

## OVERVIEW GUIDE

# ENVIRONMENTAL ISSUES & TRIBAL NATIONS



Midwest  
**Environmental**  
Advocates

This guide is for informational purposes only and may become outdated. The information contained in this guide should not be used as legal advice applicable to a specific situation and in no way constitutes an attorney-client relationship.



# ACKNOWLEDGMENTS

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We would like to thank the numerous staff of Tribal Nations who provided essential feedback throughout the process of developing these guides, including:

- Randy Poelma, Environmental Sciences Program Manager, Ho-Chunk Nation Division of Environmental Health
- Tina Van Zile, Environmental Director & Nathan Podany, Hydrologist, Sokaogon Chippewa Community
- Natalene Cummings, Air Program Director, Forest County Potawatomi
- Red Cliff Environmental Department

# CREDITS

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This overview guide is intended for a broad audience. It introduces legal frameworks for Tribal environmental rights across the state of Wisconsin. The pamphlet guides that accompany this overview guide give more detail on specific issues and legal processes.

The state of Wisconsin encompasses the ancestral and contemporary territories of Dakota, Ho-Chunk, Menominee, Mohegan, Mohican, Ojibwe, Oneida, Pequot, and Potawatomi nations. Most of these nations and their peoples remain present within what we now call Wisconsin. While these acknowledgements are important, MEA endeavors to support Native people and governments through the work we do and encourages everyone to do the same.



## A POLITICAL RELATIONSHIP

Many Indigenous peoples of North America have a unique political relationship with the United States federal government. The United States Constitution recognizes the sovereignty of Tribal nations alongside states, the federal government, and foreign nations. Tribal nations have the sovereign authority to protect and enhance the health, safety, and welfare of their citizens and territory.

*"Tribal nations are part of the unique American family of governments, nations within a nation, as well as sovereign nations in the global community of nations."*

Tribal Nations and the United States: An Introduction,  
National Congress of American Indians



## UNITED NATIONS DECLARATION

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) is a non-binding international resolution that establishes a universal framework of "minimum standards for the survival, dignity and well-being of the indigenous peoples of the world." It states that Indigenous peoples have the right to self-determination, and by virtue of that, the rights to freely determine their political status and pursue their economic, social, and cultural development.

**BAD RIVER BAND OF LAKE SUPERIOR CHIPPEWA**

**BROTHERTOWN INDIAN NATION**

**FOREST COUNTY POTAWATOMI**

**HO-CHUNK NATION**

**LAC COURTE OREILLES BAND OF LAKE SUPERIOR CHIPPEWA**

**LAC DU FLAMBEAU BAND OF LAKE SUPERIOR CHIPPEWA**

**MENOMINEE INDIAN TRIBE OF WISCONSIN**

**ONEIDA NATION**

**RED CLIFF BAND OF LAKE SUPERIOR CHIPPEWA**

**SOKAOGON CHIPPEWA COMMUNITY (MOLE LAKE BAND)**

**ST CROIX CHIPPEWA INDIANS OF WISCONSIN**

**STOCKBRIDGE-MUNSEE BAND OF MOHICAN INDIANS**

**Tribes Based Outside Wisconsin with Treaty Rights in the State**

**BAY MILLS INDIAN COMMUNITY**

**KEWEENAW BAY INDIAN COMMUNITY**

**LAC VIEUX DESERT BAND OF LAKE SUPERIOR CHIPPEWA INDIANS**

**FOND DU LAC BAND OF LAKE SUPERIOR CHIPPEWA**

**MILLE LACS BAND OF OJIBWE**



## FIRST NATIONS OF WISCONSIN

Native peoples and governments have inherent rights and sovereign authority recognized through treaties and other means. In the state of Wisconsin, 11 Tribal nations have a formal nation-to-nation relationship with the U.S. federal government. One additional Tribe, the Brothertown Indian Nation, is no longer recognized by the federal or state government.

Five other Ojibwe Tribes based outside Wisconsin have recognized treaty-reserved rights across portions of Michigan, Wisconsin, and Minnesota.

