Treaty-Guaranteed Usufructuary Rights: *Minnesota v. Mille Lacs Band of Chippewa Indians* Ten Years On

by Peter Erlinder

Peter Erlinder is Professor of Law, Wm. Mitchell College of Law, and Director, International Humanitarian Law Institute.

Editors' Summary

In *Minnesota v. Mille Lacs Band of Chippewa Indians,* the U.S. Supreme Court unanimously held that U.S. treaty negotiators severed the perpetual right to use land from formal title to the land in an 1837 (and 1854) Treaty. The *Mille Lacs* majority and dissent differed only as to whether treaty-guaranteed usufructuary property rights had been abrogated by subsequent events. Two major questions remain after *Mille Lacs*: (a) did the Anishinabe (Chippewa) have treaty-guaranteed usufructuary rights outside the 1837 and 1854 ceded territory; and (b) if so, are those treaty-guaranteed usufructuary rights also valid today?

I. Origins

> 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[1]

In *Minnesota v. Mille Lacs Band of Chippewa Indians,*[2] the U.S. Supreme Court unanimously held that, by guaranteeing Anishinabe[3] (Chippewa) rights to hunt, fish, and gather in the first portion of Minnesota territory ceded to the United States in 1837, U.S. treaty negotiators severed the right to *use* the land, a concept known as usufructuary property rights since Roman times,[4] from formal title to the land.[5] And, by so doing, the U.S. government vested the Anishinabe with treaty-guaranteed off-reservation usufructuary rights that could not be lawfully taken from them without congressional authorization,[6] either in a treaty or legislation, expressed in language understood as such a taking by the Anishinabe.

The *Mille Lacs* majority and dissenting opinions differed only as to whether the 1837 treaty-guaranteed usufructuary property rights had been abrogated by subsequent events. The *Mille Lacs* dissent did not question usufructuary property rights guaranteed in an 1854 Treaty, referenced by the majority, which had been upheld by the U.S. Court of

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1. 526 U.S. 172, 29 ELR 20557 (1999).
2. *Id.* at 175.
3. The *Anishinabe*, which means "original man" or "people," in English, were referred to by others as *"o-jib-weg,"* (those who make pictographs), which was corrupted into "Ojibwa," which was then Anglicized as "Chippewa." The Chippewa are part of the larger Algonquin language group that inhabited woodlands in much of the northeastern United States and southeastern Canada. *See* Edmund Jefferson Danziger, The Chippewas of Lake Superior 7 (Univ. of Oklahoma Press, Norman 1979). "Anishinabe" is used throughout the Article in recognition of Anishinabe self-identity, and to emphasize that the legal issues discussed herein originate from the survival practices of an indigenous culture that preexisted 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).
4. *Usufruct, n.* [fr. Latin *usufructus*] *Roman & civil law*. A right to use and enjoy the fruits of another's property for a period without damaging or diminishing it, although the property might naturally deteriorate over time . . . . La. Civ. Code art. 535. *Usufructuary, n. Roman & civil law*. One having the right to a usufruct; specif. a person who has the right to the benefits of another's property. 1 C.J.S. *Estates* §§2-5, 8, 15-21, 116-28, 137, 243.
5. *See generally* Recognizing and Protecting Native American Treaty Usufructs in the Supreme Court: The *Mille Lacs* Case, 21 Pub. Land & Resources L. Rev. 169 (2000).
6. United States v. Dion, 476 U.S. 734, 16 ELR 20676 (1986).

Appeals for the Seventh Circuit a decade earlier, nor the well-established principle that congressional abrogation of treaty-guaranteed hunting, fishing, and gathering rights was not to be lightly inferred,[7] or that treaties must be liberally interpreted, as understood by the Indians.[8]

Although this Article necessarily focuses on usufructuary property rights in northern Minnesota because the Supreme Court analysis in the *Mille Lacs* opinion arose in that context, the implications of the Supreme Court's reasoning are much, much broader. A similar analysis is applicable to any treaty in which U.S. treaty negotiators induced native peoples to give up formal "title" to land, while promising the right to "live off the land" in a traditional way. The particulars will vary from state to state, and treaty to treaty, but the general principle is now firmly established, but relatively unexplored, as source of additional off-reservation property rights, not only in the exercise of individual usufructuary rights to hunt, fish, and gather but, more importantly, in collective tribal regulation and management of activities that might diminish the off-reservation usufructuary property interests. These off-reservation usufructuary property rights will have to be accommodated, post-*Mille Lacs*, not only in Minnesota, but also in every state in which such treaties have not been abrogated by the U.S. Congress. And, as with other property rights, not "treaty-rights" per se, due process protections under the U.S. Constitution would appear to be applicable as they would in any other "takings" context.[9]

A. *Off-Reservation Usufructuary Property Rights*

As an example of the *Mille Lacs* usufructuary property analysis applied in practice, this Article elaborates on Minnesota treaty history to include usufructuary property rights not previously examined in a litigation context: (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 of La Pointe, that explicitly guarantees usufructuary property rights in unceded territory west of the 1854 Treaty boundary to the Mississippi Band of Anishinabe.[10]

These treaties, which remain largely unexamined in legal literature and case law,[11] are likely to be sources of a deeper understanding of as yet undeveloped Anishinabe usufructuary property rights in the 21st century. A similar analysis of treaties in other jurisdictions, which may have been thought settled prior to the *Mille Lacs* analysis of usufructuary property rights created by U.S. treaty negotiators in the promises of continuing "use of the land," deserve another look in other jurisdictions as well.

B. *Modern Usufructuary Property Rights and Natural Resource Co-Management*

Because usufructuary property rights include "the right to modest living" from living off the land, joint management or leasing of usufructuary rights have been the means by which the long-term value[12] of these off-reservation property rights have been protected in Minnesota and Wisconsin, post-*Mille Lacs*. This system of mandatory co-management of usufructuary property has land use implications far beyond off-reservation wildlife harvest and promises a much-expanded role for tribal governments in resource management beyond the boundaries of the reservations to the areas delineated by treaties,[13] and a potential source of income for some of our nation's most impoverished citizens, its earliest inhabitants.[14] The protection of off-reservation, usufructuary property rights also implies a completely new source of regulatory authority and tribal income that has gone largely unrecognized by tribal governments, as well as state and federal governmental regulatory bodies, with some exceptions cited in this Article. However, in light of the unanimous treaty-guaranteed usufructuary property analysis in the *Mille Lacs* opinion, co-management of off-reservation resources where treaty-guaranteed usufructuary property rights continue to exist cannot be ignored much longer.

II. Background to the Restoration of Treaty-Guaranteed Native American Usufructuary Property Rights: The Anishinabe of 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,

7. Menominee Tribe v. United States, 391 U.S. 404, 413 (1968) (citing Pigeon River Improvement, Slide & Boom Co. v. Charles W. Cox, Ltd., 291 U.S. 138, 160 (1934) ("the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress")).
8. Choctaw Nation v. United States, 318 U.S. 423, 431-32 (1943); Worcester v. Georgia, 31 U.S. 515, 582 (1832).
9. U.S. Const. amends. V & XIV.
10. 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.
11. Mole Lake Band et al v. United States, 126 Ct. Cl. 596 (Ct. Cl. 1953); State v. Keezer, 292 N.W. 2d 714 (Minn. 1980).
12. Patrick Reis, *Obama Admin Strikes $3.4B Deal in Indian Trust Lawsuit*, N.Y. Times, Dec. 8, 2009. *See also* Cobell v. Salazar (Cobell XXII), 573 F.3d 808 (D.C. Cir. 2009). *See* Great Lakes Regional Collaboration, *Tribal Nations Issues and Perspectives*, Version 1.0, Apr. 26, 2005, 15:
> *Federal Trust Responsibility*
> As a consequence of United States Supreme Court rulings that refer to Tribal Nations as "domestic dependent sovereigns," the United States, and all of its agencies, owe a special and unique duty to Tribal Nations—what the Supreme Court calls a "trust responsibility."
13. Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt, 700 F.2d 341 (7th Cir. 1983), *amended on denial of reh'g and reh'g en banc* Mar. 8, 1983.
14. *See* Connolly, *supra* note 3. This Article is 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.

