Minnesota v. Mille Lacs Band of Chippewa: 19th Century U.S. Treaty-Guaranteed Usufructuary Property Rights, the Foundation for 21st Century Indigenous Sovereignty

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†. Professor of Law (ret.), William Mitchell College of Law, St. Paul, MN 55105; Director, International Humanitarian Law Institute, St. Paul, MN 55101. The Author's research for this Article began on boat launching ramps in Northern Wisconsin in early spring of the 1980s. Legal observers from the Minnesota Chapter of the National Lawyers Guild spent long, cold nights interposed between 1854 Treaty rights activists from the Lac Courte Oreilles Reservation launching canoes for the spring walleye harvest and armed, non-Indian, anti-Treaty protestors threatening violence under the motto, "Save a Fish, Spear an Indian." From these tense, armed stand-offs that, fortunately, did not become violent, came *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, 700 F.2d 341 (7th Cir. 1983) and the treaty-created usufructuary property analysis that the U.S. Supreme Court unanimously adopted in *State of Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999).

The Author owes a debt of gratitude to living Chippewa Band activists and their forebears for keeping alive the oral history of the "usufructuary property" guarantees made before *any* Minnesota Territory was ceded to the United States. In particular, thanks is due to former Leech Lake Tribal Attorney, Frank Bibeau, Esq., for education on the legal, historical, and practical synthesis of the Anishinabe people and culture that made the Article possible. His understanding of the continuing struggle for survival and sovereignty despite ceaseless efforts to displace and eliminate Native Americans informs the entire Article. Lisa Mayne, J.D., Gigi Penn, Esq., and Amity Johnson provided invaluable research and editing assistance, as did the editors and staff of *Law and Inequality: A Journal of Theory and Practice*. The errors that remain are my responsibility alone. To all, my thanks, *Miigwitch*.

INTRODUCTION[1]

> In 1837, the United States entered into a Treaty with several Bands of Chippewa Indians. Under the terms of this Treaty . . . the United States guaranteed to the Indians certain hunting, fishing, and gathering rights on the ceded land . . . . After an examination of the historical record, we conclude that the Chippewa retain the usufructuary rights guaranteed to them under the 1837 Treaty.
>
> – Justice Sandra Day O'Connor[2]

In *Minnesota v. Mille Lacs Band of Chippewa Indians* (*Mille Lacs*), a closely divided 5–4 opinion on the merits before the Court

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1. Land use and environmental regulation implications of treaty-guaranteed usufructuary property interests arising in *Minnesota v. Mille Lacs Band of Chippewa Indians (Mille Lacs)*, 526 U.S. 172 (1999), in a broad sense, were first discussed by this Author in a short article that described the background to the 1837 Treaty and majority and dissenting opinions in the 5–4 opinion on the merits. *See* Peter Erlinder, *Treaty-Guaranteed Usufructuary Rights:* Minnesota v. Mille Lacs Band of Chippewa Indians *Ten Years On*, 41 ENVTL. L. REP. NEWS & ANALYSIS 10921 (2011), *available at* http://elr.info/news-analysis/41/10921/treaty-guaranteed-usufructuary-rights-minnesota-v-mille-lacs-band-chippewa-in [hereinafter Erlinder, *Ten Years On*]. The article was the first to point out that the closely-divided opinion disguised the Court's unanimity on the nature and origin of treaty-guaranteed usufructuary property interests. *See id.* The present Article builds upon this Author's 2011 article by applying the *Mille Lacs* usufructuary property analysis to pre-1837 treaties and long-decided "Minnesota treaty cases" to reveal the limited scope of "treaty rights" recognized prior to the *Mille Lacs* analysis. This provides a new way of understanding 160-year-old treaties and long-standing precedent and is likely to become even more far-reaching with time, as recent cases arising in civil regulatory and criminal contexts are beginning to demonstrate.

2. *Mille Lacs*, 526 U.S. at 175–76.

analyzing the continuing viability of the hunting, fishing, and gathering guarantees in an 1837 Treaty, which ceded territory to the United States, masked a unanimous opinion establishing the analytical methodology for finding such "usufructuary property" guarantees in the language used by U.S. treaty negotiators to sever the continuing right to use land for the survival of its inhabitants from mere "title" to real property.[3] This "use of the land for survival purposes" has been denominated "usufructuary property" since Roman times[4] and is but one of the "sticks" that make up the fee simple "bundle of sticks," long recognized in the common law as alienable from mere formal title.[5]

Unanimity Within a Divided Opinion: Treaty-Created Usufructuary Property Rights

By separating "title" from "use," U.S. treaty negotiators created treaty-guaranteed property interests which, like subsurface mineral rights or utility easements, do not transfer with "title."[6] Created by the language of treaties between sovereigns, these property interests may not be lawfully taken from the indigenous nations without specific congressional authorization to abrogate the property interests memorialized in a treaty between sovereigns.[7] Moreover, the abrogation of treaties with native people must be expressed in language that clearly reflects the intention of Congress to do so and is clearly understood as such by the Anishinabe.[8]

The *Mille Lacs* majority and dissenting opinions agreed with this principle and differed *only* as to whether the 1837 Treaty-guaranteed usufructuary property rights had been abrogated by one or more of three subsequent events: (a) an 1850 Executive Order by President Zachary Taylor, that purported to limit the Anishinabe to sovereign territory in Minnesota outside of the 1837 Treaty-ceded territory which was the remainder of Minnesota at

3. *See* Michael R. Newhouse, *Recognizing and Preserving Native American Treaty Usufructs in the Supreme Court: The* Mille Lacs *Case*, 21 PUB. LAND & RESOURCES L. REV. 169, 193–94 (2000).

4. Usufruct, *n.* [fr. Latin *usufructus*] *Roman & civil law.* BLACK'S LAW DICTIONARY (9th ed. 2009). "A right . . . to use and enjoy the fruits of another's property for a period without damaging or diminishing it, but allowing for any natural deterioration in the property over time." *Id. See also* LA. CIV. CODE ANN. art. 535 (1976) (codifying the definition of "usufruct"). *See* 31 C.J.S. *Estates* §§ 2–5, 8, 15–21, 116–28, 137, 243 (2014).

5. *Mille Lacs*, 526 U.S. at 175–76.

6. *Id.* at 176.

7. *See, e.g.*, United States v. Dion, 476 U.S. 734, 738 (1986).

8. *Id.*

that time as recognized by Treaties of 1825 and 1826;[9] (b) an 1855 Treaty also ceded territory but did not mention abrogation of any usufructuary rights guaranteed in the 1854 Treaty and all prior treaties;[10] or, (c) Minnesota's 1858 Statehood Act, which the Supreme Court had examined before, but never found to have abrogated pre-existing usufructuary property rights in prior U.S. treaties.[11]

The *Mille Lacs* dissent did not question that usufructuary property rights, guaranteed in an 1854 Treaty referenced by the majority, had been upheld by the Seventh Circuit and recognized by the Minnesota Department of Natural Resources (DNR) a decade earlier in the 1854-ceded territory in the eastern part of Minnesota north of Lake Superior.[12] The *Mille Lacs* dissent did note the same 1854 Treaty specifically referred to the rest of Minnesota (then covered only by the 1825 and 1826 "sovereignty Treaties" and the 1837 "cession") as being unchanged by the 1854 Treaty.[13] The majority agreed with the well-established principle that congressional abrogation of treaty-guaranteed property rights was not to be lightly inferred.[14] Further, the majority acknowledged that treaties and congressional enactments must be liberally interpreted, as understood by the Indians.[15]

Ojibwe Usufructuary Property Rights in Northern Minnesota

With respect to the usufructuary property interests of the Chippewa/Ojibwe[16] in the rest of Minnesota (outside the 1837-ceded territory), two major questions remain after the *Mille Lacs* opinion regarding the scope of treaty-guaranteed usufructuary property interests of the Ojibwe. First, did the Anishinabe have *treaty-guaranteed* usufructuary rights in the rest of Northern Minnesota outside the 1837-ceded territory at that time, or did they possess merely "aboriginal title" or "Indian title" upon which

9. *Mille Lacs*, 526 U.S. at 188.

10. *Id.* at 195.

11. *Id.* at 202.

12. *Id.* at 208–26 (Rehnquist, C.J., dissenting; Thomas, J., dissenting).

13. *See id.*

14. *Id.* at 202 (majority opinion) (citing United States v. Dion, 476 U.S. 734, 738–40 (1986); Menominee Tribe v. United States, 391 U.S. 404, 413 (1968)).

15. *Id.* at 196 (citing Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 675–76 (1979)).

16. The terms Chippewa, Ojibwe, and Anishinabe are used interchangeably throughout this Article. The terms Lakota, Dakota, Sioux, and Anishinabe are also used interchangeably.

to base later claims, as nearly all courts have assumed?[17] Second, if the Ojibwe *did* possess treaty-guaranteed usufructuary rights in the rest of Minnesota outside the 1837-ceded territory, are those property interests also as valid today as they are *within* the 1837-ceded territory, as the Supreme Court held in the *Mille Lacs* opinion? Treaty-guaranteed usufructuary property interests in the whole of Northern Minnesota, that are still valid today, would have a significant impact on the environmental and economic future of Northern Minnesota and its native people.

This Article answers these questions by elaborating treaty history to include the hunting, fishing, and gathering rights guaranteed by the U.S. government in Minnesota territory *before* 1837, which include: (a) the 1795 Treaty of Greenville; (b) the 1825 Treaty of Prairie du Chien; (c) the 1826 Treaty of Fond du Lac of Lake Superior; and (d) a relatively-unrecognized clause of the 1854 Treaty that explicitly guarantees "the Chippewas of the Mississippi" usufructuary property rights in un-ceded territory west of the 1854 Treaty-ceded territory boundary.[18] In light of the usufructuary property rights analysis unanimously adopted by the Supreme Court in *Mille Lacs*, which builds upon the analysis in the earlier *Lac Courte Oreilles* (*LCO*) cases in the Seventh Circuit,[19] the Article concludes that these treaties—which remain largely unexamined in legal literature and case law[20] for the simple reason that they did not cede territory to the United States and have been of little interest to those researching land-cession issues—are an unrecognized source of treaty-guaranteed usufructuary property rights across all of Northern Minnesota, both on and off reservations.[21]

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17. Leech Lake Band of Chippewa Indians v. Herbst, 334 F. Supp. 1001 (D. Minn. 1971).

18. Treaty with the Chippewas art. 1, U.S.-Tribal Nation, Sept. 30, 1854, 10 Stat. 1109 [hereinafter Treaty of 1854]. Territory west of the 1854 Treaty boundary, including territory where the Leech Lake, Red Lake, and White Earth Reservations are now located, remained the domain of the sovereign Anishinabe Nation and was the subject of subsequent land cession treaties and congressional enactments for the next fifty years. *See infra* Appendices I and II.

19. *See, e.g.*, Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin (*LCO I*), 700 F.2d 341 (7th Cir. 1983).

20. *But see* Mole Lake Band v. United States, 126 Ct. Cl. 596 (1953); State v. Keezer, 292 N.W.2d 714 (Minn. 1980).

21. An earlier version of the Article, which was published in the Environmental Law Reporter, focused on the implication of treaty-guaranteed usufructuary property rights as a new source of tribal-based environmental regulation in treaty territory where protection of the right to derive a "modest living" from exercising usufructuary property rights is guaranteed by federal treaties. *See* Erlinder, *Ten Years On*, *supra* note 1, at 10922.

These Treaties recognized the sovereignty of the Dakota and Anishinabe nations and changed the nature of the rights held by both the Dakota and Anishinabe from inchoate "aboriginal rights" (or "Indian title") as has been assumed by most Minnesota jurists,[22] into "treaty-guaranteed" usufructuary property rights which the *Mille Lacs* opinion teaches are the source of a developing jurisprudence in the 21st century.[23] Once these "treaty rights" are understood as a form of "property," constitutional due process protections advanced by the "property-rights movement" must protect "treaty property rights" as any other intangible property interest (such as an easement or a sub-surface mineral right).[24] A fundamental thesis of the Article is that re-conceptualizing "treaty rights" as "property interests" requires a complete reassessment of the constitutional treatment of those interests under the Due Process Clause.

Modern Usufructuary Property Rights, Sovereignty, and Natural Resources

Because usufructuary property rights include "the right to modest living,"[25] environmental protection to maintain the long-term value of these property rights will have significant long-term off-reservation land use and wildlife management implications for tribal governments and tribal members.[26] Of late, federal prosecutions of tribal members for violations of the federal Lacey Act, predicated on tribal members' violation of tribal game regulations, are direct violations of the sovereignty explicitly guaranteed in the exercise of usufructuary property rights in the heart of "Indian Country."[27] Some of these prosecutions have been dismissed by federal district court judges who recognized that,

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22. *See Herbst*, 334 F. Supp. at 1001.

23. Memorandum Opinion and Order Rejecting the Reports and Recommendations of the Magistrate Judge, United States v. Lyons, Case No. 13-70 (Nov. 25, 2013), *available at* http://turtletalk.files.wordpress.com/2013/11/90-dct-order-rejecting-mj-rr.pdf [hereinafter Tunheim Order].

24. *See infra* Part II.B.

25. Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin (*LCO VI*), 686 F. Supp. 226, 233 (W.D. Wis. 1988). *See* Erlinder, *Ten Years On*, *supra* note 1, at 10922.

26. *See infra* Part V.A.

27. For example, "Operation Squarehook" was an undercover "sting" operation in which a large number of tribal band members were prosecuted under the federal Lacey Act, 16 U.S.C. §§ 3371–3378 (2012), for wildlife violations. *See* Doug Smith & Dennis Anderson, *3-Year Walleye-Poaching Probe Nets More Charges in Minnesota*, STAR TRIB., Apr. 15, 2013, http://www.startribune.com/local/203006351.html.

while usufructuary rights established by treaties between sovereigns may be abrogated by Congress with a clear intention to do so (in language understood by both parties to accomplish that result), these rights cannot be set aside as merely incidental to a federal statute.[28]

Further, because usufructuary property rights include "the right to a modest living,"[29] where these property rights have been guaranteed by treaty with the federal government, shared management and shared income as co-equals with state governments is mandated, either through joint state/native management or state leasing of treaty-guaranteed usufructuary rights. Environmental protection to maintain the long-term value of the usufructuary property rights for the Anishinabe will be necessary in all of Northern Minnesota.[30] This, in turn, will have land-use management implications far beyond wildlife harvest management and promises both a broadened role for tribal governments in land-use decisions[31] and a potential source of income for some of Northern Minnesota's most impoverished citizens.[32]

The survival of treaty-guaranteed usufructuary property interests through subsequent transfer of title is already well established; for example, the Supreme Court held nearly fifty years ago that, even after the Menominee Reservation became Menominee County, Wisconsin, the treaty-guaranteed rights of the Menominee people continued to run with the land even after Congress terminated the Reservation itself.[33] Absent another act

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28. Tunheim Order, *supra* note 23. *See also* Menominee Tribe of Indians v. United States, 391 U.S. 404 (1968) (holding that the Menominee Tribe's hunting and fishing rights survived an act of Congress which did not explicitly eliminate them).

29. Erlinder, *Ten Years On*, *supra* note 1, at 10922.

30. *See* Cobell v. Salazar, 573 F.3d 808 (D.C. Cir. 2009). *See also* Patrick Reis, *Obama Admin Strikes $3.4B Deal in Indian Trust Lawsuit*, N.Y. TIMES (Dec. 8, 2009), http://www.nytimes.com/gwire/2009/12/08/08greenwire-obama-admin-strikes-34b-deal-in-indian-trust-l-92369.html (reporting a settlement for mismanagement of Native American land trusts); *Tribal Nations Issues and Perspectives*, GREAT LAKES REG'L COLLABORATION 17 (Apr. 26, 2005), http://glrc.us/documents/strategy/GLRC-Tribal-Briefing-Paper.pdf [hereinafter *Tribal Nations Issues and Perspectives*] (discussing the federal government's trust responsibility).

31. *See LCO I*, 700 F.2d 341, 344 (7th Cir. 1983).

32. *See* Jeffrey Robert Connolly, *Northern Wisconsin Reacts to Court Interpretations of Indian Treaty Rights to Natural Resources*, 11 GREAT PLAINS NAT. RESOURCES J. 116 (2007). The issues in this Article are limited to an examination of Anishinabe treaties with the United States, although a similar analytical approach would apply to Dakota/Lakota treaties, or those with other Indian nations. *See* Newhouse, *supra* note 3.

33. *Menominee Tribe*, 391 U.S. at 412–13.

of Congress separately abrogating the usufructuary property interests in addition to the termination of the Reservation, the usufructuary property interests of the Menominee people continue undiminished in what is now Menominee County, Wisconsin.[34]

A similar principle had already been applied to the 1854 Treaty territory by the Seventh Circuit and recognized by both Wisconsin and Minnesota.[35] The Supreme Court adopted this analysis in deciding the *Mille Lacs* case. Application of the *Mille Lacs* usufructuary property analysis to the territory described in treaties with the Chippewa would apply to all of Northern Minnesota, particularly the Treaties of 1825 and 1826 which have guaranteed usufructuary property interests not only on reservations, but also on the broad swath of territory described by Lakota/Sioux sovereign territory boundary, extending north to the Canadian border.

I. BACKGROUND TO THE RESTORATION OF CHIPPEWA TREATY-GUARANTEED USUFRUCTUARY PROPERTY RIGHTS IN NORTHERN MINNESOTA[36]

> The utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent; and, in their property, rights, and liberty, they shall never be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity, shall from time to time be made for preventing wrongs being done to them, and for preserving peace and friendship with them.
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> – Northwest Ordinance, 1787[37]

Through a series of cases brought in federal courts to enforce and define the treaty rights guaranteed to tribes and tribal members, a body of federal case law has developed that firmly establishes the concept of tribal sovereignty[38] on the order of that

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34. *Id.*

35. *See Mille Lacs*, 526 U.S. 172, 188 (1999); *LCO I*, 700 F.2d at 341.

36. Portions of this Section on historical background were drawn from the introductory article on this issue by the Author. *See* Erlinder, *Ten Years On*, *supra* note 1.

37. AN ORDINANCE FOR THE GOVERNMENT OF THE TERRITORY OF THE UNITED STATES NORTHWEST OF THE RIVER OHIO ch. 8, art. 3, 1 Stat. 50, 52 (1787) [hereinafter NORTHWEST ORDINANCE].

38. *See Tribal Nations Issues and Perspectives*, *supra* note 30, at 6–7. This reads:

enjoyed by the separate states within the federal union.[39] In addition, congressional passage of Public Law 280[40] in 1953 established tribal authority over a wide range of administrative and civil-regulatory matters,[41] which served to reinforce the tribal regulatory power but limited sovereignty over criminal matters on reservations[42] in the six states in which Public Law 280 applies.[43]

B.1 Government-to-Government Relationships

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

This relationship requires federal agencies to interact directly with Tribal Nations on a governmental basis, not merely as a segment of the general public:

- This obligation is separate and distinct from obligations to states and other governments as well as from requirements affording the opportunity for general public input on federal decisions.
- Federal agencies are to consult with tribal governments and their designated governmental representatives, to the greatest extent practical and as not otherwise prohibited by law, before taking actions that affect tribal lands, resources, people, or treaty rights.

Many states, such as Michigan and Wisconsin, have adopted government-to-government consultation policies similar to that required of the federal government.

39. State v. Losh, 755 N.W.2d 736, 739 (Minn. 2008) ("Indian Tribes retain attributes of sovereignty over both their members and . . . tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States.") (citing California v. Cabazon Band of Mission Indians, 480 U.S. 202, 207 (1987) (quoting Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 154 (1980); United States v. Mazurie, 419 U.S. 544, 557 (1975))) (internal quotation marks omitted).

40. Public Law 280, Pub. L. No. 83-280 (1953) (codified as amended at 18 U.S.C. § 1162 (2006); 25 U.S.C. §§ 1321–1324 (2006); 28 U.S.C. § 1360 (2006)). *See Losh*, 755 N.W.2d at 739.

41. *See Cabazon Band*, 480 U.S. at 207–14 (holding that Public Law 280 authorized on-reservation state criminal jurisdiction, but limited state jurisdiction over civil and regulatory matters).

42. *See* Duro v. Reina, 495 U.S. 676, 688 (1990). *But see* United States v. Lara, 541 U.S. 193, 197 (2004) (recognizing "the inherent power of Indian tribes . . . to exercise criminal jurisdiction over all Indians," 25 U.S.C. § 1301(2), but only when tribal institutions are sufficient and the alleged violator is a member of the band or tribe in question); State v. Davis, 773 N.W.2d 66, 70–71 (Minn. 2009) (concluding that the various Anishinabe Bands are separable entities).

43. *See* 18 U.S.C. § 1162 (2006):

(a) Each of the States or Territories listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws

In Minnesota, on-reservation tribal sovereignty has been recognized with respect to functions similar to state-government civil functions,[44] such as the regulation of gaming,[45] motor vehicle registration,[46] traffic,[47] sale of tobacco and other state-regulated commodities,[48] on-reservation enforcement of tribal conservation,[49] and state court enforcement of tribal court civil judgments.[50] However, except in the 1854 Treaty area in the Arrowhead, the recognition of off-reservation hunting, fishing, and gathering usufructuary rights has not kept pace with the development of on-reservation tribal civil regulatory sovereignty.[51]

A. The Late 20th Century Grassroots Activism: The Rule of Law Returns After 160 Years of Systemic Usufructuary Property Theft

More than a decade before *Mille Lacs* reached the Supreme Court, members of Anishinabe Bands in Wisconsin began a series of organized attempts to exercise rights to hunt, fish, and gather in areas of Wisconsin ceded to the United States by an 1854 Treaty, which specifically stated that, like in the 1837 Treaty, the Anishinabe retained the use of the land for hunting, fishing, and gathering.[52] News accounts of the period reported heated debates and threats of physical violence between non-natives who did not

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of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory: [i.e., Alaska, California, Minnesota, Nebraska, Oregon, Wisconsin].

44. *See, e.g.*, Bryan v. Itasca Cnty., Minn., 426 U.S. 373 (1976) (state taxation).

45. *See, e.g.*, *Cabazon Band*, 480 U.S. at 212 (tribal gambling). *See also* Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701–2721 (2014) [hereinafter IGRA] (regulating "the conduct of gaming on Indian Lands").

46. *See, e.g.*, LEECH LAKE BAND OF OJIBWE TRAFFIC CODE ch. 200, § 213 (2000) (motor vehicle registration).

47. *See, e.g.*, State v. Stone, 572 N.W.2d 725, 731 (Minn. 1997) (traffic laws); *see also* LEECH LAKE BAND OF OJIBWE TRAFFIC CODE ch. 200, §§ 201–18 (2000) (same).

48. *See, e.g.*, LEECH LAKE BAND OF OJIBWE TAXATION CODE tit. 5, ch. 2, Tobacco Tax, §§ 5.201–5.209 (2009) (tobacco sales).

49. *See, e.g.*, Grand Traverse Band of Ottawa & Chippewa Indians v. Dir., Mich. Dep't of Natural Res., 141 F.3d 635 (6th Cir. 1998) (treaty-reserved fishing rights); LEECH LAKE BAND OF OJIBWE CONSERVATION CODE tit. 11, ch. I (2012) (regulations such as issuance of fishing permits).

50. *See, e.g.*, Shakopee Mdewakanton Sioux (Dakota) Gaming Enter. v. Prescott, 779 N.W.2d 320 (Minn. Ct. App. 2010); *see also* LEECH LAKE BAND OF OJIBWE JUDICIAL CODE tit. 2, R. 60, adopted Nov. 21, 2000 (rule of procedure regarding Full Faith and Credit and Comity); Minn. Gen. Rules of Practice, Dist. Cts., R.10.01 (2014).

51. *See infra* Part II.B.

52. *See* Treaty of 1854, *supra* note 18.

understand the meaning of federal treaties and tribal members who were engaging in traditional practices that the Wisconsin DNR had outlawed.[53] The result of nearly a decade of activism and litigation was a Seventh Circuit decision upholding Anishinabe usufructuary property rights in the 1854-ceded territory in *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*[54] and related cases (*LCO* litigation)[55] that preceded the *Mille Lacs* litigation by more than a decade and were cited by the district court,[56] the Eighth Circuit,[57] and the Supreme Court.[58]

Drawing, at least in part, on the activism that brought the 1854 Treaty and Anishinabe usufructuary property rights back to life in Wisconsin, in the spring of 2010 several dozen members of the White Earth and Leech Lake Bands of Anishinabe announced a public ceremony within the territory governed by an 1855 Treaty with the United States, during which they would use traditional nets rather than state-DNR-approved methods to harvest fish the day before the "fishing opener."[59] DNR officers seized the nets, but made no arrests.[60]

Segments of the non-Indian public and media applauded the Minnesota DNR's assertion of sole authority over Anishinabe off-reservation hunting, fishing, and gathering, and called for "equal rights for non-Indians."[61] Recent "grass-roots" activism by

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53. *See* LARRY NESPER, THE WALLEYE WAR: THE STRUGGLE FOR OJIBWE SPEARFISHING AND TREATY RIGHTS (2002).

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

55. Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin (*LCO II*), 760 F.2d 177 (7th Cir. 1985); Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin (*LCO III*), 758 F. Supp. 1262 (W.D. Wis. 1991); Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin (*LCO IV*), 740 F. Supp. 1400 (W.D. Wis. 1990); Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin (*LCO V*), 707 F. Supp. 1034 (W.D. Wis. 1989); *LCO VI*, 686 F. Supp. 226, 233 (W.D. Wis. 1988); Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin (*LCO VII*), 668 F. Supp. 1233 (W.D. Wis. 1987); Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin (*LCO VIII*), 653 F. Supp. 1420 (W.D. Wis. 1987).

56. Mille Lacs Band of Chippewa Indians v. Minnesota (*Mille Lacs II*), 952 F. Supp. 1362 (D. Minn. 1997); Mille Lacs Band of Chippewa Indians v. Minnesota (*Mille Lacs III*), 861 F. Supp. 784 (D. Minn. 1994).

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

58. *Mille Lacs*, 526 U.S. 172 (1999).

59. Tom Roberts, *Band Members Continue Plan to Assert Tribal Rights with Protest*, MINN. PUB. RADIO (May 4, 2010), *available at* http://minnesota.publicradio.org/display/web/2010/05/04/ojibwe-treaty-rights.

