COMMENT

WOLVES, LONE AND PACK: OJIBWE TREATY RIGHTS AND THE WISCONSIN WOLF HUNT

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In 2012, Wisconsin authorized the first state hunt of gray wolves. Wisconsin's interest in wolf depredation is legitimate: the growth in wolf population has exponentially increased human-wolf conflicts and state expense. Yet, Wisconsin shares these wolves; 83 percent of gray wolves reside on Ojibwe reservations or on territory ceded by the Ojibwe, where the Tribes still have resource rights. The Tribes vehemently oppose the wolf hunt. The Ojibwe maintain a strong cultural kinship with wolves and have traditionally prohibited wolf hunting. The Tribes named wolves a "tribally protected species," asserting a right to protect all the wolves shared with Wisconsin. Historically, the Tribes and the State cooperatively managed shared resources. However, the State initiated the wolf hunt despite tribal protestations, instigating the first break from cooperative management in decades. Both sovereigns have legitimate and conflicting interests and appear to risk their first major treaty rights litigation in decades.

This Comment analyzes the extent of each sovereign's wolf rights in light of biological research and existing Indian law precedents. The first issue is the scope of the State's obligation to respect the Tribes' sovereign rights to protect and perpetuate reservation wolf packs. The second issue is the extent of the Tribes' rights to protect ceded-territory wolves away from reservations. This Comment argues that the Tribes can protect and perpetuate reservation wolves as a component of inherent sovereignty. Wisconsin must implement a wolf policy that respects that sovereignty, including a hunt-free "buffer zone" of some wolf territory directly adjoining the reservation. However, the Tribes' claim to protect all shared wolves is untenable, as tribal rights over wolves away from the reservation are much weaker. But the Tribes have rights correlated to those wolves and are entitled, at minimum, to a policy that ensures species survival; additionally, the Tribes can consider other options to protect wolves. Ultimately, this Comment proposes that both sovereigns can and should resolve this conflict through negotiation, continuing the tradition of cooperative management, and avoiding lengthy and expensive litigation.

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INTRODUCTION

The Creator told Wenaboozhoo[1] *and Ma'iingan*,[2] *"The two of you are brothers. Both of you must go and walk, and share the Earth, and visit all its places." Wenaboozhoo and Ma'iingan walked together, and came to know the Earth and all its places. They grew very close to each other; they became brothers. In their closeness, they realized that they were family to all the Creation.*

When they had completed the Creator's task, they talked with the Creator once again. The Creator said, "From this day on, you are to separate your paths, but they will be linked. You must go different ways, but what shall happen to one of you will also happen to the other."[3]

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1. Wenaboozhoo (or Waynaboozhoo, or Nanaboozhoo, or Manabosho) is the cultural hero and trickster figure of traditional Anishinaabe teachings. He commonly represents the spirit of the Anishinaabe people. *See* THOMAS PEACOCK & MARLENE WISURI, OJIBWE WAASA INAABIDAA: WE LOOK IN ALL DIRECTIONS 28 (2002); WILLIAM WARREN, HISTORY OF THE OJIBWAY PEOPLE 67 (2d. ed. 1984); *see generally* EDWARD BENTON-BANAI, THE MISHOMIS BOOK: THE VOICE OF THE OJIBWAY (2d. ed. 2010).

2. Ma'iingan (ma-ENG-gun) is the Ojibwemowin name for the wolf. JOHN D. NICHOLS & EARL NYHOLM, A CONCISE DICTIONARY OF MINNESOTA OJIBWE 75 (1995).

3. Wenaboozhoo stories are traditionally told orally, and only under certain specific circumstances; however, this teaching has been published before, so it seems acceptable to retell it here. *See* BENTON-BANAI, *supra* note 1, at 8 (telling a version of this story, and adding, "[w]hat the Grandfather said to them has come true. Both the Indian and the wolf have come to be alike and have experienced the same thing . . . . Both have a

In December of 2011, the U.S. Department of the Interior removed the gray wolf from the endangered species list.[4] Soon after, the State of Wisconsin passed Act 169,[5] ordering the state Department of Natural Resources ("DNR") to authorize and regulate the hunting and trapping of gray wolves.[6] The majority of these wolves reside in a "core wolf area[]" in northern Wisconsin.[7] The hunting territory overlaps extensively with the territory the Lake Superior Ojibwe ceded to the United States.[8] The Tribes have treaty-protected usufructuary rights in the ceded territory,[9] sharing these resources with the State.[10] Of the 201 wolves authorized for the first hunt, 167 (83 percent) were located within the ceded territory, shared between both sovereigns.[11]

The Tribes unanimously oppose the wolf hunt. In a letter to the DNR, the Voigt Intertribal Task Force ("Task Force") reminded the State that "Anishinaabe[12] teachings instruct that ma'iingan [the wolf] is a brother to the Anishinaabe and that the health and survival of the Anishinaabe people is tied to that of ma'iingan."[13] The literature discussing traditional Ojibwe teachings[14] and recent sociological

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Clan System and a tribe. Both have had their land taken from them . . . . [B]oth have been pushed very close to destruction").

4. 76 Fed. Reg. 81666-01 (Dec. 28, 2011).

5. 2011 Wis. Act 169.

6. *Id*.

7. 76 Fed. Reg. 81666-01, 81673 (Dec. 28, 2011).

8. *See* Treaty with the Chippewas, Wis.-Chippewas, Oct. 4, 1842, 7 Stat. 591; Treaty with the Chippewas, Wis.-Chippewas, July 29, 1837, 7 Stat. 536. *See also* Kenneth D. Nelson, *Wisconsin, Walleye, and the Supreme Law of the Land: An Overview of the Chippewa Indian Treaty Rights Dispute in Northern Wisconsin*, 11 HAMLINE J. PUB. L. & POL'Y 381, 384–386 (1990) (detailing the Ojibwe territory ceded by treaty, and including a map).

9. Usufructuary rights, the right to use or enjoy something, generally refer to hunting, fishing, and gathering rights when used in a treaty. *See United States v. Bouchard*, 464 F. Supp. 1316, 1321 (W.D. Wis. 1978).

10. *See Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, 700 F.2d 341, 343 (7th Cir. 1983) (defining usufructuary rights as including at least the treaty-reserved off-reservation hunting, fishing, trapping, and gathering rights).

11. Letter from Cathy Stepp, Wis. Dep't of Natural Res., to James E. Zorn, Great Lakes Indian Fish & Wildlife Comm'n (Aug. 15, 2012) [hereinafter DNR Letter], *available at* http://media.jsonline.com/documents/DNR_Response_on_wolf_season_081612.pdf.

12. While there are sizeable connotative and historical distinctions among the various names for the Tribes, for the purposes of this article the terms "Ojibwe," "Ojibway," "Chippewa," and "Anishinaabe" will be used interchangeably, as they all refer to the same group of people.

13. Letter from James E. Zorn, Great Lakes Indian Fish and Wildlife Commission, to Cathy Stepp, Wis. Dep't of Natural Res. (Aug. 9, 2012) [hereinafter GLIFWC Letter], *available at* http://media.jsonline.com/documents/tribes_wolfhunt_090912.pdf.

14. *See* BENTON-BANAI, *supra* note 1.

studies[15] recognize the vast cultural importance of ma'iingan. The Tribes oppose the wolf hunt as "ecologically unsound, culturally inappropriate, violative of [tribal] rights, and potentially unsustainable."[16] The Tribes note that they have "a very different management goal for wolves than the State's current goal,"[17] and that the discrepancy in goals makes it "impossible to set agreed upon harvestable surplus numbers."[18] In response, the DNR asserted that the tribal usufructuary right is "a resource harvesting right, not a resource preservation or enhancement right infringing on the State's management authority."[19] The State believes it fully respects the Tribes' rights by making half of the "harvestable surplus" of wolves within the ceded territory available for the tribal harvest.[20]

This fundamental difference in perspective drives the current dispute: the State assumes that tribal rights extend only as far as taking the number of wolves the State allows them to kill,[21] while the Tribes believe they are entitled to protect "all wolves in the Wisconsin ceded territory."[22] The State's assumption that the Tribes' rights extend only to taking wolves is the narrowest interpretation available, and almost certainly incorrect.[23] However, the Tribes must respect that the State has a legitimate sovereign interest in wolf depredation.[24] The DNR must follow the will of the legislature.[25] Human-wolf conflicts have cost the State $1.5 million since 1985.[26] With the recovering wolf population, this cost has only escalated; Wisconsin paid out a record $215,000 for wolf depredations in 2012.[27] The Tribes claim all wolves in the ceded territory, but it would be almost impossible for any court to grant them such authority to the detriment of Wisconsin's sovereignty.[28]

The State's management of wolves has been one-sided and infringes upon tribal sovereignty. The Wisconsin DNR determined target

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15. *See* Victoria Shelley et al., *Attitudes to Wolves and Wolf Policy among Ojibwe Tribal Members and Non-tribal Residents of Wisconsin's Wolf Range*, 16 HUMAN DIMENSIONS OF WILDLIFE 397, 397–413 (2011).

16. GLIFWC Letter, *supra* note 13.

17. *Id*.

18. *Id*.

19. DNR Letter, *supra* note 11.

20. *Id*.

21. *Id*.

22. GLIFWC Letter, *supra* note 13.

23. *See infra* Parts II.A, III.B.

24. The State's legitimate interest can be a balancing factor in analyzing tribal-state conflicts. *See McClanahan v. State Tax Comm'n*, 411 U.S. 164, 171 (1973).

25. 2011 Wis. Act 169.

26. Wisconsin Annual Wolf Damage Payment Summary, *available at* http://dnr.wi.gov/topic/wildlifehabitat/wolf/documents/WolfDamagePayments.pdf.

27. *Id*.

