The federal defendants did not argue in their brief that the Salmon Trout River meets the definition for navigable waters where jurisdiction can be assumed by a state pursuant to 33 U.S.C. § 1344(g)(1). Instead they relied on the designation in the MOA with Michigan.

The District Court did not grant Huron Mountain Club's request for an injunction. In the portion of the Court's decision dealing with the issue of delegation of permitting authority to the State of Michigan, however, it rejected the notion that the agreement between Michigan and USACE was dispositive of the issue. Instead, it looked to whether the Plaintiff had provided adequate evidence as to the nature of the River stating:

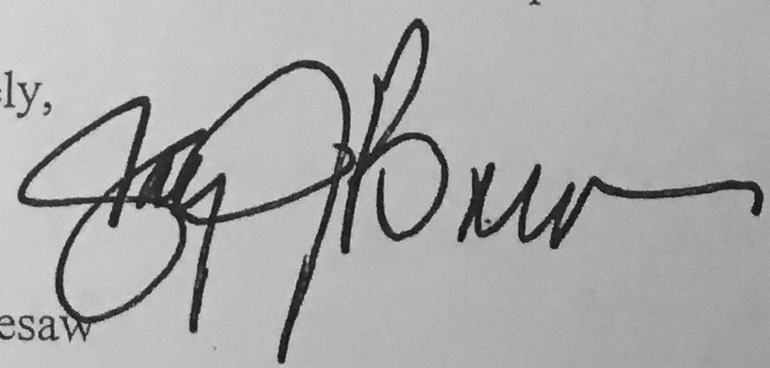
> "Section 404(g) of the Clean Water Act allows delegation only as to waters that are not "presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate . . . commerce." 33 U.S.C. § 1344(g). Even if Plaintiff could show that the Salmon Trout River can be used for interstate commerce above Sullivan Creek, Plaintiff has not presented any persuasive evidence that the waters of the Salmon Trout River in the vicinity of the Eagle Mine are presently used, or are susceptible to use, in their natural condition or by reasonable improvement as a means to transport interstate commerce."

Although Huron Mountain Club was ultimately unsuccessful in its claim that Michigan was unauthorized to assume § 404 permitting authority in regard to the Eagle Mine Project, the District Court focused on the characteristics of the water body in question to determine if the definition in § 404(g)(1) was met, and not merely on the listing in the USACE – Michigan MOA.

For all these reasons we believe that prior to moving forward with any 404 permit the EPA and USACE must make a specific formal determination regarding the jurisdictional status of the wetlands at issue in the Aquila permit. The only way to provide all sides of the project with clarity going forward is for the USACE to review all available information and conduct an Approved Jurisdictional Determination at the proposed location. Merely relying on the language of the existing MOA would constitute a failure to perform non-discretionary duties required by the Clean Water Act. It would also constitute a failure to meet the trust responsibilities of the United States to the Menominee Indian Tribe of Wisconsin. We are confident that a thorough review of the current status of interstate commerce on the Menominee River adjacent to the wetlands at issue, as well as a study of its susceptibility for future use in interstate commerce, will lead to the conclusion that the CWA does not allow for Michigan's assumption of jurisdiction pursuant to § 404(g)(1).

We would like to meet as soon as possible to consult with you on this issue. Please contact me at 715-799-5114 to schedule a time and place for this consultation.

Sincerely,



Gary Besaw
Chairman
Menominee Indian Tribe of Wisconsin