

Chippewa Off-Reservation Treaty Rights: Origins and Issues

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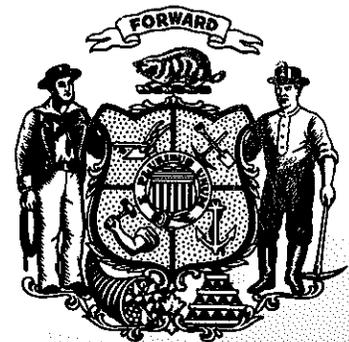


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I. Introduction

Chippewa people who live in Wisconsin have met both friendly and hostile reactions to their exercise of off-reservation hunting, fishing, and gathering rights. Popular commentaries often refer to the treaties that guarantee these rights, but they seldom examine the events that preceded the signing of the treaties. A number of historians and jurists, however, have investigated the antecedents of the current controversy. This bulletin will draw on their work to present the historical and legal background of the treaties between the Chippewa people and the U.S. government. It will also summarize recent court decisions and selected issues related to Chippewa retention and exercise of off-reservation rights.

Law professor Robert A. Williams, Jr., has suggested that the legal context for relations between Native Americans and European Americans can be traced to Innocent IV, a 13th century Roman Catholic pope who developed legal doctrines to govern relations between Christians and non-Christians. He asserted that papal jurisdiction applied to all humans, that Christianity provided norms for Christians and non-Christians alike, and that contrary views merited no respect. Such ideas survived the Protestant Reformation and influenced the legal thought of both Catholic and non-Catholic monarchs, explorers, and colonists.

When Europeans encountered the indigenous populations of the lands now known as North and South America, they applied the legal doctrines inherited from Pope Innocent IV. Two extensions of his ideas guided subsequent relations between Indians and non-Indians: that non-Christians lacked the capacity for self-rule and that failure to adopt European values and institutions justified subjugation. As expressed by historian Robert Berkofer, Indians "always stood in Christian error and deficient in civilization...."

II. The Law of Nations

Francisco de Vitoria, a Dominican scholar and legal theorist, is frequently credited with transforming the medieval, papal view of relations between Christians and non-Christians into a modern, secular view. He is said to have provided the legal principles used in Spanish colonial administration and to have founded modern international law. In a lecture delivered in 1532, for example, Vitoria said the Indians were "true owners" of the land and that civilized nations must secure Indian consent to land cessions or changes in political status. Vitoria dismissed the right of either monarchs or popes to appropriate the land of indigenous or non-Christian people. This left only a "just war" or voluntary consent as legitimate ways to acquire Indian territory. Vitoria's ideas became known as the "Law of Nations".

Vitoria insisted, however, that the Law of Nations imposed certain duties upon indigenous peoples: to treat Spaniards hospitably, to allow commerce, to include Spaniards among those permitted to share in communally held resources, and to permit the propagation of Christianity. Vitoria held that Indians were bound by the Law of Nations regardless of whether they knew about it or accepted it, and he asserted that Spain could wage a just war for any Indian violation of Spaniards' rights under this law. Professor Williams argues that Vitoria, in effect, provided a secular equivalent of papal domination.

Secular or not, some of Vitoria's ideas received support in a 1537 proclamation by Pope Paul III:

....the said Indians and all other people who may later be discovered by Christians, are by no means to be deprived of their liberty or the possession of their property, even though they be outside the faith of Jesus Christ; and that they may and should, freely and legitimately, enjoy their liberty and the possession of their property; nor should they be in any way enslaved; should the contrary happen, it shall be null and of no effect.

A century later, a Dutch lawyer, Hugo Grotius, produced a "modern" version of the Law of Nations. Although Grotius was Protestant, he cited Pope Innocent IV's 13th century arguments to support a right to intervene in non-Christian societies whose people failed to behave according to European norms.

In the Northwest Ordinance of 1787, the U.S. Continental Congress echoed the Law of Nations as it had been expressed by Vitoria and Pope Paul III:

....The utmost good faith shall always be observed towards the Indians; their land and property shall never be taken from them without their consent; and in their property, rights and liberty, they never shall be invaded or disturbed unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall from time to time be made, for preventing wrongs being done to them, and for preserving peace and friendship with them.

Felix Cohen, a leading scholar of federal Indian law, has attributed the foundation of U.S. Indian law to Spanish jurisprudence and has claimed that this Spanish heritage included recognition of Indian property rights. To support this view, Cohen and a number of other legal scholars have traced ideas about Indian rights from Vitoria through Pope Paul III, the Northwest Ordinance, and subsequent U.S. Supreme Court cases.

Professor Williams and others, however, have found little difference between Pope Innocent IV's approach to Asians and Spain's approach to Indians. In this view, the common assumption from medieval times forward has been that European values provided norms that should be observed by people throughout the world.

Regardless of European assumptions about the merits of unfamiliar civilizations and value systems, there appears to be a consensus that U.S. Indian law originated as a branch of international law. European explorers and colonists, whether they viewed Indians as equals or inferiors, with or without property rights, apparently perceived the indigenous peoples of the Americas as sovereign nations with whom they had to deal according to the rules then governing relations between independent, self-governing, foreign nations. Decisions written by Chief Justice John Marshall during the early 1800s show continuing reliance on international law when considering Indian cases.

As a result of this international law origin, argues law professor Nell Jessup Newton, U.S. courts "have applied to Indian affairs doctrines peculiar to the federal foreign affairs power." These doctrines include the "last-in-time rule" under which Congress can abrogate a treaty merely by passing a later statute conflicting with it and the political question doctrine under which

courts have declined to question congressional power in Indian cases. Thus, the courts have used international law to find congressional power to deal with Indian nations on the same basis as foreign nations, but have stopped short of finding in Indian tribes all the attributes of sovereignty possessed by foreign nations.

III. The Doctrine of Discovery

Much of U.S. legal doctrine regarding Indian land rights has been based on a principle known as the "Doctrine of Discovery". As expressed by Chief Justice John Marshall in a landmark case, *Johnson and Graham's Lessee v. William M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823), this doctrine limited the power of Indian people to convey title to their ancestral lands. In *M'Intosh*, the U.S. Supreme Court ruled that discovery gave the federal government, as successor to Great Britain's claims, sole title and right to convey title to lands held by Indians:

On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all; and the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendancy. The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence. But, as they were all in pursuit of nearly the same object, it was necessary, in order to avoid conflicting settlements, and consequent war with each other, to establish a principle, which all should acknowledge as the law by which the right of acquisition, which they all asserted, should be regulated as between themselves. The principle was, that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession....

The United States maintain, as all others have maintained, that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest....

Marshall's exposition of the Doctrine of Discovery addressed 2 main issues: the allocation of land claims among various European countries and the legal capacity of Indians to dispose of their land as they saw fit.

The Supreme Court dismissed a subsequent case, *Cherokee Nation v. The State of Georgia*, 30 U.S. (5 Pet.) 1 (1831), on jurisdictional grounds, holding that tribes were not foreign nations entitled to bring an original action in the Supreme Court. Instead, ruled Marshall, "[tribes] may, more correctly, perhaps, be de-

nominated domestic dependent nations [T]hey are in a state of pupillage. Their relation to the United States resembles that of a ward to his guardian." Although colonial records show that the British had allowed Indians to use their court system and that the British Privy Council itself had heard cases governing relations between Indians and colonists, Marshall ignored this precedent in dismissing the *Cherokee Nation* case.

In another landmark case, *Worcester v. The State of Georgia*, 31 U.S. (6 Pet.) 515 (1832), Marshall articulated a more generous view of tribal sovereignty and a more restricted view of the implications of discovery. This opinion revealed a view of tribes as originally independent, self-governing nations and limited the right conveyed by discovery to "the exclusive right of purchasing such lands as the natives were willing to sell." Marshall wrote:

America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their own laws. It is difficult to comprehend the proposition, that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or over the lands they occupied; or that the discovery of either by the other should give the discoverer rights in the country discovered, which annulled the pre-existing rights of its ancient possessors.

Marshall also wrote in the *Worcester* opinion that the United States had used the words "treaty" and "nation" in the same manner with regard to both Indians and other nations and that Indian tribes did not surrender their independence by placing themselves under the protection of the United States. Overall, the *Worcester* decision repudiated the notion of conquest found in *M'Intosh* and overruled the characterization of tribes found in *Cherokee Nation*. Law professors Russel Barsh and James Henderson have written that *Worcester* made it clear that the relationship of tribes to the United States "is governed by consent and the concept of dependency in international law, not by any wardship or subordination arising out of Indians' nature or condition."

In another commentary, Professor Henderson has described discovery as articulated by the Marshall court as a "distributional preference by which the Europeans agreed to divide up entitlements to acquire tribal lands." In this view, discovery did not negate tribal title, because tribes retained the right to withhold their lands from purchase, and tribal title was limited only by ruling out all potential purchasers except the discovering nation. Professor Newton has character-

ized the Marshall court's view of the government's property interest in tribal land as a "glorified option to buy."

IV. Colonial Indian Policies

The difficult Indian questions that found their way to the Supreme Court during the early days of the republic had deep roots. By the time of the American Revolution, there had been almost 2 centuries of contact between Indians and Europeans and ample opportunity for conflicts to develop and policies to be formulated. From the earliest days of English settlement in New England and Virginia, colonists' desire for land had disrupted relations with local tribes. Historian Alvin Josephy has suggested, for example, that when Indians thought they had agreed only to share the use of their land, whites often thought the Indians had transferred title to them. A basic problem was the 2 groups' fundamentally differing concepts of land ownership and use, with whites unable to understand common land ownership and Indians unable to understand individual ownership. Barsh and Henderson have pointed out, however, that common land ownership was not unknown in Europe, having been encountered by Caesar among the Germans.

A related problem turned on the 2 groups' different intensities of land use. Colonists tended to view the large hunting grounds of hunter-gatherer societies as unoccupied or wastefully used. Indians, however, saw such expanses as necessary to their way of life and consistent with their world view. The clash of these views led to strife as whites found in their concept of "higher use" a rationale for appropriating tribal lands and as Indians began to feel the effects of white pressures to displace them. An Indian speaker at a 1754 conference between Mohawks and representatives of New York expressed his concern in these words:

We told you a little while ago that we had an uneasiness on our minds, and we shall now tell you what it is; it is concerning our land.

