SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS
COURT OF APPEALS

Andrew Schwartz, John Schwartz, Kevin Schwartz v. The People of the Sault Ste. Marie Tribe of Chippewa Indians

APP-10-01/02/03

Decided and Released April 12, 2011

BEFORE: HARPER, KRONK, JUMP, JUSTIN, and NERTOLI Appellate Judges.

ORDER AND OPINION

Kronk, Chief Appellate Judge, who is joined by Appellate Judges Harper, Jump, Justin and Appellate Nertoli. Judges Harper and Justin both provide concurrences below.

This is a consolidated appeal of matters C-10-106 through C-10-210 from the final judgment rendered by Judge Fabry in this matter below. Appellants are Andrew Schwartz, John Schwartz, and Kevin Schwartz. On September 16, 2010, Appellants submitted Notices of Appeal requesting that the Tribal Court's "findings of responsibility, costs, fines, restitution, forfeiture and loss of fishing license be set aside." For the reasons articulated below, this Court reverses in part and upholds in part the Tribal Court's final judgment in these matters.

DISCUSSION

I. Factual and Procedural Background

Facts

This case arises from allegations that Appellants violated the subsistence fishing provisions of the Chippewa Ottawa Regulatory Authority (CORA). The investigation against Appellants was first initiated when a Michigan Department of Natural Resources and Environment (DNRE) officer, Corporal Shannon Van Patton, noticed that wholesale fish records showed that two tribal fishermen, Wade Jensen and Troy Jensen, were selling "a very large amount of Walleye during the winter months, January, February, and March." Tribal Court Transcript (TCT), 45 (July 26, 2010). Relying on catch reports required to be filed by commercial fishermen with the CORA, the Jensen brothers fished in grid 409, and that, within that grid, fishermen may only keep 15 pounds of Walleye. *Id.* at 46. Based on the records available to her, the results of a 2006 investigation, complaints received by the Michigan DNRE, and the large walleye sales, she focused her investigation on Big Bay De Noc fisheries, and in particular a fish wholesaler located in Garden, MI and Little Bay De Noc. *Id.* at 55.

Corporal Van Patton received 13 wholesale fish purchase records for January 2009 for Big Bay De Noc Fisheries and one from International Foods (otherwise known as Dan's Dorr County Fish). *Id.* at 75. The records all indicated sales of walleye and no other fish. All the sales were made by the Jensens. *Id.* Based on those records, approximately 15,000 pounds of walleye were sold in January 2009. *Id.* at 76.

For February 2009, Wade Jensen submitted a Catch Report indicating that he had not been fishing. *See* Plaintiff's Exhibit No. 9. Troy Jensen filed a Catch Report for the same period. He reported that he had caught 240 pounds of fish and the species was not identified. *See* Plaintiff's Exhibit 10. It appeared that there was a discrepancy between the Catch Reports submitted by the Jensen brothers and the wholesale fish purchase records.

Given the discrepancy, Michigan DNRE considered that the additional walleye being sold may have been obtained by subsistence fisher people. Therefore, in 2009, Corporal Van Patton and other Michigan DNRE officers began investigating the subsistence nets on Little Bay De Noc, which is known to have a healthy walleye population and is near the wholesale fisheries that purchases the increased amounts of walleye. Out of the seven nets belonging to tribal subsistence fishermen, three of those found belonged to Appellants. *Id.* at 56. As a result of her investigations, Corporal Van Patton and Officer Reid Roeske began their surveillance on the Appellants' first set of subsistence nets on Little Bay De Noc on February 2, 2009. *Id.* at 79-80. One of the nets being watched was identified with a stake number belonging to Rodney Schwartz. During an interview conducted with Andrew Schwartz by Corporal Van Patten, Andrew Schwartz admitted he had used Rodney Schwartz's subsistence number without his permission. *Id.* at 190. Catch reports filed by Kevin Schwartz, Andrew Schwartz and John Schwartz for January 2009 and February 2009 indicated they had been fishing on Little Bay De Noc using gill nets. *Id.* at 8-13.

Various Michigan DNRE officers continued to watch the activities of Appellants on Little Bay De Noc through February 21, 2009. *Id.* at 110-111. Notably, during this period of surveillance, Michigan DNRE Sgt. Darryl Shann testified that he drove to the Rapid River Cemetery to watch Andrew Schwartz's residence pursuant to a call from Corporal Van Patten at about noon on February 16, 2009. *Id.* at 83. He observed four people moving things that were white in color and that these white items took two hands to lift. *Id.* at 86-87. He testified that he recognized two individuals present on this day, John Halvorson and Kevin Schwartz. *Id.* Furthermore, Sgt. Shann testified that the men he watched that day were wearing "slickers"; "It's what commercial fishermen use when they are dealing with fish and trying to keep their clothes clean." *Id.* at 88.

Officer Larry Desloover testified that he conducted surveillance on the ice on February 20, 2009. He testified he observed four individuals on the ice, and at least one of them was dressed in a slicker. He also described that one individual went into the shanty with a large white bag, which looked like a burlap bag. *Id.* at 121. Officer Desloover also described four snowmobiles with one individual on each, one snowmobile was red and the other three were dark in color. *Id.* at 115. He also testified that the

photographs of the shack and sled taken by Corporal Van Patten of the items she discovered on February 24th, discussed below, looked like the sleigh and shack he observed on the ice on February 20, 2009. During his surveillance on February 20th and February 23rd, Officer Desloover witnessed activity that involved four men spudding a hole by the subsistence nets in question, moving the shanty over the hole, and pulling up the nets. *Id.* at 130-131. Although he could not identify the four men, it appeared to be the same men each time, and they appeared to use the same snowmobiles, shanty and sled.

Starting the night of February 21, 2009 and ending in the early morning hours of February 22, 2009, Michigan DNRE officers pulled two sets of Appellants' nets to insert microchips in the fish found in the nets in order to track the fish to the wholesale purchaser. *Id.* at 110-119. During this process, it was discovered that the nets were ganged together. *Id.* at 115, 121. Andrew Schwartz admitted that the nets were too close together, stating, "I know my nets are too tight together but they've been like that forever and no one has ever said anything." *Id.* at 190.

The Michigan DNRE officers inserted microchips into the fish. *Id.* at 123-124. Each chip registered a unique identifying number that registered on a scanner. Each chip came with a dog tag and Corporal Van Patton collected the tag for each chip. *Id.* at 125-126. Twenty fish were micro-chipped. *Id.* at 126. Later, when the fish were seized, the microchip in each was scanned to determine that the identifiable number of the microchip matched the number of the dog tag retained by Corporal Van Patten. *Id.* at 127-128.

Many Michigan DNRE officers were involved in the surveillance of Appellants on February 23, 2009. *Id.* at 132. Lt. Wade Hamilton testified that everyone was staged in order to maintain surveillance of Appellants. TCT, 61 (July 27, 2010). He also testified that he observed four snowmobiles and a lifting shack come out on the ice from the north to the south. He could see activity and four individuals where Appellants' nets were marked. *Id.* at 62-63. Michigan DNRE Officer Craig Milkowski testified that he conducted surveillance the morning following the microchipping, watching both sets of nets from shore. He saw four people on four snowmobiles enter on to the ice and drive to the net stakes. One of the snowmobiles was pulling a sled and one was pulling an ice shanty that was white or silver in color. One individual spudded a hole, the ice shanty was pulled over it, another hole was spudded, a line was attached to a net and a net was pulled out. The four individuals finished with the nets and drove to shore. *Id.* at 160-163. Vehicles matching the description of those owned by Appellants Kevin Schwartz and John Schwartz were later seen on roads near the area where the snowmobiles entered the ice. *Id.* at 190-191.

The next day, Corporal Van Patten and officers Terry Short and Larry Desloover went to Big Bay De Noc Fisheries to see if the microchipped fish were there. The available fish were scanned and microchips were located in the scanned fish. *Id.* at 136. As a result, 265 pounds of walleye were seized by Corporal Van Patten as well as 10 wholesale receipt records for February 2009 for Wade Jensen. *Id.* at 138.

