

TREATY FISHERIES IN THE UPPER MIDWEST

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INTRODUCTION

Treaty entitlements to hunt, fish, and gather natural resources in the Great Lakes region have become increasingly contentious since the early nineteen seventies, coinciding with a period of federal Indian policy that has been described as “Tribal Self-determination.” This renewal of interest by native people¹ has paralleled events in the Pacific northwest where a landmark decision by federal judge George Boldt in 1974 set the stage for a succession of cases that have revitalized tribal fisheries all over the United States. One of the most recent conflicts to gain public attention is the dispute between the State of Minnesota and the Mille Lacs Band of Chippewa Indians over exercise of treaty rights reserved by the Indians in the Treaty of 1837. The Mille Lacs case is particularly interesting because it revisits a number of issues already addressed by earlier court decisions. It is being litigated at a time when prior experience with a very similar situation in Wisconsin provides an opportunity for reasonable speculation as to the resource management outcomes should the Minnesota Indians have their rights (as they see them) reaffirmed at the appellate court level.

This paper documents the current situation in Minnesota and Wisconsin through the succession of treaties and court cases. We will examine the nature of the rights themselves and their current reduction to contemporary practice. In the process, I hope to further define the issues and identify common misperceptions about the exercise of treaty rights in a multicultural context.

A BRIEF HISTORY OF INDIAN RELATIONS

The earliest European settlers in North America established their new homes on a continent already occupied by over 400 independent nations. Most Indian tribes welcomed or tolerated the arrival of Europeans and began to actively trade land and resources for European goods. Deloria and Lytle (1983) ascribe the European interface with Indians to the theological beliefs of Francisco de Vitoria who concluded that Indians were true owners of the land. Thus, it was appropriate for the

Spaniards to travel and trade in North America, but they could not claim title by discovery, as this was appropriate only for property without ownership. Treaties thenceforth became the instruments for legal and political intercourse between Indian societies and Europeans (Deloria and Lytle, 1983). The importance of recognition of Indian societies was manifest in formal alliances such as that between the Iroquois Confederacy and English colonists in their disputes with French colonists at the outset of the French and Indian Wars in 1763 (Pevar, 1992).

Formalization of the relationship between the U.S. government and Indians is expressed in the U.S. Constitution in Articles I and II. In the Commerce Clause, the Constitution specifies (Art. I, Sect. 8, clause 3): “Congress shall have the Power ... to regulate Commerce with foreign Nations, ... and with the Indian Tribes.” In the Treaty Clause (Art. II, Sect. 2, clause 2), the President is empowered “by and with the advice and consent of the Senate, to make treaties, ...” This text establishes the basis for the contention today that state governments have no jurisdiction in Indian affairs unless specifically authorized by Congress.²

In the first few decades of existence of the new United States government, treaties continued as a means of ensuring peaceful relationships between Indians and non-Indians, and they became increasingly important as instruments of land transfer between Indians and the United States. In a succession of cases beginning in 1823, the Supreme Court under Chief Justice John Marshall began to interpret Indian nations as “domestic dependent nations” that enjoyed a sovereignty entitling them to govern themselves and to engage in political relations with the federal government (Deloria and Lytle, 1983).

These early decisions, the Cherokee cases, may have been “the two most influential decisions in all of Indian law” (Canby, 1988). The first, *Cherokee Nation v. Georgia*, established Indian tribes as political sovereigns in the limited sense of domestic dependent nations. In *Worcester v. Georgia*, Chief Justice Marshall’s opinion is the foundation of jurisdictional law that excludes states from power over Indian affairs (Canby, 1988). President

Andrew Jackson's refusal to enforce the Supreme Court ruling in *Worcester v. Georgia* was a harbinger of a multitude of policy reversals and inconsistencies that would cloud Indian relations over the following century

Indian law scholars³ recognize several critical periods in development of federal Indian policy (Table 1). Canby (1988) notes that policies toward Indians were often undertaken to set aright conditions that had further deteriorated in Indian communities as a consequence of previous administrative or legal action. The efficacy of this approach is evident in the frequency of reversals in policies toward Indians. From 1828-1934 there was an initial attempt to separate Indians from white settlers first by relocating Indians further westward, and subsequently by sequestering Indians on specified reservations. When these tactics failed to limit conflicts between cultures, forcible assimilation was attempted by offering land patents to individual Indians if they would adopt an agrarian lifestyle (General Allotment Act of 1887). After the required period of residency or improvement, the individuals who had been granted title to their land were free to sell it. This resulted in rapid diminution of territories under Indian control and ownership. From the 138 million acres under tribal ownership in 1887, only 48 million acres remained in 1934 when the allotment system was abolished (Canby, 1988).