Further contributing to unsettled relations was trade, and among all the items traded, none loomed larger than furs. The fur trade attracted a variety of interests: Indians, who found ready use for trade goods such as metal implements; traders, whose practices were often fraudulent; colonial governments, which found great wealth in the trade; and European governments, which used the trade to create political bonds with tribes. These competing interests, as well as competition among the colonies for the fur trade, doomed colonial

attempts at regulation and set the stage for royal control of Indian affairs.

Royal prerogatives were asserted when King George III issued the Proclamation of 1763, which, among other things, provided the first official designation of an area known as "Indian country". The boundary was the watershed of the Appalachians, beyond which colonists were forbidden to purchase land or settle. A major objective of this strategy was to alleviate Indian unrest resulting from white encroachments on their land, yet the proclamation itself contained words that revealed a British perception of the boundary as temporary. A series of treaties soon moved the boundary — always westward — opening new lands to whites and further restricting Indian country.

The proclamation did not, however, transfer the fur trade to royal officials. After years of failed colonial attempts to regulate that trade, the British in 1774 transferred administration of the area south of the Great Lakes and north of the Ohio River to the British colonial government in Quebec, hoping in this way to regulate the fur trade. The American Revolution intervened, however, before the fur trade question could be resolved.

V. Early U.S. Indian Policies

Before the American Revolution, according to historian Reginald Horsman, both British and colonial governments "had acknowledged that the Indian tribes possessed a 'right of soil' that should be purchased in formal treaty." Indeed, most pre-revolutionary land exchanges were accomplished by treaty or purchase. During the Revolution, however, many Indian people fought against the colonists, whom they perceived as destroyers of their way of life. The postwar consequence was that the new U.S. government assumed that Indian people had forfeited their right to possess land and had transferred their right of soil to the new nation. In addition, the British ignored the assistance they had received from Native Americans and made no provisions in the 1783 Treaty of Paris to protect Indian rights.

Although weak both financially and militarily, the United States in 1783 adopted an Indian policy based on treating Indians as conquered nations and designed to acquire land by force. Three years later the government established under the Articles of Confederation recognized that the policy was failing and resumed a policy of negotiating. Only the method, not the objective, of acquiring land had changed, however. The au-

thor of this policy change, Secretary of War John Knox, promoted land acquisition by treaty and purchase as both more economical and more just than taking land by force.

Knox, like many others who sought a "moral" policy stance, believed he was concurrently practicing the ideals of the fledgling American democracy, benefitting Indian people by facilitating their assimilation, and assuring future land cessions by Indians whose land needs would diminish with their assimilation and reduction in number.

The plan for an orderly advance of the frontier with acquisition of Indian lands occurring as needed for settlers did not materialize. Expectations that Indians would assimilate, die off, or fall back from the encroachments of civilization proved false. Perception of Indian land use as wasteful and of Indian culture as inferior fueled the white push westward and a government search for ways to acquire Indian land peacefully but quickly.

The congressional response was a series of Trade and Intercourse Acts (1790, 1793, 1796, 1799) that forbade settlement in Indian country, licensed trade, and punished crimes committed by whites against Indians in Indian country. By restricting contact between whites and Indians, these laws sought to prevent violence by frontiersmen against Indians and protect treaty-guaranteed Indian rights. Each successive act contained stronger provisions for restraining whites, whose acts of violence often led to Indian retaliation. According to historian Francis Prucha, these laws "were not primarily 'Indian' laws" but were "directed against lawless whites and sought to restrain them from violating the sacred treaties." The Trade and Intercourse Act of 1796 "specified in detail the boundary line between the whites and the Indians, the first designation of the Indian country in a statute law."

By the time Thomas Jefferson took office as president, Indian affairs were more calm. The Trade and Intercourse Act of 1802 continued the policies developed during the 1790s and remained in effect with only minor changes until 1834.

VI. Early Chippewa Contact with Europeans

The Chippewa people (known to their neighbors as Ojibwa, "those who make pictographs", and to themselves as Anishinabe, "first people") once lived near the mouth of the St. Lawrence River. About 400 years ago, they moved west to find new hunting grounds and to

escape their Iroquois enemies. Eventually, they settled both shores of Lake Superior. Those on the southern shore displaced the Fox and Santee Sioux by the end of the 17th century.

Early in the 18th century some Chippewa bands moved southward, establishing their first permanent interior village at Lac Courte Oreilles about 1745, followed soon by settlement at Lac du Flambeau. During the 18th century, the Chippewa engaged in conflict with the Sioux, whom they ousted from the area south and west of Lake Superior. Chippewa who lived near the lake fished for a living, while interior bands hunted, trapped, and harvested wild rice and maple sugar.

Jesuit missionaries are reported to have made the first European visit to Chippewa country in 1641. European influence had reached the Chippewa even earlier, however. According to historian Edmund Danzinger, Huron middlemen had introduced French trade goods to western tribes, who gladly exchanged furs for European implements.

The fur trade soon dominated the Chippewa economy, and the goods acquired in exchange for furs revolutionized the Chippewa material culture. Early contact with the French, who had a virtual monopoly on the Chippewa fur trade until the 1763 Treaty of Paris, had few other effects. The French made no assaults on tribal language and customs, and the Chippewa resisted conversion to Christianity, which they viewed as a belief system inferior to their own.

After 1763, when the French ceded to the British almost all their lands east of the Mississippi River, the British became the principal trading partner of the Chippewa. Like their French predecessors, the British were interested in Chippewa country primarily as a source of furs. They tried, therefore, to protect the traditional culture and prevent Indian-white conflict. It was in this context that George III issued the Proclamation of 1763 — attempting to persuade both Indians and frontiersmen that the British were serious about keeping peace and nurturing trade.

Subsequent treaties restored peace in the Great Lakes region, and a prosperous fur trade resumed — this time with the British. The trade route from the Lake Superior area to London was controlled so securely by the British that the American Revolution did not interrupt the fur trade. And, although the 1783 Treaty of Paris, which marked the end of the American Revolution, ceded British territory east of the Mississippi River to the United States, the British trading regime in the Northwest was not disrupted for some 30 years. In

fact, Jay's Treaty of 1794 specifically guaranteed the right of British traders to remain in the Northwest.

As the new government of the United States became stronger, it extended its influence into the Great Lakes region. A number of tribes, including the Chippewa, were parties to a 1785 treaty that established a general boundary between U.S. lands and those of Indian tribes. By this agreement the federal government appeared to give up its claims to native lands south and west of the upper Great Lakes and east of the Mississippi River. Internal government communications showed, however, that U.S. officials viewed the boundary as a temporary one that bought an opportunity for settlers to push westward and paved the way for future land cessions. The treaty also provided that future Indian land sales could be made only to the United States.

In the 1790s, the United States established a system of trading posts known as "factories". This system was intended to preserve Indian friendship and draw tribal trade away from British traders on the Great Lakes. An additional intent, as expressed by Jefferson, was to use the trading posts to encourage Indian debt, which could be paid off by ceding land to the United States. Indians could then be assimilated by settling them on agricultural reservations. The factories offered only poor quality goods at high prices, however, and thus made few inroads into established Indian trading arrangements with the British. In addition, the just treatment promised by the Northwest Ordinance proved to be a pledge the U.S. government could not or would not enforce. Settlers poured into the Great Lakes region.

Few Chippewa took part in the War of 1812, and most of those who did allied with the British. The treaty signed after the war made no changes in prewar boundaries, which assured that Americans would eventually occupy the Great Lakes area. It also assured an end to the French and British policies that focused on acquisition of furs and made little effort to change Chippewa culture. The U.S. government abolished the factory system in 1822. A new era was about to begin.

VII. U.S. Treaties with the Chippewa

The War of 1812 eliminated the Indians' British allies and thus destroyed tribal power to maintain a barrier against settlers. Thereafter, Indian people had to deal directly with the U.S. government and the growing population that wanted to move west.

Simultaneously, the U.S. government stepped up its attempts to assimilate Indians and gain control of their

land to form the several states that had been anticipated in the Northwest Ordinance of 1787. That law, although promising "the utmost good faith" toward Indians, had also created a government for the area north of the Ohio River and east of the Mississippi River. It had neglected to explain, however, how U.S. expansion into the area was compatible with good faith dealings between Indians and whites.

Treaties signed in 1819 and 1821 established some of the boundaries of Chippewa tribal areas. The 1825 Treaty of Prairie du Chien and the 1827 Treaty of Butte des Morts further defined the boundaries of lands held by the Chippewa and other tribes then living in Wisconsin. These treaties ceded no land to the United States. Instead, they identified the areas claimed by various tribes and thus identified the tribes with whom the United States had to conduct future negotiations in order to acquire specific tracts of land.

When Wisconsin became a separate territory in 1836, the federal government began negotiating with the Chippewa for title to their lands. A treaty signed in 1836 by the Chippewa and Ottawa ceded large portions of northern Michigan to the United States. The terms of the treaty provided, however, that the tribes retained "the right of hunting on the lands ceded, with other usual privileges of occupancy, until the land is required for settlement."

A year later, the Chippewa ceded lands in eastern Minnesota and northwestern Wisconsin to the U.S. government. In this treaty, the Chippewa reserved the right to hunt, fish, and gather wild rice in the ceded territory during the pleasure of the President of the United States. In 1842, the Chippewa signed a similar treaty relinquishing their remaining lands in Wisconsin and Michigan but retaining hunting and "other usual privileges of occupancy, until required to remove by the President of the United States."

Wisconsin became a state in 1848, and white settlement continued apace. President Zachary Taylor issued an executive order in 1850 revoking the hunting, fishing, and gathering rights stipulated in the treaties and ordering the Chippewa to leave Wisconsin and relocate to tribal lands in Minnesota.

White settlers and the Wisconsin Legislature joined the Chippewa in urging the federal government to give the Chippewa permanent homes in Wisconsin and the upper peninsula of Michigan. On February 27, 1854, the Wisconsin Legislature passed a resolution stating, in part:

Your memorialists pray His Excellency, the President of the United States, to rescind the orders heretofore given for the removal of said Indians and your memorialists also pray that the Senate and House of Representatives in Congress assembled will pass such laws as may be requisite to carry into effect such design and orders....

