

Michigan State University College of Law

INDIGENOUS LAW & POLICY CENTER

OCCASIONAL PAPER SERIES

Michigan Indian Treaties and
the Asian Carp

Erin Lillie, 3L

Indigenous Law & Policy Center Working Paper 2010-05

April 19, 2010

The Asian Carp Invasion

As the name implies, Asian carps originated in eastern Asia and are not indigenous to the Great Lakes. Asian Carp Workgroup, *Draft Asian Carp Control Strategy Framework 4* (2010) [hereinafter *Framework*]. "Asian carps" are actually four distinct species of carp: bighead, black, grass, and silver. *Id.* Commercial fish farms in the southern states imported and raised the bighead, grass and silver carp for food and to clean polluted water. *Id.* The black carp juveniles are indistinguishable from the young of the harmless grass carp, and were included accidentally in grass carp shipments. *Id.* Bigheads can get huge - five feet long, 100 pounds. *Id.* The black carp get even bigger. *Id.* at 5. Silver carp are also known as flying carp, because they shoot out of the water, scared by the noise of boat motors, with such velocity and altitude that they can hurt the people in the boats. *Id.*

Asian carps escaped from their holding ponds during floods in the 1980's and 1990's, according to the prevailing theory. Frequently Asked Questions - Asian Carp Management, <http://asiancarp.org/RegionalCoordination/faq> (last visited Mar. 28, 2010) [hereinafter *FAQ*]. They fruitfully multiplied, found their way into the Mississippi River, and headed north. The carp are voracious, out-eating native species. *Id.* On their way north, they have been blamed for wiping out fishery after fishery on the Mississippi and Missouri River systems, as the only fish now available are Asian carps. The Threat to the Great Lakes – Asian Carp Management, <http://asiancarp.org/RegionalCoordination/greatlakesthreat.asp> [hereinafter *Great Lakes Threat*].

The Great Lakes are directly connected to the Mississippi River system by the Chicago Ship and Sanitary Canal (CSSC). *Framework, supra*, at 4. Once in the Great Lakes, Asian carps would likely escape control efforts. *FAQ, supra*. The U.S. Fish and Wildlife service estimated in 2006 that "Asian carps could cause great economic impact" to Great Lakes commercial and sport fisheries with an estimated combined value of \$7 billion. *Great Lakes Threat, supra*. Federal and state agencies in built electronic barriers to repel fish 30 miles downstream from Lake Michigan to prevent Asian carp from reaching the Great Lakes through Chicago. However, the barriers have been off-line several times since 2005. *See* University of Wisconsin Sea Grant Institute, Dispersal Barrier, Jan. 29, 2010 entry, <http://seagrant.wisc.edu/exotics/Default.aspx?tabid=393> [hereinafter *Dispersal Barrier*]. In addition, a 2008 flood caused the Des Plaines River to flood and connect to the CSSC upstream from the barrier. *Id.* at Dec. 8, 2009 entry. The final obstacle for Asian carp are locks and gates separating Lake Michigan with various Chicago waterways, although the gates could not keep out juvenile fish and the locks are frequently opened for commercial and recreational boat traffic. *See Framework* at 6-7.

The Asian Carp Workgroup is comprised of the Illinois Department of Natural Resources and four federal agencies: the Environmental Protection Agency, the Army Corps of Engineers, the Fish and Wildlife Service, and the Coast Guard. *See Partners Roles and Responsibilities - Asian Carp Management*, <http://www.asiancarp.org/RegionalCoordination/partners.asp> (last visited Mar. 28, 2010). In February, 2010, the Workgroup released a Draft Asian Carp Control Strategy Framework. The Workgroup plans to improve existing efforts at stopping the Asian carp, including building a new electronic barrier, increasing efforts at determining the location and numbers of Asian carps, and studying the Asian carps to more accurately assess the threat

they pose. *See generally Framework*. It also plans to study the economic, sanitation, and flood-control effects of permanently closing the Chicago locks. *Id.*

At any rate, no one really knows for sure where the Asian carp are, or in what numbers. No live Asian carp have been found upstream from the barriers, or have been caught in Lake Michigan. *FAQ, supra*. But, as everyone knows, catching fish is easier said than done. Fisheries scientists are using a new technology called environmental DNA, or eDNA, to test for the presence of Asian carp. *Id.* The main concern is not that a few Asian carp will make it to the Lake, but that a breeding population will do so - what the Workgroup calls "an invasion." *Framework* at ES-2. Asian carp eDNA has been found upstream of the barriers. *Id.* In late 2009, scientists also found Asian carp eDNA in waters past the last physical barrier to Lake Michigan. *See Dispersal Barrier, supra*. This raises the possibility that at least one Asian carp, and perhaps invasion-strength numbers of them, are already free to enter Lake Michigan.

