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## COMMENT

### INDIAN FISHING RIGHTS: AFTERMATH OF THE FOX DECISION AND THE YEAR 2000

Karen Ferguson\*

#### I. Introduction

The ongoing Indian fishing rights debate in northern Michigan is intensifying as a 1985 court ordered consent agreement nears its year 2000 expiration date.<sup>1</sup> Many of the local citizenry are concerned that the debate may turn violent as it did in the 1970s.<sup>2</sup> In the 1970s there was fierce competition between Indians and non-Indians over a fish resource that was becoming depleted at an alarming rate.<sup>3</sup> While pollution of the Great Lakes and the presence of non-native parasites were more likely the cause of the depleted stocks, the sport fishermen blamed Indian gill netting for the problem.<sup>4</sup> In recent years, Indians have continually pressed for expanded gill net fishing grounds and for a higher share of the fish harvest.<sup>5</sup> The Michigan Department of Natural Resources (MDNR) wants to be able to manage and protect the state's natural resources for the benefit of all the people in the state. Sport fishermen claim that the Indians will destroy the sport fishery.<sup>6</sup> The Indians are offended by the sport fishermen's assertions that Indians are responsible for the decimation of the fish resource and by the sport fisherman's lack of respect for their fishing rights which have been guaranteed to them by the treaties and affirmed by numerous court decisions.<sup>7</sup>

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1. Diane Conners, *Fishing Debate Renews Tension of Years Past*, TRAVERSE CITY RECORD EAGLE (Traverse City, Mich.), Feb. 2, 1997, at A1 [hereinafter *Fishing Debate*].

2. *A Timeline of Fisheries in the Region*, TRAVERSE CITY RECORD EAGLE (Traverse City, Mich.), Feb. 2, 1997, at A4 [hereinafter *Timeline*].

3. *Id.*

4. *Fishing Debate*, *supra* note 1, at A1; *Timeline*, *supra* note 2, at A4. In the 1960s and 1970s the Great Lakes experienced high levels of pollution caused by the presence of toxic chemical and phosphorous. *Id.* Advisories were issued warning of the health dangers of eating Great Lakes fish. *Id.* Sea Lamprey, a non-native parasite, was responsible for killing off large numbers of fish. *Id.*

5. See *Fishing Debate*, *supra* note 1, at A1.

6. *Id.*

7. William Rastetter, *There's No Basis for the Claim of Salmon Depletion in Grand Traverse Bay*, TRAVERSE CITY RECORD EAGLE (Traverse City, Mich.), Sept. 28, 1997.

The MDNR hopes to have the new agreement in place by 1998 or 1999,<sup>8</sup> but is concerned that current controversies initiated by the Grand Traverse Band of Ottawa and Chippewa Indians have diverted efforts away from the negotiation process.<sup>9</sup> The Director of the MDNR plans to address concerns of sport fishermen but will not abide by any plan to disregard the treaties.<sup>10</sup> Whether these parties with their divergent interests will be able to negotiate a year 2000 agreement remains to be seen. But, as the Director aptly commented, this year 2000 deadline "is coming like a freight train."<sup>11</sup> Without an agreement in place many fear the resurgence of the social unrest and violence of the 1970s.<sup>12</sup> One sports writer commented that he is now hearing many comments reminiscent of that time when sport fishermen threatened Indians, tore up their boats and talked of beating up Indians.<sup>13</sup>

Part II of this comment examines the process courts use to interpret treaties in order to determine whether Indians have reserved treaty fishing rights. This process of treaty construction involves a historical review of aboriginal title, the cultural and religious significance of fishing rights, and court cases that have dealt with various Indian fishing rights issues. Court cases in Michigan have relied on the reasoning and holdings of court cases concerning fishing controversies in the State of Washington and the State of Wisconsin. Parts III, IV, and V provide an in depth review of court decisions regarding Indian fishing rights in the States of Washington, Wisconsin, and Michigan respectively. Part VI describes controversies and litigation in Michigan that followed the momentous United States district court's decision in *United States v. Michigan*,<sup>14</sup> also known as the Fox decision. The discussion focuses on the Grand Traverse Band of Ottawa and Chippewa Indians. Part VII provides a critical discourse concerning the courts' use of the canons of treaty interpretation and the arguments brought by the parties involved in the current controversies in Michigan. It also discusses many of the obstacles that must be overcome in order to reach an agreement for the year 2000. One of these obstacles concerns the expansion of the Indian's sovereign rights of

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8. Diane Conners, *Cool: New Fishing Agreement Coming*, TRAVERSE CITY RECORD EAGLE (Traverse City, Mich.), July 16, 1997, at A1 [hereinafter *New Fishing Agreement Coming*].

9. Brief in Support of the State of Michigan's Motion to Enforce Paragraph 22 of the 1985 Consent Order and for an Expedited Hearing and for an Expedited Hearing on the Motion to Enforce the State's Previous Informational Filing Regarding Paragraph 22 of the 1985 Consent Order at 8, *United States v. Michigan*, No. 2:73 CV26 (W.D. Mich. filed Aug. 29, 1997).

10. *New Fishing Agreement Coming*, *supra* note 8, at A1.

11. *Id.*

12. *Fishing Debate*, *supra* note 1, at A1.

13. *Id.*

14. *United States v. Michigan*, 471 F. Supp. 192 (W.D. Mich. 1979), *stay denied*, 505 F. Supp. 467 (W.D. Mich. 1980), *remanded*, 623 F.2d 448 (6th Cir. 1980), *modified*, 653 F.2d 277 (6th Cir. 1981), *cert. denied*, 454 U.S. 1124 (1981).

subsistence into other areas such as inland hunting and fishing. Part VIII concludes this comment.

The purpose of the comment is to further the "doctrinal literacy" of Indian fishing rights. As Professor Pommersheim suggested, literacy will open the way towards solving many of the current misunderstandings over Indian rights issues.<sup>15</sup> "When there is no basic doctrinal literacy or cultural empathy, there is no hope that any decisions [by courts affecting the parties or agreements reached between the parties] will adequately resolve the problem."<sup>16</sup>

## *II. History of Treaty Fishing Rights*

*The right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed.*<sup>17</sup>

There has been a long history of violent disputes over Indian fishing rights. Perhaps the disputes are spurred on by the same passions that once motivated the "land hungry white settlers" to push the Indians onto reservations and then advocated their removal to west of the Mississippi. These passions now are targeted on either the elimination or severe restriction of Indian fishing rights. Perhaps, this tension over fishing rights may more magnanimously be explained by a lack of understanding of the history of settlement in the United States, the promises explicitly and implicitly made by our forefathers, and of Indian history and culture. In other words, the non-Indians want the dispute resolved without reference to the past. Sport fishermen, in particular, seem to argue that placing a historical context on the debate is unfair. Indians and non-Indians alike are all "native Americans" and all are citizens of the United States.<sup>18</sup> Therefore, hunting and fishing laws should be applied equally to all.<sup>19</sup> Without placing the debate into a historical context, it might appear that Indians are being given unwarranted "super powers" over fisheries.<sup>20</sup> But contrary to the sport fishermen's view, history cannot be eradicated as it goes to the very essence of the court's review to determine fishing rights.

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15. Professor Frank Pommersheim, Remarks at the Indian Law Symposium Sponsored by Thomas M. Cooley Law Review and the Michigan Indian Law Center (Nov. 4, 1997).

16. *Id.*

17. *United States v. Winans*, 198 U.S. 371, 381 (1905).

18. Ric Zehner, *Instead of Fishing Rights, It's Discrimination By Feds*, TRAVERSE CITY RECORD EAGLE (Traverse City, Mich.), Sept. 7, 1997, at E12. The author of this forum piece was past president of the Grand Traverse Area Sport Fishing Association.

19. *Id.*

20. *See id.*

### A. Aboriginal Title

The Doctrine of Discovery was the principle European nations used to acquire and settle new lands in North America.<sup>21</sup> Discovery gave exclusive title to the discovering nation and the exclusive right to extinguish Indian title and grant the soil for settlement.<sup>22</sup> The rights of the Indians were impaired, leaving them with the right to occupy the soil, but no right to dispose of the soil.<sup>23</sup> Thus Indians had a right of occupancy that has also been called title of occupancy, aboriginal title, or Indian title.<sup>24</sup> But ultimate title vested first in the discovering nation, then later in the original states and finally in the United States.<sup>25</sup> Aboriginal title or Indian title "was recognized and extinguishable only by agreement with the tribes with the consent of the United States."<sup>26</sup> Treaties were used to legally extinguish aboriginal title in exchange for protection, goods and money.<sup>27</sup>

The process of interpreting treaties to determine the scope of Indian fishing rights must fit within the "[c]onceptual framework" that Indians granted vast areas of aboriginal lands and other valuable rights to the United States.<sup>28</sup> The common misconception is that the United States granted lands and rights to the Indians.<sup>29</sup> Rights not specifically granted by the Indians were reserved.<sup>30</sup> The grant must be narrowly construed because of the unique guardian/ward relationship between the United States and the Indians created from its obligation to protect the Indians.<sup>31</sup> Special rules to construe these treaties are discussed next.

### B. Canons of Treaty Interpretation

In order to determine what rights the Indian people have to fish, the courts will consider the treaties themselves as well as the circumstances surrounding the treaties.<sup>32</sup> The first step in the inquiry into fishing rights is whether the treaty establishing the reservation reserved fishing rights.<sup>33</sup> If the treaty did

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21. *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 584 (1823).

22. *Id.* at 586-88.

23. *Id.* at 591.

24. See CHARLES F. WILKINSON, *AMERICAN INDIANS, TIME, AND THE LAW* 39 (1987).

25. *Id.* (citing *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974)).

26. WILKINSON, *supra* note 24, at 41 (quoting *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 665 (1979)).

27. KIRKE KICKINGBIRD, ET AL., *INDIAN TREATIES* 12 (1980).

28. *United States v. Michigan*, 471 F. Supp. 192, 254 (W.D. Mich. 1979).

29. *United States v. Winans*, 198 U.S. 371, 381 (1905).

30. *Id.*

31. *United States v. Michigan*, 471 F. Supp. at 254. This guardian/ward relationship is the result of the Indian tribes' unique status as domestic dependent nations rather than foreign nations. See *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17, 40 (1831).

32. KICKINGBIRD, *supra* note 27, at 32.

33. Shelly D. Turner, *The Native American's Right to Hunt and Fish: An Overview of the*

not specifically mention fishing rights or the language was ambiguous, then the second step is to look at the circumstances surrounding the signing of the treaty, the Indian customs and practices before and after the signing of the treaty, the intent of the parties, and the documentation of treaty negotiations.<sup>34</sup> If as a result of the inquiry in steps one or two it is determined that the Indians had a right to fish, then the final step involves a review of "subsequent Acts, statutes, and agreements to determine if, from their very terms or by surrounding circumstances, they have diminished or abrogated the original rights as guaranteed by the treaty."<sup>35</sup>

Courts apply different canons of construction to different types of treaties to interpret their meaning.<sup>36</sup> For example, principles of statutory construction may be used to interpret treaties that are legislative in nature, and contract principles are often used to interpret treaties that are contractual in nature.<sup>37</sup> The canons of international treaty interpretation are (1) interpretation of the treaty's text,<sup>38</sup> (2) liberal construction of treaties to carry out the apparent contractual intent of independent nations to "secure equality and reciprocity between them,"<sup>39</sup> and (3) interpretation of the intent of the parties.<sup>40</sup>

Yet, application of contract principles may be inadequate to determine the understanding of the parties, unless those parties had equal bargaining power.<sup>41</sup> The circumstances under which the treaties were negotiated with the Indians was described in the following manner:

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*Aboriginal Spiritual Belief System, The Effect of European Contact and the Continuing Fight to Observe a Way of Life*, 19 N.M. L. REV. 377, 404 (1989).

34. *Id.*

35. *Id.* at 405.

36. David J. Bederman, *Revivalist Canons and Treaty Interpretation*, 41 UCLA L. REV. 953, 963 (1994).

37. *Id.* "A treaty is not only a law but also a contract between two nations and (it) must, if possible be construed to give full force and effect to all its parts." See KICKINGBIRD, *supra* note 27, at 6 (quoting BLACK'S LAW DICTIONARY 1674 (4th ed. 1951)).

38. Bederman, *supra* note 36, at 963.

39. *Id.* at 966.

40. *Id.* at 970. The author suggests that this canon was transformed by *Choctaw Nation v. United States*, 318 U.S. 423 (1943). *Choctaw* allowed courts to consider sources external to the treaty when interpreting the intent of the parties. *Id.* The Court intended that the *Choctaw Nation* interpretative method would be applied to international treaties as well as Indian treaties. *Id.* at 970 n.77. However, with Indian treaties the intent of the Indians is given deference over the intent of the United States. See KICKINGBIRD, *supra* note 27, at 33.

41. See Bederman, *supra* note 36, at 963. But see *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979). In *Washington Fishing Vessel*, the United States Supreme Court likened a treaty to a contract between two sovereign nations. *Id.* at 675. "When the signatory nations have not been at war and neither is the vanquished, it is reasonable to assume that they negotiated as equals at arm's length. There is no reason to doubt that this assumption applies to the treaty at issue here." *Id.* But, the Court goes on to explain that where one party is superior, it has the duty not to take advantage of the weaker party. *Id.* at 675-76. Thus, treaties must be construed as the Indians would have understood them at the time of the signing. *Id.* (relying on *Jones v. Meehan*, 175 U.S. 1, 11 (1899)).

negotiations for the treaty are conducted, on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, masters of a written language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by an interpreter employed by themselves; that the treaty is drawn up by them in their own language; that the Indians, on the other hand, are a weak and dependent people, who have no written language and are wholly unfamiliar with all the forms of legal expression, and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States.<sup>42</sup>

Because of this lack of equality in negotiations between the Indian tribes and the United States, the United States Supreme Court developed a different set of canons that give deference to the Indians.<sup>43</sup> These canons ensure that "the language used in treaties with the Indians shall never be construed to their prejudice."<sup>44</sup>

First, these treaties shall be interpreted "as the Indians would have understood them."<sup>45</sup> The words of the treaty are to be given meaning as "understood by this unlettered people, rather than their critical meaning."<sup>46</sup> Words in international treaties, on the other hand, are given their ordinary meaning as understood under the law of nations.<sup>47</sup>

Second, "[d]oubtful expressions are to be resolved in favor of the Indian parties."<sup>48</sup> Since treaties were written in English, not in the native language of the Indians, and interpreters who were employed by the United States government explained the treaties, any ambiguities are interpreted from the standpoint of the Indians.<sup>49</sup> Where two inferences could be drawn from the language of the treaty, the inference that would support rather than defeat the purpose of the Indians and the United States must be chosen.<sup>50</sup> "Only the

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42. KICKINGBIRD, *supra* note 27, at 33 (quoting *Jones v. Meehan*, 175 U.S. 1, 10-11 (1899)).

43. The canons of treaty construction were a direct result of the circumstances under which treaties were negotiated. "The Indian Nations did not seek out the United States and agree upon an exchange of lands in an arm's-length transaction. Rather, treaties were imposed upon them and they had no choice but to consent." *United States v. Michigan*, 471 F. Supp. 192, 252 (W.D. Mich. 1979) (citing *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 630-31 (1970)).

44. KICKINGBIRD, *supra* note 27, at 32 (quoting *Worcester v. Georgia*, 31 U.S. 515, 582 (6 Pet.) (1832)).

45. *United States v. Michigan*, 471 F. Supp. at 249.

46. *Id.* (quoting *Choctaw Nation v. United States*, 119 U.S. 1, 27 (1886); *United States v. Winans* 198 U.S. 371, 380 (1905)).

47. *Bederman*, *supra* note 36, at 966-67 & nn.59-60.

48. *United States v. Michigan*, 471 F. Supp. at 251.

49. *See id.* at 252.

50. KICKINGBIRD, *supra* note 27, at 32. In *Winters v. United States*, 207 U.S. 564 (1908),

clearest language depriving Indians of the rights which they had prior to the treaties will limit their rights today."<sup>51</sup>

Third, Indian treaties must be "construed liberally in favor of the Indians."<sup>52</sup> Under this canon treaties are construed more liberally than a contract or agreement between private parties.<sup>53</sup> Narrow interpretation is inappropriate where "friendly and dependent Indians are likely to accept without discriminating scrutiny the terms proposed."<sup>54</sup>

Application of these canons of construction allow consideration of nontextual sources such as the history of the treaty, the negotiations, treaty minutes, oral versions of the treaty, and the practice of the parties.<sup>55</sup> Words in a treaty or agreement must be given meaning by considering them in "connection with the entire scheme of the agreement as framed, including those parts not finally adopted, as throwing light on the meaning of the remainder."<sup>56</sup> "How the treaty in question was understood may be gathered from the circumstances."<sup>57</sup> Thus, arguably, the real basis for determining the nature of Indian fishing rights is "Indian practice, running from time immemorial, of fishing in [particular] locations as a means of livelihood."<sup>58</sup>

### C. Cultural Significance of Fishing Rights

Fishing was not only important to Indians for subsistence living, but it was culturally and religiously significant to them as well. Indians lived in harmony

the United States brought suit on behalf of the Indians to determine whether the Indians had reserved water rights. WILLIAM C. CANBY, JR., *AMERICAN INDIAN LAW* 88-89 (2d ed. 1988). Settlers, who had diverted a stream running through Indian reserved lands, argued that lands would not have been ceded without rights to water allowing for productive use of the land. *Id.* at 89. The United States, on behalf of the Indians, argued that Indians would not have reserved lands without reserving water allowing for productive use of the reservation. *Id.* Faced with two contradictory meanings and no clear language in the treaty for guidance, the Court chose the meaning most favorable to the Indians. *Id.*

51. *United States v. Michigan*, 471 F. Supp. at 252 (citing *Menominee Tribe v. United States*, 391 U.S. 404, 413 (1968)).

52. *Id.* at 251 (citing *Choctaw Nations of Indians v. United States*, 318 U.S. 423, 431-32 (1943)).

53. *Id.*

54. *Id.* at 250 (citing *United States v. Shoshone Tribe*, 304 U.S. 111, 116 (1938)).

55. *See id.*; *see also* KICKINGBIRD, *supra* note 27, at 32, 34 (explaining that treaty minutes of the treaty council "provide important information about the motives, concerns and perceptions of the parties to a treaty. . . and may substantiate the Indian's oral version of the treaty . . . [or] show examples of misunderstanding, lack of good faith or even fraud on the part of the government commissioners").

56. *Ex Parte Crow Dog*, 109 U.S. 556, 569 (1883).

57. *United States v. Michigan*, 471 F. Supp. 192, 250 (W.D. Mich. 1979).

58. Ralph W. Johnson, *The States Versus Indian Off-Reservation Fishing: A United States Supreme Court Error*, 47 WASH. L. REV. 207, 209 (1972); FELIX S. COHEN'S *HANDBOOK OF FEDERAL INDIAN LAW* 442 (Rennard Strickland et al. eds., 1982) [hereinafter COHEN'S *HANDBOOK* 1982 ED.] (explaining that aboriginal rights to hunt and fish are based on immemorial custom and practice).



with nature, feeling a "genuine respect for other life forms."<sup>59</sup> "Indians perceived man and nature as tripartite beings consisting of body, soul, and shadow."<sup>60</sup> The relationship between man and nature was interdependent and was infused with spiritual and mystical beliefs.<sup>61</sup> "In the creation myth of the indigenous Indians, all of Nature's bounty was once related to mankind."<sup>62</sup> The Great Spirit, Kitchi Manitou, was the creator and sustainer of all things and was the power or force that made "everything in Nature alive and responsive to man."<sup>63</sup> For successful hunting and fishing Indians had to comply with the strict and complex rules that were part of their belief system.<sup>64</sup> Catastrophe could result if either man or nature failed in their mutual obligation to obediently follow these prescribed rules.<sup>65</sup> While nature's obligation was to surrender up life forms, such as fish, to the Indian to satisfy his needs, the Indians' concomitant obligation to nature was to refrain from abuse of its bounty.<sup>66</sup> If the Indians abused nature, the spirits of the species would be offended and would inflict disease and scarcity of the species upon them.<sup>67</sup>

When Europeans came they brought diseases which Indians had not previously been exposed to and from which they had no immunity.<sup>68</sup> Unbeknownst to the Indians this disease was not brought upon them by the spirits.<sup>69</sup> Not comprehending why compliance with Indian rituals no longer worked, the Indians retaliated against nature by ravaging its wildlife. Not only

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59. Turner, *supra* note 33, at 377.