# LEGAL FRAMEWORKS: TRIBAL ENVIRONMENTAL REGULATION

See [\*Tribal Environmental Regulation pamphlet guide\*](#)

## INHERENT AUTHORITY

The U.S. Constitution gives Congress power to regulate commerce with “the Indian Tribes” and makes clear that treaties, including those with Tribal nations, are the “supreme Law of the Land.” Apart from this, powers of Tribal nations are not defined by the Constitution. As a result, Tribes retain authority similar to that of other sovereign nations unless divested of it in one of three ways: (1) voluntarily through treaty, (2) through an explicit act of Congress, or (3) due to inconsistency with a Tribe’s status as a domestic dependent nation within the United States.

Conflict often arises over a Tribe’s inherent regulatory authority where non-Tribal members who own land within a reservation challenge that authority. In many cases, a Tribe’s inherent powers do not extend to activities of non-members. (See *Montana v. US* (1981) in appendix). However, there are two exceptions in which Tribes retain inherent sovereign power to exercise some forms of jurisdiction over non-members within their reservations, even on lands owned by non-members:

- where nonmembers enter consensual relationships with the Tribe or its members, through commercial dealing, contracts, leases, etc.
- where nonmember conduct threatens or has some direct effect on the political integrity, economic security, or health or welfare of the Tribe. This second exception is often the basis for a Tribe’s environmental regulatory authority across its reservation.

Conflict also arises over Tribes’ authority in ceded territory in regard to development, resource extraction, and management of animals and plants.

## DELEGATED FEDERAL AUTHORITY

In addition to inherent authority, some federal statutes delegate authority to Tribes. Where delegated authority exists, a Tribe need not show inherent authority by demonstrating it satisfies one of the *Montana* exceptions. The clearest example in the environmental context is the Clean Air Act.

It is important to note that, where a Tribe does not administer a federal environmental program, federal agencies carry out these programs rather than states. This is because reservation lands are held by the federal government on behalf of Tribes.



# CONSULTATION

The political relationship between Tribal nations and the U.S. government includes the duty to consult. Generally, consultation refers to the process where a non-Tribal government and a Tribe engage in a decision-making process where Tribal interests may be implicated. In practice though consultation is often criticized as merely a box to check that has no impact on non-Tribal government decisionmaking. Thus, international law frameworks such as the United Nations Declaration on the Rights of Indigenous Peoples—and many practitioners and leaders—call for government-to-government negotiation to reach consent on shared issues.

## FEDERAL CONSULTATION

The federal consultation duty originates in the federal trust obligation owed to Tribal governments and citizens, as established by treaties, acts of Congress, and the fact that the federal government holds lands and resources in trust for Tribes and Tribal members. Certain federal laws, regulations, and executive orders also create specific consultation or notification duties. Examples include the National Historic Preservation Act, National Environmental Policy Act regulations, and Executive Order 13175. Unfortunately, these often fail to ensure consideration of cumulative impacts from multiple projects, old and new.

## STATE CONSULTATION

While there is not a long history of a recognized state consultation duty to Tribes, calls for it have grown in recent years. Wisconsin has two executive orders that affirm a government-to-government relationship with Tribes whose reservations overlap the state. In 2004, Governor Doyle established Wisconsin's State-Tribal Relations Initiative through executive order. In 2019, Governor Evers signed an executive order that directed each cabinet agency to develop a Tribal consultation policy, identify a Tribal liaison, and engage Tribes on a government-to-government basis.

## TRIBAL CONSULTATION

Some Tribes have passed their own consultation laws and regulations, which often emphasize a mutual understanding of the culture, authority, politics, laws, perspectives, and rights of the other party and lay out specific processes that must be followed in consulting with the Tribe.

## CONSENT

The United Nations Declaration on the Rights of Indigenous Peoples states that governments must secure the free, prior, and informed consent of Indigenous peoples before taking actions that will affect them, rather than merely consult with them.



# TREATY RIGHTS

Some Tribal nations reserved rights to harvest certain plants and animals on territory ceded to the United States through treaty. As signatory to these treaties, the federal government is required to uphold treaty rights and to protect the animals, plants, and ecosystems on which those rights are based.

