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# History of the Chippewa Treaty Rights Controversy

By Attorney General Don Hanaway
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One day in 1974, two members of the Lac Courte Oreilles band of Chippewa Indians went fishing at Chief Lake in northern Wisconsin. It was not fishing season and Chief Lake is not on the reservation. They were caught and issued citations by wardens from the state Department of Natural Resources.

That incident will undoubtedly go down in history as the most important fishing citations ever issued in Wisconsin.

It resulted in a lawsuit that continues today after 15 years in federal court - a suit based on rights reserved by the Chippewa in treaties signed with the federal government as long as 155 years ago.

At stake in this protracted legal battle is more than the right of Chippewa Indians to fish off reservation. Far more.

The lawsuit involves the future of non-Indians and Indians in Wisconsin, based upon agreements made generations ago. Its landmark issues are not only economic and legal, but also highly emotional. Among them are;

* The health of the valuable natural resources of Northern Wisconsin, including fish, game and forests;

* The quality of life of Indians and non-Indians, both of whom draw sustenance and satisfaction from the North's resources;

* The property rights of northern landowners, and the legal rights of the Chippewa;

* The well-being of the tourist, timber and sports industries that depend on the North's resources and are vital to the overall economy of our state;

* The future of relationships between the state and the tribe;

* Wisconsin's tradition as a state of law, rather than a state of violence.

The legal issues surrounding Chippewa resource rights are complex. Nevertheless, it is important for all of us to understand how the controversy has developed, what it means and what state government is trying to do to resolve it.

I believe the best hope for an outcome fair to the Chippewa and to non-Indians is a negotiated out-of-court settlement. That settlement will need the approval of the Governor and the Legislature and, thus, the support of voters statewide.

As the state's negotiator in the attempt to reach such a settlement, I have written this article to increase public understanding of the treaty rights controversy.

## The Origin of Chippewa Treaty Rights

As recently as 200 years ago, the land that now constitutes Wisconsin was occupied by a diverse mix of Indian tribes. The French were the first Europeans to lay claim to this land. France ceded the area to Great Britain in 1763 and it became part of the United States 20 years later.

During the 1800s, as land occupied by native Americans was settled by non-Indians, our nation was taking shape. Great tracts of land were declared "territories" by the federal government, and later were refined into states.

In 1825, the "Treaty of Prairie du Chien" defined the boundaries of lands held by Indian tribes in our area. In 1836, Wisconsin was declared a separate territory and federal officials began negotiating with Chippewa Indians for title to their lands here and in the upper peninsula of Michigan.

In 1837, the Chippewa agreed to sell the federal government title to lands in eastern Minnesota and northwest Wisconsin. In exchange, the government paid the Chippewa annuities and other financial compensation. While giving up title to the lands, however, the Chippewa reserved the right to hunt and fish in the ceded areas. The critical language is contained in Article 5 of the treaty:

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

A similar treaty was signed in 1842 with the Chippewa of the Mississippi River and Lake Superior areas. In this treaty, the Chippewa ceded land along the south shore of Lake Superior in Wisconsin and Upper Michigan, in exchange for annuities and in-kind payments. Once again, the tribe retained the right to hunt these lands:

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

## The Evolution of Federal Indian Policy

Wisconsin became a state in 1848. During this period, the federal government was not sure how to deal with the native Americans who were being displaced by non-Indian settlements.

Three principal strategies developed: pushing Indians westward to keep them out of the way of white settlements; confining native Americans to reservations; or assimilating them into the growing non-Indian society.

In 1850, President Zachary Taylor decided to employ the first option in regard to Wisconsin's Chippewa. He issued an executive order on February 6, 1850, declaring that the hunting, fishing and gathering rights in the treaties of 1837 and 1842 were "privileges granted temporarily" to the tribe and were "hereby revoked." The President ordered the Chippewa to leave Wisconsin and relocate to tribal lands in Minnesota.