28. *See* discussion *infra* Part III.A.

populations, quotas, territories, and methodologies of depredation with little regard to tribal input.[29] If the parties litigate this conflict, the Tribes can draw on a substantial body of court decisions,[30] long-standing public policy,[31] and legislative acts[32] to show that the Tribes have rights to protect and perpetuate reservation wolves[33] and some off-reservation rights as a necessary corollary to off-reservation resource rights.[34]

In order to reconcile the difference in management goals and effectuate the rights of the respective sovereigns, the policy makers of the Tribes and the State must abandon the mindset that "where trust and respect are in short supply and cordial relations give way to the notion that the first sovereign to blink loses everything."[35] Cooperative management is the best-known model for enacting the Tribes' rights while advancing Wisconsin's legitimate interest in wolf depredation.[36] The alternatives include protracted and bitter public disputes and/or lengthy, expensive litigation that will sow uncertainty over wolf policy.[37]

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29. These decisions were made pursuant to DNR plans and studies. *See generally* WIS. DEP'T OF NATURAL RES., WISCONSIN WOLF MANAGEMENT PLAN (Oct. 27, 1999).

30. *See, e.g.*, *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin* (*LCO VII*), 740 F. Supp. 1400, 1401–02 (W.D. Wis. 1990) (condoning cooperative management of deer population quotas in the ceded territory); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin* (*LCO IV*), 668 F. Supp. 1233, 1242 (W.D. Wis. 1987) ("[T]ribes may regulate their members exclusive of state regulation so long as the tribal self-regulation is effective.").

31. *See, e.g.*, WIS. DEP'T OF NATURAL RES., WISCONSIN'S DEER MANAGEMENT PROGRAM: THE ISSUES INVOLVED IN DECISION-MAKING 3 (2d. ed. 1998) ("In court decisions and in agreements in the late 1980's, six Wisconsin Ojibwa tribes and the State of Wisconsin agreed to strive for consensus in the management of deer in the Ceded Territories . . . . This cooperative management includes establishing deer management unit boundaries and over-winter deer population goals for the deer management units in the Ceded Territories. These discussions take place on a government-to-government basis . . . ."). Cooperative management of other hunted mammals, prior to wolves, has not been not necessary due to the size of their respective populations. *LCO VII*, 740 F. Supp. at 1412.

32. *See, e.g.*, 2007 Wis. Act 27 (modifying Wisconsin Statutes to recognize wardens of the Great Lakes Indian Fish and Wildlife Commission to have protections and responsibilities equal to their DNR counterparts within the ceded territory).

33. *See infra* Part II.

34. *See infra* Part III.B–C.

35. Matthew L.M. Fletcher, *Reviving Local Tribal Control in Indian Country* 14 (Feb. 3, 2006), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=879808. The paper posted on SSRN is a longer version of the article published as Matthew L.M. Fletcher, *Reviving Local Tribal Control in Indian Country*, 53 FED. LAW. 38, 42 (2006).

36. Matthew L.M. Fletcher, *Reviving Local Tribal Control in Indian Country* 1–18 (Feb. 3, 2006), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=879808.

37. The last time the State and the Tribes chose to litigate over treaty rights, the litigation required two federal courts to issue eight decisions over twelve years. See *infra*

Notably, similar conflicts arose contemporaneously in Michigan and Minnesota, which joined Wisconsin in authorizing wolf hunting in 2012.[38] The Ojibwe tribes in those areas are similarly unanimous in their opposition to wolf hunting.[39] Wisconsin is uniquely situated to be a front line of Ojibwe treaty rights conflict resolution,[40] in part because the Intertribal Task Force's central office is on the Bad River Reservation in Odanah, Wisconsin.[41]

This Comment analyzes the strength of each claim in light of potential litigation, using biological research and existing federal Indian law precedents to project how a federal court would likely resolve these conflicts if required. Ultimately, it uses this analysis to conclude that Wisconsin's current wolf policy infringes upon the Tribes' sovereign right to protect and perpetuate reservation wolves, and that the Tribes have some rights and options with respect to wolves distant from reservations, but must accept Wisconsin's sovereign right to lethal wolf depredation. Moreover, it finally concludes that for wolves near and far from reservations, cooperative management is the only reasonable route to setting wolf policy and resolving this conflict.

Part I reviews the history of resource conflict and cooperation between the State and the Tribes, and the legal standards applicable to this conflict. Part II analyzes the Tribes' right to protect reservation wolves and the degree to which the State's refusal to embrace the Tribes' request for no-kill "buffer zones" around the reservation[42] ignores

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note 48, at 18–20. The net financial cost of this litigation is not publicly available, but it assuredly cost more than cooperative management would have cost. Comparable treaty rights litigation resulted in the State of Minnesota reimbursing the Ojibwe for almost $4 million in attorneys' fees. Memorandum Opinion & Order, *Mille Lacs Band v. Minnesota*, No. 3-94-1226, at 13–14 (D. Minn. December 10, 1999).

38. *See* Louise Knott Ahern, *Saving the Wolves: Michigan Indians Fight Wolf Hunt*, LANSING ST. J. (Mar. 20, 2013), http://www.lansingstatejournal.com/article/20130320/MICHIGANDER/303200051/Saving-wolves-Michigan-Indians-fight-wolf-hunt (discussing the Michigan wolf hunt and Ojibwe opposition); Doug Smith, *Plan to Hunt Wolves Illustrates Culture Clash*, MINNEAPOLIS STAR TRIB. (June 30, 2012), http://www.startribune.com/sports/outdoors/160952295.html?refer=y (discussing the Minnesota wolf hunt and Ojibwe opposition).

39. *See* Ahren, *supra* note 38.

40. *See infra* Part I.C.

41. GREAT LAKES INDIAN FISH AND WILDLIFE COMMISSION, http://www.glifwc.org (last visited Oct. 17, 2013). This Comment focuses upon the conflict in Wisconsin, but many of the principles apply equally to the conflicts in Minnesota and Michigan, and the resolution of one of these conflicts (through either litigation or cooperative management) will probably affect the resolutions of the other conflicts.

42. The Tribes have requested that the State protect reservation wolves by prohibiting the killing of wolves within a few miles of reservation boundaries. Mary Annette Pember, *Wisconsin Tribes Struggle to Save Their Brothers the Wolves from Sanctioned Hunt*, INDIAN COUNTRY TODAY MEDIA NETWORK (Aug. 14, 2012),

research and infringes upon the tribal sovereignty. Part III analyzes the Tribes' rights over wolves away from the reservation, including the extent to which these rights can limit Wisconsin's sovereignty in the ceded territory. The Conclusion calls for the State and the Tribes to acknowledge the respective strengths and weaknesses of their claims and embrace cooperative management sooner, rather than later.

I. TRIBAL-STATE RELATIONS—CONFLICT AND COOPERATION

The current battle over wolves is part of a larger picture of the relationship between two separate but overlapping sovereigns. The Ojibwe tribes, like all Indian tribes, are "domestic dependent" nations preexisting the United States.[43] Indian tribes ceded land and territory to European settlers in exchange for reserving sovereign territory and reserving explicit and implicit rights protected by the federal government.[44] This is an important distinction: tribes did not *gain rights* by treaty, but rather *guaranteed the perpetuation of rights they always held* as sovereign people.[45]

These sovereign reserved rights have been a source of conflict and cooperation. Wisconsin did not recognize some of the Tribes' treaty rights until the Seventh Circuit forced it to do so in 1983.[46] From 1983 up until the wolf hunt, when those sovereign rights have conflicted with the sovereign rights of the State, both parties have engaged in negotiated agreements, reconciling competing interests through a model of cooperative management.[47]

A. The Ojibwe Tribes and Ceded Territory

The Lake Superior Chippewa Indians ("Ojibwe") consist of several Bands (commonly called "Tribes") native to the land surrounding Lake Superior, each of which have territorial and sovereign reservations guaranteed by federal treaty.[48] Tribes are largely sovereign bodies within

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http://indiancountrytodaymedianetwork.com/article/wisconsin-tribes-struggle-to-save-their-brothers-the-wolves-from-sanctioned-hunt-129021.

43. *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831) (establishing the "domestic dependent" relationship between sovereign tribes and the United States).

44. *See infra* Part I.A–C.

45. *United States v. Winans*, 198 U.S. 371, 381–82 (1905).

46. *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt* (*LCO I*), 700 F.2d 341, 365 (7th Cir. 1983).

47. *See infra* Part I.C–D.

48. U.S. DEP'T OF THE INTERIOR ET AL., CASTING LIGHT UPON THE WATERS: A JOINT FISHERY ASSESSMENT OF THE WISCONSIN CEDED TERRITORY 15, 18 (2d. ed. 1993), *available at* http://www.glifwc.org/publications/pdf/Casting_Light.pdf. The Tribes are, in treaty terms, separate Bands of the Lake Superior Chippewa (Ojibwe) Tribes. They are:

the U.S. federal system.[49] Tribes generally maintain sovereign management of natural resources on their reservations, free from state control.[50]

The Ojibwe and the United States negotiated the two most relevant treaties in 1837 and 1842—predating the existence of the State of Wisconsin, which achieved statehood in 1848.[51] In those treaties, the Ojibwe ceded 22,400 square miles to the United States, including land that would become all or part of thirty modern Wisconsin counties.[52] Today, the Tribes control 283,000 acres of sovereign tribal territory within or adjacent to the boundaries of the State.[53]

B. Conflict over Reserved Rights

The Great Lakes Ojibwe explicitly reserved usufructuary rights[54] on the territory they ceded to the United States. The exercise of tribal treaty rights in the ceded territory of Wisconsin was once a source of great conflict. When tribal members tried to leave the reservation to hunt and fish in traditional ways, Wisconsin refused to recognize those treaty rights, claiming they had been terminated.[55] Subsequent to the Seventh Circuit's decision that those usufructuary rights persist,[56] the State of Wisconsin made incredible strides in recognizing them.[57] Implementing the Tribes' off-reservation treaty rights required two decades of litigation, government-to-government negotiation, and eight separate

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Bad River, Lac Courte Oreilles, Lac du Flambeau, Red Cliff, St. Croix, and Sokaogon (commonly called "Mole Lake"). *Id*. at 15.

