forded an opportunity to be heard and, indeed, was heard. Other than asking why it hadn't been notified earlier, the Union interposed no objections and proposed no viable alternatives at the June 9, 1978 meeting. The letter of the same date, rather than setting forth novel arguments in opposition to the implementation of the decision, appears to be but a mere formality. On this basis, I do not find that petitioner has satisfied the first element of the *Arlook* test. Accordingly, I hold that on the basis of the record before this Court, temporary injunctive relief should not be ordered pending the finding on the merits by the ALJ, or ultimately the Board, concerning the allegation of violations of section 8(a)(5) of the Act.

Summary

For all of the above-stated reasons, petitioner has not satisfied this Court that temporary injunctive relief should issue pending the Board's determination of the unfair labor practice charges against respondents. Employing the standards set forth for this Court's review in *Union de Tronquistas de Puerto Rico v. Arlook, supra* I find that the contested factual issues could not be ultimately resolved by the Board in favor of the General Counsel. Accordingly, the petition for temporary injunctive relief pursuant to section 10(j) of the Act is denied.

UNITED STATES of America et al., Plaintiffs,

v.

STATE OF MICHIGAN et al., Defendants.

No. M26-73 C.A.

United States District Court, W. D. Michigan, N. D.

May 7, 1979.

United States brought action in its own behalf and on behalf of the Bay Mills Indian Community to protect the tribe's rights to fish in certain waters of the Great Lakes vested in the tribe by virtue of aboriginal occupation and use, the Treaty of Ghent of 1814, and the Treaty with the Ottawa and Chippewa Nation of 1836. The Bay Mills Indian Community and the Sault Ste. Marie Tribe of Chippewa Indians intervened. The District Court, Fox, Chief Judge, held that: (1) the Ottawa and Chippewa Indians of Michigan had exercised aboriginal fishing rights in waters of the Great Lakes ceded to the United States in the 1836 treaty; (2) nothing in either such treaty nor 1855 treaty abrogated or otherwise diminished such fishing rights; (3) to extent that Michigan fishing laws or regulations are inconsistent with treaty rights of plaintiff tribes, as successors to signatories of the treaties, such laws and regulations are void ab initio; (4) regulation of treaty-right fishing by plaintiff tribes preempts any state authority to regulate fishing activity of tribal members, and (5) Submerged Lands Act did not repeal by implication the Indians' treaty fishing rights.

Declaration issued.

1. Federal Courts ⇐1

United States courts exist to ensure guaranteed constitutional rights against the tyranny of popular majorities; federal court judges are, or ought to be, custodians of secured constitutional right.

2. Treaties ⇐2

States cannot enter into treaties with foreign governments, only the federal government can. U.S.C.A.Const. art. 1, § 8, cl. 3.

3. Treaties ⇐11

When acting within its power to deal with foreign governments, the federal government can make treaties which give authority in areas which otherwise would belong solely to the states and in such cases a state no longer has authority in areas governed by the treaty. U.S.C.A.Const. art. 1, § 8, cl. 3.

in. They imposed a servitude upon every piece of land as though described therein. 198 U.S. at 381, 25 S.Ct. at 664 (emphasis supplied.) *See also Seufert Bros. Co. v. United States*, 249 U.S. 194, 39 S.Ct. 203, 63 L.Ed. 555 (1919), which affirmed *Winans, supra*. The conceptual framework, then, for interpreting the treaty is that the grant or cession in the treaty is not made from the United States to the Indians. Rather, the Indians were the grantors of a vast area they owned aboriginally and the United States was the grantee. The grant from the Indians must be narrowly construed, especially in light of the wardship relationship existing between the Indian grantors and the grantee United States.

[29] In addition to providing a conceptual framework for interpreting the treaty, *Winans* also teaches that reservations in treaties are not limited to land. Although the term "reservation" is commonly thought to pertain to land, other valuable rights not relinquished when Indians convey their aboriginal title are also reservations. The Indians can, and have, reserved rights to cross private land to reach traditional fishing sites as in *Winans, supra*, and *Seufert, supra*. In *Winters v. United States*, 207 U.S. 564, 28 S.Ct. 207, 52 L.Ed. 340 (1908), the Indians reserved or retained water sufficient to irrigate their land reserve. The agreement creating the Fort Belknap Reservation out of a much larger tract occupied by the Indians was silent regarding rights to water from the Milk River. Both the area of cession and the smaller land reserve within it were arid and of little use without water:

> And this, it is further contended, the Indians knew [that the lands were arid], and yet made no reservation of the waters. We realize that there is a conflict of implications, but that which makes for the retention of the waters is of greater force than that which makes for their cession. The Indians had command of the lands and the waters—command of all their beneficial use, whether kept for hunting, "and grazing roving herds of stock," or turned to agriculture and the arts of civilization. Did they give up all this? Did they reduce the area of their occupation and give up the waters which made it valuable or adequate?

