

**INFORMATION CONCERNING THE LAKE
SUPERIOR CHIPPEWA,
AND THEIR TREATIES WITH THE UNITED
STATES, AND THE VOIGT CASE**

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**Information Concerning the Lake Superior Chippewa,
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BACKGROUND ISSUES

Accusations of Racism?

In the past thirty years it has become increasingly common for some Americans to accuse others of a deadly sin called "racism." The accusers generally consist of well-educated urban elites--academics, news writers, church leaders, government officials, and the like. Such aspersions remain widespread despite the fact of strong evidence that, since passage of Civil Rights legislation, overt and covert racial prejudice and discrimination have declined abruptly in the general American population. The facts clearly establish that only small groups of Americans continue to subscribe to anything that could be properly called a "racist" ideology, much less trying to impose such beliefs on minorities in a discriminatory manner. These pockets of residual racism are found and expressed mainly in the activities of such organizations as Skinheads, Ku Klux Klan, American Nazis, some Survivalists, and White Citizens Councils. Clearly, the vast majority of Americans abhors and flatly rejects the ideas and behaviors of such groups.

So as to evade this unmistakable evidence, some academics prone to discover "racism in the others have contrived a social disease they call "symbolic racism." On close examination, what they mean by "symbolic racism" consists of any values, attitudes, or political stances that differ from their own. Americans who do not favor forced bussing, or minority hiring quotas, or any entitlements delivered on the basis of categorical racial identity, for example, are accused of being "symbolic racists." Those who issue such condemnations do not bother to consider alternatives, the possibility that these attitudes might express something very different, such as a strong commitment to standard American values like equality of opportunity and responsibility.¹

For this reason, citizens expressing concerns about or opposition to Federal and State grants of special rights, privileges, and services to "Indians" as a social category are commonly accused of "racism." This is especially true when groups of such citizens band together to express their grievances, to protest, and to lobby their legislatures and the congress.

Such accusations of "racism" are even stronger and more frequent when, say, a reporter for a metropolitan daily or the representative of a church group sees local non-Indian citizens displaying signs containing slogans, or hears them expressing words expressing strongly negative sentiments. There is ordinarily a biased, double standard of interpretation used for such displays of protest. Non-Indians, exhibiting bumper stickers reading, "Spear an Indian, Not a Muskie," for example, are accused of "racism."² On the other hand, Indians and other citizens displaying similar announcements reading, "Custer Wore an Arrow Shirt" are not so accused, though the meaning in the two messages is the same and is equally hostile.

Unmistakably, special hunting, fishing, and gathering rights granted to

¹ Byron M. Roth, 1989, "Symbolic Racism" the making of a Scholarly Myth." Academic Questions

² 53-65: and, 1990, "Social Psychology's Racism." The Public Interest 98:26-36

those citizens called Indians by federal policy makers and the federal courts have, more than any other award of categorical privilege, polarized opinions and attitudes among different groups of citizens. So profoundly split are Americans on such matters that reasonable discussion about the underlying issues has become extraordinarily difficult. On the side of those opposed to special "treaty rights," so-called, this opposition has often erupted in harsh words, sometimes in pushing and shoving, the display of strongly worded banners and signs, anonymous threats of physical violence, and similar expressions of frustration and dissatisfaction. Less well publicized is the fact that Indians and their supporters frequently exhibit precisely the same behaviors, attitudes, and tactics. Not obvious to most Americans are the equally strong, irrational, emotionalized, negative reactions of those who vehemently support special Indian rights, among these the accusation of racism. Such accusations are no more than that slander most favored by American elite politically aligned with Indians and supporting their allies' interests. This particular defamation is most used because the accusers understand how sensitive Americans have become about, and how opposed they are to, racial prejudice and discrimination. Accusations of racism are hurled simply because they quickly disarm opponents of special treaty rights, and because they effectively deny such adversaries the support of other groups and their government. We can put this conclusion to a test by considering similar modern examples of political polarization and public protest to see what is wrong with such casual defamations of character -- the accusations of "racism."

Encounters between Americans favoring "Pro-life" and those appealing to "Pro-Choice" are similarly polarized, confrontational, hostile, and grating. But no one would accuse either side of "racism." In the arena of clashes over Indian 'treaty rights,' then, accusations of "racism" make as much sense as the harsh words some protesters throw about at boat landings during the spring Walleye spearing season. Both consist of angry, incoherent slurs. If calling the residents of northern Wisconsin "racist" is no more than a nasty smear, what then is "racism" as scientists understand it?

The Nature of Racism

Through most of the twentieth-century social scientists have extensively studied and carefully defined a phenomenon they call racism. Racism in the sense used by serious scholars has several specific, defining features, as follows:

1. It is basically a political doctrine, one that can be expressed in various ways.
2. The doctrine is based on faulty, non-scientific biological ideas.
3. The central ersatz biological idea is that the whole of the world's human population is divided neatly into a few distinct, separate sub-species, called "races." Further, members of these races can easily be identified, usually by skin-color, called White, Black, Red, Yellow, Brown.
4. These "races" are ranked from top to bottom in terms of their intelligence, their potential for learning, the complexity of their culture, their abilities, and their general worth. These characteristics are inherent and unchangeable: they are "inherited" by every child in the child's "blood."
5. Through the nineteenth-century and well into the twentieth, the 'races' were ranked, from top to bottom, with the White race clearly superior, followed by the Red (American Indian), Yellow, and Brown, and with the Black race coming a distant last.
6. Although an occasional member of a race might rise above or fall below the average for his race, Whites, in general, were superior

to all others, and Blacks unmistakably inferior, the other races arranged somewhere in between.

7. When members of different races interbred, this false biological doctrine held, the children of the mixed-race couple automatically inherited the features, potential, and status of the racially inferior parent. Thus the child of a White man or woman by an Indian, for instance, was inevitably and unavoidably an Indian, and this inherited racial status continued across many generations of interbreeding. For this reason, today, there are many tens of thousands of Americans who are officially recognized as "Indians" of 1/256th and even 1/512th or less "blood quantum."

8. These convictions about inherent, biologically caused characteristics of the races were expressed and exploited by the "superior" race in overt and covert prejudice -- thoughts and ideas about the merits and special rights of their own race and the disabilities and liabilities of lesser races. They were also expressed by patterns of discrimination -- personal behavior toward other races, official policies, obligatory living arrangements, unequal distribution of rights and resources, legal impediments, and in other ways.

9. Through the nineteenth-century, and until even today, such racial doctrines were the ideological foundation for colonialism, imperialism, much of the most extreme nationalism (as in Nazi Germany), and the internal arrangements of many societies. It was in these senses that racism was and is a political doctrine, one which justifies open prejudice and discrimination. Racism, in this scientific sense, was fundamental to the enslavement of millions of Africans in the Americas, to later Jim Crow official discrimination in the United States, and--into the present--to the South African system of Apartheid.

10. Social scientists also use the phrase "institutional racism" when writing about the organized social arrangements used to carry racial doctrines, prejudices, and stereotypes into effect. Institutional racism is usually expressed in special provisions of law. As ideology expressed institutionally and in law, racism is used to justify and maintain relationships between different categories of people in a society, people who are defined as constitutionally different from others. These relationships are exploitative and are fundamentally unequal.

If these features of racism, as seen by scientists, are understood, then it should be obvious that they do not in any fashion apply to the concerns, attitudes, and protests of those citizens and groups who stand in opposition to "treaty rights" or other categorical aids, rights, and privileges awarded to Indians by federal policies or by the courts. The central, most frequently expressed complaints of such dissidents concern a system of inequality that has been imposed on them by their government, a system of inequality which is in fact based on racial characteristics, those of the Indian.

Ordinarily, this system of inequality is expressed as a conflict between Indians and Whites; but this is entirely misleading. The controversy really involves a system imposed on two categories of American citizens, one of which includes only some Indians. Generally, only those people classified as Indians who are also enrolled in federally recognized organizations, called "tribes," are eligible for the various benefits made available. The other category of citizens includes those Indians who are not affiliated with recognized tribes, together with all other citizens, whatever their ancestry, ethnicity, race, or nationality.

The Indian in America: Institutional Racism in Practice

There is a great political curiosity in modern America. At the same time that the federal government, and most citizens, presses South Africa to do away with its apartheid policy, which is a system of institutional racism based on tribal "homelands," American policy since 1934 has favored the perpetuation of a similar system for Indians in the United States. Pressure to further strengthen, to perpetuate, and to enlarge this system of political separatism has only increased in the past twenty-five years.

The American system of segregated Indian "homelands"--called reservations--is by no means identical to that of South Africa. The most important differences are that all Indians in the United States have been citizens since 1924, and that the reservation system is justified as benefiting Indians, supposedly by helping them to preserve "traditional" cultures. Similarly, although Indians are strongly encouraged to live and make their futures within these racial homelands, in the United States they are not required by law to do so. However, Indians-by-definition who achieve high levels of education and professional training who do not "return" to their reservations to make the careers in "service" to "their people" are looked on as disloyal, as "traitors to their race."

The implications of these differences give the American system of Indian segregation its special flavor and characteristics. Indians enrolled in tribal organizations (many thousands are not), for instance, in effect have and enjoy the benefits of dual citizenship: they are "citizens plus." At one and the same time they are represented by a unit of government called a "tribe," and they are also citizens of the United States and of the state and local governments where they reside. These so-called "tribes" are federally created, sponsored, chartered, protected, and funded corporate organizations. The federally recognized "tribe" is both a body politic and a corporate business entity.

These political facts-of-life pose special problems for states and local units of government. Over the past fifteen years, states, counties, and municipalities have been pressed by the federal government and the federal courts to deal with officially recognized Indian tribes as equals, on a "government-to-government" basis. In this respect, state and local officials, representing all citizens (including tribal Indians), must do business with tribal officials, who represent only their tribe's members. This represents a radical departure from older American Indian policy, which make the authority for and responsibility of dealings with Indian tribe the exclusive business of the federal government. But state and local officials must also relate to and provide full services to all Indians, whether members of official tribes or not, as ordinary citizens.

From the perspective of tribal members, as "citizens plus," they have two separate sources of governmental support, protection, and services--their tribe, and the state where they reside. This arrangement of separate political jurisdictions, of an imperium in imperio (a state within the state), automatically creates innumerable sources of friction and conflict.

This is so because Indian tribes--these special local units of government--have special rights, powers, and exemptions enjoyed by none of the other 80,000 odd units of local government in the American federal system. Under federal law, for instance, they have a status like that of the fifty states for purposes of environmental protection legislation. Similarly, Indian tribal governments--in all their economic and business dealings --are tax exempt as regards both state and federal levies.

Moreover, individual Indians living and working within the confines of a tribe's jurisdiction, on a reservation, are exempt from federal and state taxes: income taxes, real estate taxes, sales taxes, etc. This is not true of people living on reservations who are not members of the tribe, who have the same tax liabilities as all other citizens. Indeed, such citizens, individually

or corporate, may be subject to additional tax burdens imposed by the tribes, although they have no voice or vote in the tribal government. Such citizens living within a tribe's jurisdiction may also be subject to regulation and penalties in civil matters, also without the franchise or representation within the tribal government. Similarly, Indians enrolled as members of a tribe and living on their reservation are subject to the laws and regulations of the tribe, from which there is little or no appeal, a situation that causes conflicts with their rights as American citizens.

On the other hand, the states and local governments are obligated to treat, and do treat tribal Indians as full citizens, eligible for whatever health, education, police protection, welfare, and other services that are made available to Americans generally. Because of their special legal status, Indian tribes are exempt from much federal and state legislation applied to other units of government. They are not obligated to comply with open meetings laws, for instance, and are exempt from freedom-of-information legislation, and so they ordinarily conduct their deliberations and make their decisions in secret. Likewise, an Indian tribe may actively discriminate on the basis of race in hiring and firing employees, while at the same time their members, as citizens who are part of a "protected category," are eligible for special employment rights under affirmative action policies.

This system, favoring segregated political units tied to tribal homelands, makes tribal Indians into-political double-dippers. As American citizens, outside the confines of a tribal homeland and often even when living on these reservations themselves, they are entitled to all the protections and entitlements provided by federal and state law. As members (i.e., citizens) of a recognized tribe, on the other hand, they are also entitled to whatever protections and entitlements that are made available by their tribe, and whatever special liabilities and responsibilities the tribal government imposes on them.

Unmistakably, this federally imposed system of politically and geographically segregated mini-states within the states is based on a pattern of institutional racism. This is so because the definition of what constitutes a recognized tribal Indian is based on ideas and assumptions of a racial nature, usually expressed in terms of a minimum "blood-quantum" criteria for membership. These racial assumptions are used to justify and perpetuate this system.¹

The racial assumptions on which this system of segregation is founded involved numerous prejudices, stereotypes, and open, active discrimination as regards Indians and non-Indians. Although the federal government and the courts go to great lengths to disguise the true nature of the system while sanctioning and supporting its operations legally and financially, the blatant racist character of the whole apparatus is obvious. Hence, despite the accusations about citizens who protest the effects of this system of Indian apartheid, it is on those who actively promote and support this inexorable pattern of discrimination, segregation, and stereotypes on whom the label of racist must fall.

These conclusions can be easily tested. The position of Indians in the American system is supported in part by a set of assumptions about their inherited, congenital nature. For example, it is often claimed that Indians are so inadequate that they simply cannot survive in modern America without the sheltering protection of tribal and the federal governments. The ancestors of Indians, it is further assumed, were so primitive--so inherently unintelligent, incapable, and defenseless--that they could not understand what was asked or required of them by Americans. Such assumptions, which are explicit racial stereotypes are used to justify the special safety net built around modern tribes.

¹ See James A. Clifton, 1989, Being and Becoming an Indian, Belmont CA, Wadsworth Publishing Co., pp. 1-37.

If such claims were made about African Americans or Spanish Americans, there would be immediate, widespread protests and heads would roll. Yet such racial stereotypes about Indians are not only tolerated and defended, they are the very foundation on which a manifest pattern of institutional racism is formed.¹

What is an Indian Tribe or Nation?

In everyday English the word "tribe" has several meanings, such as "a group of people having a common character, culture, identity, and history." This meaning is almost identical to that of "ethnic group." The emphasis in this meaning is on the group of people, that is, a distinctive population or part of a larger population.

In social science fields such as anthropology, the word "tribe" has several quite different technical meanings; but there is little agreement on these. Many anthropologists, for example, use "tribe" to mean one type of society, different from other kinds of societies, smaller ones such as bands, and larger and more politically centralized ones such as chiefdoms. In this technical definition, prehistoric native North American societies were of several types: bands, tribes, and chiefdoms, differing from one another in size, complexity, and political arrangements.

In recent years, social scientists have come to recognize that many societies now casually called "tribes" in North America, like those of Africa, were in fact created by colonial powers and new nations, in an effort to administer and impose order on many small, previously independent communities. The "reality" of such "tribes," thus, developed out of the efforts to adjust to changed political and economic circumstances. In America there are many examples of this colonial and early national era development, where previously distinct and separate small groups and even scattered people with no organization or territory at all, organized as "tribes" in order to deal with American authorities. The creation of such "new tribes" continues even today, in what is called the "status clarification" policy of the Bureau of Indian Affairs. Examples of these recently created "tribes" are the Lumbee of North Carolina and the Sault Ste Marie Chippewa. Older, historical examples include the Seminole of Florida and the Navajo.

From the perspective of Indians themselves, people living on a reservation, the word "tribe" is commonly used to mean that reservation's government. That is, reservation Indians usually think of the "tribe" in the same way that other Americans speak of "the White House" or "Congress," meaning "the government."

In federal policy, and under federal law, the words "Indian tribe" have distinct and different, often fluctuating meanings, incorporating some of the above elements in a frequently confused fashion. One such standard definition has four key ingredients: (1) a group of Indians of the same race, (2) united in one community, (3) under one government, and (4) inhabiting a particular territory.² Basically, this tortured effort to create a legal definition for "tribe" reflects what was just said about the colonial or invented origins of the tribe. Tribes defined in this way are creatures or dependencies of the federal government. This definition consists of what is called a legal fiction, created by the Supreme Court in an effort to make sense out of a too

¹ James A. Clifton, ed., 1990 The Invented Indian: Cultural Fictions and Federal Policies. New Brunswick NY: Transaction Publishers, cha. 1-2.

² Montoya V. Unites States, 180 U.S. 261, 266 (1901). See Also, Allen van Gestel, 1990. "When Fictions Take Hostages." In, Clifton 1990, The Invented Indian, ch. 15.

complex real situation so that judicial decisions could be rendered, about "tribal" rights, for instance. However, what should be emphasized is the blatant racist element in this definition, a racist definition enshrined in federal law.

This discussion should help make sense out of too confused uses of the word tribe. All too often government officials, scholars writing about Indians, the media, and Indians themselves will use this word in several different, confusing ways, sometimes in the same passage. Keeping these separate, different meanings clearly in mind is essential. Take the two definitions of tribe as a "group of people" and that as a federally recognized "government," for instance. The modern responsibilities a state has toward a "tribe" on the one hand, refers to a group of Indian citizens--a population which happens to live within the confines of the state. On the other hand, federal pressure for states to deal with "tribes" politically, as equals, refers to a special unit of government.

Similarly, it was with the tribe as a "group of people" that the United States negotiated treaties until 1871, when this practice was ended. Small scattered groups like the Chippewa of the Great Lakes area then had no overall tribal, that is to say, governmental, organization whatever. Indeed, even on the level of local Chippewa communities there was not much "government" of any kind. In historical fact, representatives of the United States government negotiated these agreements with men representing numerous Chippewa kinship groups--extended families and clans. These Chippewa family leaders during the treaty era negotiated on behalf of their kinfolk. The situation today is entirely different. Now officially organized and federally chartered Chippewa governments, "tribes" of modern vintage and design, bring suits in federal courts, demand, and negotiate treaty rights with local, state, and the federal governments. No longer do their leaders represent only kinfolk. Instead, they represent a constituency made up of widely scattered members of these federally sponsored corporations, a great many of whom would not have been accepted as legitimate Chippewa by the men who in the nineteenth-century negotiated the treaties in the first place.

The word "nation" has an equally complicated array of different meanings. In modern times, increasingly, Indian organizations prefer to style themselves "nations," implying that they are sovereignties equivalent in status to societies like Switzerland or Nigeria. More than anything this ostentatious trend reflects an effort to claim the status of modern nation-states, which these small organizations, as political dependencies of the United States, certainly are not.

Through the seventeenth and eighteenth centuries Europeans and Americans often called some local groups of Indians "nations"; but they also used such words as tribe, band, community, or even "party" (i.e., faction) to identify them. The French, for instance, wrote about a Nation Feu (the Fire nation) in the Great Lakes area, although no such people ever existed. Similarly, speaking of the populations the first French traders and missionaries actually met, they would often call them the Tobacco nation, or the Beaver nation, or the Rapids nation. As it turns out, sometimes these small, named groups identified as nations were local bands or tribes in the technical anthropological sense, but often they were simply a few families encountered briefly, and sometimes they were a community that was no more than one part of a larger society.

In that early historical period, "nation" did not have the meaning it does today--a society inhabiting a distinct territory with a sovereign, centralized government (properly, a nation-state). Then the meaning of the word "nation" was approximately that of what today we would call an ethnic group, say the Jews in the United States, or a community, or even a race, as with African Americans. It was in one of these or related senses that Indian groups were sometimes called "nations" by the French, British, and Spanish during the colonial era, not in the sense of sovereign nation-states, modern political rhetoric notwithstanding.

This was recognized in the most important early United States Supreme Court decisions about the status of Indian societies in the United States. Then, in 1830 and 1831, they were deemed "dependent domestic nations."¹ In these old decisions Chief Justice John Marshall clearly specified the legal status of Indian societies then recognized by the United States, those still residing on lands to which they held "aboriginal title." Under American law, "aboriginal title" was the right of a group of Indians to occupy and use the resources of a particular tract of land. These populations, as Chief Justice Marshall defined their legal status, were obviously culturally distinctive people--a "nation" in the older sense of the word. But they were not sovereign nation-states in the modern sense, and Marshall's decisions were explicit about this: Indian societies within the boundaries of the United States were political dependencies thereof, subject to the plenary power of the United States Congress. They were subordinate, not sovereign peoples.

What is an Indian Treaty

No word in Indian affairs carries more emotional freight and causes more confusion than "treaty." Modern Indian leaders in the strongest, incontrovertible terms regularly proclaim that all the special rights today enjoyed by Indians, and all the categorical aids delivered by the federal government to them, are based on explicit stipulations agreed to in treaties. They refer; supposedly, to the 374 negotiations set down in the formal documents called Indian treaties that were ratified by Congress between 1778 and 1868. Because Indian privileges and rights are all believed to stem from and depend on formal treaties, no one word causes greater fear among Indians than "abrogate." Even the least suggestion of a question about any special Indian privilege or program causes Indian leaders to raise the frightening specter of treaty abrogation (i.e., unilateral cancellation), and crowds of demonstrators--including Indians and their many supporters--will immediately assemble to protest this immoral interference in supposedly ancient, allegedly sacred rights. Indians are not alone in this misconception about treaties and abrogation. Their own self-interested misinterpretation is shared by many Americans: ordinary citizens, church groups, the media, elected representatives, and academics. This is especially true of those who serve the Indian cause actively in lobbying activities.