60. *Id.*

61. *See* Minnesota v. Fellegy, 819 N.W.2d 700 (Minn. Ct. App. 2012). Stephen Fellegy, a non-Indian, caught a walleye out of season, protesting what he views to be the state's unjust, favorable treatment of Ojibwe, the Native Americans whose

organized tribal members asserting treaty rights,[62] similar to the organized activism of Wisconsin tribal members that brought about recognition of treaty rights in Wisconsin in the 1980s,[63] is a sign that neither the State of Minnesota nor the Bureau of Indian Affairs nor tribal governments who have failed to act so far, will be able to ignore the implications of the *Mille Lacs* opinion for much longer.[64]

B. Usufructuary Property in Sovereign *Ojibwe Territory: The Northwest Ordinance and the "Forgotten Treaties" of 1795, 1825, 1826, and 1854*

Detailed histories of the 1837, 1854 (Wisconsin), and 1855 Treaties are well canvassed in both the district court opinions in the *Mille Lacs* and previous *LCO* litigation[65] regarding the 1854 Treaty, but the statutes and treaties that preceded the first cession of Minnesota territory in 1837 (i.e., the Treaties of 1795, 1825, and 1826, all of which covered the territory ceded by Anishinabe in 1837 and after) were not analyzed in light of the treaty-guaranteed usufructuary property analysis adopted unanimously by the Court in the *Mille Lacs* opinion.[66] But, each of those treaties guaranteed hunting, fishing, and gathering rights to the Anishinabe on the territory of what is now Minnesota, which, like the 1837, 1854, and 1855 Treaties, have never been abrogated

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treaty rights exempt them from prosecution for violating the state's fishing restrictions on Lake Mille Lacs. *Id.* at 702–06.

62. Dennis Anderson, *Chippewa to Fish Early in Treaty Clash*, STAR TRIB. (Apr. 21, 2010), http://www. startribune.com/local/91716694.html.

63. *See* NESPER, *supra* note 53; Dirk Johnson, *Indian Fishing Dispute Upsets North Woods' Quiet*, N.Y. TIMES (Apr. 24, 1988), http://www.nytimes.com/1988/04/24/us/indian-fishing-dispute-upsets-north-woods-quiet.html; Dirk Johnson, *Indian Hunting Rights Ignite a Wisconsin Dispute*, N.Y. TIMES (May 16, 1987), http://www.nytimes.com/1987/05/16/us/indian-hunting-rights-ignite-a-wisconsin-dispute.html.

64. *See* Letter from Karen R. Driver, Chairwoman of the Reservation Bus. Comm., Fond du Lac Band of Lake Superior Chippewa, to Burl W. Haar, Exec. Sec'y, Minn. Pub. Util. Comm'n (Sept. 29, 2014), *available at* https://www.edockets.state.mn.us/EFiling/edockets/searchDocuments.do?method=showPoup&documentId={74CF238E-151F-4307-B81E-5DE9FEE620D7}&documentTitle=20149-103433-01 (responding to the proposed Sandpiper oil pipeline project before the Minnesota Public Utilities Commission, Docket Nos. PPL 6668/CN-13-473 and PPL 6668/PPL 13-474).

65. *See LCO II*, 760 F.2d 177 (7th Cir. 1985); *LCO III*, 758 F. Supp. 1262 (W.D. Wis. 1991); *LCO IV*, 740 F. Supp. 1400 (W.D. Wis. 1990); *LCO V*, 707 F. Supp. 1034 (W.D. Wis. 1989); *LCO VI*, 686 F. Supp. 226 (W.D. Wis. 1988); *LCO VII*, 668 F. Supp. 1233 (W.D. Wis. 1987); *LCO VIII*, 653 F. Supp. 1420 (W.D. Wis. 1987).

66. *Mille Lacs II*, 952 F. Supp. 1362 (D. Minn. 1997); *Mille Lacs III*, 861 F. Supp. 784 (D. Minn. 1994).

by treaty or specific congressional enactment, as the Supreme Court found in the *Mille Lacs* opinion.

As late as 1863, U.S. treaty negotiators—for example, early Minnesota Governor Alexander Ramsey—were still verbally promising that the Anishinabe would retain the hunting, fishing, and gathering rights on ten million acres of newly-ceded territory for an indefinite period.[67] Although the U.S. negotiators did not put these promises in writing in the 1854 Treaty, the 1855 Treaty approved by Congress only months later was interpreted by the Court in the *Mille Lacs* opinion to retain the usufructuary rights previously agreed upon.[68] This series of previously uninterpreted treaties takes on new significance in interpreting the silence of all later treaties on the question of usufructuary rights.[69]

The 1787 Northwest Ordinance:[70] Native American "Property, Rights, and Liberty"

The Northwest Territory, stretching from the Ohio Valley to Minnesota, was not incorporated into the United States until the 1783 Treaty of Paris, which formally ended the American Colonies' war for political independence.[71] Four years later, the Continental Congress declared its intention with respect to Native peoples residing in the newly-gained territory by enacting the Northwest Ordinance,[72] which provided the first legal structure to govern the new territory. National policy towards the Indians in all of the Northwest Territory was to be: "[G]ood faith . . . towards the Indians; their . . . property shall never be taken from them without their consent; and in their property, rights and liberty, they never shall be invaded or disturbed . . . ."[73] Before the Constitution was ratified in 1787, before a federal executive or judiciary had been

67. Treaty with the Chippewa—Red Lake and Pembina Bands 1863, U.S.-Tribal Nation, Oct. 2, 1863, 13 Stat. 667 [hereinafter Treaty of Old Crossing]. The Senate ratified the Treaty of Old Crossing, with amendments, on March 1, 1864. *Id.* Amendments were assented to on April 12, 1864, and it was proclaimed by the President of the United States on May 5, 1864. *Id.* The Treaty did not mention hunting and fishing rights, "but the transcript of Ramsey's negotiations with the Band makes clear that the Indians were promised they could continue to hunt and fish on the ceded land until it was settled." United States v. Minnesota, 466 F. Supp. 1382, 1383 (D. Minn. 1979).

68. *Mille Lacs*, 526 U.S. 172, 202 (1999).

69. *See infra* Part III.

70. NORTHWEST ORDINANCE, *supra* note 37.

71. Definitive Treaty of Peace Between the United States of America and his Britannic Majesty, U.S.-Gr. Brit., Sept. 3, 1783, 8 Stat. 80, 80–82 [hereinafter Treaty of Paris].

72. NORTHWEST ORDINANCE, *supra* note 37.

73. *Id.* at art. 3.

established, and, perhaps most significantly, before even a standing army capable of occupying or defending the huge new Northwest Territory could be mustered by a centralized government,[74] the nation's policy of respect for Indian property rights was established by the United States.[75]

The 1795 Treaty of Greenville[76]

The 1795 Treaty of Greenville was a peace treaty between the United States and the Anishinabe and other tribes, which established a dividing line between territory claimed by the United States within the Northwest Territory and the Indian Territory over which the United States had no claim.[77] It was negotiated only a few years after the ratification of the Constitution and the Bill of Rights.[78] A peace treaty with the tribes and a promise of loyalty to the United States served the interests of the new nation, and treaty negotiator General Anthony Wayne's respect for Indian property was matched with a guarantee of continued rights of a usufructuary nature.[79] Article V of the 1795 Treaty of Greenville applied in the territory occupied

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74. *See* Mole Lake Band v. United States, 126 Ct. Cl. 596 (1953). As late as the War of 1812, the Anishinabe were "associated" with Great Britain as the Treaty of September 8, 1815 declared:

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

Id. at 604. *See also* A Treaty Between the United States of America and the Wyadot, Delaware, Seneca, Shawanoe, Miami, Chippewa, Ottawa, and Potawatimie, Tribes of Indians, Residing Within the Limits of the State of Ohio, and the Territories of Indiana and Michigan, U.S.-Tribal Nation, Sept. 8, 1815, 7 Stat. 131 [hereinafter Treaty of September 8, 1815].

75. This was more than seventy-five years before Minnesota was carved out of the Northwest Territory to become a state. Minnesota Statehood Enabling Act, ch. 50, 11 Stat. 166–67 (1857).

76. A Treaty of Peace Between the United States of America and the Tribes of Indians, Called the Wyandots, Delawares, Shawanoes, Ottawas, Chippewas, Putawatimes, Miamis, EelR-iver, Weea's, Kickapoos, Piankashaws, and Kaskaskias, U.S.-Tribal Nation, Aug. 3, 1795, 7 Stat. 49 [hereinafter Treaty of Greenville].

77. *See* Keezer, 292 N.W.2d 714 (Minn. 1980).

78. However, it was not until 1803 that *Marbury v. Madison*, 5 U.S. 137 (1803), established the role of the Supreme Court in the separation of powers framework, which raises some question as to post hoc interpretations of the Treaty of Greenville later in the 19th Century.

79. *See* Treaty of Greenville, *supra* note 76.

by the Anishinabe, which includes what is now Minnesota, provided:

> The Indian tribes who have a right to those lands, are quietly to enjoy them, hunting, planting, and dwelling thereon so long as they please, without any molestation from the United States; but when those tribes, or any of them, shall be disposed to sell their lands, or any part of them, they are to be sold only to the United States; and until such sale, the United States will protect all the said Indian tribes in the quiet enjoyment of their lands against all citizens of the United States, and against all other white persons who intrude upon the same. And the said Indian tribes again acknowledge themselves to be under the protection of the said United States and no other power whatever.[80]

Article VI gave *both* the United States and the Anishinabe the right to drive off any White person, even if the person was a citizen of the United States who settled in the Treaty territory, and it established a western boundary between land claimed by the United States and Indian Territory.[81]

The 1825 Treaty of Prairie du Chien[82]

Neither the Treaty of Greenville nor the 1825 Treaty of Prairie du Chien ceded territory to the United States. But, U.S. treaty negotiators did prevail upon Chippewa/Anishinabe and Sioux/Dakota[83] to separate their overlapping 1795 Treaty-guaranteed rights to hunt, fish, and gather anywhere they pleased in the Northwest Territory.[84] The Dakota and Anishinabe applied their own methods of inter-tribal regulation, but the 1825 Treaty formalized these aboriginal claims into sovereign treaty-guaranteed domains—the Anishinabe in Northern Minnesota and the Dakota to the south[85]—with disputes to be resolved with the assistance of the United States, a signatory to the Treaty:

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80. *Id.* at art. V.

81. *Id.* at art. VI.

82. Treaty with the Sioux and Chippewa, Sacs and Fox, Menominie, Ioway, Sioux, Winnebago, and a portion of the Ottawa, Chippewa, and Potawattomie, Tribes, U.S.-Tribal Nation, Aug. 19, 1825, 7 Stat. 272 [hereinafter 1825 Treaty of Prairie du Chien].

83. The "Dakota," a Great Plains culture, inhabited the eastern range of the Lakota language group, which also included the Nakota languages. Anishinabe called them Nadowessioux (little-snakes, or little-enemies). The French shortened the name given to them by their enemies to "Sioux." Erlinder, *Ten Years On*, *supra* note 1, at n.28. This Article will refer to the Lakota groups inhabiting Minnesota as the Dakota.

84. *See* 1825 Treaty of Prairie du Chien, *supra* note 82; Erlinder, *Ten Years On*, *supra* note 1.

85. *See* 1825 Treaty of Prairie du Chien, *supra* note 82.

> Preamble:
>
> The United States of America . . . to promote peace among these tribes, and to establish boundaries among them . . . have invited the Chippewa . . . [and] Sioux . . . to assemble together . . . to accomplish these objects; . . . and after full deliberation, the said tribes . . . have agreed with the United States, and with one another, upon the following articles.[86]

The three-party nature of the Treaty suggests that the United States recognized the claims of each sovereign entity and acted as guarantor of the Treaty terms. Formerly inchoate "native title" claims to the territory in question were transformed into "treaty guaranteed" usufructuary property interests that were to have a much different standing in the law than might have been anticipated in the early-19th Century.[87]

There can be no serious dispute that the United States initiated the 1825 Treaty negotiations,[88] acted as facilitator,[89] committed the Treaty terms to writing,[90] and signed the Treaty as a party.[91] Although the United States did not seek land cessions for itself from the Anishinabe, the 1825 Treaty did serve the interests of the United States on a frontier that was difficult to defend, considering it was ratified only a decade after the War of 1812—a war in which many Indian tribes in the Northwest Territory had openly sided with the British:

> Article 10.
>
> All the tribes aforesaid acknowledge the general controlling power of the United States, and disclaim all dependence upon, and connection with, any other power. And the United States agree to, and recognize, the preceding boundaries, subject to the limitations and restrictions before provided . . . .[92]

The terms of the 1825 Treaty give additional substance to Anishinabe oral tradition in that the United States had promised them *both* sovereignty and the right to the wild game in Northern Minnesota. Moreover, along with the 1795 Treaty, the 1825 Treaty provides concrete evidence as to the Anishinabe understanding of later treaties.[93] The 1837 Treaty was quite

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86. *Id.*

87. Johnson v. M'Intosh, 21 U.S. 543 (1823).

88. *See* 1825 Treaty of Prairie du Chien, *supra* note 82.

89. *See id.*

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

91. *Id.* at 275.

92. *Id.* at 274–75.

93. *Id.*; *see also* Erlinder, *Ten Years On*, *supra* note 1.

explicit in describing the continuing right to hunt, fish, and gather in ceded territory, but, like the 1863 Treaty based on Governor Ramsey's *verbal* promise,[94] others seem less well articulated. However, from the oral tradition of the Anishinabe and the written language of the 1825 "sovereignty" treaty, all parties, including the United States, recognized that the Anishinabe had the right to the wild game on the territory encompassed by the 1825 Treaty:

> Article 13.
>
> It is understood by all the tribes, parties hereto, that no tribe shall hunt within the acknowledged limits of any other without their assent . . . the Chiefs of all the tribes . . . allow a reciprocal right of hunting on the lands of one another, permission being first asked and obtained . . . .[95]

Moreover, Article 15 of the 1825 Treaty also demonstrates that the United States intended to be bound by the terms of the treaty: "This treaty shall be obligatory on the tribes, parties hereto, from and after the date hereof, and on the United States, from *and after its ratification by the government thereof.*"[96] The 1795 Treaty and 1825 Treaty converted inchoate aboriginal claims into treaty-recognized property rights of a usufructuary nature, based on the same canons of Indian treaty construction described by the Supreme Court in the *Mille Lacs* decision.[97]

The 1826 Treaty of Fond du Lac of Lake Superior[98]

By its own terms, the 1825 Treaty provided that a second treaty council with the Anishinabe on Lake Superior would be organized by the United States in 1826 to explain the terms of the 1825 Treaty to the widely-scattered Anishinabe who could not be present at the 1825 Treaty negotiations in Prairie du Chien on the Mississippi.[99] As promised, a secondary treaty was entered into on

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94. *See* Treaty of Old Crossing, *supra* note 67; Red Lake Band of Chippewa v. Minnesota, 614 F.2d 1161 (8th Cir. 1980); United States v. Minnesota, 466 F. Supp. 1382, 1383 (D. Minn. 1979).

95. 1825 Treaty of Prairie du Chien, *supra* note 82, at 275.

96. *Id.* at 275 (emphasis added).

97. *Mille Lacs*, 526 U.S. 172 (1999).

98. Articles of a Treaty Made and Concluded at the Fond du Lac of Lake Superior, This Fifth Day of August, in the Year of Our Lord One Thousand Eight Hundred and Twenty-Six, Between Lewis Cass and Thomas L. McKenney, Commissioners on the Part of the United States, and the Chippewa Tribe of Indians, U.S.-Tribal Nation, Aug. 5, 1826, 7 Stat. 290 [hereinafter 1826 Treaty of Fond du Lac].

99. 1825 Treaty of Prairie du Chien, *supra* note 82, at 275.

Article 12.

August 5, 1826,[100] which refers to the 1825 Treaty in its opening clause:

> Whereas a Treaty was concluded at Prairie du Chien in August last, by which the war, which has been so long carried on, to their mutual distress, between the Chippewas and Sioux, was happily terminated by the intervention of the United States; and whereas, owing to the remote and dispersed situation of the Chippewas . . . the United States agreed to assemble the Chippewa Tribe upon Lake Superior during the present year, in order to give full effect to the said Treaty, to explain its stipulations and to call upon the whole Chippewa tribe, assembled at their general council fire, to give their formal assent thereto, that the peace which has been concluded may be rendered permanent . . . .[101]

The 1826 Treaty provides, on its face, the evidence that *both* U.S. treaty negotiators and the Anishinabe understood that the ability of Anishinabe to live off the land was essential to their survival.[102] Article 3 acknowledges Anishinabe title in the land, and continuing "jurisdiction" over the ancestral territory that had been held and occupied under "Indian title,"[103] but now recognized by treaty with the U.S. Government: "The Chippewa tribe grant to the government of the United States the right to search for, and carry away any metals or minerals from any part of their country. But *this grant is not to affect the title of the land, nor the existing jurisdiction over it.*"[104]

Further, Article 5 describes, almost painfully, the diminished condition and bleak agricultural prospects observed by the treaty negotiators in 1826:

> In consideration of the poverty of the Chippewas, and of the

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

100. 1826 Treaty of Fond du Lac, *supra* note 98.

101. *Id.* at 269.

102. *Id.*

103. Leech Lake Band of Chippewa Indians v. Herbst, 334 F. Supp. 1001 (D. Minn. 1971).

104. 1826 Treaty of Fond du Lac, *supra* note 98, at 269 (emphasis added). Note: With respect to future interests the Anishinabe might claim in resource extraction, nothing in the Treaty suggests that the metals may be carried away without payment for the metals or minerals, or recuperation of the environment to protect the ability of the Anishinabe to hunt, fish and gather afterward. *Id.*

> sterile nature of the country they inhabit, unfit for cultivation, and almost destitute of game, and as a proof of regard on the part of the United States, it is agreed that an annuity of two thousand dollars, in money or goods, as the President may direct, shall be paid to the tribe . . . during the pleasure of the Congress of the United States.[105]

Finally, Article 7 displays a spark of humanity in the U.S. treaty negotiators who were so moved by the conditions of poverty they observed among the Chippewa at Fond du Lac that they went beyond their congressional mandate to alleviate the poverty they observed:

> The necessity for the stipulations in the fourth, fifth and sixth articles of this treaty could be fully apparent, only from personal observation of the condition, prospects, and wishes of the Chippewas, and the Commissioners were therefore not specifically instructed upon the subjects therein referred to; but seeing the extreme poverty of these wretched people, finding them almost naked and starving, and ascertaining that many perished during the last winter, from hunger and cold, they were induced to insert these articles. But it is expressly understood and agreed, that the fourth, fifth and sixth articles, or either of them, may be rejected by the President and Senate, without affecting the validity of the other articles of the treaty.[106]

For the Anishinabe, the continuing right to hunt, fish, and gather on all of the 1825-Treaty territory was a question of survival, according to the 1826 U.S. treaty negotiators, themselves.[107]

1834 Act to Regulate Trade and Intercourse

Another relatively contemporary indication of the importance with which Congress treated treaty rights to wild game, such as those guaranteed in the 1825 Treaty, can be seen in the 1834 Act to Regulate Trade and Intercourse with the Indian Tribes, which imposed a $500 fine for non-Native hunting and fishing within the limits of any tribe with whom the United States has *existing treaties*[108]—an enormous sum for the time—and permitted military force to be used to expel non-Indians from "Indian country."[109]

Sec. 8.

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105. *Id.* at art. V.

106. *Id.* at art. VII.

107. *Id.*

108. An Act to Regulate Trade and Intercourse with the Indian Tribes, and to Preserve Peace on the Frontiers, U.S.-Tribal Nation, June 30, 1834, 4 Stat. 729, 730 [hereinafter Act of June 30, 1834] (codified as amended at 25 U.S.C. § 177 (2006)); State v. Jackson, 16 N.W.2d 752 (Minn. 1944).

109. *Id.*

> *And be it further enacted,* That if any person, other than an Indian, shall, within the limits of any tribe with whom the United States shall have existing treaties, hunt, or trap, or take and destroy, any peltries or game, except for subsistence in the Indian country, such person shall forfeit the sum of five hundred dollars, and forfeit all the traps, guns, and ammunition in his possession, used or procured to be used for that purpose, and peltries so taken.[110]
>
> Sec. 10.
>
> *And be it further enacted*, That the superintendent of Indian affairs, and Indian agents and sub-agents, shall have authority to remove from the Indian country all persons found therein contrary to law; and the President of the United States is authorized to direct the military force to be employed in such removal.[111]

In context, this would have included all of the 1825 and 1826 Treaty territory, or all of Northern Minnesota north of Dakota territory, roughly north of Interstate 94. Thus, as of 1837, the Anishinabe had treaty-guaranteed rights to control hunting, fishing, and gathering in all of Northern Minnesota, whether by members of other Indian tribes or by non-Indians. In fact, all of Northern Minnesota was unceded, sovereign Anishinabe territory as guaranteed by U.S. Treaty up to 1854. The definition of "Indian County" described in the 1834 Act was:

> That all that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana, or the territory of Arkansas, and, also, that part of the United States east of the Mississippi river, and not within any state to which the Indian title has not been extinguished, for the purposes of this act, be taken and deemed to be the Indian country.[112]

This definition would apply to all of Minnesota in 1834 because the first land cession treaty did not occur until 1837 when the Mille Lacs Treaty was signed.[113] Moreover, the 1825 and 1826 Treaties had memorialized the usufructuary rights associated with inchoate "Indian title" nearly a decade earlier and guaranteed their continued existence in a treaty, ratified by the government of the United States.[114]

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110. *Id.* § 8.

111. *Id.* § 10.

112. *Id.* § 1.

113. Treaty with the Chippewas, U.S.-Tribal Nation, July 29, 1837, 7 Stat. 536 [hereinafter Treaty of 1837].

114. *See* 1826 Treaty of Fond du Lac, *supra* note 98, at 291 ("The Chippewa tribe grant to the government of the United States the right to search for, and carry away, any metals or minerals from any part of their country. But this grant is not to affect the title of the land, nor the existing jurisdiction over it."); 1825 Treaty of Prairie du Chien, *supra* note 82, at 275 ("[T]he Chiefs of all the tribes have

The First Minnesota Land Cession Treaty in the 1837 National Context

During the 1830s, the United States' relationships with Indian nations were contradictory as reflected in Supreme Court decisions and shifting national policies. The statement of high purpose that described U.S. policy toward native peoples and nations in Article III of the Northwest Ordinance—"[G]ood faith . . . towards the Indians; their . . . property shall never be taken from them without their consent; and, in their property, rights, and liberty, they shall never be invaded or disturbed . . . ."[115] took on a much different character as post-independence westward expansion[116] required differing relationships with Indian people occupying land needed for agricultural development in the "plantation South" such as the Cherokee;[117] and those needed for defense from potentially hostile European powers on the northern border with Canada which U.S. treaty negotiators plainly stated motivated the 1825 "Sovereignty" Treaty between the United States and the Dakota and Ojibwe nations, some of whom had allied with the British only a decade earlier:

> Article 10.
>
> All the tribes aforesaid acknowledge the general controlling power of the United States, and disclaim all dependence upon, and connection with, any other power. And the United States agree to, and recognize, the preceding boundaries, subject to the limitations and restrictions before provided.[118]

On one hand, prior to the *Milles Lacs* opinion, as early as 1823 Chief Justice Marshall interpreted the title held by Indians

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expressed a determination, cheerfully to allow a reciprocal right of hunting on the lands of one another, permission being first asked and obtained, as before provided for.").

115. NORTHWEST ORDINANCE, *supra* note 37, at 52.

116. Article V of the 1795 Treaty of Greenville applied in the territory occupied by the Anishinabe, which includes what is now Minnesota. It provided:

> The Indian tribes who have a right to those lands, are quietly to enjoy them, hunting, planting, and dwelling thereon so long as they please, without any molestation from the United States . . . the United States will protect all the said Indian tribes in the quiet enjoyment of their lands against all citizens of the United States, and against all other white persons . . . *[T]he said Indian tribes again acknowledge themselves to be under the protection of the said United States and no other power whatever.*

Treaty of Greenville, *supra* note 76, at 52 (emphasis added).

117. *See* Cherokee Nation v. Georgia, 30 U.S. 1 (1831).

118. 1825 Treaty of Prairie du Chien, *supra* note 82, at art. X.

pursuant to treaties to be something "lesser than" common law fee simple and not a property interest in *Johnson v. M'Intosh*,[119] and as noted by the majority of the Minnesota Supreme Court in *State v. Keezer:*

> [A]lthough fee title to the lands occupied by Indians when the colonists arrived became vested in the sovereign first the discovering European nation and later the original States and the United States a right of occupancy in the Indian tribes was nevertheless recognized . . . called Indian title . . . *recognized to be only a right of occupancy* . . . The Federal Government took early steps to deal with the Indians through treaty, the principle [sic] purpose often being to recognize and guarantee the rights of Indians to specified areas of land.[120]

And, in 1831 the Supreme Court held that U.S. treaties with Indian tribes did not give the tribes the status of an "independent nation" for purposes of original Supreme Court jurisdiction in *Cherokee Nation v. Georgia*.[121]

However, on the other hand, the Court did confirm that the federal courts were open to Indian treaty claims against states and held in *Worcester v. Georgia* that Indian treaty entities, such as the Cherokee nation, did constitute a "distinct community" with self-government "in which the laws of Georgia can have no force."[122] Thus, the Court established that only the United States government, and not individual states, had authority in Indian affairs. This also meant that explicit congressional direction that Indian removal be "voluntary" in the Indian Removal Act of 1830,[123] required President Andrew Jackson and his successor Martin Van Buren, justified the use of military force to clear the Choctaw and Cherokee nations from prime southern plantation land in a decade-long "Trail of Tears" to Oklahoma by claiming

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119. Johnson v. M'Intosh, 21 U.S. 543, 603 (1823) ("It has never been contended, that the Indian title amounted to nothing. Their right of possession has never been questioned. The claim of government extends to the complete ultimate title, charged with this right of possession, and to the exclusive power of acquiring that right.").

120. State v. Keezer, 292 N.W.2d 714, 716 (Minn. 1980) (citing Oneida Indian Nation v. Cnty. of Oneida, 414 U.S. 661, 667 (1974)) (emphasis added).

