system of government.¹² Tribes view treaty rights litigation as a means of asserting their rights as a sovereign government,¹³ and promoting self-sufficiency through sustainable self-management of their natural resources.¹⁴ According to Silvern, social conflict over natural resources management arises as Indian tribes challenge the existing scale of power,¹⁵ seeking jurisdiction over on-reservation natural resource management, and shared jurisdiction over off-reservation natural resources.¹⁶ Thus, conflicts and litigation over treaty rights are “instances of the political construction of geographic scale,” and litigation of treaty rights can decentralize management authority through recognition of tribal sovereignty and self-governance. This decentralization rectifies the power imbalance that exists for Indians in natural resource decision-making.¹⁷

Silvern’s assertions regarding the political construction of geographical scale are supported by the more active role of northern Michigan tribes in fisheries management as a result of litigation.¹⁸ Prior to the mid-1980s, cooperation in fisheries management between northern Michigan tribes and the DNR was non-existent. In contrast, the tribes and the DNR have been working cooperatively on the technical aspects of fisheries

¹² Getches, E. (1988). Resolving tensions between tribal and state governments: Learning from the American experience. In: Long, J.A. and Boldt, M. (Eds.), *Governments in Conflict? Provinces and Indian Nations in Canada*, (pp. 195-208.) University of Toronto Press: Toronto, p. 197; Silvern, *supra* note 9, at 640.

¹³ Cleland, *supra* note 8, at 81.

¹⁴ Wood describes four fundamental attributes of Native sovereignty that should be protected under the Indian trust doctrine: 1) a land base, 2) viable tribal economy, 3) self-governance, and 4) cultural viability. Wood, M.C. (1995). Protecting the attributes of Native sovereignty: a new trust paradigm for federal actions affecting tribal lands and resources. *Utah Law Review*, (1): 109-237, p. 113-237.

¹⁵ Silvern, *supra* note 9, at 640-641.

¹⁶ First Nations peoples and Native American tribes are increasingly reasserting their treaty rights and rights to co-manage natural resources through the courts. Moffitt, C.M. (2000). Reflecting on Native American fisheries. *Fisheries*, 25(7), p. 4.

¹⁷ Silvern, *supra* note 9, at 641-650.

¹⁸ Ferguson, K. (1998-1999). Indian fishing rights: aftermath of the Fox decision and the year 2000. *American Indian Law Review*, 23(1): 97-154, p. 133.

management since the court recognized the treaty rights of the tribes.¹⁹ Similarly, Clemens observed that federal court decisions empowered the tribes of northern Michigan,²⁰ and they subsequently re-asserted their authority to negotiate allocation of the fishery on a more equal footing with state officials.²¹

According to the analysis of stakeholder perceptions, litigation over treaty fishing rights caused a restructuring of the power scale and management authority over the Great Lakes fishery, as the court recognized treaty-fishing rights and the tribes of northern Michigan as legitimate participants in decision-making processes.²² This “balance” in the scales of power helped foster collaboration between tribal and state regulatory agencies,

¹⁹ Busiahn, *supra* note 6, at 10.

²⁰ Although consensus among multiple jurisdictions in the Great Lakes basin has been called for by the Great Lakes Fishery Commission, the tribes were excluded from participating in Great Lakes fisheries management prior to 1980. He describes how the Great Lakes Indian Fish and Wildlife Commission (GLIFWC), representing the tribes within the Great Lakes basin, sought to have the status of tribal fisheries management recognized within this document after various court decisions ruled in favor of Indians around the country. In addition, the GLIFWC called for tribal, state and provincial governmental agencies to work more cooperatively, allow greater sharing of information, and have greater accountability for political decisions. Significantly, the tribes also asked that their unique organizational structure in government be recognized. Busiahn, T.R. (1986). Great Lakes Indian Fish and Wildlife Commission Presentation on the Indian Role in the Strategic Great Lakes Fishery Management Plan Process. Committee of the Whole Workshop on Implementation of the Joint Strategic Plan for Management of Great Lakes Fisheries (SGLFMP). Agenda item 12. (February 18-20, 1986). Toronto, ON. In: Dochoda, M.R. (Ed). *Report and Recommendations from the 18-20 February 1986 and 5-6 May 1986 Meetings*. Great Lakes Fishery Commission Special Publication: Ann Arbor, MI: 55-58.

²¹ Clemens argued that differences in participation in fisheries management by Native peoples are attributed to recognition of their sovereignty and treaty fishing rights, as well as their economic status. Compared to the tribes within the United States whose sovereign treaty rights were recognized through judicial review, Canada's First Nations peoples have not enjoyed the same level of participation in fisheries management. Clemens attributes the diminished participation of Canada's First Nations peoples to the fact that their sovereign treaty rights have not been recognized to the same extent as those tribes in the United States. Clemens, M. (1994). *Participation by Native People in Interjurisdictional Resource and Environmental Governance in the Great Lakes Basin*. M.A. Thesis. Department of Geography and Institute for Environmental Studies. University of Toronto: Toronto, ON, p. 25; Edwards, D. & Glavin, T. (1999). *Set Adrift: The Plight of British Columbia's Fishing Communities*. Pacific Salmon Forest Project. David Suzuki Foundation: Vancouver, B.C., p. 22-23.

²² It is noteworthy that judicial decisions have not been the prerequisite for all cooperative natural resource management agreements between tribal and governmental entities. However, the threat of continued litigation can prompt alternative decision-making processes and cooperative management schemes. Berkes, F., George, P. & Preston, R.J. (1991). Co-management: the evolution in theory and practice of the joint administration of living resources. *Alternatives*, 18(2):12-18; Clemens, *supra* note 21, at 9; McCay, *supra* note 2, at 23-24.

and diminish social conflict over natural resource management.²³ However, I believe that the failure of sport fishers, their former representatives, and some former DNR representatives to recognize these rights intensified contentious relations between the parties and perpetuated social conflict under the 1985 Consent Order.

Policy Recommendation: Native Sovereignty and Rights to Self-Governance Must be Accepted By State and Local Government Representatives in Negotiations and Formulation of Policy.

Negotiation Processes

Inequality existed in the scale of power between the parties during the negotiation process of the 1985 Consent Order, based upon an analysis of stakeholder perceptions. The most vivid example was the federal district court's imposition of the Order when the Bay Mills Indian Community opposed this policy. In addition, some tribal respondents believed that treaty-fishing rights were not protected under this policy. During the negotiations for the 1985 Consent Order, the State of Michigan, the DNR, and the sport fishing community continued to oppose treaty rights, and they sought to diminish these rights.²⁴ Thus, the nature of the negotiations failed to protect treaty rights since they were treated as merely one other element to be considered during negotiations.²⁵

²³ Power differences or the failure to recognize particular parties as having legitimate rights to the resource tend to hinder collaboration. Selin, *supra* note 2, at 193.

²⁴ The lack of equality at the onset of negotiations for the 1985 Consent Order helps explain why McGovern's "game theory" approach to negotiations may have been unsuccessful at producing a management policy that the parties agreed to. Game theory approaches to negotiations explicitly assume that there is equality among the parties. Another problem that Edney describes with game theory allocation is that they do not help explain what happens when the resources are depleted or at a low level. Edney, J.J. (1981). Paradoxes on the commons: scarcity and the problem of equality. *Journal of Community Psychology*, 9: 3-34, p. 14-15.

²⁵ Similar to the State of Washington, fisheries management decisions were subject to greater political scrutiny than judicial review. To obtain an agreement that would be politically acceptable, the court and the non-Native parties treated tribal treaty rights as "negotiable." United States Commission on Civil

In contrast to the negotiation process for the 1985 Consent Order, respondents discussed how the State of Michigan, DNR and sport fishing organizations recognized treaty-fishing rights and the tribes as legitimate participants in fisheries management at the onset of negotiations for the 2000 Consent Decree. As a result, stakeholders perceived that the negotiation process for the 2000 Consent Decree involved greater trust, communication and cooperation between the parties.

The use of a mediator in the 2000 Consent Decree negotiations represented an important shift in dynamics between the parties, according to respondents. Those involved in negotiations for the 2000 Consent Decree believed that having a mediator was extremely helpful for empowering all the parties and giving them greater control over the policy-making process, relative to negotiations for the 1985 Consent Order. Mediation can be beneficial to parties in negotiations that are complex and when the parties have high emotional and financial stake in the outcome, as found in the controversy surrounding fishing rights within the 1836 treaty waters of the Great Lakes.²⁶

An analysis of stakeholder responses also revealed that there was an increased emphasis on consensus building during the negotiations for the 2000 Consent Decree, compared to the negotiations for the 1985 Consent Order. Similar to negotiations in other environmental disputes, these consensus-building approaches provided a more equitable, efficient, credible, and feasible outcome, relative to the 1985 Consent Order.²⁷

The respondents also commented on the tremendous time commitment made by the parties during the negotiations for the 2000 Consent Decree. As the parties worked

Rights. (1981). *Indian Tribes: A Continuing Quest for Survival*. Report of the U.S. Commission on Civil Rights. Government Printing Office: Washington, D.C., p. 82-83.

²⁶ Susskind, L. and Cruikshank, J. (1987). *Breaking the Impasse: Consensual Approaches to Resolving Public Disputes*. Basic Books: New York, NY, p.136-137.

together over time, stakeholders perceived that positions of the parties changed from being adversarial to more problem-focused, and they shared a unifying goal of reaching a satisfactory compromise to avoid litigation.²⁸ This case supported the notion that cooperation increases when parties develop solutions together over time,²⁹ and successful collaborative processes usually involve shared goals and recognition of interdependence between the parties.³⁰

Policy Recommendation: Negotiation Processes Must Involve Parties Finding Solutions Together Over Time.

Extensive support also existed among the stakeholders for having a negotiated agreement rather than a court order.³¹ Importantly, negotiated settlements can be especially effective for resolution of site-specific disputes where stakeholders challenge existing policies and regulations.³²

Policy Recommendation: To the Maximum Extent Possible, Parties Should be Encouraged to Seek to Reach Agreement Between Themselves, Rather than Having a Court-Imposed Policy.

Notably, inequality and dissatisfaction existed during negotiations for the 2000 Consent Decree, as demonstrated by allegations that the Grand Traverse Band was “held hostage” to sign the agreement by the threat that the State of Michigan would pursue

²⁷ Susskind, *supra* note 26, at 21-34.

²⁸ Successful collaboration in negotiations is problem-focused, instead of being bound by positions. Fisher, R., Ury, W., and Patton, B. (1991). *Getting to Yes: Negotiating Agreements Without Giving In*. (2nd ed.) Penguin: New York, NY, p. 27-28.

²⁹ Fisher, *supra* note 28, at 56-80; Ayling, R.A. and Kelly, K. (1997). Dealing with conflict: natural resources and dispute resolution. *Commonwealth Forestry Review*, 76(3): 182-185, p. 183; Wondolleck, J.M. and Yaffee, S.L. (2000). *Making Collaboration Work: Lessons from Innovation in Natural Resource Management*. Island Press: Washington, D.C., p. 134, 163-164.

³⁰ Wondolleck, *supra* note 29, at 142-144.

³¹ Wilkinson, C.F. (1991). To feel the summer in the spring: the treaty fishing rights of the Wisconsin Chippewa. *Wisconsin Law Review*, p. 403; Ferguson, *supra* note 18, at 150.

litigation over a land claim that affects the band's "Turtle Creek casino" if they didn't sign.³³ Despite the successes of the 2000 Consent Decree negotiations, I believe that these allegations have the effect of undermining confidence in the policy among some respondents.

Cooperative Fisheries Management

The conflict over Native treaty-fishing rights in the Great Lakes can be categorized as a "distributional dispute," or a dispute that centers on allocation.³⁴ Susskind and Cruikshank claim that consensus-building, cooperative management strategies can help resolve distributional disputes.³⁵ The benefits that have been attributed to cooperative management strategies include diminishment of social conflict.³⁶

According to an analysis of stakeholder perceptions, fisheries management within the 1836 treaty waters of the Great Lakes has been increasingly cooperative at the

³² Selin, *supra* note 2, at 194.

³³ Bradsher, K. (2000, August 8). Michigan pact resolves battle over limits on Indian fishing. *New York Times*, p. 12A.

³⁴ Susskind and Cruikshank contrast distributional disputes with constitutional disputes. In cases of constitutional disputes, fundamental constitutional rights are at stake. Some examples are a woman's right to choose to have an abortion or freedom of speech. Although the conflict surrounding Native fishing rights in the Great Lakes centers around interpretation of Native treaty rights under the U.S. Constitution, this dispute has already been decided by the courts in *United States v. State of Michigan* 471 F. Supp. 192 (W.D. Mich. 1979). The remaining issues of debate are related to issues of allocation and management. Generally, fundamental questions are decided before distributional disputes can be resolved. Susskind, *supra* note 26, at 16-18.

³⁵ Susskind, *supra* note 26, at 17-18.

³⁶ The following benefits have been attributed to cooperation in natural resources management:

- facilitation in the integration of vested interests and values;
- increased understanding and political support for decisions;
- capitalization of local knowledge and information, leading to improved and credible decision-making;
- greater coordination of management efforts;
- promotion of trust between stakeholder groups;
- relationship-building among stakeholder group representatives;
- reduced monitoring and enforcement costs; and
- enhanced ability of management agencies and communities to deal with conflicts.

Pinkerton, *supra* note 1; Feeny, D., Berkes, F., McCay, B.J. and Acheson, J.M. (1990). The tragedy of the commons: twenty-two years later. *Human Ecology*, 18(1): 1-19, p. 14; Wondolleck, *supra* note 29, at 5-10, 23-24.

management level since the 1985 Consent Order. Upon judicial recognition of the tribes' rights to participate in natural resources management, the 1985 Consent Order outlined a management strategy in which the tribal and state regulatory agencies were required to share data and work together on various aspects of fisheries management. Collaborative management processes were also put in place in the 1980s, under the framework of the Great Lakes Fishery Commission, that were beneficial for facilitating joint management and increasing cooperation between tribal and state regulatory agencies.³⁷ According to stakeholders, the Lake Committees under the Great Lakes Fishery Commission provide good examples of how such collaborative, institutionalized management structures can be effective.

Cooperation in Great Lakes fishery management was also promoted by enhanced tribal proficiency and capacity for fisheries management. Due in part to interjurisdictional issues, I believe that advances in tribal expertise and capacity tend to be paralleled by an increased awareness among policymakers that tribes should play an active role in management.³⁸ Thus, the 1985 Consent Order – in combination with the collaborative processes set up under the framework of the Great Lakes Fishery Commission and increased tribal management capacity – helped reduce social conflict at the management level by requiring greater cooperation among the multiple

³⁷ Collaborative processes in natural resource management often lead to increased cooperation among stakeholders by building understanding, through the exchange of information and ideas, and providing a means to coordinate management efforts. Selin, *supra* note 2, at 190; Clemens, *supra* 21, at 30; Wondolleck, *supra* note 29, at 18-19.

