On Teaching Indian History: Legal Jurisdiction in Chippewa Treaties

Robert H. Keller, Jr.

Ethnohistory, Vol. 19, No. 3. (Summer, 1972), pp. 209-218.

Stable URL:
http://links.jstor.org/sici?sici=0014-1801%28197222%2919%3A3%3C209%3AOTIHLJ%3E2.0.CO%3B2-4

Ethnohistory is currently published by Duke University Press.

ON TEACHING INDIAN HISTORY: LEGAL JURISDICTION IN CHIPPEWA TREATIES

by

Robert H. Keller, Jr.
Fairhaven College
Western Washington State College

ABSTRACT

Typical history textbooks fail to provide an adequate encounter with the past and too often relieve students from responsibility for making their own historical judgments. Use of Indian treaties is suggested as an alternative teaching method. The development of legal jurisdiction in Chippewa treaties illustrates how such study can lead one to search further and to see the significance of history in contemporary affairs.

Introduction

Periods, dates, names, "important issues," a textbook, bibliography, term paper, and the exam – this is the ancient litany of the typical history course. Likewise, since 1963, in my classes on American Indian history I often proceeded traditionally by organizing the course around a general survey outline, using texts by Hagan (1961), Spicer (1969), and Washburn (1964), supplemented by studies of particular tribes and policy periods, with several novels or contemporary studies by Vine Deloria (1969) or Murray Wax (1971) added to bring matters to the present.

The pedagogical shortcomings of this approach are those common to most history survey courses in that they often fail to convey adequately the viewpoint and experience of the people studied. To the student, the material may seem abstract and unreal. Primary sources, if consulted, can impress the beginning student as isolated and out of context. More important, with the survey predetermined and conveniently packaged in a syllabus, the student may either miss or can avoid the excitement of exploration and discovery which is the lifeblood of historical study. Historical problems emerge from the professor's mind instead of from the student's own relationship with the

past. Accompanying this style of teaching may be much discussion about, but little creative use of, original documents.

Our teaching can be improved to a considerable extent by using sources written by Indians, those documents which convey their views of the world in their own words. Many of these records are still buried in manuscript repositories and oral history collections, but with the resurgence of interest in Indian affairs, it can be hoped that many first-hand sources will be exhumed and published. There are, however, other resources which now are available and which are too often neglected as teaching tools. Foremost among these are the Indian treaties with the United States Government.

Several years ago while co-teaching a Free University class on Nooksack Indian history I was surprised to learn how interested several Nooksack students became when I distributed copies of the Treaty of Point Elliot, a treaty which their tribe was excluded from signing in 1855 even though it opened their lands to settlement. Since then I have used treaty study as focus for a number of college students pursuing individual projects in Indian-White relations. There is no reason why the same technique cannot be used in medium-sized classes, especially since our access to treaties and our understanding of their significance has been vastly facilitated by the recent reprinting of Charles J. Kappler's *Indian Affairs: Laws and Treaties* (1972) and of Felix Cohen's *Handbook of Federal Indian Law* (1971). (The per-student expense of these books diminishes if one requests a class of twenty students to divide equally the cost of several volumes.)

When a scholar can remark that an official tribal history "deals mainly with the treaty of 1855 but has a few interesting items" (Nolan 1959:3), he ignores the fact that treaty study can be a touchstone and fruitful pathway to learning about Indian affairs. Close examination and criticism of treaties introduces a student to the theories justifying European conquest of North America and to the legal bramblebush of state-federal relations *vis-à-vis* Indian tribes. Equally crucial, treaty study places one in touch with the concrete experience of Indian people in their past negotiations and contemporary controversies with the whites. Current tribal attitudes toward treaties can inform us about the development of a tribe's attitude toward itself, as in the case of the Yakimas, whose treaty, though deceptively and unfairly thrust upon Pacific Northwest Indians at the Walla Walla Council of 1855, 100 years later was celebrated and honored by them as an instrument of tribal identity (Yakima Tribal Council 1955).

Indian treaties may be studied through geographical and chronological comparisons, through detailed analysis of a single document (as with the Yakimas who signed only one treaty), or through tracing a particular issue found in a series of treaties with one tribe. I wish to demonstrate the last

method by using government relations with the Chippewa Indians and by asking the question: Who was given what legal jurisdiction on Indian lands under the Chippewa treaties?

