Brian Pierson

The program is entitled “Social Economic Political Issues related to the treaty rights”, and Jim invited me to be on the program because it was my privilege to work with Tom Maulson and many others in a lawsuit that we brought in 1991 as sort of a phase three of the treaty rights struggle. Phase one being the establishment of the right to go off reservation under the 1837 and 1842 treaties and harvest natural resources on the ceded territories, by the decision by Seventh Circuit Court of Appeals. The second phase was the litigation that lasted from that decision until 1991 that determined the scope of the treaty right. And the case that I was fortunate to be involved with was a civil rights case. It was not a treaty rights case but a case brought under federal civil rights laws to protect the exercise of those rights.

I don't have to go into much detail to describe why it was necessary to bring the case because you saw the videotape at lunch and you heard Tom's testimony and descriptions which were powerful and compelling. I will tell a little bit of the story about this case so that you'll understand how it fit in. The scope of the right was in the process of being formulated. Tribal members had endured a lot of abuse and violence at the landings and I think Tom and the other leading spear fishers at Lac du Flambeau were trying to find some means of getting protection for spear fishers at the landings because you had pretty much an abdication of responsibility by the political leadership of the State of Wisconsin. The elected leaders were not sending the appropriate signals to the people of northern Wisconsin who didn't like spear fishing. You don't have to like it, but the federal courts had spoken that these were rights that tribal members had, and it was the responsibility of our elected officials to leave no doubt that those rights would be upheld and that interference with those rights would be punished and that didn't happen.

On the contrary, we had political leaders, including representatives in Congress who were coddling these people the so-called protestors at boat landings. They were meeting with them, giving them credibility that they did not deserve and introducing bills in Congress. This happened in Congress. Jim Sensenbrenner is still in Congress and he introduced a bill at the time that would have abrogated treaty rights. You had representatives of both political parties talking about cutting off federal assistance to tribes if they went off reservation to do this. In 1989, you had the governor of the State of Wisconsin going into federal court and asking Federal District Judge Barbara Crabb to address the problem of violence and danger at the boat landings, not by taking forceful action against the people seeking to interfere with the right, but by shutting down the tribal fishery. He actually went into court with a straight face and said, “Your Honor, we have a crisis situation here, someone is going to get killed. Here's what we think you ought to do, prohibit the tribal members from going off and exercising their rights.”

I remember reading the transcript of that hearing. Milt Rosenberg was cross-examining one of the high officials in the Thompson administration. I think it was Al Schanks who was testifying that this was the only solution and Rosenberg finished his cross-examination by saying, “Isn't the case, sir that every high executive has somebody who he goes to as his can-do guy and in the Thompson administration you're the can't-do guy?” “Objection, Your Honor.” “Withdrawn.” But he made his point. That's the situation that we had when Tom and Nick Hocking came to ACLU Wisconsin and I was practicing law in Wisconsin at the time with a general practice firm. The ACLU had raised some money, they raised $50,000 to cover the out-of-pocket cost of the civil rights lawsuit, for paying experts, travel and photocopies and all those sorts of things. And, I at the time was working closely with Irvin Charne, who was a very

eminent attorney in the State of Wisconsin. In fact, he had represented minority school children in the City of Milwaukee in a desegregation lawsuit and I worked with him as well in a lawsuit against the suburbs to desegregate the schools in the suburbs. Irv was the kind of lawyer who would take cases like that.

So I went to ACLU headquarters and met Tom and Nick for the first time and I heard about the case. Now, I knew a little bit about Indian law because I had worked with Milt Rosenberg in law school and Milt was teaching Indian law at the time, but I had not had any exposure to it since leaving law school seven years earlier. It was all new to me other than as a citizen I had taken a keen interest in watching the coverage of the boat landings protests.

The case was set out and it was Tom or Nick or somebody who lit sweet grass and they started passing it around. I was new enough to Indian country that I just wasn't quite sure what that was and it reminded me of a controlled substance. When it came to me, having a law license and not wanting to put it at risk, I just sort of inconspicuously passed it around. I didn't want to offend anybody. I just wasn't sure what it was he was passing around. So we built that case.

