Treaty Rights for U.S. Tribal Nations in the Great Lakes Region

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Overview

- Turtle Island: A Long History of Treaty-making
- European Religious Doctrine to British Treaty-making and U.S. Treaty-making
- Treaties as Basis of U.S. –Tribal Relations and the U.S. Constitution
- Treaty Interpretation and the Indian Canons of Construction for Ambiguity
- Tribal Reserved Water Rights and New EPA Regulation 40 C.F.R. § 131.9
- Litigation v. Negotiation: Promise of Perpetual Peace and Friendship in Treaties

Tribal Jurisdiction

◊Three sovereigns in the United States: Federal, States, Tribal Nations

◊ There are 574 federally recognized Tribal Nations in the United States. All exercise self-government and have the option to operate a tribal court, approximately 350+ currently in operation. Tribes may operate an appellate level or affiliate with a regional appellate association.

◊ U.S. case law recognizes that Tribal Nations reserved powers of self-government in the Treaty-making process.

◊ 1934 Indian Reorganization Act (IRA) provided option for federally-recognized American Indian Tribes to adopt Tribal Constitutions, including provisions to establish and oversee Tribal Courts enforcing Tribal law.

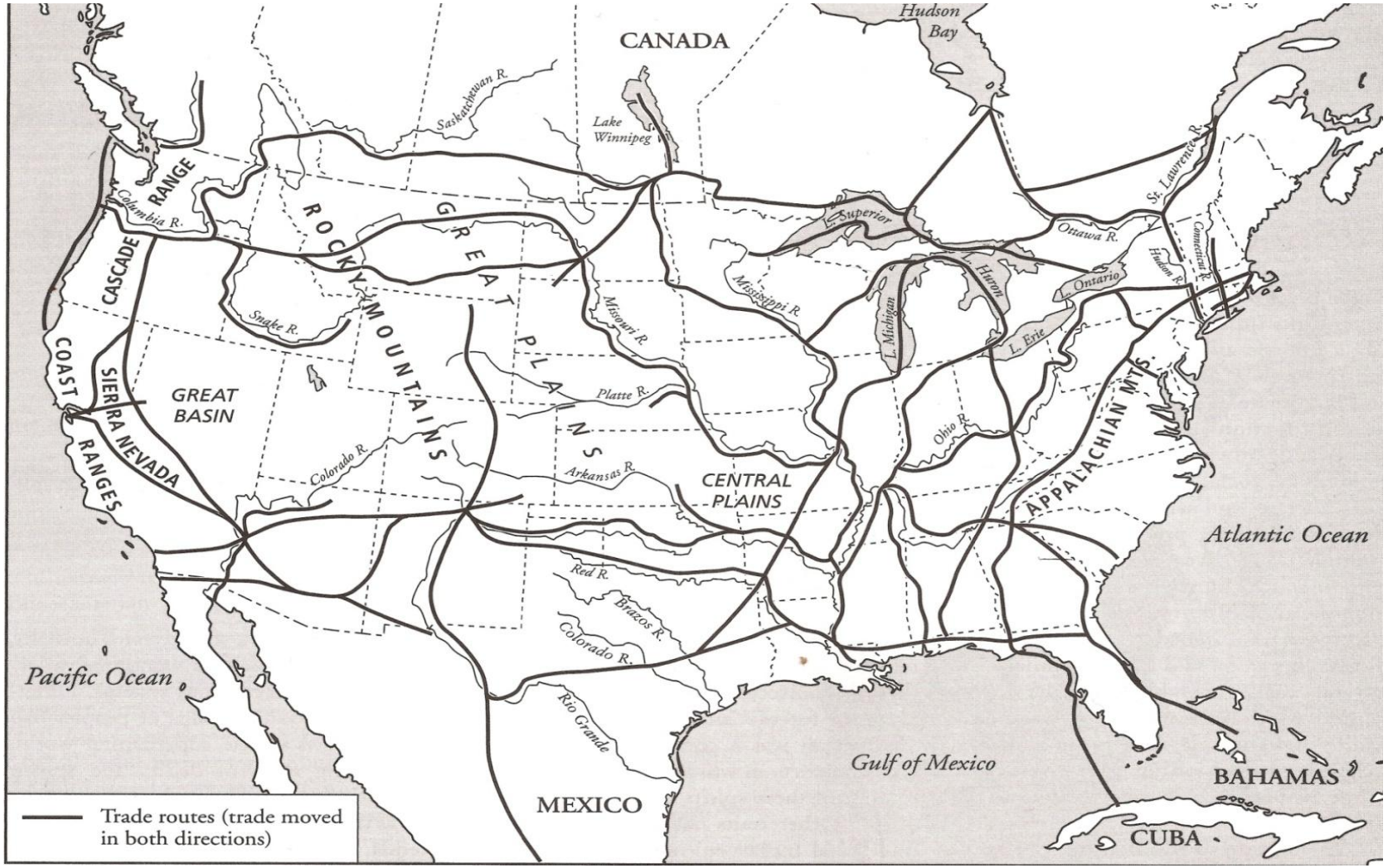
Note: Tribally enrolled people are dual citizens of their Tribal Nation and the U.S. (and have State citizenship)