The adverse effects that the General Allotment Act had inflicted upon Indians were slow to be officially recognized, but in 1926, Secretary of the Interior Hubert Work commissioned a revealing study on the social and economic status of Indians (Deloria and Lytle, 1983). Published in 1928, the Meriam Report⁴ disclosed a withering array of examples and documentation of policy gone wrong. Conditions among the Indians were said to be so deplorable that the veracity of the report itself was questioned, precipitating yet another round of investigation before substantive remedial legislation could be enacted. Finally, in 1934, the Indian Reorganization Act (Wheeler-Howard Act) terminated the policy of allotment and provided opportunities for Indian tribes to organize themselves into effective self-governing units (Deloria and Lytle, 1983).

The Indian Reorganization Act, and after it, the two identifiable periods in Indian policy that bring us to the present, are continuing testimony to the fact that there has never been closure to the issue of how much land remains under the control of Indians, or how much federal assistance is implied by the trust relationship between the U.S. government and its "domestic

dependent nations." Add to this the additional complexity of Indian activities off-reservation and the reciprocal problem of how non-Indian activities off-reservation impact Indian life, and the stage is set for the recent and continuing controversies over Indian use of fish, wildlife, and water resources.

TREATY ENTITLEMENTS TO HARVESTABLE RESOURCES

Indian entitlement to hunt and fish free of state regulation on reservations established by treaty is rarely contested. Even Public Law 280 which extended state authority to a number of civil and criminal matters on Indian land explicitly exempts these activities from state control (Clinton et al., 1991). The question that has been broadly challenged is that of Indian fishing off reservations on land ceded by treaty to the federal government during the last century. Jurisdictional problems in these cases range from questions about the extinguishment of the treaties themselves to interpretation of the intent of the treaties and, ultimately, to definitions of when it is appropriate and legal for states to intervene in the harvesting activities. Even after the legal issues have (apparently) been settled, non-Indian interests regularly question whether or not the best interests of conservation and regional economics have been served.

Except for limited reference to earlier cases as needed for clarification of concepts or precedents, the following discussion will deal with the case currently under litigation in the State of Minnesota, and its predecessor, the Voigt case in Wisconsin. These cases involve the Treaty of 1837 in which the Chippewa nation of Indians ceded to the U.S. government a tract of land extending from north-central Wisconsin on the east to central Minnesota on the west (Fig. 1). Chippewa entitlements remaining in the Wisconsin portion of the ceded territory were litigated in a succession of cases (Voigt) beginning in 1973 in U.S. District Court for the Western District of Wisconsin. Settlement for the Wisconsin judicial district (including consideration of the entitlements pursuant to the Treaty of 1842) was achieved with the decision of District Judge Barbara B. Crabb in *Lac Courte Oreilles v. State of Wisconsin* (LCO VIII) in 1991 (Satz, 1991). Interpretation of the entitlements of the Treaty of 1837 are being litigated again in Minnesota simply because the judicial boundaries today leave the Minnesota jurisdiction with the U.S. District Court for the District of Minnesota.

Before identifying the issues, it is important to recognize legal traditions relating to treaties. Judicial scholars identify four “canons of construction” or principles of interpretation in regard to treaties (Satz, 1991): 1) treaties are to be construed in favor of the Indians; 2) ambiguous language in treaties must be resolved in favor of the Indians; 3) treaties must be construed as the Indians would have understood them when they were negotiated; and, 4) treaty rights may not be extinguished by mere implication, but rather explicit action must be taken in “clear language” in order to abrogate them.