There is no federal law prohibiting interference with federally protected treaty rights, so we had to use the Civil Rights Act of 1866, which prohibits racially motivated interference with property rights because under Wisconsin property law if you sell land or transfer land and you retain the right to take minerals from it or take animals from it or whatever, that is a usufructuary right and that's called a property right. We had a property right. The rights reserved under the treaties were property rights under Wisconsin law and so if we could prove that there was interference with these rights and if we could prove that the interference was racially motivated, we could have a federal remedy. So that's what we set out to do.

We took about six months to prepare the lawsuit. The spear fishers who were active in exercising their rights were the core of that lawsuit. We interviewed them at length. They stepped forward and gave us very valuable testimony. We worked closely with GLIFWC and Jim Schlender, Jim Zorn, Sue Erickson and Jim St. Arnold. GLIFWC was an invaluable resource because it had gathered so much information and evidence over the years. We filed the case in February 1991 and we drew Judge Crabb. We sued three sheriffs and Stop Treaty Abuse Wisconsin which was led by Dean Crist who was a very militant anti-treaty activist. He had taken the protest to a new level as far as marshaling large and rowdy crowds. He was also very public about his goal. His goal was not just to exercise First Amendment rights. His goal was to actually prevent tribal members from going off- reservation and exercising their rights. He made that very clear to all including the media. If elected officials had been clearer about it, more of his followers, who didn't really quite know what to think, might have stayed away, but because there was so much coddling of Crist and political leaders meeting with Crist, people got the wrong idea about the law and its role in society. He was able to turn out huge numbers of people. We also sued three sheriffs.

We wanted two things with this lawsuit. Against Crist and his crowd, we wanted a prohibition against any interference with the right to spear. We had specific acts that we wanted prohibited, like blocking access to the lake, creating high waves on the water, throwing stones and creating blockades to prevent spearers from going on the water. We had a list of a dozen or so specific acts and then a catch-all at the end including any other acts of interference.

With regard to the sheriffs we wanted separate areas of the boat landings so that tribal people who went there to support their friends and family out on the water would not have to endure the kind of abuse that Tom referred to and that you saw on this tape. Some of these sheriffs were sympathizers with the protestors and they didn't like spear fishing either. The fact

that a lot of tribal members had to endure this sort of abuse was not a problem for them. And it was striking because some sheriffs we felt were more reasonable about it. If you have one group that's threatening another one, it seems obvious that you separate them. The sheriff of Oneida County did not have a problem doing that but the sheriff of Vilas County was unwilling to do that because I think that he kind of liked the idea that if Tribal members were going to go and exercise these rights, maybe it was okay that they have to pay this penalty to do it and endure this kind of abuse so they let it happen. That's what we wanted from them. We wanted separate areas at the landings and we wanted 250 feet, which we called a stone's throw for obvious reasons.

We had a hearing in Wausau on May 7th and Tom testified. He was excellent. We had Eddie Benton-Benai, who was a spell-binding witness who talked about the cultural and spiritual aspects of spear fishing. We thought it was important to elevate the case and use it as a teaching moment for the Judge and the people in the audience. His testimony was just fascinating and you could have heard a pin drop when he testified, including the side of the courtroom that was dressed in blaze orange and that was supporting Dean Crist.

Judge Crabb apparently had been waiting for this case to be brought because a week after the hearing, she granted a preliminary injunction. There were two results of her decision. With respect to what we asked for from the sheriffs, the answer was no. We had not done a good job at that hearing persuading her that we needed the separate landing areas. In fact, they had all kinds of law enforcement experts from the state testifying about how it would be impractical to do and the fact that so far at least the sheriffs had done a good enough job so that nobody had been killed or seriously injured. It was unfair to really be blaming them when they're doing the best they can with limited resources under such awfully difficult circumstances and do they really deserve to be targeted in this lawsuit. I think she was sort of receptive to that interpretation of the facts, and we did not get what we wanted from them.

We did, however, get everything we wanted from Dean Crist. I think we named about 15 individual members of *Stop Treaty Abuse - Wisconsin* and all of those working in concert with them. We weren't really quite sure how that was going to play out because I was afraid if we didn't get the separate areas of the landing, we would still get a lot of hell being raised.

As it turned out, I think the consensus was that the preliminary injunction was very effective. One thing that we had made clear was that we had not asked for money damages in the lawsuit and we didn't do it because the case was going to be a huge enough undertaking as it was and if you try to quantify the damages from the harassment and so forth, it would just make the case exponentially that much more difficult and complex to try. And while we were very tempted to do it because we thought it was important and we thought that the tribal people who had endured this harassment deserved compensation, the decision was made not to pursue it in the interest of making the case as efficient and manageable as possible in getting to the ultimate result that we all wanted.