Interchangeable terms: Indian, American Indian, Tribal, Indigenous, and Native American

European Mixing of Christian Doctrine and Law

- Papal Bulls (Orders by the Catholic Pope) and the "Doctrine of Discovery"
- Pope Alexander VI's *Bull Inter Caetera* on May 4, 1493.
- European Christians respected lands of other European Christians
- Right to assert superior title over "pagans" or "infidels", monopolize trade and convert to Christianity
- British Kings issued charters in the 1600s for trading companies and then for colonies in North America under the language of the papal bulls
- U.S. asserts successor status to European-based England to claim "doctrine of discovery" in Johnson v. McIntosh (1823)– is this problematic?
- On March 20, 2023, the Vatican rejected the "Doctrine of Discovery" as used to justify colonization.
- The U.S. Supreme Court has not rejected the "Doctrine of Discovery". In Johnson v. McIntosh, the Court held that Tribal people only had "occupancy" title to their lands and the United States had superior title over all Tribal lands.

Tribal Nation Commerce Historically
Estimated Trade Routes, Carl Waldman,
Atlas of the North American Indian, rev. ed. Pg. 67



Tribal Nation Treaty Relationships with the British Crown to U.S.

Tribal Nation Views

- Relationship Building – long history of treaty agreements prior to British and French arrival
- Sacred promises – agreements made ceremonially, memorialized in song, oral tradition, pictographs and other means
- Oral histories contain meaning of the treaties
- Extended to all future generations
- Protected ability to continue way of life and share resources with the settlers
- Did not sell land to others
- Could not be given land by newcomers, could agree to relocate to other lands
- Treaty rights to off reservation hunting, fishing, harvesting and ceremonial use are perpetual rights

British/U.S. Views

- Expedient to acquire means for settlement and industry
- Treaties written into the English language using legal terms – courts adopt interpretive tools "canons of construction"
- Majority of U.S. treaties promised "perpetual peace and friendship"
- Treaties necessary to establish legal title to lands
- Lands seized where possible without entering into treaty
- Treaties partially or fully "abrogated" over time without U.S. return of lands – U.S. Supreme Court empowers U.S. Congress with the "Plenary Power" doctrine

Formation of the United States

- American Revolution (1775-83): presented choice to Tribes of aligning with colonists or British officials
- Split Iroquois Confederacy, allowing for more entrenched colonists to rebel against Britain
- Articles of Confederation 1777 – ratified by states 1781
- 1778 first United States Treaty with Delaware Nation
- The 1787 Northwest Ordinance provided for population of men to organize an area into districts as a territory, and petition for statehood to join the Union.
- 1787 U.S. Constitution signed, ratified 1789.

