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**State of Minnesota v. Mille Lacs Band of Chippewa Indians,
Ten Years On**

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State of Minnesota v. Mille Lacs Band of Chippewa Indians, Ten Years On:

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ABSTRACT

In *State of Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999) the Supreme Court unanimously held that, by guaranteeing Anishinabe (Chippewa) rights to hunt, fish and gather, U.S. treaty negotiators severed the right to *use* the land from formal title to the land in an 1837 (and 1854) Treaty. The *Mille Lacs* majority and dissent differed *only* as to whether Treaty-guaranteed *usufructuary* property rights had been abrogated by subsequent events. The majority held the *usufructuary* rights had not been abrogated.

Off-Reservation Anishinabe Usufructuary Property Rights in Northern Minnesota

With respect to Minnesota Territory, not ceded in 1837 and 1854 Treaties, two major questions remain *after* the *Mille Lacs* decision: (a) did the Anishinabe have treaty-guaranteed *usufructuary* rights outside the 1837 and 1854 ceded territory; and (b) if so, are treaty-guaranteed *usufructuary* rights *outside* the 1837 and 1854 ceded territory, are *also* valid today? This article answers these questions by elaborating Minnesota treaty history to include *usufructuary* property rights guaranteed in Treaties of 1795, 1825, 1826, as well as, a relatively unrecognized clause of the 1854 Treaty, all of which guarantee some form of *usufructuary* property rights outside the 1837 and 1854 ceded territory. The article concludes that these treaties, largely ignored by the courts until now, are likely to be sources of as yet unrecognized Anishinabe *usufructuary* property rights in the 21st Century.

Modern Usufructuary Rights and Natural Resource Co-Management

Further, because *usufructuary* property rights include “the right to modest living,” environmental protection to maintain the long-term value of these property rights will have significant long term off-reservation land-use and wildlife management implications for tribal governments and tribal members.

Key words: treaty, *usufructuary*, hunting, aboriginal, Indian, reservation, property.

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***State of Minnesota v. Mille Lacs Band of Chippewa Indians*,² Ten Years On:
U.S. Treaty-Guaranteed *Usufructuary* Property; the Right to a “Modest Living;” and,
Native American Natural Resource Co-Management**

Prof. Peter Erlinder³

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² *Minnesota et al. v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 119 S.Ct. 1187, 143 L.Ed.2d 270 (1999).

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INTRODUCTION

In 1837, the United States entered into a Treaty with several Bands of Chippewa Indians. Under terms of this Treaty...the United States guaranteed to the Indians certain hunting, fishing and gathering rights on the ceded land....After an examination of the historical record, we conclude that the Chippewa retain the *usufructuary* rights guaranteed to them under the 1837 Treaty.

– Justice Sandra Day O’Connor⁴

In *State of Minnesota v. Mille Lacs Band of Chippewa Indians*, the Supreme Court unanimously held that, by guaranteeing Anishinabe⁵ (Chippewa) rights to hunt, fish and gather in the first Minnesota territory ceded to the United States in 1837, U.S. treaty negotiators severed the right to *use* the land, called *usufructuary* property rights since Roman times,⁶ from formal title to the land.⁷ And, by doing so, U.S treaty negotiators created Treaty-guaranteed property rights that could not be lawfully taken from the Anishinabe without Congressional authorization,⁸ expressed in language that clearly reflected the intention of Congress to do so, understood as such by the Anishinabe.⁹

⁴ 526 U.S. at 175.

⁵ The *Anishinabe*, which means “original man” or “people,” in English, were referred to by others as “*o-jib-weg*,” (those who make pictographs), which was corrupted into “Ojibwa,” which was then anglicized as “Chippewa.” Part of the larger Algonquin language group that inhabited woodlands in much of the northeastern United States and southeastern Canada. See EDMUND JEFFERSON DANZIGER, *THE CHIPPEWAS OF LAKE SUPERIOR* 7 (University of Oklahoma Press, Norman 1979). “Anishinabe” is used throughout the article in recognition of Anishinabe self-identity, and to emphasize that the legal issues discussed herein originate from the survival practices of an indigenous culture that pre-existed European incursions into the Great Lakes Region. See Jeffrey Robert Connelly, *Northern Wisconsin Reacts to Court Interpretations of Indian Treaty Rights to Natural Resources*, 11 GREAT PLAINS NAT. RESOURCES J. 116 (2007).

⁶ **usufruct** *n.* [fr. Latin *usufructus*] *Roman & civil law.* A right to use and enjoy the fruits of another's property for a period without damaging or diminishing it, although the property might naturally deteriorate over time . . . La. Civ. Code art. 535.

usufructuary, *n.* *Roman & civil law.* One having the right to a usufruct; specif. a person who has the right to the benefits of another's property [1. C.J.S. *Estates* §§ 2–5, 8, 15–21, 116–128, 137, 243].

⁷ See generally, Note, “Recognizing and Protecting Native American Treaty Usufructs in the Supreme Court: the Mille Lacs Case”, 21 *Pub. Land & Resources Law Review* 169 (2000).

⁸ *United States v. Dion*, 476 U.S. 734 (1986).

⁹ See discussion *infra* at notes ____

The *Mille Lacs* majority and dissenting opinions differed *only* as to whether the 1837 Treaty-guaranteed *usufructuary* property rights had been abrogated by one, or more, of three subsequent events: (a) an 1850 Executive Order issued by President Zachary Taylor;¹⁰ (b) an 1855 Treaty that did not mention the abrogation of *usufructuary* rights or prior treaties;¹¹ or, (c) Minnesota’s 1858 Statehood Act, which the Supreme Court had examined before, but had never found to have any bearing on pre-existing U.S. treaties.¹² The dissent did not question *usufructuary* property rights guaranteed in an 1854 Treaty referenced by the majority¹³ which had been upheld by the Seventh Circuit and recognized by Minnesota a decade earlier,¹⁴ and nor the well-established principle that Congressional abrogation of treaty-guaranteed property rights was not to be lightly inferred.¹⁵ Further, the majority and dissent both acknowledged that treaties and congressional enactments must be liberally interpreted, as understood by the Indians.¹⁶

Off-Reservation Anishinabe *Usufructuary* Property Rights in Northern Minnesota

With respect to the *rest* of Minnesota not ceded in the 1837 and 1854 Treaties, two major questions remain *after* the *Mille Lacs* decision: (a) what was the nature of hunting, fishing and gathering rights being exercised by the Anishinabe in the larger part

¹⁰ See discussion *infra* at notes ____

¹¹ See discussion *infra* at notes ____

¹² See discussion *infra* at notes ____

¹³ See discussion *infra* at notes ____

¹⁴ See discussion *infra* at notes ____

¹⁵ *Menominee Tribe v. United States*, 391 U.S. 404, 88 S. Ct. 1705 (1968); *Pigeon River Improvement, Slide & Boom Co. v. Charles W. Cox, Ltd.*, 291 U.S. 138, 54 S.Ct. 361, 367, 78 L.Ed. 695 (1934) (“*** the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress ***.”)

¹⁶ *Choctaw Nation v. United States*, 318 U.S. 423, 431-32 (1943); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 582. (1832).

of northern Minnesota territory, outside the 1837 and 1854 ceded territory in 1855 (See Appendix I) ; and, (b) since *usufructuary* rights in the 1837 and 1854 ceded territory were not abrogated in the 1855 Treaty and after (See Appendix II), whether treaty-guaranteed *usufructuary* rights *outside* the 1837 and 1854 ceded territory, are also valid today? ¹⁷

This article answers these questions by elaborating Minnesota treaty history to include the hunting, fishing and gathering rights guaranteed by the United States in Minnesota territory *before* 1837, and outside the territory ceded in 1854, which include: (a) the 1795 Treaty of Greenville,¹⁸ (b) the 1825 Treaty of *Prairie du Chien*¹⁹ and (c) the 1826 Treaty of *Fond du Lac* of Lake Superior,²⁰ as well as, (d) a relatively unrecognized clause of the 1854 Treaty, that explicitly guarantees *usufructuary* property rights in unceded territory west of the 1854 Treaty boundary to the Mississippi Band of Anishinabe.²¹ In light of the *usufructuary* property rights analysis unanimously adopted by Supreme Court in *Minnesota v. Mille Lacs*, which builds upon the analysis in the earlier *Lac Courte O’reilles* cases in the Seventh Circuit, the article concludes that these treaties, which remain largely unexamined in legal literature and case law,²² are likely to

¹⁷ See discussion *infra* at notes _____

¹⁸ See discussion *infra* at notes ____

¹⁹ See discussion *infra* at notes ____

²⁰ See discussion *infra* at notes ____

²¹ Territory west of the 1854 Treaty boundary, remained the domain of the sovereign Anishinabe Nation, including territory where the Leech Lake, Red Lake and White Earth Reservations are now located and was the subject of subsequent land cession treaties and Congressional enactments for the next 50 years. See, Appendices 1 and 2, *infra*.

²² *Mole Lake Band, et al v. United States*, 126 Ct. Cl. 596, 1953 WL 6071 (Ct.Cl.)(1953); *State v. Keezer*, 292 N.W. 2d 714 (Minn. 1980);

be sources of a deeper understanding of as yet undeveloped Anishinabe *usufructuary* property rights in the 21st Century.²³

Modern *Usufructuary* Rights and Natural Resource Co-Management

Further, because *usufructuary* property rights include “the right to modest living,”²⁴ either through joint state/native management²⁵ or, state leasing of U.S. treaty-guaranteed *usufructuary* rights,²⁶ environmental protection to maintain the long-term value of the *usufructuary* property rights will be necessary as a matter of federal regulation in all of northern Minnesota.²⁷ This, in turn, will have land-use management implications far beyond wildlife harvest,²⁸ and promises a broadened role for tribal governments in land use decisions that might impact the harvest of wild game, fishing or gathering²⁹ and a potential source of income for some of northern Minnesota’s most impoverished citizens;³⁰ some of its earliest inhabitants, the Anishinabe People.³¹

²³ See discussion *infra* at notes ____.

²⁴ See discussion *infra* at notes ____

²⁵ See discussion *infra* at notes ____

²⁶ See discussion *infra* at notes ____

²⁷ Patrick Reis, *Obama Admin Strikes \$3.4B Deal in Indian Trust Lawsuit*, N.Y. TIMES, Dec. 8, 2009. See also *Cobell v. Salazar* (Cobell XXII), 573 F.3d 808 (D.C. Cir. 2009). See GREAT LAKES REGIONAL COLLABORATION, *Tribal Nations Issues and Perspectives*, Version 1.0, April 26, 2005, p. 15:

Federal Trust Responsibility

As a consequence of United States Supreme Court rulings that refer to Tribal Nations as “domestic dependent sovereigns,” the United States, and all of its agencies, owe a special and unique duty to Tribal Nations – what the Supreme Court calls a “trust responsibility.”

²⁸ See, discussion of Environmental Protection Agency issues on treaty territory, *infra*.

²⁹ *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, 700 F.2d 341 (C.A.7 1983), amended on denial of rehearing and rehearing *en banc* March 8, 1983.

³⁰ See discussion *infra* at notes ____

³¹ See, Jeffrey Robert Connolly, Northern Wisconsin Reacts to Court Interpretations of Indian Treaty Rights to Natural Resources, 11 Great Plains Nat. Resources J. 116 (2007). The issues in this article are limited to an examination of *Anishinabe* treaties with the United States, although a similar analytical approach would apply to Dakota/Lakota treaties, or those with other Indian nations. See generally, Note, “Recognizing and Protecting Native American Treaty Usufructs in the Supreme Court: the Mille Lacs Case”, 21 *Pub. Land & Resources Law Review* 169 (2000).

I. BACKGROUND TO THE RESTORATION OF TREATY-GUARANTEED ANISHINABE *USUFRUCTUARY* PROPERTY RIGHTS IN MINNESOTA

The utmost good faith shall always be observed towards the Indians; *their lands and property shall never be taken from them without their consent*; and in their property, rights and liberty they shall never be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall from time to time be made, for preventing wrongs being done to them, and for preserving peace and friendship with them...

*Northwest Ordinance 1787*³²

The Late 20th Century Grassroots Activism: Return to the Rule of Law....after 160 Years of State Lawlessness

Through a series of cases brought in federal courts to enforce and define the treaty-rights guaranteed tribes and tribal members, a body of federal case law has developed that firmly establishes the concept of tribal sovereignty³³ on the order of that enjoyed by the separate states within the federal union.³⁴ In addition, Congressional

³² An Ordinance for the Government of the Territory of the United States north-west of the river Ohio, Art. III, 1 Stat. 50, 52 (1787) [hereinafter The Northwest Ordinance].

³³ See GREAT LAKES REGIONAL COLLABORATION, Tribal Nations Issues and Perspectives, Version 1.0, April 26, 2005, p. 4:

Government-to-Government Relationship

The government-to-government relationship implicit in treaty making and in the federal trust responsibility has been expanded over time to include the full gamut of federal policy implementation by all federal agencies.

This relationship requires federal agencies to interact directly with Tribal Nations on a governmental basis, not merely as a segment of the general public. Federal agencies are to consult with tribal governments and their designated governmental representatives, to the greatest extent practical and as not otherwise prohibited by law, before taking actions that affect tribal lands, resources, people, or treaty rights.

This obligation is separate and distinct from obligations to states and other governments as well as from requirements affording the opportunity for general public input on federal decisions Many states, such as Michigan and Wisconsin, have adopted government-to-government consultation policies similar to that required of the federal government.

³⁴ “Indian Tribes retain attributes of sovereignty over both their members and tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States.” *State v. Losh*, 755 N.W.2d 736, 739 (Minn. 2008) ((citing *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) (quoting *United States v. Mazurie*, 419 U.S. 544 (1975); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980)). But, “state laws may be applied to tribal Indians on their reservations if Congress has expressly so provided” and Public Law 280 “expressly granted six states

passage of Public Law 280³⁵ established tribal authority over a wide range of administrative and civil regulatory matters³⁶ which served to reinforce the tribal regulatory power on one hand, but limited sovereignty over criminal matters *on* reservations³⁷ in the six states in which Public Law 280 applies, on the other.³⁸

In Minnesota, *on*-reservation tribal sovereignty has been recognized with respect to functions similar to state government civil functions,³⁹ such as the regulation of gaming,⁴⁰ auto registration,⁴¹ traffic regulations,⁴² sale of tobacco and other state-regulated commodities,⁴³ *on*-reservation enforcement of tribal conservation regulations,⁴⁴ and state court enforcement of tribal court civil judgments.⁴⁵ However,

[including Minnesota] jurisdiction by or against Indians in Indian Country, except for offenses committed within the Red Lake Reservation and *Bois forte* Reservation at Nett Lake.” *Losh*, 755 N.W.2d at 739.

³⁵ In 1953, Congress enacted Public Law 280 (codified as amended at 18 U.S.C. § 1162 (2006) 25 U.S.C. §§ 1321 1324 (2006) 28 U.S.C. § 1360 (2006)). See *Losh*, 755 N.W.2d at 739.

³⁶ See *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) (Public Law 280 authorized *on*-reservation state criminal jurisdiction, but limited state jurisdiction over civil/regulatory matters).

³⁷ See *Duro v. Reina*, 495 U.S. 676, 688 (1990). But see *United States v. Lara*, 541 U.S. 193 (2004) (recognizing the inherent power of Indian tribes . . . to exercise criminal jurisdiction over all Indians, codified by Congress in 25 U.S.C. sec. 1301 by Congress, but only when tribal institutions are sufficient and the alleged violator is a member of the band or tribe in question); *State v. Davis*, 773 N.W.2d 66 (Minn. 2009) (based on the conclusion that the various Anishinabe Bands are separable entities).

³⁸ See 18 U.S.C. § 1162 (2006):

(a) Each of the States or Territories listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory: [*i.e.* Alaska, California, Minnesota, Nebraska, Oregon, Wisconsin].

³⁹ See, *e.g.*, *Bryan v. Itasca County*, 426 U.S. 373 (1976).

⁴⁰ See, *e.g.*, *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). See also Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701–21.

⁴¹ See, *e.g.*, Leech Lake Band of Ojibwe Traffic Code, § 213.

⁴² See, *e.g.*, *State v. Stone*, 572 N.W.2d 725, 731 (Minn. 1997); Leech Lake Band of Ojibwe Traffic Code, §§ 201–18.

⁴³ See, *e.g.*, Leech Lake Band of Ojibwe Taxation Code, tit. 5, chpt. 2, Tobacco Tax, §§ 5.201–209.

⁴⁴ See, *e.g.*, *Grand Traverse Band of Ottawa & Chippewa Indians v. Dir., Mich. Dep't of Natural Res.s*, 141 F.3d 635 (6th Cir. 1998); see also Leech Lake Band of Ojibwe Conservation Code.

⁴⁵ See, *e.g.*, *Shakopee Mdewakanton Sioux (Dakota) Gaming Enterprise v. Prescott*, 799 N.W.2d 320 (Minn. Ct. App. 2010); see also the Leech Lake Band of Ojibwe Judicial Code, tit. 2, Rules of Procedure (L.L.R.P.),

the recognition of *off*-reservation hunting, fishing and gathering *usufructuary* rights have not kept pace with the development of *on*-reservation tribal civil regulatory sovereignty.

More than a decade before *State of Minnesota v. Mille Lacs Band of Chippewa Indians* reached the Supreme Court, members of Anishinabe Bands in Wisconsin began a series of organized attempts to exercise rights to hunt, fish, and gather in areas of Wisconsin ceded to the United States by an 1854 Treaty⁴⁶ which specifically stated that, like the 1837 Treaty, the Anishinabe retained the use of the land for hunting, fishing, and gathering. News accounts of the period report heated debates and threats of physical violence by non-natives who did not understand the meaning of federal treaties, and tribal members who were engaging in traditional practices that the Wisconsin DNR had outlawed.⁴⁷ The result of nearly a decade of activism and litigation was Seventh Circuit decision upholding Anishinabe *usufructuary* property rights in the 1854 ceded territory in *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*⁴⁸ and related cases⁴⁹ (LCO litigation) that preceded the *Mille Lacs* litigation by more than a decade, and were cited by the district court,⁵⁰ Eighth Circuit⁵¹ and Supreme Court.⁵²

adopted November 21, 2000; L.L.R.P. Rule 60 (Full Faith and Credit and Comity); and Minnesota General Rules of Practice, District Courts, Rule 10.01.

⁴⁶ 1854 Treaty, 10 Stat. 1109 (1854).

⁴⁷ See, Larry Nesper, *The Walleye War: The Struggle for Ojibwe Spearfishing and Treaty Rights* (University of Nebraska Press, 2002)

⁴⁸ (*LCO I*), 700 F.2d 341 (7th Cir. 1983).

