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ABSTRACT

In *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999), the Supreme Court unanimously held that, by guaranteeing Anishinabe (Chippewa/Ojibwe) rights to hunt, fish and gather in the 1837 Treaty in which the Chipewa ceded formal title to a small portion of Minnesota, and a larger area of Wisconsin, U.S. treaty negotiators severed the right to use the land for subsistence, usufructuary property rights, from formal title to the land in the same way a utilities easement, or mineral rights, might be severed from fee simple title. This was the choice of the United States government, which negotiated other treaties with other native peoples, before and after 1837, without usufructuary property clauses.

The *Mille Lacs* majority and dissent differed only as to whether these Treaty-guaranteed usufructuary property rights had been abrogated by certain subsequent events. The opinion was unanimous in the Court’s analysis of treaty-acknowledged and guaranteed usufructuary property rights that are not extinguished by transfer of mere title to the United States, since “title” was a meaningless concept to the Chipewa and “use for subsistence” was understood as continuing without interruption.

**Anishinabe Usufructuary Property Rights in Northern Minnesota**

With respect to Minnesota Territory, none of which was ceded by the Anishinabe until the small portion mentioned in the 1837 Treaty, two major questions remain after the *Mille Lacs* decision: (a) did the Anishinabe have treaty-guaranteed usufructuary rights outside the 1837 ceded territory, or merely “aboriginal title” upon which to base later claims; and (b) if so, are those usufructuary rights in the rest of Minnesota outside the 1837 ceded territory, also valid today? This article answers these questions by elaborating Minnesota treaty history to apply usufructuary property rights analysis from the Milles Lacs opinion to Treaties of 1795, 1825, 1826 which in which U.S. treaty negotiators recognized usufructuary property rights in the Anishinabe/Ojibwe long before 1837 in unceded Minnesota territory, as well as, a relatively unrecognized clause of the 1854 Treaty, all of which guarantee usufructuary property rights outside the 1837 ceded territory, too. The article concludes that these treaties, largely ignored by the courts until now because they did not cede territory but did recognize Chipewa sovereignty over all of northern Minnesota that had not been ceded and, thus, created treaty-recognized usufructuary rights in all of Minnesota before, and after, 1837. These previously unrecognized sources of unrecognized Anishinabe usufructuary property interests provide a foundation for a new level of property-rights based sovereignty, protected by the due process clause of the United States Constitution in the 21st Century.

**Modern Usufructuary Rights, Sovereignty, and Natural Resource Co-Management**

Further, because usufructuary property rights include “the right to modest living,” environmental protection to maintain the long-term value of these property rights will have significant long term off-reservation land-use and wildlife management implications for tribal governments and tribal members.2 Similarly, recent federal prosecutions of tribal members for violations of the federal Lacey Act for wildlife violations, predicated on tribal members violation of tribal game regulations are direct violations of the sovereignty explicitly guaranteed in the exercise usufructuary property rights in the heart of “Indian Country.”3 Some of these prosecutions have been dismissed by federal district court judges who recognized the 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, but cannot be set aside as merely incident to a federal statute.4

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

**Minnesota v. the Mille Lacs Band of Chippewa:**

19th Century Treaty-Created Usufructuary Property Interests,

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the Foundation for 21st Century Indigenous Sovereignty.

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**INTRODUCTION**

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

– Justice Sandra Day O’Connor

In *Minnesota v. Mille Lacs Band of Chippewa Indians*, the Supreme Court unanimously held that, by guaranteeing the Anishinabe rights to hunt, fish and gather in the first Minnesota territory ceded to the United States in 1837, U.S. treaty negotiators severed the right to use the land, denominated “usufructuary property rights” since Roman times, which is part of the bundle of rights making up the concept of “fee simple,” as differentiated from mere “title” to real property. By doing so, U.S. treaty negotiators created treaty-guaranteed property interests which, like subsurface mineral rights or utility easements, could not be lawfully taken from the Indigenous nations with whom they negotiated as equals, without specific Congressional authorization to abrogate that treaty between sovereigns, as with other treaties between nations. Moreover, the abrogation of the treaties with native people must be expressed in language that clearly reflected the intention of Congress to do so, and is clearly understood as such by the Anishinabe.

The *Mille Lacs* majority and dissenting opinions agreed with this principle, and differed *only* as to

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7 *Mille Lacs*, 526 U.S. 172.
8 “Anishinabe,” which means “original man” or “people” in English, were referred to by others as “o-jib-weg,” (those who make pictographs), which was corrupted into “Ojibwa,” which was then anglicized as “Chippewa.” Part of the larger Algonquin language group that inhabited woodlands in much of the northeastern United States and southeastern Canada. See Edmund Jefferson Danziger, Jr., *The Chipewas of Lake Superior* (University of Oklahoma Press, 1985). “Anishinabe” is used throughout the article in recognition of Anishinabe self-identity, and to emphasize that the legal issues discussed herein originate from the survival practices of an indigenous culture that pre-existed European incursions into the Great Lakes Region. See Jeffrey Robert Connelly, *Northern Wisconsin Reacts to Court Interpretations of Indian Treaty Rights to Natural Resources*, 11 GREAT PLAINS NAT. RESOURCES J. 116 (2007).
9 Usufruct *n.* [fr. Latin *usufractus*] Roman & civil law. A right to use and enjoy the fruits of another's property for a period without damaging or diminishing it, although the property might naturally deteriorate over time . . . . La. Civ. Code art. 535 (1976). Usufructuary, *n.* Roman & civil law. One having the right to a usufruct; specif. a person who has the right to the benefits of another's property. 1. C.J.S. *Estates* §§ 2–5, 8, 15–21, 116–128, 137, 243.
12 *Dion*, 476 U.S. at 738.
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 send the Ojibwe to territory in Minnesota outside of the 1837 Treaty ceded territory that had been recognized as sovereign in an 1825 Treaty, which was the remainder of Minnesota at that time;\(^\text{13}\) (b) an 1855 Treaty also ceded territory but did not mention the abrogation of any usufructuary rights guaranteed in all of Minnesota in an 1854 Treaty and all prior treaties;\(^\text{14}\) or, (c) Minnesota’s 1858 Statehood Act, which the Supreme Court had examined before, but never found to have any bearing on pre-existing U.S. treaties.\(^\text{15}\)

The dissent did not question that usufructuary property rights, guaranteed in an 1854 Treaty referenced by the majority\(^\text{16}\) had been upheld by the Seventh Circuit and had been recognized by Minnesota DNR in practice a decade earlier in the 1854 ceded territory in the eastern part of Minnesota north of Lake Superior, but that the same 1854 Treaty specifically referred to the rest of Minnesota (then covered only by the 1825/26 “sovereignty Treaties”) as being unchanged by the 1854 Treaty. Both majority and dissent agreed with the well-established principle that Congressional abrogation of treaty-guaranteed property rights was not to be lightly inferred.\(^\text{17}\) Further, the majority and dissent both acknowledged that treaties and congressional enactments must be liberally interpreted, as understood by the Indians.\(^\text{18}\)

**Off-Reservation Anishinabe Usufructuary Property Rights In All of Northern Minnesota**

With respect to the section of Minnesota that was not ceded in the 1837 Treaty, two major

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\(^{13}\) Minnesota v. Mille Lacs Band of Chippewa Indians (*Mille Lacs*), 526 U.S. 172, 188 (1999).

\(^{14}\) *Mille Lacs*, 526 U.S. at 195.

\(^{15}\) *Mille Lacs*, 526 U.S. at 202.

\(^{16}\) See *Mille Lacs*, 526 U.S. at 208–26.

\(^{17}\) *Mille Lacs*, 526 U.S. at 202 (citing United States v. Dion, 476 U.S. 734, 738–740 (1986); Menominee Tribe v. United States, 391 U.S. 404, 413 (1968)).

questions remain: (a) what was the nature of hunting, fishing and gathering rights exercised by the Anishinabe in the larger part of northern Minnesota territory, outside the 1837 Treaty-ceded territory,\(^{19}\) and, (b) since usufructuary rights in the 1837 Treaty-ceded territory were not abrogated in the 1854 or the 1855 Treaty and after,\(^{20}\) according to the Supreme Court majority in *Milles Lacs*, whether treaty-guaranteed usufructuary rights outside the 1837 ceded territory, which had not been ceded, are also valid today?

This article answers these questions by elaborating Minnesota treaty history to include the hunting, fishing and gathering rights guaranteed by the United States government in Minnesota territory before 1837, which include: (a) the 1795 Treaty of Greenville, (b) the 1825 Treaty of *Prairie du Chien*, and (c) the 1826 Treaty of *Fond du Lac* of Lake Superior, as well as (d) a relatively unrecognized clause of the 1854 Treaty that explicitly guarantees usufructuary property rights in unceded territory west of the 1854 Treaty boundary to “the Mississippi Band of Anishinabe.”\(^{21}\) In light of the usufructuary property rights analysis unanimously adopted by Supreme Court in *Minnesota v. Mille Lacs Band of Chippewa Indians*, which builds upon the analysis in the earlier *Lac Courte Oreilles* cases in the Seventh Circuit,\(^{22}\) the article concludes that these treaties, which remain largely unexamined in legal literature and case law,\(^{23}\) for the simple reason that they did not cede territory to the U.S. and have been of little interest to those researching landcession issues, are an unrecognized source of Treaty-guaranteed usufructuary property rights across all of northern Minnesota, both on and off reservations.\(^{24}\)

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\(^{19}\) See *infra* Appendix I for a map of these territories.

\(^{20}\) See *infra* Appendix II for a map of these territories.

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

\(^{22}\) See *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, 700 F.2d 341 (7th Cir. 1983).

\(^{23}\) *Mole Lake Band v. United States*, 126 Ct. Cl. 596 (1953); *State v. Keezer*, 292 N.W. 2d 714 (Minn. 1980).

\(^{24}\) 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
These Treaties only recognized the sovereignty of the Lakota and Chippewa nations. However, the Treaties change the nature of the rights that can be asserted by both the Ashininabe and the Lakota from inchoate “aboriginal rights” as has been assumed by most Minnesota jurists, into “Treaty-guaranteed” usufructuary property rights which the Milles Lacs opinion teaches are the source of a deeper understanding of a developing usufructuary property rights in the 21st Century. Once understood as a form of property, constitutional due process protections advanced by the “property-rights movement” must protect “treaty rights” as any other intangible property interest (such as an easement or a sub-surface mineral right).

**Modern Usufructuary Rights and Natural Resource Co-Management**

Further, because usufructuary property rights include “the right to a modest living,” either through joint state/native management or state leasing of U.S. 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.25 This, in turn, will have land-use management implications far beyond wildlife harvest, and promises a broadened role for tribal governments in land use decisions that might impact the harvest of wild game, fishing or gathering26 and a potential source of income for some of northern Minnesota’s most impoverished citizens.27

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26 See Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt, 700 F.2d 341 (7th Cir. 1983), amended on denial of rehearing and rehearing en banc March 8, 1983.

27 See Jeffrey Robert Connolly, *Northern Wisconsin Reacts to Court Interpretations of Indian Treaty Rights to Natural Resources*, 11 GREAT PLAINS NAT. RESOURCES J. 116 (2007). The issues in this article are limited to an examination of Anishinabe treaties with the United States, although a similar analytical approach would apply to Dakota/Lakota treaties, or those with other Indian nations. See generally, Michael R. Newhouse, Note, *Recognizing and Protecting Native American Treaty Usufructs in the Supreme Court: the Mille Lacs Case*, 21 PUB. LAND & RESOURCES LAW REVIEW 169 (2000).
I. BACKGROUND TO THE RESTORATION OF TREATY-GUARANTEED ANISHINABE USUFRUCTUARY PROPERTY RIGHTS IN MINNESOTA

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

-Northwest Ordinance 1787

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

Through a series of cases brought in federal courts to enforce and define the treaty-rights guaranteed tribes and tribal members, a body of federal case law has developed that firmly establishes the concept of tribal sovereignty on the order of that enjoyed by the separate states within the federal union. In addition, Congressional passage of Public Law 280 established tribal authority over a wide

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


range of administrative and civil regulatory matters\textsuperscript{32} which served to reinforce the tribal regulatory power on one hand, but limited sovereignty over criminal matters on reservations\textsuperscript{33} in the six states in which Public Law 280 applies.\textsuperscript{34}

In Minnesota, on-reservation tribal sovereignty has been recognized with respect to functions similar to state government civil functions,\textsuperscript{35} such as the regulation of gaming,\textsuperscript{36} auto registration,\textsuperscript{37} traffic regulations,\textsuperscript{38} sale of tobacco and other state-regulated commodities,\textsuperscript{39} on-reservation enforcement of tribal conservation regulations,\textsuperscript{40} and state court enforcement of tribal court civil judgments.\textsuperscript{41} However, the recognition of off-reservation hunting, fishing and gathering usufructuary rights have not kept pace with the development of on-reservation tribal civil regulatory sovereignty.