Winters v. United States, supra at 576, 28 S.Ct. at 211. *See also Cappaert v. United States*, 426 U.S. 128, 96 S.Ct. 2062, 48 L.Ed.2d 523 (1976); and *Arizona v. California*, 373 U.S. 546, 83 S.Ct. 1468, 10 L.Ed.2d 542, *reh. denied*, 375 U.S. 892, 84 S.Ct. 144, 11 L.Ed.2d 122 (1963).

During the last term of the Supreme Court, *United States v. Wheeler, supra*, was decided. There the Court was faced with the issue of whether a tribe had authority to criminally prosecute an Indian despite the lack of a congressional act authorizing such prosecution. The Supreme Court, reaffirming the *Winans* concept,[21] stated:

> That the Navajo Tribe's power to punish offenses against tribal law committed by its members is an aspect of its retained sovereignty is further supported by the absence of any federal grant of such power. If Navajo self-government were merely the exercise of delegated federal sovereignty, such a delegation should logically appear somewhere. But no provision in the relevant treaties or statutes confers the right of self-government in general, or the power to punish crimes in particular, upon the Tribe.

United States v. Wheeler, supra 435 U.S. at 315, 98 S.Ct. at 1088. Thus, modernly the *Winans* doctrine is "alive and well" and applies not only to reserved rights to land, but to reserved rights to fish, reserved rights to water and reserved or retained rights of sovereignty, i. e., the right to tribal self-government. Equally important is that reserved rights, as in *Winters*, arise by *implication*. And those notions are buttressed by the canons of treaty interpretation requiring a narrow construction of the grant made by the Indians.

21. This Court has referred to treaties made with the Indians as "not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted." *United States v. Winans*, 198 U.S. 371, 381, 25 S.Ct. 662, 49 L.Ed. 1089.

[30, 31] The Indians' claim to reserved fishing rights here depends upon their having possessed such rights at the time of the cession. The legal predicate to this holding is a holding that they possessed aboriginal rights in the area of cession. European nations coming to the New World claimed title to lands which they discovered and conquered. *See, Tee-Hit-Ton Indians v. United States,* 348 U.S. 272, 75 S.Ct. 313, 99 L.Ed. 314 (1955), *Johnson v. M'Intosh,* 21 U.S. (8 Wheat) 543, 5 L.Ed. 681 (1823). Yet, the European nations generally, and Great Britain in particular, recognized an Indian right to occupy and use the lands claimed by these nations because of the Indians' aboriginal possession of the land. This right, a right of Indians to occupy land until the right is expressly extinguished by the claiming nation, was recognized by the United States in the Nineteenth century and is still recognized today. *Oneida Indian Nation v. County of Oneida,* 414 U.S. 661, 94 S.Ct. 772, 39 L.Ed.2d 73 (1974); *United States v. Santa Fe Pacific R. Co.,* 314 U.S. 339, 62 S.Ct. 248, 86 L.Ed. 260 (1941); *Worcester v. Georgia,* 6 Pet. 515, 8 L.Ed. 483 (1832); *Johnson v. M'Intosh,* 8 Wheat 543, 5 L.Ed. 681 (1823). Termination of this right is a political question. *Northwestern Bands of Shoshone Indians v. United States,* 324 U.S. 335, 339, 65 S.Ct. 690, 89 L.Ed. 985 (1945). The Indians' right of occupancy, his "Indian title" is "as sacred as the fee simple of the whites." *Mitchel v. United States,* 9 Pet. 711, 746, 9 L.Ed. 283 (1835).

The Confederated Congress recognized Indian aboriginal rights when it passed the Northwest Ordinance. These were then reaffirmed in the Treaty of Ghent. During the War of 1812 with the British, certain members of the Chippewa tribes fought in the War on the side of the British. The British suffered a series of defeats during the war, but Britain was determined not to permit this to affect her Indian allies.[22] Britain recognized Indian aboriginal rights during her occupation of the New World. She was resolved not to submit the Indians under her care to American sovereignty without treaty assurances that their rights would be absolutely respected. As noted by Senator Henry Clay and discussed above, Britain insisted that the Indians' rights not be interrupted, that this matter be included in the treaty ending the War of 1812, and made this demand a *sine qua non* to the conclusion of a peace treaty with the Americans. The Treaty of Ghent guarantees the Indians all the possessions, rights, and privileges which were recognized before the war.