To "abrogate" means to abolish an agreement by authoritative action, to cancel entirely, to annul, or to nullify. For a good many of the treaties negotiated by the United States with Indians, "abrogation" today can have no meaning whatever because such agreements were superseded long ago by later treaties. One of the many such examples is that of the Menominee.

In 1848, the Menominee signed a treaty in which they sold to the United States all of their rights to land in Wisconsin and agreed to move to a new reservation in Minnesota.² However, in 1854 they negotiated another which rescinded this agreement and awarded them a reservation in Wisconsin.³ Then, more than a century later, exercising the agreement specified in Article 3.1 of their last, 1856, treaty, the United States "terminated" the existence of the Menominee tribe and its reservation.⁴ During the years when they were

¹ See Van Gestel, 1990.

² Treaty with the Menominee, October 18, 1848, 9 stats., 952; Kapper, Indian Treaties, 572-74.

³ Treaty with the Menominee, May 12, 1854, 10 stats., 1064; Kappler, Indian Treaties, 626-27.

⁴ Treaty with the Menominee, February 11, 1856, 11 stats., 679; Kappler, Indian Treaties, 755-56.

"terminated," the Supreme Court held that the Menominee had retained their rights to hunt and fish inside the limits of their 1854 reservation. Subsequently, by Congressional action, the Menominee were "restored" to recognized tribal status on most of their 1854 reservation. Numerous other Indian groups, similarly, experienced changes in their situation brought through a series of treaties, each superseding the earlier ones, as well as by separate congressional acts. Yet, today, Menominee leaders regularly make much of their "treaty rights," and of fears of "abrogation."

The rights and privileges supposedly guaranteed by treaties include the whole range of welfare programs, social services, political status and dealings, economic development programs, and segregated status on tribal "homelands." Instead of being specified in treaties, most of these special rights derive, in fact, from post-treaty era legislation, federal policy initiatives, and court decisions. The Wisconsin Chippewa, for instance, are convinced that federal and state support of housing, education, health and other services are guaranteed them by their treaties. This mistaken belief is not only shared among the Chippewa and their supporters, it is featured in Indian produced teaching units used to indoctrinate children about Indians in school districts throughout the state.¹ In this manner, the misconceptions about treaty rights are being transmitted to a new generation. The treaties with the Lake Superior Chippewa in fact make no such guarantees about perpetual support, funding, and services.

Aside from Indian groups whose earlier compacts were changed by later ones, a great many officially recognized Indian groups, even those with reservations or (as in Alaska) their equivalents, can have no treaty rights whatever, for the simple reason that they never entered into such agreements with the United States. Such Indian groups include nearly all of Eskimo and Indians of Alaska, the Pima, Papago, and several groups of Nevada Paiutes, the Rio Grande Pueblo communities, some of the California groups, and most of the allegedly "Indian" communities in the thirteen original states, including the largest of these, the Lumbee of North Carolina whose identity as an Indian society was fabricated only in the past century.²

Attorneys representing Indian clients have been the most fertile and imaginative in discovering or inventing "treaty rights" where none were known earlier. Such ingenious fictions, especially in the past thirty years, have often but not always been persuasive when argued before well-intentioned federal judges, particularly those disposed toward the philosophy called judicial activism. Such attorneys argue, for example, that Indian treaties were like constitutionally sanctioned "statehood acts," in effect making Indian tribes and their reservations new states, with all the special rights thereof. Moreover, these Indian "states" were supposedly guaranteed the right of "measured separatism," a phrase that has been substituted for "sovereignty," meaning that the powers of Indian tribal governments apply only within their reservations, and that even these are subject to congressional authority. These rights, such attorneys argue, are perpetual and unchangeable.³

Much of this "law office history" is based on a long standing misrepresentation -

¹ Ernest St. Germaine, n.d., The Anishabe: A Unit on the History of the Lac du Flambeau Band of the Lake Superior Indians. Madison WI: American Indian Language and Culture Board, p.18

² Stephen E. Feraca, 1990, "Why Don't They Give Them Guns": the Great American Indian Myth.

³ For the best summary, see Charles F. Wilkinson, 1987, American Indians, Time, and the Law. New Haven CT: Yale University.

about Indian treaties, one widely accepted by Indians and other citizens alike. This is expressed in the phrase, "So Long as the Grass Grows and the Waters Flow," a cliché many are convinced was written into all or nearly all Indian treaties. The idea is that the promises made by the United States were forever. But such phrases and promises are not to be found in treaties authorized in Washington, D.C. The phrase and promise is, however, contained in several treaties negotiated in 1861 by the Cherokee, Comanche, Wichita and other tribes with the Confederate States of America during the Civil War, not with the United States.

The misconceptions and confusions about Indian treaties are numerous and of many different kinds. The fiction that the unique status of Indian tribes and the special services delivered to them in the United States derives wholly from treaties, discussed above, is only one of these.

Another such distorted idea is that the Indian leaders who negotiated treaties were so ignorant, ill-informed, unskilled, and incapable that they could not possibly have understood what was going on during such negotiations. So ill-equipped were they, this fallacy holds, that the Whiteman could easily trick or defraud them. The racist stereotype in this standard account should be apparent: Indians are shown as innocent and child-like, the Whiteman clearly superior in such sophisticated matters as treaty negotiations. This account is sometime reinforced with the argument that the Indian was illiterate and relied exclusively on oral agreements and traditional memory of the past, while the Whiteman was literate. Hence the Indian simply could not understand the written words in a treaty document.

This obvious racist stereotype is particularly damaging to the interests of many parties today because it places an impossibly heavy burden of proof on non-Indian defendants in treaty rights cases before the courts.¹ This stereotype is enshrined in special rules of evidence in federal courts. One of these is the rule that requires a court to construe treaties as the "Indians" would have understood them at the time they were negotiated.² Determining what "the Indians" thought about a treaty agreement at the time of its negotiation often consists of little more than contemporary legerdemain, speculations most often serving the interests of modern Indian clients. This rule is based on the stereotype that Indians all thought precisely the same way. A similar rule requires the courts to resolve all ambiguities in the treaties in favor of the Indians. Since "ambiguities" of many kinds were in later years commonly read into such documents, this places another often impossible burden on non-Indian defendants. Finally, to wrap up this legally sanctioned racism, the courts are required to construe all treaty provisions liberally, in favor of the Indians.

These rules ignore the literally tons of documentary evidence that show Indians in the treaty era to have been unusually astute, tough minded negotiators. They had, after all, a century and a half of extensive experience doing business with the French and British before there was a United States. And as the years passed each Indian society new to the treaty business had the models of others before them to work with. The stereotype that Indians were illiterate savages, moreover, ignores the fact that many leaders were bilingual and had become literate in English. When Indian treaty negotiators could not themselves read the documents, as a matter of course they regularly employed trusted interpreters to translate for them, just as statesmen representing France or the Soviet Union do today. Not uncommonly, these interpreters were their own kin or missionaries.

No less stereotypic is the conviction that American authority's regularly

¹ Van Gestel, "When Fictions Take Hostages."

² Wilkson, American Indians, 47.

set out in treaty negotiations to trick and to defraud Indians. This extraordinary distortion ignores the weight of evidence showing the lengths these authorities--went to in their efforts to communicate the specific meanings of particular treaty provisions to Indians, with repeated translations and retranslations, further clarifications, and adjustment of the wording and terms of the stipulations to meet Indian complaints. Overall, these "canons of Indian" law represent no more than early nineteenth century racial stereotypes, when federal judges could comfortably think of themselves as parental superiors watching over the interests of infantile Indians.

Another common belief about Indian treaties extends the idea that all the detailed provisions in them were perpetual. In fact, any reader can easily check this by reading through a sampling of these documents. With a few exceptions, the stipulations in the treaties were self-liquidating, set for a specified term. If annuity payments in cash or goods were to be made, then with rare exceptions such payments were limited to a term of years, fifteen to twenty-five, ordinarily. If housing was to be constructed or farms for Indians started, then the specification was for a one-shot arrangement, not forever. If medical, educational, or similar services were provided for, then these, too, were commonly limited to a set number of years. It is exceptional to find in any of these documents an explicit provision for privileges or payments which is not limited in term.

One of these few "perpetual" stipulations was contained in Article 6 of the 1794 treaty with the Six Nations (Iroquois).¹ In this treaty the United States promised--"yearly forever" --to spend \$4,500 annually for "clothing, domestic animals suited to their circumstances." Every year since the United States has appropriated that exact sum and delivered it to the increasingly numerous people who claim descent from the Six Nations of two centuries ago. But for many decades cash has been delivered to most of the descendants of these eighteenth-century communities, since the modernized Iroquois have little use for oxen or hoes. In these treaties, when a "term certain" (a cut-off point given in years or by date) was not specified for ending the delivery of payments or services, provision about their temporary nature were regularly written into them in other ways. These limitations as to length of the "treaty rights" were expressed in one or another of three ways. The treaty might specify that the payments or privileges would continue "during the pleasure of the Congress" or "during the pleasure of the President," or a combination of these. If the former were specified, it meant that the Senate (which ratified treaties) had reserved unto itself the authority to carry out some provision of a treaty at a future time, with no further negotiations with or the approval of the Indians needed. If the wording specified the President as the decision-maker, it meant that the Senate was granting the Executive Branch full, legitimate authority to implement some provision of a treaty, with no further action of the Senate or the Indians required.

Such "conditional terms" affecting particular rights were written into these agreements to take into account the uncertainty of future conditions affecting decisions about implementing treaty provisions. They provided a certain amount of flexibility either to Congress or to the President, and they allowed either branch to weigh and consider the various factors involved in making crucial decisions affecting Indians -- and others affected. One example of this was in the treaties of 1837 and 1842 with the Lake Superior Chippewa bands, which specified that the unilateral right to decide when the Chippewa would be required to move away from the lands they had ceded, and to cease hunting and fishing thereon, was placed, by the Senate, into the hands

¹ Treaty with the Six Nations, November 11, 1794, 7 stats. 44: Kappler, Indian Treaties, 36.

of the President. The reason for this provision was straightforward. At the time these treaties were ratified, neither Congress nor the Executive Branch knew for certain exactly when the ceded lands would be needed by American settlers, so this degree of flexibility in ending the rights to hunt and fish in competition with Americans was handed to the President for future determination.

Almost as if confusions about proper treaties--those agreements formally negotiated, ratified by the United States Senate, and proclaimed by the President--were not enough, and as if misconceptions about the entitlements specified in these agreements insufficiently complicated relations between Indians and other citizens, there is even more confusion about what constitutes an Indian treaty at all. Both Indians, who certainly have a large vested interest in expanding the scope of "treaty rights" by whatever means available to them, and numerous scholars, particularly those committed to serving Indian clients and causes, have contributed greatly to this additional source of mystification about treaties.

One common deception is the claim that all European colonial powers negotiated "treaties" with Indians, with the possible exception of Czarist Russia.¹ The facts are that only Great Britain and--in the tradition established by Britain--the new United States did so. The history of treaty negotiations in North America is a history of English-speaking peoples' dealings with Indians, and it spanned hardly more than a century, from 1763 to 1871. The other colonial powers in North America--France, Spain, and Russia--did not negotiate formal treaties with Indians for the reason that, under the doctrine of international law prevailing at the time, they claimed full ownership of North America by right of "discovery" or "conquest." So far as these European states were concerned, the native peoples of the Americas were subjects of the sovereigns whose own servants had made the discovery or conquest in their names. European monarchs did not negotiate treaties with their subjects.

The same was true of Great Britain until the year immediately following their conquest of New France. At that point a great Indian uprising occurred, known as Pontiac's Rebellion, which cost Britain many lives and much treasure before peace was imposed by weight of arms. One important cause of this rebellion was Indian displeasure with being told they were subjects of the British king. Only at that point, starting in 1763, did the British initiate formal treaty negotiations with any native North American society. This procedure, of employing the surface trappings of "international" treaty negotiations with native peoples, was an expedient, less expensive than imposing control by military force. George Washington, soon after being elected the first president of the United States, followed this young British precedent--as a matter of expediency.²

Befuddlement about what constitutes a treaty is at the root of such erroneous claims. Indians have commonly come to believe that particular rights granted by particular legislation--the Trade Intercourse (1834), the Indian Reorganization Act (1934), or the Indian Self-Determination Educational Assistance Act (1975), are examples--involve treaty rights. These are, however, acts of Congress applying to Indians, sometimes unilateral policy initiatives, sometimes reflecting intense interest group lobbying efforts. They are not treaties. Some historians and other scholars continue to contribute to this

¹ David R. Wrone, 1987, "Indian Treaties and the Democratic Idea." Wisconsin Magazine of History 70: 83.

² Francis Paul Prucha, 1984, The Great Father. Lincoln NE: University of Nebraska Press, Vol. 1: 52-58.

confusion, in effect lengthening and enlarging the importance of the history of treaty dealings with Indians. One good example of this kind of disinformation involves what is called “the first treaty” between North American Indians and Europeans. On inspection, this turns out to have been a 1613 commercial contract negotiated by a Dutch ship’s Captain, representing a private firm in Holland, and some Hudson River Indians.¹ Indeed, whole volumes and series of volumes have been compiled reprinting many hundreds of such trading agreements, bills-of-sale, peace settlements, leases, covenants, and pacts of many other kinds, all grandiosely called “Indian Treaties.” So far as many scholars are concerned, any agreement (of whatever nature and for any purpose) between one or more Indians (of whatever standing in their community) and one or more Europeans (of whatever office or position) representing any kind of entity (private or public) is deemed an Indian treaty.²

In Standard English the word “treaty” has two related but entirely different meanings. The first of these is the technical definition which applies in international law. A “treaty” in this legal sense consists of: (1) a formal contract in writing, (2) negotiated between two or more political authorities constituted as nation-states or sovereigns, which are internationally recognized “juristic persons,” (3) formally signed by authorized representatives, (4) ratified by the lawmaking authorities of the nation-states involved, and (5) which are intended to establish relationships governed by international law.³ This is the legal definition which, supposedly, applies to all the various agreements called Indian treaties, or so many scholars avow.

The second, more commonly used definition of “treaty” is far less specific. The meaning here is any agreement or arrangement decided on by two or more parties. Synonyms for “treaty” in this second, general, sense are: contract, transaction, covenant, mutual agreement, legal agreement, bargain, deal, indenture, deed, insurance policy, settlement, and the like. All kinds of entities, public or private, individuals or groups, can agree to “treaties” in this second general sense.

Obviously, the first of these two definitions has extremely limited applications, mainly due to the political standing of the parties involved, and the formalities and restrictions as to how the agreement was reached and legitimized. This is the definition that scholars purportedly use when discussing the so-called Indian treaties. What such scholars in fact do is to attach the legal weight and aura of this formal definition of “international treaty” to the multitude of transactions of many kinds associated with the second definition, the “private agreement.”

This extraordinarily deceptive practice is augmented with the grandiose claim that the many, varied dealings between Europeans and Indians did “not differ one whit from one [an International treaty] between the German Palatinate and Sweden formally adopted in gilded palaces.”⁴ Such statements are manifestly absurd. The differences between what are called “Indian treaties” and international treaties are numerous and striking. This can be verified by simply checking off the five characteristics,

¹ Wrone, 1987, “Indian Treaties” 84, n. 6.

² See Alden T. Vaughan, ed. 1983 Early American Indian Documents: Treaties and laws, 1607-1789. New York.

³ Harold w. Chase, et al., 1983, The Guide to American Law, St. Paul MN: West Publishing Company, Vol. 10: 142-45; Henry Campbell Black, 1979, Black’s Law Dictionary, 5th Ed. St. Paul MN: West Publishing Company.

⁴ Wrone, 1987, “Indian Treaties,” 84.

the explicit defining criteria of international treaties, against the features of the numerous agreements with Indians that are casually called "treaties." The fact that numerous agreements between Indians and Europeans were formalized in writing is of no help in making such a discrimination, since many kinds of agreements are expressed and safeguarded in writing, without their being international treaties.

However, noting the political status of the parties negotiating with one another does differentiate sharply between proper international treaties and other types of contracts or deals. Many of the Europeans involved in such dealings with Indians, for instance, were not representatives of sovereign-nation-states. Frequently, they were private parties involved in commercial transactions, as was the Dutch ship's captain in 1613 and the many businessmen who followed him in the practice of securing written deeds, bills-of-sale, or pledges of peaceful co-existence from Indians. This test also eliminates the hundreds of so-called "colonial" treaties with Indian communities in their midst, since colonies such as Virginia or New York were dependencies of Great Britain, not sovereign political entities in their own right. Absent authorization from the British Crown, and ratification by the same sovereign, these transactions could not have been international treaties. These colonies were not internationally recognized "juristic persons," legally capable of negotiating formal treaties with anyone.

The same question can be asked of the status of the Indian groups which negotiated such agreements, with the United States, for instance. Were any or all such groups "internationally recognized juristic persons"? Not according to Supreme Court decisions of the early 1830s, which held them to be dependent, domestic peoples subject to the authority of the United States, let alone dependent, domestic juristic "persons," a portentous enough legal fiction in its own right. The agreements negotiated with such groups, although customarily called "Indian treaties," did not then and do not now have standing in international law. They were intended to design and promote relationships between the United States and groups within its sovereign borders, and they prohibited Indian communities from formal, international dealings with other recognized nation-states. However, calling these agreements "treaties" creates an anomalous usage: the United States never conceded that these "tribes were separate, independent states with treaty-making capacities."¹

In the formal definition of international treaty, the third requirement is that the agreements be negotiated and approved by authorized representatives of the parties involved. There is serious doubt about the legitimate authority of Indian signatories to numerous "Indian treaties." Two of these are the Treaty of 1804 with the Sauk and Fox and the 1837 Treaty with the Winnebago.² In these and other cases, American officials negotiated agreements with some individuals from these groups who did not have authorization from their home communities. Nonetheless, documents like these have standing in American law which they would not have in international law. So far as the Supreme Court is concerned, if the United States Senate ratifies an Indian "treaty," the agreement is lawful, irrespective of the status of the Indians who approved it. Such principles again indicate the largely one-sided, domestic nature of the legal dimensions of such agreements. Moreover, even when the Indian representatives were authorized, the groups they represented were of many different political shapes and sizes, few if any of them much resembling the "nation-state" requisite of international treaties. The United States regularly negotiated "Indian treaties" with

¹ Chase, Guide to American Law, Vol. 10: 42.

² Treaty with the Sauk and Fox, November 1, 1837, 7 Stats. 544; Kappler, Indian Treaties, 498-500.

small, separate communities that were parts of larger societies, with fragments or factions from a single community, and with “instant nations,” composite groups of a purely fictional nature invented on the spur-of-the moment by American authorities for purposes of convenience in purchasing land or conducting other business. The “Chippewa nation,” invented in 1837, with which the United States negotiated the treaties of 1837 and 1842, was one such entirely notional political entity. At this point we must ask: Did Indian “nations” exist before Americans negotiated treaties with them? Or, many years later did modern Indians and their attorneys seize on the ambiguous, anomalous nature of these agreements to press a claim for “nationhood”? The answer is: it was, in later American political thinking, the treaty and modern American policy that established American Indian “nations.”

Altogether, applying the explicit benchmarks of international treaties to the many different kinds of agreements called Indian treaties indicates that they are not what they are commonly called. Following the establishment of the United States, Indian treaties were contracts negotiated by American authorities with some but not all Indian communities, for the purpose of conducting domestic business with groups subject to American sovereignty.

There are other striking differences between international treaties and what are called Indian treaties, even those dignified through ratification by the United States Senate. In international law, so as to avoid later disputes, treaties must be approved in precisely the same form by all parties. The Supreme Court has regularly held that this is not required for Indian treaties, applying the canon of Indian law which holds that these documents must be interpreted as the Indians understood them, rather than as Americans understood them. The rule which requires Indian “treaties” to be construed as Indians alone understood them automatically negates their being international treaties. Similarly, in international law, when there is a later dispute about the stipulations of a treaty, the tribunal to which the dispute is presented makes its decisions based on the plain wording of the written document. Again this is not true of Indian treaties, where the federal courts have regularly gone beyond such plain meanings to fashion their own interpretations of these old agreements, in effect amending these contracts by judicial fiat, sometimes drastically.

In addition, in international law, it is accepted that ordinarily termination of a treaty must follow the course spelled out in the document itself, and this should be accomplished by mutual consent. In this respect, Congress exercising its plenary authority over domestic Indian affairs has regularly and arbitrarily changed or eliminated older agreements with Indians. There is an alternate course for unilaterally canceling a treaty allowable under international law. This one takes account of changes wrought by the course of history, years after an international treaty was signed so as to accomplish purposes worthy and meaningful at an earlier time. Under this principle, when later history creates a fundamental alteration in the circumstances of the parties or in their relationships, then the essential, applicable parts of the treaty can be canceled unilaterally. In the United States, however, the argument that “Indian treaties are forever,” despite the most dramatic changes in the place and status of Indians in the United States, runs straight against this principle. In this final example, as in earlier ones, it will be plain that so-called ‘treaties’ between the United States and Indian groups do not have the standing or character of international treaties.