60. *Id.* at 380.

61. *Id.* at 377.

62. *Id.* at 379. This relationship is illustrated by Chipewyan legend:

woman was the first human being. In her nocturnal dreams she imagined herself sleeping with a handsome youth, who was in reality her pet dog transformed. One day a giant appeared in the land. With mighty strokes he shaped the rough-hewn landscape into lakes and rivers and mountains — all the landforms we know today. Then he stooped down and caught up the dog, "and tore it to pieces; the guts he threw into the lakes and rivers, commanding them to become the different kind of fish; the flesh he dispersed over the land, commanding it to become different kinds of beasts and land-animals; the skin he also tore into small pieces, and threw it into the air, commanding it to become all kinds of birds; after which he gave the woman and her offspring full power to kill, eat, and never spare, for that he had commanded them to multiply for her use in abundance.

*Id.* (citing CALVIN MARTIN, *KEEPERS OF THE GAME* 186 (1978) which quoted excerpts from the journal of SAMUEL HEARNE, *A JOURNEY FROM PRINCE OF WALE'S FORT IN HUDSON'S BAY TO THE NORTHERN OCEAN* 1769, 1770, 1771, 1772, at 219-20 (1795) (R. Glover ed. 1958)).

63. *Id.* at 379 & n.7.

64. *Id.* at 381.

65. *Id.*

66. *Id.* at 382.

67. *Id.* at 383.

68. *Id.* at 384.

69. *Id.*

did the Europeans unintentionally upset the balance in this relationship between the Indians and nature, but they sought to replace the Indian's religious beliefs with Christianity.<sup>70</sup> Notwithstanding the influence of white settlers on the Indian belief system, Indians continue to tenaciously cling to their aboriginal right to fish. This is true even for tribes who have gone beyond subsistence living and have found wealth by other means, such as gaming casinos.<sup>71</sup>

This tenaciousness may be difficult for non-Indians to understand. Perhaps, it is an effort to retain a sense of their ancestors who, from the time man crossed the Bering Strait thousands of years ago, hunted and fished — to retain in their present culture the vitality of the spiritual and mystical belief system of their ancestors.<sup>72</sup> For some tribes that alienated most of their lands, fishing today provides a "sense of community and identity . . . and a symbol of the group's cultural cohesiveness."<sup>73</sup> Indian claims to treaty fishing rights represent "a move toward a renewal of an embattled aspect of traditional life." Indians, seeking to establish fishing rights by challenging limitations to fishing rights and battling for more control over fishing, are only attempting to reassert their ethnic identity.<sup>74</sup>

#### *D. The Indian Treaty Right to Fish*

Indians generally have on-reservation fishing rights regardless of whether or not the treaty expressly reserved these rights.<sup>75</sup> For example, the Menominee Tribe ceded lands in Wisconsin in exchange for the Wolf River Reservation.<sup>76</sup> The treaty language specified that this reservation was "for a home, to be held as Indian lands are held."<sup>77</sup> In *Menominee Tribe of Indians v. United States*, the United States Supreme Court construed this ambiguous language in the Treaty of Wolf River favorably to the Menominees and determined that the right to fish was included.<sup>78</sup> The Court also held that

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70. *Id.* at 387-88.

71. The Grand Traverse Band of Chippewa and Ottawa Indians involved in a current fishing rights controversy in Northern Michigan has two gambling casinos, the Leelanau Sands Casino and the Turtle Creek casino.

72. See Turner, *supra* note 33, at 378, 423.

73. Michael R. Anderson, *Law and the Protection of Cultural Communities: The Case of Native American Fishing Rights*, LAW & POLY 125, 130 (1987). Salmon fishing was a "powerful symbol of cultural identity" to the Puyallup and Nisqually, both tribes having alienated most of their lands. *Id.*

74. *Id.* at 129-31.

75. DAVID H. GETCHES, *FEDERAL INDIAN LAW, CASES AND MATERIALS* 850 (3d. ed. 1993) (referring to *Menominee Tribe of Indians v. United States*, 391 U.S. 404 (1968)).

76. *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 405-06 (1968).

77. *Id.*

78. *Id.* at 413.

It would seem unlikely that the Menominees would have knowingly relinquished their special fishing and hunting rights which they enjoyed on their own lands, and

those fishing rights were not abrogated by the Termination Act of 1954.<sup>79</sup> Furthermore, *Menominee Tribe of Indians* established that on-reservation fishing rights were not subject to state hunting and fishing regulations.<sup>80</sup>

In *New Mexico v. Mescalero Apache Tribe*, the United States Supreme Court affirmed the tribe's authority to regulate fishing by Indians on the reservation.<sup>81</sup> In addition, the Court rejected the State's argument that state regulation should apply to non-Indians fishing on the reservation.<sup>82</sup> State jurisdiction to regulate on-reservation fishing is only justified if the state provides some function or services in connection with the on-reservation fishing.<sup>83</sup> The state in this case failed to demonstrate that it provided any such function or service or that there was any off-reservation effect that would warrant concurrent state regulation.<sup>84</sup> Thus, "[a] federal treaty, statute, or agreement setting aside a reservation for the use and occupation of a tribe is necessarily preemptive of state jurisdiction over Indian hunting and fishing activity on the reservation."<sup>85</sup>

While it is clear that Indians have the right to fish on the reservation and to regulate that fishing, it may not be clear whether traditional fishing grounds are part of the reservation or not. For example, in *People v. Jondreau*, a Chippewa fisherman was arrested for fishing in Lake Superior in violation of state law.<sup>86</sup> The 1854 Treaty with the Chippewa set out the boundaries of the reservation.<sup>87</sup> If the boundaries of the reservation were extended into the lake, the fisherman would have been fishing on the reservation and not subject to state regulation.<sup>88</sup> The Michigan Supreme Court rejected arguments that the State had the authority to regulate because it had title to the submerged lands and because under Michigan Law, township boundaries did not extend into the Great Lakes.<sup>89</sup> Instead, the court interpreted the treaty as the Chippewa would have understood it.<sup>90</sup> The Indians would not have

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have accepted in exchange other lands with respect to which such rights did not extend. They undoubtedly believed that these rights were guaranteed to them when these other lands were ceded to them "to be held as Indians lands are held."

*Id.* at 406 n.2 (quoting *State v. Sanapaw*, 124 N.W.2d 41,44 (Wis. 1963)).

79. *Id.* at 408 (explaining that the Termination Act provided for the "orderly termination of Federal supervision over the property and members' of the tribe").

80. *Id.*

81. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 337 (1983).

82. *Id.* at 338-44.

83. *Id.* at 341.

84. *Id.* at 341-43.

85. *Turner, supra* note 33, at 404 (quoting *Lower Brule Sioux Tribe v. South Dakota*, 711 F.2d 809, 814 (8th Cir. 1983)).

86. *People v. Jondreau*, 185 N.W.2d 375, 376-77 (Mich. 1971).

87. *Id.* (citing article 2 of the Treaty with the Chippewas of 1854, 10 Stat. 1109, 1109-10).

88. *Id.*

89. *Id.* at 377.

90. *Id.* at 377-78.

understood the concept of municipal boundaries, but because they lived on lands bordering on the waters of the Great Lakes they would have assumed that the treaty right to fish would include the right to fish in those waters.<sup>91</sup>

If the Indians also claim off-reservation fishing, then the treaty must be construed to determine if those rights were reserved. In *United States v. Winans*, the United States brought suit to enjoin non-Indian landowners from obstructing Yakima Indians from exercising fishing rights on the Columbia River in Washington.<sup>92</sup> Article 3 of the Treaty with the Yakima Nation in 1859 specifically secured Indian fishing rights on the reservation as well as the "right of taking fish at all usual and accustomed places, in common with citizens of the territory, and of erecting temporary buildings for curing them."<sup>93</sup> The United States Supreme Court construed article 3 as the Indians would have understood it.<sup>94</sup> The Court determined that the Indians had reserved rights to off-reservation fishing at traditional fishing grounds and that these reserved rights "imposed a servitude upon every piece of land," regardless of the fact that the non-Indians were granted a patent from the federal government to the land and a license from the state to operate a fish wheel.<sup>95</sup> The Court found that the treaty language provided for the contingency that these lands would be owned by non-Indians in the future, and that "the Indians were given right in the [non-Indian] land, — the right of crossing it to the river, — the right to occupy it to the extent and for the purpose mentioned."<sup>96</sup> While *Winans* is heralded for establishing the Indian's right to off-reservation fishing and providing easements to allow Indians to exercise that right, the Court hinted at the possibility of state regulation by opining that the state would not be unreasonably restrained from regulating that right.<sup>97</sup>

The United States Supreme Court had another opportunity to construe the language in article 3 of the Treaty of 1859 with the Yakima Nation. In *Tulee v. Washington*, a member of the Yakima tribe of Indians was convicted of

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91. *Id.* at 378.

92. *United States v. Winans*, 198 U.S. 371 (1905).

93. *Id.* at 378 (citing Treaty Between the United States and the Yakimas, 12 Stat. 951 (June 9, 1855) (ratified in 1859)).

94. *Id.* at 380.

95. *Id.* at 381-82.

96. *Id.* at 381.

97. Johnson, *supra* note 58, at 220-21. The author argues that precedent establishing the state's right to regulate fishing is based on this dicta in *Winans*, and dicta in *Ward v. Race Horse*, 163 U.S. 504 (1896) which has been relied on for the proposition that hunting regulations applied to Indians exercising their rights to hunt off the reservation. *Id.* at 220. He contends this has been a major United States Supreme Court error as *Race Horse* applied only when tribal hunting rights were terminated and Indians became subject to state regulation as there was no longer tribal regulation of fishing. *Id.* Also, the decision in *Winans* had nothing to do with state regulation, and any reference to it was unnecessary to the decision. *Id.* at 221.

catching salmon without a state fishing license.<sup>98</sup> The State argued that the treaty should not limit its right to regulate fishing on non-Indian lands as the regulations were nondiscriminatory, applying equally to Indians and non-Indians.<sup>99</sup> The appellant argued that he had the right under the treaty to unrestricted fishing in the "usual and accustomed places" free from state regulation of any kind.<sup>100</sup> The Court, impressed with the strong desire of the Indians to retain their fishing rights, construed the treaty language in the "spirit which generously recognizes the full obligation of this nation to protect the interests of dependent people."<sup>101</sup> Interpreting the treaty in this light, the Court found that the statute imposing a fishing license fee on Indians was invalid.<sup>102</sup>

While the decision in *Tulee* affirmed the Indian's right to off-reservation fishing without a state imposed fee, the Court again commented in dicta on the possibility of state regulation.<sup>103</sup> Regulation concerning the "time and manner" of off-reservation fishing could be imposed equally ("in common") on Indians and non-Indians if necessary for the conservation of fish.<sup>104</sup> Professor Ralph W. Johnson, in *The States Versus Indian Off-Reservation Fishing: A United States Supreme Court Error*, pointed out that later decisions have relied on *Winans* and *Tulee* to support state regulation of off-reservation Indian fishing rights.<sup>105</sup> This was done without the application of the canons of treaty construction.<sup>106</sup> Despite the United States Supreme Court decisions, the State of Washington refused to recognize Indian fishing rights. The situation became very contentious and resulted in years of litigation.

### III. Fishing Rights Controversy in Washington

*When you came to our lands seeking "freedom" you were given this and more and you took — never giving.*

*Our Lands were pure and strong with plenty for all who lived in harmony. Today we see all that is around us is suffering — our waters, our blood polluted, our fish, our strength weakened, our air bringing sickness, our mother earth and our women becoming barren.*

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98. *Tulee v. Washington*, 315 U.S. 681, 682 (1942).

99. *Id.* at 683-84.

100. *Id.* at 684.

101. *Id.* at 684-85.

102. *Id.* at 685.

103. Johnson, *supra* note 58, at 221.

104. *Id.* (pointing out that again the Court's reference to state regulation of "time and manner" of fishing was not necessary to the decision of whether the state had authority to charge Indians a license fee for the right to fish).

105. *See id.*

106. *See id.* at 221-22.

*As the natural fish become overpowered by the unnatural fish,  
so it is with the natural people. We ask you to stop for the sake  
of all unborn. We ask your respect.*<sup>107</sup>

The State of Washington continued to assert its authority to regulate Indian off-reservation fishing with the justification that it was "indispensable" to the State's scheme of regulation.<sup>108</sup> The Nisqually, Puyallup, and Muckleshoot staged Fish-Ins to defy this regulation.<sup>109</sup> The State arrested several protestors for violation of state fishing regulations.<sup>110</sup> In 1965, violence erupted when Indian fishers attempted to put a canoe in the water at a fishing landing.<sup>111</sup> Thirty-five or more state fishing wardens using "Gestapo police-state tactics" attacked eight unarmed Indian men and nineteen women and children.<sup>112</sup> Notwithstanding a 1969 United States Supreme Court's decision in *Sohappy v. Smith* upholding Indian fishing rights in Oregon, Washington continued to disregard these rights.<sup>113</sup> In 1970, "state and local police stormed an Indian fishing camp on the Puyallup River and teargassed the people, arrested dozens of Indians and their supporters, and bull-dozed the camp away." The state's disregard for Indian fishing rights encouraged acts of violence of non-Indian sport fishers as well.<sup>114</sup>

The Fish-In demonstrations were characterized as "a defense of the whole 'Indian Way' as well as a defense of fishing rights."<sup>115</sup> Fish-Ins were

107. NATIVE AMERICAN SOLIDARITY COMM., TO FISH IN COMMON (1978) [hereinafter TO FISH IN COMMON], reprinted in 4 U.S. COMM'N ON CIVIL RIGHTS, HEARING BEFORE THE U.S. COMM'N ON CIVIL RIGHTS, AMERICAN INDIAN FISHING RIGHTS IN THE STATE OF WASHINGTON 646, 653 (1978) [hereinafter HEARING ON FISHING RIGHTS].

108. GETCHES, *supra* note 75, at 864; Anderson, *supra* note 73, at 131.

109. Anderson, *supra* note 73, at 131.

110. *Id.*

111. TO FISH IN COMMON, *supra* note 107, reprinted in 4 HEARING ON FISHING RIGHTS, *supra* note 107, at 653. The U.S. Commission on Civil Rights was a temporary, independent, bipartisan agency that was established by Congress in 1957. The commission's purpose was to collect information, to serve as a clearing house for information, and to study legal developments that constituted a denial of equal protection because of race, color, religion, sex, or national origin, or in administration of justice.

112. *Id.*

113. *Id.* at 662-63.

114. *Id.* at 662. "[S]portsmen began raiding one Indian camp after another. They sank fishing boats, stole and destroyed Indian nets, took pot-shots at Indians, and harassed and threatened Indian families on their own land." *Id.*

115. Anderson, *supra* note 73, at 132. The Fish-In protest was more than an assertion of fishing rights:

Fishing was a part of tribal life. If we didn't do something the tribes would be destroyed. They knew it. We knew the odds were against us. . . . The State of Washington is attempting to deprive us of our fishing rights, using illegal chicanery, political-minded judges and militant Nazi-like Game and Fisheries Department as weapons against us. . . . Up until now we've reached a point where it's life or death for the Indian culture, and we've decided to take the offensive.

successful in bringing the issue to the forefront, but they were unsuccessful in gaining any respect for Indian fishing rights from the state or non-Indian fishers. The Indians were forced to pursue their battle one step further, in the courts. In 1967, with the assistance of the NAACP and the pan-Indian movement, the Puyallup tribe was able to bring a case arising from the Fish-In arrests before the United State Supreme Court.<sup>116</sup> In addition, responding to pressure from the Indians, the United States in 1970 brought legal action on behalf of several tribes, *United States v. Washington*, against the State of Washington to protect Indian fishing rights consistent with the *Sohappy* decision.<sup>117</sup>

In the Fish-In case, *Puyallup Tribe v. Department of Game (Puyallup I)*, the United States Supreme Court interpreted the Treaty of Medicine Creek to ascertain the meaning of the language "[t]he right of taking fish, at all the usual and accustomed grounds and stations."<sup>118</sup> Even though the Court found from the circumstances existing when the treaty was signed that fishing with nets was customary, neither the "manner" or modes of fishing nor the purpose for fishing, whether or not it was commercial, was reserved by the treaty.<sup>119</sup> In addition, the Court construed the "in common with all citizens of the Territory" to mean that fishing by both Indian and non-Indians alike was subject to state regulation.<sup>120</sup> Thus, the manner, size of fish, and commercial fishing may be regulated in the interest of conservation as long as it does not discriminate against the Indians.<sup>121</sup> But, if the use of nets to capture fish was not a necessary conservation measure, then the Puyallup's use of such nets would not be in violation of state regulations.<sup>122</sup> While the decision affirmed Indian rights to fish off-reservation at the "usual and accustomed" fishing grounds, the decision was a disappointment to Indians seeking to enhance self-determination.<sup>123</sup>

In *Department of Game v. Puyallup Tribe (Puyallup II)*, the United States Supreme Court found that the State's determination that fishing nets be banned as "necessary" to the conservation of the fish discriminated against the Indians.<sup>124</sup> "There [was] discrimination here because all Indian net fishing [was] barred and only hook-and-line fishing entirely preempted by non-

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*Id.* (quoting STAN STEINER, *THE NEW INDIANS* 52, 54, 62 (1968)).

116. *Id.* (referring to *Puyallup v. Department of Game*, 391 U.S. 392 (1968) (*Puyallup I*)).

117. TO FISH IN COMMON, *supra* note 107, reprinted in 4 HEARING ON FISHING RIGHTS, *supra* note 107, at 663 (referring to *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975)).

118. *Puyallup I*, at 395 (construing Treaty Of Medicine Creek, 10 Stat. 1132 (1854)).

119. *Id.* at 398.

120. *Id.*

121. *Id.*

122. *Id.* at 402-03.

123. Anderson, *supra* note 73, at 132.

124. *Department of Game v. Puyallup Tribe*, 414 U.S. 44, 48 (1973) (*Puyallup II*).

Indians, is allowed."<sup>125</sup> But, the Court cautioned the Indians by making an often quoted limitation to treaty fishing rights: "the Treaty does not give the Indians a federal right to pursue the last living steelhead until it enters their nets."<sup>126</sup>

*Puyallup Tribe v. Department of Game (Puyallup III)*<sup>127</sup> was decided after a lower court held that the Puyallup reservation had not been extinguished after all.<sup>128</sup> The challenged state regulation was now over on-reservation fishing.<sup>129</sup> Nevertheless, the United States Supreme Court, refused to upset state regulations protecting the fisheries, even though the Treaty expressly reserved on-reservation fishing rights.<sup>130</sup> The state's limitation on Indian steelhead catch was found to be a proper standard, necessary for conservation of the fish resource; and even though the tribe was not required to provide the state with information on tribal fishers and the size of their catch, it was probably in the fishers interest for the tribe to provide the information.<sup>131</sup> Because of the State's denial of Indian treaty fishing rights and the "deterioration of the salmon and steelhead runs and habitat," the Indians pressured the United States to bring an action against the State in *United States v. Washington*.<sup>132</sup> Indians not only protested that state regulation of Indian fishing violated their sovereign right to self-determination, but also, that state regulation allowed for over fishing by non-Indians and poor hatchery practices.<sup>133</sup> Additionally, the fisheries were being destroyed by energy development, logging practices, and industrial and farming pollution.<sup>134</sup> With the fisheries destroyed before reaching Indian fishing places, the Indians were left with no harvestable fish.<sup>135</sup>

Judge Boldt hoped that the court's decision in *United States v. Washington* would "finally settle . . . the divisive problems of treaty right fishing which for so long have plagued the citizens of this area."<sup>136</sup> The court, with the assistance of testimony and reports provided by anthropologists, interpreted the treaty language "[t]he right of taking fish at all the usual and accustomed grounds" and share "in common with all citizens of the Territory" to mean

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125. *Id.* at 48.

