

**The *Anishinabe* Nation’s “Right to a Modest Living”  
From the Exercise of *Off-Reservation Usufructuary* Treaty Rights  
.... in *All* of Northern Minnesota**

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INTRODUCTION.....1

I. The Treaties, Executive Orders, and Congressional Enactments Relevant to the Continuing Exercise of *Usufructuary* Rights in all of Northern Minnesota by the *Anishinabe* Nation: 1825 to the Present. ....7

II. Modern Litigation Upholding *Anishinabe Usufructuary* Rights, under the Treaties of 1837, 1854 and 1855 .....15

*Lac Courte Oreilles v. Wisconsin (I-VIII)*: the Right to a “Modest Living” from *Off-Reservation Usufructuary* Rights in Wisconsin and Minnesota.....18

*Minnesota v. Mille Lacs*: The U.S. Supreme Court Confirms Continuing Validity of *Off-reservation Anishinabe Usufructuary* Rights.....21

III. The Exercise of Traditional *Usufructuary* Rights in Modern Society.....24

IV. The Consequences of the State’s Failure to Apply the *Lac Courte Oreilles* and *Mille Lacs* Judgments to *All Minnesota Anishinabe* .....27

The Fiscal Consequences of Minnesota’s Continuing Failure to Recognize *Anishinabe Off-Reservation Usufructuary* Rights.....29

The Political-Economy of the Minnesota *Anishinabe* Nation’s “Right to a modest living” from *Off-Reservation Usufructuary* Rights.....30

CONCLUSION.....35

**INTRODUCTION**

In 1837, the United States entered into a Treaty with several Bands of Chippewa Indians. Under terms of this Treaty, the Indians ceded land in present-day Wisconsin and Minnesota to the United States, and the United States guaranteed to the Indians certain hunting, fishing and gathering rights on the ceded land. We must decide whether the Chippewa Indians retain these *usufructuary* rights<sup>1</sup> today. The State of Minnesota argues that the Indians lost these rights through an Executive Order in 1850, and 1855 Treaty, and the admission of Minnesota into the Union in 1858. *After an examination of the historical record, we conclude that the Chippewa retain the usufructuary rights guaranteed to them under the 1837 Treaty* (emphasis added).

-- Justice Sandra Day O’Connor<sup>2</sup>

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<sup>1</sup> **usufructuary**, *n.* Roman & civil law. One having the right to a usufruct; specif. a person who has the right to the benefits of another's property [ 1. C.J.S. *Estates* §§ 2–5, 8, 15–21, 116–128, 137, 243].

**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

<sup>2</sup> *State of Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 175 (1999).

During the latter part of the 20<sup>th</sup> Century, the 19<sup>th</sup> Century treaties between sovereign Indian nations and the government of the United States that had either been ignored, or “honored in the breach,” took on new life.<sup>3</sup> The treaties between the United States and Bands of the *Anishinabe*<sup>4</sup> Nation in Minnesota are no exception.<sup>5</sup> Through a series of cases brought in federal courts to enforce and define the treaty-rights guaranteed tribes and tribal members, a body of federal case law has developed that firmly establishes the concept of tribal sovereignty on the order of that enjoyed by the separate states within the federal union.<sup>6</sup> In addition, Congressional passage of Public Law 280<sup>7</sup>

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<sup>3</sup> *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987); *United States v. Dion*, 476 U.S. 734 (1986); *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970).

<sup>4</sup> The Chippewa Indians referred to *themselves* as “*Anishinabe*,” which means “original man” or “people” in English. See, Edmund Jefferson Danziger, *The Chippewas of Lake Superior*, p. 7 (University of Oklahoma Press, Norman, 1979). They were referred to by others as “*o-jib-weg*,” (those who make pictographs), which was corrupted into “Ojibwa” or “Ojibway,” which was anglicized as “Chippewa.” “*Anishinabe*” is used throughout the article in recognition of Anishinabe self-identity and to emphasize the origin of the legal issues discussed herein arise from an indigenous culture that pre-existed European incursions into the Great Lakes Region. See, Jeffrey Robert Connelly, “Northern Wisconsin Reacts to Court Interpretations of Indian Treaty Rights to Natural Resources,” 11 *Great Plains Nat. Resources J.* 116 (2007)

<sup>5</sup> *Infra*. This paper is limited to an examination of *Anishinabe* Treaties with the United States, although a similar analytical approach would also apply to *Lakota* land-cessions, as well. See Map, *infra*. See also, GREAT LAKES REGIONAL COLLABORATION, Tribal Nations Issues and Perspectives, Version 1.0, April 26, 2005 , p. 17:

4. Government-to-Government Relationship

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

This relationship requires federal agencies to interact directly with Tribal Nations on a governmental basis, not merely as a segment of the general public. Federal agencies are to consult with tribal governments and their designated governmental representatives, to the greatest extent practical and as not otherwise prohibited by law, before taking actions that affect tribal lands, resources, people, or treaty rights.

This obligation is separate and distinct from obligations to states and other governments as well as from requirements affording the opportunity for general public input on federal decisions...Many states, such as Michigan and Wisconsin, have adopted government-to-government consultation policies similar to that required of the federal government.

<sup>6</sup> *State v. Losh*, 755 N.W.2d 736, 739 (Minn. 2008):

“Indian Tribes retain attributes of sovereignty over both their members and tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States,” *citing California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987); *United States v. Mazurie*, 419 U.S. 544 (1975); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980). But, “state laws may be applied to tribal Indians on their reservations if Congress has expressly so provided...” and Public Law 280 “expressly granted six states [including Minnesota] jurisdiction by or against Indians in Indian Country, except for offenses committed within the Red Lake Reservation and *Bois forte* Reservation at Nett Lake.” *State v. Losh*, 755 N.W.2d 736, 739 (Minn. 2008)

<sup>7</sup> *Id.* In 1953, Congress enacted Public Law 280 (codified as amended at 18 U.S.C. § 1162 (2006) 25 U.S.C. §§ 1321 1324 (2006) 28 U.S.C. § 1360 (2006) ),

established tribal authority over a wide range of administrative and civil regulatory matters<sup>8</sup> which served to reinforce the tribal regulatory power on one hand, but limited sovereignty over criminal matters *on* reservations<sup>9</sup> in the six states in which Public Law 280 applies, on the other.<sup>10</sup>

In Minnesota, *on*-reservation tribal sovereignty has been recognized with respect to functions similar to state government civil functions,<sup>11</sup> such as the regulation of gaming,<sup>12</sup> auto registration,<sup>13</sup> traffic regulations,<sup>14</sup> sale of tobacco and other state-regulated commodities,<sup>15</sup> *on*-reservation enforcement of tribal conservation regulations,<sup>16</sup>

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<sup>8</sup> *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) (Public Law 280 authorized *on*-reservation state criminal jurisdiction, but limited state jurisdiction over civil/regulatory matters).

<sup>9</sup> *Duro v. Reina*, 495 U.S. 676, 688 (1990), but see *United States v. Lara*, 541 U.S. 193 (2004) (recognizing the inherent power of Indian tribes...to exercise criminal jurisdiction over all Indians, codified by Congress in 25 U.S.C. sec. 1301 by Congress, but only when tribal institutions are sufficient and the alleged violator is a member of the band or tribe in question); and *State v. Davis*, 773 N.W.2d 66 (Minn. 2009) (based on the conclusion that the various *Anishinabe* Bands are separable entities).

<sup>10</sup> See 18 U.S.C. § 1162 (2006):

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

Alaska	All Indian country within the State, except that on Annette Islands, the Metlakatla Indian community may exercise jurisdiction over offenses committed by Indians in the same manner in which such jurisdiction may be exercised by Indian tribes in Indian country over which State jurisdiction has not been extended.
California	All Indian country within the State.
Minnesota	All Indian country within the State, except the Red Lake Reservation.
Nebraska	All Indian country within the State
Oregon	All Indian country within the State, except the Warm Springs Reservation.
Wisconsin	All Indian country within the State.

<sup>11</sup> *Bryan v. Itasca County*, 426 U.S. 373 (1976).

<sup>12</sup> *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987); Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701-2721.

<sup>13</sup> Leech Lake Band of Ojibwe Traffic Code, Section 213.

<sup>14</sup> *State v. Stone*, 572 N.W.2d 725, 731 (Minn. 1997); Leech Lake Band of Ojibwe Traffic Code, Sections 201-218.

<sup>15</sup> Leech Lake Band of Ojibwe Taxation Code, Title 5, Chapter 2, Tobacco Tax, §§ 5.201-5.209.

and state court enforcement of tribal court civil judgments.<sup>17</sup> However, the recognition of *off-reservation* hunting, fishing and gathering *usufructuary* rights have not kept pace with the development of *on-reservation* tribal civil regulatory sovereignty issues.<sup>18</sup>

Section I of the article reviews the provisions of treaties, executive orders and Congressional enactments relevant to evaluating the continuing validity and scope of *Anishinabe usufructuary* rights, which *pre-existed* the 1837 Treaty. Section II applies the analytical methodology upon which the Supreme Court based its opinion in the *Minnesota v. Mille Lacs* case,<sup>19</sup> and which the federal courts in Wisconsin applied in the *Lac Courte Oreilles* cases,<sup>20</sup> to conclude that these cases provide an irrefutable legal foundation for the *continuing* existence of, thus far un-recognized, *off-reservation Anishinabe usufructuary* rights in the *entirety* of northern Minnesota.<sup>21</sup>

Section III describes the reach of modern-day treaty rights to ensure a “modest living” from hunting, fishing, trapping and gathering on ceded territory which, as held by the federal court in the *Lac Courte Oreilles* case<sup>22</sup> and the Supreme Court in the *Mille Lacs* case,<sup>23</sup> may well require exercise of these rights on territory that was not being

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<sup>16</sup> *Grand Traverse Band of Ottawa and Chippewa Indians v. Director, Michigan Dep't of Natural Resources*, 141 F.3d 635 (6th Cir. 1998); Leech Lake Band of Ojibwe Conservation Code.

<sup>17</sup> *Shakopee Mdewakanton Sioux (Dakota) Gaming Enterprise v. Prescott*, 2010 WL 60693 (Minn. Ct. App.); see also the Leech Lake Band of Ojibwe Judicial Code, Title 2, Rules of Procedure (L.L.R.P.), adopted November 21, 2000; L.L.R.P. Rule 60 (Full Faith and Credit and Comity); and Minnesota General Rules of Practice, District Courts, Rule 10.01.

<sup>18</sup> See, discussion *infra*.

<sup>19</sup> *State of Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 179 (1999).

<sup>20</sup> *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt* (LCO I), 700 F.2d 341 (7th Cir. 1983); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. State of Wis.* (LCO II), 760 F.2d 177 (7th Cir. 1985); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. State of Wis.* (LCO III), 653 F. Supp. 1420 (W.D. Wis. 1987); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. State of Wis.* (LCO IV), 668 F. Supp. 1233 (W.D. Wis. 1987); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. State of Wis.* (LCO V), 686 F. Supp. 226 (W.D. Wis. 1988); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. State of Wis.* (LCO VI), 707 F. Supp. 1034 (W.D. Wis. 1989); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. State of Wis.* (LCO VII), 740 F. Supp. 1400 (W.D. Wis. 1990); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. State of Wis.* (LCO VIII), 758 F. Supp. 1262 (W.D. Wis. 1991).