President Taylor's removal order was never carried out, and the 1854 Treaty of La Pointe established reservations for the Chippewa in Wisconsin, Michigan, and Minnesota. This treaty also ceded remaining Chippewa lands in Minnesota to the United States but retained hunting and fishing rights on the territory ceded.

The treaties that reserved Chippewa hunting, fishing, and gathering rights on the lands ceded to the U.S. government provide the legal basis for the current controversy. According to Prucha, "It is in the treaties that one sees best the acceptance by Europeans of the nationhood of the Indian groups that became a fixed principle in the national policy of the United States."

Excerpts from these treaties are reproduced in Appendix A.

VIII. Court Decisions Affecting Chippewa Off-Reservation Rights

During the late 1800s, the Chippewa people continued their usual practice of hunting, fishing, and gathering both on their reservations and on lands ceded to the U.S. government. Early in the 20th century, however, the State of Wisconsin took the position that conservation regulations applied to Indians as well as non-Indians.

In 1901, state officers arrested a member of the Bad River band for fishing without a license on his own reservation, and a municipal judge in Ashland convicted him of violating state law. U.S. attorneys then brought a test case, *In re Blackbird*, 109 F. 139 (1901), in federal district court. The court overturned the conviction, ordered the man's release, and chastised the state's action. The judge wrote:

After taking from them the great body of their lands and stipulating they should always have the right to fish and hunt upon all lands ceded, it would be adding insult as well as injustice now to deprive them of the poor privilege of fishing upon their own reservation.

In 1907, state conservation wardens cited a Chippewa Indian for fishing with gill nets and pond nets in Lake Superior. In that case, *State v. Morrin*, 136 Wis. 552 (1908), the Wisconsin Supreme Court ruled that Chippewa off-reservation hunting and fishing rights had been abrogated by the act of Congress that admit-

ted Wisconsin to the Union. Thereafter, the state applied its conservation rules to Indians and non-Indians alike in off-reservation areas. Subsequent U.S. Supreme Court rulings have established, however, that termination of any treaty-recognized right must be by explicit statement, not implication. The Court has also upheld lower court rulings that limit state regulation of Indian hunting and fishing rights to measures that are required for species conservation.

Recent cases related to Chippewa off-reservation treaty rights have included a 1972 Wisconsin Supreme Court decision and a series of actions in federal district court in which the Lac Courte Oreilles (LCO) and other Wisconsin bands of Chippewa Indians were plaintiffs. The series resulted in 9 key decisions, which have been numbered LCO I through LCO IX for easier identification.

State v. Gurnoe, 53 Wis. 2d 390 (1972). In 2 separate incidents in the fall of 1969, state conservation wardens arrested 6 members of the Red Cliff band and 2 members of the Bad River band of Lake Superior Chippewa Indians for fishing with gill nets in Lake Superior waters adjacent to their respective reservations. The circuit court ruled that the 1854 treaty granted the Chippewa the right to fish on their reservations but did not include fishing rights in Lake Superior.

On appeal, the Wisconsin Supreme Court ruled in 1972 that the 1854 treaty revoked the 1850 executive order, which in any case had not revoked fishing rights because it had never been carried out. Citing the U.S. Supreme Court decision in *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918) as the relevant precedent, the court also ruled that treaty-granted fishing rights included fishing rights in Lake Superior. Because the *Gurnoe* decision addressed only the question of fishing in Lake Superior, it applies only to the 2 Chippewa bands whose reservations lie adjacent to Lake Superior.

Very similar to the *Gurnoe* case and preceding it by a year was a Michigan case begun in 1965, when a state conservation officer arrested a Chippewa Indian for fishing in Keweenaw Bay of Lake Superior. The Michigan Supreme Court found in *People v. Jondreau*, 384 Mich. 539 (1971) that the Treaty of 1854, which reserved the right to hunt and fish in ceded territory, included the right to fish in Keweenaw Bay. It held state game regulations inapplicable to Indians protected by the 1854 treaty.

Lac Courte Oreilles Band of Lake Superior Chippewa Indians, et al. v. Lester P. Voigt, et al., 700

F.2d 341 (1983) (LCO I). In 1974, wardens of the Wisconsin Department of Natural Resources cited 2 members of the Lac Courte Oreilles band for fishing out of season and outside their reservation. U.S. District Court Judge James Doyle ruled in *United States v. Bouchard*, 464 F.Supp. 1316 (D.C. Wis. 1978) that President Taylor's 1850 removal order, which suspended the Chippewa people's off-reservation resource rights, was invalid. He also ruled that the Chippewa implicitly gave up their off-reservation rights when they accepted reservations in 1854.

On appeal, the U.S. Court of Appeals, Seventh Circuit, ruled in 1983 that President Taylor's removal order was invalid because it was not a response to Chippewa misbehavior against white settlers. The court also overturned Judge Doyle's ruling that creation of reservations ended the right to hunt, fish, and gather on ceded lands. The appeals court decision relied on one of several rules of treaty interpretation, or canons of construction, that originated with U.S. Chief Justice John Marshall in the early 1830s. The canon of construction emphasized in the 1983 appeals court decision was that treaties are to be construed as they would have been understood by the Indians. Because the 1854 treaty was written in English and contained no explicit language revoking Chippewa hunting and fishing rights on ceded lands, the appeals court ruled that those rights still exist. The state appealed this decision to the U.S. Supreme Court, which refused to hear the case.

Lac Courte Oreilles Band of Lake Superior Chippewa Indians, et al. v. State of Wisconsin, et al., 760 F.2d 177 (1985) (LCO II). The 1983 appeals court opinion, which found that the Chippewa continue to have off-reservation hunting and fishing rights, stated that the exercise of those rights was limited to parts of the ceded territory that "are not privately owned". The district court then fixed March 8, 1983, as the date for determining ownership status and thus determining which lands were available for the exercise of off-reservation hunting and fishing rights. On appeal, the court of appeals ruled on April 24, 1985, that changes in land ownership are of such a nature that setting a fixed date was inappropriate.

Lac Courte Oreilles Band of Lake Superior Chippewa Indians, et al. v. State of Wisconsin, et al., 653 F.Supp. 1420 (W.D. Wis. 1987) (LCO III). The court of appeals directed the district court to determine "the permissible scope of state regulation" of Chippewa off-reservation resource rights. The state and the bands agreed to undertake the trial in 2 phases: one to define off-reservation rights and decide whether there is a ba-

sis for any state regulation of those rights, and, if a basis for some regulation were found, another phase to determine the nature and extent of that regulation.

On February 18, 1987, the district court enumerated the species used by the Chippewa at the time of treaty making, and Judge Doyle ruled that they retained the right to harvest all the species enumerated. He also ruled that the Chippewa may harvest those resources by methods employed in treaty times and those developed since. Thus, the Chippewa may use modern firearms and fishing gear as well as traditional equipment. They may also trade and sell the fruits of their harvest to non-Indians, using modern sales and distribution methods.

The district court resolved the issue of hunting and fishing on privately owned land by ruling that Chippewa rights have been terminated in all parts of the ceded territory that are privately owned at the time of contemplated or actual attempted exercise of those rights. Judge Doyle declined to allocate resources between Indians and non-Indians, but ruled that the Chippewa harvest must provide a "modest living". The court also ruled that the state could regulate Chippewa hunting, fishing, and gathering only if the restrictions were reasonable and necessary to conserve a particular resource.

Lac Courte Oreilles Band of Lake Superior Chippewa Indians, et al. v. State of Wisconsin, et al., 668 F.Supp. 1233 (W.D. Wis. 1987) (LCO IV). This opinion, handed down by Judge Barbara Crabb on August 21, 1987, addressed the broad issue of the permissible extent of state regulation of tribal off-reservation rights. The court ruled on the 5 points described below.

- *State regulation must meet appropriate legal standards.* The court found that the state may regulate tribal resource harvests in the interest of conservation and must use the least restrictive alternative to accomplish this purpose. Further, the state must demonstrate that regulation of non-Indian resource users alone cannot achieve conservation purposes and that state regulations "in language and in effect, neither discriminatorily harm the Indian harvest nor discriminatorily favor non-treaty harvesters."
- *State may regulate for conservation.* Although the state proposed that it be allowed to regulate tribal harvests for any legitimate purpose, the court ruled that state regulation could occur only for conservation and other narrowly defined purposes. Judge Crabb cited cases in which federal courts have ruled that states may

not force Indians "to yield their own protected interests in order to promote the welfare of the state's other citizens."

- *State may regulate for health and safety.* After stating that no court had previously addressed this question, Judge Crabb ruled that the state could regulate off-reservation treaty rights in the interest of public health and safety, provided the regulation meets appropriate standards and does not discriminate against the Indians.
- *State may not regulate to enforce moderate living standard.* The court denied the state's request that it be allowed to regulate Chippewa harvests in order to limit them to what is needed for a modest standard of living. The court found the state's argument "misplaced" and ruled that the state may regulate non-Indian harvesters to ensure tribal access to a moderate living, not to enforce a moderate living ceiling.
- *Effective tribal self-regulation preempts state regulation.* The state and the Chippewa agreed that the Indians had a right to regulate tribal members' exercise of their off-reservation rights. They disagreed about whether the state had a concurrent right, with the state arguing that tribal regulations cannot "preempt" the state. The court ruled that the tribe may regulate its members "exclusive of state regulation so long as the tribal self-regulation is effective." Judge Crabb also described a broad outline of "effective" tribal regulation. It must address concerns about resource conservation and public health and safety; it must rely on competent and adequately trained enforcement personnel; tribal members exercising off-reservation rights must have official tribal identification; and the state and the Chippewa must engage in a full exchange of harvest, scientific, and management information.

Lac Courte Oreilles Band of Lake Superior Chippewa Indians, et al. v. State of Wisconsin, et al., 686 F.Supp. 266 (W.D. Wis. 1988) (LCO V). At the request of the state, this phase of the litigation focused on quantifying the "modest standard of living" referred to in earlier rulings. Relying on the testimony of an economist, the court found that the Chippewa could not meet their modest living needs from the available harvest, even if they were physically capable of harvesting and processing it.

The state both challenged the economist's testimony and asked the court to allocate the harvest equally between Indians and non-Indians, as had been done in the fishing dispute in Washington State. In an opinion dated June 3, 1988, Judge Crabb declined, however,

and held that "circumstances present in the State of Washington are not present in this case in Wisconsin."

