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To Feel the Summer in the Spring: The Treaty Fishing Rights of the Wisconsin Chippewa

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ARTICLES

TO FEEL THE SUMMER IN THE SPRING: THE TREATY FISHING RIGHTS OF THE WISCONSIN CHIPPEWA

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In this Article, adapted from his Oliver Rundell Lecture delivered at the University of Wisconsin Law School in April 1990, Professor Charles Wilkinson explores the historical and contemporary conflict arising out of the Chippewa people's assertion of nineteenth century treaty fishing rights. A key to comprehending the Chippewa's position is a realization that they are governments whose sovereign rights predate the United States Constitution and are preserved in federal treaties and statutes. The Chippewa's survival as a people depends upon a recognition of their sovereign prerogatives, an understanding of their history, a respect for their dignity and a just application of the rule of law. To this end, Professor Wilkinson advocates a strategy of cooperative management that would uphold the government's treaty obligations and ensure the continued health of the state's fisheries.

I. INTRODUCTION

Wisconsin has a problem that was first local, then statewide and is now national in importance. The state's six Chippewa bands[1] have secured court rulings affirming their right to fish for walleye, muskellunge and other species pursuant to their own rules, outside of the

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I dedicate this to Rennard Strickland, who has dedicated his life to the fire and the spirits, and to Ada Deer, who has dedicated hers to traveling with the wind.

1. The bands are the Lac Courte Oreilles Band of Lake Superior Chippewa Indians, the Red Cliff Band of Lake Superior Chippewa Indians, the Sokaogon Chippewa Indian Community/Mole Lake Band of Wisconsin, the St. Croix Chippewa Indians of Wisconsin, the Bad River Band of Lake Superior Chippewa Indians and the Lac du Flambeau Band of Lake Superior Chippewa Indians. The six bands are "political successors in interest" to the bands of the Lake Superior Chippewa who participated in the treaties of 1837 and 1842. Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin (*LCO VI*), 707 F. Supp. 1034, 1036 (W.D. Wis. 1989).

traditional comprehensive state power to regulate the taking of wildlife.[2] Local opposition is bitter and deep. "Treaty Beer," the proceeds from which are used to oppose Chippewa treaty rights, for a time was the best-selling brand in some package stores and bars in northern Wisconsin. The media, statewide and national, report racial epithets of the worst kind. "Red nigger." "How do you starve an Indian? Put his food stamps under his work boots." "Save a walleye, spear an Indian." "Save two walleyes, spear a pregnant squaw." "My next wife is gonna be a squaw—free fishing, free hunting, free housing, free everything."[3] Non-Indian protesters have violently interfered with Indian fishing and have assaulted numerous Indian fishers, including a tribal judge.[4] The numbers of people involved, Indian or non-Indian, are not large but the intensity and ugliness of the issues has made the conflict an epic case study in race relations, a symbol of the age-old stresses between the majority society and racial minorities.

We must note at the outset that this is not a situation where excessive Indian fishing has depleted the fishery. The courts repeatedly have found that there is no scarcity of walleye, muskellunge or other fish species in the northern Wisconsin lakes at issue.[5] In every year the

2. Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt (*LCO I*), 700 F.2d 341 (7th Cir.), *cert. denied*, 464 U.S. 805 (1983); Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin (*LCO II*), 760 F.2d 177 (7th Cir. 1985); Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin (*LCO III*), 653 F. Supp. 1420 (W.D. Wis. 1987); Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin (*LCO IV*), 668 F. Supp. 1233 (W.D. Wis. 1987); Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin (*LCO V*), 686 F. Supp. 226 (W.D. Wis. 1987); Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin (*LCO VI*), 707 F. Supp. 1034 (W.D. Wis. 1989); Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin (*LCO VII*), 740 F. Supp. 1400, 1421 (W.D. Wis. 1990). For a full discussion of these cases see *infra* notes 129—158 and accompanying text.

3. Numerous anti-treaty groups have intensified the conflict. Photos taken at rallies for Protect Americans' Rights and Resources (PARR) and Stop Treaty Abuse/Wisconsin also document individuals carrying spears with impaled paper-mache Indian heads atop them and signs saying "Send Rambo to the Flambeau," among other slogans. *See Spearing Fishing Rights in Wisconsin*, 14 CULTURAL SURVIVAL Q. 62, 62-64 (1990); Oberly, *Spearing Fish, Playing Chicken*, THE NATION, June 19, 1989, at 844, 844-48; Nicolai, *New Battle Over Indian Rights*, UTNE READER May/June 1990, at 39, 39-40; *Kosova, Race Baiting*, THE NEW REPUBLIC, June 11, 1990 at 16, 16-17.

4. For eyewitness accounts of the violence and harassment (including threats against tribal Judge Tom Maulson), see *Wisconsin Equal Rights Council Hearing*, Sept. 15, 1989. In March, 1991, Judge Barbara Crabb issued an injunction against sixteen individuals and Stop Treaty Abuse-Wisconsin, Inc., to stop them from assaulting or battering any member of the Lac du Flambeau band at any landing or on any lake within the ceded territory; intentionally creating wakes on waterways to interfere with spearers; planting decoys in waterways; blocking spearing boats from moving to spawning beds; shining lights into the eyes of spearers or boat operators; obstructing the way of any boat or taking other action intended to interfere with the members' exercise of their spearing rights. Lac du Flambeau Band of Lake Superior Chippewa Indians v. Stop Treaty Abuse-Wisconsin, Inc., Opinion and Order No. 91-C-117-C (W.D. Wis. 1991).

5. *See, e.g.*, *LCO III*, 653 F. Supp. 1420 at 1434; *LCO VI*, 707 F. Supp. 1034 at

tribes have taken significantly fewer fish than allowed by the treaties, interim agreements with the state or court orders.[6] The harvest by non-Indians, however calculated, is several times the Indian take.[7] The total take remains well under the safe harvest.[8] In those lakes where fish

1058. The walleye (*stizostedion viteum*) is the largest North American member of the percidae family, reaching weights of up to sixteen pounds. This fish has been called the "keystone" in the ecology of a lake due to its role in improving water quality as a result of its position near the top of the aquatic food chain. According to the Wisconsin Department of Natural Resources (WDNR), the spearing of spawning walleye is the most controversial of all fish harvest methods. BUREAU OF FISHERIES MANAGEMENT, WISCONSIN DEPARTMENT OF NATURAL RESOURCES, ADMINISTRATIVE REPORT NO. 31, SPEARING AND SPORT ANGLING FOR WALLEYE IN WISCONSIN'S CEDED TERRITORY 3 (1990) [hereinafter WDNR 1990 REPORT]. The WDNR estimates that there are 1.6 million adult walleye in the lakes within the ceded territories. *Id.* at 8 (*see infra* notes 65-66 for a discussion of the Chippewa land cessions). Judge Crabb, in *LCO VI*, 707 F. Supp. at 1039-40, succinctly outlined the biological facts of the fishing controversy.

The muskellunge or muskie (*esox masquinongy*) is the largest member of the pike family and can reach weights of up to sixty pounds. Called the "aristocrat" of northern trophy fishes, the muskie, along with the walleye, is a ferocious predator and is prized by anglers across the North Country. The WDNR estimates that there are 89,000 adult muskellunge in the ceded territory lakes. Juvenile populations of muskie and walleye, although not formally estimated, equal or exceed adult numbers. WDNR 1990 REPORT, *supra*, at 8. *See also LCO VI*, 707 F. Supp. at 1040; G. PHILLIPS, W. SCHMID & J. UNDERHILL, FISHES OF THE MINNESOTA REGION 80-82, 221-24 (1982).

6. The treaties reserved to the Chippewa the right to harvest within the territory ceded by treaty as much of the natural resources as necessary to provide themselves with a modest standard of living. *LCO III*, 653 F. Supp. at 1434. The "moderate living" test first was announced in Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 686 (1979). *LCO I and LCO II* established that the treaty rights to harvest did not extend into private lands within the ceded territory. LCO I, 700 F.2d 341 (7th Cir.), cert. denied, 464 U.S. 805 (1983); LCO II, 760 F.2d 177 (7th Cir. 1985). In *LCO V*, 686 F. Supp. at 233, Judge Barbara Crabb found that even if the Chippewa were able to harvest all of the available resources in the ceded territory, they would not achieve a modest standard of living.

After *LCO I*, the tribes and the Wisconsin Department of Natural Resources (DNR) negotiated a number of interim agreements covering the harvesting not only of walleye and muskellunge, *LCO VI*, 707 F. Supp. at 1047-48, 1054, but also other species of fish, deer, small game, migratory birds, bear and wild rice. *LCO VII*, 740 F. Supp. at 1401-02. The tribes entered into a series of interim agreements with the state that circumscribed their rights in order to accommodate state concerns. *LCO VI*, 707 F. Supp. at 1054.

7. For an in-depth analysis of harvest levels, see the WDNR 1990 REPORT, *supra* note 5. *See also* R. Strickland, S. Herzberg, S. Owens, Keeping Our Word: Indian Treaty Rights and Public Responsibilities (April 16, 1990) (unpublished manuscript); GREAT LAKES INDIAN FISH & WILDLIFE COMMISSION, A GUIDE TO UNDERSTANDING CHIPPEWA TREATY RIGHTS (1989) (available from the GLIFWC Public Information Office, P.O. Box 9, Odanah, WI 54861).

8. Under the court's decision in *LCO VI*, 707 F. Supp. 1034, tribal members had the right to take the full safe harvest of walleye and muskellunge from any lake they selected for fishing. *Id.* at 1059. The safe harvest level for any lake is established at an estimated sustainable harvest level, made on the basis of a population estimate obtained as provided in the opinion, to which is applied the agreed-upon exploitation rate (presently set by the Biological Issues Group at 35% for walleyes; 27% for muskellunge), and then discounted by a safety factor to be determined by the Biological Issues Group, or, if the group fails to reach agreement on that factor, to be provided by the Department of Natural Resources. *Id.* at 1043-47.

production is down, it is due to pollution and habitat degradation, not to Indian, or for that matter, non-Indian fishing pressure.[9] But even if we can set aside issues of overfishing by Indians, and even if we dismiss the racism, of which there is plainly a strong dose here, serious questions of public policy remain.

Indian issues veer away from other questions of race. The most cherished civil rights of Indian people are not based on equality of treatment under the Constitution and the general civil rights laws.[10] These special Indian rights derive from different sources and take on different definitions. For American Indians, their survival as a people—mark down those words, survival as a people—depends on nineteenth century treaties, statutes and executive orders recognizing a range of special prerogatives, including hunting, fishing and water rights; a special trust relationship with the United States; and, ultimately, the principle of tribal sovereignty, the right of tribal members to be governed on many key issues by their own tribal governments, not by the states.[11]

Claims to special rights are looked upon with suspicion by Americans, who fought their war of independence in good part to free themselves of prerogatives based on heredity and to establish a new form of egalitarianism. The skepticism over special rights is compounded when American society, which prides itself on its modernism, is confronted with special rights lodged in antiquity.

One barrier that American Indians have long faced, then, is that public understanding of their distinctive issues comes slowly. Their special rights are complex and history-based, emerging from the deep past rather than being ignited by the fire of the moment. The Chippewa-Wisconsin controversy, while important in its own right, offers lessons extending far beyond Wisconsin's borders. The same essential questions and their answers apply not only to walleyes and muskellunge in Wisconsin, but also to whitefish and lake trout in Michigan; salmon and steelhead in Washington and Oregon; eagles in Wyoming and Idaho; water in California and Nevada; tax collection in Minnesota and Nebraska; peyote in Utah and New Mexico; custody of young

9. *See supra* note 7.

10. Since Indian tribes are neither federal nor state governments, the Constitution does not limit their actions. *See, e.g.*, Talton v. Mayes, 163 U.S. 376 (1896) (Cherokee Nation not bound by fifth amendment grand jury requirements); United States v. Wheeler, 435 U.S. 313 (1978) (double jeopardy defense not available to an Indian convicted in federal court after being convicted by tribal court of a lesser offense since the tribe was considered a separate sovereign). In 1968, Congress made most sections of the Bill of Rights applicable to tribes in the Indian Civil Rights Act (ICRA), 25 U.S.C. §§ 1301-03 (1988). In Santa Clara Pueblo v. Martinez, 436 U.S. 49, 66-70 (1978), however, the Court ruled that the ICRA did not provide for federal judicial review in civil cases.

11. For comprehensive reviews of Indian rights and privileges, see FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW (1982) [hereinafter COHEN]; W. CANBY, AMERICAN INDIAN LAW IN A NUTSHELL (2d ed. 1988).

Indian children in Montana and Illinois; land title in Maine and New York; economic development in Florida and Oklahoma; tribal taxation and court jurisdiction over non-Indians in Arizona and the Dakotas; Native sovereignty in Alaska and Hawaii; aboriginal rights in Canada, Australia, and New Zealand; and the list could go on.[12] In every instance, the Indian position is fragile because it ultimately depends on the capacity and willingness of the majority society to explore unfamiliar intellectual terrain.