More than a decade before \textit{Minnesota v. Mille Lacs Band of Chippewa Indians} reached the Supreme Court, members of Anishinabe Bands in Wisconsin began a series of organized attempts to

\begin{itemize}
\item \textsuperscript{32} \textit{See} California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987) (Public Law 280 authorized on-reservation state criminal jurisdiction, but limited state jurisdiction over civil/regulatory matters).
\item \textsuperscript{33} \textit{See} Duro v. Reina, 495 U.S. 676, 688 (1990). \textit{But see} United States v. Lara, 541 U.S. 193 (2004) (recognizing the inherent power of Indian tribes . . . to exercise criminal jurisdiction over all Indians, codified by Congress in 25 U.S.C. sec. 1301 by Congress, but only when tribal institutions are sufficient and the alleged violator is a member of the band or tribe in question); State v. Davis, 773 N.W.2d 66 (Minn. 2009) (based on the conclusion that the various Anishinabe Bands are separable entities).
\item \textsuperscript{34} \textit{See} 18 U.S.C. § 1162 (2006):
\begin{itemize}
\item (a) Each of the States or Territories listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory: \textit{[i.e.} Alaska, California, Minnesota, Nebraska, Oregon, Wisconsin].
\end{itemize}
\item \textsuperscript{35} \textit{See}, e.g., Bryan v. Itasca County, 426 U.S. 373 (1976).
\item \textsuperscript{37} \textit{See}, e.g., Leech Lake Band of Ojibwe Traffic Code, § 213.
\item \textsuperscript{38} \textit{See}, e.g., State v. Stone, 572 N.W.2d 725, 731 (Minn. 1997); Leech Lake Band of Ojibwe Traffic Code, §§ 201–18.
\item \textsuperscript{39} \textit{See}, e.g., Leech Lake Band of Ojibwe Taxation Code, tit. 5, chpt. 2, Tobacco Tax, §§ 5.201–5.209.
\item \textsuperscript{40} \textit{See}, e.g., Grand Traverse Band of Ottawa & Chippewa Indians v. Dir., Mich. Dep't of Natural Resources, 141 F.3d 635 (6th Cir. 1998), Leech Lake Band of Ojibwe Conservation Code.
\item \textsuperscript{41} \textit{See}, e.g., Shakopee Mdewakanton Sioux (Dakota) Gaming Enterprise v. Prescott, 799 N.W.2d 320 (Minn. Ct. App. 2010); \textit{see also} Leech Lake Band of Ojibwe Judicial Code, tit. 2, Rules of Procedure (L.L.R.P.), adopted November 21, 2000; L.L.R.P. Rule 60 (Full Faith and Credit and Comity); and Minnesota General Rules of Practice, District Courts, Rule 10.01.
\end{itemize}
exercise rights to hunt, fish, and gather in areas of Wisconsin ceded to the United States by an 1854 Treaty,\textsuperscript{42} which specifically stated that, like the 1837 Treaty, the Anishinabe retained the use of the land for hunting, fishing, and gathering. News accounts of the period report heated debates and threats of physical violence by non-natives who did not understand the meaning of federal treaties, and tribal members who were engaging in traditional practices that the Wisconsin Department of Natural Resources (DNR) had outlawed.\textsuperscript{43} The result of nearly a decade of activism and litigation was Seventh Circuit decision upholding Anishinabe usufructuary property rights in the 1854 ceded territory in \textit{Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt}\textsuperscript{44} and related cases\textsuperscript{45} (LCO litigation) that preceded the \textit{Mille Lacs} litigation by more than a decade, and were cited by the district court,\textsuperscript{46} the Eighth Circuit\textsuperscript{47} and the Supreme Court.\textsuperscript{48}

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

\textsuperscript{42} 1854 Treaty, 10 Stat. 1109 (1854).

\textsuperscript{43} See, Larry Nesper, \textit{The Walleye War: The Struggle for Ojibwe Spearfishing and Treaty Rights} (University of Nebraska Press, 2002).

\textsuperscript{44} Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt, 700 F.2d 341 (7th Cir. 1983) (hereinafter LCO I).


\textsuperscript{47} Mille Lacs Band of Chippewa Indians v. Minnesota, 124 F.3d 904 (8th Cir. 1997).

\textsuperscript{48} Minnesota v. Milles Lacs Band of Chippewa Indians (\textit{Mille Lacs}), 526 U.S. 172 (1999).
arrests were made.  

Segments of the non-Indian public and media applauded the Minnesota DNR’s assertion of sole authority over Anishinabe off-reservation hunting, fishing, and gathering, calling for “equal rights for non-Indians.” Recent “grass-roots” activism by organized tribal members asserting treaty rights, similar to the organized activism of Wisconsin tribal members that brought about recognition of treaty rights in Wisconsin in the 1980s, 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 very much longer.

**Treaty-Guaranteed Native American Property Rights in the Northwest Territory**

Britain ceded the Northwest Territory in the 1783 Treaty, which formally ended the American Colonies’ war for political independence. Four years later, the Continental Congress declared “good faith . . . toward the Indians; their . . . property shall never be taken from them without their consent; and in their property, rights and liberty they shall never be invaded or disturbed . . . .” to be national policy toward the Indians in all of the Northwest Territory. Before the Constitution was ratified; a federal executive or judiciary had been established; and, perhaps most significantly, a standing army capable of occupying or defending the huge new Northwest Territory, could be mustered by a centralized


50 See Minnesota v. Fellegy, No. A11-1097 (Minn. Ct. App. July 11, 2012). Stephen Fellegy caught a walleye out of season protesting what he views to be the state's unjust, favorable treatment of Ojibwe, the Native Americans whose treaty rights exempt them from prosecution for violating the state's fishing restrictions on Lake Mille Lacs.


54 The Northwest Ordinance, Art. III, 1 Stat. 50, 52 (1787).
government. The nation policy of respect for Indian property rights was established by the United States more than seventy-five years before the State of Minnesota, itself, was carved out of the Northwest Territory, and was reflected in the Treaty of Greenville of 1795, negotiated with the tribes in the Northwest Territory, only a few years after the Constitution and Bill of Rights had been ratified.

Forgotten Usufructuary Property Rights In Un-ceded Territory: The Treaties of 1795, 1825, 1826, and 1854

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

As late as 1863, U.S treaty negotiators, in the person of early Minnesota Governor Alexander

55 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 (7 Stat. 131) declares:

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


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


Ramsey, were still verbally promising that the Anishinabe would retain the hunting, fishing and gathering rights on 10-million acres of newly ceded territory for an indefinite period, although they had stopped putting it in writing in the 1854 Treaty. But, if post-1837 treaties are to be interpreted as understood by the Indians, whose oral tradition would be more effective in passing inter-generational memory of past treaty negotiations, these treaties should take on new significance in interpreting the silence of all later treaties on the question of usufructuary rights.

**The 1795 Treaty of Greenville**

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

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

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

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60 Treaty with the Wyandotte, 7 Stat. 49 (August 9, 1795) [hereinafter Treaty of Greenville].
61 See State v. Keezer, 292 N.W.2d 718 (Minn. 1980).
Article VI of the Treaty agreed that both the United States and the Indian tribes had the right to drive off any citizen of the United States, or any other white person who settled in the Treaty territory and established a western boundary between land claimed by the United States and Indian territory.63

**The 1825 Treaty of Prairie du Chien**64

Like the 1795 Treaty, the 1825 Treaty of *Prairie du Chien* did not cede territory to the United States, but treaty negotiators did prevail upon Chippewa (Anishinabe) and Sioux (Dakota)65 to separate their overlapping 1795 Treaty-guaranteed rights to hunt, fish, and gather where they pleased in the Northwest Territory, subject to their own methods of Inter-Tribal regulation, into sovereign treaty-guaranteed domains -- the Anishinabe in northern Minnesota and the Dakota to the south66 -- with disputes to be resolved with the assistance of the United States, a signatory to the Treaty:

Preamble:

[The] United States of America . . . to promote peace among these tribes, and to establish boundaries among them . . . have invited the Chippewa . . . Sioux . . . to assemble together . . . to accomplish these objects; and to aid therein . . . and after full deliberation, the said tribes . . . have agreed with the United States, and with one another, upon the following articles . . . .67

There can be no serious dispute that the United States initiated the 1825 Treaty negotiations,68 acted as

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63 Art. VI, Treaty of Greenville, 7 Stat. 49 (August 9, 1795).
64 Treaty of *Prairie du Chien*, 7 Stat. 272 (August 19, 1825) [hereinafter 1825 Treaty]. The 1825 Treaty includes treaties with the Sioux and Chippewa, Sacs and Fox, Menominie, Ioway, Sioux, Winnebago, and a portion of the Ottawa, Chippewa, and Potawatome tribes.
65 The “Dakota,” a Great Plains culture, inhabited the eastern range of the Lakota language group, which also included the Nakota languages. Anishinabe called them Nadowessioux (little-snakes, or little-enemies). The French shortened the name given them by their enemies to “Sioux.” This article will refer to the Lakota groups inhabiting Minnesota as the Dakota.
facilitator,69 committed the treaty terms to writing,70 and signed the Treaty as a party.71 And, although the United States did not seek land-cessions for itself from the Anishinabe, the Treaty did serve the interests of the United States, on a frontier that, only a decade after the War of 1812, was difficult to defend:

**Article 10.**
All the tribes aforesaid acknowledge the general controlling power of the United States, and disclaim all dependence upon, and connection with, any other power. And the United States agree to, and recognize, the preceding boundaries, subject to the limitations and restrictions before provided . . .72

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

**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 . . . .73

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

**Article 15.**
This treaty shall be obligatory on the tribes, parties hereto, from and after the date hereof,

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70 1825 Treaty, 7 Stat. 272. There no record of the 1825 Treaty terms reserving usufructuary rights having been abrogated by treaty or statute with respect to the Anishinabe, although this is not the case with respect to the Dakota following the 1862 conflict, following which Dakota (Sioux) treaties were abrogated by Congress.
72 *Id.* at 274–75.
73 *Id.* at 275.
and on the United States, from and after its ratification by the government thereof . . . .\textsuperscript{74}

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

**The 1826 Treaty of \textit{Fond du Lac of Lake Superior}\textsuperscript{75}**

By its own terms the 1825 Treaty provided that a second Treaty council with the Anishinabe on Lake Superior be organized by the United States the following year, to explain the terms of the 1825 Treaty to the widely scattered Anishinabe who could not be present at the 1825 Treaty negotiations in \textit{Prairie du Chien} on the Mississippi.\textsuperscript{76} As promised, a secondary treaty was entered into on August 5, 1826\textsuperscript{77} that refers to the 1825 Treaty in its opening clause:

\begin{quote}
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...\textsuperscript{78}
\end{quote}

The 1826 treaty provides ample evidence why the United States treaty negotiators, as well as the

\textsuperscript{74} \textit{Id.} at 275.

\textsuperscript{75} Treaty of \textit{Fond du Lac}, 7 Stat. 290 (August 5, 1826).

\textsuperscript{76} 1825 Treaty, 7 Stat. 272, 275 (1825).

\textsuperscript{77} Treaty of \textit{Fond du Lac}, 7 Stat. 290 (1826).

\textsuperscript{78} Treaty of \textit{Fond du Lac}, 7 Stat. at 290.
Anishinabe, understood that their continuing ability to live off the land was essential to their survival.