<sup>21</sup> See discussion at fn \_\_\_\_\_, *infra*

<sup>22</sup> *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt* (LCO I), 700 F.2d 341 (7th Cir. 1983).

<sup>23</sup> *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 179 (1999).

homesteaded at the time the Treaties were negotiated.<sup>24</sup> This section will also describe how the ability of the *Anishinabe* people to exercise their *usufructuary* rights to provide for themselves must also include meaningful access, including easements on private property or other accommodations.<sup>25</sup> In addition, the Supreme Court and lower courts have also made clear that because the *Anishinabe* made use of then-current mid-19<sup>th</sup> Century technology, such as wagons, rifles, roads, and mechanized transport in the form of railroads and steam boats, modern *Anishinabe usufructuary* rights must also include the use of modern technology and transport.

Section IV makes the case that because the State of Minnesota has been on notice of its obligation to honor *Anishinabe usufructuary* rights in *all* of northern *Anishinabe* Bands in Minnesota since at least 1999<sup>26</sup> if not 1988,<sup>27</sup> the State of Minnesota is arguably liable to the *Anishinabe* Nation for: lost income, interest on that income and, possibly, increased damages for continuing breach of a fiduciary duty to properly manage third-party assets, similar to the \$3.4 billion trust claims settlement by the Obama administration.<sup>28</sup> Finally, taken as a whole, the *Anishinabe* rights to hunt, fish, trap and

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<sup>24</sup> *Lac Courte Oreilles Band of Lake Superior Chippewa Indians (LCO II)*, 760 F.2d 177 (7<sup>th</sup> Cir. 1985).

<sup>25</sup> *United States v. Gotchnik*, 222 F.3d 506, 509 (8<sup>th</sup> Cir. 2000):

In *Grand Traverse*, tribal members similarly sued to obtain access to two of the eight fishing areas in which they possessed the treaty right to engage in commercial fishing. Tribal members were unable to access these areas because small boats could not safely reach them and because the municipalities that owned marinas capable of mooring larger vessels were prohibited by state law from using the marinas for commercial use. The Sixth Circuit granted the tribe the right to moor their commercial ships on the municipal marinas, reasoning that the tribe's fishing rights included the right to access the designated fishing waters and that without use of the marinas their fishing right would be "destroy[ed]." See *Grand Traverse Band*, 141 F.3d at 640

<sup>26</sup> *State of Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 175 (1999).

<sup>27</sup> *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt* (LCO I), 700 F.2d 341 (7<sup>th</sup> Cir. 1983).

<sup>28</sup> "Obama Admin Strikes \$3.4B Deal in Indian Trust Lawsuit". *New York Times*. December 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, April 26, 2005, p. 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."

The trust responsibility arises from treaties, statutes, executive orders, and historical relations between the U.S. government and Tribal Nations. It may be viewed in terms of

gather, in order to achieve a “modest living” will require co-equal management of land, waters and resources in *all* of northern Minnesota to ensure that the *usufructuary* rights of the *Anishinabe* are not diminished unilaterally by development authorized by the State of Minnesota.<sup>29</sup>

However, the most important aspect of recognizing ongoing *Anishinabe* off-reservation *usufructuary* rights in all of northern Minnesota will be recovery of the political and economic sovereignty rightfully due the *Anishinabe* Nation in areas of Minnesota ceded to the United States in the 19<sup>th</sup> Century, which the State of Minnesota has failed to honor during most of the 20<sup>th</sup> Century. The result is likely to be an enormous shift in the State/*Anishinabe*, political/economic relationship in northern Minnesota that will make preservation of the wilderness experience for *all* Minnesotans *more likely* than at any other period in the 19<sup>th</sup> or 20<sup>th</sup> Centuries.<sup>30</sup>

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both general and specific components, although the line between the two is not always clear.

The general trust responsibility informs federal policy and includes the protection of the Tribal Nations’ right to maintain themselves as distinct cultural and self-governing entities:

- It establishes a standard of good faith and fair dealings that applies to all federal agencies.
- It requires pre-decisional consultation with potentially affected Tribal Nations.
- Such consultation must be designed to facilitate an understanding of the nature of tribal rights/interests involved, the impacts of a proposed action on those rights/interests, and a Tribal Nation’s own view of what should be done.

The specific component of the trust responsibility usually results only from some action of the government, such as a statute, treaty, or executive order.

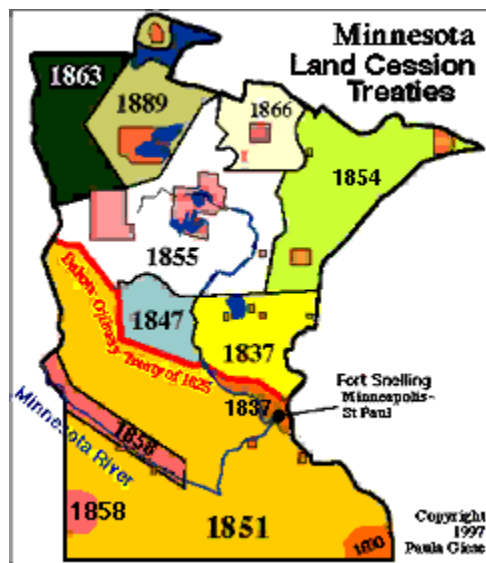
Federal courts often discuss the specific trust responsibility in terms of a common-law trust that is subject to the “strictest fiduciary standards,” and that generally has three elements: a trustee, which in this case is the U.S. government; a beneficiary, which may be a Tribal Nation or an individual Indian; and a corpus, for example tribal lands or funds from the sale of tribal timber assets.

Tribal Nations take a broad view of what is included in the “corpus” of the federal trust responsibility, particularly regarding both on- and off-reservation rights and the natural resources and ecosystems subject to those rights. In particular, they seek to hold the federal government responsible for fulfilling the purposes of treaties and ensuring that the Tribal Nations’ treaty rights are protected.

<sup>29</sup> *State of Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 175 (1999).

<sup>30</sup> *See*, discussion at notes \_\_\_\_, *infra*.

**I. The Treaties, Executive Orders and Congressional Enactments Relevant to the Continuing Exercise of *Usufructuary* Rights in *all* of Northern Minnesota by Members of the *Anishinabe* Nation: 1825 to the Present.<sup>31</sup>**



Indigenous people occupied territory of Minnesota as sovereign nations in “Indian Country” which mandated that land cessions by treaty agreements between Indian nations and the United States. Because *usufructuary* land use was so important to the survival indigenous people,<sup>32</sup> Anishinabe and Lakota *usufructuary* rights applied *everywhere* in Minnesota prior to the arrival of Europeans, as reflected in the 1805 Fort Snelling Treaty with the Lakota<sup>33</sup> As the above map indicates, *all* of what is now Minnesota was

<sup>31</sup> Not all Treaties between the United States and *Anishinabe* involved the cession of territory to the United States, to wit:

The 1825 Treaty dividing *Lakota/Anishinabe* territory *does not cede any territory to the United States and does not mention or implicate the cessation of traditional Anishinabe usufructuary rights;*

The 1826 Treaty ceded mining rights to the U.S. Government *within Anishinabe* territory but, *does not mention or implicate the cessation of traditional Anishinabe usufructuary rights, but rather states that all other rights exist unimpeded;*

Under the 1867 Treaty, the Mississippi Band ceded Leech Lake territory for the express purpose of establishing the White Earth reservation within the 1855 ceded territory and *does not mention or implicate the cessation of traditional Anishinabe usufructuary rights.*

<sup>32</sup>*Supra* note 35, at 382-84.

<sup>33</sup> Thomas Lund, *The 1837 and 1855 Chippewa Treaties in the Context of Early American Wildlife Law*, pp 486-513 in “*Fish in the Lakes...*” [compilation of expert witness testimony in *State of Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 175 (1999)].

“Although the American common law ultimately assigned ‘ownership’ of wildlife to the state, for centuries commentators had described wildlife as in fact “the property of no one.” This was the ‘natural law’ view of rights to wildlife, a natural law view which allowed everyone...to take the natural bounty spread before one and all by the Creator...This *rex nullus* theory was... drawn by the common law from the far more

inhabited by the *Anishinabe* and the *Lakota*, in areas roughly north and south of what is now Interstate 94, which bisects Minnesota.<sup>34</sup> Because the boundary area between these Indian Nations was prized for its hunting, fishing and gathering bounty, the original policy of the U.S. government was to separate the two peoples along a well-defined boundary to reduce sources of conflict.<sup>35</sup> While there is some question as to whether this policy could be squared with the *complete absence* of any concept of “land ownership” in either *Anishinabe* or *Lakota* culture,<sup>36</sup> it is undisputed that the Treaty purported to establish a boundary in 1825 that did not limit pre-existing hunting, fishing and gathering rights of either the *Anishinabe*, or the *Lakota*.<sup>37</sup> The 1825 Treaty also permitted exercise of *usufructuary* rights within the territory of each Nation, with the permission of the other.<sup>38</sup>

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ancient Roman law system...the Indians can be forgiven a comparable view. And those who held such a theory would consider the 1855 transfer of “all right, title and interest in land completely unrelated to the transferor’s interest in wildlife...” P. 500

<sup>34</sup> See Map.

<sup>35</sup> **1825 Treaty with the Sioux and Chippewa...Tribes, (7 Stat., 272):**

Preamble: THE United States of America have seen with much regret, that wars have for many years been carried on between the Sioux and the Chippewas.... In order, therefore, to promote peace among these tribes, and to establish boundaries among them and the other tribes who live in their vicinity, and thereby to remove all causes of future difficulty....

<sup>36</sup> *United States v. Winans*, 198 U.S. 371, 381 (1905). See also, *State v. Jackson*, 218 Minn. 429, 16 N.W.2d752 (1944) : “The ancient and immemorial right to hunt and fish, which was ‘not much less necessary to the existence of the Indians than the atmosphere they breathed,’ remained in them unless granted away,” citing, *United States v. Winans*, 198 U.S. 371, 381 (1905); *State v. Cooney*, 77 Minn. 518, 80 N.W. 696 (1899) and *State v. Johnson*, 212 Wis. 301, 249 N.W. 284 (Wis. 1933). See also, Thomas Lund, *The 1837 and 1855 Chippewa Treaties in the Context of Early American Wildlife Law*, pp 486-513 in “*Fish in the Lakes...*”

Like the Chippewa, the United States saw hunting, fishing, and gathering as a necessary part of occupation of the land. Cancellation of the means to subsist was intended to force the Chippewa to remove. As a practical matter there was no way the Chippewa would stop feeding themselves from the land. Everyone understood that as long as the Chippewa were resident in the ceded territory they would be permitted to hunt, fish and gather. McClurken, Id. at p. 64.