Between 1850 and 1854, some Chippewa complied. Many of them died of starvation attempting to make the journey to Minnesota in the North's severe winters. Others resisted the removal order and urged the federal government to give them permanent homes in Wisconsin and the upper peninsula of Michigan. White settlers and the young Wisconsin Legislature joined the Chippewa in this request. On February 27, 1854, the Legislature passed a resolution saying, in part:

> "The inhabitants of the counties of La Pointe and Douglass have nearly unanimously signed a petition showing...that the Chippewa Indians in the region of Lake Superior are a peaceable, quiet and inoffensive people, rapidly improving the arts and sciences; that they acquire their living by hunting, fishing, manufacturing maple sugar, and agricultural pursuits; that many of them have intermarried with the white inhabitants, and are becoming generally anxious to become educated and adopt the habits of the 'white man.'...Your memorialists would therefore pray His Excellency, the President of the United States, to rescind the orders heretofore given for the removal of said Indians...and your memorialists also pray that the Senate and House of Representatives in Congress assembled will pass such laws as may be requisite to carry into effect such design and orders; and to encourage the permanent settlement of those Indians as shall adopt the habits of the citizens of the United States."

In September 1854, the federal government responded with a fundamental shift in policy toward the Chippewa. It joined the Lake Superior and Mississippi Chippewa in the "Treaty of LaPointe", setting aside reservations in Minnesota, Wisconsin and Michigan, and allowing the tribes to remain here rather than moving west.

As a result, President Taylor's removal order was never carried out. A critical component of that order - revoking the Chippewa's hunting and fishing rights in ceded lands - remained unresolved.

In the late 1800s, Wisconsin had few hunting and fishing laws. The Chippewa continued their usual practice of hunting,

fishing and gathering both on their reservations and off, and a state of mutual coexistence existed between the Indians and the settlers.

By the early 1900s, however, the state had become more active in regulating fishing and hunting and took the position that conservation regulations applied to Indians as well as non-Indians. In 1908, in an incident foreshadowing today's legal battle, a Chippewa Indian was cited by state conservation wardens for fishing with a net.

The case went all the way to the Wisconsin Supreme Court, which ruled that Chippewa treaty rights no longer existed. After that decision, the state continued applying its conservation rules to Indians and non-Indians alike, with no significant challenge by the Chippewa until 1974.

## The Attempt to Assimilate the Chippewa

During the last 150 years, other developments affected the way today's Chippewa Indians view their treaty rights and non-Indian governments.

During the early to mid-1800s, federal policy evolved from the Treaty Era to the Removal Era to the Reservation Era. In 1887, a new policy was put into law: the Assimilation Era.

The federal General Allotment Act of 1887 provided a mechanism for Indians to obtain individual lands within their reservations. The purpose of this new policy was ostensibly to integrate Indians into non-Indian society by breaking reservations into individually owned parcels of land they could farm, and opening "surplus" reservation land to white settlement.

As individual landowners, Indians would become citizens of the United States and the states in which they lived, and would pay taxes. Much of the land, however, was not suitable for farming. And what individual Indians owned, they could sell.

With lumbering now the mainstay of the northern economy, white settlers were eager to purchase Indian lands. The long-term result was a breakup of reservations. Nationally, Indian-controlled land was reduced by about three-quarters during this period. Lands controlled by Wisconsin's Indians were reduced by half.

In 1934, the Assimilation Era gave way in federal policy to the Tribal Self-Government Era. Congress approved the Indian Reorganization Act, granting self-government to tribes. Since, many tribes have worked at rebuilding their land bases.

Today, most of the Indians in Wisconsin belong to one of six groups - the Chippewa, Menominee, Oneida, Potawatomi, Stockbridge Munsee and Winnebago. Wisconsin's native Americans are about evenly divided between reservations, inner-cities and other locations in the state.