Article 3 acknowledges Anishinabe title in the land, and jurisdiction over its use:

The Chippewa tribe grant to the government of the United States the right to search for, and carry away, any metals or minerals from any part of their country. But this grant is not to affect the title of the land, nor the existing jurisdiction over it.\(^79\)

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

In consideration of the poverty of the Chippewas, and of the sterile nature of the country they inhabit, unfit for cultivation, and almost destitute of game, and as a proof of regard on the part of the United States, it is agreed that an annuity of two thousand dollars, in money or goods, as the President may direct, shall be paid to the tribe . . . during the pleasure of the Congress of the United States.\(^80\)

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

The necessity for the stipulations in the fourth, fifth and sixth articles of this treaty could be fully apparent, only from personal observation of the condition, prospects, and wishes of the Chippewas, and the Commissioners were therefore not specifically instructed upon the subjects therein referred to; but seeing the extreme poverty of these wretched people, finding them almost naked and starving, and ascertaining that many perished during the last winter, from hunger and cold, they were induced to insert these articles. But it is expressly understood and agreed, that the fourth, fifth and sixth articles, or either of them, may be rejected by the President and Senate, without affecting the validity of the other articles of the treaty.\(^81\)

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.\(^82\) Another relatively contemporary indication of the importance with which Congress treated treaty rights to wild game, such as those guaranteed in the 1825 Treaty can be seen in an 1834 statute in which Congress imposed a $500

\(^{79}\) Treaty of Fond du Lac, 7 Stat. at 291. 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.

\(^{80}\) Treaty of Fond du Lac, 7 Stat. at 291.

\(^{81}\) Treaty of Fond du Lac, 7 Stat. at 292.

\(^{82}\) Treaty of Fond du Lac, 7 Stat. at 292.
fine for nonnative hunting and fishing within the limits of any tribe with whom the United States has existing treaties, an enormous sum for the time. Thus, as of 1837, the Anishinabe had treaty-guaranteed rights to control hunting, fishing and gathering in all of northern Minnesota, whether by members of other Indian Tribes, or by non-Indians.

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

During the 1830s, United States relationships with Indian nations were contradictory as reflected in Supreme Court decisions and shifting national policies. Even though the Supreme Court held that U.S. treaties with Indian tribes did not give them the status of an “independent nation” for purposes of original Supreme Court jurisdiction in *Cherokee Nation v. Georgia*, the Court did confirm that the federal courts were open to Indian treaty claims against states. The Court also 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," thus establishing that only the United States government, and not individual states, had authority in Indian affairs, an important concept in the *Mille Lacs* case, and in the exercise of usufructuary property rights more generally.

Thus, explicit Congressional direction that Indian removal be “voluntary” in the Indian Removal Act of 1830, required President Andrew Jackson, and his successor Martin Van Buren, to justify the use of military force to clear the Choctaw and Cherokee nations from prime southern plantation land in a decade-long “Trail of Tears” to Oklahoma by claiming authority under dubious, if not fraudulent, post-1830 “removal” treaties. The Indian Removal Act would prove important in the majority opinion in

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86 *Worcester*, 31 U.S. at 520.
87 *Worcester*, 31 U.S. at 520.
88 See Treaty of Dancing Rabbit Creek (Sept. 27, 1830); Treaty of Cusseta, 7 Stat. 366 (March 24, 1832); Treaty of Pontotoc Creek (1832); Treaty of New Echota, 7 Stat. 488 (Dec. 29, 1835); Treaty of Payne’s Landing (May 9, 1832).
Mille Lacs regarding the legality of President Zachary Taylor’s 1850 Executive Order. Further, the 1834 Indian Trade and Intercourse Act 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 one thousand dollars, in addition to prohibiting hunting and trapping, and even marking of trees.\textsuperscript{89}

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!”\textsuperscript{90} 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.\textsuperscript{91} The Cherokee removal treaty of 1836 was widely criticized as a manipulation when it was put before the Senate, and was ratified by the margin of a single vote.\textsuperscript{92}

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

\textbf{II. “RE-DISCOVERY” OF TREATY-GUARANTEED USUFRUCTUARY PROPERTY:}


\textsuperscript{90} Jackson actually wrote in a letter to John Coffee, "... the decision of the Supreme Court has fell still born, and they find that they cannot coerce Georgia to yield to its mandate," meaning the Court’s opinion was moot because, not being a legislative body, it had no power to enforce its edict. Paul F. Boller, \textit{They Never Said It: A Book of False Quotes, Misquotes, & False Attributions}, 53, (New York, 1989).

\textsuperscript{91} Treaty of New Echota, 7 Stat. 478 (Dec. 29, 1835).

\textsuperscript{92} Minnesota v. Mille Lacs Band of Chippewa Indians (\textit{Mille Lacs}), 526 U.S. 172, 175 (1999).
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 . . . we conclude that the Chippewa retain the usufructuary rights guaranteed to them under the 1837 Treaty.

-- Justice Sandra Day O’Connor

1. A Unanimous Court: “Treaties Guarantee Usufructuary Property Rights”

Within this historical context, the first land cession treaty with the Anishinabe was negotiated at Fort Snelling near where the Minneapolis-St. Paul airport is today, with representatives of nearly all of the widespread Anishinabe bands in attendance in 1837. To secure Anishinabe “consent,” United States treaty negotiators took the approach of severing formal title to land from the continued use of the land for traditional means of survival, thus guaranteeing usufructuary rights to the use of the land, separate from title to the land, which was transferred to the United States:

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

The majority and dissent in the Mille Lacs case agreed that this clause of the 1837 Treaty guaranteed usufructuary property rights, retained by the Anishinabe, that did not pass with title to the United States. The Anishinabe hunting, fishing and gathering rights in the rest of what is now Minnesota were not diminished on un-ceded territory, outside the 1837 Treaty boundary at all. The 1795 and 1825 (or 1826) Treaty-guaranteed hunting, fishing and gathering rights were not specifically referenced in the 1837 Treaty, or mentioned in the Mille Lacs opinion itself. All parties conceded that

93 Mille Lacs, 526 U.S. at 175–76.
94 Location considered Wisconsin territory at the time.
95 1837 Treaty, 7 Stat. 536, 537 (1837); Mille Lacs, 526 U.S. at 176.
96 The concept of usufructuary rights, or úse rights retained after formal transfer of title, discussed in Mille Lacs, 526 U.S. at 175–76.
97 1837 Treaty, 7 Stat. at 537.
98 Mille Lacs, 526 U.S. at 200; 526 U.S. at 208 (dissent).
the 1837 Treaty specifically reserved the treaty-guaranteed usufructuary rights in the ceded territory “during the pleasure of the President of the United States.”\(^{100}\)

But Minnesota argued that President Zachary Taylor issued an 1850 Executive Order that revoked usufructuary rights and ordered the removal of the Anishinabe to unceded Minnesota territory (where, ironically, the 1795, 1825 and 1826 Treaties still guaranteed the hunting, fishing and gathering rights of the Anishinabe), with which none of the parties apparently disagreed, nor did President Jackson. Second, the broad language of the 1855 Treaty appeared to abrogate all Anishinabe property claims of any kind, anywhere in Minnesota territory. 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 in which similar arguments had been made had rejected that argument in the 20th Century.

**President Taylor’s 1850 Executive Order**

The 5-4 majority held that President Zachary Taylor’s Executive Order was ineffective in abrogating the usufructuary rights guaranteed in the 1837 Treaty for several reasons relating to an intricate analysis of treaty language and historical context.\(^{101}\) 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,”\(^{102}\) but did not mention removal of the Anishinabe from the 1837 territory. According to the majority, this meant that the agreement in the 1837 Treaty was unlike other treaties which did provide that the

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\(^{100}\) 1837 Treaty, 7 Stat. at 537.


\(^{102}\) 1837 Treaty, 7 Stat. at 537 (1837).
Anishinabe were “subject to removal therefrom at the pleasure of the President of the United States,” and in the absence of a specific agreement to be removed in the 1837 Treaty, the 1830 Removal Act did not authorize removal in the 1850 Executive Order.

According to the Court, the historical record reveals that the initiative for the 1850 Executive Order was a request for removal from the Minnesota Territorial Legislature in a request to Congress, rather than the President. 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. However, Congressional action was not forthcoming and on February 6, 1850 President Taylor issued the Executive Order framed in the following fashion:

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

According to the majority, although the larger part of the Order ostensibly addressed the exercise of usufructuary rights, the historical record established not only that the Minnesota Territorial Legislature requested removal of the Anishinabe, not revocation of usufructuary rights, but Government officials also considered the Executive Order primarily as a removal order with the revocation of the usufructuary rights on ceded territory a necessary incentive to encourage removal to unceded territory.

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103 1842 Treaty, Art. 6, 7 Stat. 591, 592 (1842) provided for removal from territory located in Wisconsin westward to 1826 Treaty-guaranteed territory in Minnesota, unceded by 1837 Treaty.
105 Mille Lacs, 526 U.S. 172, 190.
106 Executive Order of February 6, 1850, cited in Mille Lacs, 526 U.S. at 179.
107 Mille Lacs, 526 U.S. at 179.
territory, where survival of the Anishinabe, through the exercise of usufructuary rights could continue as before. The 1842 Treaty\textsuperscript{108} relating to territory in Wisconsin, referenced in the Order, reinforced this interpretation since it directly links exercise of usufructuary rights with Presidential removal.\textsuperscript{109}

But opposition to the attempt at removal was so intense from both non-Indians, who depended on trade with the Anishinabe, as well as the Anishinabe, the policy of presidential removal was officially abandoned in 1851.\textsuperscript{110} And, the \textit{Mille Lacs} majority also found several examples of official Territorial and federal correspondence indicating that recognition of Anishinabe usufructuary rights in the 1837 ceded territory continuing long after the Executive Order was issued.\textsuperscript{111} The majority held revocation of Treaty usufructuary rights was not severable from the removal and could not be enforced independently.\textsuperscript{112}

The dissent by Chief Justice Rehnquist argued that the Executive Order was not primarily a “removal order” but a “revocation of usufructuary rights” and, as such, Congressional authorization was not necessary.\textsuperscript{113} The last part of the Order that does require removal is severable from the revocation order and should be enforced independently.\textsuperscript{114} This is the most forceful argument mounted by the dissent which Justice Rehnquist concludes resolves the matter and the remaining arguments bolster the main argument based on the analysis of Executive Order.

The 1850 Presidential Order: 
A Ratification of 1825 Treaty-Guaranteed Usufructuary Rights

From the standpoint of the Anishinabe, the 1825 Treaty and the 1826 Treaty guaranteed both rights to hunt, fish and gather, but both the 1837 Treaty and the 1850 Executive Order would have confirmed

\textsuperscript{108} 1842 Treaty, 7 Stat. 591, 592 (1842).
\textsuperscript{109} \textit{Mille Lacs}, 526 U.S. at 181.
\textsuperscript{110} \textit{Mille Lacs}, 526 U.S. at 181–83.
\textsuperscript{111} \textit{Mille Lacs}, 526 U.S. at 186.
\textsuperscript{112} \textit{Mille Lacs}, 526 U.S. at 187.
\textsuperscript{113} \textit{Mille Lacs}, 526 U.S. at 215.
\textsuperscript{114} \textit{Mille Lacs}, 526 U.S. at 215.
that, outside of the small area ceded in 1837 at a minimum, the guarantees made by the United States in the 1825 Treaty had been made even more secure by the 1850 Executive Order.