<sup>37</sup> **1825 Treaty with the Sioux and Chippewa...Tribes, (7 Stat., 272)**

<sup>38</sup> *Id.* at 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, but it being the sole object of this arrangement to perpetuate a peace among them, and amicable relations being now restored, the Chiefs of all the tribes have expressed a determination, cheerfully to allow a reciprocal right of hunting on the lands of one another, permission being first asked and obtained, as before provided for (emphasis added).*



**Treaty of 1825 (with Anishinabe and Lakota)**<sup>39</sup> -- Establishes boundary between *Anishinabe/Lakota* territory in Minnesota. *No limits on occupation or usufructuary rights with mutual agreement between Indian Nations.*<sup>40</sup>

**Treaty of 1826 (at Fond du Lac)**<sup>41</sup> – Establishes right of U.S. to carry out mining, but does not diminish Anishinabe sovereignty in any other way, *including the exercise of usufructuary rights.*

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* (emphasis added).<sup>42</sup>

**Treaty of 1837 (with Mille Lacs at St. Peter)**<sup>43</sup> – Ceding *Anishinabe* territory in Minnesota north of Minneapolis/St. Paul and west of Mississippi River to northern edge of Mille Lacs – *specifically retains pre-existing Anishinabe usufructuary rights in ceded territory, in remainder of Minnesota not effected*, as found by U.S. Supreme Court in *Minnesota v. Mille Lacs Band of Chippewa Indians.*<sup>44</sup>

**Treaty with the (Wisconsin) Chippewa 1842**<sup>45</sup> - Although this Treaty applies to land cessions now located in only in Wisconsin, its terms demonstrate the *Anishinabe* reliance on assurances that *usufructuary* rights are always retained in the treaties that do not specifically mention bargaining these rights away.<sup>46</sup>

ARTICLE 2 -- The Indians stipulate for the right of hunting on the ceded territory, with the other usual privileges of occupancy, until required to

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<sup>39</sup> **1826 Treaty with the Chippewa, 1826 (7 Stat. 290):**

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;...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, therefore...

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.

See Map, no Minnesota territory ceded to United States.

<sup>40</sup> *Supra* note 34.

<sup>41</sup> See Map, no Minnesota territory ceded to United States.

<sup>42</sup> **Treaty with the Chippewa, 1826 (7 Stat. 290).**

<sup>43</sup> See Map for Minnesota Territory ceded by the *Anishinabe*.

<sup>44</sup> **Treaty with the Chippewa, 1837 (7 Stat. 536)**

ARTICLE 5 -- The privilege of hunting, fishing, and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded, is guaranteed to the Indians, during the pleasure of the President of the United States.

<sup>45</sup> **Treaty with the Chippewa, 1837 (7 Stat., 536).**

<sup>46</sup> **Treaty with the (Wisconsin) Chippewa 1842 (7 Stat., 591).**

remove by the President of the United States, and that the laws of the United States shall be continued in force, in respect to their trade and intercourse with the whites, until otherwise created by Congress.

**Treaty of 1847 (with Pillager Band at Leech Lake)**<sup>47</sup> – Ceding *Anishinabe* territory west of Mississippi for purposes of Wisconsin Winnebago and Menominee reservations which were never established, *Anishinabe usufructuary rights not disturbed*.<sup>48</sup>

**Executive Order of 1850**<sup>49</sup> -- found by the Supreme Court of the United States *not to have terminated pre-existing Anishinabe usufructuary rights in territory ceded in 1837 and 1847* and, by necessary implication, in territory not yet ceded to the United States.<sup>50</sup>

**Treaty of 1854 (with Mississippi and Lake Superior Bands)**<sup>51</sup> – Ceding northern Wisconsin and northeastern Minnesota, including Duluth area and Minnesota's "Arrowhead" to the United States, but which the *Lac Court Oreilles* decision<sup>52</sup> determined *did not include usufructuary rights*, based on the following language in the Treaty (including 1837 and 1847 treaty territory, despite the 1850 Executive Order).<sup>53</sup>

ARTICLE 11 -- And such of them as reside in the territory hereby ceded, shall have the right to hunt and fish therein, until otherwise ordered by the President.

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<sup>47</sup> See Map for Minnesota Territory ceded by the *Anishinabe*.

<sup>48</sup>**Treaty with the Chippewa, 1847 (9 Stat. 904)**

ARTICLE 2. The Chippewa Indians of the Mississippi and Lake Superior cede and sell to the United States all the land within the following boundaries...but, as the boundary-line between the Indians, parties to this treaty, and the Chippewa Indians, commonly called "Pillagers," is indefinite, it is agreed that before the United States use or occupy the said tract of land north of Long Prairie River, the boundary-line between the said tract and the Pillager lands shall be defined and settled to the satisfaction of the Pillagers.

In *The Minnesota Chippewa Tribe, et. al. v. The United States of America*, Docket No. 18-T, *Order Granting Petitioners' Motion for Summary Judgment*, (August 20<sup>th</sup>, 1968), the Indian Claims Commission concluded, as a matter of law, the Chippewa Indians of the Mississippi and Lake Superior were owners by recognized title of the land ceded by them to the United States by the Treaty of August 2, 1847. In the *Opinion of the Commission*, Docket No. 144, 21 Ind. Cl. Comm. 1 (decided May 20, 1969), the Commission decided that the Treaty language, "It is stipulated that the country hereby ceded shall be held by the United States as Indian land, until otherwise ordered by the President," did not abrogate usufructuary rights in ceded territory.

<sup>49</sup> See Map, no territory in Minnesota ceded by *Anishinabe*.

<sup>50</sup> See *State of Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, at 194-95 (1999), in which the Court holds that "President Taylor's 1850 Executive Order was ineffective to terminate Chippewa *usufructuary* rights under the 1837 Treaty. The State has pointed to no statutory or constitutional authority for the President's removal order and the Executive Order, embodying as it did one coherent policy, is inseverable."

<sup>51</sup> **Treaty with the Chippewa, 1854 (10 Stats. 1109)**, See Map.

<sup>52</sup> *Lac Courte Oreilles and of Chippewa Indians v. Wisconsin*, 700 F.2d 341 (7th Cir. 1983).

<sup>53</sup> *Accord, State of Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999).

The 1854 Treaty *also* specifically states that *Anishinabe west of treaty border retain all previous rights in the rest of Minnesota, presumably including usufructuary rights.*

ARTICLE 1 -- The Chippewas of Lake Superior hereby cede to the United States all the lands heretofore owned by them in common with the Chippewas of the Mississippi. The Chippewas of the Mississippi hereby assent and agree to the foregoing cession...the Chippewas of Lake Superior hereby relinquish to the Chippewas of the Mississippi, all their interest in and claim to the lands heretofore owned by them in common, lying west of the above boundary-line.<sup>54</sup>

**Treaty of 1855 (with Mississippi, Pillager, Winnibigoshish Bands)**<sup>55</sup> - Ceding territory in north central Minnesota west of 1854 Treaty border. *No mention of abrogation of pre-existing usufructuary rights specifically referred to in 1854 and 1837 Treaties in Minnesota (or the 1842 Treaty in Wisconsin).*<sup>56</sup>

**Minnesota Statehood Enabling Act of 1858**<sup>57</sup> -- found by the Supreme Court of the United States *not* to have terminated pre-existing *Anishinabe usufructuary* rights in ceded territory and, *by necessary implication, un-ceded territory as well.*<sup>58</sup>

**Treaty of 1863 (with Mississippi, Pillager, Winnibigoshish Bands) (12 Stat. 1249)**<sup>59</sup> cedes reservations set up in the 1855 Treaty, but no additional territory. *No mention of abrogation of usufructuary rights.*<sup>60</sup>

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<sup>54</sup> **Treaty with the Chippewa, 1854 (10 Stat., 1109)**

ARTICLE 1 --The Chippewas of Lake Superior hereby cede to the United States all the lands heretofore owned by them in common with the Chippewas of the Mississippi.... Chippewas of Lake Superior hereby relinquish to the Chippewas of the Mississippi, all their interest in and claim to the lands heretofore owned by them in common, lying west of the above boundry-line.

ARTICLE 11 -- And such of them as reside in the territory hereby ceded, shall have the right to hunt and fish therein, until otherwise ordered by the President.

<sup>55</sup> See map for Minnesota Territory ceded by the *Anishinabe*.

<sup>56</sup> **Treaty with the Chippewa, 1855 (10 Stat., 1165)**

ARTICLE 1 -- The Mississippi, Pillager, and Lake Winnibigoshish bands of Chippewa Indians hereby cede, sell, and convey to the United States all their right, title, and interest in, and to, the lands now owned and claimed by them, in the Territory of Minnesota, and included within the following boundaries,..... And the said Indians do further fully and entirely relinquish and convey to the United States, any and all right, title, and interest, of whatsoever nature the same may be, which they may now have in, and to any other lands in the Territory of Minnesota or elsewhere.

“[T]he 1855 Treaty makes no mention of hunting and fishing rights, whether to reserve new usufructuary rights or to abolish rights guaranteed by previous treaties.” See *Minn. v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 184-85 (1999). The Court interpreted the 1855 Treaty as designed primarily to transfer land to the United States, “not to terminate Chippewa usufructuary rights.” *Id.* at 198. See also, *State v. Jackson*, 218 Minn. 429, 16 N.W.2d 752 (1944).

<sup>57</sup> See Map, no Minnesota Territory ceded by the *Anishinabe*.

<sup>58</sup> *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 179 (1999). .

<sup>59</sup> **1863 Treaty with the Chippewa of the Mississippi and the Pillager and Lake Winnibigoshish Bands (12 Stat. 1249 )**.

**Treaty of 1863 (Red Lake, Pembina Bands at Old Crossing) ( \_\_ Stat \_\_)**<sup>61</sup>  
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.*<sup>62</sup>

**1864 Modification of 1863 Treaty (with Mississippi, Pillager, Winnibigoshish Bands)**<sup>63</sup> *No discussion of abrogation of usufructuary rights.*<sup>64</sup>

**1864 Modification of 1863 Treaty (with Red Lake and Pembina Bands), Red Lake Band refuse to remove, or to cede or trade lands. (13 Stat. 689).**<sup>65</sup> *No mention of abrogation of usufructuary rights.*<sup>66</sup>

**Treaty of 1866 (with Mississippi Band)**<sup>67</sup> – Ceding territory at Canadian Border west of 1854 Treaty Border and into Dakota Territory. *No mention of abrogation of usufructuary rights.*<sup>68</sup>

**Nelson Act of 1889**<sup>69</sup> – Ceding territory between west 1855 Treaty boundary and 1863 Treaty Boundary. *No mention of abrogation of usufructuary rights.*<sup>70</sup>

**Treaty of 1904, 31 Stat. 1077**<sup>71</sup> -- *No mention of abrogation of usufructuary rights.*<sup>72</sup>

**Indian Reorganization Act of 1934 (48 Stat. 984)**<sup>73</sup> - *No mention of abrogation of usufructuary rights.*<sup>74</sup>

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<sup>60</sup> See text.

<sup>61</sup> See Map for Minnesota Territory ceded by the *Anishinabe*. *United States v. State of Minnesota.*, 466 F. Supp. 1382, 1383 (D.C. Minn. 1979).

<sup>62</sup> **The 1863 Treaty at the Old Crossing of the Red Lake River ( \_\_ Stat. \_\_)**. No mention of hunting and fishing rights, “but transcript of the negotiations does make clear that the Indians were promised continued hunting and fishing rights on the ceded land.” *United States v. State of Minnesota*, 466 F. Supp. 1382, 1383 (D.C. Minn. 1979).

<sup>63</sup>

<sup>64</sup> **13 Stat., 689.** See Map for Minnesota Territory ceded by the *Anishinabe*.

<sup>65</sup> *Id.* **ARTICLE 1.**

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

<sup>66</sup> **13 Stat., 693**

<sup>67</sup> See Map for Minnesota Territory ceded by the *Anishinabe*.