THE LAKE SUPERIOR CHIPPEWA TREATIES

The Treaties of 1825. 1826. And 1827

After the end of the War of 1812 the United States moved to exert its political control over Wisconsin, Michigan’s Upper Peninsula, Minnesota, and

adjacent trans-Mississippi regions. Although nominally part of American territory since 1783, through the peace treaty with Great Britain ending the Revolutionary War, actually this whole region, for thirty years remained under effective British control, and the Indian communities residing there maintained close political and economic relations with the British. While many of the Indian societies of this region fought on the British side during the War of 1812, including Chippewa bands from Lower Michigan, those Chippewa from northern Wisconsin remained at peace. So it was that the latter were not drawn into peace treaties with the United States in 1815—1817, as were their neighbors. Not until 1825 did the United States start calling these widely scattered Chippewa bands together to open the first treaty negotiations with them. There followed three separate negotiations, in 1825 at Prairie du Chein, in 1826 at Fond du Lac (Duluth), and in 1827 at Butte des Morts (Wisconsin).¹

Although these were negotiated and ratified as three separate “treaties,” from the perspective of both the United States and the Chippewa bands they consisted of a single, major transaction, with some special details appended to the last two of them. Three distinct meetings were necessary because American authorities found they could not bring representatives of all the Chippewa bands involved together at one time and place. Eventually, Chippewa men representing extended families and kin groups from perhaps eighty or more villages came together for these negotiations and approved the treaties. These numerous villages were identified, not singly, but in clusters, by the “band” area where they were located. These areas were more than twenty, including Saulte Ste Marie, La Point, Fond du Lac (Minnesota), Sandy Lake, Leech Lake, St. Croix, Mule Lac, Lac Courte Oreilles, Red Cedar Lake, Red (Vermilion) Lake, Rice Lake, Lac du Flambeau, Ontonagon, the Upper Wisconsin River, Snake River, Rainy Lake, and Crow Wing (Corbeau) River. In numerous instances the same leaders from the same areas were present at all three negotiations, while others participated in only one of them.

Indian societies other than the Chippewa were involved in the main business of these negotiations. These included the Sauk, Fox, Menominee, Iowa, Sioux, Winnebago, and the so-called “United Bands of Chippewa, Ottawa, and Potawatomi” from northern Illinois. This was significant because American control of intertribal relations were involved, as well as political relations between each society and the United States.

Several main items of business that were the subject of these 1825, 1826, and 1827 negotiations and contractual agreements between the Chippewa communities and the United States. From the perspective of the United States, these were:

1. To bring an end to the endemic warfare between the several Indian societies participating in the treaties.
2. To establish agreed on, explicit, firm territorial boundaries between the several societies
3. To secure agreements that each group would remain within its own boundaries and not trespass on the territory of others without the “owners” consent
4. To bring all Indian groups participating under American sovereignty
5. To bring the rule of American law to the area, and to secure agreement on the application of this law to the Indians in the region.

¹ **Treaty with the Sioux, etc., August 19, 1825, 7 stats. 272; Treaty with the Chippewa, August 5, 1826, 7 Stats., 290; Treaty with the Chippewa, etc., August 11, 1827, 7 Stats., 303. See, Kappler, *Indian Treaties*, 250-55, 268-73, and 281-83.**

During the 1825 negotiation, the Chippewa's present pointed out that many other Chippewa affected were not, and they requested another negotiation near their lands to bring them into the concord. This was the backdrop to the 1826 negotiation at Fond du Lac, and the next year's at Butte des Morts.

In 1826, at Fond du Lac much the same group of leaders assembled as the previous year, with the addition of some from other locales. In this negotiation, those present certified their consent to the main stipulations of the earlier accord; but additional provisions were agreed to during this session.

By this time Americans had become aware that the Lake Superior shoreline was rich in valuable mineral resources, particularly copper. So a special clause was agreed to whereby the Chippewa allowed American authorities to search for and remove metals or minerals from Chippewa lands. This is of importance because during the 1842 treaty negotiation the American negotiator tried to argue that the Chippewa in 1826 had already ceded their mineral resources to the United States. However, in 1826, clearly, the agreement concerned mineral exploration and the export of samples, not full-scale mining operations. There was no sale of Chippewa property rights in these first treaties, and the United States promised no payment in return.

A second special provision brought the "half-breeds" associated with these Chippewa into the picture, mainly those living near Sault Ste Marie.¹ In this agreement the Chippewa agreed to cede to the United States enough land near Sault Ste Marie to give each of a list of named "half-breeds" 640 acres, gratis. These so-called "half-breeds" were the Chippewa wives, and the children, of traders, Indian agents, military personnel, and other American citizens of French, Scots, or English ancestry. This was the first but not the last time when substantial amounts of Chippewa property and wealth was given by contractual stipulation to the "half-breeds" living on the fringes of their communities. In this period, neither the Chippewa nor Americans considered this population of mixed ancestry as legitimate, full-scale Chippewa, entitled to the full benefits of treaty agreements. Under American law the "half-breeds" possessed no aboriginal property rights, and they were not officially recognized political entities.

The third and fourth special provisions of the 1826 treaty took account of the Chippewa's considerable, growing poverty, caused by the rapid decline of the fur trade. One stipulation consisted of the annual appropriation and payment of an "annuity" of \$2,000 to the Chippewa, to be delivered at Sault Ste Marie. The second was a provision for the schooling of Chippewa youth, also at Sault Ste Marie.

Here is a place where a conditional term was established in a Chippewa treaty for the continuity of some privilege. As regards both the small annuity and the educational services, this treaty specified that they would be delivered only during the pleasure of the Congress. These were temporary privileges, not perpetual rights. Indeed, this treaty was even more restrictive. In it the Chippewa agreed that even if either the Congress or the President rejected the land for "half-breeds," the annuity, or the schools before ratifying the agreement, all the other parts of the treaty remained in force.

There was a supplementary article agreed to in 1826, of special interest to understanding decisions made by the federal courts about modern Chippewa "treaty rights" many years later. In 1824, a war-party from Vieux Desert had murdered four Americans on the upper Mississippi and stolen their possessions. The perpetrators had not yet been apprehended, and in this treaty the assembled leaders agreed that they would detain and delivered them to American officials at Green Bay or Sault Ste Marie for trial in an American courtroom.

¹ In Later parlance, people would be called "mixed-bloods." By 1826, many of them were already of much less than One-half Chippewa decent.

Even this early, the Chippewa knew that Americans treated the “misbehavior” of Indians against American citizens as individual criminal acts, requiring their trial with full due process, not as an excuse for mass punishment of whole communities.

In 1827, the negotiations at Butte des Morts concluded this three-phase agreement with the Chippewa bands of Lake Superior and neighboring areas. This negotiation again incorporated additional bands into the main agreements reached in 1825; but there were also several special provisions. Of these, the major one involved deciding on an exact boundary between the Chippewa, the Menominee, and the Winnebago.

In 1827, as in 1826, the United States again set a conditional term on privileges or payments promised in the agreement. The payment of a \$1,000 annuity was explicitly limited by a term-certain: three years; but once more the delivery of educational services for Indian children was limited by the words ‘as long as Congress may think proper.’ In neither instance was their promise of “forever.”

And once more the Indians assembled gained experience with the application of American criminal law to Indian offenders. Earlier in the year some Winnebago had been involved in the killing of a citizen near Prairie du Chein. Nonetheless, this agreement specified, the Americans would pursue and deal with the actual perpetrators only: other Winnebago remained beneficiaries of this treaty.

With the completion of their first three treaties the legal (de jure) but not the actual (de facto) status of these Chippewa bands had changed dramatically. Although they had accepted the dominium to the United States, thereby legally surrendering their position as independent communities, except for the small “half-breed” tracts near Sault Ste Marie they had not ceded their aboriginal rights--of occupation and exploitation of the resources to the areas they and the United States agreed were under their exclusive control. On the side of the United States, American authorities now recognized who they had to deal with when it came time to purchase these rights. As of 1827, these Chippewa had become “domestic, dependent” peoples in the United States.

Over the next ten years, their lives and affairs were not much affected by contacts with Americans, who remained few and far between inside Chippewa controlled territory. In this period, as was true of them in later years, these Chippewa did not entirely abide by the most important of the agreements they had made with the United States in 1825, 1826, and 1827. They failed to keep the peace with their traditional enemies, especially the Dakota (Eastern Sioux), on whom they continued to make war. And many of these Chippewa continued visiting British posts in Canada to receive their annual “presents,” payments in goods and supplies in return for which they pledged their continuing allegiance to Great Britain in case of war with the United States.

The Treaty of 1837

In these first three treaties these Indians were identified simply as those Chippewa inhabiting places inside the boundaries they had agreed upon. There was no further explicit specification expressed in the treaties as to their political organization, in part or whole. However, because three separate treaties were required, American officials certainly understood how decentralized the decision-making process was among these widely scattered small villages and bands. That is, the treaties of 1825, 1826, and 1827 were negotiated with the Chippewa groups separately and severally. So far as the United States was concerned, this was not true of their fourth treaty, that of

For this negotiation the United States invented a Chippewa “nation,” one incorporating the bands in northern Wisconsin, the western half of Michigan’s Upper Peninsula, and northern and northeastern Minnesota. This newly “conceived fictional “nation” the United States treated as a single, centralized political entity, whose representatives could make major decisions affecting all, particularly as regards their land tenure rights. Therefore, the new “nation” was also treated as a single territorial entity, holding one master title to the rights of occupying and exploiting the resources within their estate. The boundaries of the Chippewa “national” territory were those defined in the treaties of 1825—1827.

These dispersed Chippewa bands had no concept or practice of a single over-all political organization and authority, or of a single territory owned in common by all. However, because the transaction involved an area they did not occupy or use, and because they could agree to a sale of rights thereto at no cost and considerable benefit to themselves, some of the bands were especially eager to accept this American construction and to cede rights (those of other Chippewa) to a large part of the “national” territory. These were the Chippewa bands along the Upper Mississippi River. In the autumn of 1836 the chiefs of these Mississippi bands, led by Flat Mouth, made the opening moves for a treaty, offering to sell their “rights” to interior Wisconsin. These Mississippi bands chiefs had heard of the 1836 treaty with the Michigan Chippewa and Ottawa, and wanted to exchange “their” rights to lands occupied by other bands in exchange for annuities in cash and goods.²

At the time, American authorities were particularly responsive to this overture. Indeed, they were already laying plans for such a negotiated cession of the Chippewa’s’ aboriginal usufruct rights in interior Wisconsin. In part, this impetus came from the designs of the Indian Removal policy, which had been in full operation since 1830. This policy had several key features to it. The first of these was to acquire by purchase all of the property rights of Indians then still holding land in aboriginal and other forms of tenure east of the Mississippi River. These Indians and lands were in the interior southern states and territories, and in the Great Lakes-Ohio Valley region.

Once these eastern Indians had sold their rights, those who wished to maintain a “tribal” organization, with their lands owned in common, were required to migrate and to resettle in the recently formed Indian Territory southwest of the Missouri River (the eastern halves of modern Kansas and Oklahoma). Part of the compensation for the sale of rights to eastern lands was the award of titles to reservations in Indian Territory. On the other hand, under the Indian Removal policy, those Indians who preferred to remain in the East would be detribalized, owning their remaining small tracts individually, as private property; and there they would come under state or territorial law.

This was the general background to the Chippewa Treaty of 1837; but important special ingredients were added to the situation which gave this treaty its distinctive character, making it unlike the “removal” treaties being negotiated with other tribes in the area in this same period. By 1837, for example, the new Indian Territory was nearly filled with emigrant eastern Indian societies, the available lands there already awarded to these emigrants by removal treaties. Moreover, by that date American authorities had also learned that the canoe-using Indians of northern Michigan and Wisconsin, who

¹ **Treaty With the Chippewa, July 29, 1837. 7 stats. , 536; Kappler, *Indian Treaties*, 491-93.**

² **James A. Clifton, 1987, 'Wisconsin Death March: Explaining the Extremes in Old Northwest Indian Removal,' *Transactions of the Wisconsin Academy of Sciences, Arts, and Letters*, 75: 7**

relied heavily on fishing for their subsistence, were flatly, adamantly opposed to resettling in the semi-arid Kansas-Oklahoma prairies.¹

American authorities had other, specific concerns in seeking a Chippewa sale of their rights to occupy and use lands in interior Wisconsin. The United States desired to consolidate its control of the Lake Superior shore-line and of the lands along the Upper Mississippi River, for one thing. In addition to purchasing clear title to these lands, this goal involved using the Upper Mississippi as a “barrier” between tribal Indians--those who sustained themselves in traditional fashion by hunting, gathering, and horticulture, who owned land rights in common and American settlements. This aspect of the Removal Policy, pure and simple, involved segregation of tribal Indians, who were required to occupy areas some distance from American settlements. American authorities at the time saw an inherent conflict between the needs and styles of nomadic Indian hunters, who required large territories to subsist themselves, and those of sedentary American farmers and townspeople. Separating them by a natural geographic barrier would greatly reduce or eliminate that conflict. Such was part of the logic of the Indian Removal policy.

However, a larger interest of the United States in implementing this policy was to acquire unrestricted, clear title to Indian lands so that these areas could be placed in the public domain.² Once the United States had purchased clear title to Indian lands, they could be converted into organized territories, surveyed by the General Land Office, placed on the market and sold to private parties, transferred to the ownership of the states or territories, or otherwise disposed of. None of this could happen so long as an Indian society retained any of its aboriginal rights to occupy and use a tract. A further interest of the federal government in these transactions was funding its own operations. In effect, the United States was buying land cheap for a small fraction of its open market value and selling it dear. The profits went into the federal treasury and for many years were a major source of income.

The United States had an additional, strong, special interest in acquiring the particular tract that was subject of negotiations with the Chippewa in 1837.³ The area contained fabulous stands of pine and other softwood timbers. This resource was badly needed to provide inexpensive building materials, then in increasingly short and very expensive supply, for rapidly growing settlements in the mid-west and Border States. The softwood timber stands in the Chippewa’s lands were ideally situated for this purpose; since once cut the timbers and lumber could be inexpensively floated or shipped down the tributaries of the Mississippi and that major stream itself to where they were wanted.

Another background feature gave one more special dimension to the nature of the agreement resulting from the 1837 negotiations. In other parts of the South and the Great Lakes states and territories, there was substantial pressure from American settlers, especially farmers and town developers, on Indian land. This was not true of interior Wisconsin and Minnesota, where Americans were few and far between, with little prospect of substantial immigration into

¹ Clifton, 1987, “Wisconsin Death March,” 7-9, 28-29.

² In View of later federal court decisions in the Voight case, it must be emphasized that throughout the nineteenth century the “public domain” consisted of lands to which the United States held clear title.

³ The tract ceded in 1837 is identified as Royce Area 242. See, Charles C. Royce, cop., 1900, *Indian Land Cessions In the United States*. Washington DC: Government Printing Office (reprinted 1971, New York: Arno Press & New York Times), 778-77, and *Maps, Minnesota 1 & Wisconsin 1*; also, Clifton, “Wisconsin Death March,” map, p. 10.

the area in the near future.

In places where there was great “settlement pressure,” treaties with Indians for the sale of their rights and resettlement in the west invariably specified a “time certain” for their departure from the tract sold, usually within a year or two. Where there was strong anti-Indian prejudice, as in the South, such pressure to relocate within a specified time was all the more important in these treaty negotiations there. Neither was true of the interior parts of northern Wisconsin. Absent hardly any American settlers, with little prospect of their arrival in near term, and with a more positive, accepting attitude toward Indians, an alternative, more flexible stipulation for their leaving the region after ceding their rights was appropriate. Such a flexible stipulation, it happens, was inserted into the 1837 agreement.

In late July, 1837, American officials and representatives of the just invented “Chippewa nation” assembled at the military-administrative post at St. Peters, at the juncture of the Minnesota and Mississippi Rivers. Henry Dodge, governor of Wisconsin Territory, was the principal negotiator on behalf of the United States.

Broadly speaking, three distinct clusters of Chippewa bands were involved in this negotiation. First, the most numerous and foremost in directing the negotiations, were village and band leaders from Leech Lake, Gull Lake, Swan River, Mule Lac, Sandy Lake, Snake River, Red Cedar Lake, and Fond du Lac (Minnesota). Although these Chippewa leaders represented groups that did not occupy or exploit the tract wanted by Americans, they dominated the proceedings and gladly signed the resulting agreement. There was more than a little opportunism in their actions: they had much to gain in money and goods from the transaction, and nothing to lose except the good will of their kinsmen in Wisconsin, whose rights they so easily signed away. These Chippewa bands were to get half the payment for the cession.

The second cluster of bands involved were from the Lake Superior shore line, led by (Old) Pesheke (Buffalo) from La Pointe. Although the Lake Superior shore bands signed the treaty, they received nothing from the payments. Early in the negotiations they disclaimed any substantive interest in or “ownership” of the rights being ceded, also indicating that the people most involved and affected were not well represented at this negotiation.

The third cluster of bands, from interior Wisconsin, whose rights to occupy and exploit the “pine lands” tract were being sold outright, had few representatives at the St. Peter’s treaty negotiation. Of those who came, probably cowed by the aggressive and numerous leaders and warriors from Minnesota-few had much to say during the negotiations. Only one leader from Lac Courte Oreilles and five from Lac du Flambeau, together with five from the border-region St. Croix area, were present at all and signed this treaty. Others, from the Upper Wisconsin River region, for example, had not received word that there was to be a negotiation affecting their rights. However, in the following year leaders of these bands came to American posts and certified their acceptance of the agreement if they were to receive payment for the cession.

It happens that these 1837 negotiations are particularly well documented, with an extensive blow-by-blow running description of the day-to-day debate kept in a journal by Governor Dodge’s secretary, and with records kept by other participants and observers. These extensive eyewitness accounts of who-said-what, and how the participants behaved, allow an unusually full reconstruction of the verbal preliminaries and clarifications to the written treaty agreement.

For example, the Chippewa’s negotiators were made to understand fully that the Americans had come seeking an outright, final cession of all their rights to the ceded lands. In fact, on several occasions during the negotiations speakers for the Chippewa proposed alternatives. One of these alternatives was a kind of long term lease with annual payments, a lease that could be renegotiated in the future. A second alternative expressed by the Chippewa

negotiators was the possibility of their ceding their rights to the evergreen forest region, but retaining their rights to tracts with deciduous forests (which were then more valuable to the Chippewa because that was where their principal game animal, the deer, was to be found).

Both these alternatives were flatly and expressly rejected by Governor Dodge, who repeatedly emphasized that the United States would only agree to an outright purchase of all Chippewa rights to the whole tract. There were to be no limitations, restrictions, or reserved rights permitted, he repeatedly explained. After making their case for alternatives, and listening to Governor's Dodge's rejection of them, the Chippewa negotiators yielded. There can be no doubt that the Chippewa leaders present fully understood the nature of their obligations before signing the treaty.

The resulting agreement, therefore, began with a flat, outright cession of all the Chippewa's rights to occupy and exploit the land being sold, known as Royce Area 242. In Article 1 of this contract that cession is specified. The rest of the treaty articles deal with the details of compensation for the sale: how much, of what kind, to whom? In addition, Article 5 notes a temporary "privilege" granted these Chippewa.

The total consideration for this cession amounted to \$870,000. Of this sum, \$700,000 was ear-marked for payment in the form of a limited-term twenty year annuity of \$35,000 per annum, to be paid in hard money (gold and silver coin), supplies, provisions, goods, tobacco, and blacksmith, educational, and farmer services. Because this annuity could not commence until it was ratified in early 1838, its term of twenty years expired in 1857. An additional \$170,000 was to be paid out immediately, directly to other parties for different purposes.

This sum included the payment of \$100,000 in cash to the "half-breeds" associated with these Chippewa, and another \$70,000 to be paid against the Chippewa's debts to their traders. Of the total \$870,000, therefore, the Chippewa themselves received only 75 per cent; the other 25 per cent was paid to other parties, half-breeds and traders (who were often one and the same, so some received double or more portions). Because half the sum paid directly to the Chippewa went to the Mississippi bands, and none to the Lake Superior shoreline bands, the interior Wisconsin Chippewa population whose rights to occupy and exploit the land had been ceded were scheduled to receive only a fraction of the total payment. This amounted to \$17,500 per annum in cash, goods, and services, \$350,000 total over twenty years, or 40 per cent of the entire consideration. This imbalance was rectified in the Chippewa's later treaties.