³⁸ The development of sophisticated management programs by tribes has supported the legal basis for significant tribal participation in natural resource management decisions. Many tribes – including those in northern Michigan – have committed tremendous resources and hired skilled biologists. Therefore, they match state regulatory agencies in terms of technical expertise. Goodman, E. (1998-1999). The meaning of “trust”: off-reservation Indian hunting rights and habitat protection. *Natural Resources Law Institute*, 9(2):1-7, p. 6-7.

jurisdictions.³⁹ Collaborative management processes help reduce the harmful impacts of losses in institutional memory, as there are changes in staff among the parties.⁴⁰ Furthermore, they motivate people to maintain positive relations and promote the understanding that collaborative efforts are important.⁴¹

Significantly, collaborative processes established by the 1985 Consent Order and under the Great Lakes Fishery Commission will continue under the 2000 Consent Decree, and the tribal management capacity will likely be maintained or increased. Importantly, the principles and objectives outlined by the DNR for the 2000 Consent Decree include collaboration and cooperation in research, evaluation and management of shared fish stocks with other jurisdictions.⁴² Thus, cooperation in fisheries management should continue, helping reduce social conflict over issues of allocation in the 1836 treaty waters of the Great Lakes, at the management level. Institutionalized processes should be continued as tribal and state biologists continue to work collaboratively through the Technical Fisheries Review Committee of the 2000 Consent Decree and the Lake Committees of the Great Lakes Fishery Commission. One suggestion is to follow the

³⁹ According to Clemens, the Great Lakes Fishery Commission's decentralized management structure helped foster cooperation between tribal and state regulatory agencies. Yet, he points out that it was only through legal recognition of the tribe's treaty rights that there has been greater tribal participation in the Great Lakes Fishery Commission. Clemens, *supra* note 21, at 30.

⁴⁰ Krueger, C.C., Jones, M.L. and Taylor, W.W. (1995). Restoration of lake trout in the Great Lakes: challenges and strategies for future management. *Journal of Great Lakes Research*, 21(Supp. 1): 547-558, p. 556; Wondolleck, *supra* note 29, at 37.

⁴¹ Clemens, *supra* note 21; Wondolleck, *supra* note 29, at 92, 115-117.

⁴² The principles and objectives included: encouragement of multilateral cooperation in research, encouragement of collaborative research, disclosure and mutual evaluation of research, and working with other jurisdictions in the management of shared stocks. Smith, K. (2001). *Principles and Objectives: Year 2000 Fishing Agreement*. Department of Natural Resources. Presentation for a seminar in the Department of Fisheries & Wildlife, Michigan State University, East Lansing, MI.

example set by the State of Washington by having the parties meet for bi-annual retreats.⁴³

Policy Recommendation: Collaborative Management Processes Must be Institutionalized and Enduring.

Due to the complexity of problems in fisheries management and the limited resources available to address them, I believe that the tribes of northern Michigan, the DNR and the federal government must share management of the 1836 treaty waters of the Great Lakes. Problems associated with fisheries management within these waters will remain complex and dynamic, shared management will help promote collaboration, coordination and cooperation between the tribal, state and federal regulatory agencies and make management more effective.

Policy Recommendation: Great Lakes Fishery Management Must Continue to be a Shared Responsibility Between Tribal, State and Federal Regulatory Agencies.

Lake Trout Rehabilitation and Conservation

Prior to the 1985 Consent Order, many tribal respondents perceived that the politically-motivated polarization of sport fishing organizations and the DNR around the issue of banning gill nets prevented the parties from cooperatively developing credible, scientifically-based management decisions to reduce lake trout bycatch.⁴⁴ In contrast, they believed that the Council of Lake Committees within the Great Lakes Fishery Commission was a positive, proactive force in lake trout rehabilitation and conservation, and it has helped bring science to policy-makers in the Great Lakes basin since the early

⁴³ Pinkerton, E.W. (1992). Translating legal rights into management practice: overcoming barriers to the exercise of co-management. *Human Organization*, 51(4): 330-341, p. 331.

1980s.⁴⁵ The U.S. Fish and Wildlife Service has also worked collaboratively with the tribal and state regulatory agencies towards lake trout propagation and enhancement through stocking programs.⁴⁶ Once the tribes gained federal recognition to participate with the DNR in fisheries management, the 1985 Consent Order required data sharing between the tribal and state regulatory agencies, which increased the catch and effort information available for decision-making affecting lake rehabilitation and conservation. Simultaneously, the Great Lakes Fishery Commission promoted the sharing of scientific information and multijurisdictional collaboration in research and decision-making through their Lake Committee structures.⁴⁷

Despite the collaborative efforts of the tribal and state regulatory agencies under the 1985 Consent Order and the Lake Committees, reductions in gill net harvest, and federal stocking programs, lake trout mortality rates exceeded harvest quotas set for Lakes Huron, Michigan and Superior under the 1985 Consent Order.⁴⁸ To reduce lake

⁴⁴ According to Selin and Chavez, polarization of interest groups around an issue presents a challenge to collaboration. Wondolleck and Yaffee assert that management decisions must be based on science to be viewed as credible. Selin, *supra* note 2, at 190-191; Wondolleck, *supra* note 29, at 134-136.

⁴⁵ In 1983, the Council of Lake Committees encouraged tribal representation on advisory committees. Subsequently, it created a task force in 1984 to coordinate lake trout rehabilitation strategies in lake committee and act as a liaison to researchers and policy-makers. Committee of the Whole. (February 18, 1986). *Workshop on the Implementation of the Joint Strategic Plan for the Management of the Great Lakes Fisheries (SGLFMP)*. Agenda item 10, p. 53.

⁴⁶ Holey, M. (personal communication, 2002).

⁴⁷ The multi-jurisdictional nature of the Great Lakes basin has led to an ecosystem-based approach to management by the Great Lakes Fishery Commission. Significantly, the ecosystem-based model that is used by the Great Lakes Fishery Commission assumes that a cooperative approach to management is the most effective to ensure sustainability and avoid conflicts. Belsky, M.H. (1989). The ecosystem model – mandate for a comprehensive United States Ocean Policy and Law of the Sea. *San Diego Law Review*, 26, p. 448; Caldwell, L.K. (1988). Introduction: implementing an ecological systems approach to basinwide management. In: Caldwell, L.K. (Ed.) *Perspectives on Ecosystem Management for the Great Lakes*, (pp. 1-27.) University of New York Press: Albany, NY.

⁴⁸ Eshenroder, R.L., Payne, N.R., Johnson, J.E., Bowen II, C., & Ebener, M.P. (1995). Lake trout rehabilitation in the Lake Huron. *Journal of Great Lakes Research*, 21(Supp. 1): 108-127; Haley, M.E. Rybicki, R.W., Eck, G.W., Brown, Jr., E.H., Marsden, J.E., Lavis, D.S., Toney, M.L., Trudeau, T.N., & Horrall, R.M. (1995). Progress towards trout restoration in Lake Michigan. *Journal of Great Lakes Research*, 21(Supp. 1): 128-151; Hansen, M.J., Peck, J.W., Schorfhaar, R.J., Selgeby, J.H., Schreiner, D.R., Schram, S.T., Swanson, B.L., MacCallum, W.R., Burnham-Curtis, M.K., Curtis, G.L., Heinrich,

trout mortality, significant reductions in gill net effort plan to be made under the 2000 Consent Decree, and lake trout stocking programs will be continued. Population assessments should be increased under this policy as well. Therefore, respondents believe that lake trout rehabilitation and conservation should be promoted under the 2000 Consent Decree, as long as there are sufficient financial resources for implementation and greater commitment is made to enforce policy provisions.

Nonetheless, lake trout rehabilitation remains critically dependent on lake trout stocking programs in many areas of Lakes Huron and Michigan.⁴⁹ Some researchers have stressed the need for a reduced emphasis on stocking of lake trout, in light of restoration goals.⁵⁰ Although a tremendous amount of research has been done to examine the obstacles associated with lake trout rehabilitation, in my opinion, future policies will need to reflect new scientific information as it becomes available.

A few stakeholders raised concerns that lake trout rehabilitation was an ethical question, not an ecological question. They believed that lake trout rehabilitation and commercial fishing should be stopped, and managers should place greater emphasis on hatchery and stocking programs of popular game species, including non-native salmonids. These stakeholders nostalgically recalled the capture of gigantic salmon during the 1960s, and many expressed frustration that these large catches were no longer possible. They believe that the DNR should focus more on managing for large game species, instead of lake trout.

J.W., & Young, R.J. (1995). Lake trout (*Salvelinus namaycush*) populations in Lake Superior and their restoration in 1959-1993. *Journal of Great Lakes Research*, 21(Supp. 1): 152-175.

⁴⁹ Eshenroder, *supra* note 28; Holey, *supra* note 28; Hansen, *supra* note 28.

⁵⁰ "From the standpoint of maintaining natural gene pools, stocking depleted populations is a management response that also acts as a compensatory manner and can hasten the collapse of native stocks." Post, J.R., Sullivan, M., Cox, S., Lester, N.P., Walters, C.J., Parkinson, E.A., Paul, A.J., Jackson, L., and Shuter, B.J. (2002). Canada's recreational fisheries: the invisible collapse. *Fisheries*, 27(1): 6-17, p. 12.

In contrast, most fisheries managers believed that lake trout rehabilitation is necessary for ecosystem health and sustainable management. The need for lake trout rehabilitation has also been expressed by a number of researchers.⁵¹ Another concern with these perceptions is that the ecological impact of the salmon fishery on lake trout rehabilitation is not well understood. I believe that comprehensive, long-term assessments of the ecological impacts of non-indigenous species – such as salmon – on lake trout and fish communities must be conducted to guide future fisheries management decisions. Future management policies between the State of Michigan and the tribes should emphasize joint decision-making based upon science to protect the long-term health of the ecosystem. Since most fishers – sport and commercial – expressed concern over the status of the Great Lakes fishery, it is my opinion that they will support fisheries management strategies that help produce healthy and sustainable fish stocks, once they are made aware that these strategies are necessary.

Policy Recommendation: Fisheries Management Policies Must be Ecosystem-Based to Promote Sustainability of the Resource.

Some stakeholders also believe that attention and resources for invasive species management has been insufficient, despite the growing number of harmful, non-indigenous species and the lack of preventative measures.⁵² They perceive that more

⁵¹ Eshenroder, R.L., Crossman, E.J., Meffe, G.K., Olver, C.H., and Pister, E. P. (1995). Lake trout rehabilitation in the Great Lakes: an evolutionary, ecological, and ethical perspective. *Journal of Great Lakes Research*, 21(Supp. 1): 518-529; Kernen, L.T. (1995). Lake trout: valuable native fauna or just grease? *Journal of Great Lakes Research*, 21(Supp. 1): 198-201; Knuth, B.A., Lerner, S., Connelly, N.A., and Gigliotti, L. (1995). Fishery and environmental managers' attitudes and support for lake trout rehabilitation in the Great Lakes. *Journal of Great Lakes Research*, 21(Supp. 1): 185-197; Pister, E.P. (1995). Ethics of native species restoration: the Great Lakes. *Journal of Great Lakes Research*, 21(Supp. 1): 10-16.

⁵² Prevention of invasive species is critical since eradication of an established invasive species is practically impossible. Leach, J.H., Mills, E.L. and Dochoda, M.R. (1999). Non-indigenous species in the Great Lakes: ecosystem impacts, binational policies and management. In: Taylor, W.W. and Ferreri, C.P. (Eds.),

funding is needed for the control and prevention of invasive species into the Great Lakes. Yet, more research is also needed to help answer questions about the ecological impacts of non-indigenous species on lake trout and fish communities. I believe this information is necessary to help inform decision-makers in the formulation of future management policies.

Policy Recommendation: Non-Indigenous Species Research Must Increase and be Used by Decision-Makers in Fisheries Management Policies.

Allocation, Fishing Opportunities and Communities

In the case of Native treaty-fishing rights, the U.S. Supreme Court has determined that although a state cannot deprive Indians of a fair share of the fishery, Indians do not have rights to exclusive use of the fishery. Thus, both sides have a right to a “fair” allocation, in light of conservation measures to rehabilitate and conserve lake trout stocks.⁵³ However, state regulatory agencies that focus on recreational exploitation of natural resources, including the Michigan DNR, have been reluctant to accept a management framework that includes tribal harvest,⁵⁴ since they perceive there is

Great Lakes Fisheries Policy and Management (pp. 185-207) Michigan State University Press: East Lansing, MI; Shuter, B.J. and Mason, D.M. (2001). *Exotic Invertebrates, Food-Web Disruptions, and Lost Fish Production: Understanding Impacts of Dreissenid and Cladoceran Invaders on Lower-Lake Fish Communities and Forecasting Invasion Impacts on Upper-Lake Fish Communities*. Report prepared for the Board of Technical Experts, Great Lakes Fishery Commission.

⁵³ *Department of Game of Washington v. Puyallup Tribe*, 414 U.S. 44, 49 (1973); *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658, 684 (1979).

⁵⁴ Many researchers believe that Native Americans historically had an ecological, stewardship ethic towards natural resources, which forms the basis for Native resource stewardship in present time. Cornell, G. (1990). Native American perceptions of the environment. *Northeastern Indian Quarterly*, p. 3-4; Austin, R.D. (1995). Native people of America and the Environment. *Stanford Environmental Law Journal*, 14(2): ix-xi; Pierotti, R. and Wildcat, D. (1999). The connectedness of predators and prey: Native American attitudes and fisheries management. *Fisheries*, 24(4): 22-23.

Although some researchers disagree with the concept that Native Americans practiced an ecological ethic, they believe that the management of fisheries resources as property rights helped protect fish stocks by reducing access of other tribes. Barsh, R.L. (1977). *The Washington Fishing Rights Controversy: An Economic Critique*. University of Washington: Seattle, WA, p. 23; Overholt, T.W. (1979). American Indians as “natural ecologists.” *American Indian Journal*, 9-11; Anderson, T.L. (1997).

potential for overharvest.⁵⁵ In the Great Lakes fishery, some respondents from all stakeholder categories perceived that once the treaty-fishing rights of the tribes of northern Michigan were recognized by the judicial system, the tribes began to overexploit lake whitefish and lake trout stocks. Subsequently, fishing opportunities were diminished for recreational and commercial fishers, social conflict increased, and a need arose for the 1985 Consent Order to allocate the fishery and fishing opportunities. In contrast, some tribal stakeholders perceived that tribal overharvest was merely a response to efforts by the DNR to establish a recreational fishery at the expense of the tribal commercial fishery. These stakeholders believed that the diminished tribal fishing opportunities prevented the tribes from earning a living in commercial fishing, which threatened their cultural heritage.⁵⁶

McCay and Jentoft assert that healthy communities are a critical component of healthy ecosystems, and unlimited fishing behavior may be indicative of community failure, or erosion of social ties and collective concern for the fishery resource and their community.⁵⁷ Thus, management systems that preserve, restore and reinforce the social structure and culture of communities motivate fishers to participate and cooperate in fisheries management schemes that protect and sustain the resource.⁵⁸ Therefore, it is critical to consider the socioeconomic and cultural impacts of fisheries management

Conservation: Native American style. *Quarterly Review of Economics and Finance*, 37(4): 769-785, p. 777.