First, in negotiating 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 Treaty territory. Second, even when the “removal” efforts began in 1850, and ended between 1850–51, the Executive Order, by its own terms, attempted to “remove” the Anishinabe to the sovereign 1825 Treaty territory, which had not been ceded in 1837, thus, confirming Anishinabe sovereignty and, further confirmed the rights to hunt, fish and gather in the remainder of the 1825 Treaty territory which was not ceded in 1837, as Anishinabe “homeland.” All of the said Indians remaining on the lands ceded as aforesaid, are required to remove to their un-ceded lands.115

The majority and dissent in the Mille Lacs decision were unanimous in recognizing that Anishinabe usufructuary outside the 1837 Treaty territory, which necessarily would be the 1825 Treaty territory, were undiminished by the 1850 Executive Order recognized usufructuary rights in the 1825 Treaty territory as being necessary for the survival of the Anishinabe who were the subject of the proposed expulsion. Whether the Executive Order is characterized as a “removal order” or a “revocation order severable from removal” is immaterial with respect to the rest of the 1825 Treaty territory, where the Anishinabe continued to exercise their usufructuary rights in the 1825 Treaty area outside the 1837 Treaty territory, and which the 1850 Executive Order acknowledges as the Anishinabes’ only alternative for survival.116

The 1855 Treaty: the Impossibility of Silent Abrogation of Usufructuary Property Guarantees in

115 Executive Order of February 6, 1850, cited in Mille Lacs, 526 U.S. at 179.
116 Mille Lacs, 526 U.S. at 192.
The Mille Lacs majority also examined the impact of the 1855 Treaty on the treaty-guaranteed usufructuary rights in the 1837 Treaty territory.\textsuperscript{118} The 1855 Treaty, which was negotiated only with the Mille Lacs band and no other Anishinabe parties to the 1825, 1826, 1837 Treaties or the recently concluded 1854 Treaty. The 1855 Treaty set aside land for reservations within the 1837 and 1855 territory\textsuperscript{119} but was completely silent with respect to usufructuary rights guaranteed in the 1825 Treaty, the 1837 Treaty, or the recently concluded 1854 Treaty:

The Chippewa Indians to hereby cede, sell and convey to the United States all their right, title and interest in, and to, the lands now owned and claimed by them, in the Territory of Minnesota, and included within the following boundaries, \textit{viz}: [describing territorial boundaries]. And the said Indians do further and fully and entirely relinquish and convey to the United States, any and all right, title, and interest, of whatsoever nature the same may be, which they may now have in and to any other lands in the Territory of Minnesota.\textsuperscript{120}

The majority interpreted the treaty language “liberally in favor of the Indians,” as required by the precedent of the Court, but found that there was no discussion of hunting and fishing or other usufructuary rights in either 1855 Treaty or the Treaty Journal.\textsuperscript{121} According to the majority, the absence of any discussion of the usufructuary rights then being exercised by the Anishinabe in 1837-ceded territory, the 1854-ceded territory, or the un-ceded territory to which the 1850 Executive Order attempted to remove the Anishinabe (i.e., the 1825 Treaty territory), was a telling omission, “because the United States treaty drafters had the sophistication and experience to use express language when abrogating [usufructuary]

\textsuperscript{117} The United States also entered into two Treaties in 1847, one with the Mississippi and Lake Superior Bands of Anishinabe, 9 Stat. 904 (August 2, 1847), to “cede and sell the land,” the other with the Pillager Band at Leech Lake, 9 Stat. 908 (August 21, 1847), for land which “shall be held by the United States as Indian land, until otherwise ordered by the President.” The ceded territory was ostensibly for Winnebago and Menominee reservations that were never established. Neither treaty mentioned abrogation of usufructuary rights or removal of the Anishinabe. For a discussion of the circumstances underlying the 1847 Treaty with the Pillager Band, see Pillager Band of Chippewa Indians v. United States, 428 F.2d 1274 (1970).

\textsuperscript{118} Mille Lacs, 526 U.S. at 198.

\textsuperscript{119} Mille Lacs, 526 U.S. at 195.

\textsuperscript{120} 1855 Treaty, 10 Stat. 1165, 1166 (1855).

\textsuperscript{121} Mille Lacs, 526 U.S. at 198.
treaty rights.” 122

The majority noted that the same U.S. treaty drafters had used explicit language when revoking Chippewa fishing rights on the St. Mary’s River in Michigan at about the same time 123 and the majority assumed the treaty drafters would have done the same in the 1855 Treaty, were that the intention of the parties to the treaty. Perhaps more importantly, for purposes of the argument made by this article, the majority notes that the debates in the Senate specifically took note of the pre-existing treaty rights that the Chairman of the Senate Committee on Indian Affairs understood to be the foundation of treaty-guaranteed usufructuary rights upon which the 1855 Treaty was grounded. According to the majority,

The Act [of December 19, 1854] is silent with respect to authorizing agreements to terminate Indian usufructuary rights, and the silence was not likely accidental. During Senate debate on the Act, Senator Sebastian, the Chairman of the Committee on Indian Affairs, stated that the treaties to be negotiated under the Act would reserve[e] to them [i.e. the Chippewa] those rights which were secured by former treaties.‘[W]e cannot agree with the State that the 1855 Treaty abrogated Chippewa usufructuary rights…. 124

The dissent considered a complete analysis of the 1855 Treaty unnecessary for its purposes, in light of its view that the 1850 Executive Order was controlling, but offered dicta rebutting the majority with respect to the 1855 Treaty purporting to cede “all” of the territory of Minnesota. The Chief Justice argued that the language on the face of the treaty alone decided the question, and “all” means “all,” irrespective of: historical context of prior treaties; the understanding of the Chairman of the Senate Committee of Indian Affairs; or the understanding attributed to the treaty by the Indians. 125

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

123 *Mille Lacs*, 526 U.S. at 195–96.


125 Although not cited by the dissent, this is the same position adopted by the Eighth Circuit in an earlier claim by the Red Lake Band that usufructuary rights in the 1863 Treaty territory were not abrogated by congressional enactments in 1889 and 1904, which contained language similar to the 1855 Treaty in which the State of Minnesota prevailed. See United States v. State of Minnesota, 466 F. Supp. 1382 (1979). The district court looked only to the 1863 Treaty with the Red Lake Band, and to the congressional enactments in question which did not refer to retention of usufructuary rights, and concluded that the intent of Congress was to abrogate those rights along with the cession of title. However, the district court and Eighth Circuit mistakenly
Writing for the dissent, the Chief Justice suggested that broad language in the 1855 Treaty should be read as an abrogation of the usufructuary property rights specified in the 1837 Treaty, without the necessity of finding specific treaty language or congressional intent to abrogate Indian property rights created in the previous treaties,\(^\text{126}\) which would seem to be in contravention of the precedent of the Court.\(^\text{127}\) But, it also seems contrary to the historical record of subsequent conduct of the United States, itself. If the 1855 Treaty did have the meaning ascribed to it by the Chief Justice, it seems highly unlikely the United States would have found it necessary to seek subsequent land-cession treaties with the Anishinabe after 1855. However, the United States sought land cessions on at least seven separate occasions,\(^\text{128}\) which would have been completely unnecessary if the 1855 Treaty had the meaning suggested by the Chief Justice in his *Mille Lacs* dissent.

The dissent also failed to note prior Supreme Court precedent in the 19th and early 20th Centuries that had specifically analyzed the scope of the 1855 Treaty and had come to much different conclusions,\(^\text{129}\)

\(^{126}\) See DeCoteau v. District County Court for Tenth Judicial Dist., 420 U.S. 425 (1975).


\(^{128}\) Treaty of 1863 (with Mississippi, Pillager, Winnibigoshish Bands) (12 Stat. 1249) – Ceding reservations set up in the 1855 Treaty, and no mention of abrogation of *usufructuary* rights in the 1855 Treaty territory, or elsewhere in the 1825 Treaty territory.

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

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


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


\(^{129}\) Johnson v. Gearlds, 234 U.S. 422 (1914).
as had the Minnesota Supreme Court. Finally, the failure of the dissent to offer an alternative to well-settled canons of Indian treaty interpretation, which require treaties to be read contextually, as understood by the Indians and the truncated historical discussion of the 1855 Treaty, occasioned by the dissent’s view that the 1850 Executive Order made further discussion unnecessary, failed to provide the basis for a meaningful construction of the 1855 Treaty, other than that provided by the majority and the thorough historical review in the district court opinion.

1858 Statehood and Treaty-Guaranteed Usufructuary Property

Minnesota’s entry into the Union did not have any impact on rights established in treaties entered into by the United States, according to the Mille Lacs majority. Since Congress must clearly express an intent to abrogate Indian treaty rights under United States v. Dion, such an intent must have been present either in Minnesota’s 1858 enabling act, which is silent on the matter, or one of the treaties between the United States and the Anishinabe. There is no indication that Senate ratification of the 1837 Treaty contemplated that the 1837 Treaty, or other treaties, would terminate at statehood. In response to the argument by the dissent, the majority addressed nineteenth century “equal footing” doctrine, which questioned the relationship between federal treaty power to bind states entering the Union and state

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

131 Mille Lacs, 526 U.S. at 195–200.


133 Mille Lacs, 526 U.S. at 202–203.


135 Mille Lacs, 526 U.S. at 203.

136 Mille Lacs, 526 U.S. at 207.

137 Mille Lacs, 526 U.S. at 219–220.
sovereignty over wildlife regulatory matters in *Ward v. Racehorse*. The majority relied on more recent precedent to conclude that continuing recognition of Indian treaty rights by the federal government is not inconsistent with state resource management prerogatives.

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

**Minnesota Statehood Act in Prior Supreme Court Treaty Litigation**

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

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

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

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139 *Mille Lacs*, 526 U.S. at 204.


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

142 Treaty between the United States and the Red Lake and Pembina Bands of Chippewa Indians; concluded in Minnesota, October 2, 1863; ratified by the Senate with Amendments, March 1, 1864; amendments assented to April 12, 1864; proclaimed by the President of the United States, May 5, 1864, 13 Stat. 667 (1863). No mention of hunting and fishing rights, “but
Treaty of 1866 (with Mississippi Band)\(^{(143)}\) – Ceding territory at Canadian Border west of 1854 Treaty Border and into Dakota Territory. No mention of abrogation of usufructuary rights.\(^{(144)}\)

1864 Modification of 1863 Treaty (with Red Lake and Pembina Band) – Red Lake Band refuses to remove, cede or trade lands.\(^{(145)}\) No mention of abrogation of usufructuary rights.\(^{(146)}\)

Nelson Act of 1889\(^{(147)}\) – Ceding territory between west of 1855 Treaty boundary and 1863 Treaty Boundary. No mention of abrogation of usufructuary rights.\(^{(148)}\)

Statute of 1904\(^{(149)}\) – No mention of abrogation of usufructuary rights.\(^{(150)}\)

Indian Reorganization Act of 1934\(^{(151)}\) – No mention of abrogation of usufructuary rights.\(^{(152)}\)

Sec. 478b - Application of laws and treaties

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

\(^{(143)}\) See 16 Stat. 719 (1866).

\(^{(144)}\) No mention of usufructuary rights in the 1866 Treaty, but transcript of the negotiations does make clear that the Indians were promised continued hunting and fishing rights on the ceded land. United States v. Minnesota, 466 F. Supp. at 1383.

\(^{(145)}\) 13 Stat. 689 (1864) states:

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

\(^{(146)}\) Supplementary Articles to the Treaty between the United States and the Red Lake and Pembina Bands of Chippewa Indians, concluded at Washington, April 12, 1864; ratified by the Senate April 21, 1864; proclaimed by the President of the United States April 25, 1864; 13 Stat. 689 (1864).

\(^{(147)}\) An act for the relief and civilization of the Chippewa Indians of Minnesota, 25 Stat 642 (1889) [Nelson Act].

\(^{(148)}\) However, see United States v. Minnesota, 466 F. Supp. at 1383, aff’d, 614 F. 2d 1161(8th Cir. 1980), cert. denied, 449 U.S. 905 (1980), in which the Red Lake Band of Chippewa sought declaratory judgment that its members retained hunting, fishing, trapping and wild ricing rights in areas which the Band ceded to the federal Government in 1889 and 1904 relinquishing all its right, title, and interest in and to the ceded area meant that the band also ceded usufructuary rights in the subject areas, in direct contravention of the construction of the same language by the Supreme Court in the 1855 Treaty in the Mille Lacs decision.

\(^{(149)}\) 31 Stat. 1077 (1904).

\(^{(150)}\) See United States v. Minnesota, 466 F. Supp. at 1384.


