

**EXPLANATORY NOTES
TO THE MEMORANDUM OF UNDERSTANDING
REGARDING THE RECOGNITION AND IMPLEMENTATION OF
TRIBAL CEDED TERRITORY RIGHTS
GUARANTEED BY THE TREATIES OF 1836, 1837, AND 1842
ON NATIONAL FOREST LANDS**

Introduction

These explanatory notes are intended to help people understand the Memorandum of Understanding (MOU) between the Forest Service and member tribes of the Great Lakes Indian Fish and Wildlife Commission (GLIFWC). It is useful to follow along with the MOU document as you are working through this explanatory document.

The agreement has three parts: the MOU; the model code of tribal regulations; and the self-regulation agreement. The MOU captures the operating principles of the agreement. The code of regulations is a chapter of a much larger set of tribal regulations adopted by each tribal council and which governs off-reservation activities by tribal members involved in exercising treaty rights. The self-regulation agreement captures some the law enforcement aspects of the agreement between the Tribes and the Forest Service. The parties chose to use a separate agreement for the self-regulation aspects because the Tribes have entered into a similar agreement with the U.S. Fish and Wildlife Service regarding off-reservation waterfowl hunting.

The MOU is an attempt by the Tribes and the Forest Service to establish a consistent set of practices related to the trust responsibility and treaty obligations of the federal government and to the gathering of wild plants on national forest lands by the Tribes. The Tribes and the Forest Service needed this MOU to establish an agreed upon set of parameters and practices for the exercise of tribal treaty rights and the relationship between the Forest Service and the Tribes because there was no set of parameters from a court decision that applied to national forest lands.

The Tribes and the Forest Service made a conscious decision to work cooperatively and to avoid litigation if possible. Both parties believed this to be good public policy, administratively efficient, and the socially responsible thing to do given the financial and other costs associated with the protracted treaty rights litigation in Wisconsin. Support for the Forest Service to work this way with federally recognized tribes comes from a variety of sources including a 1998 Executive Order from the President of the United States. Thus, the MOU reflects a set of compromises and agreements made by the Tribes and the Forest Service instead of a court ordered settlement. In doing so, the full nature and the extent of treaty rights applicable to national forest lands may not be reflected by this agreement.

The MOU is not limited to agreements about treaty rights gathering of wild plants. The ongoing relationship between the Tribes and the Forest Service encompasses treaty rights, government-to-government consultation between the parties on a number of topics, and other administrative practices.

Thus, there are some parts of the MOU which lie outside the realm of treaty rights, but they are within the scope of the trust responsibility of the federal government to the Tribes.

The MOU is only about the Tribes and the Forest Service and it only pertains to national forest lands within the areas ceded by the Tribes in Wisconsin, Michigan, and Minnesota. The Forest Service and the Tribes have relationships with other governments and other organizations and both the Tribes and the Forest Service are governed by laws, regulations, and policies. This MOU is not intended to explore the full extent of the relationship between the Tribes and the Forest Service nor of the laws, regulations, and policies each must use in administering their programs. Neither does alter the existing practices of non-tribal people and other governments.

Finally, it is important to recognize what it means for the Forest Service to enter into an agreement with another entity. First, from the Forest Service's perspective, it does not change any laws, regulations, or policies pertinent to the Forest Service. Second, it does not change the authorities of the Forest Service to manage national forests. Third, it does not change the relationship the Forest Service has with other governments or organizations. The Forest Service is encouraged to and does enter many agreements which benefit the agency and the people of the United States. Some of the organizations with whom the Forest Service enters agreements may have radically different views about the proper management of the national forests. Entering an agreement with an organization or a government does not mean the Forest Service agrees with everything about that organization. Rather, the agreement identifies ways for the parties to work together on areas of mutual interest. Thus, the MOU with the Tribes does not alter laws, policies, or regulations, does not change the authorities of the Forest Service, and does not change the relationships of others interested in the management of national forests.

Following is an explanation of the sections and subsections of the MOU.