[32] As is clear from the history of these Indians in Michigan, the Chippewas and Ottawas actually, exclusively and continuously used and occupied the ceded areas for the "long time" required to establish aboriginal possession. Although Chippewas predominated in the Upper Peninsula and the Ottawas predominated in the southern areas of the ceded lands, these peoples inhabited the region in joint and amicable possession. *Strong v. United States,* 518 F.2d 556, 207 Ct.Cl. 254 (1975); *United States v. Pueblo of San Ildefonso,* 513 F.2d 1383, 206 Ct.Cl. 649 (1976); *Turtle Mountain Band of Chippewa, Inc. v. United States,* 490 F.2d 935, 203 Ct.Cl. 426 (1974); *Sac and Fox Tribe v. United States,* 315 F.2d 896, 903, n. 11, 161 Ct.Cl. 189, 202 n. 11 (1963). These facts were implicitly and explicitly recognized by the United States when it negotiated the 1836 treaty.

As Dr. Tanner testified, the Indians' aboriginal occupation included not only a large land area but a significant portion of the Great Lakes. Accordingly, the cession is described as "all that tract of country . . . to the boundary line *in Lake Huron* between the United States and the British province of Upper Canada . . ." Further into Article First, the ceded area is described as:

" . . . to a point in Lake Superior . . . thence south to the mouth of

22. The British record with regard to treatment of the American Indians is remarkably better than that of the United States. For an Indian expression of this viewpoint, see the speech of O-Ge-Maw-Ke-to, n. 3, *supra.*

> said [Chocolate] river . . thence, in a direct line, *through the ship channel into Green bay* . . . thence south to a point *in Lake Michigan* . . . [and] comprehending all the lands and *islands* within these limits . . . [Emphasis supplied.][23]

The important decision of the Michigan Supreme Court in *People v. LeBlanc*, 399 Mich. 31, 248 N.W.2d 199 (1976) reached precisely the same conclusion regarding Article First:

> Moreover, the area described in Article First, that being the territory ceded by the Ottawas and the Chippewas to the United States, extends well into the Great Lakes. For example, the ceded area is bounded in part by a line traveling from the mouth of the Thunder-bay river, "thence northeast to the boundary line *in Lake Huron* . . thence northwestwardly, . . *through the straits*, and river St. Mary's, *to a point in Lake Superior* north of the mouth of *Gitchy Seebing*, or Chocolate River . . . ."

People v. LeBlanc, 248 N.W.2d at 206 (emphasis in original, footnote omitted).

In exchange for this large cession of land and water the Indians received certain monetary payments and other goods and services from the United States. Within the area of cession the Indians reserved certain land parcels and rights under the treaty. In particular, they reserved nine land areas on the Upper Peninsula and five areas on the Lower Peninsula. The issue in question here is whether the Indians also possessed a right to fish in the waters ceded which they did not grant to the United States but reserved for themselves.

[33] The right to fish is one of the aboriginal usufructuary rights included within the totality of use and occupancy rights which Indian tribes might possess. *Menominee Tribe v. United States*, 391 U.S. 404, 88 S.Ct. 1705, 20 L.Ed.2d 697 (1968); *Kimball v. Callahan*, 493 F.2d 564 (9th Cir. 1974); *People v. LeBlanc, supra; State v. Tinno*, 94 Idaho 759, 497 P.2d 1386 (1972).

[34] The factual predicate giving rise to the reservation or retention of the right to fish in the Great Lakes is a showing of the Indians' dependence upon that resource. The evidence relating to Indians' use of the fishery resource, as related above, is overwhelming.

Dr. Tanner testified about the life cycle of the Indians during treaty times which included two major fishing seasons, spring and fall, as well as ice fishing in the winter. Dr. Cleland placed the treaty Indians' use of the resource into a historic and prehistoric context. All Indians of the Upper Great Lakes, including the Ottawa and Chippewa, were fishing peoples. The settlement patterns of native peoples of the Upper Great Lakes, including the treaty Indians in the case at bar, were strongly influenced by available resources, especially fish. It is no mere coincidence that the Articles Second and Third land reserves are all located on the Great Lakes and all adjacent to important fishing grounds. It is also noteworthy that most major archaeological sites in the Upper Great Lakes are near or within Articles Second and Third land reserves. In order to reach a conclusion that the Indians were not dependent upon this valuable fishery resource, the court would have to ignore hundreds of years of recorded testimony and thousands of years of prehistoric information.