\(^{(152)}\) See United States v. Minnesota, 466 F. Supp. at 1384. The Act requires recognition of prior-existing treaty rights: Sec. 478b - Application of laws and treaties:

All laws, general and special, and all treaty provisions affecting any Indian reservation which has voted or may vote to exclude itself from the application of the Act of June 18, 1934 (48 Stat. 984) (25 U.S.C. 461 et seq.), shall be deemed to have been continuously effective as to such reservation, notwithstanding the passage of said Act of June 18, 1934. Nothing in the Act of June 18, 1934, shall be construed to abrogate or impair any rights guaranteed under any existing treaty with any Indian tribe, where such tribe voted not to exclude itself from the application of said Act.
Public Law 280, 1953 – 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 preexisting federally established limitations on land use in “Indian Country.” By 1871, Congress had also made clear that tribes were not considered independent nations with which treaties would be negotiated; nonetheless, treaties with tribes the United States entered into before that date were considered binding without reference to intervening statehood. In 1914, the Supreme Court held in Johnson v. Gearlds that the terms of 1855 Treaty remained in effect despite Minnesota statehood. The Court described the impact of Minnesota statehood on the terms of the 1855 Treaty:

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. 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.’

The Court reviewed all subsequent treaties with the Anishinabe between 1863 and 1967 that ceded land but did not mention abrogation of the treaty term (at issue was a liquor ban established by statute and the

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154 25 U.S.C. § 71: No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March third, eighteen hundred and seventy-one, shall be hereby invalidated or impaired.


156 1855 Treaty, 10 Stat. 1165 (1855).

157 Gearlds, 234 U.S. at 440.

158 Gearlds, 234 U.S. at 422. The court in Gearlds cites Article 7 of the treaty which states:

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

159 Gearlds, 234 U.S. at 422 (quoting Minnesota State Constitution).
1855 Treaty. The Court also discussed the January 14, 1889 Nelson Act that authorized the President to negotiate the complete cession and relinquishment of their title. 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, citing United States v. Forty-three Gallons of Whiskey and Bates v. Clark.

The Court did review the living conditions and the status of Chippewa living in the 1855 Treaty territory, which confirms that both the Anishinabe and the Court understood that the usufructuary rights of the Anishinabe and the ancestors who signed the 1855 Treaty and earlier treaties as well, were being exercised in the 1855 Treaty territory well into the twentieth 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 . . . .

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

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

And, as pointed out in the prefatory statement, the diminished Red Lake Reservation is admittedly surrounded by a strip of land, approximately 15 miles in width, which never was subject to the treaty of 1855 . . . . This strip extends along the northerly boundary of the cession of 1855, which is perhaps 10 or 12 miles north of Bemidji.

Gearlds, 234 U.S. at 443.

162 United States v. Forty-three Gallons of Whiskey, 93 U.S. 188, 196 (1876).

163 Bates v. Clark, 95 U.S. 204, 208 (1877).

164 Gearlds, 234 U.S. at 442.
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 be amply protected by limiting the territory as to which said treaty provisions shall remain in force and effect to the area within and contiguous to said reservations, particularly described as follows: . . . I therefore recommend that Congress modify the article of said treaty quoted above so as to exclude from the operations of its provisions all of the territory ceded by said treaty to the United States, except that immediately above described.”

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

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

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

We decline to construe the Termination Act as a backhanded way of abrogating the hunting and fishing rights of those Indians. . . . “the intention to abrogate or modify a treaty is not

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165 *Gearlds*, 234 U.S. at 447.
166 *Gearlds*, 234 U.S. at 447.
to be lightly imputed to the Congress.”


The majority opinion in *Mille Lacs* referred to federal litigation construing the 1854 Treaty with the Anishinabe, which was the subject of lengthy litigation in the Seventh Circuit that resulted in first recognition usufructuary rights being upheld in the territory ceded by the 1854 Treaty in Wisconsin and Minnesota. Like the 1837 Treaty at issue in *Mille Lacs*, the face of the 1854 Treaty specifically mentioned the retention of usufructuary rights within the ceded territory. While the focus of the litigation was the impact of the Treaty on off-reservation usufructuary rights in Wisconsin, by 1988 both Wisconsin and Minnesota negotiated agreements with Anishinabe Bands within the 1854 Treaty territory that recognized the continuing validity of Anishinabe treaty rights. 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 unceded 1825 Treaty territory as of 1855.

In 1854, the House of Representatives began debating a bill “to provide for the extinguishment of title” in the Territory of Minnesota and Wisconsin, that did not require removal of the Anishinabe, but provided for reservations within the ceded territory, a provision that eventually found its way into the 1855 Treaty. 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


171 1854 Treaty, art. 11, 1854, 10 Stat. 1109, 1111 (1854).


negotiated in the fall of 1854. 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.

The Lake Superior Band retained usufructuary rights in the ceded territory in Minnesota’s arrowhead and the Mississippi Band retained rights in full west of the 1854 Treaty boundary. The 1855 Treaty was negotiated in Washington, D.C. between February 12 and 22, 1855 by Commissioner for Indian Affairs George W. Manypenny and treaty negotiators who were also well aware of the completed 1854 Treaty and, after the authorizing legislation was passed in December 1854. The *Mille Lacs* majority opinion confirms the conclusion that: (a) the authorizing legislation, (b) the 1855 Treaty, and (c) the Treaty Journal all focused on land acquisition, not the hunting, fishing, and gathering rights in which the Anishinabe were most interested and had insisted on retaining in the treaties of 1837 and 1854. The majority also pointed out that the signatories to the 1854 Treaty included most of the bands that resided in the 1837 Treaty territory, but only the *Mille Lacs* Band was party to the 1855 Treaty and:

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

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

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175 *Mille Lacs*, 526 U.S. at 183.
176 *Mille Lacs*, 526 U.S. at 184.
177 *Mille Lacs*, 526 U.S. at 183–85.
178 *Mille Lacs*, 526 U.S. at 199.
earlier treaties on un-ceded territory as well. The 1795, 1825 and 1826 Treaties make clear that the Anishinabe had more than aboriginal claims to un-ceded 1825 Treaty territory over which the United States recognized the Anishinabe retained sovereignty and the unquestioned right to hunt, fish, and gather. The 1854 Treaty is careful to differentiate the un-ceded 1825 Treaty territory from the area ceded by the Lake Superior Band:

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

Further, the terms of the 1854 Treaty specifically refer to the continuation of preexisting 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 Lake Superior and the Chippewa of the Mississippi, that the former shall be entitled to two-thirds, and the latter to one-third, of all benefits to be derived from the former treaties existing prior to the year 1847.

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

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179 See 1854 Treaty, art. 11, 10 Stat. 1109, 1111 (1854).
180 1854 Treaty, art. 1, 10 Stat. 1109 (1854).
181 1854 Treaty, art. 8, 10 Stat. at 1111.
Anishinabe.\textsuperscript{182}

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. 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;\textsuperscript{183} (b) the rights in specified in the 1825, 1837 and 1854 treaties were further ratified by the congressional authorization of the 1854 Treaty, in retrospect; (c) the passage of the authorizing legislation, after usufructuary property rights had been created in the 1854 Treaty ceded territory, and ratified in the 1854 Treaty un-ceded territory, authorizing only purchase of territory, does not suggest congressional intent to abrogate treaty-guaranteed usufructuary rights. The 1854 Treaty guarantee of undiminished claims to the Mississippi Band is powerful evidence that, as of January 1, 1855, the Anishinabe retained treaty-guaranteed hunting, fishing and gathering rights in: (a) the 1837 ceded territory; (b) the 1854 ceded territory; and, (c) the rest of the un-ceded 1825 Treaty territory, which was not abrogated by the 1854 Treaty; the December 1854 congressional treaty authorization legislation; the February 1855 Treaty; or the subsequent treaty ratification by the Senate.\textsuperscript{184}

\textbf{III. MINNESOTA TREATY PRECEDENT IN RETROSPECT: VOIGHT AND MILLE LACS USUFRUCTUARY PROPERTY ANALYSIS, AS APPLIED}

In the late 1970s and early 1980s the first modern Anishinabe treaty-rights litigation the state and federal courts, without being presented with a full record of all of the treaties bearing on treaty-guaranteed

\textsuperscript{182} See Appendix I.

\textsuperscript{183} 1854 Treaty, art. 11, 10 Stat. at 1111.

\textsuperscript{184} See Appendix I.
usufructuary property rights because not until the LCO litigation in late 1980s were treaty-guaranteed usufructuary rights understood as a form of property, like any other, and severable from title. Three examples are:

(a) Leech Lake Band of Chippewa Indians v. Herbst, in which the district court held that the 1889 Nelson Act’s “all title and interest” language did not abrogate hunting, fishing and gathering rights on public lands on the Leech Lake Reservation;

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

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

Only the first would likely to be decided similarly under the treaty-guaranteed usufructuary property analysis adopted by the Supreme Court in the Mille Lacs opinion.

Leech Lake Band of Chippewa v. Herbst

The Leech Lake Band sought an injunction against the enforcement of state hunting and fishing regulations of Band members on the Reservation. The Court limited its examination of treaty rights to the Leech Lake Reservation and started with the premise that, at the time of the passage of the Nelson Act in 1889, the Indians possessed unrestricted hunting and fishing rights as aboriginal rights that were established by reservation treaties in 1855, 1864 and 1867. The State agreed that the Leech Lake Indians possessed the claimed fishing and hunting rights, as the Minnesota Supreme Court had held in State v.

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187 Red Lake Band of Chippewa v. Minnesota, 614 F.2d 1161 (8th Cir. 1980).
189 State v. Keezer, 292 N.W.2d 714 (Minn. 1980).
190 Herbst, 334 F. Supp. at 1001.
The State also agreed that Congress alone has the power over treaty rights with Indians, citing *Lone Wolf v. Hitchcock.* 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.

However, when taken in context and understood by the Indians who had exercised such rights on the reservation for generations, the Court held this language insufficient to abrogate either the Leech Lake Reservation or the hunting, fishing and gathering rights on the Reservation, because federal responsibility in the United States trust relationship with Indian peoples is not dependent solely upon the passing of legal land title and, as the Court made clear in *Milles Lacs,* the usufructuary property rights are not so easily abrogated. 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 Indians. The United States Supreme Court has held that it is the termination of federal responsibility and not the passing of legal land title which determines whether a reservation exists in the eyes of the law.

> 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

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191 State v. Jackson, 16 N.W.2d 752 (Minn. 1944).
imputed to the Congress.” 195

Although written some 30 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.

**United States v. Minnesota**

In United States v. Minnesota,196 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 congressional enactments of 1889 and 1904, which did not mention cession of hunting, fishing and gathering usufructuary property rights. 197 These enactments duplicated the written terms of an 1863 Treaty that ceded 10 million acres to the United States, which also failed to mention hunting, fishing and gathering,198 but which were orally promised by former Minnesota Governor Alexander Ramsey, according to the 1863 Treaty minutes, “until it was settled.” 199 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 10 million acres had been ceded, the misrepresentation of the Governor Ramsey was not relevant to determining what the Indians understood about the 1889 and 1904 enactments, which stated the Red Lake Band agreed to surrender “all title and interest.” 200

197 United States v. Minnesota, 466 F. Supp. at 1383.
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.\(^{201}\) The court also conceded that treaties and agreements must be interpreted as the Indians understood them, and “. . . Congressional intent to abrogate Indian property rights must be clear from the face of the Act or surrounding circumstances and that doubtful expressions in the Act must be resolved in favor of the Indians.”\(^{202}\) Without citing \textit{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:

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\ldots \text{the [1863] cession was to operate as a complete extinguishment of Indian title . . . [i]f the cessions extinguished Indian title to the ceded areas, they also would have the effect of abrogating any aboriginal hunting, fishing, trapping or wild ricing rights. These rights are mere incidents of Indian title, not separate from Indian title, and consequently if Indian title is extinguished so also would these aboriginal rights be extinguished.}^{203}\]

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\(^{204}\) and were not “separate from Indian title.” The United States Attorney who was representing the Band apparently made an effort to use Governor Ramsey’s representation that the Anishinabe could continue to hunt and fish on the 10 million acres to demonstrate the Indian understanding of the 1889 and 1904 enactments,\(^{205}\) but failed to directly challenge the abrogation of 1863 Treaty usufructuary rights promised by the Treaty negotiators in the 10-million acres,\(^{206}\) or make use of the terms of 1795, 1825/26 or 1854 Treaties by which the United States had converted “Indian title” to treaty guaranteed usufructuary property rights long before 1863. But this was the United States arguing against its own interests, or at least wearing two different hats, regarding what

\(^{201}\) United States v. Minnesota, 466 F. Supp. at 1387.