121. Cherokee Nation v. Georgia, 30 U.S. 1, 27 (1831) ("But in no sense can they be deemed a foreign state, under the judiciary article.").

122. Worcester v. Georgia, 31 U.S. 515, 520 (1832).

123. *See* Act of May 28, 1830, ch. 148, 4 Stat. 411, 411–12 (1830) ("That it shall and may be lawful for the President of the United States to cause so much of any territory belonging to the United States . . . and to which the Indian title has been extinguished . . . to be divided into a suitable number of districts, for the reception of such tribes or nations of Indians as may choose to exchange the lands where they now reside, and remove there . . . .").

authority under dubious, if not fraudulent, post-1830 "voluntary removal" treaties.[124]

With respect to Supreme Court decisions supportive of sovereignty and the primacy of federally guaranteed treaty rights over state law, Jackson is reported to have responded, "John Marshall has made his decision. Now let him enforce it!"[125] Although the accuracy of this quote is disputed, there is no dispute that it reflected Jackson's own sentiments, or that he engineered an apparently fraudulent removal treaty with a rump group of Cherokee, which Van Buren used to justify military expulsion of the Cherokee from deep south agricultural lands just as the plantation slave-economy was beginning to boom in the Mississippi delta.[126] The Cherokee removal treaty of 1835 was widely criticized as a manipulation when it was put before the Senate, and was ratified by the margin of a single vote.[127]

The Indian Removal Act of 1830 would prove important in the majority opinion in *Mille Lacs* regarding the legality of President Zachary Taylor's 1850 Executive Order, which could not rely on pre-1850 voluntary treaties of removal with the Chippewa.[128] Further, in the 1834 Indian Trade and Intercourse Act, Congress identified much of the territory west of the Mississippi, including Minnesota, as "Indian Country," requiring passports for entry by non-Indians subject to a fine of $1,000, in addition to prohibiting hunting and trapping, and even marking of trees.[129]

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124. *See* Treaty of New Echota, U.S.-Tribal Nation, Dec. 29, 1835, 7 Stat. 488; Treaty of Pontotoc Creek, U.S.-Tribal Nation, Oct. 20, 1832, 7 Stat. 381; Treaty of Payne's Landing, U.S.-Tribal Nation, May 9, 1832, 7 Stat. 368; Treaty of Cusseta, U.S.-Tribal Nation, Mar. 24, 1832, 7 Stat. 366; Treaty of Dancing Rabbit Creek, U.S.-Tribal Nation, Sept. 30, 1830, 7 Stat. 333.

125. PAUL F. BOLLER, JR. & JOHN GEORGE, THEY NEVER SAID IT: A BOOK OF FAKE QUOTES, MISQUOTES, & MISLEADING ATTRIBUTIONS 53 (1989). Jackson actually wrote in a letter to John Coffee, "[T]he decision of the Supreme Court has fell still born, and they find that they cannot coerce Georgia to yield to its mandate," meaning the Court's opinion was moot because, not being a legislative body, it had no power to enforce its edict. *Id.*

126. Treaty of New Echota, *supra* note 124, at 479 ("The Cherokee nation hereby cede relinquish and convey to the United States all the lands owned claimed or possessed by them east of the Mississippi River . . . .").

127. *See* Ezra Rosser, *The Nature of Representation: The Cherokee Right to a Congressional Delegate*, 15 PUB. INT. L.J. 91, 107 (2005).

128. *See Mille Lacs*, 526 U.S. 172, 189 (1999) ("In this Court, no party challenges the Court of Appeals' conclusion that the Removal Act did not authorize the President's removal order.").

129. Act of June 30, 1834, *supra* note 108, at §§ 6, 8.

These were the circumstances in the rest of Minnesota when the first land cession treaty with the United States was negotiated in 1837.[130] The Treaty did not abrogate, and specifically retained the usufructuary property rights of the Chippewa that ran with the land area described in the Treaty.[131] The Treaty did not terminate the 1834 Indian Trade and Intercourse Act in the Treaty territory[132] or the usufructuary rights guaranteed in the rest of Minnesota in the Treaties of 1825 and 1826[133] that remained outside the 1837 cession area. The continuing validity of those usufructuary rights, after cession of the 1837 Treaty territory to the United States into the modern era, was actually at issue before the Court *sub silentio*.

II. "RE-DISCOVERY" OF TREATY-GUARANTEED USUFRUCTUARY PROPERTY: *MINNESOTA V. MILLE LACS BAND OF CHIPPEWA INDIANS*

> [T]he United States guaranteed to the Indians certain hunting, fishing, and gathering rights on the ceded land . . . . [W]e conclude that the Chippewa retain the usufructuary rights guaranteed to them under the 1837 Treaty.
>
> — Justice Sandra Day O'Connor[134]

Within this historical context, the first land cession treaty with the Anishinabe was negotiated at Fort Snelling near where the Minneapolis-St. Paul airport is today, with representatives of nearly all of the widespread Anishinabe bands in attendance in 1837.[135] To secure Anishinabe "consent," United States treaty negotiators took the approach of severing formal title to land[136]

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130. Treaty of 1837, *supra* note 113, at 536–38.

131. *Id.* at 537 ("The privilege of hunting, fishing, and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded, is guarantied [sic] to the Indians, during the pleasure of the President of the United States.").

132. For a discussion of the distinction between congressional termination of other aspects of "title" as distinct from "usufructuary property rights" which have been specifically segregated from other aspects of fee simple title, see Menominee Tribe of Indians v. United States, 391 U.S. 404 (1968).

133. *See* 1826 Treaty of Fond du Lac, *supra* note 98, at 291; 1825 Treaty of Prairie du Chien, *supra* note 82, at 275.

134. *Mille Lacs*, 526 U.S. 172, 175–76 (1999).

135. Treaty of 1837, *supra* note 113, at 536 (regarding location considered Wisconsin territory at the time).

136. *See id.* at 536–37; *see also Mille Lacs*, 526 U.S. at 176 ("The Chippewa agreed to sell the land to the United States, but they insisted on preserving their right to hunt, fish, and gather in the ceded territory.").

from the continued use of the land for traditional means of survival,[137] thus guaranteeing usufructuary rights to the use of the land, separate from transfer of title to the land to the United States: "The privilege of hunting, fishing, and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded, is guarantied [sic] to the Indians, during the pleasure of the President of the United States."[138] The majority and dissent in the *Mille Lacs* case agreed that this clause of the 1837 Treaty-guaranteed usufructuary property rights, retained by the Anishinabe, which did not pass with title to the United States.[139]

This is the "unanimous usufructuary rights" opinion that provides a property rights/due process analysis in a treaty context that simply was not acknowledged in any previous judicial opinions. The Anishinabe hunting, fishing, and gathering rights in the rest of what is now Minnesota were not diminished on un-ceded territory that was outside the 1837 Treaty boundary but were guaranteed by the 1795, 1825, and 1826 Treaties[140] even though not specifically referenced in the 1837 Treaty or mentioned in the *Mille Lacs* opinion itself. But, all parties to the 1837 Treaty, and to the *Mille Lacs* opinion conceded that the 1837 Treaty specifically reserved the treaty-guaranteed usufructuary rights in the ceded territory "during the pleasure of the President of the United States."[141]

In opposition to those usufructuary rights surviving to the present, Minnesota argued three major points in opposition to the usufructuary property rights plainly guaranteed in the 1837 Treaty. First, that President Zachary Taylor issued an 1850 Executive Order that revoked usufructuary rights and ordered the removal of the Anishinabe to un-ceded Minnesota territory (where,

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137. The concept of usufructuary rights, or use rights retained after formal transfer of title, is discussed in *Mille Lacs*, 526 U.S. at 175–76. *See also* Menominee Tribe of Indians v. United States, 391 U.S. 404 (1968) (holding that Menominee tribe's hunting and fishing rights granted by the Wolf River Treaty of 1854 between the tribe and United States survived the Termination Act of 1954).

138. Treaty of 1837, *supra* note 113.

139. *Mille Lacs*, 526 U.S. at 200 ("To summarize, the historical record provides no support for the theory that the second sentence of Article 1 was designed to abrogate the usufructuary privileges guaranteed under the 1837 Treaty . . . ."); *id.* at 210 (Rehnquist, J., dissenting) ("Additionally, the United States granted the Chippewa a quite limited 'privilege' to hunt and fish, 'guarantied [sic] . . . during the pleasure of the President.'").

140. *See* 1826 Treaty of Fond du Lac, *supra* note 98, at 291; 1825 Treaty of Prairie du Chien, *supra* note 82, at 275; Treaty of Greenville, *supra* note 76, at 52.

141. Treaty of 1837, *supra* note 113.

ironically, the 1795, 1825, and 1826 Treaties guaranteed the hunting, fishing, and gathering rights of the Anishinabe) with which none of the parties to the litigation apparently disagreed, thus acknowledging these property rights were fully intact according to the U.S. no later than 1850, even according to the dissent in the *Milles Lacs* opinion.[142] Second, the broad language of the 1855 Treaty appeared to abrogate *all* Anishinabe property claims of any kind, anywhere in Minnesota territory.[143] Third, Minnesota's 1858 entry into the Union abrogated pre-existing treaties that were inconsistent with state sovereignty over wildlife regulation, although the Supreme Court's previous cases appear to have rejected similar arguments in the late 19th and 20th Centuries.[144]

A. An 1850 Presidential Order Ratifies *Treaty-Guaranteed Usufructuary Property Rights in All Northern Minnesota,* Outside *1837 Treaty Land-Cession Territory*

The 1850 Presidential Order would have sent the Anishinabe back to that part of Minnesota from which the 1837 Treaty territory had been ceded, which in 1850 would have been the remainder of Northern Minnesota where the 1795, 1825, and 1826 Treaties indisputably guaranteed the hunting, fishing, and gathering rights of the Anishinabe in 1850.[145] President Taylor apparently did not question the continuing sovereignty of the Anishinabe in this territory or the usufructuary property rights that continued to exist by virtue of the earlier treaties. *Sub silentio*, the dissent in *Mille Lacs* accepted President Taylor's acknowledgement of this fact as well.

The 5–4 majority held that President Zachary Taylor's Executive Order was ineffective in abrogating the usufructuary rights guaranteed in the 1837 Treaty for several reasons relating to an intricate analysis of treaty language and historical context.[146]

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142. *See Mille Lacs,* 526 U.S. at 188–95 (O'Connor, J., majority); *id.* at 210–17 (Rehnquist, J., dissenting).

143. *See id.* at 195–202 (O'Connor, J., majority).

144. *See id.* at 202–08.

145. *See* Exec. Order No. 5626, Feb. 6, 1850 [hereinafter Taylor Exec. Order] *cited in Mille Lacs,* 526 U.S. at 179 .

146. For critiques of the *Mille Lacs* decision, see Kari Krogseng, *Minnesota v. Mille Lacs Band of Chippewa Indians*, 27 ECOLOGY L.Q. 771 (2000); Joshua C. Quinter, *Minnesota v. Mille Lacs Band of Chippewa Indians: Should the Courts Interpret Treaty Law to Empower Traditional Native American Tribes to Hatchet the Environment?*, 11 VILL. ENVTL. L.J. 461 (2000); Jason Ravnsborg, Minnesota v. Mille Lacs Band of Chippewa Indians*: The Court Goes on Its Own Hunting and Fishing Expedition*, 4 GREAT PLAINS NAT. RES. J. 312 (2000).

The Indian Removal Act of 1830 had made the question of "removal" a national issue of which all in Congress and most voters would have been aware.[147] Parsing the language of the 1837 Treaty and comparing it with other treaties that did specifically mention "removal" in light of this well-known public controversy gave the majority its reference point.[148]

First, the Court noted that the 1837 Treaty provided that the usufructuary rights were guaranteed "during the pleasure of the President of the United States,"[149] but did not specifically mention removal of the Anishinabe from the 1837 territory.[150] According to the majority, there was no agreement in the 1837 Treaty, unlike other treaties which *did* provide that the Anishinabe were "*subject to removal therefrom* at the pleasure of the President of the United States."[151] Under the 1830 Removal Act, "agreement to be removed" was a specific requirement of the Act and removal by Executive Order was not authorized by the 1830 Act.

According to the majority, the historical record reveals that the initiative for the 1850 Executive Order was a request for removal from the Minnesota Territorial Legislature in a request to Congress, rather than the President.[152] The majority considered this undisputed fact to be recognition by the Territorial Legislature that the 1837 Treaty itself did not confer removal power on the President, and that removal would require congressional action.[153] Congressional action was not forthcoming, and on February 6, 1850, President Taylor issued the Executive Order framed in the following fashion:

> The privileges granted temporarily to the Chippewa Indians of the Mississippi, by the Fifth Article of the Treaty made with them on the 29th of July 1837, "of hunting, fishing and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded" by that treaty to the

147. *See* Taylor Exec. Order, *supra* note 145.

148. *See Mille Lacs*, 526 U.S. at 188–95.

149. *Id.* at 177 (quoting Treaty of 1837, *supra* note 113, at 537).

150. *Id.* at 189 ("The treaty makes no mention of removal, and there was no discussion of removal during the Treaty negotiations.").

151. *Id.* at 177 (quoting 1842 Treaty, U.S.-Tribal Nation, Oct. 4, 1842, 7 Stat. 591, 592 [hereinafter Treaty of 1842]) (emphasis added). The Treaty of 1842 provided for removal from territory located in Wisconsin westward to 1826 Treaty-guaranteed territory in Minnesota, un-ceded by Treaty of 1837. *See* Treaty of 1842 at 591–92.

152. *Mille Lacs*, 526 U.S. at 178 ("The Territorial Legislature directed its resolution to Congress, but it eventually made its way to President Zachary Taylor.").

153. *Id.* ("Therefore, any action to remove the Chippewa from the 1837 ceded lands would require congressional approval.").

> United States; and the right granted to the Chippewa Indians of the Mississippi and Lake Superior, by the Second Article of the treaty with them of October 4th, 1842, of hunting on the territory which they ceded by that treaty, "with the other usual privileges of occupancy until required to remove by the President of the United States," are hereby revoked; and all of the said Indians remaining on the lands ceded as aforesaid, are required to remove to their unceded lands.[154]

Although the larger part of the Order ostensibly addressed the exercise of usufructuary rights, which President Taylor apparently conceded remained unceded in the 1825 and 1826 Treaty territory, the historical record established not only that the Minnesota Territorial Legislature requested removal of the Anishinabe, the record shows the Minnesota Territorial Legislature did not request revocation of usufructuary rights.[155] Government officials apparently considered the Executive Order primarily as a removal order[156] with the revocation of the usufructuary rights on ceded territory a necessary incentive to encourage removal to un-ceded 1825 and 1826 Treaty territory north of Dakota territory where the Anishinabe exercise of usufructuary rights could continue as before.[157] By contrast, an 1842 Treaty relating to territory in Wisconsin, referenced in the Order, directly links exercise of usufructuary rights with presidential removal.[158]

But opposition to the attempt at removal was so intense from both non-Indians, who depended on trade with the Anishinabe, and the Anishinabe themselves, the policy of presidential removal was officially abandoned by President Taylor in 1851.[159] And, the *Mille Lacs* majority also found several examples of official territorial and federal correspondence indicating that recognition of Anishinabe usufructuary rights in the 1837 Treaty-ceded territory continued long after the Executive Order was issued.[160]

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154. *See* Taylor Exec. Order, *supra* note 145.

155. *Mille Lacs*, 526 U.S. at 193 ("There is also no evidence that the treaty privileges themselves—as opposed to the presence of the Indians—caused any problems necessitating the revocation of those privileges.").

156. *See id.* ("More importantly, Governor Ramsey and the Minnesota Territorial Legislature explicitly tied revocation of the treaty privileges to removal.").

157. *See id.* at 192 ("President Taylor might also have revoked Chippewa usufructuary rights as a kind of 'incentive program' to *encourage* the Indians to remove . . . ." (emphasis original)).

158. *See* Treaty of 1842, *supra* note 151, at 592 ("The Indians stipulate for the right of hunting on the ceded territory, with the other usual privileges of occupancy, until required to remove by the President of the United States . . . .").

159. *See Mille Lacs*, 526 U.S. at 180–83.

160. *Id.* at 182 ("In his letter, he noted that '[t]he lands occupied by the

The majority held, therefore, that revocation of treaty usufructuary rights was not severable from the unenforceable removal Order, and could not be enforced independently.[161]

The dissent by Chief Justice Rehnquist argues that the Executive Order was not primarily a "removal order" but a "revocation of usufructuary rights" and, as such, congressional authorization was not necessary.[162] He argues the last part of the Order that does require removal, is severable from the revocation order and should be enforced independently.[163] Chief Justice Rehnquist concludes this reading of the Order resolves the matter, and the remaining arguments bolster the main argument based on this analysis of the Executive Order.[164]

For the Anishinabe, the continuing right to hunt, fish, and gather on all of the 1825/26 Treaty territory was a question of survival, confirmed by the observations of the 1826 U.S. treaty negotiators' report to Congress.[165] From the standpoint of the Anishinabe, the 1825 and 1826 Treaties guaranteed rights to hunt, fish, and gather, and both the 1837 Treaty and the 1850 Executive Order confirmed that, outside of the small area ceded in 1837, the guarantees made by the United States in the 1825 and 1826 Treaties had been made even *more* secure by the 1850 Executive Order.

First, in negotiating in 1837 to cede a portion of the 1825 Treaty sovereign territory, the United States specifically guaranteed that, although the United States would take "title," which had little practical meaning for the Anishinabe, the Anishinabe retained their ability to use the land both within the 1837-ceded territory and in the rest of the un-ceded 1825/26

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timbermen have been surveyed and sold by the United States and the Indians have no other treaty interests *except hunting and fishing*.'" (quoting Letter from Willis Gorman, Governor of the Minn. Territory, to George Manypenny, Comm'r of Indian Affairs (Feb. 16, 1855))(emphasis original)).

161. *Id.* at 195 ("All we conclude today is that the President's 1850 Executive Order was insufficient to accomplish this revocation because it was not severable from the invalid removal order.").

162. *Id.* at 215 (Rehnquist, J., dissenting) ("There is no dispute that the President had authority under the 1837 Treaty to terminate the treaty privileges.").

163. *Id.* at 215–16.

164. *Id.* at 217–20.

165. 1826 Treaty of Fond du Lac, *supra* note 98, at 292 ("The necessity for the stipulations in the fourth, fifth and sixth articles of this treaty could be fully apparent, only from personal observation of the condition, prospects, and wishes of the Chippewas . . . but seeing the extreme poverty of these wretched people, finding them almost naked and starving, and ascertaining that many perished during the last winter, from hunger and cold, they were induced to insert these articles.").

Treaty territory.[166] Second, even when the "removal" efforts began in 1850 and ended in 1851, the Executive Order, by its own terms, attempted to "remove" the Anishinabe to the 1825 Treaty "sovereign" territory, which had not been ceded in 1837.[167] Thus. the 1850 Order, itself, confirmed Anishinabe sovereignty and the rights to hunt, fish, and gather in the remainder of the 1825/26 Treaty territory, which was not ceded in 1837, as Anishinabe "homeland." All of the said Indians remaining on the lands ceded were required to remove to their un-ceded lands "sovereign" territory.[168]

The majority and dissent in the *Mille Lacs* decision were unanimous in recognizing that, outside of the 1837 Treaty-ceded territory which necessarily would be the 1825/26 Treaty territory, usufructuary property interests recognized by those Treaties were undiminished by the 1850 Executive Order.[169] In fact, the Order reinforced the continuing sovereignty of the Anishinabe in 1850 and recognized usufructuary rights in the 1825 Treaty territory as being necessary for the survival of the Anishinabe who were the subject of proposed expulsion. Whether the Executive Order is characterized as a "removal order" or a "revocation order severable from removal" is immaterial with respect to the rest of the 1825/26 Treaty territory. The Anishinabe continued to exercise their usufructuary rights in the 1825/26 Treaty area outside the 1837 Treaty territory, which the 1850 Executive Order acknowledges as the Anishinabe's only alternative for survival.

B. Allegedly Silent *Abrogation of Pre-existing Treaty-Guaranteed Property Rights*[170] *Violates Basic Principles*

166. *See* Treaty of 1837, *supra* note 113, at 537.

167. *See* Taylor Exec. Order, *supra* note 145 ("[A]nd all of the said Indians remaining on the lands ceded as aforesaid, are required to remove to their unceded lands.").

168. *See id.*

169. *Mille Lacs*, 526 U.S. at 193–95 (1999) (O'Connor, J., majority); *id.* at 210 (Rehnquist, J., dissenting) (arguing that President Taylor terminated the 1837 Treaty's usufructuary privileges within the ceded territory).

170. Majority and dissent differed as to whether the 1855 Treaty, which included general language suggesting abrogation of all Chippewa claims in Minnesota, was sufficient to abrogate prior specific references to retention of usufructuary property interests in Treaties of 1795, 1825, 1826, 1837, 1847, and 1854. The United States entered into two Treaties in 1847. First, they entered into a Treaty with the Mississippi and Lake Superior Bands of Anishinabe, to "cede and sell the land." Treaty with the Chippewas of the Mississippi and Lake Superior, U.S.-Tribal Nation, Aug. 2, 1847, 9 Stat. 904. Second, they made a Treaty with the Pillager Band at Leech Lake, for land which "shall be held by the United States as Indian land, until otherwise ordered by the President." Treaty

of Treaty Interpretation[171] *and Due Process*[172]

The *Mille Lacs* majority also examined the impact of the 1855 Treaty on the treaty-guaranteed usufructuary rights in the 1837 Treaty territory.[173] The 1855 Treaty was negotiated in Washington, D.C. only with the Milles Lacs Band and few if any other parties to the 1825, 1826, and 1837 Treaties—or the recently concluded 1854 Treaty, which applied to the "Lake Superior" Chippewa—and to territory east of the 1855 Treaty territory.[174] The 1855 Treaty set aside land for reservations within the 1837 and 1855 Treaty territories.[175] However, unlike all previous treaties, it was completely silent with respect to usufructuary rights guaranteed in the 1825 and 1826 Treaties, the 1837 Treaty, or the recently concluded 1854 Treaty:

> Chippewa Indians hereby cede, sell, and convey to the United States all their right, title, and interest in, and to, the lands now owned and claimed by them, in the Territory of Minnesota, and included within the following boundaries, viz: [describing territorial boundaries]. And the said Indians do further fully and entirely relinquish and convey to the United States, any and all right, title, and interest, of whatsoever nature the same may be, which they may now have in, and to any other lands in the Territory of Minnesota or elsewhere.[176]

The *Mille Lacs* majority found that there was no discussion of hunting and fishing or other usufructuary rights in either the 1855 Treaty or in the Treaty Journal.[177] According to the majority, the absence of any discussion of the usufructuary rights then

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with the Pillager Band of Chippewa Indians, U.S.-Chippewa, Aug. 21, 1847, 9 Stat. 908. The 1847 ceded territory was ostensibly for Winnebago and Menominee Reservations following removal. These events did not occur and neither Reservation was established. Neither Treaty mentioned abrogation of usufructuary rights or removal of the Anishinabe. For a discussion of the circumstances underlying the 1847 Treaty with the Pillager Band, see Pillager Band of Chippewa Indians v. United States, 428 F.2d 1274 (1970).

171. *See, e.g.*, Menominee Tribe of Indians v. United States, 391 U.S. 404, 408 (1968) (examining whether an act's silence on the matter of usufructuary rights "would by implication abolish those hunting and fishing rights").

172. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254 (1970) (holding that the Due Process Clause of the Fourteenth Amendment requires an evidentiary hearing before a recipient of government benefits can be deprived of those benefits, characterized as "expectation interests" and a form of property).

173. *Mille Lacs*, 526 U.S. at 195–202.

174. *See* Treaty of 1855, U.S.-Tribal Nation, Feb. 22, 1855, 10 Stat. 1165 [hereinafter Treaty of 1855].

175. *See id.* at art. 2.

176. *Id.* at art. 1.

177. *Mille Lacs*, 526 U.S. at 198.

being exercised by the Anishinabe in 1837-ceded territory, the 1854-ceded territory, or the un-ceded territory to which the 1850 Executive Order attempted to remove the Anishinabe to the 1825 and 1826 Treaty territories, was a telling omission, "because the United States treaty drafters had the sophistication and experience to use express language for the abrogation of [usufructuary] treaty rights."[178]

The majority found the absence of any reference to usufructuary property interests, only a few months after an 1854 Treaty had reserved all such interests held by the Lake Superior Band to the Mississippi Band, which the 1855 Treaty did not mention, could not mean an abrogation of those survival rights if the Court was to interpret the treaty language "liberally in favor of the Indians," as required by the precedent of the Court.[179] The majority noted that the same U.S. treaty drafters had used explicit language when revoking Chippewa fishing rights on the St. Mary's River in Michigan,[180] and the majority assumed the treaty drafters would have done the same in the 1855 Treaty if the intention of the parties was abrogation.[181]

Perhaps more importantly, for purposes of the argument made by this Article, the majority notes that the debates in the Senate specifically took note of the pre-existing treaty rights that the Chairman of the Senate Committee on Indian Affairs understood to be the foundation upon which the 1855 Treaty was grounded. According to the majority,

> The Act [of December 19, 1854] is silent with respect to authorizing agreements to terminate Indian usufructuary privileges, and this silence was likely not accidental. During Senate debate on the Act, Senator Sebastian, the chairman of the Committee on Indian Affairs, stated that the treaties to be negotiated under the Act would "reserv[e] to them [i.e., the Chippewa] those rights which were secured by former treaties." . . . [W]e cannot agree with the State that the 1855 Treaty abrogated Chippewa usufructuary rights.[182]

Because the dissent believed that the 1850 Executive Order was controlling, a complete analysis of the 1855 Treaty was deemed unnecessary; nevertheless, the dissent offered *dicta*

178. *Id.* at 195.

179. *Id.* at 200.

180. *Id.* at 195–96 (quoting Treaty with the Chippewa of Sault Ste. Marie, U.S.–Tribal Nation, Aug. 2, 1855, 11 Stat. 631, 631 ("The said Chippewa Indians surrender to the United States the right of fishing at the falls of St. Mary's . . . secured to them by the treaty of June 16, 1820.").

181. *Mille Lacs*, 526 U.S. at 195.