Given the risk, the State of Michigan is not impressed with the Workgroup's efforts. It is trying to re-open a 90-year-old lawsuit in the Supreme Court of the United States to force the re-engineering of the CSSC to permanently disconnect the Great Lakes from the Mississippi River. *See Stop Asian Carp, What Michigan's Lawsuit Seeks*, <http://stopasiancarp.com/michlawsuit.html> (last visited Mar. 28, 2010). Michigan also requested that the Supreme Court order the immediate closure of two of the Chicago locks before it even considers the lawsuit. The Court denied Michigan's first request. *See Gabriel Nelson, Supreme Court Again Rejects Injunction in Asian Carp Case*, [nytimes.com](http://www.nytimes.com/gwire/2010/03/22/22-greenwire-supreme-court-again-rejects-injunction-in-asia-55113.html) (March 22, 2010) <http://www.nytimes.com/gwire/2010/03/22/22-greenwire-supreme-court-again-rejects-injunction-in-asia-55113.html>. When scientists found eDNA from Asian carp on the lake side of one of those locks, Michigan asked the Supreme Court to reconsider, but the Court denied that

request, too. *Id.* While the Supreme Court considers whether to re-open 90-year-old lawsuit, or let Michigan start a new one, the Obama administration is also considering what actions it will take, although it has refused to order the closure of the locks or re-engineering of the CSSC. *Id.*

The risk of invasion is also too great for the Chippewa Ottawa Resource Authority (CORA), a consortium of Michigan Indian tribes that participate in the management of Great Lakes fisheries. *See* Chippewa Ottawa Resource Authority, *About Us*, <http://www.1836cora.org/aboutus.html> (last visited Mar. 28, 2010). As discussed below, the Tribes have a federally protected right to fish in Lake Michigan. The CORA has also called for the re-engineering of the CSSC to disconnect the Great Lakes from the Mississippi. *See* Chippewa Ottawa Resource Authority, *Protect Great Lakes Watershed From Asian Carp*, Res. 12-17-09 (Dec. 17, 2009), *available at* <http://www.asiancarp.org/Documents/AsianResolution2009.pdf>. However, neither Michigan's recent Supreme Court filings, nor the "stopasiancarp.com" website created by Michigan Attorney General Mike Cox to publicize Michigan's legal efforts, contain a single mention of the CORA's position or the tribes' federally protected rights. According to Grand Traverse Tribe chairman Derek Bailey, the tribes are "considering an alternative litigation strategy" based on these rights. Derek Bailey, *Editorial: Forum: Work Together Against Asian Carp*, *Traverse City Record-Eagle* (Feb 20, 2010), http://www.record-eagle.com/archivesearch/local_story_051223041.html. This paper takes a closer look at the legal basis of a possible alternative to the State of Michigan's current efforts.

The Asian carp invasion is bad news: certainly for fish and fishers, and maybe for the American economy. For Indians in Michigan, it would be the latest, and perhaps final, assault on their way of life - a way of life protected by treaty and federal law. The treaty right to fish

implies something else: a property right to access those fish and to protect the habitat of those fish, and it is a property right that the federal government is required to protect.

Tribes have a federal right to fish secured by treaty

A. A Quick Start Guide to Indian Treaties

Since fishing is essential to the cultures of Michigan tribes, it should come as no surprise that fishing has also been at the center of the tribes' legal struggles as well. Indeed, it was the tribes' successful fight with the State of Michigan over fishing rights that developed into a larger success: the restoration of a government-to-government relationship between the tribes and the federal government. At the heart of the tribes' legal fights and fishing rights is a treaty between five Michigan tribes, the State of Michigan, and the United States - The 1836 Treaty of Washington.