James Hermes testified that he bought fish regularly from Wade Jensen and Troy Jensen. *Id.* at 30. He testified that the Jensen brothers had access to his cooler because they had keys and that they were only two of approximately five fishermen with keys. *Id.* at 31. He indicated that wholesale reports, receipts and copies of checks he had written indicated purchases of walleye from Wade Jensen and Troy Jensen through February 2009. *Id.* at 34, 42. Furthermore, Mr. Hermes testified that, other than a Canadian supplier, he only bought walleye from the Jensens during the winter months. *Id.* at 50, 52. He explained that "there were no other significant amounts from any other fishermen." *Id.* at 56. Mr. Hermes testified that the fish he purchased in February 2009 were delivered by the Jensens in white grain bags and that the Jensens were the only ones who used the white grain bags. *Id.* at 51, 52, 54.

Twenty fish were tagged with microchips and all 20 of the microchipped fish were recovered from the wholesaler. *Id.* at 142. Except for the fish heads that were saved for evidence, the rest of the fish were sold to a wholesaler and the proceeds were turned over to the Tribe. *Id.* at 146.

At the same time as the fish seizure, the four nets and corresponding stakes were seized from the ice on Little Bay De Noc by Michigan DNRE officers. *Id.* at 153-157. The seized nets were turned over to Sault Ste. Marie Tribe of Chippewa Indians Law Enforcement. *Id.* at 158.

During the follow-up investigation on February 24, 2009, Corporal Van Patten found three snowmobiles and a black plastic sleigh, the kind the watched ice fishermen had used to haul equipment at the location where Appellants were gaining access to the ice. *Id.* at 192. She also saw a white lifting shack with a red snowmobile in front of it. The white shack had the name Andrew Schwartz written on it. All of the snowmobiles were registered to Andrew Schwartz. *Id.* at 193-194. Corporal Van Patten also saw white grain bags that were partially covered by the black plastic sleigh. *Id.* at 195.

Based on the foregoing evidence, Appellants were charged with numerous violations of CORA, as it was concluded that they violated the subsistence fishing regulations by selling fish taken under subsistence fishing licenses.

Procedural Background

Originally in this case, 105 citations were issued to Andrew Schwartz, John Schwartz and Kevin Schwartz (hereinafter Appellants) by Michigan DNRE Corporal Shannon Van Patton and filed on March 17, 2010. The citations were for violations allegedly committed during the Appellants' fishing activity in Little Bay De Noc in January and February 2009. The citations were issued pursuant to the Consent Decree entered in the United States District Court for the Western District of Michigan, *United States of America, 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 v. State of Michigan, et al.*, Case No. 2:CV 26 by the Hon. Richard Alan Enslen (hereinafter Consent Decree). The

citations alleged the Appellants were in violation of the Chippewa Ottawa Resource Authority Commercial, Subsistence, and Recreational Fishing Regulations for the 1836 Treaty Ceded Waters of Lake Superior, Huron and Michigan (hereinafter CORA Regulations).

The citations alleged numerous violations of the CORA Regulations, including: 1) Section XIX (d) ("Subsistence fishers shall be limited to one hundred (100) pounds round weight aggregate catch of all species in possession."); Section XIX (e) ("Subsistence fishers shall not sell or otherwise exchange for value any of the catch."); Section XIX (f) ("Subsistence gill netting is limited to one (1) net of three hundred (300) feet or less per vessel per day, except that in the St. Mary's River, as described in Section VIII(a), a single gill net shall not exceed one hundred (100) feet in length. The tying together of single gill nets to form a gang of nets is prohibited."); XIX (m) ("No subsistence fisher shall set a gill net within fifty (50) feet of another gill net."); XXI (b) ("No member of a Tribe may allow a person who does not possess a valid fishing license as required by subsection (a) of this section to aid or assist him or her while engaged in any fishing activity authorized by the Code; provided, however, that a validly licensed member of a Tribe may employ …."); and XXII (b) ("Each person to whom a subsistence fishing license has been issued shall file with his or her Tribe an accurate report of his or her harvest for each calendar month not later than the tenth (10^{th}) day of the following month."). The Appellants each filed pleas of not responsible to all of the citations through their attorneys on Friday, March 26, 2010.

No pre-trial motions were filed and the case proceeded to trial on July 26, 27, and August 13, 2010. The Tribal Court delivered an oral opinion on August 20, 2010 and filed Judgment Orders regarding each Appellant on August 24, 2010. The Tribal Court found the Appellants responsible for 79 of the 105 citations. In addition, the Tribal Court filed Orders Revoking Subsistence Fishing Licenses for a lifetime for each Appellant on August 23, 2010. Furthermore, the Tribal Court issued an Order for Seizure and Forfeiture on August 20, 2010 for the forfeit and seizure of four gill nets and four snowmobiles utilized in the illegal fishing operations.

The Tribal Court issued an order staying the forfeiture of the snowmobiles and nets on August 27, 2010 and an Order staying the collection of fines, costs, and restitution on September 2, 2010 in response to motions filed by the Appellants. The Appellants filed two motions, one on September 14, 2010 and the other on October 15, 2010, objecting to the judgments and requesting clarification. The Tribal Court noticed each for hearing. A hearing was held on the first motion on October 8, 2010 and a hearing was held on the section motion on November 30, 3010. Appellants did not request the transcript from the October 8, 2010 hearing, and it was therefore not part of the record in this appeal.

Appellants filed a Notice of Appeal with this Court on September 16, 2010. Appellants are not appealing the Tribal Court's judgment regarding the citations issued for ganging nets in contravention of CORA and Tribal Code. They are also not appealing the citations related to the use of Rodney Schwartz's subsistence license. Finally,

Appellants do not appeal the forfeiture of their nets. Accordingly, this Court will consider the following questions regarding Appellants' alleged failure to comply with CORA and Tribal Code on appeal: 1) whether Appellants illegally sold fish obtained through their subsistence fishing licenses; 2) whether Appellants illegally participated in subsistence fishing with a non-Native individual; 3) whether Appellants illegally possessed more than 100 pounds of fish in any one day; 4) whether Appellants violated the regulations regarding their February 2009 Catch Reports; 5) whether forfeiture and fine for the fish was appropriate; 6) whether forfeiture of Appellants' snowmobiles was appropriate; and 7) whether a lifetime suspension of Appellants' subsistence fishing rights was appropriate.

We will address each of these issues on appeal below.

II. Jurisdiction and Standard of Review

This Court has exclusive jurisdiction in this matter, as it is reviewing the decision of the Tribal Court. Tribal Code Section 82.109. Tribal Code Section 82.124 establishes the standard of review applicable to proceedings before this Court. In relevant part, Tribal Code Section 82.124 states:

> In deciding an appeal, the Court of Appeals shall apply the following standards:
> (1) A finding of fact by a judge shall be sustained unless clearly erroneous ... (5) A conclusion of law shall be reviewed by the Court of Appeals without deference to the Tribal Court's determination, ie, review is de novo ... (7) A matter which is a mixture of law and fact is reviewed by the standard applicable to each element; (8) A matter which is within the discretion of the Tribal Court shall be sustained if it is reflected in the record that the Tribal Court exercised its discretionary authority; applied the appropriate legal standard to the facts, and did not abuse its discretion. A matter committed to the discretion of the Tribal Court shall not be subject to the substituted judgment of the Court of Appeals; (9) A sentence and the imposition of fine, forfeiture, or other penalty, excluding the assessment of damages shall be reviewed as a discretionary determination of the Tribal Court.

In matters involving a finding of fact by the Tribal Court, this Court will review to determine whether the trial court's determination was "clearly erroneous." Tribal Code Section 82.124(1). "In applying the clearly erroneous standard of review, the Court will determine whether it is left with a 'definite and firm conviction' that the trial court made an error in its findings of fact." *Rex Smith v. Sault Ste. Marie Tribe of Chippewa Indians*, APP-08-02, 3 (August 4, 2008).

