

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

UNITED STATES OF AMERICA,)	
Plaintiff,)	No. 2:73-cv-26
)	
and)	Honorable Paul L. Maloney
)	
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, and LITTLE TRAVERSE BAY BANDS)	
OF ODAWA INDIANS,)	
Plaintiff-Intervenors,)	
)	
-v-)	
)	
STATE OF MICHIGAN, et al.,)	
Defendants.)	
_____)	

**ORDER REGARDING GRAND TRAVERSE BAND OF OTTAWA AND
CHIPPEWA INDIANS' TRIBAL ZONE**

Following the latest extension of the 2000 Great Lakes Fishing Consent Decree (the “Consent Decree”), the expiration date of the Consent Decree has been extended “until all objections to a proposed successor decree have been adjudicated” (ECF No. 2027 at PageID.12022). In the same order extending the Consent Decree, the Court noted that it had been informed by the facilitative mediator that the State of Michigan (“the State”) and the Grand Traverse Band of Ottawa and Chippewa Indians (“GTB”) had reached a stalemate in their negotiations regarding the Grand Traverse Tribal Zone provisions in the proposed successor decree (*Id.* at PageID.12021). If the State and GTB failed to reach an agreement by November 21, 2022, in an effort to facilitate an agreement among as many

parties as possible, the Court ordered the State and GTB to present their separate proposals regarding GTB's Tribal Zone for the Court's review (*Id.*). The Court also indicated that, following oral argument, it will choose one proposal to adopt in its entirety into the successor decree (*Id.* at PageID.12022).

The State and GTB did not reach an agreement, and they filed their proposals under seal (ECF Nos. 2035, 2036). The Court heard oral argument from the State and GTB on each of their proposals (*see Minutes of Hearing*, ECF No. 2039).¹ Counsel for the United States also appeared, in accordance with the Court's order, in which counsel indicated that if the Court must adopt one proposal in its entirety, the United States recommends adopting GTB's proposal to conform with the law of the case.

The Court has thoroughly reviewed both proposals and considered the arguments of counsel. Each proposal analyzes five contested issues, four of which are common among both proposals. As counsel indicated at oral argument, the two remaining issues (permit notice procedures in Grids 813 and 814 and lake trout protections in Grids 812-814) have been resolved outside the courtroom by the parties. As such, there exists four outstanding issues that require the Court's guidance: (1) the extent of the permitting requirements for gill net fishing in Grids 813 and 814; (2) the extent of net effort limitation in Grids 815 and 816; (3) whether small mesh gill net fishing should be permitted in the north half of Grid 616; and (4) whether hook-and-line gear should be permissible gear for GTB commercial fishers.

¹ The question on burden of proof has not been raised. Consequently, the Court will adopt the burden of proof established by Judge Enslin in the 1985 opinion: "The parties supporting each plan carry their own burden of establishing that their plan satisfies the appropriate standards. The burden weighs equally on each advocate of the plan before this court." *See United States v. Michigan*, 12 Indian Law Rep. 3079, 3081 (W.D. Mich. 1985), available at ECF No. 1890-1.

Both proposals are reasonable. Each proposal is persuasive on some issues, and each proposal is unpersuasive on other issues. However, the Court indicated that it would adopt the entirety of one proposal, and the Court does not intend to deviate from that plan. In accordance with the law of this case, particularly Judge Enslen's 1985 opinion in which he was tasked with choosing between two proposals regarding the allocation of the fishery, the Court will adopt GTB's proposal. *See United States v. Michigan*, 12 Indian Law Rep. 3079 (W.D. Mich. 1985), available at ECF No. 1890-1.

Before explaining why the Court chooses to adopt GTB's proposal, the Court would be remiss if it did not address Judge Enslen's 1985 opinion, where Judge Enslen was presented with similar circumstances that this Court now faces. *See id.* As the parties in this case are well aware, in March 1985, the United States, the State, GTB, the Sault Ste. Marie Tribe of Chippewa Indians, and the Bay Mills Indian Community ("Bay Mills") reached an agreement regarding the Great Lakes fishery and signed a stipulation for entry of a consent judgment. After the district court entered the consent order approving the agreement, Bay Mills objected to the order and submitted an alternative allocation plan. Judge Enslen was then tasked with adopting the allocation plan contained in the agreement or the alternative plan that Bay Mills proposed.