> 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*[15]

A. *Treaty-Guaranteed Indian Property Rights in the Northwest Territory*

Britain ceded the Northwest Territory in the 1783 Treaty of Paris, which formally ended the American Colonies' war for political independence.[16] 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. . . ."[17] to be national policy toward the Indians in all of the Northwest Territory, before the Constitution was ratified, a federal executive or judiciary established, and, perhaps most significantly, before a standing army capable of occupying or defending the huge new Northwest Territory could be mustered by a centralized government.[18] The national policy of respect for Indian property rights was established by the United States more than 75 years before the state of Minnesota itself was carved out of the Northwest Territory,[19] and was reflected in the 1795 Treaty of Greenville, negotiated with the tribes in the Northwest Territory, only a few years after the Constitution and the Bill of Rights had been ratified.[20]

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

Detailed histories of the 1837, 1854, and 1855 Treaties are well canvassed in both the district court opinions in the *Mille Lacs*[21] and *Lac Courte Oreilles*[22] litigation, but the treaties that preceded the first cession of Minnesota territory in 1837, i.e., the Treaties of 1795, 1825, and 1826, 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 guaranteed hunting, fishing, and gathering rights to the Anishinabe on the territory of what is now Minnesota, and each, like the 1837 and 1854 Treaties, has never been abrogated by treaty or specific congressional enactment.

As late as 1863, U.S treaty negotiators, in the person of the first Minnesota governor, Alexander Ramsey, were still verbally promising that the Anishinabe would retain the hunting, fishing, and gathering rights on 10-million acres of newly ceded territory for an indefinite period, although negogiators had stopped putting it in writing after 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 intergenerational memory of past treaty negotiations, these treaties should take on new significance in interpreting the silence of all later treaties on the question of long-established usufructuary rights.

C. *The 1795 Treaty of Greenville*[23]

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 set a boundary line between the lands of the United States and the lands of the Indian Tribes."[24] 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's respect for Indian property 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

15. Emphasis added. An Ordinance for the Government of the Territory of the United States Northwest of the River Ohio, Art. III, 1 Stat. 50, 52 (1787) [hereinafter Northwest Ordinance].
16. Definitive Treaty of Peace Between the United States of America and His Britannic Majesty, 8 Stat. 80 (1783).
17. Northwest Ordinance, Art. III, 1 Stat. 50, 52 (1787).
18. *See* Mole Lake Band et al v. United States, 126 Ct. Cl. 596 (Ct. Cl. 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. . . ."
19. Minnesota Statehood Enabling Act, 11 Stat. 166-67, 34 Congress, 2d Sess., ch. 60, Feb. 26, 1857.
20. 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.
21. Mille Lacs Band of Chippewa Indians v. Minnesota, 861 F. Supp. 784 (D. Minn. 1996); Mille Lacs Band of Chippewa Indians v. Minnesota, 952 F. Supp. 1362 (D. Minn. 1997).
22. Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin (LCO III), 653 F. Supp. 1420 (W.D. Wis. 1987); Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin (LCO IV), 668 F. Supp. 1233 (W.D. Wis. 1987); Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin (LCO V), 686 F. Supp. 226 (W.D. Wis. 1988); Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin. (LCO VI), 707 F. Supp. 1034 (W.D. Wis. 1989); Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin, (LCO VII), 740 F. Supp. 1400 (W.D. Wis. 1990); Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin (LCO VIII), 758 F. Supp. 1262 (W.D. Wis. 1991).
23. Treaty with the Wyandot, etc., 7 Stat. 49 (Aug. 9, 1795) [hereinafter Treaty of Greenville].
24. *See* State v. Keezer, 292 N.W.2d 718 (Minn. 1980).

> white persons . . . the Tribes acknowledge themselves to be under the protection of the United States and no other power whatever.[25]

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.[26]

D. The 1825 Treaty of Prairie du Chien[27]

Like the Treaty of Greenville, the 1825 Treaty of Prairie du Chien did not cede territory to the United States, but treaty negotiators *did* prevail upon the Chippewa (Anishinabe) and Sioux (Dakota)[28] 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 south[29]—with disputes to be resolved with the assistance of the United States, a signatory to the Treaty:

> Preamble: *THE United States of America* . . . to promote peace among these tribes, and to establish boundaries among them . . . *have invited the Chippewa [and Sioux]* . . . *assemble together* . . . *to accomplish these objects; and to aid therein*, . . . and after full deliberation, the said tribes . . . have agreed *with the United States*, and with one another, upon the following articles.[30]

There can be no serious dispute that the United States initiated the 1825 Treaty negotiations,[31] acted as facilitator,[32] committed the Treaty terms to writing,[33] and signed the Treaty as a party.[34] 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 . . . .[35]

The terms of the Treaty of Prairie du Chien 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 of Greenville, 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. . . .[36]

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

> *Article 15*
> This treaty shall be obligatory on the tribes, parties hereto, from and after the date hereof, and on the United States, from and after its ratification by the government thereof. . . .

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

E. The 1826 Treaty of Fond du Lac of Lake Superior[37]

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

25. Art. V, Treaty of Greenville, 7 Stat. 49, 52 (1795).
26. Art. VI, Treaty of Greenville, 7 Stat. 49, 52 (1795).
27. Treaty with the Sioux and Chippewa, Sacs and Fox, Menominie, Ioway, Sioux, Winnebago, and a portion of the Ottawa, Chippewa, and Potawattomie Tribes, 7 Stat. 272 (1825), a.k.a. 1825 Treaty of Prairie du Chien [hereinafter Treaty of Prairie du Chien].
28. The "Dakota," a Great Plains culture, inhabited the eastern range of the Lakota language group, which also included the Nakota languages. Anishinabe called them Nadowessioux (little-snakes, or little-enemies). The French shortened the name given them by their enemies to "Sioux." The Article will refer to the Lakota groups inhabiting Minnesota as the Dakota.
29. Treaty of Prairie du Chien, 7 Stat. 272, 272-73 (1825).
30. Emphasis added. *Id.*
31. *Id.*
32. *Id.*
33. *Id.* There is 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.
34. *Id.* at 275.
35. *Id.* at 274-75.
36. *Id.*
37. Treaty with the Chippewa, 7 Stat. 290 (1826) [hereinafter Treaty of Fond du Lac].