III. Illegal Sale of Fish Obtained Through a Subsistence Fishing License

The Tribal Court's finding the Appellants violated CORA, Part Five, Section XIX (e) is a finding of fact and conclusion of law. Accordingly, because it is a "mixture of law and fact" this Court shall review the Tribal Court's conclusion by the "standard applicable to each element". Tribal Code Section 82.124(7). In concluding that Appellants violated CORA, Part Five, Section XIX (e) the Tribal Court must have first concluded that Appellants had each sold or exchanged for value some portion of their subsistence catch. Accordingly, this finding of fact "shall be sustained unless clearly erroneous". Tribal Code Section 82.124(1). "In applying the clearly erroneous standard of review, the Court will determine whether it is left with a 'definite and firm conviction' that the trial court made an error in its findings of fact." *Rex Smith v. Sault Ste. Marie Tribe of Chippewa Indians*, APP-08-02, 3 (August 4, 2008).

Appellants were charged and found responsible for sales of fish on February 3, 4, 17, 18, 20, and 23, 2009. As explained below, the facts presented at trial only support the conclusion that sales occurred on February 17, 20 and 23, 2009. All other factual conclusions were clearly erroneous. For the alleged sales that occurred on February 3rd and 4th, there was no evidence presented to connect Appellants to the alleged sales. Appellee argues that such a connection could be inferred because "[t]here were fresh tracks [at the net stakes being watched], it appeared the nets had been pulled recently, there was fresh blood and snowmobile tracks." Amended Appellee's Brief of Appeal, *The People of the Sault Ste. Marie Tribe of Chippewa Indians v. Andrew John Schwartz, John Andrew Schwartz and Kevin George Schwartz*, APP-10-01-02-03, 16 (November 17, 2010) [hereinafter Appellee Amended Brief]. Additionally, vehicles owned by Appellants were seen in the general vicinity on those days, it appeared that a hole in the ice had recently been dug out and there was tobacco spit present. Appellee Amended Brief at 16-17. While all of this suggests a human presence on the ice those days, there is nothing to directly tie Appellants to the sale of 848 pounds of walleye on February 3, 2009 and/or the sale of 926 pounds of walleye on February 4, 2009. Given the Tribal Court concluded Appellants were responsible for the sale of 1,774 pounds of walleye during this two day period and they were supposedly under consistent surveillance by the Michigan DNRE during that time, it is troubling that the Appellants were never seen engaged in fishing-related activities during this two day period. Accordingly, this Court is left with the definite and firm conviction that the Tribal Court erred in finding Appellants responsible for sales on February 3 and 4, 2009, and such conclusion was clearly erroneous.

This Court has struggled with the Tribal Court's conclusion that Appellants were responsible for the sale of walleye that occurred on February 18, 2009. Admittedly, this sale follows closely on the heels of the February 17, 2009 sale, for which this Court sustains the Tribal Court's conclusion that Appellants participated in a sale of fish acquired under their subsistence licenses. However, it was the Tribal Court's conclusion that Appellants were responsible for the sale of 3,146 pounds of walleye on February 18, 2009. This amount far exceeds any other amount for which Appellants were supposedly

responsible. Moreover, as explained by Appellants' counsel on January 20, 2011 during oral argument before this Court, Appellants were allegedly under surveillance for approximately 12 hours on February 18, 2009 by Michigan DNRE. Yet, Michigan DNRE failed to witness Appellants directly participating in fishing on February 18, 2009. This Court therefore concludes that it would have been impossible for Appellants to obtain 3,146 pounds of walleye within the 12 hour period of time they were not under surveillance by the Michigan DNRE. This Court is therefore of the definite and firm conviction that the Tribal Court's finding of fact to the contrary regarding sales on February 18, 2009 is therefore in clear error.

Conversely, with regard to the sales made on February 17, 20 and 23, 2009, there was evidence directly connecting Appellants to the actual sales. Although the evidence presented at trial was largely circumstantial, this Court believes that there was enough presented to demonstrate that Appellants exchanged fishing caught using their subsistence fishing licenses for value. In particular, evidence was presented a trial connecting Appellants to the Jensen brothers, tribal members with commercial fishing licenses. Based on this evidence, it was reasonable for the Tribal Court to conclude that Appellants exchanged the fish taken under their subsistence fishing license in exchange for something of value from the Jensen Brothers. Moreover, on February 16, 2009, the day before the February 17, 2009 sale, there apparently was extensive activity on the ice. Appellants' vehicles were located on the ice near the nets in question, as well as at John Halverson's residence. TCT at 96 (July 26, 2010). Moreover, the white ice shack that allegedly belongs to Andrew Schwartz was seen on the ice, and an individual was seen near the ice shack. *Id.* Appellant Kevin Schwartz was seen loading something heavy (that took two hands to load) and was white into the van owned by Andrew Schwartz. TCT at 87 (July 27, 2010). Given the extensive activity on February 16, 2009, the day before the February 17, 2009 sale, the Tribal Court's finding of fact that Appellants engaged in the sale of 625 pounds of walleye on February 17, 2009 was not clearly erroneous.

On February 20, 2009, Andrew Schwartz's truck was seen at John Halvorson's residence. Appellee Amended Brief at 19. Troy Jensen, a tribal commercial fisherman allegedly serving as a "middleman" to sell the Appellants' fish to the wholesale fisheries, was seen entering Halvorson's residence the same time Andrew Schwartz's truck was there. *Id.* Mr. Jensen then left Mr. Halvorson's residence and went to the wholesale fishery, Big Bay De Noc Fisheries. *Id.* It can therefore be said that activity was witnessed that directly connected Appellants to the sale of the fish. The Tribal Court's finding of fact that a sale of 776 pounds of walleye occurred on February 20, 2009 was not in clear error.

Starting the night of February 21, 2009 and into the early morning of February 22, 2009, the Michigan DNR engaged in activities that led to 20 walleye taken from Appellants nets being microchipped. TCT at 118-123 (July 26, 2010). This process is discussed above in detail, which will not be repeated here. "On February 23, 2009, Desloover saw four snowmobiles on the ice and four individuals actively involved in fishing on the ice (TT 7/27/10, pg 135). Van Patten then saw Appellant Andrew and

John Schwartz's trucks coming northbound on 513. Each vehicle had two people in them. They headed toward Rapid River (TT 7/26/10, pg 131)." *Andrew Schwartz John Schwartz Kevin Schwartz v. The People of the Sault Ste Marie Tribe of Chippewa Indians*, Appellants Brief, APP-10-01/02/03, 8 (December 29, 2010). As detailed above, the microchipped fish were eventually discovered within the possession of the wholesaler. Accordingly, there is ample factual evidence to support the Tribal Court's conclusion that an illegal sale occurred on February 23, 2009. The Tribal Court's finding of fact that a sale of 265 pounds of walleye occurred on February 23, 2009 was therefore not in clear error.

Based on the Tribal Court's findings of facts regarding Appellants involvement in the sales of walleye on February 3, 4, 17, 18, 20 and 23, 2009, the Tribal Court made conclusions of law that Appellants had violated CORA, Part Five, Section XIX (e) as a result of these sales. This Court will apply a de novo standard of review to conclusions of law. Tribal Code Section 82.124(5). Given the Tribal Court clearly erred in concluding that sales of fish by the Appellants occurred on February 3, 4, and 18, 2009, the complimentary conclusions of law that these alleged sales violated CORA cannot be sustained, and, therefore, the Tribal Court is overruled in part as to the sales on February 3, 4, and 18, 2009. However, as explained above, the Tribal Court's ruling with regard to Appellants' sales on February 17, 20 and 23, 2009 are sustained, and, therefore, so too is the Tribal Court's conclusions of law regarding these sales. This Court therefore sustains the Tribal Court's finding that Appellants violated CORA, Part Five, Section XIX (e) for sales of walleye on February 17 (625 pounds), 20 (776 pounds), and 23 (265 pounds). Appellants therefore illegally sold 1,666 pounds of walleye in violation of CORA, Part Five, Section XIX (e).

IV. Illegal Participation by a Non-Licensed Fisherman in Subsistence Fishing

As explained above in Part III, the Tribal Court's conclusion that Appellants violated CORA, Part Six, Section XXI (b) by fishing with a "person who does not possess a valid fishing license as required by subsection (a) of this section [CORA]" required both a finding of fact and conclusion of law. Accordingly, because it is a "mixture of law and fact" this Court shall review the Tribal Court's conclusion by the "standard applicable to each element". Tribal Code Section 82.124(7). This Court will therefore first address whether the Tribal Court's conclusion that Appellants had been aided or assisted in fishing by someone who was not licensed under CORA was in error.

