

“WE STAND WITH THE WATER”: OJIBWE TREATY RIGHTS, THE WALLEYE WARS, AND THE IMMINENT THREAT OF ENBRIDGE’S LINE 5

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ABSTRACT

Enbridge Energy’s crude oil pipeline, known as Line 5, currently poses a serious threat to the vitality of the Bad River in Wisconsin and the Great Lakes more broadly. Its construction threatens centuries old treaty rights of Ojibwe nations. Line 5 has been the subject of protest and extensive legal action over the past decade. This Note analyzes the legal claims leveraged by various Ojibwe nations against Enbridge. First, it considers the history of the Ojibwe people in the Midwest region and the treaties forged between the United States and Ojibwe leaders, which enshrined rights to hunt, fish, and gather on both reservation and ceded territory. Then, it analyzes the attempted forced removal of the Ojibwe by the federal government, despite these treaties. Next, it details early twentieth century criminalization of the exercise of the right to hunt, fish, and gather, and the legal battle to exercise those reserved rights. Then, it discusses the Walleye Wars of the late twentieth century. Finally, this Note describes how the contemporary legal battle against Enbridge’s Line 5 builds upon this legacy,

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arguing that the environmental threat posed by the pipeline inhibits the ability to exercise reserved treaty rights, and threatens the vitality of the land.

I. INTRODUCTION

On April 23, 1901, John Blackbird set several fishing nets on a portion of Bear Trap Creek located within the boundaries of the Bad River reservation.¹ Later that day, Wisconsin Fish and Game Warden Bert McLaughlin confiscated Blackbird's nets and arrested him for setting them.² Blackbird was a member of the Bad River Band of Ojibwe.³ He later stood trial in the Ashland municipal court, where the judge convicted him for violation of state game laws.⁴ As a result of the conviction, the court ordered Blackbird to pay a fine of \$25.00, plus an additional \$11.75 in fees.⁵ The total cost of \$36.75 amounts to the equivalent of \$1,364.78 in 2024, a sizeable financial burden.⁶ Blackbird could not afford the price of this massive fine and was subsequently sentenced to imprisonment and 30 days of "hard labor" in the Ashland County jail.⁷

This is just one example in a century-long list of cases in which the Wisconsin state government prosecuted Ojibwe people for exercising reserved treaty rights to hunt, fish, and gather on ceded territory in the state.⁸ This Note will consider the creation of treaties between the Ojibwe and the United States within the boundaries of what is now the state of Wisconsin, the legal battle to enforce those rights during the twentieth century, and the present twenty-first century threat imposed on those treaty rights by the construction of Enbridge Energy's Line 5 pipeline.

1. CHANTAL NORRGARD, SEASONS OF CHANGE: LABOR, TREATY RIGHTS, AND OJIBWE NATIONHOOD 76 (2014).

2. *Id.*

3. *Id.* In *In re Blackbird*, Judge Bunn refers to John Blackbird's nation as the "Chippewa." 109 F. 139, 150 (W.D. Wis. 1901). This is a historical term that the United States government used to refer to the Ojibwe or Anishinaabe. NORRGARD, *supra* note 1, at 15–16. These names encompass many related nations throughout the northern Midwest region. *Id.* at 16. This Note utilizes the term Ojibwe to describe nations located in the Wisconsin portion of the Great Lakes region, following the lead of indigenous scholars Brenda Child and Chantal Norrgard.

4. *Id.* at 76.

5. *Id.*

6. Alioth Finance, *CPI Inflation Calculator*, OFF. DATA FOUND. (Nov. 24, 2024, 8:37 PM), <https://www.officialdata.org/us/inflation/1901?amount=36.75> [https://perma.cc/7C8Q-CTKE].

7. NORRGARD, *supra* note 1, at 76.

8. *See id.* at 6, 77–78.

The Ojibwe nations that call the Great Lakes region home came to inhabit that landscape long before European settlers arrived on this land.⁹ Along with a larger group of Anishinaabeg, including the Potawatomi and the Ottawa, the Ojibwe migrated from the St. Lawrence River and parted ways at the Upper and Lower peninsulas of Michigan.¹⁰ Historian Brenda Child explains that these migration routes are preserved on maps made of birch bark.¹¹ Some groups settled at the outlet of Lake Superior, or *Gichigamiing*, by the early seventeenth century, while others continued on and settled in La Pointe, Madeline Island, and Chequamegon Bay.¹²

Ojibwe historian Margaret Huettl, recounts the story and motivation behind this migration:

Hundreds of years ago, when Anishinaabe ancestors lived on the eastern edge of Turtle Island, seven prophets visited the People, each sharing a vision of an *ishkode* (fire or a period of time). The prophets told the People to move westward to the lands the Creator had made for them, where they would find *manoomin* [or wild rice]. After four or five hundred years of traveling, the Ojibweg reached the region surrounding Gichigami (Lake Superior), where indeed *manoomin* grew thick in shallow waters.¹³

By the eighteenth century, the Ojibwe had long held the territory across Lakes Ontario, Huron, and Michigan, and into the territory now called Minnesota.¹⁴ The governments of the Ojibwe nations would come to deal more and more with the newly independent United States following the Revolutionary War in 1755.¹⁵ At times, different Ojibwe nations would work together, and at other times, they would make choices individually.¹⁶ These nations would be forced to reckon with pressure, violence, and policing at the hand of the United States, Wisconsin state officials, and settlers.¹⁷ Leaders of Ojibwe nations would have to

9. BRENDA CHILD, *HOLDING OUR WORLD TOGETHER: OJIBWE WOMEN AND THE SURVIVAL OF COMMUNITY 1* (Colin G. Calloway ed., 2012).

10. *Id.* at xiii.

11. *Id.*

12. *Id.* at xiii–xiv.

13. Margaret Huettl, *Treaty Stories: Reclaiming the Unbroken History of Lac Courte Oreilles Ojibwe Sovereignty*, 68 *ETHNOHISTORY* 215, 219 (2021) (emphasis added).

14. CHILD, *supra* note 9, at xiv.

15. *See id.*

16. *Id.* at xviii–xxi.

17. *See id.*

broker deals to preserve rights essential to the Ojibwe way of life: primarily the practices of fishing, hunting, and harvesting wild rice.¹⁸

II. RESERVED RIGHTS: CREATION OF THE NINETEENTH CENTURY TREATIES

During the nineteenth century, the Ojibwe negotiated and entered into a series of treaties with the United States government.¹⁹ The treaties of 1836, 1837, 1842, and 1854, marked the secession of millions of acres of land for the Ojibwe.²⁰ While these treaties represent a significant and devastating loss of land, the Ojibwe leaders who negotiated them successfully reserved the right of the Ojibwe people to hunt, fish, and gather, both on the land they retained *and* the land they ceded.²¹ In analyzing the treaty making process, Huettl notes that from the perspective of the United States government, treaties were “transactional documents that ceded land title in exchange for payment in cash or goods.”²² However, they are also an expression of Ojibwe sovereignty and political action.²³

The treaties in fact reflected a continued practice of governing and sovereignty utilized by the broader Anishinaabeg nations, even before these agreements with the United States.²⁴ For example, the Eastern Ojibwe and the Haudenosaunee entered into a treaty agreement in the mid-seventeenth century memorialized in *wampum*.²⁵ This treaty is called *Gdoo-naaganinaa* or “Dish with One Spoon,” and acknowledges the shared territory, resources, and agreed upon rights of each nation, while respecting their individual sovereignty.²⁶ These treaties function as complex and enduring documents that must continue to be honored.²⁷

The Ojibwe carried this process of treaty making into their treaties with the United States.²⁸ The first treaty between the two parties is called the “Treaty with

18. Huettl, *supra* note 13, at 218.

19. *Id.* at 216.

20. Patty Leow & James Thannum, *After the Storm: Ojibwe Treaty Rights Twenty-Five Years After the Voigt Decision*, 35 AM. INDIAN Q. 161, 162 (2011).

21. *Id.* at 171.

22. Huettl, *supra* note 13, at 219.

23. *Id.*

24. *Id.* at 220.

