UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

and

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,

and

STATE OF MICHIGAN, et al.,

Defendants.
_____/

Case No. 2:73-cv-26

HON. PAUL L. MALONEY

COALITION TO PROTECT MICHIGAN RESOURCES' OBJECTIONS TO PARTIES' STIPULATION FOR ENTRY OF PROPOSED CONSENT DECREE (ECF 2042)

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INTRODUCTION

The Bay Mills Indian Community, Grand Traverse Band of Ottawa and Chippewa Indians, Little River Band of Ottawa Indians, Little Traverse Bay Bands of Odawa Indians, United States, and State of Michigan (the "Parties") have asked this Court to enter a Proposed Decree (ECF 2042) to replace the 2000 Consent Decree ("2000 Consent Decree"). The Proposed Decree will have profound impacts on the Great Lakes fisheries that will affect negatively both tribal and non-tribal interests and it would bind the Parties for the next 24 years. The Coalition to Protect Michigan Resources ("Coalition") and its members strongly object to this Proposed Decree as it violates the public interest, is biologically unsound, and poses a threat to the fishery resources of the Great Lakes. This Court should reject the Proposed Decree in its present form as discussed below.

The Coalition has had an established, longstanding role as *amicus curiae* in this case. Throughout the nearly 50-year history of this dispute the Coalition or its predecessor organizations have played an active role in helping the Court and the Parties navigate complex negotiations and litigation surrounding the co-management and conservation of the Great Lakes fisheries—a resource shared in common by the Coalition, the Parties, and the public. The Coalition's main purpose is to protect the Great Lakes for generations to come for all that share the resource.

The Coalition believes the Proposed Decree to be a political document based not on sound science but on the commercial or political interests of various parties. (See **Exhibit A**, Affidavit of Christopher Horton, ¶¶ 14-15 (explaining how the federal Magnuson-Steven's Act serves as a model for managing the fisheries within the Proposed Decree.)

The Coalition respectfully asks this Court to give meaningful consideration to its objections and reject this proposed decree, sending it back to the Parties for reconsideration of its fundamental flaws. The specific objections of the Coalition establish that the Proposed Decree is contrary to the public interest and creates a risk of irreparable harm to the Great Lakes fisheries. Set forth below

are the Coalition's specific objections. The main concerns of the Coalition can be summarized, however, in the following points of contention:

- **ALLOCATION OF THE FISHERY**: The Proposed Decree abandons the concept of a roughly equally shared fishery resource and allocates approximately 70% or more of the available harvest to the Tribes, thereby denying the public reasonable access to and opportunities with the Great Lakes fishery within the Treaty waters.

- **GILLNET FISHING**: The Proposed Decree abandons the initiative emphasized in the 2000 Consent Decree to move away from the destructive, lethal, gillnet fished by the tribes and to more selective and far less lethal trap nets. The change from gillnet fishing to trap net fishing was in no small part a reason for the increasing natural reproduction of Lake Trout in the treaty waters of the Great Lakes. The Proposed Decree greatly expands the destructive practice of gillnet fishing and is at odds with the biological capacity of the Great Lakes.

- **LAKE TROUT AND WHITEFISH REHABILITATION**: The Proposed Decree fails to adequately address Lake Trout rehabilitation or the steep decline of whitefish in lakes Huron and Michigan. A collapse of both of these will cause economic extinction of fishing industries and livelihoods.

- **WALLEYE AND PERCH**: The Proposed Decree drastically increases gillnet fishing for the relatively small, finite walleye and perch populations with seemingly no limitations. A collapse of the Walleye and Perch populations will cause economic extinction of fishing industries and livelihoods.

- **UNDEFINED TARGET ANNUAL MORTALITY RATES**: The Proposed Decree fails to define target annual mortality rates for Lake Trout and Whitefish, making it impossible for this Court to determine the impact the Proposed Decree would have on the Great Lakes fishery.

- **REVIEW OF HARVEST LIMITS AND TARGET ANNUAL MORTALITY RATES**: The Proposed Decree fails to frequently review harvest limits and target annual mortality rates. This creates an issue of responsiveness to issues that will inevitably arise through the life of the Proposed Decree. Fishery management has to be more nimble to respond to the changing dynamics of the fishery.

- **INFORMATION SHARING**: The Proposed Decree does not require meaningful total catch reporting. Instead, it only requires limited reporting of a fisher's catch, including only bycatch that is retained. This and other reporting failures will make it impossible to assess the selectivity and bycatch concerns posed by gillnets. It will also be impossible to document and identify when gillnet fishing is presenting a serious threat to a sustainable fishery.

- **NET MARKING**: The Proposed Decree does not adequately address the marking of gillnets, which has been a public safety issue for years and will be exacerbated with expanded gillnet activity.

- **LOCAL CONSULTATION**: The Proposed Decree does not allow local governments and recreational fishing groups to request meetings with the Tribes to address issues of local concern—which was included in the 2000 Consent Decree—and instead gives the State of Michigan an effective veto over local concerns.

- **ENFORCEABILITY**: Many provisions of the Proposed Decree regarding fishing limits are vague to the point of being unenforceable. It contains no method for effectively addressing overfishing.

This Court should reject the Proposed Decree and send the Parties back to the negotiating table to address the objections raised herein.

STANDARD OF REVIEW

"Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their **precise** terms." *United States v. Armour & Co.*, 402 U.S. 673, 681 (1971) (emphasis added). "A consent decree has attributes of both a contract and of a judicial act." *Williams v. Vukovich*, 720 F.2d 909, 920 (6th Cir. 1983). The entering of a consent decree "places the power and prestige of the court behind the compromise struck by the parties" and the court is required to "protect the integrity of the decree with its contempt powers." *Id.* A court may therefore not enter a consent decree "for an agreement which is illegal, a product of collusion, or contrary to the public interest." *Id.*

All parties affected by a decree should "be afforded a full and fair opportunity to consider the proposed decree and develop a response" at a hearing. *Id.* at 921. A court should consider whether a "consent decree is consistent with the public interest." *Id.* at 923. "The ultimate issue the court must decide at the conclusion of the hearing is whether the decree is fair, adequate and reasonable." *Id.* at 921. A court objecting to a consent decree as problematic "should inform the parties of its precise concerns and give them an opportunity to reach a reasonable accommodation."

Id. "In making the reasonableness determination the court is under the mandatory duty to consider the fairness of the decree to those affected, the adequacy of the settlement to the class, and the public interest." *Id.*

ARGUMENT

The crux of the issue in these negotiations and this case is that while the Treaty of 1836, as interpreted, protects tribal fishing rights, the resource subject to that right is shared in common. See *United States v. Michigan*, 12 ILR 3079, 3079 (W.D. Mich. 1985) ("While the Treaty, as interpreted by this court, protects tribal fishing rights, the resource is shared by other user groups"); *United States v. Michigan*, 653 F.2d 277 (6th Cir. 1981) ("The right of the Indians to engage in gillnet fishing is not absolute"); See also, *Washington v. Fishing Vessel*, 443 U.S. 658 (1979) (Holding the allocation of the fishery disputed between Tribes and the State of Washington provided a 50% maximum for the Tribes and it could be reduced as the Tribes' needs decreased). The Sixth Circuit established that any fishing right of the Tribes asserted as to this shared resource is limited by that shared nature of the resource and the Michigan Supreme Court's holding in *People v. Leblanc*, 399 Mich. 31 (1976):

> As provided in *LeBlanc*, any such state regulations restricting Indian fishing rights under the 1836 treaty, including gill net fishing, (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 other classes of fishermen. [*United States v. Michigan*, 653 F.2d 277, 279 (6th Cir. 1981).]

The difficulty in applying this standard is having the Parties reach an agreement that protects the legal rights of the competing parties without "diminishing or depleting" the treasured resource shared by the Parties. *United States v. Michigan*, 12 ILR at 3079.

To approve this Proposed Decree, this Court must determine that it is not contrary to the public's interest and is fair, adequate, and reasonable. *Williams*, 720 F.2d at 920-23. Fortunately,

this Court is not without law of the case in how to evaluate the Parties' Proposed Decree. In 1985, Judge Enslen set forth 15 factors to determine which of two allocation plans would best protect the interests of all concerned parties:

> 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. [*United States v. Michigan*, 12 ILR 3079, 3081 (W.D. Mich. 1985).][1]

This Court, although only presented with one Proposed Decree and not forced to choose between two plans, should similarly weigh these considerations in evaluating whether the Proposed Decree presented by the Parties is in the public's interest, fair, adequate, and reasonable. See *Williams*, 720 F.2d at 921 ("The ultimate issue the court must decide at the conclusion of the hearing is whether the decree is fair, adequate and reasonable").

I. THE COALITION TO PROTECT MICHIGAN RESOURCES' OBJECTIONS TO THE PROPOSED DECREE.

The Proposed Decree is contrary to the public's interest, does not preserve the Great Lakes fishery and the Parties' rights in that resource. This is despite the fact that according to its introduction the Proposed Decree is supposed to seek "[t]he health and long-term sustainability of the Great Lakes fishery [because it] is vital to the cultural, social, and economic well-being of the Tribes, the State of Michigan, and the United States" (Proposed Decree, Introduction, ¶ 3). The Coalition takes issue with the following provisions of the Proposed Decree:

[1] This Court has previously stated Judge Enslen's 1985 opinion is the "law of this case" (ECF 1982, PageID.10822).

A. The Coalition objects to the Proposed Decree because it abandons the Court's previous holding that the fishery resource is one shared in common with the public.

The 2000 Consent Decree allocated to the Tribes approximately 60% of the available harvest of fishery resources in the Treaty waters of the Great Lakes. As observed by some of the parties previously, this allocation varied from a 50-50% allocation in exchange for gear restrictions and zones that are no longer present in the Proposed Decree. Thus, the starting point for any allocation in litigation or negotiation is a sharing of the resource, essentially a "50-50 split."[2]

Estimates of the allocation now contained in the Proposed Decree approach 70% while gear limitations and zones in the 2000 Consent Decree that permitted State-licensed fishers to obtain their allocation are largely eliminated. One need only consider the major shift in the allocation of whitefish and lake trout to the Tribes in Lake Superior to understand that the 60% allocation for the last 22 years will now approach 70% or more under the Proposed Decree.

The allocation also remains important as it relates to localized impacts of expanded gillnetting in areas where such activity has not been permitted for 35 years. The parties will presumably indicate that various closures during the recreational season will mitigate against the loss of stocks for the recreational fisher to pursue under the State's allocation. However, gillnetting that is permitted prior to the recreational fishing season will degrade the viability of a fishing stock in the area. Even though fish do have tails and travel throughout the water, because of water temperature, natural topographic features, such as reefs, and available food, fish schools can localize and certainly be removed from the fishery under the current proposed allocations. Most recreational fishing ports are also now surrounded by gillnet zones which will deplete the fisheries

[2] The Sault Tribe's recent motion challenging the Court's jurisdiction may well test this "shared resource" concept and holding.

that can backfill after the seasonal gillnet seasons close. Certainly, there is a related issue with sufficient time for fish to migrate into the recreational areas for backfilling to be effective.

Once depleted, the seasonal closure that would allow the recreational fishery to proceed presumes, erroneously, that State recreational fishers can still obtain fish with their available fishing techniques (i.e., hook and line). For example, the Proposed Decree allows large mesh gillnetting to occur from October 1 through May 1 in Grid 519 and year-round large mesh gillnetting in the outer western portion of the bay in the Petoskey area (**Exhibit B**, Affidavit of Frank Krist, ¶ 51). Similarly, large mesh gillnets are proposed to extend deeper into the Grand Traverse Bays (Grids 815 and 816), which will make it extremely difficult for the recreational fishery to have an opportunity to take their portion of the fishery (Exhibit B, ¶¶ 53-55). Such netting in and near recreational fisheries will greatly reduce the number of fish; those declines will cause serious economic hardships and devastating impacts to those communities surrounding well-known fishing ports (Exhibit B, ¶¶ 27, 51). The Coalition objects to the allocation issues that are presented in the Proposed Decree and asks that the Court reject such allocations along with the expansion of gillnet and send these issues back to the Parties for further negotiation.

B. The Coalition objects to the expansion of gillnet fishing in Article IV because it does not align with the objectives of preserving and conserving the resource and will destabilize the fishery.

Gillnet fishing is recognized worldwide in the fishing community as a dangerous practice because it can catch and kill non-targeted species. Expanding gillnet, as fishery biologist David Borgeson of the Michigan Resource Stewards explains, "is, in most cases, a move in the wrong direction" (**Exhibit C**, Affidavit of David Borgeson, ¶ 16). Fishery biologist Jim Johnson, who is also intimately familiar with the Great Lakes fishery, similarly supports the concerns and adverse impacts that are caused by such expansions as shown in the various management units of the ceded

waters (**Exhibit D**, Affidavit of James Johnson, ¶ 12.b; 12.d-f; 12.g.3; 12.i; 12.j.2). This much was recognized in the 2000 Consent Decree which aimed to remove "at least fourteen (14) million feet of large mesh gill net effort from Lakes Michigan and Huron by 2003…" (2000 Consent Decree, Article X(B)). In stark contrast, the Proposed Decree massively expands gillnet fishing into new waters, undoing any of this effort to preserve the fishery resource while seriously jeopardizing the health of the Great Lakes fishery. The expansion of gillnet fishing simply fails to address the limitations of the fishery resource and will severely impact critical fish species as well as the local and tribal economies that rely on the impacted fisheries.

To illustrate the drastic expansion of gillnet fishing under the Proposed Decree, Affiant Frank Krist, current Vice President of the Hammond Bay Area Anglers Association and Chair of the Michigan Department of Natural Resources' ("MDNR") Lake Huron Citizens Fishery Advisory Committee compiled a series of maps (Exhibit B, ¶ 22) showing the areas proposed for gillnet fishing in the Proposed Decree.

Collectively, the terms of the Proposed Decree expand gillnet fishing to a significant area of new water in three of the Great Lakes. The impact the proposed expansion would have in each Great Lake is profound.[3] In allowing such expansions, the Proposed Decree does not adequately address the impacts by such expansion as discussed below, such as regulations related to how gillnets are set and checked and sufficient information reporting to even verify the presumption of the parties that the non-selective nature of gillnets will not impact the fishery (Exhibit C, ¶ 16 (noting that delayed checks and lifting of gillnets even worsens their impact on the fishery); (Exhibit D, ¶ 12.i, 12.j.4, 12.j.6 (noting the lack of the Proposed Decree tracking all fish caught in

[3] In addition to those expanded areas shown through Maps 1-20, the Proposed Decree also allows assessment fishing in Article XV.C, which provides for inadequately regulated gillnet fishing by a commercial fisher using up to 6,000 feet of gillnet for up to three years (Exhibit B, ¶ 43-45).

gillnets by species and number to properly validate and manage the impact of gillnet on the Great Lakes fishery)).

1. Gillnet expansion in Lake Michigan in Article IV(A)(1).

Affiant Krist's maps illustrate the expansion of large and small mesh gillnet zones in Lake Michigan when compared to the 2000 Consent Decree (**Exhibit B**, for example, Maps 1, 2, 3, and 4). The expansion includes many grids that have been previously closed to gillnet fishing (see for instance, Grids 308, 309, 519, 815, and 816) while also expanding gillnet fishing closer to established refuge areas (the principal place of reproduction).[4] The biologist James Johnson indicates this expansion is at odds with the reproduction and sustainability of Lake Trout in Lake Michigan (Exhibit D). Specifically, Johnson states that the Lake Trout recovery programs in Lake Michigan are tenuous as "biological information describes a resource in crisis . . . [with] Lake Trout recovery still in early stages" (Exhibit D, ¶ 10). Johnson states that Lake Trout harvest, as it currently stands, is already too high in the areas where gillnet fishing would be expanded under the Proposed Decree:

> It is my opinion that excessive lake trout harvest is already being permitted around Lake Michigan's Northern Refuge. MM-1, 2, 3 and portions of MM-5 are adjacent to or near the Lake Michigan Northern Refuge. But mortality rates are already too high in MM-1, 2, 3 for the development of spawning stocks. The Proposed Decree would incentivize increased gillnet fishing there, exacerbating the mortality issue. The utility of a spawning refuge is seriously compromised when spawning-age fish are scarce [Exhibit D, ¶ 12(g)(4)].

[4] In other regions of the country, protecting refuge areas in efforts to rebuild a fishery has been critical. See, e.g., Ben Berke, *The Atlantic cod is coming back after strict catch limits greatly decreased numbers*, https://www.npr.org/2022/07/18/1112113037/the-atlantic-cod-is-coming-back-after-strict-catch-limits-greatly-decreased-numb (last accessed January 16, 2023) ("In order to rebuild a stock, you have to sort of preserve those spawners so that they are able to reproduce").

The result of this expanded gillnet fishing will almost guarantee "that mortality rates exceed those necessary for restoration of Lake Trout" (Science-Based Analysis of How Proposed Decree Jeopardizes Sustainability of Great Lakes Fishery Resources and the Fishers that Depend on Them, Exhibit D). Yet, the Proposed Decree would allow this to happen. (Exhibit B, ¶¶ 56-57 (explaining the ambiguous provisions allowing two licenses with a maximum of 6,000 feet each for historic preservation and cultural education yet allowing extensive gear and commercial sale of the catch)). This is against the public's interest, jeopardizes the preservation of the Great Lakes fishery, and does not recognize a resource shared in common (Exhibit C, noting the disincentives of expanding gillnet when balancing the sustainability and economic viability of the resource for all users). Also noteworthy, the Tribal fishing prohibited in Article IV(A)(1)(b) indicates that it is "prohibited south of the line extending from the mouth of the Escanaba River" yet Map 9 included with the Proposed Decree appears to show the opposite (potentially in error).

The Coalition objects to gillnet expansion in Lake Michigan as set forth in Article IV(A)(1) and asks that the Court reject such expansion and send this issue back to the Parties for further negotiation.

2. Gillnet expansion in Lake Huron in Article IV(A)(2).

Affiant Krist's maps illustrate a massive increase in large and small mesh gillnet zones along with a significant reduction in the Lake Trout refuge area (the principal place of reproduction) when compared to the 2000 Consent Decree (Exhibit B, Maps 11, 12, and 13).[5] Specifically, the additional waters where gillnet fishing would be permitted in Lake Huron would

[5] Article VI(A)(2)(d)(iii) also seemingly permits Tribal trap net fishing in southern Lake Huron. The provision says the "Tribes may authorize" fishing and the "State shall issue a permit." It is likely the Parties intended fishing in these waters to be permissive, but as written the obligation for the State to issue a permit is mandatory.

be in Hammond Bay and near Rogers City Harbor (Grid 606, which has not previously been subject to gillnet fishing). The only Lake Trout refuge area identified in northern Lake Huron is proposed as being subject to gillnet fishing for more than 10 months of the year and has been reduced in size to less than half the size that has existed since 1985 (Exhibit B, ¶¶ 18-19, 25; Maps 11 and 12). The expansion of gillnet fishing in this area "would severely impact the Lake Trout population in Hammond Bay and the entirety of Lake Huron" (Exhibit B, ¶¶ 23-25).

Johnson states, in no uncertain terms, that "[t]he biological information describes a resource in crisis, with lake whitefish abundance at historic low points and Lake Trout recovery still in early stages in lakes Huron and Michigan" (Exhibit D, ¶ 10). He explains the appropriate approach:

> **The appropriate biological response** is to take a **conservative approach** to setting harvest levels in a new decree that protects the diminished whitefish stocks from overharvest while taking precautionary measures to protect lake trout as the focus of fishing shifts from whitefish to this recovering native species. The Proposed Decree, however, makes available additional fishing opportunities that will heighten harvest pressure on fragile resources . . . The Proposed Decree expands gillnetting opportunities to the detriment of the Great Lakes fishery. **This expansive new gillnetting will increase fishing pressure, enable more efficient targeting of lake trout and walleye, and expand gillnetting into areas and zones where they were not previously allowed. It represents a step backward from the framework of the 2000 Consent Decree**, which directed $14 million to converting nonselective, lethal gillnets to trapnet fisheries [Exhibit D, ¶ 12(a)(b)].

Conservative harvest policy ideally would stay in place and be reviewed annually until Lake Huron shows "signs of stabilization and self-sustainability" (Exhibit D, ¶ 12(j)(3)); (Exhibit A). Likewise, Affiant Horton similarly notes the concerns with expanded gillnetting, and opines that the management framework does not adequately account for such additional gear expansion (Exhibit A, ¶ 25).

The impact of expanded gillnet fishing would also be profound to the recreational fishing community in Rogers City and areas outside of gillnet zones. This is because under the proposed

plan there is no path for Lake Trout to migrate to Rogers City or areas south of Rogers City without coming across gillnets. (Exhibit B, Map 11). Gillnet fishing zones have never been permitted between the refuge area and Rogers City. Krist explains this difference will make it so Lake Trout will not have the same opportunity to migrate into the Hammond Bay and Rogers City area as they have in past decades (Exhibit B, ¶ 27).

In fact, the health of the Lake Trout population in all of Lake Huron is threatened by this change and expanded gillnetting, and recreational fishers are certain to be affected:

> Based on my experience, as the number of fish in the area decline to low levels, anglers lose interest with the slow fishing and move to other ports or just quit fishing. This could cause serious economic hardship and devastate the community of Rogers City [Exhibit B, ¶ 27].

The frustration with this specific expansion is that the Parties, and even Judge Enslen, have previously accepted a zone management scheme where recreational zones or refuge areas were protected from the effects of gillnet fishing. See *United States v. Michigan*, 12 ILR 3079, 3079 (W.D. Mich. 1985) ("The court finds the zonal plan superior . . . in protecting the Indian reserved treaty fishing right, preserving and managing the resource, reducing social conflict, stabilizing the fishery, and assuring both federal and state funding"). The expansion of gillnet fishing in Lake Huron eradicates a prudent plan of zone management and puts in serious jeopardy efforts to create and stabilize the Lake Trout population in the Treaty waters of Lake Huron (Exhibit B, ¶¶ 18-21). The expanded use of gillnets near the port of Rogers City also entirely fails to recognize the fundamental assumption that the resource is shared in common.

The expanding Salmon fishery during the 1985 Consent Decree in Lake Huron, and Rogers City, in particular, caused extensive community planning, investment in upgrading the harbor, and maintenance and dredging of the same to support the influx of those attempting to gain access to the fishery (Exhibit B, ¶ 14). The Mayor of Rogers City, Scott McLennan, agrees with Krist on

the impact the Proposed Decree could have on the recreational fishing industry in Rogers City. He finds that expansive gillnet fishing near Rogers City would decimate the local economy:

> Because of the high efficiency of the gill netting technique, an expanded gill netting harvest would have an immeasurable impact on the Rogers City area fishery and economy. If allowed in the Proposed Decree, **gill netting in the area is likely to irreparably harm the sport-fishery, bankrupt the Rogers City marina that depends upon the fishery, and decimate the local economy that survives on the revenues brought in by visiting sport-fishers** [**Exhibit E**, Affidavit of Scott McLennan, ¶ 5 (emphasis added)].

Without question, the Proposed Decree's expansion of gillnet fishing entirely fails to recognize that others share the resource in common, including the recreational fishing industry in Rogers City. Theses change will even threaten the well-documented wild populations of Coho Salmon and steelhead that live in the Ocqueoc River (Exhibit B, ¶ 36). Similar concerns exist regarding the expansion of small mesh gillnets without any effective policy to prevent the collapse of limited local populations of perch and walleye (Exhibit B, ¶¶ 37-39).

The Coalition objects to the expanded gillnet fishing in Lake Huron in Article IV(A)(2) and asks that the Court reject such expansion and send this issue back to the Parties for further negotiation based on these concerns.

3. Gillnet expansion in Lake Superior in Article IV(A)(3).

The expansion of large mesh gillnet fishing is proposed for all the 1836 Treaty Waters of Lake Superior (Exhibit B, Maps 16 and 17). Previously, a large portion of these waters was closed to large mesh gillnet fishing and the less lethal use of trap nets was permitted (Exhibit B, Map 16). The State of Michigan's efforts towards reducing mortality rate on fish stocks due to Sea Lamprey predation and over-fishing has been a focus since the 1960s (Exhibit C, ¶ 12). Even in the 1980s, the management of the Michigan fisheries was focused on reducing netting mortality, which produced a better fishery (Exhibit C, ¶ 14). The biological data available relevant to the MI-8

whitefish stock does not establish that additional fishing pressure is appropriate or prudent (Exhibit A, ¶ 25; Exhibit D, ¶ 12). In addition to this expansion, small mesh gill net zones for Walleye and Yellow Perch have also been extended across all the 1836 Treaty Waters of Lake Superior, representing a drastic shift from the 2000 Consent Decree (Exhibit B, Maps 19 and 20). Such expansion would impact an entire species that provides a significant economic value to the local communities and fishing ports (Exhibit B, ¶ 39; see also Exhibit C, ¶ 15-16, speaking to managing and allocating the stocks to encourage the more valued use).

The expansion of small-mesh gillnetting is largely provided to target perch and walleye. Perch and walleye stocks, however, are not sufficient within the 1836 Treaty Waters to sustain direct commercial fishing as set forth in the expanded gillnet areas (Exhibit D, ¶ 12.d; see also Exhibit B, ¶ 41, Maps 19-20, detailing the expansion in Lake Superior of small mesh gillnet zones for walleye and yellow perch).

The Coalition objects to the expanded gillnet fishing in Lake Superior in Article IV(A)(3) and asks that the Court reject such expansion and send this issue back to the Parties for further negotiation.

C. The Coalition objects to Article VII(A)(5) of the Proposed Decree because it fails to establish target annual mortality rates for Lake Trout and Whitefish.

The Proposed Decree provides that **prior to** the signing of the Proposed Decree the Executive Council,[6] in consultation with the Technical Fisheries Committee, shall adopt "target annual mortality rates at a species-specific level and management unit-specific level" (Proposed Decree, Article VII(A)(5)). Affiant Johnson, an expert fisheries biologist with extensive

[6] The Executive Council consists of chairpersons of the Tribes, the Director of the MDNR, and the Secretary of the Interior (Proposed Decree, Article XVII(A)).

experience with the Great Lakes fishery gained during his time working for the MDNR, notes that without a set mortality rate "it is impossible to judge the biological impacts that may ensue" from the Proposed Decree (Exhibit D, ¶ 12(g)(4)). Affiant Horton, another expert fisheries biologist, also explains that even if mortality rates are identified, there is no clear recourse in the Proposed Decree; the rates are not reviewed frequently enough, and target mortality rates and harvest limits need to be reviewed annually (Exhibit A, ¶ 19, 22-24).

Johnson avers that there is extensive literature establishing that the rate chosen will have dramatic impacts on the fishery: "Mortality targets for Lake Trout, if set at 40% or lower, produce harvest policy that favors reproduction—that is self-sustaining Lake Trout populations that are less dependent or independent of stocking (Exhibit D, ¶ 12(g)(1)). Based on his experience and current evaluation of Lake Trout health, Lake Trout in proximity to a "[r]efuge should be targeted for more conservative harvest management, with target mortality rates set at 40% or less and with enforcement and penalties commensurate with the importance of protecting these stocks" (Exhibit D, ¶ 12(g)(4)).

Further, the mortality rate cannot simply be ignored in favor of increased stocking because stocking is not successful in large parts of the Great Lakes, particularly Lake Huron. Lake Huron is almost entirely dependent on natural reproduction of lake trout as stocking is unsuccessful in that lake. Thus, the choice of a mortality rate for Lake Huron is critical to survival of the lake trout fishery **and** for evaluating the impact of the Proposed Decree.

Notwithstanding the critical importance of target annual mortality rates, the Parties have provided that target annual mortality rates will be determined at a later date. Simply put, neither this Court nor the Parties are able to evaluate whether the Proposed Decree aligns with the public interest and will preserve the Great Lakes fishery. The Court cannot enter a consent decree that is

contrary to the public interest and therefore should reject the Proposed Decree until there are standards that can actually be evaluated. See *Williams*, 720 F.2d at 920.

The Coalition objects to Article VII(A)(5) of the Proposed Decree because there are no established target annual mortality rates that would allow for the evaluation of the biological impact that the Proposed Decree would have on the Great Lakes fishery.

D. The Coalition objects to Articles VII(A)(5)-(6) of the Proposed Decree because the terms do not provide a biologically sound review of harvest policies or target annual mortality rates.

The Proposed Decree does not establish a framework for review of target annual mortality rates that will allow it to be flexible to the unpredictability of the fishery, especially considering the proposed expansion of gillnet fishing. A system that cannot respond to changes in the fishery is, again, a recipe for disaster and poses a real threat of irreparable harm to the fishery resource. The terms of the Proposed Decree provide for a review of target annual mortality rates every **six** years (Proposed Decree, § VII(A)(5)(b)) with harvest limits being held in constant for **three** years at a time (Proposed Decree, § VII(A)(6)). (Exhibit B, ¶ 28 (noting that the three-year review has "no in-season adjustments and accountability that ensures that all users have available a fair share of the resource each year."))

Affiant Horton specifically recommends that impacts to the Great Lakes fishery are avoided by adopting annual review of the target mortality rates along with enforceable harvest limits: "In my professional opinion, there should be significant concerns of the proposed management approach in the Proposed Decree for both recreationally and commercially important fish species in the 1836 Treaty waters of Lakes Superior, Michigan, and Huron" (Exhibit A, ¶ 29).

Under the Proposed Decree, mortality rates and harvest limits are not subject to mandatory review and change where conditions or fish populations change (Exhibit A, ¶ 19 (noting that the

biologically based committee should have the authority to constrain catch when annual catch limit quotas must be lowered based on model data or harvesting reporting data); Exhibit D, ¶ 12.j). Rather, **even if** "scientific evidence suggest it is appropriate to do so," mortality rates cannot be changed unless there is "consensus," i.e., unanimous agreement, to change them. (Proposed Decree, § VII(A)(5)(b)(i)). While the Parties may argue that "[i]t is the intention of this subsection that target annual mortality rates will be adaptive" and subject to change "as warranted," every Party has a veto right on a change even if violative of biological necessity (Proposed Decree, § VII(A)(5)(b)(iii)). This lack of a scientific approach to mortality rates and harvest limits in favor of a political approach, i.e., that the Executive Council, not biologists, will set the mortality rates or harvest limits and that any one Party may veto a change regardless of necessity, is a major threat to the sustainability of fishery populations.[7]

Further, there is no remedy in the Proposed Decree for the failure to adopt and adjust mortality rates or harvest limits prior to the time when adverse impacts will be suffered in the fishery. Any party may veto any adjustment to mortality rates or harvest limits and the dispute resolution process set forth in the Proposed Decree does not protect the resource, since it specifically states the "matters identified in the this Decree as requiring consent or agreement of all of the Parties shall not be subject to dispute resolution…" (Proposed Decree, § XVIII(A)(1)).[8] This lack of a meaningful remedy **prior** to actual damage to the fishery puts this Court in the very position that Judge Enslen warned against prior to the approval of the 1985 Consent Decree: having the Court serve as a perpetual "fish master," a role to which the Court is ill-suited in the view of

[8] Even if a dispute resolution process was available to address changes in mortality rates or harvest levels, by the time catch data is collected and verified, demands for a change made and then rejected, and the multi-step process in the dispute resolution system completed, an entire fishing season will have come and gone (Proposed Decree, § XVIII).

Judge Enslen (Exhibit A, ¶ 20 ("The Proposed Decree is not likely to be successful in ensuring the long-term sustainability of the fish stocks in the 1836 Treaty Waters").

Johnson avers that this is wholly insufficient from a biological perspective considering the unpredictability of the Great Lakes fishery:

> Harvest policy and status of the stocks **need to be reviewed at least annually and more frequently where populations are especially depressed**, yet the proposed decree would review harvest policy only every three years and mortality targets every six years. **Such infrequent reviews of harvest policy could have disastrous consequences**. [Exhibit D, ¶ 12(j) (emphasis added).]

The frequent review of harvest policy and mortality targets has been the past routine for the Parties, but this Proposed Decree represents a step backwards (Exhibit A, ¶¶ 23-24).

The potential dangers of the lack of frequent review are compounded by the proposed expansion of gillnet fishing. Both Johnson and Krist aver that gillnet fishing resulting in overfishing can produce disastrous consequences in as little as a few months, as demonstrated by assessment data from the MDNR in 1978-79:

> Vigilance is required in managing gillnet effort and lack of vigilance can have disastrous consequences in as little as a few months. An example of the consequences of a targeted and unlimited gillnet fishery is illustrated by 1978-79 Michigan Department of Natural Resources assessment data from Hammond Bay–Cheboygan areas of northern Lake Huron. **The DNR's assessment fishing there measured an 83% drop in lake trout density between 1978 and 1979**. . . . **A single fall season of gillnetting nearly eliminated the lake trout population there**. **Similarly, a wave of gillnet effort in Grand Traverse Bay in 1979 reduced the lake trout stock there by over 90% in a matter of months**. [Exhibit D, ¶ 12(j)(1) (emphasis added).]

> **Heavy gillnetting** between the fall of 1978 and the spring of 1979 in northern Lake Huron, including Hammond Bay, **caused the lake trout population to plunge precipitously.** The decline in lake trout caused the recreational fishery to decline [Exhibit B, ¶ 11 (emphasis added)].

The Proposed Decree does not have specific terms related to restrictions on boats fishing in many of the expanded gillnet areas and limits per the boat that can be used (Exhibit B, ¶ 28). The lack of terms dictating that there be frequent, necessary reviews of harvest limits and target annual

mortality rates present a significant danger to the Great Lakes fishery (Exhibit A, ¶¶ 24-25; Exhibit D, ¶ 12.j) and, honestly, to tribal and non-tribal interests alike. The proposed terms do not align with preservation of the Great Lakes fishery because the terms are reactive, rather than proactive.

The Coalition objects to the review standards in Article VII(A)(6) because the standards are insufficient to protect the Great Lakes fishery, and ultimately, the availability of the fishery resource to the Tribes and the public. These provisions should be rejected and that these issues be returned to the Parties for further negotiation—especially regarding having annual review of target mortality and harvest limits, review of fisheries stock assessments, and recommendations from outside fisheries experts regarding a better approach to the management framework incorporated in a successor decree. Further discussions should also account for data uncertainty in the stocks and promoting population abundance and sustainability, avoiding harvest goals that are too close to the maximum sustainable yield threshold, and timely evaluation of the fisheries' performance to avoid overfishing impacts for all users (Exhibit A, ¶ 29; Exhibit D, ¶ 12.j).

E. The Coalition objects to Article VII(B) because the management standards related to annual harvest limits are vague to the point of being unenforceable.

The Proposed Decree provides that "[t]he State and the Tribes shall manage their respective fisheries to avoid exceeding their respective annual Harvest Limits" and that "[l]arge deviations shall be rare and promptly addressed" (Proposed Decree, Article VII(B)). This language, without any defined terms or qualifying language, is meaningless. It seemingly permits deviations, but to what extent is completely unclear and unenforceable.

The lack of specificity presumably makes the harvest limits vague to the point of being unenforceable by this Court; this Court cannot accept such language in a consent decree because it will have the responsibility of enforcing the terms of the decree for a 24-year duration without

any guidance from the Decree or the Parties' agreement. In fact, because the "prospective provisions of [a] consent decree operate as an injunction[,]" the lack of such specificity alone should be grounds for rejecting the Proposed Decree. See *Williams*, 720 F.2d at 920 (explaining that when a court enters a consent decree its provisions operate as an injunction); Fed. R. Civ. P. Rule 65(d)(1)(C) (providing that injunctive relief must "describe in reasonable detail . . . The acts or acts restrained or required").

The lack of management standards similarly reveals a lack of feasibility in the plan purported in the Proposed Decree. The Proposed Decree is intended to set limits on what can be fished, but language indicating large deviations shall be "rare" essentially negates that intent (Proposed Decree, Article VII(B)). The language proceeds to indicate "on average neither the State nor the Tribes shall exceed their apportioned harvest opportunities." (*Id*.) Without clearer terms, this Court is only left to guess at what actions are prohibited under the Proposed Decree.

Contrast this bundle of undefined, unenforceable terms with the terms of the 2000 Consent Decree, which had clear, defined terms and consequences that made the mortality and harvest limits established by the Decree clear and enforceable (e.g., 2000 Decree, Article VII(A)(3) [mortality limits] and VII(B) [overharvest consequences]). Parties had a well-defined incentive to comply with the requirements of the 2000 Decree and clear consequences for violations of mortality or harvest limits. The Proposed Decree is ambiguous, contains no deterrents to violation and is wholly unenforceable by the Court.

The Coalition objects to Article VII(B), and the entirety of the Proposed Decree, because the management standards are so vague as to be unenforceable. We ask that these provisions be rejected and that these issues be returned to the Parties for further negotiation.

F. The Coalition objects to the information sharing framework in Article XIV of the Proposed Decree because it omits information necessary to ensure preservation of the Great Lakes fishery.

The provisions of the Proposed Decree regarding information collection, reporting and disclosure are inadequate and unenforceable in several respects that directly affect the fishery. There are several shortcomings in the proposed Decree.