⁴⁹ *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin (LCO II)*, 760 F.2d 177 (7th Cir. 1985); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin (LCO III)*, 653 F. Supp. 1420 (W.D. Wis. 1987); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin (LCO IV)*, 668 F. Supp. 1233 (W.D. Wis. 1987); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin (LCO V)*, 686 F. Supp. 226 (W.D. Wis. 1988); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin. (LCO VI)*, 707 F. Supp. 1034 (W.D. Wis. 1989); *Lac Courte Oreilles Band of Lake Superior*

Drawing, at least in part, on the activism that brought the 1854 Treaty and Anishinabe *usufructuary* property rights back to life in Wisconsin, in the spring of 2010 several dozen members of the White Earth and Leech Lake Bands of Anishinabe announced a public ceremony within the territory governed by an 1855 Treaty with the United States, during which they would use traditional nets rather than state DNR-approved methods to harvest fish, the day *before* the “fishing opener.” The nets were seized, but no arrests were made.⁵³

Segments of the non-Indian public and media applauded the Minnesota DNR’s assertion of sole authority over Anishinabe off-reservation hunting, fishing, and gathering, calling for “equal rights for non-Indians.”⁵⁴ Recent “grass-roots” activism by organized tribal members asserting treaty rights,⁵⁵ similar to the organized activism of Wisconsin tribal members that brought about recognition of treaty rights in Wisconsin in the 1980’s,⁵⁶ is a sign that neither the State of Minnesota, nor the Bureau of Indian

Chippewa Indians v. Wisconsin, (LCO VII), 740 F. Supp. 1400 (W.D. Wis. 1990) ; *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin* (LCO VIII), 758 F. Supp. 1262 (W.D. Wis. 1991).

⁵⁰ 861 F.Supp. 784 (D. Minn. 1996); 952 F. Supp. 1362 (D. Minn. 1997)

⁵¹ 124 F.3d 904 (8th Cir. 1997).

⁵² 526 U.S. 172 (1999).

⁵³ Tom Roberts, *Band Members Continue Plan to Assert Tribal Rights with Protest*, MINNESOTA PUBLIC RADIO, May 4, 2010, <http://minnesota.publicradio.org/display/web/2010/05/04/ojibwe-treaty-rights>.

⁵⁴ Mpls Star-Tribune, _____.

⁵⁵ Dennis Anderson, *Chippewa to Fish Early In Treaty Clash*, STAR-TRIBUNE, April 21, 2010, <http://www.startribune.com/local/91716694.html>

⁵⁶ See, Larry Nesper, *The Walleye War: The Struggle for Ojibwe Spearfishing and Treaty Rights* (University of Nebraska Press, 2002); Dirk Johnson, *Indian Hunting Rights Ignite a Wisconsin Dispute*, N.Y. TIMES, May 16, 1987, <http://www.nytimes.com/1987/05/16/us/indian-hunting-rights-ignite-a-wisconsin-dispute.html?scp=3&sq=Indian%20Fishing%20Dispute%20Upsets%20North%20Woods%27%20Quiet&st=cse>; Dirk Johnson, *Indian Fishing Dispute Upsets North Woods’ Quiet*, N.Y. TIMES, April 24, 1988, <http://www.nytimes.com/1988/04/24/us/indian-fishing-dispute-upsets-north-woods-quiet.html?src=pm>.

Affairs, nor tribal governments who have failed to act so far, will be able to ignore the implications of the *Mille Lacs* opinion for very much longer.⁵⁷

Treaty-Guaranteed Indian Property Rights in the Northwest Territory

Britain ceded the Northwest Territory in the 1783 Treaty, which formally ended the American Colonies' war for political independence.⁵⁸ Four years later the Continental Congress declared "*good faith...toward the Indians; their...property shall never be taken from them without their consent; and in their property, rights and liberty they shall never be invaded or disturbed...*" to be national policy toward the Indians in all of the Northwest Territory,⁵⁹ before the Constitution was ratified; a federal executive or judiciary had been established; and, perhaps most significantly, a standing army capable of occupying or defending the huge new Northwest Territory, could be mustered by a centralized government.⁶⁰ The nation policy of respect for Indian property rights was established by the United States more than seventy-five years before the State of Minnesota, itself, was carved *out* of the Northwest Territory,⁶¹ and was reflected in the

⁵⁷ The Lakota have announced and "Oyata" exercise of 1805 usufructuary Treaty rights in May 2011. [www._____](#) and the Anishinabe Red Lake Band a similar such exercise, [www._____](#).

⁵⁸ The Northwest Ordinance, Art. III, 1 Stat. 50, 52 (1787).

⁶⁰ See, *Mole Lake Band, et al v. United States*, 126 Ct. Cl. 596, 1953 WL 6071 (Ct.Cl.). As late as the War of 1812, the Anishinabe were "associated" with Great Britain as the Treaty of September 8, 1815 (7 Stat. 131) declares:

Whereas the Chippewa....were associated with Great Britain in the late war between the United States and that power, and have manifested a disposition to be restored to the relations of peace and amity with the said States...

⁶¹ Minnesota Statehood Enabling Act, 11 Stat. 166-67, 34 Congress, II sess., ch. 60, February 26, 1857.

Treaty of Greenville of 1795, negotiated with the tribes in the Northwest Territory, on a few years after the Constitution and Bill of Rights had been ratified.⁶²

**Forgotten U.S. Treaty-Guaranteed Anishinabe *Usufructuary* Property Rights
In *Unceded* Territory: The Treaties of 1795, 1825, 1826, and 1854**

Detailed histories of the 1837, 1854 and 1855 Treaties are well canvassed in both the district court opinions in the *Mille Lacs*⁶³ and *LCO* litigation,⁶⁴ but the treaties that preceded the first cession of Minnesota territory in 1837, *i.e.* the Treaties of 1795, 1825 and 1826, all of which covered the territory ceded by Anishinabe in 1837 and after, have not been analyzed in light of the treaty-guaranteed *usufructuary* property analysis adopted unanimously by the Court in the *Mille Lacs* opinion. But, each of them guaranteed hunting, fishing and gathering rights to the Anishinabe on the territory of what is now Minnesota, which like the 1837 and 1854 Treaties have never been abrogated by treaty or specific congressional enactment.⁶⁵

As late as 1863, U.S treaty negotiators, in the person of early Minnesota Governor Alexander Ramsey, were still verbally promising that the Anishinabe would retain the hunting, fishing and gathering rights on 10-million acres of newly ceded

⁶² However, it was not until 1803 that *Marbury v. Madison* 5 U.S. (Cranch 1) 137 (1803) established the role of the Supreme Court in the separation of powers framework, which raises some question as to *post hac* interpretations of the treaty later in the 19th century.

⁶³ 861 F.Supp. 784 (D. Minn. 1996); 952 F. Supp. 1362 (D. Minn. 1997)

⁶⁴ *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin (LCO III)*, 653 F. Supp. 1420 (W.D. Wis. 1987); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin (LCO IV)*, 668 F. Supp. 1233 (W.D. Wis. 1987); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin (LCO V)*, 686 F. Supp. 226 (W.D. Wis. 1988); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin. (LCO VI)*, 707 F. Supp. 1034 (W.D. Wis. 1989); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin, (LCO VII)*, 740 F. Supp. 1400 (W.D. Wis. 1990) ; *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin (LCO VIII)*, 758 F. Supp. 1262 (W.D. Wis. 1991).

⁶⁵ See discussion in *Mille Lacs* decision at notes _____, *infra*.

territory for an indefinite period,⁶⁶ although they had stopped putting it in writing in the 1854 Treaty.⁶⁷ But, if post-1837 treaties are to be interpreted as understood by the Indians, whose oral tradition would be more effective in passing inter-generational memory of past treaty negotiations, these treaties should take on new significance in interpreting the silence of all later treaties on the question of *usufructuary* rights.

The 1795 Treaty of Greenville⁶⁸

The 1795 Treaty of Greenville was a peace treaty between the United States and a number of native Tribes, including the Anishinabe, which established a dividing line between Indian Territory and territory claimed by the United States within the Northwest Territory.

The treaty established peace, provided for the return of prisoners, and sent a boundary line between the lands of the United States and the lands of the Indian Tribes.⁶⁹

A peace treaty with the tribes and a promise of loyalty to the United States served the interests of the new nation, and treaty negotiator Gen. Anthony Wayne respect for Indian property noted earlier was matched with a guarantee of continued rights of a *usufructuary* nature. Article V of the 1795 Treaty applied in the territory occupied by the Anishinabe, which includes what is now Minnesota, provides:

The Indians who have a right to those lands, are quietly to enjoy them, hunting, planting and dwelling thereon so long as they please without any molestation from the United States, but when those tribes shall be disposed to sell their lands....they are only to be sold to the United States; and until such sale, the United States will protect the said Indian Tribes in

⁶⁶ See discussion at notes ____, supra.

⁶⁷ See discussion at notes ____, supra.

⁶⁸ Treaty with the Wyandotte, 7 Stat. 49 (August 9, 1795) [hereinafter Treaty of Greenville]

⁶⁹ See, *State v. Keezer*, 292 NW2d 718 (Minn. 1980)

the quiet enjoyment of their lands against all citizens of the United States, and...all white persons....the Tribes acknowledge themselves to be under the protection of the United States and no other power whatever.⁷⁰

Article VI of the Treaty agreed that *both* the United States and the Indian tribes had the right to drive off “any citizen of the United States, or any other white person” who settled in the Treaty territory and established a western boundary between land claimed by the United States and Indian territory.⁷¹

The 1825 Treaty of *Prairie du Chien*⁷²

Like the 1795 Treaty, the 1825 Treaty of *Prairie du Chien* did not cede territory to the United States, but treaty negotiators *did* prevail upon Chippewa (Anishinabe) and Sioux (Dakota)⁷³ to separate their overlapping 1795 Treaty-guaranteed rights to hunt, fish, and gather where they pleased in the Northwest Territory, subject to their own methods of Inter-Tribal regulation, into sovereign treaty-guaranteed domains -- the Anishinabe in northern Minnesota and the Dakota to the south⁷⁴ – with disputes to be resolved with the assistance of the United States, a signatory to the Treaty:

Preamble: *THE United States of America to promote peace among these tribes, and to establish boundaries among them...have invited the Chippewa [and Sioux]... assemble together....to accomplish these objects; and to aid therein, ...and after full deliberation, the said tribes...have*

⁷⁰ Art. V, Treaty of Greenville

⁷¹ Art. VI, Treaty of Greenville

⁷² 7 Stat. 272 (August 19, 1825)

⁷³ The “Dakota,” a Great Plains culture, inhabited the eastern range of the Lakota language group, which also included the Nakota languages. Anishinabe called them Nadowessioux (little-snakes, or little-enemies). The French shortened the name given them by their enemies to “Sioux.” The article will refer to the Lakota groups inhabiting Minnesota as the Dakota.

⁷⁴ Treaty with the Sioux and Chippewa, Sacs and Fox, Menominee, Ioway, Sioux, Winnebago, and a portion of the Ottawa, Chippewa, and Potawattomie, Tribes, 7 Stat. 272 (1825) a.k.a. 1825 Treaty of *Prairie du Chien* [hereinafter 1825 Treaty].

agreed *with the United States*, and with one another, upon the following articles.⁷⁵

There can be no serious dispute that the United States initiated the 1825 Treaty negotiations,⁷⁶ acted as facilitator,⁷⁷ committed the treaty terms to writing,⁷⁸ and signed the Treaty as a party.⁷⁹ And, although the United States did not seek land-cessions for itself from the Anishinabe...yet, the Treaty did serve the interests of the United States, on a frontier that, only a decade after the War of 1812, was difficult to defend:

Article 10:

All the tribes aforesaid acknowledge the general controlling power of the United States, and disclaim all dependence upon, and connection with, any other power. And the United States agree to, and recognize, the preceding boundaries, subject to the limitations and restrictions before provided....⁸⁰

The terms of the 1825 Treaty gives additional substance to Anishinabe oral tradition that the United States had promised them both sovereignty and the right to the wild game in northern Minnesota. Moreover, along with the 1795 Treaty, it provides concrete evidence as to the Anishinabe understanding of *later* treaties that were less concrete regarding the continuing right to hunt, fish and gather in all of northern Minnesota. That all parties, including the United States recognized that the Anishinabe had the right to the wild game on the territory encompassed by the 1825 Treaty is plain:

⁷⁵ *Id.*

⁷⁶ Treaty of *Prairie du Chien* 7 Stat. 272 (1825) .

⁷⁷ *Id.*

⁷⁸ *Id.* There no record of the 1825 Treaty terms reserving *usufructuary* rights having been abrogated by treaty or statute with respect to the Anishinabe, although this is not the case with respect to the Dakota following the 1862 conflict, following which Dakota (Sioux) treaties were abrogated by Congress.

⁷⁹ *Id.* at 275.

⁸⁰ *Id.* at 274-75.

Article 13.

It is understood by all the tribes, parties hereto, that no tribe shall hunt within the acknowledged limits of any other without their assent...the Chiefs of all the tribes... allow a reciprocal right of hunting on the lands of one another, permission being first asked and obtained.....⁸¹

Moreover, the 1825 Treaty demonstrates that the United States intended to be bound by the terms of the treaty, as well.

Article 15.

This treaty shall be obligatory on the tribes, parties hereto, from and after the date hereof, and on the United States, from and after its ratification by the government thereof....

Seen in this light, it is difficult to dispute that the 1795 Treaty and 1825 Treaty converted *inchoate* aboriginal claims into treaty-recognized rights of a *usufructuary* nature, which would appear to require an analysis based on the *same* canons of Indian treaty construction described by the Supreme Court in the *Milles Lacs* decision.

The 1826 Treaty of *Fond du Lac* of Lake Superior⁸²

By its own terms the 1825 Treaty provided that a second Treaty council with the Anishinabe on Lake Superior be organized by the United States the following year, to explain the terms of the 1825 Treaty to the widely scattered Anishinabe who could not be present at the 1825 Treaty negotiations in *Prairie du Chien* on the Mississippi.⁸³ As

⁸¹ *Id.*

⁸² 1826 Treaty of *Fond du Lac* Treaty with the Chippewa, 7 Stat. 290 (August 5, 1826)

⁸³ 1825 Treaty of *Prairie du Chien* with the Chippewa, 7 Stat. 272, 275 (1825).

Article 12:

The Chippewa tribe being dispersed over a great extent of country, and the Chiefs of that tribe having requested, that such portion of them as may be thought proper, by the Government of the United States, may be assembled in 1826, upon some part of Lake Superior, that the objects and advantages of this treaty may be fully explained to them, so that the stipulations thereof may be observed by the warriors. The Commissioners of the United States assent thereto, and it is therefore agreed that a council shall accordingly be held for these purposes.

promised, a secondary treaty was entered in to on August 5, 1826⁸⁴ that refers to the 1825 Treaty in its opening clause:

WHEREAS a Treaty was concluded at Prairie du Chien in August last, by which the war, which has been so long carried on, to their mutual distress, between the Chippewas and Sioux, was happily terminated by the intervention of the United States; and whereas, owing to the remote and dispersed situation of the Chippewas..... the United States agreed to assemble the Chippewa Tribe upon Lake Superior during the present year, in order to give full effect to the said Treaty, to explain its stipulations and to call upon the whole Chippewa tribe, assembled at their general council fire, to give their formal assent thereto, that the peace which has been concluded may be rendered permanent....⁸⁵

The 1826 treaty provides ample evidence why the United States treaty negotiators, as well as the Anishinabe, understood that their continuing ability to live off the land was essential to their survival. Article 3 acknowledges Anishinabe title in the land, and jurisdiction over its use:

The Chippewa tribe grant to the government of the United States the right to search for, and carry away, any metals or minerals from any part of their country. But this grant is not to affect the title of the land, nor the existing jurisdiction over it.⁸⁶

Further, Article 5 describes, almost painfully, the diminished condition and bleak agricultural prospects observed by the treaty negotiators:

In consideration of the poverty of the Chippewas, and of the sterile nature of the country they inhabit, unfit for cultivation, and almost destitute of game, and as a proof of regard on the part of the United States, it is agreed that an annuity of two thousand dollars, in money or

⁸⁴ Treaty of *Fond du Lac*, 7 Stat. 1826

⁸⁵ *Id.*

⁸⁶ Note: With respect to future interests the Anishinabe might claim in resource extraction, nothing in the treaty suggests that the metals may be carried away without payment for the metals or minerals, or recuperation of the environment to protect the ability of the Anishinabe to hunt, fish and gather afterward.

goods, as the President may direct, shall be paid to the tribe...during the pleasure of the Congress of the United States.⁸⁷

Finally, Article 7 displays a spark of humanity in the treaty negotiators who were so moved by the conditions they observed that they went beyond their mandate to alleviate the poverty they observed:

The necessity for the stipulations in the fourth, fifth and sixth articles of this treaty could be fully apparent, only from personal observation of the condition, prospects, and wishes of the Chippewas, and the Commissioners were therefore not specifically instructed upon the subjects therein referred to; but seeing the extreme poverty of these wretched people, finding them almost naked and starving, and ascertaining that many perished during the last winter, from hunger and cold, they were induced to insert these articles. But it is expressly understood and agreed, that the fourth, fifth and sixth articles, or either of them, may be rejected by the President and Senate, without affecting the validity of the other articles of the treaty.⁸⁸

For the Anishinabe, the continuing right to hunt, fish, and gather on all of the 1825 Treaty territory was a question of survival, according to the 1826 U.S. treaty negotiators, themselves.⁸⁹ Another relatively contemporary indication of the importance with which Congress treated treaty rights to wild game, such as those guaranteed in the 1825 Treaty can be seen in an 1834 statute in which Congress imposed a \$500 fine for non-native hunting and fishing “within the limits of any tribe with whom the United States has existing treaties,”⁹⁰ an enormous sum for the time. Thus, as of 1837, the Anishinabe had treaty-guaranteed rights to control hunting, fishing and gathering in all of northern Minnesota, whether by members of other Indian Tribes, or by non-Indians.

⁸⁷ Treaty of *Fond du Lac*, 7 Stat. 1826

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ Act of June 30, 1834, Pub. L. No. 23-161, § 12, 4 Stat. 729, 730 (codified as amended at 25 U.S.C. § 177 (2006)).

The *First* Minnesota Land Cession Treaty in 1837: The National Context

During the 1830's, United States relationships with Indian nations were contradictory as reflected in Supreme Court decisions and shifting national policies. Even though the Supreme Court held that U.S. treaties with Indian tribes did not give them the status of an "independent nation" for purposes of original Supreme Court jurisdiction in *Cherokee Nation v. Georgia*,⁹¹ the Court *did* confirm that the federal courts were open to Indian treaty claims against states.⁹² The Court also held in *Worcester v. Georgia*⁹³ that Indian treaty entities such as the Cherokee nation *did* constitute a "distinct community" with self-government "in which the laws of Georgia can have no force,"⁹⁴ thus establishing that only the United States government, and not individual states, had authority in Indian affairs, an important concept in the *Mille Lacs* case, and in the exercise of *usufructuary* property rights more generally.