As so much depends upon the 1836 treaty, it is worthwhile here to discuss Indian treaties in more general terms. First, a treaty, including an Indian treaty, is federal law. U.S. Const. art. VI (“This Constitution, and the laws of the United States which shall be made in pursuance thereof; *and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land;* and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.”) (emphasis supplied). Like any federal law, it remains in effect until it is later abrogated by Congress. *See United States v. Dion*, 476 U.S. 734 (1986). Indian treaties were the primary means by which the new American federal government attempted to create peaceful conditions in its western territories at a time when Indian tribes posed a legitimate military threat. Charles F. Wilkinson & John M. Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows or*

Grass Grows Upon the Earth - *How Long a Time is That?*, 63 Cal L. Rev. 601 (1975). As American settlers pushed westward, the American military position improved as the Indians' position deteriorated. *Id.* The treaties were thus "imposed upon the [tribes] and they had no choice but to consent." *Id.* Since the US was also found to have a trust relationship with tribes, which is discussed in the next section, courts have developed three main rules, or canons, to use when interpreting Indian treaties to uphold the "reasonable expectations of the weaker party." *Id.*

1. Ambiguous expresses must be interpreted in favor of the Indians, *see McClanahan v. State Tax Comm'n*, 411 U.S. 164, 174 (1973).
2. Indian treaties must be interpreted as Indians themselves would have understood them, *see Choctaw Nation v. Oklahoma*, 397 I.S. 620, 631 (1970).
3. Indian treaties must be liberally construed in favor of the Indians. *Id.*

In addition to those general treaty interpretation canons is the concept of Indian reserved rights. The landmark case is *United States v. Winans*, 198 U.S. 371 (1905). In that case, the Supreme Court interpreted an 1859 treaty between the U.S. and the Yakama Nation in Washington State, *Id.* at 377. The Yakama Nation was one of several tribes in the Pacific Northwest that signed nearly identical treaties; the treaties are called Stevens Treaties because "[n]egotiation of the treaties on behalf of the government was the responsibility of Isaac Ingalls Stevens, the first governor of the Washington Territory and Superintendent of Indian Affairs for the Washington Territory." Michael C. Blumm & Brett M. Swift, *The Indian Treaty Piscary Profit and Habitat Protection in the Pacific Northwest: A Property Rights Approach*, 69 U. Colo. L. Rev. 407, 426 (1998). Article III of the treaty stated that the Nation would have "the right of taking fish at all usual and accustomed places, in common with citizens of the Territory." *Winans*, 198 U.S. at 378. Winans, who owned property that included a traditional Yakama

fishing spot, argued that the treaty language meant that the Yakama had the same fishing rights as everyone else, and that the Indians had to stay off his property. *Id.* at 379. The Supreme Court, using the canons to interpret the 1859 treaty, decided that the Yakama would not have understood the treaty to put them on equal footing as everyone else, subject to state property law. *Id.* at 380. Instead, the Yakama had agreed to allow the newcomers to fish in certain places that, up until that point, had been exclusive to the Yakama. "In other words," wrote Justice McKenna, "the treaty was not a grant of rights *to* the Indians, but a grant of rights *from* them - a reservation of those not granted." *Id.* at 381 (emphasis added). The treaty didn't allow the Yakama to fish off the reservation; it allowed *everyone else* to fish off the reservation. Thus, the Yakama right to fish where they had always fished remained in effect, and all the private property in the treaty zone was subject to the Yakama fishing right.

Indian fishing rights are so fundamental that an Indian treaty is presumed to reserve those rights, even if fishing rights are not mentioned in the treaty. See *Menominee Tribe v. United States*, 391 U.S. 404 (1968). In other words, Indians have fishing rights unless a treaty or other federal law specifically says differently, or the tribes later gave up those rights. In addition, treaty-protected fishing rights are federal law, superior to state law.

B. The Treaty of 1836

Unlike the 1859 treaty with the Yakama Nation, the 1836 treaty between the United States and the tribes in Michigan does not mention fishing rights. Treaty of Washington, 7 Stat. 491, March 28, 1836. However, under the rules discussed above, that means a court interpreting the 1836 treaty should find that the tribes reserved those fishing rights unless the tribes later gave them up, or unless the 1836 treaty was later abrogated by Congress. Indeed, that is what courts

did. In *People v. LeBlanc*, the Michigan Supreme Court, applying the Indian treaty canons and the doctrine of Indian reserved fishing rights, decided that the Michigan tribes never gave up their right to fish in Lake Michigan, and that the right had never been abrogated by Congress. 399 Mich. 31 (1976). Later, a federal court decided that the tribes also reserved their right to fish in inland waters as well. See *United States v. Michigan*, 471 F. Supp. 192 (W.D. Mich. 1979), *aff'd in relevant part*, 653 F.2d 277 (6th Cir. 1981), *cert. denied*, 454 U.S. 1124 (1981). These court decisions led the State of Michigan to enter into regulation agreements with Michigan tribes, called consent decrees, in which the state conceded that the tribes had never lost their right to fish in Lake Michigan or inland. See *Consent Decree, United States v. Michigan*, No. 2:73 CV 26 (W.D. Mich., Nov. 2007), *available at* <http://www.gtb.nsn.us/consent2007.html>.

