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Indian Treaties and American Myths: Roots of Social Conflict over Treaty Rights

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For almost two decades the Great Lakes region has been the arena of protracted and bitter litigation focused on rights claimed by Indians to hunt and fish free of the interference of the states of Michigan, Wisconsin and Minnesota and the province of Ontario.[1] Many of the conflicts initiated by charges of illegal fishing against individuals have found their way to federal courts as constitutional issues. In cases such as the *U.S.* v. *Michigan, Lac Court Oreilles Chippewa* v. *Wisconsin* and *The Crown* v. *Agawa*, the courts were asked to decide the contemporary reality of 19th century treaties between various Indian tribes and bands and federal authority. An additional issue that soon followed was to resolve the conflicting powers of the states and provinces, the federal government and the tribal sovereigns to regulate and manage game and fish stocks.

The enormous publicity generated by these cases and much of the social discord that continues to plague efforts to assert court-mandated treaty rights are measures of the importance assigned to the case by both the litigating parties and the public at large. In attempting to understand the nature of the reactions to treaty rights litigation, it is necessary to describe the issues as they might be perceived by the parties most directly affected by court decisions.

First, the plaintiff tribes see the issue as a means of asserting and reinforcing the rights of a political sovereign. The game and fish issue is ideal in this regard because it also symbolizes the link between Indian people and a traditional relationship with the land.[2] To Indians, the contest is all the more bitter because the usurping of control over access to game and fish and the banning of many traditional harvesting practices by the states and provinces have been made over continuing protest that hunting and fishing rights were guaranteed by treaty. The fact that federal powers have acquiesced to the states and provinces for at least one hundred years makes this treaty issue even more appealing, since if the rights are upheld, the tribes' position against all governmental power is affirmed.

Finally, there are, of course, the economic benefits, both real and

perceived, that could accrue by expanded rights to harvest fish and game. These benefits are important to the subsistence of many impoverished communities; and beyond that there are the promises of money and jobs to be gained by commercial harvesting. In the northern Great Lakes region, where there is chronic high unemployment and job prospects are few, any commercial opportunity is welcomed. Commercial fishing is particularly valued because it offers one of the few opportunities to make a good living independent of a factory or office situation.

This is not to say, however, that these potential benefits have enticed unanimous support for treaty rights litigation within Indian communities. In fact, Indians have always been split on this issue. Since litigation is so expensive and time-consuming, it obviously detracts significantly from the limited means tribes have to address a great number of important problems. Further, while hunting and fishing may have a favourable economic impact on some people when one considers alternative sources of income, these are usually a minority of tribal members. Finally, Indian communities are well aware of the social backlash occasioned by hunting and fishing litigation. These consequences must be suffered by everyone: young, old, hunters and non-hunters, commercial fishers and people who never "wet a hook." Many Indians wonder if it is really worth it.

What about the states and provinces? In the normal course of government affairs, the management of game and fish resources, the licensing of the harvest of game and fish, and the enforcement of game and fish laws, are under the purview of state power; Indian treaty litigation is a direct challenge to these prerogatives.[3] These governments also raise a practical question: How will two independent governmental entities with conflicting management philosophies manage the same biological populations? Here we see the core disagreement between the tribes and the states, since the latter have managed game and fish stocks since the very beginning as a resource for sportsmen. Even during periods when commercial fishing was compatible with these ends, there has never been any doubt that the states have tried to manage natural resources to produce large numbers of the most abundant species to be taken for the satisfaction of the closely regulated recreational fisherman. As these governments see it, this management strategy produces the greatest good for the greatest number. The obvious benefit is in promoting tourism and recreational spending, which are multi-million dollar industries. While the province of Ontario successfully promotes both a recreational and commercial fishery by strictly managed commercial licences, the Great Lakes states insist on weighing the commercial fisheries of modest commercial worth against the benefit of a recreational fishery for a large number of people. More to the point, the commercial harvest, we are

told, competes with and threatens sports-oriented tourism. It could be noted that in the United States, fisheries and wildlife establishments are thereby also threatened, since management agencies are largely supported by recreational licence revenues.

We now come to the private component of the conflict: the sportsmen themselves, who have established a large number of organizations devoted to the propagation of particular game and fish species or sportsmanship in general. These groups, with enormous memberships, often national, are backed by very profitable arms and fishing tackle industries. Further, their positions are given voice by a well-established network of outdoor newspaper and magazine writers, as well as popular hunting and fishing programs on television. Over the years sportsmen's organizations have become the principle clients of resource management departments of state governments, and have thereby often acquired a quasi-public function, such as being represented on commissions that set or influence public resource policy. These wealthy, vocal organizations wield substantial power and often directly assist states in litigation against the tribes. Needless to say, they perceive, along with the states, a threat to sports interests in the establishment of treaty hunting and fishing rights. In some cases special organizations have been formed to rally sportsmen in opposition to treaty rights. Two examples are PARR (Protect American Rights and Resources) and STA (Stop Treaty Abuse). Organizations like PARR, Trout Unlimited or the Michigan United Conservation Club see treaty hunting and fishing as ruining the sports they enjoy. Lacking the constraints incumbent on public officials, it is the sports groups who raise money, lobby and both directly and indirectly confront Indians exercising their treaty rights.