The Wisconsin Chippewa consist of six bands, most of whose 15,000 members live on separate reservations in the northern part of Wisconsin. A review of the land holdings of each band shows

evidence of the Assimilation Era's breakup of reservations, despite Chippewa progress at reacquiring land since 1934:

**Bad River Chippewa** - The 1854 treaty granted them 124,332 acres. By 1986, they held 56,557 acres.

**Lac Courte Oreilles Chippewa** - The 1854 treaty granted them 70,000 acres. By 1986, they held 48,143 acres.

**Lac Du Flambeau Chippewa** - The 1854 treaty granted 70,000 acres to this band. By 1986, their holdings were 44,726 acres.

**St. Crpix Chippewa** - The St. Croix band remained landless until 1934. In 1986, the band held 1,940 acres.

**Mole Lake Chippewa** - By 1934, this band held 1,700 acres, about the same as today.

**Red Cliff Chippewa** - In the 1854 treaty, the Red Cliff were granted 7,321 acres on the Lake Superior shoreline. In 1986, their holdings totaled 7,495 acres.

This history is a critical backdrop to today's negotiations over Chippewa resource rights.

Another critical element is the economic condition of the tribe. Chippewa unemployment is typically much higher than that of non-Indians. Although reports vary on the jobless rate among the bands, one report has calculated unemployment at a staggering 85%.

During 18 months of negotiations with the Chippewa, it has become clear to me that they view their ability to hunt, fish and gather resources as vital to their well-being. It has become equally clear that the Chippewa are unwilling to permanently sign away the resource rights the federal courts have said they retained in the 19th Century treaties. Today's Chippewa do not want to make the kind of decisions for future generations that their grandfathers made for them.

## The Case for Non-Indian Use and Regulation of Resources

Wisconsin's non-Indians also feel strongly about their right to use and to assure the health of the North's natural resources.

State government in Wisconsin has played a crucial role in regulating and preserving resources for most of this century. Over the decades, non-Indians have paid many hundreds of millions of dollars to stock and regulate fish and game populations in Wisconsin, including those in the North. Today, state conservation expenses total about $53 million annually, with virtually all of the money coming from fishing, hunting and trapping licenses.

Thus, the non-Indian population of our state has made a tremendous investment in its natural resources.

In addition, many northern landowners feel their property values and rights may be affected adversely if the Chippewa make full use of their apparent treaty rights.

Of the 16 million acres in the ceded territory, 12 million acres are in private ownership. Non-Indians did not know, when they purchased land in the North, that the Chippewa apparently had retained extensive hunting, fishing and gathering rights.

Anyone who cared to look into the legalities of those rights would have encountered the 1908 Wisconsin Supreme Court decision holding that Chippewa rights were substantially the same as those of non-Indians.

Also, like the Chippewa, many non-Indian northern residents depend upon natural resources for their livelihood. Non-Indians own and operate businesses that rely on ample deer, muskie and walleye populations, as well as ample forest resources.

And, as I have explained, the job and tax bases of the entire state depend on the North's ability to sustain tourism and forestry, two of the Wisconsin's major industries.

Although the Chippewa have claimed rights reserved in treaties written before Wisconsin became a state, many non-Indians believe they too have resource rights - rights earned through economic investment, property ownership and the patterns of land and resource use that have developed over the last century.

## What the Federal Courts Have Ruled

In 1974, on behalf of the two fishermen, the Lac Courte Oreilles band filed a class-action lawsuit in federal court, arguing that the State of Wisconsin was depriving them of their right to hunt, fish and gather resources on off-reservation land within the ceded territory.

That lawsuit became the nucleus of a number of legal actions regarding Chippewa resource rights. As state government's "law firm", the Wisconsin Department of Justice was charged with defending the state's interests in court.

In 1978, U.S. District Court Judge James Doyle ruled that President Taylor's 1850 removal order, which suspended the Chippewa's off-reservation resource rights, was invalid. However, Judge Doyle also ruled that the Chippewa implicitly gave up their off-reservation rights when they accepted reservations in 1854.