In choosing to adopt the allocation plan in the 1985 agreement (and rejecting Bay Mills' proposal), Judge Enslen stressed the court's ultimate duties in presiding over this case: protection of the 1836 Treaty rights and protection of the Great Lakes fishery. *See id.* at 3080. He noted that he must choose the "fairest and most equitable management plan for the Great Lakes," and that he could choose one of the two plans or reject both—the latter

alternative requiring a full trial on the allocation issues. *See id.* Although the court’s overarching goal was to “reach a fair and equitable decision in keeping with the reserved rights of the Tribal fishermen and the preservation of the resource,” Judge Enslen also considered fifteen specific factors in choosing a proposal:

Preservation and conservation of the resource; impact of the plans on all three tribes; consistency of the plan with the tribal right to fish and the recognition that the resource is shared; reduction of social conflict; feasibility and methods of implementation; protection of Indian fishermen from discrimination in favor of other classes of fishermen; proximity; access; species of fish stocks available; harvestability of fish stocks; the economic impact on Indian fishermen; stability of the fishery; contaminant levels; management and marketing concerns; and flexibility versus predictability of the fishery.

Id. at 3081.

With regard to the present issue before the Court—whether the State or GTB’s proposal regarding GTB’s Tribal Zone should be adopted into the successor consent decree—not all fifteen of the factors articulated by Judge Enslen are relevant, but those that are relevant are mentioned below. The Court’s ultimate decision rests on the well-settled law of this case: that any State restrictions on Tribal fishing rights under the 1836 Treaty must be the least restrictive regulations necessary for the conservation of the Great Lakes fishery. *See United States v. Michigan*, 653 F.2d 277, 279 (6th Cir. 1981). In the Court’s judgment, the State and GTB’s proposals diverge on minor issues that do not hinge on the conservation of the shared resource. Therefore, in accordance with the law of this Case, it is the Court’s opinion that GTB’s proposal must be adopted into the successor consent decree. GTB has sufficiently established that its proposal places the least restrictive regulations on its Tribal fishing rights necessary to preserve the Great Lakes fishery.

The four outstanding issues of contention are thoroughly discussed below:

A. Permit Requirements for New Gill Net Fishers in Grids 813 & 814²

GTB proposal: Permits will be required for Tribal commercial fishers using gill nets in newly opened areas for the first three years after the successor decree takes effect.

State proposal: Permits will be required for Tribal commercial fishers using gill nets in newly opened areas until gill net fishing has occurred in the area for five consecutive years.

At the outset, it is important to note that there are two points of contention in regard to this issue. Under the 2000 Consent Decree, gill net fishing was not permitted in Grids 813 and 814. In negotiating the successor decree, the parties have agreed to open these Grids to gill net fishing and require new gill net fishers, for a limited period of time, to obtain a permit. However, the State and GTB disagree about (1) the triggering event that causes the expiration of the permit requirement, and (2) the duration of the expiration provision (how many years after the triggering event the permit requirement will be effective).

GTB argues that Grids 813 and 814 will not possess net effort limitations nor harvest restrictions under the successor decree, and therefore, the permit requirement creates unnecessary busywork for the Tribe. Nevertheless, in an effort to reach a good-faith agreement, GTB agreed to a permit requirement that will expire after a period of years. GTB asserts that, if the permit requirement expires three years after the entry of the successor decree, the State will have sufficient time to educate the public (particularly boaters) about gill nets and how to avoid them. Moreover, because trap nets were permitted in Grids 813

² Although the proposals differ on whether Grid 812 would be covered under the permit requirement provision, the parties have resolved that issue. At oral argument, they informed the Court that Grid 812 would *not* be covered under the permit requirement provision. The Court accepts the parties' agreement.

and 814 under the 2000 Consent Decree, GTB argues that three years is sufficient to properly educate the public, who is already familiar with seeing a fishing net scheme in the area.

Conversely, the State argues that the permit requirement should be in place for five years after “gill net fishing has occurred in the area” (ECF No. 2035 at PageID.12072). At oral argument, when the Court inquired into the significance of five years versus three years, the State’s counsel merely responded that five years is “preferable.” Counsel failed to articulate why the State could not educate the public about the safety surrounding gill nets in three years. In other words, the State failed to prove that its proposal provides for the least restrictive measure, with respect to gill net fishing, necessary to conserve the fishery. Moreover, the Court finds that the State’s proposed triggering event to end the permit requirement—“until gill net fishing has occurred in the area for five consecutive years”—is far too ambiguous. The State failed to provide a clear definition of when “gill net fishing has occurred,” and the Court speculates that potential enforcement issues could result from this ambiguity. *See Michigan*, 12 Indian Law Rep. at 3084, 3086 (rejecting the Bay Mills proposal partly because it “leaves questions unanswered” and “is difficult to enforce”).

In sum, to promote the Tribal right to fish and to protect GTB fishermen from discrimination in favor of other classes of fishermen, *see id.* at 3081, the Court will accept GTB’s proposal in regard to the issue of gill net permit requirements in Grids 813 and 814.