The fishing controversy in northern Wisconsin is archetypically such a situation. The Chippewa have argued for the right to fish under their own laws and management regimes, beyond the purview of state regulatory jurisdiction. More recently, in a series of developments that I will discuss at some length in this Article, the Chippewa have urged the State of Wisconsin to join in government-to-government agreements to manage cooperatively and improve the fisheries in northern Wisconsin through a coordinated management regime. For a fair assessment of these issues, people must engage their minds in a fixed way

12. The major recent Supreme Court Indian-rights decisions are: Blatchford v. Native Village of Noatak, 111 S. Ct. 2578 (1991) (eleventh amendment bars suits by Indian tribes without state consent or a congressional abrogation of state immunity, neither of which had occurred in the case at bar); Oklahoma Tax Comm'n v. Citizens Band Potawatomi Indian Tribe of Oklahoma, 111 S. Ct. 905 (1991) (tribe's sovereign immunity bars suit by state to collect cigarette sales taxes on sales to nonmembers but states are free to collect sales taxes from cigarette wholesalers); Duro v. Reina, 110 S.Ct. 2053 (1990) (Indian tribe may not assert criminal jurisdiction over a non-member Indian); Employment Div., Dep't of Human Resources v. Smith, 110 S.Ct. 1595 (1990) (free exercise clause of first amendment did not prohibit application of Oregon drug laws to ceremonial ingestion of peyote); Wyoming v. United States, 109 S.Ct. 2994 (1989) (per curiam), *aff'g In re* Rights to Use Water in Big Harn River, 753 P.2d 76 (Wyo. 1988) (adjudication of federal reserved water right for Wind River Reservation); Brendale v. Confederated Tribes and Bands of Yakima Indian Nation, 109 S.Ct. 2994 (1989) (restrictions on tribal land-use zoning authority); Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989) (on-reservation production of oil and gas by non-Indian corporation subject to both state and tribal severance taxes); Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989) (jurisdiction of tribe in state adoption proceedings upheld under the Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901-63 (1988)); Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988) (free exercise clause did not prohibit government from permitting timber harvesting and road construction in area of national forest that was traditionally used for Indian religious ceremonies); United States v. Dion, 476 U.S. 734 (1986) (no treaty rights defense to charge of shooting bald eagles in violation of Endangered Species Act, 16 U.S.C. §§ 1531-44 (1988), and Bald Eagle Protection Act, 16 U.S.C. §§ 668-68ee (1988)). Discussions of these and other issues can be found in: Royster & Snow Arrow Fausett, *Control of the Reservation Environment: Tribal Primacy, Federal Delegation, and the Limits of State Intrusion*, 64 WASH. L. REV. 581-659 (1989); Laurence, *Indian Treaties and Their Abrogation By Statutes of General Applicability: A Not-Entirely Nonpartisan Essay on "Quiet" Abrogations, "Actual" Consideration, and the Unhappy Reception Given United States v. Dion*, 1989 B.Y.U. L. REV. 853 (1989); Pommersheim, *The Crucible of Sovereignty: Analyzing Issues of Tribal Jurisdiction*, 31 ARIZ. L. REV. 329 (1989); *Mineral Development on Indian Lands* (Rocky Mtn. Min. L. Fdn. 1989); Natural Resource Development in Indian Country, Natural Resources Law Center, University of Colorado School of Law, Ninth Annual Summer Program (1988). See generally C. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW (1987).

on the experience of the Chippewa, or Anishinabe, as they historically call themselves.[13] The historical search I suggest is not done out of guilt or romance; it is not a sentimental exercise. Rather, an understanding of a people and their social, legal and economic experience should be reached because it is the essential basis for devising wise policy and for assessing how the rule of law should operate.

II. The Wisconsin Chippewa Before the Treaties

The Chippewa came to what is now Canada and the northern United States at least ten thousand years ago, as the glaciers receded.[14] In the late 1500s or 1600s the Chippewa moved west from the mouth of the St. Lawrence River to the Lake Superior area.[15] They were a hunting society and, although they had semi-permanent village sites, were often on the move.[16] They hunted and fished for several dozens of species.[17] Their tie to the animals was very direct. Each of their fifteen clans was named after a fur-bearing animal, a fish or a bird.[18] Louise Erdrich, the noted modern Chippewa novelist and poet, observes that "the same Chippewa word is used for both flirting and

13. Anishinabe means "first or original man." Neighbors called them Ojibwa, probably corrupted from *o-jib-i-weg,* meaning "those who make pictographs." "Ojibwa" was later adulterated by the English into "Chippewa," the term since used by the United States government in all its dealings with the tribes. E. Danziger, The Chippewas of Lake Superior 7 (1978).

14. Among the numerous historical and anthropological studies done on the Chippewa, the following are most useful: Ritzenthaler, *Southwestern Chippewa,* in 15 Handbook of North American Indians 743 (1978); N. Lurie, Wisconsin Indians (1980); T. Roufs, The Anishinabe of the Minnesota Chippewa Tribe (1975); C. Vecsey, Traditional Ojibwa Religion and its Historical Changes (1983); T. Vennum, Wild Rice and the Ojibway People (1988); H. Hickerson, The Chippewa and Their Neighbors: A Study in Ethnohistory (1970); E. Danziger, *supra* note 13.

15. E. Danziger, *supra* note 13, at 7. During this move west, the loose confederation of Algonquian peoples known as the "Three Fires Confederacy" (made up of the Chippewa, Ottawa and Potawatomi) separated into the distinct groups later encountered by the Europeans. The final split occurred at the Straits of Mackinaw roughly 400 years ago. T. Roufs, *supra* note 14, at 40-42.

16. T. Vennum, *supra* note 14, at 3. Movements were usually closely tied to seasonal game availability, temperature and precipitation variations, and vegetational successions. *See also* E. Danziger, *supra* note 13, at 11.

17. *LCO III,* 653 F. Supp. at 1426-27; Hickerson, *supra* note 14, at 106-110; Ritzenthaler, *supra* note 14 at 746-47; T. Roufs, *supra* note 14, at 29-39. In addition to hunting and fishing subsistence, the Chippewas were noted for their substantial reliance on the wild rice crop that flourished in the region's abundant wetland areas. *See generally* T. Vennum, *supra* note 14.

18. Each individual was a member of one of the fifteen totemic clans and considered him or herself related to all others within the clan. Although the names and number of clans varied from area to area, the basic fifteen were: Catfish, Merman, Sturgeon, Pike, Whitefish, Sucker, Crane, Eagle, Loon, Goose, Cormorant, Bear, Marten, Moose and Reindeer. Ritzenthaler, *supra* note 14, at 753.

hunting game."[19] The tribe had a commercial economy, especially in the fur trade, long before they had any contact with whites.[20] Hundreds of years later, it would take a federal district judge nearly a full page to list all of the plants that the Chippewa used.[21] Among many other things, they harvested wild rice with cedar sticks and drew syrup from maple trees.[22] They employed birch bark as the exterior siding for their dome-shaped wigwams, as the shells for their elegant birchbark canoes and as rolls upon which to engrave the records of the Midéwiwin Society, perhaps, as Professor Danziger has said, "the closest thing to written documents found among the Indians north of Mexico."[23] When the Chippewa of Canada are included, the Chippewa were, and still may be, the largest tribe north of Mexico.[24]

The Chippewa are a "tribe" in the ethnological sense because they share a common culture and the same Algonquin language.[25] Historically, however, they have had no overall political structure. Bands of a few hundred people constituted the basic political units. Laws were set and enforced informally, by praise and scorn.[26] These bands were close-knit societies, the spirit of cooperation doubtless arising in part because of the harsh winters.[27] In general, the Chippewa were a peaceful people but on some occasions they warred with other tribes. In particular, animosity developed between the eastern Sioux and the Chippewa in competition for trapping territory.[28]

Beginning in the late seventeenth century and intensifying as the eighteenth century grew on, the Chippewa engaged in extensive trade with the French and British.[29] This deeply affected the economic life of the Chippewa. Anthropologist Robert Ritzenthaler explains:

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19. HARPER'S ANTHOLOGY OF 20TH CENTURY NATIVE AMERICAN POETRY 335 (D. Niatum, ed. 1988).

20. In 1682, the French explorer La Salle reported that the Chippewa traded with the Dakota who lived approximately 150 miles west of Lake Superior at the time. T. ROUFS, *supra* note 14, at 46. Since most groups were self-sufficient, however, trade was centered mainly among the widely-scattered related Chippewa bands. H. HICKERSON, *supra* note 14, at 16.

21. *LCO III*, 653 F. Supp. at 1427.

22. For an extensive review of the relationship between the Chippewa and the wild rice harvest, see T. VENNUM, *supra* note 14, and T. ROUFS, *supra* note 14, at 25-29. Sugar harvesting practices are detailed in T. ROUFS, *supra* note 14, at 16-22.

23. The Midéwiwin (Mystic Doings) Society was the guardian of traditional cultural and religious forms. Midé priests were important repositories of tribal folk history and preserved the knowledge of healing medicines. Danziger, *supra* note 13, at 7, 19.

24. Ritzenthaler, *supra* note 13, at 743.

25. *Id.*

26. E. DANZIGER, *supra* note 13, at 23.

27. *Id.* at 11.

28. *See* H. HICKERSON, *supra* note 14, at 64-79. The military successes of the Chippewa against the Dakota supports the view that the Chippewa came to later treaty negotiations with the Americans with formidable credentials.

29. *See* E. DANZIGER, *supra* note 13, at 26-67; Ritzenthaler, *supra* note 14, at 743-44.

> The licensed trader or his staff exchanged European goods, firearms, metal instruments and utensils, clothing, beads, and liquor for furs collected by the Indians. There was a rapid shift of material culture, from a stone-bone-wood-pottery complex of their own manufacture to the metal replacements of foreign manufacture. The gun replaced the bow, thus adding an efficiency factor to the hunt and to war. The economic life of the men shifted to one concentrating on trapping, and there developed a certain dependency on the post for 'necessities' such as guns and ammunition.[30]

Trading with the Europeans also brought the beginnings of other kinds of cultural change. Liquor was introduced. Intermarriage with whites, especially the French, grew increasingly common. In all, however, the thin numbers of French and British outsiders, bent on commerce rather than conquest, produced minimal cultural change beyond the tribal economy.[31] The traditional cooperative spirit of the Chippewa produced a cautious but generally welcoming attitude toward the Europeans.[32] During both the Revolutionary War and the War of 1812, the Chippewa were loosely allied with the British, but there apparently was little, if any, combat on their part.[33]

The Americans, however, were much more insistent on transforming the Chippewa.[34] The government subsidized the missions and the proselytizers endeavored to impose new religions on the intricate, deeply-held Chippewa religious ways that permeated all of their daily activities.[35] The Americans, too, were not rigorous in forbidding traders

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30. Ritzenthaler, *supra* note 14, at 743-44.

31. The various scattered Chippewa bands actually became more culturally unified as a result of the European contacts and trade relationships. C. VECSEY, *supra* note 14, at 11, 18. *See also* E. DANZIGER, *supra* note 14, at 32-33.

32. Expressive of the relationship between the Chippewa and the French and British, the following speech by a Chippewa chief was delivered during a peace council held in 1764 with the British at Fort Niagara: "We were formerly told by y[our] People that they could, & would always Supply us with goods for our furs & we now beg it may be so, as we have nothing ill in our hearts towards You." E. DANZIGER, *supra* note 13, at 56.

33. *Compare* N. LURIE, *supra* note 14, at 16 *with* E. DANZIGER, *supra* note 13, at 66.

34. The prevailing view that the Indians must be "civilized" is dramatically evidenced by the seal of the Territory of Wisconsin, designed in 1838, which proclaimed by its Latin motto "Civilitas Successit Barbarum", meaning that all society must progress from savagery to barbarism to civilization. *See* F. PRUCHA, THE GREAT FATHER, THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS, photo plate before 129 (1984).

35. Religion and education were tightly connected in federal Indian policy during the early nineteenth century in America and, in 1819, the United States specifically financed the Civilization Fund, which supported missionary efforts to educate Indians. The Fund appropriated ten thousand dollars annually to promote "civilization" among the tribes by employing "capable persons of good moral character, to instruct them [the Indians] . . . and teach[] their children." Act of Mar. 3, 1819, Ch. 85, 3 Stat. 516-17. For a detailed discussion of the motives and effects of the missionaries (both European and American) on the Chippewas, see C. VECSEY, *supra* note 14, at 26-58.

to employ liquor in commerce, and the use of alcohol among the Chippewa grew.[36] Further, the federal government had the specific goal of creating political subdivisions in the Great Lakes area. Wisconsin would become a state in 1848, Minnesota in 1858. Settling with the tribes over the key issue of land ownership was necessary to pave the way for statehood.[37]

III. THE TREATY NEGOTIATIONS

The United States entered into treaties with the Lake Superior Chippewa in 1837, 1842 and 1854.[38] Treaty-making was a decisive event in the long history of the Chippewa people and it is well worth our while to focus on the state of affairs at these junctures.

The Chippewa, both as matter of well-settled federal law and as a fact of daily life in the Northwest Territory, came to the treaty negotiations with two crucial legal attributes. First, their substantial land holdings made them an interest to be reckoned with. They possessed approximately 27 million acres of land, about 15 million in Wisconsin, seven million in Minnesota and five million in the Upper Peninsula of Michigan.[39] Second, the Chippewa bands were self-governing societies.

The United States Supreme Court had unequivocally recognized tribal land ownership and sovereignty in three widely-publicized, leading decisions, written by Chief Justice John Marshall. In the first opinion, *Johnson v. M'Intosh*,[40] decided in 1823, the Court held that Indian tribes retained title to their aboriginal lands (that is, those lands occupied by a tribe before the arrival of the whites). Before any treaties, the tribes had a right of occupancy—to hunt, fish and reside—on the

36. Although the Trade and Intercourse Act, ch. 33, 1 Stat. 137 (1790), enacted by the first Congress, strictly controlled (and later prohibited) liquor traffic with the Indians, its requirements were almost impossible to enforce on the frontier. *See* F. PRUCHA, *supra* note 34, at 98-102.

37. Efforts to secure the region began long before Minnesota and Wisconsin statehood were an issue. General James Wilkinson, appointed by President Jefferson as the first governor of the new Territory of Louisiana, was directed by the War Department in April, 1805 to "conciliate the friendship & esteem, of the Indian generally of that extensive Country, & to produce peace & harmony, as well among the several nations and tribes, as between them & the white inhabitants. . . ." Three months later, Wilkinson ordered Lieutenant Zebulon Montgomery Pike to seek the source of the Mississippi River and "to spare no pains to conciliate the Indians and to attach them to the United States." F. PRUCHA, *supra* note 34, at 72-75.

38. Treaty of St. Peter's, July 29, 1837, 7 Stat. 536; Treaty of La Pointe, Oct. 4, 1842, 7 Stat. 591; Treaty of La Pointe, Sept. 30, 1854, 10 Stat. 1109. For a detailed outline of the treaties, see N. LURIE, *supra* note 14, at 17-21.

39. These figures were approximated from maps outlining the Indian land cessions in the 1837, 1842 and 1854 treaties. *See, e.g.*, E. DANZIGER, *supra* note 13 at xvi-xvii.

40. 21 U.S. (8 Wheat.) 503 (1823). On aboriginal Indian title, see COHEN, *supra* note 11, at 486-93.

land; this tribal right, however, is shared with the United States and the federal role is superior.[41] The United States can extinguish aboriginal Indian title (as it can with any property in the nation) but it is not required by the fifth amendment to pay compensation (as it is with most types of land ownership, including Indian land recognized by treaty).[42] Also, Marshall found, traditional dealings between European nations and tribes, codified in a 1790 statute enacted by the First Congress,[43] gave rise to the rule that tribes could not sell their land without the approval of the United States, usually in the form of a treaty. The primacy of the United States, however, was in no way shared by the states or by individual settlers. The latter were barred by federal law from settling on Indian land or from purchasing tribal title.[44] These rules, well-known to federal treaty negotiators, remain in effect today. Under United States law, aboriginal Indian title is the first entry in the chain of title to all land in this country.[45]

In addition to possessing an ownership interest before any treaties, the Chippewa also governed their ancestral land. Tribal sovereignty, which was discussed by European scholars in the 1500s,[46] and perhaps

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41. Using the doctrine of discovery, Marshall found that:

> [The Indians] were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, . . . was denied by the original fundamental principle, that discovery gave exclusive title to those who made it [the Europeans/Americans].