25. *Id.* Wampum is an ornamental recording of history and official documents utilized by Eastern Indigenous nations. *Wampum*, GANONDAGAN (Oct. 6, 2024, 10:31 AM), <https://www.ganondagan.org/wampum> [<https://perma.cc/YC2M-MNKH>]. The recording is made on a belt with white and purple mollusk shells. *Id.* The designs and colors used each have meanings, making the belts mnemonic devises. *Id.*

26. Huettl, *supra* note 13, at 220.

27. *Id.*

28. *Id.* at 221.

the Ottawa, Etc., 1836.”²⁹ This treaty was entered into after negotiations between United States Commissioner Henry R. Schoolcraft and Ojibwe leaders.³⁰ The Ojibwe agreed to cede a sizeable tract of land to the United States in exchange for \$30,000 per year, for 20 years.³¹ The sum of this total was to be split between various nations of Ojibwe involved in the treaty.³² Article 13 of the treaty states, “The Indians stipulate for the right of hunting on the lands ceded, with the other usual privileges of occupancy, until the land is required for settlement.”³³ While this Article references an expiration on the right to hunt, subsequent treaties clarify the intended longevity of the right.³⁴

The next year, Ojibwe leaders and the United States government entered into the “White Pine Treaty.”³⁵ This treaty, also called the “Treaty with the Chippewa, 1837,” was signed by Ojibwe leaders and Wisconsin Governor Henry Dodge on July 29, 1837.³⁶ In exchange for this land, the United States promised to pay a sum of \$35,000 to be distributed in money, goods, building of shops, payments to farmers, provisions, and tobacco.³⁷ Article 5 addresses the reserved rights of the Ojibwe.³⁸ It states, “The privilege of hunting, fishing, and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded, is [guaranteed] to the Indians, during the pleasure of the President of the United States.”³⁹

While this language is broader, some still assert the right is subject to the discretion of the United States government.⁴⁰ However, the Ojibwe perspective of these agreements is clear.⁴¹ Magegawbaw, a Leech Lake leader, stated during deliberations, “We wish to hold on to a tree where we get our living, . . . and to reserve the streams, where we drink the waters that give us life.”⁴² Magegawbaw,

29. Leow & Thannum, *supra* note 20, at 162; Treaty with the Ottawa, etc., 1836, Chippewa & Ottawa-U.S., Mar. 28, 1836, 7 Stat. 491.

30. Treaty with the Ottawa, etc., 1836, *supra* note 29, art. 13.

31. *Id.* art. 4.

32. *Id.*

33. *Id.* art. 13.

34. *See* Treaty with the Chippewa, 1837, Chippewa-U.S., July 29, 1837, 7 Stat. 535.

35. Huettl, *supra* note 13, at 220.

36. Treaty with the Chippewa, 1837, *supra* note 34.

37. *Id.* art. 2.

38. *Id.* art. 5.

39. *Id.*

40. Huettl, *supra* note 13, at 221.

41. *Id.*

42. *Id.*

as a representative of the Ojibwe people, clearly understood this provision to represent a more enduring privilege.⁴³

This did not mark the end of negotiations and pressure from the United States on the Ojibwe to leave the region all together and relocate west of the Mississippi.⁴⁴ In 1842, the Ojibwe and the United States entered into the “Copper Treaty,” also called the “Treaty with the Chippewa, 1842.”⁴⁵ This treaty was signed by United States Commissioner Robert Stuart and Ojibwe representatives on October 4th, 1842.⁴⁶ The Ojibwe again ceded substantial territory to the United States and worked to reserve their rights to fish, hunt, and gather.⁴⁷ Article 2 states,

The Indians stipulate for the right of hunting on the ceded territory, with the other usual privileges of occupancy, until required to remove by the President of the United States, and that the laws of the United States shall be continued in force, in respect to their trade and intercourse with the whites, until otherwise ordered by Congress.⁴⁸

Additionally, in Article 3, the Ojibwe retained rights to Fond du Lac, Sandy Lake, and the Mississippi Bands territories, which were to be held in common by all Indigenous people party to the treaty.⁴⁹

The statements made at the 1842 treaty council illuminate how Ojibwe leaders understood the treaty.⁵⁰ Gichi-Waabizheshi, a leader of the Lac Courte Oreilles Band, explained his understanding of the treaty he signed:

We were told by the commissioner that our grandfather wanted our lands for the sake of the mines, but that we might remain on them as long as our grandfather see[s] fit. But I and my brother chiefs refused to touch the pen unless . . . we should be permitted to live on the land as long as we behaved well and are peaceable with our grandfather and his white children.⁵¹

43. *Id.*

44. *Id.*

45. *Id.* at 220; Treaty with the Chippewa, 1842, Chippewa-U.S., Oct. 4, 1842, 7 Stat. 591.

46. *Id.*

47. *Id.* art. 1.

48. *Id.* art. 2.

49. *Id.* art. 3.

50. Huettl, *supra* note 13, at 221.

51. *Id.*

Ultimately, the treaties established in 1836, 1837, and 1842 each reserved the right of Ojibwe people to hunt, fish, and gather both on reservation land and on land that was ceded in each of the treaties.⁵²

III. REMOVAL DESPITE TREATY GUARANTEED TERRITORY

In 1850, President Zachary Taylor issued an executive order for removal of Ojibwe people west to Minnesota.⁵³ This removal order directly ignored the rights established and guaranteed by the treaties of 1836, 1837, and 1842 between the United States and the Ojibwe.⁵⁴ The executive order attempted to condense the Anishinaabe peoples onto one reservation at Sandy Lake.⁵⁵ The Ojibwe in Wisconsin refused to comply.⁵⁶ In response, federal officials attempted to force removal by changing the location at which the Ojibwe would receive their annuity payments from the treaties.⁵⁷ The officials told the Ojibwe to travel to Sandy Lake to receive their payments.⁵⁸ However, the federal officials whom made this direction never arrived.⁵⁹ Those that reached Sandy Lake never received their annuities, and were trapped at the location until the end of winter because of dangerous traveling conditions.⁶⁰ Over 500 Ojibwe people died as a result of the order, due to starvation, disease, and attempts to return home during the harsh winter.⁶¹ Following this tragedy, now referred to as the “Wisconsin Death March,” Ojibwe leaders traveled to Washington to petition President Taylor’s successor, Millard Fillmore.⁶² These leaders demanded that President Fillmore rescind the executive order of removal.⁶³

In 1854, the Ojibwe and the United States entered into the “Treaty of La Pointe,” also called the “Treaty with the Chippewa, 1854” (1854 treaty).⁶⁴ Before

52. *Id.* at 223.

53. *Id.* at 221–22.

54. *Id.*

55. *Id.*

56. *Id.* at 222.

57. *Id.*

58. *Id.*

59. Bennet Goldstein, *How Ojibwe Tribes in Wisconsin Resisted Efforts to Deny Treaty Rights*, WIS. WATCH (Feb. 24, 2023), <https://wisconsinwatch.org/2023/02/how-ojibwe-tribes-in-wisconsin-resisted-efforts-to-deny-treaty-rights/> [<https://perma.cc/98WL-3ETZ>].

