

# Howard J. Bichler

My name is Howard Bichler, and I formerly represented the St. Croix Chippewa Indians of Wisconsin.

I want to focus a little bit in terms of the *Voigt* and *Mille Lacs* litigation the kind of people that had incredible input into the success of these cases. And they were successful. We didn't win everything, but, the major pieces of the reserved rights were secured. You know, most important for an attorney, are your clients. When the *Voigt* case started, economic conditions were rather poor up here in Indian Country. It's amazing how much tribal councils and tribal leadership allowed their limited resources to be devoted to these cases. I was a sole attorney for a small tribe and the support they gave me to go off and do the things that were necessary to adequately represent their interests was astounding, and it really came at quite a cost to them because of all the other very important work that they needed to have done.

The late Gene Taylor was a long-term tribal chairman at St. Croix and was very supportive. Lewis Taylor, the current chairman, and David Merrill the former chairman were very supportive. And I'm sure every attorney here at the table can point to tribal leadership that really gave them the green light to go ahead and do what was necessary in times of very scarce resources.

While I was at Wisconsin Judicare I was part of the *Voigt* appellate team. We had a director Gene Potack who's no longer with us, who basically said whatever you need to prosecute the successful appeal in *Voigt*, you have it. So I think it's, really important to recognize those tribal governments and those tribal councils and others who provided the attorneys with what they needed to move forward.

No case is successful, especially a treaty rights case, without quality expert witnesses. And we in the *Voigt* case and the *Mille Lacs* case relied on two types, those from the academic world and also the inside experts we got to know very well from GLIFWC. We managed, for the most part, to find people who were very knowledgeable in their field but also believed in the cause and thought what these treaty rights were all about and the implementation of them were consistent with their beliefs. I had the pleasure of working with a number of excellent, highly touted expert witnesses from the academic world. We have one here, George Spangler.

One of my favorite experts was a gentleman who was a professor at the University of Wisconsin-Steven's Point, Ray Anderson. And you had to love Ray because he was a bear expert. His life work was the black bear and he was the kind of guy that would probably feel a lot more comfortable in outdoor work clothing than academic attire. Ray was the kind of guy who would crawl into bear dens and tag bears in the winter. He was a wonderful witness in the sense of making it very simple for everyone to understand how to accomplish goals such as black bear and white-tailed deer management, much to the chagrin of state attorneys who thought it should be far more complex.

A gentleman that I got to know very well later in the *Voigt* case, Hubert Locke, who was a professor at the University of Washington but had previously been a police commissioner with the city of Detroit. Hubert was a black gentleman and we brought him in to establish the legitimacy of the law enforcement efforts that the tribes had been undertaking. I think he was astounded with what he saw on the law enforcement side or the lack of law enforcement in terms of some of the protest groups. I got to know Hubert fairly well. And,

you know, it's one of those bonuses when you work on a case like this, the people you get to know.

On the GLIFWC side, they grew with us. They became experts in their own right. Oftentimes they provided a perspective that no state witness could ever provide, and that was from working with the tribal people in the harvest of these resources. Several of them are here today with us including Jon Gilbert, Peter David, Neil Kmiecek and Tom Busiahn early in the case.

Among the attorneys, I had a unique position in that I think I was the only one of our attorney group who was brought up in the hunting and fishing culture by my family. I understood a bit of what was involved in hunting and fishing, so I was often given the task of shepherding some of the wildlife issues through and had to work with those experts. Often experts are the ones teaching the attorneys what the scientific basis really is. I don't know if anyone else will admit to that, but we needed a lot of education on occasion.

The Commission staff I thought was just absolutely vital to the successful prosecution of these cases. Commission executive directors from the start were wonderful to work with and very supportive and gave us the resources that the attorney team could take and successfully use in court. I think it often isn't said how valuable the behind-the-scenes people can be.

In addition, GLIFWC provided the foundation for the development of several of the prongs of self-regulatory tests that the tribes had to meet in order to be able to enforce their own laws and to be the mechanism or the entity that self-regulated. If not, then it would fall to the state to regulate the exercise of these rights. And I'm sure all would agree that would have caused a lot more issues than had the tribes not gotten the ability to self-regulate. GLIFWC provided us with the biologists that were needed to provide solid scientific basis for the type of regulations that the tribes were proposing. The wardens provided an effective law enforcement presence so that we could tell the Court that yes, indeed, when tribal people are out there exercising these rights, if they are violations of those rules, that there's an enforcement component out there that's effective and protect the resources.

In addition, GLIFWC was often the conduit for the only source of tribal court funding. So very important. Many of the tribes did not have tribal courts at the time that the Seventh Circuit Court of Appeals ruled in *Voigt* and the case was often the impetus for the development of these courts.

GLIFWC also helped us to present some aspects of the case that were pushing the edge or were unique to the state in the sense that the state often had absolute prohibition against certain harvest techniques. For example, there was an absolute prohibition against use of gill nets inland in Wisconsin, on inland lakes.