Thus, explicit Congressional direction that Indian removal be "voluntary" in the Indian Removal Act of 1830, required President Andrew Jackson, and his successor Martin Van Buren, to justify the use of military force to clear the Choctaw and Cherokee nations from prime southern plantation land in a decade-long "Trail of Tears" to Oklahoma by claiming authority under dubious, if not fraudulent, post-1830 "removal" treaties.⁹⁵ The Indian Removal Act would prove important in the majority opinion in *Mille Lacs* regarding the legality of President Zachary Taylor's 1850 Executive Order. Further, the 1834 the Indian Trade and Intercourse Act identified much of the territory

⁹¹ *The Cherokee Nation v. the State of Georgia*, 30 U.S. 1, 5 Pet. 1, 8 L.Ed. 25 (1831).

⁹² *Samuel Worcester v. the State of Georgia*, 31 U.S. 515, 6 Pet. 515, 8 L.Ed. 483 (1832)

⁹³ *Worcester v. Georgia*, 31 U.S. 515, 520, 6 Pet. 515, 520 (1832).

⁹⁴ *Id.*

⁹⁵

west of the Mississippi, including Minnesota, as “Indian Country,” requiring passports for entry by non-Indians subject to a fine of one thousand dollars, in addition to prohibiting hunting and trapping, and even marking of trees.⁹⁶

With respect to Supreme Court decisions supportive of sovereignty and the primacy of federally guaranteed treaty rights over state law, Jackson is reported to have responded, "John Marshall has made his decision; now let him enforce it!"⁹⁷ Although the accuracy of this quote is disputed, there is no dispute that it reflected Jackson's own sentiments, or that he engineered an apparently fraudulent removal treaty with a rump group of Cherokee, which Van Buren used to justify military expulsion of the Cherokee from deep south agricultural lands just as the plantation slave-economy was beginning to boom in the Mississippi delta.⁹⁸ The Cherokee removal treaty of 1836 was widely criticized as a manipulation when it was put before the Senate, and was ratified by the margin of a single vote.⁹⁹

These were the circumstances in the rest of Minnesota when the first land session treaty with the United States was negotiated in 1837, and under which the right to entry was statutorily prohibited to non-Indians without a passport, the right to hunt, fish and gather was specifically retained by the Indians in the territory ceded to the United States in 1837 Treaty. The validity of those *usufructuary* rights, after cession of

⁹⁶ Act of June 30, 1834, Pub. L. No. 23-161, § 12, 4 Stat. 729, 730 (codified as amended at 25 U.S.C. § 177 (2006)).

⁹⁷ Jackson actually wrote in a letter to John Coffee, "...the decision of the Supreme Court has fell still born, and they find that they cannot coerce Georgia to yield to its mandate," meaning the Court's opinion was moot because, not being a legislative body, it had no power to enforce its edict. Paul F. Boller, *They Never Said It: A Book of False Quotes, Misquotes, & False Attributions*, 53, (New York, 1989).

⁹⁸ Treaty with the Cherokee, 7 Stat. 478 (1835) a.k.a. Treaty of New Echota.

⁹⁹ *Minnesota v. Mille Lacs*, 526 U.S. at 175, 119 S.Ct. at 1191, 143 L.Ed.2d 270 (1999).

the 1837 Treaty territory to the United States was at issue before the Supreme Court in the *Mille Lacs* case.

II. “RE-DISCOVERY” OF TREATY-GUARANTEED *USUFRUCTUARY* PROPERTY RIGHTS: *STATE OF MINNESOTA V. MILLE LACS BAND OF CHIPPEWA INDIANS*

...the United States guaranteed to the Indians certain hunting, fishing and gathering rights on the ceded land.....*we conclude that the Chippewa retain the usufructuary rights guaranteed to them under the 1837 Treaty.*

Justice Sandra Day O’Connor¹⁰⁰

1. A Unanimous Court: “U.S. Treaties Guarantee Indian *Usufructuary* Property Rights”

Within this historical context, the first land cession treaty with the Anishinabe was negotiated at Fort Snelling, near where the Minneapolis St. Paul airport is today, with representatives of nearly all of the widespread Anishinabe bands in attendance.¹⁰¹ To secure Anishinabe “consent” United States treaty negotiators took the approach of severing formal title to land¹⁰² from the continued use of the land for traditional means of survival,¹⁰³ thus guaranteeing *usufructuary* rights to the use of the land, separate from title to the land, which was transferred to the United States:

The privilege of hunting, fishing and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded, is guaranteed [sic] to the Indians, during the pleasure of the President of the United States.¹⁰⁴

The majority and dissent in the *Mille Lacs* case agreed that this clause of the 1837 Treaty guaranteed *usufructuary* property rights, retained by the Anishinabe , that did not pass

¹⁰⁰ *Minnesota v. Mille Lacs*, 526 U.S. 175, 119 S. Ct. at 1191, 143 L. Ed2d 270 (1999)

¹⁰¹ Location considered Wisconsin territory at the time.

¹⁰² Treaty with the Chippewa, 7 Stat. 536, 537 (1837) [hereinafter 1837 Treaty]; *Minnesota v. Mille Lacs*, 526 U.S. at 176, 119 S.Ct. at 1191.

¹⁰³ Note 6, *supra*. The concept of *usufructuary* rights, or “use rights” retained after formal transfer of title, discussed in *Minnesota v. Mille Lacs*, 526 U.S. 172, 175-76, 119 S. Ct. ____ (1999)

¹⁰⁴ 1837 Treaty, 7 Stat. 536, 537 (1837).

with title to the United States.¹⁰⁵ The Anishinabe hunting, fishing and gathering rights in the rest of what is now Minnesota were not diminished on *unceded* territory, *outside* the 1837 Treaty boundary, although the 1795 and 1825 or 1826 Treaty-guaranteed hunting, fishing and gathering rights¹⁰⁶ were not specifically mentioned in the 1837 Treaty, or in the *Mille Lacs* opinion, itself.

All parties conceded that the 1837 Treaty specifically reserved the treaty-guaranteed *usufructuary* rights in the ceded territory “during the pleasure of the President of the United States,”¹⁰⁷ but Minnesota argued that: President Zachary Taylor issued an 1850 Executive Order that revoked *usufructuary* rights *and* ordered the removal of the Anishinabe to unceded Minnesota territory¹⁰⁸ (where, ironically, the 1795, 1825 and 1826 Treaties still guaranteed the hunting, fishing and gathering rights of the Anishinabe)¹⁰⁹; Second, the broad language of the 1855 Treaty appeared to abrogate *all* Anishinabe property claims of any kind, *anywhere* in Minnesota territory.¹¹⁰ Third, Minnesota’s 1858 entry into the Union abrogated pre-existing treaties that were inconsistent with state sovereignty over wildlife regulation, although the Supreme Court previous cases in which similar arguments had been made.¹¹¹

¹⁰⁵ *Minnesota v. Mille Lacs*, 526 U.S. 172, 200, 119 S.Ct. 1187, 1202 (1999); Dissent, 526 U.S. 172, 208, 119 S.Ct. 1187 1206 (1999).

¹⁰⁶ Treaty of Greenville, Art. III, 7 Stat. 49, 49-50 (1795); Treaty of Prairie du Chien, Article 5, 7 Stat. 272, 273 (1825); 1826 Treaty, 7 Stat. 290, 290 (1826).

¹⁰⁷ 1837 Treaty, 7 Stat. 536 at 537 (1837).

¹⁰⁸ See discussion at notes _____ *infra*.

¹⁰⁹ See discussion at notes _____, *supra*.

¹¹⁰ See discussion at notes _____, *infra*.

¹¹¹ See discussion at notes _____, *infra*.

President Taylor's 1850 Executive Order

The 5-4 majority held that President Zachary Taylor's Executive Order was ineffective in abrogating the *usufructuary* rights guaranteed in the 1837 Treaty for several reasons relating to an intricate analysis of treaty language and historical context.¹¹² First, the Court noted that the 1837 Treaty provided that the *usufructuary* rights were guaranteed, "during the pleasure of the President of the United States,"¹¹³ but did not mention removal of the Anishinabe from the 1837 territory. According to the majority, this meant that the agreement in the 1837 Treaty was unlike other treaties which *did* provide that the Anishinabe were, "subject to removal therefrom at the pleasure of the President of the United States,"¹¹⁴ and in the absence of a specific agreement to be removed in the 1837 Treaty, the 1830 Removal Act did not authorize removal in the 1850 Executive Order.

According to the Court, the historical record reveals that the initiative for the 1850 Executive Order was a request for removal from the Minnesota Territorial Legislature in a request to Congress, rather than the President.¹¹⁵ The majority considered this undisputed fact to be recognition by the Territorial Legislature that the 1837 Treaty, itself, did not confer removal power on the President, and that removal

¹¹² For critiques of *Mille Lacs* decision, see generally: Note, Natural Resources Law: Resource Conservation: *Minnesota v. Mille Lacs Band of Chippewa Indians*, 27 *Ecology L.Q.* 771(2000); Note, *Minnesota v. Mille Lacs Band of Chippewa Indians: The Court Goes On Its Own Hunting and Fishing Expedition*, 4 *Great Plains Nat. Resources J.* 312 (2000); *Minnesota v. Mille Lacs Band of Chippewa Indians: Should the Courts Interpret Treaty Law to Empower Native American Tribes to Hatchet the Environment*, 11 *Vill. Envtl. L.J.* 461 (2000).

¹¹³ 1837 Treaty, 7 Stat. 536, 537 (1837).

¹¹⁴ 1842 Treaty, Art. 6, 7 Stat. 591, 592 (1842) provided for removal from territory located in Wisconsin westward to 1826 Treaty-guaranteed territory in Minnesota, unceded by 1837 Treaty .

¹¹⁵ *Minnesota v. Mille Lacs*, 526 U.S. at 178, 119 S.Ct. at 1192 (1999).

would require Congressional action.¹¹⁶ However, Congressional action was not forthcoming and on February 6, 1850 President Taylor issued the Executive Order framed in the following fashion:

The privileges granted temporarily to the Chippewa Indians of the Mississippi, by the Fifth Article of the Treaty made with them on the 29th of July 1837, 'of hunting, fishing and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded' by that treaty to the United States; and the right granted to the Chippewa of the Mississippi and Lake Superior, by the Second Article of the treaty with them of October 4th, 1842, of hunting on the territory which they ceded by that treaty, 'with the other usual privileges of occupancy until required to remove by the President of the United States' are hereby revoked; and all of the said Indians remaining on the lands ceded as aforesaid, are required to remove to their unceded lands."¹¹⁷

According to the majority, although the larger part of the Order ostensibly addressed the exercise of *usufructuary* rights, the historical record established not only that the Minnesota Territorial Legislature requested removal of the Anishinabe, not revocation of *usufructuary* rights, but Government officials also considered the Executive Order primarily as a removal order¹¹⁸ with the revocation of the *usufructuary* rights on ceded territory a necessary incentive to encourage removal to unceded territory 1825 Treaty territory,¹¹⁹ where survival of the Anishinabe, through the exercise of *usufructuary* rights could continue as before. The 1842¹²⁰ Treaty relating to territory

¹¹⁶ *Minnesota v. Mille Lacs*, 526 U.S. at 190 (1999).

¹¹⁷ Executive Order of February 6, 1850, cited in *Minnesota v. Mille Lacs*, 526 U.S. 172, 179, 119 S.Ct. 1187, 1192 (1999).

¹¹⁸ *Minnesota v. Mille Lacs*, 526 U.S. 172, 179, 119 S.Ct. 1187, 1192 (1999).

¹¹⁹ See discussion at notes _____, *supra*.

¹²⁰ Articles of a treaty made and concluded at La Pointe of Lake Superior, in the Territory of Wisconsin, , 7 Stat. 591, 592 (1842) [hereinafter 1842 Treaty].

in Wisconsin, referenced in the Order, reinforced this interpretation since it directly links exercise of *usufructuary* rights with Presidential removal.¹²¹

But opposition to the attempt at removal was so intense from both non-Indians, who depended on trade with the Anishinabe, as well as the Anishinabe, the policy of presidential removal was officially abandoned in 1851.¹²² And, the *Mille Lacs* majority also found several examples of official Territorial and federal correspondence indicating that recognition of Anishinabe *usufructuary* rights in the 1837 ceded territory continuing long after the Executive Order was issued¹²³. The majority held revocation of Treaty *usufructuary* rights was not severable from the removal and could not be enforced independently.¹²⁴

The dissent by Chief Justice Rehnquist argued that the Executive Order was not primarily a “removal order” but a “revocation of *usufructuary* rights” and, as such, Congressional authorization was not necessary.¹²⁵ The last part of the Order that *does* require removal is severable from the “revocation order” and should be enforced independently.¹²⁶ This is the most forceful argument mounted by the dissent which Justice Rehnquist concludes resolves the matter and the remaining arguments bolster the main argument based on the analysis of Executive Order.

¹²¹ *Minnesota v. Mille Lacs*, 526 U.S. 172, 181, S.Ct. 1187, 1193 (1999).

¹²² *Id.* at 1182-83.

¹²³ *Id.* at 1193-95.

¹²⁴ *Id.* at 213.

¹²⁵ *Id.* at 215

¹²⁶ *Id.*

The 1850 Presidential Ratification of 1825 Treaty-Guaranteed *Usufructuary* Rights

From the standpoint of the Anishinabe, the 1825 Treaty and the 1826 Treaty guaranteed both rights to hunt, fish and gather, but both the 1837 Treaty and the 1850 Executive Order would have confirmed that, outside of the small area ceded in 1837 at a minimum, the guarantees made by the United States in the 1825 Treaty had been made even more secure by the 1850 Executive Order.

First, in negotiating to cede a portion of the 1825 Treaty sovereign territory in 1837, the United States specifically guaranteed that although the United States would take “title,” which had little practical meaning for the Anishinabe, the ability to use the land both within the 1837 ceded territory and in the rest of the 1825 Treaty territory had been guaranteed. Second, even when the “removal” efforts began in 1850, and ended between 1850-51, the Executive Order by its own terms attempted to “remove” the Anishinabe” to the sovereign 1825 Treaty territory, which had not been ceded in 1837. Thus, further confirming that Anishinabe sovereignty and the rights to hunt, fish and gather in the remainder of the 1825 Treaty territory, not ceded in 1837, had been confirmed as Anishinabe “homeland.”

The majority and dissent in the *Mille Lacs* decision were *unanimous* in recognizing that Anishinabe *usufructuary outside* the 1837 Treaty territory, which necessarily would be the 1825 Treaty territory, were undiminished by the 1850 Executive Order recognized *usufructuary* rights in the 1825 Treaty territory as being necessary for the survival of the Anishinabe who were the subject of the proposed expulsion. Whether the Executive Order is characterized as a “removal order” or a

“revocation order severable from removal” is immaterial with respect to the rest of the 1825 Treaty territory, where the Anishinabe *continued* to exercise their *usufructuary* rights in the 1825 Treaty area outside the 1837 Treaty territory, and which the 1850 Executive Order acknowledges as the Anishinabe’s only alternative for survival.¹²⁷

The 1855 Treaty: *Silent Abrogation of Usufructuary Property Guarantees in Treaties of 1795, 1825, 1826, 1837, 1847*¹²⁸ and 1854?

The *Mille Lacs* majority also examined the impact of the 1855 Treaty¹²⁹ on the treaty-guaranteed *usufructuary* rights in the 1837 Treaty territory. The 1855 Treaty, which was negotiated only with the *Milles Lacs* Band and no other Anishinabe parties to the 1825, 1826, 1837 or 1854 Treaties, set aside land for reservations within the 1837 and 1855 territory¹³⁰ but was completely silent with respect to *usufructuary* rights guaranteed in the 1825 Treaty, the 1837 Treaty, or the recently concluded 1854 Treaty:

The...Chippewa Indians to hereby cede, sell and convey to the United States all their right, title and interest in, and to, the lands now owned and claimed by them, in the Territory of Minnesota, and included within the following boundaries, *viz*: [describing territorial boundaries]. And the said Indians do further and fully and entirely relinquish and convey to the United States, any and all right, title, and interest, of whatsoever nature the same may be, which they may now have in and to any other lands in the Territory of Minnesota.”¹³¹

¹²⁷ *Minnesota v. Mille Lacs*, 526 U.S. 172, 192, 119 S.Ct. 1187, 1199 (1999). See discussion at notes _____, *supra*.

¹²⁸ The United States also entered into two Treaties in 1847, one with the Mississippi and Lake Superior Bands of Anishinabe, 9 Stat. 904 (August 2, 1847), “cede and sell the land,” the other with the Pillager Band at Leech Lake, 9 Stat. 908 (August 21, 1847) “shall be held by the United States as Indian land, until otherwise ordered by the President.” The ceded territory was ostensibly for Winnebago and Menominee reservations that were never established. Neither treaty mentioned abrogation of *usufructuary* rights, or removal of the Anishinabe. For a discussion of the circumstances underlying the 1847 Treaty with the Pillager Band, see *Pillager Band of Chippewa Indians v. United States*, 428 F.2d 1274 (U.S.Ct. Cl. 1970).

¹²⁹ *Minnesota v. Mille Lacs*, 526 U.S. 172, 198, 119 S.Ct. 1187, 1201 (1999)

¹³⁰ *Minnesota v. Mille Lacs*, 526 U.S. 172, 195, 119 S.Ct. 1187, 1200 (1999)

¹³¹ 1855 Treaty, 10 Stat. 1165, 1166 (1855).

The majority interpreted the treaty language “liberally in favor of the Indians” as required by the precedent of the Court, but found that there was no discussion of hunting and fishing or other *usufructuary* rights in either 1855 Treaty or the Treaty Journal.¹³² [Appendix II.] According to the majority, the absence of *any* discussion of the *usufructuary* rights then being exercised by the Anishinabe in 1837 ceded territory, the 1854 ceded territory, or the unceded territory to which the 1850 Executive Order attempted to remove the Anishinabe (i.e the 1825 Treaty territory) was a telling omission “since treaty drafters had the sophistication and experience to use express language when abrogating [*usufructuary*] treaty rights.”¹³³

The majority noted that the same U.S. treaty drafters had used explicit language when revoking Chippewa fishing rights on the St. Mary’s River in Michigan at about the same time¹³⁴ and the majority assumed the treaty drafters would have done the same in the 1855 Treaty, were that the intention of the parties to the treaty. Perhaps more importantly, for purposes of the argument made by this article, the majority notes that the debates in the Senate specifically took note of the pre-existing treaty rights that the Chairman of the Senate Committee on Indian Affairs understood to be the foundation of treaty-guaranteed *usufructuary* rights upon which the 1855 Treaty was grounded. According to the majority,

. . . . The Act [of December 19, 1854] is silent with respect to authorizing agreements to terminate Indian *usufructuary* rights, and the silence was not likely accidental. During Senate debate on the Act, Senator Sebastian, the Chairman of the Committee on Indian Affairs, stated that the treaties

¹³² *Minnesota v. Mille Lacs*, 526 U.S. 172, 198, S.Ct. 1187, 1201 (1999).

¹³³ *Id.* at 1200.

