

# STATE OF MINNESOTA IN COURT OF APPEALS

Case No. A14-0679

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Save Mille Lacs Sportsfishing, Inc.,  
Proper Economic Resource Management,  
Twin Pines Resort, Incorporated,  
Bill Eno and Fred Dally,

Petitioners,

vs.

Minnesota Department of Natural  
Resources,

Respondent.

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## REPLY BRIEF OF PETITIONERS IN SUPPORT OF DECLARATORY JUDGMENT

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- I. **The DNR's Record and Brief cite to no specific identifiable regulation or document that protects the intangible and tangible cultural heritages ~ protected under Article XIII, § 12 ~ concerning the Lake Mille Lacs region.**

The Respondent Minnesota Department of Natural Resources spends a considerable amount of time in its brief discussing its regulatory authority and its expertise regarding restrictions on the taking and possession of fish. But, as the DNR knows, there are two parts of the constitutional amendment at issue, Article XIII, § 12:

- Hunting and fishing and the taking of game and fish are a valued part of our *heritage* that shall be forever preserved for the people
- and*
- shall be managed by law and regulation for the public good.

Our concern, to which the DNR has no answer, is the first part — “our heritage.” Here, the constitutional amendment recognizes citizens rights to maintain, practice, and revitalize cultural traditions. Within the Lake Milles Lacs region this means that the political and economic communities that rely on fish is in fact a vital component of their cultures, traditions, and economic vitality. Meaning for instance, that reducing the access to fish would result in a loss of income, employment opportunities, and sense of community — elements of what we explain below of our intangible and tangible heritage protected and protectable under our state constitution. Yet, the DNR failed to identify what regulation or record documents identified the cultural heritages of the Lake Mille

Lacs region. In fact, the DNR brief relegated this discussion of the apparent obligation of the DNR Commissioner in its argument to a footnote. The DNR stated in its footnote, “The commissioner shall make *special provisions* for the management of fish and wildlife to *ensure recreational opportunities for anglers and hunters.*”<sup>1</sup> But, the DNR does not go beyond this point. The DNR chose not to go beyond this point because it would have led to the further point of identifying DNR regulations or DNR record documents pertaining to the non-Indian cultural heritages of the Lake Mille Lacs region – and there are none.

As this Court may well know, Lake Mille Lacs was once embroiled in treaty rights litigation between certain bands of Indians and the State regarding fishing and hunting rights in and around Lake Mille Lacs. This lawsuit does not challenge the ultimate settlement agreement between the parties or any other aspect of the agreement.<sup>2</sup> However, the agreement reflects the issue at hand. The agreement reflects the specific identification and preservation of the Indian’s intangible cultural heritage of harvesting fish from Lake Mille Lacs. “Intangible cultural heritage,” in a general sense, refers to any cultural phenomenon that does not assume a tangible form,<sup>3</sup> such as that which people practice in their daily lives<sup>4</sup> — “often described as the ‘spirit’ of a cultural group.”<sup>5</sup>

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<sup>1</sup> DNR Resp. Br. \*13 n.2 (Aug. 11, 2014).

<sup>2</sup> Save Mille Lacs Reply Br. Supp. App. 1.

<sup>3</sup> Sarah A. Garrott, *New Ways to Fulfill Old Promises: Native American Hunting and Fishing Rights as Intangible Cultural Property*, 92 Or. L. Rev. 571, 591 (2013) citing James A.R. Nafziger, *Cultural Law: International, Comparative and Indigenous* 614 (2010).

<sup>4</sup> *Id.* citing Richard Kurin, *Saveguarding Intangible Cultural History in the 2003 UNESCO Convention: A Critical Appraisal*, 56 Museum Int’l 66, 67 (2004).

<sup>5</sup> *Id.*

We contend that Article XIII, § 12 of the Minnesota Constitution, within the phrase “our heritage” is inclusive of all the intangible and tangible cultures that exist in the Lake Mille Lacs region.