As established above in Section I.A, the Proposed Decree vastly expands gillnet fishing. Gillnets are lethal to any species of a given size that swims into them. The use of this non-selective gear creates a significant concern related to incidental or bycatch of other species (Exhibit C, ¶ 15 (noting that trap nets do not kill non-target fish, which can be discarded and sorted alive as opposed to gillnets killing bycatch). Against this fact, the Proposed Decree only requires the Tribes to report harvest "landed" (Proposed Decree, § XIV(B)). "Landed" is not defined. Thus, non-commercial species caught and killed in gillnets, such as Atlantic Salmon, lake sturgeon, book trout, splake, brown trout, steelhead (rainbow trout) and others are not reported and will not be reported under the Proposed Decree. This is a significant issue with managing the fishery as the Parties are not even attempting to collect the necessary data to validate their presumption that expanded non-selective gillnets will have no harm on the fishery (Exhibit D, ¶ 12(j)(4)). This means the Tribes are not required to report species captured but not retained and returned to the water dead or alive, making it impossible to evaluate the use of gillnets and understand the actual catch and what is happening within the fishery.

One example of how this could play out is with the restrictions on undersized Lake Trout set forth in Article VII(F)(2). The terms provide that all live, undersized Lake Trout shall be released; however, these released fish will never be included in the information sharing (Proposed Decree, § VII(F)(2)), failing to establish the entire picture of the fishery. In contrast to these requirements of the Tribes, State-regulated charter boats operating in 1836 Treaty Waters must

report the number of each species harvested and those that are caught and released (Proposed Decree, § XIV(G)). It is obvious the Tribes know the importance of captured but released catch data, yet the Proposed Decree ignores the responsibility for the Tribes to provide such data.

The flawed reporting requirements in Article VII(F)(2) fail to adequately create a basis of information that will allow the Parties, and the public, to evaluate the health of the Great Lakes fishery. Thus, the Coalition objects to the information sharing provisions in Article VII(F)(2). We ask that these provisions be rejected and that these issues be returned to the Parties for further negotiation.

G. The Coalition objects to Article VIII because it does not provide a workable management framework for other species.

A provision for management of other species is entirely lacking in the Proposed Decree and is greatly needed, especially considering the expanded use of gillnets. For example, Johnson highlights that "[t]he Proposed Decree fails to even address the status of ciscoes in the lower two lakes or the potential impact of expanded small-mesh gillnet fishing on their recovery" (Exhibit D, ¶ 12(e)). This species is "in the early stages of recovery in Lake Michigan and are subject to a stocking-based recovery program in Lake Huron" (Exhibit D, ¶ 12(e)). This is an issue that must be addressed in the Proposed Decree, not as an emerging issue after entry of the decree.

Gillnets are not as-selective as will be suggested by the parties. In addition to fish, loons and diving ducks are threatened by gillnets, and will be caught and killed by the setting of such nets (Exhibit C, ¶ 15; Exhibit D, ¶ i.1). Loons are even listed as "threatened" by the State of Michigan (Exhibit D, ¶ i.1), yet expanded gillnet fishing is proposed. Bycatch of State-threatened lake sturgeon is even more concerning as they are also under consideration for being listed as a federally threatened species (Exhibit D).

Moreover, the allocation of species other than whitefish and Lake Trout between the Tribal and State commercial fishers is completely unstated, and the standards to resolve a dispute over allocation only compounds this issue. Article VIII(I) provides that "[i]f there is an issue of allocation between Tribal and State commercial fishers, there shall be a presumption in favor of Tribal fishers." What "presumption" is intended is unstated and not defined. Understanding that the fishery is a shared resource and roughly split equally, we can only guess at what was intended by this wholly vague statement. This creates a serious issue for this Court in enforcing the terms of the Proposed Decree and for the Parties in resolving the disputes. The standards for the harvest of other species must be definite and clear, without a need for such a "presumption" or this Court's intervention.

In all, the framework in Article VIII addressing other species must be defined to create a manageable standard that can be evaluated by this Court. Until these standards are developed, the Coalition asserts that the framework is so vague and inadequate as to be unenforceable. Absent redrafting to provide an enforceable decision-making process, this section of the Proposed Decree should be rejected. The Coalition requests that these provisions be rejected and returned to the Parties for further negotiation.

H. The Coalition objects to Article VI(C)(3) of the Proposed Decree because it does not provide adequate measures for marking nets, presenting a significant public safety concern.

The marking of gillnets and trap nets has been a public safety issue for years, yet the Proposed Decree does not create adequate marking standards for gillnets despite dramatically expanding gillnet fishing into areas where such nets have not been present for decades. The marking of gillnets presents a major public safety issue that must be addressed prior to entry of any consent decree, and this is not just a matter of "educating the public." The danger that gillnets

pose results from the recreational fisher having the propeller of their motor or fishing cables becoming entangled in the net (Exhibit B, ¶ 30).

To put this objection in context, gillnets are easily portable and movable. They can be thousands of feet in length. They can be set in any direction by a fisher with a 20-foot-long boat. They can drift with changes in current or waves. Notwithstanding, Article VI(C)(3) of the Proposed Decree merely provides that gillnets shall be marked on each end of the netting with a 16"x16" flag at least four feet above the water. There is no limit on the length of a gillnet subject to this requirement. In fact, other portions of the Proposed Decree assume that gillnets may be as much as 6,000 feet long. In the congested waters of inner Grand Traverse Bay, gillnets are limited to 4,500 feet in length.[9] In Little Bay de Noc and Big Bay de Noc, gillnets are limited to 24,000 feet. Due to the narrow areas of the bays, and the extensive expansion of gillnetting proposed, boater safety will remain a serious concern. The 4-foot poles on the ends of the net need not be reflective to radar. While there are other mandates for markings on the surface of the water depending on the depth of the net and the water, such markings can be as small as "one and one-half (1.5) inches [diameter] by four (4) inches [length]" in size (Proposed Decree, § VI(C)(2)(b)). These marking requirements create a significant safety hazard for boaters, and recreational fishers. They simply fail to provide adequate notice of where up to mile long nets are in the water. One need only consider the visibility of a 16-inch square a half mile away in seas with 2-to-4-foot

[9] This Court may take judicial notice on certain facts. *Yeldo v. MusclePharm Corp.*, 290 F. Supp. 3d 702, 708 (E.D. Mich. 2017). This Court should take judicial notice as to the width of the inner Grand Traverse Bay and Bays de Noc. For example, Little Bay de Noc narrows to approximately .7 miles (3,670 feet) at Gladstone, between Saunders Point and Hunters Point. The geographic limits of these narrow areas of water further demonstrate the impacts of walling off an area of the fishery with gillnets.

waves to understand the risk posed by inadequately marked nets.[10] Finally, the net marking provisions in the Proposed Decree set forth no way to know which direction a gillnet may run even if a flag is spotted. Does the net run north, south, east or west?

In addition to the inadequacy of net marking on the nets themselves, there is no requirement that the location of nets set in the Great Lakes be disclosed to boaters, other fishers or to the general public. Thus, nets located one day can be moved the next with no notice to the public who may assume that a net seen one day will be there the next.

Several incidents with gillnets in Lake Huron have occurred over the years. The most tragic of them was an incident in 1993 where three boaters died when "an accident occurred at the Tribal Salmon gillnet zone near Nunns Creek" (Exhibit B, ¶ 32 (b)). The solution, Krist believes, is adequate marking of gillnets in the waters, which is especially important under the Proposed Decree as it expands gillnet fishing zones into hundreds of square miles of recreational fishing waters (Exhibit B, ¶ 33).

Affiant Captain William Winowiecki, President of the Michigan Charter Boat Association, has also had numerous incidents with gillnets on the Great Lakes that have caused damage to his boat and dangerous situations for his crew and customers (**Exhibit F**, Affidavit of William Winowiecki). Based on his experience, he believes that gillnets create a serious public safety concern (Exhibit F, ¶¶ 6(a)-(g)). He believes that because the Proposed Decree expands gillnet fishing into areas that have not been fished with gillnets for decades, it is imperative that there be "adequate marking requirements . . . as well as public information sharing" (Exhibit F, ¶ 11).

[10] There are numerous other hazards posed by gillnets that break free without any intermediate markings, nets that may entangle recreational fishers who have no notice of a net location, an absence of provisions for the immediate removal of drifting nets and the assessment of costs associated therewith and other concerns.

Otherwise, the Proposed Decree "poses a danger to the charter boat community and other users of the Great Lakes" (Exhibit F, ¶ 12). Captain Winowiecki believes the following, which incorporates modern day technology, would establish adequate marking of gillnets:

> In my experience, adequate marking of gillnets **would provide the length of the net, the direction of the net, the owner of the net, and would be visible at a distance.** Adequate marking would also include public information that would give the other users of the resource notice of the grids being fished with gillnets along with GPS coordinates. With the technology available at this time, including the extensive use of cellphones and other similar devices, a phone application or website could be required by the Proposed Decree showing a map of relevant user-identified grids and a location identifying a net is in the location so boats and anglers can avoid those sites. **This is a small feat to save lives of those other users on the Great Lakes that will now more likely be within areas where commercial nets can be set. The wide expansion of the nets is a tremendous concern and safety needs to be taken seriously in the Proposed Decree** [Exhibit F, ¶¶ 9, 10 (emphasis added)].

In its current form, Captain Winowiecki believes the Proposed Decree poses a danger to the charter boat community and other users of the Great Lakes because it inadequately addresses the safety concerns related to unmarked or unknowingly placed gill nets (Exhibit F, ¶ 12).

The seriousness of this issue need only be confirmed with the United States Coast Guard, who objected to any proposal to place gillnets in the Detour Passage. Further, the Court should be concerned about the more effective measures that are available, but not included. For example, in Section IV(A)(1)(f), the Little River Band agreed that it "shall share with MDNR GPS coordinates of nets that are set as soon as possible." These GPS coordinates "may" be made "available to the public to avoid operational conflicts with other users and promote public safety." This statement establishes a number of critical points and a serious issue of public safety. First, net conflict with the public is a real concern recognized by the Little River Band. Second, the technology exists to make GPS coordinates and other location information available in real time. Third, at least the Little River Band and the State see the need to "promote public safety" yet neither the United

States nor any of the other four Tribes are willing to make public safety a priority and the State does not address public safety in any waters other than the Little River Band zone.

There is absolutely no reason that the Parties and the Proposed Decree cannot address these public safety concerns, especially in light of the massive expansion of gillnets into waters that have not seen such nets for decades. The Court should not be deceived by assertions that this is merely a matter of "education." Education cannot cause a 16" square flag a half mile away in 4-foot seas to suddenly be seen.

The Coalition objects to the current standards in Article VI(C)(3) because they are wholly inadequate in addressing the public safety concerns related to gillnets and they may actually create public safety issues if the public believes that nets are marked so as to be visible, when the opposite is the case. We ask that these provisions be rejected and that these issues be returned to the Parties for further negotiation.

I. The Coalition objects to Article XIII(C) because it does not provide a meaningful framework for local consultation, as prior decrees have, and is inconsistent with the recognition that the resource is shared in common.

Provisions of the 2000 Consent Decree allowed local governments and recreational fishing groups to request a meeting with the Tribes to discuss issues of local concern, and the Tribes agreed they would meet upon request. This provision was used sparingly by the public and local governments and served to promote understanding and problem solving. The Proposed Decree, in contrast, has eliminated these provisions and replaces them with terms forcing these groups to ask the State to address concerns with the Tribes, essentially ending local consultation except with the permission of the State. Further, the new provision eliminates the Tribes' previous commitment to meet with local governments or public interest groups (Proposed Decree, Article XIII(C)). Similarly, the 2000 Consent Decree required an annual report regarding Tribal management of the

fishery (see Article XIV of the 2000 Consent Decree), as well as other valuable data regarding catch. The Proposed Decree, however, specifically exempts commercial harvest data from disclosure to "non-parties" allowing little ability for anyone to understand the impacts of the Proposed Decree. (Proposed Decree, XIV.B.4.)

The State's inability and unwillingness[11] to address matters of local concern makes this framework unworkable. In practice, such a system is likely to create responsiveness issues to local concerns regardless of the issues that may arise within a local fishery (overfishing, overall health of the ecosystem, stocking, conflicts between users, the need for improved communication, etc.). This lack of a meaningful local consultation provision does not show a recognition the resource is shared in common nor does it further the preservation and conservation of the fishery. At the same time, the Proposed Decree also makes important data that fishery biologists outside this case would deem relevant and important to the management and study of fisheries, as well as to the public, unavailable for review, verification, and research.

The Coalition objects to Article XIII(C) of the Proposed Decree because it in inconsistent with the concept that the resource is shared in common and it is inconsistent with the reduction of conflict and open communication between those with a clear legal and practical interest in the Great Lakes fishery. The Coalition further objections to Article XIV that makes certain information unavailable to the public. These provisions should be rejected and these issues be returned to the Parties for further negotiation.

[11] The State stated to the Coalition that it does not have time for "local concerns."

CONCLUSION

The Coalition's objections and supporting affidavits and other material[12] establish that this Proposed Consent Decree should not be accepted by this Court because it is contrary to the public interest and it is in no sense fair, adequate, and reasonable to all interested parties. See *Williams*, 720 F.2d at 920-21 (Providing a court may not enter a consent decree "for an agreement which is . . . contrary to the public interest" and a court, prior to entering a consent decree, should evaluate whether it is "fair, adequate, and reasonable"). The main issues with the Proposed Decree are directly related to Judge Enlsen's 15 factor analysis from 1985. See *Michigan*, 12 ILR at 3081 (providing fifteen factors to analyze two proposed allocation plans). The Proposed Decree fails to address the need to conserve declining whitefish and fragile lake trout populations of the lower two lakes, does not adequately preserve and conserve the resource, it fails to recognize that the resource is shared, exacerbates the potential for social conflict, destabilizes the fishery, has an unworkable management scheme, and is not flexible enough for the unpredictability of the fishery. For these reasons, this Court should reject the Parties' Proposed Consent Decree and the Parties should be directed to return to negotiations to formulate a legally and factually supportable agreement, if possible. Finally, the clear merit of the Coalition's objections illustrate the contributions that the Coalition can make to an agreement that preserves the Treaty right while addressing the public interest. This contribution considered with the actions of the State in shutting out the Coalition from the negotiation process warrants a review and revision of the terms

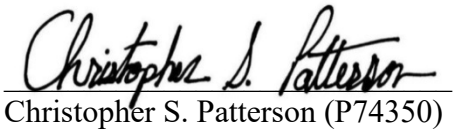
[12] The Coalition's affidavits show that the objections set forth here are supported by the testimony of expert witnesses. If the Court has any question as to the *bona fides* of these experts, the Coalition offers their testimony in support of these objections consistent with F.R.C.P. 26 and F.R.E. 702. Though the Court has not offered the opportunity for a hearing in its previous commitment to hear the Coalition's objections and supporting testimony, the Coalition is prepared to present its proofs at a hearing should the Court so allow.

applicable to the Coalition's involvement in negotiations and subsequent reviews. This Court has in the past permitted Coalition involvement in input, comment, motion practice and briefing related to the negotiation of consent decrees in this matter, all of which contributed to the successful negotiation of the two previous decrees.

WHEREFORE, the Coalition to Protect Michigan Resources respectfully requests this Honorable Court issue an order rejecting the Parties' Stipulation for Entry of Proposed Consent Decree Subject to the Court's Consideration of Objections (ECF 2042).

Respectfully submitted,

Fahey Schultz Burzych Rhodes PLC
Attorneys for CPMR



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Dated: January 20, 2023

CERTIFICATE OF COMPLIANCE PURSUANT TO LOCAL RULE 7.2

This response brief complies with the type-volume limitation of Local Rule 7.2 because it contains 10,622 words, excluding the parts exempted by Local Rule 7.2(b)(i). This response brief was prepared using Microsoft Word 365.

Respectfully submitted,

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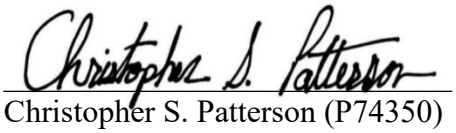
Attorneys for CPMR



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CERTIFICATE OF SERVICE

I, Kaylin J. Marshall, hereby certify that on the 20th day of January 2023, I electronically filed the foregoing document and any attachments with the ECF system which will send notification of such to all parties of record.

/s/ Kaylin J. Marshall
Kaylin J. Marshall

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

and

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,

and

STATE OF MICHIGAN, et al.,

Defendants.
_____/

Case No. 2:73-cv-26

HON. PAUL L. MALONEY

INDEX OF EXHIBITS

Exhibit A	Affidavit of Christopher Horton
Exhibit B	Affidavit of Frank Krist
Exhibit C	Affidavit of David Borgeson
Exhibit D	Affidavit of James Johnson
Exhibit E	Affidavit of Scott McLennan
Exhibit F	Affidavit of William Winowiecki

Exhibit A

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

and

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,

and

STATE OF MICHIGAN, et al.,

Defendants.

Case No. 2:73-cv-26

HON. PAUL L. MALONEY

AFFIDAVIT OF CHRISTOPHER M. HORTON

STATE OF ARKANSAS)
) ss
COUNTY OF HOT SPRING)

CHRISTOPHER M. HORTON, having been duly sworn and under oath, hereby avers, deposes and states as follows:

1. I am Christopher M. Horton, a former state agency fisheries biologist and now the Senior Director of Fisheries Policy for the Congressional Sportsmen's Foundation.

2. I make this affidavit based upon my personal knowledge and belief, and if called upon to testify in a judicial proceeding, my testimony would be consistent with the averments made herein.

3. I graduated with honors from Henderson State University in 1995 with a Bachelor of Science in Biology. I then participated in a graduate program in the School of Renewable Natural Resources at the University of Arizona where I received a Master of Science with a Major in Wildlife and Fisheries Science in 1997.

4. In 2007, I was selected to participate as a member of a United States delegation to the United Nations Food and Agriculture Organization to develop a recreational fishing code of practice.

5. In 2008, I was the keynote speaker at a joint conference of the Environmental Protection Agency, the North American Lake Management Society, and the American Fisheries Society Fisheries Administrators Section.

6. I have served two terms on the Sport Fish and Boating Partnership Council having been appointed by the Secretary of the Interior.

7. I served on the National Fish Habitat Partnership Board from 2008 to 2014.

8. In 2013, I testified before the House Natural Resources Subcommittee on Fisheries, Wildlife, Oceans, and Insular Affairs oversight hearing on *Data collection issues in relation to the reauthorization of the Magnuson-Stevens Act*.

9. In 2015, I testified before House Natural Resources Subcommittee on Water, Power, and Oceans hearing on H.R. 3094, the *Gulf States Red Snapper Management Authority Act.*

10. In 2017, I testified before the Senate Subcommittee on Oceans, Atmosphere, Fisheries and Coast Guard regarding *Reauthorization of the Magnuson-Stevens Fishery Conservation and Management Act: Oversight of Fisheries Management Successes and Challenges.*

11. From 2017 to 2019, I was appointed to the Marine Protected Areas Federal Advisory Committee by the Assistant Administrator for Fisheries at the National Oceanic and Atmospheric Administration.

12. In 2022, I was selected as a member of Maryland Governor Larry Hogan's Task Force on Recreational Fishing Data Collection and Licensing.

Background of Experience in Management of Fisheries

13. In 1976, Congress passed the Fishery Conservation and Management Act, better known as the Magnuson-Steven's Act. Magnuson-Steven's Act is the principal law governing marine fisheries in the United States. Prior to passage, foreign fishing vessels were fishing, unregulated, as near as 12 miles from the United States coastline. Magnuson-Steven's Act's primary goals were to extend control of U.S. waters to 200 nautical miles in the ocean; to phase out foreign fishing activities; to prevent overfishing, especially by foreign fleets; to allow overfished stocks to recover; and to conserve and manage fishery resources.

14. There have been two substantial revisions to Magnuson-Steven's Act since 1976, but the most recent 2007 reauthorization resulted in setting strict policies to end overfishing and rebuild stocks based on the best scientific information available. Arguably, the most recent reauthorization of Magnuson-Steven's Act has resulted in the United States having the best managed fisheries of any country in the world. The 2007 reauthorization established 10 national standards for management:

a) Prevent overfishing while achieving optimum yield.
b) Be based upon the best scientific information available.
c) Manage individual stocks as a unit throughout their range, to the extent practicable; interrelated stocks shall be managed as a unit or in close coordination.
d) Not discriminate between residents of different states; any allocation of privileges must be fair and equitable.
e) Where practicable, promote efficiency, except that no such measure shall have economic allocation as its sole purpose.

f) Take into account and allow for variations among and contingencies in fisheries, fisheries resources, and catches.
g) Minimize costs and avoid duplications, where practicable.
h) Take into account the importance of fishery resources to fishing communities to provide for the sustained participation of, and minimize adverse impacts to, such communities (consistent with conservation requirements).
i) Minimize bycatch or mortality from bycatch.
j) Promote safety at sea.

15. It is my opinion that the fisheries conservation and sustainability principles of the Magnuson-Steven's Act should serve as a model for managing the fisheries within the Proposed Consent Decree.

Analysis of Proposed Consent Decree

16. In some ways, fisheries management within the 1836 Treaty waters is not dissimilar to fisheries management under Magnuson-Steven's Act. For instance, the parties to the Proposed Consent Decree involved in negotiating fishing opportunities resemble a regional fisheries management council under Magnuson-Steven's Act, and the purpose of the Technical Fisheries Committee in the decree is similar to a regional council's all-important Science and Statistical Committee. However, in my opinion, each differ significantly in their likelihood to achieve long-term sustainability of fisheries resources that maximize the economic, cultural, and social benefits of the area's fisheries resources to the people of their respective nations.

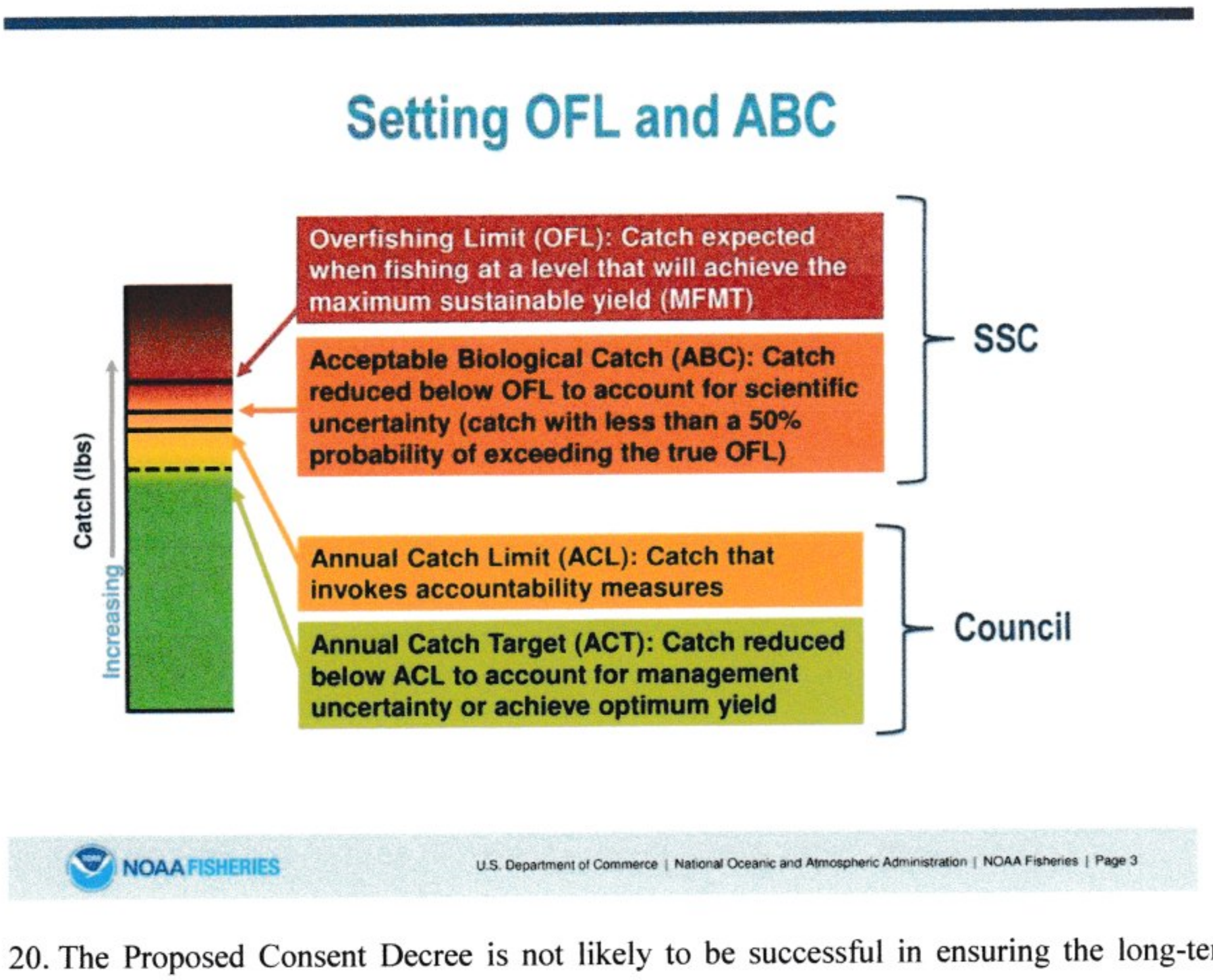
17. While both Magnuson-Steven's Act and the decree seek to manage fisheries based on the concept of maximum sustainable yield, identifying the maximum yield available to harvest from any given fishery in any given year with 100% confidence is impossible. For this reason, federal marine fisheries management manages to optimum yield, which, "will provide the greatest overall benefit to the Nation, particularly with respect to food production and recreational opportunities, and taking into account the protection of the

marine ecosystems," and "is prescribed as such on the basis of the maximum sustainable yield from the fishery, as reduced by any relevant economic, social, or ecological factor."

18. Optimum yield could be the acceptable biological catch described below, or the principle of optimum yield can be incorporated when the regional fishery management councils set the annual catch limit or annual catch target, again described below. Regardless, Optimum yield is almost always set at a percentage that is less than 100% of maximum sustainable yield to account, in part, for the fact that we never know the actual catch available at maximum sustainable yield. Allowing for harvest right up to the maximum sustainable yield level on an annual basis perpetually creates an inherent risk for recruitment overfishing. Unfortunately, the management approach under the Proposed Consent Decree does just that, and even allows for increases in harvest above model-generated yield projections according to the recent 2020 report of the Technical Fisheries Committee on the status of lake trout and lake whitefish in the 1836 Treaty waters.

19. Another glaring contrast in the ability of the two management approaches to achieve sustainability is that under Magnuson-Steven's Act there are further measures to account for data uncertainty that are incorporated into management decisions, which the Proposed Consent Decree does not similarly take these issues into account. Not only is it impossible to know the total population size with certainty, and thus the ability to calculate an accurate maximum sustainable yield (which is based on models largely relying on catch histories), but also measuring the actual catch is not precise, with errors like non-reporting or underreporting, recall bias in the recreational sector, poor estimates of discards and discard mortality, etc. Unlike the approach outlined in the Proposed Consent Decree, Magnuson-Steven's Act tries to account for data uncertainty by first requiring the Science and

Statistical Committee to establish an overfishing limit (essentially maximum sustainable yield), followed by a further reduction in harvestable quota, called the acceptable biological catch that varies based on the data used to determine the overfishing limit and for optimum yield considerations. If there is high confidence in the data, the acceptable biological catch may be set closer to the overfishing limit. If the Science and Statistical Committee determines that the models contained a lot of uncertainty, they set a much larger buffer between the overfishing limit and acceptable biological catch. Once the acceptable biological catch is determined by the Science and Statistical Committee, the regional fishery management council (comprised of state fisheries managers, the National Marine Fisheries Service, commercial and recreational fishermen, and academia) is responsible for setting an annual catch limit that can be equal to the acceptable biological catch but can never exceed the acceptable biological catch per the mandated sustainability safeguards of the Magnuson-Steven's Act. If the council feels that either the model data or the harvest reporting data still encompass a high degree of uncertainty or it may be difficult to constrain the catch, they can reduce the annual catch limit further to an annual catch target, which is set below the annual catch limit quota.



20. The Proposed Consent Decree is not likely to be successful in ensuring the long-term sustainability of the fish stocks in the 1836 Treaty waters. This is because the Proposed Consent Decree lacks any hard catch limits or targets that, when exceeded, result in management triggers and accountability measures to end overfishing and prevent a stock from becoming overfished or to rebuild stocks that have been overfished (Lake Huron whitefish in the 1836 Treaty waters are highly likely to be considered overfished if such spawning stock biomass threshold were to be established per 2020 reporting on the status of the stock).

21. Under Magnuson-Steven's Act, when a fish stock is determined to be "overfished" (population is too low to produce maximum sustainable yield), "overfishing" (too many fish are being removed to achieve maximum sustainable yield) must be ended immediately

and a rebuilding plan implemented to rebuild the stock, which often requires catch to be significantly constrained for all sectors of the fishery.

22. Currently, the Proposed Consent Decree does not call for any biomass thresholds that would indicate a fishery is overfished. It only identifies mortality targets that are noted but can be exceeded with no recourse, so there is no accountability in place to end overfishing and ensure the long-term sustainability of stock for the benefit of all.

23. Furthermore, a review of the target annual mortality rates every six years poses significant challenges for managing fisheries for sustainability. The six-year timeline is not likely to be nimble enough to protect highly targeted fisheries. If populations decline because the mortality target has been set too high for a particular stock, the lack of timeliness in adjusting mortality targets and the resulting harvest limits could result in a depleted stock that could take years, if ever, to rebuild. A depleted fishery requires significantly constraining fishing effort, and thus the economic profitability and cultural heritage of fishers would be negatively impacted for years to come.

24. In my opinion, not investing in a timely, proactive review process is not worth the risk, and target mortality rates and harvest limits should be reviewed annually to determine if management objectives are being met and opportunities to access healthy, abundant fisheries are maintained. If harvest limits are exceeded, there should be accountability measures in place to reduce harvest and prevent overfishing from occurring.

25. Yield has declined in many of the whitefish fishery management units according to the most recent status of stocks report from the Technical Fisheries Committee. Combined with a similar decline in spawning stock biomass, the condition of these depleted fisheries suggest they are both overfished and undergoing overfishing. In the interest of responsibly

managing for fisheries sustainability, it is completely counter-intuitive to expand commercial fishing efforts considering the status of the whitefish stocks. Focusing on harvest opportunities as the Proposed Consent Decree seems to do, rather than the actual abundance of a stock, is a recipe for collapsed fisheries.

26. While most lake trout stocks are doing well, the increased effort and the shift to targeting of lake trout could result in the same depleted status of lake trout over time as seen in many of the whitefish stocks currently if hard catch limits are not established and enforced. Unless there is a system put in place to monitor harvest annually and adjust harvest limits in subsequent years to ensure overfishing does not occur, the ability to ensure fisheries in the 1836 Treaty waters are sustainable is largely diminished.

27. I highly recommend that the management process outlined in the Proposed Consent Decree, and recent harvest limit reports by the Technical Fisheries Committee, be reviewed by outside experts in fisheries stock assessments and their recommendations on a better approach to management be incorporated into the decree.

Conclusion

28. The management outlined in the Proposed Consent Decree does not address the needs of the most important component, the fisheries resources. It proliferates harvest pressures in the face of a changing ecosystem and several declining stocks of fish. Fisheries management is a delicate balance between providing access to fisheries resources and ensuring those resources are sustainable for both today and for future generations. The Proposed Consent Decree does not focus on managing to healthy fisheries resources, and commercial fishing profitability, the ability to provide protein to families through subsistence fishing, and Michigan's outdoor heritage will likely be compromised.

29. In my professional opinion, there should be significant concerns of the proposed management approach in the Proposed Consent Decree for both recreationally and commercially important fish species in the 1836 Treaty waters of Lakes Superior, Michigan, and Huron. This is because the management approach fails to account for data uncertainty in stock assessments, relies too heavily on managing fishing effort rather than to promote population abundance and sustainability, sets harvest goals too close to the maximum sustainable yield (maximum sustainable yield) threshold, and lacks the timeliness needed to both evaluate management performance and adjust management measures to prevent overfishing.

Further affiant sayeth not.

Date: 1/19/23

Christopher M. Horton
Christopher M. Horton

On the 19 day of January, 2023, in Hot Spring County, Christopher M. Horton did appear before me, subscribed and having been duly sworn and under oath did attest that the forgoing affidavit and averments contained within were true and correct to the best of his knowledge and belief and having read the same he executed the foregoing Affidavit as his free act and deed.

SUSAN MCLEMORE COMM. NO. 12690327 NOTARY PUBLIC HOT SPRING COUNTY, ARKANSAS COMM. EXP. 07/01/2025

Susan McLemore
Susan McLemore, Notary Public
State of Arkansas County of Hot Spring
My Commission Expires: 07/01/2025
Acting in the County of Hot Spring

Exhibit B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

and

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,

and

STATE OF MICHIGAN, et al.,

Defendants.
_____/

Case No. 2:73-cv-26

HON. PAUL L. MALONEY

AFFIDAVIT OF FRANK KRIST

STATE OF MICHIGAN)
) ss
COUNTY OF PRESQUE ISLE)

FRANK KRIST, having been duly sworn and under oath, hereby avers, deposes and states as follows:

1. I am Frank Krist, a retired Environmental Health Enforcement Officer and the current Vice President of the Hammond Bay Area Anglers Association.
2. I make this affidavit based upon my personal knowledge and belief, and if called upon to testify in a judicial proceeding, my testimony would be consistent with the averments made herein.

Education and Experience

3. I graduated from Jackson Community College in 1967 with an Associate Degree in Science. I then studied at Michigan State University and graduated in 1969 with a Bachelor of Science in Fisheries and Wildlife.
4. Upon graduating, I served in the United States Army as a Specialist 4th Class (between 1969 and 1971).
5. When I left the Army, I studied at Central Michigan University's graduate school and completed 53 hours of coursework in limnology, with a focus on chemistry.
6. Beginning in 1974 (and through my retirement in 2008), I was employed as an Environmental Health Enforcement Officer for the District Health Department No. 4.
7. I moved to Rogers City, Michigan in June of 1974, where I immediately became interested in the fishing opportunities along Lake Huron's shoreline. From 1974 through the present, I have advocated for and coordinated bringing people, agencies, communities, and others together to share ideas and work toward successful management of the Great Lakes and inland fisheries. I specifically emphasize the need to share ideas with and solicit input from the public. I am a member of the following:
    a. Michigan Department of Natural Resources' ("MDNR") Lake Huron Citizens Fishery Advisory Committee (Chair);
    b. MDNR's Northern Inland Lakes Citizens Fishery Advisory Committee (Chair);
    c. MDNR's Lake Michigan Citizens Fishery Advisory Committee (Member, representing Lake Huron Citizens Fishery Advisory Committee);
    d. Michigan Sea Grant External Advisory Committee (Member);
    e. American Fisheries Society (Member);

f. International Association of Great Lakes Research (Member); and

g. Michigan Resource Stewards (Member).

Background with Rogers City/Hammond Bay Area and Lake Huron

8. In August of 1974, I participated in a Chinook Salmon fishery near shore in the Rogers City area. In the spring of 1975, I engaged in Splake fishing in Hammond Bay and Presque Isle Harbor. During the same year, Lake Trout began entering the recreational fishery replacing the splake.

9. By 1976, the Lake Trout were becoming larger and more numerous, resulting in the recreational fishery becoming more popular. In 1977, both the Salmon and Lake Trout fisheries were beginning to draw visitors to the Rogers City area from Hammond Bay to Presque Isle.

10. By 1978, I began to realize the potential economic benefits the fishery could offer the community. The Lake Trout population was expanding, and a decent Salmon fishery emerged due to limited stocking efforts, so I encouraged the MDNR to expand its Salmon stocking efforts in the Rogers City area.

11. Heavy gillnetting between the fall of 1978 and the spring of 1979 in northern Lake Huron, including Hammond Bay, caused the Lake Trout population to plunge precipitously. The decline in Lake Trout caused the recreational fishery to also decline. However, Salmon were still being caught, and I continued to encourage the MDNR to increase Salmon stocking efforts near Rogers City.

12. In 1983, the MDNR established a contract with a landowner adjacent to Rogers City to install a Salmon weir to harvest excess spawning fish. This enabled the MDNR to stock a

large quantity of Salmon in the area and maintain control over the problems often associated with sizable returns of spawning Salmon.

13. The increased Salmon stocking efforts energized the community, and intensive planning began. Officials from Rogers City immediately created a "Mayor's Study Committee" of government leaders, civic members, recreational fishers, and news media.

14. The existing harbor facilities and business accommodations in Rogers City were grossly inadequate to accommodate the influx of visitors related to the fishery, and major investments in the community were needed. A three-million-dollar harbor upgrade was performed, and hundreds of thousands of dollars were spent on maintenance and dredging of the facility over the years.

15. In the midst of ongoing economic challenges and high unemployment in the area, Judge Enslen's statement in his opinion regarding the 1985 Consent Decree that "establishment of long-term management zones [would] permit economic development and planning by affected communities and individuals" inspired confidence that this major harbor investment would provide returns for many years. *United States v. Michigan*, 12 ILR 3079 at 3083 (W.D. Mich, 1985).

Overview of the Proposed Consent Decree

16. The Proposed Consent Decree fails to address the limitations of the fishery resource in the Great Lakes fisheries by expanding gillnet fishing zones.

17. I was involved in the prior consent decrees in this case and have experienced the effects of the 1985 and 2000 consent decrees through the course of my professional career.

18. The 1985 Consent Decree prohibited gillnetting in many critical areas. For example, gillnet fishing was prohibited south of the Hammond Bay Refuge Harbor in Lake Huron and all Lake Trout taken were released.

