Public Land & Resources Law Review

Volume 21 Article 8

June 2000

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Recognizing And Preserving Native American Treaty Usufructs in The Supreme Court: the *Mille Lacs* Case

Michael R. Newhouse[*]

Great nations, like great men, should keep their word.

Justice Hugo Black

I. INTRODUCTION

As the United States executed its policy of manifest destiny across North America, it faced a significant hurdle.[1] Native American tribes held property rights in the lands they occupied.[2] The United States entered into treaties to acquire tribal lands in return for reservations, medical care, schools, training, and annuities.[3] These forms of consideration were important, but the cornerstones of most treaties were retention of usufructuary[4] hunting, fishing, and gathering rights that were central to tribal economies, cultures and religions.[5]

The premise behind the modern usufruct—the right to enjoy resources from land that belongs to another—was at the heart of pre-settlement native property

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1. *See* Charles F Wilkinson, *To Feel the Summer in the Spring: The Treaty Fishing Rights of the Wisconsin Chippewa*, 1991 WIS. L. REV. 375, 390 (1991) (manifest destiny).

2. Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 574 (1823) (recognizing tribal occupancy rights in land); *see also* Wilkinson, *supra* note 1, at 390 (settler's land needs); RONALD N. SATZ, CHIPPEWA TREATY RIGHTS: THE RESERVED RIGHTS OF WISCONSIN'S CHIPPEWA INDIANS IN HISTORICAL PERSPECTIVE 13 (Transactions Vol. 79, No. 1, Wisconsin Academy of Sciences, Arts and Letters 1991) (government and industry demand for inexpensive sources of timber were also central to treaty land acquisitions in Wisconsin and Minnesota).

3. *See*, e.g., United States v. Washington, 157 F.3d 630, 638 (9th Cir. 1998).

4. BLACK'S LAW DICTIONARY 1542 (7th ed. 1999) ("A right to use another's property for a time without damaging or diminishing it "). There is a legal distinction between usufructs and title or occupancy. Treaty usufructs do not depend on title or occupancy. *See* Lac Courte Orielles Band of Lake Superior Chippewa Indians v. Wisconsin, 700 F.2d 341,352 (7th Cir. 1983) [hereinafter *LCO I*].

5. *See* Wilkinson, *supra* note 1, at 387. *See also* Mille Lacs Band of Chippewa Indians v. Minnesota, 861 F. Supp. 784, 796 (D.Minn. 1994)[hereinafter *Phase I*]. The court explained that the term is an interpreter's simplification of the general right to live off of the land.

rights systems.[6] For instance, tribal members did not own tracts of land outright. Instead, they held limited use rights in community-owned lands. These interests might have included cutting birchbark during one season, and picking berries in another.[7] In essence, instead of considering property rights as an all encompassing "bundle of sticks," native paradigms conveyed "individual sticks," as needed.[8] This system reflected tribal tendencies to live nomadically and to avoid overtaxing resources.[9] Because the "individual sticks" tradition was integral to native societies, its retention in the form of usufructs was often a non-negotiable item in treaty negotiations.[10]

The struggle to retain usufructs is illustrated by treaties between the United States and the Chippewa natives that ceded lands in present day Wisconsin and Minnesota.[11] Almost immediately following these agreements, territorial, and later state authorities, enacted and enforced laws banning various tribal hunting and fishing methods.[12] These authorities also argued that admission to the Union, executive actions, or subsequent treaties terminated treaty usufructs.[13] Additionally, non-native fee holders commonly refused the Chippewa access to ceded lands and conflicts—often violent—arose when the tribal members continued to exercise their usufructs.[14]

Today, the tribes contend that these treaty usufructs remain property rights to enter and take resources from ceded lands. Further, these rights are not inherently inconsistent with state land ownership, or subsequent fee title acquisition by non-natives.[15] Consequently, property rights cannot be abrogated without payment of just compensation by subsequent treaties, acts of statehood, or other non-explicit congressional actions.[16]

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6. Eric T. Freyfogle, *Land Use and the Study of Early American History*, 94 YALE L.J. 717, 722 (1985).

7. *Id.* (citing WILLIAM CRONON, CHANGES IN THE LAND: INDIANS, COLONISTS, AND THE ECOLOGY OF NEW ENGLAND 63-64 (1983)).

8. *Id.* at 724-725. Modern legal scholars use the bundle of sticks metaphor to describe the scope of use, exclusion and alienation rights concomitant with fee titles to land. Conversely, natives simply recognized individual rights (sticks) which varied by user and by season.

9. *Id.* at 719-721.

10. Wilkinson, *supra* note 1, at 387.

11. *See* Treaty of St. Peter's, July 29, 1837, 7 Stat. 536; Treaty of La Pointe, Oct. 4, 1842, 7 Stat 591; Treaty of La Pointe, Sept. 30, 1854, 10 Stat. 1109.

12. Wilkinson, *supra* note 1, at 394 (these laws included banning fishing with weirs, nets and spears).

13. *See, e.g.*, Ward v. Race Horse, 163 U.S. 504 (1896) (abrogating treaty rights on the premise that they are always irreconcilable with state sovereignty and the equal footing doctrine).

14. Wilkinson, *supra* note 1, at 389 (citing E. DANZIGER, THE CHIPPEWAS OF LAKE SUPERIOR 96-97 (1978) ("Tribesmen roamed, half starved, through the territory ceded in the 1840's and 1850's – hunting, gathering, fishing, ")).

15. *See generally* Michael C. Blumm & Brett Swift, *The Indian Treaty Piscary Profit and Habitat Protection in the Pacific Northwest: A Property Rights Approach*, 69 U. COLO. L .REV 407, 484 n.385 (1998).

16. *See* United States v. Dion, 476 U.S. 734 (1986); Menominee Tribe of Indians v. United States, 391 U.S. 404 (1968); Leavenworth, Lawrence, & Galveston Ry. Co. v. United States, 92 U.S. 733 (1876).

These divergent perspectives have a storied legal history [17] Last term, the United States Supreme Court considered native treaty abrogation and the nature of treaty usufructs in *Minnesota v. Mille Lacs Band of Chippewa Indians.*[18] The Mille Lacs Band,[19] and the United States as intervener, sought declaratory and injunctive relief to secure the band's usufructuary rights under an 1837 treaty Conversely, the state of Minnesota, counties, and landowners claimed that the band lost those usufructs due to an executive order in 1850, a subsequent treaty in 1855, and Minnesota's admission to the Union in 1858. The Supreme Court, in a 5-4 opinion written by Justice Sandra Day O'Connor, rejected the state's position and upheld the Mille Lacs Band's usufructs.

This note argues that *Mille Lacs* represents the Court's long-awaited vindication of three assertions. First, courts must invoke the canons of Indian treaty interpretation where congressional intent to diminish rights is ambiguous, construing treaties liberally, as the natives understood them.[20] Second, treaty usufructs cannot be abrogated absent explicit congressional intent and without payment of just compensation.[21] Indeed, Justice O'Connor clarified that abrogation of Native American treaty rights may occur only through explicit congressional language, or explicit evidence in the legislative history demonstrating that Congress considered the effect of its action on treaty rights and still decided to abrogate those rights.[22] Third, subsequent land cessions are not inconsistent with continuing hunting, gathering, and fishing rights on those lands. In fact, both the majority and dissent in *Mille Lacs* recognized the tribal usufruct as an enduring property right.[23]

Section II of this paper discusses the Chippewa treaties of 1837, 1842, 1854 and 1855, and provides an historical perspective on their negotiations.[24] Sec-

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17. *See* discussion *infra* Section III. *See also* Johnson v. M'Intosh, 21 U.S. at 574 (recognizing tribal property rights); Worchester v. Georgia, 31 U.S. 515, 561 (1832) (recognizing tribal sovereignty); In re Blackbird, 109 F. Supp. 139, 140 (W.D. Wis. 1901) (on reservation fishing not subject to state law); United States v. Winans, 198 U.S. 371, 381 (1905) (recognizing off reservation fishing rights as property); State v. Morrin, 117 N.W. 1006, 1007 (Wis. 1908) (allowed Wisconsin to abrogate fishing rights on and off the reservation); State v. Johnson, 249 N.W. 284, 287 (Wis. 1933) (allowed state regulation of fee owned lands on reservations); United States v. Michigan, 471 F. Supp. 192, 280-81 (W.D. Mich. 1979) (affirmed Chippewa hunting and fishing rights under 1836 and 1855 treaties); United States v. Bouchard, 464 F. Supp. 1316 (W.D.Wis. 1978); *LCO I*, 700 F.2d at 351, 354, 356, 362, 364 (7th Cir. 1983) (1837 and 1842 treaties created rights in the tribe, and under the canons the 1842 treaty did not abrogate the 1837 rights).

18. Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999).

19. *See Phase I*, 861 F.Supp. at 792. Judge Diana Murphy described a "band" as a political/economic unit averaging twenty-five intermarried and cooperative families occupying a specific territory.

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

21. *Id.* In the case of executive abrogation, that power must stem from an act of Congress, such as a treaty, or the constitution itself. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585 (1952).

22. *Mille Lacs*, 526 U.S. at 202-03.

23. Id. at 194-95, 211-15.

24. Treaty of St. Peter's, July 29, 1837, 7 Stat. 536; Treaty of La Pointe, Oct. 4, 1842, 7 Stat. 591; Treaty of La Pointe, Sept. 30, 1854, 10 Stat. 1109; 1855 Treaty of Washington, Feb. 22, 1855, 10 Stat. 1165.

tions III and IV examine *Mille Lacs'* predecessor litigation and the state of the law when the *Mille Lacs* controversy began. Section V is an analysis of the Court's rejection of the three traditional treaty rights abrogation arguments in *Mille Lacs*, and the Court's affirmation of tribal usufructs as property rights that can co-exist with state and non-native fee titles. From this foundation, Section VI asserts that *Mille Lacs* reaffirmed the canons of Indian treaty interpretation, and raised the bar for demonstrating abrogation of usufructs by adopting an explicitness standard. This section further asserts that *Mille Lacs* recognized the validity and durability of tribal usufructs as property rights —*profits à prendre*—even in the face of subsequent transfers of fee titles to individuals. Finally, Section VII speculates on the legacy of *Mille Lacs*, suggesting that three recent lower court decisions that diminished treaty rights and failed to recognize usufructs as property rights are inconsistent with *Mille Lacs*.[25]

II. THE CHIPPEWA TREATIES

Expanding population and the federal government's goal of adding states to the Union made acquisition of tribal lands imperative.[26] However, securing those lands was no small task.[27] Relations between the United States and the Chippewa illustrate these challenges.

A. *Challenges to Acquisitions of Chippewa Lands*

During the mid-1830s, the Chippewa, also called the Ojibwa or Anishinabe, occupied 27 million acres of land in present-day Wisconsin, Minnesota and Michigan.[28] These lands were attractive to settlers, and were heavily forested with pine trees.[29] Since the Supreme Court had recognized native property rights in *Johnson v M'Intosh*,[30] the United States needed to acquire these rights before the lands could be settled or harvested. Additionally, securing titles was

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25. *See* State of Washington Department of Ecology v. Yakima Reservation Irrigation Dist., 850 P.2d 1306 (Wash. 1993) (en banc); Nez Perce Tribe v. Idaho Power Co., 847 F Supp. 791 (D. Id. 1994); In re SRBA, No. 39576 (Idaho Nov. 10, 1999) (order granting summary judgment).

26. *Cf.* Kenneth D. Nelson, *Wisconsin, Walleye, and the Supreme Law of the Land: an Overview of the Chippewa Indian Treaty Rights in Northern Wisconsin*, 11 HAMLINE J. PUB. L. & POL'Y 381, 384 (1990) (land and natural resource needs); Wilkinson, *supra* note 1, at 383 (statehood goals).

27. The following discussion on the challenges to federal acquisition of tribal lands was influenced by Wilkinson, *supra* note 1.