In essence, the Tribal Court's finding of fact in this regard turns on whether John Halvorson, a non-Indian who is therefore ineligible for a subsistence fishing license under CORA, aided or assisted the Appellants while they were engaged in a "fishing activity". CORA, Part Six, Section XXI (b). During oral argument before this Court on January 20, 2011, Appellants' counsel argued that there was no evidence directly connecting John Halvorson to Appellants' activities. Moreover, Appellants' counsel pointed to the fact that CORA does not make explicit what constitutes as "fishing activity" and, therefore, even if there was direct evidence that John Halverson was

somehow involved in Appellant's fishing activities, it is unclear whether such assistance constitutes "fishing activities". This Court agrees. Therefore, given the lack of direct evidence tying John Halvorson to Appellants' activities, this Court is of the definite and firm conviction that the Tribal Court erred in finding that such a connection existed. Accordingly, given the Tribal Court's finding of fact was in error on this point and the ambiguity in CORA regarding what constitutes "fishing activities", this Court overturns the Tribal Court's conclusion of law that Appellants violated CORA, Part six, Section XXI (b).

V. Illegal Possession of More than 100 Pounds of Fish in Any One Day

Again, the Tribal Court's finding that Appellants violated CORA, Part Five, Section XIX (d) that subsistence fishers shall be limited to one hundred (100) pounds round weight aggregate catch of all species in possession constitutes both a finding of fact and conclusion of law. As explained above, because this finding is a "mixture of law and fact" this Court shall review the Tribal Court's conclusion by the "standard applicable to each element". Tribal Code Section 82.124(7).

As explained in Part III above, this Court has reversed the Tribal Court's determination that Appellants engaged in illegal sales in contravention of CORA, Part Five, Section XIX (e) with regard to alleged sales on February 3, 4, and 18, 2009. Accordingly, in considering whether Appellants violated CORA, Part Five, Section XIX (d), this Court will limit its review to the Tribal Court's finding of illegal sales on February 17, 20, and 23, 2009 given this Court has sustained those findings. On February 17, 2009, Appellants sold 625 pounds of walleye. On February 20, 2009, Appellants sold 776 pounds of walleye. On February 23, 2009, Appellants sold 265 pounds of walleye. It is notable that, as explained above, Appellants do not appeal the Tribal Court's finding that they violated CORA, Part Five, Section XIX (m) by failing to set their nets at least 50 feet apart, or by "ganging up" their nets. Because the nets were ganged and there is no testimony indicating how much fish were found in the nets, the total amount of walleye sold on each of three days cannot be assigned to each Appellant separately. Rather, the total amount sold must be divided by three.

Applying this rationale, it was clear error for the Tribal Court to find that Appellants violated this portion of CORA on February 23, 2009, as the total amount sold on that day amounted to 265 pounds of walleye, or approximately 88.3 pounds of walleye per Appellant. Therefore, Appellants were not individually in possession of more than 100 pounds of fish on February 23, 2009. Conversely, applying the same math, Appellants individually would have been in possession of approximately 208.3 pounds and 258.7 pounds of walleye on February 17, 2009 and February 20, 2009 respectively. Accordingly, on both days, Appellants were individually in possession of more than 100 pounds of walleye. The Tribal Court's findings of fact and conclusions of law regarding Appellants' violation of CORA, Part Five, Section XIX (d) is therefore sustained as to February 17 and 20, 2009.

VI. Compliance with Catch Report Requirements

Each of the Appellants was issued tickets associated with a failure to accurately report their catches on their monthly Catch Reports. Tribal Code Section 20.107(4)(d) provides that "[e]ach subsistence netting permittee is required to report his catch on forms provided by the Tribe, and shall verbally report his catch to a tribal conservation officer upon request." Appellants were accused of failing to accurately report the amount of fish they caught on their February 2009 Catch Reports. As explained above, because this finding is a "mixture of law and fact" this Court shall review the Tribal Court's conclusion by the "standard applicable to each element". Tribal Code Section 82.124(7).

From the bench on August 20, 2010, Judge Fabry issued her initial ruling on whether Appellants had complied with Tribe's Catch Report requirements for the month of February 2009. In relevant part, Judge Fabry decided the following:

> It's quite clear, based on my other finding's, that they did not accurately reflect the amount of fish that you had caught with subsistence nets that month. Therefore, I find you [Appellants] each responsible for those tickets issued on that day.
>
> As to the fines and costs I have associated with each type of ticket, as to the catch reports, I am issuing you each a $50.00 fine and $25.00 in Court costs.

TCT, 13 (August 20, 2010).

As explained above, this Court agrees with Judge Fabry that the Appellants failed to comply with the requirements of both the relevant Tribal Code and CORA provisions. In particular, Appellants possessed more fish per day than was legally allowed and exchanged said fish for value. Moreover, there is nothing in the record before this Court to support that Appellants correctly identified these violations on their February 2009 Catch Reports. Accordingly, this Court concludes that Judge Fabry's factual finding that Appellants failed to comply with the applicable Catch Reports is not clearly erroneous, but, rather, is a reasonable conclusion given the foregoing analysis. Given Judge Fabry's conclusion regarding Appellants failure to adequately report on the February 2009 Catch Reports, her decision to institute a fine and Court costs against the Appellants is also sustained as it too is reasonable.

VII. Appropriateness of Forfeiture of and Fine Related to Illegal Sale of Fish

Appellants challenge Judge Fabry's August 24, 2010 written decision, because that written decision included a finding that Appellants must pay $15,214.60 in restitution to the Tribal Court pursuant to CORA Section XXVI(d). Appellants have previously objected to being held responsible for restitution, because:

> First, the Court did not articulate any basis for the amount of restitution ordered in its oral opinion. Indeed, the Court never mentioned restitution at all in its opinion. The restitution paragraph simply appeared, without notice and without reference to any facts in the record, in the final Judgment. The Defendants have not had an opportunity to hear and challenge the proofs supporting the restitution order and the order, therefore, is invalid.

People of the Sault Ste. Marie Tribe of Chippewa Indians v. Andrew, John and Kevin Schwartz, Objection to Judgement, C-10-106 through C-10-210, 2 (September 9, 2010). Appellants went on to explain that "C.O.R.A. Fishing Regulations § XXVI(d) does not provide authority for the award of restitution." *Id.* Appellants challenge to Judge Fabry's order that they pay restitution to the tribal court in the amount of $15,214.60 therefore appears to be based on the argument that such an award is invalid given it was not included in Judge Fabry's August 20, 2010 oral decision. Second, Appellants assert that an award for restitution is inappropriate under the applicable CORA regulations. Judge Fabry's restitution award constitutes a conclusion of law, and, therefore, review is de novo and without deference to the Tribal Court.

Appellants assertion that Judge Fabry's restitution order should be overturned because it was not first contained in her August 20, 2010 oral order is without merit. At no point in the record available to this Court do Appellants explain why such a variation between the August 20, 2010 oral decision and August 24, 2010 written decision injured them. To the contrary, given the very short time frame between the date the oral decision was rendered and the date of the written decision, it would seem unlikely that Appellants would have been injured. Moreover, Appellants fail to provide any analysis explaining why they are entitled to the totality of the judgment, including fine amounts at the time oral judgment is rendered.

Although Appellants never explicitly made the argument, it may be inferred that Appellants are asserting injury because of Judge Fabry's alleged failure to provide notice and the asserted fact that the restitution judgment was made "without reference to any facts in the record." With regard to the first point, this Court cannot fathom how the August 24, 2010 written order did not constitute adequate notice. Again, Appellants have failed to explain how they were either injured by the four day delay in "revealing" the restitution judgment between the August 20, 2010 oral decision and August 24, 2010 written decision. Furthermore, Appellants fail to provide any analysis, either in written briefs or at oral argument, of how this alleged due process violation injured them.