60. *Id.*

61. Huettl, *supra* note 13, at 222.

62. Goldstein, *supra* note 59.

63. *Id.*

64. Huettl, *supra* note 13, at 222; Treaty with the Chippewa, 1854, Chippewa-U.S., Sept. 30, 1854, 10 Stat. 1109.

negotiations, leaders of the Ojibwe agreed they would refrain from signing unless the treaty granted multiple reservations that would become their “bonafide home.”⁶⁵ This was a main focus of Bizhiki, also known as Chief Buffalo, who insisted on separate lands that reflected each band’s current location.⁶⁶ Bizhiki also emphasized the Ojibwe people’s rights to their homeland and the resources connected to that land, including the reserved right to hunt, fish, and gather.⁶⁷ Leaders of the Ojibwe and two United States Commissioners signed the treaty.⁶⁸ It again ceded land in exchange for financial resources.⁶⁹ While Ojibwe leaders agreed to ceding more land, Article 2 carved out seven reservations for the Bands in Wisconsin.⁷⁰ Article 11 addressed the issue of annuity payments, the new reservations, and the rights reserved by the Ojibwe to hunt, fish, and gather.⁷¹ It stated:

All annuity payments to the Chippewas of Lake Superior, shall hereafter be made at L’Anse, La Pointe, Grand Portage, and on the St. Louis River, and the Indians shall not be required to remove from the homes hereby set apart for them. And such of them as reside in the territory hereby ceded, shall have the right to hunt and fish therein, until otherwise ordered by the President.⁷²

This was the final treaty between the Ojibwe and the United States for the Ojibwe nations located in the Great Lakes region.⁷³ In 1854, around 4,000 Ojibwe people met at the site of the signing in La Pointe.⁷⁴ Ojibwe leaders understood that the agreement “reaffirmed and extended previous treaties to protect their land and sovereignty.”⁷⁵ Taken as a whole, these treaties did not represent a mere transaction in which they ceded territory in exchange for money.⁷⁶ These treaties also include rights reserved by the Ojibwe to hunt, fish, and gather on both reservation land and on ceded territory.⁷⁷ The Ojibwe treaties enshrined reserved rights and represented an active expression of Indigenous sovereignty.⁷⁸

65. Huettl, *supra* note 13, at 222.

66. *Id.*

67. *Id.*

68. Treaty with the Chippewa, 1854, *supra* note 64.

69. *Id.* art. 4.

70. *Id.* art. 2.

71. *Id.* art. 11.

72. *Id.*

73. Leow & Thannum, *supra* note 20, at 162.

74. Huettl, *supra* note 13, at 222.

75. *Id.*

76. *Id.*

77. *Id.* at 223.

78. *Id.* at 222.

By 1860, Ojibwe in the Great Lakes region had entered into this series of treaties with the United States, that in each instance affirmed the reserved rights of Ojibwe people to hunt fish, and gather on reservation land, as well as on ceded territory.⁷⁹ In the years to follow, and even into the twentieth century, the state of Wisconsin pursued a series of tactics to deny these reserved rights, leading to almost a century of conflict both inside and outside of the courtroom.

IV. THE EARLY TWENTIETH CENTURY: POLICE PROSECUTION, STATE RESTRICTION, AND THE FEDERAL COURTS

The treaties created during the mid-nineteenth century were properly negotiated, signed, and ratified by the representatives of the United States government, representatives of the Ojibwe, and the President of the United States.⁸⁰ Later court reliance on the text of these treaties illustrates that they satisfied the requirements of Article II of the Constitution.⁸¹ In 1871, Congress enacted a law suspending the creation of any new treaties between the United States and Indigenous nations, meaning these were the last treaties between the United States and the Ojibwe.⁸²

While the law prohibited the creation of new treaties, it specifically kept treaties already made between Indigenous nations and the United States intact.⁸³ The law states: “[N]o obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired.”⁸⁴ Meaning, all treaties made before March 3, 1871 between the United States government and Indigenous nations are not invalidated or impaired by the cessation of treaty making.⁸⁵

Therefore, even though the United States was no longer entering into new treaties with Indigenous governments, the treaties of 1836, 1837, 1842, and 1854

79. See Treaty with the Ottawa, etc., 1836, *supra* note 29; Treaty with the Chippewa, 1837, *supra* note 34; Treaty with the Chippewa, 1842, *supra* note 45; Treaty with the Chippewa, 1854, *supra* note 64.

80. See generally *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, 700 F.2d 341 (7th Cir. 1983).

81. See, e.g., *id.* at 363 (affirming the 1854 treaty did not end rights to hunt and fish on ceded territory); U.S. CONST. art. II, § 2, cl. 2.

82. Future Treaties with Indian Tribes, 25 U.S.C. § 71.

83. *Id.*

84. *Id.*

85. *Id.*

between the United States and the Ojibwe remained in full force.⁸⁶ The law further states,

Such treaties, and any Executive orders and Acts of Congress under which the rights of any Indian tribe to fish are secured, shall be construed to prohibit (in addition to any other prohibition) the imposition under any law of a State or political subdivision thereof of any tax on any income derived from the exercise of rights to fish secured by such treat[ies]⁸⁷

While this reference to the right to fish discusses a prohibition on taxing income from the practice, it begs the question, if you're not able to tax fishing, why should states be allowed to criminalize it?

Despite this clear ban on any state law aimed at infringing existing treaty rights, the state of Wisconsin pursued numerous measures to restrict and revoke these rights and criminally punish the Ojibwe that exercised them.⁸⁸ The Wisconsin legislature was interested in placing restrictions on Indigenous sovereignty from the state's incorporation into the Union in 1848.⁸⁹ Just one year after Wisconsin's incorporation, the state legislature enacted a statute that prohibited the sale of intoxicating liquor to Indigenous people, which was reaffirmed in 1858.⁹⁰ Further in 1879, the Wisconsin Supreme Court held the state's criminal laws applied to Indigenous people on and off reservation land.⁹¹

Recall the state game warden's arrest of John Blackbird on the Bad River Reservation on April 23, 1901.⁹² The municipal court judge sentenced Blackbird to 30 days imprisonment with "hard labor" because he was unable to afford the massive fine attached to the incident.⁹³ This case was appealed by attorneys William G. Wheeler and Henry T. Sheldon, before the United States District Court for the Western District of Wisconsin in June of 1901.⁹⁴ Wheeler and Sheldon argued that Wisconsin had no jurisdiction to enforce gaming regulations on reservations.⁹⁵ They claimed states do not have the authority to add crimes to the

86. *See id.*

87. *Id.*

88. Ronald N. Satz, *Chippewa Treaty Rights: The Reserved Rights of Wisconsin's Chippewa Indians in Historical Perspective*, 79 *TRANSACTIONS*, no. 1, 1991, at 1, 83.

89. *Id.*; *Wisconsin Enters the Union*, HIST. (Nov. 25, 2024, 3:36 PM), <https://www.history.com/this-day-in-history/wisconsin-enters-the-union> [<https://perma.cc/G4X8-S3QL>].

90. Satz, *supra* note 88, at 83.

91. *Id.*; *State v. Doxtater*, 2 N.W. 439, 451 (Wis. 1879).

92. *In re Blackbird*, 109 F. 139, 140 (W.D. Wis. 1901).

93. *Id.*

94. *Id.* at 139–40.

95. Satz, *supra* note 88, at 83.

Major Crimes Act of 1885, which prescribes whether state or federal courts have jurisdiction over specified offenses committed by Indigenous people.⁹⁶ The attorneys argued the Act did not grant states authority over crimes committed by Indigenous people on reservations.⁹⁷ Therefore, the state cannot criminalize fishing and cannot prosecute Indigenous people for fishing on reservations.⁹⁸

Ultimately, *In re Blackbird* held the state did not have the power to prosecute Indigenous people on reservation land, citing the Major Crimes Act and the reserved rights to hunt, fish, and gather in the treaties between the United States and the Ojibwe.⁹⁹ Judge Bunn concluded, “I feel confident that neither the state nor congress ever meditated any such cruelty, and that the prisoner’s arrest was the result of overzeal on the part of a fish and game warden, which may be excusable, but is not justifiable in law.”¹⁰⁰ Judge Bunn ordered the release of Blackbird from his sentence.¹⁰¹ This case did not address the authority of the state to prosecute Indigenous people exercising the same right off of reservation land.¹⁰²

A few years later in 1906, Michael Morrin, an Ojibwe man, was arrested and convicted for the “crime” of trapping fish with gill nets in state waters.¹⁰³ Morrin’s case was appealed all the way up to the Wisconsin Supreme Court.¹⁰⁴ The court considered whether Morrin, an Indigenous man residing in territory ceded in the 1854 Treaty between the United States and the Ojibwe, was subject to the fishing regulations of Wisconsin.¹⁰⁵ The justices, ignoring the holding in *In re Blackbird*, held that Wisconsin’s admission into the Union revoked any treaty rights gained by the Ojibwe to hunt or fish within the borders of the state.¹⁰⁶ The court went even further and held that any Indigenous person who had received an allotment under the Dawes General Allotment Act (Dawes Act), like Morrin, is a citizen of the United States, and thus loses all reserved treaty protections.¹⁰⁷ The court ultimately upheld Morrin’s conviction for trapping fish with gill nets.¹⁰⁸

96. *Id.*; see 18 U.S.C. § 1153 (1885).