Description of the Chippewa Treaties

In the eighteenth century, the southern Chippewa Indians occupied lands around the Great Lakes in southern Ontario and on the Michigan peninsula. Late in that century, patterns of white settlement and incentives of the fur trade moved these bands southwestward along Lake Superior into what were to become the states of Minnesota and Wisconsin – and into deadly, protracted warfare with the Sioux who possessed these western lands. Subsequently, the southeastern Chippewa experienced the loss of most of their land in Michigan. Their western relatives, three generations after successful expansion against the Sioux, came under assault from whites as pre-emption laws, land speculation, discovery of valuable metals, and the timber boom brought hordes of American farmers, politicians and businessmen into the far reaches of the Northwest Territory. Sealing the tribe's fate, east and west, were stupendous forced land cessions for which they received pennies per acre. By 1900 the Chippewas, reduced to seven reservations in northern Minnesota and a dozen tiny reserves in Michigan and Wisconsin, had suffered an enormous loss of land and power. Once known as the most powerful and independent of the Great Lakes tribes, they languished at the end of the nineteenth century, helpless and dependent upon the federal government for support and subsistence.

A study of Chippewa treaties could profitably concentrate on the land cessions and frauds which continued almost unabated from the 1840s into the present century; but a more manageable topic is the issue of legal jurisdiction on the reservations, a topic which parallels the loss of land and which also clearly demonstrates the degradation of Chippewa tribal autonomy.

Between 1785 and 1867 the United States ratified forty-two treaties affecting various bands of Chippewas (Kappler 1972:1077-1078). Seventeen of these treaties had jurisdictional provisions of one kind or another through which we can trace a decline of tribal independence and the rise of the federal government's legal and eventual moral control over the lives of Chippewa people. A summary of these jurisdictional provisions is outlined below. The first three treaties listed were negotiated primarily with Wyandots, Shawnee, Ottawa, and Potawatomi Indians, although Chippewa bands were included. The Chippewa land covered by each treaty is indicated in parenthesis under the council site:

Date	*Treaty*	*Jurisdictional Provisions*
1785	Fort McIntosh (Michigan)	(Art. V) Any person, including a U.S. citizen, who settled on Indian land forfeited the protection of the Government "and the Indians may punish him as they please." (Art. IX) Indians committing crimes against U.S. citizens would be delivered for trial by the tribe to the U.S.
1789	Fort Harmer (Michigan)	(Art. V) The tribes shall deliver Indians who commit crimes against citizens and such Indians would be tried under the laws of the Northwest Territory. U.S. citizens harming Indians were under the same jurisdiction, except: (Art. IX) Indians could punish white settlers on their land "as they see fit."
1795	Greenville (Michigan)	(Art. VI) Settlers on Indian land could be driven off by Indians or punished by the tribe "as they shall think fit." The U.S. Government also was granted the right to disperse and punish such settlers in order to protect Indian lands.
1825	Prairie du Chien (Wisconsin, Minnesota)	(Art. XIV) The treaty provided for a division of territory among the Sioux, Chippewa, Otoes, Winnebagoes, and Menominees. Disputes and territorial violations would be resolved by the tribes or by the U.S. Government.
1826	Fond du Lac (Lake Superior)	(Art. III) U.S. citizens were given the right to explore, prospect, and mine any minerals on Chippewa lands, but this did not change "existing jurisdiction."
1828	Green Bay (Illinois R., Fever R.)	(Art. I) The tribe surrendered jurisdiction over miners who might enter their land: "proper measures for their removal shall be referred to the President . . . ."
1833	Chicago (Illinois and So. Wisconsin)	(Art II) After ceding all of their Illinois lands, the Indians were allowed to remain for three years in southern Wisconsin "under the protection of the laws of the United States."
1837	Detroit (Michigan)	(Art. II) Whites who settled on Indian land could be removed and fined $500, presumably by the United States.
1842	La Pointe (Wisconsin, Minnesota)	(Art. II) Trade and Intercourse laws would remain in effect until altered by Congress. (Art. IV) Indians living on mineral lands could be removed by a Presidential order.