Tribal Relations and the U.S. Constitution

- Article I & II: granted the U.S. President and Congress authority to declare war and make treaties. Supremacy clause states that treaties are part of the supreme law of the land. Art. VI clause 2
- Article I section 8 clause 3 gave Congress sole authority “to regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes.”
- Original Art. I section 2 clause 3 provided a formula for taxation and contained the language: “excluding Indians not taxed.”
- Recognition that Tribal Nations were separate entities with their own governance engaging in commerce with the United States.

Treaty Interpretation: Canons of Construction

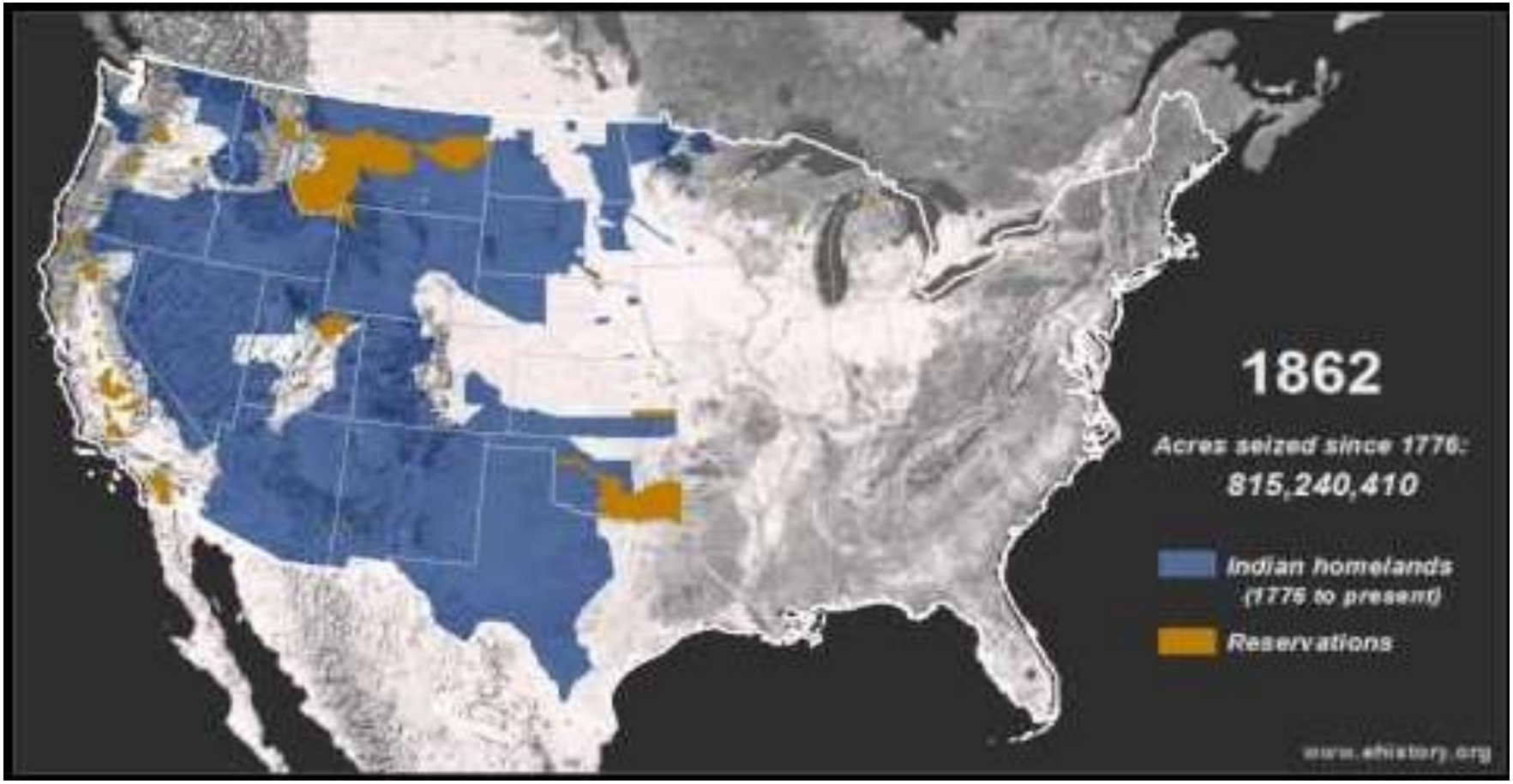
- Why uphold treaties? Justify settlement and ownership of U.S. claimed territory
- U.S. Supreme Court developed canons of Indian treaty construction =