⁵⁵ Pinkerton, *supra* note 1.; McCorquodale, S.M. (1999). Historical and contemporary policies regarding off-reservation hunting by Native Americans. *Wildlife Society Bulletin*, 27(2): 446-455, p. 452.

⁵⁶ These respondents perceived that once the tribes were granted economic opportunities they had been deprived of, there was an incentive to utilize the resource while they could.

⁵⁷ McCay, *supra* note 2; Jentoft, S. (1999). Healthy fishing communities: an important component of healthy fish stocks. *Fisheries*, 24(5): 28-29.

⁵⁸ Boulding, K. (1977). Commons and community: the idea of a public. In Hardin, G. and Baden, J. (Eds.) *Managing the Commons*. (pp. 280-294) W.E. Freeman: San Francisco, CA, p. 290; Jentoft, *supra* note 57.

decisions, since they have such important implications for cooperation and resource stewardship.⁵⁹

An analysis of stakeholder perceptions led me to believe that in 1985 the court's Special Master failed to consider the socioeconomic impacts of this policy, and as a result, small-boat gill net fishers believed that they were "forced out" of the fishery since they were unable to compete with the larger, tugboat operations.⁶⁰ The most common perception among tribal fishers was that small-boat fishers needed to upgrade under the 1985 Consent Order to sustain their livelihood. These fishers also perceived that the State of Michigan, DNR, and sport fishers tried to eliminate their fishing opportunities and erode their treaty-fishing rights recognized by the 1985 Consent Order. They expressed bitterness, anger, and resentment towards these management agencies and the sport fishing community.

The 2000 Consent Decree retains a focus on gill net fishing gear and emphasizes a significant reduction in gill net use – in combination with stocking – to rehabilitate lake trout stocks.⁶¹ As a result of continued emphasis on gill net reduction under the 2000 Consent Decree, bitterness is likely to continue over continued emphasis on conversion of small gill net operations to large, tugboat trap net operations.

Importantly, respondents at the management level perceived that the 2000 Consent Decree would reduce bycatch while preserving gill net harvest opportunities.

⁵⁹ Wondolleck, *supra* note 29, at 42-43.

⁶⁰ These perceptions are significant in light of the 1985 Consent Order's commitment to preserve small boat fishing opportunities. Rastetter, W. (1997, Sept. 28). The Grand Traverse Band of Ottawa and Chippewa Indians: our opinion. *Traverse City Record Eagle*, p. E11; Ferguson, *supra* note 18, at 134-135.

⁶¹ Although the 2000 Consent Decree attempts to protect some small-boat gill net fishing opportunities, these opportunities will decline under new regulations and restrictions. Some of the money given to the tribal governments by the federal government with the signing of the 2000 Consent Decree is expected to compensate small-boat Indian fishing operations that did not receive trap net boats, but will have their fishing opportunities restricted under this policy. Bradsher, *supra* note 33.

These perceptions stem from policy-development based upon a gill net study that demonstrated some temporal and spatial differences in the distribution of lake trout and whitefish in parts of northern Lake Huron.⁶² Tribal fishers, however, believed that the provisions of the 2000 Consent Decree would continue to diminish overall gill net fishing opportunities. In response to these restrictions, some fishers expressed interest in conversion to trap nets, but they also expressed extreme trepidation based upon past experiences. Conversion from gill nets to trap nets continues to present critical obstacles for tribal fishers due to the high cost of conversion and difficulty securing loans.⁶³ Thus, it is my opinion that the parties must address the obstacles facing tribal fishers if conversions from gill net to trap net operations are going to be successful.

Tribal fishers that did not qualify or chose not to participate in the gill net conversion plan to trap net operations under the 2000 Consent Decree – resulting from the buy-back of state-licensed commercial fishers in the Bay de Noc region – believed that this plan perpetuated inequality among tribal members. Significantly, they perceived that this policy would fail since it forced the small fishers out of the fishery, while maintaining opportunities for the largest operators. These assertions are consistent with

⁶² In this study, lake trout and lake whitefish catch data and catch-per-unit-effort (CPUE) were calculated. Three depth strata were examined, although the final analysis collapsed into two categories of depth: < 75 feet and > 75 feet. Ebener, M.P., Gerhardt, K., and Johnson, J.E. (2001). *Final Interim Report Summarizing the Spatial, Temporal, and Bathymetric Distribution of Lake Trout and Lake Whitefish in Northern Lake Huron in 1998 and 1999*. Lake Huron Technical Subcommittee of the Technical Fisheries Committee.

⁶³ Hinman and Bernsten conducted a study to provide the basis for evaluating the feasibility of tribal fishing with impoundment gear using small, trailerable boats. Data used was generated by the trap net conversion experiment of the Grand Traverse Band and the State of Michigan. The study outlined the extensive costs and liabilities associated with trap net enterprises and affects on costs. Some obstacles were outlined for the tribes, including the need for a solid credit rating and comprehensive business plan; detailed financial records; and the difficulties and high cost of borrowing for tribal members. Although no conclusions were made, a baseline analysis demonstrated that an average negative cash flow for a six-year period of conversion was -\$19,212, and the initial capital cost was estimated to be \$202,735. Hinman, D.L. and Bernsten, R.H. (1997). *Economic Assessment of Small-Boat Trap Net Fishing in the Grand Traverse Bay*. Manuscript, p. 1, 5-33.

Jentoft's belief that some government-initiated programs can lead to inequality and stratification of fishing communities, and overexploitation of the fishery resource.⁶⁴ To preserve social structure within the community and protect the resource, Jentoft suggests that fishing opportunities and cultural practices be preserved to the greatest extent possible. Furthermore, any government buy-back or conversion program that limits access for some fishers should be incorporated in an economic development plan to help foster transition and maintain the social structure and culture of the community, rather than eliminating opportunities, or preserving opportunities for a limited number of fishers through the denial of opportunities to other fishers.⁶⁵

Policy Recommendation: Fisheries Management Policies Should be Devised as to Reinforce the Social Structure of Communities, and Avoid the Creation of Inequality.

Knowledge and Acknowledgement of Native Treaty Fishing Rights

Native rights to hunt and fish are vested property rights of the tribes and were reserved in the 1836 Treaty, in exchange for land cessions with the United States government. I learned that many respondents from the sport fishing community were unaware of these legal rights.⁶⁶ However, a majority of sport fishers who knew of Native treaty-fishing rights under the 1836 Treaty failed to acknowledge the existence of these rights, despite the ongoing involvement of sport fishing organizations in treaty-fishing rights litigation,⁶⁷ and they adamantly opposed tribal fishing. Many sport fishers

⁶⁴ Jentoft, *supra* note 57, at 29.

⁶⁵ Jentoft, *supra* note 57, at 29.

⁶⁶ Walker, H. (1979). Indian hunting and fishing rights. *North American Wildlife Conference Transactions*, (44): 618-619.

⁶⁷ Ferguson believes that the lack of acknowledgement of Native treaty-fishing rights has perpetuated the controversy surrounding Native treaty fishing rights within the Michigan waters of the Great Lakes. Ferguson, *supra* note 18, at 148-149.

perceived that tribal fishing was the sole reason for reductions in fish populations within the Great Lakes.

An analysis of stakeholder perceptions revealed that tribal stakeholders believe a lack of knowledge and understanding of treaty-fishing rights and racism by sport fishers has perpetuated social conflict.⁶⁸ Numerous examples were given to demonstrate how many government and sport-fishing leaders have spread false information and used inflammatory language to fuel the flames of intolerance for tribal fishing.⁶⁹ Furthermore, in their view, there needs to be greater awareness that tribal harvest is not the only cause for diminished fish stocks.

Some stakeholders were disappointed at the lack of collaboration and failure to emphasize educational efforts called for under the 1985 Consent Order. Although there was some dissatisfaction among respondents at the discontinuation of the Information and Education Committee under the new policy, other respondents failed to perceive this as an obstacle to increase education and understanding since they believed that written materials produced by the Committee may not be the appropriate vehicle for informing

⁶⁸ Although racism is an important element affecting the lack of tolerance for Native fishing rights and social conflict among fishers, Cleland argues that racism is not their root cause. Instead, he argues that they derive from a violation of our cherished values of “equal rights” for everyone, and a violation of the myths that Indians and treaties are relics of the past without modern relevance. Cleland, *supra* note 8.

⁶⁹ One illustrative example of how legislators in the State of Michigan have helped inflame passions against treaty fishing rights pertains to a Republican task force hearing on hunting and fishing in Traverse City, Michigan in 1997. At this hearing, legislators DeVuyst and McManus vowed to support efforts of sport fishers towards prohibiting commercial tribal harvest. They reiterated the belief that tribal harvest is solely responsible for declines in the Great Lakes fishery. These legislators committed at this hearing to introducing legislation that would link treaty rights to tribal casinos, referred to as “No Fish, No Chips” legislation. Kellerman, S. (1997, November 8). Panel hears protests over gill netting. *Traverse City Record Eagle*, p. A1.

At a public meeting sponsored by the Michigan Steelhead and Salmon Fishermen’s Association, attendees consistently argued that Native fishers should only fish from birch bark canoes since that is what is allowed by the treaties. Michigan Steelhead and Salmon Fishermen’s Association Meeting. (October 1, 1999). Manistee, Michigan. However, the courts have ruled that Indian fishers have used the best available technology throughout history, and this right continues today. *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), *aff’d* 520 F. 2d 676 (9th Cir. 1975); *Washington v. Washington Passenger Fishing Vessel Association*, 443 U.S. 658 (1979).

sport fishers. Rather, these respondents believed that the educational provisions of the 2000 Consent Decree – educational forums hosted by the tribes, upon request by the DNR or sport fishing community – would be more effective.

Many respondents perceived that increased education and awareness of Native treaty-fishing rights in future policies may help to increase understanding and tolerance among the public. Increased knowledge could help resolve misunderstandings over these issues, and form a basis for collaboration instead of conflict.⁷⁰ Although attempts have been made to increase education and awareness, I believe that education remains a low priority, relative to other issues, as reflected by the discontinuation of the Information and Education Committee in the 2000 Consent Decree.

Unfortunately, the potential for future social conflict in the 1836 treaty waters of the Great Lakes fishery continues to exist as sport fishers protest against tribal fishing. According to Jacques LeBlanc, a tribal fisher of the Bay Mills Indian Community, although tension diminished after the 1985 Consent Order, he described how social conflict started “to get bad again” in Munising during the fall of 2000. This Bay was opened up to Indian commercial fishing under the 2000 Consent Decree, after being prohibited under the 1985 Consent Order.⁷¹ Thus, I believe that the parties should continue efforts to educate the public about treaty rights.

⁷⁰ Pommersheim stated, “*When there is no basic doctrinal literacy or cultural empathy, there is no hope that any decisions will adequately resolve the problem* [of controversy surrounding Native treaty-fishing rights].” Pommersheim, F. (1997, November 4). *Indian Law Symposium*. Sponsored by the Thomas M. Cooley Law Review and the Michigan Indian Law Center; Ferguson, *supra* note 18, at 154.

⁷¹ Prior to 1985, LeBlanc described how Indian fishers were often shot at and harassed by sport fishers. In January of 2001, when LeBlanc tried to ice fish the waters in Munising Bay, vandals cut the lines of his nets. He heard talk about burning his equipment and shooting at him. Doug Miron, Chairman of the Munising Bay Fish Committee, said that he is seeking a legal challenge to the tribes’ rights to fish in Munising Bay. He and other sport fishers claim that the tribes will deplete the fishery within the Bay. Flesher, J. (2002, March 9). Settlement wording rekindles battle between tribal, sport fishers. *Detroit News*, p. 1-2.

Policy Recommendation: Education of the Fishing Public Regarding Native Treaty Rights Should be Increased to Promote Greater Awareness and Understanding.

Cultural Understanding and Differing Values

A few tribal and sport fishers expressed the belief that they hold in common the same passion for fishing, enjoyment of being out in the Great Lakes, the thrill of catching fish, and spending time with family. Based upon analysis of stakeholder perceptions, however, social conflict has been perpetuated in the 1836 treaty waters of the Great Lakes fishery due to a lack of cultural understanding by the parties. I believe that sport fishers were not aware of the importance of fishing to the tribes beyond economic values.⁷² Many sport fishers perceived that commercial fishing did not make economic sense for the tribes, and they believed that Indians don't "need" to fish in present times to sustain them, because they earn revenue from casinos. Therefore, they believed that the tribes do not need to exercise their fishing rights. Others expressed the sentiment of former DNR management that sport fishing should be the only permissible use of the Great Lakes fishery, since it provides tremendous revenue for the State of Michigan.⁷³ These perceptions reflect a lack of understanding that the tribes value fishing for non-

⁷² Turner, S.D. (1989). Native American's right to hunt and fish: an overview of the aboriginal spiritual and mystical belief system, the effect of European contact and the continuing fight to observe a way of life. *New Mexico Law Review*, 19: 376-423, p. 377, 381-384.

⁷³ Some respondents from the DNR discussed the higher value of a recreational sport fishery versus a commercial fishery as justification for a diminishment of commercial fishing and establishment of a recreational fishery. According to Talhelm's economic analysis of the Great Lakes fishery in 1979, the recreational sport fishery was assessed to be worth approximately \$1 billion to the State of Michigan, compared to \$160 million that was provided by the commercial fishery. Talhelm, D.R. (1979). *Current Estimates of Great Lakes Fisheries Values: 1979 Status Report*. Great Lakes Fishery Commission: Ann Arbor, MI, p. 2.

economic purposes, as well as economic ones.⁷⁴ To illustrate, an offer to “buy-out” the tribes from fishing was made in 1979, after the Fox decision, and the tribes refused.⁷⁵

According to an analysis of stakeholder perceptions, many believe that federal Indian policies have left scars on tribal communities, and some aspects of Native culture have been lost or destroyed.⁷⁶ As a result, efforts to reassert treaty-fishing rights have been part of a larger attempt by tribes to revitalize their Native culture, religious practices, and traditions.⁷⁷ Although the tribes of northern Michigan valued commercial fishing as a source of income,⁷⁸ they also valued the exercise of their treaty rights as a demonstration of their sovereignty, culture and religion. Greater education and consideration of these non-economic values of fishing should occur to correct the misinformation that fishing is only important for economic purposes. In my opinion, this may help dispel the false belief that casinos can replace fishing as a livelihood for tribal fishers.

Policy Recommendation: Collaborative Management Processes Must Foster Trust

Through Sensitivity and Respect for Cultural Differences.