This apparently paternalistic interpretation of treaties derives from a recognition that the “unlettered peoples” negotiating these treaties were not an equal linguistic footing with the English-speaking representatives of the U.S. government. It is also clear that the special trust relationship between the U.S. government and Indians requires the government to behave as a guardian to its wards (Chief Justice Marshall’s language in the Cherokee cases). The fourth canon above also relates to what has become known as the “reserved rights doctrine.” Deloria and Lytle (1983) encapsulate this idea by stating the treaties reserve to the Indians all rights that have not been explicitly granted away. The language of the Supreme Court in *United States v. Winans* is particularly informative where it says a treaty is “not a grant of right to the Indians, but a grant of rights from them — a reservation of those not granted.”⁵ Thus, express provision for food-gathering rights is not necessary to establish their existence (Clinton, et al., 1991).

One additional legal definition, the principle of usufructuary rights, is necessary as a preamble to consideration of the midwestern cases. Usufructuary rights are a special category of property rights that confer usage privileges upon the holder of those rights. These privileges may be reserved from sale in pending transfers of title, as is commonly done in cases of water or mineral rights. It has often been argued that continuing uses of ceded territories by Indians for hunting, fishing, and gathering are merely usufructuary rights, not transferred with land title unless explicitly extinguished.

RESOURCE MANAGEMENT ISSUES IN THE TREATY CONTEXT

Issues requiring resolution in the Michigan, Wisconsin, and Minnesota cases fall into two broad categories of concerns, existence or continuation of rights, and “conservation” of natural resources. While these are yet

to be fully resolved in Minnesota, the outcome of the Michigan and Wisconsin cases may provide indications of what to expect in Minnesota.

Existence of Indian rights to continue hunting and fishing on the ceded lands have been interpreted as usufructuary rights and upheld by the courts. Specific language in the treaties of 1837, 1842 and 1854 reserves those rights:

Treaty of 1837, ARTICLE 5: “The privilege of hunting, fishing, and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded, is guaranteed to the Indians, during the pleasure of the President of the United States.”

Treaty of 1842, ARTICLE II: “The Indians stipulate for the right of hunting on the ceded territory, with the other usual privileges of occupancy, until required to remove by the President of the United States,…”

Treaty of 1854, ARTICLE 11: “And such of them as reside in the territory hereby ceded, shall have the right to hunt and fish therein, until otherwise ordered by the President.”

The qualifying language in these passages suggests to a modern reader that the President would have “unbridled discretion” to extinguish the usufructuary rights (Clinton, et al., 1991).

In 1850, President Taylor, at the request of Indian affairs officials and Alexander Ramsay, Governor of the Minnesota Territory, issued an order revoking the Wisconsin Indian’s usufructuary rights and removing the Chippewa to their unceded lands (reservation). Taylor’s order was broadly unpopular with the Wisconsin legislature and citizens of the region south of Lake Superior (Satz, 1991). The order was indefinitely suspended in August of 1851, “until the final determination of the President…” (Satz, 1991). Taylor’s successor, Millard Fillmore, upon meeting in Washington in June of 1852 with a delegation of Chippewa headed by Chief Buffalo (then in his nineties), is thought to have permanently rescinded the removal order. Although no written record has been found confirming this, an executive order cannot exceed the scope of the authority delegated by Congress (in the treaty) so legal scholars have generally concluded that the Removal Order of 1850 was invalid (Clinton, et al., 1991).

Modern jurists are thus faced with the problem of judging whether or not the usufructuary rights of the Chippewa continue to exist. Canon 3 above requires an interpretation of how the Indians perceived the qualifying conditions at the time the treaties were signed. Judge Doyle (LCO case), in interpreting the writings of both Indian and non-Indian observers at the signing of the Treaty of 1842, concluded that the Indians had been assured that they would not be required to move from the territory unless they misbehaved, i.e. "made war, or otherwise acted violently against whites." (Satz, 1991). Absent evidence of such misbehavior on the part of the Indians, the courts have upheld the continuing existence of usufructuary rights in the Wisconsin case.

The final issue in the Wisconsin case regarding existence of the property rights focused upon determining "how much of the resource base" the Chippewa were entitled to. In concluding Phase I of the trial (LCO III), Judge Doyle ruled that the Indians could harvest plant and animal resources throughout the ceded territories to an extent necessary to maintain for themselves a "modest or moderate" standard of living. Shortly thereafter, Judge Doyle died, leaving the Voigt case to Judge Barbara Crabb.