Johnson, 21 U.S. at 574.

42. The principle that aboriginal title is not compensable was announced in Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955). A taking by the federal government of land recognized by treaty, however, was held to be compensable under the fifth amendment in United States v. Creek Nation, 295 U.S. 103 (1935). For an in-depth review of Indian land claims, see generally IRREDEEMABLE AMERICA, THE INDIANS' ESTATE AND LAND CLAIMS (I. Sutton ed. 1985); L. PARKER, NATIVE AMERICAN ESTATE (1989).

43. Trade and Intercourse Act (commonly referred to as the NonIntercourse Act), Ch. 33, 1 Stat. 137 (1790). This original Act, the centerpiece of President Washington's Indian program, was amended several times and was the basic law governing Indian affairs until a new codification of Indian policy was passed in 1834. *See* Act of June 30, 1834, Ch. 161, 4 Stat. 729. For a comprehensive review of the NonIntercourse Acts, see E. PRUCHA, *supra* note 34, at 89-114.

44. Trade and Intercourse Act, Ch. 33, 1 Stat. 137 (1790). *See* F. PRUCHA, *supra* note 34, at 89-114.

45. County of Oneida v. Oneida Indian Nation, 470 U.S. 226 (1985); C. HAAR & L. LIEBMAN, PROPERTY AND LAW 3 (1985); R. CHUSED, A MODERN APPROACH TO PROPERTY 83 (1978).

46. The work of Franciscus de Victoria (1480-1546), a Dominican theologian, has been credited as a primary source of the foundation of Spanish colonial legal theory and of the status of indigenous colonized peoples under modern international and United States law. R. WILLIAMS, THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST 96 (1990). Victoria applied to Spain's treatment of American Indians the natural law principle that because all humans possess the capacity to reason, all have the natural law right to order their own lives and societies. *See* F. VICTORIA, DE INDIS ET DE

earlier, was squarely acknowledged by Chief Justice Marshall in 1832 in *Worcester v. Georgia*,[47] a great and courageous opinion that, to this day, is among a handful of the most-cited decisions handed down before the Civil War. Marshall described the tribes as "distinct communities" possessing the "right of government," and invalidated the State of Georgia's attempts to legislate in Cherokee country.[48]

Again, it is clear that federal treaty negotiators knew these things and that these large matters of land and government needed to be resolved before settlement could proceed in the Northwest Territory.[49] To be sure, the United States was militarily superior to the Chippewa and could have secured land and final political power through military pressure. But war would entail costs, both in terms of money and American lives. Moreover, there was the matter of the Northwest Ordinance, which required that the United States government show "utmost good faith" toward the Indians.[50] For the United States, treaty-making was the obvious course.

The Chippewa, for their part, came to the bargaining table with considerable sophistication. They not only loved their land, they knew it. They also knew the commercial uses that the white people wanted to make of the land, especially in terms of the surging timber and minerals industries. As Federal District Judge Doyle found as a matter of fact in recent Chippewa litigation: "The Chippewa were aware of the principles of the Euro-American market economy. They understood competition and the ramifications of the fluctuations of supply and demand, as well as the value of tangible goods and services and labor."[51]

The Chippewa, whose culture remained mostly intact despite the early contact with whites[52], also had a powerful sense of themselves as

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JURE BELLI RELICTIONES 128 (J. Bate trans. 1917) (orig. ed. 1557). Victoria argued that the natural rights of the American Indians were not affected by pronouncements of the pope purporting to grant title to the Americas to Spain, even though transgressions by the Indians against the Law of Nations could justify Christian conquest, colonization and empire in America. R. WILLIAMS *supra*, at 96-118. One of the foremost political theorists of the Enlightenment, E. De Vattel, reasoned that an "[inferior state] must be regarded as an independent State and as subject to the authority of the Law of Nations in its intercourse with other States." E. DE VATTEL, THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW, Book I, at 11 (C. Fenwick trans. 1916).

47. 31 U.S. (6 Pet.) 515 (1832). The other decision in the Marshall Trilogy is Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 178 (1831), recognizing a special federal fiduciary obligation to American Indians.

48. Marshall held that "[t]he Cherokee nation, then, is a distinct community, occupying its own territory . . . in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with acts of Congress." *Worcester*, 31 U.S. (6 Pet.) at 560-61.

49. *See generally* F. PRUCHA, *supra* note 34, at 57-60.

50. Northwest Ordinance, art. III, 1 Stat. 5, 51 (1787).

51. *LCO III*, 653 F. Supp. at 1428.

52. Although the basic internal fabric of Chippewa society (religion, morals and

a people. They thought of themselves as competent, knowing that they were superb at the hunt and that they obtained basically what they wanted from their commercial trade with the whites.[53] They believed in the superiority of their own world view and of a religion that they took to be far more sophisticated than that of the white man.[54] Their folk tales were whimsical, witness "Manabozho and the Berries":

> While walking along the river, he saw some berries in the water. He dived down for them, but was stunned when he unexpectedly struck the bottom. There he lay for quite a while, and when he recovered consciousness and looked up, he saw the berries hanging on a tree just above him.[55]

Traditional Chippewa songs also showed a lightness and wry humor, and keen sense for the human condition. The "Love-Charm Song" relates:

> 1.
> I can charm that man
> I can cause him to become fascinated
>
> 2.
> What are you saying to me?
> I am dressed in colors of the roses?
> and as beautiful as the roses?
>
> 3.
> I can make him bashful
> I do wonder what can be the matter with him
> that he is bashful?
>
> 4.
> I can do this where he may be
> under the earth
> or in the very center of the earth![56]

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family life) remained steadfast despite contacts with the Europeans and early Americans, many external aspects of Chippewa culture were substantially affected by contact with the fur traders. *See supra* note 31 and accompanying text.

53. The Chippewa considered themselves superior to the encroaching whites, especially in survival skills. Peter Grant, a fur trader for the North West Company in the late 1700s, noted that "[The Chippewa] pity [the whites] want of skill in hunting and our incapacity of travelling through their immense forests without guides or food." C. VECSEY, *supra* note 14, at 10.

54. Studies of the religious history of the Chippewa conclude that the eventual loss of traditional religious values occurred only after the Chippewa were politically subdued by the Americans during the nineteenth century and that conversion to Christianity was nominal and superficial. *See, e.g., id.* at 45-58.

55. LITERATURE OF THE AMERICAN INDIAN 77 (T. Sanders & W. Peek, ed. 1973).

56. W. BRANDON, THE MAGIC WORLD: AMERICAN INDIAN SONGS AND POEMS 99 (1971).

The Chippewa were also future-looking people and, while they knew that they could not control nature, they believed that they could control their own destiny. These thoughts are evident in the metaphorical dream-song which goes:

> as my eyes
> look across the prairie
> I feel the summer
> in the spring.[57]

In terms of realpolitik, the United States must be seen as the dominant party in the treaty negotiations. But the Chippewa were serious participants, insistent on certain things. They refused to be forced from their homeland. One United States commissioner, who participated in the negotiations leading up to the 1854 treaty, when there was talk of the Chippewa being moved west out of Wisconsin, reported that:

> We found that the points most strenuously insisted upon by them were first the privilege of remaining in the country where they reside and next the appropriation of land for their future homes. Without yielding these points it was idle for us to talk about a treaty. We therefore agreed to the selection of lands for them in territory heretofore ceded.[58]

The Chippewa also were firm in refusing to relinquish their ability to take natural resources from their ancestral lands. At the 1837 negotiations, Aish-ke-bo-ge-koshe, a chief from Leech Lake, made this point and it was included in the treaty as a reservation of off-reservation hunting, fishing and gathering rights: "Your children are willing to let you have their lands, but they wish to reserve the privilege of making sugar from the trees, and getting their living from the Lakes and Rivers, as they have done heretofore, and of remaining in the country."[59]

Unfortunately, there is one thing that the Chippewa apparently did not understand: the concept of land ownership, a notion utterly foreign to their belief system.[60] Although the treaty minutes show that,

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57. G. VIZENOR, SUMMER IN THE SPRING: OJIBWA LYRIC POEMS AND TRIBAL SONGS 23 (1965).

58. United States v. Bouchard, 464 F. Supp. 1316, 1331 (W.D. Wis. 1978) (quoting Report of Agent Gilbert, Oct. 17, 1854).

59. *Id.* at 1323. Aish-ke-bo-gi-ko-she, or Flat Mouth, was one of 51 Chippewa chiefs and warriors who signed the 1837 Treaty of St. Peter's. His speech was recorded by the secretary of the treaty council, Verplanck Van Antwerp quoted in *id.* at 1323.

60. To the Chippewa, all land belonged to the Creator, the *Manitou,* who allowed its wise use to all Indians. The people acknowledged the gifts of *Manitou* through extensive ceremonies honoring the land's bounty. T. ROUFS, *supra* note 14, at 66-68. Although the rights of families returning annually to hunting and gathering areas were respected, all land, including fishing and hunting grounds, maple groves and rice fields were common property. E. DANZIGER, *supra* note 13, at 11.

by the Treaty of 1854, the Chippewa knew that they were ceding away full title to their land, the tribal representatives apparently did not have such an understanding during the negotiations in 1837 and 1842. As one non-Indian observer recounted:

> No conversation that was held at this time [during the 1842 treaty negotiations] gave the Indians an inkling or caused them to mistrust that they were ceding away their lands, but supposed that they were simply selling the pine and minerals, as they had in the treaty of 1837, and when they were told in 1849, to move on and thereby abandon their burying grounds—the dearest thing to an Indian known—they began to hold councils and to ask each [other] as to how they had understood the treaties, and all understood them the same, that was: that they were never to be disturbed if they behaved themselves.[61]

This was a critical error for the Chippewa. To be sure, in the treaties involving Wisconsin land, those of 1837 and 1842, the Chippewa had explicitly protected their preexisting right to hunt, fish and gather in the ceded areas: "The privilege of hunting, fishing, and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded, is guarantied to the Indians, during the pleasure of the President of the United States."[62] But in the same treaties, the Lake Superior Chippewa had also ceded away almost all of their land in Wisconsin and the Upper Peninsula of Michigan.[63] Further, the 1854 treaty ceded away land in Minnesota.[64] In just 17 years, the land estate of the Chippewa in Wisconsin decreased from 15 million acres to just over 271,000 acres.[65] In all, the bands had transferred about 98% of their ancestral lands in Wisconsin, Minnesota and the Upper Peninsula. Two bands of Chippewa in Wisconsin came out even worse. The Sakaogon and St. Croix Chippewas retained no land at all.[66] The St. Croix Band went unrepresented at the 1854 negotiations.[67] The Sakaogon Band signed an 1855 treaty reserving to them 12 square miles, about 7,680 acres, but the Senate never ratified it. These two Lost Bands, as they were called, entirely lacked a land base until the late 1930s. Be-

61. *Bouchard*, 464 F. Supp. at 1327 (quoting B. ARMSTRONG, EARLY LIFE AMONG THE INDIANS 12 (1892)).

62. Treaty of St. Peter's, July 29, 1837, art. 5, 7 Stat. 536, 537; *See also* Treaty of La Pointe, Oct. 4, 1842, art. II, 7 Stat. 591, 592.

63. Treaty of St. Peter's, July 29, 1837, art. I, 7 Stat. 536, 536; Treaty of La Pointe, Oct. 4, 1842, art. I, 7 Stat. 591, 591-92.

64. Treaty of La Pointe, Sept. 30, 1854, art. I, 10 Stat. 1109, 1109.

65. *See* N. LURIE, *supra* note 14, at 10.

66. E. DANZIGER, *supra* note 13, at 153.

67. *Id.*

tween 1937 and 1942, Congress afforded at least minimal recompense, purchasing 1,804 acres for the St. Croix and, between 1937 and 1939, 1,632 acres for the Sakaogon, calling the latter the Mole Lake Reservation.[68]

IV. CHIPPEWA LAND, SOVEREIGNTY, AND CULTURE AFTER THE TREATIES

Reservation life marked the end of the Chippewa's traditional culture and the beginning of a steep decline.[69] Their hunting and fishing society required vast land areas for survival and the tiny reservations could not begin to support the Chippewa's subsistence and commercial needs.[70] As Professor Danziger describes, "[t]ribesmen roamed, half-starved, through the territory ceded in the 1840s and 1850s—hunting, gathering, fishing, looking for employment, and stealing pigs, chickens, and geese from white farmers."[71] On the reservations, food produced by the industry of tribal members was replaced by rations.[72] Liquor had been introduced in earlier years, but now it became the curse that continues to plague Indian societies.[73] The federal government's an-

68. Letter from David Farrar, Realty Officer, Great Lakes Agency, Bureau of Indian Affairs (July 17, 1990).

69. In addition to the tremendous loss of land base, the treaties caused a further fracturing of Chippewa culture. The allocation of territory to individual bands was a useful device for whites, but the practice overlooked important traditions, sentiments and land-use patterns of the Indians. General labels such as the "Chippewa Nation," and even the designation of bands, overlooked important differences in social organization and the fact that Chippewa society was primarily composed of distinct family groups. T. ROUFS, *supra* note 14, at 68.

70. *Id.* at 73; Ritzenthaler, *supra* note 14, at 745; Danziger, *supra* note 13, at 91-109.

71. E. DANZIGER, *supra* note 13, at 96-97.

72. As Commissioner of Indian Affairs William A. Jones stated in 1901: "[It has been shown] that the indiscriminate issue of rations was an effectual barrier to civilization; [and] that the periodical distribution of large sums of money was demoralizing in the extreme. . . ." F. PRUCHA, THE INDIANS IN AMERICAN SOCIETY 48-49 (1988).