In Wisconsin, Ojibwe (or Chippewa) Tribes hold treaty-reserved rights to hunt, fish, and gather on ceded lands and waters in order to meet subsistence, economic, cultural, medicinal, and spiritual needs. The **Great Lakes Indian Fish & Wildlife Commission (GLIFWC)** is an inter-Tribal agency that represents 11 Ojibwe Tribes in Michigan, Wisconsin, and Minnesota who hold these rights. GLIFWC provides natural resource management expertise, conservation enforcement, legal and policy analysis, and public information services in support of the exercise of treaty rights during well-regulated, off-reservation seasons throughout the treaty ceded territories.

**Several key court decisions have upheld the existence and exercise of treaty-reserved rights in Wisconsin.**

The Wisconsin Supreme Court's 1972 *Gurnoe* Decision ruled in favor of Bad River and Red Cliff tribal fishing rights in Lake Superior.

In 1983, the 7th Circuit Court of Appeals ruled in favor of the treaty-reserved rights of Ojibwe bands in Wisconsin in a ruling known as the *Voigt* Decision.

In 1999, the U.S. Supreme Court affirmed the 1837 treaty rights of Ojibwe Tribes in what is known as the *Mille Lacs* Decision.



# CLIMATE CHANGE

Climate change impacts Indigenous lifeways, culture, and traditional knowledge systems that recognize the importance of non-human relations. Many climate adaptation tools fail to address the unique needs, values, and cultures of Indigenous communities.

In 2019, a collaborative team produced the **Tribal Climate Adaptation Menu**, published by GLIFWC, as a framework to integrate traditional knowledge, culture, language, and history into the climate adaptation planning process. Primarily developed for the use of Indigenous communities, Tribal natural resource agencies and their non-Indigenous partners, the Tribal Adaptation Menu includes 14 key strategies that land managers can pick and choose from to best fit their particular context.

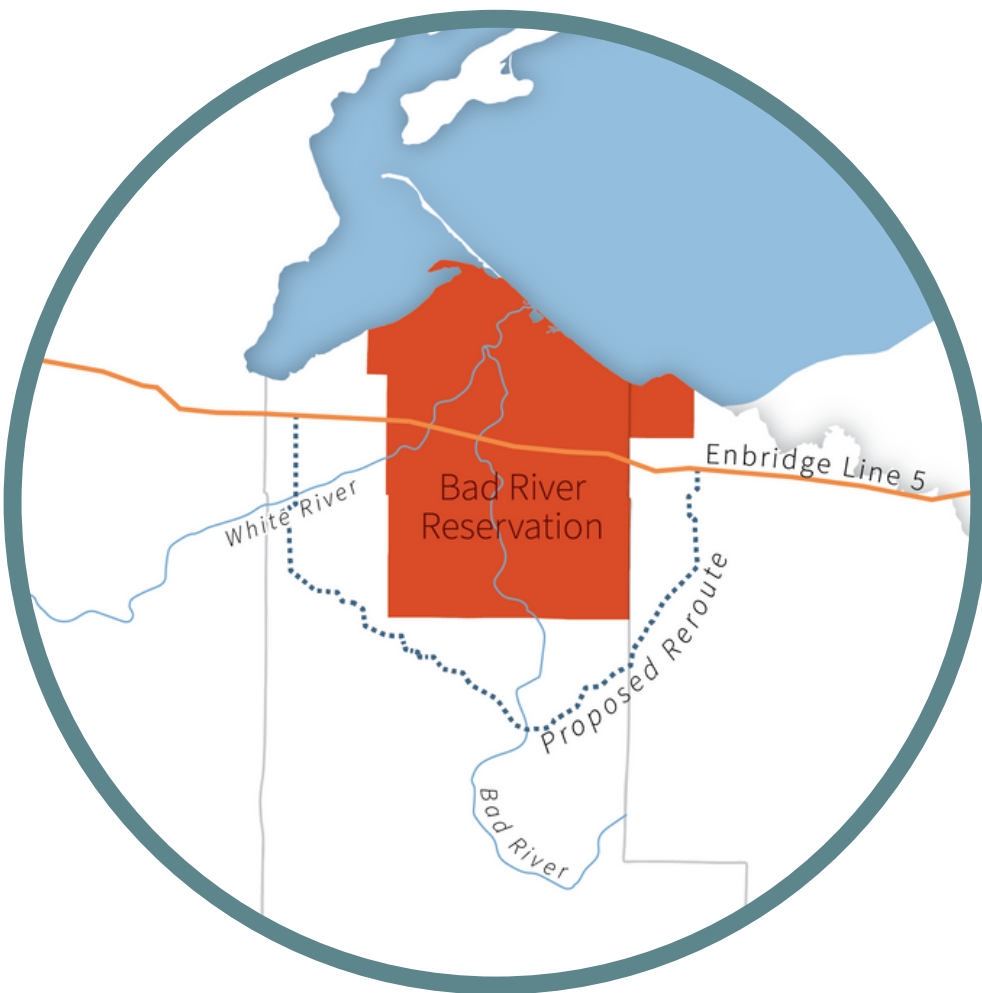
**"We exist in a web of relationships, among human and non-human communities. Giving attention and respect to all our relations will help us consider and address needs beyond simple land management objectives."**