126. *Id.* at 49.

127. *Puyallup v. Department of Game*, 433 U.S. 165 (1977) (*Puyallup III*).

128. *GETCHES*, *supra* note 75, at 868 (citing *United States v. Washington*, 496 F.2d 620 (9th Cir. 1974)).

129. *Id.*

130. *Id.* at 869.

131. *Puyallup III*, 433 U.S. at 172-73.

132. *TO FISH IN COMMON*, *supra* note 107, reprinted in 4 HEARING ON FISHING RIGHTS, *supra* note 107, at 669.

133. *Id.* at 649, 664-69.

134. *Id.*

135. *Id.* at 673.

136. *Anderson*, *supra* note 73, at 133 (quoting *United States v. Washington*, 384 F. Supp. 312, 330 (W.D. Wash. 1974)).



that Indians had the right to take up to 50% of the harvestable fish at the usual and accustomed place.<sup>137</sup> Consequently, the Indians had more than a right to "cast a fishing line" along with the thousands of non-Indians who now fish in the area, and more than an "equal opportunity to take fish."<sup>138</sup> Instead, the Indians had a right to a certain percentage of the catch, and the state had an obligation to prevent non-Indians from taking more than their 50% share.<sup>139</sup>

The court also held that the State of Washington's existing fishing regulations violated the Indians' fishing rights as they exceeded what was necessary for the conservation of the fish resource.<sup>140</sup> In order to subject Indians to state regulation, the State must show that the conservation objective is to perpetuate the run or fish species and that object cannot be accomplished by applying the restriction solely to non-Indian fishers.<sup>141</sup> Additionally, state regulations must not discriminate against the Indians.<sup>142</sup> The decision also enhanced tribal self-determination by establishing that tribes meeting certain qualifications may regulate Indian treaty fishing free from state regulation.<sup>143</sup>

Finally, the court required the state and tribes to co-manage the fisheries.<sup>144</sup> Because recalcitrant State officials and their non-Indian commercial and sports fishing allies obstinately refused to recognize Indian fishing rights, the district court retained jurisdiction to scrutinize all future

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137. *United States v. Washington*, 384 F. Supp. at 342-43, 402, 416-17. This right to 50% of harvestable fish was not just a right to take 50% of the fish that made it upstream to Indian fishing grounds from downstream non-Indian fishing sites, but instead was 50% of the fish destined for those upstream grounds regardless of whether they were captured downstream or in marine waters. *United States v. Washington*, 520 F.2d 676, 689 (9th Cir. 1975). Fish caught on the reservation did count toward the Indian's 50% share, as on-reservation rights were not shared in common with non-Indians. *Washington v. Washington State Comm. Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 687 (1979).

138. STEPHEN L. PEVAR, *THE RIGHTS OF INDIANS AND TRIBES* 185 (Norman Dorsen, ed., 1983); see also *United States v. Washington*, 520 F.2d at 688.

To hold that the Indian negotiators intended to secure for each member of the tribe the right to compete for fish on equal terms as an individual with each individual settler the state's view of the "in common with" clause as a prototype of the fourteenth amendment's equal protection clause thus would be to disregard the fabric of Indian society at the time the treaties were concluded, a society of communality whose nature was reflected in the subsequent legal character of property ownership which evolved in Federal Indian law.

*Id.* (citing FELIX S. COHEN'S *HANDBOOK OF FEDERAL INDIAN LAW* 183 (Univ. of N.M. photo. reprint 1971) (1942)).

139. PEVAR, *supra* note 138, at 185.

140. *United States v. Washington*, 520 F.2d at 682.

141. *Id.* at 683.

142. *Id.*

143. *Id.*

144. *TO FISH IN COMMON*, *supra* note 107, reprinted in 4 *HEARING ON FISHING RIGHTS*, *supra* note 107, at 672.

state regulation of Indian fishing, thus taking on the unusual role of "perpetual fishmaster" over fishing in the State of Washington.<sup>145</sup>

*United States v. Washington* has not only affirmed the Indians' right to fish but has enabled them to exercise their culture and their sovereign right to self determination.<sup>146</sup> Despite this recognition of Indian fishing rights, non-treaty fishers continued to fight the decision.<sup>147</sup> "[L]ocal fishing groups have staged protests, defied court orders, lobbied and campaigned to curtail the treaty fishing rights of Native peoples."<sup>148</sup> In an attempt to resolve the dispute a presidential task force was appointed to investigate the dispute and negotiate a compromise.<sup>149</sup> The goals of the proposed settlement plan were to (1) establish a healthy fishery for both Indian and non-Indian commercial fishers, (2) "establish a healthy sports fishery, (3) fulfill treaty fishing rights, and (4) establish a fisheries management system."<sup>150</sup> The plan recognized that both Indians and non-Indians had historic fishing patterns that should be maintained.<sup>151</sup> The plan proposed management zones that replaced the Indian's usual and accustomed fishing grounds.<sup>152</sup> "The tribes [were] not being asked to give up their treaty rights to their usual and accustomed ground, but instead to exercise their rights in a manner consistent with this settlement."<sup>153</sup>

However, the proposed settlement was rejected by the Indians because treaty fishing rights were abrogated; officials of the State of Washington and members of Congress failed to negotiate in good faith; and the plan failed to address what the Indians perceived as the real problems, including state mismanagement of the fisheries, and the refusal of State officials to recognize and enforce treaty fishing rights established in *United States v. Washington*.<sup>154</sup> Non-Indian fishing groups were equally adamant in their

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145. *United States v. Washington*, 520 F.2d at 682, 693 (Burns, J., concurring).

146. TO FISH IN COMMON, *supra* note 107, reprinted in 4 HEARING ON FISHING RIGHTS, *supra* note 107, at 683.

147. *Id.* at 689.

148. *Id.*

149. *Id.* at 695.

150. REGIONAL TEAM OF THE FEDERAL TASK FORCE ON WASHINGTON STATE FISHERIES, SETTLEMENT PLAN FOR WASHINGTON STATE SALMON AND STEELHEAD FISHERIES (1978), reprinted in 4 HEARING ON FISHING RIGHTS, *supra* note 107, at 57.

151. *Id.* at 58.

152. *Id.* at 59.

153. *Id.* at 59.

154. NORTHWEST INDIAN FISHERIES COMM'N, EXECUTIVE SUMMARY OF FORMAL RESPONSE TO SETTLEMENT PLAN FOR WASHINGTON STATE SALMON AND STEELHEAD FISHERIES (1978), reprinted in 4 HEARING ON FISHING RIGHTS, *supra* note 107, at 9. Treaty rights eliminated were: (1) traditional fishing grounds were eliminated, (2) the tribes share of up to 50% of the harvest was reduced, (3) commercial harvesting of Steelhead was eliminated, (4) tribal regulation on- and off-reservation was eliminated, (5) state's regulatory power over Indian fishing was expanded, (6) treaty defense was limited, and (7) protection of fishing rights provided because of the federal trust obligation to the Indians and because of federal court jurisdiction over state fishing

rejection of the task force proposed settlement. One commercial fishing group indicated that a settlement would never be forthcoming until "all fishermen can fish, in common pursuant to equal standards."<sup>155</sup> This group was critical of the task force's failure to resolve the two most "devastating factors of the Boldt decision, the theory of multi-management of the fishery and the unfair 50% allocation."<sup>156</sup>

At the same time the task force was attempting to negotiate a settlement, the United States Civil Rights Commission held hearings to investigate the claims of deprivation of equal protection of the law.<sup>157</sup> The Commission was to submit its findings and recommendations for corrective action to Congress and the President.<sup>158</sup>

The Washington State Game Department continued to refuse to comply with the federal court decree in *United States v. Washington* requiring the State to abandon its attempt to regulate Indian fishing.<sup>159</sup> Subsequent district court orders were also defied.<sup>160</sup> As a result, the United States Supreme Court granted certiorari to resolve the conflict.<sup>161</sup> The Court modified the decision in *United States v. Washington* by its decision in *Washington v. Washington State Commercial Passenger Fishing Vessel Association*.<sup>162</sup> The Court once again interpreted the "in common with" language.<sup>163</sup> While continuing to recognize that the Indians should be entitled to an equal share of the harvest, it held that this share should be reduced to a lesser amount if the reduced amount would provide a moderate living to the Indians.<sup>164</sup> Thus, the 50% figure is the maximum but a lower amount could be set.<sup>165</sup> The Court also upheld the district court's authority to assume direct supervision of the fisheries if "state recalcitrance or state-law barriers should be continued."<sup>166</sup>

Following this extensive litigation, tribes in the Pacific Northwest have formed intertribal fisheries management agencies, the Columbia River Intertribal Fish Commission (CRITFC) and the Northwest Indian Fisheries

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regulation was substantially reduced. *Id.*

155. Letter from Paul L. Anderson, Executive Manger, Purse Seine Vessel Owners Association to the Federal Task Force on Washington State Fisheries I (July 31, 1978), *reprinted in* 4 HEARING ON FISHING RIGHTS, *supra* note 107, at 603.

156. *Id.* at 2.

157. 3 HEARING ON FISHING RIGHTS, *supra* note 107, at 1.

158. *Id.*

159. *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 673-74 (1979).

160. *Id.*

161. *Id.* at 674.

162. *See id.* at 658.

163. *Id.* at 677-89.

164. *Id.* at 686-87.

165. *Id.*

166. *Id.* at 695.

Commission (NWIFC).<sup>167</sup> These two tribal agencies cooperate with the State of Washington's Department of Fisheries to manage the salmon and steelhead fisheries.<sup>168</sup> CRITFC reached an agreement with both the federal government and state governments in Oregon, Washington, and Idaho to adopt a cooperative management plan for salmon and steelhead.<sup>169</sup>

Nevertheless, as long as the fish resource continues to be depleted from over fishing and pollution, the controversy in the State of Washington will continue. Bitter resentment toward the Indian fishers will persist as Indians are perceived as having superior rights to fishing. Some Indians complain that the Boldt decision has forced them to become big commercial fishermen in order to compete with technology of the non-Indian fishers.<sup>170</sup> One author explained "the paradox of the Boldt decision: a legal solution designed to strengthen cultural unity through the protection of traditional elements actually functioned to increase divisiveness and lend support to marine fishers adhering to more Euro-American values."<sup>171</sup> Similar controversies over fishing rights in the Great Lakes have lead to years of litigation in Wisconsin and Michigan.

#### IV. Fishing Rights Controversy in Wisconsin

*[An old lady and her grandson told the king that they would stay and watch the grave of the king's daughter.] The King said that that was all right.*

*So everybody left except for the old lady and her grandson. The king gave them everything they asked for. They set out the net, and the next morning, when they went to the net, they found it full of fish. They did that every morning, and the net was always full.*<sup>172</sup>

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167. Charles F. Wilkinson, *To Feel the Summer in the Spring: The Treaty Fishing Rights of the Wisconsin Chippewa*, 1991 WIS. L. REV. 375, 406.

168. *Id.*

169. *Id.* at 407.

170. Anderson, *supra* note 73, at 136.

171. *Id.* at 139.

172. The Boy, His Grandmother, and the King's Daughter (n.d.), collected in VICTOR BARNOUW, *WISCONSIN CHIPPEWA MYTHS & TALES AND THEIR RELATION TO CHIPPEWA LIFE* 175 (1977). In this tale of magical powers the king's daughter is brought back to life. In another mystical story about a magical food supply, Wenebojo, a mythical and cultural hero and trickster, sees a man chopping ice. He goes up to the man and the man tells him to "Take a drink of water, if you're dry. Wenebojo drank, and there were so many little trout he swallowed some. When Wenebojo had his fill, the fellow said to go home and not to look back, no matter what." Wenebojo then ran back but heard voices calling after him, "Chase him! He's taking all our fish." Then a voice told him to leave his ice pack in a hollow. He did this and left. When he saw his wife, he said, "'Let's go see in the hollow.' When they got there, that hollow was full of trout." Wenebojo and Madjikiwis (n.d.), collected in BARNOUW, *supra*, at 88.

Three treaties were made with the Chippewa tribes living in an area which is now the State of Wisconsin.<sup>173</sup> In the Treaty of 1837 and the Treaty of 1842, the Chippewa ceded and sold lands to the United States in exchange for payments, reservation lands, and reserved fishing rights in the ceded territory.<sup>174</sup> Article 5 of the Treaty of 1837 provides that "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."<sup>175</sup> Article 2 of the Treaty of 1842 provides that:

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, and that the laws of the United States shall be continued in force, in respect to their trade and intercourse with the whites, until otherwise ordered by Congress.<sup>176</sup>

In the Treaty of 1854 the Chippewa ceded lands in exchange for reservations on lands they had ceded in the previous two treaties.<sup>177</sup>

The Lac Courte Oreilles Band of Lake Superior Chippewa Indians (LCO) brought an action, *Lac Courte Oreilles Band v. Voigt (LCO I)*,<sup>178</sup> to challenge a decision in *United States v. Bouchard*<sup>179</sup> denying the Indians their treaty based fishing rights. In *United States v. Bouchard*, District Court Judge Doyle held that off-reservation fishing rights reserved in the treaties of 1837 and 1842 had been extinguished by the Treaty of 1854.<sup>180</sup> In *LCO I*, the United States Court of Appeals held that neither the President's Removal Order of 1850 nor the Treaty of 1854 extinguished Indian off-reservation treaty fishing rights.<sup>181</sup> The court interpreted language in the treaties of 1837 and 1842 to mean that Indian fishing rights could only be terminated if the Indians "misbehaved."<sup>182</sup> Since the Chippewa had not "misbehaved," the President had no authority to terminate those rights.<sup>183</sup> The court also

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173. *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin*, 653 F. Supp. 1420, 1425 (W.D. Wis. 1987) (*LCO III*).

174. See Kenneth D. Nelson, *Wisconsin, Walleye, and the Supreme law of the Land: An Overview of the Chippewa Indian Treaty Rights Dispute in Northern Wisconsin*, 11 *HAMLIN J. PUB. L. & POL'Y* 381, 384 (1990).

175. *LCO III*, 653 F. Supp. at 1425.

176. *Id.* (quoting Treaty with the Chippewas, 7 Stat. 591 (1842)).

177. *Id.* at 1426 (referring to Treaty with the Chippewas, 10 Stat. 1109 (1854)).

178. *Lac Courte Oreilles Band v. Voigt*, 700 F.2d 341 (7th Cir. 1983) (*LCO I*).

179. *United States v. Bouchard*, 464 F. Supp. 1316, 1361 (W.D. Wis. 1978), *rev'd*, *LCO I*, 700 F.2d 341 (7th Cir. 1983).

180. *LCO III*, 653 F. Supp. at 1422.

181. *Id.*

182. *Id.* at 1425 (referring to the decision in *LCO I*).

183. *Id.* In contrast, the Chippewa were "peaceable, quiet, and inoffensive people." Nelson,

construed the 1854 treaty language as the Chippewa would have understood it to determine that the treaty did not abrogate fishing rights in the ceded territory.<sup>184</sup> Rather, the treaties of 1837 and 1842 guaranteed the Chippewa:

the right to make a moderate living off the land and from the waters in and abutting the ceded territory and throughout the ceded territory by engaging in hunting, fishing, and gathering as they had in the past and by consuming the fruits of that hunting, fishing, and gathering, or by trading the fruits of that activity for goods they could use and consume in realizing that moderate living.<sup>185</sup>

*LCO I* was shocking to non-Indian fishers in Wisconsin. Violent and confrontational protests and racial assaults followed as a result of the decision.<sup>186</sup> "Treaty Beer" was sold to finance litigation and lobbying to overturn the decision.<sup>187</sup> Opposition called for the abrogation of the 1837 and 1842 treaties and Indian fishing rights.<sup>188</sup> Members of Stop Treaty Abuse-Wisconsin, Inc. (STA) subjected Chippewa members of the Lac Du Flambeau Indians band to "stone throwing, threats of harm, racial and sexual insults, minor batteries, and damage to their vehicles."<sup>189</sup> The intent of STA was to interfere with the fish harvest during spawning season by congregating in large numbers to block landings and to harass and threaten fishers with "threats, taunts, racial insults, obscene comments, air raid sirens, whistles, and derogatory songs and chants."<sup>190</sup>

While recognizing treaty off-reservation fishing rights, the court of appeals in *LCO I* found that the Chippewa's understanding when the treaty was signed was that the exercise of these rights "could be limited if the land were needed for white settlement."<sup>191</sup> On remand, Judge Doyle interpreted this limitation to mean that the exercise of treaty fishing rights was restricted to ceded lands not privately owned as of the date of the *LCO I* decision, March 8, 1983.<sup>192</sup> The United States Court of Appeals in *LCO II*<sup>193</sup> found that Judge Doyle had

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*supra* note 174, at 386 (quoting *LCO I*, 700 F.2d at 348).

184. *LCO III*, 653 F. Supp. at 1426.

185. *Id.*

186. GETCHES, *supra* note 75, at 884.

187. *Id.*

188. *Id.*

189. Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Stop Treaty Abuse-Wisconsin, Inc., 759 F. Supp. 1339, 1344 (W.D. Wis. 1991); see Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Stop Treaty Abuse-Wisconsin, Inc., 781 F. Supp. 1385 (W.D. Wis. 1992), *rev'd*, 991 F.2d 1249 (7th Cir. 1993), *remanded*, 843 F. Supp. 1284 (W.D. Wis.), *aff'd*, 41 F.3d 1190 (7th Cir. 1994), *cert. denied sub nom.* 514 U.S. 1096 (1995).

190. *Id.*

191. *LCO III*, 653 F. Supp. at 1431.

192. *Id.* at 1422-23.

193. Lac Courte Oreilles Band v. Wisconsin, 760 F.2d 177 (7th Cir. 1985) (*LCO II*).

been too literal in interpreting the court of appeals decision in *LCO I*.<sup>194</sup> *LCO II* rejected the use of a certain date to determine which lands were privately owned and thus not available for the exercise of Indian fishing rights.<sup>195</sup> The court of appeals attempted to clarify what it meant by "settlement."<sup>196</sup> "Settlement" by non-Indians [was] synonymous with 'private ownership.'<sup>197</sup> Thus, the Chippewa could exercise treaty rights on public lands regardless of whether the lands were privately owned in the past.<sup>198</sup>

The task was left to Judge Doyle in *LCO III* to further define "settlement" and "private ownership."<sup>199</sup> He declared that "privately owned lands" meant "lands that are privately owned as of the time Chippewa exercise of usufructuary rights is contemplated or carried on."<sup>200</sup> Lands are not privately owned just because at some time in the past they were so owned, but now are publicly owned.<sup>201</sup> Furthermore, if owners of private lands allow the public to fish on their land, the owners must also allow Indians to exercise their usufructuary right to fish on their land.<sup>202</sup> Also before Judge Doyle in *LCO III* were several other issues. The Judge dealt with these issues in two phases.<sup>203</sup> Phase I involved looking at ethnographic and ethnohistorical information to determine what the activities of the Chippewa were at the time the treaty was signed, what usufructuary rights the tribe has today, and whether there was any basis for state regulation.<sup>204</sup> Phase II would consider the nature and extent of any such regulation.<sup>205</sup>

Factual findings concerning Indian activities were as follows: (1) Chippewa "harvested virtually everything on the landscape" including fish, wildlife, and plants, (2) Chippewa harvested for subsistence living and commercial purposes, (3) Chippewa did not harvest more than needed for a "moderate, satisfactory living," (4) roving habits of the Chippewa prevented exhaustion of natural resources, (5) the lands were not conducive to agriculture, and (6) Chippewa fished inland waters with use of weirs, spears, hoop nets, harpoons, hook and line, gillnets, seines, and decoys.<sup>206</sup> After the factual review, Judge Doyle held that the Chippewa had the same off-reservation rights to harvest

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194. *LCO III*, 653 F. Supp. at 1423.