  1. Ambiguities in treaties must be decided in favor of Indians (Tribes)

  2. Treaties must be interpreted as Indians would have understood them {expert witnesses}

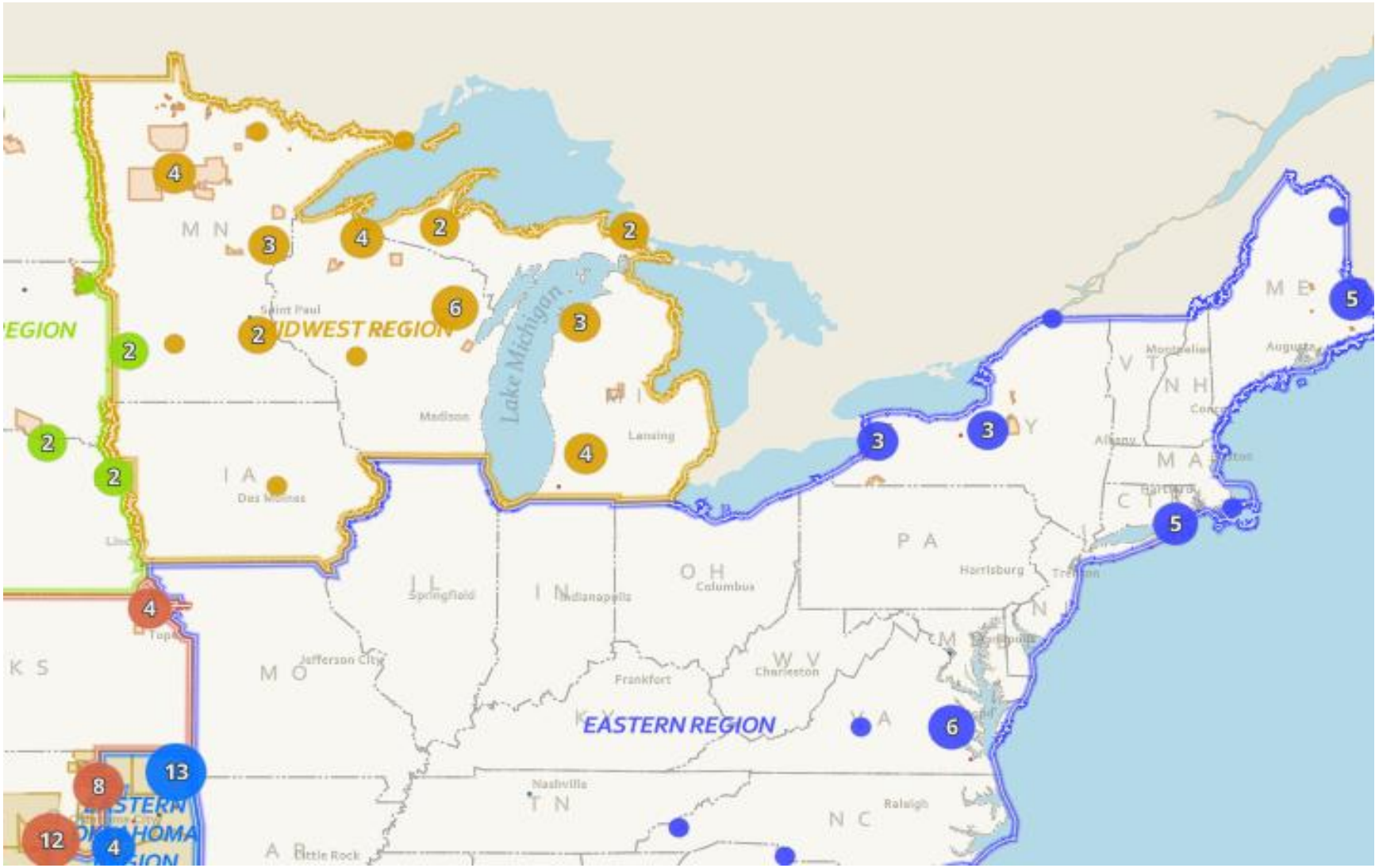
  3. Indian treaties must be construed liberally in favor of Indians
- Note: these interpretation principles are also applied to federal laws and federal regulations enacted for the benefit of Indians
- The U.S. and each Tribal Nation are treaty partners. State governments form a union within the federal government. The U.S. Constitution Article VI. Supremacy Clause requires states to follow the supreme law of the land – the U.S. Constitution, federal laws and treaties entered into by the U.S.