In four places the 1837 treaty, as ratified by the Senate, specified which branch or officer of the government had what kind of authority to implement which part of this contract. The Senate specified that the President had the right to decide where the annual annuity payment would be made. Despite complaints from the interior bands, La Pointe was selected, which meant that the southernmost Wisconsin bands had the longest and hardest trip to make each fall to obtain their small per capita shares. To the "Superintendent" (i.e., Commissioner) of Indian Affairs the Senate gave the authority for selecting locations for blacksmiths, schools, and farms. Thirdly, to the officers directly on the scene, the Chippewa's two Indian agents, the Senate entrusted the authority to determine which "half-breeds" should receive shares in the treaty compensation, in accordance with the request of the Chippewa negotiators.

It should be emphasized that these "half-breed" payments were one-time affairs. Because they were not considered legitimate members of the bands by either the Chippewa or Americans, the same "half-breeds" who accepted such cash payments were not entitled to annuities or other treaty services. There has never been any question about the unrestricted nature of these delegations of authority by the Senate to other branches or officers of government in carrying out the provisions of this treaty.

The same is not true of the fourth place where this occurred, one that has been central to recent legal controversies. In Article 5 of the 1837 treaty a special, explicitly temporary indulgence was granted to the Chippewa, with the words, "The privilege of hunting, fishing, and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory, is guaranteed to the Indians, during the pleasure of the President of the United States."

In the broader context of American aims in negotiating this treaty, and the situation of the Chippewa in lands destined to be used mainly for logging and not settlement in the immediate future, these words can have had only one meaning. With no apparent "settlement pressure," and no immediate prospect of potential conflict with numerous settlers, who were not lined up ready to flood into the ceded lands, the Chippewa were being granted a temporary privilege, with no caveats attached to it. Clearly, with all their rights ceded in the treaty's first article, and the details of compensation for this sale specified thereafter, this dispensation was neither a right reserved by the Chippewa nor part of the compensation for the sale.

This point can be made clear by emphasizing what it was the Chippewa ceded in 1837. That they had sold their aboriginal title to the lands, not the realty title, which the United States already held. Their aboriginal title consisted of the right to occupy the tract and to exploit its resources for their subsistence. They could not have both sold this aboriginal title out-right and also retained it, except as a temporary privilege, so long as it did not conflict with American settlement.

Because there was no apparent pressure on the lands from American settlers, the United States granted the Chippewa this indulgence, the favor of remaining there, gathering the food they needed, temporarily, "during the pleasure of the President." Why did the Senate use this particular phrasing? In this treaty, as in others negotiated under similar circumstances, the Senate was doing no more than to explicitly grant the President the decision making power, at some unspecified future date, to end the privilege, at a time when there would come many American settlers, and with them the potential for conflict over access to and control of the natural resources of the ceded land.

What is striking about this issue is the near total absence of any discussion of whether the Chippewa could remain in the ceded territory at all, and if so how long, recorded during the treaty negotiations proper. There is simply no contemporaneous record that the matter was raised as a serious issue by the Chippewa or anyone else during the negotiations or in the years immediately following them. Consequently, there is no record from Chippewa or other sources that any specific condition was agreed to by the parties involved for the continuity of the Chippewa's occupation of the ceded land. For this reason, the presence of this privilege, written into the treaty almost as an afterthought, is a little surprising. It has all the markings of treaty "boilerplate," a provision American authorities inserted into the treaty as a clarifying courtesy.

Once this treaty was ratified and payments for the cession commenced, the Chippewa no longer had legal rights to continuous residence on and exploitation of the ceded land. No rights had been reserved by the Chippewa, none of a permanent nature conceded by the United States as part of the compensation for the cession. So far as American authorities were concerned, the idea of a Chippewa "nation" still owning a substantial, residual "national territory" was in force, Americans in this era were firmly convinced that the Chippewas' ways of subsisting were entirely incompatible with existence in a settled, developing area. As American settlements advanced, they reasoned, the Chippewa would give way, voluntarily resettling in other parts of the Chippewa nation's estate in northern Wisconsin, or in northern Minnesota. Indians depended on large supplies of game, their reasoning went, and as settlements increased the game tended to disappear. Hence the Indians would

naturally move elsewhere.

In fact, precisely the opposite occurred in northern Wisconsin. Deer herds depend for their food on open areas adjacent to forests, and until lumbering began in the region these were in limited supply and the deer population small. However, once extensive lumbering operations began, especially clear-cutting of pine forests followed by second-growth, the areas suitable for deer increased in size sharply, and with this the size of the herds. This development made the ceded areas all the more valuable to the small Chippewa groups which had recently ceded their rights to them, not less so. Moreover, American authorities expected that the Wisconsin Chippewa would be welcomed by their Minnesota brethren, but the opposite was true. These bands were at odds with one another and felt no “national” identification or loyalties.

In these respects the 1837 treaty was entirely unlike the “removal” treaties that were negotiated with Indian societies south and east of Chippewa in these years. Removal treaties specified a time-certain when the Indians who had ceded a tract would have to leave it. They specified exactly where they were required to resettle. They provided a title to the new reservation, a title that was part of the compensation for the lands ceded. And these removal treaties also promised payment of the expenses of resettlement, including subsistence for a year following the move. None of these features were present at all in the 1837 Chippewa treaty. In this treaty, as in many earlier ones, the United States set out to purchase clear and unrestricted title to part of the lands owned by an Indian society. This was a treaty aimed at consolidating the Chippewa on their reduced “national” lands.

In any respect, while timbering activities began in earnest in the ceded lands as soon as the treaty was signed in St. Peters, rapidly expanding in scope, the lives of the Chippewa in the ceded area were not greatly affected. If anything, their economic situation was improved. With a regular flow of modest size treaty payments and goods came some improvement in their economic situation. Their situation was enhanced, also, by the economic opportunities provided by the timbering industry. For five years, few damaging effects of the treaty were apparent to these Chippewa. They had their cake annuity payments and they were eating it, too their harvests of fish and game from the ceded lands. This relatively comfortable situation ended abruptly in 1842.

The Treaty of 1842

After the Chippewa approved the 1837 negotiation and contract they had little reason to anticipate much pressure on their continued residence of the ceded tract under the indulgence granted them, “during the pleasure of the President.” In 1842 came a complete turn-around in the security of their occupation of that one and their occupation and usufruct rights to the additional area ceded that year.¹ The word “nation,” as applied to all Chippewa bands in 1837, was not used for this treaty. By now Americans were made to appreciate the division and conflicted relationships between the “Lake Superior Chippewa” (those of Wisconsin, the Upper Peninsula, and Minnesota’s north shore) and the upper Mississippi bands.

When the 1842 treaty was finally ratified, these Chippewa bands no longer owned any permanent rights to occupy and use the resources of land anywhere in Wisconsin and Michigan’s Upper Peninsula. The tract ceded that year is known as Royce Area 261; broadly speaking it included all the land on

¹. Treaty with the Chippewa Indians of the Mississippi and Lake Superior, October 4, 1842, 7 Stats., 591; Kappler, *Indian Treaties*, 542-45; Clifton, 1987, “Wisconsin Death March”, 14-18.

the Lake Superior shoreline, south to the 1837 cession, and west to the Chippewas' remaining "national" holding. The latter included large parts of northern and all northeastern Minnesota.¹

In profound contrast with the 1837 negotiation, that of 1842 was unusually acrimonious and embittered. It was made so from the start by the express requirements for the negotiation placed on the chief American negotiator, Superintendent Robert Stuart, by his superiors, Congress and the President. More so, the Chippewa were greatly concerned because they understood fully that in this negotiation they might surely be required to evacuate all their remaining territory in Wisconsin and Michigan. They were then perfectly aware that their kin, the Chippewa bands of Michigan, were being pressured to move west. So, too, they knew of the experience of their neighbors immediately to the south in Wisconsin—the Menominee, Winnebago, and the Emigrant New York Indians who were under severe pressure to leave Wisconsin and resettle either in Indian Territory or in Minnesota.

The American situation in Wisconsin and along the Lake Superior shore had changed considerably. Michigan had been a state since the time of the 1837 treaty, and Wisconsin an organized territory. Wisconsin, moreover, was moving rapidly toward statehood, as population and settlements increased, including some in the territory ceded in 1837 and on the Lake Superior shore. It was time, these Chippewa understood, for Americans to apply the removal policy to them, and this they sought to avoid by whatever means were available to them.

Others besides the Chippewa proper were greatly threatened by the particulars of the agreement Stuart was specifically ordered to obtain in 1842. Principal among these was the "mixed-blood" community, who again sought to profit as much as possible from the Chippewas' loss. From this element came the loudest and strongest protests about the treaty, both during the negotiations and afterwards, complaints about the amount of money paid them. The traders who earned their living from the Chippewa also faced a loss of their trade, but these had the option of moving west with their customers. In the end, however, the most effective opposition to the resettlement provisions in this treaty came from the numerous Americans, particularly miners, who flocked into the ceded lands immediately after the treaty's ratification to set up their operations, and who soon came to depend on the Chippewa for help and services in their projects.

The detailed orders Robert Stuart carried to La Point for the negotiations with the Chippewa were the cause of much of the controversy. He was prohibited from allowing the award of any reservations whatsoever within the area to be ceded, either for Individuals, for the "half-breeds," or for the Chippewa bands, themselves. This was precisely the issue which most disturbed the Chippewa. Payment of debt claims to traders was also forbidden; but after many protests some such payments eventually were allowed. No payments of any kind to the "half-breeds" were allowed, a point on which Stuart held fast against numerous protests and threats to disrupt the negotiations by that marginal group. Both traders' claims and payments to the "half-breed" would have sharply reduced the total compensation payable directly to the Chippewa, and Stuart sought to maximize that sum.

However, the point on which the fate of the negotiations hung was the issue of small reservations for the Chippewa bands, both in the area ceded in 1837 and the additional tracts being ceded in 1842. This the Chippewa negotiations demanded; and this Stuart could not allow them. To make matters worse, he was instructed to obtain from the Chippewa their agreement to abandon residence in and exploitation of the ceded lands and to move into the remaining "national" territory in Minnesota. A major aim of this treaty was to

¹ Royce, Indian Land Cessions, 776-79 & Maps, Michigan 1, Wisconsin 1.

secure the departure of all Chippewa from Wisconsin and the upper Peninsula, and their consolidation on the remaining “national lands somewhere in Minnesota.

Around that issue for several days negotiations floundered. Stuart’s instructions permitted him in 1842 to agree to “indefinite” privilege, like that of 1837, limiting Chippewa occupation and use to “the pleasure of the President.” This promise proved entirely too non-specific for the Chippewa. They insisted he be more exact. His first clarifying offer that the Chippewa would be allowed to remain in the newly ceded land “during the lifetime” of the elder negotiators was unsatisfactory to them. So, too, was his second proposal, that this indulgence would continue “during the lifetimes of their children.” Only when Stuart specified that the Chippewa would be allowed to remain in the ceded lands “for fifty to one hundred years” would they accept his terms and sign the treaty.

These words are not to be found in the written treaty document. Article 2 of this treaty flatly stipulated “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 (our emphasis). Nonetheless, it is unmistakable that the Chippewa negotiators at the time approved this treaty with the explicit understanding that these rights would be theirs for a lengthy period, specified and agreed to verbally as meaning “from fifty to one hundred years.” A few years later, Robert Stuart himself stressed that he had made such promises, and for a strict Scots Presbyterian like himself, his verbal commitment was a firm contract. Indeed, twenty-two years later, in 1864, when the chiefs of the Wisconsin Chippewa bands spontaneously dictated their own remembered history of their treaty dealings with the United States, they certified that the promise of being able to occupy and exploit the resources of the ceded land was limited to a period of time, not by any other qualification.¹ Many years later the federal courts decided that the Chippewa in 1842 had been promised that they could occupy and exploit the ceded area’s resources forever, so long as they remained “on good behavior.” As indicated for the 1837 treaty, there is no record whatsoever of any discussion of the meaning of the phrase “during the pleasure of the President” for that negotiation. This was not true for the 1842 compact. There is ample contemporaneous evidence that no such “good behavior” condition was ever agreed to, none recorded at the time that such a qualification was so much as mentioned. And there is abundant evidence confirming that a time limit was set, evidence coming from Robert Stuart, from missionary observers, from traders present, and from the Chippewa themselves. Because this treaty was ratified in March, 1843, the time limit agreed to would have expired somewhere between March, 1893 and March, 1943.

In Article 1 of the 1842 treaty the Chippewa ceded to the United States all their remaining rights to land in Wisconsin and the Upper Peninsula. Article 2, as indicated, contained the written part of agreement about the indulgence granted Chippewa for remaining in and exploiting the ceded area. This written stipulation must be qualified by the time limit promised verbally, which the Chippewa demanded before approving the treaty. Article 3 specified the area where these Chippewa would be required to resettle once the temporary occupation provision was lifted by the President. This area was the remaining “national” estate, the region then occupied by the Fond du Lac (Minnesota) Sandy Lake and Mississippi bands.

In Article 5 of the treaty, a revision was made of the distribution of

¹ 1. John D. Nichols, trans., 1988, **Statement Made by the Indians: a Bilingual Petition of the Chippewas of Lake Superior, 1864.** Centers for Research and Teaching of Canadian Native Languages. London OH: University of Western Ontario, line 7.8, pp. 19, 56.

the payments from the 1837 treaty. The 1837 annuity was to be added to the 1842 treaty proceeds and divided equally between the Mississippi bands and the Chippewa of Lake Superior. This had two consequences. First, the Lake Superior shore bands would now share in the proceeds of the sale of the Interior Wisconsin bands land in 1837. Second, the Mississippi bands again profited handsomely at the expense of the Wisconsin and Upper Peninsula Chippewa. The latter were now entirely landless. They now held only the impermanent privilege of living on and exploiting the areas they had ceded, and the unlikely future prospect of moving in with their western cousins.

The payment for this cession was detailed in Article 4. For a period of twenty-five years until the final payment in 1868 the Chippewa were to receive an annual annuity, amounting to \$36,200 per year. Of this sum, \$12,500 was to be paid each year in hard money, \$10,500 in goods, \$2,000 in provisions and tobacco and \$11,200 in services, blacksmiths, farmers, carpenters, schools and teachers and an agricultural development fund. Over the twenty-five years, the annuity totaled \$905,000. In addition, Stuart compromised somewhat with both the traders and the "half-breeds." The Chippewa's debts to the former were to be paid off with a sum not to exceed, \$75,000, while a single one-time payment of \$15,000 was to be distributed among the "half-breeds."

The total payment for this cession, then, amounted to \$995,000. Of this sum, \$905,000, or 91 per cent, was delivered to the Chippewa direct. In this respect, Stuart's efforts to watch out for the interests of the Chippewa brought results, a considerably larger share of the proceeds from the 1842 treaty being delivered to them than was true in 1837. With this agreement certified, the Chippewa received an additional influx of money, goods, and services. Due to the overlap with the 1837 annuity, until 1858 they would receive double payments, at which date they would start getting only the remaining ten years due under the 1842 treaty.

Article 2 of this agreement contained a provision highly unusual for Indian treaties. It provided, also, that United States Indian Trade and Intercourse law would remain in force for a time within the ceded area. Stuart wrote this provision into this treaty at the behest of influential Protestant officers from the American Board of Commissioners for Foreign Missions. These missionaries were concerned about the unregulated supply of beverage alcohol to the Chippewa in Wisconsin so long as they exercised their privilege of living and subsisting there. As Stuart made plain in his official correspondence, the aim of this provision was to prohibit the sale of strong drink to Indians, no more. This kind of a stipulation was rare, because ordinarily, once Indian lands were ceded, state or territorial law came into force over them. Hence, the 1842 provided an automatic conflict between federal and Wisconsin authority.

For the 1842 treaty, as was true of the 1837 agreement, in several places the Senate delegated to a particular branch of government or a specific officer the authority to implement some stipulation or another. The right to rescind the application of federal law over the ceded area, for instance, was reserved to Congress in Article 2. In Article 4 the Senate awarded Robert Stuart the power to decide on the extent of each trader's debts, and to authorize payment. In this same Article, to the Secretary of War (who supervised Indian Affairs, generally) was given the authority to allocate the annual agricultural development fund. To the President in Article 2 the Senate, without explicit restriction, gave the needed authority to rescind the temporary privilege of occupancy and use of the ceded region by the Chippewa.

This same explicit power was awarded the President in Article 6, which applied to only a portion of the ceded land. This was the "Mineral District" along the Lake Superior shoreline, ownership of which was a prime goal of this treaty. There, too, the Chippewa were awarded the privilege of temporary occupancy, although during the negotiations Stuart had made it plain to the Chippewa that they could not expect to live near places where there

mining operations for very long. Here, once again, the tenure rights of the Chippewa were subject to “the pleasure of the President.” Everyone concerned, the Chippewa included, recognized that these Indians would soon have to move away from the Mineral District into other parts of the ceded lands. And when the orders soon came from the President for the Chippewa to evacuate this smaller region, they did so without question or complaint.

This 1842 treaty, therefore, contained provisions for a two-step resettlement of these Chippewa. The first step, relocation out of the Mineral District, was to be accomplished immediately, when so ordered by the President. The second, larger step, relocation outside Wisconsin and the Upper Peninsula, was to occur at some time in the more distant future, when American settlements in Wisconsin and northwestern-most Michigan reached a level that might cause conflict over natural resources with the Chippewa, again when so ordered by the President. In later years, no question has ever been raised about the Senate’s delegation to authority to the executive branch for the first step. Similarly, there has been no question about the authority delegated to Stuart to decide about traders’ debt payments. It has been the second-stage withdrawal from the temporary right to occupy and exploit the resources of the ceded lands that has caused serious problems in the late twentieth century.

The complaints about the provisions of this treaty that did come immediately after its ratification stemmed from the dissatisfactions of the “half-breeds,” who had not obtained nearly as much of the Chippewa’s share as they had wanted. Working through a gullible, newly appointed Indian Agent, they sought to have the provisions of the treaty altered, with a larger share going to themselves. Similarly, there were complaints from the Chippewa about the inclusion of Isle Royale in the area ceded, but Stuart quickly resolved this confusion.

But the privilege of remaining on and making a subsistence from the ceded area for a period of “from fifty to one hundred” years created problems of a severe, and on one occasion a disastrous nature. Soon after the treaty was ratified, in March, 1843, some Wisconsin territorial officials started pressuring Washington to have the Chippewa removed and resettled in Minnesota. There was little or no support for this political maneuver from Wisconsin’s residents, generally. On the contrary, the citizens residing in areas still occupied and used by the Chippewa strongly favored their being allowed to remain in the Territory and after 1848 in the state of Wisconsin.

This was so, mainly, because the Chippewa continued finding economic opportunities for themselves. Over the next several years they made themselves increasingly valuable to key industries, working as suppliers or employees in timbering, commercial fishing and hunting, mining and Great Lakes shipping. For these, as well as philanthropic reasons, most of Wisconsin’s citizens, including the legislature, actively supported Chippewa residence in the state, but under state law.

They were quickly joined by Robert Stuart, who countered efforts to deceive Congress about the Chippewa by informing high officials of the specific promises he had made them in 1842. Stuart, who knew the Chippewa and the area particularly well, also insisted there was no reason for the Chippewa to be forced out. There was still ample game and fish for their subsistence, he pointed out, and they were finding employment in the new extractive industries. But above all, he insisted, he, Robert Stuart, had given his personal word that they could stay in the ceded territory for many years. That promise was made as a verbal part of the contract he made while he was an official of the United States government, and that promise could not lightly be disregarded, he protested.

Pressure for the Chippewa to be dislodged ebbed and flowed for eight years, with the Chippewa themselves sending several delegations to Washington to plead their case. Then, in the winter of 1850-1851, came a murderous crisis, which cost the Wisconsin Chippewa bands many lives and much property.

During the summer of 1850, the Chippewas' newly appointed Indian agent and three of his superiors organized a dangerous, deceitful project. They planned to dislodge the Chippewa, first, by closing down all the treaty guaranteed service activities in Wisconsin and moving these to Sandy Lake, Minnesota. They informed the Chippewa that only those who traveled to Sandy Lake with their families would be paid their annuities; but they also secretly planned to delay the payment of the annuities until after winter had set in, preventing a return trip to Wisconsin. The results of this trap were a tragedy. About four hundred of the Wisconsin and eastern Minnesota Chippewa who made this trip died of malnutrition, food-poisoning, disease, and exposure before spring came.¹

Because of this experience, by summer, 1851, the Wisconsin and Upper Peninsula Chippewa were even more adamantly opposed to leaving the ceded lands. The Sandy Lake area they called a "graveyard" and would have nothing to do with it. Their agent, the man most responsible for this calamity, John Watrous, they completely distrusted. Their relations with the Mississippi bands were strained to the point of rupture. Their relations with citizens in the ceded area, on the other hand, were greatly improved, and from these and other Americans they obtained much influential support of their efforts to secure reservations and with these the right to remain in Wisconsin.