28. *Id.* (geographical scope); SATZ, *supra* note 2, at 1 (Ojibwa or Anishinabe).

29. SATZ, *supra* note 2, at 13.

30. *Johnson v. M'Intosh*, 21 U.S. at 574. Chief Justice Marshall held that the European doctrine of discovery was also applicable in the United States. Specifically, native tribes have a continuing possessory right to the lands they occupied prior to the arrival of whites on the continent. However, the right is not absolute but is subject to, the property rights of those who discovered the land: the federal government.

important because citizens could not harvest Chippewa pine without federal approval under the Indian Trade and Intercourse Acts.[31]

Additionally, while the government undoubtedly possessed enough military strength to subjugate the Chippewa tribes and seize their lands, invasion was impractical. First of all, war would have been expensive, producing American casualties.[32] Indeed, Territorial Governor Henry Dodge feared such a result and worked to avoid armed conflicts.[33] Second, both Congress and the Supreme Court previously adopted positions of fair play and responsibility towards Native Americans. For example, in 1787 Congress passed the Northwest Ordinance, applicable to Wisconsin and Minnesota, which required the "utmost good faith" in dealings with northwestern tribes.[34] Likewise, in *Cherokee Nation v. Georgia*, the Supreme Court held that the United States owed a fiduciary duty to Native Americans.[35] Consequently, treaties were necessary to secure Chippewa lands.

B. *The 1837 Treaty With the Chippewa*[36]

While acquisition of settlement lands was important, the need to secure pine lands was at the heart of the 1837 Treaty negotiations. Indeed, Governor Dodge impatiently attempted to reach a cession agreement before all of the

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31. *See* SATZ, *supra* note 2, at 14 (citing FRANCIS PAUL PRUCHA, AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS: THE INDIAN TRADE AND INTERCOURSE ACTS, 1790-1834 2 (1953)). The series of Acts were an attempt to protect natives from crimes by settlers. These included a licensing system for trade, prohibitions on timber harvests, penalties for violations, and federal approval for property transfers.

32. Wilkinson, *supra* note 1, at 385.

33. SATZ, *supra* note 2, at 15 (citing Letter From Henry Dodge, Territorial Governor of Wisconsin, to Carey Allen Harris, Commissioner of Indian Affairs (Aug. 7, 1837) (on file with the National Archives and Records Service, *Documents Relating to the Negotiations of Ratified and Unratified Treaties with Various Indian Tribes, 1801-1869*, Microcopy T494, Roll 3, Record Group 75). The letter stated, "I was satisfied in my own mind that if a purchase was not made of this pine region of the country, by the United States, there was great danger of our citizens being brought into a state of collision with the Chippewa Indians, that would have resulted in bloodshed, and perhaps war." *Id.*

34. *See* SATZ, *supra* note 2, at 3-4 (citing Northwest Ordinance. Reprinted in DOCUMENTS OF UNITED STATES INDIAN POLICY 9-10 (Francis Paul Prucha ed. 2d ed. 1990). The ordinance stated:
The utmost good faith shall always be observed towards the Indians, their lands and property shall never be taken from them without their consent; and in their property, rights and liberty, they never shall be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall from time to time be made, for preventing wrongs being done to them, and for preserving peace and friendship with them . . *Id.*

35. Wilkinson, *supra* note 1, at 385, n.47 (citing Cherokee Nation v. Georgia, 30 U.S. 178 (1831)).

36. Treaty with the Chippewa 1837. This treaty is commonly known as the "Pine Tree Treaty," or the "St. Peters Treaty." However, this note refers to the Treaty simply as "The 1837 Treaty With the Chippewa" because the Supreme Court chose to do so in *Mille Lacs*. Similarly, the 1842, 1854 and 1855 Treaties will be referred to as "The 1842 Treaty With the Chippewa," "The 1854 Treaty With the Chippewa," and "The 1855 Treaty With the Chippewa."

tribes had arrived.[37] The bands resisted Dodge, but the full tribal delegation ultimately agreed to the government's terms on July 27, with one important caveat. The Chippewa refused to relinquish pre-existing rights to hunt, fish, and gather on the ceded lands. Leech Lake Chief Magegawbaw said to Dodge, "We wish to hold onto a tree where we get our living, & to reserve the streams where we drink the waters that give us life."[38] Verplanck Van Antwerp, the American secretary of the treaty council, acknowledged that Magegawbaw's words were meant to reserve the right to hunt and fish and gather on the ceded lands.[39] Further, Chief Flat Mouth of the Pillager tribe stated, "My Father. Your children are willing to let you have their lands, but they wish to reserve the privilege of making sugar from the trees, and getting their living from the Lakes and Rivers, as they have done heretofore, and of remaining in this Country "[40] Clearly, the Chippewa would not have voluntarily entered into the 1837 Treaty without assurances that they would retain their hunting, fishing and gathering rights.

The language of the 1837 Treaty demonstrated that the Chippewa did successfully retain the right to live off of their ceded lands. Article V of the Treaty stated that "[t]he privilege of hunting, fishing, and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded, is guarantied [sic] to the Indians during the pleasure of the President of the United States."[41] These two provisions in the 1837 Treaty laid the foundation for the ongoing dispute over property rights and treaty abrogation: what is the legal status of the treaty hunting and fishing right, and what is required to abrogate those rights?

C. *The 1842 Treaty With the Chippewa*

Following the 1837 Treaty, the United States developed a policy to remove tribes from their ceded lands.[42] To most government officials, removal was a prerequisite to settlement and commerce. The 1837 Treaty embodied the traditional strategy for encouraging removal by acquiring title to successive hunting grounds until native relocation was a necessity However this strategy proved ineffective with the Chippewa. As a result, many post-treaty settlers

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37. SATZ, *supra* note 2, at 17.

38. *Id.* at 18 (citing Verplanck Van Antwerp, Proceedings of a Council Held by Governor Henry Dodge, with the Chiefs and Principal Men, of the Chippewa Nation of Indians, July 20-29, 1837, at 0558-559, on file with the National Archives and Record Service, *Documents Relating to the Negotiations of Ratified and Unratified Treaties with Various Indian Tribes, 1801-1869*, Microcopy T494, Roll 3, Record Group 75).

39. *Id.*

40. *Id.* at 19 (citing Van Antwerp, *supra* note 38, at 0560-561).

41. Treaty with the Chippewa, July 29, 1837, art. 5, 7 Stat. 536, 537.

42. *Cf.* Nelson, *supra* note 26, at 384.

arrived and found natives who refused to leave.[43] The resulting conflicts over occupation and the growing interest in copper mining led to more land cessions in the 1842 Treaty with the Chippewa.[44] But, just as they had in the 1837 Treaty, the tribes insisted on retaining their usufructs in the 1842 Treaty [45]

The 1842 Treaty did, however, differ in one significant way from the 1837 Treaty. The tribes' right to occupancy existed only until the President ordered removal from the ceded lands.[46] As with the "during the pleasure of the President of the United States" language in the 1837 Treaty, the natives interpreted the 1842 removal provision differently than non-natives. The Chippewa understood the removal provision to guarantee possessory and usufructuary rights on ceded lands for as long as they remained at peace with white settlers.[47] Chief Martin of Lac Courte Oreilles, in correspondence with Commissioner of Indian Affairs T. Hartley Crawford, clarified that the 1842 Treaty was signed only after the government negotiator Robert Stuart assured protection from removal so long as the tribes "behaved well."[48]

To many non-Chippewa the removal provision was a license to terminate native possessory or usufructuary rights on the ceded lands. In *Mille Lacs*, the Supreme Court noted that the late 1840s saw mounting pressure in the Minnesota Territory to remove Chippewa Bands.[49] These pressures persuaded President Zachary Taylor to issue an executive order in 1850 purporting to remove the Chippewa under Article II of the 1842 Treaty and to terminate their hunting and fishing rights under Article V of the 1837 Treaty [50] Resulting conflicts made removal impractical, however, and the United States soon abandoned its removal policy [51]

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43. *See* SATZ, *supra* note 2, at 30.

44. *LCO I*, 700 F.2d at 345 (copper mining interest).

45. Treaty with the Chippewa, Oct. 4, 1842, art. 2, 7 Stat. 591, 592. Article II stated, "The Indians stipulate for the right of hunting on the ceded territory, with the other usual privileges of occupancy, until required to remove by the President of the United States, "

46. *Id.*

47. SATZ, *supra* note 2, at 39.

48. *Id.* at 40 (citing Chief Martin's discussion with subagent Alfred Brunson, (undated but before January 8, 1943). Letter from Brunson to Governor James D. Doty (January 8, 1943) (on file with the National Archives and Record Service, *Office of Indian Affairs, Letters Received, La Pointe Agency,* Microcopy 234, Roll 388, Record Group 75)).

49. *Mille Lacs*, 526 U.S. at 177. Justice O'Connor noted that the Minnesota Territorial Legislature, at Governor Alexander Ramsey's urging, passed a Joint Resolution asking President Taylor to issue an Executive Order removing the Chippewa from the ceded areas in the Minnesota Territory. *Id.*

50. *Id.* at 179.

51. *Id.* at 180-81. Justice O'Connor stated that government attempts to coerce removal by moving annuity payments from La Pointe to Sandy Lake "ended in disaster" when approximately 380 Chippewa died in the process of trying to retrieve their annuities and complete their journey home. *Id.*

D *The 1854 and 1855 Treaties With the Chippewa*

Amid continuing conflicts over treaty rights, and unsuccessful attempts to abrogate usufructs and remove the tribes through the 1850 Executive Order, the United States entered into the 1854 Treaty with the Chippewa.[52] The treaty secured Chippewa lands in northern Minnesota, in exchange for reservations and reserved hunting and fishing rights on the newly-ceded lands.[53] However, the 1854 Treaty made no mention of the 1837 and 1842 Treaty usufructs.

In 1855, Commissioner of Indian Affairs George Manypenny negotiated a treaty with the Mississippi, Pillager and Winnibigoshish Chippewa.[54] In contrast to the earlier treaties, the 1855 language was exceptionally broad, ceding all Chippewa "right[s], title, and interests, in, and to, any other lands in the Territory of Minnesota or elsewhere."[55] On its face, this language seemed to be a cession of any and all Chippewa land rights on the face of the earth. However, as the Supreme Court noted in *Mille Lacs*, the 1855 Treaty was completely silent regarding hunting, gathering or fishing rights.[56]

The treaties of 1837, 1842, 1854, and 1855 laid a foundation for conflict between the Chippewa and non-native settlers and their territorial and state governments. To the Chippewa, the pacts were made to share their ancestral lands while retaining the hunting, fishing, and gathering rights that were central to their cultures. To modern tribal advocates, these usufructs remain as durable property rights, generally able to endure subsequent acquisitions of fee title—in other words, *profits à prendre*.[57] Conversely, states and land owners argue that Chippewa rights to hunt, fish, and gather were simply use rights of limited duration. Thus, these rights are subservient to fee titles and can be withdrawn explicitly or implicitly through executive or legislative action, such

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52. Treaty with the Chippewas, Sept. 30, 1854, 10 Stat. 1109.

53. *See* Nelson, *supra* note 26, at 386. The 1854 Treaty With the Chippewa, Article XI, stated " [the Chippewa of Lake Superior] shall have the right to hunt and fish therein, until otherwise ordered by the President." *Id.*

54. Treaty with the Chippewas, Feb. 22, 1855, 10 Stat. 1165.

55. *Id.* art. I, 10 Stat. at 1165-1166. Article I stated in its entirety:

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 viz: [list of 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.

56. *Mille Lacs*, 526 U.S. at 184-85.

57. BLACK'S LAW DICTIONARY 1227 (7th ed. 1999) (A right or privilege to go on another s land and take away something of value from its soil or from the products of its soil (as by mining, logging, or hunting)).

as grants of statehood.[58] The Supreme Court did not fully resolve these conflicting views for 150 years; however, several lower courts did address the ongoing struggle during that time.