Date	*Treaty*	*Jurisdictional Provisions*
1854	LaPointe (Minnesota)	(Art. VIII) Liquor was prohibited on Indian lands.
1855	Washington, D.C. (Minnesota)	(Art. VI) Trade and Intercourse laws were made effective on the new reserves of the Pillager and Winnibigoshish bands, including laws which prohibited liquor. (Art. IX) Disputes with other Indians were to be referred to the President; the Pillagers and Winnibigoshish agreed to accept his decisions "and to respect and observe the laws of the United States so far as the same are to them applicable."
1855	Detroit (Michigan)	(Art. I) If two Indians disputed the same tract of allotted land, the Indian agent would decide who received it. (Art V) "The tribal organization of the Michigan Chippewas and Ottawas is hereby dissolved." General meetings of Indians were prohibited; difficulties and disputes among Indians had to be taken directly to the United States "without concurrence of other portions of their people."
1859	Sac and Fox Agency (Kansas)	(Art. I) All trade laws of the United States would be in full force. No whites except those employed by the government could enter the reserve without written permission of the agent or superintendent.
1863	Washington, D.C. (Minnesota)	(Art. VII) The treaty created a board of visitors from Christian churches who would oversee annuity payments and moral conduct on the reservation. (Art. VIII) Chiefs of the Mississippi, Pillager and Winnibigoshish bands of more than fifty persons would be paid $150 a year "to encourage and aid the said chiefs in preserving order." (Art. IX) Single persons, or any person not living with his wife, could not be employed on the reservations, Indians and missionaries excepted; Indians or mixed bloods who were morally unfit could not receive any benefits of the treaty.
1864	Washington, D.C. (Minnesota)	(Art. VII) A Christian board of visitors would report annually about general conditions on the

Date	*Treaty*	*Jurisdictional Provisions*
		reservation and the "moral deportment" of those living there.
		(Art. IX) Employees must reside with their families. Persons of full or mixed blood whose "fitness, moral or otherwise, is not conducive" to the tribe would not receive treaty benefits and could be expelled from the reservation.
		[These provisions are lacking in the Old Crossing Treaty of the same year.]
1864	Isabella Reserve (Michigan)	(Art. IV) The treaty created a board of visitors to inspect annually the vocational school. The Methodist Missionary Society was given "full and undisputed control" of the school and farm.
1867	Washington, D.C. (Minnesota)	(Art. VIII) Chippewas accused of crimes by the agent would be arrested by the local sheriff, tried, convicted and punished "in the same manner as if [they] were not a member of an Indian tribe."

Studying the Chippewa Treaties

It should be stressed to students that compiling such an outline only serves as an introduction to the topic and that a full legal understanding requires examination of statutes, court decisions, executive orders, administrative rulings of the Bureau of Indian Affairs and the Department of the Interior. Furthermore, it should be pointed out that omissions from treaties can be as significant as what is included. What remains important about treaties as against other legal documents is that, in theory, the Chippewas agreed to these provisions.

The general pattern for eighty-two years is quite clear. In 1785 Wyandots, Ottawas and Chippewas retained authority to remove or punish white settlers on their land, an authority which in 1795 was supplemented with U.S. assistance and which remained unquestioned in the treaties through 1825. In that year, the Treaty of Prairie du Chien affirmed Indian jurisdiction over other Indians. Breakdown of tribal autonomy began in the late 1820s with the loss of Indian control over miners. In Michigan, loss of control was completed by Article II of the 1837 Detroit Treaty, which limited sanctions to fines against squatters with these penalties apparently levied by the United States and not by the tribe. After 1837 reference to the Trade and Intercourse Act of 1834 began to appear in the treaties; this Act remained the only specific federal legislation governing conduct on Indian reservations until well after the end of the treaty period. In 1855 the Michigan Chippewas

agreed to their dissolution as a tribe and during the same year Minnesota Pillager and Winnibigoshish chiefs traveled to Washington where they accepted the President of the United States as arbiter in disputes with other Indians and submitted their people to the white man's law "so far as . . . to them applicable." During the 1860s the Chippewas agreed not only to the legal but to the moral jurisdiction of Christian whites over their lives. As a climax, in 1867 the bands placed themselves under local police and judicial authority "as if [they] were not member[s] of an Indian tribe."

The general development is quite obvious after a cursory reading of the treaty provisions. Less obvious, perhaps, are historical events which conditioned Chippewa autonomy. Students can now be encouraged to examine the ethnological and historical setting of treaties and of jurisdictional changes. Hopefully, examination of legal and moral jurisdiction in Chippewa treaties will arouse curiosity about pre-contact customs. Various tribal concepts of crime and social control should be explored; a brief introduction to relevant Indian customs may be found in the first chapter of William Hagan's book on Indian police and courts (Hagan 1966:10-18). Inquisitive students will want to pursue the issue after 1867 and on other reservations.[1]

Historical context must also be supplied to determine when and why Chippewa treaties became unilateral instead of bilateral agreements. Did this coincide with the loss of tribal jurisdiction in 1837; and, if so, was it due to pressure on the land, to the collapse of the fur trade, or to a combination of these and other factors?