195. *Nelson*, *supra* note 174, at 388.

196. *LCO III*, 653 F. Supp. at 1431.

197. *Id.*

198. *Nelson*, *supra* note 174, at 388-89. If treaty rights were forever extinguished when public property became publicly owned, "unscrupulous public officials could sell property to unscrupulous private individuals" to frustrate the exercise of Indian treaty fishing rights. *Id.*

199. *LCO III*, 653 F. Supp. at 1432.

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.* at 1423.

204. *Id.*

205. *Id.*

206. *Id.* at 1424-28.

all the natural resources in the ceded territory, as they did at treaty time.<sup>207</sup> Chippewa also could harvest commercially.<sup>208</sup> The manner of harvesting could be done with techniques and equipment used at treaty time or as developed since then.<sup>209</sup> Judge Doyle rejected the notion that the Wisconsin fish resource needed to be allocated at that time because the resource was not yet endangered or scarce.<sup>210</sup> When allocation is required, the Chippewa will be entitled to a share of the fish resource which will insure them a modest living.<sup>211</sup> But treaty rights to fish could be subject to state regulation if "restrictions are reasonable and necessary to conserve a particular resource."<sup>212</sup>

The issue left for Phase II, the nature and extent of state regulation, was decided by Judge Crabb in *LCO IV*.<sup>213</sup> Although the Judge admitted that the Chippewa could not have understood at the time of the treaty signing that regulation for survival of the fish resource might be needed, the Chippewa were capable of understanding that, should such state regulation be needed, it would be the least restrictive regulation possible.<sup>214</sup> Furthermore, if the conservation goal could be met by regulating non-Indians, then the state could not regulate Indian fishing.<sup>215</sup>

For the first time, however, the court in *LCO IV* decided that not only could the state regulate off-reservation Indian fishing when "reasonable" and "necessary" to the goal of conservation — ensuring the perpetuation of the species — but it could also regulate for public welfare and safety reasons.<sup>216</sup> State regulation for public welfare and safety is valid if (1) there is a need to regulate a particular resource in a particular area for public health or safety reasons, (2) the regulation is needed to prevent anticipated harm, (3) the regulation must be applied to the Indians in order to protect the welfare and safety of the public, (4) the regulation is the least restrictive alternative, and (5) the regulation does not discriminate against the Indians.<sup>217</sup> Absent these conservation and public welfare and safety needs, the tribe has sole jurisdiction over treaty off-reservation fishing.<sup>218</sup> However, tribal enforcement has to be performed in an effective and competent manner.<sup>219</sup>

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207. *Id.* at 1430.

208. *Id.*

209. *Id.*

210. *Id.* at 1434.

211. *Id.* at 1435.

212. *Id.*

213. *Lac Courte Oreilles Band v. Wisconsin*, 668 F. Supp. 1233 (W.D. Wis. 1987) (*LCO IV*); see *LCO III*, 653 F. Supp. at 1435; Nelson, *supra* note 174, at 390.

214. Nelson, *supra* note 174, at 391 (discussing *LCO IV*, 668 F. Supp. at 1236).

215. *Id.* at 391 (discussing *LCO IV*, 668 F. Supp. at 1236).

216. *Id.* at 390-91 (discussing *LCO IV*, 668 F. Supp. at 1235-36, 1242).

217. *Id.* at 391 (citing *LCO IV*, 668 F. Supp. at 1239).

218. *Id.* at 392 (citing *LCO IV*, 668 F. Supp. at 1241).

219. *Id.* (citing *LCO IV*, 668 F. Supp. at 1242).



To ensure effectiveness, the court ordered the parties to exchange scientific information.<sup>220</sup>

The judge also clarified that the moderate living standard established in *LCO III* provides for a minimum harvest level but does not limit Indian harvests when allocation of the fish resource is not needed.<sup>221</sup> Again, as in *LCO III*, the resource had not become endangered or scarce, so there was no need to allocate.<sup>222</sup> In *LCO V*, the court attempted to determine in monetary terms what a "moderate living" was.<sup>223</sup> An expert testified that "even if the tribes could exploit every harvestable natural resource in the ceded territory, they would not derive sufficient income from those resources to provide their members with a moderate standard of living."<sup>224</sup> The Chippewa then argued that they were entitled to the entire harvest because the 1837 and 1842 treaties guaranteed them a moderate living.<sup>225</sup> The State disputed this, claiming Indians had not been guaranteed exclusive rights to the entire harvest.<sup>226</sup> Rather, the Chippewa should have at most a 50% share.<sup>227</sup>

In *LCO V*, Judge Crabb refused once more to allocate the resource because the resource was not yet scarce.<sup>228</sup> Nevertheless, she did hold that if allocation were needed, the "moderate living" standard did "not provide a practical way to determine the plaintiff's share of the harvest potential."<sup>229</sup>

*LCO VI*<sup>230</sup> again addressed tribal regulation of off-reservation fishing. Judge Crabb held that the tribal regulation of the two particular species of sport fish at issue, walleye and muskellunge, was effective, therefore state regulation was unnecessary.<sup>231</sup> However, the court did require the Indians to incorporate into their resource management plans exploitation and safety factors based on the latest biological information which would be used to determine what the Indians could safely harvest without endangering the resource.<sup>232</sup>

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220. *Id.* (citing *LCO IV*, 688 F. Supp. at 1242).

221. Wilkinson, *supra* note 167, at 400 (discussing *LCO IV*, 668 F. Supp. at 1240).

222. Nelson, *supra* note 174, at 391-92 (discussing *LCO IV*, 668 F. Supp. at 1240).

223. *Id.* at 392 (citing *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin*, 686 F. Supp. 226 (W.D. Wis. 1988) (*LCO V*)).

224. *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin*, 740 F. Supp. 1400 (W.D. Wis. 1990) (*LCO VII*).

225. *Id.* at 1414.

226. *Id.*

227. *Id.* (relying on *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979)).

228. *Id.*

229. *Id.*

230. *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin*, 707 F. Supp. 1034 (W.D. Wis. 1989) (*LCO VI*).

231. *Id.* at 1055.

232. *Id.* at 1043-57. See Nelson, *supra* note 174, at 394-96, for an example applying the exploitation and safety factors to determine the allowable safe harvest.

Even though there was no evidence that the Indian harvest of fish, deer, or timber was endangering the perpetuation of the species or approaching anywhere near the 50% level, the court in *LCO VII* was ready to address the issue of allocation.<sup>233</sup> While the Chippewa understood from the treaties that they were guaranteed a "modest living," they also must have understood that there would be competition for the resource.<sup>234</sup> Therefore, the parties did not intend that the Chippewa would have exclusive rights to the entire harvest, "even if their modest living needs would otherwise require it. The non-Indians gained harvesting rights under those same treaties that must be recognized."<sup>235</sup> Even though the 1837 and 1842 treaties did not contain the same "in common with" language as the treaties in the Washington cases did, Judge Crabb held that the Indians were entitled to a maximum share of 50% "to prevent the frustration of the non-Indian treaty right."<sup>236</sup> If their "modest living" needs could be ever be met with less than 50%, then the lower amount would reflect the Indian share of the harvest.<sup>237</sup> In calculating the Indian's share, the 50% factor is applied to all harvest from all lands, including private lands.<sup>238</sup> However, the Indian's share of the harvest could be taken from public lands but not private lands.<sup>239</sup>

In *LCO-Immunity*,<sup>240</sup> the Chippewa brought suit seeking restitution and damages for past deprivation of their treaty fishing rights. The court held that after more than sixteen years of litigation which resulted in determinations that their treaty rights had been violated for over 130 years, "plaintiffs are left with no means of recovering monetary damages from the state [because of the State's constitutional Eleventh Amendment immunity] except in the unlikely event that the United States joins this suit on their behalf."<sup>241</sup> Judge Crabb felt that while this result was unfortunate and "wholly at odds with promises made to [the Chippewa] in the treaties of 1837 and 1842,"<sup>242</sup> she was "not free to rule otherwise."<sup>243</sup>

Finally, Judge Crabb ordered that the Chippewa's reserved usufructuary rights to those resources used when they entered the treaties of 1837 and 1842, but did not reserve the right to harvest commercial timber.<sup>244</sup> She

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233. *LCO VII*, 740 F. Supp. at 1414.

234. *Id.* at 1416.

235. *Id.*

236. *Id.* at 1418.

237. *Id.*

238. *Id.*

239. *Id.* at 1420. Judge Crabb did suggest that if in the future the Indian's share could not be satisfied by harvesting on public lands, access to private lands may be necessary. *Id.*

240. *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin*, 749 F. Supp. 913 (W.D. Wis. 1990) (*LCO-Immunity*).

241. *Id.* at 922.

242. *Id.*

243. *Id.* at 923. "The Eleventh Amendment embodies the principle that the states are immune from being sued in federal court without their consent." *Id.* at 922.

244. *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin*, 775 F.

reached this result in *LCO VIII*<sup>245</sup> by looking at the activities the Indians engaged in at the time the treaties were signed, and logging was not one of them.<sup>246</sup> She also ordered, consistent with past decisions, that the state was enjoined from interfering with tribal regulation of off-reservation fishing rights on the condition that the tribal management plan contain "biologically sound principles" necessary for the safe harvest and conservation of the species.<sup>247</sup> All reserved rights to harvest resources are to be apportioned equally between Indians and non-Indians.<sup>248</sup> The state could enforce certain state hunting regulations until the Indians adopted identical regulations.<sup>249</sup> Otherwise, the state can only regulate treaty off-reservation hunting and fishing rights in the interest of conservation and public health and safety.<sup>250</sup>

With most of all the major legal issues decided by the district court, the question remains whether the parties can cooperate in carrying out these decisions, or whether the district judge will have to continue to be an active "fish master." In order to enter into such a cooperative management agreement, the State of Wisconsin must first "squarely recognize the sovereign authority of the Chippewa bands and the State of Wisconsin. Second, some form of joint tribal-state natural resource commission should be established."<sup>251</sup> The commission should ideally share information, combine research efforts, and cooperatively set and enforce regulations.<sup>252</sup> However, this is unlikely as Wisconsin courts have interpreted the state's constitution as prohibiting the sharing of responsibility for the states resources.<sup>253</sup>

### *V. Fishing Rights Controversy in Michigan*

Michigan, surrounded by the Great Lakes and blessed with an abundance of inland lakes and streams, has had a similar acrimonious history regarding Indian fishing rights. The treaties signed with Indians in Michigan contain different language than the treaties in Washington and Wisconsin, yet case law interpreting those treaties did have a role in shaping jurisprudence concerning the Indian treaty fishing rights in Michigan. In *People v. Jondreau*, the Supreme Court of Michigan appreciated the instructive quality of other case law interpreting various treaties with the Indians, but did not consider these cases binding because they involved interpretation of

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Supp. 321, 322 (W.D. Wis. 1991) (*LCO VIII*)).

245. *Id.*

246. *Id.*

247. *Id.* at 323.

248. *Id.*

249. *Id.* at 324.

250. *Id.*

251. Wilkinson, *supra* note 167, at 411.

252. *Id.*

253. Nelson, *supra* note 174, at 415.

language that was not present in the treaties signed by Indians in Michigan.<sup>254</sup> Yet, the court in *Jondreau* rejected Michigan precedent, as well, and relied instead on the reasoning of Idaho state courts.<sup>255</sup> In *United States v. Michigan*,<sup>256</sup> the leading case establishing Indian fishing rights in Michigan today, the federal district court Judge Fox conducted an exhaustive review of case law from other federal and state jurisdictions before making his decision. Therefore, it is likely that federal and state decisions from other jurisdictions will be relied upon as Michigan faces many of the same legal issues faced by other states concerning usufructuary treaty rights of the Indians.

*People v. Jondreau* was a decision that surprised many people. Justice Swainson, writing for the Michigan Supreme Court, commendably "kept his eye firmly on the judicial history of the matter, on the cases in precedent, and on the documents that led most directly to his court's decision. Nevertheless, his opinion handed down, the tribes suddenly had hunting and fishing prerogatives that were not previously recognized."<sup>257</sup> Yet, this decision should not have been so surprising when viewed in the context of decisions made by other courts in the late 1960s through 1980s. The Michigan Supreme Court overruled its earlier decision in *People v. Chosa* that state regulation of fishing applied equally to Indians and non-Indians because all were citizens of the United States.<sup>258</sup> *Chosa* could hardly stand following the holding of the United States Supreme Court in *Puyallup Tribe v. Department of Game of Washington (Puyallup I)* that the Indian right to fish could not be restricted by the state "even though all Indians born in the United States are now citizens of the United States."<sup>259</sup> However, unlike *Puyallup I*, the Court refused to allow the State of Michigan to regulate for conservation of the species because the Treaty of 1854 with the Chippewa did not provide for this safeguard as did the Treaty of 1855 with the Puyallup.<sup>260</sup>

Testing these newly recognized treaty rights, A.B. LeBlanc, a member of the Bay Mills Indian Community of Chippewa Indians, fished commercially without a state issued license and with gill nets in violation of state fishing regulations.<sup>261</sup> In a format similar to the Wisconsin *LCO*

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254. *People v. Jondreau*, 185 N.W.2d 375, 379 (Mich. 1971).

255. *Id.* (rejecting *People v. Chosa*, 233 N.W. 205 (Mich. 1930) and relying instead on *State v. Arthur*, 261 P.2d 135 (Idaho 1953)).

256. *United States v. Michigan*, 471 F. Supp. 192 (W.D. Mich. 1979).

257. PHILLIP MCM. PITTMAN, DON'T BLAME THE TREATIES 10 (1997).

258. *People v. Jondreau*, 185 N.W.2d at 379 (referring to *People v. Chosa*, 233 N.W. 205 (Mich. 1930)).

259. *Id.* at 380 (quoting *Puyallup Tribe v. Department of Game of Washington*, 391 U.S. 392, 398 (1968)).

260. *Id.* at 381.

261. *People v. LeBlanc*, 248 N.W.2d 199, 202 (Mich. 1976); see PITTMAN, *supra* note 257,

cases, the Michigan Supreme Court addressed three issues: (1) did the Chippewa Indians reserve the right to fish in Lake Superior in the Treaty of 1836, (2) if the Chippewa reserved these rights, did they abrogate them by the Treaty of 1855, and (3) if these rights were not abrogated, does State regulation apply?<sup>262</sup>

Applying the canons of treaty construction to the language of article 13 of the Treaty of 1836, the court held that the Chippewa reserved fishing rights in the ceded territory.<sup>263</sup> The court looked at the activities of the Chippewa at the time the treaty was signed and nontextual sources and found that the Indians were devoting "most of their time in quest of food in the chase or in fishing."<sup>264</sup> Evidence that the Indians engaged in commercial as well as subsistence fishing was found in the treaty language itself.<sup>265</sup> Pursuant to the treaty the Chippewa received 100 barrels of salt and 500 fish barrels annually for twenty years.<sup>266</sup> Thus, the treaty language providing that lands be ceded by the Indians in exchange "'for the right of hunting on [those ceded lands] with the other usual privileges of occupancy' was understood by the Chippewa to include the right to fish."<sup>267</sup>

The court also construed the 1836 treaty language, past treaties, and Chippewa mythical beliefs and determined that the Indians' aboriginal title to ceded lands extended into the Great Lakes.<sup>268</sup> Furthermore, the language in article 13, reserving the Indians' right to exercise the privileges of occupancy "until the land is required for settlement" did not terminate the Chippewas' right to fish on ceded lands because the Great Lakes could not be "settled."<sup>269</sup>

After examining the minutes of the treaty negotiations, the court determined that there was "not the slightest indication . . . that the Treaty of 1855 would affect hunting or fishing rights reserved under the Treaty of

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at 10.

262. *LeBlanc*, 248 N.W.2d at 202 (referring to Treaty with the Ottawas, etc. Mar. 28, 1836, 7 Stat. 491 [hereinafter Treaty of 1836] and Treaty with Ottawas and Chippewas, July 31, 1855, 11 Stat. 621). It is interesting that the spelling of "Ottawas" in the 1855 treaty changed from the 1836 treaty (Ottawas).

263. *Id.* at 204.

264. *Id.* (quoting a report prepared in 1836 by the Acting Superintendent of Michigan for Indian Affairs to the Commission of Indian Affairs).

265. *Id.*

266. *Id.* (citing article 4 of the Treaty of 1836, *supra* note 262).

267. *Id.* at 205.

268. *Id.* at 206-07. The Chippewa legends tell of a pair of cranes created by the great spirit that chose the Sault Ste. Marie area as their nesting place because of the plentiful supply of fish to be found there. Upon coming to rest, the two cranes were transformed into a man and a woman who were the progenitors of the Chippewa clan in that area.

*Id.* at 207 (citing ELLEN RUSSEL EMERSON, *INDIAN MYTHS* (1965)).

269. *Id.* at 207.

1836.<sup>270</sup> Given the importance of fishing to the Chippewa way of life, the Chippewa would not have understood that the language in article 3 of the Treaty of 1855 would terminate their reserved fishing rights.<sup>271</sup> Therefore, reserved rights to fish were not one of the liabilities or claims intended to be released by the Indians in the Treaty of 1855.<sup>272</sup> To read the treaty as providing such a release would be prejudicial to the Indians.<sup>273</sup>

Finally, the court determined the scope of state regulation of off-reservation treaty rights.<sup>274</sup> After reviewing decisions in the *Tulee* and *Puyallup* cases, the court held that the Indians held their off-reservation fishing rights in common with non-Indians.<sup>275</sup> Even though the "in common" language of the treaties in the Washington cases was absent from the Michigan treaties, the court concluded that the proviso "'until the land was required for settlement' indicates that the interests and rights of the other citizens of the territory were to be taken into account."<sup>276</sup> The United States would never have agreed to the heavy encumbrance exclusive fishing rights would have caused on land needed for settlement in Michigan.<sup>277</sup>

The court continued its reliance on the *Puyallup I* to determine that the state could regulate the manner of off-reservation tribal fishing if (1) the regulation prohibiting the use of gill nets was necessary for the preservation of the fish resource, (2) application of the regulation to the Chippewas was necessary for preservation of the fish resource, and (3) the regulation did not discriminate against the Chippewas.<sup>278</sup> However, as decided in *Tulee*, the State could not charge the Chippewa a fee for a license issued by the State in order to exercise their off-reservation fishing rights.<sup>279</sup>

The decisions in the State courts did not resolve the conflict between the State, non-Indian fishers, and the Indian fishers.<sup>280</sup> "[S]carcely a day [went] by without an article appearing in one or more of the state's major newspapers concerning the controversy."<sup>281</sup> In 1973, the United States brought a federal action on behalf of the Bay Mills Indian Community to protect Indian treaty rights to fish in the Great Lakes and enjoin the State of Michigan from interfering with these rights. Additionally, Bay Mills

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270. *Id.* at 211.

271. *Id.*

272. *See id.* at 209.

273. *Id.* at 212.

274. *Id.* at 215.

275. *Id.* at 213-14.

276. *Id.* at 213.

277. *Id.*

278. *Id.* at 215 (relying on *Puyallup Tribe v. Department of Game*, 391 U.S. 392 (1968) (*Puyallup I*)).

279. *Id.* at 212 (relying on *Tulee v. Washington*, 315 U.S. 681 (1942)).

280. *United States v. Michigan*, 471 F. Supp. 192, 205 (W.D. Mich. 1979).

