2007 Inland Consent Decree Overview

Eight Principal Treaties 1807 - 1842

Outline

- 1836 Treaty Background
- Treaty rights litigation
- General overview
  - Negotiation vs. Litigation
  - DNR issues
    - Fisheries
    - Wildlife
    - Law Enforcement
    - Land Management

1836 Treaty

- Between the United States, the Ottawa and Chippewa Tribes of the northern Lower Peninsula and eastern Upper Peninsula
- Primary objective of U.S was to obtain land cession from the tribes

1836 Treaty Language

1836 Treaty, Article 13:

"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"

Treaty Rights Litigation

- 1976 State of Michigan v. LeBlanc ruling held:
  - 1836 Tribes did reserve Great Lakes commercial and subsistence fishing rights in the 1836 Treaty
  - State may regulate Tribal fishing only when:
    - The regulation is necessary to preserve the fish
    - Application to the Tribe is necessary to preserve the fish
    - The regulation does not discriminate against the Tribe

Treaty Rights Litigation

- United States v Michigan
  - Filed in 1973
  - Assigned to District Judge Noel Fox
  - Three tribes eventually intervene as Plaintiffs:
    - Bay Mills Indian Community
    - Sault Ste. Marie Tribe of Chippewa Indians
    - Grand Traverse Band of Ottawa and Chippewa Indians

Treaty Rights Litigation

- 1979 Fox Decision
  - Tribes have a treaty right to fish in Great Lakes
  - State is without authority to regulate that right

Treaty Rights Litigation

- U.S. Court of Appeals in 1981:
  - Affirms existence of Great Lakes Treaty fishing right
  - State may regulate Tribal fishing only upon a showing that the regulation:
    - Is a necessary conservation measure
    - Is the least restrictive alternative to preserve the fishery from irreparable harm
    - Does not discriminatorily harm Tribal anglers or favor other classes of anglers

Key Legal Concepts

- Treaties are the "supreme" law of the land (U.S. Constitution)
- Sovereignty – Tribes are governments
- Courts recognize the following canons of construction
  - Disputed Treaty language should be liberally construed in favor of the Tribes
  - Ambiguities of treaty language should be resolved in favor of the Tribes
  - Treaties should be construed as the Indians understood them at the time

Case History: Great Lakes Fishing

- 1979 – Federal Court, Fox Decision
- 1985 – First Consent Decree, Great Lakes fishing
  - 15 year life span
- 1997 – Two additional Tribes Federally recognized; become part of the case
  - Little Traverse Bay Band of Odawa Indians (Petoskey)
  - Little River Band of Ottawa Indians (Manistee)
- 2000 – Second Consent Decree, Great Lakes Fishing
  - 20 year life span
  - Deferred the inland issue until 2000 Great Lakes Consent Decree was finished

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US v. Michigan: Inland Litigation

- 2003 – State Initiates Inland Case in Federal Court
  - Necessary to resolve ongoing dispute of continued existence of the Tribes' Inland Article 13 rights
- 2003 – 2005
  - Trial preparation and discovery
- 2005 – present
  - Settlement negotiations

Inland Negotiations: Parties

- State of Michigan
- Five Tribes
  - Bay Mills Indian Community
  - Sault Ste. Marie Tribe of Chippewa Indians
  - Grand Traverse Band of Ottawa and Chippewa Indians
  - Little River Band of Ottawa Indians
  - Little Traverse Bay Band of Odawa Indians
- United States
- Amici

Why Negotiate?