Appellants' assertion that Judge Fabry's decision on this point should be overturned because there are allegedly no facts to support the decision is also without merit. As discussed extensively above, the record in this case is replete with facts to support that Appellants violated both Tribal Code and CORA by taking fish for commercial purposes in contravention of their subsistence licenses. In fact, Judge Fabry took time and made an extensive effort to detail her relevant findings of fact in her

August 20, 2010 oral decision. Implicitly, the August 24, 2010 written decision incorporates the findings of fact from her August 20, 2010 oral decision, and, therefore, her restitution order is supported by ample facts from the record.

Appellants are correct, however, in their assertion that neither CORA nor the relevant Tribal Code provisions explicitly reference the ability of the Tribal Court to order restitution. However, during oral argument in front of this Court on January 20, 2011, it became clear that Judge Fabry likely mistakenly used the term "restitution" instead of "forfeiture", as the CORA and relevant Tribal Code provisions do clearly allow for forfeiture. Given the fish that were illegally taken were no longer available to be forfeited to the Tribal Court, it appears Judge Fabry merely calculated the economic value of the illegally taken fish and fined Appellants accordingly. This Court therefore concludes that Judge Fabry's $15,214.60 fine in restitution was misnamed, and actually the fine was for the economic value of the forfeited fish illegally taken.

A fine for the economic value of fish illegally taken in contravention of CORA and the Tribal Code is consistent with this Court's precedence. In *Wade Jensen v. The People of the Sault Tribe of Chippewa Indians*, this Court in upholding CORA violations against commercial fishermen explained that,

> [a]t the time of the tribal court's entry of judgment, the illegally caught fish were no longer available for actual forfeiture, as the catch had been sold by Appellant for $67,577.40. Accordingly, the tribal court's fine equals the economic benefit to the Appellant from fish sold in contravention of the CORA Regulations.

APP-07-03, 1 (August 4, 2008). Moreover, CORA XXVI(e) provides that "[a]ll fish, eggs, or parts of fish taken, possessed, sold, purchased, offered for sale or purchase, or transported, delivered, received, carried, shipped, exported, or imported contrary to these [CORA] Regulations shall be subject to seizure and shall be forfeited to the appropriate tribal court." Accordingly, CORA specifically authorizes forfeiture of fish illegally taken, and the economic value of the fish is appropriate where the fish themselves are no longer available for forfeiture.

Based on past precedent, Judge Fabry acted appropriately in holding Appellants responsible for the economic value of the fish taken in contravention of CORA and the applicable Tribal Code provisions. Accordingly, this Court concludes that Appellants failed to explain how they were injured by Judge Fabry's restitution judgment and, although Judge Fabry may have inappropriately used the term "restitution" instead of "forfeiture", past precedent and both the applicable Tribal Code and CORA provisions support her judgment against Appellants for the economic value of the forfeited fish.

As explained above, however, this Court only finds enough evidence to support the conclusion that sales of fish occurred on February 17, 20, and 23, 2009, as all other conclusions related to the sale of fish were clearly erroneous. On February 17, 2009,

Appellants illegally sold 625 pounds of fish. On February 20, 2009, Appellants illegally sold 776 pounds of fish. On February 23, 2009, Appellants illegally sold 265 pounds of fish. Therefore, in total, Appellants are only responsible for the illegal sale of 1,666 pounds of fish. In her August 20, 2010 oral decision, Judge Fabry explained that she found the Appellants responsible for illegal sales of fish on February 3, 2009 (1,848 pounds of fish), February 4, 2009 (926 pounds of fish), and February 18, 2009 (3,146 pounds of fish), in addition to finding Appellants responsible for illegal sales in the amount and on the date described above. In total, Judge Fabry found Appellants responsible for illegally selling 7,586 pounds of fish over the course of the six days discussed above. The fine for the economic value of the fish was $15,214.60. Although it is not explicit in either her August 20, 2010 oral decision or August 24, 2010, it may be assumed that Judge Fabry reached the $15,214.60 amount by multiplying 7,586 by $2.01, or the economic value of each fish. Accordingly, based on this logic and the fact that this Court has only found Appellants responsible for the illegal sale of 1,666 pounds of fish, Judge Fabry's $15,214.60 fine for the economic value of the fish constitutes too large of a fine and is therefore modified to $3,348.66 (1,666 pounds of fish multiplied by $2.01, which constitutes the economic value of each fish). Appellants therefore are fined $3,348.66 for the economic value of the fish illegally sold, as it is impossible to forfeit the illegally sold fish at this time.

VIII. Appropriateness of Forfeiture of Snowmobiles

In both her written and oral orders issued on August 20, 2010, the Tribal Court ordered that four gill nets, previously seized from Little Bay de Noc and marked with identifiers ST 1084, ST 1085, ST 1086 and ST 1214, and four snowmobiles be forfeited from Appellants. TCT at 14 (August 20, 2010); *People of the Sault Ste. Marie Tribe of Chippewa Indians v. Andrew John Schwartz, John Kenneth Schwartz, Kevin George Schwartz*, Order for Seizure and Forfeit, C-10-106-210 (August 20, 2010). In rendering her oral decision in the matter, Judge Fabry explained that the four snowmobiles were "used as instrumentalities of these offenses." TCT at 14 (August 20, 2010). At oral argument before this Court on January 20, 2011, Appellants asserted that forfeiture of the four snowmobiles was inappropriate. Notably, Appellants do not appeal forfeiture of the four gill nets. The Tribal Court's decision to penalize Appellants by forfeiting their snowmobiles was done at the discretion of the Tribal Court. Tribal Code Section 82.124(9) ("A sentence and the imposition of fine, forfeiture, or other penalty, excluding the assessment of damages, shall be reviewed as a discretionary determination of the Tribal Court."). Accordingly, this Court will only substitute its judgment for that of the Tribal Court if this Court determines that the Tribal Court abused its discretion. Tribal Code Section 82.124(8). This Court will therefore consider whether the Tribal Court abused its discretion in forfeiting the snowmobiles at issue.

At the January 20, 2011 oral argument before this Court, Appellants made two primary arguments as to why the Tribal Court erred in forfeiting the four snowmobiles. First, Appellants asserted that the Tribal Court exceeded its authority in ordering

forfeiture, and that the power of courts in general should be "tempered". Second, Appellants argued that there was no correlation between the offense committed and forfeiture of the snowmobiles.

With regard to Appellants' first argument, that the Tribal Court exceeded its authority in forfeiting the snowmobiles, this Court will first consider whether the Tribal Court had the authority to forfeit the snowmobiles. Tribal Code Section 20.110 provides "[f]ishing activity conducted contrary to these rules, or contrary to the terms of any license or permit issued by the Tribe, shall constitute a violation of these rules. Violations shall be subject to the penalties provided for in the rules of the Chippewa/Ottawa Treaty Fishery Management Authority." Accordingly, the Tribal Court was limited to levying penalties provided under the relevant CORA regulations. CORA Section XXVI(e) provides:

> All traps, nets and other equipment, vessels, **snowmobiles**, vehicles, and other means of transportation used to 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 fish in violation of these Regulations **shall be subject to seizure and may be forfeited** by the appropriate tribal court. (emphasis added).

Accordingly, CORA Section XXVI(e) specifically empowers tribal courts to forfeit snowmobiles used to violate the CORA and related tribal fishing regulations. It therefore appears clear that the Tribal Court through Tribal Code Section 20.110, which incorporates CORA Section XXVI(e), had the authority to forfeit the snowmobiles in question, as their use contributed to violations of the Tribal Code and CORA.[1]

It is therefore clear that the Tribal Court had the authority to forfeit the snowmobiles under CORA Section XXVI(e). The question then becomes whether the Tribal Court exceeded its forfeiture authority in this case, as Appellants asserted at oral argument. CORA Section XXVI(e) grants the applicable tribal court authority to forfeit vehicles generally, in addition to traps, nets, vessels, equipment, snowmobiles, and other means of transportation. It would have therefore been within the Tribal Court's authority to forfeit the vehicles used, in particular the blue van and maroon trucks owned by Appellants that are mentioned extensively throughout the record in this case, to illegally sell the fish at issue. Despite this authority to forfeit several of Appellants' vehicles, the Tribal Court declined to do so, limiting forfeiture to the four gill nets and four snowmobiles directly used in commission of the illegal acts. It therefore appears that the Tribal Court tempered its own broad authority under the applicable CORA regulations and acted in a reasonable manner.