Time Lapse Map for U.S. Seizing of Native American Lands



Note this video by ehistory.org **does not adequately reflect lands pre-1776 or the reservations in Oklahoma**
Note upper North Dakota: Acquired partially by the "McCumber Agreement" of 1904 and partially by de facto occupation.

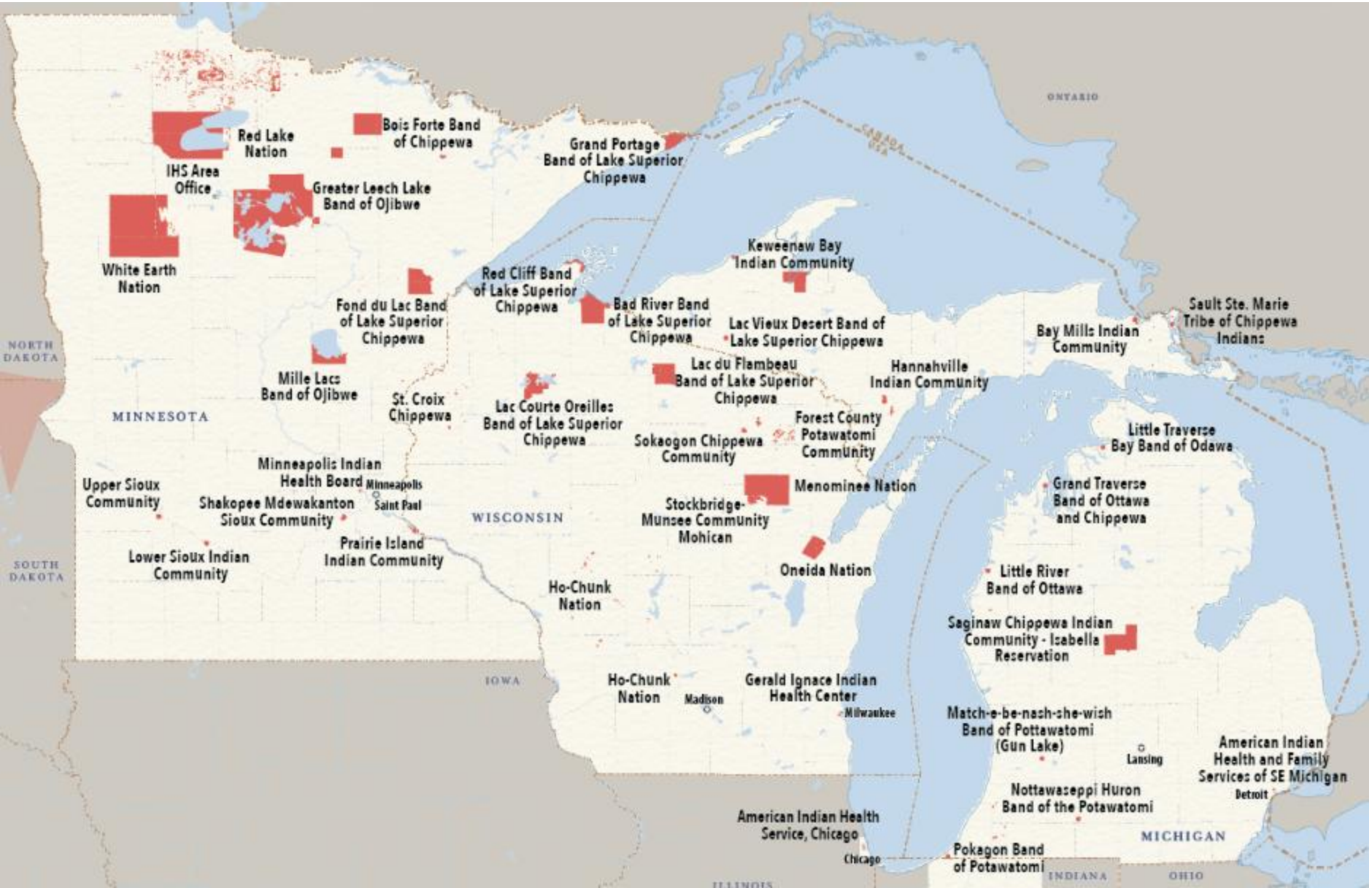
Bureau of Indian Affairs (BIA) Midwest and Eastern Regions