\(^{202}\) United States v. Minnesota, 466 F. Supp. at 1385.

\(^{203}\) United States v. Minnesota, 466 F. Supp. at 1385.

\(^{204}\) United States v. Minnesota, 466 F. Supp. at 1383.


U.S. treaty negotiators had previously agreed upon.\textsuperscript{207}

The trial court made the incorrect assumption that the Red Lake Band lacked treaty-guaranteed property interests, as did the Eighth Circuit on appeal.\textsuperscript{208} But, these usufructuary property rights were guaranteed by treaty in: (a) all of the sovereign 1795 Treaty territory, which would eventually become Minnesota; (b) the 1825 Treaty territory in the northern half of Minnesota; (c) the 1826 Treaty territory in which “title” and “jurisdiction” were guaranteed to the Anishinabe in the northern half of Minnesota; (d) the 1837 Treaty ceded territory to the United States which specifically retained usufructuary rights in the ceded territory; (e) the territory outside the 1837 Treaty territory to which the Anishinabe were to have been removed by the 1850 Executive Order, i.e., the unceded 1825 Treaty territory encompassing the rest of Minnesota; (f) the 1854 Treaty-ceded territory in the “arrowhead,” in which usufructuary rights were specifically retained; (g) the territory west of the 1854 Treaty boundary, in which the Mississippi Band were guaranteed undiminished rights in the 1854 Treaty, \textit{i.e.}, the un-ceded 1825 Treaty territory encompassing the rest of Minnesota. Thus, as of February 1855, the United States had guaranteed to the Anishinabe the right to hunt, fish and gather, guaranteed in every part of Minnesota,\textsuperscript{209} by treaty, on at least six separate occasions over a period of sixty years, which was also recognized by a Presidential Executive Order. And, 1863 treaty negotiator, Minnesota Governor Alexander Ramsey, did tell the Indians that the hunting, fishing and gathering rights were guaranteed in the 10 million acres ceded in the 1863 Treaty for an indefinite period after transfer of title to the United States.\textsuperscript{210} However, neither the district court, nor the plaintiffs’ counsel, nor the Eighth Circuit, looked farther back into treaty history than 1863.\textsuperscript{211}

\textsuperscript{207} United States v. Minnesota, 466 F. Supp. at 1386–87.

\textsuperscript{208} Red Lake Band of Chippewa Indians v. Minnesota, 614 F.2d 1161 (1980).

\textsuperscript{209} For a pictorial representation of the Treaty-ceded territories, \textit{see} Appendix I and II.

\textsuperscript{210} United States v. Minnesota, 466 F. Supp 1382 (D. Minn. 1979).

\textsuperscript{211} Red Lake Band of Chippewa v. Minnesota, 614 F.2d 1161 (8th Cir. 1980).
Furthermore, the language in the two Congressional enactments at issue is very similar to that in the 1855 Treaty which the *Milles Lacs* opinion held did not abrogate pre-existing usufructuary rights established in earlier treaties. According to the Court, the language in these enactments was “precisely suited” for eliminating “Indian title” and conveying to the government “the Indians’ entire interest in the ceded lands,”\(^\text{212}\) irrespective of the misrepresentation in the 1863 Treaty negotiations:

> [A]ny and all right, title and interest, of whatsoever nature the same may be, which they may have now have in, and to any other lands in the Territory of Minnesota or elsewhere.\(^\text{213}\)

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.\(^\text{214}\) 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, the argument that the Indians understood the United States was silently abrogating these rights is much, much more difficult to make following the usufructuary property rights analysis adopted by the Court unanimously in the *Mille Lacs* opinion.

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, by never specifically abrogating them 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”

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212 United States v. Minnesota, 466 F. Supp. at 1385.

213 1855 Treaty, art. 1, 10 Stat. 1166 (1855).

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, 1855, as well as, 1863 verbal promise by Governor Ramsey). The far more developed historical record that can be found in the *LCO* and *Mille Lacs* record, as augmented by this article, more accurately describes the nature of Anishinabe rights, post-*Mille Lacs*.

**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. The defendants had been cited by a conservation officer for harvesting wild rice on a lake designated in the Sioux (Dakota) territory in the 1825 Treaty and included within the 1795 Treaty area as Indian territory. Although a Minnesota State Supreme Court opinion has little precedential value regarding United States treaty construction and preceded *Mille Lacs* decision by nearly 20-years, it may be the only attempt to come to grips with the pre-1837 treaties in any published opinion. The majority conceived of an Indian property framework much more limited than that described by the Supreme Court in the *Mille Lacs* opinion:

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

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215 State v. Keezer, 292 N.W.2d 714 (Minn. 1980).

216 Keezer, 292 N.W.2d 714.

217 Keezer, 292 N.W.2d 714.

218 *Id.* As early as 1944, in State v. Jackson, 218 N.W. 429 (Minn. 1944), the Minnesota Supreme Court considered that the Leech Lake Reservation, created in the 1855 Treaty from “Indian Country” (carved out of the previously unceded 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 that the atmosphere they breathed remained in them unless they granted it away,” citing *United States v. Winans*, 198 U.S. 371, 381 (1905).
of land.\textsuperscript{219}

As conceived by the majority, treaties had dual purposes: (a) to recognize Indians’ right to occupancy of certain lands, and (b) to gain territory for the United States through the Indian’s relinquishment of other lands. This exchange describes ceding territory in exchange for treaty guarantee to a reservation, or another territory. The majority equates this treaty-guaranteed “right of occupancy,” as it was called by John Marshall in Johnson v. M’Intosh\textsuperscript{220} with “Indian title.”\textsuperscript{221} The majority appeared not to recognized the concept of continuing use of the land, guaranteed by treaty in any meaningful way.

The majority construed the 1795 Treaty to be a recognition of “Indian title,” and a “relinquishment by the United States of its claims of immediate possession of Indian territory . . . not its basic sovereign rights to the land itself.”\textsuperscript{222} The Indians gained treaty-guaranteed right of occupancy that could only be extinguished by purchase and “were free to enjoy their rights of occupancy, ‘hunting, planting, and dwelling there,’”\textsuperscript{223} or, as Mr. Chief Justice Marshall described it, “to use it according to their own discretion.”\textsuperscript{224}

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.” The majority also purported to construe the 1825 Treaty, as it related to rights of the Anishinabe (Chippewa) to gather wild rice on Sioux (Dakota) designated territory without state permit.\textsuperscript{225} Echoing the district

\begin{itemize}
\item \textsuperscript{219} Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 667 (1974).
\item \textsuperscript{220} Johnson v. M’Intosh, 21 U.S. 543 (1823).
\item \textsuperscript{221} See Keezer, 292 N.W.2d 714.
\item \textsuperscript{222} Keezer, 292 N.W.2d at 717.
\item \textsuperscript{223} Keezer, 292 N.W.2d at 718.
\item \textsuperscript{224} Id. (citing M’Intosh, 21 U.S. at 574 ).
\item \textsuperscript{225} Id. And without the permission of the Dakota as required in the 1825 Treaty, an issue not discussed by the Court, see 1825 Treaty.
\end{itemize}
court in *United States v. Minnesota*, and citing the Supreme Court holding in *Rosebud Sioux Tribe v. Kneip* and *De Coteau v. District County Court* for the principle that language in the 1855 Treaty that ceded “all right, title and interest” was “precisely suited” for the purpose of eliminating “Indian title” and conveying to the government “the Indians’ entire interest in the ceded lands.” The Court held that, even if the 1825 Treaty did:

> [G]rant 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.

Of course, 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.

### The 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. 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. And, that the 1825 Treaty left it to the Anishinabe and Dakota to continue to share fish, game and wild rice without interference from the United States. Justice Wahl concluded that “rights of ownership of the land, itself, [are] not dependent upon them, or incident to, fee

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228 *Keezer*, 292 N.W.2d at 721.
229 *Keezer*, 292 N.W.2d at 720.
230 *Keezer*, 292 N.W.2d at 724.
231 *Id.*
232 *Id.*
Justice Wahl’s dissent was 20 years ahead of its time in that, like the *Mille Lacs* majority, she rejected the argument that general cession language, such as all “right, title and interest,” without more, extinguished even aboriginal rights to hunt, fish or wild rice on ceded land. 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. According to Justices Wahl and Otis:

In *Leech Lake Band of Chippewa Indians v. Herbst*, however, the district court considered the same language appearing in the Nelson Act, and the held that it did not abrogate hunting and fishing rights which “while perhaps dating back many years to an aboriginal right were established in law by treaty . . . the United States Supreme Court has counseled us that the abrogation of treaty rights is not to be lightly inferred . . . . 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.”

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

This suggested framework for working through the complicated conflicting issues created by the treaty-

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233 *Id.*

234 *Keezer*, 292 N.W.2d at 722–25.

235 *Id.*

236 *Keezer*, 292 N.W.2d at 274.


238 *Keezer*, 292 N.W.2d at 275.
guaranteed property rights, and subsequent property development, virtually duplicates the resolution reached by the Seventh Circuit in the LCO case, which has been applied in Minnesota’s arrowhead region and northern Wisconsin since 1988, and in the 1837 Treaty territory since the Supreme Court decided the *Mille Lacs* case in 1999.

Under the *Mille Lacs* analysis, this language would seem to create both a treaty-guaranteed usufructuary property rights in the use of the land indefinitely that had no apparent, or necessary, relationship to “sale” of the land to the United States at any point. There is nothing in the 1795 Treaty that would put any of the Tribal signatories on notice that “sale” to the United States implied the concepts of “fee simple,” “Indian right of occupancy,” or “Indian title,” which have been used by the Supreme Court to construe the 1795 Treaty and later treaties. These court-created concepts could only be found applicable to Indian treaties after *Marbury v. Madison*\(^ {239} \) established a role for the Supreme Court in 1803. And, as the Minnesota Supreme Court majority pointed out in *State v. Keezer*,\(^ {240} \) it was not until 1823 that Chief Justice John Marshall conceptualized the “Indian Right of Occupancy” in *Johnson v. M’Intosh*.\(^ {241} \) 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, or ignored.

**IV. MODERN 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

\(^{239}\) *Marbury v. Madison*, 5 U.S. 137 (1803).

\(^{240}\) *Keezer*, 292 N.W.2d at 316.

\(^{241}\) *Johnson v. M’Intosh*, 21 U.S. 543 (1823).
wildlife resources in the 1854 ceded territory with Anishinabe Bands in Minnesota’s “arrowhead” \(^\text{242}\) and settled a suit with the Grand Portage Band of Chippewa, based on the same 1854 Treaty. \(^\text{243}\) The stakes can be significant. \(^\text{244}\)

Despite the 1854 Treaty specifically providing that the Mississippi Band retained 1825/26 Treaty-guaranteed-rights west of the 1854 Treaty boundary, Minnesota has not acknowledged that all Anishinabe Bands to which the 1854 Treaty apparently refers, \(^\text{245}\) should have the same off-reservation usufructuary rights \(^\text{246}\) as Anishinabe in Wisconsin and Minnesota \(^\text{247}\) property rights with a value of millions of dollars

\(^\text{242}\) 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.

\(^\text{243}\) The State of Minnesota settled Grand Portage Band of Chippewa of Lake Superior v. Minnesota, Civ. No. 4-85-90 (D. Minn. 1988) following the Lac Courte Oreilles decisions upholding the 1854 Treaty.


\(^\text{245}\) The contradiction is apparent in off-reservation prosecution of Indians in territory outside the 1854 Treaty ceded territory which, on one hand must acknowledge both Mille Lacs and LCO as controlling regarding usufructuary rights, but find exceptions based on treaty boundaries to permit prosecutions that would not be possible a few miles in either direction. See, State v. Butcher, 563 N.W.2d 776 (Minn. App. 1997).