III. THE PREDECESSOR LITIGATION

By the time *Mille Lacs* reached the Supreme Court in 1998, controversy over native usufructuary rights had a long judicial history.[59] The controversy concerned two general questions: first, what is the nature of treaty hunting, fishing and gathering rights, and second, what is required to abrogate those rights? These questions raise three specific inquiries: 1) what is the proper application of the canons of Indian treaty interpretation; 2) how much congressional specificity is required to abrogate a treaty right; and 3) are treaty usufructs property rights able to survive government conveyance of title to private parties?

A. *Application of the Canons of Indian Treaty Interpretation*

In *Johnson v. M'Intosh* and *Worcester v. Georgia*, the Supreme Court acknowledged that the United States had a unique relationship—a fiduciary obligation—to Native Americans.[60] Many courts have evaluated this obligation using a set of canons to interpret treaties between tribes and the United States.[61] The canons of Indian treaty interpretation require courts to interpret ambiguous treaty provisions in favor of the natives as the natives understood them at the time the treaty was signed.[62] Further, courts should construe treaty provisions liberally, to the advantage of the tribes.[63]

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58. *See* Federal Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 118 (1960) (allowing general congressional actions to abrogate treaty provisions); Morrin, 117 N.W. at 1007 (abrogation of fishing rights by statehood). *Cf. Winans*, 198 U.S. at 381, 384 (recognizing treaty fishing rights as property but subject to reasonable state regulation).

59. The cases discussed in this section do not all deal directly with the four Chippewa treaties, but still serve to illustrate the evolution of the usufruct and abrogation questions.

60. *Johnston v. M'Intosh*, 21 U.S. at 574; Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

61. *See generally* Charles F. Wilkinson & John M. Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows or Grass Grows Upon the Earth" – How Long a Time is That?*, 63 CAL. L. REV 601, 608-19 (1975).

62. *Id.* at 617 n.76-77 (citing, *e.g.*, Choctaw Nation v. Oklahoma, 397 U.S. 620, 631 (1970) [hereinafter *Choctaw II*]; United States v. Shoshone Tribe, 304 U.S. 111, 116 (1938); Starr v. Long Jim, 227 U.S. 613, 622-23 (1913); *Worcester*, 31 U.S. at 582 (interpretation according to native understanding); McClanahan v. State Tax Comm'n, 411 U.S. 164, 174 (1973); Carpenter v. Shaw, 280 U.S. 363, 367 (1930); and Winters v. United States, 207 U.S. 564, 576-77 (1908) (ambiguities construed in favor of the tribes)). *See also* Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 675-676 (1979) [hereinafter *Fishing Vessel*].

63. Wilkinson, *supra* note 61, at 617 n.78 (citing, *e.g.*, Choctaw Nation v. United States, 318 U.S. 423, 431-32 (1943) [hereinafter *Choctaw Nation*]; Tulee v. Washington, 315 U.S. 681, 684-85 (1942); and United States v. Walker River Irrigation Dist., 104 F.2d 334, 337 (9th Cir. 1939). *See also* Nelson, *supra* note 26, at 382 (citing *LCO I*, 700 F.2d at 365).

For example, in *Choctaw Nation v Oklahoma*, Justice Thurgood Marshall's majority opinion interpreted the Treaty of Dancing Rabbit Creek according to Choctaw understanding because the tribe bargained from a weaker position and the treaty was written in English.[64] Similarly, in *Choctaw Nation of Indians v United States*, Justice Frank Murphy reasoned that treaties are construed more liberally than private contracts, especially where the United States is obliged "to protect the interests of a dependent people."[65]

Lower courts have also used the canons to interpret the Chippewa Treaties of 1837, 1842, 1854, 1855, and President Taylor's 1850 Executive Order, which were the subjects of controversy in *Mille Lacs*. In 1978, in *United States v Bouchard*, the Western District of Wisconsin held that the Lac Courte Oreilles Band of Lake Superior Chippewa Indians secured usufructuary rights through the 1837 and 1842 Treaties.[66] Judge James Doyle then held that the 1850 Executive Order exceeded President Taylor's power and did not abrogate the usufructs. But, he also found that the 1854 Treaty did successfully abrogate the 1837 and 1842 usufructs.[67]

On appeal to the Seventh Circuit, *Bouchard* became *Lac Courte Orielles Band of Chippewa Indians v Wisconsin (LCO I)*.[68] The *LCO I* court affirmed Judge Doyle's opinion concerning the 1850 Executive order, but reversed regarding abrogation by the 1854 Treaty Judge Pell noted that courts should construe the removal provision "during the pleasure of the President"[69] as the natives understood it, not according to the technical understanding of lawyers.[70] The Chippewa delegation interpreted the removal provision to preserve occupancy and usufructuary rights, so long as the tribes remained peaceful.[71] Because there was no evidence of Chippewa misbehavior, the 1850 Order exceeded the President's executive authority [72] The court further noted that the 1854 Treaty failed to mention usufructs on the lands ceded in the 1837 and 1842 Treaties. Consequently, the Seventh Circuit reasoned that there was no

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64. *Choctaw II*, 397 U.S. at 620, 630-31 (citing Treaty of Dancing Rabbit Creek, Sept. 27, 1830, 7 Stat. 336). *See also* SATZ, *supra* note 2, at 28. As Native American scholar Ronald Satz notes in the Chippewa context, the following two truths justify the canon: native tribes almost never spoke English; and in most pre settlement native cultures business, rituals, and stories were all conducted or told orally, not in writing.

65. *Choctaw Nation*, 318 U.S. at 431-32. The case interpreted a treaty Between the Choctaw and Chickasaw Indians, April 28, 1866, arts. 3, 46, 14 Stat. 769, 780; Treaty Between Choctaw and Chickasaw Indians, July 1, 1902, 32 Stat. 641.

66. United States v. Bouchard, 464 F. Supp. 1316, 1361 (W.D. Wis. 1978) rev d sub nom. Lac Courte Oreilles band of Lake Superior Chippewa Indians v. Voigt, 700 F.2d 341 (7th Cir. 1983).

67. *Id.*

68. *LCO I*, 700 F.2d at 343. The LCO saga is more comprehensively treated in Nelson, *supra* note 26.

69. *Id.* at 351.

70. *Id.* (citing Jones v. Meehan, 175 U.S. 1, 10-11 (1899).

71. *See* Chief Martin's discussion, *supra* note 49 and accompanying text.

72. Wilkinson, *supra* note 1, at 392 (citing *LCO I*, 700 F.2d at 362).

abrogation because the Chippewa considered those previously secured usufructs to be separate from the 1854 Treaty, and thus felt no need to secure additional guarantees in 1854.[73]

LCO I led to *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin (LCO III)*,[74] which appliedthe canons of treaty construction in two important ways.[75] First, the court held that only Congress can abrogate treaties unless the treaty itself provides for other means. Thus, state or private actions could not abrogate the 1837 Treaty because the Chippewa did not understand such scenarios as possibilities at treaty time.[76] However, the state could burden the usufruct by enacting necessary, non-discriminatory conservation regulations.[77] Second, the court allowed the Chippewa to use modern fishing methods, and to sell the fruits of the usufruct.[78] Further, Judge Doyle broadly interpreted the resources covered in the 1837 and 1842 usufructs because the tribes understood those rights to cover extensive flora and fauna.[79]

In *LCO IV*, following Judge Doyle's death, Judge Barbara Crabb inherited the LCO saga and added a limit to *LCO III's* liberal application of the canons.[80] In addition to endorsing state regulation for conservation necessities, Judge Crabb affirmed that the state could regulate treaty usufructs in the name of necessary and non-discriminatory public health protections.[81]

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73. *Id.* (citing *LCO I*, 700 F.2d at 364).

74. *LCO I* and *LCO III* were separated by *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin*, 760 F.2d 177, (7th Cir. 1985) [hereinafter *LCO II*]. However, *LCO II* is not further discussed here because the decision did not consider the proper application of the canons of Indian treaty interpretation; which are the focal points of the *LCO I* and *LCO III* decisions. *LCO II* simply interpreted a separate part of the *LCO I* court's holding pertaining to the exercise of native treaty usufructs on private land. *See* Nelson, *supra* note 26, at 388.

75. *LCO III*, 653 F. Supp at 1422.

76. Nelson, *supra* note 26, at 389 (citing *LCO III*, 653 F Supp. at 1434).

77. *Id.* (citing *LCO III*, 653 F. Supp. at 1435). The court did not specify what constituted necessary conservation, however Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin, 707 F. Supp. 1034, 1058 (W.D. Wis. 1989)[hereinafter *LCO VI*] held that Wisconsin's attempt to limit tribal harvest to twenty percent of the allowable catch was not a legitimate conservation need. In reality it was an end run to establish an allocation that the court declined to order.

78. *Id.* (citing *LCO III*, 653 F Supp. at 1435).

79. *Id.* (citing *LCO III*, 653 F. Supp. at 1426-28.) Indeed, virtually every interpretation of *LCO III* points out the extensive scope of Judge Doyle's resource list; over a page and a half long in the reporter.

80. Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin, 668 F. Supp. 1233 (W.D. Wis. 1987) [hereinafter *LCO IV*].

81. Nelson, *supra* note 26, at 391, 402 (citing *LCO IV*, 668 F. Supp. at 1239, 1270). Some light was shed on this standard in Lac Courte Oreilles Band of Lake Superior Indians v. Wisconsin, 740 F. Supp. 1400, 1421-1424 (W.D. Wis. 1990) (where the court allowed Wisconsin to limit "shining" and summertime deer hunting in the name of public safety). Judge Crabb issued the final installment of this thirteen-year saga in the wake of the 1978 *Bouchard* decision on February 21, 1991. Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin, 758 F.Supp. 1262 (W.D. Wis. 1991) [hereinafter *LCO VIII*] (amended on March 22, 1991 to amend a spelling error). In *LCO VIII*, the court held that logging was not part of the 1837 and 1842 usufructs because the Chippewa were not engaged in logging when the treaties were signed. Therefore, they could not have understood the Treaty to guarantee such a right.

B. *The Pre-*Mille Lacs *Requirement for Native Treaty Abrogations*

In *Lone Wolf v Hitchcock*, the Supreme Court held that Congress possessed the plenary power to abrogate treaties with Native Americans.[82] However, the pre-*Mille Lacs* case history has been inconsistent regarding the standard for exercising that abrogation power. For example, the Supreme Court has alternatively held that general act of Congress can abrogate treaty rights, while also ruling that abrogation requires an express congressional declaration, and should not be imputed absent "explicit statutory language."[83]

In 1986, the Court delivered its most definitive pre-*Mille Lacs* explanation of an abrogation requirement. While invalidating an 1858 Yankton Sioux treaty the Court noted that it would not rigidly adopt a *per se* requirement of explicit congressional "language" to abrogate treaty rights.[84] Instead, Justice Marshall explained a two-part abrogation standard: To abrogate treaty rights, an "explicit" statement by Congress is preferred.[85] However, absent explicitness, "[w]hat is essential is 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."[86] This standard opened the door for less that explicit congressional language to abrogate native treaty rights.[87]

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82. Lone Wolf v. Hitchcock, 187 U.S. 553 (1903). The Court did not discuss an abrogation standard because the relevant bill explicitly modified the treaty rights in question.

83. Federal Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 120 (1960) (general acts of Congress suffice to abrogate treaty rights). The inconsistency of this decision with the government's fiduciary duty to the natives did not go unrecognized by at least three members of the Court. In a moving dissent, Justice Black wrote "I regret that this Court is to be the governmental agency that breaks faith with this dependent people. Great nations, like great men, should keep their word." *Id.* at 142 (Black, J. dissenting). Eight years later Justice Douglas, who joined the *Tuscarora* dissent, wrote that congressional intent to abrogate treaties should not be imputed casually. *Menominee Tribe*, 391 U.S. at 412-13. *See also Fishing Vessel*, 443 U.S. at 690 (reluctance to find abrogation absent explicit language); *Leavenworth Ry.*, 92 U.S. at 741 (requiring express congressional declaration); Seminole Nation v. United States, 316 U.S. 286, 296-297 (1942) (explicit statement by Congress is preferable).