⁷⁴ Ferguson points out that the exercise of treaty rights to earn a living does not represent a trade-off for other non-economic values of fishing. Ferguson also points out that no ethnic group within the United States has been forced to trade their economic pursuits for non-economic values. Ferguson, *supra* note 18, at 149.

⁷⁵ The Michigan United Conservation Clubs made an offer to the tribal fishers, which was endorsed by then Governor Milliken and the DNR. Indian fishing “buy-out” proposed. (1979). *Michigan-Out-of-Doors*, p. 12.

⁷⁶ For example, a few tribal respondents discussed how Indians living on the reservation had been removed from their families when they were children and put into boarding schools. In 1879, the Carlisle Indian Training School was established under efforts to assimilate Native children into American society. Thousands of Indian children were removed from their families and communities and forced to relocate to this and other boarding schools to adopt “American ways.” The Bureau of Indian Affairs banned Indian celebrations, languages, marriage customs and religious practices. Upon recognition of the deleterious state of Indian communities, state and federal governments sought to have the tribes become beneficiaries of social programs. However, some tribes were simultaneously forced to relinquish jurisdiction over civil and criminal matters on their reservations. United States Commission on Civil Rights, *supra* note 25, at 20-21, 42-43; Wood, *supra* note 14, at 198-199.

⁷⁷ Wood, *supra* note 14, at 198-199.

⁷⁸ Cleland, *supra* note 8, at 82.

Researcher Reflections

I believe that my identity as a Caucasian woman and a graduate student from Michigan State University influenced how respondents perceived me as a researcher. My identity was perceived differently among individuals from each stakeholder group, and I believe that these perceptions affected the information presented to me.

Although there were other Caucasians working for and with each of the tribes of northern Michigan, I perceived there was a lack of complete trust among tribal respondents. Prior to conducting research interviews, I made a concerted effort to become educated about the relevant history and culture of northern Michigan's Ojibwa and Ottawa, so I could be knowledgeable and respectful of cultural differences between respondents and myself. Yet, I believe that some of the mistrust stemmed from the mistreatment of Indians by Caucasians throughout history and their lifetime. A few respondents discussed how their families were torn apart when they were growing up in the State of Michigan, as the children were removed from the custody of their parents and sent away to boarding school in another city. These memories revealed unhealed wounds and pain that continue to exist in the hearts of some tribal members in communities of northern Michigan.

A few tribal respondents expressed trepidation and skepticism due to my association with Michigan State University. They falsely assumed that the Michigan DNR funded my research since Michigan State University has close ties to this agency. I corrected this notion during interviews, but respondents may not have shared certain information with me as a result of this misconception.

My communication style also hindered communication during some of my initial interviews with tribal respondents. As I began my research, I anticipated that respondents would be anxious to “tell their side of the story,” so I believed that very few probing questions would be needed to begin a dialogue between tribal respondents and myself. However, I realized this was not always the case, and that I needed to better prepare myself for these situations. I learned that an informal, conversation-style interview was the most productive format to use. With experience, I also learned to be more patient and comfortable as participants paused at length between responses and communicated in a non-linear mode.

Another problem I faced during data collection was my perception that several male sport fishers and representatives believed I lacked some credibility as a female researcher. In my opinion, these respondents presumed that I lacked scientific knowledge and an understanding of the Great Lakes fishery. During interviews with these respondents, I was asked to explain my academic background and why I was conducting this study. Yet I do not believe these perceptions hindered the information that was shared with me. On the contrary, these respondents spent an extraordinary amount of time detailing their issues and concerns about the fishery.

Beyond stakeholders’ attitudes towards me as a researcher, other factors also affected how stakeholder described their perceptions of the 1985 Consent Order and the 2000 Consent Decree. Racism is one social phenomena that I believe has affected social conflict between Native and non-Native fishers, particularly in the Grand Traverse Bay region of the 1836 Treaty waters of the Great Lakes. Although I did not inquire about the existence of racism between Native and non-Native fishers, tribal respondents often

expressed frustration at the racist remarks and attitudes of intolerance towards tribal members. Even those non-Native members who worked for the tribes discussed harassment.⁷⁹ These sentiments were supported by the racist remarks by some non-Native fishers from the Grand Traverse Bay region. Some of these respondents referred to the burning of tribal fishing nets as “Southern fires” and discussed how some tribal fishers should be shot for “raping the resource.” The presence of racism in these communities has contributed to intolerance, which has led to social conflict in the fishery. I believe that the presence of racism in these communities prevents resolution of social conflict and hinders educational efforts aimed at increasing understanding and acceptance.

Another influential factor on stakeholder perceptions of lake trout rehabilitation and conservation has been management of the fishery between treaty-right, Native commercial fishers and state-licensed sport fishers. As the Michigan DNR has emphasized maintenance of a viable sport fishery, the burden of lake trout rehabilitation and conservation has fallen mainly on the shoulders of the federal government. The federal government has committed the greatest resources to this effort and maintains lake trout stocking programs. The 2000 Consent Decree moves the parties towards greater coordination, cooperation and commitment in fisheries management and lake trout rehabilitation efforts, but I believe that more is needed.

One important concern about the 2000 Consent Decree is that biologists and managers believe implementation of this policy is going to pose tremendous challenges

⁷⁹ After sharing several instances where non-Native biologists and game wardens were harassed by other non-Native members of the community, I asked why these people were harassed. Several people responded that it was because the employees of the tribe wear a patch, designating that they are employed by the tribe.

for the parties. They attribute the anticipated difficulty with implementation to the complexity of the 2000 Consent Decree. One biologist believed that the confidentiality surrounding negotiations of this policy contributed to the complexity by restricting communication regarding policy provisions and the feasibility of their implementation.

Research Recommendations

This study has provided stakeholders with a baseline of stakeholder perceptions of the effectiveness of the 1985 Consent Order and the 2000 Consent Decree, with respect to lake trout rehabilitation and conservation, fishing opportunities and communities, social conflict, fisheries management between tribal and state regulatory agencies, and the negotiation processes leading to the formation of these policies. According to biologists and representatives, the 2000 Consent Decree and its policy process reflect a shift towards greater commitment to lake trout rehabilitation and conservation, enhanced fishing opportunities for all parties, continued reduction of social conflict, cooperative and science-based fisheries management between tribal and state regulatory agencies, and greater trust and cooperation between the parties as a result of the negotiation process for the 2000 Consent Decree. In contrast, tribal and sport fishers perceive that there will be a continued diminution of fishing opportunities, adverse impacts on fishing communities, and continued social conflict under this policy. Future studies should examine if the 2000 Consent Decree meets these expectations.

Conclusion

Based upon an analysis of stakeholder perceptions, the Great Lakes fishery should be managed as a shared resource to rehabilitate lake trout stocks, and provide economic opportunities for each stakeholder group, while protecting cultural interests. Allocation

of these common property resources must be done in a way that preserves resources while protecting social and ethical values to the greatest extent possible.⁸⁰ Only through continued collaborative management efforts, cooperation, and increased education and understanding will social conflict be avoided and the Great Lakes fishery will be sustainably managed to protect the resource for all stakeholders and future generations.

According to the State of Michigan and the DNR, the 2000 Consent Decree has been successful to date. They believe that fisheries management and law enforcement has been more cooperative. They also believe that relations have improved between tribal commercial and state-licensed sport fishers.⁸¹ Yet, only time will tell if this policy moves the parties closer to these goals.

⁸⁰ Edney, *supra* note 24, at 23.

⁸¹ Parker, B. (Ed.) (June 2000). 2000 Consent Decree a success, state says. *Michigan Outdoor News*.

APPENDICES

APPENDIX A: RESEARCH TIMELINE

	Phase I Fall 1998 – Summer 1999	Phase II Fall 1999– Spring 2000
Data Collection	- Conducted literature review* - Discussion with MDNR biologist (Nov. 16, 1998) - Discussion with historian/anthropologist (October 1998)	- Interview questions were reviewed by: MDNR biologist, tribal rep., sport fishing rep. - Discussion with MDNR rep. (Sept. 1999) - Attended Steelheaders Assoc. public meeting (Oct. 1, 1999) - Discussion with anthropologist (Oct. 13, 1999) - Attended status hearing (Oct. 15, 1999) - Pilot interview with sport-fishing rep. (Nov. 1, 1999) - Discussion with tribal fisher/rep. (April 3, 2000)
Questions and topics	- Created preliminary instrument for semi-structured interviews	- Assimilated feedback from preliminary instrument review and pilot interview re-drafted instrument
Analysis		- Analyzed initial interview results - Based on feedback from initial interviews, instrument was revised

APPENDIX A: RESEARCH TIMELINE

	Phase III Summer 2000	Phase IV Fall 2000 – Winter 2001
Data Collection	- Individual interviews with Grand Traverse Bay (GTB) tribal fishers, representatives, biologists; MDNR biologists in GTB region; sport fishing representatives in GTB region; sport fishers - Discussion with U.S. FWS biologists (June 8 & July 31, 2000) - Attended status hearing (August 2, 2000)	- Individual interviews with representatives from MDNR, State of Michigan, sportsmen group representatives; MDNR biologists - Individual interviews with Bay Mills, Sault Ste. Marie tribal fishers, representatives, biologists
Questions and topics	- Semi-structured interview questions (based on feedback from interviews)	- Revised semi-structured interview questions (based on feedback from interviews) and follow-up questions
Analysis	- Immediate transcription of interview data into field notes - Analysis of data throughout Phase II - Reformulate questions as needed and create follow-up questions for Phase III	- Immediate transcription of interview data into field notes - Analysis of data throughout Phase IV - Reformulate questions and create follow-up questions as necessary

APPENDIX A: RESEARCH TIMELINE

	Phase V Winter 2001 – Summer 2001	Phase VI Fall 2001 – Spring 2002
Data Collection		- Drafted results summary - Presented draft results to key informants and asked for feedback
Questions and topics		
Analysis	- Completed transcription - Conducted follow-up phonecalls regarding interview questions - Performed data analysis and interpretation	- Incorporated stakeholder comments, feedback into results - Completed evaluation of 1985 CO - Completed comparative analysis of 2000 CD - Made policy recommendations

*Literature review conducted throughout study

APPENDIX B:

FINAL RESEARCH INSTRUMENT FOR FISHERS

Overarching Research Question:

How do stakeholders perceive the 1985 Consent Order as a management tool for the 1836 Treaty waters of the Great Lakes?

- ⇒ *How long have you been fishing on the Great Lakes?*
- ⇒ *Which Great Lakes do you fish?*
- ⇒ *Where do you fish in Lake(s) _____ ?*
- ⇒ *How often do you fish?*
- ⇒ *Do you fish with others?*
 - [If so] *Who do you fish with?*
- ⇒ *Are you a member of any fishing organizations?*
 - [If so] *Which ones?*
- ⇒ *What type(s) of fish do you prefer to catch when fishing the Great Lakes?*
- ⇒ *Do you earn any income from fishing?*
 - [If so] *Does fishing provide a substantial portion of your income?*
- ⇒ *What are some (other) reasons why you fish?*
- ⇒ *Has the amount of your catch over time?*
 - [If so] *How has it changed? What do you think are some of the reasons your catch has changed?*
- ⇒ *Are you generally satisfied with the amount of fish you catch?*
- ⇒ *Have your fishing opportunities changed?*
 - [If so] *How have they changed?*
- ⇒ *Are you familiar with the 1985 Consent Order?*
 - *Are you familiar with the lake trout conservation refuges created by the 1985 Consent Order?*
 - ◆ [If so] *What is your opinion of the lake trout conservation refuges?*
 - ◆ *Do you think these refuges promoted or did not promote conservation of lake trout stocks in the Michigan waters of the Great Lakes?*
 - ◆ *What are some reasons why you think the refuges promoted/did not promote conservation of lake trout stocks?*
 - *Are you familiar with the Consent Order's assigned fishing zones for tribal fishers?*
 - ◆ [If so] *What is your opinion of the assigned fishing zones?*
 - ◆ *Do you think the assigned fishing zones are fair/unfair?*
 - ◆ *What are some of the reasons you think the zones are fair/unfair?*
 - ◆ *Do you think the assigned fishing zones helped or did not help reduce conflict between fishers?*

- ◆ *What are some reasons why you think the assigned zones did/did not help reduce conflict?*
- *Are you familiar with the Consent Decree's restrictions on gill-nets?*
 - ◆ *[If so] What is your opinion of these restrictions?*
 - ◆ *Do you think these restrictions are fair/unfair?*
 - ◆ *What are some of the reasons you think the restrictions are fair/unfair?*
- ⇒ *Were you involved in the negotiations for the 1985 Consent Order?*
[If so] Can you describe your role in the negotiations for the 1985 Consent Order?
- ⇒ *Are you familiar with the new [2000] agreement?*
- ⇒ *Were you involved in the negotiations for the 2000 Consent Decree?*
[If so] Can you describe your role in the negotiations for the 2000 Consent Decree?
- ⇒ *What is your opinion of the new agreement compared with the 1985 Consent Order?*
- ⇒ *How would you describe current relations between tribal and non-tribal fishermen?*
- ⇒ *Were these relations different in the past?*
[If so] How were they different?
- ⇒ *Have you personally interacted with tribal/sport fishers?*
[If so] Could you briefly describe your most memorable encounter?
- ⇒ *Do you know why Native fishers have fishing rights?*
- ⇒ *Do you support or do you not support Native fishing rights?*
 - ◆ *What are some reasons why you support/do not support these rights?*

APPENDIX C: FINAL RESEARCH INSTRUMENT FOR BIOLOGISTS AND REPRESENTATIVES

Overarching Research Question:

How do stakeholders perceive the 1985 Consent Order as a management tool for the 1836 Treaty waters of the Great Lakes?

Research Instrument:

What is your occupation? How long have you been in this position?

[For biologists] *How long have you worked on Great Lakes issues in Michigan?*

Are you familiar with the 1985 Consent Order?

- *Are you familiar with the lake trout conservation refuges created by the Consent Order?*
 - ◆ *[If so] What is your opinion of the refuges?*
 - ◆ *Do you think these refuges promoted or did not promote conservation of lake trout stocks in the Michigan waters of the Great Lakes?*
 - ◆ *What are some reasons why you think the refuges did/did not promote conservation of lake trout stocks?*
- *Are you familiar with the 1985 Consent Order's assigned fishing zones for tribal fishers?*
 - ◆ *[If so] What is your opinion of the assigned fishing zones?*
 - ◆ *Do you think the assigned fishing zones helped or did not help reduce conflict between fishers?*
 - ◆ *What are some reasons why you think the assigned fishing zones did/did not help reduce conflict?*
- *Are you familiar with the 1985 Consent Order's restrictions on gill net use?*
 - ◆ *[If so] What is your opinion of these restrictions?*
- *Do you think management has or has not become a more cooperative effort between tribal and state regulatory agencies since implementation of the 1985 Consent Order?*
 - ◆ *What are some reasons you think management has/has not become a more cooperative effort?*
 - ◆ *[If management has become a more cooperative effort] Can you describe how management has become a more cooperative effort?*

- *Do you think the provisions of the 1985 Consent Order were adequately enforced or not?*
 - ◆ *[If no further explanation is given] In your opinion, why was enforcement adequate/inadequate?*

*How would you describe current relations between tribal and sport fishermen?
Were these relations different in the past?*

- *[If so] How were they different?*

Were you involved in the negotiations for the 1985 Consent Order?