Continuing in the "economics phase" of the case, plaintiffs⁶ argued before the Crabb court that a modest standard of living might reasonably be judged coincident with a "zero savings" level of income, a demographic statistic available from U.S. Census Bureau tables. For northern Wisconsin, this would amount to an annual household income of approximately \$ 21,000. These ensued extensive testimony regarding the abundance of consumable fish, deer, waterfowl and wild rice throughout the ceded territory. Retail market prices corresponding to fish, red meat, chicken and other consumables were then tendered for calculation of resource values. It was even suggested that black bear gall bladders, worth several hundred dollars apiece on the aphrodisiac market, might be included in the evaluation. Long before the evidence had been completely reviewed, it was clear that the aggregate value of edible resources would not even come close to providing a modest standard of living with the households of the nearly 7500 tribal members living on or near reservations in the ceded territories. This result was subsequently reflected in Judge Crabb's final opinion⁷: Plaintiffs' modest living needs cannot be met from the present available harvest even if plaintiffs were physically capable of harvesting, gathering and processing it." If the logic of the economic phase of the trial were to be pursued, the obvious result would be

that the Indians would be entitled to the entire annual harvest of consumable resources across the ceded territories.

In the Pacific northwest, Judge Bold⁸ had allocated 50 per cent of the allowable harvest (defined below) to Indian interests. There, the treaties explicitly stated that the Indians would have "The right of taking fish at usual and accustomed grounds ... in common with all citizens of the Territory, ... " During the economics phase of the Wisconsin trial, state attorneys petitioned the court to make a similar allocation in Wisconsin, but Judge Crabb, acknowledging the language in the western treaties,⁹ refused to grant the State request, stating that she could find no such language in these treaties (Treaties of 1837 and 1842). Three years later, overcome by pragmatism and a well-entrenched resort industry based upon recreational fishing, Judge Crabb concluded: "The standard of a modest living does not provide a practical way to determine the plaintiff's share of the harvest potential of the ceded territory." In a colossal reversal of her earlier thinking, her final judgment declared: "All of the harvestable natural resources to which plaintiffs retain a usufructuary right are declared to be apportioned equally between the plaintiffs and all other persons, ..." The enormity of this provision was not lost on (then) Attorney General James E. Doyle, Jr.¹⁰ who counted Judge Crabb's conclusion among seven significant victories for Wisconsin in this case.¹¹

The outcome of the 1979 Fox decision,¹² Voigt (LCO), and other midwestern cases clearly established that hunting, fishing and gathering rights continue to exist under Nineteenth Century treaties. The consequences are that a real competition arises between Indians and non-Indians; for access to publicly-held resources. Just as the 1974 Boldt decision in the Pacific northwest affected fishing in hundreds of streams and dozens of watersheds, so too did the cases in Wisconsin and Michigan involve hundreds of lakes and thousands of acres of public land. The combined areas of the treaties of 1836, 1937 and 1842 (Fig. 1) included the northern one-third of Wisconsin and over half the land mass of Michigan. Resolution of the issues would require even further definitions of the lands and waters remaining within the provisions of the treaties.

The simplest boundary disputes were resolved by returning to the language of the treaties in defining the "metes and bounds" of the lands ceded. But complications arose where the cession boundaries projected across water

bodies rather than following the “natural” shoreline. Since the treaties referred to landmarks for demarcation of boundaries it became necessary to further define the entitlements for those cases in which the imaginary boundary line crossed the open waters of a lake.

In deciding the boundary issue in *State v. Gurnoe et al.*, the Wisconsin Supreme Court (1972) found that the right of Indians to fish on Lake Superior had been guaranteed in the treaty of 1854 (Whaley and Bresette, 1994). The Michigan Supreme Court (1971) in *People v. Jondreau*, ruled (in keeping with the second canon of construction above) that the Keweenaw Bay Indians, living on the shore of Lake Superior, would have understood the “right to fish” meant “ right to fish on Keweenaw Bay,” even though the waters of Lake Superior were not explicitly identified within the “ceded territory.” This reasoning was extended in *Lac Courte Oreilles v. State of Wisconsin* (LCO III), where the court concluded that the Indians would have understood (canon 3) “that they were guaranteed the right to make a moderate standard of living off the land and the waters *in and abutting* (emphasis added) the ceded territory.”