73. The Chippewa traded with the French even before their first contact with missionaries in 1641. E. DANZIGER, *supra* note 13, at 27. The French exchanged tools, blankets, wines and brandies, among other things, for bear and beaver pelts. *Id.* at 31. Competition among French-Canadian fur traders heightened the liquor problem among Indians. *Id.* at 62. Even after the sale of liquor to Indians was prohibited by federal statutes, *see, e.g.*, the Act of Mar. 30, 1802, ch. 13, 2 Stat. 139, 146, and F. PRUCHA, *supra* note 36, at 98-102. British traders on Hudson's Bay and some American traders provided liquor to the Chippewa. As game populations dwindled, fur companies offered more whiskey for pelts, and the competition heightened the conflicts between the Chippewa and the Sioux. E. DANZIGER, *supra* note 13, at 89. By the turn of the twentieth century, whiskey had become a major impediment to Indian "advancement," according to the Bureau of Indian Affairs. Accounts of endemic alcohol use at Lac du Flambeau, Bad River and Lac Courte Oreilles are found in the reports of BIA officials from the turn of the century through Prohibition. *Id.* at 121-23.

Today, the sale of liquor in Indian country is essentially on a "local option" basis; it is generally prohibited, but individual tribes can allow it by ordinance. *See* 18 U.S.C. §§ 1154,

nounced policy was to make Indians into farmers, but the growing season in the north country was short. Besides, the Chippewa were hunters, not farmers.[74]

By the 1880s, in spite of the treaty promises, Congress had made the decision to encourage individual Indian ownership of property in order to promote the "civilizing" of Indians, and thereby reduce the national Indian land base even further.[75] The westward expansion was in full swing and the manifest destiny of the United States was to fulfill the Jeffersonian ideal, to create an agrarian society in the West.[76] The Jeffersonian ideal was a poor fit for most Indian tribes, but that did not slow the government's drive to open up Indian lands. Under the General Allotment Act of 1887, much communal tribal land would be transferred to individual tribal members.[77] Eighty acres of agricultural land for each Indian was deemed sufficient.[78] Some of the remaining land could be retained by the tribe, but much of it was opened for settlement by non-Indians because it was "surplus" to tribal needs.[79] It is not clear whether any federal officials were able to defend, with a straight face, the idea that the Wisconsin Chippewa had "surplus" lands.

Allotment ravaged the Wisconsin Chippewa land base, as it did with tribal reservations all across the country. Nationally, Indian land holdings decreased by 90 million acres, from 140 million acres to 50 million acres.[80] For the Wisconsin Chippewa, their land base of 271,653 acres was cut to 120,077 acres.[81]

1161 (1988). *See generally* COHEN, *supra* note 11, at 305-08.

On alcohol abuse among American Indians, see May, *Alcohol Abuse and Alcoholism Among American Indians: An Overview*, in ALCOHOLISM IN MINORITY POPULATIONS 99 (1989).

The allotment program and its effects are discussed in notes 80-92 and accompanying text, *infra*.

74. The cold climate limited production to small vegetable gardens and basic crops such as potatoes, turnips, beets, parsnips and cabbages. Even if other crops such as corn and wheat could be grown successfully, transportation costs to the major markets were more than the meal and flour were worth. Only 115 out of 536,840 reservation acres were cultivated by the Indians in 1868. E. DANZIGER, *supra* note 13, at 97.

The Commissioner of Indian Affairs in 1846 wrote that the Chippewa could advance only by being concentrated "within fixed and reasonable limits," where "game will soon become scarce, and they will be compelled gradually to resort to agriculture and other pursuits of civilized life. . . ." United States v. Bouchard, 464 F.Supp. 1316, 1325 (W.D. Wis. 1978). The Commissioner also reasoned that not only would confining the Chippewa to a smaller area drive them to resort to agriculture and civilization, it would in addition make them easier to supervise. *Id.* at 1326. In fact, the Chippewa were already engaged in some agricultural pursuits, as well as hunting, fishing and gathering. *Id.* at 1330.

75. F. PRUCHA, *supra* note 34, at 659-66.

76. *See generally* H. SMITH, VIRGIN LAND (1950).

77. General Allotment Act of 1887, 25 U.S.C. §§ 331-334, 336, 339, 341, 342, 348, 349, 381 (1988).

78. *Id.*

79. F. PRUCHA, *supra* note 34, at 896.

80. *Id.*

81. *See* N. LURIE, *supra* note 14, at 10. Treaty land held by the Chippewa included:

This loss of tribal land through allotment occurred by diverse means. Some land was declared surplus and transferred directly to non-Indian homesteaders.[82] Tens of thousands of acres of Indian allotments were also lost. Initially, allottees were to receive their land in trust and subsequent sale was therefore prohibited. The trust, however, lasted only for 25 years.[83] The Bureau of Indian Affairs could extend the period, but it could also shorten it upon a finding that an individual allottee was "competent." No one will ever be able to ascertain the exact numbers, but studies of the allotment process show a remarkable congruence between "competent Indians" and Indians with a ready purchaser for their land, usually for a song.[84] In numerous other cases, the original transfer out of trust was above board, but the allottee would soon sell off the land to a sharp dealer or lose it at a tax sale. Remember, Chippewa people did not employ the concept of land ownership. Further, a county tax sale notice can be mightily confusing when you do not understand ownership to begin with, when you have never heard of taxes and when you speak only Chippewa.

Allotment was all the more unsettling to the Chippewa because it was accompanied by a government-promoted program of assimilation.[85] The Bureau of Indian Affairs began its boarding school program and young Chippewa childrcn, whether in Bureau day schools, Bureau boarding schools, church schools or state schools, were relentlessly taught that their old ways were bad and that the white man's ways—

7,321 acres owned by the Red Cliff Band, 124,332 acres owned by the Bad River Band, 70,000 acres owned by the Lac Courte Oreilles Band, and 70,000 acres owned by the Lac du Flambeau Band (total: 271,653 acres). The St. Croix and Sokoagan (Mole Lake) Bands did not hold treaty lands, *see supra* text accompanying note 71. After allotment, tribally owned land was reduced to 42,544 acres (Red Cliff: 5,122 acres, Bad River: 8,325 acres, Lac Courte Oreilles: 3,945 acres, Lac du Flambeau: 25,152 acres). Indian allotments for the four bands today total 77,533 acres (Red Cliff: 2,145 acres, Bad River: 33,477 acres, Lac Courte Oreilles: 26,584 acres, Lac du Flambeau: 15,327 acres). *See* N. LURIE, *id.*

82. F. PRUCHA, *supra* note 34, at 896.

83. 25 U.S.C. §§ 348 (1988).

84. Although the General Allotment Act originally granted citizenship to an Indian when he or she accepted an allotment, the act was modified by the Burke Act of 1906, now codified at 34 U.S.C. §§ 182, 183 (1983), which authorized the extension or reduction of the trust period. Patents then could be issued before the end of the twenty-five year trust period to Indians who were determined to be competent. The first competency commission was established in 1915 to work with reservation superintendents to determine the competency of Indians who might become citizens. In some cases, Indians arranged to sell their land immediately upon patenting. John Collier was an outspoken critic of the allotment policy and its destructive effect on Indian communities and culture. When he became Commissioner of Indian Affairs in 1933, he reversed the allotment policy and directed reservation superintendents not to issue competency certificates. F. PRUCHA, *supra* note 34, at 875-81, 951.

85. For an examination of the underpinnings of assimilation policy, see B. SHEEHAN, SEEDS OF EXTINCTION: JEFFERSONIAN PHILANTHROPY AND THE AMERICAN INDIAN (1973); F. PRUCHA, *supra* note 34, at 179-80, 760-61; COHEN, *supra* note 11, at 128-41.

in terms of clothing, language, religion and values—were good.[86] The churches stepped up their activities in Indian country.[87] Tribal authority was diminished as non-Indian settlers began to move onto the Chippewa reservations. The idea of becoming farmers never took hold and the Chippewa suffered a loss of self-worth on that account.[88] Over time, the small but contiguous land base became checkerboarded; about 56% of former reservation land was taken over by non-Indians.[89]

The allotment policy was discredited and finally abandoned in 1934 with the adoption of the Indian Reorganization Act,[90] but it was too little, too late. Although the allotment process was halted, there was no program to reclaim the lost land. Nor was it clear how the eroded culture could be restored.[91]

The next major policy initiative from Washington, D.C., was termination, in vogue during the 1950s and 1960s. The idea was that Indian people would benefit from a clean break and be "freed" from the heavy hand of the federal government, personified by the Bureau of Indian Affairs.[92] In Wisconsin, only the Menominee were selected

86. In 1889, Commissioner Thomas Morgan encouraged Indian schools across the country to teach students a "reverence for [America's] power, gratitude for its beneficence, pride in its history, and a laudable ambition to contribute to its prosperity." Instruction in American History might also teach of the "wrongs of their [Indian] ancestors." BUREAU OF INDIAN AFFAIRS, INCULCATION OF PATRIOTISM IN INDIAN SCHOOLS, (Dec. 10, 1889) *reprinted in* E. DANZIGER, *supra* note 13, at 106. One of the most disheartening aspects of Indian education at the height of the assimilation program involved parents' fears that these new schools represented the most dangerous of all attacks on basic Indian values because they were aimed at the children who were growing up without learning the old ways. For a comprehensive discussion of Indian education during the period, see M. SZASZ, EDUCATION AND THE AMERICAN INDIAN 8-15 (1974). *See also* F. PRUCHA, *supra* note 75, at 46-47; V. DELORIA & C. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE 240-44 (1983).

87. *See* C. VECSEY, *supra* note 14, at 26-58; V. DELORIA & C. LYTLE, *supra* note 86 at 240-41.

88. Indian Affairs Commissioner William A. Jones declared that "the general leasing of allotments instead of benefiting the Indians, as originally intended, only contributed to their demoralization." F. PRUCHA, *supra* note 75, at 49.

89. Lurie, *supra* note 84.

90. Ch. 576, § 1, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. § 461 (1988)).

91. As ethnologist Harold Hickerson stated: "In terms of the aboriginal past, Chippewa culture [was] a shambles, so much have the people everywhere had to accommodate to the new conditions imposed by their relations with Euro-Americans." H. HICKERSON, *supra* note 14, at 17. Professor Danziger noted that "anthropological articles [on the Chippewa] read like coroners' verdicts." E. DANZIGER, *supra* note 13, at 202.

92. In 1953, Congress resolved that it would "end [the Indians'] status as wards of the United States" and that toward that goal, many Indian tribes "should be free from Federal supervision and control and from all disabilities and limitations specially applicable to Indians." H.R. Con. Res. 108, 83d Cong., 1st Sess., 67 Stat. B132 (1953). As Senator Arthur V. Watkins exclaimed: "Following in the footsteps of the Emancipation Proclamation, . . . I see the following words emblazoned in letters of fire above the heads of the Indians—'These people shall be free!' " Watkins, *Termination of Federal Supervision: The Removal of Restrictions over Indian Property and Person,* 311 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 41-46 (May 1957). For an analysis of the termination era, see Wilkinson & Biggs, *The Evolution of the Termination Policy,* 5 AM. INDIAN L. REV. 139-84 (1977). *See generally* F. PRUCHA, *supra* note 34, at 1013-84.

for termination,[93] a policy proving so destructive that it too was later abandoned.[94] The Chippewa were spared the loss of land, finances, federal education and health programs, culture and spirit that the Menominee endured before The Menominee Restoration Act was passed in 1973.[95]

But the termination era was more than the termination statutes per se. During the 1950s, a sweeping federal agenda was put in place to assimilate those tribes that were not formally terminated.[96] Federal support programs were diminished. Federal policy promoted the enrollment of Indian children in state schools, where they faced widespread discrimination.[97] In 1953, Congress enacted Public Law 280, an experiment to transfer jurisdiction over certain reservations from the tribes and the federal government to the states.[98] Wisconsin was one of six states selected for the experiment and the Chippewa found themselves subjected to state judges and juries in both civil and criminal cases.[99] Chippewa tribal courts were effectively made obsolete until a revival in the 1980s. A quarter of a century after the passage of Public Law 280, the Supreme Court would rule that Public Law 280 did not grant the states any taxation authority.[100] In the meantime, however, Chippewa people regularly paid the taxes later declared to be invalid.

V. Chippewa Fishing Rights after the Treaties

The same pattern—the loss of land and resource base, the diminution of tribal power and the subjection to state authority—played

93. Act of June 17, 1954, ch. 303, 68 Stat. 250 (repealed 1973). Despite the severe hardships that termination brought, the Menominees' hunting and fishing treaty rights were held not to be abrogated by the Termination Act. Menominee Tribe v. United States, 391 U.S. 404 (1968).

94. The termination policy was repudiated by the Tribally Controlled Schools Act of 1988, Pub. L. 100-297, title V, § 5203, 102 Stat. 385 (codified at 25 U.S.C. § 2502(f) (1988)): "The Congress hereby repudiates and rejects House Concurrent Resolution 108 of the 83rd Congress and any policy of unilateral termination of Federal relations with any Indian Nation."

95. In support of restoration, Congress was urged to reject "[The] plan [that] brought the Menominee people to the brink of economic, social and cultural disaster." H.R. Rep. No. 604, 93d Cong., 1st Sess. 4 (1973). The Menominee Restoration Act was enacted on December 22, 1973. Menominee Restoration Act, Pub. L. No. 93-197, 87 Stat. 770 (1973) (codified at 25 U.S.C. §§ 903-03(f) (1988)).

96. M. Szasz, *supra* note 89, at 89, 125.

97. Cohen, *supra* note 11, at 140.

98. Act of Aug. 15, 1953, ch. 505, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162 (1988), 25 U.S.C. §§ 1321-26 (1988), 28 U.S.C. § 1360(1988)). *See* Goldberg, *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians,* 22 U.C.L.A. L. Rev. 535, 537-62 (1975).

99. President Eisenhower signed the bill into law, declaring that the legislation represented "still another step in granting complete political equality to all Indians in our nation." Pub. Papers 564-66 (1953). For an influential analysis of Public Law 280, see Goldberg, *supra* note 101. The other states included in Public Law 280 were California, Minnesota, Nebraska, Oregon and, upon its statehood in 1959, Alaska.

100. Bryan v. Itasca County, 426 U.S. 373 (1976).

itself out in the specific arena of Indian hunting and fishing rights. As noted earlier, after the Chippewa were confined to reservations, of necessity they continued to travel their former lands and to hunt and fish on them.[101] The state started to crack down near the turn of the century, as rural Wisconsin began to fill up with non-Indians who were not happy with the competition from Indian rifles, weirs, nets and spears.