- *[If so] Can you describe your role in the negotiations for the 1985 Consent Order?*
 - ◆ *Do you think the negotiation process affected communication between the parties?*
- *[If so] How do you think the negotiation process affected communication between the parties?*
 - ◆ *Do you think the negotiation process affected cooperation between the parties?*
- *[If so] How do you think the negotiation process affected communication between the parties?*
 - ◆ *Do you think the negotiation process affected relations between the parties? [If so] How do you think the negotiation process affected relations between the parties?*

⇒ *Are you familiar with the 2000 Consent Decree?*

- ⇒ *[If so] Were you involved in the negotiations for the 2000 Consent Decree?*
 - ◆ *[If so] Can you describe your role in the negotiations for the 2000 Consent Decree?*
 - ◆ *Do you think the negotiation process affected communication between the parties?*
[If so] How do you think the negotiation process affected communication between the parties?
 - ◆ *Do you think the negotiation process affected cooperation between the parties?*
[If so] How do you think the negotiation process affected cooperation between the parties?
 - ◆ *Do you think the negotiation process affected relations between the parties?*
[If so] How do you think the negotiation process affected relations between the parties?

⇒ *How would you compare the 1985 Consent Order to the 2000 Consent Decree?*

⇒ *Do you know why Native fishers have fishing rights?*

⇒ *Do you support or do not support Native fishing rights?*

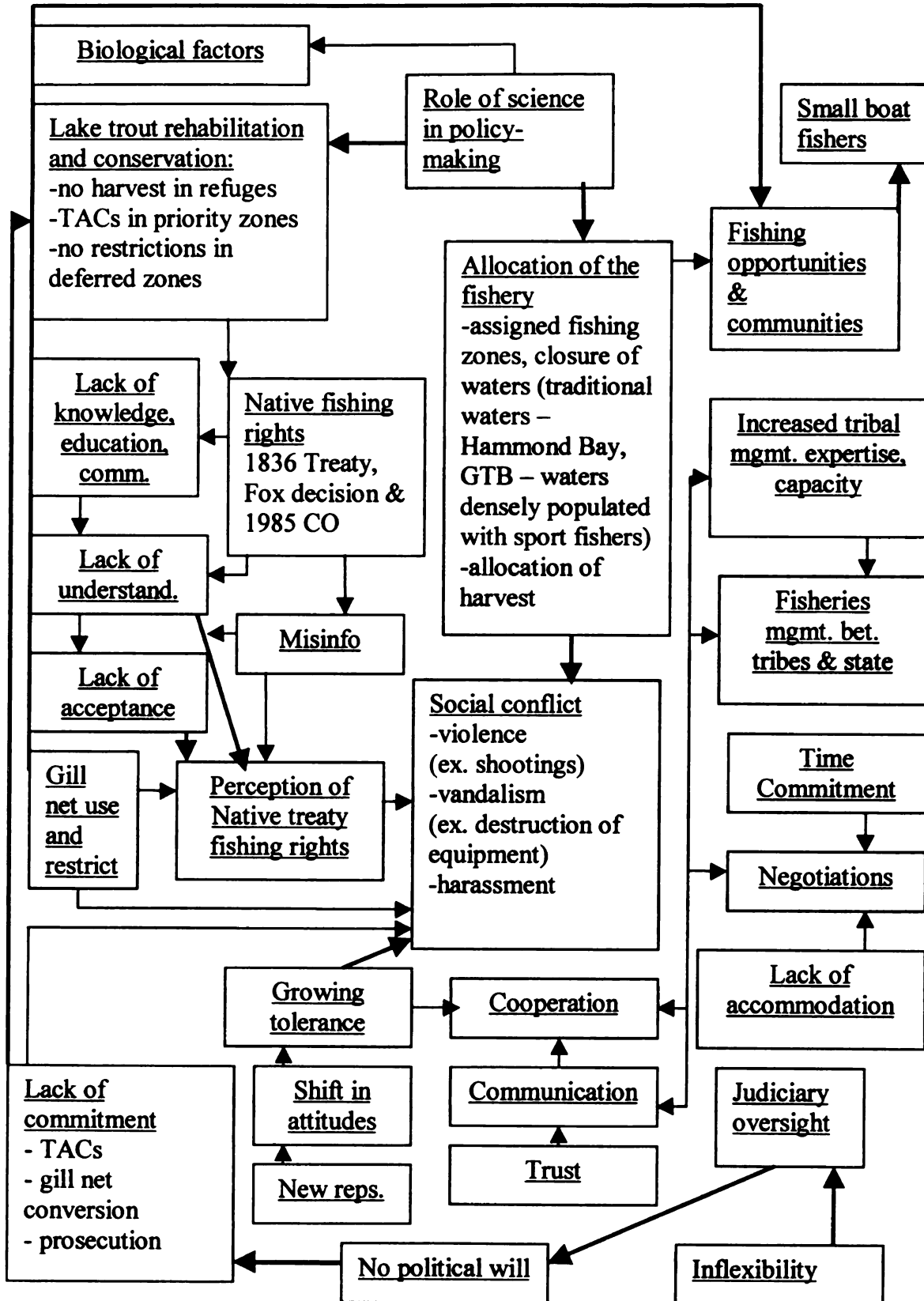
What are some reasons why you do/do not support Native fishing rights?

APPENDIX D: INTERVIEW SUMMARY

Stakeholder Group	Number of Interviews
Tribal biologists/ representatives*	9
Tribal fishers*	10
Tribal game wardens*	2
Sport fishing representatives*	4
Recreational sport fishers	9
Charter sport fishers*	4
Michigan DNR biologists/ representatives	7
State representatives	3
COTFMA Public Information & Education Committee	1
Sea Grant agent	1
Total	50

* Denotes stakeholders that fall into several categories.
They were only counted once in totals.

APPENDIX E: COGNITIVE MAP – INTERVIEW DATA ANALYSIS



LITERATURE CITED

25 C.F.R. 256.46.

44 Federal Register 65747 (November 15, 1979).

45 Federal Register 28100 (April 28, 1980).

A Timeline of Fisheries in the Region. (1997, February 2). *Traverse City Record Eagle*, p. A4.

Act of August 11, 1946. 60 Stat. 1049.

Act of March 3, 1885, 23 Stat. 362.

American Friends Service Committee (1970). *Uncommon Controversy: Fishing Rights of the Muckleshoot, Puyallup and Nisqually Indians*. University of Washington Press: Seattle, WA, p. 45-46, 48-49.

American Jurisprudence, vol. 27. (1940). Jurisprudence Publishers: San Francisco, CA, p. 546-547.

Anderson, T.L. (1997). Conservation: Native American style. *Quarterly Review of Economics and Finance*, 37(4): 769-785, p. 777.

Antoine v. Washington, 420 U.S. 194 (1975).

Austin, R.D. (1995). Native people of America and the Environment. *Stanford Environmental Law Journal*, 14(2): ix-xi.

Ayling, R.A. and Kelly, K. (1997). Dealing with conflict: natural resources and dispute resolution. *Commonwealth Forestry Review*, 76(3): 182-185, p. 183.

Baldwin, N.S., Saalfeld, R.W., Ross, M.A. & Buettner, H.J. (1979). Commercial fish production in the Great Lakes 1867-1977. *Great Lakes Fishery Commission Technical Report 3*. Ann Arbor, MI: Great Lakes Fishery Commission.

Barsh, R.L. (1977). *The Washington Fishing Rights Controversy: An Economic Critique*. University of Washington: Seattle, WA, p. 23.

Bay Mills Indian Community v. U.S., 26 Indian Claims Commission 538 (1972).

Bederman, D.J. (1994). Revivalist canons and treaty interpretation. *UCLA Law Review* 903: 953-1034.

- Beeton, A.M., Sellinger, C.E. & D.F. Reid. (1999). An introduction to the Laurentian Great Lakes ecosystem. In W.W. Taylor & C.P. Ferreri (Eds.), *Great Lakes Fisheries Policy and Management: A Binational Perspective*. (pp. 3-54) East Lansing, MI: Michigan State University Press.
- Belsky, M.H. (1989). The ecosystem model – mandate for a comprehensive United States Ocean Policy and Law of the Sea. *San Diego Law Review*, 26, p. 448.
- Bence, J. (personal communication, May 31, 2002).
- Berkes, F., George, P. & Preston, R.J. (1991). Co-management: the evolution in theory and practice of the joint administration of living resources. *Alternatives*, 18(2):12-18.
- Berst, A.H. & Spangler, G.R. (1972). Lake Huron: effects of exploitation, introductions and eutrophication on the salmonid community. *Journal of the Fisheries Research Board of Canada*: 29:877-887.
- Berst, A.H. & Spangler, G.R. (1973). Lake Huron: the ecology of the fish community and man's effects on it. *Great Lakes Fishery Commission Technical Report 21*. Ann Arbor, MI: Great Lakes Fishery Commission.
- Bickerman, J. (2000, August 7). *Parties in United States v. Michigan, 1836 Treaty Great Lakes Fishing Issue, Agree to 20 Year Settlement*. Press release. Department of Natural Resources: Lansing, MI, p. 2.
- Bielski, V., Cornell, G. & White, R. (1980, July 21). Indians only ask to keep their age-old right to fish. *Detroit Free Press*, p. 5-6.
- Bilken, S. & Bogdan, R. (1992). *Qualitative Research for Education: An Introduction to Theory and Methods*. Boston, MA: Allyn & Bacon, p. 107, 119-122.
- Bishop, R.C. & Cleland, C.E. (1984). *An Assessment of the Economic Conditions of the Bay Mills Indian Community, Sault Ste. Marie Tribe of Chippewa Indians, and Grand Traverse Band of Ottawa and Chippewa Indians, and a Cost-Return Analysis of Treaty Commercial Fishermen—1981*. Manuscript, p. 14-17.
- Black, H.C., Nolan, J.R., Nolan-Haley, J.M., Connolly, M.J., Hicks, S.C., & Albrandi, M.N. (1991). *Black's Law Dictionary*. 6th ed. St. Paul, MN: West Publishing Company, 54, 156, 673, 896, 983.
- Blanchard, B. (Producer & Director). (1982). *Difference of Rights*. [Film]. Available from Lansing Community College.
- Bobrow, D.B. & Dryzek, J.S. (1987). *Policy Analysis by Design*. Pittsburg, PA: University of Pittsburgh Press, p. 168.

- Bogdan, R. & Taylor, S.J. (1975). *Introduction to Qualitative Research Methods: An Phenomenological Approach to the Social Sciences*. Wiley: New York, NY, p. 30-32.
- Bogdan, R. & Bilken, S. (1992). *Qualitative Research for Education: An Introduction to Theory and Methods*. Boston, MA: Allyn & Bacon, p. 1-21, 29-31.
- Bogue, M.B. (2000). *Fishing the Great Lakes: An Environmental History, 1793-1933*. Madison, WI: University of Wisconsin Press, p. 29-31, 34-35, 116-117, 182, 204, 262, 312-313.
- Boulding, K. (1977). Commons and community: the idea of a public. In Hardin, G. and Baden, J. (Eds.) *Managing the Commons*. (pp. 280-294) W.E. Freeman: San Francisco, CA, p. 290.
- Bradsher, K. (2000, August 8). Michigan pact resolves battle over limits on Indian fishing. *New York Times*, p. 12A.
- Brandimore, K. (1978). Indian law – treaty fishing rights – the Michigan position. *Wayne Law Review*, 24(3): 1187-1204, p. 1196.
- Brege, D.A. & Kevern, N.A. (1978). *Michigan Commercial Fishing Regulations: A Summary of Public Acts and Conservation Commission Orders (1865-1975)*. Ann Arbor, MI: Michigan Sea Grant Program.
- Bronte, C.R., Selgeby, J.H., & Curtis, G.L. (1991). Distribution, abundance, and biology of the alewife in U.S. waters of Lake Superior. *Journal of Great Lakes Research*: 17, 304-313.
- Brown, R.W., Ebener, M. & Gorenflo, T. (1999). Great Lakes commercial fisheries: Historical overview and prognosis for the future. In W.W. Taylor & C. P. Ferreri (Eds.), *Great Lakes Fisheries Policy and Management, A Binational Perspective*. (pp. 307-354) East Lansing, MI: Michigan State University Press, p. 308-309, 320, 332-333, 335, 337, 339.
- Burnett, M.A. (1996). The dilemma of commercial fishing rights of indigenous peoples: a comparative study of the common law nations. *Suffolk Transnational Law Review*, XIX(2): 398-434, p. 404.
- Busiahn, T.R. (1984). An introduction to Native People's fisheries issues in North America. *Fisheries*, 9(5): 9-11, p. 9.

- Busiahn, T.R. (1986). Great Lakes Indian Fish and Wildlife Commission Presentation on the Indian Role in the Strategic Great Lakes Fishery Management Plan Process. Committee of the Whole Workshop on Implementation of the Joint Strategic Plan for Management of Great Lakes Fisheries (SGLFMP). Agenda item 12. (February 18-20, 1986). Toronto, ON. In: Dochoda, M.R. (Ed). *Report and Recommendations from the 18-20 February 1986 and 5-6 May 1986 Meetings*. Great Lakes Fishery Commission Special Publication: Ann Arbor, MI: 55-58.
- Caldwell, L.K. (1988). Introduction: implementing an ecological systems approach to basinwide management. In: Caldwell, L.K. (Ed.) *Perspectives on Ecosystem Management for the Great Lakes*, (pp. 1-27) University of New York Press: Albany, NY.
- Caldwell-Hill, J.L. (1996). Environment, regulations, and Native Americans. *Northern Kentucky Law Review*, 24(1-2), p. 84-85, 92-94
- Canby, W.C. (1998). *American Indian Law in a Nutshell* (3rd ed). West Group: St. Paul, MN, p. 82-83, 429-430.
- Carlson, E. (2000, July 13). Turtle Creek enters fish talks. *The Leelanau Enterprise*, 123(42), p. 1, 16.
- Carlson, E. (2000, July 20). Fishing for a gill-net solution: Band negotiators reach "agreement in principle." *The Leelanau Enterprise*, 123(43), p. 15.
- Carlson, E. (2000, July 20). Duhamel nix treaty: Native fisherman says Band would compromise rights. *The Leelanau Enterprise*, 123(43), p. 1, 15.
- Case No. 79-1414, United States Court of Appeals, 6th Cir., Memorandum and Opinion of the Honorable Albert J. Engel (September 21, 1979).
- Case No. 79-1527, United States Court of Appeals, 6th Cir., Circuit Judges Weick, Celebrezze and Merritt (October 19, 1979).
- Case No. 79-1528, United States Court of Appeals, 6th Cir. (July 16, 1980).
- Chaudhuri, J. (1985). American Indian policy: An overview. In Deloria, V. (Ed.), *American Indian Policy in the Twentieth Century*. (pp. 15-33) University of Oklahoma Press: Norman, OK, p. 23-25.
- Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831).
- Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970).
- Choctaw Nation v. United States*, 318 U.S. 423 (1943).