281. *Id.*

sought to vindicate the Indian right to fish free from state regulation, require the State to "exercise its police power to regulate any non-Indian fishing which would be in derogation of these rights," and establish that the right to fish in the ceded waters of the Great Lakes was exclusive to the Indians.<sup>282</sup> The State continued to insist that the Treaty of 1855 was a removal treaty which extinguished the tribes as well as any treaty fishing rights reserved in the Treaty of 1836; that Indians had no aboriginal rights to fish in the Great Lakes; that the "until land is required for settlement" language in the Treaty of 1836 was a condition subsequent which had been met by the subsequent settlement of land, thus vitiating any Indian fishing rights; and that even if there was a treaty right to fish, the State had a right to regulate fishing for conservation or other reasons under the police powers of the State.<sup>283</sup> Judge Fox succinctly summarized the State's argument: "the State asks the court to abrogate the Indians' aboriginal rights which have survived for over 12,000 years and are valid to this day."<sup>284</sup> Instead, "Michigan would take the Indians' subsistence and livelihood, their right to fish, and divide it by a modern day lottery, the Indians being permitted to compete for licenses equally with those who have taken their rights from them."<sup>285</sup>

Judge Fox, taking very seriously his responsibility to "ensure guaranteed constitutional rights against the TYRANNY OF POPULAR MAJORITIES"<sup>286</sup> and his duty to construe the treaties in accordance with the canons of treaty construction, issued an extensive eighty-nine-page opinion popularly called the "Fox decision."<sup>287</sup> The decision has been criticized as being an "imperfect application" of the canons of treaty construction which require delving into the historical setting of the treaty signing.<sup>288</sup> The result was the creation of a "most favorite minority composed of separate but sovereign nationals living within our geographic and political border — and at our expense."<sup>289</sup> Others have commended the decision as one consistent with the correct application of the canons of treaty construction.<sup>290</sup> The underpinning of the decision was, as required

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282. *Id.* at 203.

283. *Id.* at 204.

284. *Id.* at 203.

285. *Id.* Judge Fox drew an analogy to the plight of the Cherokee in Georgia. Georgia abolished the tribal government of the Cherokee and distributed Indians lands by a lottery system to Georgia citizens. *Id.* at 202-03. The State argued that "[t]here is no question but that the State now and always has stood ready to provide fishing privileges to all our citizens, commercial fishing privileges to all our citizens on an equal basis, including Indians or others of whatever race or ethnic background." *Id.* at 212.

286. *Id.* at 205. Judge Fox was incensed by sports fishers who attempted to improperly influence the court's decision by filing petitions with thousands of signatures. *See id.*

287. *Id.*

288. PITTMAN, *supra* note 257, at 11. The author calls this the "historical method." *Id.*

289. *Id.*

290. *See* Diane H. Deleckta, *State Regulation of Treaty Indians; Hunting and Fishing Rights*

by the canons, the intent of the Indians, "not that of the white negotiators."<sup>291</sup>

Judge Fox began the process of making his decision with a chronicle of the treatment of Indians in the United States.<sup>292</sup> Next he examined "documented historic, ethno-historic, anthropologic and archeological evidence" to determine whether the Chippewa possessed a right of fishing that could have been reserved or granted by a treaty.<sup>293</sup> The Chippewa provided evidence that as a community they relied on fishing and used gill nets to fish productively for centuries.<sup>294</sup> Thus, applying the principle of *Winans* that the Chippewa reserved all rights not specifically conveyed, Judge Fox was satisfied that the Chippewa implicitly reserved by the Treaty of 1836 the right to subsistence and commercial fishing by demonstrating the importance of the fisheries resource to the Chippewa community before and after entering into the Treaty of 1836.<sup>295</sup>

Then because the text of the treaties of 1836 and 1855 is "general, vague and ambiguous"<sup>296</sup> the Judge reviewed nontextual information including treaty negotiations and the history of the Chippewa to assist in interpreting the meaning of certain provisions and determine if the Chippewa explicitly reserved the right to fish or whether they "knowingly signed away their right to fish."<sup>297</sup>

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in *Michigan*, DET. C.L. REV. 1097, 1118 (1980).

291. *Id.*

292. *United States v. Michigan*, 471 F. Supp. 192, 200-12 (W.D. Mich. 1979).

293. *Id.* Judge Fox found the tribe's experts, who were ethnohistorians and anthropologists educated in the history and customs of the Chippewa, to be much more credible witnesses than the State's experts, an American historian and a fisheries biologist.

294. *Id.* There were two fishing seasons in the spring and fall. In the spring, up to 200 Indians would gather in fishing villages located on the shores of the Great Lakes. *Id.* at 222. After the fall season the Indians would break up into small family units and disperse inland to hunt. *Id.* Fishing was particularly important as agricultural activities were limited by short growing season north of Traverse City. *Id.* at 221. Gill nets were used on the Lower Great Lakes beginning around 2500 B.C. and eventually spread to the Upper Great Lakes. *Id.* at 222. Indian fished for sturgeon, suckers, pike, whitefish, and lake trout. *Id.* Frenchman Joutel wrote of Indian gill net fishing in 1687:

They go as far as a league out into the lake to spread their nets, and to enable them to find them again, they leave marks, namely, certain pieces of cedar wood which they call "aquantiquants," which serve the same purpose as buoys or anchors. They have nets as long as 200 fathoms and about 2 feet deep. At the lower part of those nets they fasten stones to make them go to the bottom, and on the upper part they put pieces of cedar wood . . . called floats.

*Id.* Indians fished commercially and traded with the French as early as the middle 18th century. *Id.* at 223. Well before the Treaty of 1836, fishing had become vitally important to the Indians both as a means of survival and a means of providing a livelihood. *Id.*

295. *Id.* at 213, 279.

296. *Id.* at 213.

297. *Id.* at 214.



Article 13 of the Treaty of 1836 provides that the "Indians stipulate for the right of hunting on the lands ceded, with the other usual privileges of occupancy, until the land is required for settlement."<sup>298</sup> Judge Fox examined the circumstances under which the treaty was signed to determine the meaning of this language.<sup>299</sup> Henry Schoolcraft, the Indian agent, arranged for the treaty to be negotiated and signed with the Chippewa in Washington, D.C.<sup>300</sup> There the Chippewa signed a "treaty written by white traders, explained to them by white interpreters, and fostered by men who had supplied them with firewater for years."<sup>301</sup> From the payments to be given to the Chippewa in exchange for their land, Schoolcraft and the traders were assigned the right to be paid first for debts owed to them for liquor and other supplies.<sup>302</sup>

Judge Fox also examined the intentions of the parties who signed the treaties.<sup>303</sup> This was a difficult task as intentions and motivations differed between the Indians and the United States as well as between the members representing each party.<sup>304</sup> While the dominant motivation of the non-Indians parties to the treaty appeared to be "cheat[ing] the Indians out of their lands and reduc[ing] their holdings to the reservation, the motives of the Indians seemed to be mixed.<sup>305</sup> Some wanted the annuities, some wanted to protect their fishing grounds from non-Indians, and others wanted to secure blacksmith services to make and repair implements used for fishing.<sup>306</sup> Some wanted to sell their land, others did not.<sup>307</sup> Notwithstanding the various motivations and intentions, the United States extinguished aboriginal title to a large portion of Indian lands and the Chippewa returned home with assurances that they would be able to continue to use these lands they had ceded as they had before the treaty was signed.<sup>308</sup>

The promises in the 1836 treaty were not kept, but land unimpeded by Indian claims was needed for non-Indian settlement and the exploitation of

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298. *Id.* at 213 (citing the Treaty of 1836, *supra* note 262).

299. *Id.* at 215-16.

300. *Id.* at 215. Lewis Cass, Secretary of War, assisted Henry Schoolcraft in making the treaty arrangements.

301. *Id.* "[T]he final version of the treaty was drafted behind closed doors by Henry Schoolcraft and the traders." *Id.*

302. *Id.* at 215. Schoolcraft successfully negotiated over \$50,000 for his family. *Id.* Schoolcraft and the traders together received over \$250,000. *Id.* at 216.

303. *Id.* at 226-30.

304. *Id.* at 226.

305. *Id.*

306. *Id.*

307. *Id.* at 228-29. The Ottawas did not want to sell at all. Some of the Chippewa were reluctant to sell. *Id.* at 229.

308. *Id.* at 215.

valuable minerals.<sup>309</sup> This led to the Treaty of 1855 which, like the 1836 Treaty, set up reservations near traditional fishing grounds.<sup>310</sup> It also extinguished unfulfilled obligations of the Treaty of 1836.<sup>311</sup>

Following this insightful and exhaustive historical review, Judge Fox construed the ambiguous language in article 13 as the Indians would have understood it, that the Indians would have to accommodate their rights to hunt on ceded lands to the rights of settlers.<sup>312</sup> However, the limitation was not understood to affect the Indian right to fish on the Great Lakes,<sup>313</sup> because the Indians understood that as long as Indians lived in Michigan they had the right to fish on ceded lands. Since it "was not possible to settle the Great Lakes and their connecting waters."<sup>314</sup> Judge Fox held that the Chippewa "reserved an aboriginal right to fish in the waters of the Great Lakes ceded by the Treaty of 1836."<sup>315</sup> This right included taking of fish from the Great Lakes for both subsistence and commercial fishing purposes.<sup>316</sup> It was "inconceivable" that the Chippewa would have given up their "way of life and signed a treaty which they understood to make that way of life impossible."<sup>317</sup>

Moreover, the failure to incorporate the "in common with" language of the treaties in the Washington cases into the Treaty of 1836, meant that the Chippewa right to fish was not a shared right with non-Indians.<sup>318</sup> Therefore, the Chippewa may exercise their fishing rights without regulation by the State of Michigan.<sup>319</sup> Michigan regulations inconsistent with recognition of these treaty rights were void.<sup>320</sup> Furthermore, any attempt

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309. *Id.* at 216.

310. *Id.*

311. *Id.*

312. *Id.* at 279.

313. *Id.* "According to the Indian understanding, Michigan Indians could hunt and fish 'as long as the sun rose and the waters flowed.'" *Id.* at 238.

314. *Id.* For various meanings that could be attributed to the words "until land is needed for settlement," see *id.* at 236-38.

315. *Id.* at 216. Judge Fox looked to other provisions of the treaty to support his interpretation of article 13. *Id.* at 232-34. Two reservations of land in article 2 and article 3 specifically reserved fishing grounds. *Id.* at 232. These two were specifically and exclusively reserved to the Indians because they were the subject of dispute at the time the treaty was signed. These specific reservations did not imply that other fishing grounds were not reserved. *Id.* at 233. Instead, consistent with *Winans*, the failure to mention fishing grounds in relation to any of the other reserved lands meant that the United States did not desire to acquire those rights. *Id.* at 234. Consonant with the Michigan Supreme Court decision in *LeBlanc*, Judge Fox found that article 4 providing the Indians with hundreds of fish and salt barrels acknowledged that the Indians engaged in commercial fishing. *Id.*

316. *Id.* at 213.

317. *Id.* at 231.

318. *Id.* at 270.

319. *Id.*

320. *Id.* at 281.

of the state to regulate Indian fishing was preempted by both federal regulation and tribal self-regulation.<sup>321</sup> Finally, Judge Fox found nothing in the Treaty of 1855 which abrogated the Chippewa reserved right to fish under the Treaty of 1836.<sup>322</sup>

By the time the case was decided in 1979, two other tribes had intervened, the Sault Ste. Marie Tribe of Chippewa Indians, and Grand Traverse Band of Ottawa and Chippewa Indians (GTB). Judge Fox then enjoined Michigan officials from interfering in any way with the Indians' rights to fish with gill nets and enjoined certain state court judges from continuing to decide an action before them concerning the rights of Indians to engage in gill net fishing in Grand Traverse Bay.<sup>323</sup> The United States Court of Appeals for the Sixth Circuit granted a stay of Judge Fox's order based on the strong possibility of irreparable damage or destruction of the fishery in the bay caused by the use of gill nets.<sup>324</sup> The court remanded the case to district court to determine the preemptive effect of recently issued federal Indian fishing regulations.<sup>325</sup> But in remanding the court instructed the district court to assume that *LeBlanc* correctly stated that state regulation is permissible for conservation of the species should the district court decide that federal regulation did not preempt state regulation.<sup>326</sup>

While deciding the issue, the Secretary of Interior allowed the federal regulations to lapse.<sup>327</sup> The State of Michigan then issued emergency regulations that were more restrictive on Indian rights to fish with gill nets than the federal regulations were.<sup>328</sup> Recognizing the Indian's treaty protected aboriginal right to fish with gill nets, the court, nevertheless, found that this right was not absolute.<sup>329</sup>

The rule of reason found in *LeBlanc* must be applied.<sup>330</sup> If Indian fishing with gill nets is likely to cause irreparable harm to the fish resource, the state may restrict fishing in that manner. Any such restriction must meet the requirements of *LeBlanc*: (1) it must be necessary for the conservation of the fishery, (2) it must be the least restrictive alternative for accomplishing the conservation goal, and (3) it must not discriminate against the Indians.<sup>331</sup>

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321. *Id.* at 270.

322. *Id.* at 280.

323. *United States v. Michigan*, 623 F.2d 448, 449 (6th Cir. 1980).

324. *Id.*

325. *Id.* at 450.

326. *Id.*

327. *United States v. Michigan*, 653 F.2d 277, 278 (6th Cir. 1981).

328. *Id.*

329. *Id.* at 279.

330. *Id.*

331. *Id.*

However, the State was unable to show that the fisheries would be irreparably harmed, and, therefore, State regulations were not proper at that time.<sup>332</sup> Federal regulations were to be considered in effect until modified by the district court.<sup>333</sup> In deciding whether to modify those regulations, the district court should follow the requirements of *LeBlanc*.<sup>334</sup>

The Secretary of Interior later announced that it would not renew the federal regulations and stated that *LeBlanc* should be followed.<sup>335</sup> The Secretary also "invited the parties to meet in an attempt to work out a 'consensus management program' which would recognize the concurrent responsibilities and duties of the State, the Tribes, and the Department of Interior."<sup>336</sup> The State again tried to impose its "emergency regulations" on Indian gill net fishing.<sup>337</sup> Judge Fox determined that the preemption issue was now moot, and the State indicated that it had no plan at that time to meet the requirements in *LeBlanc*.<sup>338</sup> But the court retained jurisdiction to decide the appropriateness of any future attempts by the State to regulate Indian fishing.<sup>339</sup>

Thus Judge Fox and his successor, Judge Enslen, assumed the role of "fish master" as the district court continued to supervise the ongoing litigation between the Chippewa tribes, the State of Michigan's Department of Natural Resources (MDNR) and the litigating *amici*, Michigan United Conservation Club (MUCC) and other sport fishing organizations.<sup>340</sup> Most of this litigation concerned disputes over allocation of the fish resource.<sup>341</sup> This litigation led to the entry of a consent order in 1985 (1985 Agreement) setting out the terms of a fifteen-year agreement facilitated by a special master.<sup>342</sup> The agreement was reached with the Bay Mills Indian Community, Sault Ste. Marie Tribe of Chippewa Indians, and Grand Traverse Band of Ottawa and Chippewa Indians.<sup>343</sup> The 1985 Agreement and the Dispute Resolution Mechanism are "supposed to be the device[s] for resolving continuing differences between the state and the tribes and which establishes an executive council as the forum for discussion and resolution."<sup>344</sup> The 1985 Agreement sets out provisions to protect,

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332. *Id.*

333. *Id.*

334. *Id.*

335. *United States v. Michigan*, 520 F. Supp. 207, 209-10 (W.D. Mich. 1981).

336. *Id.* at 210.

337. *Id.*

338. *Id.* at 210-11.

339. *Id.* at 211.

340. PITTMAN, *supra* note 257, at 11.

341. Consent Order 1985 Settlement Agreement at 3, *United States v. Michigan*, 520 F. Supp. 207 (W.D. Mich. 1981) (May 31, 1985) [hereinafter 1985 Agreement].

342. *Id.*

343. *Id.* at 1.

344. PITTMAN, *supra* note 257, at 11. The dispute resolution mechanism applies to all

preserve, and cooperatively manage the fish resource.<sup>345</sup> Restrictions on harvesting levels differ in each of the Great Lakes and vary by type of fish: whitefish, lake trout, walleye, perch, salmon, and bloater chubs.<sup>346</sup> The tribes can fish exclusively in some areas called zones and must refrain from fishing in others.<sup>347</sup> Tribal commercial fishing with gill nets is only allowed in designated zones.<sup>348</sup> The State is required to remove nontribal State commercial fishing licenses in some areas and reduce nontribal commercial harvest levels.<sup>349</sup>

Active participation of the tribes is required in many aspects.<sup>350</sup> In some areas the State can not license any new persons without obtaining prior written consent of the tribe.<sup>351</sup> Tribal authorization of gill net operations is required to control and limit this activity.<sup>352</sup> Rehabilitation zones and cooperative rearing programs are established.<sup>353</sup> Both MDNR and the tribes must agree as to which zones salmon fingerlings will be planted.<sup>354</sup> Tribes participate in various standing committees on enforcement, education, and fisheries review.<sup>355</sup> Both the tribes and MDNR are responsible for providing catch data to each other.<sup>356</sup>

Finally, differences regarding the 1985 Agreement are to be resolved by the Executive Council.<sup>357</sup> Where parties do not agree with the Executive Council's decision, the United States district court retains jurisdiction over these disputes in accordance with the process described in the Dispute Resolution Mechanism and may appoint a special master to assist with dispute resolution.<sup>358</sup>

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disputes arising under the 1985 Agreement. A proposal must be placed on the agenda of an Executive Council meeting. If the Executive Council votes against the proposal, then the *United States v. Michigan* Dispute Resolution Mechanism can be invoked.

345. 1985 Agreement, *supra* note 341, at 3.

346. *Id.* at 4-24.

347. *Id.* at 4-13.

348. *Id.*

349. *Id.*

350. *Id.*

351. *Id.* at 6.

352. *Id.*

353. *Id.* at 7, 9, 11.

354. *Id.* at 9.

355. *Id.* at 14-16.

356. *Id.* at 17-19.

357. *United States v. Michigan* Dispute Resolution Mechanism (1985) [hereinafter *Michigan Dispute Resolution Mechanism*] (on file with the *American Indian Law Review*).

358. 1985 Agreement, *supra* note 341, at 25; *Michigan Dispute Resolution Mechanism*, *supra* note 357, at 1-2, 6. If a party is unhappy with an Executive Council decision and wants to trigger the Dispute Resolution Mechanism, it must first inform the other parties by telephone and then file an information filing with the court and send copies to other parties. *Id.* at 2-3. The opposing party must inform the court of its position in an information filing within 15 days of receipt of the movant's information filing. *Id.* at 3-4. The litigating *amici* may present information

One author summarized the effectiveness of the 1985 Agreement and Dispute Resolution Mechanism as follows:

It is sad to report that the various parties, the state (Michigan Department of Natural Resources, representing interests of citizens of the state), the tribes, and the federal government (Department of the Interior, Bureau of Indian Affairs) have been able to resolve very little of any consequence and the United States citizens of the northern Great Lakes, whose lives and livelihoods are daily affected by the ongoing negotiations, have been excluded from the process.<sup>359</sup>

Regardless of the criticism of the 1985 Agreement, from the historical context of Federal Indian Policy, the fact that such an agreement was made represents a major change in the way Indians have been treated. In the era of self-determination cooperative agreements between a state sovereign and tribal sovereign are now possible. Under the 1985 Agreement the Chippewa tribes now have a very active role in the management of the fisheries, responsibilities of both parties are set out, and, for the first time, both sides of the "fishing rights" issue must meet to accomplish common objectives. Judge Enslen emphasized this point when a matter involving the agreement was brought before him.

But through your acceptance of the 1985 Consent Decree, you committed to working together until the conflict was resolved, at least until the year 2000. That means I do not view these proceedings . . . as adversarial proceedings. We have a common goal, and that goal is the just implementation of the consent agreement.<sup>360</sup>

Furthermore, the 1985 Agreement demonstrates the willingness of the Indians to limit their own judicially recognized treaty fishing rights in order to rehabilitate the resource. Finally, it is unknown what violence and social unrest might have taken place without the agreement in place.<sup>361</sup> Inevitably, however, the parties would disagree over a number of fishing issues.

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to the court within five days of the opponent's information filing. *Id.* at 4.

