

STATE OF MICHIGAN  
DISTRICT COURT FOR THE 94th JUDICIAL DISTRICT  
DELTA COUNTY

STATE OF MICHIGAN,  
Plaintiff,

v

JOHN HALVERSON,  
Defendant,

CASE NO: 10-738-SM

TROY JENSEN,  
Defendant,

CASE NO: 10-737-SM

WADE JENSEN,  
Defendant.

CASE NO: 10-736-SM

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DELTA COUNTY PROSECUTOR'S OFFICE

310 Ludington Ave.

Escanaba, MI 49829

906/789-5115

Attorney for Plaintiff

LaCOSSE LAW, P.C.

Fredericks, Peebles & Morgan, LLP

By: Elizabeth A. LaCosse (P46320)

104 Sixth Avenue

Menominee, MI 49858

(906) 864-1000

Attorney for Defendant, John Halverson

By: John Petoskey (P41499)

2848 Setterbo Road

Peshawbestown MI 49682

231/271-6391

Attorney for Defendants Wade  
Jensen and Troy Jensen

**BRIEF IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS BASED ON  
EXCLUSIVE JURISDICTION OF THE SAULT STE. MARIE TRIBE OF  
CHIPPEWA INDIANS**

COMES NOW Wade W. Jensen by and through his attorney, John F. Petoskey, Fredericks Peebles & Morgan LLP, and requests this Court to dismiss the charge of conspiracy to violate MCL 750.157a based upon the lack of subject matter jurisdiction in this court. Wade W. Jensen alleges that the Sault Ste. Marie Tribe has exclusive jurisdiction in this matter under the Consent Decree entered in *U.S. v. Michigan*. Alternatively, Mr. Jensen alleges that this Court does not have subject matter jurisdiction

because it cannot incorporate by reference Sault Ste. Marie tribal law as an element of the conspiracy charge.

1. Mr. Jensen is charged with the crime of conspiracy to violate MCL 750.157a. Upon information and belief, the basis of this charge is that Mr. Jensen allegedly used his federally reserved treaty-right to engage in commercial fishing under the Consent Decree of *U.S. v. Michigan* for the alleged illegal State law purpose of buying fish that are not subject to commercial sale in the State of Michigan. The Prosecutor has charged Jensen with the conspiracy to “purchase and sell or buy fish taken without a commercial fishing license” in violation of MCL 750.157a and MCL 324.48723, as a misdemeanor criminal violation.
2. For purposes of this Motion, Mr. Jensen admits that he is a member of the Sault Ste. Marie Tribe and that he has a reserved treaty-right to engage in commercial fishing. Solely for purposes of this Motion, Mr. Jensen assumes that the statements made in the above paragraph are correct.

### **LEGAL ARGUMENT**

#### **i. The Sault Ste. Marie Court has Exclusive Jurisdiction under U.S. v. Michigan**

In *People v. LeBlanc*, 399 Mich. 31, 248 N.W. 199 (Mich. 1976) held that the State does not have criminal jurisdiction over a treaty-based offense.

“Specifically, with regard to the state's authority to regulate off-reservation fishing rights, the state regulation is valid only if: (1) it is necessary for the preservation of the fish protected by the regulation; (2) the application of the regulation to the Indians holding the off-reservation fishing right is necessary for the preservation of the fish protected; (3) and the regulation does not discriminate against the treaty Indians.”

The analysis of the *LeBlanc* decision was adopted in the *U.S. v. Michigan* as a 3-part test to determine whether the State has subject matter jurisdiction to regulate and prosecute an alleged fish offense, based on reserved treaty rights.

“Only upon a finding of necessity, irreparable harm, and the absence of effective Indian tribal self-regulation should the federal district court sanction and permit state regulation restricting Indian treaty fishing rights. Unless the state meets these criteria, the state may not regulate at all. If the state meets these criteria, any regulations must be a necessary conservation measure, must be the least restrictive alternative method available for preserving the fisheries involved from irreparable harm, and must not discriminatorily harm Indian fishing or favor other classes of fishermen.” *U.S. v. State of Mich.*, 505 F. Supp. 467 (W.D. Mich. 1980). *U.S. v. State of Mich.*, 653 F.2d 277 (6<sup>th</sup> Cir. 1981).