<sup>68</sup> **16 Stat. 719.** No mention of hunting and fishing rights, but transcript of the negotiations does make clear that the Indians were promised continued hunting and fishing rights on the ceded land. *United States v. State of Minnesota.*, 466 F. Supp. 1382, 1383 (D.C. Minn. 1979).

<sup>69</sup> See Map for Minnesota Territory ceded by the *Anishinabe*.

<sup>70</sup> *United States v. State of Minnesota.*, 466 F. Supp. 1382, 1383 (D.C. Minn. 1979).

<sup>71</sup> See Map, no Minnesota Territory ceded by the *Anishinabe*.

<sup>72</sup> *United States v. State of Minnesota*, 466 F. Supp. 1382, 1384 (D.C. Minn. 1979).

<sup>73</sup> 25 U.S.C. § 461 *et seq.* See Map, no Minnesota Territory ceded by the *Anishinabe*.

**Public Law 280, 1953**<sup>75</sup> -- *No mention of abrogation of usufructuary rights.*<sup>76</sup> *Anishinabe usufructuary rights in the 1854 Treaty remain intact today in northern Wisconsin and Minnesota's Arrowhead and in all of Minnesota west of the 1854 Treaty boundary line, in which the Anishinabe retained full sovereignty in 1854.*<sup>77</sup>

The only treaties which mention the status of *usufructuary* rights in territory ceded by the *Anishinabe* from 1825 to the present are:

(a) the 1837 Treaty, which *specifically retained Anishinabe usufructuary* in the 1837 ceded territory in Minnesota<sup>78</sup> and, by implication recognized *Anishinabe usufructuary* rights in the rest of Minnesota,<sup>79</sup>

(b) the 1842 Treaty which also specifically retained *Anishinabe usufructuary* rights in ceded territory in Wisconsin,<sup>80</sup> *and*

(c) the 1854 Treaty which also specifically retained *Anishinabe usufructuary* rights in the ceded territory in both Wisconsin<sup>81</sup> and Minnesota,<sup>82</sup> but which,

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<sup>74</sup> *United States v. State of Minnesota*, 466 F. Supp. 1382, 1384 (D.C. Minn. 1979). However, the Act does require recognition of prior-existing treaty rights:

**Sec. 478b - Application of laws and treaties**

All laws, general and special, and all treaty provisions affecting any Indian reservation which has voted or may vote to exclude itself from the application of the Act of June 18, 1934 (48 Stat. 984) (25 U.S.C. 461 et seq.), shall be deemed to have been continuously effective as to such reservation, notwithstanding the passage of said Act of June 18, 1934. Nothing in the Act of June 18, 1934, shall be construed to abrogate or impair any rights guaranteed under any existing treaty with any Indian tribe, where such tribe voted not to exclude itself from the application of said Act.

<sup>75</sup> In 1953, Congress enacted Public Law 280 (codified as amended at 18 U.S.C. § 1162 (1994) 25 U.S.C. §§ 1321 1324 (1994) 28 U.S.C. § 1360 (1994) ), which gives certain states broad criminal jurisdiction within some Indian reservations. Public Law 280 adopted to confront "the problem of lawlessness on certain Indian reservations, and the absence of adequate trial institutions for..." law enforcement and criminal prosecutions. [This statute may require re-examination in light of the increasingly sophisticated law enforcement and trial court systems that have developed since enactment of the statute.]

<sup>76</sup> See Map, no Minnesota Territory ceded by the *Anishinabe*.

<sup>77</sup> **Treaty with the Chippewa, 1854 (10 Stat., 1109)**

ARTICLE 1 -- The Chippewas of Lake Superior hereby cede to the United States all the lands heretofore owned by them in common with the Chippewas of the Mississippi. The Chippewas of the Mississippi hereby assent and agree to the foregoing cession...*the Chippewas of Lake Superior hereby relinquish to the Chippewas of the Mississippi, all their interest in and claim to the lands heretofore owned by them in common, lying west of the above boundary-line.*

<sup>78</sup> See note supra

<sup>79</sup> See note supra

<sup>80</sup> See note supra

<sup>81</sup> See note supra

<sup>82</sup> See note supra

(d) *also* describes the undiminished *Anishinabe* sovereignty in *un-ceded* Minnesota territory west of the 1854 Treaty boundary line<sup>83</sup> (including portions of the Dakota territory) that was eventually ceded to the United States between 1855 and 1889.<sup>84</sup>

(e) Furthermore, none of the later treaties *mention usufructuary* rights, much less the *abrogation* of such rights.<sup>85</sup>

Consequently, as of 1855, it seems indisputable that the *Anishinabe* Nation had no less than *three* written assurances from the U.S. government that their traditional *usufructuary* rights were *not* abrogated in territory *ceded* in 1837, 1842 or 1854, and were *never* presented with written representations to the contrary, despite some lower court cases to contrary.<sup>86</sup> Furthermore, as of the 1855 Treaty cession, the *Anishinabe* traditional *usufructuary* rights *must* have been completely intact in *un-ceded* territory in the rest of Minnesota, which was north of the 1837 ceded territory and west of the 1854 ceded territory,<sup>87</sup> over which they retained complete sovereignty, with the exception of extraction of minerals.<sup>88</sup>

The question then is whether any subsequent treaties, executive orders or congressional enactments, abrogated the traditional *usufructuary* rights that the *Anishinabe* refrained in *all* of Minnesota, including ceded territory, in 1855.<sup>89</sup> According to the Seventh Circuit in the *Lac Court Oreilles* cases, as well as the Eighth Circuit and the Supreme Court of the United States, in the *Mille Lacs* case, *Anishinabe usufructuary* rights were *not* abrogated by treaty or by unilateral acts by the United States government. The State of Minnesota has also recognized the continued vitality of *Anishinabe usufructuary* Treaty rights in 1988 when it entered into the Tri-Band Agreement<sup>90</sup> with the *Anishinabe* Bands in Minnesota's "Arrowhead" region. The Tri-Band Agreement

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<sup>83</sup> See note supra

<sup>84</sup> See Map.

<sup>85</sup> *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 179 (1999).

<sup>86</sup> *United States v. State of Minnesota*, 466 F. Supp. 1382 (D. Minn. 1979).

<sup>87</sup> See Map.

<sup>88</sup> 1826 Treaty, *supra* note 42.

<sup>89</sup> The current validity of *Anishinabe usufructuary* Treaty Rights, and those of the *Lakota* differ significantly because of the reaction of Congress to the Sioux Rebellion of 1862, and the Lincoln administration execution of 38 Lakota in Mankato. See ,12 Stat 652, 12 Stat. 819.

<sup>90</sup> 1988 TRI-BAND Agreement, (author copy).

was the result of the settlement of the *Lac Courte Oreilles* litigation and again in 1999 when the *Mille Lacs* Band, and intervenors, prevailed in the Supreme Court of the United States.<sup>91</sup>

## **II. Modern Litigation Upholding the Undiminished *Usufructuary* Rights of the *Anishinabe*, under the Treaties of 1837, 1854 and 1855...Up to the Present Day.**

The first successful assertion of *Anishinabe* off-reservation hunting, fishing rights and gathering rights occurred in the Wisconsin *Lac Court Oreilles* cases in the late 1980's, which involved interpretation of an 1854 Treaty which ceded *Anishinabe* territory in northern Wisconsin and Minnesota's "Arrowhead" region, north of Lake Superior to the United States.<sup>92</sup> The federal courts held that rights retained under the 1854 Treaty entitled the *Anishinabe* to the right to a "modest living" from the exercise of off-reservation *usufructuary* rights in the 1854 ceded territory.<sup>93</sup>

The second successful assertion of off-reservation *Anishinabe* *usufructuary* rights occurred in the 1999 in the United States Supreme Court opinion in *Minnesota v. Mille Lacs Band of Chippewa Indians*,<sup>94</sup> which recognized the continuing validity of *Anishinabe* *usufructuary* rights within the 1837, 1854 and 1855 ceded territories.<sup>95</sup> The Supreme Court held that *pre-existing* *usufructuary* land-use rights were *not* removed by

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<sup>91</sup> GREAT LAKES REGIONAL COLLABORATION, Tribal Nations Issues and Perspectives, Version 1.0, April 26, 2005 , p. 2:

Some Tribal Nations in the Great Lakes Basin have formed intertribal agencies to assist them regarding treaty-reserved hunting, fishing and gathering rights. Such agencies carry out their responsibilities in accordance with specific delegations of authority from their member Tribal Nations:

- The Chippewa Ottawa Resource Authority (CORA) assists five Tribal Nations that signed the Treaty of 1836 in protecting and implementing such rights in parts of Michigan. *See* Treaty of Washington (1836), 7 Stat. 491.
- The Great Lakes Indian Fish and Wildlife Commission (GLIFWC) assists eleven Tribal Nations that signed various Treaties, including those of 1836, 1837, 1842 and 1854, in protecting and implementing such rights in parts of Michigan, Minnesota and Wisconsin. *See* Treaty of Washington (1836), 7 Stat. 491; Treaty of St. Peters (1837), 7 Stat. 536; Treaty of La Pointe (1842), 7 Stat. 591; and Treaty of La Pointe (1854), 10 Stat. 1109.
- The 1854 Authority assists two Tribal Nations that signed the Treaty of La Pointe (1854) 10 Stat. 1109 in the northeastern part of Minnesota.

<sup>92</sup> *State of Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 179 (1999).

<sup>93</sup> *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. State of Wis.* (LCO III), 653 F. Supp. 1420 (W.D. Wis. 1987).

<sup>94</sup> *State of Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 179 (1999).

<sup>95</sup> *State of Minnesota v. Mille Lacs Band of Chippewa Indians*, \_\_\_ F.2d \_\_\_ (8<sup>th</sup> Cir. 1997)

an 1850 Presidential Executive Order, by an 1855 Treaty *that failed to mention retention of usufructuary rights* by the *Anishinabe*, by Minnesota's entry into the union as a State, or subsequent treaties, executive orders and congressional enactments up to, and including, the present day.<sup>96</sup>

As the map indicates,<sup>97</sup> in addition to treaties in 1837 and 1854, various Minnesota *Anishinabe* bands entered into treaties which ceded territory to the United States and, eventually, the entirety of the State of Minnesota with the exception of *Anishinabe* Reservations that had been designated in the treaties. In addition, as the Supreme Court held in *Minnesota v. Mille Lacs*, there is nothing in any of these treaties, Executive Orders or Congressional enactments<sup>98</sup> to suggest that the pre-existing off-reservation *usufructuary* rights of *Anishinabe* bands in Minnesota have been diminished. Significantly, neither the 1855 Treaty,<sup>99</sup> the 1863 Treaty,<sup>100</sup> the 1866 Treaty,<sup>101</sup> or, the 1889 Treaty,<sup>102</sup> make *any* mention of agreed-upon limits on traditional hunting, fishing and gathering in the areas ceded to the U.S.<sup>103</sup>

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<sup>96</sup> *Id.* at 189-207.

<sup>97</sup> *See* Map.

<sup>98</sup> *Fish in the Lakes, Wild Rice and Game in Abundance: Testimony on Behalf of Mille Lacs Ojibwe Hunting and Fishing Rights*, James McClurkin, ed. (Michigan State University Press, East Lansing 2000). Congress passed several Acts regarding Ojibwa reservations between 1902 and 1923, none of which required the Ojibwa at *Mille Lacs*, or elsewhere, to give up hunting, fishing and gathering rights that pre-existed the 1837 and 1854 Treaties, which specifically retained such rights in territory ceded by those treaties. P. 425-459.