84. *Dion*, 476 U.S. at 739.

85. *Id.* (citing *Seminole Nation*, 316 U.S. at 296-297). Explicit statements help to ensure legislative accountability for treaty abrogations.

86. *Id.* at 740.

87. See South Dakota v. Bourland, 508 U.S. 679, 687, 689 (1993). Justice Thomas, writing for a 7-2 majority, relied on the *Dion* standard to allow the Flood Control and Cheyenne River Acts to abrogate tribal right to regulate hunting and fishing under the Fort Laramie Treaty. The Court did not cite specific language but in reasoning reminiscent of *Tuscarora*, held that the taking of reservation lands for public use abrogated the tribal right of regulation. *Id.* However, this decision was not cited by the Supreme Court in *Mille Lacs*.

C. *The Nature of Tribal Hunting, Fishing and Gathering Rights*

In *Mille Lacs*, the Supreme Court recognized off-reservation usufructs as property interests—*profits à prendre*, property rights to take natural resources from lands owned in fee simple by another.[88] However, prior to *Mille Lacs* several courts struggled with defining, and limiting, treaty usufructs.

In *United States v. Winans*, the Supreme Court held that treaty fishing rights were reserved property interests, existing prior to non-native settlement.[89] Similarly, the *LCO I* court acknowledged treaty usufructs as property interests, but refused to recognize those rights on private lands, unless they were open to the public by operation of state law.[90] Further, in *LCO III*, the court held that tribal usufructs were subject to state regulation for reasonable and necessary conservation.[91] And in *LCO IV*, the court upheld non-discriminatory regulation to protect public health or safety.[92] However, at least one commentator interpreted these limitations to be quite narrow.[93]

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88. *See* BLACK'S LAW DICTIONARY 1227 (7th ed. 1999); *See also Mille Lacs*, 526 U.S. at 195, 204. While Justice O'Connor did not use the term *profits a prendre* the opinion strongly suggests such a classification. *Id.*

89. United States v. Winans, 198 U.S. 371, 380-82 (1905). Specifically, these rights created a "right in land," a "servitude." *See also* Blumm & Swift, *supra* note 15, at 484 n.385 (citing *Winans*, 198 U.S. at 371 (usufruct burdened private fish wheel operators); Seufert Bros. Co. v. United States, 249 U.S. 194 (1919) (usufructs burdened a private party); Tulee v. Washington, 315 U.S. 681 (1942); Puyallup Tribe v. Dep't of Game, 391 U.S. 392 (1968); Department of Game v. Puyallup, 414 U.S. 44 (1973); *Fishing Vessel*, 443 U.S. at 690 (usufructs burdened the state in all four cases); United States v. Washington, 1998 U.S. App. LEXIS 1109, at *35 (usufruct could be exercised whether the land was privately or publicly owned). Other courts have impliedly recognized treaty rights as property; *see* United States v. Creek Nation, 295 U.S. 103, 109 (1935) (recognizing that the government's power to appropriate tribal lands carried with it the duty to provide just compensation for those lands). *See also Menominee Tribe*, 391 U.S. at 412-13 (declining to terminate a treaty fishing right out of fear that the abrogation would be a taking entitled to compensation at a tremendous cost to the government). However, this decision applied to on reservation rights, not usufructs.

90. *LCO I*, 700 F.2d at 365 n.14. This note argues, *infra* Section IV, that *Mille Lacs* broadened the LCO holdings, allowing the exercise of usufructs on private lands. These property rights are only defeasible by clear congressional abrogation, abrogation at the "pleasure of the President," or necessary and non-discriminatory safety or conservation regulations.

91. *LCO III*, 653 F. Supp. at 1435.

92. *LCO IV*, 668 F Supp. at 1238 (citing *Puyallup Tribe*, 391 U.S. at 398.).

93. *See* Nelson, *supra* note 26, at 391. Nelson argued that four factors must be met before the conservation exception is applicable: 1) regulations must be reasonable and necessary; 2) they must restrict treaty rights as minimally as possible; 3) conservation goals must be attempted against non-natives first; and 4) regulations cannot discriminate against natives. Similarly, the five factors to meet the health and safety requirement are: 1) a safety or health risk must exist; 2) the regulation must be needed to prevent the risk; 3) regulating the tribe must be necessary to counter the risk; 4) regulations must be minimally restrictive; and 5) states may not discriminate against natives, or favoring of non-natives.

IV THE LOWER COURT DECISIONS

Several courts consider usufructs to be property rights, but the resiliency of those rights in the face of subsequent fee title transfers and general congressional acts has been the subject of considerable judicial debate.[94] In two separate opinions, the District Court of Minnesota considered whether the 1837 Chippewa usufructs survived the 1850 Executive Order, the 1855 Treaty, Minnesota statehood, and title transfers to private citizens.[95]

A. Phase I

The Mille Lacs Band, joined by the United States, filed suit against the State of Minnesota's Department of Natural Resources, and several counties and landowners intervened. The band claimed that the state enacted and enforced laws and regulations diminishing the band's usufructuary rights under the 1837 Treaty The Band and the government sought three remedies: 1) a declaratory judgment confirming the continuing validity of the usufructs; 2) a declaration defining the limits of state regulation of those usufructs; and 3) an injunction prohibiting state action beyond the scope of the declaration.[96] The state argued that either the 1850 Executive Order or the 1855 Treaty abrogated the 1837 rights.[97] Judge Diana Murphy[98] held that neither the 1850 Order nor the 1855 Treaty abrogated the 1837 usufructs. Finally, while the court noted a need to consider the permissible scope of state regulation and the durability of the usufructs following title transfers to non-federal entities, it reserved those issues for *Phase II*.[99]

Relying on the canons of treaty interpretation, Judge Murphy held that President Taylor's 1850 Order to remove the Chippewa to unceded lands and terminate their 1837 usufructuary rights[100] was invalid and did not authorize removal, because the Band did not understand the 1837 Treaty to call for re-

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94. *See Race Horse*, 163 U.S. 504 *rev d in part, Mille Lacs*, 526 U.S. at 205-08.

95. *Phase I*, 861 F.Supp. 784; *Mille Lacs Band of Chippewa Indians v. Minnesota*, 952 F Supp. 1362 (D.Minn. 1997) [hereinafter *Phase II*]. Justice O'Connor referred to the bifurcated district court opinions as "Phase I" and "Phase II." For consistency, this note does the same.

96. *Phase I*, 861 F Supp. at 789.

97. *Id.* at 789-90.

98. When *Phase I* was decided, Judge Murphy was Chief Judge for the District of Minnesota. By the time the dispute reached the Eighth Circuit she had joined that Circuit but took no part in the appellate decision.

99. *See Phase I*, 861 F Supp. at 838-39.

100. *Id.* at 803-04. President Taylor's 1850 Executive Order read: "The privileges granted temporarily to the Chippewa Indians of the Mississippi by the fifth article of the treaty made with them on the 29th of July 1837 'of hunting, fishing and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded' by that treaty to the United States are hereby revoked; and all of the said Indians remaining on the land ceded aforesaid, are required to remove to their unceded lands."

moval if they remained at peace with the settlers.[101] Because the 1850 removal order was invalid, the court held the provision abrogating the 1837 usufructs was also invalid and could not be "severed" from the removal provision.[102]

Judge Murphy's decision also rejected the state's contention that the 1855 Treaty abrogated the 1837 usufructs.[103] Although it acknowledged the broad nature of the treaty's language,[104] the court ruled that the treaty was not a successful abrogation because the Chippewa did not understand the treaty to abrogate their rights to hunt, fish and gather,[105] nor did the language of the treaty make any mention of the 1837 usufructs.[106]

Finally, the court rejected the landowners' claims that subsequent land pat-

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101. *Id.* at 810-11. Judge Murphy noted that while Article V of the 1837 Treaty limited the usufruct "during the pleasure of the President of the United States," the Chippewa did not understand the language as a removal provision because they were not familiar with Euro-American temporal restrictions on occupancy. Further, removal was not discussed during the negotiations, and the Chippewa had steadfastly insisted on retaining the usufructs that were central to their existence. *Id.* at 796-97. The court also cited a 1837 letter from a missionary reporting that the Chippewa did not comprehend the 1837 Treaty as a removal treaty. *Id.* at 797 (citing Letter from William Boutwell, Missionary, to Reverend Greene (Aug. 17, 1837) (located at Plaintiffs' Ex. 54, at 2)). The Chippewa also demonstrated their belief in the durability of their usufructuary rights by risking their lives to challenge a dam built by lumbermen on ceded lands. The conflict resulted in one tribal and two American deaths and required federal troops. However, even Lieutenant J. Hamilton, commander of the federal troops, acknowledged the continuing existence of the 1837 usufructuary rights. *Id.* at 809-10; Letter from J. Hamilton to Stewart (Mar. 9, 1855) (located at Plaintiffs' Ex. 18).

102. *Id.* at 825-26. The court explained that invalid sections of executive orders are only severable where evidence demonstrates that the executive would have still chosen to enact the unsevered portion alone, and that portion would still be fully operable as a law. Because the 1850 Order was primarily a removal order, and only included abrogation of usufructs to encourage removal, the severability test was not satisfied. *Id.* at 825 (citing Champlin Ref. Co. v. Corporation Comm'n, 286 U.S. 210, 234 (1932)). Furthermore, the court held that even if the abrogation provision was severable, that provision itself was invalid. The government had an obligation to deal in good faith with the Chippewa, and to only revoke usufructs for bad behavior. Evidence in both *LCO I* and *Phase I* showed no evidence of misbehavior, thus abrogation was in bad faith, and the clause was invalid. *Id.* at 827.

103. *See Id.* at 815-16.

104. *Phase I*, 861 F.Supp at 815-17. The court reasoned that the language was not broadly drafted to deprive the Chippewa all rights, but because the government was not completely certain of the extent of Chippewa land claims throughout Minnesota

105. *Id.* at 813, 831. The court reasoned that the Chippewa did not understand the Treaty to abrogate rights, but solely as a means to sell land to a government in need of it, while securing needed money and goods for themselves. Chief Hole-in-the-Day commented "[y]our words strike us in this way. They are very short. 'I want to buy your land.'" Similarly, Chief Flatmouth stated "[i]t appears to me that I understand what you want, and your views from the few words I have heard you speak. You want land." *Id.* at 813. Furthermore, Judge Murphy noted that after the 1855 Treaty was signed, the Mille Lacs Band, and the Chippewa in general, continued to hunt, fish and gather throughout the lands ceded in the 1837 Treaty. These practices went unchallenged by the federal government. *Id.* at 818, 831. Moreover, even into the twentieth century Chippewa exercised their usufructuary rights on lands ceded in the 1837 Treaty. In one case, tribesmen even opened a commercial fishery on ceded lands adjacent to Lake Mille Lacs. *Id.* at 821.

106. *Id.* at 815-16, 830. The court cited *Dion's* requirement that either express language or clear and plain, evidence demonstrate congressional intent to abrogate rights. Because the 1855 Treaty made no reference to the 1837 usufructs, it was an invalid abrogation. *Id.* at 830.

ents issued by the federal government abrogated the 1837 usufructs.[107] Because the Chippewa did not understand the 1837 Treaty to grant usufructs subject to subsequent land transfers by the federal government,[108] the court held that allowing such abrogations in the absence of congressional intent would be an abuse of discretion.[109] The *Phase I* court also held, at the urging of the Band, that the 1837 usufructs were not *profits à prendre* because the 1837 Treaty did not grant the Band a right of access to ceded lands. The treaty did however grant the tribes the privilege to self-regulate the exercise their usufructs.[110] While it seems strange that the tribes would argue that their usufructs were not property rights, this was most likely because they feared that a classification as "property" would sweep their hunting, fishing and gathering rights into the broad scope of the 1855 Treaty's abrogations which extinguished "all right, title, and interest" to Chippewa lands.[111]

B. Phase II

Three years later, in *Phase II*, the court considered whether treaty usufructs could be exercised on private lands.[112] The Bands argued that because *Phase I* affirmed its right to self-regulate the exercise of usufructs, it should be free to secure independent agreements with landowners to exercise those rights on private property [113] Judge Davis disagreed with the Bands and held that the right to exercise the usufruct only applied to public lands and private lands opened to the public by operation of law [114] Therefore the right did not apply to private lands, even if band members secured consent from individual landowners.[115] Because the treaty did not grant a right of access to the Bands, they

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107. *Id.* a t 835-36.