Lac Courte Oreilles Band of Lake Superior Chippewa Indians, et al. v. State of Wisconsin, et al., 707 F.Supp. 1034 (W.D. Wis. 1989) (LCO VI). This ruling on March 3, 1989, addressed the issue of the extent, if any, to which the State of Wisconsin may regulate Chippewa harvest of walleye and muskellunge within the ceded territory. The court rejected the state's attempt to impose its own regulations on the Chippewa and ruled, instead, that the Wisconsin bands of Lake Superior Chippewa could regulate their own harvest, provided they "enact and implement certain conservation-based measures" set forth in the opinion. The court addressed the following specific issues:

- *The lakes in which the tribes may harvest fish by traditional methods.* The state sought to restrict tribal off-reservation fishing by traditional methods to lakes of 1,000 or more acres. The court found this minimum size for gillnetting "reasonable and necessary for conservation". It ruled that the Chippewa could harvest fish by spearing, however, on lakes of less than 500 acres, subject to certain conditions.
- *The method of establishing muskellunge harvest limits.* The court found the state's proposal to place a total limit on the number of muskellunge harvested "reasonable and necessary for conservation" and ruled that the Chippewa must use a total limit in their harvest plan.
- *Information required to open a lake for tribal harvest.* Relying on technical information presented during the trial, Judge Crabb ruled that the Chippewa may spear or net fish only on lakes that have reliable estimates of fish populations and may not fish any lake intensively more than 2 years in succession. Subject to these restrictions and the size limitation on lakes available for gillnetting, the court ruled that the Chippewa may select the lakes in which to spear and net. They must also monitor their harvest and provide biological information to the state.
- *Fish available for Chippewa harvest.* The state petitioned the court to allocate between the Chippewa and other anglers the fish available for harvest. Judge Crabb declined to allocate the harvest, however, citing Chippewa contentions that the proposed division would be discriminatory, was not a conservation measure necessary for species preservation, and represented an attempt to allocate resources without showing that allocation is necessary. The court also reiterated the LCO IV ruling that the state's "right to regulate the exercise of treaty rights in the interests of conservation arises

only if the state can show that conservation goals cannot be met by regulating the harvest of non-Indians." It ruled that the Chippewa have the right to take the full safe harvest of walleye and muskellunge from any lake they select for fishing by traditional, high efficiency methods, subject to certain conditions.

Lac Courte Oreilles Band of Lake Superior Chippewa Indians, et al. v. State of Wisconsin, et al., 740 F.Supp. 1400 (W.D. Wis. 1990) (LCO VII). Through continuing negotiation, the state and the Chippewa resolved many issues related to the harvest of wild rice, deer, and small furbearing species as well as walleye and muskellunge. By 1990, only a few disputed issues remained, but those few included the frequently debated issue of allocation of resources between the Chippewa and other Wisconsin citizens.

Judge Crabb expressed concern in this May 9, 1990, decision about differences between circumstances in Wisconsin and those in the State of Washington, where a bitter fishing rights dispute was resolved by dividing the harvest equally between Indians and non-Indians. She decided, nevertheless, to allocate the harvestable resources equally. Noting that Indian resource rights are limited to lands not privately owned, the court ruled that this circumstance cannot be used to deny the Chippewa their share of the harvest. The court also ruled that when conservation rules or harassment prevent fishing on certain lakes, it may be necessary to allow the Chippewa to harvest more than half of another lake's fish resources.

Although the court allocated to the Chippewa an equal share of all the resources within the ceded territory, it found that they may exercise their treaty rights only on public lands. When hunting or trapping on private lands, they are subject to state regulations.

The court denied Chippewa petitions to permit deer hunting during summer months and to permit "shining", that is, night hunting of deer with lights. In both instances, Judge Crabb cited safety concerns as the basis for her ruling. She also denied the state's petition to prohibit Indian deer hunting during the 24 hours immediately preceding the opening of the state deer gun season. The state urged the prohibition because of possible misconduct by non-Indians, but the court found it inappropriate to regulate Indian hunting rights in order to accommodate concerns about the conduct of non-Indian hunters.

Finally, the court rejected the Chippewa argument that trapping should be allowed in the beds of rivers,

streams, and artificial flowages that are in private ownership.

Lac Courte Oreilles Band of Lake Superior Chippewa Indians, et al. v. State of Wisconsin, et al., 749 F.Supp. 913 (W.D. Wis. 1990) (LCO VIII). This October 11, 1990, ruling addressed the issue of monetary damages for past deprivation of Chippewa treaty rights. The state challenged a 1984 ruling by Judge Doyle, who had written that states are not immune to suits by Indians. The state asserted that recent U.S. Supreme Court decisions had undermined the basis for Judge Doyle's ruling. Judge Crabb agreed about the effect of recent decisions and observed that the Chippewa "cannot pursue their claim for damages against the State of Wisconsin directly; they may do so only through the United States." Similarly, states may not sue Indian tribes unless they have congressional authorization. Judge Crabb concluded her opinion with these words:

The result of applying the Supreme Court's Eleventh Amendment analysis leaves the plaintiff tribes without an adequate remedy for the wrongs they have suffered. After more than sixteen years of litigation during which this court and the Court of Appeals for the Seventh Circuit have determined that the State of Wisconsin has violated plaintiffs' treaty rights for over 130 years, plaintiffs are left with no means of recovering monetary damages from the state except in the unlikely event that the United States joins this suit on their behalf. I find this result wholly at odds with the promises made to plaintiffs in the treaties of 1837 and 1842. Nevertheless, I am not free to rule otherwise, despite the consequences to plaintiffs, who have experienced all too often the hollowness of the promises made to them.

Lac Courte Oreilles Band of Lake Superior Chippewa Indians, et al. v. State of Wisconsin, et al., 758 F.Supp. 1262 (W.D. Wis. 1991) (LCO IX). The opinion issued February 21, 1991, ruled on the question of whether the off-reservation rights reserved under the treaties include the right to harvest commercial timber resources in the ceded territory. Judge Crabb held that the Chippewa "never contemplated retaining a usufructuary right to harvest timber commercially because harvesting and selling timber were not among [their] usual and customary activities at the time the treaties were signed." Commercial logging, she wrote, "is not simply a modern means of harvesting but an entirely different activity from any the Chippewa engaged in at treaty time." Judge Crabb recognized, however, that the Chippewa had used many tree species for particular purposes, and she ruled that they may continue to do so, subject to obtaining permits from state and county forest managers. Such permits can be required for gathering miscellaneous forest products such as tree bark,

maple syrup, firewood, and lodge poles, provided the regulations do not discriminate against the Chippewa. Forest authorities must respond to requests for permits within 14 days.

Final Judgment. On February 28, 1991, the district court issued a summary of all the rulings in *Lac Courte Oreilles Band of Lake Superior Chippewa Indians, et al. v. State of Wisconsin, et al.* and gave attorneys an opportunity to study the proposed final ruling for any omissions. The final judgment, No. 74-C-313-C (W.D. Wis. Mar. 19, 1991), recapitulated the major findings of the 9 LCO rulings and incorporated a number of stipulations by reference. A copy of the final judgment, which both the state and the Chippewa bands decided not to appeal, is printed as Appendix B.

IX. Constitutional Issues

Despite judicial resolution of Chippewa treaty rights issues, the exercise of off-reservation rights by Chippewa people continues to face opposition. Some who oppose the retention of treaty-guaranteed rights have resorted to harassment and violence. Some have threatened recall elections for certain state legislators who did not urge the attorney general to appeal the final judgment. Others have encouraged the Congress to abrogate or "update" the treaties. This controversy includes issues related to the following provisions of the U.S. Constitution:

- Article I, Section 8: The Congress shall have power to regulate commerce with foreign nations, and among the several states; and with the Indian tribes....
- Article I, Section 10: No state shall enter into any treaty, alliance, or confederation....
- Article II, Section 2: [The president] shall have power, by and with the advice and consent of the senate, to make treaties, provided two-thirds of the senators present concur....
- Article VI: This constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding.
- Article V [Amendment 5]: No person shall be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.
- Article XI [Amendment 11]: The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

A. Chippewa Property Rights. The property at issue in the treaty rights controversy consists of the resource, or "usufructuary", rights the Chippewa people retained when they ceded land to the U.S. government. As expressed by law professor Rennard Strickland in a 1990 report to the Senate Select Committee on Indian Affairs:

A usufructuary right is the right of a person (or group) to enjoy, use, or harvest something to which that person does not have actual title.... Any person (or group) may reserve a usufructuary right in property they sell or give to another.

Indian case law distinguishes between "aboriginal" title and "treaty-recognized" title. Aboriginal title has been described as a "right of occupancy" that the U.S. government can extinguish without compensating the original owners for their loss. Treaty-recognized title refers to title that has been recognized by a federal treaty or statute. It constitutes a legal interest in the land that can be extinguished only upon an explicit statement of congressional intent accompanied by payment of compensation.

The U.S. Supreme Court ruled in *United States v. Winans*, 198 U.S. 371 (1905) that retention of treaty-recognized rights of use does not necessarily require that a tribe retain title to the land. The Court reaffirmed in *Washington, et al. v. Washington State Commercial Passenger Fishing Vessel Association, et al.*, 443 U.S. 658 (1979) that treaty-recognized rights of use depend on neither title nor right of permanent occupancy.

More recently, the 7th Circuit U.S. Court of Appeals stated in the 1983 LCO I opinion:

...The rule we find emerging from prior cases dealing with Indian rights is a rather straightforward statement of contract law. If the Government explicitly promised the Indians a property interest in land, the Government would be subject to a claim for compensation if it breached the terms of the agreement.

Regardless of the monetary implications of abrogating Chippewa off-reservation rights, Congress has not taken such action. Since 1960, several resolutions abrogating Indian property rights have died in committee, and Senator Daniel Inouye, chair of the Senate Select Committee on Indian Affairs, has stated recently that abrogation of Chippewa treaties is not among the options he will present to the Congress.

