Self-Determination and Reconciliation: A Cooperative Model for Negotiating Treaty Rights in Minnesota

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Introduction

> [We] are willing to let you have [the] lands, but [we] wish to reserve the privilege of making sugar from the trees and getting [our] living from the Lakes and Rivers, as [we] have done heretofore . . . . It is hard to give up the lands. They will remain, and cannot be destroyed . . . . You know we cannot live deprived of our lakes and rivers; there is some game on the lands yet; and for that reason also we wish to remain upon them, to get a living. The Great Spirit above, made the Earth, and causes it to produce, which enables us to live.[1]
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> Aish-ke-bo-gi-ko-she (Flatmouth, Ojibwe Chief, Pillager Band, speaking on behalf of the Chiefs at the July 29, 1837 Treaty with the Chippewa[2] Conference).

Federal Native American policy has been markedly inconsistent,[3] but throughout, treaties have remained the nucleus of the

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1. Journal of Proceedings, Treaty of July 29, 1837 (from the notes of Verplanck Van Antwerp, Secretary of the Treaty Council) (cited in United States v. Bouchard, 464 F. Supp. 1316, 1323 (W.D. Wis. 1978)).

The Ojibwe did reserve hunting, fishing, and gathering rights in the Treaty with the Chippewa, July 29, 1837, 7 Stat. 536.

2. This tribe is the Ojibwe, sometimes spelled *Ojibwa* or *Ojibway*. Treaties, however, used the name *Chippewa*; consequently, treaty rights attach to the "Chippewa." *Ojibwe* is used throughout the article except in treaty, book, or case names. *Native American* is used with the same exceptions and the recognition that each tribe is a distinct cultural and legal entity.

3. Native Americans have experienced several distinct and contradictory federal policy periods. 1) In the mid-1800s, tribes were moved to permanent reservations. 2) In the late 1800s, assimilation efforts were expressed in the General Allotment (Dawes) Act of 1887, ch. 119, 24 Stat. 388 [hereinafter Allotment Act] which allotted communal tribal lands to individual Native Americans. The Allotment Act reduced Native American-held land from 138 million acres to 48 million acres, half of which was arid or semi-arid. 3) In 1934, the Indian Reorganization (Wheeler-Howard) Act, 25 U.S.C. § 461 (1988) acknowledged that tribes should exist indefinitely, protected the remaining tribal land, and encouraged tribal self-government. 4) In the late 1940s and early 1950s, during termination and relocation of tribes, the United States terminated its relationship with 109 tribes and extended state jurisdiction into tribal territory. Pub. L. No. 280, 67 Stat. 588 (codified as

federal government's legal relationship with Native Americans.[4] Treaties also functioned as peace-keeping devices between Native Americans and settlers.[5] Initially, tribal sovereignty and military power allowed Native Americans to negotiate early treaties from a position of strength. However, tribal bargaining power weakened throughout the 1800s, due in part to an increased federal military presence. As a result, the federal government negotiated treaties against a backdrop of diminishing tribal power.[6] Consequently, later treaties encroached upon tribal autonomy.[7] Although treaties transferred over two billion acres of Native American land to the United States,[8] Native Americans of the Great Lakes Region and the Northwest reserved[9] fishing, hunting, and gathering rights on some of this ceded land.

Part I of this article discusses the importance of reserved fishing rights to the Ojibwe and the controversy surrounding the recognition and exercise of Ojibwe treaty rights. Part I also notes the emergence of alternative dispute resolution (ADR) in negotiating treaty rights disputes nationwide and in Minnesota. Part II discusses the general rationale underlying ADR and finds that power imbalances are an unexamined but critical weakness of ADR. Treaty rights agreements are flawed because expansion of state interests into tribal territory has diminished tribal self-determination and has effected a power imbalance between the negotiating parties. Moreover, Minnesota's benevolence cannot substitute for self-determination in negotiations; without self-de-

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amended at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-26, 28 U.S.C. § 1360 (1982 and Supp. III) [hereinafter Public Law 280]. 5) In the 1960s, federal policy returned to tribal self-determination. The Indian Civil Rights Act of 1968, 25 U.S.C. § 1301 (1988) amended Public Law 280, allowing retrocession of Public Law 280 jurisdiction and requiring tribal consent for further assertions of state jurisdiction. 25 U.S.C. §§ 1321-22, 1326. Presidents Nixon and Reagan repudiated termination and stressed tribal autonomy.

For an expanded discussion, see Felix S. Cohen's Handbook of Federal Indian Law 47-206 (R. Strickland ed. 1982) [hereinafter Handbook of Federal Indian Law] and William C. Canby, American Indian Law in a Nutshell 9-31 (2d ed. 1988) [hereinafter American Indian Law].

4. The President makes treaties; the Senate ratifies treaties with a two-thirds vote. U.S. Const. art. II, § 2, cl. 2. Under the Supremacy Clause, treaties preempt conflicting state laws. U.S. Const. art. VI, § 2.

5. William C. Canby, *The Status of Indian Tribes in American Law Today*, 62 Wash. L. Rev. 1, 2 (1987).

6. Handbook of Federal Indian Law, *supra* note 3, at 69.

7. *Id.* at 47-48.

8. *Id.* at 48.

9. Treaty fishing rights are "not a grant of rights to the Indians, but . . . a reservation of [rights] not granted." United States v. Winans, 198 U.S. 371, 381 (1905). For a discussion of the origin of treaty rights, see Handbook of Federal Indian Law, *supra* note 3, at 441-46.

termination, benevolence becomes paternalism. Part III concludes that even if Minnesota will not recognize Ojibwe treaty rights, the Mille Lacs Band is likely to establish treaty rights through litigation. Part IV urges cooperation and reconciliation and presents a mutually beneficial cooperative model wherein Minnesota would accept the Ojibwe Bands' treaty rights and the Ojibwe Bands would accept Minnesota Department of Natural Resources expertise in managing resources on ceded land. The proposed model will cooperatively resolve resource management conflicts on ceded land and could develop into an evolved model for resolving future tribal-state conflicts. Such a cooperative venture will succeed because it is future-oriented, adds clarity to the Minnesota-Ojibwe treaty relationship, encourages non-acrimonious conflict management, and practices reciprocity. Part V suggests the cooperative venture will foster reliable behavior, erode racism and status hierarchy,[10] and lessen political unrest.

Part I

A. Fishing Rights:[11] *Significance and Controversy*

Fishing rights have enormous cultural and economic significance to Native Americans. The Supreme Court recognized the importance of fish to the Northwestern tribes as "not much less necessary to the existence of the Indians than the atmosphere they breathed."[12] The Court has held that these important treaty fishing rights aren't easily abrogated,[13] include the right to fish commercially,[14] and, if taken, are compensable.[15]

In the Great Lakes region, fish and fishing are integral to the Ojibwe totemic system, religion, and diet; fishing also influenced the geographical selection of Ojibwe reservations. The Ojibwe

10. The author defines status hierarchy as the rigid, socioeconomic stratification of identifiable groups. The status hierarchy reduces interaction among groups, which fosters alienation and maintains the status quo. *See infra* notes 202-206 and accompanying text.

11. This article initially discusses treaty rights within the context of fishing rights because public attention and litigation focuses on fishing rights. This does not diminish the importance of the rights to hunt game, gather wild rice, and collect maple sap. Later references to *treaty rights* include these rights.

12. *Winans*, 198 U.S. at 381.

13. Menominee Tribe v. United States, 391 U.S. 404, 412-13 (1968). Hunting and fishing rights survived the termination of federal-tribal relations. *See id.*

14. Dep't of Game v. Puyallup Tribe, 414 U.S. 44, 48 (1973); Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin, 653 F. Supp. 1420, 1435 (W.D. Wis. 1987).

15. *Menominee*, 391 U.S. at 413.

were known in their native tongue as "Great Lake Men."[16] According to Ojibwe oral history, the ancient totemic system is the first division of Ojibwe kindred, and this totemic system stems from six beings who emerged from "the great water."[17] The first being to emerge was the head of the clan representing all six fish totems.[18] Ojibwe Bands procured food by fishing[19] and also traded fish with early settlers.[20] The Ojibwe settled near lakes and rivers[21] and all Minnesota reservation sites were selected from lands that encompass or border lakes or rivers. Thus, the Ojibwe culture is intrinsically linked to water rights and fishing.

Although treaty rights are held in definite geographic boundaries based on aboriginal title,[22] reserved treaty rights are on lands ceded to the United States and are not part of Indian Country.[23] Consequently, state, tribal, and private interests are at stake in the

16. Great Lakes Indian Fish and Wildlife Comm'n, A Guide to Understanding Chippewa Treaty Rights 13 (1989) [hereinafter Chippewa Treaty Rights].

17. William W. Warren, The History of the Ojibway People 43-44 (1984) (originally published as: History of the Ojibways in 1885, based upon traditions and oral statements (Collections of the Minnesota Historical Society, v. 5)).

18. Aw-aus-e, the first being to emerge from the great water, heads the Aw-aus-e Clan. The fish totems of the Aw-aus-e clan are: Man-um-aig (Catfish); Kenovshay (Pike); Numa-hin (Sucker); Numa (Sturgeon); Ude-Kumaig (Whitefish); and Nebaun-aub-ay (Mermen). The Aw-aus-e Clan also claims the Me-she-num-aig-way (analogous to the Biblical Leviathan), a spirit in the sacred Me-da-we rite. *Id.*

19. *Id.* at 40; *see also* Harold Hickerson, *Ethnohistory of Chippewa of Lake Superior*, in Chippewa Indians III 146 (David Agee Horr ed. 1974) [hereinafter *Lake Superior Chippewa*]; Harold Hickerson, *Ethnohistory of Chippewa in Central Minnesota*, in Chippewa Indians II 202 (David Agee Horr ed. 1974) [hereinafter *Central Minnesota Chippewa*]; Harold Hickerson, *Ethnohistory of Mississippi Bands and Pillager and Winnibigoshish Bands of Chippewa*, in Chippewa Indians IV 247 (David Agee Horr ed. 1974) [hereinafter *Mississippi Chippewa*] (all three volumes are from the Garland American Indian Ethnohistory Series).

20. *Lake Superior Chippewa*, *supra* note 19, at 40, 123, 126; *Central Minnesota Chippewa*, *supra* note 19, at 76; *Mississippi Chippewa*, *supra* note 19, at 88.

21. In the 1800s, the Ojibwe settled near their fisheries. *Lake Superior Chippewa*, *supra* note 19, at 144; *Central Minnesota Chippewa*, *supra* note 19, at 203; *Mississippi Chippewa*, *supra* note 19, at 293. Rivers and lakes also provided wild rice beds, a gathering site for game, and transportation routes.

22. Aboriginal title is based on use and occupancy. Handbook of Federal Indian Law, *supra* note 3, at 442-43.

23. Indian Country is defined by statute as:

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and, (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151 (1982). Thus, Indian Country covers more territory than reservation lands created by treaty or statute; it includes off-reservation Native American communities.

treaty rights controversy.[24] Private interest groups of sportsmen, resort owners, and equal rights advocates have organized either to oppose or support treaty rights.[25] Although private interest groups continue to oppose treaty rights on constitutional[26] and other grounds, courts have consistently upheld treaty rights.[27] Since courts have also determined that treaty rights are held in common with state citizens,[28] who will manage the commonly held resources becomes an issue. These resource management issues[29]

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24. Groups opposing treaty fishing rights express concern over the clouding of property titles, resource depletion, and constitutional equal protection problems. *See infra* notes 26, 29.