Study of the Chippewa treaties likewise should lead one to inquire about a number of specific historical events. For example, the 1825 Prairie du Chien treaty was the direct result of a prolonged Sioux-Chippewa war, the complex ecological and economic causes of which are closely examined in Harold Hickerson's books (1962, 1970). The legal execution of four Sioux by Chippewas at Fort Snelling in 1827 provides evidence of effective native jurisdiction two years after the agreement at Prairie du Chien.

To understand provisions in the Fond du Lac and Green Bay treaties requires study of lead mining in northern Illinois and the reasons for the 1827 Winnebago War. If lead was the issue in 1828, during the next decade copper and iron became the stimulus for white intrusion along the northern Minnesota Indian frontier. Article VI of the 1842 LaPointe Treaty resulted directly from Douglas Houghton's geological surveys in the Lake Superior mineral regions beginning in 1830. After Houghton published his findings in 1841, a Chippewa treaty promptly followed. In 1844 the government issued the first mining permits to the Lake Superior Copper Company and miners quickly filled the area (Robbins 1962:139-142).

There is no doubt that passage of the Pre-emption Act of 1841, a measure marking the end of conservative federal land policy and restraint in

the settlement of the West also had a detrimental impact on Chippewa autonomy. Large land cessions began and soon it was deemed necessary to protect Minnesota Indians from miners, loggers, speculators, Indian agents – and from themselves. The ethical provisions of the 1863 treaty negotiated in Washington, D.C., were the fruit of Episcopal Bishop Henry Whipple's work on behalf of the Chippewas. A study of Whipple's influence in Minnesota, or of similar provisions in the 1864 Isabella Treaty in Michigan, requires examination of the humanitarian reform movement in Indian affairs and the extraordinary influence of the Christian churches during the remainder of the nineteenth century (Whipple 1899; Fritz 1963; Beaver 1966). Attention to conditions resulting from the 1863-1864 treaties will indicate that even married agents and Episcopal missionaries were not exempt from yielding to the temptations which reformers like Whipple sought to eliminate from the reservations. Nevertheless, the 1860s laid the foundation for the Bureau of Indian Affairs' role as ethical autocrat over Indian life, a role sustained by the courts in an 1888 decision, *United States v. Clapox* (35 Fed. 575).

Treaty study, furthermore, serves as essential preparation for the complex problems of twentieth century Indians. Chippewa jurisdictional disputes over the sale of school lands, taxation, sale of reclaimed and ceded lands, law enforcement, and regulation of native hunting and fishing have continued for the past seventy-five years between the tribe and the State of Minnesota, and among the Chippewas themselves.[2] The "last Indian uprising," a small-scale battle between Pillagers and the U.S. Army at Leech Lake in October of 1898, had its origin in questions of legal jurisdiction over liquor and timber (Roddis 1920). In the 1930s and 1940s the State's attempts to license wild rice harvests raised questions of jurisdiction and treaty rights, a problem which persisted into the 1960s (Coleman 1953; Head 1969). Most of these issues are by no means resolved today. In 1972 a study of criminal and civil jurisdiction at the Red Lake Reservation documented the chaos, confusion and irony of law enforcement on that reserve (Lawrence 1972). Also in 1972 threats of arrest and violence again flared at Leech Lake when Indians asserted hunting and fishing rights, thereby arousing many non-Indian cottage owners and the 200 resort operators on the reservation. After a federal court ruled that Chippewas were immune from Minnesota game laws, the tribe and the State agreed to a compromise which established a one dollar surtax on white sportsmen and allowed the tribe to enforce its own game laws against Indians; in turn, the Chippewas surrendered their right to commercial hunting and fishing (*Minneapolis Tribune* 1973).

A final advantage of developing the study of Indian history in terms of treaties is that it focuses a student's attention on what remains most distinctive and crucial in Indian-white affairs: the treaty relationship between tribes and the United States Government. With increasing Indian demands for

autonomy and justice, with the rise of organizations such as the American Indian Movement (AIM) and the Native American Defense Fund, and with more and more native attorneys appearing in court on behalf of their people, there is little chance that treaties or questions of legal autonomy for Indians will soon decline in importance.

