

## 1836 Treaty — Time Line re: Reserved Usufruct Rights

(prepared for Grand Traverse Band members in 2007)

On March 28, 1836 “headmen” of the Ottawa and Chippewa bands occupying the northwest portion of the lower peninsula and eastern portion of the upper peninsula executed the Treaty of Washington with the United States (7 Stat. 491). The purpose of the 1836 Treaty was for the United States to acquire legal title to the lands occupied by the Indian signatories, because the U.S. could not grant statehood to Michigan in 1837 without having legal title to the land.<sup>1</sup> Judge Fox's May 7, 1979 decision in the Great Lakes phase of the *United States, et al. v. Michigan, et al.*<sup>2</sup> litigation contains both an analysis of the concept of "retained" treaty rights and also extensive historical discussion. Suffice it to say that the 1836 Treaty in effect was a contractual agreement; the Ottawas and Chippewas agreed to covey title to the land, but they (you) reserved the right to continue using the land and waters for sustenance. For many decades following the 1836 Treaty, the non-Indian settlers did not challenge the Indians' continued use of the ceded lands for subsistence and commercial purposes.<sup>3</sup> (These uses often are referenced as "usufructuary<sup>4</sup> rights.") For example, in 1866 when John Ance, Peter Ance and Joseph Chippewa attempted to vote in Bingham Township (Leelanau County), the Board of Electors refused to allow them to cast ballots, stating: "they were not citizens, . . . neither did the Game Laws of the state prohibit their killing Deer and other wild game." The federal court's 1995 decision in the case establishing the right to moor fishing vessels at the Leland and Northport public marinas (*GTB v. DNR Director, et al.*) confirmed the basic proposition that "Treaty-reserved rights . . . are property rights protected by the United States Constitution."<sup>5</sup> Therefore the 2007 Consent Decree confirming the continued existence of fishing, gathering, hunting and trapping rights in the inland portions of the 1836 Treaty cession together with the previously confirmed Great Lakes fishing rights thus provides GTB with legal standing to challenge any future threats to these treaty-reserved property rights including habitat impairment.

### A. Great Lakes Fishing Rights

Judge Fox ruled that commercial and subsistence fishing rights on the Great Lakes were both implicitly retained and explicitly reserved in the 1836 Treaty and were not abrogated by the 1855 Treaty. With respect the limiting language of Article Thirteenth at issue in the "inland" phase of the *United States v. Michigan* litigation ("the Indians stipulate for the right to hunt and the

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<sup>1</sup> As "aboriginal occupants" of the area, the Ottawas and Chippewas were considered (by the Anglo-American legal system) to have aboriginal or "Indian title" to the lands ceded in the Treaty. See Cohen's Handbook on Federal Indian Law (1982 ed.), at pages 486, *et seq.*

<sup>2</sup> 471 F. Supp. 192 (W.D. Mich. 1979) (a copy of this opinion is available for review at <http://1836cora.org/documents/usvmichiganfox1979.pdf>)

<sup>3</sup> The Tribes' expert witnesses' reports in the "inland" phase of the *United States v. Michigan* litigation soon will be available "on line." See Greg Dowd's primary report and Jim McClurken's "rebuttal" report for historical references to Indians' usufructuary uses of the ceded territory.

<sup>4</sup> "Usufructuary" is defined as "having the use or enjoyment of something." Webster's Collegiate Dictionary (10th ed.).

<sup>5</sup> *Grand Traverse Band of Ottawa and Chippewa Indians v. Director, Michigan Department of Natural Resources*, 971 F. Supp. 282, 288 (W.D. Mich. 1995).

other usual privileges of occupancy"), Judge Fox ruled that this clause was not applicable because the Great Lakes could not be settled.

The *United States v. Michigan* litigation was commenced by the United States in 1973 in fulfillment of the federal government's trust responsibility to preserve and protect rights reserved by the Indian signatories in the 1836 Treaty with the United States. The timing of this lawsuit was prompted by events elsewhere. Tribes in the Northwest had been successful in a series of cases decided by the U.S. Supreme Court. These prompted William Jondreau at KBIC to assert fishing rights in Keweenaw Bay notwithstanding a 1930 Michigan Supreme Court decision holding that no treaty-fishing rights were preserved under the 1837 and 1842 Treaties. In 1971 the Michigan Supreme Court reversed itself – based on the intervening U.S. Supreme Court decisions – and held that KBIC did indeed have "treaty fishing" rights.<sup>6</sup> Within a few weeks "Big Abe" LeBlanc was arrested while fishing with gill nets offshore the BMIC reservation in Whitefish Bay of Lake Superior. He was prosecuted in state court and convicted of fishing commercially without a license and with using an illegal device (gill nets).<sup>7</sup> The *United States v. Michigan* case originally was filed on behalf of (as trustee for) BMIC; and BMIC intervened as a party-plaintiff in 1974; the Sault Tribe intervened in 1975; GTB intervened in October, 1979; and LRB and LTBB intervened after restoration of their tribal status by Act of Congress in 1994.