<sup>99</sup> *See, supra* note 56.

<sup>100</sup> *See, supra* note 62.

<sup>101</sup> *See, supra* note 67-68.

<sup>102</sup> *See, supra* note 69.

<sup>103</sup> *Fish in the Lakes, Wild Rice and Game in Abundance: Testimony on Behalf of Mille Lacs Ojibwe Hunting and Fishing Rights*, James McClurkin, ed. (Michigan State University Press, East Lansing 2000), McClurkin, James, Re: 1889 Nelson Allotment,

While there is no mention of hunting, fishing and gathering, in the agreement, itself, it is clear from the council minutes that the *Mille Lacs* Ojibwas believed that access to traditionally harvested natural resources [was] protected. It is true that Henry Rice assumed that the *Mille Lacs* hunters would be bound by hunting seasons codified in Minnesota law, but the *Mille Lacs* Ojibwas probably did not see this restriction as a serious problem. States in the Upper Midwest, including Minnesota, at that time had no restrictions on the number of deer the hunters could take, and there was little enforcement of game laws. The really critical issue in 1889 was whether the *Mille Lacs* Ojibwas had the right to hunt off-reservation at all, and Rice reassured them they did. (P. 404).



Prior to the decade-long federal litigation in Wisconsin testing the meaning of the 1854 Treaty as it applied to retained hunting and fishing rights in ceded areas of Wisconsin and northern Minnesota, Minnesota courts issued a number of rulings *rejecting Anishinabe* claims that cession of ownership of territory by treaty, did *not* extinguish the right to traditional uses.<sup>104</sup> For example, in 1979 in *United States v. State of Minnesota*,<sup>105</sup> the District Court applied an analysis that is completely contrary to that applied by the Supreme Court of the United States in the *Mille Lacs* opinion,<sup>106</sup> and by the Minnesota Supreme Court as early as 1944 in *State v. Jackson*.<sup>107</sup> The District Court held that the normal practice was for the Treaty to state whether the Band *reserved* hunting and fishing rights in the ceded area,<sup>108</sup> a method of analysis rendered obsolete by the Supreme Court in *United States v. Dion*<sup>109</sup> and specifically rejected with respect to Treaties with the *Anishinabe* by the *Lac Courte Oreilles*<sup>110</sup> and *Mille Lacs*<sup>111</sup> cases.

***Lac Courte Oreilles v. Wisconsin (I-VIII): the Anishinabe***  
**“Right to a Modest Living” from Off-Reservation Usufructuary Rights**

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<sup>104</sup> See e.g., *White Earth Band of Chippewa Indians v. Alexander*, 518 F. Supp. 527 (D. Minn. 1981); *White Earth Band of Chippewa Indians v. Alexander*, 683 F.2d 1129 (8th Cir. 1982); *Mille Lacs Band of Chippewa Indians v. State of Minnesota*, 861 F. Supp. 784 (D. Minn. 1994); *United States v. Gotchnik*, 222 F.3d 506 (8th Cir. 2000); *State v. Shabaiash*, 485 N.W.2d 724 (Minn. Ct. App. 1992) (individuals who are not enrolled members of a band are not entitled to exercise hunting and fishing treaty rights reserved to members under the 1854 treaty); *State v. Keezer*, 292 N.W.2d 714 (Minn. 1980); *State v. Butcher*, 563 N.W.2d 776 (Minn. 1997). However, there are a few cases which do apparently recognize the continuing validity of *usufructuary* rights: *State v. Jackson*, 218 Minn. 429, 16 N.W.2d 752 (1944) (a tribal Indian cannot be prosecuted by the state for shooting game out of season when the shooting occurred within the limits of the reservation of his tribe); *United States v. Bresette*, 761 F. Supp. 658 (D. Minn. 1991) (Chippewa charged with sale of migratory bird feathers in violation of the Migratory Bird Treaty Act; court held that Chippewa have treaty rights to sell such feathers pursuant to their *usufructuary* rights in the 1854 treaty).

<sup>105</sup> 466 F. Supp. 1382 (D. Minn. 1979).

<sup>106</sup> See *infra*.

<sup>107</sup> 218 Minn. 429, 16 N.W.2d 752, 755 (1944):

So far as treaty provisions are concerned, it is conceded that the Treaty by which Leech Lake Reservation was established (Treaty of 1855, 10 Stat. 1165) contains no express reservation by the Indians of the right to hunt and fish upon their reservation. But, such a saving clause would have been superfluous, as the ‘the treaty was not a grant of rights to the Indians, but a grant of rights from them – a reservation of those not granted.

<sup>108</sup> 466 F. Supp. 1382, 1384 (D. Minn. 1979).

<sup>109</sup> *United States v. Dion*, 476 U.S. 734, 738 (1986). In *Dion*, the Court made clear that “Congress’ intention to abrogate Indian treaty rights be clear and plain,” because “Indian treaty rights are too fundamental to be easily cast aside.”

<sup>110</sup> See discussion of *Lac Courte Oreilles*, *infra*.

<sup>111</sup> See discussion of *Mille Lacs*, *infra*.

The District Court’s precedential and analytical anomaly in *United States v. State of Minnesota* only becomes apparent in the late 1980’s when the Seventh Circuit Court of Appeals<sup>112</sup> and the Wisconsin federal courts recognized that the 1854 Treaty between the United States and the Lake Superior Band of *Anishinabe* did *not* cede *Anishinabe* hunting and fishing rights *within* the ceded territory, including Minnesota’s “Arrowhead.”<sup>113</sup> This may not be surprising because the 1854 Treaty contained language specifically retaining *Anishinabe usufructuary* rights in the ceded territory.<sup>114</sup> But, more significantly, the Seventh Circuit held that *subsequent* treaties, executive orders and congressional enactments, *that did not specifically mention the continuing validity of pre-existing usufructuary rights*, did not abrogate the pre-existing rights, as understood by the *Anishinabe*. In a series of cases over a decade, under the title *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin*, the federal courts recognized the right of the *Anishinabe* to “enjoy a modest living by the exercise of their *usufructuary* rights within the ceded territory.”<sup>115</sup>

These 20 year-old rulings have permitted Lake Superior Band members to fish, “out of season,” using traditional methods on *off-reservation* lakes and to hunt and gather on lands that were not “private” in 1854, which includes much of northern Wisconsin and northeastern Minnesota, including most lakes and rivers.<sup>116</sup> Beyond the obvious significance of this interpretation of the 1854 Treaty for the Lake Superior Bands in areas adjacent to Lake Superior, the *same* treaty also has potentially far-reaching significance for the *Anishinabe* in the rest of Minnesota, too. The 1854 Treaty is careful to

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<sup>112</sup> *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt* (LCO I), 700 F.2d 341 (7th Cir. 1983), *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. State of Wis.* (LCO II), 760 F.2d 177 (7th Cir. 1985).

<sup>113</sup> *Lac Courte Oreilles v. Wisc.*, 653 F.Supp. 1420 (W.D. Wis. 1987).

<sup>114</sup> See e.g., ARTICLE 11: “And such of them as reside in the territory hereby ceded, shall have the right to hunt and fish therein, until otherwise ordered by the President.”

<sup>115</sup> *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. State of Wis.* (LCO III), 653 F. Supp. 1420 (W.D. Wis. 1987).

<sup>116</sup> In *Lac Courte Oreilles III*, 653 F. Supp. 1420, 1424, the court specified that “[t]he Chippewa in the ceded territory were hunters and gatherers. Their hunting activities included fishing and fowling in addition to traditional notions of hunting. *The Chippewa harvested virtually everything on the landscape. They had some use or uses for all the flora and fauna in their environment, whether for food, clothing, shelter, religious, commercial, or other purposes.*” (emphasis added).

differentiate between the area ceded by the Lake Superior Band, to which the terms of the treaty applied, and the *un-ceded* lands occupied by the Mississippi Band west of the treaty border through most of northern Minnesota, which remained under *Anishinabe* sovereignty. The 1854 Treaty provides, on its face, that nothing in the treaty diminishes the rights of the Mississippi Band in the lands *west* of the treaty border which, in 1854, meant all of northern Minnesota<sup>117</sup>:

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* (emphasis added).<sup>118</sup>

Further, the terms of the 1854 Treaty specifically refer to the continuation of 1837 treaty rights to be exercised by *both* the Lake Superior and Mississippi Chippewa.

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.<sup>119</sup>

The Treaty also defined the Chippewa Bands that were parties to the Treaty:

It is understood that all Indians who are parties to this treaty, except the Chippewas of the Mississippi, shall hereafter be known as Chippewas of Lake Superior. Provided, That the stipulation by which the Chippewas of Lake Superior relinquishing their right to land to the west of the boundary line shall not apply to the *Bois Forte* band who are parties to this treaty.<sup>120</sup>

This means that the evidentiary record and legal analysis in the *Lac Courte Oreilles* cases not only include factual findings regarding the *usufructuary* rights exercised by *both* the Lake Superior and Mississippi Band in the 1854, but conclusively establish that the sovereignty rights of the Mississippi Band west of the 1854 Treaty boundary *were not* limited, in any way, and *must* be retained today, unless a later treaty or Congressional

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<sup>117</sup> Presumably, all areas inhabited by *Anishinabe* west of the 1854 Treaty border, whether in modern-day Minnesota or other states to the west, including North Dakota and South Dakota, where *Anishinabe* People were present in 1854.

<sup>118</sup> Article 1, Treaty of 1854.

<sup>119</sup> Id. Article 8.

<sup>120</sup> Id. Article 12.

enactment *removed usufructuary* rights from the Mississippi Band living in northern Minnesota.<sup>121</sup>

Although the State of Minnesota was not a party to the *Lac Courtes Oreilles* litigation, it apparently considered itself bound by that case to recognize the continuing vitality of *Anishinabe usufructuary* rights since at least 1987, when it entered into the “Tri-Band Agreement with *Anishinabe* Bands to jointly manage resources in the 1854 ceded territory.<sup>122</sup> However, Minnesota has chosen *not* to recognize the validity of off-reservations *usufructuary* rights in the Mississippi *Anishinabe* lands *west* of the 1854 Treaty border, despite the terms of the 1854 Treaty, itself, specifically states that the Mississippi Band *retains complete sovereignty* west of the 1854 Treaty boundary.<sup>123</sup>

According to the terms of the 1854 Treaty, *all Anishinabe* Bands and Reservations which resided on ceded territory, and, *ipso facto*, on sovereign territory in 1854 *should* have been benefitting from *off-reservation usufructuary* (either rights in terms of resource-harvesting,<sup>124</sup> or by receiving financial recompense) in the same fashion as bands residing on territory ceded by the 1854 Treaty. Pursuant to the *Tri-band*

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<sup>121</sup> See *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 200 (1999), where the Supreme Court concluded that neither the 1855, or later Treaties or U.S. government actions abrogated *Anishinabe usufructuary* rights for the simple reason that, after 1854, there is no mention of these traditional, pre-existing rights being diminished in any way.

<sup>122</sup> *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 in the ceded territory and Lake Superior...

<sup>123</sup> *Supra* note 54.