19. The 2000 Consent Decree similarly limited gillnetting. For example, in Hammond Bay, gillnet fishing was limited to waters shallower than 75 feet during October and December, a compromise that allowed Lake Trout to migrate into sport fishing zones the following spring (Top Map 13, **Exhibit A**).

20. The Proposed Consent Decree, in contrast, fails to address the limitations of the fishery resource and would severely impact the Great Lakes Fisheries.

21. The actions at this time while a resource is in crisis constitute, in my opinion, the State of Michigan's abdication of its Public Trust responsibilities to protect fishery resources on behalf of the citizens of Michigan.

Maps of Gillnet Fishing Zones Under the Proposed Consent Decree

22. To illustrate the proposed massive expansion of the non-selective and highly efficient large and small mesh gillnets, I created 20 maps covering the 1836 Treaty Waters using the professional Esri Mapping Software, ArcGIS 10.82. This allows accurate scaled maps to quickly show the proposed extensive expansion of both large and small mesh gillnet zones throughout Lake Michigan, Lake Huron, and Lake Superior. These maps are attached as **Exhibit A.**

Expanded Gillnet Fishing Zones in Lake Huron (Maps 11, 12, 13)

23. The destructive foodweb changes in Lake Michigan and even more intense changes occurring in Lake Huron have caused the Salmon numbers to decline sharply. As a result, Lake Trout are critical to maintaining a recreational fishery at Rogers City, which is the

busiest Trout and Salmon port on Lake Huron. Yet, despite this, the Proposed Consent Decree expands gillnet fishing zones in Lake Huron that will decimate the Lake Trout Population.

24. It is my opinion the Proposed Consent Decree would severely impact the Lake Trout population in Hammond Bay and the entirety of Lake Huron. This assertion is supported by annual assessments that show heavy gillnet fishing in Hammond Bay between the fall of 1978 and the spring of 1979 caused the Lake Trout population to plunge severely (Eshenroder et al., 1995).

25. Maps 11 and 12 illustrate the near elimination of the Northern Lake Huron Lake Trout Refuge. These important spawning grounds were critical in establishing a nearly recovered adult wild population in northern Lake Huron and continue to contribute to the Lake Trout population as distant as the southern waters of Lake Huron. The Proposed Consent Decree would eliminate the year-round protection of Lake Trout and only have restrictions for just 60 days from October 1 through November 29 while allowing gill netting and the retention of Lake Trout the rest of the year. In addition, the size of the protected waters has been reduced by more than one half. These changes will have devastating impacts on maintaining the Lake Trout population that is vitally important to all users.

26. Maps 11 and 12 show the intensive proposed gillnet expansion in Lake Huron. Shockingly, Map 13 shows that less than only six miles from Rogers City huge amounts of both large and small mesh gillnetting will be available year-round except for short spawning closures and a very limited seasonal restriction of large mesh gillnets only.

27. There is no longer an extensive period of several months for Lake Trout from the surrounding areas to migrate into Hammond Bay and the Rogers City area by spring. This

constant heavy netting throughout the year in and near these recreational fisheries will greatly reduce the number of fish in the area while the commercial fisher can easily remain profitable just by setting more gill net. As the number of fish in the area decline to low levels, anglers lose interest with the slow fishing and move to other ports or just quit fishing. This could cause serious economic hardships and devastate the community of Rogers City, as well as other fishing ports around the state.

28. Related to the issue above are the absence of Tribal local harvest limits, no restriction on the number of boats fishing in the area and no limit on the amount of net that can be used per boat. These oversights will enable a large portion of the lake-wide harvest to be taken in the Hammond Bay-Rogers City Zone. This will result in fewer fish left for the recreational angler. Unfortunately, there is no effective method in the proposal to prevent an overwhelming share of the fishery to be taken by commercial fishers since the harvest limits are only reviewed every 3 years and there is no in-season adjustments and accountability that ensures that all users have available a fair share of the resource each year. This was a point that Judge Enslen stressed and implemented by supporting zones for limiting the use of gill nets near recreational fishing ports.

Safety Concerns of Expanded Gillnet Fishing Zones in Lake Huron

29. There also is a serious problem with anglers leaving from Rogers City and fishing in the proposed gillnet zone from 40 Mile Point into Hammond Bay (Map 13). These anglers often fish near the bottom for Lake Trout where the gill nets are set. These anglers will be at serious risk of their submerged equipment becoming entangled in gillnets accidentally, creating a major conflict and serious safety concern.

30. The danger gillnets pose is easy to understand. When a motor propeller or fishing cables from a recreational fisher become entangled in the net and the material is not cut loose quickly enough, the stern or side of a boat can be pulled under the water resulting in the boat sinking or capsizing.

31. Gillnets are only marked at each end with a staff buoy and flag. Clearly, since gillnets are several hundred feet to over a mile long, it can be very difficult to determine the direction and pattern used to place the net. Many anglers arrive on the water before daylight and often fish after dark, which makes it nearly impossible to know where and the direction a net is placed. Foggy and breezy or windy conditions also make it very difficult to identify a single flag placed only on each end of a lengthy net. It becomes even more dangerous when two or more gillnetters are operating in the same vicinity since there is no way of knowing which markers belong to each net.

32. There have been multiple accidents related to gillnets in Lake Huron.

    a. A serious accident was caused in Hammond Bay along Huron Beach in 1981. **Exhibit B**.

    b. In 1993, an accident occurred at the Tribal Salmon gillnet zone near Nunns Creek. This incident tragically resulted in 3 deaths. **Exhibit C**.

    c. The dangers of gillnets were written about after this 1993 incident in the Detroit Free Press. **Exhibit D**.

33. The Proposed Consent Decree provides inadequate marking requirements, in my opinion based on my experience.

34. The added stress of fishing in waters with poorly marked gillnets causes not only safety issues as described above, but it will also likely cause many anglers to avoid returning to

the community and visit other locations instead. This can have severe economic impacts to nearby communities.

35. The limited amount of gillnet fishing zones in recent years has led to less accidents. However, with the zones under the Proposed Consent Decree, it is my opinion there are likely to be more accidents in the future if safety concerns (adequate marking of gillnets) are not addressed extensively.

Gillnet Expansion in Lake Huron Related to Salmon and Steelhead

36. This switch to the massive expansion of gillnets will threaten the documented wild population of Coho Salmon and steelhead that live in the Ocqueoc River. A mile of gillnet could easily encircle the river mouth yet comply with the 1/3-mile radius rule from the mouth. Over 45 years of fishing in the area indicate that steelhead and Coho Salmon cruise close to shore toward the end of summer where they are especially vulnerable in shallow water. The proposed 1/3-mile radius rule will not protect these spawning runs of wild fish.

Gillnet Expansion in Lake Huron Related to Yellow Perch and Walleye

37. Yellow Perch and Walleye under the Proposed Consent Decree will be a targeted commercial species.

38. Yet, with the massive expansion of small mesh gillnets, there is no effective policy in Proposed Consent Decree that determines a safe amount of each species that can be taken to prevent the collapse of limited local populations.

39. The Walleye fishery off of Rogers City and Hammond Bay is very small, but has been developing for a few years. With heavy gillnet use, it is my opinion this population will likely no longer be available to recreational fishers and probably disappear from the area.

Lake Superior large and small gill netting zones were expanded.

40. **Lake Superior Large Mesh Gill Net Zones.** The Western Lake Superior Trap Net Zone established under the 2000 Consent Decree will be eliminated in the Proposed 2022 Consent Decree and be replaced with year-round large mesh gill netting (Maps 16, 17 and 18). Au Train Bay was gill net free, but now under the 2022 proposal it is in the gill net zone with a short seasonal closure to protect only the spring run of salmon from April 1 through May 15. The deeper water recreational lake trout fishery would be open to year-round gill netting. Under the proposal the inner bay at Munising is protected, see the maps indicated above for more detail.

Lake Superior Small Mesh Gill Net Zones.

41. Under the 2000 Consent Decree the only location where small mesh trap nets or gill nets could be used to harvest yellow perch was in a small section of a grid on the extreme eastern end of Lake Superior, while the Proposed Consent Decree opens nearly the entire Lake Superior 1836 Tribal Waters to yellow perch and walleye target fishing with gill nets (Maps 19 and 20).

Summary of Concerns in the Proposed 2022 Consent Decree

42. With my intense involvement in this long running case and the negotiations of the four Consent Decrees over the last 45 years, I am very concerned about the Proposed Consent Decree as I discussed in the explanation above. The proposal is actually not better than the 2000 Consent Decree even though the Parties are strongly pushing that concept. If implemented without changes, the proposed consent decree would actually bring back many of the issues and challenges that faced the Parties before the implementation of the 1985 and 2000 Consent Decrees. During the early 1980s the resource was being depleted

in several extensive areas of the Treaty Waters and there was much conflict. The safety hazards of entangling in nets as I described above will now again be prevalent in extensive areas which have not had gill nets in over 60 years. The previous Decrees focused on the biology while working to ensure the resource is shared fairly. With the Tribal opportunities increasing greatly, it is apparent that the recreational share will decline significantly. The outcomes of the previous Decrees were fair to everyone as shown by no serious complaints reaching the court over the last 22 years. Even though the Tribes ended up with about 60% of the fishery previously, the agreements worked well. A major trade of the recreational fishery was a reduction in the allocation for gill net free zones. Unfortunately, that aspect is no longer a priority. As my statements above suggest, I strongly feel the outcome of the Proposed Consent Decree, if implemented without changes would result in a declining fishery for all users.

Assessment Fishing Projects

43. There is a major "loophole" present in the Proposed Consent Decree that allows a Tribal fisher to use up to 6,000 feet of gillnet testing a new set of rules that are contrary to the existing rules at a location. The assessment can continue to the excessively long period of three years.

44. These "research" fishers, apparently, can sell the catch. Notably, the Parties only have two weeks to review the details of an assessment proposal and then must respond at a Technical Fishery Committee ("TFC") meeting. If there are objections, then the dispute resolution may be used.

45. In my opinion, this section essentially allows a large gillnet fishery to be established anywhere at any time for 3 years in the Treaty Waters with no time or method of public

input. This represents a major departure from past research and survey netting. Agency-conducted surveys and assessments are typically completed with nets that are set for one or two days each year in a specific location.

46. I believe extending the assessment fishery over three years is biologically unsound and is a method to establish gillnet opportunities anywhere in the Tribal Waters.

Other Zones

47. The maps I created (**Exhibit A**) also focus on several ports where major expansion of gillnet fishing zones will occur under the Proposed Consent Decree. The following is my analysis and explanation of some of these zones:

Bays de Noc Zone (Maps 3 and 10)

48. This zone was a major focus of the 2000 Consent Decree where the state bought over eight State licensed trap net boats and made those operations available to the Tribes. This entire zone remained gillnet free through the 2000 Consent Decree, except for a small isolated offshore yellow perch fishery in grid 508 (Map 3).

49. As shown on Map 10, the Proposed Consent Decree allows the use of over 4.5 miles of large mesh gillnet for this zone. Lake Trout and Whitefish may be targeted but a limited bycatch of Walleye is allowed. The gillnets must be set in water 50 feet or deeper except during October and November when the minimum depth is 30 feet.

50. In addition to the limited bycatch of Walleye, there is much concern that these large mesh gillnets could by-kill a significant number of Walleye while being set in deeper water. Because of the boney structures on Walleye, they are vulnerable to becoming entangled in nets and can become a significant bycatch problem. The current Walleye population in the Bays is not strong and there is evidence that Walleye often inhabit the deeper waters.

Little Traverse Tribal Zone (Maps 8 and 9)

51. This zone in the Petoskey area will have an expansion of both large and small mesh gillnets. Map 8 shows that no commercial fishing was allowed in Grid 519 under the 2000 Consent Decree, however, the Proposed Consent Decree will allow large mesh gillnetting to occur deep into the Bay in grid 519 from October 1 through May 1 adjacent to the State Park. Since year-round large mesh gillnetting is provided in the outer western part of the Bay, there is concern that few Lake Trout will be available during the recreational season since there would be little time for Lake Trout to move into the inner bay from the more intensely gillnetted outer waters.

52. Map 9 shows a slightly different situation with the proposed increase of small mesh gillnets in the Bay. Small mesh gillnets would not be permitted in the approximately inner half of the Bay, but their use would increase greatly in the outer half and beyond.

Grand Traverse Tribal Zone (Maps 6 and 7)

53. This zone will encounter expansion of both small and large mesh gillnets. Similar to the Little Traverse Zone, gillnetting will extend deeper into each arm of the Bays. This is a concern since even though there are seasonal closures, there is not enough time for the fish to migrate into the Bays from the north where there are year-round large and small mesh gillnet fisheries. This will make it difficult for the recreational fishery to have an opportunity to take their portion of the fishery.

54. Contributing to this backfilling problem is a new large and small mesh gillnet fishery that allows Lake Trout and Cisco to be targeted along the edge of these deep Bays. This could impact the abundance of Lake Trout in the Bays because these fish often school along the edges and are especially vulnerable. The recovering cisco population in the Bays will be

vulnerable to both large and small mesh gillnets and the intensity of this proposed effort could reverse the recovery the population has achieved to date.

55. Similarly, along the Leelanau Coast to Empire new areas will be open to gillnetting and the concern again is that the seasonal closures do not provide enough time for fish to move from surrounding areas to replace those harvested and thus maintain a successful recreational fishery. Such recreational zones that had previously been closed to gillnetting acted as refuges from harvest. Opening these zones to gillnets will reduce lake trout numbers, further contributing to the failure of recreational fishing.

Little River Tribal Zone (Map 5)

56. This zone (including the Southern Lake Huron Development Zone) is very similar to the Bays de Noc Zone where large mesh gillnets have not been used for over 60 years. There are several ports in these two zones that will, under the proposed decree, encounter year-round large mesh gillnetting with several other ports dealing with seasonal closures that allow gillnetting into June or July. The recreational fishery is very active in both zones and safety will be an especially difficult challenge. Many anglers from the area have little or no knowledge of how gillnets are set and scantily marked. Much effort will be needed educating anglers and boaters of how a net is set along with the dangers that result when trolling gear or motors become entangled in the netting or ropes. Many anglers are uncomfortable fishing near gillnets and will refuse to visit these fishing ports.

57. The amount of large mesh gillnet in these two zones will be limited initially to two licenses with a maximum of 6,000 feet each, except that in the Southern Lake Michigan Development Zone one of those licenses can fish up to 4,000 feet moved from their original license. The proposed decree stresses that the goal of these two license proposals is for

emphasis on historic preservation and cultural education, yet two licenses and the amount of gear proposed seems excessive to obtain enough fish to satisfy the stated goal. The catch may be sold commercially, all of which suggests this proposal is a new gillnet fishing opportunity disguised as something else. In addition, assessments noted in the Proposed Consent Decree provide another method for establishing even more gillnetting licenses.

Literature Cited

58. In support of the opinions that I have expressed in this affidavit, I have relied upon the following:

    a. Eshenroder R. L., R.P. Payne, J. E. Johnson, C.B. Bowen II and Mark Ebner. 1995. Lake Trout Rehabilitation in Lake Huron. Journal Great Lakes Research 21 (Supplement 1):108-127.

Further affiant sayeth not.

Date: 1-18-2023

Frank Krist
Frank Krist

On the 18 day of January, 2023, in Presque Isle County, Frank Krist did appear before me, subscribed and having been duly sworn and under oath did attest that the forgoing affidavit and averments contained within were true and correct to the best of his knowledge and belief and having read the same he executed the foregoing Affidavit as his free act and deed.

ALEC GAJEWSKI
NOTARY PUBLIC - STATE OF MICHIGAN
COUNTY OF PRESQUE ISLE
My Commission Expires June 24, 2028
Acting in the County of Presque Isle

Alec Gajewski

Alec Gajewski
Alec Gajewski, Notary Public
State of MI, County of Presque Isle
My Commission Expires: 6/24/2028
Acting in the County of Presque Isle

EXHIBIT A

Maps comparing the 2000 Consent Decree and the Proposed 2022 Consent Decree Tribal Commercial Fishing Zones of Lakes Michigan, Huron and Superior

Below is a list of maps that compare the Tribal commercial fishing zones within the 2000 Consent Decree and the 2022 Proposed Consent Decree. The small mesh deep water Bloater Chub nets were not included in the comparisons since interest in this fishery has been low.

Map 1 Lake Michigan 2000 Consent Decree Large Mesh Gill Net Zones

Map 2 Lake Michigan 2022 Proposed Consent Decree Large Mesh Net Gill Net Zones

Map 3 Lake Michigan 2000 Consent Decree Small Mesh Gill Net Zones

Map 4 Lake Michigan 2022 Proposed Consent Decree Small Mesh Gill Net Zones

Map 5 Comparison Little River Band 2000 Consent Decree and 2022 Proposed Consent Decree Large Mesh Gill Net Zones

Map 6 Comparison Grand Traverse Band 2000 Consent Decree and 2022 Proposed Consent Decree Large Mesh Gill Net Zones

Map 7 Comparison Grand Traverse Band 2000 Consent Decree and 2022 Proposed Consent Decree Small Mesh Gill Net Zones

Map 8 Comparison Little Traverse Bay Band 2000 Consent Decree and 2022 Proposed Consent Decree Large Mesh Gill Net Zones

Map 9 Comparison Little Traverse 2000 Consent Decree and 2022 Proposed Consent Decree Small Mesh Gill Net Zones

Map 10 Comparison Bay de Noc 2000 Consent Decree and 2022 Proposed Consent Decree Large Mesh Gill Net Zones

Map 11. Comparing Lake Huron Lake Trout Refuge and Large Mesh Gill Net Zones for 2000 and 2022

Map 12. Comparing Lake Huron Lake Trout Refuge and Small Mesh Gill Net Zones for 2000 and 2022

Map 13. Comparing Hammond Bay 2000 and 2022 and Gill Net Zones

Map 14. Comparing 2000 and 2022 Lake Huron Tribal Fishing Zones

Map 15. Comparing Les Cheneaux Islands Tribal 2000 and 2022 Gill Net Zones

Map 16. Lake Superior 2000 Consent Decree Tribal Large Mesh Gill Net and Trap Net Zones

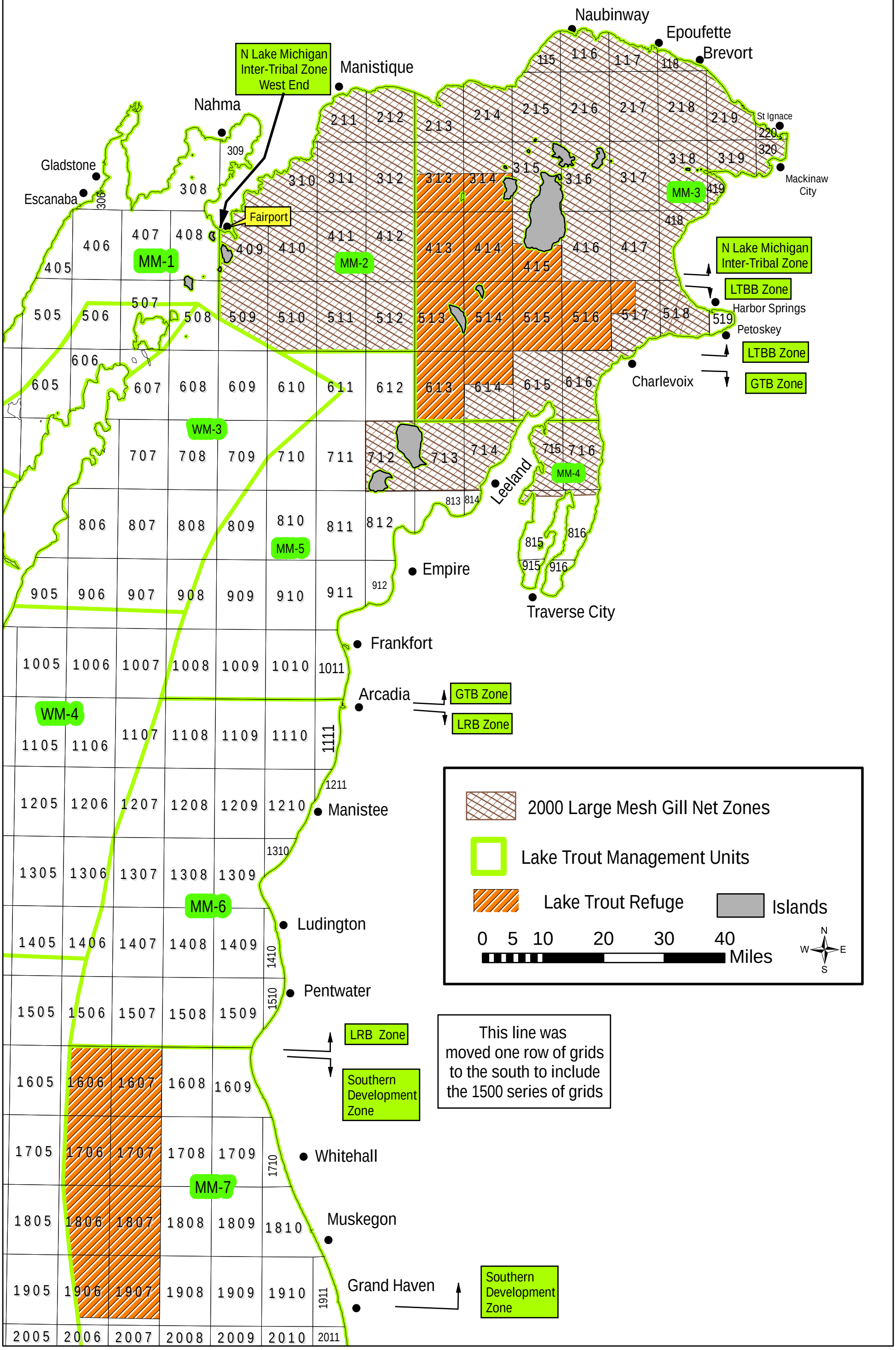
Map 17. Lake Superior 2022 Proposed Consent Decree Tribal Large Mesh Gill Net Zones

Map 18 Comparing 2000 and 2022 Tribal Large Mesh Gill Net Zones for Au Train - Munising Bays

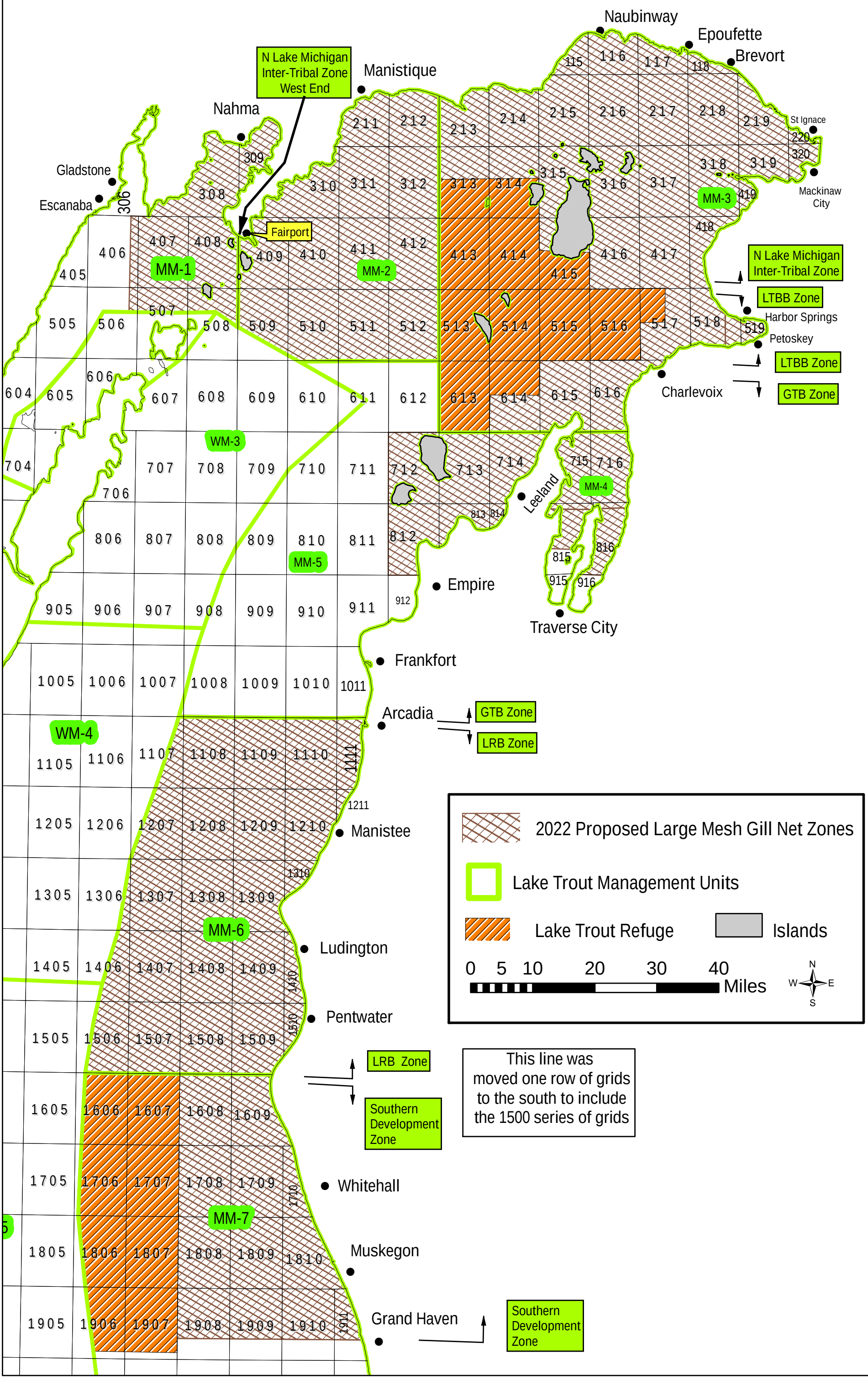
Map 19. Lake Superior 2000 Tribal Lake Superior Walleye and Yellow Perch Zones

Map 20. Lake Superior 2022 Tribal Small Mesh Gill Nets Zones for Walleye and Yellow Perch

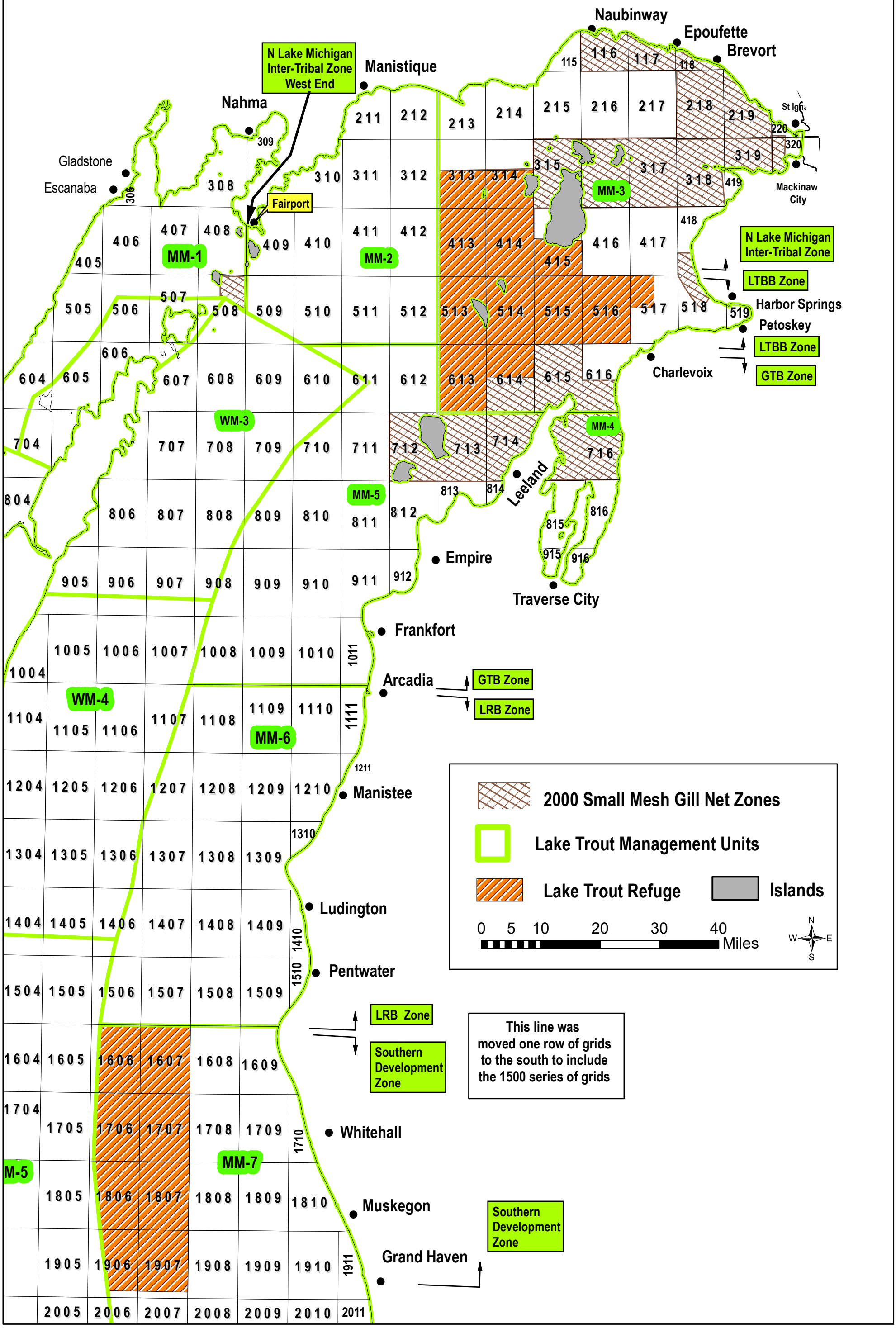
Map 1. Lake Michigan 2000 Consent Decree Large Mesh Gill Net Zones



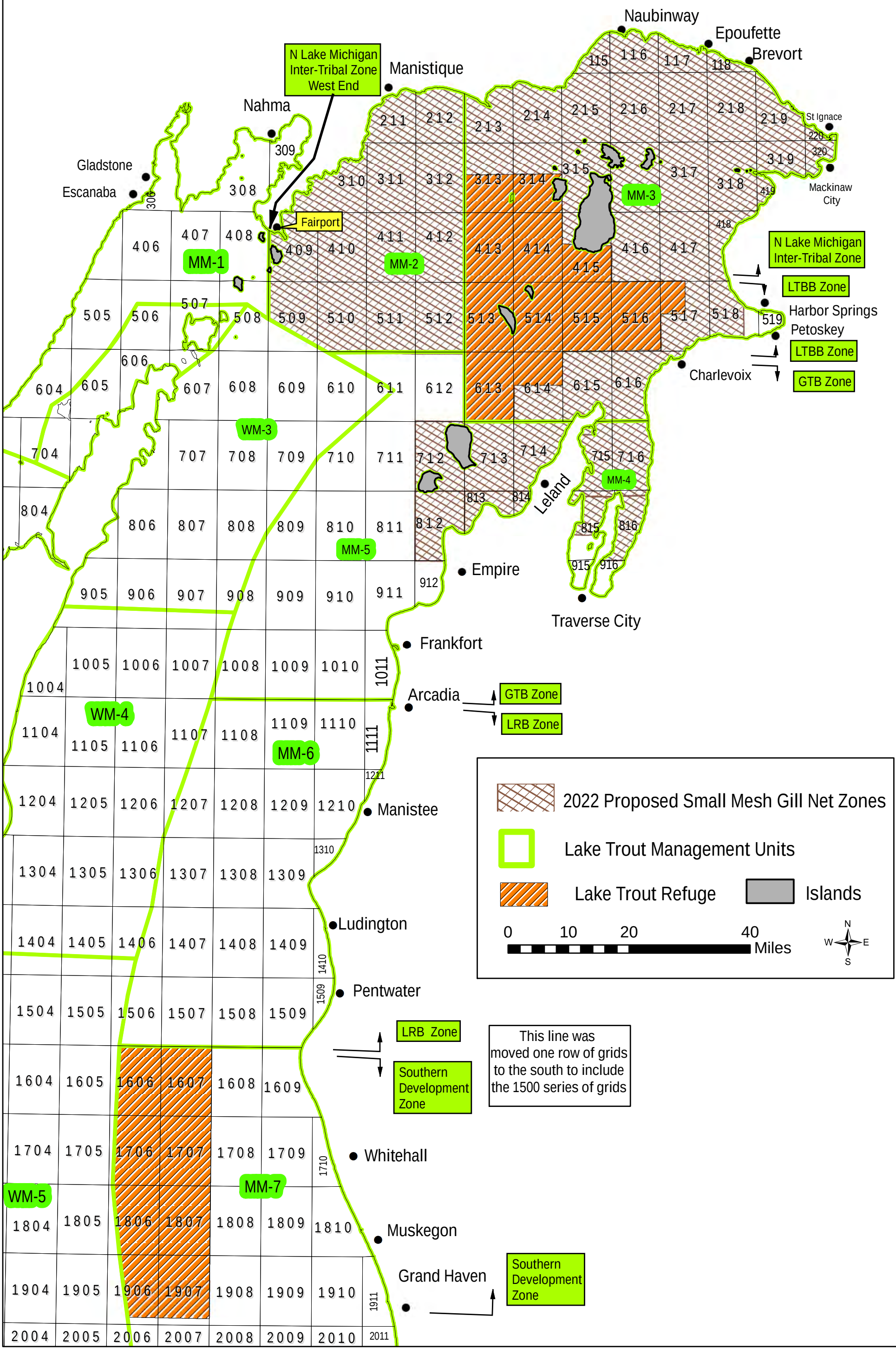
Map 2. Lake Michigan 2022 Consent Decree Proposed Large Mesh Gill Net Zones



Map 3. Lake Michigan 2000 Consent Decree Small Mesh Gill Net Zones

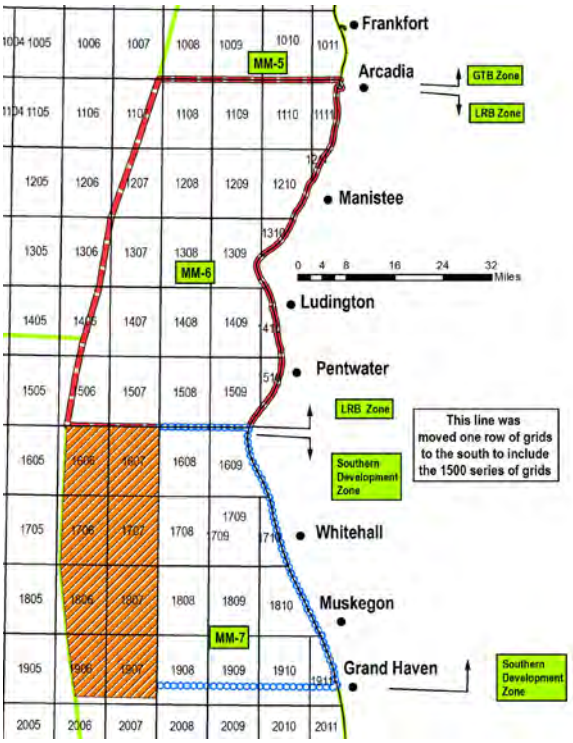


Map 4. Lake Michigan 2022 Proposed Consent Decree Small Mesh Gill Net Zones



Map 5. Comparing Little River Band Tribal 2000 and 2022 Large Mesh Gill Net Zones

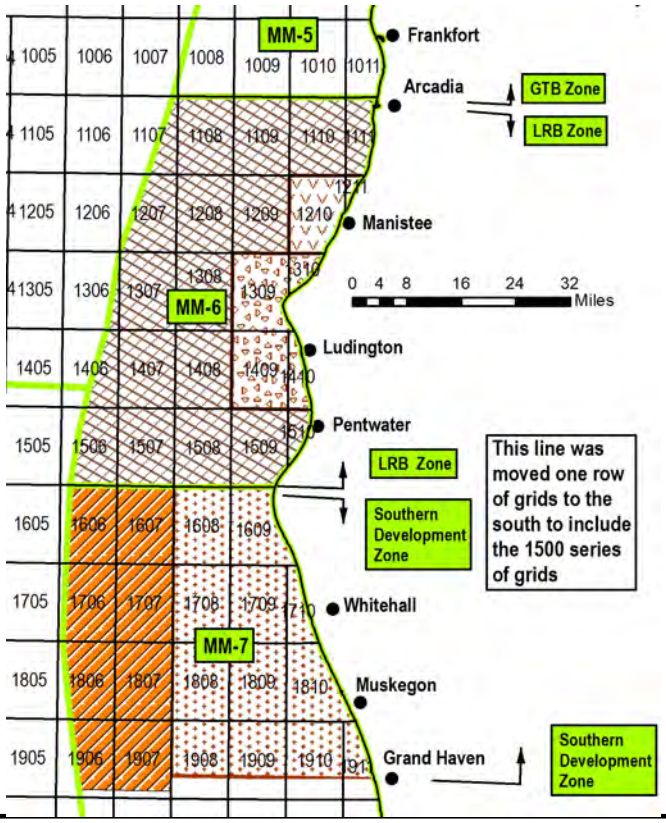
2000 Little River Band Large Mesh Gill Net Zones



In the 2000 Consent Decree only trap nets were approved for commercial fishing in the Little River Band and the Southern Lake Michigan Development Zones. A fish distribution study with gill nets was authorized during the last 5 years of the Decree to determine if more commercial licenses could be established. There was no mention of expanding commercial gill netting fishing licenses. The number of trap net licenses permitted in the 2000 Decree were very limited for these zones and there was interest in 2000 to potentially increase the number of trap net licenses.