- 1979 Fox Decision: Law of the case
- Applicable Canons of Construction
- Risks of litigation: Wisconsin and Minnesota outcome
- Create an opportunity for a more acceptable outcome

2007 Consent Decree
A Negotiated Settlement
(Agreement)

- Defines the extent of Inland Article 13 rights
- Establishes parameters that define where, when, and how the Tribes may exercise those rights

2007 Consent Decree

- General concepts
  - Provides necessary protection and management of natural resources
  - Provides stability and predictability
  - Does not affect private land* other than large tracts of commercial forest land already open to public hunting and fishing

2007 Consent Decree

- General concepts
  - Harvestable surpluses of resources will accommodate Tribal interests in most cases
    - Essentially no effect on harvest by State-licensed recreational users
    - Essentially no changes to State regulations required
  - Tribal harvest will be for personal subsistence
  - No commercial harvest operations, with minor exceptions

2007 Consent Decree

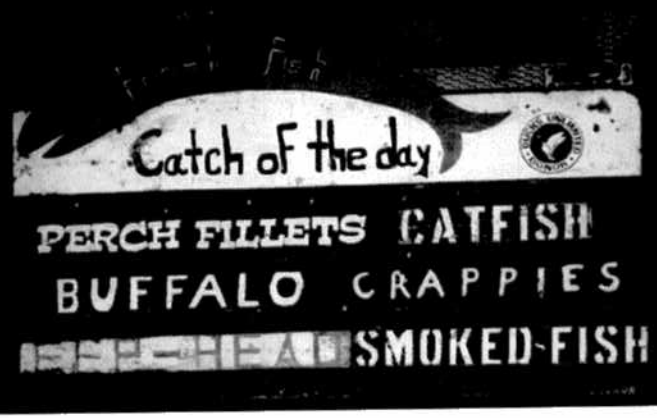
- General concepts
  - DNR/Tribal communications and consultation
    - Establishes protocols for sharing information and consulting on management and research activities
    - Establishes committees and specifies frequency of meetings to seek consultation on:
      - Work plans
      - Proposed regulations
      - Specific issues
  - Establishes informal and formal processes for resolving disputes

Fisheries

- Guiding Principle
  - Sufficient aquatic resources are available to accommodate Tribal subsistence opportunities while:
    - protecting stocks
    - minimizing impacts on harvest by State-licensed anglers
    - maintaining the current State regulatory framework

Fisheries

- Gill nets and snagging prohibited
- Commercial harvest and sale of fish is prohibited
- Use of impoundment nets and large seines are limited through a permit and reporting system
- Open water spearing for walleye, Chinook salmon and steelhead is limited through a permit and reporting system
- Tribes will follow tribal regulations which establish seasons, size, and bag limits



Fisheries

- Tribes may conduct assessment, restoration and/or enhancement activities under mutual agreement with the state
- Data sharing & planning is coordinated with the state

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Fisheries

Agreement recognizes:

- Research Area restrictions/closures
- Egg collection weir fishing restrictions
- Fishing prohibition near lamprey weirs
- Protection of threatened and endangered species

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Fisheries

- Number of lines while fishing; Tribal up to 4 lines open water, up to 7 lines ice fishing
- Spawning closures – protections recognized
- Smelt bag limit – if state adopts a limit
- Spearing of Atlantic salmon is prohibited

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Fisheries

Tribes will recognize existing special regulations for:

- Trout stream Types 5, 6, 7
- Brook and brown trout seasons
- Type D trout lakes
- Quality lakes
- Special coolwater pike and musky lakes

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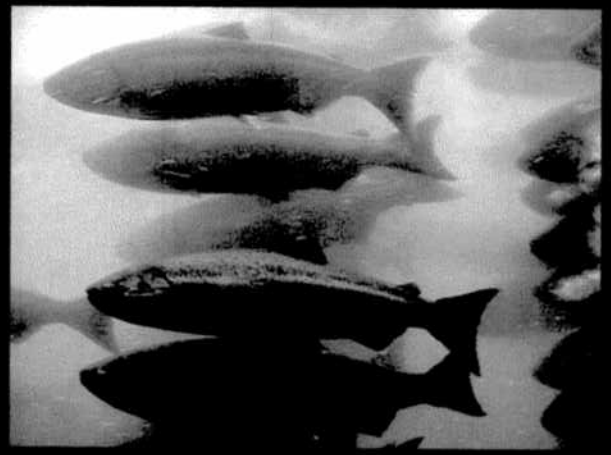
Fisheries

