

KEWEENAW BAY INDIAN COMMUNITY

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2017 KBIC Tribal Council

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TESTIMONY

of

WARREN C. SWARTZ

PRESIDENT

of the

KEWEENAW BAY INDIAN COMMUNITY

Before the

SENATE COMMITTEE ON

COMMERCE, SCIENCE, & TRANSPORTATION

SUBCOMMITTEE ON

OCEANS, ATMOSPHERE, FISHERIES, AND COAST GUARD

At the Hearing Titled

EXPLORING NATIVE AMERICAN SUBSISTENCE RIGHTS AND INTERNATIONAL TREATIES

October 31, 2017

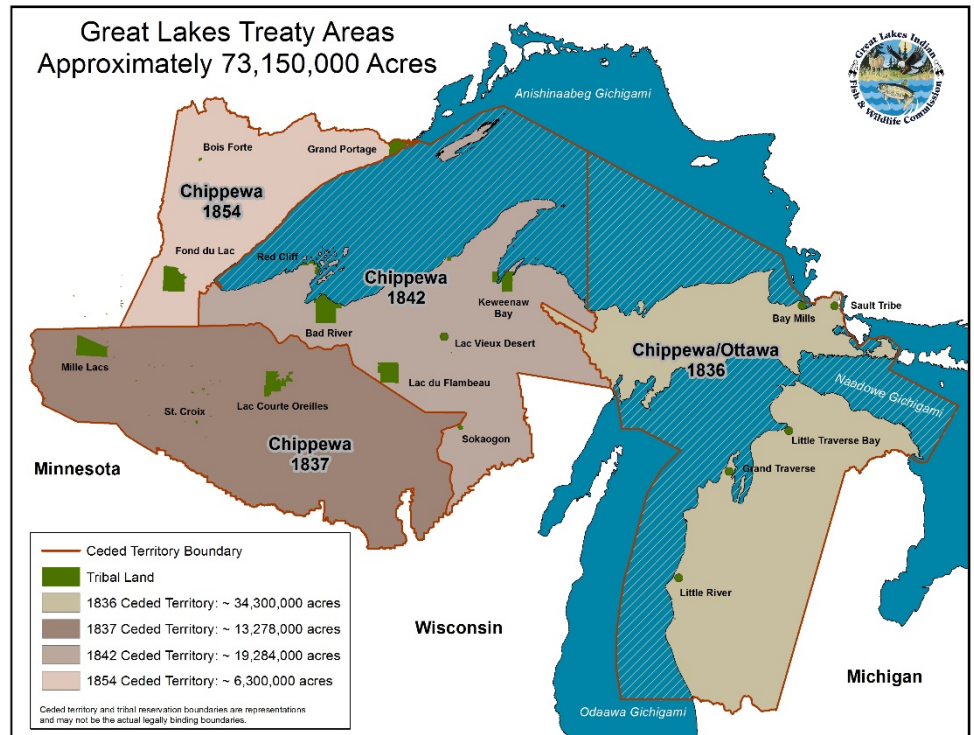
**LAKE SUPERIOR BAND OF CHIPPEWA INDIANS
“Home of the Midnight Two-Step Championship”**

Chairman Sullivan, Ranking Member Peters and Members of the Subcommittee, my name is Chris Swartz and I am the President of the Keweenaw Bay Indian Community. The Keweenaw Bay Indian reservation is located near the town of Baraga, Michigan on the east side of Lake Superior's Keweenaw Peninsula. Thank you for the opportunity to appear before you today.

I am here today to represent my tribe, but my tribe is not the only one concerned about our subsistence rights and threats to those rights, and interested in demonstrating how international treaties can provide models for intergovernmental co-management, respect, coordination and problem solving.