In 1901, John Blackbird, a full-blooded member of the Bad River Band of Chippewa, sought a writ of habeas corpus in federal court from a state court conviction that included thirty days of imprisonment at hard labor.[102] Federal District Judge Bunn, citing *Worcester v. Georgia*[103] and other cases, held that Indian on-reservation fishing is not controlled by state law and ordered Blackbird released:

> After taking from them the great body of their lands in Minnesota and Wisconsin, allowing them to reserve certain portions for reservations, and stipulating that they should always have the right to fish and hunt upon all the lands so ceded, it would be adding insult as well as injustice now to deprive them of the poor privilege of fishing with a seine for suckers in a little red marsh-water stream upon their own reservation. It is well known that these fish cannot be taken with hook and line, but only by spears and nets. They are a fish that white men will hardly ever eat, though it is a matter of common knowledge that Indians prize them quite as highly as brook trout. These lands have from long time been their hunting and fishing ground. When an Indian cannot get a morsel of pork and white flour, a red horse or sucker from some stream where brook trout would never abide, boiled or roasted by a camp fire, is sometimes a luxury, to deprive him of which would be ungrateful in the extreme. I feel confident that neither the state nor congress ever meditated any such cruelty, and that the prisoner's arrest was the result of overzeal on the part of a fish and game warden, which may be excusable, but is not justifiable in law. The prisoner will be released.[104]

In 1905, the United States Supreme Court decided *United States v. Winans*.[105] The Court, finding that Washington statehood did not abrogate Indian treaties, upheld the right of Yakima Indian fishers to take salmon at off-reservation stations on the Columbia River pursuant to an express reservation of off-reservation fishing rights in the Yakima

101. *See supra* text accompanying note 71.
102. *In re* Blackbird, 109 F. Supp. 139, 140 (W.D. Wis. 1901).
103. 31 U.S. (6 Pet.) 515 (1832).
104. *Blackbird*, 109 F. Supp. at 145.
105. 198 U.S. 371 (1905).

Treaty.[106] Three years later, the issue of the impact of statehood on treaty rights reached the Wisconsin Supreme Court in *State v. Morrin.*[107] The court, refusing to cite *Blackbird, Winans,* or *Worcester,* found that the off-reservation fishing rights of the Wisconsin Chippewa had been abrogated by Wisconsin statehood.[108] In sweeping language that applied on its face to on-reservation fishing, the court held that:

> to exempt such Indians from state laws regulating hunting and fishing within the borders of a state after its admission into the Union would deprive the state of its sovereign power to regulate the rights of hunting and fishing, and would deny to such state admission into the Union on an equal footing with the original states, upon the ground that a treaty with the national government giving the right to hunt and fish within territory which subsequently is embraced within the limits of a state is a privilege in conflict with the act of admitting the state into the Union on an equality with the other states and is repealed thereby.... [The] defendant has acquired a citizenship in this state. In view of this fact, we cannot perceive how he can claim immunity from the criminal law of this state.[109]

Prosecutions by Wisconsin continued during the first decade of the twentieth century. In 1933, in *State v. Johnson,*[110] the Wisconsin Supreme Court allowed state regulation on fee-owned lands within the Bad River Reservation.[111] After World War II, the reduced land base became ever more inadequate as the state's population boomed and the north woods became ever more popular for recreationists. Public Law 280 invited state police on to the Chippewa reservations to enforce the full gamut of state criminal laws.[112] The state crack-down on Indian hunting and fishing accelerated. By the early 1960s many Chippewas, while trying to look out into the future, must have doubted whether their eyes could for much longer look out across the prairie and feel the summer in the spring.

VI. Chippewa Fishing Rights During the Modern Era

The termination policy of the 1950s and early 1960s gradually gave way to new attitudes in Washington, D.C., and, more importantly, in

106. *Id.* at 381.

107. 136 Wis. 552, 117 N.W. 1006 (1908).

108. *Id.* at 556, 117 N.W. at 1007.

109. *Id.* at 556-57, 117 N.W. at 1007. The court relied upon Ward v. Race Horse, 163 U.S. 504 (1896), which had been disapproved by the Supreme Court as to the effect of statehood on Indian treaties. *See* United States v. Winans, 198 U.S. 371 (1905).

110. 212 Wis. 301, 249 N.W. 284 (1933).

111. *Id.* at 287, 249 N.W. at 287.

112. *See supra* text accompanying notes 101-03.

Indian country. Native people in all reaches of the nation were facing deep troubles of the same magnitude experienced by the Chippewa in the north country. If tribes were not mired in controversy over hunting and fishing rights, then they were beset by problems related to land, water, taxes, health or education. And everywhere there was a grinding, debilitating poverty.[113] Nevertheless, in defiance of all odds, the old cultures still had vitality, and at some undefinable point in the 1960s the moccasin grapevine built up a consensus that the terrible descent since the treaties and allotment must be halted and reversed. Clyde Warrior, Vine Deloria, Jr. and Ada Deer were national leaders but there were others, many others, who knew that the time was now, or it would be never.[114] The details of the consensus were sketchy but the objective was firm. Protect the land and natural resources. Reverse termination. Enforce the trust. Enhance tribal sovereignty. Keep the states from taking away the children through adoptions. Set in place a steel framework of laws that would allow the tribes to do the internal work of mending the tattered old ways and making inroads into the poverty.

One reason that tribes had remained unempowered was that they lacked access to lawyers in history's most litigious nation.[115] There were only two basic situations in which attorneys were available to Indian people in any serious way. First, on rare occasions a busy but courageous United States Attorney would read the trust relationship generously and bring suit to vindicate Indian rights. This happened, for example, with John Blackbird's turn-of-the-century petition for a writ of habeas corpus.[116] Second, in money damages cases against the United States, especially under the Indian Claims Commission Act of 1946,[117] private lawyers were more than willing to bring claims against Uncle Sam's deep pocket for a set statutory contingency fee.[118] But the

113. "On virtually every scale of measurement—employment, income, education, health—the condition of Indian people ranks at the bottom." MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING RECOMMENDATIONS FOR INDIAN POLICY, H.R. Doc. No. 363, 91st Cong., 2d Sess. 1 (1970). Especially distressing was the suicide rate of Indian people, which in 1964 was nearly triple the national average. OUR BROTHER'S KEEPER: THE INDIAN IN WHITE AMERICA 56-58 (E. Cahn ed. 1969).

114. Clyde Warrior, a Ponca from eastern Oklahoma, was president of the National Indian Youth Council in 1967. His speeches arguing for Indian freedom from white bureaucracy made him a hero among young Indians in the late 1960s. A. JOSEPHY, RED POWER: THE AMERICAN INDIAN'S FIGHT FOR FREEDOM 71 (1971). Vine Deloria, Jr., a Standing Rock Sioux, has written extensively on American Indian history and policy. In 1964 he was elected executive director of the National Congress of American Indians. He graduated from seminary school and law school, and now teaches at the University of Colorado. Ada Deer was one of the leading advocates of the Menominee Restoration Act of 1973, and later became tribal chair. She has served as chair of the Board of Directors of the Native American Rights Fund and on numerous other boards, and now teaches at the University of Wisconsin.

115. *See, e.g.*, COHEN, *supra* note 11 at 738.

116. *See supra* text accompanying notes 105-06.

117. Ch. 959, 60 Stat. 1049 (1946) (terminated 1978).

118. Attorneys for Indian tribes under the Indian Claims Commission Act received

Chippewa wanted to hunt and fish under the treaties, not to receive money for having lost their right to hunt and fish.

The initiation during the late 1960s of legal services programs for Indians was a key element in allowing the Wisconsin Chippewa to litigate their hunting and fishing rights and other pressing issues. Many of the critical, early cases were brought by Wisconsin Judicare or the Indian Law Center and, later, by lawyers in private practice and tribal attorney's offices, many of whom had passed through legal services programs.[119] Litigation on related issues involving Chippewa Bands in Michigan, Minnesota and North Dakota followed the same pattern.[120]

State v. Gurnoe,[121] decided by the Wisconsin Supreme Court in 1972, was one of the first of the new breed of cases, in which informed, tenacious Indian people had access, without cost, to attorneys expert in Indian law.[122] *Gurnoe* recognized the rights of members of the Red Cliff and Bad River Bands to fish on Lake Superior, adjacent to but off their respective reservations.[123] The opinion expressly overruled the 1933 decision in *Johnson*.[124] Although on the whole *Gurnoe* was supportive of Indian rights, the *Gurnoe* court did hold that, in order to be protected by treaty, tribal fishing methods must "reasonably conform to those types and methods of gathering fish" in vogue at treaty time in 1854 or to "such modern types and methods as are reasonably consistent with those used at the time of the treaty."[125] This position, however, was rejected six years later by the court in *Peterson v. Christensen*.[126] Various court rulings in Minnesota and Michigan, mostly

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approximately ten percent of the awards to tribes. Because the sums were so large, the attorneys petitioned Congress and received special tax relief to allow them to spread the income over a ten-year period. V. DELORIA & C. LYTLE, *supra* note 86, at 142-45.

119. For example, Wisconsin Judicare, a non-profit legal services foundation, provides legal services through its staff attorneys and through its pro bono network of Wisconsin lawyers to Wisconsin residents. Judicare has a division devoted exclusively to Indian legal services.

120. See, e.g. Byan v. Itasca County, 426 U.S. 373 (1976); Leech Lake Band of Chippewa Indians v. Herbst, 334 F. Supp. 1001 (D.Minn. 1971); United States v. Michigan, 471 F. Supp. 192 (W.D.Mich. 1979).

121. 53 Wis. 2d 390, 192 N.W.2d 892 (1972).

122. Gurnoe's attorneys were Joseph F. Preloznik and Charles W. Wheeler, from Wisconsin Judicare.

123. *Gurnoe*, 53 Wis. 2d at 408-09, 192 N.W.2d at 901. In *Gurnoe*, members of the Red Cliff and Bad River Bands were charged with violating Wisconsin statutes regarding gill net fishing and fishing licenses. The court interpreted the 1854 treaty language that set aside lands "for the use of the Chippewas of Lake Superior" as a grant of fishing rights, according to the intent of the parties to the treaty. *Id.* The rights were not confined to the reservation. The court also found that the state could exercise police power to regulate off-reservation fishing only if the regulations were reasonable and necessary for conservation. *Id.* at 410, 192 N.W. 2d at 902. *See* United States v. Winans, 198 U.S. 371, 383 (1905).

124. *Gurnoe*, 53 Wis.2d at 405, 192 N.W.2d at 899. On *Johnson*, see *supra* text accompanying notes 110-11.

125. *Id.*

126. 455 F. Supp. 1095, 1099 (E.D. Wis. 1978).

litigated by legal services attorneys, construed Chippewa fishing rights that did not govern in Wisconsin, but set a favorable context for decision making.[127]

The turning point in Wisconsin came in Judge Doyle's 1978 decision in *United States v. Bouchard*,[128] and the Seventh Circuit's decision in 1983 in the same litigation, styled *Lac Courte Oreilles Band v. Voigt (LCO I)*.[129] Most fundamentally, the Seventh Circuit upheld the validity of the tribal rights, finding that the express provisions of off-reservation rights to hunt, fish and gather in the 1837 and 1842 treaties were valid and created property rights in the tribe.[130]

With the underlying rights settled, the Seventh Circuit in *LCO I* analyzed two arguable abrogations of the provisions in the 1837 and 1842 treaties. The first involved language in the 1837 treaty, and a similar provision in the 1842 treaty that the rights were "guarantied [sic] to the Indians, during the pleasure of the President of the United States."[131] This provision meant, according to statements of those present at the treaty negotiations, that the rights would endure until the tribe "misbehaved," at which point the president could revoke them.[132] In 1850, President Zachary Taylor had seemed to exercise the presidential revocation power and had signed an executive order calling for the removal of the Chippewa to western lands and revoking the off-reservation rights.[133] As a factual matter, however, the Chippewa simply had not "misbehaved" by any standard. Indeed, in 1854 the Wisconsin Legislature described the Chippewa as "a peaceful, quiet, and inoffensive people" and called for them to remain in Wisconsin, regardless of Taylor's 1850 executive order.[134] Based on the record, the Seventh Circuit in *LCO I* found that Taylor's 1850 removal order exceeded the scope of presidential authority under the 1837 and 1842 treaties and was therefore void.[135]

Second, using traditional Indian law rules of construction, the Seventh Circuit held that the off-reservation rights were not abrogated by the 1854 treaty, which involved cessions of tribal land in Minnesota and which made no reference to hunting, fishing and gathering rights on ceded lands.[136] The Chippewa, the court found, plainly knew in

127. *See, e.g.*, People v. Jondreau, 384 Mich. 539, 185 N.W.2d 375 (1971); Leech Lake Band of Chippewa Indians v. Herbst, 334 F. Supp. 1001 (D. Minn. 1971).

128. 464 F. Supp. 1316 (W.D. Wis. 1978).

129. 700 F.2d 341 (7th Cir. 1983) (*LCO I*).

130. *Id.* at 351, 354.

131. Treaty of St. Peter's, July 29, 1837, 7 Stat. 536, 537.

132. *LCO I*, 700 F.2d at 356.

133. *Bouchard*, 464 F. Supp. at 1326-27.

134. *Id.* at 1330.

135. *LCO I*, 700 F.2d at 362.

136. Section III of the court's opinion outlined the canons of construction pertinent

1854 that they had reserved the rights in the earlier treaties, depended heavily upon them for subsistence, believed that the sequence of events stemming from the 1850 removal order had vindicated their presence in Wisconsin, and assumed that there was no need to set out additional protections for off-reservation rights.[137]

Since the *LCO I* decision in 1983, District Judges Doyle and Crabb have rendered five reported decisions ruling on a wide range of issues pertaining to the Chippewa.[138] Two of the most critical questions involved the level of permissible tribal harvest and the extent of tribal and state regulatory powers. On the tribal harvest, both judges found that although the tribes are entitled to resource allocation levels necessary to achieve a moderate standard of living, the resources should be allocated evenly between Indians and non-Indians. According to Judge Crabb, "[the tribes'] needs for a moderate standard of living dictate their right to a full share of the harvest, subject to a ceiling set at 50% to prevent the frustration of the non-Indian treaty right."[139] The decisions on these points follow logically from *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*,[140] the leading Supreme Court case that introduced both the moderate standard of living test and the concept of a 50% ceiling to the Indian harvest. Because of differing treaty provisions and factual situations, however, Judges Doyle and Crabb followed a tortuous route in applying the *Fishing Vessel* reasoning to the Wisconsin situation.