Second, Appellants argued that there was no correlation between the penalty for the illegal activities, forfeiture of the snowmobiles, and the illegal activity, illegal sales of fish.

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[1] Notably, in her August 20, 2010 oral decision, Judge Fabry made several factual findings specific to the use of the snowmobiles in question. For example, Judge Fabry specifically discusses the use of the four snowmobiles on February 20, 2009 ultimately led to the illegal sale of fish on the same day. TCT at 12 (August 20, 2010). As discussed at length above, this Court sustains the Tribal Court's holding that illegal sales of fish occurred on February 17, 20 and 23, 2009.

Based on the record in this case, however, it appears that the snowmobiles played a crucial role in obtaining the fish that were illegally sold. The snowmobiles were used to transport the Appellants on to the ice and then used to transport the fish back to shore once the fish were harvested. Without the use of the snowmobiles, it therefore seems that Appellants' illegal activities would have been exceptionally difficult if not impossible to complete. Accordingly, it would appear that use of the snowmobiles was intimately connected with the illegal acts and Appellants' assertion that there was no correlation between the forfeiture and illegal acts is without merit.

In sum, forfeiture of the four snowmobiles was within the authority and discretion of the Tribal Court, and the decision to forfeit these snowmobiles was therefore reasonable and is sustained.

IX. Appropriateness of Lifetime Suspension of Subsistence Fishing Rights

Appellants argue that the Tribal Court abused its discretion by ordering a lifetime suspension of Appellants' subsistence fishing rights. In relevant portion, Appellants assert that "[t]his type of overreaching by the Tribal Judge for a non-major offense is an abuse of discretion and should be overturned." *Andrew Schwartz John Schwartz Kevin Schwartz v. The People of the Sault Ste Marie Tribe of Chippewa Indians*, Appellants' Brief, APP-10-01/02/03, 20 (December 29, 2010). The Tribal Court's decision to penalize Appellants by revoking their subsistence fishing licenses for their lifetime was done at the discretion of the Tribal Court. Tribal Code Section 82.124(9) ("A sentence and the imposition of fine, forfeiture, or other penalty, excluding the assessment of damages, shall be reviewed as a discretionary determination of the Tribal Court."). Accordingly, this Court will only substitute its judgment for that of the Tribal Court if this Court determines that the Tribal Court abused its discretion. Tribal Code Section 82.124(8).

It is clear from the record in this case that the Tribal Court was struck by the severity of the offenses committed by Appellants. In notable part, Judge Fabry explained her decision to revoke Appellants' subsistence fishing rights for their lifetime, stating:

> Given the severity of these offenses – an let me just say, I don't know that the (inaudible) effects all the member of the tribe, of the Sault Tribe of the tribes that participated in the Consent Decree and People of the State of Michigan, the effect on the natural resource itself in the area, I don't know that that will ever be determine, whether in the short term or in the long term.
>
> And, so, it is very disheartening to the Court, I believe it's a sad day for the tribe because these actions give the tribe and all of use as tribal members sort of a black eye in the community. So, given all of that, I am Ordering that you subsistence licenses are permanently revoked.

TCT at 14 (August 20, 2010). It therefore appears that Judge Fabry was deeply concerned about how the Appellants' actions had impacted the fishery as well as negatively impacted the Sault Ste. Marie Tribe of Chippewa Indians' reputation and relationship with the other sovereigns involved in upholding the CORA regulations and underlying treaty. These are no small concerns and they are concerns that this Court shares.

In determining whether the Tribal Court abused its discretion in ordering a lifetime revocation of Appellants' fishing rights, it is necessary to first determine whether tribal fishing rights belong to the Tribe or to the individual tribal members. At oral argument on January 20, 2011, this Court requested briefing on the question of who "owns" the property interest in the fishing rights. Both Appellants and Appellee submitted written briefs on this issue and both parties seem to agree that the Tribe owns the property interest in the fishing rights, which the individual tribal members may use at the will of the Tribe. According to Appellants, "[t]ribal rights in property, including hunting and fishing rights, are owned by the tribal entirety and not as a tenancy in common of the individual members." *Andrew Schwartz John Schwartz Kevin Schwartz v. The People of the Sault Ste Marie Tribe of Chippewa Indians*, Appellants' Supplemental Brief, APP-10-01/02/03, 2 (January 31, 2011) (citing *Whitefoot v. United States*, 293 F.2d 658, 661-663 155 CT.CL. 127 (1961) *cert den* 369 US 818 (1962)). Appellee agrees, explaining that "[t]he right to fish is held by the Tribe communally." *The People of the Sault Ste. Marie Tribe of Chippewa Indians v. Andrew John Schwartz, John Andrew Schwartz, Kevin George Schwartz*, Appellee's Supplemental Brief on Appeal, APP-10-01-02-03, 1 (February 7, 2011) (citing *Whitefoot v United States*, 293 F2d 658, 662 (1961); *cert. denied*, 369 U.S. 818 (1962); *United States v Washington*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976); *Skokomish Indian Tribe v United States*, 410 F.3d 506 (9th Circuit, 2005); Cohen's Handbook of Federal Indian Law, 1982 Edition, Ch. 8, Sec. B.2., 449-50. It therefore appears clear that Appellants do not hold a property interest in their subsistence fishing licenses separate and apart from the Tribe.

This, however, does not end the analysis. Even though the Tribe owns the property interest in fishing, the question still remains whether the Tribe Court, through the applicable Tribal Code and CORA regulations, has the authority to remove Appellants' subsistence fishing rights for their lifetimes. Unfortunately, neither the Tribal Code nor CORA regulations specifically address whether a lifetime revocation is an appropriate remedy for violations like those committed by Appellants. Tribal Code Section 20.110 provides that "[v]iolations shall be subject to the penalties provided for in the rules of the Chippewa/Ottawa Treaty Fishery Management Authority." It is therefore necessary to consider the applicable CORA regulations in determining whether the Tribal Court acted within its discretion in ordering a lifetime revocation.

CORA Section XXVI provides guidance on this issue. Although not speaking to a lifetime revocation directly, CORA Section XXVI provides a list of major offenses and indicates in relevant part that an individual should receive **at least** a 30 day suspension for violation of such major offenses. One of the major offenses listed is engaging in commercial

fishing without obtaining the necessary permits and licenses. Although not officially charged, Appellants essentially were engaged in commercial fishing given the scope of their illegal harvest and the fact that they sold the fish. Even if such a comparison were not true, the 30 day license suspension guideline present in CORA Section XXVI is a helpful bench mark in determining whether the Tribal Court's lifetime revocation amounted to an abuse of discretion.

Also helpful to this analysis is this Court's own case law. In *Wade Jensen v. The People of the Sault Tribe of Chippewa Indians*, this Court considered whether a fine of $67,577.40 (for the economic value of the fish taken) and 30 day license suspension was appropriate. APP-07-03 (August 4, 2008). Notably, the party charged with violating CORA in the *Jensen* case was responsible for taking a significantly greater amount of fish than Appellants. Yet, this Court upheld the 30 day suspension of the party's license.

Based on CORA Section XXVI and *Wade Jensen v. The People of the Sault Tribe of Chippewa Indians*, it therefore seems that any license suspension would start at a 30 day suspension, which is far below the lifetime revocation ordered by the Tribal Court. Yet, as previously discussed, this Court is very much aware of the substantial natural resource and political implications of this case that strongly weigh in favor of increasing the "standard" license revocation beyond 30 days. Taken in totality, this Court finds that the Tribal Court abused its discretion by ordering a lifetime revocation of Appellants' subsistence fishing license, as such a revocation far exceeds the general guidelines spelled out in the CORA regulations and under existing tribal case law. However, given the severity of Appellants' actions, a mere 30 day suspension of their subsistence fishing licenses is also inappropriate. Therefore, to ensure that Appellants are unable to fish for an entire season, their subsistence fishing licenses are revoked for one year (365 days) from the date of this decision.