My tribe is a member of an intertribal agency known as the Great Lakes Indian Fish and Wildlife Commission (GLIFWC).¹ GLIFWC is made up of eleven Ojibwe tribes² that hold treaty reserved rights to hunt, fish and gather in territory that we ceded (or sold) to the United States in Treaties in the mid-1800s (see map). As relevant to this hearing, portions of Lakes Superior, Huron and Michigan were ceded in the Treaties of 1836 and 1842.³ GLIFWC assists its member tribes in implementing their off-reservation treaty rights.

Treaties were and are made between nations. Thus we must consider the treaties that were made between the young United States and tribal nations that predated the arrival of



¹ For more information, see www.glifwc.org.

² GLIFWC member tribes are: in Wisconsin -- the Bad River Band of the Lake Superior Tribe of Chippewa Indians, Lac Courte Oreilles Band of Lake Superior Chippewa Indians, Lac du Flambeau Band of Lake Superior Chippewa Indians, Red Cliff Band of Lake Superior Chippewa Indians, St. Croix Chippewa Indians of Wisconsin, and Sokaogon Chippewa Community of the Mole Lake Band; in Minnesota – Fond du Lac Band of Lake Superior Chippewa, and Mille Lacs Band of Ojibwe Indians; and in Michigan – Bay Mills Indian Community, Keweenaw Bay Indian Community, and Lac Vieux Desert Band of Lake Superior Chippewa Indians.

³ See Treaty of 1836, 7 Stat. 491. See, Treaty of 1842, 7 Stat. 591.

Europeans in addition to relevant treaties with our Canadian neighbors. Federal and state courts have affirmed our treaty-reserved rights to hunt, fish and gather off our reservations on ceded lands.⁴ These rights were not granted in the treaties, rather they were reserved by our ancestors to provide for the continuation of our way of life as we had always lived it on the region's lands and waters. The Keweenaw Bay Indian Reservation, created by the Treaty of 1854, is but a small part of our much larger ancestral homeland, which was ceded to the United States in these earlier treaties.⁵

The Keweenaw Bay Indian Community, as well as other tribes located around Lake Superior, are and have always been, fishing tribes. Since time immemorial, these tribes have used the resources provided by gitchi-gami (or Lake Superior) to sustain their communities. This sustenance is not only physical; it is also spiritual, cultural, medicinal and economic. These tribes, in our first treaty (with the Creator) accepted a responsibility to protect and sustain the natural resources that provide for the lifeways of our people. We have hundreds of years of experience exercising this responsibility, and can bring a wealth of traditional ecological knowledge to bear on natural resource management questions. In modern times, we welcome and actively participate in partnerships with like-minded agencies that are also stewards of these natural resources.

The history of cooperative, coordinated fishery management in the Great Lakes is both interesting and instructive. During the late 1800s and through the first half of the 1900s, the Great Lakes states and Ontario tried unsuccessfully to create cooperative fishery management mechanisms. It was only after the invasive sea lamprey began to devastate the lake trout fishery that the jurisdictions realized their problems could not be solved individually – they needed to work together with the aid of the federal government. The 1954 Convention on Great Lakes Fisheries – a treaty between the US and Canada – created the Great Lakes Fishery Commission and committed the parties to control sea lamprey, advance shared science, and help agencies work together.⁶ The Convention did not, however, divest the states, the province, or the tribes of their management authority. In fact, tribes became active partners in the Fishery Commission's structures after state and federal courts re-affirmed their treaty-reserved fishing rights.

There are a number of mechanisms set up under the Fishery Commission that provide for the cooperative, coordinated exercise of each jurisdiction's management authority – state, provincial and tribal – with the assistance of the federal governments. These mechanisms demonstrate an approach that is bottom-up rather than top-down, and respects each