Both sides appealed Judge Doyle's decision. In 1983, the U.S. Circuit Court of Appeals agreed that President Taylor's order was not valid, but it overturned Doyle's ruling that the creation of reservations meant an end to the right of the Chippewa to hunt, fish and gather on ceded lands.

The Appeals Court decision was based on a common point of law in treaty cases: When a treaty is written in a language foreign to one of its parties, that party must be given the benefit of the doubt when the treaty is interpreted. Since the 1854 reservation treaty was written in English and contained no explicit language revoking Chippewa hunting and fishing rights, the Appeals Court ruled that those rights still exist.

The state appealed this decision to the U.S. Supreme Court; the high court refused to hear the case.

With the case back in his court, Judge Doyle undertook the lengthy process of defining just what rights the Chippewa have retained and how they may be exercised. Since Judge Doyle's death

in 1987, the process of definition has been continued by U.S. District Judge Barbara Crabb in Madison.

To date, Justice Department attorneys have spent more than 14,000 hours defending the state in the federal lawsuit. Here is what the U.S. District Court has ruled so far:

1) The Chippewa still have the right to hunt, fish and gather timber and other resources from all the land they ceded to the government more than a century ago. That includes 30 counties comprising roughly the northern third of Wisconsin, above Highway 64.

2) Unlike non-Indians, the Chippewa may use these resources for both personal and commercial purposes.

3) The Chippewa can harvest sufficient resources to maintain a modest standard of living. However, the right to harvest is not exclusive to the tribe. It must be shared with non-Indians.

4) The Chippewa can use harvesting methods not available to other sportsmen, including their traditional methods like spearing and gill-netting fish, as well as modern adaptations of those methods.

5) At present, the Chippewa can harvest off-reservation resources from public lands owned by the state or its political subdivisions and can hunt and fish on private land enrolled in the state's forest cropland program.

6) If harvesting from these lands is insufficient to maintain a modest living, the Chippewa may be able to seek court permission to harvest from private lands in the northern third of the state. However, this issue remains to be clarified in future rulings.

7) The state will be allowed to exercise "reasonable and necessary" regulation of Chippewa harvesting, when the tribes don't have their own effective regulations. State regulation may be justified to prevent depletion of resources or to protect public health and safety, but any regulation must be the least restrictive possible. Indians can regulate their own harvest. The state will continue to regulate all non-Indian fishing.

8) Chippewa walleye and muskie fishing must follow strict procedures to ensure that spearfishing and gill-netting don't endanger fish populations. For example, the Chippewa are prohibited from walleye spearing on any lake more than two years in a row. While Judge Crabb has made no final decision on the "allocation" of muskie and walleye harvests among Chippewa and non-Indians, the Chippewa have an interim right to harvest all the fish that can be harvested without endangering the resource. This decision could result in the temporary closing of some northern lakes to hook and line fishing.

9) The Chippewa are entitled to collect attorneys' fees in their lawsuit.

10) The federal government is not a party to the lawsuit. We believe it should be. We argued that because federal actions had resulted in the treaty conflict, the federal government should be made part of the litigation so it would have to help pay any costs brought about by the suit. The court rejected that argument.

Many, if not all, of these rulings can still be appealed by the state to higher federal courts. Indeed, the appeals process could mean that the lawsuit begun in 1974, and the uncertainty over resource rights in the North, will continue for another decade.

Still to be decided by Judge Crabb is whether the state will have to compensate the Chippewa for "past damages" for the decades in which the tribe did not exercise its treaty rights.

## The Attempt at an Out-of-Court Settlement

In mid-1987, shortly after I took office as Attorney General, the state decided to seek a negotiated out-of-court settlement of this lawsuit. As the Attorney General, I am the state's lawyer in the lawsuit and also its negotiator, a role the governor has reinforced by appointing me to that task.

