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Treaty Rights, Political Recognition, and Indigenous Resource Access in the Obtawaing

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Abstract

To preserve access to key species, many tribes in the United States historically negotiated for usufruct rights in treaties. Treaties have taken on a renewed significance in the modern era as tribes seek to protect local resources and co-manage key species with state governments. This paper assesses the impact of treaty rights on resource access through a thematic identification study of important resource access characteristics for federally recognized tribes in Northern Michigan and the non-federally recognized Burt Lake Band of Ottawa and Chippewa Indians. While non-federal tribes can negotiate to ease some barriers to access with amicable local governments and landholders, treaty rights provide federal tribes with opportunities for regulatory control, enforcement, and an enhanced adaptive capacity to climate change.

Keywords

adaptation, co-management, environment, governance, Indigenous resource access, treaty rights

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Treaty Rights, Political Recognition, and Indigenous Resource Access in the Obtawaing

The Obtawaing Biosphere Region (OBR) is a United Nations Educational, Scientific, and Cultural Organization (UNESCO) site encompassing more than fifteen thousand square kilometers in Northern Michigan (UMBS, 2019). The region includes roaring rivers, some of the best fisheries in North America, dozens of tree species, and an incredible diversity of animals, such as moose, beavers, black bears, mink, and porcupines. In the local Anishinaabe language, Obtawaing means “the halfway or meeting point” and provides an important clue to the significance of the region. Northern Michigan is at the confluence of three Great Lakes—Huron, Michigan, and Superior. It is at this meeting point that generations of Indigenous Peoples, colonial and American settlers and traders, and, more recently, tourists, coalesced in cultural, economic, and social exchange (Friday, 2010). Within the past few centuries, the Obtawaing experienced a series of economic booms through trade in furs, fish, timber, and tourism that shaped the modern Northern Michigan landscape and culture.

Involvement by local Indigenous populations—the Burt Lake Band of Ottawa and Chippewa Indians, the Little Traverse Bay Bands of Odawa Indians, the Sault Ste. Marie Tribe of Chippewa Indians, the Bay Mills Indian Community, and the Little River Band of Ottawa Indians—is key to meeting the goals of the OBR and part of the collective’s mission to “ensuring injustices made in the past do not destroy the [...] rich culture and biological/botanical knowledge of the region” (UMBS, 2019, pp. 8-9). The original designation proposal further notes that the landscape was shaped through cooperative land management between local and Indigenous communities over generations with practices such as controlled burns and tree girdling. The Obtawaing is a great example of regional actors coming together for environmental management. But the management of the lakes and inland waterways of Northern Michigan is not always cooperative, and competition over the fisheries of the Great Lakes has led to an uneasy accord between Indigenous commercial and subsistence fishers with the non-Indigenous recreational fishers that flood the region each year in pursuit of the ultimate sport fishing experience.

The fisheries of the Great Lakes produce more than \$7 billion in commerce each year and support thousands of jobs in the region (GLFC, 2014). The Indigenous Peoples of Northern Michigan are inextricably linked to these lakes and waterways. Historically, tribal fishing grounds were more than sources of sustenance; they were meeting places for Ottawa and Chippewa societies, and, as such, were to become, and remain, culturally significant. Some Northern Michigan tribes, like the Burt Lake Band, honor this relationship by taking the name of a local water feature.

In general, Indigenous societies tend to be place-based and highly dependent on local resources (Wildcat, 2013). This dependence can create significant challenges to Indigenous identity, economies, and subsistence in times of scarcity and change (Chief et al., 2014). Climate change in Northern Michigan is anticipated to cause shifts in abundance and range for a number of traditional subsistence and culturally relevant species for tribes, as well as to impact water quality in the Great Lakes and inland waterways. In the past, local shortages of important plants and animals could push Indigenous Peoples to migrate to areas with more abundance, such as when parts of the Burt Lake Band moved north into Canada once the fur trade mostly exhausted game throughout Northern Michigan in the early 19th century (White, 1978). However, the legacy of the reservation system in the United States has complicated Indigenous efforts to pinpoint areas with greater resource availability and relocate the

communities (Maldonado et al., 2013). More recent efforts by the tribes of Northern Michigan to assert hunting, fishing, and gathering rights memorialized in past treaties are overcoming some migratory restrictions and creating new opportunities to access resources by extending geographical boundaries, providing more time and methods for harvest, and restoring power to tribes to develop and enforce sound resource management regulations.

But resource access is not universal across tribal jurisdictions. In general, tribes possess an inherent right to self-governance that predates European arrival in the Americas (Fletcher, 2006). Acknowledgment, more commonly referred to as “federal recognition,” is an affirmation of Indigenous sovereignty and establishes a trust relationship with the U.S. government that opens the tribe to access special federal resources for needs such as healthcare, education, economic development, and land management (Fletcher, 2016; Koenig & Stein, 2006; McCulloch & Wilkins, 1995). Currently there are more than four hundred Indigenous communities “unrecognized” by the U.S. government (GAO, 2012). In the most recent National Climate Assessment (NCA4), a group of government officials and Indigenous scholars explained that a tribe’s recognition status could create serious impediments to climate response:

Non-federally recognized tribes, Native Hawaiians, and other Indigenous peoples also have rights to self-determination to protect their traditional knowledges, cultures, and ancestral lands, while developing their economies and providing community services; but they do so without reservation lands, treaty rights, and federal provision of essential services, among other rights, authorities, and capacities to which federally recognized tribes can appeal. (Jantarasami et al., 2018, CH.15)

This paper addresses the effect that recognition status and treaty rights can have on climate adaptation for unrecognized tribes by answering the question: “*Do tribal lands and treaty rights preserve resource access?*” The paper includes a comparative study of resource access for the unrecognized Burt Lake Band and its federally recognized peers in the region of Northern Michigan ceded to the U.S. government by the 1836 Treaty of Washington. Coupled with human development, climate change is helping to usher in abundance for some species and scarcity for others. This has the effect of creating climate “winners” and “losers” depending upon resource needs and access. The fisheries of the Great Lakes are an example of contested space being placed under greater pressure from human development and climate change and necessitating interjurisdictional cooperation between tribes and the State of Michigan to maintain fair and equitable access to key species. I introduce the role of tribal treaty rights in shaping the management of the Great Lakes fisheries and hunting grounds of Northern Michigan and assess how key cultural species to the Northern Michigan bands are expected to fare under climate change. Important themes are identified from resource agreements and court rulings to compare access between federally recognized tribes and the Burt Lake Band. The paper concludes with the addition of another non-federal tribe, the Nulhegan Band of the Coosuk Abenaki Nation in Vermont, and contrasts its efforts to negotiate access without treaties to the opportunities currently afforded the Burt Lake Band.