Mississippi.[38] As promised, a secondary treaty was entered into on August 5, 1826,[39] that refers to the 1825 Treaty in its opening clause:

> WHEREAS a Treaty was concluded at Prairie du Chien in August last, by which the war, which has been so long carried on, to their mutual distress, between the Chippewas and Sioux, was happily terminated by the intervention of the United States; and whereas, owing to the remote and dispersed situation of the Chippewas . . . the United States agreed to assemble the Chippewa Tribe upon Lake Superior during the present year, in order to give full effect to the said Treaty, to explain its stipulations and to call upon the whole Chippewa tribe, assembled at their general council fire, to give their formal assent thereto, that the peace which has been concluded may be rendered permanent. . . .[40]

The 1826 Treaty of Fond du Lac provides ample evidence why the U.S. treaty negotiators, as well as the Anishinabe, understood that their continuing ability to live off the land was essential to their survival. Article 3 acknowledges Anishinabe title in the land, and jurisdiction over its use: "The Chippewa tribe grant to the government of the United States the right to search for, and carry away, any metals or minerals from any part of their country. But this grant is not to affect the title of the land, nor the existing jurisdiction over it."[41] 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.[42]

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.[43]

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.[44] Another relatively contemporary indication of the importance with which Congress treated treaty rights to wild game, such as those guaranteed in the 1825 Treaty of Prairie du Chien, can be seen in an 1834 statute in which Congress imposed a $500 fine for non-native hunting and fishing "within the limits of any tribe with whom the United States has existing treaties,"[45] 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.

These were the circumstances in the rest of Minnesota when the first land cession treaty with the United States was negotiated in 1837, under which the right to hunt, fish, and gather in ceded territory was specifically retained. The validity of those usufructuary rights after cession of the 1837 Treaty of St. Peters territory to the United States was at issue before the Supreme Court in the *Mille Lacs* case.[46]

III. The Supreme Court's "Re-Discovery" of Treaty-Guaranteed Usufructuary Property Rights: *Minnesota v. Mille Lacs Band of Chippewa Indians*[47]

> [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[48]

38. Treaty of Prairie du Chien, 7 Stat. 272, 275 (1825):
    Article 12:
    The Chippewa tribe being dispersed over a great extent of country, and the Chiefs of that tribe having requested, that such portion of them as may be thought proper, by the Government of the United States, may be assembled in 1826, upon some part of Lake Superior, that the objects and advantages of this treaty may be fully explained to them, so that the stipulations thereof may be observed by the warriors. The Commissioners of the United States assent thereto, and it is therefore agreed that a council shall accordingly be held for these purposes.
39. Treaty of Fond du Lac, 7 Stat. 290 (1826).
40. *Id.*
41. 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.
42. Treaty of Fond du Lac, 7 Stat. 290, 291 (1826).
43. *Id.*
44. *Id.*
45. Title XXVIII, ch. 4, §2137.
46. Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 175, 29 ELR 20557 (1999).
47. *Id.*
48. Emphasis added. *Id.*

A. A Unanimous Court: "U.S. Treaties Guarantee Anishinabe Usufructuary 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.[49] To secure Anishinabe "consent" U.S. treaty negotiators took the approach of severing formal title to land[50] from the continued use of the land for traditional means of survival,[51] thus guaranteeing the Anishinabe 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."[52] The majority and dissent in *Mille Lacs* agreed that this clause of the Treaty of St. Peters guaranteed usufructuary property rights to the Anishinabe that did not pass with title to the United States.[53] Furthermore, Anishinabe hunting, fishing, and gathering rights in the rest of what is now Minnesota were not diminished on *unceded* territory, *outside* the 1837 Treaty boundary, even though the Treaty of Greenville, Treaty of Prairie du Chien, and Treaty of Fond du Lac treaty-guaranteed hunting, fishing, and gathering rights[54] were not specifically mentioned in the Treaty of St. Peters, or in the *Mille Lacs* opinion, itself.

All parties in *Mille Lacs* conceded that the 1837 Treaty specifically reserved the treaty-guaranteed usufructuary rights in the ceded territory "during the pleasure of the President of the United States."[55] Minnesota argued that President Zachary Taylor[56] 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). 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 preexisting treaties that were inconsistent with state sovereignty over wildlife regulation, although the Supreme Court heard previous cases in which similar arguments had been made.

1. President Taylor's 1850 Executive Order

The 5-4 majority held that President Taylor's Executive Order was ineffective in abrogating the usufructuary rights guaranteed in the Treaty of St. Peters, for several reasons relating to an intricate analysis of treaty language and historical context.[57] 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,"[58] but did not mention removal of the Anishinabe from the Treaty territory. According to the majority, this meant that the agreement in the Treaty of St. Peters was unlike other treaties that *did* provide that the Anishinabe were, "subject to removal therefrom at the pleasure of the President of the United States."[59] 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.[60] The majority considered this undisputed fact to be recognition by the Territorial Legislature that the Treaty of St. Peters itself did not confer removal power on the president, and that removal would require congressional action.[61] 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 4, 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

49. Treaty with the Chippewa, 7 Stat. 536 (1837) [hereinafter Treaty of St. Peters].
50. Treaty of St. Peters, 7 Stat. at 537; *Mille Lacs*, 526 U.S. at 176.
51. The concept of usufructuary rights, "use rights" retained after formal transfer of title, is similar to the more familiar concept of "easement," which also permits use of property owned by another, either through formal agreement or on the basis of unchallenged usage over time. When title to Anishinabe land transferred to the United States, the traditional sovereign rights to hunt, fish, and gather became usufructuary rights to make use of the property of another, although as exemplified by the cession of land in the 1837 Treaty, nothing at all had changed from the standpoint of the Anishinabe. *Mille Lacs*, 526 U.S. 172.
52. Treaty of St. Peters, 7 Stat. 536, 537 (1837).
53. *Mille Lacs*, 526 U.S. at 200; Dissent, 526 U.S. at 208.
54. Treaty of Greenville, Art. III, 7 Stat. 49, 49-50 (1795); Treaty of Prairie du Chien, Art. 5, 7 Stat. 272, 273 (1825); Treaty of Fond du Lac, 7 Stat. 290, 290 (1826).
55. Treaty of St. Peters, 7 Stat. 536 at 537 (1837).
56. "Old Rough and Ready," the 12th president, fought in the War of 1812, the Black Hawk War of 1832, and the Second Seminole War of 1835, as well as in the Mexican-American War.
57. For critiques of the *Mille Lacs* decision, see generally Kari Krogseng, *Natural Resources Law: Resource Conservation:* Minnesota v. Mille Lacs Band of Chippewa Indians, 27 Ecology L.Q. 771 (2000); Jason Ravnsborg, Minnesota v. Mille Lacs Band of Chippewa Indians: *The Court Goes on Its Own Hunting and Fishing Expedition*, 4 Great Plains Nat. Resources J. 312 (2000); Joshua C. Quinter, Minnesota v. Mille Lacs Band of Chippewa Indians: *Should the Courts Interpret Treaty Law to Empower Native American Tribes to Hatchet the Environment*, 11 Vill. Envtl. L.J. 461 (2000).
58. Treaty of St. Peters, 7 Stat. 536, 537 (1837).
59. 1842 Treaty, Art. 6, 7 Stat. 591, 592 (1842) (provided for removal from territory located in Wisconsin).
60. *Mille Lacs*, 526 U.S. at 178.
61. *Mille Lacs*, 526 U.S. at 190.