¹³⁴ *Id.*

to be negotiated under the Act would ‘reserve[e] to them [i.e. the Chippewa] those rights which were secured by former treaties.’ [W]e cannot agree with the State that the 1855 Treaty abrogated Chippewa *usufructuary* rights¹³⁵

The dissent considered a complete analysis of the 1855 Treaty unnecessary for its purposes, in light of its view that the 1850 Executive Order was controlling, but offered *dicta* rebutting the majority with respect to the 1855 Treaty purporting to cede “all” of the territory of Minnesota. The Chief Justice argued that the language on the face of the treaty alone decided the question, and “all” means “all,” irrespective of: historical context of prior treaties; the understanding of the Chairman of the Senate Committee of Indian Affairs; or, the understanding attributed to the treaty by the Indians.¹³⁶

Writing for the dissent, the Chief Justice suggested that broad language in the 1855 Treaty should be read as an abrogation of the *usufructuary* property rights specified in the 1837 Treaty, without the necessity of finding specific treaty language or congressional intent to abrogate Indian property rights created in the previous treaties,¹³⁷ which would seem to be in contravention of the precedent of the Court.¹³⁸

¹³⁵ 526 U.S. at 179 (1999) (citing Treaty with the Chippewa of Sault Ste. Marie, Art 1, 11 Stat. 631 (“The said Chippewa Indians surrender to the United States the right of fishing at the falls of St. Mary’s...secured to them by the treaty of June 16, 1920”)); *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970); Cong. Globe, 33d Cong. 1st Sess., 1404 (1854).

¹³⁶ Although not cited by the dissent, this is the same position adopted by the Eighth Circuit in an earlier claim by the Red Lake Band that *usufructuary* rights in the 1863 Treaty territory were not abrogated by congressional enactments in 1889 and 1904, which contained language similar to the 1855 Treaty in which the State of Minnesota prevailed. See *United States v. State of Minnesota*, 466 F.Supp. 1382 (1979). The district court looked only to the 1863 Treaty with the Red Lake Band, and to the congressional enactments in question which did not refer to retention of *usufructuary* rights, and concluded that the intent of congress was to abrogate those rights along with the cession of title. However, the district court and Eighth Circuit mistakenly considered the rights in question to be inchoate aboriginal rights, unspecified in any previous treaty. Both the 1854 Treaty and the 1825 Treaty give lie to this apparently un rebutted assumption by the court.

¹³⁷ 420 US 425 (1975). ??????

¹³⁸ *Menominee Tribe v. United States*¹³⁸, 391 U.S. 404, 88 S. Ct. 1705 (1968)

But, it also seems contrary to the historical record of subsequent conduct of the United States, itself. If the 1855 Treaty did have the meaning ascribed to it by the Chief Justice, , it seems highly unlikely the United States would have found it necessary to seek subsequent land-cession treaties with the Anishinabe *after* 1855. However, the United States sought land-cessions on at least seven (7) separate occasions,¹³⁹ which would have been completely unnecessary if the 1855 Treaty had the meaning suggested by the Chief Justice in his *Mille Lacs* dissent. [Appendix II.]

The dissent also failed to note prior Supreme Court precedent in the nineteenth and early twentieth centuries that had specifically analyzed the scope of the 1855 Treaty and had come to much different conclusions,¹⁴⁰ as had the Minnesota Supreme Court.¹⁴¹ Finally, the failure of the dissent to offer an alternative to well-settled canons of Indian treaty interpretation, which require treaties to be read contextually, as

¹³⁹ *Treaty of 1863 (with Mississippi, Pillager, Winnibigoshish Bands)* (12 Stat. 1249) –Ceding reservations set up in the 1855 Treaty, and no mention of abrogation of *usufructuary* rights in the 1855 Treaty territory, or elsewhere in the 1825 Treaty territory.

Treaty of 1863 (Red Lake, Pembina Bands at Old Crossing) (13 Stat. 667) – Ceding territory on western Minnesota border along the Red River to the Canadian border and into Dakota Territory. No mention of abrogation of *usufructuary* rights.

1864 Modification of 1863 Treaty (with Mississippi, Pillager, Winnibigoshish Bands) – No discussion of abrogation of *usufructuary* rights.

1864 Modification of 1863 Treaty (with Red Lake and Pembina Bands), Red Lake Band refuses to remove, cede or trade lands. (13 Stat. 689). – No mention of abrogation of *usufructuary* rights.

Treaty of 1866 (with Mississippi Band) – Ceding territory at Canadian Border west of 1854 Treaty Border and into Dakota Territory. No mention of abrogation of *usufructuary* rights.

Nelson Act of 1889 – Ceding territory between west 1855 Treaty boundary and 1863 Treaty Boundary. No mention of abrogation of *usufructuary* rights.

Statute of 1904, 31 Stat. 1077 -- No mention of abrogation of *usufructuary* rights.

¹⁴⁰ *Johnson v. Gearlds*, 234 U.S. 422, 34 S.Ct. 794, 58 L.Ed. 1383 (1914).

¹⁴¹ In *State v. Jackson*, 218 Minn. 429, 16 N.W.2d 752 (1944), the Minnesota Supreme Court relied on the 1834 Trade and Intercourse with the Indians, as well as Article VII of the 1855 Treaty to find that as of 1944, Anishinabe *usufructuary* rights remained in effect in “Indian Country” which included reservations, trust territory and, “lands wherever situated, which have been set apart for use and occupancy by Indians, even though not acquired from them,” citing *United States v. McGowan*, 302 U.S. 535, 58 S.Ct. 286, 82 L.Ed. 410.

understood by the Indians. Finally, the truncated historical discussion of the 1855 Treaty, occasioned by the dissent's view that the 1850 Executive Order made further discussion unnecessary, failed to provide the basis for a meaningful construction of the 1855 Treaty, other than that provided by the majority¹⁴² and the thorough historical review in the district court opinion.¹⁴³

1858 Statehood and Treaty-Guaranteed *Usufructuary* Property

Minnesota's entry into the Union did not have any impact on rights established in treaties entered into by the United States, according to the majority.¹⁴⁴ Since Congress must clearly express an intent to abrogate Indian treaty rights under *United States v. Dion*,¹⁴⁵ such an intent must have been present in Minnesota's 1858 enabling act, which is silent on the matter of treaties between the United States and the Anishinabe.¹⁴⁶ There is also no indication that Senate ratification of the 1837 Treaty contemplated that the 1837 Treaty, or other treaties, would terminate at statehood.¹⁴⁷ In response to the argument by the dissent,¹⁴⁸ the majority addressed nineteenth century "equal footing" doctrine, which questioned the relationship between federal treaty power to bind states entering the Union and state sovereignty over wildlife regulatory matters in *Ward v. Racehorse*.¹⁴⁹ The majority relied on more recent

¹⁴² *Minnesota v. Mille Lacs*, 526 U.S. 172, 195-200, 119 S. Ct. 1187, 1200-1202 (1999).

¹⁴³ *Mille Lacs Band of Chippewa Indians v. State of Minnesota*, 861 F.Supp. 784 (D. Minn. 1996); *Mille Lacs Band of Chippewa Indians v. State of Minnesota*, 952 F. Supp. 1362 (D. Minn. 1997).

¹⁴⁴ *Minnesota v. Mille Lacs*, 526 U.S. 172, 202-203, 119 S. Ct. 1187, 1204 (1999).

¹⁴⁵ *United States v. Dion*, 476 U.S. 734, 106 S.Ct. 2216, 90 L.Ed.2d 767 (1986).

¹⁴⁶ *Minnesota v. Mille Lacs*, 526 U.S. 172, 203, (1999).

¹⁴⁷ *Minnesota v. Mille Lacs*, 526 U.S. 172, 207 (1999).

¹⁴⁸ *Minnesota v. Mille Lacs*, 526 U.S. 172, 219-220, 119 S. Ct. 1187, 1211, 1212 (1999).

¹⁴⁹ *Ward v. Race Horse*, 163 U.S. 504, 16 S.Ct. 1076, 41 L.Ed. 244 (1896) cited in *Minnesota v. Mille Lacs*, 526 U.S. 172, 203 (1999).

precedent to conclude that continuing recognition of Indian treaty rights by the federal government is not inconsistent with state resource management prerogatives.¹⁵⁰

However, despite this long-standing precedent, the *Mille Lacs* dissent took issue with the majority's treatment of *Ward v. Racehorse*, which was consistent with the above, by differentiating between rights which were "temporary and precarious" as opposed to those rights which were "of such a nature as to imply perpetuity." The Chief Justice argued that treaty rights held "at the pleasure of the President" and "usufructuary" are, by their very nature, "temporary and precarious" and were extinguished by Minnesota statehood. Justice Thomas dissented separately regarding the extent of Minnesota's regulatory authority in light of treaty provisions. However, in light of numerous examples of joint management protocols in Minnesota and other states¹⁵¹ which accommodate state and treaty-rights interests, whether the "equal footing" doctrine retains sufficient vigor to set aside congressionally approved treaty provisions in the absence of congressional intent to do so seems a doubtful proposition at best.¹⁵²

Minnesota Statehood Act in *Prior* Supreme Court Treaty Litigation

Following Minnesota statehood, the United States undertook the following treaties and congressional enactments with relation to the Anishinabe [*Appendix II.*]:

¹⁵⁰ *Minnesota v. Mille Lacs*, 526 U.S. 172, 204, (1999).

¹⁵¹ See LCO litigation discussed at notes _____, *infra*.

¹⁵² *Menominee Tribe v. United States*¹⁵², 391 U.S. 404, 88 S. Ct. 1705 (1968); *United States v. Dion*, 476 U.S. 734, 106 S.Ct. 2216, 90 L.Ed.2d 767 (1986).

*Treaty of 1863 (with Mississippi, Pillager, Winnibigoshish Bands*¹⁵³ – Ceding reservations set up in the 1855 Treaty, and no mention of abrogation of *usufructuary* rights in the 1855 Treaty territory, or elsewhere in the 1825 Treaty territory.)

Treaty of 1863 (Red Lake, Pembina Bands at Old Crossing – Ceding territory on western Minnesota border along the Red River to the Canadian border and into Dakota Territory. No mention of abrogation of *usufructuary* rights.)¹⁵⁴

*1864 Modification of 1863 Treaty (with Red Lake and Pembina Bands, Red Lake Band refuses to remove, cede or trade lands.*¹⁵⁵ – No mention of abrogation of *usufructuary* rights.)¹⁵⁶

1864 Modification of 1863 Treaty (with Mississippi, Pillager, Winnibigoshish Bands – No discussion of abrogation of *usufructuary* rights.)¹⁵⁷

*Treaty of 1866 (with Mississippi Band)*¹⁵⁸ – (Ceding territory at Canadian Border west of 1854 Treaty Border and into Dakota Territory. No mention of abrogation of *usufructuary* rights.)¹⁵⁹

*Nelson Act of 1889*¹⁶⁰ – (Ceding territory between west of 1855 Treaty boundary and 1863 Treaty Boundary. No mention of abrogation of *usufructuary* rights.)¹⁶¹

¹⁵³ Treaty with the Chippewa of the Mississippi and the Pillager and Lake Winnibigoshish Bands, 12 Stat. 1249 (1863) .

¹⁵⁴ Treaty between the United States and the Red Lake and Pembina Bands of Chippewa Indians; concluded in Minnesota, October 2 1863; ratified by the Senate with Amendments, March 1, 1864; amendments assented to April 12, 1864; proclaimed by the President of the United States, May 5, 1864, 13 Stat. 667 (1863). No mention of hunting and fishing rights, “but transcript of the negotiations does make clear that the Indians were promised continued hunting and fishing rights on the ceded land.” *United States v. Minnesota*, 466 F. Supp. 1382, 1383 (D.C. Minn. 1979).

¹⁵⁵ 13 Stat. 689(1864)

The said Red Lake and Pembina bands of Chippewa Indians do hereby agree and assent to the provisions of the said treaty, concluded at the Old Crossing of Red Lake River, as amended by the Senate of the United States by resolution bearing date the first of March, in the year eighteen hundred and sixty-four.

¹⁵⁶ Supplementary Articles to the Treaty between the United States and the Red Lake and Pembina Bands of Chippewa Indians, concluded at Washington, April 12, 1864; ratified by the Senate April 21, 1864; proclaimed by the President of the United States April 25, 1864, 13 Stat. 689 (1864).

¹⁵⁷ See 13 Stat. 693 (1864).

¹⁵⁸ See 16 Stat. 719 (1866).

¹⁵⁹ No mention of *usufructuary* rights in the 1866 Treaty, but transcript of the negotiations does make clear that the Indians were promised continued hunting and fishing rights on the ceded land. *United State v. Minnesota*, 466 F. Supp. 1382, 1383 (D.C. Minn. 1979).

¹⁶⁰ An act for the relief and civilization of the Chippewa Indians of Minnesota, 25 Stat 642 (1889) [Nelson Act].

Statute of 1904,¹⁶² -- (No mention of abrogation of *usufructuary* rights.)¹⁶³

*Indian Reorganization Act of 1934*¹⁶⁴ – (No mention of abrogation of *usufructuary* rights.)¹⁶⁵

Sec. 478b - Application of laws and treaties

...Nothing in the Act of June 18, 1934, shall be construed to abrogate or impair any rights guaranteed under any existing treaty with any Indian tribe....

*Public Law 280, 1953*¹⁶⁶ -- (No mention of abrogation of *usufructuary* rights.)

Although not discussed extensively by the majority, this was not the first occasion that the Court had to address the effect of Minnesota's statehood on pre-existing federally established limitations on land use in "Indian Country." By 1871, Congress had also made clear that tribes were not considered independent nations with which treaties would be negotiated; nonetheless, treaties with tribes the United States entered into before that date were considered binding without reference to intervening

¹⁶¹ However, see *United States v. Minnesota*, 466 F. Supp. 1382, 1383 (D.C. Minn. 1979), affirmed, *Red Lake Band of Chippewa Indians, v. State of Minnesota*, 614 F. 2d 1161, (8th Cir. 1980)(cert. den._____) in which the Red Lake Band of Chippewa sought declaratory judgment that its members retained hunting, fishing, trapping and wild ricing rights in areas which the Band ceded to the federal Government in 1889 and 1904 relinquishing "all its right, title, and interest in and to" the ceded area meant that the Band also ceded *usufructuary* rights in the subject areas, in direct contravention of the construction of the construction of the same language by the Supreme Court in the 1855 Treaty in the *Mille Lacs* decision.

¹⁶² 31 Stat. 1077(1904)

¹⁶³ See *United States v. Minnesota*, 466 F. Supp. 1382, 1384 (D.C. Minn. 1979).

¹⁶⁴ 25 U.S.C. § 461. (48 Stat. 984)

¹⁶⁵ See *United States v. Minnesota*, 466 F. Supp. 1382, 1384 (D.C. Minn. 1979). The Act *requires* recognition of prior-existing treaty rights:

Sec. 478b - Application of laws and treaties:

All laws, general and special, and all treaty provisions affecting any Indian reservation which has voted or may vote to exclude itself from the application of the Act of June 18,1934 (48 Stat. 984) (25 U.S.C. 461 et seq.), shall be deemed to have been continuously effective as to such reservation, notwithstanding the passage of said Act of June 18, 1934. Nothing in the Act of June 18, 1934, shall be construed to abrogate or impair any rights guaranteed under any existing treaty with any Indian tribe, where such tribe voted not to exclude itself from the application of said Act.

¹⁶⁶ In 1953, Congress enacted Public Law 280 (codified as amended at 18 U.S.C. § 1162 (1994) 25 U.S.C. §§ 1321 1324 (1994) 28 U.S.C. § 1360 (1994)), which gives certain states broad criminal jurisdiction within some Indian reservations. Public Law 280 adopted to confront "the problem of lawlessness on certain Indian reservations, and the absence of adequate trial institutions for" law enforcement and criminal prosecutions and re-inforces civil-regulatory tribal jurisdiction.

statehood.¹⁶⁷ In 1914, the Supreme Court held in *Johnson v. Gearlds*,¹⁶⁸ that the terms of 1855 Treaty¹⁶⁹ remained in effect despite Minnesota statehood.¹⁷⁰ The Court described the impact of Minnesota statehood on the terms of the 1855 Treaty:¹⁷¹

By act of February 26, 1857 (11 Stat. at L. 166, chap. 60), the inhabitants of a portion of the territory, including the lands ceded by the Chippewas as above, were authorized to form a state government....*The act contained no condition with reference to the treaty of 1855 or the rights of the Indians to any lands within the boundaries of the state... Congress, by act of May 11, 1858 (11 Stat. at L. 285, chap. 31), admitted the state 'on an equal footing with the original states in all respects whatever.'*¹⁷²

The Court reviewed all subsequent treaties with the Anishinabe between 1863 and 1967 that ceded land but did not mention abrogation of the treaty term (at issue was a liquor ban established by statute and the 1855 Treaty). The Court also discussed the January 14, 1889 Nelson Act (25 Stat. at L. 642, chap. 24) that authorized the President to negotiate the complete cession and relinquishment of their title.¹⁷³ The Court did not

¹⁶⁷ Title 25 U.S. § 71:

No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March third, eighteen hundred and seventy-one, shall be hereby invalidated or impaired.

¹⁶⁸ *Johnson v. Gearlds*, 234 U.S. 422 (1914).

¹⁶⁹ 1855 Treaty, 10 Stat. 1165 (1855)

¹⁷⁰ *Johnson v. Gearlds*, 234 U.S. 422, 440 (1914).

¹⁷¹ Article 7. The laws which have been or may be enacted by Congress, regulating trade and intercourse with the Indian tribes, to continue and be in force within and upon the several reservations provided for herein; and those portions of said laws which prohibit the introduction, manufacture, use of, and traffic in, ardent spirits, wines, or other liquors, in the Indian country, shall continue and be in force, within the entire boundaries of the country herein ceded to the United States, until otherwise provided by Congress.

¹⁷² *Johnson v. Gearlds*, 234 U.S. 422 (1914).

¹⁷³ The Court noted an anomaly in the area just north of the 1855 Treaty boundary, which apparently was not ceded until the 1889 Nelson allotment and, in this area, the 1855 Treaty terms apparently had no effect and, therefore, 1825 Treaty sovereign territory and associated rights were apparently intact until 1889. To the extent that the dissent's argument in *Mille Lacs* might have had some force regarding the Anishinabe having ceded "all rights" this was apparently not the case in the territory to which the Court refers. According to the Court:

And, as pointed out in the prefatory statement, *the diminished Red Lake Reservation is admittedly surrounded by a strip of land, approximately 15 miles in width, which never was subject to the treaty of*

question the assumption by all parties that the terms of the 1855 Treaty were not abrogated in Treaty territory by Minnesota statehood, citing *United States v. Forty-three Gallons of Whiskey*¹⁷⁴ and *Bates v. Clark*.¹⁷⁵ The Court did review the living conditions and the status of Chippewa living in the 1855 Treaty territory, which confirms that both the Anishinabe and the Court understood that the *usufructuary* rights of the Anishinabe, and the ancestors of those who signed the 1855 Treaty and, presumably, earlier treaties as well, were being exercised in the 1855 Treaty territory well into the twentieth century:

.....we prefer to confine our attention to the situation as it existed in 1910 within the boundaries of the great tract that was the subject of the cession of 1855*** The majority of [White Earth and Leech Lake members]these reside upon lands embraced within the original reservation, and they are the same Indians, or descendants of the same, that were parties to the treaties of 1855, 1865, and 1867***And it is admitted that for purposes of business, pleasure, hunting, travel, and other diversions, these Indians traverse parts of the region comprised in the cession of 1855, outside of the reservations, and thus visit the towns, villages, and cities in the territory, including Bemidji. On the other hand it is admitted that their visits to Bemidji are infrequent, and that there are no Indian habitations within a range of 20 miles in any direction from that city.....¹⁷⁶

With respect to the effect of Minnesota Statehood on abrogating the liquor ban imposed in the 1855 Treaty and a pre-existing federal statute, the Court made clear that the Statehood Act had no impact at all, but that Congress had the power to act, if it chose to do so:

1855...This strip extends along the northerly boundary of the cession of 1855, which is perhaps 10 or 12 miles north of Bemidji.