25. Groups opposing treaty rights are primarily located in northern border states, although Nebraska and New Mexico also have local groups. Citizens Equal Rights Alliance (CERA), a national umbrella organization, has a 22 state membership. CERA's purpose is to "change . . . Federal Indian Policies and laws [to] . . . assure equal rights for all citizens . . . ." Citizens Equal Rights Alliance, Membership Brochure and Purpose Statement. In Minnesota, the White Earth Equal Rights Committee and Totally Equal Americans contest treaty rights; in Wisconsin, the groups opposing treaty rights include Protect Americans Rights and Resources (PARR) and Stop Treaty Abuse, Inc. (STA). STA marketed "Treaty Beer," promising the proceeds to candidates favoring treaty abrogation.

Citizens groups supporting treaty rights in Wisconsin include Witness for Non-Violence and Traditional Rights; Wisconsin Greens; and HONOR. Chippewa Treaty Rights, *supra* note 16, at 14-16.

26. Because the United States made Native Americans citizens in 1924, 8 U.S.C. § 1401(b)(1989), state citizens argue they are denied equal protection as similarly situated citizens. The Supreme Court emphatically rejected the equal protection argument in Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 680-83 (1979).

27. *See infra* note 110 and accompanying text.

28. Under the Pacific Northwest treaties, fishing rights are held in common with state citizens. Treaty with the Nisquallys, Puyallups, Steilacooms, Squaksins, S'Homamish, Steh-chas, T'Peeksins, Squi-aitls and Sa-heh-wamish, Dec. 26, 1854, art. 3, 10 Stat. 1133. Unlike the Northwest treaties, the treaties with the Ojibwe do not state that treaty rights are to be held in common with state citizens. *See, e.g.*, Treaty with the Chippewa, July 29, 1837, art. 5, 7 Stat. 536; Treaty with the Chippewa, September 30, 1854, art. 11, 10 Stat. 1109. However, a Wisconsin federal district court ruled that the Ojibwe do hold treaty rights in common with state citizens. United States v. Bouchard, 464 F. Supp. 1316, 1338 (W.D. Wis. 1978), *rev'd on other grounds sub nom.* Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt, 700 F.2d 341 (1987).

29. Actually, treaty game harvests are small. For example, the Great Lakes Indian Fish and Wildlife Commission reports the 1989 Wisconsin tribal off-reservation walleye harvest at 16,053 fish; the 1989 estimated sports walleye harvest was 839,000. The 1988 Minnesota tribal deer harvest under a 1988 Treaty Agreement, *see* infra notes 37-40 and accompanying text, was 147 deer; the sports harvest was 31,053. Chippewa Treaty Rights, *supra* note 16, at 5.

Nevertheless, fishing and hunting enthusiasts fear a "tragedy of the commons" which arises when a commonly held resource is unregulated. The costs of depleting the resource are ignored by the resource consumer because there is no incentive to conserve, but there is an incentive to quickly and efficiently exploit the resource before others do so. Private property concepts internalize detrimental over-consumption. *See generally* Garrett Hardin, *The Tragedy of the Commons*, 162 Science 1243 (1968); Harold Demsetz, *Toward a Theory of Property Rights*, 57 Am. Econ.

have spurred protests at fishing sites in Wisconsin; the protests exposed tribal members to physical and verbal abuse and blatant racism.[30] These resource management issues require extensive litigation even after treaty rights are established, in order to define the scope of the treaty rights.[31]

Rev. 347 (1967). *But see* Annette Baier, *Trust and Anti-Trust*, 96 Ethics 231, 243 (1986). Baier asserts that holding "common goods" is "the best reason for confidence in another's good care of what one cares about." *Id.*

30. Tribe members were subjected to such abuse that Judge Crabb wrote, "[h]arrassment has become a fact of life for [tribal members]." Lac Courte Oreilles Band of Lake Superior Chippewa v. Wisconsin, 707 F. Supp. 1034, 1054 (W.D. Wis. 1989). Racist insults at landing sites are shocking, and include: "Save two walleye, spear a pregnant squaw." Lac du Flambeau Band of Lake Superior Indians v. Stop Treaty Rights Abuse—Wisconsin, Inc., No. 31-C-117-C, slip op. at 5 (W.D. Wis. Mar. 15, 1991). Posters in bars in Northern Wisconsin degrade and threaten the Ojibwe. One poster advertised, "[h]elp wanted: Small Indians for mud flaps. Must be willing to travel." *Id.* Another poster appeared prior to the 1987 spearing season depicting a close up of a large revolver pointed directly outward with the slogan in large letters—"SPEAR. . .THIS!!!" Chippewa Treaty Rights, *supra* note 16, at 15.

As a result of stone throwings, threats, racial and sexual slurs, minor batteries, damage to Ojibwe vehicles, and the creation of life-threatening water turbulence where the Ojibwe fished, Judge Crabb issued an injunction barring any interference with tribal members exercising fishing rights. *Lac du Flambeau*, No. 81-C-117-C, slip op. at 4, 15-16.

31. Major treaty fishing rights litigation in Washington began as early as 1905 in *Winans* and has been quieted by negotiation strategies. In Wisconsin, major litigation began as early as 1968 in *Menominee* and continues today. In 1983, the Seventh Circuit established treaty rights in Wisconsin under the 1837 and 1842 Treaties with the Chippewa. Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt, 700 F.2d 341 (7th Cir.), *cert. denied sub nom.* Besadny v. Lac Courte Oreilles Band of Lake Superior Chippewa Indians, 464 U.S. 805 (1983). However, 13 further court decisions were needed to resolve procedural questions, define the scope of the treaty rights, and the scope of state regulation. Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin, 595 F. Supp. 1077 (W.D. Wis. 1984); Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin, 760 F.2d 177 (7th Cir. 1985); Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin, 653 F. Supp. 1420 (W.D. Wis. 1987); Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin, 663 F. Supp. 682 (W.D. Wis. 1987); Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin, 116 F.R.D. 608 (W.D. Wis. 1987); Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin, 668 F. Supp. 1233 (W.D. Wis. 1987); Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin, 829 F.2d 601 (7th Cir. 1987); Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin, 686 F. Supp. 226 (W.D. Wis. 1988); Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin, 707 F. Supp. 1034 (W.D. Wis. 1989); Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin, 740 F. Supp. 1400 (W.D. Wis. 1990); Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin, 749 F. Supp. 913 (W.D. Wis. 1990); Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin, No. 74-C-313C (W.D. Wis. 1991); Lac du Flambeau Band of Lake Superior Indians v. Stop Treaty Rights Abuse—Wis., Inc., No. 81-C-117-C (W.D. Wis. 1991) (granting an injunction preventing interference with tribal members exercising treaty fishing rights).

B. *Negotiating the Exercise of Treaty Rights*

Tribes and states seek alternatives to this costly and divisive litigation. The Executive Director of the Native American Rights Fund envisions a decreased need for litigation and an increased need for alternative dispute resolution as citizens are familiarized with established treaty rights.[32] Currently, negotiated agreements are resolving Native American water rights conflicts in the western United States.[33] In addition to negotiating agreements that resolve present day rights disputes, Native Americans serve on a policy board in Washington state that advised state policymakers on regulatory matters.[34]

The state of Minnesota and Ojibwe Bands holding reserved treaty rights have used negotiated agreements innovatively in treaty rights disputes.[35] Minnesota's 1973 agreement [hereinafter 1973 Agreement] with the Leech Lake Reservation spurred congressional consideration of the Tribal-State Compact Act of 1978.[36] Minnesota's settlement of treaty rights in 1988 [hereinafter 1988 Agreement] under the 1854 Treaty with the Chippewa[37] was the first successful tribal-state agreement to resolve a hunting and

32. John E. Echohawk, *Negotiation: Crucial to Healing*, 8 Consensus 2 (1990). *Consensus* devoted its October 1990 issue to Alternative Dispute Resolution, "A New Kind of Justice for Native Americans." *Consensus*, published by The Public Disputes Network, Program on Negotiation at Harvard Law School, "spotlight[s] cases of successful dispute settlement . . . . to encourage the use of [alternative dispute resolution] techniques . . . ." *Id.*

33. *See* John Folk-Williams, *The Use of Negotiated Agreements to Resolve Water Disputes Involving Indian Rights*, 28 Nat. Resources J. 63 (1988). (Folk-Williams summarizes key problems and offers process suggestions for those negotiating resolutions to Native American water rights cases.)

34. *See infra* notes 160-165 and accompanying text.

35. In 1973, following the filing of Leech Lake Band of Chippewa Indians v. Herbst, No. 3-69 Civ. 65 (D. Minn. filed Jan. 25, 1972), Minnesota and the Leech Lake Band negotiated an on-reservation agreement that developed and jointly enforced a tribal conservation code. *See* Consent Judgment at 7-8, 15-16, Leech Lake Band of Chippewa Indians, No. 3-69 Civ. 65 (D. Minn. June 18, 1973). After the filing of Grand Portage Band of Chippewas of Lake Superior v. Minnesota, Civ. No 4-85-1090 (D. Minn. filed Aug. 20, 1985), Minnesota and three Ojibwe Bands negotiated a similar agreement covering off-reservation land ceded under the 1854 Treaty with the Chippewa. The ceded land roughly comprises the arrowhead region of northeastern Minnesota bordering Lake Superior. Memorandum of Agreement, Grand Portage Band of Chippewa of Lake Superior v. Minnesota, Civ. No. 4-85-1090 (D. Minn. filed Feb. 2, 1988).

36. The Tribal-State Compact Act was not enacted. The Act encouraged jurisdiction and regulatory agreements between states and tribes, subject to Department of Interior approval and provided that the agreements were mutually voidable. *See* Federal Indian Law, *supra* note 3, at 381 n.8, 11. *See also* Rachal San Kronowitz, Joanne Lichtman, Steven Paul McSloy & Matthew G. Olsen, *Toward Consent and Cooperation: Reconsidering the Political Status of Indian Nations*, 22 Harv. C.R.-C.L. L. Rev. 507, 584-86 (1987).

37. Treaty with the Chippewa, Sept. 30, 1854, 10 Stat. 1109.

fishing treaty rights dispute on ceded land without protracted litigation.[38] Minnesota negotiated the 1988 Agreement to "avoid the racial tensions, enmities, and deleterious economic impacts when Indian people have substantially greater rights to harvest fish and game than do their non-Indian neighbors."[39] The 1988 Agreement pays the Fond du Lac, Grand Portage, and Bois Forte Bands to forbear the exercise of hunting, fishing, and gathering treaty rights and requires the Bands to write a tribal conservation code with Minnesota Department of Natural Resources (MDNR) approval.[40] On July 1, 1989, six days after the federal court approved the agreement, the Fond du Lac Band exercised a one-year option to leave the agreement. At this time, Minnesota does not formally recognize Ojibwe treaty rights,[41] yet some Bands are paid to forbear exercising treaty rights under the 1988 Agreement. Further, the forbearing Bands' conservation code extends, with MDNR approval, game harvest beyond MDNR regulations. Minnesota's treaty rights situation creates a dilemma; Minnesota does not accept treaty rights, yet recognizes them *de facto*.