In short, the 1836 treaty, which did not mention fishing rights at all, reserved to the Michigan tribes all of their fishing rights and remains federal law.

Tribes have a property interest in the fishery

The federally protected fishing right would be empty if there were no fish to catch, yet the Asian carp invasion poses exactly this threat. The key is whether the right to go fishing in Lake Michigan also includes the right to actually catch fish in Lake Michigan, and whether it further implies the right to protect the fishery habitat to insure that there will be fish to catch. A century of litigation over similar issues in western Washington demonstrate that a treaty-protected right to fish does include a right to protect habitat.

As discussed earlier, the Winans opinion in 1905 concluded that the Stevens Treaties allowed tribes to access fishing areas on non-reservation lands, even though those lands became private property. “A property lawyer would recognize the property right created by the treaty as a

profit à prendre: the right to go on another's property and take and remove a natural resource.” Blumm & Swift, *supra* at 445 (citing Restatement of the Law of Property (Servitudes) (Tentative Draft No. 1, 1989) at xxi (“A profit creates the right to enter and remove a physical substance from land in the possession of another. It imposes a duty on the owner and possessor of the land not to interfere with removal of the substance.”)). “In this case the subject of the profit à prendre is a fishery, which common law recognized as a piscary profit à prendre.” *Id.* (citing 8 *Thompson on Real Property* § 65.02(b) (David A. Thomas ed., 1994) (listing piscary profits as one of the four principal kinds of common law profits)).

Later litigation addressed the scope of the Stevens Treaty tribes’ property rights in this very valuable fishery. In *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 674 (1979), the parties argued about whether the tribes also had a right to salmon created by privately-owned hatcheries. In deciding that the tribes do have that right, the Supreme Court added more support to the piscary profit doctrine, concluding that the Stevens Treaties protected not only access to the fishery, but also a quota – a share of the fishery that would support “a moderate living.” *Id.* at 687. (This standard has been criticized as difficult to define and apply. *See* Blumm & Swift, 458 at n. 246.) Thus, the piscary profit has two separate components: an affirmative easement to access tribal fishing grounds and a negative servitude limiting activities that jeopardize the supply of fish necessary to furnish the tribes with a moderate living. *United States v. Oregon*, 718 F.2d 299, 304 n.6 (9th Cir. 1983).

Habitat protection was one of the many issues litigated in the oldest active federal lawsuit, which, like the other cases discussed above, is centered on the Stevens Treaties and the salmon fisheries of western Washington. The litigation began in 1966 and is ongoing. In the “Phase II” opinion, *United States v. Washington*, 506 F. Supp. 187 (1980), the district court held

that “implicitly incorporated in the treaties’ fishing clause is the right to have the fishery habitat protected from man-made despoliation.” *Id.* at 190. It then issued a declaratory judgment requiring the state “demonstrate that any environmental degradation of the fish habitat proximately caused by the State’s actions (including the authorization of third parties’ activities) will not impair the tribes’ ability to satisfy their moderate living needs.” *Id.* at 207. On appeal, the Ninth Circuit struck down this declaratory judgment as too broad. *United States v. Washington*, 759 F. 2d 1353, 1357 (9th Cir. 1985). It held that the treaty parties must litigate environmental issues on a case-by-case basis. *Id.*

But the appeals court reversal of the district court’s order did not necessarily strike down the reasoning behind the order. The most recent opinion in the *Washington* saga concerned the negative impact on fisheries of roadway culverts built too high above streams for salmon to use. In the so-called Culverts Opinion, the district court concluded that the Ninth Circuit did not “reject the idea of a treaty-based duty” to protect fishery habitat from man-made despoliation, *United States v. Washington* (Culverts Opinion), No. C70-9213, Subproceeding No. 01-1, 2007 WL 2437166 (W.D. Wash. Aug. 22, 2007) at 6. Thus, the habitat-protection right still exists under the Stevens Treaty. (A right of habitat protection implied by a piscary profit is not an absolute right. Under the common law, the piscary profit entitled the holder to protection against “unreasonable interference.” For a discussion of the unreasonable interference standard as it applies to new development, *see generally* Blumm & Swift at 494-500.)