CONSERVATION ISSUES

With “territorial” and “treaty existence” issues at rest in the Wisconsin case, the remaining questions revolve around several topics in the sphere of “conservation.” As noted earlier, federal law prohibits states from interfering in the affairs of Indians except in the interests of conservation and public safety (Clinton, et al., 1991). An argument for state authority to control off-reservation Indian hunting and fishing must therefore be justified on these grounds.

Conservation issues in treaty cases have covered a broad spectrum of individual topics, including methods of capture, quantities of resources to be taken and the management authority and protocols governing the harvest. It is generally agreed that “conservation” means utilization of living resources in such a manner that the sustained productivity of the stock or species is not jeopardized by the harvest. This is an embodiment of the common notion that fish and wildlife resources annually produce a “surplus” of biomass that can be harvested without endangering the reproductive potential or future productivity of the resource. It is important to recognize that this sense of “conservation” has never been at issue with Indian or non-Indian interests. All have agreed that any allocation refers to what might reasonably be taken as a sustainable harvest, and that no one is entitled to utilize

the resource if no such surplus exists. Nevertheless, there has continually been a re-statement of suspicion in the non-Indian community that “conservation” will not be served if Indians use efficient modes of capture in taking the fish or wildlife. In examining the fishing controversy arising from tribal interests in salmon and steelhead fishing during the decade of the sixties in the Pacific northwest, the American Friends Service Committee (Anon. 1970, p. 191) concluded:

“However real and serious the problems of conservation, they are not the basis of this controversy. The real issue is the attitude of the whole society toward difference.”

Nor was the Pacific northwest the only theater in which the “conservation” question may simply have been a facade to cover a more odious design to wrest control over fish and wildlife from Indians. In analysis of the *Fox* decision, historian Robert Doherty argues that control of resource management by the state may have been a more compelling motive for the State of Michigan than the conservation issue (Doherty, 1990, Chapter 7).

In the Wisconsin case, much of the public outcry centered on spearing spawning walleye in the spring. The Chippewa proposed to use modern boats, steel-pronged spears, headlamps and electric trolling motors to pursue fish in shallow water after nightfall. While an outspoken public was inclined to suggest that the Indians should use birch-bark canoes, wooden spears and pine torches, the courts found that no such constraints were expressed or implied in the treaties, nor have any such constraints been characteristic of the development of non-Indian fisheries since the signing of the treaties. It might further be argued that the very provision of firearms and steel traps to the Indians in consideration of their cessions of land to the U.S. government testifies to the expectation that the Indians would employ “modern” methods of capture in their pursuit of fish and game.

Opposition to spear fishing also included notions of a “sense of fair chase” (a non-Indian cultural perspective) coupled with two biological rationales which have become regular features of the management mythology perpetuated by our conservation agencies, specifically: 1) that killing animals during the annual reproductive season is biologically unsound; and 2) that taking females is biologically injurious to the stock.

Belief in these tenets is so strongly held by the general public that it is not necessary for agency administrators to

promulgate falsehoods in respect to the biological requirements for conservation. Benign refusal to debunk unfounded public misperceptions is sufficient to perpetuate those myths. Again, in the northwest cases (Anon. 1970):

“The state, attempting to establish its own ‘unified control,’ has endeavored to regulate Indian off-reservation fishing. Because a net in a river can block it—though less efficiently than a dam for real estate development or power—the attack has been based on conservation: Indians endanger the ‘seed stock for the future.’ The argument ignores the fact that all salmon are ‘seed stock.’ It ignores the effects of the sportsmen’s fishing on the same rivers, with different gear but in far greater numbers.”

The first of these myths can be dispelled simply by asking the rhetorical question: What is the reproductive difference to the stock if a particular female is killed (by a spear) ten minutes before she would have spawned, rather than six months earlier (in the recreational fishery)? The second myth is somewhat more difficult to dismiss as anyone can see that the number of foals in a herd of horses is directly related to the number of mares. Nevertheless, fisheries biologists recognize that “recruitment overfishing” is often not a problem because “a handful of fish can produce millions of eggs which, if they all hatched and survived, would be more than adequate to ensure future recruitment,” (Gulland, 1983).

