

Marc Slonim

Good morning. It's a privilege to be here. My name is Marc Slonim. I've been involved in both U.S. v. Michigan and in the Mille Lacs litigation. I wanted to try to provide a little context for the treaty right and how it originated as a major force in Indian Country and what it means today. The cases we've been discussing, U.S. v. Michigan, the Voigt case and the Mille Lacs case, involved three different treaties: A treaty in Michigan negotiated in 1836, a treaty in Wisconsin and part of what's now Minnesota in 1837; and then another treaty in Wisconsin and Michigan in 1842. All of these treaties involved Indians ceding lands that they held to the United States at a time when the United States wasn't really interested in acquiring the lands for purposes of American settlement. The real goal of the United States in these treaties was to acquire natural resources, either timber or minerals or other resources that were available on the land. The lands were far enough north and considered sufficiently inhospitable to American farming and agriculture that settlement wasn't really the driving force behind the treaties. Natural resources and acquisition and control of resources was what was at stake.

From the Indian perspective, the Indian people were willing to share these resources as long as they could remain on the land and continue a way of life that centered on hunting, fishing trapping and gathering, and so every one of those treaties has a provision which preserves to the Indians the rights to remain and to hunt, fish, trap and gather. These rights were conditioned in different ways in each treaty. In the 1836 treaty in Michigan, these rights continued until the lands were required for settlement. In the 1837 treaty in Wisconsin and Minnesota these rights were preserved during the Pleasure of the President. In the 1842 treaty, these rights were preserved until the Indians were ordered to remove. But despite these conditions, it was clear, if you look at the negotiating history of these treaties, that the central condition of the Indians' land cession was the ability to remain on the land and continue to utilize resources that had sustained them for thousands of years. And that actually worked very well in the years after the treaties were enacted. Indian peoples remained on the land.

As American industry advanced and American resource extraction took place, Indians often worked in the mines, harvested the timber and traded with non-Indian communities that were moving in. The Indians provided fish and wildlife to non-Indians, while continuing their own way of life at the same time.

What changed, beginning in the later part of the 1800s, was the railroads. And with the railroads came the ability for non-Indians to commercially harvest fish and game and ship them to markets in the east, and that led to the decimation of many fish and game populations. And as states observed this, they began to step in and say we have to do something about this and the first step was to ban commercial harvest. Then as a sport fishing and sport hunting ethos developed among non-Indians, states began to develop regulations that didn't just try to prevent resources from decimation but started allocating resources to sports hunters and sports fishers. You ended up with hunting seasons that lasted two weeks in the fall, which worked perfectly for urban elites who were interested in leaving the cities and going out and hunting for a couple weeks. It didn't work so well for subsistence hunters, Indians or non-Indians, who couldn't confine eating to two weeks a year, but needed to hunt and fish the rest of the year. And as the sport regulations developed further, the idea that it was unsporting to take

fish with a net or a spear developed and only certain kinds of fishing were okay, and that further disadvantaged Indian people.

Indian people objected as states developed enforcement capabilities and started enforcing these laws. It wasn't lawyers who said, "Wait a second, the Indians have treaty rights." It was Indian people who said, "We have treaty rights. You can't tell us not to harvest natural resources." In the late 1800s and early 1900s there are literally hundreds of letters from Indians or people writing on behalf of Indians in Michigan, Wisconsin and Minnesota protesting against the enforcement of these state laws.

I came across one of these letters recently. It deals with a chief from Mille Lacs named Wadena, but it's really typical of letters that were written by or on behalf of Indian people throughout the Great Lakes region. I want to read it to you to give you a flavor of the Indian understanding of these treaties.

This was written to a Congressman by a citizen in Isle, Minnesota and he said that "Yesterday a delegation of Chippewa Indians called on me and wanted me to write to you in regard to a treaty made with the Chippewa Indians in 1837, to find out if that treaty had ever been canceled or any other had been made in its place. Chief Wadena claimed that he had a copy of 1837 which reads as follows." What follows is not the text of the treaty but the Indian understanding of the treaty:

White men can take white pine and Norway pine, but cannot take any birch, for that is my house, and may not take oak. An Indian can always hunt deer and bear for that is his meat. Indian can always gather wild rice, for that is his bread. Indian can always trap in lake or streams for all kinds of fur. Indian never sold any pulpwood or railroad ties and now white man don't want Indian to cut firewood. Also Indian never sold any maple for that is the sugar and molasses.