Background

Climate Winners and Losers

The Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services, an international body dedicated to preserving biodiversity and promoting sustainable use of ecosystems, warns, if the targets from the Paris Agreement are not met, pressures from climate change and human development could lead to the extinction of more than one million plant and animal species and cause the average abundance of local species to shrink by as much as twenty percent (IPBES, 2019). The inability of some species to migrate into new, acceptable ecosystems is driving local extinction events around the globe (Román-Palacios & Wiens, 2020).

Plants and animals provide humans with food, shelter, medicine, and recreation and are the foundation for spirituality and culture. But the rapid modification of ecosystems brought about by human development and climate change has outpaced certain species' ability to adapt and spurred biodiversity loss that threatens international sustainable development targets (UNEP, 2021). But whereas changing temperatures, precipitation, and ideal climates can harm specialized species that depend on a single characteristic of the environs, the new climates can open opportunities for other species to expand their ranges by adapting rapidly to evolving conditions (McMahon et al., 2019).

Unfortunately, not all species can easily shift their range or food sources and remain viable. For example, pollinators are experiencing severe contractions to their geographical ranges and are being forced to flee to higher elevations or move toward the poles, but not all regions benefit from the availability of higher altitudes (Pyke et al., 2016). Species pre-adapted to thrive in warmer climates and changing precipitation patterns may outcompete previously dominant species and supplant the ones upon whose abundance traditional activities may have been based. Scientists are now classifying species as climate "winners" and "losers" based on perceived capacity to adapt and survive (Somero, 2010).

This discussion extends to human populations and is spurring debates over whether justice and equity demand that winners compensate losers for their climate misfortune (Mintz-Woo & Leroux, 2021). Indigenous Peoples have already begun to feel significant negative effects from climate change (Jantarasami et al., 2018), and many tribal communities are at risk of losing relationships to key plants and animals (Chief et al., 2014). The right to harvest culturally important species embedded in historical treaties has emerged as a primary tool through which tribes ensure future access to vital resources (Lynn et al., 2013). However, treaty rights are limited to a select group of federally recognized tribes that both engaged the U.S. government in diplomatic negotiations over land cessions and had the foresight to include provisions ensuring perpetual harvest of species significant to the community. Thus, the reliance on treaty rights to preserve resource access could exacerbate climate winners and losers in Indian Country based on recognition and treaty provisions.

Species Changes and Management in Northern Michigan

Climate effects in Northern Michigan have the potential to severely inhibit subsistence and cultural practices based upon local species. A review of the historical record from firsthand accounts written by

Indigenous Peoples from Northern Michigan and questionnaire responses by the Burt Lake Band Council helped identify culturally important species. Ethical approvals for the questionnaires were received from the University of Maryland's Institutional Review Board, as well as teleconference meetings with the Burt Lake Band Tribal Council to ascertain the safest and most effective mode of data collection during the COVID-19 pandemic. The species identified in the historical document search and the Council's survey responses were then evaluated based on a vulnerability assessment conducted by the Inter-tribal Council of Michigan and on published scientific evaluations. High levels of vulnerability exposing many culturally important species in Northern Michigan threaten to place the region's Indigenous communities into the category of "climate losers."

Lake trout and sturgeon are traditional summer food sources for the Indigenous Peoples of Northern Michigan (Cleland, 1992), and lake trout remain an important commercial resource for federally recognized bands (LTBB, 2016). Recent data from the National Oceanic and Atmospheric Association indicate that surface temperatures on the Great Lakes have risen in the past few years due to thinning ice levels opening the lakes sooner in the spring (NOAA, 2021). One study estimates surface water temperatures could rise by as much as 6.7°C by 2100 (Trumpickas et al., 2009). Rapid warming of the lakes inhibits "turnover" and fosters hypoxic dead zones where oxygen levels become so low that aquatic life cannot survive (Dietz & Bidwell, 2011). These dead zones tend to occur in deeper waters where species like lake trout and sturgeon prefer to reside. The warming waters in the Great Lakes are also extending the feeding season for the invasive sea lampreys, allowing the parasitic fish to once again wreak havoc on lake trout populations (Lipton et al., 2018).

Various species of trees have historically provided the Indigenous Peoples of Northern Michigan with modes of transportation, food and food storage, shelter, and tools, to name a few uses. Sugar maples, the sap used to sustain communities recongregating after long winters (Blackbird, 1887), are expected to shift northward away from the region by 2100 (Nadelhoffer et al., 2010). White birch, traditionally a common source for canoes, are seeing renewed use in the Great Lakes (Low, 2015), but are also threatened with local extinction due to climate change (Nadelhoffer et al., 2010). Elms were historically fashioned into cylinders to store and dry out corn in the fall (Blackbird, 1887), but climate change could reduce their numbers by more than fifty percent (Nadelhoffer et al., 2010). In fact, the six most abundant tree species in the region—trembling aspen, sugar maple, bigtooth aspen, Northern white cedar, paper birch, and balsam fir—are expected to disappear before the end of the century (Nadelhoffer et al., 2010). The Little Traverse Bay Bands (LTBB), a federally recognized tribe in the region, is currently experimenting at its tribal farm with new tree species from the south in an attempt to substitute for some of these important species in the future (Nature Change, 2018).

