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JUDICIAL ALLOCATION OF FISHERY RESOUCES IN NORTHERN WISCONSIN

INTRODUCTION

This paper examines the fishery management consequences of litigation between Lac Courte Oreilles Band of Lake Superior Indians et al. and the State of Wisconsin in the United States District Court for the Western District of Wisconsin (hereafter, Lac Courte Oreilles et al. vs State of Wisconsin, or, LCO). The case is important as a study in co-management because the court explicitly rejected the notion of "dual management authority," yet the management provisions accepted by the court require nothing less than intensive discourse and cooperation between tribal entities and the Wisconsin Department of Natural Resources (WDNR). Also of interest is the court's final allocation of 50 percent of the harvestable resources to Indians and 50 percent to non-Indians, in spite of its earlier determination that the Chippewa were entitled to utilize the resources up to a level that would provide a "modest or moderate standard of living." The court-sanctioned procedures for assessing the status of fishery resources and the rules applied to subsequently allocate harvestable fish to tribal and non-Indian fishers overshadow in control and complexity any other freshwater fishery management in the country. In spite of this complexity, it is clear from the latest decade of experience in Wisconsin that tribal participants in the fishery harvest only a small fraction of the fish to which they are entitled.

Background

In March, 1974, Frederick and Michael Tribble, members of the Lac Courte Oreilles Band of Chippewa Indians, notified WDNR wardens of their intent to spear fish off the reservation. They subsequently cut a hole in the ice of Chief Lake and were arrested for spear-fishing in ceded territory in Sawyer County, near Hayward, Wisconsin (Whaley and Bresette, 1994; Satz, 1991). There followed the Voigt case, Lac Courte Oreilles Band of Chippewa Indians v. Voigt in which

the Lac Courte Oreille Band sought relief from interference by the State of Wisconsin in the Band's hunting, fishing and gathering of foodstuffs (primarily wild rice and maple sap) in territories ceded to the U.S. government in the treaties of 1837 and 1842 (figure 1). The treaties of 1836 and 1854 also figure prominently in describing Native Americans' entitlements to natural resources in the upper midwest, but the LCO case is particularly instructive as to the outcome of fishery co-management in the region as it is not confounded by the transboundary migration of fish stocks typical of Great Lakes fishery resources.

The LCO case was argued in nine discrete proceedings (LCO I through LCO IX) covering three phases of litigation (Satz 1991) from 1974 to 1991. The Declaratory Phase ruled on the nature and scope of Chippewa treaty rights, whereas the subject of this paper, the Regulatory Phase, dealt with the permissible extent of state regulation. The Damages Phase was to determine the extent to which the state was liable for damages for denying Indian access to resources.

The case was initially argued before Federal District Court Judge James Doyle, who, in 1978, ruled that the Treaty of 1854 had extinguished the hunting, fishing and gathering rights on the ceded territories, apart from reservation lands. This decision was reversed in 1983 by a three-judge panel of the U. S. Court of Appeals1 for the Seventh Circuit, who found (LCO I) that the usufructuary rights of the Indians, guaranteed by the Treaty of 1837, were not withdrawn by President Taylor's 1850 Removal Order because the order was invalid. The appellate court also found that the Treaty of 1854 did not explicitly revoke those rights either.2 The Seventh Circuit subsequently affirmed (LCO II) that these rights would be applicable to public land throughout the ceded territories, even though some portion of those lands may have passed through private ownership in the interim (U. S. Court of Appeals, 1985). After the Supreme Court refused to hear an appeal of the Court of Appeals ruling, five other Wisconsin Chippewa Bands3 joined the LCO case (Satz, 1991, citing Bichler, 1990).

Phase I of the case was concluded in 1987 by Judge Doyle (LCO III), who affirmed that, 1) the Chippewa retained the rights to harvest nearly all varieties of fish, animal and plant resources in the ceded territories to an extent that would provide a modest standard of living, 2) such harvest was to be free of state restrictions except for those both reasonable and necessary to conserve the resources, 3) the Chippewa could employ any means of harvest used at the time of treaty negotiation or developed since, 4) harvested products could be traded or sold to non-Indians using modern methods of distribution, and 5) arrangements must be made for exercise of usufructuary rights on private lands if public lands were insufficient to support a modest living (Satz, 1991).

