

Consent Decrees



Trevor VanDyke
Director Legislative & Legal Affairs Office
Tribal Coordinator

James Dexter
Fisheries Division Chief

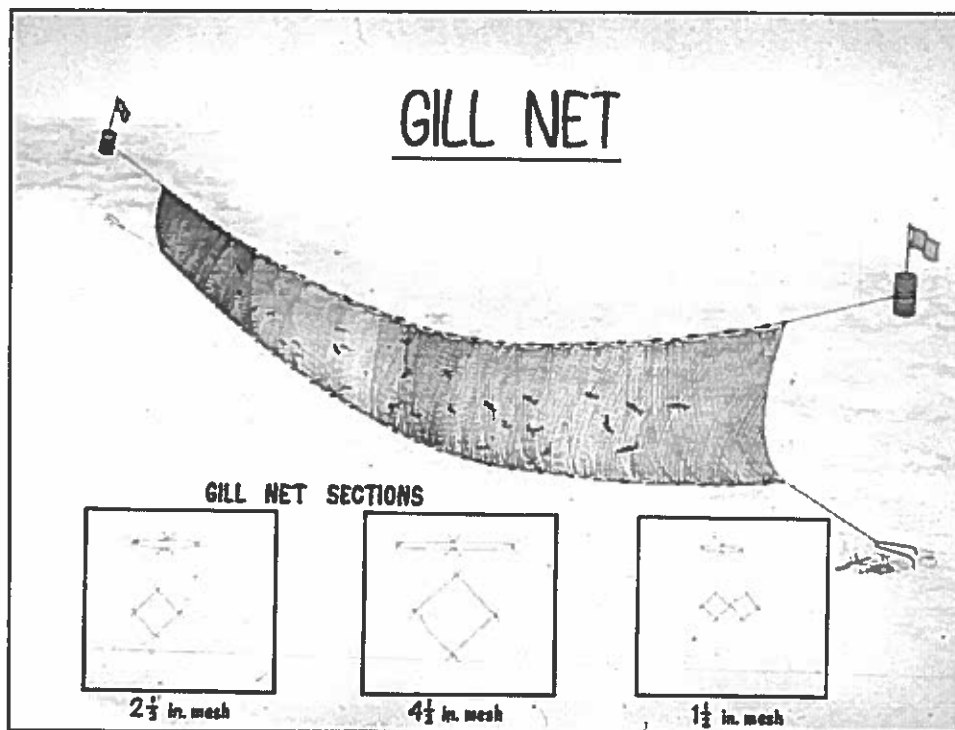
Key Legal Concepts

- Treaties “supreme” law of the land (U.S. Constitution)
- Unique obligations toward Tribes based on trust responsibility, treaty provisions
- Sovereignty - tribes are governments and citizens of the State
- “Ceded Territory” refers to land transferred to the U.S. via treaty
- Reserved Rights - Native Americans retain all rights not explicitly abrogated in treaties or other legislation

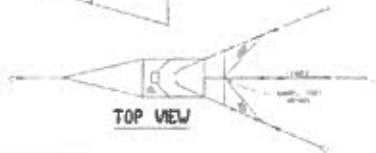


Key Legal Concepts

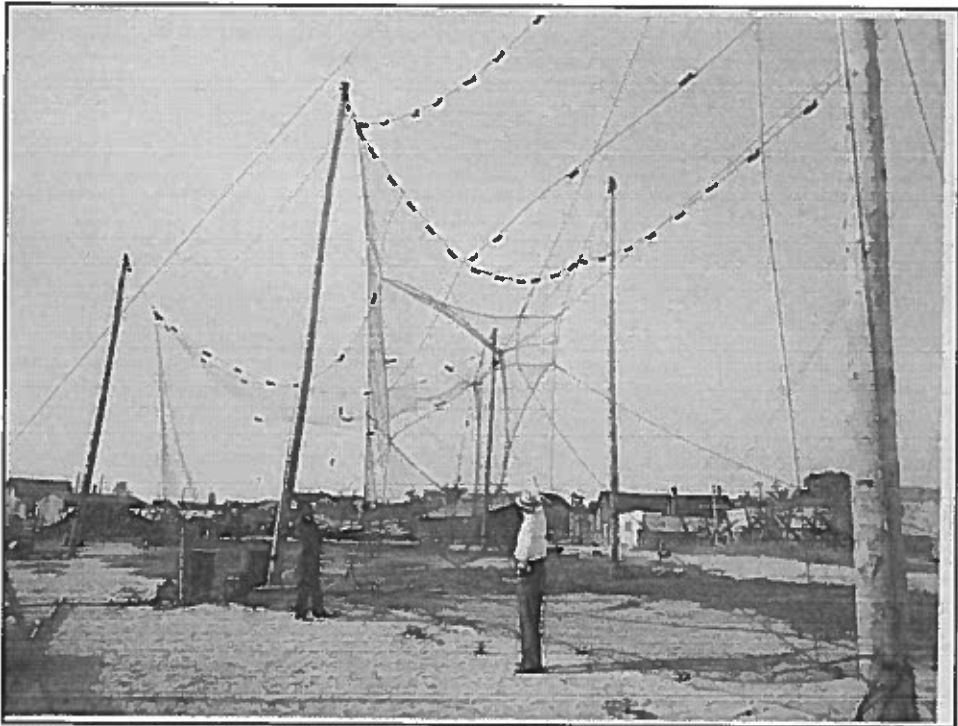
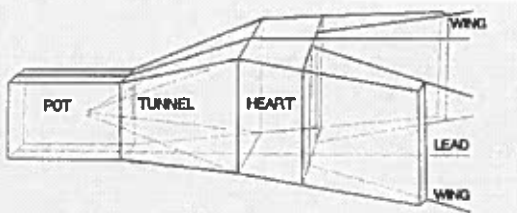
- Recognized Tribes were disadvantaged when negotiating treaties
- Disputed treaty language should be liberally construed in favor of Tribes
- Ambiguities of treaty language should be resolved in favor of Tribes
- Treaties should be construed as the Indians understood them at time of signing