The critical issue, of course, is how many fish will be killed, from all forces of mortality combined in a particular year. Thus, the efficiency of the gear is irrelevant as long as the total catch can be controlled.

In the Wisconsin case, the popular misconception of the “innate dangers in fishing efficient gear” (nets and spears) prevailed in juxtaposition with the court’s recognition of the need for biologically sound control of the fishery (endnote 7 preceding):

“Regulation of plaintiffs’ off-reservation usufructuary rights to harvest walleye and muskellunge .. is reserved to plaintiffs on the condition that they enact and keep in force a management plan that provides for the regulation of their members in accordance with biologically sound principles necessary for the conservation of the species ... “ The *efficient gear safe harvest level* [emphasis added] shall

be determined by the methods described in the opinion and order of this court ...”

Methods by which a “safe harvest level” would be determined were supplied by the Wisconsin Department of Natural Resources (Hansen, et al., 1991). They provide a mechanism to adjust the allowable harvest (by efficient gear) downward in accordance with the “reliability” of the estimates of abundance of the targeted fishery resources.

The Crabb decision also required the Wisconsin Department of Natural Resources (WDNR) to implement a plan to control the recreational fishery to prevent overfishing, especially for those waters declared as targets for the Indian spear fishery. The plan involved reducing the traditional walleye daily bag limit from five fish per day to a lesser number in accordance with the proportion of the safe harvest level that tribal fisherman would “declare” by March 15 each year. For example, if the tribes declared an intent to take 60 percent of the safe harvest level from a particular lake, the WDNR would be obligated to reduce the daily bag limit on that lake to two fish per day (Anon. 1991, Table 11).

To see the theoretical impact of the tribal fishery in Wisconsin, let us examine the actual determination of the numbers of fish to be taken in the spear fishery in accordance with the ruling of the Crabb court. State guidelines for an “acceptable” maximum exploitation rate have long been set at 35 percent of the adult stock of walleye. The Crabb decision allocates a maximum of 50 percent of that amount to Indian interest, but the Indians may declare an intent to harvest less than their full entitlement. Typically, they have stated an intent to take a reduced percentage of their entitlement that will allow the WDNR to set the daily bag limit at 2-3 fish (Anon. 1995). Each spring, before the spawning season, the Indians identify the waters they intend to fish so that fish population estimates and enforcement preparations can be made. Since spearing is regarded as an “efficient” gear, a further “safety factor” is applied to arrive at a final catch quota that can be allocated among the fishermen. The safety factor may diminish the available fish target by as little as 35 percent if the population estimate is no more than a year old, or, as much as 20 percent if the estimate is old or imprecise. Each fisherman is then issued a permit to take a pre-determined number of fish from the specified water body on a particular date. These fish will be duly counted and measured at a specified launching/landing site by a conservation officer at the conclusion of the fishing occasion.

Say that a particular lake is thought to have a recent population estimate of one thousand adult walleye. Suppose the Indians declare that they want to take all of their entitlement. The numbers available for the catch quota then become: (pop.est.) (Max. exploitation rate) (Indians' declared interest) ("harvest safety factor"), or numerically, (1000) (0.35) (1.00)(0.35)=123 fish. Say, further, that 10 fishermen express an interest in spearing those fish, the result is that each licensee is issued a permit to take a dozen fish. Now, suppose that the Indians declare that they would only want to take 60 percent of their entitlement, but the population size is known only from a two-year-old estimate (safety factor of 30%). Our quota calculation now becomes: (1000) (0.35) (0.60) (0.30)= 63 fish. Suppose further that there is a light wind resulting in choppy surface water during the evening specified for the fishing, and, that this condition causes only 75 percent of the quota to be taken, or 47 fish. If the population estimate were approximately correct in the first scenario above, the actual exploitation rate would then be a maximum of 12.3 percent. Similarly, if conditions described in the second scenario prevailed, the actual exploitation rate would have been 6.3 percent.