Judge Doyle died in June, 1987, and was succeeded in the case by Judge Barbara Crabb. Phase II began with Judge Crabb's determination (LCO IV) that the State of Wisconsin could regulate off-reservation harvest only in the interests of conservation, public safety and public health. Further, such regulations must be the least restrictive available and must not discriminate against the Chippewa (U. S. District Court, 1987). She further noted that effective tribal self-regulation would preclude state regulation.

The ambiguity resulting from the LCO I language specifying the Chippewa's entitlement to "a modest living" required further definition in LCO V. In proceedings in the spring of 1988,

Plaintiff's attorneys argued that a reasonable standard might be provided by the "zero savings level of income" reported regionally in the statistics compiled by the U. S. Bureau of the Census. Review of census tables revealed that, in the northern counties of Wisconsin, this amounted to an annual income of about $21,000 per family. This figure was subsequently adopted and it remained to determine how much the harvestable resources of the ceded territories were worth, given an opportunity to harvest them all.

Fish and wildlife biologists were called to testify as to the quantities of fur, fish and game available throughout the ceded territories as harvestable commodities. Testimony was offered equating the value of waterfowl and grouse to the retail value of poultry, venison and bear meat to the prices of beef and pork, and walleye and sunfish to retail prices for freshwater fish. It soon became obvious that the sum total of harvestable foodstuffs wouldn't nearly approach an amount necessary to provide even the poorest living for the population of some 14,000 registered members of Indian bands in northern Wisconsin. In a last ditch effort to ward off the inevitable, defense attorneys began to argue for inflation of the values by adding in things such as black bear gall bladders, worth approximately $250 an ounce on the Asian aphrodisiac market.

The upshot of this "economic phase" of the trial (LCO V) was the logical conclusion that the Chippewa were entitled by treaty to all of the harvestable fish and game in the ceded territories.4 The state immediately petitioned the court for an allocation of 50 percent of the resources to each of the parties, citing the Boldt Decision (U. S. District Court, 1974) in the Pacific northwest. Judge Crabb denied the motion noting that the Stevens Treaties governing the northwestern cessions contained specific language to the effect that Indians and non-Indians should "...share equally in..." utilization of the fishery resources. In responding to the state motion, Judge Crabb said (U. S. District Court, 1988) "I can find no such language in these treaties."

Before her final judgement in the case (U. S. District Court, 1991), Judge Crabb ultimately withdrew (LCO VII) from her earlier contention about "sharing resources" on the grounds that

> "The standard of a modest living does not provide a practical way to determine the plaintiffs' share of the harvest potential of the ceded territory."

Not only did pragmatism prevail in this issue, but the regression to a 50:50 allocation was couched in Eurocentric language:

> "All of the harvestable natural resources to which plaintiffs retain a usufructuary right are declared to be apportioned equally between the plaintiffs and all other persons,..."

Here, Judge Crabb explicitly grants to plaintiffs (Indian interests) 50 percent of harvestable resources. Contrast this language with the time-honored interpretation of treaties summarized in U. S. v. Winans (1905):

> ...a "treaty was not a grant of rights to the Indians, but a grant of rights from them–a reservation of those not granted." (Clinton, et al., 1991, p. 799).

The importance of the 50:50 allocation was not lost on Wisconsin Attorney General James E. Doyle, Jr.5 In his letter of acceptance (Doyle, 1991) of Judge Crabb's final judgement, Doyle explicitly identified this (his point numbered 6) as a victory for the State of Wisconsin: "The tribe is not entitled to all the available resources necessary to sustain a modest standard of living. Rather, the resources must be shared on a 50-50 basis." Clearly this part of the Crabb judgement would be at risk in the event that the case were appealed to the Circuit Court.

One additional point, both legal and practical, identified in Doyle's acceptance letter noted (point 3) that "The state has the ultimate authority to protect and manage the resources in the ceded territory." While this would seem to preclude either co-management or shared management of resources in the ceded territory, Doyle's claim rings hollow in light of the language in the judgement (U. S. District Court, 1991). Judge Crabb's decision clearly enjoins the state

"...from interfering in the regulation of plaintiffs' off-reservation usufructuary right to harvest walleye and muskellunge within the ceded territory in Wisconsin,... except insofar as plaintiffs have agreed to such regulation by stipulation. Regulation of plaintiffs' off-reservation usufructuary rights to harvest walleye and muskellunge ... is reserved to plaintiffs on the condition that they enact and keep in force a management plan that provides for the regulation of their members in accordance with biologically sound principles necessary for the conservation of the species being harvested,..."