To compound the dilemma, Minnesota now faces treaty rights litigation under a new treaty with another Band. In August 1990, the Mille Lacs Band of Ojibwe filed suit,[42] asserting treaty rights established by the Seventh Circuit Court of Appeals[43] in Wisconsin under the 1837 Treaty with the Chippewa[44] [hereinafter 1837 Treaty]. Minnesota claims the Mille Lacs Band's 1837 Treaty rights were expressly terminated by the Treaty of February 22,

38. Minnesota Attorney General's Office, 1854 Treaty Settlement Briefing Paper (September 9, 1988, revised May 3, 1990) [hereinafter Treaty Briefing Paper].

39. *Id.*

40. Grand Portage Band of Chippewas of Lake Superior v. Minnesota, Civ. No. 4-85-1090, slip op. at 4 (D. Minn. June 8, 1988) (Memorandum and Order). Because the MDNR approves the Band's code, it is not surprising that the Band's conservation code varies only slightly from MDNR regulations in terms of method of harvest, length of season, and game harvest limits.

41. "[Minnesota] does not waive any defenses or arguments it may have with regard to legal rights under the 1854 Treaty . . . . The . . . Bands agree to forbear the exercise of certain rights that *they* claim are reserved by the 1854 Treaty . . . ." Memorandum of Agreement at 6-7, Grand Portage Band of Chippewas of Lake Superior v. Minnesota, Civ. No. 4-85-1090 (D. Minn. June 8, 1988) (emphasis added).

42. The Mille Lacs Band claims the following damages: "confiscation of personal property; fines and other monetary penalties; incarceration; and the imposition of state licence fees" resulting from arrests of Band members exercising treaty rights. Complaint, Mille Lacs Band of Chippewa Indians v. Minnesota, (Civ. No. 4-90-605) (D. Minn. filed August, 1990).

43. Lac Courte Oreilles Band v. Voigt, 700 F.2d 341 (7th Cir. 1983). The 1837 Treaty covers a large area in northwestern Wisconsin and extends into central Minnesota approximately fifty miles. For a detailed map, see United States v. Bouchard, 464 F. Supp. 1316, 1362-63 (W.D. Wis. 1978).

44. Treaty with the Chippewa, July 29, 1837, 7 Stat. 536.

1855, between the United States and the Mississippi Bands of the Chippewa[45] [hereinafter 1855 Treaty]. Alternatively, Minnesota claims President Zachary Taylor's 1850 removal order extinguished the Mille Lacs Band's 1837 Treaty rights.[46] Minnesota also alleges that the Seventh Circuit's recognition of treaty rights under the 1837 Treaty has no value as precedent in Minnesota.[47] Although the Mille Lacs Band considers the 1988 Agreement inadequate,[48] a negotiated agreement similar to the 1988 Agreement could settle the Mille Lacs Band's 1837 Treaty rights claim.

Minnesota has three choices: continue the treaty rights dilemma by purchasing forbearance of treaty rights it does not recognize; pursue costly and divisive litigation; or escape the treaty rights dilemma by accepting Ojibwe treaty rights and negotiating resource management or forbearance agreements with the Ojibwe on a more equal basis.

Part II

A. Alternative Dispute Resolution (ADR): The Problem of Unequal Negotiating Strength and the Need for Self-Determination

ADR has grown in reaction to an apparent litigation explosion[49] that imposes costs on both the tax-supported judicial system and the individual parties.[50] Moreover, litigation stresses litigants psychologically and burdens judicial administration.[51] Congested dockets and the 1983 revision of Rule 16 of the Federal Rules of Civil Procedure encourage judges to settle cases.[52] However, en-

45. Answer at 3-5, *Mille Lacs Band* (Civ. No. 4-90-605); *see also* Treaty with the Chippewa, Feb. 22, 1855, 10 Stat. 1165.

46. Answer at 3-5, *Mille Lacs Band* (Civ. No. 4-90-605).

47. *Id.*

48. Telephone interview with Anita Fineday, co-counsel for the Mille Lacs Band (November 20, 1990).

49. For contrasting views on the nature and extent of the litigation explosion see Marc Galanter, *Reading the Landscapes of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. Rev. 4 (1983) (questioning the extent of the burden of increased lawsuit filings) and Richard Posner, The Federal Courts: Crisis and Reform 76-77 (1985) (noting the increase in federal caseload growth without a sociological explanation like Prohibition litigation in the 1920s and 1930s).

50. *But see* David M. Trubek, Austin Sarat, William L. F. Felstiner, Herbert M. Kritzer & Joel B. Grossman, *The Costs of Ordinary Litigation*, 31 UCLA L. Rev. 72, 123 (1983) (an empirical study suggesting most ordinary litigation is cost effective for litigants).

51. *But see id.* (even though the study was "unable [to] fully . . . assess the costs . . . of litigation from a social point of view . . . . [the authors] doubt whether the system is in crisis").

52. Rule 16 governs pretrial conferences. After an empirical study found judi-

couraging judicial involvement in settlement may compromise judicial ability to adjudicate fairly.[53] Beyond the obvious economic, social, and jurisprudential concerns lies the fundamental question: can ADR produce equitable results?[54]

Institutionalizing and routinizing settlement wrongly assumes equal power between the parties.[55] A power imbalance between negotiating parties outside of the adjudicative process, although critical, is largely ignored in negotiation analysis.[56] Instead, negotiation analysis traditionally focuses on quality of participation.[57] However, before considering the quality of participation, parties must be equally empowered through autonomy and self-determination.[58] Like many negotiated agreements, a negotiated agreement between the Mille Lacs Band and the State of Minnesota wrongly assumes equal power and self-determination between the parties. Presently, Minnesota has negotiating leverage over the Ojibwe by virtue of its superior economic resources and its increasing influence in Indian Country. This power imbalance suggests that any negotiated settlement between the Mille Lacs Band and Minnesota may be unfair and could reinforce social inequities.[59]

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cial control of litigation helped resolve litigation with speed and economy, Rule 16 was rewritten in 1983, expressly adding settlement discussion to pretrial conferences in Rule 16(a)(5) and 16(c)(7). Fed. R. Civ. P. 16(c) advisory committee's note.

53. Judith Resnick, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. Chi. L. Rev. 494, 548 (1986); *see also* Judith Resnick, *Managerial Judges*, 96 Harv. L. Rev. 376, 380 (1983).

54. *See generally* Richard L. Abel, *The Contradictions of Informal Justice*, in The Politics of Informal Justice 267 (Richard L. Abel ed. 1982) (examining informalism's repressive and liberating aspects).

55. Owen Fiss, *Against Settlement*, 93 Yale L.J. 1073, 1076 (1984).

56. *Id.* (disputes may not be between equals, but between a large corporation and a worker, or between a city and a racial minority); Frederick R. Anderson, *Negotiation and Informal Agency Action: The Case of Superfund*, 1985 Duke L.J. 261, 326 n.240 (discussing the problem of self-determination and relative power and influence during negotiations); *see also* Joel F. Handler, *Dependent People, the State, and the Modern/Postmodern Search for the Dialogic Community*, 35 UCLA L. Rev. 999, 1001 (1988) (dependent people must be empowered before participation in negotiations); Baier, *supra* note 29, at 240-41 (discussing the "myopia" of assumed equality of power in trust relationships).

57. Handler, *supra* note 56, at 1001.

58. *Id.* (stressing the need for autonomy); *see also* Anderson, *supra* note 56, at 326 n.240 (quoting Cormick, *Intervention and Self-Determination in Environmental Disputes: A Mediator's Perspective*, Resolve, Winter 1982, at 2 (Cormick discusses the need for self-determination through independent power to negotiate effectively)).

59. "Delegalization and informalism can, under current social conditions, reinforce rather then erode asymmetric power relations." Gunther Teubner, 17 L. & Soc'y Rev. 239, 241 (1983) (citing Richard L. Abel, *Delegalization: A Critical Review of Its Ideology, Manifestations and Social Consequences*, Alternative Rechtsformen and Alternativen zum Recht (1980)).

B. *Power Imbalance Between the Mille Lacs Band and the State of Minnesota Is Manifested in Unequal Monetary Resources and the Erosion of Tribal Self-Determination*

A power imbalance can be tangible, such as a disparity in resources. Resource disparity will influence a settlement between the Mille Lacs Band and Minnesota in three ways.[60] First, the Mille Lacs Band has fewer pre-litigation resources with which to gather and analyze the information necessary to predict the outcome.[61] Second, the Mille Lacs Band's immediate economic needs[62] may force the Band to accept a less favorable settlement. Third, the Mille Lacs Band has fewer resources to finance the actual litigation. The State of Minnesota's resource advantage necessarily influences any settlement between the Mille Lacs Band and Minnesota.

Less tangible, but more critical, is the essential need for the self-determination of all parties in any fairly negotiated dispute resolution.[63] Tribal self-determination or sovereignty was the primary source of tribal power in the original treaty negotiations.[64] However, over the past thirty years, and despite a federal policy of tribal autonomy, tribal self-determination has diminished with the expansion of state influence in Indian Country through recent Supreme Court decisions[65] and the continuation of Public Law 280 jurisdiction over Indian Country.

The Supreme Court has weakened tribal negotiating strength and self-determination by expanding state influence in Indian

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60. *See* Fiss, *supra* note 55, at 1076-78.

61. A treaty rights dispute requires considerable resources to research national and local archives in preparation for litigation.

62. The Mille Lacs Band claims the annual per capita income of Mille Lacs Reservation is $2100 and unemployment reaches fifty percent. Complaint at 7, *Mille Lacs Band* (Civ. No. 4-90-605).

63. Anderson, *supra* note 56, at 326 n.240.

64. American Indian Law, *supra* note 3, at 84-85.

65. *See* Milner S. Ball, *Stories of Origin and Constitutional Possibilities*, 87 Mich. L. Rev. 2280, 2297-98 (1989). The Supreme Court and Congress have collaborated;

> Congress has worked its will upon the tribes in whatever way it has wished, even when its actions have wholly lacked a constitutional basis or have obviously violated treaties . . . . [T]he Supreme Court has never held an act of Congress against the tribes to be unconstitutional . . . . However, now that Congress has, at least temporarily, laid down the role of aggressor against the tribes, the Supreme Court has taken it up.

Id; *see also* Canby, *supra* note 5, at 22 (Supreme Court's recent posture is at odds with congressional and executive policy of self-determination.).

Country.[66] The Court's position on allowing state influence in Indian Country has incrementally shifted over the past 150 years. Initially, the Court rejected state influence in Indian Country. Recently, the Court has applied a test allowing tribal and federal interests to preempt state interests only with "complete abdication or non-involvement . . . in on-reservation activit[ies]" by the state.[67] The Court has virtually created federal-state-tribal tripartite rule over Indian Country, weakening tribal self-determination, the essential element in a legitimately negotiated agreement.[68] Consequently, tribal negotiating strength is weakened vis-a-vis the state.