The MOU

Section I

This section of the MOU identifies the land areas involved. The agreement pertains only to lands ceded by Indian tribes to the federal government in treaties in 1836, 1837, and 1842. The agreement also pertains only to national forest lands on the Chequamegon-Nicolet, Ottawa, Hiawatha, and Huron-Manistee National Forests. The overlap of these areas defines the lands subject to the agreement (Figure 1). It is important to note that the agreement does not pertain to State or County owned lands or to private lands or other federally owned lands, such as national parks or national wildlife refuges. It pertains only to national forest administered lands and not to private or other lands within the administrative boundaries of the national forests. The parties recognize that national forests occasionally acquire and exchange lands and that the tribal gathering must occur on lands in national forest ownership at the time of the gathering. Tribal members are required to know the ownership status of the lands on which they are conducting their gathering activity. One of the ways the agreement needs to be implemented for effectiveness is for the Forest Service to notify the Tribes of any changes in land status for lands moving from federal ownership to other ownership.

Section II

This section of the MOU describes who the parties are entering the agreement. There are ten tribes which have been recognized officially by the federal government and which can be party to the agreement. They are listed in the agreement. The Forest Service has three branches which are party to the agreement: the Eastern Region of the National Forest System, the Eastern Region of the Law Enforcement and Investigations Branch, and the North Central Research Station, part of the Research Branch of the Forest Service. All of the Forest Service branches must be party to the agreement to make it valid. At least one Tribe must be party to the agreement for the agreement to be valid. Each tribe chooses to enter or not enter the agreement.

Section III

Section III of the MOU describes the principles of the agreement important to the Forest Service and the Tribes. The purpose of this section is to make clear the existing governing assumptions and principles, authorities, and policies of the Tribes and the Forest Service. The parties started these discussions agreeing to the principles of tribal self-regulation, tribal sovereignty, the existence of the ceded territory gathering rights, the management authority of the Forest Service, and the other provisions of this section. This section does not include every possible policy or law or court case pertinent to treaty rights or to the management of the national forests. Rather, it focuses on those things which are most important to the parties given the nature of the agreement.

Section III. A. is about the recognition of treaty rights of the tribes entering the agreement. The Forest Service recognizes that the Wisconsin court cases on treaty rights affirmed the existence of off-reservation rights to gather miscellaneous forest products (wild plants) on State and County owned lands and that these rights likely exist on national forest lands despite the more limited scope of the court case. Legal advice from attorneys from the USDA Office of General Counsel working for the Forest Service recommended that the Forest Service recognize the existence of those rights on national forest lands versus challenging them in court given the recent outcome of the Wisconsin court decision at the time these discussions commenced.

Section III. B. is about the status of Tribes as sovereign governments and the ability of these governments to regulate the activities of their members. All of the tribes in the agreement have been officially recognized by the federal government. The federal government maintains a list of tribes which have this status. Other tribes in Wisconsin and Michigan have achieved federal recognition, but are not part of this agreement because they were not parties to the three treaties mentioned earlier. Examples include the Menominees, Forest County Potawatomis, the Oneida Nation, the Ho-Chunk (Winnebago) Nation, and the Stockbridge-Munsee.

Federal law and policies require the Forest Service to interact with the Tribes as sovereign governments which include the rights retained as part of treaties. This is well articulated in an Executive Order from the President (#13084, May 14, 1998). The tribes in this agreement have developed government systems similar to those of States, Counties, or Townships. These tribal governments have demonstrated the ability to administer permits, pass and enforce laws, and deal out the appropriate penalties in their court systems. The federal government is interested in helping tribes become more self-sufficient, both economically and administratively. Recognizing the ability of these tribes to self-regulate is a cornerstone principle of the agreement and furthers the policies of the federal government.

Section III.C. acknowledges that the federal government has what is called trust responsibility to the Tribes and that the Forest Service shares some of that responsibility. Trust responsibility is the U.S. Government's permanent legal obligation to exercise statutory and other legal authorities to protect tribal lands, assets, resources, and treaty rights as well as a duty to carry out the mandates of federal law with respect to American Indian and Alaska Native Tribes. While the full scope of the Forest Service's role in carrying out the federal government's trust responsibility has not been defined at this time, the Forest Service has some responsibility for working with Tribes on a government-to-government basis as defined in an Executive Memorandum and Executive Order from the President of the United States and a responsibility for honoring treaty rights on national forest lands in areas ceded by the Tribes when they retained some rights on those lands.

Section III.D. summarizes the Forest Service's Native American policy which is stated in its entirety in the Forest Service Manual, a set of Forest Service policies.