49. *See, e.g*., *United States v*. *Mazurie*, 419 U.S. 544, 557 (1975) ("Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory.") (citations omitted); CHARLES F. WILKINSON, AMERICAN INDIANS, TIME AND THE LAW: NATIVE SOCIETIES IN A MODERN CONSTITUTIONAL DEMOCRACY 24 (1987).

50. *See* Judith V. Royster & Rory SnowArrow Fausett, *Control of the Reservation Environment: Tribal Primacy, Federal Delegation, and the Limits of State Intrusion*, 64 WASH. L. REV. 581, 601–05 (1989).

51. U.S. DEP'T OF THE INTERIOR ET AL., *supra* note 48, at 16.

52. *Id*.

53. *Id*.

54. Treaty with the Chippewas, Wis.-Chippewas, Oct. 4, 1842, 7 Stat. 591 ("The Indians stipulate for the right of hunting on the ceded territory, with the other usual privileges of occupancy, until required to be removed by the President of the United States."); Treaty with the Chippewas, Wis.-Chippewas, July 29, 1837, 7 Stat. 536 ("The privilege of hunting, fishing, and gathering the wild rice, upon the lands, the rivers, and the lakes included in the territory ceded, is guarantied [sic] to the Indians, during the pleasure of the President of the United States.").

55. *See United States v*. *Bouchard*, 464 F. Supp. 1316, 1321 (W.D. Wis. 1978).

56. *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v*. *Voigt* (*LCO I*), 700 F.2d 341, 365 (7th Cir. 1983).

57. *See infra* Part I.C.

federal court rulings—for the sake of brevity, these decisions are referred to as the "*LCO*" or "*Voigt*" decisions.[58]

C. A History of Cooperative Management

Since the LCO/Voigt decisions, the Tribes and the State have cooperatively managed almost every resource shared between the two sovereigns. In order to facilitate cooperative management, the Tribes created the Voigt Intertribal Task Force ("Task Force") and the Great Lakes Indian Fish and Wildlife Commission (GLIFWC) in 1984.[59] GLIFWC is empowered to coordinate and enforce treaty usufructuary rights and correlated resource management under the direction of the Task Force, which consists of a representative leader from each member tribe.[60] Between 1983 and 1993, the Task Force and the State entered into thirty-nine separate agreements implementing treaty rights and the cooperative management of relevant resources in the ceded territory.[61]

Despite originating in conflict, the spirit of cooperation between Wisconsin and the Ojibwe grew into a strong tradition, for which the Tribes and the State both deserve, in the words of a federal court, "widespread recognition and appreciation."[62] Contrast this admiration for Wisconsin with the Ninth Circuit's uncharacteristically strong admonition of the State of Washington on comparable cases of tribal treaty rights and fish management:

> The record in this case and the history set forth [in related cases] make it crystal clear that it has been [the] recalcitrance of Washington State officials (and their vocal non-Indian commercial and sports fishing allies)

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58. *LCO I*, 700 F.2d at 365 (ruling that Ojibwe off-reservation treaty rights have not been terminated); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin* (*LCO VII*), 740 F. Supp. 1400, 1426 (W.D. Wis. 1990) (determining deer and mammal hunting rights, and allocating half of the available hunting/fishing/gathering resources in the ceded territory to the tribes); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin* (*LCO VI*), 707 F. Supp. 1034 (W.D. Wis. 1989) (determining Walleye/Muskellunge fishing rights); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin* (*LCO V*), 686 F. Supp. 226, 231, 233 (W.D. Wis. 1988) ("Moderate living" decision); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin* (*LCO IV*), 668 F. Supp. 1233 (W.D. Wis. 1987) (outlining legal principles applicable to treaty interpretation in Wisconsin); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin* (*LCO III*), 653 F. Supp. 1420, 1435 (W.D. Wis. 1987) (determining the scope and extent of Ojibwe off-reservation treaty rights); *Bouchard*, 464 F. Supp. at 1361 (holding that Ojibwe off-reservation rights have been terminated by the Treaty of 1854).

59. U.S. DEP'T OF THE INTERIOR ET AL., *supra* note 48, at 21.

60. *Id*.

61. *Id*.

62. *LCO VI*, 707 F. Supp. at 1054.

> which produced the denial of Indian fishing rights requiring intervention by the District Court . . . . The state's extraordinary machinations in resisting the [previous] decree have forced the district court to take over a large share of the management of its decree. Except for some desegregation cases . . . the district court has faced the most concerted official and private efforts to frustrate a decree of a federal court witnessed in this century.[63]

For decades, the two governments have successfully cooperated in managing shared resources. They collaborate in gathering data and determining the target population and harvest quota for deer in the ceded territory,[64] as well as the population, yield, and restocking of fish in the ceded territory.[65] The only reason the two governments have not cooperatively managed other shared resources is because those animal populations are high enough to make cooperative management unnecessary.[66] Among their many successes, the State and the Tribes cooperate in resource planning, assessment of resource populations, population management practices, limits and quotas, safe harvest levels, and habitat management.[67]

D. Tribal-State Conflict and the Federal Trust Relationship

Wisconsin's largely unilateral implementation of the wolf hunt represents the first major deviation from cooperative management in three decades, creating a conflict over legal rights that can lead to litigation. In such litigation, the federal government is obligated to ensure that the Tribes' inherent sovereignty and treaty rights are protected from state infringement.[68] To do so, a court will interpret this conflict through the lens of federal Indian law.[69]

The United States has a unique trust responsibility toward Indian tribes. Chief Justice John Marshall established this trust relationship in a trilogy of early cases that serve as the foundation of federal Indian law.[70]

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63. *United States v. Washington*, 573 F.2d 1123, 1126 (9th Cir. 1978).

64. *See supra* notes 30–31 and accompanying text.

65. U.S. DEP'T OF THE INTERIOR ET AL., *supra* note 48, at 64, 66, 69–74.

66. *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin* (*LCO VII*), 740 F. Supp. 1400, 1412 (W.D. Wis. 1990).

67. U.S. DEP'T OF THE INTERIOR ET AL., *supra* note 48, at 63–83.

68. *See infra* Part II.

69. *See infra* Parts II, III.

70. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823).

Relying on federal treaty-making authority[71] and the Indian Commerce Clause,[72] Marshall defined the tribes as "domestic dependent nations," retaining sovereign status superseded only by the federal government.[73] These cases established the tribes as semi-autonomous nation-states, whose relationship with the federal government is "that of a ward to his guardian."[74] The United States has "charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards."[75] Over time, the judiciary established canons of construction, which serve as guidelines for the federal trust responsibility in protecting tribal sovereignty, interpreting tribal rights, and officiating conflict between tribes and states.[76]

If this conflict cannot be resolved without litigation, the federal government's trust responsibility will require it to ensure that the State is not infringing upon the Tribes' rights. This federal trust responsibility is "one of the 'primary cornerstones' of federal Indian law."[77] It amounts to "a federal duty to protect tribal lands, resources, and the native way of life from the intrusions of the majority society."[78] If necessary, a federal court will consider potential State infringement on two different rights: tribal sovereignty on reservation territory and off-reservation treaty rights. This Comment analyzes both in turn.

II. RESERVATION WOLVES: STATE INFRINGEMENT UPON TRIBAL SOVEREIGNTY

Prior to contact with European settlers, the Ojibwe traditionally managed territorial resources in general, specifically protecting wolves. The Ojibwe did not grant this right to the United States by treaty; per the

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71. U.S. CONST. art. II, § 2, cl. 2 ("The President . . . shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.").

72. U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have Power . . . to regulate Commerce with . . . the Indian Tribes.").

73. *Cherokee Nation*, 30 U.S. (5 Pet.) at 16–17.

74. *Id*. at 17.

75. *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942).

76. *See infra* notes 82–87 and accompanying text (Reserved Rights Doctrine and ambiguity interpretation); notes 110–27 and accompanying text (Preemption/Infringement Test and the Least Restrictive Alternative). *See generally* Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 412–16 (1993).

77. Mary Christina Wood, *Fulfilling the Executive's Trust Responsibility toward the Native Nations on Environmental Issues: A Partial Critique of the Clinton Administration's Promises and Performance*, 25 ENVTL. L. 733, 742 (1995).

78. *Id*.

Reserved Rights Doctrine, the Tribes maintain the right to protect and perpetuate wolves on their reservations.[79] Unless Wisconsin's wolf policy is the option least damaging to this right, the State is infringing upon tribal sovereignty.[80] A less damaging wolf policy would include some "buffer zone," which is best negotiated by cooperative management, guided by science and practicality.[81]

A. The Tribes Have the Sovereign Right to Protect Wolves

Indian tribes have retained all inherent sovereign rights except those rights expressly given away, or those rights necessarily superseded by the federal government. This cornerstone of modern Indian law is the Reserved Rights Doctrine.[82] The Reserved Rights Doctrine is founded on the principle that treaties were "not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted."[83] In order to identify and protect reserved rights, the United States follows the standard that courts should interpret any ambiguities in law or treaty in favor of Indian tribes.[84] This principle started with treaty interpretation, since federal trust responsibility requires that courts construe treaties "not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians."[85] In later years, courts extended the reading of ambiguity in favor of Indians to all federal acts.[86] The resolution of ambiguities in favor of tribes is frequently determinative in resolving Indian rights cases in favor of tribes.[87]

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79. *See infra* Part II.A.

80. *See infra* Part II.B.

81. *See infra* Part II.B.

82. *See* Vine Deloria Jr., *Reserving to Themselves: Treaties and the Powers of Indian Tribes*, 38 ARIZ. L. REV. 963, 971–72 (1996) (comparing the tribal reservation of rights with the Tenth Amendment reservation of authority by the states).