97. Satz, *supra* note 88, at 83.

98. See *id.*

99. 109 F. at 145.

100. *Id.*

101. *Id.*

102. See *id.*

103. State v. Morrin, 117 N.W. 1006 (Wis. 1908); Satz, *supra* note 88, at 85.

104. Morrin, 117 N.W. at 1006.

105. *Id.*

106. *Id.* at 1007.

107. *Id.*; see D.S. OTIS, THE DAWES ACT AND THE ALLOTMENT OF INDIAN LANDS 3 (Francis Paul Prucha ed., Univ. of Okla. Press 1973) (1934).

108. Morrin, 117 N.W. at 1007.

In *State v. Morrin*, the Wisconsin Supreme Court utilized the Dawes Act to strip Indigenous citizens of their status and revoke their reserved treaty rights.¹⁰⁹ The Dawes Act was enacted in February of 1887.¹¹⁰ The Act allowed the federal government to divide reservation territories.¹¹¹ To do this, officials acting on behalf of the President would no longer honor the treaty-created model of holding property in common, but force a shift to individual and nuclear-family land ownership.¹¹² The architects of the Dawes Act intended to open up tribal land to non-Indigenous people, disrupt Indigenous social culture, and force assimilation into Western culture.¹¹³ This was a direct attack by the government on Indigenous culture, which valued a community-based system of living rather than promoting a focus on the individual or nuclear family units.¹¹⁴ Forcing conversion to individual ownership also made the land taxable and called the citizenship of Indigenous people directly into question.¹¹⁵

The Dawes Act offered 160 acres of land to each nuclear family unit, 80 acres to adults 18 years or older, and 40 acres to those under 18 years old.¹¹⁶ At the end of this process, the Indigenous person or family would “become a citizen of the United States.”¹¹⁷ All reservation land that was not allotted during the enforcement of the Dawes Act was sold by the government to White settlers.¹¹⁸ The Homestead Act of 1862 actually gave 160 acre plots of land for *free* to settlers who stated an interest in farming.¹¹⁹

The Indian Reorganization Act (IRA) of 1934 followed the Dawes Act.¹²⁰ The IRA further depleted territory controlled by Indigenous nations.¹²¹ The United

109. *See id.*; Satz, *supra* note 88, at 85.

110. OTIS, *supra* note 107, at 6; General Allotment Act, Pub. L. No. 49-105, 24 Stat. 388 (1887).

111. *See* OTIS, *supra* note 107, at 6–7, 9.

112. *Id.*

113. Rebecca M. Webster, *The Wisconsin Oneida and the WPA: Stories of Corn, Colonialism, and Revitalization*, 68 ETHNOHISTORY 407, 412 (2021).

114. *See id.*

115. *Id.*; Mukesh Eswaran, *The Wrongs of Property Rights: The Erosion of Indigenous Communal Land Rights and Its Welfare Consequences*, 49 CANADIAN PUB. POL’Y 267, 281 (2023).

116. OTIS, *supra* note 107, at 6–7.

117. Eswaran, *supra* note 115, at 281.

118. *Id.*

119. *Id.*; Homestead Act, Pub. L. No. 37-64, 12 Stat. 392 (1862).

120. Eswaran, *supra* note 115, at 281; Indian Reorganization Act, Pub. L. No. 73-383, 48 Stat. 984 (1934) (codified at 25 U.S.C. §§ 5101–5111).

121. Eswaran, *supra* note 115, at 281.

States ultimately claimed another 90 million acres of land, leaving only 48 million acres in the control of Indigenous nations.¹²² The IRA and the Dawes Act provided the Wisconsin Supreme Court with what they believed to be grounds for ignoring treaty law and allowed them to conclude that Morrin, a participant of the Dawes Act allotment process, had lost his status as an Ojibwe citizen.¹²³ Further, he was now a United States citizen who enjoys no treaty protections.¹²⁴

On the heels of the Wisconsin Supreme Court's holding in *Morrin*, the state continued its efforts to extinguish sovereignty rights of Ojibwe people within the state.¹²⁵ In 1927, the Wisconsin Supreme Court held that President Taylor's 1850 removal order terminated the "right of occupancy" for the Ojibwe people in Wisconsin.¹²⁶ This holding directly ignored United States Supreme Court holdings that no executive order had terminated the Ojibwe's right of occupancy.¹²⁷ James Pipe Mustache, an elder of the Lac Courte Oreilles Band, recalled in an interview that Wisconsin state officials became aggressive during this period towards hunting and gathering wild rice off of reservation land.¹²⁸ This hostility resulted in fines, imprisonment, impoundments, and confiscations of personal firearms for numerous Indigenous people.¹²⁹

Thomas L. St. Germaine, an attorney from the Lac du Flambeau Band of Ojibwe, expressed concern over this issue.¹³⁰ St. Germaine called into question restrictions on the right to hunt, fish, and gather both on *and* off the reservation for Ojibwe people in Wisconsin.¹³¹ He brought two crucial cases that were ultimately heard by the Wisconsin Supreme Court in 1933 and in 1940.¹³² Before the court, St. Germaine argued that Ojibwe people could not be prosecuted for violating state fishing and gaming laws on or off the reservation because of rights reserved in the treaties of 1837, 1842, and 1854.¹³³ St. Germaine's efforts were not successful with the court, and the state of reserved rights for the Ojibwe in Wisconsin remained in limbo for years to come, exemplified by contradictory precedent.¹³⁴

122. *See id.*

123. *See State v. Morrin*, 117 N.W. 1006, 1007 (Wis. 1908).

124. *Id.*

125. Satz, *supra* note 88, at 85.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* at 87.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* at 87–88.

V. THE WALLEYE WARS

By the early twentieth century, a new force began to take hold in the Wisconsin fishing industry with the introduction of fishing tourism.¹³⁵ Historian Chantal Norrgard credits the shift in focus on a tourism economy to the lack of resources left in Wisconsin following the overharvesting of timber and game during the preceding century.¹³⁶ The rampant industrial capitalism in the state had exhausted lumber, mining, and fishing resources, leaving very little to extract and sell from the land.¹³⁷ Norrgard explains that while this shift in industry still provided a place for Ojibwe people to find work, the growth of tourism was at odds with treaty interests.¹³⁸

In fact, early commercial fishing processes decimated multiple species of fish within Lake Superior.¹³⁹ This prompted the initial creation of broad fishing regulations in Wisconsin.¹⁴⁰ Large fishing companies engaged in the devastation of the fish populations on the Great Lakes maintained a significant influence over the legislation.¹⁴¹ These companies viewed treaty rights as a direct threat to their ability to harvest as many fish as they wanted.¹⁴² In response, state workers began pushing tourism as a foundation of the state economy.¹⁴³ They focused on promoting sports hunting and fishing, which reflected the government's desire to use the land for "recreation" rather than survival.¹⁴⁴

Much like these companies, the state also felt threatened by treaty rights, and began to target them "as [a] way of asserting control over natural resources as well as [I]ndigenous livelihoods."¹⁴⁵ Officials and sportsmen used racialized characterizations to promote their practices in juxtaposition with the way Indigenous people hunted game.¹⁴⁶ This helped them justify their push to eradicate one form of hunting and fishing in order to preserve their own.¹⁴⁷ For example, primarily White sports fisherman followed what they called a "sportsman's code,"

135. NORRGARD, *supra* note 1, at 8, 73.

136. *Id.* at 8.

137. *Id.*

138. *Id.*

139. *Id.* at 72.

140. *Id.*

141. *Id.* at 73.

142. *Id.*

143. *Id.* at 51.