In *LCO III*,[141] Judge Doyle, citing *Fishing Vessel*, initially declined to allocate the resources covered by the treaties because no resource scarcity had been shown. Doyle did conclude that at treaty times the Chippewa understood that the treaty usufructuary rights would be suf-

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to the case. The court cited Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 528 (1832), for the rule that treaties must be construed as the Indians understood them at treaty time, and Winters v. United States, 207 U.S. 564, 576-77 (1908), for the rule that ambiguities must be resolved in favor of the Indians. The canons taken together required the court to interpret the treaty liberally in favor of the Indians and to construe strictly any act of Congress that purported to extinguish treaty rights. *LCO I*, 700 F.2d at 350-51. On rules of interpretation in Indian law, see generally COHEN, *supra* note 11, at 221-25. *See also* Note, *Wisconsin, Walleye, and the Supreme Law of the Land: An Overview of the Chippewa Indian Treaty Rights Dispute in Northern Wisconsin*, 11 HAMLINE J. PUB. L. & POL'Y 381 (1990).

137. *LCO I*, 700 F.2d at 364.

138. *LCO III*, 653 F. Supp. 1420 (W.D. Wis. 1987); *LCO IV*, 668 F. Supp. 1233 (W.D. Wis. 1987); *LCO V*, 686 F. Supp. 226 (W.D. Wis. 1988); *LCO VI*, 707 F. Supp. 1034 (W.D. Wis. 1989); *LCO VII*, 740 F. Supp. 1400 (W.D. Wis. 1990).

139. *LCO VII*, 740 F. Supp. at 1413.

140. 443 U.S. 658 (1979). The Court, in affirming the districct court's allocation to the Indians of the opportunity to harvest 50% of the fish, held that the tribal share was a ceiling: "the 50% figure imposes a maximum but not a minimum allocation." *Id.* at 686. The Court also announced an additional limiting factor, saying that the Indians were entitled to "so much as, but not more than, is necessary to provide the Indians with a livelihood—that is to say, a moderate living." *Id.*

141. 653 F. Supp. at 1434.

ficient to provide them with a moderate living. In *LCO IV* Judge Crabb elaborated on the moderate living standard, saying that it was intended to establish a minimum treaty harvest, but that, in the absence of any necessity for allocation, the standard does not serve as an upper limit on the Indian harvest.[142]

In *LCO VII*,[143] a 1990 case dealing with deer and small game hunting rights but encompassing all of the disputed resources, Judge Crabb returned to the allocation question. The opinion first decided that, because there is heavy competition for the most desirable species in the ceded territory, allocation of the resources should be made even though the tribes' share of the harvest is only a fraction of the non-Indian harvest. Further, because the tribes are expected to increase their harvesting capability, harvesting capacity is no longer a sufficient cap on tribal harvest.[144]

The *LCO VII* opinion then turned to the merits of the allocation issue. Crabb referred to Judge Doyle's finding in *Bouchard* that at the time of the treaty the Chippewa would have understood that they would be exercising their rights in common with white settlers.[145] Although Judge Doyle in *LCO III* decided that the treaty reserved to the Chippewa enough of the resource harvest to achieve a moderate standard of living,[146] Judge Crabb had found in *LCO V*[147] that all of the available harvest would not be enough to satisfy this standard. Nevertheless, while the parties to the treaty did not anticipate the comparative modern scarcity of resources, Crabb relied on Doyle's finding that the parties did not intend for the Chippewa to have an exclusive right to the resources.[148] "The bargain between the parties," Judge Crabb found, "included competition for the harvest."[149] Crabb then concluded that the harvest should be shared equally.[150] Acknowledging that the Wisconsin situation was different from the Pacific Northwest allocation of salmon, Judge Crabb nevertheless held that an equal division of resources was also the appropriate result in Wisconsin in order to protect the rights of non-Indians.[151] The division of resources could be adjusted

142. *LCO IV*, 668 F. Supp. at 1240.
143. 740 F. Supp. 1400 (W.D. Wis. 1990).
144. *Id.* at 414-16.
145. *LCO VII*, 740 F. Supp. at 1416.
146. *LCO III*, 653 F. Supp. at 1434.
147. 686 F. Supp. 226, 233 (W.D. Wis. 1987).
148. *LCO VII*, 740 F. Supp. at 1416.
149. *Id.*
150. *Id.*
151. *LCO VII*, 740 F. Supp. at 1416-18. The Chippewa treaties provided that fishing in the ceded areas would be "guarantied" to the Indians, see *supra* text accompanying note 62, while the treaties in the Pacific Northwest placed an express limitation on Indian fishing, providing that off-reservation rights would be exercised "in common with all citizens of the Territory." Washingaton v. Washington State Commercial Passenger Fishing Vessel Ass'n,

if the Indians' moderate living needs declined to the level where they could be satisfied with less than 50% of the harvest.[152]

LCO VII also dealt with two related questions of geographical allocation of the harvest within the ceded area. The first issue was whether the allocation of the harvest should be computed for the ceded territory as a whole or for each individual harvest management unit. The court rejected the Chippewa's contention that they should be entitled to larger shares in the management units closest to the reservations, reasoning that such an approach would disadvantage the non-Indians in those management units. Secondly, the court took action to assure that Indians would be assured of their full share of the harvestable resources. Because substantial numbers of fish and game are taken on privately owned lands, where Chippewa treaty rights do not apply, the court held that the tribal allocation must be based on wildlife population estimates that encompass both public and private lands within the ceded territory.[153]

Judge Crabb left open the door to reduction of the Indians' right to the harvest by saying that the allocated amounts can be adjusted to reflect the tribes' actual harvesting capacity. However, because the Chippewa are entitled to an equal share of all of the resources within the ceded territory, their rights may also be expanded to include harvesting on private lands within the ceded territory, if they can show the need and capacity to harvest on private lands.[154] Until then, Indians are subject to state regulation when they hunt and trap on private lands.[155]

On the interplay between tribal and state jurisdiction, the decisions recognize that tribal hunting and fishing rights on public lands in the ceded territory are generally free from state regulation. The state, however, may regulate tribal off-reservation hunting and fishing on a narrowly-defined basis for resource conservation and public safety concerns.[156] Judge Crabb has emphasized the need for tribal management

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443 U.S. 658, 662 (1979). Nevertheless, relying upon the finding that the parties contemplated a competition for the resource, Judge Crabb adopted the equal share formula and rejected the tribal position that the court should allocate to the Chippewa "the primary right to all of the harvestable natural resources, leaving to the non-Indians the opportunity to take the portion that tribal members lack the capacity to take at this time." *LCO VII*, 740 F. Supp. at 1416.

152. *LCO VII*, 740 F. Supp. at 1418.

153. *Id.* at 1418. Earlier opinions had held that Chippewa treaty rights did not extend to private lands. *LCO I*, 700 F.2d at 364 n.14; *LCO II*, 760 F.2d 177. *See LCO VII*, 740 F. Supp. at 1418.

154. *LCO VII*, 740 F. Supp. at 1420.

155. *Id.* at 1421.

156. The *LCO* courts have been criticized for failing to take account of the supremacy clause, which precludes operation of state law in an area governed by federal treaty. Note, *State Regulation of Lake Superior Chippewa Off-Reservation Usufructuary Rights: Lac Courte*

and has ruled that state regulation of tribal fishing can be precluded upon a finding by the court of effective tribal regulation under a comprehensive tribal management plan.[157] As a general matter, the Wisconsin cases now appear to be consistent with case law elsewhere on Indian off-reservation fishing rights in terms of the existence of the rights, the allocation of fish between Indians and non-Indians and the relationship concerning tribal and state regulatory schemes.[158]

Oreilles Band of Chippewa Indians v. Wisconsin, 11 HAMLINE L. REV. 153 (1988). Judge Crabb, in *LCO VII*, agreed with the Hamline author that the basis for state regulation of off-reservation usufructuary rights "has never been explained satisfactorily." *LCO VII*, 740 F. Supp. at 1421. *See also* Johnson, *The States Versus Indian Off-Reservation Fishing: A United States Supreme Court Error*, 47 WASH. L. REV. 207 (1972), criticizing the lack of support for the ruling in Puyallup Tribe v. Department of Game, 391 U.S. 392 (1968), where the Court for the first time recognized a state right to regulate Indian off-reservation treaty fishing. It is now established, however, that states possess, under narrow circumstances, a limited right to regulate off-reservation Indian treaty fishing for conservation purposes. "[T]he state may regulate for the purposes of conservation or for public safcty, but only if it meets its burden of demonstrating the need for the particular proposed regulatory measure." *LCO VII*, 740 F. Supp. at 1421-22. The burden is a heavy one:

> The state must show, first, that a substantial hazard exists; second, that the particular measure sought to be enforced is necessary to the prevention of the safety hazard; third, that application of the particular regulation to the plaintiff tribes is necessary to effectuate the particular safety interest; fourth, that the regulation is the least restrictive alternative available to accomplish the public safety purpose; and fifth, that the regulation does not discriminatorily harm the Indians or discriminatorily favor non-Indian harvesters.

Id. at 1422 (citations omitted).

These rules are consistent with the narrow construction given by courts to the states' right to regulate Indian off-reservation fishing for conservation purposes. *See, e.g.*, United States v. Michigan, 653 F.2d 277, 279 (6th Cir.), *cert. denied*, 454 U.S. 1124 (1981) (state has burden to show that "it is highly probable that irreparable harm will occur"); United States v. Washington, 384 F. Supp. 312, 342 (W.D. Wash. 1974), aff'd, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1979) (state regulation must be "necessary for conservation"); Sohappy v. Smith, 302 F. Supp. 899, 908 (D. Ore. 1969) (state may "use its police power only to the extent neccssary to prevent the exercise of that right in a manner that will imperil the continued existence of the fish resource"). *See also* COHEN, *supra* note 11, at 461-62 (state must establish that the conservation purpose cannot first be satisfied by restriction of non-Indian fishing).

In February, 1991, Judge Crabb held that the rights reserved in the Treaties of 1837 and 1842 do not include the right to harvest commercial timber resources. Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. State of Wisconsin, 758 F. Supp. 1262 (W.D. Wis. 1991). She also found that the state and counties may regulate the gathcring of forest products by tribal members as protected by thc treaties when regulation is rcasonable and necessary for conservation and does not discriminate against the Indians. *Id.* at 1276.

157. Regulation of the tribes' off-reservation usufructuary rights to harvest walleye and muskellunge within the ceded territory is reserved to the tribes so long as they enact a management plan that provides for regulation of members "in accordance with biologically sound principles necessary for the conservation of the species being harvested." *LCO VI*, 707 F. Supp. at 1060. *See also LCO IV*, 668 F. Supp. at 1242-43; *LCO VI*, 707 F. Supp. 1034.

158. *See supra* notes 136 (rules of Indian treaty interpretation), 140 (50% ceiling and moderate standard of living test), 151 (comparison of provisions in Chippewa and Pacific Northwest treaties), and 156 (limited right of states to regulate for conservation purposes), and *infra* note 186 (preemption of state authority in Indian law). For discussions on tribal hunting and fishing rights, see generally COHEN, *supra* note 11, at 456-62; Morisset, *The Legal Standards for Allocating the Fisheries Resource*, 22 IDAHO L. REV. 609 (1986); Reynolds,

VII. Cooperative Management

After sustained litigation that began, in its modern incarnation, in the early 1970s, virtually all of the major legal issues have now been decided at the district court level. Many of the larger natural resource and social issues, however, remain unresolved. Chippewa hunting, fishing, and gathering rights within the ceded territory, after all, implicate some twenty-four thousand square miles of federal, tribal, state, and private land;[159] more than eleven thousand lakes;[160] dozens of species of mammals, fish, and plants; and more than a million hunters and fishers. No judge can satisfactorily resolve the seemingly unending (and changing) issues of seasons, bag limits, gear restrictions, enforcement and habitat protection and restoration. Nor can court rulings by themselves resolve the social unrest that runs so deep. The judicial decisions to date have been valuable and necessary in announcing the continuing validity of the treaty promises and in establishing the broad regime for applying the treaties' relatively general terms to modern circumstances. Undoubtedly some future disputes will of necessity be decided by the courts. Nevertheless, the dispute over Indian rights has plainly reached a new plateau where it is in everyone's interest to search for ways to deemphasize litigation, and to direct time and money elsewhere in searching for durable solutions to the many, varied and complex ongoing problems.[161]

Indian Hunting and Fishing Rights: The Role of Tribal Sovereignty and Preemption, 62 N.C.L. Rev. 743 (1984). The leading Supreme Court case remains Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979).

In a ruling not specifically connected to resource regulation and allocation, Judge Crabb held in October 1990 that the eleventh amendment's principle of state sovereign immunity precluded the tribes from seeking monetary relief against the State of Wisconsin for past infringement of treaty resource rights. Although she related that the state had violated the tribes' treaty rights for over 130 years, she was constrained by recent Supreme Court interpretations of the eleventh amendment from granting redress to the Indians. Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin, 749 F. Supp. 913, 923 (W.D. Wis. 1990). Thus Judge Crabb found that the tribes cannot pursue their claims for damages against the State of Wisconsin directly; they may do so only through the United States. Judge Crabb expressly disagreed with the Ninth Circuit's decision in Native Village of Noatak v. Hoffman, 896 F.2d 1157 (9th Cir. 1990). In *Noatak*, the Ninth Circuit held that 28 U.S.C. § 1362, in its grant of federal question jurisdiction over tribal suits against any party, precluded the state sovereign immunity defense legal actions brought by federally recognized tribes. Subsequently, the Supreme Court reversed the Ninth Circuit decision in Blatchford v. Native Village of Noatak, 111 S. Ct. 2578 (1991), holding that the eleventh amendment bars suits by tribes against states and that 28 U.S.C. § 1362 does not abrogate the states' immunity. The District Court retains continuing jurisdiction over the litigation, but the parties have decided not to appeal from the decisions that have been made to date. Letter from Thomas L. Dosch, Assistant Attorney General of Wisconsin, Sept. 11, 1991.