- Lake Trout Refuge
- Lake Trout Management Units
- Little River Band Tribal Zone
- Lake Michigan Southern Development Zone

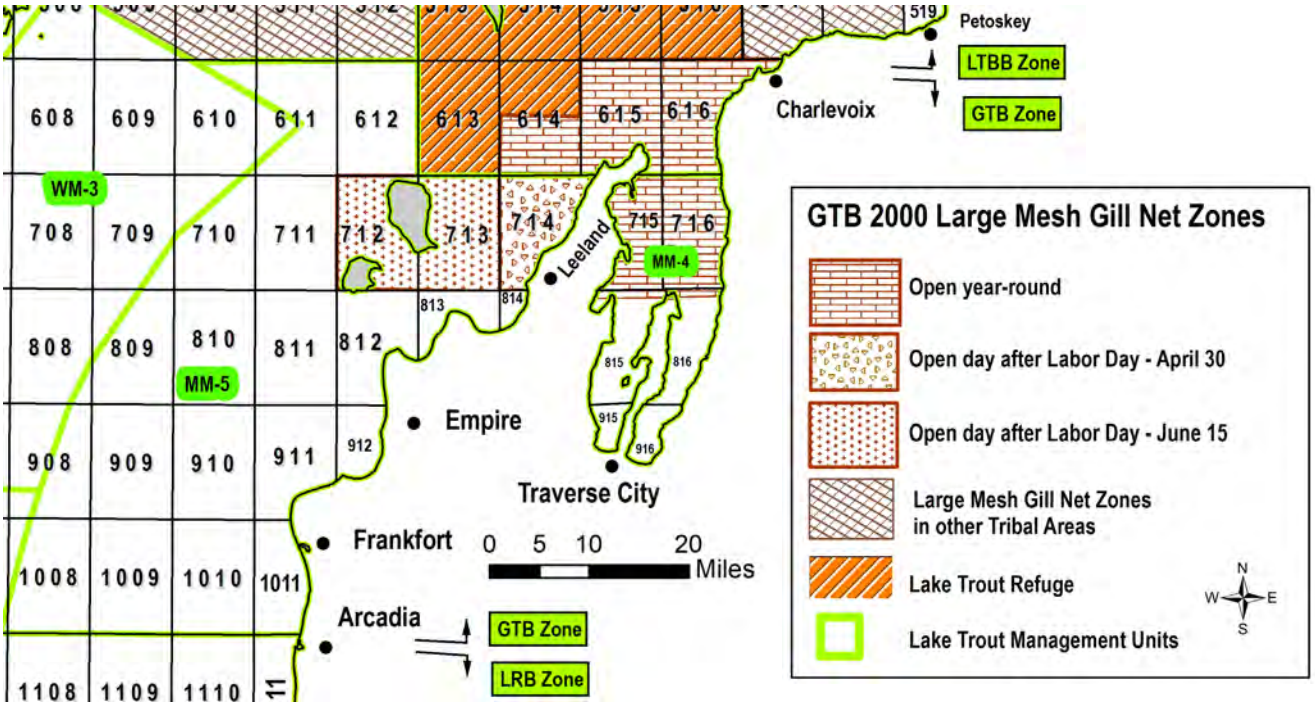
2022 Proposed Little River Band Large Mesh Gill Net Zones



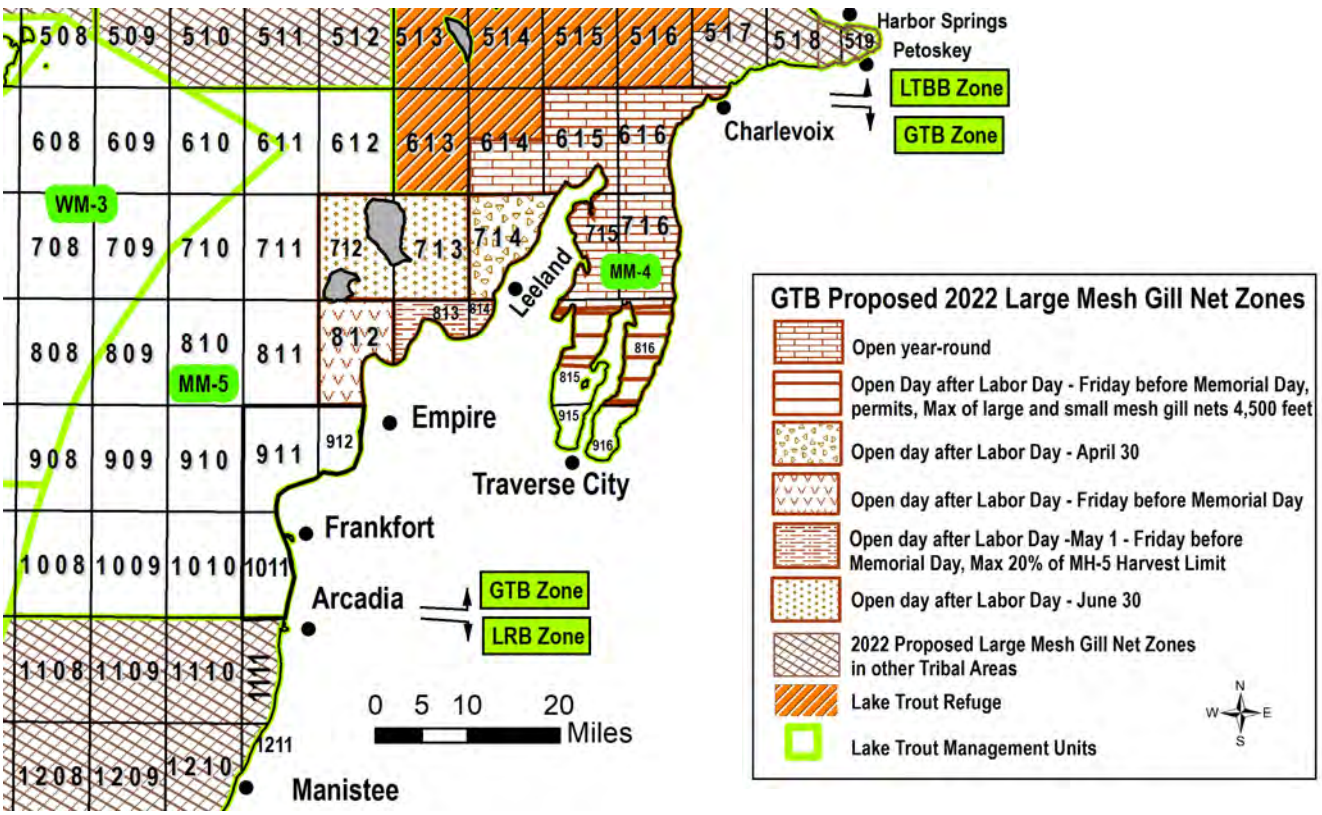
- Open year-round up to 2 licenses each fishing max of 6,000 feet of large mesh gill net and potental for expansion with seaconal closures noted below
- Open day after Labor Day - July 14
- Open day after Labor Day - June 30
- Southern Lake Michigan Deveopment Zone Open year-round, initially 4,000 feet of large mesh gill net moved from Little River Band Zone with potential for expansion.
- Lake Trout Refuge
- Lake Trout Management Units

Map 6. Comparing Grand Traverse Tribal 2000 and 2022 Large Mesh Gill Net Zones

2000 Grand Traverse Large Mesh Gill Net Zones

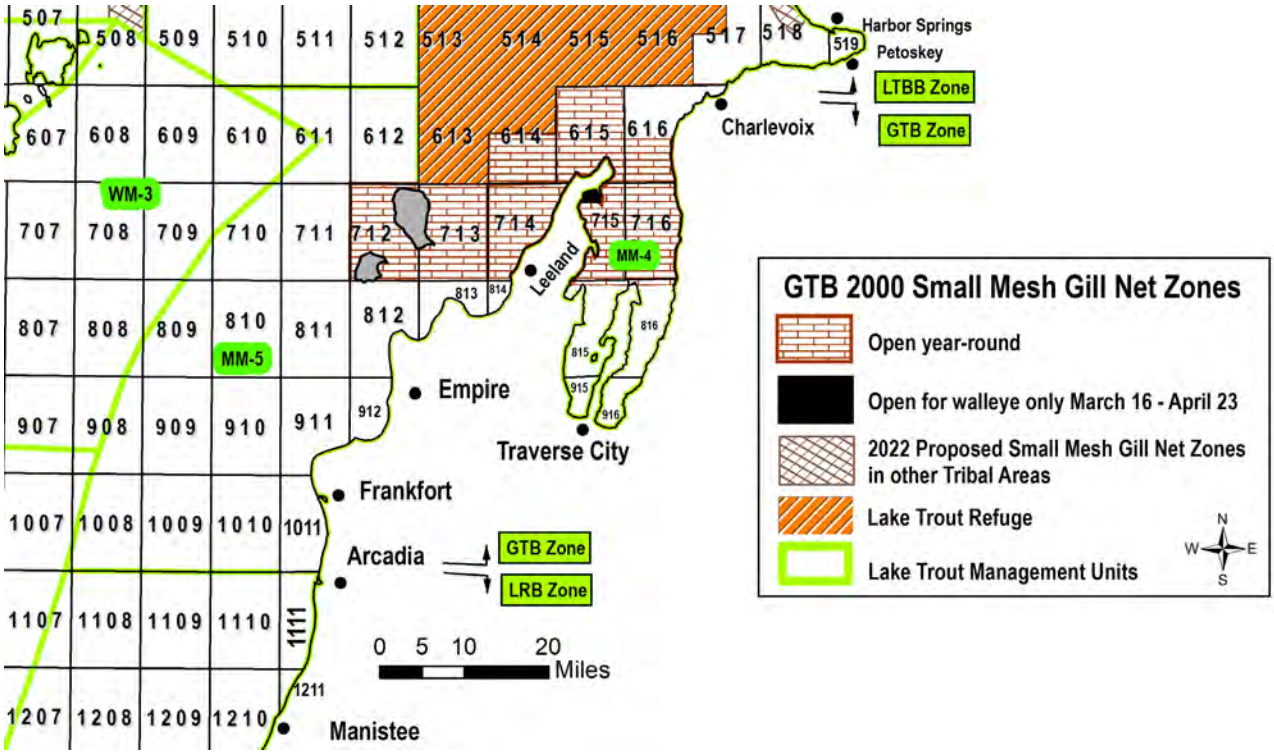


2022 Proposed Grand Traverse Large Mesh Gill Net Zones

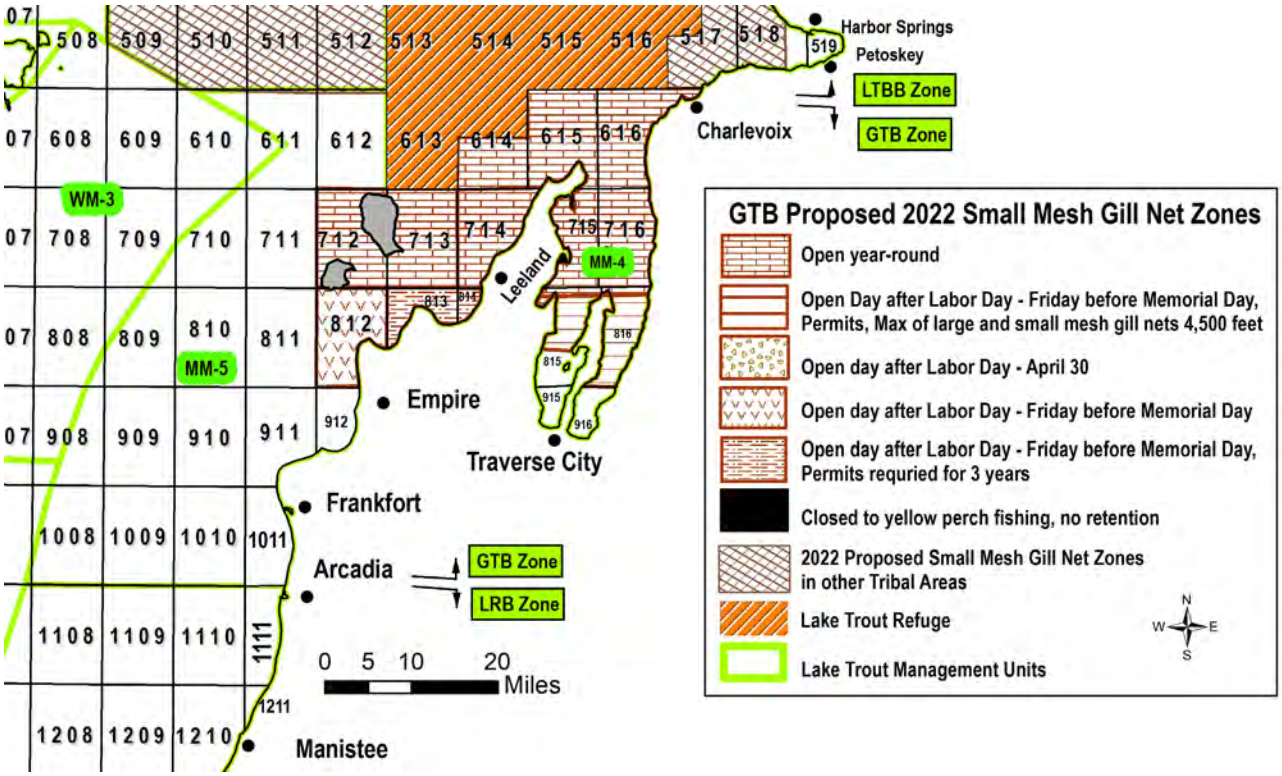


Map 7. Comparing Grand Traverse Tribal 2000 and 2022 Small Mesh Gill Net Zones

2000 Grand Traverse Small Mesh Gill Net Zones

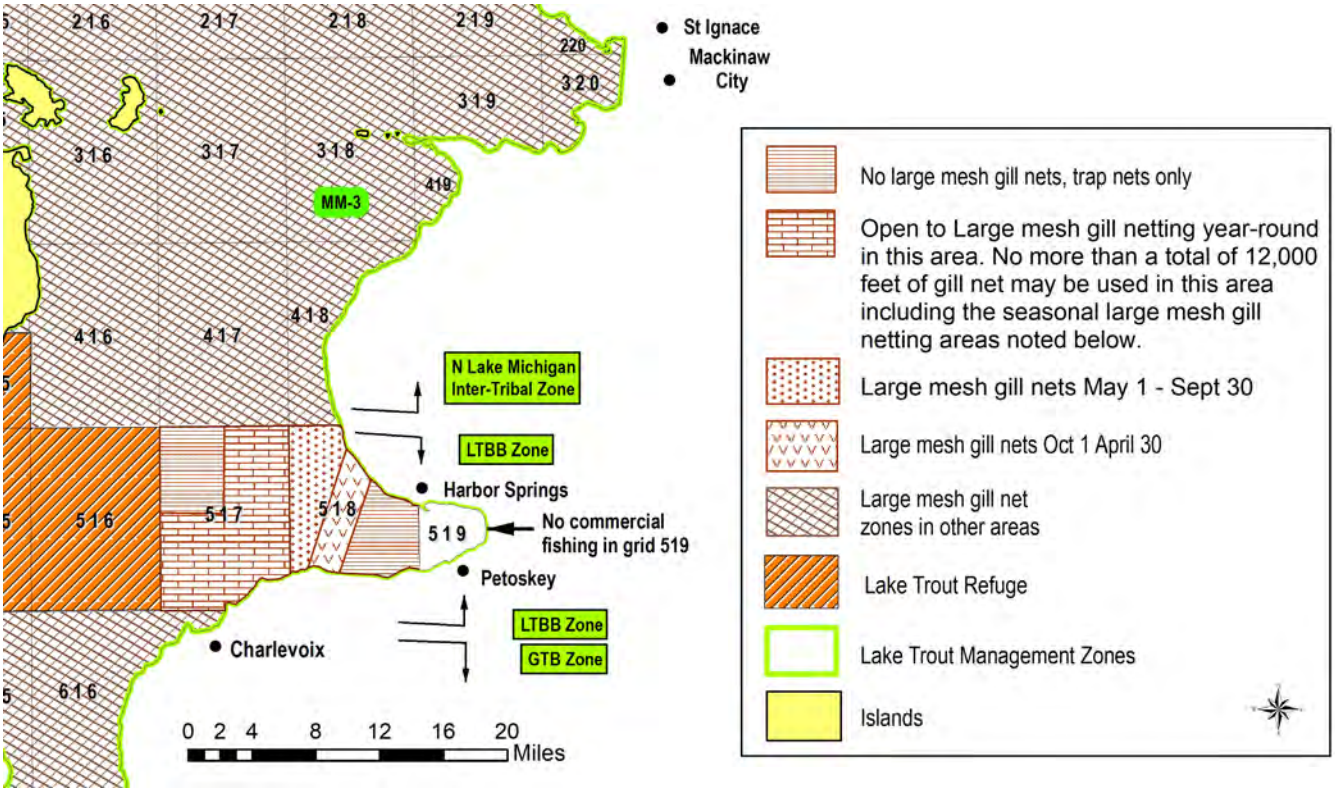


2022 Proposed Grand Traverse Small Mesh Gill Net Zones

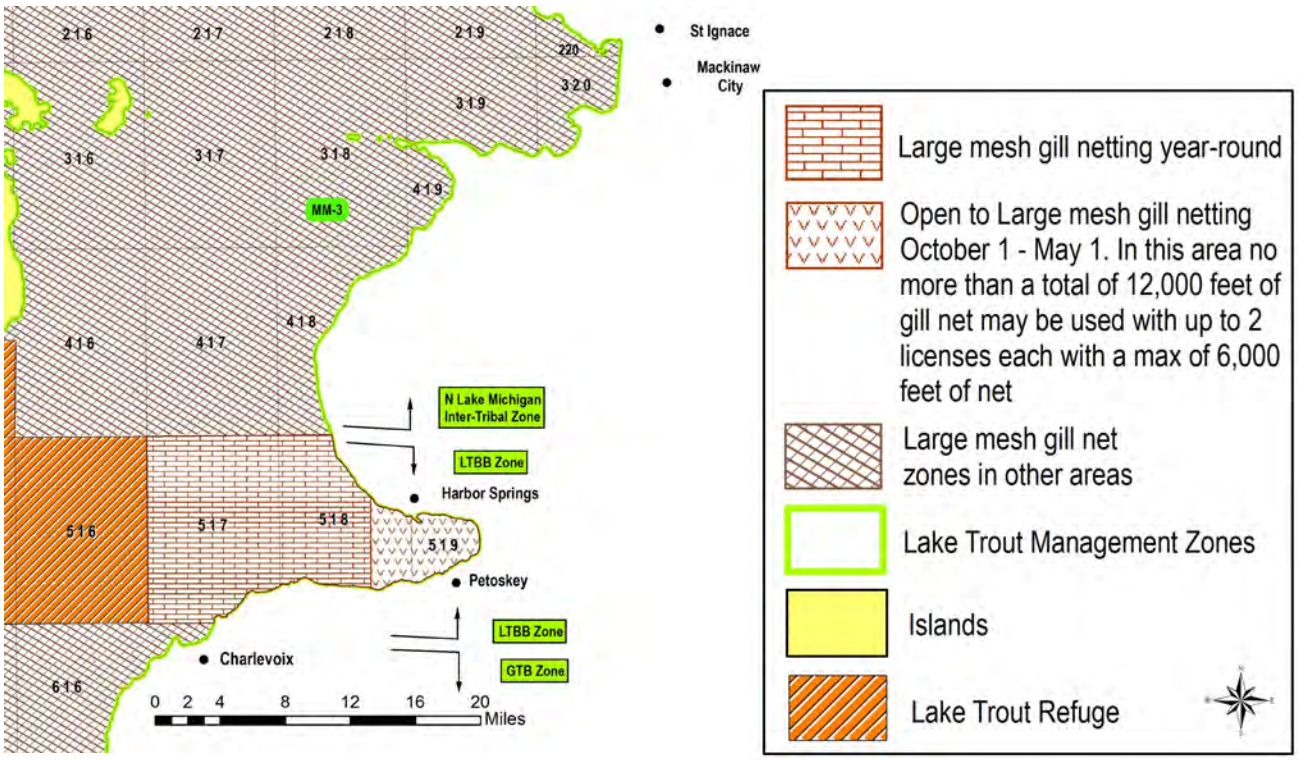


Map 8. Comparing Little Traverse Tribal 2000 and 2022 Large Mesh Gill Net Zones

2000 Little Traverse Large Mesh Gill Net

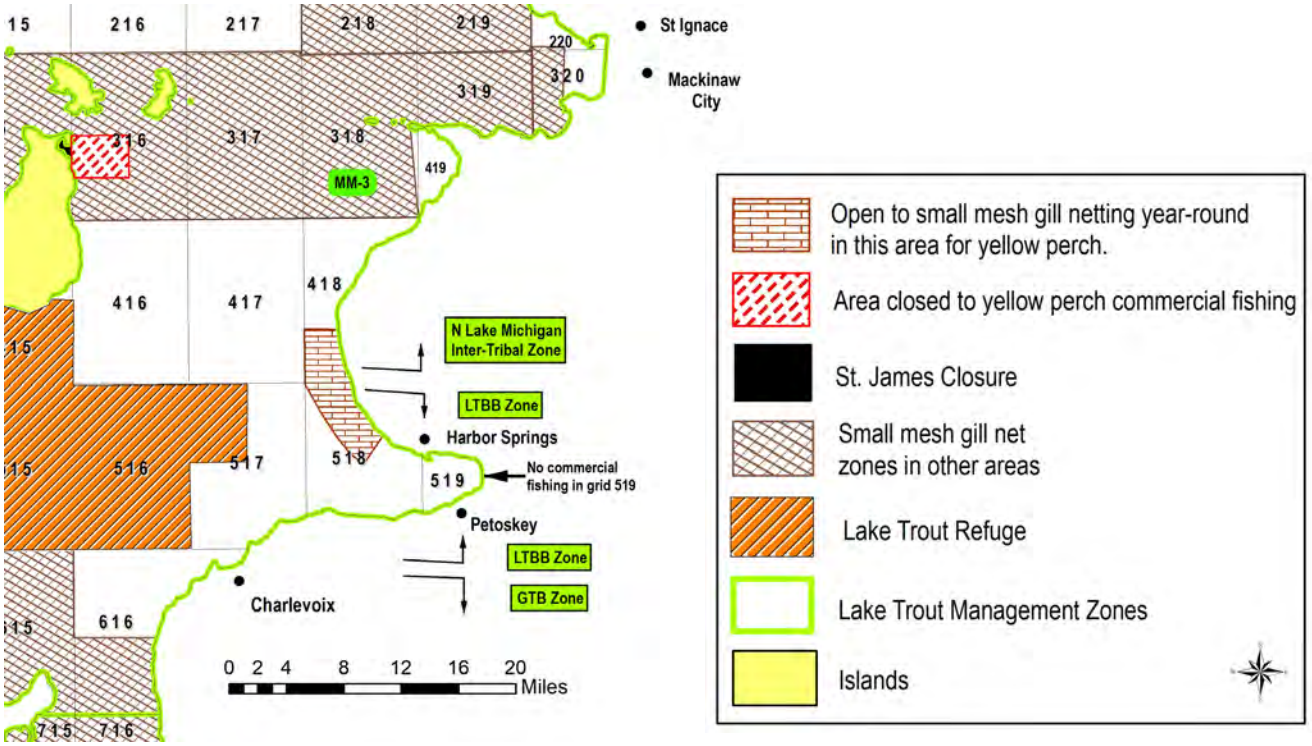


2022 Proposed Little Traverse Large Mesh Gill Net Zones

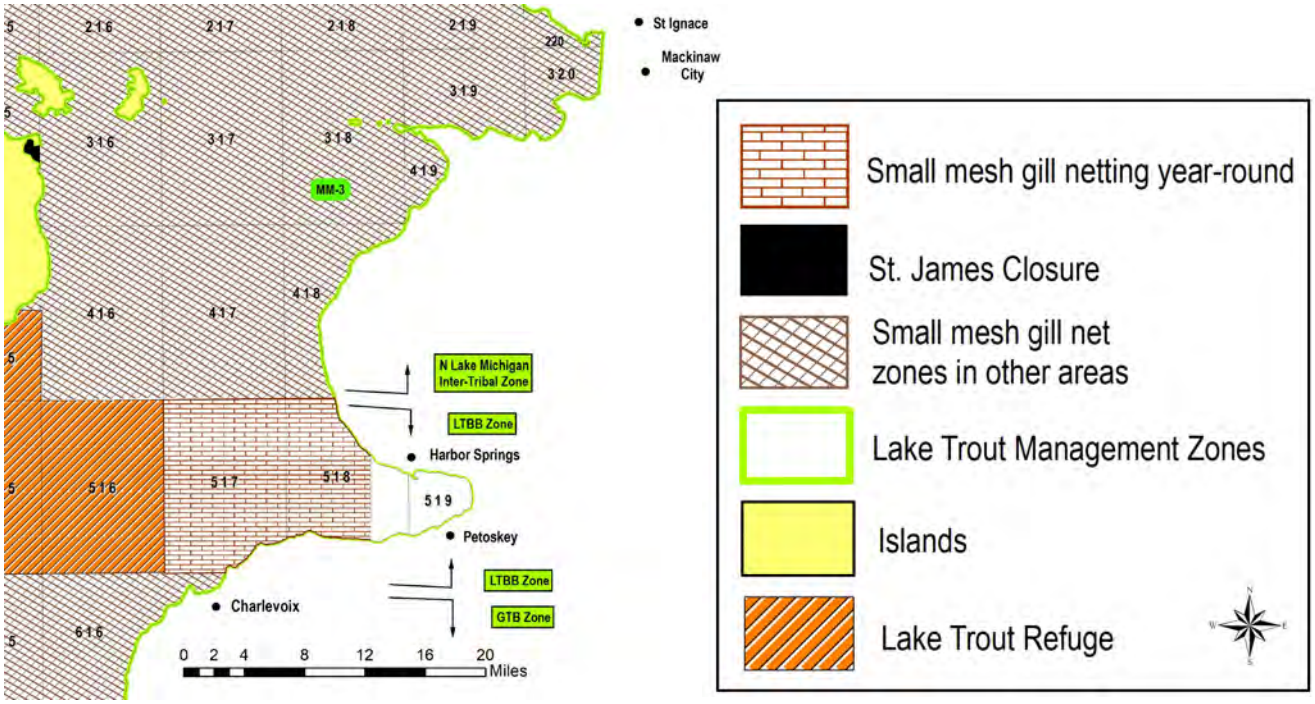


Map 9. Comparing Little Traverse Tribal 2000 and 2022 Small Mesh Gill Net Zones

2000 Little Traverse Small Mesh Gill Net Zones

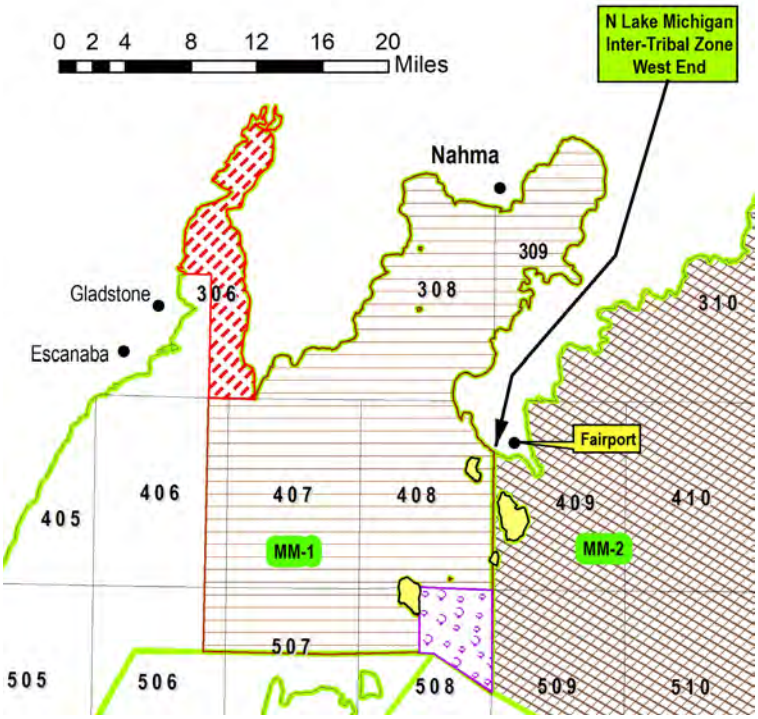


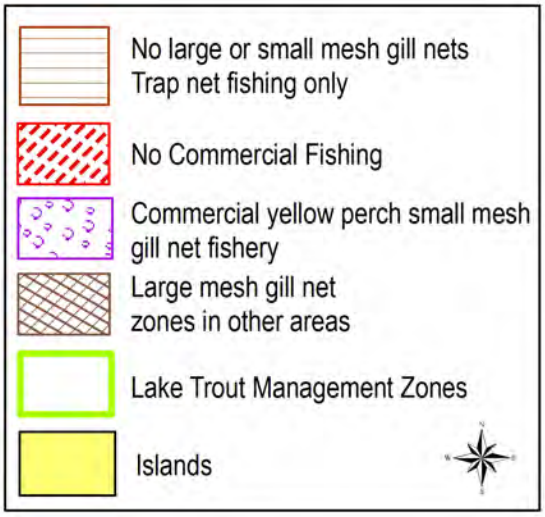
2022 Proposed Little Traverse Small Mesh Gill Net Zones



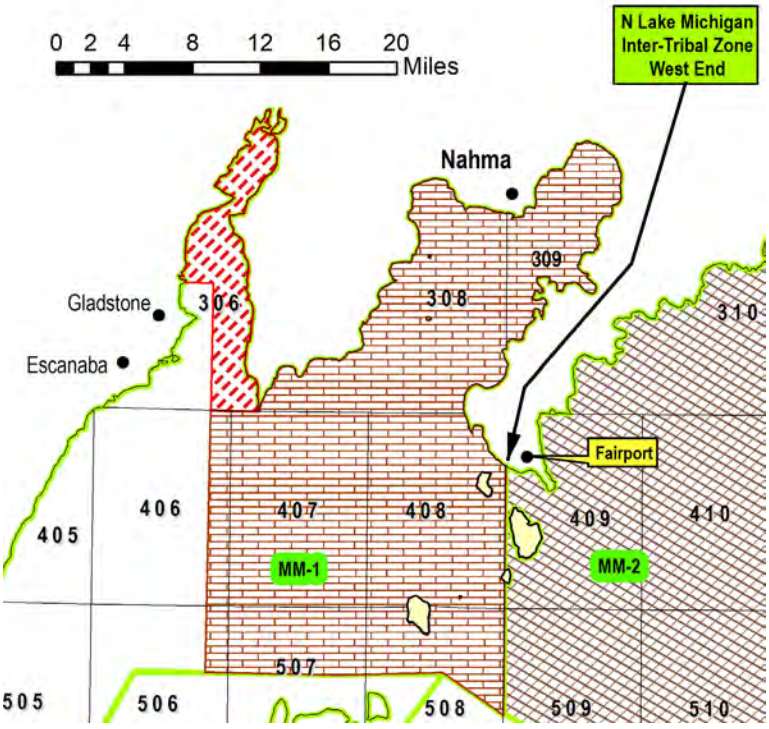
Map 10. Comparing Bay de Noc Tribal 2000 and 2022 Large Mesh Gill Net Zones

2000 Bay de Noc Large Mesh Gill Net Zones



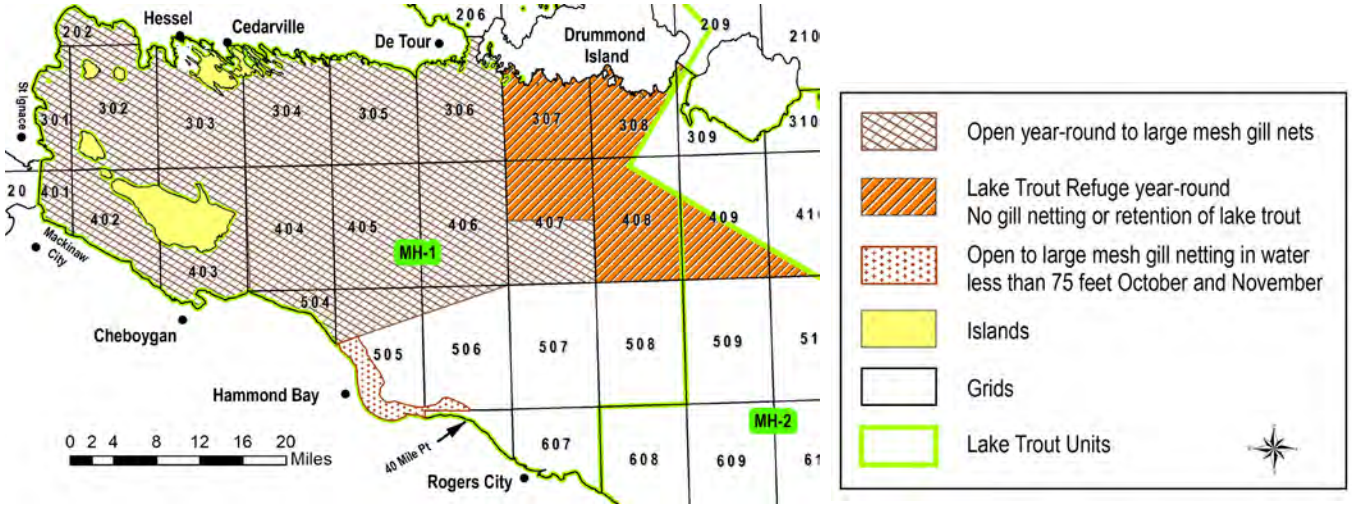


2022 Proposed Bay de Noc Large Mesh Gill Net Zones

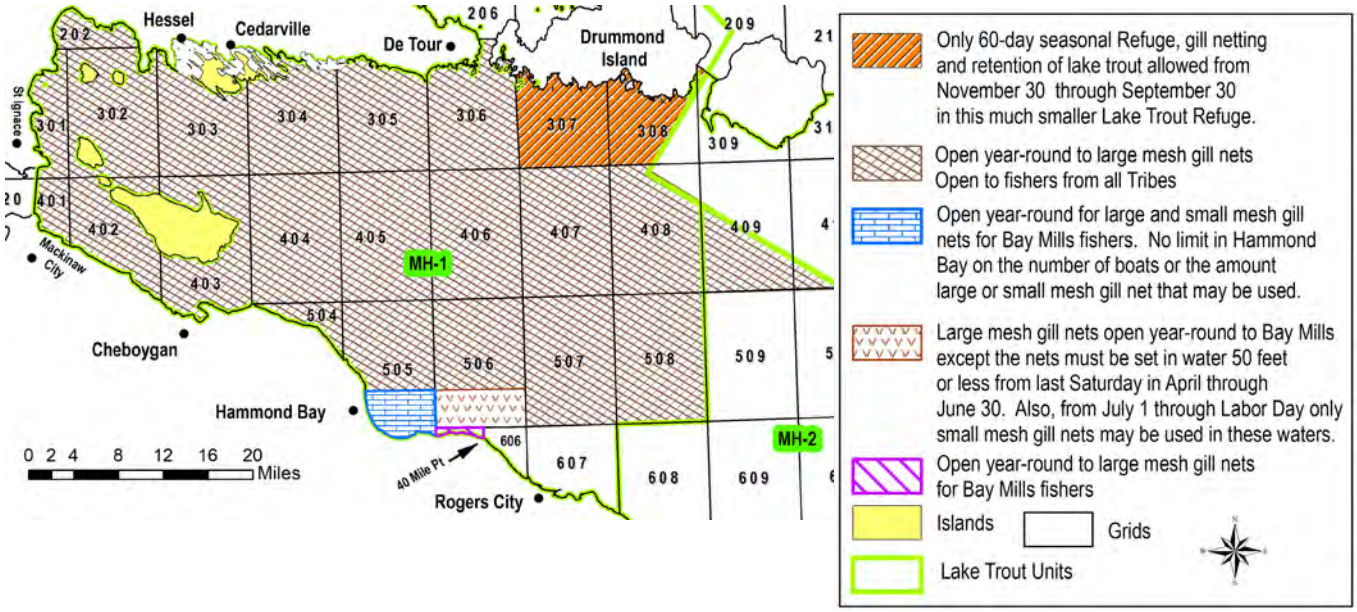


Map 11. Comparing Lake Huron Lake Trout Refuge and Large Mesh Gill Net Zones for 2000 and 2022