The Michigan tribes also have a right to habitat protection. The Stevens Treaty tribes have a piscary profit derived from fishing rights protected by federal treaty. Since the Michigan tribes also have fishing rights protected by federal treaty, they also have the rights derived from the treaty, including the piscary profit and the right to protect fishery habitat. Indeed, the

Michigan tribes may have a stronger claim for the piscary profit and habitat protection right. As discussed earlier, Indian fishing rights are presumed to be reserved unless a treaty specifically states otherwise. The Stevens treaties mention fishing rights – indeed, the “in common with” treaty language spawned a century of lawsuits, with no end in sight. Thus, the Stevens treaties tribes bargained away some, but not all, of their rights. On the other hand, the 1836 treaty is silent on the matter of fishing rights. Thus, the parties to that treaty surrendered none of their fishing rights. In short, if the Stevens Treaty protected a right to fishery habitat protection, the 1836 treaty protected that right even more.

The Indian Trust Doctrine requires federal protection of the tribes' property

An easement owned by tribes is, of course, property owned by tribes, and tribal property should be protected by the federal government under the Indian Trust Doctrine. “[T]he trust responsibility of the United States is most readily invoked with regard to the active management of Indian assets.” William C. Canby, Jr., *American Indian Law* 43 (4th ed. 2004).

The Indian Trust Doctrine is at the heart of the relationship between the federal government and tribes, although “it is very difficult to mark the boundaries of this relationship, and even more difficult to assess its legal consequences.” *Id.* at 34. The trust relationship is old. It has a Constitutional foundation. *See* U.S. Const. art. I, sec. 8, cl. 3 (Congressional power “[t]o regulate commerce with foreign nations, and among the several states, and *with the Indian tribes*”) (emphasis added), *and* U.S. Const. art. II, sec. 2, cl. 2 (The President “shall have power, by and with the advice and consent of the Senate, to make treaties”). *See also* U.S. Const. art. IV, sec. 3, cl. 2 (“Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.”). In the early 19th

Century, the Supreme Court declared that Indian tribes were dependent upon the federal government for protection, *Worcester v. Georgia*, 31 U.S. 515 (1832). Because of this relationship the federal government owed tribes protection from hostile state governments. See *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942). However, Congress can choose unilaterally to ignore this duty. *United States v. Wheeler*, 435 U.S. 313, 323 (1978).

At the very least, the federal government owes to tribes some kind of "duty of protection." William H. Rodgers, Jr., *Environmental Law in Indian Country*, § 1:9(B) (2009). According to Prof. Rodgers, the trust protection is both procedural and substantive. The procedural protection allows courts to conduct hard-look reviews of agency action, to see if the agency properly considered its impact on tribes. *See Id.* at § 1:9(C). Agencies must consult with tribes prior to taking action. *See Exec. Order 13,175* (2000) (titled "Consultation and Coordination With Indian Tribal Governments"). The substantive trust duty is supposed to protect Indian interests, including property, although the federal government is not always legally bound to provide that protection. An important test is whether the property is under the federal government's "control or supervision." *See United States v. Mitchell*, 463 U.S. 206 (1983) (Mitchell II). For example, the Supreme Court found that the federal government owed a tribe money for allowing a fort on an Indian reservation to fall into disrepair while the federal government itself was using it. *See United States v. White Mt. Apache Tribe*, 537 U.S. 465 (2003). The "control" necessary to make the federal duty legally enforceable seems to be close to ownership, unless a federal statute expressly states that the government owes tribes a legally enforceable duty. Thus, the Supreme Court found no legal duty when the Secretary of Interior undermined the a tribe's negotiations with a coal company by announcing that he would withhold his approval, required under federal law, unless the tribe settled for less; the Court found that the

federal statutes at issue did not expressly create a duty to get the best price for the tribe. See *United States v. Navajo Nation*, 537 U.S. 488 (2003).

Conclusion

If Asian carp enter the Great Lakes in sufficient numbers, they could wipe out existing fish stocks and the fisheries, worth billions of dollars, upon which those stocks are based. In addition, the fisheries are at the center of treaty rights held by Indian tribes in Michigan - treaty rights protected by federal law. The treaty right to fish is a property right, and the federal government has a trust obligation to the tribes to protect tribal property. In addition, the tribes' right to fish implies a right to protect the fishery habitat. As the Asian carp invasion is a clear threat to the Great Lakes fishery habitat, the federal government must weigh its obligation to protect tribal property as it acts to keep the carp from reaching Lake Michigan. However, there is currently no mention of tribal rights in either the current federal Asian carp plans, or in lawsuits demanding more aggressive action. Those legal efforts could be more successful if they also sought to enforce the tribes' federal rights.