83. *United States v. Winans*, 198 U.S. 371, 381 (1905).

84. *See Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt* (*LCO I*), 700 F.2d 341, 350–51 (7th Cir. 1983); *see also* Craig A. Decker, *The Construction of Indian Treaties, Agreements, and Statutes*, 5 AM. IND. L. REV. 299, 300 (1977); Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 CAL. L. REV. 1137, 1141 (1990).

85. *Jones v. Meehan*, 175 U.S. 1, 11 (1899). This canon was patterned after the concurring opinion in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 582 (1832) (McLean, J., concurring).

86. *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976) ("[S]tatutes passed for the benefit of dependent Indian tribes . . . are to be liberally construed, doubtful expressions being resolved in favor of the Indians.").

87. *See, e.g.*, *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 406 n.2 (1968); *Arizona v. California*, 373 U.S. 546, 598–99 (1963); *Winters v. United States*, 207 U.S. 564, 576 (1908).

The Ojibwe have protected wolves since time immemorial as an inherent and crucial component of their identity as sovereign people.[88] Where tribes assert that some state action infringes upon a sovereign right, an analysis of whether the right was reserved looks to whether the tribe historically exerted that right.[89] Indian tribes have historically managed their own resources.[90] Indian tribes are generally free to use or protect their own reservation resources as sovereigns, free from state interference.[91] The Ojibwe tribes have traditionally protected wolves as brothers and prohibited wolf hunting in all but the most extreme and humane circumstances.[92] This ancient policy is merely restated in the claim to "protect all wolves."[93] The Ojibwe protected the wolf due to a deep sense of cultural kinship.[94] A review of traditional Ojibwe teachings and current cultural values reveals that:

> The wolf has a distinct place in Ojibwe cultural traditions as a symbol of perseverance, fidelity, and guardianship. Along with the creation stories, there are numerous other tales of wolves and humans surviving together as family units or packs, where wolves and humans care for each other and live similar lives. Often in these stories the wolf is the caretaker of the humans. Not only is the wolf symbolic in Ojibwe oral tradition, but the wolf in modern life is seen as symbolic of ideals to be sought by humans. In this way the wolf is revered for having highly developed and complex hunting methods and for their [*sic*] stamina. Wolves are respected for their intimate, attentive, and lengthy parenting. In modern Ojibwe society, it is laudatory to be called a wolf or to be compared to one. Wolves are

88. *See infra* note 95 and accompanying text.

89. *See, e.g.*, *Rice v. Rehner*, 463 U.S. 713, 722 (1983) (concluding that states could regulate on-reservation liquor sales because a federal statute authorized the states to do so, and because "tradition simply has not recognized a sovereign immunity or inherent authority in favor of liquor regulation by Indians").

90. *See generally* Tom Busiahn and Jonathan Gilbert, *The Role of Ojibwe Tribes in the Co-management of Natural Resource in the Upper Great Lakes Region: A Success Story*, GREAT LAKES INDIAN FISH AND WILDLIFE COMMISSION (2009), *available at* http://www.glifwc.org/minwaajimo/Papers/Co-management%20Paper%20Busiahn%20%20FINAL.pdf.

91. *See* George Cameron Coggins and William Modrcin, *Native American Indians and Federal Wildlife Law*, 31 STAN. L. REV 375, 386–87 (1979) (summarizing the lack of state authority over reservation resources).

92. *See supra* notes 1–3 and accompanying text. *See also* Shelley et al., *supra* note 15, at 409.

93. Pember, *supra* note 42.

94. *See infra* note 95 and accompanying text.

> often referred to as brothers and sisters with a perception, or prediction, that what happens to the wolf, will also happen to the Ojibwe. The Ojibwe see the recovery of wolves in Wisconsin as parallel to the tribes' own cultural, economic, and political recovery.[95]

Moreover, Ojibwe tribal members still want to protect wolves. A 2011 study compared Ojibwe and non-Native perspectives on wolves and wolf hunting in northern Wisconsin.[96] Thirty-nine percent of tribal members believe that there should never be any wolf season, hunting or trapping; 7 percent of non-members believe the same.[97] Only 14 percent of tribal members believe that there should be a wolf hunting or trapping season without consideration for depredation or sustainability, compared to 40 percent of non-members.[98] Only 23 percent of tribal members believe that Wisconsin should implement a hunting season regardless of the cultural significance of the wolf; 64 percent of non-members believe so.[99]

Under the Reserved Rights Doctrine, the Tribes maintain the sovereign right to protect and perpetuate wolves on reservations. The Ojibwe Tribes historically protected wolves as brothers,[100] continue to believe that wolves should be protected,[101] and now assert the power to protect wolves as a tribally protected species.[102] Tribes exercised this sovereign right prior to the arrival of European settlers and have reemerged in the American federalist system as players in resource management on-reservation and off-reservation.[103] Even today, the Tribes manage or co-manage forest mammals on-reservation and

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95. Victoria Shelley, The Influence of Culture on Attitudes to Wolves and Wolf Policy among Ojibwe Tribal Members and Non-tribal Residents of Wisconsin's Wolf Range 46–47 (2010) (unpublished thesis, University of Wisconsin-Madison) (internal citations omitted), *available at* http://faculty.nelson.wisc.edu/treves/pubs/Shelley_MSThesis.pdf.

96. Shelley et al., *supra* note 15.

97. *Id*. at 405.

98. *Id*.

99. *Id*. Tribal members have similar views about wolf treatment and policy. When presented with the hypothetical situation in which a wolf killed a family dog or cat, only 29% of tribal members said they would kill the wolf; 60% of non-members said they would kill the wolf. *Id*. 76% of tribal members believe that wolves are essential to maintaining natural balance, while only 39% of non-members agree. *Id*. The majority (52%) of tribal members believe there should be no cap on the wolf population in Wisconsin; only 15% of non-members felt the same way. *Id*.

100. *See supra* notes 1–3 and accompanying text. *See also* Shelley et al., *supra* note 15, at 409.

101. Shelley et al., *supra* note 15, at 404–05.

102. GLIFWC Letter, *supra* note 13.

103. *See* Daniel H. Israel, *The Reemergence of Tribal Nationalism and Its Impact on Reservation Resource Development*, 47 U. COLO. L. REV. 617, 634 (1975).

off-reservation.[104] Neither of the applicable treaties has any language removing any right to perpetuate resources on the reservation.[105] Given this evidence, and since courts are to liberally construe treaties in favor of Indian tribes,[106] the Tribes maintain the sovereign right to protect reservation wolves.

B. Wisconsin's Current Wolf Policy Infringes upon Tribal Sovereignty

Wisconsin has wisely respected the Tribes' right to protect wolves on their sovereign territory, agreeing that the reservations are off-limits for wolf hunting.[107] However, when the Tribes asked for a "buffer zone" around reservations to protect reservation wolves,[108] the State refused.[109] Given the scientific evidence that shows how much damage wolf hunting in this area causes reservation wolf packs, Wisconsin's policy infringes upon tribal sovereignty.

Federal Indian law and trust responsibility prohibit states from infringing upon tribal sovereignty. When the State puts forth any legislation or regulation that affects tribal sovereignty, a federal court applies the Preemption/Infringement test.[110] The test stipulates that "[e]ven on reservations state laws may be applied to Indians unless such application would interfere with reservation self-government or impair a right granted or reserved by federal law."[111] The second time the Supreme Court applied the test, the Court clarified that "absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them."[112] The first prong of the Preemption/Infringement test considers whether federal legislation preempts the issue in question.[113] The second prong questions whether the issue diminishes the tribe's inherent rights.[114] Where tribes can show

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104. *See supra* notes 61–62 and accompanying text.

105. *See* Treaty with the Chippewas, Wis.-Chippewa, Oct. 4, 1842, 7 Stat. 591; Treaty with the Chippewas, Wis.-Chippewa, July 29, 1837, 7 Stat. 536.

106. *See supra* notes 84–87 and accompanying text.

107. DNR Letter, *supra* note 11.

108. Pember, *supra* note 42.

109. Paul A. Smith, *State Board Approves Quota for October Wolf Harvest*, MILWAUKEE J. SENTINEL (July 17, 2012), http://www.jsonline.com/sports/outdoors/state-board-approves-quota-for-october-wolf-harvest-bo65cps-162815866.html.

110. *Williams v. Lee*, 358 U.S. 217, 220 (1959).

111. *Organized Village of Kake v. Egan*, 369 U.S. 60, 75 (1962).

112. *Williams*, 358 U.S. at 220.

113. *See* Royster and Fausett, *supra* note 50, at 601–05.

114. *Id*. For the sake of brevity, this section focuses on the infringement aspect of this test. However, additional scholarship could be performed to determine whether hunting on National Forest land adjoining tribal reservations opens an argument for federal preemption. *See* Martin Nie, *The Use of Co-management and Protected Land-Use*

that state action is diminishing tribal resource rights, federal courts have generally protected the tribes.[115]

In ascertaining whether state policy damaging or limiting tribal resources infringes upon tribal rights, Wisconsin is bound by precedent to show that its policy is the option least damaging to Ojibwe resource rights. In *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin* (*LCO IV*),[116] the Western District of Wisconsin specifically declared that the legality of a Wisconsin regulation limiting tribal resources hinges upon whether that regulation is the "least restrictive alternative available."[117] In *LCO IV*, the Tribes argued for "the explicit addition of a least restrictive alternative component to the test for state regulation," and the State did not contest that standard.[118] Accounting for "the tribes' understanding at the time of the treaties," the court adopted this addition, holding that federal law will "confine [Wisconsin] to the least restrictive alternative available to accomplish its conservation purposes."[119]

The Tribes believe a no-hunt "buffer zone" around the reservation is a less restrictive alternative, and necessary to protect reservation wolves.[120] Research shows that wolves do not adhere to human political boundaries, and reservation wolf packs routinely leave the reservation.[121] The State's current policy allows hunters to kill reservation wolves within their natural territorial boundaries.[122] Because the State's wolf policy must be the least damaging to tribal resource rights, the primary question is whether killing these wolves damages the Tribes' right to protect and perpetuate wolves in their territory.