TRAP NET



TOP VIEW



1836 Treaty

- Between U.S., Ottawa and Chippewa Tribes of northern Lower Peninsula and eastern Upper Peninsula
- Objective to obtain land cession from tribes
- 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 State of Michigan v. LeBlanc

- Abe LeBlanc, Bay Mills Tribal Fisher
- Arrested and charged in state court in 1971
 - Fishing without a commercial license
 - Using prohibited gear (large mesh gill nets)
 - Convicted, affirmed by Court of Appeals



Treaty Rights Litigation MI Supreme Court Reversal 1976

- Tribes did reserve Great Lakes commercial and subsistence fishing rights in 1836 Treaty
- State may regulate Tribal fishing only when:
 - Necessary to preserve fish
 - Application to Tribe is necessary to preserve fish
 - Does not discriminate against Tribe



Treaty Rights Litigation U.S. v. Michigan

- Filed and assigned in 1973
- Three tribes intervene as Plaintiffs
 - Bay Mills Indian Community
 - Sault Ste. Marie Tribe of Chippewa Indians
 - Grand Traverse Band of Ottawa and Chippewa Indians
- Issued ruling "Fox Decision " in 1979
 - Tribes have treaty right to fish in Great Lakes
 - State without authority to regulate that right



Treaty Rights Litigation U.S. Court of Appeals

- Affirms existence of Great Lakes Treaty fishing right in 1981
- State may regulate Tribal fishing only if
 - Necessary conservation measure
 - Least restrictive alternative to preserve fishery from irreparable harm
 - Does not discriminatorily harm Tribal anglers or favor other classes of anglers



Treaty Rights Litigation Impacts

- Chaos in the fishery from 1980 to 1985
- "Racehorse" fishery
- Court-ordered closures
- Anger, hostility, threats of violence
- Tribes petition court for allocation in 1983
- Special master appointed in 1984



Treaty Rights Litigation 1985 Great Lakes Consent Decree

- Zonal approach to commercial fishing
- Lake Trout rehabilitation measures
- 15 year term - expired on May 31, 2000



Treaty Rights Litigation 2000 Negotiations

- Two "new" Tribes
- Tribes wanted more flexibility
- Lake trout management was not working
- Continued conflict and litigation
- Court orders negotiations for successor agreement in 1998
- Negotiations begin with Court ordered mediator in 1999
- Signed 20 year agreement in August 2000



Treaty Rights Litigation 2000 Consent Decree

- 9 state-licensed fishers in Bay de Noc area sell their operations
- Tribes received licenses in return for reduction in gill net effort
 - Retired 14 million feet of gill net
 - Converted 10 gill net fishers to trap nets
 - Moved to Bay de Noc and Lake Huron
 - Established penalties for overharvest



Treaty Rights Litigation 2000 Consent Decree

- State Funding - \$17,225,000
 - Gear conversion, training, access, docking
- Federal Funding - \$3,250,000
 - Fishing related activities, access and docking



Treaty Rights Litigation 2000 Consent Decree

- Governs allocation, management, and regulation of State and Tribal fisheries in 1836 Treaty waters
- Provides additional provisions to address Federal, State, and Tribal management and allocation concerns
- Defines 1836 Treaty waters as all waters of Lake Huron, Lake Michigan, Lake Superior, and connecting waters, within the area ceded in Article First of the Treaty of March 28, 1836.