**TRIBAL CLIMATE  
ADAPTATION MENU (2019)**

# EXTRACTIVE INDUSTRIES

See *Metallic Mining & Pipeline* pamphlet guides

In Wisconsin, Tribal nations have mobilized to resist extractive industrial projects, such as oil pipelines and metallic mines, that threaten their lands, waters, and public health.



Enbridge is seeking to re-route the Line 5 pipeline around and upstream of the Bad River Reservation

The **Mole Lake Band of Lake Superior Chippewa** joined forces with the **Forest County Potawatomi** to oppose the Crandon Mine, a proposed zinc and copper mine located near the headwaters of the Wolf River. In a decades-long battle that came to an end in 2003, the Band and the Forest County Potawatomi purchased the over 5,000-acre mine site, permanently protecting it from mining.

In 2012, the **Ho-Chunk Nation** Legislature passed a resolution opposing the development of frac sand and other mining operations on or near Nation lands. Ho-Chunk Nation has since joined with MEA and other environmental groups to scrutinize and oppose frac sand projects near Nation lands.

In 2013, the **Bad River Band of Lake Superior Chippewa** Tribal Council chose not to renew Enbridge's easements for the Line 5 oil pipeline across the Bad River Reservation, because of the threats it posed to public safety, environmental health, and treaty rights. In 2019, the Tribe filed a lawsuit demanding that Enbridge remove the pipeline from the Reservation, due to the expired easements and erosion near the pipeline creating an increased risk of an oil spill.

**Menominee Nation** is opposing the Back Forty Mine Project, a proposed open pit metallic sulfide mine in Lake Township, MI. If approved, the mine would threaten the environmental health of the Menominee River and endanger numerous Menominee sacred sites and burial mounds up and down the Menominee River.

# MIDWEST ENVIRONMENTAL ADVOCATES

We use the power of the law to support efforts to protect healthy water, air, land, and government.

As a non-profit environmental law center, Midwest Environmental Advocates works to defend public rights, protect natural resources, and ensure transparency and accountability in government.

For two decades, we have provided legal and technical support to those who are working to uphold Wisconsin's strong tradition of safeguarding public health and natural resources, including Tribal Nations, grassroots groups, and non-profits. In addition to providing direct legal assistance, MEA prioritizes educating and empowering people. We work to build the power of grassroots community movements by equipping people with skills and knowledge and connecting them to a statewide network of local leaders.



**EMPOWERMENT**



**STEWARDSHIP**



**COMMUNITY**



**JUSTICE**



# APPENDIX

## KEY INDIAN LAW CASES

*Prepared by Sequoia Butler & Robert Lundberg*

## MARSHALL TRILOGY

The “Marshall Trilogy” sets the foundation of federal Indian law in the United States. Together, the three cases establish: (1) federal authority in Indian matters, (2) the federal government’s responsibility to act on behalf of Indian tribes, (3) the recognition of Tribal sovereignty, and (4) the Doctrine of Discovery. The Trilogy is named for John Marshall, Chief Justice of the U.S. Supreme Court when these cases were decided.

### **JOHNSON V. M’INTOSH, 21 U.S. 543 (1823)**

This case concerned a controversy over who owned a tract of land located in the State of Illinois. Prior to the American Revolution, Johnson’s predecessor-in-interest purchased land from the Piankeshaw Indians. Decades after declaring independence from Great Britain, the United States granted land to M’Intosh in the same area. This lawsuit arose based on the claim that these parcels were the same land. However later research has shown the contested lands actually did not overlap and Johnson and M’Intosh likely worked in concert to bring a case to settle the question of whether Tribal nations could grant title directly to individual settlers.