- Christie, W.J. (1974). Changes in the fish species composition of the Great Lakes. *Journal of the Fisheries Research Board of Canada*: 31, 827-854.
- Clandinin, D.J. & Connelly, F.M. (1994). Personal experience methods. In Denzin, N. & Lincoln, Y. In *Handbook of Qualitative Research*. (pp. 413-427) Thousand Oaks, CA: Sage Publications, p. 420, 423.
- Cleland, C.E. (1982). The inland shore fishery of the northern Great Lakes: its development and importance in prehistory. *Society for American Archeology*: 761-783.
- Cleland, C.E. (1990). Indian treaties and American myths: roots of social conflict over treaty rights. *Native Studies Review*, 6(2), 81-87.
- Cleland, C.E. (1992). *Rites of Conquest: The History and Culture of Michigan's Native Americans*. Ann Arbor, MI: University of Michigan Press, p. 25, 79, 103, 109.
- Clemens, M. (1994). *Participation by Native People in Interjurisdictional Resource and Environmental Governance in the Great Lakes Basin*. M.A. Thesis. Department of Geography and Institute for Environmental Studies. University of Toronto: Toronto, ON, p. 25.
- Coble, D.W., Bruesewitz, R.E., Fratt, T.W., & Scheirer, J.W. (1990). Lake trout, sea lampreys, and overfishing in the upper Great Lakes: a review and reanalysis. *Transactions of the American Fisheries Society*: 119, 985-995.
- Cohen, F. (1942). *Handbook of Federal Indian Law*. University of New Mexico Press: Albuquerque, NM, p. XXIV, 78, 86, 208, 285-286.
- Committee of the Whole. (February 18, 1986). *Workshop on the Implementation of the Joint Strategic Plan for the Management of the Great Lakes Fisheries (SGLFMP)*. Agenda item 10, p. 53.
- Connors, D. (1996, August 23). New dispute flares over fishing rights. *Traverse City Record Eagle*, p. A1.
- Connors, D. (1997, February 2). Fishing debate renews tension of years past. *Traverse City Record Eagle*, p. A1.
- Connors, D. (1997, August 28). Court won't hear gill-net dispute until December. *Traverse City Record Eagle*, p. A1.
- Connors, P.G. (1999). *Michigan Indian Fishing Rights Controversy*, (Research Report vol. 19, no. 3). Lansing, MI: Michigan Legislative Service Bureau, Legislative Research Division, p. 3, 5, 9.

- Cool, K. (2000, April 28). *The State of Michigan and Native American Tribes Announce Major Breakthrough in Settlement Negotiations*. Department of Natural Resources: Lansing, MI, p. 1.
- Coon, T. (1999). Ichthyofauna of the Great Lakes basin. In W.W. Taylor & C.P. Ferreri, (Eds.) *Great Lakes Fisheries Policy and Management: A Binational Perspective*. (pp. 55-71) East Lansing, MI: Michigan State University Press, p. 59.
- Cornell, G. (1990). Native American perceptions of the environment. *Northeastern Indian Quarterly*, p. 3-4.
- Covington, G.M. & Pittman, P.M. (1992). *Don't Blame the Treaties: Native American Rights and the Michigan Indian Treaties*. Altwerger and Mandel Publishing: West Bloomfield, MI, p. 10-11, 151-158.
- Crotty, M. (1998). *The Foundations of Social Research: Meaning and Perspective in the Research Process*. Sage Publications: Thousand Oaks, CA, p. 3, 7-9, 17, 66-67, 78-80.
- Dale, J. (October 2000). Seven sovereigns sign 2000 Consent Decree. *Tribal Fishing*, 3(4), p. 1,4.
- Deleckta, D.H. (1980). State regulation of treaty Indians: hunting and fishing rights in Michigan. *Detroit College Law Review* 1097, 1118.
- Deloria, V. (1974). *Behind the Trail of Broken Treaties*. Delacorte Press: New York, NY, p. 25-27.
- Deloria, V. & Lytle, C.M. (1983). *American Indians, American Justice*. University of Texas Press: Austin, TX, p. 8-9, 13-14.
- Denzin, N.K. (1978). *The Research Act: A Theoretical Introduction to Sociological Methods*. McGraw-Hill: New York, NY.
- Department of Game of Washington v. Puyallup Tribe (Puyallup II)*, 414 U.S. 44 (1973).
- Doherty, R. (1990). *Disputed Waters: Native Americans and the Great Lakes Fishery*. Lexington, KY: University of Kentucky, p. 116-120.
- Ebener, M.P. (Ed). (1998). *Lake Trout Rehabilitation Guide for Lake Huron*. Great Lakes Fishery Commission: Ann Arbor, MI, p. 3.

- Ebener, M.P., Gebhardt, K., & Johnson, J. (2001). *Final Interim Report Summarizing the Spatial, Temporal, and Bathymetric Distribution of Lake Trout and Lake Whitefish in Northern Lake Huron in 1998 and 1999*. Report Prepared by the Lake Huron Technical Subcommittee of the Technical Fisheries Committee.
- Editorial (1971, June 30). *North Woods Call*, p. 6.
- Editorial (1980, July 21). Gill nets: they could seriously deplete the lakes before a court ruling. *Detroit Free Press*, p. A14.
- Edney, J.J. (1981). Paradoxes on the commons: scarcity and the problem of equality. *Journal of Community Psychology*, 9: 3-34, p. 14-15.
- Edwards, D. & Glavin, T. (1999). *Set Adrift: The Plight of British Columbia's Fishing Communities*. Pacific Salmon Forest Project. David Suzuki Foundation: Vancouver, B.C., p. 22-23.
- Ekdahl, J. (personal communication, August 29, 2000).
- Erickson, S. (2000). *State and tribal resource management in Wisconsin: Strong Management for the Future*. Great Lakes Indian Fish & Wildlife Commission. http://www.glifwc.org/publications/spring00/resource_manage.htm July 14, 2001.
- Eschmeyer, P.H. (1957). The near extinction of lake trout in Lake Michigan. *Transactions of the American Fisheries Society*: 85(1955), 102-119.
- Eshenroder, R.L. (1992). Decline of lake trout in Lake Huron. *Transactions of the American Fisheries Society*: 121, 548-550.
- Eshenroder, R.L., Crossman, E.J., Meffe, G.K., Olver, C.H., and Pister, E. P. (1995). Lake trout rehabilitation in the Great Lakes: an evolutionary, ecological, and ethical perspective. *Journal of Great Lakes Research*, 21(Supp. 1): 518-529.
- Eshenroder, R.L, Payne, N.R, Johnson, J.E., Bowen II, C., & Ebener, M.P. (1995). Lake trout rehabilitation in Lake Huron. *Journal of Great Lakes Research*: 21(Supp. 1), 108-127.
- Feeny, D., Berkes, F., McCay, B.J. and Acheson, J.M. (1990). The tragedy of the commons: twenty-two years later. *Human Ecology*, 18(1): 1-19, p. 14
- Ferguson, K. (1998-1999). Indian fishing rights: Aftermath of the Fox decision and the year 2000. *American Indian Law Review*: 23(1), 97-154.
- Fetterolf, C.M. (1980). Why a Great Lakes Fishery Commission and why a sea lamprey international symposium? *Canadian Journal of Aquatic Sciences*: 37, 1588-1593.

- Fey, H. & McNickle, D. (1959). *Indians and Other Americans*. Harper & Brothers: New York, NY, p. 70-79.
- Firestone, J. (1979, May 9). State court rule on fishing rights contradicts feds. *State News*, p. 12-13.
- Fischer, F. (1995). *Evaluating Public Policy*. Nelson-Hall: Chicago, IL, pg. 2.
- Fisher, R., Ury, W., and Patton, B. (1991). *Getting to Yes: Negotiating Agreements Without Giving In*. (2nd ed.) Penguin: New York, NY, p. 27-28, 56-80.
- Fisheries of the Great Lakes*. (1988). Madison, WI: University of Wisconsin Sea Grant Institute.
- Fishermen look to Congress after Indian rights ruling: Judge Fox's far-reaching decision heightens concern over future of Great Lakes fishery resource. (July 1979). *Michigan Out-of-Doors*, p. 32-35.
- Flesher, J. (2002, March 9). Settlement wording rekindles battle between tribal, sport fishers. *Detroit News*, p. 1-2.
- Geer v. Connecticut*, 161 U.S. 519 (1896).
- Geertz, C. (1973). *The Interpretation of Cultures*. New York, NY: Basic Books.
- General Allotment Act, 24 Stat. 388 (1887).
- Getches, E. (1988). Resolving tensions between tribal and state governments: Learning from the American experience. In: Long, J.A. and Boldt, M. (Eds.), *Governments in Conflict? Provinces and Indian Nations in Canada* (pp. 195-208) University of Toronto Press: Toronto, p. 197.
- Gill nets: they could seriously deplete the lakes before a court ruling. (1980, July 21). *Detroit Free Press*, p. 4.
- Glaser, B.G. & Strauss, A.L. (1967). *Discovery of Grounded Theory: Strategies for Qualitative Research*. Chicago, IL: Aldine, p. 3.
- Goodman, E. (1998-1999). The meaning of "trust": off-reservation Indian hunting rights and habitat protection. *Natural Resources Law Institute*, 9(2):1-7, p. 6-7.
- Grand Traverse Area Sports Fishing Association v. Clarence Maudrie et al.* File No. 79-7510 (13th Circuit Court, Grand Traverse County).

Grand Traverse Band's Motion Requesting Modifications of the 1985 Consent Judgment, *United States v. State of Michigan*, No. 2:73-CV-26 (M26-73)(W.D.Mich. January 15, 1997).

Grand Traverse Band of Chippewa and Ottawa Indians v. Director of Michigan Department of Natural Resources, Township of Leland and Village of Northport, 971 F. Supp. 282 (W.D. Mich. 1995), *aff'd*, Case No. 96-1168, 6th Cir. (April 15, 1998).

Great Lakes Fishery Commission (2000). *The Great Lakes Fishery Commission: Established by Treaty to Protect Our Fishery*. Ann Arbor, MI, Fact Sheet, 1.

Great Lakes Sport Fishing Council. (January 23, 2000). Coalition formed to protect Michigan's Great Lakes fisheries. *Weekly News: Fishery News of the Great Lakes Basin*, p. 2.

Grinold, D. (Ed.) (1998). Letter from Michigan Governor John Engler to Denny Grinold, Michigan Charter Boat Association. In *Grand Traverse Area Sport Fishing Association Newsletter*, 1(3), p. 1,3.

Haas, R. C. (1978). *Overview of the Great Lakes Commercial Fishery, With Special Emphasis on the Use of Gill Nets and Impoundment Gear* (Technical Report 78-6). Lansing, MI: Michigan Department of Natural Resources, Fisheries Division.

Hansen, M.J. (Ed.) (1994). *The state of Lake Superior in 1992. Great Lakes Fishery Commission Special Publication: 94-1*. Ann Arbor, MI: Great Lakes Fishery Commission, p. 3.

Hansen, M.J., Ebener, M.P., Shively, J.D. & Swanson, B.L. (1994). Lake trout. In Hansen, M.J. (Ed.) *The state of Lake Superior in 1992. Great Lakes Fishery Commission Special Publication: 94-1*. (pp. 13-34) Ann Arbor, MI: Great Lakes Fishery Commission, p. 15, 27-28, 30.

Hansen, M.J., Peck, J.W., Schorfhaar, R.J., Selgeby, J.H., Schreiner, D.R., Schram, S.T., Swanson, B.L., MacCallum, W.R., Burnham-Curtis, M.K., Curtis, G.L., Heinrich, J.W., & Young, R.J. (1995). Lake trout (*Salvelinus namaycush*) populations in Lake Superior and their restoration in 1959-1993. *Journal of Great Lakes Research*, 21(Supp. 1): 152-175.

Hansen, M.J. (1999). Lake trout in the Great Lakes: Basinwide stock collapse and binational restoration. In Taylor, W.W. & Ferreri, C. P. (Eds.), *Great Lakes Fisheries Policy and Management: A Binational Perspective*. (pp. 417-453) East Lansing, MI: Michigan State University Press, p. 429-430.

- Hearings Before the Subcommittee on Indian Affairs of the Committee on Interior and Insular Affairs.* House of Representatives, 92nd Congress, 2d session, (1972), p. 162-171.
- Helmbrecht, R.K, Mackety, S., & MacMullan, R.A. (July 16, 1971). *Report of the Governor's Special Task Force on Indian Fishing Rights.* Lansing, MI, p. 1-2.
- Herdendorf, C.E. (1982). Large lakes of the world. *Journal of Great Lakes Research*: 8(3): 379-412.
- Herman, J.L., Morris, L.L. & Fritz-gibbon, C.T. (1987). *Evaluator's Handbook*. Newbury Park, CA: Sage Publications.
- Hickerson, H. & Wheeler-Voegelin, E. (1974). History of the Chippewa. In D.A. Horr (Ed.), *Chippewa Indians I—The Red Lake and Pembina Chippewa*. New York, NY: Garland Publishing, p. 21.
- Hicks, W. (March 22, 1985). *Grand Traverse Area Sport Fishing Association Newsletter*, p. 1.
- Hicks, W. (April 18, 1985). *Grand Traverse Area Sport Fishing Association Newsletter*, p. 1-2
- Hile, R. (1949). Trends in the lake trout fishery of Lake Huron through 1946. *Transactions of the American Fisheries Society*: 76, 121-147.
- Hinman, D.L. and Bernsten, R.H. (1997). *Economic Assessment of Small-Boat Trap Net Fishing in the Grand Traverse Bay*. Manuscript., p. 1, 5-33.
- Holey, M.E. (personal communication, 2002).
- Holey, M.E., Rybicki, R.W., Eck, G.W., Brown, Jr., E.H., Marsden, J.E., Lavis, D.S., Toneys, M.L, Trudeau, T.N., & Horrall, R.M. (1995). Progress toward lake trout restoration in Lake Michigan. *Journal of Great Lakes Research*: 21 (Supp. 1), 128-151.
- Hornstein, D.T. (1982). Indian fishing rights return to spawn: Toward environmental protection of treaty fisheries. *Oregon Law Review*, 61(1), 102-103.
- House Concurrent Resolution 108, 83rd Congress, 1st session, passed August 1, 1953. *U.S. Statutes at Large* 67:B132.
- House of Representatives Report No. 1243, 96th Congress, 2d. Session 1, 34 (1980).
- Hunt, J.D.L. (1984). The canons of Indian treaty and statutory construction: a proposal for codification. *University of Michigan Journal of Law Reform*, 17(3): 681-713.