X. Due Process Violation

At oral argument before this Court on January 20, 2011, Appellants made essentially what amounts to an argument that the Tribal Court failed to provide due process to Appellants. Appellants implicitly asserted that their due process rights were violated because their counsel was not present during a hearing to determine the fairness of the Tribal Court's decision on "restitution", the decision itself which was discussed above. The Tribal Court, in its August 20, 2010 oral decision and August 24, 2010 decision, did not consider this matter, as the issue arose after the Tribal Court rendered its decision. Normally, this Court is unable to consider issues not considered by the Tribal Court.[2] However, an exception exists under Tribal Code for matters that may result in a "miscarriage of justice". Tribal Code Section 82.125(1). Moreover, Appellee had notice of this argument, as the argument was raised by Appellants both in their written briefs and at oral argument. Although never made explicit, Appellants essentially assert that failure to address this issue would result in a "miscarriage of justice". Given there is such

[2] In this case, there is certainly a question as to whether the Tribal Court had jurisdiction to consider Appellants' request to reconsider its "restitution" order from its August 24, 2010 written order. On September 16, 2010, Appellants filed Notices of Appeal with this Court. Accordingly, it may have been that this Court had sole jurisdiction over the pending matter after this date. However, this point was not argued before this Court and therefore will not be considered further.

an allegation and Appellee had notice and opportunity to respond to this argument, this Court will consider whether Appellants due process rights were violated when their counsel failed to appear at the hearing to consider Appellants' argument that the Tribal Court's restitution judgment was in error. In helping to understand whether a violation of Appellants' due process occurred, it is helpful to review the facts surrounding this issue.

On September 9, 2009, Appellants submitted an "Objection to Judgment" objecting to the Tribal Court's August 24, 2010 written judgment ordering $15,214.60 in restitution. *People of the Sault Ste. Marie Tribe of Chippewa Indians v. Andrew, John and Kevin Schwartz*, Objection to Judgment, C-10-106 – C-10-210 (September 9, 2010). In response to the "Objection to Judgment", the Tribal Court scheduled a hearing on the Objection for October 8, 2010 in Manistique, Michigan. Although Appellants' counsel had federal sentencing in Marquette, Michigan at 9 am that same day, Appellants' counsel did not submit a motion requesting the hearing be rescheduled. In fact, Appellants' counsel submitted a letter dated October 5, 2010 indicating her intent to be present for the October 8th hearing. Appellants' counsel failed to appear at the October 8, 2010 hearing, apparently because her federal sentencing hearing went late. It is not stated in the record whether Appellants' counsel notified the Tribal Court of the reason for her absence. A Notice of Hearing on Renewed Objection to Judgment was scheduled for November 23, 2010. *People of the Sault Ste. Marie Tribe of Chippewa Indians v. Schwartz, Andrew, John & Kenneth*, Notice of Hearing on Renewed Objection to Judgment, C-10-106 thru C-10-210 (November 1, 2010). On November 4, 2010, Counsel for Appellants submitted a motion requesting a continuance as she had a trial scheduled for November 23rd and 24th. *The People of the Sault Ste. Marie Tribe of Chippewa Indians v. Kevin George Schwartz, Andrew John Schwartz, John Kenneth Schwartz*, Motion for Continuance, C-10-106 thru C-10-210 (November 4, 2010). The Tribal Court accommodated Counsel's request and rescheduled the hearing for November 30, 2010. *People of the Sault Ste. Marie Tribe of Chippewa Indians v. Schwartz, Andrew, John & Kenneth*, Order of Adjournment, C-10-106 thru C-10-210 (November 10, 2010).

Based on the foregoing, it appears clear that Appellants had ample opportunity to raise their concerns regarding the Tribal Court's decision on "restitution". Moreover, there is no assertion that Appellants received inadequate notice of the Tribal Court's hearings. As demonstrated by the stated facts above, the Tribal Court took exceptional steps to accommodate Appellants' counsel. In general, principles of procedural due process require that a party have notice and an opportunity to be heard. There is no question that Appellants received notice. Appellants were given three opportunities to be heard. This Court therefore concludes that no due process violation occurred.

Even if a due process violation had occurred, Appellants fail to explain how they have been negatively impacted by such a violation. Therefore, any procedural violation would constitute harmless error. This conclusion is buttressed by the analysis above explaining that the Tribal Court's incorrect use of the term "restitution" in its August 24, 2010 written decision constituted harmless error.

Furthermore, other considerations only reinforce this Court's conclusion that no due process violation occurred. Generally, this Court is a court of record. As evidenced by the analysis above, review of the Tribal Court record is the basis for the Court's opinion. Other than the factual background detailed above, there is very little in the record before this Court to support Appellants' assertion. At oral argument before this Court on January 20, 2011, there was some discussion between counsel for Appellants and counsel for Appellee regarding whether then-counsel for Appellants had called to notify the Tribal Court of her inability to appear for the hearing scheduled on October 8, 2010. Ultimately, there is nothing in the record regarding this supposed phone call. This Court will not speculate on facts as basic as to whether phone calls were made and if they were made, who made them and when. That is the purpose for a record. If Appellants had wished this Court to consider this matter, Appellants should have requested that record of said phone call and similar factual matters be placed in the official record.

Furthermore, as previously explained, the Tribal Court's "restitution" decision equated to a decision that Appellants were responsible for the economic value of the fish illegally sold. Appellants had ample opportunity to challenge financial figures outlined in the fish wholesaler financial records during trial. If Appellants wished to challenge the economic information presented at trial they had every opportunity. Moreover, Appellants could have taken the witness stand to defend themselves.[3] Accordingly, not only did Appellants have ample notice and opportunity to present their arguments after judgment was rendered, they had the ability to do the same regarding the economic value of the illegally sold fish during trial.

CONCLUSION AND ORDER

Based on the foregoing analysis, the Court therefore reverses in part and upholds in part the decision of the Tribal Court in this matter. Specifically, this Court orders the following:

1) The Tribal Court's findings that Appellants illegally sold fish in contravention of CORA on February 17, 20, and 23, 2009 are sustained.
2) The Tribal Court's findings that Appellants illegally sold fish on other days are reversed.

[3] In supplemental briefing requested by the Court, both Appellants and Appellee addressed the question of whether Appellants failure to take the stand in their defense during the trial could be used against them in a civil matter. By way of comparison, an individual's failure to take the stand in a criminal proceeding may not be held against the individual. In their supplemental brief, Appellants assert that "I [Counsel for Appellants] do not believe that allowing a court to infer responsibility under our circumstances and evidence is allowed." *Andrew Schwartz John Schwartz Kevin Schwartz v. The People of the Sault Ste. Marie Tribe of Chippewa Indians*, Appellants' Supplemental Brief, APP-10-01/02/03 (January 31, 2011). Furthermore, Appellee, in its supplemental brief, explains that "[t]he Trial Court did not consider the failure of the defendants to testify" and that under Tribal Code Section 82.124(8) a matter that is within the discretion of the Tribal Court shall be sustained unless the Tribal Court abused its discretion. Given there is no assertion that the Tribal Court abused its discretion in failing to consider that Appellants did not testify in their defense during trial, this Court is unable to consider the matter further. However, Appellate Judge Justin provides additional thoughts on this point in his concurrence.

3) The Tribal Court's findings that Appellants possessed more than 100 pounds of fish in contravention of CORA on February 17, 2009 and February 20, 2009 is sustained.
4) The Tribal Court's findings that Appellants illegally possessed more than 100 pounds of fish on all other days are reversed.
5) The Tribal Court's findings of fact and conclusions of law that Appellants violated the required Catch Report provisions is sustained.
6) The Tribal Court's finding of fact and conclusion of law that Appellants were illegally engaged in subsistence fishing with a non-Native is reversed.
7) The Tribal Court's forfeiture of four snowmobiles is sustained.
8) The Tribal Court's fine based on the economic value of the fish that otherwise would have been forfeited is modified from $15,214.60 to $3,348.66.
9) The Tribal Court's lifetime revocation of Appellant's subsistence fishing rights is modified to a one year suspension beginning on the date of this decision.
10) Finally, Appellants due process rights were not violated because their counsel failed to appear at an October 8, 2010 hearing on the fairness of the Tribal Court's "restitution" decision.