The standards adopted in *U.S. v. Michigan* recognize that the Sault Ste. Marie Tribe has exclusive jurisdiction over Mr. Jensen’s alleged offense because the offense is based on Tribal status and the charged crime is not necessary to stop irreparable harm, but most importantly in this matter, the Sault Ste. Marie Tribe already has “effective tribal self-regulation.” *U.S. v. Michigan*, 471 F.Supp 192 (W.D. Mich. 1979), held that the State did not have any right to regulate members of treaty tribes exercising their rights retained under the Treaty. The District Court held that treaty rights can only be regulated by treaty tribes and not the State of Michigan. *Id.* at 266, based on treaties and the Supremacy Clause of the United States Constitution, Article XI, Clause 2. The District Court specifically held that:

“Both Bay Mills and the Sault Tribe retain the power to regulate their internal affairs and have adopted constitutions and by-laws under the Indian Reorganization Act of 1934. Both constitutions authorized the tribes to regulate and protect resources under their control. Further, both constitutions authorize the tribes to regulate the internal affairs of their members. Pursuant to the constitutions and by-laws, the tribes have developed conservation codes and fishing regulations. Pursuant to this constitutional and ordinance authority, the treaty fishing activities of the

Indians of the plaintiff tribes are comprehensively regulated and enforced.”

Under the original *U.S. v. Michigan* District Court Opinion, the court adopted a Consent Decree in 1985 and 2000 implementing the declaratory judgment. The 2000 Consent Decree provides the following:

“[T]he courts of the Tribes shall have exclusive jurisdiction over enforcement of the Tribal laws or regulations governing the fishing activities of Tribal members in the 1836 Treaty waters. The State shall not enforce its fishing laws and regulations against Tribal members engaged in fishing activity within the 1836 Treaty waters.”

Immediately after the *U.S. v. Michigan* decision in 1980, the Secretary of the Interior issued Federal Regulation 25 C.F.R. Pt. 249 recognizing the exclusive jurisdiction of tribal court.

“Any Indian tribe with a tribal court may confer jurisdiction upon a fishing court to punish violations by its members of fishing regulation violations.”

Jurisdiction was recognized in each treaty-based fishing Tribe to confer upon each tribal court of Indian offenses to punish such violations by members of tribes whose reservations are under the jurisdiction of such court. 25 C.F.R. Pt. 149. This authority did not displace existing exclusive jurisdiction of the tribal court; rather, the federal regulations recognized that the Tribal Governments’ had inherent authority to confer their exclusive subject matter jurisdiction on special Courts of Indian Offenses, a well-recognized and established process for the federal government to cover gaps in tribal law by the substitution of specialized federal Indian courts for tribal offenses within the exclusive jurisdiction of the Tribe. The authority of these federal regulations and the courts created under the regulation was recognized as an exercise of the federal and tribal

governments' authority under the Supremacy Clause of the U.S. Constitution. The regulations therefore precluded enforcement of a State Court order because the federal regulations, and the tribal authority recognized under the federal regulation, precluded State jurisdiction because the exclusive jurisdiction of the Sault Ste. Marie Tribe is recognized for the regulation of Indian fishing by tribal members. *U.S. v. Michigan*, 712 F.2d 242 (6<sup>th</sup> Cir. 1983). Even where the Tribal members were recognized in violation of internal tribal law, and therefore were, in fact, not treaty tribal fishers, Michigan courts have held that State Courts must still recognize that the Tribe has jurisdiction over the alleged fishing offense for the period time that the fisher was a member of the Sault Ste. Marie Tribe. *Attorney General v. Hermes*, 127 Mich. App. 777 (1983).

The 2000 Consent Decree also set up the Chippewa-Ottawa Resource Authority ("CORA") to which was delegated the authority to regulate treaty fishing rights. The relevant CORA regulations state:

"Section 1. Purpose.

These Regulations are adopted to govern the commercial, subsistence, and recreational fishing activities of members of the Bay Mills Indian Community, the Grand Traverse Band of Ottawa and Chippewa Indians, the Little River Band of Ottawa Indians, the Little Traverse Bay Bands of Odawa Indians, and the Sault Ste. Marie Tribe of Chippewa Indians in exercising the Great Lakes fishing rights reserved by the Tribes in the Treaty of March 28, 1836. These Regulations are intended to ensure conservation of the fishery resource for future generations of the Tribes and to ensure safe fishing practices.

(i) "Fishing" or "fishing activity" means fishing for, catching, or taking any species of fish, or attempting to fish for, catch, or take any species of fish from 1836 Treaty waters, including all related activities which occur in or on the water or ice, until such time as the vessel or vehicle is moored, tied up, or grounded.