The management of these key species can be traced back nearly two centuries to the 1836 Treaty of Washington, an agreement covering about 40% of the territory that would become the State of Michigan one year later (PACUH, 2018). *Figure 1* shows the extent of the land ceded by the Indigenous Peoples of Northern Michigan and the locations and recognition status of the six tribes within the territory. In exchange for title to the lands of the northern Lower Peninsula and eastern Upper Peninsula, the U.S. promised the Ottawas and Chippewas money for education, farm implements, cattle, doctors and medicine, blacksmiths, and other necessities, including 100 barrels of salt and 500 fish barrels each year.

Most importantly, the thirteenth article of the treaty states, “The Indians stipulate for the right of hunting on lands ceded, with the other usual privileges of occupancy, until the land is required for settlement” (Treaty of Washington, 1836, p. 495). By relinquishing title to thousands of acres of land in Northern Michigan, the Bands secured hunting and fishing rights throughout the region.

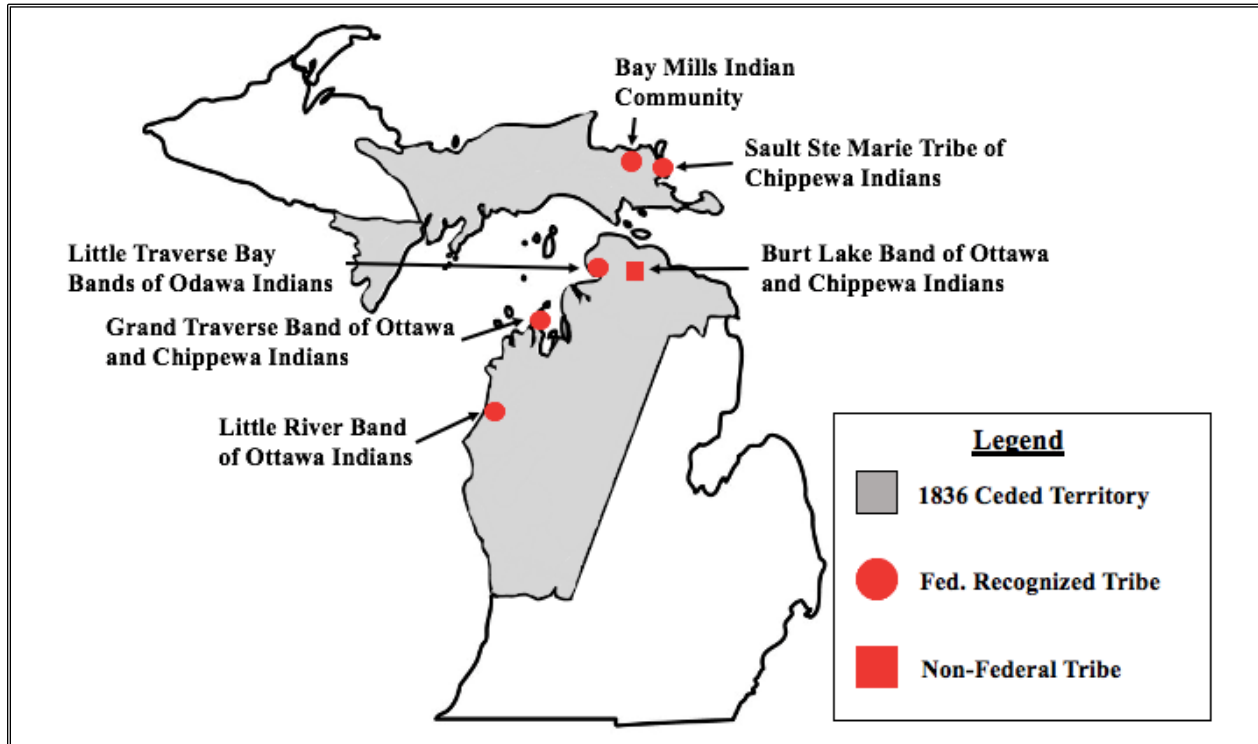


Figure 1. The Tribes of the 1836 Ceded Territory.

In the subsequent year after the treaty was signed, the U.S. government gradually removed its support of treaty hunting and fishing and pressed the tribes of Northern Michigan to assimilate into an agrarian lifestyle (Cleland, 1992). At the same time, commercial and subsistence fishing became more and more difficult to pursue. Decades of overfishing and the introduction of invasive sea lamprey and alewives helped strip the Great Lakes of its resources, and by the 1950s, the commercial and recreational viability of fishing in Lake Michigan and Lake Superior were exhausted (Doherty, 1990). But the restoration of the Great Lakes fishery in the 1960s, coupled with an Indigenous offshoot of the Civil Rights movement, renewed interest in exercising treaty rights and traditional subsistence practices. Fish-ins, where Indigenous fishermen would openly defy state regulations that conflicted with tribal usufruct rights, sprang up all over the Pacific Northwest and Great Lakes (Wilkinson, 2005). In response, sport fishermen would burn Indigenous boats and threaten businesses that bought fish from the tribes. Sport fishing was a multimillion-dollar tourist industry in Michigan by the 1970s, and state politicians would quickly side with sport fishermen against long-standing Indigenous treaty rights.

Public and political sentiment in Michigan often sided with non-Indigenous sport fishermen, but the Bands remained steadfast in their exercise of treaty fishing rights. The first case to adjudicate the matter was initiated when William Jondreau, a member of the L'Anse Band (Keweenaw Bay Indian

Community), challenged state fishing regulations by organizing a fish-in (Doherty, 1990). His claim was based on an 1854 treaty with the Band, and the Supreme Court of Michigan determined that the tribe's right to fish under the 1854 treaty had not been extinguished nor could it be limited by state law (*People v. Jondreau*, 1971). *People v. Jondreau* was an important decision because it reestablished the primacy of tribal usufruct rights over state game and fish regulations, but the court ruling was confined to a single treaty with a single tribe. The wider implications of the *Jondreau* decision were unknown to Indigenous and sport fishermen alike.