That meant that we had simplified the case. It also meant that we tried the case to the court because without the damages issue we were just trying the case with Judge Crabb. We did, however, make it clear that while we would not ask for damages, we were going to come after the defendants for attorney fees. Under the civil rights laws, if you prevail as a plaintiff you're entitled to recover your attorney fees from the losing defendants. We figured that was one incentive that we did have and we made it very clear that we would be doing that. So a lot of people who had been on the fence in a not knowing quite what to think and had chosen to follow Dean Crist pretty quickly decided that it wasn't worth the risk to them. They would be financially at risk.

Another thing that came from Judge Crabb's preliminary injunction was her very explicit findings that what had been going on at the boat landings was racially motivated. It was as if the fig leaf was off. All of this pretense about equal rights or protecting the resource that Crist had featured in his public statements and that had been picked up by the politicians and the newspapers just sort of fell away when you got a federal court calling it what it was. Suddenly the whole enterprise was a little bit less reputable than it had been. So you have a federal court calling it racism, and then you also had the risk to these folks that they were going to be hit with attorney fees.

The '91 season was really much better. There was one big event that they held at Sand and Dam Lake, which was tense, but thereafter that was kind of the last hurrah and that was the only major event they did in '91. So the preliminary injunction in retrospect was kind of the heaviest blow, even though the thing went on for four years. After the preliminary injunction, I thought great, we could wrap this baby up because what we'll do is we'll just let all of the defendants agree to be bound permanently by the preliminary injunction, which is to stay away from the landings and not interfere with the rights, and we'll make everybody contribute something to attorney's fees just so they feel a little pain. And that happened with a lot of them because they all contacted lawyers and their lawyers said you should get out of this. I mean, how much fun are you really having at the landings. You're at risk of being hit with a big judgment for attorney's fees, get out of it.

That's what their lawyers were telling them. So we started getting these calls from the lawyers saying what's it going to take to get out of it, and we said we'd like $3,000 from everybody and we'll call it. In addition you've got to agree to be permanently bound by the preliminary injunction. We decided that in order to put on extra pressure we would file a Motion for Summary Judgment to join the issue and increase the attorney fees and increase their incentive to settle the case. Everybody got out of the case, I believe, with the exception of Crist and STA, which by then was pretty much Dean Crist. Everybody else was out by the time we filed the Motion for Summary Judgment. Judge Crabb granted the Motion for Summary Judgment.

Meanwhile, we realized why Dean Crist had not bailed out of the case. Crist really viewed the case as an opportunity because he thought the State of Wisconsin had botched the *Voigt* case back in the '70s and '80s, because in his mind there were two dynamite arguments that they had failed to raise. The treaties had separate provisions for half-bloods, so he concluded from this that that must mean that only full-bloods get to exercise treaty rights. The second brainstorm was that the tribe previously brought claims under the Indian Claims Commission act of 1946 and got a settlement. When you get a settlement under the Indian Claims Commission it's supposed to be a complete settlement, and that was back in the '60s. Therefore, when this case was tried in the '70s and '80s, the off-reservation hunting and fishing rights were already gone. That was his theory. Those were the two arguments that he thought the State of Wisconsin had blown that he was going to use our civil rights case to make.

The problem is, first of all, he blew the deadline for amending his Complaint to add these arguments. So he was defeated on a technicality, but we also did address the arguments in a footnote and explained why they were bogus arguments. In the one case, it's a political relationship. Membership of the tribe is a political relationship. Tribes determine their membership. The fact that tribes at the time of the treaties made special provisions for half-bloods had nothing to do with the fact of who can exercise the rights today. That is determined

by who the tribe determines today to be eligible for membership. It was a frivolous stupid argument and it was never going to go anywhere.

The Indian Claims Commission argument was a little bit more interesting, but really wasn't going to go anywhere because, first of all, you had a judgment of the Seventh Circuit Court of Appeals in 1983. Its *res judicata*, meaning it's been ruled on. You don't get to keep kicking the cat. Under the federal legal system, you get one chance. The State of Wisconsin had that chance. That issue was resolved. Besides the tribe was never compensated for its off-reservation hunting and fishing rights because at the time the Indian Claims Commission claim it never asked for compensation for those because it continued to assert that they existed.