182. *Id.* at 197–200 (quoting CONG. GLOBE, 33d Cong., 1st Sess. 1404 (1854)).

rebutting the majority with respect to the 1855 Treaty by pointing to language purporting to cede "all" of the territory of Minnesota.[183] The Chief Justice argued that the language on the face of the treaty alone decided the question, "all means all" irrespective of historical context of prior treaties, the understanding of the Chairman of the Senate Committee of Indian Affairs, or the understanding attributed to the Treaty by the Indians.[184]

In his dissent, Chief Justice Rehnquist suggests that broad language in the 1855 Treaty should be read as an abrogation of the usufructuary property rights specified in the 1837 Treaty, without the necessity of finding specific treaty language or congressional intent,[185] which would seem to be in contravention of the Court's precedent.[186] Such a reading also seems contrary to the historical record of subsequent conduct of the United States in relation to this Treaty itself. If the 1855 Treaty did have the meaning ascribed to it by the Chief Justice, (i.e., that all usufructuary rights were abrogated) it seems highly unlikely that the United States would have found it necessary to seek subsequent land-cession treaties with the Anishinabe after 1855.

However, the United States sought land cessions on at least seven separate occasions.[187] Had the United States Government

183. *Id.* at 217–19 (Rehnquist, C.J., dissenting).

184. Although not cited by the dissent, this is the same position adopted by the Eighth Circuit in an earlier claim by the Red Lake Band that usufructuary rights in the 1863 Treaty territory were not abrogated by congressional enactments in 1889 and 1904, which contained language similar to the 1855 Treaty in which the State of Minnesota prevailed. *See* United States v. Minnesota, 466 F. Supp. 1382 (D. Minn. 1979). The district court looked only to the 1863 Treaty with the Red Lake Band and to the congressional enactments in question, which did not refer to retention of usufructuary rights, and concluded that the intent of Congress was to abrogate those rights along with the cession of title. *Id.* at 1388. However, the district court and Eighth Circuit mistakenly considered the rights in question to be inchoate aboriginal rights, unspecified in any previous treaty. Both the Treaty of 1854 and the 1825 Treaty of Prairie du Chien give lie to this apparently un–rebutted assumption by the court. *See* Treaty of 1854, *supra* note 18, at 1111; 1825 Treaty of Prairie du Chien, *supra* note 82, at 275.

185. *Mille Lacs* at 210–13. *See* DeCoteau v. Dist. Cnty. Ct. for Tenth Jud. Dist., 420 U.S. 425, 447 (1975).

186. Menominee Tribe of Indians v. United States, 391 U.S. 404 (1968).

187. An Act Making appropriations for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian tribes, U.S.-Tribal Nation, Mar. 3, 1901, 31 Stat. 1058, 1077 [hereinafter Statute of 1901] (without mention of abrogation of usufructuary rights); An Act for the Relief and Civilization of the Chippewa Indians in the State of Minnesota, U.S.-Chippewa Indians of Minnesota, except the White Earth and Red Lake Reservations, U.S.-Tribal Nation, Jan. 14, 1889, 25 Stat. 642 [hereinafter Nelson Act of 1889] (ceding territory between west 1855 Treaty Boundary and 1863 Treaty Boundary without mention of abrogation of usufructuary rights); Treaty with the Chippewa of the Mississippi, U.S.-Tribal Nation, Mar. 19, 1867, 16 Stat. 719 [hereinafter Treaty of

considered that the Anishinabe actually abrogated all "rights and claims in Minnesota," not one treaty after 1855 would have been necessary. The dissent also failed to note that Supreme Court precedent had specifically analyzed the scope of the 1855 Treaty and had come to much different conclusions than the dissent over eighty years ago,[188] as had the Minnesota Supreme Court.[189] The dissent did not provide insight into how this reading would conform to well-settled canons of Indian treaty interpretation, which require treaties to be read contextually and "liberally," as understood by the Indians.[190] Moreover, the truncated historical discussion of the 1855 Treaty, resulting from the dissent's view that the 1850 Executive Order made further discussion unnecessary, did not provide a meaningful construction of the 1855 Treaty, to contest other than the majority's view[191] and the historical review in the district court opinion.[192]

1866 (with Mississippi Band)] (ceding territory at Canadian Border west of 1854 Treaty Border and into Dakota Territory without mention of abrogation of usufructuary rights); 1864 Modification of 1863 Treaty (with Mississippi, Pillager, Winnibigoshish Bands), 13 Stat. 861 [hereinafter 1864 Modification of 1863 Treaty (with Mississippi, Pillager, Winnibigoshish Bands)] (showing no discussion of abrogation of *usufructuary* rights); Treaty with the Chippewa Indians, U.S.-Tribal Nation, Apr. 12, 1864, 13 Stat. 689 [hereinafter 1864 Modification of 1863 Treaty (with Red Lake and Pembina Bands)] (ruling without mention of abrogation of usufructuary rights); Treaty with the Chippewa Indians, U.S. Red Lake and Pembina Bands of Chippewa Indians art. II, U.S.-Tribal Nation, Oct. 2, 1863, 13 Stat. 667 [hereinafter Treaty of 1863 (Red Lake, Pembina Bands)] (ceding territory on western Minnesota border along the Red River to the Canadian border and into Dakota Territory without mention of abrogation of usufructuary rights); Treaty of 1863 (with Mississippi, Pillager, Winnibigoshish Bands), U.S.-Tribal Nation, 12 Stat. 1249 [hereinafter Treaty of 1863 (with Mississippi, Pillager, Winnibigoshish Bands)] (ceding reservations established in the 1855 Treaty without mention of abrogation of usufructuary rights in the 1855 Treaty territory, or elsewhere in the 1825 Treaty territory).

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

189. *See* State v. Jackson, 16 N.W.2d 752, 756 (Minn. 1944) (relying on the 1834 Trade and Intercourse with the Indians, as well as Article VII of the 1855 Treaty, to find that as of 1944, Anishinabe usufructuary rights remained in effect in "Indian Country," which included reservations, trust territory and "lands wherever situated, which have been set apart for use and occupancy by Indians, even though not acquired from them" (quoting United States v. McGowan, 302 U.S. 535 (1938)).

190. United States v. Minnesota, 466 F. Supp. 1382, 1384–85 (D. Minn. 1979) (citing Choctaw Nation v. Oklahoma, 397 U.S. 620, 630–31 (1970)).

191. *Mille Lacs*, 526 U.S. 172, 195–200 (1999).

192. *Mille Lacs II*, 952 F. Supp. 1362 (D. Minn. 1997); *Mille Lacs III*, 861 F. Supp. 784 (D. Minn. 1994).

C. The 1858 Minnesota Statehood Act in Prior Supreme Court Treaty Litigation

According to the *Mille Lacs* majority, Minnesota's entry into the Union did not have any impact on rights established in treaties entered into by the United States.[193] The Supreme Court has long held that Congress must clearly express intent to abrogate Indian treaty rights under *United States v. Dion*.[194] Such intent must have been present either in Minnesota's 1858 enabling act, or one of the treaties between the United States and the Anishinabe, all of which are silent on the matter.[195] There is no indication that Senate ratification of the 1837 Treaty contemplated that the 1837 Treaty, or other treaties prior to 1858, would terminate at statehood.[196]

Following Minnesota statehood, the United States undertook the following treaties and congressional enactments with relation to the Anishinabe:

> Treaty of 1863 (with Mississippi, Pillager, Winnibigoshish Bands)[197] — Ceding reservations set up in the 1855 Treaty, with no mention of abrogation of usufructuary rights in the 1855 Treaty territory, or elsewhere in the 1825 Treaty territory.
>
> Treaty of 1863 (Red Lake, Pembina Bands)[198] — Ceding territory on the western Minnesota border along the Red River to the Canadian border and into Dakota Territory. No mention of abrogation of usufructuary rights.
>
> Treaty of 1866 (with Mississippi Band)[199] — Ceding territory at the Canadian Border west of the 1854 Treaty Border and into Dakota Territory. No mention of abrogation of usufructuary rights.[200]

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193. *Mille Lacs*, 526 U.S. at 202–03.

194. United States v. Dion, 476 U.S. 734, 738–39 (1986) ("We have required that Congress' intention to abrogate Indian treaty rights be clear and plain.").

195. *Mille Lacs*, 526 U.S. at 202–03.

196. *Id.* at 207.

197. Treaty of 1863 (with Mississippi, Pillager, Winnibigoshish Bands), *supra* note 187, at 1249.

198. Treaty of 1863 (Red Lake, Pembina Bands), *supra* note 187, at 689. *See* United States v. Minnesota, 466 F. Supp. 1382, 1383 (D. Minn. 1979) (finding without mention of hunting and fishing rights that "the transcript of Ramsey's negotiations with the Band makes clear that the Indians were promised they could continue to hunt and fish on the ceded land until it was settled"); *see also infra* Appendix II.

199. Treaty of 1866 (with Mississippi Band), *supra* note 187, at 719.

200. *Id.* (making no mention of usufructuary rights in the 1866 Treaty, but transcript of the negotiations does make clear that the Indians were promised continued hunting and fishing rights on the ceded land). *Minnesota*, 466 F. Supp. at 1383.

> 1864 Modification of 1863 Treaty (with Red Lake and Pembina Bands)[201] — Red Lake Band refuses to remove, cede or trade lands. No mention of abrogation of usufructuary rights.[202]
>
> Nelson Act of 1889[203] — Ceding territory between west of the 1855 Treaty boundary and the 1863 Treaty boundary. No mention of abrogation of usufructuary rights.[204]
>
> Statute of 1901[205] — No mention of abrogation of usufructuary rights.[206]
>
> Indian Reorganization Act of 1934[207] — No mention of abrogation of usufructuary rights.[208]
>
> Section 478b—Application of laws and treaties[209] — "Nothing in the Act of June 18, 1934, shall be construed to abrogate or impair any rights guaranteed under any existing treaty with any Indian tribe . . . ."
>
> Public Law 280, 1953[210] — No mention of abrogation of usufructuary rights.

Although not discussed extensively by the majority, this was not the first occasion that the Court had to address the effect of Minnesota's statehood on pre-existing federally-established limitations on land use in "Indian Country."[211] By 1871, Congress had also made clear that tribes were not considered independent

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201. 1864 Modification of 1863 Treaty (with Red Lake and Pembina Bands), *supra* note 187, at 689 ("The said Red Lake and Pembina bands of Chippewa Indians do hereby agree and assent to the provisions of the said treaty, concluded at the Old Crossing of Red Lake River, as amended by the Senate of the United States by resolution bearing date the first day of March, in the year eighteen hundred and sixty–four.").

202. *Id.*

203. Nelson Act of 1889, *supra* note 187, at 642.

204. *But see Minnesota*, 466 F. Supp. at 1383 (1979), *aff'd*, 614 F.2d 1161 (8th Cir. 1980) (stating the Red Lake Band of Chippewa sought declaratory judgment that its members retained hunting, fishing, trapping, and wild ricing rights in areas which the Band ceded to the federal government in 1889 and 1904 relinquishing all its right, title, and interest in and to the ceded area meant that the band also ceded usufructuary rights in the subject areas, in direct contravention of the construction of the same language by the Supreme Court in the 1855 Treaty in the *Mille Lacs* decision).

205. Statute of 1901, *supra* note 187, at 1077.

206. *See Minnesota*, 466 F. Supp. at 1384.

207. Indian Reorganization Act, June 18, 1934, 73 Pub. L. 383, 48 Stat. 984.

208. *See Minnesota*, 466 F. Supp. at 1384 (recognizing that the Act requires recognition of pre-existing treaty rights).

209. 25 U.S.C. § 478b (1935).

210. In 1953, Congress enacted Public Law 280 (codified as amended at 18 U.S.C. § 1162 (1954); 25 U.S.C. §§ 1321, 1324 (1954); 28 U.S.C. § 1360 (1954)) (giving certain states broad criminal jurisdiction within some Indian reservations to confront the problem of lawlessness on certain Indian reservations, the absence of adequate trial institutions for law enforcement and criminal prosecutions, and reinforcing civil-regulatory tribal jurisdiction).

211. *See* Johnson v. Gearlds, 234 U.S. 422, 426 (1914).

nations with which treaties would be negotiated; nonetheless, treaties the United States entered into with tribes before that date were considered binding without reference to intervening statehood.[212] In 1914, the Supreme Court held in *Johnson v. Gearlds* that the terms of the 1855 Treaty[213] remained in effect despite Minnesota statehood.[214] The Court described the impact of Minnesota statehood on the terms of the 1855 Treaty:[215]

> By act of February 26, 1857 . . . the inhabitants of a portion of the territory, including the lands ceded by the Chippewas as above, were authorized to form a state government and come into the Union on an equal footing with the original states. The act contained no condition with reference to the treaty of 1855 or the rights of the Indians to any lands within the boundaries of the state . . . Congress, by act of May 11, 1858 . . . admitted the state "on an equal footing with the original states in all respects whatever."[216]

The Court reviewed all subsequent treaties with the Anishinabe between 1863 and 1867 that ceded land but did not mention abrogation of the treaty term (at issue was a liquor ban established by statute and the 1855 Treaty).[217] The Court also discussed the January 14, 1889 Nelson Act[218] that authorized the President to negotiate the complete cession and relinquishment of their title.[219] The Court did not question the assumption by all parties that the terms of the 1855 Treaty were not abrogated in Treaty territory by Minnesota statehood.[220] The Court did review

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212. 25 U.S.C. § 71 (1988) ("No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired.").

213. *See* Treaty of 1855, *supra* note 174.

214. *Gearlds*, 234 U.S. at 439 ("And we cannot agree with the District Court that article 7 of the treaty of 1855 was repealed by the Minnesota enabling act, or by the admission of that state into the Union upon equal terms with other states.").

215. *Id.* at 426 ("The laws which have been or may be enacted by Congress, regulating trade and intercourse with the Indian tribes, to continue and be in force within and upon the several reservations provided for herein; and those portions of said laws which prohibit the introduction, manufacture, use of, and traffic in, ardent spirits, wines, or other liquors, in the Indian country, shall continue and be in force, within the entire boundaries of the country herein ceded to the United States, until otherwise provided by Congress.") (citing Treaty of 1855, *supra* note 174, at 1169).

216. *Id.* (quoting MINN. CONST.).

217. *Id.* at 446.

218. *Id.* at 442–43 (citing Nelson Act of 1889, *supra* note 187, at 642).

219. *Id.* at 443 (noting an anomaly in the territory: "[T]he diminished Red Lake Reservation is admittedly a strip of land, approximately [fifteen] miles in width, which never was subject to the treaty of 1855 . . . .").

220. *Id.* at 436 (citing Bates v. Clark, 95 U.S. 204, 208 (1877); United States v.

the living conditions and the status of Chippewa living in the 1855 Treaty territory, which confirms that both the Anishinabe and the Court understood that the usufructuary rights of the Anishinabe and the ancestors who signed the 1855 Treaty, and earlier treaties as well, were being exercised in the 1855 Treaty territory well into the 20th Century:

> [W]e prefer to confine our attention to the situation as it existed in 1910 within the boundaries of the great tract that was the subject of the cession of 1855 . . . . The majority of [White Earth and Leech Lake members] these reside upon lands embraced within the original reservation, and they are the same Indians, or descendants of the same, that were parties to the treaties of 1855, 1865, and 1867 . . . . And it is admitted that for purposes of business, pleasure, hunting, travel, and other diversions, these Indians traverse parts of the region comprised in the cession of 1855, outside of the reservations, and thus visit the towns, villages, and cities in the territory, including Bemidji. On the other hand it is admitted that their visits to Bemidji are infrequent, and that there are no Indian habitations within a range of 20 miles in any direction from that city.[221]

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

> On February 17, 1911 . . . the President, in a special message, called attention to the situation in Minnesota, resulting from the operation of the old Indian treaties under present conditions; and with respect to the area ceded by the Chippewas in 1855, he stated: "The records of the Indian Bureau show that there are within said area, under the jurisdiction of the superintendents of the White Earth and Leech Lake Reservations, 7,196 Indians who can amply be protected by limiting the territory as to which said treaty provisions shall remain in force and effect to the area within and contiguous to said reservations, particularly described as follows: . . . I therefore recommend that Congress modify the article of said treaty quoted above so as to exclude from the operations of its provisions all of the territory ceded by said treaty to the United States, except that immediately above described."[222]

According to the Supreme Court in *Johnson v. Gearlds* in 1914: "That Congress has not yet acted upon this recommendation is

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Forty-Three Gallons of Whiskey, 93 U.S. 188, 196 (1876)).

221. Johnson v. Gearlds, 234 U.S. 422, 442–43 (1914).

222. *Id.* at 447.

evidence that the problem is not so entirely obvious of solution that it can be judicially declared to be beyond the range of legislative discretion."[223]

With respect to abrogation of hunting, fishing, and gathering rights established in treaties before Statehood, this would seem to be the case as well. As the Supreme Court later held in *Menominee Tribe of Indians v. United States*, even statutory language that unequivocally terminates a reservation does not abrogate usufructuary hunting and fishing property rights.[224] Treaty language that cedes title, without mentioning pre-existing usufructuary rights guaranteed in prior treaties for several decades, cannot amount to silent abrogation of those rights according to the Supreme Court's treatment of abrogation usufructuary property rights in *Menominee Tribe of Indians v. United States*.[225] Long before the treaty-guaranteed usufructuary property analysis in the *Mille Lacs* opinion, the Court stated, "We decline to construe the Termination Act as a backhanded way of abrogating the hunting and fishing rights of these Indians . . . 'the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress.'"[226]

D. The Treaty of 1854, Lac Courte Oreilles v. Voigt *(*LCO I–VIII*) and* Minnesota v. Mille Lacs Band of Chippewa

The majority opinion in *Mille Lacs* referred to the *LCO* litigation[227] construing the 1854 Treaty with the Anishinabe, which was the subject of lengthy litigation in the Seventh Circuit, resulted in first recognition usufructuary rights in territory ceded by the 1854 Treaty in Wisconsin and Minnesota.[228] Like the 1837 Treaty at issue in *Minnesota v. the Mille Lacs Band of Chippewa*, the 1854 Treaty specifically mentioned the retention of usufructuary rights within the ceded territory.[229] While the focus of the litigation was the impact of the Treaty on off-reservation

223. *Id.*

224. Menominee Tribe of Indians v. United States, 391 U.S. 404, 410–11 (1968) ("'Nothing in this section . . . shall deprive any Indian or any Indian tribe, band, or community of any right privilege, or immunity afforded under Federal treaty, agreement, or statute *with respect to hunting, trapping, or fishing* or the control, licensing, or regulation thereof.' (Emphasis added.)") (citing Public Law 280, 67 Stat. 588, as amended 18 U.S.C. § 1162 (1954)).

225. *Id.*

226. *Id.* (quoting Pigeon River Co. v. Cox Co., 291 U.S. 138, 160 (1934)).

227. *See supra* note 55.

228. Treaty of 1854, *supra* note 18, at 1111.

229. *Id.*; *Mille Lacs*, 526 U.S. 172, 199 (1999).

usufructuary rights in Wisconsin, by 1988 both Wisconsin and Minnesota negotiated agreements with Anishinabe Bands within the 1854 Treaty territory that recognized the continuing validity of Anishinabe treaty rights. The discussion of the 1854 Treaty by the *Mille Lacs* majority further clarifies the conditions in which the 1855 Treaty was negotiated and the status of Anishinabe hunting, fishing, and gathering rights in un-ceded 1825 Treaty territory as of 1855.[230]

In 1854, the House of Representatives began debating a bill "to provide for the extinguishment of the title" in the Territories of Minnesota and Wisconsin,[231] but not "removing" the Anishinabe or eliminating the hunting, fishing, and gathering subsistence activities for their livelihood.[232] But Congress did provide for reservations within the ceded territory, a provision that eventually found its way into the 1855 Treaty.[233] The Commissioner for Indian Affairs instructed his agent to acquire "all the country" the Anishinabe claimed in Minnesota and Wisconsin in August 1854, which resulted in the 1854 Treaty being negotiated in the fall of that year.[234] However, the authorizing legislation for land acquisition treaties with the Anishinabe was not passed until December 1854, when Congress must already have been aware of the terms of the already-negotiated 1854 Treaty.[235]

The Lake Superior Band retained usufructuary rights in the ceded territory in Minnesota's "arrowhead" and the Mississippi Band retained sovereignty west of the 1854 Treaty boundary, until the 1855 Treaty ceded part of the western sovereign 1825 and 1826 Treaty territory.[236] The 1855 Treaty was negotiated in Washington D.C. between February 12 and 22 by the Commissioner for Indian Affairs, George Manypenny, and treaty negotiators who were also well aware of the 1854 Treaty after the authorizing legislation was passed in December 1854.[237] The *Mille Lacs* majority opinion confirms the conclusion that the authorizing legislation, the 1855 Treaty and the Treaty Journal, all focused on land acquisition, not the hunting, fishing, and gathering rights in which the Anishinabe were most interested and had insisted on

230. *Mille Lacs*, 526 U.S. at 196–200.
231. CONG. GLOBE, 33d Cong., 1st Sess. 1032 (1854).
232. *Id.*
233. Treaty of 1855, *supra* note 174, at 1166.
234. *Mille Lacs*, 526 U.S. at 183.
235. *Id.* at 184.
236. Treaty of 1854, *supra* note 18, at 1077.
237. *Mille Lacs*, 526 U.S. at 197.

retaining in the treaties of 1837 and 1854.[238] The majority also pointed out that the signatories to the 1854 Treaty included most of the bands that resided in the 1837 Treaty territory, but only the Mille Lacs Band was party to the 1855 Treaty, and:

> If the United States had intended to abrogate Chippewa usufructuary rights under the 1837 Treaty, it almost certainly would have included a provision to that effect in the 1854 Treaty, yet that Treaty contains no such provision. To the contrary, it expressly secures *new* usufructuary rights to the signatory bands on the newly ceded territory.[239]

In the sense that the Anishinabe possessed rights to hunt, fish, and gather on un-ceded territory over which they had claims of ownership, the "treaty right" to continued use of the land after ownership claims had been ceded did "secure new usufructuary rights." However, the 1854 Treaty also specifically reserved for the Mississippi Band the undiminished usufructuary rights that had been previously recognized in earlier treaties on un-ceded territory west of the 1854 Treaty boundary as well.[240] The 1795, 1825, and 1826 Treaties make clear that the Anishinabe had more than "Indian title" claims to un-ceded 1825/26 Treaty territory, over which the United States recognized the Anishinabe retained sovereignty and the unquestioned right to hunt, fish, and gather by treaties approved by Congress.[241] The 1854 Treaty is careful to differentiate the un-ceded 1825/26 Treaty territory, with its treaty-guaranteed usufructuary rights, from the area ceded by the Lake Superior Band to the east of the 1854 Treaty boundary:

> The Chippewas of the Mississippi hereby assent and agree to the foregoing cession, and consent that the whole amount of consideration money for the country ceded above, shall be paid to the Chippewas of Lake Superior, and in consideration thereof the Chippewas of Lake Superior hereby relinquish to the Chippewas of the Mississippi, all their interest in and claim to the lands heretofore owned by them in common, lying west of the above boundary line.[242]

Further, the terms of the 1854 Treaty specifically refer to the continuation of pre-existing treaty rights to be exercised by both the Lake Superior and Mississippi Chippewa, which can meaningfully refer to Minnesota only with respect to the Treaties of 1837, 1826, and 1825: "It is agreed between the Chippewas of

238. *Id.* at 183–85.

239. *Id.* at 199 (emphasis original).

240. *See* Treaty of 1854, *supra* note 18, at 1111.

241. *See* 1825 Treaty of Prairie du Chien, *supra* note 82; Treaty of Greenville, *supra* note 76.

242. Treaty of 1854, *supra* note 18, at 1109.

Lake Superior and the Chippewas of the Mississippi, that the former shall be entitled to two thirds, and the latter to one third, of all benefits to be derived from the former treaties existing prior to the year 1847."[243] This means that the historical record and treaty construction found in the *LCO/Voight* cases not only establishes the continuing validity of the Lake Superior Chippewa usufructuary property rights in the 1854-ceded territory, but the 1854 Treaty also guarantees usufructuary property rights to the Mississippi Chippewa west of the 1854 Treaty boundary as well.[244] As of 1854, the United States had guaranteed the right of the Anishinabe to hunt, fish, and gather on the land west of the 1854 Treaty boundary in the 1795 Treaty of Greenville, the 1825 Treaty of Prairie du Chien, the 1826 Treaty of Lake Superior, the 1837 Treaty-ceded territory, and the territory to which the 1850 Executive Order would have removed the Anishinabe.[245]

Congressional passage of the treaty negotiation authorizing legislation, after the 1854 Treaty terms were drawn in the fall of 1854, is strong evidence that Congress understood before the authorizing legislation was passed that new usufructuary rights were guaranteed in 1854-ceded territory and undiminished sovereignty, including usufructuary rights, was guaranteed to the Mississippi Band in the 1825 Treaty territory west of the 1854 Treaty boundary.[246] Seen in this light, the 1854 Treaty not only supports the majority's reading of the broad language in the 1855 Treaty not having an impact regarding 1837 Treaty usufructuary rights, but also demonstrates that: (a) rights specified in the 1825 Treaty were ratified by the 1854 Treaty;[247] (b) the rights specified in the 1825/26, 1837, and 1854 Treaties were further ratified by the congressional authorization of the 1854 Treaty, in retrospect; and, (c) the passage of the authorizing legislation, after usufructuary property rights in the 1825/26 "sovereign" territory had been reinforced in the 1854 Treaty-ceded territory and ratified in the 1854 Treaty un-ceded territory, authorizing only purchase of 1854 ceded territory. Such legislation does not suggest congressional intent to abrogate treaty-guaranteed usufructuary rights.