No doubt it was the knowledge of Big Abe's case and the United States' 1973 commencement of the federal court "treaty rights" litigation (*United States v. Michigan*) that prompted GTB's community together with Art Duhamel to assert treaty-reserved fishing rights in Grand Traverse Bay in 1974. As stated in the introduction of a 1985 brief filed ten years later [\[insert link\]](#), no one in Peshawbestown expected the struggle to be so arduous before GTB's treaty rights would be confirmed.

## **B. Inland Rights to Hunt, Fish, Trap and Gather**

In the early 1990s, GTB became the first 1836 Treaty Tribe to hire staff specifically to manage the inland resources.<sup>8</sup> After Congress restored recognition to LRB and LTBB in 1994, GTB's inland biologists assisted the three lower peninsula Tribes in developing the comprehensive set of inland regulations enacted by GTB's Tribal Council April 17, 1996 as the "Uniform Conservation Code of the Northern Michigan Ottawa." These regulations ultimately provided the foundation both to the 1836 Treaty Tribes' defense to the State's counterclaim<sup>9</sup> and also to the settlement entered by the federal court as the 2007 Consent Decree.<sup>10</sup>

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<sup>6</sup> *People v. Jondreau*, 384 Mich. 539, 195 N.W.2d 375 (1971).

<sup>7</sup> In 1976 the Michigan Supreme Court again followed recent U.S. Supreme Court decisions and held that the convictions were inconsistent with BMIC's fishing rights reserved in the 1836 Treaty. *People v. LeBlanc*, 399 Mich 31, 248 N.W.2d 199 (1976). [\[insert link\]](#)

<sup>8</sup> Currently GTB employs two fisheries/wildlife biologists and one technician solely responsible for assessment/management of inland resources.

<sup>9</sup> There are two aspects to every "treaty-rights" litigation: (1) Did the Tribal signatories to the Treaty retain usufructuary rights? And, if so, (2) Do the Tribes retain sovereign authority to regulate their members' exercise of off-reservation rights reserved in the Treaty? In the absence of effective tribal regulations, courts permit state regulation.

<sup>10</sup> Starting on the first day of settlement negotiations (September 27, 2005), Tribal Chairman Kewaygoshkum continuously asked the question, "What's wrong with the UCC?" (The implication being that if GTB's regulations are not protecting the resources, then tell us and we will enact

Even before the State filed a counterclaim in the *United States v. Michigan* litigation in the fall of 2003 claiming that your "inland" treaty rights have been extinguished by operation of the "settlement clause" contained in Article Thirteenth of the 1836 Treaty, the five 1836 Treaty Tribes had been preparing for litigation. Collectively 7 expert witnesses were retained; 6 primary reports and 5 rebuttal reports were prepared as trial testimony. All of these expert witnesses' reports (as well as the reports of the United States' experts) will soon be available "on line." The history is fascinating. Especially recommended are the primary reports of Greg Dowd and Susan Gray as well as Jim McClurken's "rebuttal" report; these three experts originally were contracted/retained by GTB and eventually were funded as joint-tribal experts by CORA's litigation support grant funds from DOI-BIA. Also, Charles Cleland's report contains similar information; he originally testified on behalf of the Tribes in the Great Lakes phase of the *United States v. Michigan* litigation and subsequently was retained by GTB, BMIC and SSM in the late 1990s to prepare a report on the "inland" issues.

The State's initial settlement proposal was simple: the Tribes should follow all state fishing and hunting regulations in exchange for recognition of the continued existence of off-reservation "inland" rights. GTB's response was premised upon the foundation laid by hiring professional staff in the early 1990s and enacting the comprehensive regulations in 1996: "What's wrong with the UCC? If you (the State) have concerns, tell us, and we will address them in our regulations."

Ultimately, the framework for the 2007 Consent Decree was provided by the comprehensive inland regulations enacted by GTB as the "UCC" in 1996. Given modern-day circumstances, the 1836 Treaty Tribes were willing to forgo a commercial ("market hunting") dimension and limit use of nets in inland waters in exchange for permanent confirmation of both the continued existence of subsistence rights and tribal sovereignty to manage/regulate tribal members' exercise (fishing, gathering, hunting and trapping) throughout the 1836 Treaty cession area.