But the Chippewa themselves held a powerful hole-card. After the 1842 treaty was done, the United States moved to purchase another part of the Chippewa's "national" estate, the north shore of Lake Superior, extremely valuable because of its additional mineral resources. In 1847, for instance, American authorities attempted to negotiate for the cession of this area, but the Lake Superior Chippewa bands flatly refused to consider the possibility until a critically important concession was made them. They demanded, as part of the compensation for the North Shore, that they be awarded small reservations in that as well as the areas ceded in 1837 and 1842. This arrangement American officials would not make, so negotiations for that area were blocked for several uneasy, dangerous years. The sale of the North Shore, and the right to live on reservations in Wisconsin, remained up in the air until 1853. That year a new administration took power in Washington, an administration that soon began a radically changed Indian policy, one that was to end the old removal policy aimed at consolidating all eastern Indians in all-Indian Territories west of the Mississippi.

The Treaty of 1854

The nature of American Institutions in the Great Lakes region had changed dramatically in the years between the 1842 and the 1854 Chippewa treaties. With one exception, all of the states of the area were established and flourishing, while Minnesota had been a territory since 1849 and was well along the route to statehood (1858). Moreover, the character of the United States had changed greatly. It had become a single continental nation, Atlantic to Pacific, Canada to the Mexican border. Huge new western and southwestern territories had been added, and settlements were expanding on both coasts and the Great Plains region. With these developments, it became apparent to American officials that older Indian policies no longer suited the requirements of the industrializing, rapidly expanding nation. In particular, it was apparent that the old policy of "removal," of buying Indian lands and requiring them to resettle within the borders of one or a few all-Indian Territories, was in conflict with American institutions and values. So an entirely new Indian policy was

¹ 1. Clifton, Wisconsin Death March, 20-26.

inaugurated in the early 1850s.

This became known to historians as the ‘reservation policy. The special features of this new policy initiative were several. First, the old “removal” policy was abandoned entirely. In its place was instituted a coherent plan involving the systematic purchase of the aboriginal rights of occupation and resource exploitation for most of the lands controlled by each native society. Each Indian population would then be concentrated on a smaller tract within the ceded territory, reserved for the use of the Indians concerned. There, intensified efforts would be started to Americanize the particular native community through basic education and development projects. Indians were to become agriculturists-farmers and stock herders so they would no longer need to roam over large areas hunting and gathering.

A key feature of this reservation policy was the goal of systematically phasing out these temporarily segregated “tribal homelands.” None of the policy makers and officials in this era saw these reservations as permanent features of the American landscape. The American states were not to be further subdivided forever into numerous, smaller miniature “Indian nations.” The techniques for achieving this end included developing concepts of and experience with private property in land personal rather than collective or “tribal” land ownership.

The reservations established under this policy were to be subdivided and titles to “allotments” awarded to individual Indian owners. For a period of years, these private titles to homesteads were restricted; they could not be alienated or disposed of without official permission. Eventually, all reservation Indians would become landowners holding their titles in fee simple, citizens of the states, the original jointly owned reservation would be erased, and the tribal political organization would cease to exist. With few exceptions, all treaties negotiated with Indians between 1853 and 1856 contained these features. This was a policy of political incorporation and detribalization, and of social change and assimilation. The old American political value of *E pluribus Unum* was being applied to native peoples.

The 1854 Chippewa treaty-their last as a group- was again negotiated at LaPointe.¹ There was a final cession of the Chippewa’s aboriginal rights to one larger tract, Minnesota’s North Shore area, identified as Royce area 332. In addition, the agreement awarded the Lake Superior Chippewa for their use eight other “band” reservations, which generally were to be collecting points for a core group and other scattered Chippewa who might settle on them. These “core” reservations included, in the Upper Peninsula, one for the L’Anse and Vieux Desert groups (Royce area 333) and one for the Ontonagon population (340). In Wisconsin, two core reservations were authorized for the bands clustered around LaPointe (at Bad River, 334; at Red Cliff, 341, 342). For the LaPointe bands, an additional 200 acre tract on Madeline Island was reserved for fishing purposes (335), and old Chief Buffalo was given the right to one section for himself, to be deeded to his “connections,” the section to be made from within the North Shore tract ceded during this negotiation.

Two additional reservations in Wisconsin were authorized by this contract, for the interior Lac du Flambeau and for the Court Oreilles populations (Royce areas 336 & 337). Many years later, early in the twentieth-century, two additional small reservations were established by congressional and executive orders, for the St. Croix and the Sakaogan (Mole Lake) groups. These two small populations were not mentioned in the 1854 agreement, which anticipated that scattered groups like them would collect on one or another of the “core” reservations, which these did not. Hence, following lengthy lobbying efforts

¹ 1. *Treaty with the Chippewa Indians of Lake Superior and the Mississippi*, 10 Stats., 1109; Kappler, *Indian Treaties*, 648-52.

on behalf of the St. Croix and Mole Lake groups, the 1854 treaty was later amended to make reservation land available to them.

In Minnesota, within the area ceded in this compact, provisions were made for reservations for the Fond du Lac (338), the Grand Portage (339), and the Bois Forte bands. The latter group never actually settled on their reservation, and in an 1866 treaty they ceded their rights to same.¹

There was one additional award of land in the 1854 treaty, but not in the form of a reservation. This was the promise of clear title to eighty acres of land for each adult “mixed-blood” who claimed to be associated with the Lake Superior Chippewa.² In the decades following this treaty this provision caused great confusion and a considerable scandal. The rights of such “mixed-blood” claimants to eighty acre parcels were issued in the form of a certificate or “scrip.” The first controversy concerned where such claims could be made; inside the boundaries of one of the Chippewa reservations, or only elsewhere? This confusion was partially settled by requiring that the “mixed-bloods” select parcels elsewhere. The second and greater problem with this “mixed-blood” payola involved who was eligible for a certificate, and the fact that the scrip was a negotiable instrument, which could be sold, mortgaged, or otherwise marketed. Combined, these brought a flood of eager applicants from distant places, including Canada, all claiming to be “Chippewa-by-blood,” each entitled to their share of the proceeds. However, because these “mixed-blood” parcels were selected from lands in the public domain, not from Chippewa reservations, this did not directly reduce the amount of money payable to the Chippewa for the cession of the North Shore.

There was much important business, involving both the interests of the Chippewa and those of the United States, expressed during the negotiations leading up to the final agreement in 1854. From the perspective of American officials, the major concern was to obtain clear title to the North Shore tract, especially valuable because of its mineral resources. As described earlier, the agents of United States had for years been trying to purchase Chippewa rights to that area without success, because they could not concede to the Chippewa what the Chippewa insisted on—the right to live on reservations within the areas ceded in 1837 and 1842 (and now, as well, in the 1854 cession).

Because the 1854 treaty expressed the provisions of the new reservation policy, that objection was removed. The two Indian agents who negotiated this treaty, Henry C. Gilbert and David B. Herriman, were both personally committed to the new policy and they were carefully instructed by their superior, Commissioner of Indian Affairs George C. Manypenny as to what they could promise the Chippewa. Indeed, the repeated instructions Manypenny mailed Gilbert are among the most explicit and detailed of any treaty instructions found in the National Archives. And in 1855, after the treaty was ratified, Commissioner Manypenny himself spent weeks on the Lake Superior shoreline, meeting with Chippewa leaders, discussing and resolving their concerns and helping them select some of the reservations allowed for in the treaty. Few Indian treaties have even been so carefully fashioned and implemented as this one. A second, major item of business for the Chippewa of Lake Superior (i. e., those bands whose lands had been ceded in 1837 and 1842) involved their relations with the predatory Mississippi bands. The 1854 treaty once and for

¹ Royce, *Indian Land Cessions, 794-96, Maps Minnesota 1 and 2, Michigan 2, and Wisconsin 2*

² By this time much controversy had developed around the term “half-breed.” The problem was that many of the so-called half-breeds by then were already many generations removed from any chippewa or other Indian ancestress. Ultimately, this problem was resolved by adopting the term mixed-blood, which was more generously inclusive insofar as it incorporated numerous people who were only distantly Indian of any kind.

all time explicitly dissolved the political fiction of an overall Chippewa “nation” owning a “national territory in common.” In Article 1, immediately following the agreement on the cession of occupation and use rights to the North Shore, the division between the Lake Superior and the Mississippi bands was made plain. The Mississippi bands, for their part, assented to the sale of rights to the North Shore without the right to any payment therefore. On their side, the Lake Superior bands relinquished any claim to other lands in Minnesota, those still controlled by the Mississippi bands. In addition, Article 8 of the 1854 treaty reduced the share of the annuities payable to the Mississippi bands from the 1837 and 1842 treaties to one-third, instead of one-half.

In effect, the Lake Superior bands entered into this negotiation landless, with no rights to occupy and to exploit the resources located within the areas ceded in 1837 and 1842, except those temporary privileges contained in the “during the pleasure of the President” stipulations. Before this negotiation they also remained under threat of removal into the remaining “national territory,” as provided for in the earlier treaties. Even before they joined with Gilbert and Harriman to start negotiations in 1854, the Chippewa leaders understood that both threats of resettlement in the west and of being entirely landless in Wisconsin and the Upper Peninsula had been removed. They would not have even discussed the possibility of giving up their rights to the North Shore without such prior commitments.

That is, before the negotiation began the Chippewa leaders understood that they had already achieved the most important goal sought the right to remain in Wisconsin and the Upper Peninsula on reservations. The rest of the negotiations consisted of detail, important matters to be certain, but compared with the issues of removal and remaining in Wisconsin, lesser issues; and there was the critical issue of getting the whole agreement certified and issued in binding form.

Among these lesser issues was one where the American negotiators had to capitulate, abandoning a central point in the instructions given them by Commissioner Manypenny. Manypenny had, at first, instructed Gilbert to get all the scattered Lake Superior Chippewa bands to agree to resettle on a single large reservation, probably to be located in northern Wisconsin on the Lake Superior shoreline. After some thought about the dispersed locations of these Chippewa, he revised these instructions and specified two or a few medium size reservations, perhaps one each for the Upper Peninsula, Wisconsin, and North Shore bands. In his meetings with the Chippewa leaders, however, Gilbert and Harriman found they would not consent to such an arrangement. The best deal they could strike was for the eight smaller, widely separated reservations specified in the treaty and discussed above.

Selection of which tracts could be assigned as the eight reservations entailed many problems. One cause of these was that the whole of the two areas ceded in 1837 and 1842 had been in the public domain since the Senate ratified those treaties. That meant that the lands were under the authority of the U.S. General Land Office. Well before 1854, parts of these areas had been officially surveyed, placed on the market, and many of the parcels and lots sold to citizens. This was particularly true in the Lake Superior Mineral District, and, to the south, along the streams neighboring the prime pine timber stands. Mining, lumbering, and some American settlements were flourishing in such locations.

In addition, other tracts had passed out of the ownership of the United States in various different ways, preventing their assignment to the Chippewa as reservations. These tracts included, for instance, the so-called “school lands.” Under federal legislation, once a newly acquired area had been officially surveyed, every Section 16 in every Township was donated to the state, to be used or disposed of so as to foster free education. Similarly, tracts designated “Swamp Lands” were donated by the United States to the states were located for drainage and development projects. Finally, in the Upper Peninsula,

a certain amount of "Canal Land" had been set aside by federal legislation for Michigan to dispose of to capitalize the construction of the Sault Ste Marie ship canal. These tracts, not being currently in the public domain, the United States could not "reserve from sale," as specified in the treaty, for subsequent assignment as reservations for the Chippewa: the United States could not give to these Indians what other political entities and private parties now owned.

Gilbert and Harriman were certainly aware of this problem, as is evident in the treaty proper and associated correspondence, when it came time to identify the tracts to be assigned as reservations. The L'Anse reservation, in a surveyed area where some land had been sold already, was explicitly defined in such a way as to exclude from that reservation lands not held by the United States at the time. Similarly, for bands in locations not yet surveyed, the 1854 treaty specified how much land would be taken off the market, but not the exact location.

The American agents, on the ground and made aware of these problems, were adjusting their general instructions as best they could to fit the political and geographic realities of all the people affected, Chippewa or American. Their adjustments during the negotiation were made in consultation with the Chippewa and others involved. In the months following the treaty's ratification, lingering concerns about the size and location of the reservations were resolved, under the direct, personal supervision of Commissioner Manypenny.

The second problem associated with the selection of the eight reservations concerned the great disparities between the Chippewa bands at this time, in terms of the amount of "Americanization" they had experienced, their subsistence practices, and their customary living arrangements. The Lake Superior shoreline bands for example, were distinct from the interior Wisconsin bands in several important ways. The shoreline bands, relying heavily on the Great Lakes fishery, like fishing peoples elsewhere were more sedentary, tied to compact, permanent villages. This fact was expressed in the treaty by the special "fishing reservation" on Madeline Island. In contrast, along the waters of the Chippewa and upper Wisconsin rivers, the bands there relied more heavily on hunting and gathering. They were more migratory, and their villages were more scattered and mobile.

Thus the specifications in the treaty of where the eight reservations were to be located varied widely. Some, mainly on the lake shore, could be described exactly by surveyed township or even section. Others, in the interior of Wisconsin and on the North Shore, were identified only by size, general area, and the group that was to reside on them whenever they were selected. Hence, by the end of 1855, some of these reservations were established and occupied; but the Lac du Flambeau reservation was not established until 1863, and Lac Courte Oreilles bands did not even select the tracts for their reservation until 1873. By that date, the L'Anse community was a flourishing, Americanized community, and their reservation was being broken up into individually owned allotments under the terms of the 1854 treaty.

This allotment process was started under the stipulations in Article 3 of the 1854 treaty. In this Article, the Chippewa and the United States agreed that at some future date, to be decided on by the President, the lands in the reservation would be surveyed into plots with titles to each awarded to the heads of families and other (unmarried) adults. These tracts consisted of eighty acres each. This article also specified that the President, thereafter, could award clear "fee" titles to the Chippewa owners, and also make rules for the inheritance of such individually owned allotments. In this same Article, the executive branch was also given the right to adjust the boundaries of the reservations, so as to take account of circumstances unforeseen during the treaty's negotiation. This latter stipulation provided needed flexibility, important because of the real possibility of conflict between the areas selected for the new reservations and tracts already taken out of the Public lands.

This article of the 1854 treaty implemented, among these Chippewa, the central features of the reservation policy Commissioner Manypenny was advancing in other parts of the United States. The reservations were to be temporary way-stations on the road to Americanization and assimilation. At some point in the future, to be determined by the President and the executive branch, these collectively owned “tribal” reservations would be broken up and delivered into the hands of individual owners, who would then become American citizens under state law. At that point, collective or “tribal” ownership of the reservations would disappear, as would the bands as political entities recognized by the United States.

One important point concerning the reservations bestowed by the United States in the 1854 treaty should be made clear: they were part of the compensation for the 1854 cession of the North Shore. In 1837 and 1842, the United States had already purchased the whole of the Chippewas’ aboriginal rights to these two immense areas, and the Chippewa were already being paid for them. Payment for the newly ceded area was provided for in other parts of this treaty. The rights to these reservations were donated so as to eliminate the Chippewas’ resistance to the cession of the North Shore.

Interestingly enough, except for the provisions for later breaking up the reservation into American style family homesteads, this treaty did not otherwise specify any explicit tenure rights for the populations involved. In other Indian treaties in this era there was always one or another explicit statement of tenure rights to reserved lands. For lands awarded in Indian Territory under the older removal policy, ordinarily, tenure rights were specified as “permanent.” In the Great Lakes area, in contrast, sometimes a different type of tenure right was specified with the words, “to be held as other Indian lands are held” (i.e., in common, or collectively). The absence in the 1854 treaty of any such specification, and the presence of the explicit provisions for breaking up the reservations into individually owned allotments supervised by the Executive branch, marks the impermanence of these arrangements. The 1854 Chippewa reservations were temporary way-stations, a secure place of residence for these Chippewa until they merged into the larger population as land-owning citizens. They were not intended to exist forever as segregated political islands in Wisconsin, Michigan, and Minnesota; and the Chippewa leaders who negotiated the treaties at the time understood this.

Like their earlier treaties, that of 1854 gave several parties the authority to implement different parts of the agreement. What is unusual about this treaty is that no such authority was reserved by the Senate to Congress, itself. Only the President, the Chiefs of the Bois Forte band, and old Chief Buffalo had delegated to them any powers for implementing the treaty’s provisions.

The authority given the chiefs was minor and specialized. Chief Buffalo had the right to make his own selection of a section of land anywhere within the ceded North Shore tract, and the General Land Office could then award him title to it. To the Bois Forte band chiefs went the authority to distribute to their traders a special \$10,000 debt fund.

The authorities given by the Senate to the executive branch were numerous and significant. These included determining which “mixed-bloods” were eligible for eighty acre tracts, issuing patents to them, and the selection of the band reservations. The President was also given the power later to conduct internal surveys of these reservations, and to decide when and to whom patents for individually owned “homesteads” should be given. Because of uncertainties as to where some of the band reservations would be located, and the importance of mineral resources to the United States, the President was also given the authority later to adjust the boundaries of these tracts, should any valuable mineral deposits be discovered within them. In effect, the Chippewa had sold all their subsurface as well as their surface rights to the ceded areas, including the reservations set apart for their residence in

this treaty.

The President could also adjust the boundaries of reservations should conflicts with pre-existing “vested rights” of others be discovered. Moreover, also to the President went the authority to determine whether following expiration of the twenty year guaranteed annuity period any technical services should be provided the Chippewa, and if so for how long. Similarly, the President was authorized to deduct from the annual annuity payments the costs of any depredations committed by members of these bands. So, too, was he authorized to decide how long a prohibition of the sale of alcohol should continue, both within the newly ceded North Shore, and within the newly established reservations. This provision, in effect, lifted the prohibition in the territories ceded in 1837 and 1842, for obvious reasons: these areas were now in the jurisdiction of flourishing states.

This weighting of the authority to make decisions about continuing services to and protection of the Lake Superior Chippewa beyond the periods specified in the treaty in the executive branch marks the broad purposes of this treaty, which involved application of the new reservation policy to these Chippewa. The reservations set aside were held severally, and would at some future time be subdivided and distributed to individuals as private property. Sometime in the future, when the executive branch deemed it proper and timely, the United States would end the delivery of all services to and oversight of the interests of its Lake Superior Chippewa “wards.” Gradually, more and more Chippewa would become citizens of the states where they lived, under state, not federal jurisdiction. In the meantime, the Chippewa living securely within their reservations, the threat of removal from Wisconsin lifted, would with federal help start adjusting themselves to living as citizens. Eventually, the band reservations, and the bands as recognized political units, would wither away.

Aftermath of the Treaty Era

The plans and expectations built into the 1854 treaty were only partially realized. In the decades following ratification of the agreement, most of its provisions were carried into effect. But the consequences of these on different Chippewa bands varied widely, depending mainly on their location. Those along the Lake Superior shoreline were most heavily affected those more remote in the interior of Wisconsin and the North Shore less so. In 1874, for instance, the same year that allotment of the land set aside for the L’Anse Chippewa population began in earnest, the Lac Courte Oreilles population was only then being settled on a reservation at all.¹

1874 was a critical year for all Chippewa as regards implementing the provisions of the treaty aimed at incorporating them into the mainstream of American political and social life. For in that year the last of their treaty guaranteed annuities and services expired. Those specified by the 1837 treaty had been paid out by 1858, those from the 1842 agreement by 1868, and the last guaranteed treaty payments and services, as specified in the 1854 concord, were delivered in 1875. Thereafter, the Chippewa were left to their own devices, and these included increasing skills in securing additional funding and services from federal, state, local, and private sources, based on their status as needful, deserving Indians. Although federal policy, as expressed in the 1854 treaty, was aimed at eventually making these Chippewa independent

¹ . For the best history of Lake Superior Chippewa experiences and developments in this period, see Edmund J. Danziger, Jr. 1978, *The chippewas of Lake Superior*, Norman OK: University of Oklahoma Press. See also, j. A. Parades, ed., 1980, *Anishinabe: Six Studies of Modern Chippewa*, Tallahassee FL: Florida State University Press.

citizens, the prolonged delivery of annuities and services contributed to prolonging and intensifying dependency among many of them.

Along the way, in one region or another, many of the Chippewa experienced economic booms-and-busts. The expansion of the timbering industry in Wisconsin and the Upper Peninsula provided one temporary period of prosperity for those Chippewa living in the most heavily forested regions. Indeed, after 1874, the provision for allotment of the reservations in the 1854 treaty provided an incentive for many to actively seek both allotments and clear titles to them. Once in possession in such a title, the owners could sell either the timber-rights on their tracts or both timber and the real estate itself. However, once the timber and the land had been sold, and the proceeds of the sale disposed of, these individuals commonly had no further capital resources.

As a consequence of allotment, and the individual Chippewa's proclivity to sell real estate rights, large parts of most of the 1854 reservations were lost to Chippewa ownership. In one instance, as at Ontonagon, almost all of the reservation was sold and the population moved elsewhere, and nearly the same thing happened at L'Anse, except that most of the population continued to live in compact settlements on Keweenaw Bay.