\(^\text{246}\) See, Great Lakes Indian Fish and Wildlife Commission (GLIFWC), A Guide to Understanding Chippewa Treaty Rights: Minnesota Edition (Odanah, Wisc. 1995), which describes the self-management Wisconsin Bands have chosen, as has the Fond du lac Band in Minnesota.

\(^\text{247}\) 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 dollars over the past 22 years) would mean that the State has set the value of a small portion of the ceded area at about 140 million dollars over 20-plus years. However, the area west of the 1854 Treaty border and north of the 1937 Treaty border is much larger than that ceded in1837 and 1854 treaties, and includes prime fishing and hunting locations in the Gull Lake, Brainerd and Bemidji areas. This means that the direct loss to the largest Anishinabe bands, in territory that was un-ceded in 1854 and in which usufructuary rights were not abrogated subsequently, must be in the range of some $280 million, over just the past twenty-some years. In addition, hundreds of 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, State v. Butcher, 563 N.W.2d 776
annually, according to the State.\textsuperscript{248} The value of native usufructuary property rights was first estimated by the Seventh Circuit\textsuperscript{249} 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.\textsuperscript{250} In \textit{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.\textsuperscript{251}

And:

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

In \textit{LCO V}, the federal district court also found that in 1986, the average income level for a household that did not save anything was $20,036.\textsuperscript{252} The court found that “to provide plaintiffs the equivalent of a modest standard of living for the households of tribal members would require approximately $82,000,000.”\textsuperscript{253} Even if the income level required was equal to the average income of American Indians, it would take $22,500,000, or 4 million more than the land could produce under optimal conditions to satisfy the moderate living standard.\textsuperscript{254} The court concluded that “under the most optimal conditions,

\footnotesize{(Minn. App. 1997) and \textit{U.S. v. Lyons}, (supra). These direct and indirect damages are incalculable.}

\textsuperscript{248} \textit{Tri-Band Agreement, Article IV.}

\textbf{OBLIGATIONS AND RIGHTS OF THE STATE:}

A. Annual Payment: The State shall pay annually to the Grand Portage Band and Bois Forte Band the sum of one million six hundred thousand dollars ($1,600,000 each, and to the Fond du Lac Band the sum of one million eight hundred and fifty thousand dollars ($1,850,000) paid by the State pursuant to the settlement of litigation referenced in Minn. Stat. §§ 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.

\textsuperscript{249} LCO I and LCO II.

\textsuperscript{250} Which, of course, means that usufructuary rights remain intact in unceded territory as well.

\textsuperscript{251} LCO V, 686 F. Supp. 226, 233 (W.D. Wis. 1988).

\textsuperscript{252} LCO V, 686 F. Supp. at 228.

\textsuperscript{253} LCO V, 686 F. Supp. at 230.

\textsuperscript{254} LCO V, 686 F. Supp. at 230.
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." 255

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

[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. 256

Central to the court’s analysis was the finding in LCO V, where the court found that “even if the tribes could exploit every harvestable natural resource in the ceded territory, they would not derive sufficient income from those resources to provide their members with a moderate standard of living.” 257 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: 258

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 to be 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 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 food 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.

The scope of 19th Century usufructuary rights included a broad range of land use activities that the LOC litigation first attempted to catalogue.\footnote{As the Court explained in \textit{LOC III}, 653 F. Supp. 1420, 1424 (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,
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. The findings of the federal District Court in Lac Courte Oreilles described the rights retained by the Lake Superior Band, including:

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

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

The Chippewa harvested other miscellaneous resources, such as turtles and turtle eggs. The most important game for the Chippewa was the white-tailed deer…


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.”

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.

V. LACEY ACT FEDERAL CRIMINAL PROSECUTIONS FOR EXERCISE OF TREAY-GUARANTEED USUFRUCTUARY PROPERTY RIGHTS

Recently, a federal law enforcement “sting” operation resulted in federal criminal charges being brought under the Lacey Act of 1900 against several members of the Minnesota Chippewa Tribe for violation of tribal on-reservation fishing regulations. This prosecution occurred despite the Lacey Act specifically stating that:

> Nothing 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 . . .

From 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.

**Original Passage in 1900**

Iowa Congressman John Lacey first introduced the Lacey Act to the House of Representatives in the spring of 1900. He intended the law to "enlarge the powers of the Department of Agriculture," with the purpose of: (1) authorizing introduction and preservation of game, song, and wild birds, (2)

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262 Mille Lacs Band of Chippewa Indians v. Minnesota., 124 F.3d 904, 911 (8th Cir. 1997).
preventing the "unwise" introduction of foreign birds and animals, and (3) supplementing state laws for the protection of game and birds. 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. First, 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.

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. The state ownership doctrine was finally overturned in Hughes v. Oklahoma. 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 that traveled in interstate commerce.

The Black Bass Act of 1926

The original Lacey Act did not apply to fish. In 1926, the Black Bass Act aimed to augment

267 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. John Lacey).

268 33 Cong. Rec. 4871–74 (1900).

269 See, e.g., People v. Buffalo Fish Co., 58 N.E. 34 (N.Y. 1900).


272 See, e.g., Bowman v. Chicago Railway Co., 125 U.S. 465 (1888); Leisy v. Hardin, 135 U.S. 100 (1890). 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.

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 territorial law, as well as those killed illegally. 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.

**Lacey Act and Black Bass Act Amendments: 1930**

In 1930, the Black Bass Act was expanded to: 1) prohibit not only the transportation, but also the receipt for transportation of illegal bass; 2) include bass that had been "caught, killed, taken, sold, purchased, possessed, or transported" contrary to state law; 3) require accurate labeling of bass shipments; and 4) make all bass within a state subject to the state's laws. For example, the new Lacey Act applies to any "person, firm, corporation or association" that violated its provisions; targeted interstate shipments "by any means whatsoever," in violation of an underlying law; and expanded predicate laws to include federal and foreign laws.

**1947 Black Bass Act “other applicable law.”**

In 1947, the Black Bass Act was expanded to cover all "game fish," as that term was defined in state laws. 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. The statute was amended to cover game fish taken, transported, purchased, or sold contrary

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to state or "other applicable law." 277

In 1952 the Lacy Act was amended again. The bill had three stated purposes: (1) to develop a list of endangered species and regulating 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. 278, 279

1969 Amendments to the Lacey and Black Bass Acts

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 an Endangered Species Act. Section 2 of the Black Bass Act read as follows, in relevant part:

It shall be unlawful for any person to deliver or knowingly receive for transportation, or knowingly to transport, by any means whatsoever, from any State, Territory, or the District of Columbia, to or through any other State, Territory, or the District of Columbia, or to or through any foreign country, any black bass or other game fish, if

(1) such transportation is contrary to the law of the State, Territory, or the District of Columbia from which such black bass or other game fish is or is to be transported, or is contrary to other applicable law, or

(2) such black bass or other game fish has been either caught, killed, taken, sold, purchased, possessed, or transported, at any time, contrary to the law of the State, Territory, or the District of Columbia in which it was caught, killed, taken, sold, purchased, or possessed, or from which it was transported contrary to other applicable law . . . .

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” perpetrated by well-organized large volume criminal operations which generated substantial profits and “grim environmental consequences,” according to Congressional findings. Noting that the two acts needed to keep pace with fast-growing global trade

277 Id.


\textbf{The 1988 Lacey Act Amendments and the Clash with Indigenous Usufructuary Property}

The 1988 amendments to the Lacey Act was the first time Congress failed to create an exception to the law for tribal members exercising their federally guaranteed usufructuary property rights. The 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 3372(a)(2) and (a)(3), which had applied to wildlife "taken, possessed, transported or sold" in violation of state or foreign law.\footnote{16 U.S.C. § 3372(a)(1), (a)(2), (a)(3) (1981) (amended 1988).} Congress amended subsection 3372(a)(1) so that the language pertaining to the types of sufficient underlying violations mirrored that of the companion sections.\footnote{16 U.S.C. § 3372(a)(1).} However, in light of existing Supreme Court precedent cited in \textit{Minnesota v. Mille Lacs Band of Chippewa Indians}\footnote{Minnesota v. Mille Lacs Band of Chippewa Indians (\textit{Mille Lacs}), 526 U.S. 172 (1999).} such as the \textit{Menominee} opinion, and \textit{United States v. Dion},\footnote{Menominee Tribe of Indians v. United States, 391 U.S. 404 (1968).} and the prefatory language of the Lacey Act,\footnote{United States v. Dion, 476 U.S. 734 (1986).} itself, “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.\footnote{16 U.S.C. § 3372.}

\textbf{Pre-Mille Lacs Rejection of Criminalization}

In \textit{Leech Lake Band of Chippewa Indians v. Herbst}, Judge Devitt was “satisfied that the Leech Lake Indians held aboriginal fishing and hunting rights, that these rights were preserved by treaty

\begin{itemize}
\end{itemize}
with the United States . . .” 289 The district court 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 established by reservation treaties in 1855, 1864 and 1867. 290 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. 291 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 enjoined the state from enforcing its laws against them. 292

United States v. Bresette

Twenty years after Herbst, the district court decided United States v. Bresette, 293 which involved defendant members of the Chippewa Indian Tribe who were charged with a violation of the Migratory Bird Treaty Act 294 for selling migratory bird feathers, in the form of “dream catchers.” The court held that the defendants have the right to sell migratory bird feathers obtained from land ceded by the Chippewa in the treaties of 1842 and 1854. 295 To get to this conclusion, the court presciently applied the Mille Lacs-type analysis and found that the “defendants have a treaty right to sell these bird feathers

289 Herbst, 334 F. Supp. at 1006.
290 Herbst, 334 F. Supp. at 1004.
291 State v. Jackson, 16 N.W.2d 752 (Minn. 1944).
292 Herbst, 334 F. Supp. at 1006. The assumption by Judge Devitt that only pre-existing “aboriginal rights” were at issue was historically inaccurate. The 1825/26 Treaties in which the U.S. government recognized the sovereignty of the Anishinabe/Ojibwe and “treaty-rights,” not aboriginal “rights” preceded the reservation treaties of 1855, 1864 and 1867. However, Judge Devitt failed to recognize that the 1825/26 Treaties had guaranteed usufructuary property rights, according to the method advanced by the Court in the Milles Lacs opinion, in all of the territory of Minnesota which had not yet been ceded in the 1837 Treaty, which was the subject of that case. Although written some 30 years before Mille Lacs, and not based on the treaty-guaranteed usufructuary property rights 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 rights analysis adopted by the Court.
295 Bresette, 761 F. Supp. at 660.
which has not been abrogated . . . ”

The court referred to “the Voigt cases” from the Seventh Circuit, which involved the treaties of 1837, 1842, and 1854, in which the Chippewa ceded territory in the Northern Great Lakes region to the federal government. The 1854 treaty covers much of northeastern Minnesota, including the Fond Du Lac reservation. 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.

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.

The second clause of the 1854 treaty also specifically states that the Mississippi Chippewa west of the Treaty boundary maintain their previous rights unchanged, these being defined by the “Sovereignty” Treaties of 1825/26. 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.” This would include the sale of fish, for which Lacey Act federal prosecutors are sending undercover agents carrying out “sting” operations onto reservations across Northern Minnesota.

The Lacey Act post-Mille Lacs

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296 Bresette, 761 F. Supp. at 664.
297 Bresette, 761 F. Supp. at 660.
299 Bresette, 761 F. Supp. at 661 (citing Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt, 700 F.2d 341, 364 (7th Cir. 1983)).
300 Bresette, 761 F. Supp. at 660.
The district court’s analysis in *United States v. Smiskin*, 302 is informative of Treaty analyses post-*Mille Lacs*. In *Smiskin*, the federal government charged two Yakama tribal members with violations of the federal Contraband Cigarette Trafficking Act (CCTA). 303 The Smisks allegedly transported unstamped cigarettes from smoke shops on an Idaho Indian reservation to smoke shops on various Indian reservations in Washington.