2000 Lake Huron Lake Trout Refuge and Large Mesh Gill Net Zones

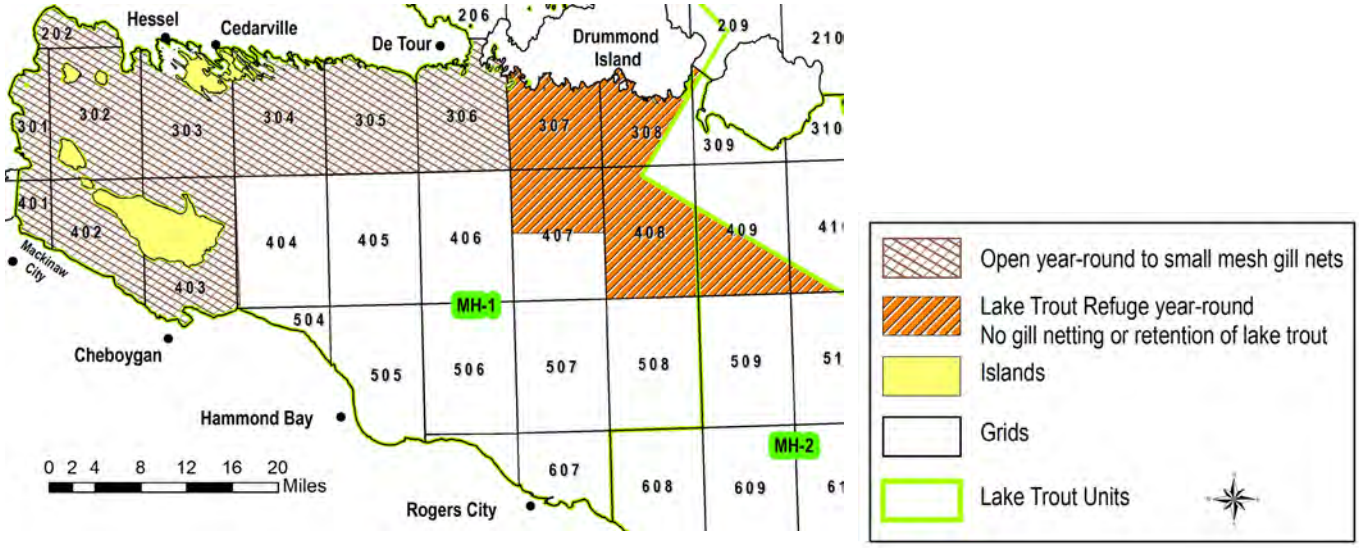


2022 Lake Huron Lake Trout Refuge and Large Mesh Gill Net Zones

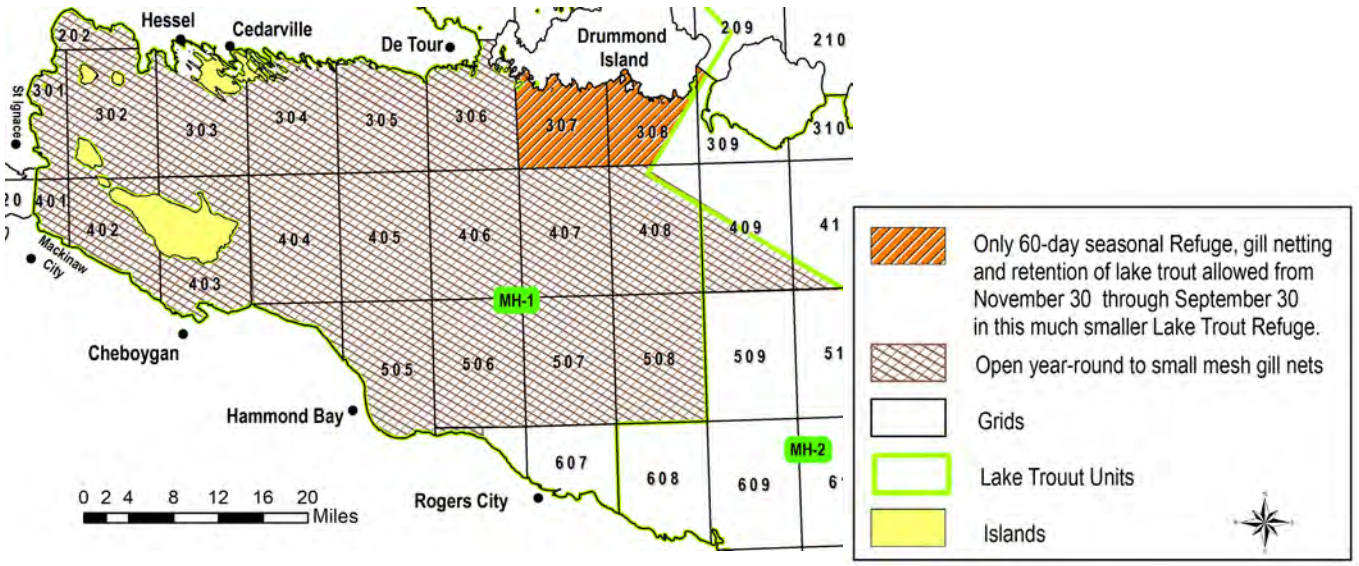


Map 12. Comparing Lake Huron Lake Trout Refuge and Small Mesh Gill Net Zones for 2000 and 2022

2000 Lake Huron Lake Trout Refuge and Small Mesh Gill Net Zones

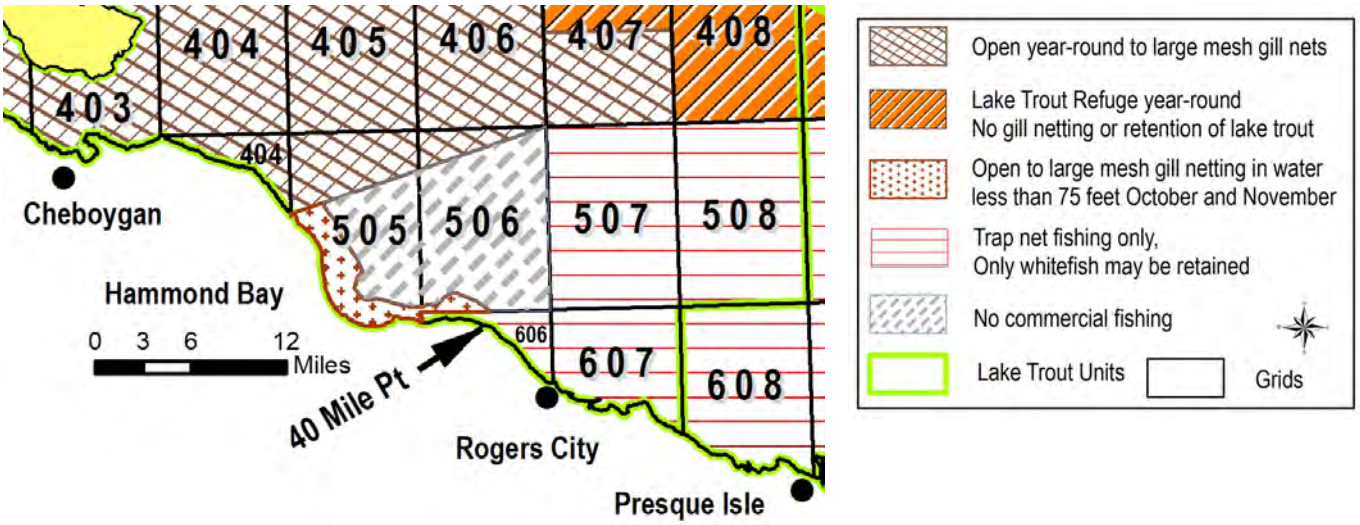


2022 Lake Huron Lake Trout Refuge and Small Mesh Gill Net Zones

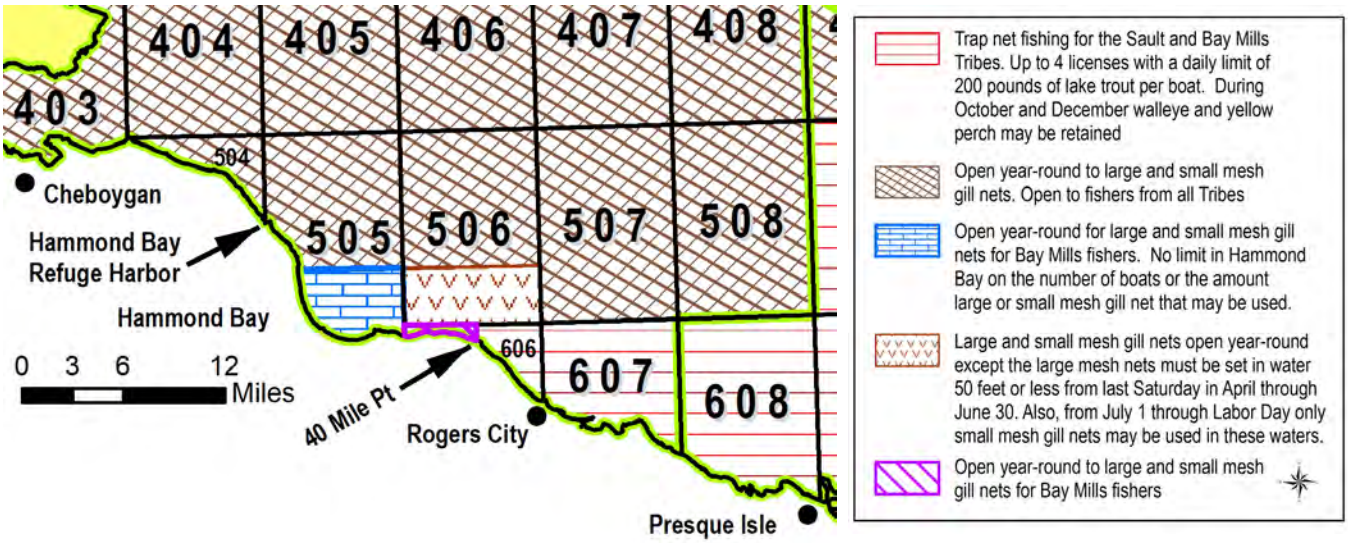


Map 13. Comparing Hammond Bay 2000 and 2022 and Gill Net Zones

2000 Lake Huron Hammond Bay Gill Net Zones

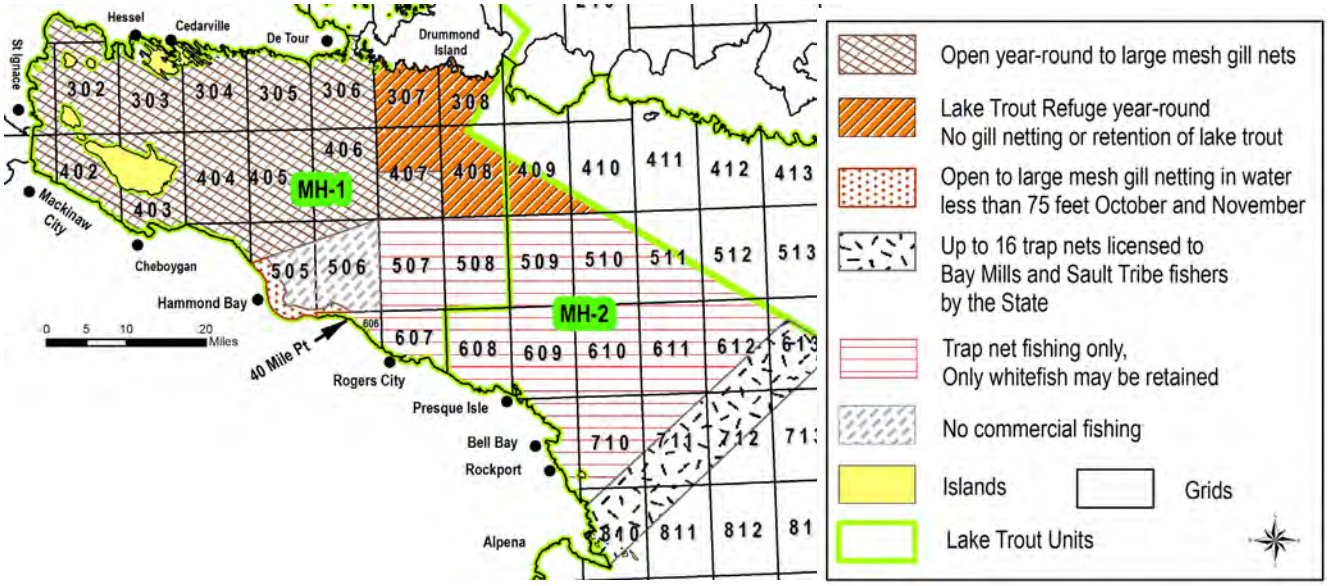


2022 Lake Huron Hammond Bay Gill Net Zones

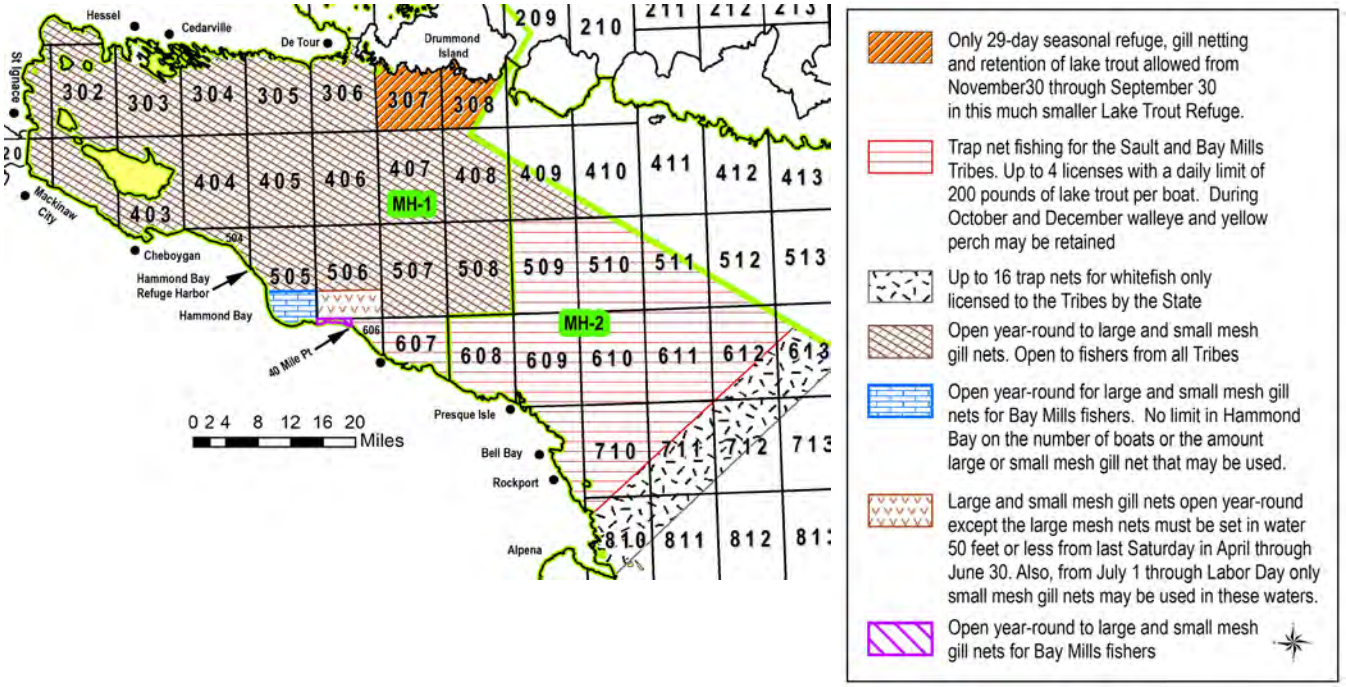


Map 14. Comparing 2000 and 2022 Lake Huron Tribal Fishing Zones

2000 Tribal Zones

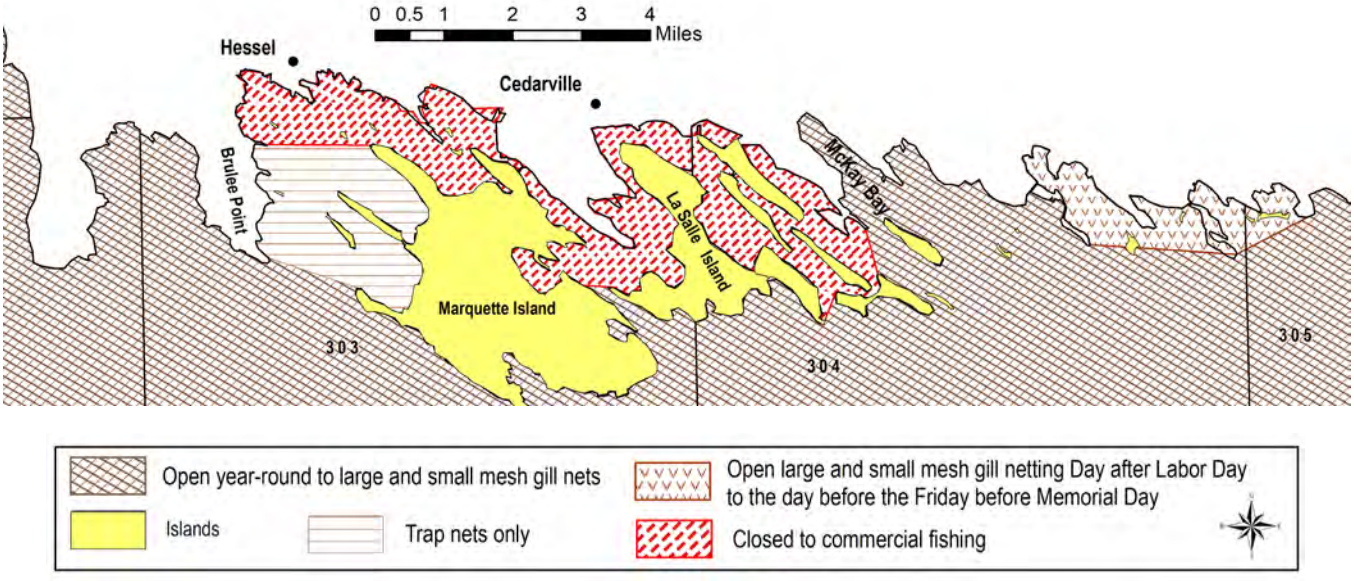


2022 Tribal Zones

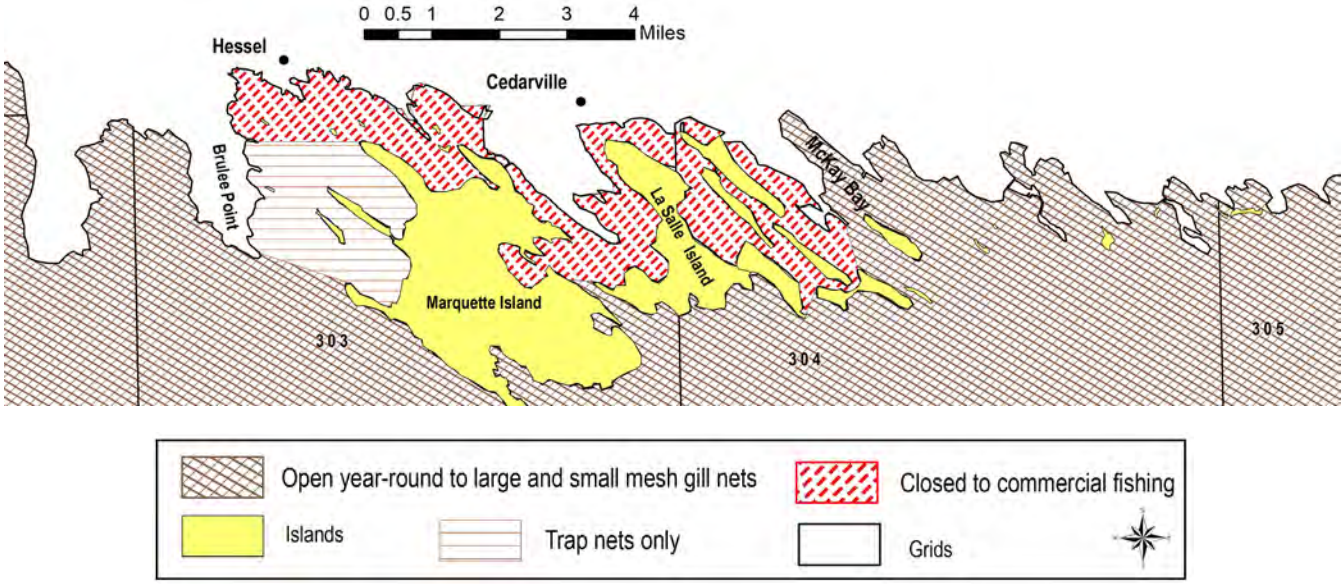


Map 15. Comparing Les Cheneaux Islands Tribal 2000 and 2022 Gill Net Zones

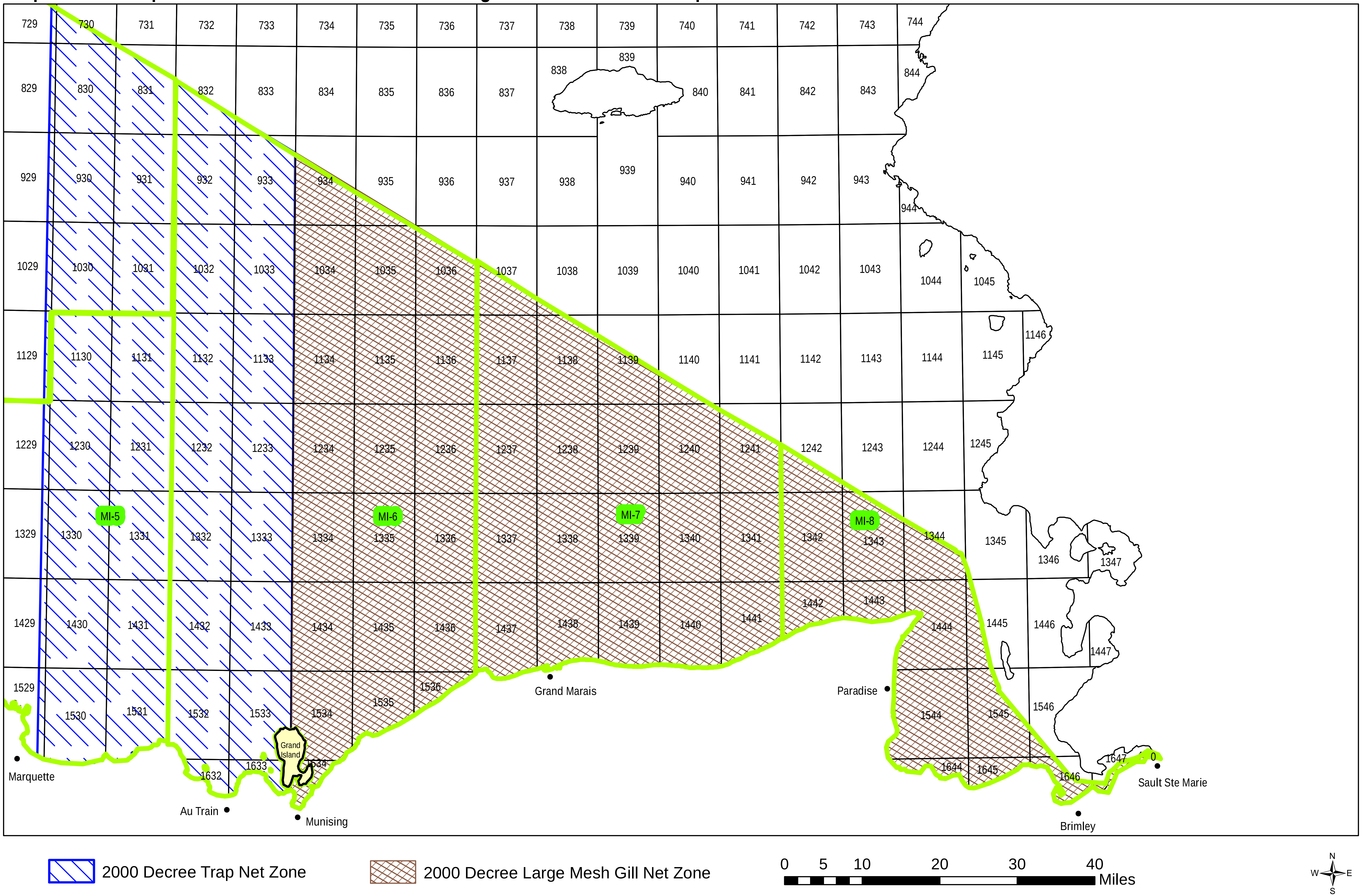
2000 Les Cheneaux Islands Large and Small Mesh Gill Net Zones



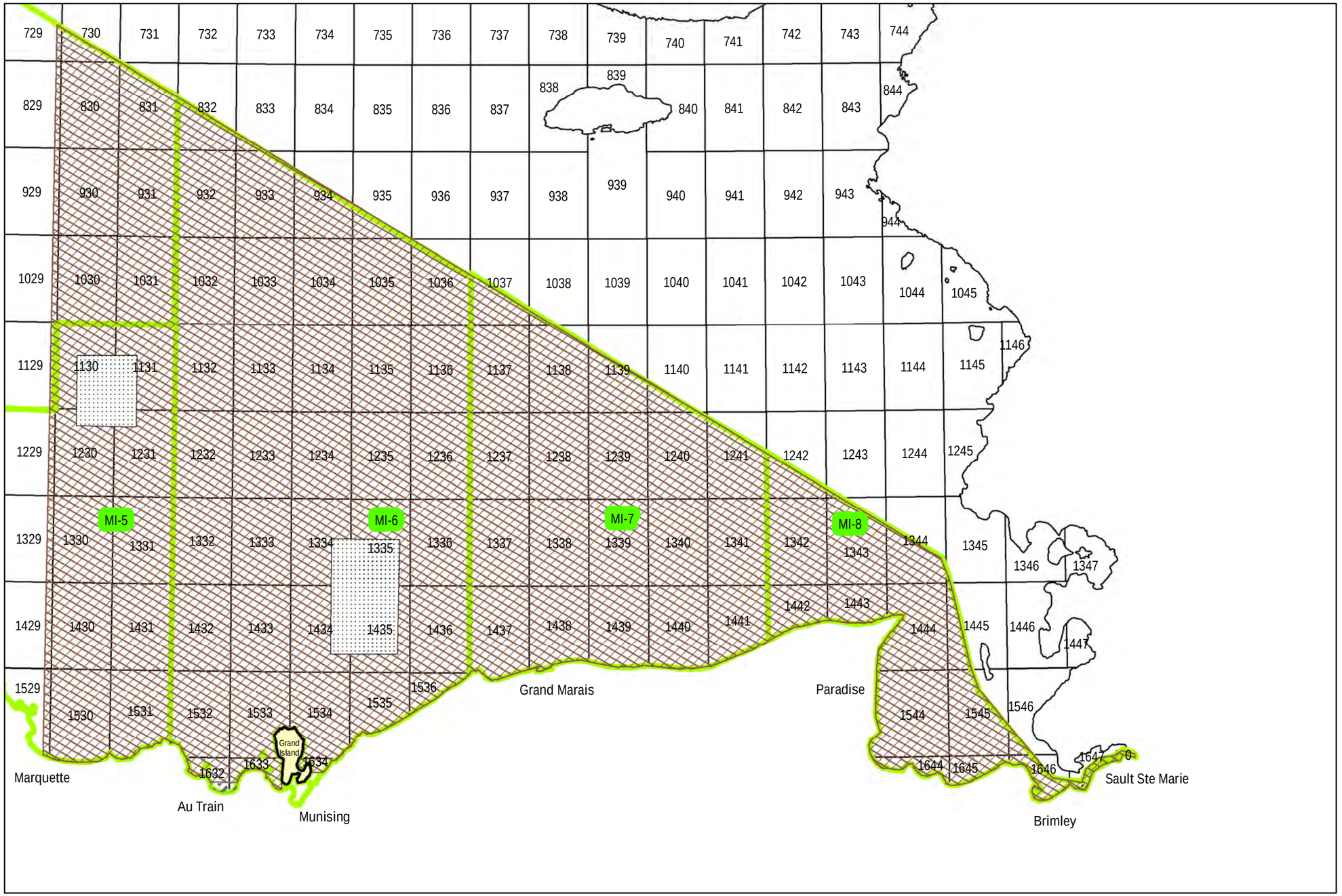
2022 Les Cheneaux Islands Large and Small Mesh Gill Net Zones



Map 16. Lake Superior 2000 Consent Decree Tribal Large Mesh Gill Net and Trap Net Zones

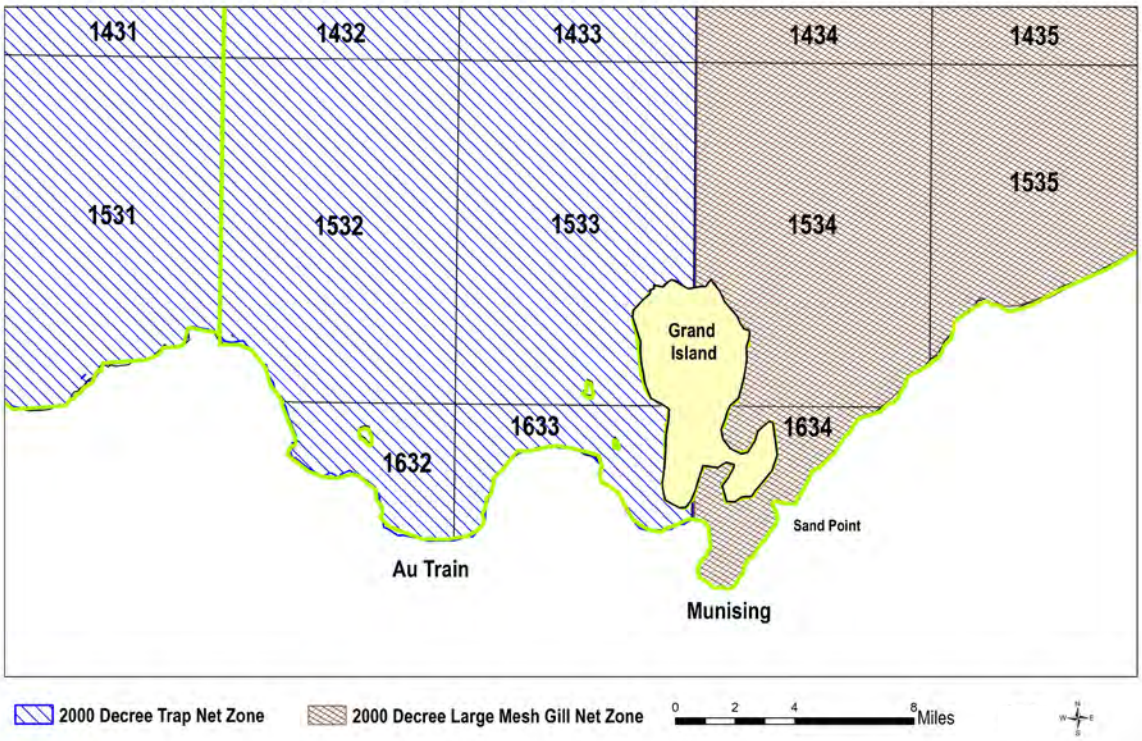


Map 17. Lake Superior 2022 Proposed Consent Decree Tribal Large Mesh Gill Net Zones

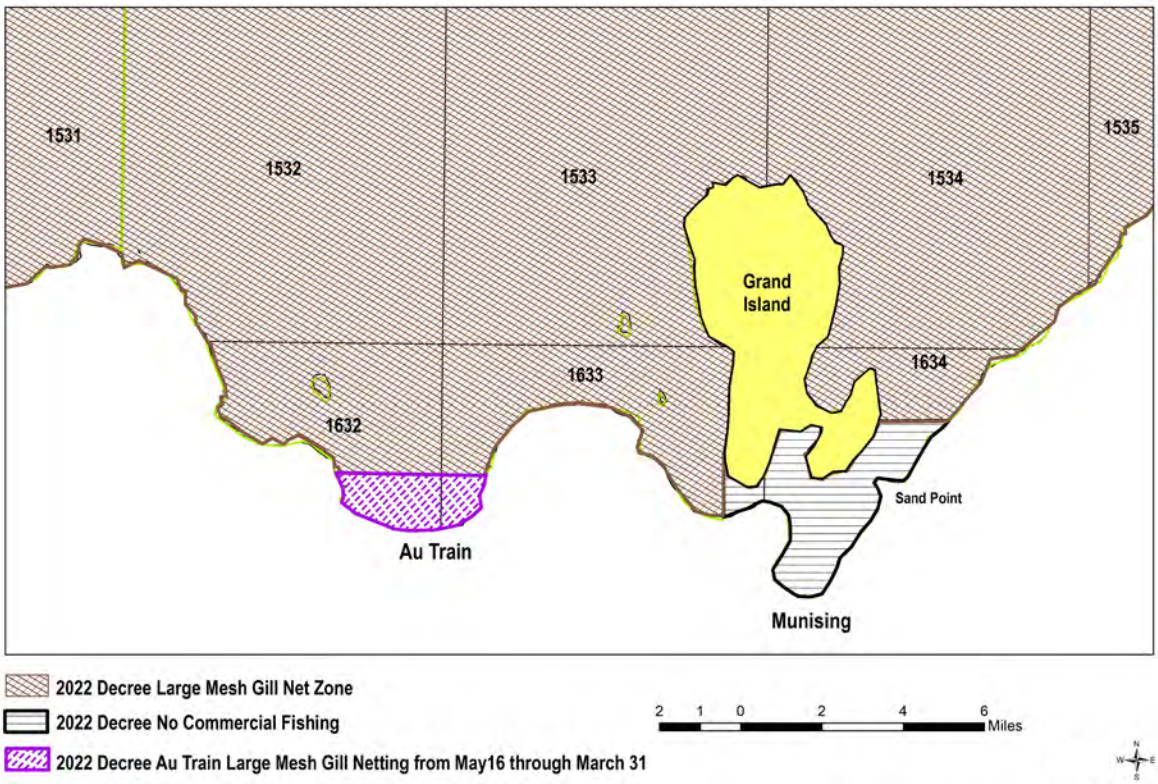


Map 18. Comparison of Tribal Large Mesh Gill Net Zones in Au Train and Munising Bays

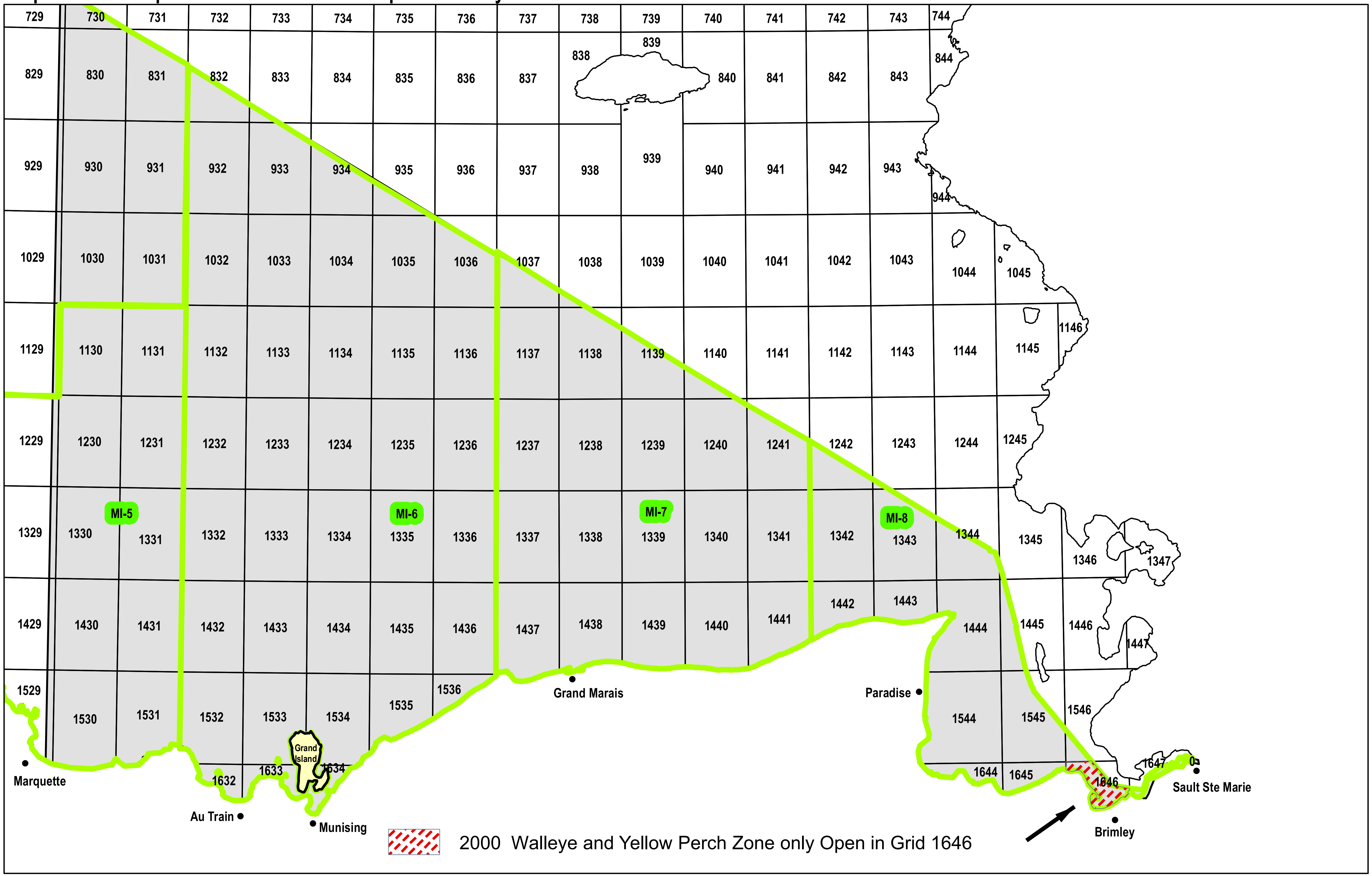
2000 Large Mesh Gill Net **Zones** in the Au Train and Munising Bays