Unlike what has been protected through the settlement agreement, the DNR has presented no regulatory protective process nor regulatory standard involving the constitutionally commanded protection of similar heritages for the non-Indian Lake Mille Lacs community. Indeed, it would appear that the duties of the DNR Commissioner to make “special provisions ... to ensure recreational opportunities for anglers...” is consistent with the preservation of all cultural heritages, specifically here, as it relates to the Lake Mille Lacs region.

It is from this vantage that we have complained that the DNR ignored applicable constitutional provisions of law.<sup>6</sup> As with the settlement agreement between the DNR and the affected bands of Indians, for Lake Mille Lacs, the DNR’s regulation of tangible assets — here, the fish — calls for a different paradigm to assure that the public trust of non-Indians is fulfilled, to honor community needs, to nurture the growth ~ defined and appropriate ~ to community fishing use patterns and to assure the regulatory effects of ordinary people related to the fishing industry are specifically identified and measured to invest in their homes, businesses, neighborhoods, communities and natural areas. These are the elements of the intangible cultural heritage of Lake Mille Lacs non-Indians and

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<sup>6</sup> See *e.g. Monk & Excelsior, Inc. v. Minnesota State Bd of Health*, 302 Minn. 502, 225 N.W.2d 821, 825 (1975); *Save Mille Lacs Princ. Br.* at 14 -15.

those that support the Lake Mille Lacs heritage not found in any DNR regulation or the DNR record documents here. While the DNR may profess an effort to discuss its regulatory limits to take fish on Lake Mille Lacs, the public inquires were directed to those restrictions, not to the non-Indian cultural heritage effects caused by the restrictions.<sup>7</sup> The DNR summarizes, “The DNR coordinates the taking of fish from Mille Lacs with several bands of Native Americans (“the Bands”) who hold treaty rights under the 1837 treaty....”<sup>8</sup> But, unlike for the Indian cultural heritage, the DNR’s brief and record documents do not identify non-Indian cultural heritages despite these cultural heritages also being constitutionally protected and, thus, in trust for the people.

Another way to approach this subject is a quick review of the DNR’s environmental protection criteria for an Environmental Assessment Worksheet (EAW) and an Environmental Impact Statement (EIS). An EAW, for instance, is a brief document prepared to rapidly assess the environmental effects which may be associated with a proposed project.<sup>9</sup> Rules identify mandatory EAW categories,<sup>10</sup> or state when they are discretionary,<sup>11</sup> and identify the categories an EAW must address.<sup>12</sup> Unlike DNR promulgated rules for an EAW, no such rules address the “heritage” protection demanded under Article XIII, § 12 of the Minnesota Constitution.

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<sup>7</sup> DNR Resp. Br. at 10.

<sup>8</sup> DNR Resp. Br. at 10.

<sup>9</sup> Minn. Stat. § 116D.04, subd. 1(c); Minn. R. 4410.1000, subp. 1.

<sup>10</sup> Minn. R. 4410.1000, subp. 2.

<sup>11</sup> Minn. R. 4410.1000, subp. 3.

<sup>12</sup> Minn. R. 4410.1200.

Similar rules exist for an EIS which is a more extensive review of a proposed project and its potential impact on the environment. Some of the listed criteria the EIS go beyond the immediate project impact to the environment. Considerations include for instance,

- the possible effects on the human environment;
- cumulative impacts;
- regional and statewide significance of the impacts and the degree to which they can be addressed; from a type of action are highly uncertain or involve unique or unknown risks;
- the degree to which governmental policies are affected the number or location of such projects or the potential for significant environmental effects; and
- the need to understand the long-term past, present, and future effects of a type of action upon the economy, environment, and way of life of the residents of the state.<sup>13</sup>

Again, no rules similar to the EIS have been promulgated as it relates to the protecting the fishing heritage of the Lake Mille Lacs region.