The CCTA makes it “unlawful for any person knowingly to ship, transport, receive, possess, sell, distribute, or purchase contraband cigarettes.” 304 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 which are in the possession of a person not otherwise authorized by the State to possess such cigarettes. 305 The State of Washington generally requires wholesalers to affix either a "tax paid" or "tax exempt" stamp to cigarette packaging prior to sale. 306 Individuals other than licensed wholesalers must “give . . . notice to the [Liquor Control Board] in advance of [transporting unstamped cigarettes].” 307 Yakama tribal members are not exempt from this pre-notification requirement.

The Smisks did not give the notice to the State prior to transporting unstamped cigarettes, thus making their cigarettes unauthorized under State law and contraband under the CCTA. The district court interpreted the Yakama Treaty of 1855 and dismissed the indictment, finding no legal basis for the Government’s prosecution of the Smisks under the CCTA.

The district court also held, and the Ninth Circuit Court of Appeal affirmed, that the state’s pre-

302 United States v. Smiskin, 487 F. 3d 1260 (9th Cir. 2007).
303 *Smiskin*, 487 F. 3d at 1262–63.
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.”\(^{308}\) In doing so, the court relied extensively on the \textit{Mille Lacs} case and prior precedent in analyzing the interpretation and application of treaty language:

\begin{quote}
[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 treaty.” (quoting \textit{Cree II}, 157 F.3d at 772 (citing \textit{Mille Lacs}, 526 U.S. at 196, 200)).\(^{309}\)
\end{quote}

And:

\begin{quote}
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 ... (citing \textit{Mille Lacs Band}, 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").\(^{310}\)
\end{quote}

The court had already held in \textit{Cree II} that the Yakama Treaty's Right to Travel provision guaranteed tribe members the “right to transport goods to market over public highways without payment of fees for that use.”\(^{311}\)

Following \textit{Mille Lacs} analysis, the \textit{Smiskin} 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,”\(^{312}\) 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.”\(^{313}\) Therefore, the pre-notification requirement is a restriction and

\(^{308}\) \textit{Smiskin}, 487 F. 3d at 1262–63.

\(^{309}\) \textit{Smiskin}, 487 F. 3d at 1265.

\(^{310}\) \textit{Smiskin}, 487 F. 3d at 1267.

\(^{311}\) Cree v. Flores, 157 F.3d 762, 769.

\(^{312}\) \textit{Smiskin}, 487 F. 3d at 1266 (quoting Yakama Indian Nation v. Flores, 955 F. Supp. 1229, 1248 (D. Wash. 1997)).

\(^{313}\) \textit{Smiskin}, 487 F. 3d at 1266 (quoting \textit{Flores}, 955 F. Supp. at 1251 (D. Wash. 1997)).
condition on the right to travel that violates the Yakama Treaty.”

VI. PROSPECTS FOR NATURAL RESOURCE CO-MANAGEMENT IN ALL OF NORTHERN MINNESOTA – THE 1825-26 “SOVEREIGNTY TREATY” AREA

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

[...]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.

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

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

In interpreting the reach of the usufructuary rights within the 1854 ceded territory, the Eighth Circuit held in United States v. Gotchnik, that the off-reservation use of motorized craft and mechanized equipment was subject to prohibition in the Boundary Water Canoe Area, despite the undisputed right of Anishinabe to hunt, fish and gather in the Arrowhead region, guaranteed by the 1854 Treaty and recognized by the Boundary Waters Act, itself. Anishinabe usufructuary rights do not prevail over all types of regulation,

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314 Smiskin, 487 F. 3d at 1266.
315 Smiskin, 487 F. 3d at 1266.
316 Mille Lacs Band of Chippewa Indians v. Minnesota, 124 F.3d 904, 911 (8th Cir. 1997).
318 United States v. Gotchnik, 222 F.3d 506 (8th Cir. 2000).
319 Gotchnik, 222 F.3d at 510. The Court resolved the contradiction between section 17 of the Boundary Waters Act, which provides that nothing in the Act shall affect existing treaties, and section 4, which imposes extensive limitations on motorized
particularly when federal wilderness area is at issue.\textsuperscript{320}

A model of state-tribal co-management is the Great Lakes Indian Fish and Wildlife Commission (GLIFWC). The GLIFWC is a co-management and licensing body created to implement the resource sharing concept required by the treaty-guarantees of the United States.

In Minnesota, 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.

\textbf{Natural Resources Co-management to ProtectUsufructuary Property Rights from Unconstitutional “Taking” without Due Process}

However, the question remaining in both Wisconsin and Minnesota for the 21st Century, with respect to the now well-established principle of treaty-guaranteed usufructuary property rights, will be the scope of those rights as related to land use, development and environmental issues. The late 20th Century saw environmental regulation and respect for healthy resource development emerge as major issues, based largely on state and federal administrative regulation. Recognition of off-reservation usufructuary transport in the BCA because the bands “presented no evidence, historical or otherwise, to suggest that the signatories adhered to a different understanding.” \textit{Id.}

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

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

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

\textsuperscript{320} \textit{But see} United States v. Bresette, 761 F. Supp. 658 (D. Minn. 1991) in which the court held that the usufructuary rights in the 1842 and 1854 Treaties encompassed the taking of migratory birds, including eagles, for their feathers for ceremonial purposes despite the limitations of the federal Migratory Bird Treaty Act, §§2–12, 16 U.S.C.A. §§703–711.
property rights requiring protection suggests that native people will have an increasingly important place
at that table, when decisions are made, and income is distributed regarding wildlife harvesting and
resource development. The Indian Commerce Clause of the Constitution establishes a direct relationship
between the federal government and Tribal Nations. With respect to federal environmental regulation,
Congress has specifically provided for a tribal role in the Clean Water Act, Clean Air Act, Safe
Drinking Water Act [Public Health Service Act], and the Comprehensive Environmental Response
Compensation and Liability Act.

An example of this dual management in practice is the dispute over a proposed mining operation
in north central Wisconsin in which Wisconsin Anishinabe usufructuary property rights were part of the
discussion in the siting of a mining operation in Crandon, Wisconsin and were a factor in the
Environmental Protection Agency (EPA) Environmental Impact Statement (EIS):

4.2.10 Indian Trust Assets

Indian Trust Assets include on- and off-reservation issues about water, fishing, hunting,
gathering, and other resources guaranteed by Treaty rights contamination of surface and/or
groundwater from a leak or spill, and other Treaty rights related to water contaminants
affecting fish and other aquatic resources, and other Treaty rights related to fishing, fish
and other aquatic resources and other Treaty rights related to hunting and wildlife species
and other Treaty rights related to gathering wild rice, other plants, and medicines.

4.2.25 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

321 U.S. Const. art. I § 8, cl. 3 states that the United States Congress shall have power “To regulate Commerce with foreign
Nations, and among the several States, and with the Indian Tribes.”
323 42 U.S.C. § 7474(c).
325 42 U.S.C. § 9626.
of the Mole Lake Reservation.\textsuperscript{326}

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

4.2.15 Socioeconomics
Socioeconomics includes issues about Native American community issues include impacts on social and economic systems, cultural, spiritual, well-being, and subsistence aspects of Native American life, racism in schools, loss or decline of wild rice production, and changes in utilities, housing, employment, and income during and after the project.\textsuperscript{327}

Minnesota’s Anishinabe people should have been entitled to such a rigorous evaluation of the impact of John D. Rockefeller purchasing and developing the Mesabe Iron Range in the late 19th Century, under the Treaties of 1795, 1825, 1826, 1837, 1854, the Executive Order of 1850 and the verbal assurances of Alexander Ramsey in 1863. The Anishinabe are certainly entitled to such assurances in all of northern Minnesota, not just the “arrowhead,” after the LOC cases and Mille Lacs, in the 21st Century. Several early treaties permitted the mining of minerals, logging or other development, whether the United States gained title to the territory\textsuperscript{328} or not, but not one treaty prohibits the payment of royalties or fees,\textsuperscript{329} particularly if the payment is for diminution of usufructuary property rights, and the ability to exercise the right to a modest living from the land, which was the promise the United States made to gain title to the land in the first place.

\textsuperscript{326} Id.
\textsuperscript{327} Id.
\textsuperscript{328} Treaty of 1826:
ARTICLE 3 The Chippewa tribe grant to the government of the United States the right to search for, and carry away, any metals or minerals from any part of their country. But this grant is not to affect the title of the land, nor the existing jurisdiction over it.
\textsuperscript{329} And, as noted earlier, the Anishinabe agreed to cede mining rights to the United States, but they did not agree to forego compensation for the either mineral depletion or diminution of their ability to exercise traditional usufructuary rights.
Royalty payments to the Anishinabe, for timber harvest in National and State Forest, and mineral explorations rights would be consistent with the modern trend toward protecting property from “takings” by government without “due process,” which certainly describes what has happened with respect to the Anishinabe with respect to United States government treaty-guaranteed usufructuary property rights in 1825/26 Treaty territory in Minnesota. And, there is precedent for such a concept. In Wisconsin, the Mole Lake Band took on the siting of a mine in Crandon Wisconsin citing the Seventh Circuit LCO opinions, and the harm the mine would cause the ability of the Band to exercise its usufructuary rights, and prevailed. A situation similar to the Crandon, Wisconsin mine has recently arisen in Minnesota that threatens the usufructuary property of the Ojibwe with a government taking, without due process.

In late 2013, the Polymet Mining Company filed a preliminary environmental impact statement which proposes a copper-nickel mine on the site of a former iron mine in northern Minnesota. The Company concedes that sulphuric acid will be a by-product of 20 years of mine production for some 500 years. The mine is located in the 1854 Treaty ceded territory, which the State of Minnesota; the 7th Circuit; and the Milles Lacs majority and dissent all have acknowledged created usufructuary property in favor of the Ojibwe in the entire ceded territory, not just on the reservations within the Treaty-ceded territory. Before the Polymet project can go forward, the Ojibwe must be recognized as equal-partners with the State of Minnesota, with equal rights to protect, before the mine is permitted. Five hundred years is much, much longer than the iconic “to the seventh generation” decision-making often attributed to native peoples. The Milles Lacs usufructuary property analysis creates a Constitutional requirement that they are so included, as a matter of fundamental due process under the “takings” clause.

CONCLUSION

330 The question of proper allocation of timber and resource harvest on reservation is not a new issue and has its roots in the 19th Century, see Mole Lake Band v. United States, 126 Ct. Cl. 596, 1953 WL 6071 (Ct. Cl.)(1953).
The unanimity of the Supreme Court in the *Minnesota v. Mille Lacs Band of Chippewa Indians* regarding treaty-guaranteed usufructuary property rights requires a re-examination of all of the treaties into which the Anishinabe of Minnesota entered with the United States. There is good reason to conclude that, after the clarification of usufructuary property rights analysis that the majority and dissenting opinions in *Mille Lacs* have brought to the question, the Anishinabe in Minnesota have long been guaranteed the same off-reservation usufructuary rights that have been recognized in northern Wisconsin since 1987, in Minnesota’s arrowhead since 1987, and in the 1837 Treaty territory from Lake Mille Lacs to Wisconsin since 1999.

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

While the method of usufructuary property-rights analysis set forth by the Supreme Court in the *Mille Lacs* opinion is not limited to the Chippewa Treaties only, this discussion is limited to the application of the analysis to the treaties between the United States and the Chippewa Bands of Northern Minnesota. Other treaties will have different language, different histories and different characteristics that come down to the present. Meticulous historical and contextual research, and conceptualizing treaties as property-creating instruments well-rooted in Roman and Common Law 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*\(^{331}\) property-based jurisprudence brought power to those without, at another time in history.

\(^{331}\) *Goldberg v. Kelly*, 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.
APPENDIX I

January 1, 1855

<table>
<thead>
<tr>
<th>Year</th>
<th>Territory</th>
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<tbody>
<tr>
<td>1825</td>
<td>Territory Unceded</td>
</tr>
<tr>
<td>1837/1854</td>
<td>Territory Ceded</td>
</tr>
<tr>
<td>1847</td>
<td>Territory Ceded</td>
</tr>
<tr>
<td>1854</td>
<td>Territory Unceded</td>
</tr>
</tbody>
</table>

**Territory Unceded**

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

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

**Territory Unceded**
Treaty-guarantee: 1825 usufructuary rights not abrogated by Mississippi Band in territory "west of 1854 Treaty boundary."