359. PITTMAN, *supra* note 257, at 11.

360. Transcript of Opening Remarks and Concluding Findings, Rulings, Statements of the Court at 7, United States v. Michigan, M26-73 (W.D. Mich. Oct. 9, 1992).

361. Response of Michigan United Conservation Clubs, Inc., Litigating Amicus, in Opposition to Grand Traverse Band's Motion Requesting Modification of the 1985 Consent Order, Including Its Information Filing Under the Court's Dispute Resolution Mechanism at 4, United States v. Michigan, No. 2:73 CV-26 (W.D. Mich. filed Mar. 12, 1997).

VI. *Aftermath of the Fox Decision and Year 2000: Current Controversies*

*[I]t is in the State's interests — and by State's interest I mean the State of Michigan and its constituency of sports fishermen — to accommodate small boat fishers because a short-term victory in the next ten years will result in a long-term defeat to the management of the fisheries after ten years have elapsed. That is so clear that if anyone misses it I guess they deserve to live with what happens in the year 2000.*<sup>362</sup>

One provision of the 1985 Agreement has generated considerable disagreement. The GTB (Grand Traverse Band of Ottawa and Chippewa Indians) agreed to refrain from fishing with gill nets in two of Grand Traverse Bay's most productive grids, provided that impoundment gear (trap nets) and technical assistance was made available to them.<sup>363</sup> In 1992, the

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362. William Rastetter, *The Grand Traverse Band of Ottawa and Chippewa Indians 'Our Opinion,'* TRAVERSE CITY RECORD EAGLE (Traverse City, Mich.), Sept. 28, 1997, at E11 [hereinafter *Our Opinion*] (quoting the district court judge in Transcript of Ruling at 33, *United States v. Michigan* (W.D. Mich. Apr. 25, 1990) (No. 999)). When this statement was made there were 10 years remaining on the 15-year agreement.

363. 1985 Agreement *supra* note 341, at 12. Grids are an area of approximately 10 square miles. Paragraph 24 (d) provides:

In grids 616 and 716, only the Grand Traverse Band may fish commercially subject to seasonal spawning closures and other agreed conservation measures. However, the parties further agree that the Grand Traverse Band shall be limited to commercial fishing with impoundment gear in these grids after January 1, 1988, provided that impoundment gear and technical assistance is made available to the Grand Traverse Band.

*Id.* Another paragraph in the 1985 Agreement provided that one license could be issued for chubs in other areas with small gill nets and for other species using impoundment gear only. *Id.* at 12-13, para. 25.

Sport fishermen dislike gill nets because the nets catch indiscriminately non-targeted as well as targeted fish. Todd Schauer et al., *Risk Assessment of Small Fishing Vessel Trap Net Operations*, 32 MARINE TECH. 231, 231 (1995). For example, when gill netting for whitefish, lake trout, a prized sport fish, is also caught. *See id.* The way the nets are designed means that non-targeted fish cannot be released as the fish become entangled and are almost always dead when extracted from the nets. *Id.* Impoundment gear, also called "trap nets" is a "more complex and expensive fishing system, . . . designed to hold fish alive until returned to the water, thus potentially preserving sport and commercial fish stocks." *Id.* Trap net fishing involves net deployment and lifting over the side of the boat which causes heeling (tipping). *Id.* This means there is a capsize risk present with trap net fishing not present with gill net fishing. *Id.* Most tribal fishing boats are small trailerable boats, 16 foot to 25 foot in length where trap netting operations would increased the chance of capsize in rough weather. *Id.* Trap net fishing is more conducive to larger boats. *Id.* But this increases the size and expense of the operation. *Id.* A dynamic analysis conducted to analyze the capsize risk of two Indian fishing boats, one 22 foot long and one 27 foot long suggests that conducting trap net operations in parts of Grand Traverse Bay in three to four and one-half foot waves may present unacceptable safety risks. *Id.* at 232,

State of Michigan brought a motion to enforce the closures to gill net fishing mandated in the 1985 Agreement.<sup>364</sup> The Chippewa protested that the State had not lived up to its obligation to develop an alternative to gill netting and requested that it be able to continue gill netting while the experiment to develop an alternative continued.<sup>365</sup> Judge Enslen granted the State's motion to prohibit gill net fishing but, nevertheless, found that the State had not satisfied its obligation to develop a small boat alternative method to gill netting.<sup>366</sup> State was ordered to pursue at "full throttle" a cooperative experimentation program.<sup>367</sup>

The experimentation program failed after four years to produce a viable small boat impoundment fishery.<sup>368</sup> In addition, the GTB complained that the State over a period of ten years failed to issue viable permits for harvesting chubs as required under another provision of the 1985 Agreement.<sup>369</sup> Impatient with the experimentation program and the lack of fishing opportunities for its fishers, the GTB is now asking the court to modify the 1985 Agreement to rescind the restriction limiting fishing in two grids to impoundment gear and to revoke the 1992 injunction prohibiting gill net fishing.<sup>370</sup> The GTB argues that its agreement to refrain from gill netting was contingent upon the "condition precedent" that a viable small boat impoundment fishery would be developed for its displaced fishers.<sup>371</sup>

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364. Order, *United States v. Michigan*, No. M26-73 (W.D. Mich. Oct. 15, 1992); *Our Opinion*, *supra* note 362, at E11.

365. Transcript of Opening Remarks & Concluding Findings, Rulings, Statements of the Court at 27, *United States v. Michigan*, No. M26-73 (W.D. Mich. Oct. 9, 1992).

366. *Id.* at 27-29.

367. *United States v. Michigan*, No. M26-73; *Our Opinion*, *supra* note 362, at E11.

368. Grand Traverse Band's Motion Requesting Modification of the 1985 Consent Judgment at 2, *United States v. Michigan*, No. 2:73-CV-26 (M 26-73) (W.D. Mich. Jan. 15, 1997). Fishing from small boats using scaled-down trap nets resulted in unacceptable harvest levels. *Id.* at 4. The experiment then focused fitting larger, trailerable boats with trap nets. *Id.* at 5. Larger boats were a problem because they could not be launched at access sites available to GTB small boat fishers. *Id.* at 5 n.5. A study on Indian small boat fishing showed that a three-person crew would lose \$6285 to \$25,785 a year if it used trap-net boats. Diane Connors, *Tribes: Trap-Net Fishing Is Not Feasible*, TRAVERSE CITY RECORD EAGLE (Traverse City, Mich.), July 16, 1997, at A1. Trap netting requires an investment of \$200,000 for a boat and equipment. *Id.* Gill netting only requires an investment of \$2000. *Id.*

369. Grand Traverse Band's Information Filing Regarding Disputes Arising Under Paragraphs 24(d) and 25 at 3, *United States v. Michigan*, No. 2:73-CV (M26-73) (W.D. Mich. Jan. 15 1997) [hereinafter GTB Information Filing Paragraphs 24(d) and 25]. Paragraph 25 provides that in 1985 one chub permit will be issued jointly by GTB and the State for harvesting of chub. Consent Order 1985 Settlement Agreement at 12, *United States v. Michigan*. Then depending on "availability of stocks and tribal needs in subsequent years, additional opportunities for chubs and/or other species can be made available to the Grand Traverse Band pursuant to jointly issued State-Tribal authorization. *Id.* at 12-13.

370. *Id.* at 1, 3.

371. *Id.* at 3.



The State failed to comply with this condition precedent, therefore, the GTB no longer has to limit its method of fishing in the Grand Traverse Bay Area to impoundment gear.<sup>372</sup> The GTB merely intends to exercise their "aboriginal, *superior* right to fish in certain waters' of Grand Traverse Bay."<sup>373</sup> The GTB also cited several incidents where the sport fishing groups, the litigating *amici*, refused to agree to any accommodation of the GTB's superior right.<sup>374</sup> If these groups were unwilling to compromise, then the tribe need not compromise their fishing rights.<sup>375</sup>

In addition to the law of contracts "condition precedent" argument, the GTB also argues that the goals of the 1985 Agreement have not been achieved; therefore, modification to the agreement is necessary.<sup>376</sup> The legal standard for modifying the 1985 Agreement is "the indication of a defect or a deficiency in the original decree which impedes the decree from achieving its goal either because experience has proven it less effective, disadvantageous, or because circumstances and conditions have changed which warrant fine-tuning the decree."<sup>377</sup> The GTB argues that this legal standard is met "because experience has proven [the 'impoundment gear' limitation] disadvantageous' to the GTB's small-boat fishers."<sup>378</sup>

Finally, the GTB threatens that if no modification is forthcoming it is "entitled to fish *everywhere* within the Grand Traverse Bay Area."<sup>379</sup> Furthermore, "[i]f the State and litigating *amici* expect the GTB to

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372. *Id.* GTB cited contract law and law of judgments in support of its position. *Id.* at 10-11. "In negotiating a contract the parties may impose any condition precedent, the performance of which is essential before they become bound by the agreement . . ." *Id.* at 10 (quoting 17 AM. JUR.2D, *Contracts* § 24, at 360 (1964)). "[A] judgment may be set aside or modified if: (2) There has been such a substantial change in the circumstances that giving continued effect to the judgment is unjust." RESTATEMENT OF JUDGMENTS (SECOND) § 73 (1982).

373. Brief in Support of Grand Traverse Band's Motion Requesting Modification of the 1985 Consent Judgment at 7, *United States v. Michigan*, No. 2:73-CV-26 (M 26-73) (W.D. Mich. Jan. 15, 1997) (quoting *Bigelow v. Michigan Dep't of Natural Resources*, 727 F. Supp. 346, 352 (W.D. Mich. 1989)).

[A]s distasteful as it may seem to [the litigating *amici*], they do not possess an 'equal right' to fish in the waters of the coast of the State of Michigan. Judge Fox ruled, and the Sixth Circuit upheld, that the tribal fishers have an aboriginal, *superior* right to fish in certain waters. *Bigelow*, 727 F. Supp. at 346.

*Id.*

374. *Id.* at 8.

375. *Id.*

376. GTB Information Filing Paragraphs 24(d) and 25 at 4-8. The GTB claimed in 1994 that the lack of alternative methods of fishing meant that there were "no fishing opportunities in 90% of the Lake Michigan waters adjacent to GTB's six-county service area." *Id.* at 7. The 1994 catch statistics showed that state licensed non-Indians were harvesting substantially more fish than the GTB was within the GTB's own tribal zone. *Id.*

377. GTB Information Filing Paragraphs 24(d) and 25 at 4 (citing *Heath v. DeCourcy*, 888 F.2d 1105, 1110 (6th Cir. 1989)).

378. *Id.*

379. *Id.*

participate in negotiations for the period subsequent to March 28, 2000, the first step is an agreement to provide limited small boat fishing opportunities as had been assured by . . . the 1985 agreement/order.<sup>380</sup> The State and litigating *amici* must realize that they, not the GTB need the 1985 Agreement to continue after the year 2000.<sup>381</sup>

Both the Michigan United Conservation Clubs, Inc. (MUCC), litigating *amicus*, and the State disagree that the restriction placed on the GTB's use of gill nets is conditioned on the success of the small boat impoundment gear experiment.<sup>382</sup> MUCC argues that there is no language in the 1985 Agreement that can be interpreted as a condition precedent.<sup>383</sup> The only promise made was that impoundment gear and technical assistance would be available from the State.<sup>384</sup> There was no specific language in the agreement mentioning a small boat impoundment gear experiment or the need for such an experiment to be "successful."<sup>385</sup> This experiment was not conceived by the court until 1990, five years after the 1985 Agreement was signed.<sup>386</sup> The 1985 Agreement could only have contemplated large scale impoundment gear because that was the only kind of impoundment gear used on the Great Lakes at that time.<sup>387</sup> Judge Enslen made it clear in 1992 that gill netting was not conditional when he stated "despite my sympathies . . . it is time for all of the tribal communities to let go of the hope that there will be continued gill netting in areas where the agreement prohibits it."<sup>388</sup>

The State argues that if the small boat trap net fishing has failed, the 1985 Agreement does not provide that gill netting will be reinstated.<sup>389</sup> Rather, any such failure requires that other alternatives to gill netting be investigated.<sup>390</sup> The State also argues that contract analysis is inappropriate

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380. *Id.*

381. *Id.*

382. Brief in Support of State of Michigan's Response to Grand Traverse Band's Motion Requesting Modification of the 1985 Consent Judgment at 1-2, *United States v. Michigan*, No. 2:73 CV 26 (M 26-73) (W.D. Mich. filed Mar. 12, 1997) [hereinafter *State of Michigan's Response to GTB's Motion for Modification*]; *Response of Michigan United Conservation Clubs, Inc., Litigating Amicus, in Opposition to Grand Traverse Band's Motion Requesting Modification of the 1985 Consent Order, Including Its Information Filing Under the Court's Dispute Resolution Mechanism at 8, United States v. Michigan*, No. 2:73 CV 26 (M26-73) (W.D. Mich. filed Mar. 12 1997) [hereinafter *MUCC in Opposition to GTB's Motion For Modification*].

383. MUCC in Opposition to GTB's Motion For Modification, *supra* note 382, at 10-11.

384. *Id.* at 8.

385. *Id.* at 10.

386. *Id.* at 9-10.

387. *Id.* at 10.

388. *State of Michigan's Response to GTB's Motion for Modification, supra* note 382, at 2 (quoting from Opening Remarks and Concluding Findings, Rulings, Statements of the Court at 32-33, *United States v. Michigan*, No. M26-73 (W.D. Mich. Oct. 9, 1992)); *MUCC in Opposition to GTB's Motion For Modification, supra* note 382, at 10.

389. *State of Michigan's Response to GTB's Motion for Modification, supra* note 382, at 4.

390. *Id.* The State suggested that drop net or pound net fishing alternatives should be

because the 1992 Court Order prohibiting fishing with gill nets is not the result of agreement between the parties, as a consent order or consent decree would be.<sup>391</sup> However, it could be argued that the 1992 Court Order was interpreting the 1985 Agreement which was entered as a consent order, and, therefore, contract analysis would be appropriate to determine the intent of the parties when they made the agreement. The State did not address the GTB's alternative basis in support for modification: that the legal standard for modification is the presence of a defect or disadvantage in the original agreement which prevents the goal of the agreement from being achieved.<sup>392</sup>

Finally, the State balked at having to enter into a complex discovery phase to determine whether the parties have made a good faith effort to develop the small-boat impoundment fishing.<sup>393</sup> The State filed an affidavit which documented the good faith efforts and money spent to develop this fishery.<sup>394</sup> The State spent over \$600,000 to provide trap nets, and other equipment, vessels, stipends to the GTB fishers, and operating and maintenance costs.<sup>395</sup> In fact, the State contends that small boat fishing with impoundment gear has not been shown to be infeasible.<sup>396</sup>

It also documented the efforts to issue a permit to fish chubs.<sup>397</sup> The State issued permits requested by the GTB to fish chub every year since 1992.<sup>398</sup> But GTB refused to accept them because they allowed for joint enforcement, because the band wanted 50% of the available harvest, and because the permit only allowed for one agent fisher rather than several.<sup>399</sup> Finally, the MDNR asked GTB to provide them with criteria in order that acceptable permits could be issued to them.<sup>400</sup> MDNR then issued the permits meeting the GTB's requirements including tribal self-regulation except that MDNR refused to waive the right to pursue the violation in state courts.<sup>401</sup> The GTB still refused the permits because "it was not

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investigated. *Id.* at 6.

391. *Id.* at 4.

392. *See id.* at 1-6.

393. *Id.* at 6.

394. Response to Informational Filing by the Grand Traverse Band of Ottawa & Chippewa Indians at 4-5, United States v. Michigan, No. 2:73 CV26 (W.D. Mich. filed Mar. 12, 1997) [hereinafter State's Response to GTB's Informational Filing]; Affidavit of Don Nelson, United States v. Michigan, No. 2:73 CV26 (W.D. Mich. filed Mar. 12, 1997) [hereinafter Affidavit of Don Nelson].

395. Affidavit of Don Nelson, *supra* note 394, at 1-6.

396. State's Response to GTB's Informational Filing, *supra* note 394, at 4.

397. State's Response to GTB's Informational Filing, *supra* note 394, at 6-8; Affidavit of Don Nelson, *supra* note 394, at 6-9.

398. State's Response to GTB's Informational Filing, *supra* note 394, at 6.

399. *Id.* at 7.

400. *Id.*

401. *Id.* at 8.

appropriate for the MDNR to expect the GTB fishers to operate pursuant to state law and regulations, when the federal courts have upheld the Indian Tribes' sovereign right of self-regulation.<sup>402</sup>

Another provision of the 1985 Agreement causing dissension among the parties concerns the salmon fishery. The 1985 Agreement provides that salmon fingerlings will be planted by the MDNR at locations agreed upon by the Tribes and the MDNR.<sup>403</sup> Suspended gill nets can only be used between August 16 and October 30 of each year and use is prohibited "outside a two mile radius from the stream mouths where such plantings occur."<sup>404</sup> Plantings have occurred in Nunn's Creek in northern Lake Huron.<sup>405</sup> The GTB tribal fishers began to fish for salmon outside the two-mile area around Nunn's Creek.<sup>406</sup> When Skip Duhamel was cited for illegal fishing, the GTB tribal judge took the opportunity to elaborate on his interpretation of the 1985 Agreement.<sup>407</sup> The tribal judge indicated that fishing with a new kind of salmon net, a net that anchors at the bottom of the lake bed rather than a gill net that is "suspended," does not violate the 1985 Agreement.<sup>408</sup> Furthermore, Coho salmon and Chinook salmon are not listed in the agreement, and, therefore, fishing for them is not prohibited outside the two-mile radius of Nunn's Creek.<sup>409</sup>

Concerned about these tribal court decisions, the state sought a ruling from Judge Enslen on whether tribal fishers can fish for salmon outside the Nunn's Creek area.<sup>410</sup> The tribes response to the State's move was that "the tribes never would have negotiated away the right to control Salmon by fishing them" because salmon is a major predator of other fish caught by the tribe.<sup>411</sup> The Nunn's Creek area was just a special fishing grounds stocked by the State; it was not intended to be the only salmon fishing grounds.<sup>412</sup> Sport fishermen were upset over the tribes expansion into Grand Traverse Bay as their license fees were used to stock the salmon in Grand Traverse Bay.<sup>413</sup> Judge Enslen delivered what the sport fishermen

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402. Affidavit of Don Nelson, *supra* note 394, at 9.

403. 1985 Agreement, *supra* note 341, at 9-10.

404. *Id.* at 10.

405. State of Michigan's Brief in Support of Defendant's Motion For a Preliminary Injunction at 6, United States v. Michigan, No. 2:73 CV26 (W.D. Mich. filed Aug. 29, 1997) [hereinafter State's Brief For a Preliminary Injunction].

406. Diane Conners, *New Net Catches State's Interest*, TRAVERSE CITY RECORD EAGLE (Traverse City, Mich.), Sept. 18, 1995, at A1.

407. *Id.*

408. *Id.*

409. *Id.*

410. Diane Conners, *Fishing Case Goes to Federal Court*, TRAVERSE CITY RECORD EAGLE (Traverse City, Mich.), Jan. 19, 1996, at B1.

411. *Id.*

412. *Id.*

413. Diane Conners, *Court Expands Tribal Fishing Rights in GT Bay*, TRAVERSE CITY

called a "severe blow to the Traverse Bay area fishery" when he issued a ruling that the GTB may license for the 1996 fishing season one fisherman to fish for salmon in one area of the Bay, but no fishing was allowed within one-half mile of a creek or river mouth.<sup>414</sup> While pleased with the decision, the GTB indicated that it would not be satisfied in the future to license just one salmon fisherman in just one area of Lake Michigan.<sup>415</sup>

One year later, the GTB pushed for half of the salmon harvest taken out of Grand Traverse Bay, approximately 125,000 pounds.<sup>416</sup> The GTB refused to compromise and accept any of the State's proposals.<sup>417</sup> The GTB claimed that under the Treaty of 1836 it was entitled to fish anywhere in Grand Traverse Bay and that the tribe "voluntarily suspended much of those fishing rights" in the 1985 Agreement but was now reasserting them.<sup>418</sup> The GTB then proceeded to issue its own commercial salmon fishing permits for the 1997 season for 90,000 pounds, more than two times the tribal salmon harvest in 1996.<sup>419</sup> Angered by the GTB's actions, area sport fishermen vowed to press the State to pursue an injunction forcing the tribes to stop salmon fishing and to pursue the arrest of tribal fishers.<sup>420</sup> The MDNR, concerned about two reported incidents of boats becoming entangled in tribal fishers' gill nets and fearful of similar incidents over the Labor Day weekend, asked Judge Enslen to order an immediate halt to

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RECORD EAGLE (Traverse City, Mich.), Aug. 20, 1996, at A1 [hereinafter *Court Expands Tribal Fishing Rights*].