In 1832, the Supreme Court in *Worcester v. Georgia* stated that state laws had "no force" in Cherokee territory.[69] Tribal sovereignty and self-determination remained relatively strong[70] until 1959, when the Supreme Court formally recognized state interests in Indian Country with the introduction of the "infringement test" in *Williams v. Lee*.[71] Although the infringement test is viewed as a reaffirmation of tribal authority,[72] it also can diminish tribal self-determination by allowing state influence in Indian Country if the court determines that state action does not "infringe" on tribal authority to govern.[73]

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66. This discussion is necessarily general, using seminal cases to demonstrate the erosion of tribal self-determination and expansion of state influence in Indian Country. The complexity and intricacy of federal Native American law can be bedazzling. *See generally* Philip P. Frickey, *Scholarship, Pedagogy, and Federal Indian Law*, 87 Mich. L. Rev. 1199 (1989) (examining the reasons underlying the incoherence in federal Native American law).

67. Cotton Petroleum Corp. v. New Mexico, 109 S. Ct. 1698, 1712 (1989).

68. *See* Anderson, *supra* note 56, at 326 n.240.

69. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561 (1832).

70. *But see, e.g.*, United States v. McBratney, 104 U.S. 621 (1881) (affirming Colorado's criminal jurisdiction over a non-Native American defendant for the murder of a non-Native American on the reservation.); Draper v. United States, 164 U.S. 240 (1896) (applying the same rule in Montana).

71. 358 U.S. 217, 220 (1959) A state could not assert jurisdiction over a debt action arising on the reservation brought by a non-Native American against a Native American. *Id.* [T]he Court stated, "the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." *Id.*

72. *See* Steven M. Christenson, *Regulatory Jurisdiction over Non-Indian Hazardous Waste in Indian Country*, 72 Iowa L. Rev. 1091, 1097 (1987); *see also* Stephen M. Feldman, *The Developing Test for State Regulatory Jurisdiction in Indian Country: Application in the Context of Environmental Law*, 61 Or. L. Rev. 561, 567 (1982).

73. *See* Canby, *supra* note 5, at 6. The infringement test is potentially "not very protective of tribal authority if the area of tribal self-government [is] narrowly viewed." *Id.* Tribal authority was limited in Montana v. United States, 450 U.S. 544, 564-65 (1981) (certain tribal powers are "inconsistent with the dependent status of the tribes") and in Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) (power to arrest and try a non-Native American for violations of tribal law on-res-

In 1973, in *McClanahan v. Arizona State Tax Comm'n*[74] the Court relegated tribal sovereignty to a mere "backdrop" to aid in treaty and statute interpretation.[75] The Court adopted "federal preemption" of state interests as the dominant test for resolving tribal-state conflicts without expressly replacing the infringement test.[76] *McClanahan* assumes that state law will apply if not preempted by federal law.[77] The *McClanahan* decision reversed the *Williams'* presumption of no state infringement[78] and ran contrary to the federal policy of tribal self-determination.[79] By considering state interests[80] and failing to clarify the scope of the preemption analysis under the infringement test, the Court takes an *ad hoc* approach, encouraging lower courts to construe federal statutes narrowly or broadly in order to achieve a desired result.[81]

In 1989, in *Cotton Petroleum Corp. v. New Mexico*,[82] the Court's *ad hoc* approach resulted in a holding that the state's concurrent taxation of a non-Native American oil corporation's on-reservation activity survived the preemption analysis. Although claiming to apply a "flexible pre-emption analysis sensitive to the particular state, federal, and tribal interests,"[83] the Court actually applied an "exclusivity" standard,[84] suggesting preemption of state interests only with "complete abdication or non-involvement of the state in on-reservation activity."[85]

Cotton Petroleum's preemption analysis gives state interests extraordinary deference while minimizing tribal and federal interests. First, the Court acknowledged that tribal and federal regula-

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ervation is inconsistent with the dependent nation status of tribes). *See also* San Kronowitz, Lichtman, McSloy & Olsen, *supra* note 36, at 569 (*Williams* is an "erosion of the principle of inherent tribal sovereignty as an independent bulwark against state interference.").

74. 411 U.S. 164 (1973) (Arizona attempted to levy tax on income earned by Native Americans entirely upon the reservation.).

75. *Id.* at 172.

76. Christenson, *supra* note 72, at 1100; San Kronowitz, Lichtman, McSloy & Olsen, *supra* note 36, at 564. *But see* Feldman, *supra* note 72, at 569 (claiming *McClanahan* revitalizes the *Williams* infringement test).

77. San Kronowitz, Lichtman, McSloy & Olsen, *supra* note 36, at 564.

78. *McClanahan*, 411 U.S. at 171. "[N]otions of Indian sovereignty have been adjusted to take account of the State's legitimate interests in regulating the affairs of non-Indians." *Id.* *See* Canby, *supra* note 5, at 7.

79. Canby, *supra* note 5, at 22.

80. *Id.*

81. San Kronowitz, Lichtman, McSloy & Olsen, *supra* note 36, at 565. *See also* Canby, *supra* note 5, at 7. Preemption analysis is "extremely fact-specific . . . . As a consequence, results are unpredictable." *Id.*

82. 109 S. Ct. 1698 (1989).

83. *Id.* at 1711.

84. *Id.* at 1723 (Blackmun, J., dissenting).

85. *Id.* at 1712.

tory interests were "extensive"[86] but held that the state's minor regulatory interest[87] was not preempted because tribal and federal interests were not "exclusive."[88] Second, the court magnified state interests, weighing relatively insignificant state oil-and-gas-related expenditures on the reservation too heavily.[89] Third, the Court further diminished tribal interests by ignoring the tribe's reliance on gas and oil leases for ninety percent of tribal income.[90] According to the Court, the additional state taxes, resulting in a seventy-five percent tax increase to lease purchasers, had only "a marginal effect on the . . . [value of] on-reservation leases . . . . [An effect] too indirect and too insubstantial" to impair the federal and tribal policy of securing the highest value for the exploitation of reservation resources.[91] The Court's characterization of *Cotton Petroleum's* application of the preemption test as flexible and sensitive to tribal interests seems disingenuous; under this formulation, state interests dominate federal and tribal interests.

The Court's discussion of Cotton Petroleum Corporation's alternative claims of multiple taxation and commerce clause violations was more candid. In rejecting Cotton Petroleum Corporation's multiple taxation claim, the Court relegated the tribe to merely one of "three different governmental entities, each of which has taxing jurisdiction" on the reservation.[92] Any burden from the additional state tax was "entirely attributable to the fact that . . . two governmental entities share jurisdiction."[93] The Court applied the same analysis to reject Cotton Petroleum Corporation's commerce clause claim, concluding that the "[s]tates and tribes have concurrent jurisdiction" and therefore, the commerce

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86. *Id.*

87. *Id.* at 1723 n.9. (Blackmun, J., dissenting) Even the state regulation of the mechanical integrity and spacing of the wells demonstrates the pervasiveness of federal interests; the state regulation could not apply without federal Bureau of Land Management approval. *Id.*

88. *Id.* at 1712.

89. The *Cotton Petroleum* dissent notes that, during the five years at issue, "federal expenditures were $1,206,800; tribal expenditures were $736,358; the state spent, at most, $89,384. *Id.* at 1724 n.11 (Blackmun, J., dissenting) (citing Brief for Jicarilla Apache Tribe as *Amicus Curiae* at 10-11 n.8). The state collected $2,293,953 in taxes for their $89,384 expenditure. *Id.* at 1724 (Blackmun, J., dissenting).

90. *Id.* at 1725 (Blackmun, J., dissenting).

91. *Id.* at 1713. The Court contradicted its previous rejection of Arizona's two percent gross proceeds tax on a non-Native American trader on the reservation because it put "financial burdens on [either the trader] or the Indians . . . ." *Id.* at 1726 (Blackmun, J., dissenting) (quoting Warren Trading Post Co. v. Arizona Tax Comm'n, 380 U.S. 685, 691 (1965)).

92. *Id.* at 1714.

93. *Id.*

clause did not apply.[94] Even if the Court did not make Indian Country a state-federal-tribal tripartite in *Cotton Petroleum*, apparently *any* state interest will survive *Cotton Petroleum's* preemption analysis.

Although recently Congress has not expanded state interests in Indian Country, in 1953 Public Law 280 gave Minnesota and four other states jurisdiction over Indian Country.[95] As a result of both state and tribal criticism,[96] the Indian Civil Rights Act allowed states to retrocede Public Law 280 jurisdiction to the federal government.[97] Although Public Law 280 jurisdiction is limited,[98] Minnesota has not retroceded jurisdiction and retains some legal authority over the Mille Lacs Band. Public Law 280 jurisdiction and the Supreme Court's affirmation of expanded state interests in Indian Country limit the Mille Lacs Band's self-determination and thus, the Band's effectiveness in negotiating agreements with Minnesota.

C. *Benevolence or Trust Cannot Substitute for Self-Determination*

The Mille Lacs Band needs self-determination in treaty rights negotiations to ensure equitable settlement of their treaty rights. Even if Minnesota attempts to negotiate benevolently, that is, in the interests of the Mille Lacs Band, the agreement would still be suspect. Benevolence and paternalism weaken the Mille Lacs Band's autonomy and negotiating strength.[99] The judicially

94. *Id.* at 1716.

95. 18 U.S.C. § 1162 (1988)(for criminal offenses); 28 U.S.C. § 1360 (1988) (for civil jurisdiction). California, Minnesota, Nebraska, Oregon, and Wisconsin were granted jurisdiction; Alaska was added in 1958. Public Law 280 allowed other states the option to assert jurisdiction. Ten other states assumed differing levels of jurisdiction over Indian Country. *See* Handbook of Federal Indian Law, *supra* note 3, at 362-63 n.122, 123, 125.

96. Handbook of Federal Indian Law, *supra* note 3, at 370. States resented the imposition of additional law enforcement duties without congressional or tribal funding. Tribes resented state incursion into tribal jurisdictional authority. *Id.*

97. 25 U.S.C. § 1323(a) (1988). However, the Indian Civil Rights Act has no provisions for tribal initiation of retrocession proceedings or for tribal veto of a state's initiation of retrocession proceedings. Handbook of Federal Indian Law, *supra* note 3, at 371.

98. *E.g.*, Public Law 280 cannot interfere with treaty hunting, fishing, and trapping rights. 18 U.S.C. § 1162(b) (1988).

The Supreme Court has also limited Public Law 280's scope. *E.g.*, Bryan v. Itasca Co., 426 U.S. 373 (1976) (no state property tax on unrestricted Native American property).

99. "Benevolence [or] patronage . . . can never lead to self-determination in its true sense. . . . Successful negotiations require that each party recognize the right of all other negotiating parties to participate equally in the negotiating process." Anderson, *supra* note 56, at 326 n.240 (quoting Cormick).

developed trust relationship,[100] although occasionally benefiting Native Americans,[101] illustrates the weakening effects of paternalism. Describing the federal government's duty in the trust relationship, the Supreme Court characterized Native Americans as dependent, weak, and helpless.[102] The Court's perception of Native American dependency justified the drastic reductions in the Native American land base[103] and increased jurisdictional control over Native Americans.[104] Government paternalism and "trust" have damaged Native American self-determination.