¹⁷⁴ *United States v. Forty-three Gallons of Whiskey*, 93 U.S. 188, 196, 23 S.Ct. L. ed. 846, 847 (1876).

¹⁷⁵ *Bates v. Clark*, 95 U.S. 204, 208, 24 L.ed. 471, 472 (1877).

¹⁷⁶ *Johnson v. Gearlds*, 234 U.S. at 440 (1914)..

....On February 17, 1911 (Senate Doc. No. 824, 61st Cong., 3d Sess., vol. 85), the President, in a special message, called attention to the situation in Minnesota, resulting from the operation of the old Indian treaties under present conditions; and with respect to the area ceded by the Chippewas in 1855, he stated: 'The records of the Indian Bureau show that there are within said area, under the jurisdiction of the superintendents of the White Earth and Leech Lake Reservations, 7,196 Indians who can be amply protected by limiting the territory as to which said treaty provisions shall remain in force and effect to the area within and contiguous to said reservations, particularly described as follows: . . . I therefore recommend that Congress modify the article of said treaty quoted above so as to exclude from the operations of its provisions all of the territory ceded by said treaty to the United States, except that immediately above described.'

According to the Supreme Court in *Johnson v. Gearlds* in 1914:

That Congress has not yet acted upon this recommendation is evidence that the problem is not so entirely obvious of solution that it can be judicially declared to be beyond the range of legislative discretion.....

With respect to abrogation of hunting, fishing and gathering rights established in treaties before Statehood, this would seem to be the case as well. As the Supreme Court later held in *Menominee Tribe of Indians v. United States*¹⁷⁷, in which statutory language that unequivocally terminated a reservation was held not to abrogate hunting and fishing rights. Treaty language the cedes title as does the 1855 Treaty without mentioning *usufructuary* rights guaranteed in prior treaties for several decades would appear to directly contravene the Supreme Court's treatment of abrogation of hunting and fishing rights in *Menominee Tribe of Indians v. United States*¹⁷⁸, long before the treaty-guaranteed *usufructuary* property analysis applied by the majority and dissent in

¹⁷⁷ *Menominee Tribe v. United States*, 391 U.S. 404, 88 S. Ct. 1705 (1968)

¹⁷⁸ *Id.*

the *Mille Lacs* opinion. In the face of a federal statute that terminated a reservation, the Court held:

“We decline to construe the Termination Act as a backhanded way of abrogating the hunting and fishing rights of those Indians. *** ‘The intention to abrogate or modify a treaty is not to be lightly imputed to the Congress.’”¹⁷⁹

2. *Lac Courte Oreilles v. Voigt*¹⁸⁰: The First Judicial Recognition of Treaty-Guaranteed *Usufructuary* Property Rights

The majority opinion in *Mille Lacs* referred to federal litigation construing the 1854 Treaty with the Anishinabe, which was the subject of lengthy litigation in the Seventh Circuit that resulted in first recognition *usufructuary* rights being upheld in the territory ceded by the 1854 Treaty in Wisconsin and Minnesota.¹⁸¹ Like the 1837 Treaty at issue in *Mille Lacs*, the face of 1854 Treaty specifically mentioned the retention of *usufructuary* rights within the ceded territory.¹⁸² While the focus of the litigation was the impact of the Treaty on off-reservation *usufructuary* rights in Wisconsin, by 1988 both Wisconsin and Minnesota negotiated agreements with Anishinabe Bands within the 1854 Treaty territory that recognized the continuing validity of Anishinabe treaty rights.¹⁸³ The discussion of the 1854 Treaty by the *Mille Lacs* majority further clarifies

¹⁷⁹ Id. at 413, 88 S.Ct. at 1711.

¹⁸⁰

¹⁸¹ *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Vogt*, 700 F.2d 341 (7th Cir. 1983) appeal dismissed and cert. denied *sub nom. Besadny v. Lac Courte Oreilles Band of Lake Superior Chippewa Indians*, 464 U.S. 805, 104 S.Ct. 53, 78 L.Ed. 72 (1983) cited in *Minnesota v. Mille Lacs*, 526 U.S. at 188, 119 S.Ct. at 1197 (1999).

¹⁸² Article 11, 1854 Treaty, 10 Stat. 1109, 111 (1854).

¹⁸³ See discussion at notes _____, *infra*.

the conditions in which the 1855 Treaty was negotiated, and the status of Anishinabe hunting, fishing and gathering rights in *unceded* 1825 Treaty territory as of 1855.¹⁸⁴

In 1854 the House of Representatives began debating a bill “to provide for the extinguishment of title....in the Territory of Minnesota and Wisconsin,”¹⁸⁵ that did not require removal of the Anishinabe, but provided for reservations within the ceded territory, a provision that eventually found its way into the 1855 Treaty.¹⁸⁶ The Commissioner for Indian Affairs instructed his agent to acquire “all the country” the Anishinabe claimed in Minnesota and Wisconsin in August 1854, which resulted in the 1854 Treaty being negotiated in the fall of 1854.¹⁸⁷ However, the authorizing legislation for land acquisition treaties with the Anishinabe was not passed until December 1854, when Congress must already have been aware of the terms of the already-negotiated 1854 Treaty.¹⁸⁸ The Lake Superior Band retained *usufructuary* rights in the ceded territory in Minnesota’s “arrowhead” and the Mississippi Band retained “rights in full” west of the 1854 Treaty boundary. The 1855 Treaty was negotiated in Washington, D.C. between February 12 and 22, 1855 by Commissioner for Indian Affairs George W. Manypenny and treaty negotiators who were also well aware of the completed 1854 Treaty and. after the authorizing legislation was passed in December 1854.

The *Mille Lacs* majority opinion confirms the conclusion that: (a) the authorizing legislation, (b) the 1855 Treaty, and (c) the Treaty Journal all focused on land acquisition, not the hunting, fishing, and gathering rights in which the Anishinabe were most

¹⁸⁴ *Minnesota v. Mille Lacs*, 526 U.S. 172, 196-200, 119 S.Ct. 1187, 1201-1202 (1999).

¹⁸⁵ Cong. Globe, 33rd Cong., 1st Sess., 1032 (1854).

¹⁸⁶ 1855 Treaty, 10 Stat. 1165, 1166 (1855).

¹⁸⁷ *Minnesota v. Mille Lacs*, 526 U.S. 172, 183, 119 S.Ct. 1187, 1195 (1999).

¹⁸⁸ *Minnesota v. Mille Lacs*, 526 U.S. 172, 184, 119 S.Ct. 1187, 1195 (1999).

interested and had insisted on retaining in the treaties of 1837 and 1854.¹⁸⁹ The majority also pointed out that the signatories to the 1854 Treaty included most of the bands that resided in the 1837 Treaty territory, but only the *Mille Lacs* Band was party to the 1855 Treaty and:

If the United States had intended to abrogate Chippewa *usufructuary* rights under the 1837 Treaty, it almost certainly would have included a provision to that effect in the 1854 Treaty, yet that Treaty provides no such provision. To the contrary, it expressly secures *new* usufructuary rights to the signatory bands on newly ceded territory.¹⁹⁰

In the sense that the Anishinabe possessed rights to hunt, fish, and gather on unceded territory over which they had claims of ownership, the “treaty right” to continued use of the land after ownership claims had been ceded *did* “secure new *usufructuary* rights.” However, the 1854 Treaty also specifically reserved for the Mississippi Band the undiminished *usufructuary* rights that had been previously recognized in earlier treaties on unceded territory, as well.¹⁹¹ The 1795, 1825 and 1826 Treaties make clear that the Anishinabe had more than aboriginal claims to *unceded* 1825 Treaty territory over which the United States recognized the Anishinabe retained sovereignty and the unquestioned right to hunt, fish, and gather. The 1854 Treaty is careful to differentiate the unceded 1825 Treaty territory from the area ceded by the Lake Superior Band [*Appendix I*]:

The Chippewas of the Mississippi hereby assent and agree to the foregoing cession, and consent that the whole amount of consideration money for the country ceded above, shall be paid to the Chippewas of Lake Superior, and *in consideration thereof the Chippewas of Lake Superior hereby relinquish to the Chippewas of the Mississippi, all of their*

¹⁸⁹ *Minnesota v. Mille Lacs*, 526 U.S. 172, 183-185, 119 S.Ct. 1187, 1194-1195 (1999).

¹⁹⁰ *Minnesota et al v. Mille Lacs Band of Chippewa Indians et al*, 526 U.S. 172, 199 (1999).

¹⁹¹ Article 11, 1854 Treaty, 10 Stat 1109 (1854)

*interest in and claim to the lands heretofore owned by them in common, lying west of the above boundary line.*¹⁹²

Further, the terms of the 1854 Treaty specifically refer to the continuation of pre-existing treaty rights to be exercised by *both* the Lake Superior and Mississippi Chippewa, which can meaningfully refer to Minnesota only with respect to the Treaties of 1837, 1826 and 1825¹⁹³:

“It is agreed between the Chippewas of Lake Superior and the Chippewa of the Mississippi, that the former shall be entitled to two-thirds, and the latter to one-third, of all benefits to be derived from the former treaties existing prior to the year 1847.”¹⁹⁴

This means that the historical record and treaty construction found in the *LCO* cases not only establish the continuing validity of the Lake Superior Chippewa *usufructuary* property rights in the 1854 ceded territory, but the 1854 Treaty also guarantees *usufructuary* property rights to the Mississippi Chippewa west of the 1854 Treaty boundary, as well. As of 1854, the United States had guaranteed the right of the Anishinabe to hunt, fish and gather on the land west of the 1854 Treaty boundary in: the 1795 Treaty of Greenville; the 1825 Treaty of *Prairie du Chien*; the 1826 Treaty of Lake Superior; the 1837 Treaty ceded territory; the territory to which the 1850 Executive Order would have removed the Anishinabe. [*Appendix I.*]

Congressional passage of the treaty negotiation authorizing legislation, *after* the 1854 Treaty terms were drawn in the fall of 1854, is strong evidence that Congress understood *before* the authorizing legislation was passed that: new *usufructuary* rights

¹⁹² Article 1, 1854 Treaty, 10 Stat. 1109, 1109 (1854). (Emphasis added) For a discussion of “the interest in and claim to the lands heretofore owned by them in common” from the standpoint of treaty-guaranteed property rights, see discussion at notes _____, *supra*.

¹⁹³ An 1842 Treaty applied to territory entirely within Wisconsin. See, _____.

¹⁹⁴ Article 8, 1854 Treaty, 10 Stat. 1109, 1111 (1854).

were guaranteed in 1854 ceded territory; and, undiminished sovereignty, including *usufructuary* rights, was guaranteed to the Mississippi Band in the 1825 Treaty territory west of the 1854 Treaty boundary. Seen in this light, the 1854 Treaty not only supports the majority's reading of the broad language in the 1855 Treaty not having an impact regarding 1837 Treaty *usufructuary* rights, but also demonstrates that: (a) rights specified in the 1825 Treaty were ratified by the 1854 Treaty;¹⁹⁵ (b) the rights in specified in the 1825, 1837 and 1854 treaties were further ratified by the congressional authorization of the 1854 Treaty, in retrospect; (c) the passage of the authorizing legislation, after *usufructuary* property rights had been created in the 1854 Treaty ceded territory, and ratified in the 1854 Treaty *unceded* territory, authorizing *only* purchase of territory, does not suggest congressional intent to abrogate treaty-guaranteed *usufructuary* rights. The 1854 Treaty guarantee of undiminished claims to the Mississippi Band is powerful evidence that, as of January 1, 1855, the Anishinabe retained treaty-guaranteed hunting, fishing and gathering rights in: (a) the 1837 ceded territory; (b) the 1854 ceded territory; *and*, (c) the rest of the *unceded* 1825 Treaty territory, which was not abrogated by the 1854 Treaty; the December 1854 congressional treaty authorization legislation; the February 1855 Treaty; or the subsequent treaty ratification by the Senate. [Appendix I.]

¹⁹⁵ Article 11, 1854 Treaty

III. MINNESOTA TREATY RIGHTS PRECEDENT IN RETROSPECT:¹⁹⁶ THE IMPACT OF *LAC COURTE O'REILLES* AND *MILLE LACS USUFRUCTUARY* PROPERTY ANALYSIS, AS APPLIED

In the late 1970's and early 1980's the first modern Anishinabe treaty-rights litigation the state and federal courts, without being presented with a full record of *all* of the treaties bearing on treaty-guaranteed *usufructuary* property rights because not until the *LCO* litigation in late 1980's were treaty-guaranteed *usufructuary* rights understood as a form of property, like any other, and severable from title. Three examples are:

(a) *Leech Lake Band of Chippewa Indians et al, v. Herbst*,¹⁹⁷ in which the district court held that 1889 Nelson Act [*Appendix II*] "all title and interest" language did not abrogate hunting, fishing and gathering rights on public lands on the Leech Lake Reservation;

(b) *United States v. The State of Minnesota*¹⁹⁸ in which the Minnesota District Court and the Eighth Circuit¹⁹⁹ held that cession of "all title and interest" in 1889 Nelson Act and a 1904 congressional enactment [*Appendix II.*] did abrogate Red Lake Band of Chippewa *usufructuary* property rights on 3.2 million acres of non-reservation ceded territory, despite verbal promises by Minnesota Governor Alexander Ramsey that the Red Lake Band could hunt and fish on ceded territory "until it was settled;"²⁰⁰ and,

¹⁹⁶ **NOTE: section may be eliminated, if the impact on existing Minnesota treaty analysis is of secondary importance to the usufructuary property analysis, or if length is an issue.**

¹⁹⁷ 334 F. Supp. 1001 (D. Minn. 1971)

¹⁹⁸ 466 F. Supp 1382 (D.Minn. 1979)

¹⁹⁹ *Red Lake Band of Chippewa v. State of Minnesota*, 614 F.2d 1161 (8th Cir. 1980).

²⁰⁰ 466 F. Supp. at 1383.

(c) *State of Minnesota v. Keezer*,²⁰¹ in which the Minnesota Supreme Court overturned a three-judge panel, which held hunting, fishing and gathering rights, guaranteed in the 1825 and 1795 Treaties, [Appendix I.] prohibited Minnesota from regulating Anishinabe wild ricing on public land. Only the first would likely to be decided similarly under the treaty-guaranteed *usufructuary* property analysis adopted by the Supreme Court in the *Mille Lacs* opinion.

Leech Lake Band of Chippewa v. Herbst²⁰²

The Leech Lake Band sought an injunction against the enforcement of state hunting and fishing regulations of Band members on the Reservation. The Court limited its examination of treaty rights to the Leech Lake Reservation and started with the premise that at the time of the passage of the Nelson Act in 1889, the Indians possessed unrestricted hunting and fishing rights as aboriginal rights that were established by reservation treaties in 1855, 1864 and 1867. The State did that the Leech Lake Indians possessed the claimed fishing and hunting rights, as the Minnesota Supreme Court in *State v. Jackson*,²⁰³ . And, the State agreed that Congress alone has the power over treaty rights with Indians. *Lone Wolf v. Hitchcock*,²⁰⁴ .

The State of Minnesota argued that the Leech Lake Band ceded all hunting and fishing rights in the 1889 Nelson Act :

“[We] do hereby grant, cede and relinquish and convey to the United States, for the purposes and upon the terms stated in said (Nelson) Act,

²⁰¹ 292 N.W. 2d 714 (1980).

²⁰² 334 F. Supp. 1001 (D. Minn. 1971)

²⁰³ 218 Minn. 429, 16 N.W.2d 752 (1944)

²⁰⁴ 187 U.S. 553, 23 S.Ct. 216, (1903)

all our right, title and interest in and to the lands reserved and set apart²⁰⁵ ***.”

However, when taken in context and understood by the Indians who had exercised such rights on the reservation for generations, the Court held this language insufficient to abrogate either the Leech Lake Reservation or the hunting, fishing and gathering rights on the Reservation, because federal responsibility in the United States trust relationship with Indian peoples’ is not dependent solely upon the passing of legal land title:

It is apparent in light of events before and after the passage of the Nelson Act that its purpose was not to terminate the reservation or end federal responsibility for the Indian.... The United States Supreme Court has held that it is the termination of federal responsibility and not the passing of legal land title....which determines whether a reservation exists in the eyes of the law.²⁰⁶

That the Nelson Act was not intended to terminate federal responsibility for the Indians.....If it was the intention of Congress to disestablish the Leech Lake Reservation, the Congress knew how to say so in clear language.....It spoke with the necessary clarity also in the case of the Menominee Indians of Wisconsin. There the Congress effected its intention to terminate the reservation by express language,²⁰⁷

Despite this unequivocal language in *Menominee Tribe of Indians v. United States*²⁰⁸, , the United States Supreme Court held that while the language was effective to terminate the reservation, it still did not abrogate Indian fishing and hunting rights. It said:

“We decline to construe the Termination Act as a backhanded way of abrogating the hunting and fishing rights of those Indians. *** ‘The intention to abrogate or modify a treaty is not to be lightly imputed to the Congress.’”²⁰⁹(emphasis added)

²⁰⁵ H.R. Document 247 50th Congress, First Session (1889)

²⁰⁶ Citing *Seymour v. Superintendent*, 368 U.S. 351, 82 S.Ct. 424, 7 L.Ed.2d 346 (1962)

²⁰⁷ 25 U.S.C. § 891-902.

²⁰⁸ 391 U.S. 404, 88 S.Ct. 1705, 20 L.Ed.2d 697 (1968)

²⁰⁹ *Leech Lake Band of Chippewa v. Herbst*, 334 F. Supp. at 1005, citing 391 U.S. at 413, 88 S.Ct. at 1711.

Although written some 30-years before *State of Minnesota v. Mille Lacs Band of Chippewa Indians*, and not based on the treaty-guaranteed *usufructuary* property analysis adopted in that case, the respect of Indian property rights reflected in the *Herbst* decision appears quite modern and would certainly withstand scrutiny by either the *Mille Lacs* majority or the dissent, as expressing the reasoning underlying the *usufructuary* property analysis adopted by the Court.