414. *Id.* (referring to United States v. Michigan, No. 23:73 CV26 (W.D. Mich.) order establishing the terms for the 1996 salmon fishery) (Aug. 15, 1996). Skip Duhamel then tested the one-half-mile rule by placing his nets within one-half mile of a creek mouth. Dianne Conners, *New Dispute Flares Over Fishing Rights*, TRAVERSE CITY RECORD EAGLE (Traverse City, Mich.), Aug. 23, 1996, at A1. When asked by the court to pull his nets, he complained that "[i]t's nice to say you can have a salmon fishery, but if you can't fish where the salmon live, it's worthless . . . We really feel betrayed." Bill Hicks with the Grand Traverse Area Sport Fishermen's Association responded, "Well isn't that too bad." "We are fed up with what is happening." *Id.* The parties later agreed that Skip Duhamel could fish slightly within the one-half-mile radius of Belanger Creek. Will Scott, *New Guidelines Allow Net Near Belanger Creek*, TRAVERSE CITY RECORD EAGLE (Traverse City, Mich.), Aug. 31, 1996.

415. *Court Expands Tribal Fishing Rights*, *supra* note 413, at A1.

416. Steve Kellman, *Tribe Wants to Net More Salmon*, TRAVERSE CITY RECORD EAGLE (Traverse City, Mich.), July 26, 1997, at A1 [hereinafter *Tribe Wants to Net More Salmon*]. GTB harvested 38,000 pounds of salmon in 1996, which was 14% of the total salmon harvest. *Id.*

417. *Id.*

418. *Id.*

419. Diane Conners, *Court Won't Hear Gill-Net Dispute Until December*, TRAVERSE CITY RECORD EAGLE (Traverse City, Mich.), Aug. 28, 1997, at A1.

420. *Id.*

salmon fishing on Grand Traverse Bay.<sup>421</sup> The GTB agreed to pull its gill nets over the busy holiday weekend.<sup>422</sup>

Judge Enslen denied the State's motion for an injunction because the GTB had already taken action to protect public safety.<sup>423</sup> Judge Enslen also refused to grant the State's motion for an expedited hearing to enforce the provisions of the 1985 Agreement concerning the salmon tribal fishery.<sup>424</sup> This matter is set to be heard in December 1997.<sup>425</sup> However, because the parties could not agree to the terms of the interim 1997 salmon fishery for Grand Traverse Bay, Judge Enslen imposed the 1996 terms with safety modifications.<sup>426</sup> Two fishers could be licensed, but the total linear footage of the nets fished could not exceed 3600 feet, and nets had to be submerged at least eight feet below the surface.<sup>427</sup> The GTB protested that the tribal fishers could not economically harvest salmon by submerging their nets eight feet below the surface of the water because the fish were in shallower waters where the nets could not be dropped that deep.<sup>428</sup> Judge Enslen denied the GTB's motion for reconsideration of the court's eight foot requirement.<sup>429</sup>

The State, anxious to focus on negotiating a new agreement for the year 2000, has been frustrated by the GTB's continual testing of the limits of its treaty fishing rights.<sup>430</sup> The GTB, with its own agenda of preserving its

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421. Steve Kellman, *Tribe Will Pull Nets For Holiday Weekend*, TRAVERSE CITY RECORD EAGLE (Traverse City, Mich.), Aug. 30, 1997, at A1 [hereinafter *Tribe Will Pull Nets*]. Apparently GTB was not marking its nets in accordance with its own regulations. Instead it was using black and white floats that are difficult to see in rough waters. State's Brief for a Preliminary Injunction *supra* note 405, at 6. GTB also failed to give adequate notice to other users of Grand Traverse Bay that it would be placing its gill nets. *Id.* at 8.

422. *Tribe Will Pull Nets*, *supra* note 421, at A1.

423. Diane Connors, *Judge Won't Order Nets Out of Bay*, TRAVERSE CITY RECORD EAGLE (Traverse City, Mich.), Sept. 5, 1997, at A1 [hereinafter *Judge Won't Order Nets Out of Bay*].

424. *Id.*

425. *Id.*

426. *United States v. Michigan*, No. 2:73 CV26, at 1-2 (W.D. Mich. Sept. 11, 1997) (order denying motion for reconsideration and setting the terms of the 1997 target salmon fishery).

427. *Id.* at 1-3

428. *Id.* at 1; *Judge Won't Order Nets Out of Bay*, *supra* note 422. Skip Duhamel, tribal fisher, commented on Judge Enslen's order, "I can't submerge nets eight feet under in nine feet of water [where the fish are] and catch fish." *Id.* "We won't catch fish, which is exactly what they want." *Id.*

429. *United States v. Michigan*, No. 2:73 CV26, at 2.

430. Brief in Support of the State of Michigan's Motion to Enforce Paragraph 22 of the 1985 Consent Order and For an Expedited Hearing and For an Expedited Hearing on the Motion to Enforce the State's Previous Informational Filing Regarding Paragraph 22 of the 1985 Consent Order at 8, *United States v. Michigan*, No. 2:73 CV26 (W.D. Mich. filed Aug. 29, 1997) [hereinafter Brief in Support of State's Motion For Expedited Hearing]. "Worse, unlike what the Court and Defendant Michigan had hoped, the continued controversy concerning the targeting of salmon by commercial treaty fishers . . . has exacerbated the differences between the parties." *Id.* The Court and the Special Master must spent time "resolving this issue every year instead of

treaty fishing rights; seeking proper allocation of the resource; and ensuring self-determination in the administration and enforcement of those rights, finally decided it was in the tribe's best interest to end the talks for a new year 2000 fishing agreement.<sup>431</sup> "Thus, from the perspective of the Tribe, it would be much more productive for time and resources to be spent internally in developing the management policies and regulations required to protect the resources once the 15-year consent decree expires than to participate in negotiations with persons who have unreasonable expectations."<sup>432</sup> The expectations of sport fishermen that the GTB should cut back on taking its share of the salmon harvest by gill netting because it will "destroy" the fishery when it now only takes 5% and proposes to take less than one-third of the total salmon harvested, is unreasonable.<sup>433</sup>

### *VII. Role of Treaty Interpretation: Vision for Year 2000 Litigation or Negotiated Agreement*

Today, the courts' resort to the application of the canons of treaty construction to every fishing rights case in order to determine the existence and scope of treaty fishing rights has become so mechanical that every result is nondistinct and inevitable. It is as though adherence to the process of applying such worthy canons must ultimately lead to worthy results. The courts used these principles to render a long line of decisions in each of three states, Washington, Wisconsin, and Michigan. The treaties involved different language, and, yet, the results have been so surprisingly similar that the treaties construed may as well have been identical.

The first generation of fishing rights cases applicable to these three states recognized the existence of Indian treaty fishing rights contrary to precedent.<sup>434</sup> In order to reach this result courts in *Winans*, *LCO I*, and *Jondreau* the courts interpreted various treaty language: (1) in *Winans*, the "right of taking fish at all usual and accustomed places in common with citizens of the territory," (2) in *LCO I* the "privileges of hunting and fishing . . . are guaranteed to the Indians during the pleasure of the President" and "right of hunting on ceded territory, with the other usual privileges of occupancy until required to be removed by the president," and

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helping the parties focus on the year 2000." *Id.*

431. Steve Kellman, *Tribe Ends Talks For New Fishing Agreement*, TRAVERSE CITY RECORD EAGLE (Traverse City, Mich.), Sept. 12, 1997, at A1; Grand Traverse Band's Initial 1997 Memorandum Regarding ¶ 22 Dispute in Grand Traverse Bay Area of Lake Michigan at 2-4, No. 2:73 CV26 (M26-73) (W.D. Mich. filed Aug. 8, 1997) [hereinafter GTB's Initial Memorandum Regarding Paragraph 22] (explaining that the controversy is really just an issue of allocation).

432. *Our Opinion*, *supra* note 362, at E11.

433. GTB's Initial Memorandum Regarding Paragraph 22, *supra* note 431, at 7.

434. COHEN'S HANDBOOK 1982 ED., *supra* note 58, at 469 & nn. 16-19. In Michigan, *People v. Chosa*, 233 N.W.2d 375 (Mich. 1930), was overruled.

(3) in *Jondreau*, the "right of hunting on the lands ceded, with the usual privileges of occupancy until the land is required for settlement."

The second generation of cases involved state regulation of off-reservation treaty fishing rights. In *Puyallup I*, the court found that the manner of fishing could be regulated by the State of Washington because "manner" had not been reserved by the treaty and the "in common with" language meant Indians could be regulated as well as non-Indians.<sup>435</sup> However, the State could only regulate the manner and commercial aspects of Indian fishing if the regulation was a necessary conservation measure and did not discriminate against the Indians.<sup>436</sup>

Judge Doyle in *LCO III* acknowledged the State of Wisconsin's right to regulate fishing based on *Puyallup I* even though the language of the treaties was different.<sup>437</sup> Although conceding that *Puyallup I* and *Puyallup II* decisions were unclear as to the reasons why the State of Washington could regulate fishing, Judge Doyle felt bound by them and rejected any efforts to distinguish the Washington cases from the Wisconsin case.<sup>438</sup> Again, as in *Puyallup I*, permissible regulation was limited to that necessary for conservation and public safety.<sup>439</sup>

Likewise, the Michigan Supreme Court in *LeBlanc* adopted the holding in *Puyallup I* even though the "in common with" language was not in the applicable treaty.<sup>440</sup> This was a complete turnaround from *Jondreau* where the court distinguished *Puyallup I* by holding that the Treaty of 1836 with the Chippewas did not provide the same protections to the State of Michigan as the Treaty of 1855 with the Puyallup did.<sup>441</sup> Consequently, the Michigan Supreme Court relied on precedent that interpreted different treaty language and the intent of the United States government, rather than how the Chippewa would have understood the Treaty of 1836 to arrive at the result in *LeBlanc*.<sup>442</sup> The decision was contrary to a correct application of the canons of treaty construction in that the court looked at the intent of the United States government to determine that it would not have contemplated such an encumbrance on land needed for settlement.<sup>443</sup>

Later when Judge Fox in *United States v. Michigan* exhaustively applied the canons of treaty interpretation to the Treaty of 1836, he held that the failure to incorporate the "in common with" language meant that the state

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435. See *supra* notes 118-21 and accompanying text.

436. See *supra* notes 121-22 and accompanying text.

437. *LCO III*, 653 F. Supp., at 1435; *LCO IV*, 668 F. Supp., at 1235.

438. *LCO III*, 653 F. Supp., at 1434-35.

439. *LCO IV*, 668 F. Supp., at 1235.

440. See *supra* notes 275-77 and accompany text.

441. See *supra* note 261 and accompanying text.

442. See Delekta, *supra* note 290, at 1117-19, for a critical review of the inconsistencies in the *Jondreau* and *LeBlanc* decisions.

443. See text accompanying note 277.



could not regulate Indian treaty fishing.<sup>444</sup> However, the United States Court of Appeals guided future decisions by Judge Fox, indicating that *LeBlanc* correctly stated the law regarding state regulation of Indian fishing.<sup>445</sup> The United States Court of Appeals decision did not discuss *Puyallup I* or offer any explanation for this decision, but in summarily adopting *LeBlanc* it, in a circuitous way, adopted *Puyallup I*.

Professor Ralph W. Johnson criticized the *Puyallup I* decision:

No valid basis for the existence of such state power [to regulate fishing] can be found. The Constitution of the United States provides that treaties are the "supreme law of the land." Because agreements with the Indians are treaties, the Indians are not subject to state regulation unless the treaty so provides or unless Congress so legislates. The treaties with the Indians do not provide for state regulation and Congress has never authorized such regulation. Therefore, the Supreme Court should clearly hold that the states have no power to regulate Indian off-reservation fishing . . . .<sup>446</sup>

Assuming Professor Johnson is correct in that *Puyallup I* is bad law, then fishing rights jurisprudence in both Washington and Michigan has been built on a false basis.

The third generation cases dealing with allocation of the fish resource seem to fit a *Washington v. Washington State Commercial Fishing Vessel Association* mold.<sup>447</sup> In the Washington cases the treaty language "in common with" was interpreted to mean that 50% of the fish would be allocated to the Indians and 50% to the non-Indians, unless the Indians could achieve a "moderate living" with a reduced percentage.<sup>448</sup> In Wisconsin, a similar result was achieved even though the "in common with" language was missing from the applicable treaty.<sup>449</sup> In Michigan the 1985 Agreement sets out fishing grounds, manner of fishing and seasonal harvest levels.<sup>450</sup> However, the GTB are pressuring the State and the *amici* for 50% of the harvest, including the salmon harvest.<sup>451</sup>

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444. See text accompanying notes 317-20.

445. *United States v. Michigan*, 623 F.2d 448, 449-50 (6th Cir. 1980).

446. Johnson, *supra* note 58, at 208.

447. *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979).

448. *Id.* at 686-87.

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

450. 1985 Agreement *supra* note 341, at 1.

451. *Tribe Wants to Net More Salmon*, *supra* note 416, at A1; William Rastetter, *There's No Basis for the Claim of Salmon Depletion in GT Bay*, *TRAVERSE CITY RECORD EAGLE* (Traverse City, Mich.), Sept. 28, 1997, at E13 (arguing that "the current salmon fishing "controversy" in Grand Traverse Bay is an allocation issue, not a resource-protection issue).

Where court decisions regarding Indian fishing rights are so strikingly similar, it seems disingenuous for the courts to claim that they are applying canons of treaty construction to varying language in treaties to reach these results. It may be more prudent for both sides to recognize that the likelihood of a decision against the grain is small. Rather than investing large sums of money to hire anthropologists and ethnohistorians to attempt to find some slight historic fact that might persuade the court that the Indians don't have fishing rights, states and sport fishing groups may have more success if they recognize treaty fishing rights. Having engaged in the fishing rights litigation for years, both the states and the sport fishermen could hardly escape gaining some understanding or "literacy" of the Indians right to fish.

As Professor Pommersheim recently suggested, "literacy" and "cultural empathy" will open the way toward solving the problem.<sup>452</sup> Those who continue to argue that Indians should only be allowed to fish for subsistence and with equipment traditionally used, don't know the history or culture of Indians.<sup>453</sup> By exchanging lands with the Chippewas for reserved lands near their traditional fishing grounds, for the right to hunt on ceded lands with the "other usual privileges of occupancy," and for one hundred barrels of salt and 500 fish barrels annually it is clear that the United States government recognized that the Indians were fishing for more than subsistence living.<sup>454</sup> "Indian people have fished on a commercial scale for trade with other tribes since time immemorial, and we know from many written records that they engaged in trading fish on a commercial scale for both barter and cash in Michigan 300 years ago."<sup>455</sup> Bruce Catton, a Michigan historian, described the Indian way of life for the Chippewa, the most northerly of Michigan Indians, as "hunters and fishers, and inevitably wanderers who could not live in fixed villages."<sup>456</sup> They traded with the Ottawas who lived south of the them for corn and beans.<sup>457</sup> But even the Ottawas who grew crops "went en masse to fishing camps in the summer" and into the woods in the winter to hunt.<sup>458</sup> Both tribes also exchanged goods with traders from Canada.<sup>459</sup>

"Arguments that Indians should use vine nets and unpowered canoes as they did when the treaty was signed are silly. Courts have ruled that Indian fishermen always used the best available technology and have a right to do

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452. Pommersheim, Remarks, *supra* note 15.

453. Eric Sharp, DNR, *Indians Should Compromise to Avoid Fishing Battle*, DETROIT FREE PRESS, Sept. 4, 1997.

454. Treaty of 1836, *supra* note 262, at 492.

455. Sharp, *supra* note 453.

456. BRUCE CATTON, MICHIGAN: A HISTORY 37 (2d ed. 1984).

457. *Id.*

458. *Id.*

459. *Id.*

so today.<sup>460</sup> Thus, Indians are not limited to using the equipment available to fish with at the time the treaty was signed, "just as non-Indians are not so limited. Indians may employ modern boats, nets and other techniques in the exercise of treaty-reserved rights."<sup>461</sup>

Other complaints frequently advanced by sport fishermen focus on Indians taking of fish species introduced by the state after the treaties were signed.<sup>462</sup> The GTB are taking salmon planted with money from fishing licenses purchased by sport fishermen.<sup>463</sup> However, drawing a distinction between an Indian right to fish native as oppose to non-native planted fish has been rejected by the court in *United States v. Washington*.<sup>464</sup> The 1985 Agreement with Chippewa tribes in Michigan provides for the stocking of perch, lake trout, and salmon in certain areas of the Great Lakes.<sup>465</sup> Obviously the 1985 Agreement contemplated Indian fishing of planted species. In addition, the MDNR injected a coded wire tag (CWTs) to trace harvested fish. A "[p]reliminary analysis of CWTs suggests that only about ½ of the salmon caught in the GTB fishery were from a *known* stocking location."<sup>466</sup> The remainder were probably from naturally reproduced or salmon immigrating from other Great Lakes.

Additionally, sport fishermen accuse the Chippewa of the "destruction" or "decimation" of fish stocks.<sup>467</sup> However, statistical information collected by the state and reviewed by the Technical Fisheries Review Committee on 1996 harvest levels indicates that Indian fishermen took as little as 11% of the harvest, or 2401 salmon of the 21,795 harvest.<sup>468</sup> Sport fishermen, on

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460. Sharp, *supra* note 453; see *LCO III*, at 1435 (holding that the right to fish includes "use of all the methods of harvesting employed in treaty times and those developed since" and use of "modern methods of distribution and sale"); COHEN'S HANDBOOK 1982 ED., *supra* note 58, at 447 (explaining that the historical review of places and methods of fishing required by a correct application of canons of treaty interpretation is done for the purpose of determining the intent of the parties, not for the purpose of limiting the right to fish).

461. COHEN'S HANDBOOK 1982 ED., *supra* note 58, at 447 (citing *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975) and *Washington v. Washington Fishing Vessel Ass'n*, 443 U.S. 658 (1979)).

462. Zehner, *supra* note 18, at E12.

463. *Id.*

464. COHEN'S HANDBOOK 1982 ED., *supra* note 58, at 448 (citing *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974)) (explaining that "[t]he right secured by the treaties to the Plaintiff tribes is not limited as to species of fish [or] the origin of fish").

465. 1985 Agreement, *supra* note 341, at 9, 10, 22.

466. TECHNICAL FISHERIES REVIEW COMM., 1996 REPORT TO THE EXECUTIVE COUNCIL 4-5 (1996).

467. Zehner, *supra* note 18, at E12 (claiming "over-exploitation" and "decimation" of fish stocks by Indians); *The Battle over Indian Fishing Rights on the Grand Traverse Bay Stirs Up Turbulent Waters* (Heritage Broadcasting Co. of Michigan, WWTV and WWUP-TV News broadcast, Sept. 10, 1997). Jack Nowland, of Grand Traverse Area Sports Fishing Association, expressed concern over more nets in Grand Traverse Bay and the depletion of the fishery. *Id.*

468. TECHNICAL FISHERIES REVIEW COMM., *supra* note 466, at 4.

the other hand took 32%, or 6934 salmon, with fish weirs taking 57%, or 12,460 salmon.<sup>469</sup>

Finally, the sportfishermen make an equal protection claim. [They] ask that all Indians be treated and recognized as citizens, and we ask that all laws be equally administered to all citizens.