Anyway, that's why the case dragged on for four more years. Crist thought he could take these issues to the United States Supreme Court. Judge Crabb granted Summary Judgment, it went to the 7th Circuit Court of Appeals and the 7th Circuit Court of Appeals reversed Judge Crabb on the grounds that where race is a motivation, the defendants are entitled to their day in court. They should get to have a full trial and look the Court in the face and say with all sincerity "I know it doesn't look good, but I was really motivated by something other than race." And who knows, maybe the trier of fact, the judge or jury, whoever it is, will be convinced. They are entitled to that opportunity. Judge Crabb, you have to give them that opportunity. However, we do affirm Judge Crabb on denying them these two arguments. And by the way, we don't mean to second guess Judge Crabb. These are the words they used; "The stench of racism is unmistakable in this case."

So the Seventh Circuit was sending it back, telling her she had to go through a trial, but it was acknowledging the strength of the documentary evidence. Which, by the way, we had based on not only what you saw on the videotapes but also on their literature, which was filled with racial stereotypes including all the tens of thousands of dollars that every Indian person is entitled to from the federal government on account of their race, all the fish that they spear and then they don't even bother to fillet them and they waste them because they're too lazy to do that. They won't even buy American because they import these spears. All of this incendiary information was in the literature. It spoke for itself. The Seventh Circuit Court of Appeals acknowledged that the stench of racism was unmistakable, but they sent it back down.

We had one week trial in Wausau. Same scenario, one side of the room Native people, the other side was blaze orange. The Indian people were stoic and well-mannered. Judge Crabb at a social occasion years later mentioned to me how striking it was that the Indian people watched it and were dignified and that on the other side of the room there was snickering and hooting and that kind of thing. A lesson to lawyers, if your client's supporters are doing that, clear them out because it doesn't make a good impression on the judge.

Anyway, no surprise, we had our trial. She then again issued a permanent injunction and the case went up to the Seventh Circuit Court of Appeals a second time and again we argued it orally. The Seventh Circuit Court of Appeals said "Tribe, you guys win and we affirm the permanent injunction." Crist then filed a petition for *certiorari* to the United States Supreme Court. They get about 5,000 of those requests every year and they grant about 125 of them, but we had to fully brief it. The answer was 'no' on that. And the case was at an end at that point.

And I think that the lessons from it are that the failure of leadership by our elected officials hurt the State of Wisconsin. It gave the state a black eye. It didn't have to be that way. We did not have to have those broadcasts on the evening news across the country showing those ugly boat landing protests. Our elected leaders should have sent a clear message that, "Sorry, we understand your frustration, we understand you don't like spear fishing, but the court has spoken,

it's the law of the land." We should never have to prove that they were motivated by racial bias or racial animus against Indian people. It should have been enough that there was one, a federal treaty right and two, interference with it.

An independent judiciary is important. We had a federal judge with lifetime tenure, who was insulated from political pressures. I think I mentioned that our whole legal basis for the case was the Civil Rights Act of 1866. That never really did much good for African Americans in the south for all that century or more that it was in effect until the 1960s because until then there were no lawyers who would take those cases and there were no judges who would enforce those rights, so the value of an independent judiciary is crucial.

As a lawyer, I don't mix in with the policy decisions, but there were very difficult decisions that tribal leaders had to make at that time and offers were made to them not to go off reservation. Those are not easy decisions at all. It's like if you look at the transcripts of the treaty negotiations of 1837 or 1842 or 1854 or any of scores of others, the choices that the tribal leaders were presented with were no win situations. The future of your people is going to depend on it and nobody can predict the future. I think in this case it was a difficult decision and the people who felt that they should have held back on exercising the right, from where I sat were acting in good faith trying to protect their people.

I think in retrospect all these years later it did prove to be an important and good decision that the ancestors of the spear fishers had always asserted we have those rights and this crucial time came in history where you had to decide are we going to fight these thing and exercise these rights or not and the decision was let's do this and it was very painful, but now they are there. It was like Candy [Kathryn] Tierney said this morning, that every lawyer wants to be involved in something that's meaningful and I think I share with a number of the lawyers that were on the panel this morning a feeling that my involvement in this case was the most meaningful case I ever handled. It was a great privilege for me to be involved in it and to work with Tom and many other tribal people.

So, I want to thank GLIFWC and all of you and Tom for asking me to be part of this event. Thanks.