**II. Protection of indigenous heritage is no different than those protections granted by the constitutional amendment of heritage rights within the same affected region caused by government regulation.**

The DNR does not argue, and cannot here, that it has identified the heritage of the Lake Mille Lacs region to be preserved as it pertains to fishing. Managing fishing through limits does not identify the standards needed to create the balance between limitations for the “public good” and the heritage held in the “public trust.” We submit that what is the

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<sup>13</sup> Minn. R. 4410.3800



“heritage” of the American Indian in the Lake Mille Lacs region expressed through the litigation that ultimately resulted in a settlement agreement is akin to the constitutionally protected heritage the DNR must establish and consider for all others within the same region. As the U.S. District Court recognized the importance of Lake Mille Lacs to the Chippewa Indians ~ not only as a way of life but also as it pertained to its social, political, and economic development ~ so too must the DNR for all others heritages:

The area around Lake Mille Lacs was an ideal location for the Chippewa way of life because the lake was filled with fish and there were large maple sugar groves and wild rice lakes nearby. The Chippewa had a broad and detailed understanding of their environment and developed efficient methods of gathering natural resources. They also developed social and political systems to allocate the resources.

The largest economic and political unit of the Chippewa society was the band....<sup>14</sup>

The DNR points to no regulation and no rule that addresses or specifically states the need to consider the social, political, or economic impacts of its rule to limit fishing on Lake Mille Lacs to the regional community – inclusive of Indians and non-Indians.

We have reviewed the documents cited by the DNR to supports its contention that it considered the “recreational and economic impacts of the restrictions.”<sup>15</sup> The citations to the record are not impressive and non-supportive to the DNR’s position. No where is a regulation or rule cited as it relates to the intangible cultural impacts as noted above. One

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<sup>14</sup> *Mille Lacs Band of Chippewa Indians v. State of Minn.*, 861 F. Supp. 784, 791-92 (D. Minn. 1994) *aff'd*, 124 F.3d 904 (8th Cir. 1997) *aff'd sub nom. Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999).

<sup>15</sup> DNR Resp. Br. at 16.

set of documents reflect preferences but not the cultural heritage impacts as demonstrated with the DNR's identified document numbers 982-997. There is a significant difference. One is a wish; the other is an effect. Likewise, the DNR reference to document number 18108, which is to a chart reflecting a list regarding extended night fishing ban and other restrictions as to "pressure" and "kill" and a chart regarding "vulnerable biomass" for walleyes, is not cultural heritage analysis. And, the DNR provides no explanation as to how this relates to a specific regulation regarding heritage. Similarly, document number 5203, as with document numbers 982-997, provides no analysis of economic impact of any kind but non-factually based "opinion."<sup>16</sup> Like any other survey, it is meaningless without a basis and certainly no regulation is cited to reflect that the DNR must take any information gathered as a necessary element or criteria to reach such a conclusion.

As we noted before, an EIS, *as a regulatory necessity*, requires some formal review of issues related to regional impact and long-term past, present, and future effects upon the economy, environment, and way of life. These factors are considered without question as part of an EIS. But, the DNR in its brief points to no such regulation or record documents which addresses the constitutional mandate on the DNR to identify and review the impact of fishing rules on Lake Mille Lacs region cultural heritage. So, the DNR certainly has the

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<sup>16</sup> DNR documents 67-77 merely reflect individual inquires about certain fishing regulations. They are not a full-fledged consideration of the DNR regarding the impact to the cultural heritage of the Lake Mille Lacs region as to the community, economically, politically, or other traditional values of the non-treaty participants.

capability of analyzing heritage – as it might with an EIS – but rejects that it must do so under the Minnesota Hunting and Fishing Heritage Preservation Amendment.

### CONCLUSION

The DNR has not specifically identified any regulation that reflects a consideration and balancing of the intangible and tangible cultural heritages of the Lake Mille Lacs region of non-Indian treaty participants. The protections of fishing heritage are stated under Article XIII, § 12 of the Minnesota Constitution. The provision is in two parts. The DNR cannot claim an obligation as to only part of the provision, but must enact the whole. Therefore, this Court should issue a declaratory judgment in the broadest possible way to ensure the DNR in the future, when considering regulations affecting fishing on Lake Mille Lacs, is directed to apply the Minnesota Hunting and Fishing Heritage Preservation Amendment in whole, inclusive of all cultural heritages that exist in that region.

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