108. *Id.* at 835. In 1855, after the United States sold ceded lands to timbermen, Governor Gorman, in correspondence to Commissioner Manypenny, acknowledged that the Chippewa still held fishing and hunting rights on the lands.

109. *Id.* at 836. Illustrating a lack of intent the court pointed out that only one year earlier, the United States negotiated a treaty which, unlike the 1837 Treaty, clearly subjected usufructs to termination by subsequent land transfers. *Id.* at 835.

110. *Id.* at 834.

111. Treaty with the Chippewa, Feb. 22, 1855, 10 Stat. 1165. Conversely, in *Mille Lacs*, discussed *infra* Section V, the Supreme Court recognized the usufructs as property rights without subjecting those rights to the 1855 Treaty abrogations.

112. *Phase II*, 952 F Supp. 1362 (D.Minn. 1997).

113. *Id.* at 1376.

114. *Id.* at 1378-79 (citing *Phase I* and *LCO VII*). The court accepted the Minnesota tree growth tax as an example of an "operation of state law" where land owners receive favorable tax status in return for granting public rights of access.

115. *Id.* at 1378, 1379. Judge Davis referred to the "consent" issue as a red herring. He noted that in *LCO VII*, tribal members attempted to assert their usufructs on private lands with owner consent. There the court agreed with the state of Wisconsin that this could not be done because case by case owner consent to exercise usufructs had the potential to provide individual band members with more rights that other members. Since the 1837 Treaty conveyed rights to the band as a whole, individual land owner/band

could not skirt their duty to obey state regulations by securing a right to hunt on private lands from the owners.[116]

However, this holding appears inconsistent with *Phase I.* Judge Murphy noted that while the 1837 Treaty did not convey a *profit à prendre*, the tribes reserved the right to regulate the taking of wildlife on ceded lands.[117] Hence, under the *Phase I* holding, it would seem that the Chippewa do not have to obey state hunting or fishing regulations, because the 1837 Treaty reserved to them the right of self-regulation. Further, in *Mille Lacs*, the Supreme Court disagreed with the conclusion that the 1837 Treaty did not grant "access." Justice O'Connor clarified that the treaty granted both the right to continue to occupy the ceded lands, and to exercise their usufructs on those lands.[118]

C. *The Appeal*

The Eighth Circuit affirmed the district court's holdings in *Phase I.* First, it agreed that the 1850 Executive Order was invalid as a removal and abrogation action.[119] The court concluded that President Taylor had no authority to remove the Chippewa through the 1850 Order because the Removal Act of 1830 required tribal agreement for removal, and the Chippewa had not assented.[120] Similarly, the provision in the 1850 Order revoking the 1837 usufructs was not severable because it was enacted primarily as a removal, not an abrogation order.[121]

Second, the Eighth Circuit agreed that the 1855 Treaty did not abrogate the 1837 usufructs.[122] Invoking the canons of Indian treaty interpretation, the court reasoned that neither the government nor the Chippewa understood the Treaty

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member agreements would violate the spirit of the treaty. Similarly, the court was not comfortable with the potential for landowners to discriminate in granting access, which in turn would place an undue burden on state conservation officials who would have to individually contact landowners to determine whether an access agreement existed before they could determine if laws were being broken. Thus, the court labeled the consent issue "legally gratuitous." *Id.* at 1378 (citing *LCO VII*, 740 F Supp. at 1420).

116. Id. at 1378-79.

117. *Phase I*, 861 F. Supp. at 834, 838-39. "The state may not impose its own regulations if the band can effectively self-regulate and if tribal regulations are adequate to meet conservation, public health, and public safety needs." *Id.* at 839.

118. *Mille Lacs*, 526 U.S. at 194, n.5.

119. Mille Lacs Band of Chippewa Indians v. Minnesota, 124 F.3d 904, 914-918 (8th Cir. 1997) [hereinafter *Mille Lacs Appeal*].

120. *Id.* at 917 ("[i]f Congress required consent for removal, and the Bands did not consent, then President Taylor had no authority for his 1850 Executive Order of removal."] *Id.*

121. *Id.* at 918 (citing *Champlin,*, 286 U.S. at 234, where the court noted that severability only applies where the President would have independently enacted the severed provision, and it would be fully operational as a law on its own).

122. *Id.* at 921.

to abrogate usufructs. In fact, both parties continued to behave in a manner that recognized the usufructs after the 1855 Treaty [123]

Third, the court rejected Minnesota's argument that its statehood act abrogated the 1837 Treaty rights under the equal footing doctrine.[124] The state argued that under the Tenth Amendment states must be admitted to the Union on equal footing, acquiring among other rights, the sovereign right to regulate their natural resources.[125] However, the court held that the 1837 usufructs were "in no way tied to [continuing land] ownership, but instead were intended to be continuing rights."[126] States, the court held, must respect these non-possessory property rights unless they interfere with a necessary and non-discriminitory conservation or public safety law [127]

V THE SUPREME COURT DECISION

By the time the Supreme Court granted certiorari in 1998, the Mille Lacs controversy symbolized the struggle to affirm vital Native American treaty

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123. *Id.* at 920-21. The Eighth Circuit also distinguished *Klamath Tribe*, as did the Supreme Court later. In *Klamath Tribe*, the tribe "cede[d], surrender[ed], grant[ed], and convey[ed] to the United States all their claim, right title and interest in and to," incorrectly surveyed portions of their reservation lands in Oregon which abrogated its hunting and fishing rights. However, the Eighth Circuit distinguished this case, noting that those cessions concerned exclusive, on-reservation rights, which were naturally terminated when the tribe ceded reservation lands. Oregon Dep't of Fish & Wildlife v. Klamath Indian Tribe, 473 U.S. 753, 760 (1985). Conversely, in *Mille Lacs*, the lands at issue were non-exclusive, off-reservation rights, and were not even mentioned in the 1855 Treaty. *Mille Lacs Appeal,* 124 F.3d at 925, 926; *Mille Lacs*, 526 U.S. at 198.

124. *Mille Lacs Appeal,* 124 F.3d at 926-27. This equal footing argument was originally raised and rejected as part of the *Phase II* litigation. No. 3-94-1266 (D.Minn., Mar. 29, 1996)(Davis, J.), App. to Pet. For Cert. 182-189. While questions of fact cannot be invoked on appeal if not first raised at trial, the court allowed the equal footing argument because it was raised in both parts of the bifurcated *Fond du Lac* trial (Fond du Lac Band of Chippewa Indians v. Carlson, No. 5-92-159 (D.Minn. Mar. 18, 1996)), and it was a question of law that had been fully briefed by all parties. *Mille Lacs Appeal,* 124 F.3d at 926 n.40.

125. *Mille Lacs Appeal,* 124 F.3d at 926.

126. *Id.* at 927. This sentence suggests that the Chippewa usufructs should be viewed as property rights, albeit defeasible in some situations (conservation or safety) but able to endure transfers of ownership. It further appears to be an ability to exercise a right in the soil of another; a *profit a prendre*. This seems to run counter to the district court's holding that the 1837 usufructs are not *profits a prendre*, and cannot be exercised on private lands unopened to the public by operation of law. *See Phase I*, 861 F Supp. at 834.

127. *Id.* at 928 (citing *Winans*, 198 U.S. at 378 (binding the state of Washington to a tribal right to take fish at their usual and accustomed places in common with Territorial citizens, and referring to usufructs not as grants, but as rights retained by the tribes; a remnant of the "great rights they possessed" before Europeans arrived)). *See also* Tulee v. Washington, 315 U.S. 681 (1942) which followed *Winans* and allowed natives to rely on off-reservation treaty rights in conflict with state regulation unless the state laws were needed for conservation. Again these characterizations of the usufruct as an enduring property right makes the court's ultimate denial of the usufructs consistent with subsequent fee title acquisition by private parties seem unsupported. Finally, relying on *Dion*, the court rejected abrogation because there was no evidence that Minnesota's Admission Act contemplated the 1837 usufructs. *Mille Lacs Appeal,* 124 F.3d at 929.

rights. In a 5-4 opinion, Justice O'Connor affirmed the District Court of Minnesota and the Eighth Circuit Court of Appeals, holding that neither President Taylor's 1850 Executive Order, the 1855 Treaty, nor Minnesota's 1858 Admission Act abrogated the 1837 Treaty usufructs.[128]

A. *The 1850 Executive Order*

Justice O'Connor agreed with the Eighth Circuit's holding (and neither party disputed) that the 1830 Removal Act did not authorize President Taylor's 1850 removal order because Congress only authorized removal in exchange for other lands, which the 1850 Order did not offer.[129] The Court also considered whether the provision revoking the 1837 usufructs could be severed from the invalid removal provision,[130] and it held that the order could be severed if the evidence showed that President Taylor would have enacted the abrogation provision alone, and if that independent provision would have been lawful.[131] The Court opined that President Taylor intended the order to operate as a single coherent policy [132] Justice O'Connor acknowledged that the order contemplated two separate events: removal and abrogation of the 1837 usufructs.[133] Since the government implemented the order only as a removal action, however, and not as an abrogation of usufructuary rights, the Court saw this as evidence that President Taylor would not have enacted the order solely

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128. *Mille Lacs*, 526 U.S. at 176 Additionally, departing from the lower courts, yet within the spirit of the Eighth Circuit's language, Justice O'Connor signaled that the 1837 Treaty usufructs are indeed durable property rights (though subject to limited defeasibility); *profits a prendre* are able to withstand title transfers to states and even individuals in certain circumstances. *See* discussion *infra* Section VI. Justice O'Connor did not explicitly use the term "*profits a prendre*" however she acknowledged that the Chippewa retained the right to occupy their ceded lands in the 1837 Treaty, and that even after a fee title transfer to private timbermen, the right to hunt and fish still survived. *Mille Lacs*, 526 U.S. at 182. When combined, these findings affirm a right to access the lands of another, and take natural resources from those lands: a *profit a prendre*. *See* RESTATEMENT, *supra* note 89 and accompanying text.

129. *Mille Lacs*, 526 U.S. at 189. However, citing *Youngstown*, Justice O'Connor also clarified that "the Removal Act did not forbid" such an order. Thus, the Court was obligated to look for other constitutional or congressional authority authorizing the Order. *Id.* at 188-89 (citing *Youngstown*, 343 U.S. at 585). Subsequently, the Court addressed the landowners' contention that the 1837 Treaty itself authorized the 1850 Order. Justice O'Connor stated "[t]here is no support for this proposition, . . . [t]he Treaty makes no mention of removal, and there was no discussion of removal during the Treaty negotiations." *Id.* at 189. Likewise, the government often negotiated removal explicitly, but did not in the 1837 Treaty. *Id.* at 189-90 n.4 (listing four other 1837 treaties which explicitly addressed removal).

130. *Id.* at 191. The Court acknowledged that it had never decided the severability of executive orders. However, because the Eighth Circuit used the statutory severability test, and no parties objected, the Court assumed *arguendo* that the test was appropriate in this context.

131. *Id.* (citing *Champlin*, 286 U.S. at 234).