Sections III.E through G. contain some important language about the effects of this agreement on the management authorities and obligations of the parties. The Forest Service and Tribes wanted to make it clear to one another several things. First, the Forest Service has the authority to manage natural resources on national forest lands within existing law and regulations. Second, the Forest Service has the authority to enforce federal regulations on its lands again within the respective law and regulations. There was no need to list all of the applicable laws and regulations which are extremely numerous. Third, the parties wanted to make it clear to one another that the provisions of the MOU did not affect other aspects of Forest Service - Tribal relations.

Section III. H. indicates that the agreement is not binding on any tribes which choose not to be part of the agreement.

Section III. I. contains language that nothing in the MOU can be used against the Tribes or the Forest Service in a legal claim should any party decide to terminate the agreement. Should the MOU be terminated, either party could bring a claim against the other and the fact that the MOU was in place would have no bearing on that claim. It also states that the parties can enter this agreement without waiving any rights, authorities, or legal claims. Lastly, it indicates that this document is about agreements the parties were able to reach, not about the limits of treaty rights nor of federal authorities.

Section IV

This section of the MOU describes the objectives of the agreement.

Section IV. A describes the relationship the parties wish to have and keep. The relationship is based on the mutual recognition of the sovereignty of the federal and tribal governments, the desire to have timely and effective communications, and the desire to have the Tribes participate effectively in land management decisions made by the Forest Service based on existing law, regulations, and Executive Orders.

Section IV. B. states the intent of the agreement to establish mutually agreed upon conditions under which Tribes will conduct their gathering activities on national forest lands within the scope of this agreement.

Section IV.C. describes the intent to manage natural resources on the national forests in such a way that they are conserved for future use. This is not intended to deny the needs of any other individual or non-tribal organization or government. Again, because this agreement is between the Tribes and the Forest Service, only those statements which are pertinent to the parties are made.

Section V

Section V lists the mutual interests of the parties related to gathering by Tribes and to the relationship of the parties. It is standard practice in agreements like this to list the mutual interest of the parties. Listing these interests does not in any way exclude the interests of other parties in national forests and it is not necessary to list all other parties' interests. In other agreements, the Forest Service has entered into, for example, with the organization Fishing Has No Boundaries, the mutual interests of the Forest Service and FHNB were listed.

Section V.A. describes the interests of the Tribes and the Forest Service, as an agency of the federal government, for the Tribes to have the capability to have an effective government, one which can administer and enforce regulations on its members and one which can interact effectively with the federal government. The policies of the federal government toward Tribes support the concept of effective tribal governments.

Section V.B. describes the mutual interest of the Tribes and the Forest Service to manage national forests in a way so that tribal interests and desires can be met. This is consistent with the Forest Service's Native American policy described in more detail in the 1563 section of the Forest Service Manual. It is the desire of the Forest Service to meet tribal needs and desires within the principles of good management, multiple use, and national forest laws and policies.

Section V.C. states the mutual interest in managing national forest lands in a way so they remain productive and provide opportunities for the sustainable harvest of products. The Tribes and the Forest Service both recognize that sustaining the ecosystems from which the products flow is in everyone's best interest.

Section V.D. states that both the Tribes and the Forest Service recognize that the most effective and meaningful law enforcement for tribal members exercising their treaty rights is through tribal means. This idea is supported by the Department of Justice's U.S. Attorney's offices in Wisconsin and Michigan and is consistent with the federal government's approach toward tribal governments and tribal communities.

Section V.E. discusses the interest of the Tribes and the Forest Service to have a consistent set of gathering regulations for tribal members on national forest lands across their ceded territory. This was one of the primary reasons for the initiation of these discussions. The benefits of this consistency are mutual to the Tribes and to the Forest Service and will result in more effective and efficient administration and law enforcement.

Section V.F. discusses the mutual interest to interact effectively. This is an important section in this agreement because of the historical context of Forest Service - tribal relations. It has not always been easy for the Tribes to interact effectively with the Forest Service. Cultural barriers, the relatively small

size and limited resources of tribal governments, and other reasons have made tribes feel shut out of the management of national forests despite the federal government's responsibility to interact on a government-to-government basis and the federal government's trust responsibility to federally recognized tribes. The Forest Service does want to improve communications and relationships with these and other tribes.