> all of the said Indians remaining on the lands ceded as aforesaid, are required to remove to their unceded lands.[62]

According to the majority, although the larger part of the Executive Order ostensibly addressed the exercise of usufructuary rights, the historical record established not only that the Minnesota Territorial Legislature requested removal of the Anishinabe and not revocation of usufructuary rights, but also that government officials considered the Executive Order primarily as a removal order,[63] with the revocation of the usufructuary rights on ceded territory a necessary incentive to encourage removal to unceded Prairie du Chien Treaty territory where survival of the Anishinabe through the exercise of usufructuary rights could continue as before. The 1842[64] Treaty relating to territory in Wisconsin, referenced in the Executive Order, reinforced this interpretation, since it directly links exercise of usufructuary rights with presidential removal.[65]

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 themselves; that the policy of presidential removal was officially abandoned in 1851.[66] Additionally, the *Mille Lacs* majority found several examples of official territorial and federal correspondence indicating that recognition of Anishinabe usufructuary rights in the 1837 Treaty of St. Peters ceded territory continuing long after the Executive Order was issued.[67] The majority held revocation of Treaty usufructuary rights was not severable from the removal and could not be enforced independently.[68]

The dissent by Chief Justice William H. 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.[69] The last part of the Executive Order that *does* require removal is severable from the "revocation order" and should be enforced independently.[70] 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.

2. Presidential Ratification of 1825 Treaty-Guaranteed Usufructuary Rights

From the standpoint of the Anishinabe, who certainly would have been aware of the 1825 Treaty of Prairie du Chien and the 1826 Treaty of Fond du Lac as having guaranteed both rights to hunt, fish, and gather, but also something more, both the 1837 Treaty of St. Peters and the 1850 Executive Order would have confirmed that, outside of the small area ceded in 1837 at a minimum, the guarantees made by the United States in the 1825 Treaty of Prairie du Chien had been made even more secure by the 1850 Executive Order.

Apparently, both the majority and dissent in the *Mille Lacs* decision were unanimous in recognizing that Anishinabe hunting, fishing, and gathering usufructuary rights in all of Minnesota *outside* the 1837 Treaty territory, which necessarily would be the 1825 Treaty of Prairie du Chien territory, were undiminished by the 1850 Executive Order. The Executive Order, by its nature, 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 remainder of the 1825 Treaty of Prairie du Chien territory outside the 1837 Treaty of St. Peters territory, where the Anishinabe *continued* to exercise their usufructuary rights and which the 1850 Executive Order acknowledges as the Anishinabe's only alternative for survival. It appears that the 5-4 *Mille Lacs* Court was unanimous in concluding that usufructuary rights to hunt, fish, and gather, specified in the 1825 Treaty, were both acknowledged and ratified by the 1850 Executive Order.[71]

3. The 1855 Treaty: Unlikely Silent Abrogation of Usufructuary Property Guaranteed in 60 Years of Prior Treaties, 1795-1847[72] and 1854

The *Mille Lacs* majority also examined the impact of the 1855 Treaty[73] on the treaty-guaranteed usufructuary rights in the 1837 Treaty of St. Peters territory. The 1855 Treaty, which was negotiated only with the *Mille Lacs* Band and no other Anishinabe parties to the 1825, 1826, 1837, or 1854 Treaties, set aside land for reservations within the 1837 and 1855 territory but was completely silent with respect to usufructuary rights guaranteed in the 1825 Treaty of Prairie de Chien, the 1837 Treaty of St. Peters, or the recently concluded 1854 Treaty:

> The . . . Chippewa Indians do 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,

62. Executive Order of February 6, 1850 (cited in *Mille Lacs*, 526 U.S. at 179).
63. *Mille Lacs*, 526 U.S. at 179.
64. Articles of a treaty made and concluded at La Pointe of Lake Superior, in the Territory of Wisconsin, between Robert Stuart, commissioner on the part of the United States, and the Chippewa Indians of the Mississippi, and Lake Superior, by their chiefs and headmen, 7 Stat. 591 (1842) [hereinafter 1842 Treaty].
65. Art. II, 1842 Treaty, 7 Stat. 591, 592 (1842).
66. *Mille Lacs*, 526 U.S. at 181.
67. *Mille Lacs*, 526 U.S. at 182-83.
68. *Mille Lacs*, 526 U.S. at 193-95.
69. *Mille Lacs*, 526 U.S. at 213.
70. *Mille Lacs*, 526 U.S. at 215.
71. *Mille Lacs*, 526 U.S. at 192.
72. The United States also entered into two treaties in 1847, one with the Mississippi and Lake Superior Bands of Anishinabe, 9 Stat. 904 (Aug. 2, 1847) ("cede and sell the land"), the other with the Pillager Band at Leech Lake, 9 Stat. 908 (Aug. 21, 1847) ("shall be held by the United States as Indian land, until otherwise ordered by the President"). The ceded territory was ostensibly for Winnebago and Menominee reservations that were never established. Neither treaty mentioned abrogation of usufructuary rights, or removal of the Anishinabe. For a discussion of the circumstances underlying the 1847 Treaty with the Pillager Band, see *Pillager Band of Chippewa Indians v. United States*, 428 F.2d 1274 (Ct. Cl. 1970).
73. Treaty with the Chippewa, 10 Stat. 1165 (1855) [hereinafter 1855 Treaty].

> in the Territory of Minnesota, and included within the following boundaries, *viz*: [describing territorial boundaries]. And the said Indians do further and fully and entirely relinquish and convey to the United States, any and all right, title, and interest, of whatsoever nature the same may be, which they may now have in and to any other lands in the Territory of Minnesota."[74]

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.[75] [Appendix II.] According to the majority, the absence of any discussion of the usufructuary rights then being exercised by the Anishinabe in 1837 ceded territory, 1854 ceded territory, or unceded territory to which the 1850 Executive Order attempted to remove the Anishinabe, i.e., the 1825 Treaty territory, was a telling omission "since treaty drafters had the sophistication and experience to use express language when abrogating [usufructuary] treaty rights."[76]

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,[77] 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 preexisting 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. . . .[78]

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.[79]

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 of St. Peters without the necessity of finding specific treaty language or congressional intent to abrogate Indian property rights created in the previous treaties,[80] which would seem to be in contravention of the precedent of the Court[81] and 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, ceding all claims to the territory, 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,[82] which would have been completely unnecessary if the 1855 Treaty had the meaning suggested by the Chief Justice in his *Mille Lacs* dissent. [Appendix II.]

The dissent also failed to note prior Supreme Court precedent in the 19th and early 20th centuries that had specifically analyzed the scope of the 1855 Treaty and had

74. 1855 Treaty, 10 Stat. 1165, 1166 (1855).
75. *Mille Lacs*, 526 U.S. at 198.
76. *Id.* at 1200.
77. *Id.*
78. *Mille Lacs,* 526 U.S. at 197 (citing Treaty with the Chippewa of Sault Ste. Marie, Art 1, 11 Stat. 631) ("The said Chippewa Indians surrender to the United States the right of fishing at the falls of St. Mary's . . . secured to them by the treaty of June 16, 1920"); Choctaw Nation v. Oklahoma, 397 U.S. 620, 631 (1970); Cong. Globe, 33d Cong. 1st Sess. 1404 (1854).
79. Although not cited by the dissent, this is the same position adopted by the Eighth Circuit in an earlier claim by the Red Lake Band that usufructuary rights in the 1863 Treaty territory were not abrogated by congressional enactments in 1889 and 1904, which contained language similar to the 1855 Treaty in which the state of Minnesota prevailed. *See* United States v. Minnesota, 466 F. Supp. 1382 (1979). The district court looked only to the 1863 Treaty with the Red Lake Band, and to the congressional enactments in question that did not refer to retention of usufructuary rights, and concluded that the intent of Congress was to abrogate those rights along with the cession of title. However, the district court and Eighth Circuit mistakenly considered the rights in question to be inchoate aboriginal rights, unspecified in any previous treaty. Both the 1854 Treaty and the 1825 Treaty give lie to this apparently unrebutted assumption by the court.
80. *Mille Lacs*, 526 U.S. at 217-18.
81. Menominee Tribe v. United States, 391 U.S. 404 (1968).
82. Treaty of 1863 (with Mississippi, Pillager, Winnibigoshish Bands) (12 Stat. 1249). The treaty ceded reservations set up in the 1855 Treaty, but not additional territory, and included 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) (13 Stat. 689)—No discussion of abrogation of usufructuary rights.