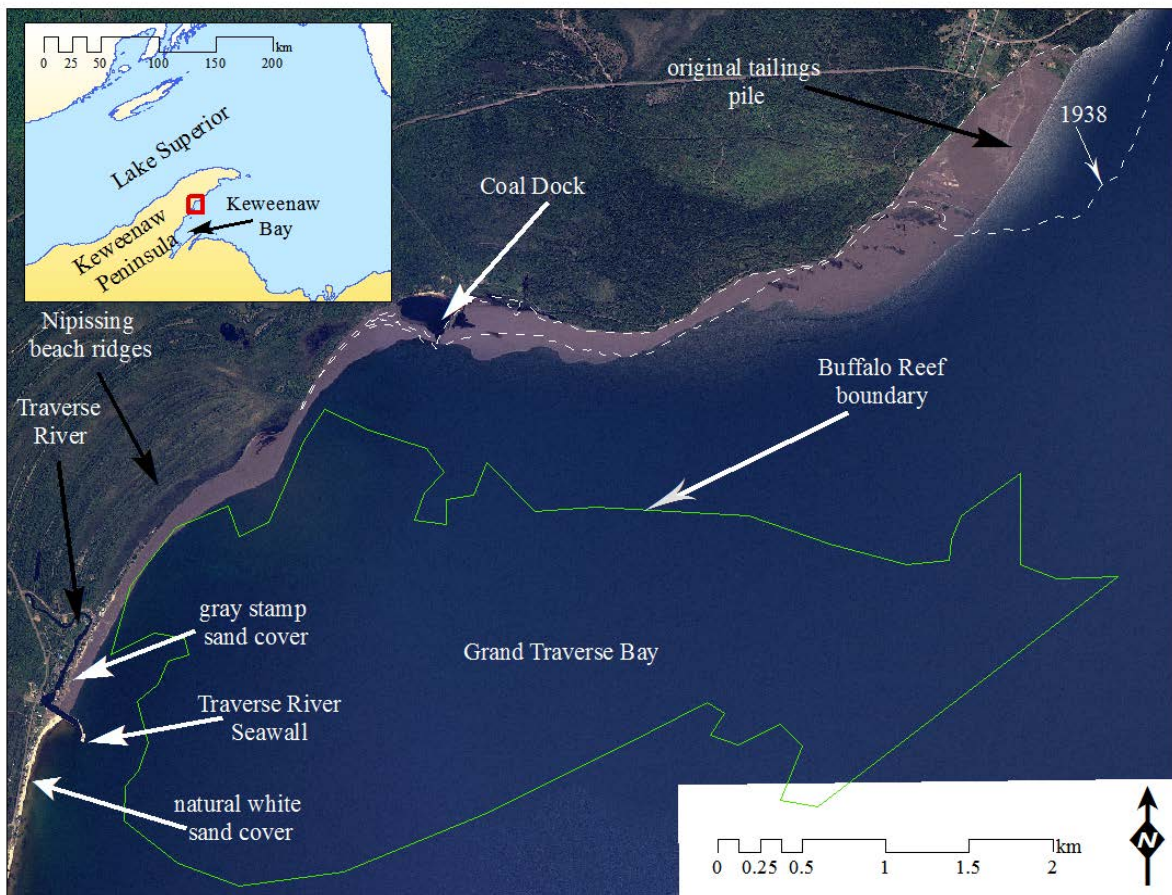
⁴ See, e.g. *People of the State of Michigan v. Jondreau*, 384 Mich. 539, 185 N.W. 2d 375 (Mich. 1971), and *United States v. Michigan*, 471 F.Supp. 192 (W.D.Mich. 1979).

⁵ See Treaty of 1854, 10 Stat. 1109.

⁶ For more information, see www.glfc.org.