From a resource management standpoint, the essential features of this contrast in perspective are: 1) the state insistence on being seen as having ultimate authority in management matters; 2) the implicit assumption that having the authority assures enactment of measures appropriate to conserve the resources; 3) the clear requirement for an Indian management plan, 4) a requirement that the Indians manage according to biologically sound principles; and, 5) that the state and Indians adhere to mutually accepted principles, goals and facts relating to the walleye and muskellunge resources. This final point, notwithstanding Attorney General Doyle's protestations, is a clear manifestation of *de facto* co-management since the articles of stipulation before the court were clearly matters of agreement between the parties.

Rules for harvest

Between the Voigt Decision in 1983 and the final judgement of the Crabb court in 1991, the Wisconsin Chippewa and WDNR had entered into more than three dozen "interim" agreements enabling access to some of the resources while the details overall were being addressed in the litigation. These agreements provided valuable experience for assessing the status of stocks and regulating the spear fishery.

Early in the court proceedings, both parties agreed to a maximum allowable exploitation rate of 35 percent of the adult stock of walleye. This figure had been the management specification in the WDNR's managment plan since at least 1974, and it remains the target figure throughout Wisconsin's walleye fishery today (Anonymous, 1991). Judging compliance with this guideline requires both an estimate of the fish available, and an estimate of the harvest. The former is accomplished either by "knowing" the capacity of the lake for walleye production, based upon a

regression model that relates size of lake to walleye population number, or, by explicit population estimates. Explicit estimates are generally done by mark-recapture surveys (Petersen type mark and release methods) conducted in the spring prior to the spear-fishing season.

Harvest is estimated as the combined results of the tribal fishery (most importantly, spring spearing) and recreational (non-Indian) fishing, especially during the open-water season. Tribal fishing is regulated by quota and monitored completely (Anonymous, 1991). Sport fishing is regulated by indirect methods, such as season length and individual daily bag limits. The WDNR has established a response rule (Table 1) for indicating the extent of reduction in the daily bag limit, contingent upon the harvest intent declared by the Indians (see below). The impact of sport fishing is estimated through creel surveys on known walleye lakes chosen at random from the ceded territories, and through comparison with standardized creel surveys on selected lakes that have been monitored since 1980.

Estimation of allowable tribal harvest proceeds in stages. Following adoption of one of the population estimation procedures defined above, the estimate is multiplied by a "safety factor" thought to be necessary (Hansen et al., 1991) because tribal fishers will be using efficient gear (gillnets or spears). The resulting number is then multiplied by the 35 percent maximum allowable exploitation rate to arrive at a "safe harvest level." Fishery managers have to know in advance what the likely tribal harvest will be if they are to set daily bag limits at levels that will prevent an "overfishing" event. Thus, tribal authorities are required to state their harvest intentions by March 15 each year. These declarations have voluntarily been set at about 60 percent of the safe harvest level because the Indians perceive that the WDNR would have to reduce the anglers' daily bag limit to zero if they declare an intent to take over 68% of the safe harvest level (Satz, 1991).

RESULTS

The extent to which the Indian quota is diminished under these rules is apparent in Tables 2 and 3. Imagine a hypothetical "Lake A" and calculate the Safe Harvest Level given a "current year population estimate," i.e. the best possible circumstances for harvest. If the lake has (estimated) populations of 2000 adult walleye and 200 adult muskellunge, note that a safety factor based on the 95% lower confidence limit would further diminish the available fish to 75% and 60% of the original numbers, respectively. Acceptable maximum exploitation rates of 35% for walleye and 27% for muskellunge result in "safe harvest levels" of 525 walleye and 32 muskellunge (Table 2).

Imagine now that the Indians declare an intent to take only 60% of their allowable harvest. This further reduces the permissible numbers to 315 walleye and 19 muskellunge. If all of these fish were actually taken in the spear fishery, the maximum exploitation rate would be 16 percent for Indian harvest of walleye and 9.5 percent for muskellunge under the most optimistic conditions defining the tribal harvest. (Anonymous, 1991).