The Ojibwe need certainty and reliability, not paternalism or "trust."[105] Unreliable, contradictory federal policy[106] has ensnared tribal, federal, and state governments in an uncooperative and confounding legal relationship. The tribal-federal relationship has been compared to "novelist Mark Harris' card game TEGWAR—'The Exciting Game Without Any Rules'—except [that] the government always gets to deal."[107] Because federal Native American policy is inconsistent, an agreement similar to Minnesota's 1988 Agreement offers the Ojibwe Bands little security; the 1988 Agreement allows Minnesota a one-year withdrawal option.[108] Minnesota's payment of forbearance compensation and *de facto* recognition of some Ojibwe treaty rights[109] may be merely a brief historical whim. The Ojibwe can only secure certainty, reliability,

100. The Marshall Court articulated the trust relationship between the United States and Native American tribes as resembling "a ward to his guardian." Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831).

101. *See* Adele Fine, *Off-Reservation Enforcement of the Federal-Indian Trust Responsibility*, 7 Pub. L. Rev. 117 (1986) (citing instances of judicial enforcement of the fiduciary standard on the federal government and arguing for the extension of the government's fiduciary standard to off-reservation matters).

102. United States v. Kagama, 118 U.S. 375, 383-84 (1886). Tribes are "wards of the nation . . . dependent on the United States . . . [due to] their very weakness and helplessness." *Id.* *See also* Lone Wolf v. Hitchcock, 187 U.S. 553, 564-65 (1903). (Because of Native American dependency, congressional power to care for and protect Native Americans could not be limited indirectly by treaty.).

103. *Lone Wolf*, 187 U.S. at 553 (upheld a statute allowing the allocation of tribal lands, even though allocation was not allowed under a prior treaty).

104. *Kagama*, 118 U.S. at 375 (upheld the Major Crimes Act which granted federal jurisdiction and federal court venue for seven crimes with Native American or non-Native American victims).

105. *See* Baier, *supra* note 29, at 231-32. "Exploitation and conspiracy, as much as justice and fellowship, thrive better in an atmosphere of trust." *Id.*

106. *See supra* note 3.

107. Frickey, *supra* note 66, at 1201 (referring to Mark Harris, Bang the Drum Slowly 8 (1956)).

108. Grand Portage Band of Chippewas of Lake Superior v. Minnesota, Civ. No. 4-85-1090, slip op. at 3 (D. Minn. June 8, 1988) (Memorandum and Order). Bands also have a one-year option, but without treaty rights, withdrawal leaves the Bands with nothing.

109. *See supra* note 41 and accompanying text.

and self-determination with permanent recognition of their treaty rights, either through litigation or through Minnesota's affirmative acceptance of treaty rights.

Part III The Mille Lacs Band Has a Convincing Argument to Establish Treaty Rights

Although mutual cooperation and reconciliation is recommended, if Minnesota does not recognize treaty rights, the Mille Lacs Band has a convincing argument for establishing treaty rights under the 1837 Treaty through litigation. Courts consistently affirm treaty rights. Since 1887, Native Americans have been successful in all sixteen major cases establishing treaty fishing and water rights.[110] Additionally, the Mille Lacs Band's argument is highly persuasive. In *Lac Courte Oreilles v. Voigt*,[111] the Seventh Circuit established treaty rights under the same 1837 Treaty at issue here and recently, a Minnesota federal district court in *United States v. Bresette*, relying on *Voigt*, concluded that Minnesota Ojibwe within the scope of the 1854 and 1842[112] Treaties have "full usufructuary[113] rights."[114] Moreover, Minnesota's arguments for denying treaty rights are diminished by accepted canons of treaty interpretation.

In *Voigt*, the Seventh Circuit affirmed treaty rights in Wisconsin under the 1837, 1842, and 1854 Treaties[115] and dismissed the validity of President Zachary Taylor's 1850 removal order that Minnesota relies upon;[116] the Supreme Court denied certiorari.[117] The Seventh Circuit affirmed the district court finding that Presi-

110. Herbert McLean, *Pact and Impact: Ending the Northwest Logging Wars*, Am. Forests, May-June 1987, at 28, 30.

111. 700 F.2d 341 (7th Cir. 1983).

112. Treaty with the Chippewa, Oct. 4, 1942, 7 Stat. 591.

113. "Usufructuary rights are the right to make a modest living by hunting and gathering off the land." United States v. Bresette, No. 5-90-7, slip op. at 4 (D. Minn Apr. 11, 1991) (order).

114. *Id.* at 7-8.

115. Although only the the 1837 Treaty is at issue in the Mille Lacs Band's claim, the 1842 and 1854 Treaties are discussed here as well. *Voigt* interpreted the 1837 Treaty at issue in the Mille Lacs Band's claim when the tribes in Wisconsin brought suit asserting treaty rights. The 1837 Treaty covers a large area of northwestern Wisconsin and extends into central Minnesota approximately fifty miles. The 1842 Treaty territory lies north of the 1837 Treaty territory and covers most of northern Wisconsin bordering Lake Superior. The 1854 Treaty, subject of the 1988 Agreement, covers the northeastern arrowhead region of Minnesota bordering Lake Superior. For a detailed map of the 1837, 1842 and 1854 Treaty territories, see United States v. Bouchard, 464 F. Supp. 1316, 1362-63 (W.D. Wis. 1978).

116. *Voigt*, 700 F.2d at 362.

117. Besadny v. Lac Courte Oreilles Band of Lake Superior Chippewa Indians, 464 U.S. 805 (1983).

dent Taylor's removal order exceeded the scope of the 1837 Treaty. Taylor's removal power was conditioned upon Ojibwe misbehavior; Taylor's removal order was not a direct response to, nor did the order mention, Ojibwe "misbehavior."[118]

Significantly, in *Bresette*, the court, relying on *Voigt*, dismissed the United States' prosecution of two Ojibwe for the sale of traditional "dream catchers"[119] incorporating migratory bird feathers.[120] *Voigt*'s interpretation of the 1837, 1842, and 1854 Treaties with the Chippewa persuaded the Minnesota district court to conclude that the 1854 and 1842 Treaties "reserved full usufructuary rights for the Chippewa."[121] Because the Ojibwe defendants were geographically outside the 1837 Treaty boundaries, the defendants needed only to rely on the 1854 and 1842 Treaties. However, *Bresette* specifically relied upon *Voigt*'s analysis which affirmed 1837 Treaty rights.[122] The Seventh Circuit's *Voigt* interpretation of the 1837 Treaty and President Taylor's removal order, combined with the recent *Bresette* decision, strengthens the Mille Lacs Band's argument considerably.

Further, Minnesota's claim that the Mille Lacs Band's 1837 Treaty rights were extinguished by the subsequent 1855 Treaty in Minnesota is weakened by application of treaty interpretation canons. Although the 1855 Treaty states that the tribes relinquish "all right, title and interest in" the delineated lands,[123] treaty language must be construed as the negotiating tribes would have understood it.[124] First, it is implausible that the same Ojibwe chiefs would relinquish, eighteen years after the 1837 Treaty, rights without which they stated they "could not live."[125] In all likelihood,

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118. *Voigt*, 700 F.2d at 362.

119. Dream catchers, traditional objects of artistic and spiritual value, are suspended over sleepers to protect them from dreams during their defenseless sleep. Dreams and birds have spiritual significance to the Ojibwe. Birds remind the Ojibwe of the eagle; the eagle bridges the spiritual and material worlds. *Bresette*, No. 5-90-7, slip op. at 2.

120. The Migratory Bird Act forbids use or sale of migratory bird feathers. 16 U.S.C. 703 (1988).

121. *Bresette*, No. 5-90-7, slip op. at 7-8.

122. *Id.*

123. Treaty with the Chippewa, Feb. 22, 1855, art. I, 10 Stat. 1165. The 1855 Treaty covers a large area of central Minnesota, overlapping the 1837 Treaty territory.

124. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 582 (1832) (McLean, J., concurring). "The language used in treaties with Indians should never be construed to their prejudice . . . . How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction." *Id.*; *see also* Tulee v. Washington, 315 U.S. 681, 684-85 (1942).

125. Aish-ke-bo-gi-ko-she (Flat Mouth) stated that the tribes could not live without rights reserved at the 1837 Treaty Conference. *See supra* note 1 and accompa-

the Ojibwe did not consider such an integral part of their existence an ownership interest in property.[126] Second, had the United States intended to eliminate explicitly held treaty rights secured in the 1837 Treaty, it should have explicitly extinguished the rights.[127] In *Voigt*, the court held that the subsequent 1854 Treaty did not extinguish the 1837 Treaty rights because "omission of any reference to those rights in the 1854 [T]reaty suggests that the . . . band believed their right to use ceded land for traditional pursuits to be secure and unaffected by the 1854 [T]reaty."[128] Similarly, Minnesota's claim that the 1855 Treaty extinguished the Mille Lacs Band's 1837 Treaty rights will fail. The highly detailed, multi-page 1855 Treaty intricately specifies land holding and compensation schemes but does not specifically mention hunting, fishing, or gathering rights.[129] The United States was not interested in reclaiming hunting, fishing, and gathering rights on ceded land. Instead, the United States wanted the timber and minerals.[130] Third, the land delineated in the 1855 Treaty also covered land outside the land ceded by the 1837 Treaty, and portions of the Mille Lacs Band lived outside of the 1855 Treaty area. A respected Native American ethnohistorian questions the Mille Lacs Band's affiliation with the Mississippi Bands of the 1855 Treaty.[131] Under all these circumstances, the 1855 Treaty should not be construed to extinguish the Mille Lacs Band's treaty rights.

Part IV

A. Cooperation and Reconciliation: A Better Solution

Although the Mille Lacs Band's case is highly persuasive, the

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nying text. Flat Mouth signed the 1855 Treaty. Treaty with the Chippewas, Feb. 22, 1855, 10 Stat. 1165.

126. *See* Jones v. Meehan, 175 U.S. 1, 11 (1899). A "treaty must . . . be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians." *Id. See also* State v. Keezer, 292 N.W.2d 714, 723 (Minn. 1980) (Wahl, J., dissenting) (noting that "western notions of territoriality and exclusivity of property ownership" were foreign to tribal communal use of land).

127. Lac Courte Oreilles v. Voigt, 700 F.2d 341, 363 (7th Cir. 1983). *See also*, Washington v. Fishing Vessel A'ssn, 443 U.S. 658, 666-67 (1979); Menominee Tribe v. United States, 391 U.S. 404, 413 (1968).

128. *Voigt*, 700 F.2d at 363.

129. Treaty with the Chippewa, Feb. 22, 1855, 10 Stat. 1165.

130. *See Voigt*, 700 F.2d at 344, 345, 347, 348; *see also* Warren, *supra* note 17, at 346; Helen E. Knuth, *Economic and Historical Background of Northeastern Minnesota Lands Ceded by Chippewa Indians of Lake Superior*, in Chippewa Indians III 287 (David Agee Horr ed. 1974) (from the Garland American Indian Ethnohistory Series).