While it is intuitively obvious that reducing the size of a pack causes some damage, biological research concludes that the killing of

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Designations to Protect Tribal Cultural Resources and Reserved Treaty Rights on Federal Lands, 48 NAT. RES. J. 585, 589 (2008).

115. *See, e.g.*, *Sohappy v. Smith*, 302 F. Supp. 899, 910 (D. Or. 1969) ("The state cannot so manage the fishery that little or no harvestable portion of the run remains to reach the upper portions of the stream where the historic Indian places are mostly located.").

116. 668 F. Supp. 1233 (W.D. Wis. 1987).

117. *Id*. at 1236.

118. *Id*.

119. *Id*. Beyond being direct precedent on Wisconsin and the Ojibwe tribes, this standard is common in considering a state regulation affecting a tribal resource. *See, e.g.*, *United States v. Oregon*, 769 F.2d 1410, 1416 (9th Cir. 1985) (Restricting Oregon to the least restrictive alternative); *United States v. Michigan*, 653 F.2d 277, 279 (6th Cir. 1981) (State regulation of tribal resources "must be the least restrictive alternative method available for preserving [resources] from irreparable harm."); .

120. Pember, *supra* note 42.

121. *See infra* Diagrams 1 and 2.

122. WIS. DEP'T OF NATURAL RES., 2013 WOLF HUNTING AND TRAPPING REGULATIONS, *available at* http://dnr.wi.gov/files/PDF/pubs/wm/WM0538.pdf.

even a single wolf can have tremendous repercussions, including dissolving an entire pack.[123] The National Science Foundation is supporting new wolf research, in part because "it is unprecedented for a species to move this rapidly from highly protected to heavily-hunted, and it remains important to quantitatively assess the probable consequences of these policies as carefully as possible."[124] One such study showed that the killing of a single breeding adult wolf threatens the viability of the pack in a number of ways, even causing the entire pack to disband 38 percent of the time.[125] The death of one breeding adult means that existing wolf pups are less likely to survive, and more than half the time packs fail to reproduce even a single pup in the subsequent year.[126] Seven out of ten wolf packs were small enough that killing a single adult wolf would have a 50 percent probability of halting reproduction entirely.[127] Killing even one wolf does not simply damage a pack by reducing its numbers; it significantly endangers the existence of the pack itself.

Killing one wolf does not only threaten immediate pack survival, it can also send the pack into an evolutionary tailspin. Separate research focused on wolves living predominately in a protected area, but whose territory sometimes took them out of the protected area—a situation incredibly analogous to reservation wolves.[128] The researching biologists concluded that hunting or trapping wolves just outside a protected area damages the crucial family-based social structure of the surviving pack members.[129] Even where a wolf harvest does not threaten a pack's existence, it inflicts significant damage upon many evolutionarily meaningful pack traits, damaging the pack's long-term viability and unbalancing the entire ecosystem.[130] The biologists concluded, "Reducing levels of exploitation by expanding no-harvest zones to include areas outside park boundaries is a relatively simple, long-term solution to promote persistence of top predators that are integral to healthy ecosystems."[131] Research scientists studied a situation profoundly analogous to the current policy dispute over reservation buffer zones,

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123. Scott Creel & Jay J. Rotella, *Meta-Analysis of Relationships between Human Offtake, Total Mortality and Population Dynamics of Gray Wolves (Canis Lupus)*, PLOS ONE, at 1, September 2010, *available at* http://www.wolfandwildlifestudies.com/downloads/huntingpaper/creelandrotella.pdf.

124. *Id*.

125. *Id*. at 3.

126. *Id*.

127. *Id*.

128. Linda Y. Rutledge, et al., *Protection from Harvesting Restores the Natural Social Structure of Eastern Wolf Packs*, 143 BIOLOGICAL CONSERVATION 332, 333 (2010), *available at* http://www.utm.utoronto.ca/~w3bio/bio464/lectures/lectures_assets/Protection_eastern_wolf_pack.pdf.

129. *Id*. at 337.

130. *Id*.

131. *Id*.

concluding not only that that a wolf harvest damages packs and environments, but *specifically recommending* buffer zones as a simple solution to the problem.[132]

This research leaves almost no room for debate—the State's wolf policy with respect to reservations and buffer zones infringes upon tribal sovereignty. This is especially true given that the Wisconsin DNR knows that a wolf pack's territory can extend up to eighty miles,[133] and that the territory of every known reservation wolf pack extends beyond reservation boundaries.[134] Both common sense and scientific research conclude that a buffer zone around reservations is less damaging than no buffer zone; if those are the only two options presented to a federal court, precedent demands that the court choose the former, despite Wisconsin's legitimate interests in wolf depredation.[135]

However, the ideal buffer is probably not an arbitrary distance from reservation borders, but rather a fluid buffer designed in light of environmental layout, actual wolf pack territory, and human population centers. Erik Olson, a Ph.D. whose dissertation researched wolf-human conflict, believes that buffers are necessary, and that buffer design should be context-dependent, considering both the territory of a given pack and the layout of surrounding terrain.[136] "Each Ojibwe reservation is spatially unique, as is the area surrounding it," Dr. Olson explains.[137] "Some of the Ojibwe reservations are relatively small in area, less contiguous or highly irregular, while others are more contiguous or relatively large. Thus,

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132. *Id*. at 337–38.

133. WIS. DEP'T OF NATURAL RES., GRAY WOLF IN WISCONSIN, *available at:* http://dnr.wi.gov/topic/wildlifehabitat/wolf/.

134. *See infra* Diagram 1.

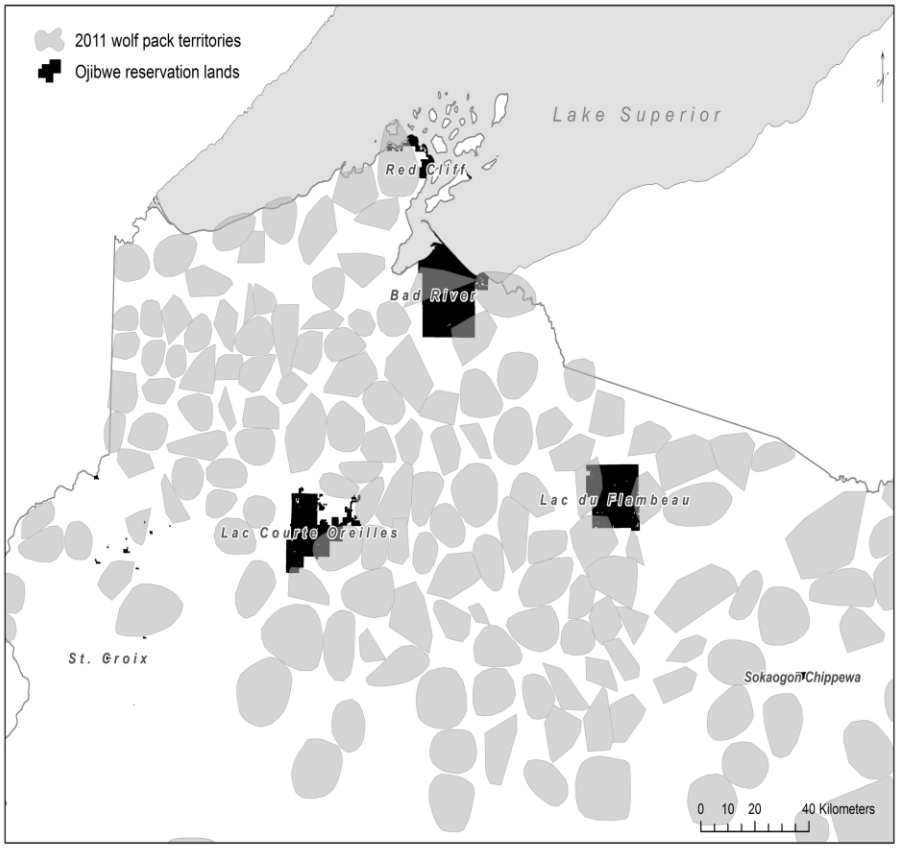
135. Courts have repeatedly proven willing to enjoin legitimate state interests that damage tribal rights or resources. *See, e.g.*, *Kittitas Reclamation District v. Sunnyside Valley Irrigation District*, 763 F.2d 1032, 1035 (9th Cir. 1985) (ordering the release of state irrigation water into a river in order to protect the Yakima right to fish); *Muckleshoot Indian Tribe v. Hall*, 698 F. Supp. 1504, 1517 (W.D. Wash. 1988) (enjoining the building of a marina because the tribes claimed it would eliminate their fishing ground). If courts are willing to enjoin state interests as pressing as the irrigation of arid farmland in order to protect tribal rights, then Wisconsin must show a novel and overwhelming state interest in wolf depredation in these specific areas to excuse infringement.

136. Interview with Erik Olson, Ph.D., in Madison, Wis. (Mar. 18, 2013). At the time of the interview, Mr. Olson was a doctoral candidate at the Nelson Institute for Environmental Studies at the University of Wisconsin-Madison. His Ph.D. research focused in wolf-human conflict in Wisconsin and its relationship with wildlife ecosystems. His dissertation was published in 2013. *See* Erik R. Olson, *As a Wolf: A Wisconsin Case-Study of Wolf-Human Conflict and Predator-Prey Ecology* (Ph.D. dissertation, University of Wisconsin-Madison) (on file with author).