Another aspect of the property rights issue is state liability for damages as a result of having prevented the exercise of Chippewa resource rights. In 1966, Congress enacted Section 1362 of the U.S. Code, which provides that federal district courts "shall have original

jurisdiction of all civil actions brought by an Indian tribe wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States." The U.S. Court of Appeals, 8th Circuit, held in *Standing Rock Sioux Indian Tribe v. Dorgan*, 505 F.2d 1135 (1974), however, that the 11th Amendment barred a tribal suit against a state and that Section 1362 did not strip states of their immunity. The U.S. Court of Appeals, 9th Circuit, ruled in *Native Village of Noatak v. Hoffman*, 896 F.2d 1157 (1990) that Section 1362 does permit tribes to sue for damages. To resolve the conflict between these appeals court decisions, the U.S. Supreme Court agreed in October 1990 to hear an appeal of the 9th Circuit ruling. That same month, Judge Crabb ruled that the Chippewa could not "pursue their claim for damages against the State of Wisconsin directly" and could seek damages only if the United States joined the suit. Her action was affirmed when the U.S. Supreme Court decided in *Blatchford v. Native Village of Noatak*, 501 U.S. ____, 115 L.Ed. 2d 686 (1991) that the 11th Amendment shields states from tribal suits for damages. By that time, both the Chippewa bands and the State of Wisconsin had already decided not to appeal Judge Crabb's decision, and, based on *Blatchford*, it appears doubtful that a Chippewa appeal of the district court ruling would have succeeded.

B. Federal Authority. Constitutional provisions for negotiating treaties and regulating commerce with Indians suggest that neither the federal nor state government has authority over Indians without their consent. A recent commentary in the *Harvard Civil Rights Civil Liberties Law Review* by Rachel San Kronowitz et al. asserts that the "true intention of the Constitution was to serve as a framework for United States-Indian relations, and not a source of United States power" (italics in original). Similarly, in the Northwest Ordinance of 1787, the U.S. government pledged itself to protect Indian property, rights, and liberty and proclaimed the "utmost good faith" toward Indian people.

Historians point out, however, that the documents of 1787 were written at a time when the tribes were strong and the new U.S. government weak. By the time Indian cases began to reach the U.S. Supreme Court early in the 19th century, the balance of power was shifting. Tribal power was weakening, and the position of the Supreme Court in the federal system was not yet secure. It has been argued that Chief Justice Marshall framed some of his early decisions with the intent of making them politically acceptable. In this perspective, Marshall expressed a strong view of tribal sovereignty

in the 1832 *Worcester* decision only because by that time he felt that the Court was secure politically.

Supreme Court decisions thus appear to reveal the interface of 2 histories: legal and political. As the place of the Supreme Court in the U.S. system became more secure, Marshall's decisions showed increasing recognition of Indian sovereignty. Simultaneously, however, tribes were becoming weaker militarily and politically. When later courts examined Marshall's decisions for precedents regarding federal jurisdiction over Indian tribes, they cited early cases that reduced tribal sovereignty to a right of occupancy rather than later cases that recognized tribes as the "third sovereignty" encompassed within the United States.

In *Martin v. Waddell*, 41 U.S. (16 Pet.) 367 (1842), the Supreme Court ruled, for example, that the federal government held full title to Indian lands, leaving Indians only a right of occupancy. It further determined in *United States v. Rogers*, 45 U.S. (4 How.) 567 (1846) that the federal government had a right to interfere in internal tribal affairs and govern Indians. By the late 19th century, the denial of Indian power was virtually complete. The Supreme Court ruled in *Cherokee Tobacco*, 78 U.S. (11 Wall.) 616 (1870) that Congress could enact legislation in conflict with treaty provisions. A year later, Congress ended treaty making with Indian tribes and transferred conduct of Indian affairs from the executive to the legislative branch — an action that marked the low point of federal acknowledgment of tribal sovereignty.

When Congress gave itself control of Indian affairs, it did so by amending an appropriations act with a rider that prohibited the United States "from recognizing any Indian nation as capable of making a treaty." Thereafter, the federal government conducted Indian affairs by means of "agreements" which, because they were considered legislation rather than treaties, were ratified by both houses of Congress. An analysis by Kronowitz et al. of the 1871 act that ended treaty making asserts that the law violated the separation of powers doctrine by eliminating a constitutionally enumerated executive power through legislation rather than constitutional amendment. Barsh and Henderson have described the consequences of the amendment as follows:

Treaties, like contracts, are unenforceable except against those agreeing specifically and expressly to be bound by them. Legislation, however, is presumed to be legitimate when enacted, and enforceable against all persons within the power of the legislature. Consent is neither specific nor express, but general and implied in the right to vote. Tribal

Indians in 1871 could not vote. Thus what appeared to be a transfer of responsibility between branches of the federal government, was in actuality an assertion or arrogation of the power to govern tribes without their consent.

The 1887 Allotment Act, an attempt at assimilation that was not abandoned until 1934, reduced the Indian land base in the United States from more than 140 million acres to fewer than 50 million acres. The act provided for the subdivision of tribal lands into small parcels that Indians could acquire in fee simple upon being judged "competent" and for the sale of "surplus" land to non-Indians. Both the economic system and lifestyle implied by allotment were foreign to most Indians, and many sold their allotments to pay taxes.

The 20th century has witnessed another swing of the pendulum. The U.S. Supreme Court, in *United States v. Winans*, 198 U.S. 371 (1905), ruled that a treaty is "not a grant of rights to the Indians, but a grant of rights from them — a reservation of those not granted" and has followed this meaning of treaties since 1905.

The Court decided in *Menominee Tribe of Indians v. United States*, 391 U.S. 404 (1968) that hunting and fishing rights are valuable property rights, abrogation of which gives rise to a claim for compensation under the 5th Amendment, and that "the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress." In *Morton, Secretary of the Interior, et al. v. Mancari, et al.*, 417 U.S. 535 (1974), it ruled that congressional exercise of power over Indians is "tied rationally to the fulfillment of Congress' unique obligation" to Indians.

As these cases indicate, federal authority over Indian people and their affairs is broad but far from absolute. Twentieth century U.S. Supreme Court rulings have repeatedly upheld treaty-guaranteed rights. They have also sustained the power of Congress to abrogate treaties but have constrained that power by reaffirming the trust relationship of the federal government to Indian people.

C. State Authority. The Chippewa people arrested in 1974 for fishing out of season and outside their reservation raised the issue of whether the state has a right to regulate their activity. Subsequent federal court decisions have established that the Chippewa have retained their off-reservation hunting, fishing, and gathering rights, and the district court has described the limited purposes and conditions under which the state can regulate Chippewa exercise of their rights.

Limitations on state authority to regulate off-reservation hunting and fishing originate with the sovereignty of Indian people. Although case law has established that tribes are no longer fully sovereign, they retain all aspects of sovereignty that have not been eliminated by treaty or statute. Resource rights reserved by treaty thus constitute one attribute of tribal sovereignty. As described by judge and former law professor William C. Canby, Jr.: "Tribal sovereignty has operated to a considerable degree as a shield against intrusions of state law into Indian country."

In contrast to municipalities, which must receive their powers to act from the states, tribes need no authorization from the federal government, according to Canby. To him, the relevant question regarding tribal power "is whether any limitation exists to prevent the tribe from acting, not whether any authority exists to *permit* the tribe to act" (italics in original).

In *Williams v. Lee*, 358 U.S. 217 (1959), the U.S. Supreme Court ruled that state law cannot be applied in Indian country if it interferes with the right of Indians to make and be governed by their own laws. The Court further ruled in *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973) that state law can intrude into Indian country only if it does not interfere with tribal self-government and only if non-Indians are involved. The latter case, however, introduced the idea that Indian sovereignty provides only a "backdrop against which the applicable treaties and federal statutes must be read" and suggested that courts must examine, case by case, whether federal law preempts state law.

Despite differing views of the current extent of tribal sovereignty, legal literature is virtually unanimous that treaties take precedence over any conflicting state laws. This proposition dates from the 1832 *Worcester* decision, which rested on 2 principles: constitutional delegation to the federal government of authority in Indian affairs, and the right of tribes to self-government, free of state interference. According to the most recent edition of Cohen's *Handbook of Federal Indian Law*, "The single most important factor in state exclusion is tribal sovereignty under the protection of federal law." Further, states the *Handbook*, "broad preemption of state laws in Indian country has been consistently recog-

nized as a necessary implication from the federal policy protecting tribal sovereignty."

Cohen's commentary emphasizes that the supremacy clause of the Constitution precludes the application of state laws to Indian affairs without specific congressional authorization. Similarly, a recent study prepared by Michael H. McCabe and published by the Midwestern Legislative Conference of the Council of State Governments points out that states must "recognize that their authority over Indian affairs is limited by Congressional delegation and is often subject to tribal consent."

Analysis of the supremacy clause has led a number of scholars to conclude that any application of state law that has not been authorized by Congress is unconstitutional. According to law professor Ralph Johnson, for example, it was only *dicta* in *United States v. Winans*, 198 U.S. 371 (1905) and *Tulee v. State of Washington*, 315 U.S. 681 (1942) that suggested that a state can regulate Indian fishing rights if necessary for conservation. It was not until the ruling in *Puyallup Tribe, et al. v. Department of Game of Washington, et al.*, 391 U.S. 392 (1968) that the U.S. Supreme Court confronted the issue of state regulation directly, and, in Johnson's view, "conceded the Indians' best position without argument...." Even then, however, the Court ruled that the state could regulate Indian fishing only if its regulation met appropriate standards and did not discriminate against Indians.

Similarly, a federal district court held in *Sohappy v. Smith*, 302 F.Supp. 899 (D.Or. 1969) that a state may limit Indian treaty fishing "only to the extent necessary to prevent the exercise of that right in a manner that will imperil the continued existence of the fish resource." The court rejected the State of Oregon's contention that "conservation" needs included allocating the resource among competing groups, perhaps recalling the admission of an expert witness that "state officials used the term 'conservation' to mask the fact that state regulations promoted only non-Indian interests." The court also ruled that Indians exercising treaty-guaranteed rights "were entitled to appropriate notice and opportunity to participate meaningfully in the rule-making process."

Chippewa Spring Spearfishing Harvest, 1985-1990

Year	No. Lakes Speared	Walleye Harvest	Muskellunge Harvest
1985	13	2,716	86
1986	30	6,940	55
1987	67	21,321	196
1988	93	25,969	158
1989	102	16,054	118
1990	119	25,346	303

Source: U.S. Department of the Interior, *Casting Light Upon the Waters*, 1991, p. 62.