Section VI

Section VI is the meat of the MOU. It contains the specific agreements between the Forest Service and the Tribes in many areas.

In *section VI.A*, the Forest Service and Tribes come to agreement on how to administer the parts of the MOU. They agree to try to reach consensus in decisions that need to be made and in the absence of consensus, agree to a process for resolving disputes in an efficient and timely manner. This seems like a very reasonable way for two governments to interact. The Tribes and Forest Service agree to meet at least annually to review how the MOU is working, to establish a Technical Working Group which can provide advice on technical issues affecting the MOU, to share natural resources data and information, to seek adequate funding for implementing the agreement, and to learn more about each other's cultures and bureaucracies so that they can work together effectively. An important statement in this section is that nothing in this MOU affects the budgetary authority of the Tribes or the Forest Service. While it will take time and funds to implement this agreement, no commitment of funds is made in the MOU and both the Tribes and the Forest Service recognize that the fluctuations in annual operating budgets and the authority of the Forest Service to spend money on certain activities could affect how well the agreement is implemented.

In *section VI.B*, the Forest Service and the Tribes come to agreement on how they will interact on decisions the Forest Service makes on management of national forest lands. Both the Tribes and the Forest Service recognize that how national forest lands are managed affects the distribution, abundance, and access to resources the Tribes are interested in and that the Forest Service should understand tribal needs and desires before making final land management decisions.

This section boils down to an interpretation of how government-to-government consultation will occur. Because the specifics of government-to-government consultation protocol have never been established for the Forest Service and because the Tribes and the Forest Service wish to have a consistent operating procedure among the national forests and among various tribes, capturing these operating procedures provides a basis for that desired consistency. When a dispute can't be resolved, the Tribes and the Forest Service agree that the Forest Service will simply use its existing authority to make a decision and implement an action. Of course, the Tribes have reserved the right to legally challenge any Forest Service action.

In *section VI.C*, the Tribes and the Forest Service agree to work together in managing the harvest of wild plants on national forest lands. Specifically, they agree to regulate and monitor the resources so that Tribes have an opportunity to harvest an equal amount as non-tribal gatherers. This agreement was made so that in the event some resource becomes in short supply and only a limited amount can be harvested by anyone, the Tribes will have an opportunity to take up to half of the allowable harvest. This is in keeping with the way walleyes and some other resources under state jurisdiction are allocated. At

present, none of the resources the Tribes have an interest in gathering on national forest lands are regulated this way with only a limited harvest.

The Tribes agree to adopt regulations no less restrictive than those found in the model code of regulations (Appendix A) unless the Forest Service consents to the less restrictive regulations.

The Tribes and the Forest Service agree to monitor the amount of harvest to the best of their abilities and to exchange information.

The Tribes and the Forest Service agree to work together to find places suitable for tribal sugarbushes and to develop management plans for those areas so that mutual goals are met.

The Tribes and the Forest Service agree to work together on locating areas where tribal members can find the resources they desire. This agreement is in the MOU because the Tribes want to have access to information which helps them locate resources they desire. The reference to timber sale areas is there to identify places with resources commonly desired by tribal members (for example, firewood and birch bark) and which are typically not removed by the loggers. This information is commonly given out to non-tribal people looking for resources as well.

In Section VI.C.7, the Forest Service agrees to notify Tribes of areas it intend to sell as salvage timber. The notice is provided to the Tribes so that commercially valuable salvage timber is not harvested by the Tribes for firewood.

In section VI.C.8, the Tribes agree to not issue permits for the harvesting of house logs without consent from the Forest Service. The Forest Service agrees to consider tribal requests for house logs in a timely manner and not deny any request unreasonably. This was stated so that it was clear that the Tribes need Forest Service permission through administrative free use to harvest logs and so that the Forest Service would not delay the processing of tribal requests.

In section VI.C.9, the Forest Service and Tribes agree to work out an agreement and implementation plan for fee and length of stay waivers in developed campgrounds when tribal members use the campgrounds for gathering. This topic was brought up late in the negotiations after the parties learned that campground fees and length of stay limits were being waived for another tribe with treaty rights (Nez Perce) to gather in the western United States. No specific agreements have been made beyond a general agreement that fees and stay limits could be waived in some areas.