Finally, consider that safety factors will seldom be based upon current year estimates; rather, they will be derived for population estimates that are one or two years old, or, they will be based

upon the less precise "regression" estimates. Table 3 shows that the population estimates will be reduced to 35 or 45 percent of the estimated values rather than remaining at 75 or 60 percent (for walleye and muskellunge, respectively). In actuality, lake conditions cannot be relied upon to be perfectly favorable for night-time spear fishing, so the total harvest will be something less than the permitted (licensed) harvest in any given year's fishing. Over the period 1989-1997, the proportion of the Indian quota actually harvested (far right column,) has ranged from 37 to 73 percent (Krueger, 1998). Instead of the original calculation for hypothetical Lake A, if we now substitute the empirical values derived from nearly a decade of experience with the treaty spear fishery, our 2000 walleye would deliver an actual harvest according to the following calculation: (2000)(0.35)(0.35)(0.60)(0.60)= 88 fish, or, 4.4 percent of the estimated population of adult walleye. This little simulation suggests that, unless fishing conditions are virtually ideal throughout the ceded territories in a given season, and, unless tribal declarations of intent to fish exceed the 60 percent figure typical of the past, tribal fishers will have no reasonable expectation of realizing a catch of anywhere near 17 percent of the adult stock, i.e., the court's declared allocation of half of the allowable harvest of fish.

Empirical experience has shown (Figure 2) that, indeed, tribal spearers have harvested less than 60 percent of their quota, on average, during the recent past. To put these numbers in perspective relative to the non-Indian harvest, the number of walleye speared from 1989-1997 has averaged 24,293 fish. Angler exploitation rates throughout the ceded territory are only poorly known, but it is estimated (Table 5) that angler catch averaged 910,000 walleye per year from 1980-1989, increasing to 1,200,000 annually from 1990-1994 (Anonymous, 1995). In trial testimony in 1988, statistics presented by the plaintiffs clearly showed that Indian harvest amounted to only 6 percent of the total catch of walleye in the ceded territories, whereas recreational fishers were responsible for 94 percent of the walleye harvested. Little has changed in the relative magnitude of these statistics since Judge Crabb's final judgement.

CONCLUSIONS

The court-ordered "allocation" of 50 percent of harvestable walleye resources to Indians throughout the ceded territory of Wisconsin pursuant to the 1991 Crabb decision has clearly failed to produce the apparent goals of the decision. The imposition of the

"safe harvest level" as a device to prevent individual fishing events from exceeding the maximum exploitation guidelines diminishes the Indians' permissible catch to an extent that obviates any hope that tribal fishers will "share equally in" use of the fishery resources of the ceded territory.

The only obvious solution to the problem of increasing Indian participation in the harvest rests squarely upon tribal authorities, requiring them to declare an intent to take nearly 100 percent of their available quota. To do so would be broadly interpreted as inimical to the relations between Indians and non-Indians throughout the ceded territories. Satz (1991) cites this example as a deliberate attempt by WDNR officials to circumvent the non-interference conditions imposed in LCO VI. Strickland, et al. (1990) characterize the current management:

> "...Denied the right to directly regulate the Chippewa by the courts, {Wisconsin DNR officials} have attempted to indirectly regulate the Chippewa by restricting the bag limits placed on non-Indian fishers, which they have done by manipulating fish population estimates (termed "voodoo biology" by several observers). Since the Chippewa have historically been sensitive to the needs of non-Indians, the state uses bag limits to place pressure on the Chippewa to "voluntarily" restrict their treaty rights. Under this approach the state can contend, "But we are not regulating the Chippewa, we're regulating the non-Indians."

Throughout the ceded territories of Wisconsin it is clear that the very best intentions of the court have not been fulfilled. The non-Indian fishery is now under a somewhat more restrictive set of regulations (specifically a minimum size limit of 15 inches, total length) than it was prior to the Crabb decision, but these restrictions

> "...would have been imposed even if the tribes' treaty rights had not been judicially recognized." (U. S. District Court, 1989)

It is not yet clear that the WDNR can effectively control exploitation rates through indirect regulation of the non-Indian fishery, in spite of the trust placed in them by the federal court. The illusion of co-management has been replaced by an empirical record of continuing allocation of the resources to non-Indian interests.

Whether or not this condition will be challenged by tribal interests in yet another appeal to the courts remains to be seen.