B. Net Effort Limitations in Grids 815 & 816

GTB proposal: Gill net effort will be limited to 4,500 feet of gill net in the water per day.

State proposal: Gill net effort will be limited to 3,600 feet of gill net in the water per day.

GTB emphasizes that the difference between the two proposals in regard to the amount of daily gill net effort per Grid is a mere 900 feet. While this difference is negligible to the State, it is significant to GTB. To put this issue into perspective: all Tribal commercial fishers must share the permitted amount of daily gill net effort in each Grid, and each Grid is ten nautical miles by ten nautical miles. Therefore, the allowance of an additional 900 feet of gill net effort—that all the Tribal commercial fishers must share—beyond what the State has proposed, in a massive Grid, is minor. Although an extra 900 feet of gill net effort per Grid is a minor difference for the State, that difference could result in the exclusion of an entire GTB operation.

Moreover, under the successor decree, the State is allowing thousands more feet of gill net effort per day to the other Tribes: the proposed decree would allow up to three licenses and a total of 12,000 feet of large mesh gill net effort by Little Traverse fishers and two licenses and a total of 12,000 feet of large mesh gill net effort by Sault Tribe fishers. Further, Little Traverse would be allowed to license two fishers each with up to 6,000 feet of net in Little Traverse Bay, and same for Little River Band within its Tribal zone. Finally, the proposed decree places no net effort limitations on Bay Mills fishers (*see* ECF No. 2036 at PageID.12093).

To justify the discrepancy among the amount of gill net effort between the other Tribes and GTB, the State asserts that the characteristics of each zone determine how many feet each Tribe is permitted to use in gill net effort. For example, Grand Traverse Bay, which encompasses Grids 815 and 816, is deep (between 400 and 600 feet), narrow, and contains steep banks. Because lake trout are commonly found near drop-offs and in less than 200 feet of water, the State asserts that GTB does not need more than 3,600 feet of gill netting per day to effectively fish for lake trout. On the other hand, Little Traverse Bay does not exceed 200 feet in depth and does not contain drop-offs. Therefore, the State asserts that more feet of net is necessary to effectively fish for lake trout in Little Traverse Bay. In other words, the State is seeking to impose additional regulations on GTB, for the sole purpose of regulating GTB's fishing techniques.

In the Court's judgment, permitting GTB to fish with 900 more feet of gill net per day in each Grid accomplishes the goals of the Treaty. Grids 815 and 816 will continue to be managed by harvest limitations, meaning an additional 900 feet of gill net effort per day will not imperil the fishery. The State does not seek to reduce the amount of gill net effort for conservationist reasons; the State seeks to regulate GTB's gill net fishers. The State's proposal does not promote the "fairest and most equitable management plan for the Great Lakes." *Michigan*, 12 Indian Law Rep. at 3080. Conversely, GTB's proposal promotes the Tribal right to fish, access to the fishery, and a positive economic impact on GTB fishermen. *See id.* at 3081. The Court therefore accepts GTB's proposal with respect to the gill net effort limitation issue.

C. Small Mesh Gill Net Fishing in the North Half of Grid 616

GTB proposal: This area will be open to perch fishing with small mesh gill nets year-round.

State proposal: This area will remain closed to perch fishing with small mesh gill nets.

The northern half of Grid 616 contains the Lake Charlevoix/Round Lake channel that empties into Lake Michigan. Under the 2000 Consent Decree, small mesh gill nets were prohibited in this area. According to GTB, the proposed successor decree expands opportunities to use small mesh gill nets to target yellow perch and walleye. However, the State seeks to continue the prohibition of small mesh gill net fishing in the northern half of Grid 616, which GTB argues is inconsistent with the goals of the proposed successor decree.

According to GTB's biologist, the rationale for continuing the prohibition on small mesh gill net fishing in this area "remains a bit of a mystery" (ECF No. 2036 at PageID.12095). Specifically, GTB asserts that "little to none" of the population of yellow perch and walleye originate in this area of Grid 616, and GTB has not identified a biologically driven reason why small mesh gill net fishing should be prohibited in this area (*see id.*). Conversely, the State asserts that "[t]his area hosts an important recreational yellow perch fishery in the spring and fall, and the closure to commercial fishing supports that fishery" (ECF No. 2035 at PageID.12072). With respect to any biological reasons for keeping this area closed to small mesh gill net fishing, the Court accepts the position of GTB's biologist.

Absent any biological or conservationist reasons for prohibiting small mesh gill net fishing in the northern half of Grid 616, the State's remaining argument is unpersuasive. Although the State wishes to keep this area closed to small mesh gill net fishing—which occurs

closer to shore than large mesh gill net fishing—because this area sees heavy boat traffic in and out of the Lake Charlevoix/Round Lake channel, it is the State’s duty to inform boaters about gill nets and how to avoid them.

