

A summary of Judge Enslin's opinion of 1985 with respect to the Coalition's "Three Criteria for Renewed Negotiations"

Here we give some of Judge Enslin's opinions (quotes in italics) from: *United States et al. v. Michigan et al.*, No. M26 73 CA (Western District of Michigan, May 31, 1985), Richard Enslin. *Indian Law Reporter*, August 1985. We have categorized these views by our three criteria for renewed negotiations. These excerpts represent just a fraction of his opinion but are representative his more serious concerns – concerns that we, the Coalition for Protection of Michigan Resources, share.

Science-based harvest limits.

Without protection from overharvest, the resource is vulnerable to collapse and the consequent loss of fishing opportunities for all the parties. Estimates of the amount available for harvest is a prerequisite to allocation. *"It is in the best interests of the resource and all of the parties to improve the gathering and exchange of technical data and to coordinate data collection efforts. These efforts should provide for information needs to protect and manage the fisheries resource on a long-term basis.... The designation of additional funds for fishery assessment contemplated by the stipulated agreement will increase the available technical data."* *"Rehabilitation of the lake trout requires a combination of three strategies: First, the total annual mortality from sea lamprey predation and premature and excessive harvest must be reduced; Second, the opportunity for successful reproduction must be maximized by maintaining and improving habitat and selecting and managing stocking sites and accordance with prime lake trout habitat; and Third, ..."* [quantity and quality of lake trout stocked]. Keeping mortality rates within acceptable bounds requires not only comprehensive data sets but also rigorous models – tools for estimation of lake trout and whitefish populations by age group and the mortality rate as the fish live from one age group to the next. Past agreements have included commitments from the parties to fund enhanced data collection and population assessments (*"The stipulated agreement provides for ... funding for the production of more information."*). This funding for improvement of data collection and modeling tools continues to be critically necessary for the current agreement.

The principal of an equitable distribution of harvest opportunity.

Judge Enslin had a nuanced and informed view of distribution of harvest opportunity that went beyond a simple 50/50 allocation. He ruled against a motion by Bay Mills Tribe to base the 1985 Decree on a 50/50 allocation, ruling that a zonal plan would offer a more equitable and stable distribution of opportunity. Zonal management as detailed by Judge Enslin in his 1985 opinion provided for a successfully shared Great Lakes fishery for more than 3 decades and is central to the Coalition's positions during consent decree negotiations. *"The court adopts the allocation plan contained in the March 28th, 1985, agreement that would establish management zones and rejects Bay Mills proposal that would allocate 50 percent of the commercial catch to the tribes. The court finds the zonal plan superior to the Bay Mills plan in protecting the Indian reserved treaty fishing right, preserving, and maintaining the resource, reducing social conflict, stabilizing the fishery, and assuring both state and federal funding."* We agreed with this opinion because this has been the basis for the successful sharing of the Great Lakes fishery for more than 37 years. He pointed out that allocation and the opportunity to harvest are different terms and often confused. *"Sometimes availability and harvestability are confused in the minds of the fisher-pursuers"*. His preference for a zonal plan was based on the need to assure that different elements of the fishery, with different gear efficiencies, would be able to achieve their equitable share of harvest. He also argued zonal plans allowed for long-term stability that allowed for

economic development of the fishery and its markets and for long-range resource management plans to be carried out by the agencies. *“The zonal plan ... presents stability. A tribal fisher knows where to fish and can plan. There is a long-term sense of management and accountability. There is a separation of treaty and non-treaty fishers in certain areas, separating different users in space so as to reduce conflicts and provide certainty. The zonal plan is much superior for lake trout harvest. It avoids the adverse impact on lake trout, so important to the fishery, by creating separate zones for whitefish [gillnet] efforts and lake trout rehabilitation areas...”* *“...the focus of the zonal plan is to locate tribes proximately to where they live. The zonal plan, for the most part, discourages a ‘racehorse’ fishery and gives the tribes the opportunity to regulate the fishery over time.”* And further: *“The zonal plan takes into account that not all portions of the lakes are suitable for a small-boat fishery, since some areas are suitable for tugs and trap nets”*. The same is true for recreational anglers, who fish predominantly out of small boats.

Collaborative approach.

Data sharing is fundamental to collaboration as well as to science-based management. From Enslin’s opinion: *“It must be obvious to all that it is good for the fishery management to share information and data with each other. The stipulated agreement provides for this and requires the exchange of data, and provided for funding for the production of more information.”* *“Cooperation is essential for if there is none all will try to exploit the source at the expense of the others, the fishery suffers and some, particularly small-boat fishers, suffer dramatically.”*

The Great Lakes, being inter-state and international water, are managed collaboratively under the aegis of the Great Lakes Fisheries Commission and the negotiating parties are signatory to the GLFC Joint Strategic Plan for Managing Great Lakes Fisheries. Judge Enslin recognized the coordinating role of the Great Lakes Fishery Commission, first reciting its origins in law and then listing its principal roles in Great Lakes Fisheries: *“GLFC has two major responsibilities: First, to develop coordinated programs of research in the Great Lakes and, on the basis of the findings, recommend measures that will permit the maximum sustained productivity of stocks of fish of common concern; the second, to formulate and implement a program to eradicate or minimize sea lamprey...”*. *“The GLFC has created a lake committee for each of the five Great Lakes. Each lake committee is presently composed of senior fishery management personnel from provincial and state [and, more recently, tribal] resource agencies...”* These committees lead in collaborative approaches *“with technical problems that need resolution”* by appointing *“ad hoc or standing technical committees composed of scientific and technical specialists ... and charge these specialists with devising the most scientifically justifiable recommendations. These recommendations are submitted to the lake committee for endorsement and incorporation into fishery management strategies.”* Lake trout rehabilitation is a long-standing technical problem for the GLFC committees. *“Lake trout rehabilitation plans are now completed for each of the three lakes and have been approved by the respective lake committees”*. Presently, the lake committees are turning their attention to the crisis of whitefish recruitment failure, its causes, and possible solutions. Management decisions that largely ignore interstate and international obligations and opportunities to collaborate, as called for by the Joint Strategic Plan, would undermine important elements of interjurisdictional lake trout rehabilitation plans and other initiatives of the GLFC lake committees and turn a blind eye to the variety of technical and scientific expertise available in the Great Lakes arena that could assist in model improvement and in diagnosis of whitefish recruitment failure.