The Michigan State Supreme Court was again asked to rule on tribal treaty fishing rights in 1976 after A.B. LeBlanc, a member of the Bay Mills Indian Community, was arrested for violating state law by fishing with a gillnet. In ruling in favor of LeBlanc, the Court cited government documents about the historical reliance on fishing for subsistence by the Bay Mills Indian Community and the provisions that reserved hunting and fishing rights for the signatory Bands of the 1836 Treaty of Washington (*People v. LeBlanc*, 1976). The Court also found that no subsequent treaties or actions extinguished those rights. The Court would conclude that the State did have an interest in regulating tribal fishing, but it was limited to "reasonable and necessary conservation measure[s]" (*People v. LeBlanc*, 1976, p. 64). The case was remanded back to the lower courts to determine if the State's gillnet prohibition was reasonable, necessary, and non-discriminatory toward Native Americans.

The fight over the Great Lakes fishery hit a fever pitch soon after the decision in *LeBlanc*. A case was filed in federal court by the U.S. government on behalf of three federally recognized tribes in the 1836 Ceded Territory to further resolve treaty fishing rights. Similar to the Michigan State Supreme Court decision in *LeBlanc*, federal district court judge Noel Fox ruled that Northern Michigan tribes had a right to fish under the 1836 and 1855 treaties and were not restricted as to time, place, type, or manner of taking (*U.S. v. Michigan*, 1979). The judge ordered the tribes and the State of Michigan to develop a framework to co-manage the fisheries.

The court opted to enlist the help of a mediator to oversee the co-management of the fishery through alternative dispute resolution. The result of the dispute resolution process was the 1985 Consent Order. In the agreement, the mediator essentially divided the lakes and kept sport and Indian commercial fishing interests far away from each other (*U.S. v. Michigan*, 1985). The order was updated in 2000 and welcomed two more tribes to the negotiating table, following the federal recognition in the 1990s of the Little Traverse Bay Bands of Odawa Indians and the Little River Band of Ottawa Indians (*U.S. v. Michigan*, 2000). The formula for the 2000 Consent Decree over the fisheries of the 1836 Ceded Territory was later adapted to treaty hunting rights in the 2007 Inland Consent Decree.

Comparing Resource Access in Northern Michigan

In order to discern how recognition status impacts Indigenous access to resources, a theme identification methodology was used to ascertain the most important and relevant aspects of resource access to tribes in Northern Michigan. Theme identification was applied to the 1836 Treaty of Washington, the *Jondreau*, *LeBlanc*, and *Michigan* cases, and the 2000 and 2007 consent decrees that form the modern basis for the co-management of hunting, fishing, and gathering resources in the region previously ceded by the 1836 Treaty. The major considerations in these sources provide a foundation that

allows for the comparison of differences in resource access between federally recognized tribes in Northern Michigan and the Burt Lake Band.

Data and Methods

Theme identification is a qualitative methodology used to help describe and explain data by grouping information into categories for comparison (Ryan & Bernard, 2003). There are numerous strategies used to discern themes, including the repetition of terms, the identification of familiar terms used in unfamiliar ways, the examination of the context in which a word is used, the transition to new content, and the exploration of similarities and differences between terms (Ryan & Bernard, 2003). The data utilized to perform the theme identification are public documents related to the establishment of the modern resource management framework in Northern Michigan. This framework is delineated through a mediated negotiation every twenty years between federally recognized tribes and the State of Michigan; this periodic negotiation is referred to as the consent decree process.

The history of the consent decree process is well-established in the literature, and there are numerous books written by legal scholars (Pittman & Covington, 1992), historians (Doherty, 1990), and sport fishing journalists (Williams, 1986) about the origins of the Consent Decrees and the documents and court rulings that gave the decrees life. Each book referenced the origin of the decrees, the 1836 Treaty of Washington, and a trio of court cases in the 1970s and 1980s as the foundation for what are now two separate decrees—the 2000 Consent Decree covering the Great Lakes fisheries and the 2007 Inland Consent Decree overseeing hunting and gathering in the 1836 Ceded Territory. The three court cases were the *People v. Jondreau* (1971), the *People v. LeBlanc* (1976), and the *U.S. v. Michigan* (1979). The 1836 Treaty, the 2000 and 2007 decrees, and the three court cases comprise the data examined for theme identification.

To focus the comparative analysis on the most relevant themes, I utilized an identification strategy based on frequency and response. Frequency, sometimes called repetition, is one of the most common identifiers and attaches significance to themes that appear most often in the data (Ryan & Bernard, 2003). Given the incredibly contentious battle over fishing rights that spurred the negotiation of the consent decrees, response identification was also used to establish which themes elicit strong reactions when violated.

The 2000 Consent Decree consists of twenty-five sections and covers issues such as commercial fishing zones and permits, recreational fishing zones and permits, the division of regulatory authority between the tribes and the State, management of key species like lake trout and salmon, subsistence fishing, harvest methods, information sharing and gathering, and enforcement (Consent Decree, 2000). Of the twenty-five sections in the 2000 Consent Decree, 8 sections can be eliminated from the theme assessment because they are not relevant to resource management, such as attorneys' fees (Section XXIV), the duration of the agreement (Section XXII), and the definitions of key terms (Section II). The 2007 Inland Consent Decree for hunting and gathering incorporates similar elements throughout twenty-nine sections for the division of regulatory authority, commercial and subsistence harvesting, the methods used for harvest, allocation of rare species like elk and sturgeon, enforcement, and the exchange

of information (Inland Consent Decree, 2007). Seven sections were similarly excluded from the Inland Consent Decree based on irrelevance to the assessment.