The common theme in GTB’s proposal, including this issue, is that GTB wants to keep its options open for commercial fishers. The parties do not dispute that the Great Lakes fishery has significantly changed since the entry of the 2000 Consent Decree, and given the downward trend of the population of salmon, lake trout, whitefish, etc., GTB wishes to have the option to utilize small mesh gill nets in the northern half of Grid 616. Even back in 1985, Judge Enslin recognized the unpredictability of the fishery and the need for maximizing opportunities for Tribal commercial fishers:

The Court . . . finds that the present fishery lacks predictability and stability. This impairs the full opportunity of the various user groups of the fishery to maximize the benefits to be obtained from the fishery as well as the parties’ abilities to manage and plan the future development of the fishery resource.

The lack of predictability and stability within the fishery impairs the benefits of the fishery for the tribes by inhibiting the reasonable development of markets and marketing opportunities.

See Michigan, 12 Indian Law Rep. at 3083. Today, the unpredictability of the fishery is even greater. The Court is well aware of the declining fishery, and in turn, the declining opportunities for Tribal fishers. Because opening the northern half of Grid 616 would not biologically harm the fishery, the Court will accept GTB’s proposal in regard to this issue.

D. Use of Hook-and-Line Gear for Commercial Fishing

GTB proposal: Recreational hook-and-line fishing gear will be allowed for commercial fishing only within the Grand Traverse Tribal Zone.

State proposal: Recreational hook-and-line fishing gear (i.e., rod and reel) will not be allowed for commercial fishing anywhere within 1836 Treaty waters.

The last issue of contention concerns the use of recreational hook-and-line fishing gear by GTB commercial fishers. Under the State's proposal, the use of this gear is specifically prohibited by commercial fishers. The State asserts that, since 1985, the Tribes have never reported that their commercial fishers use hook-and-line gear. Allowing the use of this recreational gear could cause serious enforcement issues for the State. Recreational fishers are not permitted to sell fish caught using hook-and-line gear. If commercial fishers are permitted to sell fish caught using this gear, which are more profitable, recreational fishers may be incentivized to illegally sell the fish they catch.

GTB counters that the State's concerns about an illegal market are merely conjectures. GTB asserts that there are numerous provisions in the successor decree that remedy the State's concerns, and at this point, curtailing the traditional right to fish with hook-and-line gear is premature. The State asserts that the successor decree contains an assessment provision that would allow GTB to conduct an assessment of hook-and-line gear in its commercial fishery, and those results could form the basis for an amendment to the future decree. Yet, the same could be true for GTB's proposal: allow GTB commercial fishers to use hook-and-line gear, and if this gear turns out to be problematic, the State can conduct an assessment and amend the future decree.

GTB's proposal in regard to hook-and-line gear aligns with the common theme of keeping GTB's fishing opportunities open in the future. This gear is less efficient than other means of fishing, but it is a commercial fisher's prerogative to use a less efficient gear. Moreover, with the ever-changing fishery, there may be areas of the waters in the future that are inaccessible with nets but where hook-and-line gear would be appropriate. Hook-and-line gear is also less expensive than other equipment, which may give smaller-scale fishers with smaller boats the opportunity to commercially fish.

The State's proposal on this issue unnecessarily regulates GTB commercial fishers. If GTB commercial fishers wish to use hook-and-line gear, a less efficient way to fish, the Court sees no problem with allowing this methodology of fishing, especially considering the State's concerns have not materialized. *See Michigan*, 12 Indian Law Rep. at 3085 (acknowledging that the 1985 agreement "provides for the tribes making their own internal decisions"). GTB's proposal promotes preservation/conservation of the resource, the Tribal right to fish, and greater opportunities for Tribal fishers in light of the unpredictable fishery. *See id.* at 3081. Again, the Court accepts GTB's proposal with respect to the issue of the use of hook-and-line gear by GTB commercial fishers.

To conclude, the Court finds that GTB's proposal promotes the Tribal right to fish, the protection of GTB fishermen from discrimination, the recognition that the resource is shared, access to the fishery, and granting more opportunities for GTB commercial fishers in light of the unpredictable fishery. Given that neither proposal promotes conservationist or preservationist benefits more than the other, in accordance with the 1983 Treaty and the law of this case, the Court will adopt the entirety of GTB's reasonable, least restrictive proposal.

Accordingly,

THE COURT HEREBY ORDERS the parties to incorporate GTB's proposal regarding its Tribal zone (ECF No. 2036-1), subject to any outstanding stylistic revisions, into the proposed successor decree.

IT IS SO ORDERED.

Date: December 2, 2022

/s/ Paul L. Maloney
Paul L. Maloney
United States District Judge