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

    Treaty of 1866 (with Mississippi Band) (14 Stat. 765)—Ceding territory at Canadian Border west of 1854 Treaty Border and into Dakota Territory. No mention of abrogation of usufructuary rights.

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

    Statute of 1904 (31 Stat. 1077)—No mention of abrogation of usufructuary rights.

come to much different conclusions,[83] as had the Minnesota Supreme Court.[84] 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, along with its 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[85] and the thorough historical review in the district court opinion.[86]

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.[87] Since Congress must clearly express an intent to abrogate Indian treaty rights under *United States v. Dion*,[88] such an intent must have been present in Minnesota's 1858 enabling act, which is silent on the matter of treaties between the United States and the Anishinabe.[89] There is also no indication that Senate ratification of the 1837 Treaty of St. Peters contemplated that the 1837 Treaty, or other treaties, would terminate at statehood.[90]

In response to the argument by the dissent,[91] the majority addressed nineteenth century "equal footing" doctrine, which questioned the relationship between federal treaty power to bind states entering the Union and state sovereignty over wildlife regulatory matters in *Ward v. Racehorse*.[92] 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.[93]

The *Mille Lacs* dissent took issue with the majority's treatment of *Ward*, which was consistent with the above, by differentiating between rights that were "temporary and precarious," as opposed to those rights that 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. However, in light of numerous examples of joint management protocols in Minnesota and other states that 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.[94]

As the Supreme Court held in *Menominee Tribe of Indians v. United States*,[95] statutory language that unequivocally terminated a reservation was held not to abrogate hunting and fishing rights. Similarly, treaty or statutory language that cedes title, as does the 1855 Treaty and all later treaties and enactments, without mentioning hunting, fishing, and gathering rights guaranteed in prior treaties for several decades, would appear to directly contravene the Supreme Court's treatment of abrogation of hunting and fishing rights in *Menominee Tribe*.[96] Long before the treaty-guaranteed usufructuary property analysis applied by the majority and dissent in the *Mille Lacs* opinion, and in the face of a federal statute that terminated a reservation, the Court held: "We decline to construe the Termination Act as a backhanded way of abrogating the hunting and fishing rights of those Indians. . . . 'The intention to abrogate or modify a treaty is not to be lightly imputed to the Congress.'"[97]

B. Lac Courte Oreilles v. Voigt[98]: *The First Judicial Recognition of Treaty-Guaranteed Usufructuary Property Rights*

The majority opinion in *Mille Lacs* referred to federal litigation construing the 1854 Treaty with the Anishinabe, which was the subject of lengthy litigation in the Seventh Circuit that resulted in first-recognition usufructuary rights being upheld in the territory ceded by the 1854 Treaty in Wisconsin and Minnesota. 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.[99] 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.[100] The discussion of

83. Johnson v. Gearlds, 234 U.S. 422 (1914).
84. In *State v. Jackson*, 218 Minn. 429 (1944), the Minnesota Supreme Court relied on the 1834 Trade and Intercourse with the Indians, as well as Article VII of the 1855 Treaty to find that as of 1944, Anishinabe usufructuary rights remained in effect in "Indian Country" which included reservations, trust territory. and "lands wherever situated, which have been set apart for use and occupancy by Indians, even though not acquired from them" (citing United States v. McGowan, 302 U.S. 535 (1938).
85. *Mille Lacs*, 526 U.S. at 195-200.
86. Mille Lacs Band of Chippewa Indians v. State of Minnesota, 861 F. Supp. 784 (D. Minn. 1996); Mille Lacs Band of Chippewa Indians v. State of Minnesota, 952 F. Supp. 1362 (D. Minn. 1997).
87. *Mille Lacs*, 526 U.S. at 202-03.
88. 476 U.S. 734, 16 ELR 20676 (1986).
89. *Mille Lacs*, 526 U.S. at 203.
90. *Mille Lacs*, 526 U.S. at 207.
91. *Mille Lacs*, 526 U.S. at 219-20.
92. 163 U.S. 504 (1896) (cited in *Mille Lacs*, 526 U.S. at 203.
93. *Mille Lacs*, 526 U.S. at 204.
94. Menominee Tribe v. United States, 391 U.S. 404 (1968); United States v. Dion, 476 U.S. 734, 16 ELR 20676 (1986).
95. *Menominee Tribe*, 391 U.S. at 404.
96. *Id.*
97. *Menominee Tribe*, 391 U.S. at 413.
98. Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Vogt, 700 F.2d 341 (7th Cir. 1983), *appeal dismissed and cert. denied sub nom.* Besadny v. Lac Courte Oreiles Band of Lake Superior Chippewa Indians, 464 U.S. 805 (1983) (cited in *Mille Lacs*, 526 U.S. at 188.
99. Art. 11, 1854 Treaty, 10 Stat. 1109, 111 (1854).
100. Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt, 700 F.2d 341 (7th Cir. 1983). In Wisconsin, usufructuary rights of the band of Lake Superior Chippewa Indians established under 1837 and 1842 Treaties were neither terminated nor released by the 1854 Treaty, where the 1854 Treaty made no reference whatsoever to usufructuary rights of the Chippewas who had previously ceded their territory to the United States, and where nothing compelled the conclusion that the band understood the 1854 Treaty as abrogating their treaty-recognized usufructuary rights.

In Minnesota, the out-of-court agreement was codified as Minn. Stat. §97A.157. Grand Portage Band of Chippewas et al. v. State of Min-

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 of Prairie du Chien territory as of 1855.[101]

The *Mille Lacs* majority opinion documents the conclusion that: (a) the 1855 Treaty, (b) its authorizing legislation, and (c) the Treaty Journal all focused on land acquisition and 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.[102] The majority also pointed out that the signatories to the 1854 Treaty included most of the bands that resided in the 1837 Treaty of St. Peters 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.[103]

In the sense that the Anishinabe possessed rights to hunt, fish, and gather on unceded territory over which they had claims of ownership, the "treaty right" to continued use of the land after ownership claims had been ceded *did* "secure new usufructuary rights." However, the 1854 Treaty also specifically reserved for the Mississippi Band the undiminished usufructuary rights that had been previously recognized in earlier treaties on unceded territory, as well.[104]

The Treaties of Greenville, Prairie du Chien, and Fond du Lac make clear that the Anishinabe had more than aboriginal claims to *unceded* 1825 Treaty territory over which the United States recognized the Anishinabe retained sovereignty and the unquestioned right to hunt, fish, and gather. The 1854 Treaty is careful to differentiate the unceded 1825 Treaty territory from the area ceded by the Lake Superior Band [Appendix I]:

> The Chippewas of the Mississippi hereby assent and agree to the foregoing cession, and consent that the whole amount of consideration money for the country ceded above, shall be paid to the Chippewas of Lake Superior, and *in consideration thereof the Chippewas of Lake Superior hereby relinquish to the Chippewas of the Mississippi, all of their interest in and claim to the lands heretofore owned by them in common, lying west of the above boundary line*.[105]

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 St. Peters, Fond du Lac, and Prairie du Chien:[106] "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."[107] This means that the historical record and treaty construction found in the *LCO* cases not only establish the continuing validity of the Lake Superior Chippewa usufructuary property rights in the 1854 ceded territory, but the 1854 Treaty also guarantees usufructuary property rights to the Mississippi Chippewa in the unceded territory west of the 1854 Treaty boundary as well. The 1854 Treaty guarantee of undiminished claims to the Mississippi Band is powerful evidence that, as of January 1, 1855, the Anishinabe retained treaty-guaranteed hunting, fishing, and gathering rights in: (a) the 1837 ceded territory; (b) the 1854 ceded territory; and (c) the rest of the unceded 1825 Treaty territory that was not abrogated by the 1854 Treaty, the December 1854 congressional treaty authorization legislation, the February 1855 Treaty, or the subsequent treaty ratification by the Senate. [Appendix I]

IV. Modern Usufructuary Rights: A Modest Living From the Land"

The findings of the federal district court in *Lac Courte Oreilles* described the scope of the usufructuary rights retained by the Lake Superior Band, including: "the rights to all the forms of animal life, fish, vegetation . . . *and the use of all methods of harvesting employed in treaty times and those developed since* . . . [t]he fruits . . . may be traded and sold to non-Indians, *employing modern methods of distribution and sale* . . . to enjoy a modest living . . . ."[108] The U.S. Court of Appeals for the Eighth Circuit noted "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."[109] The scope of 19th century usufructuary rights included a broad range of land use activities that the *Lac Courte Oreilles* litigation first attempted to catalogue.[110]

nesota et al., Civ. No. 4-85-1090. The state of Minnesota desires to settle all outstanding matters relating to the above dispute.

101. *Mille Lacs*, 526 U.S. at 196-200.
102. *Mille Lacs*, 526 U.S. at 183-85.
103. *Mille Lacs,* 526 U.S. at 199.
104. Art. 8, 1854 Treaty, 10 Stat. 1109, 1111 (1854).
105. Emphasis added. Art. 1, 1854 Treaty, 10 Stat. 1109, 1109 (1854).
106. Art. 1, 1854 Treaty, 10 Stat. 1109, 1109 (1854) (emphasis added).
107. Art. 8, 1854 Treaty, 10 Stat. 1109, 1111 (1854).
108. Emphasis added. Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. State of Wisconsin (LCO III), 653 F. Supp. 1420, 1435 (W.D. Wis. 1987).
109. Mille Lacs Band of Chippewa Indians v. Minnesota, 124 F.3d 904, 911, 28 ELR 20183 (8th Cir. 1997).
110. As the Court explained in *Lac Courte Oreilles III*, 653 F. Supp. 1420, 1424:

> As of 1837 and 1842, the Chippewa exploited virtually every resource in the ceded territory. Among the mammals the Chippewa hunted at treaty time were white-tailed deer, black bear, muskrat, beaver, marten, mink, fisher, snowshoe hare, cottontail rabbit, badger, porcupine, moose, woodchuck, squirrel, raccoon, otter, lynx, fox, wolf, elk, and bison. Among the birds the Chippewa hunted were ducks, geese, songbirds, various types of grouse, turkeys, hawks, eagles, owls, and partridges.
>
> Among the fish the Chippewa harvested were, in Lake Superior, whitefish, herring, chubs, lake trout and turbot; and, in-shore, suckers, walleye, pike, sturgeon, Muskie, and perch.

The scope of the exercise of these rights, according to the court, continues to exist throughout the entire ceded territory, with the possible exception of "private land" that had been occupied by settlers at the time of the treaty, unless the exercise of usufructuary rights on private property was necessary for the Anishinabe, in which case the Court invited the Anishinabe to return to establish that the available public land was insufficient for their support.[111]

The value of native usufructuary property rights was first estimated by the Seventh Circuit[112] and the Wisconsin federal courts, which recognized that the 1854 Treaty guaranteed the right of the Anishinabe to "enjoy a modest living" by the exercise usufructuary rights.[113] The *Lac Courte Oreilles* district court determined the economic value of the "modest standard of living" guaranteed under the 1854 Treaty using the following reasoning:

> 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.[114]

> … [u]nder the most optimal conditions, capture of the entire potential harvest of the ceded territory could produce no more than $18,000,000 in foods, pelts, and timber for personal consumption and sale.[115]

In 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.[116]

> [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.[117]

Central to the court's analysis was the finding in *LCO V*, 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."[118]

There is no shortage of evidence that Native American poverty is endemic,[119] and the individual exercise of treaty-guaranteed usufructuary rights may be helpful, but

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

Id. at 1426-28.

111. *Id.*

112. Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin (LCO I), 700 F.2d 341 (7th Cir. 1983); Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin (LCO II), 760 F.2d 177 (7th Cir. 1985).

113. Which, of course, means that usufructuary rights remain intact in unceded territory, as well.

114. Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin (LCO V), 686 F. Supp. 226, 233 (W.D. Wis. 1988).

115. *Id.* at 230.

116. Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin (LCO VII), 740 F. Supp. 1400 (W.D. Wis. 1990).

117. *Id.* at 1416.

118. *Id.* at 1414 (citing *LCO V*, 686 F. Supp. at 230).

119. Great Lakes Regional Collaboration, Tribal Nations Issues and Perspectives, Version 1.0, Apr. 26, 2005, at 4:

- 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%. . . .

will not come close to meeting the needs of Native peoples living on or near reservations. However, along with the individual exercise of usufructuary property rights, the collective management of those rights along with state and federal authorities offers a completely different level of support, and recognition of continuing usufructuary property rights recognized by the Supreme Court in the *Mille Lacs* opinion. The two models for this collective management are: (a) the independent Native American regulatory authority co-management exemplified by the Great Lakes Fish and Wildlife Authority in Wisconsin, and (b) the periodic lease-back of usufructuary rights approach adopted by Minnesota's "Tri-Band Agreement." Minnesota entered into the "Tri-Band Agreement" to jointly manage wildlife resources in the 1854 ceded territory with Anishinabe Bands in Minnesota's "arrowhead"[120] and settled a suit based on the same 1854 Treaty as the *LCO* cases with the Grand Portage Band of Chippewa.[121]

The stakes can be significant.[122] The Minnesota Department of Natural Resources (DNR) 2010-2011 Biennial Budget shows a payment of nearly $15 million allocated for "treaty rights" in the limited areas in which Minnesota has recognized in 1987[123] and in 1999 following the *Mille Lacs* decision[124] but, arguably, should have recognized and leased Anishinabe usufructuary rights in all of northern Minnesota for several decades.[125] The Anishinabe Bands in Wisconsin have elected to establish a self-management institution, such as the Great Lakes Indian Fish and Wildlife Commission (GLIFWC) to co-manage wildlife and other natural resources cooperatively with the state of Wisconsin and is an alternative to lease payments.[126] The Anishinabe bands in northern Wisconsin have, in effect, established a parallel Tribal DNR with management and licensing authority within the ceded territory in which treaty-guaranteed off-reservation usufructuary property rights are retained, as a source of income for the Band.