Treaty Rights Litigation 2000 Consent Decree

- 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



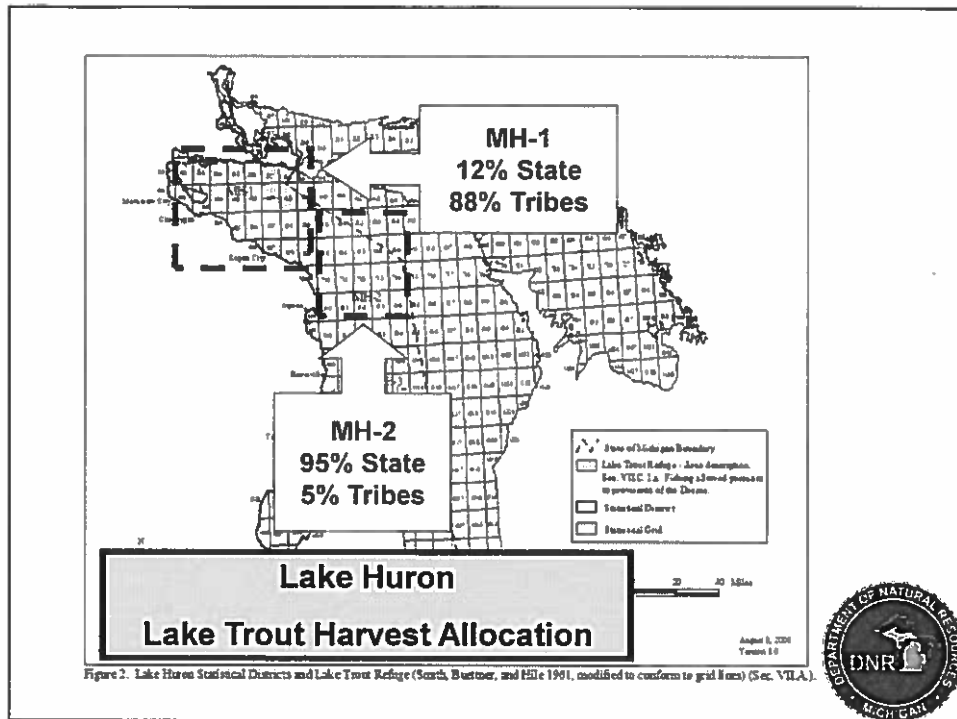


Figure 2. Lake Huron Statistical Districts and Lake Trout Refuge (Sorch, Buetner, and Hill 1991, modified to conform to grid lines) (See VHLA).

Treaty Rights Litigation 2007 Inland Consent Negotiations

- State initiates in Federal Court in 2003
 - U.S. v. Michigan
 - Necessary to resolve ongoing dispute of continued existence of Tribes' Inland Article 13 rights
- Trial preparation and discovery in 2003 thru 2005
- Settlement negotiations 2005 thru 2007



Treaty Rights Litigation 2007 Consent Decree

- Negotiated settlement with no expiration
- Defines extent of Inland Article 13 rights
- Defines extent of right to hunt, and other usual privileges of occupancy, secured by 1836 Treaty
- Established parameters that define where, when, and how Tribes may exercise those rights



Treaty Rights Litigation 2007 Consent Decree

- Established restoration, reclamation, enhancement projects, and assessment activities
- Established process for consultation and information sharing and dispute resolution
- Provides necessary protection and management of natural resources
- Does not affect private land other than commercial forest land



Treaty Rights Litigation 2007 Consent Decree

- 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



Treaty Rights Litigation 2007 Consent Decree

- Tribal harvest will be for personal subsistence
- No commercial harvest operations with minor exceptions
- DNR/Tribal communications and consultation protocols
 - Management and research activities
 - Committees and frequency of meetings on work plans, proposed regulations and specific issues
- Establishes informal and formal processes for resolving disputes



Treaty Rights Litigation 2007 Consent Decree

- Gill nets and snagging prohibited
- Use of impoundment nets and large seines limited
- Open water spearing for walleye, Chinook salmon, and steelhead limited and Atlantic salmon prohibited
- Tribes will follow tribal regulations which establish seasons, size, and bag limits
- Spawning closures protections recognized



Treaty Rights Litigation 2007 Consent Decree

- Migratory birds - follow Federal Tribal regulations
- Turkey - Tribal regulations, spring and fall hunts
- Black Bear - 10% of state harvest and increase to 12.5% if 10% met previous year
- Elk - 10% of state harvest
- Deer - Tribal members limited to a season bag limit of 5 deer



Treaty Rights Litigation 2007 Consent Decree

- 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 determine suitable locations
 - Tribal permit required
 - Allows for personal sale of modest quantities



Treaty Rights Litigation 2007 Consent Decree

- Firewood, conifer boughs, Black Ash, Basswood, and Ironwood, White Birch bark
 - Work cooperatively to identify areas suitable for gathering activities
 - Tribal permit required
 - Tribal regulations must be developed for all but firewood collection



Treaty Rights Litigation 2007 Consent Decree

- Cannot harvest timber or extract sand, gravel, or other minerals from State land
- Temporary structures
 - Modest use with size and time restrictions
 - Tribes may authorize hunting blinds consistent with State regulations



Treaty Rights Litigation 2007 Consent Decree

- Michigan Conservation Officers may enforce provisions of Decree
- If Tribal officers are MCOLEs certified, may enforce State regulations with respect to non-tribal members
- Tribal forum - Violations of fish and game laws by Tribal members in 1836 ceded territory

Treaty Rights Litigation 2007 Consent Decree

- Tribes regulate licensing of ORVs, snowmobiles, and boats used in exercising Treaty-related hunting, trapping, fishing, or gathering activities
- State regulates other use by Tribal members
- State courts – violations of Michigan Penal Code
- State OR Tribal courts - violations of safety zone regulation, recreational trespass, hunter/angler harassment regulations



Questions?