2022 Large Mesh Gill Net **Zones** in the Au Train and Munising Bays



Map 19. Lake Superior 2000 Tribal Lake Superior Walleye and Yellow Perch Zones



2000 Decree No Gill Nets or Trap Nets for Walleye and Yellow Perch

0 5 10 20 30 40 Miles

N W E S

Map 20. Lake Superior 2022 Tribal Small Mesh Gill Nets Zones for Walleye and Yellow Perch

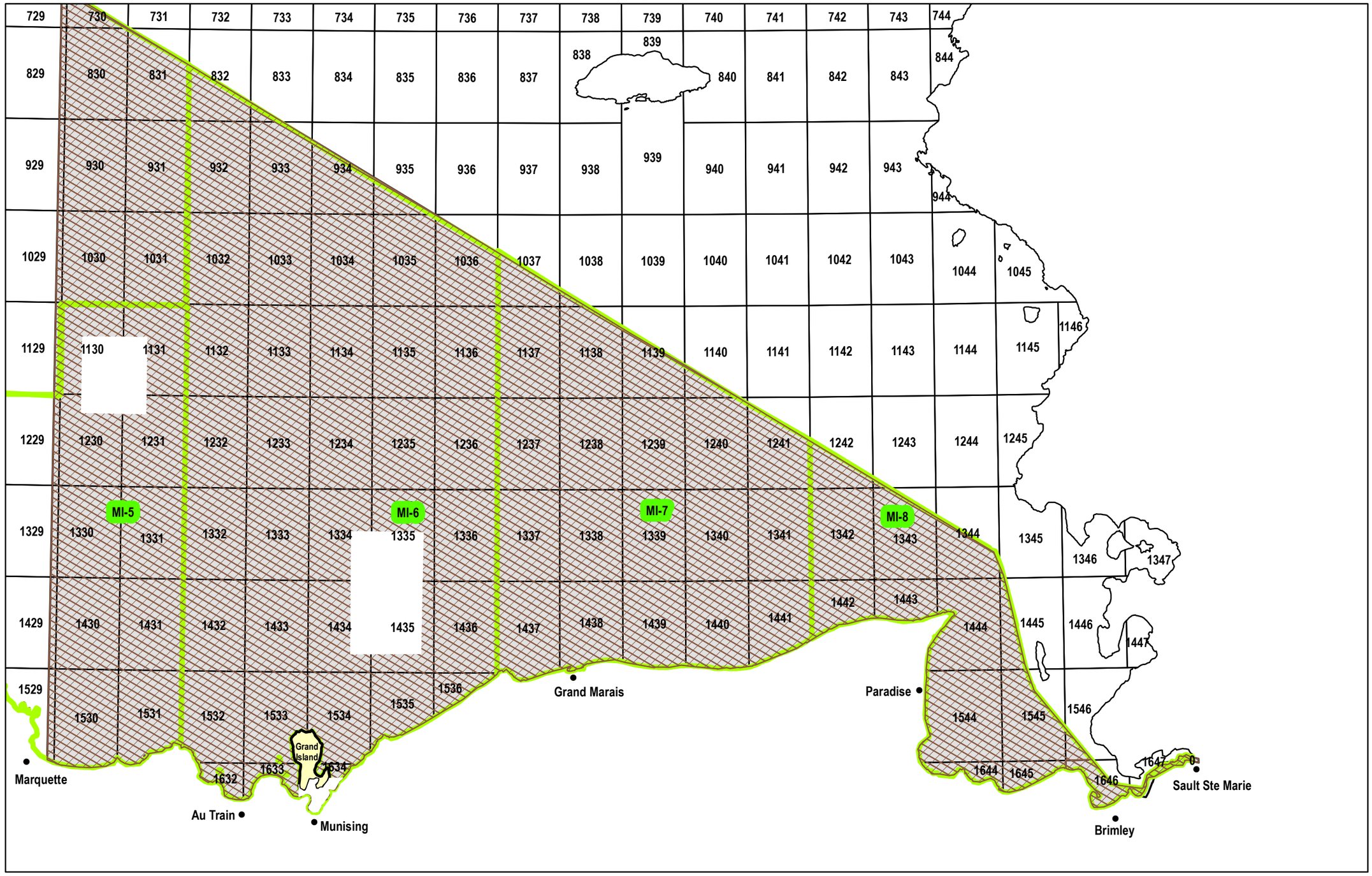


EXHIBIT B

Fish nets cause serious accident at Huron Beach

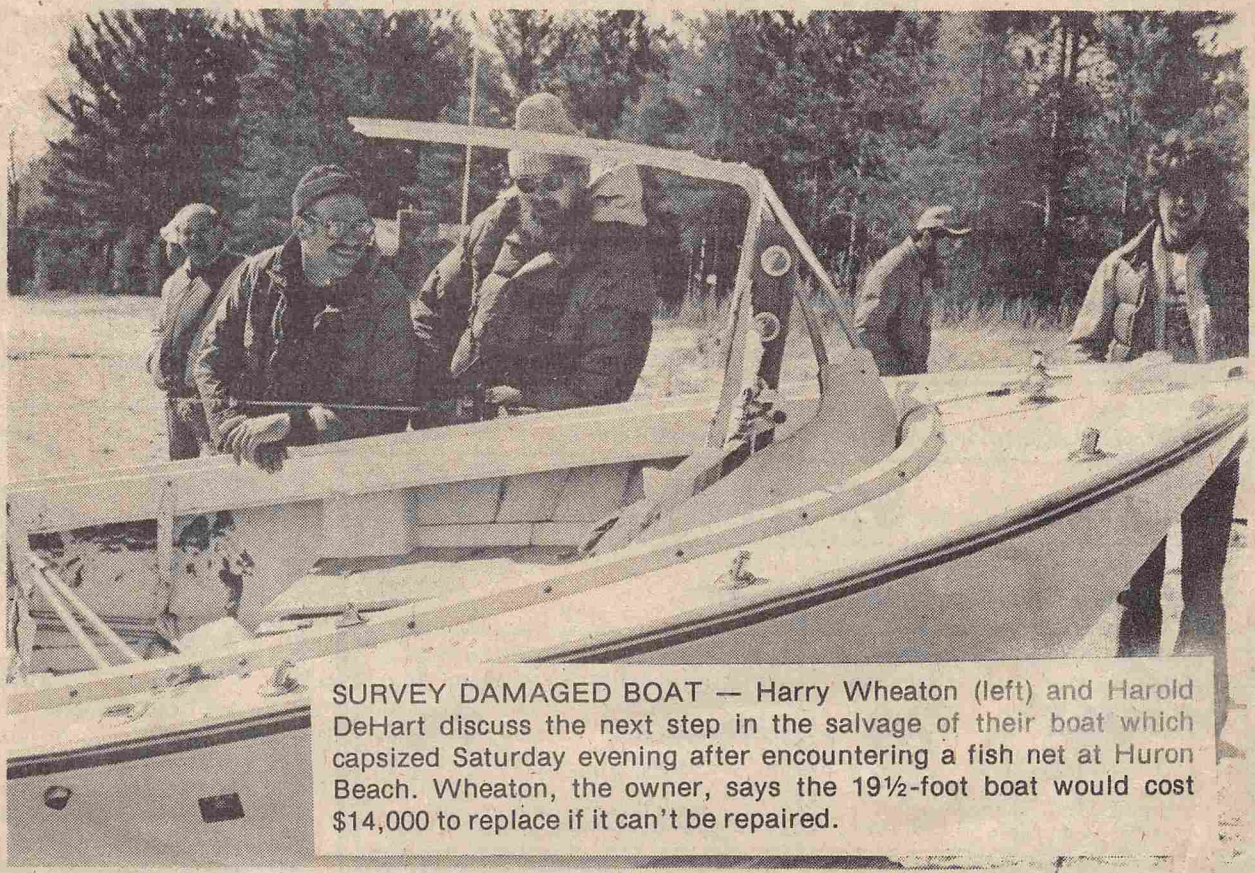
Three lake trout fishermen were treated to a harrowing experience Saturday evening when their 19-foot boat capsized off the shore of Huron Beach while they were trolling in Lake Huron.

Harold DeHart, Harry Wheaton and Carl Wheaton were fishing in a favorite area about 500 yards offshore when the downriggers from the boat caught in a net and brought the boat to a stop even with the small trolling motor still running. As they tried to free the downriggers, the motor's propeller caught in the netting and caused the stern of the boat to slope downard at a perilous angle so that the water started pouring in. The boat capsized quickly, throwing the men into the lake. The boat floated upside down and the men managed to cling to it and signaled for help, not knowing whether or not anyone could see them bobbing in the waves.

Luckily for the fishermen, Mark Piavis, who lives with his parents on the nearby lakeshore, saw the accident. He managed to get a small boat launched and got to the men before they had further problems. Due to the cold water temperature, hypothermia could have developed in a few hours and the men would have been in a serious plight.

After getting the men to shore, Piavis aided them in a salvage effort with a larger boat and the capsized craft was towed closer to shore and

(Continued on Page 2)



SURVEY DAMAGED BOAT — Harry Wheaton (left) and Harold DeHart discuss the next step in the salvage of their boat which capsized Saturday evening after encountering a fish net at Huron Beach. Wheaton, the owner, says the 19½-foot boat would cost $14,000 to replace if it can't be repaired.

Fishing nets cause serious accident

(Continued from Page 1)

anchored on a sand reef for the night. The capsized boat could not be towed all the way to the beach because of rough wave action.

Early Sunday morning the men tried to get the craft out of the water and found it had broken loose from the anchoring spot and floated around upside down, causing more severe damage to the boat and its motors.

Harry Stern, a neighbor of the Wheatons, brought in a Jeep with a winch and a line was fastened to the boat and it was dragged to shore. Several men from the area aided in getting it on a trailer and it was towed to Wheaton's home.

The fishing boat, 19'6" long, with a large motor and a trolling motor, would cost approximately $14,000 to replace. The steering wheel housing was crushed, the metal hand rail torn away, the main motor crushed in at the top, the small trolling motor damaged badly by sand and water, and several places in the boat's hull were cracked and scarred. The trolling motor had several pieces of netting wrapped around the propeller when it was taken out of the water. Many valuable fishing articles were lost when the boat turned over. Some, of the floating type, were recovered but non-floating equipment went to the bottom of the lake.

The fishing net is reportedly owned by Indians who have fished in the Hammond Bay area for the last few years. DeHart, who works for the Department of Natural Resources in Cheboygan, said it was a trap net and not the gill net that has been the center of much controversy. According to the DNR, the Indians are fishing legally under present law which state, federal and tribal representatives have been discussing in Washington.

According to the men aiding in the recovery efforts Sunday, the Indians have been setting their nets in the area for many months and have taken tons of fish from the lake. They complained that the nets are not easily seen due to insufficient use of marker buoys. The nets stretch for 500 yards or more underwater and the main pole marker with a flag is hard to see, especially in rough water. The residents at the beach state that other boaters have also had trouble running into nets.

Harold DeHart is a supervisor for Bearinger Township and lives in the Orchard Lake area year-round. Wheaton and his son Carl are from Milford. The father spends many of his off-days at a summer cottage located at Huron Beach and fishes a lot on the waters nearby. Ironically, this is the first time on the lake for

A PILE OF BROKEN GEAR — Carl Wheaton gathered bits and pieces of some of the gear from the capsized boat in which he was fishing last Saturday. He said he never expected anything like this his first time out on the lake. Fortunately, a shoreline resident saw the mishap or things could have been worse.

MOTOR DAMAGED — Harry Wheaton (left) and Harold DeHart are shown above holding strands of the netting in which they became entangled while fishing Saturday on Lake Huron, with bits of the net still wrapped around the motor's propellor blade. They were able to cling to their overturned boat until help arrived.

Early copy needed for next

Monday, May 25, is Memorial Day and in order fo
that holiday off to spend with their families, it will b
early copy for the next issue of The Presque Isle Coun

Where possible, we ask that correspondents an
get copy into our office by 5 p.m. on Friday, M
advertisements will be taken up to noon on Tuesday
that late time perfection cannot be guaranteed.

We urgently seek your cooperation in this ma
continue to give our readers the type of news and adve
they deserve. Thank you.

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104 South Third Street
Rogers City, Michigan 49779

EXHIBIT C

FOR IMMEDIATE RELEASE

November 30, 1993

Contact: Dan J. Dowdell, Esq.
Mackinac County Prosecutor
396 North State
St. Ignace, Michigan 49781
(906) 643-7329

BOATING TRAGEDY ON ST. MARTIN BAY

On September 4, 1993, a tragedy occurred on St. Martin Bay. At approximately 11:00 a.m. sportsfisherman James Swikowski, his son Martin (age 18) and brother Dan departed from the Carp River boat launch to fish for salmon. Family members of the fishermen remained at a nearby campsite where the families were spending the Labor Day weekend.

A short time later the fishermen's 17 foot vessel, the *Pinky Lee*, became entangled in a floating gillnet and sank. All three men perished in the cold water of Lake Huron. Martin was wearing a life jacket; his father and uncle were not.

Due to the extensive public interest in this tragic incident, an investigation was conducted under the authority of the Mackinac County Sheriff's Department with the assistance of the Michigan State Police. While complete details of the investigation are available by appropriate request, the following are among the most significant conclusions.

1. Weather Conditions: There is contradictory evidence regarding wind and wave conditions on St. Martin Bay on the date of the incident. Several native American fishermen who claim to have been on the bay that morning reported high winds and rough seas. In fact, these same fishermen state that they met the victims at the Carp River boat launch and warned them against

going onto the bay. Residents along the east shore of the bay similarly described lake conditions as treacherous.

Coast Guard reports, on the other hand, describe calm and clear weather conditions throughout the day except for a squall that passed through the area at approximately 2:00 p.m. A video tape of the bay taken at 11:00 a.m. by family members of the victims depicts calm seas and very little wind. It should be noted, however, that the video was taken from the west side of the bay, which would have been sheltered from the southwesterly winds that prevailed during the squall.

2. Radio Distress Call: Coast Guard records of radio traffic confirm transmission of "Mayday" distress calls at 1:15 p.m. from the St. Martin Bay area. The calls lasted only about 10 seconds. Unfortunately, the transmission was completely covered by a more powerful transmission and was discovered only after the fact.

3. Net Presence in St. Martin Bay: According to local tribal commercial fishermen, as many as twelve fishermen with more than thirty nets were operating out of St. Martin Bay on September 4th. Tribal fishermen explain that under the 1985 consent decree they are unable to fish in much of their treaty water. Consequently, they have been squeezed into the waters around St. Ignace and St. Martin Bay.

Documentation by the Coast Guard confirms that St. Martin Bay was riddled with nets on September 4th. The net in which the victims' boat was entangled was 1800 feet in length. The net, 35 feet deep, was suspended from the surface, where it was marked by small blue and white floats, to the lake's bottom in 29 feet of water. Tribal fishing rules also require that nets be

marked with a flag staff at one end and some sort of buoy at the other. The purpose of the rule is to allow the owner of the net to be easily identified. It is uncertain whether any tribal netting regulations exist which establish minimum safety standards.

4. Condition of Victim's Boat: The *Pinky Lee* initially was discovered by the fishermen in whose nets it was entangled. With the assistance of the Coast Guard buoy tender *Buckthorn*, the sunken vessel was lifted from the lake bottom. Approximately 60 feet of the gillnet remained attached to the vessel, the rest having been severed by the fishermen who discovered it.

A visual inspection revealed the net to be afoul with boating and fishing equipment. The primary motor, an 80 h.p. Mercury, was manually latched in the up position, suggesting that it was not being used when the boat came into contact with the net. The prop of the 5 h.p. trolling motor was obviously wrapped with netting. In fact, the monofilament net was wrapped so tightly around the prop that it could not be turned. After the net was cut away, the prop turned freely. Therefore, it is most likely that the small motor was running when it came into contact with the net.

A mechanical and electrical inspection of the vessel was conducted by Coast Guard personnel. No significant findings were made.

5. Presence of Alcohol/Tampering with Nets: The victims' family confirmed that the victims had taken a twelve-pack of beer with them. Eight unopened cans were recovered near where the incident occurred. Toxicology reports from the body of Martin Swikowski were negative for alcohol.

Several tribal fishermen also have voiced suspicion that the victims may have been tampering with the net (e.g. stealing salmon) when they became

entangled. While such a possibility exists, there is no evidence whatsoever to substantiate this claim.

6. History of Problem: Safety concerns associated with the presence of floating nets have increased substantially in recent years. The tragedy of the *Pinky Lee* was, arguably, a disaster waiting to occur.

Complaints among local ferry lines and sport fishermen are well documented. Residents of St. Martin Point have expressed fear of going out into the bay due to the number of nets which the residents maintain are "all but invisible in choppy water." In one particular incident during September of 1992, two residents experienced a near tragedy when their boat became entangled in a net. With the engine stalled as a result of the net being wrapped around the prop, the boat swung downwind, exposing the transom, and began taking on water. One of the men was able to balance the boat while the other one cut away the net. Another area resident experienced a similar near tragedy in 1989.

Local officers of the United States Coast Guard have repeatedly expressed concern about the navigational hazards created by floating nets, especially the difficulty in seeing them under different weather and lake conditions. The Coast Guard previously has communicated its concern to tribal authorities and recommended that the nets be lowered from the surface to a depth sufficient to ensure safe clearance for all boats. Tribal fishermen have rejected the recommendation.

It should be noted that Coast Guard vessels have also experienced unpleasant and dangerous encounters with floating nets. During a search and rescue operation in Hammond Bay during September of 1992, a Coast Guard vessel became entangled in a floating net. The crew was attempting to assist another

craft that had become entangled in a different net.

At one point during its search for the crew of the *Pinky Lee*, the Coast Guard was forced to abort its operation due to the number of floating nets in St. Martin Bay. After the incident and for the remainder of the salmon season, the Coast Guard transmitted twice daily over marine radio warnings to boaters around the St. Ignace and St. Martin Bay areas. The warning cautioned boaters to exercise "extreme caution when transiting these areas as the nets can be extremely difficult to see both during the day and at night."

Given the generally controversial history associated with tribal gill netting in the open Great Lakes, it is not surprising that individuals and groups with competing agendas and interests have followed this case closely. Tribal fishermen and their representatives consider the matter to be within the sovereign jurisdiction of the tribal courts. The State of Michigan, according to the tribal fishermen, has no authority to intervene or otherwise attempt to regulate how they conduct their federal treaty-protected fishing rights.

Other groups and individuals who oppose the right of natives to fish commercially with gill nets, on the other hand, view this case as a legitimate opportunity to review the entire issue--to correct what they perceive as irrational and obsolete reasoning by appointed federal judges.

A decision to prosecute <u>any</u> citizen must, however, be based solely on applicable law and relevant facts. To initiate or pursue a criminal prosecution to satisfy the interests of one group or another would, at the very least, represent an abuse of prosecutorial discretion.

On the other hand, I do not share the belief that the State of Michigan is without authority to prosecute native American fishermen whose conduct or

actions violate state laws that are designed, not to regulate fishing, but to protect the safety and welfare of its citizens. Indeed, the State of Michigan also has attributes of sovereignty, the most basic of which includes the protection of its citizens from the unreasonable and dangerous activity of others. Recent federal court decisions relating to the right of natives to hunt deer at night in the State of Wisconsin provides authority for this position.

In the present case, there obviously is no evidence that the fishermen in whose nets the victims' boat became entangled intended to cause them any harm. However, the State of Michigan makes it a criminal offense to exercise even a legal right in a grossly reckless manner that causes loss of life.

Whether the practice of floating nets of great length across the lake surface amounts to criminal recklessness is a question of fact. Certainly the history of previous serious incidents as well as the recent tragedy, and the growing concern of the United States Coast Guard, are persuasive indicators that floating nets do present a substantial threat to navigational safety.

The ironic fact remains, however, that the use of floating nets is the standard practice among the tribal fishermen in pursuit of salmon. Approved by tribal authorities and apparently accepted or tolerated by state and/or federal authorities, the use of floating nets is perceived among tribal fishermen as a legal and totally appropriate manner of pursuing their livelihood.

Unlike the typical criminal case involving reckless conduct where the individual knows, or should know, that his actions are unlawful, no such knowledge can be presumed or imputed to the fishermen in whose nets the *Pinky Lee* became entangled. Although the concerns relating to floating nets have

previously been communicated to tribal authorities, and the issue addressed amongst tribal fishermen and tribal authorities, no tribal or other lawful regulation exists which makes the use of floating nets a criminal offense. In other words, there is no evidence to prove that the fishermen knew that the use of floating nets in St. Martin Bay could amount to criminal recklessness. In the absense of any culpable intent or knowledge, a criminal prosecution would be inappropriate.

The survivors of the victims are entitled to pursue their claims, if any exist, in civil suits. But the overriding issue here is one of public safety, not a criminal prosecution of an individual fisherman or private litigation. The Great Lakes, including treaty waters, belong to all of the citizenry. Each and every citizen has an equal right to use the waters of the Great Lakes without being exposed to unreasonable and unnatural hazards.

As a matter of public safety, this issue must be confronted and resolved by our state and federal representatives. The rights and safety of all citizens who use the Great Lakes must be protected. Whether by negotiations with tribal authorities, or by legislative mandate, prompt action must be undertaken to prevent further needless tragedies from occurring. A failure to act truly would be reckless.

EXHIBIT D

Drownings highlight the hazards of gill nets

ST. IGNACE — While this tragedy was just waiting to happen, it's likely no one will ever know how the 17-foot outboard boat Pinky Lee became entangled in an Indian fisherman's gill net and sank in St. Martin Bay last Sept. 4.

The three men on board are dead.

A statement released recently by Mackinac County prosecutor Dan Dowdell said that when it was hauled up from 29 feet of water, the boat had nylon net wrapped so tightly around its trolling motor, the propeller couldn't be turned. The net was 1,800 feet long and 35 feet deep.

ERIC SHARP

Outdoors

My guess is James Swikoski of Kalkaska, his son Marty, 18, and brother Daniel were trolling for salmon when the boat hit the net.

There are conflicting weather reports. A videotape relatives made of the boat leaving a Carp River dock at the west side of the bay shows calm water. Indian fishermen, who said they were driven in by high seas, reportedly warned the men not to launch. A spokesman for the Indians admitted that report hadn't been confirmed, but people on the east side of the bay reported big seas.

If any kind of sea was running, Pinky Lee would soon have swung stern to the waves as the net acted like a big sea anchor. And I suspect there had to be something of a seaway — and perhaps with the added weight of someone in the stern trying frantically to pull the net loose — or the small boat wouldn't have been pooped by waves breaking over her transom.

Whatever happened was quick. The U.S. Coast Guard station at St. Ignace later discovered it had taped a radio distress call from St. Martin Bay at 1:15 p.m. Sept. 4. No one noticed at the time because the 10-second call was masked by a stronger transmission from another boat.

Something else that makes me suspect rough conditions is that fact that none of the men swam to shore, not even Marty, who was wearing a life jacket. Northern Lake Huron is near its warmest in early September, and I suspect at least one would have made it if the water was calm.

They aren't the first sport fishermen to run into a gill net in the area. What's so infuriating is that it took three deaths to get state officials and Indian fishermen to admit gill nets are more than a mere inconvenience in St. Martin Bay.

Phil Pittman at the Le Chenaux Club in Cedarville said, "We've been screaming about this since 1985," when modifications to Indian fishing rights concentrated large numbers of nets in St. Martin Bay. Sept. 4, about a dozen Native American fishermen laid more than 30 nets in the bay, each more than 1,500 feet long.

"The federal government and the state won't listen to us," Pittman said. "There was even a case where three tribal fishermen drowned when they were caught in their own nets. There have been at least eight reports of boats being caught in the nets in the last two years, and I know of some other cases that weren't reported. At one point, the Indians laid so many nets right in front of the Coast Guard station that the Coast Guard boats couldn't get out."

The nets are hard to see if there's a chop. And a friend and I learned that when we ran into one as we were returning from Bois Blanc Island to Carp River two years ago. We didn't get tangled, but we checked both ends of the net for warning flags. There weren't any.

Pittman said a major problem is that some fishermen don't put the required flag at one end of the net. Even if the net is marked, it's almost impossible to see at night.

John Hatch, a spokesman for the Chippewas in Sault Ste. Marie, said, "We've made every effort to mark those nets properly, but in light of the tragedy, the whole system is under review."

Hatch said some of those nets are not set by Indians but by others fishing illegally. He suggested that might explain the lack of markers, adding "we want to know about unmarked nets as quickly as possible" so that tribal officials can attempt to catch the people setting them.

But Hatch admitted unmarked nets are "a communitywide problem" and said a new mechanism will be on hand to prevent further tragedies by the time the next salmon run starts in late August.

The more I think about it, the more I lean toward a solution that involves sport fishermen and Indian fishermen working it out between them. After all, we can look at the government's record so far in the whole Indian fishing controversy, and it has been abysmal.

It was a federal court that oversaw the 1985 consent decree that created this most recent problem. And it was largely a failure by the state to negotiate seriously with the Chippewas 20 years ago that started the whole mess.

Exhibit C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

and

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,

and

STATE OF MICHIGAN, et al.,

Defendants.
/

Case No. 2:73-cv-26

HON. PAUL L. MALONEY

AFFIDAVIT OF DAVID P. BORGESON, MICHIGAN RESOURCE STEWARDS

AFFIDAVIT OF DAVID P. BORGESON, CHAIR OF FISHERIES COMMITTEE OF MICHIGAN RESOURCE STEWARDS

STATE OF MICHIGAN)
) ss
COUNTY OF INGHAM COUNTY)

DAVID P. BORGESON, having been duly sworn and under oath, hereby avers, deposes and states as follows:

1. I live in the County of Eaton, Michigan. I am a retired Michigan Department of Natural Resources ("DNR") fishery biologist and now serve as the Chair of the Fisheries Committee of the Michigan Resource Stewards ("Resource Stewards").

2. I make this affidavit based upon my personal knowledge and belief, and if called upon to testify in a judicial proceeding, my testimony would be consistent with the averments made herein.

3. The Resource Stewards is a non-profit organization founded by natural resource and environmental professionals who spent years working or volunteering in the public and private sectors managing and protecting our natural resources and environment. The organization was formed in 1997 to continue the fight for protection of environment and natural resources within the State of Michigan ("State") by the same people who had dedicated their careers to this noble objective.

4. Since its inception, the Resource Stewards has earned a reputation as an organization that uses sound science in arriving at positions on a wide variety of conservation and environmental issues. Individual members have testified before various commissions, boards and legislative committees, and serve on a variety of work groups to share the expertise and experience they have accumulated over decades of hands-on involvement. The Members of the Resource Stewards oppose the politicization of resource management, or decisions based on unscientific principles, and are a respected and outspoken voice on behalf of the long-term use and conservation of Michigan's natural resources.

5. The Resource Stewards is an active member of the Michigan United Conservation Clubs. The Stewards bring an immeasurable amount of hands-on professional experience and credibility in all aspects of conservation and environmental protection, in both the public and private sectors.

6. The Resource Stewards was inducted into the Michigan Environmental Hall of Fame in 2019 for its 22 years of service to Michigan.

7. The mission of the Resource Stewards is to advance professional stewardship of Michigan's natural resource legacy through sound scientific principles, including our land, water, biota, and the ecosystems comprising them.

8. I received a Master's Degree in Fisheries Biology from Michigan State University in 1959. I am a 60-year member of the American Fisheries Society and a 30-year member of the Resource Stewards Board and six years as President.

9. In the summer 1957, I worked for the US Fish & Wildlife Service to help measure the impact of the Japanese gill net fishery on the spawning escapement of Sockeye Salmon to the rivers of Bristol Bay, Alaska.

10. Beginning in 1959, I worked as a fisheries biologist with the California Deptartment of Fish and Game and headed investigations on trout lake research and co-authored several research reports.

11. In 1966, the year salmon were first introduced into the Great Lakes, I was recruited by the Fisheries Division of the DNR as a Trout and Salmon Specialist. I worked in this role as a specialist from that time until my retirement. I had increasing staff responsibilities in establishing and implementing fisheries policies for Michigan's Great Lakes in my role with the DNR.

12. In the 1960's, I was involved in converting the State's large mesh gill net fishery to a trap net fishery. This move was needed to reduce the mortality rate on fish stocks that were severely depressed by sea lamprey predation and over-fishing. Lamprey control's positive results were first observed in 1966, and it was hoped that with the reduction in gill net efforts to protect from over-fishing, the protection and rehabilitation of lake trout and whitefish could be accomplished along with the new salmon introduction.

13. From 1980 to 1991, as Assistant Chief of Fisheries Division in charge of fishery programs, I was Michigan's representative to the Great Lakes Fisheries Commission and was a member for 11 years on the Lake Superior, Lake Michigan, and Lake Huron committees and the Council of Lake Committees and served 2 years as Chairman for each committee.

14. During the 1980's, I led the management of Michigan's commercial fisheries, including the implementation of a program to reduce excessive trap net effort by buying back trap net licenses from willing sellers. This reduced netting mortality which increased the number of older year classes in the population as well as the size of fish in the catch. The result was that fewer nets caught more fish and larger fish of greater value. I was an advisor to the state in the negotiations of the first Consent Decree in 1985 under Judge Enslen. I still have in my den the three champagne bottles signed by the parties to the agreement.

15. In managing public natural resources, it is important to protect the resources and realize the long-term benefits from them. By this measure, the proposed Consent Decree falls short in some areas. Lake trout, salmon, steelhead and walleye generate greater value when caught by sports-fishermen with hook and line than when taken by commercial nets, and trap net harvested fish are more valuable than an equal harvest by gill nets. Fish taken in trap nets can be sorted by size and species and small fish and non-target species can be released alive. For example, large lake trout females could be released for spawning. Fish taken in gill nets cannot be sorted in this way. A large portion of fish die in gill nets and are often in poor condition for sale and many targeted and non-targeted fish are wasted. Foul weather or equipment problems that delay the lifting of nets worsens this problem. As a result, fish caught in gill nets on average command lower market prices than those taken

by trap nets. Gill nets are also a threat to loons and diving ducks and constitute a negative resource impact that deserves consideration.

16. The Decree should include a provision that encourages the purchase by the State or Federal Government of catch quotas or netting effort from willing sellers in those instances where reallocation will encourage a more valuable use or offer needed protection of fish stocks or both. This provision, in my experience, would be an attractive option for tribal fishermen who would be able to realize a reliable income from a stressed resource while helping it to recover, yet not losing the option to re-enter the fishery in the future. This provision would be particularly valuable if initiated before purchases of large mesh gill nets are made. The large mesh gill net expansion is, in most cases, a move in the wrong direction. It will accommodate an easier short-term harvest but increase the mortality rate of already stressed fish populations and jeopardize the long-term sustainability of the fisheries resource, the fisheries themselves, and the fisheries-based economy they support.

Further affiant sayeth not.

Date: Jan. 17, 2023

David P. Borgeson

STACY A PARRISH
Notary Public - State of Michigan
County of Ingham
My Commission Expires Sep 1, 2028
Acting in the County of Ingham

On the 17th day of January, 2023, in Ingham County, David P. Borgeson did appear before me, subscribed and having been duly sworn and under oath did attest that the forgoing affidavit and averments contained within were true and correct to the best of his knowledge and belief and having read the same he executed the foregoing Affidavit as his free act and deed.

Stacy A. Parrish, Notary Public
County of Ingham
My commission expires: 9/1/2028
Acting in the County of Ingham

Exhibit D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

and

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,

and

STATE OF MICHIGAN, et al.,

Defendants.
_____/

Case No. 2:73-cv-26

HON. PAUL L. MALONEY

AFFIDAVIT OF JAMES E. JOHNSON

STATE OF MICHIGAN)
) ss
COUNTY OF ALPENA)

JAMES E. JOHNSON, having been duly sworn and under oath, hereby avers, deposes and states as follows:

1. I am James E. Johnson, a retired Great Lakes fishery research biologist and current Chair of the Besser Museum for Northeast Michigan Fishery Heritage Project.
2. I make this affidavit based upon my personal knowledge and belief, and if called upon to testify in a judicial proceeding, my testimony would be consistent with the averments made herein.

3. I graduated from Michigan State University in 1969 with a Bachelor of Science in Fisheries and Wildlife. I then participated in a graduate program in Fisheries and Wildlife at Michigan State University and graduated with a Master of Science in 1972.
4. Upon graduating, I worked for the Nebraska Game and Parks Commission (between 1972 and 1979) and the Utah Division of Wildlife Resources (between 1979 and 1989). I managed fishery-related projects in both of these roles.
5. I have been a member of the American Fisheries Society since 1978 and a member of the Michigan Chapter of the American Fisheries Society since 1989.
6. Beginning in 1989 (and through my retirement in 2014), I worked for the Michigan Department of Natural Resources ("MDNR") as Manager of the Alpena Fishery Research Station. In this role, I conducted research on lake trout, brown trout, Chinook salmon, steelhead trout, and lake whitefish in Lake Huron. I also served on the Lake Huron Citizen Fishery Advisory Committee, where I co-chaired the Sea Lamprey Control Funding Committee.
7. While employed with the MDNR, I coordinated fishery work with the province of Ontario, the Sault Ste. Marie and Bay Mills bands of Chippewa-Ottawa tribes, and federal partners under the umbrella of the U.S. State Department's Great Lakes Fishery Commission. I also participated in the negotiations with the 1836 Treaty Tribes that led to the 2000 Consent Decree and in managing the fishery assessment of elements of the 1985 Consent Decree. My involvement in Treaty Waters fishery management included:
    a. With others, the injunction against an unauthorized gillnet fishery in 1997.
    b. Leading a court-ordered study of a comparison of catch and bycatch and non-target species mortality of trapnets and gillnets in MH-1,2 (Johnson et al. 2004)

and conducted a related literature review on the catch and bycatch of different gear types, with emphasis on gillnets and trapnets of the Great Lakes (Johnson et al, 2004b).

c. Leading the DNR's Alpena Fishery Research Station. With Dr. Ji. X. He and others, we conducted assessments of lake trout and whitefish populations and commercial fisheries in Lake Huron from 1989-2014. The assessment work was used for, among other things, building lake trout and whitefish models for Lake Huron.

d. Participating in negotiations and providing some information resources that led to the 2000 Consent Decree.

8. I have co-authored several publications relating to the Great Lakes fishery, including:

a. Johnson, J. E., and J. P. Vanamberg. 1995. Evidence of natural reproduction of lake trout in western Lake Huron. Journal of Great Lakes Research 21 (Supplement 1):253-259;

b. Johnson, J. E., and G. P. Rakoczy. 2004. Investigations into Recent Declines in Survival of Brown Trout stocked in Lake Charlevoix and Thunder Bay, Lake Huron. Michigan Department of Natural Resources Fisheries Research Report 2075, Ann Arbor;

c. Johnson, J. E., J. L. Jonas, and J. W. Peck. 2004. Management of commercial fisheries bycatch, with emphasis on lake trout fisheries of the Upper Great Lakes. Michigan Department of Natural Resources Fisheries Research Report 2070;

d. Johnson J. E., M. P. Ebener, K. Gebhardt, and R. Bergstedt. 2004. Comparison of catch and lake trout bycatch in commercial trap nets and gill nets targeting lake

whitefish in northern Lake Huron. Michigan Department of Natural Resources Fisheries Research Report 2071;

e. Johnson, J. E., J. X. He, A. P. Woldt, M. P. Ebener, and L. C. Mohr. 2004. Lessons in rehabilitation stocking and management of lake trout in Lake Huron. Pages 157-171 in M.J. Nickum, P.M. Mazik, J.G. Nickum and D.D. MacKinlay, editors. Propagated Fish in Resource Management. American Fisheries Society, Symposium 44, Bethesda, Maryland;

f. Johnson, J. E., S. P. De Witt, and D. J. A. Gonder. 2010. Mass-marking reveals emerging self-regulation of the Chinook salmon population in Lake Huron. North American Journal of Fisheries Management, 30:518–52;

g. Johnson, J. E., J. X. He, and D. G. Fielder. 2015. Rehabilitation Stocking of Walleyes and Lake Trout: Restoration of Reproducing Stocks in Michigan Waters of Lake Huron, North American Journal of Aquaculture, 77, 396-408; and

h. Johnson, J. E., and J. X. He. 2018. Lake trout where you need them—Restoring reproducing lake trout in Michigan waters of Lake Huron. Wild Trout 12:157-171.

Introduction

9. I have appended the literature research that the Coalition to Protect Michigan Resources conducted into the biological status of fish populations of 1836 Treaty Waters of the Great Lakes, with scientific literature sources upon which our description of fish stock status was based, as support for my affidavit. See **Exhibit 1**.

10. This research demonstrates that foodweb changes that have led to substantial declines in whitefish reproduction and abundance, collapse of alewives and chinook salmon that

depend on alewives for food in Lake Huron, decline in chinook salmon abundance in Lake Michigan, and the tenuous status of lake trout recovery programs in lakes Huron and Michigan. The biological information describes a resource in crisis, with lake whitefish abundance at historic low points and lake trout recovery still in early stages in lakes Huron and Michigan. The conclusion is that the tenuous status of the resource needs to be at the core of any new consent decree and that these resource limitations call for a conservative approach to harvest management, which should include measures to reduce exploitation rates on lake whitefish and lake trout.