https://biamaps.geoplatform.gov/Tribal-Leaders-Directory/

Great Lakes Indian Fish & Wildlife Commission (GLIFWC): 11 Tribal Nations in Michigan, Minnesota, and Wisconsin Treaties in Force and the Great Lakes

Overview of regional Tribal Nations



34 Tribal Nations of the Great Lakes Native American Research Center for Health

The Basis for Tribal Water Rights in the U.S.

- From the Tribal perspective, “Mni Wiconi” = Water is Life; There exists a stewardship and respectful relationship for this life source
- From the U.S. federal perspective, the legal basis is derived from the acknowledgement of territory: 1) Treaty; 2) Federal Statute; 3) Executive Order; 4) Agreements; or 5) Other Operative Documents
- United States v. Winans, 198 U.S. 371 (1905) – treaty fishing case “In other words, the treaty was not a grant of rights to the Indians, but a grant of rights from them – a reservation of those not granted.” = retain any rights not expressly surrendered in the treaty
- Winters v. United States, 207 U.S. 564 (1908) – reserved water rights for the purpose of the Indian reservation; Water rights reserved with date of reservation (May 1, 1888) by federal government and binding on state
- United States v. Adair, 723 F.2d 1394 (9th Cir. 1983) extended *Winters* doctrine by holding that water rights are reserved sufficient to support hunting and fishing rights as part of purpose of a treaty
- Implied right to habitat protection – United States v. Washington, 853 F.3d 946 (9th Cir. 2016) “culvert case”

Reservation System in the U.S.

- Necessary for U.S. to settle from coast to coast; if unlivable lands then Tribal communities would leave
- Most water rights are held under the *Winters* doctrine – generally implied from the acknowledgement of a reservation, and encompass sufficient water to carry out the purposes for which land was set aside
- *Winans* water rights (Treaty hunting and fishing) flow from aboriginal uses and time immemorial
- Most courts don't make a distinction between the two types
- U.S. as trustee for 50 year period planned and built dams and diversions without regard to tribal water rights
- 1973 National Water Commission Report – "In the history of the [U.S.] Government's treatment of Indian tribes, its failure to protect Indian water rights for use on the Reservations it set aside for them is one of the sorrier chapters."