The overall result of intensive walleye management in Wisconsin since the Crabb decision has been a tribal quota ranging from 39-45 thousand walleye, with an actual annual harvest (1991-1995) of 25,100 fish by spearing and netting (Anon., 1995). Creel surveys estimated an angling harvest (kill) of 320,000 fish per year since 1990. Angler catch (including released fish) average of 1,200,000 from 1990-1994. Anglers still account for over 90 percent of the catch from over 800 lakes known to be inhabited by walleye. Annual exploitation rate by tribal spearing in 153 lakes with good natural reproduction has ranged from 4-20 percent, averaging 5 percent (Anon., 1995).

In fishery management terms, the number of adult walleye population estimates has grown from an annual average of less than a dozen prior to 1986 to more than 40. Fall surveys to estimate abundance of juvenile fish have grown to over 200 annually. In the few years that have transpired since the reactivation of the tribal fisheries, this fishery has gone from a condition in which exploitation rates had occasionally exceeded 50 percent to one which is consistently within the accepted range of management objectives. It is now better understood and better regulated than any other fishery of its size in the midwest. These remains a degree of dissatisfaction with the current situation in the minds of many treaty rights advocates. It is clear from the numbers presented above

that the Chippewa are not yet taking even half of what the court has identified as their entitlement. It remains to be seen whether or not this will change without further intervention of the court.

Total costs for the state's treaty fishery assessment program are expected to exceed \$ 1.2 million annually (Anon., 1991), leading the Senate Select Committee on Indian Affairs to conclude that "The cost of managing the ceded territory fishery represents only a small percentage of the value of benefits derived from the fishery ... the value of the ceded territory fishery to the state economy, in 1985 was estimated at \$ 240 million ... The value .. to the Chippewa society and culture is immeasurable." (Anon., 1991).

PROGNOSIS FOR THE MINNESOTA FISHERIES IN TERRITORIES CEDED IN THE TREATY OF 1837

On January 29, 1997, federal Judge Michael Davis issued his Memorandum Opinion and Order¹³ in the case of *The Mille Lacs Band of Chippewa Indians et al. v. State of Minnesota, et al.* His summary judgment found in favor of the Indians in early every point contested by the litigants. If the Davis opinion were to be fully implemented, the state would not have sole management authority to regulate tribal hunting and fishing, but would be required to cooperate with the Mille Lacs Band in reaching agreement on acceptable harvest levels. There would be no explicit allocation of 50 percent of the harvestable surplus to either of the parties, nor would tribal interests be prohibited from prosecuting a treaty fishery in any portion of those lakes that are partially within the ceded territory.

State attorneys moved quickly to appeal the Davis decision and property owners in the region around Mille Lacs Lake petitioned the U.S. Eighth Circuit Court of Appeals to stay the Davis order until the appeal could be heard. The latter motion was granted on the understanding that the appeal would be heard early in the summer of 1997. The appellate court agreed however to allow a modest harvest of walleye this spring for ceremonial purposes.

In attempting to resolve treaty hunting and fishing rights in the midwest, we have learned much about Indian and non-Indian cultures. We have come to understand ourselves and our impact on fish populations. We know

more of our own history and of the ways in which legal precedents help to shape the future. We can now more fully appreciate the conclusions reached over a quarter of a century ago in the Pacific northwest (Anon. 1970, p. 191).

“The Indians look at fishing and fishing rights differently, and they fish in different ways. Difference is nearly intolerable in a society which expects conformity in behavior and outlook — one which tends to equate equal treatment with identical treatment, acceptable behavior with conforming behavior, integration with assimilation. The Indians’ right to fish in different ways and under different rules is felt by many non-Indians to be completely inappropriate, and the connection of fishing right with identity to be nonsense. Hostility rises from the threat presented by the differences, not from danger to the fish. Efforts to control Indian fishing have been rationalized around conservation, but they have recognized neither the pervasive importance of environmental changes nor the questions of humanness.”

In accepting the Crabb decision, leaders of the six bands of Wisconsin Chippewa explained their rationale in foregoing their right to further appeal:¹⁴

“ ... They do this as a gesture of peace and friendship towards the people of Wisconsin, in a spirit they hope may some day be reciprocated on the part of the general citizenry and officials of this state.”

Will similar gestures of peace and friendship towards Indian people be reciprocated by the people of Minnesota? We shall see.