<sup>124</sup> See, Great Lakes Indian Fish and Wildlife Commission (GLIFWC), *A Guide to Understanding Chippewa Treaty Rights: Minnesota Edition* (Odanah, Wisc. 1995), which describes the self management Wisconsin Bands have chosen, as has the *Fond du lac* Band in Minnesota.

*Agreement*,<sup>125</sup> Minnesota enters into lease agreements with the *Anishinabe* to enforce wildlife regulations on behalf of the Bands, in exchange for State payments of several millions of dollars annually.<sup>126</sup>

***Minnesota v. Mille Lacs: The Supreme Court of the United States Confirms Continuing Off-reservation Minnesota Anishinabe Usufructuary Rights.***

More than a decade after *Lac Courte Oreilles* cases were decided in the Wisconsin courts, and Minnesota had recognized the continued vitality of *Anishinabe usufructuary* rights under the 1854 Treaty, the U.S. Supreme Court ruling in the *Mille Lacs* case established that specifically retained *usufructuary rights* in 1837 ceded territory, were not abrogated by subsequent treaties, executive orders and congressional enactments, including the 1855 Treaty which, like all treaties after 1854, made *no references usufructuary rights*.<sup>127</sup> In tandem with the *Lac Courte Oreilles* case, the *Mille Lacs* case established the principle that traditional rights are retained by the *Anishinabe*,

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<sup>125</sup> (author copy)

<sup>126</sup> ***Tri-Band Agreement, Article IV. OBLIGATIONS AND RIGHTS OF THE STATE:***

A. **Annual Payment:** The State shall pay annually to the Grand Portage Band and Bois Forte Band the sum of one million six hundred thousand dollars (\$1,600,000,000 *each*, and to the Fond du Lac Band the sum of one million eight hundred and fifty thousand dollars (\$1,500,000,000) paid by the State pursuant to the settlement of litigation referenced in Minn. Stat. Secs. 97A.151 and 97A.155 (1986) shall be matched dollar for dollar, in the payments made to each of the Three Bands. This formula shall continue to apply to the Three Bands even if it may in the future no longer apply to Leech Lake Band.

<sup>127</sup> In the *Mille Lacs* case, the Court found that the 1855 Treaty set aside lands as reservations for the *Mille Lacs* Band, but made no mention of, among other things, whether it abolished rights guaranteed by previous treaties. Because Congress must clearly express an intent to abrogate Indian treaty rights, *United States v. Dion*, 476 U.S. 734, 738-740, because the *Mille Lacs* Court found that after examination of the historical record the Chippewa retained the *usufructuary* rights guaranteed to them under the 1837 Treaty and that in that Treaty, based upon the 1837 Journal of Treaty Negotiations, the Chippewa insisted on preserving their right to hunt, fish, and gather in the ceded territory, the fact the 1855 Treaty does not have the same express language as the 1837 Treaty in regard to hunting and fishing rights should only be interpreted to mean all the prior treaty rights retained were reserved.

In fact, the *Mille Lacs* Court in discussing the 1855 Treaty pointed out the 1855 Treaty did make no mention of hunting and fishing rights, “whether to reserve new *usufructuary* rights or to abolish rights guaranteed by previous treaties (p. 184-185 of the Opinion) and agreed with the District Court’s rejection of the State’s argument that the 1855 Treaty abolished any of the 1837 Treaty rights. Page 185-186 of the Opinion. [The] “Court of Appeals concluded that the 1855 Treaty did not extinguish the *Mille Lacs* Band’s *usufructuary* privileges (citation) – the Court noted that the revocation of hunting and fishing rights was neither discussed during the Treaty negotiations nor mentioned in the Treaty itself.” *Id.* p. 187.

unless specifically “bargained away” by subsequent treaties,<sup>128</sup> or specifically removed by a clearly articulated act of Congress.<sup>129</sup>

The *Mille Lacs* litigation required construction of the Treaty of 1855,<sup>130</sup> which applied to territory *west* of that ceded to Mississippi Band by the Lake Superior Band in 1854,<sup>131</sup> and which the United States recognized as sovereign *Anishinabe* territory in the 1854 Treaty, and not shared with the Lake Superior Band which *had* ceded its territory,<sup>132</sup> but retained its *usufructuary* rights.<sup>133</sup> This means that, as of 1854, the *remainder* of the Minnesota, west of the 1854 Treaty boundary, remained the domain of the sovereign *Anishinabe* Nation, including where the Leech Lake, Red Lake and White Earth Reservations are now located.<sup>134</sup> The Supreme Court held that the 1855 Treaty did nothing to disturb the pre-existing hunting and fishing rights in the 1937 ceded area, *or* in the 1855 ceded area.<sup>135</sup>

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<sup>128</sup> See also *United States v. Dion*, 476 U.S. 734 (1986).

<sup>129</sup> See *infra*, at note 139.

<sup>130</sup> See Map.

<sup>131</sup> See Map.

<sup>132</sup> **Treaty with the Chippewa 1854:**

ARTICLE 12-- It is understood that all Indians who are parties to this treaty, except the Chippewas of the Mississippi, shall hereafter be known as Chippewas of Lake Superior. Provided, That the stipulation by which the Chippewas of Lake Superior relinquishing their right to land to the west of the boundary line shall not apply to the *Bois forte* band who are parties to this treaty.

<sup>133</sup> *Lac Courte Oreilles Band of Chippewa Indians v. Wisconsin*, *supra/infra*

<sup>134</sup> See Map.

<sup>135</sup> See, *State of Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999) in which the Supreme Court made the following findings:

1. President Taylor’s Executive Order of 1850 did not terminate Chippewa hunting and fishing rights under the 1837 Treaty. The Court found that the 1850 removal order was unauthorized because the Chippewa did not consent to the removal. *Id.* at 189. Further, because the Taylor’s Order had no statutory or constitutional authority, the Order was not severable from the invalid removal order. *Id.* at 195.

2. The *Mille Lacs* Band did not relinquish its *usufructuary* rights when it entered into the 1855 Treaty. To come to this conclusion, the Court looked to the history of the treaty, the negotiations, and the practical construction adopted by the parties. The Court noted that “the 1855 Treaty was designed primarily to transfer Chippewa land to the United States, not to terminate Chippewa *usufructuary* rights.” *Id.* at 196. During the Senate debate, Senator Sebastian, chairperson 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 are secured by former treaties.’ *Id.* at 197.

3. The Court interpreted silence with respect to hunting/fishing rights as *not* abrogating the Chippewa’s *usufructuary* rights because the Chippewa would not have agreed to relinquish the rights they fought so hard for in 1837 without a word during the committee session. *Id.* at 198. The Court noted that “Indian

A principal question in the *Mille Lacs* litigation before the Supreme Court, like that the *Lac Courte Oreilles* litigation in Wisconsin, was whether the 1855 Treaty with the Mississippi Band or later actions of the United States abrogated the hunting and fishing rights specifically granted within the 1837 ceded territory, and presumably fully retained in areas of Minnesota in which the *Anishinabe* were sovereign in 1837, and after. Like the Wisconsin Courts, the federal courts in Minnesota, and the Supreme Court held that the 1855 Treaty did *not* diminish the *usufructuary* rights of the Mille Lacs Band, any more than the 1854 Treaty had diminished the rights of the *Fond du Lac*, *Bois forte* or Grand Portage Bands upheld in the *Lac Courte Oreilles* cases,<sup>136</sup>

The entire 1855 Treaty, in fact, is devoid of any language expressly mentioning – much less abrogating – *usufructuary* rights. Similarly, the Treaty contains no language providing money for the abrogation of previously held rights. This omissions are telling because the United States treaty drafters had the sophistication and experience to use express language for the abrogation of treaty rights. In fact, just a few months after Commissioner Manypenny completed the 1855 Treaty, he negotiated a Treaty with the Chippewa of Sault Ste. Marie that expressly revoked fishing rights that had been reserved in an earlier Treaty. See 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”). See e.g. *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970)....

The 1855 Treaty was designed primarily to transfer Chippewa land to the United States, not to terminate Chippewa *usufructuary* rights. It was negotiated under the authority of the Act of December 19, 1854...The Act is silent with respect to authorizing agreements to terminate Indian

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treaties are to be interpreted liberally in favor of the Indians . . . and any ambiguities are to be resolved in their favor,” concluding that the *Mille Lacs* Band did not relinquish its *usufructuary* rights when it entered the 1855 Treaty. *Id.* at 200.

4. Finally, the Court rejected the notion that the Chippewa’s *usufructuary* rights under the 1837 Treaty were extinguished when Minnesota was admitted to the Union in 1858. *Id.* at 202. Minnesota relied on the *Ward v. Race Horse*, which held that a treaty granting Indian hunting and fishing rights was voided by Wyoming’s statehood in 1890. *Id.* at 203. O’Connor pointed out that *Race Horse* does not apply because *Race Horse* rested on the false premise that an Indian tribe’s treaty rights were irreconcilable with a state’s sovereignty over its natural resources. *Id.* at 204. The Court concluded that Indian treaty rights “can coexist with state management of natural resources” and unless these rights were expressly terminated at statehood (which they were not in this case), such rights continue after statehood. *Id.* at 204-205. The Court also refused to recognize that the Chippewa’s *usufructuary* rights were impliedly terminated upon statehood. *Id.* at 207.

<sup>136</sup> *United States v. Dion*, 476 U.S. 734 (1986). In *Dion*, the Court made plain that “We have required that Congress’ intention to abrogate Indian treaty rights be clear and plain,” and that “Indian treaty rights are too fundamental to be easily cast aside.”

*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.” Cong. Globe, 33d Cong. 1<sup>st</sup> Sess., 1404 (1854)...we cannot agree with the State that the 1855 Treaty abrogated Chippewa *usufructuary* rights...<sup>137</sup>

### III. The Exercise of *Anishinabe* Traditional *Usufructuary* Rights in Modern Society

The exercise of 19<sup>th</sup> Century *usufructuary* rights included a broad range of land use activities that the *Lac Courtes Oreille* litigation first attempted to catalogue.<sup>138</sup> The

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<sup>137</sup> *State of Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 179 (1999).