United States v. Minnesota

In *United States v. Minnesota*,²¹⁰ the Red Lake Band of Chippewa, sought a declaratory judgment that members of the Band retain hunting, fishing and gathering rights in 3.2 million acres ceded in congressional enactments of 1889 and 1904, which did not mention cession of hunting, fishing and gathering *usufructuary* property rights.²¹¹ These enactments duplicated the written terms of an 1863 Treaty that ceded 10 million acres to the United States, which also failed to mention hunting, fishing and gathering,²¹² but which were orally promised by former Minnesota Governor Alexander Ramsey, according to the 1863 Treaty minutes, “until it was settled.”²¹³

The district court found that, because the 1889 and 1904 congressional enactments addressed only cession of the 3.2 million acres that remained with the Red Lake Band after the 10 million acres had been ceded, the misrepresentation of the Governor Ramsey was not relevant to determining what the Indians understood about the 1889 and 1904 enactments, which stated the Red Lake Band agreed to surrender

²¹⁰ 466 F. Supp 1382 (D. Minn. 1979)

²¹¹ *Id.* at 1383.

²¹² *Id.* at 1386.

²¹³ *Id.* at 1388.

“all title and interest.”²¹⁴ The court did concede that there is no record that Congress intended *either* abrogation or retention of hunting, fishing and gathering rights, so the decision turned largely on whether the Anishinabe had “treaty-guaranteed” rights before 1863, or not.²¹⁵

The court also conceded that treaties and agreements must be interpreted as the Indians understood them, and, “...Congressional intent to abrogate Indian property rights must be clear from the face of the Act or surrounding circumstances and that doubtful expressions in the Act must be resolved in favor of the Indians.”²¹⁶ Without citing *Leech Lake v. Herbst* or its analysis of the Nelson Act, the Court considered that “Indian title” was the nature of the property at issue in the Red Lake claim, without reference to treaties before 1863 in concluding that:

“...the cession was to operate as a complete extinguishment of Indian title...[i]f the cessions extinguished Indian title to the ceded areas, they also would have the effect of abrogating any aboriginal hunting, fishing, trapping or wild ricing rights. These rights are mere incidents of Indian title, not separate from Indian title, and consequently if Indian title is extinguished so also would these aboriginal rights be extinguished.”²¹⁷

The Court concluded that, at least with respect to the 3.2 million acres at issue, the Red Lake Band could claim only hunting and fishing rights that ran with the land²¹⁸ and were not, “separate from Indian title.”

The United States Attorney who was representing the Band apparently made an effort to use Alexander Ramsey’s representation that that the Anishinabe could

²¹⁴ Id.

²¹⁵ Id. 1387.

²¹⁶ 466 F. Supp at 1385.

²¹⁷ Id.

²¹⁸ Id. at 1383.

continue to hunt and fish on the 10 million acres to demonstrate the Indian understanding of the 1889 and 1904 enactments,²¹⁹ but failed to directly challenge the abrogation of 1863 Treaty *usufructuary* rights promised by the Treaty negotiators in the 10-million acres,²²⁰ or make use of the terms of 1795, 1825 or 1854 Treaties by which the United States converted “Indian title” to treaty guaranteed rights and, at least arguably, to *usufructuary* rights in all of northern Minnesota, long before the Red Lake Band ceded territory in 1863.²²¹

The Court made the assumption that, prior to 1863, the Anishinabe in Minnesota lacked treaty-guaranteed property interests,²²² as did the Eighth Circuit on appeal in *Red Lake Bank of Minnesota Chippewa*.²²³ However, the United States *had* guaranteed by treaty Anishinabe rights to hunt, fish and gather by treaty in: (a) all of the sovereign 1795 Treaty territory, which would eventually become Minnesota;²²⁴ (b) the 1825 Treaty territory in the northern half of Minnesota;²²⁵ (c) the 1826 Treaty territory in which “title” and “jurisdiction” were guaranteed to the Anishinabe in the northern half of Minnesota;²²⁶ (d) the 1837 Treaty ceded territory to the United States which specifically retained *usufructuary* rights in the ceded territory;²²⁷ (e) the territory outside the 1837 Treaty territory to which the Anishinabe were to have been removed by the 1850 Executive Order, *i.e.*, the unceded 1825 Treaty territory encompassing the rest of

²¹⁹ *Id.* at 1386-87

²²⁰ *Id.*

²²¹ *Id.*

²²² See discussion at notes _____, *supra*.

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Minnesota;²²⁸ (f) the 1854 Treaty ceded territory in the “arrowhead” in which *usufructuary* rights were specifically retained;²²⁹ (g) the territory west of the 1854 Treaty boundary in which the Mississippi Band were guaranteed undiminished rights in the 1854 Treaty, *i.e.*, the unceded 1825 Treaty territory encompassing the rest of Minnesota.²³⁰ Thus, as of February 1855, the United States had guaranteed to the Anishinabe the right to hunt, fish and gather, guaranteed in every part of Minnesota,²³¹ by treaty, on at least six (6) separate occasions over a period of sixty (60) years, which was also recognized by a Presidential Executive Order.²³²

But, as the Court in *United States v. Minnesota* noted, 1863 treaty negotiator, Minnesota Governor Alexander Ramsey, *did* tell the Indians that the hunting, fishing and gathering rights *were* guaranteed in the 10 million acres ceded in the 1863 Treaty for an indefinite period *after* transfer of title to the United States.²³³ However, neither the district court, nor the plaintiffs’ counsel, nor the Eighth Circuit, looked farther back into treaty history than 1863.²³⁴ The court did not explain how it had concluded that “Indian title” was the sole property interest held by the Red Lake Band, and the Court did not examine any *usufructuary* property rights which may have been guaranteed by pre-1863 treaties between the United States and the Red Lake Band, or why the verbal representations of Governor Ramsey did not give rise to *usufructuary* property rights, severable from title to the land, in light of those earlier treaties. But, after the analysis

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²³¹ See Appendix.

²³² See discussion at notes ____supra.

²³³ 466 F. Supp 1382 (D. Minn. 1979)

²³⁴ Red Lake Band of Chippewa v. State of Minnesota, 614 F.2d 1161 (8th Cir. 1980).

of treaty-guaranteed *usufructuary* property rights was described by the Supreme Court in the *Mille Lacs* case,²³⁵ and the origins of treaty guarantees of the *usufructuary* rights to the Anishinabe in the territory that is now Minnesota can be traced to Britain's cession of the Northwest Territory and the Treaty of 1795,²³⁶ the absence of any serious foundation for the Court's opinion under a current understanding of *usufructuary* property rights analysis seems apparent.

First, the language in the two Congressional enactments is very similar to that in the 1855 Treaty. According to the Court, the language in these enactments was "precisely suited" for eliminating "Indian title" and conveying to the government "the Indians entire interest in the ceded lands,"²³⁷ irrespective of the misrepresentation in the 1863 Treaty negotiations.

"any and all right, title and interest, of whatsoever nature the same may be, which they may have now have in, and to any other lands in the Territory of Minnesota or elsewhere."²³⁸

However, this is precisely the language that the majority rejected in *State of Minnesota v. Mille Lacs Band of Chippewa Indians* as inadequate to abrogate specific reservation of *usufructuary* rights in the 1837 Treaty.²³⁹ Moreover, when the misrepresentation by Ramsey in the 1863 Treaty negotiations is placed in the context of sixty (60) years of explicit guarantees by the United States that Anishinabe had the right to hunt, fish and gather on the land, upon which they had depended for survival for centuries,²⁴⁰ the

²³⁵ *Minnesota v. Mille Lacs*, 526 U.S. 172, 119 S. Ct. 1187 (1999).

²³⁶ Treaty with the Wyandotte, 7 Stat. 49 (August 9, 1795) [Treaty of Greenville]

²³⁷ 466 F. Supp. at _____

²³⁸ 1855 Treaty Art. 1, 10 Stat. 1166 (1855)

²³⁹ *Minnesota v. Mille Lacs*, 526 U.S. 172, 119 S. Ct. 1187 (1999).

²⁴⁰ See discussion at notes _____, *supra*.

argument that the Indians *knew* the United States was *silently* abrogating these rights is much, much more difficult to make following the usufructuary property rights analysis adopted by the Court in *Mille Lacs*.

In addition, taken as a whole, the treaties from 1795 to 1854,²⁴¹ brigaded by the verbal promise in 1863,²⁴² as well as, the *Mille Lacs* majority and dissenting opinions' method for determining the existence of treaty-guaranteed *usufructuary* property rights²⁴³ make clear that U.S. treaty negotiators created such rights in treaties with the Anishinabe over several decades and, by *never* specifically abrogating them with the approval of Congress,²⁴⁴ those rights must certainly be alive today. In retrospect, it now appears quite clear that prior to the Supreme Court's analysis in *Minnesota v. Mille Lacs*, neither plaintiffs', nor the court, had yet grasped the significance of "early treaty-guaranteed" *usufructuary* property rights analysis and, as a result, *United States v. Minnesota* is not a comprehensive review of treaties which have an impact on the treaty-guaranteed *usufructuary* rights in question today (*i.e.* the 1795, 1825, 1826, 1837, 1854, 1855, as well as, 1863 verbal promise by Governor Ramsey). The far more developed historical record that can be found in the *LCO* and *Mille Lacs* record, as augmented by this article, more accurately describes the nature of Anishinabe rights, post-*Mille Lacs*.

²⁴¹ See discussion at notes _____, *supra*.

²⁴² See discussion at notes _____, *supra*.

²⁴³ See discussion at notes _____, *supra*

²⁴⁴ 292 N.W.2d 714 (Minn. 1980)

State of Minnesota v. Keezer

Another pre-*Mille Lacs* case that leads to the same conclusion is *State of Minnesota v. Keezer*,²⁴⁵ in which the Minnesota Supreme Court, citing *United States v. Minnesota* and *Red Lake Band of Chippewa Band Indians v. Minnesota*, overturned a special three-judge panel which had upheld the rights of two Anishinabe Band members to gather wild rice guaranteed in the 1825 Treaty territory, free from state licensing regulation.²⁴⁶ The defendants had been cited by a conservation officer for harvesting wild rice on a lake designated in the Sioux (Dakota) territory in the 1825 Treaty and included within the 1795 Treaty area as Indian territory.²⁴⁷ Although a Minnesota State Supreme Court opinion has little precedential value regarding United States treaty construction²⁴⁸ and preceded *Mille Lacs* decision by nearly 20-years, it may be the only attempt to come to grips with the pre-1837 treaties in any published opinion.

The majority conceived of an Indian property framework much more limited than that described by the Supreme Court in the *Mille Lacs* opinion:

fee title became vested in the sovereign – first the discovering European nation and later the original states and the United States – right of occupancy in the Indian Tribes was recognized....called Indian title....recognized only to be a right of occupancy...The Federal Government took early steps to deal with the Indians through treaty, the

²⁴⁵ *Id.* at 715

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.* As early as 1944 in *State v. Jackson*, 218 N.W.429 (Minn. 1944) the Minnesota Supreme Court considered that the Leech Lake Reservation, created in the 1855 Treaty from “Indian Country” (the unceded 1825 and 1854 Treaty territories) did not require an explicitly state right to hunt and fish on the reservation because, “the ancient and immemorial right to hunt and fish, which was not much less necessary to the existence of the Indians that the atmosphere they breathed remained in them unless they granted it away.” Citing *United States v. Winans*, 198 U.S. 371, 381 (1905).

principle purpose often being to recognize and guarantee the rights of Indians to specified areas of land.²⁴⁹

As conceived by the majority, treaties had dual purposes: (a) to recognize Indians' *right to occupancy of certain lands*, and (b) to gain territory for the United States through *the Indian's relinquishment of other lands*. This exchange describes ceding territory in exchange for treaty guarantee to a reservation, or another territory. The majority equates this treaty-guaranteed "right of occupancy" as it was called by John Marshall in *Johnson v. M'Intosh*²⁵⁰ with "Indian title."²⁵¹

The majority construed the 1795 Treaty to be a recognition of "Indian title", and a "relinquishment by the United States of its claims of immediate possession of Indian territory....not its basic sovereign rights to the land itself."²⁵² The Indians gained treaty-guaranteed right of occupancy that could only be extinguished by purchase....and "were free to enjoy their rights of occupancy, 'hunting , planting, and dwelling there,'"²⁵³ or, as Mr. Chief Justice Marshall described it, "to use it according to their own discretion."²⁵⁴

However, what the majority described in post-*Mille Lacs* terms, is a treaty which has severed fee title from treaty guaranteed *usufructuary* property rights and which gives lie to the district court's assertion in *United States v. Minnesota* that the Red Lake Band lacked specific treaty-guaranteed rights, beyond "Indian title." The majority also purported to construe the 1825 Treaty, as it related to rights of the Anishinabe (Chippewa) to gather wild rice on Sioux (Dakota) designated territory without state

²⁴⁹ *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 667, 94 S. Ct. 772, 777 (1974).

²⁵⁰ 21 U.S. (8 Wheat) at 543 5 L.Ed 681 (1823)

²⁵¹ 292 N.W.2d 714 (Minn. 1980)

²⁵² Id. at 717.

²⁵³ Id. at 718.

²⁵⁴ Id. at 718, citing *Johnson v. M'Intosh*. 21 U.S. (8 Wheat.) at 574 (1823).

permit.²⁵⁵ The Court held that, even if the 1825 Treaty did “grant hunting rights...these rights were extinguished by later treaties....the Chippewa right of occupancy in Minnesota, except for reservation land, was extinguished in the Treaty of 1855. 10 Stat 1165.”²⁵⁶

Echoing the district court in *United States v. Minnesota*, and citing the Supreme Court holding in *Rosebud Sioux Tribe v. Kneip*,²⁵⁷ and *De Coteau v. District County Court*²⁵⁸ for the principle that language in the 1855 Treaty that ceded “all right, title and interest” was “‘precisely suited’ for the purpose of eliminating ‘Indian title’ and conveying to the government ‘the Indians’ entire interest in the ceded lands.’”²⁵⁹ Of course, after the unanimous Supreme Court analysis regarding treaty-guaranteed *usufructuary* property rights in *State of Minnesota v. Mille Lacs Band of Chippewa Indians*, this is plainly an incorrect statement of the law.²⁶⁰

More to the point was the dissent by Justice Rosalee Wahl, joined by Justice Otis, who anticipated the reasoning of the Supreme Court in the *Mille Lacs* decision, and the Seventh Circuit *LCO* decision regarding treaty-guaranteed *usufructuary* property rights.²⁶¹ Justice Wahl considered that the United States guaranteed an undifferentiated right to hunt, fish and gather within the 1795 Treaty territory

²⁵⁵ And, without the permission of the Dakota as required in the 1825 Treaty, an issue not discussed by the Court, see 1825 Treaty.

²⁵⁶ 292 N.W.2d 714, 720. (Minn. 1980)

²⁵⁷ *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977).

²⁵⁸ *Decoueteau v. Disrict County Court*, 420 U.S. 425, 95 S.Ct. 1082, 43 L.Ed.2d 300 (1975).

²⁵⁹ *State of Minnesota v. Keezer*, 292 N.W. 2D 714, 721 (Minn. 1980).

²⁶⁰ *Id.* at 724.

²⁶¹ *Id.*

relinquished by the United States.²⁶² And, that the 1825 Treaty left it to the Anishinabe and Dakota to continue to share fish, game and wild rice without interference from the United States. Justice Wahl:

... rights of ownership of the land, itself, not dependent upon them, or incident to, fee title.²⁶³

Justice Wahl's dissent was 20-years ahead of its time in that, like the *Mille Lacs* majority, she rejected the argument that general cession language, such as all "right, title and interest" without more, extinguished even *aboriginal rights* to hunt, fish or wild rice on ceded land.²⁶⁴ Justice Wahl cited an earlier federal court construction of Nelson Act, the same 1889 Congressional enactment at issue in *United States v. Minnesota*, which was not cited by the majority, the federal courts, or, presumably, plaintiff's counsel. According to Justice Wahl and Otis:

In *Leech Lake Band of Chippewa Indians v. Herbst*²⁶⁵ however, the district court considered the same language appearing in the Nelson Act, and the held that it did not abrogate hunting and fishing rights which "while perhaps dating back many years to an aboriginal right were established in law by treaty....The United States Supreme Court has counseled us that the abrogation of treaty rights is not to be lightly inferred. Id at 1004." It is noteworthy that the *Leech Lake Band* Court found that Chippewa hunting and fishing rights were not extinguished by the 1855 Treaty, in which the Indians conveyed "all right title and interest...in, and to any other land in the Territory of Minnesota or elsewhere."²⁶⁶

Justice Wahl's dissent also anticipates the co-management of natural resources that have resulted in Wisconsin and portions of Minnesota, as a result of treaty-guaranteed *usufructuary* property interests having been upheld in the 1837 and 1854 Treaties in the

²⁶² Id.

²⁶³ Id.

²⁶⁴ 334 F. Supp. 1001 (D. Minn 1971),

²⁶⁵ Id.

²⁶⁶ *Keezer* at 274.

Mille Lacs and *LCO* litigation which are more fully discussed later in the article. However, as suggested by Minnesota Supreme Court Justices Wahl and Otis:

[We] would hold that while the state may regulate the exercise of the Chippewa Indians' right to harvest wild rice to the extent reasonable and necessary to conserve the state's wild rice resources, *Tulee v. Washington*,²⁶⁷ the state may not require them to purchase a license....[this] is not to hold the Chippewa Indians may hunt, fish or rice wherever they choose. The....rights of private property owners who have titles traceable to patents granted by the United States government is not presented by this case...²⁶⁸

This suggested framework for working through the complicated conflicting issues created by the treaty-guaranteed property rights, and subsequent property development, virtually duplicates the resolution reached by the Seventh Circuit in the *LCO* case, which has been applied in Minnesota's arrowhead region and northern Wisconsin since 1988, and in the 1837 Treaty territory since the Supreme Court decided the *Mille Lacs* case in 1999.

Under the *Mille Lacs* analysis, this language would seem to create both a treaty-guaranteed *usufructuary* property rights in the use of the land indefinitely that had no apparent, or necessary, relationship to "sale" of the land to the United States at any point. There is nothing in the 1795 Treaty that would put any of the Tribal signatories on notice that "sale" to the United States implied the concepts of: "fee simple;" "Indian right of occupancy;" or, "Indian title," which have been used by Court to construe the 1795 Treaty, and later treaties. These court-created concepts could only be found

²⁶⁷ 315 U.S. 681, 62 S. Ct. 862 (1942)

²⁶⁸ *Keezer* at 725.

applicable to Indian treaties after *Marbury v. Madison*²⁶⁹ established a role for the Supreme Court in 1803. And, as the Minnesota Supreme Court majority pointed out, *State v. Keezer*,²⁷⁰ it was not until 1823 that Chief Justice John Marshall conceptualized the “Indian Right of Occupancy” in *Johnson v. M’Intosh*.²⁷¹ However, there can be little question that, from the Anishinabe standpoint, the guarantee of indeterminate rights to hunt, fish and wild rice in the Northwest Territory in 1795, and after, became part of the Tribal oral history, even if written treaty guarantees;²⁷² oral promises of U.S. treaty negotiators and Minnesota Governors²⁷³ had been forgotten, or ignored.²⁷⁴

IV. MODERN USFRUCTUARY RIGHTS: THE “RIGHT TO A MODEST LIVING”

Although the State of Minnesota was not a formally party to the *Lac Courtes Oreilles* litigation,²⁷⁵ considered itself practically bound since at least 1987, when it entered into the “Tri-Band Agreement” to jointly manage wildlife resources in the 1854 ceded territory with Anishinabe Bands in Minnesota’s “arrowhead”²⁷⁶ and settled a suit

²⁶⁹ 5 U.S. (Cranch 1) 137 (1803)

²⁷⁰ *Keezer* at 316.