The 1854 Treaty guarantee of undiminished claims to the Mississippi Band is powerful evidence that, as of January 1, 1855,

243. *Id.* at art. 8.
244. *Id.*
245. *See infra* Appendix I.
246. Treaty of 1854, *supra* note 18, at 1111.
247. *Id.* at art. 11.

the Anishinabe retained treaty-guaranteed hunting, fishing, and gathering rights in: (a) the 1837-ceded territory; (b) the 1854-ceded territory; and (c) the rest of the un-ceded 1825/26 Treaty territory, which was not abrogated by the 1854 Treaty, the December 1854 congressional treaty authorization legislation, the February 1855 Treaty, or the subsequent treaty ratification by the Senate.[248]

III. MINNESOTA TREATY PRECEDENT IN RETROSPECT: *MILLE LACS* USUFRUCTUARY PROPERTY ANALYSIS, AS APPLIED

In the late 1970s and early 1980s, the first modern Anishinabe treaty-rights litigation began being decided by state and federal courts without a full record of all of the treaties bearing on treaty-guaranteed usufructuary property rights.[249] Nor could previous judicial opinions benefit from the more complete understanding of the usufructuary property analysis provided by the *Mille Lacs* opinion regarding the property interests created by the language chosen by U.S. treaty negotiators to secure "title" to treaty territory.[250] By applying the *Mille Lacs* analysis retrospectively to selected examples of Minnesota "treaty precedent," it is possible to gauge how the *Mille Lacs* opinion is likely to impact long-accepted precedent. Three examples selected for illustration are:

(a) *Leech Lake Band of Chippewa Indians v. Herbst*,[251] in which the district court held that the 1889 Nelson Act's "all our right, title and interest" language did not abrogate hunting, fishing, and gathering rights on public lands on the Leech Lake Reservation;

(b) *United States v. Minnesota*,[252] in which the Minnesota District Court and the Eighth Circuit[253] held that cession of "all . . . title and interest" in the 1889 Nelson Act and a 1904 congressional enactment did abrogate the Red Lake Band of Chippewa usufructuary property rights on 3.2 million acres of non-reservation ceded territory, despite verbal promises by

248. *See infra* Appendix I.

249. *See* United States v. Minnesota, 466 F. Supp. 1382, 1383 (D. Minn. 1979); Leech Lake Band of Chippewa Indians v. Herbst, 334 F. Supp. 1001, 1003–04 (D. Minn. 1971); State v. Keezer, 292 N.W.2d 714, 715 (Minn. 1980).

250. *See Mille Lacs*, 526 U.S. 172, 184 (1999).

251. *Herbst*, 334 F. Supp. at 1003–06.

252. *Minnesota*, 466 F. Supp. at 1383–84.

253. Red Lake Band of Chippewa Indians v. Minnesota, 614 F.2d 1161, 1162 (8th Cir. 1980).

Minnesota Governor Alexander Ramsey that the Red Lake Band could hunt and fish on ceded territory "until it was settled";[254] and

(c) *State v. Keezer*,[255] in which the Minnesota Supreme Court overturned a three-judge panel, which held hunting, fishing, and gathering rights, guaranteed in the 1795 and 1825 Treaties, prohibited Minnesota from regulating Anishinabe wild ricing on public land.

Only the first of the three examples is likely be decided similarly under the treaty-guaranteed usufructuary property analysis adopted by the Supreme Court in the *Mille Lacs* opinion.

A. Leech Lake Band of Chippewa Indians v. Herbst

The Leech Lake Band fought against state enforcement of state hunting and fishing regulations as applied to Band members on the Reservation. The court limited its examination of treaty rights to the Leech Lake Reservation and started with the premise that, at the time of the passage of the Nelson Act in 1889, the Indians possessed unrestricted hunting and fishing rights as aboriginal rights that were established by reservation treaties in 1855, 1864, and 1867.[256] The State agreed that the Leech Lake Indians possessed the claimed fishing and hunting rights as the Minnesota Supreme Court held in *State v. Jackson*.[257] The State also agreed that Congress alone has the power over treaty rights with Indians, citing *Lone Wolf v. Hitchcock*.[258] The State of Minnesota argued that the Leech Lake Band ceded all hunting and fishing rights in the 1889 Nelson Act: "[We] do hereby grant, cede and relinquish and convey to the United States, for the purposes and upon the terms stated in said (Nelson) Act, all our right, title and interest in and to the lands reserved and set apart."[259] However, when taken in context and understood by the Indians who had exercised such rights on the reservation for generations, the Court held this language insufficient to abrogate either the Leech Lake Reservation or the hunting, fishing, and gathering rights on the Reservation, because federal responsibility in the United States trust relationship with Indians is not

254. *Minnesota*, 466 F. Supp. at 1383–84.

255. *Keezer*, 292 N.W.2d at 715.

256. *Herbst*, 334 F. Supp. at 1004.

257. *Id.* at 1003–04; State v. Jackson, 16 N.W.2d 752, 753 (Minn. 1944).

258. *Herbst*, 334 F. Supp. at 1003. *See also* Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903).

259. *Herbst*, 334 F. Supp. at 1003.

dependent solely upon the passing of legal land title and, as the court made clear in *Milles Lacs*, the usufructuary property rights are not so easily abrogated.[260] As stated in *Leech Lake Band of Chippewa Indians v. Herbst*:

> It is apparent in light of events before and after the passage of the Nelson Act that its purpose was not to terminate the reservation or end federal responsibility for the Indian . . . . The United States Supreme Court has held that it is the termination of federal responsibility and not the passing of legal land title within an area which determines whether a reservation exists in the eyes of the law . . . . That the Nelson Act was not intended to terminate federal responsibility for the Indians . . . . If it was the intention of Congress to disestablish the Leech Lake Reservation, the Congress knew how to say so in clear language . . . . It spoke with the necessary clarity also in the case of the Menominee Indians of Wisconsin. There the Congress effected its intention to terminate the reservation by express language . . . . Despite this unequivocal language in *Menominee Tribe of Indians v. United States* . . . the United States Supreme Court held that while the language was effective to terminate the reservation, it still did not abrogate Indian fishing and hunting rights. It said: "We decline to construe the Termination Act as a backhanded way of abrogating the hunting and fishing rights of those Indians. The intention to abrogate or modify a treaty is not to be lightly imputed to the Congress."[261]

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

B. United States v. Minnesota

In *United States v. Minnesota*,[262] the Red Lake Band of Chippewa were represented by the federal government in seeking a declaratory judgment that members of its Band retain hunting, fishing, and gathering rights in 3.2 million acres ceded in the congressional enactments of 1889 and 1904, which did not mention cession of hunting, fishing, and gathering usufructuary property

260. *Id.* at 1005; *Mille Lacs*, 526 U.S. 172, 193–95 (1999).

261. *Herbst*, 334 F. Supp. at 1005 (citing Menominee Tribe of Indians v. United States, 391 U.S. 404, 413 (1968)).

262. United States v. Minnesota, 466 F. Supp. 1382, 1383 (1979).

rights.[263] These enactments duplicated the written terms of the 1863 Treaty that ceded ten million acres to the United States, which also failed to mention hunting, fishing, and gathering,[264] but which were orally promised by former Minnesota Governor Alexander Ramsey, according to the 1863 Treaty minutes, until it was settled.[265] The district court found that, because the 1889 and 1904 congressional enactments addressed only cession of the 3.2 million acres that remained with the Red Lake Band after ten million acres had been ceded, the misrepresentation of Governor Ramsey was not relevant to determining what the Indians understood about the 1889 and 1904 enactments, which stated the Red Lake Band agreed to surrender "[a]ll its right, title, and interest."[266]

The court did concede that there is no record that Congress intended either abrogation or retention of hunting, fishing, and gathering rights, so the decision turned largely on whether the Anishinabe had "treaty-guaranteed" rights before 1863 or not.[267] The court also conceded that treaties and agreements must be interpreted as the Indians understood them and "[c]ongressional intent to abrogate Indian property rights must be clear from the face of the Act or surrounding circumstances and, that doubtful expressions in the Act must be resolved in favor of the Indians."[268] Without citing *Leech Lake v. Herbst* or its analysis of the Nelson Act at all, the court concluded "Indian title" was at issue in the Red Lake claim, without reference to treaties before 1863:

> [T]he [1863] cession was to "operate as complete extinguishment of Indian title"... [i]f the cessions extinguished Indian title to the ceded areas, they also would have the effect of abrogating any aboriginal hunting, fishing, trapping, or wild ricing rights. These rights are mere incidents of Indian title, not rights separate from Indian title, and consequently if Indian title is extinguished so also would these aboriginal rights be extinguished.[269]

The court concluded that, at least with respect to the 3.2 million acres at issue, the Red Lake Band could claim only hunting and fishing rights that ran with the land[270] and were not

263. *Id.*
264. *Id.*
265. *Id.* at 1383, 1387.
266. *Id.* at 1388.
267. *Id.* at 1385–86.
268. *Id.* at 1384–85.
269. *Id.* at 1385.
270. *Id.* at 1383, 1388.

"separate from Indian title."[271] This holding would be completely contrary to *Milles Lacs'* usufructuary property rights analysis today because the court ignored the usufructuary property interests created by United States treaty negotiators in the language of the 1825, 1826, and 1854 Treaties, which refer to the same territory as the 1863 Treaty-ceded territory.[272]

The U.S. Attorney representing the Band apparently made some effort to use Governor Ramsey's oral representation that the Anishinabe could continue to hunt and fish on the ten million acres to demonstrate the Indian understanding of the 1889 and 1904 enactments,[273] but failed to directly challenge the abrogation of 1863 Treaty usufructuary rights promised by the treaty negotiators in the ten million acres,[274] or make use of the terms of 1795, 1825, 1826, or 1854 Treaties, by which the United States had converted "Indian title" to treaty-guaranteed usufructuary property rights long before 1863.[275] But the United States argued, against its own interests, what usufructuary property interests the Chippewa and U.S. treaty negotiators had previously agreed upon before the land cession treaties began in 1837.[276] The U.S. Attorney did not correct the trial court's incorrect assumption that the Red Lake Band lacked treaty-guaranteed property interests, nor did the U.S. Attorney seek to correct this error before the Eighth Circuit on appeal by pointing out the usufructuary property rights guaranteed in the Treaties prior to 1837.[277]

But, as described earlier in this Article, these usufructuary property rights were guaranteed by treaty in: (a) the sovereign territory governed by the 1787 Northwest Ordinance; (b) all of the sovereign 1795 Treaty territory, which would eventually become Minnesota; (c) the sovereign 1825 Treaty territory in Minnesota north of sovereign Dakota territory in southern Minnesota; (d) the 1826 Treaty territory in which "title" and "jurisdiction" were guaranteed to the Anishinabe in the northern half of Minnesota;

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271. *See* Treaty of Old Crossing, *supra* note 67, at 1249; Treaty of 1854, *supra* note 18, at 1111; 1826 Treaty of Fond du Lac, *supra* note 98, at 290; 1825 Treaty of Prairie du Chien, *supra* note 82, at 272.

272. *See infra* Appendices I and II.

273. *Minnesota*, 466 F. Supp. at 1386–87.

274. *Id.*

275. *See* Treaty of 1854, *supra* note 18, at 1111; 1826 Treaty of Fond du Lac, *supra* note 98, at 290; 1825 Treaty of Prairie du Chien, *supra* note 82, at 272; Treaty of Greenville, *supra* note 76, at 49.

276. *Minnesota*, 466 F. Supp. at 1386–87.

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

(e) the 1837 Treaty that ceded territory to the United States, which specifically retained usufructuary rights in that territory; (f) the territory outside the 1837 Treaty territory to which the Anishinabe were to have been removed by the 1850 Executive Order (i.e., the un-ceded 1825/26 Treaty territory encompassing the rest of Minnesota); (g) the 1854 Treaty-ceded territory in the "arrowhead," in which usufructuary rights were specifically retained; and (h) the territory west of the 1854 Treaty boundary, in which the Mississippi Band were guaranteed undiminished rights (i.e., the un-ceded 1825/26 Treaty territory encompassing the rest of Minnesota).[278]

Thus, as of February 1855, the United States had guaranteed to the Anishinabe the right to hunt, fish, and gather in every part of Minnesota[279] by treaty, on at least six separate occasions over a period of sixty years, including a Presidential Executive Order.[280] And, 1863 treaty negotiator, Minnesota Governor Alexander Ramsey, did tell the Indians that the hunting, fishing, and gathering rights were guaranteed in the ten million acres ceded in the 1863 Treaty for an indefinite period after transfer of title to the United States.[281] However, neither the district court, nor the Eighth Circuit, nor plaintiff's counsel looked further into treaty history than to determine whether the territory ceded in 1863 had previous Treaty status or not.[282]

Furthermore, the language in the two congressional enactments at issue is very similar to that in the 1855 Treaty, which the *Mille Lacs* opinion held did not abrogate pre-existing usufructuary rights established in earlier treaties.[283] According to the Court, the language in these enactments was "precisely suited" for eliminating "Indian title" and conveying to the government "the Band's interest in the ceded lands,"[284] irrespective of the misrepresentation in the 1863 Treaty negotiations: "[A]ny and all right, title, and interest, of whatsoever nature the same may be,

278. *See* NORTHWEST ORDINANCE, *supra* note 37, at art. 3; *see also* Treaty of 1854, *supra* note 18, at 1111; Treaty of 1837, *supra* note 113, at 537; 1826 Treaty of Fond du Lac, *supra* note 98; 1825 Treaty of Prairie du Chien, *supra* note 82, at 272; Treaty of Greenville, *supra* note 76, at 49.

279. For a pictorial representation of the Treaty-ceded territories, see *infra* Appendices I and II.

280. *See* Taylor Exec. Order, *supra* note 145.

281. *Minnesota*, 466 F. Supp. at 1383.

282. *Red Lake Band*, 614 F.2d at 1161.

283. *Mille Lacs*, 526 U.S. 172, 208 (1999) (holding that the Chippewa usufructuary rights are guaranteed by the 1837 Treaty).

284. *Minnesota*, 466 F. Supp. at 1385.

which they may now have in, and to any other lands in the Territory of Minnesota or elsewhere."[285] However, this is precisely the language that the majority rejected in *Minnesota v. Mille Lacs Band of Chippewa Indians* as inadequate to abrogate specific reservation of usufructuary rights in the 1837 Treaty.[286] Moreover, when the misrepresentation by Ramsey in the 1863 Treaty negotiations is placed in the context of the preceding sixty years of explicit guarantees by the United States that Anishinabe had the right to hunt, fish, and gather on the land upon which they had depended for survival for centuries,[287] the argument that the Indians understood the United States was silently abrogating these rights is much more difficult to sustain following the usufructuary property rights analysis unanimously adopted by the Court in the *Mille Lacs* opinion.[288]

In addition, taken as a whole, the treaties from 1795 to 1854, brigaded by the verbal promise in 1863 as well as the *Mille Lacs* majority and dissenting opinions' method for determining the existence of treaty-guaranteed usufructuary property rights, make clear that U.S. treaty negotiators created such rights in treaties with the Anishinabe over several decades and, because those usufructuary property rights were never specifically abrogated with the approval of Congress, those rights must certainly be alive today. In retrospect, it now appears quite clear that prior to the Supreme Court's analysis in *Minnesota v. Mille Lacs Band of Chippewa Indians*, neither the United States Government nor the Court had yet grasped the significance of "early treaty-guaranteed" usufructuary property rights. And, as a result, *United States v. Minnesota* is not a comprehensive review of treaties which have an impact on the treaty-guaranteed usufructuary rights in question today (i.e., the 1795, 1825, 1826, 1837, 1854, and 1855, as well as the 1863 verbal promise by Governor Ramsey).[289] The far more developed historical record that can be found in both the *LCO* litigation and *Mille Lacs*, as

285. Treaty of 1855, *supra* note 174, at art. 1.

286. *Mille Lacs*, 526 U.S. at 200.

287. State v. Jackson, 218 Minn. 429, 433 (Minn. 1944) ("The ancient and immemorial right to hunt and fish, which was 'not much less necessary to the existence of the Indians than the atmosphere they breathed,' remained in them unless they granted it away.").

288. *See Mille Lacs*, 526 U.S. at 207–08.

289. For an example, see Red Lake Band of Chippewa Indians v. Minnesota, 614 F.2d 1161, 1162 (8th Cir. 1980) (finding that the Red Lake Band of Chippewa Indians gave up its rights to hunt, fish, trap, and gather wild rice free of Minnesota's regulation of said activities).

augmented by this Article, more accurately describes Anishinabe rights post-*Mille Lacs*.[290]

C. State v. Keezer

Another pre-*Mille Lacs* case that leads to the same conclusion is *State v. Keezer*, in which the Minnesota Supreme Court, citing *United States v. Minnesota* and *Red Lake Band of Chippewa Band Indians v. Minnesota*, overturned a special three-judge panel which had upheld the rights of two Anishinabe Band members to gather wild rice guaranteed in the 1825 Treaty territory free from state licensing regulation.[291] The defendants had been cited by a conservation officer for harvesting wild rice on a lake designated in the Sioux territory in the 1825 Treaty and included within the 1795 Treaty area as Indian territory.[292] Although a Minnesota State Supreme Court opinion has little precedential value regarding United States treaty construction and preceded the *Mille Lacs* decision by nearly twenty years, it may be the only attempt to come to grips with the pre-1837 treaties in any published opinion.[293] The majority conceived of an Indian property framework much more limited than that described by the Supreme Court in the *Mille Lacs* opinion:

> [F]ee title . . . became vested in the sovereign—first the discovering European nation and later the original States and the United States—a right of occupancy in the Indian tribes was nevertheless recognized. That right, sometimes called Indian title . . . recognized to be only a right of occupancy . . . .
>
> The Federal Government took early steps to deal with the Indians through treaty, the principle [sic] purpose often being to recognize and guarantee the rights of Indians to specified areas of land.[294]

As conceived by the majority, treaties had dual purposes: (a) to recognize Indians' right to occupancy of certain lands, and (b) to gain territory for the United States through the Indians'

290. *See, e.g.*, *Mille Lacs II*, 124 F.3d 904 (8th Cir. 1997); *LCO I*, 700 F.2d 341 (7th Cir. 1983).

291. State v. Keezer, 292 N.W.2d 714, 721–22 (Minn. 1980).

292. *Id.* at 715.

293. As early as 1944, in *State v. Jackson*, 218 Minn. 429, 433 (1944), the Minnesota Supreme Court considered that the Leech Lake Reservation, created in the 1855 Treaty from "Indian Country" (carved out of the previously un-ceded 1825 and 1854 Treaty territories), did not require an explicit state right to hunt and fish on the reservation because "the ancient and immemorial right to hunt and fish, which was 'not much less necessary to the existence of the Indians than the atmosphere they breathed,' remained in them unless granted away," citing *United States v. Winans*, 198 U.S. 371, 381 (1905).

294. Oneida Indian Nation v. Cnty. of Oneida, 414 U.S. 661, 667 (1974).

relinquishment of other lands.[295] This exchange describes ceding territory for a treaty guarantee to a reservation or another territory.[296] The majority equates this treaty-guaranteed "right of occupancy," as it was called by John Marshall in *Johnson v. M'Intosh*[297] with "Indian title."[298] The majority appeared not to recognize the concept of continuing use of the land, guaranteed by treaty, in any meaningful way that would be cognizable as the usufructuary property described in the *Mille Lacs* opinion.[299]

The majority construed the 1795 Treaty to be a recognition of "Indian title," and a relinquishment by the United States of "its claims on [immediate possession of] Indian lands" but not a relinquishment of "its basic sovereign rights to the land itself."[300] The Indians gained a treaty-guaranteed right of occupancy that could only be extinguished by purchase and "were free to enjoy their rights of occupancy, 'hunting, planting, and dwelling there,'[301] or as Mr. Chief Justice Marshall described it, 'to use it according to their own discretion.'"[302]

However, what the majority described in post-*Mille Lacs* terms is a treaty which has severed fee title from treaty-guaranteed usufructuary property rights and contradicts the court's assertion in *United States v. Minnesota* that the Red Lake Band lacked treaty-guaranteed rights beyond "Indian title."[303] The majority also purported to construe the 1825 Treaty as it related to rights of the Anishinabe to gather wild rice on Sioux designated territory without state permit.[304] Echoing the district court in *United States v. Minnesota*, and citing the Supreme Court holding in *Rosebud Sioux Tribe v. Kneip*[305] and *DeCoteau v. District County Court*[306] for the principle that language in the 1855 Treaty that

295. *Id. See also Keezer*, 292 N.W.2d at 716.

296. *Id.*

297. Johnson v. M'Intosh, 21 U.S. 543, 584–85 (1823) ("It has never been doubted, that either the United States, or the several States, had a clear title to all the lands within the boundary lines described in the treaty, subject only to the Indian right of occupancy . . . .").

298. *See Keezer*, 292 N.W.2d at 716.

299. *See Oneida Indian Nation*, 414 U.S. at 661.

300. *Keezer*, 292 N.W.2d at 717.

301. *Id.* at 718.

302. *Id.* (citing *M'Intosh*, 21 U.S. at 574).

303. *Id.* at 721.

304. *Id.* at 724. And without the permission of the Dakota, as required in the 1825 Treaty of Prairie du Chien, an issue not discussed by the Court. *See* 1825 Treaty of Prairie du Chien, *supra* note 82.

305. Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977).

306. DeCoteau v. Dist. Cnty. Ct. for Tenth Jud. Dist., 420 U.S. 425 (1975).

ceded "all right, title and interest" was "precisely suited" for the purpose of eliminating "Indian title" and conveying to the government "the Indians' entire interest in the ceded lands."[307] The Court held that, even if the 1825 Treaty did "grant . . . hunting rights . . . these rights were extinguished by later treaties . . . [and] *the Chippewa right of occupancy* in Minnesota, except for reservation land, was extinguished in the Treaty of 1855."[308] After the unanimous Supreme Court analysis regarding treaty-guaranteed usufructuary property rights in *Minnesota v. Mille Lacs Band of Chippewa Indians*, this is plainly an incorrect statement of the law.[309]

The *State v. Keezer* Dissent

More to the point was the dissent by Justice Rosalie Wahl, joined by Justice Otis, who anticipated the reasoning of the Supreme Court in the *Mille Lacs* decision and the Seventh Circuit *LCO* decision regarding treaty-guaranteed usufructuary property rights.[310] Justice Wahl considered that the United States guaranteed an undifferentiated right to hunt, fish, and gather within the 1795 Treaty territory relinquished by the United States.[311] And, that the 1825 Treaty left it to the Anishinabe and Dakota to continue to share fish, game, and wild rice without United States interference.[312] Justice Wahl concluded, "rights of ownership of the land itself, [are] not dependent upon [them], or incident to, fee title."[313]

Justice Wahl's dissent was twenty years ahead of its time in that, like the *Mille Lacs* majority, she rejected the argument that general cession language, such as all "right, title and interest," without more, extinguished even aboriginal rights to hunt, fish, or wild rice on ceded land.[314] Justice Wahl cited an earlier federal court construction of the Nelson Act, the same 1889 congressional enactment at issue in *United States v. Minnesota*, which was not cited by the majority, the federal courts, or, presumably, the plaintiff's counsel.[315] According to Justices Wahl and Otis:

307. *Keezer*, 292 N.W.2d at 721.
308. *Id.* at 720 (emphasis added).
309. *Id.* at 724.
310. *Id.*
311. *Id.*
312. *Id.*
313. *Id.*
314. *Id.*
315. *Id.* at 714–22.

> In *Leech Lake Band of Chippewa Indians v. Herbst*,[316] however, the district court considered the same language appearing in the Nelson Act, and held that it did not abrogate hunting and fishing rights which 'while perhaps in fact dating back many years to an aboriginal right were established in law by treaty . . . [t]he United States Supreme Court has counseled us that the abrogation of treaty rights is not to be lightly inferred.' It is noteworthy that the *Leech Lake Band* Court found that Chippewa hunting and fishing rights were not extinguished by the 1855 treaty, in which the Indians conveyed 'all right, title, and interest . . . to any other land in the Territory of Minnesota or elsewhere.'[317]

Justice Wahl's dissent also anticipated the co-management of natural resources that has resulted in Wisconsin and portions of Minnesota because of treaty-guaranteed usufructuary property interests having been upheld in the 1837 and 1854 Treaties in the *Mille Lacs* and *LCO* litigation. Justices Wahl and Otis:

> [W]ould hold that while the state may regulate the exercise of the Chippewa Indians' right to harvest wild rice to the extent reasonable and necessary to conserve the state's wild rice resources, *Tulee v. Washington*, the state may not require them to purchase a license . . . [this] is not to hold the Chippewa Indians may hunt, fish or rice wherever they choose. The . . . rights of private property owners who have titles traceable to patents granted by the United States government is not presented in this case.[318]

This suggested framework for working through the complicated conflicting issues created by the treaty-guaranteed property rights, and subsequent property development, virtually duplicates the resolution reached by the Seventh Circuit in the *LCO* case, which has been applied in Minnesota's arrowhead region and northern Wisconsin since 1988, and in the 1837 Treaty territory since the Supreme Court decided the *Mille Lacs* case in 1999.[319]

Under the *Mille Lacs* analysis, this language would seem to create a treaty-guaranteed usufructuary property right in the use of the land indefinitely that had no apparent, or necessary, relationship to "sale" of the land to the United States at any point. There is nothing in the 1795 Treaty that would put any of the tribal signatories on notice that "sale" to the United States implied the concepts of "fee simple," "Indian right of occupancy," or "Indian

316. *Id.*

317. *Id.* at 724 (citation omitted).

318. *Id.* at 725 (citation omitted).

319. *LCO I*, 700 F.2d 341, 365 (7th Cir. 1983) (holding that the exercise of property rights by the LCO Band is limited to those portions of the ceded lands that are not privately owned).

title," which have been used by the Supreme Court to construe the 1795 Treaty and later treaties.[320] These court-created concepts could only be found applicable to Indian treaties after *Marbury v. Madison* established a role for the Supreme Court in 1803.[321] And, as the Minnesota Supreme Court majority pointed out in *State v. Keezer*,[322] it was not until 1823 that Chief Justice John Marshall conceptualized the "Indian Right of Occupancy" in *Johnson v. M'Intosh*.[323] However, there can be little question that, from the Anishinabe standpoint, the guarantee of indeterminate rights to hunt, fish, and wild rice in the Northwest Territory in 1795 and after, became part of the tribal oral history, even if written treaty guarantees and oral promises of U.S. treaty negotiators and Minnesota Governors had been forgotten[324] or ignored.

IV. POST-*MILLE LACS* USUFRUCTUARY PROPERTY RIGHTS: THE "RIGHT TO A MODEST LIVING"

Although the State of Minnesota was not a formal party to the *LCO* litigation, it considered itself practically bound since at least 1987, when it entered into the "Tri-Band Agreement" to jointly manage wildlife resources in the 1854 ceded territory with Anishinabe Bands in Minnesota's "arrowhead"[325] and settled a suit

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320. Treaty of Greenville, *supra* note 76. *See also Keezer*, 292 N.W.2d at 715.