Results and Discussion

Table 1 lists the sections from each of the consent decrees included in the theme identification. Upon examining the sections, we were able to place them into groups, which made categorizing themes based on frequency more straightforward. For example, the sections of the 2007 Inland Consent Decree governing the hunting of certain species, such as deer (Section XV), wild turkeys (Section XVI), and bears (Section XVII), are all concerned with determining the dates on which hunting is permitted and can sometimes create special seasons for hunting outside state regulations. Other themes that appear frequently include commercial harvesting (4 sections), licensing (8), enforcement (2), regulatory authority (10), reporting requirements (7), funding (2), and harvest boundaries (4).

Table 1. Thematic Identification in the Consent Decrees

Theme	2000 Consent Decree	2007 Inland Consent Decree
<i>Licensing</i>	IV. Commercial Fishing Zones	X. Restrictions on Hunting and Fishing in Particular Locations
	V. Recreational Fishing	XI. Gear and Methods of Take
	IX. Tribal Charter Boat Operations	XV. Deer Hunting
	XII. Subsistence Fishing	XVI. Wild Turkey Hunting
<i>Infrastructure Funding</i>	XX. Financial and Other Commitments	XXII. Restoration, Reclamation, and Enhancement
<i>Extended/Special Harvest Seasons</i>	V. Recreational Fishing	XV. Deer Hunting
	VII. Lake Trout Management	XVI. Wild Turkey Hunting
	VIII. Management of Other Species	XVII. Species in Need of Allocation
	XII. Subsistence Fishing	XVIII. Migratory Birds
		XIX. Threatened and Endangered Species under State Law
		XXV. Wildlife Species for Which the State Does Not Currently Permit Hunting

<i>Extended/Special Harvest Boundaries</i>	VI. Regulation of the Fishery	VII. Land and Waters on which Tribal Members May Exercise Inland Article 13 Rights
		X. Restrictions on Hunting and Fishing at Particular Locations
		XX. Use of State Land
<i>Commercial Enterprise</i>	IV. Commercial Fishing Zones	VIII. Commercial Harvests
	XI. Tribal Charter Boat Operations	IX. Sale or Trade of Live Animals
<i>Regulatory Authority</i>	IX. Stocking	IV. Recognition of Treaty Rights
	X. Tribal Trap Net Operations	V. Regulation of Treaty Rights
	XVIII. Executive Council	VI. Definition of the Extent of Inland Article 13 Rights
	XIX. Dispute Resolution	XI. Gear and Method of Take
		XII. The Use of Specially Regulated Fishing Methods in Inland Lakes and Their Tributaries
		XIII. Disease Control
<i>Enforcement</i>	XVII. Jurisdiction and Enforcement	XXIV. Law Enforcement
<i>Reporting/Info Sharing</i>	XIII. Technical Fisheries Committee	XIV. Tagging and Reporting Requirements
	XIV. Notice and Consultation	XXI. Assessment Activities
	XV. Information Sharing	XXII. Consultation and Exchange of Information
	XVI. Information Gathering	

The cases reinforced a few important themes to supplement the groupings derived from the consent decrees. *Jondreau* (1972) and *LeBlanc* (1976) emphasized the desire of the Bands to regulate subsistence, recreational, and commercial activities on tribal lands and adjacent waters. Central to tribal fishing rights in *LeBlanc* were protecting traditional methods for harvesting resources, such as the use of gillnets to catch fish. Gillnets had long been outlawed by the State of Michigan because the nets had a propensity to indiscriminately scoop up any variety of fish that became trapped in its web (Doherty, 1990). The 2000 Consent Decree addresses the use of gillnets by providing funding to help tribal

fishermen transition to other netting practices that better target individual species and significantly reduce bycatch. *U.S. v. Michigan* turned on questions regarding the time, place, and manner in which fishing took place within the 1836 Ceded Territory (*U.S. v. Michigan*, 1979). Each of these considerations is incorporated into the 8 themes derived from the consent decrees.

The findings from the theme identification study can generally be grouped into two categories. The first category consists of strategies to ease barriers to accessing resources. Examples include free fishing licenses, funding for infrastructure, such as construction of new fishing docks, and hunting seasons that extend beyond state regulation. The second category includes strategies for asserting control over the management of resources, such as permitting commercial fishing, developing regulations for tribal lands, enforcing those regulations, and monitoring the health of different species. *Table 2* presents a comparison of resource access in Northern Michigan between federally recognized tribes from the 1836 Ceded Territory and the Burt Lake Band.

For each theme, the federally recognized tribes benefit from the easing of barriers and extensive control over the regulation and enforcement of key species. In *Governing the Commons*, her seminal book on managing resources, Nobel Prize laureate political scientist Elinor Ostrom developed a framework for analyzing the effectiveness of common resources management (Ostrom, 1990). She extolled the virtues of actions like information sharing, adjusting rules as ecosystem conditions change, and respecting the autonomy of individual actors to change rules based on guidelines supported by external authorities. The consent decrees house each of these characteristics. Each decree includes extensive reporting and monitoring requirements for key species by the tribes and the State of Michigan that are shared with others in the group (Consent Decree, 2000; Inland Consent Decree, 2007). Some tribes, such as the Little Traverse Bay Bands, have even chosen to publicly share this data (Odawa NRD, 2017). The Technical Fisheries Committee established in the 2000 Consent Decree serves as a representative advisory body to help make decisions about the overall health of the fishery. Participation in the consent decrees provides federally recognized tribes not only the opportunity to exert regulatory control over important resources but also to interact with state and federal actors on major resource management decisions.

Tribal co-management of the treaty lands and waters encompasses both the harvesting of species and the regulation of that harvesting. As *U.S. v. Michigan* worked its way through federal court, the Northern Michigan Bands had already begun to pass fishing regulations on their reservations (Doherty, 1990). These natural resource codes form the backbone of the co-management of Northern Michigan's vast land and aquatic resources. For example, the Little Traverse Bay Bands passed a 62-page revised hunting and fishing code in 2015 (LTBB, 2015). Other ceded territories in the Great Lakes regions formed collectives to help with management and reporting, such as the Great Lakes Indian Fish and Wildlife Commission (GLIFWC) that works with eleven federal tribes in three states governed by three different treaties.