- Section XIII(f) and (g) restricts the “possession” or “retention” of walleye caught commercially, and prohibits the sale of undersized walleye.
- Section XIX(e) states (with emphasis added) that “[s]ubsistence fishers shall not sell or otherwise exchange for value any of the catch.”
- Section XX(a) of the CORA Fishing Regulations, which is identical to Section VI(A)(5) of the Consent Decree, demonstrates that commercial fishing activity includes the sale of the fishery resource: “A commercial fishing license entitles the holder to operate a fishing boat and to participate fully in all commercial fishing activities, including the capture and sale of all species pursuant to these Regulations.” (Emphasis added).
- Section XXVI(e) provides that “[a]ll traps, nets and other equipment, vessels, snowmobiles, vehicles, and other means of transportation used in aid in the taking, possessing, selling, purchasing, offering for sale or purchase, transporting, delivery, receiving, carrying, shipping, exporting, or importing any fish, eggs, or parts of fishing violation of these Regulations shall be subject to seizure and may be forfeited by the appropriate tribal court.” (Emphasis added).

Like the 2000 Consent Decree, the CORA Fishing Regulations, at § XXVI(a), state that the Tribe has exclusive jurisdiction over violations by tribal members:

“Jurisdiction to enforce these Regulations upon members of each Tribe is vested exclusively in the tribal court of that Tribe.”

Michigan law similarly recognizes that tribes have exclusive jurisdiction over treaty fishing. In *People v. Denomie*, 2000 WL 33389845 (Mich. App) the Michigan Court of Appeals held that the DNR did not have authority to criminally cite an Indian fishing vessel for noncompliance with State safety laws. Although the Court utilized the 3-part preservation of fish in the recognized in the *LeBlanc* and *U.S. v. Michigan* decision, the Court held that the particular regulation could not impinge on defendant’s tribal rights. *Denomie* is consistent with Michigan law that recognizes that tribes with treaty-based rights, such as fishing, have a unique interest in the regulation of treaty-based rights. *People v. Jondreau*, 384 Mich 539, 548 (1971). *Grand Traverse Band of*

*Ottawa and Chippewa Indians v. Michigan Dep't of Natural Resources*, 141 F.3d. 635, 639 (CA6 1998). See also *People v. Bennett*, 195 Mich.App 455, 458; 491 NW2d (1992).

Tribal authority to regulate treaty-based fishing by the exercise of tribal exclusive jurisdiction is based on the original sovereign status of the tribes in entering into treaty relations with the United States, which retained the tribe's original sovereign rights to regulate hunting and fishing. The chronology from *LeBlanc* in 1976 to *U.S. vs. Michigan* in 1979 and the related appeals to the Sixth Circuit in the 1980s to the implementation of the 25 C.F.R. Pt. 249 in 1980 regulations, and the subsequent re-promulgation of the regulations to the 1985 and 2000 Consent Decrees implementing *U.S. v. Michigan* and the detailed and comprehensive CORA regulations that continual modified by the Tribes, are a natural devolution and recognition of the original sovereign status of Tribes, and SSM in particular, to regulate treaty fishing. This original sovereign status creates exclusive subject matter jurisdiction in the tribal court of SSM to regulate all aspects of treaty fishing, including the acts of Jensen that give rise to the State criminal charge. Tribal governing authority in this area stems from its sovereign status and the recognition of that sovereign status in the development of the above cases and regulations. This District Court should recognize the exclusive jurisdiction of the SSM to address the acts covered by the State criminal charge.

**ii. The State Criminal Charge of Conspiracy requires the incorporation of Sault Tribe substantive law on the regulation of treaty fishing as an essential element of the State Charge. The incorporation of Sault Tribal Law is not permitted and therefore the charge should be dismissed.**

The incorporation by reference standard is a well-recognized procedure for the federal government to incorporate state substantive law as federal law for the purposes of