131. *Mississippi Chippewa*, *supra* note 19, at 262.

treaty rights dilemma affords Minnesota and the Ojibwe Bands holding treaty rights an opportunity to use a cooperative model to manage the conflict inherent in the treaty rights dilemma and spread cooperation to other state-tribal interactions.[132] A cooperative model assumes the parties desire an equitable agreement and want to build relationships based on reliability.[133] Litigation does not supply needed reliability in conflict management and will thwart needed cooperation.

Practically, litigation results are unpredictable. Moreover, litigation does not guarantee a quick and final resolution to the treaty rights dilemma or to resource management problems. If the courts establish treaty rights and force Minnesota to cooperate with the Ojibwe, Minnesota can continue its opposition, draining the Ojibwe Bands' resources through appeals and protracted litigation. If the courts deny treaty rights and force the Ojibwe to cooperate with Minnesota, the Ojibwe can continue asserting treaty rights, exposing themselves to arrest and increasing state enforcement costs. Either result will exacerbate tribal-state tensions.

Most importantly, litigation will harm future cooperation between Minnesota and the Ojibwe. Although it is asserted that litigation is "cost effective" for establishing rights,[134] costs are measured solely from a short-term economic perspective, without consideration of long-term social costs.[135] Opportunity costs[136] must be considered before entering into rights litigation. Because power contests create new conflicts by "leav[ing] a residue of anger, distrust, and a desire for revenge,"[137] the lost opportunity for cooperation is not merely temporary and issue specific, but cooperation can be damaged indefinitely and uncooperative behavior can cross over to other issues.[138] On the other hand, cooperation, once

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132. *See infra* notes 139, 167 and accompanying text.

133. *See* Donald G. Gifford, *A Context Based Theory of Strategy Selection in Legal Negotiation*, 46 Ohio St. L. J. 41, 52 (1985) (Gifford says cooperative relationships are built on trust; here, "reliability" is more accurate for what is proposed.).

134. *See* Trubek, Sarat, Felstiner, Kritzer & Grossman, *supra* note 50, at 123.

135. *See id.* (empirical study unable to measure litigation costs from a social perspective); Jeanne M. Brett, Stephen B. Goldberg & William L. Ury, *Designing Systems for Resolving Disputes in Organizations*, 45 Am. Psychologist 162, 164-65 (Feb. 1990). The benefits of managing conflict and reconciling interests exceed minimizing conflict management costs. Furthermore, the higher initial costs of reconciling interests are compensated by the low recurrence of reconciled disputes. *Id.*

136. In any choice situation, a party must forego some choice. The opportunity cost is the value of the best available opportunity foregone because of the action.

137. Brett, Goldberg & Ury, *supra* note 135, at 165.

138. Robert E. Scott, *Conflict and Cooperation in Long-Term Contracts*, 75 Calif. L. Rev. 2005, 2025 (1987). "Each party must consider the effect of its choice not only on the immediate conflict but also on later conflict situations." *Id.*; Louis Kriesberg, *Research and Policy Implications*, in Intractable Conflicts and Their

begun tends to continue.[139] There is a temptation among "[i]ntellectuals and politicians [to be] ideological agitators, championing opposition to oppression, or [to be] . . . [working to justify] the status quo. Less often, they are articulators of reconciliation . . . . Yet, those latter roles are, in the long run, critical."[140] The emerging treaty rights dilemma presents Minnesota and the Ojibwe with an opportunity to reject potentially damaging rights contests while improving the Minnesota-Ojibwe relationship.[141]

Minnesota has used negotiated treaty rights agreements to avoid conflict; Minnesota can now use the agreements as instruments of reconciliation. In 1987, Minnesota observed a "Year of Reconciliation" to recognize wrongs committed against the Lakota during the Lakota uprising.[142] Minnesota's use of reconciliation reflects the "deepest and soundest" elements of the ADR movement.[143] Reconciliation recognizes that law and justice are not always synonymous[144] but that justice is discovered when people interact and listen to each other.[145] The Supreme Court and Congress have unjustly eroded tribal self-determination; the extent of political justice and self-determination for Native Americans in Minnesota is manifested in community values revealed in the 1973 and 1988 Minnesota-Ojibwe Agreements. Minnesota's next increment in justice and reconciliation with Native Americans is the full, public acceptance of Ojibwe treaty rights without resorting to a legal rights contest.[146]

B. The Cooperative Venture

Like the miner's canary, the Indian marks the shifts from

Transformation 215 (1989). Segments of adversarial groups may "develop vested interests in the struggle. For the fighters, it may become a way of life." *Id.*

139. Scott, *supra* note 138, at 2026. By beginning a cooperative response pattern, mutual cooperation is "introduced and then reinforced by a 'lock-in' effect. Empirical studies of cooperative interactions indicate that lock-in effects are very strong." *Id. See also* Robert Axelrod, The Evolution of Cooperation 21 (1984) (Cooperation, once begun, can thrive and maintain itself.).

140. Kriesberg, *supra* note 138, at 220.

141. Minnesota wants to "foster good relationships between Indian[s] and non-Indian[s]." Memorandum of Agreement at 7, Grand Portage Band of the Chippewas of Lake Superior v. Minnesota, Civ. No. 4-85-1090 (D. Minn. June 8, 1988).

142. State of Minnesota Proclamation, Governor Rudy Perpich (Dec. 19, 1986).

143. Andrew W. McThenia & Thomas L. Shaffer, *For Reconciliation*, 94 Yale L.J. 1660, 1664-65 (1985).

144. *Id.* at 1664.

145. *Id.* at 1665.

146. Acceptance of Ojbiwe treaty rights is merely another step in the journey out of the treaty rights dilemma. However, if accepting treaty rights is perceived as a dramatic step, a "fundamental shift . . . . A basic change in the nature of the conflict and the way it is conceived is necessary." Kriesberg, *supra* note 138, at 217.

> fresh air to poison gas in our political atmosphere; and our treatment of Indians . . . reflects the rise and fall of our democratic faith.[147]

In addition to reconciliation and justice, Minnesota can use negotiated agreements to *manage* conflict, rather than merely use the agreements to *avoid* conflict. This cooperative venture is proposed as a model to aid in the disposition of treaty rights without resorting to litigation, to effectively manage the inherent conflict when two parties share a resource,[148] and to serve as a model for resolution of other tribal-state disputes.

The State of Minnesota should begin the cooperative venture by accepting Ojibwe treaty rights in ceded land. The individual Ojibwe Bands holding treaty rights can then *choose* to either negotiate a treaty rights forbearance agreement from a position of self-determination *or* participate with Minnesota in a cooperative venture to manage resources on ceded land.[149] If the Ojibwe Bands choose to participate in a cooperative venture, they will agree to use Minnesota Department of Natural Resources technological expertise in resource management decisions. Like the 1973 and 1988 Minnesota-Ojibwe Agreements, the cooperative venture will integrate Band members into any enforcement schemes. The cooperative venture will be fully publicized as a cooperative undertaking to mutually manage future conflicts over Minnesota's resources on ceded land. Representatives of the Minnesota Department of Natural Resources and the Bands holding treaty rights will meet monthly with a mutually selected mediator to manage resource use and implement agreements on ceded land.

Unresolvable issues will be subjected to multi-step consideration.[150] If an issue becomes unresolvable in mediated negotiations, that issue will be the sole issue reconsidered at the next meeting. If unresolved portions of that issue still remain after that meeting, each party will submit only those portions of the unresolvable issue in a best offer form to a mutually selected panel of three arbitrators for a binding decision. The arbitrators will decide *only*

147. Handbook of Federal Indian Law, *supra* note 3, at v.

148. The cooperative venture employs a non-adversarial approach. Cooperative strategy uses initial concessions to build confidence and reliability and to induce reciprocal cooperative actions. In the cooperative approach, concession is not a sign of weakness, but is an affirmative technique to begin fair negotiations, and is especially useful in distributive bargaining, where parties share a fixed resource. *See* Gifford, *supra* note 133, at 46-47.

149. Offering the Ojibwe a choice better effectuates the anti-paternalistic intent of this cooperative venture.

150. Effective dispute resolution systems need procedures that minimize social and economic costs in resolving deadlocks. *See* Brett, Goldberg & Ury, *supra* note 135, at 167.

upon the best offers and *will not consider* the parties' prior resolution of any other portion of the issue. In short, the purpose of the arbitration will be a narrow, piece by piece, independent consideration of unresolvable sub-issues. The losing party will pay costs of the arbitration according to American Arbitration Association schedules. If the arbitration panel develops an alternative to the parties' best offers, the parties will have the option of accepting the alternative and splitting arbitration costs.

This cooperative venture will benefit Minnesota by facilitating resource management;[151] by saving litigation and enforcement costs; and by furthering Minnesota's political prestige resulting from its innovative resolution of the treaty rights dilemma.[152] A cooperative venture benefits the Ojibwe by recognizing treaty rights;[153] saving litigation and criminal penalties costs; and increasing Ojibwe interactions with Minnesota's resource and information wealth.[154]

Accepting treaty rights without judicial coercion is not the weakening "benevolent" or "paternalistic" behavior[155] that is a continuing and destructive refrain in the Native American relationship with the dominant culture.[156] Accepting treaty rights is anti-paternalistic; it empowers the Ojibwe in resource management or treaty rights settlement negotiations.[157] Minnesota's acceptance of Ojibwe treaty rights will balance Minnesota's influence over Ojibwe tribal interests in Indian Country with Ojibwe treaty interests in ceded land. Minnesota can opportunistically use the treaty rights dilemma to balance the political and negotiating environment, thus stimulating a facilitated dialogue to manage conflict within the cooperative structure.

Dialogue and cooperation are essential because difficult, con-

151. Minnesota wants to "define the manner in which hunting and fishing [treaty] rights will be exercised, and to insure that the fish and wildlife resource will be preserved in perpetuity." Memorandum of Agreement at 7, Grand Portage Band of the Chippewas of Lake Superior v. Minnesota, Civ. No. 4-85-1090 (D. Minn. June 8, 1988).

152. The State of Minnesota is proud of the 1988 Agreement which resolved the 1854 Treaty controversy. *See* Treaty Briefing Paper, *supra* note 38.

153. The Fond du Lac Band rejected Minnesota's 1.85 million dollar annual offer rather than forbear recognition and exercise of their treaty rights. Telephone interview with Henry Buffalo, counsel for the Fond du Lac Band (Feb. 13, 1991).

154. *See infra* notes 203-206 and accompanying text.

155. *See supra* notes 99-104 and accompanying text.

156. The Allotment Act, Public Law 280, and the trust relationship are examples of destructive governmental paternalism toward Native Americans. *See supra* notes 3, 95-104 and accompanying text.