Johnson sued to eject M’Intosh from the land, arguing that the Piankeshaw Indians had the right to convey land to private citizens. The Court, in an opinion authored by Chief Justice Marshall, held that Johnson’s title to the land was invalid and M’Intosh owned the land. The Court found that only the United States government can acquire land from a Tribe. Under the Doctrine of Discovery, only the “discovering” nation can acquire the Tribal land. In this case, Britain originally held the right to acquire the land from Tribes as it was the original “discoverer.” Upon declaring independence, the United States inherited Britain’s discovery claim over Indian lands. As the treaty in which the Piankeshaw ceded territory to the United States did not expressly protect property rights of people like Johnson, the transaction between the Piankeshaw and Johnson was not recognized by the United States. Thus, the U.S. was free to grant the land to M’Intosh.

### **CHEROKEE NATION V. GEORGIA, 30 U.S. 1 (1831)**

This case concerned several laws enacted by the State of Georgia to take away land and rights from the Cherokee Nation. The Cherokee Nation filed an injunction with the United States Supreme Court, alleging that Georgia’s laws would displace the Cherokee from their land and violated federal treaties negotiated with the United States government. The Supreme Court found that the Court itself lacked jurisdiction over the matter since the Cherokee Nation was not a foreign nation within the meaning of Article III of the United States Constitution. Rather, Tribes are “domestic dependent nations,” whose relationship with the United States mirrors that of a ward in U.S. guardianship. This relationship was later interpreted to give Congress broad “plenary” power over Tribes.

## **WORCESTER V. GEORGIA, 31 U.S. 515 (1832)**

This case concerned a Georgia law prohibiting white men from living in Cherokee territory without a license. Worcester, a missionary, was arrested for preaching in Cherokee territory without the required state license. The Court held that state law does not extend into Cherokee territory, unless the Cherokee government, treaties, or Congress provide otherwise. Indian nations are “distinct political communities” in “which their authority is exclusive.” In other words, Indian tribes retain the inherent sovereignty to make and enforce laws within their territory. The case also reaffirmed that only the federal government—not individual states—has authority over Indian affairs.

## **MONTANA V. UNITED STATES, 450 U.S. 544 (1981)**

A key question of this case was whether the Crow Nation had the authority to regulate hunting and fishing on fee lands owned by a non-Tribal member. The Court held that the Crow Nation could not regulate the activities of non-Tribal members on land owned by non-Tribal members. A Tribe can generally only regulate its members, not non-members. However, the Court outlined two exceptions where Tribes may regulate the activities of non-Tribal members:

1. The non-Tribal member enters into a “consensual relationship with the Tribe or its members through commercial activities” or
2. The conduct of non-Tribal members threatens or directly affects “the political integrity, the economic security, or the health or welfare of the Tribe.”

## **MONTANA V. ENVIRONMENTAL PROTECTION AGENCY, 137 F.3D 1135 (9TH CIR. 1998)**

This case concerned an EPA regulation that permitted Tribes to exercise regulatory authority over water resources located within the borders of the reservation, including where water passed over lands held by non-Tribal members. Section 518(e) of the Clean Water Act (CWA) authorizes EPA to treat a Tribe as a state (TAS) for the purpose of setting water quality standards. EPA’s regulations require Tribes to apply for TAS status in order to set standards. To be granted TAS status, a Tribe must: (1) be federally recognized; (2) have a governing body carrying out substantial duties and powers; (3) demonstrate jurisdiction over the water resources it’s seeking to set standards for; and (4) be able to carry out the functions of the CWA.

Pursuant to this regulation, the Confederated Salish and Kootenai Tribes applied for TAS status over the Flathead Indian Reservation, noting in their application facilities on fee lands within the Reservation that would impair water quality in the reservation. Despite opposition from the State of Montana, the EPA approved the application, “determining that the Tribes possessed inherent authority over non-members on fee lands.” The Ninth Circuit ruled that a Tribe need not wait until pollution of Tribal waters occurs to apply for and receive TAS, but needs only to show the potential for future pollution and the “serious and substantial” impacts it would have on the Tribe. This can be shown by “‘generalized findings’ on the relationship between water quality and human health and welfare.”