U.S. State Water Law Systems: Western and Eastern

- **Eastern water law** – riparian rights based on land ownership; entitled a "reasonable use" of the stream, shortages are shared
- Seminole Nation entered into negotiated water settlement in riparian water system, less water settlement actions in riparian rights states

- **Western water law** – prior appropriation = first in time, first in right based on first date that water is put to a beneficial use; senior met before junior rights, quantification decrees
- "Use or Lose it; Can forfeit right if not put to beneficial use"
- Tribal Nations: priority date for reserved rights is the date of the reservation, rather than the date when the water is put to use. Reserved rights are not lost through non-use, but may be asserted at any time

Tribal Environmental Regulation

- The U.S. Supreme Court has not decided any cases in the area dealing specifically with Tribal Nations and environmental regulation. The U.S. Supreme Court has narrowed reliance on interpretations by federal agencies by striking Chevron deference in Loper Bright Enterprises v. Raimondo (June 28, 2024). Keep that in mind as Circuit Courts have provided deference to the EPA on decisions regarding "Treatment as States" for Water Quality Standards (WQS).
- Three major federal environmental statutes, process of federal programs implemented by states under the U.S. Environmental Protection Agency (EPA).
- Between 1986 and 1990 statutes amended to include Tribes "treatment as states/Tribes as states" (TAS):
- 1) Clean Water Act
- 2) Safe Drinking Water Act
- 3) Clean Air Act

Clean Water Act, 33 U.S.C. § 1251 et seq.

- 1) National Pollutant Discharge Elimination System (NPDES) permits for any "point source" discharging pollutants into navigable waters and 2) 404 permit discharge of dredged or fill material into navigable waters managed by EPA
- CWA allows states to set water quality standards, subject to review and approval.
- EPA then issues permits based on maintaining the water quality standards (WQS) set.
- 33 U.S.C. § 1377(e) authorizes Tribes to be treated as states "TAS" status,
- 33 U.S.C. § 1377(c)(3) mentions "former Indian reservations in Oklahoma" and includes Alaska Native Villages
- 2024 40 C.F.R. § 131.9 Protection of Tribal reserved water rights
- News article on wild rice and Great Lakes here.

2024 U.S. EPA revised the Clean Water Act

- 40 C.F.R. § 131.9 **Protection of Tribal reserved water rights**
- (a) Where a right holder has asserted a Tribal reserved right in writing to the State and EPA for consideration in establishment of water quality standards, to the extent supported by available data and information, the State must:
- (1) Take into consideration the use and value of their waters for protecting the Tribal reserved right in adopting or revising designated uses pursuant to § 131.10;
- (2) Take into consideration the anticipated future exercise of the Tribal reserved right unsuppressed by water quality in establishing relevant water quality standards; and
- (3) Establish water quality criteria, consistent with § 131.11, to protect the Tribal reserved right where the State has adopted designated uses that either expressly incorporate protection of or encompass the right. This requirement includes developing criteria to protect right holders using at least the same risk level (e.g., cancer risk level, hazard quotient, or illness rate) as the State would otherwise use to develop criteria to protect the State's general population, paired with exposure inputs (e.g., fish consumption rate) representative of right holders exercising their reserved right.
- (b) States and right holders may request EPA assistance with evaluating Tribal reserved rights. EPA will provide such assistance to the extent practicable. In providing assistance to States as they adopt and revise water quality standards consistent with paragraph (a) of this section, EPA will engage with right holders.
- (c) In reviewing State water quality standards submissions under this section, EPA will initiate the Tribal consultation process with the right holders that have asserted their rights for consideration in establishment of water quality standards, consistent with applicable EPA Tribal consultation policies, in determining whether State water quality standards are consistent with paragraph (a) of this section.
- [89 FR 35747, May 2, 2024]

Energy Pipelines and Treaty Resources and Waters

- Tribal Nation stewardship of homelands and the United States
- For-Profit Oil Pipelines:

-Dakota Access Pipeline (Missouri River)
-Enbridge Line 3 Replacement Pipeline, Rebranded Line 93 (crosses 200 rivers and streams to headwaters of the Mississippi River in Minnesota)
-Keystone XL Pipeline (canceled)
*Enbridge Line 5 Litigation active in Michigan, see Colin Jackson, *Federal appeals court keeps Line 5 lawsuit in state court*, Michigan Public Radio Network, Aug. 16, 2024:

"It is a critical responsibility of the State to protect our Great Lakes from the threat of pollution. Our state claims, brought under our state law, will continue to be heard in a state court, and I am grateful we are one step closer to resolving this case on behalf of the state of Michigan," [Mich. Attorney General] Nessel said in a press release.