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

and pushed the rhetoric that animals were victims of the hunting styles of the Indigenous population.¹⁴⁸ The government easily joined in with this narrative to support their continued attempt to undermine Indigenous fishing rights.¹⁴⁹

The shift to a tourist economy worked well for the state.¹⁵⁰ In the 1950s, around four million tourists visited Wisconsin.¹⁵¹ These tourists came to Wisconsin for both the landscape and for the fishing.¹⁵² Historian Ronald Satz explained that fishing was the “most popular attraction” during the tourism boom.¹⁵³ Satz detailed that in 1960, Wisconsin issued more than 925,000 fishing licenses.¹⁵⁴ With the increased number of tourists participating in hunting and fishing in the state, game wardens turned their attention more aggressively toward Ojibwe hunters and fishers in an attempt to offer those resources to primarily White tourists and deprive those same resources from the Ojibwe who required them for their livelihood.¹⁵⁵

As a result, the wardens carried out more arrests of Ojibwe people exercising their treaty rights.¹⁵⁶ Many Ojibwe people viewed these arrests as an attempt to undermine their treaty rights and found them to be unduly aggressive.¹⁵⁷ On November 10, 1959, the Bad River Band of Ojibwe’s Tribal Council drafted and issued a “Declaration of War.”¹⁵⁸ This document signified the Band’s commitment to retaining and exercising their treaty-based reserved rights to fish, hunt, and gather on both reservation and ceded land.¹⁵⁹ The declaration stated:

When, in the course of human events, it becomes necessary to protect the rights and liberties of certain peoples of this great nation from encroachment by other peoples, it is the duty of the Tribal Council, the governing body of the Bad River Band of the Lake Superior Tribe of Chippewa Indians of Wisconsin, to take measures that will protect the members of said Band from unjust arrests by State Conservation officials.

148. *Id.*

149. *See id.* at 51, 73.

150. Satz, *supra* note 88, at 89.

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.* at 89–90.

157. *Id.*

158. *Id.* at 89.

159. *Id.* at 89–90.

IT IS HEREBY DECLARED, that a state of cold war exists between the Bad River Band of Chippewa Indians and the officials of the Wisconsin Department of Conservation, and that such state shall exist until such time as the State of Wisconsin shall recognize Federal treaties and statutes affording immunity to the members of this Band from State control over hunting and fishing within the boundaries of this reservation.

During this period, State conservation officials shall be denied access to all tribal and restricted lands within the boundaries of this reservation.

Nothing in this declaration shall be construed to mean that the Tribal Council condones any un-Christian act, or any act of violence upon any person, or to be taken to sanction any riot, or in any manner disturbing the peace. It is known that any such acts are punishable under State Law, such jurisdiction having been given by this Band under {Public Law 280,} the Act of August 15, 1953. (Bad River Tribal Council 1959).¹⁶⁰

In 1966, a few years after this declaration, Attorney General Bronson C. La Follette issued a declaration reminding wardens that treaty rights remain in effect and conservation laws apply in off reservation territory only.¹⁶¹ This declaration came in the same decade that Senator Gaylord Nelson began to target, and attempt to remove, the Bad River and Red Cliff Bands of Ojibwe from their territory.¹⁶² Senator Nelson is well-known for his role in establishing Earth Day.¹⁶³ What many do not know is that Senator Nelson also developed a plan that would effectively restrict Ojibwe sovereignty and access to their own land.¹⁶⁴ Nelson's plan included moving multiple Ojibwe nations inland off of their reservation territory and terminating their remaining hunting and fishing rights.¹⁶⁵

Historian Katrina Phillips refers to this plan as "stealth termination."¹⁶⁶ This meant Nelson intended to incorporate Ojibwe lands into the Wisconsin lakeshore and avoid paying for the process.¹⁶⁷ Phillips located a letter sent from Nelson in 1963 to the Assistant Commissioner of the Bureau of Indian Affairs, E. Reeseman Fryer, in which he detailed that the legislation should "exchange Tribal Council

160. *Id.*

161. *Id.* at 90.

162. Goldstein, *supra* note 59.

163. Katrina Phillips, *When Grandma Went to Washington: Ojibwe Activism and the Battle Over the Apostle Islands National Lakeshore*, NATIVE AM. & INDIGENOUS STUD., Fall 2021, at 29, 29.

164. *Id.*

165. Goldstein, *supra* note 59.

166. Phillips, *supra* note 163, at 38.

167. *Id.*

lands within the Bad River and Red Cliff reservations for lands of equal value farther inland.”¹⁶⁸ Nelson’s plan involved designating the area known as the Apostle Islands as a recreational area instead of a national park or wilderness area.¹⁶⁹ Including tribal territory in this proposal threatened both the landholdings and the treaty rights to hunt, fish, and gather for the Red Cliff and Bad River Bands.¹⁷⁰

Members of the Ojibwe nations pushed back publicly against this plan.¹⁷¹ The proposal was the subject of three years of congressional hearings in Washington, D.C., and in Ashland, Wisconsin.¹⁷² Members of both Bands traveled to speak at the hearings.¹⁷³ Victoria Gokee, an Ojibwe woman from Red Cliff and a descendant of Chief Buffalo, spoke at the hearings.¹⁷⁴ Chief Buffalo himself traveled to Washington D.C. at the age of 90 in 1852 to protest the federal government’s attempts to take his people’s land.¹⁷⁵ Gokee explained, “We already gave you everything we had—Wisconsin, Michigan, and Minnesota I do not know where you are going to push us—out into the lake?”¹⁷⁶

In addition to this public testimony in opposition to the proposed plan, leaders staged public protests.¹⁷⁷ In 1969, Philip Gordon, Richard Gurnoe, and four other members of the Red Cliff Band deliberately used an “illegal” gill net while fishing on Lake Superior.¹⁷⁸ Their subsequent arrest led to the important decision in *State v. Gurnoe*.¹⁷⁹ Gurnoe and his co-defendants were charged with violating state law related to “gill net fishing and fishing without a license.”¹⁸⁰ The Wisconsin Supreme Court ultimately held that the 1854 treaty between the United States and the Lake Superior Chippewa granted these defendants, and more broadly the Ojibwe, the right to fish in Lake Superior.¹⁸¹

168. *Id.* at 37.

169. *Id.* at 30.

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.* at 29–31.

174. *Id.* at 29.

175. *Id.*

176. *Id.* at 30.

177. *Id.* at 31.

178. *Id.*

179. *Id.*; see *State v. Gurnoe*, 192 N.W.2d 892 (Wis. 1972).

180. *Gurnoe*, 192 N.W.2d at 893.

181. *Id.* at 901–02.

Following years of Congressional hearings, the testimony of numerous Ojibwe women, scholars, and government officials, and public demonstrations against the proposal, then President Richard Nixon signed the lakeshore proposal into law in 1970.¹⁸² The Ojibwe's opposition resulted in a cut of nearly one fourth of the land Senator Nelson originally wanted, but still allowed for 42,000 acres of new recreation area in northern Wisconsin.¹⁸³ Ultimately, the House Interior Committee excluded "all Indian trust lands from the boundaries of the project."¹⁸⁴ This marked a win for the fight to retain Ojibwe rights to the land and to use that land to exercise reserved rights.¹⁸⁵

Following these brief victories, conflicting interests in commercial fishing, tribal sovereignty, and "conservation" continued to simmer, leading to a series of violent clashes in the 1980s.¹⁸⁶ In 1983, the United States Court of Appeals for the Seventh Circuit decided *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, commonly known as the *Voigt* decision.¹⁸⁷ The case stemmed from the actions of two brothers, Fred and Mike Tribble of the Lac Courte Oreilles Band.¹⁸⁸ The Tribble brothers wanted to test the legality of state jurisdiction over the members of the Band.¹⁸⁹ So, they went off reservation land and spearfished.¹⁹⁰ For this action, they were charged with possession of a spear, taking fish off-reservation, and "occupying a fish shanty without a legitimate tag."¹⁹¹ The Tribble brothers were found guilty of the charges, which caused the Lac Courte Oreilles Band to file a suit against Wisconsin state game warden Lester Voigt.¹⁹²

In the resulting *Voigt* decision, the court first held the 1837 and 1842 treaties did not grant unlimited discretion to the executive branch to terminate the usufructuary rights granted to the Ojibwe.¹⁹³ Second, the doctrines of *res judicata* and collateral estoppel do not preclude consideration of the validity of the removal

182. Phillips, *supra* note 163, at 31–32.

183. *Id.* at 32.

