

CR 90-83



State of Wisconsin \ DEPARTMENT OF NATURAL RESOURCES

Carroll D. Besadny, Secretary
Box 7921
Madison, Wisconsin 53707
TELEFAX NO. 608-267-3579
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STATE OF WISCONSIN)
)
DEPARTMENT OF NATURAL RESOURCES) ss

TO ALL TO WHOM THESE PRESENTS SHALL COME, GREETINGS:

I, Bruce B. Braun, Deputy Secretary of the Department of Natural Resources and custodian of the official records of said Department, do hereby certify that the annexed copy of Natural Resources Board Order No. FR-57-89 was duly approved and adopted by this Department on July 26, 1990. I further certify that said copy has been compared by me with the original on file in this Department and that the same is a true copy thereof, and of the whole of such original.

IN TESTIMONY WHEREOF, I have here-
unto set my hand and affixed the
official seal of the Department at
the Natural Resources Building in
the City of Madison, this 19th
day of September, 1990.

Bruce B. Braun
Bruce B. Braun, Deputy Secretary

(SEAL)

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11-1-90

ORDER OF THE STATE OF WISCONSIN NATURAL RESOURCES BOARD
CREATING RULES

IN THE MATTER of creating subch. IV of
ch. NR 13 of the Wisconsin Administrative
Code pertaining to Chippewa Indian treaty
gathering rights

FR-57-89

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Analysis Prepared by Department of Natural Resources · Revisor of Statutes
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Authorizing statutes: ss. 23.09(2), 23.11 and 227.11(2)(a), Stats.

Statutes interpreted: chs. 23, 26 to 29, Stats.

The creation of ch. NR 13, subch. IV, will result in a set of rules regulating Chippewa Indian off-reservation gathering based on treaty rights recognized by Lac Courte Oreilles Band v. Voigt, 700 F. 2d 341 (7th Cir. 1983) and Lac Courte Oreilles Chippewa Ind. v. State of Wis., 653 F. Supp. 1420 (W. D. Wis. 1987).

SECTION 1. Subchapter IV of chapter NR 13 is created to read:

Subchapter IV

Gathering

NR 13.50 DEFINITIONS. In addition to definitions in s. NR 13.02, the following definitions apply to this subchapter:

(1) "Appraised value" means the monetary value of timber designated for cutting and removal as determined by the department.

(2) "Band" means one of the Wisconsin Chippewa bands entitled to exercise off-reservation treaty rights under Lac Courte Oreilles v. Voigt, 700 F. 2d 341 (7th Cir. 1983).

(3) "Bucking" means cutting felled trees into shorter lengths.

(4) "Department gathering permit" means a permit issued by the department authorizing a treaty rights participant to gather miscellaneous forest products listed in ss. NR 13.54(1) and 13.55(1) on department land.

(5) "Department land" means land under the ownership of the department within the ceded territory where the department has authority to manage and harvest timber and other forest products on the land.

(6) "Department property" means a department project including but not limited to a state forest, state park, wildlife area or fisheries area.

(7) "Designated timber" means timber described in the timber gathering plan, marked or otherwise designated by the department for cutting and removal.

(8) "Establish" or "established" means the department's setting up of a tract of timber for cutting by designation of the timber to be cut and determination of cutting specifications and conditions.

(9) "Felling" means the cutting of a standing tree.

(10) "Forest products" means all forms of vegetation, and parts thereof, including fruits, seeds, berries and roots.

(11) "Gathering timber" means felling, bucking, skidding, piling and hauling timber to the mill.

(12) "Natural area" means land designated or dedicated under s. 23.28 or 23.29, Stats.

(13) "Public offering" means the advertisement or offer by the department of a tract of its timber to the public for sale.

(14) "Skidding" means dragging or otherwise moving trees on department land to the site of loading for hauling.

(15) "Slash" has the meaning established in s. 26.12(6)(a), Stats.

(16) "Timber" means logs, pilings, posts, poles, pulpwood, other cord wood products and full tree or cord wood chipping.

(17) "Timber gathering permit" means the authorization issued by the timber permit issuing authority to authorize the gathering of timber on a tract of department land.

(18) "Timber gathering permittee" means a treaty rights participant who is issued a timber gathering permit by the timber permit issuing authority.