<sup>138</sup> 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 Chippewa also harvested a large number of plants and plant materials, including: box elder, sugar maple, arum-leaved arrow-head, smooth sumac, staghorn sumac, wild ginger, common milkweed, yellow birch, hazelnut, beaked hazelnut, nannyberry, climbing bitter-sweet, large-leaved aster, Philadelphia fleabane, dandelion, panicled dogwood, large toothwort, cucumber, Ojibwe squash, large pie pumpkin, gourds, field horsetail, bog rosemary, leather leaf, wintergreen, Labrador tea, cranberry, blueberry, beech, white oak, bur oak, red oak, black oak, corn, wild rice, Virginia waterleaf, shell bark hickory, butternut, wild mint, catnip, hog peanut, creamy vetchling, navy bean, lima bean, cranberry pole bean, lichens, wild onion, wild leek, false spikenard, sweet white water lily, yellow lotus, red ash, white pine, hemlock, brake, marsh marigold, smooth juneberry, red haw apple, wild strawberry, wild plum, pin cherry, sand cherry, wild cherry, choke cherry, highbush blackberry, red raspberry, large-toothed aspen, prickly gooseberry, wild black currant, wild red currant, smooth gooseberry, Ojibwe potato, hop, Virginia creeper, river-bank grape, red maple, mountain maple, spreading dogbane, paper birch, low birch, downy arrowwood, woolly yarrow, white sage, alternate-leaved dogwood, wool grass, great bulrush, scouring rush, sweet grass, Dudley's rush, marsh vetchling, sweet fern, black ash, balsam fir, tamarack, black spruce, jack pine, Norway pine, arbor vitae (white cedar), hawthorn, shining willow, sphagnum moss, basswood, cat-tail, wood nettle, slippery elm, and Lyall's nettle, poison ivy, winterberry, mountain holly, sweet flag, Indian turnip, wild sarsaparilla, ginseng, spotted touch-me-not, blue cohosh, speckled elder, hound's tongue, marsh bellflower, harebell, bush honeysuckle, red elderberry, snowberry, highbush cranberry, white campion, yarrow, pearly everlasting, lesser cat's foot, common burdock, ox-eye daisy, Canada thistle, common thistle, daisy fleabane, Joe-Pye weed, tall blue lettuce, white lettuce, black-eyed Susan, golden ragwort, entire-leaved groundsel, Indian cup plant, fragrant golden-rod, tansy, cocklebur, bunch berry, tower mustard, marsh cress, tansy-mustard, squash, wild balsam-apple, hare's tail, wood horsetail, prince's pine, flowering spurge, golden corydalis, giant



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.<sup>139</sup>

The findings of the federal District Court in *Lac Courte Oreilles* described the 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...*”<sup>140</sup>

As part of the *Mille Lacs* treaty rights litigation in the 1990s, the Eighth Circuit, noted that “*usufructuary* rights reserved by the Band included the rights to harvest resources for commercial purposes, and were not limited to use of any particular techniques, methods, devices, or gear.”<sup>141</sup> Not only are tribal members entitled to expressly retained treaty rights, inherent within those rights are the right to modern *usufructuary* rights.<sup>142</sup> Further, “any regulation imposed by the State must be necessary to ensure public health and

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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.

<sup>139</sup> *Id.*

<sup>140</sup> *Lac Courte Oreilles v. Wisc.*, 653 F. Supp. 1420, 1435 (W.D. Wis. 1987).

<sup>141</sup> *Mille Lacs Band of Chippewa Indians v. State of Minnesota.*, 124 F.3d 904, 911 (8th Cir. 1997).

<sup>142</sup> *Id.* and *Supra*

safety, and the State could not impose its own regulations if the Chippewa could establish tribal regulations adequate to meet conservation, public health and public safety needs.”<sup>143</sup> 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.<sup>144</sup>

However, in interpreting the reach of the *usufructuary* rights within the 1854 ceded territory, shortly after the *Mille Lacs* case opinion, 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,<sup>145</sup> despite the undisputed right of *Anishinabe* to hunt, fish and gather in the Arrowhead region guaranteed by the 1854 Treaty, and recognized by the Boundary Waters Act, itself.<sup>146</sup>

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<sup>143</sup> *Id.*

<sup>144</sup> *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 204-205 (1999).

<sup>145</sup> Art. I *et seq.*, 10 Stat. 1109; Act Oct. 21, 1978, § 4, 92 Stat. 1649.

<sup>146</sup> *Id.* *United States v. Gotchnik*, 222 F.3d 506, 509 (8<sup>th</sup> Cir. 2000). The Court resolved the contradiction between section 17 of the Boundary Waters Act, which provides nothing in the Acts “shall effect” existing treaties, and section 4, which imposes extensive limitations on motorized transport in the BCA because, “the Bands have presented no evidence, historical or otherwise, to suggest that the signatories [of the 1854 Treaty] adhered to a different understanding” (*emphasis added*).

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 would seem to be required. 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<sup>146</sup> and Congressional abrogation of treaty rights requires:

#### IV. The Consequences of the Minnesota's Failure to Apply the *Lac Courte Oreilles* and *Mille Lacs* Judgments to All Minnesota *Anishinabe*.

Because *only* the *Anishinabe* Bands who were parties to the *Lac Courte Oreille* 1854 Treaty litigation intervened in the *Mille Lacs* case,<sup>147</sup> the judgment in favor of the *Mille Lacs* plaintiffs *formally* did not extend to Minnesota Bands *other than* the Mille Lacs Band (in the 1837 and 1855 ceded territory) and *Fond du Lac*, *Bois forte* and Grand Portage Bands (in the 1854 ceded territory). However, it appears that principles of *res judicata*,<sup>148</sup> and/or *offensive collateral estoppel*<sup>149</sup> would preclude the State from re-litigating its objections to the treaty claims and factual issues decided in the previous litigation. But, in addition to resolving facts and law beyond dispute, the *Mille Lacs* decision also put the State on notice that it was bound to recognize the *usufructuary* rights clearly set out in the 1837 Treaty and not removed by the 1855 Treaty, or later.

Further, in entering into the Tri-Band Agreement with the *Anishinabe* Bands in Minnesota's "Arrowhead" region in 1988, the State apparently has considered itself bound by the terms of the 1854 Treaty, although, like the *Anishinabe* Bands of northern Minnesota in the *Milles Lacs* case,<sup>150</sup> the State of Minnesota never intervened in that litigation. The State of Minnesota has chosen *not* to recognize that the same treaty interpretation principles either within, or outside of the 1837, 1854, 1855 ceded territory, nor in territory later ceded by the Treaties did not discuss abrogation of *usufructuary* rights.

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*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.*<sup>146</sup>

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,<sup>146</sup> or "clear evidence" that Congress intended to abrogate *Anishinabe* Treaty rights in enacting the Boundary Waters Act,<sup>146</sup> the issue will have to be re-visited in future negotiations, or litigation, with respect to all of northern Minnesota, as well as the Boundary Waters.

<sup>147</sup> *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999).

<sup>148</sup> *Cromwell v. Country of Sac*, 94 U.S. 351 (1877). As one *Anishinabe* Nation, the northern Minnesota Bands north of the 1837 Treaty boundary, and west of the 1854 Treaty boundary are likely to be in *privity* with the *Anishinabe* Bands in that were parties to the *Lac Courte Oreilles* and *Mille Lacs* litigation.

<sup>149</sup> *Parklane Hosiery Co., Inc. v. Shore*, 429 U.S. 322 (1979). Under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." *Montana v. United States*, 440 U.S. 147, 153, 99 S.Ct. 970, 973, 59 L.Ed.2d 210 (1979).

<sup>150</sup> *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999).

Thus, while the existence and extent of *off*-reservation hunting and fishing rights retained by all Minnesota *Anishinabe* bands has already been established by the *Lac Courte Oreilles* and *Mille Lacs* cases, the State appears to have intentionally, or willfully, avoided fully accepting its Treaty responsibilities with all *Anishinabe* Bands. In light of the foregoing, it would seem that the State of Minnesota has improperly benefited from the State's own failure to put the *all* of Minnesota's *Anishinabe* Bands on notice that the 1837, 1854 and 1855 Treaties apply to the exercise of their Treaty-based *usufructuary* rights in the rest of Minnesota.

Moreover, once the U.S. Supreme Court decided *United States v. Dion*, 476 U.S. 734 (1986) (requiring clear evidence that Congress intentionally abrogated Treaty rights, and 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), the State of Minnesota was on notice that:

(a) pre-existing *Anishinabe usufructuary* rights were guaranteed within the 1837 ceded territory, as well as the rest of Minnesota that remained un-ceded at that time;<sup>151</sup>

(b) *usufructuary* rights were guaranteed within the 1854 ceded territory,<sup>152</sup> and the entirety of Minnesota west of the 1854 Treaty border;<sup>153</sup>

(c) the 1855 Treaty did not abrogate *Anishinabe usufructuary* rights in ceded territory;<sup>154</sup> and,

(d) subsequent treaties, executive orders and Congressional enactments did not abrogate *any* of the *Anishinabe*'s pre-existing traditional *usufructuary* rights.

This means that the State of Minnesota knew, or should have known, that it was obliged to treat all *Anishinabe* Bands *the same*, under the treaties, with respect to the existence of *off*-reservation hunting and fishing rights in *all* parts of Minnesota in which the *Anishinabe* resided in 1854. Therefore, when the State entered into the Tri-Band Agreement in 1988, but certainly no later than the interpretation of the 1837 and 1855 Treaties in the *Mille Lacs* Supreme Court opinion in 1999, the State of Minnesota has

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<sup>151</sup> See Map

<sup>152</sup>

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<sup>154</sup> See Map

most probably been without a defense to the assertion of *off-reservation usufructuary* rights by *all Anishinabe* Bands in all areas they occupied in Minnesota in 1855.

**The Fiscal Consequences of Minnesota’s Continuing Failure to Recognize  
*Anishinabe Off-Reservation Usufructuary Rights.***

The immediate financial consequences for the State of Minnesota arising from its failure to recognize Ashinabe Treaty rights, and to negotiate equally with all of Minnesota’s Anishinabe Bands may be quite significant. The monetary value of the usufructory rights west of the 1854 Treaty boundary, that the State has not yet recognized, can be roughly estimated by comparison with the value the State has placed on the usufructory rights in the 1854 ceded area in the Arrowhead, which is reflected in the original 1988 Tri-Band Agreement. The *usufructuary* rights leased by the State in the Arrowhead, were valued at approximately \$6 million annually in 1988.<sup>155</sup> The 2010-11 Biennial Budget of Minnesota Department of Natural Resources reflects payments or about \$7.5 million annually for “treaty rights.”<sup>156</sup> And estimated average value of \$6.5 million over the past 22 years, would mean that the State of Minnesota, itself, has set the value of a small portion of the ceded area at about \$140 million over 20-plus years.<sup>157</sup>

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 1837 and 1854, and includes many prime fishing and hunting locations in the Gull Lake, Brainerd and Bemidji areas.<sup>158</sup> This means that the *direct* loss to the largest *Anishinabe* bands, in territory that was *un-ceded* in 1854 and in which *usufructory* rights were not abrogated subsequently, *must* be in the range of some \$280 million, over just the past twenty-some years. In addition, thousands of *Anishinabe* Band members have been unlawfully arrested, incarcerated and/or fined by

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<sup>155</sup> Tri-Band Agreement, 1987: IV. OBLIGATIONS AND RIGHTS OF THE STATE: ...”the State shall pay annually to the Grand Portage Band and the Bois Forte Band the sum of...(\$1,600,000) each, and to the Fond du Lac Band (\$1,850,000,000).

<sup>156</sup> Bi-ennial Budget State of Minnesota: This budget line can *only* refer to *Bois Fort* and Grand Portage Bands in the 1854 ceded territory and *Milles Lacs* Band in the 1837 ceded territory,<sup>156</sup> because the *Fond du Lac* Band withdrew from the Tri-Band Agreement after the first year.

<sup>157</sup> As noted earlier, the *Fond du lac* Band located in the 1854 ceded territory in Minnesota has withdrawn from the original “Tri-Band Agreement” and is now self-managing wildlife and other resources on the model of Wisconsin’s *Anishinabe* Bands.

<sup>158</sup> See Map

the State, for arguably exercising *off-reservation usufructuary* activities, or subject to tribal jurisdiction.<sup>159</sup> These direct, and indirect, damages are nearly incalculable but certainly can be estimated at least one-half of the amount unlawfully withheld lease payments, and perhaps in the neighborhood of \$140-million. This would value the *direct* losses to the Anishinabe over the past twenty years about \$420 million, exclusive of statutory interest and attorney's fees.