In sum, Appellants are responsible for all fines and costs associated with their illegal sale of fish on February 17, 20, and 23, 2009; for illegally possessing more than 100 pounds of fish each on February 17, 2009 and February 20, 2009; and for failing to correctly submit Catch Reports on the days they committed offenses. Moreover, Appellants' four snowmobiles and fishing nets used in the commission of these offenses are forfeited. Finally, Appellants must pay to the tribal court $3,348.66 for the economic value of the fish illegally taken on February 17, 20, and 23, 2009.

It is SO ORDERED.

Judge W. Justin, concurring in the opinion and holding of this Court.

I would concur with the majority decision to partially affirm and partially reverse the Tribal Court. I write separately because I wish to elaborate more fully on various issues present in this matter.

Testifying in a Civil Matter

The case at bar is a civil matter and not criminal. It is a quest which, hopefully, renders facts from which the Tribal Court may determine what ultimately happened. I truly wish the Appellants had testified in Tribal Court, however; if they decide not to testify they do so at their own peril.

I believe it is good judicial policy that a court may consider the fact that a party to a civil action did not deny under oath the various allegations made against them. This policy encourages the parties to create a more complete record as to their respective

positions which can only help the Tribal Court in fulfilling its obligation to render findings of fact and applicable conclusions of law.

Investigative Concerns

Investigations should be designed to assist the Court or Trier of Fact as to exactly what happened without concern that the evidence supports a party or not. In matters such as this, the investigative goal should be to provide as complete a picture as possible. I do not believe this investigation did that.

The investigation by the MDNR began in 2006 when several complaints were lodged that subsistence fishers were illegally selling fish in the commercial market. These complaints were unsubstantiated[4] by the MDNR. Further, initial investigative efforts focused on some (but not all) of the subsistence fishers. When these initial investigative efforts (in 2006) did not pan out, the MDNR turned its attention to the Appellants because they had not yet been investigated. The trial transcript discloses no evidence specific to the Appellants that links them to any prior illegal sale of fish. We are then left with the reasons the Appellants were initially under scrutiny... subsistence fishers yet to be investigated and the MDNR found the location of the Appellant's nets suspicious.

Recognizing a trial is an adversarial endeavor and one would think that direct evidence would have been sought rather than indirect or circumstantial evidence. Direct that evidence which stands on its own merit whereas indirect or circumstantial evidence requires certain assumptions.

There were a number of situations which the MDNR chose not to prove their allegations with direct evidence, but rather circumstantially. In so doing, the investigation generated far more heat than light. By way of example, consider the following:

a. After chipping the fish and with twelve investigative officers being present no one stayed at the scene to see who harvested the fish and who (or with who's assistance) delivered the fish to the fish wholesaler. Once MDNR officials placed microchips in the 20 fish found in Appellants' nets, the twelve officers simply left at 3:30 a.m.[5] The next time any surveillance takes place is mid-morning February 23, 2009 at the home of one of the Appellants. It was at that location and time that we have the only clear identification of the Jensen brothers being in the presence of or associating with the Appellants. T.C.T., 116-130 (July 26, 2010).

b. Various witnesses testified that they saw something "white" being taken from one vehicle and being transferred to another at a particular location. T.C.T., 103 (July 27, 2010). Despite having seen the "white" container, it appears as if those

[4] I refer to the complaints made in 2006.
[5] It apparently took 12 officers four hours to insert microchips into 20 fish on the evening spanning February 22 and 23.

investigative tools outlined in the CORA treaty were ignored. The CORA treaty regulations specifically grant to investigating officers powers which would have allowed them to intervene and determine what was in the "white" container. The CORA regulations expressly state at Section XXVI, Jurisdiction and Enforcement:

Subsection (G) Any enforcement officer may:

1. *Detain for inspection and inspect any package, crate, box, or other container, including its contents and all accompanying documents or tags, at reasonable times.*

2. *Arrest without warrant any persons committing in his or her presence or view a violation of Section XXVII*
3. *Execute any process for enforcement of the provisions of these Regulations.*
4. *Search any place reasonably related to fishing activity, with or without a warrant, as authorized by law.*

One can only assume the language quoted above was made clear between the parties. Why the MDNR did not utilize these powers is a mystery. Perhaps had the MDNR exercised its powers outlined in CORA they would have had direct evidence that the white container contained walleye and the identity of the non-tribal fisherman assisting with the catch. Simple facts such as these would have gone a long way in proving the allegations made against the Appellants. Instead we are asked to assume what was in the white container and speculate who was involved in the loading and unloading process. I will neither assume nor speculate beyond what is sustained in this opinion.

I would remind the MDNR that in cases such as this direct evidence would have been far more persuasive and made the record clearer.

Judge D. Harper, concurring in the opinion and holding of this Court.

I concur with the Court's conclusion and order in this matter. I would like to take this opportunity as the Community Member Appellate Judge to address an issue concerning this case. Tribal Sovereignty for Tribes is the authority to govern themselves; and the ability of a people to live and make their own laws. As a sovereign Nation it is the Tribe's duty and obligation to follow its codes and law set in place. Because this investigation should have been a joint effort by the Michigan Department of Natural Resources ("MDNR") and Sault Tribe Law Enforcement under the Chippewa Ottawa Resource Authority (CORA) Regulations, I am perplexed why MDNR did not involve Sault Tribe Law Enforcement. It is Sault Tribe's authority and the Tribe should have been involved with this case. The Chippewa Ottawa Resource Authority (CORA) was established in January 2001, as the Inter-Tribal regulatory body for Indian fishing with

Michigan Tribes. CORA regulates Michigan Tribes' fishery catch statistics, recommends harvest levels, and carries out population research and studies. CORA member Tribes are: Sault Ste. Marie Tribe of Chippewa Indians, Bay Mills Indian Community, Grand Traverse Band of Ottawa and Chippewa Indians, Little Traverse Bay Band of Ottawa Indians, and Little River Band of Ottawa Indians. Subject to regulations under CORA all five (5) Tribes have Tribal Codes implementing CORA regulations. The state and federal agencies involved in the investigation did not involve the Sault Tribe Law Enforcement in their investigation until almost the last day of the investigation when 12 officers were micro- chipping the fish found in Appellants' nets. Sault Tribe Public Safety Officer Money stated in his testimony in front of the Tribal Court that he didn't know anything about the case and that he arrived after most of the fish were chipped. This investigation had been ongoing for some time and Sault Ste. Marie Tribal Law Enforcement must be involved in these types of incidences.

Mr. Tom Gorenflo, Inter-Tribal Fisheries and Assessment Program, testified that the program contacts the tribal fisherman if his or her report is not accurate. However, during cross-examination, Attorney Henderson asked Mr. Gorenflo about how the Inter-Tribal Fisheries handle discrepancies over a period of years by the fisher person. Mr. Gorenflo said that they usually handle discrepancies themselves and don't usually get Law Enforcement involved unless the fisherperson in question does not turn in a monthly Catch Report. Mr. Gorenflo then said, "In fact, I don't think we ever have mentioned that there was a discrepancy to law enforcement." (July 26, 2010) I ask -- how are the laws enforced? Clearly reporting discrepancies over inaccurate fish reports have never been addressed in the past or present according to Mr. Gorenflo. The implementation of CORA regulations unquestionably needs improvement.

In the case People *v. A.B. Leblanc* 399 Mich 31, 248 NW 2 d 199 (1976), the Michigan Tribes' fishing rights were re-established in all the waters adjoining those lands ceded by the Treaty of 1836. Tribes throughout Michigan made great strides paving the way to lawfully fish, whether it was gill net fishing, subsistence, or commercial fishing. Moreover, the Supreme Court upheld gill net fishing for Michigan Tribes. Our ancestors fought hard to have fishing and hunting rights protected. These rights should never be violated, abused, or taken for granted. The actions of the Schwartz Brothers in this matter are clearly a blatant disregard for what our Leaders and Elders fought for.