²⁷¹ 21 U.S. (8 Wheat.) at 543, 5 L.Ed. 681 (1823).

²⁷² See discussion at notes ____, supra.

²⁷³ See discussion at notes ____ supra

²⁷⁴ See discussion at notes _____, supra

²⁷⁵ See discussion at notes _____ supra.

²⁷⁶ *The Agreement between the Grand Portage, Boise Forte and the Fond du Lac Bands of Chippewa and the State of Minnesota, 1987:*

III. CONDITIONS

A. This Agreement is contingent upon adoption by the Minnesota Legislature, at the 1988 Session, thereof of legislation effectuating the terms of this Agreement, and is further contingent upon the Governor signing such legislation into law.

B. The Agreement is contingent upon ratification of governing bodies of the Grand Portage, Bois Forte and Fond du Lac Bands....

D. If legislation effectuating the terms of this Agreement is enacted into law, all parties will apply to the Court for entry of a consent judgment consistent with the terms of this Agreement...

with the Grand Portage Band of Chippewa, based on the same 1854 Treaty.²⁷⁷ The stakes can be significant.²⁷⁸ The DNR 2010-11 Biennial Budget shows a payment of nearly \$15 million, allocated for “treaty rights” of in the limited areas in which Minnesota has recognized in 1987,²⁷⁹ and in the 1837 Treaty territory following the *Mille Lacs* decision, in 1999.²⁸⁰

Despite the 1854 Treaty specifically providing that the Mississippi Band retained 1825 Treaty-guaranteed-rights west of the 1854 Treaty boundary,²⁸¹ Minnesota has not acknowledged that *all* Anishinabe Bands to which the 1854 Treaty apparently refers,²⁸² *should* have the same *off-reservation usufructuary* rights²⁸³ as Anishinabe in Wisconsin and Minnesota²⁸⁴ property rights with a value of millions of dollars annually, according

F. Until such time as a Tri-Band Code and Grand Portage Code have been duly adopted pursuant to this Agreement, the Three Bands shall abide by all provisions of state law when hunting and fishing.

²⁷⁷ The State of Minnesota settled *Grand Portage Band of Chippewa of Lake Superior v. Minnesota*, Civ. No. 4-85-90 (D. Minn.1988) following the *Lac Courte Oreilles* decisions upholding the 1854 Treaty).

²⁷⁸ “Obama Admin Strikes \$3.4B Deal in Indian Trust Lawsuit”. *New York Times*. December 8, 2009. See also, *Cobell v. Salazar (Cobell XXII)*, 573 F.3d 808 (D.C. Cir. 2009).

²⁷⁹ The *Anishinabe* Bands in Wisconsin have elected to establish self-management institution, such as the Great Lakes Fish and Wildlife Commission (GLIFWC) to co-manage wildlife and other natural resources cooperatively with State of Wisconsin and is an alternative to lease payments. The *Fond du Lac* Band has rejected the Tri-Band Agreement payment formula and has also elected to self-manage *usufructuary* rights under the 1854 Treaty. See Chippewa Treaty Rights: History and Management in Minnesota and Wisconsin, <http://ncseonline.org/nae/docs/Chippewa.html>.

²⁸⁰

²⁸¹ *Supra* at note____, which would, presumably include all of the territory of Minnesota north of the Chippewa/Sioux 1825 Treaty boundary..

²⁸² The contradiction is apparent in off-reservation prosecution of Indians in territory outside the 1854 Treaty ceded territory which, on one hand must acknowledge both *Mille Lacs* and *LCO* as controlling regarding *usufructuary* rights, but find exceptions based on treaty boundaries to permit prosecutions that would not be possible a few miles in either direction. See, *State v. Butcher*, 563 N.W.2d 776 (Minn. App. 1997).

²⁸³ See, Great Lakes Indian Fish and Wildlife Commission (GLIFWC), *A Guide to Understanding Chippewa Treaty Rights: Minnesota Edition* (Odanah,Wisc. 1995), which describes the self- management Wisconsin Bands have chosen, as has the *Fond du lac* Band in Minnesota.

²⁸⁴ The *usufructuary* rights leased by the State in the “arrowhead” were valued at approximately \$6 million annually in 1988.The 2010–11 Biennial Budget of Minnesota Department of Natural Resources reflects payments of about \$7.5 million annually for “treaty rights.” And estimated average value of \$6.5

to the State.²⁸⁵ The value of native *usufructuary* property rights was first estimated by the Seventh Circuit²⁸⁶ and the Wisconsin federal courts which recognized that the 1854 Treaty guaranteed the right of the Anishinabe to “enjoy a modest living” from the exercise *usufructuary* rights.²⁸⁷ The *LCO* district court determined the economic value of the “modest standard of living” guaranteed under the 1854 Treaty:

- “Plaintiffs have shown that their modest living needs cannot be met from the present available harvest even if they were physically capable of harvesting, processing, and gathering it. The standard of a modest living does not provide a practical way to determine the plaintiffs' share of the harvest potential.”²⁸⁸
- “The modest standard of living guaranteed to plaintiffs under the 1837 and 1842 treaties may be quantified as a zero savings level of income” (based on Judge Doyle’s findings of fact in *LCO III*, the Chippewa had no interest in the accumulation of wealth).²⁸⁹

million dollars over the past 22 years, would mean that the State has set the value of a small portion of the ceded area at about 140 million dollars over 20-plus years. However, the area *west* of the 1854 Treaty border and *north* of the 1937 Treaty border is at least *twice* as large as that in the ceded in 1837 and 1854 treaties, and includes prime fishing and hunting locations in the Gull Lake, Brainerd and Bemidji areas.

This means that the *direct* loss to the largest Anishinabe bands, in territory that was *un-ceded* in 1854 and in which *usufructuary* rights were not abrogated subsequently, *must* be in the range of some \$280 million, over just the past twenty-some years. In addition, thousands of Anishinabe Band members have been unlawfully arrested, incarcerated and/or fined by the State, for arguably exercising *off-reservation usufructuary* activities, or subject to tribal jurisdiction. *See, State v. Butcher*, 563 N.W.2d 776 (Minn. App. 1997). These direct and indirect damages are incalculable but if estimated at one-half of the of withheld lease payments, perhaps in the neighborhood of \$140 million, the *direct* losses to the Anishinabe over the past twenty years would be \$420 million.

²⁸⁵ *Tri-Band Agreement, Article IV.*

OBLIGATIONS AND RIGHTS OF THE STATE:

A. Annual Payment: The State shall pay annually to the Grand Portage Band and Bois Forte Band the sum of one million six hundred thousand dollars (\$1,600,000 *each*, and to the Fond du Lac Band the sum of one million eight hundred and fifty thousand dollars (\$1,850,000) paid by the State pursuant to the settlement of litigation referenced in Minn. Stat. Secs. 97A.151 and 97A.155 (1986) shall be matched dollar for dollar, in the payments made to each of the Three Bands. This formula shall continue to apply to the Three Bands even if it may in the future no longer apply to Leech Lake Band.

²⁸⁶ *LCO I* and *LCO II*.

²⁸⁷ Which, of course, means that *usufructuary* rights remain intact in un-ceded territory, as well.

²⁸⁸ *Id.* at 233

²⁸⁹ *Id.* at 230.

- In 1986, the average income level for a household that did not save anything was \$20,036.²⁹⁰
- The court found that “to provide plaintiffs the equivalent of a modest standard of living for the households of tribal members would require approximately \$82,000,000.”²⁹¹
- Even if the income level required was equal to the average income of American Indians, it would take \$22,500,000, or 4 million more than the land could produce under optimal conditions to satisfy the moderate living standard.²⁹²
- “[u]nder the most optimal conditions, capture of the entire potential harvest of the ceded territory could produce no more than \$18,000,000 in foods, pelts, and timber for personal consumption and sale.”²⁹³

In a later district court proceedings, the court held that on the issue of fish in the ceded territory, resources should be allocated equally (50%) between Indians and non-Indians.²⁹⁴

[T]he parties did not intend that plaintiffs' reserved rights would entitle them to the full amount of the harvestable resources in the ceded territory, even if their modest living needs would otherwise require it. The non-Indians gained harvesting rights under those same treaties that must be recognized. The bargain between the parties included competition for the harvest. How to quantify the bargained-for competition is a difficult question. The only reasonable and logical resolution is that the contending parties share the harvest equally.”²⁹⁵

Central to the court’s analysis was the finding in *LCO V*, where the court found that “even if the tribes could exploit every harvestable natural resource in the ceded territory, they would not derive sufficient income from those resources to provide their members with a moderate standard of living.”²⁹⁶

²⁹⁰ *Id.*

²⁹¹ *Id.*

²⁹² *Id.*

²⁹³ *Id.*

²⁹⁴ 740 F.Supp. 1400 (W.D. Wis. 1990):

²⁹⁵ *Id.* at 1416.

²⁹⁶ *Id.*

The exercise of *usufructuary* rights for individual tribal members, even if insufficient to provide a liveable income, hold the promise of supplementing both income and diet, for enrolled tribal members who live on or near reservations in conditions almost as shocking as those that moved the U.S. treaty negotiators in 1826,²⁹⁷ according to studies published as recently as 2005:²⁹⁸

- The poverty rate in reservation areas is approximately 50%, almost four times the United States average, and that the poverty rate for Indian children in reservation areas is 60%....
- Other federal data show that, as of 1999, over 40% of all adults living on or near reservations were unemployed and that over 30% of those employed were still living in poverty....
- Tribal communities tend to consume larger quantities of fish, game and other natural foods than other communities, and thus face higher health risks posed by bioaccumulative toxics.
- In 2001, approximately 34% of drinking water suppliers in Indian country violated monitoring and reporting requirements and approximately 5% violated maximum contaminant level/treatment technologies.....
- Many Tribal Nations have no waste management program at all and use dumps or burn barrels as the primary method of waste disposal.....
- Tribal communities have higher incidences than other communities of certain diseases, such as diabetes, cardiovascular diseases and hypertension, obesity, gall-bladder disease, and dental disease.
- Age-adjusted death rates for the following causes were considerably higher than those for other population segments in 1995: alcoholism—627 percent greater; tuberculosis—533 percent greater; diabetes mellitus—249 percent greater; accidents—204 percent greater; suicide—72 percent greater, pneumonia and influenza—71 percent greater; and homicide—63 percent greater. Studies have shown a clear relationship between the use of traditional foods food and the health and well-being of tribal members, including:

²⁹⁷ See discussion at notes _____, *supra*.

²⁹⁸ GREAT LAKES REGIONAL COLLABORATION, Tribal Nations Issues and Perspectives, Version 1.0, April 26, 2005, p. 4:

- The improvement of diet and nutrient intake.
- The prevention of chronic diseases.
- The opportunities for physical fitness and outdoor activities associated with harvesting traditional foods.
- The opportunity to experience, learn, and promote cultural activities.
- The opportunity to develop personal qualities valued in tribal culture such as sharing, self-respect, pride, self-confidence, patience, humility and spirituality.

The scope of 19th Century *usufructuary* rights included a broad range of land use activities that the *Lac Courtes Oreille* litigation first attempted to catalogue.²⁹⁹ The

²⁹⁹ As the Court explained in *Lac Courte Oreilles III*, 653 F. Supp. 1420, 1424:

As of 1837 and 1842, the Chippewa exploited virtually every resource in the ceded territory. Among the mammals the Chippewa hunted at treaty time were white-tailed deer, black bear, muskrat, beaver, marten, mink, fisher, snowshoe hare, cottontail rabbit, badger, porcupine, moose, woodchuck, squirrel, raccoon, otter, lynx, fox, wolf, elk, and bison. Among the birds the Chippewa hunted were ducks, geese, songbirds, various types of grouse, turkeys, hawks, eagles, owls, and partridges.

Among the fish the Chippewa harvested were, in Lake Superior, whitefish, herring, chubs, lake trout and turbot; and, in-shore, suckers, walleye, pike, sturgeon, muskie, and perch.

The Chippewa also harvested a large number of plants and plant materials, including: box elder, sugar maple, arum-leaved arrow-head, smooth sumac, staghorn sumac, wild ginger, common milkweed, yellow birch, hazelnut, beaked hazelnut, nannyberry, climbing bitter-sweet, large-leaved aster, Philadelphia fleabane, dandelion, panicled dogwood, large toothwort, cucumber, Ojibwe squash, large pie pumpkin, gourds, field horsetail, bog rosemary, leather leaf, wintergreen, Labrador tea, cranberry, blueberry, beech, white oak, bur oak, red oak, black oak, corn, wild rice, Virginia waterleaf, shell bark hickory, butternut, wild mint, catnip, hog peanut, creamy vetchling, navy bean, lima bean, cranberry pole bean, lichens, wild onion, wild leek, false spikenard, sweet white water lily, yellow lotus, red ash, white pine, hemlock, brake, marsh marigold, smooth juneberry, red haw apple, wild strawberry, wild plum, pin cherry, sand cherry, wild cherry, choke cherry, highbush blackberry, red raspberry, large-toothed aspen, prickly gooseberry, wild black currant, wild red currant, smooth gooseberry, Ojibwe potato, hop, Virginia creeper, river-bank grape, red maple, mountain maple, spreading dogbane, paper birch, low birch, downy arrowwood, woolly yarrow, white sage, alternate-leaved dogwood, wool grass, great bulrush, scouring rush, sweet grass, Dudley's rush, marsh vetchling, sweet fern, black ash, balsam fir, tamarack, black spruce, jack pine, Norway pine, arbor vitae (white cedar), hawthorn, shining willow, sphagnum moss, basswood, cat-tail, wood nettle, slippery elm, and Lyall's nettle, poison ivy, winterberry, mountain holly, sweet flag, Indian turnip, wild sarsaparilla, ginseng, spotted touch-me-not, blue cohosh, speckled elder, hound's tongue, marsh bellflower, harebell, bush honeysuckle, red elderberry, snowberry, highbush cranberry, white campion, yarrow, pearly everlasting, lesser cat's foot, common burdock, ox-eye daisy, Canada thistle, common thistle, daisy fleabane, Joe-Pye weed, tall blue lettuce, white lettuce, black-eyed Susan, golden ragwort, entire-leaved groundsel, Indian cup plant, fragrant golden-rod, tansy, cocklebur, bunch berry, tower mustard, marsh cress, tansy-mustard, squash, wild balsam-apple, hare's tail, wood horsetail, prince's pine, flowering spurge, golden corydalis, giant puffball, wild geranium, rattlesnake grass, blue flag, wild bergamot, heal-all, marsh skullcap, white sweet clover, reindeer

scope of the exercise of these rights, according to the court, continues to exist throughout the entire ceded territory with the *possible* exception of “private land” that had been occupied by settlers *at the time of the treaty*, unless the exercise of *usufructuary* rights on private property was necessary for the *Anishinabe*, in which case the Court invited the *Anishinabe* to return to establish that the available public land was insufficient for their support.³⁰⁰

The findings of the federal District Court in *Lac Courte Oreilles* described the rights retained by the Lake Superior Band, including:

“the rights to all the forms of animal life, fish, vegetation . . . and the use of all methods of harvesting employed in treaty times and those developed since . . . [t]he fruits . . . may be traded and sold to non-Indians, employing modern methods of distribution and sale...to enjoy a modest living”³⁰¹

As part of the *Mille Lacs* treaty rights litigation in the 1990s, the Eighth Circuit, noted that “*usufructuary* rights reserved by the Band included the rights to harvest resources for commercial purposes, and were not limited to use of any particular techniques,

moss, northern clintonia, Canada mayflower, small Solomon's seal, star-flowered Solomon's seal, carrion flower, twisted stalk, large flowered bellwort, ground pine, Canada moonseed, heart-leaved umbrella-wort, yellow water lily, great willow-herb, evening primrose, Virginia grape fern, yellow ladies' slipper, rein orchis, adder's mouth, bloodroot, white spruce, common plantain, Carey's persicaria, swamp persicaria, curled dock, shield fern, female fern, sensitive fern, red baneberry, Canada anemone, thimble-weed, wild columbine, gold thread, bristly crowfoot, cursed crowfoot, purple meadow rue, agrimony, large-leaved aven, rough cinquefoil, marsh five-finger, smooth rose, high bush blackberry, meadow-sweet, steeple bush, goose grass, small cleaver, small bedstraw, prickly ash, balsam poplar, large toothed aspen, quaking aspen, crack willow, bog willow, pitcher-plant, butter and eggs, cow wheat, wood betony, mullein, moosewood, musquash root, cow parsnip, sweet cicely, wild parsnip, black snakeroot, Canada violet, American dog violet, speckled alder, sweet gale, goldthread, bluewood aster, horseweed, Canada hawkweed, fragrant goldenrod, shin leaf, sessile-leaved bellwort, slender ladies' tresses, and starflower.

The Chippewa harvested other miscellaneous resources, such as turtles and turtle eggs. The most important game for the Chippewa was the white-tailed deer.” *Id.* at 1426-28.

³⁰⁰ *Id.*

³⁰¹ *Lac Courte Oreilles v. Wisc.*, 653 F. Supp. 1420, 1435 (W.D. Wis. 1987).

methods, devices, or gear.”³⁰² Technological advances in weaponry, transport, husbandry, gathering and processing were all part of Anishinabe *usufructuary* property rights in the 19th Century and in the 21st.

IV. PROSPECTS FOR NATURAL RESOURCE CO-MANAGEMENT IN ALL OF NORTHERN MINNESOTA

Tribal members may be entitled to expressly retain U.S. treaty-guaranteed modern *usufructuary* rights,³⁰³ but tribal property rights do not exist in a vacuum and, as described in the LCO litigation, must co-exist with lawful state regulatory authority.

“[A]ny regulation imposed by the State must be necessary to ensure public health and safety, and the State could not impose its own regulations if the Chippewa could establish tribal regulations adequate to meet conservation, public health and public safety needs.”³⁰⁴

The Supreme Court came to a similar conclusion in the *Mille Lacs* opinion:

Although States have important interests in regulating wildlife and natural resources within their borders, this authority is shared when the Federal Government exercises one of its enumerated constitutional powers, such as treaty making. Here the 1837 Treaty gave the Chippewa the right to hunt, fish and gather in the ceded territory free of territorial and later state, regulation, a privilege that others did not enjoy. Today this freedom from state regulation curtails the State’s ability to regulate hunting, fishing and gathering by the Chippewa on the ceded lands. But this Court’s cases have also recognized that Indian treaty-based *usufructuary* rights do not guarantee the Indian’s ‘absolute freedom’ from state regulation We have repeatedly reaffirmed state authority to impose reasonable and non-discriminatory regulation on Indian hunting, fishing and gathering rights in the interest of conservation.³⁰⁵

In interpreting the reach of the *usufructuary* rights within the 1854 ceded territory, shortly after the *Mille Lacs* case opinion in the *Gotchnik* case, the Eighth Circuit held that

³⁰² *Mille Lacs Band of Chippewa Indians v. State of Minnesota.*, 124 F.3d 904, 911 (8th Cir. 1997).