In the interior of Wisconsin, the reservations were allotted, large portions of them were sold, and increasing numbers of Chippewa made their homes elsewhere. During the forty years following the 1854 treaty, despite the promises of the Chippewa and the expectations of American authorities, few spent their lives or earned their whole livelihood within the confines of the reservations. Treaty supported efforts to promote subsistence and market-farming, for example, produced only modest results. Given the nature of the soils and climate, and the dispositions of the Chippewa themselves, in no reservation could the population sustain itself entirely, or even largely, by agriculture.

Similarly, the fish and game populations within these small reservations were inadequate to the task of feeding the Chippewa: these were quickly exhausted. Moreover, except for government employment for a few, there were almost no other sources of income on the reservations proper. So it was that the Chippewa continued to turn outwards for their employment and subsistence, off the reservations in the lands ceded in 1837, 1842, and 1854. Numerous Chippewa found employment in timbering, mining, Great Lakes transportation, and other enterprises; and many others continued to rely on hunting and fishing both for subsistence and commercial purposes. With the large increase in the deer herds following the clear-cutting of the forests came the development of large-scale commercial or market hunting, in which many Chippewa participated extensively. In this period there were but few efforts on the part of the states to regulate Chippewa off-reservation hunting, fishing, and gathering. Indeed, there were few state efforts to regulate the taking of natural resources by anyone, Indian or otherwise, for many years.

These unregulated days came to an end in the mid-1890s. American population in northern Wisconsin and adjacent areas had increased greatly. New, smaller counties had been established, their governments, rights, and jurisdiction created. Of greater importance, it soon became apparent that the uncontrolled taking of natural resources from the commons was near to disaster proportions. Entire species had vanished or were threatened, and the Chippewa had contributed at least their share to these ecological problems. The result was the passage of state-wide fish and game regulations, which quickly were applied to all citizens equally, including specified seasons, methods of taking, licensing, catch limitations, and penalties for violations. Eventually, the citizenry came to accept these regulations. What was involved was a principle of distributive justice: all residents of Wisconsin were treated as equals under the fish and game laws, and all had to share in the burdens of restrictions as well as the benefits of catch limitations and sustained yields.

Until that moment when state law was brought to bear on all hunters and fishermen — whether for commercial or sports purposes, for Indians or non-Indians within, the area of the state’s jurisdiction, there had been no problem with the Chippewa hunting and fishing outside the boundaries of their reservations. By 1895, then, a whole Chippewa generation had been born and had matured accustomed to living on a reservation and hunting and fishing elsewhere. So it was a new conviction was created in the minds of some of these Chippewa, namely, that “their treaties” had somehow guaranteed them the right forever to hunt and fish without any regulation whatsoever in the areas ceded decades earlier. That is, it was efforts to impose state regulation which caused the first protests of “special rights” for Chippewa. Earlier, this had been a concern of no one.

This raised a serious question of jurisdiction, whether state or federal. The contemporary issue concerning Chippewa tribal participation in management of natural resources, whether on or off the reservations, did not and could not then have arisen. This was so because the federal government did not recognize that these Chippewa bands had any political standing whatever as governments. Their affairs were managed for them directly by the United States. Local Chippewa leaders, at best, acted as advisors to agents of the Bureau of Indian Affairs. The Bureau of Indian Affairs, in its legislatively specified protective capacity, was empowered to manage the affairs of those Chippewa individuals still within its charge. The Bureau was not empowered to recognize and did not deal with the Chippewa as having officially recognized governments.

Once Chippewa complaints were forthcoming about state “interference” in their supposedly treaty guaranteed rights to hunt, fish, and gather, they were quickly disposed of. Both the Chippewa and state officials were repeatedly informed by federal authorities, in no uncertain terms, that once Chippewas traveled outside their reservations they came under state law, and their rights were precisely the same as other citizens. Indeed, federal authorities also indicated that state law applied as well to all that land within the original reservations that had passed out of federal control or Chippewa ownership.

These tracts consisted of all those allotments where the Chippewa owner had been issued a clear title, as well as those owners had sold to non-Chippewa. If the particular parcel of land on which a Chippewa was fishing, for instance, was not in protected federal trust status, then the activity came under state jurisdiction. Lands in trust status included the small remaining areas that had not been allotted, and those allotments the titles to which were still restricted. In such official decisions, the United States was doing no more than to signal to the Chippewa and state authorities the official, legal interpretation of the intentions, stipulations and consequences of the treaties of 1837, 1842, and 1854. There were, it was eventually determined, several exceptions to this general jurisdictional settlement, particularly as regards the rights of the LaPointe area bands to fish in Lake Superior.

Following this official, federal clarification of supposed Chippewa “treaty rights,” for more than another half-century the jurisdictional issue remained largely quiescent. Then, starting in 1934, came the beginning of a revolutionary turn-around in United States Indian policy.

Whereas over the prior century federal policy had been aimed at the wholesale integration of Indians into American political and social institutions, in 1934 the Indian Reorganization Act (IRA) was passed. This new policy was essentially segregationist in conception and execution, and it became only more so as the years passed. This legislation allowed Indians throughout the United States to organize new federal chartered corporations with combined economic and political functions. Indeed, so fervent were the promoters of this new policy that they actively pressured many Indian groups to conform and organize under the terms of the IRA, in spite of great opposition

from Indians in many places.

There was little strong, open opposition to petitioning for an official new political status from inside the Lake Superior Chippewa communities. At the same time, within most of the bands, those who strongly favored accepting the IRA, and organizing new political units under its terms, were most often small minorities. The IRA required only that a fraction of any band's membership approve this step, and the required thirty or so per cent was forthcoming in most of these now widely scattered populations. Interestingly enough, support for organizing under the IRA was largest and strongest in those groups that had most successfully assimilated into the mainstream of American politics and social life, at Keweenaw Bay, for instance. Similarly, a great deal of the support for reorganization came from people whom neither American officials nor the Chippewa elders who negotiated treaties between 1825--1854 would have accepted as legitimately Chippewa.

These were the increasingly numerous mixed-bloods," or, as the traditional Chippewa called them, the Wiisaakodewiniwag. They were the children and descendants of American fathers of European, predominantly French descent. With agreement on the 1854 treaty, both the authentic Chippewa leaders and American authorities agreed, these mixed-bloods' were to get one final pay off, eighty acres each in the public domain. That award attracted numerous people of obscure ancestry to Chippewa country, adding one more incentive for them to claim some affiliation with these small populations. And as the years passed, the percentages of Wiisaakodewiniwag penetrating and taking up places in Chippewa communities increased, dramatically so. This was due to increased intermarriage between outsiders, far more often than not, involving the marriage of American males to Chippewa (or "mixed-blood") women. As the years passed before passage of the IRA, this element had taken up an influential role within the communities. And so they emerged as advocates of accepting the IRA.

The presence of large percentages of Wiisaakodewiniwag in these now greatly altered communities was expressed in the membership provisions of the constitutions the bands drew up under the IRA. Traditionally, to be a legitimate Chippewa, a person had to be descended from a line of Chippewa forefathers. It was the rights of such traditional, legitimate Chippewa that the band leaders defended during their treaty negotiations. The offspring of Chippewa women by French or British or Finnish males belonged, so far as these traditional Chippewa were concerned, to their father's ethnic groups, not to the Chippewa.

But in the IRA constitutions none of this was recognized. Instead, the American practice of using a "blood-quantum" cut-off was specified, irrespective of which line of ancestors an applicant claimed as Chippewa. Thus an American racial definition of membership was substituted for the traditional Chippewa patrilineal definition. The "blood-quantum" minimum specified in the Chippewas' IRA constitutions of the late 1930s was "one-fourth Chippewa blood." But even then, this "one-fourth" was often illusory, based on the mere declaration or assumption that the one needed supposedly Chippewa grand-parent was a "full-blood."

It was not until the decades after World War II, and another full generation of extensive intermarriage, that the full implications of the IRA's segregation and "tribal" government development policy blossomed. It took the Civil Rights movement, the Viet Nam War, and the growth of the ethnic rights movement to bring modern "Chippewa" activism to where it is today. Then fresh ingredients were added to the principles laid down in the IRA. One of the most important of these was President Richard Nixon's declaration of an "Indian Self-Determination" policy. In practice, this meant increasingly that the federal government would deal with each officially recognized Indian political unit on a "government-to-government" basis, a far cry from the policy of the United States throughout the late-nineteenth and well into the twentieth-century. Moreover, through additional federal pressure on the

states, the states themselves were pushed to recognize and deal with Indian communities on an artificial “government-to-government” basis.

To fully understand contemporary controversies over supposed “treaty rights,” all this historical and political background must be kept in mind. This controversy about the demand that the states subordinate their interests, the interests of their constituent counties and municipalities, and the interests of their non-Indian citizens, to the interest of the state’s Indian citizens who happen to be enrolled in a federally created “tribe” is an outgrowth of very recent political changes. As a consequence of Nixon’s “self determination” policy, increased weight and power has been given to only recently created Chippewa governments.

This modern trend runs in direct opposition to the intentions of and the stipulations in the treaties the traditional Chippewa negotiated with the United States a century and a half ago. It was not the intention of the United States then to create a situation where, in the late twentieth-century, Michigan, Wisconsin, and Minnesota would house racially segregated mini-states, each a separate political unit largely free of state jurisdiction. And it was not the intention of the United States in these treaties to produce a situation where the states would have to deal with two separated classes of citizens, one of them enjoying numerous rights and benefits denied to the other. The authorities who negotiated these treaties were integrationists, not segregationists. To them, the prospect of a situation where the states of the union would forever be divided up by hundreds of mini-states whose memberships were defined in racial terms was anathema. This was what the Chippewa treaties were explicitly designed to avoid, that and the perpetual, costly, damaging human conflict caused by such politically determined racial segregation and discrimination.

MODERN TREATY RIGHTS LITIGATION

The Chippewa’s Indian Claims Commission Cases

The aftermath of the nineteenth century treaty era left much unfinished business in Indian country. Numerous disputes over promises made in these agreements persisted, with no straightforward, systematic, efficient means of resolving them. Both piecemeal legislation and a series of federal court cases were the main ways of delivering some satisfaction to Indian plaintiffs, but neither offered comprehensive solutions to generations-old complaints.

These disputes concerned many issues. The whole legitimacy of particular treaties was one such. However, most of the disputes concerned details, questions about the individual stipulations of a particular treaty. Were the Indians paid enough for the cession of their rights to land? Had the federal government paid the agreed upon amounts in full? Had the United States negotiated, or failed to negotiate, with the correct title-holders of particular tracts? Was improper force, coercion, trickery, or deception used by American authorities? These and other specific unresolved complaints accumulated over the years, generating chronic dissatisfaction among Indians, and dreams of restitution, usually in the form of large additional cash awards.

In this period, within most Indian communities, great attention was paid to obtaining settlements of their treaty complaints from the federal government. For many years, however, Indian groups were required to take a long and difficult path. They had first to obtain an enabling act from Congress: special permission to bring an action against the United States in the Court of Claims. Such special Congressional acts were not easy to come by. Then, once Congress had granted such permission, the Indian plaintiffs had to press their case in the Court of Claims, and in such actions they did not by any means always prevail. So it was that, over the course of a century, hundreds of specific treaty rights disputes remained unsettled.

Immediately following World War II, in 1946, Congress authorized establishment of a special tribunal to hear and resolve all treaty-rights cases against the United States, the Indian Claims Commission (ICC). At the time of passage of this legislation, federal Indian policy had temporarily reversed itself from the segregationist trend of the late 1930s and 1940s. For some years, new policy initiatives were aimed at systematically dismantling the “government-to-government” relations between the United States and Indian organizations. Policy was redirected toward getting the United States out of the business of managing the affairs of its “Indian wards.” This was called the “termination policy,” which in the years following was applied to only a few Indian communities, most notably, the largest, being the Menominee of Wisconsin and the Kiamath of Oregon, together with a dozen or so smaller populations.

Establishing the Indian Claims Commission--a special tribunal that would resolve all outstanding claims against the United States was intended to foster the process of terminating federal responsibility for funding, supervising, and managing the affairs of Indians, corporately or individually. The idea was that Indians would be unwilling to accept termination so long as they had outstanding claims against the federal government. So the ICC was set to work to resolve these claims.¹ First established for a five year period in 1946, the Commission was granted several extensions until its authority at last expired in 1978. At that point, the numerous claims still not decided and the ICC’s case records were carried over to the Court of Claims, which was granted the power to decide them.

The Commission’s mandate was sharply restricted. It could hear only treaty rights cases involving the federal government. Moreover, the complaints it could hear and decide were of two types. The first of these involved the adequacy of treaty specified compensation for the cession of rights to land: had the United States agreed to pay the Indians a fair price for their land rights at the time they were sold? A fair price was estimated on the basis of the actual market value of the land at the time it was sold. Second, the ICC could hear cases concerning the alleged failure to pay the agreed on sums in full. Once the particular complaint was heard and decided before the Commission, the Indian plaintiffs were forever barred from later legal actions against the United States. So far as the United States was concerned, this was a once-and-for-all-time effort to wipe the books clean of treaty rights disputes; and satisfaction was to take the form of monetary payment, if the ICC held the United States liable.

The modern Lake Superior Chippewa bands were among the many Indian communities whose complaints about their treaties were addressed to and settled before the Indian Claims Commission. They were principals in several such actions before this tribunal, involving the payments they were promised and which they had or had not received under the treaties of 1837, 1842 and 1854. Their claims involved both inadequate compensation promised by the United States under these treaties, and accounting claims for failure to deliver annuities in the amount and form promised. Attorneys representing these Chippewa presented their cases in three dockets. The first of these, involving the 1854 treaty, was Docket 18—U, decided in favor of the Chippewa in 1964.² Their second case was presented in Docket 18—C, for inadequacies of payment under the 1837 treaty, and it was decided in their favor in 1968.³ Their third and last action before the ICC

¹ **United States Indian Claims Commission SICC], n.d.. Final Report, Washington, D.C.**

² **14 Ind. Claims Comm. 360**

³ **19 Ind. Claims comm. 514**

was for sums due under the 1842 treaty, argued in Docket 18—S, also decided in their favor in 1968.¹

In all of these cases the Indian Claims Commission decided that the Lake Superior Chippewa had been inadequately compensated for the sale of their aboriginal rights to the areas ceded to the United States in 1837, 1842 and 1854. In further hearings concerning the value of the areas at the time they were ceded, the ICC decided how much they should have been paid. From these sums, the Commission then deducted the amounts they had actually been paid, and certain other offsets. Among these offsets was the value of the reservations awarded them in 1854. At this point, it was the responsibility of Congress to appropriate the money needed to pay these judicially determined debts. This was done, and the totals were deposited to the account of the Lake Superior Chippewa bands in the U.S. Treasury. Actual payment of these amounts, with interest accumulated since the Commission's decision, was delayed for many years. This had to await development of approved lists of legitimate claimants in each band, and federal approval of a plan for disbursing the sums involved.

Once the ICC's work was done in the Lake Superior Chippewa cases, the United States government no longer had any obligations to these communities under the stipulations of their treaties. Nor could the Chippewa make any additional claims against the United States for the sale of their rights to the lands sold in 1837, 1842, and 1854. The United States was protected against further legal action by the Chippewa involving these treaties by the legal rule called *res judicata*. Their complaints against the United States had been settled on their merits in the courts, so further litigation involving the same parties and issues was prohibited. Before proceeding, it is important to stress two issues. First, in the Indian Claims Commission actions it was the federal government--the United States that was the sole defendant. No other party was subject to or liable in the Chippewa plaintiff's action before the ICC, nor could this be under the Commission's enabling legislation.

The second issue is even more pertinent: what was the basis for the legal actions of the Lake Superior Chippewa bands before the Commission? Attorneys for these Chippewa argued that in 1837, 1842, and 1854 the Chippewa had sold to the United States the whole of their aboriginal title, which is sometimes called "Indian title" or "original title." Aboriginal title consisted of the Chippewas' possessory rights both to occupy and to exploit the resources of the areas ceded in those years. That is, to win before the Indian Claims Commission, the Chippewa had to plead that they had sold all their rights to occupy and use northern Wisconsin, and adjacent parts of Minnesota and the Upper Peninsula. Once the ICC held in their favor, they no longer had a basis for litigation against the United States concerning these treaties or what was accomplished in them.

The termination policy of the 1950s and early 1960s was applied only piecemeal; but even these efforts to move the federal government out of the Indian business, to incorporate Indians fully into the political and social life of the states where they lived, caused a storm of protest. It was quickly abandoned, to be replaced during the 1970s by a full-scale separatist policy called "self-determination" and "sovereignty." It is this policy which is operating, full-blown, today. This policy, however, was accompanied by a fiscal retrenchment on the part of the United States in its support of Indian programs. This sharp curtailment of federal funding, which came after the boom "War on Poverty" years, when funds for Indian projects were lavish, and when expectations in Indian organizations had been greatly inflated, caused great distress for the many individuals and organizations who had become

¹. 19 Ind. Claims Comm. 319.

dependent on outside support of Indian community employment and services.

The effects of this federal fiscal retrenchment were exacerbated by other developments. One of these was the extraordinary increase in the number of Americans who claimed to be Indians, and who sought and obtained membership in officially recognized Indian organizations. Between the 1970 U.S. census and 1985 a fifteen year period the numbers of people claiming Indian identity soared by 250 per cent, and the number of these "Indians" living on reservations doubled. Therefore, as federal funding of Indian organizations declined absolutely, so too it declined far more so relatively, relative to the greatly increased numbers of people clamoring for categorical aids as Indians. Eventually, by the late 1970s, there were many fewer federally appropriated dollars available per capita for Indian programs than there had been about 1965.

In effect, as the United States government loudly advertised its support of the independence of the Indian governments it had started creating with the 1934 Indian Reorganization Act, it also started reducing its fiscal support of these organizations. In addition, by 1980 or so, these Indian governments had been pressed into becoming, even if in a miniature form, full-scale social welfare states, each providing a complete array of social services and employment. Though there were large variations from place to place, few if any Indian reservation communities possessed in their own right the physical or economic resources to finance these services at the level demanded by their greatly increased memberships.

These factors, and others such as the sharp decline in job opportunities for inadequately educated, low-skilled workers throughout the United States, created a growing fiscal crisis within Indian organizations. To perpetuate themselves, to grow, to flourish, to satisfy the expectations and demands of their constituents for services and jobs, they had to seek funding for their operations outside the meager economic resources they controlled outright.

One significant solution to this funding crisis has been the proliferation of high-stakes Bingo operations owned by and conducted on behalf of Indian organizations throughout the United States. These are sometimes immensely profitable, tax-exempt enterprises protected from restriction or control by state law by the doctrine of Indian "sovereignty." Nation-wide, the take from these gambling operations now runs into many hundreds of millions of dollars. A highly successful Indian gambling operation, however, depends on numerous factors outside the control of particular Indian groups. Geographic location and accessibility to large numbers of the working-poor or retired people most addicted to such gambling is the key to such success. Indian reservations remote from major metropolitan regions have had much less profit from such enterprises than have others more fortunately situated. Among these more remote reservations are those of the Chippewa bands of northern Wisconsin. In their case, in addition to their remote locations, the fact of competition between numerous such Indian gambling operations in the same area further reduces the earnings of each.

Another source of outside income has been the prosecution of treaty rights cases. In this respect, the Indian Claims Commission may have succeeded in finally providing a reasonably adequate means of resolving such claims that are made against the United States, but it had extraordinary, unanticipated consequences. For more than a century most Indians dreamed of a time when the United States would settle its outstanding debts with Indians; and the ICC's work largely accomplished this goal. But rather than erasing pent-up demand for a once-and-for-all-time final satisfaction of all such claims, the operations of the Indian Claims Commission only increased them. But now the targets of such litigation could not be the federal government. That well was dry.

One unpredicted result of the Indian Claims Commissions work was to greatly enlarge and enhance the position of the legal branch of the Indian rights industry. For more than a century before the ICC was established,

numerous attorneys and some firms took on Indian clients as sidelines to their other business. Once the ICC was established and in full operation, however, the size of the Indian legal rights industry took a quantum leap. Aside from private attorneys and firms that began specializing in Indian cases, numerous specialized Indian Law organizations, of a public service nature, were established. One the largest and the best financed and staffed of these is the Native American Rights Fund. During the War on Poverty years, as well, every state containing a significant Indian population had established in them a federally financed Indian Legal Services office.

Since then many new attorneys specialized in Indian law, hundreds themselves Indians, have also been trained and brought into service. In addition, especially as a consequence of the research and expert witness needs of the Indian Claims Commission, a great many historians, anthropologists, geographers, economists, and other scholarly specialists have grown accustomed to servicing the needs of Indian clients in legal cases. There is probably no federally recognized Indian community today which does not have at least one in-house counsel; and all such have available to them the services of the state, regional, and national firms and organizations that specialize in Indian law.