184. *Id.* at 49.

185. *Id.* at 32.

186. *Spearfishing Controversy*, MILWAUKEE PUB. MUSEUM (Oct. 6, 2024, 10:26 AM), <https://www.mpm.edu/educators/wirp/nations/ojibwe/spearfishing-controversy> [<https://perma.cc/CE83-N55U>].

187. 700 F.2d 341 (7th Cir. 1983).

188. NORRGARD, *supra* note 1, at 81–82.

189. *Id.*

190. *Id.* at 82.

191. *Id.*

192. *Id.*

193. *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, 700 F.2d 341, 358 (7th Cir. 1983).

order of 1850.¹⁹⁴ Third, the 1850 removal order exceeded the scope of the treaties of 1837 and 1842, making it invalid.¹⁹⁵ Fourth, the usufructuary rights established in the 1837 and 1842 treaties were not terminated or released by the 1854 treaty.¹⁹⁶ So, the reserved rights to hunt, fish, and gather remain intact.¹⁹⁷

This reiteration of the rights reserved within the treaties resulted in serious pushback from government officials, representatives of commercial fisheries, and sports fisherman who felt their rights were being attacked.¹⁹⁸ Tommy Thompson became the governor of Wisconsin in 1986 and dedicated a large portion of his campaign platform to terminating Ojibwe treaty rights.¹⁹⁹ One of his first actions in office was to have the Wisconsin Department of Justice appeal the *Voigt* decision, which was ultimately unsuccessful.²⁰⁰ His administration also offered \$10 million to the Mole Lake Ojibwe and \$42 million to the Lac du Flambeau Ojibwe in an attempt to get them to sign agreements with the state that would terminate their rights to fish and hunt on ceded territory.²⁰¹ Neither band accepted these offers.²⁰² Republican Congressman Frank J. Sensenbrenner attempted to remove these same rights through Congress.²⁰³ Sensenbrenner introduced legislation to remove all “off-reservation hunting, fishing, and harvesting rights in Wisconsin,” but Congress and President Bush declined to take up his cause.²⁰⁴

Governor Thompson continued to pursue termination of Ojibwe treaty rights unsuccessfully through the courts.²⁰⁵ In response to his suit, United States District Court Judge Barbara Crabb held that the Ojibwe were entitled to 100% of the state’s harvestable fish, deer, small game, and timber available in ceded territory, in her March 1989 ruling.²⁰⁶ The next year Judge Crabb rolled back her holding to declare that the Ojibwe were only entitled to 50% of the state’s harvestable fish,

194. *Id.* at 360–61.

195. *Id.* at 362.

196. *Id.* at 364.

197. *Id.* at 365.

198. *Spearfishing Controversy*, *supra* note 186.

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

206. *Indian Treaty Ruling Praised in Wisconsin*, CHI. TRIB. (Aug. 10, 2021, 7:02 PM), <https://www.chicagotribune.com/1990/05/11/indian-treaty-ruling-praised-in-wisconsin/>; *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin*, 707 F. Supp. 1034, 1060 (W.D. Wis. 1989).

deer, small game, and timber within ceded territory.²⁰⁷ Governor Thompson considered this a victory for settler's rights, but did not let up his push to terminate treaty rights.²⁰⁸

Ojibwe fishers did not actually harvest the number of fish allotted to them.²⁰⁹ In 1987, for example, Ojibwe fishers were permitted to harvest 82,000 walleyes, but only harvested 21,321.²¹⁰ Non-native sports fisherman harvested 839,000 walleye from the lakes that same year.²¹¹ Moreover each Ojibwe band operated their own fish hatcheries, replacing more fish than they harvested by spearfishing.²¹²

Judge Crabb's decision on allotment of harvesting rights came in the heat of intense collisions between White protestors and the Ojibwe fishers.²¹³ Judge Crabb noted this violence in her decisions, stating that it was non-native protestors, not the Ojibwe, initiating the violence.²¹⁴ These protestors would assemble at boat landings in northern Wisconsin, where members of the Ojibwe fished, and leverage racial slurs, carry posters with violent images threatening Ojibwe people, and yell death threats.²¹⁵

By the end of the conflict, White Wisconsinites threatened, stoned, and shot at Ojibwe people, claiming treaty rights somehow disadvantaged them.²¹⁶ At the conclusion of this conflict, the Lac Du Flambeau Band of Ojibwe brought a series of legal claims against these protestors and the government officials that supported them.²¹⁷ In 1991, in response to these claims, Judge Crabb issued a temporary

207. *Indian Treaty Ruling Praised in Wisconsin*, *supra* note 206; *Band of Lake Superior Chippewa Indians v. Wisconsin*, 740 F. Supp. 1400, 1426 (W.D. Wis. 1990).

208. *Indian Treaty Ruling Praised in Wisconsin*, *supra* note 206.

209. *Spearfishing Controversy*, *supra* note 186.

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.*

215. Scott Plencner, *War in Vacationland: The Failure of Grassroots Backlash Politics in Wisconsin's Northwoods 1* (Apr. 27, 2015) (unpublished manuscript), <https://www.splencner.com/history/Papers/WarinVacationlandweb.pdf> [<https://perma.cc/CQS9-ZQ7J>].

216. See LARRY NESPER, *THE WALLEYE WAR: THE STRUGGLE FOR OJIBWE SPEARFISHING AND TREATY RIGHTS* 84 (2002).

217. *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Stop Treaty Abuse-Wis., Inc.*, 991 F.2d 1249, 1252 (7th Cir. 1993).

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injunction against the non-Indigenous “protesters.”²¹⁸ She made this injunction permanent in 1992.²¹⁹

In the years that followed the injunction granted by Judge Crabb, Ojibwe people continued to exercise their treaty rights.²²⁰ Even with several decades between this conflict and the present day, the Walleye Wars still loom in the cultural landscape of northern Wisconsin.²²¹

VI. ENBRIDGE’S LINE 5: THE LEGAL CHALLENGE

Since the Seventh Circuit’s *Voigt* decision, the United States Supreme Court has also upheld treaty reserved rights.²²² For example, in *Herrera v. Wyoming*, the Court held the establishment of Wyoming statehood did not undermine the right to hunt under the 1868 treaty between the United States and the Crow Nation.²²³ However, even with the *Herrera* and *Voigt* precedent supporting the Ojibwe’s treaty-backed right to hunt, fish, and gather, the bands still face new and evolving challenges in accessing and maintaining that right.²²⁴

These attacks are both blatant and discreet. Even in 2022, tribal and state officials had to release formal warnings that harassment of spear-fishers is strictly prohibited.²²⁵ In this formal warning, Wisconsin Attorney General Josh Kaul stated, “Tribal members have the right to hunt, fish and gather in the Ceded Territories, . . . [a]ny attempt to interfere with those rights is illegal and should be reported to local law enforcement and Great Lakes Indian Fish and Wildlife Commission.”²²⁶ Similarly, Preston D. Cole, the secretary of the Wisconsin Department of Natural Resources, has warned against harassment and noted, “We fully support Ojibwe sovereignty and treaty rights.”²²⁷

218. *Id.* at 1253.

219. *Id.*

220. *Ojibwe Treaty Rights*, MILWAUKEE PUB. MUSEUM (Oct. 29, 2024, 3:11 PM), <https://www.mpm.edu/content/wirp/ICW-110> [<https://perma.cc/SA9B-49H7>].

221. Plencner, *supra* note 215, at 25–26.

222. *See Herrera v. Wyoming*, 587 U.S. 329, 329–30 (2019).

223. *Id.* at 348.