The proscription of state authority in Indian country appears to have an empirical as well as a constitutional base. Even when recognition of tribal sovereignty had reached its lowest point, the U.S. Supreme Court held in *United States v. Kagama*, 118 U.S. 375 (1886) that tribes "owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the states where they are found are often their deadliest enemies." Many things have changed since those words were written, but federal law and court rulings still hold that states have no jurisdiction over Indians and their property within reservation boundaries without specific congressional authorization. Recent federal court rulings in Wisconsin have further defined state jurisdiction over Chippewa people who exercise treaty-guaranteed hunting and fishing rights *outside* reservation boundaries and have limited those rights only for the purposes of conservation and public health and safety.

The decisions reached in Wisconsin parallel those reached in Michigan in a series of actions begun by the United States in 1973 to protect the right of Chippewa Indians living in Michigan to fish in the adjacent Great Lakes. In *United States v. Michigan*, 471 F.Supp. 192 (W.D. Mich. 1979), the federal district court affirmed the Indians' fishing rights, and subsequent proceedings upheld their right to regulate their own members.

X. Resource Conservation Issues

The state has argued that its regulation of Chippewa usufructuary rights is necessary for resource conservation, and the federal district court, relying on *Puyallup*, has established conservation as one of the few purposes for which the state may regulate tribal resource harvests. The court has ruled, however, that the state must use the least restrictive alternative and must not discriminate against Indian harvesters. With specific regard to walleye and muskellunge, the court has ruled that the Chippewa may regulate their own harvest,

provided they observe certain conservation-based rules.

Rules used by the Chippewa incorporate proposals submitted by the Great Lakes Indian Fish and Wildlife Commission (GLIFWC) and certain modifications requested by the DNR to create a methodology for establishing a "safe harvest". The question of what constitutes a safe harvest of walleye and muskellunge has received more analysis and generated more controversy than perhaps any other phase of the treaty rights litigation.

A report recently prepared at the instigation of Senator Daniel Inouye and published by the U.S. Department of the Interior addressed concerns about the health of the fishery resource. The report (cited hereafter as the Inouye report) presents data compiled by a team of professionals representing the Wisconsin Department of Natural Resources, the U.S. Fish and Wildlife Service, the Great Lakes Indian Fish and Wildlife Commission, the Bureau of Indian Affairs, and the 6 Wisconsin bands of Chippewa Indians. The data relate to 2 primary questions: Has Chippewa spearing harmed the resource? Is the fish population in the ceded territory healthy?

Senator Inouye, whose comments introduce the report, wrote that he and many others shared

....[a] perception that the fires of controversy were being fueled by a campaign of misinformation regarding the impact of Indian treaty fishing on the fishery resource.... Applying state of the art methods, the results of this jointly-conducted assessment confirm that fish populations are not being over-exploited in most cases and that current fish populations meet or exceed agreed-upon goals.

The Inouye report states, for example, that there are 2,300 lakes larger than 25 acres in the ceded territory, of which 859 contain walleye and 603 contain muskellunge. It places the estimated average annual sport harvest of these species at approximately 623,525 walleye

and 9,454 muskellunge, and it reports the 1985-1990 Chippewa harvest in the table on page 14.

Spearfishing opponents have claimed that the Chippewa harvest is harming the resource and must be regulated in order to preserve fish for sport anglers. The Wisconsin Department of Natural Resources (DNR) has characterized sport fishing as self-regulating because of the great time and effort required to catch each fish and has asserted that bag limits protect fish populations from over-exploitation. Indeed, data based on interviews with 28,901 anglers show that 93 percent of sport anglers who fished in the ceded territory caught no walleye during the period 1980-1987 and that 51 percent of those who did bag walleye caught only one. Nevertheless, harvest estimates indicate that sport anglers, regulated by bag limits, have taken substantial numbers of fish. The Inouye report described the effect of bag limits on the fishery in these words:

Bag limits indirectly control harvest by limiting the number of fish that an individual angler can keep but there is no direct control over the total harvest.

If bag limits have little effect on total harvest because there is no control of the number of anglers fishing for their limit, what about quotas? Under the federal district court order, spear fishers must identify the lakes on which they plan to fish and take no more than a specified number of fish from each lake. The result is that the exact number of fish taken by Chippewa spear fishers is known, and their fishing of a given water body must stop when they reach the quota set for that lake. The Inouye report explained the quota approach to harvest control as follows:

Quotas are based on a predetermined number of fish that can be harvested. This number protects the fish populations from the effects of over-harvest and provides direct control over the fishery if it is adequately monitored.

Although both sport and treaty fishers are subject to the court order that limits harvests to a "safe level", some observers have found an inconsistency in counting every fish speared by the Chippewa while assuming that sport fishing is self-regulating and will not result in over-exploitation by non-Indian anglers. The fallacy in that assumption is evidenced by the following statement in the state's 1979 fisheries management plan:

Based on current estimates of trends in angler demand there will be an adequate supply of 11 inch and larger fish through 1990. If only the 13 inch and larger walleye are considered harvestable demand will exceed supply by 1985.

Judge Crabb addressed this issue in the LCO IV decision. Regarding reduced bag limits, she wrote:

....these restrictions would have been imposed even if the tribes' treaty rights had not been judicially recognized. It is purely fortuitous that the time for their implementation came shortly after the start up of Indian spring spearing.

There also appear to be inconsistencies in DNR assessments of the impacts of spearfishing. On the one hand, George Meyer, administrator of the DNR's Division of Enforcement, testified in 1989 before the Wisconsin Advisory Committee to the U.S. Commission on Civil Rights that fishing stocks in northern Wisconsin will not be reduced or depleted because of spearfishing. He identified the "real issue" as how the fish are allocated among users. On the other, the department has reduced sport fishing bag limits but has done so only on lakes speared by the Chippewa. This practice may give the appearance that Chippewa activity is responsible for the reduction.

Strickland has suggested that the practice of reducing sport fishing bag limits helps the department pressure the Chippewa to "voluntarily" reduce their catch, which then enables the state to contend it is regulating non-Indians, not the Chippewa. This, in turn, reinforces the argument that the Chippewa are to blame for reduced bag limits. In 1990, new state fishing regulations called attention to Chippewa fishing through the following choice of words:

Daily bag limits on walleye will be reduced and muskellunge size limits will be raised on some lakes in response to Indian harvest goals.... These regulations are apt to change on short notice.... (Bold face, underlined type in original.)

Regulations for 1991, which contained county-by-county lists of special regulations, included the following language for counties wholly or partially in the ceded territory:

....[name] County is in the ceded territory and some bodies of water may have more restrictive bag or size limits.

The number of fish taken by the Chippewa and critics' concern about the impact of that harvest on the sport fishery have received wide attention. Some media have also publicized tribal hatching, rearing, and restocking efforts. The Lac du Flambeau band, for example, has operated a hatchery since 1936. In 1989, the band released approximately 27 million walleye fry, 735,000 walleye fingerlings, 200,000 muskellunge fry, and 1,000 muskellunge fingerlings. Strickland has pointed out that many non-Indians fish on the reservation, and it is estimated they take 90 percent of the walleye catch on the Lac du Flambeau reservation.

Since 1983, when the federal court affirmed Chippewa off-reservation resource rights in LCO-I, state and tribal officials have worked together in many ways. In September 1991, plans for expanding state-tribal cooperation were announced. Projects tentatively selected include walleye and lake trout rearing and stocking, sturgeon production, and increasing tribal natural resource enhancement capabilities.

XI. Racism and Information Issues

Long before Chippewa people resumed exercise of their off-reservation resource rights, Indians throughout the United States encountered racism. A task force established by the U.S. Department of Justice in 1972 "found full-scale and widespread racial discrimination against Indians." The U.S. Commission on Civil Rights noted in 1981 that Indians have been viewed as an "inferior race" since colonial times and that "racism has served to justify a view ... that Indians are not entitled to the same legal rights as others in this country." The commission asserted that the judiciary of the United States "has also lent support to the myth of Indian inferiority."

Such allegations find support in legal commentaries that examine certain premises upon which courts have relied. The assertion of federal over state authority in the U.S. Supreme Court *Kagama* ruling, for example, appears to rest on a prejudiced view of Indians:

These Indian tribes are wards of the nation. They are communities dependent on the United States. Dependent largely for their daily food. Dependent for their political rights.... From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which has been promised, there arises the duty of protection, and with it the power (italics in original).

Cohen found that the power over Indians claimed in *Kagama* came not from the Constitution but from the Court's perception that Indians need protection — a view that, in turn, depended on a perception of Indians as inferior. As attorney Irene Harvey has observed, "By fabricating inferiorities in Indians, the Court justified rule over them." Or, as expressed by law professor Newton,

...one key to the Court's finding of a congressional guardianship power over Indians was its view of their racial and cultural inferiority.

Discussions of racist perceptions of Indians often focus on lack of information, especially lack of accurate information, as a condition that feeds racism. At a 1977 hearing before the Senate Select Committee on Indian

Affairs, Mel Tonasket, an Indian from the State of Washington, testified:

I think a lot of the backlash coming from the common citizens is mainly out of ignorance, because of the lack of educational systems to teach anything about Indians, about treaties.... When the population really doesn't know what the rights are and what the laws say, they have to make judgment decisions based on what the media puts out to them or what a politician [says].

That same year, the American Indian Policy Review Commission established by the U.S. Congress reported:

One of the greatest obstacles faced by the Indian today ... is the American public's ignorance of the historical relationship of the United States with Indian tribes and the lack of general awareness of the status of the American Indian in our society today.

Similarly, a 1989 report by the Wisconsin Advisory Committee to the U.S. Commission on Civil Rights cited "numerous complaints regarding the lack of public knowledge about Indian treaty rights." The committee also "found that tensions between Indians and non-Indians have been present for many years in northern Wisconsin" but "have transformed into increased racial hostility and fears of violence" since judicial affirmation of off-reservation resource rights.

The extent of public ignorance regarding the Chippewa treaty rights controversy has been revealed in 2 recent surveys. The Survey Center of St. Norbert College, which conducted telephone interviews with 514 Wisconsin residents during March and April 1990, found that only 6 percent of those surveyed answered all 3 of the following questions correctly:

Do you happen to know, are these Chippewa Indian Treaties between Chippewa Indians and the Wisconsin State Government, or are they between Chippewa Indians and the U.S. Federal government, or are you not sure?