157. John Echohawk, Executive Director of the Native American Rights Fund states, "as Indian's rights are *established* . . . there is a greater likelihood for negotiations . . . ." Echohawk, *supra* note 32, at 2 (emphasis added).

flict-inducing resource management decisions arise after treaty rights are affirmed. Wisconsin and Ojibwe litigated, recently completing their thirteenth judicial proceeding in the eight years following the *Voigt* decision;[158] Minnesota's situation after the *Bresette* decision is more unsettled; the *Bresette* court explicitly left "the nature and extent of the usufructuary rights open to contention."[159] Moreover, beyond the obvious treaty interpretation and resource allocation litigation, unforeseen issues arise, requiring further costly judicial intervention. For example, after treaty rights had been established and resources allocated, a district court in the state of Washington held that treaty rights implicitly include a right to an environmentally protected fishery.[160] Eventually, the Ninth Circuit, sitting *en banc*, withdrew the judgement on procedural grounds,[161] but the prior holdings prompted Native Americans, the state of Washington, Washington industry, and environmentalists to negotiate cooperatively as the Timber/Fish/Wildlife Council (TFWC).[162] The TFWC recognized that unanticipated problems, compounded by treaty rights in ceded land, required "formaliz[ing] the *reciprocal* obligations of the State and the Tribes toward the fishery resource which they now share."[163] The TFWC cooperative agreement actually eliminated litigation,[164] relieved racial tensions, and developed a comprehensive resource management strategy.[165] In the TFWC framework, tribes holding

158. *See supra* note 31.

159. United States v. Bresette, No. 5-90-7, slip op. at 8 (D. Minn. Apr. 11, 1991) (Order).

160. United States v. Washington (Phase II), 506 F. Supp. 187, 203 (W.D. Wash. 1980), *aff'd in part and rev'd in part*, 694 F.2d 1374 (9th Cir. 1982), *vacated, opinion replaced on rehearing en banc*, 759 F.2d 1353 (9th Cir. 1985), *cert. denied*, 474 U.S. 994 (1985).

Environmental regulation of Indian Country and, conceivably, environmental preservation of Native American interests in ceded land poses special jurisdictional and environmental problems for tribes. For a discussion of environmental regulation issues in Indian Country, see Judith V. Royster & Rory SnowArrow Fausett, *Control of the Reservation Environment: Tribal Primacy, Federal Delegation, and the Limits of State Intrusion*, 64 Wash. L. Rev. 581 (1989); Richard A. Du Bey, Mervyn T. Tano & Grant D. Parker, *Protection of the Reservation Environment: Hazardous Waste Management on Indian Lands*, 18 Envtl. L. 449 (1988); Christenson, *supra* note 72; Feldman, *supra* note 72.

161. United States v. Washington (Phase II), 759 F.2d at 1353.

162. Telephone interview with TFWC spokesperson (Nov. 13, 1990).

163. United States v. Washington (Phase II), 694 F.2d 1374, 1381 (9th Cir. 1982), *vacated, opinion replaced, on rehearing en banc*, 759 F.2d 1353 (9th Cir.) (emphasis in original).

164. The reduction in litigation in Washington state was astonishing. In 1983, there were 66 court actions involving the parties. After the plan was negotiated no more court actions were initiated. Robert C. Barrett, *Experiments in Decisionmaking Processes*, Vol. XVII, No. 7 Envtl. L. Rep. 10269, 10270 (1987).

165. The Timber/Fish/Wildlife Final Agreement detailed "the framework, pro-

treaty rights negotiated from self-determination. Minnesota should model Washington's cooperative approach.

The cooperative venture accepts the inevitability of future conflict between Minnesota and the Ojibwe. The cooperative venture not only considers the resolution of the immediate and future treaty rights issues but also uses the structured conflict management format to maintain and enhance the relationship between the Ojibwe and Minnesota. The mutually empowered cooperative venture can refine itself while managing the resource management conflicts. Later, the venture can be applied to other Minnesota-Ojibwe conflicts as an evolved model, accomplishing the agreements contemplated by the Tribal State Compact Act.[166]

C. *The Cooperative Venture Will Succeed*

Although mutually empowered cooperation in a historically adversarial relationship seems improbable, "cooperation can get started even in a world of unconditional defection, ... evolve from small clusters of individuals . . . . [and] can protect itself from invasion by less cooperative strategies. Thus, the gear wheels of social evolution have a rachet."[167] The results of two multidisciplinary, international computer tournaments based on the "Prisoner's Dilemma" game[168] divined several rules to promote cooperation and maximize benefit yield[169] between two parties

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cedures and requirements for successfully managing our state's forests so as to meet the needs of a viable timber industry and at the same time provide protection for our public resources, fish, wildlife and water as well as the cultural/archeological resources of Indian tribes within our own state." Timber/Fish/Wildlife Council, Final Agreement 1 (1987).

166. One potential issue for further cooperative efforts is a mutual reexamination of Public Law 280. The Indian Civil Rights Act did not include provisions for tribal initiation of retrocession, nor did the Act require tribal consent before initiating retrocession procedures. Handbook of Federal Indian Law, *supra* note 3, at 371.

167. Axelrod, *supra* note 139, at 21. *See also* Scott, *supra* note 138, at 2026 (the "lock-in" effect of mutual cooperation has been empirically demonstrated to be strong).

168. Game theorists developed the "Prisoner's Dilemma" to illustrate why, when parties are unable to communicate or bargain, they always choose self-interested behavior, even in situations where cooperation would further advance both parties individual interests. The Prisoner's Dilemma develops when two accomplices are arrested for the same crime and questioned separately. If neither confess, they can only be charged with a minor crime and sentenced to one year. But if one confesses, he is set free in exchange for his cooperation, while his partner, who remained silent, gets five years. If both confess, they each get three years. Although it is in their collective interest to cooperate, remain silent and receive only a one year punishment, it is in either party's self-interest to confess. Thus, "[i]ndividual rationality leads to a worse outcome for both . . . . Hence the dilemma." Axelrod, *supra* note 139, at 9.

169. The winning strategy, TIT-FOR-TAT always began by cooperating and de-

without a central authority forcing parties to cooperate.[170] The tournaments demonstrated that cooperation is facilitated and mutual benefits are maximized when interactions are future-oriented and non-finite;[171] when interactions are clear and intelligible;[172] when the participants are "nice" and not envious of the other's success;[173] and when participants behave reciprocally.[174] This theory of cooperative evolution does not require trust or concern for another's welfare; cooperation will evolve by rational selection.[175] The cooperative rules drawn from prisoner's dilemma tournaments are manifested in the cooperative venture.[176]

1. The Cooperative Venture Is Future-Oriented

The specter of non-finite legal conflicts establishing, defining, and managing the unforeseen conflicts in the Minnesota-Ojibwe treaty rights dilemma provides the impetus[177] and milieu for cooperation between Minnesota and the Ojibwe. In a finite number of interactions, uncooperative behavior yields the highest payoffs.[178] However, a non-finite number of interactions enhances cooperation,[179] even in highly adversarial situations.[180] The cooperative venture is future-oriented, relying upon the non-finite nature of

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fected only after defection by the other participant. TIT-FOR-TAT forgave immediately, resuming cooperation immediately upon the other participant's cooperation. *Id.* at 20. Minnesota's acceptance of treaty rights, followed by Ojibwe acceptance of continuing Department of Natural Resources expertise models TIT-FOR-TAT.

170. In treaty rights litigation, the court would be the central authority forcing cooperation. *But see supra* notes 133-41 and accompanying text.

171. Axelrod, *supra* note 139, at 126-32.

172. *Id.* at 120-23.

173. *Id.* at 110-17.

174. *Id.* at 118-20.

175. *Id.* at 6-11.

176. Conflicts managed within a social structure "often take on qualities of a game." Kreisberg, *supra* note 138, at 212. *See also* Axelrod, *supra* note 139, at 131. Interactions within a small group deciding policy for and between larger organizations is like a "multilevel game." *Id.*

177. *See* Brett, Goldberg & Ury, *supra* note 135, at 163. The "costs of poorly managed conflict . . . stimulate[s] organizations to reevaluate the way conflict is being managed." *Id.*

178. Axelrod, *supra* note 139, at 12.

179. *Id.* at 10. For example, Senators cooperate because they anticipate the other Senator's future reciprocation. *Id.* at 16. Consider the difficulties a finite-term, "lame duck" politician has eliciting cooperation. *See also* Scott, *supra* note 138, at 2024 (analyzing decisionmaking strategies between parties to long-term contracts, suggesting a stake in the non-finite future changes negotiating strategy away from defection).

180. *See generally* Axelrod, *supra* note 139, at 57-82. In World War I trench warfare, a cooperative live-and-let-live system developed between the Allied and German forces. The soldiers nonverbally ceased fire at regular intervals. The truces were possible because the non-finite, serious interaction made predictability of the

Minnesota-Ojibwe interaction. Acceptance of the Ojibwe Bands' treaty rights eliminates the present controversy and focuses on the future mutual resolution of resource management issues.

The cooperative venture also ensures that Minnesota and the Ojibwe will continue to perceive the importance of the future by making interactions more frequent and durable.[181] Scheduled meetings ensure the frequent, continued interaction which makes the future "loom larger than it otherwise would."[182] Moreover, publicizing the cooperative venture as a cooperative undertaking to mutually manage future resource conflicts on ceded land publicly promotes the durability of the relationship. One commentator uses a wedding to illustrate "a public act designed to celebrate and promote the durability of the relationship" and notes that "[d]urability of an interaction can help not only lovers, but enemies."[183] Although Minnesota and the Ojibwe Bands have already demonstrated they are not enemies by negotiating the 1973 and 1988 Agreements, litigation threatens to upset this relationship. Minnesota and the Ojibwe can avoid regressing into costly, uncertain litigation and enforcement mechanisms by moving to the next cooperative increment accepting treaty rights and state expertise.

2. The Cooperative Venture Adds Clarity

The cooperative venture clarifies the status of treaty rights in Minnesota and adds clarity by limiting the number of participants in the negotiations. Clarity enhances cooperation and mutual benefit.[184] The cooperative venture clarifies the uncertain status of treaty rights in Minnesota. In the 1988 Agreement, Minnesota, possibly attempting to maximize individual benefits while attempting cooperation, clouded the treaty rights issue and created the current dilemma. Minnesota purchased treaty rights forbearance

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enemy's future behavior crucial. Apparently, even the most adversarial relationships can cooperate if the interaction is future-oriented and non-finite.

The live and let live system developed in approximately one-third of all trench tours by British divisions. *Id.* at 218 n.1 (citing Tony Ashworth, Trench Warfare, 1914-1918: The Live and Let Live System 171-75 (1980)).

181. Frequency and durability of interactions promote cooperation by enlarging the shadow of the future. Axelrod, *supra* note 139, at 129.

182. *Id.*

183. *Id. See also* Scott, *supra* note 138, at 2029 (a precommitment strategy requires parties to behave predictably).

184. The winning strategy in Axelrod's tournaments, TIT FOR TAT, was simple and clear; the other party could easily understand TIT FOR TAT's actions. Sophisticated strategies to maximize individual benefits frequently became entrenched in mutual defection merely due to misunderstanding. The uncooperative, strategically clever (and unsuccessful) players "did not take into account that their *own* behavior would lead the other player to change." *Id.* at 120-22 (emphasis in original).

and then, by agreement, allowed the use of those purchased rights, while simultaneously denying their validity. In competitive negotiations, obfuscation is strategically beneficial; if your opponent cannot understand your behavior, your opponent's strategy becomes less efficient.[185] However, Minnesota and the Ojibwe cooperated in the 1973 and 1988 Agreements and do not need to compete. Both parties need cooperation for mutual benefit. Unambiguous recognition of treaty rights will facilitate mutually beneficial cooperation.