### **C. Historical Time Line**

"Aboriginal Occupancy"

Federal Indian Policy

- 1789-1871: treaty era
- 1871-1928: assimilation
- 1928-1942: reorganization
- 1943-1961: termination
- 1961- : self-determination

1836 Treaty [\[insert link\]](#)

"Reservations" designated for GTB in 1836 and 1855 Treaties

1872 "Termination" of GTB's Tribal Status<sup>11</sup>

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necessary changes; the DNR never identified any deficiency with GTB's regulations. It has never been suggested that GTB's regulations fail to protect the resources.)

<sup>11</sup> "In 1872, then-Secretary of the Interior, Columbus Delano, improperly severed the government-to-government relationship between the Band and the United States, ceasing to treat the Band as a federally-recognized tribe. This occurred because the Secretary had misread the 1855 Treaty of Detroit, . . . Following termination of the relationship, the Band experienced increasing poverty, loss of land base and depletion of the resources of its community." *Grand Traverse Band*

Indian Reorganization Act of 1934 - GTB's unsuccessful effort to restore federal recognition<sup>12</sup>

1943 Deed of "Indian Community Trust Lands" from State to Leelanau County

GTB's 1978 Petition for Federal Acknowledgment

1980 Restoration of GTB's federal recognition<sup>13</sup>

#### **D. Time Line of GTB's "Modern-Day" Assertions of Treaty Rights**

**1970s** - State of Michigan changes policy from managing Great Lakes fisheries for commercial fishing to managing for "sports" fishing/promoting tourism; all large-mesh gill netting prohibited; all commercial fishing for lake trout prohibited, and fishing for whitefish limited to trap nets

- DNR eliminates all commercial fishing in Grand Traverse Bay

**1971** - Michigan Supreme Court reverses 1930 decision and upholds Keweenaw Bay Indian community (KBIC) fishing rights reserved in Treaties of 1837 and 1842 (*People v. Jondreau*); Bay Mills Indian Community (BMIC) member Albert "Big Abe" LeBlanc then challenges state law by asserting "treaty-fishing" rights reserved in 1836 Treaty and is arrested, prosecuted and convicted for fishing with gill nets (and without state license)

**1973** - In response to LeBlanc prosecution and in capacity as trustee on behalf of BMIC's rights reserved in the 1836 Treaty, United States files *United States v. Michigan* litigation asserting that the Ottawa and Chippewa signatories to 1836 Treaty retained usufructuary rights to fish, hunt, trap and gather within ceded territory; subsequently BMIC intervenes as party-plaintiff in *United States v. Michigan* litigation

**1974** - Art Duhamel's first arrests/DNR citations for violating state law (fishing with gill nets without state license in Grand Traverse Bay) [\[insert link\]](#)

**1975** - Sault Ste. Marie Tribe of Chippewa Indians (SSM) achieves federal recognition and intervenes as party-plaintiff in *United States v. Michigan* litigation

**1976** - Michigan Supreme Court issues *People v. LeBlanc* decision confirming that BMIC retained subsistence and commercial fishing rights under 1836 Treaty (and that "Big Abe's" conviction for fishing with gill nets without a state license was invalid); notwithstanding *LeBlanc* decision, DNR refused to modify state law/policy to accommodate Indian "treaty fishing" (thus the federal litigation continued)

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*of Ottawa and Chippewa Indians v. U.S. Attorney and State of Michigan*, 369 F.3d 960, 961-62 (6th Cir. 2004).

<sup>12</sup> The 1978 ethnohistorical report supporting GTB's restoration to federal recognition and BIA's 1979 recommendation/evidence summary (p. 3) and history report (pp. 7-9) cite a letter written in 1937 by Emelia Schaub, Leelanau County Prosecuting Attorney, to Eleanor Roosevelt seeking assistance for GTB in response to the failure of the BIA to permit the Tribe to organize under the 1934 Indian Reorganization Act.

<sup>13</sup> 45 Fed. Reg. 19321-22 (March 25, 1980).