132. *Id.*

133. *Id.* at 178-79.

for the purpose of abrogation.[134] Therefore the Court held that the order was not severable, nor were its removal and abrogation provisions authorized.[135]

B. *The 1855 Treaty*

Justice O'Connor noted that the 1855 Treaty used very broad language to cede extensive Chippewa lands within Minnesota territory However, she wrote that "[t]he Treaty makes no mention of hunting and fishing rights, whether to reserve new usufructuary rights or to abolish rights guaranteed by previous treaties."[136] The Court also reasoned that subsequent Chippewa actions, such as challenges to construction of the Rum River Dam within ceded lands, and Governor Gorman's acknowledgment that the Chippewa retained usufructs even after the land was sold to lumbermen, were evidence that the tribes would have understood the 1837 usufructs to survive the 1855 Treaty [137]

Further, according to the Court, the purpose of the 1855 Treaty was to secure land for the United States, not to extinguish Chippewa usufructs.[138] Justice O'Connor noted that the 1854 statute authorized negotiations to extinguish native land rights in Wisconsin and Minnesota, but did not mention abrogation of usufructs.[139] The Court also cited the district court's factual findings in Phase I and the treaty negotiations to support its interpretation that the only purpose of the1855 Treaty was to secure land cessions.[140] Finally, the Court would not subscribe to the notion that the Chippewa forfeited their usufructs by not addressing the subject during negotiations.[141] Thus, according to the Court, the 1855 Treaty did not abrogate the 1837 usufructs.[142]

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134. *Id.* at 179-80 (describing the "circular" which mentioned removal, but failed to mention abrogation).

135. Chief Justice Rehnquist disagreed with this part of the holding. Id. at 212-13. Justice O'Connor suggested that the Chief Justice incorrectly presumed that the President held an inherent power to remove tribes from public lands. She stated that Chippewa property rights on the ceded lands predated American title, and that the Chippewa understood the 1837 usufructs to retain their right to occupy the ceded lands. Therefore, Chief Justice Rehnquist's position was inconsistent with the canons of Indian treaty interpretation. Similarly, Justice O'Connor rejected the Chief Justice's contention that the executive order's provisions were severable because of the presumption of legality for executive actions. In this case, she said, that presumption is trumped by the canons. *Id.* at 194, n.5.

136. *Id.* at 184-85.

137. *Id.* at 182, 202.

138. *Id.* at 202.

139. *Id.* at 196-97 (citing Act of December 19, 1854, ch. 7, 10 Stat. 598). The Court continued that the silence concerning usufructs was not accidental. Senator Sebastian, Chairman of the Committee on Indian Affairs, openly stated that the treaties under the Act would reserve the rights secured under former treaties. CONG. GLOBE, 33d Cong., 1st Sess. 1404 (1854).

140. *Mille Lacs,* 526 U.S. at 196-98; *see also* discussion *supra* note 105 and accompanying text.

141. *Id.* at 198-99.

142. *Id.* at 202. Affirming the Eighth Circuit, the Court rejected the assertion that *Klamath Tribe* bound the Court to find abrogation. *Id.* at 200-02. *See* discussion *supra* note 124 and accompanying text.

C. *The Admission Act and the Equal Footing Doctrine*

The Supreme Court also held that Minnesota's 1858 Admission Act did not abrogate the 1837 usufructs because it was silent with respect to Indian treaty rights.[143] Justice O'Connor cited *Menominee*, *Dion*, and *Fishing Vessel*, ruling that Congress must "clearly express" its intent to abrogate treaty rights, or a party must show "clear evidence" that Congress considered the effect of abrogation on the natives, yet still chose to terminate the rights.[144] The opinion noted that the language of the Act "provides no clue that Congress considered the reserved rights of the Chippewa and decided to abrogate those rights when it passed the Act," nor did the legislative history [145] Therefore, the Act did not satisfy either prong of the abrogation requirement.[146]

Minnesota argued that *Ward v. Race Horse* stood for the proposition that the equal footing doctrine meant that statehood abrogates treaty usufructs.[147] In part, *Race Horse* did hold that treaty rights inherently conflicted with states' powers to regulate natural resources; according to Minnesota therefore, usufructs infringed on state sovereignty and violated the equal footing doctrine.[148] However the Court rejected Minnesota's position and ruled that *Race Horse* "rested on a false premise."[149] Justice O'Connor clarified that other cases as far back as *Winans*, nine years after *Race Horse*, recognized that native treaty usufructs are compatible with state sovereignty and natural resource management.[150] Further, the 1837 Treaty preserved Chippewa usufructs

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143. *Id.* at 203.

144. *Id.* at 202-03 (citing *Dion*, 476 U.S. at 738-40; *Fishing Vessel*, 443 U.S. at 690; *Menominee*, 391 U.S. at 413). *See also* discussion *infra* Section V (arguing that the *Dion*, *Fishing Vessel*, and *Menominee* abrogation standards, as applied to the facts in *Mille Lacs*,constitute a *de facto* "explicitness requirement" which is more difficult to satisfy than the *Dion* standard).

145. *Id.* at 203.

146. *Id.*

147. *Id.*

148. *Id.* (quoting *Race Horse*, 163 U.S. at 516). In dissent, the Chief Justice argued that *Race Horse* was reaffirmed in 1985 by the *Klamath Tribe* decision. *Id.* at 219. Justice O'Connor explained that *Klamath Tribe* dealt only with the second part of the *Race Horse* holding: that the federal government could require states to respect tribal usufructs, even if the state's admission act did not specifically say so. *Id.* at 206-08. In *Race Horse* the Court agreed that the usufructs did not survive Wyoming statehood. From this foundation, the Chief Justice argued that the usufructs in *Klamath Tribe* did not survive statehood because they were "temporary and precarious," as opposed to those that were permanent and in "perpetuity." *Id.* at 219 (citing *Race Horse*, 163 U.S. at 515). Similarly, the Chief Justice saw the 1837 usufructs as temporary because they were subject to the pleasure of the President. Id. at 219-20 n. 3. Disagreeing with Chief Justice Rehnquist's analysis, and demonstrating the permanent nature of the 1837 usufructs, the majority illuminated the slippery slope that his reasoning could produce writing "any right created by operation of federal law could be described as 'temporary and precarious,' because Congress could eliminate the right whenever it wished." *Id.* at 207.

149. *Id.* at 204.

150. *Id.* at 204 (citing *Fishing Vessel*, 443 U.S. at 690; Antoine v. Washington, 420 U.S. 194 (1975); *Winans*, 198 U.S. at 382-384).

free of territorial, or state regulation, a freedom subject only to the pleasure of the president, or reasonable and necessary conservation and safety laws.[151] Consequently, statehood alone did not abrogate treaty usufructs, since they are not inherently inconsistent with states' natural resource regulatory powers.

VI. THE IMPLICATIONS

The Supreme Court's holding in *Mille Lacs* stands for three principles. First, the opinion is an unequivocal reaffirmation of the importance of the canons of Indian treaty interpretation acknowledged by the majority[152] and both dissenting opinions.[153] Second, the decision builds on *Dion*'s clear evidence requirement by establishing a more stringent explicitness standard to abrogate Native American treaty rights.[154] Third, *Mille Lacs* means that native treaty usufructs are by their nature property rights—*profits à prendre*—which are not inherently inconsistent with subsequent title transfers. Even in dissent, Chief Justice Rehnquist referred to the usufructs as "real property interest[s]."[155]

A. *Reaffirming the Canons*

Historically, courts rely on the canons of Indian treaty interpretation to determine native treaty rights in the face of subsequent congressional action.[156] The Rehnquist Court, however, has routinely avoided utilizing the canons to benefit the tribes.[157] *Mille Lacs* is an important decision because it affirms the continuing relevancy of the canons, applying them prominently and broadly in

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151. *Id.* at 204-05, 207. Justice Thomas dissented in an attempt to discredit the majority's reasoning that the 1837 usufructs were durable property rights. He suggested that the 1837 Treaty only conveyed a revokable "privilege" to hunt, fish and gather, as opposed to a more durable "right." *Id.* at 222-23 (Thomas, J. dissenting). The majority, affirming the nature of the usufruct as a property "right" stated that the Court has never distinguished between rights and privileges regarding state regulatory authority. Further, under the canons, the usufructs should be classified as property rights because there was no evidence the Chippewa understood the intricate legal distinction between property rights and privileges in 1837. *Id.* at 205-06.

152. *Id.* at 206.

153. *Id.* at 218, 222, 223.

154. *Id.* at 202-03.

155. *Id.* at 213.

156. *See supra* notes 61-63 and accompanying text.

157. *See* Ralph W Johnson & Bernie Martinis, *Chief Justice Rehnquist and the Indian Cases*, 16 PUB. LAND. L. REV. 1, 18 (1995) ("Whatever the subject, Rehnquist manages to construe the law to limit or impair the governing powers and jurisdiction of Indian Tribes. This is in direct conflict with a basic canon of Indian law."). *See also Bourland*, 508 U.S. at 687-88 (writing for the majority, Justice Thomas acknowledged the canons, yet still held that the Flood Control Act, and Cheyenne River Act abrogated rights under the Fort Laramie Treaty rights, even though those Acts made no mention of the treaty); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208 n.17 (1978) (Justice Rehnquist acknowledging the canons, yet refusing to allow the tribe to prosecute alleged criminals living on their reservation because those suspects were non-natives).

favor of the natives. Between *Mille Lacs* majority opinion and its two dissents, in fact, the canons are explicitly or implicitly acknowledged over ten times.[158]

The canons require courts to interpret ambiguous treaty provisions in favor of natives[159] as the natives understood the provisions at the time of the treaty [160] When in doubt, courts should liberally construe treaty provisions to favor the tribes.[161] However, the canons should not apply in the absence of ambiguity The 1855 Treaty appears at first glance to show no ambiguity· Under the first article of the Treaty, the Chippewa "fully and entirely relinquish[ed] any and all right, title, and interest, of whatsoever nature " throughout Minnesota.[162] But Justice O'Connor found ambiguity in this article because it did not indicate whether the 1837 usufructs were specifically included in the provision's broad relinquishments.[163] In light of this ambiguity, the Court proceeded to apply the canons and interpreted the provision liberally to the benefit of the Chippewa.[164] Because the 1855 Treaty was ambiguous, and neither the treaty history nor its negotiations suggested that the Chippewa understood the 1855 Treaty to abrogate treaty-guaranteed usufructs, the Court liberally construed the provision in favor of the Band and declined to find abrogation.[165]

The Court also applied the canons to interpret whether the 1837 Treaty authorized the 1850 Executive Order. The majority held the "pleasure of the President" provision in the 1837 Treaty was not clear concerning Presidential removal authority [166] Again, due to ambiguous language, the Court interpreted the 1837 Treaty as the Chippewa would have understood it: to allow them to exercise usufructs on ceded lands so long as they remained at peace with white populations.[167] Interpreting the provision liberally in favor of the Band, the Court held that the 1837 Treaty did not authorize the 1850 Executive Order.[168] Further, while Justice O'Connor noted a general presumption that executive orders are legal, in this case the presumption runs into the canons.[169] As the holding shows, the canons prevailed.[170] Even in dissent, Chief Justice Rehnquist and Justice Thomas both acknowledged the applicability of the canons.[171]

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158. *See Mille Lacs*, 526 U.S. at 200 (twice), 202 (twice), 203, 206, 215-16, 217, 218, 219, 223.
159. *Id.* at 206.
160. *Id.*
161. *Id.* at 200.
162. 1855 Treaty with the Chippewa, 10 Stat., art. I, 1165-66.
163. *Mille Lacs*, 526 U.S. at 200.
164. *Id.* at 202.
165. *Id.* at 202, 206.
166. *Id.* at 189.
167. *Id.* at 193.
168. *Id.* at 189-90.
169. *Id.* at 194, n.5.
170. Similarly, the Court relied on the canons to reject Minnesota's claim that the 1858 Admission Act abrogated the Chippewa usufructs. *Id.* at 205. Because the Admission act was silent regarding treaty rights, the Chippewa could not have understood the Act to abrogate their rights. *Id.* at 203.
171. *Id.* at 218, 223.