In section VI.C.10, the Tribes and Forest Service agree to disagree about tribal use of motors on Crooked Lake in the Sylvania Wilderness on the Ottawa National Forest where there are wild rice beds traditionally used by Tribes and where some non-tribal use of outboard motors currently occurs. Even though the Tribes believe in principle that their treaty rights entitle them to use motorized and mechanized equipment in federally designated wildernesses, they agreed to make that illegal for tribal members. The Forest Service agreed to look at exceptions to this on a case by case basis on tribal request. The only place the Tribes requested an exemption was on Crooked Lake. No agreement could be reached at this site, so the parties agreed to disagree, but to try to resolve the issue in the future. Agreeing to disagree means that both the Tribes and the Forest Service understand that they may face a legal

challenge from the other if the Tribes use outboard motors on the lake or if the Forest Service enforces federal regulations against tribal members using motors on the lake.

In *section VI.C.11*, the Forest Service agrees to notify tribes before making changes to laws or regulations governing gathering on national forests so that tribal input can be given. This is in keeping with the government-to-government consultation protocol. This is a desirable agreement because changes in federal policy, such as, limiting the gatherable amounts of a certain resource could have an effect on the tribal gathering regulations.

In *section VI.D*, the Tribes and the Forest Service agree to work together on research projects, on determining the amounts of harvest, and on determining the effects of gathering wild plants on the overall population of plants and on the ecosystems which support the plants. These things are simply good resource stewardship principles.

In *section VI.E*, the Forest Service and Tribes agree to adopt a tribal self-regulation agreement (Appendix B), to provisions for changing that agreement, to recognize that the primary enforcement of tribal gathering should be done by the Tribes, and to coordinate Forest Service and tribal enforcement activities. This is a short, but very important section. It articulates the specific agreements which reflect one of the cornerstone principles of the MOU, tribal self-regulation.

In *section VI.F*, the Tribes and Forest Service agree to a set of procedures for proposing changes to parts of the MOU, federal laws and regulations governing harvesting, the tribal code of regulations, and the self-regulation agreement. This is mostly bureaucratic language about time frames and proper notification procedures, but is necessary to reduce potential confusion by the Tribes or the Forest Service in the future when there is a need to propose changes.

Section VII

This is standard language required in Forest Service MOU's.

Sections VIII and IX

This section identifies how the agreement takes effect or can be terminated.

Section X

This section calls for the Tribes and the Forest Service to meet within 90 days of ratifying the agreement to begin work on implementing the specific agreements.

THE MODEL CODE OF REGULATIONS (APPENDIX A) AND THE TRIBAL SELF-REGULATION AGREEMENT (APPENDIX B)

The second and third parts of the agreement are the Model Code of Regulations (Appendix A) and the Tribal Self-Regulation Agreement (Appendix B). Both are explained here because of the close relationship of the two parts. The self-regulation agreement recognizes the ability of the Tribes to regulate their own members through permitting, enforcement of violations, and serving justice in tribal courts. In the agreement, the Tribes and Forest Service agree to avoid dual prosecution when there are similar federal and tribal regulations related to gathering. The Tribes and the Forest Service also agree that if a violation is particularly flagrant, the parties will consult with one another before the Forest Service issues a citation under federal law. The essence of this agreement is that Tribes should govern the behavior of their members to the greatest extent possible, but that the federal government reserves the right to use its regulatory authority. These concepts are consistent with federal Indian policy and are supported by the U.S. Attorney's offices in Wisconsin and Michigan.

The Model Code is a set of regulations which will be adopted by each tribal government desiring to be a party to the agreement. These regulations govern the behavior of tribal members gathering wild plants on national forest lands. All tribes with whom the Forest Service has been negotiating have a code of regulations governing other off-reservation activities, such as, hunting, fishing, gathering wild rice, and trapping. This set of regulations becomes an additional chapter in that code. As noted earlier, each tribe must adopt a set of regulations at least as restrictive as the model code, but may adopt additional more restrictive regulations if they do not want their members engaging in some activities.

The code is written in legal terms similar to other parts of the tribal off-reservation code which has been approved by federal court. It contains several chapters and sections. The code is written in a way that describes which actions are illegal as opposed to attempting to list all possible legal actions a tribal member can take. This is similar to the U.S. Code of federal regulations.