The cooperative venture's structure also adds clarity by ensuring that decisionmakers meet with only a few others, thereby helping to initiate and stabilize cooperation.[186] Limiting the number of decisionmakers makes the negotiators recognizable and their behavior predictable.[187] If decisions must be made by state resource agents in the field, where policy is unclear and parties conflict without cooperative structure, clarity is diminished and cooperation is frustrated. On the other hand, the cooperative venture, by creating a mutual resource management strategy and by limiting the decisionmakers, enhances clarity and promotes cooperation.

3. The Cooperative Venture Requires "Niceness" and Discourages Envy

To reap maximum benefits from the cooperative venture, Minnesota and the Ojibwe Bands must be "nice." That is, neither party should attempt to defect by leaving the negotiating table first. Niceness is a powerful rule; it avoids unnecessary conflict and is the best predictor of success in maximizing benefits.[188] The cooperative venture requires niceness on Minnesota's part by its

185. *Id.* at 123.

186. *See id.* at 131. Referring issues to high level policymakers who are familiar with each other and the issues, and binding them together in a "long-term, . . . multilevel game, [can] promote the emergence of cooperation among groups too large to interact individually." *Id.* *See also* Kriesberg, *supra* note 138, at 212. Participants can hold special roles to manage conflict with other units. When these participants "have the authority to make binding decisions, shifts toward tractability can be relatively quickly done." *Id.*

187. Axelrod, *supra* note 139, at 139-40.

188. In the final round of Axelrod's computer tournament, fourteen of the top fifteen scorers were nice and fourteen of the bottom fifteen scorers were not nice. *Id.* at 113-14. "Forgiveness," a related concept, forgives defection immediately upon the other party's resuming cooperation. Because TIT FOR TAT will defect as long as the other party defects, "a generous level of forgiveness" may be required in problematic conflicted situations. *Id.* at 120. *See also* Scott, *supra* note 138, at 2028-30 (suggesting a conciliatory posture of delayed retaliation for defection in order to stabilize cooperation).

acceptance of Ojibwe treaty rights and from the Ojibwe by their acceptance of Minnesota Department of Natural Resources expertise. In the structure of the cooperative venture, Minnesota and the Ojibwe will avoid unnecessary conflict and utilize the niceness rule to maximize future benefits.

Minnesota need not envy the Ojibwe Band's gain of treaty rights; Minnesota's initial cooperative gesture (niceness) will have a "lock-in" effect and promote the cooperation necessary for Minnesota's benefits to accrue.[189] If cooperation is to begin and stabilize, participants cannot be envious of each other's gains.[190] Most negotiation strategy assumes a competitive posture even though cooperation predominates in everyday life. For example, business people cooperatively trade concessions and favors without envy to enhance long-term mutual benefit. A participant measures success by the other participant's lack of success only if the goal is to harm that other participant.[191] In its prior agreements, Minnesota and the Ojibwe have demonstrated a desire to cooperate, not harm each other. If the cooperative venture is to succeed, Minnesota and the Ojibwe Bands must return to cooperation without envy. In doing so, they can avoid the destructive conflict of threatened litigation and ensure mutual benefits.

4. The Cooperative Venture Encourages Reciprocity: An Analogy

After cooperation is established by an enlarged future, reciprocity will maintain the cooperative venture's stability and promote cooperation. Cooperation is enhanced by reciprocity between participants.[192] Cooperation is promoted when participants exchange "reciprocal concrete incentives" necessary for each to complete their task.[193]

A study involving chronic patients illustrates the power of reciprocal concrete incentives with the evolution of "informed consent."[194] Legislatures, to empower patients and encourage patient self-determination in treatment decisions, created a duty for doctors to inform patients. Doctors resisted, perceiving patients as

189. Scott, *supra* note 138, at 2026; *see also* Axelrod, *supra* note 139, at 21.

190. Axelrod, *supra* note 139, at 110.

191. *Id.* at 111.

192. *Id.* at 118 (Reciprocity is "amazingly robust," it defeats uncooperative strategies and flourishes in interactions with other cooperative strategies.).

193. Handler, *supra* note 56, at 1008.

194. *See id.* at 1002-8.

child-like.[195] Doctors complied minimally with legal requirements to reduce their risk exposure and patients acquiesced to their doctors' recommendations. However, with the chronic patient, doctors needed high levels of patient cooperation and patient information to provide competent care. Patients were given discretionary power regarding their care. The shared decisionmaking stimulated information-sharing dialogue and developed understanding and cooperation over an extended period.[196]

The analogy is clear. Minnesota and the Ojibwe Bands face a chronic treaty rights and game management relationship. Like the doctor and the patient relationship, much can be mutually gained by cooperation, reciprocity, and understanding over this indefinite, extended period. The Ojibwe Bands, like the patient,[197] will benefit from Minnesota's sophisticated resource management research and wealth. Like the information-wealthy doctor, Minnesota needs tribal cooperation, resource management information, and prestige. Acceptance of treaty rights allows the Ojibwe Bands, like the patient, discretion and input in a critical area of life. That discretion will decrease political tensions, increase Minnesota's prestige as a problem solver, and increase resource management information.[198] Like the physician, Minnesota's acceptance of the Ojibwe Bands' treaty rights surpasses minimal compliance and exchanges real reciprocal concrete incentives with the Ojibwe Bands. Minnesota's acceptance of treaty rights and sharing game management discretion and the Ojibwe Bands' agreement to work with Minnesota Department of Natural Resources are reciprocal concrete incentives. In addition to the mutual benefits, the Ojibwe-Minnesota cooperative venture will allow the Ojibwe and Minnesota to demonstrate mutual reliability.

Part V

A. Expect Minnesota and the Ojibwe to Respect the Resources

Both Minnesota and the Ojibwe will act reliably to protect

195. *Id.* at 1003. The powerless are perceived as child-like. *See supra* notes 100-102 and accompanying text; *see infra* text accompanying note 201.

196. *Id.* at 1008; *see also* Brett, Goldberg & Ury, *supra* note 135, at 165. "The information shared in the process of searching for a resolution may increase mutual understanding and benefit the relationship." *Id.*

197. Analogizing the Ojibwe to the patient and Minnesota to the doctor is not meant to suggest that the Ojibwe are not able to care for themselves or that Minnesota is insensitive.

198. To solicit information, including self-reporting, regulators should be cooperative advice-givers. Handler, *supra* note 56, at 1026.

the resources since exploitation of the resources would not be in the best interest of either party. Holding resources as common goods is "[t]he best reason for confidence in another's good care of what one cares about . . . . [Although] [t]his may not, and usually will not, ensure agreement on what best should be done to take care of that good, . . . it rules out suspicion of ill will."[199] Upon accepting Ojibwe treaty rights, resources on the ceded land become the common goods of both Minnesota citizens and the Ojibwe Bands. Minnesota and the Ojibwe may disagree on the best resource management techniques to employ on ceded land, but recognizing the resource as common goods removes the ill will that results in litigation, increased social tensions, noncompliance with conservation schemes, information loss, and disruption of cooperation. Expectations of both parties to respect the resources within the cooperative venture allows Minnesota and the Ojibwe to meet each others' mutual expectations, creating a record of stability and reliability to counter vacillating federal policy.[200] The Ojibwe participation in setting and meeting resource use expectations will also counter the paternalistic, racist characterization of Native Americans as child-like and irresponsible.[201]

B. The Cooperative Venture Can Reduce Racism and Political Unrest

The cooperative venture will reduce racism and status hierarchy. In discussing the social structure of cooperation, one commentator says that "labelling" participants chills cooperation.[202] A label is a fixed, observable characteristic. Cooperation is diminished by labelling because labels influence the choice of whether or not to cooperate—or even interact—and can have the "disturbing consequence of . . . lead[ing] to self-confirming stereotypes."[203] Labelling also limits minorities' interactions with the resource-wealthy majority, thereby supporting the status hierarchy.[204] Although both Minnesota and the Ojibwe Bands suffer by not interacting cooperatively, the Ojibwe Bands suffer greater losses from the limitation on interactions with resource-wealthy

199. Baier, *supra* note 29, at 243.

200. The potential stability created by meeting *mutually* determined expectations should be contrasted with the effects of the vacillation in governmental policy unilaterally formulated by the dominant culture. *See supra* note 3.

201. *See supra* notes 100-102, 195 and accompanying text.

202. Axelrod, *supra* note 139, at 147.

203. *Id.*; *see* Kriesberg, *supra* note 138, at 215 (Adversaries try to "define the other and impose an identification.").

204. *See* Axelrod, *supra* note 139, at 148-49.

Minnesota.[205] The cooperative venture's scheduled monthly mediated meetings and use of Minnesota Department of Natural Resources expertise will increase the number of Ojibwe interactions with Minnesota and will provide a venue for both to view each other as cooperative and reliable. Increasing the quantity and quality of interactions between Minnesota and the Ojibwe will diminish the impact of labelling and disrupt the status hierarchy dominating the Ojibwe. As quality interactions increase, the benefits from the mutual cooperation accrue. As mutual cooperation and benefits increase, the status hierarchy can change and the Minnesota-Ojibwe relationship will evolve constructively and positively.[206]

The political problem of potential violence between Ojibwe Bands exercising treaty rights and state citizens shadows the acceptance of Ojibwe treaty rights.[207] The furor over the exercise of the 1837 Treaty rights in Wisconsin dwarfs the actual impact of the Ojibwe Bands' resource use.[208] Minnesota is justifiably concerned about political unrest, but the prospect of political unrest should not dictate justice. Certain social issues need to be resolved to bring "recalcitrant reality" into alignment with our ideals.[209] In the South, courts forced the states to bring recalcitrant reality into line with our constitutional and democratic ideals. Likewise, in Wisconsin, the courts forced Wisconsin to accept the 1837 Treaty rights. In the South and in Wisconsin, the state governments resisted and did not support the judicially established rights. The lack of state support created ambiguity that exacerbated a difficult situation. In both cases, controversy, racism, harassment, and violence followed.

Minnesota has an opportunity to act affirmatively by clearly supporting the Ojibwe Bands' treaty rights. By acting affirmatively within the cooperative venture, Minnesota can "avoid . . . racial enmities,"[210] circumvent costly, divisive litigation, and effectively manage future resource conflicts on ceded land. Most importantly, Minnesota and the Ojibwe can refine a cooperative

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205. *Id.* at 147.

206. The cooperative exchanges in World War I trench warfare actually changed the nature of the interaction. The cooperative exchanges "tended to make the two sides care about each other." *Id.* at 85; *see also* Brett, Goldberg & Ury, *supra* note 135, at 165 (sharing information in resolving disputes may increase understanding and benefit the relationship).

207. Minnesota negotiated the 1988 Agreement to avert potential violence. Treaty Briefing paper, *supra* note 38.

208. *See supra* note 29.

209. Fiss, *supra* note 55, at 1089.

210. Treaty Briefing Paper, *supra* note 38.

model for managing future state-tribal conflicts. Minnesota's 1973 and 1988 cooperative efforts with the Ojibwe Bands should be extended by publicly accepting and supporting Ojibwe treaty rights. In so doing, Minnesota and the Ojibwe Bands can demonstrate the heartening proposition that the "gears of social evolution have a rachet."[211]

211. Axelrod, *supra* note 139, at 21.