NOTES

1. An example of late nineteenth century destruction of tribal jurisdiction and autonomy in the Indian Territory is given in detail by Arrell Gibson (1972:279-310). Vine Deloria's anthology, *Of Utmost Good Faith* (1971), has a definite point of view and much information about jurisdiction; but, though prepared for college students, it proves hard reading because most undergraduates lack the background to understand the issues which Deloria raises. To proceed from the treaties and the history to the courts would make his book more useful. For a general legal survey, Wilcomb Washburn (1971) is good. Among the classic court decisions concerning jurisdiction on reservations are: *Ex Parte Crow Dog* (109 U.S. 556); *U.S. v. Kagama* (118 U.S. 373); *Talton v. Mayes* (163 U.S. 376); *Native American Church v. Navajo Tribal Council* (272 F. 2d 131); *Colliflower v. Garland* (342 F. 2d 369); *Williams v. Lee* (358 U.S. 217); and most recently, *McClanahan v. Arizona* (March 27, 1973). Once the basic reference tools are known, legal research is exceptionally easy and students should be encouraged to master it.
2. See *Minnestoa v. Hitchcock* (185 U.S. 373); *U.S. v. Holt Bank* (270 U.S. 49); *Chippewa Indians v. U.S.* (301 U.S. 358); *State v. Jackson* (16 N. W. 2d 752); *Commissioner of Taxation v. Brun* (174 N. W. 2d 120); Public Law 280 (67 *Stat.* 590); and the Civil Rights Act of 1968 (82 *Stat.* 78).

REFERENCES

Beaver, R. Pierce
1966 *Church, state and the American Indian.* St. Louis, Concordia Press.
Cohen, Felix
1971 *Handbook of federal Indian law.* Albuquerque, The University of New Mexico Press.
Coleman, Sister Bernard
1953 The Ojibwa and the wild rice problem. *Anthropological Quarterly*, Vol. 26, No. 3 (July), pp. 79-88. Washington, Catholic University of America.
Deloria, Vine, Jr.
1969 *Custer died for your sins.* New York, Macmillan.
1971 *Of utmost good faith.* San Francisco, Straight Arrow Books.
Fritz, Henry M.
1963 *The movement for Indian assimilation, 1860-1890.* Philadelphia, University of Pennsylvania Press.
Gibson, Arrell
1972 *The Chickasaws.* Norman, University of Oklahoma Press.
Hagan, William T.
1961 *American Indians.* Chicago, University of Chicago Press.
1966 *Indian police and judges: experiments in acculturation and control.* New Haven, Yale University Press.

Hickerson, Harold
1962 The southwestern Chippewas: An ethnohistorical study. *Memoirs of the American Anthropological Association*, no. 92. Menasha, Wisconsin, American Anthropological Association.
1970 *The Chippewas and their neighbors.* New York, Holt, Rinehart and Winston.
Head, Douglas M.
1969 Wild rice. Opinion of the Attorney General of Minnesota. (Copies are available from the Native American Defense Fund, 1506 Broadway, Boulder, Colorado, 80302).
Kappler, Charles J.
1972 *Indian affairs: laws and treaties.* Vol. 2. New York, Interland Publishing, Inc.
Lawrence, William L.
1972 Tribal injustice: the Red Lake court of Indian offenses. *North Dakota Law Review*, Vol. 48, No. 4 (Summer), pp. 639-659. Grand Forks, University of North Dakota School of Law.
Minneapolis Tribune
1973 Leech Lake agreement is law. April 25, p. 4A.
Nolan, Edward W.
1959 Bibliography of the Yakima. Typescript, n. p. Copy on file with the author.
Robbins, Roy M.
1962 *Our landed heritage: the public domain, 1776-1936.* Lincoln, University of Nebraska Press.
Roddis, Louis
1920 The last Indian uprising in the United States. *Minnesota History*, Vol. 3, No. 5 (February), pp. 273-290. St. Paul, Minnesota Historical Society.
Spicer, Edward H.
1969 *A short history of the Indians of the United States.* New York, Van Nostrand-Reinhold Co.
Washburn, Wilcomb
1964 *The Indian and the white man.* Garden City, Anchor Books.
1971 *Red man's land – white man's law.* New York, Scribners.
Wax, Murray L.
1971 *Indian Americans: unity and diversity.* Englewood Cliffs, Prentice Hall.
Whipple, Henry B.
1899 *Lights and shadows of a long episcopate.* New York, Macmillan.
Yakima Tribal Council
1955 *Treaty centennial, 1855-1955: the Yakimas.* Edited by Click Relander. Yakima, Republic Press.

References

The Ojibwa and the Wild Rice Problem
Bernard Coleman
Anthropological Quarterly, Vol. 26, No. 3, New Series Vol. 1. (Jul., 1953), pp. 79-88.
Stable URL:
http://links.jstor.org/sici?sici=0003-5491%28195307%2926%3A3%3C79%3ATOATWR%3E2.0.CO%3B2-W