The area that we were often challenged on and was hard to deal with and where we often had our least amount of success was typically on safety issues. I think it's ironic now that some of what the tribes proposed back then have come to pass in terms of state regulations on state citizens on some of these issues. For example, a few weeks ago I believe the state changed the legal age to hunt deer to ten years old. We proposed an age that was consistent with traditional hunting, that young tribal members could go out and hunt at a very young age and now state law reflects an age of ten. Many people dispute that. And it's pretty incredible that the state did it without requiring a hunter safety course for these young ten-year olds, and I think that's terribly ironic.

Some of the season lengths that were originally proposed by the tribes, much longer than what the state would allow then, are in place now. The state is now edging towards those longer seasons. Trapping seasons are longer. I believe now the state has deer hunting seasons that extend at least 25 to 30 days throughout the fall time and the lengths of the tribal season that was proposed was hotly contested. So it's both amusing and ironic to see the state coming to these tribal positions. I don't know that it was because of what we proposed or other forces, but I think it validates the original views on some of these issues that the tribes had.

No successful case is achieved without a core of very dedicated, very knowledgeable, very hard-working attorneys. I think each tribe should know that their attorneys were, I think, some of the most dedicated people I've ever met. We have some attorneys in the audience who worked on the case. Tracy Schwalby represented the Lac Courte Oreilles Band, David Seigler, who represented off and on Bad River; and Milt Rosenberg, who was the *Voigt* case from the beginning.

I remember a newspaper article that I read a long time ago and it was an interview with one of our expert witnesses who was not in the end very friendly towards us after the dust had settled. Jim Clifton was from the University of Wisconsin — Green Bay and later with a university in Michigan. He was quoted in a newspaper article about the case and he said. "... *the tribal attorneys are ruthless.*" And I think that was a compliment. I took it as one. I think he thought we were doing our job. Maybe we went over the top a little in his mind, but it was a pleasure working with all of the attorneys.

Now I have some distance because I no longer represent one of the plaintiff tribes and looking forward I think, there needs to be a real effort to preserve the institutional memory of what transpired and the reasons why it transpired. It's very frustrating as an attorney occasionally to get second guessed on decisions that were made 20, 25 years ago. And most decisions of what to pursue and how to pursue it in this case really were in the context of a very specific set of circumstances that were in existence at the time. On the state side I can think of no better repository of institutional memories than Mike Lutz. He represented the state from the first get-go and I worry about losing that memory because without that kind of context sometimes the rights and the decisions lose their power and effect and lose their place. That's not to say that things shouldn't be adjusted or things shouldn't be changed.

In conclusion, after working on these cases for so many years there's favorite writings or powerful moments and I think one of the powerful moments that I had the privilege of being involved with was when at the end of all the litigation in the *Voigt* case and the tribes and the state were kind of doing a shadow dance about whether we should appeal to the Seventh Circuit or should we just call it a day. Both sides had lost issues that they felt were near and dear to them in this case.

Looking back I think the major tribal issues that could have gone differently were the issues of timber, timber harvest and the issue of damages for past interference with the treaty rights, and that always will remain a sore spot. And the state had the same regrets.

The tribal leadership and the state both decided that they weren't going to appeal. There's a deadline that you have to file for your appeal, and both sides issued their own press releases as to the reasons why they weren't seeking an appeal. And after all, in Wisconsin it was the *Voigt* treaty rights litigation that was named by the Associated Press as the decade's number one story in Wisconsin. A huge story. Every spring the papers were filled with this, so it was big news, and both sides said they had to say some parting words to justify what they were going to do.

I want to read you what the tribal leadership agreed as their statement and it was very simple. And I believe Milt Rosenberg was the drafter of this statement. It was dated May 20, 1991:

To the People of Wisconsin: The six bands of Lake Superior Chippewa aligned for many years in litigation against the State of Wisconsin in order to confirm and uphold their treaty right to hunt, fish and gather and now secure in the conviction that they have preserved these rights for generations to come, have this day foregone their right to further appeal and dispute adverse rulings in this case, including a district court ruling barring them from damages. They do this knowing that the subject of the latter ruling is currently before the United States Supreme Court and has been decided in favor of Indian tribes in the Ninth Circuit Court of Appeals. They do this as a gesture of peace and friendship towards the people of the State of Wisconsin in a spirit they hope may someday be reciprocated on the part of the general citizenry and officials of this state.

It was signed by the six plaintiff tribal chairmen: gaiashkibos, Patricia DePerry; Raymond McGeshick, Eugene Taylor, Donald Moore and Michael Allen. And I think that really sums it all up.

In conclusion, I once heard an attorney talking about a major case. He wasn't part of that case and he said, you know, this is the kind of case I would be proud to be associated with. And in conclusion I can say I'm very proud to have contributed in my own small way to this case and I think it is a good day for all of us. Thank you.