And the letter goes on to talk about Chief Wadena's feelings about the Indian agent at Cass Lake, and I'll let you use your imagination on that.

So the early legal battles involving Indian treaty rights weren't these comprehensive cases brought by the United States, like *U.S. v. Michigan*, they were case-by-case decisions where a State would prosecute Indians for violating its fish and game laws. And Indians who were doing what they needed to do to survive and continue their culture would be defendants in state court prosecutions, and sometimes judges would be sympathetic and throw out the prosecutions and sometimes they wouldn't, but there were dozens, if not hundreds, of these cases. And some of them went up to higher courts, to state appellate courts and some decisions were favorable and some weren't, but there was this kind of piecemeal legal confrontation going on throughout the Great Lakes region.

And then eventually the interest in the issue rose to the federal level and broader cases were filed in federal court. The first major one in the Great Lakes was *U.S. v. Michigan*. In the Voigt litigation the tribes themselves took the lead and then ultimately when we came to the Mille Lacs case, that case was filed by the Mille Lacs band although ultimately the U.S. was also involved. We spent many years trying to get the US to support us in that litigation. It wasn't until after we had essentially settled the case with the State, only to have the settlement

rejected by the Minnesota State Legislature that the federal government finally came in and decided they would support the Band. There were some very difficult hearings in which tribal elders were testifying in front of Minnesota legislative committees to explain the cultural and spiritual importance of these rights to them, only to be kind of harassed and berated by some state representatives and state senators.

These larger cases raised the stakes because they would lead to a final adjudication of whether the rights existed at all, as well as to ultimately working out how they would be implemented in practice. Unlike the individual criminal prosecutions that had been going on for decades, these cases would decide once and for all whether the rights still exist.

And so on behalf of tribes, those of us who were litigating these cases and realizing the stakes that were involved, brought everything we could possibly bring to bear to explain to the courts the nature and importance of the Indians' treaty rights, and to allow Indian voices to be heard. We did that both through the use of anthropologists and ethnohistorians and Ojibwe linguists, but also with the testimony of Indian people. I think some of the most powerful testimony in the Mille Lacs case was from Mille Lacs band members, who were hunters and fishers and could talk about what those activities meant to them.

One of the issues, that both Bruce [Greene] and Mike Lutz alluded to was, once it was established that the rights still existed, the question was, well, what does that mean? Who regulates the rights, how do we implement the rights? The initial U.S. Supreme Court cases suggested that the states could still regulate in the interests of conservation. They couldn't regulate to extract license fees so they couldn't require licenses from Indians, they couldn't regulate purely to keep Indians out of traditional hunting and fishing areas, but if regulations were necessary for conservation, then the states could regulate.

And so through this litigation, and much of this developed both in *U.S. v. Washington* and in the litigation in the Great Lakes region, the tribes began to argue that, we can regulate. And as long as we can regulate for conservation reasons and assure the protection of the resources, then there's no room for state regulation. And the courts agreed with that. They agreed that as long as tribal self-regulation would protect the resources and protect public health and safety, there was no room for state regulation. And that's what led to the development of tribal regulatory mechanisms including the formation of inter-tribal organizations. And having worked with and seen a number of them, I can tell you that GLIFWC is the gold standard in this area.

And today some of the best wildlife biologists, some of the best fisheries biologists not only in this country but in the world work either directly for tribes or for organizations such as GLIFWC. This has led to the cutting edge of Indian treaty rights, which is not only the protection of the resources, but the protection of the natural ecosystems on which they depend. And tribes are uniquely situated to work to preserve, protect and restore natural ecosystems because they're essential to the preservation of their treaty rights. They're essential to the preservation of their culture and as I think many people are beginning to realize, they're essential to everyone's survival. So what began as an effort by Indian people to subsist in a way that they have always subsisted has become a struggle for survival on a much larger scale.

It's been a great privilege to be involved in this work to represent tribes and to be involved with an organization such as GLIFWC, and I want to also extend my congratulations to all of you on the occasion of GLIFWC's 25th anniversary. Thank you.