For a number of reasons, I believe a negotiated settlement is both possible and far preferable to continued battle in court.

First, a negotiated settlement can resolve the treaty conflict much more quickly, and at much less cost. If unsettled, the Chippewa lawsuit could last as long as 25 years, costing the state millions of dollars in attorneys' salaries and court costs alone. Just as importantly, the continuing uncertainty over treaty rights prolongs frustration and anger in the North.

Second, a negotiated settlement can be far more successful in solving the conflict once and for all. Because of the nature of lawsuits, legal issues are narrowly drawn and court decisions inevitably leave ambiguities that can breed more controversy. The last thing we need is more ambiguity. We need clarity.

Negotiated settlements, on the other hand, allow the state and tribe to resolve a wide range of issues, without ambiguity. It's possible in a settlement, for example, to address not only treaty rights, but other state/tribal concerns like reservation gambling and law enforcement issues.

Third, while the conflict inherent in a lawsuit strains state/tribal relations, the cooperation necessary for settlement can strengthen that relationship. Tribal cooperation in Wisconsin has been excellent in the past. We want it to continue and be enhanced.

Fourth, the Chippewa have shown a willingness to reach agreements with the state to protect northern Wisconsin's resources. In 1983, the state and the Chippewa entered into an "interim" one-year agreement on deer-hunting rights. That became the first in a series of annual agreements in which the Chippewa have promised to restrain their hunting and fishing so that non-Indians could also enjoy northern resources without endangering fish and game populations.

Fifth, there has been precedent for acceptable agreements in other states. In Michigan, the state has earmarked parts of Lake Michigan and Lake Superior for Indian fishing and has agreed to compensate non-Indian commercial fishermen for reduced catches.

In Minnesota, the state has agreed to pay its three Chippewa bands $5 million a year not to exercise their off-reservation hunting and fishing rights.

Finally, there is precedent around the nation for states working out agreements with tribes on sensitive matters of mutual benefit -- matters ranging from economic assistance and law enforcement to resource rights. Agreements of one kind or another have been reached in Washington, Oregon, Florida, Alaska, California, Colorado, Idaho, and Iowa, among others.

Despite my hopes for a negotiated agreement, I have no illusions about the difficulty of cooperatively resolving a resource conflict that has continued for more than 150 years.

Our information shows that eight or 10 other states have also attempted to resolve resource conflicts with tribes in recent years - but no other case in the nation has involved the extent of rights set forth in federal court rulings on the treaties with Wisconsin's Chippewa tribe.

Further complicating negotiations is the emotionalism that surrounds treaty rights. For the last several years, spring demonstrations by non-Indians at spearfishing sites have been characterized by tension, racial epithets, threats of violence, and arrests. Last year, state agencies and local law enforcement agencies spent $600,000 to keep the peace during spearfishing season.

Tribal members and supporters of their treaty rights reportedly have received physical threats, and treaty opponents are talking about renewed demonstrations when the ice breaks and spearfishing season comes this spring.

In this emotional climate, the state negotiating team has attempted to persuade the Chippewa that an out-of-court settlement is in the best interests of Indians and non-Indians alike. The treaties were written and signed at a time when Wisconsin was a far different place. Today, 19th Century treaties seem to be in conflict with 20th Century realities.

Confrontation -- in the courts or on the boat landings of the north - is far less desirable than collaboration in assuring the future well-being of Indians and non-Indians in our state.

From the beginning of our negotiations in the summer of 1987 to July 1988, the state team talked collectively with the six Chippewa bands. Then last July, the bands declared they wanted to negotiate separately. Since then, I have attempted to continue negotiating individually with the bands.

In December, our team reached an apparent agreement with negotiators for the Mole Lake band. Under this proposed agreement, the state would have paid the band about $1 million yearly to lease most of its hunting, fishing and gathering rights for the next 10 years. After 10 years, either the state or the band could renew the agreement for up to 15 additional years.