- Art Duhamel convicted by 86th District Court

- Judge Fox issues pre-trial order in *United States v. Michigan* litigation bifurcating inland/Great Lakes issues and schedules trial on Great Lakes phase

**1979** - Judge Fox issues historic ruling on May 7, 1979 that 1836 Treaty Tribes retained Great Lakes commercial and subsistence fishing rights when they ceded title to the territory described in the Treaty. [\[insert link\]](#)

- GTASFA files lawsuit on August 27, 1979 in G.T. County Circuit Court (using DNR affidavits) alleging destruction of fish resources in Grand Traverse Bay caused by "Indian gill netting" (and the baseless accusations/related fear-mongering causes widespread discrimination against Native Americans, especially in Grand Traverse region, that was documented in 1985 findings/report of Michigan Department of Civil Rights); on the same day the state court enjoins individual Indians (members of BMIC and SSM) from fishing with gill nets in Grand Traverse Bay; Judge Fox then enjoins state court from enforcing its injunction; Sixth Circuit Court of Appeals then "stays" Judge Fox's order; ultimately (in 1981) Sixth Circuit Court of Appeals upholds Judge Fox's ruling that state court has no jurisdiction over Indians exercising rights declared in federal court litigation

- Art Duhamel once again arrested for violating state fishing laws (for sixth time) on September 30, 1979

- On October 18, 1979 DOI (BIA) publishes preliminary notice in Federal Register of GTB's federal recognition

- On October 25, 1979 GTB files (through MILS representation) motions to intervene and for preliminary injunction based upon DOI (BIA) preliminary notice and related findings/report

- On October 26, 1979 Judge Fox grants GTB's motion to intervene (as party-plaintiff in *United States v. Michigan* litigation) and issues injunction prohibiting state from arresting and prosecuting GTB fishers

**1980** - On March 25, 1980 DOI (BIA) publishes final notice in Federal Register of GTB's federal recognition (effective May 27, 1980)

**1981** - U.S. Court of Appeals for Sixth Circuit affirms Judge Fox's decision; U.S. Supreme Court denies State's request for writ of certiorari, thus Judge Fox's historic ruling forever remains the "law of the land"

- first discussions among parties re: allocating Great Lakes fish harvests (and corresponding backlash from BMIC and SSM Tribes against GTB's insistence that fishing opportunities for GTB must be preserved in Grand Traverse Bay area)

**1980s** - periodic settlement discussions among parties re: allocating Great Lakes fish harvests

**1985** - Consent Decree (imposed by Court over BMIC objection) allocating Great Lakes fish harvests for 15-year period; limited "home waters" established for GTB in Grand Traverse Bay area

**1986** - BMIC and SSM Tribes take position that by majority vote they may decide how to disperse income from the \$3,000,000.00 trust fund created by 1985 Consent Decree; GTB files pleading with the federal court asserting right to share equally, which has occurred subsequent to court's ruling that Tribes must decide unanimously how to allocate funds

**1990s** - GTB becomes first 1836 Treaty Tribe to fund/hire "inland" biologists and begins gathering information and assessing inland fish and wildlife resources; after 1994 Act of Congress restoring tribal status for the Little Traverse Bay Bands and Little River Band, GTB-NRD and NR&EC begin meeting with LTBB & LRB Chairs/representatives for purpose of developing regulations managing the inland resources and regulating members' exercise of "inland" rights reserved under 1836 Treaty

**1996** - On April 17, 1996 GTB Tribal Council enacts the comprehensive inland code (designated as the "UCC," the Uniform Conservation Code of the Northern Michigan Ottawa) developed in conjunction with LTBB and LRB

**1997** - DNR initiates discussions with 1836 Treaty Tribes about possible judicial resolution of question whether "inland" rights reserved in 1836 Treaty continue to exist

**2000** - Consent Decree [\[insert link\]](#) entered allocating Great Lakes fish harvests for 20-year period; expanded "home waters" for GTB in Grand Traverse Bay area, but restrictions imposed in some areas surrounding Leelanau peninsula with respect to fishing locations, depths and seasons not applicable to fishing opportunities provided for Tribes in other areas

**2003** - State of Michigan files counterclaim in *United States v. Michigan* litigation asserting that the 1836 Treaty Tribes' "inland" treaty rights have been extinguished by "settlement" clause of Article Thirteenth

**2004** - "inland" litigation schedule adopted by federal court (discovery deadlines, trial date, etc.)

- expert witness reports exchanged (i.e., trial testimony of experts retained by Tribes, United States and State)

**2005** - expert witness rebuttal reports exchanged; parties take depositions of other parties' expert witnesses, assess strength/weaknesses of claims

- settlement discussions commence involving the *United States v. Michigan* parties (United States, five 1836 Treaty Tribes and State of Michigan) as well as representatives of several "amici" groups

**2007** - Consent Decree [\[insert link\]](#) entered confirming continued existence of "inland" treaty-reserved rights and GTB's sovereign right to manage/regulate members' exercise of fishing, gathering, hunting and trapping rights throughout the Treaty-ceded territory [\[insert link\]](#)

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