It is important to point out the relationship between the model code and federal regulations governing gathering and other activities on the national forests. The model code deals only with tribal gathering. The federal code of regulations covers the full spectrum of activities on national forest lands. Tribal members violating a federal regulation not covered by a similar tribal regulation, for example, breaking down a gate which is closing a road, are subject to prosecution under the federal system.

When a tribal member breaks a tribal regulation, he or she is likely breaking a similar federal regulation as well, such as gathering boughs in a campground. In the self-regulation agreement (Appendix B), the Forest Service and Tribes agree that the Tribes should enforce their own regulations on their members and come up with appropriate penalties in their tribal court system. They further agree that the Forest Service will not cite a tribal member into federal court on a violation which is also in the tribal regulations to avoid dual prosecution of the individual. However, as stated earlier, the Tribes and the Forest Service agree that the Forest Service may want to issue a federal citation for a particularly flagrant violation of a tribal regulation. The parties agree to consult before this action is taken.

The Model Code of Regulations

The Model Code contains several chapters and numerous provisions. The following narrative briefly describes each chapter and the key provisions in each chapter.

Chapter One provides some of the basics about the tribal code, under what authority it is established, its purposes, when it goes into effect for each Tribe adopting it, and how it shall be interpreted.

Section 1.05 (2) contains language about interpreting the provisions of the code of regulations liberally and in favor of the tribe. This section is consistent with other chapters of tribal codes and is simply to ensure that any conflict between a tribal member and a tribal government about the interpretation of the provisions of the code of regulations will be ruled in favor of the tribe versus the individual. Thus, it is the way the tribe interprets the provisions that will prevail.

Section 1.08 of the model code deals with religious or ceremonial use of plants. Tribal use of plants and animals for ceremonial or religious purposes has a long history and tribal governments are reluctant to try to limit what a tribal member does to practice his or her individual beliefs. The provisions in this section reflect that. At the same time, the Tribe indicates that tribal members wishing to conduct the harvest of wild plants on national forests for ceremonial or religious purposes need a permit in order to insure that harvest does not take place in a manner which causes biological harm. The Tribes and Forest Service recognize that some plants may be rare or localized in their distribution and that Research Natural Areas may contain the only populations of these plants. This is why there is a reference to RNA's. The Tribes agree to consult with the Forest Service if the requested gathering is to take place in an RNA. This consultation would be the time at which the Forest Service could either help the tribal member find another place to harvest the plants or express concern over the proposed harvest.

Chapter 2 provides the definitions for a number of terms that are in the Model Code so that each tribe and all tribal members know exactly what is being referred to by the terms. Other terms may be defined and added to this section from time to time if experience shows that there is some confusion about other terminology.

Chapter 3 contains the provisions about general harvesting regulations including the need for various kinds of permits for tribal gatherers, record keeping, and harvest restrictions.

Sections 3.02 and 3.03 describe the kinds of permits needed by tribal gatherers.

Section 3.05 describes how an emergency closure on tribal gathering can be done by tribal officials.

Section 3.06 describes the areas where tribal harvesting is not allowed or certain activities associated with harvesting are not allowed. The Tribes have identified "tribal wildernesses, tribal RNA's, and tribal vehicle permit areas." These are simply the same as federal wildernesses, RNA's, and places where tribal members need a permit to park their vehicles. A document attached to the Model Code identifies these areas.

Section 3.07 describes the restrictions on gathering plants (specifically trees) which have become the property of another party through a timber sale contract and the restrictions on gathering in an open timber sale area before the sale is closed. These provisions were designed to protect purchasers of national forest timber sales.

Section 3.08 protects landline trees, bearing trees, and trees on national forest lands which are being prepared for a timber sale contract.

Section 3.09 describes who can participate in tribal gathering and is similar to the provision in other off-reservation codes for hunting, fishing, trapping, and harvesting wild rice.

Chapter 4 deals with procedures of enforcement and tribal courts. The sections describe enforcement procedures and penalties and other procedures in tribal court.

Chapter 5 deals with harvest regulations for specific resources. Regulations were developed based on the need for conservation of the resource, public health or safety, a principle carried forward from the Wisconsin court cases on treaty rights.