11. I have extensively reviewed the Proposed Consent Decree and it is my opinion it does not put the tenuous status of the resource at the core and fails to conserve and preserve the Great Lakes fishery.

Biological Analysis of Proposed Consent Decree

12. The Proposed Consent Decree, rather than balance extractions with reduced resource capacity, focuses on providing new fishing opportunity, fails to address resource limitations, and proposes actions that would increase fishing pressure, when the reduced and fragile status of fish stocks call for a reduction in fishery extractions. This will do irreparable harm to Great Lakes public-trust resources and the people that depend upon their sustainability for the following reasons:

    a. The Proposed Consent Decree fails to protect and conserve the fisheries by emphasizing new fishing opportunity over resource protection. In my opinion, and based on my experience as a biologist, the decreased availability of the leading target species for recreational (salmon) and commercial (whitefish) fishing since 2000 and the tenuous status of lake trout recovery in lakes Michigan and Huron

must be considered. The appropriate biological response is to take a conservative approach to setting harvest levels in a new decree that protects the diminished whitefish stocks from overharvest while taking precautionary measures to protect lake trout as the focus of fishing shifts from whitefish to this recovering native species. The Proposed Consent Decree, however, makes available additional fishing opportunities that will heighten harvest pressure on fragile resources.

b. The Proposed Consent Decree expands gillnetting opportunities to the detriment of the Great Lakes fishery. This expansive new gillnetting will increase fishing pressure, enable more efficient targeting of lake trout and walleye, and expand gillnetting into areas and zones where they were not previously allowed. It represents a step backward from the framework of the 2000 Consent Decree, which directed $14 million to converting nonselective, lethal gillnets to trapnet fisheries.

c. The Proposed Consent Decree fails to protect recreation zones and a lake trout refuge from gillnetting. Zone management, which in the 1985 and 2000 Consent Decrees had protected recreational zones and fish refuges from gillnetting, has been diminished in the Proposed Consent Decree and gillnetting has been extended to many new areas. Recreational zones, where gillnetting is prohibited, would be greatly reduced (increasing the area of gillnetting) and one refuge would be opened to gillnetting. Lake trout mortality rates tend to be lower in gillnet-free zones and lake trout populations have thus flourished in such locations. Opening these zones to gillnetting therefore further jeopardizes rehabilitation of lake trout.

d. The Proposed Consent Decree calls for a vast expansion of small-mesh gillnetting, much of which is to target yellow perch and walleye. There are almost no yellow perch or walleye stocks in 1836 Treaty Waters that can sustain directed commercial fishing. The lakes are too cold and unproductive to be capable of producing fisheries of a commercial scale for either of these species and this condition has been exacerbated by the mussel invasion. Where walleyes are targeted, stocking is usually necessary to sustain populations, and numbers are so suppressed by commercial fishing as to prevent recreational fishers from engaging in those fisheries. Expanding commercial exploitation of perch and walleye will further erode the recreational fishery's ability to realize a fair allocation of harvest.

e. The Proposed Consent Decree fails to even address the status of ciscoes in the lower two lakes or the potential impact of expanded small-mesh gillnetting on their recovery. The statement: "The State and the Tribe shall manage their own respective harvests of cisco" is the only mention of cisco in the proposed Decree. Small-mesh gillnets will be effective in harvesting ciscoes, which are in early stages of recovery in Lake Michigan and are the subject of a stocking-based recovery program in Lake Huron.

f. One center of cisco recovery is the Traverse Bays of Lake Michigan. The proposal to expand both large-mesh and small-mesh gillnetting in these bays seems targeted at this recovering species.

g. The Proposed Consent Decree does not provide target annual mortality rates and delegates setting of mortality rates to the Executive Council with input from the

Technical Fisheries Committee, which leaves this critical need unresolved. A brief analysis of mortality rates for lake trout shows how a varying mortality rate will have significant consequences:

1. Mortality targets for lake trout, if set at 40% or lower, produce harvest policy that favors reproduction—that is self-sustaining lake trout populations that are less dependent or independent of stocking. Target rates can be set higher but would represent harvest policy that is dependent on costly, taxpayer supported, stocking. Mortality rates have for years been much higher than the desired 40% in northern Lake Michigan and reproduction there is minimal; northern Lake Michigan is, therefore, a put-grow-take lake trout fishery dependent on stocking.
2. Mortality rates in Lake Huron have been generally below the 40% target and reproduction is increasing, though recovery is far from complete. Dr. Ji X. He of the DNR's Alpena Fishery Research Station, in 2020 wrote in a scientific journal (https://doi.org/10.1093/icesjms/fsaa030) the following about northern Lake Huron lake trout:

> Thus, aggressive control of sea lamprey-induced mortality and fishing mortality will continue to be crucial for maintaining and further expanding the biomass and production of adult lake trout. A serious concern is whether the fixed harvest control rule, i.e. annual mortality of 40–45%, will continue to be closely implemented [*that is, whether mortality rates will continue to be managed below this level; note by J. E. Johnson*] in the future. Relaxation of the harvest control will likely lead to a downward trend in adult biomass and production, unless recruitment increases to such a level as to fully compensate for the expected increase in fishing mortality. Our findings also imply that the annual mortality might need to be further reduced unless substantial increases in recruitment occur soon.

3. Thus, Dr. He worries that an increase in mortality rate will jeopardize the status of Lake Huron's self-sustaining lake trout, but the proposed decree would do just that by expanding gillnetting opportunity and opening the area's refuge to gillnet fishing.

4. It is my opinion that excessive lake trout harvest is already being permitted around Lake Michigan's Northern Refuge. MM-1, 2, 3 and portions of MM-5 are adjacent to or near the Lake Michigan Northern Refuge. But mortality rates are already too high in MM-1, 2, 3 for the development of spawning stocks. The Proposed Consent Decree would incentivize increased gillnet fishing there, exacerbating the mortality issue. The utility of a spawning refuge is seriously compromised when spawning-age fish are scarce. The grids surrounding the Northern Refuge should be targeted for more conservative harvest management, with target mortality rates set at 40% or less and with enforcement and penalties commensurate with the importance of protecting these stocks; however, enforcement and penalties are not defined in the Proposed Consent Decree and without a set mortality rate it is impossible to judge the biological impacts that may ensue.

h. The Proposed Consent Decree will increase exploitation rates on lake whitefish while their population levels in lakes Huron and Michigan are extremely depressed, putting at risk the future of commercial fishing on lakes Michigan and Huron, where whitefish are the mainstay of the fishery. Whitefish represent a species of special cultural heritage and economic importance.

1. Eastern Lake Superior (MI-8) is realizing whitefish mortality rates that are higher than anywhere in Treaty of 1836 waters and the rates are increasing. This should be looked at with alarm because a failure of these "home waters" for Bay Mills and the Sault tribes would undermine an ancient fishery heritage. There is no effort directed to this issue. Instead, the Proposed Consent Decree seems to incentivize increasing gillnet efforts, and the decline of whitefish in lakes Huron and Michigan will likely cause gillnet fishers to focus even more effort on Lake Superior; thus, further declines in the status of whitefish in MI-8 seem likely.

i. The Proposed Consent Decree's expansion of gillnetting also compromises other Great Lakes fish populations, including lake sturgeon. Lake sturgeon number less than 1% of historical levels (Ed Baker: https://www.michiganradio.org/environment-science/2020-08-11/dead-sturgeon-found-on-lake-michigan-beaches), are State-listed as "threatened" in Michigan, and a federal court has ordered the U.S. Fish and Wildlife Service to make a determination by 2024 whether imperiled populations of lake sturgeon will be protected under the Endangered Species Act. Restoration stocking of lake sturgeon began in Bays de Noc in 2006 and these stocked fish are relatively young, meaning they are of sizes to be vulnerable to the 4.5-inch gillnets most commonly fished for lake whitefish and lake trout. Gillnets are non-selective, and their catch is often dead or moribund when landed. Thus, it is important to protect sturgeon rehabilitation sites from commercial gillnetting. The proposed decree

prohibits the possession of lake sturgeon, but prescribes no on-board monitoring of bycatch and discard rates of lake sturgeon or other "nontargeted" species. "Nontargeted" is placed in quotes because it is impossible to effectively target one bottom-oriented species over another with gillnets.

1. Common loons are listed as "Threatened" by the State of Michigan. Threats include climate change and botulism caused by foodweb changes induced by the mussel invasion. Loons drown when entangled in gillnets or captured in the pots of trapnets lacking loon-exclusion windows. While loon exclusion windows are a remedy for trapnet fisheries, to my knowledge none of the negotiating parties require loon-exclusion windows and they are not proposed in the draft consent decree.

j. The Proposed Consent Decree prescribes harvest policy and mortality targets that are vague and inadequate to protect the fishery resource. Harvest policy and status of the stocks need to be reviewed at least annually and more frequently where populations are especially depressed, yet the proposed decree would review harvest policy only every three years and mortality targets every six years. Such infrequent reviews of harvest policy could have disastrous consequences. As we have seen during the early 2000s—when alewives and Chinook salmon crashed in Lake Huron, salmon numbers declined in Lake Michigan, and whitefish reproduction began a steep decline in both lakes—much can happen to fish populations and fishing patterns in as few as one or two years.

1. Vigilance is required in managing gillnet effort and lack of vigilance can have disastrous consequences in as little as a few months. An example of the consequences of a targeted and unlimited gillnet fishery is illustrated by 1978-79 Michigan Department of Natural Resources assessment data from Hammond Bay–Cheboygan areas of northern Lake Huron. The DNR's assessment fishing there measured an 83% drop in lake trout density between 1978 and 1979. Survival rate was less than 2% for the 1973 cohorts of lake trout during that one-year period; these cohorts were at record high abundance levels in 1978 and their abrupt decline coincided with an intensive gillnet fishery that operated on those grounds in fall 1978 (Cruise report for the Michigan DNR Research Vessel Chinook, May 28-June 29, 1979. Michigan Department of Natural Resources, Alpena Fishery Research Station, Unpublished Report). A single fall season of gillnetting nearly eliminated the lake trout population there. Similarly, a wave of gillnet effort in Grand Traverse Bay in 1979 reduced the lake trout stock there by over 90% in a matter of months. These are examples of the "fishing up" of targeted stocks of fish: when a lucrative fishing ground is identified, the site is intensely targeted causing the stock to decline. As the stock declines, gillnet fishers respond by setting even more gillnet. Effort spirals up until the targeted stock is almost fished out and no longer attractive as a fishery. This fishing up can have disastrous effects in as little as a few

months, as shown above. These examples point to the essential need for timely review of harvest policy and mortality targets.

2. The Proposed Consent Decree does not protect vulnerable aggregates of spawning lake trout and lake trout staging for spawning. The spawning closure defined by the Proposed Consent Decree is November 7 through November 29. Most lake trout spawn in lakes Michigan and Huron beginning in mid-October and continuing until mid-November. Thus, lake trout are presently not protected during the height of their spawning and are extremely vulnerable to harvest during late October and early November. The proposed expansion of gillnet "opportunity" will enable the commercial fishery to target these aggregations efficiently, remove brood stock fish before they have the opportunity to spawn, and thus undermine progress made toward self-sustaining lake trout fisheries.

3. The Proposed Consent Decree should set initially conservative target mortality rates for recovering and stressed stocks to reverse the declining trend in the status of fisheries of lakes Huron and Michigan. It is essential that these target rates and harvest limits be reviewed annually and that corrective adjustments be made to harvest plans on a timely basis, at least until lakes Huron and Michigan begin showing signs of stabilization and self-sustainability.

4. Because gillnets are not selective for the bottom-dwelling fish they target, it is important that bycatch that is killed in nets be counted and reported. Validation of bycatch killed (discards) must be validated by

scientifically designed on-board studies of bycatch incidence by species so that the untargeted kill of important species such as ciscoes, coaster brook trout, and undersized lake trout can be estimated and accounted for in models and adjusting catch policy and harvest limits.

5. Stock assessment and harvest projection models are inexact and the whitefish models, in particular, have not been performing well. There may be modeling issues caused by incomplete reporting of harvest, inaccurate harvest reports, large uncertainties surrounding recruitment estimation, and uncertainty of several other key parameters. We see no consideration of methods to improve stock assessment and modeling in the proposed decree or to hedge against effects of uncertainty that can cause overly optimistic harvest policy. **It is my professional opinion that the models should be subjected to an independent review** by qualified stock assessment biologists elsewhere in the professional community and that, until the models are improved, harvest projections be adjusted downward in mitigation of these uncertainties and low model performance levels.

6. Law enforcement, penalties for overharvest, and data quality control measures are largely missing in the Proposed Consent Decree. In my opinion, it is unlikely that harvest management can be effective if there are no clear consequences for not reporting daily harvest, not reporting accurately, exceeding harvest limits or quotas or not reporting discards and whether discarded fish were dead. Consequences for exceeding a

party's allocated share of Total Allowable Catch that were specifically given in the 2000 Decree have been removed in this proposal.

Further affiant sayeth not.

Date: January 19, 2023

James E. Johnson

On the 19th day of JANUARY, 2023, in ALPENA County, James E. Johnson did appear before me, subscribed and having been duly sworn and under oath did attest that the forgoing affidavit and averments contained within were true and correct to the best of his knowledge and belief and having read the same he executed the foregoing Affidavit as his free act and deed.

ALCONA COUNTY, Notary Public
State of MI, County of ALPENA
My Commission Expires: 11/24/2028
Acting in the County of ALPENA

ANGELA NICOLE METHERINGHAM
Notary Public, State of Michigan
County of Alcona
My Commission Expires 11-24-2028
Acting in the County of ALPENA

EXHIBIT 1

Science-Based Analysis of How Proposed Consent Decree Jeopardizes Sustainability of Great Lakes Fishery Resources and the Fishers that Depend on Them.

January 2023

Introduction

The Proposed Consent Decree between the State of Michigan, the United States, and four of the five tribes with fishing rights under the Treaty of 1836 represents a huge step backward in protection and stewardship of Michigan's fragile Great Lakes fisheries.

The State of Michigan, in negotiating this proposed Decree, abandoned the initiative of the 2000 Consent Decree to replace destructive, lethal gillnets commonly fished by the tribes with more selective and far less lethal trapnets. In so doing, the proposed Decree opens to gillnetting vast reaches of Lake Superior that were, until now, trapnetting and recreational fishing zones. Gillnetting "opportunities" have also been expanded in lakes Michigan and Huron. In Lake Huron, the proposed Decree even opens a lake trout spawning refuge to gillnetting 10 months of the year and reduces its protective area by more than half. This refuge, which until now was closed to gillnets and the harvest of lake trout, was given refuge status by the Canadian and US biologists that coordinate their activities on Lake Huron under the aegis of the Great Lakes Fishery Commission. Another refuge, the Northern Lake Michigan Refuge, is surrounded by waters suffering from effects of overfishing and which will now experience even more nets. Lake trout were exterminated from lakes Huron and Michigan by overfishing and sea lamprey depredation. They are still dependent on stocking in Lake Michigan and are staging a fragile recovery in Lake Huron; lake trout cannot sustain such increases in fishing pressure. Zones for recreational

and trapnet fishing designated by the previous consent decree had afforded lake trout protection from the impacts of gillnets and, thus, were centers for lake trout recovery. These zones are vastly diminished, and gillnets will now be allowed in many of these areas.

This unleashing of fishing pressure is seriously at odds with the biological capacity of lakes Huron and Michigan. These two lakes are suffering from the devastating effects of invasive zebra and quagga mussels and continue to struggle with the toll taken by the invasive sea lamprey. Yet, the Proposed Consent Decree does the opposite of what is needed to protect the resource, significantly increasing fishing "opportunities" in all three lakes. Whitefish in most areas of northern lakes Huron and Michigan have already collapsed to near economic extinction. If lake trout also collapse, most types of fishing activities will prove unsustainable. The shared heritage of subsistence, commercial and recreational fishing will be threatened, along with the economic and cultural wellbeing of families and businesses that have engaged in fishing for generations.

In summary, the proposed agreement ignores the reduced and fragile state of the resource and instead focuses on "new fishing opportunities" that can only accelerate the rate of the fish community's decline. The Proposed Consent Decree's failure to provide measures that would protect the resource represents a dereliction of the State's Great Lakes public trust responsibility and the State and tribal agency's past commitments to resource protection and sustainability.

The biological setting

The lakes tell us, in no uncertain terms, that fishing needs be carefully and conservatively managed to maintain balance between harvest and the new reality of shrinking fishing resources imposed in recent decades by a wave of invasive species.

The foodweb was irrevocably altered when two species of dreissenid mussels (zebra and quagga) invaded the Great Lakes via ballast water of salt-water-going cargo ships, which in turn had gained access to the Great Lakes by the St. Lawrence Seaway around Niagara Falls. During the 1990s, both species of mussels colonized all of the Great Lakes, but with only limited success in Lake Superior. (Superior water is too "soft," lacking sufficient calcium for the mussels to build shells, and too cold for zebra mussels.) The mussels were soon followed by the round goby, a cigar-sized, bottom-dwelling fish. All three species are of Caspian origin.

The first documented casualty of the mussel invasion was the shrimp-like bottom dwelling Diporeia, which until about 2000, had been the dietary staple of lake whitefish (Nalepa et al., 2009; Nalepa et al., 2010). Today, Diporeia are nearly absent from lakes Huron and Michigan. Although the exact cause of the Diporeia collapse remains unclear (Nalepa et al., 2005), both Diporeia and dreissenid mussels are filter feeders; that is, they feed on tiny particles, mostly suspended algae and detritus. The filtering efficiency of enormous numbers of mussels may have worked to the detriment of Diporeia. Zooplankton, very small planktonic animals that feed on phytoplankton (the suspended algae) declined almost simultaneously with the collapse of Diporeia, evidently also a victim of mussel filtering (Holland, 1993; Kerfoot et al., 2010; Vanderploeg et al., 2010; Bacaniov et al. 2014). Zooplankton are essential for survival of fry of certain species that hatch at very small

sizes, and thus have small mouth openings, whitefish and walleye for example (Freeburg et al., 1990; Pothoven et al., 2014; Zorn and Kramer, 2022). As a result of "dreissenid reengineering" of nutrient pathways, nutrients in the nearshore zone tend to be sequestered in the form of periphytic (attached to lake bottom) filamentous algae and benthic invertebrate biomass (Hecky et al., 2004; Davies and Hecky, 2005; Malkin et al., 2010) which are not available to larval fish with small mouth gapes (Nalepa and Pothoven, 2006; Higgens et al., 2008; Vanderploeg et al., 2010). Lake whitefish reproduction in most of the northern portions of the two lakes reached critically low levels and by 2015 the lack of reproduction was evidenced by sharply declining catches (Ebener et al., 2022; Lennart, 2022; Modeling Subcommittee, Technical Fisheries Committee, 2017; see appended Figures 1 and 2). The planktivorous mid-water alewife, upon which Chinook salmon depend for food, almost disappeared from Lake Huron (Riley et al., 2008) by 2005 and declined sharply in Lake Michigan (Bunnel et al. 2019); thus, the decline in zooplankton has far-reaching implications to the fish community.

Two foundational assumptions at the time of execution of the 2000 Consent Decree were that: a) robust Chinook salmon populations would be the mainstay of recreational fishing in both lakes Huron and Michigan; and b) a vibrant commercial fishery for lake whitefish, which had reached record-high harvest levels at the time of signing, would sustain the commercial and tribal subsistence fisheries for the foreseeable future.

The signers of the 2000 Consent Decree could not have imagined how swiftly and thoroughly their vision for the future would be reversed. By 2006, Lake Huron's Chinook salmon were all but gone and Lake Michigan's salmon were in decline. Presently, whitefish

catches are so low in some units that commercial fishers are seeking other species to sustain their businesses.

Such a steep decline in the resource represents a crisis for not only the resource but the fishers that depend upon it. As opportunity to harvest whitefish declined, fishers have been shifting their targets to lake trout, but lake trout in lakes Michigan and Huron are not yet recovered from their local extinctions caused by a combination of sea lamprey depredation and overfishing (Eshenroder et al., 1992; Eshenroder et al., 1995; Johnson et al. 2004). Efforts to restore lake trout in the Great Lakes constitute one of North America's largest-scaled keystone predator recovery projects (Johnson et al., 2015). In the late 1950s, the Great Lakes Fishery Commission implemented a sea lamprey control program for the Great Lakes (Brant 2019). Restocking of lake trout in Lake Huron began in the 1970s (Eshenroder et al., 1995; Whelan and Johnson, 2004; Johnson et al., 2015). It is important to recognize that avoiding any overfishing during recovery is essential to rehabilitation of this species. Similarly, walleye and yellow perch fisheries, particularly in Big and Little Bays de Noc, have suffered declines since 2000 and cannot sustain significant targeting by commercial fishing.

Healthy fish populations are the foundation of sustainable fishing, whether commercial or recreational; in other words, sustainable fishing opportunity can only be had with stable fish populations. To assure sustainability, the parties must recognize the dramatic reductions in the fish populations of lakes Michigan and Huron and squarely address the diminished state of the fishery by balancing harvest with today's reduced capacity of the fish community.

The parties, therefore, must recognize the decreased availability of the leading target species for recreational (salmon) and commercial (whitefish) fishing since 2000. The appropriate biological response, in light of these changes, is to take a conservative approach in any new decree, one that protects the diminished whitefish stocks from overharvest while taking precautionary measures to protect lake trout and walleye as the focus of fishing shifts to these recovering native species. Recognition of these biological realities should have been the basis of negotiations for a renewed consent decree.

Proposed Decree Ignores Reality of a Diminished Resource

Contrary to logic and the direction supported by biology, the parties have barely considered the changed trophic state of the lower two lakes and have, instead, been seeking "increased opportunities" to harvest whitefish, lake trout, walleye, and yellow perch. The 2000 Consent Decree, in an effort to reduce mortality of nontarget species such as lake trout, directed $14 million to converting nonselective, lethal gillnets to more selective trapnet fisheries. This conversion project has been abandoned in the proposed decree. In a huge step backward, expansive new gillnetting opportunities that will increase fishing pressure have been proposed.

Recreational and trapnet fishing cannot compete with gillnet fishing conducted in the same spatial area. As catch rates decline, gillnetters can maintain their harvest levels by simply setting more gillnet, whereas recreational and trapnet fisheries are less efficient than gillnets and are limited in how much effort they can deploy. "Zone Management," which in the 1985 and 2000 Consent Decrees had protected recreational zones, trapnet fishing, and lake trout refuges from gillnetting, has been much diminished in the proposed decree. Recreational zones would be greatly reduced, and one refuge would be reduced to less than

half its size and opened to gillnetting. Gillnet fishing proposed for the present recreational zone of Bays de Noc will further shrink the walleye and yellow perch populations there and jeopardizes the most important recreational fishing area of Michigan's Upper Peninsula. Most recreational and trapnet zones in Lake Superior, designated by the 2000 Decree, will disappear.

Lake trout spawning refuges have been designated in northern lakes Michigan and Huron by inter-jurisdictional actions of the Great Lakes Fishery Commission Lake Committees. These refuges are designed to help protect recovering stocks from overfishing by prohibiting lake trout harvesting in the vicinity of historically important spawning areas. A combination of the Drummond Island Refuge designation, the 2000 Consent Decree gillnet-to-trapnet conversion project, millions of dollars in lake trout stocking, and more millions of dollars in heightened sea-lamprey control, particularly in the St. Marys River, have contributed to rehabilitation of spawning lake trout in northern Lake Huron (Johnson et al., 2015). Spawning in northern Lake Huron appears to be supporting lake trout throughout the lake (He et al., 2020a). Since the collapse of alewives, lake trout stocking no longer is deemed economically viable (Lake Huron Committee Minutes 2012-2016). Thus, the proposal to open the Drummond Island Refuge to gillnetting is a unilateral action, unsanctioned by other Great Lakes Fishery Commission member agencies, that is likely to undermine progress to date in lake trout rehabilitation in Lake Huron. It is unlikely the agencies can "stock their way out" of a second collapse of lake trout in Lake Huron as long as stocking continues to be ineffective. In addition, Lake Michigan's northern refuge will be surrounded by heightened gillnetting under the Proposed Consent Decree, almost assuring that mortality rates will exceed those necessary for restoration of lake trout. The

spawning refuge will, consequently, be almost devoid of lake trout old enough to spawn and the commercial fishery will continue to be supported by "put-grow-take" stocking and millions of tax dollars annually in fish hatchery costs.

Gillnetting compromises other Great Lakes fish populations, including lake sturgeon. Lake sturgeon number less than 1% of historical levels (Ed Baker: https://www.michiganradio.org/environment-science/2020-08-11/dead-sturgeon-found-on-lake-michigan-beaches), are State-listed as "threatened" in Michigan, and a federal court has ordered the U.S. Fish and Wildlife Service to make a determination by 2024 whether imperiled populations of lake sturgeon will be protected under the Endangered Species Act. Restoration stocking of lake sturgeon began in Bays de Noc in 2006 and these stocked fish are relatively young, meaning they are of sizes to be vulnerable to the 4.5-inch gillnets most commonly fished for lake whitefish and lake trout. Gillnets are non-selective, and their catch is often dead or moribund when landed (Johnson et al., 2004). Thus, it is important to protect sturgeon rehabilitation sites from commercial gillnetting.

The Proposed Consent Decree, if implemented, will not only further destabilize fish populations and compromise sustainability of commercial fisheries, but they will also undermine recreational fishing and, therefore, represent a *de facto* allocation of almost all harvest in 1836 Treaty waters to tribal fishers. Because lake trout and whitefish are slow growing and long-lived, a collapse of these species would take at least 10 years for even partial recovery to be realized. A decade of lost fishing opportunity would mean economic extinction of fishing industries and livelihoods.

Engaging resource users as advocates for stewardship and sustainability

The Proposed Consent Decree should foster an informed community of resource users: Recreational and commercial fishers are often the most vocal and effective advocates for resource stewardship. It was commercial fishers that most effectively advocated for sea lamprey control during the 1940s and 1950s (Brant, 2019). The finding of chlorinated hydrocarbon contamination of salmon during the 1970s marshalled a successful advocacy, led by recreational fishers, for banning of DDT and PCBs (Dempsey, 2001). Informed fishers can foster support for sustainable management of fishery resources; therefore, a wise beginning to the negotiation of a new decree would have been outreach to the fishing communities with the objective of sharing with the fishers the constraints imposed upon fishing opportunity by invasive-species-triggered foodweb changes (largely negative on available fishing stocks). But the negotiations have been conducted in secret, under a "nondisclosure agreement" among the parties, and the fishers and other potential resource stewardship advocates were, until the recent public release of the proposed decree, not aware of any provisions of the proposed decree.

A shared understanding of resource conditions would also have laid a foundation of common understanding regarding causes of declining whitefish stocks and set the stage for discussion of needed research into corrective measures, such as whether restocking whitefish might restore some of the lost whitefish production. A shared understanding of the cause of recent declines in whitefish stocks and the tenuous status of lake trout in lakes Huron and Michigan would also have helped to establish realistic expectations for future fishing opportunities. Only with a shared understanding of the depleted and fragile state

of fish populations will regulation of the resource be met with widespread acceptance by its users.

Resource management strategies and harvest regulation

Given the disastrous collapse of whitefish stocks in most waters of Lake Michigan and northern Lake Huron, the resource agencies must take a precautionary approach to future harvest management. The management framework set forth in the proposed decree must be based on this cautionary approach.

The parties (agencies and fishers) need to recognize that there are few, if any, opportunities for increasing harvest of either whitefish or lake trout in lakes Huron and Michigan. Because both lake trout and whitefish now feed on the invasive round goby, and round gobies prefer rocky substrates, both target species will be concentrated on a finite number of exposed rock substrates. The gillnet fishery is now likely to focus on such substrates; this will increase the catch of lake trout in gillnets targeting whitefish. In many areas of these lakes, whitefish numbers are so low that gillnet fisheries are purposefully targeting lake trout, which are now more concentrated—and vulnerable—on rock-substrate feeding grounds. Thus, considering the tenuous status of lake trout recovery in both lakes Huron and Michigan and the recovery efforts for the threatened lake sturgeon, it would be prudent for the parties to continue with the limitation of gillnet effort initiated with the 2000 Decree.

Mortality of lake trout is above target levels in MM-1,2,3 (Northern Lake Michigan) and MM-4 (Traverse Bay). While below-target levels now prevail in other Huron and Michigan units, any rise in lake trout bycatch in gillnets and any increase in gillnet targeting of lake trout would threaten the status of those stocks as well.

A cautionary approach that should protect these recovering stocks of lake trout would include:

1. Continuing the effort initiated by the 2000 Consent Decree to convert the nonselective, more lethal gillnet to trapnet effort. This would have the added advantage of protecting lake sturgeon and other non-target species.

2. Prescribing lake trout total mortality rates that are below 40% for all lake trout management units and whitefish total mortality rates below about 45%. Mortality targets were set in the 2000 Decree but have not been defined in the draft agreement, leaving this critical decision unresolved.

3. Recognizing that performance for the 13 working whitefish models is rated as "high" for only one of them, with the remaining rated as "medium" or "low" performing. With changing growth, recruitment, longevity, diets, distribution, and gear selectivity, models need to be continually updated and, even if they are, they lag behind real-time events in the fisheries. Estimation of recruitment is especially inexact. Given these uncertainties, a conservative approach to harvest estimation would be appropriate. Presently, harvest is estimated based upon maximum sustainable mortality rates, which leaves no room for error. Under such "maximum sustainable yield" approaches any overestimations of allowable harvest can compromise sustainability of the resource. Allowing a "buffer" to shield the resource from harvest estimation error should be routine given the instability of the Huron and Michigan fisheries.

4. Recognizing that the commercial fishers are shifting from the diminishing whitefish, and recreational fishers from salmon, to lake trout fishing and, accordingly, take precautionary

measures. Such measures would include reviewing lake trout commercial harvest and recreational bag limits annually, as has been almost routine since the 2000 Decree; maintaining the trapnet and recreational fishing zones from the 2000 Decree as gillnet-free zones, reducing the number of zones where gillnets may be fished, and limiting entry of new gillnet effort by management unit.

5. Using zone management to protect especially valuable habitats or vulnerable aggregations of fish and to protect opportunities for recreational and trapnet fishers to realize their allocation of the resource.

6. Continuing to protect lake trout refuges from lake trout fishing. Refuges are one type of zone management that protect locations considered by the agencies to be the most productive spawning habitats. These refuges are important to the lakes-wide management and recovery of lake trout.

7. Protecting large, vulnerable aggregates of lake trout during spawning season. The spawning closure defined by the draft Decree is November 7 through November 29. Most lake trout spawn in lakes Michigan and Huron beginning in mid-October and continuing until about November 20. Thus, lake trout are presently not protected during the height of their spawning and are extremely vulnerable to harvest during late October and early November.

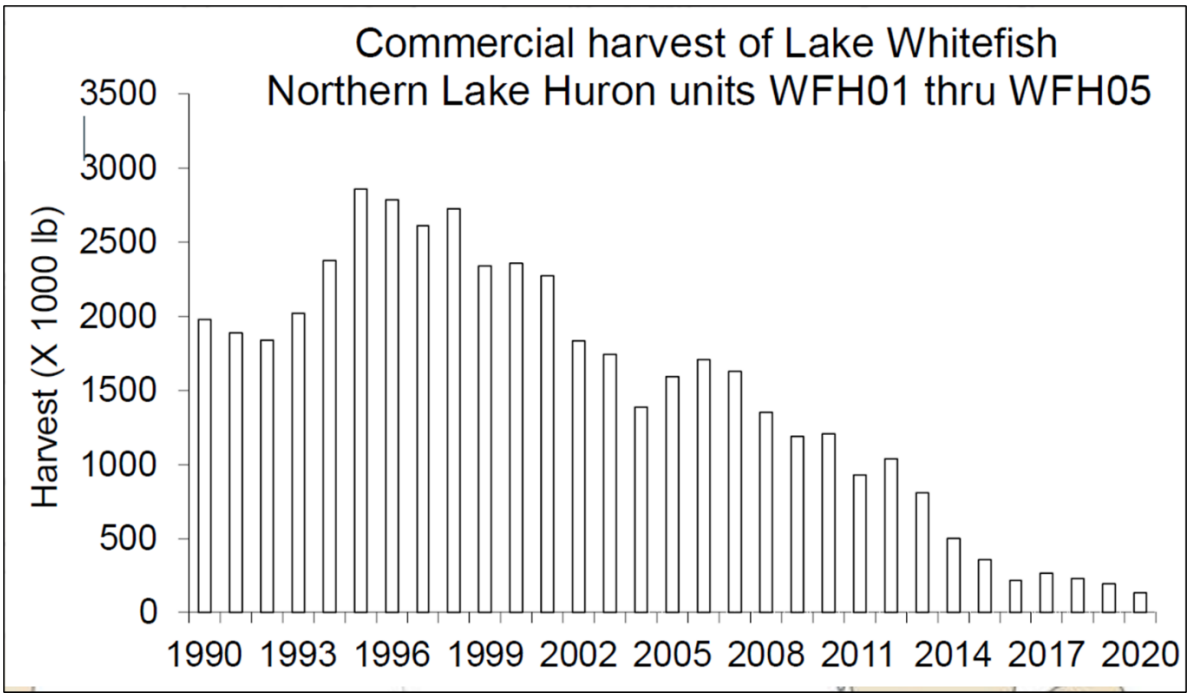

Figure 1. Commercial harvest of lake whitefish from northern units (1836 Treaty Waters) of Lake Huron, from Lenart (2022).

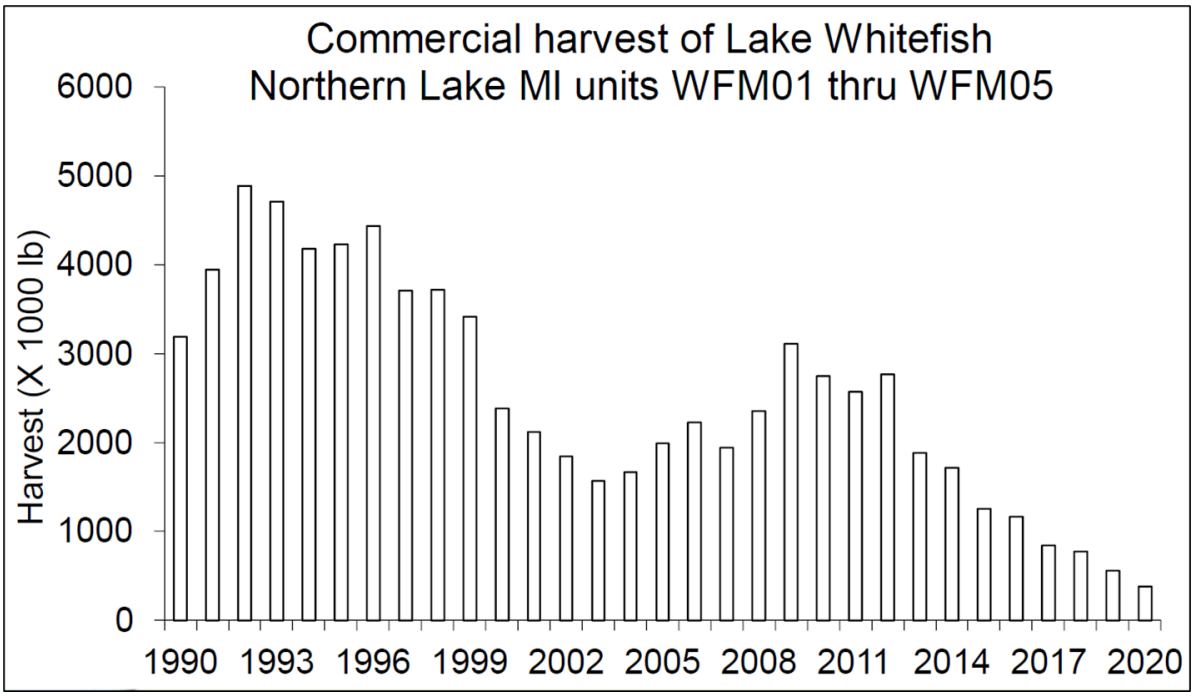

Figure 2. Commercial harvest of lake whitefish from northern whitefish management units of Lake Michigan, from Lenart (2022).

Appendix I, Science-based Literature Review of Status of fisheries

Lake trout of Lake Huron

Beginning in 1984, reproduction was documented in Thunder Bay, western Lake Huron; however, after 1990 reproduction appeared to be in decline (Johnson and VanAmberg, 1995). Persistent sea lamprey depredation and localized overfishing contributed to delays in restoring spawning populations of lake trout.

An investment of approximately $5,000,000 (in addition to the usual approximately $15-$20 million annual cost of Great Lakes lamprey control) to treat the St. Marys River lamprey population (northern Lake Huron's chief source of sea lampreys) brought sea lampreys to targeted levels. A $14,000,000 investment in conversion of about half of tribal gillnets to trapnets appeared to resolve the overfishing issues in northern Lake Huron during the early 2000s.

Prior to the 2000 Consent Decree, two lake trout spawning refuges, closed to lake trout harvest and gillnet fishing, were designated in Michigan waters. The Drummond Island Refuge in northern Lake Huron is in 1836 Treaty Waters and was accordingly designated as a refuge in the 2000 Consent Decree, with lake trout harvest and gillnet fishing prohibited. These important measures allowed rebuilding of lake trout spawning-stock biomass to targeted levels in all Michigan management units of Lake Huron by 2002.