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Discrimination against its own citizens is being practiced by our federal government. Indians who don't recognize themselves as citizens of the United States are being given preferential treatment.<sup>470</sup>

This equal protection argument has been rejected by courts.<sup>471</sup> Indians derive their rights from aboriginal title, treaties, and federal law, not as sport fishermen do from the state as a privilege.<sup>472</sup> The sport fishermen claim equal rights to fish based on payment of a nominal sum for a license whereas the Indians right to fish has been acquired over 12,000 years.<sup>473</sup> "Clearly then there are no constitutional impediments to treating Indian fishermen differently than other state citizens."<sup>474</sup>

The least coherent argument advanced by those who are opposed to recognizing Indian fishing rights is "aren't these the same Indians who used to war with other tribes and the government and kill white settlers?" It is not clear if this argument is advanced because they think the Indians don't deserve "superior rights" to fish or because they think the United States won various wars against the Indians and, therefore, is in the superior position of dictating what the Indians' rights are, and these rights shouldn't include fishing non-native species with gill nets. However, if the savagery of one's ancestors is a reason for denying rights, there is no group of people including white settlers, whose rights could not be restricted.<sup>475</sup>

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469. *Id.*

470. Zehner, *supra* note 18, at E12.

471. See *United States v. Michigan*, 471 F. Supp. 192, 270-71 (W.D. Mich. 1979) (relying on *Morton v. Mancari*, 417 U.S. 535 (1974)). "If the State were correct, however, Indian fishermen would derive nothing from their treaty. Indeed, it would be as if there were no treaty at all." *Id.* at 271; see also COHEN'S HANDBOOK 1982 ED., *supra* note 58, at 469 (citing *Washington State Comm. Passenger Fishing Vessel Ass'n v. Tollefson*, 571 P.2d 1373 (1977), *vacated and remanded sub nom. Washington v. Fishing Vessel Ass'n*, 443 U.S. 658 (1979)).

472. *United States v. Michigan*, 471 F. Supp. at 270-71 (explaining that the "Supremacy Clause mandates different treatment because Indian fishermen derive their rights, not privileges, under federal law").

473. *Id.* at 271.

474. *Id.*

475. There is some indication that white settlers may have provoked the Indians to commit violent acts of savagery:

[M]any murders of priests and converts took place, sometimes by hostile Indians, who seem to have been instigated to commit the crimes by whites, and sometime

These arguments are advanced by those who are directly opposed to a long line of court decisions recognizing tribal fishing rights, or by those who are either unintentionally or deliberately "illiterate" regarding these rights. A recent example of such illiteracy was displayed in hearings held by a republican task force on hunting and fishing held in Traverse City, Michigan. Sport fishermen found legislators to be a receptive audience to their arguments for banning of gill netting.<sup>476</sup> The same time-worn arguments of only allowing subsistence fishing and limiting Indian harvesting of fish to those species taken at the time the treaty was signed were advanced by an angry audience of sport fishermen.<sup>477</sup> Instead of promoting some kind of compromise position, these legislators "sympathized with their plight" and vowed to act on their behalf.<sup>478</sup> Representative DeVuyst stated, "Any place we've been successful in creating a fishing hatchery, they [Chippewas] want to go in . . . . They probably won't be satisfied until they've fished it out."<sup>479</sup> Representative McManus reported that she had introduced resolutions recognizing the "rights of state and U.S. residents to hunt and fish."<sup>480</sup> Both DeVuyst and McManus promised to co-sign legislation tying approval of tribal gambling casinos to fishing rights.<sup>481</sup>

This hearing was disturbing for a couple of reasons. First, sports fishing groups have been involved in litigation in Michigan concerning Indian fishing for years. They have heard testimony describing the historical, cultural and religious significance of fishing to the Indians, yet they steadfastly refuse to acknowledge it. They want only the present to determine the rights, equal rights between Indians and sport fishermen, all as United States citizens. By refusing to acknowledge this history, culture, and the different origins of Indian fishing rights from their own, sport

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by the Europeans themselves. . . . That the Red Man when on the war-path is a brutal savage is a fact that cannot be gainsaid, but I have my own opinion about the amount of provocation he received. I have not been able to discover that he ever commenced hostilities without provocation, though there is no doubt that his reprisals were often visited on innocent victims. I am sorry to add that there is also no doubt his attacks were often instigated by both French and English, one against the other.

PAUL FOUNTAIN, *THE GREAT NORTH-WEST AND THE GREAT LAKE REGION OF NORTH AMERICA* 316 (1904). The author wrote of his travels and observations in Michigan and other areas of the Great Lakes region.

476. Steve Kellman, *Panel Hears Protests Over Gill Netting*, TRAVERSE CITY RECORD EAGLE (Traverse City, Mich.), Nov. 8, 1997, at A1. Approximately 60 angry sport fishermen attended a hearing on hunting and fishing rights in Traverse City. *Id.*

477. *Id.*

478. *Id.*

479. *Id.*

480. *Id.*

481. *Id.* This type of legislation is known as "No fish, no chips." *Id.*

fishermen and their legislators, who blindly give life and legitimacy to the sport fishermen's cause, perpetuate the controversy.

Secondly, by holding fishing rights hostage to gambling casinos, these legislators again fail to show any understanding of where fishing rights originate. These rights were reserved and lands were ceded in exchange for them. Taking the sport fishermen's argument one step further, the Indians are making too much money from gambling and, therefore, no longer need fishing rights. Exercising these rights means culture, religion, and sovereignty to the Indians. Because a tribe chooses to pursue economic development doesn't mean it must give up its beliefs, traditions, or culture. This trade off has never been imposed on any ethnic group of people in the United States.

It is not surprising, given the prevailing attitude concerning treaty fishing rights, that the GTB has called off negotiations.<sup>482</sup> Negotiation means compromise. If the sport fishermen are willing to compromise nothing, there is no reason to come together to negotiate and every reason for the sport fishermen to fear the GTB's every step toward further defining their sovereignty.<sup>483</sup> The GTB, like other tribes, is a sovereign that wants to "exercise its power to allow its culture to flourish."<sup>484</sup> Sport fishermen are fearful of what this means. If sport fishermen were "literate" there would be no basis for fear.<sup>485</sup> Instead, there would be a "basis for mutual collaboration."<sup>486</sup>

If sport fishermen and the State of Michigan could accept that judicial precedent has established the existence and scope of Indian rights to fish, the Indian fishing disputes could reach a new plateau beyond resorting to the rigorous process of treaty interpretation.<sup>487</sup> "[I]t is in everyone's interest to search for ways to de-emphasize litigation, and to direct time and money elsewhere in searching for durable solutions to the many, varied and complex ongoing problems."<sup>488</sup> It is time to turn from the courts "to the negotiating tables."<sup>489</sup>

While Michigan does have an agreement in place and a dispute resolution mechanism, these are court ordered, and the court has considerable ongoing

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482. See *Our Opinion*, *supra* note 362, at E11.

483. Zehner, *supra* note 18, at E12 (stating adamantly that "[s]port fishermen believe there should be no negotiations in this matter").

484. Pommersheim, Remarks, *supra* note 15. Professor Pommersheim's remarks applied to tribes generally. The Professor's remarks have influenced how this author views the current situation facing the GTB.

485. *Id.*

486. *Id.*

487. Wilkinson, *supra* note 167, at 403.

488. *Id.*

489. *Id.*

involvement in deciding disputes.<sup>490</sup> Some states have entered cooperative agreements that are not court ordered.<sup>491</sup> For example, the State of Minnesota and the Grand Portage Band of Chippewa negotiated an agreement that provided for recognition of tribal fishing rights, limitations on harvest levels, and tribal regulation of netting, state stocking of fish, and state training of tribal conservation officers.<sup>492</sup> Two co-management agreements in the Pacific Northwest, the Columbia River Intertribal Fish Commission (CRITFC) and the Northwest Indian Fisheries Commission (NWIFC), have been lauded as "model[s] for the nation."<sup>493</sup> Agreements that are not court ordered truly reflect that each party recognizes the others sovereignty.

Several obstacles may stand in the way of a non-court-ordered year 2000 agreement or any year 2000 agreement at all. First, Indians can agree to restrictions that go beyond what is needed for the conservation of the species. However, the state and sports fishing groups need to be cognizant that if the agreement is terminated or breached, the Indians are no longer obligated to be regulated for reasons other than "conservation" and "public safety." The GTB argues that the current restrictions in the 1985 Agreement go beyond "conservation and safety" restrictions. The lack of willingness to accommodate the GTB and to make modest fishing opportunities available to them has jeopardized GTB's inclinations to negotiate.<sup>494</sup> As GTB already threatened, any short term victory gained by the State and its constituent sport fishermen in the current controversies is "not conducive to the [M]DNR Director's announced goal of negotiating a new agreement."<sup>495</sup>

If the GTB does agree to negotiate, its resolve has been toughened and there probably won't be an agreement unless it contains at a minimum a 50% allocation of all fish harvest, more gill net opportunities, more grounds open to Indian fishing, more self-regulation, and a closer nexus between any restrictions in the agreement to conservation or public safety concerns.<sup>496</sup>

Lack of continuity in State personnel dealing with Indian issues, also causes concerns to GTB.<sup>497</sup> After reaching an understanding with State negotiators and the head of the state agency, the MDNR personnel changed and new people with different political motivations come on board, who were unfamiliar with the history of the negotiations and the import of the

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490. See *supra* notes 341-60 and accompanying text notes.

491. GETCHES ET AL., *supra* note 75, at 859.

492. *Id.*

493. Wilkinson, *supra* note 167, at 406.

494. See *Our Opinion*, *supra* note 362, at E11.

495. *Id.*

496. See *id.*

497. See *id.*

terms of the 1985 Agreement.<sup>498</sup> This lack of continuity causes the GTB to distrust the state and its commitment to the agreement.<sup>499</sup>

The tribes want to define the issues to be discussed for the year 2000 agreement. One of these issues, inland hunting and fishing, is very controversial.<sup>500</sup> The MDNR director has indicated that "he's not anxious to deal with inland hunting and fishing issues, even though the tribes say their members do not need state licenses.<sup>501</sup> If events force the issue, it will likely have to be resolved in a court and could even go to the U.S. Supreme Court."<sup>502</sup> The director stated that the State's position and the position of the public it represents is that the Indian's have no treaty reserved right to inland hunting and fishing.<sup>503</sup> Conversely, the Indians insist that these rights do exist and fully expect that the issue will go to court as "[t]hey [State officials] haven't seemed willing to concede anything unless the court tells them to."<sup>504</sup> The GTB in 1996 developed its own regulations and issued inland off-reservation fishing and hunting licenses to its members.<sup>505</sup> The State responded by threatening to arrest tribal members hunting and fishing off-reservation without state licenses.<sup>506</sup> One year later the Little River Band of Ottawa Indians in Manistee (LRB) and the Little Traverse Bay Band of Ottawa Indians in Harbor Springs (LTB) threatened to issue their own hunting and fishing permits for the Great Lakes and inland areas.<sup>507</sup>

The MDNR director, feeling forced to deal with the issue and hoping to resolve it in time to give guidance to the year 2000 negotiations, wrote a letter to the tribes "suggesting that it was time for the tribes and the state to seek a court ruling on the inland hunting and fishing issue."<sup>508</sup>

The State and public are concerned that this push to expand treaty rights may expand beyond inland fishing and hunting to exploitation of other natural resources, such as off-reservation logging. *LCO III* and *LCO IV*

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498. *See id.*

499. *See id.*

500. Diane Conners, *Cool: New Fishing Agreement Coming*, TRAVERSE CITY RECORD EAGLE (Traverse City, Mich.), July 15, 1997, at A1.

501. *Id.*

502. *Id.*

503. *Id.*

504. Diane Conners, *Manistee Tribe Stirs Up More Fishing Debates*, TRAVERSE CITY RECORD EAGLE (Traverse City, Mich.), Aug. 22, 1997, at A1 [hereinafter *Tribe Stirs Up More Fishing Debate*].

505. Diane Conners, *Tribe Challenges State with Issuance of Own Hunting, Fishing Licenses*, TRAVERSE CITY RECORD EAGLE (Traverse City, Mich.), Oct. 20, 1996, at A1 [hereinafter *Tribe Challenges State*].

506. *Id.*; Diane Conners, *DNR: Tribal Hunters Without State License Face Arrest*, TRAVERSE CITY RECORD EAGLE (Traverse City, Mich.), Nov. 11, 1996, at A1.

507. *Tribe Stirs Up More Fishing Debate*, *supra* note 504, at A1.

508. *Id.*



recognized Indian inland off-reservation usufructuary rights to take and gather fish, wildlife, and vegetation and the tribal right to self regulate.<sup>509</sup> The state could only regulate for conservation and public safety.<sup>510</sup> The Indians however, had not reserved the right to log, but had reserved the right to gather forest products such as firewood, tree bark, and maple sap.<sup>511</sup> It is unlikely that a court would hold that the Ottawas and Chippewas in Michigan had not reserved these inland rights as it is documented that they historically dispersed inland in the winter to hunt and fish.<sup>512</sup> The right to fish until the land is required for "settlement" language in the Treaty of 1836 should not be a deterrent to Indian inland fishing rights. There is considerable unsettled land in Michigan, and the courts have shown more willingness to rely on other court decisions granting such rights then on interpreting this language to the prejudice of the Indians.

The LRB and LTB add a new dimension to the controversy, in that they are two tribes in Michigan not federally recognized until 1994.<sup>513</sup> Contrary to the State's position, LTB asserts that it is not subject to the 1985 Agreement as it was not a signatory to that agreement.<sup>514</sup> What this means for year 2000 is that instead of seven parties who must agree there will be nine parties (State of Michigan, United States, five tribes, and two litigating *amici*). This tendency to lump all the tribes together may make the process so unwieldy that no agreement would be forthcoming. Forcing tribes to enter into agreements with provisions not affecting them and requiring tribes to compromise for the sake of agreement of all parties on provisions specifically affecting them may only be setting the stage for future controversy from the onset of the agreement. On the other hand, tribes may prefer to require the State to negotiate with them in bulk as they will be more of a force to reckon with.

Finally, allowing the litigating *amici*, sport fishing groups, a role in the year 2000 negotiating process presents another obstacle to reaching any agreement.<sup>515</sup> This hybrid, somewhere between a party and *amici*, adds to the complexity to negotiations. These sport fishing groups were originally denied intervenor status by the United States district court, are technically

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509. *LCO III*, 653 F. Supp. 1420, 1435 (W.D. Wis. 1987); *LCO IV*, 668 F. Supp. 1233, 1241 (W.D. Wis. 1987).

510. *LCO IV*, 668 F. Supp. at 1239.

511. *LCO VIII*, 775 F. Supp. 321, 322 (W.D. Wis. 1991).

512. *United States v. Michigan*, 471 F. Supp. 192, 217, 222 (W.D. Mich. 1979); CATTON, *supra* note 456, at 37.

513. *LCO IV*, 668 F. Supp. at 1239.

514. *Id.*

515. 1985 Agreement *supra* note 341, at 3 (explaining that sport fishing groups sought to intervene in a 1983 motion by the tribes requesting allocation and the district court allowed them to participate instead as litigating *amici curiae*).

already represented by the State, and should be relegated solely to advising the court as *amici*.<sup>516</sup> They should not, as they have now, some right of approval over any year 2000 agreement. By granting them special status it makes it more difficult for the State to make decisions that would be in the best interest of all the citizens of the state.

In order to properly assess Indian fishing rights issues, "people must engage their minds in a fixed way on the experience of the Chippewa . . . [A]n 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."<sup>517</sup> To gain this understanding both the history of the Indians and case law regarding Indian fishing rights must be studied. The 1985 Agreement between the tribes and the State of Michigan established an Information and Education Committee for the purpose of educating the public about the agreement and promoting the understanding of treaty rights and responsibilities.<sup>518</sup> This provision needs to be resorted to in the fullest extent possible, as it is clear that in Northern Michigan there is considerable "illiteracy" regarding Indian fishing rights. "Illiteracy" only fuels the controversy.<sup>519</sup> A solution will only be forthcoming if "literate" "Indian and non-Indian people . . . create it together."<sup>520</sup>

### VIII. Conclusion

"Tribal nations are currently in a period of intense cultural and spiritual rebirth."<sup>521</sup> For this reason tribal fishing rights are very important to Indians. In order to understand the current controversy in Michigan over these rights non-Indians must begin with a basic understanding of the source of those rights: treaties, aboriginal title, and agreements. Numerous court decisions have interpreted treaty language and relied on prior case law to determine that the right to engage in subsistence and commercial fishing exist both on and off the reservation. When the resource becomes scarce, courts have allocated the harvest to approximately 50% to Indians, 50% to non-Indians or to an amount that will provide the Indians with a moderate living. Tribal right to regulate treaty fishing has been acknowledged, limited

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516. *United States v. Michigan*, 471 F. Supp. at 204.

517. *Wilkinson*, *supra* note 167, at 379-80.

518. 1985 Agreement *supra* note 341, at 16; *see also* Nelson, *supra* note 174, at 415 (describing the State of Wisconsin's regional committees established to promote cultural understanding); TO FISH IN COMMON, *supra* note 107, reprinted in 4 HEARING ON FISHING RIGHTS, *supra* note 107, at 705 (describing what can be done to become educated about Indian fishing rights).

519. *Our Opinion*, *supra* note 362, at E11.

520. TO FISH IN COMMON, *supra* note 107, reprinted in 4 HEARING ON FISHING RIGHTS, *supra* note 107, at 705.

521. FRANK POMMERSHEIM, BRAID OF FEATHERS 194 (1995).

only by the states' right to regulate for conservation of the resource or public safety.

Respecting a tribe's right to regulate fishing is important to the tribe in that it acknowledges the tribe as a sovereign. Most important in this era of self-determination, "Indians want clear and unequivocal acknowledgment of the right of self-government."<sup>522</sup> When sport fishermen, jealous of the Indians' "superior fishing rights," denigrate the treaties, they would diminish Indian rights, and diminish the way of Indian people. Sport fishermen are a very organized, vocal, and active group. Tirelessly, they continue to bring the same time worn arguments in an attempt to eliminate treaty fishing rights. Despite the fact that all of their arguments have been decided by a long line of court cases, they still manage to incite others and gain sympathy from legislators.<sup>523</sup>

Rather than supporting the sport fishermen's cause, the State and legislators should engage in a campaign of education. Literate citizens would support government-to-government agreements. There will be less need for a "judicial fish master" and each party will have more control if the agreement can be reached without court intervention.

As the debate in Michigan intensifies, the more difficult it may be to negotiate a year 2000 agreement. Yet such an agreement is necessary to still the violence and social unrest.<sup>524</sup>

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522. KICKINGBIRD, *supra* note 27, at 46.

523. Rich Wertz, *Leelanau Officials Probe Shooting Incidents*, TRAVERSE CITY RECORD EAGLE (Traverse City, Mich.), Jan. 23, 1996, at A1. A recent example of violence occurred in 1996 when non-Indians shot at an Indian fisherman over his use of the municipal marina. *Id.* It required a court ruling to establish that tribal fishermen have the right to use the marina. *Id.*

524. Response of Michigan United Conservation Clubs, Inc., Litigating Amicus, in Opposition to Grand Traverse Band's Motion Requesting Modification of the 1985 Consent Order, Including Its Information Filing Under the Court's Dispute Resolution Mechanism at 5, *United States v. Michigan*, No. 2:73 CV-26 (W.D. Mich. filed Mar. 12, 1997). This patronizing response to GTB motion blames the tribe for advancing its own agenda to expand salmon fishing, extend fishing grounds inland, regulate tribal fishing, and to expand gill netting. *Id.* at 6. It accuses the tribe of being "strident and defiant" and of jeopardizing the "spirit of cooperation" behind the 1985 agreement. *Id.* at 5. Finally it accuses GTB of risking violence and social unrest by pursuing its motion. *Id.* This response seems to imply that GTB can only blame itself if anything bad happens from pursuing rights granted to tribal members by the treaties.