Individual tribes and organizations like GLIFWC produce a number of reports on harvesting activities and resource and habitat monitoring. The 2016-2017 LTBB Annual Harvest Report calculates that seventeen percent of the tribal population had hunting and fishing licenses and harvested a record 238 deer in 2016 (Odawa NRD, 2017). GLIFWC similarly performs a number of monitoring activities,

including advice for consuming mercury-affected fish (Moses, 2020), commercial catch in the Great Lakes (Mattes, 2020), wild plant gathering (Wrobel, 2017), and the wild rice harvest (David, 2020).

Whereas federally recognized tribes like LTBB have experienced record harvests of key species in recent years, a survey of BLB council members noted that traditional hunting and fishing practices had become unsustainable as the region's tourism industry brought vacation homes and weekend boating enthusiasts to the tribe's ancestral lands. Citizens of federal tribes in the 1836 Ceded Territory also have access to commercial fishing opportunities on Lake Michigan and Lake Superior, but BLB members cannot receive permits for such activities without federal recognition under the consent decrees. One BLB council member linked limited economic opportunities in the region to an outmigration of tribal citizens to distant urban centers like Detroit or Lansing. The lack of resource access can be felt in the economic, social, and cultural outcomes for the Burt Lake Band.

Through theme identification, pertinent issues were identified in the use and regulation of key species in Northern Michigan. The comparative analysis of the eight resource access categories demonstrates a clear divide between federally recognized tribes in the 1836 Ceded Territory and the Burt Lake Band in how tribal members can derive cultural and economic benefits from subsistence and commercial harvesting activities. Despite being a signatory of the 1836 Treaty of Washington, the Burt Lake Band benefits from none of the agreement's provisions. In this instance, the Band's lack of recognition impairs adaptive capacity as compared to its federally recognized peers.

Are Treaty Rights Even Necessary? The Case of the Nulhegan Band

The Burt Lake Band is a rare case in the class of non-federal tribes because it has two treaties with the federal government, albeit agreements that the U.S. government refuses to honor absent formal recognition. There are hundreds of Indigenous communities in the United States that never had the opportunity to engage in treaty-making with the U.S. government. The U.S. government ended its practice of negotiating treaties with Tribal nations in 1871, and many tribes in the western U.S. had not yet established substantial diplomatic and trade relations with the U.S. government that would have warranted treaty negotiations (Quinn, 1990). Along the East Coast, the federal government found treaties unnecessary as it assumed most tribes in the region had gone extinct or assimilated into mainstream society (McCulloch & Wilkins, 1995). In conducting research on both federal recognition of Tribal nations and resource access, a secondary question about whether tribes that lack recognition and treaty rights navigate resource access differently than tribes like the Burt Lake Band. One non-federal tribe thought to have disappeared more than a century ago, the Nulhegan Band of Coosuk Abenaki in Vermont, were identified while researching non-treaty tribes. The Nulhegan Band possesses a strong interest in securing resource access for its Tribal citizens and was willing to share its experiences on the subject. This section presents the case of the Nulhegan Band as a juxtaposition to the Burt Lake Band and examines its efforts to negotiate for resource access absent federal recognition and treaty rights. To examine the case of the Nulhegan Band, a tribal official participated in an hour-long, semi-structured interview about the Band's strategies and success in securing resource access for its members in Vermont. This interview was supplemented with state legislation, agreements with public and private entities, and news reports chronicling the parameters of the Nulhegan Band's access.

The Nulhegan Band is part of the Algonquin family of Western Abenaki and historically maintained very diverse subsistence patterns in present-day New England and eastern Canada. The population for all the Abenaki territory was estimated to be around ten thousand in 1600, but the arrival of Europeans would decimate their populations in the region by as much as 95-percent (Calloway, 1990). Band life revolved around seasonal migration for food by hunting moose and deer, fishing, gathering, and planting maize and other sister crops. Historian Colin Calloway wrote,

While English settlers benefitted from Abenaki knowledge, adopted Abenaki practices in their hunting, fishing, and planting, and utilizing native herbal remedies, Abenakis had to come to terms with European notions about ownership and utilization of the land. (1990, p. 187)

Despite a federal law prohibiting the private purchase of land from Native Americans, land speculators formed the Eastman Company and bought 3,000 square miles of Vermont from King Phillip of the Upper Coos in 1796. The sale included a provision that allowed for perpetual hunting and fishing rights to the tribe.

As generations passed, New Englanders assumed the Abenaki bands had gone extinct. This was the prevailing belief, despite the Bands constantly petitioning for land rights in the 19th century. The federal government continually denied Abenaki petitions arguing that Abenaki land rights had been extinguished by old colonial treaties (Calloway, 1990). With fierce resistance from federal officials to acknowledge Abenaki existence, local recognition and relationships surprisingly grew in the 1970s. The governor of Vermont would formally recognize the Abenakis in 1976, but his successor would quickly rescind that acknowledgment (Calloway, 1990). Attempts to restore old hunting grounds were thwarted when the mouth of the Missisquoi River was designated a wildlife refuge, and the Vermont Supreme Court subsequently overturned recognition of Abenaki fishing rights with what it viewed as “the increasing weight of history” (Calloway, 1990, p. 250). The Abenaki relationship with the State of Vermont and subsistence resources has changed considerably in the past few decades since that state supreme court decision.

The State of Vermont formally acknowledged the Nulhegan Band in 2011 (1 V.S.A. § 854). In outlining its process for recognition, the state legislature attempts to restrain recognition by arguing it should not “be construed to create, extend, or form the basis for any right or claim to land” (1 V.S.A. § 853[h]). The Band has a three-branch government comprised of a council-nominated chief and 2nd chief, an elected council of 5-13 members, and an elder’s council or council of judges to interpret the Nulhegan constitution (Nulhegan Band, 2021a). It is the responsibility of the chief (Sogomo) to manage the day-to-day operations, security, and services of the Band.