- Hyman, H.M. (1986). *American Singularity: The 1787 Northwest Ordinance, the 1862 Homestead and Morrill Acts, and the 1944 G.I. Bill*. University of Georgia Press: Athens, GA, p. 22-24, 28.
- Indian fishing “buy-out” proposed. (1979). *Michigan-Out-of-Doors*, p. 12.
- Indian fishing rules protested. (1980). *Michigan Out-of-Doors*, p. 11-12.
- Indian Removal Act (“An Act to provide for an exchange of lands with the Indians residing in any of the states or territories, and for their removal west of the river Mississippi.”), 4 Stat. 411 (1830).
- Indian Reorganization Act, 48 Stat. 984 (1934).
- Indian Tribes' Amended Motion to Allocate Resource, *United States v. State of Michigan*, Civil Action No. M26-72 (W.D. Mich. April 25, 1984).
- Indians resume gill net fishing. (September 1979). *Michigan Out-of-Doors*, p. 103.
- Indians will keep fishing. (1980, June 5). *Detroit Free Press*, p. 6D.
- Jaye, D. (1997, June 4). *No Fish, No Chips*. State of Michigan House of Representatives, Press release.
- Jennings, F. (1975). *The Invasion of America: Indians, Colonialism, and the Cant of Conquest*. University of North Carolina Press: Chapel Hill, NC, p. 105-106, 127.
- Jensen, A.L. (1976). Assessment of the United States lake whitefish (*Coregonus clupeaformis*) fisheries of Lake Superior, Lake Michigan and Lake Huron. *Journal of the Fisheries Research Board of Canada*: 33(4):747-759.
- Jensen, A.L. (1978). Assessment of the lake trout fishery in Lake Superior, 1929-1950. *Transactions of the American Fisheries Society*: 107, 543-549.
- Jentoft, S. (1999). Healthy fishing communities: an important component of healthy fish stocks. *Fisheries*, 24(5): 28-29.
- Johnson, J.E. & VanAmberg, J. (1995). Evidence of natural reproduction in western Lake Huron. *Journal of Great Lakes Research*, 21(Supp.1): 253-259.
- Johnson, R.W. (1972). The states versus Indian off-reservation fishing: A United State Supreme Court error. *Washington Law Review*, 47(2), p. 207-209.
- Johnson v. McIntosh*, 21 U.S. (8 Wheat) 543 (1823).

Joint Status Report. *United States v. State of Michigan*, Case No. 2:73-CV-26 (M26-73)(W.D.Mich. September 1, 1999).

Jones v. Meehan, 175 U.S. 1 (1899).

Kappler, C.J. (1940-1941). *Indian Affairs: Laws and Treaties*. Washington, D.C.: Government Printing Office, p. 491-93, 542-545.

Kellerman, S. (1997, November 8). Panel hears protests over gill netting. *Traverse City Record Eagle*, p. A1, A2.

Kernen, L.T. (1995). Lake trout: valuable native fauna or just grease? *Journal of Great Lakes Research*, 21(Supp. 1): 198-201.

Kickingbird, K. (1985). What's past is prologue: the status and contemporary relevance of American Indian treaties. *St. Thomas Law Review*, 7(3): 603-629, p. 604-605.

Knuth, B.A., Lerner, S., Connelly, N.A., and Gigliotti, L. (1995). Fishery and environmental managers' attitudes and support for lake trout rehabilitation in the Great Lakes. *Journal of Great Lakes Research*, 21(Supp. 1): 185-197.

Koelz, W. (1926). Fishing industry of the Great Lakes. (pp. 554-617) In *Report of the U.S. Commissioner of Fisheries, 1925*. Washington, D.C.: Government Printing Office.

Krueger, C.C., Jones, M.L. and Taylor, W.W. (1995). Restoration of lake trout in the Great Lakes: challenges and strategies for future management. *Journal of Great Lakes Research*, 21(Supp. 1): 547-558, p. 556.

Krueger, C.C., Perkins, D.L., Mills, E.L. & Marsden, J.E. (1995). Predation by alewives on lake trout fry in Lake Ontario: role of an exotic species in preventing restoration of a native species. *Journal of Great Lakes Research*, 21 (Supp. 1): 458-469, 464-467.

Kuchenberg, T. (1978). *Reflections in a Tarnished Mirror: The Use and Abuse of the Great Lakes*. Sturgeon Bay, WI: Golden Glow Publishers, p. 28, 31-32, 35-36, 41, 62-63, 67, 79, 89-91, 102-103.

Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt (LCO I), 700 F.2d 341(1983), cert. denied, 464 U.S. 805 (1983).

Lac du Flambeau Band of Lake Superior Chippewa Indians v. Stop Treaty Abuse-Wisconsin, Inc. Opinion and Order No. 91-C-117-C (W.D. Wis. 1991).

Lawrie, A.H. (1970). The sea lamprey in the Great Lakes. *Transactions of the American Fisheries Society*: 99(4), 766-774.

- Lawrie, A.H. & Rahrer, J.F. (1972). Lake Superior: effects of exploitation and introductions on the salmonid community. *Journal of the Fisheries Research Board of Canada*: 29, 765-776.
- Lawrie, A.H. & Rahrer, J.F. (1973). Lake Superior: a case history of the lake and its fisheries. *Great Lakes Fishery Commission Technical Report 19*. Ann Arbor, MI: Great Lakes Fishery Commission.
- Lawrie, A.H. (1978). The fish community of Lake Superior. *Journal of Great Lakes Research*: 4, 513-549.
- Leach, J.H., Mills, E.L. and Dochoda, M.R. (1999). Non-indigenous species in the Great Lakes: ecosystem impacts, binational policies and management. In: Taylor, W.W. and Ferreri, C.P. (Eds.), *Great Lakes Fisheries Policy and Management*. (pp. 185-207) Michigan State University Press: East Lansing, MI.
- Lin, A.C. (1998). Bridging positivist and interpretivist approaches to qualitative methods. *Policy Studies Journal*, 26(1): 162-180, p. 162, 165.
- Lincoln, Y.S. & Guba, E.G. (1985). *Naturalistic Inquiry*. Newbury Park, CA: Sage Publications, p. 202, 313-316.
- Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903).
- Lyons, O. (1992). *Exiled in the Land of the Free: Democracy, Indian Nations and the U.S. Constitution*. Clear Light Publishing: Santa Fe, CA, p. 199, 288, 318-319.
- Magnaghi, R.M. (1984) *A Guide to the Indians of Michigan's Upper Peninsula 1621-1900*. Marquette, MI: Belle Fontaine Press, p. 8, 35.
- Manion, P.J. & Hanson, L.H. (1980). Spawning behavior and fecundity of lampreys from the upper three Great Lakes. *Canadian Journal of Fisheries and Aquatic Sciences*: 37, 1635-1640.
- Maxwell, J.A. (1996). Qualitative research design: an interactive approach. *Applied Social Research Methods Series*, vol. 41. Thousand Oaks, CA: Sage Publications, p. 17.
- McCay, B.J. and Jentoft, S. (1998). Market or community failure? Critical perspectives on common property research. *Human Organization*, 57(1): 21-29, p. 24-29.
- McClanahan v. Arizona Tax Commission*, 411 U.S. 164 (1973).
- McCorquodale, S.M. (1999). Historical and contemporary policies regarding off-reservation hunting by Native Americans. *Wildlife Society Bulletin*, 27(2), 446-455, p. 451-452.

- McCullough, A.B. (1989). *The Commercial Fishery of the Canadian Great Lakes*. Ottawa, Canada: Environment Canada, p. 19-21.
- McGovern, F.E. (1986). Toward a functional approach for managing complex litigation. *University of Chicago Law Review*: 53(2), 440-493.
- McMinds, G.R. (1979). The Northwest fishing rights controversy: An Indian perspective. *North American Wildlife Conference Transactions*. No. 44, p. 605-606.
- Memorandum of April 29, 1994, Government-to-Government Relations with Native American Tribal Governments. 59 Fed. Reg. 22,951 (President Clinton).
- Menominee v. United States*, 391 U.S. 404 (1968).
- Message From the President of the United States Transmitting Recommendations for Indian Policy (President Nixon). *H.R. Doc. No. 363, 91st Congress, 2nd session* (1970).
- MICH. COMP. LAWS ANN. §302.1 (Supp. 1977).
- Michigan Department of Natural Resources. (May 1985). Treaty fishing agreement heralds new era. *Natural Resources Register*, p. 4-7.
- Michigan Department of Natural Resources. (August/September 2000). A new beginning: Historic Great Lakes fishery agreement signed August 7. *Natural Inquirer, Special Edition*, p. 3.
- Michigan United Conservation Clubs v. Anthony*, 90 Mich. App. 99 (1979).
- Milliken asks Reagan to rescind federal Indian fishing regulations. (1981, January 28). *State News*, p. 2.
- Miller, R.R. (1957). Origin and dispersal of the alewife, *Alosa pseudoharengus*, and the gizzard shad, *Dorosoma cepedianum*, in the Great Lakes. *Transactions of the American Fisheries Society*: 86(1956), 97-111.
- Milner, J. W. (1872). Report on the fisheries of the Great Lakes: The result of inquiries prosecuted in 1871 and 1872. In *Report for the U.S. Commission of Fish and Fisheries*. Washington, D.C.: Government Printing Office, Appendix A, 42nd Congress, 3rd session, S. Misc. Doc. 74, 20-34.
- Milner, J.W. (1873). *Report on the Fisheries of the Great Lakes*. Washington, D.C.: Government Printing Office, p. 14-15.
- Missouri v. Holland*, 252 U.S. 416 (1920).

- Moffitt, C.M. (2000). Reflecting on Native American fisheries. *Fisheries*, 25(7), p. 4.
- Morison, S.E. (1965). *Oxford History of the American People*. Oxford University Press: New York, NY, p. 445-446, 450, 753.
- Morton v. Mancari*, 417 U.S. 535 (1974).
- Neuman, W.L. (2000). *Social Research Methods: Qualitative and Quantitative Approaches*. (4th ed.). Allyn & Bacon: Boston, MA, p. 170-171.
- New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983).
- Northwest Ordinance, 1 Stat. 50; 5 U.S.C. Sec. 479 (1789).
- O'Brien, S. (1985). Federal Indian policies and international protection of human rights. In Deloria, V. (Ed.), *American Indian Policy in the Twentieth Century*. (pp. 35-61) University of Oklahoma Press: Norman, OK, p. 43-44.
- O'Brien, S. (1989). *American Indian Tribal Governments*. University of Oklahoma Press: Norman, OK, p. 258-259.
- O'Brien, S. (1991). Tribes and Indians: With whom does the United States maintain a relationship? *Notre Dame Law Review*, 66(5), p. 1464-1465, 1467.
- Opre, T. (1980, June 5). Tribal permits not valid: state to enforce Indian netting ban. *Detroit Free Press*, p. 6D.
- Overholt, T.W. (1979). American Indians as "natural ecologists." *American Indian Journal*, 9-11.
- Page, L.M. & Burr, B.M. (1991). *A Field Guide to Freshwater Fishes*. Boston, Massachusetts: Houghton Mifflin Company, p. 14-15.
- Parker, B. (Ed.) (June 2000). 2000 Consent Decree a success, state says. *Michigan Outdoor News*.
- Patton, M.Q. (1987). *How to Use Qualitative Methods in Evaluation*. Newbury Park, CA: Sage Publications, p. 147.
- Patton, M.Q. (1990). *Qualitative Evaluation and Research Methods*. (2nd ed.). Newbury Park, CA: Sage Publications, p. 39, 69-71, 87, 156, 169, 176, 179-180, 182, 183, 185.
- Patton, M.Q. (1997). *Utilization-Focused Evaluation: The New Century Text*. (3rd ed.) Sage Publications: Thousand Oaks, CA.

- Pevar, S.L. (1992). *The Rights of Indians and Tribes*. (2nd ed). Southern Illinois University Press: Edwardsville, IL, p. 4. 8-9.
- People v. Chosa*, 252 Mich 160; 233 N.W. 205 (1930).
- People v. Jondreau*, 384 Mich. 539 (1971).
- People v. LeBlanc*, 55 Mich. App. 684 (1974), 399 Mich. 31 (1976).
- Pierotti, R. and Wildcat, D. (1999). The connectedness of predators and prey: Native American attitudes and fisheries management. *Fisheries*, 24(4): 22-23.
- Pinchot, G. (1947). *Breaking New Ground*. Harcourt Brace: New York, NY.
- Pinkerton, E. (Ed). (1989). *Cooperative Management of Local Fisheries: New Directions for Improved Management and Community Development*. University of British Columbia Press: Vancouver, B.C.
- Pinkerton, E.W. (1992). Translating legal rights into management practice: overcoming barriers to the exercise of co-management. *Human Organization*, 51(4): 330-341, p. 331.
- Piper, D.C. (1967). *The International Law of the Great Lakes: A Study of Canadian-United States Cooperation*. Durham, NC: Commonwealth Studies Center, Duke University Press.
- Pister, E.P. (1995). Ethics of native species restoration: the Great Lakes. *Journal of Great Lakes Research*, 21(Supp. 1): 10-16.
- Pommersheim, F. (1997, November 4). *Indian Law Symposium*. Sponsored by the Thomas M. Cooley Law Review and the Michigan Indian Law Center.
- Post, J.R., Sullivan, M., Cox, S., Lester, N.P., Walters, C.J., Parkinson, E.A., Paul, A.J., Jackson, L., and Shuter, B.J. (2002). Canada's recreational fisheries: the invisible collapse. *Fisheries*, 27(1): 6-17, p. 12.
- President's Special Message to the Congress on the Problems of the American Indian: The Forgotten American. (March 6, 1968). *Public Papers 1, 1968-69*, p. 335 (President Johnson).
- President's Message to Congress on Indian Affairs (July 8, 1970). *Public Papers 1970*, p. 564 (President Nixon).
- Prucha, F.P. (1975). *Documents of United States Indian Policy*. University of Nebraska Press: Lincoln, NE, p. 219-221.