Indians are by no means isolated from the mainstream of developments in American culture. Their inclination to tap the frustrated monetary dreams of millions of Americans through the promise of paying out huge gambling prizes is shared by most of the states, other units of government, charitable organizations, and commercial gaming interests. Their predilection for seeking resolution of their complaints in the courts is shared by millions of other Americans, for whom the possibility of a substantial awards based on a claim for damages from successful litigation has become routine. Indians are alone, however, in basing their claims for such windfalls on their special place in American history and society, claims that sometimes have an overpowering emotional appeal both for jurists and the general public. They are alone, additionally, in being the beneficiaries of standards of evidence and rules of procedure, and special bodies of law and legislation, which gave them a huge advantage not shared by other plaintiffs seeking redress and bonanzas in the federal courts.

All of these elements form the background to the Lake Superior Chippewas' recent efforts to squeeze from the gray areas of their early nineteenth-century treaties yet one more windfall. Having won their cases before the Indian Claims Commission, thus having exhausted their right to seek further awards for damages from the United States; having developed highly expensive forms Of community government and service programs; confronted with greatly increased populations demanding such services; faced with much reduced legislatively appropriated funds; possessing well trained and experienced legal services; and having become entirely dependent upon funding from outside their own resources and memberships, these Chippewa, like other Indian organizations, have turned once again to the federal court system seeking once again to refresh their fortunes. For them, as for other Indians, their old treaties have become like perennial, everbearing trees. Cultivated, pruned, and grafted properly, these century and a half old agreements can be periodically shaken so as to produce substantial harvests of money and other valuable considerations.

The Wisconsin "Voigt" Case

The preliminaries to what became known as the "Voigt" case started in 1974. For eighty years before that date the State of Wisconsin had regularly enforced its fish and game laws against all residents of the state. Among those subject to such regulation were members of the six Chippewa bands of northern Wisconsin, when they hunted or fished outside the boundaries of their reservations.

applying the state's jurisdiction to these Chippewa had been explicitly approved by federal authorities and legal decisions soon after such laws were passed and enforcement began.

However, as described above, by the early 1970s the nature of Indian policy had changed dramatically, and some (by no means all) of Wisconsin's Chippewa were protesting their treatment as equal under state fish and game laws. Similarly, the United States was claiming increased powers and rights for the newly established "tribal" governments, especially so their right to exercise jurisdiction within the boundaries of their reservations.

However, in some locales Indians also began seeking restoration or affirmation of rights outside the boundaries of their reservations. In 1974, by prearrangement, seeking to provoke just such a "test case," two brothers, Frederick and Michael Tribble, members of the Lac Courte Oreilles band, went fishing where they knew game wardens were active.¹ They were arrested, cited, and the first steps in the Voigt case began. Fifteen years later these brothers explained what they had in mind in provoking this episode: they and the Chippewa who supported them were seeking a favorable judicial determination that could later be converted into a large cash settlement via negotiation. As events developed, fifteen years after this provocative incident, a majority of Chippewa voters have shown that they are by no means eager to accept such a settlement, even as a temporary lease-back arrangement.

Following the Tribble brothers arrest and arraignment in state court, the Lac Courte Oreilles filed a class-action suit in the Wisconsin federal district court. Eventually, this case was joined with two others involving Wisconsin Chippewa and similar treaty-rights hunting and fishing issues, all disputing state jurisdiction over the Chippewa in areas within the areas ceded in 1837 and 1842, both inside and outside the 1854 reservations.²

The first legal arguments and evidentiary hearings were before Judge James Doyle in Madison's federal district court chambers. The most critical of Judge Doyle's decisions at this stage was that, with the 1854 treaty establishing their reservations, the Chippewa had surrendered their temporary rights to hunt and fish in the ceded lands under the 1837 and 1842 treaties. Both the Chippewas and the State of Wisconsin filed appeals before Chicago's 7th Circuit Court of Appeals. In 1983, the Circuit Court reversed Judge Doyle's earlier decision, deciding that the Chippewa bands in 1837 and 1842 had not sold their aboriginal rights to the ceded areas, and that the 1854 treaty had not erased these rights either. Again the state appealed, to the Supreme Court, but was turned down.

The Circuit Court then sent the case back to Judge Doyle for a long series of further hearings and findings dealing with subsidiary matters. Who

¹ Don Hanaway's, 1989, "History of the Chippewa Treaty Rights Controversy," Madison WI: State of Wisconsin, Department of Justice, is a useful overview of the development of this case, from the perspective of the agency representing the state's legal interests in court, and in negotiations with the bands. Donald L. Fixico's "Chippewa Fishing and Hunting Rights and the Voigt Decision," in Donald L. Fixico, ed. , 1987, An Anthology of Western Great Lakes Indian History, Milwaukee WI: American Indian Studies Program, University of Wisconsin-Milwaukee, is not based on systematic knowledge of or research into the treaties, the many other historical documents or the Voigt case file. A strongly partisan story, it is based largely on newspaper accounts, including the Chippewas' own newsletters and newspapers, Masinaigan. The latter is the best source for the official Chippewa view on developments.

² The three cases are identified as United States V. Jerome Bouchard, United States V. Ben Rudy and Sons, at al., and Lac Courte Oreilles Band of Lake Superior Chippewa, at al. V. Lester P. Voigt, at al., Nos. 76-CR-70, 72-C-366, and 74-C-313, United States District Court, Western District of Wisconsin. They were joined for hearings and decisions, and are commonly called after the third and most inclusive of these the "Voigt case."

should regulate the Chippewa in their exploitation of natural resources outside their reservations and to what extent: the State, the governments of the bands, both? What species could the Chippewa take, in what quantities, and with what technology? Were the Chippewa restricted to subsistence and ritual gathering only, or could they also exploit the resources for purely commercial purposes? What damages should the Chippewa be paid for the eighty year period when the state prevented them freely from exploiting these off reservation resources? These were only some of the complex, technical issues that had to be presented in a series of court hearings and decisions which are, as of 1990, not yet ended. And when these subsidiary matters are finally decided at the district court level, they will certainly be followed by further appeals.

Judge Doyle did not live to see the end of these subsequent hearings. Fatally ill when he rendered his first decision, he was forced to retire from the case before the hearings were completed and the long series of decisions written; and after his tragic death the case was turned over to his successor, Judge Barbara Crabb.

To date, the federal courts have rendered numerous specific decisions. The Chippewa have retained, so it was decided, the right to exploit nearly all the natural resources of the areas they ceded in 1837, 1842, and 1854. For any practical purpose, they may so exploit these resources forever, and they may do so for both personal subsistence and for commercial income producing purposes. The Chippewa may use technologies of harvest not allowable to others under state law and unknown to their ancestors before or during the treaty era, and they may take enough of various species to maintain a "modest" standard of living. A "modest standard of living," has been defined by the Court as approximately \$22,500, in current dollars, for a family of four (i.e., \$5625 per capita).

The Chippewa may now exploit the natural resources on "public lands," which the court has decided means lands regularly accessible to the public. These include state owned land, county and municipally owned land, and privately owned land enrolled in state taxation programs which requires that they be open to public use. Presently excluded are other privately owned lands, but if the resources so far made available are found insufficient, the court may well later open these to Chippewa exploitation as well. Although the court has awarded the Chippewa the right to take 100 per cent of the "allowable" harvest of particular species, other citizens are supposed to have the right to some share of these resources. Under limited circumstances, such as to prevent depletion of a specific resource, or when the Chippewa do not have the institutional means to police themselves, the state may exercise some ("least possible") regulation over harvesting these resources. Finally, the attorneys who have served these Indians in these cases have the right to collect fees for their services over the years (payments which would be over and above the salaries they have been receiving first as federal and recently as Chippewa employees).

Finally, the Chippewa may later seek damages from the state for the supposed state denial of them these rights since about 1895. Wisely enough, when the Chippewa first brought this case before the federal courts, they made the State of Wisconsin but not the United States the defendants. For this reason, the Voigt case decisions so far do not apply to federally owned lands in Wisconsin, Minnesota, and the Upper Peninsula. This is an obvious contradiction, because only the federal government had the legal authority to negotiate treaties with Indians and to purchase their rights to resources from them; and it was the federal government, after purchasing these rights, which placed the land on the market and donated it to the state or sold it to private parties. Hence the Voigt decisions apply only to areas that have been legally purchased or acquired by these third parties from the United States. The courts' decisions about Chippewa rights to "public" lands are contradictory, as well, because in the treaty era and throughout the nineteenth century "public land" was defined as federally owned land. In

effect, the courts have not fixed blame or expenses on the one and only legitimate authority for making treaties and for implementing their provisions--the United States; and they have levied heavy damages against innocent bystanders the State of Wisconsin, lesser units of local government, and non-Chippewa citizens.

The Chippewa decision not to make the United States a defendant in this case was a wise one, because by this means they have continued to obtain federal support in the case against Wisconsin, and they have not brought the considerable weight of the U.S. Department of Justice down on them in court.

Had the United States been made a party to the case, then the significance of the earlier decisions of the Indian Claims Commission in their favor would probably have worked straight against their aims. In effect, before the Indian Claims Commission, attorneys representing these Chippewa argued that their clients had sold their whole cake that the United States had taken from them all further rights to its nourishment, but they had not been paid enough for the sale. The Indian Claims Commission, a federal court, agreed, and ordered the United States to pay up. In the Voigt case, entirely to the contrary, their attorneys argued that they had not sold the cake at all, demanding for their clients the right to eat it now and forever. Again, a different federal court agreed, and has ordered the State of Wisconsin to provide the forks and knives, as well as the main course.

Judge James Doyle's 1978 Decision: A Critique

The three cases joined under the Voigt rubric each dealt with somewhat different issues; but Judge Doyle determined that decisions on each of them would involve considering the same massive body of historical and anthropological evidence, and overlapping matters of precedent and law.

The Bouchard case was entered by the United States as a proceeding for criminal trespass against Bouchard, a non-Chippewa citizen of Wisconsin, for fishing on the sloughs within the boundaries of the Bad River Chippewa reservation. Essentially, this case involved questions of ownership of these waterways, Chippewa jurisdiction over them, and the authority of the United States in its role as guardian of the rights of these Indians. Judge Doyle held against the United States and the Chippewa. The waterways in question, he decided, had passed to the ownership of the United States long ago, at the time of Wisconsin's statehood.

In Ben Ruby, another question about land and resources within the boundaries of a Chippewa reservation was before Judge Doyle. This matter concerned Section 16 lands: the school land sections which federal policy had made the property of the states once they were properly surveyed in the nineteenth-century. This was a civil action entered, once again, by the United States on behalf of its Chippewa wards. The United States claimed it continued to hold fee simple title to these school lands in trust for the Chippewa, notwithstanding the fact that the state had long since transferred its ownership interest to many private parties. After examining the numerous precedents, the law, and the array of historical facts concerning these matters, Judge Doyle again dismissed this argument as being without merit. The Section 16s in question, he decided, had never been made part of a Chippewa reservation at the time the reservation was established by the United States: a clear title to them had passed to the State of Wisconsin well before the reservation was surveyed and established.

In both Bouchard and Ben Ruby there were issues of contemporary policy never raised before or examined by the Court. Why, a century after establishment of the Chippewa reservations, hath the United States suddenly decided to seek exclusive title to the waterways and the Section 16s on behalf its Chippewa clients? After all, it was the same United States that in the first half of the nineteenth-century awarded title to these areas to Wisconsin, not to these Indians.

The answer to this question involves efforts of the United States to enforce and to enlarge the scope of the recent Indian “sovereignty” and “self-determination” initiatives, its Indian segregation policies, policy developments that are only a few decades old. The aim of the United States in Bouchard and Ben Ruby was to increase the power and the resources of the Chippewa bands affected. The goal was to add to the areas held by the federal government in trust for these Chippewa through judicial, not legislative process, which would have increased the jurisdiction and the resources of these federally invented pseudo “nations.” The United States in these actions was trying to take care of its own dependents, without care for the repercussions and damages done to the interests of other units of government and citizens. Similarly, in the 1970s, the United States paid little heed to the fact that the treaties in question were negotiated in an era when the political and social integration of Indians was the dominant policy aim of the United States.

Because the issues in Bouchard and Ben Ruby involved areas within the reservations established by the 1854 treaty, the earlier decisions of the Indian Claims Commission had little bearing on them. This is so because the value of the reservations established by the 1854 treaty were calculated as deductions from the debt owed the Lake Superior Chippewa by the United States. If the United States in the 1970s had been successful in enlarging the size and the value of resources delivered to the Lake Superior Chippewa by these treaties, it would have slightly decreased the amounts owed the Chippewa by the federal government.

In the third case joined and heard by Judge Doyle, *Voigt* proper, the plaintiffs and the issues were different. This was the action entered by the Lac Courte Oreilles band on behalf of the Tribble brothers, itself, and other Lake Superior Chippewa. These plaintiffs argued that in the treaties of 1837 and 1842 they had reserved their rights to hunt, fish, and gather wild rice in the ceded regions outside the boundaries of the reservations, and that this right was expressed in the clauses in these treaties giving only the President the power to cancel these rights. Since a presidential order to this effect had been issued in 1850, apparently to be withdrawn two years later, the off-reservation rights were still in effect. So for many years the State of Wisconsin had improperly been denied these Chippewa their supposedly “treaty guaranteed” rights.

The United States was not made a party to the *Voigt* case proper and so stood aside. However, like the implications of the Bouchard and Ben Ruby matters, the hidden agenda in these proceedings involved a further enhancement of the resources controlled by the Lake Superior bands--the natural products of the ceded areas. It also included an enlargement of the powers of these recently created miniature states-within-the State of Wisconsin, by extension of their jurisdiction over both natural resources and their own populations when hunting and fishing outside the boundaries of the reservations. Such aims were congenial to the policy aims of the federal government as regards its Chippewa clients.

As for Bouchard and Ben Ruby, in *Voigt* Judge Doyle rejected the arguments of the Chippewa. The reasoning he used to reach his decision was concise and logic-tight, based on such historical evidence as was made available to him. He found that in both the 1837 and the 1842 treaties the power given by the Senate to the executive branch at some future time to cancel the hunting and gathering rights of the Chippewa had a serious limitation to it. Based on the scanty evidence available to him, he concluded that this limit did not consist of a specified period of time, a possibility he did not even consider.

Instead, Judge Doyle decided, there was an entirely different sort of qualification to the President’s authority promised the Chippewa during the negotiation of these treaties. Supposedly, the official commitment was that

they could remain in Wisconsin and hunt and gather on the ceded lands so long as they behaved themselves and committed no offenses against Americans. In effect, in this part of his decision, Judge Doyle entirely nullified the effect of the “during the pleasure of the President” clause in the treaties. Based on his reasoning, the Chippewa’s rights to exploit the ceded lands are perpetual; no President could ever exercise the powers given by the Senate in these treaties. This must be so, because these treaties did not specify legally acceptable standards of what constituted Chippewa “misbehavior” of such magnitude as to justify presidential withdrawal of the privilege.

Nonetheless, Judge Doyle determined that the rights had been extinguished once the 1854 treaty was negotiated, signed, and ratified. He found that in this treaty, key Chippewa leaders explicitly indicated that they understood they were giving up the temporary hunting rights in the ceded areas in exchange for reservations, on which they would confine themselves and live. Because in some instances the reservations were not established and occupied for some time (not until 1874 for Lac Courte Oreilles). Some of the bands were legally entitled to hunt and fish during the intervening years. But once the reservations were established and settled, the rights were gone.

Judge Doyle called these rights “permissive,” in contrast to aboriginal rights, or permanent rights granted by treaty or other congressional action. He concluded that there could be no reasonable distinction between the right to occupy parts of the ceded land, and the right to hunt and fish in them. Hence, the Chippewa could not live within their reservations and hunt and fish elsewhere. Together, these “permissive rights had been surrendered with the 1854 treaty. He also dismissed the argument that the Chippewa had freely roamed over the area hunting and fishing until the 1890s without state regulation: so, too, had many other residents of the state, he pointed out.

All in all, in Bouchard, Ruby, and Voigt (the Voigt case as a joined whole), Judge James Doyle held against the Chippewa bands. Had his decision stood the test of an appeal, there would be no Chippewa hunting, fishing, and timber cutting controversy in Wisconsin, the Upper Peninsula, and eastern Minnesota today. But it did not pass this test, and his decision was firmly reversed.

In a case of this nature, which depends heavily on submissions of historical documents and expert witness testimony, a judge is severely constrained in his decision making capacity. Federal court judges are not professional historians or anthropologists, nor are the attorneys who argue their cases before them. The standards of evidence and truth-seeking in court and in scholarly research are not the same. Attorneys representing the several parties at odds go to considerable lengths to control what evidence is presented in court. They can, and often do, carefully screen what documents are laid before the court, picking only those which support their arguments, ignoring others which weigh against their arguments and goals. Even more carefully they screen the potential testimony of expert witness, selecting only those whose contributions are likely to favor their case, then rehearsing them carefully before their appearances on the stand.

In such adversarial proceedings, attorneys are employed to win their client’s case at all costs, not to tell the truth. They present their cases in terms of much exaggerated, mutually exclusive blacks and whites, not gray areas. Moreover, in federal cases involving Indian treaty issues, the attorneys representing Indian clients have a much easier time of it than do attorneys serving their adversaries. They are greatly aided by the special canons of Indian law that require any ambiguities in the evidence to be settled in favor of the Indians, and for treaties to be construed as the Indians supposedly understood them at the time they were negotiated. In this respect, their adversaries are severely handicapped, and an extraordinary, often impossible burden of proof is thrust on them.

Judge Doyle, a long experienced federal Jurist, and a far better than average historical scholar in his own right, fully appreciated these difficulties.

Yet, he scrutinized such evidence as was presented to him with utmost care and reached out for other documents not shown him by the attorneys. He took no expert witness's testimony at face value. When the examinations and cross examinations of a witness did not produce information or interpretations that he needed on a particular point, he himself intervened with his own perceptive lines of questioning.

An example of the latter was Judge Doyle's considerable concern that the Chippewa, in selecting particular places for reservations, may have made such selections with a view toward exploiting special resources such as wild rice beds located nearby, but outside the reservation's boundaries. He had a strong precedent for this line of inquiry. An earlier federal case involving the Chippewa bands on the Lake Superior shore had decided that they had retained the right to take fish from the adjacent waters of the lake.¹ Indeed, the small reservation on Madeline Island for Lake Superior fishing purposes had been explicitly set aside in the 1854 treaty, and this precedent was what occupied Judge Doyle's attention.

Was there any evidence that the interior bands, Lac Court Oreilles in particular, had deliberately selected tracts for a reservation that would provide them ready access to important, neighboring resources, he asked? He could find no such evidence and so he rejected the possibility, which he himself had raised, that he might find the interior bands had retained the right to harvest one or more critical resources in particular places. Clearly, as he expressed it in his decision, the Chippewa claim to all natural resources in the whole ceded territory was far beyond the bounds of reason or justice.

This is just one example of the fine wisdom and the searching care for Chippewa rights Judge Doyle displayed during the course of the critically important first trial in the *Voigt* case. But it is also evident that he took care to consider the rights of the state and of other citizens to these resources.

For all these reasons, it is difficult to fault Judge Doyle's first decision, in which he denied the Lake Superior Chippewa rights to hunt, fish, and gather outside their reservations as Indians, without state control and management (his decision did not affect the special Lake Superior fishing rights, which had already been determined). Yet there were a few serious gaps in his historical reasoning, and it was through these gaps that the 7th Circuit Court's reversal of his decision flowed.

Judge Doyle did not have available to him certain critically important documents containing explicit evidence that would have affected his thinking about the limits on the presidential authority to withdraw the "permissive" rights to hunt and gather in the ceded territory. Nor did he have before him a critical assessment of the merits of the single document he used to decide that this "permissive" right was conditioned on, in fact made permanent by, the continued "good behavior" of the Chippewa. And his conclusion that the 1850 presidential order withdrawing these rights was illegal was also apparently based upon a seriously flawed assumption about how the United States, during the treaty era, went about punishing Indians for offenses against Americans and their property.

Judge Doyle's assumption was that in that period, between 1825 and 1854, when the Chippewa were negotiating their treaties, the United States regularly engaged in mass punishment of whole Indian communities for the criminal acts of one, a few, or some of their members. Nothing is farther from the historical truth, and the Chippewa at the time understood to the contrary perfectly well. In the first three treaties negotiated with these Chippewa, 1825—1827, the United States demanded and the Chippewa leaders agreed to turn over to American authorities, for trial and judgment, in American courts any individuals from their bands who had committed such offenses.

¹ *Stats. v. Gurone*, 53 Wisc 2nd 390, 192 N.W. 2nd 892 (1972),

In the years after 1825, on the rare occasions when serious offenses were committed, the few murders, for instance, this explicit agreement was implemented, or at least American and Chippewa authorities attempted to fulfill it. Moreover, American Indian law at the time required that federal authorities deal with individual perpetrators, not punish entire groups. For this latter reason alone, no American authority during the Chippewa treaty era could have countenanced including such a stipulation in any treaty. Basing privileges or rights granted on the whole group's "good behavior" even verbally, during a treaty negotiation violated fundamental American principles of jurisprudence and Indian law. Even more certainly, the United States Senate would not have accepted such an obviously illegal qualification of its power to delegate authority when ratifying an Indian treaty.