- Extensive biological protections built into steelhead, Chinook, and walleye protocols



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Fisheries

- Harvest is allowed under a permit and reporting system for:
  - Steelhead
  - Chinook salmon
  - Walleye
- Harvest is not currently allowed for:
  - Sturgeon

Fisheries

- Steelhead
  - Agreed upon set of protected streams with reduced harvest potential and limitations for harvest on all other waters

Fisheries

- Salmon
  Special protection for egg collection on:
  - Little Manistee River
    - Graduated harvest Sept. 1 – Nov. 14
  - Other rivers: harvest allowed

Fisheries

- Walleye
  - Inland lakes protocol with daily bag and size limit and total allowable harvest for each lake
  - Maintain harvest at protective levels through permit and reporting system
- Bays de Noc tributaries – special limits
- Muskegon River – special limits

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Wildlife

- Allocation of resources
  - Deer
  - Turkey
  - Elk
  - Black Bear
  - Migratory Birds
  - Other game

Wildlife

- Deer
  - Firearm season allowed from the day after Labor Day through October 31 and November 15 through the first full weekend in January
  - Firearm quiet period from November 1 through November 14
  - Tribal members limited to a season bag limit of five deer
    - Only two can be antlered bucks
    - Only one buck allowed with firearm before November 1
  - Archery season from the day after Labor Day through the first full weekend in January

Wildlife

- Turkey
  - Tribes can authorize:
    - A spring male only hunt from April 15 to June 15
    - A fall any-sex hunt from October 1 to November 14
  - Tribal regulations specify season bag limits

Wildlife

- Elk
  - Tribes can issue a number of permits equal to 10% of licenses issued by the State
  - If the State issues less than 101, but greater than 50 licenses, tribes can issue 10 permits
    - Guaranteed minimum of five permits
  - Permits must be distributed geographically consistent with the State's management objectives
  - Tribal hunts will occur during State-regulated seasons, and may continue for 15 days past last elk season closing date

Wildlife

- Black Bear
  - Tribes may authorize up to 10% of the harvest in each BMU
  - May increase harvest up to 12.5% if 10% met in previous year
  - Same start and end dates as State regulations
    - No breaks
  - Up to two additional permits are allowed at any time per tribe
    - Ceremonial and medicinal uses

Wildlife

- Migratory Birds
  - Tribes will abide by Federal Tribal regulations and harvest frameworks

Wildlife

- Other game is hunted under current tribal regulations
- Any future changes in tribal regulations available for review by all parties

Law Enforcement

General Principles

- Michigan Conservation Officers may enforce provisions of the Decree
- Violations of fish and game laws by Tribal members in the 1836 ceded territory shall be heard in a Tribal forum

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Law Enforcement

- Michigan Penal Code violations prosecuted in state courts
  - Reckless use of a firearm
  - ATV/ORV DUI

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Law Enforcement

- Violations prosecuted in State OR Tribal courts
  - Safety zone regulation
  - Recreational trespass
  - Hunter/angler harassment regulations

Law Enforcement

- Vehicles/Vessels
  - Tribes regulate licensing of ORVs, snowmobiles, and boats that are being used while members are engaged in exercising Treaty-related hunting, trapping, fishing, or gathering activities.
  - State regulates other use by Tribal members

Law Enforcement

- Authority to stop and check
  - The DNR with assistance of the Attorney General has determined and the Decree authorizes Tribal officers to stop and check hunters and anglers in the field to determine if they are Tribal members and to enforce Tribal regulations on Tribal members.

Law Enforcement

- Deputization
  - If Tribal officers are deputized by local or county Law Enforcement Agencies, under applicable law, they may enforce State regulations with respect to non-tribal members.