the elements of a federal crime. Title 18 U.S.C. § 1152, the Indian Country Crimes Act, applying the general federal laws to punishment of offenses committed anywhere within the exclusive jurisdiction of the United States to Indian country. Title 18 U.S.C. 1153(a) extends federal jurisdiction to specifically identified major crimes within Indian country and Title 18 U.S.C. 1153(b) generally characterized as the Assimilated Crimes Act, extends federal jurisdiction to Indian Country by the incorporation, “assimilating”, State substantive law as an element of a federal criminal law for crimes in Indian country where federal substantive criminal law does not contain specific substantive law identifying the crime. The application of the Indian Country Crimes Act, 18 U.S.C. 1152, and the Assimilated Crimes Act, 18 U.S.C. § 1153(b), is a recognized process in the State of Michigan. *United States v. Yamott*, 42 F.3d 999, (1994). (Holding that the application of 18 U.S.C. § 1152 and 18 U.S.C. § 1153(b) provided the federal court with subject matter jurisdiction for a criminal offense that the particular crime was not specifically identified in federal substantive law, but rather, the particular crime was identified in State substantive law.) *United States v. Peltier*, 344 F.Supp. D 539 (2004), (Holding that the federal court had jurisdiction under 18 U.S.C. § 1153(b).) Unlike this well-defined process in federal law, the State does not have a general State statute that incorporates by reference the substantive law of an Indian tribe as an element of a State law crime violation. The State can point to no similar process in State substantive law that mirrors the federal/state relationship for the incorporation of another sovereign’s substantive law.

Jensen is charged under the Michigan criminal law to commit a conspiracy, MCL 750.157a to violate MCL 324.48723 in the purchase, sale transportation and possession of certain fish prohibited; exceptions. Upon information and belief, the elements of the



conspiracy have to incorporate by reference Sault Ste. Marie tribal law on subsistence and commercial fishing. The People charge that Jensen, as a Sault Ste. Marie Tribal fisher exercising treaty rights, violated not only Michigan substantive law, but also Sault Ste. Marie tribal law on catch limitations. A necessary element of the criminal conspiracy theory is the incorporation by reference of substantive Sault Ste. Marie tribal law, the fact that Jensen is a Sault Ste. Marie tribal fisher regulated by substantive Sault Ste. Marie tribal fishing law and regulations under the Consent Decree and CORA, and that Jensen used this status as a condition precedent to acquiring illegally State-caught and tribal-caught fish. In the similar case of *People v. Wemigwans*, 2003 WL 734257 (2003), the Michigan Court of Appeals recognized that a State court could incorporate by reference tribal substantive statutory law on OUIL, that was similar to MCL § 257.625, however, that incorporation was specifically predicated upon “the Michigan Vehicle Code, MCL § 257.1 et seq., allows the use of prior *foreign* (emphasis supplied) convictions for charge enhancement in OUIL cases.” In the matter at hand, the State does not have and cannot point to a specific State statutory law that allows a Prosecutor and State Court to incorporate by reference Sault Ste. Marie tribal substantive law, which forms an essential element, that Jensen is a Sault Ste. Marie tribal fisher violating Sault Ste. Marie tribal law, of the State’s conspiracy charge. Without the element of Sault Tribal law and the violation of the Sault Tribe law relative to treaty fishing, there is no conspiracy to violate Sault Tribe law. Therefore, unlike the holding in *People v. Wemigwans*, where the State did have specific authorization to use substantive Tribal law, here the State does not have the authority to incorporate by reference Sault Ste. Marie substantive law into MCL 750.157a and therefore the charge should be dismissed.

There is no general authority for State law to use an "assimilated crimes" type analysis that is available in the relationship between the federal criminal law and State criminal law. The State, in the present criminal charge of conspiracy, needs Sault tribal law as an element of its State conspiracy theory, but the State does not have the authority to incorporate by reference Sault Ste. Marie tribal law into the State criminal law.

Whether the tribe had prohibited the particular conduct of the Jensen's at the time of their activities does not determine whether the tribe has and retained jurisdiction over the Jensen's to regulate their conduct as it relates to the fishing resource.

### CONCLUSION

Jensen is a licensed Sault Ste. Marie tribal commercial fisher, regulated by the exclusive jurisdiction of the Sault Ste. Marie Tribe, under the U.S. v. Michigan Consent Decree and CORA regulations. Therefore, this conspiracy charge should be dismissed for a lack of subject matter jurisdiction. Alternatively, this Court does not have subject matter jurisdiction based on the inability of the State conspiracy charge to incorporate by reference the fact that Jensen is a regulated tribal fisher under Sault Ste. Marie Tribal law and violated tribal law as an element of the State conspiracy charge.

**RESPECTFULLY SUBMITTED,**

  
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John F. Petoskey (P41499)  
Fredericks Peebles & Morgan LLP  
2848 Setterbo Rd.  
Peshawbestown, MI 49682  
[jpetoskey@ndnlaw.com](mailto:jpetoskey@ndnlaw.com)  
Office: (231) 271-6391

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