Lake Huron lake trout were almost entirely of hatchery-origin in 2000 (Johnson et al., 2004) but by 2013, lake trout reproduction was evident lake wide and wild lake trout numerically composed approximately half of the Main Basin lake trout population; more than half of lake trout younger than seven years old were wild and prospects for

rehabilitation appeared promising (Johnson et al., 2015). In the northern units, mortality targets were being achieved, spawning-stock biomass remained robust, and recent recruits were dominated by wild fish (Johnson and He, 2017).

However, the Lake Huron Technical Committee has now determined that stocking success for lake trout has declined to the point that it is no longer an economically viable tool for supporting lake trout populations in Lake Huron (Lake Huron Technical Committee meeting minutes, 2012-2016) and lake trout recruitment has declined in recent years, especially so in the south (He et al., 2020a). Reproduction in central and southern units of Lake Huron is insufficient to support populations there and northern Lake Huron appears to be contributing to what lake trout are to be found in the more southern units of Lake Huron (He et al., 2020a).

Lake trout that spawn on the Drumond Island Refuge migrate to adjacent management units, including Ontario waters, where commercial exploitation of lake trout is relatively high. Some migrate long distances, apparently to find favorable feeding conditions, returning to the refuge to spawn in subsequent years (Binder et al., 2017). Thus, protection of sustainable spawning populations of lake trout in the north appears to be essential to the future of lake trout in the entirety of Lake Huron. Were reproduction to fail, stocking appears unlikely to be useful in any future recovery efforts.

He et al. (2020b) concludes:

> Thus, aggressive control of sea lamprey-induced mortality and fishing mortality will continue to be crucial for maintaining and further expanding the biomass and production of adult lake trout. A serious concern is whether the fixed harvest control rule, i.e. annual mortality of 40–45%, will continue to be closely implemented [that is, whether mortality rates will continue to be managed below this level; note by J. E. Johnson] in the future. Relaxation

> of the harvest control will likely lead to a downward trend in adult biomass and production, unless recruitment increases to such a level as to fully compensate for the expected increase in fishing mortality. Our findings also imply that the annual mortality might need to be further reduced unless substantial increases in recruitment occur soon.

Lake trout in Lake Michigan

Similar to Lake Huron, lake trout recovery in Lake Michigan from decimation by overfishing and sea lampreys was a slow process, and it was not until after massive investment in sea lamprey control and reductions in fishing mortality that measurable reproduction was regularly measured in Lake Michigan (Holey et al., 1995; Lavis et al., 2003, Kornis et al., 2019). As in Lake Huron, spawning refuges for lake trout are protected from lake trout harvest and gillnet fishing. Unlike Lake Huron and more southerly units in Lake Michigan, spawning-age lake trout in the Northern Lake Michigan Refuge and MM-1,2,3 declined almost 10-fold after 2000 due to a combination of increased sea lamprey, fishing mortality (Kornis et al., 2019), and reduced stocking there (Madenjian and Decorcie, 2010).

Following restoration of stocking levels and improved sea lamprey control, spawning-age lake trout biomass was restored to former levels (but still below targeted parameters for recovery) by 2019 (Madenjian et al., 2020). This decline and recovery illustrate the sensitivity of recovering lake trout populations to changes in recruitment and mortality. It should be noted that reproduction of lake trout in MM-123 remains very low and this unit's lake trout is a "put-grow-take" commercial fishery almost entirely dependent on a massive stocking effort.

Lake trout mortality rates ***have regularly exceeded target levels in MM123***. In MM-4 (Grand Traverse Bay), lake trout mortality rates ***regularly exceeded target levels*** until 2019, a year that the recreational bag limit was reduced to one fish. Unclipped, wild lake trout began to regularly contribute to recruitment in Traverse Bay beginning in 2014, although the incidence remains low (Modeling Subcommittee, Technical Fisheries Committee, 2020).

In MM-5 (Leland area), where most harvest since about 2005 is from recreational fishing, mortality rates declined to below target level almost immediately after the 2000 Consent Decree ***and wild fish are regularly contributing to recruitment***. Declines in sea lamprey-induced mortality in this unit have also contributed to decline in total mortality and a rise in spawning-age lake trout biomass (Modeling Subcommittee, Technical Fisheries Committee, 2020). Mortality rates in MM-67 (the most southerly units of 1836 Treaty Waters) declined to below target levels beginning in 2004. Most harvest in this zone, under provisions of the expiring 2000 Decree, is recreational. ***Reproduction has been most pronounced in this unit, rising to 34% by 2019.*** Stocking, however, was reduced here in 2017 and unless reproduction is sufficient to replace the stocked fish, there will be a commensurate reduction in fish available for harvest in future years (Modeling Subcommittee, Technical Fisheries Committee, 2020).

Walleye in Lake Michigan

Little Bay de Noc and Big Bay de Noc (MM-1) together constitute the most important recreational fishery of the Upper Peninsula of Michigan. The bays' walleye and yellow perch populations are the primary target of anglers.

Since dreissenid colonization of the bays, however, recreational fishing effort has declined 57% (Zorn and Kramer, 2022). Zooplankton densities were very low during 2014-2016 (Zorn et al., 2020). Overall, increases in water clarity and declines in zooplankton densities appear to have caused a significant decline and redistribution of walleye in the bays (Zorn and Kramer, 2022). Walleye of the bays, especially larger females, now are seasonally leaving Little Bay de Noc, most likely in search of more favorable feeding areas (Whitinger et al., 2022). These recent changes have probably contributed to the decline in angling use of the bays. The bays' walleye population has been supplemented by stocking, which has largely been conducted by the local angling group "Bay de Noc Great Lakes Sportfishermen."

Walleye and yellow perch elsewhere

Walleye and yellow perch are scarce in Lake Superior, but isolated populations of both are found in Little Traverse Bay, Grand Traverse Bay, and Hammond Bay. None of these populations are large enough to sustain a commercial-scaled fishery. Yellow perch are a mainstay of the very important recreational fishery of the Les Cheneaux Islands of northern Lake Huron.

Lake Sturgeon

Lake sturgeon number less than 1% of historical levels (Ed Baker: https://www.michiganradio.org/environment-science/2020-08-11/dead-sturgeon-found-on-lake-michigan-beaches), are State-listed as "threatened" in Michigan, and a federal court has ordered the U.S. Fish and Wildlife Service to make a determination by 2024 whether imperiled populations of lake sturgeon will be protected under the Endangered

Species Act. Restoration stocking of lake sturgeon began in Bays de Noc in 2006 and these fish are relatively young, meaning they are of sizes to be vulnerable to the 4.5-inch gillnets most commonly fished for lake whitefish. Gillnets are non-selective, and their catch is often dead or moribund when landed. Thus, it is important to protect sturgeon rehabilitation sites from commercial gillnetting.

Lake Superior

Lake Superior's lake trout population is nearly fully rehabilitated from its decimation by sea lampreys (He and Sitar, 2006). Lake Superior was spared the impacts of dreissenid mussels and, thus, its foodweb remains essentially unchanged since approximately the 1940s. Though its whitefish and lake trout populations are presently sustainable and healthy, declines in fish stocks in lakes Huron and Michigan could foreshadow a shift in commercial fishing effort from lakes Michigan and Huron to Lake Superior as commercial fishers seek to maintain sufficient catch rates.

Lake Superior's recreational fishery has, in certain locations, been protected from a rise in commercial exploitation by the designation of recreational fishing zones. Whitefish unit WFS-08 (in Brimley area of Whitefish Bay) is an exception to the general health of Lake Superior's fisheries. Fishing effort is high enough there that lake trout are scarce and whitefish mortality rates have exceeded target levels of 60% annual mortality from 2016-2018. Whitefish harvest reached record-high levels from 2016-2018 and there has been a nearly continuous decline in spawning-age whitefish since the mid-1990s. Commercial effort (amount of gear fished) rose sharply in WFS-08 beginning in 2013 (Modeling Subcommittee, Technical Fisheries Committee, 2020). The rise in effort in WFS-08 could represent a beginning of a shift of commercial effort from the lower two lakes to Lake

Superior. The status of this stock of whitefish can only be described as stressed and unstable.

Appendix II, Consequences of proposed decree

The Proposed Consent Decree fails to address resource limitations and proposes actions that would increase fishing pressure. Such actions at this time of resource crisis constitute the State of Michigan's abdication of its Public Trust responsibilities to the Citizens of Michigan. They also constitute an abdication of the Tribes' responsibility to preserve the fishery for future generations. These actions will do irreparable harm to Great Lakes public-trust resources and the people that depend upon their sustainability. Examples of harmful actions include:

1. Opening the Drummond Island Refuge to gillnet fishing and harvesting of lake trout until October 1. Such a proposal would violate the State of Michigan's obligations to the Great Lakes Fishery Commission's Joint Strategic Plan for Management of Great Lakes Fisheries (http://www.glfc.org/pubs/misc/jsp97.pdf) to which the State is signatory. The Drummond Island Refuge was established by interagency consensus in 1985 as part of the rehabilitation effort for lake trout in Lake Huron. To our knowledge, no resource manager from the member international agencies of the Great Lakes Fishery Commission Lake Huron Committee and its technical committee has suggested that this refuge is no longer necessary. Hosting the best spawning habitat and some of the most important rock substrates, which are attractive to lake trout feeding on gobies, the refuge acts as a buffer from the potential overfishing of MH-1's lake trout. Lake trout begin concentrating near the spawning reefs as early as mid-September (Michigan DNR Alpena Fishery Research Station, unpublished data). Opening the refuge to gillnet fishing will increase the

exploitation rate on a recovering lake trout population and jeopardize its future trajectory, which presently is showing a modest, and concerning, decline in biomass.

2. Excessive harvest is being permitted around Lake Michigan's Northern Refuge. MM-1,2,3 and portions of MM-5 are adjacent to or near the Lake Michigan Northern Refuge. Mortality rates are too high in MM-1,2,3 for the development of spawning stocks. It must be said that the utility of a spawning refuge is seriously compromised when spawning-age fish are scarce. Those grids surrounding the Northern Refuge should be targeted for especially guarded harvest management, with target mortality rates set at 40% or less and with enforcement and penalties commensurate with the importance of protecting these stocks. Enforcement and penalties are not defined in the proposed decree.

3. Opening of Bays de Noc to gillnet fishing. Walleyes are perhaps the most vulnerable of Great Lakes fish to gillnets because of their teeth, spines and sharp opercula (gill covers) which readily entangle in the mesh. Walleye can be efficiently targeted with gillnets on rock substrates of the bays (Zorn and Kramer, 2022). Commercial gillnet fisheries can rapidly deplete walleye stocks to the point that recreational fishing for them is no longer feasible. Thus, increasing commercial exploitation of walleye in the bays would not only potentially destabilize the population but would compromise the recreational fishery's ability to realize its allocation. Some of these walleyes are products of stocking by the Bay de Noc Great Lakes Sportfishermen Association.

4. Commercial fishing for perch and walleye in other waters. There are almost no yellow perch or walleye stocks in 1836 Treaty Waters that can sustain directed commercial fishing. The lakes are too cold and unproductive to be capable of producing fisheries for these species of a commercial scale and this condition has been exacerbated by the dreissenid

invasion. Where walleyes are targeted, stocking is usually necessary to sustain populations, and numbers are so suppressed by commercial fishing as to prevent recreational fishers from engaging in those fisheries. Expanding commercial exploitation of perch and walleye will further erode the recreational fishery's ability to realize a fair allocation of harvest.

5. Increased gillnetting "opportunities" in Grand Traverse Bay, Little Traverse Bay, and MM-5, 6, and 7 in Lake Michigan and increased gillnet opportunities in Hammond Bay, Lake Huron, would increase exploitation of the beleaguered whitefish and potentially compromise the promising recovery trajectory of lake trout in these areas. Lake trout mortality targets are being exceeded regularly in Grand Traverse Bay; thus, only a slight increase in exploitation could bring reproduction there to a halt.

6. In 2019, the recreational fishery accepted a lake trout daily bag limit reduction to just one fish per day in Grand Traverse Bay and two fish in northern Lake Huron. The reduced bag limit in Grand Traverse Bay brought mortality down to target levels there that year. Increasing commercial fishing that targets lake trout in the wake of these angling penalties is totally inappropriate and will stymy the emergence of reproduction. Gillnets are more efficient than trapnets or angling and an increase in gillnetting could bring catch rates down to the point of economic extinction for the trapnet and recreational fisheries, depriving them of their allocations of harvest. A case in point is Rogers City, nearly adjacent to the proposed unlimited shallow-water (less than 50 ft) gillnetting opportunity during spring on 40-Mile Point. Lake trout aggregate densely in these rocky shoal waters to prey on round gobies. Increased lake trout exploitation there will inevitably cause erosion of recreational catch rates and compromise the economic vitality of Rogers City and its marina

development, which was partially predicated on the vibrant recreational fishery the area has enjoyed under the 2000 Decree.

An example of the consequences of a targeted and unlimited gillnet fishery is illustrated by 1978-79 DNR assessment data from Hammond Bay–Cheboygan areas of northern Lake Huron. The DNR's assessment fishing there measured an 83% drop in lake trout density between 1978 and 1979. Survival rate was less than 2% for the 1973 cohorts of lake trout in 1979; these cohorts were at record high abundance levels in 1978 and the decline coincided with an intensive gillnet fishery that operated on those grounds in fall 1978 (Cruise report for the Michigan DNR Research Vessel Chinook, May 28-June 29, 1979. Michigan Department of Natural Resources, Alpena Fishery Research Station, Unpublished Report). A single fall season of gillnetting nearly eliminated the lake trout population there. Similarly, a wave of gillnet effort in Grand Traverse Bay in 1979 reduced the lake trout stock there by over 90% in a matter of months. These are examples of the "fishing up" of targeted stocks of fish: when a lucrative fishery is identified, the fish population is intensely targeted causing the stock to decline. As the stock declines, gillnet fishers respond by setting ever more gillnet. Effort spirals up until the targeted stock is almost fished out and no longer attractive as a fishery. This fishing up can have disastrous effects in as little as a few months, as shown above.

7. Increasing exploitation rates of lake whitefish while their population levels in Lake Huron and Lake Michigan are extremely depressed puts at risk the future of commercial fishing on lakes Michigan and Huron, where whitefish are the mainstay of the fishery. Whitefish represent a species of special cultural heritage and economic importance.

8. Harvest policy and status of the stocks need to be reviewed at least annually and more frequently where populations are especially depressed, yet the proposed decree would review harvest policy only every three years and mortality targets every six years. Such infrequent reviews of harvest policy could have disastrous consequences. As we have seen during the early 2000s, much can happen to fish populations and fishing patterns in as few as one or two years. The proposed decree needs to set initially conservative target mortality rates for recovering and stressed stocks to reverse the declining trend in the status of fisheries of lakes Huron and Michigan. The proposed decree fails to set objective-based mortality targets and delegates setting of mortality rates to the Executive Council with input from the Technical Fisheries Committee, which leaves this critical need unresolved. It is essential that harvest limits be reviewed annually and that corrective adjustments be made to harvest plans on a timely basis, at least until lakes Huron and Michigan begin showing signs of stabilization and self-sustainability.

9. Eastern Lake Superior (MI-8) is realizing whitefish mortality rates that are higher than anywhere in Treaty of 1836 waters and the rates are increasing. This should be looked at with alarm because a failure of these "home waters" for the Bay Mills and the Sault tribes would undermine an ancient fishery heritage. We see no effort to direct attention to this issue. Instead, the proposed decree incentivizes an increase in gillnet effort. The decline of whitefish in lakes Huron and Michigan will probably cause gillnet fishers to focus even more effort on Lake Superior, thus further declines in the status of whitefish in MI-8 seems likely.

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Exhibit E

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

and

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,

and

STATE OF MICHIGAN, et al.,
Defendants.
/

Case No. 2:73-cv-26

HON. PAUL L. MALONEY

AFFIDAVIT OF SCOTT McLENNAN

AFFIDAVIT OF SCOTT McLENNAN

STATE OF MICHIGAN)
) ss
COUNTY OF Presque Isle)

SCOTT McLENNAN, having been duly sworn and under oath, hereby avers, deposes and states as follows:

1. I am Scott McLennan, Mayor of Rogers City, Michigan.
2. I make this affidavit based upon my personal knowledge and belief, and if called upon to testify in a judicial proceeding, my testimony would be consistent with the averments made herein.

Introduction

1. Rogers City is engaged in efforts to preserve and revitalize its economy and has recently achieved "Redevelopment Ready Community" and "Michigan Main Street" status from the Michigan Economic Development Corporation. As part of these efforts, Rogers City officials are working to fill empty downtown storefronts with businesses that will benefit the local economy.
2. Lake Huron is Rogers City's greatest economic asset, and the City boasts a 132-slip marina, which draws sport-fishers and their business to the area. Accordingly, the future prosperity of Rogers City is heavily dependent upon the successful management of the Lake Huron fishery. This includes ensuring for successful sport-fishing trips that supports tourisms and creates an fishery where fishers return annually to Rogers City's local community.

Economic Impacts of Gill Netting Near Rogers City

3. The Proposed Consent Decree provides for an expansion of Tribal gill netting in the waters near Rogers City.
4. Gill netting has proven to be extremely efficient in capturing and killing large quantities of sport-fish, without differentiating between species such as white fish, lake trout, and salmon.
5. Because of the high efficiency of the gill netting technique, an expanded gill netting harvest would have an immeasurable impact on the Rogers City area fishery and economy. If allowed in the Proposed Consent Decree, gill netting in the area is likely to irreparably harm the sport-fishery, bankrupt the Rogers City marina that depends upon the fishery, and decimate the local economy that survives on the revenues brought in by visiting sport-fishers.

6. I fear that the Rogers City fishery will suffer irreparable harm that will be unlikely to overcome if the expansion of gill nets near Rogers City. The economic effects of this damage will have a devastating impact on the local economy and the future of Rogers City.

Further affiant sayeth not.

Date: January 16, 2023

Scott McLennan

On the 16th day of January, 2023, in Presque Isle County, Scott McLennan did appear before me, subscribed and having been duly sworn and under oath did attest that the forgoing affidavit and averments contained within were true and correct to the best of his knowledge and belief and having read the same he executed the foregoing Affidavit as his free act and deed.

Terri L Koss, Notary Public
State of Michigan, County of Presque Isle
My commission expires: 11-05-2023
Acting in the County of Presque Isle

Exhibit F

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

and

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,

and

STATE OF MICHIGAN, et al.,

Defendants.
_____/

Case No. 2:73-cv-26

HON. PAUL L. MALONEY

AFFIDAVIT OF WILLIAM WINOWIECKI

AFFIDAVIT OF WILLIAM WINOWIECKI

STATE OF MICHIGAN)
) ss
COUNTY OF GRAND TRAVERSE)

WILLIAM WINOWIECKI, having been duly sworn and under oath, hereby avers, deposes and states as follows:

1. I am Captain William (Bill) Winowiecki, President of the Michigan Charter Boat Association.
2. I make this affidavit based upon my personal knowledge and belief, and if called upon to testify in a judicial proceeding, my testimony would be consistent with the averments made herein.

3. The Michigan Charter Boat Association runs over 27,000 charter runs a year on the Great Lakes.
4. One concern as the President of the Michigan Charter Boat Association is the safety of our captains and clients on the Great Lakes.
5. In my time as a captain, I have had extensive experience with commercial nets creating safety concerns in the Great Lakes fishery. As reflected in the circumstances recounted in this affidavit, it is my opinion that I could have avoided most of those situations if GPS coordinates were available noting the location of the nets where commercial fishers had placed such nets.
6. The safety issue regarding commercial nets in the Great Lakes is based upon the fact many nets are not marked or are inadequately marked. Here are some examples of encounters I have had with commercial nets over the years:
    a. I encountered an illegal net set in Traverse Bay grid 815 that was marked with a Prestone antifreeze jug set 1 to 2 feet under the surface of the water, so it was not likely for someone to be able tell the net was there. The location of the net was particularly concerning because recreational fishers do typically congregate and fish for lake trout in that area.
    b. I encountered a legally set gillnet in grid 714 off of Leland and it was marked with a Clorox jug set in shallow water anchored to shore and a flag staff set approximately 1/4 or 3/8 of a mile out in the water. I was caught in the net with certain fishing accessories while trolling in a small 14-foot boat and lost fishing equipment as a result.

c. In a separate instance, I was using my boat off Leland, MI, and again came in contact with gillnets when I was in grid 714 and saw a wood board sticking out of the water. I was unsure of what the board was marking and found myself surrounded by gillnet floats and net floating in the water. I reported it to learn that it was a fisher's net that had been lost.

d. I ran into a trap net anchor buoy in grid 713 off North Manitou Island in 191 feet of water. It was especially surprising as one buoy was black and very hard to see from a distance.

e. I encountered an abandoned trapnet, which I reported to the DNR, in Good Harbor Bay grid 814 that only had a floating staff. The flag had likely worn off during the winter months. But for the floating staff, I would have never found it.

f. I encountered a gillnet, which was marked with a flag, off Leland in grid 713 on a foggy day and was therefore unable to spot it in time. It was particularly concerning because I had already fished the same location just the day before. The net was set between that morning and the next morning. It had a flag, but the fog was so dense that it was not possible to clearly see it without being within close proximity of the boat. In fact, one of my clients spotted the net and reported it to me so I could maneuver my boat.

g. The worst encounter I have had with gillnets was on July 5, 2014, when I was coming in from the west side of South Manitou in grid 812. The seas were heavy (3-4 ft. waves), and my engine came to a complete stop. I was caught in a trapnet anchor that I had previous knowledge was left in before winter and not removed from the lakes. Fortunately, this incident did not result in tragedy as we were able

to cut ourselves out of the net and start the engine to make it to shore. A copy of this Accident Report from the U.S. Coast Guard is attached as **Exhibit A**.

7. The encounters I have had with unmarked and marked nets demonstrate the dangers that are posed towards those on the Great Lakes. It is my experience that commercial nets that are unmarked or marked consistent with current requirements create a serious public safety concern.

8. It is my belief that unless gillnet marking is enhanced through better marking measures and those who place them in the water are responsible for completing such marking, public safety is jeopardized.

9. In my experience, adequate marking of gillnets would provide the length of the net, the direction of the net, the owner of the net, and would be visible at a distance.

10. Adequate marking would also include public information that would give the other users of the resource notice of the grids being fished with gillnets along with GPS coordinates. With the technology available at this time, including the extensive use of cellphones and other similar devices, a phone application or website could be required by the Proposed Consent Decree showing a map identifying set nets with grid locations being fished so that boats and anglers can avoid those sites. This is a small task to save lives of those other users on the Great Lakes that will now more likely be boating and fishing within areas where commercial nets can be set. The wide expansion of the nets is a tremendous concern and safety needs to be taken seriously in the Proposed Consent Decree.

11. It is my opinion, based on my experience and knowledge, that the Proposed Consent Decree expands gillnetting into areas that have not been fished with gillnets for decades without creating adequate marking requirements for those placing gillnets in the water, as

well as necessary public information sharing. The technology to do so is readily available to provide much-needed and regularly updated information to other users of the resource where commercial nets are located, allowing them to avoid those areas.

12. I believe the Proposed Consent Decree therefore poses a danger to the charter boat community and other users of the Great Lakes because it inadequately addresses the safety concerns related to unmarked, or marked, but not otherwise shared with the public, gillnets. The outcome of becoming entangled in a net can be costly and dangerous.

Date: 1/18/2023

William Winowiecki

William Winowiecki

On the 18 day of January, 2023, in Grand Traverse County, William Winowiecki did appear before me, subscribed and having been duly sworn and under oath did attest that the forgoing affidavit and averments contained within were true and correct to the best of his knowledge and belief and having read the same he executed the foregoing Affidavit as his free act and deed.

Lauren E Darshall

Lauren E Darshall, Notary Public
State of Michigan, County of Grand Traverse
My commission expires: 9/30/2023
Acting in the County of Grand Traverse

EXHIBIT A

Watta Bite Charter Fishing

Captain Bill Winowiecki
3700 Schomberg Rd
Cedar, MI 49621
(231) 228-7417 Home Phone
web site: wattabite.com
(231) 409-0963 Cell Phone
e-mail address: charterfishing@wattabite.com

FACSIMILE TRANSMITTAL COVER SHEET

DATE: **Monday, July 07, 2014**

PLEASE DELIVER TO: **MST2 Santana**
Detach Duty Grand Haven

RECIPIENT'S PHONE NUMBER:
RECIPIENT'S FAX NUMBER: **(616) 850-2584**

FROM: **Sue Winowiecki** **Phone:** (231) 228-7417
WattaBite Charter Fishing

MESSAGE:
Here is the form that you requested to be filled out regarding the fishing net incident on Saturday, July 5, 2014. Should you have any questions regarding this form please call Captain Bill Winowiecki @ 231-409-0963.

THANKS
SUE WINOWIECKI

If you have any questions, please contact the above sender.

The following document(s) are transmitted for delivery to the above named individual and consists of __2 pages, including the cover sheet.

DEPARTMENT OF HOMELAND SECURITY
U.S. Coast Guard
REPORT OF MARINE CASUALTY

OMB No. 1625-0001
Expires: 01/31/2016

SECTION I. GENERAL INFORMATION

1. Name of Vessel or Facility	2. Official No.	3. Nationality	4. Call Sign	5. USCG Certificate of Inspection issued at:
Watta Bite				

6. Type (Towing, Freight, Fish, Drill, etc.)	7. Length	8. Gross Tons	9. Year Built	10. Propulsion (Steam, diesel, gas, turbine...)
Fishing Charter Boat	22'		1999	Gas

11. Hull Material (Steel, Wood...)	12. Draft (Ft. - in.) FWD	AFT.	13. If Vessel Classed, By Whom: (ABS, LLOYDS, DNV, BV, etc.)	14. Date (of occurrence)	15. TIME (Local)
Fiberglass				7/5/14	11:30 Am

16. Location (See Instruction No. 10A)	17. Estimated Loss of Damage TO:
N. 44-38-086 — W 086-07-475	VESSEL ____ CARGO ____ OTHER None

18. Name, Address & Telephone No. of Operating Co.

19. Name of Master or Person in Charge	USCG License	20. Name of Pilot	USCG License	State License
William P. Winowieck	☒ YES ☐ NO		☐ YES ☐ NO	☐ YES ☐ NO

19a. Home or Work Street Address (City, State, Zip Code)	19b. Home or Work Telephone No.	20a. Home or Work Street Address (City, State, Zip Code)	20b. Home or Work Telephone No.
3700 Schoonberg Rd Cedar MI. 49621	231-409-0963		

21. Casualty Elements (Check as many as needed and explain in Block 44.)

- ☐ NO. OF PERSONS ON BOARD ____
- ☐ DEATH - HOW MANY? ____
- ☐ MISSING - HOW MANY? ____
- ☐ INJURED - HOW MANY? ____
- ☐ HAZARDOUS MATERIAL RELEASED OR INVOLVED (Identify Substance and amount in Block 44.)
- ☐ OIL SPILL - ESTIMATE AMOUNT: ____
- ☐ CARGO CONTAINER LOST/DAMAGED
- ☐ COLLISION (Identify other vessel or object in Block 44.)
- ☐ GROUNDING ☐ WAKE DAMAGE
- ☒ FLOODING; SWAMPING WITHOUT SINKING
- ☐ CAPSIZING (with or without sinking)
- ☐ FOUNDERING OR SINKING
- ☐ HEAVY WEATHER DAMAGE
- ☐ FIRE
- ☐ EXPLOSION
- ☐ COMMERCIAL DIVING CASUALTY
- ☐ ICE DAMAGE
- ☐ DAMAGE TO AIDS TO NAVIGATION
- ☐ STEERING FAILURE
- ☐ MACHINERY OR EQUIPMENT FAILURE
- ☐ ELECTRICAL FAILURE
- ☐ STRUCTURAL FAILURE
- ☐ FIREFIGHTING OR EMERGENCY EQUIPMENT FAILED OR INADEQUATE (Describe in Block 44.)
- ☐ LIFESAVING EQUIPMENT FAILED OR INADEQUATE (Describe in Block 44.)
- ☐ BLOW OUT (Petroleum exporation/production)
- ☐ ALCOHOL INVOLVEMENT (Describe in Block 44.)
- ☐ DRUG INVOLVEMENT (Describe in Block 44.)
- ☒ OTHER (Specify) Ran into Ice moved Net Anchor Rope

22. Conditions

A. Sea or River Conditions (wave height, river stage, etc.)	B. WEATHER	C. TIME	D. VISIBILITY	E. DISTANCE (miles of visibility)	F. AIR TEMPERATURE (F)	G. WIND SPEED & DIRECTION	H. CURRENT SPEED & DIRECTION
	☐ CLEAR ☐ RAIN ☐ SNOW ☐ FOG ☒ OTHER (Specify) Windy	☒ DAYLIGHT ☐ TWILIGHT ☐ NIGHT	☒ GOOD ☐ FAIR ☐ POOR	10 miles	70°	20 SSW	

23. Navigation Information
- ☐ MOORED, DOCKED OR FIXED
- ☐ ANCHORED ☒ UNDERWAY OR DRIFTING
- SPEED AND COURSE: 20 mph

24. Last Port Where Bound: ____

24a. Time and Date of Departure: 5:30 Am.

25. FOR TOWING ONLY	25a. NUMBER OF VESSELS TOWED	Empty	Loaded	Total	25b. TOTAL H.P. OF TOWING UNITS	25c. MAXIMUM SIZE OF TOW WITH TOW-BOAT(S)	Length	Width	25d. (Describe in Block 44.)
									☐ PUSHING AHEAD ☐ TOWING ASTERN ☐ TOWING ALONGSIDE ☐ MORE THAN ONE TOW-BOAT ON TOW

SECTION II. BARGE INFORMATION

26. Name	26a. Official Number	26b. Type	26c. Length	26d. Gross Tons	26e. USCG Certificate of Inspection Issued at:

26f. Year Built	26g. ☐ SINGLE SKIN ☐ DOUBLE	26h. Draft FWD	AFT	26i. Operating Company

26j. Damage Amount	26k. Describe Damage to Barge
BARGE ____ CARGO ____ OTHER ____	

SECTION III. PERSONNEL ACCIDENT INFORMATION

27. Person Involved
☐ MALE or ☐ FEMALE
☐ DEAD ☐ INJURED
☐ MISSING

27a. Name (Last, First, Middle Name)

27b. Address (City, State, Zip Code)

27c. Status
☐ Crew
☐ Passenger
☐ Other

28. Birth Date | 29. Telephone No. | 30. Job Position | 31. (Check here if off duty) ☐

32. Employer - (if different from Block 18., fill in Name, Address, Telephone No.)

33. Person's Time

	YEAR(S)	MONTH(S)
A. IN THIS INDUSTRY -		
B. WITH THIS COMPANY -		
C. IN PRESENT JOB OR POSITION -		
D. ON PRESENT VESSEL/FACILITY -		
E. HOURS ON DUTY WHEN ACCIDENT OCCURRED -		

34. Industry of Employer (Towing, Fishing, Shipping, Crew Supply, Drilling, etc.)

35. Was the Injured Person Incapacitated 72 Hours or More?

36. Date of Death

37. Activity of Person at Time of Accident

38. Specific Location of Accident on Vessel/Facility

39. Type of Accident (Fall, Caught between, etc.)

40. Resulting Injury (Cut, Bruise, Fracture, Burn, etc.)

41. Part of Body Injured

42. Equipment Involved in Accident

43. Specific Object, Part of the Equipment in block 42., or Substance (Chemical, Solvent, etc.) that directly produced the Injury.

SECTION IV. DESCRIPTION OF CASUALTY

44. Describe how accident occured, damage, information on alcohol/drug involvement and recommendations for corrective safety measures. (See instructions and attach additional sheets if necessary).

On a charter Fishing Trip west of South Manitou Island we were Returning home. Seas were heavey for a 22' Fishing Boat. Water was coming over the top as we hit waves. All of a sudden the boat screamed to a stop an lost Power. Passenger said she saw rope Floating on the side of the Boat. Waves were 3 to 4' and splashing over the back I hit both Billdge switches. We proceeded to pull the boat back into the waves, and started cutting Rope. The Rope was Attached to a Trap Net Ancher pulled loose by the Ice Flows. It was Not marked and impossible to see in the heavey seas. With a dull Jack knife And needle Nose wire cutters, we cut our self free. →

45. Witness to Casualty (Name, Address, Telephone No.)

46. Witness to Casualty (Name, Address, Telephone No.)

SECTION V. PERSON MAKING THIS REPORT

47. Name (PRINT) (Last, First, Middle): Wimmiecki William P

47a. Signature: William P. Wimmiecki

47b. Address (City, State, Zip Code): 3700 Schomberg Rd. Cedar, MI 49621

47c. Title: owner operator

47d. Telephone No.: 231-409-0963

47e. Date: 7/5/14

FOR COAST GUARD USE ONLY

REPORTING OFFICE:

MISLE Incident Investigation Activity Data Entry:

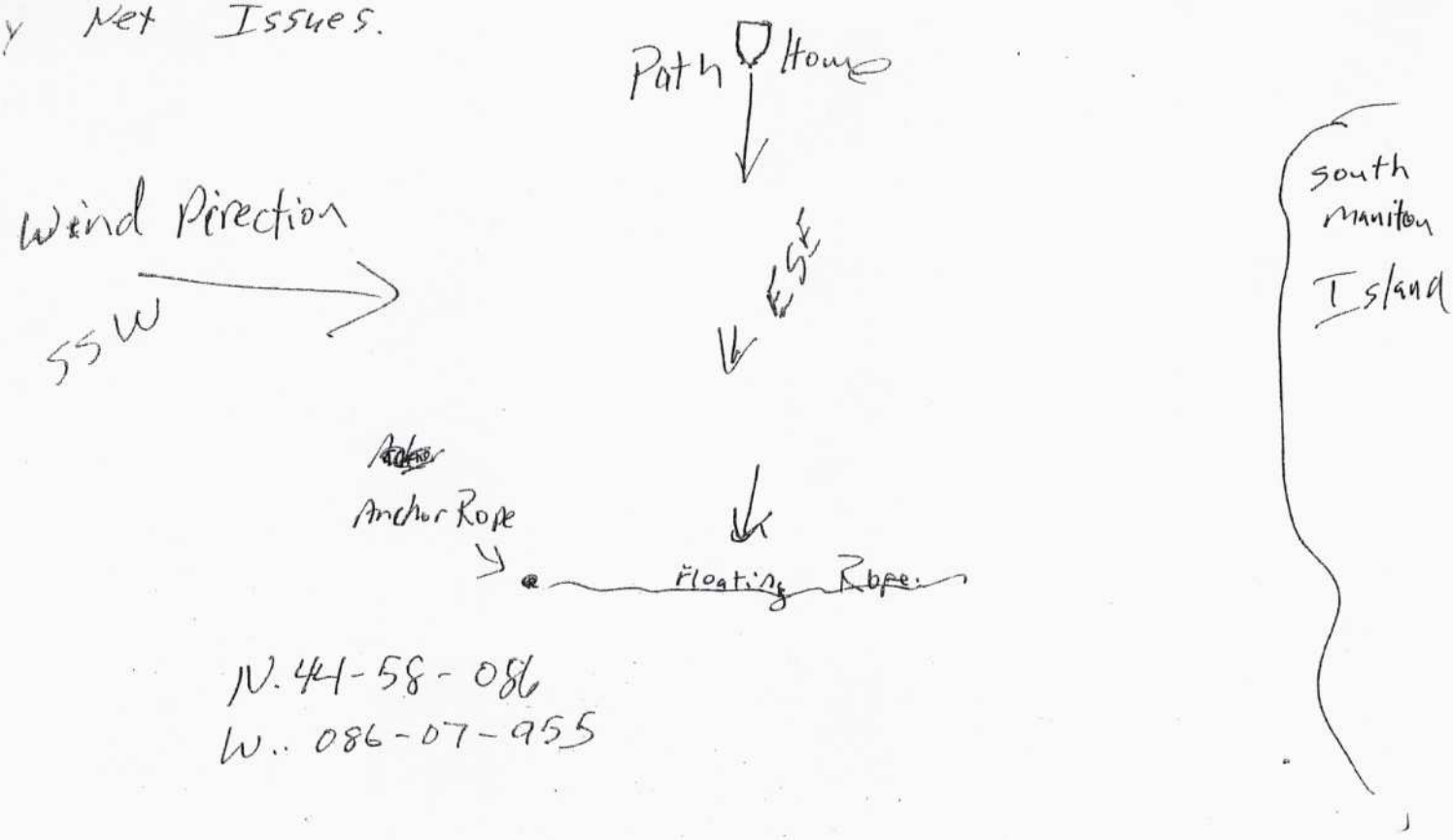
MISLE Incident Investigation Activity Number (if applicable)

☐ NONE ☐ PRELIMINARY ☐ DATA COLLECTION ☐ INFORMAL ☐ FORMAL

Serious Marine Incident ☐ Yes ☐ No
Major Marine Casualty ☐ Yes ☐ No

INVESTIGATOR (Name) | DATE | APPROVED BY (Name) | DATE

It took us at least 15 to 20 minutes to cut loose in the heavy seas. Fortunately the motor started, and no damage was done. I wrote down GPS location and headed to shore. I reported the floating Rope, and incident to the michigan DNR. Law inforcement usually calls the Tribe to handle any Net Issues.



N. 44-58-086
W. 086-07-955