B. *The Explicitness Standard*

The pre-*Mille Lacs* standard for abrogation of native treaty rights was malleable. Prior Supreme Court cases indicated that abrogation should be express and should not be imputed casually [172] In the oft-cited *Dion* opinion, the Court stated a preference for explicit congressional language to prove congressional intent to abrogate rights, yet the Court did not require it.[173] Therefore, courts could rely on less than specific congressional language to find treaty abrogation, even without finding clear evidence of intent to abrogate in the legislative history [174] In *Mille Lacs*, the Court raised the bar beyond *Dion*, clarifying that the abrogation standard is a high hurdle, or what this note refers to as an "explicitness standard."[175]

Citing *Dion*, Justice O'Connor reasoned that Congress must "clearly express" its intent to abrogate Indian treaty rights.[176] At first glance, this reliance on *Dion* might seem to suggest that the Court merely maintained the status quo. and that less than explicit congressional language would suffice to abrogate native treaty rights, as it had in *Bourland* and *Dion*.[177] But *Mille Lacs* demonstrated that the Court superseded *Dion* and adopted an explicitness standard requiring explicit congressional language, or "clearly express[ed]" evidence of Congress' intent to abrogate treaty rights.[178] The Court declined to find abrogation because neither the 1855 Treaty nor the treaty journal made an explicit reference to hunting, fishing or gathering rights.[179] This part of the holding is an endorsement of the explicitness standard because, on its face, the 1855 Treaty appeared to abrogate every land right the Chippewa ever had in Minnesota: Article I relinquished "any and all right, title, and interest, of whatsoever nature the same may be, " to lands in Minnesota.[180] Still, the Court refused to abrogate the Chippewa usufructs because the treaty language, while broad, did not explicitly mention usufructs, and the state did not offer adequate evidence to demonstrate that Congress "clearly expressed" an intent to abrogate

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172. *See Leavenworth Ry.*, 92 U.S. at 741-742; *Menominee Tribe*, 391 U.S. at 412-413; *Dion*, 476 U.S. at 739-40; *Bourland*, 508 U.S. at 679, 687, 689. *See also supra* notes 83-86 and accompanying text.

173. *See Dion*, 476 U.S. at 739.

174. In *Dion* the Bald Eagle Protection Act did not specifically abrogate native treaty rights to hunt bald eagles. *Id.* at 740. However, the Court still found abrogation because the language was "sweepingly framed." *Id.* (citing Andrus v. Allard, 444 U.S. 51, 56 (1979). *See also Bourland*, 508 U.S. at 679, 687, 689; *supra* note 86 and accompanying text.

175. Unlike the *Dion* and *Bourland* holdings, which allowed abrogation in light of less than explicit congressional language, *Mille Lacs* made it clear that courts can only abrogate native treaty rights due to congressional language when that language is explicit, or when there is "clearly express[ed]" evidence that Congress intended abrogation. *Mille Lacs*, 526 U.S. at 202.

176. *Mille Lacs,* 526 U.S. at 202-03 (citing *Dion*, 476 U.S. at 740).

177 *See Bourland* and *Dion* discussion *supra* notes 83-88 and accompanying text.

178. *Mille Lacs*, 526 U.S. at 202-03.

179. *Id.* at 195.

180. 1855 Treaty With the Chippewa, at 1165-1166.

hunting, fishing or gathering rights.[181]

The Court also held that the 1837 Treaty did not authorize removal, an equally powerful endorsement of the explicitness standard. Although the treaty clearly stated that Chippewa rights existed "at the pleasure of the President," the Court reasoned that because removal was not explicitly mentioned in the Treaty, the President had no authority to order it.[182]

C. *The Nature of the Native Treaty Usufructs*

Mille Lacs also stands for the proposition that native treaty usufructs are property rights: *profits à prendre*. The Court's opinion demonstrates that these property rights, though defeasible in specified circumstances, are quite durable. With limited exceptions, usufructs are consistent with subsequent fee title transfers, even to private property owners.[183]

First, Justice O'Connor made clear that the Court did not view native usufructs as "grants" by the government of the "privilege" to hunt, fish and gather.[184] Rather, the usufructs were a consequence of the Chippewa's retained property rights that the tribe held on ceded lands prior to the 1837 Treaty [185] Retention of some pre-treaty property rights included the continuing right to access and occupy ceded lands and the right to take resources from those lands.[186] A right of access, combined with the right to take resources from another's land, creates a *profit à prendre*.[187] Further, while Chief Justice Rehnquist disagreed with nearly every aspect of the majority opinion's holding, he conceded "[a]fter the Treaty was executed and ratified, the ceded lands belonged to the United States, and the only *real property interest* in the land remaining to the Indians was the privilege to *come onto it and hunt* during the pleasure of the President."[188] Thus, both the *Mille Lacs* majority and the Chief Justice in dissent acknowledged that native treaty usufructs are property rights.

Second, tribes' *profits à prendre* are not necessarily inconsistent with subse-

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181. *See Mille Lacs*, 526 U.S. at 202-03.

182. *Id.* at 207.

183. These narrow exceptions include: necessary and non-discriminitory state safety or conservation regulations, *id.* at 205; congressional abrogation, *id.* at 202-03; or limits in the treaty such as "at the pleasure of the President," in the 1837 Treaty with the Chippewa, at art. V or hunting rights confined to "unoccupied lands" as was the case in *Race Horse*. *Id.* at 207.

184. *Mille Lacs*, 526 U.S. at 201-02 (refuting Justice Thomas' contention that the 1837 usufructs were not "rights" but only "privileges").

185. *Id.* at 194, n.5. Justice O'Connor stated "[t]he Chippewa were on the land long before the United States acquired title to it. The 1837 treaty does not speak to the right of the United States to order them off the land upon acquisition of title, and in fact, the usufructuary rights guaranteed by the Treaty presumed that the Chippewa would continue to be on the land." *See also Winans*, 198 U.S. at 381.

186. *Mille Lacs*, 526 U.S. at 194, n.5.

187. Blumm & Swift, *supra* note 15, at 445.

188. *Mille Lacs*, 526 U.S. at 213 (Rehnquist, C.J. dissenting) (emphasis added).

quent transfers of fee simple title to private property owners. Even after ceded lands were surveyed and sold to lumbermen, the Chippewa continued to hold usufructuary rights on those now privately held lands.[189] This is consistent with several Supreme Court and lower court holdings, beginning with *Winans*, recognizing the enduring property nature of native treaty usufructs.[190] It is important to note, however, that these *profits à prendre* are defeasible in specified circumstances. The Court noted that under the 1837 Treaty with the Chippewa the President could conceivably extinguish the Chippewa rights at will.[191] Further, as Justice O'Connor explained, many other treaties limit native usufructs to "unoccupied lands" or for as long as wild game populates the land.[192]

The Court also noted that the 1837 usufructs were free from regulation by the Minnesota Territory, and later the state of Minnesota.[193] The Court then concluded that today the Chippewa still enjoy the same freedom from state regulation.[194] But, importantly, the native right to self-regulation is not absolute. The right is curtailed by states' authority to enact regulations that further reasonable, necessary and non-discriminatory conservation interests.[195]

VII. THE LEGACY

Mille Lacs answers a century-and-a-half old debate regarding the interpretation, durability, and nature of Native American treaty rights. According to *Mille Lacs*, 1) the canons of Indian treaty interpretation must guide any legal analysis of native treaty rights; 2) Congress cannot abrogate those rights without explicit intent; and 3) treaty usufructs are real property rights, able to endure subsequent fee title transfers to state governments or private individuals.[196] This section considers three recent court decisions, arguing that all should be re-examined in light of *Mille Lacs*.[197]

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189. *Id.* at 182.

190. *See* Blumm & Swift, *supra* note 15, at 484 n. 385. *See also* Mariel J. Combs, *United States v. Washington: The Boldt Decision Reincarnated*, 29 ENVTL. L. 683, 711 (1999) (citing United States v. Washington, 157 F.3d 630, 650-651 (recognizing a treaty property right to take shellfish from private beds).

191. *Mille Lacs*, 526 U.S. at 194.

192. *Id.* at 203.

193. *Id.* at 204.

194. *Id.*

195. *Id.*

196. *See Id.* at 196, 197, 202, 218.

197. The three cases are Washington Dep't of Ecology v. Yakima Reservation Irrigation District, 850 P.2d 1306 (Wash. 1993)[hereinafter *Washington DOE*]; Nez Perce Tribe v. Idaho Power Co., 847 F. Supp. 791 (D. Idaho 1994); In Re SRBA, No. 39576, Order on Motions to Strike, Motion to Supplement the Record and Motions for Summary Judgment (Idaho Nov. 11, 1999).

A. Washington DOE

In 1993, the Washington Supreme Court adopted a "diminished treaty rights" concept.[198] In *Washington Dep't of Ecology v. Yakima Reservation Irrigation District*, following a McCarran Amendment adjudication in state court, the Yakima Nation argued that the Treaty of 1855 reserved a right to adequate water flow to sustain fish populations in waters flowing through, or adjacent to reservations.[199] The non-Indian irrigation districts contended that a history of litigation, legislation, and administrative actions since the treaty either abrogated, or at least diminished, tribal water rights.[200] According to this diminished rights concept, treaty abrogations do not require explicit language or evidence of congressional intent to abrogate. The court instead held that rights can be "diminished" by considering several disjointed congressional, executive, administrative, and judicial acts in the aggregate.[201]

The court spent the first half of its opinion affirming the applicability of the canons, citing *Choctaw Nation*, *Winters*, *Menominee*, and *Fishing Vessel*.[202] The opinion noted "[i]f the standard were one of reasonable inference from the cumulative actions of Congress, then the Court might be able to find a diminishment of fishing rights."[203] But, the court acknowledged, Congress must actually consider the conflict.[204] Yet the opinion inexplicably went on to hold that while the Yakima rights were not abrogated, they were "diminished" by a series of government actions over the course of time.[205]

This "diminished rights" concept is wholly inconsistent with *Mille Lacs* which synthesized the holdings in *Dion*, *Menominee*, and *Fishing Vessel* and developed an exceedingly narrow explicitness standard for abrogation.[206] This standard requires either explicit language from Congress or explicit evidence of congressional intent to abrogate treaty rights.[207] Nowhere does the *Mille Lacs* explicitness standard allow for, or imply, that a diminished rights concept

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198. *See* Blumm & Swift, *supra* note 15, at 475.

199. *Washington DOE*, 850 P.2d. at 1315-1317 (citing Treaty between the United States and the Yakima Nation of Indians, June 9, 1855, art. III, 12 Stat. 951, 952-53; Cappaert v. United States, 426 U.S. 128, 141(1976)).

200. *Washington DOE*, 850 P.2d. at 1310.

201. *Id.* at 1323.

202. *Id.* at 1317.

203. *Id.* at 1322.

204. *Id.*

205. *Id.* at 1323. Specifically the court opined:

We therefore cannot conclude that the inconsistent actions of Congress, the executive branch and administrative agencies, were sufficient, in and of themselves, to *extinguish* those reserved water rights necessary to fulfill treaty fishing rights. We conclude, however, that there was encroachment upon and significant damage to the Indians' treaty fishing rights during this period. Thus although the treaty rights were not extinguished, they were diminished (emphasis in original).

206. *See* discussion *supra* notes 168-178 and accompanying text.

207. *See* discussion *supra* notes 174-177 and accompanying text.

exists. Indeed, the facts of *Mille Lacs* imply that diminishing treaty rights by aggregating subsequent government actions is not an acceptable substitute for explicit congressional intent to abrogate. For example, subsequent to the 1837 Treaty with the Chippewa, the government enacted three actions: an 1850 Executive Order, an 1855 Treaty, and Minnesota's statehood act.[208] The Court noted that many non-native interests interpreted these actions to weaken or extinguish Chippewa usufructs.[209] However, finding no explicit congressional intent to abrogate the Chippewa usufructs, the Court declined the state's abrogation claims, and did not even acknowledge the possibility of a diminished rights concept.