224. *See id.*; *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, 700 F.2d 341, 365 (7th Cir. 1983).

225. *See Frank Vaisvilas, As Tribal Spearfishing Season Begins in Northern Wisconsin, Officials Say They Have ‘Zero Tolerance’ for Harassment*, GREEN BAY PRESS-GAZETTE (April 5, 2022, 12:21 PM), <https://www.greenbaypressgazette.com/story/news/native-american-issues/2022/04/04/tribal-spearfishing-northern-wisconsin-ceded-territories-warn-against-harassment/7236368001/> [<https://perma.cc/FE4E-5GMW>].

226. *Id.*

227. *Id.*

Even with these warnings, tribal officials report that incidents of harassment occur every single year.²²⁸ Melvin Buckholtz reported to police that he and his 13-year-old son faced a group of people who screamed racial profanities at them, threw rocks, and threatened violence with a gun while they were trying to fish.²²⁹ As a result of this incident, Colin Louvar was charged with “felony harassment with aggravated violations for screaming racially-charged profanities” at the family.²³⁰ Similarly, Greg Johnson of the Lac du Flambeau Band reported gunshots directed at him while he and a group of spear fishers exercised their treaty rights.²³¹ Subsequently, 62-year-old, James Kelsey, who “pleaded no contest to using a gun while intoxicated” and interfering with tribal fishing, served no jail time for this offense.²³² In response to frustration over the light punishment, the Vilas County District Attorney stated the hate crime and use of a dangerous weapon modifiers were dropped because he pleaded no contest.²³³ These are just two examples of an all-too-common occurrence today for Ojibwe people in Wisconsin.²³⁴

Enbridge Energy’s (Enbridge) Line 5 Pipeline poses a more subversive threat to Ojibwe treaty rights.²³⁵ This oil pipeline is 645 miles long and crosses more than 280 rivers and streams that flow into the Great Lakes.²³⁶ Line 5 “transports crude oil and natural gas liquids from Superior, Wisconsin to Sarnia, Ontario.”²³⁷ Every day, Line 5 “transports up to 23 million gallons of crude oil and gas” from Wisconsin to Ontario.²³⁸ In the 69 years that Line 5 has been operational, it has ruptured a minimum of 30 times, releasing more than one million gallons of oil into the surrounding land and water.²³⁹ Line 5 runs through hundreds of waterways and the treaty-reserved territory of numerous Indigenous nations.²⁴⁰ Yet neither Enbridge nor the United States government consulted with a single Indigenous

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.*

235. See *Line 5 Pipeline: Wisconsin Reroute*, EARTH JUST. (Jan. 19, 2023), <https://earthjustice.org/case/line-5-pipeline-wisconsin-reroute> [<https://perma.cc/4NLY-FRFP>].

236. *Id.*

237. *Id.*

238. *The Great Lakes Are Under Threat*, EARTH JUST. (July 11, 2024), <https://earthjustice.org/article/the-great-lakes-under-threat> [<https://perma.cc/L6A2-HMWK>].

239. *Line 5 Pipeline: Wisconsin Reroute*, *supra* note 235.

240. *The Great Lakes Are Under Threat*, *supra* note 238.

government before building it.²⁴¹ Leaving each of these nations to cope with the associated risks poses a threat not only to their landscape and health, but also to their hard fought treaty rights.²⁴²

In 2021, Enbridge proposed a relocation plan for Line 5 that would reroute the oil pipeline through the Bad River watershed—water the Bad River Band of Lake Superior Chippewa relies on.²⁴³ As mentioned, Enbridge has a history of oil spills.²⁴⁴ “In 2010, Enbridge was responsible for the largest inland oil spill” in the history of the United States.²⁴⁵ One of their other pipelines, referred to as Line 6B, unleashed nearly one million gallons of oil into the Kalamazoo River in Michigan.²⁴⁶

The Reservation for the Bad River Band is located within the Bad River watershed.²⁴⁷ This watershed is also a tributary of Lake Superior, which spans over 1,000 miles of interconnected rivers.²⁴⁸ Not only does the poor health of this water source have serious environmental, cultural, and economic significance for the Bad River Band, it compromises the Band’s ability to exercise their treaty rights.²⁴⁹ The Bad River Band brought a lawsuit against Enbridge for the rerouting of Line 5.²⁵⁰ In the spring of 2023, erosion on the riverbank moved the Bad River current within 11 feet of Line 5, leading the Bad River Band to seek an emergency shutdown hoping to stop an oil spill.²⁵¹ Ultimately, U.S. District Judge William Conley held that the Line 5 pipeline was illegally trespassing on the Bad River Reservation.²⁵² This is because the previous lease that Enbridge had with the Bad River Band of

241. *Id.*

242. *See id.*

243. *Line 5 Pipeline: Wisconsin Reroute*, *supra* note 235.

244. *Id.*

245. *Line 5 Pipeline: Michigan Tunnel*, EARTH JUST. (Apr. 16, 2021), <https://earthjustice.org/case/line-5-pipeline> [<https://perma.cc/H9F5-N2GU>].

246. *Id.*

247. *Line 5 Pipeline: Wisconsin Reroute*, *supra* note 235.

248. *Id.*

249. Elena Bruess, *Treaty Rights Acknowledged for First Time in Oil Pipeline’s Controversial History*, GREAT LAKES NOW (Mar. 15, 2021), <https://www.greatlakesnow.org/2021/03/treaty-rights-line-5-oil-pipelines-controversial-history/> [<https://perma.cc/EG6R-PHL3>].

250. *The Great Lakes Are Under Threat*, *supra* note 238.

251. *Id.*

252. *Bad River Band of the Lake Superior Tribe of Chippewa Indians of the Bad River Rsrv. v. Enbridge Energy Co.*, 626 F. Supp. 3d 1030, 1049 (W.D. Wis. 2022).

Lake Superior Chippewa expired over a decade ago in 2013.²⁵³ At that time, the Band refused to renew the lease, but Enbridge never stopped pumping oil through the pipeline.²⁵⁴ The final order from Judge Conley ordered Enbridge to remove the pipeline by June 16, 2026 and to pay the Band \$5,151,668 for the past trespass.²⁵⁵

Instead of creating a plan to comply with this order, Enbridge proposed two alternative plans.²⁵⁶ The first involves creating a new 41-mile section of pipeline to direct Line 5 around the Bad River Band's reservation.²⁵⁷ While this route is technically not on the reservation, it would still cross around 200 watersheds that are upstream from the reservation, putting drinking water on the reservation at risk.²⁵⁸ The second plan involves a completely new and untested underground tunnel that would impact another community with protected treaty interests.²⁵⁹

The Bad River Band is not the only Ojibwe nation facing this direct threat to their livelihood and treaty rights.²⁶⁰ The Bay Mills Indian Community was the first nation to intervene before the Michigan Public Service Commission in opposition to Enbridge's proposal to build and reroute Line 5.²⁶¹ Ultimately, three other tribes became involved in the proceedings including "the Grand Traverse Band of Ottawa and Chippewa Indians, the Nottawaseppi Huron Band of the Potawatomi, and the Little Traverse Bay Bands of Odawa Indians."²⁶² The Bay Mills Indian Community contests the proposed tunnel in the Straits of Mackinac, which is a waterway connecting Lake Michigan and Lake Huron.²⁶³ In January of 2024, the Michigan Public Service Commission decided to allow Enbridge to move forward with

253. *Id.* at 1040, 1048; Ray Levy-Uyeda, *Indigenous Water Protectors Warn of Line 5 Pipeline's Looming Dangers*, TRUTHOUT (Nov. 28, 2024), <https://truthout.org/articles/indigenous-water-protectors-warn-of-line-5-pipelines-looming-dangers/> [<https://perma.cc/9RPE-LVFR>].

254. Levy-Uyeda, *supra* note 253.

255. Amended Final Judgment in a Civil Case at 2, *Bad River Band of the Lake Superior Tribe of Chippewa Indians of the Bad River Rsrv. v. Enbridge Energy Co.*, No. 19-cv-602 (W.D. Wis. June 29, 2023).