Enbridge said the dispute belongs in federal court because the line is under the jurisdiction of both federal regulators and international agreements.

"The Attorney General seeks to shutdown Line 5 based on perceived safety concerns, but Line 5's safety is exclusively regulated by the Pipeline and Hazardous Materials Safety Administration (PHMSA). Every year PHMSA reviews the safety compliance of Line 5 across the Straits of Mackinac," Duffy's statement said.

- Litigation by Tribal Nations to resist construction, replacement, or expansion of pipelines
- Asserting Treaty rights in litigation and seeking justice

Photo of a water ceremony performed at the Straits of Mackinac.(Nikki Caputo and Chris "Mo" Hollis/Wingspan Media Bay. Courtesy of Bay Mills Indian Community)

Litigation vs. Settlement

Litigation is:

- Expensive;
- Time consuming;
- Flexibility to come to creative solutions is limited by precedent;
- Zero-sum game for all parties; and
- Adversarial posture of parties who will continue to be in relations

Negotiation is typically the preferred approach by most parties in a water rights adjudication.

- Allows for a comprehensive solution;
- Can integrate water management into the settlement;
- May provide funding for “wet water”; and
- Based on treaty relationships of “perpetual peace and friendship”

- Secretary of Interior has an Indian Water Rights Office.

8 States in Relations with Tribal Nations Great Lakes Region

State	Federally Recognized Tribes
Illinois (1)	Prairie Band Potawatomi Nation with land put into trust on April 19, 2024 for the Shab-eh-nay Reservation, the Nation has its headquarters on a reservation in Kansas
Indiana (1)	Pokagon Band of Potawatomi (also in Michigan) *Miami Tribe of Oklahoma, Cultural Extension Office, near Fort Wayne
Michigan (12)	Bay Mills Indian Community Grand Traverse Band of Ottawa and Chippewa Indians Hannahville Potawatomi Indian Community Nottawaseppi Huron Band of Potawatomi Keweenaw Bay Indian Community Sault Ste. Marie Tribe of Chippewa Indians Little Traverse Bay Band of Odawa Indians Little River Band of Ottawa Indians Match-e-be-nash-she-wish Band of Pottawatomi Indians Pokagon Band of Potawatomi Indians Saginaw Chippewa Indian Tribe Lac Vieux Desert Band of Lake Superior Chippewa Indians
Minnesota (11)	Bois Forte Band of Chippewa Fond du Lac Band of Lake Superior Chippewa Grand Portage Band of Lake Superior Chippewa Leech Lake Band of Ojibwe Lower Sioux Indian Community Mille Lacs Band of Ojibwe Prairie Island Indian Community Red Lake Band of Chippewa Indians Shakopee Mdewakanton Sioux (Dakota) Community Upper Sioux Community White Earth Nation

8 States in Relations with Tribal Nations Great Lakes Region

State	Federally Recognized Tribes	Not Federally Recognized Tribe
New York (8+1)	Cayuga Nation Oneida Indian Nation Onondaga Nation Saint Regis Mohawk Tribe Seneca Nation of Indians Shinnecock Indian Nation Tonawanda Seneca Nation Tuscarora Nation	Unkechaug Indian Nation – state recognized
Ohio		
Pennsylvania		
Wisconsin (11)	Bad River Band of Lake Superior Chippewa Forest County Potawatomi Ho-Chunk Nation Lac Courte Oreilles Band of Lake Superior Chippewa Lac du Flambeau Band of Lake Superior Chippewa Menominee Indian Tribe of Wisconsin Oneida Nation Red Cliff Band of Lake Superior Chippewa Sokaogon Chippewa Community St. Croix Chippewa Indians of Wisconsin Stockbridge-Munsee Band of Mohican Indians	Brothertown Indian Nation – not state or federally recognized