Data

To better discern how the Nulhegan Band approaches issues related to resource access in Vermont, a semi-structured interview was conducted with a tribal official for 1 hour on the telephone. Ethical approvals for the interview with the Nulhegan official were obtained from the University of Maryland’s Institutional Review Board. The questions were primarily derived from a combination of background

research into the Nulhegan Band's resource activities and the themes exposed in *Table 2*. Topics included the plant and animal species important to the Nulhegan Band, how members harvest those species, barriers to access, political relationships with state and local jurisdictions, what assistance those jurisdictions contribute to the Nulhegan Band's resource access, and discussion about different projects instigated by the Nulhegan Band to improve access. The interview was supplemented by publicly available local news reports over the past decade on the projects and agreements with public and private entities that maintain access to certain resources for members of the Nulhegan Band.

Table 2. Comparing Resource Access between Northern Michigan Tribes

	Fed. Tribes in 1836 Ceded Territory	Burt Lake Band (MI)
<i>Easing Barriers</i>		
Free licenses	Yes	No
Infrastructure funding	Yes	No
Extended/special harvest seasons	Yes	No
Extended/special harvest boundaries	Yes	No
<i>Asserting Control</i>		
Commercial fishing permitted	Yes	No
Regulatory authority	Yes	No
Enforcement	Yes	No
Reporting requirements	Yes	No

The document search was guided by interview responses from the Nulhegan Band official. The official’s responses uncovered one bill from the state legislature, eight partnerships for resource harvesting with public and private entities, and two land development agreements. Each of these eleven opportunities was reviewed for instances of the eight criteria developed through theme identification. *Table 3* lists each of the opportunities and details which criteria are present.

Table 3. Nulhegan Band Resource Agreements

	1	2	3	4	5	6	7	8	9	10	11
<i>Easing Barriers</i>											
Free licenses	✓										
Infrastructure funding										✓	✓
Extended/special harvest seasons											
Extended/special harvest boundaries		✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
<i>Asserting Control</i>											
Commercial fishing Permitted											
Regulatory authority											
Enforcement											
Reporting requirements											

Sources for Nulhegan Band Resource Agreements

1. License Fees. 10 V.S.A. § 4255. (2021).
2. Vermont Fish and Wildlife Dept. (2021). Abenaki Collecting License.
3. Green Mountain Abenaki Center. (2021). Abenaki Gathering Agreement.
4. First Light + Power Resources. (2016). Tribal request to gather plants on lands within the boundary of the Federal Energy Regulatory Commission (FERC) licensed Projects #1889 and #2485 (Project Lands).
5. Green Mountain Power. (2019). Letter of License Agreement for Abenaki Tribe Plant Collections within Green Mountain Power’s Federal Energy Regulatory Commission (FERC) Licensed Project Boundaries for the Bolton Falls Project, FERC P-2879.
6. U.S. Dept. of Agriculture. (2016). Letter Authorizing the Collection of “Special Forest Products” for non-commercial uses.
7. Vermont Dept. of Forests, Parks, and Recreation. (2019). License #19768.
8. U.S. Fish and Wildlife Service. (2021). Special Use Permit.

9. Winooski Hydroelectric Company. (2019). Consent to Request to Gather Plants on Winooski Hydroelectric Company Lands.
10. Vermont Land Trust. (2012, Dec. 17). *Nulhegan Abenaki attain first tribal forestland in more than 200 years*. [Press Release]. Available at: <https://vtdigger.org/2012/12/18/nulhegan-abenaki-attain-first-tribal-forestland-in-more-than-200-years/>.
11. Goodwin, C. (2020). "Dawnland Garden and Black River Seed Library." [Sterlingcollege.edu](https://www.sterlingcollege.edu/blog/dawnland-garden-black-river-seed-library/). Available at: <https://www.sterlingcollege.edu/blog/dawnland-garden-black-river-seed-library/>.

The Vermont state legislature passed a law in 2020 to extend certain hunting and fishing rights to state-recognized tribes. The bill includes permanent, free combined hunting and fishing licenses for members of state-recognized tribes (10 V.S.A. § 4255, 2021). In 2012, the Vermont Land Trust, an organization dedicated to the protection and stewardship of farms and forests throughout the state, partnered with the tribe to secure a sixty-five-acre parcel of land to serve as a community garden, maple syrup operation, and the Nulhegan Band's community meeting place (Vermont Land Trust, 2012). A coalition was put together with help from the Sierra Club, U.S. Fish and Wildlife Service, and private donations to purchase the land. The maple syrup operation helps fund youth education for the Nulhegan Band, and the land base serves as a center for growing traditional foods and provides for firewood, hunting, and the gathering of medicinal plants. To supplement the sixty-five-acre plot, Nulhegan officials have negotiated eight different agreements with the state and federal governments, as well as with private and corporate landowners, to gather and harvest certain resources from public and private lands. The Nulhegan official said during the interview that the Band was looking to expand their harvesting into new territories through these cooperative access agreements.

Finally, the Nulhegan Band has recruited local landowners to grow traditional Abenaki foods for tribal members through the Abenaki Land Link Project (Berger, 2020). The landowners grow traditional corn, beans, and squash using heirloom varieties of Abenaki plants stewarded for generations. The Nulhegan Band has also partnered with a local college to preserve those seeds in a seed bank (Goodwin, 2020). The Nulhegan official explained during the interview that traditional foods are important to their culture, and the seeds represent a "chain of custody" that extends all the way to the Creator. The Abenakis helped European colonists survive and adapt in New England, so now the Nulhegan Band is asking local farmers to return the favor. Despite not having any historical treaties or federal recognition, the Nulhegan Band managed to secure a land base for subsistence and cultural activities, engaged local communities in contributing to the food security of its members, and negotiated reduced barriers and improved access to its traditional territories for hunting, fishing, and gathering.