In fact, considering all the historical evidence, there is no suggestion that the "continued good behavior" qualification of the temporary permission to occupy and use the ceded areas was so much as mentioned either during the 1837 or the 1842 treaty negotiations. As discussed above, the matter of post treaty occupation and exploitation of the resources of the ceded areas was hardly mentioned at all during the 1837 negotiations, the duration or conditions of such privileges not at all that year.

In 1842, the situation was entirely different. Superintendent Robert Stuart was explicitly instructed to explain to these Chippewa, and to obtain from them an agreement, that they would (1) have to abandon the mineral district almost immediately, and (2) that they would have give up the occupation and use of the whole of the ceded areas at some time in the indefinite future. The right to make the decisions about this two-step surrender of the temporary privilege, the "permissive right" as Judge Doyle characterized it, the Senate handed to the executive branch. In both instances, the written treaty contained the same phrasing in this regard, "during the pleasure of the President." There has never been any suggestion that the Chippewas continued occupation of the "mineral district" was contingent on their good behavior, or that the President's decision to order them off these tracts was illegal. These questions arose only as regards their use and occupation of the remainder of the ceded areas. How could this be?

Superintendent Stuart carried out his instructions to the letter. In so doing, he found that getting the Chippewa leaders to agree to the 1842 treaty cession at all hung on the difficult issue of their somehow remaining within the ceded areas. His instructions firmly prohibited him from offering small reservations to the bands; and this was precisely what the Chippewa negotiators at first demanded. When their requirements were rejected, the two sides locked horns while seeking a compromise. Many of the specifics of their tough minded debate are in the historical record. They were reported by Superintendent Stuart himself. They are found in the recorded words and messages of the Chippewa; and they were recorded by other, more disinterested eyewitnesses.

The most important of these documents were not available to Judge Doyle at the time of the first trial. Unlike the 1837 treaty, no official journal of the 1842 proceedings was taken. But following the negotiation, Superintendent Stuart coming to the defense of the Chippewa when they were threatened with premature resettlement, repeatedly reiterated the explicit promise he had to make before he could get their consent to the treaty. This promise, Stuart explained, was that they could remain living on and taking their subsistence from the ceded lands for a long time. Stuart protested in these reports that the efforts to move them were improper because it was early. If there was ever a time when a responsible eye-witness participant should have mentioned the "during good behavior" qualification of the "pleasure of the President" language, it was in these protests from Stuart to his superiors, but neither he nor anyone else in a similar position did so.

On the other hand, the Chippewa themselves at the time of the treaty, neither during the negotiations or immediately thereafter, raise the issue of "good behavior." But they, like Stuart, did complain about the premature timing. The one most critical document in this

respect, which Judge Doyle did not have available to him while preparing his decision, was the "Statement of Treaties" the Lake Superior Chippewa leaders themselves drew up in 1864. In this statement they trenchantly indicated that Stuart in 1842 firmly promised them the privilege of occupying and exploiting the ceded areas "for fifty to one hundred years." That is, the strong verbal agreement, which although not written into the official treaty, was part of the contract so far as both the Chippewa and Stuart were concerned. It specified a long but not unlimited period of time as the qualification on the President's authority to end the Chippewa's occupation and use of the ceded territory.

This interpretation is further corroborated by other documentation by eye-witnesses to the 1842 negotiation and agreement. Of these records, also not available to Judge Doyle, the most important one is the lengthy, unofficial running journal of events and debates kept by the Rev. Leonard Wheeler, Missionary to the Lake Superior shoreline bands.¹ These highly credible eye witness accounts make no mention of a good behavior qualification. They further attest that an extended time limitation was placed on the privilege of occupying and exploiting the areas sold to the United States in 1837 and 1842, and that both Chippewa and American authorities understood and accepted this.

It was only years later, in connection with the disastrous 1850 attempt to lure the Chippewa out of Wisconsin, that a few Chippewa made any mention of good "behavior." However, in the context of their later (entirely rightful) complaints, they were not saying they had been promised they could remain if they behaved themselves. They were complaining that they could not understand why they were being pushed out of the ceded lands earlier. "What have we done to deserve such ill treatment?" they were complaining, "We have done nothing to warrant this."

This discussion of the nature of the agreed-upon qualification of the privilege of remaining in the ceded areas had little bearing on the consequences of Judge Doyle's first decision. The weight of the historical evidence, too little of which he had before him, indicates that he made his decision in this matter on the basis of inadequate hard facts as well as positive misinformation. His faulty conclusion about the nature contingency placed on the President's authority did not, in the light of his other determinations, carry any useful weight for modern Chippewa. This is so because he decided that they had surrendered this privilege completely in the 1854 treaty. It became critically important only when the 7th Circuit Court reversed him on the 1854 treaty, but accepted his conclusion about the 1842 agreement.

The misinformation came from the one document Judge Doyle relied on to decide that the "good behavior" contingency had been part of the 1842 verbal agreement between Superintendent Stuart and the Chippewa leaders. This item consisted of a passage from the supposed reminiscences of an elderly Ashland, Wisconsin pioneer settler, Benjamin G. Armstrong.² Armstrong, among his numerous other unsubstantiated recollections, claimed he had been adopted by old Chief Buffalo of LaPointe, whose aide and confidant in his later years he claimed to be. He was, supposedly, an eyewitness and important participant in

¹ 51 Wheeler to Rev. David Greene, May 3, 1843. Box 3, American Board of Commissioners for Foreign Missions Papers, Minnesota Historical Society, St. Paul.

² Benjamin G. Armstrong, 1892, *Early Life Among the Indians, Ashland, WI* (partially reprinted 1972-1973, as *Reminiscences of Life Among the Chippewa*, William C. Haygood, ad., *Wisconsin Magazine of History* 56: 175-96, 287-309, 37-58, 140-61.

the treaties of 1837, 1842, 1847, and 1854. According to his own testimony about his self-defined role, he was a key figure in bringing about a reversal of the 1850-1852 effort to dislodge the Chippewa from Wisconsin.

It was one selection from Armstrong's "reminiscences" that Judge Doyle, and the 7th Circuit, relied on for the "good behavior" qualification. Without other supporting or corroborating evidence, and to the exclusion of much evidence as regards the "long time" contingency, both courts effectively nullified the only well-documented Chippewa and Senate approved qualification of the "pleasure of the President" authority. Armstrong claimed that he had been present when Superintendent Stuart expressly promised the Chippewa they could remain in Wisconsin so long as they behaved themselves. That was not the way Stuart or the Chippewa at the time reported their debates and agreement.

It is surprising that Judge Doyle used Armstrong's recollections for such an important matter. Early in his decision the judge, ordinarily perceptively critical of historical sources; had noted how unreliable Armstrong's supposed "memories" were. His was an excellent point, and his suspicions about Armstrong's ex post facto recollections were well founded.

Armstrong was born in 1820 or so. His reminiscences were dictated to a second party, Thomas Wentworth, in 1892, when he was seventy-one, an elderly man. Whatever it was he said to Wentworth was then further edited, dressed up, and published by an Ashland newsman, Arthur W. Bowron. How much of his biographer and editor's thinking, phrasing, and opinions are in the final product is impossible to tell. But the Armstrong "reminiscences" of 1892 were obviously badly contaminated by his own faulty memory, by his pronounced tendency to inflate his own youthful importance, by his own outright falsification, and by the glamorization and editorial contributions of his scribe and publisher. This product which had to be reassembled from the disjointed, disconnected fragments which an elderly narrator will spin out as his self-glorifying memories of youth do not and cannot have the weight as historical evidence as contemporaneous historical documents.

Armstrong, a youth of seventeen in 1837 and new to Wisconsin Territory, fifty-five years after the event is made by his editor to speak as if he was an eye-witness to or had extensive first-hand knowledge of the 1837 treaty. But he could not have been, for elsewhere in his disjointed recollections we learn he was far distant from St. Peters the month that treaty was negotiated.

Of his experiences as a young man of twenty-five in 1842, fifty years after the event his editor makes him a mover-and-shaker among the Chippewa on the Lake Superior shore. But there is not a shred of supporting evidence for such boastful claims.

A mature man of thirty-four years in 1854, the edited version of whatever Armstrong told his scribe and editor makes him an even more influential party among both Chippewa and American authorities, especially important in support of his alleged adoptive father, old Buffalo. Once again, not an iota of separate evidence to support such retrospective self-glamorization.

All three of these treaties and the documents accompanying them can be examined in vain for a single mention of the name, Benjamin G. Armstrong. He is listed as neither interpreter, nor witness, nor involved party, nor even a trader claiming a payment from the debt funds allowed in these treaties. There is but one particularly interesting exception to this blank historical slate. The 1854 treaty gave Buffalo the right to select one section of land to be deeded to his unnamed "connections." Thirty--eight years later, Armstrong "reminiscences" claimed that he had been the sole such "connection," that Buffalo had been moved to do this to reward him for the many valuable services he had delivered on behalf of this leaders and the Chippewa. Either his memory had failed him again, or his editor got it wrong and embellished whatever Armstrong said, or the old man was flatly lying. The hard contemporaneous evidence for this is a claim presented by Armstrong himself, in 1856, the one document associated with any of these treaties mentioning his name.

In that document; he claimed clear title to Buffalo's section. In it, he told the commissioners that he had "inherited," one fourth of Buffalo's section, and that he had purchased the other 480 acres from Buffalo's legitimate heirs (his niece and nephews), for \$1 and other valuable considerations. The section of land in question was adjacent to modern Duluth, even in 1856 extremely valuable real estate.

Overall, the picture of Benjamin Armstrong that comes through is that of a minor figure on the Lake Superior shore, a small time sharper whose major accomplishment seems to have been to live long enough to catch the attention of a scribe, Wentworth, and a newsman, Bowron. Why in 1892 were this garrulous old-timer's reminiscences of any significance? This was the time when the State of Wisconsin was moving to exercise its jurisdiction over off-reservation Chippewa hunting and fishing. Armstrong's reminiscences, collected, edited, and published in 1893, were calculated to elicit sympathy for the Chippewa at that critical moment in their history.

Similarly, why were these antique reminiscences of such significance as to occupy many pages in the Wisconsin Magazine of History in 1972—1973, a periodical not known for being unsympathetic to the "plight" of the Indian? This was another critical time for the Chippewa, who were then in the midst of the Gurnoe Lake Superior fishing rights case, and the republication of these old stories gave them a good press. However, to use Armstrong's faulty, self-serving recollections uncritically, or to give them such weight in the later 1970s in a matter so momentous and disruptive as the Voigt case, violates the canons of historical research methodology. Without substantial corroboration, Benjamin Armstrong's testimony in his old age has little or no value except, in two successive centuries, as ammunition used by the Chippewa's supporters.

In this manner, Judge Doyle and the 7th Circuit Court panel unilaterally amended the 1837 and 1842 treaties, making the Lake Superior Chippewa's rights to exploit the natural resources of the ceded areas perpetual. These rights, should this decision stand against further appeals, truly are now made "forever."

If the 1837 and 1842 Chippewa compacts were legitimate treaties between sovereign nation-states then there could be no question whatever about the plain words in these documents: "during the pleasure of the President." Such words would have given any President of the United States from John Tyler to George Bush the unqualified authority to rescind the Chippewa's privilege of continuing to enjoy the benefits of a property right they had sold entirely. Judge Doyle, inadvertently, and the 7th Circuit, blatantly, produced judicial results exactly contrary to the intentions of American authorities at the time the treaties were negotiated.

What constitutes sufficient "misbehavior" by the Chippewa to permit any President to exercise such a totally ambiguous contingency? In 1837 and 1842, such thinking would have made no sense to the elected officials who authorized and approved these treaties. In 1837 and 1842, the goals of Congress, the Executive Branch, and their designated agents were to produce a situation where there would be no basis for conflict over resources between the traditional Chippewa and American citizens. The Voigt decisions has had exactly the opposite result, creating a situation of extreme conflict over these resources, and the decisions were issued with no thought of their profoundly damaging, extraordinarily expensive social consequences.

But so-called Indian "treaties" are not like proper international treaties. Following the canons of Indian law, such agreements must be interpreted in a lop-sided way as the Indians at the time they were negotiated understood the meanings of the words used. In this respect, the Chippewa who negotiated the 1842 treaty declared, and other authorities and witnesses corroborated their understanding, that the privilege of taking their subsistence from the areas they had sold were temporary, that at some distant date the President could unilaterally decide to retract this favor. This understanding,

however, was not in the minds of the Chippewa alone. It was the very basis of the concord between all the negotiators responsible for obtaining that agreement. The weight of the full historical evidence allows no other interpretation.

This being the case--that there was a time limit contingency of a minimum of fifty to a maximum of one hundred years agreed to on the President's right to rescind the privilege--then somewhere between 1893 and 1943 that contingency expired. It happens that not until the mid-1890s did the State of Wisconsin, acting with the support and concurrence of federal officials, attempt to restrict Chippewa hunting by the same rules applied to all citizens. The Chippewa by then were becoming citizens, as all today now are. In this manner, all the stipulations of the 1837 and 1842 treaties were carried out to the letter. Whatever the Chippewa were promised, they had delivered them.

Nonetheless, while the authorities who negotiated the treaties anticipated that a day would come when the Chippewa would be treated as fully equal to other citizens under American law, the 7th Circuit has imposed a system of legal inequality, one based on race, on the residents of northern Wisconsin, the Upper Peninsula, and eastern Minnesota. There are today few more striking examples of judicial activism, of a few unelected contemporary jurists thwarting the plain democratic goals of the last century's elected legislators.

The 7th Circuit Court's 1983 Reversal: A Critique

With no additional evidence for it to review, how, then, did the 7th Circuit panel come to reverse Judge Doyle on the whole carefully thought out decision? How could two federal courts, after examining the same array of evidence, reach two such radically different interpretations of the meanings and understandings embodied in the negotiations leading to the treaties of 1837, 1842 and 1854? These questions are especially pertinent, because the appeals court certainly did not give anywhere near the time and effort to the careful examination of even the limited array evidence brought before Judge Doyle as did Doyle, himself.¹

The 7th Circuit agreed with Judge Doyle in part. The second decision, like the first, was that the language of the 1837 and 1842 treaties did not give "unlimited discretion" to the President to terminate the Chippewas' right to exploit the resources of the ceded areas. The Circuit Court decision emphasized that the President could only do so if the Chippewa "were instrumental in causing disturbances with the white settlers." Hence the 1850 Removal Order was illegal. Also, because of the absence of any definition of what constituted "disturbances" of such magnitude as to warrant such executive branch action, the Court made these "property rights" perpetual. Hidden underneath this conclusion are two old, false stereotypes. One of these is that during the treaty era the United States granted Indians many rights to last "as long as the grass grows and the waters flow." In the absence of such language or intent in these Chippewa treaties, or any other treaty, the 7th Circuit Court in effect wrote it into the agreements of 1837 and 1842. The second is the misconception that through the nineteenth-century the United States regularly engaged in mass punishment of Indians for the misbehaviors of some of them. In this manner, the Court unilaterally amended these treaties, without regard for historical truth or modern social consequences.

In contrast to Judge Doyle's reasoning and decision, the Circuit Court

¹ Lac Courte Oreilles Band, et al., v. Voigt, and United States v. State of Wisconsin, 1983, 700 Federal Reporter, 2nd Series, 341.

did distinguish between the Chippewa's right to reside in the ceded areas and their right to exploit them. It held that they had retained their usufruct (the property right of extracting benefits from the natural products of an area) but not the right to occupy. In this manner, the 7th Circuit's decision granted the Chippewa bands the right to live on their reservations and also to exploit the areas they had sold to the United States more than a century earlier. That this land had long since passed into the ownership of others was a question not considered on the Circuit Court level. So, while this decision awarded court-determined "justice" to one party, it also loaded an extraordinary injustice on many others: individual non-Chippewa citizens, private enterprises, local units of government, and the State of Wisconsin.

Apparently, the Circuit Court relied on the common misconception that these modern Chippewa all live on their reservations and were still dependent on hunting, fishing, and gathering for their subsistence. There is no suggestion that the jurists involved were at all aware of the facts of modern Chippewa life, that the people who are members of these recently created "tribal" organizations live in widely scattered places throughout the United States. Nor did the Court seem to be aware of the considerable ethnic, cultural, and racial diversity that has developed among them in the past century and a half. The Court apparently was convinced that these modern Chippewa are essentially the same people as the early nineteenth-century populations with the same name, and that they were confined to reservations and suffering great deprivation for want of sufficient game and fish.

However, the 7th Circuit Court then had to confront the heart of Judge Doyle's decision. His view, based on the evidence, was that in the 1854 treaty the Chippewa surrendered their off-reservation property rights in exchange for the band reservations established under the terms of that agreement. Based on the same evidence, the Circuit Court decided to the contrary: when the Chippewa were awarded these reservations in 1854, they were given a place to reside, but they retained their usufruct rights outside these reservations. Taken together, it was this reasoning on the federal appeals level that has caused many additional years of highly expensive court hearings, and the prolonged, growing conflict between the Chippewa and their neighbors in northern Wisconsin.

In brief, the 7th Circuit's decision has brought about a situation exactly opposite to the intentions of those who negotiated the 1837, 1842, and 1854 treaties. Internal peace was a major aim of all these negotiations, and the prospect of a day when the Lake Superior Chippewa would be fully integrated under conditions of equality into the body politic of the states where they now live. In the language of social philosophers, the Circuit Court's decision was profoundly in-egalitarian. It made the property rights of one group of contemporary citizen's superior to all others. It was also, perhaps inadvertently, a racist decision, because those with the superior rights are now defined in terms of possessing "Chippewa blood," irrespective of their ancestries, habits of living, language, place of residence, education, or need. Editor note: Recall that these treaties applied to full blooded Chippewa only, and at their own insistence.

In reaching their decisions, both Judge Doyle and the Circuit Court allowed themselves to be completely side-tracked by the issue of the 1850 Removal Order, for want of adequate, in-depth documentary research into the intentions of American authorities, and the understanding of the Chippewa negotiators regards the "pleasure of the President" phrasing. Both decided that the order was illegal: the Chippewa had not misbehaved and did not warrant such punishment. At the time, however, those who had participated in these old negotiations saw the matter entirely differently: the Presidential order rescinding their usufruct rights was much too early. Only some time in the distant future, a half-century or a century away, would these rights expire. They were not forever.

A variety of federal procedural issues were also involved in the Circuit Court's decision. One of these was that in Judge Doyle's hearings the Chippewa had not consented to a trial based on the documentary and other evidence

submitted, hence Doyle improperly issued a summary judgment dismissing the Chippewa's claims. There were unsettled questions of fact; the Circuit Court decided which made this step improper. This allowed the Circuit Court to examine and reinterpret these materials.

A second such issue concerned the nature of the rights retained by the Chippewa bands after the 1837 and 1854 agreements. Did these involve "aboriginal title" or were they rights awarded by a treaty. This is important because under federal law it is easier for the United States to take at any time and by whatever means an Indian society's "aboriginal rights" than it is to rescind "treaty awarded rights." The latter consist of an explicit, congressionally sanctioned property right, which can only be taken following an equally explicit congressional act, together with the payment of compensation. Such "treaty rights" do not require that the Chippewa held title to the land. It was this distinction the 7th Circuit used to decide that the Chippewa still had their "use" rights on property, the title to which was owned by others. In this context, the Appeals Court rejected Judge Doyle's conclusion that the Chippewa's usufruct rights under the 1837 and 1842 treaties were "permissive, hence more easily rescinded.

The Appeals Court, as do other federal courts hearing Indian treaty cases, made much of the ancient canon of Indian law which holds that these documents must be interpreted as the Indians at the time would have understood them, not as some sophisticated American lawyer or judge might. Therefore, the court had somehow to dismiss the Chippewa's own contemporaneous statements indicating they understood they had sold all their rights to the United States in their treaties. This was a point old Chief Buffalo made during the 1854 treaty negotiations, when he expressed much satisfaction at finally being awarded the reservations the Wisconsin Chippewa had been requesting since 1842.

Buffalo, the senior chief and elder statesman of the Lake Superior Chippewa bands, and their prime spokesman during the 1854 negotiations, was a man whose speeches must be taken with utmost seriousness. A Chippewa leader of his age and position was expressing the consensus of the Chippewa. So, as Judge Doyle acknowledged, when Buffalo plainly indicated that the Chippewa in 1854 were giving up their temporary rights to occupy and use the areas ceded in 1837 and 1842 in exchange for reservations and the promise that they would not be forced to resettle outside Wisconsin, the Appeals Court had to deal with his expression of understanding.

It did so by claiming that the Chippewa had misunderstood the 1837 and 1842 treaties, and that Chief Buffalo's expression of understanding and acceptance had nothing to do with the rights "retained" under them. In this way, while seeming to hew to the letter of the law, the 7th Circuit Court drastically revised history so as to amend the Chippewa treaties, awarding to the late twentieth-century descendants special rights no one at the time had intended or anticipated. This is the legal basis for the growing human conflict which promises to embroil the citizens of Wisconsin for decades to come.