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ENDNOTES

1. Broader issues of tribal identity are treated extensively in : Cornell, Stephen E. 1988. The return of the native: American Indian political resurgence. Oxford University Press, 1988. 285 pages.
2. Note also that the root of this very issue was contentious when the Continental Congress reviewed Article IX of the Articles of Confederation, concluding finally that congressional power over tribal Indians would be paramount (Clinton, et al. 1991).
3. The periods identified in Table 1 are approximate in date and duration because some scholars have chosen to identify a period by the earliest codified administrative or legislative action, while others have elected to develop historical accounts from the onset of explicit concerns, investigations or statements of intent.
4. Meriam, Lewis. 1928. The Problem of Indian Administration. Johns Hopkins University Press, Baltimore.
5. *United States v. Winans*, 198 U.S. 371, 381 (1905).
6. The six bands of Indians included: Law Courte Oreilles Band of Lake Superior Chippewa Indians, Red Cliff Band of Wisconsin, St. Croix Chippewa Indians of Wisconsin, Bad River Band of The Lake Superior Chippewa Indians, and the Law du Flambeau Band of Lake Superior Chippewa Indians.
7. Final Judgment of Judge Barbara Crabb in Law Courte Oreilles Band of Lake Superior Indians et al. V. State of Wisconsin et al., March 19, 1991 (Final Judgment 74-C-313-C)
8. *United States v. Washington*, 384 F. Supp. 312 (Western Dist. Washington, 1974).
9. The “Stevens Treaties” so-named after their chief negotiator, Issa Ingalls Stevens, first Governor and first Superintendent of Indian Affairs for Washington Territory.
10. Wisconsin Attorney General Doyle was the son of Judge Crabb’s predecessor in this case, federal judge James Doyle who died in 1987.
11. Statement by Attorney General James E. Doyle, Jr. to the people of Wisconsin dated May 20, 1991, 9:30 AM . This statement of acceptance of the Crabb decision detailed the Attorney General’s reasons for not pursuing an appeal with the U.S. Court of Appeals for the Seventh Circuit.
12. Statement by Attorney General James E. Doyle, Jr. to the people of Wisconsin, dated May 20, 1991, 9:30 AM. This statement of acceptance of the Crabb decision detailed the Attorney General’s reasons for not pursuing an appeal with the U.S. Court of Appeals for the Seventh Circuit.
13. U.S. District Court, District of Minnesota, Third Division, Court File No. 3-94-1226, January 29, 1997.
14. Letter to the People of Wisconsin, dated May 20, 1991, and signed by Gaiashkibos, Chairman Law Courte Oreilles Band of Lake Superior Chippewas, Patricia R. DePerry, Chairman Red Cliff Band of Lake Superior Chippewas, Raymond McGeshick, Chairman Sokaogon Chippewa Indian Community; Mole Lake Band of Wisconsin, Eugene Taylor, Chairman St. Croix Chippewa Indians of Wisconsin, Donald Moore, Chairman Bad River Band of the Lake Superior Tribe of Chippewa Indians, and Michael W. Allen, Chairman Lac Du Flambeau Band of Lake Superior Chippewa Indians.

Table 1. Critical periods in post-Columbian North American Indian policy.

Designation	Approximate dates	Characteristic policies
Tribal independence	1492-1787	Each nation controlled its own culture and territories
European dilemma	1530-1787	Title by discovery was inapplicable if the Indians did not provoke a "just war" with Spain
Northwest Ordinance	1787-1828	Treaties between nations acknowledged as "sovereign" in the Northwest Ordinance (1787)
Removal and relocation	1828-1887	Removal of Indians to reservations to reduce interaction with non-Indians
General Allotment Act (Dawes Act of 1887)	1887-1934	Attempt to force assimilation of Indians into white society by allotment of Indian lands to individuals
Indian Reorganization	1934-1953	Responding to the Meriam report of 1928, prevented further loss of tribal land holdings
Termination and relocation	1953-1968	Termination of federal recognition of some reservations and monetary inducement for relocation to urban centers (Public
Tribal self-determination	1968-present	Renewed attempts to provide opportunity for Indian self-determination (Indian Civil Rights Act of 1968)

Treaty Ceded Areas