## **WISCONSIN V. ENVIRONMENTAL PROTECTION AGENCY, 266 F.3D 741 (7TH CIR. 2001)**

This case concerned the EPA’s decision to grant the Mole Lake Band of Lake Superior Chippewa Indians (the Band) TAS status. Wisconsin opposed the Band’s application on the basis that only Wisconsin could regulate bodies of water in the state. Despite Wisconsin’s opposition, the EPA found that the Band demonstrated inherent authority over the water resources within its reservation, noting that “the inherent authority question did not turn on who had title to the land underneath the waters.” The Seventh Circuit upheld the decision to grant TAS status, finding that the Band adequately demonstrated the importance of the bodies of water “to the Band’s economic and physical existence.”

## **STATE V. GURNOE, 192 N.W.2D 892 (WIS. 1972)**

This case concerned a violation of Wisconsin conservation regulations by six members of the Red Cliff and Bad River bands of Lake Superior Chippewa Indians. The six individuals were caught fishing on Lake Superior with gill nets in violation of Wisconsin regulations and law. The Wisconsin Supreme Court held that fishing rights granted by the Treaty of 1854 included fishing grounds on Lake Superior. The Court reasoned that when the treaty was initially signed in 1854, it was the intention of the signatory parties that the Chippewa tribe would retain the right to fish on Lake Superior. Otherwise, the Chippewa tribe would not have consented to a treaty that would have limited their access to the lake they relied upon for sustenance. However, the Court also held that the grant of fishing rights did not foreclose Wisconsin’s police power to control fishing on Lake Superior, even by the Tribes.

# LAC COURTE OREILLES BAND OF LAKE SUPERIOR CHIPPEWA INDIANS V. WISCONSIN

Also known as the “Voigt decision,” this case concerns the right of Ojibwe Tribes in Wisconsin to hunt, fish, and gather in territory that the Tribes ceded to the United States in a series of treaties in the 1800s. Various stages of the case have spanned many decades, producing multiple pivotal decisions. The holdings of three pivotal stages of the case are summarized below:

## **LAC COURTE OREILLES BAND OF LAKE SUPERIOR CHIPPEWA INDIANS V. VOIGT, 700 F.2D 341 (7TH CIR. 1983)**

The Seventh Circuit U.S. Court of Appeals held that hunting, fishing, and gathering rights of all Wisconsin Ojibwe Tribes were not extinguished or abrogated by an 1850 Presidential Order. As such, the Tribes still hold rights to hunt, fish, and gather on ceded lands that are not privately owned.

## **LAC COURTE OREILLES BAND OF LAKE SUPERIOR CHIPPEWA INDIANS V. WISCONSIN, 775 F. SUPP. 321 (W.D. WIS. 1991)**

The federal District Court for the Western District of Wisconsin held that Wisconsin Ojibwe tribes had the right to use any method of harvesting when hunting, gathering, and fishing, and Wisconsin could not interfere with the Tribes' ability to harvest within ceded territory. However, the Tribes were prohibited from exercising those rights on privately owned lands or croplands or managed forest lands. While, the State of Wisconsin is responsible for managing natural resources, it cannot interfere with the Tribes' hunting and gathering. The only time Wisconsin may interfere is when both parties stipulate to Wisconsin's intervention. In addition, Wisconsin was permitted to prohibit Tribal members from hunting deer at night outside of reservations.

## **LAC COURTE OREILLES BAND OF LAKE SUPERIOR CHIPPEWA INDIANS V. WISCONSIN, 769 F.3D 543 (7TH CIR. 2014)**

Concerning the 1991 judgment upholding a state statute that prohibited the hunting of deer at night, the Seventh Circuit reversed the district court's order that prohibited Ojibwe Tribal members from hunting deer at night. In its opinion, the Seventh Circuit noted that Wisconsin did not show a substantial detriment or hazard to public health or safety, that the regulation was necessary to prevent or ameliorate the identified detriment or hazard, or that the particular application of the regulation to the Tribes was necessary to effectuate the public health or safety interest.