V. Off-Reservation Resource Co-Management: Necessary Protection for U.S. Treaty-Guaranteed Usufructuary Property Rights

Tribal members may be entitled to expressly retain U.S. treaty-guaranteed modern usufructuary rights,[127] but tribal property rights do not exist in a vacuum and, as described in the *LCO* litigation, must co-exist with lawful state regulatory authority. "[A]ny regulation imposed by the State must be necessary to ensure public health and safety, and the State could not impose its own regulations if the Chippewa could establish tribal regulations adequate to meet

- Other federal data show that, as of 1999, over 40% of all adults living on or near reservations were unemployed and that over 30% of those employed were still living in poverty. . . .
- Tribal communities tend to consume larger quantities of fish, game and other natural foods than other communities, and thus face higher health risks posed by bio-accumulative toxics.
- In 2001, approximately 34% of drinking water suppliers in Indian country violated monitoring and reporting requirements and approximately 5% violated maximum contaminant level/treatment technologies. . . .
- Many Tribal Nations have no waste management program at all and use dumps or burn barrels as the primary method of waste disposal. . . .
- Tribal communities have higher incidences than other communities of certain diseases, such as diabetes, cardiovascular diseases and hypertension, obesity, gall-bladder disease, and dental disease.
- Age-adjusted death rates for the following causes were considerably higher than those for other population segments in 1995: alcoholism—627 percent greater; tuberculosis—533 percent greater; diabetes mellitus—249 percent greater; accidents—204 percent greater; suicide—72 percent greater, pneumonia and influenza—71 percent greater; and homicide—63 percent greater.
- Studies have shown a clear relationship between the use of traditional foods food and the health and well-being of tribal members, including:
- The improvement of diet and nutrient intake.
- The prevention of chronic diseases.
- The opportunities for physical fitness and outdoor activities associated with harvesting traditional foods.
- The opportunity to experience, learn, and promote cultural activities.
- The opportunity to develop personal qualities valued in tribal culture such as sharing, self-respect, pride, self-confidence, patience, humility and spirituality.

120. *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.

121. 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.

122. *Obama Admin Strikes $3.4B Deal in Indian Trust Lawsuit*, N.Y. Times, Dec. 8, 2009. *See also* Cobell v. Salazar (Cobell XXII), 573 F.3d 808 (D.C. Cir. 2009).

123. *See* Chippewa Treaty Rights: History and Management in Minnesota and Wisconsin, http://ncseonline.org/nae/docs/Chippewa.html.

124. Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 29 ELR 20557 (1999).

125. The usufructuary rights leased by the state in the "arrowhead" were valued at approximately $6 million annually in 1988. The 2010-2011 Biennial Budget of the Minnesota Department of Natural Resources reflects payments of about $7.5 million annually for "treaty rights." An estimated average value of $6.5 million over the past 22 years would mean that the state has set the value of a small portion of the ceded area at about $140 million over 20-plus years. However, the area west of the 1854 Treaty border and north of the 1937 Treaty border is at least twice as large as that in the ceded in the 1837 and 1854 Treaties, and includes prime fishing and hunting locations in the Gull Lake, Brainerd, and Bemidji areas.

This means that the direct loss to the largest Anishinabe Bands, in territory that was unceded in 1854 and in which usufructuary rights were not abrogated subsequently, must be in the range of some $280 million, over just the past 20-plus years. In addition, thousands of Anishinabe Band members have been unlawfully arrested, incarcerated, and/or fined by the state, for arguably exercising off-reservation usufructuary activities, or subject to tribal jurisdiction. *See* State v. Butcher, 563 N.W.2d 776 (Minn. App. 1997). These direct and indirect damages are incalculable, but if estimated at one-half of the withheld lease payments, perhaps in the neighborhood of $140 million, the *direct* losses to the Anishinabe over the past 20 years would be $420 million.

126. *See* GLIFWC, *A Guide to Understanding Chippewa Treaty Rights: Minnesota Edition* (Odanah,Wis. 1995), which describes the self-management Wisconsin Bands have chosen, as has the Fond du Lac Band in Minnesota.

127. *Id.*

conservation, public health and public safety needs."[128] 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.[129]

In interpreting the reach of the usufructuary rights within the 1854 ceded territory, shortly after the *Mille Lacs* case opinion in the *Gotchnik* case, the Eighth Circuit held that the off-reservation use of motorized craft and mechanized equipment was subject to prohibition in the Boundary Water Canoe Area,[130] despite the undisputed right of the *Anishinabe* to hunt, fish, and gather in the "arrowhead" region, guaranteed by the 1854 Treaty and recognized by the Boundary Waters Act, itself.[131] Anishinabe usufructuary rights do not prevail over all types of regulation, particularly when federal wilderness area is at issue, rather than state regulations.[132]

A model state-tribal co-management is the Great Lakes Indian Fish and Wildlife Commission (GLIFWC), which was established by Wisconsin Anishinabe Bands as a co-management and licensing body to put into effect the court-ordered co-management resource-sharing concept required by the treaty-guarantees of the United States. In Minnesota, the Fond du Lac Band with usufructuary rights guaranteed in the 1795, 1825, 1826, 1837 Treaties, 1850 Executive Order, and 1854 Treaty ceded territory, and White Earth Band[133] and Leech Lake Bands[134] with usufructuary rights guaranteed in the 1795, 1825, 1826, 1837 Treaties, 1850 Executive Order, and 1854 Treaty *unceded* territory west of the Treaty boundary, have opted for co-management systems that are either in operation or in the process of being established.

However, the question remaining in both Minnesota and Wisconsin 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 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[135] with respect to federal environmental regulation, and Congress has specifically provided for a tribal role in the Clean Water Act,[136] Clean Air Act,[137] Safe Drinking Water Act [Public Health Service Act],[138] and the Comprehensive Environmental Response, Compensation, and Liability Act.[139]

An example of this dual management in practice may be the dispute over a proposed mining operation in north central Wisconsin, in which, perhaps for the first time since the days of early treaty negotiations, Wisconsin Anishinabe usufructuary property rights were part of the discussion in

128. *Id.*

129. *Mille Lacs*, 526 U.S. at 204-05.

130. Arts. I et seq., 10 Stat. 1109; Act Oct. 21, 1978, §4, 92 Stat. 1649.

131. *Id.* United States v. Gotchnik, 222 F.3d 506, 509, 31 ELR 20012 (8th Cir. 2000). The Court resolved the contradiction between §17 of the Boundary Waters Act, which provides nothing in the Act "shall effect" existing treaties, and §4, which imposes extensive limitations on motorized transport in the Boundary Canoe Area because "the Bands have presented no evidence, historical or otherwise, to suggest that the signatories [of the 1854 Treaty] adhered to a different understanding."

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

However, the *Gotchnik* opinion firmly recognizes that interpretation of treaty language depends upon giving effect to the terms of the treaty as the Indian signatories would have understood 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 *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 revisited in future negotiations, or litigation, with respect to all of northern Minnesota, as well as the Boundary Waters.

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

133. The Leech Lake and White Earth Bands have formed a commission to negotiate treaty issues with the state and federal governments in hopes of avoiding such a court battle. They also have written a conservation code for the lands in question, hoping some day to co-manage them with the state. *Dakota Indians Net Cedar Lake,* Minneapolis Star Trib., May 14, 2001, http://www.startribune.com/local/minneapolis/121749664.html.