137. Interview with Erik Olson, Ph.D., in Madison, Wis. (Mar. 18, 2013).

some Ojibwe lands could largely support multiple wolf packs, while other lands may not substantially support any wolf packs."[138]

DIAGRAM 1—WOLF PACK TERRITORIES AND RESERVATION BOUNDARIES[139]



Olson's research concludes that "a buffer area adjacent to Ojibwe reservation land would be essential to protect wolf packs whose territory overlaps with non-reservation land. However, which wolf packs should

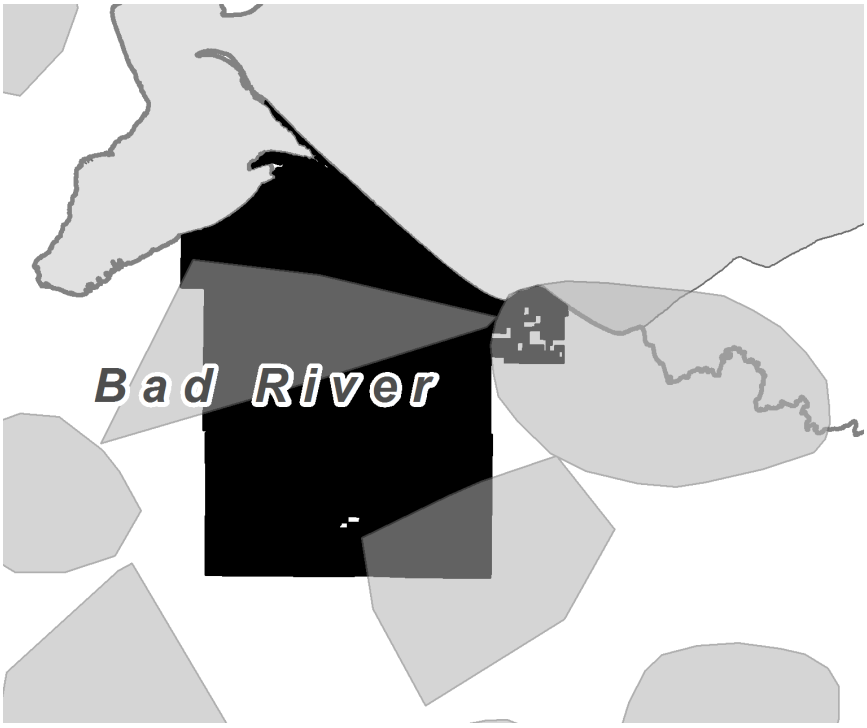
138. *Id*.

139. Diagram 1 was created by Erik Olson, Ph.D., using data from his dissertation research. Dr. Olson created this map specifically for this Comment, and it is printed with his permission. Many of these data (and many insights valuable to this topic) are available in his dissertation. *See* Erik R. Olson, *As a Wolf: A Wisconsin Case-Study of Wolf-Human Conflict and Predator-Prey Ecology* (Ph.D. dissertation, University of Wisconsin-Madison) (on file with author).

be targeted and the delineation of the buffer area to protect those wolf packs would be up to the State and the Tribes."[140]

The Bad River Reservation is a microcosm of the complicated issues at play in determining buffer design. Diagram 2 is a close-up of wolf territory and the Bad River Reservation; as in Diagram 1, the black area is the reservation and the translucent area is known wolf pack territory.

DIAGRAM 2—WOLF PACK TERRITORIES ON THE BAD RIVER RESERVATION[141]



There are three active wolf packs in Bad River: a pack living almost entirely on the western edge of the reservation, a pack moving freely between Wisconsin and the southeast corner of the reservation, and a pack that lives predominately in Wisconsin and Michigan, but living (in part) on the eastern lakeshore of the reservation.[142] Which packs are most

140. Interview with Erik Olson, Ph.D., in Madison, Wis. (Mar. 18, 2013).

141. This map was created by Erik Olson, Ph.D., using data from his dissertation research. Dr. Olson created the map specifically for this Comment, and it is printed with his permission. *See* Erik R. Olson, *As a Wolf: A Wisconsin Case-Study of Wolf-Human Conflict and Predator-Prey Ecology* (Ph.D. dissertation, University of Wisconsin-Madison) (on file with author).

142. *Id*.

likely to have negative interactions with humans or livestock? Are some buffer habitats better suited to depredation by trapping and returning the wolves to the pack on the reservation instead of killing them? The State's legal obligation to choose the least restrictive policy available means that a buffer is largely inevitable, but what should be the shape and scope of the buffer?

Wildlife biologists and policy makers are best prepared to answer these questions, and the strong tradition of cooperative management between the State and the Tribes is perfectly designed to negotiate a policy from those scientific answers. Perhaps fixed-distance buffer zones around every reservation are scientifically sufficient to protect reservation wolf packs; perhaps only some reservations require buffer zones, and those zones might be larger or smaller, depending on research. It is not the purpose of this Comment to propose the specifics of buffer design, for exactly the same reason that both the State and the Tribes should prefer cooperative management to legal battles: because the optimal decision will be a result of discussion among the respective stakeholders, rather than imposed externally. Moreover, it is in the State's best interest to negotiate now: the State might get buffer exceptions through negotiations (e.g., depredation permits for private landowners near the reservation, perhaps including lethal authorization in some circumstances)[143] that a court would not necessarily award.

III. CEDED TERRITORY WOLVES: STATE AUTHORITY AND TRIBAL COROLLARY RESOURCE RIGHTS

The Tribes' claim to protect all wolves in the ceded territory as a Tribally Protected Species will almost certainly fail.[144] The Tribes oppose the State's unilateral determination of wolf policy; similarly, the Tribes must understand that they cannot unilaterally dictate wolf policy, especially so far from the reservation. However, the wolves remain a resource shared between the Tribes and the State. As such, the Tribes have some corollary resource rights—including, at bare minimum, a right to a wolf policy that guarantees the perpetuation of wolves in the ceded territory.[145] Moreover, additional options in non-lethal tribal

143. Such buffer exceptions might benefit the Tribes as well as the State. "For the buffer to serve its purpose, a quick, effective, and professional response to wolf-human conflicts on private lands would be critical. Without such a program, private landowners may become intolerant of wolves and participate in behaviors that undermine the intent of the buffer." Interview with Erik Olson, Ph.D., in Madison, Wis. (Mar. 18, 2013).

144. *See infra* Part III.A.

145. *See infra* Part III.B.

depredation in the ceded territory might protect more wolves without undermining the State's goals.[146]

A. The Tribes' Claim to Protect All Wolves Is Untenable

The Tribes claim to protect all wolves in the ceded territory as a tribally protected species,[147] but this claim ignores the State's legitimate interest in wolf depredation and infringes upon Wisconsin's sovereignty.[148] Courts have two standards for treaty resource allocation, and neither standard awards a tribe the entirety of the resource.[149] It is incredibly unlikely that a court would find that the Tribes have the right to protect all wolves.

Wolves in the ceded territory are shared between the two sovereigns, and the Tribes have a near-zero chance of claiming exclusive management rights to all of them. The Supreme Court has held that tribal treaty resource rights provide for a "moderate living standard," and has an absolute ceiling of 50 percent of the available resource.[150] Courts have routinely used some variation of this standard in subsequent treaty hunting or fishing rights, including in Wisconsin.[151] This is the most applicable standard, and it leaves no room for the theory that the Tribes can control all of the shared wolves.

The only other potentially applicable standard for resource division governs water, originating in *Arizona v. California*.[152] Shared water resources are determined under the Practical Irrigable Acreage (PIA) standard; tribes are entitled to enough water to sufficiently irrigate each acre of reservation that was irrigable, regardless of whether the land was presently cultivated.[153] "[T]he PIA standard, while limiting the Indians' water allocation, provides the maximum amount of that resource for the uses envisioned at the time the reservation was established."[154] The Tribes can attempt to claim that the standard for protecting a species is more like the standard for water rights than the standard for hunting rights. The standard for hunting rights is about taking, while the standard

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146. *See infra* Part III.C.

147. GLIFWC Letter, *supra* note 13.

148. *See supra* notes 24–27 and accompanying text.

149. *See* Eric Eisenstadt, *Fish out of Water: Setting a Single Standard for Allocation of Treaty Resources*, 17 AM. INDIAN L. REV. 209, 210–16 (1992).

150. *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 686–87 (1979).

151. *See, e.g.*, *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin* (*LCO V*), 686 F. Supp. 226, 227, 232–33 (W.D. Wis. 1988) (applying a "moderate living" standard with a ceiling of 50% of total harvest).

152. 373 U.S. 546 (1963).

153. *Id.* at 600–01.

154. Eisenstadt, *supra* note 149, at 214.

for water rights is about using, and the Tribes seek to continue to utilize wolves as kin rather than prey.[155] If the court apportioned wolves by the use standard, the Tribes would be entitled to the maximum amount of wolves envisioned at the time the reservation was established.[156] Reading "use" as broadly as possible, that could include all wolves. However, even if the Tribes could persuade a court that species protection is more similar to sharing water than it is to divvying harvested animals, the court would remain unlikely to read the beneficial standard that broadly. No court has ever used the PIA standard to give the entirety of a shared resource to one party.[157]

Regardless of legal standard, the Tribes' claim ignores Wisconsin's legitimate state interests and decimates its sovereignty. The Tribes' assertion would require a court to hold that, despite an increase in wolf-human conflict and escalating wolf-related costs,[158] Wisconsin has no right to lethal control of hundreds of predators on 14.3 million acres of its sovereign territory.[159] This conclusion would require complete disregard for Wisconsin's political integrity, as well as concerns of cost and public safety. Additionally, Michigan and Minnesota recently instituted wolf hunting, and their neighboring Ojibwe tribes are similarly opposed to these hunts under similar treaty provisions.[160] Even the most specifically tailored ruling for the Tribes would necessitate undermining the sovereignty of three states. It is almost unthinkable that a court might find that the Tribes have meaningful control over all wolves in the ceded territory. However, that does not mean that the Tribes have no rights or options regarding those wolves.