Having been involved as an expert witness in several key hunting and fishing cases, and as a close observer of the social, political and ideological positions that have led to turmoil and conflict, I am nonetheless shocked again and again by the intensity of feelings, and the degree of antagonism and hatred that some segments of the non-Indian community display toward Indians who exercise federally mandated and protected treaty rights.

During the initial conflict over the decision in *U.S.* v. *Michigan*, which affirmed the right of Ottawa and Chippewa fishermen to commercially harvest Great Lakes fish free of state regulations, Michigan Indians faced many hostile and occasionally violent confrontations with sportsmen. Fishing access points were blocked; boats, nets and vehicles were damaged or destroyed; and threats were made against Indian fishermen. This abuse extended to non-fishing Indians and to Indian children in school, thereby creating a nasty anti-Indian mood that in many quarters has not abated.

It is clear in hindsight that an aggressive media blitz supported by sportsmen's organizations, sports editorial writers and highly placed state officials was instrumental in fanning the flames of protest and inciting anti-treaty forces to violence. Only belatedly did the tribes try to counter this disinformation campaign.

The latest and perhaps most violent anti-treaty demonstrations are those that have followed on the heels of the Voight decision in northern Wisconsin. This decision, which permits the Lake Superior Chippewa to harvest game and fish from the territory ceded in the treaties of 1837 and 1842, which is held in public ownership, has met with well-organized opposition from sportsmen, resort owners and a sizable group of anti-treaty advocates. During the tribally mandated spring spearing seasons in 1988, 1989 and 1990, huge, angry demonstrations were held at dozens of spearing locations. In some cases law enforcement officials and the National Guard barely managed to control crowds of hundreds of people who were both blatantly racist and violent. The familiar exhortation "Save a Walleye, Spear an Indian" escalated to "Spear a Pregnant Squaw and Save Two Walleyes." Organized through newspaper ads and local fliers and financed by the sale of Treaty Beer, these demonstrations resulted in rock throwing, gunshots, death threats and dangerous boat encounters on the water. Remarkably, there has been no loss of life. In the spring of 1990 the state of Wisconsin spent an estimated half million dollars protecting Indians pursuing court-mandated fishing fights.[4]

Under the assumption that these tensions cannot be resolved until they are understood, this discussion is devoted to examining the cause of the aggression being expressed toward Indian people as a consequence of their exercising treaty rights.

First, I believe we must reject the notion that the root cause of social conflict is racial hatred. Certainly there is a strong element of racism involved, but it also seems clear that racism has been an historic constant in Chippewa country, at least in this century. As a corollary, I do not believe that the solution to social disharmony is to be found in trying to convince racists not to be racist. Certainly, efforts to establish better race relations could only be beneficial in the long term and should be encouraged, but by comparison, we should remind ourselves that the civil rights movement in the United States would not have proceeded as it has if it had depended on converting the Ku Klux Klan and other hate groups to the cause of brotherly love and charity.

It is also contended that the root of present social conflict is purely economic. Exercising treaty rights, it is said, is destroying the viable tourist economy of northern Wisconsin. The hatred, it is said, is the direct threat the tribal fishery makes to the livelihood of non-Indians in the

region. People are fighting for their economic welfare. While the treaty and sports fishery may conflict occasionally, there is no substantial evidence of a decline in northern tourism. Sales of both resident and non-resident fishing licences in Wisconsin have held steady since 1982. In fact, there is good evidence that the tribes are a vital force in both the tourist and non-tourist sectors of the economy. Tribal stocking, research and enforcement measures have actually improved game and fish harvests.

In my view, the social conflict we are experiencing is deep, fundamental and, most important, cultural. Its intensity is based on the perceived violation of cherished values, and especially the violation of the myths through which North American society deals with Indians. To most non-Indian North Americans and to some Native Americans, the court decisions reaffirming treaty rights seem to strike at the fundamental principles on which they believe North American democracy is based. In short, to be pro-treaty is to be undemocratic.

There are three mythological constructs that seem to explain the social conflict at hand. The first deals with the idealized place of Indians within North American society. In North American mythology, Indians are afforded little contemporary reality. Indians are firmly placed in historical context—as part of our past, not our future. Our school children, Indian and non-Indian alike, learn much of what they know about Indians as a brief footnote to a history in which whites are heroes and major players, while Indians are relegated to the role of an "extinct species" with reality only in the olden times. Why do the newspapers always refer to treaties as "nineteenth century agreements?" It is because treaties are perceived to be relics of the historical past without modern relevance. The theory of "evaporating treaty rights" now being voiced in certain quarters deserves contempt. This theory goes beyond attempts to void treaty agreements by either arguing alternative historical or legal meaning or even by denying their contemporary application. The evaporating treaty right theory denies treaty rights by denying the cultural reality of modern tribes and bands. The important point here, however, is that by reaffirming treaty rights the courts have forced a very reluctant North American society to confront the reality of modern Indian people. Many non-Indian North Americans are afraid of, or at least uncomfortable with this reality.