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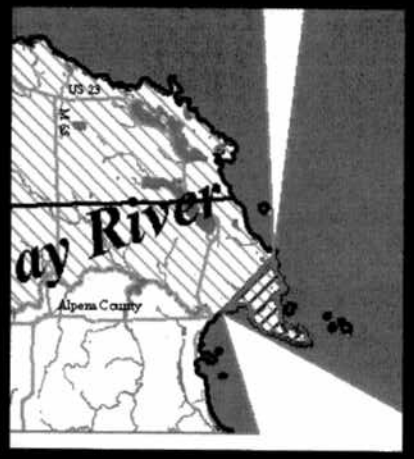
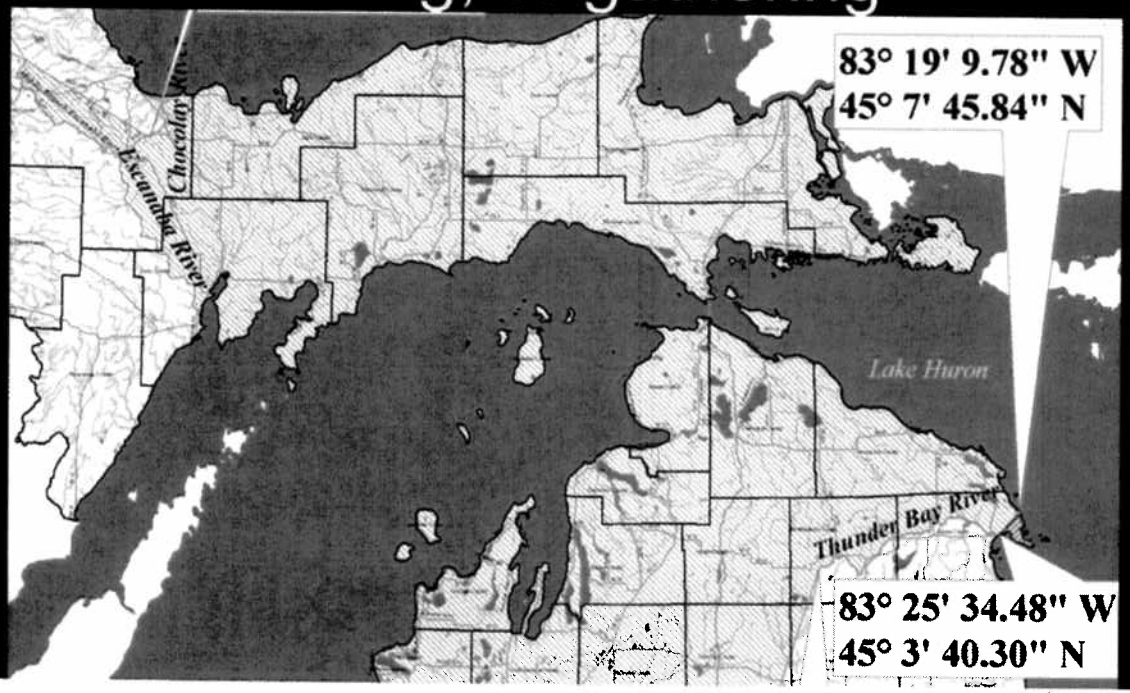
Law Enforcement

- Two boundary areas are in dispute
- Resolution deferred
- No tribal hunting, fishing, or gathering





Land Management

- Gathering Activities
- Plant materials and other natural resources can be collected and utilized for personal, medicinal, cultural or traditional craft use
- Maple sap collection/Sugar Bushes
  - DNR and Tribes will work jointly to determine suitable locations
  - Tribal Permit required
  - Allows for personal sale of modest quantities

Land Management

- Firewood, Conifer Boughs, Black Ash, Basswood, and Ironwood, White Birch Bark
  - DNR and Tribes shall work cooperatively to identify areas suitable for gathering activities
  - Tribal Permit required
  - Tribal Regulations must be developed for all but Firewood collection
- Cannot harvest timber or extract sand, gravel or other minerals from State land

Land Management

- Temporary Structures
  - Modest use with size and time restrictions
  - Tribes may authorize hunting blinds on state land consistent with current State regulations