(19) "Timber gathering plan" means the timber cutting plan prepared by the department for silviculturally sound timber harvest on department land which addresses but is not limited to the estimated volume of timber available, the proper time of harvest, proper harvest methods, designation of trees suitable for harvest and other conditions on harvest necessary to conserve the timber resource and assure a safe harvest.

(20) "Timber permit issuing authority" means the band or designee which issues a treaty rights participant a permit authorizing the gathering of timber on off-reservation land in the ceded territory.

(21) "Tract" means a specific description or area of department land established by the department for timber cutting and removal.

(22) "Treaty rights participant", for purposes of this subchapter, means any person defined as a treaty rights participant in s. NR 13.02(13) or any of the 6 Wisconsin Chippewa bands.

(23) "Utilization" means the specified degree to which each tree shall be cut and removed.

(24) "Year" means the calendar year.

(25) "Zone" means a specific area or portion of a tract.

NR 13.51 RESTRICTIONS. Subject to the modifications and exceptions of this subchapter, and in addition to the modifications and exceptions provided elsewhere in this chapter, the following provisions are applicable to treaty rights participants engaged in gathering activities:

(1) Statutory provisions.

(a) Chapter 24 Public domain and trust funds

(b) Section 26.05 Timber theft.

- (c) Section 26.06(2) and (3) Relating to possession of timber products.
- (d) Section 26.09 Civil liability for unlawful cutting, removal and transport.
- (e) Section 29.415 Endangered and threatened species protected.
- (f) Section 29.547 Ginseng protected.
- (g) Section 85.075 Rail program rules.
- (h) Sections 85.15 and 85.16 Property management and Department rules and forms.
- (i) Section 86.02 Injury to highway.
- (j) Section 86.03 Trees on and adjacent to highway.
- (k) Section 86.07(2) Relating to alteration in any highway.
- (2) Administrative code provisions.
 - (a) Section NR 1.24 Management of state and county forests
 - (b) Section NR 19.09 Wild rice conservation.
 - (c) Section NR 19.11(1)-(5) Scientific collectors permits.
 - (d) Section NR 45.04(1)(a) Relating to gathering on state property.
 - (e) Chapter NR 28 Wild plants.

NR 13.52 TIMBER OR FOREST PRODUCT GATHERING ELIGIBILITY AND ASSISTANCE.

Treaty rights participants gathering timber or other forest products on department land may not be assisted in the gathering by any person other than another treaty rights participant. Treaty rights participants may not permit any person other than another treaty rights participant to tend or operate equipment involved in the gathering.

NR 13.53 TIMBER GATHERING. (1) PERMIT REQUIRED. A treaty rights participant may gather timber on department land reserved for gathering under sub. (3)(e) if:

- (a) The treaty rights participant is a timber gathering permittee; or
- (b) The treaty rights participant who is not the permittee but who has been named in a timber gathering permit for the tract issued by the timber permit issuing authority to assist the permittee;
- (c) The gathering is being conducted in accordance with the timber gathering plan which was provided to the timber gathering permittee by the department under sub. (3)(e); and
- (d) The permit and authorization under it is conditioned on compliance with the timber gathering plan.

(2) GATHERING IN ACCORDANCE WITH TIMBER GATHERING PLAN. Gathering by treaty rights participants on department land shall be in accordance with and fully comply with the timber gathering plan prepared for the tract. The timber gathering plan shall include:

- (a) The designated timber which is authorized to be cut and removed and which shall be cut and removed either by describing the timber or the manner by which it has been or will be designated for cutting.
- (b) Cutting and utilization specifications as well as other conditions on the manner in which the timber shall be cut and removed.
- (c) The time period or time periods within which the timber may or shall be cut and removed.
- (d) Conditions on the disposal or handling of slash and debris.
- (e) Conditions on construction and use of roads or landing areas on department land.
- (f) Conditions on access to the tract.

(g) A description of cutting zones within the total tract subject to the gathering.

(h) The required progression of cutting of zones within the tract subject to the gathering and assurance bonding requirements.

(i) Conditions pertaining to safety.