There may be several explanations to account for the intensity of such feeling. One is that the reality of modern non-historical Indians also threatens the North American myth of equality and the ideals of fair play. In exercising treaty rights Indians are perceived as receiving special social, political and economic benefits. Although treaty rights are specifically protected by the Constitution of Canada and by treaty commitment and the supremacy clause of the U.S. Constitution, the public persists in

perceiving of treaties as historical flukes. One asks, however, where is the evidence of these special benefits treaties provide? Certainly not in the affluence of Indian citizens. Beyond this point we should recall that U.S. and Canadian law in fact protects the special interest of many groups—racial minorities, women, blind people and Texas oilmen, for example. Why not Indians? What sets Indians apart? Unlike most special interest groups, Indians, lacking numbers, political power or wealth, have turned to the judicial rather than the executive or legislative branches of government for relief. It is here, in theory, and in these cases I believe in reality, that decisions have been cast in terms of fact, reason and precedent, rather than votes or political influence. Unfortunately these few Indian victories are perceived by many as favouritism. In the eyes of anti-treaty rights activists, Indians have become the inside traders of the northern economy. No matter how wrong they may be about the actual facts, there are few things that seem to generate more anger among North Americans than the notion that someone is taking unfair advantage.

The third powerful myth that seems to be violated, at least in regard to the U.S. tribes, is the belief in governmental sovereignty—one nation indivisible. As long as Indian tribes had no resources to administer, they had no real impact on the lives of their non-Indian neighbours. With the recognition of off-reservation treaty rights, not only are U.S. Indians resurrected from an historical grave, but tribal government is vested with the power to challenge state authority. This plays out in several ways. Real tribal sovereignty runs counter to many decades of nationalistic propaganda aimed at mainstreaming ethnic minorities. The old melting-pot theory, and its anthropological corollary, acculturation, was so reassuring to the greater society because it promised total dissolution of minorities. Now the treaty cases, by reaffirming the political reality of the Native American minority, also provide that minority with both permanence and sovereign power. Thus, the decisions strike at both the theory and reality of American hegemony.

For the tribes, real sovereign authority presents practical problems. As long as the tribes were threatened from without, the threat often strengthened resolve at both the tribal level and in the consortiums of tribes that often joined to pursue treaty litigation. Once the victory was won, the problem of distributing authority and sharing resources caused bitter factionalism within many Indian communities. This pressure has been compounded by the demands of American and Canadian society that Indian management conform to those already instituted by state, provincial and federal powers. That is, game and fish management philosophy, techniques and other practical details of research, harvest and administration, should be designed as tribal duplicates of those existing at

the state and provincial level. It is obvious that the more Indians behave like non-Indians, the less external pressure will be exerted. Needless to say, non-Indian governments are able to exert powerful influences on bands and tribes, and without belabouring the point, many tribes are succumbing. Chiefs are being traded for chief executive officers and policies for traditions. In fact, many U.S. tribes have already demonstrated that they can manage resources as effectively as the states, and in some cases, better. But here one must ask why the tribes should want to pursue the same policies that have been designed to capitalize, exploit and consumerize the resources of the natural world. Why should they want to adopt the policies, attitudes and objectives that experience has so thoroughly demonstrated has led our society to almost total disfunction with nature?

Part of the solution to the social conflict that now besets North American tribes as the result of treaty hunting and fishing litigation seems to lie in the use of sovereign authority acquired by the tribes to manage natural resources *differently*. The reaffirmation of treaty rights gives the tribes an opportunity to demonstrate that cultural pluralism and shared stewardship of resources can be innovative and productive. Certainly, the future requires a new natural resources philosophy or perhaps the re-establishment of a very ancient one. In this struggle to create a new philosophy concerning the relationship between cultural behaviour and the shrinking natural realm, there will be room to reconsider old ideas about resource-use. Beyond this, it is incumbent on those familiar with our history to recognize and reveal the fallacies of our common mythology regarding the role of minorities in our society.

Notes

An earlier version of this paper was presented at the 1989 Annual Meeting of the American Society for Ethnohistory, Chicago, 4-6 November 1989.

1 Cathrine A. O'Conner, "The Fishing Rights Controversy in Michigan: Federal Treaty Interpretation, Backlash and Fishing Depletion," Honors Thesis, Department of History, University of Michigan, Flint, n.d.

2 George Cornell, "Native American Contribution to the Formation of the Modern Conservation Ethic," Ph.D. Dissertation, Michigan State University, 1982.

3 E. Adams, *The Fishing Rights of Treaty #3 Indians*, Report to the Chiefs of Treaty Area #3 (Kenora, Ontario: Treaty and Aboriginal Rights Research, 1986).

4 The newspaper *Masinaigan*, published by the Great Lakes Indian Fish and Wildlife Commission of Odanah, Wisconsin, has carefully charted the harassment of Indian fishermen and hunters preserving their right to take game and fish in northern Wisconsin and the waters of Lake Superior. See especially the spring 1990 issue.