- Prucha, F.P. (1994). *American Indian Treaties: The History of a Political Anomaly*. University of California Press: Berkley, CA, p. 53, 63-64, 132, 167, 198, 404-405, 410-415.
- Public Law 280. 83rd Congress, 1st session, passed August 15, 1953. *U.S. Statutes at Large* 67: 588-90.
- Puget Sound Gillnetters Association v. Moos*, 565 P.2d 1151 (1977).
- Puyallup Tribe v. Department of Game of Washington*, 391 U.S. 392 (1968).
- Puyallup Tribe v. Department of Game of Washington (Puyallup III)*, 433 U.S. 175 (1976).
- Pycha, R.L. & King, G.R. (1975). Changes in the lake trout population of southern Lake Superior in relation to the fishery, the sea lamprey, and stocking, 1950-1970. *Great Lakes Fishery Commission Technical Report 28*. Ann Arbor, MI: Great Lakes Fishery Commission, p. 29.
- Rastetter, W. (1997, Sept. 28). The Grand Traverse Band of Ottawa and Chippewa Indians: our opinion. *Traverse City Record Eagle*, p. E11.
- Response to Informational Filing by the Grand Traverse Band of Ottawa and Chippewa Indians, *United States v. State of Michigan*, No. 2:73-CV-26 (M26-73)(W.D. Mich. 1997).
- Reynolds, L. (1984). Indian hunting and fishing rights: the role of tribal sovereignty and preemption. *North Carolina Law Review*, 62(4): 743-793, p. 743-744.
- Rosenthal, H.D. (1990). *Their Day in Court: A History of the Indian Claims Commission*. Garland Press: New York, NY, p. 170.
- Rostlund, E. (1952). Freshwater fish and fishing in Native North America. *University of California Publications in Geography, Vol. IX*. Berkley, CA: University of California Press, p. 29-30.
- Rubenstein, B.A. (1976). Justice denied: Indian land frauds in Michigan: 1855-1900. *Old Northwest* 2(2), p. 133-139.
- Sadewasser, S. (personal communication, November 16, 1998).
- Sargent, M. & Kibbey, R. (1997). *An Assessment of the Impact of the 1985 Consent Decree on Fishing Operations by Grand Traverse Band Members*. Kalamazoo, MI: Community Research and Education Center.

- Schlender, J.H. (1991). Treaty Rights in Wisconsin: A Review. *Northeast Indian Quarterly*: 8(1): 4-16, p. 4, 8, 11.
- Schwandt, T.A. (1994). Constructivist, interpretivist approaches to human inquiry. In Denzin, N.K. and Lincoln, Y.S. (Eds.), *Handbook of Qualitative Research*, pp. 118-137. Sage Publications: Thousand Oaks, CA, p. 125.
- Selin, S. and Chavez, D. (1995). Developing a collaborative model for environmental planning and management. *Environmental Management*, 19(2):189-195, p. 190.
- Selgeby, J.H. (1995). Introduction to the proceedings of the 1994 International Conference on Restoration of Lake Trout in the Laurentian Great Lakes. *Journal of Great Lakes Research*: 21(Supp. 1), 1.
- Senate Report No. 667, 96th Congress, 2d. Session, 1-2 (1980).
- Sharp, E. (1998, July 30). Commission targets lamprey source. *Detroit Free Press*, p. 1-4.
- Shulz, S. (2001). *United States v. Michigan: Treaty Fishing Rights in the Great Lakes*. Presentation for a seminar in the Department of Fisheries & Wildlife, Michigan State University, East Lansing, MI.
- Shuter, B.J. and Mason, D.M. (2001). *Exotic Invertebrates, Food-Web Disruptions, and Lost Fish Production: Understanding Impacts of Dreissenid and Cladoceran Invaders on Lower-Lake Fish Communities and Forecasting Invasion Impacts on Upper-Lake Fish Communities*. Report prepared for the Board of Technical Experts, Great Lakes Fishery Commission.
- Silvern, S.E. (1999). Scales of justice: law, American Indian treaty rights and the political construction of scale. *Political Geography*, 18: 639-668.
- Smith, H.M. & Snell, M.M. (1891). Review of the fisheries of the Great Lakes in 1885. In *Report of the Commissioner for 1887*. (pp. 1-333) Washington, D.C.: U.S. Government Printing Office.
- Smith, K. (2001). *Treaty Fishing in the Great Lakes: Year 2000 Consent Decree*. Presentation for a seminar in the Department of Fisheries & Wildlife, Michigan State University, East Lansing, MI.
- Smith, S.H. (1968). Species succession and fishery exploitation in the Great Lakes. *Journal of the Fisheries Research Board of Canada*: 25, 667-693.
- Smith, S.H. (1970). Species interactions of the alewife in the Great Lakes. *Transactions of the American Fisheries Society*: 99(4), 743-765.

- Smith, S.H. (1972). Factors of ecological succession in oligotrophic fish communities of the Laurentian Great Lakes. *Journal of Great Lakes Research*: 25, 667-693.
- Smith, B.R. & Tibbles, J.J. (1980). Sea lamprey (*Petromyzon marinus*) in Lakes Huron, Michigan, and Superior: history of invasion and control, 1936-1978. *Canadian Journal of Fisheries and Aquatic Sciences*: 37, 1780-1801.
- Sohappy v. Smith*, 302 F. Supp. 899 (1969).
- Springstead, B. (1998). Making progress. *Grand Traverse Area Sport Fishing Association Newsletter*, 1(3), p. 2.
- Springstead, B. (August 25, 2000). The agreement. *Grand Traverse Area Sport Fishing Association*, 1(7), p.1.
- State of Michigan's Brief in Support of Defendant's Motion for a Preliminary Injunction, *United States v. State of Michigan*, No. 2:73-CV-26 (M26-73)(W.D. Mich. Filed August 29, 1997).
- State v. Satiacum*, 314 P.2d 400 (1957).
- Statement on Indian Policy (January 24, 1983). *Public Papers 1, 1983*, p. 96 (President Reagan).
- Strauss, A.L. & Corbin, J. (1990). *Basics of Qualitative Research: Grounded Theory Procedures and Techniques*. Newbury Park, CA: Sage Publications, p. 23.
- Strauss, A.L. and Corbin, J. (1998). *Basics of Qualitative Research Techniques and Procedures for Developing Grounded Theory*. (2nd ed.) Sage Publications: Thousand Oaks, CA, p. 43-46, 48-52, 66, 202-203.
- Susskind, L. and Cruikshank, J. (1987). *Breaking the Impasse: Consensual Approaches to Resolving Public Disputes*. Basic Books: New York, NY, p. 21-34, 136-137.
- Talhelm, D. (1979). *Current Estimates of Great Lakes Fisheries Values: 1979 Status Report*. Ann Arbor, MI: Great Lakes Fishery Commission.
- Talhelm, D. (Winter 1979). Fisheries: Dollars & cents. *Water Spectrum*, p. 9.
- Tanner, H.H. (1974). Report *United States v. State of Michigan* No. M 26-73 C.A., U.S.D.C (Western District of Michigan, Northern Division), p. 1, 38, 40, 47.
- Tanner, H., Patriarche, M.H. & Mullendore, W.J. (1980). *Shaping the World's Finest Freshwater Fishery*. Lansing, MI: Michigan Department of Natural Resources, p. 22, 27-29, 33, 35-56, 58-59, 82.
- Tanner, H.H. (1987). *Atlas of Great Lakes Indian History*. Norman, OK: University of Oklahoma Press, p. 12, 19, 22.

- Taylor, S. J. & Bogdan, R. (1984). *Introduction to Qualitative Research Methods: The Search for Meaning*. (2nd ed.) New York, NY: John Wiley Press, p. 1-2.
- Tiner, R.W., Jr. (1984). *Wetlands of the United States: Current Status and Recent Trends*. Washington, D.C.: Government Printing Office, p. 13.
- Trade and Intercourse Act of 1790, 1 Stat. 137.
- Treaty of 1820, 7 Stat. 206 (1821).
- Treaty of 1855, 11 Stat. 624.
- Treaty of Ghent, 8 Stat. 218 (1814).
- Treaty of Hopewell 7 Stat. 18 (1785).
- Treaty of Medicine Creek, 10 Stat. 1132 (1855).
- Treaty of Point Elliot, 12 Stat. 927 (1863).
- Treaty of September 30, 1854, 10 Stat. 1109.
- Treaty of Washington, 7 Stat. 491 (March 28, 1836).
- Treaty with the Nisquallys, 10 Stat. 1132 (1855).
- Treaty with the Yakima, 23 Stat. 951 (1863).
- Tribes, state reach fishing agreement. (2000, July 14). *Detroit Free Press*, p. 3B.
- True, F.W. (1887). The fisheries of the Great Lakes. In Goode, G.B. (Ed.), *The Fisheries and Fishing Industries of the United States*. (pp. 631-673) Washington, D.C.: U.S. Commission on Fish and Fisheries.
- Tulee v. Washington*, 315 U.S. 681 (1942).
- Turner, S.D. (1989). Native American's right to hunt and fish: an overview of the aboriginal spiritual and mystical belief system, the effect of European contact and the continuing fight to observe a way of life. *New Mexico Law Review*, 19: 376-423, p. 377, 381-384.
- United States Commission on Civil Rights. (1981). *Indian Tribes: A Continuing Quest for Survival*. Report of the U.S. Commission on Civil Rights. Government Printing Office: Washington, D.C., p. 20-21, 42-43, 82-83.
- United States Constitution (1787).

United States' Request for Relief. *United States v. State of Michigan*, No. 2:73-CV-26 (M26-73)(W.D. Mich. September 20, 1999).

United States v. Kagama, 118 U.S. 375 (1887).

United States v. Shoshone Tribe, 304 U.S. 111 (1938).

United States v. State of Michigan, 471 F. Supp. 192 (W.D. Mich. 1979), *remanded*, 623 F.2d 448 (6th Cir. 1980), *as modified*, 653 F.2d 277 (6th Cir. 1981), *cert. denied*, 454 U.S. 1124 (1981).

United States v. State of Michigan, 89 F.R.D. 307, 308-314 (W.D. Mich. 1980).

United States v. State of Michigan, 505 F. Supp. 467 (W.D. Mich. 1980).

United States v. State of Michigan, 508 F.Supp. 480 (W.D. Mich. 1980).

United States v. State of Michigan, 520 F. Supp. 207 (W.D. Mich. 1981).

United States v. State of Michigan, 623 F.2d 448 (6th Cir. 1980).

United States v. State of Michigan, 653 F. 2d 277 (6th Cir. 1981).

United States v. State of Michigan, Consent Order 1985 Settlement Agreement, 520 F. Supp. 207 (W.D. Mich. 1981) (May 31, 1985).

United States v. State of Michigan (1985 Consent Order), 12 ILR 3087 (1985).

United States v. State of Michigan, No. M26-73 (W.D. Mich. October 15, 1992).

United States v. State of Michigan, No. 2:73-CV-26 (M26-73)(W.D. Mich. September 11, 1997).

United States v. State of Michigan (2000 Consent Decree), Case No. 2:73-CV-26 (M26 73)(W.D. Mich. August 7, 2000).

United States v. State of Oregon, 769 F.2d 1410 (9th Cir. 1985).

United States v. State of Washington, 384 F.Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d. 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976).

United States v. State of Washington, 459 F.Supp. 1020 (W.D.Wash), *aff'd*, 573 F.2d 1123 (9th Cir. 1978).

United States v. State of Washington, 496 F.2d 620 (9th Cir.) (1974).

United States v. State of Washington, 694 F.2d 188 (9th Cir. 1982), *cert. denied*, 463 U.S. 1207 (1983).

- United States v. State of Washington*, 759 F.2d 1353 (9th Cir. 1985).
- United States v. State of Washington*, 774 F.2d 1470 (9th Cir. 1985).
- United States v. Winans*, 198 U.S. 371 (1905).
- Updyke, F.A. (1915). *The Diplomacy of the War of 1812*. John Hopkins Press: Gloucester, MA, p. 226-227.
- 25 U.S.C. §71 (1871).
- Van Oosten, J. (1937). The dispersal of smelt, *Osmerus mordax* (Mitchill) in the Great Lakes region. *Transactions of the American Fisheries Society*: 66(1936): 160-161.
- Van Oosten, J., Hile, R., & Jobes, F.W. (1946). The whitefish fishery of Lakes Huron and Michigan with special reference to the deep trapnet fishery. *U.S. Fish and Wildlife Service Bulletin*: 40, 297-394.
- Walker, H. (1979). Indian hunting and fishing rights. *North American Wildlife Conference Transactions*, (44): 618-619.
- Warren, W.W. (1984). *History of the Ojibway People*. St. Paul, MN: Minnesota Historical Society, p. 40, 97.
- Washburn, W.E. (1985). Land claims in the mainstream. In Sutton, I. (Ed.) *Irredeemable America*. University of New Mexico: Albuquerque, NW, p. 23-24.
- Washington State Commercial Passenger Fishing Vessel Association v. Tollefson*, 571 P.2d 1373 (1977).
- Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658 (1979).
- Weeks, G. (1992). *Mem-ka-weh: Dawning of the Grand Traverse Band of Ottawa and Chippewa Indians*. Traverse City, MI: Village Press, p. 3, 19, 41, 47, 56-57.
- Wells, L. (1970). Effects of alewife predation on zooplankton populations in Lake Michigan. *Limnology and Oceanography*: 15(4): 556-565.
- Wells, L. & McLain, A.L. (1973). Lake Michigan: man's effects on native fish stocks and other biota. *Great Lakes Fishery Commission Technical Report 20*. Ann Arbor, MI: Great Lakes Fishery Commission.

- Whyte, W.F. (1984). *Learning from the Field: A Guide from Experience*. Beverly Hills, CA: Sage Publications, p. 118-121-126.
- Wilkinson, C.F. (1991). To feel the summer in the spring: the treaty fishing rights of the Wisconsin Chippewa. *Wisconsin Law Review*, (3):375-414, p. 376, 403.
- Williams, C.H. & Neubrech, W. (1976). *Indian Treaties – American Nightmare*. Outdoor Empire Publishing: Seattle, WA.
- Williams, T. (1986). *Don't Blame the Indians: Native Americans and the Mechanized Destruction of Fish and Wildlife*. GSJ Press: South Hamilton, MA.
- Williams v. Lee*, 358 U.S. 217 (1959).
- Winters v. United States*, 207 U.S. 564 (1908).
- Wondolleck, J.M. and Yaffee, S.L. (2000). *Making Collaboration Work: Lessons from Innovation in Natural Resource Management*. Island Press: Washington, D.C., p. 134, 163-164.
- Wood, M.C. (1995). Protecting the attributes of Native sovereignty: a new trust paradigm for federal actions affecting tribal lands and resources. *Utah Law Review*, (1): 109-237, p. 113-237.
- Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).
- Yanow, D. (2000). *Conducting Interpretive Policy Analysis*. Sage Publications: Thousand Oaks, CA, p. 9-10, 14-22, 31-33.
- Zint, M.T., Taylor, W.W., Carl, L., Edsall, C.C., Heinrich, J., Sippel, A., Lavis, D., & Schaner, T. (1995). Do toxic substances pose a threat to rehabilitation of lake trout in the Great Lakes? A review of the literature. *Journal of Great Lakes Research* 21(Supp. 1): 530-546, p. 539-540.

MICHIGAN STATE UNIVERSITY LIBRARIES



3 1293 02372 6825