321. Marbury v. Madison, 5 U.S. 137, 179 (1803) (affirming the principle of judicial review).

322. *Keezer*, 292 N.W.2d at 716.

323. For example, see Johnson v. M'Intosh, 21 U.S. 543, 574 (1823) (utilizing the phrase "Indian Right of Occupancy" regarding conveyance of title).

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

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

> III. CONDITIONS
> A. This Agreement is contingent upon adoption by the Minnesota Legislature, at the 1988 Session, thereof of legislation effectuating the terms of this Agreement, and is further contingent upon the Governor signing such legislation into law.
> B. The Agreement is contingent upon ratification of governing bodies of the Grand Portage, Bois Forte and Fond du Lac Bands . . . .
> D. If legislation effectuating the terms of this Agreement is enacted into law, all parties will apply to the Court for entry of a consent judgment consistent with the terms of this Agreement . . . .
> F. Until such time as a Tri–Band Code and Grand Portage Code have been duly adopted pursuant to this Agreement, the Three Bands shall abide by all provisions of state law when hunting and fishing . . . .

See Peter Erlinder, The Anishinabe Nation's "Right to a Modest Living" From the Exercise of Off–Reservation Usufructuary Treaty Rights . . . in All of Northern

with the Grand Portage Band of Chippewa, based on the same 1854 Treaty.[326] The stakes can be significant.[327]

Despite the 1854 Treaty specifically providing that the Mississippi Band retained 1825 and 1826 Treaty-guaranteed-rights west of the 1854 Treaty boundary, Minnesota has not acknowledged that all Anishinabe Bands to which the 1854 Treaty apparently refers[328] should have the same off-reservation usufructuary rights[329] as Anishinabe in Wisconsin and Minnesota,[330] property rights with a value of millions of dollars annually, according to the State.[331] The value of native

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Minnesota 20 (unpublished manuscript) (on file with William Mitchell College of Law) [hereinafter Erlinder, Anishinabe Nation].

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

327. Reis, *supra* note 30. *See also* Cobell v. Salazar, 573 F.3d 808 (D.C. Cir. 2009).

328. The contradiction is apparent in off-reservation prosecution of Indians in territory outside the 1854 Treaty-ceded territory which must acknowledge both *Mille Lacs* and *LCO I* as controlling regarding usufructuary rights, but find exceptions *based on treaty boundaries to permit prosecutions that would not be possible a few miles in either direction. See* State v. Butcher, 563 N.W.2d 776, 784 (Minn. Ct. App. 1997).

329. *See* GREAT LAKES INDIAN FISH AND WILDLIFE COMM'N (GLIFWC), A GUIDE TO UNDERSTANDING CHIPPEWA TREATY RIGHTS: MINNESOTA EDITION (1995) (describing the self-management Wisconsin Bands have chosen, as has the Fond du lac Band in Minnesota).

330. The usufructuary rights leased by the State in the arrowhead region were valued at approximately $6 million annually in 1988. The 2010–11 Biennial Budget of Minnesota Department of Natural Resources reflects payments of about $7.5 million annually for treaty rights (an estimated average value of $6.5 million over the past twenty-two years) would mean that the State has set the value of a small portion of the ceded area at about $140 million over twenty-plus years. However, the area west of the 1854 Treaty border and north of the 1937 Treaty border is much larger than that ceded in the 1837 and 1854 Treaties, and includes prime fishing and hunting locations in the Gull Lake, Brainerd, and Bemidji areas. This means that the direct loss to the largest Anishinabe Bands, in territory that was un-ceded in 1854 and in which usufructuary rights were not abrogated subsequently, must be in the range of some $280 million, over just the past twenty-some years. *See* FISCAL ANALYSIS DEP'T, MINN. H. OF REP., MINNESOTA'S GENERAL FUND BUDGET FOR THE FY 2010–11 BIENNIUM (Oct. 2009). In addition, hundreds if not thousands of Anishinabe Band members have been unlawfully arrested, incarcerated and/or fined by the State, for arguably exercising off-reservation usufructuary activities, or subject to tribal jurisdiction. *See Butcher*, 563 N.W.2d at 776 and the Tunheim Order, *supra* note 23. These direct and indirect damages are incalculable.

331. Tri–Band Agreement art. IV:

> OBLIGATIONS AND RIGHTS OF THE STATE:
> A. Annual Payment: The State shall pay annually to the Grand Portage Band and Bois Forte Band the sum of one million six hundred thousand dollars ($1,600,000 *each*, and to the Fond du Lac Band the sum of one

usufructuary property rights was first estimated by the Seventh Circuit[332] and the Wisconsin federal courts, which recognized that the 1854 Treaty guaranteed the right of the Anishinabe to "enjoy a modest living" from their exercise of usufructuary rights.[333] In *LCO V*, the federal district court determined the economic value of the "modest standard of living" guaranteed under the 1854 Treaty:

> Plaintiffs have shown that their modest living needs cannot be met from the present available harvest even if they were physically capable of harvesting, processing, and gathering it. The standard of a modest living does not provide a practical way to determine the plaintiffs' share of the harvest potential.[334]

And:

> The modest standard of living guaranteed to plaintiffs under the 1837 and 1842 treaties may be quantified as a zero savings . . . .[335]

The federal district court also found that in 1986, the average income level for a household that did not save anything was $20,036.[336] The court found that "[t]o provide plaintiffs the equivalent of a modest standard of living for the households of tribal members would require approximately $82,000,000."[337] Even if the income level required was equal to the average income of American Indians, it would take $22.5 million, or $4 million more than the land could produce under optimal conditions, to satisfy the moderate living standard.[338] The court concluded that "[u]nder the most optimal conditions, capture of the entire potential harvest of the ceded territory could produce no more than $18,000,000 in foods, pelts, and timber for personal consumption and sale."[339]

> million eight hundred and fifty thousand dollars ($1,850,000) paid by the State pursuant to the settlement of litigation referenced in Minn. Stat. §§ 97A.151 and 97A.155 (1986) shall be matched dollar for dollar, in the payments made to each of the Three Bands. This formula shall continue to apply to the Three Bands even if it may in the future no longer apply to Leech Lake Band.

See also Erlinder, Anishinabe Nation, supra note 325, at 21.

332. *See, e.g.*, *LCO II*, 760 F.2d 177 (7th Cir. 1985); *LCO I*, 700 F.2d 341 (7th Cir. 1983).

333. This, of course, means that usufructuary rights remain intact in un-ceded territory as well.

334. *LCO V*, 686 F. Supp. 226, 233 (W.D. Wis. 1988).

335. *Id.* at 230.

336. *Id.* at 228.

337. *Id.* at 230.

338. *Id.*

339. *Id.*

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

> [T]he parties did not intend that plaintiffs' reserved rights would entitle them to the full amount of the harvestable resources in the ceded territory, even if their modest living needs would otherwise require it. The non-Indians gained harvesting rights under those same treaties that must be recognized. The bargain between the parties included competition for the harvest. How to quantify the bargained-for competition is a difficult question. The only reasonable and logical resolution is that the contending parties share the harvest equally.[340]

Central to the court's analysis was the finding in *LCO IV*, where the court found that "even if the tribes could exploit every harvestable natural resource in the ceded territory, they would not derive sufficient income from those resources to provide their members with a moderate standard of living."[341] The exercise of usufructuary rights for individual tribal members, even if insufficient to provide a livable income, hold the promise of supplementing both income and diet for enrolled tribal members who live on or near reservations in conditions almost as shocking as those who moved the U.S. treaty negotiators in 1826, according to studies published as recently as 2005:

> Tribal communities tend to be poorer and have higher unemployment levels than most other communities:
>
> - Recent census data show that the poverty rate in reservation areas is approximately 50%, almost four times the United States average, and that the poverty rate for Indian children in reservation areas is 60%.
> - Other federal data show that, as of 1999, over 40% of all adults living on or near reservations were unemployed and that over 30% of those employed were still living in poverty.
>
> Tribal populations tend to face increased risk of public health threats from environmental contamination and are subject to impacts from environmental degradation to a greater extent than other population segments:
>
> - Tribal communities tend to consume larger quantities of fish, game and other natural foods than other communities, and thus face higher health risks posed by bioaccumulative toxics.
> - In 2001, approximately 34% of drinking water suppliers in Indian country violated monitoring and

340. *LCO IV*, 740 F. Supp. 1400, 1416 (W.D. Wis. 1990).

341. *Id.* at 1413.

> reporting requirements and approximately 5% violated maximum contaminant level/treatment technologies. The vast majority of the public water systems with significant noncompliance have been out of compliance for nine months or more.
>
> • Many Tribal Nations have no waste management program at all and use dumps or burn barrels as the primary method of waste disposal.
>
> According to a 1999 Indian Health Service report, tribal communities face significant disparities vis-à-vis other communities regarding disease and mortality rates:
>
> • Tribal communities have higher incidences than other communities of certain diseases, such as diabetes, cardiovascular diseases and hypertension, obesity, gall-bladder disease, and dental disease.
>
> • Age-adjusted death rates for the following causes were considerably higher than those for other population segments in 1995: alcoholism—627 percent greater; tuberculosis—533 percent greater; diabetes mellitus—249 percent greater; accidents—204 percent greater; suicide—72 percent greater, pneumonia and influenza—71 percent greater; and homicide—63 percent greater.
>
> Studies have shown a clear relationship between the use of traditional foods and the health and well-being of tribal members, including:
>
> • The improvement of diet and nutrient intake.
>
> • The prevention of chronic diseases.
>
> • The opportunities for physical fitness and outdoor activities associated with harvesting traditional foods.
>
> • The opportunity to experience, learn, and promote cultural activities.[342]

The scope of usufructuary rights in the 19th Century included a broad range of land use activities that the *LCO* litigation first attempted to catalogue.[343] The scope of the exercise of these rights,

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342. GREAT LAKES REGIONAL COLLABORATION, TRIBAL NATIONS ISSUES AND PERSPECTIVES 3–4 (Version 1.0, Apr. 26, 2005), *available at* http://www.glrc.us/documents/strategy/GLRC-Tribal-Briefing-Paper.pdf.

343. As the Court explained in *LCO III*, 653 F. Supp. 1420, 1426–28 (W.D. Wis. 1987):

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

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

The Chippewa also harvested a large number of plants and plant materials, including: box elder, sugar maple, arum–leaved arrow–head, smooth sumac, staghorn sumac, wild ginger, common milkweed, yellow birch, hazelnut, beaked hazelnut, nannyberry, climbing bitter–sweet, large–leaved aster, Philadelphia fleabane, dandelion, panicled dogwood, large toothwort, cucumber, Ojibwe squash, large pie pumpkin, gourds, field horsetail, bog rosemary, leather leaf, wintergreen, Labrador tea, cranberry, blueberry, beech, white oak, bur oak, red oak, black oak, corn, wild rice, Virginia waterleaf, shell bark hickory, butternut, wild mint, catnip, hog peanut, creamy vetchling, navy bean, lima bean, cranberry pole bean, lichens, wild onion, wild leek, false spikenard, sweet white water lily, yellow lotus, red ash, white pine, hemlock, brake, marsh marigold, smooth juneberry, red haw apple, wild strawberry, wild plum, pin cherry, sand cherry, wild cherry, choke cherry, highbush blackberry, red raspberry, large–toothed aspen, prickly gooseberry, wild black currant, wild red currant, smooth gooseberry, Ojibwe potato, hop, Virginia creeper, river–bank grape, red maple, mountain maple, spreading dogbane, paper birch, low birch, downy arrowwood, woolly yarrow, white sage, alternate–leaved dogwood, wool grass, great bulrush, scouring rush, sweet grass, Dudley's rush, marsh vetchling, sweet fern, black ash, balsam fir, tamarack, black spruce, jack pine, Norway pine, arbor vitae (white cedar), hawthorn, shining willow, sphagnum moss, basswood, cat–tail, wood nettle, slippery elm, and Lyall's nettle, poison ivy, winterberry, mountain holly, sweet flag, Indian turnip, wild sarsaparilla, ginseng, spotted touch–me–not, blue cohosh, speckled elder, hound's tongue, marsh bellflower, harebell, bush honeysuckle, red elderberry, snowberry, highbush cranberry, white campion, yarrow, pearly everlasting, lesser cat's foot, common burdock, ox–eye daisy, Canada thistle, common thistle, daisy fleabane, Joe–Pye weed, tall blue lettuce, white lettuce, black–eyed Susan, golden ragwort, entire–leaved groundsel, Indian cup plant, fragrant golden–rod, tansy, cocklebur, bunch berry, tower mustard, marsh cress, tansy–mustard, squash, wild balsam–apple, hare's tail, wood horsetail, prince's pine, flowering spurge, golden corydalis, giant puffball, wild geranium, rattlesnake grass, blue flag, wild bergamot, heal–all, marsh skullcap, white sweet clover, reindeer moss, northern clintonia, Canada mayflower, small Solomon's seal, star–flowered Solomon's seal, carrion flower, twisted stalk, large flowered bellwort, ground pine, Canada moonseed, heart–leaved umbrella–wort, yellow water lily, great willow–herb, evening primrose, Virginia grape fern, yellow ladies' slipper, rein orchis, adder's mouth, bloodroot, white spruce, common plantain, Carey's persicaria, swamp persicaria, curled dock, shield fern, female fern, sensitive fern, red baneberry, Canada anemone, thimble–weed, wild columbine, gold thread, bristly crowfoot, cursed crowfoot, purple meadow rue, agrimony, large–leaved aven, rough cinquefoil, marsh five–finger, smooth rose, high bush blackberry, meadow–sweet, steeple bush, goose grass, small cleaver, small bedstraw, prickly ash, balsam poplar, large toothed aspen, quaking aspen, crack willow, bog willow, pitcher–plant, butter and eggs, cow wheat, wood betony, mullein, moosewood, musquash root, cow parsnip, sweet cicely, wild parsnip, black snakeroot, Canada violet, American dog violet, speckled alder, sweet gale, goldthread, bluewood aster, horseweed, Canada hawkweed, fragrant goldenrod, shin leaf, sessile–leaved bellwort, slender ladies' tresses, and starflower.

The Chippewa harvested other miscellaneous resources, such as turtles

according to the court, continues to exist throughout the entire ceded territory with the possible exception of "private land" that had been occupied by settlers at the time of the treaty, unless the exercise of usufructuary rights on private property was necessary for the Anishinabe, in which case the court invited the Anishinabe to return to establish that the available public land was insufficient for their support.[344] The findings of the federal district court in *LCO III* described the rights retained by the Lake Superior Band, including: "[The] rights to all the forms of animal life, fish, vegetation . . . and use of all methods of harvesting employed in treaty times and those developed since . . . . The fruits . . . may be traded and sold to non-Indians, employing modern methods of distribution and sale . . . . [T]o enjoy a modest living . . . ."[345] As part of the *Mille Lacs* treaty rights litigation in the 1990s, the Eighth Circuit noted that "usufructuary rights reserved by the Band included the rights to harvest resources for commercial purposes, and were not limited to use of any particular techniques, methods, devices or gear."[346] Technological advances in weaponry, transport, husbandry, gathering, and processing were all part of Anishinabe usufructuary property rights in the 19th Century and now in the 21st Century.[347]

V. PROSPECTS FOR 21ST CENTURY RESOURCE CO-MANAGEMENT IN ALL OF NORTHERN MINNESOTA—1825 AND 1826 "SOVEREIGNTY TREATY" TERRITORY

The Indian Commerce Clause of the Constitution establishes a direct relationship between the Federal Government and Tribal Nations.[348] In addition, Congress has specifically provided for a tribal role in the Clean Water Act,[349] Clean Air Act,[350] Safe Drinking Water Act [Public Health Service Act],[351] and the

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and turtle eggs. The most important game for the Chippewa was the white–tailed deer.

344. *Id.* at 1426–28.

345. *Id.* at 1435.

346. *Mille Lacs II*, 124 F.3d 904, 911 (8th Cir. 1997).

347. Erlinder, Anishinabe Nation, *supra* note 325, at 5 (discussing how Anishinabe usufructuary rights must adapt to include the use of modern technology).

348. U.S. CONST. art. 1, § 8, cl. 3 (stating Congress shall have power "[t]o regulate commerce with foreign nations, and among the several States, and with the Indian tribes").

349. 33 U.S.C. §§ 1251–1387 (2014).

350. 42 U.S.C. §§ 7401–7671q (2014).

351. *Id.* §§ 300f–300j-26.

Comprehensive Environmental Response Compensation and Liability Act.[352]

Tribal members may be entitled to expressly retain U.S. treaty-guaranteed modern usufructuary rights,[353] but tribal property rights do not exist in a vacuum and, as described in the *Mille Lacs* Eighth Circuit litigation, must co-exist with lawful state regulatory authority: "[A]ny regulation imposed by the State must be necessary to ensure public health and safety, and the State could not impose its own regulations if the Chippewa could establish tribal regulations adequate to meet conservation, public health and public safety needs."[354] The Supreme Court came to a similar conclusion in the *Mille Lacs* opinion:

> Although States have important interests in regulating wildlife and natural resources within their borders, this authority is shared when the Federal Government exercises one of its enumerated constitutional powers, such as treaty making . . . . Here, the 1837 Treaty gave the Chippewa the right to hunt, fish, and gather in the ceded territory free of territorial, and later state, regulation, a privilege that others did not enjoy. Today, this freedom from state regulation curtails the State's ability to regulate hunting, fishing, and gathering by the Chippewa in the ceded lands. But this Court's cases have also recognized that Indian treaty-based usufructuary rights do not guarantee the Indians "absolute freedom" from state regulation . . . . We have repeatedly reaffirmed state authority to impose reasonable and necessary nondiscriminatory regulations on Indian hunting, fishing, and gathering rights in the interest of conservation.[355]

Growing recognition that state governments are obligated to adhere to treaty-guaranteed usufructuary property rights can be seen in Minnesota Governor Mark Dayton's Executive Order No. 13-10 of August 8, 2013 that directs identified state agencies[356] to implement consultation policies with Minnesota's eleven federally-recognized Tribal Nations.[357]

I, Mark Dayton, Governor of the State of Minnesota, by

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352. *Id.* §§ 9601–9675.

353. United States v. Smiskin, 487 F.3d 1260, 1266 (9th Cir. 2007).

354. *Mille Lacs II*, 124 F.3d 904, 911 (8th Cir. 1997).

355. *Mille Lacs*, 526 U.S. 172, 204–05 (1999) (citations omitted).

356. All other Cabinet-level Executive Branch agencies shall coordinate, as needed, with the tribal liaison in the Governor's Office to consult with the Minnesota Tribal Nations.

357. Governor's Exec. Order No. 13-10 (Aug. 8, 2013), *available at* http://mn.gov/governor/images/EO-13-10.pdf [hereinafter Dayton Exec. Order] (rescinding former Minnesota Governor Tim Pawlenty's earlier Order affirming government-to-government relations between Minnesota and Tribes located therein).

> virtue of the power invested in me by the Constitution and applicable statutes, do hereby issue this Executive Order:
>
> **Whereas**, the United States and the State of Minnesota have a unique legal relationship with federally recognized Tribal Nations, as affirmed by the Constitution of the United States, treaties, statutes, and case law; . . . .
>
> **Now, Therefore,** I hereby order that:
>
> 1. All Executive Branch agencies of the State of Minnesota shall recognize the unique legal relationship between the State of Minnesota and the Minnesota Tribal Nations, respect the fundamental principles that establish and maintain this relationship, and accord Tribal Governments the same respect accorded to other governments.
>
> 2. By March 10, 2014, the following Cabinet-level Executive Branch agencies (hereinafter 'Cabinet Agency' and 'Cabinet Agencies') shall, in consultation with the Minnesota Tribal Nations, develop and implement tribal consultation policies to guide their work and interaction with the Minnesota Tribal Nations . . . .
>
> 3. As appropriate, and at the earliest opportunity, Cabinet Agencies shall consult with the Minnesota Tribal Nations . . . . Cabinet Agencies shall consider the input generated from tribal consultation into their decision-making processes, with the goal of achieving mutually beneficial solutions.
>
> 4. Each Cabinet Agency shall designate a staff member to assume responsibility for implementation of the tribal consultation policy and to serve as the principal point of contact for the Minnesota Tribal Nations.
>
> 5. All Cabinet Agencies shall provide training for designated staff who work with the Minnesota Tribal Nations in an effort to foster a collaborative relationship between the State of Minnesota and the Minnesota Tribal Nations.[358]

Executive Order 13-10 does not create rights or provide judicial review, but it does provide evidence that Minnesota state agencies, like never before, must actively consider "laws, rules, directives, or other legal requirements or obligations imposed by state or federal law, or set forth in agreements or compacts between one or more of the Minnesota Tribal Nations or any other Tribal Nation and the State or its agencies."[359]

358. *Id.*
359. *Id.*

A. Co-Management of Treaty-Guaranteed Usufructuary Property Rights: Preventing an Unconstitutional "Taking"—Protecting Natural Resources for All

However, the question remaining in both Wisconsin and Minnesota for the 21st Century with respect to the now well-established principle of treaty-guaranteed usufructuary property rights will be the scope of those rights in off-reservation treaty territory as well as on-reservation. The late 20th Century saw environmental regulation and respect for healthy resource development emerge as major issues, based largely on state and federal administrative regulation.[360] Recognition of off-reservation usufructuary property rights requiring protection suggests that native people will have an increasingly important place at that table[361] when decisions are made and income is distributed regarding wildlife harvesting and resource development in territory covered by treaties that guarantee usufructuary property interests to native peoples.[362] A model of state-tribal co-management is the Great Lakes Indian Fish and Wildlife Commission (GLIFWC).[363] The GLIFWC is a co-management and licensing body created by Anishinabe Bands in the 1854 Treaty territory to implement the resource-sharing concept required by the treaty-guarantees of the United States upheld in the *LCO* litigation. In Minnesota and Wisconsin, both Lake Superior Band descendants (the Fond du Lac Band) and Mississippi Band descendants (the White Earth and Leech Lake Bands) have opted for co-management systems that are either in operation or in the process of being established.[364] The post-*Mille Lacs* precedent for such a concept can be found in the early 21st Century challenge of the Mole Lake Chippewa Band to the siting of a mine in Crandon, Wisconsin, within the 1854 Treaty territory, citing the Seventh Circuit *LCO* opinions and the harm the mine would cause in the ability of the Band to exercise its usufructuary rights reflected in

360. Erlinder, *Ten Years On*, *supra* note 1, at 10933.

361. Dayton Exec. Order, *supra* note 357 (stating that Cabinet Agencies will work with Minnesota Tribal Nations on a number of policies and procedures that will affect Minnesota Tribal Nations).

362. Erlinder, *Ten Years On*, *supra* note 1, at 10933–34.

363. Tom Busiahn & Jonathan Gilbert, *The Role of Ojibwe Tribes in the Co-Management of Natural Resource in the Upper Great Lakes Region: A Success Story* (2009), *available at* http://www.glifwc.org/minwaajimo/Papers/Co-management%20Paper%20Busiahn%20%20FINAL.pdf.

364. *Id.* (discussing how co–management as a concept was never officially endorsed by Minnesota or Wisconsin and thus indicating the need for their establishment).

the Environmental Protection Agency ("EPA") Environmental Impact Statement ("EIS").[365]

B. Mille Lacs *Usufructuary Property Off-Reservation: The Crandon Mine Dispute*

An example of "dual management" of usufructuary property in 1854 Treaty territory in practice was the 2002 dispute over a proposed mining operation in north central Wisconsin in which Anishinabe usufructuary property rights were part of the discussion in the siting of a mining operation in Crandon, Wisconsin.[366] The 1854 Treaty-guaranteed property interests were a factor in the EPA's EIS and in the "scoping report" of the Army Corps of Engineers:

> 4.2.9 Indian Trust Assets
>
> Indian Trust Assets include on- and off-reservation issues about water, fishing, hunting, gathering, and other resources guaranteed by Treaty rights . . . [including] contamination of water from a leak or spill, and other Treaty rights related to water . . . [and] contaminants affecting fish and other aquatic resources, and other Treaty rights related to fishing, fish and other aquatic resources . . . . [As well as] Treaty rights related to hunting and wildlife species . . . and other Treaty rights related to gathering wild rice, other plants, and medicines.
>
> 4.3.3 Wild Rice
>
> Wild rice includes issues about contaminants and geochemistry, harvesting, water levels, and development from population growth . . . . Development issues include indirect impacts on wild rice from population growth and associated housing, road building, and other development occurring outside the boundaries of the Mole Lake Reservation.[367]

The impact of land use issues on the harvest of wildlife is not limited to the economic impact alone. The EPA studies evaluating the impact on treaty-protected rights extends to the entire treaty territory.[368] Further, the social dimension, as destruction of the ability to exercise usufructuary property rights has devastated Anishinabe communities, must be considered as well:

> 4.2.7 Socioeconomics
>
> Native American community issues include impacts on social

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365. Erlinder, *Ten Years On*, *supra* note 1, at 10934.

366. Natalie Jablonski, *Looking Back on a Mine Controversy: What Does the Crandon Mine Story Mean Today?*, MIRROR OF THE NORTHWOODS, WINDOW ON THE WORLD (Oct. 28, 2013), http://wxpr.org/post/what-does-crandon-mine-story-mean-today.

367. U.S. ARMY CORPS OF ENG'RS, CRANDON MINE PROJECT ENVIRONMENTAL IMPACT STATEMENT DRAFT (2002) [hereinafter CRANDON EIS].

368. Erlinder, *Ten Years On*, *supra* note 1, at 10934.

> and economic systems, cultural, spiritual, well-being, and subsistence aspects of Native American life, racism in schools, loss or decline of wild rice production, and changes in utilities, housing, employment, and income during and after the project.[369]

C. PolyMet Mining and "Sandpiper" Pipeline Proposals in Minnesota's 1854 Treaty Territory: Mille Lacs *Usufructuary Property Analysis and the Crandon Mine Experience*

A situation similar to the Crandon Mine arose recently in Minnesota that threatens the off-reservation usufructuary property of the Anishinabe in the siting and permitting of the PolyMet Mining operation proposed for the 1854 Treaty territory.[370] In late 2013, the PolyMet Mining Company filed a preliminary EIS, which proposes a copper-nickel mine on the site of a former iron mine in Northern Minnesota and concedes that sulphuric acid will be a by-product of twenty years of mine production for some 500 years.[371] The proposed mine is located in the 1854 Treaty-ceded territory which the State of Minnesota, the State of Wisconsin, the Seventh Circuit, and the *Mille Lacs* majority and dissent all have acknowledged as treaty-created usufructuary property in favor of the Anishinabe in the entire ceded territory, not just on the reservations within the Treaty-ceded territory. In 2002, the off-reservation usufructuary property rights of the Mole Lake Band proved decisive in preventing the siting of gold and copper mines upstream of the reservation proper based on the 1854 Treaty.[372] On October 28, 2004, the Sokaogon

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369. CRANDON EIS, *supra* note 367. The Crandon Mine site was never approved and was eventually purchased by the tribe.