256. *The Great Lakes Are Under Threat*, *supra* note 238.

257. *Id.*

258. *Id.*

259. *Id.*

260. *Line 5 Pipeline: Michigan Tunnel*, *supra* note 245.

261. *Id.*

262. Colin Jackson, *Great Lakes Tribes Appeal MPSC Permit for Line 5 Tunnel Project*, UPPER MICH. SOURCE (Jan. 2, 2024, 7:16 PM), <https://www.uppermichiganssource.com/2024/01/03/great-lakes-tribes-appeal-mpsc-permit-line-5-tunnel-project/> [<https://perma.cc/PW4D-JGU9>].

263. *Line 5 Pipeline: Michigan Tunnel*, *supra* note 245.

building the Line 5 tunnel beneath the Mackinac Straits.²⁶⁴ This poses a threat to the community, as even today over half of the Bay Mills Indian Community gets “part or all of their income from commercial fishing.”²⁶⁵

The potential for oil spills is great. According to the National Oceanic and Atmospheric Administration, “Thousands of oil spills occur in [United States] waters each year.”²⁶⁶ These oil spills pose a direct threat to the livelihood of Ojibwe people in Wisconsin and their reserved rights.²⁶⁷ The amount of harm caused by a spill can vary from ecosystem to ecosystem, but will always impact wildlife.²⁶⁸ Oil toxicity and fouling are two of the main causes of the damage.²⁶⁹ The International Joint Commission’s Great Lakes Science Advisory Board published a report that evaluated the vulnerability of the Great Lakes Area to oil spills in 2018.²⁷⁰ This report found that “all levels of the aquatic ecosystem would be affected by a crude oil spill, along with drinking water for many of the 40 million people who depend on the Great Lakes.”²⁷¹ Many of the habitats are home to wild rice, sturgeon, trout, and coastal wetlands, all of which are particularly vulnerable to oil spills.²⁷²

Not far away, in Michigan, the Ojibwe are leveraging treaty-based arguments against Line 5.²⁷³ Their claims remind the government that not only is this an issue of fishing rights, but it is a danger to sovereignty more broadly.²⁷⁴ For the Ojibwe, water is of central importance to their way of life, and that belief is rooted in thousands of years of history.²⁷⁵

VII. CONCLUSION

Indigenous nations must continuously fight for these rights to be upheld as promised. Now, the United States is faced with another opportunity to choose between the rights of Ojibwe nations and protect the important resources connected

264. Jackson, *supra* note 262.

265. *Id.*

266. *Oil Spills*, NAT’L OCEANIC & ATMOSPHERIC ADMIN. (Aug. 1, 2020), <https://www.noaa.gov/education/resource-collections/ocean-coasts/oil-spills> [<https://perma.cc/A3GB-UTBV>].

267. Bruess, *supra* note 249.

268. *Oil Spills*, *supra* note 266.

269. *Id.* Fouling occurs when “oil physically harms a plant or animal.” *Id.*

270. Bruess, *supra* note 249.

271. *Id.*

272. *Id.*

273. *Id.*

274. *See id.*

275. *Id.*

to the Great Lakes region, or to prioritize Enbridge's profits.²⁷⁶ Recently, Enbridge received the permits required from the Department of Environment, Great Lakes and Energy (EGLE) and the Michigan Public Service Commission to move forward with construction.²⁷⁷ When granted, both permits were challenged by the Bay Mills Indian Community, Grand Traverse Band of Ottawa and Chippewa Indians, Little Traverse Bay Bands of Odawa Indians, and the Nottawaseppi Huron Band of Potawatomi.²⁷⁸

In addition to the first two permits, Enbridge also needs to obtain a permit from the United States Army Corps of Engineers for the planned project in Michigan.²⁷⁹ The Army Corps announced in 2023 that it would be extending its environmental review of the Line 5 tunnel project.²⁸⁰ This review is expected to be released in spring 2025, likely pushing construction back to 2026, after the expiration of the permit granted by EGLE.²⁸¹ The parties stipulated that Enbridge would not act on the previously issued permits and allow it to expire on February 25, 2026.²⁸² Therefore, EGLE will have another opportunity to assess the risks and costs, particularly as they relate to Indigenous interests.²⁸³

The Bad River Band in Wisconsin is still similarly situated.²⁸⁴ On November 14, 2024, the Wisconsin Department of Natural Resources (DNR) granted Enbridge the permits necessary to build the 41-mile-long section of Line 5 around the Bad River Reservation.²⁸⁵ Even in the face of overwhelming public opposition, the DNR approved these permits.²⁸⁶ Regarding the grant of permits by the DNR, Stefanie Tsosie, Senior Attorney with Earthjustice explained, "In granting these permits, DNR officials chose to serve Enbridge's interests at the cost of the Bad River Band's treaty rights and the state's future clean water supply."²⁸⁷ Bad River

276. Jackson, *supra* note 262.

277. Kyle Davidson, *Enbridge Agrees to Redo Key Permit for Line 5 Tunnel Project*, MICH. ADVANCE (Sept. 6, 2024), <https://michiganadvance.com/2024/09/06/enbridge-agrees-to-redo-key-permit-for-line-5-tunnel-project/> [<https://perma.cc/Q5F9-J6TQ>].

278. *Id.*

279. *Id.*

280. *Id.*

281. *Id.*

282. *Id.*

283. *Id.*

284. See Levy-Uyeda, *supra* note 253.

285. *Id.*

286. Press Release, Earthjustice, Wisconsin Bows to Enbridge, Approving Line 5 Reroute Permits (Nov. 14, 2024), <https://earthjustice.org/press/2024/wisconsin-bows-to-enbridge-approving-line-5-reroute-permits> [<https://perma.cc/QN6U-7E2J>].

287. *Id.*

Band Chairman Robert Blanchard also commented on the DNR’s decision, “I’m angry that the DNR has signed off on a half-baked plan that spells disaster for our homeland and our way of life.”²⁸⁸ The DNR’s approval is even more disappointing, in that it directly ignores Judge Conley’s 2023 order.²⁸⁹

Now, the United States Army Corps of Engineers must approve the plan on the federal level.²⁹⁰ In August, the Army Corps received more than 150,000 public comments from private citizens opposed to the project.²⁹¹ In addition to the individuals who submitted comments, the Bad River Band, the Sierra Club (and more than 100 other advocacy groups), the Great Lakes Business Network (consisting of more than 200 business leaders), the Healthy Climate Wisconsin, the Wisconsin Public Health Association, and the American College of Physicians, all submitted letters in opposition to the project.²⁹²

So, the fight against Line 5 in both Wisconsin and Michigan awaits the pending results of the Army Corps’ evaluation of Enbridge’s permit applications.²⁹³ The Army Corps should and must consider the potential threat of Line 5 on the health of the land and the people who live on it, as well as the threat to sovereignty and treaty rights. Rene Ann Goodrich of the Bad River Ojibwe, put it best in her public commentary, “As a Bad River tribal member our way of life, historical homelands, cultural resources, subsistence, wildrice, medicines, fisheries, and water are in direct jeopardy of an imminent catastrophic oil spill. . . . We reject the reroute and we stand with the water—we will always stand with the water.”²⁹⁴

288. *Id.*

289. *See* Amended Final Judgment in a Civil Case, *supra* note 255 (ordering Enbridge to remove the pipeline from the Bad River Reservation).

290. Press Release, Wisconsin Bows to Enbridge, Approving Line 5 Reroute Permits, *supra* note 286.

291. *Id.*

292. *Id.*; Press Release, Earthjustice, Over 150k Pub. Comments Oppose Fed. Permits for Line 5 Pipeline (Aug. 30, 2024), <https://earthjustice.org/press/2024/over-150k-public-comments-oppose-federal-permits-for-line-5-pipeline> [<https://perma.cc/H257-QR3J>].

293. Levy-Uyeda, *supra* note 253; Davidson, *supra* note 277.

294. Press Release, Over 150k Pub. Comments Oppose Fed. Permits for Line 5 Pipeline, *supra* note 292.