In a unique feature, 75% of the state payments would be specifically earmarked for job-development projects for the band. The rest of the money, meant to benefit the health and welfare of the band, would be allocated at the discretion of its leaders.

In effect, this agreement would have helped the Mole Lake band ensure that its members and its future generations could rely on jobs for their livelihood. The agreement would also have held substantial benefit for northern landowners and other non-Indians, by calling upon all Wisconsin taxpayers to protect the resources and property rights of the North.

I consider the principle of job creation a model for agreements with other Chippewa bands, but I also understand that the state's agreement with each band may vary. Each band has its own political leadership, its own resource patterns and its own priorities. I was hopeful, however, that the Mole Lake agreement would be a breakthrough in moving the treaty-rights controversy from the court room to the negotiating table.

But to become a binding agreement, the proposal had to be approved first in a Mole Lake referendum, then by the State Legislature and the Governor. On January 14, 1989, members of the band overwhelmingly voted against the proposal.

## The Issue of Federal Involvement

Although the Mole Lake rejection prevented the proposed settlement agreement from ever coming to a vote in the Legislature, the proposal was debated in the press by non-Indians.

Some groups and individuals raised a logical question: Why should the state pay for a settlement with the Chippewa? Today's conflict is the result of treaties signed by the federal government and a removal order issued by a President. Why doesn't the federal government pay?

Others have asked why Congress doesn't simply change or abrogate the treaties.

In recent years, Congress has given two clear messages to state officials. First, they will not change the treaties in any way, unless the state and the Chippewa first agree on changes. It is clear that the Chippewa are adamantly opposed to any modifications in treaty language.

Second, congressional leaders have told us that the federal government will not help pay the costs of settlement. I intend to make every effort to change that policy. I believe the federal government does have financial responsibility to help resolve the resource conflicts caused by its treaties with the Chippewa.

However, Wisconsin must be very careful in attempting to involve Washington, D.C. The federal government is the type of guest who, once invited, is not inclined to leave. The regulation of Wisconsin resources is a state responsibility. We must be careful not to involve the federal government in settling resource and regulatory questions here, or they may try to do so permanently.

## The Future of Negotiations

As I write this essay, we are continuing negotiations with other Chippewa bands, but I remain only marginally hopeful that out-of-court settlement with the tribe can be reached before the next spearfishing season begins.

Clearly, if we are to resolve the treaty rights conflict before spring, a dramatic breakthrough will be needed - a breakthrough in which the Chippewa agree to unite again for negotiations, and to negotiate intensively and earnestly.

I believe the Chippewa should not wait. As I have said, court rulings won't fully resolve the issues between us. At some point, the state and the tribe must reach a long-term settlement of their resource conflict, and that can only happen through negotiations. The federal district court already has defined Chippewa rights so extensively that resource conflicts seem inevitable without some agreement to moderate the exercise of those rights in exchange for some type of compensation from the state.

In future talks, as in those of the past, I consider these factors paramount:

1. **We must protect Wisconsin's northern resources, and the rights of all people to enjoy them.** The fish, game and forests of the north are vital to the quality of life for all Wisconsin residents, Indian and non-Indian.

2. **We must respect the property rights of non-Indian landowners, as well as the treaty rights of the Chippewa.** Our job is to make 19th Century treaty rights compatible with the land ownership of 20th Century Wisconsin.

3. **We must acknowledge the Chippewa's need to maintain a decent living for themselves and their families and to protect the livelihood of future generations.** We can ease the pressure on natural resources by helping the tribe build a future based not just on fish, game and forests, but also on economic development and jobs.

4. **Reason, not emotion, must settle the dispute.** As Wisconsin's Attorney General, I will not allow violence to write this important chapter in our state's history.

We face a choice: another season of acrimony in the North, or a new season of cooperation and mutual respect. The odds seem against resolution of so emotional and complex a conflict. But we must try.

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