(3) TIMBER AVAILABILITY; MAXIMUM AMOUNT; NOTICE. (a) Maximum amount of timber available for gathering. 1. Subject to subds. 2 to 4, 50% of the total appraised value of all tracts on each department property or combination of properties to be offered at a single public offering shall be available for gathering by treaty rights participants under this section.

2. Gathering on each department property shall be by total tract and in accordance with the timber gathering plan for the tract.

3. If only one tract is established for the public offering, the tract shall be available for gathering under this section.

4. The 50% maximum in subd. 1 may be exceeded under the following conditions:

a. If only 2 tracts are established for the public offering, the larger or smaller tract may be selected for gathering under this section.

b. If multiple tracts are established for the public offering, a tract or tracts exceeding 50% by the smallest margin may be requested for gathering under this section.

Note: Tracts are normally established for public offering in the spring and fall of each year. A single public offering may include more than one department property.

(b) Notification to bands of timber available on department land. The department shall notify each band in writing at least 60 days in advance of public offering of a tract or tracts.

(c) Tribal notification to the department. The timber to be available for gathering subject to par. (e) shall be based on requests of the bands subject to the maximum of par. (a), provided that the requests are filed with and received by the department within 30 days of the mailing of the notice under par. (b). Tribal requests shall be based upon past harvest performance and capacity to harvest. The tribal requests shall be submitted to the department property office identified in the notice under par. (b).

(d) Tribal notification to treaty rights participants. The bands shall notify the treaty rights participants of the availability of timber on department land for gathering identified under par. (c). If more than one treaty rights participant is interested in an available tract of timber, the bands or other timber permit issuing authority shall select the treaty rights participant or participants and issue a timber gathering permit to authorize the treaty rights participant or participants to gather timber on the tract. The timber gathering permit shall name the treaty rights participant or participants authorized to engage in the gathering.

(e) Filing timber gathering permit and assurance bond with the department; reserving department land for timber gathering; providing timber gathering plan. 1. As a condition of gathering timber on department land and reserving that tract for gathering, the timber gathering permittee shall file, in person, the timber gathering permit authorizing the gathering and the assurance bond under par. (f) at the department office designated in the notice to the bands under par. (b) within 30 days from the date that notice is mailed to the bands. Within 72 hours of the timely filing of the permit and assurance bond by the permittee, the department's timber gathering plan for the tract shall be prepared. The permittee shall then acknowledge receipt of it by signature on the department's copy of the plan within 10 days of notification by the department that the plan is available for acknowledgement.

2. A tract of timber available for gathering and noticed as such under par. (b) shall be offered for sale to the public and no longer available for gathering in that year if it is not reserved as provided in this paragraph.

(f) Assurance bond. As a condition to the department's providing a timber gathering permittee the timber gathering plan and as a condition of the gathering, the timber gathering permittee shall deposit funds in the form of cash, bond, letter of credit or certificate of deposit, acceptable to the department, equal to 10% of the department's appraised value of the timber designated to be cut on the tract or the zone on which cutting is authorized if progression cutting is also authorized in the plan. The department may retain the assurance bond for a period of 30 days beyond completion of cutting in compliance with timber gathering plan, if the department has been notified of the completion by the permittee, or 30 days beyond the date the cutting is to be completed.

(4) REMEDIES FOR FAILURE OF A TREATY RIGHTS PARTICIPANT TO COMPLY WITH THIS SUBCHAPTER AND THE TIMBER GATHERING MANAGEMENT PLAN. Upon a determination by the department that a timber gathering permittee has failed to comply with the timber gathering plan and upon written notice to the permittee and timber permit issuing authority, the department may pursue any or all of the following remedies:

(a) Prevent further gathering by the timber gathering permittee or any other treaty rights participant on the tract and offer the tract to the public for sale or otherwise manage it.

(b) Retain all or part of the permittee's assurance bond for damages which are incurred due to the timber gathering permittee's failure to comply with the timber gathering plan.

(c) Prevent the timber gathering permittee from reserving or gathering on any tract for 2 years from written notice to the permittee of the permittee's failure to gather in accordance with the timber gathering plan.

NR 13.54 GATHERING MISCELLANEOUS FOREST PRODUCTS ON DEPARTMENT LAND.