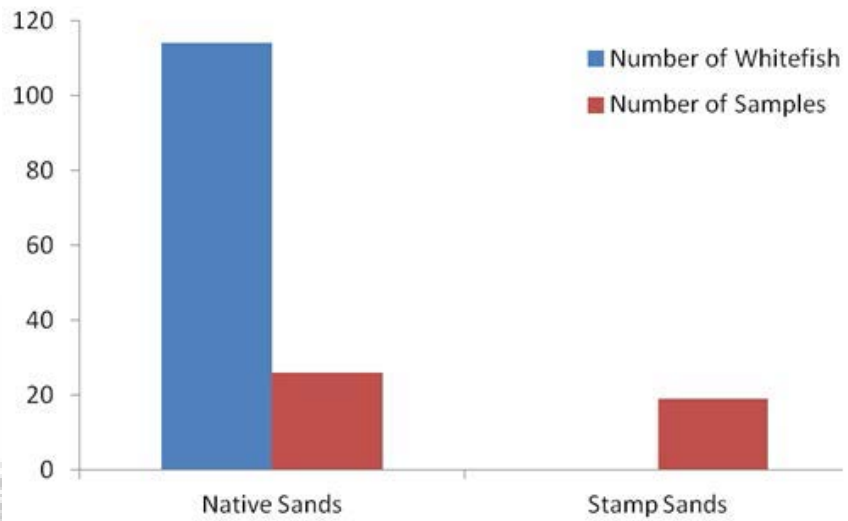
jurisdiction's expertise, knowledge and management authority. The federal government assists in coordination but does not prescribe outcomes.

There are many threats to Lake Superior's fishery in addition to sea lamprey. I would like to tell you about one other particular threat that would, if left unaddressed, undermine the significant progress that the partners have made in restoring a "self-sustaining" lake trout population, a status that was declared in 1996. This threat also undermines the ability of my tribe and others to sustain themselves through the harvest and sharing of fish, and undermines the obligation of the United States to uphold its treaty guarantees. An important whitefish and lake trout spawning reef is being smothered with what are known as stamp sands – mining waste that was dumped into Lake Superior and on its shoreline during the late 1800s and early 1900s. The stamp sands are destroying the spawning reef by filling in and contaminating the



cobble substrate where the fish lay eggs. The stamp sands are high in copper, mercury, arsenic and other contaminants toxic to aquatic life, illustrated by the fact that juvenile fish are not found in shoreline habitats that are covered in stamp sands (see chart, below). At present, approximately 35% of the reef is no longer viable because it is covered with an inch or more of stamp sands; modeling predicts that by 2025, 60% of the reef will no longer be viable for lake trout and whitefish spawning.

The Great Lakes supports a \$7 billion commercial, subsistence and recreational fishery, including associated tourism expenditures and more than 75,000 direct and indirect jobs.⁷ In Michigan waters of Lake Superior, Buffalo Reef is estimated to supply 23% of the tribal commercial harvest of lake trout, and the loss of this habitat would



likely result in the loss of approximately 125,000 pounds of whitefish and 12,500 pounds of lake trout annually. If the reef is lost, over \$1 million in tribal fishing jobs would also be lost.⁸ There would be additional impacts to the recreational fishery as well as to local businesses that rely on locally caught fish. At one time, the Great Lakes fed the cities of Chicago and Detroit. As the population continues to grow, their economies can only be helped by a productive fishery. Not only can the Great Lakes fisheries continue to feed the populations of these cities, but the recreational fishing industry is a growing source of a healthy economy in this region. Both depend on healthy ecosystems and resources.

Buffalo Reef is also an important source of genetic diversity to Lake Superior. Fish tagged on the reef have been caught as far away as Pancake Bay, Ontario and the western arm of Lake Superior.⁹

In addition to the treaties with tribes and the Convention on Great Lakes Fisheries, another treaty has bearing on this issue. The Boundary Waters Treaty of 1909 obliges the US and Canada “not to pollute” the boundary waters.¹⁰ That obligation has been implemented through an agreement, known as the Great Lakes Water Quality Agreement (GLWQA), which was first signed in 1978. In 2012, it was updated with the signing of a Protocol that explicitly reaffirms “the rights and obligations of both countries under the *Treaty relating to the Boundary Waters and Questions arising along the Boundary between Canada, and the United*

⁷ See <http://www.glf.org/the-fishery.php>

⁸ Great Lakes Indian Fish and Wildlife Commission, unpublished data.