Do you happen to know, did the U.S. Federal Courts give the Chippewa Indians these hunting, fishing, and gathering rights, or have the Chippewa Indians always had these rights, or are you not sure?

Do you happen to know, do the Chippewa Indian Treaties allow them to take unlimited numbers of fish and game, or is there a limit to how much fish and game they can take, or are you not sure?

Similarly, a 1990 study directed by sociologist Lawrence Bobo of the University of California at Los Angeles found that only 9 percent of the 784 Wisconsin residents surveyed were able to respond correctly to all 3 of the following questions:

As far as you know, do the Chippewa Indians cooperate with the State in monitoring the fishing and deer hunting of tribal members?

To your knowledge, do any of the Chippewa Indian bands have fish rearing and stocking programs?

As far as you know, do the court rulings on Chippewa Indian treaty rights allow the Chippewa unlimited fishing rights in Treaty Wisconsin?

The Bobo research team also found a statistically significant correlation between knowledge and level of education, as well as between knowledge and attitudes. Fifty percent of those who answered all 3 questions correctly favored Chippewa fishing rights compared to only 13 percent of those who answered all 3 incorrectly. Moreover, 85 percent of those with more accurate information opposed efforts to terminate treaties, compared to only 62 percent of those with less accurate information. Bobo's research results have led him to conclude that

....schools and information campaigns can probably play an important role in resolving the treaty rights dispute. Level of education contributes to the accuracy of the information individuals are likely to possess on the treaty rights issue. The better educated are also less likely to hold negative images of American Indians. Knowledge, stereotyping and level of education directly shape attitudes toward treaty rights and knowledge and stereotyping influence the level of support for comanagement. Given the low levels of knowledge and these empirical patterns an informational program about the treaties and enhanced discussion of the American Indian experience in the schools would probably encourage a more tolerant response to the treaty rights issue.

The St. Norbert survey suggests that Wisconsin residents support such an informational program. In response to a question about requiring all elementary and secondary schools in Wisconsin to teach students about Indian culture, history and government, 74 percent of those surveyed answered affirmatively. A St. Norbert followup survey conducted in April 1991, in which 55 percent of respondents said they support the exercise of treaty rights, also found support strongest among those aged 18-24 (83 percent) and college graduates (69 percent).

Before any of these surveys was available, the Wisconsin Legislature included the following provisions in 1989 Wisconsin Act 31:

[The state superintendent shall] In coordination with the American Indian language and culture education board, develop a curriculum for grades 4 to 12 on the Chippewa Indians' treaty-based, off-reservation rights to hunt, fish and gather. (S. 115.28 (17) (d), Wisconsin Statutes)

[Each school board shall provide an instructional program designed to give pupils] At all grade levels, an understanding

of human relations, particularly with regard to American Indians, Black Americans and Hispanics. (S. 118.01 (2) (c) 8, Wisconsin Statutes)

[Each school board shall] Beginning September, 1991, as part of the social studies curriculum, include instruction in the history, culture and tribal sovereignty of the federally recognized American Indian tribes and bands located in this state at least twice in the elementary grades and at least once in the high school grades. (S. 121.01 (L) (4), Wisconsin Statutes)

To implement these laws, the Wisconsin Department of Public Instruction has sponsored conferences for educators, prepared extensive resource guides for teachers, and developed classroom activity units concerning the histories, cultures, and tribal governments of Wisconsin Indians. The department's American Indian History and Culture Program plans to create additional resources to help teachers meet the requirements of the law.

Troubled economic conditions as well as ignorance and misinformation have been cited as contributors to the conflict about the exercise of off-reservation resource rights. Although northern Wisconsin was experiencing poverty and unemployment before the resumption of off-reservation hunting, fishing, and gathering, certain groups have used racist appeals to blame the Chippewa for these deteriorating conditions and have alleged that spearfishing has caused declines in tourism and sport fishing. Reports by the Wisconsin Department of Development have contradicted such claims, however, and have suggested, instead, that tourism is flourishing. Perhaps Professor Strickland identified the villain in this scenario when he wrote that northern Wisconsin's economic distress "provides a fertile bed for the exploitation of fear and frustration".

Other coincident conditions have been cataloged by historian David Wrone. Many of today's tourists seek amenities unavailable at aging, rustic resorts. Long weekends are replacing week-long vacations. Fishing itself is being affected by water pollution and shoreline developments that destroy spawning beds. And, although Wrone found "the focus of advertising, the thrust of the resort business psychology, is locked on the theory that tourists go north to fish", a 1987 study by the University of Wisconsin-Extension found that only 8.3 percent of tourists cited fishing as the main reason for their trips.

Since 1984, when spearfishing was resumed and opposition to spearfishing generated attendant media coverage, there have been complaints of media bias and media "overkill" as well as acknowledgment that both

print and broadcast media have documented displays of racism. On the one hand, the media have shown treaty rights opponents shouting obscenities and racial taunts. On the other, as noted by GLIFWC administrator James Schlender, "The search for 'news' often looks for division and glosses over the educational aspect of reporting current events." It has been reported, for example, that the presence of TV cameras has sometimes precipitated protest activity. Regardless of whether media attention has contributed to the nature and extent of boatlanding demonstrations, critics have accused the media of failing to cover treaty rights stories accurately and objectively and of trying, in Schlender's words, "to deal with a complex issue through simple messages conveyed by their headlines, 'sound bites,' and file footage."

XII. Conclusion

The treaty rights controversy has occupied Wisconsin to the extent that more than 80 percent of residents surveyed in 1990 by both St. Norbert and UCLA researchers reported having heard or read about it. It has stirred deep emotions and moved people to action in ways that are reminiscent of the civil rights disputes of the 1960s. Despite its regrettable aspects, the controversy now appears to be yielding positive results.

Human Relations. Both the state and the Chippewa bands have decided not to appeal the district court's final order. These decisions permit the parties to change the focus of their relationships from confrontation to cooperation. They also enable the parties to redirect dollars from litigation to economic development and resource enhancement.

Cooperative efforts to date include cultural awareness training for state government officials, deputization of GLIFWC wardens as state conservation wardens, and collaboration between chambers of commerce and tribal representatives to promote tourism. In addition, the new curriculum materials related to Indian history and culture offer hope that education can lead to greater understanding and respect.

Resource Conservation. Research compiled in the Inouye report indicates that new steps have been taken

to determine what actions are needed to maintain or improve the sport fishery. Evidence of progress in the resource area includes increasing efforts by the DNR to evaluate fishery resources; a growing number of cooperative efforts between the DNR and the Chippewa bands; and joint endeavors among community groups, such as Fish for the Future. Fish for the Future is a cooperative venture involving the Bad River and Red Cliff bands, the Cable Chamber of Commerce, and a group of resort owners and sportsmen. Under this program, eggs from speared fish are collected by volunteers and tribal biologists, incubated in tribal hatcheries, and fry provided for rearing ponds operated by Fish for the Future or for stocking in area waters.

Future Prospects. Creating a sound economy and a climate of mutual cooperation and respect will require sustained effort by both Indians and non-Indians. The initiatives now taking shape, however, appear to herald a new era of collaboration. If these efforts continue, Wisconsin can look forward to improved relations between Indians and non-Indians and improved fishing opportunities for both groups. As DNR Secretary Carroll Besadny stated in a recent newsletter:

The ending of this legal battle now provides a climate for cooperation in the North unlike any time since 1974.... By moving beyond the courtroom ... the dreams of all who want a North of peace and natural resources harmony can have a better chance of coming true.

Since the earliest days of Indian-white contact, Indian people have viewed treaties as "sacred obligations", not mere "temporal agreements". White settlers and white governments appear to have taken a different view, however. Their dealing with treaties as documents subject to change has been a continuing issue.

Even today, there are those who claim the treaties should be "updated". Those who disagree cite a model of justice proposed in a dissenting opinion by U.S. Supreme Court Justice Hugo Black in *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99 (1960):

Great nations, like great men, should keep their word.

Appendix A

Excerpts from Selected Treaties Between the Chippewa and the United States

Treaty of 1836 (ceding portions of northern Michigan):

Article 13: The Indians stipulate for the right of hunting on the lands ceded, with the other usual privileges of occupancy, until the land is required for settlement.

Treaty of 1837 (ceding portions of eastern Minnesota and northwestern Wisconsin):

Article 5: The privilege of hunting, fishing, and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded, is guaranteed to the Indians, during the pleasure of the President of the United States.

Treaty of 1842 (ceding remaining lands in Wisconsin and Michigan):

Article II. The Indians stipulate for the right of hunting on the ceded territory, with the other usual privileges of occupancy, until required to remove by the President of the United States....

Treaty of 1854 (ceding remaining lands in Minnesota):

Article XI: And such of them as reside in the territory hereby ceded, shall have the right to hunt and fish therein, until otherwise ordered by the President.

Source: *A Guide to Understanding Chippewa Treaty Rights*. Odanah: The Great Lakes Indian Fish and Wildlife Commission, 1991.

Appendix B

Final Judgment of Judge Barbara Crabb in *Lac Courte Oreilles
Band of Lake Superior Indians et al. v. State of Wisconsin et al.*,
March 19, 1991*

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

LAC COURTE OREILLES BAND OF
LAKE SUPERIOR CHIPPEWA INDIANS;
RED CLIFF BAND OF LAKE SUPERIOR
CHIPPEWA INDIANS; SOKAOGON
CHIPPEWA INDIAN COMMUNITY;
MOLE LAKE BAND OF WISCONSIN;
ST. CROIX CHIPPEWA INDIANS OF
WISCONSIN; BAD RIVER BAND OF
THE LAKE SUPERIOR CHIPPEWA INDIANS;
LAC DU FLAMBEAU BAND OF LAKE
SUPERIOR CHIPPEWA INDIANS,

Plaintiffs,

FINAL JUDGMENT

v.

74-C-313-C

STATE OF WISCONSIN, WISCONSIN NATURAL
RESOURCES BOARD, CARROLL D. BESADNY,
JAMES HUNTOON, and GEORGE MEYER

Defendants,

and

ASHLAND COUNTY, BURNETT COUNTY,
FLORENCE COUNTY, LANGLADE COUNTY,
LINCOLN COUNTY, MARINETTE COUNTY,
WASHBURN COUNTY, and THE WISCONSIN
COUNTY FORESTS ASSOCIATION, INC.,

Intervening Defendants.

