

Backgrounder on the Situation in the Mi'Kmaq Community of Esgenoopetitj (Burnt Church, New Brunswick)

Issue

Mi'Kmaq people have been fishing the Miramichi Bay from time immemorial. Currently, they seek to continue to manage that ecosystem in a sustainable manner and, at the same time, provide for their families from that resource. Despite a recent Supreme Court decision affirming their Treaty Rights to make a moderate living from fishing, they are threatened by constant Department of Fisheries and Oceans (DFO) interference and harassment in their fishery. On the bay, tensions and divisions between the Mi'Kmaq, Acadian and English communities and lack of leadership from DFO in building a co-operative solution could lead to a breakdown of the situation and violence, such as was experienced in the area last fall.

Recommendations

- The Government of Canada and the Department of Fisheries and Oceans must co-operate with the Mi'Kmaq First Nation community in Esgenoopetitj.
- The Department of Fisheries and Oceans must recognize the legitimacy of tags issued by the Esgenoopetitj First Nation.

Background

The Canadian Constitution entrenches Aboriginal and Treaty Rights within Canadian law. In September, 1999, the Marshall decision of the Supreme Court of Canada affirmed the Treaty Right of Aboriginal peoples to make a moderate livelihood from fishing, hunting and gathering. In October, the people of Esgenoopetitj attempted to exercise their Treaty Rights by fishing for lobster. Non-native fishermen responded by cutting lines and destroying \$210,000 worth of traps belonging to the people of Esgenoopetitj. The DFO and RCMP took no action to prevent destruction of property or violence directed towards people. The situation was tense, with fishermen ramming boats and threatening each other with firearms. Two Mi'kmaq men were seriously injured during an altercation. The people of Esgenoopetitj were afraid and felt very isolated.

In the wake of this, a clarification of the Marshall decision was drafted by the judges who held the minority opinion in the original decision. This clarification gave the Government of Canada the authority to limit Treaty Rights, provided that the limitations can be justified for the purposes of conservation or substantial public objectives such as economic fairness. Following this, DFO limited the number of Esgenoopetitj traps to 600 and began to confiscate traps.

This spring, DFO proposed fisheries agreements to each of the 35 bands in Atlantic Canada. The Atlantic Policy Congress of First Nations Chiefs examined the template of the agreement and the potential implications that it could have on future court decisions on the issue of Treaty Rights and advised bands not to sign. However, DFO is offering substantial amounts of money and benefits to bands (offers are as high as \$22 million per band). The agreements give DFO the regulatory power and limit the amount of traps in return for boats, equipment and cash. Although the agreements are for communal licenses, in many cases the benefits of the agreements will flow to only a few people in the First Nations community. Many reserves have become divided due to the approach DFO has taken with these agreements. To date, according to DFO, approximately half of the bands have pending or signed agreements.

In Burnt Church, the community held a number of meetings. As a community, they determined that they were not willing to risk their Treaty Rights. They decided to develop their own fisheries policy and management plan. The primary objectives of the policy are to protect Treaty Rights, protect the fishery and the ecosystem and to maximize collective benefits for all members of the community. The community and the Band Council accepted the policy and the plan and prepared to regulate their fishery through permits and treaty tags.

Under the Esgenoopetitj First Nation Management Plan, any member of the community who wants to fish, can fish. Any limitations needed for conservation purposes, will be placed first upon those fishing the maximum number of traps. The maximum lobster fishery under the management plan is 15,000 traps. If DFO determines that the zone (LFA-23) cannot handle the additional fishing pressure, they could reduce the number of traps by 15,000 through either a withdrawal of 15 traps from the 300 allotted to each commercial fisherman within the zone, perhaps with compensation for each trap, or through a buy-out program, such as DFO is currently pursuing.

The Band anticipates that, in actuality, their spring fishery will be approximately 5000 traps. This would reduce fishing pressure in the zone by 10,000 traps. As the Mi'Kmaq have traditionally fished in the fall when the lobster are close to shore, the Band will permit a fall fishery. The management plan clearly addresses the conservation concerns raised by the Supreme Court clarification.

Despite the community and Band Council decision to regulate their own fishery, DFO used divide and conquer tactics and issued "communal" tags to 13 Esgenoopetitj commercial fishermen. Subsequently, DFO announced that any Treaty tags would not be recognized and threatened to seize boats and equipment that did not have DFO issued tags.

The community is still firm in its resolve and has been exercising its Treaty Rights by putting out traps. DFO has been seizing the traps. This places the community in a difficult position. DFO is acting outside of their authority as established by the Supreme Court decision, but the community does not have the resources to take DFO to court. If the community accepts the DFO position, they will be accepting an infringement upon

their recently re-affirmed Treaty Right. If they continue to put out traps with Treaty Tags, the conflict may escalate.

The situation in the St. Mary's Bay area of Nova Scotia offers a striking counterpoint to the Esgenoopetitj situation. The local bands and non-native fishing organizations have defied DFO and developed the St. Mary's Bay Working Group. The Working Group is looking at management options and developing a joint management plan for St. Mary's Bay. The members of the Working Group include; Fundy Fixed Gear Association, Maritime Fishermen's Union - Local 9, Marine Resource Centre, Annapolis Valley First Nation, Bear River First Nation, Acadia First Nation and the Mi'Kmaq Fish and Wildlife Commission. Similar to Esgenoopetitj, the 3 involved First Nation Bands have resolved not to sign DFO agreements despite heavy pressure from DFO. In Nova Scotia, for the past 3 years bands have been using both band tags and Mi'Kmaq Fish and Wildlife Commission tags although, at this point, no one is fishing with only First Nation tags for fear of their traps being disturbed.

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