END NOTES

1 This reversal by the appellate court was subsequently upheld in 1983 by the U. S. Supreme Court in its refusal to review the case (U. S. Supreme Court, 1983).

2 The canons of construction for interpreting Indian treaties include the stipulation that treaty rights may not be extinguished by mere implication, but rather, explicit action must be taken in order to abrogate them (Satz, 1991; Clinton et al., 1991).

3 Red Cliff Band of Lake Superior Chippewa Indians; Sokaogon Chippewa Indian Community of Wisconsin/Mole Lake Band; St. Croix Chippewa Indians of Wisconsin; Bad River Band of Lake Superior Tribe of Chippewa Indians of Wisconsin; and the Lac du Flambeau Band of Lake Superior Chippewa Indians.

4 Whaley and Bresette (1994) refer to this as the "100 percent ruling" and credit its misinterpretation by the news media with extremism in the non-Indian social backlash in Wisconsin.

5 Attorney General Doyle was the son of Judge James Doyle who ruled on the first phase of the LCO case.

LITERATURE CITED

Anonymous. 1991. Casting Light Upon the Waters: A Joint Fishery Assessment of the Wisconsin Ceded Territory. U.S. Dept. of the Interior, Bureau of Indian Affairs, Minneapolis, Minnesota. 102pp.

Anonymous. 1995. Fishery Status Update in the Wisconsin Treaty Ceded Waters. First Edition. U.S. Dept. of the Interior, Bureau of Indian Affairs, Minneapolis, Minnesota. 20pp.

Bichler, Howard J. 1990. Three Perspectives on the Existence and Scope of the Chippewa Treaty Rights: St. Croix Chippewa Indians of Wisconsin and Lac du Flambeau Band of Chippewa. State Bar of Wisconsin Mid-Winter Convention Program 2 (Jan. 17-19, 1990): 251-256.

Clinton, Robert N., N.J. Newton, and M.E. Price. 1991. American Indian Law: Cases and Materials. Third Edition. The Michie Company, Charlottesville, Virginia. 1378pp.

Hansen, Michael J, M.D. Staggs, and M. H. Hoff. 1991. Derivation of safety factors for setting harvest quotas on adult walleyes from past estimates of abundance. Trans. Am. Fish. Soc. 120: 620-628.

Krueger, J. 1998. Open Water Spearing in Northern Wisconsin by Chippewa Indians During 1997. Administrative Report 98-01, Feb. 1998. Great Lakes Indian Fish and Wildlife Commission, Biol. Services Division, 54pp.

Satz, Ronald N. 1991. Chippewa Treaty Rights. Wisconsin Academy of Sciences, Arts and Letters, Transactions Vol. 79. No.1. 251pp.

Strickland, R., S. J. Herzberg, and S. R. Owens. MS 1990. Keeping Our Word: Indian Treaty Rights and Public Responsibilities–A Report on a Recommended Federal Role Following Wisconsin's Request for Federal Assistance. Unpublished manuscript, University of Wisconsin-Madison School of Law.

U. S. District Court, Western District, Washington. 1974. United States v. State of Washington 384 Federal Supplement 312-420.

U. S. District Court, Western District, Wisconsin. 1987. Lac Courte Oreilles Band of Lake Superior Chippewa Indians et al. v. State of Wisconsin et al. 653 Federal Supplement 1420-1435.

U. S. District Court, Western District, Wisconsin. 1988. Lac Courte Oreilles Band of Lake Superior Chippewa Indians et al. v. State of Wisconsin et al. 686 Federal Supplement 226-233.

U. S. District Court, Western District, Wisconsin. 1989. Lac Courte Oreilles Band of Lake Superior Chippewa Indians et al. v. State of Wisconsin et al. 707 Federal Supplement 1034-1062.

U. S. District Court, Western District, Wisconsin. 1991. Lac Courte Oreilles Band of Lake Superior Chippewa Indians et al. v. State of Wisconsin et al. Final Judgement, 74-C-313-C, 1-9.

U. S. Court of Appeals, Seventh Circuit, 1985. Lac Courte Oreilles Band of Lake Superior Chippewa Indians et al. v. State of Wisconsin et al. 760 Federal Reporter 2d 177-183.

Whaley, Rick and W. Bresette. 1994. Walleye Warriors. New Society Publishers. Philadelphia, Pennsylvania. 272pp.