That the treaty Indians were commercial, as well as subsistence, fishermen is also well documented and beyond dispute. The Indians caught fish and traded them for goods available to them from the European mar-

23. In *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 623, 90 S.Ct. 1328, 1334, 25 L.Ed.2d 615, *reh. denied*, 398 U.S. 945, 90 S.Ct. 1834, 26 L.Ed.2d 285 (1970), the Supreme Court was required to interpret certain treaties to determine whether a reservation included the streambed of the Arkansas River. The Court concluded that the language " thence down the main channel of the Arkansas River" was purposefully included and ruled that the tribe did have title to the bed of the river. If the United States had wanted to exclude the streambed it could have described the cession by reference to the north side or bank of the Arkansas River.

ket. They were employed by the American Fur Co. to catch fish. Indians operated their own commercial outfits and sold their catch to the American Fur Co. as well. Years after the treaty, Smith and Snell (Ex. P–4) reported that most of the fishermen they surveyed were of Indian heritage. Right down to today a significant proportion of commercial fishermen on the Great Lakes included within the area of cession are of Indian heritage.

The Michigan Supreme Court decision in *People v. LeBlanc, supra,* also supports plaintiffs' contentions regarding the commercial dimension of the Indian fishery:

> The record below [which was much less detailed than the record here] clearly indicates that fishing was central to the Chippewa way of life at the time the Treaty of 1836 was negotiated.
>
> * * * * * *
>
> Clearly, too, Chippewa fishing had a commercial dimension. In fact, Article Fourth of the Treaty of 1836 provided for the delivery of 10,000 fish barrels and 2,000 barrels of salt to the Indians over a twenty year period to be used in the fishing business.

People v. LeBlanc, 248 N.W.2d at 204 (footnote omitted).

The State would have this court find that the Indian fishery had no commercial aspect because, in effect, they did not own and operate the American Fur Co. But even the State's own witness testified that the Indians did not have the capital or the business experience to start such a venture. (Tr. 1770.) Besides, the American Fur Co. was "one of the most successful economic companies in the early American history, one of the prime examples of big business at this early period." (Tr. 1770.) This type of business activity simply has no analogue in the society of the Ottawa and Chippewa. If the standard the tribes are required to meet is that they too controlled a business like the American Fur Co.—the General Motors of the Great Lakes—then plaintiffs have failed. (*See* Tr. 1884.) However, there is no such burden on the Indians. Plaintiffs have shown that treaty Indians relied upon the resource for subsistence purposes and that their fishery had a substantial commercial dimension as well. From the beginning of the commercial market, as we understand and use that term today, the Indians were participants. Obviously they could not participate in a European-type market economy until there was one.

[35] On the basis of the findings of fact above, which concluded that the Ottawa and Chippewa Indians of northern Michigan have relied upon the catching of fish in the Great Lakes for subsistence and for commerce for centuries, and that such a reliance has been the one most important single aspect of their lives from a time at least one hundred years before any contact with Europeans right up until the time of the signing of the Treaty of 1836, this court rules as a matter of law that the Indians who are plaintiffs in this action held an aboriginal and treaty right under the Treaty of Ghent to catch fish in the Great Lakes at the time of the 1836 Treaty. *United States v. Santa Fe Pacific R. Co.,* 314 U.S. 339, 62 S.Ct. 248, 86 L.Ed. 260 (1941).

[36] Under *Winans, supra,* Indians retain whatever rights they possess which are not relinquished by treaty or taken by Congress. Rights are reserved by implication if they are not expressly relinquished and a contrary conclusion is inconsistent with the use of the resource by the Indians at the time of the treaty. *United States v. Wheeler,* 435 U.S. 313, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978); *Cappaert v. United States,* 426 U.S. 128, 96 S.Ct. 2062, 48 L.Ed.2d 523 (1976); *Arizona v. California,* 373 U.S. 546, 83 S.Ct. 1468, 10 L.Ed.2d 542 (1963); *Winters v. United States,* 207 U.S. 564, 28 S.Ct. 207, 52 L.Ed. 340 (1908); *United States v. Winans, supra.*

[37] On the basis of the following facts: (1) the Treaty of 1836 contains no language expressly relinquishing the aboriginal right of the treaty Indians to fish in the ceded waters; (2) at the time of the 1836 treaty subsistence and commercial fishing was essential to the livelihood of these Indians and