370. *PolyMet Mine Proposal*, MINING TRUTH, http://www.miningtruth.org/sulfide-mining-minnesota/polymet-mine-proposal/#.VBdS4hbuqYQ.

371. *Id.*

372. Jablonski, *supra* note 366.

> Today marks 10 years since a proposal for a copper and zinc mine in Forest County came to an end. Members of the Mole Lake Sokaogon Chippewa and Menominee tribes gathered this weekend to celebrate . . . but pointed out that mining remains a controversial issue in northern Wisconsin.
>
> First Exxon and later BHP Billiton proposed to open a copper and zinc mine near Crandon, Wisconsin. But the mine site was close to the pristine Wolf River. The Menominee Reservation was 40 miles downstream, and the Mole Lake Reservation was even closer. The tribes worried water pollution could ruin their sacred beds of wild rice.

Chippewa Community Mole Lake Band and the Forest County Potawatomi Community bought Nicolet Minerals and the Crandon land for $16.5 million, including all mineral rights.[373]

Based on the Crandon Mine precedent under the same 1854 Treaty, before the PolyMet project can go forward, the Anishinabe must be recognized as equal partners with the State of Minnesota with equal usufructuary property rights to protect in all of the 1854 Treaty territory, not just the reservations which might be impacted, before the mine is permitted.[374] The 500 years' residual impact the proposed mine will have on the usufructuary property interests of the Ojibwe is much, much longer than the iconic "the seventh generation" decision-making often attributed to native peoples.[375] The *Mille Lacs* usufructuary property analysis creates the possibility for due process challenges to the unconstitutional "taking" of these 21st Century property interests of this and future generations that did not exist before the *Mille Lacs* Court

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> In 2002 the Mole Lake Sokaogon tribe won the right as a sovereign nation to set its own standards for air and water quality. Mole Lake Sokaogan Tribal chairman Chris McGeshick says that meant it could set strict limits on pollutants.
>
> "Enacting our own water quality standards. I feel that was the turning point, where the tribe—our rights were recognized as a government, to have the ability to adopt and enforce our own water quality regulations within this watershed."
>
> The following year, the nearly three-decade fight ended. October 28th marks ten years since Mole Lake Sokaogon and Forest County Potawatomi purchased the mine site for more than 16 million dollars.
>
> Some see parallels between the Crandon mine story and Gogebic Taconite's plan for a Penokee mine. Like activist Francis Van Zile. She was involved in the fight against the Crandon mine since the 70s.

373. *Controversial Mineral Deposit Sold*, GEOTIMES (last visited Oct. 27, 2014), http://www.geotimes.org/jan04/resources.html. *See also* Amy Rinard & Meg Jones, *Tribes' Purchase Ends Crandon Mine Tussle: Mining Company Says 'Hostile Political Climate' Doomed Project*, MILWAUKEE JOURNAL SENTINEL (Oct. 29, 2003), http://ecoearth.info/shared/reader/welcome.aspx?linkID=26666.

374. *See* Wisconsin v. EPA, 266 F.3d 741, 743 (7th Cir. 2001) (upholding the EPA treatment of the Reservation as a "state" for management of water quality standards, pursuant to the 1854 Treaty).

375. LINDA CLARKSON ET AL., OUR RESPONSIBILITY TO THE SEVENTH GENERATION: INDIGENOUS PEOPLES AND SUSTAINABLE DEVELOPMENT 7 (1992) ("The original law passed down from their ancestors crystallizes the sacred responsibility of Indigenous people to be the caretaker of all that is on Mother Earth and therefore that each generation is responsible to ensure the survival for the seventh generation.").

identified these interests for what they are: "usufructuary property."[376]

In "Indian Country" beyond the treaty territory discussed in this Article, the Keystone XL Pipeline has become an international focus of attention for a growing coalition with interests that coincide with the Dakota, Ojibwe, and other Indian Nations with treaty-guaranteed usufructuary property interests threatened by pipeline operations.[377] However, within the 1825 and 1826 Treaty territory, of which the 1854 and 1855 Treaty territories are a part,[378] a Minnesota version of the Keystone XL opposition movement is growing in response to the "Sandpiper" Pipeline application filed by a Canadian pipeline with the Minnesota Public Utilities Commission ("PUC") to construct a heavy-oil pipeline from North Dakota to the east and south through the lakes region at the headwaters of the Mississippi,[379] an area with some of the most hydrologically-sensitive groundwater flows in the state according to fifty years of U.S. Geological Survey ("USGS") data.[380]

In hearings before the Commission and using the *Mille Lacs* treaty-guaranteed usufructuary property rights analysis as a starting point, Indian and non-Indian opponents of the Sandpiper

376. Another example of treaty-guaranteed usufructuary property interests playing a role in the permitting and regulating process is taking place in the "Sandpiper" oil pipeline currently pending before the Minnesota Public Utility Commission ("PUC"). Canadian pipeline company, Enbridge, is seeking to construct a pipeline to transport North Dakota and Canadian oil across Minnesota to transfer points on the lower Mississippi and Great Lakes. Enbridge proposes to cross the headwaters of the Mississippi, certified organic wild rice beds, and other sensitive environmental areas. Environmental Impact Statements considering the impact of the pipeline on the native population's right to a "modest living" from exercise of usufructuary property rights, similar to those in the Crandon Mine example above, have been requested by members of the White Earth and Leech Lake Bands in the current permitting process. For example, Wisconsin has an outline for an EIS. *See* WIS. DEP'T OF NATURAL RES., ENVTL. IMPACT STATEMENT FOR ENBRIDGE SANDPAPER PETROLEUM PIPELINE AND RELATED PROJECTS OUTLINE (2014), *available at* http://dnr.wi.gov/topic/EIA/documents/Enbridge/SandpiperLine3EISOutline.pdf.

377. Mitch Smith, *Nebraskans Raise Their Voices in Fight Against Keystone XL Pipeline*, N.Y. TIMES (Sept. 29, 2014), http://www.nytimes.com/2014/09/30/us/keystone-xl-pipeline-nebraska-opponents.html?_r=0.

378. *See infra* Appendices I and II.

379. Pub. Util. Comm'n Docket Description: Sandpiper Pipeline Project, PUC Docket No. PL6668/PPL-13-474.

380. USGS has been identifying and mapping aquifers across the U.S., including those in Minnesota, for many decades and often in collaboration with Minnesota's DNR, Pollution Control Agency, and the Department of Health. Numerous reports exist about aquifers and aquifer vulnerability in specific locations within Minnesota from the USGS Minnesota Water Science Center. For information about aquifers provided by the Minnesota DNR, see MINN. DEP'T OF NATURAL RES. AQUIFERS, *available at* http://www.dnr.state.mn.us/groundwater/aquifers.html.

Pipeline introduced written and oral evidence documenting the unique characteristics of the land and water resources for the exercise of treaty-guaranteed usufructuary rights in treaty territory.[381] On August 21, 2014, the Minnesota DNR and Pollution Control Agency ("PCA") each submitted comments opposing the route originally proposed by Enbridge.[382]

On September 11, 2014, the Commission voted to reconsider the Sandpiper proposal as to need, and to consider alternative routes if need for the pipeline can be substantiated in the first place.[383] The continuing and future role of the treaty-guaranteed usufructuary property interests, which are common to the Mole Lake Band in the Crandon Mine permitting issue and the Minnesota Bands in the Sandpiper matter under the 1854 and 1855 Treaties, are in the historic process of development now:[384]

> Enbridge's proposed route for its Sandpiper line traverses a significant portion of the Fond du Lac Band of Lake Superior Chippewa's 1854 ceded territory. The Band is responsible for protecting natural resources both on the reservation and within its ceded territories. The Band's concerns about the route encompass the need to protect Band self-sufficiency and cultural practices . . . (and) lack of tribal consultation on the

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381. Minn. Pub. Util. Comm'n Decisions: PUC Agenda Meeting, Docket No. PL6668/PPL-13-474 (2014), recording *available at* https://minnesotapuc.legistar.com/MeetingDetail.aspx?ID=325625&GUID=4A0F4B38-E454-4DAB-AAE7-DC8A22AD711D&Options=info|&Search=. There are also several supporting documents for the hearing, *available at* https://www.edockets.state.mn.us/EFiling/edockets/searchDocuments.do?method=eDocketsResult&docketYear=13&docketNumber=474. *See also* David Schaffer, *Minnesota Regulators Order a Broader Look at Pipeline Route*, STAR TRIB. (Sept. 12, 2014), http://www.startribune.com/business/274834771.html.

> Minnesota regulators on Thursday ordered a broader search for the best pathway to build a major new crude oil pipeline across the state. The 3–2 decision by the state Public Utilities Commission was a setback for Enbridge Energy, which wants to build the $2.6 billion Sandpiper pipeline through northern Minnesota to carry North Dakota oil to a terminal in Superior, Wis., that feeds refineries across the Midwest.

Id.

382. *See* Dep't of Natural Res. & Pollution Control Agency, Comments submitted to Pub. Util. Comm'n Docket No. PL6668/PPL-13-474 (Aug. 21, 2014).

383. Schaffer, *supra* note 381 (noting that Minnesota regulators ordered a search for alternative pathways during a meeting held on September 11, 2014).

384. On September 29, 2014, Chairwoman Karen Diver of Fond du Lac Band of Lake Superior Chippewa sent a letter to the Executive Secretary of the PUC providing notice of threats to on- and off-reservation 1854 Treaty-guaranteed usufructuary property interests. *See* Letter from Karen Diver, Chairwoman, Fond du Lac Band of Lake Superior Chippewa, to Dr. Burl W. Haar, Exec. Sec'y Minn. Pub. Util. Comm'n. (Sept. 29, 2014) (on file with Minn. Dep't of Commerce). These are exactly the issues raised under the 1854 Treaty in the aforementioned Crandon Mine dispute, and the assertion of treaty-guaranteed usufructuary property interests advocated by this Article.

> environmental review process and identification of historically, archaeologically and culturally significant lands . . . . [T]he Band's subsistence lifestyle is based upon the harvest of healthy fish, game, wild rice, maple sugar, medicinal plants and forest products. We have been able to sustain this way of life because our local ecosystem is still largely intact.[385]

The letter does not cite the *Voigt* litigation, but does cite the 1854 Treaty upon which the *LCO* cases turned, and upon which the *Mille Lacs* analysis of treaty-guaranteed usufructuary property interests was based. However, the Enbridge Sandpiper Pipeline permitting issue, with the Crandon Mine litigation as legal, political, and historical precedent,[386] has put the scope of *Mille Lacs* property protections in environmental and resource permitting squarely on the agenda in the 21st Century. In an Securities Exchange Commission filing on September 30, 2014, Enbridge announced that completion of the Sandpiper Pipeline project would be delayed by at least a year, until 2017.[387]

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385. *Id.*

386. *See generally* Rinard & Jones, *supra* note 373.

387. John Myers, *Enbridge Delays Proposed Sandpiper Completion*, GRAND FORKS HERALD (Sept. 30, 2014):

> Enbridge Energy Inc. on Tuesday said its proposed Sandpiper oil pipeline between western North Dakota and Superior, Wis., won't be completed until 2017, about a year behind the company's original estimate.
>
> Enbridge announced the delay in a filing with the federal Securities and Exchange Commission, noting that it is a material change in the company's plans that stockholders need to know about . . . .
>
> Al Monaco, Enbridge's president and CEO, said in Toronto that the delay was caused by the Minnesota regulator's decision to split a review of the public need for the line and its routing into two separate hearings.
>
> The Minnesota Public Utilities Commission is taking longer than expected to approve possible routes for the pipeline that need to be thoroughly studied for environmental and social impacts. The company hoped to limit those possible routes to two options.
>
> On Sept. 11, the PUC opened up the possibility that other routes might have to be included for study.
>
> Several groups have organized to propose additional routes, or oppose the line altogether, saying Minnesota shouldn't have to bear the risk for oil that will mostly go to other states. They cite the possibility of pipeline spills into northern Minnesota lakes, rivers, and wetlands, and some groups have proposed new routes that would take the line south, through more farmland and urban areas.
>
> The $2.6 billion, 616-mile Sandpiper line is needed, supporters say, to

In the 19th Century, Minnesota's Anishinabe people were not able to insist on a rigorous evaluation of the environmental and cultural impact of John D. Rockefeller's mining interests development and degradation of the Mesabe Iron Range.[388] The usufructuary property rights created in the Treaties of 1795, 1825, 1826, 1837, and 1854; the Executive Order of 1850; and the verbal assurances of Alexander Ramsey to the Red Lake Band in 1863,[389] did not receive judicial attention until late in the 20th Century.[390] After the *Mille Lacs* treaty-guaranteed usufructuary property analysis clarified the nature of the interests held by the Anishinabe, the "Crandon model" was the first example of 21st Century recognition of 1854 Treaty-guaranteed off-reservation usufructuary property interests being protected in the environmental scoping and permitting process.[391] As of September 29, 2014, the Sandpiper Pipeline has become the second. [392]

> alleviate the bottleneck of crude oil that North Dakota is pumping for the rest of America but for which there aren't enough pipelines or railcars to ship it to refineries. Sandpiper, if built, would move 15.8 million gallons of oil a day across northern Minnesota, about 20 percent of all of the crude out of the Bakken oilfield region . . . .
>
> Enbridge had expected public hearings to be held on both the need for the pipeline and the route, simultaneously, over the winter with a final Minnesota Public Utilities Commission decision coming in May 2015. Construction would have started after PUC approval.
>
> Now, it appears the pipeline's route and its perceived public need will be reviewed under a more complex process that separates the public need hearings from route considerations. The need hearings will be held on the original schedule, with hearings in January and an administrative law judge decision in April, Lorraine Little, an Enbridge spokeswoman, said Tuesday.
>
> It's still unclear how and when the route aspects will advance through the PUC process.

388. Duluth native Leonidas Merritt and his brothers made some of the most valuable mining discoveries but sold their interests to John D. Rockefeller who sold to Andrew Carnegie's U.S. Steel Corporation. *See generally* DAVID ALLEN WALKER, IRON FRONTIER: THE DISCOVERY AND EARLY DEVELOPMENT OF MINNESOTA'S THREE RANGES chs. 5, 7–9 (1979). *Id.* at pp. 6–7 (talking generally about the Fond du Lac Treaty and mineral rights).

389. Treaty of Old Crossing, *supra* note 67. No mention of hunting and fishing rights, "but the transcript of Ramsey's negotiations with the Band makes clear that the Indians were promised they could continue to hunt and fish on the ceded land until it was settled." United States v. Minnesota, 466 F. Supp. 1382, 1383 (D. Minn. 1979).

390. *See* United States v. Gotchnik (*Gotchnik I*), 222 F.3d 506 (8th Cir. 2000); *Mille Lacs II*, 124 F.3d 904 (8th Cir. 1997); United States v. Bresette, 761 F. Supp. 658 (D. Minn. 1991).

391. Rinard & Jones, *supra* note 373. This outcome is not impacted by the

VI. FEDERAL PROSECUTIONS OF TRIBAL MEMBERS FOR EXERCISING TREATY RIGHTS: *MILLES LACS* AND TREATY-GUARANTEED USUFRUCTUARY PROPERTY "IMMUNITY"

A. United States v. Bresette

Twenty years after the district court found that Leech Lake Band members were immune from state prosecution for violation of state wildlife regulation on the Leech Lake Reservation in *Herbst*, the federal district court in Minnesota decided *United States v. Bresette*.[393] In *Bresette*, a member of the Chippewa Indian Tribe was charged with a violation of the federal Migratory Bird Treaty Act[394] for selling migratory bird feathers in the form of dream catchers.[395] The court held that the defendants had the right to sell migratory bird feathers obtained from land ceded by the Chippewa in the Treaties of 1842 and 1854.[396] To get to this conclusion, the court presciently applied the analysis used in *Mille Lacs* and found that the "defendants have a treaty right to sell these bird feathers which has not been abrogated . . . ."[397] They

existence of several early treaties that permitted the mining of minerals, logging or other development, whether the United States gained title to the territory, or not.

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

Treaty between the United States and the Chippewa Band of Indians, Aug. 5, 1826, 7 Stat. 290 [hereinafter Treaty of 1826].

392. *See* Myers, *supra* note 387.

393. United States v. Bresette, 761 F. Supp. 658, 659 (D. Minn. 1991). In *Herbst*, Judge Devitt was "satisfied that the Leech Lake Indians held aboriginal fishing and hunting rights, [and] that these rights were preserved by treaty with the United States . . . . " Leech Lake Band of Chippewa Indians v. Herbst, 334 F. Supp. 1001, 1006 (D. Minn. 1971). The State did not seriously dispute that the Leech Lake Indians possessed the claimed fishing and hunting rights, as the Minnesota Supreme Court had held in the 1944 case *State v. Jackson*, 16 N.W.2d 752 (Minn. 1944). The district court in *Herbst* concluded that "[the Indians] have the right to hunt and fish and gather wild rice on public lands and public waters of the Leech Lake Reservation free of Minnesota game and fish laws" and "[d]efendants are enjoined the state from enforcing such laws against them." *Herbst*, 334 F. Supp. at 1006.

394. 16 U.S.C. §§ 703–12 (2012).

395. *Bresette*, 761 F. Supp. at 659.

396. *Id.* at 660.

397. *Id.* at 664.

concluded the Treaties must have contemplated commercial transactions.[398]

The court referred to the *Voigt* cases from the Seventh Circuit,[399] which involved the Treaties of 1837, 1842, and 1854.[400] In these cases, the Chippewa people ceded territory in the Northern Great Lakes region to the federal government.[401] The 1854 Treaty covers much of Northeastern Minnesota, including the Fond du Lac Reservation, and the *Voigt* cases provided historical analysis that the *Mille Lacs* Court would use:

> Indian treaty rights are to be afforded a broad construction and, indeed, are to be interpreted as the Indians understood them because the Indians were generally unlettered and the government had great power over the Indians with a corresponding responsibility toward them.[402]

Thus, the court concluded:

> [T]he inclusion in the 1854 treaty of a reservation of usufructuary rights by the Minnesota Chippewas suggests, in our view, that the LCO band believed their usufructuary rights to be secure and unaffected by the treaty.[403]

As discussed earlier, the second clause of the 1854 Treaty also specifically states that the Mississippi Chippewa *west* of the Treaty boundary, in territory that had not been ceded to the United States as of 1854 as was sovereign under the Treaties of 1825 and 1826, maintained their previous rights unchanged by the 1854 Treaty. The territory referenced is the remainder of Minnesota land in which the Treaties of 1825 and 1826 recognized the Chippewa as sovereign (as did the 1850 Presidential Order which identified the territory not ceded by the 1837 Treaty) as the territory to which removal should occur.

B. United States v. Gotchnik

In 1998, officials of the Forest Service cited two members of the Bois Forte Band of Chippewa for using motorized vehicles in "no motor" areas of the Boundary Waters Canoe Area Wilderness

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398. Whether commercial transactions are treaty-protected is at issue in the current Lacey Act prosecutions of tribal members in the "Squarehook" cases discussed earlier. *See supra* note 27.

399. *Bresette*, 761 F. Supp. at 660.

400. *Id.*

401. *Id.*

402. *Id.* at 661 (citing Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 675–76 (1979)).

403. *Bresette*, 761 F. Supp. at 661 (citing *LCO I*, 700 F.2d 341, 364 (7th Cir. 1983)).

("BWCA") in violation of 36 C.F.R. § 261(a).[404] Defendants were found to be using a motorized canoe and a snowmobile.[405] Both asserted the affirmative defense based on "treaty rights" guaranteed by the 1854 Treaty, which was without the benefit of the *Mille Lacs* treaty-guaranteed usufructuary property analysis announced in 1999.[406] The Eighth Circuit held that treaty-guaranteed usufructuary rights do not prevail over all types of regulation on public lands,[407] particularly when federal wilderness area is at issue.[408] The usufructuary rights remain, but in a form limited by the wilderness usage regulations imposed by the BWCA use regulations.[409]

However, this fact-dependent holding was limited by a lack of evidence that the modern technology, usage, and activity was equivalent to that anticipated under the 1854 Treaty.[410] In interpreting the reach of the usufructuary rights within the 1854-ceded territory, the Eighth Circuit held that the off-reservation use of motorized vehicles by Chippewa Band members was subject to prohibition in the BWCA despite the unchallenged right of the Anishinabe to hunt, fish, and gather in the arrowhead region in Minnesota north of Lake Superior (which was guaranteed by the 1854 Treaty, acknowledged by the State of Minnesota, and recognized by the Boundary Waters Act, itself.)[411] This is because "travel" was not considered part of the usufructuary "package," although the court phrased the question differently in the pre-*Mille Lacs* period.[412] If evidence does exists that the Anishinabe made use of wagons, sailboats, railroads, steamboats, or other

404. United States v. Gotchnik (*Gotchnik II*), 57 F. Supp. 798, 800 (D. Minn. 1999).

405. *Id.*

406. *Id.*

407. *Gotchnik I*, 222 F.3d 506, 511 (8th Cir. 2000).

408. *But see Bresette*, 761 F. Supp. at 662–65 (holding that the usufructuary rights in the 1842 and 1854 Treaties encompassed the taking of migratory birds, including eagles, for their feathers for ceremonial purposes despite the limitations of the federal Migratory Bird Treaty Act, 16 U.S.C.A. §§ 703–711) ("In sum, defendants have a treaty right to sell these bird feathers which has not been abrogated and is not, under the terms of the Migratory Bird Treaty Act, subject to *Puyallup* limitation. Defendants have prevailed on their affirmative defense.").

409. *Gotchnik I*, 222 F.3d at 512.

410. *Id.* at 510.

411. *Id.* The Court resolved the contradiction between section seventeen of the Boundary Waters Act, which provides that nothing in the Act shall affect existing treaties, and section four, which imposes extensive limitations on motorized transport in the BWCA because the Bands "presented no evidence, historical or otherwise, to suggest that the signatories adhered to a different understanding." *Id.*

412. *Id.* at 511.

contemporary 1854 transport in the exercise of their usufructuary rights, a contrary outcome might be required, but balanced against a broader area in which usufructuary rights may be exercised, another outcome may be reached. As noted in both the *LCO* litigation and *Mille Lacs* cases, modern means of transportation to reach areas in which usufructuary rights might be exercised is distinguishable from the use of modern equipment and techniques in the exercise of usufructuary rights to hunt, fish, and gather.[413]

However, the *Gotchnik* opinion does firmly recognize that interpretation of treaty language depends upon effect given to the terms of the treaty as the Indian signatories would have understood them; congressional abrogation of treaty rights requires "clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty."[414] Since the *Gotchnik* opinion was, as the court allowed, was not based on a historical and factual record as to what the Anishinabe understood when signing the Treaty in 1854, and decided without any clear evidence that Congress intended to abrogate Anishinabe Treaty rights in enacting the Boundary Waters Act, the issue will have to be revisited in future negotiations, or litigation, with respect to all of Northern Minnesota and the Boundary Waters.[415]

C. United States v. Smiskin

The district court's analysis in *Smiskin* is informative of Treaty analyses post-*Mille Lacs*.[416] In *Smiskin*, the federal government charged two Yakama tribal members with violating the federal Contraband Cigarette Trafficking Act ("CCTA").[417] The tribe members allegedly transported unstamped cigarettes from

413. *See Mille Lacs*, 526 U.S. 172 (1999); *Mille Lacs II*, 952 F. Supp. 1362 (D. Minn. 1997); *Mille Lacs III*, 861 F. Supp. 784 (D. Minn. 1994); *Mille Lacs IV*, 124 F.3d 904 (8th Cir. 1997); *LCO II*, 760 F.2d 177 (7th Cir. 1985); *LCO I*, 700 F.2d 341 (7th Cir. 1983); *LCO III*, 758 F. Supp. 1262 (W.D. Wis. 1991); *LCO IV*, 740 F. Supp. 1400 (W.D. Wis. 1990); *LCO V*, 707 F. Supp. 1034 (W.D. Wis. 1989); *LCO VI*, 686 F. Supp. 226 (W.D. Wis. 1988); *LCO VII*, 668 F. Supp. 1233 (W.D. Wis. 1987); *LCO VIII*, 653 F. Supp. 1420.

414. *Gotchnik I*, 222 F.3d at 509.