⁹ Great Lakes Indian Fish and Wildlife Commission, unpublished data.

¹⁰ Boundary Waters Treaty of 1909, 36 Stat. 2448. Article IV.

States done at Washington on 11 January 1909 (Boundary Waters Treaty) and, in particular, the obligation not to pollute boundary waters;” .¹¹

The GLWQA is an agreement between the US and Canada, but, like the Convention on Great Lakes Fisheries, its goals cannot be accomplished without the participation of the other governments with management authority over the fishery, including tribes that hold rights reserved in treaties equal in stature to the Boundary Waters Treaty. Tribes have management authority relative to their treaty rights, and must be “in the room and at the table” with other governmental partners when natural resource decisions are being made. This requires that equitable funding be available to support the capacity of tribes to participate in these partnerships and to develop the science and management expertise that they need to be effective partners.

There are a number of mechanisms for coordination under the auspices of the GLWQA, including intergovernmental working groups that are producing Lakewide Action and Management Plans (LAMPs) for each of the Great Lakes. In Lake Superior, this type of coordinated, binational state, federal, tribal and provincial partnership has been ongoing since the early 1990s. The most recent LAMP, produced in 2015, identifies actions to restore and protect Buffalo Reef as a priority project from a lakewide perspective.¹² The National Oceanic and Atmospheric Administration (NOAA), the US Army Corps of Engineers, the Environmental Protection Agency, and the Bureau of Indian Affairs as well as state and tribal governments have committed to take actions to further this work.

And they are taking action – federal, state and tribal managers have coordinated to take immediate steps to protect the viable portion of the reef. This past summer, stamp sand dredging occurred in Grand Traverse Harbor and the adjacent beach area. In addition, funds have been committed to dredge a trench, or trough, that has protected the reef, but which has now filled up with stamp sands. This dredging is estimated to provide 3-5 years of protection for the reef, but the trough will refill and stamp sands will again encroach upon the reef. A Task Force led by federal, state, tribal agencies is now being established to explore long term solutions to the problem and identify sources of funding. The Task Force will include other stakeholders as well, including Michigan Technological University. There is no one partner that can accomplish this work alone, commitment and cooperation by all affected governments and parties will be necessary.

¹¹ See, Protocol Amending the Agreement Between Canada and the United States of America on Great Lakes Water Quality, 1978, as Amended on October 16, 1983 and on November 18, 1987, at <http://www.ijc.org/en /Great Lakes Water Quality>

¹² Lake Superior Lakewide Action and Management Plan, https://www.epa.gov/sites/production/files/2016-10/documents/lake_superior_lamp_2015-2019.pdf. Page 8.

There is an important role for Congress here as well. Congress can:

- support the work of the intergovernmental Buffalo Reef Task Force as it develops appropriate, locally driven long term solutions that will have benefits at a basin-wide scale;
- support funding at no less than \$300 million for the Great Lakes Restoration Initiative (GLRI), which is doing so much to enable the protection and restoration of the Great Lakes;
- support the appropriate and legitimate role of tribes to be “at the table” as full partners in the development and implementation of solutions that will both restore the reef and protect it from further damage. The GLRI has provided an important source of funding to KBIC, other Great Lakes tribes, and to GLIFWC so that they have the capacity to carry out these roles; and
- recognize that the United States’ treaty obligations require the restoration of this reef. Habitat destruction creates a backdoor abrogation of the treaties between the United States and tribes; treaty reserved rights are diminished when the resources that are the subject of those rights are destroyed.

Lake Superior is an invaluable resource. The restoration and protection of Buffalo Reef will have long-term benefits for tribes and the continuation of their lifeways, as well as provide broad benefits to the region and all the communities that value the greatest of the Great Lakes, gitchi-gami. Finally, I respectfully invite the Chair, Ranking Member, and any or all members of this Subcommittee to tour Buffalo Reef and to visit the L’Anse reservation, the oldest and largest reservation in Michigan.