Further, *if* the State of Minnesota is found to have intentionally, or willfully, withheld recognition of Treaty rights properly belonging to *Anishinabe* people, the State of Minnesota may have breached of a fiduciary duty which, under state law<sup>160</sup> would *greatly increase* the damages payable to the victims of the State's self-interested, mis-handling of *Anishinabe* assets.<sup>161</sup> However, it is possible that the Bands will choose to seek only declaratory relief, and joint-regulation or lease of *usufructuary* rights going forward,<sup>162</sup> or some combination thereof.

**The Political-Economy of the *Anishinabe* Nation's "Right to a modest living"  
from *Off-Reservation Usufructuary* Rights in Minnesota.**

Perhaps, even more important than any financial settlement for past-wrongs which extend far longer than the 20-some years dating from the *Lac Courte Oreilles* litigation, and the Tri/Bi-Band Agreement, are the necessary changes in the political/power relationship between the State of Minnesota and the *Anishinabe* Nation that are a likely consequence of recognition and assertion of *Anishinabe usufructuary*

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<sup>159</sup> *State v. Beaulieu*, 2006 WL 852139 (Minn. App. April 4, 2006); *State v. Jones*, 729 N.W.2d 1 (2007); *State v. Losh*, 755 N.W.2d 736 (2008); *State v. LaRose*, 673 N.W.2d 157 (Minn. App. 2004); *State v. Davis*, 733 N.W.2d 66 (Minn. 2009); *State v. Butcher*, 563 N.W. 2d 776 (Minn App. 1997); *State v. St. Clair*, 560 N.W.2d 732 (Minn App. 1997); *State v. Shabaiash*, 485 N.W.2d 724 (Minn App. 1992); *State v. Keezer*, 292 N.W.2d 714 (Minn. App. 1980); 3, 16 N.W.2d 752 (Minn. 1944).

<sup>160</sup> Minnesota law imposes on a *fiduciary* the highest obligation of good faith, loyalty, fidelity, fair dealing, and full disclosure of material matters affecting the client's interests. *See PJ Acquisition Corp. v. Skoglund*, 453 N.W.2d 1, 17 (Minn.1990) (good faith, loyalty, fidelity, and fair dealing); *Perl II*, 345 N.W.2d at 215 (disclosure). Traditionally, those owing fiduciary duties include general partners with limited partners, attorneys with clients, and trustees with beneficiaries. The fiduciary obligation is premised on trust. *Rice v. Perl*, 320 N.W.2d 407, 410 (Minn.1982) (*Perl I*).

<sup>161</sup> "Obama Admin Strikes \$3.4B Deal in Indian Trust Lawsuit". *New York Times*. December 8, 2009. *See also, Cobell v. Salazar (Cobell XXII)*, 573 F.3d 808 (D.C. Cir. 2009).

<sup>162</sup> *See*, declaratory judgments in *Mille Lacs*, etc.

rights in all of northern Minnesota.<sup>163</sup> As noted earlier, *on-reservation* gaming has provided both economic and political resources for *Anishinabe* Bands located near large population centers,<sup>164</sup> the more isolated northern *Anishinabe* Bands lack *on-reservation* sources of income and employment.<sup>165</sup> However, when *Anishinabe* *off-reservation*

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<sup>163</sup> See, GLRC, *Tribal Nations within the United States Constitutional System – General Principles*, Attachment C:

1. *United States Constitution’s “Indian Commerce” Clause*

The United States Constitution vests the power to regulate commerce with Indian Tribal Nations in the federal government. Some courts have called this authority “plenary.” However, tribal powers persist unless Congress has otherwise provided or where a treaty otherwise provides.

The Constitution’s “Supremacy Clause” makes the treaties and laws of Congress controlling over state laws. Thus, as a general rule, courts have taken the view that tribal sovereignty is dependent upon and subordinate to only the federal government, not the states.

Congress often acts to affirm tribal authority, rather than to restrict it. For example, Congress has specifically provided for a tribal role in the implementation of a number of key laws relevant to the GLRC, including:

- Clean Water Act, 33 U.S.C. sec. 1377.
- Clean Air Act, 42 U.S.C. sec. 7474(c).
- Safe Drinking Water Act [Public Health Service Act], 42 U.S.C. sec. 300j-11.
- Comprehensive Environmental Response Compensation and Liability Act, 42 U.S.C. sec. 9626.

<sup>164</sup> Primarily the *Milles Lacs* Band (Casinos at *Mille Lacs* and Hinkley) and *Fond du Lac* Band (Casinos at Cloquet and Duluth)

<sup>165</sup> GREAT LAKES REGIONAL COLLABORATION, *Tribal Nations Issues and Perspectives*, Version 1.0, April 26, 2005, p. 4:

A.2 *Demographic Data*

The total enrolled membership of the 35 Tribal Nations within the Great Lakes Basin is about 175,000, while the total service population (i.e. enrolled members and others who live on or near tribal reservations and who are entitled to receive tribal services and/or benefits) is about 110,000.

Many tribal reservations in the Great Lakes Basin are a mixed pattern (often called “checkerboard”) of land ownership involving lands owned by the United States and held in trust for the Tribal Nation or individual tribal members, by the Tribal Nation itself in “fee” title, and by non-tribal entities and individuals in “fee” title. In some instances, there also may be public land administered by a federal or state agency.

Many non-tribal members reside within tribal reservations. In addition, portions of many municipalities are located within tribal reservations. This leads to many issues regarding the extent of tribal jurisdiction over non-Indians and activities by non-tribal entities, as well as regarding more practical aspects of delivering services to provide for the overall health, welfare and safety of those residing within reservation boundaries.

Tribal communities tend to be poorer and have higher unemployment levels than most other communities:

- Recent census data show that the poverty rate in reservation areas is approximately 50%, almost four times the United States average, and that the poverty rate for Indian children in reservation areas is 60%.

*usufructuary* rights are finally recognized in northern Minnesota, even remote *Anishinabe*

Bands will be in a position to:

- (a) guarantee all *Anishinabe* Band members a “modest income” from living off the land;
- (b) greater exercise of sovereignty on-reservation, with respect to criminal offenses related to civil or wildlife regulation;
- (b) shared income from off-reservation *usufructuary* resources used by non-Indians, as co-equal sovereigns with the State of Minnesota; and,
- (c) co-equal management of wildlife and natural resources with the State of Minnesota.<sup>166</sup>

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

<sup>166</sup> The *Anishinabe* Bands in Wisconsin have elected to establish self-management institution, such as the Great Lakes Fish and Wildlife Commission (LGFWC) to co-manage wildlife and other natural resources cooperatively with State of Wisconsin and is an alternative to lease payments. The *Fond du Lac* Band has rejected the Tri-Band Agreement payment formula and has also elected to self-manage *usufructuary* rights



And, as noted earlier, the *Anishinabe* agreed to cede mining rights to the United States as early as the Treaty of 1826,<sup>167</sup> but they did *not* agree to forego compensation for the diminution of their ability to exercise traditional usufructory rights, which are an inevitable consequence of mining, logging, or other land-use inconsistent with their already established “right to a modest incomes” from living off the land *if*, and when, minerals (such as iron) ore were discovered:

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.<sup>168</sup>

Thus, the ability of the *Anishinabe* to provide a “modest living” for themselves from off-reservation *usufructuary* rights, exercised in a modern context, will likely require virtually *any* form of economic development or changes in land-use in northern Minnesota to be undertaken with the joint-agreement of that *Anishinabe*, as should have been occurring in all ceded territory since 1854.<sup>169</sup> Further, the *Anishinabe*'s ability to exercise their off-reservation *usufructuary* rights will likely require negotiated-agreements between the federal government, the State of Minnesota, and the *Anishinabe* Nation in the wide range of activities involving a modern exercise of the traditional subsistence activities. The result is likely to be a significant increase in the collective

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under the 1854 Treaty. See Chippewa Treaty Rights: History and Management in Minnesota and Wisconsin, <http://ncseonline.org/nae/docs/Chippewa.html>.

<sup>167</sup> *Supra*

<sup>168</sup> *Id.*

<sup>169</sup> GREAT LAKES REGIONAL COLLABORATION (GLRC) Tribal Nations Issues and Perspectives, Version 1.0, April 26, 2005, p. 4:

- Tribal Nations holding off-reservation rights have a unique relationship with the states in which the rights may be exercised:
- Tribal Nations are particularly concerned about how state actions – such as harvest levels authorized for state licensees, the issuance of water pollution discharge permits, or the establishment of state air emission standards – could impact the quantity or quality of the natural resources that tribal members harvest pursuant to those rights.
  - A state may not infringe upon a those rights either directly through the regulation of the time, manner or place of treaty-protected harvest activities, or indirectly through the exercise of state management authority that is retained in the ceded territories.
  - Whether viewed as co-management or cooperative management responsibilities, Tribal Nations and states are compelled to communicate and engage with each other in the exercise of their respective responsibilities in the off-reservation ceded territories.

political and economic power for northern Minnesota's *Anishinabe* Nation in the 21<sup>st</sup> Century, and beyond.

Had *Anishinabe* off-reservation *usufructuary* rights been properly respected by the State of Minnesota in the 19<sup>th</sup> and 20<sup>th</sup> Centuries, a *much* larger share of the vast wealth produced by John D. Rockefeller's U.S. Steel on Minnesota's Iron Range would have *remained* in Minnesota.<sup>170</sup> And, that vast wealth would likely have been produced with far less ecological damage with which present and future generations of Minnesotans must contend. The same can be said for the clear-cutting of Minnesota's old growth forests by the Weyerhausers, and other lumber barons, a few decades earlier.<sup>171</sup>

All Minnesotans, *both Anishinabe* and non-Indian, alike, have a stake in the kind of long-term thinking about the protection of the wilderness and environmental issues that is at the heart of the continuing exercise of *Anishinabe usufructuary* rights.<sup>172</sup> It is just possible that the thus far unacknowledged usufructory rights of the *Anishinabe* People in all of northern Minnesota will be able to help us save the *best* of Minnesota for our children...and our children's children, to the Seventh Generation.<sup>173</sup>

We can only hope they succeed, *on behalf of all of us*.

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## CONCLUSION

The State of Minnesota has failed to recognize the proper exercise of sovereignty guaranteed Minnesota's *Anishinabe* Bands by a series of treaties with the U.S. government. The continuing validity of *Anishinabe* hunting and fishing rights have long been established by federal litigation interpreting the major treaties which apply to Minnesota's *Anishinabe* Bands which has resulted in the State sharing wildlife management with Bands located in the 1854 ceded territory.

However, the failure of the State of Minnesota to recognize that the same arrangements are mandated with respect to *Anishinabe* Bands located in territory that was *not* ceded in the 1854 Treaty, or later Treaties, is a continuing harm to Minnesota's *Anishinabe* People. The State's failure to recognize its treaty and legal obligation with the *Anishinabe* has resulted in lost income that must be in excess of hundreds of millions of dollars for past failures. And, going forward, the necessary recognition of these *usufructuary* rights will require the State of Minnesota to establish a more equal relationship with the sovereign *Anishinabe* Nation in *all* areas of governmental interaction and oversight in ceded territories that will guarantee the *Anishinabe* People a "modest living" from exercising *modern usufructuary* rights in *all* of northern Minnesota.

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