³⁰³ *Id* and *Supra*

³⁰⁴ *Id.*

³⁰⁵ *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 204-205 (1999).

the off-reservation use of motorized craft and mechanized equipment was subject to prohibition in the Boundary Water Canoe Area,³⁰⁶ despite the undisputed right of *Anishinabe* to hunt, fish and gather in the “arrowhead” region, guaranteed by the 1854 Treaty and recognized by the Boundary Waters Act, itself.³⁰⁷ Anishinabe usufructuary rights do not prevail over all types of regulation, particularly when federal wilderness area is at issue, rather than state regulations.³⁰⁸

A model state-tribal co-management is the Great Lakes Indian Fish and Wildlife Commission (GLIFWC) was established by Wisconsin Anishinabe Bands as a co-management and licensing body to put into effect the court-ordered co-management

³⁰⁶ Art. I *et seq.*, 10 Stat. 1109; Act Oct. 21, 1978, § 4, 92 Stat. 1649.

³⁰⁷ *Id.* *United States v. Gotchnik*, 222 F.3d 506, 509 (8th Cir. 2000). The Court resolved the contradiction between section 17 of the Boundary Waters Act, which provides nothing in the Acts “shall effect” existing treaties, and section 4, which imposes extensive limitations on motorized transport in the BCA because, “*the Bands have presented no evidence, historical or otherwise, to suggest that the signatories [of the 1854 Treaty] adhered to a different understanding*” (emphasis added).

Of course, if evidence *does* exist that the Anishinabe made use of wagons, sailboats, railroads, steamboats, rifles, lanterns, metal implements or other “modern” 1854 transport, in the exercise of their usufructuary rights a contrary outcome might be required, but balanced against a broader area in which usufructuary rights may be exercised another calculus might obtain. As noted in both the *Lac Courte Oreilles* and *Mille Lacs* cases, modern means of transportation to *reach* areas in which usufructuary rights might be exercised was distinguishable from the use of modern equipment and techniques in the *exercise* of usufructuary rights to hunt, fish and gather.

However, the *Gotchnik* opinion firmly recognizes that interpretation of treaty language depends upon giving effect to the terms of the treaty as the Indian signatories would have understood them³⁰⁷ and Congressional abrogation of treaty rights requires: *clear evidence that Congress actually considered the conflict* between its intended action on the one hand and Indian treaty rights on the other, *and chose to resolve that conflict by abrogating the treaty.*³⁰⁷

Since the *Gotchnik* opinion was, as the court allowed, based on a *non-existent historical and factual record* as to what either the Anishinabe understood when signing the Treaty in 1854,³⁰⁷ and certainly no “clear evidence” that Congress intended to abrogate Anishinabe Treaty rights in enacting the Boundary Waters Act,³⁰⁷ the issue will have to be re-visited in future negotiations, or litigation, with respect to all of northern Minnesota, as well as the Boundary Waters.

³⁰⁸ However, see *United States v. Bresette*, 761 F. Supp. 658 (D. Minn. 1991) in which the court held that the usufructuary rights in the 1842 and 1854 Treaties encompassed the taking of migratory birds, including eagles, for their feathers for ceremonial purposes despite the limitations of the federal Migratory Bird Treaty Act, §§2-12, 16 U.S.C.A. §§703-711.

resource sharing concept required by the treaty-guarantees of the United States.³⁰⁹ In Minnesota, the *Fond du Lac* Band with *usufructuary* rights guaranteed in the 1795, 1825, 1826, 1837 Treaties, 1850 Executive Order, and in the 1854 Treaty ceded territory; the White Earth Band³¹⁰ and Leech Lake Bands,³¹¹ with *usufructuary* rights guaranteed in the 1795, 1825, 1826, 1837 Treaties, 1850 Executive Order and in the 1854 Treaty *unceded* territory west of the Treaty boundary, have opted for co-management systems that are either in operation or in the process of being established.

However, the question remaining in both Wisconsin and Minnesota for the 21st Century, with respect to the now well-established principle of treaty-guaranteed *usufructuary* property rights, will be the *scope* of those rights as related to land use, development and environmental issues. The late 20th Century saw environmental regulation and respect for healthy resource development emerge as a major issue, based largely on state and federal administrative regulation. Recognition of off-reservation *usufructuary* property rights requiring protection suggests that native people will have an increasingly important place at that table, when decisions are made, and income is distributed regarding wildlife harvesting and resource development. Indian Commerce Clause of the Constitution establishes a direct relationship between the federal government and Tribal Nations³¹² with respect to federal environmental regulation, and Congress has specifically provided for a tribal role in the Clean Water

³⁰⁹ See, note ____, *infra*

³¹⁰

³¹¹

³¹² See, The Great Lakes Collaboration

Act³¹³; Clean Air Act³¹⁴; Safe Drinking Water Act [Public Health Service Act]³¹⁵; and, the Comprehensive Environmental Response Compensation and Liability Act.³¹⁶

An example of this dual management in practice may be the dispute over a proposed mining operation in north central Wisconsin in which, perhaps for the first time since the days of early treaty negotiations, Wisconsin Anishinabe *usufructuary* property rights were part of the discussion in the siting of a mining operation in Crandon, Wisconsin and were a factor in the Environmental Protection Agency (EPA) Environmental Impact Statement (EIS):³¹⁷

Indian Trust Assets

Indian Trust Assets include on- and off-reservation issues about water, fishing, hunting, gathering, and other resources guaranteed by Treaty

³¹³ 33 U.S.C. sec. 1377

³¹⁴ 42 U.S.C. sec. 7474(c)

³¹⁵ 42 U.S.C. sec. 300j-11

³¹⁶ 42 U.S.C. sec. 9626

³¹⁷ 4.2.10 Indian Trust Assets

Indian Trust Assets include on- and off-reservation issues about water, fishing, hunting, gathering, and other resources guaranteed by Treaty rights... Water issues include impacts on Native American reserved water rights, on the Wolf River, contamination of surface and/or groundwater from a leak or spill, and other Treaty rights related to water. Fishing issues include impacts on subsistence, harvest and ceremonial use of fish and other aquatic resources, contaminants affecting fish and other aquatic resources, and other Treaty rights related to fishing, fish and other aquatic resources. Hunting issues include impacts on subsistence, harvest and ceremonial use of game animals, contaminants affecting game and other wildlife species, and other Treaty rights related to hunting and wildlife species. Gathering issues include impacts on subsistence, harvest and ceremonial use of wild rice, other plants, and medicines, contaminants affecting wild rice, other plants, and medicines, and other Treaty rights related to gathering wild rice, other plants, and medicines.

4.2.25 Wild Rice

Wild rice includes issues about contaminants and geochemistry, harvesting, water levels, and development from population growth. Contaminant and geochemistry issues include impacts from water quality degradation, heavy metal accumulating in the wild rice, and changes in surface water geochemistry of Rice Lake and Swamp Creek. Harvesting issues include impacts on wild rice yield and harvesting by the Sokaogon-Chippewa Mole Lake Band and other local Tribes that depend on a share of the rice for subsistence or for seed. Water level issues include impacts from fluctuating water levels in Rice Lake on wild rice production and survival. Development issues include indirect impacts on wild rice from population growth and associated housing, road building, and other development occurring outside the boundaries of the Mole Lake Reservation.

*rights**contamination of surface and/or groundwater from a leak or spill, and other Treaty rights related to water***contaminants affecting fish and other aquatic resources, and other Treaty rights related to fishing, fish and other aquatic resources***and other Treaty rights related to hunting and wildlife species***and other Treaty rights related to gathering wild rice, other plants, and medicines.*³¹⁸

Wild Rice

Wild rice includes issues about contaminants and geochemistry, harvesting, water levels, and development from population growth***. *Development issues include indirect impacts on wild rice from population growth and associated housing, road building, and other development occurring outside the boundaries of the Mole Lake Reservation.*³¹⁹

The impact of land use issues on the harvest of wildlife is not limited to the economic impact alone, in the EPA studies evaluating the impact on treaty-protected rights which extends to the entire treaty territory. Further, the social dimension, as destruction of the ability to exercise *usufructuary* property rights has devastated Anishinabe communities, must be considered, as well:

4.2.15 Socioeconomics

Socioeconomics includes issues about*** Native American community issues include impacts on social and economic systems, cultural, spiritual, well-being, and subsistence aspects of Native American life, racism in schools, loss or decline of wild rice production, and changes in utilities, housing, employment, and income during and after the project. ***³²⁰

Minnesota's Anishinabe people have been entitled to such a rigorous evaluation of the impact of John D. Rockefeller purchasing and developing the Mesabe Iron Range in the late 19th Century³²¹, under the Treaties of 1795, 1825, 1826, 1837, 1854,³²² the

³¹⁸ Id.

³¹⁹ Id.

³²⁰

³²¹

³²²

Executive Order of 1850³²³ and the verbal assurances of Alexander Ramsey in 1863.³²⁴

The Anishinabe are certainly entitled to such assurances in all of northern Minnesota, not just the “arrowhead,” after the *Lac Courte O’reilles* cases and *State of Minnesota v. Mille Lacs Band of Chippewa*, in the 21st Century.

Several early treaties permitted the mining of minerals, logging or other development, whether the United States gained title to the territory³²⁵ or not,³²⁶ but not *one* treaty prohibits the payment of royalties or fees,³²⁷ particularly if the payment is for diminution of *usufructuary* property rights, and the ability to exercise the “right to a modest living” from the land, which was the promise the United States made to gain title to the land in the first place. Royalty payments to the Anishinabe, as well as the Minnesota DNR, for timber harvest³²⁸ and mineral explorations rights would be consistent with the modern trend toward protecting property from “takings” by government without “due process,”³²⁹ which certainly describes what has happened with respect to the Anishinabe from 1795 to the present, with respect to United States government treaty-guaranteed *usufructuary* property rights in 1825 Treaty territory in Minnesota.

³²³

³²⁴

³²⁵ Treaty of 1826:

ARTICLE 3 - The Chippewa tribe grant to the government of the United States the right to search for, and carry away, any metals or minerals from any part of their country. But this grant is not to affect the title of the land, *nor the existing jurisdiction over it.*³²⁵

³²⁶

³²⁷ And, as noted earlier at note 311, the Anishinabe agreed to cede mining rights to the United States, but they did *not* agree to forego *compensation* for the either mineral depletion or diminution of their ability to exercise traditional *usufructuary* rights.

³²⁸ The question of proper allocation of timber and resource harvest on reservation is not a new issue and has its roots in the 19th century, see *Mole Lake Band, et al v. United States*, 126 Ct. Cl. 596, 1953 WL 6071 (Ct. Cl.)(1953)

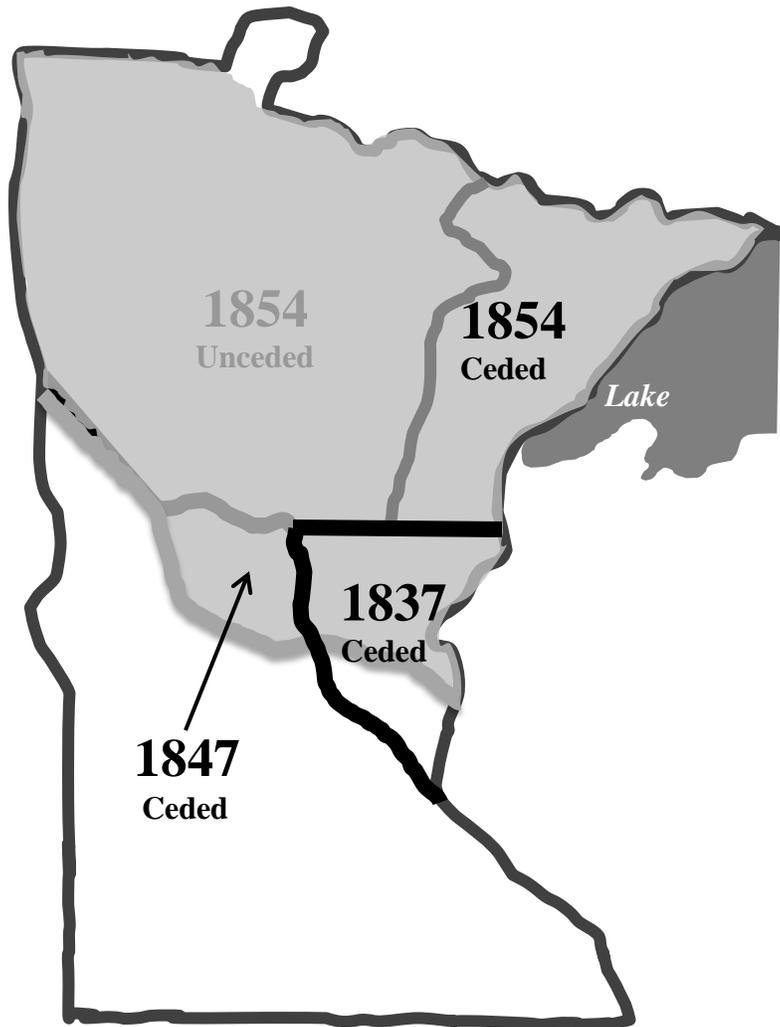
³²⁹

CONCLUSION

The unanimity of the Supreme Court in the *State of Minnesota v. Mille Lacs Band of Chippewa Indians* regarding treaty-guaranteed *usufructuary* property rights requires a re-examination of all of the treaties into which the Anishinabe of Minnesota entered with the United States. There is good reason to conclude that, after the clarification of *usufructuary* property rights analysis that the majority and dissenting opinions in *Mille Lacs* have brought to the question, the Anishinabe in Minnesota have long been guaranteed the same off-reservation *usufructuary* rights that have been recognized in northern Wisconsin since 1987, in Minnesota's arrowhead since 1987, and in the 1937 Treaty territory from Lake *Mille Lacs* to Wisconsin since 1999.

Moreover, either the joint resource management model in place in Wisconsin for more than 20-years, or the state-lease model that Minnesota has adopted, will probably be expanded to all of northern Minnesota in the near future. An open question will be, what is to be done about the lost *usufructuary* property benefits and lost income that northern Minnesota Anishinabe Bands *should* have been sharing since 1987, or at least 1999, which certainly runs into tens of millions, if not hundreds of millions of dollars. But, perhaps more importantly, as the Wisconsin post-LCO Environmental Impact Statements demonstrate, U.S. treaty-guaranteed Anishinabe *usufructuary* property rights have to be part of the equation when both on-reservation and off-reservation natural resources in all of northern Minnesota are developed or regulated, and the Anishinabe must be at the table when income for their use is allocated.

APPENDIX I



January 1, 1855



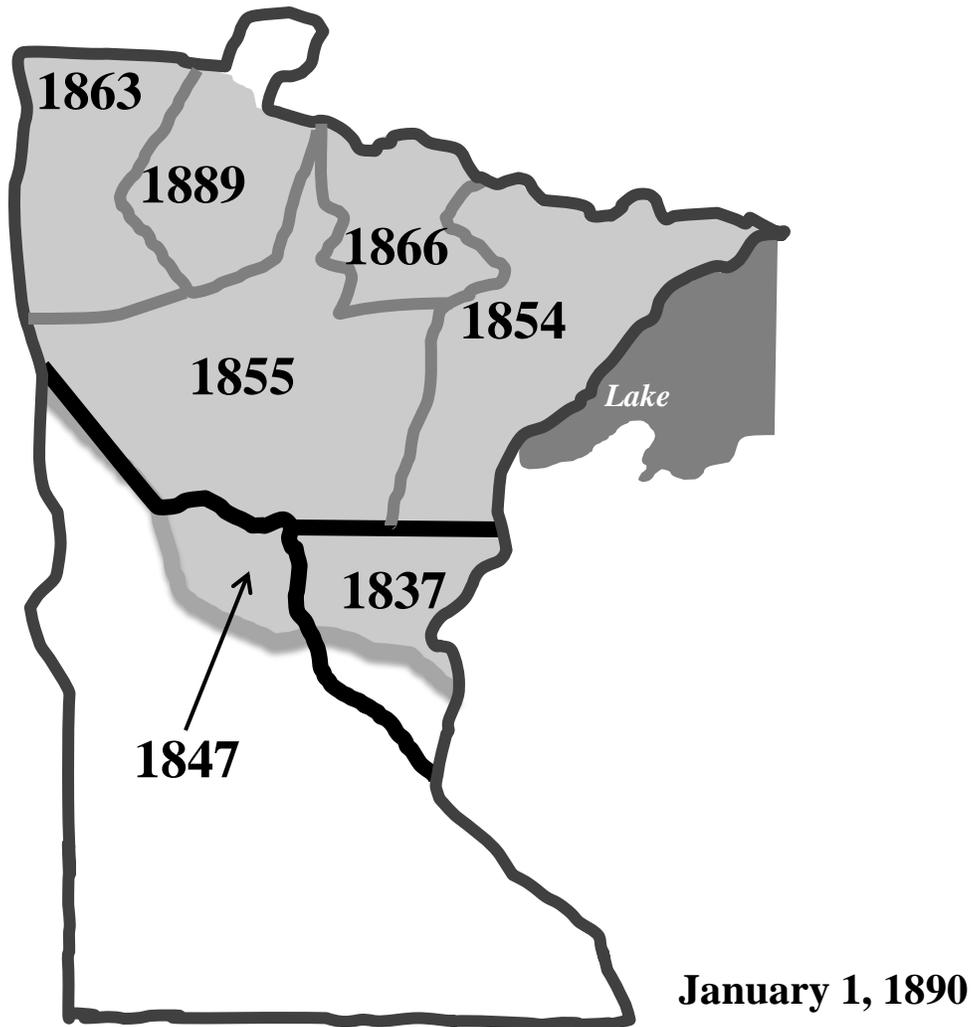
1825
Territory Unceded
 Treaty-guarantee:
usufructuary rights/
 sovereignty north of
 Dakota territory.

1837/1854
Territory Ceded
 Treaty-guarantee:
usufructuary rights
 retained to present.

1847
Territory Ceded
 Treaty-guarantee:
 "Indian
 nd" *usufructuary*
 rights not abrogated.

1854
Territory Unceded
 Treaty-guarantee:
 1825 *usufructuary/*
 other rights retained
 by Mississippi Band in
 territory "west of 1854
 Treaty boundary."

APPENDIX II



1855 → 1858 → 1863 → 1866 → 1889

Territory Ceded
Treaty-guarantee:
usufructuary rts
not abrogated

Minnesota
Statehood:
Treaties not
abrogated

Territory Ceded
Treaty-guarantee:
usufructuary rts
not abrogated/
promised verbally

Territory Ceded
Treaty-guarantee:
usufructuary rts.
not abrogated

Nelson Act.
Territory Ceded
Congress-guarantee:
usufructuary rts
not abrogated