159. LCO VII, 740 F. Supp. at 1403.

160. LCO VII, 740 F. Supp. at 1412.

161. Non-Indian fishing interests might be encouraged toward continued litigation and appeal by recent Supreme Court opinions suggesting that the Court's generally favorable treatment of tribal sovereign prerogatives may be waning. *See* Duro v. Reina, 110 S. Ct. 2053

The national trend during the last decade in state-Indian disputes has been toward negotiations between state and tribal governments. The parties, better than any judge, can establish detailed, workable regulatory systems to resolve problems through cooperation and coordination. The underlying dynamics in other states have been the same as with Wisconsin Chippewa fishing rights: the courts have been extraordinarily active during the last thirty years in Indian law[162] and, with many of the legal contours fixed by the courts, the tribes and the states have begun to turn from the courthouses to the negotiating tables to settle complex disputes. Hundreds of tribal-state jurisdictional agreements have been reached on a wide variety of issues, including law enforcement, taxation, child custody matters, fire protection, zoning, motor vehicle registration, and numerous other matters.[163] The formal recognition by states of the governmental status of Indian tribes has accelerated during the past few years. Recently, the State of Washington recognized the government-to-government status between the state and the numerous federally recognized tribes in Washington. The Centennial Accord, signed in August, 1989 by Washington Governor Booth Gardner and the representatives of twenty-six tribes, formalizes the relationship and "respects the sovereign status of the parties, enhances and improves communications between them, and facilitates the resolution of issues."[164] President Bush hailed the Accord as a "model for the entire nation."[165] The governors of South Dakota, Wyoming, and Alaska have since issued government-to-government proclamations.[166] Former Wisconsin Governor Anthony Earl, in 1983, recog-

(1990) (tribes lack inherent jurisdiction over nonmember Indians); Brendale v. Confederated Tribes and Bands of Yakima Nation, 109 S. Ct. 2994 (1989) (tribe possesses inherent jurisdiction to zone land of non-Indians in areas of reservation where land ownership is predominantly Indian; tribe lacks jurisdiction to zone non-Indian land in area of reservation where land ownership is predominantly non-Indian); Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989) (state has jurisdiction to tax non-Indian mineral company extracting petroleum within reservation boundaries). Those opinions, however, deal with issues largely unrelated to the Wisconsin-Chippewa litigation. Further, the rulings in the Chippewa cases are unremarkable in that they are consistent with decisions on similar issues handed down by the Supreme Court and by circuit and district courts dealing with Indian fishing rights disputes in the Pacific Northwest and in Michigan. *See supra* note 158.

162. *See* generally C. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW (1987).

163. *See generally* D. GETCHES & C. WILKINSON, CASES AND MATERIALS ON FEDERAL INDIAN LAW 547 (2d ed. 1986).

164. Centennial Accord Between the Federally Recognized Indian Tribes in Washington State and the State of Washington, signed Aug. 4, 1989.

165. President George Bush, in a congratulatory letter to the participating tribes, stated that the Accord "is more than a reflection of the wisdom and determination of its signatories. It is a model for the entire nation," and that "such a relationship with the tribes will help all levels of state and tribal government to work together to solve problems of mutual concern. This will benefit everyone." *Id.* Letter from President George Bush to participating tribal chairs (Sept. 22, 1989).

166. *See* Executive Proclamation by Governor George Mickelson of South Dakota

nized that "it is in the best interest of all units of [state] government . . . to seek out a mutual atmosphere of education, understanding and trust with the . . . tribal government[s]."[167]

From the perspectives of the states, intergovernmental cooperation has been facilitated by the manner in which tribes have expanded their administrative structures since the late 1970s. This movement toward more elaborate and stable tribal entities—giving states formal tribal bodies and often substantial staffs and expertise to rely upon—has been evident throughout tribal government, including the court systems, and has been especially pronounced in the management of natural resources.[168] Tribal-state relations are still relatively young and a number of difficulties, often including cultural distance and distrust on both sides, persist in many situations. At the same time, pressing cross-jurisdictional issues need to be addressed, and both states and tribes have shown a steadily growing inclination to approach these disputes in a pragmatic, cooperative fashion.

Natural resources management has been an active area of tribal-state cooperation and a number of agreements are now in place.[169] Two

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cstablishing a "Year of Reconciliation" between the state and Indian tribes, Exec. Proclamation "1990 Year of Reconciliation," Office of the Governor, State of South Dakota (Feb. 1, 1990) (available from the Office of the Governor, Pierre, SD); Executive Order by Governor Michael Sullivan of Wyoming recognizing and respecting the sovereignty of the Shoshone and Arapaho Tribes, Exec. Order No. 1989-4 (Apr. 5, 1989) (available from the Office of the Governor, Cheyenne, WY); Administrative Order by Governor Steve Cowper of Alaska recognizing the tribal status of Alaskan Native Groups, Admin. Order No. 123 (Sept. 10, 1990) (available from the Office of the Governor, Juneau, Alaska).

167. Executive Order No. 31 by Governor Anthony S. Earl (Oct. 13, 1983) (available from the Office of the Governor, Madison, Wisconsin).

168. On tribal water management, *see, e.g.*, Shupe, *Water in Indian Country: From Paper Rights to a Managed Resource*, 57 U. COLO. L. REV. 561 (1986). In the area of environmental regulation, most federal environmental statutes now treat tribes as states and establish authority for tribes to exercise regulatory primacy under the federal environmental laws in Indian country. *See generally* Royster & SnowArrow Fausett, *Control of the Reservation Environment: Tribal Primacy, Federal Delegation, and the Limits of State Intrusion*, 64 WASH. L. REV. 581 (1989). For descriptions of tribal fish and wildlife regulations see, e.g., New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983) (tribal management of elk herds) and text accompanying *infra* notes 169-82 (tribal fisheries agencies in Oregon, Washington, Michigan, and Wisconsin). Several national Indian organizations provide support of different kinds to tribal management agencies. They include the Native American Fish & Wildlife Society in Broomfield, Colorado; the Council on Energy Resource Tribes in Denver, Colorado; and the American Indian Resources Institute in Oakland, California.

169. One of the most extensive areas of tribal-state cooperation involves water rights and water development. Congress has formally recognized the agreements in a number of recent important settlements. *See, e.g.*, Fallon Paiute Shoshore Indian Tribes Water Rights Settlement Act of 1990, Pub. L. No. 101-618, 104 Stat. 3289; Colorado Ute Indian Water Rights Settlement Act of 1988, Pub. L. No. 100-585, 102 Stat. 2973; Salt River Pima-Maricopa Indian Community Water Rights Settlement Act of 1988, Pub. L. No. 100-512, 102 Stat. 2549; San Luis Rey Indian Water Rights Settlement Act of 1987, Pub. L. No. 100-675, 102 Stat. 4000. The state of Oregon has set up a formal procedure for negotiating tribal-state water disputes. OR. REV. STAT. §§ 539.300-.350 (1989). For a collection of these and other

leading examples, however, are especially pertinent to the Wisconsin situation.

In the Pacific Northwest, the complexities involving the management of the salmon and steelhead runs have resulted in a state-tribal co-management system that remains the model for the nation. After the recognition of Indian treaty fishing rights by the Supreme Court,[170] the tribes formed two intertribal fisheries management agencies, the Columbia River Intertribal Fish Commission (CRITFC), on the Columbia River, and the Northwest Indian Fisheries Commission (NWIFC), on Puget Sound and various Washington coastal rivers. CRITFC and NWIFC are main participants in the complex task of managing the Pacific salmon and steelhead,[171] some of whom have life journeys of ten thousand miles, passing through as many as twenty-one separate international, national, state and tribal jurisdictions.[172]

Both intertribal entities are directly involved with the setting of seasons and harvest levels for the various fish species. The NWIFC, for instance, works with the State of Washington's Department of Fisheries in determining the annual sport fishing regulation package and regulations controlling commercial ocean fishing harvest levels.[173] The

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water negotiations and settlements, see Sourcebook On Indian Water Settlements (1989) (available from the American Indian Resource Institute). For other examples of cooperation in natural resource management see 1979 Memorandum of Understanding between the Colorado Division of Wildlife, the New Mexico Department of Game and Fish, the United States Departments of Agriculture (Forest Service) and Interior (Bureau of Land Management) and the Southern Ute and Jicarilla Apache Indian Tribes establishing the San Juan Interstate Wildlife Working Group to manage the habitat and population of big game wildlife in southern Colorado and northern New Mexico (The Working Group, made up of representatives of the signatories, strives to achieve consensus on recommendations for big game hunting regulation in the region); Agreement between Minnesota and bands of Lake Superior Chippewa concerning tribal hunting and fishing regulations (in exchange for payments to the bands, the Chippewa agreed to adopt and enforce regulations similar to state rules). *See* D. GETCHES & C. WILKINSON, CASES AND MATERIALS ON FEDERAL INDIAN LAW 729-30 (2d ed. 1986). For an overview of natural resource management cooperation, see also NATIONAL CONFERENCE OF STATE LEGISLATORS, STATE-TRIBAL AGREEMENTS: A COMPREHENSIVE STUDY (May 1981) (available from the National Indian Law Library, Boulder, Colorado).

170. *See* United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert denied*, 423 U.S. 1086 (1976), *aff'd sub nom*, Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979).

171. For overviews of the Pacific Northwest situation see *Cohen, Treaty Indian Tribes and Washington State: The Evolution of Tribal Involvement in Fisheries Management*, CO-OPERATIVE MANAGEMENT OF LOCAL FISHERIES 37-48 (E. Pinkerton ed. 1989) [hereinafter PINKERTON]; Dale, Getting to Co-management: Social Learning in the Redesign of Fisheries Management, PINKERTON, supra, at 49-66. Despite the successful cooperation between the tribes and the states in the Northwest, the future of the salmon is far from certain. The destructive effects of decades of logging and dam building have severely diminished most salmon runs. "Northwest Salmon at the Crossroads," High Country News, April 22, 1991, at 6-28.

172. Wilkinson & Conner, *The Law of the Pacific Salmon Fishery: Conservation and Allocation of a Transboundary Common Property Resource*, 32 U. KAN. L. REV. 17 (1983).

173. *See* NORTHWEST INDIAN FISHERIES COMMISSION, 1989 ANNUAL REPORT (avail-

CRITFC, representing the Columbia River tribes in Oregon, Washington and Idaho, has negotiated with the federal government and the three states to adopt the Columbia River Fish Management Plan.[174] The Plan, which concerns Columbia River salmon and steelhead, sets out catch levels and harvest management, stocking and hatchery programs that must be followed by the parties. The Plan includes a dispute resolution mechanism intended to reduce the likelihood of future litigation. Biologists from CRITFC and state and federal wildlife agencies also control a "water budget" on the Columbia River, designed to provide for releases of water from dams in order to facilitate downstream movement of juvenile salmon and steelhead.[175]

The NWIFC and CRITFC also are major participants in the widely-praised Timber/Fish/Wildlife (TFW) agreement signed in 1987.[176] Concerned with the impacts of timber harvesting and the building of roads on salmon and steelhead habitat, the two groups worked with industry and environmental groups, along with the State of Washington, to develop state administrative regulations governing timber harvesting. The TFW set up a natural resource management system, administered by the Washington Department of Natural Resources, that involves all parties in site-specific and regional planning decisions regarding road construction, riparian area protection and timber harvesting operations.

The other major state-tribal cooperative management system for fisheries has been installed in Michigan, where three tribes have formed the Chippewa-Ottawa Treaty Fishing Management Authority (COTFMA). COTFMA, similar in many respects to the Great Lakes Indian Fish and Wildlife Commission in Wisconsin, has offices in Sault Saint Marie, Michigan, with a biological staff of five, and a growing biological assessment capability.[177]

Lengthy litigation over the fish resources of the Great Lakes between the tribes and the state culminated in a 1985 Allocation Plan

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able from Northwest Indian Fisheries Commission, 6730 Martin Way East, Olympia, WA 98506).

174. The Plan is described in United States v. Oregon, 699 F. Supp. 1456 (D. Or. 1988). On appeal, the Ninth Circuit Court of Appeals approved the Plan over the objections of the State of Idaho and the Shoshone-Bannock Tribe. United States v. Oregon, 913 F.2d 576 (9th Cir. 1990).

175. *See, e.g.*, Wilkinson & Conner, *supra* note 172, at 92-93.

176. On the Timber/Fish/Wildlife agreement *see generally* J. McMahon, Timber Harvesting On Private Lands: The Washington Timber—Fish—Wildlife Agreement (paper presented as part of Water Quality Control: Integrating Beneficial Use and Environmental Protection, Ninth Annual Summer Program, Natural Resources Law Center, University of Colorado School of Law, May 31-June 2, 1988).

177. COTFMA's jurisdiction over management of tribal treaty fishing rights was acknowledged in United States v. Michigan, 534 F. Supp. 668 (W.D. Mich. 1982).

that is in effect for fifteen years.[178] The Allocation Plan, in essence, "zones" the Great Lakes surrounding Michigan into treaty-guaranteed and non-treaty fishing areas. The zones were drawn to correspond with the traditional fishing areas of the tribes. For example, northern waters, closer to the tribal lands and more prized by the tribes, are zoned for Indian fishing while southern waters, sought after by non-Indian sport groups, are zoned for non-Indian fishing. COTFMA promulgates, in conjunction with the state, fishing regulations that have resulted in substantial increases in valuable whitefish populations. Cooperation between biologists from COTFMA and the state has been instrumental to these successes.[179]

In Wisconsin, contrary to the common perception and despite the high level of public contentiousness, tribal and state biologists and attorneys have engaged in successful negotiations on a considerable number of subjects. These negotiations have been manifested in administrative agreements and litigation stipulations stating the terms and conditions governing tribal off-reservation treaty rights. The administrative agreements, limited to specific time periods (corresponding to hunting and fishing seasons), cover a wide range of resources and include harvest procedures, monitoring of resource levels and mechanisms for enforcement of tribal and state regulations.[180] These interim agreements guided the conduct of the parties on a resource-by-resource, year-to-year basis until the trial court could make final rulings on the disputed resource. The parties are now governed by final natural resource management stipulations that narrowed the remaining issues to be litigated. These final stipulations, like the interim agreements, cover many resource issues and govern the harvesting of resources such as wild plants, black bear, small game, deer and fish species other than walleye and muskellunge. All of the stipulations have been approved

178. *See* Order Adopting Allocation Plan Embodied in Agreement for Entry of Consent Order (May 31, 1985), pursuant to United States v. Michigan, No. M26-73, cited in Bigelow v. Michigan Dept. of Natural Resources, 727 F. Supp. 346, 348 (W.D. Mich. 1989). In *Bigelow*, the court ruled that commercial fishers were not denied equal protection by Michigan's enforcement of the 1985 Allocation Plan. The state and the tribes had negotiated the Plan, but one of the tribes had refused to ratify it. The lower court, however, after a hearing, had adopted the Plan as part of an order, thus making it binding on all of the parties. On the Michigan litigation and the 1985 Plan, see D. GETCHES & C. WILKINSON, FEDERAL INDIAN LAW 739-40, 750-51 (2d ed. 1986).