134. *Id.*

135. U.S. Const. art. I, §8, Cl. 3. *See also* The Great Lakes Collaboration, http://www.glrc.us/index.html.

136. 33 U.S.C. §§1251-1387, ELR Stat. FWPCA §§101-607.

137. 42 U.S.C. §§7401-7671q, ELR Stat. CAA §§101-618.

138. 42 U.S.C. §§300f to 300j-26, ELR Stat. SDWA §§1401-1465.

139. 42 U.S.C. §§9601-9675, ELR Stat. CERCLA §§101-405.

the siting of a mining operation in Crandon, Wisconsin, and were a factor in the U.S. Environmental Protection Agency (EPA) environmental impact statement (EIS):[140]

> 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*.[141]

> Wild Rice
> Wild rice includes issues about contaminants and geochemistry, harvesting, water levels, and development from population growth ***. *Development issues include indirect impacts on wild rice from population growth and associated housing, road building, and other development occurring outside the boundaries of the Mole Lake Reservation.*[142]

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 that 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. ***[143]

Minnesota's Anishinabe people have been entitled to such a rigorous evaluation of the impact of John D. Rockefeller purchasing and developing the Mesabi Iron Range in the late 19th century,[144] under the Treaties of 1795, 1825, 1826, 1837, 1854,[145] the Executive Order of 1850,[146] and the verbal assurances of Alexander Ramsey in 1863.[147] The Anishinabe are certainly entitled to such assurances in all of northern Minnesota, not just the "arrowhead," after the *Lac Courte Oreilles* 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 or not,[148] but not *one* treaty prohibits the payment of royalties or fees,[149] particularly if the payment is for diminution of usufructuary property rights, and the ability to exercise the "right to a modest living" from the land, which was the promise the United States made to gain title to the land in the first place. Royalty payments to the Anishinabe, as well as the Minnesota DNR, for timber harvest[150] and mineral explorations rights would be consistent with the modern trend toward protecting property from "takings" by government without "due process,"[151] which certainly describes what has happened with respect to the Anishinabe from 1795 to the present, with respect to United States government treaty-guaranteed usufructuary property rights in 1825 Treaty of Prairie du Chien territory in Minnesota.

VI. Conclusion

The unanimity of the Supreme Court in *Mille Lacs* regarding treaty-guaranteed usufructuary property rights requires a reexamination of all of the treaties into which the Anishinabe of Minnesota entered with the United States, as well as the usufructuary property rights created in treaties with other native peoples, as well. 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 1988, and in the 1937 Treaty of St. Peters territory from Lake Mille Lacs to Wisconsin since 1999.

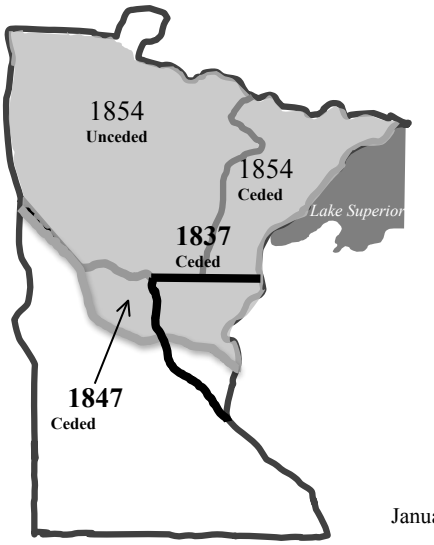
Moreover, either the joint resource management model in place in Wisconsin for more than 20 years, or the state-lease model that Minnesota has adopted, will probably be

140. Emphasis added. Crandon Mine Project Environmental Impact Statement Final Scoping Document, U.S. Army Corps of Engineers, January 2002.
141. *Id.*
142. *Id.*
143. *Id.*
144. The Mesabi Iron Range contained the richest deposit of iron ore in the United States, but the peculiar quality of its soft hematite ore delayed discovery and exploitation until the 1890s. When its great value became known, there was a scramble to enter the land through abuse of the Preemption Act (1841) and the Homestead Act (1862). Duluth native Leonidas Merritt and his seven brothers made some of the greatest finds, though, lacking capital to build a railroad to Lake Superior, they were unable to market their ore and lost their rich deposits to John D. Rockefeller. He, in turn, sold them to Andrew Carnegie, who transferred them to the U.S. Steel Corporation. *See* David Allan Walker, Iron Frontier: The Discovery and Early Development of Minnesota's Three Ranges, (Minn. Historical Society Press, 1979).
145. Treaty of Greenville, 7 Stat. 49 (1795), Treaty of Prairie du Chien, 7 Stat. 272 (1825), Treaty of Fond du Lac, 7 Stat. 290 (1826), Treaty of St. Peters, 7 Stat. 536 (1837), 1854 Treaty, 10 Stat. 1109 (1854).
146. Executive Order of Feb. 6, 1850 (cited in Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 179, 29 ELR 20557 (1999).
147. Treaty of Old Crossing, 13 Stat. 667 (1864).
148. 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." Treaty of Fond du Lac, 7 Stat. 290, 290 (1826).
149. 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.
150. The question of proper allocation of timber and resource harvest on reservation is not a new issue and has its roots in the 19th century. *See* Mole Lake Band et al v. United States, 126 Ct. Cl. 596 (Ct. Cl.) (1953).
151. U.S. Const. amend. V.

expanded to all of northern Minnesota in the near future. An open question will be, what is to be done about the lost usufructuary property benefits and lost income that northern Minnesota Anishinabe Bands *should* have been sharing since 1987, or at least 1999, which certainly runs into tens of millions, if not hundreds of millions of dollars. But, perhaps more importantly, as the Wisconsin post-*LCO* EISs 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.

The question remains whether U.S. treaty negotiators guaranteed similar usufructuary property rights in the hundreds of other treaties that, like the treaties with the Anishinabe, have been honored in the breach for more than a century. The unanimous Supreme Court in *Mille Lacs* may have provided the basis for reexamination of many previously unexplored claims, and a basis for a new resource management regime founded upon the continuing usufructuary property rights, promised to the Native American people by an expanding nation, and soon forgotten.

APPENDIX I



January 1, 1855

1825 → 1837/1854 → 1847 → 1854

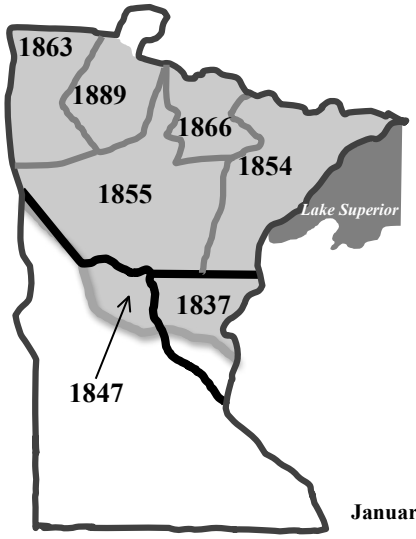
Shaded Area: 1825 Treaty Territory Unceded
Treaty-guarantee: sovereignty north of Dakota territory.

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

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

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

APPENDIX II



January 1, 1890

1855 → 1858 → 1863 → 1866 → 1889

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

Minnesota Statehood:
Treaties not abrogated.

Territory Ceded
Treaty-guarantee: *usufructuary* rights not abrogated/ promised verbally.

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

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