415. *Id.*

416. United States v. Smiskin, 487 F.3d 1260 (9th Cir. 2007).

417. *Id.* at 1262–63.

smoke shops on an Idaho Indian reservation to smoke shops on various Indian reservations in Washington.[418]

The CCTA makes it "unlawful for any person knowingly to ship, transport, receive, possess, sell, distribute, or purchase contraband cigarettes . . . ."[419] The CCTA defines contraband cigarettes as "a quantity in excess of 10,000 cigarettes, which bear no evidence of the payment of applicable State or local cigarette taxes in the State or locality where such cigarettes are found," and in the possession of a person not otherwise authorized by the State to possess such cigarettes.[420] The State of Washington generally requires wholesalers to affix either a "tax paid" or "tax exempt" stamp to cigarette packaging prior to sale.[421] Individuals other than licensed wholesalers must "have given notice to the [Liquor Control] Board in advance of . . . [transporting unstamped cigarettes]."[422] Yakama tribal members are not exempt from this pre-notification requirement.[423]

The tribe members charged did not give notice to the State prior to transporting unstamped cigarettes, thus making their cigarettes unauthorized under state law and contraband under the CCTA.[424] The district court interpreted the Yakama Treaty of 1855 to find no legal basis for the Government's prosecution of the tribe members under the CCTA.[425] The district court also held, and the Ninth Circuit Court of Appeals affirmed, that the state's pre-notification requirement violated the "Right to Travel" provision of the Yakama Treaty of 1855, which "secures to Yakama tribal members the right to travel upon the public highways."[426] In doing so, the court relied extensively on the *Mille Lacs* case and prior precedent in analyzing the interpretation and application of treaty language:

> [T]he Yakama Treaty, and the Right to Travel provision in particular, were of tremendous importance to the Yakama Nation when the Treaty was signed . . . [and], although the United States "negotiated with the Northwest tribes many treaties containing parallel provisions," a "public highways clause" promising a right to travel is found in only one other

418. *Id.* at 1263.
419. 18 U.S.C. § 2342(a) (2013).
420. *Id.* § 2341(2).
421. WASH. REV. CODE § 82.24.030 (2013).
422. *Id.* § 82.24.250(1).
423. *Smiskin*, 487 F.3d at 1263.
424. *Id.*
425. *Id.* at 1262.
426. *Id.*

> treaty.[427]

And:

> The Supreme Court's jurisprudence makes clear, however, that we must interpret a treaty right in light of the particular tribe's understanding of that right at the time the treaty was made . . . .[428] (citing *Mille Lacs*, 526 U.S. at 201–02) (noting that similar language in two treaties may have different meanings because the Court examines 'the historical record and . . . the context of the treaty negotiations to discern what the parties intended by their choice of words').[429]

The court had already held in *Cree II* that the Yakama Treaty Right to Travel guaranteed tribe members the "right to transport goods to market over public highways without payment of fees for that use."[430]

Following the *Mille Lacs* analysis, the *Smiskin* district court held that "the Yakamas understood the Treaty at the time of signing to 'unambiguously reserve to [them] the right to travel the public highways without restriction for purposes of hauling goods to market,'[431] and that both parties to the treaty expressly intended that the Yakamas would retain their right to travel outside reservation boundaries, with no conditions attached."[432] Therefore, the pre-notification requirement is a restriction and condition on the right to travel that violates the Yakama Treaty.[433] Further, in interpreting the treaty rights as the Indians understood them, the court held that usufructuary rights include "the right to sell the fruit of the land" and "commercial activity."[434]

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427. *Id.* at 1265 (citing Yakama Indian Nation v. Flores, 955 F. Supp. 1229, 1238 (E.D. Wash. 2007)) (citations omitted).

428. *Id.* at 1267.

429. *Id.* at n.11.

430. Cree v. Flores, 157 F.3d 762, 769 (9th Cir. 1996).

431. *Smiskin*, 487 F.3d at 1266 (quoting *Flores*, 955 F. Supp. at 1248) (emphasis added).

432. *Id.* at 1266 (quoting *Flores*, 955 F. Supp. at 1251) (emphasis added).

433. *Id.* ("Applying either type of requirement to the Yakamas imposes a condition on travel that violates their treaty right to transport goods to market without restriction. Thus, just as the State cannot issue citations to tribal members for not paying fees before they bring lumber to market, the federal government cannot impose criminal sanctions on tribal members for not providing notice to the State before transporting tobacco for sale or trade.").

434. United States v. Bresette, 761 F. Supp. 658, 662 (D. Minn. 1991).

D. Federal Lacey Act "Sting" Prosecutions of Minnesota Chippewa for On-Reservation Exercise of Treaty-Guaranteed Usufructuary Rights

Recently, federal law enforcement sting operations in Minnesota resulted in federal criminal indictments under the Lacey Act of 1900[435] against several members of the Minnesota Chippewa Tribe for violation of tribal on-reservation fishing regulations.[436] These prosecutions are the first of their kind brought in federal court against tribal band members for violation of tribal wildlife regulations on a reservation. It has long been established that band members are immune from such prosecutions for violations of state regulations.[437]

Whether this is a legitimate exercise of federal jurisdiction, in light of the treaty-guaranteed usufructuary property precedent of *Mille Lacs,* is a test of the scope of property interests conveyed by U.S. treaty negotiators in the language of the Treaties at issue as well as the intention of Congress to abrogate any or all treaty-guaranteed usufructuary property interests in the manner required by *Menominee.*[438] This prosecution occurred despite the Lacey Act specifically stating that "[n]othing in this chapter shall be construed as . . . repealing, superseding, or modifying any right, privilege, or immunity granted, reserved, or established pursuant to treaty, statute, or executive order pertaining to any Indian tribe, band or community . . . ."[439] From the original passage of the Act in 1900 until the 1988 Lacey Act Amendments, there was no evidence that Congress intended for the Lacey Act to affect treaty agreements.[440] In 1988 however, amendments to the Lacey Act

435. Lacey Act of 1900, ch. 553, 31 Stat. 187 (codified as 16 U.S.C. §§ 3371–3378 (2014)).

436. Doug Smith, *Major Fish-Poaching Scheme Busted in Northern Minnesota, Authorities Say*, STAR TRIB., http://www.startribune.com/local/202443861.html (last updated Apr. 15, 2013, 12:51 AM).

437. Leech Lake Band of Chippewa Indians v. Herbst, 334 F. Supp. 1001, 1006 (D. Minn. 1971).

438. Menominee Tribe of Indians v. United States, 391 U.S. 404 (1968).

439. 16 U.S.C. § 3378(c)(2).

440. *See id.* §§ 3371–3378. *See also* Lacey Act Amendments of 1988, Pub. L. No. 97-79, 95 Stat. 1073 (codified as 16 U.S.C. §§ 3371–3378 (1988)). "Nothing in this Act should be construed to prevent the several states or Indian tribes from making or enforcing laws or regulations not inconsistent with the provisions of this Act." Lacey Act Amendments of 1981, Pub. L. No. 97-79, 95 Stat. 1073 (codified as amended at 16 U.S.C. §§ 3371–3378 (1981)). United States v. Brown, 13–68 (JRT/LIB), 13–70 (JRT/LIB) WL 6175202 at *9 (D. Minn. 2013) (citing S. REP. NO. 97–123, 18, 1981 U.S.C.C.A.N. 1748, 1765) ("Nothing in this Act shall be construed as enlarging or diminishing the authority of any state or Indian tribe to regulate the activities of persons within the Indian reservations. The Committee recognizes

established federal criminal jurisdiction for violations of Indian tribal regulations in the same way violations of state wildlife regulations had provided a basis for federal jurisdiction in earlier versions of the Act.[441]

The current language of the Lacey Act, like the Cigarette Tax Contract ("CTC") language in *Smiskin,* relies upon violations of state law as a trigger to federal jurisdiction.[442] The 1988 Amendment adds Indian laws and statutes as precursors, despite the exclusionary original language of the Act.[443] In *United States v. Brown*, Judge John Tunheim held that the Band members were immune, applying the treaty analysis of usufructuary property principles from the *Mille Lacs* opinion.[444] Citing *Gotchnik,* the court found that the defendants "clearly possess the right to hunt and fish in the ceded territory" under the Band's Treaty, and that the right has not been abrogated, as "the Court has found no Supreme Court precedent, and the Government has presented none, endorsing an approach that looks for a treaty to exempt Indians from the application of a federal law rather than for the federal statute to abrogate the treaty rights."[445] A brief history of the Lacey Act demonstrates the recent vintage of the interpretation of the Lacey Act to apply to Indians on reservations when these Indians are charged with exercising treaty-guaranteed usufructuary property rights as described by the Court in the *Mille Lacs* opinion.

i. Passage and Brief History of the Lacey Act 1900–1988

Iowa Congressman John Lacey first introduced the Lacey Act to the House of Representatives in the spring of 1900.[446] He intended the law to "enlarge the powers of the Department of

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that there is a continuing controversy about the extent of state and tribal jurisdiction over resources within Indian reservations and regarding non-Indians on those reservations. Nothing in this Act is intended to preempt whatever jurisdiction individual states may have over resources within Indian Reservations under existing law, nor is it intended to alter or change the existing authority of Indian tribes over resources within their reservations.").

441. Lacey Act Amendments of 1988, Pub. L. No. 97-79, 95 Stat. 1073 (codified as 16 U.S.C. §§ 3371–3378 (1988)).

442. Lacey Act of 1900, ch. 553, 31 Stat. 187 (codified as 16 U.S.C. §§ 3371-3378 (2014)).

443. Lacey Act Amendments of 1988, Pub. L. No. 97-79, 95 Stat. 1073 (codified as 16 U.S.C. §§ 3371-3378 (1988)).

444. United States v. Brown, 13-68 (JRT/LIB), 13-70 (JRT/LIB) WL 6175202 at *10 (D. Minn. 2013).

445. *Id.* at *4–5.

446. The Lacey Act of 1900, ch. 553, 31 Stat. 187 (codified as amended at 16 U.S.C. §§ 3371–3378 (2014)).

Agriculture," with the purpose of: (a) authorizing introduction and preservation of game, song, and wild birds; (b) preventing the "unwise" introduction of foreign birds and animals; and (c) supplementing state laws for the protection of game and birds.[447] The original Lacey Act also addressed game poaching and wildlife "laundering," which had been fostered by limitations on state control over merchandise traveling in interstate commerce.[448]

The inability of state laws to address these scenarios stemmed from the "state ownership" doctrine, in which states were considered to own all the wildlife found within their borders and had exclusive power to restrict the export of such wildlife.[449] The state ownership doctrine was finally overturned in *Hughes v. Oklahoma*.[450] The second doctrine that prevented direct state regulation of imported wildlife prior to the Lacey Act arose from a series of judicial decisions strictly construing the Commerce Clause to preclude state control over virtually any item in interstate commerce.[451]

The Black Bass Act of 1926

The original Lacey Act did not apply to fish.[452] In 1926, the Black Bass Act[453] aimed to augment state laws and expanded the Lacey Act's provisions by prohibiting the transport of fish that had been sold, purchased, or possessed in violation of state or

447. Lacey told his colleagues about the agricultural damage that had accompanied the decline in bird populations. Lacey spoke of having recently discussed some worm-infested apples with a fellow House member. "'Well,' said I, 'my friend, the killing of the birds causes this condition—man kills the birds that killed the insect that laid the egg that hatched the worm that defiled the apple.'... The destruction of the insectivorous birds has resulted in the loss of our fruit." 33 CONG. REC. 4871 (1900) (statement of Rep. Lacey).

448. 33 CONG. REC. 4872 (1900). *See, e.g.*, People v. Buffalo Fish Co., 58 N.E. 34 (N.Y. 1900). It was common at that time for large numbers of game to be killed by poachers (known as market-hunters or "pothunters") in one state, and shipped to another state for sale to the public. A second common problem involved local game killed during a state's closed season and sold under the guise of having been brought into the state from elsewhere.

449. Geer v. Connecticut, 161 U.S. 519 (1896).

450. Hughes v. Oklahoma, 441 U.S. 322 (1979).

451. *See, e.g.*, Leisy v. Hardin, 135 U.S. 100 (1890); Bowman v. Chi. Ry. Co., 125 U.S. 465 (1888). The Supreme Court declared in *Scott v. Donald*, 165 U.S. 58 (1897) that, because liquor was a lawful item of interstate commerce, states could not control its importation or sale within their borders.

452. *See* Lacey Act of 1900, ch. 553, 31 Stat. 187 (codified as amended at 16 U.S.C. §§ 3371–3378 (2014)).

453. Black Bass Act, ch. 346, 44 Stat. 576 (1926), *repealed by* Lacey Act Amendments of 1981, Pub. L. No. 97-79, 95 Stat. 1073 (codified as 16 U.S.C. §§ 3371–3378 (1981)).

territorial law, as well as those killed illegally.[454] In 1930, the Black Bass Act was expanded to: (a) prohibit not only the transportation but also the receipt for transportation of illegal bass; (b) include bass that had been "caught, killed, taken, sold, purchased, possessed, or transported" contrary to state law; (c) require accurate labeling of bass shipments; and (d) make all bass within a state subject to the state's laws.[455]

In 1947, the Black Bass Act was expanded to cover all "game fish," as that term was defined in state laws.[456] The statute was amended to cover game fish taken, transported, purchased, or sold contrary to state or "other applicable law."[457] In 1952, the Black Bass Act was amended again.[458] The Bill had three stated purposes: (1) to develop a list of endangered species and regulate trade in them in order to assist in global species preservation; (2) to strengthen the Lacey Act's provisions to provide more protection for domestically endangered species; and (3) to authorize the purchase of private land for wildlife conservation purposes.[459]

1969 Endangered Species Act and Lacey Act Amendments

In 1969, Congress passed a bill that contained amendments to the Lacey and Black Bass Acts, as well as the nation's second version of the Endangered Species Act.[460] Section 2 of the Black Bass Act read as follows, in relevant part:

> It shall be unlawful for any person—
>
> (1) to deliver or receive for transportation, or . . . for any person knowingly to transport, by any means whatsoever, in interstate or foreign commerce, any black bass or other fish, if such person knows and in the exercise of due care should know that

454. 33 CONG. REC. 4871 (1900) (statement of Rep. Lacey). The term "law" was not defined in the Act, but was held by the Supreme Court in 1957 to include regulations promulgated by the Florida Game Commission, based on explicit rule-making powers granted to the commission and clear congressional intent to include such regulations within the scope of the Black Bass Act. United States v. Howard, 352 U.S. 212, 218–19 (1957).

455. Act of July 2, 1930, ch. 801, §§ 2–4, 46 Stat. 845, 845–46 (1930).

456. Act of July 30, 1947, ch. 348, 61 Stat. 517 (1946). During congressional hearings, an undersecretary of the Department of the Interior suggested that the Act be expanded to cover game fish taken illegally on lands under federal jurisdiction, such as national parks and Indian reservations. But this language relating to treaties was not added to the statute.

457. *Id.*

458. Act of July 16, 1952, ch. 911, 66 Stat. 736 (1952).

459. S. REP. NO. 526, at 1–2 (1969), *reprinted in* 1969 U.S.C.C.A.N. 1413.

460. Endangered Species Act of 1969, Pub. L. No. 91-135, 83 Stat. 275 (1969).

> (A) such delivery or transportation is contrary to the law of the State or any foreign country from which such black bass or other fish is or is found or transported, or is contrary to other applicable law, or
>
> (B) such black bass or other fish has been either caught, killed, taken, sold, purchased, possessed, or transported, at any time, contrary to the law of the State or foreign country in which it was in which it was caught, killed, taken, sold, purchased, or possessed, or from which it was transported or contrary to other applicable law . . . [461]

1981 Combination of the Lacey and Black Bass Acts

In 1981, Congress again addressed the Lacey and Black Bass Acts, prompted by "massive illegal trade in fish and wild life" which was perpetrated by well-organized, large-volume criminal operations, which generated substantial profits and created "grim environmental consequences," according to congressional findings.[462] Noting that the two Acts needed to keep pace with fast-growing global trade in illegal wildlife, the two laws were combined in Title 16 in the Lacey Act Amendments of 1981.[463]

ii. The 1988 Lacey Act Amendments Add Tribal Regulation of Usufructuary Property Rights to Trigger Federal Prosecution on Reservations

This brief history makes plain that the Lacey Act does not embody an unambiguous congressional purpose to abrogate pre-existing treaty-guaranteed usufructuary property rights at the level required to accomplish the task described in *Menominee*.[464] The 1988 amendments provided the first indication of the exception for tribal members exercising their federally guaranteed usufructuary property rights, but not whether this was an intended or unintended byproduct of the amendment.[465] The

461. *Id.* § 9, 83 Stat. at 281–82 (repealed 1981).

462. Lacey Act Amendments of 1981, Pub. L. 97-79, 95 Stat. 1073 (codified as amended at 6 U.S.C. §§ 3371–3378 (1981)). *See also* H.R. REP. NO. 276, at 1, 5 (1981); S. REP. NO. 276, at 1 (1981), *reprinted in* 1981 U.S.C.C.A.N. 1748, 1748.

463. Lacey Act Amendments of 1981, Pub. L. No. 97-79, 95 Stat. 1073 (codified as amended at 16 U.S.C. §§ 3371–3378 (1981)).

464. Menominee Tribe of Indians v. United States, 391 U.S. 404 (1968).

465. "[A]reas traditionally left to tribal self-government, those most often the subject of treaties, have enjoyed an exception from the general rule that congressional enactments, in terms applying to all persons, includes Indians and their property interests." United States v. Brown, 13–68 (JRT/LIB), 13–70 (JRT/LIB), 2013 WL 6175202, at *10 n.6 (D. Minn. Nov. 25, 2013) (citing United States v. White, 508 F.2d 453, 455 (8th Cir. 1974)).

language of subsection 3372(a)(1), which referred to the taking or possession of wildlife in violation of federal or tribal law, was in contradiction with subsections 3372(a)(2) and (a)(3), which had applied to wildlife "taken, possessed, transported or sold" in violation of state or foreign law.[466] Congress amended subsection 3372(a)(1) so that the language pertaining to the types of sufficient underlying violations mirrored that of the companion sections.[467]

However, in light of existing Supreme Court precedent cited in *Mille Lacs* such as the *Menominee* and *Dion* opinions,[468] and the prefatory language of the Lacey Act itself,[469] abrogation by criminalization of Treaty-guaranteed usufructuary property rights cannot be so casually imposed upon those whose right to a modest living is recognized by a unanimous Supreme Court.[470] Like the *Smiskin* federal prosecution, violation of local or tribal regulation is a necessary precursor to the invocation of federal jurisdiction under the CTC[471] and the Lacey Act, but the language on the face of the original Lacey Act is particularly solicitous of pre-existing rights, privileges, and immunities, pertaining to any Indian tribe, specifically stating that "[n]othing in this chapter shall be construed as . . . repealing, superseding, or modifying any right, privilege, or immunity granted, reserved, or established pursuant to treaty, statute, or executive order pertaining to any Indian tribe, band or community . . . ."[472] In the Justice Department's Eighth Circuit Brief, the United States argued that amendments from 1988 in which Congress authorized federal prosecution of band members for violation of "tribal laws" is sufficient congressional authorization to abrogate both the prefatory language of the Lacey Act and the multiple treaty-guaranteed usufructuary property rights that ran with the land, at least in the manner recognized in *Menominee* some fifty years ago.[473]

The Government's analysis of the Judge Tunheim decision demonstrates that the court applied the *Mille Lacs* treaty-

466. *See, e.g.*, Lacey Act Amendments of 1981 § 3, Pub. L. No. 97-79, 95 Stat. 1073 (codified as amended at 16 U.S.C. §§ 3371–3378 (1981)).

467. 16 U.S.C. § 3372(a)(1).

468. United States v. Dion, 476 U.S. 734 (1986); *Menominee*, 391 U.S. at 404.

469. 16 U.S.C. § 3371–3378.

470. *See generally* Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999); United States v. Dion, 476 U.S. 734 (1986); *Menominee*, 391 U.S. at 404.

471. United States v. Smiskin, 487 F.3d 1260 (9th Cir. 2007).

472. 16 U.S.C. § 3378(c)(2).

473. *See* Opening Brief for the United States of America, United States v. Brown (No. 13-3800), 2014 WL 6175202, (8th Cir. Mar. 6, 2014).

guaranteed usufructuary property analysis by relying on the specific treaties and the specific historical context in which the 1837 Treaty was drafted by U.S. treaty negotiators:

> [T]he district court first concluded that the 1837 Treaty granted an "exclusive" right to hunt and fish . . . *that this right is held by and can be asserted by, individual tribal members* . . . . [H]e found "no indication in the text of the Lacey Act that Congress intended to abrogate individual Chippewa members' fishing rights . . . *the district court concluded the 1837 Treaty provides individual tribal members immunity from federal prosecution* . . . .[474]

The application of the relevant Treaty and federal statute is completely consistent with the unanimous Court's methodology in *Mille Lacs* and its long-established precedential companion *Menominee*. The decision of the Eighth Circuit on the question of a Chippewa Band member's immunity from federal prosecution for violation of tribal game regulations under the principles upheld unanimously by the Court in *Mille Lacs* will mark another step in the development of treaty-guaranteed usufructuary property interests in the 21st Century.

CONCLUSION

The unanimity of the Supreme Court in *Mille Lacs* regarding the method for determining the existence of treaty-guaranteed usufructuary property rights in the language used by U.S. treaty negotiators, within the closely divided 5-4 opinion on the merits, requires a re-examination of a previously well-settled precedent and previously unexamined treaty-guaranteed usufructuary property interests in light of the *Mille Lacs* opinion.[475] The *Mille Lacs* majority points to the language in two contemporaneous treaties with the Chippewa to demonstrate that professional negotiators drafted treaties that did not, retain usufructuary property rights on territory ceded to the United States by the Chippewa.[476]

Only by examining each treaty applicable to the territory in question, in light of the *Mille Lacs* methodology, is it possible to determine whether usufructuary property rights were retained from the fee simple bundle of property interests for which the treaty negotiators bargained, in relation to the territory in question. Then, tracing those bargained-for ususfructuary

474. *Id.* at 11 (United States v. Dion, 476 U.S. 734, 738 (1986)) (emphasis added).

475. 526 U.S. 172 (1999).

476. *Id.* at 196.

property interests to the present to determine whether Congress acted to abrogate the treaty-guaranteed property interest in language intended for that purpose, understood as such by the native signatories to the treaties.

Since this usufructuary property-oriented analysis of treaty rights emerged in the *Voigt* litigation in the Seventh Circuit and was adopted unanimously by the Supreme Court in the *Mille Lacs* opinion in 1999, this analysis has been reflected in a wide range of wildlife and environmental regulations and as a defense to state and federal criminal prosecution of Native Americans. Moreover, the joint resource management model, in place in Wisconsin for more than twenty years, or the state lease model that Minnesota has adopted,[477] both demonstrate these are currently-existing property rights that are likely to be expanded to all of Northern Minnesota in the near future. But perhaps more importantly, as the Wisconsin post-*LCO* Environmental Impact Statements from the Crandon Mine siting dispute demonstrate, U.S. treaty-guaranteed Anishinabe usufructuary property rights have to be part of the equation when both on- and off-reservation natural resources in Northern Minnesota are developed or regulated.

This method of usufructuary property rights analysis set forth by the Supreme Court in the *Mille Lacs* opinion is not limited to the Anishinabe Treaties in Minnesota, although the Chippewa Treaties are convenient examples of the larger historical reality in which the *Mille Lacs* Supreme Court opinion can be situated. Other treaties with other tribes will have different language, histories, and characteristics that come down to the present and must be analyzed to determine whether treaty-guaranteed usufructuary property interests, or other protectable interests, remain viable in the present. Meticulous historical and contextual research, as well as factual development to support the scope of usufructuary property interests at the time the treaty is signed is necessary for each treaty in question.

But, conceptualizing treaties as property-creating instruments, well-rooted in Roman and Common Law property principles subject to constitutional protections, can be a starting place for a treaty jurisprudence that makes use of property-based legal concepts to empower those without power in the way that *Goldberg v. Kelly*[478] property-based jurisprudence brought power to

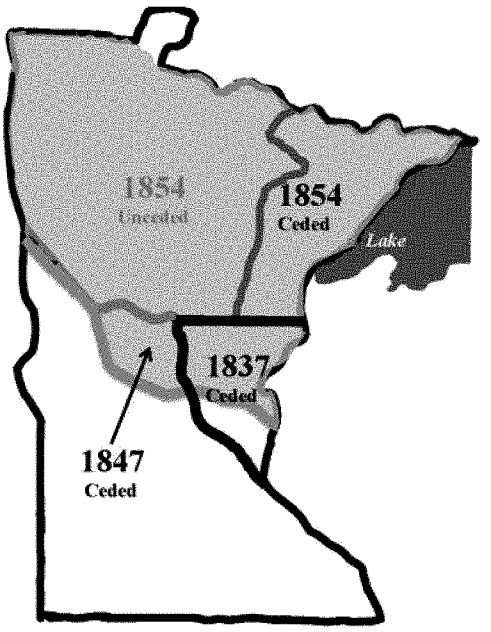
477. *Id.*

478. 397 U.S. 254 (1970). In *Goldberg v. Kelly*, the Supreme Court ruled that the Due Process Clause of the Fourteenth Amendment requires an evidentiary hearing before a recipient of government benefits can be deprived of those benefits.

those who had only an "expectation interest" in continuing to receive government benefits, at another time in history. Usufructuary property interests, created by treaty guarantees made by United States treaty negotiators and not abrogated by Congress,[479] are property worthy of constitutional protection no less than any other.

479. *See* Menominee Tribe v. United States, 391 U.S. 404 (1968).

APPENDIX I



January 1, 1855

1825 → **1837/1854** → **1847** → **1854**

Territory Unceded

Treaty-guarantee: *usufructuary* rights/ sovereignty north of Dakota territory.

Territory Ceded

Treaty-guarantee: *usufructuary* rights retained to present.

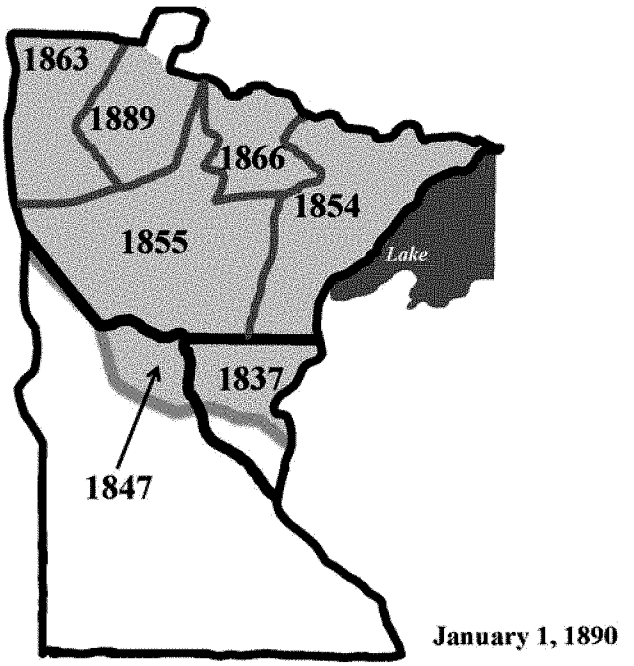
Territory Ceded

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

Territory Unceded

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

APPENDIX II



1855 → **1858** → **1863** → **1866** → **1889**

1855	1858	1863	1866	1889
Territory Ceded Treaty-guarantee: *usufructuary* rts not abrogated	*Minnesota Statehood:* Treaties not abrogated	*Territory Ceded* Treaty-guarantee: *usufructuary* rts not abrogated/ promised verbally	*Territory Ceded* Treaty-guarantee: *usufructuary* rts. not abrogated	Nelson Act. *Territory Ceded* Congress-guarantee: *usufructuary* rts not abrogated