B. The Tribes Necessarily Have Rights Corollary to Resource Rights

Indian tribes like the Ojibwe frequently hold special off-reservation usufructuary rights that limit a state's management options.[161] It is crucial to note that these rights are in no way jurisdictional, but remain a

155. *See* GLIFWC Letter, *supra* note 13.

156. Eisenstadt, *supra* note 149, at 214.

157. *See supra* note 149 and accompanying text.

158. *See supra* notes 26–27 and accompanying text.

159 *See supra* note 52 and accompanying text.

160 *See supra* note 38 and accompanying text.

161. *See, e.g.*, *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999) (upholding off-reservation reserved rights of Milles Lac Band of Chippewa Indians); *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979) (affirming off-reservation reserved rights fisheries of numerous tribes located in Washington state); *Kimball v. Callahan*, 590 F.2d 768 (9th Cir. 1979) (recognizing off-reservation reserved rights of the Klamath Tribes); *Kimball v. Callahan*, 493 F.2d 564 (9th Cir. 1974).

property right, tied to the resource in the usufructuary rights.[162] Implicitly and explicitly, courts have recognized that Indian tribes have rights correlated to treaty resource rights—some courts have determined those corollary rights to be managerial, while others have determined that the only right corollary to a resource is the perpetuation of the resource.[163] The Ojibwe Tribes have usufructuary resource rights to wolves in the ceded territory, and with those resource rights come some necessary correlated rights. The State recognized the Tribes' resource rights, reserving half of the wolf harvest for tribes and tribal members, but denies that the Tribes have any corollary rights "infringing on the State's managerial authority."[164] The maximum scope of the Tribes' corollary rights is unclear, but the minimum scope of those rights is not: at bare minimum, the Tribes are entitled to a policy that maintains the existence of wolves in the ceded territory.

The foundational theory of corollary rights to treaty resources tacitly originated in the Supreme Court. In 1979, the Court considered tribal rights similar to those of the Ojibwe—a reserved right to an off-reservation resource, in this case fish.[165] Following the canons of construction, the Court interpreted the treaty by resolving ambiguities in favor of the Indians.[166] The Court reasoned that a treaty-signing tribe "would be unlikely to perceive a 'reservation' of [a fishing] right as merely the chance, shared with millions of other citizens, occasionally to dip their nets into the territorial waters."[167] The Court concluded that tribes did not simply reserve the basic right to fish, but rather the right to fish under certain conditions.[168]

This decision led to the first explicit declaration of tribal corollary rights. One year later, in *United States v. Washington*,[169] the Western District of Washington considered whether tribal fishing rights carried a corollary right to ensure the existence of fish.[170] Furthering the Supreme Court's reasoning, the Western District of Washington concluded that it was "necessary to recognize an implied environmental right in order to

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162. *See* Charles F. Wilkinson, *To Feel the Summer in the Spring: The Treaty Fishing Rights of the Wisconsin Chippewa*, 1991 WIS. L. REV. 375, 398 (The "off-reservation rights to hunt, fish and gather in the 1837 and 1842 treaties were valid and created property rights in the tribe.").

163. *See infra* notes 169–75 and accompanying text.

164. DNR Letter, *supra* note 11.

165. *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979).

166. *See supra* notes 84–87 and accompanying text.

167. *Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. at 678–79.

168. *Id.* at 678–85.

169. 506 F. Supp. 187 (W.D. Wash. 1980), *vacated in part*, 759 F.2d 1353 (9th Cir. 1985).

170. *Id.* at 202–06.

fulfill the purposes" of the resource rights,[171] because "[t]he most fundamental prerequisite to exercising the right to take fish is the existence of fish to be taken."[172] Without those corollary rights, "the right to take fish would eventually be reduced to the right to dip one's net into the water . . . and bring it out empty."[173]

Despite clear reasoning, this ruling would be short lived. The court did not explain the extent of that environmental right, instead merely acknowledging its existence.[174] Five years later, the United States Court of Appeals for the Ninth Circuit vacated this part of the holding as a broad environmental servitude because it was "imprecise in definition and uncertain in dimension."[175] Note that the Ninth Circuit did not determine that corollary rights do not exist; rather, it simply said that the management of shared resources depends "on all of the facts presented by a particular dispute."[176] States (and courts) are understandably wary of some vague, unlimited tribal veto power over state management of off-reservation resources.

However, many courts have respected some tribal corollary rights, including the baseline corollary right to the existence of the resource. For example, the District Court of Oregon enjoined the U.S. Army Corps of Engineers from building a dam that would flood off-reservation fishing grounds.[177] Similarly, the Western District of Washington enjoined the construction of an oil pipeline, in part because it might "proximately cause the [off-reservation] fish habitat to be degraded such that the rearing or production potential of the fish will be impaired or the size or quality of the run will be diminished."[178] The court did not award a tribe extensive authority over the off-reservation ecosystem or the construction of off-reservation oil pipelines; rather, it tacitly inferred that a reservation of fishing rights includes a tacit reservation of fish, and both rights must be protected.[179] The Western District of Wisconsin has declared that Wisconsin has "the fiduciary obligation of managing the natural resources within the ceded territory for the benefit of current and

171. *Id*. at 205.

172. *Id*. at 203.

173. *Id*.

174. *Id*.

175. *United States v*. *Washington*, 759 F.2d 1353, 1357 (9th Cir. 1985) (en banc).

176. *Id*.

177. *Confederated Tribes of the Umatilla Indian Reservation v*. *Alexander*, 440 F. Supp. 553, 556 (D. Or. 1977). The court did not hold that the Confederated Tribes have some broad managerial veto power over the U.S. Army Corps of Engineers; rather, it simply recognized that a reservation of fishing rights implicitly reserves a corollary right to fishing grounds. *Id*. at 555.

178. *No Oilport! v*. *Carter*, 520 F. Supp. 334, 372 (W.D. Wash. 1981) (quoting *United States v*. *Washington*, 506 F. Supp. 187, 208 (W.D. Wash. 1980)).

179. *Id*.

future users," including a management plan "in accordance with biologically sound principles necessary for the conservation of the species being harvested."[180] As in the above cases, the court's reasoning tacitly recognized that when the Tribes reserved usufructuary rights to deer, the Tribes necessarily reserved the right to have fish.[181] Today, the state's management options with wolves are similarly limited; at minimum, the Tribes' usufructuary rights to off-reservation wolves necessarily include the right to the existence of wolves outside of the reservation.

The bare minimum of the Tribes' corollary rights is the existence of wolves, but courts have also acknowledged a tribal corollary right to consultation or co-management.[182] In *Klamath Tribes v. United States*,[183] the Federal District Court of Oregon enjoined the U.S. Forest Service from selling timber "without ensuring, in consultation with the Klamath Tribes on a government-to-government basis, that the resources on which the Tribes' treaty rights depend will be protected."[184] The court emphasized that this government-to-government consultation was part of the Tribes' reserved rights.[185] In *Ecology v. Yakima Reservation Irrigation District*,[186] the Washington Supreme Court had to consider the Yakima tribe's right to treaty-protected fish in light of Washington's legitimate interest in irrigating dry farm land.[187] It ruled that the Yakima Tribe was entitled, at minimum, to an environment "necessary to maintain [fish] in the river," and held that the legitimate interest of irrigation must be limited by tribal treaty right.[188] Notably, the court ordered that stakeholders determine the specifics of that limitation, based on practicality and scientific research—effectively ordering cooperative management.[189] While courts sometimes hesitate to explicitly declare off-reservation tribal corollary management rights, courts recognize the necessity of some tribal input into the management of that resource, ensuring—at bare minimum—the right to the perpetuation of that resource.

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180. *Lac Courte Oreilles Band of Indians v. State* (*LCO VI*), 707 F. Supp. 1034, 1060 (W.D. Wis. 1990).

181. *Id*.

182. *See, e.g.*, *United States v. Oregon*, 699 F. Supp. 1456, 1469 (D. Or. 1988), *aff'd*, 913 F.2d 576, 590 (9th Cir. 1990) (amending and approving the Columbia River Fish Management Plan).

183. No. 96-381-HA, 1996 WL 924509 (D. Or. Oct. 2, 1996).

184. *Id*. at *9.

185. *Id*.

186. 850 P.2d 1306 (Wash. 1993).

187. *Id*. at 1317.

188. *Id*. at 1310.

189. *Id*. at 1318–21.

It is feasible that a court would find the Tribes' corollary wolf rights to include equal co-managerial rights with the State. In determining the scope of Ojibwe corollary rights to treaty fish, the Western District of Wisconsin determined that the Tribes' "exercise of their treaty rights does not make them the manager of the fisheries. That responsibility and authority remains the [State's]."[190] The court emphasized the fact that fully recognizing a tribal right to manage fish would require giving the Tribes veto power over off-reservation, state-funded, state-run fisheries.[191] Unlike fish management rights, recognizing wolf management rights would not require a court to give the Tribes "veto power" over the State. Wolves are not grown and hatched in state-run facilities. Thorough acknowledgment of wolf management rights would only require a court to order that the parties cooperatively manage the shared resource—a solution that courts have supported in the past, including these same parties cooperatively managing deer in this same ceded territory.[192]

Regardless of whether a court interprets the Tribes' corollary wolf rights narrowly or broadly, it will defend those rights if the Tribes can show that wolves are at risk. The Tribes assert that Wisconsin's wolf policy is "ecologically unsound."[193] A panel of tribal biologists told the DNR that the wolf population (estimated at 850 during the winter) could support a first-year harvest of 128 wolves.[194] Instead, the DNR "disregarded that recommendation" and announced a harvest goal of 201 wolves—a target 57 percent larger than the panel's recommendation for

190. *Lac Courte Oreilles Band of Indians v. State* (*LCO VI*), 707 F. Supp. 1034, 1060 (W.D. Wis. 1990).

191. *Id*. Like many district courts determining the scope of tribal corollary resource rights, the court did not specifically cite the Ninth Circuit's ruling in *Washington*; however, its analysis followed the appellate court's nonbinding recommendation, turning "on all the facts presented by [the] particular dispute." *See supra* note 175 and accompanying text.