In *Washington DOE* the state could only point to inconsistent congressional, executive, administrative and judicial actions over six decades—concerning irrigation allocations—as evidence of abrogation or diminishment.[210] None of those actions contained explicit congressional language, or other explicit evidence that Congress intended to abrogate or diminish Yakima treaty rights to adequate water for fishing in favor of the rights of irrigation users. Because these disjointed government actions do not demonstrate explicit congressional intent to abrogate, the state court should not have applied the diminished rights concept to the Yakima's treaty water rights.

B. Nez Perce

In 1855 the Stevens Treaty guaranteed the Nez Perce the right to take fish from all usual and accustomed places in common with the territory's citizens.[211] In *Nez Perce Tribe v Idaho Power Co.*, the tribe sought property damages under section ten of the Federal Power Act (FPA) when the Hells Dam complex, licensed under the FPA, damaged fish runs.[212] The Idaho federal District Court held that the Nez Perce tribe's treaty fishing rights were not property rights, and thus were not compensable under the FPA, which only provides damages for losses to property As with *Washington DOE*, this decision is also incompatible with *Mille Lacs*, which recognized treaty usufructs

208. *Mille Lacs*, 526 U.S. at 179-86.

209. *Id.* at 182. For example, the majority opinion noted that white lumbermen built a dam within ceded lands on the Rum River and defended it with force in 1855 under the belief that the Chippewa no longer held usufructs on those lands.

210. *Washington DOE*, 850 P.2d at 1322.

211. *Nez Perce*, 847 F.Supp. at 805 (*citing* Treaty between the United States and Nez Perce, June 11, 1855. art. III, 12 Stat. 957).

212. *Id.* at 794. Hells Canyon Dam Complex is licensed under the FPA, and § 803(c) provides for recovery to all parties whose "property" is damaged as the result of licensed dam building, operations or maintenance. Federal Power Act, 16 U.S.C. § 803(c) (1994).

as durable property rights.[213]

Like the 1855 Treaty with the Chippewa, courts should interpret the 1855 Treaty with the Nez Perce to reserve a property right in fish: a *profit à prendre*.[214] Under the FPA, the tribe should have been compensated for damages to its property rights by the Idaho Power Company However, the court failed to simply ask whether the tribe held a property right in the fish that the Stevens Treaty guaranteed it. Instead, the *Nez Perce* court mischaracterized the relevant question as whether the treaty granted the tribe an absolute property right to preservation of fish runs as they existed in 1855.[215] Under the unnecessarily narrow constraints of its inquiry, the court reasoned that the 1855 Treaty only conveyed a limited, non-property right to the tribe to take fish in common with territorial citizens.[216] Because the court did not recognize a tribal property right in the fish destroyed by the building, operation, and maintenance of the dam, it held that Idaho Power was not liable under section 803(c) of the FPA for monetary damages to fish runs that were diminished.[217]

Mille Lacs calls the *Nez Perce* holding into question because the lower court failed to recognize treaty usufructs as property rights. Both Justice O'Connor, writing for the majority, and Chief Justice Rehnquist in dissent acknowledged that treaty usufructs are property rights.[218] According to the Court, in their 1837 Treaty with the United States, the Chippewa reserved rights to hunt, fish, and gather on ceded lands during the pleasure of the President.[219] For example, Justice O'Connor acknowledged that these reserved usufructs are a portion of the complete property rights that the Chippewa held in their lands prior to the 1837 Treaty [220] Likewise, Chief Justice Rehnquist agreed that the 1837 Treaty usufructs are "real property interest[s]"[221]

Similarly, the Nez Perce treaty fishing rights should be recognized as property rights as well. The 1855 Treaty ceded tribal lands, but reserved the right to continue to take fish "at all usual and accustomed places."[222] Indeed, even the *Nez Perce* court acknowledged that "[t]the tribes reserved certain rights [to fish] over the relinquished lands."[223] As Justice O'Connor held in *Mille Lacs*,

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213. *See Mille Lacs*, 526 U.S. at 194, n.5; *see also supra* notes 177-189 and accompanying text. *See also generally* Allen H. Sanders, *Damaging Indian Treaty Fisheries: A Violation of Tribal Property Rights?*, 17 PUB. LAND & RESOURCES L. REV. 153, 162-67 (1996) (criticizing the *Nez Perce* court for misunderstanding treaty-created property rights).

214. *See supra* notes 179-191 and accompanying text.

215. *Nez Perce*, 847 F. Supp. at 807.

216. *Id.* at 809.

217. *Id.* at 811.

218. *Mille Lacs*, 526 U.S. at 204, 218.

219. *Id.* at 177.

220. *Id.* at 194 n.5.

221. *Id.* at 213 (Rehnquist, C.J. dissenting).

222. *Nez Perce*, 847 F. Supp. at 794.

223. *Id.* at 806 (emphasis added).

treaty "reserved" usufructs are indeed property rights: a portion of the complete, pre-treaty, property rights that native tribes once held.[224] Because the Nez Perce reserved *profit à prendre* rights to fish in the 1855 Treaty, and the FPA provides for damages to property resulting from dam construction, operations and maintenance, and the court should have awarded pecuniary damages to the tribe for fish destroyed by Hells Dam.

C. In Re SRBA

In Re SRBA contradicts *Mille Lacs* because the court refused to apply the canons of Indian treaty construction, and failed to recognize off-reservation treaty usufructs as *profit à prendre* property rights.[225] In 1855, the Nez Perce and the United States entered into a treaty which ceded tribal lands, but in return stated "[t]he exclusive right of taking fish in all streams where running through or bordering said reservation is secured to the Indians; as also the right of taking fish at all usual and accustomed places in common with the citizens of the territory "[226] The tribe and the government, based on this language and the canons of Indian treaty interpretation, argued that the Nez Perce reserved a property right to fish both on and off-reservation lands, and that along with those rights to fish, the tribe necessarily reserved, an implied "Indian reserved water right" to adequate stream flows because minimum amounts of water are necessary to sustain fish populations in both on and off-reservation waters.[227] While the court deferred the on-reservation water claims, because they dealt with "federal reserved water rights," it held that the treaty did not reserve an off-reservation property right to water.[228] *In Re SRBA* is fundamentally inconsistent with *Mille Lacs* because it failed to apply the canons to ambiguous treaty language, and it did not recognize that off-reservation treaty usufructs are property rights.

Although the court accurately articulated the canons of Indian treaty interpretation, it failed to apply them to determine if an Indian reserved water right existed to fulfill off-reservation fishing rights. From the court's perspective, the treaty language was unambiguous; thus, the canons did not apply [229] How-

224. *Mille Lacs*, 526 U.S. at 194 n.5.

225. *In Re SRBA*, at 30, 37.

226. *Id.* at 27 (citing Treaty between United States and Nez Perce, June 11, 1855, Art. III, 12 Stat. 957).

227. *Id.* at 27 28. It is important to note that according to the court, an implied "Indian reserved water right," is different that an implied "federal reserved water right." A implied federal reserved right, commonly referred to as the "Winter's Doctrine," says that where public land withdrawals (such as Native American reservations) are silent concerning water rights, a right to water on the withdrawn land will be implied. However, an implied Indian reserved water right is a water right either reserved by treaty, or not expressly ceded by a treaty or other agreement. *Id.* at 24.

228. *Id.* at 28-30.

229. *Id.* at 30.

ever, the 1855 Treaty with the Nez Perce is no less ambiguous concerning water rights than the 1855 Treaty with the Chippewa was ambiguous concerning the forfeiture of usufructs in *Mille Lacs*. Both treaties used unspecific language to define usufructs. Further, *Mille Lacs* made clear that under the canons' pro-native directive, demonstrating ambiguity in treaty language is not an onerous burden. For example, the 1855 Treaty with the Chippewa seems unambiguous on its face. In part, the language reads "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,* "[230] However, even in the face of such unequivocal language, Justice O'Connor held that the treaty language was ambiguous because it failed to specifically mention relinquishment of usufructs; thus, the Court applied the canons.[231]

Based on *Mille Lacs*' endorsement of applying the canons in arguable cases of ambiguity, the language in the 1855 Nez Perce Treaty was also ambiguous. The language states that the tribes reserved the right to take fish "at all usual and accustomed places "[232] Because the language does not expressly mention a right to "water" the state court concluded, without further reasoning, that no off-reservation water right was reserved.[233] However, the provision's lack of specificity actually adds to its ambiguity For instance, the language does not clarify what are "usual and accustomed places," and to reserve a right to fish without a concomitant right to water to sustain the fish would seem self-defeating. In light of the ambiguity in the 1855 Treaty language, the court should have applied the canons to recognize an off-reservation reserved water right for the Nez Perce's expressly reserved treaty fishing rights.

Furthermore, the court's failure to apply the canons contributed to its erroneous holding that off-reservation treaty usufructs are not *profit à prendre* property rights. In *Mille Lacs*, Justice O'Connor noted that the 1837 Treaty language was ambiguous concerning the nature and durability of Chippewa hunting, fishing, and gathering rights on ceded lands.[234] The Court explained that under the canons, ambiguous treaties must be interpreted liberally to favor natives.[235] Thus, the Court denied the state's argument that the Chippewa usufructs were simply privileges, as opposed to property rights. Instead, the majority interpreted the treaty language liberally, holding that the usufructs were indeed durable property rights, not simply privileges.[236]

In contrast to *Mille Lacs*, *In Re SRBA* refused to apply the canons, and instead relied on the previously discussed and flawed *Nez Perce Tribe* decision,

230. *Mille Lacs*, 526 U.S. at 184 (emphasis added).
231. *See supra* note 158 and accompanying text.
232. *In Re SRBA* at 27.
233. *Id.*
234. *Mille Lacs*, 526 U.S. at 200.
235. *Id.*
236. *See id.*

concluding that "[t]he Nez Perce do not have a property interest in the fish," and thus could not have a concomitant reserved water right.[237] This holding was also inconsistent with Supreme Court rulings prior to *Mille Lacs*, such as *Winans* and its progeny However, in the wake of *Mille Lacs'* application of the canons to recognize and preserve native property rights, and its majority and dissenting opinions' agreement that off-reervation treaty usufructs are property rights, the *In Re SRBA* court's failure to recognize Nez Perce fishing and water rights as property was an error.

VIII. CONCLUSION

Treaties between the United States and Native Americans typically retained tribal rights to live off of the land, specifically to hunt, fish and gather.[238] Exercise of the usufructs often clashed with the interests of territorial and state governments, as well as those of non-native settlers.[239] These conflicts produced a long judicial history that sought to determine the nature and scope of native treaty usufructs, as well as their susceptibility to abrogation.

The Supreme Court's decision in *Minnesota v Mille Lacs Band of Chippewa Indians* answers these questions. The canons of Indian treaty interpretation define the scope of ambiguous treaty rights: a narrow "explicitness standard" requires explicit congressional language, "clear and express" evidence in the legislative history, or surrounding circumstances to abrogate treaty rights; and tribal usufructs are indeed durable real property rights, *profits à prendre*, that are only subject to defeasibility under specific circumstances that are expressly defined in the treaty

Mille Lacs heeded Justice Black's words of admonishment, and advisement "[g]reat nations, like great men, should keep their word."[240] In the nineteenth century the United States secured vast lands at insignificant costs. In return, the majority of treaties reserved tribal *profits à prendre* to continue living off of those ceded lands. In *Mille Lacs*, the Court recognized those rights as enduring property rights. Absent explicit congressional intent, or payment of just compensation, those rights must be honored; whether or not they remain convenient.

237. *In Re SRBA* at 36.
238. *See* discussion *supra* note 5 and accompanying text.
239. *See* discussion *supra* note 14 and accompanying text.
240. *Tuscarora*, 362 U.S. at 142 (Black, J. dissenting).