Comparing Across Recognition Status and Geographies

Table 4 compares resource access between federally recognized tribes in the 1836 Ceded Territory, the Burt Lake Band, and the Nulhegan Band. The comparison demonstrates that federally recognized tribes in Northern Michigan have significantly more control over resources and fewer barriers to access than the two non-federal tribes. Further, the efforts of Nulhegan officials have contributed to an easing of barriers to accessing culturally important resources, but the Nulhegan Band lacks the control measures available to federally recognized tribes in the 1836 Ceded Territory. The lack of easements and control over resource access available to the Burt Lake Band reduces the community's adaptive capacity and

leave it more vulnerable to geographic shifts and local extinctions of key species anticipated with climate change.

Table 4. Comparing Resource Access between Tribes

	Fed. Tribes in 1836 Ceded Terr.	Burt Lake Band (MI)	Nulhegan Band (VT)
<i>Easing Barriers</i>			
Free licenses	Yes	No	Yes
Infrastructure funding	Yes	No	Yes
Extended/special harvest seasons	Yes	No	No
Extended/special harvest boundaries	Yes	No	Yes
<i>Asserting Control</i>			
Commercial fishing permitted	Yes	No	N/A
Regulatory authority	Yes	No	No
Enforcement	Yes	No	No
Reporting requirements	Yes	No	No

The federal tribes and the Nulhegan Band share many of the same opportunities to ease barriers to access important resources, such as receiving free fishing licenses, securing funding to support infrastructure improvements related to resource access, and expanding the geographies where resources can be harvested. However, neither of the non-federal tribes are able to assert control over the resources through regulation, enforcement, and monitoring like federal tribes in Northern Michigan.

Efforts by the Nulhegan Band to reestablish heirloom plants and agricultural activities with deep historical significance are part of a broader movement to reconnect with Indigenous cultures through renewed expressions of traditional practices. Cultural restoration has been shown to aid in healing historical traumas brought about by generations of colonial oppression (Jacob, 2013) and rehabilitate damaged ecosystems (Eckert et al., 2018). With the help of a landscape architecture student from the University of Michigan, the Burt Lake Band is establishing a healing garden at its tribal offices (Roos, 2021). The garden is called *Izhi-Minoging Mashkikiwan*, which translates to “place where medicine grows well.” The garden includes more than forty species of plants arranged in a traditional medicine wheel. The project is an example of the Burt Lake Band improving access to important species and cultural revitalization without the need for treaty rights or federal recognition. However, should the Band desire to expand access to more vulnerable or contested species, it would likely need to intercede in the consent decree process.

Despite signing the 1836 Treaty of Washington, the Burt Lake Band has never attempted to participate in the consent decree process set up by the federal court in *U.S. v. Michigan* and assert its treaty rights. When asked in the questionnaire why it would forego the opportunity, Burt Lake officials voiced concern that intervention could sour the Band's relationship with the State of Michigan and the federally recognized tribes in Northern Michigan. The support of those groups is very important to the Band's push for federal recognition, so it is avoiding situations that would "rock the boat." Recently, Emanuel and Wilkins (2020) noted a similar rationale from non-federal tribes in North Carolina seeking federal recognition while simultaneously resisting the permitting of the Atlantic Coast Pipeline. As climate change places more stress on local resources, the Burt Lake Band may need to reassess recognition support vs. exercising treaty rights. Regardless, a lack of treaty rights places non-federal tribes at a disadvantage in securing resource access, but the case of the Nulhegan Band demonstrates that savvy political maneuvering can help ease some barriers to harvesting.

Conclusion

There are many ways in which communities can improve access to and reduce barriers around important resources. The experiences of the Nulhegan Band and the tribes of the 1836 Ceded Territory in Michigan demonstrate how removing obstacles, like offering free hunting and fishing licenses, can improve participation and bring Indigenous Peoples closer to traditional activities. The case of the Nulhegan Band shows that treaties do not preclude the use and harvesting of resources, but instead highlight how access remains negotiable, even if treaties are no longer the preferred instrument.

It is too soon to determine if reducing barriers to access will be sufficient for climate adaptation or if Indigenous communities also need more regulatory authority to safeguard cultural resources. In discussing the climate, the Nulhegan official noted there were no significant climate effects on resource access for their community yet, and in fact, some aspects of culture could be helped, such as how warming temperatures are extending the traditionally short growing season in Northern Vermont.

The situations concerning the Northern Michigan Bands and the Nulhegan Band suggest that federal recognition, and the rights often reserved in historical treaties, are not necessarily a prerequisite to ensuring modern resource access and climate wins. However, access alone may not protect the resource needs of the community in the face of climate change. Instead, the relationship that a tribe has with neighboring jurisdictions, private interests, and the state may play a crucial role in adapting to challenges with resource scarcity. Although the State of Michigan lists the Burt Lake Band as a "State Historic Tribe," the two sovereigns have no real interactions on resource management. Despite being a signatory of the 1836 Treaty of Washington, the Burt Lake Band is excluded from the consent decree process and unable to exert the same regulatory authority over important commercial, subsistence, medicinal, and cultural resources as their federally recognized peers. The strong relationship between the Nulhegan Band and the State has enabled the Vermont tribe to ease some barriers to resource access, but that relationship has stopped short of transferring regulatory control to the tribe. Managing scarce resources is a perpetual endeavor, and climate change could open new opportunities for Indigenous communities and states to share administration.

Future research would benefit from an exploration into more alternatives to treaty rights, such as the partnerships currently being built by the Nulhegan Band with private companies, neighboring farmers, and the State of Vermont. Treaty rights are limited to federally recognized tribes that had the opportunity to negotiate in the small window in which the fledgling U.S. government engaged in the practice. This leaves non-federal tribes without a strong instrument to press for resource access, but it also opens those communities to explore creative opportunities to build political relationships, revitalize cultures, and assert sovereignty.

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