*As amended on March 22, 1991, to correct a spelling error.

Reprinted by permission of the Wisconsin Academy of Sciences, Arts and Letters from *Chippewa Treaty Rights: The Reserved Rights of Wisconsin's Chippewa Indians in Historical Perspective*, a special issue of *Transactions*, by Ronald N. Satz, Graduate School Dean and Professor of American Indian History at the University of Wisconsin-Eau Claire.

Judgment is entered as follows:

The usufructuary rights retained by plaintiffs as a consequence of the treaties they entered into with the United States of America in 1837 and 1842 include rights to those forms of animal life, fish, vegetation and so on that they utilized at treaty time, set forth in the facts sections of the opinions entered herein on February 18, 1987 and February 21, 1991. Also, plaintiffs have the right to use all of the methods of harvesting employed in treaty times and those developed since. Plaintiffs' retained usufructuary rights do not include the right to harvest commercial timber. They do include the right to gather miscellaneous forest products, namely, such items as firewood, tree bark, maple sap, lodge poles, boughs and marsh hay.

The fruits of the plaintiffs' exercise of their usufructuary rights may be traded and sold to non-Indians, employing modern methods of distribution and sale, as set forth in the opinion entered on February 18, 1987.

The usufructuary rights reserved by the plaintiffs in 1837 and 1842 have been terminated as to all portions of the ceded territory that are privately owned as of the times of the contemplated or actual attempted exercise of those rights.

Plaintiffs' modest living needs cannot be met from the present available harvest even if plaintiffs were physically capable of harvesting, gathering and processing it. The standard of a modest living does not provide a practical way to determine the plaintiffs' share of the harvest potential of the ceded territory.

The state defendants will continue to bear the responsibility and authority for the management of all of the natural resources of the state except as provided herein.

Defendants are enjoined from interfering in the regulation of plaintiffs' off-reservation usufructuary rights to harvest walleye and muskellunge within the ceded territory in Wisconsin, except insofar as plaintiffs have agreed to such regulation by stipulation. Regulation of plaintiffs' off-reservation usufructuary rights to harvest walleye and muskellunge within the ceded territory is reserved to plaintiffs on the condition that they enact and keep in force a management plan that provides for the regulation of their members in accordance with biologically sound principles necessary for the conservation of the species being harvested, as set out in the opinion entered herein on March 3, 1989, as amended on April 28, 1989. The efficient gear safe harvest level shall be determined by the methods described in the opinion and order of this court of March 3, 1989, as supplemented and amended by proceedings in court on March 28, 1989, the court's order of March 30, 1989 (R. 996) and the court's order of April 28, 1989. In the event of a dispute in determining the safe harvest level for any lake that cannot be resolved by the parties, the determination shall be made by the Department of Natural Resources.

Defendants are enjoined from interfering in the regulation of plaintiffs' hunting and trapping on public lands within the ceded territory in Wisconsin, except insofar as plaintiffs have agreed to such regulation by stipulation, on the condition that plaintiffs enact and keep in force an effective plan of self-regulation that conforms to the orders of the court.

All of the harvestable natural resources to which plaintiffs retain a usufructuary right are declared to be apportioned equally between the plaintiffs and all other persons, with such apportionment applying to each species and to each harvesting unit with limited exceptions as set forth in the order entered herein on May 9, 1990; and upon the condition that no portion of the harvestable resources may be exempted from the apportionable harvest. With respect to miscellaneous forest products, the

total estimated harvest is to be apportioned equally between the plaintiffs and all other persons, with such apportionment applying to each type of miscellaneous forest product and to each state or county forest unit or state property on which the gathering of miscellaneous forest products is permitted.

The defendants and intervening defendants may regulate the plaintiffs' gathering of miscellaneous forest products through the application of Wis. Admin. Code Section NR 13.54 and Proposed County Regulation Section 5.

Defendants are enjoined from enforcing those portions of Section NR 13.32(2)(f) and Section NR 13.32(r)(2)(b) that include a percentage of "public land" as an element of the formulas for determining the maximum tribal antlerless deer quota (in Section NR 13.32(2)(f)) or the maximum tribal fisher quota (in Section NR 13.32(r)(2)(b)).

Plaintiffs may not exercise their usufructuary rights of hunting and fishing on private lands, that is, those lands that are held privately and are not enrolled in the forest cropland or open managed forest lands program under Wis. Stat. ch. 77 at the time of the contemplated or actual attempted exercise of such rights. Plaintiffs may not exercise their usufructuary rights of trapping on private lands or those lands that are enrolled in the forest cropland or open managed forest lands program under Wis. Stat. ch. 77. Plaintiffs are subject to state hunting and trapping regulations when hunting or trapping on private lands. For purposes of plaintiffs' trapping activities, privately owned stream beds, river bottoms and overflowed lands are private lands unless and until state law having state-wide effect is changed to allow such activities.

Defendants may enforce the prohibition on summer deer hunting contained in Section NR 13.32(2)(e) until such time as plaintiffs adopt a regulation prohibiting all deer hunting before Labor Day.

Defendants are prohibited from enforcing that portion of Section NR 13.32(2)(e) that bars tribal deer hunting during the twenty-four hour period immediately preceding the opening of the state deer gun period established in Section NR 10.01(3)(e).

Defendants may enforce the prohibition on shining of deer contained in Section NR 13.30(1)(q) until such time as plaintiffs adopt regulations identical in scope and content to Section NR 13.30(1)(q).

With respect to the exercise of any of plaintiffs' off-reservation usufructuary rights not expressly referred to in this judgment, the state may regulate only in the interest of conservation and in the interest of public health and safety, in accordance with the applicable standards set forth in the opinion entered herein on August 21, 1987.

The following stipulations by the plaintiffs and defendants and consent decrees are incorporated into this judgment as though fully set forth herein:

<u>Docket Number</u>	<u>Subject</u>
Joint Exhibit p-54 from 12/85 Trial	Stipulation as to the Boundaries of the Territory Ceded by the Treaties of 1837 and 1842 (Incorporated into Order of Feb. 23, 1987, R. 452)
R. 330	Stipulation that the issue of the use of Lake Superior under the Treaty of 1842 shall not be adjudicated in this case, but is reserved for litigation at later time

<u>Docket Number</u>	<u>Subject</u>
R. 911	Stipulation on Biological and Certain Remaining Issues in Regard to the Tribal Harvest of Walleye and Muskellunge (Incorporated into Order of March 3, 1989, R. 991)
R. 912	Stipulation on Fish Processing in Regard to the Tribal Harvest of Walleye and Muskellunge (Incorporated into Order of March 3, 1989, R. 991)
R. 913	Stipulation on Gear Identification and Safety Marking in regard to the Tribal Harvest of Walleye and Muskellunge (Incorporated into Order of March 3, 1989, R. 991)
R. 914	Stipulation on Enforcement and Tribal Court Issues in regard to the Tribal Harvest of Walleye and Muskellunge (Incorporated into Order of March 3, 1989, R. 991)
R. 1167	Stipulation in regard to the Tribal Harvest of the White-tailed Deer on issues related to the (1) Biology of Deer Management, (2) Tribal Enforcement and Preemption of State Law, (3) Sale of Deer, (4) Wild Game Processing, (5) Management Authority and (6) Ceremonial Use (Incorporated into Order of May 9, 1990, R. 1558)
R. 1222	Stipulation and Consent Decree in regard to the Tribal Harvest of Wild Rice on issues related to the (1) Biology of Wild Rice, (2) Tribal Enforcement and Preemption of State Law, and (3) Management of Wild Rice
R. 1271	Stipulation of Uncontested Facts relevant to Contested Issues of Law in regard to the Tribal Harvest of Furbearers and Small Game (Incorporated into Order of May 9, 1990, R. 1558)
R. 1289	Stipulation and Consent Decree (R. 1296) in regard to the Tribal Harvest of Fisher, Furbearers and Small Game (Incorporated into Order of May 9, 1990, R. 1558)
R. 1568	Stipulation and Consent Decree (R. 1570) in regard to the Tribal Harvest of Fish Species Other than Walleye and Muskellunge
R. 1607	Stipulation and Consent Decree in regard to the Tribal Harvest of (1) Black Bear, Migratory Birds, Wild Plants, and (2) Miscellaneous Species and Other Regulatory Matters

Except as otherwise specifically provided by the parties' stipulation (R. 1607), defendants may enforce and prosecute in state courts violations of the state boating laws in Wis. Stat. Ch. 30 and Wis. Admin. Code Ch. 5 committed by members of the plaintiff tribes engaged in treaty activities even if the plaintiff tribes have

adopted identical boating regulations for the off-reservation treaty activities of their members.

Plaintiffs' failure to enact an effective plan of self-regulation that conforms with the orders of the court, or their withdrawal from such a plan after enactment, or their failure to comply with the provisions of the plan, if established in this court, will subject them or any one of them to regulation by defendants.

This judgment is binding on the members of the plaintiff tribes as well as on the plaintiff tribes.

Defendants are immune from liability for money damages for their violations of plaintiffs' treaty rights.

Plaintiff Lac Courte Oreilles Band of Lake Superior Chippewa Indians is entitled to actual attorneys' fees and costs for work performed in phase one of this litigation in the amount of \$166,722.24, which amount has been paid.

Costs are awarded to plaintiffs and to the defendants and intervening defendants to the extent they are prevailing parties within the meaning of Fed. R. Civ. P. 54(d).

This judgment is without prejudice to applications for additional attorneys' fees for work performed in phase two of the litigation.

The third-party complaint against the third-party defendants United States of America, William Clark, Secretary of the United States Department of the Interior and John Fritz, deputy assistant secretary of Indian Affairs, Bureau of Indian Affairs, is dismissed.

The motion of plaintiff Lac Courte Oreille{s} Band of Lake Superior Chippewa Indians to join the United States of America as an involuntary party plaintiff is denied as untimely.

Approved as to form this 19th day of March, 1991,

Barbara B. Crabb
District Judge

Entered this 19th day of March, 1991,
Joseph W. Skupniewitz, Clerk of Court

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