192. *See also Klamath Tribes v. United States*, No. 96-381-HA, 1996 WL 924509, at *9 (D. Or. Oct. 2, 1996) (ordering consultation with the Klamath Tribe before actions that might harm treaty resources); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin* (*LCO VII*), 740 F. Supp. 1400, 1402 (W.D. Wis. 1990) (approving "tribal representation on department committees established to manage deer in the ceded territory"); *United States v. Oregon*, 699 F. Supp. 1456, 1469 (D. Or. 1988), *aff'd*, 913 F.2d 576, 590 (9th Cir. 1990) (approving cooperative management of the treaty resources in Columbia River); *Yakima Reservation Irrig. Dist*., 850 P.2d at 1318–21 (Wash. 1993) (upholding the trial court's holding that the environmental specifics necessary for fish life should be cooperatively determined by multiple stakeholders, according to science).

193. GLIFWC letter, *supra* note 13.

194. Jessica Vanegeren, *Brother Wolf: Native Americans Say Upcoming Wolf Hunt Is Premature and Disrespectful*, CAP. TIMES (Madison) (Sept. 12, 2012), http://host.madison.com/news/local/govt-and-politics/capitol-report/brother-wolf-native-americans-say-upcoming-wolf-hunt-is-premature/article_8e8f8bf6-fc61-11e1-94aa-001a4bcf887a.html.

a sustainable harvest.[195] After the closing of the wolf season, a total of 241 wolves were killed in Wisconsin in 2012.[196] Despite the fact that the Tribes did not kill any of their allotted wolves, 88 percent more wolves were killed in 2012 than the amount the tribal scientists considered to be ecologically sound.[197] Given the potential long-term damage of killing even a single adult wolf,[198] the Tribes can certainly assert that the death of 113 more wolves than GLIFWC's researched recommendation might seriously threaten the perpetuation of wolves.[199]

GLIFWC is not the only collection of researchers who claim the State's wolf policy endangers the long-term presence of wolves in Wisconsin. The State's target wolf population of 350 wolves "runs counter to a widely accepted scientific model for harvest management."[200] Two different wolf population models show that a wolf population of 350 is unstable and may be too low to sustain wolves in Wisconsin.[201] In contrast, both Minnesota and Michigan have set wolf policies that "tread lightly," aiming for stable wolf population models.[202] This discrepancy in policy and regard for science might be due to the fact that in spring 2013, the Wisconsin DNR Wolf Committee was revamped "to exclude university researchers and reduce DNR staff," replacing them with representatives from interest groups like the Wisconsin Cattlemen's Association and the Wisconsin Trappers' Association.[203] This committee is drafting a long-term plan for wolf management to be presented to the Natural Resources Board, which dictates policies and goals for the DNR.[204] Multiple DNR employees questioned the wisdom of altering natural resources policy to replace researchers with special

195. *Id*.

196. Paul Smith, *Analyzing Data from Wisconsin's Wolf Hunt*, MILWAUKEE J. SENTINEL (Dec. 26, 2012), http://www.jsonline.com/sports/outdoors/analyzing-data-from-wisconsins-wolf-hunt-f585tou-184881311.html. This total includes fifty-seven wolves killed by federal wildlife agents, twenty-two hit by vehicles, eighteen killed by landowners, and nine killed illegally by hunters. *Id*.

197. *See supra* notes 194, 196 and accompanying text.

198. *See supra* Part II.B.

199. Courts have enjoined actions or policies that might proximately cause the degradation or viability of treaty resources. *See supra* notes 169–89 and accompanying text.

200. Rory Linnane, *Scientists Question State's Course on Wolves*, WISCONSINWATCH.ORG (Oct. 13, 2013), http://www.wisconsinwatch.org/2013/10/13/scientists-question-states-course-on-wolves/

201. *Id*. (quoting Timothy Van Deeland, associate professor at the University of Wisconsin-Madison, and Jennifer Stenglein, doctoral student at the University of Wisconsin-Madison).

202. *Id*.

203. *Id*. The representative from the Wisconsin Trappers' Association is adamant that the target wolf population will not be increased, saying: "I'll change my mind when I'm six feet under." *Id*.

204. *Id*.

interest groups.[205] One DNR section chief protested that this approach was "not a great way to integrate science into committee work, which should be the foundation of our recommendations."[206] The wolf committee facilitator admits that discussing a higher target population "will make people nervous because of the political pressure out there."[207] It appears that the Tribes might have sound support for their claim that the State's wolf policy endangers the existence of wolves in Wisconsin.

If the Tribes believe Wisconsin's policy is unsustainable, the bare minimum interpretation of their treaty rights gives them standing to challenge that policy in court.[208] The only question is whether the State would prefer to hear, debate, and reconcile these concerns at the table of cooperative management or the bench of a federal courthouse—where university researchers would have a seat at the experts' table, and where DNR employees might find that an oath before the court removes nervousness about potential political pressure. Given the length, cost, and uncertainty of litigation, Wisconsin would almost certainly better serve its interests via cooperative management.

C. The Tribes Can Save Wolves via Non-Lethal Harvest

The Tribes might further their goal to protect wolves by exploring other harvest options in the ceded territory. Looking toward minimizing wolf-human conflict, Wisconsin determines its current wolf policy with the knowledge that the Tribes intend to kill no wolves. However, if the Tribes were to use some or all of their allotted harvest to capture wolves, rather than kill them, then the Tribes could protect wolves while assisting the State's legitimate aims.

Non-lethal harvesting of wolves would affect future wolf quotas. "[S]ome in the scientific community believe the state DNR manipulated the wolf hunt quota."[209] The original recommendation was to harvest 128 animals, but the DNR "disregarded that recommendation" and announced a harvest goal of 201, allotting 85 wolves to the Tribes despite knowing that they intended to kill no wolves.[210] A harvest goal of 201 wolves, subtracting the 85 that the tribes would not actually harvest, would leave a harvest of 116 wolves. One GLIFWC biologist believes

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205. *Id*. (quoting DNR employees whose opinions were obtained via open records requests for emails and internal reports).

206. *Id*. (quoting DNR wildlife and forestry Section Chief Karl Martin).

207. *Id*. (quoting Bill Vander Zouwen, DNR Ecology Section Chief and facilitator of the wolf committee).

208. *See supra* notes 177–89 and accompanying text.

209. Vanegeren, *supra* note 194.

210. *Id*.

that those numbers are "pretty darn close, too close [. . .] the numbers and the math look suspicious."[211]

This Comment makes no assertion as to the validity of this suspicion, but rather notes simply that GLIFWC could alter any hypothetical quota manipulation by non-leathal harvesting of more than zero wolves. Regardless of these concerns, harvesting wolves by capturing them would help the State's legitimate goals (and, logically, reduce the next year's quota) without killing any wolves. The Tribes could explore the option of creating wolf sanctuaries on tribal lands, or consider agreements with existing wolf sanctuaries,[212] either of which would support the goals of both the Tribes and the State.

CONCLUSION

Wisconsin's tradition of cooperative management with the Ojibwe is not flawless, but it is nonetheless a strong institution.[213] The State and the Tribes share rights and responsibilities on all treaty resources (ma'iingan and otherwise) in the ceded territory, including the responsibility of ensuring the continued presence of those resources. It is unwise for either sovereign to attempt to unilaterally dictate the use of that shared resource or the management of that shared responsibility. This disagreement is an opportunity to continue to lead the way in resolving tribal-state conflict, which would likely influence the outcomes of analogous conflicts in Michigan and Minnesota.[214] Ultimately, the State and the Tribes should embrace cooperative management of wolf policy because it is the method most likely to optimally achieve their respective goals.[215] Moreover, both sovereigns should embrace cooperative management out of self-interest: if they do not recognize the respective sovereignty of one another quickly enough, they might find both of their authorities limited by a federal government forced to play peacekeeper.[216]

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211. *Id*. (quoting GLIFWC biologist and wildlife section leader Jonathan Gilbert).

212. *See*, *e.g*., Annie B. White, *Captive Wolf Facilities in North America*, GRAY WOLF CONSERVATION, http://www.graywolfconservation.com/Captivity/seeing_captive_wolves.htm (listing nineteen gray wolf sanctuaries in thirteen states, as well as two in Canada).

213. *See supra* Part I.C.

214. *See supra* note 38 and accompanying text.

215. *See supra* notes 35–36 and accompanying text.

216. *See* Richard A. Monette, *New Federalism for Indian Tribes: The Relationship between the United States and Tribes in Light of Our Federalism and Republican Democracy*, 25 U. TOL. L. REV. 617, 618 (1994) (discussing the states and tribes as being on the same sovereign plane in the American federalist system).

Both the State and the Tribes will benefit by embracing cooperative management sooner, rather than later. This means that the State will have to accept that wolves are important to the Tribes, and that the Tribes need to have meaningful impact on wolf policy. This also means that the Tribes will have to accept that they cannot protect or control all off-reservation wolves. Both sovereigns should avoid the staggering financial cost and ongoing uncertainty that inevitably accompany ongoing litigation,[217] especially since the eventual court resolution might order cooperative management anyway.[218] As a logistical matter, both parties should embrace a practical and scientifically backed "buffer zone" on public lands adjoining a reservation, negotiated on a government-to-government basis. As a practical matter, both the State and the Tribes must respect one another as brothers in resource rights and responsibilities. Like the story of Wenaboozhoo and Ma'iingan, the paths of the State and the Tribes are linked, for what will happen to the wolves of Wisconsin will happen to the ma'iingan of the Ojibwe.

217. *See supra* note 37 and accompanying text.

218. The last time Wisconsin and the Ojibwe litigated treaty rights, the court's order included cooperative management. *See supra* note 58 and accompanying text. Recent treaty litigation led to similar results. *See supra* notes 182–89 and accompanying text.