(1) Any treaty rights participant interested in gathering from department land firewood other than on a tract under s. NR 13.53, tree bark, maple sap, lodge poles, boughs, marsh hay or other miscellaneous forest products not enumerated in s. NR 13.55 or this section shall obtain a permit from the manager of the department property upon which the gathering is desired. The department shall respond to the gathering request no later than 14 days after receipt of the request. The permit shall indicate the location of the material to be gathered, the volume of material to be gathered, and conditions on the gathering of the material necessary for conservation of the timber and other forest products on the department land or for safety.

(2) The department may not deny a request to gather miscellaneous forest products on a department property under this section unless the gathering is inconsistent with the management plan for that property or the gathering will conflict with the preexisting rights of a permittee, other person who has an approval to conduct an activity on the department property or a contractor of the department.

NR 13.55 GATHERING FRUITS, SEEDS, BERRIES OR CERTAIN PLANTS. (1) NO GATHERING PERMIT REQUIRED. Except as provided in subs. (2) and (3), treaty rights participants may gather fruits, seeds or berries on department property without a permit issued by the department.

(2) GATHERING PERMIT REQUIRED. No treaty rights participant may gather anything other than edible berries on a natural area without a

department gathering permit. The department shall respond to the gathering permit request no later than 14 days after receipt of the request. The permit shall indicate the type of material, location and volume of material to be gathered and conditions on the gathering of the material necessary for conservation of the timber and other forest products on the department land or for safety.

(3) GATHERING NOT PERMITTED. No treaty rights participant may gather forest products, including fruits, seeds, berries or plants which are listed on the department's endangered or threatened species list established under s. 29.415, Stats.

(4) GINSENG. Treaty rights participants harvesting ginseng shall comply with the provisions of s. 29.547, Stats., and ch. NR 28, except the license requirements.

(5) WILD RICE. Wild rice may be harvested on department land without a permit under this subchapter when harvested in accordance with s. NR 19.09.

NR 13.56 SAFETY. Treaty rights participants engaged in gathering on department land may not impair or obstruct developed recreational trails or special use areas. Any forest products subject to gathering which are cut and may impede or impair use of those trails or other special use areas shall be immediately removed by the treaty rights participant.

NR 13.57 DEPARTMENT INSPECTION. Any treaty rights participant engaged in gathering on department land shall present, upon request by department representatives, the timber gathering permit, the permit authorizing gathering miscellaneous forest products, and his or her tribal identity card.

NR 13.58 EFFECTIVE PERIOD OF THE RULES. Sections NR 13.50(1), (3), (7) to (9), (11) to (21), (23) and (25) and 13.53 shall be effective only for so long as the federal court exercising jurisdiction in Lac Courte Oreilles v. Voigt, 700 F. 2d 341 (7th Cir. 1983) holds that the harvest of timber is , subject to the Chippewa off-reservation treaty right of gathering.

The foregoing rules were approved and adopted by the State of Wisconsin Natural Resources Board on July 26, 1990.

The rules shall take effect on the first day of the month following publication in the Wisconsin administrative register as provided in s. 227.22(2)(intro.), Stats.

Date at Madison, Wisconsin September 14, 1990

STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES

By Carroll D. Besachy
Carroll D. Besachy, Secretary

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State of Wisconsin \ DEPARTMENT OF NATURAL RESOURCES

Carroll D. Besadny, Secretary
Box 7921
Madison, Wisconsin 53707
TELEFAX NO. 608-267-3579
TDD NO. 608-267-6897

September 14, 1990

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SEP 19 1990

Mr. Gary L. Poulson
Assistant Revisor of Statutes
119 Martin Luther King, Jr., Blvd.

Revisor of Statutes
Bureau

Dear Mr. Poulson:

Enclosed are two copies, including one certified copy, of State of Wisconsin Natural Resources Board Order No. FR-57-89. These rules were reviewed by the Assembly Committee on Natural Resources and the Senate Committee on Transportation, Conservation and Mining pursuant to s. 227.19, Stats. Summaries of the final regulatory flexibility analysis and comments of the legislative review committees are also enclosed.

You will note that this order takes effect following publication. Kindly publish it in the Administrative Code accordingly.

Sincerely,


C. D. Besadny
Secretary

Enc.