179. Details on Great Lakes cooperative management were obtained during a Nov. 20, 1990 interview with Bruce R. Greene, former counsel to the Bay Mills Indian Community and lead counsel in litigation resulting in the adoption of the Plan, see *Bigelow*, 727 F. Supp. at 348. Disputes among Michigan sporting groups and some of the tribes, however, have prevented complete implementation of the Plan. Ongoing negotiations are currently aimed at resolving the conflicts.

180. Since 1983, there have been over thirty agreements between the tribes and the state. A complete list of the agreements is available from the Wisconsin Department of Natural Resources, Madison, WI.

and implemented through court orders to ensure compliance with their terms.[181] Judge Crabb has twice complimented the extent to which the parties have reached agreement on issues such as wild rice and fish harvests.[182]

Yet a great deal remains to be done before the state and tribes can be said to have achieved cooperative management or co-management. The term "co-management," for example, has become something of a political football. In 1989, the Wisconsin Department of Natural Resources expressed the fear that "co-management" involves the "relinquish[ment] of state (constitutionally granted) rights to protect the interests of all citizens in the natural resources [of Wisconsin]" and that " 'co-management' is not good state policy."[183] Such statements about the legal inability of Wisconsin to manage resources cooperatively with the tribes almost certainly stem from the political desire to assuage the vocal minority so vigorously opposed to Chippewa treaty rights. Nevertheless, confusion over whether Wisconsin can "share" its management authority with the tribes seems to have had a considerable impact on the policy debate.

In fact, there are no legal barriers to Wisconsin adopting a regime of state-tribal management similar in concept to those now in place in Oregon, Washington and Michigan.[184] Wisconsin would not be relinquishing its authority over hunting and fishing; the precise message, after all, of the Indian hunting and fishing cases is that congressional action, by treaty or statute, preempts state law pursuant to the Supremacy Clause of the United States Constitution.[185] Thus, Wisconsin

181. The stipulations, signed by the Wisconsin Attorney General's Office and representatives of the various tribes, are filed under the *LCO* litigation, Case No. 74-C-313-C. A complete compilation of the stipulations is available from the Wisconsin Attorney General's Office, Madison, WI.

182. *See LCO VI*, 707 F. Supp. at 1054: "both the tribes and the officials of the State of Wisconsin responsible for implementing the tribes' treaty rights can take pride in their accomplishments over the last six years. They deserve widespread recognition and appreciation for their efforts." *See also LCO VII*, 740 F. Supp. at 1401-02 (Judge Crabb commending the parties for their cooperation in reaching agreements on numerous matters). In September 1991, a large delegation of state legislators, tribal leaders and resource managers made a fact-finding trip to the Pacific Northwest to examine state-tribal cooperation in Washington. Letter from Thomas L. Dosch, *supra* note 158.

183. *See* Memorandum from C.D. Besadny, Secretary of Wisconsin Department of Natural Resources, 2 Wisconsin Legislators, Nov. 6, 1989. *See also* Letter from Wisconsin State Senator Lloyd Kincaid, Chairperson of the Senate Committee on Transportation, Tourism and Conservation, to Frank Boyle, Chairperson of the American Indian Study Committee (June 12, 1990) (commenting on the possibility of "co-management" in Wisconsin, Senator Kincaid stated that "the DNR is not authorized to share its regulatory and management responsibilities . . . with any Indian tribe . . . or with anyone or anything else" and that "any proposal . . . based on co-management of the natural resources of this state will be dead on arrival in the Senate.")

184. *See supra* text accompanying notes 169-79.

185. U.S. CONST. art. VI, cl. 2.

natural resource laws, whether constitutional or statutory, have been overridden by the Chippewa treaties insofar as they infringe upon Indian hunting, fishing and gathering protected by treaty.[186] The idea of unlimited state authority over wildlife traces back to the so-called state ownership doctrine announced in 1896 in *Geer v. Connecticut*,[187] which embodied the concept that states "owned" wildlife within their borders. In 1979, however, the Supreme Court expressly overruled *Geer* and held that state ownership of wildlife is a "19th-century legal fiction."[188]

In northern Wisconsin, therefore, it is simplistic and wrong to think of state police power over wildlife as being absolute. Rather, wildlife law is best understood as a complex interaction of the laws of three kinds of governmental authority—federal, state, and tribal—each of which, depending on the specific circumstances, can be exclusive, concurrent or inapplicable. In modern times, such cross-jurisdictional conflicts (which can also include the laws of foreign nations, counties, cities and special districts) have become increasingly common and governments regularly turn to intergovernmental agreements to eliminate uncertainty in the many areas where authority is unclear or overlapping.[189] The process of developing cooperative intergovernmental management agreements is commonplace in modern wildlife management and is best understood as involving the settlement of disputed and

186. *See, e.g.*, Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979); New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983). See generally COHEN, *supra* note 11 at 270-79 (preemption of state laws by federal laws and treaties governing Indian affairs). State authority over wildlife is also sometimes preempted by other federal laws not related to Indian affairs, including certain laws relating to the federal public lands and some environmental laws such as the Endangered Species Act. *See, e.g.*, Kleppe v. New Mexico, 426 U.S. 529 (1976) (recognizing plenary federal authority to preempt state laws, including wildlife laws, on federal public lands); Sierra Club v. Clark, 755 F.2d 608 (8th Cir. 1985) (upholding federal protections of wolves from trapping practices permissible under Minnesota state law).

187. 161 U.S. 519 (1896).

188. Hughes v. Oklahoma, 441 U.S. 322 (1979) (striking down an Oklahoma state law prohibiting the shipping of minnows outside the state as violative of the commerce clause and expressly overruling *Geer*).

189. On intergovernmental cooperation under such circumstances, see, *e.g.*, M. BEAN, THE EVOLUTION OF NATIONAL WILDLIFE LAW 409-10 (1983) ("The major innovation of recent [federal wildlife] legislation is in the effort to coordinate the use of these various [federal] regulatory tools to establish comprehensive programs of wildlife conservation and to achieve a relationship between the states and the federal government capable of carrying out those programs."); G. COGGINS, PUBLIC NATURAL RESOURCES LAW § 4.01 [3] (1990) ("cooperative federalism on the federal public lands is manifested in a variety of forms usually determined by the contours and content of federal law. Federal law seldom excludes all state participation, but the state roles in the various public natural resources law programs cover a spectrum from dominant partner to consultant."); G. COGGINS & C. WILKINSON, FEDERAL PUBLIC LAND AND RESOURCES LAW, 209-11, 229 (2d ed. 1986) (preemption and cooperative federalism); *supra* notes 168-79 (intergovernmental cooperation in the state-tribal context). *See generally Symposium on Transboundary Problems in Natural Resources Law*, 32 U. KAN. L. REV. (1983).

uncertain areas of governmental authority. Whether phrased as cooperative management, co-management or something else, the important point for the purposes of the current conflict in Wisconsin is that intergovernmental negotiations ought not to be prevented at the outset by slogans or labels. For those issues that are especially sensitive, negotiation offers a flexible context for parties to draft individualized provisions to protect specific prerogatives, which may be asserted as a matter of either law or policy.

There are two cornerstones to this endeavor. First, Wisconsin, as several other states have done, should squarely recognize the sovereign authority of the Chippewa bands and the government-to-government relationship between the bands and the State of Wisconsin.[190] Second, some form of joint tribal-state natural resource management commission should be established.[191] To achieve cooperation, the joint commission would then adopt comprehensive regulations governing matters such as seasons, limits, gear and enforcement, presumably including cross-deputization of state and tribal officials. The scientific side is also of critical importance. The tribes and the state, through the joint commission, should agree to share information so that they will have a common pool of data as to such matters as species productivity and harvest levels, enabling them to base their management program upon the most extensive information available. The parties should also combine their research efforts in areas such as the stocking of lakes and environmental protection.[192]

To be sure, there are daunting obstacles to effective cooperative management of natural resources in northern Wisconsin. The possibilities for direct personal conflicts are greater on Wisconsin's small, inland lakes where fishers often work in close quarters; on the Great

190. *See, e.g.*, notes 164-66 (proclamations by the governors of Washington, Alaska, South Dakota and Wyoming). This would amount to a reaffirmation and expansion of Wisconsin Governor Earl's 1983 proclamation. *See supra* note 167.

191. Existing models, such as those in the Pacific Northwest and Michigan, would undoubtedly prove useful but ultimately the parties in Wisconsin will and should develop their own individualized approach. A large number of practical issues would have to be resolved, including membership, possible veto power by the state and tribes, staffing and the jurisdiction of the commission in regard to geographic area and wildlife and plant species. The fundamental importance of such a commission is underscored by Judge Crabb's suggestion that, if necessary, she would "consider an order directing the establishment of a joint tribal-state natural resources commission." *LCO IV*, 668 F. Supp. 1233, 1242 (W.D. Wis. 1987).

192. The classic text on wildlife management is A. LEOPOLD, GAME MANAGEMENT (1933). *See also* J. BAILEY, PRINCIPLES OF WILDLIFE MANAGEMENT (1984); BIG GAME OF NORTH AMERICA: ECOLOGY AND MANAGEMENT (J. Schmidt & D. Gilbert ed. 1978). For a provocative essay on wildlife management, see Coggins & Ward, *The Law of Wildlife Management on the Federal Public Lands*, 60 OR. L. REV. 59, 61-75 (1981). This important cooperative sharing of scientific, biological and technical information has already begun. *See supra* notes 180-82 on agreements and stipulations between the tribes and the state.

Lakes, and to some extent in the Pacific Northwest, the fishers are more dispersed. But Wisconsin has advantages, too. Fisheries management in Wisconsin, for example, is much less complex and the fisheries are in much better biological condition than those in the Pacific Northwest.[193] Further, Wisconsin is almost certain to find, as have state and tribal officials in the Pacific Northwest and Michigan, that joint state-tribal efforts are attractive candidates for substantial federal funding.[194] In any event, while the development of a cooperative management regime will be time-consuming in its own right, such an approach—which is ultimately based on the idea that the highest objective ought to be the enhancement of Wisconsin's wildlife and habitat—surely seems preferable to the considerable social and economic costs inherent in plunging into a third decade of intensive litigation.

VIII. CONCLUSION

Let me offer, by way of conclusion, a prediction that the State of Wisconsin and the six Chippewa bands will enter into some form of arrangement that will amount to cooperative management of the fishery resource and cooperative regulation of hunting and fishing. There are several reasons why this is likely to be so.

Racism is detestable, a virulence, and it seems inconceivable that the people of Wisconsin will allow it to continue in this vicious form for much longer. Further, there is a growing realization among both resource professionals and sport fishers that one of the real tragedies in the Wisconsin situation is that so much time and money have been expended on litigation and other forms of combat and diverted away from improving the fishery. Additional support needs to be given to fish stocking programs. Far more important, public policy needs to turn in earnest toward habitat protection. The most serious problems in Wisconsin include acid rain, point and nonpoint source pollution and the rusty crayfish, the populations of which have proliferated in recent years, destroying weed beds in lakes containing walleyes, which are a

193. On the complexity of fisheries regulation in the Pacific Northwest, *see generally* Wilkinson & Conner, *supra* note 172. In the Columbia River watershed several runs of salmon are being considered for designation under the Endangered Species Act. *See, e.g.*, the issue entitled "Northwest Salmon at the Crossroads," *High Country News* (April 22, 1991). For an overview of the current condition of Wisconsin's fisheries, see the WDNR 1990 REPORT, *supra* note 5.

194. There have already been some returns. In 1990, Congress appropriated $300,000 to fund an independent assessment of the status of Wisconsin fishery resources, to be conducted jointly by the federal, state and Chippewa tribal governments. *See* MASINAIGAN, QUARTERLY PUBLICATION OF THE GREAT LAKES INDIAN FISH & WILDLIFE COMMISSION 3 (Fall, 1990). This original allocation went to the U.S. Fish and Wildlife Service and to the Great Lakes Fish and Wildlife Commission.

weed fish.[195] There is much else to be done, ranging from the development of independent, neutral, scientific verification of fish census data to scientific research on habitat, reproduction, climate change and numerous other issues. Some form of joint effort by the state and the tribes is the best way to approach these concerns.

Tribal-state jurisdictional and management agreements are the vanguard of modern Indian policy. Ultimately, they have become possible because of broadened perspectives gained during the negotiation process. Tribal and state governments have found that cooperative jurisdictional agreements can be adopted without either side relinquishing essential governmental functions. State officials have come to appreciate that the burgeoning tribal wildlife management corps has much to offer. States and tribes also have discovered, as negotiations progress, that the talks change from debates about ideology to practical discussions of what works. And, again, it seems critical that state and tribal fish managers in Wisconsin get to the subject of what works, for what exists now seems plainly not to be working.

Let it be said, too, that in the making of good public policy, cooperation is an end in itself. It reduces stresses of all kinds. It heals and builds community.

But there is a last, and truest, reason why Chippewa rights should be institutionalized in a tribal-state compact and why they should endure forever in Wisconsin. That reason—which goes beyond the wise use of public funds, good conservation practices, the community good will that flows from cooperation and even the fact that the air will no longer be tinged with racism—is that these rights are organic and grew out of a context that has dignity and deserves to be honored. This transcends the pervasive principle of our legal system that promises ought to be kept. Even more than that, on their merits these were fair promises, fair when made, even fairer today given that most of their companion promises have been torn away.

Indian people have an ability to stretch their minds, to search far back and far ahead. The Chippewa were thinking in those terms at treaty time—thinking of the long procession back ten thousand years or more, thinking of an equally long procession out ahead. Those treaties were signed amid the din of a collision of cultures, but the Chippewa held firm to their world view, as best as they could.

That world view was lodged in federal treaties—it became law. It matters that the world view is now law. But it matters, too, that this law is a wise law, a just law, with roots deep in history, minority rights,

195. *See generally* Capelli & Magnuson, *Morphoedaphic and Biogeographic Analysis of Crayfish Distribution in Northern Wisconsin*, 3 J. CRUSTACEAN BIOLOGY 548 (1983).

land title, sovereign prerogatives and a historical trust obligation. The Chippewa negotiators did the right thing, they looked across the prairie and felt the summer in the spring, and we should honor that view by reaffirming our promise that it may continue, with the full and welcoming support of the state and federal governments, forever.